M153

CYCLOPEDIA

OF

LAW AND PROCEDURE

WILLIAM MACK, LL.D.
EDITOR-IN-CHIEF

VOLUME XXXVII

116782
19 6 11

NEW YORK
THE AMERICAN LAW BOOK COMPANY
LONDON: BUTTERWORTH & CO., 12 Bell Yard
1911

Copyright, 1911
By The American Law Book Company

J. B. LYON COMPANY
PRINTERS AND BINDERS
ALBANY, N. Y.

To

CHARLES WALTER DUMONT

more than to any other man is due the existence of the Cyclopedia of Law and Procedure. His was the idea; his was the plan; and his has been the business ability and energetic management, as organizer and president of The American Law Book Company, which have made possible the successful publication of these volumes, which are therefore respectfully dedicated to him.

William Mack.

TABLE OF TITLES, EDITORS, AND CONTRIBUTORS

Streets and Highways, 1	Louis Lougee Hammon Arthur W. Blakemore
Submission of Controversy, 346	Alexander Karst
Subrogation, 361	Henri Elzear Taschereau
Subscriptions, 481	Edwin H. Woodruff
Suicide, 518	Isaac Franklin Russell
Summary Proceedings, 528	Alexander Karst
Sunday, 535	N. W. Hoyles
Supersedeas, 596	Edward C. Ellsbree
Taxation, 672	Henry Campbell Black
Telegraphs and Telephones, 1601	Francis Raymond Stark
Words, Phrases, and Maxims	Francis Dana Edwin DuBose Smith Esten Calhoun Taylor

CITE THIS VOLUME

37 Cyc.

FOLLOWED BY PAGE.

STREETS AND HIGHWAYS

By Louis Lougee Hammon * and Arthur W. Blakemore †

I. **Definitions,** 12

II. **Establishment, Alteration, and Discontinuance,** 17

A. *Modes of Establishment in General,* 17

B. *Establishment by Prescription, User, or Recognition,* 18

1. *In General,* 18

2. *Sufficiency of User,* 21

a. *In General,* 21

b. *Public User and Adaptability of Way Thereto,* 21

c. *Definiteness of Line of Travel,* 22

d. *Continuity of User; Interruptions; Acquiescence of Landowner,* 23

e. *Hostility of User; Color of Claim of Right; Permissive User,* 25

(I) *In General,* 25

(II) *Exclusiveness of User,* 28

(III) *Recognition, Maintenance, and Repair by Public Authorities,* 29

(IV) *User of Wild and Unoccupied Lands,* 31

(V) *User of Land Outside of Established Highway,* 32

(VI) *User Under Defective Proceedings to Establish Highway or Ineffectual Dedication,* 33

f. *Duration of User; Prescriptive Period,* 34

g. *Knowledge, Intent, and Consent of Owner of Fee; Mistake,* 36

(I) *Knowledge,* 36

(II) *Intent; Consent; Mistake,* 37

3. *Against Whom Prescription May Be Asserted,* 37

4. *Lands Subject to Prescription,* 38

5. *Effect of Prescription,* 39

6. *Character and Extent of Highway,* 39

a. *Town or County Way,* 39

b. *Extent,* 40

(I) *In General,* 40

(II) *Effect of Defective Proceedings to Establish Highway,* 41

7. *Ascertainment and Entry of Record,* 41

8. *Pleading and Evidence,* 43

C. *Establishment by Legislative Act or by Statutory Proceedings,* 45

1. *Constitutional Power,* 45

a. *In General,* 45

b. *Conditions Annexed to Its Exercise,* 45

(I) *In General,* 45

(II) *Public Use; Public Necessity, Utility, and Convenience,* 45

(A) *In General,* 45

---

* Author of "Disturbance of Public Meetings," 14 Cyc. 539; "Mutual Benefit Insurance," 29 Cyc. 1; "Peonage," 30 Cyc. 1382; "General Principles of the Law of Contract;" "Evidence," etc. Joint author of "Estoppel," 16 Cyc. 671; "Factors and Brokers," 19 Cyc. 109; "Principal and Agent," 31 Cyc. 1175. Editor of "Habeas Corpus," 21 Cyc. 279.

† Author of "Common Lands," 8 Cyc. 342; "Depositaries," 13 Cyc. 792; "Wills," — Cyc. —. Joint author of "Bankruptcy Act of 1898, Annotated and Explained."

(B) *As Affected by Termini of Road; Cul-de-Sac*, 46
(C) *Determination as to Public Use, Necessity, Utility, and Convenience*, 48
c. *Delegation of Power*, 51
2. *Lands Subject to Exercise of Power*, 52
3. *Persons Against Whom Power May Be Exercised*, 52
4. *Establishment by Statute or by Town Vote*, 52
5. *Establishment by Statutory Proceedings*, 53
a. *Statutes; Enactment and Adoption; Validity; Construction and Operation; Amendment and Repeal*, 53
b. *Jurisdiction and Powers Generally of Local Authorities*, 54
(I) *In General*, 54
(II) *As Between County Officers and Officers of Township, Town, or Municipality Within County*, 56
(III) *Where Road Is Wholly or Partly in Another Coördinate Territorial Jurisdiction*, 57
(IV) *Refusal or Neglect of Officers Having Primary Power*, 57
c. *Parties*, 59
(I) *Petitioners*, 59
(II) *Respondents*, 61
(III) *Addition or Withdrawal*, 61
d. *Citation and Notice; Opportunity to Be Heard; Appearance*, 62
(I) *Necessity*, 62
(II) *Form and Sufficiency*, 65
(A) *In General*, 65
(B) *Time*, 66
(III) *Service*, 67
(A) *In General*, 67
(B) *Return or Proof*, 68
(IV) *Objections and Waiver*, 69
e. *Petition or Other Application*, 70
(I) *Necessity*, 70
(II) *Formal Requisites*, 71
(III) *Sufficiency*, 71
(A) *In General*, 71
(B) *Particular Averments*, 72
(1) *Qualification of Petitioners*, 72
(2) *Ownership or Occupancy of Land*, 72
(3) *Utility, Necessity, and Character of Road*, 72
(4) *Neglect or Refusal of Selectmen to Establish Road*, 73
(5) *Description of Road*, 73
(IV) *Application Relating to Two or More Roads*, 75
(V) *Amendments*, 75
(VI) *Withdrawal of Petition*, 76
(VII) *Objections and Waiver*, 76
f. *Opposition, Remonstrance, or Other Answer; Demurrer*, 76
g. *Commissioners, Viewers, Surveyors, Jurors, and Other Like Officers*, 77
(I) *Right to and Necessity For Such Officers*, 77
(II) *Appointment, Qualification, and Substitution*, 78
(A) *Power to Appoint*, 78
(B) *Form, Sufficiency, and Validity of Order of Appointment*, 79

(C) *Number Appointed*, 80
(D) *Qualification*, 80
(E) *Proof of Qualification; Record, Return, Report, Etc.*, 81
(F) *Dismissal or Failure to Act, and Substitution*, 82
(G) *Waiver of Objections*, 83
(III) *Competency or Eligibility*, 84
(A) *In General*, 84
(B) *Persons Interested*, 85
(C) *Petitioners*, 87
(IV) *Compensation*, 87
(V) *Acts and Proceedings*, 88
(A) *In General*, 88
(B) *Notice*, 88
(1) *Necessity*, 88
(2) *Contents and Sufficiency*, 90
(3) *Manner of Giving*, 91
(4) *Time*, 91
(5) *Proof and Record*, 92
(C) *Adjournments and Continuances*, 93
(D) *Proceedings by Part of Commissioners, Viewers, or Other Officers*, 93
(E) *Irregularities and Improper Conduct*, 94
(1) *In General*, 94
(2) *Entertainment by Person Interested*, 95
(F) *Meeting at Wrong Time or Place*, 95
(G) *View*, 95
(H) *Reconsideration or Rehearing*, 96
(I) *Waiver of Objections; Laches*, 96
(1) *In General*, 96
(2) *Objections to Notice*, 97
(J) *Report in General*, 97
(1) *Form, Sufficiency, and Validity in General*, 97
(2) *Report as to Presence of Commissioners, Viewers, Etc.*, 98
(3) *Report as to Necessity, Utility, Convenience, and Character of Road; Individual Advantage or Prejudice*, 100
(4) *Report as to Damages and Cost of Road*, 101
(5) *Description of Road*, 103
(6) *Return of Map or Plat and Petition*, 104
(7) *Report as to Owners and Improvements*, 105
(K) *Return of Report and Proceedings Thereon*, 106
(1) *Time For Filing Report*, 106
(a) *In General*, 106
(b) *Extension*, 107
(2) *Exceptions and Objections*, 107
(a) *In General*, 107
(b) *Time of Filing*, 108
(3) *Petition For Review*, 109
(4) *Time of Hearing*, 110
(5) *Conclusiveness of Report*, 110
(6) *Determination and Disposition of Proceedings*, 112

(a) *In General*, 112
(b) *Adoption of Part and Rejection of Part of Report*, 112
(7) *Amendment and Recommitment*, 112
(8) *Subsequent Views*, 113
(a) *In General*, 113
(b) *Report of Reviewers and Re-reviewers*, 114
h. *Location*, 115
(I) *Course*, 115
(A) *By Whom Selected*, 115
(B) *Where Located*, 115
(1) *In General*, 115
(2) *Feasibility*, 116
(3) *On Section Lines*, 116
(4) *In Two Jurisdictions*, 116
(5) *Terminus*, 116
(C) *Variance*, 117
(1) *From Petition or Agreement*, 117
(2) *From Report and Order*, 118
(II) *Length*, 118
(III) *Width*, 118
(A) *How Fixed*, 118
(B) *Location Parallel to and Adjoining Existing Road*, 120
(IV) *Survey*, 120
(A) *In General*, 120
(B) *Resurvey*, 120
i. *Judgment or Order and Record*, 121
(I) *Form and Contents*, 121
(A) *In General*, 121
(B) *Description of Road*, 121
(C) *Width*, 122
(D) *Statement of Jurisdictional Facts; Notice*, 122
(E) *Signature and Seal*, 123
(F) *Conditional in Form*, 124
(II) *Amendment Nunc Pro Tunc*, 124
(III) *Record and Filing*, 124
(IV) *Equitable Relief; Injunction*, 125
(V) *Review and Setting Aside Injunction*, 125
(VI) *Operation and Effect*, 126
(A) *Conclusiveness*, 126
(B) *Presumption of Regularity*, 126
(C) *Extrinsic Evidence to Sustain Record*, 127
(D) *Refusal of Road as Bar to Subsequent Application*, 127
(E) *Recitals of Jurisdiction*, 127
(F) *Collateral Attack*, 128
j. *Defects in Proceedings*, 129
(I) *In General*, 129
(II) *Waiver and Estoppel*, 130
(A) *In General*, 130
(B) *Applying For and Accepting Damages*, 130
(III) *Curative Statutes*, 131
k. *Review*, 131
(I) *Appeal and Error*, 131
(A) *Right to Appeal*, 131

(1) *In General*, 131
(2) *Persons Entitled to Appeal*, 132
(3) *Decisions Reviewable*, 133
(B) *To What Tribunal Appeal May Be Taken*, 135
(C) *Reservation and Presentation of Grounds of Review*, 136
(D) *Parties*, 136
(E) *Proceedings For Transfer*, 137
(F) *Proceedings on Appeal*, 139
(1) *In General*, 139
(2) *Notice of Hearing*, 139
(3) *Adjournment*, 139
(4) *Scope of Review, Trial De Novo, and Presumptions*, 140
(5) *References*, 142
(6) *Determination and Disposition of Cause; Dismissal*, 143
(G) *Effect of Appeal*, 145
(II) *Certiorari*, 145
(A) *Availability and Grounds*, 145
(B) *Persons Entitled to*, 147
(C) *Application For and Return of Writ*, 147
(D) *Review and Determination*, 148
l. *Costs and Expenses*, 150
(I) *Of Original Proceedings*, 150
(II) *Of Proceedings For Review*, 151
m. *Operation and Effect of Establishment*, 152
(I) *In General*, 152
(II) *Character, Location, and Extent of Road*, 152
n. *Pleading and Evidence of Existence of Highway*, 153
(I) *Pleading*, 153
(II) *Evidence*, 154
(A) *Presumptions and Burden of Proof*, 154
(B) *Admissibility*, 154
(C) *Weight and Sufficiency*, 156
D. *Alteration, Vacation, and Abandonment*, 157
1. *Alteration*, 157
a. *In General*, 157
(I) *What Constitutes Alteration*, 157
(II) *Power to Alter*, 158
(A) *In General*, 158
(B) *Roads in Different Jurisdictions*, 159
(C) *By Jury; Massachusetts Statute*, 160
(III) *What Roads May Be Altered*, 161
(IV) *Grounds of Alteration*, 161
(V) *Proceedings*, 162
(A) *In General*, 162
(B) *Petition and Parties*, 163
(1) *Petition*, 163
(a) *In General*, 163
(b) *Amendment*, 164
(2) *Parties*, 165
(C) *Notice*, 165
(D) *Remonstrance*, 166
(E) *Hearing and Determination*, 166
(F) *Commissioners, Viewers, Jurors, or Other Like Officers*, 166

(1) *Order of Appointment*, 166
(2) *Competency and Qualification*, 166
(3) *Compensation*, 167
(4) *Report*, 167
(G) *Order or Judgment*, 168
(1) *In General*, 168
(2) *Filing and Record*, 169
(3) *Conclusiveness and Collateral Attack*, 169
(a) *In General*, 169
(b) *Bar to Second Application*, 170
(H) *Defects and Objections*, 170
(I) *Supervision of Courts*, 171
(1) *In General*, 171
(2) *Appeal*, 171
(3) *Certiorari*, 172
(J) *Costs*, 173
(VI) *Operation and Effect*, 174
b. *Relocation*, 175
2. *Vacation*, 175
a. *Power to Vacate*, 175
(I) *By Legislative Act*, 175
(II) *By Local Governmental Agencies*, 176
(A) *In General*, 176
(B) *Roads in Two Jurisdictions*, 176
(III) *By Vote of Town*, 176
b. *What Roads May Be Vacated*, 177
(I) *In General*, 177
(II) *Roads Laid Out But Not Opened*, 178
c. *Grounds For Discontinuance*, 179
(I) *In General*, 179
(II) *Roads Laid Out But Not Opened*, 180
d. *Mode of Effecting Vacation*, 180
(I) *In General*, 180
(II) *Petition and Parties*, 181
(A) *In General*, 181
(B) *Amendment*, 182
(III) *Notice*, 182
(IV) *Answers and Remonstrances*, 184
(V) *Hearing and Determination*, 185
(VI) *Commissioners, Viewers, and Other Like Officers*, 185
(VII) *Order or Judgment and Record*, 187
(A) *In General*, 187
(B) *Conclusiveness and Collateral Attack*, 189
(1) *In General*, 189
(2) *Bar to Further Proceedings*, 189
(VIII) *Defects and Objections and Waiver Thereof*, 189
(IX) *Appeal and Error*, 190
(X) *Certiorari*, 191
(XI) *Injunction*, 192
(XII) *Costs*, 192
e. *Operation and Effect*, 192
f. *Damages*, 192
3. *Abandonment*, 194
a. *In General*, 194
b. *By Non-User*, 195
(I) *In General*, 195
(II) *Of Part of Width*, 196

c. *By Failure to Open, Construct, or Repair*, 197
d. *By Reason of Obstructions or Encroachments*, 199
e. *By Acceptance or Use of New Road in Place of Old*, 199
f. *By Deviation From Established Way*, 199

III. TITLE TO HIGHWAYS, AND RIGHTS OF PUBLIC AND ABUTTING OWNERS, 200

A. *Title to Highways*, 200
1. *In General*, 200
2. *On Vacation or Abandonment*, 202
3. *Right to Soil and Materials*, 203
a. *In General*, 203
b. *For Constructing or Repairing Highway*, 204
B. *Rights of Public*, 205
1. *To Use Highway For Other Public Purposes*, 205
2. *Right to Deviate From Established Way*, 206
C. *Rights of Abutting Owners*, 206
1. *In General*, 206
2. *To Use Highway For Private Purpose*, 207
3. *Remedies*, 208

IV. HIGHWAY DISTRICTS AND OFFICERS, 210

A. *Districts*, 210
1. *Nature*, 210
2. *Creation, Alteration, Consolidation, and Discontinuance*, 211
3. *Assignment to Officers*, 211
B. *Officers*, 212
1. *Appointment, Election, and Qualification*, 212
a. *In General*, 212
b. *Bond*, 213
2. *Creation and Tenure of Office*. 214
3. *Meetings and Records*, 214
4. *Compensation*, 215
5. *Powers and Authority*, 216
a. *In General*, 216
b. *Indebtedness and Expenditures*, 216
6. *Duties and Liabilities*, 216
a. *Duties; Failure to Perform*, 216
b. *Personal Liabilities*, 216
c. *Justification by Authority*, 218
d. *Liability of Municipality For Negligent or Wrongful Acts of Officers*, 218
7. *Actions and Proceedings*, 219
a. *Civil*, 219
b. *Penal or Criminal*, 220
(I) *In General*, 220
(II) *Indictment*, 220
(III) *Proof*, 221

V. CONSTRUCTION, IMPROVEMENT, AND REPAIR, 222

A. *Statutory Regulation*, 222
B. *Mode, Plan, and Sufficiency*, 222
1. *In General*, 222
2. *Taking Material From Abutters*, 223
3. *Removal of Fences, Buildings, and Other Property*, 223
4. *Guide-Posts*, 224
C. *Roads Affected*, 224
1. *In General*, 224

2. *Roads in Different Jurisdictions*, 225
D. *Upon Whom Duty to Do Road Work Rests*, 226
1. *Municipality and Municipal Officers*, 226
a. *In General*, 226
b. *As Dependent Upon Availability of Funds*, 227
2. *Individual Duty and Liability; Exoneration of Municipality*, 228
E. *Drainage*, 228
1. *Right and Manner; Casting Water Upon Adjoining Land*, 228
2. *Personal Liability of Officer*, 230
3. *Abatement of Drainage Nuisance*, 231
4. *Enjoining Wrongful Drainage*, 231
F. *Expenses*, 231
1. *Apportionment*, 231
2. *Liability of Municipality to Laborer or Materialman*, 232
3. *Improvement Bonds or Certificates*, 233
4. *Work or Material on Credit*, 233
5. *Recovery of Advances Made by Highway Officer*, 233
G. *Contracts For Road Work*, 233
1. *Execution; Form and Validity*, 233
2. *Construction*, 234
3. *Performance and Payment*, 235
4. *Contractor's Bonds*, 235
5. *Actions*, 235
H. *Establishment, Construction, Repair, and Improvement of Free Gravel Roads and Turnpikes*, 236
1. *In General*, 236
2. *Commissioners or Viewers*, 237
3. *Hearing*, 237
4. *Record*, 237
5. *Appeal*, 237
I. *Proceedings Regulating*, 238
1. *In General*, 238
2. *Criminal*, 238
3. *Injunction Against Illegal Work*, 239
J. *Damages*, 239
1. *Right*, 239
a. *In General*, 239
b. *Change of Grade*, 240
c. *For Unauthorized Acts*, 241
2. *Liability*, 241
3. *Payment or Assessment as Prerequisite to Road Work*, 242
4. *Measure of Damages; Offsetting Benefits*, 242
5. *Actions or Proceedings to Recover*, 244
a. *Jurisdiction and Venue*, 244
b. *Form of Action*, 244
c. *Parties*, 244
d. *Application, Complaint, or Petition*, 244
e. *Limitations*, 245
f. *Assessment of Damages by Commissioners or Jurors*, 245
g. *Arbitration or Agreement*, 246
h. *Costs*, 246
i. *Appeal; Reassessment or Recommittal*, 246

VI. OBSTRUCTION AND ENCROACHMENT, 247

A. *As Nuisance*, 247
B. *What Constitutes*, 247
C. *Existence or Legality of Highway*, 248
D. *Authorized Obstructions, Prescription*, 249

E. *Persons Liable*, 250
1. *In General*, 250
2. *Necessity of Notice to Charge Defendant*, 250
F. *Remedies*, 250
1. *Action For Damages*, 250
a. *By Private Person*, 250
(I) *Right; Procedure*, 250
(II) *Damages*, 252
b. *By Municipality*, 252
2. *Injunction*, 252
a. *In General*, 252
b. *By Public Authorities*, 253
c. *By Private Person*, 253
3. *Mandamus Against Public Officer to Compel Removal*, 255
4. *Action Against Obstructer to Compel Removal*, 256
a. *In General*, 256
b. *Order and Notice*, 256
c. *Appeal or Certiorari*, 256
5. *Summary Proceedings For Removal*, 256
6. *Summary Removal Without Legal Formality*, 257
a. *By Public Officer*, 257
b. *By Private Person*, 258
c. *Notice of Claim by Landowner*, 258
7. *Penalties*, 258
a. *Statutory Provision*, 258
b. *Recovery; Procedure*, 259
8. *Criminal Prosecution*, 260
a. *In General*, 260
b. *Jurisdiction*, 262
c. *Indictment*, 262
d. *Evidence*, 263
(I) *In General*, 263
(II) *Intent; Wilfulness*, 264
e. *Trial; Appeal*, 265
f. *Punishment*, 266

VII. USE OF HIGHWAY, AND LAW OF THE ROAD, 266
A. *Right and Mode of Use*, 266
1. *In General*, 266
2. *By Vehicles*, 267
a. *Automobiles*, 267
b. *Traction Engines, and Other Heavy Equipment*, 268
c. *Bicycles*, 268
3. *Stopping and Standing*, 269
B. *Law of the Road*, 269
1. *To What Roads Applicable*, 269
2. *To What Situations Applicable*, 270
a. *Meeting*, 270
(I) *In General*, 270
(II) *Horseman or Light Vehicle Passing Heavier Vehicle*, 271
b. *Overtaking and Passing*, 272
c. *Turning Across Road*, 272
d. *Meeting at Cross Roads*, 272
e. *Pedestrians*, 273
(I) *In General*, 273
(II) *Crossing Road*, 273

f. *Vehicles Having the Right of Way*, 274
C. *Care and Negligence in Use of Road*, 274
1. *In General*, 274
2. *Care Required of Drivers of Teams*, 275
a. *In General*, 275
b. *Reckless Driving or Racing*, 276
3. *Frightening Horses*, 277
4. *Runaways; Horses Left Unhitched in the Road*, 277
5. *Traction Engines; Automobiles*, 279
6. *Contributory or Imputed Negligence*, 279
D. *Actions and Proceedings For Misuse*, 281
1. *Civil*, 281
a. *Pleading and Proof*, 281
b. *Evidence*, 281
(I) *Burden of Proof*, 281
(II) *Admissibility; Weight and Sufficiency*, 282
c. *Trial*, 283
(I) *Questions For Court and For Jury*, 283
(II) *Instructions*, 283
(III) *Findings*, 284
d. *Punitive Damages*, 284
2. *Penal or Criminal*, 284
E. *Injuries From Defects or Obstructions*, 285
1. *Care and Duty as to Condition of Road*, 285
a. *In General*, 285
b. *Roads and Portions Thereof to Which Duty Extends*, 286
(I) *In General*, 286
(II) *Roads Under Repair*, 287
c. *Defects and Obstructions Causing Injury*, 287
(I) *General Nature; Enumeration*, 287
(II) *Defects Caused by the Elements; Snow and Ice*, 290
(III) *Obstructions Calculated to Frighten Horses*, 290
d. *Precautions*, 291
(I) *Against Travel on Unsuitable Roads*, 291
(II) *Lighting Highways*, 291
(III) *Railings or Barriers*, 291
e. *Necessity of Notice of Defect to Charge Municipality*, 292
2. *Rights and Duties of Person Injured*, 294
a. *Who Can Recover*, 294
(I) *Traveler*, 294
(A) *In General*, 294
(B) *Outside of Traveled Path*, 294
(II) *Lawbreakers*, 295
(III) *Persons Bound to Repair*, 295
b. *Contributory Negligence*, 295
(I) *In General*, 295
(II) *Competency or Infirmity of Person Injured*, 298
(III) *Knowledge of Defect as Evidence of Contributory Negligence*, 298
c. *Doctrine of Proximate Cause* 299
3. *Liability For Injury*, 301
a. *General Nature*, 301
b. *Who Liable*, 302
(I) *Abutting Owner*, 302
(II) *Road Officer*, 302
(III) *County*, 303
(IV) *Road Districts*, 303

(v) *Town*, 303
(vi) *Person Causing Defect*, 304
4. *Actions*, 305
a. *Nature of Action; Parties*, 305
b. *Notice of Injury as Condition Precedent*, 306
(i) *Necessity: Waiver*, 306
(ii) *Form and Contents*, 306
(iii) *Service*, 307
c. *Time to Sue*, 308
d. *Pleading*, 308
(i) *Declaration or Complaint*, 308
(ii) *Plea or Answer*, 309
e. *Issues, Proof, and Variance*, 310
f. *Evidence*, 310
(i) *Presumptions and Burden of Proof*, 310
(ii) *Admissibility*, 311
g. *Trial*, 314
(i) *Questions For Court and For Jury*, 314
(ii) *Instructions*, 316
(iii) *Verdict and Findings*, 318
h. *Damages*, 318
i. *Appeal and Error*, 319

VIII. ROAD TAXES, 319
A. *In General*, 319
1. *Statutory Regulation*, 319
a. *In General*, 319
b. *Amendment and Repeal*, 320
2. *Levy and Assessment*, 320
a. *In General*, 320
b. *Formalities*, 321
c. *Purposes*, 322
d. *Amount*, 323
3. *Persons and Property Taxed*, 323
a. *Property*, 323
b. *Persons*, 324
4. *Collection and Payment*, 324
a. *Collection*, 324
(i) *In General*, 324
(ii) *Remedies Against Tax*, 325
5. *Distribution of Proceeds*, 325
B. *Local Assessment and Special Taxes*, 326
1. *Statutory Regulation*, 326
2. *Levy and Assessment*, 327
a. *Method; Uniformity*, 327
b. *Reassessment*, 329
3. *Liability and Exemption*, 329
4. *Collection and Enforcement*, 329
5. *Disposition of Proceeds*, 330
6. *Landowners' Remedies; Costs*, 330
C. *Poll Taxes*, 331
D. *Work on Roads by Taxpayers*, 332
1. *Statutory Regulation*, 332
2. *Notice*, 332
3. *Liability and Exemption*, 333
4. *Effect of Failure or Refusal to Work and Proceedings Thereon*, 334
5. *Collection of Taxes Not Worked Out*, 335

CROSS-REFERENCES

For Matters Relating to:
Bridge, see BRIDGES, 5 Cyc. 1049.
Canal as Highway, see CANALS, 6 Cyc. 267.
Dedication, see DEDICATION, 13 Cyc. 434.
Eminent Domain, see EMINENT DOMAIN, 15 Cyc. 543.
Ferry, see FERRIES, 19 Cyc. 491.
Highway as Boundary, see BOUNDARIES, 5 Cyc. 905.
Private Road, see PRIVATE ROADS, 32 Cyc. 362.
Street or Public Way in City, see MUNICIPAL CORPORATIONS, 23 Cyc. 832.
Toll-Road, see TOLL-ROADS, — Cyc. ——.
Turnpike, see TOLL-ROADS, — Cyc. ——.
Waterway, see CANALS, 6 Cyc. 267; WATERS.

I. DEFINITIONS.

The term "highway" is a generic name for all kinds of public ways,[1] whether

1. *Georgia.*— Johnson *v.* State, 1 Ga. App. 195, 200, 58 S. E. 265.
Illinois.— Mobile, etc., R. Co. *v.* Davis, 130 Ill. 146, 148, 22 N. E. 850.
Iowa.— Chamberlain *v.* Iowa Tel. Co., 119 Iowa 619, 621, 93 N. W. 596; Sachs *v.* Sioux City, 109 Iowa 224, 228, 80 N. W. 336; Stokes *v.* Scott County, 10 Iowa 166, 175.
Minnesota.— Northwestern Tel. Exch. Co. *v.* Minneapolis, 81 Minn. 140, 154, 83 N. W. 527, 86 N. W. 69, 53 L. R. A. 175.
Missouri.— Kerney *v.* Barber Asphalt Paving Co., 86 Mo. App. 573, 578.
Oklahoma.— Southern Kansas R. Co. *v.* Oklahoma City, 12 Okla. 82, 94, 69 Pac. 1050.
South Carolina.— State *v.* Harden, 11 S. C. 360, 368; Heyward *v.* Chisolm, 11 Rich. 253, 259, whether under the charge of commissioners or not, and whether originally laid out for the whole public, or laid out for particular persons and used by the public.
Vermont.— State *v.* Wilkinson, 2 Vt. 480, 487, 21 Am. Dec. 560.
Virginia.— Talbott *v.* Richmond, etc., R. Co., 31 Gratt. 685, 691.
United States.—Abbott *v.* Duluth, 104 Fed. 833, 837 [*affirmed* in 117 Fed. 137, 55 C. C. A. 153].
England.— Reg. *v.* Saintiff, 6 Mod. 255, 4 Vin. Abr. 502, 87 Eng. Reprint 1002.

Every thoroughfare which is used by the public, and which is common to all the public, and which the public has a right to use is a highway. Arkansas River Packet Co. *v.* Sorrels, 50 Ark. 466, 472, 8 S. W. 683; Parsons *v.* San Francisco, 23 Cal. 462, 464; Southern R. Co. *v.* Combs, 124 Ga. 1004, 1006, 53 S. E. 508; Shelby County *v.* Castetter, 7 Ind. App. 309, 33 N. E. 986, 987, 34 N. E. 687; Union Pac. R. Co. *v.* Colfax County Com'rs, 4 Nebr. 450, 456; Southern Kansas R. Co. *v.* Oklahoma City, 12 Okla. 82, 94, 69 Pac. 1050; Styles *v.* Victoria, 8 Brit. Col. 406, 414.

Bridge as part of highway see BRIDGES, 5 Cyc. 1052.

Cul-de-sac.— The term "highway" may properly be applied to a mere cul-de-sac. Penick *v.* Morgan County, 131 Ga. 385, 392, 62 S. E. 300; Bartlett *v.* Bangor, 67 Me. 460, 467; People *v.* Kingman, 24 N. Y. 559, 565 [*overruling* Holdane *v.* Cold Spring, 23 Barb. (N. Y.) 103]; People *v.* Van Alstyne, 3 Abb. Dec. (N. Y.) 575, 577, 3 Keyes 35; Saunders *v.* Townsend, 26 Hun (N. Y.) 308, 309; Bateman *v.* Bluck, 18 Q. B. 870, 17 Jur. 386, 21 L. J. Q. B. 406, 83 E. C. L. 870, 14 Eng. L. & Eq. 69; Rugby Charity *v.* Merryweather, 11 East 376 note, 10 Rev. Rep. 528, 103 Eng. Reprint 1049. And see Chick *v.* Newberry County, 27 S. C. 419, 422, 3 S. E. 787 [*quoting* Rapalje & L. L. Dict.]; British Museum Trustees *v.* Finnis, 5 C. & P. 460, 24 E. C. L. 655. *Contra*, People *v.* Jackson, 7 Mich. 432, 446, 74 Am. Dec. 729. And see Rex *v.* Great Dover St. Rd. Trustees, 5 A. & E. 692, 2 Harr. & W. 423, 6 L. J. M. C. 25, 1 N. & P. 157, 31 E. C. L. 786; Wood *v.* Veal, 5 B. & Ald. 454, 1 D. & R. 20, 24 Rev. Rep. 454, 7 E. C. L. 250; Woodyer *v.* Hadden, 5 Taunt. 125, 14 Rev. Rep. 706, 1 E. C. L. 74. See *infra*, note 50; and II, C, 1, b, (II), (B). Cul-de-sac defined see 12 Cyc. 988.

Ferry as part of highway see FERRIES, 19 Cyc. 493.

Landings, levees, and river banks are not regarded as highways. Duffy *v.* New Orleans, 49 La. Ann. 114, 119, 21 So. 179.

Lane as highway see 24 Cyc. 1477.

Pent road as highway see PENT ROADS, 30 Cyc. 1379.

Private road as highway see PRIVATE ROADS, 32 Cyc. 366 *et seq.*

Public square.— The term "highway" is properly applied to so much of a public square as is around and about the courthouse, and devoted to the purpose of a highway. It belongs to the public, and they use it of right until public authority shall abolish it, although there be no overseer of it, for an overseer is not essential to the existence of a highway. State *v.* Eastman, 109 N. C. 785, 787, 13 S. E. 1019.

Railroad as highway see RAILROADS, 33 Cyc. 37; STREET RAILROADS, 36 Cyc. 1338.

A sidewalk is as much a part of the highway as the traveled wagon road is. People *v.* Meyer, 26 Misc. (N. Y.) 117, 119, 56 N. Y. Suppl. 1097. See also Martinovich *v.* Wooley, 128 Cal. 141, 143, 60 Pac. 760; *Ex p.*

by land or by water.[2] Ordinarily, however, the term is confined to public ways

Taylor, 87 Cal. 91, 96, 25 Pac. 258; Marini *v.* Graham, 67 Cal. 130, 132, 7 Pac. 442; Bonnet *v.* San Francisco, 65 Cal. 230, 231, 3 Pac. 815; Denver Bd. of Public Works *v.* Hayden, 13 Colo. App. 36, 56 Pac. 201, 204; Frankfort *v.* Coleman, 19 Ind. App. 368, 49 N. E. 474, 475, 65 Am. St. Rep. 412; Challiss *v.* Parker, 11 Kan. 384, 391.

Toll-road as highway see TOLL-ROADS.

Town way.— Under the system of public ways prevalent in some of the New England states a highway is a public way leading from town to town or place to place, in contradistinction to private ways for the use of the inhabitants of a particular town. Waterford *v.* Oxford County Com'rs, 59 Me. 450, 452; Harding *v.* Medway, 10 Metc. (Mass.) 465, 469; Com. *v.* Newbury, 2 Pick. (Mass.) 51, 56; Com. *v.* Charlestown, 1 Pick. (Mass.) 180, 188, 11 Am. Dec. 161. So in Quebec where one side of a road runs along the boundary line between two local municipalities, although such road is wholly situate in one of them, it is a county road. Walsh *v.* St. Anicet Parish, 25 Quebec Super. Ct. 319, 320. The distinction between highways, technically so-called, and town ways or private ways, consists in the fact that the former are laid out and may be altered or discontinued by the authorities having jurisdiction throughout the county, such as the county court, the court of general sessions, and, in modern times, the county commissioners, while the latter are laid out and may be altered or discontinued by the selectmen, with the approval of the town. In other respects they are alike, and equally parts of the system of public ways. Butchers' Slaughtering, etc., Assoc. *v.* Boston, 139 Mass. 290, 291, 30 N. E. 94; Denham *v.* Bristol County, 108 Mass. 202, 205; Flagg *v.* Flagg, 16 Gray (Mass.) 175, 179; Valentine *v.* Boston, 22 Pick. (Mass.) 75, 80, 33 Am. Dec. 711. And see Davis *v.* Smith, 130 Mass. 113. So in New York under the colonial laws, a country road was one which belonged to the country, and was under the direct charge of the country, as distinguished from the owners of the towns and manors; and it was a necessary line of communication between sparsely settled communities, and it was for the better laying out, repairing, and preserving the public and general highways within the colony that the legislation as to such roads was adopted. Townsend *v.* Brookhaven, 97 N. Y. App. Div. 316, 327, 89 N. Y. Suppl. 982. In common acceptation, however, the term "highway" means a public way, and includes a town way. Wells *v.* York County Com'rs, 79 Me. 522, 528, 11 Atl. 417; Cleaves *v.* Jordan, 34 Me. 9, 12; Clark *v.* Hull, 184 Mass. 164, 166, 68 N. E. 60; Blackstone *v.* Worcester County, 108 Mass. 68; Harding *v.* Medway, *supra*; Com. *v.* Hubbard, 24 Pick. (Mass.) 98; Com. *v.* Charlestown, *supra*. *Contra*, Com. *v.* Newbury, *supra*. In Maine, when the term is used in a statute, its import is restricted to county roads or county ways (Wells *v.* York County Com'rs, 79 Me. 522, 528, 11 Atl. 417; Waterford *v.* Oxford County Com'rs, *supra*; Cleaves *v.* Jordan, *supra*), unless its connection should require some different construction (Cleaves *v.* Jordan, *supra*). In Massachusetts, however, the term is given its ordinary meaning (Janvrin *v.* Poole, 181 Mass. 463, 464, 63 N. E. 1066; Harding *v.* Medway, *supra*; Com. *v.* Hubbard, 24 Pick. (Mass.) 98, 101; Jones *v.* Andover, 6 Pick. (Mass.) 59, 61), unless it appears that the legislature used it in its narrower sense (Boston, etc., R. Co. *v.* Boston, 140 Mass. 87, 88, 2 N. E. 943; Jones *v.* Andover, *supra*).

A wharf, simply as such, and not being part of a street, is not a highway. State *v.* Cowan, 29 N C. 239, 247.

Statutory construction.— As used in various statutes the term "highway" is sometimes given a narrower meaning. Mills *v.* State, 20 Ala. 86, 88; State *v.* Harden, 11 S. C. 360, 368 (in both of which cases neighborhood roads were held not to be highways); Territory *v.* Richardson, 8 Ariz. 336, 339, 76 Pac. 456; Wells *v.* York County Com'rs, 79 Me. 522, 528, 11 Atl. 417 (where the term "highway" was held not to include town ways); Paine Lumber Co. *v.* Oshkosh, 89 Wis. 449, 457, 61 N. W. 1108 (where the term "highway" was held not to include roads dedicated by private owners).

2. *Minnesota.*— Northwestern Tel. Exch. Co. *v.* Minneapolis, 81 Minn. 140, 154, 83 N. W. 527, 86 N. W. 69, 53 L. R. A. 175

New York.— *In re* Burns, 155 N. Y. 23, 29, 49 N. E. 246 [*reversing* 16 N. Y. App. Div. 507, 44 N. Y. Suppl. 930], the sea and the Great Lakes.

South Carolina.— Heyward *v.* Chisolm, 11 Rich. 253, 263.

United States.—Abbott *v.* Duluth, 104 Fed. 833, 837 [*affirmed* in 117 Fed. 137, 55 C. C. A. 153].

Canada.— Styles *v.* Victoria, 8 Brit. Col. 406, 414.

A canal is a highway. Shelby County *v.* Castetter, 7 Ind. App. 309, 33 N. E. 986, 987, 34 N. E. 687; Union Pac. R. Co. *v.* Colfax County, 4 Nebr. 450, 456; Lehigh Valley R. Co. *v.* Dover, etc., R. Co., 43 N. J. L. 528, 531; Barnett *v.* Johnson, 15 N. J. Eq. 481, 485 (holding that a canal is a "public highway," and is not the less so because of the tolls charged, or by reason of its being subject to the regulations of the company operating it); *In re* Burns, 155 N. Y. 23, 26, 49 N. E. 246 [*reversing* 16 N. Y. App. Div. 507, 44 N. Y. Suppl. 930]; Southern Kansas R. Co. *v.* Oklahoma City, 12 Okla. 82, 94, 69 Pac. 1050; Bonaparte *v.* Camden, etc., R Co., 3 Fed. Cas. No. 1,617, Baldw. 205, 223. And see New Town Cut *v.* Seabrook, 3 Strobh. (S. C.) 380. See, generally, CANALS, 6 Cyc. 267.

A navigable river is a highway. Arkansas River Packet Co. *v.* Sorrels, 50 Ark. 466, 8 S. W. 683; Shelby County *v.* Castetter, 7 Ind. App. 309, 33 N. E. 986, 987, 34 N. E. 687; Morgan *v.* Reading, 3 Sm. & M. (Miss.)

over land,[3] and it is in this sense that it is employed in this article. Thus used it means a way open to all the people without distinction for passage and repassage at their pleasure.[4] Accordingly the term includes country and township

366, 406; Union Pac. R. Co. *v.* Colfax County, 4 Nebr. 450, 456; *In re* Burns, 155 N. Y. 23, 28, 49 N. E. 246 [*reversing* 16 N. Y. App. Div. 507, 44 N. Y. Suppl. 930]; Southern Kansas R. Co. *v.* Oklahoma City, 12 Okla. 82, 94, 69 Pac. 1050; Chick *v.* Newberry County, 27 S. C. 419, 422, 3 S. E. 787; Wallamet Iron Bridge Co. *v.* Hatch, 19 Fed. 347, 9 Sawy. 643 [*reversed* on other grounds in 125 U. S. 1, 8 S. Ct. 741, 31 L. ed. 607]. See Perkins *v.* Colebrook, 68 Conn. 113, 125, 35 Atl. 772. And see NAVIGABLE WATERS, 29 Cyc. 304 *et seq.*

3. Perkins *v.* Colebrook, 68 Conn. 113, 125, 35 Atl. 772; Duffy *v.* New Orleans, 49 La. Ann. 114, 119, 21 So. 179; *In re* Burns, 155 N. Y. 23, 28, 49 N. E. 246 [*reversing* 16 N. Y. App. Div. 507, 44 N. Y. Suppl. 930]; Chick *v.* Newberry County, 27 S. C. 419, 422, 3 S. E. 787 [*quoting* Rapalje & L. L. Dict.].

4. *Connecticut.*— Canastota Knife Co. *v.* Newington Tramway Co., 69 Conn. 146, 156, 36 Atl. 1107; Laufer *v.* Bridgeport Traction Co., 68 Conn. 475, 488, 37 Atl. 379, 37 L. R. A. 533.

Illinois.— Morse *v.* Sweenie, 15 Ill. App. 486, 492.

Indiana.— Bogue *v.* Bennett, 156 Ind. 478, 483, 60 N. E. 143, 83 Am. St. Rep. 212; State *v.* Moriarty, 74 Ind. 103, 104; Wild *v.* Deig, 43 Ind. 455, 458, 13 Am. Rep. 399; Westfield Gas, etc., Co. *v.* Abernathy, 8 Ind. App. 73, 35 N. E. 399, 400; Shelby County *v.* Castetter, 7 Ind. App. 309, 33 N. E. 986, 987, 34 N. E. 687.

Kansas.— Burlington, etc., R. Co. *v.* Johnson, 38 Kan. 142, 148, 16 Pac. 125.

Kentucky.— Riley *v.* Buchanan, 116 Ky. 625, 628, 76 S. W. 527, 25 Ky. L. Rep. 863, 63 L. R. A. 642.

Michigan.— Macomber *v.* Nichols, 34 Mich. 212, 217, 22 Am. Rep. 522; People *v.* Jackson, 7 Mich. 432, 446, 74 Am. Dec. 729; People *v.* Beaubien, 2 Dougl. 256, 285.

Minnesota.— Northwestern Tel. Exch. Co. *v.* Minneapolis, 81 Minn. 140, 154, 83 N. W. 527, 86 N. W. 69, 71, 53 L. R. A. 175; Carli *v.* Stillwater St. R., etc., Co., 28 Minn. 373, 375, 10 N. W. 205, 41 Am. Rep. 290.

Missouri.— Walton *v.* St. Louis, etc., R. Co., 67 Mo. 56, 57; Jenkins *v.* Chicago, etc., R. Co., 27 Mo. App. 578, 583; Belcher Sugar Refining Co. *v.* St. Louis Grain El. Co., 10 Mo. App. 401, 407.

New Hampshire.— Opinion of Justices, 66 N. H. 629, 672, 33 Atl. 1076.

New Jersey.— Starr *v.* Camden, etc., R. Co., 24 N. J. L. 592, 597.

New York.— Liekens *v.* Staten Island Midland R. Co., 64 N. Y. App. Div. 327, 330, 72 N. Y. Suppl. 162; Hutson *v.* New York, 5 Sandf. 289, 312 [*affirmed* in 9 N. Y. 163, 59 Am. Dec. 526]; People *v.* Meyer, 26 Misc. 117, 119, 56 N. Y. Suppl. 1097, 14 N. Y. Cr. 57.

North Carolina.— State *v.* Cowan, 29 N. C. 239, 248.

Pennsylvania.— Chambers *v.* Furry, 1 Yeates 167, 169.

South Carolina.— Chick *v.* Newberry County, 27 S. C. 419, 422, 3 S. E. 787; State *v.* Harden, 11 S. C. 360, 368. And see State *v.* Mobley, 1 McMull. 44, 47; Withers *v.* Claremont County, 3 Brev. 83, 85.

Tennessee.— State *v.* Stroud, (Ch. App. 1898) 52 S. W. 697, 698.

Texas.— Gulf, etc., R. Co. *v.* Montgomery, 85 Tex. 64, 67, 19 S. W. 1015.

Vermont.— Lynch *v.* Rutland, 66 Vt. 570, 573, 29 Atl. 1015; Slicer *v.* Hyde Park, 55 Vt. 481, 482; State *v.* Wilkinson, 2 Vt. 480, 487, 21 Am. Dec. 560.

Virginia.— Bailey *v.* Com., 78 Va. 19, 21.

Wisconsin.— State *v.* Paine Lumber Co., 84 Wis. 205, 207, 54 N. W. 503.

United States.—Abbott *v.* Duluth, 104 Fed. 833, 837 [*affirmed* in 117 Fed. 137, 55 C. C. A. 153]; Wallamet Iron Bridge Co. *v.* Hatch, 19 Fed. 347, 355, 9 Sawy. 643.

Canada.— Styles *v.* Victoria, 8 Brit. Col. 406, 414.

Other definitions are: "A passage or road through the country, or some parts of it, for the use of the people." Bouvier L. Dict. [*quoted* in Northwestern Tel. Exch. Co. *v.* Minneapolis, 81 Minn. 140, 154, 83 N. W. 527, 86 N. W. 69, 53 L. R. A. 175; Abbott *v.* Duluth, 104 Fed. 833, 837 (*affirmed* in 117 Fed. 137, 55 C. C. A. 153)].

"A passage, road, or street which every citizen has a right to use." Bouvier L. Dict. [*quoted* in Carli *v.* Stillwater St. R., etc., Co., 28 Minn. 373, 375, 10 N. W. 205, 41 Am. Rep. 290].

"A public way or road; a way or passage open to all; a way over which the public at large have a right of passage." Burrill L. Dict. [*quoted* in Matter of Burns, 16 N. Y. App. Div. 507, 514, 44 N. Y. Suppl. 930 (*reversed* on other grounds in 155 N. Y. 23, 49 N. E. 246)].

"A public road or passage; a way open to all passengers by either land or water." Century Dict. [*quoted* in Northwestern Tel. Exch. Co. *v.* Minneapolis, 81 Minn. 140, 154, 83 N. W. 527, 86 N. W. 69, 53 L. R. A. 175]

"A public passage, open to all the people." Holthouse L. Dict.; Jacob L. Dict.; Tomlin L. Dict. [*quoted* in Bailey *v.* Com., 78 Va. 19, 21].

"A passage that is open to all the public." Rapalje & L. L. Dict. [*quoted* in Chick *v.* Newberry County, 27 S. C. 419, 422, 3 S. E. 787].

"A public road; a way open to all passengers." Webster Dict. [*quoted* in State *v.* Paine Lumber Co., 84 Wis. 205, 207, 54 N. W. 503]. And see Mobile, etc., R. Co. *v.* State, 51 Miss. 137, 141.

Origin and development.— In the most primitive state of society the conception of a highway was merely a foot-path; in a slightly more advanced state it included the idea of a way for pack animals; and, next,

roads,[5] streets and alleys in incorporated cities, towns, and villages,[6] and public ways of every description.[7] It accordingly includes not only public ways devoted to vehicular transportation,[8] but also public ways of all kinds, including

a way for vehicles drawn by animals, constituting, respectively, the "*iter*," the "*actus*," and the "*via*" of the Romans. And thus the methods of using public highways expanded with the growth of civilization, until to-day our urban highways are devoted to a variety of uses not known in former times, and never dreamed of by the owners of the soil when the public easement was acquired. Cater *v.* Northwestern Tel. Exch. Co., 60 Minn. 539, 543, 63 N. W. 111, 51 Am. St. Rep. 543, 28 L. R. A. 310. And see Boyden *v.* Achenbach, 79 N. C. 539, 541. Highways "are of many kinds, varying with the state of civilization and wealth of the country through which they are constructed, and according to the extent of the traffic to be carried on upon them." Shelby County *v.* Castetter, 7 Ind. App. 309, 33 N. E. 986, 987, 34 N. E. 687.

Nature.— A public highway is a perpetual easement and a freehold estate. Taylor *v.* Pierce, 174 Ill. 9, 11, 50 N. E. 1109; Crete *v.* Hewes, 168 Ill. 330, 332, 48 N. E. 36; Chaplin *v.* Highway Com'rs, 126 Ill. 264, 271, 18 N. E. 765.

The way must be public else it is not a highway (Coulter *v.* Great Northern R. Co., 5 N. D. 568, 67 N. W. 1046, 1050. And see *infra*, II, B, 2, b), although it is the right to travel upon a way by all the world, and not the exercise of the right, which makes the way a highway (*In re* New York, 135 N. Y. 253, 260, 31 N. E. 1043, 31 Am. St. Rep. 825), and a road open to the public is a public road, although one person will be most benefited by it (Galveston, etc., R. Co. *v.* Baudat, 18 Tex. Civ. App. 595, 600, 45 S. W. 939). It is essential to the notion of a highway that its use must be common to all citizens. Sun Printing, etc., Assoc. *v.* New York, 8 N. Y. App. Div. 230, 283, 40 N. Y. Suppl. 607 [*affirmed* in 152 N. Y. 257, 46 N. E. 499, 37 L. R. A. 788]. To constitute a highway, it must be one to which all the people of the state have a common and equal right to travel, and in which they have a common, and at least general, interest to keep unobstructed. Talbott *v.* Richmond, etc., R. Co., 31 Gratt. (Va.) 685, 692. Accordingly the term "public highway" is a tautological expression, since a highway is a passage, road, or street which every citizen has a right to use, and is therefore necessarily public. Walton *v.* St. Louis, etc., R. Co., 67 Mo. 56, 57; Jenkins *v.* Chicago, etc., R. Co., 27 Mo. App. 578, 583. And the public includes strangers as well as inhabitants of the district where the way exists. Mobile, etc., R. Co. *v.* Davis, 130 Ill. 146, 150, 22 N. E. 850; Lynch *v.* Rutland, 66 Vt. 570, 573, 29 Atl. 1015; Slicer *v.* Hyde Park, 55 Vt. 481, 482.

Necessity of practical passage.— The word "highway" imports a practicable passage. It is a contradiction in terms to speak of an impassable highway. Armstrong *v.* St. Louis, 3 Mo. App. 151, 157. And see *infra*, II, B, 2, b.

Cul-de-sac as highway see *supra*, note 1; *infra*, note 50.

Town way as highway see *supra*, note 1.

5. *Indiana.*— State *v.* Moriarty, 74 Ind. 103, 104; Shelby County *v.* Castetter, 7 Ind. App. 309, 33 N. E. 986, 987, 34 N. E. 687.

Iowa.— Chamberlain *v.* Iowa Tel. Co., 119 Iowa 619, 621, 93 N. W. 596; Sachs *v.* Sioux City, 109 Iowa 224, 227, 80 N. W. 336; Stokes *v.* Scott County, 10 Iowa 166, 175.

Missouri.—Walton *v.* St. Louis, etc., R. Co., 67 Mo. 56, 57; Kerney *v.* Barber Asphalt Paving Co., 86 Mo. App. 573, 578; Jenkins *v.* Chicago, etc., R. Co., 27 Mo. App. 578, 583.

Nebraska.— Union Pac. R. Co. *v.* Colfax County, 4 Nebr. 450, 456.

New Jersey.— Vantilburgh *v.* Shann, 24 N. J. L. 740, 744.

New York.— *In re* Burns, 155 N. Y. 23, 28, 49 N. E. 246 [*reversing* 16 N. Y. App. Div. 507, 44 N. Y. Suppl. 930].

Oklahoma.— Southern Kansas R. Co. *v.* Oklahoma City, 12 Okla. 82, 94, 69 Pac. 1050.

Wisconsin.— Herrick *v.* Geneva, 92 Wis. 114, 117, 65 N. W. 1024.

United States.—Abbott *v.* Duluth, 104 Fed. 833, 837 [*affirmed* in 117 Fed. 137, 55 C. C. A. 153].

England.— Reg. *v.* Chart, etc., Upper Half Hundred, L. R. 1 C. C. 237, 239.

New England town way as highway see *supra*, note 1.

Road defined see *infra*, this section, text and notes 12–20.

6. See MUNICIPAL CORPORATIONS, 28 Cyc. 832 *et seq.*

New England town way as highway see *supra*, note 1.

7. See *supra*, this section, text and notes.

8. *Arkansas.*— Arkansas River Packet Co *v.* Sorrels, 50 Ark. 466, 472, 8 S. W. 683.

Connecticut.— Laufer *v.* Bridgeport Traction Co., 68 Conn. 475, 488, 37 Atl. 379, 37 L. R. A. 533.

Kansas.— Burlington, etc., R. Co. *v.* Johnson, 38 Kan. 142, 148, 16 Pac. 125.

Massachusetts.— Harding *v.* Medway, 10 Metc. 465, 469.

Nebraska.— Union Pac. R. Co. *v.* Colfax County, 4 Nebr. 450, 456.

North Carolina.— State *v.* Cowan, 29 N. C. 239, 248.

South Carolina.—State *v.* Harden, 11 S. C. 360, 368; Heyward *v.* Chisolm, 11 Rich. 253, 263.

Tennessee.— State *v.* Stroud, (Ch. App. 1898) 52 S. W. 697, 698.

England.— Reg. *v.* Chart, etc., Upper Half Hundred, L. R. 1 C. C. 237, 239; Reg. *v.* Saintiff, 6 Mod. 255, 4 Vin. Abr. 502, 87 Eng. Reprint 1002.

Canada.— Styles *v.* Victoria, 8 Brit. Col. 406, 414.

footways,[9] bridle paths,[10] and drift ways.[11] In its broadest sense the term "road" is synonymous with "way," [12] and thus applies to any place set apart and appropriated, either *de jure* or *de facto*, for the purpose of free passage, whether by public authority or by the general license or permission of the owners of the land,[13] and also to private ways.[14] More commonly in legal acceptation the term "road" is regarded as synonymous with "highway." [15] It is said to be a

9. *Arkansas.*— Arkansas River Packet Co. *v.* Sorrels, 50 Ark. 466, 472, 8 S. W. 683.
Connecticut.— Laufer *v.* Bridgeport Traction Co., 68 Conn. 475, 488, 37 Atl. 379, 37 L. R. A. 533.
Kansas.— Burlington, etc., R. Co. *v.* Johnson, 38 Kan. 142, 149, 16 Pac. 125.
Massachusetts.— Boston, etc., R. Co. *v.* Boston, 140 Mass. 87, 88, 2 N. E. 943; Harding *v.* Medway, 10 Metc. 465, 469.
Nebraska.— Union Pac. R. Co. *v.* Colfax County, 4 Nebr. 450, 456.
North Carolina.— State *v.* Cowan, 29 N. C. 239, 248.
South Carolina.— State *v.* Harden, 11 S. C. 360, 368; Heyward *v.* Chisolm, 11 Rich. 253, 263.
Tennessee.— State *v.* Stroud, (Ch. App. 1898) 52 S. W. 697, 698.
England.— Reg. *v.* Saintiff, 6 Mod. 255, 4 Vin. Abr. 502, 87 Eng. Reprint 1002.
Canada.— Styles *v.* Victoria, 8 Brit. Col. 406, 414.

10. *Arkansas.*— Arkansas River Packet Co. *v.* Sorrels, 50 Ark. 466, 472, 8 S. W. 683.
Kansas.— Burlington, etc., R. Co. *v.* Johnson, 38 Kan. 142, 148, 16 Pac. 125.
Nebraska.— Union Pac. R. Co. *v.* Colfax County, 4 Nebr. 450, 456.
North Carolina.— State *v.* Cowan, 29 N. C. 239, 248.
South Carolina.— Heyward *v.* Chisolm, 11 Rich. 253, 263.
England.— Reg. *v.* Saintiff, 6 Mod. 255, 4 Vin. Abr. 502, 87 Eng. Reprint 1002.
Canada.— Styles *v.* Victoria, 8 Brit. Col. 406, 414.
But see Terry *v.* McClung, 104 Va. 599, 52 S. E. 355.

11. Styles *v.* Victoria, 8 Brit. Col. 406, 414.

12. Wood *v.* Truckee Turnpike Co., 24 Cal. 474, 487; Chollar-Potosi Min. Co. *v.* Kennedy, 3 Nev. 361, 373, 93 Am. Dec. 409; International, etc., R. Co. *v.* Jordan, 1 Tex. App. Civ. Cas. § 859; Terry *v.* McClung, 104 Va. 599, 602, 52 S. E. 355. See, however, Kister *v.* Reeser, 98 Pa. St. 1, 4, 42 Am. Rep. 608.

13. Com. *v.* Gammons, 23 Pick. (Mass.) 201, 202; International, etc., R. Co. *v.* Jordan, 1 Tex. App. Civ. Cas. § 859; Hart *v.* Red Cedar, 63 Wis. 634, 638, 24 N. W. 410.

14. Jaquith *v.* Richardson, 8 Metc. (Mass.) 213, 215; Kister *v.* Reeser, 98 Pa. St. 1, 4, 42 Am. Rep. 608.

15. *Indiana.*— Aurora *v.* West, 9 Ind. 74, 76.
Iowa.—Nichols *v.* Chicago, etc., R. Co., 125 Iowa 236, 238, 100 N. W. 1115, by statute.
Maryland.— Horner *v.* State, 49 Md. 277, 280.
Massachusetts.— Clark *v.* Hull, 184 Mass. 164, 166, 68 N. E. 60; Stedman *v.* Southbridge, 17 Pick. 162, 164.
Minnesota.— Northwestern Tel. Exch. Co. *v.* Minneapolis, 81 Minn. 140, 154, 83 N. W. 527, 86 N. W. 69, 71, 53 L. R. A. 175.
Nebraska.— People *v.* Buffalo County, 4 Nebr. 150, 158.
New Hampshire.— Morgan *v.* Palmer, 48 N. H. 336, 337.
New York.— Fowler *v.* Lansing, 9 Johns. 349, 350.
Oregon.—Heiple *v.* East Portland, 13 Oreg. 97, 103, 8 Pac. 907.
Pennsylvania.— Respublica *v.* Arnold, 3 Yeates 417, 421.
Texas.— International, etc., R. Co. *v.* Jordan, 1 Tex. App. Civ. Cas. § 859.
Wisconsin.— Bogie *v.* Waupun, 75 Wis. 1, 4, 43 N. W. 667, 6 L. R. A. 59.
United States.—Abbott *v.* Duluth, 104 Fed. 833, 837 [*affirmed* in 117 Fed. 137, 55 C. C. A. 153].
Canada.— Styles *v.* Victoria, 8 Brit. Col. 406, 414.
Other definitions are: "A public way for passage or travel; a strip of ground appropriated for travel, forming a line of communication between different places; a highway, hence any similar passage for travel public or private. Century Dict. [*quoted* in Northwestern Tel. Exch. Co. *v.* Minneapolis, 81 Minn. 140, 154, 83 N. W. 527, 86 N. W. 69, 53 L. R. A. 175].
"A public passage, open to all the people." Holthouse L. Dict.; Jacob L. Dict.; Tomlin L. Dict. [*quoted* in Bailey *v.* Com., 78 Va. 19, 21].
"An open way or public passage." Imperial Dict. [*quoted* in St. Vincent Tp. *v.* Greenfield, 12 Ont. 297, 305].
"A track for travel forming a communication between one city, town or place and another." Webster Dict. [*quoted* in Osborne *v.* Mecklenburg County, 82 N. C. 400, 402].
"An open way or public passage — ground appropriated for public travel." Webster Dict. [*quoted* in Manchester *v.* Hartford, 30 Conn. 118, 120].
"An open way or public passage, as between one town, city or place and another." Worcester Dict. [*quoted* in Osborne *v.* Mecklenburg County, *supra*].
A "public thoroughfare." Aurora *v.* West, 9 Ind. 74, 76.
"A passage through the country for the use of the people." Horner *v.* State, 49 Md. 277, 286 [*citing* Bouvier L. Dict.].
A "right of passage in the public." Leavitt *v.* Towle, 8 N. H. 96, 97.
"An open way or public passage; — it is ground appropriated for travel, forming a

generic term for all kinds of ways,[16] and thus includes highways,[17] streets,[18] alleys,[19] and lanes.[20]

II. ESTABLISHMENT, ALTERATION, AND DISCONTINUANCE.

A. Modes of Establishment in General. A highway may be established either by prescription, user, or recognition,[21] by statute or statutory proceedings

communication between one city or town and another." Hutson *v.* New York, 5 Sandf. (N. Y.) 289, 312 [*affirmed* in 9 N. Y. 163, 59 Am. Dec. 526].

The term "public highway" and "public road" are not deemed synonymous in Georgia. Johnson *v.* State, 1 Ga. App. 195, 198, 58 S. E. 265.

Necessity of actual user.—A "road" is a way actually used in passing from one place to another. A mere survey or location of a route for a road is not a road. Brooks *v.* Morrill, 92 Me. 172, 176, 42 Atl. 357.

16. Griffin *v.* Sanborn, 127 Ga. 17, 56 S. E. 71; Windham *v.* Cumberland County Com'rs, 26 Me. 406, 409.

A carriageway is within the term "road." International, etc., R. Co. *v.* Jordan, 1 Tex. App. Civ. Cas. § 859; Terry *v.* McClung, 104 Va. 599, 602, 52 S. E. 355.

A footway is included in the term "road." International, etc., R. Co. *v.* Jordan, 1 Tex. App. Civ. Cas. § 859; Terry *v.* McClung, 104 Va. 599, 602, 52 S. E. 355. And see Kister *v.* Reeser, 98 Pa. St. 1, 4, 42 Am. Rep. 608. A road *prima facie* includes the foot-paths as well as the carriageway. Derby County *v.* Urban Dist., [1896] A. C. 315, 323, 60 J. P. 676, 65 L. J. Q. B. 419, 74 L. T. Rep. N. S. 595. So a sidewalk is part of the road. Manchester *v.* Hartford, 30 Conn. 118, 120.

A bridle path is included in the term "road" in its generic sense. Terry *v.* McClung, 104 Va. 599, 602, 52 S. E. 355.

A driftway is within the term "road." Terry *v.* McClung, 104 Va. 599, 602, 52 S. E. 355.

In all the old acts the word "path" is used as synonymous with the word "road." Singleton *v.* Road Com'rs, 2 Nott & M. (S. C.) 526, 527.

Great road defined see 20 Cyc. 1365.

17. Manchester *v.* Hartford, 30 Conn. 118, 120; Stokes *v.* Scott County, 10 Iowa 166, 175; Dubuque County *v.* Dubuque, etc., R. Co., 4 Greene (Iowa) 1, 14 (per Kinney, J., dissenting); Follmer *v.* Nuckolls County Com'rs, 6 Nebr. 204, 209; People *v.* Buffalo County Com'rs, 4 Nebr. 150, 158; Kister *v.* Reeser, 98 Pa. St. 1, 4, 42 Am. Rep. 608.

18. *Connecticut.*— Manchester *v.* Hartford, 30 Conn. 118, 120.

Iowa.— Chamberlain *v.* Iowa Tel. Co., 119 Iowa 619, 621, 93 N. W. 596; Stokes *v.* Scott County, 10 Iowa 166, 175; Dubuque County *v.* Dubuque, etc., R. Co., 4 Greene 1, 14, 15, per Kinney, J., dissenting.

Minnesota.— Northwestern Tel. Exch. Co. *v.* Minneapolis, 81 Minn. 140, 154, 83 N. W. 527, 86 N. W. 69, 53 L. R. A. 175.

Nebraska.— Follmer *v.* Nuckolls County Com'rs, 6 Nebr. 204, 209; People *v.* Buffalo County Com'rs, 4 Nebr. 150, 158.

Pennsylvania.— Kister *v.* Reeser, 98 Pa. St. 1, 4, 42 Am. Rep. 608.

Texas.— International, etc., R. Co. *v.* Jordan, 1 Tex. App. Civ. Cas. § 859.

Wisconsin.— State *v.* Sheboygan, 111 Wis. 23, 33, 86 N. W. 657, 659.

United States.— Abbott *v.* Duluth, 104 Fed. 833, 837 [*affirmed* in 117 Fed. 137, 55 C. C. A. 153].

To the contrary see Carter *v.* Rahway, 55 N. J. L. 177. 178, 26 Atl. 96; *In re* Woolsey, 95 N. Y. 135, 138; Vanderkar *v.* Rensselaer, etc., R. Co., 13 Barb. (N Y.) 390, 391.

Loose use of terms.— An examination of the authorities will show that the terms "street," "avenue," "road," "public road," "county road," etc., are used loosely and indiscriminately in legislation and judicial decisions relating to public highways, and little reliance can be placed on the particular term used to describe any given way. Undoubtedly the term "street" or "avenue" commonly applies to a public highway in a village, town, or city, and the term "road" to suburban highways. But there may be roads in a city or town and streets and avenues in the country. Murphy *v.* King County, 45 Wash. 587, 591, 88 Pac. 1115.

19. Chamberlain *v.* Iowa Tel. Co., 119 Iowa 619, 621, 93 N. W. 596; Northwestern Tel. Exch. Co. *v.* Minneapolis, 81 Minn. 140, 154, 83 N. W. 527, 86 N. W. 69, 71, 53 L. R. A. 175; State *v.* Sheboygan, 111 Wis. 23, 33, 86 N. W. 657; Abbott *v.* Duluth, 104 Fed. 833, 837 [*affirmed* in 117 Fed. 137, 55 C. C. A. 153].

20. *Connecticut.*— Manchester *v.* Hartford, 30 Conn. 118, 120.

Iowa.— Chamberlain *v.* Iowa Tel. Co., 119 Iowa 619, 623, 93 N. W. 596; Stokes *v.* Scott County, 10 Iowa 166, 175; Dubuque County *v.* Dubuque, etc., R. Co., 4 Greene 1, 14, 15, per Kinney, J., dissenting.

Minnesota.— Northwestern Tel. Exch. Co. *v.* Minneapolis, 81 Minn. 140, 154, 83 N. W. 527, 86 N. W. 69, 53 L. R. A. 175.

Nebraska.— Follmer *v.* Nuckolls County Com'rs, 6 Nebr. 204, 209; People *v.* Buffalo County Com'rs, 4 Nebr. 150, 158.

Pennsylvania.—Kister *v.* Reeser, 98 Pa. St. 1, 4, 42 Am. Rep. 608.

Texas.— International, etc., R. Co. *v.* Jordan, 1 Tex. App. Civ. Cas. § 859.

Wisconsin.— State *v.* Sheboygan, 111 Wis. 23, 33, 86 N. W. 657.

United States.—Abbott *v.* Suluth, 104 Fed. 833, 837 [*affirmed* in 117 Fed. 137, 55 C. C. A. 153].

21. See *infra*, II, B.

in the exercise of the right of eminent domain,[22] or by dedication to the public by the owner of the soil with the sanction of the public authorities,[23] and in no other way.[24] However, a person may be equitably estopped from denying the existence of a highway.[25] If a highway is admitted to exist, the method by which it became such is ordinarily immaterial.[26]

B. Establishment by Prescription, User, or Recognition[27] — **1. In General.** It has been said that it is improper to say that a highway may exist by prescription,[28] because, it is said, prescription is based on the presumption of a prior grant,[29] and the public cannot take by grant.[30] By the better opinion,

22. *Alabama.*— Cross *v.* State, 147 Ala. 125, 41 So. 875; Harper *v.* State, 109 Ala. 66, 19 So. 901.

Georgia.— Southern R. Co. *v.* Combs, 124 Ga. 1004, 53 S. E. 508; Johnson *v.* State, 1 Ga. App. 195, 58 S. E. 265.

Illinois.— Chicago *v.* Borden, 190 Ill. 430, 60 N. E. 915; Grube *v.* Nichols, 36 Ill. 92; Daniels *v.* People, 21 Ill. 439.

Kentucky.— See Louisville, etc., R. Co. *v.* Survant, 96 Ky. 197, 27 S. W. 999, 16 Ky. L. Rep. 545.

New Hampshire.— Northumberland *v.* Atlantic, etc., R. Co., 35 N. H. 574.

New York.— Speir *v.* New Utracht, 121 N. Y. 420, 24 N. E. 692 [*modifying* 49 Hun 294, 2 N. Y. Suppl. 426]; People *v.* Mosier, 112 N. Y. Suppl. 307.

North Carolina.—Stewart *v.* Frink, 94 N. C. 487, 488, 55 Am. Rep. 619; Kennedy *v.* Williams, 87 N. C. 6.

See *infra*, II, C.

23. *Alabama.*— Cross *v.* State, 147 Ala. 125, 41 So. 875; Harper *v.* State, 109 Ala. 66, 19 So. 901.

Georgia.— Southern R. Co. *v.* Combs, 124 Ga. 1004, 53 S. E. 508; Johnson *v.* State, 1 Ga. App. 195, 58 S. E. 265.

Illinois.— Chicago *v.* Borden, 190 Ill. 430, 60 N. E. 915; Grube *v.* Nichols, 36 Ill. 92; Daniels *v.* People, 21 Ill. 439.

Kentucky.— Louisville, etc., R. Co. *v.* Survant, 96 Ky. 197, 27 S. W. 999, 16 Ky. L. Rep. 545.

New York.— Speir *v.* New Utrecht, 121 N. Y. 420, 24 N. E. 692 [*modifying* 49 Hun 294, 2 N. Y. Suppl. 426]; People *v.* Mosier, 112 N. Y. Suppl. 307.

North Carolina.— Stewart *v.* Frink, 94 N. C. 487, 488, 55 Am. Rep. 619; Kennedy *v.* Williams, 87 N. C. 6.

See Dedication, 13 Cyc. 434.

24. See cases cited *supra*, notes 22, 23.

25. Ross *v.* Thompson, 78 Ind. 90, holding that where the owner of land through which a way runs knows that another is making costly improvements in the belief that the way is public, and offers no objection, he is estopped from asserting that the way is not public. And see Le Roy *v.* Leonard, (Tenn. Ch. App. 1895) 35 S. W. 884. See, however, Chicago *v.* Howes, 169 Ill. 260, 48 N. E. 408, holding that the fact that plaintiff, when he purchased property, took it subject to a lease which reserved ten feet for an alley, will not estop him from claiming the strip, but is a circumstance to be considered, in connection with other evidence, as showing his acquiescence in the appropriation of the strip as a public alley.

26. Portland, etc., R. Co. *v.* Clarke County, 48 Wash. 509, 93 Pac. 1083; State *v.* Horlacher, 16 Wash. 325, 47 Pac. 748.

27. Dedication distinguished see Dedication, 13 Cyc. 439.

Establishment of street or alley by prescription see Municipal Corporations, 28 Cyc. 835.

User as evidence of: Dedication see Dedication, 13 Cyc. 478 *et seq.* Acceptance of dedication see Dedication, 13 Cyc. 467.

28. State *v.* Kansas City, etc., R. Co., 45 Iowa 139. And see Thomas *v.* Ford, 63 Md. 346, 52 Am. Rep. 513.

29. *Alabama.*— Western R. Co. *v.* Alabama, etc., R. Co., 96 Ala. 272, 11 So. 483, 485, 17 L. R. A. 474; Rosser *v.* Bunn, 66 Ala. 89.

Illinois.— Chicago *v.* Borden, 190 Ill. 430, 60 N. E. 915; Warren *v.* Jacksonville, 15 Ill. 236, 58 Am. Dec. 610.

Iowa.— State *v.* Kansas City, etc., R. Co., 45 Iowa 139.

Kansas.— Meade *v.* Topeka, 75 Kan. 61, 88 Pac. 574. And see Topeka *v.* Cowee, 48 Kan. 345, 29 Pac. 560.

Kentucky.— Riley *v.* Buchanan, 116 Ky. 625, 76 S. W. 527, 25 Ky. L. Rep. 863, 63 L. R. A. 642; Louisville, etc., R. Co. *v.* Bailey, 109 S. W. 336, 33 Ky. L. Rep. 179; Wright *v.* Willis, 63 S. W. 991, 23 Ky. L. Rep. 565.

Maine.— State *v.* Wilson, 42 Me. 9.

Massachusetts.— Com. *v.* Coupe, 128 Mass. 63.

New Jersey.—Prudden *v.* Lindsley, 29 N. J. Eq. 615.

New York.— Clements *v.* West Troy, 10 How. Pr. 199.

North Carolina.— State *v.* Hunter, 27 N. C. 369, 44 Am. Dec. 41.

Texas.— Austin *v.* Hall, 93 Tex. 591, 57 S. W. 563; Evans *v.* Scott, 37 Tex. Civ. App. 373, 83 S. W. 874.

See 25 Cent. Dig. tit. "Highways," §§ 1, 2.

A presumption of prior dedication of the land to public use is sometimes said to be the basis of prescription as applied to highways. Rosser *v.* Bunn, 66 Ala. 89; State *v.* Kansas City, etc., R. Co., 45 Iowa 139; Kruger *v.* Le Blanc, 70 Mich. 76, 37 N. W. 880.

30. State *v.* Kansas City, etc., R. Co., 45 Iowa 139; Clements *v.* West Troy, 10 How. Pr. (N. Y.) 199. And see Riley *v.* Buchanan, 116 Ky. 625, 76 S. W. 527, 25 Ky. L. Rep. 863, 63 L. R. A. 642. But see State *v.* Wilson, 42 Me. 9.

however, the doctrine of prescription, as applied to highways, is based on the presumption of an antecedent exercise of the power of eminent domain by the proper authorities.[31] However this may be, it is unquestionably true that by common usage the term "prescription" and the rules applicable to estates held by prescription have been applied to the tenure of the right of the public in a highway which rests on user, so that it may be deemed not improper to say that a highway may exist by prescription.[32] Apart from this, in many states statutes

31. *Alabama.*— Rosser *v.* Bunn, 66 Ala. 89.

Arkansas.—Waring *v.* Little Rock, 62 Ark. 408, 36 S. W. 24.

Connecticut.—Brownell *v.* Palmer, 22 Conn. 107.

Indiana.— See Houlton *v.* Carpenter, 29 Ind. App. 643, 64 N. E. 939.

Iowa.— See State *v.* Mitchell, 58 Iowa 567, 12 N. W. 598.

Kansas.— See Topeka *v.* Cowee, 48 Kan. 345, 29 Pac. 560.

Kentucky.— Elliott *v.* Treadway, 10 B. Mon. 22.

Maine.— State *v.* Bunker, 59 Me. 366; Bigelow *v.* Hillman, 37 Me. 52; State *v.* Bigelow, 34 Me. 243 [*overruling* State *v.* Sturdivant, 18 Me. 66]. And see State *v.* Wilson, 42 Me. 9.

Maryland.— See Thomas *v.* Ford, 63 Md. 346, 52 Am. Rep. 513.

Massachusetts.—Veale *v.* Boston, 135 Mass. 187; Fitchburg R. Co. *v.* Page, 131 Mass. 391; Com. *v.* Coupe, 128 Mass. 63; Gould *v.* Boston, 120 Mass. 300; Jennings *v.* Tisbury, 5 Gray 73; Com. *v.* Belding, 13 Metc. 10; Folger *v.* Worth, 19 Pick. 108; Sprague *v.* Waite, 17 Pick. 309; Stedman *v.* Southbridge, 17 Pick. 162; Reed *v.* Northfield, 13 Pick. 94, 23 Am. Dec. 662; Jones *v.* Percival, 5 Pick. 485, 16 Am. Dec. 415; Com. *v.* Low, 3 Pick. 408; Com. *v.* Newbury, 2 Pick. 51. And see Tilton *v.* Wenham, 172 Mass. 407, 52 N. E. 514.

New Hampshire.— Webber *v.* Chapman, 42 N. H. 326, 80 Am. Dec. 111; *In re* Campton, 41 N. H. 197; Willey *v.* Portsmouth, 35 N. H. 303; Wallace *v.* Fletcher, 30 N. H. 434; Greeley *v.* Quimby, 22 N. H. 335; Barker *v.* Clark, 4 N. H. 380, 17 Am. Dec. 428. And see State *v.* Morse, 50 N. H. 9; Stevens *v.* Nashua, 46 N. H. 192; Haywood *v.* Charlestown, 34 N. H. 23.

New Jersey.— Ward *v.* Folly, 5 N. J. L. 566.

North Carolina.— Boyden *v.* Achenbach, 79 N. C. 539 [*approved* in State *v.* Lucas, 124 N. C. 804, 32 S. E. 553]; State *v.* Marble, 26 N. C. 318.

North Dakota.— Walcott Tp. *v.* Skauge, 6 N. D. 382, 71 N. W. 544.

South Carolina.— Lawton *v.* Rivers, 2 McCord 445, 13 Am. Dec. 741.

Texas.— Galveston, etc., R. Co. *v.* Baudat, 21 Tex. Civ. App. 236, 51 S. W. 541.

United States.—Hicks *v.* Fish, 12 Fed. Cas. No. 6,459, 4 Mason 310.

Canada.— Dickson *v.* Kearney, Cameron Cas. 53.

See 25 Cent. Dig. tit. "Highways," §§ 1, 2.

32. *Alabama.*— Cross *v.* State, 147 Ala. 125, 41 So. 875; Harper *v.* State, 109 Ala. 66, 19 So. 901.

Arkansas.—Waring *v.* Little Rock, 62 Ark. 408, 36 S. W. 24; Patton *v.* State, 50 Ark. 53, 6 S. W. 227; Howard *v.* State, 47 Ark. 431, 2 S. W. 331.

California.— Barnes *v.* Daveck, 7 Cal. App. 220, 487, 94 Pac. 779. And see Patterson *v.* Munyan, 93 Cal. 128, 29 Pac. 250.

Connecticut.—Ely *v.* Parsons, 55 Conn. 83, 10 Atl. 499.

Georgia.— Southern R. Co. *v.* Combs, 124 Ga. 1004, 53 S. E. 508; Johnson *v.* State, 1 Ga. App. 195, 58 S. E. 265.

Illinois.— Chicago *v.* Borden, 190 Ill. 430, 60 N. E. 915; Landers *v.* Whitefield, 154 Ill. 630, 39 N. E. 656; Grube *v.* Nichols, 36 Ill. 92; Lewiston *v.* Proctor, 27 Ill. 414; Daniels *v.* People, 21 Ill. 439; Dimon *v.* People, 17 Ill. 416; Bolo Tp. *v.* Liszewski, 116 Ill. App. 135.

Indiana.— Kyle *v.* Kosciusko County Com'rs, 94 Ind. 115; Ross *v.* Thompson, 78 Ind. 90; Summers *v.* State, 51 Ind. 201 (*semble*); Houlton *v.* Carpenter, 29 Ind. App. 643, 64 N. E. 939 (*semble*); Zimmerman *v.* State, 4 Ind. App. 583, 31 N. E. 550 (*semble*).

Iowa.— Whetstone *v.* Hill, 130 Iowa 637, 105 N. W. 193; McAllister *v.* Pickup, 84 Iowa 65, 50 N. W. 556; Baldwin *v.* Herbst, 54 Iowa 168, 6 N. W. 257; State *v.* Kansas City, etc., R. Co., 45 Iowa 139; Onstott *v.* Murray, 22 Iowa 457; Keyes *v.* Tait, 19 Iowa 123.

Kansas.— Meade *v.* Topeka, 75 Kan. 61, 88 Pac. 574; Missouri, etc., R. Co. *v.* Long, 27 Kan. 684.

Kentucky.— Riley *v.* Buchanan, 116 Ky. 625, 76 S. W. 527, 25 Ky. L. Rep. 863, 63 L. R. A. 642; Louisville, etc., R. Co. *v.* Com., 104 Ky. 35, 46 S. W. 207, 20 Ky. L. Rep. 371; Louisville, etc., R. Co. *v.* Survant, 96 Ky. 197, 27 S. W. 999, 16 Ky. L. Rep. 545 (*semble*); Porter *v.* Clinton, 74 S. W. 232, 24 Ky. L. Rep. 2435; Witt *v.* Hughes, 66 S. W. 281, 23 Ky. L. Rep. 1836; Wright *v.* Willis, 63 S. W. 991, 23 Ky. L. Rep. 565.

Maine.— State *v.* Wilson, 42 Me. 9. And see State *v.* Bunker, 59 Me. 366.

Maryland.— Thomas *v.* Ford, 63 Md. 346, 52 Am. Rep. 513; Day *v.* Allender, 22 Md. 511.

Massachusetts.— Clark *v.* Hull, 184 Mass. 164, 68 N. E. 60; White *v.* Foxborough, 151 Mass. 28, 23 N. E. 652; Com. *v.* Coupe, 128 Mass. 63; Gould *v.* Boston, 120 Mass. 300; Com. *v.* Petitcler, 110 Mass. 62; Com. *v.* Old Colony, etc., R. Co., 14 Gray 93; Folger *v.* Worth, 19 Pick. 108; Odiorne *v.* Wade, 5 Pick. 421.

exist which declare that a way is a highway where it has been used as such by the public for a certain period of time, which varies in the different states,[33] or where it has been used as a highway for a certain length of time, and maintained and

Michigan.— Kruger *v.* Le Blanc, 70 Mich. 76, 37 N. W. 880; Peninsula Iron, etc., Co. *v.* Crystal Falls Tp., 60 Mich. 510, 27 N. W. 666.

Missouri.— Longworth *v.* Sedevic, 165 Mo. 221, 65 S. W. 260; State *v.* Wells, 70 Mo. 635; State *v.* Walters, 69 Mo. 463; State *v.* Transue, 131 Mo. App. 323, 111 S. W. 523; Sikes *v.* St. Louis, etc., R. Co., 127 Mo. App. 326, 105 S. W. 700; Dow *v.* Kansas City Southern R. Co., 116 Mo. App. 555, 92 S. W. 744; Power *v.* Dean, 112 Mo. App. 288, 86 S. W. 1100; Moore *v.* Hawk, 57 Mo. App. 495.

Montana.— State *v.* Auchard, 22 Mont. 14, 55 Pac. 361.

New Hampshire.— Prichard *v.* Atkinson, 3 N. H. 335. And see Willey *v.* Portsmouth, 35 N. H. 303.

New Jersey.— Riverside Tp. *v.* Pennsylvania R. Co., 74 N. J. L. 476, 66 Atl. 433.

New York.— Speir *v.* Utrecht, 121 N. Y. 420, 24 N. E. 692 [*modifying* 49 Hun 294, 2 N. Y. Suppl. 426]; Witte *v.* Koerner, 123 N. Y. App. Div. 824, 108 N. Y. Suppl. 560; People *v.* Mosier, 112 N. Y. Suppl. 307. *Contra*, Clements *v.* West Troy, 10 How. Pr. 199.

North Carolina.— Stewart *v.* Frink, 94 N. C. 487, 55 Am. Rep. 619.

North Dakota.— Walcott Tp. *v.* Skauge, 6 N. D. 382, 71 N. W. 544.

Ohio.— Taylor *v.* Bailey, Wright 646; Reed *v.* Harlan, 2 Ohio Dec. (Reprint) 553, 3 West. L. Month. 632.

Oregon.— Wallowa County *v.* Wade, 43 Oreg. 253, 72 Pac. 793.

Pennsylvania.— Com. *v.* Cole, 26 Pa. St. 187; Helpenstein *v.* Reichenbach, 23 Pa. Co. Ct. 66.

South Carolina.— State *v.* Washington, 80 S. C. 376, 61 S. E. 896.

Tennessee.—Wilson *v.* Acree, 97 Tenn. 378, 37 S. W. 90; Le Roy *v.* Leonard, (Ch. App. 1895) 35 S. W. 884. And see Raht *v.* Southern R. Co., (Ch. App. 1897) 50 S. W. 72.

Texas.— Heilbron *v.* St. Louis Southwestern R. Co., (Civ. App. 1908) 113 S. W. 610, 979; Hall *v.* Austin, 20 Tex. Civ. App. 59, 48 S. W. 53; Ward *v.* State, 42 Tex. Cr. 435, 60 S. W. 757. And see Galveston, etc., R. Co. *v.* Baudat, 21 Tex. Civ. App. 236, 51 S. W. 541.

Washington.— State *v.* Rixie, 50 Wash. 676, 97 Pac. 804; Seattle *v.* Smithers, 37 Wash. 119, 79 Pac. 615.

Wisconsin.— State *v.* Lloyd, 133 Wis. 468, 113 N. W. 964; Chippewa Falls *v.* Hopkins, 109 Wis. 611, 85 N. W. 553.

See 25 Cent. Dig. tit. "Highways," § 1.

In Louisiana it is otherwise under the civil code. Lawson *v.* Shreveport Waterworks Co., 111 La. 73, 35 So. 390.

33. See the statutes of the different states, and the following cases:

Idaho.— Juliaetta *v.* Smith, 12 Ida. 288, 85 Pac. 923. But see *infra*, II, B, 2, e, (III).

Illinois.— Chicago *v.* Galt, 224 Ill. 421, 79 N. E. 701; Peotone *v.* Illinois Cent. R. Co., 224 Ill. 101, 79 N. E. 678; Rose *v.* Farmington, 196 Ill. 226, 63 N. E. 631; Madison Tp. *v.* Gallagher, 159 Ill. 105, 42 N. E. 316; Landers *v.* Whitefield, 154 Ill. 630, 39 N. E. 656; Chicago *v.* Chicago, etc., R. Co., 152 Ill. 561, 38 N. E. 768; Manrose *v.* Parker, 90 Ill. 581; Dickerman *v.* Marion, 122 Ill. App. 154; Bolo Tp. *v.* Liszewski, 116 Ill. App. 135.

Indiana.— Shellhouse *v.* State, 110 Ind. 509, 11 N. E. 484; Ft. Wayne *v.* Coombs, 107 Ind. 75, 7 N. E. 743, 57 Am. Rep. 82; Kyle *v.* Kosciusko County, 94 Ind. 115; Nichols *v.* State, 89 Ind. 298; Ross *v.* Thompson, 78 Ind. 90; Gillespie *v.* Duling, 41 Ind. App. 217, 83 N. E. 728; McClaskey *v.* McDaniel, 37 Ind. App. 59, 74 N. E. 1023; Blumenthal *v.* State, 21 Ind. App. 665, 51 N. E. 496; Cromer *v.* State, 21 Ind. App. 502, 52 N. E. 239; Brown *v.* Hines, 16 Ind. App. 1, 44 N. E. 655.

Michigan.— Neal *v.* Gilmore, 141 Mich. 519, 104 N. W. 609; Stickley *v.* Sodus Tp., 131 Mich. 510, 91 N. W. 745, 59 L. R. A. 287; Bigelow *v.* Brooks, 119 Mich. 208, 77 N. W. 810; Potter *v.* Safford, 50 Mich. 46, 14 N. W. 694; Green *v.* Belitz, 34 Mich. 512, holding, however, that the statute does not apply to private ways.

New Hampshire.— Harriman *v.* Moore, 74 N. H. 277, 67 Atl. 225 (holding that under Pub. St. (1901) c. 67, § 1, defining a highway as a way that has been used for public travel for twenty years, etc., highways by user arising from the uninterrupted use of land for public travel exist notwithstanding sections 2, 12, 13 prescribe methods for laying out highways); Bryant *v.* Tamworth, 68 N. H. 483, 39 Atl. 431; State *v.* Morse, 50 N. H. 9; Northumberland *v.* Atlantic, etc., R. Co., 35 N. H. 574; Haywood *v.* Charlestown, 34 N. H. 23.

New York.— James *v.* Sammis, 132 N. Y. 239, 30 N. E. 502 [*affirming* 10 N. Y. Suppl. 143] (holding that Laws (1865), c. 6, extending to Suffolk county the provision of 1 Rev. St. p. 521, § 100, that all roads which have been used for public highways for twenty years or more shall be deemed public highways, converts into a public highway, immediately on its taking effect, a road in that county which had previously been used as a public thoroughfare for twenty years); Culver *v.* Yonkers, 80 N. Y. App. Div. 309, 80 N. Y. Suppl. 1034 [*affirmed* in 180 N. Y. 524, 72 N. E. 1141]; People *v.* Osborn, 84 Hun 441, 32 N. Y. Suppl. 358 [*affirmed* in 155 N. Y. 685, 50 N. E. 1120]; Devenpeck *v.* Lambert, 44 Barb. 596. But see *infra*, note 68.

North Dakota.— Walcott Tp. *v.* Skauge, 6 N. D. 382, 71 N. W. 544.

Wisconsin.— Hanson *v.* Taylor, 23 Wis.

kept in repair by the public authorities at the public expense,[34] or simply where it has been worked or recognized as a highway by the public authorities.[35]

2. Sufficiency of User — a. In General. To establish a highway by prescription the land in question must have been used by the public [36] with the actual or implied knowledge of the landowner,[37] adversely under claim or color of right, and not merely by the owner's permission,[38] and continuously and uninterruptedly,[39] for the period required to bar an action for the recovery of possession of land or otherwise prescribed by statute.[40] When these conditions are present a highway exists by prescription; [41] otherwise not.[42]

b. Public User and Adaptability of Way Thereto. To create a highway by prescription the user must be by the public generally as a way common to all. A user by a few individuals as such is not generally sufficient.[43] The word

547; Tomlinson *v.* Wallace, 16 Wis. 234. But see *infra*, note 66.

See 25 Cent. Dig. tit. "Highways," §§ 3, 8.

The California statute has been repealed. Sutton *v.* Nicolaisen, (1896) 44 Pac. 805; Cooper *v.* Monterey County, 104 Cal. 437, 38 Pac. 106; Huffman *v.* Hall, 102 Cal. 26, 36 Pac. 417 [*overruling* Gloster *v.* Wade, 78 Cal. 407, 21 Pac. 6].

In Virginia, the act of Oct. 31, 1751, and the act passed in the fourth year of the reign of Queen Anne, providing for the laying out of public roads "where the same is not already done," and "that the highways already laid out . . . shall . . . be kept well cleared . . . at least thirty foot broad," does not establish as public highways all roads that are shown to have been in use at the date of the passage of those statutes. Gaines *v.* Merryman, 95 Va. 660, 29 S. E. 738.

Effect on common-law prescription.— Dak. Terr. Laws (1883), c. 112, declaring all public roads which had been opened and in use as such for twenty years prior to the taking effect of the act to be public highways, whether lawfully established or not, did not repeal Dak. Pol. Code (1877), c. 29, § 37, or prevent roads from thereafter becoming public highways by prescription. Walcott Tp. *v.* Skauge, 6 N. D. 382, 71 N. W. 544.

Operation of statute.— Mich. Rev. St. c. 25, § 29, providing that all roads not recorded which have been used as highways twenty years or more shall be deemed public highways, applies not only to cases where the period of twenty years had elapsed at the taking effect of the law, but also to cases where the full period should not elapse until afterward. Bumpus *v.* Miller, 4 Mich. 159.

Statutory user as curing defective proceedings to establish highway see *infra*, II, B, 2, e, (VI).

34. See *infra*, II, B, 2, e, (III).

35. See *infra*, II, B, 2, e, (III).

36. See *infra*, II, B, 2, b.

37. See *infra*, II, B, 2, g, (I).

38. See *infra*, II, B, 2, e.

39. See *infra*, II, B, 2, d.

40. See *supra*, II, B, 1; *infra*, II, B, 2, e, (III); II, B, 2, f.

41. *Arkansas.*— Howard *v.* State, 47 Ark. 431, 2 S. W. 331.

California.— Hartley *v.* Vermillion, 141 Cal. 339, 74 Pac. 987, (1902) 70 Pac. 273.

Iowa.— Haan *v.* Meester, 132 Iowa 709, 109 N. W. 211; Cedar Rapids *v.* Young, 119 Iowa 552, 93 N. W. 567; McAllister *v.* Pickup, 84 Iowa 65, 50 N. W. 556; Ewell *v.* Greenwood, 26 Iowa 377.

Michigan.— Parkey *v.* Galloway, 147 Mich. 693, 111 N. W. 348.

Missouri.— Longworth *v.* Sedevic, 165 Mo. 221, 65 S. W. 260.

North Carolina.—See Boyden *v.* Achenbach, 79 N. C. 539.

Tennessee.— Le Roy *v.* Leonard, (Ch. App. 1895) 35 S. W. 884.

Washington.— State *v.* Rixie, 50 Wash. 676, 97 Pac. 804.

Wisconsin.— State *v.* Lloyd, 133 Wis. 468, 113 N. W. 964.

See 25 Cent. Dig. tit. "Highways," §§ 2, 6–18. See also *infra*, II, B, 2, b–g, *passim*.

42. *Illinois.*— Falter *v.* Packard, 219 Ill. 356, 76 N. E. 495; O'Connell *v.* Chicago Terminal Transfer R. Co., 184 Ill. 308, 56 N. E. 355; Dickerman *v.* Marion, 122 Ill. App. 154.

Indiana.— Shellhouse *v.* State, 110 Ind. 509, 11 N. E. 484.

Iowa.— State *v.* Green, 41 Iowa 693; State *v.* Tucker, 36 Iowa 485.

Nebraska.— Nelson *v.* Sneed, 76 Nebr. 201, 107 N. W. 255; Bleck *v.* Keller, 73 Nebr. 826, 103 N. W. 674; Gehris *v.* Fuhrman, 68 Nebr. 325, 94 N. W. 133; Engle *v.* Hunt, 50 Nebr. 358, 69 N. W. 970.

North Carolina.— See Boyden *v.* Achenbach, 79 N. C. 539.

Texas.— Cunningham *v.* San Saba County, 1 Tex. Civ. App. 480, 20 S. W. 941.

See 25 Cent. Dig. tit. "Highways," §§ 2, 6–18. And see *infra*, II, B, 2, b–g, *passim*.

43. *Alabama.*— Harper *v.* State, 109 Ala. 66, 19 So. 901.

Illinois.— Chicago *v.* Borden, 190 Ill. 430, 60 N. E. 915; O'Connell *v.* Chicago Terminal Transfer R. Co., 184 Ill. 308, 56 N. E. 355; Madison *v.* Gallagher, 159 Ill. 105, 42 N. E. 316; Martin *v.* People, 23 Ill. 395.

Indiana.—Shellhouse *v.* State, 110 Ind. 509, 11 N. E. 484.

Iowa.— Davis *v.* Bonaparte, 137 Iowa 196, 114 N. W. 896; Teeter *v.* Quinn, 62 Iowa 759, 17 N. W. 529; Hougham *v.* Harvey, 40 Iowa 634; State *v.* Tucker, 36 Iowa 485.

Massachusetts.— Aikens *v.* New York, etc., R. Co., 188 Mass. 547, 74 N. E. 929; Com. *v.* Coupe, 128 Mass. 63; Jennings *v.* Tisbury, 5 Gray 73.

"public," as used in this connection, means all those who have occasion to use the road;[44] and the public character of a road does not depend upon the extent or quantity of travel if it is open and in use by all who have occasion to go over it;[45] nor is the fact that the public travel thereon bears an insignificant proportion to private travel necessarily decisive against its becoming a highway.[46] While a road, to become a highway, must be so situated and so conditioned as to be available to the traveling public,[47] yet it need not be of great length,[48] or connect prominent points,[49] or be open at both ends.[50] A New England town way may become a county way or highway by prescription.[51]

c. Definiteness of Line of Travel. The public cannot acquire a prescriptive right to pass over a tract of land generally. In order to create a highway by prescription the user must be confined to a definite and specific line or way.[52]

Michigan.— Grandville *v.* Jenison, 84 Mich. 54, 47 N. W. 600 [*cited* in Gage *v.* Pittsfield Tp., 120 Mich. 436, 79 N. W. 687].

Montana.— State *v.* Auchard, 22 Mont. 14, 55 Pac. 361.

Nebraska.— Nelson *v.* Sneed, 76 Nebr. 201, 107 N. W. 255; Kansas City, etc., R. Co. *v.* State, 74 Nebr. 868, 105 N. W. 713; Bleck *v.* Keller, 73 Nebr. 826, 103 N. W. 674; Gehris *v.* Fuhrman, 68 Nebr. 325, 94 N. W. 133; Hill *v.* McGinnis, 64 Nebr. 187, 89 N. W. 783; Lewis *v.* Lincoln, 55 Nebr. 1, 75 N. W. 154; Engle *v.* Hunt, 50 Nebr. 358, 69 N. W. 970.

New Hampshire.— State *v.* Nudd, 23 N. H. 327.

New York.— Culver *v.* Yonkers, 80 N. Y. App. Div. 309, 80 N. Y. Suppl. 1034 [*affirmed* in 180 N. Y. 524, 72 N. E. 1141] (holding that the use of a strip of land as a private road does not bring it within 1 Rev. St. (9th ed.) p. 704, § 100, declaring that lands which have been used by the public as a highway for twenty years shall be a highway); People *v.* Osborn, 84 Hun 441, 32 N. Y. Suppl. 358 [*affirmed* in 155 N. Y. 685, 50 N. E. 1120]; People *v.* Livingston, 27 Hun 105, 63 How. Pr. 242; Riley *v.* Brodie, 22 Misc. 374, 50 N. Y. Suppl. 347.

Washington.— Stohlton *v.* Kitsap County, 49 Wash. 305, 95 Pac. 268; Petterson *v.* Waske, 45 Wash. 307, 88 Pac. 206; Rice *v.* Pershall, 41 Wash. 73, 82 Pac. 1038.

West Virginia.— State *v.* Dry Fork R. Co., 50 W. Va. 235, 40 S. E. 447.

Wisconsin.— State *v.* McCabe, 74 Wis. 481, 43 N. W. 322.

See 25 Cent. Dig. tit. "Highways," § 6.

User of a road solely by people of the neighborhood does not as a rule create a highway. Harper *v.* Dodds, 3 Ill. App. 331; Breneman *v.* Burlington, etc., R. Co., 92 Iowa 755, 60 N. W. 176; Burnley *v.* Mullins, 86 Miss. 441, 38 So. 635; State *v.* Lucas, 124 N. C. 804, 32 S. E. 553; State *v.* Gross, 119 N. C. 868, 26 S. E. 91; Boyden *v.* Achenbach, 79 N. C. 539; Shaver *v.* Edgell, 48 W. Va. 502, 37 S. E. 664. And see Marshfield Land, etc., Co. *v.* John Week Lumber Co., 108 Wis. 268, 84 N. W. 434. But see Wright *v.* Willis, 63 S. W. 991, 23 Ky. L. Rep. 565.

44. Gillespie *v.* Duling, 41 Ind. App. 217, 83 N. E. 728; Grandville *v.* Jenison, 84 Mich. 54, 47 N. W. 600 [*cited* in Gage *v.* Pittsfield Tp., 120 Mich. 436, 79 N. W. 687].

45. *California.*—Hartley *v.* Vermillion, 141 Cal. 339, 74 Pac. 987, (1902) 70 Pac. 273.

Illinois.— Madison Tp. *v.* Gallagher, 159 Ill. 105, 42 N. E. 316, holding that the test whether a road is public or private is not simply how many persons actually use it, but how many have a free right in common to use it.

Indiana.— Louisville, etc., R. Co. *v.* Etzler, 3 Ind. App. 562, 30 N. E. 32. And see Gillespie *v.* Duling, 41 Ind. App. 217, 83 N. E. 728.

Iowa.— Baldwin *v.* Herbst, 54 Iowa 168, 6 N. W. 257.

Michigan.— Grandville *v.* Jenison, 84 Mich. 54, 47 N. W. 600 [*cited* in Gage *v.* Pittsfield Tp., 120 Mich. 436, 79 N. W. 687]. But see Stickley *v.* Sodus Tp., 131 Mich. 510, 91 N. W. 745, 59 L. R. A. 287.

Missouri.— Dow *v.* Kansas City Southern R. Co., 116 Mo. App. 555, 92 S. W. 744.

See 25 Cent. Dig. tit. "Highways," § 6.

46. Taft *v.* Com., 158 Mass. 526, 33 N. E. 1046, where the road leads to a remote and barren point, and the greater portion of the travel is necessarily by visitors to a hotel situated there.

47. State *v.* Tucker, 36 Iowa 485; Horn *v.* Williamson, 4 Nebr. (Unoff.) 763, 96 N. W. 178. And see Fairchild *v.* Stewart, 117 Iowa 734, 89 N. W. 1075; Teeter *v.* Quinn, 62 Iowa 759, 17 N. W. 529.

48. Nichols *v.* State, 89 Ind. 298.

49. Harper *v.* Dodds, 3 Ill. App. 331.

50. See cases cited *infra*, this note.

A cul-de-sac may become a highway by prescription. Nichols *v.* State, 89 Ind. 298; Gillespie *v.* Duling, 41 Ind. App. 217, 83 N. E. 728; State *v.* Rixie, 50 Wash. 676, 97 Pac. 804; Atty.-Gen. *v.* Antrobus, [1905] 2 Ch. 188, 69 J. P. 141, 74 L. J. Ch. 599, 3 Loc. Gov. 1071, 92 L. T. Rep. N. S. 790, 21 T. L. R. 471. And see Wright *v.* Willis, 63 S. W. 991, 23 Ky. L. Rep. 565; Taft *v.* Com., 158 Mass. 526, 33 N. E. 1046; Com. *v.* Petitcler, 110 Mass. 62. See, however, Fairchild *v.* Stewart, 117 Iowa 734, 89 N. W. 1075; State *v.* Tucker, 36 Iowa 485; Stohlton *v.* Kitsap County, 49 Wash. 305, 95 Pac. 268. See *supra*, note 1.

51. State *v.* Bunker, 59 Me. 366; Com. *v.* Petitcler, 110 Mass. 62; Valentine *v.* Boston, 22 Pick. (Mass.) 75, 33 Am. Dec. 711; Stedman *v.* Southbridge, 17 Pick. (Mass.) 162.

52. *Colorado.*— Lieber *v.* People, 33 Colo. 493, 81 Pac. 270.

This is especially true where the *locus in quo* consists of wild or uninclosed lands.[53]

d. Continuity of User; Interruptions; Acquiescence of Landowner. Occasional or desultory travel is not sufficient to create a highway by prescription; the user must have been continuous throughout the prescriptive period.[54] Furthermore the road must have been used without interference or interruption [55] by the owner

Illinois.— Chicago *v.* Galt, 224 Ill. 421, 79 N. E. 701; Madison Tp. *v.* Gallagher, 159 Ill. 105, 42 N. E. 316 (holding that the prescriptive right to a highway must be confined to a specific, definite, and certain line or way, which line may be precisely defined by fences on its sides); Gentleman *v.* Soule, 32 Ill. 271, 83 Am. Dec. 264; Bryan *v.* East St. Louis, 12 Ill. App. 390.

Indiana.— Shellhouse *v.* State, 110 Ind. 509, 11 N. E. 484.

Michigan.— Schroeder *v.* Onekama, 95 Mich. 25, 54 N. W. 642.

Mississippi.— Burnley *v.* Mullins, 86 Miss. 441, 38 So. 635.

Nebraska.— Nelson *v.* Sneed, 76 Nebr. 201, 107 N. W. 255; Bleck *v.* Keller, 73 Nebr. 826, 103 N. W. 674; Gehris *v.* Fuhrman, 68 Nebr. 325, 94 N. W. 133; Hill *v.* McGinnis, 64 Nebr. 187, 89 N. W. 783; Engle *v.* Hunt, 50 Nebr. 358, 69 N. W. 970; Shaffer *v.* Stull, 32 Nebr. 94, 48 N. W. 882.

New Hampshire.— See State *v.* Nudd, 23 N. H. 327.

New Jersey.— South Branch R. Co. *v.* Parker, 41 N. J. Eq. 489, 5 Atl. 641.

New York.— People *v.* Livingston, 27 Hun 105, 63 How. Pr. 242.

Oregon.— Montgomery *v.* Somers, 50 Oreg. 259, 90 Pac. 674; Bayard *v.* Standard Oil Co., 38 Oreg. 438, 63 Pac. 614.

Texas.— Cunningham *v.* San Saba County, 1 Tex. Civ. App. 480, 20 S. W. 941.

See 25 Cent. Dig. tit. "Highways," § 7.

Slight deviations from the common way within the prescriptive period do not preclude the creation of a highway by prescription. Gentleman *v.* Soule, 32 Ill. 271, 83 Am. Dec. 264 (holding, however, that the time in which various distinct lines of travel to a certain point have been used cannot be united, so as to make up the requisite time to establish a prescriptive right to any given line of road); Berry *v.* St. Louis, etc., R. Co., 124 Mo. App. 436, 101 S. W. 714; Nelson *v.* Jenkins, 42 Nebr. 133, 60 N. W. 311; Bayard *v.* Standard Oil Co., 38 Oreg. 438, 63 Pac. 614 (*semble*); Cunningham *v.* San Saba County, 1 Tex. Civ. App. 480, 20 S. W. 941 (*semble*); Portland, etc., R. Co. *v.* Clarke County, 48 Wash. 509, 93 Pac. 1083. *Compare* Bumpus *v.* Miller, 4 Mich 159. So encroachments upon a road or changes in the line of travel at other and distant points do not prevent the road from becoming a highway by user at points where the line of travel has remained substantially unchanged. Hart *v.* Red Cedar, 63 Wis. 634, 24 N. W. 410. Width of highway see *infra*, II, B, 6, b.

Travel over entire length.— The fact that a large portion of the travel over a public road, instead of passing over the entire length of such road, turned off and passed over a shorter route to the city, will not prevent the running of the statute in favor of the public as to the portion not generally used, where there has not been an entire nonuser of such road. Beatrice *v.* Black, 28 Nebr. 263, 44 N. W. 189. See, however, South Branch R. Co. *v.* Parker, 41 N. J. Eq. 489, 5 Atl. 641. And *compare* State *v.* Nudd, 23 N. H. 327.

53. Friel *v.* People, 4 Colo. App. 259, 35 Pac. 676; O'Connell *v.* Chicago Terminal Transfer R. Co., 184 Ill. 308, 56 N. E. 355; Ottawa *v.* Yentzer, 160 Ill. 509, 43 N. E. 601; Brushy Mound *v.* McClintock, 150 Ill. 129, 36 N. E. 976; Owens *v.* Crossett, 105 Ill. 354; Gray *v.* Haas, 98 Iowa 502, 67 N. W. 394; Pope *v.* Alexander, 36 Mont. 82, 92 Pac. 203, 565. See *infra*, II, B, 2, e, (IV).

54. *Alabama.*— Harper *v.* State, 109 Ala. 66, 19 So. 901.

California.— Sutton *v.* Nicolaisen, (1896) 44 Pac. 805.

District of Columbia.— District of Columbia *v.* Robinson, 14 App. Cas. 512 [*affirmed* in 180 U. S. 92, 21 S. Ct. 283, 45 L. ed. 440].

Illinois.— Chicago *v.* Galt, 224 Ill. 421, 79 N. E. 701; Falter *v.* Packard, 219 Ill. 356, 76 N. E. 495; Rose *v.* Farmington, 196 Ill. 226, 63 N. E. 631; O'Connell *v.* Chicago Terminal Transfer R. Co., 184 Ill. 308, 56 N. E. 355; Madison Tp. *v.* Gallagher, 159 Ill. 105, 42 N. E. 316; Chicago *v.* Chicago, etc., R. Co., 152 Ill. 561, 38 N. E. 768; Gentleman *v.* Soule, 32 Ill. 271, 83 Am. Dec. 264; Dickerman *v.* Marion, 122 Ill. App. 154.

Iowa.— Davis *v.* Bonaparte, 137 Iowa 196, 114 N. W. 896; Mills *v.* Evans, 100 Iowa 712, 69 N. W. 1043; Hougham *v.* Harvey, 40 Iowa 634; State *v.* Tucker, 36 Iowa 485.

Kansas.— Missouri, etc., R. Co. *v.* Long, 27 Kan. 684.

Maine.— State *v.* Calais, 48 Me. 456.

Massachusetts.— Com. *v.* Coupe, 128 Mass. 63.

Nebraska.— Kansas City, etc., R. Co. *v.* State, 74 Nebr. 868, 105 N. W. 713; Hill *v.* McGinnis, 64 Nebr. 187, 89 N. W. 783; Lewis *v.* Lincoln, 55 Nebr. 1, 75 N. W. 154.

New Hampshire.— State *v.* Nudd, 23 N. H. 327.

New York.— White *v.* Wiley, 13 N. Y. Suppl. 205.

Wisconsin.— Marshfield Land, etc., Co. *v.* John Week Lumber Co., 108 Wis. 268, 84 N. W. 434.

Canada.— See Byrnes *v.* Bown, 8 U. C. Q. B. 181.

See 25 Cent. Dig. tit. "Highways," §§ 8, 9.

Duration of user see *infra*, II, B, 2, f.

55. *Alabama.*— Whaley *v.* Wilson, 120 Ala.

of the soil;[56] in other words the owner must have acquiesced in the adverse

502, 24 So. 855; Harper *v.* State, 109 Ala. 66, 19 So. 901.

District of Columbia.— District of Columbia *v.* Robinson, 14 App. Cas. 512 [*affirmed* in 180 U. S. 92, 21 S. Ct. 283, 45 L. ed. 440].

Illinois.— Chicago *v.* Galt, 224 Ill. 421, 79 N. E. 701; Falter *v.* Packard, 219 Ill. 356, 76 N. E. 495; Rose *v.* Farmington, 196 Ill. 226, 63 N. E. 631; Illinois Cent. R. Co. *v.* Bloomington, 167 Ill. 9, 47 N. E. 318; Madison Tp. *v.* Gallagher, 159 Ill. 105, 42 N. E. 316; Dickerman *v.* Marion, 122 Ill. App. 154.

Indiana.— Shellhouse *v.* State, 110 Ind. 509, 11 N. E. 484.

Iowa.— Davis *v.* Bonaparte, 137 Iowa 196, 114 N. W. 896; State *v.* Green, 41 Iowa 693; Hougham *v.* Harvey, 40 Iowa 634; State *v.* Tucker, 36 Iowa 485.

Kansas.— Topeka *v.* Cowee, 48 Kan. 345, 29 Pac. 560; Missouri, etc., R. Co. *v.* Long, 27 Kan. 684.

Massachusetts.— Weld *v.* Brooks, 152 Mass. 297, 25 N. E. 719; Jennings *v.* Tisbury, 5 Gray 73.

Montana.— State *v.* Auchard, 22 Mont. 14, 55 Pac. 361.

Nebraska.— Nelson *v.* Sneed, 76 Nebr. 201, 107 N. W. 255; Bleck *v.* Keller, 73 Nebr. 826, 103 N. W. 674; Gehris *v.* Fuhrman, 68 Nebr. 325, 94 N. W. 133.

New York.— Devenpeck *v.* Lambert, 44 Barb. 596; *In re* Howland Bridge, 14 N. Y. Suppl. 845.

Oregon.— Bayard *v.* Standard Oil Co., 38 Oreg. 438, 63 Pac. 614.

Pennsylvania.— *In re* Springfield Tp. Road, 14 Montg. Co. Rep. 97.

Tennessee.— Whitesides *v.* Earles, (Ch. App. 1901) 61 S. W. 1038.

Texas.— Cunningham *v.* San Saba County, 1 Tex. Civ. App. 480, 20 S. W. 941.

Wisconsin.— Rolling *v.* Emrich, 122 Wis. 134, 99 N. W. 464; Frye *v.* Highland, 109 Wis. 292, 85 N. W. 351.

England.— Stone *v.* Jackson, 16 C. B. 199, 81 E. C. L. 199.

Canada.— See Byrnes *v.* Bown, 8 U. C. Q. B. 181.

See 25 Cent. Dig. tit. "Highways," § 9.

What constitutes interruption defeating prescription.—Any unambiguous act by the landowner that evinces an intention to exclude the public defeats prescription. Harper *v.* State, 109 Ala. 66, 19 So. 901; Shellhouse *v.* State, 110 Ind. 509, 11 N. E. 484; Megrath *v.* Nickerson, 24 Wash. 235, 64 Pac. 163; Stone *v.* Jackson, 16 C. B. 199, 81 E. C. L. 199. And see Whaley *v.* Wilson, 120 Ala. 502, 24 So. 855. It has been said, however, that the interruption, to defeat the right of prescription, must be an interruption of the right, and not simply of the use or possession. Madison Tp. *v.* Gallagher, 159 Ill. 105, 42 N. E. 316; Toof *v.* Decatur, 19 Ill. App. 204. The interruption must be actual and substantial. Chicago *v.* Howes, 169 Ill. 260, 48 N. E. 408 (holding that twenty years' use by the public of a strip of land within an alley without interruption save from temporary obstructions not of a character to exclude the public from the strip or to show an appropriation of it to private use creates a public easement therein; and that constructing a narrow sidewalk along one side of the alley and placing posts along its outer edge are not such acts by the owner as are inconsistent with the use of the whole alley as a public highway); Madison Tp. *v.* Gallagher, *supra*; Toof *v.* Decatur, *supra*; Greene County Com'rs *v.* Huff, 91 Ind. 333 (holding that the fact that the owner used the way to carry off surface water did not defeat prescription, where such use was not incompatible with the use of the way as a highway); Weld *v.* Brooks, 152 Mass. 297, 25 N. E. 719; Ellsworth *v.* Grand Rapids, 27 Mich. 250 (holding that the mere recording of a plat which ignores the existence of a road in actual use is not such an interference with the public use of the road as to affect the running of limitations); Power *v.* Dean, 112 Mo. App. 288, 86 S. W. 1100 (holding that the mere fact that a road was permissively used by adjoining landowners as a cattle lot, but without obstructing it as a roadway, is insufficient to break the continuity of an adverse user); State *v.* Auchard, 22 Mont. 14, 55 Pac. 361; Speir *v.* Utrecht, 121 N. Y. 420, 24 N. E. 692 [*modifying* 49 Hun 294, 2 N. Y. Suppl. 426] (holding that the fact that during part of the twenty years that a strip of land was used by the public generally for travel there were railroad tracks on a part of the strip would not prevent the strip from becoming a highway by user); Ferrell *v.* Ferrell, 1 Baxt. (Tenn.) 329 (holding that there must be an actual and substantial suspension of the use by intervention of the owner, either by adverse occupancy or by suit); Ft. Worth *v.* Cetti, 38 Tex. Civ. App. 117, 85 S. W. 826 (holding that a judgment for plaintiff in a suit to foreclose a vendor's lien on land, a street through which has been dedicated by the purchaser, does not as a matter of law interrupt an adverse use of the street theretofore begun by the public); Galveston, etc., R. Co. *v.* Baudat, 21 Tex. Civ. App. 236, 51 S. W. 541; Rhodes *v.* Halvorson, 120 Wis. 99, 97 N. W. 514. Mere verbal objection by the owner, without more, is insufficient to defeat prescription. Devenpeck *v.* Lambert, 44 Barb. (N. Y.) 596. Fences and gates as obstruction see *infra*, this section.

If a prescriptive right is afterward asserted from subsequent user, the time necessary to perfect it must begin anew, and be computed from the date of such interruption. Whaley *v.* Wilson, 120 Ala. 502, 24 So. 855; Shellhouse *v.* State, 110 Ind. 509, 11 N. E. 484.

56. Madison Tp. *v.* Gallagher, 159 Ill. 105, 42 N. E. 316 (holding that interruptions by a mere trespasser are of no effect); Goelet *v.* Newport, 14 R. I. 295 (holding that in order to work an interruption the entry must be by the legal owner of the soil in the assertion of his right).

user.[57] Hence if the landowner obstructs free travel by means of gates or fences, it ordinarily prevents the public from acquiring a highway by prescription.[58]

e. Hostility of User; Color or Claim of Right; Permissive User — (i) *In General.* Mere user of another's land by the public as for a highway is insufficient of itself to establish a highway by prescription.[59] The user must be adverse and

57. Madison Tp. *v.* Gallagher, 159 Ill. 105, 42 N. E. 316; Chicago *v.* Chicago, etc., R. Co., 152 Ill. 561, 38 N. E. 768; Warren *v.* Jacksonville, 15 Ill. 236, 58 Am. Dec. 610; Toof *v.* Decatur, 19 Ill. App. 204; Missouri, etc., R. Co. *v.* Long, 27 Kan. 684; Devenpeck *v.* Lambert, 44 Barb. (N. Y.) 596; Gaines *v.* Merryman, 95 Va. 660, 29 S. E. 738.

58. *Alabama.*—Whaley *v.* Wilson, 120 Ala. 502, 24 So. 855; Harper *v.* State, 109 Ala. 66, 19 So. 901.

California.— See Smithers *v.* Fitch, 82 Cal. 153, 22 Pac. 935.

Delaware.— Johnson *v.* Stayton, 5 Harr. 448.

Idaho.— See Palmer *v.* Northern Pac. R. Co., 11 Ida. 583, 83 Pac. 947.

Indiana.— Shellhouse *v.* State, 110 Ind. 509, 11 N. E. 484.

Iowa.— Mills *v.* Evans, 100 Iowa 712, 69 N. W. 1043; Gray *v.* Haas, 98 Iowa 502, 67 N. W. 394; Breneman *v.* Burlington, etc., R. Co., 92 Iowa 755, 60 N. W. 176.

Kansas.— State *v.* Cipra, 71 Kan. 714, 81 Pac. 488.

Kentucky.—Louisville, etc., R. Co. *v.* Bailey, 109 S. W. 336, 33 Ky. L. Rep. 179.

Maine.— State *v.* Strong, 25 Me. 297.

Massachusetts.—Aiken *v.* New York, etc., R. Co., 188 Mass. 547, 74 N. E. 929.

Nebraska.— Horn *v.* Williamson, 4 Nebr. (Unoff.) 763, 96 N. W. 178.

New York.— Loughman *v.* Long Island R. Co., 83 N. Y. App. Div. 629, 81 N. Y. Suppl. 1097. See Riley *v.* Brodie, 22 Misc. 374, 50 N. Y. Suppl. 347.

Tennessee.—Whitesides *v.* Earles, (Ch. App. 1901) 61 S. W. 1038.

Texas.— Cunningham *v.* San Saba County, 11 Tex. Civ. App. 557, 32 S. W. 928, 33 S. W. 892.

Washington.— Megrath *v.* Nickerson, 24 Wash 235, 64 Pac. 163; Shell *v.* Poulson, 23 Wash. 535, 63 Pac. 204.

See 25 Cent. Dig. tit. "Highways," § 14.

Gate as allowing travel.— The fact that the landowner places a gate in a fence which he erects across a claimed highway (State *v.* Cipra, 71 Kan. 714, 81 Pac. 488), and leaves it unlocked (Shell *v.* Poulson, 23 Wash. 535, 63 Pac. 204), does not affect the rule stated in the text. And see cases cited *supra*, this note.

However, putting up a fence or barrier across a way does not necessarily, as matter of law, constitute an interruption of the use of the way claimed by prescription, in the absence of evidence of the occasion or circumstances or effect of the act. Weld *v.* Brooks, 152 Mass. 297, 25 N. E. 719. Thus fences with gates erected solely to keep cattle from straying do not defeat prescription. Clark *v.* Hull, 184 Mass. 164, 68 N. E. 60; Sikes *v.* St. Louis, etc., R. Co., 127 Mo. App. 326, 105 S. W. 700; Rhodes *v.* Halvorson, 120 Wis. 99, 97 N. W. 514. So where plaintiff fenced in a part of the originally traveled road, which had been used for seven or eight years, and established a new road in another place, with the intention that the road as changed should be used by the public, and it was so used for eight or nine years, the act of plaintiff, not being hostile to the right of the public, did not interrupt the running of the statute so as to prevent the whole road from becoming a highway by adverse possession. Berry *v.* St. Louis, etc., R. Co., 124 Mo. App. 436, 101 S. W. 714. *Compare* Goelet *v.* Newport, 14 R. I. 295.

Fencing a road after the prescriptive rights of the public have matured is of no effect. Yakima County *v.* Conrad, 26 Wash 155, 66 Pac. 411.

59. *Alabama.*— Gosdin *v.* Williams, 151 Ala. 592, 44 So. 611; Jones *v.* Bright, 140 Ala. 268, 37 So. 79, both holding that the mere use of land for the purpose of a road carries with it no presumption of adverse claim or claim of right to so use it.

Illinois.— Falter *v.* Packard, 219 Ill. 356, 76 N. E. 495.

Iowa.— Davis *v.* Bonaparte, 137 Iowa 196, 114 N. W. 896; Haan *v.* Meester, 132 Iowa 709, 109 N. W. 211; State *v.* Mitchell, 58 Iowa 567, 12 N. W. 598, all decided under a statute providing that the fact of adverse possession must be proved by evidence distinct from and independent of the use. And see Gray *v.* Haas, 98 Iowa 502, 67 N. W. 394.

Kentucky.— Hall *v.* McLeod, 2 Metc. 98, 74 Am. Dec. 400, holding that, where a way is opened as a private passway, it cannot be converted into a highway by the mere use thereof, no matter how long that use may be continued.

Massachusetts.— Fall River Print Works *v.* Fall River, 110 Mass. 428.

North Carolina.— State *v.* Wolf, 112 N. C. 889, 17 S. E. 528.

Vermont.— Emery *v.* Washington, Brayt. 129; Bailey *v.* Fairfield, Brayt. 128.

Virginia.— Terry *v.* McClung, 104 Va. 599, 52 S. E. 355; Com. *v.* Kelly, 8 Gratt. 632.

West Virginia.— State *v.* Dry Fork R. Co., 50 W. Va. 235, 40 S. E. 447; Dicken *v.* Liverpool Salt, etc., Co., 41 W. Va. 511, 23 S. E. 582.

United States.— District of Columbia *v.* Robinson, 180 U. S. 92, 21 S. Ct. 283, 45 L. ed. 440 [*affirming* 14 App. Cas. (D. C.) 512].

See 25 Cent. Dig. tit. "Highways," §§ 10, 11.

The use of a strip of an open common for driving or walking is the exercise of the right in a common, and does not make it a highway by prescription. McKay *v.* Reading,

hostile to the rights of the owner,[60] and under color or claim of right so to use the

184 Mass. 140, 68 N. E. 43; Emerson *v.* Wiley, 7 Pick. (Mass.) 68.

Operation of statute.— Miller Code Iowa, § 2031, providing that the use of land shall not be admitted as evidence of a claim of right, but the fact of adverse possession shall be proved by evidence distinct from and independent of the use, does not apply where a highway had been acquired by prescription before the statute was enacted, it being so declared in section 2036. McAllister *v.* Pickup, 84 Iowa 65, 50 N. W. 556; Baldwin *v.* Herbst, 54 Iowa 168, 6 N. W. 257.

60. *Alabama.*— Jones *v.* Bright, 140 Ala. 268, 37 So. 79; Harper *v.* State, 109 Ala. 66, 19 So. 901.

Colorado.— Lieber *v.* People, 33 Colo. 493, 81 Pac. 270.

Illinois.— Chicago *v.* Galt, 224 Ill. 421, 79 N. E. 701; Falter *v.* Packard, 219 Ill. 356, 76 N. E. 495; Rose *v.* Farmington, 196 Ill. 226, 63 N. E. 631; Chicago *v.* Borden, 190 Ill. 430, 60 N. E. 915; O'Connell *v.* Chicago Terminal Transfer R. Co., 184 Ill. 308, 56 N. E. 355; Illinois Cent. R. Co. *v.* Bloomington, 167 Ill. 9, 47 N. E. 318; Madison Tp. *v.* Gallagher, 159 Ill. 105, 42 N. E. 316; Chicago *v.* Chicago, etc., R. Co., 152 Ill. 561, 38 N. E. 768; Gentleman *v.* Soule, 32 Ill. 271, 83 Am. Dec. 264; Dickerman *v.* Marion, 122 Ill. App. 154; Toof *v.* Decatur, 19 Ill. App. 204.

Indiana.— Baltimore, etc., R. Co. *v.* Seymour, 154 Ind. 17, 55 N. E. 953.

Iowa.— Hougham *v.* Harvey, 40 Iowa 634.

Kansas.— Topeka *v.* Cowee, 48 Kan. 345, 29 Pac. 560.

Massachusetts.— Slater *v.* Gunn, 170 Mass. 509, 49 N. E. 1017, 41 L. R. A. 268; Com. *v.* Coupe, 128 Mass. 63.

Mississippi.— Warren County *v.* Mastronardi, 76 Miss. 273, 24 So. 199, holding that the privilege exercised must be such as to expose the party asserting the right of way to an action, if he wrongfully exercised the privilege.

Nebraska.— Nelson *v.* Sneed, 76 Nebr. 201, 107 N. W. 255; Bleck *v.* Keller, 73 Nebr. 826, 103 N. W. 674; Gehris *v.* Fuhrman, 68 Nebr. 325, 94 N. W. 133; Engle *v.* Hunt, 50 Nebr. 358, 69 N. W. 970.

North Carolina.— State *v.* Fisher, 117 N. C. 733, 23 S. E. 158; State *v.* Wolf, 112 N. C. 889, 17 S. E. 528.

Oregon.— Bayard *v.* Standard Oil Co., 38 Oreg. 438, 63 Pac. 614.

Pennsylvania.— Root *v.* Com., 98 Pa. St. 170, 42 Am. Rep. 614; *In re* Springfield Tp. Road, 14 Montg. Co. Rep. 97.

Washington.— Stohlton *v.* Kitsap County, 49 Wash. 305, 95 Pac. 268; Petterson *v.* Waske, 45 Wash. 307, 88 Pac. 206.

United States.— District of Columbia *v.* Robinson, 180 U. S. 92, 21 S. Ct. 283, 45 L. ed. 440 [*affirming* 14 App. Cas. (D. C.) 512].

See 25 Cent. Dig. tit. "Highways," § 10.

Adverse user of a highway imports an assertion of right, on the part of those traveling the road, hostile to the owner of the land over which the highway runs. St. Andrews Parish Tp. Com'rs *v.* Charleston Min., etc., Co., 76 S. C. 382, 57 S. E. 201. Accordingly a highway is not established where no act of control or dominion over the land was exercised or asserted by the public authorities (Hill *v.* McGinnis, 64 Nebr. 187, 89 N. W. 783. Recognition, maintenance, and repair by public authorities see *infra*, II, B, 2, e, (III)), or where the use was not inconsistent with the use of the land by the owner (Dexter *v.* Tree, 117 Ill. 532, 6 N. E. 506; Heilbron *v.* St. Louis Southwestern R. Co., (Tex. Civ. App. 1908) 113 S. W. 610, 979). So where a city seeks to establish a highway by prescription along a railroad right of way, evidence that the city, during the period it claims adverse user, had recognized the company's right of way as an easement or by title is material and competent. Illinois Cent. R. Co. *v.* Bloomington, 167 Ill. 9, 47 N. E. 318.

Levy of taxes on land in dispute.—While the fact that the municipality has levied and collected taxes or special assessments on the land claimed as a highway within the prescriptive period tends to rebut the claim of adverse user (Illinois Cent. R. Co. *v.* Bloomington, 167 Ill. 9, 47 N. E. 318; Huntington *v.* Townsend, 29 Ind. App. 269, 63 N. E. 36. And see Haan *v.* Meester, 132 Iowa 709, 109 N. W. 211), it is not conclusive against the claim that the land is a highway (Toof *v.* Decatur, 19 Ill. App. 204), especially where the highway did not cover all the tract on which the tax was levied (Cedar Rapids *v.* Young, 119 Iowa 552, 93 N. W. 567). And where the public has already acquired an easement by user in a highway, the listing of the land for taxes and the payment thereof by the owner do not affect the rights of the public in the land. Campau *v.* Detroit, 104 Mich. 560, 62 N. W. 718.

However, it is not always necessary to show some aggressively hostile act by the public, but the adverse character of the user may be presumed from the facts and circumstances of the case. Barnes *v.* Daveck, 7 Cal. App. 220, 487, 94 Pac. 779; Earle *v.* Poat, 63 S. C. 439, 41 S. E. 525 (holding that where the public has for twenty years asserted the right to a way for public purposes, it is sufficient to carry with it an adverse use by the public); Hall *v.* Austin, 20 Tex. Civ. App. 59, 48 S. W. 53 (holding that a highway by prescription may be established without other evidence of the assertion of an adverse claim than that afforded by the nature of the use). And see McAllister *v.* Pickup, 84 Iowa 65, 50 N. W. 556.

Burden of proof.—Where the public claims title to the easement in a highway by user, the burden rests on the state to show adverse possession. State *v.* Fisher, 117 N. C. 733, 23 S. E. 158. And where plaintiff sued for land included in a deed from his father,

land.[61] A user by license or permission of the owner of the land sought to be impressed with a public easement of travel is not adverse, and affords no basis for prescription,[62]

which land defendants claimed the prescriptive right to use as a road, plaintiff's evidence of title and that defendants' use of the road had been merely permissive established a *prima facie* case, and placed the burden on defendants to prove their adverse holding. Rose *v.* Stephens, (Ky. 1908) 112 S. W. 676.

Highway prescription acts.— In New York, it seems, the words, "used as public highways," in 1 Rev. St. 521, § 100, declaring that "all roads not recorded which have been or shall have been used as public highways for twenty years or more shall be deemed public highways," do not require the user to be adverse and under such circumstances as would be required to give an individual a right of way by prescription (Speir *v.* Utrecht, 121 N. Y. 420, 24 N. E. 692 [*modifying* 49 Hun 294, 2 N. Y. Suppl. 426]), although a different conclusion seems to have been reached by the courts of some other states having similar statutes (see cases cited *supra*, this note; *infra*, note 61). The user, however, must be like that of highways generally. Speir *v.* Utrecht, *supra*; Buffalo *v.* Delaware, etc., R. Co., 68 N. Y. App. Div. 488, 74 N. Y. Suppl. 343 [*affirmed* in 178 N. Y. 561, 70 N. E. 1097]. The road must be not only traveled upon but kept in repair or taken in charge of or adopted by the public authorities. See *infra*, note 68. And the fact that a portion of the public have traveled over it for more than twenty years does not alone make it a highway. See *supra*, II, B, 2, b.

61. *Alabama.*— Jones *v.* Bright, 140 Ala. 268, 37 So. 79.

Colorado.— Lieber *v.* People, 33 Colo. 493, 81 Pac. 270.

District of Columbia.— District of Columbia *v.* Robinson, 14 App. Cas. 512 [*affirmed* in 180 U. S. 92, 21 S. Ct. 283, 45 L. ed. 440].

Illinois.— Chicago *v.* Galt, 224 Ill. 421, 79 N. E. 701; Falter *v.* Packard, 219 Ill. 356, 76 N. E. 495; Chicago *v.* Borden, 190 Ill. 430, 60 N. E. 915; O'Connell *v.* Chicago Terminal Transfer R. Co., 184 Ill. 308, 56 N. E. 355; Illinois Cent. R. Co. *v.* Bloomington, 167 Ill. 9, 47 N. E. 318; Madison Tp. *v.* Gallagher, 159 Ill. 105, 42 N. E. 316; Chicago *v.* Chicago, etc., R. Co., 152 Ill. 561, 38 N. E. 768; Dexter *v.* Tree, 117 Ill. 532, 6 N. E. 506; Gentleman *v.* Soule, 32 Ill. 271, 83 Am. Dec. 264; Toof *v.* Decatur, 19 Ill. App. 204. See, however, Menard County Road Dist. No. 1 *v.* Beebe, 231 Ill. 147, 83 N. E. 131.

Indiana.— Southern Indiana R. Co. *v.* Norman, 165 Ind. 126, 74 N. E. 896; Shellhouse *v.* State, 110 Ind. 509, 11 N. E. 484.

Iowa.— Fairchild *v.* Stewart, 117 Iowa 734, 89 N. W. 1075; Hougham *v.* Harvey, 40 Iowa 634; State *v.* Tucker, 36 Iowa 485.

Kansas.— Topeka *v.* Cowee, 48 Kan. 345, 29 Pac. 560.

Kentucky.— Louisville, etc., R. Co. *v.* Bailey, 109 S. W. 336, 33 Ky. L. Rep. 179.

Massachusetts.— Slater *v.* Gunn, 170 Mass. 509, 49 N. E. 1017, 41 L. R. A. 268.

Mississippi.— Wills *v.* Reed, 86 Miss. 446, 38 So. 793; Burnley *v.* Mullins, 86 Miss. 441, 38 So. 635; Warren County *v.* Mastronardi, 76 Miss. 273, 23 So. 199.

Nebraska.— Nelson *v.* Sneed, 76 Nebr. 201, 107 N. W. 255; Kansas City, etc., R. Co. *v.* State, 74 Nebr. 868, 105 N. W. 713; Bleck *v.* Keller, 73 Nebr. 826, 103 N. W. 674; Gehris *v.* Fuhrman, 68 Nebr. 325, 94 N. W. 133; Hill *v.* McGinnis, 64 Nebr. 187, 89 N. W. 783; Lewis *v.* Lincoln, 55 Nebr. 1, 75 N. W. 154; Engle *v.* Hunt, 50 Nebr. 358, 69 N. W. 970.

Oregon.— Bayard *v.* Standard Oil Co., 38 Oreg. 438, 63 Pac. 614.

Pennsylvania.— Root *v.* Com., 98 Pa. St. 170, 42 Am. Rep. 614.

Tennessee.— Sharp *v.* Mynatt, 1 Lea 375.

Texas.— Cunningham *v.* San Saba County, 1 Tex. Civ. App. 480, 20 S. W. 941.

Wisconsin.— State *v.* Joyce, 19 Wis. 90. See, however, State *v.* Lloyd, 133 Wis. 468, 113 N. W. 964.

See 25 Cent. Dig. tit. "Highways," § 11.

The claim of right must be manifested by acts indicating an intention to enjoy the land as a highway without regard to the wishes of the owner (Rose *v.* Farmington, 196 Ill. 226, 63 N. E. 631; Shellhouse *v.* State, 110 Ind. 509, 11 N. E. 484; State *v.* Green, 41 Iowa 693), as by some appropriate action on the part of the public authorities (Kansas City, etc., R. Co. *v.* State, 74 Nebr. 868, 105 N. W. 713; Hill *v.* McGinnis, 64 Nebr. 187, 89 N. W. 783; Lewis *v.* Lincoln, 55 Nebr. 1, 75 N. W. 154. Recognition, maintenance, and repair by public authorities see *infra*, II, B, 2, e, (III)).

However, it is not always necessary for the public in using a roadway to make proclamation that they are using it under a claim of right, where the right is asserted as flowing from long usage with the knowledge and acquiescence of the owner of the land; but the claim of right may be presumed from the facts and circumstances attending the use. Barnes *v.* Daveck, 7 Cal App. 220, 487, 94 Pac. 779; Rose *v.* Farmington, 196 Ill. 226, 63 N. E. 631; Shellhouse *v.* State, 110 Ind. 509, 11 N. E. 484; State *v.* Green, 41 Iowa 693. An unexplained user of land as a highway by the public for the prescriptive period will be presumed to be under a claim of right, the user being otherwise sufficient. Southern Indiana R. Co. *v.* Norman, 165 Ind. 126, 74 N. E. 896; Hanson *v.* Taylor, 23 Wis. 547. And see Evans *v.* Cook, 111 S. W. 326, 33 Ky. L. Rep. 788.

Effect of levy of taxes on land in dispute see *supra*, note 60.

62. *Alabama.*— Jones *v.* Bright, 140 Ala. 268, 37 So. 79; Harper *v.* State, 109 Ala. 66, 19 So. 901.

California.— Hartley *v.* Vermillion, (1902) 70 Pac. 273, 141 Cal. 339, 74 Pac. 987. And

where the land owner does not consent to the user of his land by the public as of right.[63]

(II) *Exclusiveness of User.* In order to create a highway over private lands by prescription, the public user must be exclusive; that is, it must be such as to show a claim of right to use the land as a highway to the exclusion of any individual right of the owner inconsistent therewith.[64]

see Cooper *v.* Monterey County, 104 Cal. 437, 38 Pac. 106.

Illinois.— Chicago *v.* Galt, 224 Ill. 421, 79 N. E. 701; Rose *v.* Farmington, 196 Ill. 226, 63 N. E. 631; Chicago *v.* Borden, 190 Ill. 430, 60 N. E. 915; Dexter *v.* Tree, 117 Ill. 532, 6 N. E. 506.

Indiana.— Baltimore, etc., R. Co. *v.* Seymour, 154 Ind. 17, 55 N. E. 953; Shellhouse *v.* State, 110 Ind. 509, 11 N. E. 484.

Kansas.— Meade *v.* Topeka, 75 Kan. 61, 88 Pac. 574, *semble.*

Kentucky.— Rose *v.* Stephens, (1908) 112 S. W. 676; Louisville, etc., R. Co. *v.* Bailey, 109 S. W. 336, 33 Ky. L. Rep. 179.

Massachusetts.—Slater *v.* Gunn, 170 Mass. 509, 49 N. E. 1017, 41 L. R. A. 268.

Michigan.— Homer Tp. Highway Com'r *v.* Riker, 79 Mich. 551, 44 N. W. 955, where the user was under an agreement made by the highway authorities with the owner that the public might cross his land temporarily for the purpose of avoiding a defect in the highway as originally laid out until the true highway could be put in safe condition, and he continued to allow such use of his land, relying on the promises of the authorities year after year to restore it to him.

Mississippi.— Burnley *v.* Mullins, 86 Miss. 441, 38 So. 635.

Nebraska.—Hill *v.* McGinnis, 64 Nebr. 187, 89 N. W. 783.

New Hampshire.— Plummer *v.* Ossipee, 59 N. H. 55.

New Jersey.— Marino *v.* New Jersey Cent. R. Co., 69 N. J. L. 628, 56 Atl. 306; South Branch R. Co. *v.* Parker, 41 N. J. Eq. 489, 5 Atl. 641.

North Carolina.— Davis *v.* Ramsey, 50 N. C. 236.

Pennsylvania.— Root *v.* Com., 98 Pa. St. 170, 42 Am. Rep. 614.

Tennessee.—Sharp *v.* Mynatt, 1 Lea 375.

Texas.—Heilbron *v.* St. Louis Southwestern R. Co., (Civ. App. 1908) 113 S. W. 610, 979; Cunningham *v.* San Saba County, 1 Tex. Civ. App. 480, 20 S. W. 941; Smith *v.* State, (Cr. App. 1897) 40 S. W. 736.

Virginia.— Terry *v.* McClung, 104 Va. 599, 52 S. E. 355; Com. *v.* Kelly, 8 Gratt. 632 [*cited* in Gaines *v.* Merryman, 95 Va. 660, 29 S. E. 738], both holding that a mere permission to the public by the owner of land to pass over a road thereon is, without more, to be regarded as a mere license, revocable at pleasure.

Wisconsin.—Frye *v.* Highland, 109 Wis. 292, 85 N. W. 351, holding that where it was claimed that a way private in its inception had become a public way by user, the fact that persons other than those who had used it by invitation were permitted to do so did not militate against its private character, it not being clear evidence of a change to a public thoroughfare.

United States.— District of Columbia *v.* Robinson, 180 U. S. 92, 21 S. Ct. 283, 45 L. ed. 440 [*affirming* 14 App. Cas. (D. C.) 512]; Coburn *v.* San Mateo County, 75 Fed. 520, holding that the fact that a landowner for a long period of years permitted the residents of a neighboring village, and visitors thereto, to pass through his gate and over his land to an attractive beach on the seashore, created no prescriptive right to a public road through his land.

England.— Atty.-Gen. *v.* Antrobus, [1905] 2 Ch. 188, 69 J. P. 141, 74 L. J. Ch. 599, 92 L. T. Rep. N. S. 790, 21 T. L. R. 471, 3 Loc. Gov. 1071, so held in regard to Stonehenge.

See 25 Cent. Dig. tit. "Highways," § 10.

Permissive use of a road has reference to the conduct of the landowner in consenting to its travel by the public (St. Andrews Parish Tp. Com'rs *v.* Charleston Min., etc., Co., 76 S. C. 382, 57 S. E. 201), although not as of right (see cases cited *infra*, note 63).

Burden of proof.—Where the public has had exclusive possession and use of land for a highway for a period of time barring recovery, the burden is on the owner of the title to show that the use was permissive. Meade *v.* Topeka, 75 Kan. 61, 88 Pac. 574; Evans *v.* Cook, 111 S. W. 326, 33 Ky. L. Rep. 788.

Question for jury.—Where a railroad crossing in connection with a street has been used as a highway for twenty years, and the street has been repaired by the town and the crossing has been planked by the railroad, it is a question for the jury whether such use was adverse or permissive. Fitchburg R. Co. *v.* Page, 131 Mass. 391, 7 Am. & Eng. R. Cas. 86.

A finding that for more than ten years there had existed a public road along the strip in controversy, which had been used as a public road by the people without let or hindrance of any kind, negatives any presumption that the use of the strip of land was by license or permission. Hartley *v.* Vermillion, 141 Cal. 339, 74 Pac. 987, (1902) 70 Pac. 273.

Although the use of a road was begun by permission, yet if it was used under a claim of right for a term equal to the period of the statute of limitations, the right is acquired by prescription. McAllister *v.* Pickup, 84 Iowa 65, 50 N. W. 556.

63. Falter *v.* Packard, 219 Ill. 356, 76 N. E. 495; Toof *v.* Decatur, 19 Ill. App. 204; Bassett *v.* Harwich, 180 Mass. 585, 62 N. E. 974. And see cases cited *supra*, note 62.

64. Falter *v.* Packard, 219 Ill. 356, 76

(III) *Recognition, Maintenance, and Repair by Public Authorities.* In many states it is provided by statute that where, for a specified time, which varies in the different jurisdictions,[65] a way is used by the public as a highway and worked as such by the public authorities, it shall be deemed a highway the same as if regularly laid out.[66] To establish a highway under these provisions it is essential that the way shall be maintained and kept in repair by the public authorities during the time so fixed.[67] In the absence of statute, however, the fact that the public authorities have not recognized or worked the way in question as a highway does not necessarily defeat prescription; [68] nor does such a statute

N. E. 495; Rose *v.* Farmington, 196 Ill. 226, 63 N. E. 631; O'Connell *v.* Chicago Terminal Transfer R. Co., 184 Ill. 308, 56 N. E. 355; Chicago *v.* Chicago, etc., R. Co., 152 Ill. 561, 38 N. E. 768; Dickerman *v.* Marion, 122 Ill. App. 154; Baltimore, etc., R. Co. *v.* Seymour, 154 Ind. 17, 55 N. E. 953; *In re* Springfield Tp. Road, 14 Montg. Co. Rep. (Pa.) 97; Cunningham *v.* San Saba County, 1 Tex. Civ. App. 480, 20 S. W. 941.

Retention of dominion and control over the land by the owner precludes prescription. Jones *v.* Phillips, 59 Ark. 35, 26 S. W. 386; Buffalo *v.* Delaware, etc., R. Co., 68 N. Y. App. Div. 488, 74 N. Y. Suppl. 343 [*affirmed* in 178 N. Y. 561, 70 N. E. 1097]; State *v.* Gross, 119 N. C. 868, 26 S. E. 91. And see Cooper *v.* Monterey County, 104 Cal. 437, 38 Pac. 106.

65. See *supra*, II, B, 1; *infra*, II, B, 2, f.

66. See the statutes of the different states, and the following cases:

Delaware.— State *v.* Southard, 6 Pennew. 247, 66 Atl. 372; Johnson *v.* Stayton, 5 Harr. 448.

Idaho.—Meservey *v.* Gulliford, 14 Ida. 133, 93 Pac. 780.

Michigan.—Neal *v.* Gilmore, 141 Mich. 519, 104 N. W. 609.

Minnesota.— Meyer *v.* Petersburg, 99 Minn. 450, 109 N. W. 840; Elfelt *v.* Stillwater St. R. Co., 53 Minn. 68, 55 N. W. 116.

Missouri.— State *v.* Transue, 131 Mo. App. 323, 111 S. W. 523.

Rhode Island.— Hampson *v.* Taylor, 15 R. I. 83, 8 Atl. 331, 23 Atl. 732; Goelet *v.* Newport, 14 R. I. 295; State *v.* Cumberland, 6 R. I. 496.

Wisconsin.— Rhodes *v.* Halvorson, 120 Wis. 99, 97 N. W. 514; Chippewa Falls *v.* Hopkins, 109 Wis. 611, 85 N. W. 553; State *v.* McCabe, 74 Wis. 481, 43 N. W. 322.

Canada.— St. Vincent Tp. *v.* Greenfield, 12 Ont. 297.

See 25 Cent. Dig. tit. "Highways," § 12. And see *infra*, II, B, 2, e, (VI), as to creation of highway by user under defective proceedings to establish same.

The operation of a statute declaring that when a road shall have been continuously used, kept in repair, and worked for six years, it shall be a highway is not affected by the fact that proceedings previously commenced to lay it out as a highway are still pending. Elfelt *v.* Stillwater St. R. Co., 53 Minn. 68, 55 N. W. 116. On an issue whether a road was a highway, the fact that it had never been worked by the county as required by statute is immaterial, where the road had been established by prescription before the passage of such act. Sikes *v.* St. Louis, etc., R. Co., 127 Mo. App. 326, 105 S. W. 700.

67. Meservey *v.* Gulliford, 14 Ida. 133, 93 Pac. 780; Juliaetta *v.* Smith, 12 Ida. 288, 85 Pac. 923; Palmer *v.* Northern Pac. R. Co., 11 Ida. 583, 83 Pac. 947.

Extent of work.— It is not essential that every part of a road should be worked as a highway by the public authorities, if the road as a whole is used by the public for travel and so much of it is worked as is necessary. Gross *v.* McNutt, 4 Ida. 286, 38 Pac. 935; Neal *v.* Gilmore, 141 Mich. 519, 104 N. W. 609; State *v.* Macy, 72 Mo. App. 427 (holding that a statute requiring an expenditure of labor and money during the period of limitation in order to acquire title by adverse user does not require such expenditure on any particular part of the road, it being sufficient if it is made on any part of it); Scribner *v.* Blute, 28 Wis. 148. And see State *v.* Transue, 131 Mo. App. 323, 111 S. W. 523.

Waiver of objections.—Where, to establish the existence of a highway, evidence was given of immemorial user, but no evidence of repair by the town, and no exceptions were taken to the want of evidence of repair, the appellate court will assume a waiver of evidence of repair. Hampson *v.* Taylor, 15 R. I. 83, 8 Atl. 331, 23 Atl. 732.

68. *Illinois.*— Menard County Road Dist. No. 1 *v.* Beebe, 231 Ill. 147, 83 N. E. 131; Madison Tp. *v.* Gallagher, 159 Ill. 105, 42 N. E. 316.

Indiana.— Louisville, etc., R. Co. *v.* Etzler, 3 Ind. App. 562, 30 N. E. 32.

Kentucky.— Smith *v.* Illinois Cent. R. Co., 105 S. W. 96, 31 Ky. L. Rep. 1323.

Massachusetts.— Bassett *v.* Harwich, 180 Mass. 585, 62 N. E. 974.

Missouri.— State *v.* Transue, 131 Mo. App. 323, 111 S. W. 523; Sikes *v.* St. Louis, etc., R. Co., 127 Mo. App. 326, 105 S. W. 700; Dow *v.* Kansas City Southern R. Co., 116 Mo. App. 555, 92 S. W. 744; Cox *v.* Tipton, 18 Mo. App. 450 [*citing* State *v.* Wells, 70 Mo. 635].

Tennessee.— Sharp *v.* Mynatt, 1 Lea 375.

Washington.— Seattle *v.* Smithers, 37 Wash. 119, 79 Pac. 615.

Wisconsin.— Hanson *v.* Taylor, 23 Wis. 547 [*overruling* State *v.* Joyce, 19 Wis. 90], *semble.*

See 25 Cent. Dig. tit. "Highways," § 12. And see cases cited *infra*, note 69.

Contra.— Johnson *v.* State, 1 Ga. App. 195, 58 S. E. 265, *semble.* In New York, it seems, under 1 Rev. St. 521, § 100, declaring that

preclude the creation of a highway by common-law prescription independently of its provisions.[69] Nevertheless the fact that the public authorities have worked the road claimed as a highway, or otherwise recognized it as such, tends to show that a highway exists, and in connection with public user for the necessary period may establish a highway by prescription;[70] and, on the other hand, the fact

"all roads not recorded which have been or shall have been used as public highways for twenty years or more shall be deemed public highways," the user need not be adverse and under such circumstances as would be required to give an individual a right of way by prescription. See *supra*, note 60. The user must, however, be like that of highways generally; the road must not only be traveled upon, but kept in repair or taken in charge of or adopted by the public authorities; and so the fact that a portion of the public have traveled over it more than twenty years does not alone make it a highway. Speir *v.* Utrecht, 121 N. Y. 420, 24 N. E. 692 [*modifying* 49 Hun 294, 2 N. Y. Suppl. 426]; Buffalo *v.* Delaware, etc., R. Co., 68 N. Y. App. Div. 488, 74 N. Y. Suppl. 343 [*affirmed* in 178 N. Y. 561, 70 N. E. 1097]; Burlew *v.* Hunter, 41 N. Y. App. Div. 148, 58 N. Y. Suppl. 453; People *v.* Osborn, 84 Hun (N. Y.) 441, 32 N. Y. Suppl. 358 [*affirmed* in 155 N. Y. 685, 50 N. E. 1120]; Harriman *v.* Howe, 78 Hun (N. Y.) 280, 28 N. Y. Suppl. 858 [*affirmed* in 155 N. Y. 683, 50 N. E. 1117]. And see Loughman *v.* Long Island R. Co., 83 N. Y. App. Div. 629, 81 N. Y. Suppl. 1097; Hamilton *v.* Owego, 42 N. Y. App. Div. 312, 59 N. Y. Suppl. 103 [*affirmed* in 171 N. Y. 698, 64 N. E. 1121]; Riley *v.* Brodie, 22 Misc. 374, 50 N. Y. Suppl. 347. But the courts of some other states having similar statutes reach a different conclusion. See cases cited *supra*, this note.

Whether the highway authorities did or did not regard the road as a highway at any particular time is of no consequence. Menard County Road Dist. No. 1 *v.* Beebe, 231 Ill. 147, 83 N. E. 131. So an order of county commissioners dismissing a petition for the discontinuance of a road as a highway on the ground that it is not a highway is not evidence that it has not become a highway by prescription. Com. *v.* Petitcler, 110 Mass. 62.

Wild and unoccupied lands.— The necessity of recognition, maintenance, and repair of a road over wild and unoccupied lands is considered *infra*, note 72.

69. Seattle *v.* Smithers, 37 Wash. 119, 79 Pac. 615; Chippewa Falls *v.* Hopkins, 109 Wis. 611, 85 N. W. 553.

70. *Arkansas.*— State *v.* Moore, 23 Ark. 550, holding that the fact that the county court appointed an overseer of a road is evidence that it was a public road during the term for which he was appointed.

Connecticut.— See Paulsen *v.* Wilton, 78 Conn. 58, 61 Atl. 61.

Georgia.— Southern R. Co. *v.* Combs, 124 Ga. 1004, 53 S. E. 508; Johnson *v.* State, 1 Ga. App. 195, 58 S. E 265.

Illinois.— Peotone *v.* Illinois Cent. R. Co., 224 Ill. 101, 79 N. E. 678; Dimon *v.* People, 17 Ill. 416; Nealy *v.* Brown, 6 Ill. 10; Eyman *v.* People, 6 Ill. 4.

Indiana.— Nichols *v.* State, 89 Ind. 298.

Iowa.—Haan *v.* Meester, 132 Iowa 709, 109 N. W. 211; Cedar Rapids *v.* Young, 119 Iowa 552, 93 N. W. 567; Casey *v.* Tama County, 75 Iowa 655, 37 N. W. 138; Brown *v.* Jefferson County, 16 Iowa 339.

Kansas.— See State *v.* Horn, 35 Kan. 717, 12 Pac. 148.

Massachusetts.— Clark *v.* Hull, 184 Mass. 164, 68 N. E. 60; Com. *v.* Holliston, 107 Mass. 232.

Michigan.— Parkey *v.* Galloway, 147 Mich. 693, 111 N. W. 348; Wicks *v.* Ross, 37 Mich. 464, holding that evidence that the overseer of a highway has allowed a road tax to be worked out on the road in question is admissible to aid in establishing its character as a highway by user.

Missouri.— State *v.* Walters, 69 Mo. 463.

Montana.— State *v.* Auchard, 22 Mont. 14, 55 Pac. 361.

New Hampshire.— Harriman *v.* Moore, 74 N. H. 277, 67 Atl. 225.

New York.— Wakeman *v.* Wilbur, 147 N. Y. 657, 42 N. E. 341 [*reversing* 4 N. Y. Suppl. 938].

North Carolina.— Boyden *v.* Achenbach, 79 N. C. 539.

Oregon.— Ridings *v.* Marion County, 50 Oreg. 30, 91 Pac. 22.

Rhode Island.— State *v.* Cumberland, 6 R. I. 496.

Tennessee.— Raht *v.* Southern R. Co., (Ch. App. 1897) 50 S. W. 72.

Texas.— Hall *v.* Austin, 20 Tex. Civ. App. 59, 48 S. W. 53.

Vermont.— Brown *v.* Swanton, 69 Vt. 53, 37 Atl. 280; Folsom *v.* Underhill, 36 Vt. 580. And see Whitney *v.* Essex, 42 Vt. 520.

Virginia.— Com. *v.* Kelly, 8 Gratt. 632 [*cited* in Gaines *v.* Merryman, 95 Va. 660, 29 S. E. 738].

Wisconsin.—Tomlinson *v.* Wallace, 16 Wis. 224.

United States.— Hull *v.* Richmond, 12 Fed. Cas. No. 6,861, 2 Woodb. & M. 337.

See 25 Cent. Dig. tit. "Highways," § 12.

However, the surveying, platting, and recording of a road will not be presumed from the fact that the road has been worked and kept in repair by the authorities, where the evidence tends to establish that the road was never surveyed, platted, or recorded. District of Columbia *v.* Robinson, 180 U. S. 92, 21 S. Ct. 283, 45 L. ed. 440 [*affirming* 14 App. Cas. (D. C.) 512].

This applies to roads over wild and unoccupied lands. Hall *v.* Austin, 20 Tex. Civ. App. 59, 48 S. W. 53. And see State *v.* Horn, 35 Kan. 717, 12 Pac. 148. See *infra*, II, B, 2, e, (IV).

that the public authorities have not worked the road in question, or otherwise recognized it as a highway, while not conclusive of its non-existence as such,[71] tends to show that no highway exists.[72] In a few states a way is declared by statute to be a highway simply where it is recognized [73] or worked [74] as such by the public authorities.

(IV) *USER OF WILD AND UNOCCUPIED LANDS.* It is sometimes said that a highway cannot be established by prescription where the *locus in quo* is wild and unoccupied land.[75] This statement, however, is too broad. While a mere user of wild and unoccupied lands by the public for travel is insufficient without more to create a highway,[76] yet a highway may be prescribed over such

Approval of town supervisors.— Under a statute providing that all roads not recorded, which shall hereafter be used ten years or more, shall be deemed public highways, expenditure of money or performance of work on a road under the direction of the highway overseer is a sufficient adverse public user to establish it as a highway, without proof that his action was approved by the town supervisors. Blute *v.* Scribner, 23 Wis. 357.

Recognition, maintenance, and repair is not conclusive evidence that a highway exists (Baltimore, etc., R. Co. *v.* Seymour, 154 Ind. 17, 55 N. E. 953; Buffalo *v.* Delaware, etc., R. Co., 68 N. Y. App. Div. 488, 74 N. Y. Suppl. 343 [*affirmed* in 178 N. Y. 561, 70 N. E. 1097]; Gaines *v.* Merryman, 95 Va. 660, 29 S. E. 738; Megrath *v.* Nickerson, 24 Wash. 235, 64 Pac. 163; State *v.* McCabe, 74 Wis. 481, 43 N. W. 322), in the absence of statute to the contrary (see *infra*, this section, text and notes 73, 74.

Extent of work see *supra*, note 67.

Recognition of road used by public under defective proceedings to establish highway see *infra*, II, B, 2, e, (VI).

71. See *supra*, this section, text and note 70.

72. *California.*— Cooper *v.* Monterey County, 104 Cal. 437, 38 Pac. 106. And see Sutton *v.* Nicolaisen, (1896) 44 Pac. 805.

Illinois.— O'Connell *v.* Chicago Terminal Transfer R. Co., 184 Ill. 308, 56 N. E. 355; Brushy Mound *v.* McClintock, 150 Ill. 129, 36 N. E. 976; Lewiston *v.* Proctor, 27 Ill. 414.

Iowa.—Haan *v.* Meester, 132 Iowa 709, 109 N. W. 211; Fairchild *v.* Stewart, 117 Iowa 734, 89 N. W. 1075; State *v.* Green, 41 Iowa 693.

Kansas.— See State *v.* Horn, 35 Kan. 717, 12 Pac. 148.

Massachusetts.— McKay *v.* Reading, 184 Mass. 140, 68 N. E. 43; Fall River Print Works *v.* Fall River, 110 Mass. 428.

Michigan.— Stickley *v.* Sodus Tp., 151 Mich. 510, 91 N. W. 745, 59 L. R. A. 287.

Mississippi.— Wills *v.* Reid, 86 Miss. 446, 38 So. 793; Burnley *v.* Mullins, 86 Miss. 441, 38 So. 635.

Nebraska.—Hill *v.* McGinnis, 64 Nebr. 187, 89 N. W. 783.

New Hampshire.—State *v.* Nudd, 23 N. H. 327.

New York.— See cases cited *supra*, note 68.

North Carolina.— State *v.* Lucas, 124 N. C. 804, 32 S. E. 553; State *v.* Gross, 119 N. C. 868, 26 S. E. 91.

South Carolina.—Miles *v.* Postal Cable Tel. Co., 55 S. C. 403, 33 S. E. 493.

Tennessee.— Sharp *v.* Mynatt, 1 Lea 375.

Washington.— Stohlton *v.* Kitsap County, 49 Wash. 305, 95 Pac. 268; Rice *v.* Pershall, 41 Wash. 73, 82 Pac. 1038.

West Virginia.— State *v.* Dry Fork R. Co., 50 W. Va. 235, 40 S. E. 447.

Wisconsin.— Marshfield Land, etc., Co. *v.* John Week Lumber Co., 108 Wis. 268, 84 N. W. 434.

See 25 Cent. Dig. tit. "Highways," § 12.

This is especially true as to roads over wild and unoccupied lands. Rosser *v.* Bunn, 66 Ala. 89; Brumley *v.* State, 83 Ark. 236, 103 S. W. 615; People *v.* Osborn, 84 Hun (N. Y.) 441, 32 N. Y. Suppl. 358 [*affirmed* in 155 N. Y. 685, 50 N. E. 1120]; Harriman *v.* Howe, 78 Hun (N. Y.) 280, 28 N. Y. Suppl. 858 [*affirmed* in 155 N. Y. 683, 50 N. E. 1117]. And see State *v.* Horn, 35 Kan. 717, 12 Pac. 148. See *infra*, II, B, 2, e, (IV).

If repairs are not needed, this does not apply. Lewiston *v.* Proctor, 27 Ill. 414. Extent of repairs see *supra*, note 67.

73. See Lieber *v.* People, 33 Colo. 493, 81 Pac. 270; Meservey *v.* Gulliford, 14 Ida. 133, 93 Pac. 780.

74. Ball *v.* Cox, 29 W. Va. 407, 1 S. E. 673.

75. Lieber *v.* People, 33 Colo. 493, 81 Pac. 270; Smith *v.* Smith, 34 Kan. 293, 8 Pac. 385; Shaffer *v.* Stull, 32 Nebr. 94, 48 N. W. 882; Graham *v.* Hartnett, 10 Nebr. 517, 7 N. W. 280; Cunningham *v.* San Saba County, 1 Tex. Civ. App. 480, 20 S. W. 941.

76. *Illinois.*— O'Connell *v.* Chicago Terminal Transfer R. Co., 184 Ill. 308, 56 N. E. 355; Kyle *v.* Logan, 87 Ill. 64; Warren *v.* Jacksonville, 15 Ill. 236, 58 Am. Dec. 610; Toof *v.* Decatur, 19 Ill. App. 204; Fox *v.* Virgin, 5 Ill. App. 515, 11 Ill. App. 513.

Iowa.— State *v.* Kansas City, etc., R. Co., 45 Iowa 139.

Kansas.— State *v.* Horn, 35 Kan. 717, 12 Pac. 148; Missouri, etc., R. Co. *v.* Long, 27 Kan. 684.

Kentucky.— Bowman *v.* Wickliffe, 15 B. Mon. 84.

Nebraska.— Brandt *v.* Olson, 79 Nebr. 612, 113 N. W. 151, 114 N. W. 587; Engle *v.* Hunt, 50 Nebr. 358, 69 N. W. 970; Rathman *v.* Norenberg, 21 Nebr. 467, 32 N. W. 305.

New York.— People *v.* Osborn, 84 Hun 441, 32 N. Y. Suppl. 358 [*affirmed* in 155 N. Y. 685, 50 N. E. 1120]; Harriman *v.* Howe, 78 Hun 280, 28 N. Y. Suppl. 858 [*affirmed* in 155 N. Y. 683, 50 N. E. 1117].

lands,[77] provided the user is adverse and under claim or color of right,[78] and not by mere license or permission of the landowner,[79] and is such as to put the owner on notice that a highway is claimed as of right,[80] and is otherwise sufficient to establish a highway by prescription.[81]

(v) *User of Land Outside of Established Highway.* An adverse user by the public, by mistake or otherwise, for the requisite period of time, of lands outside of the lines of an established highway is generally held to create a prescriptive right to use such lands as a highway,[82] and after the lapse of the

South Carolina.— Gibson *v.* Durham, 3 Rich. 85.

Washington.— Rice *v.* Pershall, 41 Wash. 73, 82 Pac. 1038.

See 25 Cent. Dig. tit. "Highways," § 16.

77. *Illinois.*— Peotone *v.* Illinois Cent. R. Co., 224 Ill. 101, 79 N. E. 678 (holding that Laws (1887), p. 263, which declares roads used by the public for fifteen years to be public highways, applies to both inclosed and uninclosed roads, but in the latter the acts of the public indicating the location of a highway must be more pronounced than in the former); O'Connell *v.* Chicago Terminal Transfer R. Co., 184 Ill. 308, 56 N. E. 355 (*semble*); Dimon *v.* People, 17 Ill. 416; Shugart *v.* Halliday, 2 Ill. App. 45.

Iowa.— Onstott *v.* Murray, 22 Iowa 457.

Kansas.— State *v.* Horn, 35 Kan. 717, 12 Pac. 148, *semble.*

South Carolina.— State *v.* Toale, 74 S. C. 425, 54 S. E. 608; Kirby *v.* Southern R. Co., 63 S. C. 494, 41 S. E. 765.

Texas.— Hall *v.* Austin, 20 Tex. Civ. App. 59, 48 S. W. 53.

See 25 Cent. Dig. tit. "Highways," § 16.

Where the lands are reclaimed, and the ways thereover are left open for use and are used by the public as highways, these acts may constitute the beginning of a prescriptive right of way, and, if continued for twenty years without interruption, raise the presumption of a grant to the public. Rosser *v.* Bunn, 66 Ala. 89.

Question for jury.— The continuous use by the public for more than ten years of a road along a mountain valley defining its course by natural limits, although it ran through an unfenced country and had never been laid out or recognized by the authorities as a public road, is sufficient to demand the submission to the jury of the right of those using it to a highway by prescription. Hall *v.* Austin, 20 Tex. Civ. App. 59, 48 S. W. 53.

78. *Arkansas.*— Brumley *v.* State, 83 Ark. 236, 103 S. W. 615.

Colorado.— Lieber *v.* People, 33 Colo. 493, 81 Pac. 270.

Illinois.— Ottawa *v.* Yentzer, 160 Ill. 509, 43 N. E. 601.

Maine.— Bethun *v.* Turner, 1 Me. 111, 10 Am. Dec. 36.

South Carolina.— Hutto *v.* Tindall, 6 Rich. 396; Gibson *v.* Durham, 3 Rich. 85.

Texas.— Cunningham *v.* San Saba County, 1 Tex. Civ. App. 480, 20 S. W. 941.

See 25 Cent. Dig. tit. "Highways," § 16.

Fencing highway.— The rule that a public road cannot be established by prescription where it runs over a prairie does not apply where it is fenced on each side. Raven *v.* Travis County, (Tex. Civ. App. 1899) 53 S. W. 355. But fencing is not always necessary to establish a highway over such lands by prescription. Shugart *v.* Halliday, 2 Ill. App. 45; Hall *v.* Austin, 20 Tex. Civ. App. 59, 48 S. W. 53. Fencing as notice of adverse claim see *infra,* II, B, 2, g, (I), note 8.

Presumption as to adverseness of user see *infra,* note 79.

Recognition, maintenance, and repair of road as evidence of existence of highway see *supra,* II, B, 2, e, (III), note 70. Failure to work or recognize road as evidence of nonexistence of highway see *supra,* II, B, 2, e, (III), note 72.

79. *Arkansas.*— Brumley *v.* State, 83 Ark. 236, 103 S. W. 615.

Colorado.— Lieber *v.* People, 33 Colo. 493, 81 Pac. 270.

Illinois.— Falter *v.* Packard, 219 Ill. 356, 76 N. E. 495; Rose *v.* Farmington, 196 Ill. 226, 63 N. E. 631; Brushy Mound *v.* McClintock, 150 Ill. 129, 36 N. E. 976.

North Carolina.— Stewart *v.* Frink, 94 N. C. 487, 55 Am. Rep. 619.

Texas.— Cunningham *v.* San Saba County, 1 Tex. Civ. App. 480, 20 S. W. 941.

Washington.— Rice *v.* Pershall, 41 Wash. 73, 82 Pac. 1038; Watson *v.* Adams County Com'rs, 38 Wash. 662, 80 Pac. 201.

See 25 Cent. Dig. tit. "Highways," § 16.

Presumption as to permission.—Where the public use a road through open and unfenced lands without any order of the county court making it a public road, and without any attempt to work it or exercise authority over it as a highway, the presumption is that the use of the road is not adverse to the rights of the owner of the land, but is by his consent. Brumley *v.* State, 83 Ark. 236, 103 S. W. 615. And see Cross *v.* State, 147 Ala. 125, 41 So. 875; Brushy Mound *v.* McClintock, 150 Ill. 129, 36 N. E. 976.

80. See *infra,* II, B, 2, g, (I).

81. See *passim,* II, B, 2.

82. *California.*— Patterson *v.* Munyan, 93 Cal. 128, 29 Pac. 250.

Illinois.— Landers *v.* Whitefield, 154 Ill. 630, 39 N. E. 656 [*overruling dictum* in Manrose *v.* Parker, 90 Ill. 581]; Green *v.* Stevens, 49 Ill. App. 24.

Indiana.— Bales *v.* Pidgeon, 129 Ind. 548, 29 N. E. 34 (holding that where adjoining landowners agree upon their division line, and establish a road supposed to be on the land of one of them, which road for fifty years is used by the subsequent owners of the land and by the public, the road cannot

prescriptive period the public authorities cannot correct the mistake by opening the road on the lines originally established.[83] However, to have this effect the user must be adverse and under claim of right, and not merely permissive,[84] and be otherwise sufficient to create a highway by prescription.[85]

(VI) *User Under Defective Proceedings to Establish Highway*[86] *or Ineffectual Dedication.* Although statutory proceedings for the establishment of a highway over private land be fatally defective, yet if the public use the *locus in quo* as a highway,[87] and the public authorities recognize it as

be closed by the owner of the other tract when he finds by a resurvey that the road is on his land instead of the adjoining land as it was supposed to be); Strong *v.* Makeever, 102 Ind. 578, 1 N. E. 502, 4 N. E. 11 (holding that a person who wishes to make the question that by mistake or otherwise the highway used is not on the proper line should pursue the proper legal remedy for the correction of the mistake before the expiration of the twenty years' use which confirms the highway as public property; merely objecting is of no avail after the expiration of that time); Lemasters *v.* State, 10 Ind. 391.

Massachusetts.— Com. *v.* Old Colony, etc., R. Co., 14 Gray 93.

Minnesota.— Meyer *v.* Petersburg, 99 Minn. 450, 109 N. W. 840, holding that where a strip of land has been claimed to be a highway by statutory user, and all provisions of the statute as to use have been complied with, including working the strip as a highway, it is a legal highway, although the landowner and the public authorities may have been mistaken as to the true location of a section line, which they believed to have been the center of the highway.

Nebraska.— Brandt *v.* Olson, 79 Nebr. 612, 113 N. W. 151, 114 N. W. 587, holding that where a highway is established presumably on a section line, and used for ten years or more by the public without objection by an adjoining landowner, and it becomes known that the road is in fact partly on his land, the right of the landowner to recover the strip of his land thus used is barred by prescription.

New Jersey.— Marlboro Tp. *v.* Van Derveer, 47 N. J. L. 259; Gulick *v.* Groendyke, 38 N. J. L. 114, holding that where a highway has been mislocated, an abutting landowner who has acquiesced therein over seventy years cannot move his fence and narrow the road used by the public.

New York.—Wakeman *v.* Wilbur, 147 N. Y. 657, 42 N. E. 341 [*reversing* 4 N. Y. Suppl. 938], where the land is worked as a highway. And see Cleveland *v.* Cleveland, 12 Wend. 172.

Ohio.— Taylor *v.* Bailey, Wright 646.

Pennsylvania.— Hancock *v.* Wyoming, 148 Pa. St. 635, 24 Atl. 88; Com. *v.* Marshall, 137 Pa. St. 170, 20 Atl. 580. *Compare* Morrow *v.* Com., 48 Pa. St. 305.

Rhode Island.— See Almy *v.* Church, 18 R. I. 182, 26 Atl. 58, holding that where a highway has been obstructed, and another way equally convenient has been in use by general and long-continued acquiescence, the latter will be considered as substituted for the original highway.

Wisconsin.— State *v.* Lloyd, 133 Wis. 468, 113 N. W. 964. And see Konkel *v.* Pella, 122 Wis. 143, 99 N. W. 453.

See 25 Cent. Dig. tit. "Highways," § 18.

Contra.— Bolton *v.* McShane, 79 Iowa 26, 44 N. W. 211; State *v.* Schielb, 47 Iowa 611; State *v.* Gould, 40 Iowa 372; State *v.* Welpton, 34 Iowa 144; State *v.* Crow, 30 Iowa 258 [all *distinguished* in Buch *v.* Flanders, 119 Iowa 164, 93 N. W. 101]; Shanline *v.* Wiltsie, 70 Kan. 177, 78 Pac. 436; Hamilton County *v.* Garrett, 62 Tex. 602. See, however, Duncombe *v.* Powers, 75 Iowa 185, 39 N. W. 261; Kelsey *v.* Furman, 36 Iowa 614 (holding that where the public have traveled for more than ten years a route deviating slightly from that originally established as a highway, by reason of an obstacle in the surveyed route of the road and pursuant to some arrangement with adjacent owners and not by mistake merely, such traveled route becomes a highway by prescription); Dodson *v.* State, (Tex. Cr. App. 1899) 49 S. W. 78.

83. Patterson *v.* Munyan, 93 Cal. 128, 29 Pac. 250; Strong *v.* Makeever, 102 Ind. 578, 1 N. E. 502, 4 N. E. 11; Lemasters *v.* State, 10 Ind. 391; Hancock *v.* Wyoming, 148 Pa. St. 635, 24 Atl. 88. And see Marlboro Tp. *v.* Van Derveer, 47 N. J. L. 259. But see Blair *v.* Boesch, 59 Iowa 554, 13 N. W. 662, holding that evidence of user is not admissible to vary the line of the road as originally surveyed.

84. Warren County *v.* Mastronardi, 76 Miss. 273, 24 So. 199; Randall *v.* Rovelstad, 105 Wis. 410, 81 N. W. 819, holding that proof of user, to establish a prescriptive right to land outside the limits of an established highway, must be clear and definite, and any mere deviation beyond the bounds which may be accounted for by topographical difficulties or carelessness of travelers as to the true line must be presumed not to be adverse. And see Konkel *v.* Pella, 122 Wis. 143, 99 N. W. 453.

85. See *passim*, II, B, 2.

86. User as aiding defective record see *infra*, II, C, 5, i, (VI), (B).

87. *Illinois.*— Elmira Highway Com'rs *v.* Osceola Highway Com'rs, 74 Ill. App. 185; Willow Branch, etc., Highway Com'rs *v.* People, 69 Ill. App. 326.

Kansas.— Griswold *v.* Huffaker, 47 Kan. 690, 28 Pac. 696, 48 Kan. 374, 29 Pac. 693.

Massachusetts.— Richards *v.* Bristol County Com'rs, 120 Mass. 401.

Michigan.— Neal *v.* Gilmore, 141 Mich. 519, 104 N. W. 609; Gage *v.* Pittsfield Tp., 120 Mich. 436, 79 N. W. 687; Grandville *v.* Jenison, 86 Mich. 567, 49 N. W. 544, 84 Mich. 54, 47 N. W. 600; Wayne County Sav. Bank

such,[88] for the requisite period, it becomes such by prescription, the user and recognition generally being referable to a claim and color of right in the public. However, in the absence of statute to the contrary, the public user, as in other cases, must be adverse and under claim or color of right, and not merely by revocable permission of the owner,[89] and otherwise sufficient to establish a highway by prescription;[90] and the land so used must be that described in the defective proceedings.[91] Similarly a highway may be established by prescription over land which the owner has made an ineffectual attempt to dedicate to the public as a highway.[92]

f. Duration of User; Prescriptive Period. The period of time during which the user must continue in order to create a highway by prescription varies in the different states.[93] Anciently prescription implied a claim to an incorporeal hereditament arising from the same having been enjoyed from time immemorial.[94]

v. Stockwell, 84 Mich. 586, 48 N. W. 174, 22 Am. St. Rep. 708; Potter *v.* Safford, 50 Mich. 46, 14 N. W. 694, so holding under statute. See Green *v.* Belitz, 34 Mich. 512.

Minnesota.— Rogers *v.* Aitkin, 77 Minn. 539, 80 N. W. 702.

Missouri.— Harper *v.* Morse, 46 Mo. App. 470; State *v.* Pullen, 43 Mo. App. 620, it being expressly so declared by statute.

Montana.— State *v.* Auchard, 22 Mont. 14, 55 Pac. 361.

Nebraska.— Lydick *v.* State, 61 Nebr. 309, 85 N. W. 70; Beatrice *v.* Black, 28 Nebr. 263, 44 N. W. 189; Langdon *v.* State, 23 Nebr. 509, 37 N. W. 79.

New Hampshire.— Bryant *v.* Tamworth, 68 N. H. 483, 39 Atl. 431.

New York.— See Wakeman *v.* Wilbur, 147 N. Y. 657, 42 N. E. 341 [*reversing* 4 N. Y. Suppl. 938].

Oregon.— Nosler *v.* Coos Bay R. Co., 39 Oreg. 331, 64 Pac. 644; Bayard *v.* Standard Oil Co., 38 Oreg. 438, 63 Pac. 614.

Pennsylvania.— Ide *v.* Lake Tp., 9 Kulp 192.

Wisconsin.— West Bend *v.* Mann, 59 Wis. 69, 17 N. W. 972; Tomlinson *v.* Wallace, 16 Wis. 224, it being expressly so declared by statute.

See 25 Cent. Dig. tit. "Highways," § 17.

Operation of statute.—Wis. Laws (1857), c. 19, embodying the rule stated in the text, although prospective in its operation, applies as well to highways laid out and recorded and opened and worked before its passage as after. Tomlinson *v.* Wallace, 16 Wis. 224 [*overruling* State *v.* Atwood, 11 Wis. 422].

Question for jury.— Under the Wisconsin statutes, notwithstanding informalities may have intervened in laying out a highway, it is proper for the court to submit the question of its legality to the jury upon the record and evidence as to its having been opened and worked. Tomlinson *v.* Wallace, 16 Wis. 224.

88. Elmira Highway Com'rs *v.* Osceola Highway Com'rs, 74 Ill. App. 185; Willow Branch, etc., Highway Com'rs *v.* People, 69 Ill. App. 326; Rogers *v.* Aitkin, 77 Minn. 539, 80 N. W. 702; Tomlinson *v.* Wallace, 16 Wis. 224. And see Wakeman *v.* Wilbur, 147 N. Y. 657, 42 N. E. 341 [*reversing* 4 N. Y. Suppl. 938].

89. Whitesides *v.* Earles, (Tenn. Ch. App. 1901) 61 S. W. 1038.

90. See *passim*, II, B, 2.

91. Watrous *v.* Southworth, 5 Conn. 305; Horn *v.* Williamson, 4 Nebr. (Unoff.) 763, 96 N. W. 178. And see Shell *v.* Poulson, 23 Wash. 535, 63 Pac. 204; Bartlett *v.* Beardmore, 74 Wis. 485, 43 N. W. 492.

However, proof that part of an entire highway the laying out of which was defective has been used by the public for the prescriptive period is evidence of a legal highway as to the part so used, although no distinct act of acceptance by the town be shown. State *v.* Morse, 50 N. H. 9.

Width of highway by prescription under defective proceedings to establish see *infra*, II, B, 6, b, (II).

92. Com. *v.* Henchey, 196 Mass. 300, 82 N. E. 4; Bassett *v.* Harwich, 180 Mass. 585, 62 N. E. 974 [*overruling* in effect Moffatt *v.* Kenny, 174 Mass. 311, 54 N. E. 850].

93. See cases cited *infra*, this note *et seq.*

Period held sufficient see Canday *v.* Lambert, 2 Root (Conn.) 173 (forty years); Smith *v.* Illinois Cent. R. Co., 105 S. W. 96, 31 Ky. L. Rep. 1323 (twenty-five years); Reed *v.* Northfield, 13 Pick. (Mass.) 94, 23 Am. Dec. 662 (forty years); Gulick *v.* Groendyke, 38 N. J. L. 114 (seventy years).

Period held insufficient see Oliphant *v.* Atchison County Com'rs, 18 Kan. 386, five years.

By the law of Scotland, where the English Prescription Act of 1832 is not in force, forty years' user of a road by the public is sufficient to establish the right of user; but evidence of user as of right for a period short of forty years is not sufficient, unless the circumstances are such that the user raises a presumption of prior user of the same character extending over the required period. Edinburgh Magistrates *v.* North British R. Co., 5 F. (Ct. Sess.) 620.

94. Washburn Easem. & Serv. 124. And see Riley *v.* Buchanan, 116 Ky. 625, 76 S. W. 527, 25 Ky. L. Rep. 863, 63 L. R. A. 642; Witt *v.* Hughes, 66 S. W. 281, 23 Ky. L. Rep. 1836; Clark *v.* Hull, 184 Mass. 164, 68 N. E. 60; Com. *v.* Coupe, 128 Mass. 63; Folger *v.* Worth, 19 Pick. (Mass.) 108; Odiorne *v.* Wade, 5 Pick. (Mass.) 421; Hancock *v.* Wyoming Borough, 148 Pa. St. 635, 24 Atl. 88; State *v.* Cumberland, 6 R. I. 496 [*cited* in

At one time this period was fixed by statute [95] at the commencement of the reign of Richard I, A. D. 1189.[96] Although this statute applied to actions for the recovery of land only, and not to those for the recovery of incorporeal things, the judges proceeded to apply the rule as to prescription established by the statute to incorporeal hereditaments, and among others to easements. Subsequently when by statute [97] the time for bringing a possessory action to recover land was reduced to twenty years, it might have been expected that the judges would, as in the case of the earlier act, apply the analogy of this act to incorporeal things. This, however, it seems, they did not do, but they effected the same end by the adoption of the fiction that a grant of the right would be presumed if it had been exercised for a period of twenty years, this doctrine of lost grant being in reality prescription under another name, shortened in analogy to the period of limitation fixed by the statute of James.[98] Whether this doctrine applies in strict propriety to the creation of highways by user has been elsewhere discussed.[99] However that may be, many courts of this country have recognized the twenty-years' period as one sufficient for and necessary to the creation of a highway by adverse user.[1] By the great weight of modern authority, however, in the absence of any statute specially applicable to highways, the duration of the user is governed by analogy by the local statute fixing the time for bringing an action for land, whether that time be fixed at twenty years or a greater or lesser period.[2] In many states, as

Hampson *v.* Taylor, 15 R. I. 83, 8 Atl. 331, 23 Atl. 732].

95. Statute of Westminster I, c. 39 [3 Edw. I (A. D. 1275)].

96. Washburn Easem. & Serv. 124.

97. St. 21 Jac. I, c. 16 (A. D. 1623).

98. 2 Tiffany Real Prop. § 445; Washburn Easem. & Serv. 125.

99. See *supra*, II, B, 1.

1. *Alabama.*— Jones *v.* Bright, 140 Ala. 268, 37 So. 79; Harper *v.* State, 109 Ala. 66, 19 So. 901; Rosser *v.* Bunn, 66 Ala. 89.

District of Columbia.— District of Columbia *v.* Robinson, 14 App. Cas. 512 [*affirmed* in 180 U. S. 92, 21 S. Ct. 283, 45 L. ed. 440].

Georgia.— Southern R. Co. *v.* Combs, 124 Ga. 1004, 53 S. E. 508 (twenty years sufficient, if not necessary); Johnson *v.* State, 1 Ga. App. 195, 58 S. E. 265 (twenty years necessary).

Illinois.— Grube *v.* Nichols, 36 Ill. 92; Gentleman *v.* Soule, 32 Ill. 271, 83 Am. Dec. 264; Lewiston *v.* Proctor, 27 Ill. 414; Daniels *v.* People, 21 Ill. 439; Toof *v.* Decatur, 19 Ill. App. 204.

Maine.— State *v.* Bunker, 59 Me. 366; Mayberry *v.* Standish, 56 Me. 342; Estes *v.* Troy, 5 Me. 368; Rowell *v.* Montville, 4 Me. 270.

Maryland.— Thomas *v.* Ford, 63 Md. 346, 52 Am. Rep. 513; Day *v.* Allender, 22 Md. 511.

Massachusetts.—Com. *v.* Coupe, 128 Mass. 63; Jennings *v.* Tisbury, 5 Gray 73; Com. *v.* Low, 3 Pick. 408.

New Jersey.— Prudden *v.* Lindsley, 29 N. J. Eq. 615; Holmes *v.* Jersey City, 12 N. J. Eq. 299, *semble.*

North Carolina.— Tise *v.* Whitaker-Harvey Co., 146 N. C. 374, 59 S. E. 1012; State *v.* Wolf, 112 N. C. 889, 17 S. E. 528; Stewart *v.* Frink, 94 N. C. 487, 55 Am. Rep. 619; Kennedy *v.* Williams, 87 N. C. 6; State *v.* Purify, 86 N. C. 681; Boyden *v.* Achenbach, 79 N. C. 539; State *v.* Marble, 26 N. C. 318.

South Carolina.— State *v.* Washington, 80 S. C. 376, 61 S. E. 896; Kirby *v.* Southern R. Co., 63 S. C. 494, 41 S. E. 765; Hutto *v.* Tindall, 6 Rich. 396.

Tennessee.— Raht *v.* Southern R. Co., (Ch. App. 1897) 50 S. W. 72; Le Roy *v.* Leonard, (Ch. App. 1895) 35 S. W. 884.

Wisconsin.— State *v.* Lloyd, 133 Wis. 468, 113 N. W. 964.

United States.— Hull *v.* Richmond, 12 Fed. Cas. No. 6,861, 2 Woodb. & M. 337.

See 25 Cent. Dig. tit. "Highways," § 8.

2. *Arkansas.*— Patton *v.* State, 50 Ark. 53, 6 S. W. 227; Howard *v.* State, 47 Ark. 431, 2 S. W. 331.

California.—Hartley *v.* Vermillion, 141 Cal. 339, 74 Pac. 987, (1902) 70 Pac. 273; Schwerdtle *v.* Placer County, 108 Cal. 589, 41 Pac. 448; Patterson *v.* Munyan, 93 Cal. 128, 29 Pac. 250.

Colorado.— Starr *v.* People, 17 Colo. 458, 30 Pac. 64.

Iowa.— Davis *v.* Bonaparte, 137 Iowa 196, 114 N. W. 896; Whetstone *v.* Hill, 130 Iowa 637, 105 N. W. 193; Cedar Rapids *v.* Young, 119 Iowa 552, 93 N. W. 567; McAllister *v.* Pickup, 84 Iowa 65, 50 N. W. 556; State *v.* Green, 41 Iowa 693; State *v.* Tucker, 36 Iowa 485; Ewell *v.* Greenwood, 26 Iowa 377; Keyes *v.* Taft, 19 Iowa 123.

Kansas.—Meade *v.* Topeka, 75 Kan. 61, 88 Pac. 574; Topeka *v.* Cowee, 48 Kan. 345, 29 Pac. 560; State *v.* Horn, 35 Kan. 717, 12 Pac. 148; Missouri, etc., R. Co. *v.* Long, 27 Kan. 684. And see Oliphant *v.* Atchison County Com'rs, 18 Kan. 386, holding that the public acquire no right to the possession of a highway by mere prescription any sooner than an individual does to the land he occupies.

Kentucky.— Riley *v.* Buchanan, 116 Ky. 625, 76 S. W. 527, 25 Ky. L. Rep. 863, 63 L. R. A. 642; Louisville, etc., R. Co. *v.* Com.,

has been seen, the period for prescribing a highway has been specially fixed by statute.[3] The same period of time is necessary in order to establish a highway by prescription over lands formerly occupied by a highway which has been legally discontinued,[4] or over public lands of the United States a right of way over which has been granted by act of congress for highway purposes,[5] as is necessary to establish a prescriptive highway over private lands in general.

g. Knowledge, Intent, and Consent of Owner of Fee; Mistake — (i) *Knowledge.* In order that a highway over private lands may be established by prescription the owner must have had knowledge of the adverse user,[6] especially where the lands are wild and unoccupied.[7] If he has no actual knowledge of the

104 Ky. 35, 46 S. W. 207; Porter *v.* Clinton, 74 S. W. 232, 24 Ky. L. Rep. 2435.

Missouri.— Longworth *v.* Sedevic, 165 Mo. 221, 65 S. W. 260; Kansas City Milling Co. *v.* Riley, 133 Mo. 574, 34 S. W. 835; State *v.* Wells, 70 Mo. 635; State *v.* Walters, 69 Mo. 463; State *v.* Young, 27 Mo. 259; State *v.* Transue, 131 Mo. App. 323, 111 S. W. 523; Dow *v.* Kansas City Southern R. Co., 116 Mo. App. 555, 92 S. W. 744; Power *v.* Dean, 112 Mo. App. 288, 86 S. W. 1100; State *v.* Macy, 72 Mo. App. 427.

Montana.— State *v.* Auchard, 22 Mont. 14, 55 Pac. 361.

Nebraska.— Nelson *v.* Sneed, 76 Nebr. 201, 107 N. W. 255; Kansas City, etc., R. Co. *v.* State, 74 Nebr. 868, 105 N. W. 713; Bleck *v.* Keller, 72 Nebr. 826, 103 N. W. 674; Gehris *v.* Fuhrman, 68 Nebr. 325, 94 N. W. 133; Hill *v.* McGinnis, 64 Nebr. 187, 89 N. W. 783; Lewis *v.* Lincoln, 55 Nebr. 1, 75 N. W. 154; Engle *v.* Hunt, 50 Nebr. 358, 69 N. W. 970; Shaffer *v.* Stull, 32 Nebr. 94, 48 N. W. 882; Graham *v.* Hartnett, 10 Nebr. 517, 7 N. W. 280.

Oregon.— Ridings *v.* Marion County, 50 Oreg. 30, 91 Pac. 22; Wallowa County *v.* Wade, 43 Oreg. 253, 72 Pac. 793; Bayard *v.* Standard Oil Co., 38 Oreg. 438, 63 Pac. 614; Douglas County Road Co. *v.* Abraham, 5 Oreg. 318.

Pennsylvania.— Com. *v.* Cole, 26 Pa. St. 187; *In re* Springfield Tp. Road, 14 Montg. Co. Rep. 97.

Texas.— Evans *v.* Scott, 37 Tex. Civ. App. 373, 83 S. W. 874 (holding that where the prescriptive period to establish the public right to a road is not fixed by statute, the longest period of limitation in actions for land, which is ten years, will control); Hall *v.* Austin, 20 Tex. Civ. App. 59, 48 S. W. 53; Cunningham *v.* San Saba County, 1 Tex. Civ. App. 480, 20 S. W. 941.

Vermont.— Morse *v.* Ranno, 32 Vt. 600; State *v.* Wilkinson, 2 Vt. 480, 21 Am. Dec. 560.

Washington.— State *v.* Rixie, 50 Wash. 676, 97 Pac. 804; Vogler *v.* Anderson, 46 Wash. 202, 89 Pac. 551, 123 Am. St. Rep. 932, 9 L. R. A. N. S. 1223. And see Seattle *v.* Smithers, 37 Wash. 119, 79 Pac. 615, holding that a road which has been used by the general public adversely for the period of limitation for quieting title to land becomes a public highway by prescription.

See 25 Cent. Dig. tit. "Highways," § 8.

Amendment of statute pending user.— Where the period of limitation when the adverse use of a highway began was twenty years, a subsequent statute changing the period of limitation to ten years applies to such highway. State *v.* Macy, 72 Mo. App. 427.

3. See *supra*, II, B, 1; II, B, 2, e, (III).

4. Coakley *v.* Boston, etc., R. Co., 159 Mass. 32, 33 N. E. 930.

5. Vogler *v.* Anderson, 46 Wash. 202, 89 Pac. 551, 123 Am. St. Rep. 932, 9 L. R. A. N. S. 1223. See, however, Montgomery *v.* Somers, 50 Oreg. 259, 90 Pac. 674.

6. *District of Columbia.*— District of Columbia *v.* Robinson, 14 App. Cas. 512 [*affirmed* in 180 U. S. 92, 21 S. Ct. 283, 45 L. ed. 440].

Illinois.— Chicago *v.* Galt, 224 Ill. 421, 79 N. E. 701; Falter *v.* Packard, 219 Ill. 356, 76 N. E. 495; Rose *v.* Farmington, 196 Ill. 226, 63 N. E. 631; Madison Tp. *v.* Gallagher, 159 Ill. 105, 42 N. E. 316; Chicago *v.* Chicago, etc., R. Co., 152 Ill. 561, 38 N. E. 768; Dickerman *v.* Marion, 122 Ill. App. 154.

Iowa.— State *v.* Kansas City, etc., R. Co., 45 Iowa 139.

Kansas.— State *v.* Horn, 35 Kan. 717, 12 Pac. 148; Missouri, etc., R. Co. *v.* Long, 27 Kan. 684.

Maine.— Bethum *v.* Turner, 1 Me. 111, 10 Am. Dec. 36.

Nebraska.— Engle *v.* Hunt, 50 Nebr. 358, 69 N. W. 970; Shaffer *v.* Stull, 32 Nebr. 94, 48 N. W. 882; Graham *v.* Hartnett, 10 Nebr. 517, 7 N. W. 280.

Ohio.— Reed *v.* Harlan, 2 Ohio Dec. (Reprint) 553, 3 West. L. Month. 632.

Virginia.— Gaines *v.* Merryman, 95 Va. 660, 29 S. E. 738.

Washington.— Rice *v.* Pershall, 41 Wash. 73, 82 Pac. 1038.

See 25 Cent. Dig. tit. "Highways," § 13.

It seems to be otherwise under the New York highway prescription act. Devenpeck *v.* Lambert, 44 Barb. (N. Y.) 596.

Knowledge of claim of right.— Under Iowa Code (1873), § 2031, providing that adverse possession must be proved by evidence distinct from the use, and that the one against whom the claim is made had express notice thereof, a highway cannot be established by user alone, although the owner had knowledge of it, unless he also had express notice that a highway was claimed independent of the mere use. State *v.* Mitchell, 58 Iowa 567, 12 N. W. 598.

7. Gray *v.* Haas, 93 Iowa 502, 67 N. W. 394; Topeka *v.* Cowee, 48 Kan. 345, 29 Pac. 560; Van Wanning *v.* Deeter, 78 Nebr. 282,

user, it must be open and of such a character, and the facts and circumstances must be such, as to put him on notice thereof and of the fact that a public right of travel is claimed.[8] As just intimated, however, actual knowledge is not necessary, but it may be implied from the character of the user and the facts and circumstances of the case.[9]

(II) *Intent; Consent; Mistake.* The intent of the landowner and his consent or dissent to the public user of his land are immaterial, standing alone, to the question whether a highway has been established by prescription.[10] The fact that he intends to abandon his land to the public and acquiesces in its use as a highway does not, on the one hand, detract from the hostility of the public's user so as to preclude prescription;[11] nor, on the other hand, does the fact that the owner does not intend to abandon his land, and dissents to its user as a highway, preclude the public from acquiring a highway over it,[12] unless he does some positive act amounting to an interruption of the adverse user.[13] So the fact that the owner's acquiescence in the adverse user is due to a mistaken belief that a highway over the land has been duly established by the public authorities does not defeat the public's prescriptive right thereto.[14]

3. Against Whom Prescription May Be Asserted.[15] It has been seen that by the better opinion the doctrine of prescription as applied to highways is based, not on the presumption of a lost grant, but on the presumption of an antecedent exercise of the right of eminent domain by the public authorities;[16] and since the exercise of this power is not affected by any legal disability of the landowner,[17] it should follow that a highway may be acquired by prescription over lands owned by a person who is *non sui juris*.[18] Most of the cases in which this question is

110 N. W. 703, 112 N. W. 902; Watson *v.* Adams County, 38 Wash. 662, 80 Pac. 201.

8. O'Connell *v.* Chicago Terminal Transfer R. Co., 184 Ill. 308, 56 N. E. 355; Gentleman *v.* Soule, 32 Ill. 271, 83 Am. Dec. 264; State *v.* Kansas City, etc., R. Co., 45 Iowa 139; State *v.* Wolf, 112 N. C. 889, 17 S. E. 528; Rice *v.* Pershall, 41 Wash. 73, 82 Pac. 1038.

Necessity of fencing as notice.—Where a pass through the mountains was the only available passway to the public, the fact that the public had not fenced it would not bar their acquiring a prescriptive right from the beginning of such use, such fence being unnecessary as notice. Hall *v.* Austin, 20 Tex. Civ. App. 59, 48 S. W. 53. And see *supra*, II, B, 2, e, (IV), note 78.

Presumption of knowledge.—While long continued notoriety of a fact is usually sufficient to raise a presumption that persons affected thereby or interested therein had full notice of the matter, yet in the case of wild and uninclosed land the presumption would not so readily arise, and adding a further circumstance of the non-residence of the owner, or the location of the lands at a distance from his place of residence, the law will not presume that the notorious use as a highway is known to the owner. State *v.* Kansas City, etc., R. Co., 45 Iowa 139. And see Topeka *v.* Cowee, 48 Kan. 345, 29 Pac. 560; Bethum *v.* Turner, 1 Me. 111, 10 Am. Dec. 36; Watson *v.* Adams County, 38 Wash. 662, 80 Pac. 201. See, however, Dimon *v.* People, 17 Ill. 416. *Compare* State *v.* Teeters, 97 Iowa 458, 66 N. W. 754.

Necessity of acts indicating adverse user under claim of right see *supra*, II, B, 2, e, (I), notes 60, 61.

9. Barnes *v.* Daveck, 7 Cal. App. 220, 94 Pac. 779; Chicago *v.* Galt, 224 Ill. 421, 79 N. E. 701. And see cases cited *supra*, note 8.

10. *California.*— Freshour *v.* Hihn, 99 Cal. 443, 34 Pac. 87.

Idaho.— Meservey *v.* Gulliford, 14 Ida. 133, 93 Pac. 780.

Illinois.— Peotone *v.* Illinois Cent. R. Co., 224 Ill. 101, 79 N. E. 678; Madison Tp. *v.* Gallagher, 159 Ill. 105, 42 N. E. 316.

Indiana.— Strong *v.* Makeever, 102 Ind. 578, 1 N. E. 502, 4 N. E. 11 [*overruling* Greene County *v.* Huff, 91 Ind. 333]; McClaskey *v.* McDaniel, 37 Ind. App. 59, 74 N. E. 1023; Brown *v.* Hines, 16 Ind. App. 1, 44 N. E. 655.

Michigan.— Ellsworth *v.* Grand Rapids, 27 Mich. 250.

New York.— Speir *v.* Utrecht, 121 N. Y. 420, 24 N. E. 692; Devenpeck *v.* Lambert, 44 Barb. 596.

See 25 Cent. Dig. tit. "Highways," § 13.

User under revocable license or permission from the owner, however, is insufficient to prescribe a highway. See *supra*, II, B, 2, e, (I).

11. See *supra*, II, B, 2, e, (I).

12. See cases cited *supra*, note 10.

13. See *supra*, II, B, 2, d.

14. State *v.* Waterman, 79 Iowa 360, 44 N. W. 677; Duncombe *v.* Powers, 75 Iowa 185, 39 N. W. 261.

Mistake as to location of established highway see *supra*, II, B, 2, e, (V).

15. Prescription against sovereign see *infra*, II, B, 4.

16. See *supra*, II, B, 1.

17. See Eminent Domain, 15 Cyc. 611.

18. Elliott R. & St. (2d ed.) §§ 177, 180.

involved, however, hold to the contrary,[19] deciding the question as if prescription were based on the presumption of a lost grant,[20] even in states where the presumption of an antecedent exercise of the power of eminent domain is recognized as the basis of highway prescription.[21] However this may be, it is well settled that a statute of limitation, in the absence of a saving clause, runs against all persons, whether *sui juris* or not;[22] and since a statute prescribing a period for the establishment of a highway by user is in effect a statute of limitation, it follows that in those states where such a statute exists the legal disability of the owner of the *locus in quo* does not, in the absence of a saving clause, affect the establishment of a highway by user.[23] In any event prescription is not defeated by a disability not existing when the user began but subsequently intervening within the prescriptive period.[24] A highway over lands held in trust may be established by prescription against both trustee and beneficiary.[25]

4. Lands Subject to Prescription.[26] A highway may be established by prescription over public lands,[27] lands once covered by a highway since discon-

19. Austin *v.* Hall, 93 Tex. 591, 57 S. W. 563 (where the right is asserted against one other than defendant or some person under whom he claims); Wright *v.* Fanning, (Tex. Civ. App. 1905) 86 S. W. 786; Evans *v.* Scott, 37 Tex. Civ. App. 373, 83 S. W. 874.

Coverture of landowner precludes prescription. State *v.* Macy, 67 Mo. App. 326; State *v.* Bishop, 22 Mo. App. 435. Otherwise under the Pennsylvania married women's act. Schenley *v.* Com., 36 Pa. St. 29, 78 Am. Dec. 359.

Infancy of landowner precludes prescription. State *v.* Bishop, 22 Mo. App. 435, *semble*. See Infants, 22 Cyc. 528.

Insanity of landowner precludes prescription. Moore *v.* Waco, 85 Tex. 206, 20 S. W. 61.

Burden of proof.—Where persons assert a right to a road over the land of another by prescription, the burden is on them to establish that the owners were free from legal disability and were persons against whom a prescriptive right could be acquired by adverse user. Austin *v.* Hall, 93 Tex. 591, 57 S. W. 563; Wright *v.* Fanning, (Tex. Civ. App. 1905) 86 S. W. 786; Evans *v.* Scott, 37 Tex. Civ. App. 373, 83 S. W. 874.

Cases involving highways by dedication implied from user are not in point on this question, since dedication is based on the landowner's consent, express or implied (see Dedication, 13 Cyc. 452), and not on any presumption of an antecedent exercise of the power of eminent domain.

Cases involving private easements are not in point on this question, since the doctrine of prescription as applied to such easements is properly referable to the presumption of a lost grant (see Easements, 14 Cyc. 1145), and not to any presumption of an antecedent exercise of the power of eminent domain.

20. Austin *v.* Hall, 93 Tex. 591, 57 S. W. 563; Evans *v.* Scott, 37 Tex. Civ. App. 373, 83 S. W. 874.

21. Galveston, etc., R. Co. *v.* Baudat, 21 Tex. Civ. App. 236, 51 S. W. 541.

22. See Limitations of Actions, 25 Cyc. 1226 *et seq.*

23. Devenpeck *v.* Lambert, 44 Barb. (N. Y.) 596.

24. See Easements, 14 Cyc. 1153. See also Limitations of Actions, 25 Cyc. 1267.

Tacking disabilities.— The two disabilities of infancy and coverture cannot be tacked so as to defeat prescription following the landowner's attainment of majority. State *v.* Bishop, 22 Mo. App. 435, as where a woman under age who owns land which the public is using adversely as a highway marries during infancy, and the user continues for the necessary period after she reaches majority. See also Reimer *v.* Stuber, 20 Pa. St. 458, 59 Am. Dec. 744. And see Limitations of Actions, 25 Cyc. 1270.

25. Prudden *v.* Lindsley, 29 N. J. Eq. 615, although the trust, which was created by private individuals, was in favor of the public.

26. **Wild and unoccupied land** see *supra*, II, B, 2, e, (iv).

Change of town way to county way see *infra*, II, B, 6, a.

27. Dimon *v.* People, 17 Ill. 416, *semble*. *Contra*, Great Northern R. Co. *v.* Viborg, 17 S. D. 374, 97 N. W. 6, *semble*. For other cases to the contrary see *infra*, this note, next paragraph.

United States lands.—A prescriptive right to a highway may attach to lands embraced in U. S. Rev. St. (1878) § 2477 [U. S. Comp. St. (1901) p. 1567], granting the right of way for the construction of highways over public lands not reserved for public use. Bequette *v.* Patterson, 104 Cal. 282, 37 Pac. 917; McRose *v.* Bottyer, 81 Cal. 122, 22 Pac. 393; Walcott Tp. *v.* Skauge, 6 N. D. 382, 71 N. W. 544; Great Northern R. Co. *v.* Viborg, 17 S. D. 374, 97 N. W. 6; State *v.* Rixie, 50 Wash. 676, 97 Pac. 804; Peterson *v.* Baker, 39 Wash. 275, 81 Pac. 681; Smith *v.* Mitchell, 21 Wash. 536, 58 Pac. 667, 75 Am. St. Rep. 858, holding that a prescriptive right to a highway may attach while land is held under a preëmption or homestead claim and prior to the issuance of a patent by the United States. And see Murray *v.* Butte, 7 Mont. 61, 14 Pac. 656; Montgomery *v.* Somers, 50 Oreg. 259, 90 Pac. 674. See also Public Lands, 32 Cyc. 866. *Contra*, Cross *v.* State, 147 Ala. 125, 41 So. 875; Smith *v.* Smith,

tinued,[28] a railroad right of way,[29] a previously established private way,[30] common lands,[31] and lands held by proprietors in common,[32] provided in all these cases that the user is otherwise sufficient to establish a highway by prescription.[33]

5. Effect of Prescription. User of land as a highway for the prescriptive period, the user being otherwise sufficient to establish a highway by prescription,[34] vests an indefeasible right in the public so to use the land,[35] of which right they cannot be divested,[36] save by alteration,[37] vacation,[38] or abandonment [39] of the highway. This right inures to the benefit of any person who has an interest in maintaining the road,[40] and it is not lost by the fact that the principal use of the road has become beneficial to only one person.[41]

6. Character and Extent of Highway — a. Town or County Way. In some of the New England states a county highway, and not a town way, is generally presumed from mere use and enjoyment; [42] but once a town way is duly estab-

34 Kan. 293, 8 Pac. 385, although the road be occupied by an intending homesteader.

State lands.—A highway may be established by prescription over public school lands. Wallowa County *v.* Wade, 43 Oreg. 253, 72 Pac. 793.

Municipal lands.—Although land be set aside for a public square, the public may acquire a highway across it by user. Green County *v.* Huff, 91 Ind. 333.

Saving questions for review.— The objection that a highway cannot be prescribed over lands owned by the United States cannot be raised for the first time on appeal. Parkey *v.* Galloway, 147 Mich. 693, 111 N. W. 348.

28. Coakley *v.* Boston, etc., R. Co., 159 Mass. 32, 33 N. E. 930, *semble*. And see Larry *v.* Lunt, 37 Me. 69.

29. Peotone *v.* Illinois Cent. R. Co., 224 Ill. 101, 79 N. E. 678; Blumenthal *v.* State, 21 Ind. App. 665, 51 N. E. 496; Marino *v.* Central R. Co., 69 N. J. L. 628, 56 Atl. 306, *semble*.

Otherwise by statute in Massachusetts. See Aiken *v.* New York, etc., R. Co., 188 Mass. 547, 74 N. E. 929.

30. *Alabama.*— Harper *v.* State, 109 Ala. 66, 19 So. 901, *semble*.

Illinois.— Madison Tp. *v.* Gallagher, 159 Ill. 105, 42 N. E. 316; Bolo Tp. *v.* Liszewski, 116 Ill. App. 135, both cases so holding under highway prescription acts.

Iowa.— Breneman *v.* Burlington, etc., R. Co., 92 Iowa 755, 60 N. W. 176, *semble*.

Kentucky.— Smythe *v.* Cleary, 11 Ky. L. Rep. 328.

Massachusetts.—Weld *v.* Brooks, 152 Mass. 297, 25 N. E. 719; Com. *v.* Petitcler, 110 Mass. 62; Taylor *v.* Boston Water Power Co., 12 Gray 415.

North Carolina.— Davis *v.* Ramsey, 50 N. C. 236, *semble*.

Wisconsin.— Frye *v.* Highland, 109 Wis. 292, 85 N. W. 351, *semble*.

See 25 Cent. Dig. tit. "Highways," § 15.

As against landowner not a party to suit. —Where part of an alleged way is over a private alley way owned by two in common, the court will not declare the existence of such alleged way unless both the owners of the private way are before the court. In such a case the court would rather presume a license by the absent owner than to declare that the use was adverse without his being heard. South Branch R. Co. *v.* Parker, 41 N. J. Eq. 489, 5 Atl. 641.

There must be clear evidence of a change to a public way in such case. Hall *v.* McLeod, 2 Metc. (Ky.) 98, 74 Am. Dec. 400; Aiken *v.* New York, etc., R. Co., 188 Mass. 547, 74 N. E. 929; Frye *v.* Highland, 109 Wis. 292, 85 N. W. 351. And see Miles *v.* Postal Cable Tel. Co., 55 S. C. 403, 33 S. E. 493; State *v.* McCabe, 74 Wis. 481, 43 N. W. 322.

31. Veale *v.* Boston, 135 Mass. 187 [*distinguished* in McKay *v.* Reading, 184 Mass. 140, 68 N. E. 43 (*citing* Emerson *v.* Wiley, 7 Pick. (Mass.) 68)].

32. Folger *v.* Worth, 19 Pick. (Mass.) 108.

33. See *supra*, II, B, 2, *passim*.

34. Sufficiency of user see *supra*, II, B, 2, *passim*.

35. Ft. Wayne *v.* Coombs, 107 Ind. 75, 7 N. E. 743, 57 Am. Rep. 82; Devenpeck *v.* Lambert, 44 Barb. (N. Y.) 596.

Presumptions.— Mere user of land as a highway for the prescriptive period is only *prima facie* evidence of a right so to use it; but the right is conclusively established if the user was adverse and under claim of right and not merely by license of the owner, and also exclusive, continuous, and uninterrupted, and with the owner's knowledge and acquiescence. Washburn Easem. & Serv. 66, 67 [*cited* erroneously in Falter *v.* Packard, 219 Ill. 356, 76 N. E. 495].

Acquisition of highway by prescription subject to peculiar privilege of landowner see *infra*, III, C, 2.

36. Kyle *v.* Kosciusko County, 94 Ind. 115 (by the owner of the fee); Campau *v.* Detroit, 104 Mich. 560, 62 N. W. 718. And see LeRoy *v.* Leonard, (Tenn. Ch. App. 1895) 35 S. W. 884; Yakima County *v.* Conrad, 26 Wash. 155, 66 Pac. 441.

37. See *infra*, II, D, 1, a, (VI).

38. See *infra*, II, D, 2, e.

39. See *infra*, II, D, 3.

40. Hall *v.* Austin, 20 Tex. Civ. App. 59, 48 S. W. 53.

Rights of abutting landowners see *infra*, II, C.

41. Galveston, etc., R. Co. *v.* Baudat, 21 Tex. Civ. App. 236, 51 S. W. 541.

Abandonment by nonuser see *infra*, II, D, 3, b.

42. Stedman *v.* Southbridge, 17 Pick.

lished, long continued user of it by the public does not make it a county way by prescription.[43]

b. Extent — (i) *In General.* Generally speaking, the extent of a prescriptive highway is governed by the extent of the user.[44] So it is frequently said that the width of the highway is measured by the actual user.[45] According to many cases, however, this statement is too broad, and the width is to be determined by what is reasonably necessary for the public easement of travel [46] and for ordinary repairs and improvements,[47] or by the usual width of highways in the locality,[48] the question of width being one of fact for the determination of the jury.[49] The question of the width of a highway by user is affected in some states

(Mass.) 162; Com. *v.* Newbury, 2 Pick. (Mass.) 51.

43. Bigelow *v.* Hillman, 37 Me. 52; Coakley *v.* Boston, etc., R. Co., 159 Mass. 32, 33 N. E. 930.

44. Wayne County Sav. Bank *v.* Stockwell, 84 Mich. 586, 48 N. W. 174, 22 Am. St. Rep. 708.

45. *California.*— Cooper *v.* Monterey County, 104 Cal. 437, 38 Pac. 106.

Illinois.— Samuell *v.* Sherman, 170 Ill. 265, 48 N. E. 576. *Compare* Konkel *v.* Pella, 122 Wis. 143, 99 N. W. 453.

Indiana.— Anderson *v.* Huntington, 40 Ind. App. 130, 81 N. E. 223.

Iowa.— Davis *v.* Bonaparte, 137 Iowa 196, 114 N. W. 896; Haan *v.* Meester, 132 Iowa 709, 109 N. W. 211.

Kansas.— Meade *v.* Topeka, 75 Kan. 61, 88 Pac. 574.

Michigan.—Scheimer *v.* Price, 65 Mich. 638, 32 N. W. 873. See, however, Michigan cases cited *infra*, note 50.

Minnesota.— Arndt *v.* Thomas, 93 Minn. 1, 100 N. W. 378, 106 Am. St. Rep. 418; Prescott *v.* Beyer, 34 Minn. 493, 26 N. W. 732, width limited to width of grading and user.

Montana.— State *v.* Auchard, 22 Mont. 14, 55 Pac. 361.

Oregon.— Montgomery *v.* Somers, 50 Oreg. 259, 90 Pac. 674; Bayard *v.* Standard Oil Co., 38 Oreg. 438, 63 Pac. 614.

Vermont.— Morse *v.* Ranno, 32 Vt. 600; State *v.* Trask, 6 Vt. 355, 27 Am. Dec. 554.

Wisconsin.— Konkel *v.* Pella, 122 Wis. 143, 99 N. W. 453. *Compare* Samuell *v.* Sherman, 170 Ill. 265, 48 N. E. 576.

United States.— District of Columbia *v.* Robinson, 180 U. S. 92, 21 S. Ct. 283, 45 L. ed. 440 [*affirming* 14 App. Cas. (D. C.) 512].

See 25 Cent. Dig. tit. "Highways," § 21.

However, the width is not necessarily limited to the traveled track made by passing vehicles (Lawrence *v.* Mt. Vernon, 35 Me. 100; Tilton *v.* Wenham, 172 Mass. 407, 52 N. E. 514; Hannum *v.* Belchertown, 19 Pick. (Mass.) 311; Sprague *v.* Waite, 17 Pick. (Mass.) 309; Bumpus *v.* Miller, 4 Mich. 159; Arndt *v.* Thomas, 93 Minn. 1, 100 N. W. 378, 106 Am. St. Rep. 418; Marchand *v.* Maple Grove, 48 Minn. 271, 51 N. W. 606; Coffin *v.* Plymouth, 49 N. H. 173; Montgomery *v.* Somers, 50 Oreg. 259, 90 Pac. 674; Bayard *v.* Standard Oil Co., 38 Oreg. 438, 63 Pac. 614; Whitesides *v.* Green, 13 Utah 341, 44 Pac. 1032, 57 Am. St. Rep. 740; Yakima County *v.* Conrad, 26 Wash. 155, 66 Pac. 411; Konkel *v.* Pella, 122 Wis. 143, 99 N. W. 453; Bartlett *v.* Beardmore, 77 Wis. 356, 46 N. W. 494), or to such track and the ditches on either side (State *v.* Morse, 50 N. H. 9).

The width as used at the end of the prescriptive period is the width of a highway by user. Hart *v.* Bloomfield Tp., 15 Ind. 226; Epler *v.* Niman, 5 Ind. 459.

Evidence as to location of highway see *infra*, II, B, 8.

46. Montgomery *v.* Somers, 50 Oreg. 259, 90 Pac. 674 (reasonable width and that only); Whitesides *v.* Green, 13 Utah 341, 44 Pac. 1032, 57 Am. St. Rep. 740; Yakima County *v.* Conrad, 26 Wash. 155, 66 Pac. 411.

47. Marchand *v.* Maple Grove, 48 Minn. 271, 51 N. W. 606.

48. Whitesides *v.* Green, 13 Utah 341, 44 Pac. 1032, 57 Am. St. Rep. 740; Bartlett *v.* Beardmore, 77 Wis. 356, 46 N. W. 494, 496; Hull *v.* Richmond, 12 Fed. Cas. No. 6,861, 2 Woodb. & M. 337, holding that the width of a prescriptive highway, where fenced, is the traveled path, and the usual distance for roads of that character on each side of the traveled path.

49. *Iowa.*— Davis *v.* Clinton, 58 Iowa 389, 10 N. W. 768.

Maine.— Lawrence *v.* Mt. Vernon, 35 Me. 100.

Massachusetts.— Tilton *v.* Wenham, 172 Mass. 407, 52 N. E. 514; Com. *v.* Coupe, 128 Mass. 63; Hannum *v.* Belchertown, 19 Pick. 311; Sprague *v.* Waite, 17 Pick. 309.

Minnesota.— Arndt *v.* Thomas, 93 Minn. 1, 100 N. W. 378.

New Hampshire.— See State *v.* Morse, 50 N. H. 9.

New York.— Harlow *v.* Humiston, 6 Cow. 189.

Oregon.— Montgomery *v.* Somers, 50 Oreg. 259, 90 Pac. 674; Bayard *v.* Standard Oil Co., 38 Oreg. 438, 63 Pac. 614.

Utah.— Whitesides *v.* Green, 13 Utah 341, 44 Pac. 1032, 57 Am. St. Rep. 740, holding that a controversy about the width of a highway acquired by user presents a question for the jury to determine from all the facts and circumstances proved, and when such a case is tried by the court without a jury, then it is a question of fact to be determined by the court.

Washington.— See Yakima County *v.* Conrad, 26 Wash. 155, 66 Pac. 411.

See 25 Cent. Dig. tit. "Highways," § 21.

by statutes prescribing the width of highways generally;[50] and an important element in determining the width of a highway by prescription is the recognition of the limits of the way by persons whose lands front thereon.[51]

(II) *Effect of Defective Proceedings to Establish Highway.* Another qualification of the general statement that the width of a prescriptive highway is measured by the actual user exists where a highway is acquired by prescription under color of defective proceedings to establish the same. In this event the width of the highway is ordinarily the width of the highway so attempted and intended to be established, although the user does not extend over that entire width.[52] On the other hand the width of the highway thus prescribed is limited to the bounds of the highway so attempted and intended to be established, where there has been no actual adverse user of lands outside of those bounds.[53]

7. Ascertainment and Entry of Record. In many states statutes have been enacted which provide for the ascertainment, description, and entry of record, by the proper authorities, of highways existing by user.[54] In such a proceeding

Sufficiency of evidence; appeal.—Where it has been determined that a highway has been acquired by adverse user, but it is difficult from the evidence to find the boundaries of such highway, the cause will be remanded for further proceedings to determine such boundaries. Arndt *v.* Thomas, 93 Minn. 1, 100 N. W. 378.

50. Montgomery *v.* Somers, 50 Oreg. 259, 90 Pac. 674 (where the statute affected the question of reasonable width); Yakima County *v.* Conrad, 26 Wash. 155, 66 Pac. 411 (where the statute affected the question of necessary width).

Presumption.—A highway by prescription is presumed to be of the statutory width (Meservey *v.* Gulliford, 14 Ida. 133, 93 Pac. 780; Kruger *v.* Le Blanc, 70 Mich. 76, 37 N. W. 880; Bumpus *v.* Miller, 4 Mich. 159. See, however, Michigan case cited *supra*, note 45), where nothing appears to the contrary (Meservey *v.* Gulliford, *supra*; Kruger *v.* LeBlanc, *supra*; Bumpus *v.* Miller, *supra*. And see *infra*, this section text and note).

The statute does not govern the width absolutely. A prescriptive highway may be either narrower (Davis *v.* Clinton, 58 Iowa 389, 10 N. W. 768; Harlow *v.* Humiston, 6 Cow. (N. Y.) 189. And see Wayne County Sav. Bank *v.* Stockwell, 84 Mich. 586, 48 N. W. 174, 22 Am. St. Rep. 708) or wider (Marchand *v.* Maple Grove, 48 Minn. 271, 51 N. W. 606) than the width prescribed by statute for highways generally.

51. Bumpus *v.* Miller, 4 Mich. 159; State *v.* Morse, 50 N. H. 9. And see Tilton *v.* Wenham, 172 Mass. 407, 52 N. E. 514; Holbrook *v.* McBride, 4 Gray (Mass.) 215; Hull *v.* Richmond, 12 Fed. Cas. No. 6,861, 2 Woodb. & M. 337.

Fences and monuments as indicating width of highway see Com. *v.* Coupe, 128 Mass. 63; Kruger *v.* LeBlanc, 70 Mich. 76, 37 N. W. 880; Washington Borough *v.* Steiner, 25 Pa. Super. Ct. 392; Whitesides *v.* Green, 13 Utah 341, 44 Pac. 1032, 57 Am. St. Rep. 740.

Estoppel.— It has been held that a person will not be heard to dispute the location of a highway, which location he has distinctly admitted by his declarations and acts. Whitesides *v.* Green, 13 Utah 341, 44 Pac. 1032, 57 Am. St. Rep. 740. See, generally, Estoppel, 16 Cyc. 722 *et seq.*

52. Pillsbury *v.* Brown, 82 Me. 450, 19 Atl. 858, 9 L. R. A. 44; State *v.* Auchard, 22 Mont. 14, 55 Pac. 361; Nosler *v.* Coos Bay R. Co., 39 Oreg. 331, 64 Pac. 644, 855 [*citing* Bayard *v.* Standard Oil Co., 38 Oreg. 438, 63 Pac. 614]; Upper *v.* Lowell, 7 Wash. 460, 35 Pac. 363. And see *supra*, II, B, 2, e, (VI).

This rule does not apply where part of the highway as attempted to be established has been inclosed and exclusively used and occupied by the owner during the prescriptive period. Watz *v.* Sunderland, 147 Mich. 96, 110 N. W. 507.

53. Samuell *v.* Sherman, 170 Ill. 265, 48 N. E. 576; Konkel *v.* Pella, 122 Wis. 143, 99 N. W. 453.

If there has been an adverse user by the public, for the prescriptive period, of lands outside of the bounds of a highway so attempted to be established, the user governs the width of the highway. Com. *v.* Old Colony, etc., R. Co., 14 Gray (Mass.) 93; Bayard *v.* Standard Oil Co., 38 Oreg. 438, 63 Pac. 614. And see Waltman *v.* Rund, 109 Ind. 366, 10 N. E. 117.

54. See the statutes of the different states.

Necessity of ascertainment and entry of record.— In Idaho roads that have been used and worked at public expense for five years need not be recorded in order to become highways. Meservey *v.* Gulliford, 14 Ida. 133, 93 Pac. 780. In Missouri, where a road has been used adversely by the public as a highway for the prescriptive period, it becomes a highway without any formal recognition of it as such by the public authorities. State *v.* Wells, 70 Mo. 635; Brown *v.* Kansas City, etc., R. Co., 20 Mo. App. 427; Cox *v.* Tipton, 18 Mo. App. 450. In New York and Maryland under early statutes see People *v.* Lawson, 17 Johns. (N. Y.) 277; U. S. *v.* Emery, 25 Fed. Cas. No. 15,052, 4 Cranch C. C. 270.

To what roads statute applies.— The Illinois statute applies to only those roads whose character as highways has been established by consent of the owners of the soil and by recognition as such by the proper authorities, and not any mere neighborhood

questions of procedure — questions of pleading and practice, evidence, etc., are governed mainly by the local statutes.[55]

lane used for travel. People *v.* Worth Tp. Highway Com'rs, 52 Ill. 498. So the New Jersey statute does not apply to private roads laid out by surveyors of the highways. Yeomans *v.* Ridgewood Tp., 46 N. J. L. 508. The Indiana statute applies to roads established by dedication as well as user. McKeen *v.* Porter, 134 Ind. 483, 34 N. E. 223. And the same is true of the Rhode Island statute. Goelet *v.* Newport, 14 R. I. 295. But it was otherwise under an early New York statute. North Hempstead Highway Com'rs *v.* Queens County Judges, 17 Wend. (N. Y.) 9. Ind. Acts (1897), p 192, c. 127 (Burns Rev. St. Ind. (1901) § 6762), providing that all highways which have been or may be used as such for twenty years or more shall be deemed highways, and may be ascertained, described, and entered of record by the county commissioners, and the width thereof declared and described, "which width shall not be less than 30 feet," applies only to prescriptive highways having a width of thirty feet or more. This act only partially repealed Ind. Acts (1867), p. 133, c. 62, providing that highways used as such for twenty years or more shall be highways, and giving the county commissioners power to ascertain, describe, and enter of record such highways, and left that act in force as to prescriptive highways less than thirty feet wide. McCreery *v.* Fallis, 162 Ind. 255, 67 N. E. 673.

Sufficiency of user.—In Indiana there must be a user with the consent of the landowner. Vandever *v.* Garshwiler, 63 Ind. 185. In Rhode Island there must have been an actual user of the highway for the prescriptive period; but if, notwithstanding a fence with gates erected across the highway within that period, the public quietly, peaceably, and actually used the street as a highway, the impediment of the fence and gate is unimportant; otherwise if, on account of the fence, the public ceased to use the street, or used it not as a highway but as a way of sufferance. Goelet *v.* Newport, 14 R. I. 295.

Duration of user.— The public authorities cannot declare an unrecorded road to be a highway unless the user has been continued for the full period fixed by statute. North Hempstead Highway Com'rs *v.* Queens County, 17 Wend. (N. Y.) 9; Goelet *v.* Newport, 14 R. I. 295; Remington *v.* Millerd, 1 R. I. 93. And see Milam *v.* Sproull, 36 Ga. 393.

The constitutional rights of landowners must be respected in a proceeding under the statute. Milam *v.* Sproull, 36 Ga. 393; McCreery *v.* Fallis, 162 Ind. 255, 67 N. E. 673. Necessity of notice of proceeding see *infra*, note 55.

55. See the statutes of the different states, and *infra*, this note.

Commencement of proceeding.— Under 1 Ind Rev. St. (1876) p. 534, § 45, the county commissioners may, of their own motion, proceed to ascertain, describe, and enter of record a highway alleged to have been used for twenty years but not recorded. Higham *v.* Warner, 69 Ind. 549; Gibons *v.* Copper, 67 Ind. 81. It is, however, proper to commence such proceedings by petition when moved by any person other than such board. Higham *v.* Warner, *supra*.

Notice.— Under Ind. Rev. St. (1894) § 6762, giving county commissioners power to cause roads which have been used as highways for twenty years without being recorded to be ascertained, described, and recorded, actual notice of the proceedings is necessary, although the statute makes no provision therefor. Hardinsburg *v.* Cravens, 148 Ind. 1, 47 N. E. 153; Yelton *v.* Addison, 101 Ind. 58 [*overruling* Gibbons *v.* Copper, 67 Ind. 81; State *v.* Schultz, 57 Ind. 19]; Vandever *v.* Garshwiler, 63 Ind. 185. However, parties who appear before the county commissioners and make no objection to the failure to give proper notice waive whatever objections might have been made, and cannot raise them on appeal. Orton *v.* Tilden, 110 Ind. 131, 10 N. E. 936; Washington Ice Co. *v.* Lay, 103 Ind. 48, 2 N. E. 222; Vandever *v.* Garshwiler, *supra*.

Parties.— Any person competent to sue may, by petition or motion, become a party to the proceedings. Gibbons *v.* Copper, 67 Ind. 81.

Petition.—A petition for the ascertainment and record of a highway by user need not be in writing. Higham *v.* Warner, 69 Ind. 549. But if in writing it should state the names of the landowners in order that the court may order the proper notice to be given. Vandever *v.* Garshwiler, 63 Ind. 185. However, a judgment in favor of petitioners will not be reversed for failure of the petition to state the names of all the owners, where all appeared without objecting to want of notice. Orton *v.* Tilden, 110 Ind. 131, 10 N. E. 936. The petition need not be signed by twelve freeholders of the county. Vandever *v.* Garshwiler, *supra*. It is not an abuse of discretion to allow an amendment changing the description so at to shift somewhat the location of the way, although there has already been one trial, and petitioners have once before amended their petition in the matter of description. McKeen *v.* Porter, 134 Ind. 483, 34 N. E. 223. In Gibbons *v.* Copper, 67 Ind. 81, the court say that no question as to the sufficiency of the petition can be raised; but in Vandever *v.* Garshwiler, *supra*, it is said that the sufficiency and certainty of the petition may be tested by demurrer or motion. However this may be, a motion to dismiss a petition, no ground for such motion being specified, is properly overruled. Vandever *v.* Garshwiler, *supra*. Necessity and propriety of petition see *supra*, this note, par. 1.

Election between counts.— Petitioners cannot be compelled to elect on which of several paragraphs of the petition they will proceed

8. Pleading [56] and Evidence.[57] A defense in ejectment that the *locus in quo* is a highway by prescription must be pleaded in order to be proved.[58] Such a plea is not objectionable as a plea of acquisition of title to land by parol.[59] An allegation that a road had been used as a highway for more than ten years prior to the commencement of the action cannot be treated as definitely describing a longer period than ten years and one day.[60] The pleadings and proof must correspond.[61] Gen-

to trial. Vandever *v.* Garshwiler, 63 Ind. 185.

Pleading and proof; issues; variance.— The only issue to be tried in such a proceeding is whether the alleged highway has existed by user for more than twenty years with the consent of the owners, or has been laid out and not recorded. Vandever *v.* Garshwiler, 63 Ind. 185. Where the petition and evidence agree that there was a highway commencing at the north end of a certain road, but disagree as to the distance of the north end of that road from the named corner of land, such variance will overthrow the proceedings. Washington Ice Co. *v.* Lay, 103 Ind. 48, 2 N. E. 222.

Evidence.— The burden is on petitioner to show affirmatively that none of an objector's land would be unconstitutionally taken. McCreery *v.* Fallis, 162 Ind. 255, 67 N. E. 673. In Rhode Island deeds showing that the lands had become a highway by dedication and had been recognized as such are admissible as tending to show that the lands had been "considered" a highway, within the terms of the statute. Goelet *v.* Newport, 14 R. I. 295.

Questions for jury.— The user or non-user by the public as described in the statute is a question for the jury. Goelet *v.* Newport, 14 R. I. 295.

Viewers need not be appointed in such proceedings. Vandever *v.* Garshwiler, 63 Ind. 185.

Location of road; boundaries; width.— In ascertaining and describing a road which has not been laid out but has become a highway merely by public use for twenty years, the power of the highway commissioners is limited to ascertaining the boundaries of the road according to the actual use of the twenty years and they cannot enlarge the road or change its location with reference to present public convenience. Talmadge *v.* Huntting, 29 N. Y. 447 [*affirming* 39 Barb. 654]; People *v.* Cortland County, 24 Wend. (N. Y.) 491.

Certainty of ascertainment and description. — To entitle a highway to be entered of record, it should be ascertained and described with the same certainty that would be necessary in establishing a highway originally. Stephenson *v.* Farmer, 49 Ind. 234. However, where the survey gives the termini exactly and the line of the road between them by distances and directions from point to point, so that any practical surveyor could easily ascertain and describe the road as it is surveyed, it is sufficient. Higham *v.* Warner, 69 Ind. 549.

Sufficiency of order.— Under R. I. Gen. St. c. 59, §§ 18–21, empowering town councils to declare lands used as highways for twenty years to be public highways, the plat described by section 21 must be made a part of the declaration. Simmons *v.* Providence, 12 R. I. 8.

Conclusiveness of order.— In New York, when the commissioners of highways meet, and, it appearing to them that a certain road has been used as a highway for more than twenty years, order it to be ascertained and recorded, such order is not conclusive on a person claiming that the highway is a private road. Cole *v.* Van Keuren, 4 Hun (N. Y.) 262, 6 Thomps. & C. 480 [*affirmed* in 64 N. Y. 646]. But see Colden *v.* Thurber, 2 Johns. (N. Y.) 424. So in Missouri the refusal of the county court to recognize the existence of a prescriptive highway does not affect its existence as such, or the vested rights of the public therein. State *v.* Wells, 70 Mo. 635; Brown *v.* Kansas City, etc., R. Co., 20 Mo. App. 427.

Appeal; injunction.— Parties aggrieved by the action of the commissioners have their remedy by appeal or by injunction. Gibbons *v.* Copper, 67 Ind. 81.

56. See, generally, Pleading, 31 Cyc. 1.

57. See, generally, Evidence, 16 Cyc. 821, 17 Cyc. 1.

58. Burlew *v.* Hunter, 41 N. Y. App. Div. 148, 58 N. Y. Suppl. 453.

59. Rose *v.* Stephens, (Ky. 1908) 112 S. W. 676, holding that where, in a suit to recover a strip of land used as a road between the lands of plaintiff and defendants, defendants, after pleading a parol agreement between prior owners for the straightening of the line providing that the strip in controversy should be thereafter used as a road for themselves and the owners of more remote land, alleged that for more than fifteen years before suit was brought defendants had occupied the strip in controversy as a public road as a matter of right, such plea was good as a plea of limitations.

60. Meservey *v.* Gulliford, 14 Ida. 133, 93 Pac. 780.

61. Meservey *v.* Gulliford, 14 Ida. 133, 93 Pac. 780, holding that where, in an action to remove an obstruction of a highway, it was alleged that for more than ten years preceding the commencement of the action the road had been traveled by the public, it was error to admit evidence that the road was first traveled more than nineteen years prior to the commencement of the action, and to find that the same had been established by user under a law which did not require such highway to be kept up at public expense, which law had been amended more than thirteen years prior to the commencement of the action so as to require it to be so kept up,

erally speaking the ordinary rules of evidence relating to presumptions and burden of proof,[62] admissibility of evidence,[63] and weight and sufficiency of evi-

and under which amendment the action was brought.

62. See cases cited *infra*, this note.

Generally speaking the burden of proof on an issue whether a highway exists by prescription rests on the party who has the affirmative of the issue, and he must in consequence convince the jury of the existence of all the essential elements of prescription as applied to highways. District of Columbia *v.* Robinson, 14 App. Cas. (D. C.) 512 [*affirmed* in 180 U. S. 92, 21 S. Ct. 283, 45 L. ed. 440]; Shaver *v.* Edgell, 48 W. Va. 502, 37 S. E. 664. It has been held, however, that the unexplained public user of a road as a highway for the prescriptive period raises a presumption of the existence of the other elements of a highway by user, and accordingly shifts the burden of adducing evidence. Chicago *v.* Chicago, etc., R. Co., 152 Ill. 561, 38 N. E. 768; Toof *v.* Decatur, 19 Ill. App. 204.

Adverse user; claim of right; permissive user.— Presumptions and burden of proof as to adverseness of user, claim of right, and permissive user are elsewhere considered. See *supra*, II, B, 2, e, (I), notes 60–62. Presumption as to adverseness of user of wild and unoccupied lands see *supra*, II, B, 2, e, (IV), note 79.

Burden of proof as to legal capacity of landowner see *supra*, note 19.

Presumptions from adverse use for prescriptive period. Antecedent exercise of right of eminent domain see *supra*, II, B, 1. Dedication see *supra*, II, B, 1. And see DEDICATION, 13 Cyc. 434. Grant see *supra*, II B, 1.

Presumption as to width of road see *supra*, II, B, 6, b, (I).

63. Clark *v.* Hull, 184 Mass. 164, 68 N. E. 60 (holding that a coast survey chart made under Act Cong. Feb. 10, 1807 (2 U. S. St. at L. 413, c. 8, § 1), providing for a coast survey, showing the roads within twenty leagues of the shore, is admissible to show the existence of an ancient way); Plummer *v.* Ossipee, 59 N. H. 55 (holding that a selectman's declaration that he directed the removal of a stone by permission of the adjacent landowner is evidence of a use of land for highway purposes by license, and not adversely). And see Miles *v.* Postal Tel. Cable Co., 55 S. C. 403, 33 S. E. 493.

Ancient deeds.— On an issue whether a street was a public way by prescription, an ancient deed describing the lots therein conveyed as being bounded by the street, and referring to a plan showing the lots to be bounded on the street, was admissible to show the origin and location of the street. Bagley *v.* New York, etc., R. Co., 165 Mass. 160, 42 N. E. 571, holding also, on an issue whether a street which crossed a railway was a public way by prescription, that a charge that there was no sufficient evidence of such prescription before the location of the railway, but that, in passing on the question whether there had been twenty years' adverse use after the location of the railway, the jury might consider the condition of things prior to that time — as whether it was then used adversely and under a claim of right — did not authorize the consideration of an ancient deed and plan, which were made before the location of the railway and showed certain lots to be bounded by said street, as evidence of such adverse use. And see Clark *v.* Hull, 184 Mass. 164, 68 N. E. 60.

Defective records of highway.— In order to establish the limitation under Wis. Laws (1857), c. 19, the record of the highway may be admitted in evidence, and it is not necessary to show that the survey followed the precise route named in the petition, that the proper notices were given of the meeting of the commissioners, or that they met pursuant thereto, or that there was an appraisement of damages or compensation made to the landowner. Tomlinson *v.* Wallace, 16 Wis. 224. However, an invalid order laying out a highway is not admissible as a foundation for showing that a certain place is a highway by user, where it does not describe such place as an intended highway and the other evidence shows that there was no intention to lay out a highway at that place; and the admission of such an order and the statement of the trial court to the jury that it was admitted as some evidence of a highway by user is a material error, the jury having found, against a preponderance of the evidence, that the place in question was a highway. Bartlett *v.* Beardmore, 74 Wis. 485, 43 N. W. 492.

Primary and secondary evidence.— Parol testimony tending to prove a highway by prescription may be received without requiring the party first to show that there is no record of such road, or that the record was imperfect or beyond his reach, or the like. The parol evidence is not secondary. Eyman *v.* People, 6 Ill. 4; Mosier *v.* Vincent, 34 Iowa 478; Young *v.* Garland, 18 Me. 409; Brigham City *v.* Crawford, 20 Utah 130, 57 Pac. 842. And see Woburn *v.* Henshaw, 101 Mass. 193, 3 Am. Rep. 333. See, generally, EVIDENCE, 17 Cyc. 465 *et seq.*

Reputation.— A prescriptive highway may be established by reputation or tradition, or the general understanding in the community. Clark *v.* Hull, 184 Mass. 164, 68 N. E. 60; Gage *v.* Pittsfield Tp., 120 Mich. 436, 79 N. W. 687; Wicks *v.* Ross, 37 Mich. 464; Hampson *v.* Taylor, 15 R. I. 83, 8 Atl. 331, 23 Atl. 732; State *v.* Cumberland, 6 R. I. 496.

Width of way.— Evidence of the location of wheel tracks a year or more after the time in question is competent to show the limits of a highway established by user at the time in question, it being found as a matter of fact that the evidence was not too remote. Plummer *v.* Ossipee, 59 N. H. 55. An order made by the highway commissioners after a road has been used as a highway for

dence [64] govern in cases wherein the existence or location of a highway by prescription is in dispute.

C. Establishment by Legislative Act or by Statutory Proceedings [65] — **1. Constitutional Power** [66] — **a. In General.** The state may, in the exercise of the inherent right of eminent domain, appropriate private property for use as a highway,[67] such use being public within the rule that the use for which property may be appropriated by the state must be a public one.[68] And in such case the owner is not deprived of his property without due process of law,[69] provided he is given notice of the proceedings so as to afford him an opportunity to contest the appropriation or to have the amount of his damages fairly determined.[70]

b. Conditions Annexed to Its Exercise [71] — (I) *In General.* Since the power to take property for highway purposes is referable to the right of eminent domain,[72] it follows that the exercise of that power is subject to all the conditions and limitations annexed to the exercise of the right of eminent domain.[73] Furthermore, in appropriating property for a highway, as in other cases, due process of law must be observed.[74]

(II) *Public Use; Public Necessity, Utility, and Convenience* — (A) *In General.* To justify the exercise of the right of eminent domain the pro-

twenty years is admissible to show the width of the highway as manifested by its use as such for twenty years, and that without proof of the commissioners' authority to make it. Ivory *v.* Deer Park, 116 N. Y. 476, 22 N. E. 1080. Since, when the public right rests on usage, it can be no more extensive than the usage itself, evidence of private occupancy is admissible to disprove or qualify the usage. State *v.* Trask, 6 Vt. 355, 27 Am. Dec. 554. Acts of abutting owners in recognition of bounds of highway as evidence see *supra*, II, B, 6, b, (I).

Evidence as to recognition, maintenance, and repair of road by public authorities see *supra*, II, B, 2, e, (III).

Levy of taxes on land in dispute as tending to rebut claim of adverse user see *supra*, II, B, 2, e, (I), note 60.

64. Teeter *v.* Quinn, 62 Iowa 759, 17 N. W. 529; State *v.* Toale, 74 S. C. 425, 54 S. E. 608 (holding that where a well-defined road was laid out through uninclosed woodland and used for more than twenty years by the public as a road, it is some evidence of adverse user); Whitesides *v.* Earles, (Tenn. Ch. App. 1901) 61 S. W. 1038; Whitesides *v.* Green, 13 Utah 341, 44 Pac. 1032, 57 Am. St. Rep. 740.

Evidence held sufficient to take case to jury see Casey *v.* Tama County, 75 Iowa 655, 37 N. W. 138; Clark *v.* Hull, 184 Mass. 164, 68 N. E. 60; Bagley *v.* New York, etc., R. Co., 165 Mass. 160, 42 N. E. 571; Hall *v.* Austin, 20 Tex. Civ. App. 59, 48 S. W. 53.

Evidence as to recognition, maintenance, and repair of road by public authorities see *supra*, II, B, 2, e, (III).

Evidence of change of private way to highway see *supra*, note 30.

Reputation as establishing highway by prescription see *supra*, note 63.

65. **Establishment of:** Free roads of gravel, macadam, etc., or free turnpikes, so-called see *infra*, V, H. Streets and alleys in incorporated cities, towns, and villages see Municipal Corporations, 28 Cyc. 834 *et seq.* Toll-Roads see Toll-Roads.

66. **Constitutional distribution of governmental powers and functions with respect to highways** see Constitutional Law, 8 Cyc. 827, 830 note 88.

Special or local statutes relating to establishment of highways see Statutes, 36 Cyc. 1008.

67. See Eminent Domain, 15 Cyc. 585.

68. See Eminent Domain, 15 Cyc. 578.

69. See Constitutional Law, 8 Cyc. 1126, 1127.

70. See *infra*, II, C, 1, b, (I).

71. **Right of trial by jury** see Eminent Domain, 15 Cyc. 872; Juries, 24 Cyc. 133.

72. Clark *v.* Saybrook, 21 Conn. 313. And see Eminent Domain, 15 Cyc. 585.

73. See, generally, Eminent Domain, 15 Cyc. 543. And see Clark *v.* Saybrook, 21 Conn. 313.

Compensation see *infra*, V, J. And see, generally, Eminent Domain, 15 Cyc. 638 *et seq.*

Necessity that taking be for public use see Eminent Domain, 15 Cyc. 578 *et seq.*, 585, 586. And see *infra*, II, C, 1, b, (II).

Notice and opportunity to be heard see *infra*, II, C, 5, d; II, C, 5, g, (V), (B). And see, generally, Eminent Domain, 15 Cyc. 841 *et seq.*

De minimis. — The fact that the quantity of land proposed to be taken for a highway is very small affords no reason for taking it without legal right. Earl Highway Com'rs *v.* People, 4 Ill. App. 391.

74. See, generally, Constitutional Law, 8 Cyc. 1080 *et seq.*, 1124.

Compensation see *infra*, V, J. And see, generally, Constitutional Law, 8 Cyc. 1124, 1127.

Necessity that taking be for public use see Constitutional Law, 8 Cyc. 1127. And see *infra*, II, C, 1, b, (II).

Notice and opportunity to be heard see *infra*, II, C, 5, d; II, C, 5, g, (V), (B). And

posed use for which the property is sought to be taken must be a public use.[75] It is unquestioned that use for a highway is a public use for which land may be appropriated.[76] Nevertheless the question may arise whether in the particular case the road sought to be laid out would, if established, constitute a highway, and so justify the taking of land therefor. Bearing in mind what has been elsewhere said of the nature and essentials of a highway,[77] it is sufficient to say here that in order to justify the taking of land as for a highway, it is necessary that the road, if laid out, should be subject to a public easement of travel, and be so situated and conditioned as to be susceptible of use as a highway. In the absence of constitutional authority, one man's land cannot be appropriated against his consent for the sole benefit of private individuals.[78] In order to justify the taking of land as for a highway, there must exist a public necessity for the proposed road, and it must be of public utility or convenience.[79]

(B) *As Affected by Termini of Road; Cul-de-Sac.* The character of the place of beginning and ending of a proposed highway has a bearing on the question of the public necessity, utility, or convenience thereof. If the proposed road neither begins nor ends at a preëxisting highway or other public place, it cannot as a rule be established as a highway, since in the nature of the case no public necessity exists for it, and if formally laid out it would not be of public utility or conven-

see, generally, CONSTITUTIONAL LAW, 8 Cyc. 1126.

75. See EMINENT DOMAIN, 15 Cyc. 578.

76. See EMINENT DOMAIN, 15 Cyc. 585.

77. See *supra*, I.

78. See EMINENT DOMAIN, 15 Cyc. 578–586. And see cases cited *infra*, next note.

79. *Indiana.*— Blackman *v.* Halves, 72 Ind. 515. See Sterling *v.* Frick, 171 Ind. 710, 86 N. E. 65, 87 N. E. 237.

Kentucky.— Fletcher *v.* Fugate, 3 J. J. Marsh. 631; Morris *v.* Salle, 19 S. W. 527, 14 Ky. L. Rep. 117.

Maine.— Gay *v.* Bradstreet, 49 Me. 580, 77 Am. Dec. 272.

Maryland.— State *v.* Price, 21 Md. 448.

Michigan.— People *v.* Jackson, 7 Mich. 432, 74 Am. Dec. 729.

New Hampshire.— Gurnsey *v.* Edwards, 26 N. H. 224; Dudley *v.* Cilley, 5 N. H. 558.

New York.— People *v.* East Fishkill Highway Com'rs, 42 Hun 463, 4 N. Y. St. 850 (holding that mandamus will not issue to compel highway commissioners to open a road which would be a benefit to relator alone, and not to the public, although a jury had after due formalities certified to the necessity of such road, and although relator executed a personal undertaking to fence the road and indemnify the town against all damages); Matter of Lawton, 22 Misc. 426, 50 N. Y. Suppl. 408.

Ohio.— Kinney *v.* De Mar, 8 Ohio Cir. Ct. 149, 4 Ohio Cir. Dec. 282, holding that Ohio Act Feb. 19, 1893 (90 Laws 28), making it obligatory on township trustees to appropriate the land of private persons for a highway at the request of certain persons, who have no land through which it is to pass, without giving such trustees the power to determine whether or not such highway and appropriation will be for the public good, is unconstitutional.

Pennsylvania.— *In re* Nescopek Road, 1 Kulp 402; *In re* Brecknock Tp. Road, 2 Woodw. 437.

South Carolina.—Singleton *v.* Road Com'rs, 2 Nott & M. 526.

Vermont.— Woodstock *v.* Gallup, 28 Vt. 587.

See 25 Cent. Dig. tit. "Highways," § 26.

Absolute necessity — Under the Indiana general highway act, limiting the right of viewers to lay out highways to such highways as will in their judgment be of public utility, and declaring a want of public utility a ground of remonstrance, the question of public utility is generally one of fact to be determined in the light of public convenience and interest, but it is not essential that the contemplated road be absolutely necessary to the public. Speck *v.* Kenoyer, 164 Ind. 431, 73 N. E. 896; Fritch *v.* Patterson, 149 Ind. 455, 49 N. E. 380; Green *v.* Elliott, 86 Ind. 53. But in the state of Tennessee, on the other hand, the necessity for the road must be imperative. McWhirter *v.* Cockrell, 2 Head (Tenn.) 9.

Individual advantages.—In deciding whether the public good requires that a highway be laid out, it is proper that individual advantages going to make up the public should be considered by the commissioners. Hopkinton *v.* Winship, 35 N. H. 209. The charter of a bridge company providing that no way should at any time thereafter be located leading from the bridge to a certain place, which "shall be for the necessary convenience of said company, unless the entire cost and expense of building and maintaining such new way . . . shall be defrayed by said company," does not prohibit the location of any way required by common convenience and necessity. Shattuck's Appeal, 73 Me. 318. The fact that one or a few individuals will be most benefited by the proposed highway does not necessarily prevent the establishment of the road. Heath *v.* Sheetz, 164 Ind. 665, 74 N. E. 505; Masters *v.* McHolland, 12 Kan. 17; Heninger *v.* Peery, 102 Va. 896, 47 S. E. 1013. But see *In re* Richmond County Four-Cornered Road, 13 N. Y. Suppl. 458. Extent of travel as af-

ience. One terminus at least must be at a preëxisting highway or other public place.[80] It is not requisite, however, in order to justify the establishment of a highway, that it should both begin and end at preëxisting highways or other public places, provided it is a public necessity, and, if laid out, it will be of public utility and convenience. It is sufficient if one terminus be at an existing highway or other public place.[81] Accordingly a cul-de-sac may be established as a highway if public necessity, utility, or convenience requires. Under such circumstances

fecting establishment of highway see *infra*, II, C, 1, b, (II), (C).

80. *In re* Frankford Tp. Road, 24 Pa. Co. Ct. 649; Snow *v.* Sandgate, 66 Vt. 451, 29 Atl. 673; Lewis *v.* Washington, 5 Gratt. (Va.) 265, holding that one terminus of the proposed road must be at the court-house, or a public warehouse, landing, ferry, mill, coal mine, lead or iron works, or the seat of government, or in an already established road leading to one or more of these places. And see cases cited *infra*, this note. See, however, Rice *v.* Rindge, 53 N. H. 530.

Highway as terminus.— Selectmen of a town have jurisdiction to lay out a highway, although the streets with which it connects at one terminus are not legally established as highways. It is not necessary that access to the road in question should be by a highway which the town is bound to maintain and for defects in which it is liable; but it is sufficient if the public, or so many individuals as to make it of public utility, have access to the road in question by owning the land at its terminus, by license, by a turnpike road, a railroad depot, or by means of a wharf or landing upon navigable waters, and the like. Neither is it an objection that this right of access is limited to less than the public generally, because roads may rightfully be laid out for the accommodation of individuals. Boston, etc., R. Co. *v.* Folsom, 46 N. H. 64. It is not necessary that a highway with which another connects should be proved to be a legal highway in order to sustain the connecting highway. It is presumed to be a legal highway. Moore *v.* Roberts, 64 Wis. 538, 25 N. W. 564.

Proposed highway as terminus.— In Pennsylvania it has been held that a public road may be laid out to end in a street ordained for public use by a borough, although not opened. *In re* Sadsbury Road, 9 Pa. Co. Ct. 521. So it has been held that a road may terminate at a point on a county line in a prospective road to be laid out in continuation of it by the adjoining county, without proceedings under the act of 1836, relating to roads on and along dividing lines of adjoining counties, and requiring concurrent views. *In re* Conyngham Road, 1 Wilcox (Pa.) 245. On the other hand it has been held that the terminus of an unopened street in a borough cannot be adopted as the terminus for an adjoining township road, although the borough authorities intend to open the street as soon as the township road is open. *In re* Plainfield Tp. Road, 6 Pa. Co. Ct. 412.

Turnpike as terminus.—A point in a turnpike road maintained by a duly incorporated company may lawfully be made the terminus of a public road, as it is a highway for such purpose. *In re* Derry Tp. Road, 30 Pa. Super. Ct. 538. And see Boston, etc., R. Co. *v.* Folsom, 46 N. H. 64.

Private road as terminus.—A private road which may at any time be obstructed or closed by the owners is not a proper terminus for a highway. *In re* West Manchester Tp. Road, 8 York Leg. Rec. (Pa.) 169.

Railroad right of way as terminus.— It has been held that a railroad is not a proper terminus for a highway, where the station is on the other side of the track. *In re* Upper Darby Road, 2 Pa. Co. Ct. 366, 2 Del. Co. 472. However, it has been held that it is no objection that a road begins in the middle of a right of way of a railroad where that is the terminus of a preëxisting public road. *In re* Upper Hanover Road, 2 Kulp (Pa.) 179.

Railroad station as terminus.—A railroad station is a proper terminus for a highway (*In re* Cheltenham Tp. Road, 17 Montg. Co. Rep. (Pa.) 18. And see Boston, etc., R. Co. *v.* Folsom, 46 N. H. 64; *In re* Upper Darby Road, 2 Pa. Co. Ct. 366, 2 Del. Co. 472), but such a highway is not sufficiently laid out if it extends only to the line of the railroad, and does not cross it to the other side, where the station is located (*In re* Upper Darby Road, *supra*).

Watercourse as terminus.— There is no positive rule of law forbidding a town council to lay out a highway connecting another highway with the bank of a private stream capable only of being used with small boats without loads, the fact that such a stream is one of the termini of the highway going merely to the question of its public necessity. Watson *v.* South Kingstown Town Council, 5 R. I. 562. And see Boston, etc., R. Co. *v.* Folsom, 46 N. H. 64; Lewis *v.* Washington, 5 Gratt. (Va.) 265.

Mill as terminus.—A sawmill situate on the line of an unopened state or county road is a suitable place for the terminus of a new public road. *In re* Jefferson, etc., Tp. Road, 2 Wkly. Notes Cas. (Pa.) 138. And see Lewis *v.* Washington, 5 Gratt. (Va.) 265.

School-house as terminus.—A public schoolhouse is a proper terminus for a highway. *In re* London Britain Road, 13 Lanc. Bar (Pa.) 207.

Pent roads, that is, roads closed at both termini, are recognized in some states, and form an exception to the rule stated in the text. See PENT ROADS, 30 Cyc. 1380.

81. State *v.* Price, 21 Md. 448; Lewis *v.* Washington, 5 Gratt. (Va.) 265, holding that the other terminus may be at any place, public or private. And see cases cited *infra*, note 82.

the road when laid out need not be a thoroughfare.[82] The state line is a proper terminus, although there is no connecting road, existing or proposed, in the other state.[83]

(c) *Determination as to Public Use, Necessity, Utility, and Convenience.*[84] Generally speaking the question of the necessity or expediency of exercising the right of eminent domain is a political question to be determined by the legislature or those to whom it has delegated the power of exercising the right,[85] in the absence of a constitutional or statutory provision investing the courts with jurisdiction to determine it,[86] either in the first instance [87] or by way of reviewing the deter-

82. *Connecticut.*— Goodwin *v.* Wethersfield, 43 Conn. 437; Peckham *v.* Lebanon, 39 Conn. 231.

Iowa.— Johnson *v.* Clayton County, 61 Iowa 89, 15 N. W. 856, holding that a road may be of public utility, although it gives egress to only one person, who has no other public road, and he objects to its establishment; for the public is entitled to a road to reach him, and he has no right to render himself inaccessible.

Kansas.— Masters *v.* McHolland, 12 Kan. 17.

Maryland.— State *v.* Price, 21 Md. 448.

Michigan.— Fields *v.* Colby, 102 Mich. 449, 60 N. W. 1048.

New Hampshire.— See Boston, etc., R. Co. *v.* Folsom, 46 N. H. 64.

New Jersey.— Atkinson *v.* Bishop, 39 N. J. L. 226.

New York.— People *v.* Kingman, 24 N. Y. 559; People *v.* Van Alstyne, 3 Abb. Dec. 575, 3 Keyes 35; Saunders *v.* Townsend, 26 Hun 308. See Hickok *v.* Plattsburgh, 41 Barb. 130.

Texas.— Decker *v.* Menard County, (Civ. App. 1894) 25 S. W. 727.

See 25 Cent. Dig. tit. "Highways," § 27. And see *supra*, I, note 1; II, B, 2, b.

But see *In re* London Britain Road, 13 Lanc. Bar (Pa.) 207; *In re* Roaring Brook Road, 1 Wilcox (Pa.) 263; *In re* Brecknock Tp. Road, 2 Woodw. (Pa.) 437, all holding that a highway cannot end on private land.

Public necessity, utility, or convenience.— A cul-de-sac cannot be established as a highway unless it is a public necessity, or unless it will be of public utility or convenience. Ayres *v.* Richards, 41 Mich. 680, 3 N. W. 179 (holding that the road commissioner cannot establish a highway which is of no practical use to the public or to individuals until extended or connected with some existing or future highway); People *v.* Jackson, 7 Mich. 432, 74 Am. Dec. 729; People *v.* Van Alstyne, 32 Barb. (N. Y.) 131. See, however, Rice *v.* Rindge, 53 N. H. 530.

83. Rice *v.* Rindge, 53 N. H. 530; Crosby *v.* Hanover, 36 N. H. 404.

84. **Notice of hearing on question of expediency, necessity, or utility, as convenience** see *infra*, II, C, 5, d, (I).

85. See EMINENT DOMAIN, 15 Cyc. 629 *et seq.*

Rule applied to highways see Lowndes County *v.* Bowie, 34 Ala. 461; Matter of Whitestown, 24 Misc. (N. Y.) 150, 53 N. Y. Suppl. 397; Fanning *v.* Gilliland, 37 Oreg. 369, 61 Pac. 636, 62 Pac. 209, 82 Am. St. Rep. 758 (holding that the claim in a petition for a public road over private property that it is necessary, and that the property of petitioners cannot be reached by any convenient highway, is not issuable, since the manner of its determination is a legislative question, and since the legislature has provided that the appearance of these facts in the petition shall be sufficient to authorize the court to appoint viewers to lay out the road); Paine *v.* Leicester, 22 Vt. 44.

Discretion of local officers.— Determination of question of necessity, expediency, etc., held to be within the discretion of the local administrative officers see *In re* Conant, 102 Me. 477, 67 Atl. 564; Strahan *v.* Attala County, 91 Miss. 529, 44 So. 857; Howard *v.* Clay County, 54 Nebr. 443, 74 N. W. 953. And see Sackett *v.* Greenwich, 38 Conn. 525; Monterey *v.* Berkshire County, 7 Cush. (Mass.) 394.

Jurisdiction in the first instance is generally vested in local administrative officers. See the statutes of the different states. And see Shattuck's Appeal, 73 Me. 318.

86. See EMINENT DOMAIN, 15 Cyc. 629 *et seq.*

87. Greenburg *v.* International Trust Co., 94 Fed. 755, 36 C. C. A. 471, holding that N. Y. Laws (1892), c. 493, providing for the extending of highways in one town into or through other towns in the same county is not in violation of the state constitution because it confers on certain courts of the state the power to determine the necessity or expediency of such extensions, the highest court of the state having upheld the exercise of such powers by the courts in numerous analogous cases arising under the same constitution.

Intervention of committee.— Under the Connecticut statute, the court to which a petition is made for the laying out of a highway may find with regard to the convenience and necessity of the road without the intervention of a committee. Bridgeport *v.* Hubbell, 5 Conn. 237; Windsor *v.* Field, 1 Conn. 279. So in Massachusetts the appointment of a viewing committee by the court of sessions, in proceedings to lay out a highway, to report an opinion as to the convenience or necessity of the way prayed for, is not required by statute, but is discretionary with the court. Com. *v.* Cambridge, 7 Mass. 158; Com. *v.* Coombs, 2 Mass. 489.

Delegation of jurisdiction.— A general rule of court requiring viewers to report, in proceedings to lay out a new road, whether dam-

mination of the local administrative officers.[88] It has been held that the issue of the utility of a proposed highway, on a trial in the circuit court, is limited to the utility of the route selected by the viewers, and that the utility of other proposed routes is immaterial;[89] also that the commissioners' court, in determining the expediency of establishing a highway, does not act alone upon evidence produced according to legal rules.[90] In determining the question of public necessity, utility, and convenience, the officers or tribunal having the matter in hand may properly consider the topography of the country,[91] and the wants and wishes of the people;[92] the condition of the population,[93] the location of public places,[94] the location of railroads,[95] and the location of highways already established[96] or pro-

ages ought to be paid by petitioners or the county, involves no surrender of the power conferred on the court by the Pennsylvania act of Feb. 24, 1845, as the purpose is not to delegate to the viewers the power of conclusively determining whether there is such public necessity for the road as to warrant the payment of damages by the county, but to obtain the opinion of the viewers as an aid to the court in forming a correct judgment. *In re* Stowe Tp. Road, 20 Pa. Super. Ct. 404.

88. See *infra*, II, C, 5, k.

In trespass quare clausum fregit against highway officers for opening a road over plaintiff's land, the question of the necessity of the road is for the jury. Singleton *v.* Road Com'rs, 2 Nott & M. (S. C.) 526.

89. Speck *v.* Kenoyer, 164 Ind. 431, 73 N. E. 896.

90. Lowndes County *v.* Bowie, 34 Ala. 461.

Materiality and definiteness.— On an issue as to the public utility of a proposed highway, it is proper to exclude a question as to how much it would cost to "make a good road through the timber," since it calls for an indefinite answer, especially where witness has testified to the cost of putting the road in such passable condition as would be required of the road district, which is as far as the inquiry is material. Sterling *v.* Frick, 171 Ind. 710, 86 N. E. 65, 87 N. E. 237.

Opinions.—A committee, on an application for the laying out of a highway, may receive the opinions of witnesses having knowledge of the subject as to the convenience and necessity of the road. Bristol *v.* Branford, 42 Conn. 321. So it is proper to allow a witness who is acquainted with the value of land in the neighborhood to testify that the proposed highway would be a convenience to persons residing on a certain part of the land, and would make a difference in the market value thereof. Hire *v.* Kniseley, 130 Ind. 295, 29 N. E. 1132.

Circumstantial evidence.— The public utility of a proposed highway on a decision of a board of commissioners need not be shown by direct evidence, but may be inferred from facts contained in the case. Hagaman *v.* Moore, 84 Ind. 496.

Evidence held sufficient to support a finding that the proposed highway would be of public utility see Heath *v.* Sheetz, 164 Ind. 665, 74 N. E. 505; Speck *v.* Kenoyer, 164 Ind. 431, 73 N. E. 896.

91. Lowndes County *v.* Bowie, 34 Ala. 461; Opp *v.* Timmons, 149 Ind. 236, 48 N. E. 1028.

The character of the soil may be considered. Opp *v.* Timmons, 149 Ind. 236, 48 N. E. 1028; Angell *v.* Hornbeck, 31 Ind. App. 59, 67 N. E. 237.

92. Lowndes County Com'rs Ct. *v.* Bowie, 34 Ala. 461; *In re* Lower Merion Tp. Roads, 16 Montg. Co. Rep. (Pa.) 66, holding that whenever the want of a road would prevent a portion of the public from getting to market, to church, or to other places where men are in the habit of meeting in their lawful business or in pursuance of their proper duties, the road is necessary as a public road. And see Hartford *v.* Day, 64 Conn. 250, 29 Atl. 480.

93. Opp *v.* Timmons, 149 Ind. 236, 48 N. E. 1028.

94. Opp *v.* Timmons, 149 Ind. 236, 48 N. E. 1028 (markets); Angell *v.* Hornbeck, 31 Ind. App. 59, 67 N. E. 237 (markets, schoolhouses, churches, graveyards).

95. See cases cited *infra*, this note.

Proposed sidings.—A contract binding a railroad corporation having a railroad in operation to construct a side-track at a point on the railroad near the terminus of a proposed highway within a reasonable time after it shall be constructed is competent to be received and considered by the commissioners, in a hearing upon the laying out of the proposed highway, as evidence tending to show the probability that if the proposed road be laid and built persons drawing lumber over it will be furnished with railroad facilities at that point. Hayward *v.* Bath, 40 N. H. 100.

In Connecticut, in the determination of the question of "public convenience and necessity" in the lay-out of a highway within one hundred yards of a railroad track under Gen. St. § 2700, the main elements for consideration are those of accommodation of the public travel and the dangers arising from the proximity of the railroad. The element of increased expense by reason of the location within the prohibited distance may also be a matter of consideration, but the judge is not required to give to this element the same weight and effect that might be given to it by a committee appointed by the superior court to hear and determine the question of the lay-out of a highway under section 2713. Hartford *v.* Day, 64 Conn. 250, 29 Atl. 480.

96. Sterling *v.* Frick, 171 Ind. 710, 86

posed,[97] but not the fact that a highway over the same route has previously been discontinued,[98] or the fact that the highway sought to be established might otherwise become a highway by user.[99] They may also consider the probable extent of travel,[1] and the expense of opening the highway or resulting therefrom;[2] but not the

N. E. 65, 87 N. E. 237 (including their proximity to the proposed road and their accessibility, but not the number of miles of highway in the township); Opp *v.* Timmons, 149 Ind. 236, 48 N. E. 1028; Angell *v.* Hornbeck, 31 Ind. App. 59, 67 N. E. 237 (including their condition); People *v.* Moore, 60 Hun (N. Y.) 586, 15 N. Y. Suppl. 504 [*affirmed* in 129 N. Y. 639, 29 N. E. 1031] (holding that where a highway extends a distance of about half a mile from another highway to a point about two hundred feet from a third highway, the extension of such highway from such distance of two hundred feet is not subject to the objection that it is unnecessary); *In re* Richmond County Four-Corner Road, 13 N. Y. Suppl. 458; Ralpho Tp. Road, 1 Mona. (Pa.) 427 (holding that a highway is a necessity where the road formerly traveled by the inhabitants of the town has become dangerous to life and property by reason of the frequent railroad crossings and the length of road along and close to two railroads doing a large business); Franklin, etc., Road, 7 Pa. Co. Ct. 273 (holding that it is improper to lay out two roads near to and parallel with each other, where it is apparent that one, or a large portion of it, is rendered useless; and it does not matter that the termini of the old and new roads are different).

However, it is not error to exclude evidence of an existing highway which does not affect the one proposed to be opened. Kyle *v.* Miller, 108 Ind. 90, 8 N. E. 721.

Other ways than highways.— It may be shown that the travel is already accommodated over a certain route, although it is not proved to be a highway. Hayward *v.* Bath, 38 N. H. 179. So evidence of the existence of private ways that are opened and used by the public, or that, although they were opened and used for the purpose, the owners have closed them, is admissible. King *v.* Blackwell, 96 N. C. 322, 1 S. E. 485.

The fact of a road having been an old one has no weight in determining an application for its establishment as a road under the statute. Bradford *v.* Cole, 8 Fla. 263.

97. Peckham *v.* Lebanon, 39 Conn. 231 (holding, however, that where a proposed highway runs from a town in one county into an adjoining town in another, in determining whether one section will be a road of common convenience and necessity the committee should act with great caution, in view of the fact that the other section is necessary to its usefulness and may not be laid out); Freetown *v.* Bristol County, 9 Pick. (Mass.) 46 (holding that where a proposed road between two towns in one county will pass through another county, the highway commissioners of the former may properly, before locating the road, take a bond from individuals that the part of the road lying in the latter shall be laid out by its commissioners, and, if not, that it shall be made and kept open and in repair).

98. Hayward *v.* Bath, 38 N. H. 179.

99. Opp *v.* Timmons, 149 Ind. 236, 48 N. E. 1028.

1. Bryan *v.* Branford, 50 Conn. 246 (holding that it is no objection to the laying out of a highway that much of the public travel will be merely for pleasure; but that travel which is limited to the summer months is entitled to less weight than that which is constant); Heath *v.* Sheetz, 164 Ind. 665, 74 N. E. 505 (holding that it is not necessary to show that the entire community, or even a large portion thereof, will use the highway, but it is sufficient if it will be a public convenience); Fritch *v.* Patterson, 149 Ind. 455, 49 N. E. 380 (holding that a road will be established if public convenience requires it, although it will be used by a few persons more than others); Murphy *v.* Blandford, 11 S. W. 715, 11 Ky. L. Rep. 125 (holding that evidence that the proposed road will be a better and shorter route than any existing for probably fifty people in the vicinity to go to their railroad depot, mill, and church is sufficient to show that the road is reasonably necessary); Lewis *v.* Washington, 5 Gratt. (Va.) 265 (holding that no limitation to the power of the county court to establish a road is to be found in the degree of accommodation which it may afford to the public at large, but that is a matter which addresses itself, not to the authority, but to the discretion of the court).

Individual convenience as compared with public convenience see *supra*, II, C, 1, b, (II), (A), note 79.

2. Rominger *v.* Simmons, 88 Ind. 453; Nelson *v.* Goodykoontz, 47 Iowa 32; *In re* Richmond County Four-Corner Road, 13 N. Y. Suppl. 458; Hunter *v.* Newport, 5 R. I. 325, holding that the expense of opening a new highway, in comparison with its convenience to the public, is proper to be considered in coming to a conclusion whether it should be laid out. And see Hartford *v.* Day, 64 Conn. 250, 29 Atl. 480.

All the damages and benefits determinable from all the evidence are to be considered. Watson *v.* Crowsore, 93 Ind. 220; Rominger *v.* Simmons, 88 Ind. 453; Com. *v.* Cambridge, 7 Mass. 158. Where, however, there was evidence that the proposed highway would be of public utility, it was error to instruct that the benefits accruing to a landowner should be considered in connection "with all the other evidence in the case," as allowing the jury to consider all the evidence, when they should have been instructed to consider only such as bore properly on the issue of damages and benefits. Angell *v.* Hornbeck, 31 Ind. App. 59, 67 N. E. 237.

Repair of connecting highways.— The committee may consider the additional expendi-

amount of taxable property, the rate of road taxation, the amount of the road fund, or the number of road hands in the district.[3] Likewise they may consider the improvement of public grounds,[4] or the ability of the town or county to keep the highway in repair.[5] It has been held that the commissioners' court or other tribunal should not be influenced by the fact that individuals offer to pay all or some part of the damages and expenses of opening the highway prayed for, or pay the same into court,[6] or by the fact that an individual offers his land for the highway at a low price.[7] Where, however, the proposed highway lies in adjoining counties, it is not ground for setting aside the report that a majority of the commissioners of one county would not have consented to lay out the road had not a satisfactory apportionment of damages and expenses been made.[8]

c. Delegation of Power. In the absence of a constitutional provision to the contrary,[9] the legislature may delegate the power to establish highways to a local inferior body.[10]

ture necessitated to put a connecting highway in better condition in consequence of the new travel. Howe *v.* Ridgefield, 50 Conn. 592.

Evidence of the cost of new highways at remote times and places is inadmissible. Hayward *v.* Bath, 38 N. H. 179.

Bond for construction for certain sum.— It has been held that a bond offered to the highway authorities by a citizen for the construction of the highway for a certain sum cannot be considered on the question of cost (Hoadley *v.* Waterbury, 34 Conn. 38. *Contra,* Bern, etc., Tp. Road, 2 Mona. (Pa.) 105), in the absence of a statute to the contrary (Bryan *v.* Branford, 50 Conn. 246, holding that the statute which allows a committee to receive and regard as evidence on the question of the cost of a new highway a bond for the construction of the highway for a stated price applies to a highway laid out over a navigable river; also that the act which provides that such a bond shall stipulate that the work shall be done to the acceptance of the county commissioners does not repeal, but is to be taken in connection with, the former act, which provides that such a bond shall be conditioned for the doing of the work "in a specified time and manner").

3. Sterling *v.* Frick, 171 Ind. 710, 86 N. E. 65, 87 N. E. 237.

4. Woodstock *v.* Gallup, 28 Vt. 587, holding that ornament and improvement of grounds about a public building may be taken into consideration and regarded, in connection with the convenience and necessity of the proposed highway.

5. Lowndes County Com'rs Ct. *v.* Bowie, 34 Ala. 461, so far as expediency of the highway is concerned.

6. Gay *v.* Bradstreet, 49 Me. 580, 77 Am. Dec. 272; Dudley *v.* Cilley, 5 N. H. 558. And see cases cited *infra,* this note.

So in Massachusetts as to county ways (Com. *v.* Sawin, 2 Pick. 547; Com. *v.* Cambridge, 7 Mass. 158), but not as to town ways (Copeland *v.* Packard, 16 Pick. 217).

Otherwise in Missouri.— Rev. St. (1899) § 9416, relative to opening highways, provides that, if the county court be of the opinion that the facts justify the location of the road at the expense of the county, they shall make an order of record requiring the county road commissioner to survey the road, or otherwise such proceedings shall be dismissed. The statute further provides that if petitioners pay into the county treasury, for the use of the landowners, the probable amount of the damages, which shall be fixed at the time by the court, then the order to the commissioner shall issue. It was held that where petitioners pay the damages into the treasury, it is not requisite that the order should find a public necessity justifying its being opened at the expense of the county. Seafield *v.* Bohne, 169 Mo. 537, 69 S. W. 1051.

Invalidating effect of offer or payment; presumptions.— Such offer or payment does not invalidate the laying out proceedings in the absence of evidence that the commissioners were influenced thereby. Cummins *v.* Shields, 34 Ind. 154; Butts *v.* Geary County, 7 Kan. App. 302, 53 Pac. 771. And see *In re* Cheltenham Tp. Road, 17 Montg. Co. Rep. (Pa.) 18. *Contra, In re* Knowles, 22 N. H. 361. But see Smith *v.* Conway, 17 N. H. 586.

Indemnity bond as evidence against public necessity.— The fact that a town council does not act on a petition to lay out a highway until petitioners have given a bond to the town to indemnify it against all expenses has no legally ascertained weight as evidence to show that the highway is not of public necessity. Watson *v.* South Kingstown, 5 R. I. 562.

Agreement to pay cost of alteration see *infra,* II, D, 1, a.

Establishment of highway on condition that individuals pay expense see *infra,* II, C, 5, l, (I).

Validity of agreement to pay damages or expenses see 1911 Cyc. Annot., CONTRACTS, 9 Cyc. 490–493.

7. Smith *v.* Conway, 17 N. H. 586, holding, however, that road commissioners, in the absence of proof, will not be presumed to have been induced by the offer; and if such offer is not actually an inducement to them, it is not a ground for setting aside their report.

8. Chandler *v.* Candia, 54 N. H. 178.

9. See the constitutions of the different states. And see Keeler *v.* Westgate, 10 Pa. Dist. 240.

10. See CONSTITUTIONAL LAW, 8 Cyc. 827,

2. LANDS SUBJECT TO EXERCISE OF POWER. Subject to certain statutory exemptions, and to certain qualifications with reference to property already devoted to public use, any land susceptible of public travel may be taken for highway purposes.[11]

3. PERSONS AGAINST WHOM POWER MAY BE EXERCISED.[12] The fact that a person is under legal disability does not prevent the taking of his land for a highway.[13]

4. ESTABLISHMENT BY STATUTE OR BY TOWN VOTE. It is competent for the legislature to establish a specific highway without the intervention of any inferior agency,[14] and this it sometimes does.[15] In New England a highway over private lands cannot be established simply by town vote.[16]

830 note 88; EMINENT DOMAIN, 15 Cyc. 566. And see *infra*, II, C, 5, a.

Effect of delegation.— The power of laying out highways, with necessary bridges over coves and creeks and other highways, has been delegated to the county commissioners, and consequently no special act of the legislature authorizing such a highway is requisite. Groton *v.* Hurlburt, 22 Conn. 178.

11. See EMINENT DOMAIN, 15 Cyc. 602 *et seq.*

Burial grounds see CEMETERIES, 6 Cyc. 715.

12. **Sovereign** see EMINENT DOMAIN, 15 Cyc. 611.

13. See EMINENT DOMAIN, 15 Cyc. 611; also *supra*, II, B, 3.

Cases assuming this to be so see *infra*, notes 53, 70.

14. *Georgia.*—Johnson *v.* State, 1 Ga. App. 195, 58 S. E. 265.

New York.— People *v.* McDonald, 4 Hun 187 [*affirmed* in 69 N. Y. 362].

Pennsylvania.— Mahanoy Tp. *v.* Comry, 103 Pa. St. 362.

Rhode Island.— Knowles *v.* Knowles, 25 R. I. 325, 55 Atl. 755.

Washington.— Lewis County *v.* Hays, 1 Wash. Terr. 109.

See 25 Cent. Dig. tit. "Highways," § 37.

Special statutes relating to establishment of highways see STATUTES, 36 Cyc. 1008.

15. Lyons *v.* Hinckley, 12 La. Ann. 655 (holding, however, that the Louisiana act of Feb. 7, 1829, relative to roads and levees, establishing a highway on the banks of bayous, etc., does not apply to those streams or bayous running through a high country not subject to overflow, and where the roads are made directly across the country, and not along the winding of the stream); Knowles *v.* Knowles, 25 R. I. 325, 55 Atl. 755 (holding that where the legislature establishes a highway no acceptance is necessary).

However, Kan. Laws (1887), p. 308, c. 215 (since repealed by Kan. Laws (1889), p. 281, c. 188), declaring all section lines in certain counties public highways, did not declare them open for travel. Hanselman *v.* Boan, 71 Kan. 573, 81 Pac. 182. So Nebr. Gen. St. (1873) p. 959, declaring section lines public roads, did not of itself create a lawful highway along such lines, but proper authorities must provide first for the payment of damages for the right of way. Van Wanning *v.* Deeter, 78 Nebr. 284, 112 N. W. 902, 78 Nebr. 282, 110 N. W. 703. Moreover, such statute was so far modified by Nebr. Laws (1879), p. 120 (Comp. St. c. 78), that section lines not used as roads for five years before the passage of the latter act cannot be opened as such without complying with the requirements of that act. Henry *v.* Ward, 49 Nebr. 392, 68 N. W. 518.

Highway or private way.— The general assembly ordered a committee to plat land owned by the state. The certificate of the surveyor on the plat stated that it was a draft of, among other things, a highway, the land of which was not included in the lots. The report of the committee stated that they had laid out a highway to a pond that every lot might have free access in case of drought. It was held that such statement of the reason therefor did not limit the meaning of the word "highway" so as to make it a private way. Knowles *v.* Knowles, 25 R. I. 325, 35 Atl. 755.

Highway over public lands under act of congress see PUBLIC LANDS, 32 Cyc. 866.

Highway by user.— Statutes declaring roads previously in use to be highways, although not opened pursuant to law, are treated *supra*, II, B, 1; II, B, 2, e, (III).

16. Burns *v.* Annas, 60 Me. 288 (holding that a way across private lands cannot be established by a town vote of acceptance without any previous location by the selectmen); Kean *v.* Stetson, 5 Pick. (Mass.) 492 (holding that where the selectmen of the several towns are authorized and empowered by statute to lay out ways for the use of their towns, this act is to be done by them independently and without any direction, and therefore a town vote directing the selectmen to lay out a particular town way is unauthorized and improper); Haywood *v.* Charlestown, 34 N. H. 23; State *v.* Newmarket, 20 N. H. 519 (holding, under St. Feb. 8, 1791, prescribing that where there shall be occasion for a new highway, the selectmen are empowered, on application made to them, if they see cause, to lay out the same, that a road was not legally established where a town, at a meeting warned to see if it would instruct the selectmen to lay out such road, voted so to instruct, and the selectmen returned that pursuant to the vote they did lay out the road).

Highway over public lands.—Where a town passed a vote that certain persons, naming them, "have liberty to make a road from," etc., "over the public land, provided they give a deed to the town of their own lands, two

5. Establishment by Statutory Proceedings — a. Statutes; Enactment and Adoption; Validity; Construction and Operation; Amendment and Repeal. To justify the establishment of a highway by local officers there must be statutory authority therefor;[17] and such statutes, in so far as they authorize the taking of private property for public use, will be strictly construed.[18] It is proper that the legislature should provide a mode of procedure for the establishment of highways,[19] and this is commonly done.[20] It is not necessary, however, that all the rules

rods wide," and the deed was given accordingly in due season, but nothing of importance toward the execution of this vote was afterward done, the vote was a mere license, and must have been executed and the road made in a reasonable time and manner for public travel, or the vote would cease to have any efficacy, and consequently there was no highway. Curtiss *v.* Hoyt, 19 Conn. 154, 48 Am. Dec. 149.

Acceptance by town vote of highway located by selectmen see *infra*, II, C, 5.

17. Brunswick, etc., R. Co. *v.* Waycross, 94 Ga. 102, 21 S. E. 145; Funderburk *v.* Spengler, 234 Ill. 574, 85 N. E. 193; People *v.* Kimball, 4 Mich. 95, so holding under a constitutional provision "that when private property is taken for the use and benefit of the public, the necessity for using such property and the just compensation to be made therefor except when to be made by the state, shall be ascertained by a jury of twelve freeholders . . . or not less than three commissioners . . . as shall be prescribed by law." And see Eminent Domain, 15 Cyc. 567.

Adoption of statute by local vote.—Where the alternative road law provided for by Ga. Act, Dec. 24, 1896, as amended by Ga. Act, Dec. 19, 1898, was adopted by public vote, the recommendation of the grand jury was unnecessary to put the law into effect. Grodon County Road, etc., Com'rs *v.* Burns, 118 Ga. 112, 44 S. E. 828. Where a special term of the superior court is called, and the grand jury which served at the preceding regular term is required to be in attendance such grand jury has authority to make a recommendation, under Ga. Pol. Code, § 576 *et seq.*, that the alternative road law be adopted by the county. McGinnis *v.* Ragsdale, 116 Ga. 245, 42 S. E. 492. Where one member of a grand jury recommending that the provisions of the road law should go into effect in a given county was not then a resident thereof, the recommendation is not thereby vitiated, if it affirmatively appears that irrespective of the vote of such juror there was a majority in favor of the recommendation. And a recommendation of a grand jury "that our county commissioners and ordinary adopt the alternative road law as found in the Code of 1895, sections 573–579," adopts the entire "alternative road law" contained in sections 573–582 inclusive. Crawford *v.* Crow, 114 Ga. 282, 40 S. E. 286. Under Mich. Const. art. 4, § 49, providing that the county road system shall become operative only in such counties as shall adopt it by a majority vote of the electors, a majority vote of the electors voting is sufficient for the adoption thereof. Shearer *v.* Bay County, 128 Mich. 552, 87 N. W. 789.

Partial invalidity of statute.—An act which authorizes the making of a public avenue and directs the commissioners to have a map made thereof, and then provides a specified mode by which the moneys to pay for the expense of the project are to be raised, will not be sustained with respect to the making of the map, if the plan for providing the moneys turns out to be illegal; and a landowner is so far injured by the mapping out of such avenue that he is entitled to have the judgment of the law on the project, without waiting until his property is attempted to be appropriated in point of fact. State *v.* Hudson County Ave. Com'rs, 37 N. J. L. 12.

Special or local acts relating to highways see Statutes, 36 Cyc. 1008.

18. Curran *v.* Shattuck, 24 Cal. 427; Funderburk *v.* Spengler, 234 Ill. 574, 85 N. E. 193. And see Eminent Domain, 15 Cyc. 567.

Implied power.—A grant of power to lay out and open a highway implies power to condemn private property therefor. Chicago, etc., R. Co. *v.* Cicero, 154 Ill. 656, 39 N. E. 574. *Contra*, Brunswick, etc., R. Co. *v.* Waycross, 94 Ga. 102, 21 S. E. 145.

19. Cones *v.* Benton County Bd., 137 Ind. 404, 408, 37 N. E. 272 [*cited* in State *v.* Marion County, (Ind. 1907) 82 N. E. 482, 170 Ind. 595, 85 N. E. 513], where it is said: "Highways are the arteries of the State, and the State has never surrendered her right to direct, by legislation, the manner and agencies through which they are created, maintained, and vacated."

20. See the statutes of the different states; and cases cited *infra*, this note.

Construction as to which of two statutes governs see Peoria County *v.* Harvey, 18 Ill. 364. A power given by the legislature to road commissioners to lay out a special roadway is to be regarded as merely an addition to their previous powers, and should be exercised according to the regulations prescribed by the general laws. People *v.* Richmond County, 20 N. Y. 252. The provision of Tex. Sess. Laws (1895), p. 213, c. 132, constituting a special road law for certain counties, that the commissioners' court may condemn land in the same manner that a railroad company can condemn land for a right of way, is mandatory, and does not confer on the commissioners' court a merely discretionary power to proceed under the railroad law. Plowman *v.* Dallas County, (Tex. Civ. App. 1905) 88 S. W. 252.

La. Rev. St. § 3369, is not inoperative as being in conflict with La. Civ. Code, art. 2640,

governing the proceedings should be embodied in one statute, but the general rules of procedure, statutory and otherwise, may be looked to in aid of a statute providing for the establishment of highways.[21] The statutes must be complied with by the local authorities, substantially, if not strictly.[22] Questions as to the amendment or repeal of highway statutes are governed by the rules relating to statutes generally.[23] An unconditional repeal of the statute under which a proceeding for the establishment of a highway is pending *ipso facto* abates the proceeding.[24] If the mode of procedure is changed by statute *pendente lite*, the subsequent proceedings should as a rule follow the new procedure.[25]

b. Jurisdiction and Powers Generally of Local Authorities [26] — (i) *In General.* The question of what officer or body of officers is invested with the del-

and the articles immediately preceding. Fuselier *v.* Iberia Parish Police Jury, 109 La. 551, 33 So. 597.

Ascertainment and entry of record of highway by user see *supra*, II, B, 7.

Condemnation proceedings in general see EMINENT DOMAIN, 15 Cyc. 805 *et seq.*

Exclusiveness of statutory mode of establishment see supra, II, A; II, B, 1, note 33; II, B, 2, e, (III).

21. Lawrence County *v.* Deadwood, etc., Toll-Road Co., 11 S. D. 74, 75 N. W. 817.

22. Cumberland Valley R. Co. *v.* Martin, 100 Md. 165, 59 Atl. 714; People *v.* Scio Tp. Bd., 3 Mich. 121; McBeth *v.* Trabue, 69 Mo. 642; York County *v.* Fewell, 21 S. C. 106. See also *infra*, II, C, 5, *passim*.

Strict compliance is necessary. Curran *v.* Shattuck, 24 Cal. 427; Hyslop *v.* Finch, 99 Ill. 171; Geneseo Highway Com'rs *v.* Harper, 38 Ill. 103; *In re* Conanta, 102 Me. 477, 67 Atl. 564; Cassidy *v.* Smith, 13 Minn. 129; Delahuff *v.* Reed, Walk. (Miss.) 74; Austin *v.* Allen, 6 Wis. 134. Other cases, on the contrary, hold that a substantial compliance is sufficient. Canyon County *v.* Toole, 8 Ida. 501, 69 Pac. 320; Nickerson *v.* Lynch, 135 Mo. 471, 37 S. W. 128; *In re* Spear's Road, 4 Binn. (Pa.) 174. At any rate if jurisdictional requisites are complied with, a substantial compliance in other respects is sufficient. Town *v.* Blackberry, 29 Ill. 137; Shull *v.* Brown, 25 Nebr. 234, 41 N. W. 186; Howard *v.* Dakota County, 25 Nebr. 229, 41 N. W. 185; Sanford *v.* Webster County, 5 Nebr. (Unoff.) 364, 98 N. W. 822; State *v.* Richmond, 26 N. H. 232. But the requirements conferring jurisdiction must be observed. Wabaunsee County *v.* Muhlenbacker, 18 Kan. 129; *In re* Buffalo, 78 N. Y. 362; Ruhland *v.* Hazel Green, 55 Wis. 664, 13 N. W. 877.

Curative acts see *infra*, II, C, 5, j, (III).

Mandamus to highway officers see MANDAMUS, 26 Cyc. 296 *et seq.*

23. See, generally, STATUTES, 36 Cyc. 1053, 1068.

Repeal of particular statutes see Hutchinson *v.* Lowndes County, 131 Ga. 637, 62 S. E. 1048; Barham *v.* Weems, 129 Ga. 704, 59 S. E. 803; Howell *v.* Chattooga County, 118 Ga. 635, 45 S. E. 241; McGinnis *v.* Ragsdale, 116 Ga. 245, 42 S. E. 492; Casey *v.* Kilgore, 14 Kan. 478; Hurst *v.* Martinsburg, 80 Minn. 40, 82 N. W. 1099; Cook *v.* Vickers, 141 N. C. 101, 53 S. E. 740; *In re* Bucks County Road, 3 Whart. (Pa.) 105; Greene, etc., Tp. Road, 21 Pa. Super. Ct. 418.

24. *Illinois.*— Menard County *v.* Kincaid, 71 Ill. 587.

Maine.— Webster *v.* County Com'rs, 63 Me. 27 (holding that the word "actions," as used in Rev. St. c. 1, § 3, providing that "actions pending at the time of the passage or repeal of an act, shall not be affected thereby," does not include petitions for the location of highways pending before the county commissioners); William *v.* Lincoln County, 35 Me. 345 (*semble*).

Maryland.— Wade *v.* St. Mary's Industrial School, 43 Md. 178.

Pennsylvania.— *In re* Uwchlan Tp. Road, 30 Pa. St. 156; *In re* North Canal St. Road, 10 Watts 351, 36 Am. Dec. 185. And see *In re* Hatfield Tp. Road, 4 Yeates 392.

Virginia.— Terry *v.* McClung, 104 Va. 599, 52 S. E. 355.

See 25 Cent. Dig. tit. "Highways," § 30.

But see Steele *v.* Empsom, 142 Ind. 397, 41 N. E. 822; Burrows *v.* Vandevier, 3 Ohio 383.

If the statute saves pending proceedings there is of course no abatement thereof. Sayres *v.* Gregory, 7 Ind. 633; Schuylkill County's Appeal, 38 Pa. St. 459.

Repeal of statute conferring jurisdiction see *infra*, II, C, 5, b, (I).

Right to recover damages after repeal of statute see *infra*, V, J.

25. Mayne *v.* Huntington County, 123 Ind. 132, 24 N. E. 80; Burrows *v.* Vandevier, 3 Ohio 383; *In re* Hickory Tree Road, 43 Pa. St. 139 (subject, however, to some qualifications); Towamencin Road, 23 Pa. Co. Ct. 113, 15 Montg. Co. Rep. 194; Tuttle *v.* Knox County, 89 Tenn. 157, 14 S. W. 486. And see *In re* Hatfield Tp. Road, 4 Yeates (Pa.) 392. See, however, Wentworth *v.* Farmington, 48 N. H. 207; Boston, etc., R. Co. *v.* Cilley, 44 N. H. 578; Colony *v.* Dublin, 32 N. H. 432.

Saving clause see Baubie *v.* Ossman, 142 Mo. 499, 44 S. W. 338.

But the proceedings are not therefore abated. Mayne *v.* Huntington County, 123 Ind. 132, 24 N. E. 80; Burrows *v.* Vandevier, 3 Ohio 383; *In re* Uwchlan Tp. Road, 30 Pa. St. 156.

Enactment of statute conferring jurisdiction pendente lite see *infra*, II, C, 5, b, (I).

26. **Jurisdiction by consent** see *infra*, II, C, 5, j, (II).

egated power to establish highways depends of course upon the statutes of the particular state.[27] Sometimes the power is delegated to officers whose office is especially created for the purpose;[28] but more commonly it is delegated as an additional power to officers having other functions in the administration of the local government.[29] It has been held that where jurisdiction is conferred on a

Waiver of objections to jurisdiction see *infra*, II, C, 5, j, (II).

27. See the statutes of the different states.

28. See cases cited *infra*, this note.

Highway commissioners or supervisors see State *v.* Canterbury, 28 N. H. 195. Without an order of the quarter sessions, supervisors of the highways have no authority either to open a temporary way for the public in a case of sudden necessity through private property or to correct errors in the opening of an old one. Holden *v.* Cole, 1 Pa. St. 303. The South Carolina act of 1728, authorizing highway commissioners "to make, alter, and keep in repair" the roads, means only such roads as are or shall be laid out by legislative authority, and does not give the commissioners discretionary power to create highways, as the legislature showed, by other and special legislation for the creation of highways, that there was no intention to vest such power in the commissioners. Withers *v.* Claremont County Road Com'rs, 3 Brev. (S. C.) 83.

Highway surveyors.— The word "highway," as used in Mass. St. (1896) c. 417, providing a board of survey for the town of Revere to lay out and establish highways, covers all ways which the public interest requires to be laid out, relocated, altered, or widened by the town authorities, including an avenue in the town. Janvrin *v.* Poole, 181 Mass. 463, 63 N. E. 1066. Surveyors of the highways have power to lay out a road in a newly created township before the town officers can by its terms be elected. Minhinnah *v.* Haines, 29 N. J. L. 388.

29. See cases cited *infra*, this note.

County commissioners or supervisors see Kennedy *v.* Dubuque, etc., R. Co., 34 Iowa 421; Johnson County *v.* Minnear, 72 Kan. 326, 83 Pac. 828; Wells *v.* York County, 79 Me. 522, 11 Atl. 417; Barrickman *v.* Harford County, 11 Gill & J. (Md.) 50; Blackstone *v.* Worcester County, 108 Mass. 68; Foster *v.* Dunklin, 44 Mo. 216 (county court); Gillett *v.* McGonigal, 80 Wis. 158, 49 N. W. 814. Formerly the levy court in Maryland. Williamson *v.* Carnan, 1 Gill & J. (Md.) 184. In Louisiana the police jury. Fuselier *v.* Iberia Parish Police Jury, 109 La. 551, 33 So. 597; Jefferson Police Jury *v.* De Hemecourt, 7 Rob. (La.) 509.

Township committee or supervisors see Carter *v.* Wade, 59 N. J. L. 119, 35 Atl. 649; Lewly *v.* West Hoboken, 54 N. J. L. 508, 24 Atl. 477; Williams *v.* Turner Tp., 15 S. D. 182, 87 N. W. 968.

Town selectmen see Orrington *v.* Penobscot County, 51 Me. 570; Butchers' Slaughtering, etc., Assoc. *v.* Boston, 139 Mass. 290, 30 N. E. 94.

Courts.— In Tennessee the county courts have power to lay out highways. Hydes Ferry Turnpike Co. *v.* Davidson County, 91 Tenn. 291, 18 S. W. 626. But not the circuit courts in Iowa. Kennedy *v.* Dubuque, etc., R. Co., 34 Iowa 421. Police magistrates may lay out roads in Illinois. Goshen Highway Com'rs *v.* Jackson, 165 Ill. 17, 45 N. E. 1000 [*affirming* 61 Ill. App. 381].

As between county supervisors and auditor. — Under Iowa Code (1873), § 937, providing that the auditor shall proceed to establish a highway if no objections or claims for damages are filed before a certain time; and section 939, providing that if objections to the establishment of the highway or claims for damages are filed, the further hearing of the application shall stand continued to the next session of the board of supervisors, the auditor has no authority to establish the highway where a claim for damages is filed before the time specified, although the claim is also paid before that time. Ressler *v.* Hirshire, 52 Iowa 568, 3 N. W. 613. Iowa Acts, 12th Sess. c. 160, § 2, making the auditor clerk of the board of supervisors, his acts "subject however, in all cases, to final review and approval by the Board," does not abridge the authority of the board to establish highways, the "review" embracing the facts, as well as the law, of each case. Brooks *v.* Payne, 38 Iowa 263.

As between county commissioners and public land agent.— The authority to locate roads through public lands selected for settlement being vested by Me. Rev. St. c. 18, § 32, in the county commissioners, the requirement of chapter 5, section 29, that the land agent "cause such roads to be located as the public interests," etc., "shall require," confers on him no authority to locate them. Burns *v.* Annas, 60 Me. 288.

As between selectmen and fire district commissioners.— N. H. Act, July 21, 1887, did not transfer from town selectmen to fire district commissioners the power to lay out highways. Henry *v.* Haverhill, 67 N. H. 172, 37 Atl. 1039.

As between county commissioners and district court see *infra*, II, C, 5, b, (IV).

As between town and selectmen see *supra*, II, C, 4.

Change of statute pendente lite.—Where a statute provided for courts of common pleas, and gave them all the jurisdiction vested in the former court of common pleas and of all actions pending in the several counties, it transferred to such new courts all petitions for highways from county to county pending in the late court. *In re* Wheeler, 7 N. H. 280. Prior to Vt. Acts (1886), No. 20, the selectmen or the county court had no authority to establish highways at grade across a railroad; but while this case was pending on appeal, having been remanded from the supreme court to the county court, said act was passed authorizing the laying of high-

court the court may act in vacation.[30] A proceeding which is void for want of jurisdiction does not exhaust a special power under which the commissioners may act but once.[31] The unconditional repeal of a statute conferring jurisdiction in highway cases *pendente lite* defeats further proceedings.[32] So if a statute allows only a certain period of time for laying out a particular road, the expiration of that time *pendente lite* takes away all power to act further.[33]

(II) *As Between County Officers and Officers of Township, Town, or Municipality Within County.* As between officers of a county and officers of a township, town, or incorporated municipality within the county, it may be said, subject to some qualifications, limitations, and exceptions, that the latter officers have the power to lay out ways which are wholly within their respective territorial jurisdictions, while the power of the county officers is confined to the establishment of ways extending beyond the limits of a township or town or without the limits of a municipality.[34]

ways at grade. It was held that as the act gave no original jurisdiction, and as the jurisdiction of the county court was merely appellate, it had in this case no power to establish such highway, but that proceedings must be commenced *de novo*. Connecticut, etc., R. Co. *v.* St. Johnsbury, 59 Vt. 320, 10 Atl. 573.

30. State *v.* Macdonald, 26 Minn. 445, 4 N. W. 1107.

31. Cole *v.* Cumberland County, 78 Me. 532, 7 Atl. 397.

32. William *v.* Lincoln County, 35 Me. 345 (*semble*); Terry *v.* McClung, 104 Va. 599, 52 S. E. 355. And see *supra*, II, C, 5, a.

33. William *v.* Lincoln County, 35 Me. 345.

34. See cases cited *infra*, this note.

As between officers of county and township. — If a road lies wholly within a township, the power to establish it as a highway rests in the township officers (Keen *v.* Fairview Tp., 8 S. D. 558, 67 N. W. 623, road within township on section line of land belonging to United States), and the county officers have no jurisdiction (Daggy *v.* Green, 12 Ind. 303). In some states, however, the county officers have jurisdiction in such cases. Renard *v.* Grande, 29 Ind. App. 579, 64 N. E. 644; Seafield *v.* Bohne, 169 Mo. 537, 69 S. W. 1051; Russell *v.* Leatherwood, 114 N. C. 683, 19 S. E. 643. If the road extends beyond the township, the power vests in the county officers (Daggy *v.* Green *supra*; *Re* Verona Borough, etc., Road, 9 Pa. Cas. 114, 12 Atl. 456; *In re* Chester, etc., Road, 2 Chest. Co. Rep. (Pa.) 438, 3 Del. Co. 174; *In re* Plymouth Borough, etc., Road, 5 Kulp (Pa.) 115; *In re* Ransom Tp., etc., Road, 2 Lack. Leg. N. (Pa.) 279), and the township officers cannot act in the matter (see *supra*, this note). However, Mich. Const. art. 10, § 11, providing that "the board of supervisors of each organized county may provide for laying out highways, constructing bridges," etc., does not necessarily give such supervisors exclusive control over those matters, and the legislature may confer power in regard to them on township highway commissioners. People *v.* Mankin Highway Com'rs, 15 Mich. 347.

As between officers of county and town. — In New England town officers have the power to lay out a road wholly within the limits of the town. Hebron *v.* Oxford County, 63 Me. 314 (holding that the fact that a road laid out by selectmen extends to a town line does not defeat the jurisdiction, within the statute giving to county commissioners power to establish highways leading from town to town); Craigie *v.* Mellen, 6 Mass. 6 (holding that a way laid out by selectmen from one part to another of a county road may yet be a town way for the convenience of the inhabitants, and properly laid out by the selectmen); *In re* Newport, 39 N. H. 67; Hopkinton *v.* Winship, 35 N. H. 209. In such case the county officers have no jurisdiction (*In re* Newport, *supra*, holding that where a petition asks for the laying out of a new highway in two towns, and it appears by the report of the commissioners to whom the same is referred that no new highway is needed except in one town, the common pleas have no authority to establish the road; and a nominal laying out of the road as petitioned for in the other town, by running from the new highway over a preëxisting highway in both towns, so as to extend the new highway to the terminus of the route petitioned for in the other towns, will not give jurisdiction; *In re* Sumner, 14 N. H. 268; *In re* Bridport, 24 Vt. 176, holding that Comp. St. 1850, c 22, §§ 28, 44, providing that when public necessity or convenience requires a highway to be laid out on a line between two towns any seven or more freeholders may make application to the selectmen for such road, and if they refuse, to the county court to appoint commissioners for that purpose, empowers the commissioners to lay out the road on the line between the towns only, and a location by the side of that line and wholly within one of the towns will be set aside. Otherwise in Maine. Hermon *v.* Penobscot County, 39 Me. 583; Windham *v.* Cumberland County, 26 Me. 406; Harkness *v.* Waldo County, 26 Me. 353; New Vineyard *v.* Somerset County, 15 Me. 21), unless the way so laid out forms part of a county way (Wells *v.* York County, 79 Me. 522, 11 Atl. 417; Com. *v.* Cambridge, 7 Mass. 158; *In re* Griffin, 27 N. H. 343; Kelley *v.* Danby, 46 Vt. 504. But see Monterey *v.* Berkshire County, 7 Cush. (Mass.) 394; *In re* Newport, *supra*). If the way extends into two or more towns

(iii) *Where Road Is Wholly or Partly in Another Coördinate Territorial Jurisdiction.* The legislature may confer on the supervisors of one county the power to establish a highway in another county.[35] As a rule, however, if a proposed road lies in two or more counties, the officers of each must take action to establish the highway;[36] and a like rule applies where the proposed road lies in two or more townships.[37]

(iv) *Refusal or Neglect of Officers Having Primary Power.* In New England county commissioners or certain county courts have jurisdiction to lay out a town way in case the town selectmen neglect or refuse to do so.[38]

the county officers have jurisdiction to lay it out (Windham *v.* Litchfield, 22 Conn. 226; Com. *v.* Stockbridge, 13 Mass. 294, holding that the court of sessions have authority to locate a highway on the divisional line between two towns, so that the whole extent of the road shall be divided lengthwise by such line; *In re* Newport, *supra*; Platt *v.* Milton, 55 Vt. 490; Kelley *v.* Danby, *supra*; Kent *v.* Wallingford, 42 Vt. 651, the last two cases further holding that, where a petition prays for a highway extending into two towns in the same county, the county court has original jurisdiction, and this is not taken away by the road's being laid out in one town only), and the selectmen cannot do so (Monterey *v.* Berkshire County *supra*; *In re* Griffin, *supra*).

As between officers of county and municipal corporation.—As a rule the county officers have no power to establish highways wholly (Philbrick *v.* University Place, 106 Iowa 352, 76 N. W. 742; Barker *v.* Wyandotte County, 45 Kan. 681, 698, 26 Pac. 585, 591; Salsbury *v.* Gaskin, 66 N. J. L. 111, 48 Atl. 531; *In re* Verona Borough, etc., Road, 9 Pa. Cas. 114, 12 Atl. 456; *In re* West Liberty, etc., Roads, 20 Pa. Super. Ct. 586) or partly (Shields *v.* Ross, 158 Ill. 214, 41 N. E. 985; Atlantic Coast Electric R. Co. *v.* Griffin, 64 N. J. L. 513, 46 Atl. 1062; Freeman *v.* Price, 63 N. J. L. 151, 43 Atl. 432. *Contra*, Sparling *v.* Dwenger, 60 Ind. 72; *In re* Verona Borough, etc., Road, *supra*; *In re* Chester, etc., Tp. Road, 2 Chest. Co. Rep. 438, 3 Del. Co. 174; *In re* Plymouth Borough, etc., Road, 5 Kulp (Pa.) 115; *In re* Ransom Tp., etc., Road, 2 Lack. Leg. N. (Pa.) 279) within the limits of an incorporated city, town, or village. Proceedings of commissioners of highways attempting to lay out a highway sixty feet wide on land of which half the width was situated in an incorporated city whose charter gave it power to open, alter, and abolish streets, being void as to the land inside the city, was also void as to the half lying outside the city limits, as the statute did not allow a highway less than forty feet wide to be opened by the commissioners. Shields *v.* Ross, *supra*.

35. People *v.* Lake County, 33 Cal. 487.

36. See cases cited *infra*, this note.

Joint action is necessary. State *v.* Wood County Treasurer, 17 Ohio 184.

Separate action.—Where a proposed highway runs from a town in one county into an adjoining town in another county the superior court in each county has power to lay out the portion of the road within its county; and it is not a valid objection to the laying out of the road within one town that the section in the other cannot be laid out by the court of that county, since the complaint and decree can be postponed until after action has been had in the other county, or can be made in such form as to provide for such a contingency. Peckham *v.* Lebanon, 39 Conn. 231. In Indiana where proceedings are instituted for the location of a highway extending into two or more counties, the county board before whom the petition is first filed has jurisdiction. Cooper *v.* Harmon, 170 Ind. 113, 83 N. E. 704. It is not a valid objection to the location of a highway by the county commissioners of one county that the way begins at the end of a town way which extends into another county. Millett *v.* Franklin County, 81 Me. 257, 16 Atl. 897.

37. Mack *v.* Highway Com'rs, 41 Ill. 378; Brewer *v.* Gerow, 83 Mich. 250, 47 N. W. 113, both holding that where the road is to be on the line between two towns, the commissioners of highways of both towns must act jointly.

However, commissioners of highways have the power to locate roads anywhere within the limits of their own towns, without the intervention of the commissioners of highways of adjoining towns. Mack *v.* Highway Com'rs, 41 Ill. 378. And a petitioner may apply for a highway terminating at a town line, and trust to the adjoining town to treat the balance of the way to his farm as a highway, or to his being able to make other satisfactory arrangements as to that part of the road, and he need not apply under the law providing for laying out highways in two or more towns. Matter of Burdick, 27 Misc. (N. Y.) 298, 58 N. Y. Suppl. 759.

New England towns.— In New Hampshire a petition praying that a new highway may be laid out within two towns may be filed in the office of the clerk of the supreme court, or may be presented to the selectmen of such towns acting jointly; and neither such presentation, nor the neglect or refusal of the selectmen to lay out the highway, is necessary to give the court jurisdiction. Lord *v.* Dunbarton, 54 N. H. 405.

38. *Connecticut.*—Waterbury *v.* Darien, 9 Conn. 252, holding also that the averment of neglect and refusal by the selectmen to lay out a highway may be supported by any evidence from which the fact may be fairly inferred.

Maine.— Orrington *v.* Penobscot County, 51 Me. 570.

Massachusetts.— Monterey *v.* Berkshire

In such case the neglect or refusal of the selectmen is a prerequisite to the jurisdiction of the county commissioners or court;[39] and a like rule prevails in

County, 7 Cush. 394; Brown *v.* Essex County, 12 Metc. 208, so holding, although the selectmen, in the petition to them, were requested to discontinue an old way, which they had no authority to do, as well as to lay out a new one.

New Hampshire.— Simpson *v.* Orford, 41 N. H. 228 (holding also that a petition to the court for the laying out of a highway for the accommodation of the public will not be dismissed for any difference between it and the petition to the selectmen, in the order of naming the termini of the route or in describing the route, provided the court can see without any possibility of mistake, from a comparison of the two petitions, that the highway they are asked to lay out is in all respects identical with the one described in the petition to the selectmen); White *v.* Landaff, 35 N. H. 128; *In re* Stratton, 21 N. H. 44 (holding further that the neglect of the selectmen to lay out a road for the space of seven months after presentment of a petition to them, and their separating at the end of that time without adjournment or recording their proceedings, constitute such neglect as will give jurisdiction to the court of common pleas).

Vermont.— Dunn *v.* Pownal, 65 Vt. 116, 26 Atl. 484 (holding further that where, on a petition for the appointment of commissioners to lay out a highway, defendant moved to dismiss on the ground that its selectmen had not at the time of the bringing of such petition refused to lay out a highway, and witnesses were produced by both parties, and trial had by the court, it was error for the court, on disagreeing, not to decide the issues raised, and to adjudge that petitioners were entitled as a matter of right to the appointment of commissioners); Crawford *v.* Rutland, 52 Vt. 412.

See 25 Cent. Dig. tit. "Highways," § 34.

Extent of jurisdiction.— On the neglect or refusal of the selectmen to act, the county commissioners have the same powers, and the performance of the same duties, and none others, that were given to the selectmen under the petition when pending before them; and hence the commissioners can act only within the territorial limits of the town. *In re* Bridport, 24 Vt. 176.

Character of way.— The county commissioners are not restricted in laying out a way, where the selectmen of a town shall unreasonably refuse, to a way exclusively for the benefit of one or more individuals; but the statute is intended to embrace those cases also where the way should be adjudged to be of general benefit. Lisbon *v.* Merrill, 12 Me. 210. The authority conferred on selectmen to lay out town ways for the use of their respective towns is limited to roads having their termini within the town; but it is no objection to such laying out that the road is intended as one link in a chain of continuous roads; that it is for the convenience of the inhabitants only from its connection with some great thoroughfare; and that, when established, it will be for the use of the public generally, as well as of the inhabitants of the town in which it is situated; and if selectmen unreasonably neglect or refuse to lay out such way, the county commissioners may lay out the same; and whether a town way, for the laying out of which application is made to the county commissioners on the refusal of the selectmen to lay it out, is for the use of the town within which it is situated, is a question exclusively within the discretion of the commissioners to decide. Monterey *v.* Berkshire County, 7 Cush. (Mass.) 394. The court of common pleas have jurisdiction of petitions for highways in towns bordering on adjacent states, where the petitions have been presented to the selectmen of such towns and refused by them. The fact that the highway prayed for is only a part of one which may be or has been made in the adjoining states does not affect the jurisdiction. Crosby *v.* Hanover, 36 N. H. 404.

Subsequent action of selectmen.—After the court has acquired jurisdiction by the neglect of selectmen to lay out a road and the filing in court of a petition, it cannot be ousted of such jurisdiction by subsequent action of the selectmen in laying out the road. *In re* Stratton, 21 N. H. 44.

Delay in petitioning court.— The selectmen to whom a petition for a highway was first presented neglected to act upon it while they were in office from December, 1848, until March, 1849, it appearing that their refusal to lay out the highway was recorded Dec. 24, 1849, and petitioners did not file their petition to the court until Dec. 9, 1850. It was held that the delay did not oust the court of its jurisdiction. *In re* Toppan, 24 N. H. 43.

Refusal of town to approve laying out of way by selectmen.—The county commissioners have power to approve and allow of a town way as laid out by the selectmen, leading from one town road to another town road and passing through the land of the applicant under his possession and improvement, if the town shall unreasonably refuse or delay to approve thereof. North Berwick *v.* York County, 25 Me. 69.

Waiver of objections to jurisdiction of county officers see *infra*, II, C, 5, j, (II).

39. Wolcott *v.* Pond, 19 Conn. 597; Plainfield *v.* Packer, 11 Conn. 576 (holding that it must not only be averred in the petition that the selectmen neglected and refused to lay out such highways, but it must appear from the record that such averment is true); Lewiston *v.* Lincoln County, 30 Me. 19 (holding further that the town cannot be said to have delayed or refused to approve the way where the selectmen had made no proper return or report of the laying out of such way); *In re* Newport, 39 N. H. 67 (holding, on a petition asking for the laying out of a new highway in two towns originally pre-

some other states as between other officers having primary and secondary jurisdiction.[40]

c. Parties [41] — (i) *PETITIONERS.* No general rule can be laid down as to the requisite number and qualifications of petitioners for a highway. It depends upon the local statutes.[42] When the proposed road runs into two or more terri-

sented to the court of common pleas, that if it appear by the report of the county commissioners to whom the same is referred that in their judgment no new highway is really needed except in one town, and that consequently none has been actually laid out except in that town, such report is conclusive that in the opinion of the commissioners the petition should have been presented in the first instance to the selectmen of that town alone, and that the court have no original authority to establish the road actually laid out, and the report in such a case should be rejected and the petition dismissed); Hopkinton *v.* Winship, 35 N. H. 209 (holding, on a petition for a highway in two or more towns, that where it appears by the report of the commissioners that the object of petitioners is to obtain a road in one town alone, and thus evade the statute requiring such petitions to be first presented to the selectmen, the petition will be dismissed); *In re* Patten, 16 N. H. 277; Crawford *v.* Rutland, 52 Vt. 412 (holding, on a petition to the county court, that commissioners to inquire into the merits of the petition will not be appointed, where defendant by plea denies the refusal or neglect of the selectmen, until the question of jurisdiction shall first be determined).

However, on the presentation of a petition for a way in two or more towns, the court will not, prior to the reference of the petition to the commissioners, inquire into the fact whether the object of petitioners be not to obtain a road in one town alone, and the statute requiring such petitions to be first presented to the selectmen thus be evaded. Hopkinton *v.* Winship, 35 N. H. 209.

40. *In re* Barrett, 7 N. Y. App. Div. 482, 40 N. Y. Suppl. 266 (holding that under Laws (1890), c. 568, § 94, providing that where it is proposed to lay out a highway extending from one county to another, and the highway commissioners of the two counties cannot agree, they may certify that fact to the supreme court, which may thereupon appoint commissioners to determine the matter, the fact of the disagreement of the highway commissioners is jurisdictional); Haynes *v.* Satterfield, 2 Tex. Unrep. Cas. 299 (holding that where the commissioners' court has full power over the subject of opening roads, parties are required ordinarily to apply to that court for relief with respect to that matter, and that until the party has exhausted his remedies in that court he is not entitled to invoke the equitable powers of the district court).

41. Remonstrants see *infra*, II, C, 5, f.

42. See the statutes of the different states, and the following cases:

California.— San Luis Obispo County *v.* Simas, 1 Cal. App. 175, 81 Pac. 972, holding that Pol. Code, § 2681, providing that "any ten freeholders who will be accommodated by the proposed road, two of whom must be residents of the road district wherein any part of the proposed road is situated, and who are taxable therein for road purposes, may petition therefor," etc., only requires that two of the ten freeholding petitioners shall be taxable in the district for road purposes.

Florida.— Bradford *v.* Cole, 8 Fla. 263, holding that the petition should be signed by twelve or more householders, inhabitants of the county, praying for the establishment of a neighborhood or settlement road, and not by an individual representing his own interests.

Illinois.—Afton Highway Com'rs *v.* Ellwood, 193 Ill. 304, 61 N. E. 1033 (holding that under Hurd Rev. St. (1899) c. 121, § 31, which authorizes town commissioners to lay out any road when petitioned by not less than twelve landowners, or two thirds of the landowners residing in the town within two miles of the road, petitioners must reside in the town, but need not reside within two miles of the road, unless the petition is signed by less than twelve landowners who own two thirds of the property within two miles of the road); Behrens *v.* Melrose Tp. Highway Com'rs, 169 Ill. 558, 48 N. E. 578 (holding that a petition for a road for private and public use may be signed by one person directly interested (Rev. St. c. 121, § 54), the provision in said section that the commissioners, on receiving the petition, shall be governed in their proceedings by the rules prescribed in said act in relation to public roads, not referring to section 31, which requires a petition for a public road to be signed by at least twelve landowners, etc., but to the sections following, which provide rules for the proceedings after the filing of the petition); Warne *v.* Baker, 35 Ill. 382 (holding that petitioners must be voters of the town to be affected, voters of other towns not being competent); Sholty *v.* Stewart, 134 Ill. App. 541 (holding that a petition for a road of less than sixty feet wide must be signed by a majority of the landowners residing along the line of the proposed road, and that, in the absence of such a petition, the commissioners are without jurisdiction to act); People *v.* Blackwelder, 21 Ill. App. 254 (holding that, in applying Rev. St. c. 121, § 57, requiring a petition for the opening of roads to be "signed by not less than twelve landowners residing in either county, within three miles of the road," the words "or township" must be supplied after the word "county," and the word "either" be read to mean "each").

Indiana.— Hall *v.* McDonald, 171 Ind. 9, 85 N. E. 707; Thrall *v.* Gosnell, 28 Ind. App.

torial jurisdictions, it is generally required that persons of the requisite qualifications from all such jurisdictions shall join in the petition.[43] The qualification

174, 62 N. E. 462, both holding that the commissioners have no jurisdiction unless it is established that twelve of the persons whose names are signed to the petition are freeholders of the county in which the highway is proposed to be located, and that six of them reside in the immediate neighborhood of such highway.

Kansas.— Oliphant *v.* Atchison County, 18 Kan. 386; Wabaunsee County *v.* Muhlenbacker, 18 Kan. 129, both holding that where neither upon the papers nor the proceedings of the county board does it affirmatively appear that at least twelve of the petitioners were householders, resident in the vicinity of the proposed road, and the proceedings are attacked directly by petition in error, the defect is fatal, and the proceedings must be set aside as void. And see Willis *v.* Sproule, 13 Kan. 257.

Kentucky.— Louisville, etc., R. Co. *v.* Gerard, 130 Ky. 18, 112 S. W. 915, holding that the petition must be signed by at least five landowners of the county.

Maine.— Cyr *v.* Dufour, 68 Me. 492, holding that the provision of Rev. St. c. 18, that a petition for laying out a highway must be presented by "responsible persons," is merely directory to the commissioners, and is for the protection of the county against needless costs, if the location is not found to be of common convenience or necessity.

Michigan.—Wilson *v.* Burr Oak Tp. Bd., 87 Mich. 240, 49 N. W. 572, holding that a petition for a highway which does not purport to be signed by freeholders of the township confers no jurisdiction on the commissioner.

Minnesota.— Cassidy *v.* Smith, 13 Minn. 129, holding that the statute requiring the petition to be signed by not less than six legal voters living within a mile of the proposed road must be strictly observed.

Nebraska.— Letherman *v.* Hauser, 77 Nebr. 731, 110 N. W. 745 (holding that the statutory provision that the petition shall be signed by at least ten electors residing within five miles of the road is jurisdictional); Shull *v.* Brown, 25 Nebr. 234, 41 N. W. 186 [*following* Howard *v.* Dakota County, 25 Nebr. 229, 41 N. W. 185] (holding that where a petition for the establishment of a public road is presented to the county clerk under Comp. St. (1887) c. 78, by a greater number of signers than is required by law, and it is accompanied by an affidavit of one of such signers that all the signers are electors of the county in which the establishment of the road is desired, and that they reside within five miles of the proposed road, and is accompanied also with a deposit of money for the purpose of defraying the expenses in case the road should not be established, the county clerk will have jurisdiction to appoint a commissioner, as provided for by section 6 of said chapter, to view the proposed road); Horn *v.* Williamson, 4 Nebr. (Unoff.) 763, 96 N. W. 178 (holding that in the case of a consent road, all persons owning land to be taken must sign the petition).

New York.— People *v.* Warren County, 82 Hun 298, 31 N. Y. Suppl. 248 (holding that a highway commissioner as such cannot apply for a highway); Harrington *v.* People, 6 Barb. 607; People *v.* Eggleston, 13 How. Pr. 123; Brunswick Highway Com'rs *v.* Meserole, 10 Wend. 122.

Oregon.— King *v.* Benton County, 10 Oreg. 512 (holding that the county court has no jurisdiction to act on a petition for a county road signed by persons whose names are not on the notice); Kamer *v.* Clatsop County, 6 Oreg. 238 (holding that an unmarried man who keeps house and employs domestic servants is a householder, within Misc. Laws, c. 50, tit. 1, § 2, calling for a petition by householders for the establishment of a road).

South Dakota.— Kothe *v.* Berlin Tp., 19 S. D. 427, 103 N. W. 657 (holding that Rev. Pol. Code, § 1707, providing for the laying out of a highway on the petition of a specified number of voters owning real estate within one mile of the road, means one mile in a direct line, and not by the usual route of travel); Bockoven *v.* Lincoln Tp., 13 S. D. 317, 83 N. W. 335 (holding that under Comp. Laws, §§ 1296–1298, giving the board of supervisors jurisdiction to lay out highways and award compensation for the land appropriated for that purpose, on the filing of a petition with the board, signed by at least six legal voters who are owners of land or occupants under the homestead or preëmption laws of the United States, or under contract from the state, situated within one mile from the proposed road, a petition signed by ten persons is sufficient, without designating how they held their land, although some of them were not qualified, where it appeared that six of them were competent).

Texas.— Huggins *v.* Hurt, 23 Tex. Civ. App. 404, 56 S. W. 944, holding that under Rev. St. art. 4671, giving commissioners' courts the power, and making it their duty, to lay out and open public roads "when necessary," that court has authority to establish a road on its own motion, and therefore is not without jurisdiction to appoint a jury of view and establish a road on petition of freeholders, because of the persons who sign the petition not exceeding five are freeholders residing in any road precinct through which the road is sought to be established.

Vermont.— Gilman *v.* Westfield, 47 Vt. 20, holding that a highway may be laid and established in one town solely upon the petition of residents thereof, although the only land and premises interested in the construction of the road are situate in an adjoining town.

See 25 Cent. Dig. tit. "Highways," § 41.

Waiver of objections to number or qualifications of petitioners see *infra*, II, C, 5, e, (VII), note 20.

43. Wright *v.* Middlefork Highway Com'rs, 145 Ill. 48, 33 N. E. 876; Warne *v.* Baker,

of petitioners is a matter of evidence to be determined by the court on the hearing of the petition,[44] and the burden of proof is on petitioners.[45]

(II) *RESPONDENTS.*[46] In a proceeding to establish a highway the owner or occupant of the land affected must be made a party respondent,[47] and as a rule he is the only necessary party.[48] In New England, however, a town is a necessary party respondent in a proceeding to lay out a road therein.[49]

(III) *ADDITION OR WITHDRAWAL.* A purchaser *pendente lite* of land affected by a highway proceeding need not be added as a party respondent.[50] Petitioners for a highway are generally allowed, at any time before a final hearing and determination, to withdraw as such on payment of costs.[51]

35 Ill. 382; *In re* Morris, etc., County Road, 7 N. J. L. 36. See, however, Johnson *v.* Clontarf, 98 Minn. 281, 108 N. W. 521 (which holds nevertheless that under Gen. Laws (1897), c. 199, authorizing county commissioners to locate a highway running into more than one town on a petition signed by twenty-four freeholders of a county, a petition containing twenty-four signatures, of which only twenty-one were those of freeholders, is fatally defective); State *v.* Macdonald, 26 Minn. 445, 4 N. W. 1107 (holding, under Gen. St. (1878) c. 13, § 76, which provides that "whenever a petition praying that a road be laid through two or more counties in any judicial district . . . signed by twenty legal voters, resident in said counties, shall be presented to the judge of the district court in said district, the said judge is hereby authorized to appoint three commissioners," who shall lay out such road, that the petition is sufficient, although all the twenty signers reside in one of the counties of such district); Knapp *v.* Reck, 90 Hun (N. Y.) 497, 36 N. Y. Suppl. 51 (holding, under Laws (1890), c. 568, providing (§ 82) that any person assessable for highway labor may apply to the commissioners to lay out a new highway, and (§ 92) that when application is made to lay out a highway in two or more towns, all notices required to be served on the commissioners shall be served on the commissioners of each town, a person in one town may initiate proceedings to lay out a highway located partly in two towns); Gilman *v.* Westfield, 47 Vt. 20.

Meaning of "freeholder."— Under Wis. Laws (1860), c. 31, § 2, providing that power to lay out a highway on or between lines of towns can be exercised only on petition of not less than "thirty resident freeholders," the term "freeholder" means a person who resides in the town and owns a freehold interest in land situated therein. Damp *v.* Dane, 29 Wis. 419.

44. Fisher *v.* Davis, 27 Mo. App. 321.

45. *In re* Highway, 3 N. J. L. 665.

46. **Persons entitled to notice** see *infra*, II, C, 5, d, (I).

Persons who may oppose petition see *infra*, II, C, 5, f.

47. Ft. Wayne *v.* Ft. Wayne, etc., R. Co., 149 Ind. 25, 48 N. E. 342; Sherman *v.* Peterson, 91 Mich. 480, 51 N. W. 1122. And see Lyle *v.* Chicago, etc., R. Co., 55 Minn. 223, 56 N. W. 820.

Making husband of owner a party respondent held sufficient, although wife was not joined see Kothe *v.* Berlin Tp., 19 S. D. 427, 103 N. W. 657.

48. Ryder *v.* Horsting, 130 Ind. 104, 29 N. E. 567, 16 L. R. A. 186; Porter *v.* Stout, 73 Ind. 3 (both holding that the opinion of a highway is sufficient, as against a collateral attack, if it appears that either an owner, an occupant, or an agent was properly named and notified); Stewart *v.* White, 98 Mo. 226, 11 S. W. 568; Smith *v.* Ferris, 6 Hun (N. Y.) 553 (holding that the holder of a contract for the purchase of the land need not be joined).

A mortgagee of the land need not be joined. The mortgagor is deemed the owner. Goodrich *v.* Atchison County, 47 Kan. 355, 27 Pac. 1006, 18 L. R. A. 113; Warren *v.* Gibson, 40 Mo. App. 469.

The holder of an equitable title is not a necessary party. Hidden *v.* Davisson, 51 Cal. 138. However, one who has been placed in possession of land under a parol gift, and has lived on it for fourteen years, paid the taxes, and made lasting and valuable improvements thereon, is at least the equitable owner of the same, and where the county road commissioner is informed of these facts when he views such land in connection with proceedings to open a public road, the equitable owner should be made a party to the proceedings. Anderson *v.* Pemberton, 89 Mo. 61, 1 S. W. 216.

49. Gifford *v.* Norwich, 30 Conn. 35. And see Lanesborough *v.* Berkshire County, 22 Pick. (Mass.) 278.

The inhabitants and taxpayers of a town are not parties to highway proceedings, and have as such no right to appear and be heard in opposition to the laying of a highway, but are represented by the town. Bennett *v.* Tuftonborough, 72 N. H. 63, 54 Atl. 700.

Towns in vicinity.—It is not necessary that towns in the vicinity of those through which a road is to pass, and which may be chargeable under the statute, should be made parties to the original application for the road; but where it is manifest that a town in the vicinity will be eventually charged by the commissioners with a portion of the expense, it is the better practice to make such town a party to the original petition. Webster *v.* Alton, 29 N. H. 369.

50. Stewart *v.* White, 98 Mo. 226, 11 S. W. 568. See, however, *infra*, note 53.

Adding parties by amendment of petition see *infra*, II, C, 5, e, (V), note 11.

51. Ralston *v.* Beall, 171 Ind. 719, 30 N. E.

d. Citation and Notice;[52] Opportunity to Be Heard; Appearance — (i) *Necessity.* It is generally necessary throughout the United States that some sort of notice of the application for the opening of a highway should be given the owner or occupant of the land to be affected or other persons interested;[53] and in some

1095; Black *v.* Campbell, 112 Ind. 122, 13 N. E. 409; Little *v.* Thompson, 24 Ind. 146; Webster *v.* Bridgewater, 63 N. H. 296; Hays *v.* Jones, 27 Ohio St. 218.

Effect on jurisdiction.— If, after the withdrawal of certain petitioners, the remaining petitioners are less than the required number, the proceeding is properly dismissed. Ralston *v.* Beall, 171 Ind. 719, 30 N. E. 1095. *Contra*, Little *v.* Thompson, 24 Ind. 146.

Effect of remonstrance by petitioner.— In a proceeding under Ohio Act Jan. 27, 1853, as amended by Ohio Act April 16, 1873, jurisdiction once properly attached is not defeated by any number of the petitioners becoming remonstrants against granting the prayer of the petition. Grinnell *v.* Adams, 34 Ohio St. 44. It is otherwise, however, under Ohio Act March 29, 1867, as amended by Ohio Act May 9, 1869. Hays *v.* Jones, 27 Ohio St. 218. However, until a petitioner for a road improvement has indicated in some unmistakable manner his intention to withdraw his consent and become a remonstrator, he may be counted as a petitioner. Dawson *v.* Barron, 9 Ohio S. & C. Pl. Dec. 706.

Waiver.— The right of petitioners to insist, in the circuit court, upon a motion to withdraw their names, made before the county commissioners had decided upon the sufficiency of the petition, is not waived by permitting the remonstrants in the first instance to move in the circuit court to dismiss the petition for want of jurisdiction, and allowing the case to be disposed of on that motion. Black *v.* Campbell, 112 Ind. 122, 13 N. E. 409. However, a request by a part of the signers of a petition for the alteration of a highway to withdraw their names therefrom when made for the first time after the commissioners of highways have passed on the petition comes too late. Tolono Highway Com'rs *v.* Bear, 224 Ill. 259, 79 N. E. 581.

Withdrawal of party by amendment of petition see *infra*, II, C, 5, e, (v), note 11.

Withdrawal of petition see *infra*, II, C, 5, e, (vi).

52. Notice of proceedings by commissioners, viewers, etc. see *infra*, II, C, 5, g, (v), (b).

53. *California.*— Curran *v.* Shattuck, 24 Cal. 427, holding that notice, actual or constructive, to the owner of land, of proceedings to lay out a public way across it, is indispensable, whether the statute provides for such notice or not.

Connecticut.— Shelton *v.* Derby, 27 Conn. 414, holding, under the statute with regard to the laying out of highways, which provides that an application to the superior court for a highway shall, unless the parties shall agree on the judgment to be rendered, be referred by the court to a committee, to be heard by them "at such time and place, and with such notice to those interested therein, as said court shall order," that by the term "those interested therein," persons other than those already before the court as parties to the record are intended, persons whose lands might be taken for the highway, or who might be injuriously affected by the laying out of the same, and who have therefore a right to be heard before the committee.

Delaware.— *In re* Jones, 6 Pennew. 463, 70 Atl. 15, holding, however, that service of notice of an intention to apply for the establishment of a public road upon him holding legal title to lands across which the road is to run is sufficient, although another has a life-interest therein, it being unnecessary to serve notice on the life-tenant or tenant in possession.

Illinois.— Frizell *v.* Rogers, 82 Ill. 109; Perry *v.* Bozarth, 95 Ill. App. 566 [*reversed* on other grounds in 198 Ill. 328, 64 N. E. 1075]; Oran Highway Com'rs *v.* Hoblit, 19 Ill. App. 259; North Henderson Highway Com'rs *v.* People, 2 Ill. App. 24.

Indiana.— Ft. Wayne *v.* Ft. Wayne, etc., R. Co., 149 Ind. 25, 48 N. E. 342; Wright *v.* Wells, 29 Ind. 354.

Iowa.— Chicago, etc., R. Co. *v.* Ellithrope, 78 Iowa 415, 43 N. W. 277; Barnes *v.* Fox, 61 Iowa 18, 15 N. W. 581; Alcott *v.* Acheson, 49 Iowa 569 (holding that if the owner of the abutting land be a non-resident, notice of the proposed highway must be served on the occupier); State *v.* Anderson, 39 Iowa 274.

Kansas.— Hughes *v.* Milligan, 42 Kan. 396, 22 Pac. 313; State *v.* Farry, 23 Kan. 731.

Kentucky.— Louisville, etc., R. Co. *v.* Gerard, 130 Ky. 18, 112 S. W. 915; Case *v.* Myers, 6 Dana 330; Morris *v.* Salle, 19 S. W. 527, 14 Ky. L. Rep. 117.

Michigan.— Welch *v.* Hodge, 94 Mich. 493, 54 N. W. 175; Wilson *v.* Burr Oak Tp. Bd., 87 Mich. 240, 49 N. W. 572; Dixon *v.* Port Huron Tp. Highway Com'r, 75 Mich. 225, 42 N. W. 814; Blodgett *v.* Highway Com'rs, 47 Mich. 469, 11 N. W. 275.

Minnesota.— Thompson *v.* Berlin, 87 Minn. 7, 91 N. W. 25 (holding that under Gen. St. (1894) § 1808, providing that when town supervisors receive a petition for laying out a highway they shall cause notice of the time and place for hearing thereon to be served on all occupants of the land through which the highway may pass, the service must be had on the person having the actual possession and control of the land, and not on all who may reside thereon); Cassidy *v.* Smith, 13 Minn. 129. See Lyle *v.* Chicago, etc., R. Co., 55 Minn. 223, 56 N. W. 820.

Missouri.— Monroe *v.* Crawford, 163 Mo. 178, 63 S. W. 373.

Nebraska.— Barry *v.* Deloughrey, 47 Nebr. 354, 66 N. W. 410; State *v.* Otoe County, 6 Nebr. 129, holding that where the inhabitants

jurisdictions it has been held that, in the absence of a general appearance by the per-

of a county desire the opening of a new road, they must give notice that they will, at a specified time, present a petition therefor. However, the county board may, without petition or notice, make a preliminary order establishing a section-line road or declaring that it shall be opened; but before it can be actually opened there must be proceedings, upon proper notice, to ascertain damages. Damages, see *infra*, V, J.

New Jersey.— Pursell *v.* Edison Portland Cement Co., 65 N. J. L. 541, 47 Atl. 587; State *v.* Shreeve, 15 N. J. L. 57.

New York.— People *v.* Allen, 37 N. Y. App. Div. 248, 55 N. Y. Suppl. 1057 [*affirmed* in 162 N. Y. 615, 57 N. E. 1122], holding that proceedings for the establishing of a highway are void, even though a person whom the commissioners supposed to be the owner and occupant was served with notice and participated in the proceedings. However, notice of an application to lay out a highway need not be given to an owner who is not in occupation. The commissioners have jurisdiction if notice is given to the actual occupant of the lands required. People *v.* Allegany County Sup'rs, 36 How. Pr. 544. And under Long Island Highway Act (Acts (1830), c. 56), the landowners are not entitled to notice of an application to the commissioners, or of any other steps in the proceedings. The only notice required is that to be given to the commissioners in case of an appeal from their decision. People *v.* Smith, 21 N. Y. 595.

Ohio.— Badgely *v.* Hamilton County, 1 Disn. 316, so holding as to non-resident owners.

Texas.— McCown *v.* Hill, (Civ. App. 1903) 73 S. W. 850. However, under Sayles Annot. Civ. St. (1897) arts. 4674, 4675, authorizing a county commissioners' court to lay out one first-class road in the direction of the county-seat of each adjacent county, and article 4676, providing the method of assessing damages from laying out such roads, notice to the owners of the land taken for the road is not essential to the validity of the proceedings. Morgan *v.* Oliver, (Civ. App. 1904) 80 S. W. 111 [*reversed* on other grounds in 98 Tex. 218, 82 S. W. 1028].

United States.— Burns *v.* Multnomah R. Co., 15 Fed. 177, 8 Sawy. 543.

See 25 Cent. Dig. tit. "Highways," § 60.

Only owners of land taken for the proposed highway are entitled to notice. Huff *v.* Donehoo, 109 Ga. 638, 34 S. E. 1035, although they may be injured thereby. So where land has been occupied and held adversely for eighteen years by one claiming to be the owner, it is not necessary, in order to lay out a highway on such land, to serve the statutory notice on others claiming an interest in the land, although they are non-residents. Nedow *v.* Porter, 122 Mich. 456, 81 N. W. 256.

As shown by transfer books.— Under Iowa Code (1873), § 936, requiring notice of the lay-out of a highway to be served on each owner or occupier of land lying in, or abutting on, the proposed way, as shown by the auditor's transfer books, who resides in the county, failure to name, in the notice published, the record owners of the land, being non-residents, or to serve notice on the actual occupier, vitiates the proceedings. State *v.* Iowa Cent. R. Co., 91 Iowa 275, 59 N. W. 35. The notice required to be given to each owner of land adjacent to a proposed highway must be served on those who are shown by the transfer books in the auditor's office to hold title to the land. Wilson *v.* Hathaway, 42 Iowa 173. And where the transfer books show title in a decedent notice need not be given to his heirs, although his death and the names of the heirs are shown by county records. Starry *v.* Treat, 102 Iowa 449, 71 N. W. 350. Service on railroad companies see *infra*, this note.

Husband and wife.— Under Ohio Act, Jan. 27, 1853 (Swan & C. St. p. 1291), relative to the opening of public roads, which requires that notice shall be given by the principal petitioner to the owner or owners of land through which the road is proposed to be laid out or altered, such notice should be given to both husband and wife, where the land sought to be appropriated is vested in the wife. Dwiggins *v.* Denver, 24 Ohio St. 629. S. D. Rev. Pol. Code, § 1707, provides that a petition for the laying out of a road shall contain the names of the owners of the lands, if known, over which the road is to pass. A petition for a road did not contain the name of plaintiff, who owned the land, but named her husband, who exercised acts of ownership over it, leased it in his own name, and received the rents, and plaintiff permitted her husband to represent her before the board of supervisors in the proceedings for the laying out of the road. It was held that, the husband having been named in the petition, and proper notice served on him, the failure to name the wife and to serve her with notice was not a jurisdictional defect. Kothe *v.* Berlin Tp., 19 S. D. 427, 103 N. W. 657. Where a wife owns an undivided interest in common with her husband in lands over which a public highway is laid out, she is entitled to receive previous written notice of the hearing. Whitcher *v.* Benton, 48 N. H. 157, 97 Am. Dec. 597. But a wife occupying with her husband a homestead the legal title to which is in the latter is not an owner of the land, within Kan. Gen. St. (1901) par. 6019, requiring notice of proceedings to establish a highway to be served on the owner. Mathewson *v.* Skinner, 66 Kan. 309, 71 Pac. 580. The marriage and subsequent change of name of one of the owners of the land through which the proposed road would run did not require a new and additional notice to her in order to give the court jurisdiction as to her. Schmidt *v.* Wright, 88 Ind. 56.

Infants.— To lay out a road on the lands of a minor without notice to his guardian or someone interested for him is error sufficient to set aside the report of viewers, although damages may have been assessed in his favor

son interested, some form of process, such as a summons or an order to show cause,

for the loss or injury occasioned thereby. Neeld's Road Case, 1 Pa. St. 353.

Heirs and legatees must have notice. Sheldon *v.* Derby, 27 Conn. 414 (holding that where the road was laid by the committee over land belonging to the unsettled estate of a deceased person, and the party remonstrating had no other interest than as one of the residuary legatees under the will of deceased and as one of his heirs at law, and the executors were authorized to sell the land and convert it into money, and the interest of the remonstrant under the will was liable to be divested upon a certain contingency, he had a sufficient interest in the land taken to have a right to object to the omission of the notice and to appear and remonstrate against the acceptance of the report); North Henderson Highway Com'rs *v.* People, 2 Ill. App. 24 (holding that where the record shows that a portion of land taken for a highway belongs to certain heirs, one of whom is a non-resident, and no notice is shown to have been given her, and it does not appear that any one is authorized to represent her, and she has never released her claim for damages, the commissioners of highways are justified in refusing to open the road); Boonville *v.* Ormond, 26 Mo. 193 (heirs).

Notice to agent held to be sufficient see *In re* Kimmey, 5 Harr. (Del.) 18 (overseer of non-resident); Pickford *v.* Lynn, 98 Mass. 491. Otherwise see Chase County *v.* Carter, 30 Kan. 581, 1 Pac. 814; Lullamire *v.* Kaufman County, 3 Tex. App. Civ. Cas. § 325, holding that a person who had been looking after land for a non-resident, and preventing persons from cutting timber on it, and who had contracted with the owner to fence the land, but who had no connection with it, was not an agent or attorney of the owner so that service on him, under Tex. Rev. St. art. 4470, in proceedings to establish a public road, of the notice required to be given, was service on the owner.

Trustee.—It is enough that notice be served on one of several trustees who has control of land. *In re* Ralph, 5 Pennew. (Del.) 124, 58 Atl. 1036.

The mortgagor is the proper person to serve with notice (Whiting *v.* New Haven, 45 Conn. 303; Goodrich *v.* Atchison County, 47 Kan. 355, 27 Pac. 1006, 18 L. R. A. 113; Cool *v.* Crommet, 13 Me. 250; Gurnsey *v.* Edwards, 26 N. H. 224), unless the mortgagee is in possession (Cool *v.* Crommet, *supra*; *In re* Parker, 36 N. H. 84, holding also that if the mortgagee in possession holds under a mortgage from a corporation, duly executed, the court will not, in a proceeding for laying out a highway, inquire whether the corporation had authority under its charter to make the mortgage).

A judgment creditor of the owner is not entitled to notice. Gimbel *v.* Stolte, 59 Ind. 446.

Where a highway is laid over a turnpike road, and the easement or franchise of the corporation is taken, it is not necessary to notify the owners of the land over which the turnpike road was established. Peirce *v.* Somersworth, 10 N. H. 369.

Death of owner pendente lite.—Where public notice of a meeting of the county commissioners for the purpose of locating a highway and assessing the damages was given in the manner prescribed by Mass. St. (1828) c. 103, § 3, it was sufficient as against the heirs of a person over whose land the highway was laid out, although such person died four days before the meeting, out of the commonwealth, and none of the heirs resided at that time within the commonwealth, or had actual notice. Taylor *v.* Hampden County, 18 Pick. (Mass.) 309.

A purchaser pendente lite is not entitled to notice. Murphy *v.* Beard, 138 Ind. 560, 38 N. E. 33; Graham *v.* Flynn, 21 Nebr. 229, 31 N. W. 742. *Contra*, Curran *v.* Shattuck, 24 Cal. 427.

Petitioner is not entitled to notice, since he is plaintiff. Graham *v.* Flynn, 21 Nebr. 229, 31 N. W. 742.

Railroad company.—A railroad running over the land of non-residents is such a resident occupier as must be served with notice of the lay-out of a highway over the land. State *v.* Iowa Cent. R. Co., 91 Iowa 275, 59 N. W. 35. Where a railroad company's ownership of a railroad track is not shown by the county transfer book, notice of a report in favor of establishing a road across such track need not be served personally on an officer or agent of the road. State *v.* Chicago, etc., R. Co., 80 Iowa 586, 46 N. W. 741. Iowa Code (1873), § 936, relative to the establishment of highways, declares that "notice shall be served on each owner or occupier of land lying in the proposed highway, or abutting thereon, as shown by the transfer books in the auditor's office, who resides in the county, in the manner provided for service of original notice in actions of law." It was held that where it does not appear that the land proposed to be taken stands in the name of any one as owner on the auditor's books, a railway corporation which is in the open and notorious occupation of the land is entitled to notice, if a resident of the county. Chicago, etc., R. Co. *v.* Ellithrope, 78 Iowa 415, 43 N. W. 277. In the application of the statutes relating to notice of the establishment of highways, a railway company is to be regarded as a resident of any county in which it operates its road or exercises corporate franchises. Chicago, etc., R. Co. *v.* Ellithrope, *supra*; State *v.* Bogardus, 63 Kan. 259, 65 Pac. 251. Land belonging to a railroad company, on which its tracks are laid, is improved property, within the rule of court requiring notice to be given to owners of such property when a highway is proposed to be laid out over it. *In re* Lancaster City Road, 68 Pa. St. 396. A station agent at a depot on the grounds through which the highway is proposed to be laid out is the occupant of such grounds, upon whom notice may be served, under Sanborn & B. Annot. St. Wis.

is necessary.[54] In some of the New England states the town is entitled to notice of a proceeding to lay out a town way.[55] Persons interested likewise have a right to appear and be heard.[56] The authorities are in conflict as to whether persons interested are entitled to notice and a hearing on the question of the expediency or necessity of establishing a road, or of its public utility or convenience.[57]

(II) *Form and Sufficiency* — (A) *In General.* A notice substantially conforming to the statutory requisites as to form is generally sufficient.[58] As a rule it should state the names of petitioners for the highway,[59] and the tribunal to whom the application will be made,[60] the time when the application is to be

§ 1267, providing for the service of such notices, or under section 2637, as amended by Laws (1887), c. 552 (2 Sanborn & B. Annot. St. p. 1512), providing for the service of summons in actions against railway companies. State *v.* O'Connor, 78 Wis. 282, 47 N. W. 433.

Township and borough officers.— Pa. Act May 2, 1899 (Pamphl. Laws 176), relating to notice to supervisors in proceedings for opening a road, does not require notice of a proposed opening and construction of a new road to be given to borough officers. *In re* Cornplanter Tp. Road, 26 Pa. Super. Ct. 29. But all the supervisors of the township must be notified. *In re* Chartiers Tp. Road, 30 Pittsb. Leg. J. N. S. (Pa.) 268.

New notice after amendment of petition.— Where a petition for the location of a highway was filed after due notice, and subsequently an amended petition was filed changing the length of the proposed highway from two and one-half to one and three-quarter miles, but no new notice was given, the commissioners had no jurisdiction to determine the matters set forth in the amended petition, since in effect it amounted to a new proceeding. Thrall *v.* Gosnell, 28 Ind. App. 174, 62 N. E. 462.

County line road.— In proceedings to open a highway on the county line, where the petition and notice required by law are not posted in one of the counties, all the proceedings are void for want of jurisdiction. Schuchman *v.* Highway Com'rs, 52 Ill. App. 497.

Constructive notice is sufficient. Stewart *v.* Hines County Police Bd., 25 Miss. 479. And see Curran *v.* Shattrick, 24 Cal. 427.

54. Fletcher *v.* Fugate, 3 J. J. Marsh. (Ky.) 631 (holding that, before appointing viewers of a proposed road, the county court should cause the owners of the land through which the road is to be passed to show cause why it should not be established); Anonymous, 2 T. B. Mon. (Ky.) 91 (holding that to authorize the establishment of a public road it must appear that the owners of the land were summoned or that they appeared in court).

55. Gifford *v.* Norwich, 30 Conn. 35; Baker *v.* Windham, 25 Conn. 597; Plainfield *v.* Packer, 11 Conn. 576; Com. *v.* Cambridge, 7 Mass. 158; Com. *v.* Egremont, 6 Mass. 491; Com. *v.* Sheldon, 3 Mass. 188; Com. *v.* Chase, 2 Mass. 170; Com. *v.* Metcalf, 2 Mass. 118; Drown *v.* Barton, 45 Vt. 33.

However, a town in which no part of a road prayed for lies is not entitled to notice, although it is a party to the petition. Windsor *v.* Field, 1 Conn. 279. And it is not necessary that the towns in the vicinity of those through which a road is to pass, and which may be chargeable under the statute, should be notified of the hearing on the question of laying out the road. Webster *v.* Alton, 29 N. H. 369.

Only the town is entitled to notice of the pendency of a petition against it in court for the laying out of a road. The landowners' rights are secured by notice of hearing thereon. *In re* Toppan, 24 N. H. 43.

56. Shelton *v.* Derby, 27 Conn. 414 (holding that it was not necessary that before being permitted to appear a person interested should give a bond to the town, respondent on the record, to save it harmless from all cost resulting from his appearance, under the statute which provides that any member of a community appearing in and defending a suit brought against the community shall give such bond, since he was appearing in his own name, and to defend his own rights and not in the name or to defend the rights of the town); Storm Lake *v.* Iowa Falls, etc., R. Co., 62 Iowa 218, 17 N. W. 489 (tenant under lease perpetual at his option).

57. **Pro.**— Walbridge *v.* Cabot, 67 Vt. 114, 30 Atl. 805; Lynch *v.* Rutland, 66 Vt. 570, 29 Atl. 1015; Seifert *v.* Brooks, 34 Wis. 443.

Con.— Lent *v.* Tillson, 72 Cal. 404, 14 Pac. 71; Com. *v.* Cambridge, 7 Mass. 158; People *v.* Smith, 21 N. Y. 595.

58. Stevens *v.* Cerro Gordo County, 41 Iowa 341, holding that a notice that a petition will be presented "for a new road" is in substance a notice of the petition for establishment of a new road, and is therefore sufficient.

59. King *v.* Benton County, 10 Oreg. 512.

However, an immaterial variance between the names on the petition and notice is not a jurisdictional defect, and will not render the proceedings void. Bewley *v.* Graves, 17 Oreg. 274, 20 Pac. 322.

60. Abbott *v.* Scott County, 36 Iowa 354 (holding, however, that notice stating that application will be made to the county auditor, who is *ex officio* clerk of the board of supervisors, or to the board of supervisors, is sufficiently certain, since the effect of notice is that, if the board of supervisors should be in session at the time named, the petition will be presented to them, and that, if not in session, it would be presented to the county auditor); Sweek *v.* Jorgensen, 33 Oreg. 270, 54 Pac. 156 (holding, however, that notice that, at a session of the "county court for —— County," a petition will be pre-

made [61] or when objections must be filed,[62] and the place of application.[63] It should also contain a description of the proposed road.[64] The notice is sometimes required to be signed,[65] but need not be under seal.[66]

(B) *Time.*[67] The statutory provisions as to the time of notice must be strictly observed.[68] It has been held that in computing the time both the day of service and the day of hearing must be excluded.[69]

sented to "said court" to establish a road "within said county" along a certain line in H county, sufficiently shows, as against collateral attack, that the petition is to be presented to the county court of H county).

61. State *v.* Waterman, 79 Iowa 360, 44 N. W. 677.

However, notice of the presentation of a petition to construct a road, stating that the petition would be presented on the first day of the next term of the board of commissioners, "which will be held on the first day of May," is not defective because such term in fact commenced on the "first Monday" in May, all persons being charged with notice of the statutory requirement (Burns Rev. St. Ind. (1901) § 7821) that such board shall meet on the first Monday of each month. Gifford *v.* Baker, 158 Ind. 339, 62 N. E. 690. And notice of an application for surveyors to lay out a road need not set out the precise hour of the day that the application will be made. *In re* Highway, 3 N. J. L. 665. See People *v.* Wallace, 4 Thomps. & C. (N. Y.) 438.

62. Beatty *v.* Beethe, 23 Nebr. 210, 36 N. W. 494, holding that, under Comp. St. (1881) c. 78, § 18, providing that in the location of highways a notice shall be published stating that objections to such highway must be filed by a day named therein, a notice which fails to fix such day gives the county commissioners no jurisdiction.

63. *In re* Public Roads, 5 Harr. (Del.) 174.

64. Butterfield *v.* Pollock, 45 Iowa 257; *In re* Highway, 16 N. J. L. 391, holding that the notice should designate the beginning and the terminating points.

A substantial description is sufficient. Jenkins *v.* Riggs, 100 Md. 427, 59 Atl. 758. Thus, although words may be used which, according to their strict literal meaning, render the description somewhat confused, yet if, on giving them their ordinary signification, and referring to the context, there does not seem to be any want of particularity as to the commencement, termination, or route of the proposed street, it is sufficient. State *v.* Orange, 32 N. J. L. 49. So a notice designating the points of commencement and termination of the highway, and indicating the line of route by intelligible reference to the lines of the congressional subdivisions of the land through which it passes, sufficiently describes the proposed highway. Woolsey *v.* Hamilton County, 32 Iowa 130. And where a notice sufficiently states the starting point and width, the use of the words, "varying so far as is necessary to find suitable ground for making a good and substantial road," will not vitiate the legality of the highway, so far as it actually follows the survey lines. Shepard *v.* Gates, 50 Mich. 495, 15 N. W. 878. And since the statutes do not require that the notice of an application of freeholders for appointment of surveyors to lay out a public road shall state the width of the road, proceedings will not be set aside because the width is not stated in such notice. State *v.* Shreve, 4 N. J. L. 297.

Obvious mistake.— A mistake in the notice respecting the proposed location will not defeat the jurisdiction of the supervisors if it is of such a character that a person would readily discover it. Butterfield *v.* Pollock, 45 Iowa 257.

Variance between notice and petition.— Where the description of a proposed public road in the notice to landowners of the petition for the road does not correspond with the description in the petition, the notice is insufficient. *In re* Parker, 2 Pennew. (Del.) 336, 45 Atl. 347. Variance between location and description in notice see *infra*, II, C, 5, h, (I), (C).

65. *In re* Parker, 2 Pennew. (Del.) 336, 45 Atl. 347; *In re* Road Notices, 5 Harr (Del.) 324; State *v.* Orange, 32 N. J. L. 49; Minard *v.* Douglas County, 9 Oreg. 206. *Contra*, Wright *v.* Wells, 29 Ind. 354; Daugherty *v.* Brown, 91 Mo. 26, 3 S. W. 210. But see Milhollin *v.* Thomas, 7 Ind. 165.

66. State *v.* Chicago, etc., R. Co., 80 Iowa 586, 46 N. W. 741.

67. Statement of time of application in notice see *supra*, II, C, 5, d, (II), (A).

68. Dixon *v.* Port Huron Tp. Highway Com'r, 75 Mich. 225, 42 N. W. 814; Anderson *v.* San Francisco, 92 Minn. 57, 99 N. W. 420; Cassidy *v.* Smith, 13 Minn. 129; Ball *v.* Westmoreland, 54 N. H. 103 (holding that the court has no authority to make an order of notice on a petition for laying out or altering a highway, filed in term-time or vacation, returnable during an existing term); Bitting *v.* Douglas County, 24 Oreg. 406, 33 Pac. 981 (holding, under Hill Annot. Laws Oreg. § 4063, providing that notice to establish a county road shall be served by posting in public places, and that it shall be posted thirty days previous to presentation of the petition, that a notice, without date, merely stating that at the next regular term of court a petition would be presented for change in a road, is not sufficient).

69. *In re* Public Roads, 5 Harr. (Del.) 174; Cox *v.* Hartford Tp. Highway Com'r, 83 Mich. 193, 47 N. W. 122; People *v.* Clay Tp. Highway Com'rs, 38 Mich. 247. *Contra*, under S. D. Comp. Laws, § 4805, which provides that the time in which any act provided by law is to be done is computed by excluding the first day and including the last.

(III) *SERVICE* — (A) *In General.* Service of the notice may be made by delivery thereof to the person concerned,[70] or by leaving it at his dwelling-house,[71] or it may be made constructively, as by publication in a newspaper,[72] or by posting a copy of the petition or notice.[73]

Williams *v.* Turner Tp., 15 S. D. 182, 87 N. W. 968.

70. See cases cited *infra*, this note.

Service on infant.— Where a committee appointed by the common pleas reported that a highway sought to be laid out would pass over the land of certain infants, a notice served on the infants themselves of the time and place for hearing the landowners is insufficient, and it was proper for the court, on motion by petitioners, to appoint a guardian *ad litem* for the infants, on whom legal notice might be served of the time and place of hearing. Clarke *v.* Gilmanton, 12 N. H. 515.

Service on town.— In proceedings under Conn. Rev. St. tit. 24, § 22, providing for an application to the superior court for relief by any party aggrieved by the doings of selectmen in laying out a highway, and that the selectmen shall be duly cited to show reason why the relief should not be granted, the town is the party respondent, and service on one of the selectmen is sufficient. Baker *v.* Windham, 25 Conn. 597. And see Plainfield *v.* Packer, 11 Conn. 576.

Sufficiency of service generally.— The fact that the copy of a petition for a highway, and of the clerk's order of notice on the petition, served on the towns, were made and served by petitioner himself, did not render the service insufficient. McClure *v.* Groton, 50 N. H. 49. Where witness saw plaintiff a distance from him, and called to him to come and get a notice of proceedings to open a road, and plaintiff sent his wife after the paper, and she placed it in his hands, there was a valid personal service on plaintiff. Vogt *v.* Bexar County, 16 Tex. Civ. App. 567, 42 S. W. 127. Where the notice by the supervisors of the time and place of meeting to decide on the application for the laying out of a highway is served by reading the notice to those entitled to it it is a personal service. Green *v.* State, 56 Wis. 583, 14 N. W. 620.

71. Winchester *v.* Hinsdale, 12 Conn. 88 (holding that service of a petition for a highway on a town by leaving a copy at the usual place of abode of one of the selectmen is good); Sanborn *v.* Meredith, 58 N. H. 150.

72. State *v.* Chicago, etc., R. Co., 68 Iowa 135, 26 N. W. 37 (holding also that a foreign railroad corporation across whose tracks a highway is being established is not an "owner or occupier . . . who resides in the county," within the meaning of Iowa Code (1873), § 936, requiring written notice of the proposed establishment of a highway, and consequently it is not entitled to notice otherwise than by publication); Wilson *v.* Hathaway, 42 Iowa 173; State *v.* Beeman, 35 Me. 242 (where no mode is pointed out by statute for giving notice); Pawnee County *v.* Storm, 34 Nebr. 735, 52 N. W. 696.

Presumption of notice.— In such case notice is imputed to the person concerned, regardless of his actual knowledge. State *v.* Beeman, 35 Me. 242; East Baltimore Station Methodist Protestant Church *v.* Baltimore, 6 Gill (Md.) 391, 48 Am. Dec. 540. And see Pawnee County *v.* Storm, 34 Nebr. 735, 52 N. W. 696.

Character of newspaper.—Where public notice in road cases is required to be made in two newspapers nearest the road, such publication made in two German newspapers in the German language is not according to law. *In re* Upper Hanover Road, 44 Pa. St. 277.

Affidavit for publication.— In an action by a county to obtain a right of way over land for a highway, the affidavit for the publication of the summons, when the person on whom service is to be made resides out of the state, must state that the proceedings directed by Cal. Pol. Code, §§ 2698–2708, have been had, or no cause of action is shown. Yolo County *v.* Knight, 70 Cal. 430, 11 Pac. 662.

73. Wilson *v.* Hathaway, 42 Iowa 173; Mathewson *v.* Clinton Tp., 8 Pa. Co. Ct. 204, holding that want of personal notice to the owner of seated land will not render void the decree of the court of quarter sessions establishing a road over it, although such notice is required by rule of court, notice by posting advertisements, as required by Pa. Act, Feb. 24, 1845, having been given.

Posting held to be necessary see Frizell *v.* Rogers, 82 Ill. 109; North Henderson Highway Com'rs *v.* People, 2 Ill. App. 24; Anderson *v.* San Francisco, 92 Minn. 57, 99 N. W. 420; Cassidy *v.* Smith, 13 Minn. 129; People *v.* Stedman, 57 Hun (N. Y.) 280, 10 N. Y. Suppl. 787, holding, under a statute which requires every person applying for the laying out of a highway to cause notices in writing to be posted in three of the most public places in the town, specifying as near as possible the proposed route of the highway, etc., that it is not sufficient to deposit such notices in the mail, addressed to the persons whose land is to be affected by the proposed highway.

Both petition and notice must be posted under a statute requiring that petitioners "shall cause a copy of their petition and notice stating when said petition will be presented to the township board to be heard, to be posted." Peed *v.* Barker, 61 Mo. App. 556.

Copies of the notice may be posted under Hill Annot. Laws Oreg. § 4063, providing that a petition for the establishment of a county road shall be accompanied by "proof that notice has been given by advertisement, posted at the place of holding county court, and also in three public places" in the vicinity of the proposed road. Vedder *v.* Marion County, 22 Oreg. 264, 29 Pac. 619.

Posting by county commissioner.—The fact

(B) *Return or Proof.*[74] As a rule there should be due proof of service of the notice required by statute.[75]

that one of the county commissioners posted the notice of the petition for a highway does not affect the validity of the order establishing the road. Schmidt *v.* Wright, 88 Ind. 56.

Posting as notice to residents.— Hurd Rev. St. Ill. (1899) c. 121, § 43, providing that where it appears in proceedings before town commissioners to lay out a road that there are "non-resident or unknown owner or owners, who cannot be found and served within the county," service of notice of such proceedings may be made on the occupant of the land and by posting notice, cannot be construed to authorize such service on a known resident landowner who cannot be found. Afton Highway Com'rs *v.* Ellwood, 193 Ill. 304, 61 N. E. 1033. However, the posting by the selectmen of the town of a notice of their intention to lay out a town way, as required by Mass. Gen. St. c. 43, § 61, is a sufficient notice to the owner of the land taken, although a resident of the town, if such ownership be not known to the selectmen. Healey *v.* Newton, 119 Mass. 480.

Place of posting.— A notice posted more than a mile from the proposed route is not a sufficient compliance with Mills Annot. St. Colo. § 3934, requiring the posting of notices along a road proposed to be established. Williams *v.* Routt County, 37 Colo. 55, 84 Pac. 1109. But a notice posted at a railroad depot about six or seven hundred feet from where the proposed road connnects with the main highway, at which point there is no suitable place for posting it, is posted at a public place in the vicinity of the proposed road, within the meaning of Mont. Comp. St. div. 5, § 1809, providing that such notice shall be so posted. Territory *v.* Lannon, 9 Mont. 1, 22 Pac. 495. The word "township," in Iowa Revision, § 823, requiring notice of presentation of a petition for the establishment of a road to be posted in three public places in each "township" through which the road passes, refers to townships created by state, and not by federal, laws. McCollister *v.* Shuey, 24 Iowa 362. Where it was required by a town that notice of its meetings should be posted at the town house on a specified street, posting at "the town house" was held sufficient, it not being shown that more than one town house existed. State *v.* Beeman, 35 Me. 242. In Minnesota the petition or notice is required to be posted in three public places. Anderson *v.* San Francisco, 92 Minn. 57, 99 N. W. 420; Cassidy *v.* Smith, 13 Minn. 129. Minn. Gen. St. (1894) § 1030, providing for the posting of notices for laying out of county roads and for the designation of places for the posting of such notices, is to be so construed as to effectuate the obvious purpose of the legislature of providing effective means of securing posting of notices at public places. Accordingly where two notices were posted in strict conformity with the statute, and the third, because no post had been provided for by the supervisors until a later period, was posted at a public place, in the ordinary acceptation of the term, which had been previously designated and used for posting notices, not then a statutory place for posting, the irregularity did not deprive the county board of jurisdiction. Lutgen *v.* Stearns County, 99 Minn. 499, 110 N. W. 1, a case in which the third notice was posted on a tree near a designated schoolhouse, which was one of the most public places in the township. Under Minn. Gen St. (1894) § 1883, as amended by Gen. Laws (1895), c. 47, providing for roads in more than one county, and directing the presentation of the petition to the judge of the district court in the district in which one of the counties is situated, which must be posted thirty days prior to its presentation at three of the most public places in such judicial district, where the road runs in two judicial districts, notices of the presentation of the petition need be posted only in the judicial district wherein the petition was presented to the court. Forster *v.* Winona County, 84 Minn. 308, 87 N. W. 921. And in Missouri, where the statute relating to the establishment of public roads provides that notice shall be given by hand-bills put up in three or more public places in the township or townships, one to be put up at the proposed beginning and one at the proposed termination of the road, a proposed road ran through two townships, and three notices were posted, one at the beginning and one at the end of the proposed road, and the third at a public place on the line, and it was held a compliance with the statute. Bennett *v.* Hall, 184 Mo. 407, 83 S. W. 439.

74. Record and presumption as to notice see *infra*, II, C, 5, i, (I), (D).

75. *Delaware.*— *In re* Parker, 2 Pennew. 336, 45 Atl. 347 (holding that where there was no proof, by affidavit or in open court, of the service of notice on landowners of a petition for a public road, the notice was insufficient); Isaacs' Petition, 1 Pennew. 61, 39 Atl. 588 (holding that proof of service of notice on the landowners through whose property a public road is proposed to be run must be made before the order to lay out the road is granted).

Illinois.— North Henderson Highway Com'rs *v.* People, 2 Ill. App. 24, holding that in the absence of proof that Rev. St. c. 121, § 71, has been complied with, requiring copies of the petition for laying out the proposed highway to be posted, etc., the commissioners must refuse to act.

Indiana.—Wright *v.* Wells, 29 Ind. 354, holding that the sufficiency of the proof of the posting of the notice of the petition is a jurisdictional fact, which must be determined by the board of commissioners before the appointment of viewers.

Kansas.— State *v.* Farry, 23 Kan. 731, holding that a county board cannot establish a road without first complying with Comp.

(IV) *OBJECTIONS AND WAIVER.* Notice of a proceeding to lay out a high-

Laws (1879), c. 89, § 4, which requires the giving of notice to the landowners, and the filing of affidavits of service, with copies of the notice, in the county clerk's office.

Kentucky.— Louisville, etc., R. Co. *v.* Gerard, 130 Ky. 18, 112 S. W. 915, holding that the giving of notice prior to filing the petition is an indispensable jurisdictional fact that must be made to appear in the county court, either by the record or the introduction of evidence.

New Jersey.— State *v.* Shreeve, 15 N. J. L. 57, holding that the court of common pleas have no jurisdiction to appoint surveyors of the highways without due proof that the advertisements have been set up according to law.

See 25 Cent. Dig. tit. "Highways," § 69.

See, however, Pagels *v.* Oaks, 64 Iowa 198, 19 N. W. 905 (holding that under Code (1873), §§ 937, 938, providing that, if the auditor is satisfied that notice has been served and published as required, he shall proceed to establish the road, no filing of an affidavit of publication is necessary to give the county supervisors jurisdiction to establish a highway, and the burden of showing want of notice is on the party objecting thereto); Forster *v.* Winona County, 84 Minn. 308, 87 N. W. 921 (holding that Gen. St. (1894) § 1883, as amended by Gen. Laws (1895), c. 47, providing for roads in more than one county, and directing the presentation of the petition to the judge of the district court in the district in which one of the counties is situated, which must be posted thirty days prior to its presentation at three of the most public places in such district, does not require affidavits of posting to be filed at the time of the presentation of the petition; it is enough if the notices are in fact posted).

By whom made.— In Nebraska proof of posting should be made by the affidavit of the person who posted the notice. State *v.* Otoe County, 6 Nebr. 129. In New Hampshire, however, it is not necessary that the return of service should be made by the person making the service, but any other satisfactory proof of the fact of service is sufficient. Parish *v.* Gilmanton, 11 N. H. 293. In Oregon the proof may be by the affidavit of one of the petitioners, who knows that such notice has been given. Gaines *v.* Linn County, 21 Oreg. 425, 28 Pac. 131.

Oral proof may be given that a person who was inadvertently omitted in the affidavit of service of notice on the landowners through whose property a public road was petitioned for was served with notice. Isaacs' Petition, 1 Pennew. (Del.) 61, 39 Atl. 588.

Necessity of calling witnesses.— To prove that copies of the petition were properly posted, it is not necessary to call as witnesses the parties who posted them. Their *ex parte* affidavits attached to the petition are sufficient. Wells *v.* Hicks, 27 Ill. 343.

The affidavit should state when, where, and by whom the notices were posted. State *v.* Otoe County, 6 Nebr. 129. Howell Annot. St. Mich. § 1298, requires notice of proceedings to lay out a highway to be served on railroad companies by leaving a copy "with the agent in charge of any ticket or freight office of the company," etc. Section 1299 provides that, on service of the notice required by the last section, the person by whom the service was made shall make an affidavit stating the time and manner of service, "and, if upon a railroad company, the fact of such service, and upon whom." It was held that an affidavit showing merely that service was made on a railroad company "by leaving a copy of the notice with their freight agent at Dorr station," without giving his name, or showing that he was in charge of the freight office, is insufficient. Truax *v.* Sterling, 74 Mich. 160, 41 N. W. 885.

Certificate of posting.— Under Ill. Rev. Laws (1874), c. 121, § 71, providing that a copy of a petition for a highway shall be posted up in three of the most public places in the town, and that the posting of any such notice required by the act may be proved by affidavit of the person posting the same, or by other legal evidence, it is not sufficient proof of such posting that at the end of the petition there appears this recital, "I hereby certify this was posted according to law." Frizell *v.* Rogers, 82 Ill. 109.

Affidavit as aided by record.— An affidavit stating that a notice of the intention to petition for the opening of a road was posted more than thirty days before presentation of said petition, and to which a copy of the notice is attached, and which bears a notation purporting to state the date when the notice was posted, such date being more than thirty days prior to the presentation of the petition, when taken in connection with the order of the county court establishing the road, which recites that it appears from proof filed that due notice of the proceeding has been given more than thirty days prior to the presentation of the petition, sufficiently shows that the posting was made at a date more than thirty days before the presentation of the petition. French-Glenn Live-Stock Co. *v.* Harney County, 36 Oreg. 138, 58 Pac. 35. So posting of notice in three public places within the vicinity of the proposed road is sufficiently shown by affidavits designating places where notices were posted, as a barn on the line of road, the barn of V, and a fence at the east end of the road, and the recital, in the journal entry of the court appointing viewers, that it appeared that the notice had been posted in three of the most public places along the line. Sweek *v.* Jorgensen, 33 Oreg. 270, 54 Pac. 156. Record and presumption as to notice see *infra*, II, C, 5, i, (I), (D).

Power to administer oath.— Since Ind. Rev. St. (1842) p. 189, § 52, gives the county auditor power to administer all oaths necessary for the performance of the duties of his office, and since, by virtue of his office, he is clerk of the board of commissioners of high-

way may be waived by a landowner;[76] and if he appears generally and participates in the proceeding he thereby waives the absence of notice or defects therein.[77] So notice may be waived by the consent of the landowner to the laying out of the road.[78] The right to object to the absence of notice is generally regarded as personal.[79]

e. Petition or Other Application — (i) *Necessity.* Unless expressly required

ways, the proof of putting up the notices of an intended application, and that the petition was signed by the requisite number of freeholders, might be made on oath administered by the county auditor. Milhollin *v.* Thomas, 7 Ind. 165.

76. McCown *v.* Hill, (Tex. Civ. App. 1903) 73 S. W. 850 (so holding, although the notice is jurisdictional); Allen *v.* Parker County, 23 Tex. Civ. App. 536, 57 S. W. 703. And see cases cited *infra*, note 77 *et seq.*

77. *California.*— Kimball *v.* Alameda County, 46 Cal. 19.

Indiana.— Fisher *v.* Hobbs, 42 Ind. 276; Daggy *v.* Coats, 19 Ind. 259; Milhollin *v.* Thomas, 7 Ind. 165.

Kansas.— State *v.* Hadeen, 47 Kan. 402, 28 Pac. 203 (holding that, although no notice is given to one of the owners through whose land a highway is laid out, or any finding made that he is a non-resident of the county, the want of jurisdiction is cured by the presentation by him to the county commissioners of a claim for damages in consequence of the opening of the road); Woodson County *v.* Heed, 33 Kan. 34, 5 Pac. 543 (holding that where county commissioners had jurisdiction over the laying out of a road, but not over the person of one landowner, his presentation of a claim for damages after the opening of the road was a waiver of want of jurisdiction).

Kentucky.—Anonymous, 2 T. B. Mon. 91.

Massachusetts.— Hyde Park *v.* Wiggin, 157 Mass. 94, 31 N. E. 693; Copeland *v.* Packard, 16 Pick. 217 (holding that where a party was present at the town meeting when the proceedings of selectmen laying out a road were approved, and objected that he was not allowed sufficient amount of damages, he cannot thereafter object that he had not received sufficient notice of the laying out of such road); *In re* New Salem, 6 Pick. 470.

Michigan.— Page *v.* Boehmer, 154 Mich. 693, 118 N. W. 602, holding that jurisdiction was obtained over a landowner by his participation in the proceedings and taking an appeal.

New Hampshire.— Roberts *v.* Stark, 47 N. H. 223 (holding that if a town files exceptions to the notice and at the same time contests the petition on other grounds, the defect in the notice will be waived); Peavey *v.* Wolfborough, 37 N. H. 286 (holding that objections to the notices, if not taken at the hearing, will be waived).

North Carolina.— Little *v.* May, 10 N. C. 599.

Pennsylvania.— *In re* Corplanter Tp. Road, 26 Pa. Super. Ct. 29, holding that where a borough has actual notice of proceedings to open a road, and its representatives are present at the view, it has no standing subsequently to object that written notice was not served on its officers, and that a duly attested copy of the notice was not filed in the office of the clerk of the quarter sessions.

South Dakota.— Issenhuth *v.* Baum, 11 S. D. 223, 76 N. W. 928.

Texas.— Onken *v.* Riley, 65 Tex. 468, holding that a landowner who was present when a road was laid out through his land by a jury of freeholders appointed by the commissioner's court, and also when their action was confirmed and adopted by the court, cannot object to such road on the ground of want of notice to him of the proceedings for its establishment.

Vermont.— Robinson *v.* Winch, 66 Vt. 110, 28 Atl. 884, holding that want of notice of a hearing by the board of selectmen as to the necessity of a highway is waived by one's appearance at the hearing.

Virginia.— Tench *v.* Abshire, 90 Va. 768, 19 S. E. 779.

See 25 Cent. Dig. tit. "Highways," § 70.

Otherwise unless the occupant consents to the laying out of the road over his land, or accepts damages, or in some way adopts the acts of the supervisors as his own. State *v.* Langer, 29 Wis. 68.

78. Barnes *v.* Fox, 61 Iowa 18, 15 N. W. 581 (*semble*); Crawford *v.* Snowden, 3 Litt. (Ky.) 228 (*semble*); State *v.* Langer, 29 Wis. 68 (*semble*). *Contra,* St. Bartholomew's Parish Lower Bd. Road Com'rs *v.* Murray, 1 Rich. (S. C.) 335.

However, the consent of the proprietors of land where a road is to pass must be given in court, and not to the commissioners appointed to view the road. Crawford *v.* Snowden, 3 Litt. (Ky.) 228.

79. Knox *v.* Epsom, 56 N. H. 14 (holding that persons interested in the laying out of a highway, but who are not by statute entitled to notice of the petition, cannot object to the sufficiency of the notice given to a town which is entitled to notice); Hasler *v.* Hitler, 9 Ohio Dec. (Reprint) 233, 11 Cinc. L. Bul. 246 (holding that where a landowner through whose land the proposed way is to be constructed waives his right to compensation and damages for the taking of such land, persons other than such landowner cannot object that he was not served with notice of the proceedings to lay out such way). But see State *v.* Logue, 73 Wis. 598, 41 N. W. 1061, holding that the fact that a landowner signed the petition for a highway does not dispense with the necessity of notice to the public and other owners, and he may avail himself of want of such notice to impeach the proceedings.

by statute, which is usually the case,[80] it is not necessary to the valid laying out of a highway that there should have been a petition or other application therefor.[81]

(II) *FORMAL REQUISITES.* A petition for the establishment of a highway should be addressed to the court or board having jurisdiction to establish highways.[82] It need not be signed by petitioners,[83] in the absence of a statute to the contrary.[84]

(III) *SUFFICIENCY*[85] — (A) *In General.* A petition for the establishment of a highway should contain all the facts required to be stated therein by statute in order to confer jurisdiction.[86] It is not essential that the petition should follow the exact language of the statute. Language unmistakably indicating its object and purpose will be held sufficient.[87]

80. *Iowa.*— Lehmann *v.* Rinehart, 90 Iowa 346, 57 N. W. 866.

Kansas.— Shaffer *v.* Weech, 34 Kan. 595, 9 Pac. 202; Oliphant *v.* Atchison County, 18 Kan. 386; Hentzler *v.* Bradbury, 5 Kan. App. 1, 47 Pac. 330.

Maine.— Cushing *v.* Webb, 102 Me. 157, 66 Atl. 719.

Maryland.—Barrickman *v.* Harford County, 11 Gill & J. 50.

Massachusetts.— Com. *v.* Cambridge, 7 Mass. 158; Com. *v.* Peters, 3 Mass. 229; Com. *v.* Coombs, 2 Mass. 489.

Nebraska.— Doody *v.* Vaughn, 7 Nebr. 28; State *v.* Otoe County, 6 Nebr. 129; Robinson *v.* Mathwick, 5 Nebr. 252.

New Hampshire.— State *v.* Morse, 50 N. H. 9; Clement *v.* Burns, 43 N. H. 609; State *v.* Rye, 35 N. H. 368; Haywood *v.* Charlestown, 34 N. H. 23; Wiggin *v.* Exeter, 13 N. H. 304; Prichard *v.* Atkinson, 3 N. H. 335.

Oregon.— Johns *v.* Marion County, 4 Oreg. 46.

United States.— Burns *v.* Multnomah R. Co., 15 Fed. 177, 8 Sawy. 543.

See 25 Cent. Dig. tit. "Highways," § 47.

81. Howard *v.* Hutchinson, 10 Me. 335; O'Neil *v.* Walpole, 74 N. H. 197, 66 Atl. 119; Kopecky *v.* Daniels, 9 Tex. Civ. App. 305, 29 S. W. 533; Decker *v.* Menard County, (Tex. Civ. App. 1894) 25 S. W. 727.

In Nebraska the establishment of section-line roads is governed by the special provisions of Road Law, § 46, by which all section lines are declared to be public roads, and may be opened as such whenever, in the judgment of the county boards, the public interest demands, a petition not being essential. Barry *v.* Deloughrey, 47 Nebr. 354, 66 N. W. 410; Rose *v.* Washington County, 42 Nebr. 1, 60 N. W. 352; Howard *v.* Brown, 37 Nebr. 902, 56 N. W. 713; McNair *v.* State, 26 Nebr. 257, 41 N. W. 1099; Throckmorton *v.* State, 20 Nebr. 647, 31 N. W. 232.

In New York it is not necessary to the valid laying out of a highway, that there should have been a written application therefor, but the commissioner may act of his own motion, 1 Rev. St. p. 513, § 55, providing that, whenever the commissioners shall lay out any road either "upon application or otherwise," they shall cause a survey to be made, etc. Marble *v.* Whitney, 28 N. Y. 297; People *v.* Richmond County, 20 N. Y. 252; McCarthy *v.* Whalen, 19 Hun 503 [*affirmed* in 87 N. Y. 148]; Gould *v.* Glass, 19 Barb. 179. *Contra*, Harrington *v.* People, 6 Barb. 607.

82. State *v.* Barlow, 61 Iowa 572, 16 N. W. 733.

However, it is no cause for complaint that the petition runs to the clerk of the board of supervisors instead of the board itself. State *v.* Barlow, 61 Iowa 572, 16 N. W. 733. Nor is a petition fatally defective because it is addressed to the wrong court, where it was filed and indorsed in the proper court, and all subsequent proceedings, including the appointment of viewers, and the confirmation of their report, were made by that court. *In re* Union Tp. Road, 29 Pa. Super. Ct. 573. An omission in the address, not going to the jurisdiction, cannot be taken advantage of by a motion to dismiss. Tucker *v.* Eden, 68 Vt. 168, 34 Atl. 698.

83. Warren *v.* Gibson, 40 Mo. App. 469.

84. Cooper *v.* Harmon, 170 Ind. 113, 83 N. E. 704, holding, however, that the fact that many of the signers of such petition signed their christian names by the initials does not warrant the dismissal of the petition, but merely entitles defendants upon proper motion to have the full christian and surname of each petitioner entered of record.

85. **Sufficiency as against collateral attack** see *infra*, II, C, 5, i, (VI). (F).

86. Canyon County *v.* Toole, 9 Ida. 561, 75 Pac. 609; Randolph *v.* Ætna Highway Com'rs, 8 Ill. App. 128; *In re* Sussex County, etc., Road, 13 N. J. L. 157, holding that it should specify the places where the notices were set up.

Averment of ultimate facts is sufficient. Sullivan *v.* Cline, 33 Oreg. 260, 54 Pac. 154.

87. Stevens *v.* Cerro Gordo County, 41 Iowa 341.

No particular words or form of words are required by the statute in applications to the county commissioners for the location of roads, and the greatest technical accuracy and precision is not to be expected. Windham *v.* Cumberland County, 26 Me. 406. Thus a petition for the appointment of a commissioner "to open a road" sufficiently complies with a statute providing for the "establishment" (Stevens *v.* Cerro Gordo County, 41 Iowa 341; McCollister *v.* Shuey, 24 Iowa 362) or "laying out" (Winooski Lumber, etc., Co. *v.* Colchester, 57 Vt. 538) of a road. Likewise a petition for the appointment of a commissioner to "examine into the expediency of establishing" the road confers jurisdiction un-

(B) *Particular Averments* — (1) QUALIFICATION OF PETITIONERS. Unless required by statute, it is not necessary that the petition should show on its face that petitioners possessed the requisite qualifications.[88] This fact is a matter of evidence to be determined by the board or court on the hearing of the petition.[89]

(2) OWNERSHIP OR OCCUPANCY OF LAND. A petition for the location of a highway is frequently required to give the names of the owners and occupants or agents of all lands over which the proposed road is to run,[90] or, if unknown, it must so state.[91]

(3) UTILITY, NECESSITY, AND CHARACTER OF ROAD. When required by statute, a petition for a highway should aver that the highway is of public utility and necessity.[92] But it is not necessary that the exact language of the statute

der such a statute. State *v.* Pitman, 38 Iowa 252. Nor does jurisdiction fail merely because the word "road" instead of "highway" is used in the petition or in the record, if an examination of the whole will show what description of road was intended. Windham *v.* Cumberland County, *supra*. And see Dartmouth *v.* Bristol County, 153 Mass. 12, 26 N. E. 425. But a petition asking that a highway commencing and terminating at designated points "be ——" not indicating the relief desired, is insufficient to confer jurisdiction on the board to establish a highway. Lehmann *v.* Rinehart, 90 Iowa 346, 57 N. W. 866.

88. *California.*— Humboldt County *v.* Dinsmore, 75 Cal. 604, 17 Pac. 710.

Illinois.— Afton Highway Com'rs *v.* Ellwood, 193 Ill. 304, 61 N. E. 1033, where such qualification appears by recitals in the petition or in the record of the proceedings of the commissioners.

Indiana.—Hall *v.* McDonald, 171 Ind. 9, 85 N. E. 707; Washington Ice Co. *v.* Lay, 103 Ind. 48, 2 N. E. 222; Brown *v.* McCord, 20 Ind. 270. But see Conaway *v.* Ascherman, 94 Ind. 187; Watson *v.* Crowsore, 93 Ind. 220.

Iowa.— Keyes *v.* Tait, 19 Iowa 123.

Kansas.— Wabaunsee County *v.* Muhlenbacker, 18 Kan. 129; Willis *v.* Sproule, 13 Kan. 257.

Missouri.— Snoddy *v.* Pettis County, 45 Mo. 361; Fisher *v.* Davis, 27 Mo. App. 321. But see Jefferson County *v.* Cowan, 54 Mo. 234.

Oregon.— Bewley *v.* Graves, 17 Oreg. 274, 20 Pac. 322.

See 25 Cent. Dig. tit. "Highways," § 51.

But see Nischen *v.* Hawes, 21 S. W. 1049, 15 Ky. L. Rep. 40; Craft *v.* De Soto County, 79 Miss. 618, 31 So. 204; *In re* Sussex County, etc., Road, 13 N. J. L. 157; Howe *v.* Jamaica, 19 Vt. 607; Hewes *v.* Andover, 16 Vt. 510.

89. Humboldt County *v.* Dinsmore, 75 Cal. 604, 17 Pac. 710; Brown *v.* McCord, 20 Ind. 270; Snoddy *v.* Pettis County, 45 Mo. 361; Fisher *v.* Davis, 27 Mo. App. 321.

90. Conaway *v.* Ascherman, 94 Ind. 187; Schmied *v.* Kenney, 72 Ind. 309; Meyers *v.* Brown, 55 Ind. 596 (holding that it is sufficient to allege in the alternative that such persons are owners, occupants, or agents); Vawter *v.* Gilliland, 55 Ind. 278 (holding that the petition is fatally defective where, instead of setting out the full given names of the owners of the land, it gives initials only of the christian names of the individual owners, and the firm-names only of the owners in partnership); Hughes *v.* Sellers, 34 Ind. 337 (holding that it is not a sufficient designation of such owners to say that they are the heirs of a person named); Hays *v.* Campbell, 17 Ind. 430; Milhollin *v.* Thomas, 7 Ind. 165 (holding, however, that the fact that the petition, while stating the owners of the land through which the road would pass, failed to state who occupied the land, will not affect the jurisdiction of the commissioners); Cowing *v.* Ripley, 76 Mich. 650, 43 N. W. 648; Navin *v.* Martin, (Mo. App. 1907) 102 S. W. 61; Mulligan *v.* Martin, 125 Mo. App. 630, 102 S. W. 59; Godchaux *v.* Carpenter, 19 Nev. 415, 14 Pac. 140.

A map accompanying the petition, and showing the names of the landowners, may be considered in determining the sufficiency of the petition. Bennett *v.* Hall, 184 Mo. 407, 83 S. W. 439.

Highway crossing railroad.— Where the route of a proposed highway crosses a railroad, the petition should name the railroad company as one of the owners of the land crossed by it. Lyle *v.* Chicago, etc., R. Co., 55 Minn. 223, 56 N. W. 820. But see Weymouth *v.* York County, 86 Me. 391, 29 Atl. 1100, holding that a petition need not aver the fact that the way will cross a railroad track, although the railroad company must receive notice of the pendency of the petition.

91. Navin *v.* Martin, (Mo. App. 1907) 102 S. W. 61; Mulligan *v.* Martin, 125 Mo. App. 630, 102 S. W. 59.

92. Morris *v.* Salle, 19 S. W. 527, 14 Ky. L. Rep. 117.

In Alabama it is held that, although the petition should properly state facts to show the expediency of the road prayed for, yet it is not demurrable for omitting to do so. Lowndes County Com'rs Ct. *v.* Bowie, 34 Ala. 461.

In Indiana, in a petition to locate a highway under Acts (1905), c. 167, § 21, it is not necessary to allege that the proposed highway will be of public utility, or that the cost thereof will be less than the benefits, since it is the duty of the county commissioners to appoint viewers, if the jurisdictional facts exist, and thereafter the matters suggested are to be considered. Cooper *v.* Harmon, 170 Ind. 113, 83 N. E. 704; Conaway

as to convenience and necessity be followed, a substantial allegation thereof being sufficient.[93]

(4) Neglect or Refusal of Selectmen to Establish Road. Under a statute authorizing an application to the county court for a highway from place to place within the same town only where the selectmen neglect or refuse to lay out the same, it has been decided that the averment of such neglect or refusal is indispensable to give the court jurisdiction.[94]

(5) Description of Road. Technical accuracy is not necessary in the description of a proposed line of road.[95] It is sufficient if the description is so definite and certain as to enable persons familiar with the locality to locate the way,[96] and to enable a surveyor to run it.[97] Thus the petition must describe with reasonable certainty the terminal points of the proposed way [98] and its general

v. Ascherman, 94 Ind. 187; Bowers *v.* Snyder, 88 Ind. 302.

93. Plainfield *v.* Packer, 11 Conn. 576 (holding that a petition was sufficient which stated that, in the opinion of petitioners, common convenience and necessity required that a new highway should be laid out between the two places, and that thereby the distance would be greatly lessened, and not only the travel in the immediate neighborhood, but also the general travel, be greatly facilitated); Windsor *v.* Field, 1 Conn. 279 (holding that where a petition for a highway alleged that the old road was "very circuitous, hilly, and on bad ground," and that a new road might be laid out between the same termini "so as to greatly accommodate the public, with little expense to the town, or injury to private property," it was sufficient, under the statute, without alleging that the highway "is wanting," or that it would be of "common convenience or necessity"); Lockwood *v.* Gregory, 4 Day (Conn.) 407 (holding that an application for a highway by petition, under the statute, need not state that the road prayed for would be "of common convenience or necessity," if the facts stated induce such an inference).

94. Torrington *v.* Nash, 17 Conn. 197 (holding that an averment that the "town" neglected and refused to lay out the highway is not equivalent to an averment that the "selectmen" neglected and refused to lay out the highway); Plainfield *v.* Packer, 11 Conn. 576 (holding further that it must appear from the record that the averment is true; otherwise the proceeding is erroneous); Waterbury *v.* Darien, 9 Conn. 252 (holding, however, that the allegation of a special demand or request is unnecessary); Treat *v.* Middletown, 8 Conn. 243; *In re* Kennett, 24 N. H. 139 (holding that an affidavit saying, "I am confident that a petition was presented to the selectmen before any petition was filed in court," is not sufficient alone to prove that fact); *In re* Patten, 16 N. H. 277.

In Maine the petition must allege that the refusal was unreasonable. Goodwin *v.* Sagadahoc County, 60 Me. 328. But a specific statement of all the acts and facts which constitute an unreasonable refusal is unnecessary. True *v.* Freeman, 64 Me. 573.

95. *Illinois.*— Henline *v.* People, 81 Ill. 269.

Indiana.— Adams *v.* Harrington, 114 Ind. 66, 14 N. E. 603.

Maine.— Windham *v.* Cumberland County, 26 Me. 406.

Maryland.— Jenkins *v.* Riggs, 100 Md. 427, 59 Atl. 758.

Michigan.— Page *v.* Boehmer, 154 Mich. 693, 118 N. W. 602.

See 25 Cent. Dig. tit. "Highways," § 53.

A petition for the location of a county road should not be too critically judged, especially where the termini are plainly fixed. Bryant *v.* Penobscot County, 79 Me. 128, 8 Atl. 460.

96. Cushing *v.* Webb, 102 Me. 157, 66 Atl. 719; Page *v.* Boehmer, 154 Mich. 693, 118 N. W. 602.

97. Wells *v.* Rhodes, 114 Ind. 467, 16 N. E. 830; Adams *v.* Harrington, 114 Ind. 66, 14 N. E. 603; Conaway *v.* Ascherman, 94 Ind. 187; McDonald *v.* Wilson, 59 Ind. 54; Fancher *v.* Coffin, 41 Ind. App. 489, 84 N. E. 354; Warren *v.* Brown, 31 Nebr. 8, 47 N. W. 633; Robinson *v.* Winch, 66 Vt. 110, 28 Atl. 884; Shell *v.* Poulson, 23 Wash. 535, 63 Pac. 204.

Descriptions held sufficiently certain see McDonald *v.* Payne, 114 Ind. 359, 16 N. E. 795; Clift *v.* Brown, 95 Ind. 53; Casey *v.* Kilgore, 14 Kan. 478; Acton *v.* York County, 77 Me. 128; Thompson *v.* Trowe, 82 Minn. 471, 85 N. W. 169; People *v.* Taylor, 34 Barb. (N. Y.) 481; State *v.* O'Connor, 78 Wis. 282, 47 N. W. 433.

Descriptions held too uncertain see Hayford *v.* Aroostook County, 78 Me. 153, 3 Atl. 51; Clement *v.* Burns, 43 N. H. 609.

98. *Maine.*— Andover *v.* Oxford County, 86 Me. 185, 29 Atl. 982; Hayford *v.* Aroostook County, 78 Me. 153, 3 Atl. 51; Sumner *v.* Oxford County, 37 Me. 112.

Massachusetts.— Pembroke *v.* Plymouth County, 12 Cush. 351.

New Jersey.— State *v.* Green, 18 N. J. L. 179; State *v.* Hart, 17 N. J. L. 185; *In re* Highway, 16 N. J. L. 391.

Pennsylvania.—*In re* Cornplanter Tp. Road, 26 Pa. Super. Ct. 20; Anderson's Appeal, 25 Leg. Int. 77.

Washington.— Chelan County *v.* Navarre, 38 Wash. 684, 80 Pac. 845.

See 25 Cent. Dig. tit. "Highways," § 54.

The caption of a petition for a road view may be considered in connection with the petition in determining whether the termini and the names of the township and county are

course;[99] but, unless required by statute, it need not state the proposed width.[1] If the petition is based on a special statute, the sufficiency of the description will depend on the requirements thereof.[2]

sufficiently stated. *In re* Quemahoning Tp. Road, 27 Pa. Super. Ct. 150.

The petition may be aided by the report of the viewers as respects the description of the termini. *In re* Bensalem Tp. Road, 11 Pa. Co. Ct. 398.

The maxim that "that is certain which is capable of being made certain" applies to a petition for a road, as to stating the definite points where the road shall begin and end. State *v.* Lane, 26 Iowa 223; *In re* Private Road, 4 Yeates (Pa.) 514; *In re* West Goshen Roads, 7 Pa. Co. Ct. 250.

Alternative termini.— It has been held that it is not a valid objection to the proceedings that the petition describes alternative places for its location or its termini. Packard *v.* Androscoggin County, 80 Me. 43, 12 Atl. 788; Sumner *v.* Oxford County, 37 Me. 112.

"At or near" designated points.—An application for a road stating the termini to be "at or near" certain designated points is sufficiently certain. Westport *v.* Bristol County, 9 Allen (Mass.) 203; State *v.* Northrop, 18 N. J. L. 271; *In re* Sterrett Tp. Road, 114 Pa. St. 627, 7 Atl. 765; *In re* Verona Borough, etc., Road, 9 Pa. Cas. 114, 12 Atl. 456; Miller's Case, 9 Serg. & R. (Pa.) 35; *In re* Cornplanter Tp. Road, 26 Pa. Super. Ct. 20. But see De Long *v.* Schimmel, 58 Ind. 64; Farmer *v.* Pauley, 50 Ind. 583. Thus the terminus of a public road petitioned for is sufficiently described as a stake marked in a certain way near a certain house. *In re* Ralph, 5 Pennew. (Del.) 124, 58 Atl. 1036. So a petition has been held to sufficiently define the terminus of a road where it describes it as ending at a certain point in a proposed public road. The fact that the road for the terminal point is not yet laid out does not render the terminus indefinite. *In re* West Goshen Roads, 7 Pa. Co. Ct. 250.

Designation of county or township.— Ordinarily a petition to appoint viewers to lay out a public road must state the county or township in which it is to be opened. *In re* Private Road, 1 Pearson (Pa.) 170; *In re* New Hanover Tp. Road, 2 Montg. Co. Rep. (Pa.) 40. But where the terminal points are described with such particularity that no difficulty can be had in locating them, it has been held that it is not necessary to state in what county or township such points are. Sutherland *v.* Holmes, 78 Mo. 399; Oxford Tp. *v.* Brands, 45 N. J. L. 332; *In re* South Abington Tp. Road, 109 Pa. St. 118; *In re* Rostraver Tp. Road, 21 Pa. Super. Ct. 195; *In re* Bellevernon Road, 15 Wkly. Notes Cas. (Pa.) 232.

Descriptions of termini held sufficient see Sisson *v.* Carithers, 35 Ind. App. 161, 72 N. E. 267, 73 N. E. 924; Johnson *v.* Clayton County, 61 Iowa 89, 15 N. W. 856; Packard *v.* Androscoggin County, 80 Me. 43, 12 Atl. 788; State *v.* Rapp, 39 Minn. 65, 38 N. W. 926; State *v.* Macdonald, 26 Minn. 445, 4 N. W. 1107; Wentworth *v.* Milton, 46 N. H. 448; *In re* Knowles, 22 N. H. 361; Biddle *v.* Dancer, 20 N. J. L. 633; Nelson *v.* Yamhill County, 41 Oreg. 560, 69 Pac. 678; Jackson *v.* Rankin, 67 Wis. 285, 30 N. W. 301.

Descriptions of termini held insufficient see *In re* Mills, 5 Pennew. (Del.) 16, 58 Atl. 825; McDonald *v.* Wilson, 59 Ind. 54; Sime *v.* Spencer, 30 Oreg. 340, 47 Pac. 919; Woodruff *v.* Douglas County, 17 Oreg. 314, 21 Pac. 49; *In re* Dunbar Tp. Road, 12 Pa. Super. Ct. 491; *In re* Montgomery Tp. Road, 15 Pa. Co. Ct. 384; *In re* Pocopson Road, 7 Pa. Co. Ct. 617; *In re* Warrington Tp. Road, 8 Del. Co. (Pa.) 79.

99. Smith *v.* Weldon, 73 Ind. 454; Scraper *v.* Pipes, 59 Ind. 158; Andover *v.* Oxford County, 86 Me. 185, 29 Atl. 982; Sumner *v.* Oxford County, 37 Me. 112.

Intermediate points.— Except when required by statute (see Nelson *v.* Yamhill County, 41 Oreg. 560, 69 Pac. 678; Ames *v.* Union County, 17 Oreg. 600, 22 Pac. 118; Woodruff *v.* Douglass County, 17 Oreg. 314, 21 Pac. 49), it is generally held improper for the petition to fix any intermediate points. The terminal points and the general course only should be stated, leaving the route to the discretion of the commissioners or viewers. Wiggin *v.* Exeter, 13 N. H. 304; *In re* Highway, 7 N. J. L. 37; *In re* Middlesex County, etc., Road, 4 N. J. L. 34. Thus a petition which discloses an attempt to locate one fifth of a road in what purported to be a designation of one of the termini, which is followed by the viewers, makes the proceedings so defective that they must be set aside by the appellate court on review. *In re* Allegheny Tp. Road, 14 Pa. Super. Ct. 244. But where a single petition embraces three distinct roads designed to form a system of roads, if the termini of one road indicate intermediate points in another proposed road, it will not be fatal to the proceedings, if the jury is not controlled by the intermediate points designated. *In re* West Goshen Roads, 7 Pa. Co. Ct. 250.

1. *California.*— Hill *v.* Ventura County, 95 Cal. 239, 30 Pac. 385.

Indiana.— Watson *v.* Crowsore, 93 Ind. 220.

Missouri.— *In re* Essex Ave., 121 Mo. 98, 25 S. W. 891; *In re* Gardner, 41 Mo. App. 589.

New Hampshire.—*In re* Kennett, 24 N. H. 139.

New Jersey.— State *v.* Shreve, 4 N. J. L. 341.

See 25 Cent. Dig. tit. "Highways," § 55.

2. See cases cited *infra*, this note.

In Illinois, under Road Act (1883), § 54, providing for the laying out of a road "from a lot of land to a public road," the petition must contain a suitable description of the lot. Fulton County Highway Com'rs *v.* Mallory, 21 Ill. App. 184.

(iv) *Application Relating to Two or More Roads.* In the absence of express statutory authority,[3] some decisions lay down the rule that several distinct highways cannot be prayed for in the same petition,[4] unless they connect with one another [5] or are closely identified and designed to form a system of roads.[6] On the other hand it has been held that while such a proceeding is doubtless irregular, and it may be safer and better to require that a separate petition be filed in each case,[7] such irregularity is not jurisdictional.[8] By the weight of authority a prayer for a new road and the vacation of an old road may be joined in the same petition,[9] where the former is to take the place of the latter.[10]

(v) *Amendments.* The power to allow amendments to petitions in highway cases is well established.[11] This power is comprehensive, and the discretion of the court or board will not be reviewed unless abused.[12] But it will not be construed to extend to allowing the petition to be amended in those particulars upon which the original jurisdiction of the local tribunal depends, after reference to commissioners or viewers and a report made by them,[13] or after the case has been removed into the appellate court.[14] Nor is an amendment permissible which will vary the original purpose of the proceeding.[15] A second petition by

In Indiana, under 1 Rev. St. (1876) pp. 531, 532, § 16, providing that where the road is laid out on the line dividing the land of two individuals, each shall give half of the road, a petition for a highway which describes the highway in several places as "running on the line dividing" the lands of certain named proprietors, without averring that it ran upon or over such lands, or what part of such road passed upon each tract, is sufficient. Hedrick *v.* Hedrick, 55 Ind. 78.

3. See the statutes of the different states.

4. Baker *v.* Ashland, 50 N. H. 27; State *v.* Oliver, 24 N. J. L. 129; *In re* Sadsbury Tp. Roads, 147 Pa. St. 471, 23 Atl. 772. *Compare In re* Highway, 7 N. J. L. 37.

Designation of two routes.— In the absence of a statute permitting it, there is said to be no authority for an application for one road to be laid out in one or another of two designated routes. *In re* Highway, 7 N. J. L. 37.

5. Barry *v.* Deloughery, 47 Nebr. 354, 66 N. W. 410.

6. *In re* Sadsbury Road, 9 Pa. Co. Ct. 521; *In re* West Goshen Roads, 7 Pa. Co. Ct. 250.

In Ohio, where the laying out and construction of a new county road and the improvement of an existing road or roads constitute one continuous road improvement, the proceedings therefor before the county commissioners, under 64 Ohio Laws, p. 80, and the acts amendatory thereof, may be had under the same petition. Putnam County *v.* Young, 36 Ohio St. 288.

7. Banse *v.* Clark, 69 Minn. 53, 71 N. W. 819; Chelan County *v.* Navarre, 38 Wash. 684, 80 Pac. 845.

8. Banse *v.* Clark, 69 Minn. 53, 71 N. W. 819; Chelan County *v.* Navarre, 38 Wash. 684, 80 Pac. 845. And see Hardy *v.* Keene, 54 N. H. 449.

9. Anderson *v.* Wood, 80 Ill. 15; Brown *v.* Roberts, 23 Ill. App. 461 [*affirmed* in 123 Ill. 631, 15 N. E. 30]; Bowers *v.* Snyder, 88 Ind. 302; People *v.* Robertson, 17 How. Pr. (N. Y.) 74. *Contra,* Cox *v.* Hartford Tp. Highways Com'r, 83 Mich. 193, 47 N. W. 122; Shue *v.* Richmond Tp. Highway Com'rs, 41 Mich. 638, 2 N. W. 808.

The consolidation of a proceeding to establish a new road with another to vacate a road, the order of vacation being issued without a view, and after objections thereto duly made, is erroneous, and should be set aside on appeal. Geddes *v.* Rice, 24 Ohio St. 60.

10. Harris *v.* Mahaska County, 88 Iowa 219, 55 N. W. 324.

11. *Indiana.*— Thrall *v.* Gosnell, 28 Ind. App. 174, 62 N. E. 462.

Massachusetts.— Dartmouth *v.* Bristol County, 153 Mass. 12, 26 N. E. 425.

New Hampshire.— Young *v.* Laconia, 59 N. H. 534; *In re* Patten, 16 N. H. 277.

North Carolina.— Pridgen *v.* Anders, 52 N. C. 257.

Pennsylvania.— *In re* Dickinson Tp. Road, 23 Pa. Super. Ct. 34; *In re* East Hempfield Tp. Road, 2 Leg. Chron. 151.

See 25 Cent. Dig. tit. "Highways," § 58.

Illustrations.—Thus it has been held proper to allow an amendment slightly changing the route to be followed (Windham *v.* Litchfield, 22 Conn. 226; Burns *v.* Simmons, 101 Ind. 557, 1 N. E. 72), changing the terminal points (*In re* Upper Mt. Bethel Road, 7 North. Co. Rep. (Pa.) 29), showing ownership of the land affected (Hedrick *v.* Hedrick, 55 Ind. 78; Milhollin *v.* Thomas, 7 Ind. 165; Sisson *v.* Carithers, 35 Ind. App. 161, 72 N. E. 267, 73 N. E. 924), adding (Bronnenburg *v.* O'Bryant, 139 Ind. 17, 38 N. E. 416) or striking out (Webster *v.* Bridgewater, 63 N. H. 296) names, or showing the qualifications of petitioners (Howe *v.* Jamaica, 19 Vt. 607; Hewes *v.* Andover, 16 Vt. 510).

12. Burns *v.* Simmons, 101 Ind. 557, 1 N. E. 72.

13. Dinsmore *v.* Auburn, 26 N. H. 356.

14. Shueey *v.* Stoner, 47 Md. 167; Gilley *v.* Barre, (Vt. 1897) 37 Atl. 1111.

15. Spencer *v.* Graham, 5 Ind. 158 (holding that where there were two sections of a statute in force concerning highways, and a petition was filed for leave to do a certain act, and it was materially defective upon the section on which it was evidently founded, the practice act of 1852 not being in force,

proper parties entitled "supplemental" will be treated as part of the original petition, although not stated to be such.[16]

(VI) *WITHDRAWAL OF PETITION.*[17] A petition for a highway may be withdrawn at any time before the final decision of the tribunal having jurisdiction thereof,[18] unless under the circumstances such action would be contrary to public policy.[19]

(VII) *OBJECTIONS AND WAIVER.* As a general rule, objections not going to the jurisdiction should be made at the first opportunity, or they will be deemed waived.[20] But if the petition is so insufficient as to form no basis for the action of the local tribunal, an objection thereto will be fatal at any stage of the proceeding.[21] Objections to the petition must be specifically stated, or they will be disregarded.[22]

f. Opposition, Remonstrance, or Other Answer;[23] Demurrer. The statutes of the several states generally provide for a contest of highway proceedings by the filing of a remonstrance or other answer to the petition;[24] but in Indiana

it was not competent for the court to allow such amendments as would bring it under the other section); Thrall *v.* Gosnell, 28 Ind. App. 174, 62 N. E. 462.

16. *In re* Markley St., 13 Montg. Co. Rep. (Pa.) 120.

17. **Withdrawal of parties** see *supra*, II, C, 5, c, (III).

18. West *v.* Tolland, 25 Conn. 133, holding that a petition for a highway may be withdrawn after the commissioners to whom it has been referred have announced to the parties that they are of opinion that public convenience and necessity do not require such highway to be laid out.

19. Jacobs *v.* Tobiason, 65 Iowa 245, 21 N. W. 590, 54 Am. Rep. 9, holding that proceedings for the establishment of highways are essentially public in their character, and, although instituted on the petition of a private person, are for the benefit of the whole people, and a contract whereby such party agrees to abandon the proceedings is contrary to public policy and void.

20. Dillman *v.* Crooks, 91 Ind. 158; Crossley *v.* O'Brien, 24 Ind. 325, 87 Am. Dec. 329; Fox *v.* Tuftonborough, 58 N. H. 19; Lord *v.* Dunbarton, 55 N. H. 245; Hardy *v.* Keene, 54 N. H. 449; Stevens *v.* Goffstown, 21 N. H. 454.

Objections to the number or qualifications of the petitioners should be made at the first opportunity before the county board. If not made then and there, they will be deemed waived. Bronnenburg *v.* O'Bryant, 139 Ind. 17, 38 N. E. 416; Osborn *v.* Sutton, 108 Ind. 443, 9 N. E. 410; Washington Ice Co. *v.* Lay, 103 Ind. 48, 2 N. E. 222; Forsythe *v.* Kreuter, 100 Ind. 27.

Appearance without making objections to the sufficiency of the petition is a waiver of whatever objections might have been made. Crouse *v.* Whitlock, 46 Ill. App. 260; Washington Ice Co. *v.* Lay, 103 Ind. 48, 2 N. E. 222; Turley *v.* Oldham, 68 Ind. 114; Fisher *v.* Hobbs, 42 Ind. 276; Smith *v.* Goldsborough, 80 Md. 49, 30 Atl. 574; Carpenter *v.* Sims, 3 Leigh (Va.) 675. Filing a remonstrance against granting a petition for the establishment of a highway, without objection to the sufficiency of the petition, waives such objection. Sowle *v.* Cosner, 56 Ind. 276. The reference of a petition for a highway to the commissioners without objection is a waiver of all objections to the form of the petition and preliminary proceedings. Bacheler *v.* New Hampton, 60 N. H. 207.

21. Treat *v.* Middletown, 8 Conn. 243; Hughes *v.* Sellers, 34 Ind. 337; Hays *v.* Campbell, 17 Ind. 430.

A landholder who signs such a petition is not estopped thereby from asserting a judicial defect for lack of sufficient signatures. Stewart *v.* Wyandotte County, 45 Kan. 708, 26 Pac. 683, 23 Am. St. Rep. 746.

22. Osborn *v.* Sutton, 108 Ind. 443, 9 N. E. 410.

23. **Effect of filing of remonstrance by petitioner** see *supra*, II, C, 5, c, (III), note 51.

24. See cases cited *infra*, this note. *Contra*, Logan *v.* Kiser, 25 Ind. 393. And see Irwin *v.* Armuth, 129 Ind. 340, 28 N. E. 702, where a person who was not a party to the proceeding appeared before the board of commissioners and filed a "plea in abatement," alleging that less than six persons signing the petition for the highway resided in the neighborhood thereof, and the board struck out the plea on the ground that the contestant offering it was not a party to the proceeding, and it was held that if contestant had a right to contest the jurisdiction of the board, he had the right without filing any plea whatever, and that the same was properly stricken out.

Who may contest proceeding.— A person through whose lands a proposed road will pass is beneficially interested, and is a proper party to contest the legality of the proceedings for the establishment of the road. Damrell *v.* San Joaquin County, 40 Cal. 154. But if the land assessed does not front the proposed street, or is legally exempt from assessment, the owner cannot competently object. French *v.* East Orange, 49 N. J. L. 401, 8 Atl. 107. And a taxpayer, merely as such, will not be heard in opposition to laying out a highway. He is represented by the town, and his interest is too remote. Burnham *v.* Goffstown, 50 N. H. 560. Under Ind. Rev. St. (1881) § 5023, confining the right to object to the location of a highway as use-

it has been held that no such pleadings as an answer or demurrer are proper in highway proceedings.[25]

g. Commissioners, Viewers, Surveyors, Jurors, and Other Like Officers — (i) *Right to and Necessity For Such Officers.*[26] It is generally, although not always, required that a petition for a highway shall be referred to commissioners, viewers, surveyors, jurors, or other like officers, the question depending entirely upon the local statutes.[27]

less to resident freeholders of the county, a remonstrance must show on its face that its signers are such resident freeholders. Wells *v.* Rhodes, 114 Ind. 467, 16 N. E. 830.

Dissent of a majority of the owners of land to be affected by the proposed road defeats the proceedings under some statutes. Lewly *v.* West Hoboken, 54 N. J. L. 508, 24 Atl. 477; French *v.* East Orange, 49 N. J. L. 401, 8 Atl. 107.

Time for remonstrance.— Allegations of a road petition essential to the jurisdiction of the commissioners are to be taken as true if not controverted at the proper stage of the proceedings, which is before reference of the petition. State *v.* Rye, 35 N. H. 368. On petition to the county court for the laying out of a highway, the question of the pendency of a prior petition to the selectmen, and the consequent unlawfulness of an assumption of jurisdiction by such court, may be raised by plea *in limine*, and need not await the appointment of commissioners and determination by them. Crawford *v.* Rutland, 52 Vt. 412.

Grounds of remonstrance.— An owner of land through which a right of way is condemned for a road cannot object on the ground that the land taken occupies the only available route for a contemplated railroad, which, if constructed, would enhance the value of his property. Phillips *v.* Watson, 63 Iowa 28, 18 N. W. 659. And see *infra*, II, C, 5, h.

Sufficiency of averments.— An averment in a remonstrance that the proposed highway would not be of "sufficient public utility" is a negative pregnant, and is equivalent to an admission that it would be of public utility. Wells *v.* Rhodes, 114 Ind. 467, 16 N. E. 830.

Amendments.— Where a remonstrance alleging want of public utility was rejected by the commissioners and circuit court as to that allegation, as not showing that the remonstrants were resident freeholders, the court does not err in refusing to allow the remonstrance to be amended in that respect, there being no reason why the amendment should not have been made in the commissioners' court, and no showing as to what actually occurred there. Wells *v.* Rhodes, 114 Ind. 467, 16 N. E. 830.

Waiver of objections.— Persons may remonstrate on the ground of the inutility of the proposed highway, and also claim damages in the same remonstrance. Schmied *v.* Keeney, 72 Ind. 309; Peed *v.* Brenneman, 72 Ind. 288. But see Fisher *v.* Hobbs, 42 Ind. 276, holding that where, on petition for a highway, a remonstrant over whose lands it would pass appeared in the commissioners' court and filed his claim for damages without objecting to the utility of the road, the objection was thereby waived. In a proceeding to establish a highway, a person filed with the county commissioners two remonstrances: The first relying on the ground that the proposed highway was not of public utility; the second on the ground that it ran through his inclosed land, damaging him to the extent of a sum specified, and asking the appointment of reviewers to assess his damages. It was held that the remonstrances raised no objection to the proposed highway on the ground that it ran through the remonstrator's inclosure of one year's standing without his consent, and that a good way could otherwise be had; and such objection was thereby impliedly waived. Cummins *v.* Shields, 34 Ind. 154.

25. Logan *v.* Kiser, 25 Ind. 393.

26. **Right of trial by jury** see EMINENT DOMAIN, 15 Cyc. 872; JURIES, 24 Cyc. 133.

27. *Georgia.*—Howell *v.* Chattooga County, 118 Ga. 635, 45 S. E. 241, holding that Pol. Code (1895), § 520, providing that on application for any new road the ordinary shall appoint commissioners, who shall make their report that it is laid out conformably to law, is not inconsistent with the alternative road law of 1891, and must be complied with before a new public road can be lawfully established in a county where such alternative road law is operative.

Kansas.— Hughes *v.* Milligan, 42 Kan. 396, 22 Pac. 313, where the general road law of 1868 provides that before a highway can be laid out and opened it is necessary that viewers be appointed, whose duty it is to determine whether the road prayed for is necessary, and also to assess and determine the amount of damages sustained by any person through whose land the road may run, and Laws (1867), c. 67, as amended by Laws (1868–1869), declare section lines in certain counties to be highways, and provide that the provisions of the general road law shall be applicable where damages are claimed under the act, and it was held that the opening of a highway under the provisions of the latter act could be enjoined where no viewers were appointed.

Kentucky.— Louisville, etc., R. Co. *v.* Gerard, 130 Ky. 18, 112 S. W. 915, holding that the provision of St. (1903) § 4296, that when, in proceedings to have a new road opened, exceptions shall be filed by either party, the court shall, unless the parties agree that it may try such issues, impanel a jury to try the issue of fact made by the exceptions, applies to questions of fact growing out of the necessity for opening the road and the amount

(II) *Appointment, Qualification, and Substitution* — (A) *Power to Appoint.*[28] The question of what officer or tribunal has power to appoint commissioners, viewers, surveyors, jurors, etc., depends upon the local statutes.[29]

of damages awarded, and does not apply to exceptions pointing out as errors that the jurisdictional requirements of sections 4289, 4290, as to the signing of the petition for the road and the giving of notice were not complied with.

Nebraska.— Warren *v.* Brown, 31 Nebr. 8, 47 N. W. 633, holding that, under Comp. St. c. 78, § 37, a county board has no jurisdiction to establish a public road where no commissioner has been appointed to examine into and report upon its expediency, unless the written consent of all the landowners whose land is sought to be taken for that purpose is filed with the county clerk.

New Hampshire.— Mitchell *v.* Holderness, 34 N. H. 209 (holding that under the act of July, 1855, remodeling the judiciary, all matters pending in the common pleas relative to highways and requiring a reference must be referred to the county commissioners, unless there be some special statute to the contrary); *In re* Howard, 28 N. H. 157 (holding that while a court might exercise its discretion to refuse to refer a petition for a highway to the road commissioners if the merits of such petition had been repeatedly passed upon, still, where two years elapse after the discontinuance of a road before the presentation of a petition for its reëstablishment, the presumption would be that there was a case that should go to the road commissioners).

New York.— People *v.* Jones, 63 N. Y. 306 [*reversing* 2 Thomps. & C. 360], holding that a certificate of freeholders as to the necessity of laying out or altering a highway through improved land is necessary only where the highway is laid out without the consent of the owners.

North Carolina.— Carr *v.* Hairston, 4 N. C. 20, holding that under Rev. St. c. 104, §§ 1, 4, the interposition of a jury is necessary in the laying out of a road; but in deciding whether there shall be a road in a particular section of the country the whole power is in the court.

Pennsylvania.— Matter of Clinton St., 2 Brewst. 599, holding that the road law of 1836, providing for the appointment of juries of view, is not unconstitutional as giving courts power to delegate authority, since the report of such a jury is intended to do no more than to bring the questions in proper form before the court for consideration and for approval and confirmation. See CONSTITUTIONAL LAW, 8 Cyc. 857 note 50.

Tennessee.— Hawkins *v.* Trousdale County Justices, 12 Lea 351 (holding that it is not the report of a jury of view that determines the rights of the parties to a proceeding for laying out a road; that the county court may try the contest without a report, and determine it upon the evidence; and that a party therefore cannot be dismissed from court because the jury disagree, or even because there is no jury at all); Beard *v.* Campbell County Justices, 3 Head 97 (holding that all questions connected with the establishment of public roads, whether matter of law or of fact, are determined exclusively by the county court, and a jury has nothing to do with the determination thereof).

Texas.— Allen *v.* Parker County, 23 Tex. Civ. App. 536, 57 S. W. 703 (holding that under Rev. St. art. 4671, which empowers and requires county commissioners' courts to order the laying out and opening of necessary public roads, and to discontinue or alter any road, when deemed expedient, as thereinafter prescribed; and art. 4682, which authorizes them, on their own motion, to open new roads deemed necessary, a county commissioners' court was authorized and empowered to lay out and establish a public road, the qualification of art. 4671, "as hereinafter prescribed," only applying to discontinuance or alteration of existing roads; and hence the requirement of art. 4688 that all roads be laid out by a jury of review were not essential to the jurisdiction of such court of a proceeding to open a new road, and could be waived); Cummings *v.* Kendall County, 7 Tex. Civ. App. 164, 26 S. W. 439 (holding that Rev. Civ. St. art. 4361, providing that commissioners' courts may, on their own motion, open new roads, does not change the law requiring a jury of view).

See 25 Cent. Dig. tit. "Highways," § 81.

A statute is not unconstitutional which provides that a jury of view shall be appointed by the commissioners' court without the concurrence of property-owners. Galveston, etc., R. Co. *v.* Baudat, 18 Tex. Civ. App. 595, 45 S. W. 939.

Propriety of reference.— Where the parties to a petition for a highway appeared before the county court, and agreed to a reference of the petition to the county commissioners, which was ordered accordingly, the finding of such agreement was equivalent to a finding that the parties did not agree as to the judgment to be rendered. Hence the reference was proper. Harwinton *v.* Catlin, 19 Conn. 520. Under N. H. Pub. St. c. 68, § 5, providing that if no sufficient objection is made, all petitions for highways shall be referred to the county commissioners, what constitutes a sufficient objection is a question of fact in each case to be determined by the trial term. Gurnsey *v.* Keene, 68 N. H. 243, 34 Atl. 742.

28. Jurisdiction of highway proceedings generally see *supra*, II, C, 5, b.

29. Gist *v.* Owings, 95 Md. 302, 52 Atl. 395 (holding that under Code Pub. Gen. Laws, art. 25, § 86, authorizing the county commissioners to appoint examiners in proceedings to establish a public road, the court exceeded its jurisdiction in appointing such examiners); Garretson *v.* Baker, 65 N. J. L. 184, 46 Atl. 705 (holding that the court of common pleas is invested by 3 Gen. St. p. 2804, with the power to appoint surveyors

Such power cannot be delegated,[30] in the absence of a statute to the contrary.[31]

(B) *Form, Sufficiency, and Validity of Order of Appointment.* It has been held that an order appointing viewers need not be made in regular term.[32] The omission of a seal from the order is not necessarily fatal;[33] nor is a clerical variance between the order and the petition.[34] The order need not designate the surveyors by name, if they are otherwise designated with certainty;[35] and a clerical error in the order appointing viewers to lay out a road, stating the number to be four instead of three, is not ground for reversal where it appears that only the legal number were actually appointed and discharged their duties.[36] The order need not affirmatively show that the persons selected were competent and eligible to act;[37]

of the highways to lay out public roads, and when the proceedings are in conformity with the statutes relating to such subject-matter jurisdiction will always be presumed to be vested in such court, and the burden is on those by whom such proceedings are attacked to establish the want of jurisdiction); *In re* Highway, 3 N. J. L. 666, 881 (holding that the supreme court has no authority to appoint chosen freeholders to review the proceedings of the surveyors appointed by that court before the statute taking from it that power and conferring it on the common pleas); Matter of Baker, 173 N. Y. 249, 65 N. E. 1100 (county court); People *v.* Queens County, 58 Hun (N. Y.) 371, 12 N. Y. Suppl. 21 (holding that since the amendment of the general highway law by Laws (1873), c. 773, prohibiting the laying out of a road through buildings without the consent of the owner, unless the commissioners of highways certify that the public interest will be greatly promoted thereby, the board of supervisors have no power to appoint special commissioners to lay out such a road, under Laws (1838), c. 314, § 1, subd. 4, and Laws (1848), c. 164, which authorized them to make such appointment when satisfied that the road was important, and that the authority of the commissioners of highways could not or would not be exercised for the purpose).

Number of appointing justices.— An order appointing a jury of freeholders to view and lay out a public road is an order laying out a public road, within the meaning of Tenn. Acts (1804), c. 1, § 1; and therefore such an order, made by less than twelve justices, or one third of the justices of the county, is void, by Tenn. Acts (1817), c. 48. Ingram *v.* Wilson, 4 Humphr. (Tenn.) 424.

Time for exercise of power.— Tex. Act, Feb. 7, 1884 (Sayles Civ. St. art. 4360*a*, § 2), provides that it shall be the duty of each commissioners' court, within ninety days after the passage of the act, on their own motion, to appoint a jury of view to lay out certain roads, and on the report of the jury of view such roads shall be declared to be highways. It was held that while this statute made it the duty of the courts to act within ninety days, their power to act on their own motion was not limited to that time. Evans *v.* Santana Live-Stock, etc., Co., 81 Tex. 622, 17 S. W. 232.

30. Bennett *v.* Fisher, 26 Iowa 497; State *v.* Kimball, 23 Iowa 531, both holding that the board of supervisors have no power to delegate to the clerk the power to appoint in vacation a commissioner to view and report upon a road which has been petitioned for.

31. See State *v.* Kimball, 23 Iowa 531.

32. *In re* Jefferson Tp. Road, 2 Lack. Leg. N. (Pa.) 287 [*affirmed* in 3 Pa. Super. Ct. 467].

33. State *v.* Meyers, 29 N. J. L. 392 (holding that a return of surveyors will not be set aside because the appointment of one of them was not made under the hands and seals of the township committee); *In re* Upper Tyrone Tp. Road, 3 Walk. (Pa.) 319 (holding that where the court omitted to affix its seal on its order to viewers, but did properly affix its seal to an order issued to reviewers, after confirmation of their report, the proceedings would not be set aside because of the irregularity of the first order issued).

34. State *v.* Atkinson, 27 N. J. L. 420, holding that a variance betwen the petition for the appointment of surveyors and the order of appointment, consisting of a clerical error in the name of one of the landowners across whose land the road was to be laid, is not such a variance as to cause proceedings otherwise correct to be set aside.

35. State *v.* Potts, 4 N. J. L. 401, 5 N. J. L. 1015, holding that where the statute directed the court "to appoint six of the surveyors of the highways of said county," and the court appointed them, not by name, but by townships, viz., "the two surveyors of the highways of Trenton," etc., it was sufficiently certain.

36. *In re* Beigh's Road, 23 Pa. St. 302.

37. Matter of Baker, 173 N. Y. 249, 65 N. E. 1100 [*affirming* 59 N. Y. App. Div. 625, 69 N. Y. Suppl. 1128]; *In re* Schuylkill Falls' Road, 2 Binn. (Pa.) 250. *Contra*, Cumberland Valley R. Co. *v.* Martin, 100 Md. 165, 59 Atl. 714; Jones *v.* Zink, 65 Mo. App. 409.

Sufficiency of recital.— The recital, in a resolution of county commissioners authorizing the opening of a road, that in accordance with their order appointing persons who possess the statutory qualifications as a board of viewers, etc., the road is ordered opened, is a sufficient record in their proceedings that the viewers possessed the statutory qualifications. Crowley *v.* Gallatin County, 14 Mont. 292, 36 Pac. 313.

but the place of meeting must be definitely stated therein.[38] In some states the order must state one or more of the statutory reasons justifying the establishment of a highway;[39] and it must contain a general description of the proposed road.[40] It being provided by statute that applications shall be referred to a committee of three disinterested persons selected by the parties, or, if the parties cannot or do not agree in the selection, by the court, it is not necessary to the validity of the appointment of such committee that the court shall have expressly found either that the parties agreed or were unable or failed to agree on the persons appointed;[41] and an order to a jury of re-review, reciting the action of one jury for and another against the road, is not such an irregularity as will require setting aside the proceedings of the jury of re-review.[42]

(c) *Number Appointed.* The number of commissioners, viewers, etc., is fixed by the local statutes.[43]

(d) *Qualification.*[44] It is generally required by statute that the commissioners, viewers, etc., must be sworn; and a failure to comply with this requirement vitiates the proceedings.[45] The form of the oath is commonly prescribed by stat-

38. Wharton *v.* Sorden, 59 N. J. L. 356, 36 Atl. 672; *In re* Johnson, 49 N. J. L. 381, 8 Atl. 113, both holding that an order of appointment is insufficient if it merely designates a township or village as the place of meeting, without naming the building in which the meeting shall be held.

39. Fletcher *v.* Fugate, 3 J. J. Marsh. (Ky.) 631; Abney *v.* Barnett, 1 Bibb (Ky.) 557; Nischen *v.* Hawes, 21 S. W. 1049, 15 Ky. L. Rep. 40, it being insufficient that the application alone set forth such reasons, since it forms no part of the order.

40. Hubbard *v.* Wickliffe, 2 A. K. Marsh. (Ky.) 502 [*followed* in Hubbard *v.* Wickliffe, 1 Litt. (Ky.) 80], holding that an order appointing viewers for a road, without pointing out a general description of the ground over which the road is to pass, but leaving the viewers to the direction of the applicant, is erroneous.

It is sufficiently certain, however, if it gives the points of commencement and termination, and a general direction as to the manner in which it should pass over the intervening space. Wood *v.* Campbell, 14 B. Mon. (Ky.) 422.

The description must not be too specific as to courses and distances (Hampton *v.* Poland, 50 N. J. L. 367, 13 Atl. 174) and intermediate points (*In re* Catharine Tp. Road, 76 Pa. St. 189).

41. Baker *v.* Windham, 25 Conn. 597, but it will be presumed that the court, having jurisdiction of the cause, acted properly in making the appointment.

42. *In re* Willistown Tp. Road, 5 Pa. Co. Ct. 303.

43. *In re* Plumcreek Tp. Road, 110 Pa. St. 544, 1 Atl. 431; *In re* Camack's Road, 1 Browne (Pa.) 164.

Appointment of more than the required number does not invalidate a judgment of a board of supervisors as to laying out a road. Illinois Cent. R. Co. *v.* Swalm, 83 Miss. 631, 36 So. 147.

Change of statute pendente lite.— Where six viewers had been appointed for a view under the old law, and after the passage of the Pennsylvania act of April 2, 1860, but three were appointed for the review, as directed by the act, such appointment was proper, for the old law had been so far changed by the repealing act. *In re* Hickory Tree Road, 43 Pa. St. 139.

44. **Competency or eligibility** see *infra*, II, C, 5, g, (III).

45. *Alabama.*— Molett *v.* Keenan, 22 Ala. 484, holding that where the jury who were appointed to view and mark out the road are also impaneled to assess the damages occasioned by it to the persons through whose lands it passes, they should be sworn and charged with a view to the assessment of such damages.

Georgia.— Frith *v.* Justices Inferior Ct., 30 Ga. 723.

Massachusetts.— Com. *v.* Coombs, 2 Mass. 489, holding that a committee appointed by the court of sessions in proceedings to lay out a highway must be sworn to the faithful and impartial appraisement of damages. However, it is not necessary that a viewing committee appointed by the court of sessions on a petition for the laying out of a highway should be sworn before they perform that service. Com. *v.* Cambridge, 7 Mass. 158.

New Jersey.— Hoagland *v.* Culvert, 20 N. J. L. 387; State *v.* Barnes, 13 N. J. L. 268; State *v.* Hutchinson, 10 N. J. L. 242; Fisher *v.* Allen, 8 N. J. L. 301; State *v.* Lawrence, 5 N. J. L. 1000; *In re* Middlesex County, etc., Public Road, 4 N. J. L. 396.

New York.— *In re* David, 44 Misc. 192, 89 N. Y. Suppl. 812.

Pennsylvania.— *In re* Bryson's Road, 2 Penr. & W. 207; *In re* Butler Tp. Road, 6 Kulp 443; *In re* Foster Tp. Road, 1 Kulp 246, all holding that if viewers are not sworn before entering upon the duties of their appointment, the report will be set aside. However, under the act of March 30, 1846 (Pamphl. Laws 199), reviewing road commissioners are not required to be sworn specially. Their general oath of office is sufficient. *In re* Pike Tp. Road, 30 Pa. Super. Ct. 644.

ute,[46] and in that event it must be administered in that form.[47] In some states the oath need not be subscribed,[48] or even be in writing.[49] An oath of office of a surveyor is not rendered invalid because of a mistake in the spelling of his name in the body of the oath, where he signed it with his true name.[50] The question as to who may administer the oath is governed by the local statutes.[51]

(E) *Proof of Qualification; Record, Return, Report, Etc.* In order to render the proceedings effective in some jurisdictions it must appear that the commissioners, viewers, etc., were duly sworn;[52] and this is generally required to appear of

Texas.— Davidson *v.* State, 16 Tex. App. 336, holding that where jurors do not take the oath prescribed by statute before acting, the proceedings are void.

Virginia.— Fisher *v.* Smith, 5 Leigh 611.

See 25 Cent. Dig. tit. "Highways," § 89.

See, however, State *v.* Hogue, 71 Wis. 384, 36 N. W. 860, holding that under Const. art. 4, § 28, providing that the legislature may exempt inferior officers from taking an oath, the failure of a special act appointing commissioners to locate a state road to provide for their taking an oath is not fatal, where the general law makes no provision for such an oath.

All acting must be sworn. *In re* Middlesex County, etc., Public Road, 4 N. J. L. 396; *In re* Broad St. Road, 7 Serg. & R. (Pa.) 444.

The failure of the township clerk to transmit the official oaths of the surveyors of highways to the county clerk, however, did not vitiate their election to office, or their appointment by the court of common pleas in a proceeding to establish a road. Bassett *v.* Denn, 17 N. J. L. 432.

46. Huntington *v.* Birch, 12 Conn. 142; Matter of David, 44 Misc. (N. Y.) 192, 89 N. Y. Suppl. 812, holding that Highway Law (Laws (1890), c. 568), § 84, requiring commissioners appointed by a county court to determine the necessity of a highway and to assess the damages to take the constitutional oath of office, means the oath prescribed by Const. art. 13, § 1, requiring, among other things, an oath to support the federal and state constitutions.

47. Keenan *v.* Dallas County Com'rs' Ct., 26 Ala. 568 (holding that the statutory form must be precisely pursued); Molett *v.* Keenan, 22 Ala. 484; State *v.* McLeod County, 27 Minn. 90, 6 N. W. 421 (holding that under Sp. Laws (1879), c. 248, requiring the commissioners appointed thereby to survey, locate, and establish a state road in certain counties, to meet and make oath "that they will faithfully and impartially discharge their duties, as provided by this act, and fairly and impartially assess the damage, if any, they may find to be sustained by owners of land through which said road may run, and then proceed to discharge their duties," an oath taken by the commissioners that "we will faithfully proceed to locate and establish said state road according to the provisions of said act, and according to the best of our abilities," is not sufficient); *In re* Cambria St., 75 Pa. St. 357 (an oath by road viewers faithfully to discharge their duties held not to comply with a statutory requirement that they make oath to perform their duties "impartially and according to the best of their judgment"); *In re* Kidder Tp. Road, 1 Kulp (Pa.) 10 (holding that the oath to be taken by road viewers as prescribed by the general road law must be substantially complied with, or it will be fatal to the proceedings upon exceptions to the report); *In re* Jefferson Tp. Road, 2 Lack. Leg. N. (Pa.) 328 (holding that, the statute having prescribed the form of oath to be taken by road viewers, the courts have no discretion to permit a modification).

Oaths held to be sufficient see Com. *v.* Westborough, 3 Mass. 406 (holding that where a warrant to a locating committee particularly describes their whole duty, an oath "faithfully and impartially to perform the service to which they are appointed," or "faithfully and impartially to discharge the trust reposed in them," is sufficient); *In re* Foster Tp. Road, 1 Kulp (Pa.) 100; *In re* Kidder Tp. Road, 9 Luz. Leg. Reg. (Pa.) 10 (the last two cases holding that under the general road law of 1836 (Brightly's Purdon Dig. p. 1283, pl. 87), requiring viewers of a highway to make oath "to perform their duties impartially according to the best of their judgment," an oath "to perform their duties with impartiality and fidelity" is sufficient).

48. Hays *v.* Parrish, 52 Ind. 132. *Contra*, Hoagland *v.* Culvert, 20 N. J. L. 387; State *v.* Barnes, 13 N. J. L. 268; Fisher *v.* Allen, 8 N. J. L. 301; State *v.* Lawrence, 5 N. J. L. 1000; *In re* Middlesex County, etc., Public Road, 4 N. J. L. 396.

49. Galveston, etc., R. Co. *v.* Baudat, 18 Tex. Civ. App. 595, 45 S. W. 939, holding that the oaths of the members of a jury of view need not be reduced to writing.

50. Hoagland *v.* Culvert, 20 N. J. L. 387.

51. *In re* Lower Merion Tp. Road, 8 Pa. Dist. 581, 15 Montg. Co. Rep. 177 (holding that the Pennsylvania act of Aug. 10, 1864, § 2 (Pamphl. Laws 962), authorizing notaries "to take depositions and affidavits," etc., authorizes them to administer an oath to a road viewer, under the act of June 13, 1836, providing that the oath or affirmation must be administered by a magistrate); *In re* East Penn Tp. Road, 2 Pa. Co. Ct. 453 (holding that under the Pennsylvania act of June 13, 1836, providing that the oath will be administered to the viewers of a highway by any magistrate of the county, or by any one of their number, a viewer who is also a justice of the peace could not administer the oath to himself).

52. Crossett *v.* Owens, 110 Ill. 378; *In re* Ryan Tp. Road, 3 Kulp (Pa.) 76.

record,[53] as by the return or report.[54] It must also appear that the person who administered the oath was qualified to do so.[55]

(F) *Dismissal*[56] *or Failure to Act, and Substitution.* The power of appointment generally includes the power to appoint a new committee, jury, etc., where the one originally appointed is disqualified to act,[57] or fails or refuses to act,[58] or

Secondary evidence.— In order to prove the oath of office of surveyors, it is not necessary to produce the originals which are filed with the clerk of the township. Copies duly proved are sufficient. State *v.* Hutchinson, 10 N. J. L. 242.

Certificate of oath.— If a surveyor has taken and subscribed the oath of office before a justice and filed the same in due time, but the justice has failed to certify when it was taken as the law requires, it is fatal to the return; and such omission cannot be cured by a supplemental certificate of the justice. State *v.* Northrop, 18 N. J. L. 271. See, however, State *v.* Bergen, 21 N. J. L. 342.

On appeal, on the merits, under Tenn. Code, § 1191, from the county court to the circuit court, in a proceeding directing the opening of a public road, the trial is *de novo*, and an error in the proceedings in the county court, such as the failure to show that the jury of view were sworn, becomes immaterial. Patton *v.* Clark, 9 Yerg. (Tenn.) 268.

53. Breckinridge *v.* Ward, 1 T. B. Mon. (Ky.) 57; Pollard *v.* Ferguson, 1 Litt. (Ky.) 196; Elliott *v.* Lewis, 1 A. K. Marsh. (Ky.) 453; Daveiss *v.* Hopkins County Ct., 1 Bibb (Ky.) 514; Grimes *v.* Doyle, Ky. Dec. 58; Fisher *v.* Smith, 5 Leigh (Va.) 611. *Contra*, State *v.* Bergen, 21 N. J. L. 342 (holding that a surveyor of highways is not disqualified by the fact that the town clerk did not keep a copy of his oath of office, or that it does not appear on the oath of office where it was taken, or that the officer administering the same was a justice, provided these facts are shown *aliunde*); State *v.* Green, 15 N. J. L. 88 (holding that if it satisfactorily appears that the surveyors of highways did take the oath of office in due time before the proper justices, and that such justices did certify in proper time, the court will not set aside the return; that it may be shown by affidavits that the persons by whom the surveyors were sworn were justices of the peace of the county residing in the respective townships for which the surveyors were chosen, and that the oaths of office were in fact administered and subscribed in those townships).

54. Parham *v.* Justices Decatur County Inferior Ct., 9 Ga. 341; *In re* Private Road, 3 Serg. & R. (Pa.) 210 (holding that where the report of viewers does not state that they were all sworn, the proceedings will be quashed); *In re* West Hempfield Tp. Road, 4 Lanc. Bar (Pa.) 7; Douglass *v.* Rawlins, 4 Hayw. (Tenn.) 111.

Otherwise in the absence of statute see Dollarhide *v.* Muscatine County, 1 Greene (Iowa) 158, holding that the official certificate, or the testimony of the officer who administered the oath required by law to road viewers, is more authentic than the mere statement in the report of such viewers that they had been duly sworn.

Recitals held to be sufficient see Husted *v.* Greenwich, 11 Conn. 383; *In re* Locust St., 153 Pa. St. 276, 25 Atl. 816; *In re* East Donegal Tp. Road, 90 Pa. St. 190; *In re* Hilltown Road, 2 Walk. (Pa.) 78; *In re* East Penn Tp. Road, 2 Pa. Co. Ct. 453.

Recitals held to be insufficient see Keenan *v.* Dallas County Com'rs Ct., 26 Ala. 568; Crossett *v.* Owens, 110 Ill. 378; *In re* Plains Tp. Road, 7 Kulp (Pa.) 233; *In re* Nicetown Lane, 32 Leg. Int. (Pa.) 28.

Recital as evidence of oath.— A recital in the report of the commissioners, viewers, etc., that they were first sworn is at least *prima facie* proof thereof. Lowndes County Com'rs' Ct. *v.* Bowie, 34 Ala. 461; Huntington *v.* Birch, 12 Conn. 142; Wood *v.* Campbell, 14 B. Mon. (Ky.) 422. See, however, cases cited *supra*, this note.

Presumptions.— Where the report of reviewers shows that they were sworn, it will be presumed that they were sworn to do the things they were appointed to do. Bronnenburg *v.* O'Bryant, 139 Ind. 17, 38 N. E. 416. So, where it appears from the face of the record that the viewers were duly sworn, and the exceptions filed do not refer to any defect in form of the oath, it will be presumed that the oath was in form required by statute. *In re* Nescopeck Tp. Road, 1 Kulp (Pa.) 316.

55. State *v.* Hutchinson, 10 N. J. L. 242. See, however, State *v.* Green, 15 N. J. L. 88.

56. **Removal by quo warranto** see QUO WARRANTO, 32 Cyc. 1421.

57. Northern R. Co. *v.* Enfield, 57 N. H. 508, holding, however, that it is only where all members of the board of selectmen are disqualified to act that they can join in appointing substitutes to determine the petition.

58. Henline *v.* People, 81 Ill. 269 (holding that, where the county court acquires jurisdiction of a petition for establishing a road, a failure of the viewers appointed to report at the next term will not divest the court of power to appoint other viewers at a subsequent term); *In re* Charlotte St., 23 Pa. St. 286; *In re* West Chester Alley, 1 Pa. Co. Ct. 649 (holding that, where the viewers acted on an order after the return-day, the order will not be continued in order to enable them to report the result of such irregular action on their part, but the court will appoint another jury on the original petition). See, however, *In re* Silver Lake Tp. Road, 84 Pa. St. 131, where an order was made to review a road, but the viewers took no action thereunder, and the order was continued to the following session of the court, when other viewers were substituted who proceeded to act under the original order without the issuance of a new

fails to agree.[59] So if a commissioner, juror, viewer, etc., is disqualified to act,[60] or dies [61] or becomes incapacitated,[62] or fails or refuses to act,[63] another may be substituted; and the court may strike off a viewer and appoint another in his place.[64] If a road commissioner's term of office expires *pendente lite*, his successor may make the report on the proposed highway.[65] Where, by reason of a similarity of names, a person who was not appointed as one of a jury of viewers was notified that he had been appointed, and in good faith acted in concurrence with the others in laying out a highway, the report will not be set aside.[66]

(G) *Waiver of Objections.* Failure to object to an irregularity in due season generally operates as a waiver thereof.[67] This applies for instance to objections based on the incompetency or ineligibility of the commissioners, viewers, etc.,[68]

order, and it was held that the proceeding was irregular; and this notwithstanding that the continuance and substitution appeared of record.

59. Mendon *v.* Worcester County, 10 Pick. (Mass.) 235 (so holding, although the statute made no express provision for such a case); People *v.* Nash, 60 Hun (N. Y.) 582, 15 N. Y. Suppl. 29; *In re* Charlotte St., 23 Pa. St. 286.

60. Northern R. Co. *v.* Enfield, 57 N. H. 508 (holding that if there is one member of the board of selectmen who is qualified he must appoint the persons to take the place of the disqualified ones); Mitchell *v.* Holderness, 29 N. H. 523.

61. Shaw *v.* Piscataquis County, 91 Me. 102, 39 Atl. 468.

62. Osborn *v.* Sutton, 108 Ind. 443, 9 N. E. 410.

63. Shaw *v.* Piscataquis County, 91 Me. 102, 39 Atl. 468. See, however, *In re* Ryan Tp. Road, 3 Kulp (Pa.) 158, holding that, if only two road viewers are present, they have no authority to choose a third.

64. *In re* Little Britain Road, 27 Pa. St. 69, holding also that notice that this will be done is not necessary.

65. Jeter *v.* Board, 27 Gratt. (Va.) 910.

66. *In re* Elk Tp. Road, 2 Pa. Co. Ct. 45.

67. *Alabama.*— Molett *v.* Keenan, 22 Ala. 484, holding that where a person through whose land a road is to pass wishes to challenge the jurors appointed to view and lay out the road, such challenges must be made before the jury are sworn.

Connecticut.— Harwinton *v.* Catlin, 19 Conn. 520, holding that where the commissioners had acted under reference and reported their proceedings to a subsequent term of the court, at which term the petition, with the proceedings thereon, was by agreement of the parties and order of court recommitted to the commissioners to be by them further proceeded with and determined, the objection that it did not appear that the parties did not agree to the reference came too late.

Massachusetts.— Hyde Park *v.* Wiggin, 157 Mass. 94, 31 N. E. 693, holding that where a town, by its authorized officers, appeared before the board of county commissioners pursuant to notice, and without objection participated in the hearing of a petition to lay out a highway, it cannot afterward object to the organization of the board when the notice was issued. See, however, Danvers *v.* Essex County, 2 Metc. 185, holding that where, on a petition for a new road, the parties interested met the commissioners on a certain day, according to due notice, but the meeting was adjourned without any proceedings being had, an objection to the constitution of the board of commissioners made at the opening of the hearing before them on the second day of the adjourned meeting was seasonable.

New Hampshire.— *In re* Steele, 44 N. H. 220, where two county commissioners, three days before the hearing of a petition for a highway and two days before the death of the third commissioner, appointed a substitute for him, who took the oath of office and entered on the discharge of his duties at the hearing, and the facts were known to the parties in interest, but they did not object at the time of the hearing, and it was held that objections came too late when made for the first time upon the presentation of the commissioners' report in court.

New Jersey.— State *v.* Hopping, 18 N. J. L. 423, holding that objections to preliminary proceedings to the appointment of surveyors, which, if made at the time, might have been obviated, cannot be made as ground for setting aside their return of the road.

See 25 Cent. Dig. tit. "Highways," § 91.

68. *Connecticut.*— Pond *v.* Milford, 35 Conn. 32 (holding, however, that if persons not qualified are appointed, and the landowners in interest were not before the court at the time of the appointment, so as to have an opportunity of being heard, they are not precluded from objecting to the committee); Groton *v.* Hurlburt, 22 Conn. 178.

Indiana.— Osborn *v.* Sutton, 108 Ind. 443, 9 N. E. 410.

Kentucky.— Garrett *v.* Hedges, 17 S. W. 871, 13 Ky. L. Rep. 647.

Maine.— Robinson *v.* Somerset County, (1886) 4 Atl. 556; Friend *v.* Abbott, 56 Me. 262.

Massachusetts.— Ipswich *v.* Essex County, 10 Pick. 519, holding that a party to the proceedings of county commissioners laying out a highway has notice that one of them is not a disinterested party, where such commissioner has land in the town through which the road is laid out, and has been taxed for it; hence the party, not objecting to such commissioner, could not object afterward on the ground that he had no notice of the commissioner's interest.

or their failure duly to qualify as such.[69] So irregularities in the appointment or qualification of the commissioners, etc., are waived by one who appears before them generally and contests the proceeding on the merits.[70] If a party consents to the doing of a certain thing he has no standing subsequently to object to the irregularity thereof.[71]

(III) *COMPETENCY OR ELIGIBILITY* [72] — (A) *In General.* The statutes commonly prescribe qualifications for commissioners, viewers, jurors, etc.[73] How-

New Hampshire.— Wentworth *v.* Farmington, 51 N. H. 128 (holding that the return of their certified oath of office to the clerk of the court appointing commissioners to act upon a single petition for a highway is constructive notice to all parties of all facts contained in such certificate, and an objection to their qualifications will be held to be waived unless made before the hearing); Towns *v.* Stoddard, 30 N. H. 23.

New York.— People *v.* Taylor, 34 Barb. 481.

Pennsylvania.— *In re* Allen Tp. Road, 18 Pa. St. 463; *In re* Hilltown Tp. Road, 18 Pa. St. 233; *In re* Limerick Tp. Road, 16 Pa. Co. Ct. 567, 11 Montg. Co. Rep. 163; *In re* Millcreek Road, 9 Pa. Co. Ct. 592; *In re* Hazle Tp. Road, 6 Kulp 463; *In re* Nanticoke St., 4 Kulp 513; *In re* Upper Leacock Tp. Road, 8 Lanc. L. Rev. 76; *In re* Bethlehem Road, 2 Lehigh Val. L. Rep. 265; *In re* Whitemarsh Tp. Road, 7 Montg. Co. Rep. 161.

West Virginia.— Doddridge County *v.* Stout, 9 W. Va. 703.

Wisconsin.— State *v.* Wilson, 17 Wis. 687.

See 25 Cent. Dig. tit. "Highways," § 91.

69. Louisville, etc., R. Co. *v.* Gerard, 130 Ky. 18, 112 S. W. 915; Towns *v.* Stoddard, 30 N. H. 23; Goodwin *v.* Milton, 25 N. H. 458; *In re* Gilford, 25 N. H. 124. But see Brown *v.* Stewart, 86 Ind. 377, holding that failure to object, either before the board or in the circuit court, that viewers or reviewers were not properly sworn, will not constitute a waiver of the objection.

70. *In re* Gilford, 25 N. H. 124; Matter of Niel, 55 Misc. (N. Y.) 317, 106 N. Y. Suppl. 479.

71. Pond *v.* Milford, 35 Conn. 32; Harwinton *v.* Catlin, 19 Conn. 520; Robinson *v.* Somerset County, (Me. 1886) 4 Atl. 556; People *v.* Taylor, 34 Barb. (N. Y.) 481.

72. Qualification see *supra*, II, C, 5, g, (II), (D).

Waiver of objections based on incompetency or ineligibility see *supra*, II, C, 5, g, (II), (G).

73. See cases cited *infra*, this note.

Residents.— Proceedings for the establishment of a public road are invalid where the venire issued by the justice required the constable to summon six men to serve as jurors, "at least one-half of whom shall be residents of the town," whereas Ill. Rev. St. c. 121, § 46, provides that not more than one half of the jury shall be residents of the town. File *v.* St. Jacob Highway Com'rs, 34 Ill. App. 538. Where the court omits without reason to appoint the surveyors of highways in the townships where the road is to be laid, the proceedings to lay out the road will be set aside. Conover *v.* Bird, 56 N. J. L. 228, 28 Atl. 428. For early New Jersey cases see State *v.* Bergen, 21 N. J. L. 342; State *v.* Vanbuskirk, 21 N. J. L. 86; State *v.* Willingborough Road, 1 N. J. L. 150; State *v.* Elmer, 1 N. J. L. 67.

Freeholders.— The commissioners, jurors, etc., are not infrequently required to be freeholders of the county or township where the proposed road runs. Cumberland Valley R. Co. *v.* Martin, 100 Md. 165, 59 Atl. 714; Illinois Cent. R. Co. *v.* Swalm, 83 Miss. 631, 36 So. 147; *In re* Highway, 3 N. J. L. 665. A remainder-man, after termination of a life-estate in lands, is a freeholder within the law requiring that jurors in proceedings to establish public road shall be freeholders. Garrett *v.* Hedges, 17 S. W. 871, 13 Ky. L. Rep. 647. Where testator directed that land should be sold and the proceeds divided among named persons, but he named no executor, and the will contained no power of sale other than as above, title vested in the heirs at law subject to the execution of the power of sale; and hence such heirs were freeholders within the statute providing for a certificate of freeholders that a proposed highway is necessary and proper. People *v.* Scott, 8 Hun (N. Y.) 566. One who has title to real estate is a freeholder irrespective of the amount or value therein, and therefore he is qualified to sign a certificate as to the necessity and propriety of opening a highway. People *v.* Scott, *supra*. A person owning real estate is competent as a freeholder to act as a road viewer, although such estate is not clear of encumbrances. *In re* Harbaugh Ave., 10 Pa. Co. Ct. 440. However, under a statute providing that road jurors shall be suitable persons, a road juror need not be a freeholder. *In re* Lee, 4 Pennew. (Del.) 576, 60 Atl. 862. And under a statute requiring the viewers of a highway to be the inhabitants near where the complaint is made, it is not necessary that the court, in appointment of viewers, should select freeholders residing in the township. *In re* Poquessing Creek Road, 1 Browne (Pa.) 210.

Proximity to road.— County commissioners, in appointing commissioners to lay out a new road, under Ga. Pol. Code (1895), § 520, should not appoint men without reference to their fitness for the duties imposed upon them merely because they live nearer to the proposed road than others who are competent; and the county commissioners are not limited to the regular road commissioners appointed for the purpose of caring for the public roads, but may appoint any three proper persons residing as near as possible

ever, the fact that one member of the body is incompetent to act does not in all cases invalidate the proceedings.[74] Nor does the fact that one of the surveyors of the town through which the proposed road ran objected to it and had given an opinion as to its propriety disqualify him to act.[75]

(B) *Persons Interested.* If a person has a direct personal or financial interest in the establishment of a highway, he is incompetent to act as commissioner, juror, viewer, etc.[76] Thus a person is so disqualified where he owns land along

to where the road is intended to pass. Brown *v.* Sams, 119 Ga. 22, 45 S. E. 719.

Members of county court.— The county court may appoint the president of the court and the other two members of it as a committee to view the proposed road. Herron *v.* Carson, 26 W. Va. 62.

Surveyors, jurors, etc., having previously acted as to same road.— The fact that a person appointed as a surveyor of a highway has previously acted in the same capacity, and laid out a road over the same route, is no disqualification. State *v.* Bergen, 24 N. J. L. 548. In Michigan members of a township board who heard a proceeding to establish a highway on the merits, and decided the necessity for the highway, and awarded damages, were disqualified to sit on the hearing of a subsequent proceeding to establish the same highway, after the quashing of the former proceeding. Locke *v.* Wyoming Tp. Highway Com'r, 107 Mich. 631, 65 N. W. 558. In Pennsylvania, however, under the act of 1857, relating to the establishment of roads in Erie county, and providing that the jurors summoned by the justice in a dispute as to the location and alteration of a road, or the damages incident thereto, can be rejected for interest, but for no other cause, a juror could not be rejected on account of having sat on, and rendered a verdict in, the same case on a former trial, which had been set aside. Venango Tp. Road Com'rs *v.* Morgan, 47 Pa. St. 276. And where road viewers fail to report within the term, the same viewers may be appointed under the same petition at the next regular term. Union Tp. Road, 29 Pa. Super. Ct. 573.

Presumptions.— Where the law directs that the court appoint three discreet and proper persons to make the review, the appellate court will presume that they are discreet and proper persons until the contrary appears. Parham *v.* Justices Decatur County Inferior Ct., 9 Ga. 341.

74. Betts *v.* New Hartford, 25 Conn. 180 (where the three county commissioners to whom a petition for a highway was referred were unanimous in their report, and it was held that even if one of them was disqualified the other two would constitute the committee, and could make their report as the entire board); Carmel Highway Com'rs *v.* Judges Putnam County Cts., 7 Wend. (N. Y.) 264 (holding that the fact that five out of twenty freeholders who signed a certificate as to the propriety of laying out a road were of kin to the owner of the land did not vitiate the certificate, where the act providing for the laying out of roads only required that the certificate be made by twelve freeholders). But see Kieckenapp *v.* Wheeling, 64 Minn. 547, 67 N. W. 662 (where the three members of the town board of supervisors acted in laying out a highway, and one of them was interested, but the other two, constituting a majority of the board, were not interested, and it was held that the proceedings were voidable, but not absolutely void); Tiffany *v.* Gifford, 7 N. Y. Suppl. 43 (holding that under Laws (1881), c. 696, providing for a jury of twelve men to certify to the necessity of altering and laying out highways, and prescribing their qualifications and manner of selection, where the names of twelve men are drawn, but one is disqualified, the other eleven are not a qualified jury, and their acts as such are void, although the statute also provides that it is sufficient if nine or more of the jurors act). And see cases cited *passim*, II, C, 5, g, (III).

75. *In re* Highway, 3 N. J. L. 948.

76. *Maryland.*— Cumberland Valley R. Co. *v.* Martin, 100 Md. 165, 59 Atl. 714.

Mississippi.— Illinois Cent. R. Co. *v.* Swalm, 83 Miss. 631, 36 So. 147.

New Hampshire.— *In re* New Boston, 49 N. H. 328; Mitchell *v.* Holderness, 29 N. H. 523.

New Jersey.— State *v.* Crane, 36 N. J. L. 394, holding that the fact that no highways could be laid out if it happened that a majority of the board were interested does not create a legal necessity for departure from the maxim that no man can be a judge in his own cause.

New York.— Matter of Baker, 173 N. Y. 249, 65 N. E. 1100.

See 25 Cent. Dig. tit. "Highways," § 83.

Otherwise in absence of statute.— The common-law rule that a judge cannot sit in a cause in which he is interested does not apply to commissioners of highways. Groton *v.* Hurlburt, 22 Conn. 178; Foot *v.* Stiles, 57 N. Y. 399. In the appointment of reviewers of highways in places where all the citizens are more or less interested, it is impossible to be as nice about questions of challenge for cause as in regular jury trials. Much must be left to the discretion of the court appointing them, and the court above will not interfere unless it appears that this discretion is exercised erroneously. *In re* Lower Windsor Tp. Road, 29 Pa. St. 18.

What interest disqualifies.— A highway established by a township board a member of which is personally or financially interested therein is illegal. Wilson *v.* Burr Oak Tp. Bd., 87 Mich. 240, 49 N. W. 572. The statute requiring road commissioners to be "disinterested freeholders" means that they shall be freeholders not pecuniarily interested in

or over which the road is proposed to be established; [77] or, it has been held, where he is a taxpayer in the town through which the proposed road runs; [78] or where he is a relative of a person thus interested,[79] or a stock-holder in an interested corporation.[80] So in New England a resident in one of several towns through which it is proposed to run a highway cannot act as commissioner in laying it out.[81]

the establishment or non-establishment of the highway. Chase *v.* Rutland, 47 Vt. 393. However, an interest, to disqualify them, must be shown to be an immediate, direct interest in the laying out the road, as distinguished from that general interest which each citizen has in a highway. Parham *v.* Justices Decatur County Inferior Ct., 9 Ga. 341. It must be a direct interest, and not a remote or supposed advantage or disadvantage. Mitchell *v.* Holderness, 29 N. H. 523.

The fact that two persons are related is no reason why both should not be viewers. Crowley *v.* Gallatin County, 14 Mont. 292, 36 Pac. 313.

77. *Indiana.*— Daggy *v.* Green, 12 Ind. 303.

Maryland.— Cumberland Valley R. Co. *v.* Martin, 100 Md. 165, 59 Atl. 714.

Minnesota.— Kieckenapp *v.* Wheeling, 64 Minn. 547, 67 N. W. 662.

New Jersey.— State *v.* Conover, 7 N. J. L. 203, holding that where a caveat is entered against recording the return of surveyors, and the court, in appointing freeholders to view the road and certify whether they believe the same necessary, appoint, by mistake, a person through whose land the road runs as one of the six freeholders to view the road, and he actually proceeds with the five others to view and advise concerning the same, although he does not actually sign the certificate, the court may set aside the appointment as incautiously made.

Pennsylvania.—*In re* Warrington Tp. Road, 8 Del. Co. 79. But see *In re* Nelson's Mill Road, 2 Leg. Op. 54.

See 25 Cent. Dig. tit. "Highways," § 83.

Otherwise in absence of statute see Danvers *v.* Essex County, 2 Metc. (Mass.) 185; Webster *v.* Washington County, 26 Minn. 220, 2 N. W. 697 (as to adjacent landowners); Foot *v.* Stiles, 57 N. Y. 399; People *v.* Landreth, 1 Hun (N. Y.) 544.

Removal of disqualification by conveyance. — A landowner who has been appointed commissioner may remove his disqualification by conveying his lands before acting. Gray *v.* Middletown, 56 Vt. 53.

78. *In re* New Boston, 49 N. H. 328. *Contra,* Wilbraham *v.* Hampden County, 11 Pick. (Mass.) 322; Parsell *v.* Mann, 30 N. J. L. 530. And see Thompson *v.* Goldthwait, 132 Ind. 20, 31 N. E. 451.

79. *Arkansas.*— Beck *v.* Biggers, 66 Ark. 292, 50 S. W. 514, father-in-law or brother of the principal petitioner.

Kentucky.— Phillips *v.* Tucker, 3 Metc. 69, brother-in-law of a petitioner.

Maine.— *In re* Clifford, 59 Me. 262, uncle of petitioner.

Massachusetts.—Taylor *v.* Worcester County, 105 Mass. 225, brother-in-law of owner of land to be taken.

Pennsylvania.— *In re* Hellam County Road, 6 York Leg. Rec. 149, brother-in-law of a petitioner. But see *In re* Lower Windsor Tp. Road, 29 Pa. St. 18, holding that it is no objection to the competency of a person as viewer that he is related to a person living near the highway and having an interest in the location thereof, but who is not one of the petitioners therefor.

See 25 Cent. Dig. tit. "Highways," § 83.

Contra.— Groton *v.* Hurlburt, 22 Conn. 178, holding also that a statute disqualifying judges and justices of the peace from acting in civil actions by reason of relationship does not apply to the acts of commissioners in surveying and laying out highways, as such acts are not judicial in their character.

However, an engineer is not ineligible because his brother-in-law owns real estate within the limits assessable for the construction of the road laid out, the viewers alone being empowered to make the assessments, and his duty being simply to aid the viewers in the location of the work, and in making estimates of cost, etc. Thompson *v.* Goldthwait, 132 Ind. 20, 31 N. E. 451. So a county commissioner is not disqualified by reason of the fact that his brother and his son are among the petitioners for the highway, in the absence of a showing that such persons have any other than a public interest in the matter. Wilbraham *v.* Hampden County, 11 Pick. (Mass.) 322. Where one of twelve freeholders appointed to view the site of a proposed road and certify as to its necessity was a brother-in-law of a trustee of a church, land of which would be taken if the proposed location were adopted, he was not such "kin to the owner" of the land, within the statute, as to be incapacitated from acting. People *v.* Cline, 23 Barb. (N. Y.) 197. And the fact that a petitioner's wife was aunt of a wife of one of the road viewers is not ground for setting aside their report, where there was no intimacy between petitioner and the viewer. *In re* Sadsbury Road, 9 Pa. Co. Ct. 521.

80. *In re* New Boston, 49 N. H. 328.

81. Mitchell *v.* Holderness, 29 N. H. 523.

However, a county commissioner is not disqualified by reason of being an inhabitant of a town to the line of which the road in question extends, and with a road in which it is intended to connect. Monterey *v.* Berkshire County, 7 Cush. (Mass.) 394. And although a commissioner who resides in one of several towns through which a highway is sought to be laid out is interested in the question whether the way shall be laid out, he is not disqualified, after a board of disinterested commissioners has adjudged that the way is necessary and determined its course, from acting in laying out any section in another town which cannot affect the course of the way within the town in which he resides.

(c) *Petitioners.*[82] A petitioner for a highway is generally held to be incompetent to serve as a commissioner, juror, viewer, etc., and if he does so the proceedings are vitiated.[83]

(iv) *Compensation.*[84] The right of the commissioners, viewers, etc., to compensation, and the amount thereof, are governed by the local statutes.[85]

Rutland *v.* Worcester County, 20 Pick. (Mass.) 71. Where a road commissioner resided in a town adjoining that through which the highway prayed for was to pass, and it was alleged that such town, although not a party to the record, might be liable eventually, under the statute, to contribute toward the construction of the highway, and that therefore the commissioner was incompetent to sit upon any question in the case, the commissioner was not disqualified until the question of the liability of such town should properly and legally arise before the board, which is not ordinarily the case till after the board has decided to lay out the highway, unless such town was a party to the original application for the highway. Mitchell *v.* Holderness, 29 N. H. 523.

82. **Relatives of petitioners** see *supra*, II, C, 5, g, (III), (B).

83. *Delaware.*— *In re* Public Road, 5 Harr. 242, commissioner.

Indiana.— Epler *v.* Niman, 5 Ind. 459, viewer.

Maine.— *In re* Conant, 102 Me. 477, 67 Atl. 564 (holding that where one of the selectmen of a town signs a petition for laying out a town way in his town, and such selectman is one of the two selectmen who lays out the way and signs the return on the petition for the way, the action of the selectman in laying out the way is void, although a sufficient number of selectmen without him concur in the result); *Ex p.* Hinckley, 8 Me. 146 (committeeman).

Oregon.— Thompson *v.* Multnomah County, 2 Oreg. 34, viewer.

Pennsylvania.— Ohio Tp., etc., Road, 166 Pa. St. 132, 31 Atl. 74 (reviewer); *In re* Green Tp., etc., Road, 129 Pa. St. 527, 19 Atl. 855 (holding that where persons appointed to view and lay out a public road were interested in the same, and signed the petition, but before it was presented to the court caused their names to be erased from the petition in order that they might be appointed as viewers, an order confirming their report will be reversed); *In re* McClaysburg Road, 4 Serg. & R. 200; *In re* Radnor Tp., etc., Road, 5 Binn. 612; *In re* May Town Road, 4 Yeates 479; *In re* Lykens Tp. Road, 19 Pa. Co. Ct. 145 (the last four cases relating to viewers).

Rhode Island.— Anthony *v.* South Kingstown, 13 R. I. 129.

See 25 Cent. Dig. tit. "Highways," § 84.

Contra.— Parham *v.* Justices Decatur County Inferior Ct., 9 Ga. 341 (reviewers); Webster *v.* Washington County, 26 Minn. 220, 2 N. W. 697 (county commissioner); Buckley *v.* Drake, 41 Hun (N. Y.) 384; People *v.* Potter, 36 Hun (N. Y.) 181 (the last two cases relating to jurors).

It has been held, however, that a judgment of the commissioners' court laying out a public road is not void because some of the petitioners for the road were appointed on the jury of view, where the statute did not inhibit the appointment of petitioners as jurors, since the disqualification of jurors does not invalidate a judgment based on their verdict (Vogt *v.* Bexar County, 16 Tex. Civ. App. 567, 42 S. W. 127); and that, although persons unite in a petition for the opening of a road, they may nevertheless be appointed viewers of the route of the road, where they do not become parties on the record (White *v.* Coleman, 6 Gratt. (Va.) 138).

Evidence of identity.— The fact that two signers of a petition were W. C. E. and Carl C, and Warren E. and Carl L. C. are members of the board, will not invalidate the proceedings, in the absence of proof that the signers of the petition and the members of the board were the same persons. Bockoven *v.* Lincoln Tp., 13 S. D. 317, 83 N. W. 335.

Former petitioners.— One who was an applicant for a road once laid, where the proceedings were afterward set aside, is not thereby disqualified for discharging the duties of a surveyor on a subsequent application for a road over the same route. State *v.* Vandervere, 25 N. J. L. 669.

A paid employee of petitioners for a road is not competent to act as a viewer. *In re* Whitemarsh Road, 3 Kulp (Pa.) 474.

84. **Compensation of commissioners or other officers on appeal** see *infra*, II, C, 5, l, (II).

85. *Louisiana.*— *In re* New Orleans, 20 La. Ann. 394, holding that a jury of freeholders summoned to determine the line of a road have no authority to fix their own compensation.

Minnesota.— Raymond *v.* Stearns County, 18 Minn. 60, holding that a commissioner performing services in the laying out of a state road under Sp. Laws (1869), c. 110, as amended by Sp. Laws (1870), c. 142, upon presentation to and disallowance by the commissioners of the county in which such service was rendered of his claim therefor, may maintain an action for such services at the rate prescribed by such statute, although no provision is made, by legislation or otherwise, for the assessment or payment of damages for the lands to be taken for such road.

New Hampshire.— Peavey *v.* Wolfborough, 37 N. H. 286, holding that, where the report of town commissioners for the opening of a highway is recommitted, they are entitled to traveling expenses incurred, and compensation for services rendered in consequence of the recommitment.

Pennsylvania.— *In re* Worth St., 5 Pa. Dist. 231 (holding that the act of May 21, 1895, requiring road jurors to file their reports within six months from the date of their ap-

(v) *Acts and Proceedings* — (a) *In General.* Commissioners and viewers are restricted by and must follow with accuracy the direction of the statutes [86] or order of court [87] under which they are appointed. If appointed to lay a road within a town they can act only within the territorial limits of the town within which the road is to be laid.[88] They have, from necessity, full power and authority to regulate their own proceedings and to determine the order and course of business before themselves,[89] but they must give a full hearing on the merits to all parties interested and desiring to be heard.[90] They may but are not compelled to call upon the county surveyor to assist them in laying out the road,[91] it being held sufficient if the commissioners by their report designate the location of the road with sufficient certainty; [92] but if the precise location cannot otherwise be given the commissioners should order a survey to be made.[93]

(b) *Notice* [94] — (1) Necessity. The statutes regulating proceedings to establish highways generally provide that notice of the proceeding of the commissioners or viewers shall be given to those interested therein, such as owners of adjacent land or those over whose land they are about to make the location,[95]

pointment, and that on failure to do so no compensation shall be made them, does not deprive them of their compensation on failure to file their report within six months, where the court extended the time for filing them); *In re* Tremont Tp. Road, 6 Pa. Co. Ct. 7 (holding that the act of May 19, 1887, covering costs in highway cases arising from taking depositions, making surveys, commissioners' fees, etc., does not repeal the act of May 13, 1874, fixing definite fees for viewers); Weaver *v.* Bushong, 9 Lanc. Bar 33 (holding that since there is no statute allowing jurors of view mileage on views, such fees cannot be allowed).

Washington.— State *v.* Gasch, 9 Wash. 226, 37 Pac. 427, holding that a county surveyor appointed under Laws (1893), c. 98, § 3, as one of the viewers to view a proposed road, stands on the same footing as any other viewer, and is not entitled to compensation for his services in advance of its establishment by order of the superior court.

See 25 Cent. Dig. tit. "Highways," § 107.

86. Craig *v.* North, 3 Metc. (Ky.) 187; Spurlock *v.* Dornan, 182 Mo. 242, 81 S. W. 412.

87. Webb *v.* Rocky-Hill, 21 Conn. 468, holding that county commissioners to whom the laying out or discontinuance of a highway is referred are restricted in their action on the matter referred to them to the convenience and necessity of the highway, every other question in the case belonging to the county court.

88. *In re* Bridport, 24 Vt. 176.

89. Jones *v.* Goffstown, 39 N. H. 254. See also Brown *v.* Ellis, 26 Iowa 85.

They have a right to employ counsel to aid them, and the fact that they do so does not disqualify them. Tift *v.* Dougherty County, 74 Ga. 340.

Admissibility and competency of evidence. — On a trial before a jury impaneled by an officer in highway proceedings, it is the province of the officer, and not of the jury, to pass on the admissibility of the evidence. Merrill *v.* Berkshire, 11 Pick. (Mass.) 269. County commissioners are sometimes expressly authorized by statute to determine finally the question of the competency of evidence submitted to them in road hearings. Jones *v.* Goffstown, 39 N. H. 254.

90. Jones *v.* Goffstown, 39 N. H. 254, holding that if county commissioners were to refuse such hearing before them, it might furnish good cause for rejecting or recommitting their reports.

Sufficiency of hearing.— Where the petition was presented to and read by the board of supervisors, and petitioners' witnesses were present and a statement was made as to what would be proved by them, it was a sufficient hearing of the parties within Miss. Code (1906), § 4400, providing that in a proceeding to lay out a street the court shall hear the parties, although the board refused to let the witnesses testify. Strahan *v.* Attala County, 91 Miss. 529, 44 So. 857.

91. Wyatt *v.* Thomas, 29 Mo. 23; Onken *v.* Riley, 65 Tex. 468, holding that the act of Feb. 5, 1884, allowing the commissioners' jury to call upon the county surveyor to assist them in laying out a road, is directory merely.

92. Wyatt *v.* Thomas, 29 Mo. 23.

Even under a code provision that the commissioner shall cause the line of the proposed highway to be surveyed and marked out when the precise location cannot be given otherwise, where the road is specifically pointed out as extending a certain number of feet on each side of the portion of a certain section line described in the petition, the mere omission of the commissioner to survey and plat the road will not invalidate the proceedings. Palmer *v.* Clark, 114 Iowa 558, 87 N. W. 502.

93. Hoye *v.* Diehls, 78 Nebr. 77, 110 N. W. 714.

Resurvey.— Where the starting point of a highway could not be accurately ascertained from the original survey, the town selectmen will be deemed authorized to resurvey the same. Adams *v.* Derby, 73 Vt. 258, 50 Atl. 1063.

94. **Notice of institution of highway proceedings** see *supra*, II, C, 5, d.

95. Shelton *v.* Derby, 27 Conn. 414 (holding that a statute providing for such notice to those interested therein as the court shall

or to the town in which the highway is to be located.[96] Failure to give such notice is an irregularity;[97] and under the construction given some of the statutes the required notice is a condition precedent to action on the part of the commissioners or viewers and in its nature jurisdictional, failure to give the notice invalidating the proceedings.[98] On the other hand proceedings for the purpose of establishing a highway have been held not wholly void for failure to serve the notice required by statute on property-owners affected, the proceedings being held valid as to the property-owners served with notice or who have waived notice by appearing and taking part in the proceedings;[99] and the report of the com-

order leaves to the discretion of the court only the mode in which the notice shall be given, and the court has no right to omit the order of notice entirely); Howard *v.* Hutchinson, 10 Me. 335; Harlow *v.* Pike, 3 Me. 438; State *v.* Orange, 32 N. J. L. 49; Greene Tp., etc., Road, 21 Pa. Super. Ct. 418; *In re* Towamencin Road, 23 Pa. Co. Ct. 113, 15 Montg. Co. Rep. 194; *In re* Grapevine Road, 18 Pa. Co. Ct. 639; *In re* Plymouth Borough, etc., Road, 5 Kulp (Pa.) 115 (holding that notice by viewers to the owners of land through whose property a public road may chance to pass is of right). But see *In re* App's Tavern Road, 17 Serg. & R. (Pa.) 388, holding that while no notice need be given to the owners of land of the time when the viewers will meet to lay out a road passing through it, the viewers ought, in passing through improved ground, to call the person living thereon.

It is immaterial that the owner knew of the view, if he was not properly notified thereof. *In re* Grapevine Road, 18 Pa. Co. Ct. 639.

The omission in a special act of any provision for notice of the meeting of the commissioners appointed to locate the road does not invalidate the act, where the provisions of the general statutes relating to highways regulate the manner of giving notice. State *v.* Hogue, 71 Wis. 384, 36 N. W. 860.

Notice to county commissioners.— Under the Pennsylvania act of April 15, 1891, the county commissioners are entitled to notice of views where the county must pay the damages. *In re* Ryon Tp. Road, 4 Pa. Dist. 736; *In re* North Lebanon Road, 3 Pa. Dist. 393; *In re* Friendsville, etc., Road, 16 Pa. Co. Ct. 172.

Insufficiency of notice to widow and administrator.— A report of viewers establishing a highway through decedent's estate will be set aside where no notice was given to the heirs, notice to the widow and administrator being insufficient. *In re* Union St., 6 Lanc. L. Rev. (Pa.) 73.

It will be presumed that landowners had notice of the laying out of the road, where viewers report that they endeavored to obtain release of damages from landowners, and there is nothing to contradict their report. *In re* Forest Lake Road, 24 Pa. Co. Ct. 606.

By the term "those interested therein," in a statute providing for notice to such, persons other than those already before the court as parties to the record are intended. Shelton *v.* Derby, 27 Conn. 414.

96. Com. *v.* Egremont, 6 Mass. 491; *In re* Ryan Tp. Road, 3 Kulp (Pa.) 158, holding that the supervisors and auditors of all the townships through which the proposed road is to be laid out must be notified of the review.

97. Shelton *v.* Derby, 27 Conn. 414.

98. *Illinois.*— Audubon *v.* Hand, 231 Ill. 334, 83 N. E. 196; McKee Highway Com'rs *v.* Smith, 217 Ill. 250, 75 N. E. 396; Frizell *v.* Rogers, 82 Ill. 109; Wood *v.* Highway Com'rs, 62 Ill. 391; Oran Highway Com'rs *v.* Hoblit, 19 Ill. App. 259.

Kansas.— State *v.* Bogardus, 63 Kan. 259, 65 Pac. 251.

New York.— People *v.* Smith, 7 Hun 17.

Pennsylvania.— *In re* Greenwood Tp. Road, 23 Pa. Co. Ct. 85.

Texas.— McIntire *v.* Lucker, 77 Tex. 259, 13 S. W. 1027; Missouri, etc., R. Co. *v.* Austin, (Civ. App. 1897) 40 S. W. 35.

Vermont.— La Farrier *v.* Hardy, 66 Vt. 200, 28 Atl. 1030.

Wisconsin.—Austin *v.* Allen, 6 Wis. 134, holding that it is not sufficient that notice was given to appellant, one of the occupants of land affected.

See 25 Cent. Dig. tit. "Highways," § 93.

But see Hasler *v.* Hitler, 9 Ohio Dec. (Reprint) 233, 11 Cinc. L. Bul. 246, holding that notice to a landowner of the pendency of a petition to establish a county road through his land and of the time and place of meeting of the viewers is not jurisdictional, where due publication of the fact of the petition has been made.

99. Leavenworth County *v.* Epsen, 12 Kan. 531 (holding that the notice relates not so much to the laying out of the road as to the compensation, and its omission is merely a matter for complaint by the person neglected); Tyrone *v.* Burns, 102 Minn. 318, 113 N. W. 695 (holding also that a town is not entitled to recover back money paid to a property-owner served with notice for damages for laying out a highway over his premises because notice of the proceedings was not served to the other property-owners); Hurst *v.* Martensburg, 80 Minn. 40, 82 N. W. 1099; State *v.* Richmond, 26 N. H. 232; Kidder *v.* Jennison, 21 Vt. 108.

In Texas, under Rev. St. art. 4691, which provides that the jury of freeholders appointed to lay out a road shall give notice to the landowners of the time when they will lay out the road, "or when they will assess the damages," it is held that the notice refers only to the question of damages, and a notice is not required where the damages are not assessed at the time the road

missioners will not be set aside on the ground that the notice to the selectmen and landholders of the hearing was insufficient, in the absence of anything to show that any one was prejudiced;[1] and notice of a view to open or vacate a road has been held necessary to an adjoining property-owner only when his land is affected thereby.[2]

(2) CONTENTS AND SUFFICIENCY. The sufficiency of the notice must of course be determined largely by the statute or order under which the notice is given.[3] The notice should be of the time and place of the meeting of the commissioners and viewers;[4] and both time[5] and place[6] should be specified with particularity. It must describe the starting point of the road to be laid out[7] and the land included in the proposed highway.[8] If in writing, the notice should be authenticated by a responsible signature.[9] In the absence of a provision to the contrary, notice need

is laid out. Kelly *v.* Honea, (Civ. App. 1903) 73 S. W. 846.

1. *In re* Ford, 45 N. H. 400.

2. Matter of Susquehanna River Road, 1 Pearson (Pa.) 59.

3. See cases cited *infra*, this note.

Notice held sufficient see Lawrence *v.* Nahant, 136 Mass. 477; Copeland *v.* Packard, 16 Pick. (Mass.) 217; *In re* Toppan, 24 N. H. 43; Parish *v.* Gilmanton, 11 N. H. 293.

Where the statute requires a notice that the meeting is called "to decide" upon the application, this requirement is not satisfied by a notice of a meeting "to examine and consider" (Austin *v.* Allen, 6 Wis. 134); or by a notice by the town supervisors that they will meet at a certain time and place to take into consideration an application to lay out a highway (Babb *v.* Carver, 7 Wis. 124). See also Fitchburg R. Co. *v.* Fitchburg, 121 Mass. 132.

The notice required by Pennsylvania act of April 15, 1891, providing that notice of the time and place of holding a view for laying out a public road shall be given to the county commissioners, must be actual notice. *In re* Ryon Tp. Road, 4 Pa. Dist. 736.

Extrinsic evidence is inadmissible to explain a notice for the establishment of a highway, respecting the proposed location thereof, in determining the sufficiency of such notice. Butterfield *v.* Pollock, 45 Iowa 257.

Sufficiency of entry of record of notice. — The requirement of Gen. St. (1901) § 6018, that a record of the notice of the meeting of viewers shall be entered in the commissioners' journal, is satisfied by copying the contents of such notice in the journal, no references as to its publication being required. Molyneux *v.* Grimes, (Kan. 1908) 98 Pac. 278.

4. Audubon *v.* Hand, 231 Ill. 334, 83 N. E. 196; Damon *v.* Baldwin Town Bd., 101 Minn. 414, 112 N. W. 536; State *v.* Auchard, 22 Mont. 14, 55 Pac. 361 (holding that it is necessary to jurisdiction that the affidavit show that notice of the place, as well as the time, of the meeting of the viewers was given); State *v.* O'Connor, 78 Wis. 282, 47 N. W. 433. But see Orono *v.* Penobscot County, 30 Me. 302, holding that a notice given by county commissioners of the time and place appointed for viewing the route in relation to the location of a highway need not fix the time and place for hearing the parties.

5. Damon *v.* Baldwin Town Bd., 101 Minn. 414, 112 N. W. 536. See also People *v.* Wallace, 4 Thomps. & C. (N. Y.) 438.

6. Audubon *v.* Hand, 231 Ill. 334, 83 N. E. 196 (holding that the statute means some definite point or locality, and the site of a proposed road one mile long is not such place or locality); Hammon *v.* Highway Com'rs, 38 Ill. App. 237 (holding a notice of the place of meeting as "at the sight of the proposed road in said town" too indefinite, and the proceedings based therein void); Oran Highway Com'rs *v.* Hoblit, 19 Ill. App. 259 (holding that notice of the place of a meeting to examine a proposed route of a highway is insufficient, where it declares that the meeting will be in a certain village, which is composed of a dozen houses, without stating the particular house).

Notice held sufficiently specific as to place see Smith *v.* Hudson Tp. Highway Com'rs, 150 Ill. 385, 36 N. E. 967 (where commissioners of highways gave notice that they would meet at the west end of a proposed road for the purpose of viewing the road); Thompson *v.* Berlin, 87 Minn. 7, 91 N. W. 25; Thompson *v.* Emmons, 24 N. J. L. 45 (holding that notice for a surveyor's meeting "at the house of A" was sufficient without specifying the township, the alleged deficiency not appearing to have prevented any one's attendance); *In re* Mt. Joy Tp. Road, 13 Lanc. L. Rev. (Pa.) 383 (holding that a notice of view is sufficient, although it did not give the proper christian name of the proprietor of the hotel where the viewers met, the surname having been correctly given).

7. Behrens *v.* Melrose Tp. Highway Com'rs, 169 Ill. 558, 48 N. E. 578, holding, however, that a notice of a meeting to finally determine on the laying out of the road is not fatally defective for failing to describe the starting point of the road with certainty, where it refers to the petition, where the route is clearly described, and the party objecting has not been misled.

8. State *v.* O'Connor, 78 Wis. 282, 47 N. W. 433, where, however, a notice was held sufficient which describes the land included in the proposed highway as a portion of the right of way of a railway company, giving the government subdivisions of which it is a part.

9. *In re* Springfield Tp. Road, 6 Del. Co. (Pa.) 94, holding that notice of a road view

not be in writing if the owner is notified personally and attends the survey;[10] but a rule requiring written notice of a road view to be given to the owner or occupier of lands is not complied with by giving verbal notice to a tenant.[11] Notice of the time and place of the surveyors' meeting may be served by the applicants or any other person in their behalf.[12]

(3) Manner of Giving. Personal notice is necessary where required by rule of court [13] or by statute;[14] but under some statutes personal notice is not necessary,[15] notice by posting [16] or by publication or advertisement [17] being held sufficient. And the appointment of commissioners and viewers, and their visiting the ground, have been held to be circumstances of such notoriety as to put all persons on their guard that they may know when to attend court to be heard.[18]

(4) Time. The notice must be given the number of days before the meeting specified in the statute,[19] or, in the absence of specific provision enacted by the

must be signed by some person, either by the clerk, the viewers, persons interested, or some other responsible person or persons.

A notice of hearing signed by the chairman of the board is sufficient, where the statute does not direct by whom it shall be signed. Peavey *v.* Wolfborough, 37 N. H. 286. And a notice of a meeting of highway commissioners to view the route of a highway, signed "by order of the commissioners, A. B., Chairman," is sufficient over an objection that it does not appear that the notice was issued at a meeting of three or more of the commissioners. Com. *v.* Berkshire County, 8 Pick. (Mass.) 343.

A notice signed by a majority of the committee and duly served on all landholders interested was sufficient. Goodwin *v.* Wethersfield, 43 Conn. 437.

10. Humboldt County *v.* Dinsmore, 75 Cal. 604, 17 Pac. 710.

11. *In re* Clinton Tp. Road, 3 Pa. Co. Ct. 170.

A verbal communication, made by the selectmen to a landowner at the time of hearing on a petition for a new highway, that they had decided to lay out the proposed highway, no return or record of the laying out having then been made, is not sufficient notice of the laying out to limit the time within which such landowner may appeal to sixty days, under N. H. Gen. St. c. 63, § 11. Freeman *v.* Cornish, 52 N. H. 141.

12. State *v.* Atkinson, 27 N. J. L. 420.

13. *In re* Lower Swatara Tp. Road, 6 Pa. Dist. 686.

Personal notice to owners residing out of the state is unnecessary, notice by mail being reasonable notice. Crane *v.* Camp, 12 Conn. 464.

Service held sufficient see *In re* Moreland Tp. Road, 13 Montg. Co. Rep. (Pa.) 71; State *v.* Pierce County Super. Ct., 47 Wash. 11, 91 Pac. 241.

Service held insufficient see Damon *v.* Baldwin Town Bd., 101 Minn. 414, 112 N. W. 536. See also Evans *v.* Santana Live-Stock, etc., Co., 81 Tex. 622, 17 S. W. 232, holding that notice of proceedings by viewers appointed to lay out a road, served on one who is the agent of a corporation, does not bind the corporation, where it does not purport to be notice served on the corporation's agent.

14. Damon *v.* Baldwin Town Bd., 101 Minn. 414, 112 N. W. 536.

15. Murphy *v.* Beard, 138 Ind. 560, 38 N. E. 33; Matter of David, 44 Misc. (N. Y.) 192, 89 N. Y. Suppl. 812; Clayton's Case, 1 Walk. (Pa.) 527.

16. Frizell *v.* Rogers, 82 Ill. 109; Matter of David, 44 Misc. (N. Y.) 192, 89 N. Y. Suppl. 812.

Notice held to be properly posted see People *v.* La Grange Tp. Bd., 2 Mich. 187.

Improper posting see *In re* West Manheim Road, 1 Pa. Dist. 800 (holding that where a rule of court requires notice of the meeting of viewers of a public road to be posted at private dwellings along the route of the proposed road, the posting of the same at a remote blacksmith shop is not sufficient); *In re* West Manchester Tp. Road, 8 York Leg. Rec. (Pa.) 169.

17. Murphy *v.* Beard, 138 Ind. 560, 38 N. E. 33; Freetown *v.* Bristol County, 9 Pick. (Mass.) 46 (holding that publication of a notice by highway commissioners, to all persons interested, of the time and place appointed for viewing a road prayed for, in a newspaper printed within the county, is sufficient); *In re* Sterrett Tp. Road, 114 Pa. St. 627, 7 Atl. 765.

18. Stewart *v.* Hines County Police Bd., 25 Miss. 479; *In re* Baldwin, etc., Road, 3 Grant (Pa.) 62.

In New Hampshire it has been held that the notice of the original petition for a highway is held to be sufficient notice of a hearing of all matters properly and legally arising on that petition from beginning to end, and therefore notice of proceedings by the commissioners need not be given. Chandler *v.* Candia, 54 N. H. 178.

19. Coquard *v.* Bœhmer, 81 Mich. 445, 45 N. W. 996; Detroit Sharpshooters' Assoc. *v.* Hamtramck Highway Com'rs, 34 Mich. 36; Anderson *v.* San Francisco, 92 Minn. 57, 99 N. W. 420; Matter of Niel, 55 Misc. (N. Y.) 317, 106 N. Y. Suppl. 479, where, however, there was held to be a sufficient compliance with the highway law, requiring five days' notice of such application.

In computing the time, the day on which the notice is served and the day of meeting must be excluded. Coquard *v.* Bœhmer, 81 Mich. 445, 45 N. W. 996.

legislature, within a reasonable time under the facts and circumstances of each particular case.[20]

(5) Proof and Record. It is generally held that the record of the proceedings must show that a proper notice of the meeting of commissioners or viewers has been duly served, published, or posted,[21] and that otherwise the proceedings will be void.[22] A report of viewers setting forth that they met "pursuant to legal notice" has been held to be sufficient, in the absence of any allegation by any property holder that he had not received notice,[23] as has also a report that notice of the meeting "as is required by law" was given.[24] But on the other hand it has been held that the fact of service and not the proof of it gives jurisdiction,[25] and accordingly under some of the statutes the fact of giving notice need not appear in the report, but may be shown by extrinsic evidence.[26] But it has been held that the record is not sufficient evidence that notice of the location of the highway was given to the owners through whose land it was to run, where the giving of such notice is contradicted.[27]

20. Belfast Academy *v.* Salmond, 11 Me. 109 (notice of seven days held sufficient); *In re* Kennett, 24 N. H. 139 (notice of fourteen days held sufficient).

21. *Illinois.*— Skinner *v.* Lake View Ave. Co., 57 Ill. 151; Johnson *v.* Stephenson, 39 Ill. App. 88.

Maine.— Southard *v.* Ricker, 43 Me. 575; Harlow *v.* Pike, 3 Me. 438.

Massachusetts.—Lancaster *v.* Pope, 1 Mass. 86, holding that a committee appointed by the court of sessions to locate a highway must return specifically what notice was given persons interested.

Michigan.— Detroit Sharpshooters' Assoc. *v.* Hamtramck Highway Com'rs, 34 Mich. 36; Dupont *v.* Hamtramck Highway Com'rs, 28 Mich. 362 (holding that the statutory notice required in proceedings to lay out a highway is in the nature of process, and the return of the commissioners must contain legal proof that it has been given); Van Auken *v.* Vernon, etc., Highway Com'rs, 27 Mich. 414; Farrer *v.* Silver Creek Highway Com'rs, 2 Mich. N. P. 106.

New Jersey.— *Ex p.* Shough, 16 N. J. L. 264; *In re* Highway, 16 N. J. L. 91; State *v.* Van Geison, 15 N. J. L. 339; State *v.* Scott, 9 N. J. L. 17.

See 25 Cent. Dig. tit. "Highways," § 96.

This must appear by the return, and cannot be proved *aliunde*, or the proceedings of the surveyors present will be void. State *v.* Van Geison, 15 N. J. L. 339.

A report of viewers will be set aside if it fails to show that notice was given to the county commissioners or their clerk of the time and place of holding the view. West Brunswick Tp. Road, 9 Pa. Dist. 256, 23 Pa. Co. Ct. 359.

Return as prima facie evidence.— The return of selectmen in proceedings to lay out a townway is *prima facie* evidence that they gave notice on a petition for the way, and also of such other facts as are required by law to be embraced in the notice, such as that the notice contained a description of the way, and what it was. Cushing *v.* Webb, 102 Me. 157, 66 Atl. 719.

Sufficient showing that the requirements of the statute as to notice were substantially complied with see Windsor *v.* Field, 1 Conn. 279; *In re* New Salem, 6 Pick. (Mass.) 470.

Insufficient proof of service of the statutory notice see Detroit Sharpshooters' Assoc. *v.* Hamtramck Highway Com'rs, 34 Mich. 36; State *v.* Hall, 17 N. J. L. 374.

If served upon an agent the notice must, in order to give jurisdiction, be supported by proof of the possession of such agent or of his authority to act as such. Chase County *v.* Cartter, 30 Kan. 581, 1 Pac. 814.

22. Southard *v.* Ricker, 43 Me. 575; Van Auken *v.* Vernon, etc., Highway Com'rs, 27 Mich. 414; Farrer *v.* Silver Creek Highway Com'rs, 2 Mich. N. P. 106; State *v.* Van Geison, 15 N. J. L. 339.

23. *In re* Springdale Tp. Road, 91 Pa. St. 260; *In re* Verona Borough, etc., Tp. Road, 9 Pa. Cas. 114, 12 Atl. 456; *In re* Yardley Borough, 22 Pa. Co. Ct. 179. But see Skinner *v.* Lake View Ave. Co., 57 Ill. 151.

24. Locust St., 153 Pa. St. 276, 25 Atl. 816.

25. Krenik *v.* Cordova, 95 Minn. 372, 104 N. W. 130; Thompson *v.* Berlin, 87 Minn. 7, 91 N. W. 25, holding that, although the affidavit of service of notice of a meeting to determine the question of the laying out of a highway was informal, where there was no doubt that the notice had been duly and properly served, it was sufficient.

26. *In re* South Abington Tp. Road, 109 Pa. St. 118; *In re* Middle Creek Road, 9 Pa. St. 69; *In re* Washington Tp. Road, 1 Pa. Cas. 177, 1 Atl. 657; *In re* Rostraver Tp. Road, 21 Pa. Super. Ct. 195. But see *In re* Salem Tp. Road, 7 Kulp (Pa.) 105; *In re* Plymouth Borough Road, 5 Kulp (Pa.) 115 (holding that it is advisable, but not absolutely essential, that viewers set forth in their report the fact that notice was given); *In re* Benton Tp. Road, 2 Luz. Leg. Reg. (Pa.) 99.

27. Harlow *v.* Pike, 3 Me. 438. See also *In re* Palmer Tp. Road, 11 Wkly. Notes Cas. (Pa.) 429, holding that a statement in a report of viewers appointed to lay out a road that five days' notice of the view was given to the owners and occupants of the land through which the proposed road was to pass creates no inference of service of notice on

(c) *Adjournments and Continuances.* It is competent for the commissioners or viewers to adjourn, at their discretion, to another time and place,[28] the commissioners being the sole judges of what is a sufficient cause to adjourn;[29] but where the statute limits the number of days for which adjournment may be made, proceedings at a meeting adjourned beyond the time specified are void,[30] the unauthorized adjournment being in effect a denial of the application of the highway.[31] It has been held that the commissioners must give notice of the adjournment to all interested parties;[32] and that if, after a commissioner sits pursuant to a proper notice, he adjourns the hearing to another day without designating the time and place, he thereby loses jurisdiction to proceed further;[33] but other cases hold that all parties originally notified must take notice of such adjournments without any new notice.[34] The omission of commissioners to adjourn from day to day, pending proceedings on a petition for a highway, is an irregularity which is not jurisdictional in its character.[35]

(d) *Proceedings by Part of Commissioners, Viewers, or Other Officers.* Under some of the statutes it is held that a majority of the commissioners or viewers can act in laying out the road.[36] This is so of course where the statute expressly so provides,[37] or even where there is a general statute providing that majorities of boards of this kind can act.[38] Under other statutes it is held that when several persons are authorized to view a road, they must all deliberate and view the proposed road,[39] although a majority may decide[40] or make the report,[41] unless the

an owner or occupant who is not described in such report.

28. *Connecticut.*— Goodwin *v.* Wethersfield, 43 Conn. 437.

Maine.—Orono *v.* Penobscot County, 30 Me. 302; Harkness *v.* Waldo County, 26 Me. 353.

Michigan.— Wilson *v.* Atkin, 80 Mich. 247, 45 N. W. 94.

Minnesota.—Burkleo *v.* Washington County, 38 Minn. 441, 38 N. W. 108.

New Jersey.— State *v.* Vanbuskirk, 21 N. J. L. 86, holding also that the power to adjourn, given to surveyors by Rev. St. p. 520, § 12, is not restricted to the case where only a part meet; but the whole six, when met, may adjourn.

New York.— Brooklyn *v.* Patchen, 8 Wend. 47.

Ohio.— Butman *v.* Fowler, 17 Ohio 101.

Pennsylvania.— *In re* Paradise Tp. Road, 29 Pa. St. 20.

South Dakota.— Issenhuth *v.* Baum, 11 S. D. 223, 76 N. W. 928.

See 25 Cent. Dig. tit. "Highways," § 99.

29. *In re* Hampstead, 19 N. H. 343, holding that where no corruption is surmised, the court will not revise the decision of the commissioners on a motion to adjourn, founded on the state of the weather or of the earth.

30. Wilson *v.* Atkin, 80 Mich. 247, 45 N. W. 94; State *v.* Castle, 44 Wis. 670.

31. State *v.* Castle, 44 Wis. 670.

32. Goodwin *v.* Wethersfield, 43 Conn. 437. See also *In re* Britton, 19 N. H. 445.

33. Dixon *v.* Port Huron Tp. Highway Com'rs, 75 Mich. 225, 42 N. W. 814.

34. Weymouth *v.* York County, 86 Me. 391, 29 Atl. 1100; Westport *v.* Bristol County, 9 Allen (Mass.) 203 (holding that county commissioners may complete the laying out of a highway at an adjourned or subsequent meeting without any new notice, the parties in interest having been previously fully heard); *In re* Peach Bottom Tp. Road, 3 Pennyp. (Pa.) 541.

35. Allison *v.* McDonough County Highway Com'rs, 54 Ill. 170.

36. Hays *v.* Parrish, 52 Ind. 132; Dartmouth *v.* Bristol, 153 Mass. 12, 26 N. E. 425; Jones *v.* Andover, 9 Pick. (Mass.) 146; Hall *v.* Manchester, 40 N. H. 410; *In re* Church St., 49 Barb. (N. Y.) 455.

37. Eatontown Tp. *v.* Wolley, 49 N. J. L. 386, 8 Atl. 517 [*affirmed* in 50 N. J. L. 177, 17 Atl. 1103]; *In re* State Road, 60 Pa. St. 330; *In re* Paradise Tp. Road, 29 Pa. St. 20.

38. Hall *v.* Manchester, 40 N. H. 410, 39 N. H. 295. See also Dartmouth *v.* Bristol County, 153 Mass. 12, 26 N. E. 425.

39. Com. *v.* Ipswich, 2 Pick. (Mass.) 70; State *v.* Shreve, 4 N. J. L. 341; Babcock *v.* Lamb, 1 Cow. (N. Y.) 238; *In re* Paradise Tp. Road, 29 Pa. St. 20; *In re* Pike Tp. Road, 30 Pa. Super. Ct. 644; *In re* Road, etc., Viewers, 8 Pa. Co. Ct. 557; *In re* Plains Tp. Road, 7 Kulp (Pa.) 233; *In re* Butler Tp. Road, 6 Kulp (Pa.) 443; *In re* Ryan Tp. Road, 3 Kulp (Pa.) 158; *In re* Ryan Tp. Road, 3 Kulp. (Pa.) 76.

Where one member does not qualify or act, proceedings of the other two commissioners have been held erroneous. *In re* Wells County Road, 7 Ohio St. 16. *Contra*, Hays *v.* Parrish, 52 Ind. 132. See People *v.* Schellenger, 10 N. Y. Suppl. 947.

40. Babcock *v.* Lamb, 1 Cow. (N. Y.) 238; *In re* State Road, 60 Pa. St. 330; *In re* Paradise Tp. Road, 29 Pa. St. 20; *In re* Pike Tp. Road, 30 Pa. Super. Ct. 644; *In re* Plains Tp. Road, 7 Kulp (Pa.) 233.

41. Bronnenburg *v.* O'Bryant, 139 Ind. 17, 38 N. E. 416; Hays *v.* Parrish, 52 Ind. 132; Jones *v.* Andover, 9 Pick. (Mass.) 146; *In re* Paradise Tp. Road, 29 Pa. St. 20; *In re* New Hanover Tp. Road, 18 Pa. St. 220.

statute expressly otherwise provides.[42] They must, however, act as a body and not separately;[43] and if there be a vacancy in the board the remaining members cannot act even to make a report.[44] A minority cannot act;[45] and if the majority have met and decided against an application, the minority cannot thereafter meet and lay out the road.[46] It is not material to the validity of the report of road reviewers that a dissenting one was not present at the first meeting, if he afterward attended and took part in the proceedings.[47]

(E) *Irregularities and Improper Conduct* — (1) In General. While it is held that the proceedings of commissioners, viewers, and jurors in establishing a highway cannot be guarded with the same strictness as those which are had in court, every reasonable precaution should be taken to guard against the possibility of improper influence and to insure a perfectly fair trial;[48] and any irregular conduct or improper evidence which appears to have unduly prejudiced their determination will furnish grounds to set the determination aside.[49] And thus where county commissioners introduced or encouraged conversations or discussions relative to the laying out of a highway referred to them with one party, in the absence of the other,[50] or where viewers refused to listen to a remonstrance by citizen taxpayers who were present at the view,[51] the report has been set aside; but conduct slightly irregular may not be ground for setting aside the report;[52] and although incompetent evidence be laid before road commissioners, yet their report will not be set aside on that account, if it appears that it was directly withdrawn, and that they gave it no consideration; and their own affidavits are admissible to show that they disregarded it.[53]

Effect of relationship of viewer to interested petitioner.— If one of six re-reviewers is found to be related to an interested petitioner for the road and is challenged on that account after the view has begun, and he retires, the remaining five re-reviewers may proceed to complete the review and make report. Whitemarsh, etc., Road Case, 2 Montg. Co. Rep. (Pa.) 29.

A supplemental report signed by two of three original viewers is sufficient. *In re* Springdale Tp. Road, 91 Pa. St. 260.

42. Colony *v.* Dublin, 32 N. H. 432, holding, however, that the act of July 13, 1855, providing that no highway should thereafter be laid out except on the unanimous report of the road commissioners, does not apply to the case of a petition which was pending when the act was passed.

43. Whittingham *v.* Hopkins, 70 N. J. L. 322, 57 Atl. 402, holding that Gen. St. p. 2804, § 5, regulating the laying out of public roads by surveyors of highways, contemplates the joint action of the appointees, or a majority of them, acting as a body, in dating, signing, and delivering their return, and where two of the four purporting to sign the return did so on separate dates and apart from their associates the return was invalid.

44. Wentworth *v.* Farmington, 49 N. H. 119; Palmer *v.* Conway, 22 N. H. 144. But see Smith *v.* New Haven, 59 Conn. 203, 22 Atl. 146; Whitmarsh, etc., Road Case, 2 Montg. Co. Rep. (Pa.) 29.

45. State *v.* Horn, 34 Kan. 556, 9 Pac. 208.

46. *In re* Highway, 16 N. J. L. 391.

47. *In re* Paradise Tp. Road, 29 Pa. St. 20.

48. Beardsley *v.* Washington, 39 Conn. 265.

49. Harris *v.* Woodstock, 27 Conn. 567; *In re* Willistown Tp. Road, 5 Pa. Co. Ct. 303, holding that a report of an alias jury will be set aside, where it appears that the jury were informed that a previous jury had granted a road over the same route, and that their report had been set aside for a technical error, the names of the former jurors given, and the statement made that it required but a short time for the jury to report in favor of the road.

50. Peavey *v.* Wolfborough, 37 N. H. 286. But see Matter of Hickory Tree Road, 1 Pearson (Pa.) 202, holding that the report of viewers in a road case will not be set aside because one of them asked the owner of land how much damages he would claim for opening a road through it.

51. *In re* Jopho Road, 4 Lanc. L. Rev. (Pa.) 123.

Facts held insufficient to show that all had not a fair opportunity to be heard see Windham *v.* Litchfield, 22 Conn. 226.

52. Goodwin *v.* Wethersfield, 43 Conn. 437.

Conduct held not to be irregular or improper see Williams *v.* Stonington, 49 Conn. 229 (holding that there was no impropriety in the committee stating to both parties at the close of the hearing that they should not deliver their report to the party in whose favor it should be made until their fees were paid, or in counsel for one of the parties stating that if the report was in favor of his client, he would at once pay the fees); Horton *v.* Norwalk, 45 Conn. 237. See also *In re* Patten, 16 N. H. 277, holding that, where petitioner and a commissioner viewed together a part of the projected way before the meeting of the commissioners, an objection based upon this was addressed to the discretion of the court below, whose action in overruling it would not be revised.

53. Goodwin *v.* Milton, 25 N H. 458.

(2) Entertainment by Person Interested. While it is sometimes held that the mere entertainment of road viewers, commissioners, or jurors by an interested party is cause for setting aside their report,[54] the majority of cases hold that the entertainment is not of itself sufficient to invalidate the proceedings where it does not appear that they were unduly influenced,[55] particularly where the entertainment was at the conclusion of the work after the report had been signed;[56] and where it is a custom in the county for petitioners to furnish lunches to the county commissioners during the proceedings for the location of a highway, such furnishing is not a ground for quashing the same,[57] even though petitioner, without improper motives, urges upon the commissioners in private after the hearing the importance of the way.[58] But if the entertainment is of such a nature as unduly to influence the commissioners or viewers it may be a ground for setting aside their proceedings,[59] as it will be also where the entertainment is in violation of a rule of court that viewers shall not be entertained by or at the expense of any person interested in the proceedings;[60] and under such a rule the report will be set aside where the viewers were entertained at the house of a petitioner, although done at the instance of a person not interested.[61]

(f) *Meeting at Wrong Time or Place.* If viewers, commissioners, or jurors meet to transact business at a time[62] or place[63] different from that designated by their notice or order of court[64] their proceedings are void and will be set aside.

(g) *View.*[65] The mode of examination rests generally in the discretion of the viewers, commissioners, or jurors.[66] It has been held that the route over which

54. *In re* Blakely Road, 8 Pa. Co. Ct. 592; *In re* North Branch Road, 8 Pa. Co. Ct. 284; *In re* Butler Tp. Road, 6 Kulp (Pa.) 443; *In re* Ross Tp. Road, 4 Kulp (Pa.) 67; *In re* Upper Hanover Road, 2 Kulp (Pa.) 179; *In re* Magnolia St., 8 Phila. (Pa.) 468.

The ground for this view is that no court can draw the line between harmless and improper entertainments. *In re* Ross Tp. Road, 4 Kulp (Pa.) 67.

Furnishing transportation to a viewer to the place of view is no ground for setting aside the report of viewers appointed for the opening and construction of a highway. *In re* Springfield Tp. Road, 24 Pa. Co. Ct. 625.

55. *Connecticut.*— Greene *v.* East Haddam, 51 Conn. 547, holding that it will not be inferred that attentions and hospitality shown a committee during their stay in a neighborhood for the purpose of deciding on an application for laying out a way were improper or produced an improper influence on their action.

Massachusetts.— Blake *v.* Norfolk County, 114 Mass. 583.

New Jersey.— Borden *v.* Justice, 24 N. J. L. 413 (holding that it is not sufficient ground for setting aside the return of freeholders on the laying out of a public road that the caveators furnished them their dinners); State *v.* Bergen, 21 N. J. L. 342.

New York.—People *v.* Weld, 6 N. Y. St. 173.

Pennsylvania.— *In re* Drumore Tp. Road, (1886) 7 Atl. 193; *In re* Plymouth Tp. Road, 5 Rawle 150; *In re* East Franklin Tp. Road, 8 Pa. Co. Ct. 590; *In re* East Earl Tp. Road, 10 Lanc. L. Rev. 340; *In re* Bethlehem Road, 2 Lehigh Val. L. Rep. 265; *In re* West Manchester Tp. Road, 8 York Leg. Rec. 169; *In re* Lower Chanceford Tp. Road, 8 York Leg. Rec. 165.

See 25 Cent. Dig. tit. "Highways," § 102.

56. *In re* North Hopewell Tp. Road, 5 Del. Co. (Pa.) 85.

57. Blake *v.* Norfolk County, 114 Mass. 583.

58. Blake *v.* Norfolk County, 114 Mass. 583.

59. *In re* Newport Highway, 48 N. H. 433, where county commissioners, while engaged in the hearing of a petition for a highway, repeatedly drank spirituous liquors furnished them by petitioners, and the commissioners' report in their favor was set aside, and the petition recommitted to a new board, without inquiring how far the commissioners were affected by the treats.

60. *In re* Sadsbury Road, 9 Pa. Co. Ct. 521.

61. Beardsley *v.* Washington, 39 Conn. 265; *In re* Londonderry Tp. Road, 6 Pa. Co. Ct. 391.

62. Hobbs *v.* Tipton County, 103 Ind. 575, 3 N. E. 263. But see West Fallowfield Road, 7 Pa. Co. Ct. 645, holding that where a jury of view fixed nine o'clock in the morning for their meeting to view the route, and on account of a storm and high waters they did not reach the place until two in the afternoon, but some parties opposed to the road, who were not owners of lands over which the road was laid out, after waiting awhile, left, while others remained, who urged their objections to the road, the report of the jury laying out the road would not be set aside.

63. Barlow *v.* Oscoda Tp. Highway Com'r, 59 Mich. 443, 26 N. W. 665; *In re* Johnson, 49 N. J. L. 381, 8 Atl. 113; State *v.* Scott, 9 N. J. L. 17; *In re* Merion Tp. Road, Wilcox (Pa.) 249.

64. State *v.* Scott, 9 N. J. L. 17.

65. Review or re-review see *infra*, II, C, 5, g, (v), (k), (8).

66. State *v.* Justice, 24 N. J. L. 413.

a highway is laid out need not be examined by the commissioners before the hearing.[67]

(H) *Reconsideration or Rehearing.* The general rule is that the authority of viewers, commissioners, or jurors ends with their decision, and after they have rendered the decision and reported they cannot reconsider or alter it,[68] or render a second report without a fresh appointment;[69] and even though the power subsequently to alter a report be recognized the alterations should be made at an adjourned or called meeting of the viewers, and not by separate or individual agreement.[70] It has been held, however, that in proceedings by freeholders to lay out a public road, they may reconsider any vote passed before they separate.[71] A rehearing on the ground of newly discovered evidence will be refused where it was not shown that the evidence could not have been obtained earlier by reasonable diligence.[72]

(I) *Waiver of Objections; Laches*[73] — (1) In General. Although entertainment of a highway committee may invalidate proceedings by them in laying out a highway if properly objected to,[74] parties who proceed with the hearing without objection cannot, after a decision adverse to them has been rendered, raise the objection for the first time,[75] particularly where the record shows that no real wrong was done, that the person thus objecting had a chance to except, that damages had been paid, and work on the road actually done.[76] Similarly an irregularity in filing a report of viewers out of time is cured by defendant's laches in not objecting until more than a year thereafter, during which time he acquiesced in the report, and plaintiff had prepared for trial.[77] So an appeal to the supervisors on the merits is a waiver of the irregularity in failing to adjourn from day to day.[78] Again, the objection that petitioner for a new highway is not a competent witness for petitioner on a hearing before road commissioners must be made when witness is offered or it will be held to be waived.[79] And failure of interested parties to object in due time to the report of a road commissioner upon the route of a proposed highway because of his failure to comply with the provisions of a statute directing him to report whether any yard, garden, orchard, or part thereof will be taken if the road is established is a waiver of such objection.[80] So a person may be estopped to set up the insufficiency of the report in the description of the land taken.[81] But where viewers, before they were sworn, viewed a great portion of the road, such irregularity is not a matter which counsel could waive; and hence his silence at the time cannot estop the party interested from making the objection afterward;[82] and in like manner the appearance by one claiming to be the attorney of the landowners, and his argument against the necessity of the highway, have been held to be no waiver of objection to the failure of the commissioners, in their order for the highway, to follow the description of the road in the application as required by statute.[83]

67. Raymond *v.* Griffin, 23 N. H. 340, holding that the examination may be made after the hearing and before the laying out, provided the parties had an opportunity to be present at the examination and to be heard if they desired it.

A view cannot be made after the beginning of the term to which the order is returnable. *In re* Manchester Tp. Road, 15 Pa. Co. Ct. 623; *In re* Fairview Tp. Road, 7 Kulp 232.

68. Pollard *v.* Ferguson, 1 Litt. (Ky.) 196 (holding that where one report was quashed, and the viewers without any new order made out another report to a subsequent term, the action of the court thereon in establishing the road was erroneous); *In re* Highway, 16 N. J. L. 391.

69. Phillips *v.* Tucker, 3 Metc. (Ky.) 69.

70. *In re* West Manchester Tp. Road, 8 York Leg. Rec. (Pa.) 169.

71. State *v.* Justice, 24 N. J. L. 413.

72. Goodwin *v.* Wethersfield, 43 Conn. 437.

73. Time of filing objections see also *infra*, II, C, 5, g, (v), (k), (2), (b).

74. See *supra*, II, C, 5, g, (v), (e), (2).

75. Williams *v.* Stonington, 49 Conn. 229.

76. *In re* Eldred Tp. Road, 24 Pa. Co. Ct. 321.

77. Higgins *v.* Sharon, 5 Pa. Super. Ct. 92, 41 Wkly. Notes Cas. 9.

78. Allison *v.* McDonough County Highway Com'rs, 54 Ill. 170.

79. Watts *v.* Derry, 22 N. H. 498.

80. Jeter *v.* Board, 27 Gratt. (Va.) 910.

81. Hay *v.* U. S. Pipe Line Co., 7 Kulp (Pa.) 401.

82. *In re* Foster Tp. Road, 1 Kulp (Pa.) 249.

83. People *v.* Stedman, 57 Hun (N. Y.) 280, 10 N. Y. Suppl. 787.

(2) Objections to Notice. Where parties entitled to notice of the time and place of the meeting of commissioners or viewers appear and make no objection at the time to the notices or the service of them, such appearance is a waiver of the right to notice,[84] and consequently of the right to object to the form or sufficiency of the notice,[85] or to the character of the service thereof.[86] Similarly objection to the proceedings or to the notice upon some specified ground is a waiver of objections upon other grounds; [87] and although the statutory requirement as to time of notice has not been complied with, one who, having informal notice of the meeting, allows the road to be made and expenditures to be incurred is estopped to deny the sufficiency of the notice; [88] and the omission of a town to appear in court and object to the acceptance of an award of highway commissioners or move for its recommitment has been held to be a waiver of the alleged insufficiency of the notice received from the commissioners.[89] Although the county commissioners are entitled to notice of road view where the county must pay the damages, they alone can object to the want of such notice; [90] and under a statute directing the committee to give seasonable notice to the selectmen of a town in which a highway is to be laid out, failure to give notice to the selectmen of one of two towns, both of which were parties to the proceedings, cannot be taken advantage of by the other.[91] Similarly where a rule requires written notice of a road view to be given to the owner or occupier of lands, and the only notice given was verbal notice to a tenant, no objection can be made thereto except by the owner.[92]

(J) *Report in General* — (1) Form, Sufficiency, and Validity in General. No general rule can be laid down in regard to the form, sufficiency, and validity of the report or return of the commissioners, viewers, jurors, etc. It depends upon the requirements of the local statutes.[93]

84. Stephens *v.* Leavenworth County, 36 Kan. 664, 14 Pac. 175; Hurst *v.* Martinsburg, 80 Minn. 40, 82 N. W. 1099; Anderson *v.* Decoria, 74 Minn. 339, 77 N. W. 229; Kieckenapp *v.* Wheeling, 64 Minn. 547, 67 N. W. 662; Grand Trunk R. Co. *v.* Berlin, 68 N. H. 168, 36 Atl. 554; *In re* Gilford, 25 N. H. 124; Parish *v.* Gilmanton, 11 N. H. 293; Matter of Susquehanna River Road, 1 Pearson (Pa.) 59; *In re* Byberry Road, 6 Phila. (Pa.) 384.

Appearing to protest against the report of the jury is not a waiver of notice. McIntire *v.* Lucker, 77 Tex. 259, 13 S. W. 1027. And it is held that a landowner, appearing at a meeting of viewers appointed to lay out a road and assess damages, and filing exceptions to their report, does not thereby waive his statutory right to notice of the meeting. Beck *v.* Biggers, 66 Ark. 292, 50 S. W. 514.

Attendance as a witness in obedience to a subpœna will not be deemed a waiver of notice. People *v.* Osborn, 20 Wend. (N. Y.) 186.

Casual presence.— But see *In re* Upper Fairfield Tp. Road, 11 Pa. Co. Ct. 396, holding that where a rule of court of quarter sessions required notice of the time and place of meeting of the viewers to be given to the supervisors of the township or townships in which the road was located, such notice was not waived by the casual presence at the meeting of the viewers of one of such supervisors, his presence having no reference to the view.

85. Condon *v.* County Com'rs, 89 Me. 409, 36 Atl. 626; *In re* Gilford, 25 N. H. 124; Parish *v.* Gilmanton, 11 N. H. 293; *In re* Schuylkill Falls' Road, 2 Binn. (Pa.) 250; *In re* North Hopewell Tp. Road, 5 Del. Co. (Pa.) 85; *In re* Mt. Joy Tp. Road, 13 Lanc. L. Rev. (Pa.) 383; *In re* Lower Chanceford Tp. Road, 8 York Leg. Rec. (Pa.) 165.

86. Parish *v.* Gilmanton, 11 N. H. 293.

87. Com. *v.* Westborough, 3 Mass. 406.

88. Rutland *v.* Worcester County, 20 Pick. (Mass.) 71.

89. Gill *v.* Scituate, 100 Mass. 200.

90. *In re* Friendsville, etc., Road, 16 Pa. Co. Ct. 172.

91. Windsor *v.* Field, 1 Conn. 279.

92. *In re* Clinton Tp. Road, 3 Pa. Co. Ct. 170.

Nor can the written notice be waived by the tenant. *In re* Clinton Tp. Road, 3 Pa. Co. Ct. 170.

93. *Massachusetts.*— Carr *v.* Berkley, 145 Mass. 539, 14 N. E. 746 (holding that where the selectmen of a town have, under Pub. St. c. 49, § 71, filed the laying out of a highway in the office of the town clerk seven days before the town meeting called to vote on the acceptance of such way, the fact that less than seven days before such meeting they filed a report to the town, which contained a duplicate of the laying out, will not prevent the establishment of the way, as the paper first filed might equally well have been treated and acted on as a report); Com. *v.* Merrick, 2 Mass. 529 (holding that the laying out of a town way by the selectmen must be recorded before it is offered to the town for acceptance).

(2) Report as to Presence of Commissioners, Viewers, Etc. The statutes, and therefore the cases, are not in accord as to whether the report should

Michigan.— Mœtter *v.* Grosse Pointe Tp. Highway Com'r, 39 Mich. 726, holding that proceedings to lay out a highway are defective if the commissioners' report to the township clerk does not show when the hearing upon the application took place.

Missouri.— Spurgeon *v.* Bartlett, 56 Mo. App. 349, holding that a report of the commissioners need not recite that they heard complaints, as required by Rev. St. § 7799.

New Hampshire.— Hopkinton *v.* Winship, 35 N. H. 209, holding that the report of commissioners laying out a highway over a road that had previously been discontinued need not state any change of circumstances as having occurred after the discontinuance.

New Jersey.— *In re* Middlesex County, etc., Public Road, 4 N. J. L. 290, holding that the fixing of the time at which the road is to be opened is an essential and indispensable part of the surveyor's duty, and such time should be stated in their return; but that a return that the road should be opened "on or before the 1st day of September next" sufficiently fixed the times.

Pennsylvania.— *In re* Drumore Tp. Road, (1886) 7 Atl. 193 (holding that the requirement of the act of June 13, 1883 (Purdon Dig. p. 1496, pl. 3), that a road, when laid out, shall, whenever practicable, be no more than five degrees in elevation, is not among the facts required by statute to be stated in the report of viewers); Mill Creek Road Com'rs *v.* Fickinger, 51 Pa. St. 48 (where the jury were sworn as to "all matters" in regard to locating and vacating, and found "that the road, as laid out by the commissioners, is hereby confirmed," and it was held that the verdict was in accordance with the statute); *In re* Paradise Tp. Road, 29 Pa. St. 20 (holding that it is immaterial to the validity of a report of road reviewers that it embraces parts of two roads, if both are embraced in the petition for the appointment of viewers); *In re* Lower Macungie Tp. Road, 26 Pa. St. 221 (holding that a report of viewers is not bad as a matter of law merely because it was drawn up by the attorney for petitioners at the request of the viewers); *In re* Herrick Tp., etc., Road, 16 Pa. Super. Ct. 579 (holding that the report should state whether the viewers were severally sworn or affirmed); *In re* West Manchester Tp. Road, 8 York Leg. Rec. 169 (holding that the report of the viewers and the accompanying draft must be considered together, and omissions in one may be supplied by the other).

West Virginia.— Herron *v.* Carson, 26 W. Va. 62, holding that, although it would be more formal for a committee appointed to view a proposed road to return their report in writing, yet if it was not reduced to writing and signed by each member, but, in lieu thereof, the whole report, containing all the details required by the statute, is set out at length in the order book of the county court in the form of a recital, and an order of the court is made on such recital, it will suffice.

See 25 Cent. Dig. tit. "Highways," §§ 108, 109.

Signature and seal.— The return of a locating committee appointed by the court of sessions in proceedings to lay out a highway must be under the hands and seals of the committee or a major part of it. Com. *v.* Coombs, 2 Mass. 489. However, it is not necessary that the surveyor should sign the report finding the necessity for the road. Muchmore *v.* Miller, 9 Ohio Dec. (Reprint) 176, 11 Cinc. L. Bul. 160. And the fact that the initial letter of the second christian name of one of the viewers is omitted in making the order of appointment, but is inserted in the signature to the report, will not warrant the setting aside of the report. *In re* South Abington Tp. Road, 109 Pa. St. 118. Where two of the viewers have signed the report, the fact that the third viewer does not sign it until the return-day does not vitiate the report. *In re* Greenwood Tp. Road, 27 Pa. Super. Ct. 549. In any event the fact that only two out of three viewers signed the report is not a ground for setting aside the proceedings three years after the final confirmation of the report and after the road had been opened and public money expended thereon to a considerable amount. *In re* Union Tp. Road, 29 Pa. Super. Ct. 573.

Report by deputy.— Under the Pennsylvania act of Feb. 24, 1873, providing that a surveyor is to be appointed for Allegheny county with authority to appoint a deputy to perform his duties, the surveyor to act as artist on road views, a report signed by the deputy surveyor is authorized where viewers were appointed, the county surveyor being named as one without designating his office. *In re* Killbuck Private Road, 77 Pa. St. 39. In Washington the county engineer is authorized to employ a deputy, and such deputy has the same power as his chief, and his report in proceedings to establish a road, signed by his own name, is sufficient as if made by the county engineer. State *v.* Clarke County Super. Ct., 49 Wash. 392, 95 Pac. 488. On a petition for viewers to lay out a road, the court appointed D, T, and B. The report of the viewers was signed by S and the latter two. After the report had been confirmed absolutely, and an order to open issued, a petition to set aside the confirmation and admit exceptions was presented. A certificate was then filed by D, who was county engineer, to the effect that S was the duly appointed deputy engineer, and was deputed by him to survey and locate the road. It was held that it sufficiently appeared that the persons who signed the report were the persons contemplated and authorized by law to act as viewers, and that the objection that the certificate was not filed by leave of court would not avail after the time for exceptions had elapsed. *Re* Verona Borough Road, 9 Pa. Cas. 114, 12 Atl. 456.

Certainty.— The return of surveyors of the highway will be set aside for uncertainty and

show that all or a majority of the viewers or surveyors were present at the view or survey.[94]

incongruity. State *v.* Green, 15 N. J. L. 88. Viewers of a highway reported that all who signed the report were present, and that, having been severally sworn in pursuance of the order, they viewed, laid out, and appointed for public use the following road, etc., and named the properties on which no damages were claimed, and the amounts of damages allowed on other properties, and stated that they were of opinion that the road as laid out was necessary for a public road or street, and recommended it to be fifty feet wide. It was held that the proceedings were substantially correct, and would not be set aside as being inaccurate and uncertain. *In re* Pottsgrove Road, 2 Walk. (Pa.) 503. See also State *v.* Schanck, 9 N. J. L. 107. Certainty of description of road see *infra*, II, C, 5, g, (v), (j), (5).

Report as to competency of petitioners.— The board of county commissioners having appointed viewers, approved their report locating a road, and ordered it opened on a petition purporting to have been signed by more than twelve householders, the proceedings are valid, although the board made no express finding that petitioners were householders. Schade *v.* Theel, 45 Kan. 628, 26 Pac. 38. In the absence of statutory provisions as to residence and citizenship of a petitioner for the opening of a road, the commissioners need not find on those points. Crowley *v.* Gallatin County, 14 Mont. 292, 36 Pac. 313.

Report as to time and place of meeting.— While good practice requires it (*In re* Kidder Tp. Road, 1 Kulp (Pa.) 10), yet the report of road viewers need not affirmatively state that the viewers met at the time and place designated. In the absence of evidence to the contrary, or of an inference to be drawn to the contrary from something on the face of the report, it will be presumed that the jury did their duty. *In re* Greenwood Tp. Road, 27 Pa. Super. Ct. 549; *In re* Kidder Tp. Road, *supra*. So the failure of re-reviewers to state the date of their meeting is not necessarily fatal. *In re* Limerick Road, 1 Montg. Co. Rep. (Pa.) 171.

Report as to adjournments.— The omission of re-reviewers to state that they had an adjourned meeting is not sufficient of itself to set aside their report, if it appears that the parties interested had due notice of the actual view. *In re* Limerick Road, 1 Montg. Co. Rep. (Pa.) 171. Although it is necessary that when surveyors of highways adjourn they should do so in the manner prescribed by statute, yet where surveyors met on the twenty-third, and the report was signed on the twenty-sixth, without showing that they had adjourned in the meantime, it was not defective for not stating that they adjourned in the statutory manner, since it did not certainly appear that any adjournment took place; and although surveyors met on the twenty-third, and their report is signed on the twenty-sixth of the month, and it does not appear that they adjourned in the meantime, their report is not objectionable on the ground that it ought to appear that the adjournment was legal and proper, it appearing from the length of the road to be examined that three days were necessary without having taken an adjournment. *In re* Middlesex County, etc., Public Road, 4 N. J. L. 290. The return made by surveyors of a highway was not vague and uncertain because the surveyors met on one day at the house of one person, and the return was dated and signed on another day of the same month at another house, without showing adjournment of time and place. State *v.* Schanck, 9 N. J. L. 107.

Report as to view and survey.— Good practice requires that a report of viewers should show that they viewed the ground, but an omission to state such fact is not fatal to the report. *In re* Kidder Tp. Road, 1 Kulp (Pa.) 10. In any event a report of the county surveyor setting forth the full description of the location of a road, together with the plat thereof, is sufficient to show compliance with the order of court directing him to view, mark out, and survey the proposed road. Spurgeon *v.* Bartlett, 56 Mo. App. 349.

Report as to: Notice of proceedings see *supra*, II, C, 5, g, (v), (b), (5). Qualification of commissioners, viewers, etc., see *supra*, II, C, 5, g, (ii), (e).

94. See the statutes of the different states, and cases cited *infra*, this note.

In Illinois, where a report is signed by two only of three viewers of a road, it will be presumed that the third was present and consulting, until the contrary is shown. Louk *v.* Woods, 15 Ill. 256.

In New Jersey, under the statute providing that surveyors appointed to locate a highway, or a majority of them when they have met, on due proof of the performance of certain conditions precedent, shall view the premises, etc., a return signed by four out of a board composed of six, reciting that on the appointed day two of them met, and, on due proof that proper notices were given, adjourned, etc., is insufficient as showing the required proof to have been made before less than a majority. State *v.* Hall, 17 N. J. L. 374. A return by road surveyors must show that an absent surveyor had notice of their meeting, or such notice must appear by proof laid before the court. Bassett *v.* Clement, 17 N. J. L. 166. Where the return of surveyors laying out a highway is submitted by only a part of their number, it must be shown by their return that the non-subscribing surveyors were present and did not concur, or, if absent, that they had been duly notified of the meeting. State *v.* Van Geison, 15 N. J. L. 339. Where the return of a road is signed by less than all the surveyors, it should appear that the others either met with them or had notice of the meeting. Griscom *v.* Gilmore,

(3) Report as to Necessity, Utility, Convenience, and Character of Road; Individual Advantage or Prejudice. It is sometimes required that the report should contain statements as to the necessity [95] or utility [96] of the proposed road, the public advantage and private inconvenience thereof,[97] and its

16 N. J. L. 105; State *v.* Burnet, 14 N. J. L. 385.

In Pennsylvania, it seems, the road viewers' report should state particularly who of them were present at the view. *In re* South Abington Tp. Road, 109 Pa. St. 118; *In re* Herrick Tp., etc., Road, 16 Pa. Super. Ct. 579. But see *In re* Springbrook Road, 64 Pa. St. 451; Greenleaf Ct. Case, 4 Whart. (Pa.) 514, holding that omissions in the report of a jury of review to state the names of the jurymen absent will not vitiate the report, although signed by five. However, a report signed by all the viewers, stating that they "had viewed," is a sufficient averment as to who were present at the view. *In re* Ross Tp. Road, 36 Pa. St. 87.

95. Truax *v.* Sterling, 74 Mich. 160, 41 N. W. 885 (holding that under Howell Annot. St. Mich. § 1300, providing that the commissioner of highways "shall, at the time appointed, proceed to view the premises described in the application and notice, and to ascertain and determine the necessity for laying out, altering, or discontinuing a highway pursuant to such application," etc., it is a jurisdictional prerequisite that the commissioner's return shall state positively that he has ascertained and determined the necessity for taking the land for purposes of a highway); *In re* Upper St. Claire Tp., etc., Road, (Pa. 1887) 7 Atl. 772 (holding that it is an essential requisite, under the Pennsylvania act of June 12, 1836 (Purdon Dig. p. 1496, pl. 3), specifying the requisites of the viewers' report, that the report should state that the road is necessary).

Otherwise in California. Humboldt County *v.* Dinsmore, 75 Cal. 604, 17 Pac. 710.

However, where the report of a committee stated that they found that a certain part of the road prayed for was not required by common convenience and necessity, and that they were of opinion that that portion of the petition should not be granted, but that they found that a certain other portion ought to be laid out, and that they therefore laid it out, it was sufficiently found that the latter portion was required by common convenience and necessity. Pierce *v.* Southbury, 29 Conn. 490. And it is not necessary that the surveyor should sign the report finding the necessity for the road. Muchmore *v.* Miller, 9 Ohio Dec. (Reprint) 176, 11 Cinc. L. Bul. 160. The viewers appointed under the Pennsylvania act of June 13, 1836, reported that "after due consideration, and diligent inquiry as to the necessity of the said road, they are of opinion that the prayer of the petitioners should be granted for the reasons set forth in their petition," and "have therefore located and distinctly marked upon the ground, and do recommend for public use the following described road," etc. It is held that the report need not be made in the very words of the act, and that the report in question substantially found that the road was necessary. *In re* Upper St. Clair Tp., etc., Road, 8 Pa. Cas. 470, 11 Atl. 625. So the report of viewers which states that "they laid out the road for public use," and that, "in their opinion it will fully answer as a public road, and will accommodate the traveling public," is a sufficient finding that the road is necessary. *In re* Versailles Tp. Road, 4 Brewst. (Pa.) 57.

96. Butts *v.* Geary County, 7 Kan. App. 302, 53 Pac. 771 (holding that where viewers are appointed on a petition for a highway under Gen. St. (1889) c. 89, § 29, before the board of commissioners can prove the viewers' report, and direct the highway to be located and opened, it must appear therefrom that the road proposed is practicable and of public utility); *In re* Marsh, 2 Aik. (Vt.) 239 (holding that a committee appointed to survey a road should decide upon its utility or inutility).

In Indiana, however, under Rev. St. § 5016, which imposes on viewers the duty to ascertain whether a highway will be of "public utility," and to "locate and mark" it "on the best ground," and under section 5017, providing for a report by such viewers giving a description of such location "by metes and bounds," their report that they have "proceeded to review, mark and locate said proposed public highway," with a description of the road, is sufficient, and they are not required to state therein that the road will be of public utility, and is located on the best ground. Campbell *v.* Fogg, 132 Ind. 1, 31 N. E. 454. And where the report of viewers appointed to locate a public road is favorable, but is silent as to the public utility of the location, or if it does not state that the location is of public utility, it will be presumed that they deemed it of public utility. Heagy *v.* Black, 90 Ind. 534. Where a remonstrance against a proposed highway includes the ground of damages and the inutility of the proposed road, it cannot be objected that the reviewers exceeded their authority in reporting the highway of public utility. Brown *v.* Stewart, 86 Ind. 377.

97. See the statutes of the different states, and cases cited *infra,* this note.

In Alabama the record must show that the road described in the order of the court was viewed and marked out by the jury "to the greatest advantage to the public, and with as little prejudice to individuals as possible, and without partiality or favor;" and where the order of the court directs the jury "to view and mark out the best route for the said road," and they report that, "being duly sworn before acting," they "performed the duty assigned them in the order to the best of their ability, without partiality or favor," this is not a sufficient compliance with the

character, as whether it is a town or private way, or whether it is necessary for public or private purposes.[98]

(4) Report as to Damages and Cost of Road. It is commonly required that the report shall contain a finding as to the damages which would result to property owners from the establishment of the proposed road; [99] and it is sometimes neces-

statute Keenan *v.* Dallas County Com'rs, Ct., 26 Ala. 568.

In Kentucky the report of road viewers must state the public and private conveniences to result from the proposed road (Winston *v.* Waggoner, 5 J. J. Marsh. 41; Fletcher *v.* Fugate, 3 J. J. Marsh. 631; Abney *v.* Barnett, 1 Bibb 557), and state them specifically (Wood *v.* Campbell, 14 B. Mon. 422; Peck *v.* Whitney, 6 B. Mon. 117; Foreman *v.* Allen, 2 Bibb 581).

In Maine, where the charter of a bridge company (Priv. Laws (1879), c. 128, § 6) provided that no way should at any time thereafter be located leading from said bridge to a certain place, which shall be for the necessary convenience of said company, unless the entire cost thereof be defrayed by said company, it was not sufficient that the committee adjudged the way to be a common convenience and necessity, but they must also adjudge, after due notice to the bridge company, whether the way would be a necessary convenience to the company. Shattuck's Appeal, 73 Me. 318. But under Acts (1832), c. 42, requiring county commissioners in proceedings for the laying out of the road to adjudge the road to be of "common convenience and necessity," it is sufficient if they find it of "convenience and necessity," omitting the word "common" (Cushing *v.* Gay, 23 Me. 9); and under St. (1821) c. 118, the evidence that a road laid out by the selectmen of a town is for the benefit of the town, or of some one or more individuals in it, is the approval and allowance of it by the town at a legal meeting or of the county commissioners on appeal, and the selectmen therefore need not state that fact in their report (*In re* Limerick, 18 Me. 183).

In New Jersey, in laying out a road, the requirements of the statute that the surveyors shall so lay it "as may appear to them to be most for the public and private convenience," and "in such a manner as to do the least injury to private property," are matters of substance, and the return of the surveyors must show a compliance with them. State *v.* Lippincott, 25 N. J. L. 434.

In Oregon the viewers, in proceedings under Laws (1903), p. 269 (Road Laws 1903), § 20, to locate a public road from petitioner's residence to another public road, being required by law to locate the road "so as to do the least damage," where this fact appears from their report, it is not necessary that the report show that the road located by them is on the most accessible or desirable route. Kemp *v.* Polk County, 46 Oreg. 546, 81 Pac. 240.

In Vermont, under Acts (1882), No. 14, providing that commissioners appointed to lay out a highway may make their decision to lay out the road conditional upon payment by petitioners, especially to be benefited, of such sums as they may think proper toward the expense of laying out and building the road, a report showing an unconditional decision by the commissioners that the convenience of individuals and the public good required the road to be laid out, is not affected by the fact that the decision as to convenience and necessity is made conditional upon the payment of part of the expenses by one who was benefited, but who did not sign the petition, although he agreed to make the payments, as it is immaterial at whose expense it was built. Hancock *v.* Worcester, 62 Vt. 106, 18 Atl. 1041. And a report of commissioners laying out a highway in such manner as to protect a railroad will not be set aside if it imposes no additional burden upon defendant town, the error being only formal. Orcutt *v.* Bartland, 52 Vt. 612.

98. Christ Church *v.* Woodward, 26 Me. 172 (holding that the return of the selectmen of the laying out of a way must state whether it is a town or private way, as in the one case the damage is to be paid by the individuals benefited and in the other by the town); *In re* Herrick Tp., etc., Road, 16 Pa. Super. Ct. 579 (holding that the viewers' report should state whether the road is necessary for public or private purposes).

However, a report of viewers that they have laid out a road for public use is a sufficient compliance with the order to state whether it is deemed necessary for a public or private road. *In re* Norriton Tp., etc., Road, 4 Pa. St. 337. So it is a sufficient adjudication that the road is a public one if the viewers say they lay out the road for public use. *In re* App's Tavern Road, 17 Serg. & R. (Pa.) 388. And it is not a sufficient exception to the report of a jury of review in the case of a street that it does not state whether the street be necessary for a public or a private road, where the report adopts and confirms the record of the first jury, in which the street is laid out as a public one. Greenleaf Ct. Case, 4 Whart. (Pa.) 514. Under Pa. Act, June 13, 1836, § 3, requiring the viewers of a road to state in their report whether the road is necessary for a public or private road, the report by viewers that they had laid out and "do return for public use the following road" was sufficient, as showing that it was necessary for a public road. *In re* West Hempfield Tp. Road, 4 Lanc. Bar (Pa.) 7.

99. *Indiana.*— Peed *v.* Brenneman, 72 Ind. 288.

Massachusetts.— Com. *v.* Coombs, 2 Mass. 489.

New Hampshire.— *In re* Patten, 16 N. H. 277.

New Jersey.—In laying out a highway over land of any one not an applicant therefor, the

sary that the report should show a refusal of owners to grant a right of way over their property or to release damages.[1] In some states the report of the super-

surveyors must certify in their return as to the damages sustained by such owner. Kearsley *v.* Gibbs, 44 N. J. L. 169; Washington *v.* Fisher, 43 N. J. L. 377; State *v.* Runyon, 24 N. J. L. 256; State *v.* Garretson, 23 N. J. L. 388; State *v.* Cooper, 23 N. J. L. 381. So holding unless the surveyors were misled by false statements of such owner himself. State *v.* Bennett, 25 N. J. L. 329. So holding, although the surveyors were ignorant of the law. State *v.* Everitt, 23 N. J. L. 378.

Pennsylvania.— *In re* New Washington Road, 23 Pa. St. 485; *In re* Palmer Tp. Road, 11 Wkly. Notes Cas. 429, holding that the report of viewers must either assess damages to the owners and occupants of land taken, or return a release of damages. And see *In re* Kingston Tp. Road, 8 Kulp 489, holding that where road viewers lay a road through land of an owner whose name does not appear on the draft, to whom no damages are awarded, and from whom no release is reported, on the reasonably prompt application of such owner, and proof that he had no actual notice of the proceedings, confirmation of the report will be stricken off.

See 25 Cent. Dig. tit. "Highways," § 112.

Contra.— Detroit *v.* Somerset County, 52 Me. 210, holding that proceedings of county commissioners, in laying out a highway, will not be quashed because no damages are awarded to the owners of the land taken, as it is to be presumed that they decided that no damages were sustained.

Hearing.—A recital in a report that the commissioners, after due notice to all parties in interest, heard all the testimony offered as to damages, and thereon assessed such damages, sufficiently shows that the commissioners heard complaints as required by Mo. Rev. St. § 7799. Spurgeon *v.* Bartlett, 56 Mo. App. 349.

Amount awarded, and particular assessment to each owner.—A report of reviewers finding that damages will be suffered by a certain person but which omits to find the amount of such damages is defective. *In re* Kingston Tp. Road, 5 Kulp (Pa.) 43. The return of the surveyors should specify the names of all whose lands are taken, and the amount assessed to each. An assessment to "A, B, and others" is bad. Mt. Olive Tp. *v.* Hunt, 51 N. J. L. 274, 17 Atl. 291; State *v.* Oliver, 24 N. J. L. 129. And see *In re* Greenwood Tp. Road, 23 Pa. Co. Ct. 85.

Award of lump sum.— Under Cal. Pol. Code, § 2686, providing that the report of the viewers to the supervisors shall contain "the estimate of the damage to the owner," it was held that as the report was not binding on the owner as to damages, it was sufficient to report a lump sum as the proper amount to be paid. Monterey County *v.* Cushing, 83 Cal. 507, 23 Pac. 700.

Land damaged.—Although the report of the board awarding damages on laying out a highway should specify all the land which the supervisors consider damaged, it is not necessary to specify all adjacent land which they consider as not being damaged, or with regard to which the benefits may equal the damages. Olson *v.* Curran, 137 Wis. 380, 119 N. W. 101.

How, when, and by whom payable.—An unauthorized direction how, when, or by whom the damages should be paid held to be surplusage and not necessarily fatal to the report see *In re* O'Hara Tp. Road, 87 Pa. St. 356. Under the Pennsylvania act of Feb. 24, 1845, regulating the laying out of roads in certain counties, and requiring the court to examine the amount of damages assessed by the viewers, the viewers should recommend in their report how the damages should be paid, in order that the responsible parties may have notice, and the question be raised, and the court have the findings of the viewers as a basis of action. *In re* Covington Road, Wilcox (Pa.) 121.

Proportion payable by different townships, etc.—Where a road is laid out in two or more townships, the surveyors must certify the proportion of assessment to be paid by the several townships in which the road is laid out. State *v.* Cannon, 33 N. J. L. 218; State *v.* Garretson, 23 N. J. L. 388. So where a road is laid out partly in a township and partly in a borough, the viewers must make a separate assessment of the damages sustained by the respective owners, showing the amounts to be paid to each by the borough, if any, and the amounts to be paid to each by the township. *In re* Greenwood Tp. Road, 23 Pa. Co. Ct. 85. But where the return directs the different amounts awarded for damages to the landowners to be paid by the respective townships through which the road runs, it need not state the aggregate sum to be paid by each township. Oxford Tp. *v.* Brands, 45 N. J. L. 332.

Description of owners entitled to damages see *infra*, II, C, 5, g, (v),(j), (7).

Right to damages and proceedings to assess same see *infra*, V, J.

1. See the statutes of the different states and cases cited *infra*, this note.

In Missouri, Rev. St. § 6937, recites: "The commissioner shall take the relinquishment of the right of way of all persons who may give such, and make report thereon. The commissioner shall also state, in his report, the names of all persons who have relinquished . . . or failed to relinquish the right of way, giving the names of both and the reasons therefor." It was held that this contemplates a conference between the landowners and the commissioner, which must affirmatively appear on the face of the proceedings before the county court can take jurisdiction to appoint jurors to assess damages. Chicago, etc., R. Co. *v.* Young, 96 Mo. 39, 8 S. W. 776. The report must affirmatively show the refusal of non-consenting owners to relinquish the right of way through their lands, and a recital that they failed to make the relinquishment will not suffice. Jones *v.* Zink,

visors or commissioners must, under ordinary circumstances at least, contain an estimate of the cost of the proposed road.[2]

(5) Description of Road. The report must contain a definite and certain description of the road to be laid out.[3] But all that is necessary is that the road

65 Mo. App. 409. However, a report that plaintiff had refused to give the right of way, and that he demanded one hundred dollars therefor, was sufficient, the commissioner not being authorized to agree with plaintiff on a price for the right of way. Lingo *v.* Burford, 112 Mo. 149, 20 S. W. 459.

In Pennsylvania, however, it is not necessary that the report of the viewers should state that they have endeavored to obtain the release, as it will be presumed that they did so. *In re* South Abington Tp. Road, 109 Pa. St. 118; *In re* McConnell's Mill Road, 32 Pa. St. 285; *In re* Cornplanter Tp. Road, 26 Pa. Super. Ct. 20; *In re* Clinton Tp. Road, 3 Pa. Co. Ct. 170. *Contra, In re* Warrington Tp. Road, 8 Del. Co. 79; *In re* Pen Argyl Road, 2 Lehigh Val. L. Rep. 370; *In re* Lower Chanceford Tp. Road, 8 York Leg. Rec. 165; *In re* Lower Chanceford Tp. Road, 8 York Leg. Rec. 8. In any event, where a report of viewers stated that, "failing to procure releases of damages from the persons through whose land the road passes," the viewers made the following assessments, the report sufficiently showed that an effort was made to procure releases. *In re* North Hopewell Tp. Road, 5 Del. Co. 85. And where viewers report that no damages will be sustained by the proposed road, it cannot be objected to their report that they failed to obtain releases of claims for damages. *In re* Hazle Tp. Road, 6 Kulp 463. But the use of the words, "no damages claimed," by viewers in their report, is not consistent with the claim that they endeavored to procure releases from landowners. *In re* Allegheny Tp. Road, 19 Pa. Co. Ct. 30.

2. Tehama County *v.* Bryan, 68 Cal. 57, 8 Pac. 673 (holding, however, that to give the supervisors jurisdiction to proceed further in the opening of the road, it is sufficient if the viewers' report gives the probable cost of the construction, and the several items of expense, such as grading, bridges, etc., need not be reported separately); Seafield *v.* Bohne, 169 Mo. 537, 69 S. W. 1051 (holding, however, under a statute which requires the road commissioners to estimate the cost of bridges, culverts, and grading, and make a survey and plat of the proposed road, and return it to the court, that where the commissioners gave no estimate of the cost of the grading and culverts, but it was stated that the cost would be paid by petitioners, the failure to give the cost of the grading and culverts did not invalidate the proceedings).

3. *Arkansas.*— Beck *v.* Biggers, 66 Ark. 292, 50 S. W. 514.

Kentucky.— Phillips *v.* Tucker, 3 Metc. 69 (holding that viewers of a road must describe by metes and bounds the route laid out by them; they must fix exactly by some visible object the beginning and the termination thereof; and it will not be a satisfactory fixing of the beginning to trace back to it by the description from the end); Wood *v.* Campbell, 14 B. Mon. 422.

New Jersey.— State *v.* Hulick, 37 N. J. L. 70 (holding that where the return and map of a road do not give the length of the line through the land of the several owners, and the map does not show the division fences and lines where the road crosses them, the return is illegal); State *v.* Woodruff, 36 N. J. L. 204; Griscom *v.* Gilmore, 16 N. J. L. 105 (holding that the return should set out the road in its whole length with such precision that the landholders, and he or they who may have to open or use it, may have no difficulty in ascertaining where they have a right to travel, or where they would be trespassing; also that a return stating the beginning or ending point of the road to be at or near a certain place is too vague); State *v.* Green, 15 N. J. L. 88; State *v.* Clark, 1 N. J. L. 261.

Pennsylvania.—*In re* O'Hara Tp. Road, 152 Pa. St. 319, 25 Atl. 602; *In re* Bean's Road, 35 Pa. St. 280; *In re* Yardley Borough, 22 Pa. Co. Ct. 179 (holding that the report of viewers and the draft accompanying it should specify the quantity of land taken, the length and width, the courses and distances, etc., so clearly that the record thereof will define the lines of the street, the grade thereof, and the boundaries of the properties thereon); *In re* Union Tp. Road, 17 Pa. Co. Ct. 39; *In re* Cheltenham Tp. Road, 3 Montg. Co. Rep. 37; *In re* Abington Tp. Road, 2 Montg. Co. Rep. 92; *In re* Windsor Tp. Road, 10 York Leg. Rec. 185; *In re* Lehman Tp. Road, 1 Am. L. J. 321 (holding that proceedings in a road case will be set aside where the termini are shown by neither the report nor the draft).

Canada.— Boyington *v.* Holmes, 5 N. Brunsw. 74.

See 25 Cent. Dig. tit. "Highways," § 113.

Description of land taken.—The land taken for the road must likewise be described. Rose *v.* Garrett, 91 Mo. 65, 3 S. W. 828; *In re* Franklin Tp. Road, 4 Pa. Dist. 417.

Width of road.— Under some statutes the report must state the width of the road. Hayes *v.* Shackford, 3 N. H. 10; Matter of Feeney, 20 Misc. (N. Y.) 272, 45 N. Y. Suppl. 830; *In re* Franklin Tp. Road, 4 Pa. Dist. 417; Boyington *v.* Holmes, 5 N. Brunsw. 74. And see Clarke *v.* South Kingstown, 18 R. I. 283, 27 Atl. 336. Under other statutes the rule is otherwise. Sisson *v.* Carithers, 35 Ind. App. 161, 72 N. E. 267, 73 N. E. 924; Tench *v.* Abshire, 90 Va. 768, 19 S. E. 779. And see *In re* Aston Tp. Road, 4 Yeates (Pa.) 372, holding that the breadth of a proposed road returned by the viewers is mere surplusage. However this may be, a report of

be so described that it can be located with reasonable certainty.[4] Where objectors in highway opening proceedings claimed that the description in the viewers' report was written after the report had been filed, and without the viewers' knowledge, and that the report was insufficient for want of a description, the burden was on the objectors to prove such fact in the commissioners' court.[5]

(6) RETURN OF MAP OR PLAT AND PETITION. It is frequently required that the report shall be accompanied by a map or plat of the proposed road;[6] and

commissioners showing the center of the highway, but failing to set out its width, is sufficiently definite as to the width, under Wis. Rev. St. § 1264, which provides that all highways shall be not less than four rods wide. State *v.* Hogue, 71 Wis. 384, 36 N. W. 860.

Grade of road.— In Virginia the grade of the road need not be stated in the report of the viewers. Tench *v.* Abshire, 90 Va. 768, 19 S. E. 779. And in Pennsylvania, where the statute does not require that the report of viewers of a road should state the elevation, in the absence of any contrary showing in the record it will be presumed that, wherever practicable, the road was laid out at a proper grade. *In re* Drumore Road, 3 Lanc. L. Rev. (Pa.) 222. But under the Pennsylvania act of March 2, 1854, providing that no road shall be laid thereunder unless it can be graded at an elevation of not more than five degrees from the plane of the horizon, or be easily reduced to that elevation, it was error to confirm a report of viewers where it did not appear in the report or draft, or any part of the record, that the road could be graded as required. *In re* Cussewago Tp. Road, 3 Brewst. (Pa.) 190. And see *In re* Yardley Borough, 22 Pa. Co. Ct. 179.

Whole report to be considered.— In laying out a proposed road, an uncertainty in one part of the commissioners' report is not fatal, if from the whole may be gathered a description leaving no difficulty in locating the road. Todemier *v.* Aspinwall, 43 Ill. 401. So where the return of the surveyors commenced with a recital, it was held that for the purpose of designating the general locality of the road, the recital might be considered as part of the return, especially where the return contained words of reference to the description in the recital. State *v.* Cake, 24 N. J. L. 516.

Petition or order and report to be considered together.—Where, in the establishment of a highway, the locality is named in the petition and order, failure of the viewers to name it in their report is not a fatal defect. *In re* Hilltown, etc., Road, 2 Del. Co. (Pa.) 480.

Map or plat and report to be considered together.— That the width of a proposed highway is not indicated in the report of the council committee is immaterial, where the width is shown in a plat accompanying the report. Clarke *v.* South Kingstown, 18 R. I. 283, 27 Atl. 336. But where the courses and distances of the return of the surveyors lay a public road through dwelling-houses, the proceeding is fatally defective, although the map of the surveyors shows the road to be to one side of the dwellings. Mowbray *v.* Allen, 58 N. J. L. 315, 33 Atl. 199.

Variance between courses and distances and monuments.—Where the return of the road states that stone monuments have been set up and marked at the angles of the road, and also gives the courses and distances, which disagree with the monuments, the courses and distances may be corrected by the monuments named in the return. Woodman *v.* Somerset County, 25 Me. 300.

Variance between report and petition: As to length see *infra*, II, C, 5, h, (II). As to location see *infra*, II, C, 5, h, (I), (C), (1). As to width see *infra*, II, C, 5, h, (III), (A).

4. *Connecticut.*—Windsor *v.* Field, 1 Conn. 279.

Indiana.— Lake Erie, etc., R. Co. *v.* Shelley, 163 Ind. 36, 71 N. E. 151; Brown *v.* Stewart, 86 Ind. 377; Mossman *v.* Forrest, 27 Ind. 233; Merom Gravel Co. *v.* Pearson, 33 Ind. App. 174, 69 N. E. 694, 71 N. E. 54.

Kentucky.— Rochester *v.* Sledge, 82 Ky. 344, 6 Ky. L. Rep. 235; Vogle *v.* Bridges, 22 S. W. 82, 15 Ky. L. Rep. 6.

Massachusetts.— Dartmouth *v.* Bristol County, 153 Mass. 12, 26 N. E. 425; Carr *v.* Berkley, 145 Mass. 539, 14 N. E. 746.

New Jersey.— State *v.* Cake, 24 N. J. L. 516 (holding that it is not necessary to be shown, either in the return or map, at what point the road crosses a township line); State *v.* Emmons, 24 N. J. L. 45; State *v.* Hopping, 18 N. J. L. 423; State *v.* Schanck, 9 N. J. L. 107.

New York.— *In re* Redmond, 105 N. Y. Suppl. 936.

Pennsylvania.— *In re* Moyamensing Road, 4 Serg. & R. 106 (holding that proceedings for the establishment of a highway are not vitiated by the report of commissioners designating such highway as a street); *Re* Verona Borough Road, 9 Pa. Cas. 114, 12 Atl. 456; *In re* Cornplanter Tp. Road, 26 Pa. Super. Ct. 20; *In re* Herrick Tp., etc., Road, 16 Pa. Super. Ct. 579; *In re* East Earl Road, 10 Lanc. L. Rev. 340. And see *In re* Stowe Tp. Road, 20 Pa. Super. Ct. 404.

See 25 Cent. Dig. tit. "Highways," § 113.

5. Merom Gravel Co. *v.* Pearson, 33 Ind. App. 174, 69 N. E. 694, 71 N. E. 54.

6. Prescott *v.* Beyer, 34 Minn. 493, 26 N. W. 732; Rutherford's Road Case, 10 Serg. & R. (Pa.) 120; *In re* Warrior Run Road, 3 Binn. (Pa.) 3; *In re* Herrick Tp., etc., Road, 16 Pa. Super. Ct. 579.

However, the neglect of the commissioners to return a plan of the way laid out is not material if they have returned a sufficient description. Howland *v.* Penobscot County, 49 Me. 143; Lisbon *v.* Merrill, 12 Me. 210,

in at least one jurisdiction the petition for the road is required to be returned by the selectmen.[7]

(7) Report as to Owners and Improvements. The names of the owners of the lands over which the proposed road runs,[8] and a description of the improvements over which it passes,[9] are sometimes required to be contained in the report or map or plat.

Who may make, sign, and annex map.— Where surveyors, having viewed and laid out a road, caused it to be surveyed by a practical surveyor, and marked the proper distances, and signed the return, containing a full description of the road as laid out, and annexed such map to the return, the mechanical operation of drafting the map was in no sense a judicial act, and therefore it was not necessary that they should either make it or sign it. State *v.* English, 22 N. J. L. 291. So the viewers, or any person by them authorized, may attach the plan of the road. *In re* New Hanover Tp. Road, 18 Pa. St. 220.

Time of making and annexing map.— In New Jersey the map which is required by the road act to be annexed to the return of the surveyors of the highways laying out a road may, by their direction, be both made and annexed by the practical surveyors after they have signed their return and separated. State *v.* English, 22 N. J. L. 713. So in Pennsylvania the plan may be attached after viewers have signed their report and separated. *In re* New Hanover Tp. Road, 18 Pa. St. 220.

Reference to plat in report.—Although the plat is not referred to or identified by the report of the commissioners, yet, if it is referred to by the court in the adjudication confirming the road, it is sufficient. State *v.* Prine, 25 Iowa 231.

Form and sufficiency of map or plat.—A return of a road will not be set aside for the reason that one course of it is, by accident, not delineated on the map, if it is given in the written report, and can be supplied therefrom. State *v.* Miller, 23 N. J. L. 383. Under a statute requiring surveyors of highways to make a map or draft of the road, with the courses and distances, and reference to the most remarkable places and improvements through which it may pass, a return and map were not insufficient because they did not show the township and county lines which the road crossed. *In re* Middlesex County, etc., Public Road, 4 N. J. L. 290. If the draft of the road shows that it passes through the lot of an individual, it need not state the precise distance it passes through it. *In re* App's Tavern Road, 17 Serg. & R. (Pa.) 388. That a draft does not show on its face the name of the public road at the end of which the proposed road begins is not fatal to a viewer's report. Matter of Ross Tp. Public Road, 5 Pa. Super. Ct. 85. However, the report must be set aside where the accompanying draft does not state the courses and distances. *In re* Race St., 8 Pa. Co. Ct. 95. And the draft submitted by the viewers should define the location of the termini so that they correspond with those set forth in the proceedings. *In re* Middletown Tp. Road, 3 Del. Co. (Pa.) 208. Sufficiency as to names of landowners and improvements on land see *infra*, II, C, 5, g, (v), (j), (7).

7. Kidder *v.* Jennison, 21 Vt. 108, holding, however, that the omission of the selectmen to return to the town clerk's office the petition in pursuance of which they have laid a highway will not avoid their act in laying the highway.

8. Morris *v.* Salle, 19 S. W. 527, 14 Ky. L. Rep. 117; Com. *v.* Great Barrington, 6 Mass. 492; Com. *v.* Coombs, 2 Mass. 489 (both holding that the return of a committee appointed to locate a highway must contain the names of persons over whose land the way passes, if such names are known to the committee, or, if they are unknown, a certification of that fact); Mt. Olive Tp. *v.* Hunt, 51 N. J. L. 274, 17 Atl. 291; State *v.* Oliver, 24 N. J. L. 129; *In re* Kingston Tp. Road, 8 Kulp (Pa.) 489. See, however, Talliferro *v.* Roach, 12 S. W. 1039, 11 Ky. L. Rep. 665 (holding that where the report of road viewers gives the names of all the owners of the land over which the proposed road runs, the fact that the name of a tenant under the control of an owner, or cropping on shares, does not appear, will not vitiate the proceeding); Detroit *v.* Somerset County, 52 Me. 210 (holding that proceedings of county commissioners in laying out a highway will not be quashed because no damages are awarded to the owners of the land taken, and the latter are not named, as it is to be presumed that they decided that no damages were sustained); Merrill *v.* Berkshire, 11 Pick. (Mass.) 269 (holding that the verdict of a jury appointed for the laying out of a highway need not name the owners of the land over which the way is established, for they have no authority to lay out the way over the land of any other persons except the petitioners for the jury); Stokes *v.* Parker, 53 N. J. L. 183, 20 Atl. 1074 (holding that the fact that the return of the surveyors described certain persons to whom awards of damages were made as residents of one town, when in fact they lived elsewhere, did not invalidate the proceedings of the surveyors).

9. State *v.* Hopping, 18 N. J. L. 423 (holding that "improvements" means inclosures as distinguished from wastes and commons); *In re* O'Hara Tp. Road, 152 Pa. St. 319, 25 Atl. 602; *In* re Road, 13 Serg. & R. (Pa.) 445; *In re* Herrick Tp., etc., Road, 16 Pa. Super. Ct. 579; *In re* Upper Darby Tp. Road, 15 Pa. Super. Ct. 652, 8 Del. Co. 154 (holding that a draft containing only the words "Improved Land" written across each of the subdivisions of the land

(K) *Return of Report and Proceedings Thereon* — (1) TIME FOR FILING REPORT — (a) IN GENERAL. The statutes generally provide when the report of proceedings is to be made and filed,[10] it often being required by the statutes that county commissioners shall make a return or report to the term of court held next after their appointment or next after their proceedings are had and finished;[11] and if it is not so returned the proceedings are irregular and the report may be set aside,[12] and the parties have a right to consider the application as

through which the road runs is not a sufficient compliance with the Pennsylvania act of June 13, 1836, requiring the improvements to be briefly noted); *In re* Middletown Tp. Road, 3 Del. Co. (Pa.) 208; *In re* Kidder Tp. Road, 1 Kulp (Pa.) 10; *In re* Lower Chanceford Tp. Road, 8 York Leg. Rec. (Pa.) 165; *In re* Lower Chanceford Tp. Road, 8 York Leg. Rec. (Pa.) 8.

However, a barn or dwelling-house is not such an improvement as is required, by the Road Act to be laid down in the map annexed to the return of surveyors. State *v.* Smith, 21 N. J. L. 91. Nor are boundary lines improvements. *In re* Leet Tp. Road, 159 Pa. St. 72, 28 Atl. 238. While a report of road viewers should set forth the improvements on the lands over which the road passes, the report will not be set aside for non-compliance with this rule, where the draft shows the residences of at least two of the adjoiners of the proposed road plainly set out, which would indicate that the land was improved, and no proof is produced of the existence of any other improvement. *In re* Mt. Joy Tp. Road, 25 Pa. Co. Ct. 111, 18 Lanc. L. Rep. 175. It is not necessary that the noting of improvements should appear on the draft returned by the viewers with their report. It is sufficient if there be a reference to the improvements either in the draft or the report. *In re* East Earl Road, 10 Lanc. L. Rev. (Pa.) 340. The provisions of the statute making it the duty of a road commissioner, when directed to view the route of a proposed highway, to report specially whether any yard, garden, orchard, or any part thereof will be taken if the road is established are directory only. Jeter *v.* Board, 27 Gratt. (Va.) 910.

10. See the statutes of the several states. And see cases cited *infra*, this note *et seq.*

Statutes merely directory.— Cal. Act, March 31, 1866, which provides that the "viewers therein appointed shall 'survey, locate, and establish' the road between the points specified in the Act, and report their proceedings," etc., "on or before the first Monday in March, one thousand eight hundred and sixty-six," is, as regards the provision respecting the time when the viewers were to report their proceedings, merely directory, inasmuch as such construction is necessary to make it harmonize with the purpose of the act and make its operation possible. People *v.* Lake County, 33 Cal. 487.

11. *Maine.*— Parsonsfield *v.* Lord, 23 Me. 511; Cushing *v.* Gay, 23 Me. 9.

Massachusetts.— Com. *v.* Great Barrington, 6 Mass. 492; Durell *v.* Merrill, 1 Mass. 411.

Missouri.— Rose *v.* Garrett, 91 Mo. 65, 3 S. W. 828.

New Jersey.— *In re* Highway, 3 N. J. L. 881; *In re* Highway, 3 N. J. L. 666.

Pennsylvania.— *In re* Boyer's Road, 37 Pa. St. 257; *In re* Sewickley Tp. Road, 26 Pa. Super. Ct. 572 (holding that the act of June 13, 1836 (Pamphl. Laws 551), section 3, directing that road viewers shall report at the next term after their appointment, is mandatory, and if they fail to do so all their subsequent proceedings are void); *In re* Bern Tp. Road, 3 Pa. Dist. 8 (holding that the commissioners cannot agree on their report on the return-day of an order requiring them to report at the next term, but their final conclusion must be arrived at before the next term begins).

See 25 Cent. Dig. tit. "Highways," § 118.

The words "regular session" are equivalent to "term of record," and a report fixed at the next "term of record" is regular under a statute by which the court of county commissioners is required to file its report of the location of a way at its next "regular session" after the hearing. Harpswell *v.* Cumberland County, 78 Me. 100, 2 Atl. 880. But the report must be made to, and recorded at, a term of their court held next after such proceedings shall have been had and finished, and not at an adjournment of a term commencing previously. Parsonsfield *v.* Lord, 23 Me. 511.

Day of session returnable.— In Maine the report may be returned at any day of the session. Chapman *v.* York County, 79 Me. 267, 9 Atl. 728. Otherwise in Missouri, where the statute specifically provides that the return must be on or before the first day of the term. Rose *v.* Garrett, 91 Mo. 65, 3 S. W. 828. In Pennsylvania the filing of a report by viewers after the first day of the term to which the order is returnable is sufficient (*In re* Whitemarsh Tp. Road, 2 Montg. Co. Rep. (Pa.) 39), where a rule of court provides that viewers shall make their report on or before the third day of the next sessions (*In re* Lampeter Tp. Road, 35 Pa. Super. Ct. 379).

A report by viewers submitted at an adjourned session of the term at which they were to report is too late. *In re* Broad St., 31 Leg. Int. (Pa.) 316.

12. Rose *v.* Garrett, 91 Mo. 65, 3 S. W. 828; *In re* Sewickley Tp. Road, 26 Pa. Super. Ct. 572; *In re* Upper Mahanoy Tp. Road, 2 Pa. Dist. 467, 12 Pa. Co. Ct. 618 (holding that a report of reviewers, presented to court on September 2, when the time for holding of court at the term to which it was returnable expired on August 27, is too late);

abandoned;[13] and it is error in the court to award a view returnable to any but the next term, or to confirm a report made in pursuance of an order not followed up as the statute prescribes.[14] Furthermore under such a statute viewers cannot report during the term at which they were appointed.[15] Viewers may file an amended report at any time before final action.[16]

(b) EXTENSION. If a view cannot be had in time to report at the next term after the order issued as required by statute,[17] a continuance of the order from time to time may be obtained,[18] unless the original order is *functus officio*.[19] Where the court ordered a continuance for a report of viewers of a highway, a report cannot be filed at the same term at which the continuance was granted.[20]

(2) EXCEPTIONS AND OBJECTIONS — (a) IN GENERAL. Defects or irregularities in proceedings of commissioners, viewers, or jurors may be taken advantage of by remonstrance,[21] exception,[22] suggestion,[23] objection,[24] request for recommitment,[25] application for a review,[26] or by a second petition,[27] according to the practice

In re Nanticoke Borough, 4 Kulp (Pa.) 513 (holding that the failure of reviewers to report at the next term of court without a continuance of the order is fatal); *In re* Mahanoy Road, 2 Leg. Rec. (Pa.) 390; *In re* Byberry New Road, 6 Phila. (Pa.) 384; Stauffer's Appeal, 1 Am. L. Reg. (Pa.) 441.

Approval nunc pro tunc at a subsequent term will not remedy the irregularity. *In re* Gibson, etc., Mill Road, 37 Pa. St. 255. Similarly where the report was filed during the term in which the order was granted, the approval of the court at the third term thereafter, and its subsequent confirmation, were held irregular and void. *In re* Chartiers Tp. Road, 48 Pa. St. 314.

13. *In re* Baldwin, etc., Road, 3 Grant (Pa.) 62.

14. *In re* Frankstown Tp. Road, 26 Pa. St. 472.

15. *In re* Chartiers Tp. Road, 48 Pa. St 314; *In re* Baldwin Tp., etc., Road, 36 Pa. St. 9. But see *In re* Franconia Tp. Road, 4 Leg. Op. (Pa.) 587, where the report of viewers of a highway filed before the term at which it was returnable was held properly so filed, no action being taken thereon by the court until the proper return.

16. Vogle *v.* Bridges, 22 S. W. 82, 15 Ky. L. Rep. 6.

17. See *supra*, II, C, 5, g, (v), (K), (1), (a).

18. *In re* Baldwin, etc., Road, 3 Grant (Pa.) 62; *In re* Reserve Tp. Road, 2 Grant (Pa.) 204; *In re* Sewickley Tp. Road, 26 Pa. Super. Ct. 572.

Time for application for continuance by juror appointed by court of quarter sessions of Philadelphia see *In re* Magnolia Ave., etc., 10 Pa. Co. Ct. 159.

The continuance should be obtained in open court and docketed, so that the record may be notice that the order is still pending. *In re* Baldwin, etc., Road, 3 Grant (Pa.) 62. See, however, *In re* Jones, 6 Pennew. (Del.) 463, 70 Atl. 15.

19. *In re* Baldwin, etc., Road, 3 Grant (Pa.) 62, holding that an order of Sept. 30, 1854, extending the time for making a report on an order to view a road, made Dec. 10, 1853, but which had not been acted upon, is null, the original order being *functus officio*.

20. *In re* Mahanoy Road, 2 Leg. Rec. (Pa.) 390.

21. Beardsley *v.* Washington, 39 Conn. 265; Shelton *v.* Derby, 27 Conn. 414; Lockwood *v.* Gregory, 4 Day (Conn.) 407; Brown *v.* Stewart, 86 Ind. 377.

Remonstrance generally see *supra*, II, C, 5, f.

22. *In re* Long Point Road, 5 Harr. (Del.) 152; Hamblin *v.* Barnstable County, 16 Gray (Mass.) 256; *In re* Beigh's Road, 23 Pa. St. 302; *In re* Hilltown Road, 2 Walk. (Pa.) 78.

When exceptions lie.— If the owner of land refuses to release, the viewers cannot refuse to hear his proofs, and consider his claim for damages, if he makes any; but if his claim is decided adversely his remedy is not by exception to the report, but by application for a review. *In re* Upper Mt. Bethel Road, 7 North. Co. Rep. (Pa.) 29; *In re* Plum Tp. Road, 2 Pittsb. (Pa.) 184. So on exceptions to the report of viewers, the court will not consider whether the road is unnecessary or improperly located, as the exceptant has his application for a review, and should pursue that remedy. *In re* Moreland Tp. Road, 13 Montg. Co. Rep. (Pa.) 71.

Signature of exceptions.—Where exceptions to the return of the commissioners appointed to lay out a public road are based wholly or in part upon facts supported by affidavit of exceptions, it is sufficient if the exceptions are signed by their counsel. *In re* Jones, 6 Pennew. (Del.) 463, 70 Atl. 15.

23. Hubbard *v.* Wickliffe, 2 A. K. Marsh. (Ky.) 502; Bennett *v.* Greenup County, 17 S. W. 167, 13 Ky. L. Rep. 349, holding that after the report of viewers is filed, any one interested should be permitted to make suggestions why it ought not to be adopted, without filing written exceptions thereto.

24. Sullivan *v.* Lafayette County, 58 Miss. 790; Bernard *v.* Callaway County Ct., 28 Mo. 37; State *v.* Emmons, 24 N. J. L. 45.

25. *In re* Beigh Road, 23 Pa. St. 302.

26. *In re* North Hopewell Tp. Road, 5 Del. Co. (Pa.) 85; *In re* Drumore Road, 5 Lanc. L. Rev. (Pa.) 265; *In re* Upper Mt. Bethel Road, 7 North. Co. Rep. (Pa.) 29; *In re* Plum Tp. Road, 2 Pittsb. (Pa.) 184.

27. Schepman *v.* Buhner, 32 Ind. App. 562, 70 N. E. 390, holding that the remedy of any

and procedure in particular courts or under particular statutes. An objector must have a direct interest in the land affected,[28] and must base his objections upon sufficient grounds sustained by proof.[29]

(b) Time of Filing.[30] Exceptions to be available must be taken in good season;[31] and it is held that the court is without power, after the time for filing exceptions has passed, to permit the filing of another exception raising the point desired, or an amendment of a former exception.[32] But the court will permit an amendment to exceptions to the report of road viewers to be filed *nunc pro tunc*, where the magnitude of the expenses to be incurred shows that action on the report should be had only upon full notice to taxpayers and all others concerned.[33] The statutes

person aggrieved by the report of viewers that the highway petitioned for was not of public utility was not by motion to set aside the report, but was under Burns Rev. St. Ind. (1901) § 6753, permitting action on a second petition on a bond for costs being filed by petitioners.

28. *In re* Long Point Road, 5 Harr. (Del.) 152 (holding that a possible diversion of travel from a tavern and wharf owned by exceptant to the commissioners' return is too remote an interest); Bernard *v.* Callaway County Ct., 28 Mo. 37 (holding that only those persons owning lands through which the route of a state road is located, and who consider themselves aggrieved, can object to the approval of the commissioners' report in the county court); State *v.* Emmons, 24 N. J. L. 45 (holding that a party whose land has not been taken cannot object to the return of the surveyors on the ground that no compensation has been awarded to his neighbor, whose land was taken); *In re* Greene Tp., etc., Road, 21 Pa. Super. Ct. 418 (holding that where viewers have reported on the necessity of a public road, and there appears to have been no abuse of their discretion, a turnpike company has no standing to oppose the road merely because the opening of the road would diminish the company's tolls).

Remonstrant held to have sufficient interest to appear and remonstrate against the acceptance of the report see Shelton *v.* Derby, 27 Conn. 414; State *v.* Stout, 33 N. J. L. 42.

29. Lockwood *v.* Gregory, 4 Day (Conn.) 407 (holding a remonstrance to the report of a viewing committee appointed on application for a highway, containing no direct denial of the facts stated in the report, or alleging matter in avoidance otherwise than by reciting a town vote, without averring the truth of the facts contained in such report, insufficient); Hayward *v.* Bath, 40 N. H. 100 (holding that charges of partiality, corruption, and improper conduct on the part of county commissioners in laying out a highway, unsustained by proof, furnish no cause for setting aside their report). See also *In re* Hilltown, etc., Road, 2 Walk. (Pa.) 78, holding that an exception to the report of viewers that it did not appear by the report that five days' notice was served, where exceptants did not claim that they were not notified, was purely technical.

The want of necessity for a proposed road is not ground for exception to the report of the viewers, that question being for the viewers exclusively. *In re* East Pennsylvania Tp. Road, 2 Pa. Co. Ct. 453; *In re* North Hopewell Tp. Road, 5 Del. Co. (Pa.) 85; *In re* Upper Leacock Road, 8 Lanc. L. Rev. (Pa.) 76, holding that exceptions denying the necessity of the road, and alleging the existence of another similar road in the vicinity, will be discharged, in the absence of evidence to sustain them or to show misconduct of the viewers, as the viewers are supposed to have duly considered these matters. See also Brown *v.* Stewart, 86 Ind. 377, holding that where remonstrants united in the same remonstrance the question of utility and damages, they cannot complain that the reviewers took action on both questions and reported the highway of public utility. But see Hubbard *v.* Wickliffe, 2 A. K. Marsh. (Ky.) 502, holding that where, upon the report of viewers relating to the establishment of a highway, a party appeared in court and suggested that it passed through his land unnecessarily, and that a better and more convenient way could be had over the land of the applicant entirely, and prayed an order of survey for the purpose of showing these facts, the court should have ordered such survey, so that it might have been produced on the final hearing.

An objector must stand upon his objections as made before the commissioners, and cannot subsequent to a hearing thereon urge objections differing from those first made. Sullivan *v.* Lafayette County, 58 Miss. 790.

Definiteness of objections.— Objections to the report of highway viewers in that it was "insufficient in law," and "not made in accordance with law," are insufficient for indefiniteness. Sisson *v.* Carithers, 35 Ind. App. 161, 72 N. E. 267, 73 N. E. 924.

30. **Waiver of objections** see *supra*, II, C, 5, g, (v), (i), (l).

31. Hamblin *v.* Barnstable County, 16 Gray (Mass.) 256 (holding that an exception to proceedings before a county commissioners' jury must be taken before the acceptance and affirmance of the verdict, in order to avail those petitioners for the highway who have entered into a recognizance to pay the costs); *In re* Beigh's Road, 23 Pa. St. 302.

32. *In re* Oxford Alley, 8 Pa. Co. Ct. 221, where an exception to the report of a jury of view alleged that the statute under which the jury was appointed and acted was unconstitutional, but by mistake named the wrong statute.

33. *In re* Cherrytree Tp. Road, 10 Pa. Co. Ct. 389.

generally provide the time within which exceptions or objections to the proceeding or report of commissioners, reviewers, etc., must be taken, and exceptions or objections not taken within such time are of no effect.[34] After a public road has been opened pursuant to order of court, it is too late to move to set aside the report of viewers for irregularities in the proceedings, in the absence of any excuse for the delay in making the motion;[35] and after the report of viewers appointed to lay out a road has been confirmed absolutely by the court, it is too late to take exceptions thereto which are purely technical.[36] An exception to the recommitment must be taken when the petition is recommitted.[37] But where it appears on the record that one of the viewers of a road, and one of the petitioners for viewers, is the same person, exceptions to the report of the viewers may be filed *nunc pro tunc* when the report is heard for final confirmation;[38] and exceptions may be taken to road viewers' reports even after final confirmation, where the exceptions are to matters apparent on the record, and fatal to the confirmation; and, if not allowed by the lower court, they may be taken in the appellate court.[39]

(3) Petition For Review. In some states provision is made by statute for a review;[40] and since the review is a matter of right, the report of a road jury cannot be confirmed pending the petition to review,[41] although there is nothing irregular in the appointment of reviewers while exceptions are pending to the report of viewers.[42] Where the statute so provides, as is sometimes the case, a petition for review must be made at or before the term of court next after that at which the viewers' report was confirmed,[43] and should be signed by the parties in

34. Brands *v.* Craig, 49 N. J. L. 185, 6 Atl. 430; State *v.* Waldron, 17 N. J. L. 368; *In re* Adelphi St., 2 Whart. (Pa.) 174. See also *In re* Branch Tp. Road, 1 Leg. Chron. (Pa.) 29, 4 Leg. Gaz. 413, holding that where the persons excepting to the report of viewers of a highway withdrew their exceptions, appellant, who had not excepted, being a stranger to the record, was not entitled, on motion, to file exceptions after the time therefor had expired.

Although the court has adjourned, exceptions filed to a road report before the expiration of the second week of the session are in time. *In re* Lower Chanceford Tp. Road, 8 York Leg. Rec. (Pa.) 165; *In re* Lower Chanceford Tp. Road, 8 York Leg. Rec. (Pa.) 8.

In Oregon, under Hill Annot. Laws, § 4065, which provides for locating and altering public roads, and directs that, after receiving the report of the viewers, the court shall "cause the same to be publicly read on two different days" before acting on the report, the right to remonstrate continues until after the report is read a second time. Vedder *v.* Marion County, 28 Oreg. 77, 36 Pac. 535, 41 Pac. 3; Latimer *v.* Tillamook County, 22 Oreg. 291, 29 Pac. 734.

35. Williams *v.* Wright, 6 Pa. Co. Ct. 497; *In re* Saucon Tp. Road, 2 Del. Co. (Pa.) 370.

36. *Re* Verona Borough Road, 9 Pa. Cas. 114, 12 Atl. 456.

37. Foss *v.* Strafford, 25 N. H. 78.

38. *In re* Delmar Tp. Road, 13 Pa. Co. Ct. 505.

39. *In re* O'Hara Tp. Road, 152 Pa. St. 319, 25 Atl. 602.

40. See the statutes of the several states, and cases cited *infra*, this note *et seq.*

Caveat as suspending proceedings.—A caveat filed against recording the return of a road suspends proceedings for the appointment of freeholders to review until the term next succeeding the filing of such caveat. State *v.* Reckless, 38 N. J. L. 393.

A petition for a third view of a road does not lose its place and become a petition for a second view because the report of the second viewers was set aside as being based on an erroneous order. *In re* Jackson Road, Wilcox (Pa.) 242.

41. *In re* Cussewago Tp. Road, 3 Brewst. (Pa.) 190.

42. *In re* Cross Keys Tavern Road, 2 Pennyp. (Pa.) 50. And see *In re* Greenwood Tp. Road, 27 Pa. Super. Ct. 549, holding that where, after the report of re-reviewers had been presented for confirmation, exceptions were filed to it, and at the same time a petition was presented for a re-review, and the court directed this petition to be filed to await the disposition of the exceptions, it was not error to confirm the report of the re-reviewers absolutely without formally disposing of the petition for a re-review.

43. *In re* Lackawanna Tp. Road, 112 Pa. St. 212, 3 Atl. 848; *In re* Indiana County Road, 51 Pa. St. 296 (holding that it is a fatal objection that the petition for review is not presented or acted upon until two years after the filing of the original report); *In re* Cheltenham Tp. Road, 8 Pa. Cas. 600, 13 Atl. 93; *In re* Palmer Tp. Road, 4 Pa. Dist. 568 (holding that a petition for review by road viewers, not presented until the second term after filing their report, comes too late, and a review founded thereon has nothing to support the reference); Matter of Seller's House Road, 2 Pearson (Pa.) 449.

An application filed at any time during the next term is in time under such a statute. *In re* Mifflin Tp. Road, 4 Pa. Dist. 238, 16 Pa. Co. Ct. 74.

interest,[44] and must show that the court has jurisdiction;[45] and petitioner should first ask the court to strike off or open the confirmation.[46] But a petition for the review of a highway on the ground that damages allowed on view were inadequate should not state the amount of damages awarded.[47]

(4) TIME OF HEARING. A hearing on the report must be had at or within the time provided by the statute or order of court,[48] which is generally a specified number of days after the presentment of the report,[49] or at the next regular term of the court.[50] It has been held, however, that a confirmation of the report may be entered at a subsequent term, where objections have delayed a final decision.[51] Notice of the hearing must be given within a specified time after the filing of the report,[52] such notice being allowed to be given by any one interested in the proceeding.[53]

(5) CONCLUSIVENESS OF REPORT. The conclusiveness of the report of the commissioners, viewers, etc., depends largely upon the statutes in the several states. In some of the cases it is held that the report is conclusive as to all matters of which the commissioners had jurisdiction to determine, as, for instance, the question of a previous dedication,[54] or of the necessity, utility, or convenience of the road,[55] unless the commissioners acted in bad faith or were guilty of gross

A petition for review presented at an adjourned term of court after the term at which the first view was reported is too late. *In re* West Bradford Tp. Road, 2 Chest. Co. Rep. (Pa.) 313. But see Matter of Hickory Tree Road, 1 Pearson (Pa.) 202.

44. *In re* Shafferstown Road, 3 Watts (Pa.) 475, holding that a signing by the attorney for the parties is not sufficient.

It is not necessary that a majority of the original petitioners should sign the petition for review. *In re* Augusta Tp. Road, 17 Pa. St. 71; *In re* Dallas, etc., Road, 7 Luz. Leg. Reg. (Pa.) 147.

45. *In re* Church Road, 5 Watts & S. (Pa.) 200.

46. Matter of Seller's House Road, 2 Pearson (Pa.) 449.

47. *In re* East Fallowfield Road, 2 Chest. Co. Rep. (Pa.) 424.

48. Masters *v.* McHolland, 12 Kan. 17; Monticello *v.* Aroostook County, 59 Me. 391; Stearns *v.* Deerfield, 51 N. H. 372; Tompkins *v.* Clackamas County, 11 Oreg. 364, 4 Pac. 1210, holding that a county court having appointed viewers to lay out a county road, with instructions "to report in writing at the next term of this court," the proper time for considering such report is the next regular term fixed by law, and not a special term appointed after the appointment and instruction of the viewers.

Change of date for hearing report.—Where the report of a committee relative to the laying out of a new highway was presented, and notice ordered for hearing on a certain date, it was improper to rescind such order, and to fix another date and order notice of hearing to be given, without entering a formal continuance. Clarke *v.* South Kingstown, 18 R. I. 283, 27 Atl. 336.

49. Larson *v.* Fitzgerald, 87 Iowa 402, 54 N. W. 441.

50. *In re* Gibson, etc., Mill Road, 37 Pa. St. 255; *In re* Ross Tp. Road, 36 Pa. St. 87; *In re* Appleby Manor Road, 1 Grant (Pa.) 443; *In re* Lower Allen Tp. Road, 5 Pa. Dist. 764, 18 Pa. Co. Ct. 298; Cannon *v.* McAdams, 7 Heisk. (Tenn.) 376.

Where the report has been regularly continued, it will not be set aside because the report was dated before the continuance was made, it appearing that, whatever the date might be and whenever it might have actually been drawn up, it had not been presented to the court when the continuance was granted, and was therefore still in the power of the viewers. *In re* North Lebanon Tp. Road, 3 Pa. Co. Ct. 401.

Taking testimony in vacation.—In Vermont where, for want of time, a hearing on a report of road commissioners cannot be had at the term of court when it otherwise should be heard, a rule may be granted to the parties to take testimony in vacation and file it with the clerk. *In re* Buckmaster, 16 Vt. 326.

51. *In re* McConnell's Mill Road, 32 Pa. St. 285. See also *In re* Mead Tp. Road, 66 Pa. St. 185, where a report of road viewers was returned at the proper term, but was not confirmed *nisi* until at the adjourned term, and it was held not to be error if a reasonable time for objections was allowed before the commencement of the next term.

52. Matter of Glenside Woolen Mills, 92 Hun (N. Y.) 188, 36 N. Y. Suppl. 593.

53. Matter of Glenside Woolen Mills, 92 Hun (N. Y.) 188, 36 N. Y. Suppl. 593.

54. Betts *v.* New Hartford, 25 Conn. 180.

55. Scutt *v.* Southbury, 55 Conn. 405, 11 Atl. 854; Goodwin *v.* Wethersfield, 43 Conn. 437; Harwinton *v.* Catlin, 19 Conn. 520; Plainfield *v.* Packer, 11 Conn. 576; Freeman *v.* Plainfield, 52 N. H. 146, so holding as to a report of county commissioners refusing to lay out a new highway.

Supervisors of a township cannot refuse to obey an order of the court to open a highway, made upon a confirmed report of viewers, on the ground that they do not think it necessary. *In re* Roaring Brook Tp. Road, 140 Pa. St. 632, 21 Atl. 411.

errors and mistakes,[56] it being held that the question of the necessity of a proposed public road must be determined in the duly appointed mode of proceeding by viewers, reviewers, and, in the discretion of the court, re-reviewers; and it is error for the court to determine the question on evidence given before it on appeal from the reports of viewers,[57] the court being held to exercise the same control over commissioners for laying out a road, etc., that it does over arbitrators, and no more, and that it will not review their proceedings by way of appeal.[58] Elsewhere the report of viewers concerning the establishment of a road is held to be designed to aid the court, but not in any manner to control it;[59] and where the view is taken upon the hearing evidence may be introduced in regard to the pro-

In New Jersey jurisdiction to determine the necessity of a road is conferred on the surveyors exclusively, and the power to review their determination is lodged exclusively in freeholders who shall be delegated to review their report; and unless the decision of the surveyors shall be reversed by the freeholders, the return of the surveyors is to be recorded without a review by the court. Carpenter *v.* Brown, 53 N. J. L. 181, 20 Atl. 738; Hoffman *v.* Rodman, 39 N. J. L. 252; State *v.* Bishop, 39 N. J. L. 226; State *v.* Justice, 24 N. J. L. 413. The common pleas court has, however, jurisdiction to determine whether the proceedings have been conducted according to the directions of the statute, and may set aside the surveyors' report or the freeholders' certificate for non-conformity with the statutory requirements or illegality in matter of substance, but cannot review the surveyors' determination as to the necessity of the road, nor set aside their return on the ground that their judgment was erroneous. State *v.* Bishop, *supra*.

In Virginia, where landowners are summoned under Code (1887), § 949, providing that, on the favorable report of the viewers, if the court be in favor of establishing the road, it shall award process to summon proprietors to show cause against the establishment of the road, the burden of proof is on the landowners to overcome the *prima facie* case made by the report of the viewers. Heininger *v.* Peery, 102 Va. 896, 47 S. E. 1013.

56. *Illinois.*— Cole *v.* Peoria, 18 Ill. 301, where a party was prevented from adducing evidence before the commissioners by reason of the statement of one of them to him that their minds were made up.

New Hampshire.— Thompson *v.* Conway, 53 N. H. 622.

New Jersey.— State *v.* Justice, 24 N. J. L. 413.

Pennsylvania.— *In re* East Franklin Tp. Road, 8 Pa. Co. Ct. 590 (holding that the report of road viewers, so far as it relates to the necessity for the road, is entitled to the same respect as the verdict of a jury, and ought not to be disregarded, save for errors of law apparent on its face or misconduct on the part of viewers); *In re* Berks St., 15 Phila. 381 (holding that the court will not disturb the finding of a road jury before whom all the facts have been properly placed, and by whom the subject has been maturely considered, merely because the evidence might support conclusions somewhat different, and the court does not fully agree with the jury in all their determinations); *In re* Byberry New Road, 6 Phila. 384 (holding that where the report of viewers is not palpably erroneous, the court will not interfere with their finding upon mere allegations of mistake as to facts).

Vermont.— Shattuck *v.* Waterville, 27 Vt. 600, holding that if commissioners appointed by the court upon a petition to lay out a road report adversely, the court can take no further action, and the petition must be dismissed unless improper practices upon the committee are shown.

57. *In re* Ohio, etc., Tp. Road, 166 Pa. St. 132, 31 Atl. 74; Cummings *v.* Kendall County, 7 Tex. Civ. App. 164, 26 S. W. 439, holding that Rev. Civ. St. art. 4361, providing that the commissioners' court may, on their own motion, open new roads, does not authorize the courts to change the report made by the jury of view as to the location of the road, or as to damages, without a hearing, or without complying with article 4360*a*, § 4, which provides for the rejection of the report, and the appointment of another jury.

58. Bushwick, etc., Bridge, etc., Co. *v.* Ebbets, 3 Edw. (N. Y.) 353.

59. Molyneux *v.* Grimes, 78 Kan. 830, 98 Pac. 278 (holding that the provision of Gen. St. (1901) § 6021, that if the viewers report against a proposed road, and the commissioners think the report just, no further proceeding shall be had, implies that the commissioners may establish the road notwithstanding the adverse report, if their opinion is contrary to that of the viewers); Bennett *v.* Greenup County, 17 S. W. 167, 13 Ky. L. Rep. 349; Vedder *v.* Marion County, 28 Oreg. 77, 36 Pac. 535, 41 Pac. 3 (holding that Hill Annot. Laws Oreg. § 4065, providing that, the county court being satisfied that a road sought to be established will be of public utility, the viewers' report being favorable thereto, the court shall cause the report, survey, and plat to be recorded, and the road shall thenceforth be considered a highway, does not make the favorable report of viewers binding on the court); *In re* Blakely Road, 8 Pa. Co. Ct. 592 (holding that where a road is projected almost wholly through a borough not benefited thereby, and is also parallel with another road which would be rendered useless, and the court is not satisfied that the road is necessary, the report of the jury laying it out will be set aside).

priety or otherwise of a proposed road, in addition to the reviewers' report.[60] But the court will not consider affidavits as to what took place in proceedings before the commissioners, or as to motives, principles, or inducements on which they founded or joined in a report.[61] The judgment of a sworn jury in proceedings relating to the establishment of roads should be sustained unless manifestly unjust;[62] and an affidavit of a person not one of the surveyors will not be sufficient evidence to contradict the return of a road.[63]

(6) Determination and Disposition of Proceedings — (a) In General. The report of the commissioners or viewers may be set aside and another ordered by the same or different persons,[64] or it may be recommitted;[65] but mere irregularities in the report is no ground for dismissing the entire proceedings.[66] If the report is confirmed, it must be confirmed unconditionally.[67]

(b) Adoption of Part and Rejection of Part of Report. In some states the report of commissioners, viewers, etc., cannot be adopted in part and rejected in part;[68] and the court has no authority to order a material alteration in a proposed road because it appeared that the surveyor had not pursued the directions of the viewers, and to confirm the report as altered, but should return the report to the viewers that they may make the correction.[69] But in other states the rule is otherwise.[70]

(7) Amendment and Recommitment. Amendments to the report are allowed liberally.[71] In case of clerical error or of omission of necessary matter from a

60. Winston *v.* Waggoner, 5 J. J. Marsh. (Ky.) 41.

61. *In re* Groton, 43 N. H. 91.

62. Jefferson Parish Police Jury *v.* De Hemecourt, 7 Rob. (La.) 509; Cross *v.* Lafourche Interior Police Jury, 7 Rob. (La.) 121.

63. State *v.* Scott, 9 N. J. L. 17.

64. Lowndes County Com'rs' Ct. *v.* Bowie, 34 Ala. 461; *In re* North Union Tp. Road, 150 Pa. St. 512, 24 Atl. 749; *In re* Jackson Road, Wilcox (Pa.) 242. But see *In re* Highway, 18 N. J. L. 291.

An excessive elevation of the proposed road will justify setting aside the report of the viewers. *In re* Guilford Tp. Road, 4 Pa. Dist. 570; *In re* Drumore Road, 5 Lanc. L. Rev. (Pa.) 265; *In re* Rapho Road, 4 Lanc. L. Rev. (Pa.) 123; *In re* London Grove Road, 1 Am. L. J. (Pa.) 380.

65. Monroe *v.* Danbury, 24 Conn. 199; *In re* Warwick Tp., 18 Pa. St. 372. And see *infra*, II, C, 5, g, (v), (k), (7).

66. Brown *v.* Stewart, 86 Ind. 377.

67. *In re* Lathrop Tp. Road, 84 Pa. St. 126 (holding that confirmation of report of reviewers should not be made conditional upon payment of the land damages); *In re* Hazle Tp., etc., Road, 4 Kulp (Pa.) 421. See also *In re* Beigh's Road, 23 Pa. St. 302.

68. Winchester *v.* Hinsdale, 12 Conn. 88, 13 Conn. 132; *In re* Benzinger Tp. Road, 115 Pa. St. 436, 10 Atl. 35; *In re* Pike Tp. Road, 30 Pa. Super. Ct. 644 (holding that, where proceedings are begun to vacate a portion of an old road and to lay out a new road in its place, an order confirming a report of reviewers in so far as it concerned the laying out of the new road, but setting it aside in so far as it vacated a portion of the old road, is erroneous); Clarke *v.* Newport, 5 R. I. 333; Cummings *v.* Kendall County, 7 Tex. Civ. App. 164, 26 S. W. 439.

69. *In re* Catharine Tp. Road, 76 Pa. St. 189; *In re* Road, 14 Serg. & R. (Pa.) 204.

70. *In re* Patten, 16 N. H. 277 (holding that a separable portion of the proceedings of the commissioners, in excess of their authority, may be rejected, and the other portion accepted); Peirce *v.* Somersworth, 10 N. H. 369 (holding that the court of common pleas may accept the report of a committee so far as it lays out a part of a highway, and reject it for the residue).

71. Boothroyd *v.* Larimer County, 43 Colo. 428, 97 Pac. 255 (holding that the fact that after a board of county commissioners acted on the viewers' report the viewers were allowed to amend the report by adding an award to one whose name through mistake was omitted from the original report does not invalidate the report, or afford another landowner ground to object); Bowen *v.* Hester, 143 Ind. 511, 41 N. E. 330 (holding that the board of commissioners have authority to amend the report of the viewers and engineer appointed by them to examine the proposed route, and report the lands that will be benefited thereby, by adding a list of the lands so reported, and to assess such additional lands together with those reported as benefited by the viewers); Andover *v.* Essex County, 5 Gray (Mass.) 393; Stokes *v.* Parker, 53 N. J. L. 183, 20 Atl. 1074; Craig *v.* Brands, 46 N. J. L. 521.

To whom application to amend must be made.—An application to amend the return of highway surveyors upon laying out a road must be made to the court by which the surveyors were appointed. Washington *v.* Fisher, 43 N. J. L. 377.

Commissioners of highways out of office cannot amend their return of the proceedings already made. People *v.* Caledonia Highway Com'rs, 16 Mich. 63.

Radical defects disclosed in a road viewers'

report, the court may recommit the report for correction,[72] as, for instance, where a report is defective in not stating that efforts were made to obtain releases of damages, and in not specifying the improvements,[73] where the viewers fail to set out the fact of notice in their report,[74] or where there is a discrepancy between the return of the viewers and the petition, but the accompanying draft shows a substantial compliance with the order of the court; [75] and the commissioners may, upon such recommitment, make a supplemental report.[76] Upon a general recommitment the report is open to correction or amendment in any particular; [77] and where the report of commissioners in regard to laying out a new highway is recommitted on account of want of notice to some landowners affected thereby, such landowners have a right to be heard, to hear and meet the evidence, and to examine witnesses on the new hearing before the commissioners.[78]

(8) SUBSEQUENT VIEWS — (a) IN GENERAL. In some jurisdictions if interested parties are for some good reason dissatisfied with the view they may have a review [79]

report, as where they had not been properly sworn, cannot be cured by amendment. *In re* Cambria St., 75 Pa. St. 357.

72. *Connecticut.*— Greene *v.* East Haddam, 51 Conn. 547; Ives *v.* East Haven, 48 Conn. 272, holding that upon such recommitment a hearing *de novo* cannot be claimed.

Delaware.— *In re* Jones, 6 Pennew. 463, 70 Atl. 15, holding that where it appears, on exceptions to the return of commissioners appointed to lay out a public road, that they did not assess damages of all the owners or holders of land across which the road is to run, or state in such report that they assessed no damages to certain owners and holders, considering all circumstances of benefit or injury which might accrue therefrom, but assessed damages only to the person who would be least damaged thereby, the return will be remanded to the commissioners for amendment.

New Hampshire.— Farmer *v.* Hooksett, 28 N. H. 244; *In re* Patten, 16 N. H. 277, holding that an objection to a report that it awards no damages to a certain landowner is generally cause for recommitment.

New Jersey.—Evers *v.* Vreeland, 50 N. J. L. 386, 13 Atl. 241.

Pennsylvania.— *In re* Springdale Tp. Road, 91 Pa. St. 260 (recommitment for the purpose of noting improvements more fully); *In re* Boyer's Road, 37 Pa. St. 257 (holding that clerical errors in a report of viewers before appointed to lay out a road should be referred to the viewers by the court before confirmation); *In re* New Hanover Tp. Road, 18 Pa. St. 220 (holding that the report may be recommitted for alteration if there is a material omission or variation in the plan from the courses and distances stated in the report); Potts' Appeal, 15 Pa. St. 414 (holding that where the draft omits to notice the improvements on the line of the road, the report may be referred by the court of quarter sessions to the same viewers for correction); Hause's Appeal, 3 Walk. 54; *In re* Charleston Road, 2 Grant 467 (where road viewers made an incomplete report); *In re* West Manchester Tp. Road, 10 Pa. Co. Ct. 429 (mistake as to the name of a proprietor through whose land the road passes); *In re* West Bradford Road, 2 Chest. Co. Rep. 471 (where reviewers laid out the same road as the viewers, and reported that they confirmed the former report, but did not give the courses and distances, or return a draft); *In re* Kingston Tp. Road, 8 Kulp 489; *In re* Kidder Tp. Road, 1 Kulp 10 (where the report and draft returned by viewers failed to show the improvements); *In re* West Cain Road, 2 Lanc. L. Rev. 160 (where a jury of view omitted to state in their report the township in which they located a road); *In re* Bethlehem Road, 2 Lehigh Val. L. Rep. 265 (omission of viewers to annex a plat of draft of the proposed road to their return).

See 25 Cent. Dig. tit. "Highways," § 128.

A recommitment is discretionary with the court. *In re* Charleston Road, 2 Grant (Pa.) 467.

Notice of hearing on the recommitment is unnecessary. Fulton *v.* Cummings, 132 Ind. 453, 30 N. E. 949; Berry *v.* Hebron, 38 N. H. 196; *In re* Charleston Road, 2 Grant (Pa.) 467.

73. *In re* Kingston Tp. Road, 8 Kulp (Pa.) 489; *In re* Plum Tp. Road, 2 Pittsb. (Pa.) 184; *In re* Lower Chanceford Tp. Road, 8 York Leg. Rec. (Pa.) 165; *In re* Lower Chanceford Tp. Road, 8 York Leg. Rec. (Pa.) 8. And see cases cited *supra*, note 72. *Compare In re* Warrington Tp. Road, 8 Del. Co. (Pa.) 79.

74. *In re* Seidel's Road, 2 Woodw. (Pa.) 275.

75. *In re* Brecknock Tp. Road, 2 Woodw. (Pa.) 13.

76. Ives *v.* East Haven, 48 Conn. 272.

77. Peavey *v.* Wolfborough, 37 N. H. 286.

78. Stinson *v.* Dunbarton, 46 N. H. 385.

79. Grimwood *v.* Macke, 79 Ind. 100 (holding that the improper rejection by commissioners of the report of road viewers does not divest the former of jurisdiction over the matter before them, but they may proceed to order a review; and they may have power to proceed in the matter until the final order or conclusion is reached); Eatontown Tp. *v.* Wolley, 49 N. J. L. 386, 8 Atl. 517 [*affirmed* in 50 N. J. L. 177, 17 Atl. 1103]; *In re* Highway, 16 N. J. L. 345; State *v.* Conover, 7 N. J. L. 203; Preist *v.* Addis, 3 N. J. L. 812; *In re* Heidelberg Tp. Road, 47 Pa. St. 536; *In re* Reserve Tp. Road, 2 Grant (Pa.) 204;

and a re-review,[80] and even a fourth view under special circumstances,[81] the expenses of all of which must be borne by petitioners therefor.[82] A review prior to confirmation is held to be a matter of right;[83] but the granting of a third view of a proposed road rests in the discretion of the court,[84] and the court will not allow the practice to extend to unreasonable bounds, but will limit the reviews, and after a reasonable number of reviews is had the dissatisfied party is limited to his appeal to the court on the merits.[85]

(b) Report of Reviewers and Re-Reviewers. The court may adopt the report of the viewers or that of the reviewers at their discretion,[86] the adoption of a report of re-reviewers being a waiver of a report of viewers, although exceptions thereto are still pending.[87] Similarly, where there have been reports by viewers and reviewers, a final order of the court confirming the report of the viewers disposes of the report of the reviewers, and the exceptions thereto, as fully as if they had been expressly adjudicated upon;[88] and where viewers and reviewers, on a second review, reported substantially the same route for a road, if the court, under a misapprehension as to the identity of the routes, confirm the first report, such misapprehension will not invalidate the decree.[89] In deciding between two

In re Jonestown Road, 1 Penr. &. W. (Pa.) 243; *In re* Orthodox St., 2 Ashm. (Pa.) 28. But see *In re* Cherry Grove Tp. Road, 98 Pa. St. 145.

The whole question of public utility and damages is opened up, not only as to the party petitioning, but as to the other remonstrants, where viewers failed to find either for or against one of the remonstrants on the question of damages, and a *venire de novo* is granted. Peed *v.* Brenneman, 72 Ind. 288.

Pennsylvania act of April 27, 1855, relating to the review of road locations, does not apply to roads in Lackawanna county. Ackerly *v.* Lackawanna County, 1 Lack. Leg. N. (Pa.) 14.

80. Road Case, 2 Rawle (Pa.) 124; *In re* Strasburgh Road, 2 Yeates (Pa.) 53; Roberts' Appeal, 5 Pa. Co. Ct. 304 (holding it to be no substantial objection to an order of court appointing re-reviewers of a highway that it gave information as to what had been the action of reviewers); *In re* Nescopeck Road, 1 Kulp (Pa.) 402 (holding that where there is a report of viewers in favor of a proposed road, and a report of viewers against it, it is a proper cause for a re-review). But see *In re* Augusta Tp. Road, 17 Pa. St. 71, holding that when, in proceedings to vacate a road not opened, but in favor of which a report has been made and confirmed, a report is made against the road, a new one cannot be established by petition for re-review, but must be by proceedings *de novo*.

A re-review need not be of the whole of the road, but only of a portion between certain points. *In re* Hellertown Road, 5 Watts & S. (Pa.) 202.

The court cannot order a re-review of its own motion, although the view and review were granted on petition. *In re* Upper Yoder Tp. Road, 129 Pa. St. 640, 18 Atl. 551. And see *In re* Hellertown Road, 5 Watts & S. (Pa.) 202 (holding that a re-review of a road can be had only upon a petition presented to the court for that purpose); *In re* Butler Tp. Road, 6 Kulp (Pa.) 443 (holding that the court has no discretionary power to order a re-review of its own motion). The discretionary right of the court to award an alias review, under the Pennsylvania act of Feb. 23, 1870 (Pub. Laws 228), is limited to cases in which the petition for a review was defective, and does not extend to a case where the petition was proper, but a reviewer was ineligible. *In re* Leet Tp. Road, 159 Pa. St. 72, 28 Atl. 238; *In re* Manchester Tp. Road, 15 Pa. Co. Ct. 623.

81. *In re* West Hempfield Tp. Road, 3 Lanc. Bar (Pa.) Sept. 30, 1871.

82. *In re* Upper Yoder Tp. Road, 129 Pa. St. 640, 18 Atl. 551; *In re* Hellertown Road, 5 Watts & S. (Pa.) 202.

83. *In re* King's Road, 1 Dall. (Pa.) 11, 1 L. ed. 15.

Necessity of filing exceptions.—Where one of the reviewers did not view the road, new reviewers will be appointed on the same petition, although no exceptions were filed to the report of the viewers. *In re* Overfield Tp. Road, 25 Pa. Super. Ct. 5.

84. *In re* Moore Tp. Road, 17 Pa. St. 116; *In re* Ephrata Road, 5 Lanc. L. Rev. (Pa.) 5.

85. *In re* Poquessing Road, 1 Browne (Pa.) 210. See also *In re* Spring Garden Road, 43 Pa. St. 144, holding that where one view has been ordered under the general road law, and a review awarded under a new local law then passed, it is not error in the court to refuse to grant a third review of the road.

86. *In re* Bensalem Tp. Road, 38 Pa. St. 368 (holding also that in approving one rather than the other, the court does not pass on the subject of damages); *In re* Paradise Tp. Road, 29 Pa. St. 20; *In re* Ralpho Tp. Road, 1 Mona. (Pa.) 427; *In re* Bachman's Road, 1 Watts (Pa.) 400; *In re* Road, 3 Serg. & R. (Pa.) 236; *In re* Dallas Road, 7 Luz. Leg. Reg. (Pa.) 147. See also State *v.* Cruser, 14 N. J. L. 401.

87. *In re* Norriton Tp., etc., Road, 4 Pa. St. 337.

88. *In re* Kingston Tp. Road, 134 Pa. St. 409, 19 Atl. 750.

89. *In re* Beigh's Road, 23 Pa. St. 302. But

reports the court will have regard to the public interest.[90] After reviewers have filed their report in the clerk's office, it is competent for the court, during the same term, to vacate their appointment for sufficient reasons, and to set aside all the proceedings thereon.[91] Where viewers and re-reviewers unanimously favor a road, it will not be refused because two of three reviewers report adversely to its establishment.[92] A report of the jury of review is sufficient if it adopts and confirms the original return of the viewers.[93] Where viewers have recommended a certain width, and this was the width fixed by the court when it confirmed the report nisi, and the re-reviewers report and recommend "the same road, with its courses and distances as reported by the viewers in this case," the omission to attach a copy of the plan reported by the viewers to the report of the re-reviewers is not a fatal defect.[94]

h. Location[95] — (I) *Course* — (A) *By Whom Selected.* Local statutes govern the body empowered to select the route of a highway.[96]

(B) *Where Located* — (1) In General. Statutes sometimes provide that highways shall be laid out only over vacant[97] private[98] land. While it is true as

see *In re* New Washington Road, 23 Pa. St. 485, where the court confirmed a report of viewers absolutely, and of reviewers *nisi*, on the same day, and it was held that the proceedings were erroneous.

90. *In re* Dallas Road, 7 Luz. Leg. Reg. (Pa.) 147. See also *In re* Aston Tp. Road, 4 Yeates (Pa.) 372, holding that where there have been different views of a road, and separate returns thereon, it is immaterial whether any two returns agree, since the court of sessions is bound to approve such return as will most conduce to the public good and do the least injury to private property.

Burden of proving necessity for road.— Where there is a report of viewers in favor of a proposed road, and a report of reviewers against it, it is a proper cause for a re-review; but, in the absence of such re-review, the court must decide between the two reports, and in such case the burden of showing the necessity for the road rests upon the petitioners therefor. *In re* Hatfield Tp. Road, 1 Pa. Dist. 820.

The difficulty in keeping in proper repair existing roads is sufficient reason for refusing to open a new road where its necessity is doubtful, where there is a report of viewers in favor of a proposed road, and a report of reviewers against it, and no re-review is asked. *In re* Hazle Tp. Road, 6 Kulp (Pa.) 463.

91. *In re* Baldwin Tp., etc., Road, 36 Pa. St. 9.

92. *In re* Manheim Tp. Road, 5 Lanc. Bar (Pa.) Feb. 14, 1874.

93. *In re* Moreland Tp. Road, 13 Montg. Co. Rep. (Pa.) 71.

94. *In re* Stowe Tp. Road, 20 Pa. Super. Ct. 404.

95. Location of streets see Municipal Corporations, 28 Cyc. 838.

96. *Connecticut.*—Windham *v.* Litchfield, 22 Conn. 226.

Louisiana.— Calder *v.* Police Jury, 44 La. Ann. 173, 10 So. 726, police juries and jury of freeholders.

Massachusetts.— Lanesborough *v.* Berkshire County, 22 Pick. 278; Merrill *v.* Berkshire, 11 Pick. 269.

North Carolina.— Welch *v.* Piercy, 29 N. C. 365, jury determines line between termini.

Pennsylvania.— *In re* Sadsbury Tp. Roads, 147 Pa. St. 471, 23 Atl. 772 (viewers and not court should designate route); *In re* McConnell's Mill Road, 32 Pa. St. 285 (route for viewers to decide); Com. *v.* Plymouth Tp., 19 Pa. Super. Ct. 408 (supervisors and not viewers).

Rhode Island.— Watson *v.* South Kingstown, 5 R. I. 562, precise course voted by town council and order given to mark out "as may be most advantageous to the public."

Texas.— Ehilers *v.* State, 44 Tex. Cr. 156, 69 S. W. 148, commissioners' court and not overseer may locate road.

See 25 Cent. Dig. tit. "Highways," § 138; and see the statutes of the different states.

Defects cured.— On petition for a public road over private property, designating the exact route desired, the court ordered that the road be laid in accordance with the petition. The viewers appointed by the court thereafter reported that they had laid the road as ordered, and so "as to do the least possible damage to the land over which it passed." It was held that while the order of the court might imply that the road should be laid exactly as called for in the petition, regardless of damage, the report of the viewers that it had been so laid as to cause the least damage cured the defect. Fanning *v.* Gilliland, 37 Oreg. 369, 61 Pac. 636, 62 Pac. 209, 82 Am. St. Rep. 758.

The board having once laid out a road have no power to change it. Farrelly *v.* Kane, 172 Ill. 415, 50 N. E. 118.

97. Fredericks *v.* Hoffmeister, 62 N. J. L. 565, 41 Atl. 722, not through building even of an applicant for a highway.

98. Gist *v.* Owings, 95 Md. 302, 52 Atl. 395 (not through lands owned by the county); Hope Tp. Highway Com'rs *v.* Ludwick, 151 Mich. 498, 115 N. W. 419, 15 L. R. A. N. S. 1170 (not over or into navigable water); *In re* Catawissa Tp., etc., Road,

a general rule that one road cannot be located on another regularly laid out and opened, yet one may be laid on another so far as it may be necessary to reach the terminus called for in the order.[99] And while grade crossings are not allowed in some states except in case of imperious necessity, a highway may nevertheless be laid out over a private siding.[1] Collusion between county commissioners and a railroad company in locating a proposed county road cannot be shown by the fact that the railroad company desired the location agreed to for its own purposes, where there was no evidence of improper influence or inducement.[2] The road should be so described in the proceedings as to be identified.[3] Where the road has not been opened by the supervisors under the order, a mere user with their acquiescence would not be competent to change the route located by the viewers.[4]

(2) Feasibility. The local officers should select the most direct and feasible course for the highway.[5]

(3) On Section Lines. Statutes often provide for the lay-out of highways on section lines; [6] but this does not take away power to locate them elsewhere.[7]

(4) In Two Jurisdictions. Where a road extends in two jurisdictions, the officers of each should act separately in locating it.[8]

(5) Terminus.[9] In locating the road the terminus should be as ordered,[10]

17 Pa. Super. Ct. 21 (not over approach to county bridge).

99. State *v.* Hamilton County, 8 Ohio Dec. (Reprint) 457, 8 Cinc. L. Bul. 83; Springdale Tp. Road, 91 Pa. St. 260; *In re* Greene Tp. Road, 21 Pa. Super. Ct. 418; *In re* Ross Tp. Public Road, 5 Pa. Super. Ct. 85; *In re* Taylor Tp., etc., Road, 3 Lack. Leg. N. 194.

Prayer of petition.—A new highway including a shorter and narrower existing road may properly be laid out, although the petition does not pray for an alteration of the latter. Folsom *v.* Middlesex County, 173 Mass. 48, 53 N. E. 155.

1. *In re* Greene Tp., etc., Road, 21 Pa. Super. Ct. 418 [*citing* Bryner *v.* Youghiogheny Bridge Co., 190 Pa. St. 617, 42 Atl. 1100; Perry County R. Extension Co. *v.* Newport, etc., R. Co., 150 Pa. St. 193, 24 Atl. 709].

2. State *v.* Clarke County Super. Ct., 49 Wash. 392, 95 Pac. 488.

3. St. Vincent Tp. *v.* Greenfield, 12 Ont. 297.

However, a proposed highway described as commencing at the southeast corner of the southwest quarter of a designated section, and thence west on the said line one hundred and sixty rods, is sufficiently located, the line described being intended as the center of the highway. Quinn *v.* Baage, 138 Iowa 426, 114 N. W. 205.

A boundary line between two towns is susceptible of exact location, and hence is competent to serve as a monument in the description of lands proposed to be taken for a highway. Matter of Burdick, 27 Misc. (N. Y.) 298, 58 N. Y. Suppl. 759.

Description of road in judgment of laying it out see *infra*, II, C, 5, i, (I), (B).

4. Morrow *v.* Com., 48 Pa. St. 305.

5. *Louisiana.*— Maginnis *v.* Terrebonne Police Jury, 106 La. 293, 30 So. 846; Cross *v.* Lafourche Interior Police Jury, 7 Rob. 121, unless great damage to individuals is likely.

Maine.— *In re* Conant, 102 Me. 477, 67 Atl. 564.

New Hampshire.— Ford *v.* Danbury, 44 N. H. 388.

New Jersey.— Whittingham *v.* Hopkins, 70 N. J. L. 322, 57 Atl. 402.

New York.— *In re* Union Ave., 8 N. Y. Suppl. 718, although another route would be somewhat less expensive.

See 25 Cent. Dig. tit. "Highways," § 137.

See, however, State *v.* Hamilton County, 8 Ohio Dec. (Reprint) 457, 8 Cinc. L. Bul. 83.

6. *In re* Roaring Creek Road, 11 Pa. St. 356. See Gascho *v.* Sohl, 155 Ind. 417, 58 N. E. 547 (not on a half section line); Henry *v.* Ward, 49 Nebr. 392, 68 N. W. 518 (where all section lines are declared by statute to be highways).

Evidence as to location of section line see Palmer *v.* Clark, 114 Iowa 558, 87 N. W. 502.

7. Casey *v.* Kilgore, 14 Kan. 478. See State *v.* Boone County, 78 Nebr. 271, 110 N. W. 629.

There is no presumption that, because a highway had some portion of its course on a section line, it followed the line throughout. Seisler *v.* Smith, 150 Ind. 88, 46 N. E. 993.

8. Detroit *v.* Somerset County, 52 Me. 210.

Highway between towns.—Where commissioners appointed under Vt. Comp. St. (1850) c. 22, §§ 28, 44, laid the road wholly in one town, and it appeared from their report that the road could, except for a short distance in one or two places, as well have been laid on the line of both towns as by the side of said line, the commissioners exceeded their power. *In re* Bridport, 24 Vt. 176.

9. **Variance in termini** see further *infra*, II, C, 5, h, (I), (C), (1).

10. Kane *v.* Farrelly, 192 Ill. 521, 61 N. E. 648 (according to field-notes of the government survey); *In re* Penn Tp. Road, 24 Pa. Co. Ct. 526. But see State *v.* Hamilton County, 8 Ohio Dec. (Reprint) 457, 8 Cinc. L. Bul. 83, where the location was held valid, although the special statute authorizing the road was only substantially followed.

and should be suitable for the purpose of a highway ; otherwise the location cannot be sustained.[11]

(c) *Variance* — (1) From Petition, or Agreement. The lay-out should in general follow the course named in the petition asking for it,[12] with the same termini;[13] but it is enough if it is substantially the same,[14] and the local authorities

11. See *supra*, II, C, 1, b, (II), (B).

12. Washington Ice Co. *v.* Lay, 103 Ind. 48, 2 N. E. 222; Cushing *v.* Webb, 102 Me. 157, 66 Atl. 719; Snyder *v.* Trumpbour, 38 N. Y. 355, although passing through improved lands not mentioned.

Lay-out held to be void as varying from the application see Halverson *v.* Bell, 39 Minn. 240, 39 N. W. 324 (ten rods distant from road petitioned for); Norton *v.* Truitt, 70 N. J. L. 611, 57 Atl. 130; State *v.* French, 24 N. J. L. 736 (where applied for "in the line dividing lands" and laid out all on land of A; variance of ninety-eight links); *In re* Hempfield Tp. Road, 122 Pa. St. 439, 16 Atl. 738; *In re* Union Tp. Road, 29 Pa. Super. Ct. 179.

The language of the petition need not be followed exactly. Orono *v.* Penobscot County, 30 Me. 302 (if no inconsistency appears); Windham *v.* Cumberland County, 26 Me. 406 (if route located is embraced by petition); *In re* North Lebanon Tp. Road, 3 Pa. Co. Ct. 401 (mere inversion of route does not avoid proceedings). So, where the committee found that the latter portion of a road ought to be laid out as prayed for in the petition, and thereupon proceeded to lay it out by survey, it sufficiently appeared that it was the same road prayed for in the petition, although that fact was not shown with certainty by the survey, or by any other part of the report of the committee. Pierce *v.* Southbury, 29 Conn. 490.

13. *In re* Lower Merion Road, 58 Pa. St. 66; *In re* Cornplanter Tp. Road, 26 Pa. Super. Ct. 20; *In re* Byberry New Road, 6 Phila. (Pa.) 384; *In re* Lower Chanceford Tp. Road, 8 York Leg. Rec. (Pa.) 8, 165.

The presumption is that the road is properly laid down. Cushing *v.* Gay, 23 Me. 9 (holding that the commissioners must necessarily be more precise in designating the termini of the road laid out than is required in a petition to have it laid out; and therefore, where they may not appear identical on the record, they may be presumed to be the same in the absence of proof to the contrary); Smith *v.* Conway, 17 N. H. 586 (although terminus is seventeen rods distant).

Lay-out held to be void on account of variance in the termini see Deer *v.* Sidney Highway Com'rs, 109 Ill. 379 (terminus near but not at point prayed for); Shinkle *v.* Magill, 58 Ill. 422 (variance of twenty-five links in commencement); Flanders *v.* Colebrook, 51 N. H. 300 (one hundred rods variance); Eames *v.* Northumberland, 44 N. H. 67; Cole *v.* Canaan, 29 N. H. 88; State *v.* Burnet, 14 N. J. L. 385; *In re* Boyer's Road, 37 Pa. St. 257; *In re* Hellertown Road, 5 Watts & S. (Pa.) 202; *In re* Seidel's Road, 2 Woodw. (Pa.) 275.

14. *Connecticut.*— Greene *v.* East Haddam, 51 Conn. 547; Clark *v.* Middlebury, 47 Conn. 331.

Indiana.— McDonald *v.* Payne, 114 Ind. 359, 16 N. E. 795, holding that where in the report of the viewers a highway is laid and described substantially as in the petition, the substitution of the words "Bending's Crossing" for "Bendig's Crossing" as the point of commencing is an immaterial variance, parol evidence being admissible to identify the monument.

Maine.— Wayne *v.* Kennebec County, 37 Me. 558.

Montana.— Crowley *v.* Gallatin County, 14 Mont. 292, 36 Pac. 313.

New Hampshire.— Bacheler *v.* New Hampton, 60 N. H. 207 (sufficient if termini correspond substantially); Ford *v.* Danbury, 44 N. H. 388 (may vary from straight line); State *v.* Rye, 35 N. H. 368 (holding that where a road petition described one terminus of the route as "northerly" of a certain monument, and the report of the commissioners described the corresponding terminus of the road laid out as "northeasterly" of the same monument, it was no variance); Stevens *v.* Goffstown, 21 N. H. 454 (although direction not exactly east as prayed for).

New Jersey.—Evers *v.* Vreeland, 50 N. J. L. 386, 13 Atl. 241 (a variance in termini, if within the width of the proposed road, is immaterial); Adams *v.* Rulon, 50 N. J. L. 526, 14 Atl. 881 (where courses are described as "about," the surveyors may lay out in general direction indicated); State *v.* Atkinson, 27 N. J. L. 420 (although one of courses of northwesterly road is southwest); State *v.* Smith, 21 N. J. L. 91 (although stake is not "in the middle of" road as petitioned for).

New York.— People *v.* Hildreth, 126 N. Y. 360, 27 N. E. 558 [*affirming* 1 Silv. Sup. 358, 5 N. Y. Suppl. 308] (no material variance in termini where object sought of connecting two roads is accomplished); People *v.* Carman, 69 Hun 118, 23 N. Y. Suppl. 386 (change of course at different point); Hallock *v.* Woolsey, 23 Wend. 328 (general course only).

Pennsylvania.—*In re* Springfield Road, 73 Pa. St. 127 (intersection described by middle lines); Schuylkill County's Appeal, 38 Pa. St. 459; *In re* Cornplanter Tp. Road, 26 Pa. Super. Ct. 20; *In re* Cassville Borough Road, 4 Pa. Super. Ct. 511.

South Dakota.— Kothe *v.* Berlin Tp., 19 S. D. 427, 103 N. W. 657.

Wisconsin.— State *v.* Clyde, 130 Wis. 159, 109 N. W. 985, slight variation presumed reasonable and necessary.

See 25 Cent. Dig. tit. "Highways," § 139.

If the application describes the road by its general direction, and not by strict course and distance, it is sufficient if the road laid

often have authority to change it.[15] If one through whose land the road would run agrees that it may be run in a given way, it cannot be established in any other way without first summoning the landowner.[16]

(2) From Report and Order. Ordinarily no change will be permitted in the lay-out from the report of the officers designated.[17]

(II) *Length.* Public roads must be laid out neither shorter[18] nor longer[19] than ordered or petitioned for.

(III) *Width*[20]— (A) *How Fixed.* Statutes sometimes fix the width of public highways,[21] and sometimes leave it to the discretion of the local authorities to fix

out, taken as a whole, answers substantially the description in the application. Covert *v.* Hulick, 33 N. J. L. 307.

Presumption as to materiality of variance. — When the viewers reported only the admission that the street had not been opened according to the draft, "but had been changed to run more at right angles through the property of the petitioner," and it did not appear how much the divergence was, whether material or so slight as to come within the discretion of the proper authorities, there was no error in the confirmation of the report by the court below. Schuylkill County's Appeal, 38 Pa. St. 459.

15. *Connecticut.*— Clark *v.* Middlebury, 47 Conn. 331, selectmen.

Maryland.— Smith *v.* Goldsborough, 80 Md. 49, 30 Atl. 574.

Minnesota.— State *v.* Thompson, 46 Minn. 302, 48 N. W. 1111.

Pennsylvania.— *In re* State St., 8 Pa. St. 485, not confined to course suggested.

Texas.— Kelley *v.* Honea, 32 Tex. Civ. App. 220, 73 S. W. 846.

See 25 Cent. Dig. tit. "Highways," § 139.

Re-reviewers may recommend a route of their own, and return the plan of such route. *In re* Abington Tp. Road, 14 Serg. & R. (Pa.) 31.

16. Lewis *v.* Smith, 1 A. K. Marsh (Ky.) 158.

17. *Alabama.*— Lowndes County Com'rs' Ct. *v.* Bowie, 34 Ala. 461, no discretion left in the order.

Kansas.— Shaffer *v.* Weech, 34 Kan. 595, 9 Pac. 202.

Kentucky.— Com. *v.* Logan, 5 Litt. 286.

New Jersey.—Whittingham *v.* Hopkins, 70 N. J. L. 322, 57 Atl. 402, lay-out deviating more than the width of the road is void.

North Dakota.— Dunstan *v.* Jamestown, 7 N. D. 1, 72 N. W. 899.

Pennsylvania.— Furniss *v.* Furniss, 29 Pa. St. 15, from report of viewers.

See 25 Cent. Dig. tit. "Highways," § 138.

The route but not the termini may be varied by a committee appointed by the court. Goodwin *v.* Hallowell, 12 Me. 271.

Consent of the interested landowners has been held not to authorize a variance. Calder *v.* Chapman, 8 Pa. St. 522. However, a change of twenty feet in the final location of a road from that originally laid out and surveyed, when it appears to have been by the consent of those affected thereby, does not avoid the proceedings upon the objection thereafter made by a landowner whose lines are not affected by the change. Miller *v.* Hamilton County Com'rs, 9 Ohio Dec. (Reprint) 312, 12 Cinc. L. Bul. 152.

Slight changes may be made. Lowndes County Com'rs Ct. *v.* Bowie, 34 Ala. 461 (regarding nature of ground); Riggs *v.* Winterode, 100 Md. 439, 59 Atl. 762 (in course).

18. *California.*— Brannan *v.* Mecklenburg, 49 Cal. 672.

Michigan.— People *v.* Springwells Tp. Bd., 12 Mich. 434.

New Hampshire.— Ford *v.* Danbury, 44 N. H. 388.

New Jersey.— Freeman *v.* Price, 63 N. J. L. 151, 43 Atl. 432 (void where laid out in two unconnected parts); State *v.* Cassedy, 33 N. J. L. 179.

Pennsylvania.— Matter of Twenty-eighth St., 11 Phila. 436.

See 25 Cent. Dig. tit. "Highways," § 140.

Partial lay-out held to be valid see Harkness *v.* Waldo County, 26 Me. 353; Princeton *v.* Worcester County, 17 Pick. (Mass.) 154.

A short difference is immaterial. Riggs *v.* Winterode, 100 Md. 439, 59 Atl. 762.

19. State *v.* Molly, 18 Iowa 525; Anderson's Appeal, 25 Leg. Int. (Pa.) 77; Megrath *v.* Nickerson, 24 Wash. 235, 64 Pac. 163.

Unauthorized extension over land at request of owner held not to vitiate the lay-out see State *v.* O'Connor, 78 Wis. 282, 47 N. W. 433.

20. Specification of width in judgment ordering location see *infra*, II, C, 5, i, (I), (C).

Width of street see Municipal Corporations, 28 Cyc. 838.

21. *Iowa.*— Quinn *v.* Baage, 138 Iowa 426, 114 N. W. 205.

Nebraska.— Sanford *v.* Webster County, 5 Nebr. (Unoff.) 364, 98 N. W. 822, that buildings and river-banks extended into highway at certain points is no objection.

New York.— Matter of Adolph, 102 N. Y. App. Div. 371, 92 N. Y. Suppl. 841 [*affirmed* in 186 N. Y. 547, 79 N. E. 1100]; Purdy *v.* Moore, 73 N. Y. App. Div. 615, 76 N. Y. Suppl. 289.

Ohio.— Hays *v.* Lewis, 28 Ohio St. 326.

Vermont.— Bridgman *v.* Hardwick, 67 Vt. 132, 31 Atl. 33.

See 25 Cent. Dig. tit. "Highways," § 147.

The presumption is that the road was laid out of the statutory width (Hentzler *v.* Bradbury, 5 Kan. App. 1, 47 Pac. 330, to minimum legal width; Schenider *v.* Brown Tp., 142 Mich. 45, 105 N. W. 13; McGarry *v.* Runkel, 118 Wis. 1, 94 N. W. 662), or the width of an old road over which it was laid out (*In re*

the width;[22] and a variance in the width ordered from that set out in the petition is commonly not fatal.[23] The width may be fixed by user,[24] or by reference to buildings and fences along the way.[25] A ditch by the side of a highway is not necessarily part of the highway.[26]

Towamencin Road, 23 Pa. Co. Ct. 113, 15 Montg. Co. Rep. 194).

Lay-outs too narrow held void see State *v.* Wagner, 45 Iowa 482; Bridgman *v.* Hardwick, 67 Vt. 132, 31 Atl. 33; Perley *v.* Dibblee, 3 N. Brunsw. 514.

22. *Connecticut.*— Greene *v.* East Haddam, 51 Conn. 547, widening for convenience where road meets another.

Iowa.— State *v.* Barlow, 61 Iowa 572, 16 N. W. 733.

Michigan.— Brown *v.* Greenfield Tp. Bd., 109 Mich. 557, 67 N. W. 566, a statute providing that highways shall be "not less than" certain width does not prevent making them wider.

New York.— Matter of East Hampton, 21 N. Y. App. Div. 623, 47 N. Y. Suppl. 269 (only what is absolutely necessary); Matter of Feeney, 20 Misc. 272, 45 N. Y. Suppl. 830 (commissioners, not county court or judge, must fix width).

North Carolina.— Small *v.* Eason, 33 N. C. 94.

Pennsylvania.— East Union Tp. *v.* Comrey, 100 Pa. St. 362 (under power to open and construct); *In re* Ewing's Mill Road, 32 Pa St. 282 (duty of court and not viewers); *In re* Whitemarsh Tp., etc., Public Road, 5 Pa. St. 101; Com. *v.* Plymouth Tp., 13 Pa. Super. Ct. 209 (width fixed after confirmation of report); *In re* Derry Tp. Public Road, 11 Pa. Super. Ct. 232; *In re* Springfield Tp. Road, 24 Pa. Co. Ct. 625. See, however, Jonestown Road Case, 1 Serg. & R. 487 (holding that authority to lay out does not include right to regulate width); Maus *v.* Mahoning Tp., 24 Pa. Super. Ct. 624 (viewers have no power to fix width under act Feb. 17, 1882); *In re* Stowe Tp. Road, 20 Pa. Super. Ct. 404 (reviewers have no authority to fix width).

Virginia.— Terry *v.* McClung, 104 Va. 599, 52 S. E. 355, power to determine width of road gives no authority to establish a bridle-path.

Washington.—Hab *v.* Georgetown, 46 Wash. 642, 91 Pac. 10.

See 25 Cent. Dig. tit. "Highways," § 149.

An order nunc pro tunc is invalid. *In re* Croyle Tp. Road, 37 Pa. Super. Ct. 57; *In re* Derry Tp. Public Road, 11 Pa. Super. Ct. 232.

23. *Massachusetts.*— Com. *v.* Boston, etc., R. Corp., 12 Cush. 254, where petition is for a highway "over and along an existing bridge" the commissioners could make it wider.

Missouri.— *In re* Essex Ave., 121 Mo. 98, 25 S. W. 891, may be narrower than asked for.

New Hampshire.— Raymond *v.* Griffin, 23 N. H. 340.

Pennsylvania.— *In re* State St., 8 Pa. St. 485.

Texas.— Hamilton County *v.* Garrett, 62 Tex. 602.

Washington.—Hab *v.* Georgetown, 46 Wash. 642, 91 Pac. 10.

See 25 Cent. Dig. tit. "Highways," § 150.

Variance rendering lay-out illegal see North Henderson Highway Com'rs *v.* People, 2 Ill. App. 24.

24. Smithtown *v.* Ely, 75 N. Y. App. Div. 309, 78 N. Y. Suppl. 178 [*affirmed* in 178 N. Y. 624, 70 N. E. 1110]. And see *supra*, II, B, 6, b. See, however, Atty.-Gen. *v.* Perry, [1904] 1 Ir. 247. *Compare* Furniss *v.* Furniss, 29 Pa. St. 15 (holding that where a road has been opened, but not of the legal width, nor upon the ground designated by the viewers, subsequent supervisors, in widening the road to its legal width, must be governed by the road as opened, and its breadth must be regulated from the center of the beaten track as used); Com. *v.* Plymouth Tp., 19 Pa. Super. Ct. 408.

The expenditure of public money on a road laid out thirty feet wide can only make it a highway to that extent, and will not have the effect of extending it to a highway four rods wide. Basterach *v.* Atkinson, 7 N. Brunsw. 439.

25. Offin *v.* Rochford Rural Dist. Council, [1906] 1 Ch. 342, 70 J. P. 97, 75 L. J. Ch. 348, 4 Loc. Gov. 595, 94 L. T. Rep. N. S. 669, 54 Wkly. Rep. 244 (holding that fences by the side of a highway are *prima facie* the boundaries of the highway so as to raise a presumption that the public right of way extends over the whole space of ground between the fences; but the mere existence of fences on either side of a highway is not conclusive; in order to raise the presumption, it must be proved that there is nothing to show that they were not put up as boundaries of the highway); Locke-King *v.* Woking Urban Dist. Council, 62 J. P. 167, 77 L. T. Rep. N. S. 790, 14 T. L. R. 32 (holding that where a highway, although of varying and unequal width, runs between fences, the public right of way *prima facie* extends over the whole space between the fences).

Where, however, a public foot-path passes through a lane of irregular shape containing a private occupation road, and of a varying breadth between the fences, there is no presumption, as there is in the case of an ordinary public highway bounded by fences, that the public rights extend to the whole space between the fences. Ford *v.* Harrow Urban Dist. Council, 67 J. P. 248, 1 Loc. Gov. 256, 88 L. T. Rep. N. S. 394.

In Massachusetts this question is governed by statute. See Horne *v.* Haverhill, 110 Mass. 527; Morton *v.* Moore, 15 Gray 573; Plumer *v.* Brown, 8 Metc. 578; Wood *v.* Quincy, 11 Cush. 487.

26. Chippendale *v.* Pontefract Rural Dist. Council, 71 J. P. 231; Simcox *v.* Yardley Rural Dist. Council, 69 J. P. 66, 3 Loc. Gov. 1350, holding that where a highway of a

(B) *Location Parallel to and Adjoining Existing Road.* A public road cannot be located adjoining another public road, thus evading the law limiting the width of highways.[27]

(IV) *SURVEY* — (A) *In General.* A survey must be made by the proper person,[28] and be approved by the proper authority.[29] It need not be made before the assessment of damages,[30] and the presence of the third commissioner is not necessary to give it validity.[31] It must describe the road with certainty [32] by definite monuments,[33] and specify the width of the road.[34] A survey must not vary from the location ordered,[35] or the location fixed by the viewers,[36] and must itself be followed in the actual lay-out.[37]

(B) *Resurvey.* A resurvey is sometimes provided for by statute.[38]

specified width has been laid out within living memory under an inclosure award, there is no presumption that an adjoining ditch and hedge form part of the highway, if the highway is of the specified width without the ditch or hedge.

27. Bridgewater Turnpike, etc., Road Case, 4 Watts & S. (Pa.) 39.

It may, however, connect with another highway at a very acute angle. *In re* West Pikeland Road, 63 Pa. St. 471.

28. *Delaware.*—Huey *v.* Richardson, 2 Harr. 206.

Illinois.— Brown *v.* Robertson, 123 Ill. 631, 15 N. E. 30 [*affirming* 23 Ill. App. 461].

Indiana.— Suits *v.* Murdock, 63 Ind. 73.

Maine.— Crommett *v.* Pearson, 18 Me. 344.

Massachusetts.— Blaisdell *v.* Winthrop, 118 Mass. 138.

South Dakota.— Van Antwerp *v.* Dell Rapids Tp., 3 S. D. 305, 53 N. W. 82.

See 25 Cent. Dig. tit. "Highways," § 151.

29. Miller *v.* Union County, 48 Oreg. 266, 86 Pac. 3, "approving" equivalent to "adopting." And see Crommett *v.* Pearson, 18 Me. 344.

30. Crouse *v.* Whitlock, 46 Ill. App. 260.

31. Marble *v.* Whitney, 28 N. Y. 297.

32. Pagel *v.* Fergus County, 17 Mont. 586, 44 Pac. 86; Kidder *v.* Jennison, 21 Vt. 108.

Compass directions; true meridian.— The compass directions were followed in Huey *v.* Richardson, 2 Harr. (Del.) 206, without allowance for variation of the needle. The true meridian was followed in *In re* Friendsville, etc., Road, 16 Pa. Co. Ct. 172.

33. *Illinois.*— Dumoss *v.* Francis, 15 Ill. 543.

Iowa.— McCollister *v.* Shuey, 24 Iowa 362.

Maine.— Detroit *v.* Somerset County, 35 Me. 373, natural monuments.

New Hampshire.— Crosby *v.* Hanover, 36 N. H. 404, state line controls.

Rhode Island.— Clarke *v.* South Kingstown, 18 R. I. 283, 27 Atl. 336; Hunter *v.* Newport, 5 R. I. 325, easterly side of a lane which is private property.

Texas.— Floyd *v.* State, 25 Tex. 277, by natural objects.

Canada.— Reg. *v.* Cosby, 21 Ont. 591, survey not being conclusive.

See 25 Cent. Dig. tit. "Highways," § 153.

Where two objects distant from each other are marked by the commissioners, as designating the route of the road, the presumption is that the road is located on a straight line from one object to the other, if nothing appears to the contrary from their report or other official action. Butler *v.* Barr, 18 Mo. 357.

Statutes requiring the setting of stone bounds held to be directory merely see Howland *v.* Penobscot County, 49 Me. 143; Monterey *v.* Berkshire County, 7 Cush. (Mass.) 394.

Omission to note improvements held not to be fatal see Garretson *v.* Baker, 65 N. J. L. 184, 46 Atl. 705; *In re* Quemahoning Tp. Road, 27 Pa. Super. Ct. 150.

34. Beardslee *v.* French, 7 Conn. 125, 18 Am. Dec. 86. *Contra*, People *v.* Salem Highway Com'rs, 1 Cow. (N. Y.) 23.

Where a single line is run by commissioners in laying out a road, it will be intended to be the center of the road; and a specification of the quantity of land which the road will take from each proprietor over whose grounds it passes will ascertain its width. People *v.* Redhook Highway Com'rs, 13 Wend. (N. Y.) 310.

35. Phipps *v.* State, 7 Blackf. (Ind.) 512; Butler *v.* Barr, 18 Mo. 357. See, however, Munson *v.* Mallory, 36 Conn. 165, 4 Am. Rep. 52 (surveyor may make slight changes); Offutt *v.* Montgomery County, 94 Md. 115, 50 Atl. 419 (road may be located at a less incline than ordered).

36. Dunstan *v.* Jamestown, 7 N. D. 1, 72 N. W. 899, holding that when the plat and notes of the county surveyor, in a highway proceeding, differ from the location fixed by the viewers, the latter must prevail.

37. Deere *v.* Cole, 118 Ill. 165, 8 N. E. 303; Flint *v.* Horsley, 25 Wash. 648, 66 Pac. 59.

38. McNamara *v.* Brehm, 112 Iowa 576, 84 N. W. 676; Balke *v.* Bailey, 20 Iowa 124; Culver *v.* Fair Haven, 67 Vt. 163, 31 Atl. 143.

The sole object of a resurvey is to ascertain the location of the road and its boundaries precisely as they were established by the original survey. Caulkins *v.* Ward, 127 Iowa 609, 103 N. W. 956; Barnes *v.* Fox, 61 Iowa 18, 15 N. W. 581 (holding that the resurvey cannot cure fatal defects in the original proceedings); Blair *v.* Boesch, 59 Iowa 554, 13 N. W. 662; Carey *v.* Weitgenant, 52 Iowa 660, 3 N. W. 709 (holding that a resurvey can be made only of a road which has been duly established); Trudeau *v.* Sheldon, 62 Vt. 198, 20 Atl. 161.

i. Judgment or Order and Record — (i) *Form and Contents* — (a) *In General.* The judgment should order the lay-out in plain terms,[39] state what preliminary steps were taken,[40] apportion the expense,[41] and settle damages.[42] It should be entered at the time allowed by statute,[43] and should give the landowner time to remove his property.[44] Clerical errors in the judgment will not invalidate it.[45]

(b) *Description of Road.* The judgment must describe the highway with certainty.[46]

39. Williams *v.* Turner Tp., 15 S. D. 182, 87 N. W. 968; Mondoux *v.* Yamaska County, 22 Quebec Super. Ct. 148.

Judgment held valid see Boulder County *v.* Brierly, 39 Colo. 99, 88 Pac. 859; Suits *v.* Murdock, 63 Ind. 73 (although not showing that highway was to be taken equally from adjoining proprietors); Larson *v.* Fitzgerald, 87 Iowa 402, 54 N. W. 441 ("it is ordered for record"); Tucker *v.* Rankin, 15 Barb. (N. Y.) 471 (although informal); Patchin *v.* Doolittle, 3 Vt. 457 ("within a year" equivalent to "not less than a year").

Judgment held void see Dempsey *v.* Donnelly, 58 Ill. 40; Kinzer *v.* Brown, 170 Ind. 81, 83 N. E. 618 (holding that the board had no power to order highway opened as soon as damages paid); People *v.* Sico Tp. Bd., 3 Mich. 121; Oyler *v.* Ross, 48 Nebr. 211, 66 N. W. 1099 (an order for survey not an order for opening); Baker *v.* Wilson, 25 N. C. 168 (mere appointment of overseer over road).

To "open for travel" is not to "establish" a highway, nor has a board of supervisors jurisdiction to do the latter on petition for the former. Curtis *v.* Pocahontas Co., 72 Iowa 151, 33 N. W. 616.

Finding as to public necessity see Cowing *v.* Ripley, 76 Mich. 650, 43 N. W. 648 (should define necessity for road); Barry *v.* Deloughrey, 47 Nebr. 354, 66 N. W. 410 (finding of public necessity of section line road need not be made of record by county board); Hunter *v.* Newport, 5 R. I. 325 ("public convenience requires" is equivalent to finding it "necessary").

Matters unnecessary in the report see McManus *v.* McDonough, 107 Ill. 95 (public announcement of decision is merely directory requirement); Harvey *v.* Wayne, 72 Me. 430 (distance in each town).

An acceptance of a report of the viewers may be a sufficient opening. Lockwood *v.* Gregory, 4 Day (Conn.) 407; State *v.* Dover, 10 N. H. 394; *In re* Beigh's Road, 23 Pa. St. 302 (confirming report); State *v.* Newfane, 12 Vt. 422.

40. *Illinois.*— Tower *v.* Pitstick, 55 Ill. 115; Town *v.* Blackberry, 29 Ill. 137, before a survey and report.

Maine.— Pownal *v.* Cumberland County, 63 Me. 102.

Michigan.— Kruger *v.* Le Blanc, 70 Mich. 76, 37 N. W. 880, survey alone is insufficient.

New York.— McCarthy *v.* Whalen, 19 Hun 503 [*affirmed* in 87 N. Y. 148]; Pratt *v.* People, 13 Hun 664, survey must be incorporated in order.

Pennsylvania.— *In re* Thirtieth St., 147 Pa. St. 245, 23 Atl. 555 ("exceptions sustained" indicates that all exceptions were sustained); *In re* Delaware Ave., 67 Pa. St. 309 (order setting aside report must state that it was set aside on exception sustained by court); Hibberd *v.* Delaware County, 3 Pa. Dist. 667

Texas.— Missouri, etc., R. Co. *v.* Austin, (Civ. App. 1897) 40 S. W. 35.

See 25 Cent. Dig. tit. "Highways," §§ 155, 156.

The name of the applicant should be given. New *v.* Ewing, 1 A. K. Marsh. (Ky.) 55; Daveiss *v.* Hopkins County Ct., 1 Bibb (Ky.) 514.

The fact that the petitioners are qualified to petition should appear. Oliphant *v.* Atchison County, 18 Kan. 386; Waubaunsee County *v.* Muhlenbacher, 18 Kan. 129.

41. Pingree *v.* Penobscot County, 30 Me. 351; Illinois Cent. R. Co. *v.* Swalm, 83 Miss. 631, 36 So. 147.

42. Brown *v.* Sams, 119 Ga. 22, 45 S. E. 719; Savage *v.* Cass County, 10 Ill. App. 204; Helms *v.* Bell, 155 Ind. 502, 58 N. E. 707, damages must be paid before judgment establishes highway.

43. Wood *v.* Springfield Highway Com'rs, 62 Ill. 391 (within thirty days from the petition); *In re* Ewing's Mill Road, 32 Pa. St. 282; *In re* Middle Creek Road, 9 Pa. St. 69; Terrell *v.* Tarrant County, 8 Tex. Civ. App. 563, 28 S. W. 367 (may be entered at special term); Morris *v.* Edwards, 132 Wis. 91, 112 N. W. 248.

44. Crenshaw *v.* Snyder, 117 Mo. 167, 22 S. W. 1104 (valid, although failing to set time within which owners shall give possession); Kidder *v.* Jennison, 21 Vt. 108.

Where no time is allowed by the sessions for the owner of land over which a highway is laid to remove wood, etc., it is not to be presumed that any wood, etc., was growing on the land. Com. *v.* Westborough, 3 Mass. 406.

45. Monterey *v.* Berkshire County, 7 Cush. (Mass.) 394; Banse *v.* Clark, 69 Minn. 53, 71 N. W. 819; State *v.* Miller, 136 Wis. 344, 117 N. W. 809.

46. *California.*— People *v.* Whitaker, 101 Cal. 597, 36 Pac. 109, the "Elam Route" to D valley insufficient.

Colorado.— Lieber *v.* People, 33 Colo. 493, 81 Pac. 270, inconsistency in descriptions.

Georgia.— Green *v.* Bibb County Road Bd., 126 Ga. 693, 56 S. E. 59.

Iowa.— Barnes *v.* Fox, 61 Iowa 18, 15 N. W. 581.

Massachusetts.— Yeamans *v.* Hampden County, 16 Gray 36 ("petition be in part granted" insufficient); Danvers *v.* Essex County, 2 Metc. 185 (termini not designated).

(c) *Width.*[47] A judgment of lay-out must specify the width of the road[48] as laid,[49] which may be done by proper reference.[50]

(d) *Statement of Jurisdictional Facts; Notice.* The record must affirmatively show jurisdiction,[51] and notice, being jurisdictional, must appear from the

Michigan.— Blodgett *v.* Clam Lake Highway Com'rs, 47 Mich. 469, 11 N. W. 275.

Minnesota.— Sonnek *v.* Minnesota Lake, 50 Minn. 558, 52 N. W. 961, "as near as practicable" to a specified line insufficient.

Missouri.— Peterson *v.* Beha, 161 Mo. 513, 62 S. W. 462, holding that a description of a road as "beginning at a point ten or twelve rods north of the center of section 33," etc., is so uncertain and indefinite as to amount to no description at all.

Montana.— Pagel *v.* Fergus County, 17 Mont. 586, 44 Pac. 86 [*distinguishing* Crowley *v.* Gallatin County, 14 Mont. 292, 36 Pac. 313].

New York.— Matter of De Camp, 19 N. Y. App. Div. 564, 46 N. Y. Suppl. 293 (survey should be incorporated in order); People *v.* Diver, 19 Hun 263 (starting "near" instead of "at" certain objects).

Pennsylvania.— *In re* Hector Tp. Road, 19 Pa. Super. Ct. 124; *In re* Crescent Tp. Road, 18 Pa. Super. Ct. 160; *In re* Dunbar Tp Road, 12 Pa. Super. Ct. 491.

Wisconsin.— Blair *v.* Milwaukee Light, etc., Co., 110 Wis. 64, 85 N. W. 675 (monuments which cannot be located by reference to the order cannot be used to cure ambiguities); Moll *v.* Benckler, 30 Wis. 584; Isham *v.* Smith, 21 Wis. 32.

United States.— Hicks *v.* Fish, 15 Fed. Cas. No. 6,459, 4 Mason 310, from A, as it shall be most convenient, insufficient.

See 25 Cent. Dig. tit. "Highways," § 159.

Description held to be sufficiently certain see Blakeslee *v.* Tyler, 55 Conn. 387, 11 Atl. 291; Harwinton *v.* Catlin, 19 Conn. 520; Green *v.* Bibb County Road Bd., 126 Ga. 693, 56 S. E. 59; Brown *v.* Sams, 119 Ga. 22, 45 S. E. 719; Clifford *v.* Eagle, 35 Ill. 444; Todd *v.* Crail, 167 Ind. 48, 77 N. E. 402; Ruston *v.* Grimwood, 30 Ind. 364; Baker *v.* Gowland, 37 Ind. App. 364, 76 N. E. 1027; People *v.* Milton Highway Com'rs, 37 N. Y. 360; People *v.* Brown, 47 Hun 459; People *v.* Nash, 15 N. Y. Suppl. 29; Woolsey *v.* Tompkins, 23 Wend. 324; Dunstan *v.* Jamestown, 7 N. D. 1, 72 N. W. 899; *In re* Sewickley Tp. Road, 23 Pa. Super. Ct. 170; Bare *v.* Williams, 101 Va. 800, 45 S. E. 331; Tench *v.* Abshire, 90 Va. 768, 19 S. E. 779; Moore *v.* Roberts, 64 Wis. 538, 25 N. W. 564.

Where a road has been used for more than fifty years, uncertainty in the original lay-out will not render it void. Dominick *v.* Hill, 6 N. Y. St. 329. So if the evidence shows that the beginning of the road is marked by a monument fixed by the commissioners who laid out said road, and that its course and boundaries have become well defined by use in accordance with said monuments, and the actual markings made by them, the judgment may be corrected to correspond with such facts, although the commissioners' report itself and the petition may have wrongly stated the distance the starting point is from the center of the section. Peterson *v.* Beha, 161 Mo. 513, 62 S. W. 462.

The judgment will be treated as an entirety usually. Hence if the description is in part defective the lay-out is void. Sonnek *v.* Minnesota Lake, 50 Minn. 558, 52 N. W. 961.

47. See also *supra*, II, C, 5, h, (III).

48. *California.*— Freshour *v.* Hihn, 99 Cal. 443, 34 Pac. 87; Humboldt County *v.* Dinsmore, 75 Cal. 604, 17 Pac. 710.

Illinois.—File *v.* St. Jacob Highway Com'rs, 34 Ill. App. 538. Otherwise after recognition for eighteen years. Pearce *v.* Gilmer, 54 Ill. 25. And see Highway Com'rs *v.* Harrison, 108 Ill. 398.

Missouri.— Snoddy *v.* Pettis County, 45 Mo. 361; State *v.* Parsons, 53 Mo. App. 135.

Nebraska.— Close *v.* Swanson, 64 Nebr. 389, 89 N. W. 1043.

New York.— Matter of King, 42 Misc. 480, 87 N. Y. Suppl. 236.

Pennsylvania.— *In re* Hempfield Tp. Road, 122 Pa. St. 439, 16 Atl. 738; *In re* Boyer's Road, 37 Pa. St. 257; Bliss *v.* Sears, 24 Pa. St. 111; *In re* Shaefferstown Road, 5 Pa. St. 515; *In re* Norriton Tp., etc., Road, 4 Pa. St. 337; *In re* Pitt Tp. Public Road, 1 Pa. St. 356; *In re* Clowe's Road, 2 Grant 129; *In re* Bridgewater Turnpike, etc., Road, 4 Watts & S. 39; *In re* Silverlake Tp. Public Road, 3 Watts & S. 559; *In re* Shamokin Road, 6 Binn. 36.

Vermont.— State *v.* Leicester, 33 Vt. 653.

Canada.— Basterach *v.* Atkinson, 7 N. Brunsw. 439.

See 25 Cent. Dig. tit. "Highways," § 160.

Contra.— Quinn *v.* Baage, 138 Iowa 426, 114 N. W. 205; Clarke *v.* South Kingstown, 18 R. I. 283, 27 Atl. 336; Boston, etc., R. Corp. *v.* Lincoln, 13 R. I. 705.

The width should be fixed at the time of the order (*In re* Whitemarsh Tp. Road, 7 Montg. Co. Rep. (Pa.) 161; *In re* Derry Road, Wilcox (Pa.) 165), and not *nunc pro tunc* (*In re* Lackawanna Tp. Road, 112 Pa. St. 212, 3 Atl. 848; *In re* Lower Allen Tp. Road, 5 Pa. Dist. 764, 18 Pa. Co. Ct. 298).

49. Carlton *v.* State, 8 Blackf. (Ind.) 208 (void where width not defined); Snyder *v.* Plass, 28 N. Y. 465.

50. State *v.* Schilb, 47 Iowa 611; Rose *v.* Kansas City, 128 Mo. 135, 30 S. W. 518; People *v.* Haverstraw, 137 N. Y. 88, 32 N. E. 1111 [*reversing* 20 N. Y. Suppl. 7] (sufficient where center line and width on each side given); *In re* Loretto Road, 29 Pa. St. 350. See, however, Hudson *v.* Voreis, 134 Ind. 642, 34 N. E. 503, holding that a reference to the petition is insufficient where the statute does not require the petition to state the width.

51. *Alabama.*— Russell Com'rs' Ct. *v.* Harver, 25 Ala. 480; Talladega Com'rs' Ct. *v.* Thompson, 18 Ala. 694.

Colorado.— Thatcher *v.* Crisman, 6 Colo.

record,[52] which, however, need not show particulars about the notice;[53] and upon proof of posting it will be presumed that it was posted a sufficient length of time,[54] in public places.[55] In like manner record of notice is *prima facie* proof of its publication.[56]

(E) *Signature and Seal.* An order of lay-out should be under the seal of the court,[57] and signed by the whole board;[58] and where an order of commissioners of highways is signed by only two without reciting a meeting of the three or notice to the third it is void unless it appears that the town had only two commissioners;[59]

App. 49, 39 Pac. 887, holding that a petition not duly signed carries no presumption of validity.

Connecticut.— Southington *v.* Clark, 13 Conn. 370.

Illinois.— Cox *v.* East Fork Tp. Highway Com'rs, 194 Ill. 355, 62 N. E. 791; Imhoff *v.* Somerset Highway Com'rs, 89 Ill. App. 66; North Henderson Highway Com'rs *v.* People, 2 Ill. App. 24.

Kansas.— Heacock *v.* Sullivan, 70 Kan. 750, 79 Pac. 659; Wabaunsee County Com'rs *v.* Muhlenbacker, 18 Kan. 129.

Maine.— Higgins *v.* Hamor, 88 Me. 25, 33 Atl. 655; Cyr *v.* Dufour, 68 Me. 492; Bethel *v.* Oxford County Com'rs, 42 Me. 478; Scarborough *v.* Cumberland County Com'rs, 41 Me. 604; Small *v.* Pennell, 31 Me. 267; *Ex p.* Pownal, 8 Me. 271, holding that unreasonable refusal of selectmen must appear.

Massachusetts.— Belchertown *v.* Hampshire County Com'rs, 11 Cush. 189.

Michigan.—Schroeder *v.* Onekama, 95 Mich. 25, 54 N. W. 642.

Mississippi.— State *v.* Morgan, 79 Miss. 659, 31 So. 338.

Missouri.— Zimmerman *v.* Snowden, 88 Mo. 218.

Nebraska.— Letherman *v.* Hauser, 77 Nebr. 731, 110 N. W. 745.

Nevada.— Godchaux *v.* Carpenter, 19 Nev. 415, 14 Pac. 140.

New Hampshire.— Hopkins *v.* Crombie, 4 N. H. 520.

New York.— Miller *v.* Brown, 56 N. Y. 383; Harrington *v.* People, 6 Barb. 607.

North Carolina.— Link *v.* Brooks, 61 N. C. 499, names of justices.

Ohio.— Smith *v.* Frenzer, 12 Ohio Cir. Ct. 250, 5 Ohio Cir. Dec. 658.

Oregon.— State *v.* Myers, 20 Oreg. 442, 26 Pac. 307; Thompson *v.* Multnomah County, 2 Oreg. 34.

Texas.— Allen *v.* Parker County, 23 Tex. Civ. App. 536, 57 S. W. 703.

Wisconsin.— Williams *v.* Giblin, 86 Wis. 147, 56 N. W. 645.

See 25 Cent. Dig. tit. "Highways," § 170.

Prima facie evidence of jurisdiction is afforded by a record stating jurisdictional facts (Trotter *v.* Barrett, 164 Ill. 262, 45 N. E. 149); and it seems that the order of the highway commissioners to lay out the highway is *prima facie* evidence of their jurisdiction (Cooper *v.* Bean, 5 Lans. (N. Y.) 318).

52. *Alabama.*— Barnett *v.* State, 15 Ala. 829; Talladega County Road, etc., Com'rs *v.* Thompson, 15 Ala. 134.

Illinois.— Perry *v.* Bozarth, 95 Ill. App. 566; North Henderson Highway Com'rs *v.* People, 2 Ill. App. 24, posting.

Iowa.— State *v.* Waterman, 79 Iowa 360, 44 N. W. 677; McBurney *v.* Graves, 66 Iowa 314, 23 N. W. 682; State *v.* Anderson, 39 Iowa 274.

Maine.— Larry *v.* Lunt, 37 Me. 69.

Michigan.— Nielson *v.* Wakefield, 43 Mich. 434, 5 N. W. 458 (proof of service); People *v.* Brockway Tp. Highway Com'rs, 40 Mich. 165.

Missouri.— Whitely *v.* Platte County, 73 Mo. 30, holding posting of petition must appear.

New Jersey.— State *v.* Shreeve, 15 N. J. L. 57.

Ohio.— Fravert *v.* Finfrock, 43 Ohio St. 335, 1 N. E. 875; Ferris *v.* Bramble, 5 Ohio St. 109; Reed *v.* Harlan, 2 Ohio Dec. (Reprint) 553, 3 West. L. Month. 632.

Pennsylvania.—Central R. Co.'s Appeal, 102 Pa. St. 38, service of notice.

See 25 Cent. Dig. tit. "Highways," § 171.

Presence of a landowner is presumed from notice. Searey *v.* Clay County, 176 Mo. 493, 75 S. W. 657.

It cannot be alleged, by way of collateral attack on the proceedings of a board of commissioners in opening a highway, that it will be seen from reading the board's record that no notice was given as provided by law, where the board has found that notice was given. Heagy *v.* Black, 90 Ind. 534.

53. Lowndes County Com'rs' Ct. *v.* Bowie, 34 Ala. 461.

54. McCollister *v.* Shuey, 24 Iowa 362.

Absence of affidavit of posting does not prove that notice was not posted. Carron *v.* Clark, 14 Mont. 301, 36 Pac. 178.

55. Carr *v.* Fayette County, 37 Iowa 608.

56. Crawford *v.* Elk County, 32 Kan. 555, 4 Pac. 1011.

57. Com. *v.* Coombs, 2 Mass. 489.

58. State *v.* Clyde, 130 Wis. 159, 109 N. W. 985 (although supervisors of two towns met together); Gillett *v.* McGonigal, 80 Wis. 158, 49 N. W. 814 (order void as laid out by committee of board instead of by board itself).

59. People *v.* Williams, 36 N. Y. 441; People *v.* Hynds, 30 N. Y. 470; Simmons *v.* Sines, 4 Abb. Dec. (N. Y.) 246, 4 Keyes 153 (holding that it cannot be presumed that there was not a third); Stewart *v.* Wallis, 30 Barb. (N. Y.) 344; People *v.* Seward Highway Com'rs, 27 Barb. (N. Y.) 94 [*affirmed* in 30 N. Y. 470]. But see Marble *v.* Whitney, 28 N. Y. 297, where the order, although made by only two commissioners, was held

and a power given to one officer, while the survey is incomplete, to sign for another is ineffectual.[60]

(F) *Conditional in Form.* Exactly to what extent an order establishing a highway may be made conditional does not clearly appear from the cases. Thus it has been held that the court or commissioners may in the exercise of a sound discretion impose as a condition that the expense of location should be borne by petitioners,[61] while, on the other hand, such a condition has been held void,[62] as has been also a provision requiring a town to tend a draw in a bridge and to keep lamps lighted thereon,[63] or attempting to bind the petitioner for the road to construct and maintain a fence to protect the owner through whose land the road will run.[64] But the imposition of unauthorized conditions does not necessarily render void the whole order laying out a road,[65] although an order conditional in form may not be final.[66]

(II) *Amendment Nunc Pro Tunc.* The record of proceedings may be amended *nunc pro tunc* if there be matter of record authorizing it,[67] and where the record is amended in a proper and legal manner it has the same force and effect as though originally made as amended,[68] and can no more be contradicted by parol than any other lawful record.[69] But amendment cannot be employed to alter or review what has been done judicially, but only as to ministerial acts.[70]

(III) *Record and Filing.* Recording a location may be necessary to complete the lay-out,[71] which record should show clearly the facts,[72] and should be made within the time designated by statute,[73] although it has been held that

valid, in the absence of any finding that the third commissioner did not meet and deliberate with the others.

60. Todd *v.* Todd, 3 Hun (N. Y.) 298, 5 Thomps. & C. 531. See also State *v.* James, 4 Wis. 408, holding that one supervisor cannot sign the name of another without his immediate assent and direction.

61. Brown *v.* Ellis, 26 Iowa 85 (although no time was fixed for complying with condition); Patridge *v.* Ballard, 2 Me. 50.

62. *In re* Brown, 51 N. H. 367; Dudley *v.* Cilley, 5 N. H. 558; Webb *v.* Albertson, 4 Barb. (N. Y.) 51.

63. Braintree *v.* Norfolk, 8 Cush. (Mass.) 546.

64. Engler *v.* Knoblaugh, 131 Mo. App. 481, 110 S. W. 16, holding that the order should include in the damages awarded to the owner the expense of erecting such fence.

65. Rich. *v.* Gow, 19 Ill. App. 81.

66. Linblom *v.* Ramsey, 75 Ill. 246.

67. Lowndes County Com'rs' Ct. *v.* Hearne, 59 Ala. 371; Brown *v.* Robertson, 123 Ill. 631, 15 N. E. 30; Du Page County *v.* Martin, 39 Ill. App. 298; *In re* Gardner, 41 Mo. App. 589. See also *In re* East Fallowfield Road, 2 Lanc. L. Rev. (Pa.) 160, amendment by filing affidavit of service of notice. But see *In re* Brown, 51 N. H. 367.

68. Du Page County *v.* Martin, 39 Ill. App. 298.

69. Du Page County *v.* Martin, 39 Ill. App. 298.

70. Hallock *v.* Woolsey, 23 Wend. (N. Y.) 328 [*following* Woolsey *v.* Tompkins, 23 Wend. (N. Y.) 324].

71. *Illinois.*— Highway Com'rs *v.* People, 61 Ill. App. 634; Breese *v.* Poole, 16 Ill. App. 551.

Maine.— Todd *v.* Rome, 2 Me. 55.

Minnesota.— Teick *v.* Carver County, 11 Minn. 292, in both counties where road lies.

Ohio.— King *v.* Kenny, 4 Ohio 79.

Tennessee.— Whitesides *v.* Earles, (Ch. App. 1901) 61 S. W. 1038.

United States.— Burns *v.* Multnomah R. Co., 15 Fed. 177, 8 Sawy. 543; U. S. *v.* Emery, 25 Fed. Cas. No. 15,052, 4 Cranch C. C. 270.

Canada.— *Ex p.* Weade, 8 N. Brunsw. 307. See 25 Cent. Dig. tit. "Highways," § 162.

But see Ford *v.* Whitaker, 1 Nott & M. (S. C.) 5.

Effect of loss of report.— The mere fact that, twelve years after a highway which has, to all appearances, been duly established, the report of the commissioners cannot be found among the papers in the county clerk's office, affords no ground for disputing the legal existence of the highway. State *v.* O'Laughlin, 29 Kan. 20. Where the original report is lost a copy may be used for filing. Frame *v.* Boyd, 35 N. J. L. 457. But see *In re* Howell's Mills State Road, 6 Whart. (Pa.) 352.

72. Orono *v.* Penobscot County, 30 Me. 302; Sumner *v.* Peebles, 5 Wash. 471, 32 Pac. 221, 1000; Basterach *v.* Atkinson, 7 N. Brunsw. 439.

73. Fenwick Hall Co. *v.* Old Saybrook, 69 Conn. 32, 36 Atl. 1068 (immediate recording held not necessary); Wright *v.* Middlefork Highway Com'rs, 145 Ill. 48, 33 N. E. 876.

Filing held ineffective as made too late see Highway Com'rs *v.* People, 61 Ill. App. 634 (after three years); Martin *v.* Stillwell, 50 N. J. L. 530, 14 Atl. 563; Wayne *v.* Caldwell, 1 S. D. 483, 47 N. W. 547, 36 Am. St. Rep. 750; Morris *v.* Edwards, 132 Wis. 91, 112 N. W. 248; Dolphin *v.* Pedley, 27 Wis. 469.

the requirement as to the time of filing is directory merely and does not go to the validity of the proceedings.[74]

(iv) *Equitable Relief; Injunction.*[75] Equity may enjoin opening a road under invalid proceedings;[76] but that no funds are available,[77] or that the road would damage a landowner considerably,[78] will not justify an injunction, and an injunction will not lie where the landowner's legal remedy,[79] as by appeal,[80] is adequate; nor will equity interfere to control the discretion of a board having jurisdiction,[81] or where the injunction proceeding is a collateral attack,[82] or to enjoin a theoretical wrong.[83] All matters relied on by plaintiff as ground for the equitable relief should be averred in the complaint.[84]

(v) *Review and Setting Aside.* In many cases it has been held that a statutory board having power to lay out a highway exhausts its authority by the lay-out and has no implied authority to review or reverse it.[85] Other cases,

74. People *v.* Vandewater, 83 N. Y. App. Div. 60, 82 N. Y. Suppl. 626; Hark *v.* Gladwell, 49 Wis. 172, 5 N. W. 323. But see Rider *v.* Stryker, 63 N. Y. 136.

The failure of a town clerk to record the surveyor's plat of the road with the road order, and its loss and non-production in evidence, does not render the order invalid or inadmissible in evidence. Banse *v.* Clark, 69 Minn. 53, 71 N. W. 819. But see People *v.* Scott, 70 N. Y. App. Div. 618, 75 N. Y. Suppl. 410.

75. Delay in payment of damages as ground for enjoining opening of road see Eminent Domain, 15 Cyc. 786.

76. *California.*— Curran *v.* Shattuck, 24 Cal. 427.

Illinois.— Frizell *v.* Rogers, 82 Ill. 109; Whittaker *v.* Gutheridge, 52 Ill. App. 460.

Indiana.— Hudson *v.* Voreis, 134 Ind. 642, 34 N. E. 503.

Missouri.— Monroe *v.* Crawford, 163 Mo. 178, 63 S. W. 373.

Texas.— See Smith *v.* Jarvis, 47 Tex. Civ. App. 185, 105 S. W. 1168.

See 25 Cent. Dig. tit. "Highways," § 165.

Right to open new road.—A perpetual injunction against opening a road under proceedings which have been taken does not prevent laying out a road at any future time over the same land whenever the proper steps are taken to acquire the right of way and the right has been secured. Curran *v.* Shattuck, 24 Cal. 427.

Where the proceedings are not entirely void an injunction will not be granted. McDonald *v.* Payne, 114 Ind. 359, 16 N. E. 795; Adams *v.* Harrington, 114 Ind. 66, 14 N. E. 603.

A board of county supervisors is not a proper party defendant in a proceeding to determine the validity of its action in establishing a highway. Everett *v.* Pottawattamie County, 93 Iowa 721, 61 N. W. 1062.

A grantee of a petitioner cannot enjoin the use of a road upon the ground of want of notice to his grantor. Graham *v.* Flynn, 21 Nebr. 229, 31 N. W. 742.

77. Throener *v.* Cuming County, 82 Nebr. 453, 118 N. W. 92.

78. Throener *v.* Cuming County, 82 Nebr. 453, 118 N. W. 92.

79. Leach *v.* Day, 27 Cal. 643; Lippitt *v.* Albany, 131 Ga. 629, 63 S. E. 33; Atlanta, etc., R. Co. *v.* Redwine, 123 Ga. 736, 51 S. E. 724; Gold *v.* Pittsburgh, etc., R. Co., 153 Ind. 232, 53 N. E. 285.

80. *Georgia.*— Hutchinson *v.* Lowndes County, 131 Ga. 637, 62 S. E. 1048.

Indiana.— Rassier *v.* Grimmer, 130 Ind. 219, 28 N. E. 866, 29 N. E. 918; Adams *v.* Harrington, 114 Ind. 66, 14 N. E. 603.

Iowa.— McCrory *v.* Griswold, 7 Iowa 248. See Mastelar *v.* Edgarton, 44 Iowa 495, possibility of appeal to board which has no chancery powers is no defense.

Missouri.— Chicago, etc., R. Co. *v.* Maddox, 92 Mo. 469, 4 S. W. 417.

Vermont.— Central Vermont R. Co. *v.* Royalton, 58 Vt. 234, 4 Atl. 868.

Wisconsin.— Olson *v.* Curran, 137 Wis. 380, 119 N. W. 101.

81. Gray *v.* Lott, 18 Ill. 251; Throener *v.* Cuming County, 82 Nebr. 453, 118 N. W. 92; Decker *v.* Menard County, (Tex. Civ. App. 1894) 25 S. W. 727.

82. Chicago, etc., R. Co. *v.* Sutton, 130 Ind. 405, 30 N. E. 291.

83. Newby *v.* Clay County Highway Com'rs, 21 Ill. App. 245.

84. Ryder *v.* Horsting, 130 Ind. 104, 29 N. E. 567, 16 L. R. A. 186 (holding that the complaint in an action to enjoin the opening of the road through plaintiff's land on the ground of want of jurisdiction in the road proceedings because plaintiff was not made a party must negative the fact that the occupant of the land was made a party); Boire *v.* Yamhill County, 53 Oreg. 36, 98 Pac. 520 (holding that the pleadings must be clear).

85. *Illinois.*— Farrelly *v.* Kane, 172 Ill. 415, 50 N. E. 118.

Indiana.— Robson *v.* Richey, 159 Ind. 660, 65 N. E. 1032; Badger *v.* Merry, 139 Ind. 631, 39 N. E. 309; Doctor *v.* Hartman, 74 Ind. 221.

Massachusetts.— Wood *v.* Milton, 197 Mass. 531, 84 N. E. 332 (holding that a vote to postpone indefinitely is equivalent to refusal, and town cannot act thereafter without a new lay-out); West Boston Bridge *v.* Middlesex County Com'rs, 10 Pick. 270.

New Jersey.— See State *v.* Schanck, 9 N. J. L. 107.

New York.— *In re* Mt. Morris Square, 2 Hill 14.

however, are to the contrary,[86] and it is held that so long as the order remains unexecuted the board has power to change it;[87] and that where a board of county commissioners rejects a report of viewers appointed by it to lay out and locate a public road such board may at the same session reconsider its action by which the report was rejected.[88]

(VI) *Operation and Effect*—(A) *Conclusiveness.* Where the proper tribunal has acted on a lay-out of a road as to matters within its jurisdiction its decision is conclusive[89] and *res judicata*[90] in other proceedings until vacated or declared void by some legal process or proceeding, only, however, as to matters within its jurisdiction,[91] directly in issue,[92] and actually adjudicated,[93] as a result of proceedings conducted according to the statutes authorizing them.[94]

(B) *Presumption of Regularity.* The action of an inferior tribunal having jurisdiction is presumed to be regular.[95] This is especially true after there has

Oregon.— Roe *v.* Union County, 19 Oreg. 315, 24 Pac. 235.

Pennsylvania.— *In re* Brown Tp. Road, 42 Leg. Int. 406.

See 25 Cent. Dig. tit. "Highways," § 163.

86. Thorpe *v.* Worcester County, 9 Gray (Mass.) 57; New Marlborough *v.* Berkshire County, 9 Metc. (Mass.) 423; *In re* Bucks County Road, 3 Whart. (Pa.) 105, holding that the court may quash an order issued by its clerk in recess.

87. Burkett *v.* San Joaquin County, 18 Cal. 702.

If commissioners of highways regard the damages assessed as too high they may revoke all proceedings had by a written order to that effect. People *v.* Highway Com'rs, 88 Ill. 141. See also Cutler *v.* Sours, 80 Ill. App. 618.

88. Higgins *v.* Curtis, 39 Kan. 283, 18 Pac. 207.

89. *Illinois.*— Farrelly *v.* Kane, 172 Ill. 415, 50 N. E. 118 (as to location); Gordon *v.* Wabash County Road Dist. No. 3 Highway Com'rs, 169 Ill. 510, 48 N. E. 451 (as to damages sustained).

Indiana.— Monroe County *v.* Conner, 155 Ind. 484, 58 N. E. 828 (as to regularity of election for building roads); Suits *v.* Murdock, 63 Ind. 73.

Missouri.— Searcy *v.* Clay County, 176 Mo. 493, 75 S. W. 657 (holding that a surveyor's error cannot be shown); Seafield *v.* Bohne, 169 Mo. 537, 69 S. W. 1051; State *v.* Schenkel, 129 Mo. App. 224, 108 S. W. 635.

New York.— Matter of Fenn, 128 N. Y. App. Div. 10, 112 N. Y. Suppl. 431, as to public necessity.

Oregon.— French-Glenn Live Stock Co. *v.* Harney County, 36 Oreg. 138, 58 Pac. 35.

Washington.— State *v.* Adams County Super. Ct., 29 Wash. 1, 69 Pac. 366.

See 25 Cent. Dig. tit. "Highways," § 166.

But see *In re* Strafford, 14 N. H. 30.

90. *Connecticut.*—Webb *v.* Rocky-Hill, 21 Conn. 468.

Delaware.— Wilson *v.* Cochran, 4 Harr. 88.

Iowa.— Hupert *v.* Anderson, 35 Iowa 578.

Maine.— Woodman *v.* Somerset County, 25 Me. 300.

Massachusetts.—Craigie *v.* Mellen, 6 Mass. 7.

New Hampshire.— Winship *v.* Enfield, 42 N. H. 197.

Pennsylvania.— Millcreek Tp. *v.* Reed, 29 Pa. St. 195.

The pleadings must set up the judgment as *res judicata*. Kinzer *v.* Brown, 170 Ind. 81, 83 N. E. 618.

91. People *v.* Allen, 37 N. Y. App. Div. 248, 55 N. Y. Suppl. 1057 [*affirmed* in 162 N. Y. 615, 57 N. E. 1122]; Grady *v.* Dundon, 30 Oreg. 333, 47 Pac. 915; Galveston, etc., R. Co. *v.* Baudat, 18 Tex. Civ. App. 595, 45 S. W. 939.

92. Speir *v.* Utrecht, 121 N. Y. 420, 24 N. E. 692.

93. Speir *v.* Utrecht, 121 N. Y. 420, 24 N. E. 692.

94. Jones *v.* Zink, 65 Mo. App. 409.

95. *Arkansas.*— Brumley *v.* State, 83 Ark. 236, 103 S. W. 615.

California.— Siskiyou County *v.* Gamlich, 110 Cal. 94, 42 Pac. 468; Los Angeles County *v.* San Jose Land, etc., Co., 96 Cal. 93, 30 Pac. 969, by statute.

Illinois.— Hankins *v.* Calloway, 88 Ill. 155; Morgan *v.* Green, 17 Ill. 395; Dumoss *v.* Francis, 15 Ill. 543; Willow Branch, etc., Highway Com'rs *v.* People, 69 Ill. App. 326.

Indiana.— Todd *v.* Crail, 167 Ind. 48, 77 N. E. 402; Heagy *v.* Black, 90 Ind. 534; Crossley *v.* O'Brien, 24 Ind. 325, 87 Am. Dec. 329.

Iowa.— Quinn *v.* Baage, 138 Iowa 426, 114 N. W. 205 (especially after lapse of time); Davenport Mut. Sav. Fund, etc., Assoc. *v.* Schmidt, 15 Iowa 213.

Kansas.— Willis *v.* Sproule, 15 Kan. 257.

Montana.— Carron *v.* Clark, 14 Mont. 301, 36 Pac. 178.

New Hampshire.— Proctor *v.* Andover, 42 N. H. 348.

New Jersey.— Conover *v.* Bird, 56 N. J. L. 228, 28 Atl. 428.

New York.— People *v.* Heddon, 32 Hun 299; Fowler *v.* Mott, 19 Barb. 204; Wildrick *v.* Hager, 10 N. Y. St. 764; Colden *v.* Thurbur, 2 Johns. 424.

Oregon.— French-Glenn Live Stock Co. *v.* Harney County, 36 Oreg. 138, 58 Pac. 35; Thompson *v.* Multnomah County, 2 Oreg. 34.

Texas.— Sneed *v.* Falls County, (Civ. App. 1897) 42 S. W. 121, holding that the face of the record of the commissioners' court need not affirmatively show a compliance with all the requirements.

been a user of the highway.[96] And the order is presumed as made on sufficient evidence,[97] and on a sufficient finding.[98]

(c) *Extrinsic Evidence to Sustain Record.* The record may usually be sustained by extrinsic evidence either in a direct or collateral proceeding.[99]

(d) *Refusal of Road as Bar to Subsequent Application.* The rejection of a petition for a road is no bar to another application for the same road,[1] although such new application is often excluded for a certain period by law,[2] such exclusion being operative, however, only where the second petition is for substantially the same highway,[3] and not precluding a subsequent petition when the proceedings were dismissed for mere informality or irregularity.[4]

(e) *Recitals of Jurisdiction.* The recitals of jurisdictional facts should conform to the statute,[5] a general finding that all legal prerequisites have been complied with being in some cases held sufficient.[6] A recital of notice [7] or a finding of other

Virginia.— White *v.* Coleman, 6 Gratt. 138.
See 25 Cent. Dig. tit. "Highways," § 169.

Any step required by law to be taken in the opening of a public road, not being a jurisdictional fact, will be presumed to have been taken unless the contrary affirmatively appears. Sutherland *v.* Holmes, 78 Mo. 399.

But where jurisdiction does not appear there is no presumption of regularity. State *v.* Chicago, etc., R. Co., 50 Iowa 692; Winchester *v.* Cecil County, 78 Md. 266, 27 Atl. 1075; Peed *v.* Barker, 61 Mo. App. 556; Sneed *v.* Falls County, 91 Tex. 168, 41 S. W. 481.

96. *Colorado.*— Weld County *v.* Ingram, 31 Colo. 319, 73 Pac. 37.

Iowa.— Taeger *v.* Riepe, 90 Iowa 484, 57 N. W. 1125; Crismon *v.* Deck, 84 Iowa 344, 51 N. W. 55, payment of costs presumed.

Kentucky.— Com. *v.* Logan, 5 Litt. 286.

Maine.— Brock *v.* Chase, 39 Me. 300; Gibbs *v.* Larrabee, 37 Me. 506; Larry *v.* Lunt, 37 Me. 69; Harlow *v.* Pike, 3 Me. 438.

Massachusetts.— Drury *v.* Worcester, 21 Pick. 44.

New Hampshire.— Webster *v.* Boscawen, 67 N. H. 111, 29 Atl. 670; Plummer *v.* Ossipee, 59 N. H. 55; Hayward *v.* Bath, 38 N. H. 179; State *v.* Alstead, 18 N. H. 59.

New Jersey.— Tainter *v.* Morristown, 19 N. J. Eq. 46.

Virginia.— Clarke *v.* Mayo, 4 Call 374.
See 25 Cent. Dig. tit. "Highways," § 169.

Notice presumed see Larry *v.* Lunt, 37 Me. 69; Harlow *v.* Pike, 3 Me. 438.

User as creating estoppel to assert defects in proceedings see *infra*, II, C, 5, j, (II).

User under defective proceedings as creating highway by prescription see *supra*, II, B, 2, e, (VI).

97. *Kansas.*— Howell *v.* Redlon, 44 Kan. 558, 24 Pac. 1109.

New Hampshire.— Robbins *v.* Bridgewater, 6 N. H. 524.

Ohio.— Miller *v.* Hamilton County, 9 Ohio Dec. (Reprint) 312, 12 Cinc. L. Bul. 152.

Oregon.— State *v.* Myers, 20 Oreg. 442, 26 Pac. 307.

Vermont.— Kidder *v.* Jennison, 21 Vt. 108.
See 25 Cent. Dig. tit. "Highways," § 170.

98. Humboldt County *v.* Dinsmore, 75 Cal. 604, 17 Pac. 710; New Jersey Southern R. Co. *v.* Chandler, 65 N. J. L. 173, 46 Atl. 732.

99. Todd *v.* Crail, 167 Ind. 48, 77 N. E. 402; Oliphant *v.* Atchison County, 18 Kan. 386; Banse *v.* Clark, 69 Minn. 53, 71 N. W. 819; Harrington *v.* People, 6 Barb. (N. Y.) 607.

But the declaration of a commissioner of highways at the time of laying out a road that he intended to lay it out four rods wide is not admissible. Basterach *v.* Atkinson, 7 N. Brunsw. 439.

1. *Illinois.*— Smith *v.* Hudson Tp. Highway Com'rs, 150 Ill. 385, 36 N. E. 967.

Indiana.— Washington Ice Co. *v.* Lay, 103 Ind. 48, 2 N. E. 222.

Iowa.— Pagels *v.* Oaks, 64 Iowa 198, 19 N. W. 905, where the application had been dismissed for non-payment of damages.

Nebraska.— Throener *v* Cuming County, 82 Nebr. 453, 118 N. W. 92.

New York.— Bruyn *v.* Graham, 1 Wend. 370.

North Carolina.— Warlick *v.* Lowman, 111 N. C. 532, 16 S. E. 336.

Oregon.— Kamer *v.* Clatsop County, 6 Oreg. 238.

Vermont.— Ferguson *v.* Sheffield, 52 Vt. 77.
See 25 Cent. Dig. tit. "Highways," § 167.

Contra.— Terry *v.* Waterbury, 35 Conn. 526, notwithstanding passage of statute meanwhile providing that petitioners might give bond.

2. Cole *v.* Cumberland County, 78 Me. 532, 7 Atl. 397; Waterford *v.* Oxford County, 59 Me. 450; People *v.* Springwells Tp. Board, 13 Mich. 462; Whitcher *v.* Landaff, 48 N. H. 153; State *v.* Potts, 4 N. J. L. 401; *In re* Highway, 3 N. J. L. 665.

3. Waterford *v.* Oxford County, 59 Me. 450, holding that a town way is not substantially the same thing as a highway.

4. *In re* Franconia Tp. Road, 78 Pa. St. 316 (view irregular); *In re* Towamencin Road, 10 Pa. St. 195; *In re* West Manchester Tp. Road, 10 Pa. Co. Ct. 429; *In re* Second St., 1 Northumb. Co. Leg. N. 115.

5. Chicago, etc., R. Co. *v.* Young, 96 Mo. 39, 8 S. W. 776; Daugherty *v.* Brown, 91 Mo. 26, 3 S. W. 210.

6. Burnley *v.* State, 83 Ark. 236, 103 S. W. 615; State *v.* Minneapolis, etc., R. Co., 88 Iowa 689, 56 N. W. 400; Cassidy *v.* Smith, 13 Minn. 129.

7. Cassidy *v.* Smith, 13 Minn. 129; Lingo

jurisdictional facts[8] is generally presumed to be true when attacked in a collateral proceeding.

(F) *Collateral Attack.* A judgment of an inferior tribunal having jurisdiction is generally binding against collateral attack;[9] but, such a judgment is not bind-

v. Burford, 112 Mo. 149, 20 S. W. 459 [*affirming* (1892) 18 S. W. 1081]; State *v.* Lewis, 22 N. J. L. 564; State *v.* Harland, 74 Wis. 11, 41 N. W. 1060.

Recital of notice may be attacked directly. Williams *v.* Routt County, 37 Colo. 55, 84 Pac. 1109.

A memorandum that notice was published in a particular manner is not sufficient evidence that no other publication was made. Molyneux *v.* Grimes, 78 Kan. 830, 98 Pac. 278.

Statements of notice held insufficient see *In re* Gardner, 41 Mo. App. 589; Cameron *v.* Wasco County, 27 Oreg. 318, 41 Pac. 160; State *v.* Officer, 4 Oreg. 180.

The particulars of notice should be recited. Molett *v.* Keenan, 22 Ala. 484; Fravert *v.* Finfrock, 43 Ohio St. 335, 1 N. E. 875.

8. *Indiana.*— Todd *v.* Crail, 167 Ind. 48, 77 N. E. 402; Hobbs *v.* Tipton County, 116 Ind. 376, 19 N. E. 186; Heagy *v.* Black, 90 Ind. 534; Rominger *v.* Simmons, 88 Ind. 453; Breitweiser *v.* Fuhrman, 88 Ind. 28.

Iowa.— State *v.* Prine, 25 Iowa 231.

Maine.— Goodwin *v.* Hallowell, 12 Me. 271.

Minnesota.— Bruggerman *v.* True, 25 Minn. 123.

New Jersey.— State *v.* Schanck, 9 N. J. L. 107.

South Dakota.— Yankton County *v.* Klemisch, 11 S. D. 170, 76 N. W. 312.

See 25 Cent. Dig. tit. "Highways," § 172.

Collateral attack generally see *infra*, II, C, 5, i, (VI), (F).

9. *Arkansas.*— Brumley *v.* State, 83 Ark. 236, 103 S. W. 615, recitation of notice "as required by law" is sufficient.

California.— San Mateo County *v.* Coburn, 130 Cal. 631, 63 Pac. 78, 621; Siskiyou County *v.* Gamlich, 110 Cal. 94, 42 Pac. 468 (attack on ground of insufficient evidence); San Luis Obispo County *v.* Simas, 1 Cal. App. 175, 81 Pac. 972 (attack on intermediate orders and proceedings).

Colorado.— Williams *v.* Routt County, 37 Colo. 55, 84 Pac. 1109.

Connecticut.—Fenwick Hall Co. *v.* Old Saybrook, 69 Conn. 32, 36 Atl. 1068.

Georgia.— Nichols *v.* Sutton, 22 Ga. 369.

Idaho.— Canyon County *v.* Toole, 9 Ida. 561, 75 Pac. 609.

Illinois.— Oswego *v.* Kellogg, 99 Ill. 590; Hankins *v.* Calloway, 88 Ill. 155; Wells *v.* Hicks, 27 Ill. 343; Looby *v.* Austin, 19 Ill. App. 325.

Indiana.— Todd *v.* Crail, 167 Ind. 48, 77 N. E. 402; Helmes *v.* Bell, 155 Ind. 512, 58 N. E. 707; Layman *v.* Hughes, 152 Ind. 484, 51 N. E. 1058; Monroe County *v.* Harrell, 147 Ind. 500, 46 N. E. 124; Bowen *v.* Hester, 143 Ind. 511, 41 N. E. 330; Evans *v.* West, 138 Ind. 621, 38 N. E. 65; Adams *v.* Harrington, 114 Ind. 66, 14 N. E. 603; Ely *v.* Morgan County, 112 Ind. 361, 14 N. E. 236; Burton *v.* State, 111 Ind. 600, 12 N. E. 486; Strieb *v.* Cox, 111 Ind. 299, 12 N. E. 481; McIntyre *v.* Marine, 93 Ind. 93 (although owner's name is not stated); Heagy *v.* Black, 90 Ind. 534; Million *v.* Carrol County, 89 Ind. 5; Miller *v.* Porter, 71 Ind. 521 (owners described by initial letters and as the "Bryant heirs"); Phillips *v.* Hutchinson, 34 Ind. App. 486, 73 N. E. 159.

Iowa.—McNamara *v.* Brehm, 112 Iowa 576, 84 N. W. 676; Larson *v.* Fitzgerald, 87 Iowa 402, 54 N. W. 441 (holding, under Code (1851), which provided for the appointment by the court of a commissioner to examine into the expediency of a proposed road, and declared that the court should fix the time for the commencement of such examination, and that, if the commissioner reported against the road, "no further proceedings shall be had thereon," that the omission to fix a time for the commencement of the examination did not invalidate a proceeding for the establishment of a road); Knowles *v.* Muscatine, 20 Iowa 248; Davenport Mut. Sav. Fund, etc., Assoc. *v.* Schmidt, 15 Iowa 213; Smiths *v.* Dubuque County, 1 Iowa 492.

Kansas.— Molyneux *v.* Grimes, 78 Kan. 830, 98 Pac. 278.

Kentucky.— Ditto *v.* Com., 2 Bibb 17; Com. *v.* Ditto, Hard. 442.

Louisiana.— Fuselier *v.* Iberia Parish Police Jury, 109 La. 551, 33 So. 597, unless in clear case of abuse.

Maine.— Cushing *v.* Webb, 102 Me. 157, 66 Atl. 719; Cyr *v.* Dufour, 62 Me. 20; State *v.* Madison, 33 Me. 267; Small *v.* Pennell, 31 Me. 267; Longfellow *v.* Quimby, 29 Me. 196, 48 Am. Dec. 525; Baker *v.* Runnels, 12 Me. 235.

Maryland.— Tyson *v.* Baltimore County, 28 Md. 510.

Massachusetts.— Gilkey *v.* Watertown, 141 Mass. 317, 5 N. E. 152; Durant *v.* Lawrence, 1 Allen 125.

Michigan.— Campau *v.* Le Blanc, 127 Mich. 179, 86 N. W. 535; People *v.* La Grange Tp. Board, 2 Mich. 187.

Mississippi.— Illinois Cent. R. Co. *v.* Swalm, 83 Miss. 631, 36 So. 147.

Missouri.— Baubie *v.* Ossman, 142 Mo. 499, 44 S. W. 338; Mitchell *v.* Kansas City, etc., R. Co., 138 Mo. 326, 39 S. W. 790; Bruce *v.* Saline County, 26 Mo. 262; Walker *v.* Likens, 24 Mo. 298; State *v.* Miller, 110 Mo. App. 542, 85 S. W. 912.

New Hampshire.— Bryant *v.* Tamworth, 68 N. H. 483, 39 Atl. 431; Spaulding *v.* Groton, 68 N. H. 77, 44 Atl. 88; Dana *v.* Craddock, 66 N. H. 593, 32 Atl. 757 (appointment of commissioners); State *v.* Weare, 38 N. H. 314; State *v.* Rye, 35 N. H. 368; State *v.* Canterbury, 28 N. H. 195.

New Jersey.— Seabright *v.* New Jersey Cent. R. Co., 73 N. J. L. 625, 64 Atl. 131;

ing, even as against an attack in a collateral proceeding, if the court did not have jurisdiction.[10]

j. Defects in Proceedings — (i) *In General.* Local statutes govern questions as to what are defects in proceedings,[11] and who may object to them;[12] and exceptions taken in the course of the proceedings are governed by local rules of practice.[13]

Humphreys *v.* Woodstown, 48 N. J. L. 588, 7 Atl. 301; Niel *v.* Car, 1 N. J. L. J. 23.

New York.— Dederer *v.* Voorhies, 81 N. Y. 153; Ham *v.* Silvernail, 7 Hun 33; Cooper *v.* Bean, 5 Lans. 318; *In re* Emmons Ave., 1 N. Y. Suppl. 829 [*affirmed* in 113 N. Y. 624, 20 N. E. 877]; People *v.* Collins, 19 Wend. 56; People *v.* Kings County, 7 Wend. 530; People *v.* Collins, 7 Johns. 549, where an alternative mandamus had been directed to a town clerk, commanding him to record the survey of a road or show cause; and the clerk returned, *inter alia*, that he did not record the survey because the commissioners had not taken the oath of office and filed a certificate of the oath with the clerk, according to law, and it was held that the return was insufficient and a peremptory mandamus was awarded.

North Carolina.— State *v.* Yoder, 132 N. C. 1111, 44 S. E. 689; State *v.* Joyce, 121 N. C. 610, 28 S. E. 366.

Oregon.— Bewley *v.* Graves, 17 Oreg. 274, 20 Pac. 322.

Pennsylvania.— Crescent Tp. *v.* Pittsburg, etc., R. Co., 210 Pa. St. 334, 59 Atl. 1103; Fowler *v.* Jenkins, 28 Pa. St. 176; Smith *v.* Lebanon, 8 Pa. Super. Ct. 481.

South Carolina.— State *v.* Kendall, 54 S. C. 192, 32 S. E. 300.

South Dakota.— Yankton County *v.* Klemisch, 11 S. D. 170, 76 N. W. 312, description sufficiently definite.

Tennessee.— Gilson *v.* State, 5 Lea 161.

Texas.— Vogt *v.* Bexar County, 16 Tex. Civ. App. 567, 42 S. W. 127 (since right of appeal exists); Sneed *v.* Falls County, (Civ. App. 1897) 42 S. W. 121; Kelley *v.* State, 46 Tex. Cr. 23, 80 S. W. 382; Crouch *v.* State, 39 Tex. Cr. 145, 45 S. W. 578.

Vermont.— Fitch *v.* Flanders, 27 Vt. 608; State *v.* Vernon, 25 Vt. 244.

Washington.— State *v.* Pierce County Super. Ct., 47 Wash. 11, 91 Pac. 241, on ground of insufficient number on petition.

Wisconsin.—Blair *v.* Milwaukee Light, etc., Co., 110 Wis. 64, 85 N. W. 675.

See 25 Cent. Dig. tit. "Highways," § 168.

Evidence of qualifications.—When attacked collaterally, the fact that petitioners are qualified householders or freeholders may be shown by testimony *aliunde* the record; documentary evidence is not indispensable. Oliphant *v.* Atchison County, 18 Kan. 386; Austin *v.* Allen, 6 Wis. 134, holding also that peaceable possession under claim of title is *prima facie* evidence of seizin in fee. But when no such testimony is offered, the party who produces the record and rests upon it alone makes out a *prima facie* case that the proceedings were void. Oliphant *v.* Atchison County Com'rs, *supra*.

10. *Kansas.*— Howard *v.* Schmidt, 70 Kan. 640, 79 Pac. 142, recital of filing of claim for damages is open to contradiction.

Maine.— Small *v.* Pennell, 31 Me. 267.

Missouri.— Navin *v.* Martin, (App. 1907) 102 S. W. 61; Mulligan *v.* Martin, 125 Mo. App. 630, 102 S. W. 59.

Nebraska.— Peterson *v.* Fisher, 71 Nebr. 238, 98 N. W. 660.

New York.— Beardslee *v.* Dolge, 143 N. Y. 160, 38 N. E. 205, 42 Am. St. Rep. 707, false statement of jurisdiction may be collaterally attacked.

See 25 Cent. Dig. tit. "Highways," § 168.

11. **Defects held to be fatal** see La Barre *v.* Bent, 154 Mich. 520, 118 N. W. 6 (defective service); State *v.* Stout, 33 N. J. L. 42 (applicant induced to sign by promise of damages); *In re* Reserve Tp. Road, 2 Grant (Pa.) 204 (confirmation of invalid proceedings *nunc pro tunc*); *In re* Rush Tp. Road, 2 Leg. Rec. (Pa.) 193 (error apparent on face of the record).

Defects held not to be fatal see Howard *v.* Schmidt, 70 Kan. 640, 79 Pac. 142 (although in places described as a private road); Hentzler *v.* Bradbury, 5 Kan. App. 1, 47 Pac. 330 (mere irregularity); Coomb's Appeal, 68 Me. 484 (landowner's agreement to claim no damages); *In re* Vassalborough, 19 Me. 338 (that damages be paid by those interested in establishing the road); Anderson *v.* San Francisco, 92 Minn. 57, 99 N. W. 420 (merely that town had an indebtedness without evidence of expense of road, financial condition of town, etc.); Warren *v.* Gibson, 40 Mo. App. 469 (trivial — contrary to fact); Vanderbeck *v.* Blauvelt, 34 N. J. L. 261 (formal error); *In re* Union Tp. Road, 29 Pa. Super. Ct. 573 (as termini somewhat indefinite); *In re* Towamencin Road, 23 Pa. Co. Ct. 113, 15 Montg. Co. Rep. 194 (failure to file copy of notice with the record).

12. Ludlam *v.* Swain, 73 N. J. L. 162, 62 Atl. 192, taxpayer by statute.

Party held not entitled to object see *In re* Cornplanter Tp. Road, 26 Pa. Super. Ct. 20 (by landowner, although statute as to notice to supervisors not literally complied with); Allen *v.* Parker County, 23 Tex. Civ. App. 536, 57 S. W. 703 (only interest as resident in neighborhood); Pesant *v.* St. Leonard Parish, 7 Quebec Pr. 220.

13. *Indiana.*— Gifford *v.* Baker, 158 Ind. 339, 62 N. E. 690, objection to form of notice cannot be taken after action by board.

Maine.— *In re* Conant, 102 Me. 477, 67 Atl. 564, raised when report of committee offered for acceptance.

Mississippi.— Evans *v.* Sharkey County, 89 Miss. 302, 42 So. 173, to review matters of law arising on the face of the proceedings.

Pennsylvania.— *In re* Greene Tp., etc., Road, 21 Pa. Super. Ct. 418, no exception

Questions relating to appeals in highway proceedings are discussed elsewhere in this article.[14]

(II) *WAIVER AND ESTOPPEL* — (A) *In General.* Objections to a lay-out of a road may be waived[15] by failure to make objections,[16] or delay in making them,[17] or by consenting to the irregularity.[18]

(B) *Applying For and Accepting Damages.* Application for[19] and acceptance

to location if referred to in petition and report.

Texas.— Howe *v.* Rose, 35 Tex. Civ. App. 328, 80 S. W. 1019, proposal to remit all damages if road located differently from report of jury treated as an objection.

See 25 Cent. Dig. tit. "Highways," § 173.

14. See *infra*, II, C, 5, k, (I).

15. Campau *v.* Le Blanc, 127 Mich. 179, 86 N. W. 535, 8 Detroit Leg. N. 273 (appeal to township board waives previous irregularities of highway commissioner); Nye *v.* Clark, 55 Mich. 599, 22 N. W. 57 (by petitioning and fencing); State *v.* Richmond, 26 N. H. 232; Woodworth *v.* Spirit Mound Tp., 10 S. D. 504, 74 N. W. 443 (only by parties interested, however).

A general appearance operates as a waiver of service and jurisdiction of the person. Hanson *v.* Cloud County, (Kan. App. 1898) 55 Pac. 468; Hurst *v.* Martinsburg, 80 Minn. 40, 82 N. W. 1099 (one appearing cannot object that other owners were not served with notice); Issenhuth *v.* Baum, 11 S. D. 223, 76 N. W. 928. See, however, McKee Highway Com'rs *v.* Smith, 217 Ill. 250, 75 N. E. 396, no waiver by general appearance after motion to dismiss was overruled. *Compare In re* Patten, 16 N. H. 277.

Acquiescence in the lay-out may work an estoppel to object thereto. Freetown *v.* Bristol County, 9 Pick. (Mass.) 46 (by inaction during expenditure); State *v.* Boscawen, 32 N. H. 331 (for twenty years); *In re* Woolsey, 95 N. Y. 135; Roller *v.* Kirby, 1 Ohio Dec. (Reprint) 76, 1 West. L. J. 550; McMurtrie *v.* Stewart, 21 Pa. St. 322 (seven years' use); Felch *v.* Gilman, 22 Vt. 38; State *v.* Wertzel, 62 Wis. 184, 22 N. W. 150.

A grantee of one estopped is himself barred. Miller *v.* Schenck, 78 Iowa 372, 43 N. W. 225; Gurnsey *v.* Edwards, 26 N. H. 224.

A town may be estopped as an individual would be. Ives *v.* East Haven, 48 Conn. 272; Freetown *v.* Bristol County, 9 Pick. (Mass.) 46; State *v.* Boscawen, 32 N. H. 331. See Damp *v.* Dane, 29 Wis. 419.

16. Humboldt County *v.* Dinsmore, 75 Cal. 604, 17 Pac. 710 (by appearing without contest); Stronsky *v.* Hickman, 116 Iowa 651, 88 N. W. 825 (by failure to object after notice); Seafield *v.* Bohne, 169 Mo. 537, 69 S. W. 1051 (by failure to file exceptions); Huntress *v.* Effingham, 17 N. H. 584.

Estoppel held not to arise see Roehrborn *v.* Schmidt, 16 Wis. 519, by presence and silence.

17. Nobleboro *v.* Lincoln County, 68 Me. 548 (after judgment); Carpenter's Petition, 67 N. H. 574, 32 Atl. 775; *In re* Kennett, 24 N. H. 139; People *v.* Mills, 109 N. Y. 69, 15 N. E. 886 (not first on appeal); Marble *v.* Whitney, 28 N. Y. 297; Vondron *v.* Cranberry Tp., 8 Ohio S. & C. Pl. Dec. 227, 6 Ohio N. P. 534 (by failure to object to location at proceedings before commissioners). See *In re* Patten, 16 N. H. 277.

Objection must be made before reference. White *v.* Landaff, 35 N. H. 128; Stevens *v.* Goffstown, 21 N. H. 454.

Estoppel held not to arise see Underwood *v.* Bailey, 56 N. H. 187; Damp *v.* Dane, 29 Wis. 419, by failure to object before justice who could not inquire into regularity of proceedings.

18. Miller *v.* Schenck, 78 Iowa 372, 43 N. W. 225 (one who had dedicated land for street is estopped); Keeler *v.* Lauer, 73 Kan. 388, 85 Pac. 541; Young *v.* Milan, 73 N. H. 552, 64 Atl. 16 (expressions of satisfaction); Patterson *v.* Hill County, 43 Tex. Civ. App. 546, 95 S. W. 39 (by agreement to donate land); McCown *v.* Hill, (Tex. Civ. App. 1903) 73 S. W. 850 (by consent to route as reported). See, however, Pagel *v.* Fergus County, 17 Mont. 586, 44 Pac. 86 (consent to private road does not admit public road); Scott *v.* State, 1 Sneed (Tenn.) 629 (no estoppel by activity in having road laid out and subsequently buying land).

Petitioning for a road is no waiver of irregularities in the lay-out (Chase *v.* Cochran, 102 Me. 431, 67 Atl. 320; La Barre *v.* Bent, 154 Mich. 520, 118 N. W. 6, petitioner for highway, worked on it, and was paid therefor; Hoy *v.* Hubbell, 125 N. Y. App. Div. 60, 109 N. Y. Suppl. 301. See Clarke *v.* Mayo, 4 Call (Va.) 374), unless joined with a release of damages (Trickey *v.* Schlader, 52 Ill. 78; Warfield *v.* Hohman, 128 Ill. App. 243); but a petition to change a road may estop petitioner from objecting to the road as laid out (Kelley *v.* State, 46 Tex. Cr. 23, 80 S. W. 382).

Consent of legislature to laying out highway over state lands see EMINENT DOMAIN, 15 Cyc. 611.

Necessity of consent of landowner in exceptional cases see EMINENT DOMAIN, 15 Cyc. 602 *et seq.*

19. *Kansas.*—Ogden *v.* Stokes, 25 Kan. 517.

Massachusetts.— Pitkin *v.* Springfield, 112 Mass. 509.

Nebraska.— Hoye *v.* Diehls, 78 Nebr. 77, 110 N. W. 714 (indefinite description); Davis *v.* Boone County, 28 Nebr. 837, 45 N. W. 249.

New York.— Lansing *v.* Caswell, 4 Paige 519.

Pennsylvania.— See *In re* Appleby Manor Road, 1 Grant 443.

Texas.— Allen *v.* Parker County, 23 Tex. Civ. App. 536, 57 S. W. 703, where irregularities not fatal to jurisdiction and plaintiff claimed damages.

See 25 Cent. Dig. tit. "Highways," § 175.

of [20] damages estop landowners to contest the validity of the lay-out of a highway.

(III) *CURATIVE STATUTES.* Statutes are often passed to cure defects in road proceedings,[21] and they are constitutional.[22]

k. Review — (I) *APPEAL AND ERROR* — (A) *Right to Appeal* — (1) IN GENERAL. As highway proceedings are not according to the course of the common law, they are generally considered not reviewable by writ of error;[23] and, in regard to appeals, the general rule that the right to appeal exists only when expressly conferred by constitutional or statutory provision[24] is applicable.[25] Under the statutes of many states, however, the right of appealing to another board or specified court exists,[26] some of the statutes conferring the right but limiting it

Estoppel held not to arise see Smith *v.* Gorrell, 81 Iowa 218, 46 N. W. 992, by filing conditional claim for damages, which claim was abandoned.

20. *Illinois.*— Hartshorn *v.* Potroff, 89 Ill. 509; Town *v.* Blackberry, 29 Ill. 137.

Michigan.— Prescott *v.* Patterson, 49 Mich. 622, 14 N. W. 571.

Nebraska.— O'Dea *v.* State, 16 Nebr. 241, 20 N. W. 299.

Pennsylvania.— *In re* Chartiers Tp. Road, 34 Pa. St. 413.

Wisconsin.— Moore *v.* Roberts, 64 Wis. 538, 25 N. W. 564; Schatz *v.* Pfeil, 56 Wis. 429, 14 N. W. 628; State *v.* Langer, 29 Wis. 68; Karber *v.* Nellis, 22 Wis. 215.

See 25 Cent. Dig. tit. "Highways," § 175.

See, however, Patterson *v.* Munyan, 93 Cal. 128, 29 Pac. 250.

21. Adle *v.* Sherwood, 3 Whart. (Pa.) 481.

Applicability.— Curative statutes held applicable see Madison *v.* County Com'rs, 34 Me. 592; New York, etc., R. Co. *v.* Boston, 127 Mass. 229 (by reference to a street as existing); State *v.* Bruggerman, 31 Minn. 493, 18 N. W. 454. Curative statutes held inapplicable see Thatcher *v.* Crisman, 6 Colo. App. 49, 39 Pac. 887; Ilwaco *v.* Ilwaco R., etc., Co., 17 Wash. 652, 50 Pac. 572 (where streets were not actually platted); Burns *v.* Multnomah R. Co., 15 Fed. 177, 8 Sawy. 543.

Roads which had ceased to exist as such held not revived by curative statutes see Hunter *v.* Chicago, etc., R. Co., 99 Wis. 613, 75 N. W. 977; Williams *v.* Giblin, 86 Wis. 147, 56 N. W. 645.

Want of jurisdiction held not cured by statutes see State *v.* Auchard, 22 Mont. 14, 55 Pac. 361; Grady *v.* Dundon, 30 Oreg. 333, 47 Pac. 915.

Retrospectiveness.— Statutes held retroactive see Simmons *v.* Cornell, 1 R. I. 519; Tomlinson *v.* Wallace, 16 Wis. 224. Statutes held prospective see State *v.* Atwood, 11 Wis. 422.

Irregularities in lay-out held cured see Canoe Creek *v.* McEniry, 23 Ill. App. 227; Louisville, etc., R. Co. *v.* Com., 104 Ky. 35, 46 S. W. 207, 20 Ky. L. Rep. 371; Parker *v.* Van Houten, 7 Wend. (N. Y.) 145.

22. Johnson *v.* Wells County, 107 Ind. 15, 8 N. E. 1; Fair *v.* Buss, 117 Iowa 164, 90 N. W. 527; Bennett *v.* Fisher, 26 Iowa 497; O'Brian *v.* Baltimore County Com'rs, 51 Md. 15 (not void as a special law); Com. *v.* Reiter, 78 Pa. St. 161.

23. Windsor *v.* Field, 1 Conn. 279; *In re* Banks, 29 Me. 238; Greenland *v.* Harford County, 68 Md. 59, 11 Atl. 581; Savage Mfg. Co. *v.* Owings, 3 Gill (Md.) 497; Dorchester *v.* Wentworth, 31 N. H. 451.

24. See APPEAL AND ERROR, 2 Cyc. 517, 519.

25. Webster *v.* Cockey, 9 Gill (Md.) 92; Savage Mfg. Co. *v.* Owings, 3 Gill (Md.) 497; *In re* Chestnut St., 86 Pa. St. 88; State *v.* Wallman, 110 Wis. 312, 85 N. W. 975.

The rule should be carefully applied, and a statute which is not wholly silent as to the right of appeal should be liberally construed in favor of it. Cook *v.* Vickers, 141 N. C. 101, 53 S. E. 740.

Applicability of general statutes.—Although the highway statutes of some states are silent as to appeals, the right is sometimes held to exist under general statutes, such as those giving generally the right to appeal from decisions of commissioners. Kirsch *v.* Braun, 153 Ind. 247, 53 N. E. 1082. However, a statute allowing an appeal where a claim against a county is disallowed by the county commissioners does not authorize an appeal from a decision of the commissioners locating a highway and assessing the damages therefor, as such assessment does not create a claim against the county (Koenig *v.* Winona County, 10 Minn. 238); and where proceedings are instituted for the taking of land for a public road by private citizens, and not by the county, the road becomes a highway of the commonwealth, which the township wherein it is located is bound to keep in repair, and over which the county has no ownership or control; and in such case no appeal lies from the award of the viewers to the court of common pleas (Lamoreux *v.* Luzerne County, 116 Pa. St. 195, 9 Atl. 274).

26. *Maine.*— Cole *v.* Cumberland County, 78 Me. 532, 7 Atl. 397; Byron's Appeal, 57 Me. 340; Orrington *v.* Penobscot County, 51 Me. 570.

Michigan.— Brown *v.* Greenfield Tp. Bd., 92 Mich. 294, 52 N. W. 614.

New York.— People *v.* Hildreth, 126 N. Y. 360, 27 N. E. 558 [*affirming* 1 Silv. Sup. 358, 5 N. Y. Suppl. 308]; People *v.* Temple, 27 Hun 128. But see Matter of Bowery Extension, 12 How. Pr. 97.

North Carolina.— Cook *v.* Vickers, 141 N. C. 101, 53 S. E. 740; Ashcraft *v.* Lee, 81 N. C. 135. See also Gatling *v.* Liverman, 23

to certain matters, such as an award of damages,[27] or other particular matters.[28] It is no objection to the validity of statutes relating to highway proceedings that they make no provision whatever for appeals.[29]

(2) Persons Entitled to Appeal. Under most statutes, in order to entitle one to appeal or have the decision of the highway board reviewed by writ of error, he must be interested in, or aggrieved by, the decision.[30] This rule does not confine the right to the petitioners for the road,[31] but extends it so as to include owners of land on and over which the road will pass,[32] as well as boards or com-

N. C. 63, holding that under early statutes the right was somewhat limited.

Tennessee.—Beard *v.* Campbell County Justices, 3 Head 97.

Texas.— Galveston, etc., R. Co. *v.* Baudat, 18 Tex. Civ. App. 595, 45 S. W. 939.

Wisconsin.— State *v.* Goldstucker, 40 Wis. 124 [*followed* in Brock *v.* Hishen, 40 Wis. 674]. But see State *v.* Wallman, 110 Wis. 312, 85 N. W. 975.

See 25 Cent. Dig. tit. "Highways," § 177. And see the statutes of the several states.

In Pennsylvania there was formerly no appeal from the court of quarter sessions (*In re* Roaring Brook Tp. Road, (1891) 21 Atl. 412; *In re* Chestnut St., 86 Pa. St. 84; *In re* Chartiers Tp. Road, 1 Mona. 365; *In re* Allegheny City State Road, 1 Pittsb. 67), but the right is now given by statute (Stauffer *v.* Lower Swatara Tp., 8 Pa. Dist. 104, 22 Pa. Co. Ct. 151).

Prospective operation of statute.—A statute giving to landowners the right of appeal from decisions of selectmen laying out highways will not be construed as extending to proceedings pending at the time of its enactment unless such an intent of the legislature is clearly manifested. Boston, etc., R. Co. *v.* Cilley, 44 N. H. 578.

Successive appeals, or appeals from the court appealed to, are authorized by some statutes (see Ashcraft *v.* Lee, 81 N. C. 135, 79 N. C. 34), but, in the absence of such statutory authorization, no appeal lies from the decision of the court to which an appeal is first taken (Marion County *v.* Harper, 44 Ill. 482), unless it has exceeded its jurisdiction (Cumberland Valley R. Co. *v.* Martin, 100 Md. 165, 59 Atl. 714; Webster *v.* Cockey, 9 Gill (Md.) 92).

27. *In re* Dugan, 129 Iowa 241, 105 N. W. 514; Pollard *v.* Dickinson County, 71 Iowa 438, 32 N. E. 418; Kent *v.* Labette County, 42 Kan. 534, 22 Pac. 610; Cummings *v.* Noble County, 13 Okla. 21, 73 Pac. 288; King County *v.* Neely, 1 Wash. Terr. 241.

In Illinois the right is so limited in the case of counties not under township organization, although it seems that on the trial of the appeal the regularity of the proceedings may be inquired into (Roosa *v.* Henderson County, 59 Ill. 446; Lockman *v.* Morgan County, 32 Ill. App. 414), and when the road in controversy is on the line between two towns, an appeal may be taken from the commissioners to the supervisors (Warne *v.* Baker, 24 Ill. 351).

Iowa cases bearing on the right to appeal from an order establishing a road under early statutes see Prosser *v.* Wapello County, 18 Iowa 327; Umbarger *v.* Bean, 15 Iowa 256; Myers *v.* Simms, 4 Iowa 500; Ball *v.* Humphrey, 4 Greene 264.

28. Foster *v.* Dunklin, 44 Mo. 216.

A mere resurvey is not the subject of appeal under a statute giving the right when a road has been laid out or altered. Hogaboon *v.* Highgate. 55 Vt. 412.

29. See Galveston, etc., R. Co. *v.* Baudat, 18 Tex. Civ. App. 595, 45 S. W. 939; State *v.* Wallman, 110 Wis. 312, 85 N. W. 975.

In what proceedings statute may be attacked.— The question as to whether a constitutional provision clothing a specified court with appellate jurisdiction upon all questions concerning a roadway is violated by a statute limiting the right of appeal in condemnation proceedings to questions of law may only be raised on appeal from such proceedings, and may not be raised in an injunction suit to restrain road commissioners from proceeding to lay out a road. Painter *v.* St. Clair, 98 Va. 85, 34 S. E. 989.

30. Shurtleff *v.* Chase County, 63 Kan. 645, 66 Pac. 654; Goldman *v.* Grainger County, 3 Head (Tenn.) 107.

A person who has been assessed for benefits may appeal under some statutes. Kelly *v.* Philadelphia, 6 Pa. Co. Ct. 243. And see Hays *v.* Lewis, 28 Ohio St. 326.

An amicus curiæ has no right of appeal. Irwin *v.* Armuth, 129 Ind. 340, 28 N. E. 702.

A town, county, or state has no right of appeal, unless such right is expressly conferred on it by statute. Com. *v.* Dudley, 5 T. B. Mon. (Ky.) 21; Montgomery County *v.* Tipton, 15 S. W. 249, 12 Ky. L. Rep. 847; Carpentier's Petition, 67 N. H. 574, 32 Atl. 773.

31. Underwood *v.* Bailey, 56 N. H. 187.

Where a petition for a public road is granted, the petitioner is not entitled to appeal, as he has obtained the very thing which he sought. Gray *v.* Jones, 178 Ill. 169, 52 N. E. 941 [*affirming* 78 Ill. App. 309]. And see Goldman *v.* Grainger County Justices, 3 Head (Tenn.) 107.

32. Hegenbaumer *v.* Heckenkamp, 202 Ill. 621, 67 N. E. 389; Gray *v.* Lott, 18 Ill. 251; Underwood *v.* Bailey, 56 N. H. 187.

Non-residence in the town within which the road is to be laid out does not affect the right of a landowner to appeal. State *v.* Geneva Town Bd., 107 Wis. 1, 82 N. W. 550.

The ownership of appellant is a matter of proof and need not be stated in his petition for appeal. Smith *v.* Boisvert, 183 Ill. 318, 55 N. E. 631.

A corporation owning land on which a highway is laid is a "person" within the

missioners whose decisions have been reversed;[33] but although in some jurisdictions the right of appeal is held to belong to every resident taxpayer in the town, who, as such, is liable to assessment for highway labor,[34] the weight of authority is to the effect that one is not aggrieved so as to entitle him to appeal unless he is interested in or affected by the proceedings in some manner differently from the public, citizens, and taxpayers generally,[35] and some courts specifically confine the right to persons whose lands have been or will be taken.[36]

(3) Decisions Reviewable. Except where the right to appeal from interlocutory orders is given by statute,[37] only a final determination of the proceedings may be reviewed on appeal or writ of error.[38] A judgment or order is final, within the meaning of this rule, when it makes a complete disposition of the cause or proceeding;[39] and, according to the weight of authority, it is only a final order

meaning of a statute giving the right of appeal to every person who considers himself aggrieved by the decision. People *v.* May, 27 Barb. (N. Y.) 238.

A landowner may waive his appeal from the decision of commissioners laying out a street, by going before the jury for assessing damages, and giving evidence to increase his damages. Lansing *v.* Caswell, 4 Paige (N. Y.) 519. Likewise a person who knowingly accepts the damages awarded him by the county commissioners' court is not afterward entitled to appeal from such award. Karnes County *v.* Nichols, (Tex. Civ. App. 1899) 54 S. W. 656.

33. Lowndes County Com'rs' Ct. *v.* Bowie, 34 Ala. 461; Lafollette *v.* Road Com'r, 105 Tenn. 536, 58 S. W. 1065. But see *In re* Ripley Selectmen, 39 Me. 350.

34. People *v.* Cortelyou, 36 Barb. (N. Y.) 164; Smith *v.* Harkins, 39 N. C. 486.

Under the Wisconsin statute it is not necessary that the appellants be owners of land affected by the highway, or that they have any special interest therein, provided they consider themselves aggrieved. State *v.* Wheeler, 97 Wis. 96, 72 N. W. 225.

35. *Delaware.*— *In re* Long Point Road, 5 Harr. 152.

Iowa.— McCune *v.* Swafford, 5 Iowa 552.

Kentucky.— Com. *v.* Dudley, 5 T. B. Mon. 21; Taylor *v.* Brown, 3 Bibb 78; Barr *v.* Stevens, 1 Bibb 292.

Massachusetts.— Chandler *v.* Railroad Com'rs, 141 Mass. 208, 5 N. E. 509.

New Hampshire.— Bennett *v.* Tuftonborough, 72 N. H. 63, 54 Atl. 700.

Tennessee.— Goldman *v.* Grainger County Justices, 3 Head 107.

See 25 Cent. Dig. tit. "Highways," § 178.

And see Moore *v.* Hancock, 11 Ala. 245, holding that no individual has the right to intervene and put questions on the record by bills of exception, under a statute giving the privilege of bills of exceptions only to parties to a suit and in the trial of a cause.

A person owning land within one mile of the proposed road, which real estate would be affected by the construction of the road, has been held to have such an actual and substantial interest as to entitle him to appeal. Fleming *v.* Hight, 95 Ind. 78.

36. Butler Grove Highway Com'rs *v.* Barnes, 195 Ill. 43, 52 N. E. 775; Taylor *v.* Normal Highway Com'rs, 88 Ill. 526; Vacoune *v.* Police Jury, 1 Mart. N. S. (La.) 596; Foster *v.* Dunklin, 44 Mo. 216; Overbeck *v.* Galloway, 10 Mo. 364. *Compare* Oswego *v.* Kellogg, 99 Ill. 590.

37. Warner *v.* Doran, 30 Iowa 521; Jeter *v.* Board, 27 Gratt. (Va.) 910 [*distinguishing* Trevilian *v.* Louisa R. Co., 3 Gratt. (Va.) 326]. *Compare* Newell *v.* Perkins, 39 Iowa 244.

38. *Illinois.*— Ravatte *v.* Race, 152 Ill. 672, 38 N. E. 933; Roosa *v.* Henderson County, 59 Ill. 446.

Indiana.— Kelley *v.* Augsperger, 171 Ind. 155, 85 N. E. 1004; Kirsch *v.* Braun, 153 Ind. 247, 53 N. E. 1082; Wilson *v.* McClain, 131 Ind. 335, 30 N. E. 1093; Anderson *v.* Claman, 123 Ind. 471, 24 N. E. 175. Tomlinson *v.* Peters, 120 Ind. 237, 21 N. E. 910; Neptune *v.* Taylor, 108 Ind. 459, 8 N. E. 566.

Kentucky.— Helm *v.* Short, 7 Bush 623.

Maine.— Moore's Appeal, 68 Me. 405.

Missouri.— Platte County Court *v.* McFarland, 12 Mo. 166. But see Bennett *v.* Woody, 137 Mo. 377, 38 S. W. 972, holding that Rev. St. (1899) § 7801, contemplates appeals as well from the judgment of the county court assessing the damages, as from the final judgment ordering the road to be established and opened.

Nebraska.—Jones *v.* Daul, 5 Nebr. (Unoff.) 236, 97 N. W. 1029, holding that where the county board merely ascertains the amount of the damages to be assessed on a given tract, but declines to determine whether the claimant is the owner of the land or entitled to the damages, its order is not appealable.

Ohio.— Anderson *v.* McKinney, 24 Ohio St. 467.

Tennessee.— Evans *v.* Shields, 3 Head 70.

See 25 Cent. Dig. tit. "Highways," § 179.

39. Kelley *v.* Augsperger, 171 Ind. 155, 85 N. E. 1004.

Conditional order.—An order establishing the road on condition that the assessed damages be paid by the petitioners is final and appealable, although conditional. McNichols *v.* Wilson, 42 Iowa 385; Dwiggins *v.* Denver, 24 Ohio St. 629.

A judgment of an intermediate court disposing of an appeal thereto is final within the meaning of the rule. Hall *v.* McDonald, 171 Ind. 9, 85 N. E. 707; Helm *v.* Short, 7 Bush (Ky.) 623.

establishing the road that may be reëxamined by a higher court,[40] although recent cases in a few jurisdictions hold that an order dismissing a petition for a road, or a petition for the vacation of an old road and the location of a new one, may be reviewed.[41] The determination as to the necessity, expediency, and utility of the proposed road is a quasi-legislative and discretionary matter which, under most statutes, is committed so exclusively to the highway board or tribunal as not to be the subject of review, or if reviewable, is unreversible if supported by any evidence.[42] Under some statutes, however, an appeal brings up the whole proceedings on the merits, and it is proper for the appellate tribunal to inquire into the necessity for the road as well as the matter of damages, but not questions of the jurisdiction and regularity of the proceedings,[43] while under other statutes matters of power and jurisdiction are reviewable on appeal or writ of error,[44] but no other

40. *Illinois.*— Sangamon County *v.* Brown, 13 Ill. 207.

Kentucky.— Williams *v.* Jackman, 2 J. J. Marsh. 352.

Michigan.— Wilson *v.* Burr Oak Tp. Bd., 87 Mich. 240, 49 N. W. 572.

Missouri.— Aldridge *v.* Spears, 101 Mo. 400, 114 S. W. 118 [*affirming* 40 Mo. App. 527, and *overruling* Cox *v.* Dake, 34 Mo. App. 80].

North Carolina.— Hawkins *v.* Randolph County, 5 N. C. 118.

See 25 Cent. Dig. tit. "Highways," § 181.

And see Hill *v.* Bridges, 6 Port. (Ala.) 197.

41. Kelley *v.* Augsperger, 171 Ind. 155, 85 N. E. 1004 [*distinguishing* Bowman *v.* Jobs, 123 Ind. 44, 23 N. E. 976; Jones *v.* Duffy, 119 Ind. 440, 21 N. E. 348; and McKee *v.* Gould, 108 Ind. 107, 8 N. E. 724, on the ground that they were decided under Rev. St. (1881) § 5024, before it was amended by Acts (1905), c. 167, § 10]; *In re* Pike Tp. Road, 30 Pa. Super. Ct. 644; Shields *v.* Greene County Justices, 2 Coldw. (Tenn.) 60.

42. *Alabama*— Lowndes County Com'rs *v.* Bowie, 34 Ala. 461.

California.— Butte County *v.* Boydstun, (1886) 11 Pac. 781.

Indiana.— Forsyth *v.* Wilcox, 143 Ind. 144, 41 N. E. 371; Moore *v.* Auge, 125 Ind. 562, 25 N. E. 816; Jamieson *v.* Cass County, 56 Ind. 466.

Minnesota.— Fohl *v.* Sleepy-Eye Lake Common Council, 80 Minn. 67, 82 N. W. 1097.

Nebraska.—See Johnson *v.* Hanson, 1 Nebr. (Unoff.) 609, 95 N. W. 704.

New York.— *In re* Mitchell, 177 N. Y. 560, 69 N. E. 1127 [*affirming* 85 N. Y. App. Div. 277, 83 N. Y. Suppl. 211], applying the rule to an appeal from the county court confirming the decision of the county commissioners. And see Matter of Burdick, 27 Misc. 298, 58 N. Y. Suppl. 759.

North Carolina.— Pridgen *v.* Bannerman, 53 N. C. 53.

Oregon.— Vedder *v.* Marion County, 28 Oreg. 77, 36 Pac. 535, 41 Pac. 3.

Pennsylvania.— *In re* Loretto Road, 29 Pa. St. 350; *In re* Derry Tp. Road, 30 Pa. Super. Ct. 538, holding that the decision of the lower court will not be reversed unless an abuse of discretion is clearly shown.

Washington.— Selde *v.* Lincoln County, 25 Wash. 198, 65 Pac. 192.

See 25 Cent. Dig. tit. "Highways," § 182.

In Maine it is the province of a committee appointed on appeal to determine whether common convenience and necessity require the location of the way prayed for. Bryant *v.* Penobscot County, 79 Me. 128, 8 Atl. 460.

Necessity of vacating road.— The determination as to the necessity or expediency of maintaining or vacating a public road is, under some statutes, committed exclusively to county boards and other such agencies, and is not a subject for judicial review. Otto *v.* Conroy, 76 Nebr. 517, 107 N. W. 752.

Other matters of discretion are not reviewable (Parsell *v.* Mann, 30 N. J. L. 530), unless the lower court has exercised its discretion capriciously, in violation of settled principles of law or equity (State *v.* Vandervere, 25 N. J. L. 669).

43. Troxell *v.* Dick, 216 Ill. 98, 74 N. E. 694; Geneseo Highway Com'rs *v.* Harper, 38 Ill. 103; Oran Highway Com'rs *v.* Hoblit, 19 Ill. App. 259; Bickford *v.* Franconia, 73 N. H. 194, 60 Atl. 98 (holding that, as an appeal affords an opportunity for a party aggrieved to be heard anew by an impartial tribunal, the fact that one of the selectmen who originally decided the matter was disqualified is not a jurisdictional defect, so as to preclude the court from taking cognizance of the appeal, but is a mere voidable irregularity for which the appeal furnishes an adequate remedy); Morris *v.* Ferguson, 14 Wis. 266; State *v.* Bailey, 6 Wis. 291. And see Fusilier *v.* St. Mary Police Jury, 6 La. Ann. 670. *Compare* Sangamon County *v.* Brown, 13 Ill. 207.

Where the appeal is limited to the assessment of damages, the court need not inquire whether the petition, notice, or other papers are sufficient. Sutherland *v.* Holmes, 78 Mo. 399.

44. *In re* Hanson, 51 Me. 193; Smith *v.* Jacobs, 77 Mo. App. 254.

In New York the rule stated in the text applies to appeals from county courts (People *v.* Onondaga County Ct., 152 N. Y. 214, 46 N. E. 325; *In re* De Camp, 151 N. Y. 557, 45 N. E. 1039 [*reversing* 77 Hun 478, 29 N. Y. Suppl. 99]), but not to appeals to county courts or judges (People *v.* Harris, 63 N. Y. 391; Warwick Highway Com'rs *v.* Orange County Judges, 13 Wend. 432). Thus, an order of a county court dis-

questions are.[45] The joint decision of commissioners of different counties is not appealable in some jurisdictions on account of a lack of statutory provision therefor.[46]

(B) *To What Tribunal Appeal May Be Taken.* An appeal in highway proceedings can be taken only to a court or judge having jurisdiction thereof,[47] and where the jurisdiction of different courts is dependent upon the amount of damages, the amount claimed and not that allowed by the highway board is determining.[48] As the right of the public in highways is a perpetual easement,[49] a proceeding to establish a highway involves a freehold within the meaning of statutes conferring appellate jurisdiction of such questions on certain courts.[50]

missing an application to vacate a decision of commissioners in proceedings to lay out a highway, without a hearing on the merits, on the erroneous determination that application was not made in time, is appealable. Matter of Glenside Woolen Mills, 92 Hun 188, 36 N. Y. Suppl. 593. It has also been held that an appeal lies from a void order of the supreme court on certiorari to review the proceedings and determination of highway commissioners (People *v.* Ferris, 36 N. Y. 218 [*reversing* 41 Barb. 121]), and that where the special term, on motion, has corrected the judgment of the general term, by allowing costs against appellant who brought the appeal from the commissioners of highways, and whose lands were taken for the road, and disallowed costs as against the county judge and referees, the general term will not review the decision of the special term, since the question was one resting in the discretion of the judge at special term (People *v.* Robinson, 25 How. Pr. 345).

45. Wells *v.* York County, 79 Me. 522, 11 Atl. 417; Goodwin *v.* Hallowell, 12 Me. 271; *In re* Cornplanter Tp. Road, 26 Pa. Super. Ct. 20 (holding that a decision of the court of quarter sessions on questions of fact is irreviewable on appeal); *In re* Hector Tp. Road, 19 Pa. Super. Ct. 120.

In Indiana the only remedy for an aggrieved party, when the commissioners' court acts without authority of law in setting aside its final order establishing a highway after it has been made and recorded, is by appeal (Badger *v.* Merry, 139 Ind. 631, 39 N. E. 309); and it also lies where the board of commissioners dismisses the petition unless the petitioners open and maintain the road at their own expense (Crossley *v.* O'Brien, 24 Ind. 325, 87 Am. Dec. 329), but not from an order sustaining a demurrer to an answer to a petition for a highway, as no such pleadings as an answer and demurrer are proper in such case (Logan *v.* Kiser, 25 Ind. 393).

Matters of law, such as the sufficiency of a verdict, are the subject of appeal under the Massachusetts statutes. Lanesborough *v.* Berkshire County, 22 Pick. (Mass.) 278.

The validity and the regularity of the proceedings, as well as the question of damages, may be reviewed under the Minnesota statutes. Pairier *v.* Itasca County, 68 Minn. 297, 71 N. W. 382.

46. Freeman *v.* Franklin County, etc., 74 Me. 326; *In re* Banks, 29 Me. 288; People *v.* Nelson, 26 How. Pr. (N. Y.) 346.

There is statutory provision in New York for the appointment of commissioners by the supreme court on the disagreement of the highway commissioners of two or more towns of different counties and for an appeal from the decision of the commissioners so appointed. Matter of Barrett, 7 N. Y. App. Div. 482, 40 N. Y. Suppl. 266.

47. People *v.* Van Alstyne, 3 Abb. Dec. (N. Y.) 575, 3 Keyes 35; Northington *v.* Taylor County, (Tex. Civ. App. 1901) 62 S. W. 936 (holding that an appeal from the commissioners' court in proceedings under Sayles Annot. Civ. St. art. 4674, requiring the establishment of first-class roads from county-seat to county-seat, should be taken to the district court, and not to the county court); State *v.* Goldstucker, 40 Wis. 124. And see Bennett *v.* Bryan, 1 Ky. L. Rep. 274.

A change of venue may be granted, as appeals from the order of the board of commissioners establishing or relocating a highway are on the same footing with ordinary civil actions. Schmied *v.* Keeney, 72 Ind. 309.

Deputy town clerk sitting on appellate board.—Where a town clerk is incapacitated to sit as a member of the township board on an appeal to it from the highway commissioner in laying out a public highway, the deputy clerk is not authorized to sit as a member of the board, as the deputy acts for his principal and cannot perform duties which his principal is incapacitated to perform. Dubois *v.* Riley Tp. Bd., 126 Mich. 587, 85 N. W. 1067.

48. Gorman *v.* St. Mary, 20 Minn. 392; Dell Rapids *v.* Irving, 9 S. D. 222, 68 N. W. 313.

A constitutional provision that justices shall not have jurisdiction where the amount in controversy exceeds one hundred dollars, or the title to real estate is involved, is not violated by a statute providing for appeal to a jury, summoned by a justice of the peace, as the appeal is really to the jury. State *v.* Rapp, 39 Minn. 65, 38 N. W. 926.

49. See *supra*, I, note 4.

50. Chaplin *v.* Wheatland Tp. Highway Com'rs, 126 Ill. 264, 18 N. E. 765; Lee County Highway Com'rs *v.* Chicago, etc., R. Co., 34 Ill. App. 32; Goudy *v.* Lake View, 31 Ill. App. 652.

In Canada highway proceedings are held not to involve title to lands or to present

(c) *Reservation and Presentation of Grounds of Review.* The general rule that objections cannot be raised for the first time on appeal [51] is applicable to highway proceedings,[52] even though the objector did not become a party to the proceedings until after the appeal was taken.[53] This rule precludes a party from having considered on appeal from the court in which a review is first sought objections which he has failed to make in the primary board or court;[54] and objections which he has properly made but failed to insist on in the intermediate court will not be considered by the higher court.[55] In order to escape the consequences of the rule the objections of a party must be specifically stated,[56] and it is not sufficient to adopt exceptions made by other parties.[57]

(d) *Parties.* It has been stated broadly that all persons whose rights and liabilities may in any way be affected by the final decree should be made parties to the proceedings for review,[58] and, more specifically, that where the case is tried *de novo* on appeal, the petitioner for the highway should be made plaintiff, and the remonstrants defendants.[59] Whether the board or court which passed on the estab-

controversies of a pecuniary nature so as to give the supreme court jurisdiction of appeals. Toussignant *v.* Nicolet County, 32 Can. Sup. Ct. 353 [*following* Dubois *v.* Ste. Rose, 21 Can. Sup. Ct. 65; Bell Tel. Co. *v.* Quebec, 20 Can. Sup. Ct. 230; Vercheres County *v.* Varennes, 19 Can. Sup. Ct. 365; Sherbrooke *v.* McManamy, 18 Can. Sup. Ct. 594].

51. See APPEAL AND ERROR, 2 Cyc. 660.

52. *Alabama.*— Long *v.* Butler County Com'rs' Ct., 18 Ala. 482.

Connecticut.— Windsor *v.* Field, 1 Conn. 279.

Illinois.—Winfield *v.* Moffatt, 42 Ill. 47.

Indiana.— Forsyth *v.* Wilcox, 143 Ind. 144, 41 N. E. 371; Wilkinson *v.* Lemasters, 122 Ind. 82, 23 N. E. 688 (holding that no appeal lies from a judgment of a board of county commissioners, at the instance of owners of land assessed for damages, who failed to appear and remonstrate before the board); Mathews *v.* Droud, 114 Ind. 268, 16 N. E. 599; Robinson *v.* Rippey, 111 Ind. 112, 12 N. E. 141; Thayer *v.* Burger, 100 Ind. 262; Lowe *v.* Ryan, 94 Ind. 450; Smith *v.* Alexander, 24 Ind. 454; Wilson *v.* Whitsell, 24 Ind. 306; Little *v.* Thompson, 24 Ind. 146; Shafer *v.* Bardener, 19 Ind. 294; Fancher *v.* Coffin, 41 Ind. App. 489, 84 N. E. 354.

Minnesota.— Krenik *v.* Cordova, 95 Minn. 372, 104 N. W. 130.

Missouri.— Bennett *v.* Woody, 137 Mo. 377, 38 S. W. 972. And see Nickerson *v.* Lynch, 135 Mo. 471, 37 S. W. 128.

New York.— People *v.* Burton, 65 N. Y. 452; Cooper *v.* Bean, 5 Lans. 318.

North Carolina.—Piercy *v.* Morris, 24 N. C. 168.

Pennsylvania.— *In re* Collins Tp., etc., Road, 36 Pa. St. 85; *In re* Lower Merion Tp. Road, 18 Pa. St. 238; *In re* Moore Tp. Road, 17 Pa. St. 116; *In re* Hellertown Road, 5 Watts & S. 202; *In re* Quemahoning Tp. Road, 27 Pa. Super. Ct. 150; *In re* West Donegal Tp. Road, 21 Pa. Super. Ct. 620; *In re* Rostraver Tp. Road, 21 Pa. Super. Ct. 195; *In re* Catawissa, etc., Tp. Road, 17 Pa. Super. Ct. 21; *In re* Upper Darby Tp. Road, 15 Pa. Super. Ct. 652, 8 Del. Co. 154.

See 25 Cent. Dig. tit. "Highways," § 184.

Under the Kansas practice this rule does not obtain. Wabaunsee County *v.* Muhlenbacker, 18 Kan. 129.

Matters which are necessarily vacated by the appeal and trial *de novo* are not within the operation of the rule. Brandenburg *v.* Hittel, (Ind. 1894) 37 N. E. 329.

53. Smith *v.* Alexander, 24 Ind. 454.

54. Lowndes County Com'rs' Ct. *v.* Bowie, 34 Ala. 461; Forsyth *v.* Wilcox, 143 Ind. 144, 41 N. E. 371; Fancher *v.* Coffin, 41 Ind. App. 489, 84 N. E. 354; Davis *v.* Boone County, 28 Nebr. 837, 45 N. W. 249.

An objection to the qualification of a judge who hears the appeal must be made, if at all, on such hearing, and when not so made is not ground for reversal by a higher court. Carmel Highway Com'rs *v.* Judges Putnam County Ct., 7 Wend. (N. Y.) 264.

55. Long *v.* Talley, 91 Mo. 305, 3 S. W. 389.

56. Osborn *v.* Sutton, 108 Ind. 443, 9 N. E. 410.

57. *In re* Shaler Tp. Road, 1 Pa. Cas. 337, 3 Atl. 102.

58. Hibberd's Appeal, 6 Kulp (Pa.) 497.

59. Schmied *v.* Keeney, 72 Ind. 309.

Where either party brings a petition in error to review the proceedings, those opposed are necessary parties. Wood County *v.* Junkins, 19 Ohio St. 348.

The principal petitioner should be made a party defendant on a petition in error (Chase County *v.* Carter, 24 Kan. 511), and a statute providing that a notice of appeal shall be served on the four persons first named in the petition for the highway is mandatory, and service on a less number will not give the court jurisdiction, nor will service on a person who has the greatest interest in the establishment of the highway, and who has deposited the amount allowed the landowner (Finke *v.* Zeigelmiller, 77 Iowa 251, 42 N. W. 183); and the Tennessee courts hold that, on appeal, the proper parties are the justices of the county court on the one side and the parties interested or aggrieved on the other (Cannon *v.* McAdams, 7 Heisk. (Tenn.) 376; Evans *v.* Shields, 3 Head (Tenn.) 70).

lishment of the highway is a proper and necessary party is a question decided differently in different jurisdictions, it being held in some that it is,[60] and in others that it is not.[61]

(E) *Proceedings For Transfer.* The proceedings necessary to transfer a highway proceeding from the highway board to a court are prescribed and regulated entirely by statute, and when there are specific provisions relating to highway proceedings, they control over statutes relating to appeals generally.[62] An appeal or error proceeding is premature when instituted before the final termination of the proceedings before the board.[63] When a disposition of the proceedings has been made, the appeal must be taken within the time limited by statute;[64] and before a transfer of the proceedings is effected there must be a compliance with statutory requirements relating to the petition or application for appeal,[65] the

60. Talladega County Road, etc., Com'rs *v.* Thompson, 15 Ala. 134; Chase County *v.* Carter, 24 Kan. 511; Cannon *v.* McAdams, 7 Heisk. (Tenn.) 376; Evans *v.* Shields, 3 Head (Tenn.) 70.

61. Schmied *v.* Keeney, 72 Ind. 309; Jamieson *v.* Cass County, 56 Ind. 466; Wright *v.* Wells, 27 Ind. 65; Barr *v.* Stevens, 1 Bibb (Ky.) 292.

The rule in Indiana is relaxed when the board does not sit as a court, but simply calls into action the authority created by law to make a reassessment for the protection and reimbursement of the county. Goodwin *v.* Warren County, 146 Ind. 164, 44 N. E. 1110.

62. Baugher *v.* Rudd, 53 Ark. 417, 14 S. W. 623; Kimble *v.* Leisher, 5 Ky. L. Rep. 466.

A statute which takes effect before an appeal is taken, and which does not except pending cases from its operation, regulates the time and mode of taking such appeal. Webster *v.* Androscoggin County, 64 Me. 434.

Where the mode of appealing is not prescribed by statute, the statute regulating appeals from justices' courts have been followed in some jurisdictions (Blair *v.* Coakley, 136 N. C. 405, 48 S. E. 804. See also Peoria County *v.* Harvey, 18 Ill. 364), and in others a mode previously in use has been adopted (Twombly *v.* Madbury, 27 N. H. 433).

63. Sangamon County *v.* Brown, 13 Ill. 207; Irwin's Appeal, 7 Pa. Super. Ct. 354.

Under the North Carolina statutes, an appeal is not premature when taken before the order opening the road is executed (McDowell *v.* Western North Carolina Insane Asylum, 101 N. C. 656, 8 S. E. 118; Warlick *v.* Lowman, 101 N. C. 548, 8 S. E. 120), and an appeal from an order of the county commissioners establishing a public road, and directing a jury to be summoned to lay it out and assess damages, may be taken as well after the confirmation of the report of the jury as before (Lambe *v.* Love, 109 N. C. 305, 13 S. E. 773).

64. *Indiana.*— Robson *v.* Richey, 159 Ind. 660, 65 N. E. 1032.

Missouri.— Sidwell *v.* Jett, 213 Mo. 601, 112 S. W. 56.

North Carolina.— Blair *v.* Coakley, 136 N. C. 495, 48 S. E. 804.

Oregon.— Miller *v.* Union County, 48 Oreg. 266, 86 Pac. 3 [*followed* in Pierce *v.* Union County, 48 Oreg. 622, 86 Pac. 5].

Pennsylvania.— *In re* Crescent Tp. Road, 18 Pa. Super. Ct. 160, limiting the rule to questions which are not jurisdictional in their nature.

See 25 Cent. Dig. tit. "Highways," § 190.

Under the Maine statute an appeal may be taken after the decision has been placed on file (Gray *v.* Cumberland County, 83 Me. 429, 22 Atl. 376), and before the first day of the next term of the supreme judicial court (Appleton *v.* Piscataquis County, 80 Me. 284, 14 Atl. 284). Under a prior statute, an appeal could not be taken until after the decision had been entered of record. *In re* Russell, 51 Me. 384.

The time of a final order, and not that of a prior conditional one, is the starting point of the period of limitation. Wilson *v.* Whitsell, 24 Ind. 306.

Evasion of statute.—A person affected with notice of the proceedings from the beginning, who has allowed the time for taking an appeal to expire, cannot accomplish the same object by moving the court to strike off the order of confirmation, and then appealing from the refusal of the court to grant his motion. Pittsburg, etc., R. Co.'s Appeal, 130 Pa. St. 190, 18 Atl. 600; *In re* Winter Ave., 23 Pa. Super. Ct. 353; *In re* North Franklin Tp. Road, 8 Pa. Super. Ct. 358.

Where the statute does not expressly limit the time, the intervention of a term of court before the appeal is entered does not render it irregular and void. Shelburn *v.* Eldridge, 10 Vt. 123.

Where all the required steps are taken within the time allowed, it is immaterial which is taken first. Restad *v.* Scambler, 33 Minn. 515, 24 N. W. 197. And see Libbey *v.* McIntosh, 60 Iowa 329, 14 N. W. 354, holding that the filing of the transcript before service of the notice of appeal is a mere irregularity which does not affect the jurisdiction.

The fact that judgment has been entered on the award of viewers does not render too late an appeal taken within the prescribed time after the filing of the award. Brown *v.* Beaver Borough, 2 Pa. Dist. 318, 12 Pa. Co. Ct. 313.

65. Whittaker *v.* Gutheridge, 52 Ill. App. 460, holding that a petition for an appeal

appeal bond,[66] notice of appeal,[67] the filing of a transcript or transmission of original papers,[68] and the filing of an affidavit of interest by an appellant who is not a party to the proceedings.[69] However, only the steps required by statute need be taken in order to perfect an appeal;[70] and under some statutes defects may be waived by failure to object in due season,[71] or may be cured;[72] and appellee

alleging that petitioner was directly interested in the decision is sufficient to show that petitioner was owner of lands adjoining a proposed highway.

Only matters specifically enumerated in the statute need be stated in the application. State *v.* St. John, 47 Minn. 315, 50 N. W. 200.

The address of the application need not be to the town clerk (Ross Highway Com'rs *v.* Newell, 53 Ill. 320) or to the supervisors (People *v.* Smith, 15 Ill. 326) by their respective names.

66. Schwede *v.* Burnstown, 35 Minn. 468, 29 N. W. 72; State *v.* Austin, 35 Minn. 51, 26 N. W. 906; Vaill *v.* New Shoreham, 18 R. I. 405, 28 Atl. 344 (holding that a statute requiring appellant to give bond to the town to prosecute his appeal is not complied with by giving a bond to the town council); Merritt *v.* Pryor, 86 Tenn. 155, 5 S. W. 534.

The bond should be signed, when the appeal is taken by the town, by the supervisors of the town in the name of the town, and not by the commissioners of highways. Appanooce *v.* Kneff, 2 Ill. App. 583.

Sureties on the bond are not required by some statutes (Oswego *v.* Kellogg, 99 Ill. 590), and when they are required, one appellant may be a surety for a co-appellant (Glassburn *v.* Deer, 143 Ind. 174, 41 N. E. 376), or where several persons interested filed separate remonstrances, one of them may appeal from the order made against him by filing bond with his co-remonstrator as surety (Leffel *v.* Obenchain, 90 Ind. 50, 52). However, a bond with but one surety does not satisfy a statute calling for a bond with "sufficient sureties." State *v.* Fitch, 30 Minn. 532, 16 N. W. 411.

Approval of the bond should be had by an official who is not disqualified by reason of his being one of the petitioners for the road (Gray *v.* Jones, 178 Ill. 169, 52 N. E. 941 [*affirming* 78 Ill. App. 309]), and should be clearly made to appear on the record as an act of his own judgment (Shepherd *v.* Dodd, 15 Ind. 217).

On a subsequent appeal, the bond should be conditioned to pay the costs in the court from which the appeal is taken and not those in the primary board or court. State *v.* Hoelz, 69 Wis. 84, 33 N. W. 597.

67. *California.*—Butte County *v.* Boydstun, 68 Cal. 189, 8 Pac. 835.

Iowa.— Polk *v.* Foster, 71 Iowa 26, 32 N. W. 7; Maxwell *v.* La Brune, 68 Iowa 689, 28 N. W. 18.

Michigan.— Brazee *v.* Raymond, 59 Mich. 548, 26 N. W. 699; Wilder *v.* Hubbell, 43 Mich. 487. 5 N. W. 673; People *v.* Hamtramck Tp. Bd., 38 Mich. 558.

Minnesota.— McElrath *v.* Lakeville Tp., 92 Minn. 248, 99 N. W. 895; Runyon *v.* Alton, 78 Minn. 31, 80 N. W. 836.

New York.— Kinderhook Highway Com'rs *v.* Claw, 15 Johns. 537.

See 25 Cent. Dig. tit. "Highways," § 189.

The Maine statute is directory. Cambridge *v.* Piscataquis County, 86 Me. 141, 29 Atl. 960.

The notice need not state any of the reasons why the order of the commissioners of highways is erroneous or illegal (Rector *v.* Clark, 78 N. Y. 21 [*reversing* 12 Hun 189]. To like effect see Ross Highway Com'rs *v.* Newell, 53 Ill. 320); nor need it state that the appellant has filed the application and bond required to perfect the appeal (Andrews *v.* Marion, 23 Minn. 372).

68. Moore *v.* Smock, 6 Ind. 392; Malone *v.* Hardesty, Smith (Ind.) 53; Weaver *v.* Lyon County, 69 Kan. 72, 76 Pac. 407. And see State *v.* Goldstucker, 40 Wis. 124.

Appeals from several counties.—A statute providing that, in case proceedings be had in more than one county, the auditors of each county, on being notified of an appeal, shall transmit to the court to which the appeal is taken all the proceedings in such county, does not make each appeal a separate case, which must be brought up on a separate transcript of the record. Glassburn *v.* Deer, 143 Ind. 174, 41 N. E. 376.

Duty of clerk.—When a transcript is required, the appellant must put the clerk under obligation to forward a proper one by paying or tendering his fees. Blair *v.* Coakley, 136 N. C. 405, 48 S. E. 804.

69. Jones *v.* Theiss, 30 Ind. 311.

A person who is named in a petition for opening a highway as one whose land is to be taken therefor need not file such an affidavit in order to appeal from an order establishing such highway, since he is a party to the proceeding. Wilson *v.* Wheeler, 125 Ind. 173, 25 N. E. 190.

70. *Illinois.*—Wells *v.* Hicks, 27 Ill. 343.

Indiana.— Smith *v.* Scearce, 34 Ind. 285; Malone *v.* Hardesty, Smith 53. And see Scraper *v.* Pipes, 59 Ind. 158.

Minnesota.— McElrath *v.* Lakeville Tp., 92 Minn. 248, 99 N. W. 895; Haven *v.* Orton, 37 Minn. 45, 35 N. W. 264.

Ohio.— Geddes *v.* Rice, 24 Ohio St. 60.

Texas.— Karnes County *v.* Nichols, (Civ. App. 1899) 54 S. W. 656.

See 25 Cent. Dig. tit. "Highways," §§ 188, 189.

71. State *v.* Shardlow, 43 Minn. 524, 46 N. W. 74.

72. Winfield *v.* Moffatt, 42 Ill. 47; Whittaker *v.* Gutheridge, 52 Ill. App. 460; Lafollette *v.* Road Com'r, 105 Tenn. 536, 58 S. W. 1065, holding that the omission of a road commissioner to give an appeal-bond on an

may be estopped to attack the assignment of errors because his full name does not appear therein.[73]

(F) *Proceedings on Appeal* — (1) In General. In many respects the procedure on an appeal in a highway case is the same as in ordinary civil actions,[74] such as the procedure relating to change of venue,[75] and appeals in the same proceeding should be consolidated.[76] In some jurisdictions the appeal is triable by a judge without the intervention of a jury.[77]

(2) Notice of Hearing. It is generally required that notice of the hearing of an appeal in highway proceedings be given [78] to the appellants and appellees,[79] as well as to the owners of land through which the road will pass,[80] and to the commissioners or other officers who established the highway.[81]

(3) Adjournment. Where the appeal is heard by a board, that body may adjourn for reasonable cause,[82] even to a place outside of the limits of the town.[83]

appeal is supplied and cured by giving such bond in the appellate court at the time a motion to dismiss because of no bond being given is made.

73. Hall *v.* McDonald, 171 Ind. 9, 85 N. E. 707, holding that, where appellees signed only their surnames and initials to a petition for highway improvements, they may not require the appeal to be dismissed because the assignment of errors describes them in the same manner and does not set out their full names, as required by the supreme court rules.

74. See cases cited *infra*, this note *et seq.*

Time of hearing.— The action is triable, under the Tennessee practice, at the same term in which the transcript required by statute is delivered to the clerk. Lafollette *v.* Road Com'r, 105 Tenn. 536, 58 S. W. 1065.

The right to open and close belongs to the remonstrant where the remonstrance, after having been amended, is for damages only (Peed *v.* Brenneman, 89 Ind. 252), although ordinarily the burden is on petitioners to establish that the proposed highway will be of public utility, and upon each of the remonstrators to prove his individual damages (Heath *v.* Sheetz, 164 Ind. 665, 74 N. E. 505).

That parties not appealing were not duly summoned on the appeal is immaterial, when the appeal is taken in term-time, under the Indiana statutes which require summons only when appeal is taken in vacation. Kirsch *v.* Braun, 153 Ind. 247, 53 N. E. 1082.

75. Schmied *v.* Keeney, 72 Ind. 309.

76. Corley *v.* Kennedy, 28 Ill. 143; Jamieson *v.* Cass County, 56 Ind. 466; Disosway *v.* Winant, 34 Barb. (N. Y.) 578, 13 Abb. Pr. 216 [*reversed* on other grounds in 1 Abb. Dec. 508, 3 Keyes 412, 2 Transcr. App. 192, 33 How. Pr. 460]. *Compare* Williams *v.* Turner Tp., 15 S. D. 182, 87 N. W. 968, denying the right of the court to order a consolidation on the ground that the parties in the appeals were different.

77. Greene County Justice *v.* Graham, 6 Baxt. (Tenn.) 77; Beard *v.* Campbell County Justices, 3 Head (Tenn.) 97; McWhirter *v.* Cockrell, 2 Head (Tenn.) 9.

Where the judges separate without conference before decision, an order signed by two of them at different times and places is irregular. Harris *v.* Whitney, 6 How. Pr. (N. Y.) 175.

Justice as member of jury.— Under a statute providing for a jury trial on an appeal to a justice's court from an award of damages, the justice is not entitled to sit with the jury in the capacity of a juror. Halstead *v.* Sawyer, 1 Ohio Dec. (Reprint) 456, 10 West. L. J. 85.

78. Corley *v.* Kennedy, 28 Ill. 143.

Curing of defect.—A party who has received notice cannot object that notice has not been given to another party (Leeds *v.* Androscoggin County, 75 Me. 533), and a decision by a township board of an appeal which is void for failure to give notice of the time and place of hearing does not preclude a subsequent hearing of the same appeal after proper notices have been given (Sanger *v.* Brownston Tp. Bd., 118 Mich. 19, 76 N. W. 121). If the occupants of the land waive notice of the proceedings on appeal, but afterward, before any action is had thereon, withdraw it, the referees cannot proceed without giving notice. People *v.* Crosier, 12 Abb. Pr. (N. Y.) 445, 26 How. Pr. 195.

79. McPherson *v.* Holdridge, 24 Ill. 38; Prescott *v.* Patterson, 44 Mich. 525, 7 N. W. 237, holding that the action of a township board on appeal is invalid unless it appears that the party appealing had notice of the meeting, even though the return shows that it was held at his house.

80. People *v.* Kniskern, 54 N. Y. 52 [*reversing* 50 Barb. 87]; Terpening *v.* Smith, 46 Barb. (N. Y.) 208.

81. People *v.* Osborn, 20 Wend. (N. Y.) 186.

82. People *v.* Essex Tp. Bd., 38 Mich. 615.

Adjournment without day.— Supervisors, when they dismiss an appeal and adjourn without any intention of further action, cannot resume the subject unless notice of the time and place of a future meeting is served on the commissioners of highways, and on the three petitioners before served. Keech *v.* People, 22 Ill. 478.

A defect in the adjournment is waived by the appearance of the parties at the adjourned meeting. Anderson *v.* Wood, 80 Ill. 15.

83. Goshen Highway Com'rs *v.* Jackson,

(4) Scope of Review, Trial De Novo, and Presumptions. Appellate jurisdiction in highway proceedings is confined to the subject-matter of the original petition,[84] and to the issues framed in the board or court where the proceedings were first instituted, even though there is a trial *de novo* on appeal;[85] and the appellate court will not take cognizance of or consider matters not embraced in the record,[86] which can be made up and matter incorporated therein only in the manner prescribed by the statute and practice of the particular jurisdiction;[87] and matters not stated therein will be presumed not to have been done,[88] an exception existing as to steps not jurisdictional in their nature and which are not absolutely required to be in the record.[89] Where no evidence is introduced in the appellate tribunal, the review proceeds on questions of law and jurisdiction much in the same manner

165 Ill. 17, 45 N. E. 1000 [*affirming* 61 Ill. App. 381].

84. *In re* Patten, 16 N. H. 277. And see Russell *v.* Leatherwood, 114 N. C. 683, 19 S. E. 643.

85. Kinzer *v.* Brown, 170 Ind. 81, 83 N. E. 618; Fulton *v.* Cummings, 132 Ind. 453, 30 N. E. 949; Indianapolis, etc., R. Co. *v.* Hood, 130 Ind. 594, 30 N. E. 705; Denny *v.* Bush, 95 Ind. 315; Green *v.* Elliott, 86 Ind. 53; Schmied *v.* Keeney, 72 Ind. 309; Crossley *v.* O'Brien, 24 Ind. 325, 87 Am. Dec. 329; Daggy *v.* Coats, 19 Ind. 259; Raab *v.* Roberts, 30 Ind. App. 6, 64 N. E. 618, 65 N. E. 191 (holding that on a trial *de novo* the facts controverted by the remonstrance or answer are the facts in issue); Greene County Justices *v.* Graham, 6 Baxt. (Tenn.) 77. But see Cross *v.* Lafourche Interior Police Jury, 7 Rob. (La.) 121.

Where the right of appeal is limited by statute to the issue of damages, the determination of the commissioner's court is conclusive as to all other matters. Huggins *v.* Hurt, 23 Tex. Civ. App. 404, 56 S. W. 944. Likewise, on appeal from a decision on a petition to set aside the proceedings establishing the highway, the court cannot entertain a motion to amend the original petition establishing the highway as a motion in the original cause. Ashcraft *v.* Lee, 75 N. C. 157.

Opening of issues after trial.— The refusal of an intermediate court to which an appeal has been taken to open the issues and permit a motion to be filed after one trial of the appeal has been had, and after the case has been sent to another county for retrial, and a large amount of costs has been accumulated, is a proper exercise of discretion, and not reviewable. Fifer *v.* Ritter, 159 Ind. 8, 64 N. E. 463.

Evidence foreign to the issue involved should be excluded. Gayle *v.* Jackson County Com'rs Ct., 155 Ala. 204, 46 So. 261.

The issues should be properly worded so as to take into consideration the public convenience, where they are submitted to the jury on a trial *de novo*. King *v.* Blackwell, 96 N. C. 322, 1 S. E. 485.

Only that part of the road against which objections are urged need be viewed and taken into consideration. Sonora Highway Com'rs *v.* Carthage, 27 Ill. 140.

86. Wood *v.* Campbell, 14 B. Mon. (Ky.) 422; *In re* Gardner, 41 Mo. App. 589; *In re* Lower Macungie Tp. Road, 26 Pa. St. 221; *In re* Herrick Tp., etc., Road, 16 Pa. Super. Ct. 579.

The appellate jurisdiction of county commissioners must be shown by the record in order to entitle their acts to any validity. Guilford *v.* Piscataquis County, 40 Me. 296. And see Eden *v.* Hancock County, 84 Me. 52, 24 Atl. 461.

The judgment of the lower court will not be disturbed where the record does not show the grounds upon which it was based (Cox *v.* Lindley, 80 Ind. 327; McCain *v.* Putman, 36 S. W. 552, 18 Ky. L. Rep. 376), or where there is no separation of law and facts in the record (Harding *v.* Putman, 21 S. W. 100, 14 Ky. L. Rep. 677; Welch *v.* Ward, 6 Ky. L. Rep. 584). Where the objection urged against the sufficiency of the description in the petition for a road view is based on allegations of fact outside of the record, the decision of the lower court overruling it will not be reversed unless manifest error has been committed. *In re* Cornplanter Tp. Road, 26 Pa. Super. Ct. 20.

Identity of two petitions.— The action of county commissioners in establishing a public road after dismissal of another like petition will not be reviewed on appeal, where the record does not show that the petitions are identical, and that the evidence, proof, and necessity for the road were the same in both cases. Warlich *v.* Lowman, 111 N. C. 532, 16 S. E. 336.

87. Scotten *v.* Divilbiss, 60 Ind. 37; Burntrager *v.* McDonald, 34 Ind. 277 (holding that a ruling of the circuit court can be presented to the supreme court only by a bill of exceptions); Purviance *v.* Drover, 20 Ind. 238; Brabham *v.* Custer County, 3 Nebr. (Unoff.) 801, 92 N. W. 989.

88. North Henderson Highway Com'rs *v.* People, 2 Ill. App. 24; Wilson *v.* Wheeler, 125 Ind. 173, 25 N. E. 190; Wabaunsee County *v.* Muhlenbacker, 18 Kan. 129; *In re* Greensburg Road, 1 Am. L. Reg. (Pa.) 124.

89. Baker *v.* Windham, 25 Conn. 597; *In re* James, 43 Hun (N. Y.) 67; Miller *v.* Hamilton County, 9 Ohio Dec. (Reprint) 312, 12 Cinc. L. Bul. 152; *In re* App's Tavern Road, 17 Serg. & R. (Pa.) 388; Baltimore Turnpike Road Case, 5 Binn. (Pa.) 481.

That the public good requires the road to be opened need not be entered on the record as an express finding. Brabham *v.* Custer County, (Nebr. 1902) 92 N. W. 989.

as on a writ of error;[90] but, under the statutes of some jurisdictions, there is a trial *de novo* on appeal,[91] and where such a trial is had, the court disregards irregularities in the original proceedings and proceeds to try the matter anew on the merits.[92] The usual presumptions in favor of the correctness and regularity of the proceed-

90. Murphy *v.* Blandford, 11 S. W. 715, 11 Ky. L. Rep. 125; People *v.* Milton Highway Com'rs, 37 N. Y. 360; People *v.* Cline, 23 Barb. (N. Y.) 197; *In re* Cornplanter Tp. Road, 26 Pa. Super. Ct. 20; *In re* Manheim Tp. Road, 12 Pa. Super. Ct. 279; Beard *v.* Campbell County Justices, 3 Head (Tenn.) 97. And see People *v.* Dutchess County Judges, 23 Wend. (N. Y.) 360.

An appeal from an order overruling a motion to quash the proceedings is in the nature of certiorari, and brings up the record for the consideration of the superior court. *In re* Sewickley Tp. Road, 23 Pa. Super. Ct. 170.

An appeal from a judgment on exceptions to the report of a jury ordered to lay out a road between certain termini embraces only such exceptions, and does not include the merits of the petition, as it is not regular on the hearing of such exceptions, for the court to consider the propriety of such order. Anders *v.* Anders, 49 N. C. 243.

91. *Indiana.*— Fifer *v.* Ritter, 159 Ind. 8, 64 N. E. 463; Black *v.* Thomson, 107 Ind. 162, 7 N. E. 184; Schmied *v.* Keeney, 72 Ind. 309; Bowers *v.* Snyder, 66 Ind. 340; Scraper *v.* Pipes, 59 Ind. 158; Moore *v.* Smock, 6 Ind. 392; Malone *v.* Hardesty, Smith 53.

New York.— Rector *v.* Clark, 78 N. Y. 21; People *v.* Goodwin, 5 N. Y. 568; People *v.* Albright, 14 Abb. Pr. 305, 23 How. Pr. 306.

Pennsylvania.— Hibberd's Appeal, 6 Kulp 497, appeal from award of jury to court of quarter sessions.

Rhode Island.— Hazard *v.* Middletown, 12 R. I. 227.

Tennessee.— Green County Justices *v.* Graham, 6 Baxt. 77.

See 25 Cent. Dig. tit. "Highways," § 199.

In Kentucky this is now the practice. Louisville, etc., R. Co. *v.* Gerard, 130 Ky. 18, 112 S. W. 915. Under earlier statutes the right to a trial *de novo* did not exist. Rawlings *v.* Biggs, 85 Ky. 251, 3 S. W. 147, 8 Ky. L. Rep. 919; Smith *v.* McMeekin, 79 Ky. 24, 1 Ky. L. Rep. 259; Helm *v.* Short, 7 Bush 623; Morris *v.* Salle, 19 S. W. 527, 14 Ky. L. Rep. 117.

In Missouri the practice is now as stated in the text. Mayes *v.* Palmer, 206 Mo. 293, 103 S. W. 1140. Formerly such a trial was not authorized. Nickerson *v.* Lynch, 135 Mo. 471, 37 S. W. 128; St. Louis County *v.* Lind, 42 Mo. 348.

Qualified right to trial de novo.— Under some statutes there is a trial *de novo* on all questions presented by the notice of appeal (Williams *v.* Turner Tp., 15 S. D. 182, 87 N. W. 968), and under others, the appeal brings before the court the propriety of the amount of damages, and all other matters referred to in the application for appeal (Gorman *v.* St. Mary, 20 Minn. 392). Under the Illinois statutes, which restrict the power and authority of supervisors on appeal to call a jury to assess damages to cases where the state of the proceedings require it, that course may be taken only when it has not already been taken. People *v.* Highway Com'rs, 188 Ill. 150, 58 N. E. 989.

92. Kelley *v.* Augsperger, 171 Ind. 155, 85 N. E. 1004; Hughes *v.* Beggs, 114 Ind. 427, 16 N. E. 817; Fleming *v.* Hight, 95 Ind. 78; Breitweiser *v.* Fuhrman, 88 Ind. 28 (holding that it is error to refuse to allow a party to show that the county board unlawfully prevented him from filing a remonstrance); Brown *v.* McCord, 20 Ind. 270; Louisville, etc., R. Co. *v.* Gerard, 130 Ky. 18, 112 S. W. 915 (holding that it is necessary to prove jurisdictional facts in the appellate court, when they are put in issue by exceptions); Bennett *v.* Hall, 184 Mo. 407, 83 S. W. 439; Lafollette *v.* Road Com'r, 105 Tenn. 536, 58 S. W. 1065.

Dilatory or technical objections are out of place on such a trial and need not be entertained. People *v.* Smith, 15 Ill. 326. Thus a motion to set aside the proceedings of the lower board is useless, as the trial on appeal is *de novo.* Dillman *v.* Crooks, 91 Ind. 158. Likewise the court may properly refuse to allow appellant to file a plea in abatement alleging that less than six persons signing the petition resided in the neighborhood, since he has a right to contest the jurisdiction without filing any plea. Irwin *v.* Armuth, 129 Ind. 340, 28 N. E. 702.

The reports of viewers are of no value on such a trial and cannot be attacked for irregularity (Clift *v.* Brown, 95 Ind. 53); nor are they competent evidence, as they simply embody conclusions as to matters which are to be tried anew (Freck *v.* Christian, 55 Ind. 320; Coyner *v.* Boyd, 55 Ind. 166. And see Washington Ice Co. *v.* Lay, 103 Ind. 48, 2 N. E. 222, holding that the petition need not be offered in evidence. *Compare* Daggy *v.* Coats, 19 Ind. 259, holding that the necessary papers of record in the cause are operative in the appellate court to make a *prima facie* case, at least for the party in whose favor they are). However, it is not error for the court to permit the petitioners to read to the jury the report of viewers, with a plat of the lands reported benefited attached as an exhibit, under instructions that the contents of these papers are not evidence of the fact therein contained, but may be used to apply to other evidence. Fulton *v.* Cummings, 132 Ind. 453, 30 N. E. 949.

It is the province of the jury in such a trial to pass upon the credibility and weight of evidence; and its conclusion, when approved by the trial court, will not be disturbed on appeal. Raab *v.* Roberts, 30 Ind. App. 6, 64 N. E. 618, 65 N. E. 191.

ings of the lower tribunal [93] obtain in appeals in highway proceedings, especially on appeals from an intermediate court to a higher court; [94] and, among other things, it will be presumed in the absence of a contrary showing that the viewers were not only properly qualified and appointed,[95] but that they observed statutory requirements in performing their duties.[96]

(5) REFERENCES. The statutes of a few states provide for the reference of the appeal to referees, commissioners, or to a committee,[97] who in some states exercise the same functions as county commissioners in the first instance.[98] Under such statutes it is essential that there be a valid appointment [99] of disinterested persons,[1] who must be properly sworn before they assume their duties.[2] After

93. See APPEAL AND ERROR, 3 Cyc. 275 *et seq.*

94. *Alabama.*— Gayle *v.* Jackson County Com'rs' Ct., 155 Ala. 204, 46 So. 261, presumption that case was tried by impartial jury.

Indiana.— Kirsch *v.* Braun, 153 Ind. 247, 53 N. E. 1082 (presumption that on consolidation of appeals the rights of the parties were fully heard and determined); Mathews *v.* Droud, 114 Ind. 268, 16 N. E. 599.

Kentucky.— Louisville, etc., R. Co. *v.* Gerard, 130 Ky. 18, 112 S. W. 915, applying the presumption to the regularity of the proceedings of an intermediate court on appeal.

Minnesota.— Forster *v.* Winona County, 84 Minn. 308, 87 N. W. 921, holding that it will be presumed that the court satisfied itself as to the posting of the required notices at the time of issuing the order appointing the commissioners.

Missouri.— Nickerson *v.* Lynch, 135 Mo. 471, 37 S. W. 128.

Pennsylvania.— *In re* Quemahoning Tp. Road, 27 Pa. Super. Ct. 150 (holding that an exception in the court below depending on a question of fact will be presumed to have been properly determined); *In re* Rostraver Tp. Road, 21 Pa. Super. Ct. 195.

Vermont.— Adams *v.* Derby, 73 Vt. 258, 50 Atl. 1063; French *v.* Barre, 58 Vt. 567, 5 Atl. 568.

See 25 Cent. Dig. tit. "Highways," § 197.

Presumption attaching to order.— Under a statute providing that the order laying out or discontinuing a highway "shall be presumptive evidence of the facts herein stated and of the regularity of all the proceedings prior to the making of such order," the appellate court is concluded by the order as to the regularity of all steps prior thereto, including the sufficiency of a notice and its service, in the absence of an affirmative showing to the contrary. State *v.* Miller, 136 Wis. 344, 117 N. W. 809.

95. Towns *v.* Klamath County, 33 Oreg. 225, 53 Pac. 604; *In re* Derry Tp. Road, 11 Pa. Super. Ct. 232.

96. *In re* South Abington Tp. Road, 109 Pa. St. 118; *In re* Derry Tp. Road, 11 Pa. Super. Ct. 232.

97. See the cases cited *infra*, this note *et seq.*

In Indiana the practice is otherwise and the appointment of viewers on appeal constitutes an irregularity. Hays *v.* Parrish, 52 Ind. 132; Kemp *v.* Smith, 7 Ind. 471.

Compensation of referees in New York see Disosway *v.* Winant, 1 Abb. Dec. (N. Y.) 508, 2 Transcr. App. 192, 3 Keyes 412, 33 How. Pr. 460 [*reversing* 34 Barb. 578, 13 Abb. Pr. 216].

98. Andover Selectmen *v.* Oxford County, 86 Me. 185, 29 Atl. 982.

In New York referees on appeal in highway proceedings have all the powers and duties, in regard to the matter in hand, of the common pleas judges, in whose stead they are substituted by statute. People *v.* Flake, 14 How. Pr. 527. However, it is not within their province to dismiss the appeal, and refuse further proceedings, on the ground that the order of the judge appointing them was improvidently or irregularly granted. People *v.* Cortelyou, 36 Barb. 164.

99. French *v.* Oxford County, 64 Me. 583 (holding that under the Maine statutes the committee must be appointed during the term in which the appeal is entered, and can be subsequently appointed only where one of the committee refuses to act or becomes disqualified); People *v.* Greenburgh, 57 N. Y. 549 (holding that, under a statute providing that in case of disability of a county judge, one of the justices of the sessions shall appoint the referees, the county judge has no right to make an order designating the justice to make the appointment; but that such an order, being a nullity, does not affect the validity of the appointment made by the justice so designated).

Same referee hearing two appeals.— The same referees may be lawfully appointed by one and the same order to hear two appeals. People *v.* Kniskern, 50 Barb. (N. Y.) 87 [*reversed* on other grounds in 54 N. Y. 52].

Where one of the committee resigns, an application should be made at the same term to have the vacancy filled. Belfast *v.* Waldo County, 67 Me. 530.

1. Friend's Appeal, 53 Me. 387.

Who is disinterested.— The fact that a member of a committee appointed on appeal is the owner of land liable to taxation on account of the establishment of the highway does not disqualify him. Andover Selectmen *v.* Oxford County, 86 Me. 185, 29 Atl. 982.

An objection to the qualifications of commissioners comes too late when made after the commissioners are selected and have determined the appeal. Brock *v.* Hishen, 40 Wis. 674.

2. People *v.* Connor, 46 Barb. (N. Y.) 333; State *v.* Hoelz, 69 Wis. 84, 33 N. W. 597.

holding hearings at the proper time and place,[3] a valid decision may be arrived at by any two of the three referees,[4] and, upon making their report, the proceeding is then before the court for affirmance, modification, or reversal.[5]

(6) Determination and Disposition of Cause; Dismissal. The reviewing court will affirm or reverse the decision of the lower court or board in accordance with its views as to whether or not material error was committed,[6] or it may affirm the proceedings in part and reverse them in part;[7] and while it has no power to validate proceedings taken without jurisdiction,[8] it is not compelled to reverse the proceedings for every technical and harmless error, but may itself correct, or allow to be corrected, the mistake,[9] or remand the record to the lower court for correction.[10] The appellate court possesses power either to make a final dispo-

Time to object.—An objection that a committee appointed to determine an appeal were not sworn before fixing upon the time and place for the hearing comes too late if made, in the first instance, after their report. Raymond *v.* Cumberland County, 63 Me. 110.

3. People *v.* Strevell, 27 Hun (N. Y.) 218, holding that the referees may meet to consider the matter outside of the town in which the highway is located.

Where an adjournment without day is had, the powers of the referees are exhausted. Rogers *v.* Runyan, 9 How. Pr. (N. Y.) 248.

After the hearing has been closed, the only power then left to the referees is to decide, including the incidental power of adjourning from time to time for this purpose, and to prepare and sign, and cause to be filed, the evidence of their decision; they have no power to entertain a motion of third persons to open the cause for a further hearing, and for the reception of evidence impeaching the original testimony. People *v.* Ferris, 41 Barb. (N. Y.) 121, 18 Abb. Pr. 64, 27 How. Pr. 193 [*reversed* on other grounds in 36 N. Y. 218, 1 Transcr. App. 19, 34 How. Pr. 189].

4. Action *v.* York County, 77 Me. 128; People *v.* Burton, 65 N. Y. 452; People *v.* Sherman, 15 Hun (N. Y.) 575.

Their decision is not vitiated by the fact that appellant executed an undertaking to the town pledging private aid to the enterprise, where it appeared that such decision was not procured or induced by such undertaking. State *v.* Geneva Town Bd., 107 Wis. 1, 82 N. W. 550.

5. Peirce *v.* Portsmouth, 58 N. H. 311.

An error of the commissioners or referees does not extend back to the prior procedings, but may be fully redressed by setting aside the report, leaving the appeal to be proceeded with as if no hearing had been had and report made. Underwood *v.* Bailey, 58 N. H. 59.

The report must be made within the time limited by statute, and the court has no authority to accept a report made after such time, although the delay in making it was in accordance with an express written agreement between the parties, indorsed on the back of the warrant at the time of the view and hearing. Belfast's Appeal, 53 Me. 431.

6. Hawkins *v.* Robinson, 5 J. J. Marsh. (Ky.) 8; Peirce *v.* Portsmouth, 58 N. H. 311; Matter of Tappan Highway, 83 Hun (N. Y.) 613, 31 N. Y. Suppl. 625; People *v.* Hildreth, 1 Silv. Sup. (N. Y.) 358, 5 N. Y. Suppl. 308 [*affirmed* in 126 N. Y. 360, 27 N. E. 558] (holding that, when it appears that the general route was followed, it would be improper for an appellate court, without any knowledge of the obstacles in the proposed road, to interfere with the conclusion of the commissioners and referees appointed by the county court); *In re* Quemahoning Tp. Road,, 27 Pa. Super. Ct. 150 (holding that the omission to name the township in the petition, order of view, and report is not cause for reversal, where the termini are so precisely described in the report as to leave no room for doubt as to the location of the road).

Causes arising subsequent to the action of the board are not grounds of reversal, the only causes which the appellate court can recognize being those existing at the time the action was taken. Donnell *v.* York County, 87 Me. 223, 32 Atl. 884.

Under the Maine statutes the committee appointed by the supreme court on appeal reports whether the decision of the county commissioners should be affirmed or reversed (Cole *v.* Cumberland County, 78 Me. 532, 7 Atl. 397), and the only power of the court is to accept or reject the report of the committee (*In re* Brunswick, 37 Me. 446).

Findings.—Where the trial on appeal is *de novo* the verdict of the jury or decision of the court must embrace a finding of all the facts which the board would have been required to find to entitle the petitioners to the highway (Scraper *v.* Pipes, 59 Ind. 158), but in a special finding it is not necessary to state in detail the preliminary steps taken before the board of commissioners, if indeed it is proper to state them at all (Lowe *v.* Brannan, 105 Ind. 247, 4 N. E. 580).

7. Bryant *v.* Penobscot County, 79 Me. 128, 8 Atl. 460; Anthony *v.* Berkshire County, 14 Pick. (Mass.) 189; People *v.* Baker, 19 Barb. (N. Y.) 240. *Contra,* Sherburne Highway Com'rs *v.* Chenango Judges, 25 Wend. (N. Y.) 453; State *v.* Whitingham, 7 Vt. 390; Royalton *v.* Fox, 5 Vt. 458.

8. Cumberland Valley R. Co. *v.* Martin, 100 Md. 165, 59 Atl. 714.

9. Gordon *v.* Wabash County Highway Com'rs, 169 Ill. 510, 48 N. E. 451; Carpenter *v.* Windsor Tp., etc., Highway Com'rs, 64 Mich. 476, 31 N. W. 460; Anderson *v.* Myrtle Tp. Bd., 75 Mo. 57.

10. Sidener *v.* Esser, 22 Ind. 201 [*followed*

sition of the case and execute its own judgment [11] or to remand the case to the board or lower court with directions as to how to proceed,[12] which directions must be obeyed.[13] Where its judgment reverses an order refusing the road, or is that a slightly different location should be made, it may, and under some statutes must, proceed to establish and lay out the road.[14] Statutory requirements relating to the filing of the order of the appellate tribunal must be complied with before such order is valid and effective.[15] The court may dismiss an appeal which has not been perfected within the statutory time,[16] or where the record clearly shows

in Merom Gravel Co. *v.* Pearson, 33 Ind. App. 174, 69 N. E. 694, 71 N. E. 54]; *In re* Ford, 45 N. H. 400 (holding that when an error has been found in the proceedings of the county road commissioners, it is in the discretion of the court to recommit their report directly to the same board of commissioners for correction, instead of sending it to the court from which it first emanated); *In re* Clowe's Road, 2 Grant (Pa.) 129; *In re* Indiana Tp. Road, 2 Am. L. Reg. (Pa.) 122. *Compare* Wells *v.* Rhodes, 114 Ind. 467, 16 N. E. 830, holding that a motion to the circuit court, pending proceedings therein, for an order to compel a board of commissioners to correct its record, is rightly overruled, as an appellate court has no power to compel an inferior court to correct its record on appeal, the remedy being by application for that purpose to the board of commissioners itself.

11. Smith *v.* Scearce, 34 Ind. 285; McPherson *v.* Leathers, 29 Ind. 65; Woodring *v.* Brown, 27 Ind. App. 622, 61 N. E. 946; Shoffner *v.* Fogleman, 44 N. C. 280.

12. McPherson *v.* Leathers, 29 Ind. 65; Woodring *v.* Brown, 27 Ind. App. 622, 61 N. E. 946; Cross *v.* Lafourche Interior Police Jury, 7 Rob. (La.) 121; *In re* Shamokin Road, 6 Binn. (Pa.) 36. And see Hubbard *v.* Reckless, 38 N. J. L. 393. *Compare* Caldwell *v.* Parks, 61 N. C. 54.

The directions of the reviewing court may be general, such as to proceed according to law, without any specific directions as to ulterior proceedings. Winchester *v.* Hinsdale, 12 Conn. 88.

Award of damages by reviewing court.— Where the appellate court awards a larger sum of damages, the board of supervisors may reconsider their action establishing the road (Nelson *v.* Goodykoontz, 47 Iowa 32. See also State *v.* White, 151 Ind. 364, 51 N. E. 481), and where damages are assessed by the appellate court in favor of a remonstrant, it is not error in the court to leave it to the option of the board of commissioners to pay such assessment (Jamieson *v.* Cass County, 56 Ind. 466). In such a case the commissioners, by refusing a petition to open the road and pay the damages out of the county treasury, do not lose jurisdiction of the proceeding, so as to be unable to entertain a subsequent petition to open the road on the payment by the petitioners of half of the damages. Wilkinson *v.* Bixler, 88 Ind. 574.

13. Brock *v.* Hishen, 40 Wis. 674, holding, however, that a short delay in obeying the order is not fatal. And see *In re* Beeler's Road, 9 Pa. St. 217.

A mere reversal, without more, does not bind the commissioners to lay out the road. People *v.* Cherry Valley Highway Com'rs, 8 N. Y. 476; People *v.* Watertown Com'rs, 7 How. Pr. (N. Y.) 28; People *v.* Plainfield Com'rs, 7 How. Pr. (N. Y.) 27.

Obedience may be compelled by mandamus (Harriman *v.* Waldo County, 53 Me. 83; People *v.* Salem Highway Com'rs, 1 Cow. (N. Y.) 23), as well as by a writ of prohibition to prevent their proceeding in a manner contrary to the judgment of the reviewing court (Harriman *v.* Waldo County, *supra*). However, mandamus will be denied where it appears that the whole proceedings were without jurisdiction. North Henderson Highway Com'rs *v.* People, 2 Ill. App. 24.

Retrial.—Where the judgment of a county court approving a part of a report of a certain committee laying out a highway, and disapproving another part on the ground that a part of the highway was not of convenience and necessity, was reversed on appeal on the ground that the court had no power to adopt a part of the road and reject the residue, the lower court, on a second hearing, may try the issue over again and establish the entire highway, after finding that it was of convenience and necessity. Winchester *v.* Hinsdale, 13 Conn. 132.

14. People *v.* Barber, 12 Barb. (N. Y.) 193; People *v.* Watertown Com'rs, 7 How. Pr. (N. Y.) 28; People *v.* Champion, 16 Johns. (N. Y.) 61; Shoffner *v.* Fogleman, 44 N. C. 280. But see *Ex p.* Danube, 1 Cow. (N. Y.) 142, holding that the judges of the common pleas could not lay out a road differing from the one submitted to the commissioners.

The rule is otherwise under the Maine statutes (Irving *v.* Sagadahoc County, 59 Me. 513. And see Winslow *v.* County Com'rs, 31 Me. 444), except where the appeal is to and not from the county commissioners (Orrington *v.* Penobscot County, 51 Me. 570).

An entirely new road on an independent line cannot be laid out, as that would be establishing a road without the preliminary steps required by law. People *v.* Carman, 47 Hun (N. Y.) 380.

Statutory notice to landowners must be given. People *v.* Brown, 47 Hun (N. Y.) 459.

15. Alexander *v.* Rubensam, 12 Ill. App. 120.

16. Blair *v.* Coakley, 136 N. C. 405, 48 S. E. 804.

that the highway board was without jurisdiction;[17] and the effect of such dismissal is to leave the cause as if no appeal had been taken.[18] Grounds for a dismissal may be presented orally as well as in writing.[19]

(G) *Effect of Appeal.* An appeal in highway proceedings vacates the judgment of the lower board or court,[20] and suspends the authority of the highway officials to open the road or take other steps in execution of the judgment.[21]

(II) *CERTIORARI* [22] — (A) *Availability and Grounds.* The writ of certiorari, or the equivalent statutory writ of review, is the proper remedy, and in some states the only remedy, for testing the jurisdiction of the board or tribunal which passed on the question of the establishment of the highway,[23] and for reviewing the regularity and legality of its proceedings,[24] or the proceedings on appeal from its

Where all the parties are not properly before the court, a dismissal is proper. Jewell *v.* Kirk, 47 S. W. 766, 20 Ky. L. Rep. 853.

Failure to sign petition.— It is not a sufficient ground for dismissal that one who filed a petition before the county board, in whose name, with the names of other petitioners, the case was conducted before such board and in the circuit court on appeal, did not sign the petition. Hays *v.* Parrish, 52 Ind. 132.

17. Milliser *v.* Wagner, 133 Ind. 400, 32 N. E. 927.

Where the commissioners have properly acquired jurisdiction, no irregularity in their subsequent proceedings is cause for dismissing the petition in the circuit court, because such irregular proceedings are vacated by the appeal. Black *v.* Thomson, 107 Ind. 162, 7 N. E. 184.

18. Andrews *v.* Beam, 97 N. C. 315, 1 S. E. 532; Norfolk, etc., R. Co. *v.* Rasnake, 90 Va. 170, 17 S. E. 879, holding that the same result follows where the appeal is dismissed by agreement of the parties.

19. Scotten *v.* Divilbiss, 60 Ind. 37.

20. Turley *v.* Oldham, 68 Ind. 114; Bickford *v.* Franconia, 73 N. H. 194, 60 Atl. 98; Morse *v.* Wheeler, 69 N. H. 292, 45 Atl. 561.

The order is only partially vacated when the grounds of appeal affect particular persons only (Pool *v.* Breese, 114 Ill. 594, 3 N. E. 714; Schuchman *v.* Jefferson County Highway Com'rs, 52 Ill. App. 497), but the entire order is vacated when the grounds of appeal affect the validity of the order as an entirety (Pool *v.* Breese, *supra*).

21. Smith *v.* Cumberland County, 42 Me. 395; Geddes *v.* Rice, 24 Ohio St. 60; Taft *v.* Pittsford, 28 Vt. 286. And see Hazard *v.* Middletown, 12 R. I. 227.

In Illinois the power of the commissioners is suspended for a year. People *v.* Oswego Highway Com'rs, 103 Ill. 640.

22. See, generally, CERTIORARI, 6 Cyc. 730.

23. *Arkansas.*— Grinstead *v.* Wilson, 69 Ark. 587, 65 S. W. 108.

Georgia.—Atlanta, etc., R. Co. *v.* Redwine, 123 Ga. 736, 51 S. E. 724.

Illinois.— Geneseo Highway Com'rs *v.* Harper, 38 Ill. 103; Mill Shoals Highway Com'rs *v.* Hucker, 133 Ill. App. 252; Perry *v.* Bozarth, 95 Ill. App. 566 [*reversed* on other grounds in 198 Ill. 328, 64 N. E. 1076].

Maine.— Hayford *v.* Aroostook County, 78 Me. 153, 3 Atl. 51.

New Hampshire.— Grand Trunk R. Co. *v.* Berlin, 68 N. H. 168, 36 Atl. 554.

Oregon.— Canyonville, etc., Road Co. *v.* Douglas County, 5 Oreg. 280.

See 25 Cent. Dig. tit. "Highways," § 204.

Petitioner's ignorance of lack of jurisdiction.—A petition for the writ which does not allege that petitioner did not know, at the beginning of the proceedings, of the want of jurisdiction of the commissioners arising from disqualification of one of them, or that she could not by the exercise of reasonable diligence have ascertained the fact, is insufficient. Stevens *v.* Somerset County, 97 Me. 121, 53 Atl. 985.

Notice.—A failure to acquire jurisdiction by giving notice of the time and place of hearing on the petition is ground for certiorari (Ware *v.* Penobscot County, 38 Me. 492); but after jurisdiction has been once acquired, defects in subsequent notices are not grounds for the issuance of the writ where no substantial injustice has been done (Rutland *v.* Worcester County, 20 Pick. (Mass.) 71; Boston, etc., R. Co. *v.* Folsom, 46 N. H. 64). Also the writ will not be granted because the record does not show how, or by whom, notice to the parties interested was given (*In re* Vassalborough, 19 Me. 338), or where the failure to give notice is without fault on the part of the tribunal, and is occasioned by want of knowledge of a title acquired during the pendency of the proceedings (Pickford *v.* Lynn, 98 Mass. 491).

24. *Illinois.*— Trainer *v.* Lawrence, 36 Ill. App. 90; Deitrick *v.* Bishop Tp. Highway Com'rs, 6 Ill. App. 70.

Iowa.— Chambers *v.* Lewis, 9 Iowa 583.

Massachusetts.— Durant *v.* Lawrence, 1 Allen 125.

Michigan.—Cowing *v.* Ripley, 76 Mich. 650, 43 N. W. 648.

New Hampshire.— Boston, etc., R. Co. *v.* Folsom, 46 N. H. 64.

New York.— People *v.* Stedman, 57 Hun 280, 10 N. Y. Suppl. 787.

Oregon.— Canyonville, etc., Road Co. *v.* Douglas County, 5 Oreg. 280; Thompson *v.* Multnomah County, 2 Oreg. 34, holding that the proceedings of highway officers in opening public roads are "judicial" proceedings, within the rule that certiorari lies to review judicial, but not ministerial, acts.

Tennessee.—White's Case, 2 Overt. 109.

See 25 Cent. Dig. tit. "Highways," §§ 204, 205.

action.[25] It will not lie where the proceedings conform in all respects to the requirements of law,[26] or where there exists the right of appeal,[27] or other adequate remedy.[28] Neither is it available to question the public necessity for the road or the proper exercise of the discretion vested in the board;[29] and in nearly all cases the general rule that certiorari is not a writ of right but is a writ issuable in the discretion of the court to prevent substantial injustice[30] is applicable.[31] However, to prevent substantial injustice, the writ will issue,

Town way.—According to the practice in Maine and Massachusetts, certiorari cannot issue to a town to remove its proceedings in the case of a private or town way. Harlow *v.* Pike, 3 Me. 438; Todd *v.* Rome, 2 Me. 55; Robbins *v.* Lexington, 8 Cush. (Mass.) 292.

When a bill of exceptions is allowed on a petition for a highway, the remedy on such bill of exceptions is by writ of certiorari. *In re* Landaff, 34 N. H. 163.

25. Kinderhook Highway Com'rs *v.* Claw, 15 Johns. (N. Y.) 537; Lawton *v.* Cambridge Highway Com'rs, 2 Cai. (N. Y.) 179.

In Michigan, the decision of the township board, on appeal from the determination of a commissioner of highways, will be reviewed by certiorari only in case of peculiar and exceptional circumstances. Soller *v.* Brown Tp. Bd., 67 Mich. 422, 34 N. W. 888; Burt *v.* Sumpter Highway Com'rs, 32 Mich. 190.

26. Hightower *v.* Jones, 85 Ga. 697, 11 S. E. 872; Behrens *v.* Melrose Tp. Highway Com'rs, 169 Ill. 558, 48 N. E. 578.

27. *Illinois.*—Hegenbaumer *v.* Heckenkamp, 202 Ill. 621, 67 N. E. 389; Wright *v.* Carrollton Highway Com'rs, 150 Ill. 138, 36 N. E. 980.

Maine.— Hodgdon *v.* Lincoln County, 68 Me. 226.

Maryland.— Gaither *v.* Watkins, 66 Md. 576, 8 Atl. 464.

Michigan.— Nightingale *v.* Simmons, 66 Mich. 528, 33 N. W. 414; Flint, etc., R. Co. *v.* Norton, 64 Mich. 248, 31 N. W. 134.

New York.— People *v.* Onondaga County Ct., 152 N. Y. 214, 46 N. E. 325 [*affirming* 4 N. Y. App. Div. 542, 38 N. Y. Suppl. 920]; Matter of Taylor, 8 N. Y. App. Div. 395, 40 N. Y. Suppl. 839; People *v.* Thayer, 88 Hun 136, 34 N. Y. Suppl. 592.

See 25 Cent. Dig. tit. "Highways," § 204.

Under the former New York statutes, the right to appeal did not exist in some cases, and in such instances there was a right to certiorari. People *v.* Mosier, 50 Hun 64, 8 N. Y. Suppl. 621.

Where the proceedings are void for want of jurisdiction, the fact that parties interested had the right to appeal does not deprive them of their right to a writ of certiorari. Schuchman *v.* Jefferson County Highway Com'rs, 52 Ill. App. 497. Thus parties who have not been given notice of the proceedings lose nothing by their failure to appeal, but may seek their remedy by certiorari. Names *v.* Olive Tp., etc., Highway Com'rs, 30 Mich. 490.

Where an appeal has been refused, a writ of certiorari will be awarded to bring up the cause. Shields *v.* Greene County Justices, 2 Coldw. (Tenn.) 60.

28. Nobleboro *v.* Lincoln County, 68 Me. 548 (writ of error to correct error not apparent on face of record); *In re* Tucker, 27 N. H. 405; Devine *v.* Olney, 68 N. J. L. 284, 53 Atl. 466 (application for appointment of freeholders to review assessment); People *v.* McDonald, 4 Hun (N. Y.) 187 [*affirmed* in 69 N. Y. 362]. But see Walker *v.* Winkler, 60 N. J. L. 105, 37 Atl. 445, holding that a certiorari will not be dismissed because the prosecutor, before suing out the writ, applied to the court of common pleas for the appointment of freeholders, under the statute, to review the action of the surveyors in laying out the road.

29. Tiedt *v.* Carstensen, 61 Iowa 334, 16 N. W. 214; Thorpe *v.* Worcester County, 9 Gray (Mass.) 57; Kingman *v.* Plymouth County, 6 Cush. (Mass.) 306; Hampton *v.* Poland, 50 N. J. L. 367, 13 Atl. 174; State *v.* Pierson, 37 N. J. L. 363; Fretz's Appeal, 15 Pa. St. 397. *Contra,* People *v.* Ireland, 75 Hun (N. Y.) 600, 27 N. Y. Suppl. 582.

30. See CERTIORARI, 6 Cyc. 748.

31. White *v.* Lincoln County, 70 Me. 317; Howland *v.* Penobscot County, 49 Me. 143; North Berwick *v.* York County, 25 Me. 69; *In re* Vassalborough, 19 Me. 338; Granville *v.* Hampden County, 97 Mass. 193; Grand Trunk R. Co. *v.* Berlin, 68 N. H. 168, 36 Atl. 554; *In re* Landaff, 34 N. H. 163; Hancock *v.* Worcester, 62 Vt. 106, 18 Atl. 1041. And see Com. *v.* Hall, 8 Pick. (Mass.) 440; *In re* Appleby Manor Road, 1 Grant (Pa.) 443.

The writ has been issued where it appeared on the record that surveyors were appointed in less than one year after a former decision (*In re* Highway, 3 N. J. L. 1038); that a member of the court of sessions was an interested party (State *v.* Delesdernier, 11 Me. 473); that the proceedings were closed earlier than the time allowed by law (*In re* Windham, 32 Me. 452), or recorded later than the time prescribed (Cornville *v.* Somerset County, 33 Me. 237); or that the road was not completely and intelligibly described (Portland, etc., R. Co. *v.* York County, 65 Me. 292; Lewiston *v.* Lincoln County, 30 Me. 19).

The writ has been refused or quashed where the only ground therefor was an immaterial one of form (Monterey *v.* Berkshire County, 7 Cush. (Mass.) 394; *Ex p.* Miller, 4 Mass. 565), such as an omission to state the name of one person whose land is taken, or to describe his land as of a person unknown (North Reading *v.* Middlesex County, 7 Gray (Mass.) 109). It has also been held that it is not a ground for certiorari that the court, in the appointment

although the defect be formal and technical,[32] provided it is not the subject of amendment.[33]

(B) *Persons Entitled to.* The interest of a citizen and a taxpayer subject to a small and undetermined tax on account of the establishment of a road is not sufficient to entitle him to a writ of certiorari or review to reverse the proceedings; to come within the class of persons entitled to the writ he must show by the records that he owns land through which the road runs,[34] in addition to the fact that he was a party to the proceedings,[35] although this latter requirement is held to be fulfilled by showing that his rights are concluded by the judgment;[36] and a person *prima facie* shows legal injury and a right to the writ by establishing his ownership together with the illegal establishment of the road.[37] Highway commissioners are entitled to have a reversal, by supervisors on appeal, of their order laying out a highway, reviewed by certiorari.[38] A landowner estops himself by instituting proceedings to recover damages.[39]

(C) *Application For and Return of Writ.* Application for a writ of certiorari is premature when made before the final termination of the proceedings to establish or lay out the highway,[40] or before the disposition of an appeal therefrom;[41] and

of freeholders, passed over one of the freeholders of the town through which the road ran, and appointed one from another town (*In re* Highway, 3 N. J. L. 1026), or that the county commissioners failed to include an underpass for cattle awarded to a landowner by the selectmen (Bethel *v.* Oxford County, 60 Me. 535), or that the petition for the highway described the petitioners as "inhabitants of said town, or owners of land therein," where it affirmatively appears in the petition for certiorari, and in the agreed statement, that the original petitioners were in fact inhabitants of the town (Hebron *v.* Oxford County, 63 Me. 314). The writ will not be granted because the commissioners allowed no time to the landowners to remove their property from the land taken for the highway, where the law itself grants them a fixed time. Detroit *v.* Somerset County, 52 Me. 210.

32. Boston, etc., R. Co. *v.* Folsom, 46 N. H. 64.

33. Smith *v.* Cumberland County, 42 Me. 395.

Where the objectionable order was modified by the commissioners within two months after it was made, certiorari will not issue, although no new notice was given to the town of the meeting of the commissioners at which the modification was made. North Reading *v.* Middlesex County, 7 Gray (Mass.) 109.

34. *Alabama.*— Parnell *v.* Dallas County Com'rs' Ct., 34 Ala. 278; Creswell *v.* Greene County Com'rs' Ct., 24 Ala. 282.

Illinois.— Sampson *v.* Chestnut Tp. Highway Com'rs, 115 Ill. App. 443 (giving as an additional reason for denying the certiorari that the petitioners were not parties interested in such a sense as to permit them to question the proceedings by direct appeal); Imhoff *v.* Somerset Highway Com'rs, 89 Ill. App. 66 [*distinguishing* Hyslop *v.* Finch, 99 Ill. 171].

Maine.— Harkness *v.* Waldo County, 26 Me. 353; Bath Bridge, etc., Co. *v.* Magoun, 8 Me. 292, holding that, although a county road operates to the injury of a neighboring turnpike by diverting travel therefrom, yet the corporation owning the same is not entitled to a writ of certiorari where it owns no lands over which the road was laid, and is not directly affected in any of its vested rights.

Michigan.— Vanderstolph *v.* Highway Com'r, 50 Mich. 330, 15 N. W. 495.

New York.— People *v.* Weld, 6 N. Y. St. 173.

See 25 Cent. Dig. tit. "Highways," § 206.

Diversion of business.—A party whose only interest in the laying out of a new road is that he keeps an inn on the old road, and the new road, if opened, will divert travel and business from him, has not such interest as will entitle him to a writ of certiorari to review the proceedings of the commissioners. People *v.* Schell, 5 Lans. (N. Y.) 352.

35. Canyonville, etc., Road Co. *v.* Douglas County, 5 Oreg. 280.

36. Gaines *v.* Linn County, 21 Oreg. 430, 28 Pac. 133, where the person in question was not named on the record, but was a landowner entitled to notice.

37. *Ex p.* Keenan, 21 Ala. 558; Names *v.* Olive, etc., Tps. Highway Com'rs, 30 Mich. 490, holding that a showing that some portion of the applicant's lands have been appropriated is a sufficient showing that they were injured by the action taken. See also Parsonsfield *v.* Lord, 23 Me. 511.

38. Butler Grove Highway Com'rs *v.* Barnes, 195 Ill. 43, 62 N. E. 775.

A town will be denied its application for certiorari, where it does not appear that it owns any of the land claimed to be damaged or that it is otherwise injured. Strong *v.* County Com'rs, 31 Me. 578.

39. *In re* Weaver's Road, 45 Pa. St. 405.

A landowner who assists in procuring a settlement between the applicants and another landowner is precluded from applying for a certiorari. Rinehart *v.* Cowell, 44 N. J. L. 360.

40. Smith *v.* Lauderdale County Road, etc., Com'rs, 1 Stew. (Ala.) 183.

41. Grinager *v.* Norway, 33 Minn. 127, 22 N. W. 174; *In re* Road, 8 N. J. L. 139.

after the final termination of the proceedings the writ must be sued out within the time limited by statute,[42] or, in case there is no statutory limitation, within a reasonable time,[43] and before money or labor has been expended on the highway.[44] The application should be prosecuted by the party aggrieved,[45] and the applicants for the road should be made defendants.[46] The writ should state the termini of the proposed road,[47] and be directed to the board whose action is sought to be reviewed.[48] The return thereto must be made by certifying the record as it existed when the writ issued,[49] and sending up the records which relate to the matter sought to be reviewed.[50]

(D) *Review and Determination.* On certiorari in a highway case, the reviewing court will confine itself to, and pass on, only errors of law appearing on the face of the record; it will not examine the evidence received by the board or lower court on appeal, or receive evidence itself;[51] nor will it pass on the merits of the

42. *In re* Roaring Brook Tp. Road, 140 Pa. St. 632, 21 Atl. 411; *In re* Wilkins Tp. Road, 4 Pa. Cas. 299, 7 Atl. 166.

The time does not begin to run, under the New York statutes, until the order laying out the highway is recorded in the town clerk's office. People *v.* Vandewater, 83 N. Y. App. Div. 60, 82 N. Y. Suppl. 626.

43. Butler Grove Highway Com'rs *v.* Barnes, 195 Ill. 43, 62 N. E. 775 (holding, however, that the illegal levying of a tax in the meantime is no bar); Pursell *v.* Edison Portland Cement Co., 65 N. J. L. 541, 47 Atl. 587; People *v.* Landreth, 1 Hun (N. Y.) 544.

Mere lapse of time, short of the limitation for prosecuting a writ of error, will not bar the issuing of the writ, and in order that it may be barred by laches, something must have been done in reliance upon the validity of the order, so that great public detriment might result from declaring it invalid. Hyslop *v.* Finch, 99 Ill. 171.

44. Burnett *v.* Swaney, 114 Mich. 609, 72 N. W. 599; Hildreth *v.* Rutherford, 52 N. J. L. 501, 20 Atl. 60; State *v.* Clark, 38 N. J. L. 102; State *v.* Ten Eyck, 18 N. J. L. 373.

This is not a bar, where it appears that the petitioner objected to the proceedings *in limine* and applied for the writ at the next term of court after the termination of the proceedings. State *v.* Green, 18 N. J. L. 179.

45. State *v.* Fitch, 30 Minn. 532, 16 N. W. 411, holding that as an appeal, under Gen. St. (1878) c. 13, § 60, to a justice of the peace from the denial by county commissioners of a petition to lay out a highway, is to be considered as prosecuted on behalf of the county, the county commissioners are proper parties to prosecute a writ of certiorari to quash the proceedings before the justice.

Joinder.— The mere fact that two persons unite in objecting to the laying out of a road does not so bind them together that one cannot afterward sue out and prosecute a writ of certiorari without the other (Powell *v.* Hitchner, 32 N. J. L. 211), and where the road established lies in two towns, it is not necessary that both towns should join in the petition for a certiorari (*In re* Landaff, 34 N. H. 163).

46. State *v.* Stout, 33 N. J. L. 42; People *v.* Onondaga County Ct., 92 Hun (N. Y.) 13, 37 N. Y. Suppl. 869, holding further that the highway commissioner whose duty it is to lay out the highway should not be a defendant.

47. *In re* East Nantmill Tp., etc., Road, 4 Yeates (Pa.) 433.

48. French *v.* Springwells Highway Com'rs, 12 Mich. 267; State *v.* Lebanon, 132 Wis. 103, 111 N. W. 1129.

49. Lowndes County Com'rs' Ct. *v.* Hearne, 59 Ala. 371.

50. Highway Com'rs *v.* Newby, 31 Ill. App. 378; People *v.* Van Alstyne, 32 Barb. (N. Y.) 131.

The affidavits upon which the writ is granted forms no part of the commissioners' return. People *v.* Burton, 65 N. Y. 452.

Two distinct final orders of the commissioners' court, one establishing a road and the other granting a license to keep a ferry, cannot be taken to the circuit court by one writ of certiorari, although the ferry is part of the road. Creswell *v.* Greene County Com'rs' Ct., 24 Ala. 282.

51. *California.*— Johnston *v.* Glenn County, 104 Cal. 390, 37 Pac. 1046.

Illinois.— Smith *v.* Hudson Tp. Highway Com'rs, 150 Ill. 385, 36 N. E. 967; Brown *v.* Roberts, 23 Ill. App. 461 [*affirmed* in 123 Ill. 631, 15 N. E. 30].

Maine.— Stevens *v.* Somerset County Com'rs, 97 Me. 121, 53 Atl. 985.

Massachusetts.— Janvrin *v.* Poole, 181 Mass. 463, 63 N. E. 1066.

New Jersey.— State *v.* Smith, 21 N. J. L. 91, holding that the court will not inquire into sufficiency of proof.

New York.— People *v.* Burton, 65 N. Y. 452; People *v.* Moore, 60 Hun 586, 15 N. Y. Suppl. 504 [*affirmed* in 129 N. Y. 639, 29 N. E. 1031]; People *v.* Dolge, 45 Hun 310, holding that the court will not review facts stated in the return where they are founded upon personal inspection and individual knowledge of the locality.

Pennsylvania.— *In re* Spring Garden Road, 43 Pa. St. 144; *In re* Little Britain Road, 27 Pa. St. 69; *In re* Moon Tp. Public Road, 4 Pa. Cas. 91, 6 Atl. 762; *In re* Fifteenth St., 2 Pa. Cas. 266, 4 Atl. 167; *In re* West Donegal Tp. Road, 21 Pa. Super. Ct. 620; *In re* Drumove Road, 3 Lanc. L. Rev. 222; *In re* Bedminster Road, 29 Leg. Int. 132. *Compare* Baltimore Tp. Road Case, 5 Binn. 481, hold-

controversy, or the expediency of the action of the board.[52] The proceedings of the board or court which established the road cannot be sustained, on certiorari, unless the record shows that the board or court had jurisdiction, and that its jurisdiction was exercised in the mode prescribed by statute;[53] but in favor of the regularity of the proceedings; certain presumptions attach,[54] such as the presumption that due notice of the different steps of the proceeding was properly given.[55] Where proceedings as to different parts of a highway are separable, the court may affirm them so far as they are regular and quash them so far as they are irregular,[56] or it may dismiss the writ, where it appears for the first time

ing that evidence was admissible to show that all the viewers attended the view, where the record did not state the contrary, and no exception to the non-attendance of any of the viewers was taken below.

Wisconsin.— Morris *v.* Ferguson, 14 Wis. 266.

See 25 Cent. Dig. tit. "Highways," § 211.

Where an appeal has been taken, only the proceedings of the board or officers to which the appeal was made may be reviewed. People *v.* Talmadge, 46 Hun (N. Y.) 603; State *v.* Wallmann, 110 Wis. 312, 85 N. W. 975. Likewise, when the certiorari brings up only one record, the supreme court cannot notice the fact that some of the viewers had served in the same capacity in a former proceeding to lay out the same road. *In re* Chartiers Road, 34 Pa. St. 413.

Under the New Hampshire statute, providing for the taking of a bill of exceptions, the supreme court will pass on the admissibility of evidence, but where it has adjudged certain evidence to be incompetent, it will not receive evidence that the commissioners did not in fact deem the evidence at all material, or consider it in making up their opinion. *In re* Landaff, 34 N. H. 163.

Reservation of exceptions.— It has been held that certiorari brings into review the whole proceedings in laying out the road, and that it is wholly immaterial whether a question has been raised in the court below (State *v.* Vandervere, 25 N. J. L. 233 [*affirmed* in 25 N. J. L. 669 (*distinguishing* Biddle *v.* Dancer, 20 N. J. L. 633)]); while on the other hand it has been held that where an appeal has been taken from the decision of county commissioners in laying out a highway, all objections to their jurisdiction, or their otherwise invalid proceedings, must be taken when the report of the committee is offered for acceptance, and that if not so taken certiorari will not lie to quash their proceedings (Phillips *v.* Franklin County Com'rs, 83 Me. 541, 22 Atl. 385), and that in order to have the question whether the petition in the original proceeding was signed by the requisite number of freeholders reviewed by certiorari, objection must be made before the finding and judgment of the board is made (Gifford *v.* Jasper County, 160 Ind. 654, 67 N. E. 509).

Where an alleged variance between the beginning point of the road applied for and the beginning point of the road laid out is relied upon by plaintiff in certiorari, it is incumbent on him to show affirmatively that there was a variance, and that the variance is material. State *v.* Vanbuskirk, 21 N. J. L. 86.

52. Harris *v.* Mahaska County, 88 Iowa 219, 55 N. W. 324; Tiedt *v.* Carstensen, 61 Iowa 334, 16 N. W. 214 [*distinguishing* Warner *v.* Doran, 30 Iowa 521; McCrory *v.* Griswold, 7 Iowa 248]; State *v.* Green, 18 N. J. L. 179; *In re* Palmer Tp. Road, 109 Pa. St. 274; *In re* Chartiers Tp. Road, 1 Mona. (Pa.) 365; *In re* Stowe Tp. Road, 20 Pa. Super. Ct. 404; Gallup *v.* Woodstock, 29 Vt. 347.

53. Keenan *v.* Dallas County Com'rs' Ct., 26 Ala. 568; Woodruff *v.* Douglas County, 17 Oreg. 314, 21 Pac. 49.

Errors of law are ground for reversal, even though made within the jurisdiction of the lower board or court (*In re* Landaff, 34 N. H. 163), and a laying out of a highway which is clearly contrary to statute should not be allowed to remain in force merely because, in the particular instance, no substantial injury seems likely to result, or because the error was due wholly to ignorance of law on the part of the selectmen (*In re* Brown, 51 N. H. 367).

54. Lawton *v.* Cambridge Highway Com'rs, 2 Cai. (N. Y.) 179 (presumption that road is of proper width); *In re* South Abington Tp. Road, 109 Pa. St. 118 (presumption that viewers were properly sworn).

55. *In re* Schuylkill Falls' Road, 2 Binn. (Pa.) 250. But see Pegler *v.* Grand Rapids Highway Com'rs, 34 Mich. 359.

A finding of the lower court that notice of the view was properly given will be presumed to have been based on sufficient evidence. *In re* Washington Tp. Road, (Pa. 1885) 3 Atl. 436.

Public announcement of decision.— It will be presumed that the commissioners publicly announced their decision at the hearing, as required by law, where they indorsed upon the petition a memorandum of their decision to grant the petition, which bears date on the day of the hearing. McManus *v.* McDonough, 107 Ill. 95.

56. Com. *v.* West Boston Bridge, 13 Pick. (Mass.) 195.

Where the sufficiency of the original petition is not attacked, but the exceptions filed simply relate to the doings of the commissioners on the petition, and to the judgment of the court of common pleas accepting their report and establishing the highway, if the supreme court order the judgment of the common pleas to be quashed, the original petition for the highway is not quashed, but remains for further proceedings in the common pleas. Hayward *v.* Bath, 35 N. H. 514.

on the hearing that it was improvidently allowed or too tardily applied for;[57] but it has no power, on reversal, to order the appointment of new referees.[58]

l. Costs and Expenses — (i) *Of Original Proceedings.* As in civil actions generally,[59] costs in highway proceedings follow the event of the suit and go to the prevailing party;[60] but this rule must be applied in conjunction with the rule that there exists no right to recover any costs in the absence of statutory authority therefor,[61] and with statutes which expressly or impliedly deny the right to recover costs to the applicant or petitioner for the road,[62] or which impose liability therefor upon the county or town,[63] or exempt a remonstrant from liability.[64] Liability for fees of referees, the expense of laying out the road, and other charges not included in costs proper is dependent largely upon statute,[65] the rule, in the absence

57. Flint, etc., R. Co. *v.* Norton, 64 Mich. 248, 31 N. E. 134; State *v.* Everitt, 23 N. J. L. 378. And see Summerville Macadamized, etc., Road Co. *v.* Deutscher Scheutzen Club, 57 Ga. 495, where the county judge acted without jurisdiction, and the supreme court reversed the action of the superior court on certiorari reversing the county court.

58. People *v.* Ferris, 36 N. Y. 218 [*reversing* 41 Barb. 121].

59. See Costs, 11 Cyc. 27, 34.

60. *In re* Knowles, 23 N. H. 193 (holding further that no costs may be taxed for or against landowners unless they place their names upon the docket and become regular parties to the controversy); Hanson *v.* Effingham, 20 N. H. 460; Davis *v.* Hill, 33 N. C. 9 (holding that a denial of the prayer of the petition entitles defendants to costs, even though the court orders the laying out of a road not included in such prayer); Senaker *v.* Sullivan County Justices, 4 Sneed (Tenn.) 116. And see Cushing *v.* Gay, 23 Me. 9.

Only one bill of costs is allowable, even though several parties prevail (Hanson *v.* Ossipee, 20 N. H. 523), except where there are unusual circumstances which take the case out of the general rule (Currier *v.* Grafton, 28 N. H. 73).

Items.— The taxable costs in highway proceedings generally include the expenses of travel and witness' fees (Abbott *v.* Penobscot County, 52 Me. 584; Hanson *v.* Effingham, 20 N. H. 460; *In re* Sinclair, 18 N. H. 226), but not attorney's fees (Rush County *v.* Cole, 2 Ind. App. 475, 28 N. E. 772; Eppig *v.* New York, 57 N. Y. App. Div. 114, 68 N. Y. Suppl. 41; People *v.* Warren County, 82 Hun (N. Y.) 298, 31 N. Y. Suppl. 248).

Payment of costs into the county treasury is proper, when their payment is a condition precedent to the establishment of the road. Cincinnati, etc., R. Co. *v.* Brossia, 26 Ohio Cir. Ct. 773.

61. *In re* Bergen County, etc., Public Highway, 22 N. J. L. 293; Patterson *v.* Allegheny, 30 Pittsb. Leg. J. N. S. (Pa.) 271.

62. Hawkins *v.* Robinson, 5 J. J. Marsh. (Ky.) 8.

63. Switzerland County Com'rs *v.* Hedges, 11 Ind. 291; Ropes *v.* Essex County Public Road Bd., 40 N. J. L. 64; White *v.* Coleman, 6 Gratt. (Va.) 138, holding that the damages caused by the opening of a road, and the costs of inquest, should be directed to be paid out of the county levy; but that the other costs of the applicant should be recovered against the contestant.

Under the Pennsylvania statute, the court may, in its discretion, impose all liability for costs upon the county. *In re* North Union Tp. Road View, 18 Pa. Co. Ct. 332; *In re* West Penn Tp. Road View, 18 Pa. Co. Ct. 321.

The commissioners personally cannot be taxed for costs. Oran Highway Com'rs *v.* Hoblit, 19 Ill. App. 259.

64. Hawkins *v.* Robinson, 5 J. J. Marsh. (Ky.) 8.

65. *Indiana.*—Walker *v.* Hamilton County, 19 Ind. App. 668, 49 N. E. 1078. And see Scott *v.* Vermillion County, 101 Ind. 42.

Kentucky.— Rawlings *v.* Biggs, 85 Ky. 251, 3 S. W. 147, 8 Ky. L. Rep. 919.

New Hampshire.— Smith *v.* Belknap County, 71 N. H. 203, 51 Atl. 628.

New York.— Patton *v.* Miller, 28 N. Y. App. Div. 517, 51 N. Y. Suppl. 202; Matter of Miller, 9 N. Y. App. Div. 260, 41 N. Y. Suppl. 581.

Pennsylvania.— Ackerly *v.* Lackawanna County, 1 Lack. Leg. N. 14; Davis *v.* Lackawanna County, 4 Lanc. L. Rev. 68; Allegheny County *v.* Gibson, 2 Am. L. J. 221; Ernst *v.* Baker, 1 Browne 326.

Vermont.— Howard *v.* Colchester, 24 Vt. 644.

See 25 Cent. Dig. tit. "Highways," §§ 216, 218.

Laying out of road conditioned on payment of expense.— Where a petition for the location of a highway is granted on condition that the expenses of its location should be borne by the petitioners, the petitioners are not bound to cause the road to be laid out; but, if they do, they assent to the condition imposed, and are bound by it. Patridge *v.* Ballard, 2 Me. 50.

Determination as to liability and amount. — It has been held that if county commissioners lay out a highway across a township, but fail to determine who is to bear the expense, the proceedings are invalid (Ware *v.* Penobscot County Com'rs, 38 Me. 492), and that before a recovery of expenses may be had, it must be shown by the record of the county commissioners to whom, and by whom, the amount was adjudged to be paid (Waldo County *v.* Moore, 33 Me. 511). Under the Maine statute regulating the proceedings of the county commissioners in laying out highways, the towns may be cited to object to the

of statute, being that the county or town is not liable, but that the party who invokes the action of the officials is.[66] Statutes requiring the giving of cost bonds in highway proceedings are generally given a liberal construction, and irregularities in regard to the contents, sureties, approval, or filing are rarely held to be incurable or fatal to jurisdiction.[67]

(II) *Of Proceedings For Review.* The right of an appellate court to make any award of costs in highway proceedings has been denied;[68] but on the other hand, it has been held that it should at least dispose of the costs made in its own court,[69] and the statutes of some states confer upon it a discretion as to the terms of the award,[70] while in other states the rule giving costs to the prevailing party is applicable.[71] A party seeking a review of the proceedings by either the original

agent's account at an adjourned sitting of the commissioners, and not necessarily at a regular term. Sumner *v.* Oxford County, 37 Me. 112.

Payment and collection.—Under the Minnesota statute, the county is not liable for payment of commissioners' services in opening a road, until their work is finished and the road opened (Thorn *v.* Washington County, 14 Minn. 233); and under a statute providing that the fees of the commissioners appointed to open a state road through three counties named shall be paid out of the county treasuries of the three counties "in proportion, as near as may be, to the extent of said road situated in each of said counties," one of such commissioners cannot, in an action against one of the counties, and upon proof that a certain number of days' service was performed by him in that county, recover the sum due for such services, since payment by the counties according to the terms of the act might impose a different measure of liability upon each county from that of paying for all the work upon the portion of the road lying in that county (Steele *v.* Randolph County, 63 Ill. 460). Under the New York statutes a petitioner is not remitted to a presentation of his claim to the supervisors, but on confirming a commissioners' report in proceedings to lay out a highway, the county court has authority, under Code Civ. Proc. § 3240, to allow the petitioner's costs and disbursements in excess of the fifty dollars provided by Highway Law, § 152. *In re* Peterson, 94 N. Y. App. Div. 143, 87 N. Y. Suppl. 1014.

Reimbursement may be had by petitioners who have expended money in procuring the establishment of the highway of the remaining petitioners, unless the petition has been materially altered without their consent. Jewett *v.* Cornforth, 3 Me. 107; Jewett *v.* Hodgdon, 3 Me. 103; Burnham *v.* Steele, 8 N. H. 182.

66. Smith *v.* Belknap County, 71 N. H. 203, 51 Atl. 628. *Compare* Onderdonk *v.* Plainfield, 42 N. J. L. 480.

67. Hopkins *v.* Contra Costa County, 106 Cal. 566, 39 Pac. 933; Hill *v.* Ventura County, 95 Cal. 239, 30 Pac. 385; Humboldt County *v.* Dinsmore, 75 Cal. 604, 17 Pac. 710; State *v.* Barlow, 61 Iowa 572, 16 N. W. 733; Eble *v.* State, 77 Kan. 179, 93 Pac. 803, 127 Am. St. Rep. 412 (holding that one petitioner may be a surety on the bond of another petitioner); Casey *v.* Kilgore, 14 Kan. 478; Miller *v.* Hamilton County, 9 Ohio Dec. (Reprint) 312, 12 Cinc. L. Bul. 152.

A bond is not required under the Oregon statutes (Douglas County *v.* Clark, 15 Oreg. 3, 13 Pac. 511), and in Massachusetts the fact that a town, in applying to the county commissioners to lay out a highway, gave no recognizance for costs, is not a ground for quashing the commissioners' proceedings upon the application of one over whose lands the way was located (Blake *v.* Norfolk County, 114 Mass. 583). A remonstrant who appears in his own name to defend his own rights does not come within a statute providing that any member of the community defending a suit brought against the community shall give bond. Shelton *v.* Derby, 27 Conn. 414.

68. People *v.* Spring Wells Tp. Bd., 12 Mich. 434; Butman *v.* Fowler, 17 Ohio 101.

Where the error might have been remedied in the lower court by amendment on motion, costs will be refused in the higher court. Mount Olive Tp. *v.* Hunt, 51 N. J. L. 274, 17 Atl. 291; People *v.* Ferris, 36 N. Y. 218 [*reversing* 41 Barb. 121].

Where the proper parties are not before the court, it will make no award of costs. Evans *v.* Shields, 3 Head (Tenn.) 70.

69. Ball *v.* Humphrey, 4 Greene (Iowa) 204.

Payment cannot be required until the appeal has been determined and the costs have been adjudged. Scott *v.* Lasell, 71 Iowa 180, 32 N. W. 322.

70. People *v.* Schodack Highway Com'rs, 27 How. Pr. (N. Y.) 158; People *v.* Flake, 14 How. Pr. (N. Y.) 527. *Compare* People *v.* Heath, 20 How. Pr. (N. Y.) 304.

In the absence of any statute governing the matter, the appellate court must exercise its discretion. *Ex p.* Williams, 4 Yerg. (Tenn.) 579.

A joint liability for the fees of referees attaches where several appeals are heard at one and the same hearing. Disosway *v.* Winant, 1 Abb. Dec. (N. Y.) 508, 3 Keyes 412, 2 Transcr. App. 192, 33 How. Pr. 460 [*reversing* 34 Barb. 578, 1 Abb. Pr. 216].

71. Sangamon County *v.* Brown, 13 Ill. 207 (holding that the obtaining of a material increase of damages on an appeal is a successful prosecution of the county to liability for costs); State

board or tribunal or a higher court is chargeable with the costs of the steps which he takes to obtain such review upon the dismissal of his exceptions, either of his own motion or by the court; [72] and where the cause is dismissed by the appellate court for want of jurisdiction in the lower board or court, the applicant for the road is liable for all the costs of the proceedings, including those of appeal.[73]

m. Operation and Effect of Establishment — (i) *In General.* When all the steps required by statute have been regularly taken, a road is established and is, in contemplation of law, open, notwithstanding the fact that it is not actually open,[74] or that the time for an aggrieved party to apply for a discontinuance has not expired,[75] and when so established, it remains such until vacated by the public authorities or abandoned.[76] The public has a perpetual easement, which is a freehold, in its highways,[77] as the valid establishment of a public highway deprives an owner of land over which it passes of his freehold therein,[78] although he still retains certain prescriptive rights, such as easements which are not inconsistent with the easement of the highway.[79]

(ii) *Character, Location, and Extent of Road.*[80] The character of a road is usually determined by the terms of the statute and order under and by

v. Flaherty, 46 Minn. 128, 48 N. W. 686; Harris *v.* Coltraine, 10 N. C. 312; Tripp *v.* Carbondale, 8 Luz. Leg. Reg. (Pa.) 1.

Partial affirmance.—Where, on the trial of a highway appeal, there is a finding establishing such highway, but allowing damages therefor to a remonstrant, the costs accruing from the trial of the former issue should be assessed against such remonstrant, and that accruing upon the latter against the petitioners. Jamieson *v.* Cass County, 56 Ind. 466. Under a statute making the referees' fees a county charge when the highway commissioners' decision is "reversed" on appeal, the word "reversed" applies to a case of reversal in part, as well as to an entire reversal. People *v.* Orange County, 20 Hun (N. Y.) 196 [*affirmed* in 85 N. Y. 641].

Liability of petitioner.— In Maine the district court on appeal has no authority to award costs either for or against the original petitioners (*In re* Jordan, 32 Me. 472), while Iowa Code (1873), § 963, provides that if an appeal has been taken by claimant, the petitioner for the highway or the county must pay the costs occasioned by the appeals (Hanrahan *v.* Fox, 47 Iowa 102).

As the commissioners have no personal interest in the matter, an award of costs should not be made against them personally (Russell Com'rs' Ct. *v.* Tarver, 25 Ala. 480; Alexander *v.* Rubensam, 12 Ill. App. 120), except where they have made themselves parties to the appeal or certiorari (Russell Com'rs' Ct. *v.* Tarver, *supra*; Sonora Highway Com'rs *v.* Carthage, 27 Ill. 140).

72. Smith *v.* Brasher, 67 Mo. App. 556; *In re* Stowe Tp. Road, 20 Pa. Super. Ct. 404.

73. Dyer *v.* Steuben County, 84 Ind. 542; Wilhite *v.* Wolfe, 90 Mo. App. 18.

74. Ferris *v.* Ward, 9 Ill. 499; Harrow *v.* State, 1 Greene (Iowa) 439.

Under the Minnesota statutes, a county road does not in all cases become a public highway open to public use, immediately upon the order of the county commissioners granting the prayer of the petition. Thus, where the road is over inclosed lands, it is essential that the road be opened by the supervisors of the town. State *v.* Leslie, 30 Minn. 533, 16 N. W. 408.

When contingent on act of landowner.— Where a street has been laid out and confirmed, subject to the right of the owner of the land to have compensation before it is opened, it becomes a public highway when opened as such by the owner of the land, and may lawfully be used as such, although a turnpike road and toll gate are thereby avoided. Greensburg, etc., Turnpike Road Co. *v.* Breidenthal, 1 Phila. (Pa.) 170.

75. Cragie *v.* Mellen, 6 Mass. 7.

Likewise, under a statute providing that if the court approve the report allowing a road it shall direct the breadth of the road, and at the next court the whole proceedings shall be entered on record, and thenceforth the road shall be deemed to be a lawful road, the road becomes a public highway on the report being confirmed and the exceptions dismissed, without waiting for the expiration of the succeeding term of court. Hibberd *v.* Delaware County, 1 Pa. Super. Ct. 204.

76. Champlain *v.* Morgan, 20 Ill. 181. See *infra*, II, D, 2, e; II, D, 3.

77. People *v.* Magruder, 237 Ill. 340, 86 N. E. 615; Perry *v.* Bozarth, 198 Ill. 328, 64 N. E. 1076; Farrelly *v.* Kane, 172 Ill. 415, 50 N. E. 118; Waggeman *v.* North Peoria, 160 Ill. 277, 43 N. E. 347; Brusby Mound *v.* McClintock, 146 Ill. 643, 35 N. E. 159.

A patent for public lands is subject to the easement of a highway under an act of congress granting a right of way for highways over public lands not reserved for public use. Bequette *v.* Patterson, 104 Cal. 282, 37 Pac. 917; McRose *v.* Bottyer, 81 Cal. 122, 22 Pac. 393. And see Public Lands, 32 Cyc. 866.

78. Aden *v.* Road Dist. No. 3, 97 Ill. App. 347.

79. Augusta *v.* Moulton, 75 Me. 284.

80. **Of highway acquired by user** see *supra*, II, B, 6.

Of highway established by dedication see Dedication, 13 Cyc. 488.

virtue of which it was established,[81] and its character as a public highway is not changed or affected by the fact that it is used for only a few purposes or by only a few persons,[82] by the fact that it terminates on private lands,[83] or that the erection of gates upon it is authorized.[84] In determining the location and extent of a public highway the courts endeavor to so construe the location as to make it certain and within the powers of the officers who made it.[85] An intention to furnish access to public waters will be carried out by holding that a road thereto extends to the water's edge,[86] and monuments will be held to govern courses and distances;[87] but in the case of a variation between a location by monuments and the return of the authorities, the latter is controlling.[88]

n. Pleading and Evidence of Existence of Highway — (i) *PLEADING.* In pleading the existence and location of a public highway, a statement of the legal proceedings taken to establish the highway is sufficient,[89] but general averments

81. McCearley *v.* Lemennier, 40 La. Ann. 252, 3 So. 649; Goodwin *v.* Hollowell, 12 Me. 271; Mann *v.* Marston, 12 Me. 32; State *v.* Davis, 68 N. C. 297; State *v.* Huffman, 2 Rich. (S. C.) 617.

In Vermont, all highways, whether open, cross roads, lanes, or pent roads, are public highways, although a highway will not be presumed to be an open one where the record is silent as to the nature of the road but designates a width less than that required by law for an open highway. French *v.* Barre, 58 Vt. 567, 5 Atl. 568.

The incidents of a public highway, such as the facts that it is a public charge and has an overseer, are not conclusive as to its character. State *v.* Smith, 100 N. C. 550, 6 S. E. 251.

A mere assumption by highway commissioners that a certain strip of land is a public road does not make it such (Speir *v.* New Utrecht, 49 Hun (N. Y.) 294, 2 N. Y. Suppl. 426 [*modified* in 121 N. Y. 420, 24 N. E. 692]); nor does a certificate by officials having no authority in the matter that a certain road is a by-road have the effect of making it such (Heiser *v.* Martin, 9 N. J. L. J. 277).

Where only part of an authorized highway is opened, that part is a highway. Vandemark *v.* Porter, 40 Hun (N. Y.) 397.

It is a question for the jury, in some cases, as to whether a road is a public or private way. Drake *v.* Rogers, 3 Hill (N. Y.) 604.

82. Kissinger *v.* Hanselman, 33 Ind. 80; Metcalf *v.* Bingham, 3 N. H. 459.

83. Sheaff *v.* People, 87 Ill. 189, 29 Am. Rep. 49.

84. Blakeslee *v.* Tyler, 55 Conn. 387, 11 Atl. 291.

85. Simons *v.* Walker, 100 Mass. 112; Proctor *v.* Andover, 42 N. H. 348, holding that alternative words in the description which do not refer to any stake or monument may be disregarded. And see Dowdle *v.* Cornue, 9 S. D. 126, 68 N. W. 194.

The width of the highway will be taken to be that required by statute, in the absence of any designation thereof in the record of the proceedings. Crowley *v.* Gallatin County, 14 Mont. 292, 36 Pac. 313; Sumner *v.* Peebles, 5 Wash. 471, 32 Pac. 221, 1000. Thus a description of a first-class road as running south with a certain line, the road being established under a statute requiring such roads to be not less than forty feet in width, will be deemed to describe a tract twenty feet wide on each side of such line. Terrell *v.* Tarrant County, 8 Tex. Civ. App 563, 28 S. W. 367.

86. Dana *v.* Craddock, 66 N. H. 593, 32 Atl. 757; Newark Lime, etc., Mfg. Co. *v.* Newark, 15 N. J. Eq. 64 (holding that if the shore is extended into the water by alluvial deposits, or is filled in by the proprietor of the soil, the public easement is, by operation of law, extended from its former terminus over the new-made land to the water); Fowler *v.* Mott, 19 Barb. (N. Y.) 204; People *v.* Lambier, 5 Den. (N. Y.) 9, 47 Am. Dec. 273; Balliet *v.* Com., 17 Pa. St. 509, 55 Am. Dec. 581.

But when, subsequent to the location of the highway, the state makes a grant of all the land, below the original high-water line in front of the highway, the rule is otherwise. Elizabeth *v.* New Jersey Cent. R. Co., 53 N. J. L. 491, 22 Atl. 47 [*following* Hoboken *v.* Pennsylvania R. Co., 124 U. S. 656, 8 S. Ct. 643, 31 L. ed. 543, and *distinguishing* Hoboken Land, etc., Co. *v.* Hoboken, 36 N. J. L. 540].

87. Miller *v.* Silsby, 8 N. H. 474; Racine *v.* J. I. Case Plow Co., 56 Wis. 539, 14 N. W. 599.

Survey as estoppel.— The survey and platting of a road by the county surveyor under the order of the highway commissioner estops the public from claiming that the road runs on a different line from the survey. Gentleman *v.* Soule, 32 Ill. 271, 83 Am. Dec. 264.

A statute intended merely to enable landowners to have undisputed street lines marked so as to designate their location does not authorize the officials named therein to determine the location of disputed street lines. Kent *v.* Pratt, 73 Conn. 573, 48 Atl. 418.

88. Dennett *v.* Hopkinson, 14 Me. 341.

89. Hawkins *v.* Stanford, 138 Ind. 267, 37 N. E. 794.

A vacation of a part of a road and the establishment of it elsewhere is sufficiently pleaded by setting out the proceedings. Kyle *v.* Kosciusko County, 94 Ind. 115.

and description are also sufficient,[90] and an averment that the road was duly and legally established authorizes a showing of dedication and public acceptance.[91]

(II) *EVIDENCE* [92] — (A) *Presumptions and Burden of Proof.* The burden of proving the legal establishment and existence of a public highway is on the public authorities or other parties who allege its existence; [93] but where it is shown that the authorities which established the road had jurisdiction, every presumption thereafter is in favor of the legality and regularity of their proceedings,[94] and the burden of showing an abandonment of the road is on the owner of the land through which the road passes.[95] Where ancient records are offered as proof of the existence of a way, all reasonable presumptions are to be taken in favor of their validity.[96]

(B) *Admissibility.*[97] While the records of the establishment of a highway constitute the regular proof of its establishment, existence, and location, and according to some authorities are the only evidence admissible on those questions, unless their loss is accounted for,[98] the weight of authority favors the view that these facts may be proved by reputation or hearsay, such as by ancient records and documents and the declarations of deceased persons,[99] or by other parol evi-

Irregularity in the establishment of a road is well pleaded by alleging facts showing a failure to post the notices of the proceedings in the manner required by statute, and it is not necessary to allege fraudulent purpose in failing to post them, or that the parties had no notice of the proceedings. Williams *v.* Routt County, 37 Colo. 55, 84 Pac. 1109.

90. Freshour *v.* Hihn, 99 Cal. 443, 34 Pac. 87; Thompson Tp. Highway Com'r *v.* Beebe, 55 Mich. 137, 20 N. W. 826.

A transcript of the board's proceedings need not be filed with the pleading, since, when it has jurisdiction, its proceedings are attended with the same presumption of regularity as are those of a court of general jurisdiction, and are not susceptible of collateral attack. Chicago, etc., R. Co. *v.* Sutton, 130 Ind. 405, 30 N. E. 291.

91. Hartford *v.* New York, etc., R. Co., 59 Conn. 250, 22 Atl. 37.

92. **In action or prosecution for obstructing highway** see *infra*, VI; VII.

93. Dingwall *v.* Weld County, 19 Colo. 415, 36 Pac. 148; Van Wanning *v.* Deeter, 78 Nebr. 284, 112 N. W. 902, 78 Nebr. 282, 110 N. W. 703; Bare *v.* Williams, 101 Va. 800, 45 S. E. 331. But see Heacock *v.* Sullivan, 70 Kan. 750, 79 Pac. 659, holding that in an action to enjoin a road surveyor and the board of county commissioners from attempting to lay out a public highway along a section line, the burden of proving the nonexistence of the road in question is on plaintiff.

94. Biglow *v.* Ritter, 131 Iowa 213, 108 N. W. 218; St. Bartholomew's Parish Lower Bd. Road Com'rs *v.* Murray, 1 Rich. (S. C.) 335.

The presumption is one of fact merely, and may be rebutted by showing that the proper steps were not in fact taken. State *v.* Logue, 73 Wis. 598, 41 N. W. 1061.

Presumption of jurisdiction.—Where the return of selectmen shows that they acted upon a petition for a way, and when the use of the way has been acquiesced in for several years, there is a *prima facie* presumption that the petition was sufficient in form to give the selectmen jurisdiction to act. Cushing *v.* Webb, 102 Me. 157, 66 Atl. 719.

The actual location of the road will be presumed to be correct until the contrary is shown. Council Grove Tp. *v.* Bowman, 76 Kan. 563, 92 Pac. 550.

Presumption of legality of highway as terminus of proposed highway see *supra*, II, C, 1, b, (II), (B), note 80.

95. Dingwall *v.* Weld County, 19 Colo. 415, 36 Pac. 148.

96. Geer *v.* Fleming, 110 Mass. 39.

97. **Evidence of dedication** see DEDICATION, 13 Cyc. 472.

98. M. B., etc., R. Co. *v.* Greenup County, 12 Ky. L. Rep. 46 (holding, however, that where no objection to parol evidence has been made, complaint that the best evidence was not offered cannot be made after verdict); Hoffman *v.* Rodman, 39 N. J. L. 252; Brander *v.* Chesterfield Justices, 5 Call (Va.) 548, 2 Am. Dec. 606. And see Willis *v.* Sproule, 13 Kan. 257.

A town or private way cannot be proved by parol. State *v.* Berry, 21 Me. 169. But see Bigelow *v.* Hillman, 37 Me. 52.

In a direct proceeding to vacate a road, a former order of vacation must be proved by the record, and cannot be proved by parol. Whetton *v.* Clayton, 111 Ind. 360, 12 N. E. 513.

Where the place has never been opened or used as a public highway, it cannot be shown to be such by parol evidence. Harrington *v.* People, 6 Barb. (N. Y.) 607.

99. *Connecticut.*— Wooster *v.* Butler, 13 Conn. 309.

Missouri.— St. Louis Public Schools *v.* Risley, 40 Mo. 356.

New Hampshire.— Webster *v.* Boscawen, 67 N. H. 111, 29 Atl. 670; Lawrence *v.* Tennant, 64 N. H. 532, 15 Atl. 543; State *v.* Vale Mills, 63 N. H. 4; Willey *v.* Portsmouth, 35 N. H. 303.

Rhode Island.— Hampson *v.* Taylor, 15 R. I. 83, 8 Atl. 331, 23 Atl. 732.

Wisconsin.—Randall *v.* Rovelstad, 105 Wis. 410, 81 N. W. 819.

See 25 Cent. Dig. tit. "Highways," § 227.

dence,[1] the use of a way by the public and the limits thereof being considered a public fact concerning which any one with knowledge may speak.[2] Any or all of the records of the proceedings establishing the way or certified copies thereof, including the notes and maps of the surveyors and viewers, are admissible,[3] especially under statutes requiring a record to be made,[4] or under statutes making them or a certified copy thereof competent evidence;[5] and under the presumption of regularity which attaches to the proceedings of the board,[6] the record, to be admissible, need not be explicit as to all the preliminary steps, provided it shows jurisdiction and the final order;[7] but the records are not admissible when so incomplete or manifestly irregular as to be misleading and untrue,[8] or when made by one without author-

Compare Shepherd *v.* Turner, 129 Cal. 530, 62 Pac. 106, holding that while it is competent to prove the use made of the road, it is not competent to prove such user by the declaration of third persons or by reputation.

1. *Georgia.*—Penick *v.* Morgan County, 131 Ga. 385, 62 S. E. 300, holding admissible evidence of acts of control and dominion over road by public authorities.

Illinois.— Ferris *v.* Ward, 9 Ill. 499; Nealy *v.* Brown, 6 Ill. 10; Eyman *v.* People, 6 Ill. 4.

New York.— Chapman *v.* Gates, 46 Barb. 313.

Pennsylvania.— Morrow *v.* Com., 48 Pa. St. 305.

Tennessee.— Mankin *v.* State, 2 Swan 206.

See 25 Cent. Dig. tit. "Highways," § 228.

The actual location of the road may be proved by parol testimony as to its opening and use. Louk *v.* Woods, 15 Ill. 256; Arnold *v.* Flattery, 5 Ohio 271.

To prove that a road is not a public highway, testimony of the county supervisor who has charge of all the highways and public road of the county is admissible. Miles *v.* Postal Tel. Cable Co., 55 S. C. 403, 33 S. E. 493.

2. Brown *v.* Jefferson County, 16 Iowa 339.

3. Penick *v.* Morgan County, 131 Ga. 385, 62 S. E. 300; Louk *v.* Woods, 15 Ill. 256; Roehrborn *v.* Schmidt, 16 Wis. 519; Reg. *v.* McGowan, 17 N. Brunsw. 191. And see Atty.-Gen. *v.* Antrobus, [1905] 2 Ch. 188, 69 J. P. 141, 3 Loc. Gov. 1071, 92 L. T. Rep. N. S. 790, 21 T. L. R. 471.

The original survey and minutes of the commissioners in the laying out of a road are admissible in evidence, instead of authenticated copies (King *v.* Kenny, 4 Ohio 79); and when the original records have been destroyed by fire, secondary evidence of their contents is competent (Wildrick *v.* Hager, 10 N. Y. St. 764).

A report found on the files of the town, but not otherwise recorded, is sufficient evidence of the laying out of a highway. Hardy *v.* Houston, 2 N. H. 309.

An act of the legislature recognizing the road as a highway, together with proof that a person under whom plaintiff claims title was cognizant of the application to the legislature for the passage of the act, and subsequently acted under it as commissioner, is admissible in evidence. Tyson *v.* Baltimore County, 28 Md. 510.

4. Jonestown Road Case, 1 Serg. & R. (Pa.) 487 (certified copy); Randall *v.* Rovelstad, 105 Wis. 410, 81 N. W. 819.

The neglect to have filed and recorded the proper records, as required by law, does not raise a presumption that the authorities proceeded contrary to statute in establishing the road, or render inadmissible evidence that the necessary acts were in fact done. Carron *v.* Clark, 14 Mont. 301, 36 Pac. 178.

5. Waterman *v.* Raymond, 34 Ill. 42; Epler *v.* Niman, 5 Ind. 459, transcript of proceedings.

6. See *supra*, II, C, 5, n, (II), (A).

7. *Illinois.*— Dumoss *v.* Francis, 15 Ill. 543.

Iowa.— State *v.* Lane, 26 Iowa 223.

Missouri.— State *v.* Gilbert, 73 Mo. 20.

New York.— Sage *v.* Barnes, 9 Johns. 365.

Ohio.— McClelland *v.* Miller, 28 Ohio St. 488; Beebe *v.* Scheidt, 13 Ohio St. 406; Arnold *v.* Flattery, 5 Ohio 271.

See 25 Cent. Dig. tit. "Highways," § 231.

Compare Williams *v.* Holmes, 2 Wis. 129, holding that before a petition for laying out a road is admissible in evidence, it must be affirmatively shown that there were six freeholders, petitioners.

Omission of provisions as to compensation or damages does not affect the admissibility of the records. Howard *v.* State, 47 Ark. 431, 2 S. W. 331; Thompson *v.* Major, 58 N. H. 242. But see Dunning *v.* Matthews, 16 Ill. 308.

8. Watrous *v.* Southworth, 5 Conn. 305; State *v.* Snyder, 25 Iowa 208 (holding the record in question objectionable for uncertainty in not stating the termini of the road); State *v.* Berry, 21 Me. 169 (holding that the records of a town which are not admissible to prove the existence of a legal town way cannot be admitted to show the limits or outside lines of the road); Young *v.* Garland, 18 Me. 409.

Jurisdiction must be shown in order to render the records admissible. Mankin *v.* State, 2 Swan (Tenn.) 206.

Where certification is required, failure to obtain it is fatal to the admissibility of the records. Blodget *v.* Royalton, 14 Vt. 288.

Slight discrepancies, or clerical mistakes, which may be readily corrected by reference to other papers of the record, are of no moment in passing on the admissibility of the evidence (Humboldt County *v.* Dinsmore, 75 Cal. 604, 17 Pac. 710; State *v.* Prine, 25 Iowa 231); but where selectmen, in laying out a highway, referred for a particular de-

ity.[9] Such records are at least *prima facie* evidence of the facts which they recite,[10] and are not subject to direct contradiction by parol evidence,[11] except as to jurisdictional facts,[12] although evidence *aliunde* may be received to explain and supply defects therein,[13] or to identify the subject-matter.[14] The writings or parol testimony offered must be relevant and purport to be evidence of the matters intended to be proved.[15]

(c) *Weight and Sufficiency.* In considering evidence as to the legal or actual existence and limits of a highway, care should be taken against giving any one item conclusive effect,[16] and of giving any independent weight to evidence which

scription to a plan recorded in the registry of deeds, in proving the limits of such highway, the records thus referred to should be produced as a part of the description (Hall *v.* Manchester, 39 N. H. 295).

Although inadmissible to prove a laying out, on account of irregularity, the records may nevertheless be admitted as evidence to show the commencement of the way, in order to rebut a presumption of a dedication (Avery *v.* Stewart, 1 Cush. (Mass.) 496), or to show a prescriptive right (Wright *v.* Fanning, (Tex. Civ. App. 1905) 86 S. W. 786).

9. Gray *v.* Waterman, 40 Ill. 522.

The certificate of a person not acting judicially but only as commissioner to see the work executed is but *prima facie* evidence of the facts recited therein, and may be contradicted by parol. Davis *v.* Concordia Police Jury, 19 La. 533.

The appointment of a person who has made a report must be established, before such report may be admitted in evidence. Fowler *v.* Savage, 3 Conn. 90.

A report embodying matters not within the jurisdiction of the persons making it is no evidence of such matters. Schuylkill County's Appeal, 38 Pa. St. 459.

10. Waterman *v.* Raymond, 34 Ill. 42; Lowe *v.* Aroma, 21 Ill. App. 598 (holding that Rev. St. c. 121, § 52, making the town clerk's record *prima facie* evidence of the regularity of proceedings in relation to highways, applies where the road was established before, as well as after, its enactment); Shaffer *v.* Weech, 34 Kan. 595, 9 Pac. 202 (map and field notes of surveyor); Willis *v.* Sproule, 13 Kan. 257; Roehrborn *v.* Schmidt, 16 Wis. 519.

11. *Louisiana.*— Innis *v.* Kemper, 3 Mart. N. S. 119.

Maine.— Blaisdell *v.* Briggs, 23 Me. 123.

Michigan.— Moore *v.* People, 2 Dougl. 420.

Missouri.— Butler *v.* Barr, 18 Mo. 357.

New Hampshire.— State *v.* Rye, 35 N. H. 368; Dudley *v.* Butler, 10 N. H. 281.

North Carolina.— Cline *v.* Lemon, 4 N. C. 323.

Ohio.— Beebe *v.* Scheidt, 13 Ohio St. 406.

See 25 Cent. Dig. tit. "Highways," § 232.

The records of one county are not subject to impeachment in a collateral way by the records of another county. Bradbury *v.* Benton, 69 Me. 194.

12. People *v.* Seward, 27 Barb. (N. Y.) 94 [*affirmed* in 30 N. Y. 470]; Anderson *v.* Hamilton County, 12 Ohio St. 635.

13. Ackerson *v.* Van Vleck, 72 Iowa 57, 33 N. W. 362; Keyes *v.* Tait, 19 Iowa 123; Oliphant *v.* Atchison County, 18 Kan. 386; Smith *v.* Cumberland County, 42 Me. 395; Austin *v.* Allen, 6 Wis. 134, holding that, in proving that the signers of the petition were freeholders, resort to documentary evidence is not necessary. *Compare* Butterfield *v.* Pollock, 45 Iowa 257 (holding that in determining the sufficiency of a notice, extrinsic evidence is inadmissible to explain it); Stewart *v.* Wallis, 30 Barb. (N. Y.) 344.

Evidence of user in aid of defective record see *supra*, II, C, 5, i, (VI), (B).

14. Penick *v.* Morgan County, 131 Ga. 385, 62 S. E. 300, where testimony to show that the road referred to in the minutes was the road testified about was held to have been properly received.

15. Shepherd *v.* Turner, 129 Cal. 530, 62 Pac. 106 (holding that as the refusal to vacate a highway does not tend to make the premises a highway, an order making such refusal is inadmissible); Wooster *v.* Butler, 13 Conn. 309; Lincoln *v.* Com., 164 Mass. 1, 41 N. E. 112; State *v.* Alstead, 18 N. H. 59 (holding that the testimony of one that he has acted as a road surveyor, and in execution of his warrant caused a road to be repaired, is not evidence of such road having been established as a public highway, when there is no evidence that it was within his district, and his warrant has not been produced or accounted for).

The condition of a road is not evidence as to whether or not it is a highway. Zimmerman *v.* State, 4 Ind. App. 583, 31 N. E. 550.

Identification of the records and the entries therein by showing when the book or record came into existence, in whose custody it is, and when the entries therein were made is a condition precedent to its admissibility. Shepherd *v.* Turner, 129 Cal. 530, 62 Pac. 106; Penick *v.* Morgan County, 131 Ga. 385, 62 S. E. 300.

Facts showing a sufficient identification see Hall *v.* Manchester, 40 N. H. 410.

Verdicts and judgments between other parties are not admissible to show the establishment of a highway, except in the case of highways claimed by prescription and user. Fowler *v.* Savage, 3 Conn. 90.

16. Beach *v.* Meriden, 46 Conn. 502.

A plan filed by a town in compliance with a statutory requirement, showing a number of roads, some of which were admitted to be county roads, and showing also brooks and other things not called for by the act, is not conclusive evidence that a way delineated

is of no worth unless accompanied by other evidence.[17] Thus, surveys, reports, and other preliminary proceedings are insufficient to establish the existence of the highway without proof of an actual opening to public use;[18] and in general the rules and standards prevailing in other civil actions[19] are applicable in passing on the weight and sufficiency of evidence relating to the existence of a highway.[20]

D. Alteration, Vacation, and Abandonment — 1. Alteration[21] — a. In General — (i) *What Constitutes Alteration.* An alteration of a highway, as the expression is used, generally refers to a change in the course thereof,[22] and therefore necessarily involves to some extent the establishment of a new highway, and the vacation of the part of the old highway for which the substitution is made.[23] But the term has been extended to include a widening or narrowing,[24] and the

thereon is a county road. Butchers' Slaughtering, etc., Assoc. *v.* Boston, 139 Mass. 290, 30 N. E. 94. Likewise a plat returned by county commissioners of the location of a public road is not conclusive evidence of its actual location. Hiner *v.* People, 34 Ill. 297.

Order to remove fence.— An order of the town supervisor requiring an occupant of land to remove a fence on the ground that it encroaches upon a public highway is not conclusive evidence of the legal existence of such highway. Soule *v.* State, 19 Wis. 593.

17. Brantly *v.* Huff, 62 Ga. 532.

18. Ottawa *v.* Yentzer, 160 Ill. 509, 43 N. E. 601. And see O'Connell *v.* Chicago Terminal Transfer R. Co., 184 Ill. 308, 56 N. E. 355.

Subsequent surveys leave the proof of the existence of the road precisely as it was before. Gentleman *v.* Soule, 32 Ill. 271, 83 Am. Dec. 264.

19. See Evidence, 17 Cyc. 753.

20. See Neff *v.* Smith, 91 Iowa 87, 58 N. W. 1072; State *v.* Horn, 34 Kan. 556, 9 Pac. 208 (holding that where the record of the county board recites that two of the viewers acted and made a report, but the report itself shows otherwise, the report is the better evidence and must prevail); Warner *v.* Holyoke, 112 Mass. 362; Bellevue *v.* Hunter, 105 Minn. 343, 117 N. W. 445; Arndt *v.* Thomas, 90 Minn. 355, 96 N. W. 1125; Postal *v.* Martin, 4 Nebr. (Unoff.) 534, 95 N. W. 8; State *v.* Morse, 50 N. H. 9; State *v.* Stites, 13 N. J. L. 172 (holding that a written petition for a highway is more conclusive, as evidence of the route applied for, than the subsequent declarations of the applicants); Tincher *v.* State, 19 Tex. 156; Bare *v.* Williams, 101 Va. 800, 45 S. E. 331; Austin *v.* Allen, 6 Wis. 134 (holding that proof of peaceable possession under claim of title is *prima facie* evidence that the signers of the petition were freeholders).

Evidence sufficient to go to jury see Reed *v.* Harlan, 2 Ohio Dec. (Reprint) 553, 3 West. L. Month. 632.

The sufficiency and effect of the records are for the determination of the court alone. State *v.* Prine, 25 Iowa 231.

A recorded plat is not evidence of the existence of a road, but is only evidence of its precise locality. Naylor *v.* Beeks, 1 Oreg. 216.

Absence of record proof.— Evidence that a road has been used and traveled by the public, and kept in repair by the road overseer of the district in which it is located, is sufficient *prima facie* to establish the existence of such road as a public highway (Madison Tp. *v.* Scott, 9 Kan. App. 871, 61 Pac. 967); and the mere absence of record proof is insufficient to establish the fact that the place in question is not a public highway (State *v.* Robinson, 12 Wash. 491, 41 Pac. 884).

Sufficiency of evidence to support finding of necessity of highway see *supra*, II, C, 1, b, (II), (C), note 90.

21. **At railroad crossing** see Railroads, 33 Cyc. 266.

Change of grade of city streets see Municipal Corporations, 28 Cyc. 839.

Of city streets see Municipal Corporations, 28 Cyc. 838.

22. Gloucester *v.* Essex County, 3 Metc. (Mass.) 375; Buchholz *v.* New York, etc., R. Co., 71 N. Y. App. Div. 452, 75 N. Y. Suppl. 824 [*affirmed* in 177 N. Y. 550, 69 N. E. 1121]; Hutchinson *v.* Chester, 33 Vt. 410; State *v.* Burgeson, 108 Wis. 174, 84 N. W. 241; Harrison *v.* Milwaukee County, 51 Wis. 645, 8 N. W. 731.

"Alter" means to change or modify; to change in form without destroying identity. Heiple *v.* Clackamas County, 20 Oreg. 147, 25 Pac. 291.

A change making a right angle instead of an obtuse angle in an existing highway is an "alteration" thereof. People *v.* Jones, 63 N. Y. 306.

23. People *v.* Jones, 63 N. Y. 306; Buchholz *v.* New York, etc., R. Co., 71 N. Y. App. Div. 452, 75 N. Y. Suppl. 824 [*affirmed* in 177 N. Y. 550, 69 N. E. 1121]; Millcreek Tp. *v.* Reed, 29 Pa. St. 195; *In re* Loyalsock Tp. Road, 26 Pa. Super. Ct. 219; West Penn. Road, 23 Pa. Co. Ct. 477.

A technical alteration is the substitution of one way for another. Bigelow *v.* Worcester, 169 Mass. 390, 48 N. E. 1; Johnson *v.* Wyman, 9 Gray (Mass.) 186.

"Alteration" distinguished from "discontinuance" see Thompson *v.* Crabb, 6 J. J. Marsh. (Ky.) 222.

Operation and effect of alteration see *infra*, II, D, 1, a, (VI).

24. Boston, etc., R. Co. *v.* Middlesex County, 177 Mass. 511, 59 N. E. 115; New England R. Co. *v.* Worcester County R. Com'rs, 171 Mass. 135, 50 N. E. 549; Holmes *v.* Jersey City, 12 N. J. Eq. 299; People *v.*

straightening of a crooked highway.[25] But the mere leveling,[26] or change of grade,[27] of an existing highway is not an alteration thereof. Nor is it permissible upon a petition for an alteration in an existing highway to establish a new highway.[28]

(II) *Power to Alter* — (A) *In General.* The power existing in the legislature to establish highways includes the lesser power to alter them, subject only to the duty of making compensation for the property taken or injured thereby.[29] The subject of alteration of highways is regulated by statute, and courts and public officers have no power except such as the statute confers.[30] This power of alteration may be exercised by the legislature itself,[31] or it may be delegated to subordinate governmental agencies, such as county commissioners[32] or supervisors,[33]

McNeil, 2 Thomps. & C. (N. Y.) 140; Heiple *v.* Clackamas County, 20 Oreg. 147, 25 Pac. 291. But see Alston's Petition, 1 Pennew. (Del.) 359, 40 Atl. 938; State *v.* Vanderveer, 48 N. J. L. 80, 2 Atl. 771.

In Pennsylvania the word "change" in the act of 1836 was construed to mean a change of location only, and not a change of width. *In re* Liberty Alley, 8 Pa. St. 381; *In re* Church Road, 5 Watts & S. 200. But the act of 1850 may be regarded as an amendment of the eighteenth section of the act of 1836 whereby the term "change" as used in that section was enlarged beyond the construction previously given to it, so as to include a widening, as well as an alteration of location of parts of the road and the vacation of the parts supplied. *In re* Loyalsock Tp. Road, 26 Pa. Super. Ct. 219. And the word "altering" as used in the act of 1868 is sufficiently broad to cover the widening of a road. *In re* Loyalsock Tp. Road, *supra.*

25. Bowley *v.* Walker, 8 Allen (Mass.) 21; State *v.* Canterbury, 40 N. H. 307 (holding that the commissioners, in straightening curves or corners, may depart entirely, for short distances, from the route of the old highway; and the fact that the new route varied in some places four rods from the limits of the old road is no objection); State *v.* Vanderveer, 48 N. J. L. 80, 2 Atl. 771; State *v.* Reesa, 59 Wis. 106, 17 N. W. 873. But see Weber *v.* Ryers, 82 Mich. 177, 46 N. W. 233.

26. Callender *v.* Marsh, 1 Pick. (Mass.) 418.

27. Bigelow *v.* Worcester, 169 Mass. 390, 48 N. E. 1; Hutchinson *v.* Chester, 33 Vt. 410; Harrison *v.* Milwaukee County, 51 Wis. 645, 8 N. W. 731.

But where a highway is raised eighteen feet and carried by a bridge over a railroad formerly crossed at grade, it is a change in the structural formation of the way, not merely made for repair, and can be effected only under the authority of, and on a plan fixed by, those having power to lay or alter ways, and order specific changes. Dana *v.* Boston, 170 Mass. 593, 49 N. E. 1013.

28. *Indiana.*— Lowe *v.* Brannan, 105 Ind. 247, 4 N. E. 580.

Maine.— *In re* Livermore, 11 Me. 275.

Massachusetts.— Goodwin *v.* Marblehead, 1 Allen 37; Gloucester *v.* Essex County, 3 Metc. 375; Sprague *v.* Waite, 17 Pick. 309; Bliss *v.* Deerfield, 13 Pick. 102; Com. *v.* Cambridge, 7 Mass. 158.

New Hampshire.— State *v.* Canterbury, 40 N. H. 307.

New Jersey.— Pursell *v.* Edison Portland Cement Co., 65 N. J. L. 541, 47 Atl. 587.

Oregon.— Vedder *v.* Marion County, 28 Oreg. 77, 36 Pac. 535, 41 Pac. 3.

Wisconsin.— State *v.* Burgeson, 108 Wis. 174, 84 N. W. 241.

See 25 Cent. Dig. tit. "Highways," §§ 234, 236.

29. Nicholson *v.* New York, etc., R. Co., 22 Conn. 74, 56 Am. Dec. 390.

30. Hall *v.* Houston, etc., R. Co., (Tex. Civ. App. 1908) 114 S. W. 891; Hutchinson *v.* Chester, 33 Vt. 410.

31. Nicholson *v.* New York, etc., R. Co., 22 Conn. 74, 56 Am. Rep. 390.

32. *Alabama.*— James *v.* Hendree, 34 Ala. 488.

Georgia.— Bibb County *v.* Reese, 115 Ga. 346, 41 S. E. 636.

Indiana.— Patton *v.* Creswell, 120 Ind. 147, 21 N. E. 663; Houlton *v.* Carpenter, 29 Ind. App. 643, 64 N. E. 939.

Maryland.— Jenkins *v.* Riggs, 100 Md. 427, 59 Atl. 758.

Massachusetts.— Watertown *v.* Middlesex County, 176 Mass. 22, 56 N. E. 971.

South Carolina.— State *v.* Raborn, 60 S. C. 78, 38 S. E. 260.

See 25 Cent. Dig. tit. "Highways," § 236.

In Massachusetts the omission of the selectmen to make a written report to the town of their alteration of a town way, on a written petition for an alteration, is such a refusal or neglect to alter it as gives jurisdiction of the matter to the county commissioners, under Rev. St. c. 24, § 71. New Marlborough *v.* Berkshire County, 9 Metc. 423.

A single commissioner has no power to alter a road. St. Bartholomew's Parish Road Com'rs *v.* Murray, 1 Rich. (S. C.) 335.

Commissioners' court see Morris *v.* Cassady, 78 Tex. 515, 15 S. W. 102.

33. See cases cited *infra*, this note.

Iowa Code (1897), § 427, enacts that the board of supervisors of any county shall have power, on its own motion, to change and establish a highway along a stream, when it can avoid bridging such stream. This statute does not require the road to be constructed on the immediate bank of the stream, but it may be within a reasonable distance. Stahr *v.* Carter, 116 Iowa 380, 90 N. W. 64.

N. Y. Acts (1875), c. 482, conferring upon boards of supervisors authority to authorize

road or highway commissioners,[34] towns in town meeting,[35] selectmen [36] or other town authorities,[37] surveyors,[38] railroad commissioners,[39] and various courts.[40] A public highway, however established, cannot be altered or changed at the will of the owner of the land over which it passes.[41]

(B) *Roads in Different Jurisdictions.* In the absence of statutory prohibition, local tribunals have authority to make alterations in a highway within the limits of their town or county, although such highway is a part of a continuous line of road running into other towns or counties.[42] Special provision is usually made, however, for the alteration of highways extending through or into more than one town or county.[43]

the laying out of highways of a less width than is now required by law, and reducing the width of highways now in existence, does not confer upon such boards power to adopt a resolution or ordinance reducing the width of a road already in existence, but merely authorizes them to provide by suitable legislation for the doing of those acts by commissioners of highways or by other suitable agencies. Phillips *v.* Schumacher, 10 Hun (N. Y.) 405.

Wis. Rev. St. (1871) c. 19, § 105, confers upon the board of supervisors of any county, through which any state road may be laid out, authority to alter the same within the limits of the county, but not to discontinue unless the road lies wholly within the county. Hark *v.* Gladwell, 49 Wis. 172, 5 N. W. 323.

34. State *v.* State Militia Road Com'rs, 11 Rich. (S. C.) 485; St. Bartholomew's Parish Road Com'rs *v.* Murray, 1 Rich. (S. C.) 335; State *v.* St. Helena Road Com'rs, 4 McCord (S. C.) 5.

35. Latham *v.* Wilton, 23 Me. 125.

36. Clement *v.* Burns, 43 N. H. 609; Hutchinson *v.* Chester, 33 Vt. 410.

37. See cases cited *infra*, this note.

N. Y. Laws (1882), p. 381, c. 317, provides that county boards of supervisors may authorize town boards to alter or discontinue any public highway laid out by the state within their boundaries. People *v.* Vandewater, 176 N. Y. 500, 68 N. E. 876 [*reversing* 83 N. Y. App. Div. 54, 82 N. Y. Suppl. 627].

Wis. Rev. St. (1898) §§ 1265–1269, authorizes town supervisors to lay out, widen, alter, or discontinue highways on petition therefor. State *v.* Burgeson, 108 Wis. 174, 84 N. W. 241.

A member of a highway committee of a town council cannot give permission to widen a highway. Stone *v.* Langworthy, 20 R. I. 602, 40 Atl. 832.

38. Holmes *v.* Jersey City, 12 N. J. Eq. 299.

39. Nicholson *v.* New York, etc., R Co., 22 Conn. 74, 56 Am. Dec. 390.

For example, where the removal of a grade crossing renders it necessary to lay out and construct a new highway for a short distance, the action of the railroad commissioners does not interfere with the general power of towns as to laying out new highways, but such action is merely the alteration of an existing highway, and not the establishment of a new one. Doolittle *v.* Branford, 59 Conn. 402, 22 Atl. 336. So where two highways cross a railroad half a mile apart, and unite, a short distance after, on the east, the railroad commissioners have authority, under Conn. Sess. Laws (1876), p. 102, and Sess. Laws (1884), p. 378, to make an order to unite these highways on the west side of the railroad, thus saving more than one crossing of the railroad. Suffield *v.* New Haven, etc., R. Co., 53 Conn. 367, 5 Atl. 366.

40. **County courts** see Foster *v.* Dunklin, 44 Mo. 216; Heiple *v.* Clackamas County, 20 Oreg. 147, 25 Pac. 291.

Court of quarter sessions see *In re* Burnish St., 140 Pa. St. 531, 21 Atl. 500; Cook *v.* Deerfield Tp., 64 Pa. St. 445, 3 Am. Rep. 605; Chester Tp. *v.* Baltimore, etc., R. Co., 3 Del. Co. (Pa.) 151, holding that the only tribunal that can reduce the width of a highway is the court of quarter sessions. The common pleas has no jurisdiction. But the quarter sessions has no authority to grant a review to widen, straighten, and fix the limits of a road already laid out and used for many years. Its power is only to lay out, vacate, and alter or change an established route. *In re* Church Road, 5 Watts & S. (Pa.) 200. Under the Pennsylvania act of 1874, requiring the proceedings for widening a street, on approval of the board of surveyors, to be "as now required by law," the Pennsylvania act of 1871 in this regard governs, and the court of quarter sessions of the county of Philadelphia has no jurisdiction of a proceeding to widen a street on one side upon petition of the property holders only on the side to be widened. *In re* Chestnut St., 86 Pa. St. 84.

Court of general sessions see Alston's Petition, 1 Pennew. (Del.) 359, 40 Atl. 938.

Levy courts.— Under Md. Acts (1821), c. 152, the levy court of Baltimore county has jurisdiction and power of opening a new road, or of altering or vacating an old road. Williamson *v.* Carnan, 1 Gill & J. (Md.) 184.

41. Gross *v.* McNutt, 4 Ida. 300, 38 Pac. 935; Holcraft *v.* King, 25 Ind. 352; Houlton *v.* Carpenter, 29 Ind. App. 643, 64 N. E. 939; State *v.* Young, 27 Mo. 259.

42. Jackson *v.* Smiley, 18 Ind. 247.

43. See the statutes of the several states, and cases cited *infra*, this note.

In Vermont the county courts are authorized, through the aid of commissioners, to alter highways extending through or into more than one town, but wholly within the county (Hutchinson *v.* Chester, 33 Vt. 410); and the supreme court has the same powers

(c) *By Jury; Massachusetts Statute.* Under the Massachusetts statute a party aggrieved by the doings of the county commissioners in the location or alteration of a highway may, upon proper preliminary proceedings, have a jury to determine the matter of his complaint, and the jury may make any alterations that are prayed for between the termini, so far as they shall think them necessary or proper.[44] Under this provision, the jury may make alterations in a highway that has been located anew by the commissioners.[45] The power which the statute gives to such a jury is very limited.[46] They cannot revise the judgment of the commissioners as to the common convenience and necessity of laying out or altering the way in question;[47] neither have they authority to make an entire new line of way from one terminus to the other,[48] nor to change the termini of the road as located by the county commissioners,[49] nor to remove the road, or any part of it, to the land of another proprietor.[50] They can only make minor alterations, limited to the land of the petitioners, and thus render the way less burdensome to

when the highway petitioned to be altered extends through or into more than one county (Hutchinson *v.* Chester, *supra*).

In Wisconsin the power given by Rev. St. § 67, c. 19, to the supervisors of two adjoining towns to lay out a town line road, is held to include the power of altering such road upon application duly made to them for that purpose. Neis *v.* Franzen, 18 Wis. 537. The statutes seem to make a distinction between state and territorial roads. Laws (1869), c. 152, § 90, prohibits town boards of supervisors from altering any and all state roads. But such statute does not take away the power of such boards to alter territorial roads provided they lie "wholly within such towns," which words are held to mean and define a road which begins or ends within the town limits. State *v.* Hayden, 32 Wis. 663.

44. Mass. Rev. St. c. 24, § 13; Mass. Gen. St. c. 43, §§ 19, 20. See also Dean *v.* Lowell, 135 Mass. 55; Yeamans *v.* Hampden County, 105 Mass. 140; Boston, etc., R. Co. *v.* Middlesex County, 1 Allen (Mass.) 324; State Lunatic Hospital *v.* Worcester County, 1 Metc. (Mass.) 437.

Two objects are contemplated by the statute, to be accomplished by a jury; one is to alter the assessment of damages made by the commissioners, and the other is, within certain limits, to make alterations in the location of the road by the commissioners. Lanesborough *v.* Berkshire County, 22 Pick. (Mass.) 278.

Party aggrieved.— In the location of a highway by the county commissioners, the town through which it passes is a party, and as such may apply for a jury to make alterations in the location, and may appeal from the decision of the court of common pleas adjudicating upon the acceptance of the verdict. Westport *v.* Bristol County, 9 Allen (Mass.) 204; Lanesborough *v.* Berkshire County, 22 Pick. (Mass.) 278; Gloucester *v.* Essex County, 3 Metc. (Mass.) 375.

Verdict.— The verdict of a jury altering the location by the commissioners is sufficiently certain if it gives the commencement and termination, and the courses and distances. Merrill *v.* Berkshire, 11 Pick. (Mass.) 269. It is not necessary to name in the verdict the owners of the land over which the road is established, because the jury have no power to lay out the road over the land of any other person. Merrill *v.* Berkshire, *supra*.

45. Gloucester *v.* Essex County, 3 Metc. (Mass.) 375; State Lunatic Hospital *v.* Worcester County, 1 Metc. (Mass.) 437; Merrill *v.* Berkshire, 11 Pick. (Mass.) 269.

46. Yeamans *v.* Hampden County, 105 Mass. 140; Boston, etc., R. Co. *v.* Middlesex County, 1 Allen (Mass.) 324; Lanesborough *v.* Berkshire County, 22 Pick. (Mass.) 278.

47. Yeamans *v.* Hampden County, 105 Mass. 140; State Lunatic Hospital *v.* Worcester County, 1 Metc. (Mass.) 437; Lanesborough *v.* Berkshire County, 22 Pick. (Mass.) 278; Merrill *v.* Berkshire, 11 Pick. (Mass.) 269.

The regularity and legality of the proceedings of the commissioners are to be assumed by the jury (Yeamans *v.* Hampden County, 105 Mass. 140), and all evidence relating thereto or to prior proceedings in regard to the same and other ways in the vicinity is irrelevant except so far as it tends to prove the extent and character of the travel over the way in question, as bearing upon the question of what width it needs to have (Yeamans *v.* Hampden County, *supra*).

48. Hobart *v.* Plymouth County, 100 Mass. 159; Gloucester *v.* Essex County, 3 Metc. (Mass.) 375; Merrill *v.* Berkshire, 11 Pick. (Mass.) 269.

49. Hobart *v.* Plymouth County, 100 Mass. 159; Hayward *v.* North Bridgewater, 5 Gray (Mass.) 65; Gloucester *v.* Essex County, 3 Metc. (Mass.) 375; State Lunatic Hospital *v.* Worcester County, 1 Metc. (Mass.) 437; Lanesborough *v.* Berkshire County, 22 Pick. (Mass.) 278; Merrill *v.* Berkshire, 11 Pick. (Mass.) 269.

The phrase "alterations between the termini," in the meaning of the words in their ordinary use, distinctly imports a change in the course or direction of the road, and not in the mode of its construction, or in the place and manner in which it is to be built and finished; and in respect to this latter the jury have no duty to perform. Westport *v.* Bristol County, 9 Allen (Mass.) 204; Boston, etc., R. Co. *v.* Middlesex County, 1 Allen (Mass.) 324.

50. Wilson *v.* Beverly, 103 Mass. 136.

them.[51] But a petition is not vitiated by including it in a prayer for alterations which it would not be in the power of the jury to grant.[52]

(III) *What Roads May Be Altered.* A road becomes a public highway within the meaning of a statute authorizing the alteration of public highways[53] either when it has been laid out pursuant to statutory directions,[54] or where it has been used over twenty years as a highway,[55] or where it has been laid out and dedicated to public use as a highway by the owner of the soil, and accepted or ratified as a highway by the township in which it lies.[56] The fact that a highway has not been opened or used will not prevent its alteration if the circumstances require it.[57] The alteration of special classes of highways may be provided for by special statute.[58]

(IV) *Grounds of Alteration.* Public roads are laid out for the public convenience, and therefore should not be altered, except when the interests of the public require the alteration.[59] If the public interest requires the alteration,

51. Wilson *v.* Beverly, 103 Mass. 136; Hobart *v.* Plymouth County, 100 Mass. 159; Gloucester *v.* Essex County, 3 Metc. (Mass.) 375; Merrill *v.* Berkshire, 11 Pick. (Mass.) 269.

52. Westport *v.* Bristol County, 9 Allen (Mass.) 204.

The proper course is for the commissioners to issue the warrant for a jury in the general form to determine the matter of the petitioners' complaint, and to make such of the alterations prayed for therein as may be lawful and meet. Westport *v.* Bristol County, 9 Allen (Mass.) 204. When the jury is impaneled, it then becomes the duty of the presiding officer to decide, upon the facts as they are made to appear, whether any specific alteration asked is within their power. Westport *v.* Bristol County, *supra*.

53. **The words "public highway"** may be regarded as used to designate and comprehend all roads open to the public, owned by the state, as the ultimate proprietor, for use as highways, maintained at public expense, subject to legislative control, and under the protection and management of governmental agencies, such as counties, townships, or road districts, and to distinguish such highways from others owned by private corporations, and maintained at private expense, as toll roads owned by turnpike or gravel road companies. Houlton *v.* Carpenter, 29 Ind. App. 643, 64 N. E. 939.

54. Holmes *v.* Jersey City, 12 N. J. Eq. 299.

55. Houlton *v.* Carpenter, 29 Ind. App. 643, 64 N. E. 939; Lincoln *v.* Com., 164 Mass. 1, 41 N. E. 112; Holmes *v.* Jersey City, 12 N. J. Eq. 299; Snyder *v.* Plass, 28 N. Y. 465.

Under Mich. Laws (1881), No. 243, revising the road laws, a highway commissioner may alter a public road, whether it has been long in use or not. Weber *v.* Ryers, 82 Mich. 177, 179, 46 N. W. 233, 234.

56. Holmes *v.* Jersey City, 12 N. J. Eq. 299.

57. *In re* Gettysburg State Road, 2 Penr. & W. (Pa.) 289; Com. *v.* House, 4 Pa. L. J. 327, 3 Pa. L. J. Rep. 1.

58. See cases cited *infra*, this note.

Section lines.— Under the South Dakota territorial act of Jan. 12, 1871 (Comp. Laws, § 1189), declaring that all section lines shall be public highways so far as practicable, "provided that nothing in the act shall be so construed as to interfere with existing highways in the settled portions of the territory," a person seeking to prevent the change of a highway must show that it was legally established in a settled portion of the territory, or existed by prescription, at the time such act was passed. Keen *v.* Fairview Tp., 8 S. D. 558, 67 N. W. 623.

3 Howell Annot. St. Mich. §§ 1365, 1366, providing that when any public highway "which passes along the bank" of any lake, river, or other watercourse, and which is not included in the limits of a city or village, shall, by the washing away of the banks, or from any other cause, become reduced to a width of less than fifty feet, the highway commissioners shall lay out such highway upon adjacent lands to that width, does not refer to highways in which a ditch or other artificial watercourse may be laid, and which may be so reduced in width. De Lapp *v.* Beckwith, 114 Mich. 394, 72 N. W. 237.

59. Com. *v.* Cambridge, 7 Mass. 158; Kenedy *v.* Erwin, 44 N. C. 387; Matter of Chestnut St., 11 Phila. (Pa.) 411.

By "necessity" is not to be understood absolute physical necessity, but so great a public benefit that the want of the way is a great public convenience. Com. *v.* Cambridge, 7 Mass. 158.

Evidence as to utility of change.— The opinion of a witness as to the public utility of a proposed change of a highway is not admissible as evidence. Thompson *v.* Deprez, 96 Ind. 67; Yost *v.* Conroy, 92 Ind. 464, 47 Am. Rep. 156.

Danger from railroad trains.— The fact that a public road cannot be traveled without danger from locomotives and cars operated on a railroad is sufficient to justify the county court in changing the road, however great the inconvenience which may result therefrom to the owners of the lands on which the change is proposed, for which, and for the value of the land taken, they may be compensated. Helm *v.* Short, 7 Bush (Ky.) 623. Conversely when it appears that a county road gives the public reasonably convenient access to a railroad station, and that

it will be made, even at any sacrifice of private interest; but such sacrifice will never be required, except upon the ground of the general good.[60] Conversely if no inconvenience results to the public, the mere fact that the change promotes the interest of an individual will not make such change unlawful.[61]

(v) *PROCEEDINGS* — (A) *In General.* Authority under the order to open is exhausted by the action of those to whom it is directed, and cannot be resumed;[62] and a road, once laid, cannot be altered, except by a new and original proceeding, according to the road law.[63] This would be so, even though the boundaries do not precisely conform to the survey.[64] The alteration of a highway must be effected in a regular proceeding for that purpose,[65] and the statutory requirements must be strictly adhered to and complied with,[66] especially in all matters that are intended to affect individuals or the general public with notice.[67] Under some circumstances, however, there may be a legal change in the location of the highway, notwithstanding the want of statutory proceedings.[68] And in some cases it will

a proposed change of the road, so as to make it pass nearer the station, would make the road longer, and render the danger of horses becoming frightened from the trains greater, while it would not make the road itself better, the change is properly refused. Bennett *v.* Greenup County, 17 S. W. 167, 13 Ky. L. Rep. 349. Conn. Gen. St. § 3489, provides that the railroad commissioners, where the public safety requires it, may order such alterations in any highway crossed at grade by a railroad as they shall deem best. Doolittle *v.* Branford, 59 Conn. 402, 22 Atl. 336.

Mo. Laws (1893), p. 222, providing the same method of procedure for changing highways as for establishing new ones, authorizes the changing of roads on any ground for which a new road might be established. Turlow *v.* Ross, 144 Mo. 234, 45 S. W. 1125.

60. Kenedy *v.* Erwin, 44 N. C. 387.

61. State *v.* State Militia Road Com'rs, 11 Rich. (S. C.) 485.

A private corporation may be granted power by their charter to alter the course or bed of existing highways with the approval of the selectmen of the town where the highways are located, whenever it becomes necessary or convenient to do so in the construction and maintenance of a dam across a river. State *v.* Ousatonic Water Co., 51 Conn. 137.

62. Morrow *v.* Com., 48 Pa. St. 305; Ross *v.* Malcom, 40 Pa. St. 284; McMurtrie *v.* Stewart, 21 Pa. St. 322.

63. Patterson *v.* Munyan, 93 Cal. 128, 29 Pac. 250 [*distinguishing* Watkins *v.* Lynch, 71 Cal. 21, 11 Pac. 808]; Babcock *v.* Welsh, 71 Cal. 400, 12 Pac. 337; Hancock *v.* Wyoming, 148 Pa. St. 635, 24 Atl. 88; Van Buskirk *v.* Dawley, 91 Pa. St. 423; Cook *v.* Deerfield Tp., 64 Pa. St. 445, 3 Am. Rep. 605; Morrow *v.* Com., 48 Pa. St. 305; Ross *v.* Malcom, 40 Pa. St. 284; Furniss *v.* Furniss, 29 Pa. St. 15; McMurtrie *v.* Stewart, 21 Pa. St. 322 (holding, however, that this rule does not prevent subsequent supervisors from opening and clearing out the road to its legal width); Holden *v.* Cole, 1 Pa. St. 303.

64. Gray *v.* North Versailles Tp., 208 Pa. St. 77, 57 Atl. 190; Hancock *v.* Wyoming, 148 Pa. St. 635, 24 Atl. 88; Morrow *v.* Com., 48 Pa. St. 305; Clark *v.* Com., 33 Pa. St. 112; Holden *v.* Cole, 1 Pa. St. 303.

65. Clay County Highway Com'rs *v.* Harrison, 108 Ill. 398; Anderson *v.* Huntington, 40 Ind. App. 130, 81 N. E. 223; Cooper County *v.* Geyer, 19 Mo. 257; Heddleston *v.* Hendricks, 52 Ohio St. 460, 40 N. E. 408.

Time of commencing proceedings.— Proceedings by the township commissioner of highways to condemn land for the purpose of altering a highway, under Howell Annot. St. c. 29, §§ 1296–1305, are not irregular and premature because taken during the pendency of certiorari to review a former decision of the commissioner discontinuing such highway, where such decision is afterward held void. Weber *v.* Stagray, 75 Mich. 32, 42 N. W. 665.

66. Cassidy *v.* Smith, 13 Minn. 129; State *v.* Farrelly, 36 Mo. App. 282; *In re* Salem Tp. Road, 103 Pa. St. 250; *In re* Dallas Tp. Road, 8 Kulp (Pa.) 58, holding that proceedings for vacating and relaying part of a road which practically permit the petitioners and the court instead of the viewers to relay the road are fatally defective.

A statute providing for the discontinuance of roads does not apply to cases of alteration of roads. Thompson *v.* Crabb, 6 J. J. Marsh. (Ky.) 222.

To make a change from the route of the original view before the road is opened in whole or in part, the proper proceeding is not a petition to change and vacate, but a petition to review, upon which the court is at liberty to adopt the report of the viewers, or that of the reviewers as may seem best. *In re* Vernon Tp. Road, 70 Pa. St. 23.

Filing plat of road.— In Missouri the filing of a plat of the road with the county court is not a prerequisite to valid proceedings. State *v.* Moniteau County Ct., 113 Mo. App. 586, 87 S. W. 1193.

Misnomer of the highway to be altered is immaterial where there is no doubt as to the highway intended. People *v.* Van Brunt, 99 N. Y. App. Div. 564, 90 N. Y. Suppl. 845.

67. *In re* Salem Tp. Road, 103 Pa. St. 250. And see *infra*, II, D, 1, a, (v), (c).

68. Silverthorne *v.* Parsons, 60 Ohio St. 331, 54 N. E. 259, holding that when the owners of land crossed by a county road enter into an agreement with the county commissioners, pursuant to which they convey to

be presumed that formal proceedings were taken for the alteration of the highway in question.[69]

(B) *Petition and Parties* — (1) PETITION — (a) IN GENERAL. Under the provisions of some early statutes an application to change or alter a public highway could be made by motion, provided notice was given, but the later statutes of practically all the states require such application to be made by written petition, the form and contents of which are usually expressly prescribed.[70] It is not necessary that the statutory form be strictly followed. A substantial compliance is sufficient, expressing with reasonable certainty the action desired.[71] The petition must state specifically the object; and that must appear to be clearly within the purview of the act giving the court jurisdiction, otherwise the proceedings are irregular.[72] It should further describe the existing road,[73] the route of the proposed road,[74] the termini thereof,[75] the character of the alterations pro-

the commissioners other land, with a view to effecting a necessary change in the road, and the road is by order of the commissioners opened on the lands conveyed, and is so used by the public and by the proper authorities, there is a legal change in the location of the highway, notwithstanding the want of statutory proceedings for that purpose.

69. Leigh Urban Dist. Council *v.* King, [1901] 1 K. B. 747, 65 J. P. 243, 70 L. J. K. B. 313, 83 L. T. Rep. N. S. 777, 17 T. L. R. 205.

70. See the statutes of the several states, and cases cited *infra*, this note.

In Kentucky under the provisions of the general statutes an application to open a new road, or to change an old one, could be made by motion, provided the usual notice had been given in writing of the proposed application; but the act of 1894, which is chapter 110 of the Kentucky statutes, made a material change in these proceedings by requiring that such application should be by written petition, signed by at least five landholders of the county, and setting forth a description of the road, etc. Ford *v.* Collins, 108 Ky. 553, 56 S. W. 993, 994, 22 Ky. L. Rep. 251.

71. Harris *v.* Mahaska County, 88 Iowa 219, 55 N. W. 324; Jenkins *v.* Riggs, 100 Md. 427, 59 Atl. 758.

72. Wisner *v.* Barber County, 73 Kan. 324, 85 Pac. 288 (holding that a defective statement of a change prayed for in a highway will not render the petition void, where, notwithstanding the defect, the purpose of the petition can be gathered from the language used); Wilhite *v.* Wolf, 179 Mo. 472, 78 S. W. 793; *In re* Church Road, 5 Watts & S. (Pa.) 200.

73. Cox *v.* East Fork Tp. Highway Com'rs, 194 Ill. 355, 62 N. E. 791; Kelley *v.* Augsperger, 171 Ind. 155, 85 N. E. 1004; Lowe *v.* Brannan, 105 Ind. 247, 4 N. E. 580 (holding that under a petition professing to describe an existing highway, but in fact describing a highway as it will exist if the improvement is made, the court cannot order the straightening of an existing highway not described); Shute *v.* Decker, 51 Ind. 241 (holding that the description of a highway, in a petition for its change, as beginning at the state line in a certain section is too indefinite, where the section lies a mile in extent on the state line; but if the point in the road where the proposed change is to commence is definitely pointed out, and the line of the change designated, it will be sufficient); Scherer *v.* Bailey, 34 Ind. App. 172, 72 N. E. 472 (holding that a petition failing to describe the old road is fatally defective, notwithstanding a description of the proposed change); Raymond *v.* Cumberland County, 63 Me. 112.

74. Kelley *v.* Augsperger, 171 Ind. 155, 85 N. E. 1004; Scherer *v.* Bailey, 34 Ind. App. 172, 72 N. E. 472; *In re* Chartiers Tp. Road, 48 Pa. St. 314; *In re* Nelson's Mill Road, 2 Leg. Op. (Pa.) 54; Neis *v.* Franzen, 18 Wis. 537.

A description which is sufficiently definite to enable a surveyor to locate the highway is all that the law requires. Conaway *v.* Ascherman, 94 Ind. 187; Zeibold *v.* Foster, 118 Mo. 349, 24 S. W. 155.

Township or county.— A petition for the alteration of a highway must state the township (State *v.* Convery, 53 N. J. L. 588, 22 Atl. 345; Parkhurst *v.* Vanderveer, 48 N. J. L. 80, 2 Atl. 771) or county (*In re* Quemahoning Tp. Road, 27 Pa. Super. Ct. 150) in which the proposed road lies. But the omission to name the township in the petition, order of view, and report is not cause for the reversal of an order of confirmation, where the termini are so precisely described in the report as to leave no room for doubt as to the location of the road. *In re* Quemahoning Tp. Road, *supra*.

75. Raymond *v.* Cumberland County, 63 Me. 112; Johns *v.* Marion County, 4 Oreg. 46.

Reasonable certainty is required in defining the termini of the proposed route. *In re* West Penn Road, 23 Pa. Co. Ct. 477.

The caption of a petition may be considered in connection with the petition in determining whether the termini and the names of the township and county are sufficiently stated. *In re* Quemahoning Tp. Road, 27 Pa. Super. Ct. 150.

Description held sufficient see *In re* Lee, 4 Pennew. (Del.) 576, 60 Atl. 862; Hyde Park *v.* Norfolk County, 117 Mass. 416.

Where the petition designates other points on the road besides the termini, the proceedings will be set aside on exceptions. *In re*

posed,[76] and whatever else the statute may require.[77] Unless required by statute,[78] it is not necessary that the petition shall contain any averment as to notice,[79] or as to the length [80] or width [81] of the proposed road, or that it will be of public utility.[82] The petition should describe the petitioners, so as to make it appear that they have an interest in the subject-matter of the legal controversy which the petition initiates,[83] and should state the names of the property-owners over whose lands the proposed road is to be located.[84] A new and separate highway cannot be laid out upon an application to alter an existing highway.[85] Nor does a petition to lay out a road give jurisdiction to alter an already existing road.[86] But there is no objection to asking in the same petition for the vacation of one highway and the establishment of another in lieu thereof,[87] unless such alteration will effect such a radical change in the route of the road as practically to amount to a new road.[88]

(b) AMENDMENT. A petition to alter a highway is subject to amendment in a proper case.[89] But the commissioners have no right to amend a petition signed

Dallas Tp. Road, 8 Kulp (Pa.) 58, holding that the viewers should be left free to exercise their own judgment and discretion for the public good rather than be bound or controlled by that of the petitioners for private purposes. Bnt see *In re* Covington Road, Wilcox (Pa.) 121, holding that in proceedings to vacate and relay part of a road it was not error for the petition to mention other points in the road besides the termini.

76. Raymond *v.* Cumberland County, 63 Me. 112.

77. **Intention to vacate part supplied.**— Where the statute does not permit the alteration or change of a portion of a highway without at the same time vacating the part rendered unnecessary by reason of the alteration, the intention to vacate such unnecessary part should be specifically mentioned in the application, and set out on the plans and surveys accompanying the same. *In re* Washington Pike, 9 Pa. Dist. 52.

78. Wilson *v.* Berkstresser, 45 Mo. 283 (notice); Leath *v.* Summers, 25 N. C. 108 (necessity and utility).

79. Conaway *v.* Ascherman, 94 Ind. 187.

80. Bowers *v.* Snyder, 88 Ind. 302.

81. Zeibold *v.* Foster, 118 Mo. 349, 24 S. W. 155.

82. Conaway *v.* Ascherman, 94 Ind. 187; Bowers *v.* Snyder, 88 Ind. 302.

To move the discretion of the court, it is proper to recite in the petition the particular defects in the present location of the road (*In re* Ottercreek Tp. Public Road, 104 Pa. St. 261); but this need not be done (*In re* Manheim Tp. Road, 12 Pa. Super. Ct. 279).

83. Conaway *v.* Ascherman, 94 Ind. 187; State *v.* Nelson, 57 Wis. 147, 15 N. W. 14.

Residence.— Under the Pennsylvania act of June 13, 1836, a petition to change an old road need not indicate the residence of the petitioners. *In re* Friendsville, etc., Road, 16 Pa. Co. Ct. 172.

The petition should show that the petitioners are freeholders, and that six of them "reside in the immediate neighborhood of the highway proposed to be located, vacated, or of the change to be made." Conaway *v.* Ascherman, 94 Ind. 187.

84. Conaway *v.* Ascherman, 94 Ind. 187, where the change will vacate an existing way running over the lands of more than one person, and relocate it upon the lands held by two or more different owners. And see Wagner *v.* Mahrt, 32 Wash. 542, 73 Pac. 675.

Consent.— Where the petition does not disclose that consent of the landowner was not had, for the purpose of admitting evidence as to proceedings based upon that petition, it will be presumed that such consent was obtained. Wagner *v.* Mahrt, 32 Wash. 542, 73 Pac. 675.

85. See *supra*, II, D, 1, a, (I).

86. Norton *v.* Truitt, 70 N. J. L. 611, 57 Atl. 130.

87. Anderson *v.* Wood, 80 Ill. 15; Brown *v.* Roberts, 23 Ill. App. 461 [*affirmed* in 123 Ill. 631, 15 N. E. 30]; Harris *v.* Mahaska County, 88 Iowa 219, 55 N. W. 324; Green *v.* Loudenslager, 54 N. J. L. 478, 24 Atl. 367; State *v.* Bergen, 21 N. J. L. 342; Conrad *v.* Lewis County, 10 W. Va. 784. And see *supra*, II, C, 5, e, (IV).

Such a petition is not double because it seeks to have a part of an old highway vacated and a new one established in lieu thereof, as a change of highway implies a departure from the road already established and the opening of a new road. Kelley *v.* Augsperger, 171 Ind. 155, 85 N. E. 1004. The change of a highway necessarily requires the vacation of a portion of the highway and the location of such portion upon a different line, and in this sense a vacation and location are authorized in the same proceeding. Bowers *v.* Snyder, 88 Ind. 302. And see Patton *v.* Creswell, 120 Ind. 147, 21 N. E. 663; State *v.* Burgeson, 108 Wis. 174, 84 N. W. 241.

88. Bacon *v.* Noble, 20 Ohio Cir. Ct. 281, 11 Ohio Cir. Dec. 49.

89. New Marlborough *v.* Berkshire County, 9 Metc. (Mass.) 423 (holding that a petition to county commissioners to alter a town way according to a report of selectmen, which the town is alleged to have unreasonably refused to accept, may be amended, even after a hearing of the parties on the petition, by striking out the alleged unreasonable neglect of the town, and substituting an allegation of the unreasonable neglect of the selectmen to alter

by others, after it has been acted upon by them, and thus confer upon themselves a jurisdiction which they did not possess when the petition was presented.[90]

(2) PARTIES. The proper persons to join in a petition to secure the alteration of a highway must be determined by reference to the particular statute under which the proceeding is brought.[91]

(c) *Notice.* A proceeding to change a public road requires notice to be given, as in the case of new roads,[92] and there must be proof of this notice in court.[93] Such notice may be required to be given to the parties interested,[94] to the town

the way); *In re* East Hempfield Tp. Road, 2 Leg. Chron. (Pa.) 163 (holding that where a petition asked for the appointment of viewers to widen a certain road, and also to widen and change into a public road a certain private road, and viewers were appointed, it was not too late to allow an amendment of the petition, making it for a single, instead of a double, purpose).

90. Newcastle *v.* Lincoln County, 87 Me. 227, 32 Atl. 885.

91. See the statutes of the several states, and cases cited *infra*, this note.

In Illinois, under a law authorizing the commissioners of highways to lay out or alter any road upon the petition of not less than twelve legal voters residing within three miles of the road, it was held that the persons joining in a petition to the commissioners must be citizens of the town to be affected by such location or alteration. Warne *v.* Baker, 35 Ill. 382.

In Indiana, under the act of 1838, § 12, the petitioners for a change of part of a road must own all the land through which the part of the road proposed to be changed runs. Taylor *v.* Lucas, 8 Blackf. 289.

Under Mass. Pub. St. c. 112, § 129, providing a method for altering the location of highways at railroad crossings, the petition in such case must be brought by the mayor and aldermen of the city or the selectmen of the town in which the crossing is, or by the directors of the railroad corporation. Boston, etc., R. Co. *v.* Middlesex County, 177 Mass. 511, 59 N. E. 115.

In Missouri, under Wagner St. p. 1129, §§ 56–58, persons wishing for a change in a county road can only apply for it by a petition showing a wish to cultivate their lands. Wilson *v.* Berkstresser, 45 Mo. 283.

92. See the statutes of the several states, and Garrett *v.* Hedges, 17 S. W. 871, 13 Ky. L. Rep. 647; Williamson *v.* Carnan, 1 Gill & J. (Md.) 184; Self *v.* Gowin, 80 Mo. App. 398.

In New Brunswick, it seems that no notice was necessary, under Act 5 Wm. IV, cap. 2, to be given to the objecting parties of the time and place of the jury's meeting to inquire into the intended alterations. Reg. *v.* Johnston Parish Highway Com'rs, 5 N. Brunsw. 583.

By whom made and given.— Taylor St. Wis. p. 491, § 66 (Rev. St. p. 400, § 1269), providing that, "upon application made to the supervisors for the laying out, altering or discontinuing of any highway, they shall make out a notice, and fix therein a time and place at which they will meet," etc., merely requires the notice of an application for an alteration to be given by the direction and authority of the supervisors, and not that it shall be signed by them. Williams *v.* Mitchell, 49 Wis. 284, 5 N. W. 798.

93. Self *v.* Gowin, 80 Mo. App. 398.

An ex parte affidavit of the giving of such notice is not sufficient proof thereof. Self *v.* Gowin, 80 Mo. App. 398. Where no particular character of evidence is required it is immaterial that the affidavits of service of notices fail to state that they were written. Zeibold *v.* Foster, 118 Mo. 349, 24 S. W. 155.

94. *Arkansas.*— Grinstead *v.* Wilson, 69 Ark. 587, 65 S. W. 108.

Kentucky.—Walker *v.* Corn, 3 A. K. Marsh. 167.

Maryland.— Jenkins *v.* Riggs, 100 Md. 427, 59 Atl. 758.

Missouri.— Wilson *v.* Berkstresser, 45 Mo. 283.

New York.— Phillips *v.* Schumacher, 10 Hun 405.

Pennsylvania.— *In re* Reserve Tp. Road, 80 Pa. St. 165.

West Virginia.— Conrad *v.* Lewis County, 10 W. Va. 784.

See 25 Cent. Dig. tit. "Highways," § 241.

Exceptions to rule.— Where the owners or occupants of the lands to be affected by a proposed alteration in a highway are the petitioners for such alteration, notice of the meeting to decide upon the petition need not be served upon them. State *v.* Nelson, 57 Wis. 147, 15 N. W. 14. See also Sullivan *v.* Robbins, 109 Iowa 235, 80 N. W. 340. So a voluntary general appearance (People *v.* Van Brunt, 99 N. Y. App. Div. 564, 90 N. Y. Suppl. 845), or filing a remonstrance (Patton *v.* Creswell, 120 Ind. 147, 21 N. E. 663), waives the giving of notice.

No notice required for making repairs.— A statute requiring notice to landowners when a highway is altered does not apply to the making of specific repairs. Bigelow *v.* Worcester, 169 Mass. 390, 48 N. E. 1.

In South Carolina, under the act of 1825, relating to roads, the board of commissioners had power to make alterations in a road without giving notice. St. Bartholomew's Parish Road Com'rs *v.* Murray, 1 Rich. 335; Maddox *v.* Ware, 2 Bailey 314. The act of 1883 (1 Rev. St. § 1171 *et seq.*) requires written notice to be posted in public places. State *v.* Raborn, 60 S. C. 78, 38 S. E. 260. This act was repealed by the act of 1893, which only requires notice to be given to the persons owning the land where the alteration is to be made, without prescribing any particular form thereof. State *v.* Raborn, *supra*.

to be affected by such alteration,[95] to the highway commissioner,[96] or to the public generally.[97] The form and contents of the notice, as prescribed by statute, must be substantially complied with.[98]

(D) *Remonstrance.* The object of requiring notice is to invite objection to the proposed change, and any one whose interest may be affected may contest the matter.[99] And a "remonstrance" is usually expressly provided for.[1] Such a remonstrance, whether against the public utility of the proposed highway or on account of damages, constitutes an answer to the petition and tenders an issue which must be examined by the commissioners.[2] The right to remonstrate against the utility of a road is not waived by first remonstrating on account of damages.[3]

(E) *Hearing and Determination.* It is the duty of the public officers or court acting upon a petition to alter a highway to make a full investigation, and this involves a hearing and due consideration of all such facts as have a proper bearing on the merits of the petition both for and against.[4] The determination of the matter must be made within a prescribed time from the date of the hearing.[5]

(F) *Commissioners, Viewers, Jurors, or Other Like Officers* — (1) ORDER OF APPOINTMENT. The order appointing viewers must conform to the requirements of the statute, or it will be fatally defective.[6]

(2) COMPETENCY AND QUALIFICATION. Under a statute providing that road

95. Huntington *v.* Birch, 12 Conn. 142; Com. *v.* Cambridge, 4 Mass. 627; Com. *v.* Peters, 3 Mass. 229.

96. Matter of Wood, 111 N. Y. App. Div. 781, 97 N. Y. Suppl. 871.

97. Peabody *v.* Sweet, 3 Ind. 514; Conrad *v.* Lewis County, 10 W. Va. 784.

98. State *v.* Nelson, 57 Wis. 147, 15 N. W. 14.

Description of road.— The notice must contain a description of the road and the proposed alteration thereof (Jenkins *v.* Riggs, 100 Md. 427, 59 Atl. 758; Chasmer *v.* Convery, 53 N. J. L. 588, 22 Atl. 345; State *v.* Nelson, 57 Wis. 147, 15 N. W. 14) sufficient to inform an owner that it is his land that is to be taken (Quackenbush *v.* District of Columbia, 20 D. C. 300). Under Wash. Code (1881), § 2871, the notice of the relocation of a road need not state the width of the proposed road, but only the place of beginning, the intermediate points, if any, and the place of termination. Hab *v.* Georgetown, 46 Wash. 642, 91 Pac. 10.

Township in which road lies see Chasmer *v.* Convery, 53 N. J. L. 588, 22 Atl. 345; Parkhurst *v.* Vandervecr, 48 N. J. L. 80, 2 Atl. 771.

Time and place of meeting of viewers see *In re* Dallas Tp. Road, 8 Kulp (Pa.) 58.

Residence of judge before whom alteration to be made see Chasmer *v.* Convery, 53 N. J. L. 588, 22 Atl. 345.

99. Self *v.* Gowin, 80 Mo. App. 398.

1. See the statutes of the several states. and Jenkins *v.* Riggs, 100 Md. 427, 59 Atl. 758; Schroeder *v.* Jabin, 94 Mo. App. 111, 67 S. W. 949; Self *v.* Gowin, 80 Mo. App. 398, holding, however, that in a proceeding by a petitioner to change a road from one place on his land to another there is no place for remonstrants, although any one whose interest may be affected may contest the matter.

2. Schmied *v.* Keeney, 72 Ind. 309.

3. Schmied *v.* Keeney, 72 Ind. 309.

4. Shaw *v.* Piscataquis County, 92 Me. 498, 43 Atl. 105 (holding that the questions to be considered on such hearing are limited by the terms of the petition); *In re* Washington Pike, 9 Pa. Dist. 52.

If objections to the establishment of the highway or claims for damages are filed, Iowa Code, § 939, provides that the further hearing of the application shall stand continued to the next session of the board of supervisors held after the commissions appointed to assess damages have reported. Ressler *v.* Hirshire, 52 Iowa 568, 3 N. W. 613.

5. People *v.* Van Brunt, 99 N. Y. App. Div. 564, 90 N. Y. Suppl. 845, holding that under section 147 of the New York village law (Laws (1897), p. 416, c. 414), requiring the board of trustees to determine within twenty days from the date fixed for a hearing on the question, where the hearing in proceedings to widen a highway was fixed for April 21, a determination of the matter on May 11 was in time.

6. See the statutes of the several states, and cases cited *infra*, this note.

In Kentucky an order appointing commissioners to view a proposed alteration of a road should designate the part of the old road which is to be viewed, and also the direction of the new way. Poston *v.* Terry, 5 J. J. Marsh. 220. But the order need only give a general description of the old road and the proposed new one. Garrett *v.* Hedges, 17 S. W. 871, 13 Ky. L. Rep. 647. On an application to the county court for the privilege of erecting gates across a road, the order appointing viewers must designate the place where it is proposed to erect them. Bond *v.* Mullins, 3 Metc. 282. The order need not recite in detail the names of the parties upon whose application it is made. Ford *v.* Cullins, 108 Ky. 553, 56 S. W. 993, 22 Ky. L. Rep. 251.

jurors shall be "suitable persons" a road juror need not be a freeholder.[7] Unless required by statute,[8] such viewers need not be sworn.[9]

(3) Compensation. The compensation of road viewers is fixed by statute.[10]

(4) Report. The sufficiency and contents of the report of the viewers must be determined by reference to the statute under which the alteration proceeding is brought.[11] A strict compliance with these requisites is indispensable to the

7. *In re* Lee, 4 Pennew. (Del.) 576, 60 Atl. 862, holding that a person engaged in the real estate business, who is familiar with farming land, and who is acquainted with the dangers of railroad crossings sought to be avoided by a proposed change in a road, is competent to act as road juror under the statute requiring road jurors to be suitable persons.

Signers of petition.— The validity of proceedings to change a highway is not affected by the fact that some of the jurors had signed the petition for the change. People *v.* Dains, 38 Hun (N. Y.) 43.

8. Garrett *v.* Hedges, 17 S. W. 871, 13 Ky. L. Rep. 647, holding that where the law requires that a jury in proceedings to make a change in a public road shall be sworn by the officer having them in charge, an oath administered to such jury by the sheriff having them in charge, he being the lawful officer for that purpose, was sufficient.

9. Mitchell *v.* Thornton, 21 Gratt. (Va.) 164, even if the order appointing them directs them to be sworn.

10. See the statutes of the several states, and case cited *infra*, this note.

In Pennsylvania viewers appointed under the act of 1891 to vacate, extend, and straighten a street in a borough should each be allowed costs at the rate of five dollars a day, which must be paid by the borough; but no mileage is allowed. *In re* Walnut St., 17 Lanc. L. Rev. 302.

11. See the statutes of the several states, and cases cited *infra*, this note.

In Delaware the return of the commissioners to a petition for a change in a road should determine what part of the old road should be vacated on opening the new, and who should inclose the same. *In re* Lee, 4 Pennew. 576, 60 Atl. 862. Such return is not required to state what portion of the costs the persons who inclose the vacated portion ought to pay. *In re* Lee, *supra*.

Under Ga. Code, § 603, which provides that road commissioners shall report upon the utility of all applications for new roads, or alterations in old ones, and shall mark out the same, the county commissioners have no power to establish the new road until it has been marked out, and its utility reported, as provided by said law. Cotting *v.* Culpepper, 79 Ga. 792, 4 S. E. 388.

Ind. Acts (1903), p. 255, c. 145, § 3, requires viewers to "make a report to the board of commissioners and file the same with the auditor of the county, which report shall show the public utility or convenience of the proposed improvement, an estimate of the costs and expenses thereof, the damages assessed to the several tracts of lands, the benefits of each 40 acres or less tract of land where such exists, and give a description of the work proposed, the grade, drains, culverts, kind of improvement, the commencement and terminus of the road." Spaulding *v.* Mott, 167 Ind. 58, 76 N. E. 620. The report is not required to contain a statement of the necessity for widening the highway. Spaulding *v.* Mott, *supra*.

In Kentucky the report of commissioners appointed to view a proposed change of a road must show whose land will be affected by the change, and also the public and private conveniences and inconveniences of the old and new roads. Poston *v.* Terry, 5 J. J. Marsh. 220. It must describe the route by metes and bounds, and by courses and distances (Craig *v.* North, 3 Metc. 187; Garrett *v.* Hedges, 17 S. W. 871, 13 Ky. L. Rep. 647), and must show what amount of land is to be taken for the purposes of the road, as well as its precise locality (Craig *v.* North, *supra*). A report giving the courses and distances of a single line run on the proposed route is a substantial compliance with the statute, which requires the report to describe the route laid out and reported by metes and bounds, and by general courses and distances. Tingle *v.* Tingle, 12 Bush 160. The viewers are not expressly required to name, in their report, the persons through whose land the road may be proposed to run. Gashweller *v.* McIlvoy, 1 A. K. Marsh. (Ky.) 84.

The New Jersey Road Act requires of the surveyors of highways, when acting under appointment of the court, to determine on the necessity for the road applied for. If they determine it to be a matter of public need, they are required to lay the road "as it may appear to them to be most for the public and private convenience, having a regard to the best ground for a road, and the shortest distance, in such a manner as to do the least injury to private property," and they must certify in their return that they have observed these statutory directions. If they fail to so certify, the court, in reviewing their proceedings, will presume that they have neglected the statutory requirements, and set aside their return for that reason. Hampton *v.* Poland, 50 N. J. L. 367, 13 Atl. 174; Roth *v.* Yauger, 29 N. J. L. 384; Brock *v.* Lippincott, 25 N. J. L. 434. A map of the road vacated must accompany the return, as well as a map of the road laid out. The road vacated must be described in the return with as much certainty as that laid out. Brock *v.* Lippincott, *supra*.

Under the Pennsylvania statute the report of a jury of view should state the courses and distances of the road altered. *In re*

validity of their report,[12] but it will be presumed to have been made in conformity with the statute, where nothing to the contrary appears.[13] The report of the viewers is not conclusive and final,[14] but is subject to the approval of the court.[15] When insufficient,[16] or incorrect in form or detail,[17] the report may be recommitted or referred back for correction.

(G) *Order or Judgment* — (1) In General. The order for the alteration of a highway must be for such a way as the one described in the petition.[18] The order should preferably follow the terms of the statute, but if it substantially conforms thereto, it will be sufficient.[19] Such an order is usually required to contain a description of the highway so altered,[20] and the kind of improvement to be

Londongrove Road, 2 Lanc. L. Rev. 160. But the omission to designate the township in which the road is situated is not such an irregularity as will justify reversal, where the petition and order designate the township in which the road begins and ends, and there is no uncertainty as to its location. *In re* Manheim Tp. Road, 12 Pa. Super. Ct. 279. Moreover it must state briefly the improvements through which the old road passes. *In re* West Penn Road, 23 Pa. Co. Ct. 477. It should fix the termini at some fixed and permanent object, and a slight change of termini for the purpose of starting from some fixed object will not invalidate the action of the viewers. *In re* Friendsville Road, 16 Pa. Co. Ct. 172. The act of June 13, 1836, requires that the report of viewers should set forth *inter alia* that they were severally sworn or affirmed. *In re* West Penn Road, *supra*. But there is nothing in the act which requires the oath taken by the viewers to be in writing and attached to the report. *In re* West Penn Road, *supra*. Neither is it necessary to attach to the report the copy of the notice posted, or the proof of said posting. It is sufficient if the report sets forth that the notice of the proposed meeting was duly put up at least ten days before the time of meeting in the vicinity of the place to be viewed. *In re* West Penn Road, *supra*.

The inclusion of matters upon which the viewers are not authorized to pass renders the report irregular and illegal. *In re* Sunbury Borough Church St., 8 Pa. Dist. 457. But where the tribunal appointing the viewers had power to authorize them to do what they actually did, it may subsequently ratify such unauthorized acts. Hark *v.* Gladwell, 49 Wis. 172, 5 N. W. 323

12. Craig *v.* North, 3 Metc. (Ky.) 187; Fowler *v.* Larabee, 59 N. J. L. 259, 35 Atl. 911.

Description of proposed route.— A statute regulating the alteration of public roads requires the utmost attainable certainty in the description to be given by the viewers of the route of the proposed alteration. Craig *v.* North, 3 Metc. (Ky.) 187. But see Robson *v.* Ryler, 14 Tex. Civ. App. 374, 37 S. W. 872, holding that the degree of certainty required in the description of the road is not the highest, but only such as is reasonable. If the description be such as that the places designated will enable persons familiar with the locality to locate the way with reasonable certainty, it will be deemed sufficient.

Mere ambiguity and lack of precision of statement, if, in substance, the order was complied with, is not a sufficient ground to quash the proceedings. *In re* Brecknock Tp. Road, 2 Woodw. (Pa.) 13.

13. Heagy *v.* Black, 90 Ind. 534, holding that if the report be favorable, and silent as to the public utility of the location or change, or if they do not report that the location or change is not of public utility, it should be presumed that they deemed it of public utility.

14. *In re* Penn Tp. Cove Road, 8 Pa. Dist. 391 (holding that the fact that the road as relocated requires a retaining wall, which, as erected, is of doubtful integrity, presents a reason for non-approval of the report of viewers); Robson *v.* Byler, 14 Tex. Civ. App. 374, 37 S. W. 872.

15. *In re* Penn Tp. Cove Road, 8 Pa. Dist. 391.

The report of viewers is not prima facie evidence of the matters therein contained, but is merely intended to aid the court, and may be by it rejected in whole or in part, either on its own knowledge, or after hearing opposing evidence. Bennett *v.* Greenup County, 17 S. W. 167, 13 Ky. L. Rep. 349.

16. Fowler *v.* Larabee, 59 N. J. L. 259, 35 Atl. 911, failure to assess damages.

Clerical errors.— The report of a jury of view laying out a road and vacating an old road, thereby rendering it useless, should state the courses and distances of the road vacated; but such omission is merely a clerical error, and may be corrected by referring the report back. *In re* Londongrove Road, 2 Lanc. L. Rev. (Pa.) 160.

17. Deering *v.* Cumberland County, 87 Me. 151, 32 Atl. 797; *In re* Brecknock Tp. Road, 2 Woodw. (Pa.) 13.

18. Lowe *v.* Brannan, 105 Ind. 247, 4 N. E. 580; People *v.* Springwells Tp. Board, 12 Mich. 434; Robinson *v.* Logan, 31 Ohio St. 466.

19. Cox *v.* East Fork Tp. Highway Com'rs, 194 Ill. 355, 62 N. E. 791; Mitchell *v.* Thornton, 21 Gratt. (Va.) 164.

Surplusage.— If a statement improperly included in an order may be treated as surplusage, the remainder of the order will not be affected. Tolono Highway Com'rs *v.* Bear, 224 Ill. 259, 79 N. E. 581.

20. Levee Dist No. 9 *v.* Farmer, 101 Cal. 178, 35 Pac. 569, 23 L. R. A. 388 (holding that an order of the board of supervisors laying out a new road, and vacating an old

made.[21] The order need not be absolute, but may be made to depend upon a future contingency;[22] but it should be specific and not in the alternative.[23] A void order may be set aside or vacated at a subsequent term *ex mero motu*,[24] or at the instance of a party aggrieved.[25] But a valid order cannot be vacated at a subsequent term.[26]

(2) Filing and Record. As the altering of a road necessarily vacates at least a part of the old road, there ought to be some record by which it can be determined what was vacated and what was newly established;[27] and provision for the recording of the order of alteration is often expressly made.[28]

(3) Conclusiveness and Collateral Attack — (a) In General. The rule that a judgment of a court of competent jurisdiction cannot be collaterally attacked in any other court for irregularity has been applied by many courts to the orders of county officers exercising their statutory authority in proceedings for the altering of a public highway.[29] Much less can a fact necessary to confer jurisdiction, which is found and made a part of the proceedings, be collaterally denied and put in issue.[30] If, however, the order or judgment is wholly void it is impeachable in collateral proceedings.[31] The jurisdiction of the local authorities to alter

one, is not void because it fails to show on its face that there is any connection or relation between the two roads, if the surveys and descriptions of the new and the old roads show the connection); State *v.* Burgeson, 108 Wis. 174, 84 N. W. 241.

The description cannot be aided by extrinsic evidence of the intention of those who laid out the highway as changed. Rud *v.* Pope County, 66 Minn. 358, 68 N. W. 1062, 69 N. W. 886.

Remedy for uncertainty in description.— Uncertainty in the description of the intended change occurring in an order directing a change in the location of a highway may be remedied by motion before the commissioners, or, failing this, at the final order of the common pleas; but it is not ground for a dismissal of proceedings. Daggy *v.* Coats, 19 Ind. 259.

Misdescriptions in the order will not vitiate the same if, taking the whole location together with the description and plan, the way intended can be identified and constructed with reasonable certainty. Gilkey *v.* Watertown, 141 Mass. 317, 5 N. E. 152.

21. Spaulding *v.* Mott, 167 Ind. 58, 76 N. E. 620, holding that where the report of the viewers, in proceedings under Acts (1903), p. 255, c. 145, for the improvement of a public highway, contained plans and specifications for the improvement and was made a part of the order of the board of commissioners directing the improvement, the order sufficiently stated the kind of improvement to be made.

22. Harris *v.* Mahaska County, 88 Iowa 219, 55 N. W. 324; State *v.* Kinney, 39 Iowa 226; Thurman *v.* Emmerson, 4 Bibb (Ky.) 279; McIlvoy *v.* Speed, 4 Bibb (Ky.) 85; Blake *v.* Norfolk County, 114 Mass. 583, holding that the contingent part of the order, if void, does not affect the validity of the alteration. But see Williams *v.* Mitchell, 49 Wis. 284, 5 N. W. 798.

If the condition is against public policy, it will render the order void. State *v.* Ryan, 127 Wis. 599, 106 N. W. 1093.

23. Shaw *v.* Piscataquis County, 92 Me. 498, 43 Atl. 105; Roxbury *v.* Boston, etc., R. Corp., 6 Cush. (Mass.) 424.

24. Mitchell *v.* Coosa County Com'rs' Ct., 116 Ala. 650, 22 So. 993.

25. Hollins *v.* Patterson, 6 Leigh (Va.) 457.

26. Reiff *v.* Conner, 10 Ark. 241; Robson *v.* Byler, (Tex. Civ. App. 1896) 37 S. W. 872.

27. Cox *v.* East Fork Tp. Highway Com'rs, 194 Ill. 355, 62 N. E. 791.

28. See the statutes of the several states, and cases cited *infra*, this note.

Construction of statutory provisions.— In some states the statute requiring an order of alteration to be filed in the offices of the town and county clerks within a specified time is held merely directory (Hark *v.* Gladwell, 49 Wis. 172, 5 N. W. 323), and the alteration is lawful, although the order is not filed as required (White *v.* Morris, 4 Blackf. (Ind.) 2; Boston *v.* Brazer, 11 Mass. 447). Under other statutes the filing of the order within the time specified is held essential to the validity of the proceedings. Jeffries *v.* Swampscott, 105 Mass. 535.

29. *California.*— Levee Dist. No. 9 *v.* Farmer, 101 Cal. 178, 35 Pac. 569, 23 L. R. A. 388.

Georgia.— Crum *v.* Hargrove, 119 Ga. 471, 46 S. E. 626.

Illinois.— Bailey *v.* McCain, 92 Ill. 277.

Indiana.— Heagy *v.* Black, 90 Ind. 534.

Iowa.— Sullivan *v.* Robbins, 109 Iowa 235, 80 N. W. 340; State *v.* Kinney, 39 Iowa 226.

Massachusetts.— Taft *v.* Com., 158 Mass. 526, 33 N. E. 1046; Kilkey *v.* Watertown, 141 Mass. 317, 5 N. E. 152.

New Jersey.—Ackerman *v.* Nutley, 70 N. J. L. 438, 57 Atl. 150; Tainter *v.* Morristown, 33 N. J. L. 57.

Tennessee.—Stanley *v.* Sharp, 1 Heisk. 417.

Texas.— Robson *v.* Eyler, (Civ. App. 1896) 37 S. W. 872.

See 25 Cent. Dig. tit. "Highways," § 251.

30. Huntington *v.* Birch, 12 Conn. 142.

31. Ahearn *v.* Middlesex County, 182 Mass.

roads is generally considered special and limited, and consequently all the essential facts necessary to confer jurisdiction to make the alteration must appear on the face of the record.[32] But where the court has general jurisdiction of the subject of alteration of roads,[33] or where jurisdiction is established upon the record,[34] then all reasonable intendments will be made in favor of the regularity and validity of the proceedings. In some states an order altering a highway is made by statute *prima facie* evidence of the regularity of all proceedings prior thereto,[35] subject to rebuttal by any person questioning the validity of such proceedings.[36]

(b) Bar to Second Application. It is provided by statute in some states that upon the final determination of proceedings to alter a highway, no other proceedings shall be had, nor any petition entertained, in regard to the same road, for a limited time thereafter.[37] Such a limitation does not include a decision refusing to alter,[38] or a decision reversing or setting aside an order to alter.[39]

(h) *Defects and Objections.* As a general rule all objections to alteration proceedings must be made before the inferior tribunal,[40] and if not so presented they will be considered by the appellate court to have been waived.[41]

518, 65 N. E. 905; State *v.* Morristown, 33 N. J. L. 57, holding that the conclusive effect of such an order can only be overcome for jurisdictional defects.

32. Fulton County *v.* Amorous, 89 Ga. 614, 16 S. E. 201 (holding that an order of the commissioners of roads and revenues, authorizing the widening of a public road, and reciting "that notice of such widening had been published as required by law," furnishes no presumption that persons residing on the land through which such road goes were notified in writing as Code, § 606, requires); Wilhite *v.* Wolf, 179 Mo. 472, 78 S. W. 793; Zeibold *v.* Foster, 118 Mo. 349, 24 S. W. 155.

33. Robson *v.* Byler, 14 Tex. Civ. App. 374, 37 S. W. 872.

34. *Alabama.*— Moore *v.* Hancock, 11 Ala. 245.

Illinois.— Cox *v.* East Fork Tp. Highway Com'rs, 194 Ill. 355, 62 N. E. 791.

Iowa.— Larson *v.* Fitzgerald, 87 Iowa 402, 54 N. W. 441, holding that where the auditor's court, passing upon a petition to change a road, finds "that all the requirement of the law was performed," the posting of notices of the petition, although a jurisdictional prerequisite, may, in a collateral proceeding, be proved by parol evidence.

New Jersey.— Tainter *v.* Morristown, 33 N. J. L. 57.

Texas.— Smith *v.* Ernest, 46 Tex. Civ. App. 247, 102 S. W. 129.

Vermont.—Wead *v.* St. Johnsbury, etc., R. Co., 64 Vt. 52, 24 Atl. 361.

See 25 Cent. Dig. tit. "Highways," § 251.

35. Cox *v.* East Fork Tp. Highway Com'rs, 194 Ill. 355, 62 N. E. 791; State *v.* Nelson, 57 Wis. 147, 15 N. W. 14 (as to posting of notice); Williams *v.* Mitchell, 49 Wis. 284, 5 N. W. 798 (holding that in order to impeach the validity of the order, on the ground of a failure to serve notice on one of the adjoining landowners, such failure must affirmatively appear); Hark *v.* Gladwell, 49 Wis. 172, 5 N. W. 323; Neis *v.* Franzen, 18 Wis. 537.

36. Cox *v.* East Fork Tp. Highway Com'rs, 194 Ill. 355, 62 N. E. 791.

37. See the statutes of the several states, and cases cited *infra*, this section.

In New Jersey section eleven of the act of 1799 provided as follows: "That it shall not be lawful for any court to appoint surveyors of the highways to lay cut, vacate or alter any road oftener than once in the course of the same year, except where the return of said surveyors shall have been set aside for irregularity or illegality of procedure." To this act a supplement was passed in 1807 (Pamphl. Laws, p. 70), providing for the appointment of freeholders, and if they should certify that the road was necessary, such certificate should be binding; but if they found it unnecessary, then the road was to be vacated, and could not be again applied for under the term of one year. Since the road acts of 1818 and 1846, repealing the act of 1799, do not prohibit a second appointment of surveyors for the alteration of a highway within one year after the road is applied for, such application may be allowed within the year. Smock *v.* Vanderveer, 41 N. J. L. 303.

38. Randecker *v.* Highway Com'rs, 61 Ill. App. 426; People *v.* Jones, 63 N. Y. 306 [*reversing* 2 Thomps. & C. 360].

A proceeding to obtain the alteration of a road is a continuous proceeding; therefore if a proceeding on one application fails, there must be a new application. Rex *v.* White, (East. T. 1831) Stevens' N. Brunsw. Dig. 401.

39. Sholty *v.* Dale Tp. Highway Com'rs, 63 Ill. 209.

40. Mitchell *v.* Thornton, 21 Gratt. (Va.) 164.

41. *Indiana.*— Shafer *v.* Bardener, 19 Ind. 294.

Kentucky.— Ford *v.* Collins, 108 Ky. 553, 56 S. W. 993, 22 Ky. L. Rep. 251; Garrett *v.* Hedges, 17 S. W. 871, 13 Ky. L. Rep. 647.

Massachusetts.—Watertown *v.* Middlesex County, 176 Mass. 22, 56 N. E. 971.

Virginia.— Mitchell *v.* Thornton, 21 Gratt. 164.

Washington.— Sumner *v.* Peebles, 5 Wash. 471, 32 Pac. 221, 1000.

See 25 Cent. Dig. tit. "Highways," § 247.

(1) *Supervision of Courts* — (1) In General. Where county authorities alter a public road in the mode pointed out by law, courts will not interfere with the exercise of their discretion unless it is manifestly abused.[42] Mere errors made by them, or irregularities in their proceedings, are reviewable only upon appeal, when permitted by statute,[43] or certiorari,[44] and do not form a proper foundation for a bill in equity.[45]

(2) Appeal. An appeal is a purely statutory remedy, and only exists in those cases specified or reasonably implied by the statutes; and this is true of appeals in proceedings to alter highways.[46] Being purely statutory it must be taken as the statute directs, and all the jurisdictional requisites must be complied with.[47] When conferred the right of appeal is usually limited to persons interested,[48] or

42. *Georgia.*— Ponder *v.* Shannon, 54 Ga. 187.

Maryland.— Jenkins *v.* Riggs, 100 Md. 427, 59 Atl. 758.

Massachusetts.— Cambridge *v.* Middlesex, 167 Mass. 137, 44 N. E. 1089.

Missouri.— Foster *v.* Dunklin, 44 Mo. 216; State *v.* Moniteau County Ct., 113 Mo. App. 586, 87 S. W. 1193.

New Hampshire.— Clement *v.* Burns, 43 N. H. 609; *In re* Hampstead, 19 N. H. 343.

Texas.— Smith *v.* Ernest, 46 Tex. Civ. App. 247, 102 S. W. 129.

See 25 Cent. Dig. tit. "Highways," §§ 238, 247.

Alteration of highway by corporation.— Where a corporation was empowered to construct a dam, and to alter the course or bed of a highway where necessary, and it becomes necessary to alter the highway, the court cannot prescribe the particular mode in which it shall be done. State *v.* Ousatonic Water Co., 51 Conn. 137.

The necessity and utility of the alteration are not reviewable. People *v.* Jones, 63 N. Y. 306.

43. See *infra*, II, D, 1, a, (v), (1), (2).

44. See *infra*, II, D, 1, a, (v), (1), (3).

45. Bailey *v.* McCain, 92 Ill. 277; Jenkins *v.* Riggs, 100 Md. 427, 59 Atl. 758.

46. Aldridge *v.* Spears, 101 Mo. 400, 14 S. W. 118; Howe *v.* Callaway, 119 Mo. App. 251, 95 S. W. 974; Schroeder *v.* Jabin, 94 Mo. App. 111, 67 S. W. 949; Heiple *v.* Clackamas County, 20 Oreg. 147, 25 Pac. 291.

Mass. Rev. St. c. 24, § 71, provides that, on the refusal or neglect of the selectmen to make an alteration upon petition, an appeal will lie from their decision to the county commissioners. New Marlborough *v.* Berkshire County, 9 Metc. 423.

1 N. Y. Rev. St. 518 provides that every person who shall conceive himself aggrieved by any determination of the commissioners of highways, either in laying out, altering, or discontinuing, or in refusing to lay out, alter or discontinue any road, may appeal to any three of the judges of the court of common pleas. People *v.* Harris, 63 N. Y. 391; People *v.* Cortland County Judges, 24 Wend. 491. By the statute of 1847 (c. 455), the appeal was required to be made to the county judges, by whom referees were to be appointed to hear the appeal, and the same powers and duties before devolved upon the judges were devolved upon them. People *v.* Harris, *supra*; People *v.* Newgass, 12 N. Y. St. 760.

In Pennsylvania no appeal lies from the decree of the court of quarter sessions in the case of a street or road. *In re* Chestnut St., 86 Pa. St. 88.

47. See cases cited *infra*, this note.

Filing copy of notice of appeal.— Under Minn. Laws (1895), c. 54, which requires a copy of the notice of appeal from a change in the location of a highway to be filed with the clerk of each town in which such highway may be situated, the district court can acquire no jurisdiction of the subject-matter without such filing. Hagemeyer *v.* Wright County, 71 Minn. 42, 73 N. W. 628. The jurisdictional thing is the fact of filing, and not the proof of it; so that proof of the fact may be made, if the question is raised on appeal. Hagemeyer *v.* Wright County, *supra*.

Appeal-bond.— In Indiana, where an appeal is taken to the circuit court by remonstrants from an order of the board of county commissioners directing a change in a highway, the appeal-bond must be approved by the county auditor; and if not so approved the appeal may be dismissed. Scotten *v.* Divelbiss, 46 Ind. 301.

Time for taking appeal.— Under Vt. Rev. Laws, § 2940, providing that a landowner dissatisfied with the alteration of a highway by selectmen may petition the county court, at the next term, "if there is time for notice," if not, at the succeeding term, for commissioners to rehear the cause, the petition need not be brought to the first term if, in addition to the time for notice, there is not reasonable time for considering the case and preparing papers. Crook *v.* Bradford, 65 Vt. 513, 27 Atl. 118.

48. **Who are "persons interested."**— In Missouri only those whose private rights are affected — whose property is taken — have the power of appeal. Foster *v.* Dunklin, 44 Mo. 216; Cooper County *v.* Geyer, 19 Mo. 257. It is said that perhaps twelve remonstrants might appeal if they sustained no special damage, because of their statutory right to remonstrate. Schroeder *v.* Jabin, 94 Mo. App. 111, 67 S. W. 949. But if fewer than twelve would appeal, they must show a special injury that will be sustained by them, besides what the public at large will sustain. Schroeder *v.* Jabin, *supra*. In Illinois one not owning land upon that part of a highway re-

aggrieved,[49] or who consider themselves aggrieved.[50] This appellate jurisdiction does not involve the right to review the discretion of the commissioners or lower court,[51] unless there has been a manifest abuse thereof.[52] Under some of the statutes, the appellate court has jurisdiction only of matters of law arising on the record;[53] under others such court must try the cause upon its merits, and not as a court of error.[54]

(3) CERTIORARI. Where no other remedy exists,[55] certiorari will ordinarily lie to review the action of the local authorities in altering roads, to the end that the validity of the proceedings may be determined, excesses of jurisdiction restrained, and errors and irregularities corrected.[56] Indeed parties have been permitted to resort to certiorari, even when the proceedings were wholly void for want of jurisdic-

located, and who has no interest in the alteration of the road as a thoroughfare, and who is not a taxpayer, is not "a person interested" in the proposed alteration. Brown *v.* Robertson, 123 Ill. 631, 15 N. E. 30 [*affirming* 23 Ill. App. 461]. In Iowa an order for the removal of a road, upon payment of damages by the petitioners therefor, gives a sufficiency of private interest, as contradistinguished from that of the public, to permit of an appeal being taken. Spray *v.* Thompson, 9 Iowa 40.

49. Who are "persons aggrieved."— The owner of lands through or along which the highway runs is a party aggrieved, entitled to appeal and to have his damages assessed, if any were occasioned by the alteration of the road, although the injury he suffers is of the same nature as that shared in common by the other inhabitants. Wendt *v.* Minnetrista, 87 Minn. 403, 92 N. W. 404. But see Chandler *v.* Commonwealth R. Com'rs, 141 Mass. 208, 5 N. E. 509. Both the petitioners for an alteration of a highway (Emery *v.* Pembroke, 55 N. H. 229) and the remonstrants (Bond *v.* Mullins, 3 Metc. (Ky.) 282) are entitled to appeal under a statute giving this remedy to "persons aggrieved."

No distinction between "any party aggrieved" and "a party aggrieved" see Chandler *v.* Commonwealth R. Com'rs, 141 Mass. 208, 5 N. E. 509.

Where the general public is aggrieved by an alteration in a road, the county attorney may prosecute an appeal in their behalf. Com. *v.* Kimberlin, 8 Bush (Ky.) 444.

Under the English Highway Act of 1835 (5 & 6 Wm. IV, c. 20) §§ 85, 89, where, on an appeal against a certificate for the diversion of a highway, the jury find in answer to questions left to them, that the proposed new highway would be more commodious to the public, but that the parties appealing would be injured or aggrieved by the diversion, the appeal must be allowed notwithstanding the first finding of the jury. Walker *v.* York, [1906] 1 K. B. 724, 70 J. P. 270, 75 L. J. K. B. 413, 4 Loc. Gov. 524, 94 L. T. Rep. N. S. 744, 22 T. L. R. 456, 54 Wkly. Rep. 493 [*reversing* 69 J. P. 304].

50. Under Wis. Rev. St. § 1776, any freeholder of the town who "considers" himself aggrieved may appeal from an order altering a highway, and he need not own land affected by the highway, or have any special interest therein. State *v.* Wheeler, 97 Wis. 96, 72 N. W. 225.

51. Shafer *v.* Bardener, 19 Ind. 294; Williamson *v.* Carnan, 1 Gill & J. (Md.) 184; Foster *v.* Dunklin, 44 Mo. 216.

52. Com. *v.* Bainbridge, 6 J. J. Marsh. (Ky.) 436.

53. Ford *v.* Collins, 108 Ky. 553, 56 S. W. 993, 22 Ky. L. Rep. 251; Grider *v.* Porter, 7 Ky. L. Rep. 47; Foster *v.* Dunklin, 44 Mo. 216.

54. Schmied *v.* Keeney, 72 Ind. 309; Beeler *v.* Hantsch, 5 Blackf. (Ind.) 594; People *v.* Newgass, 12 N. Y. St. 760.

The appellate court should have before it the original papers. Taylor *v.* Lucas, 8 Blackf. (Ind.) 289; Reddington *v.* Hamilton, 8 Blackf. (Ind.) 62.

Evidence.— Since the case is tried *de novo* in the appellate court, a report of viewers appointed to pass on the advisability of a change in a highway is inadmissible in evidence on an appeal from an order entered on their report directing the change. Freck *v.* Christian, 55 Ind. 320. And see Daggy *v.* Coats, 19 Ind. 259. The case is to be heard upon facts existing at the time the hearing is had. Rector *v.* Clark, 78 N. Y. 21 [*reversing* 12 Hun 189]. Upon such hearing the appellant cannot attack the regularity of the proceedings before the commissioners. Rector *v.* Clark, *supra*; People *v.* McNeil, 2 Thomps. & C. (N. Y.) 140; People *v.* Newgass, 12 N. Y. St. 760.

55. Appeal.— Certiorari is ordinarily not available when the right of appeal exists (Grinstead *v.* Wilson, 69 Ark. 587, 65 S. W. 108; Spray *v.* Thompson, 9 Iowa 40); but where it appears that petitioner has lost his right of appeal without his fault, he may have a remedy by certiorari (Grinstead *v.* Wilson, *supra*).

56. *Arkansas.*— Grinstead *v.* Wilson, 69 Ark. 587, 65 S. W. 108.

California.— Sutter County Levee Dist. No. 9 *v.* Farmer, 101 Cal. 178, 35 Pac. 569, 23 L. R. A. 388.

Georgia.— Nichols *v.* Sutton, 22 Ga. 369.

Massachusetts.— Ahearn *v.* Middlesex County, 182 Mass. 518, 65 N. E. 905; Taft *v.* Com., 158 Mass. 526, 33 N. E. 1046; Gilkey *v.* Watertown, 141 Mass. 317, 5 N. E. 152.

New Hampshire.— *In re* Hampstead, 19 N. H. 343.

See 25 Cent. Dig. tit. "Highways," § 249.

The assumption of unauthorized jurisdiction will be corrected by writ of certiorari. Grinstead *v.* Wilson, 69 Ark. 587, 65 S. W. 108.

tion.[57] But the decision upon the necessity of the alteration, and the manner in which it shall be made, and the limits of it, is final, and will not be considered.[58] The application for a certiorari is always addressed to the sound discretion of the court.[59] It is to be granted, not as a matter of right, for the purpose of enabling a party to reverse proceedings for mere errors of form, or technical objections, but only where substantial injustice has been done to the party seeking redress.[60] The time also of making the application for a certiorari,[61] and the whole circumstances of the case, and particularly the consequences resulting from a reversal of the proceedings, have a material influence upon the action of the court in such cases.[62] As a rule the writ is available only to one who is directly interested in the proceedings sought to be reversed and who will suffer a special injury.[63] The trial is solely by inspection of the record, no inquiry as to any matter not appearing by the record being permissible.[64] If the errors are such as to demand it, the judgment should be that the proceedings below be quashed.[65]

(J) *Costs.* In proceedings before the county commissioners for the alteration of a town way costs are discretionary with the commissioners,[66] and a writ of certiorari will not be granted for the purpose of revising their adjudication as to such costs.[67] On appeal by one of the petitioners for the alteration of a highway he

57. See Ahearn *v.* Middlesex County, 182 Mass. 518, 65 N. E. 905.

58. *Georgia.*— Ponder *v.* Shannon, 54 Ga 187.

Iowa.—Harris *v.* Mahaska County, 88 Iowa 219, 55 N. W. 324.

Massachusetts.— Cambridge *v.* Middlesex County, 167 Mass. 137, 44 N. E. 1089; Chandler *v.* Commonwealth R. Com'rs, 141 Mass. 208, 5 N. E. 509.

New Hampshire.— Clement *v.* Burns, 43 N. H. 609; *In re* Hampstead, 19 N. H. 343.

New Jersey.— Hampton *v.* Poland, 50 N. J. L. 367, 13 Atl. 174.

New York.— People *v.* Jones, 63 N. Y. 306.

Pennsylvania.— *In re* Loretto Road, 29 Pa. St. 350.

See 25 Cent. Dig. tit. "Highways," § 249.

59. Board of Sup'rs *v.* Magoon, 109 Ill. 142; Whately *v.* Franklin County, 1 Metc. (Mass.) 336.

60. Whately *v.* Franklin County, 1 Metc. (Mass.) 336.

61. **Under the Pennsylvania act of April 1, 1874,** certiorari to a court of quarter sessions in the matter of proceedings to vacate and relocate a township road must be taken within two years from the date of the confirmation of the report of the viewers. The language of the act, "any judgment, in any real, personal or mixed action," is to be deemed used in a comprehensive sense. *In re* Salem Tp. Road, 103 Pa. St. 250.

62. Whately *v.* Franklin County, 1 Metc. (Mass.) 336.

Effect of laches.— As a general rule, applications for a certiorari are not to be granted where a party, with full knowledge of the course of the proceedings, by his own laches, has neglected to avail himself of the proper opportunity to arrest the action of the inferior tribunal, while the case was in its incipient stages, and before any mischievous consequences would result from setting aside the proceedings. Watertown *v.* Middlesex County, 176 Mass. 22, 56 N. E. 971; Whately *v.* Franklin County, 1 Metc. (Mass.) 336. The parties cannot lie by and permit great expenditures to be incurred, the benefits of which they will, to some considerable extent, enjoy, and then avoid all responsibility for the payment of those expenditures, by quashing those proceedings under which the expenditures were ordered. Whately *v.* Franklin County, *supra.*

In reference to the subject of notice to the town or parties interested in the proposed location of a highway, although there has been a plain and obvious defect in not complying with the statute provisions as to notice of the time of making the location, yet this defect may be waived by the conduct of the party interested, and in such case it is too late to take the exception after the road is actually made and heavy expenditures have been made. Board of Sup'rs *v.* Magoon, 109 Ill. 142; New Marlborough *v.* Berkshire County, 9 Metc. (Mass.) 423; Whately *v.* Franklin County, 1 Metc. (Mass.) 336.

63. Conklin *v.* Fillmore County, 13 Minn. 454; Morris, etc., Dredging Co. *v.* Jersey City, 64 N. J. L. 142, 45 Atl. 917. And see Moore *v.* Hancock, 11 Ala. 245.

A person who is not a party to the proceeding may sue out a certiorari, if the proposed alteration of the road will injuriously affect him. Mill Creek Road Com'rs *v.* Fickinger, 51 Pa. St. 48.

64. Randecker *v.* Highway Com'rs, 61 Ill. App. 426; People *v.* Van Brunt, 99 N. Y. App. Div. 564, 90 N. Y. Suppl. 845; People *v.* Dolge, 45 Hun (N. Y.) 310 [*affirmed* in 110 N. Y. 680, 18 N. E. 483].

65. Gilkey *v.* Watertown, 141 Mass. 317, 5 N. E. 152.

66. New Marlborough *v.* Berkshire County, 9 Metc. (Mass.) 423.

Costs may include witness' fees. Brown *v.* Beaver Borough, 2 Pa. Dist. 692.

67. New Marlborough *v.* Berkshire County, 9 Metc. (Mass.) 423, holding that the omission of county commissioners to take a new recognizance for costs, upon an amended petition for an alteration of a town way, is

is *prima facie* liable for all the costs, there being nothing to show but that he caused all the costs.[68]

(VI) *Operation and Effect.* It has been repeatedly decided that an alteration by competent authority of an existing road or way operates as a discontinuance of such portions of the old road as are not embraced within the limits fixed for the new one,[69] and no special order of discontinuance is necessary.[70] There are, however, certain cases in which alteration will not have this effect, as where the old road is not thereby rendered unnecessary;[71] where there is strictly no alteration, but rather the establishment of a new road;[72] or where there is no record to show that an alteration was intended.[73] In any case the old road continues the public highway until the new is laid out and made practicable.[74] Where a road has

no ground for a writ of certiorari to remove the record of their proceedings in altering the way conformably to such petition.

68. Reader *v.* Smith, 88 Ind. 440.

69. *Georgia.*— Ponder *v.* Shannon, 54 Ga. 187; Nichols *v.* Sutton, 22 Ga. 369.

Illinois.— Cox *v.* East Fork Tp. Highway Com'rs, 194 Ill. 355, 62 N. E. 791.

Indiana.— Kelley *v.* Augsperger, 171 Ind. 155, 85 N. E. 1004.

Iowa.— Stahr *v.* Carter, 116 Iowa 380, 90 N. W. 64.

Maine.— Cyr *v.* Dufour, 68 Me. 492.

Massachusetts.— Com. *v.* Boston, etc., R. Co., 150 Mass. 174, 22 N. E. 913; Hobart *v.* Plymouth County, 100 Mass. 159; Bowley *v.* Walker, 8 Allen 21; Goodwin *v.* Marblehead, 1 Allen 37; Johnson *v.* Wyman, 9 Gray 186; Bliss *v.* Deerfield, 13 Pick. 102; Com. *v.* Cambridge, 7 Mass. 158; Com. *v.* Westborough, 3 Mass. 406.

New York.— People *v.* Jones, 63 N. Y. 306; People *v.* Dolge, 45 Hun 310 [*affirmed* in 110 N. Y. 680, 18 N. E. 483].

Pennsylvania.— Millcreek Tp. *v.* Reed, 29 Pa. St. 195; *In re* Manheim Tp. Road, 12 Pa. Super. Ct. 279; *In re* West Penn Road, 23 Pa. Co. Ct. 477; *In re* Friendville, etc., Road, 16 Pa. Co. Ct. 172.

Vermont.— Closson *v.* Hamblet, 27 Vt. 728.

Virginia.— Bare *v.* Williams, 101 Va. 800, 45 S. E. 331.

West Virginia.— Poling *v.* Ohio River R. Co., 38 W. Va. 645, 18 S. E. 782, 24 L. R. A. 215.

See 25 Cent. Dig. tit. "Highways," § 253.

70. *California.*— Brook *v.* Horton, 68 Cal. 554, 10 Pac. 204.

Iowa.— Rector *v.* Christy, 114 Iowa 471, 87 N. W. 489.

Maryland.— Jenkins *v.* Riggs, 100 Md. 427, 59 Atl. 758.

Massachusetts.— Com. *v.* Boston, etc., R. Co., 150 Mass. 174, 22 N. E. 913; Hobart *v.* Plymouth County, 100 Mass. 159; Bowley *v.* Walker, 8 Allen 21.

Wisconsin.— State *v.* Reesa, 59 Wis. 106, 17 N. W. 873; Hark *v.* Gladwell, 49 Wis. 172, 5 N. W. 323.

See 25 Cent. Dig. tit. "Highways," § 253.

Under W. Va. Code (1868), c. 43, § 32, providing that "when any road is altered, the former road shall be discontinued to the extent of such alteration," no separate order is necessary to effect such discontinuance. Yates *v.* West Grafton, 33 W. Va. 507, 11 S. E. 8.

71. Rector *v.* Christy, 114 Iowa 471, 87 N. W. 489; Bennett *v.* Clemence, 6 Allen (Mass.) 10 (holding that, for the purpose of proving that an existing way has not been discontinued by the substitution of a new way therefor, evidence is competent to prove the existence of a public landing to which the way furnishes a necessary access, or can reasonably be considered as appurtenant); Atty.-Gen. *v.* Morris, etc., R. Co., 19 N. J. Eq. 386 (holding that the vacation of a public highway which crosses another public street or highway, even where for a short distance it runs along the highway so crossed, where the two highways are parts of different routes, will not vacate the part of the road crossed by the highways so vacated).

72. Vedder *v.* Marion County, 28 Oreg. 77, 36 Pac. 535, 41 Pac. 3, holding that the establishment of a new road upon a petition for the establishment of such road, and also for the vacation of an old road, does not operate to vacate the latter, where the new road does not lie within the termini of the old one, and connects with it only at one end.

73. Johnson *v.* Wyman, 9 Gray (Mass.) 186, holding that, in the absence of any record of the laying out of either way, evidence of the construction and subsequent repair of the new way by public authority does not necessarily presuppose the discontinuance of the old one.

74. Lawson *v.* Shreveport Waterworks Co., 111 La. 73, 35 So. 390; Witter *v.* Damitz, 81 Wis. 385, 51 N. W. 575. See also Heagy *v.* Black, 90 Ind. 534; Keystone Bridge Co. *v.* Summers, 13 W. Va. 476.

The neglect of the town authorities to put such new highway in fit condition to be traveled cannot deprive the public of the right to use the old highway. Witter *v.* Damitz, 81 Wis. 385, 51 N. W. 575.

By statute it is sometimes provided that before a public road can be vacated by the opening of a new road in accordance with the statute for changing and vacating, it must appear that the new road is open and in good condition, and an order vacating the old road must have been made. Phelps *v.* Pacific R. Co., 51 Mo. 477. Under such statute an order shutting up the old road before the new one is opened is void, and a subsequent order setting aside the first furnishes no ground for

been discontinued by the effect of an alteration therein, it can be reëstablished only by the proper statutory proceedings,[75] or by the dedication of the owner.[76]

b. Relocation. Under the Massachusetts statute, the county commissioners are authorized to relocate or locate anew any road laid out by the authority of a town, or otherwise, either for the purpose of establishing the boundaries, or of making alterations in the course or width of the same.[77] Under this authority the commissioners may make some departure from the old or existing boundaries,[78] and so much of the old road as is not included within the new lines is thereby discontinued.[79] To relocate is the same thing as to locate anew; [80] and under a petition to relocate the commissioners may widen a road and change its grade, and include within its boundaries new strips of land, and exclude other strips.[81] All the expenses of locating anew may be assessed upon the petitioners, the town, or the county, as the commissioners may order.[82]

2. Vacation [83] — a. Power to Vacate — (i) *By Legislative Act.* Public highways are created by statute either directly or through delegated power, and are under full control of the legislature.[84] While this control is, as regards vacation generally, exercised through the instrumentality of local governmental subdivisions of the state,[85] the legislature may, in the absence of constitutional limitations,[86] discontinue highways by direct legislative act.[87]

complaint. Bridgeport, etc., Turnpike Road's Appeal, 171 Pa. St. 312, 33 Atl. 145.

75. Yates *v.* West Grafton, 33 W. Va. 507, 11 S. E. 8.

76. Yates *v.* West Grafton, 33 W. Va. 507, 11 S. E. 8.

77. Mass. Gen. St. c. 43, § 12. And see Cambridge *v.* Middlesex County, 167 Mass. 137, 44 N. E. 1089; Richards *v.* Bristol County, 120 Mass. 401; Hyde Park *v.* Norfolk County, 117 Mass. 416; Stockwell *v.* Fitchburg, 110 Mass. 305.

The word "relocate," without addition or qualification, means to locate again, and implies a preservation of the identity of the way without material change. Bennett *v.* Wellesley, 189 Mass. 308, 75 N. E. 717.

Distinguished from alteration.— A relocation of the way under Rev. Laws, c. 48, § 12, is a different proceeding in law from an alteration of a way under section 1 or section 65 of the same chapter, although a relocation may sometimes include an alteration in the course or width of the way, and an alteration under section 1 or section 65 may sometimes involve, at least in part, a kind of relocation. Holbrook *v.* Douglas, 200 Mass. 94, 85 N. E. 854. The jurisdiction of the county commissioners to act under one section or the other is determined by the language of the petition, interpreted in its application to the way referred to. Holbrook *v.* Douglas, 200 Mass. 94, 85 N. E. 854; Bennett *v.* Wellesley, 189 Mass. 308, 75 N. E. 717; Watertown *v.* Middlesex County, 176 Mass. 22, 56 N. E. 971.

78. Cambridge *v.* Middlesex County, 167 Mass. 137, 44 N. E. 1089.

The main purpose of locating anew or relocating is to establish the boundary lines of a road which are in doubt or dispute. Bennett *v.* Wellesley, 189 Mass. 308, 75 N. E. 717; Tufts *v.* Somerville, 122 Mass. 273. Relocating is not intended to be used as a method of making important changes in a way. By the express terms of the statute it can only be done when the whole road to be relocated is in a single town. Bennett *v.* Wellesley, *supra.*

79. See *supra*, II, D, 1, a, (VI).

80. Cambridge *v.* Middlesex County, 167 Mass. 137, 44 N. E. 1089; Hyde Park *v.* Norfolk County, 117 Mass. 416.

81. Watertown *v.* Middlesex County, 176 Mass. 22, 56 N. E. 971; Cambridge *v.* Middlesex County, 167 Mass. 137, 44 N. E. 1089; Richards *v.* Bristol County, 120 Mass. 401; Hyde Park *v.* Norfolk County, 117 Mass. 416.

82. Richards *v.* Bristol County, 120 Mass. 401; Hyde Park *v.* Norfolk County, 117 Mass. 416.

83. Of city streets see MUNICIPAL CORPORATIONS, 28 Cyc. 840.

Vested rights in highways see CONSTITUTIONAL LAW, 8 Cyc. 905.

84. Chrisman *v.* Brandes, 137 Iowa 433, 112 N. W. 833. And see *supra*, II, C, 1; II, C, 4; II, C, 5, a.

85. See *infra*, II, D, 2, a, (II); II, D, 2, a, (III).

86. See cases cited *infra*, this note.

Under Mich. Const. art. 4, § 23, which prohibits the legislature from discontinuing highways laid out by township authorities, although the right to vacate state roads is unquestioned, an act which declares certain township highways to be state roads, and thus places it in the power of the legislature to vacate them, is void. Davies *v.* Saginaw County, 89 Mich. 295, 50 N. W. 862.

87. State *v.* Marion County, (Ind. 1907) 82 N. E. 482; Hanselman *v.* Born, 71 Kan. 573, 81 Pac. 192; Davies *v.* Saginaw County, 89 Mich. 295, 50 N. W. 862; Yost *v.* Philadelphia, etc., R. Co., 29 Leg. Int. (Pa.) 85.

Highways established by dedication or prescription.— The provision of the Revised Statutes of New Hampshire, c. 53, § 7, that no highway not laid out agreeably to statute law shall be deemed a public highway, unless

(II) *By Local Governmental Agencies* — (A) *In General.* Public highways can be vacated only through the instrumentalities and in the mode prescribed by law.[88] The governmental agencies upon which this power is usually conferred are the highway commissioners,[89] county supervisors,[90] surveyors of highways,[91] towns, by vote in town meetings[92] or through the selectmen,[93] and various courts.[94]

(B) *Roads in Two Jurisdictions.* A highway in two counties, located by the commissioners of both counties acting jointly, cannot be discontinued, in whole or in part, by one of said boards acting separately.[95]

(III) *By Vote of Town.* By statute in some states highways in a town may be vacated by a vote of the town in town meeting,[96] although they are parts of

the same has been used by the public for twenty years, operates to discontinue all highways not so used, and depending upon dedication, even when used long enough to become public highways under the former laws. Currier *v.* Davis, 68 N. H. 596, 41 Atl. 239; State *v.* Morse, 50 N. H. 9; State *v.* Atherton, 16 N. H. 203.

88. People *v.* Marin County, 103 Cal. 223, 37 Pac. 203, 26 L. R. A. 659 (holding that the fact that the board of directors of the state prison have, by the constitution, charge of the prison, does not authorize them to close a public highway passing through the prison grounds because it facilitates the escape of prisoners); State *v.* Marion County, (Ind. 1907) 82 N. E. 482; New London *v.* Davis, 73 N. H. 72, 59 Atl. 369.

89. Shields *v.* Ross, 158 Ill. 214, 41 N. E. 985 (holding that the fact that the road vacated is partly outside the commissioners' territorial jurisdiction does not invalidate their proceedings so far as the part within their jurisdiction is concerned); Willow Branch, etc., Highway Com'rs *v.* People, 69 Ill. App. 326; Rice *v.* Chicago, etc., R. Co., 30 Ill. App. 481; Springfield *v.* Hampden County Highway Com'rs, 4 Pick. (Mass.) 68; People *v.* Nichols, 51 N. Y. 470.

Territorial roads.— In Michigan township highway commissioners have no jurisdiction to discontinue territorial roads. That power belongs to the county supervisors exclusively. People *v.* Nankin Highway Com'rs, 15 Mich. 347.

90. People *v.* Marin County, 103 Cal. 223, 37 Pac. 203, 26 L. R. A. 659; Chrisman *v.* Brandes, 137 Iowa 433, 112 N. W. 833; Lamansky *v.* Williams, 125 Iowa 578, 101 N. W. 445.

91. State *v.* Bassett, 33 N. J. L. 26; State *v.* Snedeker, 30 N. J. L. 80.

92. See *infra*, II, D, 2, a, (III).

93. See cases cited *infra*, this note.

In Connecticut and Vermont the selectmen of a town may, with the approbation of the town, discontinue any highway within the town, except where the same was laid out by the legislature or the courts. Simmons *v.* Eastford, 30 Conn. 286; State *v.* Shrewsbury, 8 Vt. 223. The approbation of the town may be expressed before the discontinuance is made by the selectmen. Greist *v.* Amrhyn, 80 Conn. 280, 68 Atl. 521; Welton *v.* Thomaston, 61 Conn. 397, 24 Atl. 333. But a vote of a town in town meeting is not an approbation by the town of a subsequent vote of the selectmen discontinuing a highway, where the action of the selectmen is not in conformity to the vote of the town. Greist *v.* Amrhyn, *supra*.

94. See cases cited *infra*, this note.

County courts see Allen *v.* Lyon, 2 Root (Conn.) 213; Foster *v.* Dunklin, 44 Mo. 216; Bruce *v.* Saline County, 26 Mo. 262; Callaway County Ct. *v.* Round Prairie Tp., 10 Mo. 679 (holding that mandamus will not lie from the circuit court to compel the county court to set aside an order vacating a county road, since the county court has conclusive jurisdiction of proceedings to vacate such roads).

Court of quarter sessions in Pennsylvania see *In re* Palo Alto Road, 160 Pa. St. 104, 28 Atl. 649; *In re* Henry St., 123 Pa. St. 346, 16 Atl. 785; *In re* Newville Road, 8 Watts (Pa.) 172; *In re* Palo Alto Road View, 13 Pa. Co. Ct. 537. The jurisdiction of the quarter sessions over state roads is one of special authority, not of general power. The only power of the court over a state road is to change or supply its route by a new road and to vacate so much of the state road as shall be supplied. *In re* Penn Tp. Road, 66 Pa. St. 461; *In re* State Road, 52 Pa. St. 161.

95. Lamansky *v.* Williams, 125 Iowa 578, 101 N. W. 445 (holding, however, that where a road terminating at a county line was established by the independent action of the board of the county in which it is situated, it could be vacated by the independent action of such board, although after it was established the adjoining county established a road connecting therewith); State *v.* Oxford, 65 Me. 210; Bigelow *v.* Brooks, 119 Mich. 208, 77 N. W. 810.

The commissioners in such cases must act in concert, and the road cannot be vacated in either county until it is so ordered in both. Lamansky *v.* Williams, 125 Iowa 578, 101 N. W. 445.

A road laid out on a county line can only be vacated by joint viewers of both counties. *In re* Roaring Creek Road, 11 Pa. St. 356.

96. State *v.* Brewer, 45 Me. 606; Niles *v.* Patch, 13 Gray (Mass.) 254; Avery *v.* Stewart, 1 Cush. (Mass.) 496 (holding that in a vote to discontinue a town, a description of it as "leading from William Gates' to the pond" is sufficient); Com. *v.* Tucker, 2 Pick. (Mass.) 44 (holding that a town may discontinue a town way); Brackett *v.* McIntire, 72 N. H. 67, 54 Atl. 705 (holding

continuous thoroughfares extending to other towns.[97] The fact that the vote is conditional has been held not to make the vacation void.[98]

b. What Roads May Be Vacated — (i) *In General.* Where statutes confer general authority to vacate public highways, it is immaterial how such highways originated, whether by long usage,[99] dedication,[1] or under authority of a special charter.[2] The application to vacate may be limited to a part of a road,[3] and in such case it is lawful to vacate such part only;[4] but the vacation cannot lawfully be less extensive than the application.[5] In the absence of express statutory authority,[6]

that where the vote of a town was "to rescind all action taken by the selectmen relating" to a proposed highway, and the "action taken by the selectmen" was the laying out of the highway in question, the purpose of the vote was sufficiently stated to be the discontinuance of the highway); Currier *v.* Davis, 68 N. H. 596, 41 Atl. 239 (holding, however, that a highway originating by user cannot be discontinued by a town without the consent of the court); Drew *v.* Cotton, 68 N. H. 22, 42 Atl. 239; Thompson *v.* Major, 58 N. H. 242 (holding that where a highway laid out by a town subsequently became a part of a new town, the latter town could discontinue the same as if laid out by its own selectmen).

In Connecticut a town in town meeting cannot discontinue a highway. Greist *v.* Amrhyn, 80 Conn. 280, 68 Atl. 521.

In New Hampshire the consent of the supreme judicial court to the discontinuance of highways by towns is necessary in all cases, except where the highway was laid out by the selectmen; and the exception does not include highways existing by prescription, it not being made to appear that they were laid out by the selectmen. *In re* Campton, 41 N. H. 197.

A public landing is not a way, and a town has no power to discontinue it. Com. *v.* Tucker, 2 Pick. (Mass.) 44.

Actual shutting up of road is unnecessary to render vacation effectual. Coakley *v.* Boston, etc., R. Co., 159 Mass. 32, 33 N. E. 930.

Alteration.— A statute providing that "a town, at a meeting regularly called for the purpose, may discontinue any town way or private way," does not authorize a town, by a mere vote, to alter one of the boundary lines of a town way, and discontinue that portion of the way which lies outside of the newly located line. Such action can properly be taken only by a tribunal proceeding judicially, after notice thereof to the landowners along the way. Lincoln *v.* Warren, 150 Mass. 309, 23 N. E. 45.

The private interest of the voters does not debar them from voting, or the town from acting. New London *v.* Davis, 73 N. H. 72, 59 Atl. 369.

Time when vote takes effect.— A vote absolute in its terms takes effect from its passage, although the meeting at which it is passed may be adjourned to a subsequent day. Bigelow *v.* Hillman, 37 Me. 52. Whether such a vote can be reconsidered after the rights of third persons have intervened *quære.* Bigelow *v.* Hillman, *supra.*

97. Drew *v.* Cotton, 68 N. H. 22, 42 Atl. 239; Styles *v.* Victoria, 8 Brit. Col. 406.

98. See cases cited *infra,* this note.

For example the general discontinuing power may be exercised to take effect at a time subsequent to the vote, or when another highway shall be laid out and constructed to take the place of the old one. Coakley *v.* Boston, etc., R. Co., 159 Mass. 32, 33 N. E. 930; New London *v.* Davis, 73 N. H. 72, 59 Atl. 369.

Whether the condition is precedent or subsequent depends on the intent of the parties. Sears *v.* Fuller, 137 Mass. 326.

Effect of illegal proviso.— A proviso in the vote of discontinuance empowering abutting owners to use the way as a private way for their especial use does not render the discontinuance void, even if the proviso itself is illegal, as converting a town way into a private way, where the town thereafter ceased to work the road, and posted notice that it was not a public way. Coakley *v.* Boston, etc., R. Co., 159 Mass. 32, 33 N. E. 930.

99. State *v.* Snedeker, 30 N. J. L. 80.

1. State *v.* Snedeker, 30 N. J. L. 80.

2. State *v.* Snedeker, 30 N. J. L. 80.

Where a turnpike road has been abandoned for many years by the company which built it, and has been used by the public as an ordinary highway, and repaired at the public expense, it becomes subject to the laws concerning roads, and the surveyors of the highways have power to vacate it. The power and jurisdiction of the surveyors over such a highway is the same as they have over any other highway, except only as to those holding under the turnpike company, and entitled to their chartered rights. State *v.* Snedeker, 30 N. J. L. 80.

3. Condict *v.* Ramsey, 65 N. J. L. 503, 47 see State *v.* Bassett, 33 N. J. L. 26.

4. State *v.* Bassett, 33 N. J. L. 26.

Any portion of a road which is useless is a road for all the purposes of exercising authority for its discontinuance, and may be discontinued without affecting the residue. People *v.* Nichols, 51 N. Y. 470; *In re* Swanson St., 163 Pa. St. 323, 30 Atl. 207. And see State *v.* Bassett, 33 N. J. L. 26.

In Indiana the statute not only confers the authority in general terms to vacate highways, but expressly provides for the vacation of a highway, "or any part thereof." Hughes *v.* Beggs, 114 Ind. 427, 16 N. E. 817.

5. Condict *v.* Ramsey, 65 N. J. L. 503, 47 Atl. 423.

6. See the statutes of the several states, and cases cited *infra,* this note.

mere private ways are of course not subject to vacation by the public authorities.[7] The vacation of particular classes of roads may be provided for by special statutes.[8]

(II) *Roads Laid Out But Not Opened.* In the absence of any statutory limitation relating thereto,[9] a highway is subject to discontinuance after it has been laid out and recorded, although it has never been opened,[10] where the original occasion for it has ceased by reason of the opening of another highway, or where there has been a material change as to its necessity;[11] and in some states express statutory provision is made for the vacation of highways laid out and recorded, but not opened.[12]

In Pennsylvania the act of 1836 prohibits the courts from vacating streets laid out by private persons, even after dedication to public use. *In re* Streets in Wayne, 2 Del. Co. 115. The act of April 21, 1846, extends the power of the court to all roads, public or private, except private ways resting in express grant, the evidence of which is still existing. *In re* Streets in Wayne, *supra*.

7. *In re* Streets in Wayne, 2 Del. Co. (Pa.) 115.

8. See the statutes of the several states, and cases cited *infra*, this note.

Lateral road.— Ky. Gen. St. c. 110, authorizes the county court to close up any lateral road when running within one mile of a turnpike or plank road. Bradbury *v.* Walton, 94 Ky. 163, 21 S. W. 869, 14 Ky. L. Rep. 823. Such a provision has been construed not to apply to a lateral road which, in one direction, has no common terminus with the other road, wherefore one of them could not reasonably subserve the purposes of the other. Shuck *v.* Lebanon, etc., Turnpike Road Co., 9 Bush (Ky.) 168.

9. See cases cited *infra*, this note.

New York; four years.— By section 9 of chapter 455 of the Laws of 1847, when the referees "shall make any decision laying out, altering or discontinuing any road in whole or in part," it shall be the duty of the commissioners to carry out the decision, etc., "and such decision shall remain unaltered for the term of four years from the time the same shall have been filed in the office of the town clerk." People *v.* Pike, 18 How. Pr. 70. The affirmance of the decision of the commissioners is making a decision laying out the road, within the meaning of that provision. People *v.* Pike, *supra*. The policy of the provision is to prevent litigation for the period specified in regard to the road, after the decision on appeal; and it is applicable to a case of affirmance of a decision of the commissioners laying out, as to a case where they have refused, and the referees have laid out the road. People *v.* Pike, *supra*. By a similar provision in the Revised Statutes, when the appeal was to the judges, "no road which has been fixed by the decision of the judges, on appeal to them, shall be discontinued or altered," for the time therein mentioned, etc. This relates to cases of affirmance, as well as reversal and laying out. People *v.* Pike, *supra*.

In Pennsylvania, where a road has been laid out according to law, and adequate compensation has been paid to the owners of the land, it will not be vacated against the protest of the original petitioners on petition presented within two years. *In re* Spring Tp. Road, 2 Woodw. 179. When a public road has been laid out and opened, it is improper to entertain proceedings to vacate within sixty days after its completion, and before its usefulness can be fairly tested by the community. *In re* Cassville Road, 21 Pa. Co. Ct. 212.

Wisconsin; one year.— Under Wis. Rev. St. c. 19, § 83, a town meeting has no jurisdiction over the subject of abandoning highways, and even the supervisors cannot vacate a road within one year after laying it out. Brock *v.* Hishen, 40 Wis. 674.

10. *Maine.*— State *v.* Wellman, 83 Me. 282, 22 Atl. 170; Millett *v.* Franklin County, 80 Me. 427, 15 Atl. 24.

Massachusetts.— Springfield *v.* Hampden County Highway Com'rs, 4 Pick. 68.

Missouri.— Hagemeier *v.* Keene, 8 Mo. App. 574.

New Jersey.— State *v.* Adams, (Sup. 1891) 21 Atl. 937; State *v.* Salem Pleas Judges, 9 N. J. L. 246.

New York.— Matter of McFadden, 96 N. Y. App. Div. 58, 89 N. Y. Suppl. 104; People *v.* Griswold, 2 Thomps. & C. 351; People *v.* Reading Highway Com'rs, 1 Thomps. & C. 193.

Virginia.— Senter *v.* Pugh, 9 Gratt. 260.

See 25 Cent. Dig. tit. "Highways," § 259.

11. Matter of McFadden, 96 N. Y. App. Div. 58, 89 N. Y. Suppl. 104. And see *infra*, II, D, 2, c, (II).

12. See the statutes of the several states, and cases cited *infra*, this note.

In Pennsylvania, the nineteenth section of the act of 1836 provides, "that roads laid out and confirmed, but not opened, may be vacated and annulled upon the petition of a majority of the original petitioners for the said road, within the respective counties in the same manner as other roads may be vacated." *In re* Greenwich Tp. Road, 11 Pa. St. 186; *In re* Heath Tp., etc., Road, 21 Pa. Co. Ct. 254. There is nothing in the act of 1836 which would authorize such a proceeding where the road is in part opened. *In re* Greenwich Tp. Road, *supra; In re* Heath Tp., etc., Road, *supra*. But an application will not be defeated by merely showing that the road has been worked on by the public authorities. It must appear that part of the road has actually been opened for safe and convenient public travel. *In re* Heath Tp., etc., Road, *supra*. This want of authority to vacate roads opened in part produced the act of May 3, 1855, authorizing the courts

c. Grounds For Discontinuance — (1) *In General.* Public highways cannot be vacated unless they are useless, inconvenient, or burdensome.[13] In determining whether or not a highway is useless, the question is not what is the opinion of the greatest number of people, but what are the facts as to the actual use of, and necessity for, the road.[14] Although a road is useless in itself, yet if it is intersected by or is the terminus of other public roads, it should not be vacated.[15]

to change or vacate such roads, but this law expressly excepted state roads authorized by a special law. *In re* Phœnixville State Road, 52 Pa. St. 161. A road opened for a distance of eighty-five feet, wide enough for ordinary travel, and cleared and graded, is "opened in part," whether any travel goes over it or not, within the act of May 3, 1855 (Pamphl. Laws 422), allowing the appointment of viewers to vacate such roads. *In re* Union Tp. Road, 10 Pa. Co. Ct. 433.

13. Com. *v.* Roxbury, 8 Mass. 457; Matter of Coe, 19 Misc. (N. Y.) 549, 44 N. Y. Suppl. 910; *In re* Howland, 108 N. Y. Suppl. 1122; People *v.* Pike, 18 How. Pr. (N. Y.) 70; *In re* Sewickley Tp. Road, 23 Pa. Super. Ct. 170, holding that under the Pennsylvania act of June 13, 1836 (Pamphl. Laws 558), § 18, the court cannot vacate a road, unless it has become useless, inconvenient, or burdensome, and can take no action on a mere statement by viewers in their report that they "are of the opinion that the same is becoming useless and inconvenient on account of the construction of a coal tipple and railroad siding."

Meaning of "useless."— A statute authorizing the discontinuance of a highway as "useless" has been held to mean "practically useless," and not "absolutely useless." Matter of Trask, 45 Misc. (N. Y.) 244, 92 N. Y. Suppl. 156; *In re* Howland, 108 N. Y. Suppl. 1122. *Compare* Matter of Coe, 19 Misc. (N. Y.) 549, 44 N. Y. Suppl. 910. Nor does it mean a uselessness existing at the laying out of the highway. People *v.* Griswold, 67 N. Y. 59; People *v.* Mills, 8 N. Y. St. 734 [*affirmed* in 109 N. Y. 69, 15 N. E. 886].

The Ohio statute (Swan Rev. St. p. 810, § 53) requires the concurrence of two circumstances to authorize township trustees to vacate a township road: (1) That the road shall have become useless; and (2) that no injustice shall be done by its vacation. De Forest *v.* Wheeler, 5 Ohio St. 286.

In Pennsylvania the power of the quarter sessions to vacate the whole or part of a road laid out and opened can be exercised only when the road becomes useless, inconvenient, and burdensome. If laid out but not opened, it can be exercised only when a majority of the original petitioners resident in the county invoke it; but the extent of the power is the same in both cases. *In re* Madison, etc., School House Road, 37 Pa. St. 417.

Danger from railroad.—Under W. Va. Code (1899), c. 43, § 30, the county court may discontinue the portion of a county road made highly dangerous to the public by the legal occupancy and use thereof by a railroad, and their discretion in so doing cannot be controlled by prohibition. Armstrong *v.* Taylor County Ct., 54 W. Va. 502, 46 S. E. 131. See also *In re* Palto Alto Road, 160 Pa. St. 104, 28 Atl. 649.

Burden of proof.— In proceedings to vacate a road, where there is a report of viewers in favor of the vacation and a report of reviewers against it, the burden is on the petitioners of satisfying the court that the road has become useless, inconvenient, or burdensome. *In re* Exeter Tp. Road, 1 Kulp (Pa.) 363; Oulton *v.* Carter, 9 N. Brunsw. 169.

14. Ashcraft *v.* Lee, 81 N. C. 135; *In re* Exeter Tp. Road, 1 Kulp (Pa.) 363.

Opinion evidence is inadmissible on an issue as to the utility of vacating a highway. Hughes *v.* Beggs, 114 Ind. 427, 16 N. E. 817. But see Robertson *v.* McDowell, 24 S. W. 7, 15 Ky. L. Rep. 503. The motives and opinions of prominent persons sought to be elicited by the testimony might warp the judgment and influence the action of jurors, but would not legitimately conduce to a fair and full understanding of the matter in dispute, or contribute to the formation of a just and correct opinion of its merits. Ashcraft *v.* Lee, 81 N. C. 135.

The proper inquiry is, Does the public convenience require the road, and does it furnish needed facilities of transit to such a number as to give it a public character. Ashcraft *v.* Lee, 81 N. C. 135. While the private interest and convenience of the citizens must be considered in determining whether or not to vacate a township road (De Forest *v.* Wheeler, 5 Ohio St. 286), the fact that the road is convenient and necessary to a few persons is not decisive of the question of common convenience and necessity (Scutt *v.* Southbury, 55 Conn. 405, 11 Atl. 854). Still if it appears that the road is necessary for any considerable portion of the people for public use, it ought not to be vacated, even though a still larger number of the people in the vicinity would never require its use. *In re* Exeter Tp. Road, 1 Kulp (Pa.) 363.

The private benefit of a person or corporation is not a proper ground for vacating a highway. *In re* Lehman Tp. Road, 7 Kulp (Pa.) 404; *In re* Roaring Brook Road, Wilcox (Pa.) 263; Armstrong *v.* Taylor County Ct., 54 W. Va. 502, 46 S. E. 131. Thus a public road cannot be vacated, so as to leave a part of it leading to the house of an individual for his sole accommodation; but, a public school-house being a proper terminus for a highway, a road already established may be so vacated that it ends at a school-house. *In re* London Britain Road, 1 Chest. Co. Rep. (Pa.) 396.

15. Matter of Susquehanna Road, 1 Pearson (Pa.) 59.

(II) *Roads Laid Out But Not Opened.* To sustain an application for the discontinuance of a highway laid out but not constructed, it is necessary for the applicants to show new matter accruing since the establishment of the highway,[16] removing the occasion for it and rendering it unnecessary,[17] or the matter will be considered *res adjudicata*, and no longer open to litigation.[18] The changes which may occur to affect the expediency or necessity of constructing a particular road, in a country undergoing a constant change, are various and incalculable.[19] The period at which the change occurred is immaterial, provided it was since the road was laid out.[20]

d. Mode of Effecting Vacation — (I) *In General.* Public highways can be discontinued or vacated only after proper proceedings had in the manner pointed out by statute.[21] They cannot be discontinued at the pleasure of a

16. Perkins *v.* Andover, 31 Conn. 601; Webb *v.* Rocky-Hill, 21 Conn. 468; *In re* Marlborough, 46 N. H. 494; *In re* Boscawen, 33 N. H. 421.

17. People *v.* Griswold, 67 N. Y. 59; Miller *v.* Oakwood Tp., 9 N. D. 623, 84 N. W. 556.

18. Webb *v.* Rocky-Hill, 21 Conn. 468. If the commissioners find that no change has occurred since the highway was laid out substantially affecting the expediency of laying the same, that is an end of their inquiries, and they will report that fact to the court. *In re* Goffstown, 43 N. H. 199. But if changes are proved, affecting the expediency of laying out the highway, then the commissioners will go farther and inquire what the state of facts was, existing at the time the road was laid ou, in order to see how the changes affect those facts. *In re* Goffstown, *supra.*

19. *In re* Hopkinton, 27 N. H. 133.

What may be sufficient to justify the abandonment of a projected improvement of that sort, it would be wholly impossible to predetermine, or even to indicate the nature or subject-matter of such changes. All that can be done is to ascertain from the report that substantial changes have intervened, and that they are such that they may reasonably be supposed to influence the course of public travel, or the expenses of constructing the road, and that, in the opinion of the commissioners at least, they actually have varied, or of necessity must vary, the business and wants of the community in a manner pointed out by the report and to a degree to supersede the need of the contemplated road, and to justify the abandonment of it. *In re* Hopkinton, 27 N. H. 133. The same change of circumstances that would warrant the discontinuance of a highway in one case might be entirely insufficient in another, depending on the degree of necessity there was for the original laying out of the highway. *In re* Goffstown, 43 N. H. 199.

The laying out in good faith of another highway obviating the necessity for the first might constitute a sufficient change of circumstances to authorize a discontinuance. *In re* Webster, 60 N. H. 576; Matter of McFadden, 96 N. Y. App. Div. 58, 89 N. Y. Suppl. 104; People *v.* Reading Highway Com'rs, 1 Thomps. & C. (N. Y.) 193. But the mere facts of the pendency and the reference of a petition for another highway which might be a substitute for the first do not constitute a sufficient change of circumstances. *In re* Marlborough, 45 N. H. 556. Nor does the fact that a highway has been laid out and opened over substantially the same ground for one third of the distance constitute such a change of circumstances. Perkins *v.* Andover, 31 Conn. 601.

A diminution of the ability of a town to build and maintain a highway may be a sufficient change of circumstances to authorize the discontinuance of the highway. Tuftonborough *v.* Fox, 58 N. H. 416. See also *In re* Marlborough, 45 N. H. 556. The indebtedness of a town, incurred after a highway was laid out and before it was constructed, may be a proper cause for discontinuance of such highway, but although such indebtedness may be large, it is not necessarily such a cause; that must depend upon all the circumstances of the case. *In re* Marlborough, 46 N. H. 494.

The construction and near completion of a railroad are a change of circumstances proper to be reported by the road commissioners as a reason for discontinuing a highway not opened for travel. *In re* Bethlehem, 20 N. H. 210. So upon a petition for the discontinuance of a highway laid out but not constructed, the road commissioners may lawfully consider the extension of a railroad, which railroad had been partly constructed when such highway was laid out, as a "change of circumstance" affecting the question before them. *In re* Hopkinton, 27 N. H. 133.

Increase of damages.— The fact that a jury appointed to reassess the damages to be paid to landowners have raised the damages from the sum of one hundred and ten dollars, as allowed by the committee which laid out the highway, to the sum of three hundred and sixty dollars, is not a sufficient change of circumstances. Perkins *v.* Andover, 31 Conn. 601.

20. *In re* Hampstead, 19 N. H. 343, holding that it is no objection to a report discontinuing a highway that the changes described therein have occurred since the petition was committed.

21. *Connecticut.*— Greist *v.* Amrhyn, 80 Conn. 280, 68 Atl. 521.

Illinois.— Rice *v.* Chicago, etc., R. Co., 30 Ill. App. 481.

Kansas.— England *v.* Duncan, (App. 1900) 62 Pac. 710.

town,[22] or of the officers upon whom the power of discontinuing or vacating highways is conferred.[23]

(II) *PETITION AND PARTIES* — (A) *In General.* In most jurisdictions application for the vacation of a public highway must be made by written petition,[24] signed by the petitioners.[25] While the petition need not follow the exact statutory form,[26] it must contain everything that is required to be set forth therein

Kentucky.— Big Sandy R. Co. *v.* Boyd County, 124 Ky. 345, 101 S. W. 354, 31 Ky. L. Rep. 17.

Maryland.— Cumberland Valley R. Co. *v.* Martin, 100 Md. 165, 59 Atl. 714.

Massachusetts.— Loring *v.* Boston, 12 Gray 209; Harrington *v.* Berkshire County, 22 Pick. 263, 33 Am. Dec. 741.

Minnesota.— Miller *v.* Corinna, 42 Minn. 391, 44 N. W. 127.

Missouri.— State *v.* Wells, 70 Mo. 635 (holding that a county court cannot, without the regular statutory proceeding, discontinue a public road by a mere order to the road overseer); Sheppard *v.* May, 83 Mo. App. 272 (holding that where the law provides for the vacation of public highways on petition to the county court of twelve householders of the township where the road is located, the attempt of the county court to declare a road vacant on suggestion of the overseer is void for want of jurisdiction; hence its order is no justification for the obstruction of such road).

Nebraska.— McNair *v.* State, 26 Nebr. 257, 41 N. W. 1099.

North Carolina.—State *v.* Shuford, 28 N. C. 162.

Ohio.— Silverthorn *v.* Parsons, 8 Ohio Cir. Dec. 349.

See 25 Cent. Dig. tit. "Highways," § 263.

Necessity of bond by petitioners.— That petitioners applying to a county board for the vacation of a highway did not file a bond for the payment of the expenses of the proceedings will not invalidate the same. Sullivan *v.* Robbins, 109 Iowa 235, 80 N. W. 340.

22. Cromwell *v.* Connecticut Brown Stone Quarry Co., 50 Conn. 470.

By contract.— A town has no power to agree, for a valuable consideration, to discontinue a highway. Cromwell *v.* Connecticut Brown Stone Quarry Co., 50 Conn. 470 (holding further that a town cannot enforce a promise of the other party of which its own promise to destroy a public right — as to discontinue a highway — was the consideration); Anderson *v.* Hamilton County, 12 Ohio St. 635 (holding further that evidence of such a contract or arrangement, offered to invalidate the effect of the record establishing the road, is incompetent); Silverthorn *v.* Parsons, 8 Ohio Cir. Dec. 349; State *v.* Castle, 44 Wis. 670.

23. Rice *v.* Chicago, etc., R. Co., 30 Ill. App. 481, holding that commissioners of highways, under the law, have no authority to substitute one road for another by surrendering a public highway to a railroad company in exchange for a new one to be provided by it.

24. *Illinois.*— Rice *v.* Chicago, etc., R. Co, 30 Ill. App. 481.

Iowa.— Lamansky *v.* Williams, 125 Iowa 578, 101 N. W. 445.

Kansas.— Mills *v.* Neosho County, 50 Kan. 635, 32 Pac. 361.

Missouri.— Sheppard *v.* May, 83 Mo. App. 272.

North Carolina.—State *v.* Shuford, 28 N. C. 162.

Oregon.— Fisher *v.* Union County, 43 Oreg. 23, 72 Pac. 797.

Pennsylvania.— *In re* Abington Road, 3 Pa. Dist. 226; *In re* Hamiltonban Tp. Road, 19 Pa. Co. Ct. 648.

See 25 Cent. Dig. tit. "Highways," § 264.

Contra.— Brown *v.* Sagadahoc County, 68 Me. 537.

25. *In re* Abington Road, 3 Pa. Dist. 226; *In re* Hamiltonban Tp. Road, 19 Pa. Co. Ct. 648.

In Nebraska the statutory provision that a petition for the vacation of a public road shall be signed by at least ten electors residing within five miles of the road is jurisdictional. Letherman *v.* Hauser, 77 Nebr. 731, 110 N. W. 745.

In Nevada, St. (1866) 252, § 5, requires the signatures of twenty-four freeholders in counties containing one hundred or more legal voters. State *v.* Washoe County, 12 Nev. 17.

In Pennsylvania, where a road has simply been cut through, but has not been made passable for public travel, it cannot be vacated, except upon the petition of a majority of such original petitioners. *In re* Heath Tp., etc., Road, 21 Pa. Co. Ct. 254; *In re* Huntington Road, 3 Kulp 373. Where it has been opened in part, an application by the original petitioners cannot be sustained; but such application will not be defeated by merely showing that the road has been worked on by the public authorities. It must appear that part of the road has actually been opened for safe and convenient public travel. *In re* Heath Tp., etc., Road, *supra.* A petition not signed by a majority of original petitioners for the road, and not averring that the road was open in part, will be dismissed. *In re* Rapho Tp., etc., Road, 7 Del. Co. 571.

A petition in behalf of the town may, in the absence of any statutory provision on the subject, be signed by the selectmen, or by the agent or attorney of the town, in its name. New London *v.* Davis, 73 N. H. 72, 59 Atl. 369; *In re* Milton, 20 N. H. 261.

Signature induced by fraud.— That one was induced through fraud to sign a petition to the county board for the vacation of a highway is not a ground for declaring void the action of the board. Sullivan *v.* Robbins, 109 Iowa 235, 80 N. W. 340.

26. Devoe *v.* Smeltzer, 86 Iowa 385, 53

by the statute,[27] and nothing else.[28] In some states the facts required to be alleged in the petition are jurisdictional;[29] in others, the insufficiency of the petition does not affect the jurisdiction, but merely the validity of the proceedings as affecting persons injured by the discontinuance.[30]

(B) *Amendment.* Unless a petition is a mere nullity it may be amended.[31]

(III) *NOTICE.* It is almost universally provided that, to authorize the local authorities to vacate a public highway, notice must be given[32] to designated par-

N. W. 287; *In re* McCandless Tp. Road, 110 Pa. St. 605, 1 Atl. 594.

27. See cases cited *infra*, this note.

Description of road.— In an application to vacate, the petition must necessarily describe the portion of the highway sought to be vacated. Cook *v.* Quick, 127 Ind. 477, 26 N. E. 1007. But unless expressly required by statute the petition need not describe it by termini, courses and distances, metes and bounds, following the exact description of the laying out. *In re* Milford, 37 N. H. 57. It is sufficiently certain if, by clear reference to the former proceedings, it enables the court and commissioners to know and understand, without possibility of mistake, what highway is referred to. *In re* Milford, *supra*. And see Vedder *v.* Marion County, 22 Oreg. 264, 29 Pac. 619. The fact that an application for discontinuance of a portion of the highway describes a larger part of the highway than the applicant on the hearing seeks to have discontinued does not render the application invalid. Matter of Trask, 45 Misc. (N. Y.) 244, 92 N. Y. Suppl. 156.

Designation of intermediate points.— Although a petition to lay out a new road should designate only the termini, a petition to vacate an old road may point out intermediate spots to show defects which may be remedied by selecting another route. *In re* Ottercreek Tp. Road, 104 Pa. St. 261; *In re* Ottercreek Tp. Road, 41 Leg. Int. (Pa.) 243.

Under the Pennsylvania statute of 1836, a petition to vacate a public highway must set forth in a clear and distinct manner, not only that the road is useless, inconvenient, and burdensome (*In re* Hamiltonban Tp. Road, 19 Pa. Co. Ct. 648), but the situation and other circumstances which render it so (*In re* Ross Tp. Road, 36 Pa. St. 87; *In re* Shaler Tp. Road, 5 Pa. Super. Ct. 270; *In re* Abington Road, 3 Pa. Dist. 226; *In re* Curtin Tp., etc., Road, 23 Pa. Co. Ct. 328; *In re* Hamiltonban Tp. Road, *supra*; *In re* Blakely Road, 8 Pa. Co. Ct. 498; *In re* Hunlock Tp. Road, 9 Kulp 432, 15 Montg. Co. Rep. 143; *In re* Jefferson Tp. Road, 2 Lack. Leg. N. 287 [*affirmed* in 3 Pa. Super. Ct. 467]; *In re* Cheltenham Tp. Road, 17 Montg. Co. Rep. 18; *In re* Hancock Tp. Road, 13 York Leg. Rec. 48; *In re* Peachbottom Tp., etc., Road, 11 York Leg. Rec. 11, 65). If this be not done, and the defect be not supplied by the report of the viewers, it is fatal to the proceedings. *In re* Ross Tp. Road, *supra*.

Requisite number of petitioners.— Unless required by statute, it is not essential to the validity of a vacation of a highway by the commissioners that either the petition on which they act or the order of vacation should recite that the petition was made by the requisite number of landowners. Shields *v.* Ross, 158 Ill. 214, 41 N. E. 985. *Contra*, State *v.* Douglas County, 27 Nev. 469, 77 Pac. 984.

Names of owners or occupants of land through which highway passes see Houpt *v.* Dutton, 170 Ind. 69, 83 N. E. 634.

Variance.— There is no fatal variance between a petition for the discontinuance of a highway, which describes it as laid out across a particular river, near a certain locality named, and the record of the laying out of said highway, which describes it as laid out across the same river near the same locality, but designates the locality as equally well known by another name also as by that set forth in the petition. *In re* Milford, 37 N. H. 57. Nor is there any such fatal variance between a petition which describes the highway as laid out by the court of common pleas, and the record of the proceedings of the town in relation to the discontinuance, wherein it is described as having been laid out by the road commissioners. *In re* Milford, *supra*.

28. Matter of Rushmore, 57 Misc. (N. Y.) 555, 109 N. Y. Suppl. 1099, holding that when not required the petition need not allege that the part of the highway to be discontinued is useless.

29. Letherman *v.* Hauser, 77 Nebr. 731, 110 N. W. 745.

30. Pearsall *v.* Eaton County, 71 Mich. 438, 39 N. W. 578.

31. *In re* Milton, 20 N. H. 261 (holding that a petition in behalf of a town, praying leave to discontinue a highway, signed by two only of a committee of three, may be amended by adding the name of the third); *In re* Cheltenham Tp. Road, 17 Montg. Co. Rep. (Pa.) 18 (holding that an original petition for the vacation of a road, and the laying out of a new one in place thereof, may be supplemented by a petition giving the reasons for the vacation).

In Pennsylvania the failure of a petition to vacate a road to set forth particulars may be supplied by the report of viewers. *In re* Hunlock Tp. Road, 9 Kulp 422, 15 Montg. Co. Rep. 143; *In re* Hancock Tp. Road, 13 York Leg. Rec. 48.

32. See the statutes of the several states, and the following cases:

Indiana.— Houpt *v.* Dutton, 170 Ind. 69, 83 N. E. 634.

Iowa.— Lamansky *v.* Williams, 125 Iowa 578, 101 N. W. 445; Miller *v.* Schenck, 78 Iowa 372, 43 N. W. 225.

Kentucky.— Lebanon, etc., Turnpike Co. *v.* Caney Creek Road, 6 Ky. L. Rep. 747.

ties [33] in the form [34] and manner [35] and within the time [36] prescribed. The failure to

Michigan.— Pearsall *v.* Eaton County, 74 Mich. 558, 42 N. W. 77, 4 L. R. A. 193; Ross *v.* Taylor Tp. Highway Com'rs, 32 Mich. 301.

West Virginia.— Lazzell *v.* Garlow, 44 W. Va. 466, 30 S. E. 171.

See 25 Cent. Dig. tit. "Highways," § 265.

In a few states no notice is required. Nicholson *v.* Stockett, Walk. (Miss.) 67; Haynes *v.* Lassell, 29 Vt. 157; *Ex p.* Bostwick, 1 Aik. (Vt.) 216.

In Massachusetts a town way may be discontinued without notice to individuals except by the warrant calling the town meeting. Pub. St. 49, § 66; Bigelow *v.* Worcester City Council, 169 Mass. 390, 48 N. E. 1.

33. See cases cited *infra*, this note.

Parties interested.— The statutes frequently require notice of proceedings to discontinue a highway to be given to "interested parties." Abutting landowners are to be deemed interested parties. Hill *v.* Hoffman, (Tenn. Ch. App. 1899) 58 S. W. 929. And the owner of a parcel of land not fronting upon any highway, and whose only outlet is a private way two rods wide, belonging to him and extending therefrom to the public highway, is entitled to notice of proceedings to discontinue such public highway, as much as if his whole parcel abutted upon it. People *v.* China Highway Com'rs, 35 Mich. 15. But where a highway is laid out wholly over the land of one who owns the land abutting on the north, the abutting owners on the south are not interested in the highway. Atty.-Gen. *v.* Sherry, 20 R. I. 43, 37 Atl. 344. Where the discontinuance of a highway leaves the way to a landowner's house a cul-de-sac, he is directly interested in the proceedings, and entitled to notice. Goss *v.* Westphalia Tp. Highway Com'rs, 63 Mich. 608, 30 N. W. 197.

Owners or occupants.— The notice is often required to be served on the owners or occupants of lands through which the road passes. Moffitt *v.* Brainard, 92 Iowa 122, 60 N. W. 226, 26 L. R. A. 821; Kimball *v.* Homan, 74 Mich. 699, 42 N. W. 167; Ross *v.* Taylor Tp. Highway Com'rs, 32 Mich. 301; People *v.* Nunkin Highway Com'rs, 14 Mich. 528; Morris *v.* Edwards, 132 Wis. 91, 112 N. W. 248; Schroeder *v.* Klipp, 120 Wis. 245, 97 N. W. 909. But it is held that notice is necessary to an adjoining property-owner only when his land is affected thereby. Sullivan *v.* Robbins, 109 Iowa 235, 80 N. W. 340; Matter of Susquehanna Road, 1 Pearson (Pa.) 59. Under such a provision the occupants of lands abutting upon the portion of such highway not sought to be discontinued are entitled to have notice served upon them personally or by copy just as much as the occupants of lands abutting upon the portion of such highway so sought to be discontinued. Morris *v.* Edwards, *supra*; Schroeder *v.* Klipp, *supra*. An owner of a life-estate in land affected, who occupies the land jointly with his tenant, is entitled to notice. Hatt *v.* Napoleon Tp. Bd., 144 Mich. 266, 107 N. W. 1058.

Supervisors.— Under the provisions of the Pennsylvania act of May 2, 1899, notice must be given to the supervisors of the township or townships affected by the road to be vacated, and a copy of such notice, properly attached, must be filed among the records of the court having cognizance, and a failure to do so will be sufficient ground for an application to set aside the proceedings. *In re* Curtin Tp., etc., Road, 23 Pa. Co. Ct. 328.

34. Moffitt *v.* Brainard, 92 Iowa 122, 60 N. W. 226, 26 L. R. A. 821 (statement of names of landowners); *In re* Dallas Tp. Road, 8 Kulp (Pa.) 58 (statement of time and place where viewers will meet).

Signature.— In Pennsylvania notice of proceedings to vacate a road need not be signed by the viewers, where they were posted strictly in accordance with the rule of court, being printed conspicuously, and signed by the attorneys for the petitioners. *In re* Lower Merion Tp. Road, 8 Pa. Dist. 581, 15 Montg. Co. Rep. 177.

35. Ross *v.* Taylor Tp. Highway Com'rs, 32 Mich. 301.

Service either personally or by copy left at residence of owner or occupant see People *v.* Nankin Highway Com'rs, 14 Mich. 528.

Posting in public place.— Mitchell *v.* Bond, 11 Bush (Ky.) 614; People *v.* Nankin Highway Com'rs, 14 Mich. 528; Lazzell *v.* Garlow, 44 W. Va. 466, 30 S. E. 171. In the absence of a legislative requirement on the subject it is sufficient to post copies instead of originals of the notice of the presentation of the petition. Vedder *v.* Marion County, 22 Oreg. 264, 29 Pac. 619.

36. See the cases cited *infra*, this note.

Illustrations.— Under Howell Annot. St. Mich. § 1298, providing that proceedings to discontinue a highway must be after ten days' notice, such proceedings at a hearing on June 6, pursuant to notice given June 1, are irregular and void. Price *v.* Stagray, 68 Mich. 17, 35 N. W. 815. Under Ky. Gen. St. c. 94, art. 1, § 13, one month's previous notice in writing, posted up at the court-house door of the county and at three of the most public places in the vicinity of the road, is necessary to give the county court jurisdiction to make an order appointing viewers to report on the proposition to discontinue a road. Mitchell *v.* Bond, 11 Bush (Ky.) 614. Under Wis. Rev. St. (1858) c. 13, § 28, subd. 8, as amended by Laws (1866), c. 85 (1 Taylor St. p. 299), requiring an applicant to a county board of supervisors for vacation of a street, to give notice sixty days before the sitting of the court to which he intends to make application, the fact that the petition is presented to the board, and by it referred to a committee thereof before the expiration of the sixty-day notice, does not affect the validity of the proceedings of the board, no action having been taken by it until after the sixty days had expired. State *v.* Milwaukee County, 58 Wis. 4, 16 N. W. 21.

comply with this requirement is not a formal defect, but a substantial wrong, and cannot be disregarded. It goes directly to the validity of the procedure.[37] The return of service should state specific facts from which the sufficiency of the service may be determined.[38] If the proceedings are invalid in this respect as to any of the parties, they are invalid as to all.[39] But it has been held that the requirement of notice may be waived.[40]

(iv) *ANSWERS AND REMONSTRANCES.* Proceedings to vacate highways are strictly statutory, and only such persons as the statute permits can remonstrate.[41] It is essential that it should appear on the face of the remonstrance that

37. *Illinois.*— Troxell *v.* Dick, 216 Ill. 98, 74 N. E. 694.

Iowa.— Moffitt *v.* Brainard, 92 Iowa 122, 60 N. W. 226, 26 L. R. A. 821.

Kansas.— Crawford *v.* Elk County, 32 Kan. 555, 4 Pac. 1011; Troy *v.* Doniphan County, 32 Kan. 507, 4 Pac. 1009.

Kentucky— Mitchell *v.* Bond, 11 Bush 614.

Michigan.— Hatt *v.* Napoleon Tp. Bd., 144 Mich. 266, 107 N. W. 1058; Curry *v.* Place, 99 Mich. 524, 58 N. W. 472; Goss *v.* Westphalia Tp. Highway Com'rs, 63 Mich. 608, 30 N. W. 197; Ross *v.* Taylor Tp. Highway Com'rs, 32 Mich. 301; People *v.* Nankin Highway Com'rs, 14 Mich. 528.

Tennessee.— Hill *v.* Hoffman, (Ch. App. 1899) 58 S. W. 929.

Wisconsin.— Morris *v.* Edwards, 132 Wis. 91, 112 N. W. 248; Schroeder *v.* Klipp, 120 Wis. 245, 97 N. W. 909.

See 25 Cent. Dig. tit. "Highways," § 265.

Variance.— Under a statute requiring the publication of notice of application for vacating a county road, a variance between the notice and petition for vacation in stating the place of termination of the road is fatal to the jurisdiction of the county court. Fisher *v.* Union County, 43 Oreg. 223, 72 Pac. 797.

Proof of notice.— Where the petitioners are required to give the notice, they are competent to furnish proof that it has been given. Vedder *v.* Marion County, 22 Oreg. 264, 29 Pac. 619; Gaines *v.* Linn County, 21 Oreg. 425, 28 Pac. 131.

38. People *v.* Nankin Highway Com'rs, 14 Mich. 528.

39. Hatt *v.* Napoleon Tp. Bd., 144 Mich. 266, 107 N. W. 1058; Schroeder *v.* Klipp, 120 Wis. 245, 97 N. W. 909. *Contra*, Chrisman *v.* Brandes, 137 Iowa 433, 112 N. W. 833, holding that failure to give notice to other landowners of proceedings to vacate highways does not render the proceedings invalid as to the landowners properly notified.

40. See cases cited *infra*, this note.

By acquiescence in order of discontinuance. — Although notice is required to be posted before a road, or any portion thereof, can be lawfully discontinued, yet, after the final order discontinuing it has been acquiesced in for a period of eighteen years, the omission of such notice will be regarded as waived. Yates *v.* West Grafton, 33 W. Va. 507, 11 S. E. 8.

By appearance.—Appearance of the parties entitled to notice is regarded as a waiver thereof (Chrisman *v.* Brandes, 137 Iowa 433, 112 N. W. 833; Candia *v.* Chandler, 58 N. H. 127; Matter of Susquehanna River Road, 1 Pearson (Pa.) 59), or defects therein (*In re* Lower Merion Tp. Road, 8 Pa. Dist. 581, 15 Montg. Co. Rep. 177). But see Mitchell *v.* Bond, 11 Bush (Ky.) 614, 615 (where, construing a requirement of public notice, the court say: "The object of the notice required . . . is to give notice to the public at large, and to enable any citizen who may wish to do so to appear and resist the making of the order applied for, and any one who does appear thereby becomes the representative of the public, but he cannot waive the rights of the public, and by his mere silence give the court jurisdiction of a matter affecting the interest of the public of which it would, but for such silence, have had no jurisdiction"); Hatt *v.* Napoleon Tp. Bd., 144 Mich. 266, 107 N. W. 1058 (holding that the fact that a party entitled to notice of proceedings for the discontinuance of a highway does not complain of the proceedings taken does not cure the irregularity in proceedings taken without giving him such notice).

41. See the statutes of the several states, and cases cited *infra*, this note.

Persons through whose land road passes.— In some states a remonstrance against the vacation of a highway can only be filed by persons through whose lands such highway may pass. Under such a statutory provision the persons who may complain of the vacation of a way must be such as are directly affected in their convenience of access to their property, and who are liable to lose their immediate means of communication. Kimball *v.* Homan, 74 Mich. 699, 42 N. W. 167. A person through whose land a highway passes may remonstrate, although the part to be vacated does not pass through his land, but merely touches it. Houpt *v.* Dutton, 170 Ind. 69, 83 N. E. 634. A person whose premises are so situated that he could not reach the discontinued way without first crossing a public street, communicating with others in various directions, and furnishing abundant guards against isolation, has no right to complain. Kimball *v.* Homan, 74 Mich. 699, 42 N. W. 167. The fact that a highway proposed to be vacated intersects with another highway, on which an owner's lands abut, does not make him an abutting owner, within the meaning of such a statute. Brandenburg *v.* Hittel, 16 Ind. App. 224, 45 N. E. 45. A person through whose land it may be proposed to vacate a highway may remonstrate

the remonstrant has the statutory qualifications; otherwise the remonstrance is fatally defective.[42]

(v) *HEARING AND DETERMINATION.* Upon the hearing of a vacation proceeding there are but two questions to try; one the utility or non-utility of the highway;[43] and the other the question of damages, if they are allowable, and asked for by a remonstrant.[44] These can be ascertained by testimony addressed to the court or board,[45] unless a jury of view is required to be appointed by statute.[46] Adjournments are regulated by statute.[47]

(vi) *COMMISSIONERS, VIEWERS, AND OTHER LIKE OFFICERS.* A petition being filed, provision is usually made in the statutes for the appointment of commissioners or viewers who shall examine and report.[48] Their authority is limited

on the ground that the highway is of public utility, and in the same remonstrance claim damages in consequence of the proposed vacation. Butterworth *v.* Barlett, 50 Ind. 537.

All freeholders of township.— In other states the right to object to proceedings to vacate a county road is not limited to landowners whose lands are occupied by the road, but extends to all the freeholders of the township. *In re* Big Hollow Road, 40 Mo. App. 363.

In New Jersey it is said that every citizen is interested, more or less, in every highway and has a right to submit any questions affecting such interests to the court. State *v.* Snedeker, 30 N. J. L. 80.

42. Early *v.* Hamilton, 75 Ind. 376; Brandenburg *v.* Hittel, 16 Ind. App. 224, 45 N. E. 45.

43. Cook *v.* Quick, 127 Ind. 477, 26 N. E. 1007; Nicholson *v.* Stockett, Walk. (Miss.) 67.

Evidence.— Evidence as to the original purpose in opening a road is not material to the question of the expediency of its discontinuance. Ashcraft *v.* Lee, 81 N. C. 135. Nor is it competent to permit petitioners for the vacation of a highway to prove the offer of individuals to maintain private ways or bridges. Whetton *v.* Clayton, 111 Ind. 360, 12 N. E. 513. Evidence that the road hands in a certain township are in number insufficient to keep up all the roads in that township has no tendency, unless connected with other facts, to show that any particular road should be discontinued. Ashcraft *v.* Lee, *supra.*

44. Cook *v.* Quick, 127 Ind. 477, 26 N. E. 1007.

45. Thomas *v.* Hawkins, 20 Ga. 126.

In Mississippi the statute declaring that no person shall turn, alter, or change any public road unless it is by order of court, founded upon the report of a jury, does not require the intervention of a jury in proceedings to discontinue a road. Nicholson *v.* Stockett, Walk. 67.

46. See *infra*, II, D, 2, d, (vi).

47. **Howell Annot. St. Mich. § 1300,** provides that the commissioner may adjourn proceedings to discontinue a highway no longer than twenty days. Therefore proceedings had on June 6, pursuant to a twenty-day adjournment from May 18, are irregular and void. Price *v.* Stagray, 68 Mich. 17, 35 N. W. 815.

48. See the statutes of the several states, and cases cited *infra*, this note.

In Maryland, under Code Pub. Gen. Laws, art. 25, § 86, and the local laws of Baltimore county (Acts (1900), p. 1086, c. 685, § 280), providing that, whenever the county commissioners shall deem it expedient that examiners shall be appointed to view the grounds for the purpose of opening, altering, or closing a road, they shall appoint three persons as examiners, etc., the appointment of examiners to view the grounds on the closing of a road is within the discretion of the commissioners. Riggs *v.* Winterode, 100 Md. 439, 59 Atl. 762.

In Michigan the amendment to the state constitution (Laws (1859), § 1102) gives authority to highway commissioners to discontinue such roads as they have jurisdiction over without the intervention of a jury. People *v.* Nankin Highway Com'rs, 15 Mich. 347.

In New Hampshire, before the act of June 20, 1840, providing for the election of road commissioners, it was the established practice in the court of common pleas to refer petitions for the discontinuance of highways to the same committees which had passed upon the question of laying them out; and after the passage of that act all such petitions were, by a rule of that court, uniformly referred to such commissioners. Such a rule of court was well adopted, and the Revised Statutes have made no change in the law in this respect. *In re* Howard, 28 N. H. 157; *In re* Hampstead, 19 N. H. 343; Hopkinton *v.* Smith, 15 N. H. 152; *In re* Strafford, 14 N. H. 30; *In re* Nashua, 12 N. H. 425.

Under the New York Highway Law, § 83 (Laws (1890), p. 1193, c. 568), if a petition for the discontinuance of a highway is presented in good faith, it is the duty of the county court to appoint commissioners as asked for. Matter of McFadden, 96 N. Y. App. Div. 58, 89 N. Y. Suppl. 104.

Under Pa. Act (1836), § 18, the appointment of viewers to vacate a highway rests in the discretion of the court, and is not a matter of right. *In re* Ottercreek Tp. Public Road, 104 Pa. St. 261; *In re* Newville Road, 8 Watts 172; *In re* Abington Road, 3 Pa. Dist. 226; *In re* Cassville Road, 21 Pa. Co. Ct. 212; *In re* Sheik's Pond Road, 5 Pa. Co. Ct. 360.

In Vermont, in petitions to discontinue roads laid out by committees appointed by

by statute or by the terms of the order appointing them.[49] While all the viewers must participate in the view,[50] or at least be given an opportunity to do so,[51] if a minority for any reason do not take part, the others may proceed in their absence,[52] and may make a valid report.[53] The form and contents of such reports are usually prescribed by statute.[54] According to the circumstances of the case

court, the practice is to appoint the same committee that laid out the road. Livingston *v.* Jerico, 11 Vt. 96.

Qualification of commissioners or viewers.— Commissioners or viewers appointed to pass on the question of discontinuance of a highway are usually required by statute to be disinterested persons. Moore *v.* Sandown, 19 N. H. 93 (holding that one who several years before had signed a petition to lay out the highway was not incompetent to act upon the petition for its discontinuance); *In re* Nashua, 12 N. H. 425 (holding that a citizen of the town through which the road passed was incompetent to act as commissioner upon a petition for its discontinuance). The New York Highway Law (Laws (1890), p. 1193, c. 568), § 84, requires that the three commissioners appointed to determine the uselessness of a highway shall be disinterested freeholders. Under this act, to be qualified, a commissioner must have been a freeholder at the time of his appointment, and the fact that he became one before the hearing of an application to vacate his appointment is insufficient. Matter of Trask, 81 N. Y. App. Div. 318, 81 N. Y. Suppl. 53. In Pennsylvania, questions relating to the disqualification of viewers are usually left to the judgment of the court below. *In re* McCandless Tp. Road, 110 Pa. St. 605, 1 Atl. 594, holding that the fact that one of the viewers was among those who signed the petition to vacate does not necessarily disqualify him to act.

49. *In re* Hampstead, 19 N. H. 343; Matter of Coe, 19 Misc. (N. Y.) 549, 44 N. Y. Suppl. 910 (holding that commissioners appointed to determine the uselessness of highways proposed to be discontinued (Laws (1890), c. 568, § 84) have no authority to require the opponents of the application to pay a sum of money in order to be heard in the proceeding); *In re* Silver Lake Tp. Road, 84 Pa. St. 131.

An order to lay out a road does not authorize the viewers to vacate any part of the road, although the petition asked for such vacation. *In re* Silver Lake Tp. Road, 84 Pa. St. 131; *In re* North Branch Tp. Road, 1 Leg. Chron. (Pa.) 119; *In re* Franklin Tp. Road, 1 Leg. Chron. (Pa.) 57. But on petition of a majority of the original petitioners for the road, viewers may report in favor of vacating part of the unopened road, and return the remainder for public use. *In re* Madison School-House Road, 7 Luz. Leg. Reg. (Pa.) 242.

Time of making view.— Viewers have no authority to view and lay out the road after the commencement of the term to which their order is returnable. *In re* Metzler, etc., Road, 62 Pa. St. 151; *In re* Newlin Road, 2 Chest. Co. Rep. (Pa.) 373; *In re* Madison Road, 2 Lanc. L. Rev. (Pa.) 35. Nor does it make any difference that the viewers had previously met and then adjourned for further deliberation and action until the day the road was laid out. Viewers have no authority after the term commences to do more than to make out their return and report their previous action to the court, unless a continuance of their order has been obtained from the court, or the report is returned by the court for amendment or correction. *In re* Newlin Road, *supra*.

Place of hearing.— It is usual to have the hearing as near to where the highway proposed to be discontinued is located as possible; but where there is nothing in the statutes, or in the decisions of the courts, which compels the commissioners to have the hearing at any particular place, they may select any place in the town where the highway is located for the hearing of the application. Matter of Coe, 19 Misc. (N. Y.) 549, 44 N. Y. Suppl. 910.

50. *In re* Farrell Road, 35 Pa. Super. Ct. 86.

A report signed by all the viewers, stating that they "had viewed," is a sufficient averment of who were present at the view. *In re* Ross Tp. Road, 36 Pa. St. 87.

51. Condict *v.* Ramsey, 65 N. J. L. 503, 47 Atl. 423.

52. Condict *v.* Ramsey, 65 N. J. L. 503, 47 Atl. 423.

53. *In re* Farrell Road, 35 Pa. Super. Ct. 86, holding that a report of reviewing road commissioners in proceedings to vacate a road under the Pennsylvania act of July 2, 1901 (Pamphl. Laws 607), signed by only two of the three commissioners, and not showing on its face that all of the commissioners participated in the review, is not fatally defective.

Report of joint board.— Under a statute providing that all petitions relating to roads which pass over land in two or more counties shall be referred to the commissioners of all such counties, "and they shall constitute a joint board," it is not necessary that reports upon petitions for the discontinuance of highways be signed by a majority of the commissioners of each county. If signed by a majority of the joint board, it is sufficient. *In re* Goffstown, 35 N. H. 292.

54. See cases cited *infra*, this note.

The report should preferably pursue the words of the statute strictly (Oulton *v.* Carter, 9 N. Brunsw. 169); if not it must use words necessarily equivalent thereto (Oulton *v.* Carter, *supra*, holding that to justify the shutting up a highway under 1 Rev. St. cap. 66, the return of the commissioners must show, either expressly or by necessary im-

the report will be confirmed,[55] set aside,[56] or recommitted for correction or amendment.[57]

(VII) *ORDER OR JUDGMENT AND RECORD* — (A) *In General.* An order or judgment discontinuing a public highway must substantially conform to statutory requirements.[58] Where the law appears to have been properly complied

plication, that the road is not required for the convenience of the inhabitants of the parish. The words "not required for the inhabitants" and "not required for the convenience of the inhabitants" are not identical in meaning).

Description of road.— It is sufficient, in a report discontinuing a highway, to describe it as the highway laid out upon the petition of certain individuals named, without particularly setting it forth by metes and bounds, courses and distances. *In re* Mt. Vernon, 37 N. H. 515. A report is not void for uncertainty because its only statement of the roads vacated is by reference to a draft attached to the report on which such vacated roads are so indicated. *In re* Whiteley Road, 2 Mona. (Pa.) 194, 15 Atl. 895. Where there is on the files of the court a draft of a road, to vacate which road proceedings are commenced, a draft of the road thus vacated need not be returned by the viewers, although the order of the court direct it to be done. *In re* Jackson Tp. Road, 9 Pa. St. 85.

In Michigan a copy of the notice served must be appended to the report. In order to comply with the statute, it should appear upon what particular persons the notice was served, and whether served by copy left at the residence, or personally, in order that there may be distinct proof of the parties bound by such notice. People *v.* Nankin Highway Com'rs, 14 Mich. 528. The public places where the notices were posted should also be designated. People *v.* Nankin Highway Com'rs, *supra.*

In New Hampshire county commissioners, in their report discontinuing a highway, should state that the highway has become no longer necessary, and that changes which have occurred since its laying out require its discontinuance, and should state, not only the changes generally, but also the particular circumstances, and how they affect the case. *In re* Marlborough, 46 N. H. 494; *In re* Hopkinton, 27 N. H. 133; *In re* Hampstead, 19 N. H. 343.

Conditional report.— A report of viewers appointed to vacate parts of a public road stating that the road had become useless, dangerous, inconvenient, and burdensome, and should be vacated, and, furthermore, that said vacation should take effect from the time a certain railroad company had completed, ready for use, an overhead bridge over the tracks of its road, is not objectionable as containing a condition. *In re* Londonderry Tp. Roads, 24 Wkly. Notes Cas. (Pa.) 327.

55. *In re* Forks Tp. Road, 2 Lanc. L. Rev. (Pa.) 307, holding that where viewers, in proceedings to vacate a highway, reported in favor of vacating the road, and reviewers reported adversely, but re-reviewers agreed with the first viewers, the court will confirm the report for vacation.

Premature confirmation.— Where viewers have been appointed and they have made their report vacating the road, an entry of confirmation thereon, without giving the petitioners the right to be heard, is premature. *In re* Spring Tp. Road, 2 Woodw. (Pa.) 179.

56. *In re* Lower Makefield Road, 71 Pa. St. 175 (holding that a report of reviewers vacating parts of a road will be set aside for want of a return of the plot, although the omission was not excepted to below); *In re* Lower Merion Tp. Road, 8 Pa. Dist. 562, 22 Pa. Co. Ct. 299, 15 Montg. Co. Rep. 81 (holding that in proceedings to vacate a public road, the report of viewers will be set aside where it appears that the rule of court was not observed in regard to the posting of notices of the time and place of the meeting of the jury of view).

57. *In re* Marlborough, 45 N. H. 556, holding that where the county commissioners, upon petition for leave to discontinue a new highway laid out but not constructed, report in favor of the discontinuance of such new highway for two reasons, of which one is legally insufficient and the other not conclusive in law, in the absence of anything to show that they considered the latter reason alone sufficient, the report will, on motion, be recommitted.

Amendment of clerical errors.— The court has power to send a report back to the viewers for amendment of clerical errors before confirmation. *In re* Silver Lake Tp. Road, 84 Pa. St. 131.

58. McKenzie *v.* Gilmore, (Cal. 1893) 33 Pac. 262 (holding that an order vacating a public highway is legislative, and the act ought to appear in the order); Elliott *v.* Treadway, 10 B. Mon. (Ky.) 22 (holding that to give validity to an order discontinuing a road, it must be shown that it was ordered by a court properly constituted); Com. *v.* Roxbury, 8 Mass. 457.

Signature.— Under Minn. Gen. St. (1878) c. 13, § 37, providing for the laying out, altering, or discontinuing of any highway, a public highway can be vacated only by an order signed by the town supervisors, and until signed such order has no force or effect as an order. Keyes *v.* Minneapolis, etc., R. Co., 36 Minn. 290, 30 N. W. 888. In some states it is sufficient if a majority of the members of the board sign the order. State *v.* Goodwin, 24 Wis. 286.

Posting order of discontinuance not necessary to validity.— In New York, failure of a town clerk to post notices of the order of the discontinuance of a highway in the place where the town meetings are held does not

with, immaterial defects in the order will not invalidate it.[59] Conditional adjudications of tribunals having the power to discontinue ways are not uncommon, and have often been upheld.[60] Sometimes, however, the condition has been declared void,[61] and sometimes it has made the whole adjudication of no effect.[62] An order discontinuing a road, however irregular, cannot be rescinded for that cause at a subsequent term.[63] But if it is wholly void, it may be set aside at any subsequent term.[64] The facts essential to the jurisdiction of a county board or court to vacate a road must affirmatively appear on the record of the proceedings, or such record will be fatally defective.[65] When the exercise of authority is limited by statute, and its exercise affects the private rights of individuals by divesting them of property or valuable rights, the record of the proceedings must show that the act by which this is done is within the limits of the power conferred.[66] Presumptions of law favoring the validity of a judgment rendered by an inferior court or tribunal do not arise, unless it affirmatively appears in the record that the court or tribunal has jurisdiction of the subject-matter of the action or proceeding pending, and the parties litigant.[67] But when the record shows juris-

make the order invalid. Elgleman *v.* Langhorst, 6 N. Y. St. 522.

59. Atherton *v.* Highway Com'rs, 81 Ill. App. 59.

60. Sears *v.* Fuller, 137 Mass. 326; New London *v.* Davis, 73 N. H. 72, 59 Atl. 369. And see Coakley *v.* Boston, etc., R. Co., 159 Mass. 32, 33 N. E. 930.

61. Coakley *v.* Boston, etc., R. Co., 159 Mass. 32, 33 N. E. 930; Cheshire Turnpike *v.* Stevens, 10 N. H. 133, holding that a town cannot discontinue a highway during pleasure, with a reservation of a right to open it at any time, without paying damages. The reservation in such case will be void, and the discontinuance absolute.

62. Hayes *v.* Tylor, 85 Iowa 126, 52 N. W. 116.

63. Barr *v.* Stevens, 1 Bibb (Ky.) 292.

64. Conrad *v.* Lewis County, 10 W. Va. 784.

65. Imhoff *v.* Somerset Highway Com'rs, 89 Ill. App. 66; Crawford *v.* Elk County, 32 Kan. 555, 4 Pac. 1011; Price *v.* Stagray, 68 Mich. 17, 35 N. W. 815; People *v.* Caledonia Highway Com'rs, 16 Mich. 63; Letherman *v.* Hauser, 77 Nebr. 731, 110 N. W. 745.

The order must be complete and sufficient on its face, and its defects cannot be helped out or supplied by parol. Keyes *v.* Minneapolis, etc., R. Co., 36 Minn. 290, 30 N. W. 888.

Notice.— The record must show affirmatively that the notice provided for in the statute has been given, so that the court may be able to see, either from the facts themselves, or specific recitals of those facts, that "due notice" was given. Troxell *v.* Dick, 216 Ill. 98, 74 N. E. 694; Imhoff *v.* Somerset Highway Com'rs, 89 Ill. App. 66; Mitchell *v.* Bond, 11 Bush (Ky.) 614; People *v.* Caledonia Highway Com'rs 16 Mich. 63; Gaines *v.* Linn County, 21 Oreg. 430, 28 Pac. 133. But see *In re* Sewickley Tp. Road, 23 Pa. Super. Ct. 170, holding that proceedings to vacate a portion of the public road will not be quashed merely because it does not appear from the record that the notice required by the act of May 2, 1899 (Pamphl. Laws 176), was given when there is no denial of the fact that the notice was given, and the report of the viewers expressly states that "due notice of the view" was served on the supervisors. In Yates *v.* West Grafton, 33 W. Va. 507, 11 S. E. 8, it is said that there is nothing in the chapter authorizing these proceedings which directs such notice to be made a part of the record. If not given, and it be a case requiring it, the omission, in order to be taken advantage of, must appear on the record, or there must be sufficient positive evidence *aliunde* introduced to rebut the presumption that the proceedings were regular.

View of premises and finding of public necessity.— An order discontinuing a highway is void when the record of the commissioner's proceedings does not show that he viewed the premises, or determined the public necessity of such discontinuance. Furman *v.* Furman, 86 Mich. 391, 49 N. W. 147.

Residence of petitioner.— Under section 4661, Ohio Revised Statutes, providing for the vacation of county roads, residence in the vicinity of the road proposed to be vacated is an essential qualification of a petitioner for vacation; and the fact of such residence is a jurisdictional one and must affirmatively appear in the record to confer jurisdiction on the board of commissioners to order a vacation. Smith *v.* Frenzer, 12 Ohio Cir. Ct. 250, 5 Ohio Cir Dec. 658.

66. Pearsol *v.* Eaton County, 71 Mich. 438, 39 N. W. 578, holding that under a statute requiring every order, resolution, and determination of the board of supervisors, made in pursuance of the act authorizing them to lay out and discontinue state roads, to be recorded and signed by the chairman and clerk, there can be no presumption that they performed their duty; and, it not appearing in the record that the interests of the public were considered, the discontinuance is invalid.

67. Smith *v.* Frenzer, 12 Ohio Cir. Ct. 250, 5 Ohio Cir. Dec. 658.

Effect of statute making record prima facie evidence of regularity of proceedings.— Section 52 of chapter 121, Hurd Rev. St. Ill. (1897), which provides that the record of the town clerk, or a certified copy of such

diction in the court or tribunal, and does not disclose some prejudicial error in the proceedings, in such cases presumptions of law arise and sustain the judgment or order.[68]

(B) *Conclusiveness and Collateral Attack* — (1) In General. In some states it seems that the principle which obtains in suits at common law, that a former judgment is conclusive upon all points directly in issue upon the trial, does not apply strictly to proceedings to procure the discontinuance of highways.[69] But as a rule it is held that an order or judgment discontinuing a public road must be deemed conclusive so long as it remains in force,[70] and the correctness of such a proceeding cannot be attacked collaterally,[71] unless it is void.[72]

(2) Bar to Further Proceedings. It is commonly provided by statute that after the final determination of a proceeding to discontinue a highway no further proceedings shall be had in reference to the same highway,[73] until the expiration of a limited time.[74] In the absence of a statute on the subject no general rule can be laid down as to how far a court or board will go in entertaining successive petitions to vacate.[75]

(VIII) *Defects and Objections and Waiver Thereof.*[76] In cases of this character objections to the regularity of the proceedings must be seasonably taken at the hearing or they cannot be made available on appeal.[77]

record and papers relating to the establishment, location, alteration, widening, or vacation of any road, shall be *prima facie* evidence in all cases that all necessary antecedent provisions have been complied with, and that the action of the commissioners or other persons and officers in regard thereto has been regular in all respects, applies only where the papers show jurisdiction on their face. Imhoff *v.* Somerset Highway Com'rs, 89 Ill. App. 66. The presumption raised is not conclusive, but is subject to rebuttal. Schroeder *v.* Klipp, 120 Wis. 245, 97 N. W. 909.

68. Smith *v.* Frenzer, 12 Ohio Cir. Ct. 250, 5 Ohio Cir. Dec. 658.

69. *In re* Strafford, 14 N. H. 30.

70. Bradbury *v.* Walton, 94 Ky. 163, 21 S. W. 869, 14 Ky. L. Rep. 823; Briggs *v.* Bowen, 60 N. Y. 454.

71. Sullivan *v.* Robbins, 109 Iowa 235, 80 N. W. 340; Ellis *v.* Blue Mountain Forest Assoc., 69 N. H. 385, 41 Atl. 856, 42 L. R. A. 570; Briggs *v.* Bowen, 60 N. Y. 454; Haynes *v.* Lassell, 29 Vt. 157.

72. People *v.* Three Judges Suffolk County, 24 Wend. (N. Y.) 249; Hill *v.* Hoffman, (Tenn. Ch. App. 1899) 58 S. W. 929.

73. See cases cited *infra*, this note.

In Iowa, Code (1873), § 927, providing that if a commissioner, after a general examination, "shall not be in favor of establishing a proposed highway, he will so report, and no further proceedings shall be had thereon," is applicable to proceedings to vacate a highway. Devoe *v.* Smeltzer, 86 Iowa 385, 53 N. W. 287; Cook *v.* Trigg, 52 Iowa 709, 3 N. W. 725.

74. See cases cited *infra*, this note.

In New Jersey, Revision, p. 1013, § 100, provides that in case the surveyors shall return that they think the laying out, vacation, or alteration of the road to be necessary, no new application touching said road shall be made under one year after said appointment. Under such a provision surveyors of the highways cannot be appointed to vacate a road while proceedings upon a previous appointment of surveyors to vacate the same road are still pending. State *v.* Adams, 55 N. J. L. 334, 26 Atl. 914 [*reversing* (Sup. 1891) 21 Atl. 938].

Under N. Y. Laws (1847), c. 455, § 9, a refusal of referees to discontinue a road is no bar to new proceedings within four years for that purpose; such a decision is not one for "laying out, altering or discontinuing a road." People *v.* Nichols, 51 N. Y. 470.

75. See cases cited *infra*, this note.

In an early New Hampshire case it is said: "Even if there have been a decision upon the merits of a road petition, it has not been the practice here to apply to it the common law principle, that a former judgment is conclusive upon all points directly in issue upon the trial, and necessarily determined. But perhaps if the merits of a road petition had been repeatedly passed upon and examined, the court might, by analogy to proceedings in suits at law, exercise a legal discretion, and refuse to entertain it." *In re* Strafford, 14 N. H. 30. If a second petition is founded upon the same vote of the town which formed the basis of the former application, the matter will be regarded as *res judicata*, and the petition will be dismissed. *In re* Bath, 22 N. H. 576. Upon a fresh vote, however, the presumption is that a new state of facts has arisen, and the court will take such a course with a petition founded upon such a vote, as though no previous application had been made. *In re* Bath, *supra*.

76. Waiver of notice see *supra*, II, D, 2 d, (III).

77. Williamson *v.* Houser, 169 Ind. 397, 82 N. E. 771 (holding that a landowner who did not appear before the commissioners cannot present an application for damages or a remonstrance that the proposed vacation is not of public utility for the first time in the circuit court on appeal); Millett *v.* Franklin

(IX) *APPEAL AND ERROR.* Unless allowed by statute,[78] no appeal lies from an order or judgment vacating a highway.[79] Where appeals are permitted, the jurisdiction of the appellate court is, in some states, appellate only, and the merits of the case cannot be entered into;[80] nor can the order or judgment of the inferior tribunal be reversed unless for some error or irregularity apparent on the record,[81] or because the court below exceeded their jurisdiction or erred in their judgment in point of law.[82] In other states the case is tried *de novo* in the appellate court.[83] The persons entitled to appeal, as in the case of appeals in proceedings to establish highways, must be determined by reference to the local statutes.[84] Further-

County, 81 Me. 257, 16 Atl. 897 (holding that an objection not made at the hearing, but only after the report of the committee had been returned to court, came too late); *In re* Manchester, 28 N. H. 296 (holding that the exception that a town has passed no legal vote to discontinue a highway cannot be taken after a petition for such discontinuance has been referred to the road commissioners without objection, and a report has been made thereon); *In re* Allentown Road, 5 Whart. (Pa.) 442.

78. See *In re* Big Hollow Road, 111 Mo. 326, 19 S. W. 947 [*affirming* 40 Mo. App. 363]; Webster *v.* Spindler, 36 Mo. App. 355; Hagemeier *v.* Keene, 8 Mo. App. 574; Senter *v.* Pugh, 9 Gratt. (Va.) 260; Hull *v.* Stephenson, 19 Wash. 572, 53 Pac. 669.

Appeal lies only from final order or judgment see Cook *v.* Quick, 127 Ind. 477, 26 N. E. 1007; Green *v.* Ayers, 31 Ind. 248.

If the order or judgment is void it is not the subject of an appeal. People *v.* Three Suffolk County Judges, 24 Wend. (N. Y.) 249; *In re* Perry Tp. Road, 36 Pa. Super. Ct. 131.

Time for taking appeal.—An appeal to the circuit court from an order of the county court closing a road need not be prosecuted within sixty days, as required in other appeals from the county court, but may, under Ky. Gen. St. c. 94, art. 1, § 43, be prosecuted at any time within one year. Rountree *v.* Lebanon, etc., R. Co., 9 Ky. L. Rep. 817. Me. Rev. St. c. 18, §§ 48, 49, giving the right of appeal to a committee to revise the doings of county commissioners in discontinuing a highway, requires that the committee be appointed at the first term after appeal, and that the committee shall view the route, hear the parties, and make their report at the next term of the court after appointment. The statute is mandatory, and it is no objection to the report of such committee that the hearing before them took place while exceptions touching questions of law in the case were pending in the law court. Millett *v.* Franklin County, 81 Me. 257, 16 Atl. 897.

Action to set aside judgment obtained by fraud.— The rule that a new action may be maintained to set aside and annul a judgment obtained by fraud is applicable to set aside the verdict of a jury rendered on an appeal from an order vacating a highway. Street *v.* Alden, 62 Minn. 160, 64 N. W. 157, 54 Am. St. Rep. 632.

79. Daughters of American Revolution *v.* Schenley, 204 Pa. St. 572, 54 Atl. 366, holding that under the Pennsylvania act of May 16, 1891 (Pamphl. Laws 75), giving a right of appeal to abutting owners from ordinances opening, widening, extending, or otherwise improving any street, no appeal lies from the vacating of a street.

80. Wheatley *v.* Hanna, 23 Ind. 518; Crittenden County Ct. *v.* Shanks, 88 Ky. 475, 11 S. W. 468, 11 Ky. L. Rep. 8; Simpsonville, etc., R. Co. *v.* French, 7 Ky. L. Rep. 661; Laytham *v.* Wilson, 4 Ky. L. Rep. 263; Anderson *v.* San Francisco, 104 Minn. 320, 116 N. W. 473; *In re* Swanson St., 163 Pa. St. 323, 30 Atl. 207; *In re* Jefferson Tp. Road, 3 Pa. Super. Ct. 467.

81. *In re* Allentown Road, 5 Whart. (Pa.) 442; *In re* Jefferson Tp. Road, 3 Pa. Super. Ct. 467.

82. Daughters of American Revolution *v.* Schenley, 204 Pa. St. 572, 54 Atl. 366; *In re* Jefferson Tp. Road, 3 Pa. Super. Ct. 467.

83. Cook *v.* Quick, 127 Ind. 477, 26 N. E. 1007; Brandenburg *v.* Hittel, 16 Ind. App. 224, 45 N. E. 45; *In re* Big Hollow Road, 111 Mo. 326, 19 S. W. 947; Buchanan *v.* Baker, 54 Ohio St. 324, 43 N. E. 330.

84. See the statutes of the several states, and cases cited *infra*, this note.

Persons interested.— To entitle a person to appeal from an order or judgment vacating a highway it is commonly required that he be "interested" therein. See Barr *v.* Stevens, 1 Bibb (Ky.) 292; Brown *v.* Sagadahoc County, 68 Me. 537. Under such a requirement, the right of appeal is sometimes held to be limited to the owners of land abutting the road to be vacated. Bloomington Highway Com'rs *v.* Quinn, 136 Ill. 604, 27 N. E. 187 [*overruling* Whitmer *v.* Dry Grove Tp. Highway Com'rs, 96 Ill. 289]; Taylor *v.* Normal Highway Com'rs, 88 Ill. 526. But it has been held that a party may be directly interested in such a matter, although he does not own any lands directly abutting upon the road to be vacated. This may affect the degree of his interest, but he may have a direct, valuable, and substantial interest without such ownership, entirely different from that of a person residing in a remote part of the county. Hull *v.* Stephenson, 19 Wash. 572, 53 Pac. 669. Thus in New York resident taxpayers of a town may appeal from a decision discontinuing a highway, although they are not owners of any of the land over which the highway passes. Matter of Coe, 19 Misc. 549, 44 N. Y. Suppl. 910. Under Hurd Rev. St. Ill. (1897) c. 121, §§ 31, 59, persons residing within two miles of a road which highway commissioners have decided to

more the right to appeal should appear affirmatively from the record; otherwise the appeal will be dismissed.[85]

(x) *CERTIORARI.* A proceeding to discontinue a highway is judicial in its nature and therefore reviewable by certiorari.[86] It is the duty of the superior tribunal to inspect the record as it is returned in obedience to the writ,[87] and to determine whether the inferior tribunal had jurisdiction,[88] or whether it exceeded its jurisdiction,[89] or otherwise proceeded in violation of law.[90] Matters within the discretion of the inferior tribunal will not be reviewed.[91] A petition for a writ of certiorari is an application to the judicial discretion of the court,[92] and will not be granted for formal and technical errors only, where no real injustice has been done;[93] nor will it be granted, even where more substantial errors are apparent in the proceedings, upon the application of one whose rights are not affected injuriously by such errors.[94]

vacate are entitled to appeal from the commissioners' decision. Imhoff *v.* Somerset Highway Com'rs, 89 Ill. App. 66. In Kentucky it has been held that the owners of land through which a highway passes has not such an interest in the road as to entitle him to question, by appeal or writ or error, the order of a county court discontinuing such way. Cole *v.* Shannon, 1 J. J. Marsh. (Ky.) 218.

Parties to proceeding.— Under the statutes of some states either party to a petition to discontinue a public highway has a right to appeal. Ashcraft *v.* Lee, 81 N. C. 135; Fisher *v.* Union County, 43 Oreg. 223, 72 Pac. 797.

Party or person aggrieved.— Ind. Rev. St. (1843) pp. 186, 187, provides that if the person aggrieved by the decision, and appealing therefrom, be not a party to the matter or proceeding, the appeal shall not be allowed, unless he makes himself a party by affidavit setting forth explicity the nature of his interest in the subject-matter. Odell *v.* Jenkins, 8 Ind. 522.

Persons aggrieved are sometimes granted the right to appeal. Under such a provision freeholders remonstrating against the discontinuance of a county road may appeal to the circuit court from a judgment of the county court vacating the road, and adjudging costs against them. *In re* Big Hollow Road, 40 Mo. App. 363 [*affirmed* in 111 Mo. 326, 19 S. W. 947].

Person who may feel himself aggrieved.— Minn. Gen. St. (1878) c. 13, § 59, provides that "any person who may feel himself aggrieved" by an order discontinuing a highway may appeal. This is not to be taken literally. A person having no interest which could be affected might imagine himself aggrieved, yet the statute could not have intended to give such a person a right to appeal. The person claiming the right must undoubtedly be in a position to be injuriously affected by the order or determination made; in a position to sustain special injury, disadvantage, or inconvenience not common to himself with the other inhabitants or property-owners of the town. One through whose land a new road is laid out is in such a position; and so is one through, to, or along whose land an old road to be discontinued runs. State *v.* Holman, 40 Minn. 369, 41 N. W. 1073; State *v.* Barton, 36 Minn. 145, 30 N. W. 454; Schuster *v.* Lemond, 27 Minn. 253, 6 N. W. 802.

85. Odell *v.* Jenkins, 8 Ind. 522.

86. People *v.* Shaw, 34 N. Y. App. Div. 61, 54 N. Y. Suppl. 218.

87. Troxell *v.* Dick, 216 Ill. 98, 74 N. E. 694, holding that, when the return is made, the superior tribunal tries the case upon the record alone, and not upon the allegations contained in the petition for the writ, or on facts not contained in the record so returned.

The answer or return to a writ of certiorari to revise an order vacating a highway must show that the board had jurisdiction to make the order which they defend. State *v.* Washoe, County, 12 Nev. 17.

88. Troxell *v.* Dick, 216 Ill. 98, 74 N. E. 694.

89. Troxell *v.* Dick, 216 Ill. 98, 74 N. E. 694; People *v.* Three Judges, Suffolk County, 24 Wend. (N. Y.) 249.

90. Troxell *v.* Dick, 216 Ill. 98, 74 N. E. 694; Sullivan *v.* Robbins, 109 Iowa 235, 80 N. W. 340; Moore *v.* Sandown, 19 N. H. 93.

Defects in proceedings.— If on presentation of a proper petition to vacate a portion of a state road, the board of supervisors acquire jurisdiction to act, and do not in their final determination of the case exceed their jurisdiction, defects in their intermediate proceedings will not invalidate their conclusion or make it subject to review on certiorari. People *v.* Shiawassee County, 38 Mich. 642.

91. See cases cited *infra*, this note.

The expediency of vacating highways is for the board, and their action is not reviewable by certiorari. Chrisman *v.* Brandes, 137 Iowa 433, 112 N. W. 833; Com. *v.* Roxbury, 8 Mass. 457; People *v.* Shiawassee County, 38 Mich. 642.

92. Holden *v.* Berkshire, 7 Metc. (Mass.) 561.

Effect of laches.— The court, in its discretion, will not grant a writ of certiorari to reverse proceedings which have been long acquiesced in by all parties, and especially those principally interested. Holden *v.* Berkshire, 7 Metc. (Mass.) 561.

93. Holden *v.* Berkshire, 7 Metc. (Mass.) 561.

94. Holden *v.* Berkshire, 7 Metc. (Mass.)

(xi) *INJUNCTION*. Injunction will not lie to restrain the vacation of a highway, if an adequate remedy at law exists.[95] But in the absence of such an adequate remedy, injunction will lie.[96] In such an action the burden is upon plaintiff to establish the fact that he has rights which will be abridged or destroyed by such vacation.[97]

(xii) *COSTS*. Unless authorized by statute,[98] no costs can be allowed upon petitions for the discontinuance of highways.[99]

e. Operation and Effect. An order vacating a public highway should be limited to the road it purports to vacate, and which alone was authorized to be vacated.[1] The effect of such vacation is to extinguish the public easement,[2] and to relieve the public from any duty to keep the road in repair.[3] But it does not extinguish or alter private easements and rights in lands covered by the highway.[4] Nor is the easement of the public in a prescriptive way, which has been extinguished by the location of a highway, revived or restored by the subsequent discontinuance of the highway.[5]

f. Damages.[6] In the absence of special legislative provision,[7] it is held in

561; State *v.* Ramsey, 65 N. J. L. 503, 47 Atl. 423; People *v.* Shaw, 34 N. Y. App. Div. 61, 54 N. Y. Suppl. 218.

95. Kroeger *v.* Walcott, (Iowa 1898) 76 N. W. 841 (certiorari); McLachlan *v.* Gray, 105 Iowa 259, 74 N. W. 773 (certiorari).

96. See cases cited *infra*, this note.

Where proceedings to vacate a highway are void for want of jurisdiction, the remedy by certiorari is not exclusive, but injunction lies to prevent the proposed vacation. Moffit *v.* Brainard, 92 Iowa 122, 60 N. W. 226, 26 L. R. A. 821.

Discontinuance without making compensation.—Where compensation for the discontinuance of a highway is allowed, injunction is the proper remedy to prevent a discontinuance without compensation. McQuigg *v.* Cullins, 56 Ohio St. 649, 47 N. E. 595.

Mere apprehension that a highway is about to be vacated is not sufficient ground for interference by injunction. Troy *v.* Doniphan County, 32 Kan. 507, 4 Pac. 1009.

97. Sawyer *v.* Meyer, 45 Iowa 152.

Those whose lands abut a highway, and are affected by an unlawful closing thereof, may maintain a suit in equity to restrain the closing, although their lands do not abut the highway at the exact point of the obstruction. Hill *v.* Hoffman, (Tenn. Ch. App. 1899) 58 S. W. 929. But the closing of a public road will not be restrained so that plaintiff may continue its use in reaching a boat landing, where it appears that, if the road remained open, plaintiff could not thereby reach the boat landing without also crossing private property. Hyde *v.* Teal, 46 La. Ann. 645, 15 So. 416.

98. See cases cited *infra*, this note.

In New Hampshire petitions for the discontinuance of highways are held to be embraced in the general rule of the Revised Statutes that costs follow the event of every action or petition unless otherwise directed by the law or by the court. *In re* Barrington, 19 N. H. 399. Upon a petition by a town for leave to discontinue a road, such of the original petitioners as prove by affidavit that they appeared as parties on the docket to resist the petition are entitled to recover costs against the town, including the travel and attendance of witnesses, and the sums paid by the commissioners for their services; but no one who appeared as a party is entitled to be taxed as a witness. *In re* Barrington, *supra*. The original petitioners are chargeable only for such costs as are occasioned by their opposition to the discontinuance. *In re* Grafton, 22 N. H. 216; *In re* Hampstead, 20 N. H. 241. They are not answerable for the costs which are incurred before their appearance, or for such as must be incurred whether there is an appearance or not, or for the fees of the commissioners. *In re* Hampstead, *supra*. All costs which must be incurred, whether there is an appearance to oppose the petition or not, must be borne by the town. *In re* Grafton, 22 N. H. 216.

99. Warren *v.* Wausau, 66 Wis. 206, 28 N. W. 187.

1. Larkin *v.* Harris, 36 Iowa 93, holding that an order changing or vacating one of two highways established on the same line will not affect the one not mentioned in the order and notice, and an obstruction placed upon such highway by a road supervisor may be removed by mandamus.

2. See *infra*, III, A, 2.

3. Tinker *v.* Russell, 14 Pick. (Mass.) 279; Com. *v.* Western, 1 Pick. (Mass.) 136; McQuigg *v.* Cullins, 56 Ohio St. 649, 47 N. E. 595.

4. Holloway *v.* Southmayd, 139 N. Y. 390, 34 N. E. 1047, 1052; Matter of New York Bd. of Education, 24 N. Y. App. Div. 117, 48 N. Y. Suppl. 1061; McQuigg *v.* Cullins, 56 Ohio St. 649, 47 N. E. 595.

5. *In re* Old Orchard Rd. Crossing, 91 Me. 135, 39 Atl. 478, even though the town within which it was located never took possession of the land to build or repair the way, and failed for six years to open the highway.

6. From vacation of city streets see MUNICIPAL CORPORATIONS, 28 Cyc. 1073.

7. *Indiana.*— Cook *v.* Quick, 127 Ind. 477, 26 N. E. 1007; Butterworth *v.* Bartlett, 50 Ind. 537.

Massachusetts.— Fenner *v.* Sheldon, 11 Metc. 521.

some jurisdictions that the vacation of a highway is not an injury to abutting landowners for which compensation must be made.[8] Nor can it make any difference that the party claiming damages has some interest in the road different from that of the public in general.[9] On the other hand many cases hold that the vacation of a highway in such a manner as to deprive an abutting owner of access to his property is a "taking" of property within the constitutional prohibition, for which compensation must be made.[10] This right to damages does not extend to owners of land not abutting on the highway vacated, and accessible by other

New Hampshire.— Candia *v.* Chandler, 58 N. H. 127.

Wisconsin.— Schroeder *v.* Klipp, 120 Wis. 245, 97 N. W. 909, holding that under a statute providing that, in case an owner fails to agree with the supervisors as to the compensation he is to receive, they shall, at the time of making the order of discontinuance, assess his damages, a failure to award or secure a waiver or release of damages, and to file an award with the order of discontinuance, vitiates the proceedings therefor.

Canada.— *In re* Tate, 10 Ont. L. Rep. 651.

See 25 Cent. Dig. tit. "Highways," § 278.

Although a highway is discontinued before it is opened or worked, or any contract is made to work it, yet a party who sustains damages by such discontinuance is entitled to recover those damages. Hallock *v.* Franklin County, 2 Metc. (Mass.) 558.

In Indiana a person through whose land it may be proposed to vacate a highway may remonstrate, on the ground that the highway is of public utility, and in the same remonstrance claim damages in consequence of the proposed vacation. In such a case, if the viewers find in favor of the proposed vacation, they may assess such damages as the party objecting may sustain. Butterworth *v.* Bartlett, 50 Ind. 537.

In New Hampshire the statute makes it the duty of the commissioners to assess the damages in the case of a discontinuance, and they should proceed in substantially the same manner as when land is taken for the laying out of a highway. Candia *v.* Chandler, 58 N. H. 127.

Statutes held not to confer right to damages.— Iowa Code (1873), § 946, relating to the establishment of public highways by boards of supervisors, and providing that the board "may make such establishment, vacation, or alteration, conditioned upon the payment in whole, or in part, of the damages awarded, or expenses in relation thereto," does not contemplate damages for vacation of a public highway. Grove *v.* Allen, 92 Iowa 519, 61 N. W. 175; Brady *v.* Shinkle, 40 Iowa 576. Pennsylvania act of May 16, 1891 (Pamphl. Laws 75), contains no express grant to property-owners of the right to damages for the vacation of a highway, nor any clear implication of an intent to make such a grant. Howell *v.* Morrisville Borough, 212 Pa. St. 349, 61 Atl. 932. Tenn. Code, § 403, relating to the method of conducting suits against counties, confers no new liabilities, and cannot be invoked to sustain an action against a county for damages caused by acts of the county officials in laying off and afterward closing a public road. White's Creek Turnpike Co. *v.* Davidson County, 14 Lea (Tenn.) 73.

8. *California.*— Levee Dist. No. 9 *v.* Farmer, 101 Cal. 178, 35 Pac. 569, 23 L. R. A. 388.

Iowa.— McKinney *v.* Baker, 100 Iowa 362, 69 N. W. 683; Brady *v.* Shinkle, 40 Iowa 576; Ellsworth *v.* Chickasaw County, 40 Iowa 571.

Kansas.— Coffey County *v.* Venard, 10 Kan. 95.

Kentucky.— Bradbury *v.* Walton, 94 Ky. 163, 21 S. W. 869, 14 Ky. L. Rep. 823, holding that the legislature has power to authorize the county court to close or discontinue public roads without making compensation to the owners of abutting property, although no such power exists as to the streets of a town or city.

Montana.— State *v.* Deer Lodge County, 19 Mont. 582, 49 Pac. 147.

Pennsylvania.— Howell *v.* Morrisville Borough, 212 Pa. St. 349, 61 Atl. 932; Paul *v.* Carver, 24 Pa. St. 207, 64 Am. Dec. 649.

See 25 Cent. Dig. tit. "Highways," § 278.

The vacation of a road does not take any person's private property. It leaves the property of individuals just as though no road had ever been established. If a party owns the land over which the road runs, his rights and privileges are increased by the vacation of the road, instead of being diminished. If he does not own the land over which it runs, then of course no property of his can be taken from him. Coffey County *v.* Venard, 10 Kan. 95. A private citizen has no right of property in a public road, although it passes over his own land, unless he owns the land itself subject to the easement. If the owner of land abutting on a public road has a right of property in the easement, it necessarily follows that no change or alteration can be made without first making compensation to the owner, as it would be a taking of private property for public use without compensation; but he has no other interest except such as is common to the entire public, and where he is the owner of the land and the road is discontinued, its use then reverts to him to the extent he has title, but no further. Bradbury *v.* Walton, 94 Ky. 163, 21 S. W. 869, 14 Ky. L. Rep. 823.

9. Coffey County *v.* Venard, 10 Kan. 95.

10. Brandenburg *v.* Hittel, (Ind. 1894) 37 N. E. 329; Peace *v.* McAdoo, 46 Misc. (N. Y.) 295, 92 N. Y. Suppl. 368; McQuigg *v.* Cullins, 56 Ohio St. 649, 47 N. E. 595. And see EMINENT DOMAIN, 15 Cyc. 665 note 56.

ways,[11] unless the statute allowing damages is broad enough to include such persons.[12] In no case can the petitioner establish a claim for damages unless he first shows that there has been a highway discontinued.[13] A petition for the assessment of damages must show a sufficient legal interest in petitioner.[14] The amount of damages awarded will not be reviewed in the absence of any suggestion of misconduct on the part of the tribunal charged with the duty of estimating the same.[15]

3. Abandonment[16] — a. In General. A public highway may be extinguished and lost by abandonment.[17] To effect an abandonment there must be an

The term "taking" should not be used in an unreasonable or narrow sense. It should not be limited to the absolute conversion of property, and applied to land only; but it should include cases where the value is destroyed by the action of the government, or serious injury is inflicted to the property itself, or exclusion of the owner from its enjoyment, or from any of the appurtenances thereto. In either of these cases it is a taking within the meaning of the provision of the constitution. Pearsall *v.* Eaton County, 74 Mich. 558, 42 N. W. 77, 4 L. R. A. 193.

11. Nichols *v.* Richmond, 162 Mass. 170, 38 N. E. 501; Castle *v.* Berkshire County, 11 Gray (Mass.) 26.

The line has to be drawn somewhere, on practical grounds, between those who may and those who may not recover for damages caused by the discontinuance, in whole or in part, of a street or way; and it has been drawn so as to limit the right of recovery to damages which are special and peculiar, and different in kind from those suffered by the public at large. Nichols *v.* Richmond, 162 Mass. 170, 38 N. E. 501.

Time of accrual.— The damages for the closing of a road accrue at the time of the closing, as a personal right of the owner at that time, although they are not at once fixed and ascertained, and remain his, although he conveys the land previous to the award for damages being made, unless they are embraced in the deed. King *v.* New York, 102 N. Y. 171, 6 N. E. 395 [*affirming* 50 N. Y. Super. Ct. 406].

12. See cases cited *infra*, this note.

Under the New Hampshire statute providing for "damages occasioned to any person" by the discontinuance of a highway, the county commissioners should assess such damages as are occasioned to owners of land abutting on the highway by the discontinuance, and to those whose land does not abut thereon, who suffer a peculiar and special damage not common to the public. *In re* Concord, 50 N. H. 530.

In Indiana Rev. St. (1894) § 6746 (Rev. St. (1881) § 5019), relating to the establishment and vacation of highways, and giving a remedy to any person "through" whose land the highway or change may pass, read in the light of that part of the statute relative to the opening and vacation of highways running into more than one county, which does not limit the right to recover damages to persons "through" whose land the road runs, gives a right to damages for vacation of a road to owners of land merely abutting on it. Brandenburg *v.* Hittel, (1894) 37 N. E. 329.

13. Perry *v.* Sherborn, 11 Cush. (Mass.) 388 (holding that on a petition to assess damages caused by discontinuing a town way, the town, at the hearing, may show that the way which was discontinued was not a legal town way); Eames *v.* Northumberland, 44 N. H. 67.

14. Hawkins *v.* Berkshire County, 2 Allen (Mass.) 254 (holding that it is not necessary, in a petition for damages to land sustained by reason of the discontinuance of a highway, that one who is in possession of the same, claiming title thereto in fee as trustee, should describe himself as a trustee in his petition); Perry *v.* Sherborn, 11 Cush. (Mass.) 388 (holding that a petition for a jury to assess damages occasioned by discontinuing a town way, which did not contain a particular description of the land of the petitioner, and the situation of the same in relation to the way, or an allegation of the injury sustained by the petitioner, did not show sufficient legal interest in him to maintain the action).

Possession of land under a claim of title in fee is *prima facie* sufficient to support a petition for damages thereto sustained by reason of the discontinuance of a highway. Hawkins *v.* Berkshire County, 2 Allen (Mass.) 254.

Amendment.—A petition for a sheriff's jury to assess damages caused by discontinuing a town way cannot be amended at the hearing before the sheriff's jury. Perry *v.* Sherborn, 11 Cush. (Mass.) 388.

15. *In re* Howland, 108 N. Y. Suppl. 1122.

Of city streets see Municipal Corporations, 28 Cyc. 841.

Of franchise of turnpike company see Toll-Roads.

Of highways by dedication see Dedication, 13 Cyc. 495 *et seq.*

16. **Loss of right in highway by adverse possession** see Adverse Possession, 1 Cyc. 1120.

17. *Connecticut.*— Greist *v.* Amrhyn, 80 Conn. 280, 68 Atl. 521.

Illinois.— Cox *v.* East Fork Tp. Highway Com'rs, 194 Ill. 355, 62 N. E. 791.

Indiana.— Small *v.* Binford, 41 Ind. App. 440, 83 N. E. 507, 84 N. E. 19.

New Jersey.— Mason *v.* Ross, (Ch. 1908) 71 Atl. 141.

New York.— Woodruff *v.* Paddock, 56 Hun 288, 9 N. Y. Suppl. 381 [*affirmed* in 130 N. Y. 618, 29 N. E. 1021].

See 25 Cent. Dig. tit. "Highways." § 279.

intention to abandon;[18] and when relied upon it must be clearly and satisfactorily proven.[19]

b. By Non-User — (i) *In General.* It seems to be settled by the weight of authority that non-user will not operate to discontinue a legally established highway,[20] unless coupled with affirmative evidence of a clear determination to abandon.[21] Especially is this so when there is no use of the premises adverse to the right in the public.[22] Nevertheless it is said that the law will raise a presumption of an extinguishment of the right when the road had been abandoned for a long period.[23] And cases concerning public highways can arise of such a character, and be founded upon such an actual notorious abandonment of the highway by the public, that justice requires that an equitable estoppel shall be asserted even against the public in favor of individuals.[24] By statute in some states non-user of a highway for a designated period operates as an abandonment thereof.[25]

18. Small *v.* Binford, 41 Ind. App. 440, 83 N. E. 507, 84 N. E. 19; Perry *v.* Staple, 77 Nebr. 656, 110 N. W. 652.

19. Cox *v.* East Fork Tp. Highway Com'rs, 194 Ill. 355, 62 N. E. 791; Lewiston *v.* Proctor, 27 Ill. 414; Quinn *v.* Monona County, 140 Iowa 105, 117 N. W. 1100; Lyons *v.* Mullen, 78 Nebr. 151, 110 N. W. 743; Perry *v.* Staple, 77 Nebr. 656, 110 N. W. 652; Kelly Nail, etc., Co. *v.* Lawrence Furnace Co., 46 Ohio St. 544, 22 N. E. 639, 5 L. R. A. 652.

20. *California.*—People *v.* Myring, 144 Cal. 351, 77 Pac. 975.

Illinois.— Galbraith *v.* Littiech, 73 Ill. 209.

Iowa.— Bradley *v.* Appanoose County, 106 Iowa 105, 76 N. W. 519; Davies *v.* Huebner, 45 Iowa 574.

Missouri.— State *v.* Culver, 65 Mo. 607, 27 Am. Rep. 295.

New Hampshire.— Thompson *v.* Major, 58 N. H. 242.

New Jersey.— Smith *v.* State, 23 N. J. L. 130; Mason *v.* Ross, (Ch. 1908) 71 Atl. 141.

Pennsylvania.— Com. *v.* McNaugher, 131 Pa. St. 55, 18 Atl. 934; Com. *v.* Moorehead, 118 Pa. St. 344, 12 Atl. 424, 4 Am. St. Rep. 599; Blakely Borough *v.* Delaware, etc., Canal Co., 2 Lack. Leg. N. 59.

Rhode Island.— Knowles *v.* Knowles, 25 R. I. 325, 55 Atl. 755.

Tennessee.— Gilson *v.* State, 5 Lea 161.

See 25 Cent. Dig. tit. "Highways," § 281.

Contra.— Coleman *v.* Flint, etc., R. Co., 64 Mich. 160, 31 N. W. 47; Lyle *v.* Lesia, 64 Mich. 16, 31 N. W. 23; Gregory *v.* Knight, 50 Mich. 61, 14 N. W. 700; Burgwyn *v.* Lockhart, 60 N. C. 264. And see Fox *v.* Hart, 11 Ohio 414; Bayard *v.* Standard Oil Co., 38 Oreg. 438, 63 Pac. 614.

21. Matter of Jerome Ave., 120 N. Y. App. Div. 297, 105 N. Y. Suppl. 319; Woodruff *v.* Paddock, 56 Hun (N. Y.) 288, 9 N. Y. Suppl. 381 [*affirmed* in 130 N. Y. 618, 29 N. E. 1021].

Illustration.—Absolute non-user for thirty-three years, and the fact that the way cannot be used as a highway, and the further fact that other highways are provided and kept in repair, and are used by the public, are facts sufficient to show an abandonment. Phillips *v.* Lawrence, 64 S. W. 411, 23 Ky. L. Rep. 824.

22. Davies *v.* Huebner, 45 Iowa 574.

23. *Connecticut.*— Greist *v.* Amrhyn, 80 Conn. 280, 68 Atl. 521; Beardslee *v.* French, 7 Conn. 125, 18 Am. Dec. 86.

Illinois.— Brockhausen *v.* Bochland, 137 Ill. 547, 27 N. E. 458; Galbraith *v.* Littiech, 73 Ill. 209; Peoria *v.* Johnston, 56 Ill. 45.

Indiana.— Jeffersonville, etc., R. Co. *v.* O'Connor, 37 Ind. 95; Small *v.* Binford, 41 Ind. App. 440, 83 N. E. 507, 84 N. E. 19, holding, however, that abandonment of an ancient highway would not be presumed where it would leave certain landowners without means of egress or ingress.

Iowa.— Heller *v.* Cahill, 138 Iowa 301, 115 N. W. 1009.

New York.— Woodruff *v.* Paddock, 56 Hun 288, 9 N. Y. Suppl. 381 [*affirmed* in 130 N. Y. 618, 29 N. E. 1021].

North Carolina.— Crump *v.* Mims, 64 N. C. 767.

Ohio.— Fox *v.* Hart, 11 Ohio 414.

See 25 Cent. Dig. tit. "Highways," § 281.

24. Bradley *v.* Appanoose County, 106 Iowa 105, 76 N. W. 519; Davies *v.* Huebner, 45 Iowa 574; Baldwin *v.* Trimble, 85 Md. 396, 37 Atl. 176, 36 L. R. A. 489.

The first requisite to establish such estoppel should be that the adverse possession should continue for ten years, by analogy to the statute of limitations relating to the recovery of land. Then it should be shown that there was a total abandonment of the road for at least the period of ten years. Davies *v.* Huebner, 45 Iowa 574.

25. See the statutes of the several states, and cases cited *infra*, this note.

In California, under Civ. Code, § 806, providing that "the extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired," and is extinguished, when acquired by enjoyment, by disuse "for the period prescribed for acquiring title by enjoyment," where the public have acquired a right to use a highway by five years' user, as prescribed by statute, non-user for less than that period will not create an abandonment by operation of law. McRose *v.* Bottyer, 81 Cal. 122, 22 Pac. 393.

In Nebraska, Comp. St. c. 78, § 3, provides for the vacation of all roads that have not been used within five years. Gehris *v.* Fuhr-

But the abandonment by the public must be complete and entire to work a vacation.[26] But the non-user need not extend the entire length of the road in order to fall within such a statutory provision.[27]

(II) *Of Part of Width.* If a highway is legally laid out and established, the mere fact that the public does not use the same to its entire width will not of itself constitute an abandonment of any portion thereof.[28] Encroachments on a highway continually used cannot be legalized by mere lapse of time. The limited use will not lessen the right of the public to use the entire width of the road whenever the increased travel and exigencies of the public render this desirable.[29]

man, 68 Nebr. 325, 94 N. W. 133; O'Dea *v.* State, 16 Nebr. 241, 20 N. W. 299.

In New Jersey, in Laws (1880), p. 111, § 1, declaring vacated a highway "unused for public travel" for five years, "unused" signifies abandonment by the public. State *v.* Pennsylvania R. Co., 45 N. J. L. 82.

In New York a public highway, not used as such for six years, ceases to be such under Laws (1890), c. 568, § 99. Excelsior Brick Co. *v.* Haverstraw, 142 N. Y. 146, 36 N. E. 819; Horey *v.* Haverstraw, 124 N. Y. 273, 26 N. E. 532; Buffalo *v.* Delaware, etc., R. Co., 68 N. Y. App. Div. 488, 74 N. Y. Suppl. 343 [*affirmed* in 178 N. Y. 561, 70 N. E. 1097]; Mangam *v.* Sing Sing, 26 N. Y. App. Div. 464, 50 N. Y. Suppl. 647 [*affirmed* in 164 N. Y. 560, 38 N. E. 1089]; Riley *v.* Brodie, 22 Misc. 374, 50 N. Y. Suppl. 347. The term "highway" applies to a street in a village incorporated under the general act for the incorporation of villages. Excelsior Brick Co. *v.* Haverstraw, 142 N. Y. 146, 36 N. E. 819; Horey *v.* Haverstraw, 124 N. Y. 273, 26 N. E. 532.

Prospective or retrospective operation.— In accordance with the general rule, such a statute is to be so construed as to operate prospectively, and unless the legislative intent that it shall act retrospectively is expressed in clear and unambiguous language, such a construction must be given to it. Amsbry *v.* Hinds, 48 N. Y. 57 [*reversing* 46 Barb. 622]. In Williams *v.* Smith, 68 Nebr. 329, 94 N. W. 150, it is held that Comp. St. (1901) c. 78, § 3, providing that all roads that have not been used within five years shall be deemed vacated, applies exclusively to roads that had not been used within five years before the enactment of such section.

26. O'Dea *v.* State, 16 Nebr. 241, 20 N. W. 299.

A transient or partial non-user will not suffice. Cox *v.* East Fork Tp. Highway Com'rs, 194 Ill. 355, 62 N. E. 791; Lewiston *v.* Proctor, 27 Ill. 414.

Time of continuance.— Non-user by the public, in order to work abandonment of a highway acquired by prescription, must be shown to have been as long continued as its use originally was necessary to raise a prescriptive right, or as long as an adverse claimant must show possession in order to maintain title by force of the statute of limitations. Kelly Nail, etc., Co. *v.* Lawrence Furnace Co., 46 Ohio St. 544, 22 N. E. 639, 5 L. R. A. 552. It appears to be well settled by the authorities that, in order to work abandonment by simple non-user of an easement, all acts of enjoyment must have totally ceased for the same length of time necessary to create the original presumption. Kelly Nail, etc., Co. *v.* Lawrence Furnace Co., *supra.*

27. Newsome *v.* Walker, 1 Nebr. (Unoff.) 587, 95 N. W. 772.

The term "highway" does not mean that any part of a highway, however small, that has not been traveled or worked for five years, shall be considered legally discontinued. It is a highway *eo nomine*, as a generic term, to which the statute relates; at least enough of any public road or thoroughfare to be called in ordinary parlance a highway. Maire *v.* Kruse, 85 Wis. 302, 55 N. W. 389, 26 L. R. A. 449. Such term in a statute providing that any highway abandoned as a route of travel, and on which no highway tax had been expended for five years, shall be considered discontinued, was construed to include a country road more than half a mile in length connecting two other highways. Herrick *v.* Geneva, 92 Wis. 114, 65 N. W. 1024. Failure to use three miles of a road thirty miles long vacates such unused portion. Newsome *v.* Walker, 1 Nebr. (Unoff.) 587, 95 N. W. 772.

28. *Indiana.*— Brown *v.* Hiatt, 16 Ind. App. 340, 45 N. E. 481.

Kansas.— Hentzler *v.* Bradbury, 5 Kan. App. 1, 47 Pac. 330.

New Jersey.— Humphreys *v.* Woodstown, 48 N. J. L. 588, 7 Atl. 301.

Pennsylvania.— Com. *v.* Moorehead, 118 Pa. St. 344, 12 Atl. 424, 4 Am. St. Rep. 599.

Wisconsin.— Moore *v.* Roberts, 64 Wis. 538, 25 N. W. 564.

See 25 Cent. Dig. tit. "Highways," § 284.

In Michigan it is held that part of a highway may be lost by non-user, but that such non-user will not affect the part kept in use. Wayne County Sav. Bank *v.* Stockwell, 84 Mich. 586, 48 N. W. 174, 22 Am. St. Rep. 708; Coleman *v.* Flint, etc., R. Co., 64 Mich. 160, 31 N. W. 47; Lyle *v.* Lesia, 64 Mich. 16, 31 N. W. 23; Gregory *v.* Knight, 50 Mich. 61, 14 N. W. 700.

29. Quinn *v.* Baage, 138 Iowa 426, 114 N. W. 205 (holding that the fact that a fence was not changed, save by one of two adjacent owners after the location of a highway between them, will not prevent the public from asserting its right to the portion inclosed by the other adjacent owner whenever increased travel and the exigencies of the public so require); Webb *v.* Butler County, 52 Kan. 375, 34 Pac. 973; Lane *v.* Kennedy,

Nor does a statute providing that all roads that have not been opened or used within a certain time shall be deemed vacated apply so as to vacate a part of the width of a road not actually used.[30]

c. By Failure to Open, Construct, or Repair. In the absence of any statutory provision on the subject, the fact that there has been delay in opening up a highway cannot generally be relied on to defeat the right to the way.[31] Nor will failure to keep a road in repair constitute an abandonment of the road.[32] But statutes exist in most states providing that highways shall be considered vacated unless opened within a certain time after their establishment.[33] These statutes are con-

13 Ohio St. 42; Fox *v.* Hart, 11 Ohio 414. And see *infra*, II, D, 3, d.

30. *Illinois.*— Taylor *v.* Pearce, 179 Ill. 145, 53 N. E. 622.

Kansas.—Webb *v.* Butler County, 52 Kan. 375, 34 Pac. 973; Topeka *v.* Russam, 30 Kan. 550, 2 Pac. 669.

Maine.— Heald *v.* Moore, 79 Me. 271, 9 Atl. 734.

Nebraska.— Krueger *v.* Jenkins, 59 Nebr. 641, 81 N. W. 844.

New Jersey.— South Amboy *v.* New York, etc., R. Co., 66 N. J. L. 623, 50 Atl. 368; Humphreys *v.* Woodstown, 48 N. J. L. 588, 7 Atl. 301.

New York.—Walker *v.* Caywood, 31 N. Y. 51; Mangam *v.* Sing Sing, 26 N. Y. App. Div. 464, 50 N. Y. Suppl. 647 [*affirmed* in 164 N. Y. 560, 58 N E. 1089].

Ohio.— Peck *v.* Clark, 19 Ohio 367; Dodson *v.* Cincinnati, 5 Ohio Dec. (Reprint) 295, 4 Am. L. Rec. 312.

South Dakota.— Baker *v.* Hogaboom, 12 S. D. 405, 81 N. W. 730.

See 25 Cent. Dig. tit. "Highways," § 284.

31. Impson *v.* Sac County, (Iowa 1904) 98 N. W. 118; Davies *v.* Huebner, 45 Iowa 574 (holding that where a highway has been established by the proper legal authority, although never actually opened, mere non-user for a period of ten years will not operate to defeat the right of the public therein, where there has been no adverse use of the land); Bruce *v.* Saline County, 26 Mo. 262 (holding that the lapse of six years after a road is ordered to be opened, before it is really opened, does not authorize a presumption that it has been abandoned).

32. Brumley *v.* State, 82 Ark. 236, 103 S. W. 615; State *v.* Mobley, 1 McMull. (S. C.) 44.

33. See the statutes of the several states, and cases cited *infra*, this note.

The effect of such a statute is to invalidate the laying out of the highway if it is not opened within the prescribed time. Seidschlag *v.* Antioch, 207 Ill. 280, 69 N. E. 949 [*affirming* 109 Ill. App. 291]; Marble *v.* Whitney, 28 N. Y. 297.

What constitutes "opening."—What must be done to constitute an opening of the road within the meaning of the statute is not precisely defined. It may be formally opened by the road overseers along the line of the road, or it may be informally opened by themselves or by others; or it may be opened in fact by the public travel taking possession of it and using it. Wilson *v.* Janes, 29 Kan. 233. The opening of a highway for travel, under such a statute, is accomplished by removing obstructions existing at the time the highway is established, and it is not essential to the opening of a highway that unlawful obstructions subsequently erected thereon should be removed. Wragg *v.* Penn Tp., 94 Ill. 11, 34 Am. Rep. 199. A road is "opened," where the trees on it have been felled and cut up for more than the statutory period, although it is impassable except for those on foot. Baker *v.* Runnels, 12 Me. 235. It cannot be said that a road has been "opened" when nothing has been done to a large portion of it, and the remainder was a road opened and used as such before. State *v.* Cornville, 43 Me. 427. But it is not necessary, in order to prevent the discontinuance of a highway by operation of the statute, that it should be in such a state of repair as not to be subject to indictment. State *v.* Cornville, *supra*. Where a culvert is put in an established highway by the officer having authority to work the same, and the road is traveled more or less until fenced in by plaintiff, the facts are sufficient to show an acceptance of such highway by the public. Devoe *v.* Smeltzer, 86 Iowa 385, 53 N. W. 287. In the following cases the "opening" of the road was held sufficient to take the case out of the statute: Wiley *v.* Brimfield, 59 Ill. 306; Baker *v.* Runnels, 12 Me. 235; Marble *v.* Whitney, 28 N. Y. 297.

When limitation begins to run.— The time when the limitation begins to run is usually to be determined by reference to the particular statute. Under the Ohio statute the seven years' limitation runs from the date of the order granted for the opening. McClelland *v.* Miller, 28 Ohio St. 488. In Kansas, in the case of a county road established by a special act, the provision of Gen. St. (1901) § 6058, that any county road should be vacated if it remains unopened for seven years after the order is made or the authority given for opening the same, refers to the time that the act is passed, and not to the time an order for an opening of the road is made by the county commissioners. Cowley County *v.* Johnson, 76 Kan. 65, 90 Pac. 805. In New York the twenty-third section of the act which was passed March 19, 1813 (2 Rev. Laws 277) enacts, "that if any public highway already laid out, or hereafter to be laid out, shall not be opened and worked within six years after the passing of this act, or from the time of its being so laid out, the same shall cease to be

strued to apply only to roads which have been authorized, but never in fact opened.[34] To avoid vacation the road must be opened its entire length within the time limited.[35]

a public highway or road, for any use, intent or purpose whatsoever." The act is prospective. It speaks in the future tense. It requires that the road shall be opened and worked, &c. — not, shall have been opened and worked, &c. The clause, "or from the time of its being so laid out," refers to those roads only, to be laid out subsequent to the time at which the act passed. Lyon *v.* Munson, 2 Cow. 426. Time consumed in litigation must not be estimated as part of the period within which a public road is required by statute to be opened after it is laid. Lyons Highway Com'rs *v.* People, 38 Ill. 347.

In Massachusetts, under Pub. St. c. 49, § 88, providing that the laying out of a way shall be void as against the owner of any land over which the same is located, unless possession is taken of such land, for the purpose of constructing such way, within two years from the time when the right to take it accrues, failure to take possession for such time avoids the proceedings, so as to leave the county commissioners to proceed again for laying out a way including the same land. Folsom *v.* Middlesex County, 173 Mass. 48, 53 N. E. 155; Pickford *v.* Lynn, 98 Mass. 491. An entry upon any part of the land embraced in the location or alteration of a way within two years from the passage of an order therefor is a sufficient entry upon all under such statute. Poor *v.* Blake, 123 Mass. 543. And see Gilkey *v.* Watertown, 141 Mass. 317, 5 N. E. 152. The placing of stone bounds in accordance with an order for widening a street is not, as a matter of law, a taking possession, within section 88. Parker *v.* Norfolk County, 150 Mass. 489, 23 N. E. 231.

34. Topeka *v.* Russam, 30 Kan. 550, 2 Pac. 669; Wilson *v.* Janes, 29 Kan. 233; Tainter *v.* Morristown, 19 N. J. Eq. 46; Hedleston *v.* Hendricks, 52 Ohio St. 460, 40 N. E. 408; Grove *v.* Graham, 41 Ohio St. 303; McClelland *v.* Miller, 28 Ohio St. 488; Peck *v.* Clark, 19 Ohio 367.

In Indiana, Rev. St. (1843), p. 332, § 54, providing that every highway which shall not be opened and worked within six years from the time of its being laid out shall cease to be a highway, does not apply to streets. Indianapolis *v.* Croas, 7 Ind. 9.

In Kansas, under an act of the legislature declaring all section lines in a certain county to be public highways, and providing that they shall be opened by the county commissioners on the petition of ten householders, such section lines become county roads within Gen. St. (1901) § 6058, providing that any part of a county road not opened for travel within a stated time shall be vacated. Cowley County *v.* Johnson, 76 Kan. 65, 90 Pac. 805.

The New York statute provides that "every public highway and private road already laid out and dedicated to the use of the public, that shall not have been opened and worked within six years from the time of its being so laid out, and every such highway hereafter to be laid out that shall not be opened and worked within the like period, shall cease to be a road for any purpose whatever." The courts of that state have repeatedly held that this statute applies to all county roads and city streets in which the public have an easement only. Horey *v.* Haverstraw, 124 N. Y. 273, 26 N. E. 532; Buffalo *v.* Delaware, etc., R. Co., 68 N. Y. App. Div. 488, 74 N. Y. Suppl. 343 [*affirmed* in 178 N. Y. 561, 70 N. E. 1097]; Mangam *v.* Sing Sing, 11 N. Y. App. Div. 212, 42 N. Y. Suppl. 950; Buffalo *v.* Hoffeld, 6 Misc. 197, 27 N. Y. Suppl. 869.

In Washington, Ballinger Annot. Codes & St. § 3803 (Pierce Code, § 7854), providing that any "county road" or part thereof, which remains unopened for public use for a space of five years after the order is made or authority granted for opening the same, shall be vacated and the authority for building it barred by lapse of time, is applicable to streets dedicated through platted land outside the limits of any incorporated city or town. Murphy *v.* King County, 45 Wash. 587, 88 Pac. 1115.

The Wisconsin statute provides that "every public highway already laid out, or which shall hereafter be laid out, shall cease to be considered a public highway at the expiration of four years from the time it was so laid out, except such parts thereof as shall have been opened and worked within such time." And the court has held that the act only applied to roads or streets laid out by the public authorities. The language of the statute referred to is not applicable to streets dedicated or granted by recorded plat, operating as a statutory conveyance. Paine Lumber Co. *v.* Oshkosh, 89 Wis. 449, 61 N. W. 1108.

35. Wragg *v.* Penn Tp., 94 Ill. 11, 34 Am. Rep. 199 (holding that no unlawful obstruction of an established highway, after it has been opened for travel, can be considered in determining whether the entire road has been opened within the five years required by law after its establishment); Green *v.* Green, 34 Ill. 320; State *v.* Cornville, 43 Me. 427 (holding that it cannot be said that a road has been "opened" when nothing has been done to a large portion of it, and the remainder was a road open and used as such before); Beckwith *v.* Whalen, 70 N. Y. 430, 435 [*affirming* 9 Hun 408] (where it is said: "A highway cannot be said to be opened and worked, unless it is passable for its entire length. It must be opened as a highway over its entire route. It need not be worked in every part, but it must be worked sufficiently to be passable for public travel"). *Compare* Beckwith *v.* Whalen, 65 N. Y. 322 [*reversing* 5 Lans. 376]; Marble *v.* Whitney, 28 N. Y. 297; People *v.* Marlette, 94 N. Y. App. Div.

d. By Reason of Obstructions or Encroachments. It is a familiar rule that an encroachment or obstruction placed upon a highway,[36] or the erection of bars and gates,[37] will not affect or diminish the public rights in it, or constitute an abandonment in favor of an abutting owner. The encroachment may, however, be submitted to for such a period of time as to raise a fair presumption of abandonment;[38] and the public may be estopped to claim any easement in a road where it has for years been in disuse and closed to travel by permanent structures built across the entire width.[39]

e. By Acceptance or Use of New Road in Place of Old. The mere building of a new highway is ineffectual to work an abandonment of an old road, where the former is a new and separate highway.[40] But the public will lose their right to a highway where they have abandoned it and accepted another in its stead for such a length of time, and under such circumstances, as to give them a title to the substituted road.[41] In order to provide against the implication arising from the establishment of a new road, it is sometimes provided by statute that the old road shall not be vacated thereby, unless such vacation is prayed for in the petition, and so declared in the order establishing the new road.[42]

f. By Deviation From Established Way. If a highway is legally laid out, a slight deviation from its legal limits,[43] by mistake,[44] or to avoid some obstacle,[45]

592, 88 N. Y. Suppl. 379 [*affirming* 41 Misc. 151, 83 N. Y. Suppl. 962]; McCarthy *v.* Whalen, 19 Hun (N. Y.) 503 [*affirmed* in 87 N. Y. 148].

36. Matter of Jerome Ave., 120 N. Y. App. Div. 297, 105 N. Y. Suppl. 319; Mangam *v.* Sing Sing, 26 N. Y. App. Div. 464, 50 N. Y. Suppl. 647 [*affirmed* in 164 N. Y. 560, 58 N. E. 1089]; Woodruff *v.* Paddock, 56 Hun (N. Y.) 288, 9 N. Y. Suppl. 381 [*affirmed* in 130 N. Y. 618, 29 N. E. 1021]; McCarthy *v.* Whalen, 19 Hun (N. Y.) 503, 508 [*affirmed* in 87 N. Y. 148 (where it is said: "At most it shows an acquiescence by the public and the public authorities, in a partial obstruction of the highway, for the convenience of the occupants; but such acquiescence is no evidence that the road was not opened and worked as a public highway, or that it was abandoned as such"); Hill *v.* Hoffman, (Tenn. Ch. App. 1899) 58 S. W. 929.

37. Schwerdtle *v.* Placer County, 108 Cal. 589, 41 Pac. 448; Power *v.* Watkins, 58 Ill. 380; State *v.* Culver, 65 Mo. 607, 27 Am. Rep. 295; McCarthy *v.* Whalen, 19 Hun (N. Y.) 503 [*affirmed* in 87 N. Y. 148]; People *v.* Marlett, 41 Misc. (N. Y.) 151, 83 N. Y. Suppl. 962, 13 N. Y. Annot. Cas. 234.

Fencing up a road does not constitute an abandonment where a gate is left for the public to pass through. Bannister *v.* O'Connor, 113 Iowa 541, 85 N. W. 767; Hempsted *v.* Huffman, 84 Iowa 398, 51 N. W. 17.

38. Beardslee *v.* French, 7 Conn. 125, 18 Am. Dec. 86 (where the owner of the soil had kept up bars across the highway for about ninety years, the fact was held admissible evidence to prove an extinguishment of the public right); Power *v.* Watkins, 58 Ill. 380; Crump *v.* Mims, 64 N. C. 767.

39. Baldwin *v.* Trimble, 85 Md. 396, 37 Atl. 176, 36 L. R. A. 489.

40. Small *v.* Binford, 41 Ind. App. 440, 83 N. E. 507, 84 N. E. 19.

41. *Illinois.*— Taylor *v.* Pearce, 179 Ill. 145, 53 N. E. 622; Galbraith *v.* Littiech, 73 Ill. 209; Peoria *v.* Johnston, 56 Ill. 45; Grube *v.* Nichols, 36 Ill. 92 (holding further that the question for the jury is not whether the public convenience is as well served by the substituted road, but whether the change has been in fact made); Champlin *v.* Morgan, 20 Ill. 181; Brockhausen *v.* Boehland, 36 Ill. App. 224 [*affirmed* in 137 Ill. 547, 27 N. E. 458].

Michigan.— Lyle *v.* Lesia, 64 Mich. 16, 31 N. W. 23.

Ohio.— Rittberger *v.* Flick, 4 Ohio Dec. (Reprint) 406, 2 Clev. L. Rep. 115.

Pennsylvania.— Flick's Estate, 6 Kulp 329.

Tennessee.— Young *v.* State, 9 Yerg. 390.

See 25 Cent. Dig. tit. "Highways," § 286.

Abandonment of old road necessary see State *v.* Holleman, 130 N. C. 658, 41 S. E. 99; Crump *v.* Mims, 64 N. C. 767.

Acceptance of new road necessary.—A party cannot, by his own act, relocate a road. That can only be done by those having the power by law. The fact that a party has given other ground for a road, without proof of acceptance by the public authorities, will not show an abandonment of the old line. Galbraith *v.* Littiech, 73 Ill. 209.

42. See Lyons *v.* Mullen, 78 Nebr. 151, 110 N. W. 743. In Chadwick *v.* McCausland, 47 Me. 342, it is held that if by long user the public has acquired an easement in the land over which a road passes, the laying out by the town of another road near the first one will not operate as a discontinuance of the latter, or defeat the public easement, if the record is silent upon the subject.

43. Bannister *v.* O'Connor, 113 Iowa 541, 85 N. W. 767; Davis *v.* Huebner, 45 Iowa 574; Konkel *v.* Pella, 122 Wis. 143, 99 N. W. 453.

44. Shanline *v.* Wiltsie, 70 Kan. 177, 78 Pac. 436.

45. *Illinois.*— Ohio, etc., R. Co. *v.* Cox, 26 Ill. App. 491.

does not constitute an abandonment of such road, even under a statute providing that a road remaining unopened or unused for a certain period shall be deemed vacated.[46]

III. TITLE TO HIGHWAYS, AND RIGHTS OF PUBLIC AND ABUTTING OWNERS.

A. Title to Highways[47] — **1. In General.** The laying out of a highway gives to the public a mere right of passage; and the owner of the soil is not thereby divested of his title to the land.[48] While it is entirely competent for the legis-

Indiana.— Davis *v.* Nicholson, 81 Ind. 183; Small *v.* Binford, 41 Ind. App. 440, 83 N. E. 507, 84 N. E. 19.

Iowa.—Wenzel *v.* Kempmeier, 53 Iowa 255, 5 N. W. 185.

Missouri.— Zimmerman *v.* Snowden, 88 Mo. 218.

Nebraska.— Perry *v.* Staple, 77 Nebr. 656, 110 N. W. 652. And see Newsome *v.* Walker, 1 Nebr. (Unoff.) 587, 95 N. W. 772.

Tennessee.— Elkins *v.* State, 2 Humphr. 543.

See 25 Cent. Dig. tit. "Highways," § 287.

46. Topeka *v.* Russam, 30 Kan. 550, 2 Pac. 669; Stickel *v.* Stoddard, 28 Kan. 715 (holding that such a statute is intended to apply to cases where it would seem, from the acts and omissions of the public, that the public intended wholly to abandon the use of the road, and not to cases where the travel merely passed out of the road for the temporary purpose of avoiding an obstruction); O'Dea *v.* State, 16 Nebr. 241, 20 N. W. 299; Maire *v.* Kruse, 85 Wis. 302, 55 N. W. 389, 26 L. R. A. 449.

47. To highways by dedication see DEDICATION, 13 Cyc. 486, 487.

To streets see MUNICIPAL CORPORATIONS, 28 Cyc. 845 *et seq.*

48. *California.*— Sutter County Levee Dist. No. 9 *v.* Farmer, 101 Cal. 178, 35 Pac. 569, 23 L. R. A. 388.

Connecticut.— Woodruff *v.* Neal, 28 Conn. 165; Peck *v.* Smith, 1 Conn. 103, 132, 6 Am. Dec. 216; Brown *v.* Freeman, 1 Root 118.

Illinois.— Postal Tel.-Cable Co. *v.* Eaton, 170 Ill. 513, 49 N. E. 365, 62 Am. St. Rep. 390, 39 L. R. A. 722; Old Town *v.* Dooley, 81 Ill. 255.

Indiana.— Hagaman *v.* Moore, 84 Ind. 496; Vaughn *v.* Stuzaker, 16 Ind. 338; Western Union Tel. Co. *v.* Krueger, 36 Ind. App. 348, 74 N. E. 25.

Iowa.— Dubuque *v.* Maloney, 9 Iowa 450, 74 Am. Dec. 358.

Kansas.— Shawnee County *v.* Beckwith, 10 Kan. 603.

Louisiana.— Bradley *v.* Pharr, 45 La. Ann. 426, 12 So. 618, 19 L. R. A. 647.

Maine.— Small *v.* Pennell, 31 Me. 267.

Massachusetts.— Boston *v.* Richardson, 13 Allen 146.

Minnesota.—Glencoe *v.* Reed, 93 Minn. 518, 101 N. W. 956, 67 L. R. A. 901.

Missouri.— Williams *v.* Natural Bridge Plank Road Co., 21 Mo. 580.

Nebraska.— Follmer *v.* Nuckolls County, 6 Nebr. 204.

New Hampshire.— Varney *v.* Manchester, 58 N. H. 430, 40 Am. Rep. 592; Leavitt *v.* Towle, 8 N. H. 96; Makepeace *v.* Worden, 1 N. H. 16.

New Jersey.— Winter *v.* Peterson, 24 N. J. L. 524, 61 Am. Dec. 678.

New York.— Higgins *v.* Reynolds, 31 N. Y. 151; Galen *v.* Clyde, etc., Plank Road Co., 27 Barb. 543; Northern Turnpike Road Co. *v.* Smith, 15 Barb. 355; Waterloo Presb. Soc. *v.* Auburn, etc., R. Co., 3 Hill 567; Whitbeck *v.* Cook, 15 Johns. 483, 8 Am. Dec. 272; Jackson *v.* Hathaway, 15 Johns. 447, 8 Am. Dec. 263.

North Carolina.— State *v.* Hewell, 90 N. C. 705.

Pennsylvania.— Phillips *v.* Dunkirk, etc., R. Co., 78 Pa. St. 177.

Rhode Island.— Tucker *v.* Eldred, 6 R. I. 404.

South Carolina.— Charleston Rice Milling Co. *v.* Bennett, 18 S. C. 254.

Utah.—Whitesides *v.* Green, 13 Utah 341, 44 Pac. 1032, 57 Am. St. Rep. 740.

Vermont.— Lynch *v.* Rutland, 66 Vt. 570, 29 Atl. 1015; Slicer *v.* Hyde Park, 55 Vt. 481; Holden *v.* Shattuck, 34 Vt. 336, 80 Am. Dec. 684; Pettibone *v.* Purdy, 7 Vt. 514.

United States.— Harris *v.* Elliott, 10 Pet. 25, 9 L. ed. 333; Barclay *v.* Howell, 6 Pet. 498, 8 L. ed. 477; U. S. *v.* Harris, 26 Fed. Cas. No. 15,315, 1 Sumn. 21.

England.— Harrison *v.* Rutland, [1893] 1 Q. B. 142, 57 J. P. 278, 62 L. J. Q. B. 117, 68 L. T. Rep. N. S. 35, 4 Reports 155, 41 Wkly. Rep. 322; Goodtitle *v.* Alker, 1 Burr. 133, 97 Eng. Reprint 231.

See 25 Cent. Dig. tit. "Highways," § 288.

A highway is nothing but an easement comprehending merely the right of all the individuals in the community to pass and repass, with the incidental right in the public to do all the acts necessary to keep it in repair. This easement does not comprehend any interest in the soil, or give the public the legal possession of it. Smith *v.* San Luis Obispo, 95 Cal. 463, 30 Pac. 591; Newton *v.* New York, etc., R. Co., 72 Conn. 420, 44 Atl. 813; Peck *v.* Smith, 1 Conn. 103, 6 Am. Dec. 216; Starr *v.* Camden, etc., R. Co., 24 N. J. L. 592; Kelsey *v.* King, 1 Transcr. App. (N. Y.) 133, 33 How. Pr. 39; Adams *v.* Rivers, 11 Barb. (N. Y.) 390; Lynch *v.* Rutland, 66 Vt. 570, 29 Atl. 1015.

Presumption of title.— The title to the soil and freehold, over which a highway is laid, is presumed to be in the owners of the adjoining land, until the contrary is shown. Greist *v.* Amrhyn, 80 Conn. 280, 68 Atl. 521; Chatham *v.* Brainerd, 11 Conn. 60; Copp *v.*

lature to provide for taking the fee of the land appropriated, and divesting the owners of all proprietary interest therein,[49] yet to accomplish that purpose it is necessary plainly to declare an intention so to do,[50] and an easement only will be taken unless the statute plainly contemplates and provides for the appropriation of a larger interest.[51] A town is also authorized to accept a deed of the fee of lands for highway purposes.[52] Where an abutting owner owns the fee of a highway, a grant or conveyance of the land abutting on such highway carries the fee in the highway to the center thereof,[53] except in so far as title thereto is reserved by the terms of the conveyance.[54] An intention on the part of a grantor to with-

Neal, 7 N. H. 275; Glasby *v.* Morris, 18 N. J. Eq. 72; Mott *v.* Eno, 181 N. Y. 346, 74 N. E. 229. In the absence of evidence to the contrary this title is presumed to extend to the center of the way. Newton *v.* New York, etc., R. Co., 72 Conn. 420, 44 Atl. 813; Benham *v.* Potter, 52 Conn. 248; Rawls *v.* Tallahassee Hotel Co., 43 Fla. 288, 31 So. 237; Huffman *v.* State, 21 Ind. App. 449, 52 N. E. 713, 69 Am. St. Rep. 368; Smith *v.* Slocomb, 11 Gray (Mass.) 280; Paige *v.* Schenectady R. Co., 77 N. Y. App. Div. 571, 79 N. Y. Suppl. 266 [*reversing* 38 Misc. 384, 77 N. Y. Suppl. 889]; Adams *v.* Rivers, 11 Barb. (N. Y.) 390; Houston *v.* Finnigan, (Tex. Civ. App. 1905) 85 S. W. 470; Harrison *v.* Rutland, [1893] 1 Q. B. 142, 57 J. P. 278, 62 L. J. Q. B. 117, 68 L. T. Rep. N. S. 35, 4 Reports 155, 41 Wkly. Rep. 322; *In re* White, [1898] 1 Ch. 659, 67 L. J. Ch. 430, 78 L. T. Rep. N. S. 550, 46 Wkly. Rep. 479; University College *v.* Oxford, 68 J. P. 471, 20 T. L. R. 637. But this presumption is rebutted where the deed under which the owner holds grants the land to the side of the way only. Smith *v.* Slocomb, 11 Gray (Mass.) 280.

Dutch law.— The ownership of the fee of roads established during the Dutch occupancy of New York is governed by the Dutch law, which vests it in the public. Mott *v.* Clayton, 9 N. Y. App. Div. 181, 41 N. Y. Suppl. 87.

A gift of the right of way is not a transfer of the absolute property in the soil. Smith *v.* Rome, 19 Ga. 89, 63 Am. Dec. 298; Lade *v.* Shepherd, Str. 1004, 93 Eng. Reprint 997. A grant of a highway, without any other words indicating an intent to enlarge the import of the word, conveys only an easement. Jamaica Pond Aqueduct Corp. *v.* Chandler, 9 Allen (Mass.) 159.

49. Hawesville *v.* Hawes, 6 Bush (Ky.) 232; Mott *v.* Eno, 181 N. Y. 346, 74 N. E. 229; Kings County *v.* Sea View R. Co., 23 Hun (N. Y.) 180; Raleigh, etc., R. Co. *v.* Davis, 19 N. C. 451.

Merger of easement in fee.— The easement which the public has in a highway does not merge in the fee of the servient estate, when acquired by the state. People *v.* Marin County, 103 Cal. 223, 37 Pac. 203, 26 L. R. A. 659.

50. Boston *v.* Richardson, 13 Allen (Mass.) 146 (holding that evidence that the selectmen had staked out a highway for the town's use is immaterial to show that the town either did or did not own the land under such way); Mott *v.* Eno, 181 N. Y. 346, 74 N. E. 229; Kings County *v.* Sea View R. Co., 23 Hun (N. Y.) 180.

51. Kings County *v.* Sea View R. Co., 23 Hun (N. Y.) 180.

The general rule is that when the language of the statute will bear a construction which will leave the fee in the landowner, that construction will be preferred. Mott *v.* Eno, 181 N. Y. 346, 74 N. E. 229.

52. Alling *v.* Burlock, 46 Conn. 504.

Particular deeds construed.—Where land was conveyed by a warranty deed to a town "for the sole use and purpose of a public highway," it was held that the deed conveyed more than an easement, and that so long as the premises continued to be used for a highway the town had a complete title to the fee of the land. Taylor *v.* Danbury Public Hall Co., 35 Conn. 430. So where owners of land abutting on a road conveyed a strip to the city by a deed reciting that the grantors "grant, release and forever quit claim" so much of their lands as might be necessary for a road of a specified breadth "to and for the sole and only use of a public road forever," it was held that the deed conveyed to the city a fee in the land covered thereby. Mitchell *v.* Einstein, 105 N. Y. App. Div. 413, 94 N. Y. Suppl. 210 [*reversing* 42 Misc. 358, 86 N. Y. Suppl 759]. Where one grants land for the purpose of a public highway, adding also "the reversion and remainder," his reversionary right vests in his grantee. Vaughn *v.* Stuzaker, 16 Ind. 338.

53. See BOUNDARIES, 5 Cyc. 906, 907.

54. See cases cited *infra*, this note.

Particular deeds construed.—An exception or reservation of an existing highway passing through the lands conveyed is held to embrace only the easement or right of the public in the highway and does not except the fee. Peck *v.* Smith, 1 Conn. 103, 6 Am. Dec. 216; Day *v.* Philbrook, 85 Me. 90, 26 Atl. 999; Kuhn *v.* Farnsworth, 69 Me. 404; Stetson *v.* Dow, 16 Gray (Mass.) 372; Capron *v.* Kingman, 64 N. H. 571, 14 Atl. 868; Leavitt *v.* Towle, 8 N. H. 96; Myers *v.* Bell Tel. Co., 83 N. Y. App. Div. 623, 82 N. Y. Suppl. 83; Abraham *v.* Abbott, 8 Oreg. 53; Kister *v.* Reeser, 98 Pa. St. 1, 42 Am. Rep. 608. In Munn *v.* Worrall, 53 N. Y. 44, 13 Am. Rep. 470, it was held that an exception in a deed in the following words: "Saving and excepting from the premises hereby conveyed all, and so much, and such part and parts thereof as has or have been lawfully taken for a public road or roads," was an exception

hold his interest in a road to the middle of it, after parting with all his right and title to the adjoining land, is never to be presumed.[55]

2. On Vacation or Abandonment.[56] From the principles stated in the preceding section it regularly follows that when the highway is discontinued or abandoned the land becomes discharged of this servitude,[57] and the entire and exclusive enjoyment reverts to the proprietor of the soil,[58] except where the fee to the highway has passed to the public.[59] This general rule governs even in cases where a new and different one is substituted for the one abandoned.[60] Where the public easement upon lands has been once extinguished, it cannot be revived except by new dedication or condemnation.[61] Under the statutes of some states the adjoining owners are entitled to reclaim the soil of a vacated road to the center thereof,[62] unless the ground was originally taken in unequal proportions, in which case the

of the land covered by a public highway across the premises, and not simply of the easement therein, and the fee of such land remained in the grantor and passed to a subsequent purchaser from him. The exception is "from the premises," and the decision is based upon the phraseology, without impairing the general doctrine of the above cases. A reservation of the right to open a highway "the whole length of said east line. And if, at any future time, a public highway shall be laid out . . . all the rights of [the grantor], in said reserved highway, shall revert to [the grantee]," reserves the right to dedicate a highway, the fee therein to belong to the grantee. Dunn *v.* Sanford, 51 Conn. 443. Where one dedicated a strip of land in front of his premises to the public as a highway, and expressly excepted it as such in his deed of the land, the grantee cannot assume the ownership of the strip, although it was never actually used as a public highway. Southern Pac. R. Co. *v.* Ferris, 93 Cal. 263, 28 Pac. 828, 18 L. R. A. 510.

55. Ball *v.* Ball, 1 Phila. (Pa.) 36.

56. Of city street see Municipal Corporations, 28 Cyc. 846.

57. Blain *v.* Staab, 10 N. M. 743, 65 Pac. 177; Pettibone *v.* Purdy, 7 Vt. 514.

58. *Colorado.*— Olin *v.* Denver, etc., R. Co., 25 Colo. 177, 53 Pac. 454.

Connecticut.—Woodruff *v.* Neal, 28 Conn. 165; Buel *v.* Clark, 1 Root 49.

Maryland.—Williamson *v.* Carnan, 1 Gill & J. 184.

Mississippi.— Hatch *v.* Monroe County, 56 Miss. 26, holding, however, that an order by the county board that a highway be "discontinued as a public road," but "be kept open as a private right of way," does not so surrender the public right as to warrant a landowner in inclosing the road for his private use.

New Mexico.— Blain *v.* Staab, 10 N. M. 743, 65 Pac. 177.

New York.— Mangam *v.* Sing Sing, 11 N. Y. App. Div. 212, 42 N. Y. Suppl. 950; Jackson *v.* Hathaway, 15 Johns. 447, 8 Am. Dec. 263.

Pennsylvania.— Flick's Estate, 6 Kulp 329.

Texas.— Hall *v.* La Salle County, 11 Tex. Civ. App. 379, 32 S. W. 433.

Vermont.— Pettibone *v.* Purdy, 7 Vt. 514.

United States.— Harris *v.* Elliott, 10 Pet. 25, 9 L. ed. 333; Barclay *v.* Howell, 6 Pet. 498, 8 L. ed. 477.

See 25 Cent. Dig. tit. "Highways," § 289.

Easements of this character may cease to exist, like all other burdens upon land, and when they do the land is freed from the encumbrance as completely as though it had never existed, and the owner of the soil has an absolute title to the same. Benham *v.* Potter, 52 Conn. 248.

According to the civil law, a grant of land calling for a public road as a boundary conveyed no title to the soil covered by the road; but the title to the road-bed remained in the sovereignty. Hence, upon the abandonment of the road as a highway, the land covered by it became vacant public domain, subject to entry, and did not belong, as it would at common law, to proprietors whose lands were bounded by the road. Mitchell *v.* Bass, 33 Tex. 259.

Consideration for such reversion.— The acquisition of title to vacated streets by reversion to the abutting lot-owners is supported by the consideration of the enhanced price paid for such lots in consequence of the prospective use of such streets. Olin *v.* Denver, etc., R. Co., 25 Colo. 177, 53 Pac. 454.

59. Lake City *v.* Fulkerson, 122 Iowa 569, 98 N. W. 376.

60. Benham *v.* Potter, 52 Conn. 248; Flick's Estate, 6 Kulp (Pa.) 329.

61. Cooper *v.* Detroit, 42 Mich. 584, 4 N. W. 262.

62. *Kansas.*— Southern Kansas R. Co. *v.* Showalter, 57 Kan. 681, 47 Pac. 831.

Michigan.— Scudder *v.* Detroit, 117 Mich. 77, 75 N. W. 286.

New York.— Mitchell *v.* Einstein, 105 N. Y. App. Div. 413, 94 N. Y. Suppl. 210 [*reversing* 42 Misc. 358, 86 N. Y. Suppl. 759].

Pennsylvania.— *In re* Magnet St., etc., Public Road, 5 Pa. Dist. 771, 19 Pa. Co. Ct. 70.

Wisconsin.— Paine Lumber Co. *v.* Oshkosh, 89 Wis. 449, 61 N. W. 1108.

See 25 Cent. Dig. tit. "Highways," § 289.

Effect on private easements.—While the effect of N. Y. Laws (1867), c. 697, authorizing the closing of the Bloomingdale road, was to extinguish the public easement, it did not operate to extinguish private easements and rights in lands covered by the public highway, but left them as they were. Holloway *v.* Southmayd, 139 N. Y. 390, 34 N. E.

owners may reclaim in the proportion of the original contribution.[63] The legislature, in discontinuing a road, can vest in abutting owners only such title to the road-bed as is owned by the public.[64]

3. Right to Soil and Materials[65] — a. In General. Notwithstanding the laying out of the highway and the condemnation of the land to the use of the public for travel, the title to the soil, and all the profits thereof consistent with the existence of the easement, remain in the original owner.[66] The title of the owner, subject only to the easement, remains perfect, not only to the land covered by the highway, but to all the material within its boundaries, except such as may be needed to build or to maintain the road.[67] He therefore has title to any superfluous earth, gravel, or rock, not necessary or useful to the construction or repair of the highway,[68] and to all mines or quarries,[69] trees,[70] grass,[71] springs of water,[72] growing

1047, 1052; *In re* New York Bd. of Education, 24 N. Y. App. Div. 117, 48 N. Y. Suppl. 1061.

63. Southern Kansas R. Co. *v.* Showalter, 57 Kan. 681, 47 Pac. 831; *In re* Magnet St., etc., Public Road, 5 Pa. Dist. 771, 19 Pa. Co. Ct. 70.

64. Mitchell *v.* Einstein, 105 N. Y. App. Div. 413, 94 N. Y. Suppl. 210 [*reversing* 42 Misc. 358, 86 N. Y. Suppl. 759].

65. In city street see Municipal Corporations, 28 Cyc. 847.

In highways by dedication see Dedication, 13 Cyc. 493.

66. *Connecticut.*—Woodruff *v.* Neal, 28 Conn. 165.

Illinois.— Palatine *v.* Kreuger, 121 Ill. 72, 12 N. E. 75; Old Town *v.* Dooley, 81 Ill. 255.

Indiana.— Huffman *v.* State, 21 Ind. App. 449, 52 N. E. 713, 69 Am. St. Rep. 368.

Iowa.— Overman *v.* May, 35 Iowa 89.

Massachusetts.— Tucker *v.* Tower, 9 Pick. 109, 19 Am. Dec. 350; Stackpole *v.* Healy, 16 Mass. 33, 8 Am. Dec. 121.

Minnesota.— Glencoe *v.* Reed, 93 Minn. 518, 101 N. W. 956, 67 L. R. A. 901.

New Hampshire.— Makepeace *v.* Worden, 1 N. H. 16.

New York.— Jackson *v.* Hathaway, 15 Johns. 447, 8 Am. Dec. 263.

Rhode Island.— Tucker *v.* Eldred, 6 R. I. 404.

Vermont.— Holden *v.* Shattuck, 34 Vt. 336, 80 Am. Dec. 684; Pettibone *v.* Purdy, 7 Vt. 514.

Virginia.— Bolling *v.* Petersburg, 3 Rand. 563.

See 25 Cent. Dig. tit. "Highways," § 292.

67. Old Town *v.* Dooley, 81 Ill. 255; Overman *v.* May, 35 Iowa 89; Higgins *v.* Reynolds, 31 N. Y. 151; Sanderson *v.* Haverstick, 8 Pa. St. 294.

68. Phillips *v.* Bowers, 7 Gray (Mass.) 21; Glencoe *v.* Reed, 93 Minn. 518, 101 N. W. 956, 67 L. R. A. 901; Chambers *v.* Furry, 1 Yeates (Pa.) 167; Pettibone *v.* Purdy, 7 Vt. 514.

69. *Connecticut.*—Woodruff *v.* Neal, 28 Conn. 165.

Iowa.— Overman *v.* May, 35 Iowa 89.

Kentucky.—West Covington *v.* Freking, 8 Bush 121.

Massachusetts.— Denniston *v.* Clark, 125 Mass. 216.

New York.— Jackson *v.* Hathaway, 15 Johns. 447, 8 Am. Dec. 263.

Rhode Island.— Tucker *v.* Eldred, 6 R. I. 404.

United States.— Barclay *v.* Howell, 6 Pet. 498, 8 L. ed. 478.

See 25 Cent. Dig. tit. "Highways," § 292.

When the absolute title to streets is vested in trustees, and not merely an easement over them for the use of the public, the trustees own the coal which is under the surface of such streets. Hawesville *v.* Hawes, 6 Bush (Ky.) 232.

70. *Connecticut.*—Woodruff *v.* Neal, 28 Conn. 165.

Iowa.— Overman *v.* May, 35 Iowa 89; Deaton *v.* Polk County, 9 Iowa 594.

Massachusetts.— Denniston *v.* Clark, 125 Mass. 216.

New York.— Jackson *v.* Hathaway, 15 Johns. 447, 8 Am. Dec. 263.

Ohio.— Daily *v.* State, 51 Ohio St. 348, 37 N. E. 710, 46 Am. St. Rep. 578, 24 L. R. A. 724; Phifer *v.* Cox, 21 Ohio St. 248, 8 Am. Rep. 58.

Rhode Island.— Tucker *v.* Eldred, 6 R. I. 404.

United States.— Barclay *v.* Howell, 6 Pet. 498, 8 L. ed. 477.

See 25 Cent. Dig. tit. "Highways," § 292.

71. *Connecticut.*—Woodruff *v.* Neal, 28 Conn. 165.

Iowa.— Deaton *v.* Polk County, 9 Iowa 594.

Massachusetts.— Denniston *v.* Clark, 125 Mass. 216; Adams *v.* Emerson, 6 Pick. 57.

New Hampshire.— Varney *v.* Manchester, 58 N. H. 430, 40 Am. Rep. 592.

Pennsylvania.— Chambers *v.* Furry, 1 Yeates 167.

Rhode Island.— Tucker *v.* Eldred, 6 R. I. 404.

Vermont.— Cole *v.* Drew, 44 Vt. 49, 8 Am. Rep. 363; Holden *v.* Shattuck, 34 Vt. 336, 80 Am. Dec. 684.

United States.— Barclay *v.* Howell, 6 Pet. 498, 8 L. ed. 477.

England.—Curtis *v.* Kesteven County Council, 45 Ch. D. 504, 60 L. J. Ch. 103, 63 L. T. Rep. N. S. 543, 39 Wkly. Rep. 199.

See 25 Cent. Dig. tit. "Highways," § 292.

72. Jackson *v.* Hathaway, 15 Johns. (N. Y.) 447, 8 Am. Dec. 263.

Public have no right in spring on highway. Wright *v.* Austin, 143 Cal. 236, 76 Pac.

crops,[73] and pasturage upon and above the surface of the soil covered by the highway.[74]

b. For Constructing or Repairing Highway. Upon the laying out of a highway the public acquire not only the right of way, but also the powers and privileges incident to that right,[75] among which is the right to keep the highway in proper repair.[76] To accomplish this purpose the proper officers may do any act in the highway that is necessary or proper to make and keep the way safe and convenient for the public travel.[77] They may raise or lower the surface,[78] dig up the earth,[79] cut down trees,[80] and use the earth, stone, and gravel within the limits of the highway in a reasonable and proper manner.[81]

1023, 101 Am. St. Rep. 97, 65 L. R. A. 949; Suffield *v.* Hathaway, 44 Conn. 521, 26 Am. Rep. 483; Old Town *v.* Dooley, 81 Ill. 255. On the other hand, inasmuch as the law places upon towns the duty of constructing and repairing all necessary highways within their respective limits, it is the corresponding right of the officers representing towns in this behalf to dispose of water flowing from springs upon a public way, by such methods as will in their judgment most economically and completely establish its safety. Suffield *v.* Hathaway, *supra*.

73. Denniston *v.* Clark, 125 Mass. 216; Cole *v.* Drew, 44 Vt. 48, 8 Am. Rep. 363.

74. Parker *v.* Jones, 1 Allen (Mass.) 270; Tucker *v.* Eldred, 6 R. I. 404.

Public have no right of pasturage.— The public have no right in a highway but to pass and repass thereon. They cannot therefore justify turning their cattle thereon for the purpose of grazing. Woodruff *v.* Neal, 28 Conn. 165; Stackpole *v.* Healy, 16 Mass. 33, 8 Am. Dec. 121; Harrison *v.* Brown, 5 Wis. 27. And it seems that the legislature has no authority to enact that cattle may go at large and feed in the highway, without compensation to the owner of the soil over which the highway is laid out. Stackpole *v.* Healy, *supra*. *Contra*, Hardenburgh *v.* Lockwood, 25 Barb. (N. Y.) 9, holding that the right to allow cattle, horses, or sheep to go at large on highways is one of the easements or servitudes pertaining to the land occupied as a highway; and the owner of land taken for a highway may be presumed to have been compensated for this as well as other easements to which land so taken is subject.

75. See *infra*, III, B.

76. *California.*— Smith *v.* San Luis Obispo, 95 Cal. 463, 30 Pac. 591.

Connecticut.— Benham *v.* Potter, 52 Conn. 248; Woodruff *v.* Neal, 28 Conn. 165; Peck *v.* Smith, 1 Conn. 103, 6 Am. Dec. 216.

Illinois.— Palatine *v.* Kreuger, 121 Ill. 72, 12 N. E. 75.

Iowa.— Overman *v.* May, 35 Iowa 89.

Massachusetts.— Upham *v.* Marsh, 128 Mass. 546; Boston *v.* Richardson, 13 Allen 146.

Vermont.— Cole *v.* Drew, 44 Vt. 49, 8 Am. Rep. 363; Pettibone *v.* Purdy, 7 Vt. 514.

See 25 Cent. Dig. tit. "Highways," §§ 292, 293.

77. Boston *v.* Richardson, 13 Allen (Mass.) 146.

Upon the question of necessity, the judgment and action of these public officers cannot be revised by the jury in any action at law. And if the act be done within the scope of the surveyor's authority, it does not become illegal by reason of the motive which influenced it. Upham *v.* Marsh, 128 Mass. 546.

78. Denniston *v.* Clark, 125 Mass. 216; Boston *v.* Richardson, 13 Allen (Mass.) 146.

79. Boston *v.* Richardson, 13 Allen (Mass.) 146; Adams *v.* Emerson, 6 Pick. (Mass.) 57.

80. *Iowa.*— Deaton *v.* Polk County, 9 Iowa 594.

Massachusetts.— Boston *v.* Richardson, 13 Allen 146.

New Hampshire.— Makepeace *v.* Worden, 1 N. H. 16.

New York.— Niagara Falls Suspension Bridge Co. *v.* Bachman, 4 Lans. 523 [*reversed* on other grounds in 66 N. Y. 261].

Rhode Island.— Tucker *v.* Eldred, 6 R. I. 404.

England.— Turner *v.* Ringwood Highway Bd., L. R. 9 Eq. 418, 21 L. T. Rep. N. S. 745, 18 Wkly. Rep. 424.

See 25 Cent. Dig. tit. "Highways," § 293.

The only right the public acquire in relation to such trees is that of cutting down and removing to a convenient distance, for the use of the owner, such trees as it is necessary to remove in order to the making or repair of the road in a proper and reasonable manner. They acquire no right to use any trees or timber growing on the land for the purpose of building or repairing the road. Baker *v.* Shephard, 24 N. H. 208; Niagara Falls Suspension Bridge Co. *v.* Bachman, 4 Lans. (N. Y.) 523 [*reversed* on other grounds in 66 N. Y. 261]; Tucker *v.* Eldred, 6 R. I. 404. And see Makepeace *v.* Worden, 1 N. H. 16.

81. New Haven *v.* Sargent, 38 Conn. 50, 9 Am. Rep. 360; Overman *v.* May, 35 Iowa 89; Anderson *v.* Van Tassel, 53 N. Y. 631; Jackson *v.* Hathaway, 15 Johns. (N. Y.) 447, 8 Am. Dec. 263; Felch *v.* Gilman, 22 Vt. 38.

Whether the use made of the stone was reasonable and proper is a mixed question of law and fact. Overman *v.* May, 35 Iowa 89.

Split stone.— The ownership of split stone lying upon land taken for a highway is not affected by the location, and the officers of the town have no right to use such stone in constructing the highway. Small *v.* Danville, 51 Me. 359.

B. Rights of Public — 1. To Use Highway For Other Public Purposes.[82] The right of the public in a highway consists in the privilege of passage,[83] and such privileges as are annexed as incidents by usage or custom,[84] as the right to make sewers and drains,[85] lay gas and water pipes,[86] make reservoirs,[87] and many other

Right to remove materials from one point to another.—As to the right of the authorities to take material from within the limits of a highway at one point, not for, or as an incident to, the improvement of the highway at that point, but for use upon that or other highways remote from the owner's land, without making compensation therefor, the authorities are at variance. In Bissell *v.* Collins, 28 Mich. 277, 15 Am. Rep. 217, the officials were held authorized to take gravel from below grade on one street, and haul it out to improve another, filling with less valuable material the excavation thus made. In line with this case are Bundy *v.* Catto, 61 Ill. App. 209; Upham *v.* Marsh, 128 Mass. 546; Denniston *v.* Clark, 125 Mass. 216, 222; Adams *v.* Emerson, 6 Pick. (Mass.) 57; Baxter *v.* Winooski Turnpike Co., 22 Vt. 114, 52 Am. Dec. 84; Huston *v.* Ft. Atkinson, 56 Wis. 350, 14 N. W. 444. In Denniston *v.* Clark, *supra*, it is said that highway officials are authorized "for the purpose of repairing the same highway, turnpike or railroad, to take earth, gravel or stones from one part and deposit them on another," and that all the highways within one municipal jurisdiction are, for such purposes, to be regarded as one. New Haven *v.* Sargent, 38 Conn. 50, 9 Am. Rep. 360, decides only that the city is entitled to use, to grade one street, soil which must necessarily be removed in grading another street. In Robert *v.* Sadler, 104 N. Y. 229, 10 N. E. 428, 58 Am. Rep. 498, the court of appeals, after reviewing some of these cases, with others from New York, declined to accede to the Michigan doctrine, and declared that the municipality could not remove, for use in other places, the gravel, etc., from within the boundaries of the highway, where this removal was not necessary to, or intended for, the establishment of the proper grade on that part of the highway. To the same effect are Anderson *v.* Bement, 13 Ind. App. 248, 41 N. E. 547; Ladd *v.* French, 3 Silv. Sup. (N. Y.) 1, 6 N. Y. Suppl. 56. In Niagara Falls Suspension Bridge Co. *v.* Bachman, 4 Lans. (N. Y.) 523 [*reversed* on other grounds in 66 N. Y. 261], it was said that gravel might be removed to other parts of the road, but it is apparent that this was gravel necessary to be removed in order to get the highway to its grade. In Turner *v.* Rising Sun, etc., Co., 71 Ind. 547, it is decided that, although, by a lawful appropriation, a public highway had become the property of the turnpike company, for the purpose of maintaining and constructing its road thereon, with a statutory provision authorizing it to take from the land so occupied stone, gravel, etc., for the road's construction, yet, under the law, it could not open a gravel pit in the highway, and haul out the gravel generally upon its road, without compensating the landowner therefor.

82. **City streets** see Municipal Corporations, 28 Cyc. 853.

Highways by dedication see Dedication, 13 Cyc. 493, 494.

Purpose of use and modes of travel see *infra*, VII, A.

83. *Indiana.*— Huffman *v.* State, 21 Ind. App. 449, 52 N. E. 713, 69 Am. St. Rep. 368.

Maine.—Burr *v.* Stevens, 90 Me. 500, 38 Atl. 547; Stinson *v.* Gardiner, 42 Me. 248, 66 Am. Dec. 281.

New Hampshire.— Winchester *v.* Capron, 63 N. H. 605, 4 Atl. 795, 56 Am. Rep. 554.

New Jersey.— State *v.* Laverack, 34 N. J. L. 201.

New York.— Kelsey *v.* King, 1 Transcr. App. 133, 33 How. Pr. 39.

England.— Hickman *v.* Maisey, [1901] 1 Q. B. 752, 69 L. J. Q. B. 511, 82 L. T. Rep. N. S. 321, 16 L. T. Rep. N. S. 274, 48 Wkly. Rep. 385; Harrison *v.* Rutland, [1893] 1 Q. B. 142, 62 L. J. Q. B. 117, 57 J. P. 278, 68 L. T. Rep. N. S. 35, 4 Reports 155, 41 Wkly. Rep. 322.

See 25 Cent. Dig. tit. "Highways," § 298.

84. Palatine *v.* Kreuger, 121 Ill. 72, 12 N. E. 75; Old Town *v.* Dooley, 81 Ill. 255; Overman *v.* May, 35 Iowa 89; State *v.* Laverack, 34 N. J. L. 201; Holloway *v.* Southmayd, 139 N. Y. 390, 34 N. E. 1047, 1052; Jackson *v.* Hathaway, 15 Johns. (N. Y.) 447, 8 Am. Dec. 263.

Right of repair see *supra*, III, A, 3, b.

No distinction between streets and highways.—As to the rights of the public in highways held under valid dedications and acceptances, and the power of the legislature over the same, there is no distinction between streets of incorporated cities and towns and country roads. Hardman *v.* Cabot, 60 W. Va. 664, 55 S. E. 756, 7 L. R. A. N. S. 506.

The user of a highway by touts for the purpose of watching the trials of race-horses on adjoining downs was held to be an unreasonable user, and such as to render them liable in an action of trespass to the owner of the soil. Hickman *v.* Maisey, [1900] 1 Q. B. 752, 69 L. J. Q. B. 511, 82 L. T. Rep. N. S. 321, 16 T. L. R. 274, 48 Wkly. Rep. 385.

85. Boston *v.* Richardson, 13 Allen (Mass.) 146; State *v.* Laverack, 34 N. J. L. 201; West *v.* Bancroft, 32 Vt. 367.

86. State *v.* Laverack, 34 N. J. L. 201; West *v.* Bancroft, 32 Vt. 367.

87. West *v.* Bancroft, 32 Vt. 367, holding that the proper public authorities of a town have a right to place in a highway a reservoir for the purpose of retaining water to sprinkle the highway with, and the owner of the fee of the land where such reservoir is placed cannot maintain an action against such authorities for so doing.

acts which the public may require; [88] but the public has no right in a highway which is incongruous with the purpose for which it was originally created, and which at the same time is injurious to the proprietor of the soil.[89]

2. Right to Deviate From Established Way. Where a highway becomes impassable, travelers are entitled to deviate from the established road on to adjacent land, taking care to do no unnecessary damage.[90] But this right gives the public no permanent easement in such adjoining land.[91]

C. Rights of Abutting Owners [92] **— 1. In General.** An abutting landowner has by reason of that ownership some interest in the highway which is not common to the public generally,[93] and this regardless of whether the fee of the highway is in him or not.[94] This interest includes the easement of access,[95] and

88. See cases cited *infra*, this note.

All acts which tend to facilitate travel, and add to the ease, comfort, and convenience of the traveler, or his beasts, whether it be by cutting down the hills, filling the ravines, paving the roads, erecting watering troughs, or sprinkling the streets, are acts which it is proper and often necessary for the public to do. West *v.* Bancroft, 32 Vt. 367.

Construction of side-path.— Laws (1900), c. 640, § 2, providing that no side-path shall be constructed on or along any regularly constructed sidewalk except with the consent of the abutting owner, does not require the abutting owner's consent to a side-path without the sidewalk. O'Donnell *v.* Preston, 74 N. Y. App. Div. 86, 77 N. Y. Suppl. 305.

89. Huffman *v.* State, 21 Ind. App. 449, 52 N. E. 713, 69 Am. St. Rep. 368; Carli *v.* Stillwater St. R., etc., Co., 28 Minn. 373, 10 N. W. 205, 41 Am. Rep. 290; State *v.* Laverack, 34 N. J. L. 201; Harrison *v.* Rutland, [1893] 1 Q. B. 142, 57 J. P. 278, 62 L. J. Q. B. 117, 68 L. T. Rep. N. S. 35, 4 Reports 155, 41 Wkly. Rep. 322.

Erection of watch-house.— The easement acquired by a town by the laying out of a highway does not include a right to erect a watch-house within the limits of the highway. Winchester *v.* Capron, 63 N. H. 605, 4 Atl. 795, 56 Am. Rep. 554.

90. *Indiana.*— Small *v.* Binford, 41 Ind. App. 440, 83 N. E. 507, 84 N. E. 19.

Maine.— Kent *v.* Judkins, 53 Me. 160, 87 Am. Dec. 544.

Massachusetts.— Campbell *v.* Race, 7 Cush. 408, 54 Am. Dec. 728.

New York.— Williams *v.* Safford, 7 Barb. 309; White *v.* Wiley, 13 N. Y. Suppl. 205.

Texas.— Hedgepeth *v.* Robertson, 18 Tex. 858, pulling down of fence justifiable.

Vermont.—Morey *v.* Fitzgerald, 56 Vt. 487, 48 Am. Rep. 811.

See 25 Cent. Dig. tit. "Highways," § 291.

91. State *v.* Northumberland, 44 N. H. 628.

92. In city streets see Municipal Corporations, 28 Cyc. 856 *et seq.*

In highways by dedication see Dedication, 13 Cyc. 490, 491.

93. *Connecticut.*— Newton *v.* New York, etc., R. Co., 72 Conn. 420, 44 Atl. 813.

Indiana.— Indiana, etc., R. Co. *v.* Eberle, 110 Ind. 542, 11 N. E. 467, 59 Am. Rep. 225; Ross *v.* Thompson, 78 Ind. 90; Huffman *v.* State, 21 Ind. App. 449, 52 N. E. 713, 69 Am. St. Rep. 368.

Kentucky.—Bohne *v.* Blankenship, 77 S. W. 919, 25 Ky. L. Rep. 1645.

New Jersey.— Barnett *v.* Johnson, 15 N. J. Eq. 481.

New York.— Holloway *v.* Southmayd, 139 N. Y. 390, 34 N. E. 1047, 1052.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Philadelphia, etc., Pass. R. Co., 6 Pa. Dist. 487.

See 25 Cent. Dig. tit. "Highways," § 296.

These easements of the abutting landowner are in addition to such as he possesses as one of the public, to whose use the property has been subjected. They are independent of the public easement, and, whether arising through express or implied grant, are as indestructible in their nature by the acts of the public authorities or of the grantor of the premises as is the estate which is the subject of the grant. Holloway *v.* Southmayd, 139 N. Y. 390, 34 N. E. 1047, 1052. See also Indiana, etc., R. Co. *v.* Eberle, 110 Ind. 542, 11 N. E. 467, 59 Am. Rep. 225.

94. Longmont *v.* Parker, 14 Colo. 386, 23 Pac. 443, 20 Am. St. Rep. 277; Denver *v.* Bayer, 7 Colo. 113, 2 Pac. 6; Holloway *v.* Southmayd, 139 N. Y. 390, 34 N. E. 1047, 1052.

95. *Colorado.*— Longmont *v.* Parker, 14 Colo. 386, 23 Pac. 443, 20 Am. St. Rep. 277; Denver *v.* Bayer, 7 Colo. 113, 2 Pac. 6.

Connecticut.— Newton *v.* New York, etc., R. Co., 72 Conn. 420, 44 Atl. 813.

Indiana.— Indiana, etc., R. Co. *v.* Eberle, 110 Ind. 542, 11 N. E. 467, 59 Am. Rep. 225; Ross *v.* Thompson, 78 Ind. 90.

Michigan.— Eagle Tp. Highway Com'rs *v.* Ely, 54 Mich. 173, 19 N. W. 940.

New York.— Holloway *v.* Southmayd, 139 N. Y. 390, 34 N. E. 1047, 1052; Ryan *v.* Preston, 59 N. Y. App. Div. 97, 69 N. Y. Suppl. 100; Peace *v.* McAdoo, 46 Misc. 295, 92 N. Y. Suppl. 368 [*affirmed* in 110 N. Y. App. Div. 13, 96 N. Y. Suppl. 1039].

Tennessee.— Hill *v.* Hoffman, (Ch. App. 1899) 58 S. W. 929.

Texas.—Heilbron *v.* St. Louis Southwestern R. Co., (Civ. App. 1908) 113 S. W. 979.

See 25 Cent. Dig. tit. "Highways," § 296.

This easement of access includes the right of ingress, egress, and regress, a right of way from a *locus a quo* to the *locus ad quem*, and from the latter forth to any other spot to which the party may lawfully go, or back to the *locus a quo*. Newton *v.* New York, etc., R. Co., 72 Conn. 420, 44 Atl. 813. If

of light and air,[96] the right to lateral support,[97] and the right to have the highway kept open as a thoroughfare to the whole community for the purpose of travel.[98]

2. To Use Highway For Private Purpose.[99] The owner of land through which a highway passes has a right to make any reasonable use of the highway which does not interfere with the enjoyment of the public easement.[1] Thus a reasonable

necessary for him to reach the traveled part, he has the right to bridge a ditch or construct a grade for that purpose (Newton *v.* New York, etc., R. Co., *supra*; Eagle Tp. Highway Com'rs *v.* Ely, 54 Mich. 173, 19 N. W. 940); but in doing so he has no right wilfully to obstruct such ditch or highway, his rights as a private landowner being subordinate to the public right of constructing and keeping the highways in repair (Eagle Tp. Highway Com'rs *v.* Ely, *supra*). So he may ordinarily construct a sidewalk, set hitching-posts, and place stepping-stones to enable passengers to enter or alight from a carriage more readily. Newton *v.* New York, etc., R. Co., *supra*. But this right is subject to the condition that it must not unreasonably obstruct the way. Appleton *v.* Nantucket, 121 Mass. 161. Such a sidewalk laid by an individual lot-owner along the line of his lot, which projects seven and one-half feet into the public highway, and the placing by said lot-owner of six trees and two hitching-posts along the outer edge of said pavement, do not constitute a public nuisance, in the absence of anything further to show that they create an unreasonable obstruction to the carriage-way. Com. *v.* Hauck, 103 Pa. St. 536.

96. Barnett *v.* Johnson, 15 N. J. Eq. 481; Holloway *v.* Southmayd, 139 N. Y. 390, 34 N. E. 1047, 1052.

97. Finegan *v.* Eckerson, 26 Misc. (N. Y.) 574, 57 N. Y. Suppl. 605.

98. Bohne *v.* Blankenship, 77 S. W. 919, 25 Ky. L. Rep. 1645; Peace *v.* McAdoo, 46 Misc. (N. Y.) 295, 92 N. Y. Suppl. 368 [*affirmed* in 110 N. Y. App. Div. 13, 96 N. Y. Suppl. 1039].

99. City streets see Municipal Corporations, 28 Cyc. 859–864.

1. *Connecticut.*— Newton *v.* New York, etc., R. Co., 72 Conn. 420, 44 Atl. 813; Windsor *v.* Field, 1 Conn. 279.

Illinois.— Nelson *v.* Fehd, 203 Ill. 120, 67 N. E. 828 [*affirming* 104 Ill. App. 114]; Sadorus *v.* Black, 65 Ill. App. 72.

Maine.— Lynn *v.* Hooper, 93 Me. 46, 44 Atl. 127, 47 L. R. A. 752; Burr *v.* Stevens, 90 Me. 500, 38 Atl. 547; Kuhn *v.* Farnsworth, 69 Me. 404.

Massachusetts.— King *v.* Norcross, 196 Mass. 373, 82 N. E. 17; Underwood *v.* Carney, 1 Cush. 285; Van O'Linda *v.* Lothrop, 21 Pick. 292, 32 Am. Dec. 261.

Missouri.— Pemberton *v.* Dooley, 43 Mo. App. 176, holding that the owner of the land on the two sides of an ordinary county road has such an interest in the soil of the road as entitles him to a passageway for his stock from one side to the other.

New Jersey.— State *v.* Establishment of Useful Manufactures Soc., 46 N. J. L. 274.

Utah.— Whitesides *v.* Green, 13 Utah 341, 44 Pac. 1032, 57 Am. St. Rep. 740.

Vermont.— Holden *v.* Shattuck, 34 Vt. 336, 80 Am. Dec. 684.

See 25 Cent. Dig. tit. "Highways," § 296.

What may be deemed a reasonable and proper use of a public highway must depend much on the local situation, and much on public usage. Underwood *v.* Carney, 1 Cush. (Mass.) 285; Van O'Linda *v.* Lothrop, 21 Pick. (Mass.) 292, 32 Am. Dec. 261.

Right to work quarry.—Where defendant was the owner of the land within the limits of a country highway, subject only to the public easement, and the land contained a valuable deposit of sandstone, it was held that defendant was not required to maintain the highway unobstructed to its full width, so as not to interfere at all with the use of the highway for public travel, as a condition of its right to remove the sandstone, but was only required to keep a passageway open and in good repair within the limits of the highway on the surface of the ground, or by bridges of width sufficient to enable teams to pass each other. Clarendon *v.* Medina Quarry Co., 102 N. Y. App. Div. 217, 92 N. Y. Suppl. 530 [*affirmed* in 92 N. Y. Suppl. 1148].

Right to dig ditch.—A property-owner has a right to dig a ditch, necessary for the drainage of his lands, along a highway bordering his property, provided he does not render the use of the highway less safe, useful, or convenient for the public; but if his ditch creates an obstruction his acts become unlawful (Woodruff *v.* Neal, 28 Conn. 165; Nelson *v.* Fehd, 203 Ill. 120, 67 N. E. 828 [*affirming* 104 Ill. App. 114]; Clay *v.* Hart, 25 Misc. (N. Y.) 110, 55 N. Y. Suppl. 43 [*affirmed* in 41 N. Y. App. Div. 625, 58 N. Y. Suppl. 1150]; Baring *v.* Heyward, 2 Speers (S. C.) 553); and to this end he is bound to erect bridges over the passage where it crosses the highway, and keep them in repair; and a subsequent owner of the land who continues the watercourse across the highway is bound to repair the bridge (Woodring *v.* Forks Tp., 28 Pa. St. 355, 70 Am. Dec. 134). No person has a right to dig on his own land so as to endanger the safety of the highway or to cause the earth to fall down. Hudson County *v.* Woodcliff Land Imp. Co., 74 N. J. L. 355, 65 Atl. 844; Milburn *v.* Fowler, 27 Hun (N. Y.) 568.

Right to plant trees and shrubs.—An abutting owner, although owning the fee to the center of a street, can only maintain trees and shrubs thereon subject to the right of other abutters to have them removed in the exercise of their right to use the whole length and breadth of the street for passage. Pinkerton *v.* Randolph, 200 Mass. 24, 85 N. E. 892. N. Y. Laws (1863), c. 93, providing that persons owning land fronting on any highway may plant shade trees along the road-

use may be made of highways for moving buildings,[2] receiving or delivering goods from stores or warehouses or the like,[3] and temporarily depositing goods, fuel, and building materials;[4] but a systematic and continued encroachment upon a highway, although for the purpose of carrying on a lawful business, is unjustifiable.[5] These rights of the owner may grow less and less, as the public needs increase.[6] But at all times he retains all that is not needed for public uses, subject, however, to municipal or police regulations.[7]

3. Remedies.[8] Subject only to the public easement, an abutting owner has all the usual rights and remedies of the owner of a freehold,[9] including trespass,[10]

side within a certain distance from the outward line of the highway, authorizes abutting owners to plant trees in the highways, without reference to the ownership of the fee. Edsall *v.* Howell, 86 Hun (N. Y.) 424, 33 N. Y. Suppl. 892.

Right to maintain gates for protection of adjoining land.— Unless authorized to do so (see *infra*, VI, D), landowners have no right to put up gates on public highways for the purpose of protecting their land from injury (Henby *v.* Ripley Tp., 10 Ind. 45); but where a road has been encumbered for forty years with movable bars or gates, the right to use the road exists subject to such obstruction (Green *v.* Bethea, 30 Ga. 896; Hinks *v.* Hinks, 46 Me. 423).

Right to join fence to bridge see Old Town *v.* Dooley, 81 Ill. 255; Sadorus *v.* Black, 65 Ill. App. 72.

2. Varney *v.* Manchester, 58 N. H. 430, 40 Am. Rep. 592; Graves *v.* Shattuck, 35 N. H. 257, 69 Am. Dec. 536. And see *infra*, VII, A, 1.

3. Varney *v.* Manchester, 58 N. H. 430, 40 Am. Rep. 592; People *v.* Cunningham, 1 Den. (N. Y.) 524, 43 Am. Dec. 709.

4. *California.*— Coburn *v.* Ames, 52 Cal. 385, 28 Am. Rep. 634.

Massachusetts.— King *v.* Norcross, 196 Mass. 373, 82 N. E. 17.

New Hampshire.— Varney *v.* Manchester, 58 N. H. 430, 40 Am. Rep. 592; Chamberlain *v.* Enfield, 43 N. H. 356.

New York.— People *v.* Cunningham, 1 Den. 524, 43 Am. Dec. 709.

Pennsylvania.— Piolett *v.* Simmers, 106 Pa. St. 95, 51 Am. Rep. 496; Mallory *v.* Griffey, 85 Pa. St. 275.

See 25 Cent. Dig. tit. "Highways," § 296.

5. *Iowa.*— Jenks *v.* Lansing Lumber Co., 97 Iowa 342, 66 N. W. 231.

New York.— People *v.* Cunningham, 1 Den. 524, 43 Am. Dec. 709.

Pennsylvania.— Snively *v.* Washington Tp., 218 Pa. St. 249, 67 Atl. 465, 12 L. R. A. N. S. 918.

Wisconsin.—Busse *v.* Rogers, 120 Wis. 443, 98 N. W. 219, 64 L. R. A. 183.

England.— Rex *v.* Carlile, 6 C. & P. 636, 25 E. C. L. 614.

See 25 Cent. Dig. tit. "Highways," § 296.

6. Burr *v.* Stevens, 90 Me. 500, 38 Atl. 547.

7. Burr *v.* Stevens, 90 Me. 500, 38 Atl. 547.

The control of highways and the grades and changes made thereon are not to be determined by the abutting owners, but are by statute placed under the control of the local municipal authorities. It follows that an abutting owner has no right to take possession of a public road or street and change its grade without authority from the body having it under statutory control, and when such action is taken a right of action inures to other abutting owners. McCarthy *v.* Pennsylvania Land, etc., Co., 5 Pa. Super. Ct. 641. And see Davis *v.* Pickerell, 139 Iowa 186, 117 N. W. 276.

For obstructions in city streets see Municipal Corporations, 28 Cyc. 865, 902, 904.

8. Compensation of abutting owners under law of eminent domain see Eminent Domain, 15 Cyc. 662.

Rights and remedies of private persons in general see *infra*, VI, F.

9. *Connecticut.*— Read *v.* Leeds, 19 Conn. 182.

Indiana.— Huffman *v.* State, 21 Ind. App. 449, 52 N. E. 713, 69 Am. St. Rep. 368.

Louisiana.— Bradley *v.* Pharr, 45 La. Ann. 426, 12 So. 618, 19 L. R. A. 647.

New York.—Adams *v.* Rivers, 11 Barb. 390.

Virginia.— Bolling *v.* Petersburg, 3 Rand. 563.

See 25 Cent. Dig. tit. "Highways," § 297.

10. *Connecticut.*—Woodruff *v.* Neal, 28 Conn. 165; Read *v.* Leeds, 19 Conn. 182; Hart *v.* Chalker, 5 Conn. 311, for any injury to such highways not necessary to the enjoyment of the right.

Indiana.— Huffman *v.* State, 21 Ind. App. 449, 52 N. E. 713, 69 Am. St. Rep. 368.

Iowa.— Deaton *v.* Polk County, 9 Iowa 594.

Louisiana.— Bradley *v.* Pharr, 45 La. Ann. 426, 12 So. 618, 19 L. R. A. 647.

Maine.— Hunt *v.* Rich, 38 Me. 195, for unauthorized alteration of highway.

Massachusetts.— O'Linda *v.* Lothrop, 21 Pick. 292, 32 Am. Dec. 261; Stackpole *v.* Healy, 16 Mass. 33, 8 Am. Dec. 121; Perley *v.* Chandler, 6 Mass. 454, 4 Am. Dec. 159, for illegal acts affecting his limited interest. In Mayhew *v.* Norton, 17 Pick. (Mass.) 357, 28 Am. Dec. 300, it was held that trespass may be supported by the owner of the soil for taking away the grass or herbage, but will not lie for any encumbrance or nuisance erected.

New Jersey.— Starr *v.* Camden, etc., R. Co., 24 N. J. L. 592.

New York.—Dunham *v.* Williams, 36 Barb. 136 [*reversed* on other grounds in 37 N. Y. 251] (*semble*); Gidney *v.* Earl, 12 Wend. 98 (for digging and removing the soil in the

ejectment,[11] waste,[12] and injunction in cases where his rights are unwarrantably invaded.[13] And if he suffers a special injury from the obstruction beyond that suffered by the public, he may maintain an action for damages,[14] and to abate the

road); Jackson *v.* Hathaway, 15 Johns. 447, 8 Am. Dec. 263; Cortelyou *v.* Van Brundt, 2 Johns. 357, 3 Am. Dec. 439.

Ohio.— Bingham *v.* Doane, 9 Ohio 165.

Pennsylvania.— Lewis *v.* Jones, 1 Pa. St. 336, 44 Am. Dec. 138; Cook *v.* Dolan, 6 Pa. Dist. 524, 19 Pa. Co. Ct. 401.

Vermont.— Pettibone *v.* Purdy, 7 Vt. 514.

United States.— Barclay *v.* Howell, 6 Pet. 498, 8 L. ed. 477.

See 25 Cent. Dig. tit. "Highways," § 297.

Where one owns lands extending only to the line of the road, case is the only remedy. Bingham *v.* Doane, 9 Ohio 165.

Necessity of interest in road.— One who has moved to establish a public road across another's land has no interest in the road by virtue of any agreement with the owner of the fee that entitles him to maintain trespass on the case against a railroad for injury to the roadway by making a deep cut across it. Norfolk, etc., R. Co. *v.* Rasnake, 90 Va. 170, 17 S. E. 879.

Use of abusive language by passer-by.— A person is a trespasser who, instead of passing along on the side of a street, stops on it, in front of a man's house, and remains there, using toward him abusive and insulting language. Adams *v.* Rivers, 11 Barb. (N. Y.) 390.

11. See EJECTMENT, 15 Cyc. 25 *et seq.*

12. Jackson *v.* Hathaway, 15 Johns. (N. Y.) 447, 8 Am. Dec. 263.

Waste, generally, see WASTE.

13. Bradley *v.* Pharr, 45 La. Ann. 426, 12 So. 618, 19 L. R. A. 647.

Necessity of special injury.— The owner of the fee in lands abutting upon or constituting a part of a public road is entitled to equitable relief for injuries or obstructions of a special or distinct character from those sustained by the general public (Dubach *v.* Hannibal, etc., R. Co., 89 Mo. 483, 1 S. W. 86; H. B. Anthony Shoe Co. *v.* West Jersey R. Co., 57 N. J. Eq. 607, 42 Atl. 279; Prudden *v.* Morris, etc., R. Co., 19 N. J. Eq. 386; Bechtel *v.* Carslake, 11 N. J. Eq. 500; Ackerman *v.* True, 175 N. Y. 353, 67 N. E. 629 [*reversing* 71 N. Y. App. Div. 143, 75 N. Y. Suppl. 695]; Madden *v.* Pennsylvania R. Co., 21 Ohio Cir. Ct. 73, 11 Ohio Cir. Dec. 571; Philadelphia, etc., R. Co. *v.* Philadelphia, etc., R. Co., 6 Pa. Dist. 269; Pettibone *v.* Hamilton, 40 Wis. 402), as where his right of access is interfered with (Ruthstrom *v.* Peterson, 72 Kan. 679, 83 Pac. 825; Finegan *v.* Eckerson, 26 Misc. (N. Y.) 574, 57 N. Y. Suppl. 605; Philadelphia, etc., R. Co. *v.* Philadelphia, etc., R. Co., 6 Pa. Dist. 487; Gorton *v.* Tiffany, 14 R. I. 95).

An abutting owner who does not own the ultimate fee in the soil has nevertheless his rights of ingress and egress, and if he sustains private or particular injury not in common with the annoyance to the public, may have his redress. Philadelphia, etc., R. Co. *v.* Philadelphia, etc., R. Co., 6 Pa. Dist. 487. But he cannot maintain a suit to restrain a nuisance which injures him only in a right enjoyed by him as one of the public. H. B. Anthony Shoe Co. *v.* West Jersey R. Co., 57 N. J. Eq. 607, 42 Atl. 279; Cobb *v.* Warren St. R. Co., 218 Pa. St. 366, 67 Atl. 654.

Property need not actually abut way.— It is not essential, in order to entitle such property-owner to an injunction, that his property should actually abut upon such way. It is sufficient if it is near enough to be materially affected by closing or obstructing such way. Madden *v.* Pennsylvania R. Co., 21 Ohio Cir. Ct. 73, 11 Ohio Cir. Dec. 571.

It must appear that the injuries will be reasonably certain to occur before the court should interfere with or obstruct highway commissioners in improving the public roads according to their judgment. Barnard *v.* Nokomis Highway Com'rs, 172 Ill. 391, 50 N. E. 120 [*affirming* 71 Ill. App. 187].

Temporary, and not unreasonable, use of the roadway in front of plaintiff's premises, by teams and trucks standing in line to unload in turn on defendant's adjoining premises, will not be enjoined. Manley *v.* Leggett, 62 Hun (N. Y.) 562, 17 N. Y. Suppl. 68.

To restrain trespass.— An injunction to restrain trespasses will be refused where such trespasses were merely technical and no property rights were threatened or infringed. Fielden *v.* Cox, 22 T. L R. 411.

14. *California.*— Coburn *v.* Ames, 52 Cal. 385, 28 Am. Rep. 634.

Illinois.— Pittsburgh, etc., R. Co. *v.* Reich, 101 Ill. 157.

Indiana.— Pittsburgh, etc., R. Co. *v.* Noftsger, 148 Ind. 101, 47 N. E. 332; Indiana, etc., R. Co. *v.* Eberle, 110 Ind. 542, 11 N. E. 467, 59 Am. Rep. 225; Ross *v.* Thompson, 78 Ind. 90.

Maine.— Sutherland *v.* Jackson, 32 Me. 80.

New York.— Ackerman *v.* True, 175 N. Y. 353, 67 N. E. 629 [*reversing* 71 N. Y. App. Div. 143, 75 N. Y. Suppl. 695], holding that the fact that an encroachment on a highway by an adjoining landowner was also a public nuisance does not prevent a private action against him for injuries to the adjoining lands.

Texas.—Heilbron *v.* St. Louis Southwestern R. Co., (Civ. App. 1908) 113 S. W. 610, 979.

See 25 Cent. Dig. tit. "Highways," § 297.

The interruption of access is a special injury different in kind from that suffered by the public generally, and entitles an abutting owner to maintain an action for damages. Pittsburgh, etc., R. Co. *v.* Noftsger, 148 Ind. 101, 47 N. E. 332; Dantzer *v.* Indianapolis Union R. Co., 141 Ind. 604, 39 N. E. 223, 50 Am. St. Rep. 343, 34 L. R. A. 769; Walker *v.* Vicksburg, etc., R. Co., 52 La. Ann. 2036, 28 So. 324; Smith *v.* Putnam, 62 N. H. 369; Bechtel *v.* Carslake, 11 N. J. Eq. 500; Milburn *v.* Fowler, 27 Hun (N. Y.) 568.

nuisance.[15] So trover lies for cutting timber within the limits of a highway,[16] or for taking earth or stone not necessary to the construction or repair thereof.[17] No action lies for obstructing a highway until it is opened.[18]

IV. HIGHWAY DISTRICTS AND OFFICERS.

A. Districts — 1. NATURE. Road districts are involuntary political subdivisions of the state created by general laws to aid in the administration of government.[19]

Pleading.—A complaint for impeding plaintiff's ingress and egress to his lots, by obstructing the highway on which they abut, need not aver he had the right of ingress and egress, such right being presumed. Yates *v.* Big Sandy R. Co., 89 S. W. 108, 28 Ky. L. Rep. 206. A complaint alleging that defendant placed an embankment four feet high in the highway in front of and parallel with plaintiff's lots, thereby impeding his ingress and egress, shows apparent injury. Yates *v.* Big Sandy R. Co., *supra*.

Who may sue.— One may sue for damages to lots by obstruction of a highway, although the legal title is held by another as trustee for him. Yates *v.* Big Sandy R. Co., 89 S. W. 108, 28 Ky. L. Rep. 206.

Damages.— In ascertaining the damages an abutting owner sustains by reason of an obstruction or encroachment on the highway, the rule is to prove the value of his property with the obstruction or encroachment, and its value with the same removed, and the difference is the measure of the loss. Ackerman *v.* True, 175 N. Y. 353, 67 N. E. 629 [*reversing* 71 N. Y. App. Div. 143, 75 N. Y. Suppl. 695], holding that the fact that plaintiff can sell his property for more than he could before the alleged encroachment does not render a dismissal of the complaint on the merits proper, where his property is worth about fifteen thousand dollars less with the encroachment than without it. In an action to recover damages for an obstruction of an abutting lot-owner's rights in a highway, where the character of the injury is permanent, and the complaint recognizes the right of defendant to continue in the use of the property wrongfully appropriated, and to acquire, as a result of the suit, the title thereto, the damages should be assessed on the basis of the permanent depreciation in value of the property injured (Indiana, etc., R. Co. *v.* Eberle, 110 Ind. 542, 11 N. E. 467, 59 Am. Rep. 225; Wallace *v.* Kansas City, etc., R. Co., 47 Mo. App. 491, holding that an embankment of stone and earth in a street in front of a lot obstructing ingress and egress thereto is a permanent structure, and damages for such injury are original and may at once be estimated and compensated); but where the action is in trespass, to recover for a past injury, without recognizing the legality of the obstruction, or defendant's right to continue it as a result of the suit, only such damages can be recovered as accrued up to the time of the commencement of the action (Indiana, etc., R. Co. *v.* Eberle, *supra*). Incidental damages in common with the rest of the public are not the subject of recovery. Dantzer *v.* Indianapolis Union R. Co., 141 Ind. 604, 39 N. E. 223, 50 Am. St. Rep. 343, 34 L. R. A. 769; Indiana, etc., R. Co. *v.* Eberle, *supra*. Thus for merely incidental damages as result from the careful construction and prudent operation of a railroad on the land of another, even though it be in a public street, the adjacent proprietor cannot recover. Pittsburgh, etc., R. Co. *v.* Noftsger, 148 Ind. 101, 47 N. E. 332. So an obstruction or discontinuance of the highway at another place, although it may indirectly affect the value of his property by requiring a longer and more circuitous route to reach it, is not an injury or tort for which the landowner can recover damages. Newton *v.* New York, etc., R. Co., 72 Conn. 420, 44 Atl. 813; Jacksonville, etc., R. Co. *v.* Thompson, 34 Fla. 346, 16 So. 282, 26 L. R. A. 410. The mere fact of interference with his right of access will entitle an abutting owner to at least nominal damages. Bannon *v.* Murphy, 38 S. W. 889, 18 Ky. L. Rep. 989. Damages arising from both a temporary and a permanent nuisance may be recovered in the same action. Wallace *v.* Kansas City, etc., R. Co., 47 Mo. App. 491.

Abatement by owner.— Every proprietor of land adjoining a highway has a right to reasonable access to its traveled part; and any fence or other obstruction which so annoys or encumbers it as essentially to interfere with this right is a nuisance, and may be removed by such proprietor. Hubbard *v.* Deming, 21 Conn. 356. So where one stops in the road and uses loud and indecent language, he thereby becomes a trespasser, and the owner of the soil has the right to abate the nuisance. State *v.* Davis, 80 N. C. 351, 30 Am. Rep. 86.

Pleading.—Where a complaint to abate a nuisance does not explicitly state that plaintiff has sustained an injury different in kind from the general public, it is insufficient on special demurrer; but when such injury appears by inference it is proper to overrule a motion for judgment on the pleadings at the commencement of the trial. Hargo *v.* Hodgdon, 89 Cal. 623, 26 Pac. 1106.

15. Hargro *v.* Hodgdon, 89 Cal. 623, 26 Pac. 1106; Coburn *v.* Ames, 52 Cal. 385, 28 Am. Rep. 634; Green *v.* Asher, 11 S. W. 286, 10 Ky. L. Rep. 1006; Smith *v.* Putnam, 62 N. H. 369; Ackerman *v.* True, 175 N. Y. 353, 67 N. E. 629 [*reversing* 71 N. Y. App. Div. 143, 75 N. Y. Suppl. 695].

16. Sanderson *v.* Haverstick, 8 Pa. St. 294.

17. Phillips *v.* Bowers, 7 Gray (Mass.) 21.

18. Southerland *v.* Jackson, 30 Me. 462, 50 Am. Dec. 633.

19. Farmer *v.* Myles, 106 La. 333, 30 So. 858.

In some jurisdictions, however, road districts have no separate corporate existence, and are not political entities.[20]

2. Creation, Alteration, Consolidation, and Discontinuance. Statutes often provide for the creation of road districts,[21] and their alteration,[22] consolidation,[23] or discontinuance.[24]

3. Assignment to Officers. It is the duty of the proper authorities to assign road districts to the care of the proper officers.[25]

20. San Bernardino County *v.* Southern Pac. R. Co., 137 Cal. 659, 70 Pac. 782; Denver *v.* Myers, 63 Nebr. 107, 88 N. W. 191; Dixon County *v.* Chicago, etc., R. Co., 1 Nebr. (Unoff.) 240, 95 N. W. 340; Madden *v.* Lancaster County, 65 Fed. 188, 12 C. C. A. 566; Travelers' Ins. Co. *v.* Oswego, 59 Fed. 58, 7 C. C. A. 669.

21. *Idaho.*— Genesee *v.* Latah County, 4 Ida. 141, 36 Pac. 701, under control of the trustees.

Illinois.— Keech *v.* People, 22 Ill. 478, for roads on division lines.

Iowa.— Marks *v.* Woodbury, 47 Iowa 452, only territory not in a city.

Missouri.— State *v.* Gordon, 197 Mo. 55, 94 S. W. 987, confined to counties not having township organization.

New York.— See Shapter *v.* Carroll, 18 N. Y. App. Div. 390, 46 N. Y. Suppl. 202, where road district within a town was treated as distinct from the rest of the town.

Pennsylvania.— Pitt Tp. Road Case, 8 Watts & S. 74, district being subject to general road laws until it is admitted into the city.

Vermont.—Newbury *v.* Tenney, 2 Aik. 295, public record of division being necessary.

See 25 Cent. Dig. tit. "Highways," § 301.

Different systems of road supervision compared see Miller *v.* Kern County, 137 Cal. 516, 70 Pac. 549; Raymond Special Road Dist. *v.* Huber, 212 Mo. 551, 111 S. W. 472; Brant *v.* Tracey, 70 N. J. L. 497, 57 Atl. 125; Bowman *v.* Essex, 69 N. J. L. 109, 54 Atl. 818.

Territory included.— Surveyors' districts are not required to be so limited as to include the whole territory of the town. It is sufficient if they include a definite part of the highways. It is not necessary that they should include the residences of all the persons named in their lists of taxes. Thompson *v.* Fellows, 21 N. H. 425.

22. Lyon *v.* Kee, 120 Ind. 150, 22 N. E. 128 (by township trustees); Dunster *v.* Smith, 49 N. J. L. 150, 6 Atl. 663 (cannot change limits after election of overseer, however).

One division of a township into road districts may exhaust the power of local authorities. People *v.* Whipple, 187 Ill. 547, 58 N. E. 468 [*reversing* 87 Ill. App. 145]; Scott *v.* Mount Tabor, 48 Vt. 391. See Lamphire *v.* Windsor, 27 Vt. 544.

23. See the statutes of the different states.

Withdrawal of petitioner.— A signer of the petition required by Iowa Acts 20th Gen. Assembly, c. 200, § 4, relating to the consolidation of the road districts of a township on petition of a majority of the voters, may withdraw his name therefrom at any time before action is taken; and the signing of a remonstrance to such consolidation, by one who had previously signed the petition, operates to withdraw his signature from the petition. Dunham *v.* Fox, 100 Iowa 131, 69 N. W. 436.

Review by certiorari.— Under Iowa Acts 20th Gen. Assembly, c. 200, § 4, providing that the board of township trustees may on petition, etc., consolidate the road districts of the township into one highway district, the proceeding so authorized is judicial in its nature, within the meaning of Iowa Code, § 3216, declaring that a writ of certiorari may issue when an inferior tribunal or board exercising judicial functions has exceeded its proper jurisdiction. Dunham *v.* Fox, 100 Iowa 131, 69 N. W. 436.

Who may attack consolidation.— A taxpayer has such interest in the subject-matter as will entitle him to maintain proceedings to set aside an illegal order of the board of township trustees consolidating all the road districts of the townships, even though he is not directly prejudiced thereby. Dunham *v.* Fox, 100 Iowa 131, 69 N. W. 436.

24. People *v.* Sly, 4 Hill (N. Y.) 593. See, however, Tehama County *v.* Bryan, 68 Cal. 57, 8 Pac. 673, holding that a repealing act did not abrogate existing road districts.

25. Morgan *v.* Monmouth Plank Road Co., 26 N. J. L. 99. And see cases cited *infra*, this note. See, however, Callender *v.* Marsh, 1 Pick. (Mass.) 418, holding that the provision for assignment is directory only.

Who should assign district.— When a town chooses surveyors of highways, it is not necessary that the vote of the town should assign a particular district to each surveyor; that is properly left to be done by the selectmen. Palmer *v.* Carroll, 24 N. H. 314.

Mandamus to compel assignment.— A mandamus will be granted to compel a township committee to assign a road to the overseers of the highways. Anonymous, 7 N. J. L. 192, holding, however, that it will not be granted until after the committee have had due notice of the motion. And see People *v.* Mills, 8 N. Y. St. 734 [*affirmed* in 109 N. Y. 69, 15 N. E. 886]. See, generally, Mandamus, 26 Cyc. 125.

Who may object to non-assignment.—Want of assignment cannot be attacked by third persons. Ward *v.* Folly, 5 N. J. L. 482.

Powers and duties of surveyors or overseers in case of non-assignment.— Where no assignment of the limits and divisions of the ways of a town is made to each highway surveyor

B. Officers — 1. Appointment, Election, and Qualification — a. In General. The election [26] or the appointment [27] of highway officers must be made according to statute by the proper authorities,[28] and must be of someone of a class eligible,[29]

under Mass. Gen. St. c. 44, § 6, the surveyors may nevertheless act together, or by a majority of the whole board. McCormick *v.* Boston, 120 Mass. 499. And see Callender *v.* Marsh, 1 Pick. (Mass.) 418. The neglect or refusal of a township committee to assign a road to an overseer, or appropriate money to work it, does not authorize any one to close or obstruct it, or absolve the overseer from his duty enjoined by law to open, clear out, and work the public roads. Morgan *v.* Monmouth Plank Road Co., 26 N. J. L. 99. And see Ward *v.* Folly, 5 N. J. L. 482, holding that the overseer is justified in repairing a road, although not assigned to him in writing by the township committee. While it is the duty of the committee to assign to the overseers in writing their several limits and divisions of the highways, yet if the committee neglects to do so, the overseers are to observe and conform themselves to such assignment as may have at any time theretofore been made. Morgan *v.* Monmouth Plank Road Co., *supra*.

26. *Connecticut.*— Pinney *v.* Brown, 60 Conn. 164, 22 Atl. 430, appointment void where not properly warned in town meeting; appointment must be of first selectman for time being as provided by town meeting.

Massachusetts.— Walker *v.* West Boylston, 128 Mass. 550 (at special meeting at which act providing for road commissioners is accepted); Benjamin *v.* Wheeler, 15 Gray 486 (where selectmen were chosen surveyors by town vote).

Michigan.— Davies *v.* Saginaw County, 89 Mich. 295, 50 N. W. 862, a statute creating road districts with road officers is void where the constitution provides for annual elections of town officers.

New Hampshire.— Brewster *v.* Hyde, 7 N. H. 206, where warrant for town meeting was issued without authority.

New Jersey.—Winans *v.* Crane, 36 N. J. L. 394 (statute authorizing town committee to fill vacancies entitles them to elect in case of tie vote); Green *v.* Kleinhans, 14 N. J. L. 473 (at annual town meeting).

See 25 Cent. Dig. tit. "Highways," § 304.

27. *Alabama.*— Thompson *v.* State, 21 Ala. 48, appointment of overseer by probate court while another is in office is voidable.

Delaware.— State *v.* Rothwell, 5 Harr. 312, in writing.

Idaho.— Meservey *v.* Gulliford, 14 Ida. 133, 93 Pac. 780, order of appointment need not recite vacancy.

Kentucky.— Poole *v.* Slayton, 128 Ky. 514, 108 S. W. 903, 33 Ky. L. Rep. 373.

Michigan.— Wayne County Road Com'rs *v.* Wayne County, 148 Mich. 255, 111 N. W. 901 (holding that Act No. 146, Pub. Acts (1905), in so far as it provides in section 6 for the appointment of county road commissioners for Wayne county by the county clerk and the mayor of Detroit, conflicts with the theory of local self-government guaranteed by the constitution, and cannot be sustained); People *v.* Springwells Tp. Bd., 25 Mich. 153 (state commissioners cannot become town officers by acquiescence).

Missouri.— State *v.* Gasconade County Ct., 25 Mo. App. 446, appointed by court only where taxpayers fail to act.

New Jersey.— See Poinier *v.* State, 44 N. J. L. 433, as to statute validating appointment made under an unconstitutional law.

New York.— People *v.* Richmond County, 20 N. Y. 252 (holding that where two persons are appointed to fill vacancies in the office of commissioners of highways, without designating the class to which they shall respectively belong, the one first named in the appointment is to be regarded as appointed to the first class, or that highest in numerical order); Matter of Kerr, 57 Misc. 324, 108 N. Y. Suppl. 591 (holding that where the concurrence of four members of a town board is essential to an appointment of a highway commissioner, no valid appointment is made by a concurrence of four members of whom the appointee is one).

Tennessee.— State *v.* Maloney, (1901) 65 S. W. 871, appointment of officer to board newly created until the next election is an appointment to fill a vacancy within the constitution.

Virginia.— See Painter *v.* St. Clair, 98 Va. 85, 34 S. E. 989, supervisor is a member of the road commission by virtue of his office.

See 25 Cent. Dig. tit. "Highways," § 304.

28. People *v.* Carver, 5 Colo. App. 156, 38 Pac. 332 (by county commissioners in office at the time); Wayne County Road Com'rs *v.* Wayne County, 148 Mich. 255, 111 N. W. 901; People *v.* Havemeyer, 3 Hun (N. Y.) 97 (creation of board of state engineers is valid); Matter of Kerr, 57 Misc. (N. Y.) 324, 108 N. Y. Suppl. 591 (appointee himself cannot make one of the necessary number of board to appoint); Ice *v.* Marion County Ct., 40 W. Va. 118, 20 S. E. 809 (by county court). See, however, Read *v.* Com., 3 Bibb (Ky.) 484, holding that the right of the court to appoint officer cannot be attacked on his trial for delinquency.

29. Allison *v.* State, 60 Ala. 54 (of minor is voidable); Boyd County *v.* Arthur, 118 Ky. 932, 82 S. W. 613, 26 Ky. L. Rep. 906 (cannot order that magistrates be supervisors); Pulaski County *v.* Sears, 117 Ky. 249, 78 S. W. 123, 25 Ky. L. Rep. 1381; Daviess County *v.* Goodwin, 116 Ky. 891, 77 S. W. 185, 25 Ky. L. Rep. 1081 (county judge not eligible to be supervisor of roads).

Residence in the district may be necessary. Spann *v.* State, 14 Ala. 588; People *v.* Markiewicz, 225 Ill. 563, 80 N. E. 256 [*affirming* 126 Ill. App. 203] (as legal voter and resident); People *v.* Whipple, 187 Ill. 547, 58 N. E. 468 [*affirming* 87 Ill. App. 145].

who must duly qualify.[30] The election or appointment is not necessarily defeated by informalities.[31] The appointment of someone to fill a vacancy may be enforced by judicial order.[32]

b. Bond. Statutes commonly provide that road officers shall give bond for the faithful performance of their duties.[33] However, the omission to give bond does not *ipso facto* oust the appointee from office or render him a trespasser. He is at least an officer *de facto*.[34]

30. State *v.* Ayres, 15 N. J. L. 479; State *v.* Burnet, 14 N. J. L. 385; State *v.* Davis, 13 N. J. L. 10, all requiring oath of office.

Necessity of bond see *infra*, IV, B, 1, b.

31. *California.*— Wristlen *v.* Donlan, 79 Cal. 472, 21 Pac. 868.

Maryland.— State *v.* Baltimore County, 29 Md. 516, failure to order election within specified time.

Massachusetts.— Clark *v.* Easton, 146 Mass. 43, 14 N. E. 795, although town had not accepted the statute.

New Jersey.— State *v.* Meyers, 29 N. J. L. 392.

New York.— Bentley *v.* Phelps, 27 Barb. 524, formal acceptance omitted.

Tennessee.— Mitchell *v.* State, 2 Swan 554, officer waives irregularity by acting in office.

See 25 Cent. Dig. tit. "Highways," § 304.

Constitutional objections.— The board of road commissioners for Wayne county, appointed by the county clerk and the mayor of Detroit, as provided by section 6, Act No. 146, Pub. Acts (1905), being appointed in an unconstitutional manner, are not officers *de jure*, and are therefore not entitled to disburse the fund raised by a tax levied by them, notwithstanding the board of supervisors recognized them as officers in so far as to spread the tax levied by them. Wayne County Road Com'rs *v.* Wayne County, 148 Mich. 255, 111 N. W. 901.

32. People *v.* Marlette, 94 N. Y. App. Div. 592, 88 N. Y. Suppl. 379 [*affirming* 41 Misc. 151, 83 N. Y. Suppl. 962]. And see MANDAMUS, 26 Cyc. 251.

33. Wells *v.* Stombock, 59 Iowa 376, 13 N. W. 339 (expending money for materials which he should pay over to township clerk is a breach of the bond); Ham *v.* Silvernail, 7 Hun (N. Y.) 33 (that in receiving and keeping money the officer acted without authority is no defense); Mead Tp. *v.* Couse, 156 Pa. St. 311, 27 Atl. 26.

No action lies on the bond for personal injuries resulting from the breaking of a bridge (Coleman *v.* Eaker, 111 Ky. 131, 63 S. W. 484, 23 Ky. L. Rep. 513), or for failure of the commissioner to take a bond from a contractor for the payment of labor and material used in his work (State *v.* Miller, 123 Mo. App. 730, 101 S. W. 616).

Refusal to accept bond.— Where a supervisor is duly elected, and is ready and willing to give a proper bond, as required by the Pennsylvania act of March 16, 1860 (Pamphl. Laws 174), the township auditors cannot refuse to accept the security because the supervisor owes a debt to the township which he refuses to pay; but the duties of the auditors are to accept the security offered, and, if a balance is due to the township by the supervisor, to proceed to collect the same by legal process. Rice's Appeal, 158 Pa. St. 157, 27 Atl. 842.

Prerequisite to action on bond.— It is not necessary, as a prerequisite to an action on the official undertaking of a highway commissioner, that a demand be made upon him for the records of his office under Town Law, § 84. That section has reference only to a proceeding to secure such records. Hadley *v.* Garner, 116 N. Y. App. Div. 68, 101 N. Y. Suppl. 777.

Parties defendant.— In an action by a town against the sureties on an official undertaking of the commissioner of highways, it is not necessary to join the commissioner as a party defendant. Hadley *v.* Garner, 116 N. Y. App. Div. 68, 101 N. Y. Suppl. 777.

Sufficiency of complaint.— An allegation that the bond was executed in the county court or approved by that court is necessary. Coleman *v.* Eaker, 111 Ky. 131, 63 S. W. 484, 23 Ky. L. Rep. 513. When the official undertaking of a commissioner of highways states that J of the town of H has been duly elected commissioner of highways, without stating for what town he was elected, a complaint setting out such undertaking does not fail to state a cause of action on the theory that no specific obligee is named, for by Town Law, § 50, only electors and residents of a town are eligible to town offices. And while it is inartificial to set out the breach of an undertaking by negativing the language of its conditions, yet it is sufficient as an allegation of breach upon demurrer. In any event the remedy for the defect is by motion to make the complaint more definite and certain. Hadley *v.* Garner, 116 N. Y. App. Div. 68, 101 N. Y. Suppl. 777.

Evidence.— Where an account is required to be filed "on or before" a certain date, evidence that defendant did not file it "on" that date is insufficient to show a breach of his bond. Sherwood Forest *v.* Benedict, 48 Wis. 541, 4 N. W. 582.

34. Willey *v.* Windham, 95 Me. 482, 50 Atl. 281; Foot *v.* Stiles, 57 N. Y. 399; Matter of Kerr, 57 Misc. (N. Y.) 324, 108 N. Y. Suppl. 591 (holding that, although a statute provides that if one elected highway commissioner neglects to file his bond within ten days of notice of his election he shall be deemed to refuse to serve, and that the office may be filled as in case of vacancy, where applicant was elected November 5. filed his oath November 21, was notified of his election December 7, his predecessor's term expired December 31, and he presented his bond for approval January 2 following,

2. Creation and Tenure of Office. The creation and tenure of highway offices depends on statute.[35] Highway officers may hold over on failure to elect a successor,[36] and may be appointed to fill a vacancy.[37] They may lose office by operation of law,[38] by resignation,[39] or removal.[40] Commissioners of highways, receiving their powers from express grant of the legislature, are not corporations, and, in the absence of express authority, have no right to expel from among them one appointed to the position by the state.[41]

3. Meetings and Records. A road district board may commonly act by a majority at a meeting legally called or in which all participate.[42] It has been

he is entitled to the office, no valid attempt to fill the vacancy, if one existed, having been made, and no actual vacancy having been judicially determined to exist); Lower Merion Tp. *v.* Frederick, 22 Pa. Co. Ct. 448, 15 Montg. Co. Rep. 105.

35. People *v.* Carver, 5 Colo. App. 156, 38 Pac. 332; Kinmonth *v.* Wall Tp., 73 N. J. L. 440, 63 Atl. 861; Harrington Tp. Road Commission *v.* Harrington Tp., 54 N. J. L. 274, 23 Atl. 666.

The legislature cannot enlarge the term of an elected town officer by an act passed after his election; and hence the provisions of Laws (1893), c. 344, for the enlargement of the term of office of certain town highway commissioners from one year to two years, are to be construed as applicable only to officers elected after its passage. People *v.* Randall, 151 N. Y. 497, 45 N. E. 841 [*affirming* 91 Hun 266, 36 N. Y. Suppl. 202].

When term expires.— By force of the Public Officers Law (Laws (1892), c. 681, art. 1, § 5), where an officer subject to its provisions, such as a town commissioner of highways, is lawfully holding over, the office is to be deemed vacant for the purpose of electing a successor from and after the expiration of the term for which the incumbent was chosen, although the term of the office, as distinguished from the term for which he was chosen, may have been in the meantime enlarged. People *v.* Randall, 151 N. Y. 497, 45 N. E. 841 [*affirming* 91 Hun 266, 36 N. Y. Suppl. 202].

36. Bunker *v.* Gouldsboro, 81 Me. 188, 16 Atl. 543; *In re* Highway, 16 N. J. L. 91.

37. See cases cited *infra*, this note.

Notice.— When there is a vacancy in the board of road commissioners which can legally be filled in vacation by a judge of the court of common pleas, it is not necessary for the party applying to have the vacancy filled to give notice of the application. Goodwin *v.* Milton, 25 N. H. 458. So the power conferred by the New Jersey act of 1872 upon the judge of the circuit court to fill a vacancy in the board of commissioners to make assessments resulting from death, absence, or other disability can be exercised when a member of the board resigns, and no notice of such appointment is necessary in the absence of a statutory requirement to that effect. King *v.* Duryea, 45 N. J. L. 258.

When vacancy exists see People *v.* Sandman, 12 Hun (N. Y.) 165. Failure to elect is not treated as a vacancy. State *v.* Rothwell, 5 Harr. (Del.) 312. *Contra*, People *v.* Randall, 12 Misc. (N. Y.) 619, 34 N. Y. Suppl. 450.

38. See cases cited *infra*, this note.

One becoming a non-resident may lose his office *ipso facto*. Mauck *v.* Lock, 70 Iowa 266, 30 N. W. 566. But see Mitchell *v.* State, 2 Swan (Tenn.) 554 (holding that removal from bounds does not excuse officer from acting); State *v.* Nelson, 7 Wash. 114, 34 Pac. 562 (holding that commissioners cannot oust overseer by changing boundaries of his district).

The refusal of a highway surveyor to execute a receipt for a tax bill does not vacate his office. Cummings *v.* Clark, 15 Vt. 653.

39. State *v.* Ferguson, 31 N. J. L. 107, holding, however, that resignation takes effect only when accepted at a meeting duly notified.

40. People *v.* Carver, 5 Colo. App. 156, 38 Pac. 332, holding that under Colo. Sess. Laws (1891), p. 303, providing that the general road overseer may be removed by the board of county commissioners for reasons satisfactory to them, they may remove him at will without any hearing; but that under Gen. St. (1883) § 1160, providing that the board of county commissioners shall meet on certain days, and at such other times as in the opinion of the board the public interests may require, a road overseer cannot be removed or appointed at a special meeting, called for another purpose, at which all the commissioners are not present.

41. State *v.* Lancaster Road Com'rs, 2 Brev. (S. C.) 293.

42. Lancaster Highway Com'rs *v.* Baumgarten, 41 Ill. 254.

All must act in Pennsylvania (Batten *v.* Brandywine Tp., 5 Pa. L. J. 546, on questions requiring deliberation. And see Somerset Tp. *v.* Parson, 105 Pa. St. 360 (holding that one cannot bind the township); Logan *v.* Rochester Tp., 21 Pa. Super. Ct. 113 (holding that where a township has but two supervisors, they must honestly confer with each other, and fairly deliberate in the interest of the taxpayers before they attempt to bind the township by their action). *Contra*, Com. *v.* Colley Tp., 29 Pa. St. 121, where supervisors divide the township among them), unless the act is purely ministerial (Brodhead *v.* Lower Saucon Tp., 2 Lehigh Val. L. Rep. 381). So in New Hampshire it is only where it would be impossible to convene the board that the action of a minority is legal, notwithstanding a usage of a town for highway surveyors to furnish their own services and pay without special authority. Scribner *v.*

held that the district officers need not keep a record,[43] in the absence of statute to the contrary.[44]

4. Compensation. Highway district officers are entitled to compensation as fixed by statute.[45]

Hollis, 48 N. H. 30. In Illinois in an emergency an individual commissioner has power to make a temporary crossing without special authority given to him at a regular or special meeting of the board of commissioners, where no expense would thereby be cast on the body politic. Meacham *v.* Lacey, 133 Ill. App. 208.

Unless those absent were duly notified of the meeting a majority cannot act. People *v.* Williams, 36 N. Y. 441 [*overruling* Tucker *v.* Rankin, 15 Barb. (N. Y.) 471]; Mericle *v.* Mulks, 1 Wis. 366. So an order of commissioners of highways signed by only two, and not reciting a meeting, etc., of three, or notice to a third, is void unless it affirmatively appears that the town had only two commissioners. It cannot be presumed that there was not a third. Simmons *v.* Sines, 4 Abb. Dec. (N. Y.) 246, 4 Keyes 153.

Commissioners of highways must act as a body, and not as individuals, to bind the body. So where a paper was signed by them, agreeing to dismiss a proceeding to assess damages for land for a road, no two of them being together when signing, and they had never met and conferred together in reference to the agreement, and had made no minutes or entry thereof, it was held no error in the justice to refuse to dismiss the proceeding. McManus *v.* McDonough, 107 Ill. 95.

Where a vacancy exists in a board of road commissioners, there is no authority in the remaining members to discharge the duties intrusted to the board. Palmer *v.* Conway, 22 N. H. 144.

Where a commissioner is disqualified.— Va. Acts Assembly (1897–1898), § 5, authorizing the opening of roads, provides that when either of the members of a district road commission to which an application for opening a road is made is personally interested therein by reason of ownership of any land affected, etc., the chairman of the board of supervisors shall summon the road commissioners from the nearest district in which the commissioners may have no such interest or relationship, to act on such application. It was held that such chairman must summon the whole board of such adjoining district, and not simply one of its members to take the place of the disqualified member of his commission. Painter *v.* St. Clair, 98 Va. 85, 34 S. E. 989.

Notice of adjournment.— Where the commissioners of highways at their meeting to consider the propriety of laying out a public road make an adjournment, that fact should be publicly announced, and notice of the adjourned meeting should be posted up at the place where the first meeting is had; but a failure to post such notice at the place required by law, when it appears that such notice was posted at a more public place than that where the first meeting is had, is but an irregularity that will not affect the jurisdiction of the board of commissioners. Wright *v.* Middlefork Highway Com'rs, 145 Ill. 48, 33 N. E. 876.

43. Old Town *v.* Dooley, 81 Ill. 255 (holding that commissioners are quasi-corporations and need not keep any records); Interstate Independent Tel., etc., Co. *v.* Towanda, 123 Ill. App. 55 [*affirmed* in 221 Ill. 299, 77 N. E. 456] (holding that a notice given by highway commissioners pursuant to statute is valid, notwithstanding an authorizing resolution was not made a matter of record; except where the statute specifically so provides, highway commissioners may act without an antecedent record being made).

44. Chicago Great Western R. Co. *v.* Leaf River, 135 Ill. App. 559. And see Gillett *v.* Taylor, 48 Ill. App. 403; Mericle *v.* Mulks, 1 Wis. 366.

45. *Illinois.*— Martin *v.* La Salle, 21 Ill. App. 438, daily allowance not limited to attendance on board meetings.

Indiana.— Montgomery County *v.* Fullen, 118 Ind. 158, 20 N. E. 771.

New Hampshire.— See Hoit *v.* Babcock, 17 N. H. 260, holding that road commissioners may recover from parties requiring their services, and may severally sue for their fees.

North Carolina.— State *v.* Beardsley, (1900) 35 S. E. 241.

Washington.— Robertson *v.* King County, 20 Wash. 259, 55 Pac. 52.

United States.— Chinese Tax Cases, 14 Fed. 338, 8 Sawy. 384, for collecting road tax.

See 25 Cent. Dig. tit. "Highways," § 308.

But see People *v.* Pelham, 74 Hun (N. Y.) 83, 26 N. Y. Suppl. 122.

Deficiency in funds.— If road taxes are nearly all paid in work, so that there are not funds enough to pay the road overseer, the deficiency should be paid from the county treasury. State *v.* Bourn, 75 Mo. 473.

A road-master may recover for the use of his team by consent of the town officers (Willey *v.* Windham, 95 Me. 482, 50 Atl. 281), but not where such use is unknown to the supervisors (Andrus *v.* Shippen Tp., 36 Pa. Super. Ct. 22).

A road overseer must have his account approved by the town board. Denver *v.* Myers, 63 Nebr. 107, 88 N. W. 191.

Taxes worked out in labor cannot be made the ground for commissions. Brennan's Appeal, 1 Walk. (Pa.) 522; Brennan's Appeal, 38 Leg. Int. (Pa.) 105; Lewis *v.* Flanagan, 1 Leg. Rec. (Pa.) 141.

Statutes.— In the absence of statute authorizing it road officers are not entitled to compensation. Sikes *v.* Hatfield, 13 Gray (Mass.) 347. Ky. St. § 4310, fixes the compensation of road overseers by exempting them from jury service and from poll tax for road and bridge purposes, and this excludes the idea that they can legally be allowed anything in addition thereto for their services

5. Powers and Authority — a. In General. The authority of road officers is entirely dependent on legislative act,[46] and is strictly confined to the highway limits [47] and to highway matters.[48] They may in general employ counsel when necessary,[49] and necessary clerical services;[50] but they cannot bind towns by contracts.[51]

b. Indebtedness and Expenditures. Highway officers have ordinarily no authority to issue certificates of indebtedness,[52] to create indebtedness,[53] or to purchase on credit;[54] and they have a limited authority to expend money.[55]

6. Duties and Liabilities [56] — a. Duties; Failure to Perform. One elected as a highway officer is commonly bound to serve [57] after due notice of his election;[58] and is sometimes subjected to a penalty for refusal to serve.[59] It is the duty of a road overseer to account for all moneys coming into his hands, the disbursements made, and for what purpose.[60]

b. Personal Liabilities. A highway officer may be liable for his own negligent [61]

as overseers. Vaughn *v.* Hulett, 119 Ky. 380, 84 S. W. 309, 27 Ky. L. Rep. 35. Statutes concerning compensation are not usually retroactive. Placer County *v.* Freeman, 149 Cal. 738, 87 Pac. 628; Blanchard *v.* La Salle, 99 Ill. 278 [*affirming* 1 Ill. App. 635].

46. See the statutes of the different states. And see Harmon *v.* Taylor, 15 Lea (Tenn.) 535 (holding that road commissioners cannot control litigation as to establishment of roads); Piché *v.* Portneuf, 17 Quebec Super. Ct. 589 (holding that the powers of a special overseer depend on powers given him by the council).

47. Posey Tp. *v.* Senour, 42 Ind. App. 580, 86 N. E. 440; Clay *v.* Postal Tel.-Cable Co., 70 Miss. 406, 11 So. 658; Moore *v.* Hawk, 57 Mo. App. 495; Silverthorn *v.* Parsons, 8 Ohio Cir. Dec. 349, "highways," not including highways in villages.

Authority over roads between two municipalities see Arbec *v.* Lussier, 21 Quebec Super. Ct. 204; Nelson *v.* Megantic, 20 Quebec Super. Ct. 334; Rocan *v.* St. Vincent de Paul, 16 Quebec Super. Ct. 379.

48. Posey Tp. *v.* Senour, 42 Ind. App. 580, 86 N. E. 440; St. Andrews Parish *v.* Charleston Min., etc., Co., 76 S. C. 382, 57 S. E. 201, holding, however, that they have jurisdiction over highways acquired by prescription.

49. Duntz *v.* Duntz, 44 Barb. (N. Y.) 459, in the preparation and trial of an indictment for obstructing highway.

But not at expense of county or town. Ross *v.* Bibb County, 130 Ga. 585, 61 S. E. 465; People *v.* Warren County, 82 Hun (N. Y.) 298, 31 N. Y. Suppl. 248.

50. Ross *v.* Collins, 106 Ill. App. 396, in making out tax list.

51. Posey Tp. *v.* Senour, 42 Ind. App. 580, 86 N. E. 440; Niland *v.* Bowron, 193 N. Y. 180, 85 N. E. 1012 [*affirming* 113 N. Y. App. Div. 661, 99 N. Y. Suppl. 914]; People *v.* Oyster Bay, 175 N. Y. 394, 67 N. E. 620 [*reversing* 80 N. Y. App. Div. 280, 80 N. Y. Suppl. 309] (holding that commissioners of highways have no right to represent the town and contract for it in emergencies, or to make any contract binding on the town, unless authorized by statute); Van Antwerp *v.* Dell Rapids Tp., 3 S. D. 305, 53 N. W. 82, 5 S. D. 447, 59 N. W. 209.

52. Sullivan *v.* Highway Com'rs, 114 Ill. 262, 29 N. E. 688 (interest bearing orders); Van Alstyne *v.* Freday, 41 N. Y. 174 (to borrow money or give notes to bind successors). But see Duntz *v.* Duntz, 44 Barb. (N. Y.) 459, officer advancing money to pay proper claim may recover the amount from his successor.

53. St. Louis, etc., R. Co. *v.* People, 200 Ill. 365, 65 N. E. 715; Niland *v.* Bowron, 193 N. Y. 180, 85 N. E. 1012 [*affirming* 113 N. Y. App. Div. 661, 99 N. Y. Suppl. 914]; Sweet *v.* Conley, 20 R. I. 381, 39 Atl. 326, except perhaps in emergency. See People *v.* Queens County, 131 N. Y. 468, 30 N. E. 488 [*reversing* 16 N. Y. Suppl. 705]; F. C. Austin Mfg. Co. *v.* Ayr Tp., 24 Pa. Super. Ct. 91.

54. Hanks *v.* North, 58 Iowa 396, 10 N. W. 785, (1880) 7 N. W. 156; Wells *v.* Grubb, 58 Iowa 384, 10 N. W. 799.

55. Atty.-Gen. *v.* Bay County, 34 Mich. 47; Fowler *v.* Westervelt, 40 Barb. (N. Y.) 374, 17 Abb. Pr. 59. See Wells *v.* Goffstown, 16 N. H. 53, holding that where they can purchase they may also have lumber surveyed.

56. Liability for injuries caused by defective ways see *infra*, VII, E, 3, b, (II).

Liability for repair of highway see *infra*, V, J, 2.

57. Paterson Ave., etc., Road Com'rs *v.* Kingsland, 44 N. J. L. 567 (mandamus may be used); France *v.* State, (Tex. Cr. App. 1903) 77 S. W. 452 (inability to read and write being no defense).

A written excuse within the statute must be furnished. Allison *v.* State, 60 Ala. 54; Spann *v.* State, 14 Ala. 588.

58. Yocum *v.* Waynesville, 39 Ill. 220, holding, however, that public reading of name at meeting is sufficient notice.

59. Winnegar *v.* Roe, 1 Cow. (N. Y.) 258; State *v.* Russell, 3 Head (Tenn.) 165. And see Haywood *v.* Wheeler, 11 Johns. (N. Y.) 432.

60. Denver *v.* Myers, 63 Nebr. 107, 88 N. W. 191, holding also that the law implies that such report shall be sufficiently comprehensive and intelligent that its correctness may be inquired into and passed upon by those whose duty it is to examine and to approve the accounting so made.

61. Huey *v.* Richardson, 2 Harr. (Del.)

or malicious [62] ministerial acts,[63] or those of his servants,[64] or for his unauthorized acts [65] of trespass.[66] Highway officers are not liable while acting within their authority,[67] or while acting in good faith within their general powers in excess of their special authority,[68] or for errors of judgment,[69] their duty being

206; Sells *v.* Dermody, 114 Iowa 344, 86 N. W. 325 (holding that the fact that a person elected a road supervisor is subject to a penalty for refusing to accept the office does not relieve such officer from individual liability for negligence in failing to perform ministerial duties in keeping the roads in repair); Gould *v.* Schermer, 101 Iowa 582, 70 N. W. 697 (chargeable with ordinary negligence and not merely "gross" negligence); Moynihan *v.* Todd, 188 Mass. 301, 74 N. E. 367, 108 Am. St. Rep. 473. *Contra*, Young *v.* Road Com'rs, 2 Nott & M. (S. C.) 537.

However, in an action against highway commissioners to recover damages resulting from acts done in their official capacity, plaintiff cannot recover against one of the defendants for an act done in his personal capacity, and not directed or assented to by the board. Illinois Agricultural Co. *v.* Cranston, 21 Ill. App. 174. And a road supervisor, liable under Iowa Code, § 1557, for all damages resulting from a defect in a highway which is allowed to remain after a reasonable time for repairing the same after the receipt of a written notice thereof, is not personally liable for failure to repair a defect in a highway where notice thereof has not been given to him. Sells *v.* Dermody, 114 Iowa 344, 86 N. W. 325.

62. *Iowa.*— Wilding *v.* Hough, 37 Iowa 446, malice in tearing down house being provable by showing that road was not improved.

Missouri.— Cook *v.* Hecht, 64 Mo. App. 273.

Nebraska.— Denver *v.* Myers, 63 Nebr. 107, 88 N. W. 191, fraudulent overpayments.

New Hampshire.— Makepeace *v.* Worden, 1 N. H. 16, converting wood for private use.

New Jersey.— Winter *v.* Peterson, 24 N. J. L. 524, 61 Am. Dec. 678.

New York.— Beardslee *v.* Dolge, 143 N. Y. 160, 38 N. E. 205, 42 Am. St. 707 (for false statements in return of proceedings, although intentions were honest); Rector *v.* Clark, 78 N. Y. 21 [*reversing* 12 Hun 189] (for failure to notify and false return).

Ohio.— Brick *v.* Green, Wright 86, refusal to certify to work done.

See 25 Cent. Dig. tit. "Highways," § 313.

63. Tearney *v.* Smith, 86 Ill. 391 (ministerial act of construction of highway); McCord *v.* High, 24 Iowa 336; Clark *v.* Miller, 54 N. Y. 528 [*affirming* 42 Barb. 255, 47 Barb. 38], although refusal to act is based on a *bona fide* opinion that the statute is unconstitutional).

64. Ely *v.* Parsons, 55 Conn. 83, 10 Atl. 499, for unnecessary cutting by laborer acting under general directions. *Contra*, Huey *v.* Richardson, 2 Harr. (Del.) 206, for mistake of competent surveyor.

65. *Louisiana.*— Michel *v.* Terrebonne Police Jury, 9 La. Ann. 67; Michel *v.* West Baton Rouge Police Jury, 3 La. Ann. 123; Morgan *v.* Pointe Coupe Police Jury, 11 La. 157.

Maine.— Field *v.* Towle, 34 Me. 405.

Nebraska.— Denver *v.* Myers, 63 Nebr. 107, 88 N. W. 191, overpayments.

New Hampshire.— Waldron *v.* Berry, 51 N. H. 136; Brown *v.* Rundlett, 15 N. H. 360.

New York.— Mather *v.* Crawford, 36 Barb. 564.

North Carolina.— Hitch *v.* Edgecombe County, 132 N. C. 573, 44 S. E. 30.

Pennsylvania.—Eisenhart *v.* Hykes, 4 Lanc. L. Rev. 98.

66. Beyer *v.* Tanner, 29 Ill. 135 (even if they are misled as to the correct line of a road); Pinkerton *v.* Randolph, 200 Mass. 24, 85 N. E. 892 (cutting trees from street in front of plaintiff's property; selectmen and agents joint trespassers); Ross *v.* Malcom, 40 Pa. St. 284; Webster *v.* White, 8 S. D. 479, 66 N. W. 1145. But see Brown *v.* Bridges, 31 Iowa 138 (officers not liable for minute trespasses); Foot *v.* Stiles, 57 N. Y. 399 (holding that the omission of one elected to the office of commissioner of highways to execute and file an official bond as required by statute does not render his official acts void in such a sense as to make him liable as trespasser therefor).

67. Spitznogle *v.* Ward, 64 Ind. 30; Sage *v.* Laurain, 19 Mich. 137; McConnell *v.* Dewey, 5 Nebr. 385 (unless action given by statute); Driggs *v.* Phillips, 103 N. Y. 77, 8 N. E. 514; Finucan *v.* Ramsden, 95 N. Y. App. Div. 626, 88 N. Y. Suppl. 430.

68. Mann *v.* Richardson, 66 Ill. 481, holding that when public agents acting within the scope of their general powers in good faith contract with parties having full knowledge of the extent of their authority, or who have equal means of knowledge with themselves, they do not become individually liable unless the intent to incur personal responsibility is clearly expressed, although it is found that through ignorance of the law they may have exceeded their authority. See Parks *v.* Ross, 11 How. (U. S.) 362, 13 L. ed. 730.

69. *Illinois.*—Neville *v.* Viner, 115 Ill. App. 364; Summers *v.* People, 109 Ill. App. 430.

Iowa.— Nolan *v.* Reed, 139 Iowa 68, 117 N. W. 25.

Maine.— Wilson *v.* Simmons, 89 Me. 242, 36 Atl. 380. But see Frost *v.* Portland, 11 Me. 271.

Massachusetts.— Benjamin *v.* Wheeler, 8 Gray 409; Callender *v.* Marsh, 1 Pick. 418.

New Hampshire.— Waldron *v.* Berry, 51 N. H. 136; Rowe *v.* Addison, 34 N. H. 306.

New York.— Freeman *v.* Cornwall, 10 Johns. 470.

See 25 Cent. Dig. tit. "Highways," § 313.

simply to exercise a reasonable discretion, with which the court will not interfere if they act in good faith.[70]

c. Justification by Authority. Highway officers may justify their action when proceeding under an order of court [71] or other authority,[72] as where the road is duly established by law.[73]

d. Liability of Municipality For Negligent or Wrongful Acts of Officers. A township or county is responsible for the negligence of its agents where they act within the scope of their authority,[74] but not when they act beyond their

70. *Connecticut.*— Rudnyai *v.* Harwinton, 79 Conn. 91, 63 Atl. 948.

Indiana.— Cason *v.* Lebanon, 153 Ind. 567, 55 N. E. 768.

Iowa.— Dewey *v.* Des Moines, 101 Iowa 416, 70 N. W. 605.

Maryland.— Blundon *v.* Crosier, 93 Md. 355, 49 Atl. 1.

Michigan.— Campau *v.* Grosse Pointe Highway Com'r, 132 Mich. 365, 93 N. W. 879.

New Jersey.— Mendham Tp. *v.* Losey, 2 N. J. L. 347.

Pennsylvania.— Le Moyne *v.* Washington County, 213 Pa. St. 123, 62 Atl. 516; Oil City *v.* Oil City Boiler Works, 152 Pa. St. 348, 25 Atl. 549.

Wisconsin.— Benson *v.* Waukesha, 74 Wis. 31, 41 N. W. 1017.

See 25 Cent. Dig. tit. "Highways," § 313 *et seq.*

71. Cockrun *v.* Williamson, 53 Ark. 131, 13 S. W. 592; McIlvoy *v.* Speed, 4 Bibb (Ky.) 85 (order of court held sufficient where road was used for years without showing that road was opened by applicant); Crenshaw *v.* Snyder, 117 Mo. 167, 22 S. W. 1104; Walker *v.* Likens, 24 Mo. 298 (holding that road overseers and hands compelled to work roads are not bound at their peril to see that the orders under which they act are in conformity to the constitution and the laws); Wooldridge *v.* Rentschler, 62 Mo. App. 591 (where circuit court has jurisdiction); Rousey *v.* Wood, 57 Mo. App. 650 (where record discloses jurisdiction); Peery *v.* Gill, 36 Mo. App. 685 (notwithstanding irregularities in the proceedings in which order is made); Yeager *v.* Carpenter, 8 Leigh (Va.) 454, 31 Am. Dec. 665 (even though irregular).

Court orders held to be no justification see Shoup *v.* Shields, 116 Ill. 488, 6 N. E. 502 (where hedge destroyed is not within boundaries of highway); Swan Tp. Highway Com'rs *v.* People, 31 Ill. 97; Barnard *v.* Haworth, 9 Ind. 103 (where order is void on its face); Brown *v.* Neal, 36 Me. 407 (where town layout proceedings are illegal); Patten *v.* Weightman, 51 Mo. 432 (wanton trespass); Peed *v.* Barker, 61 Mo. App. 556; Rousey *v.* Wood, 57 Mo. App. 650 (where court had no jurisdiction); Rousey *v.* Wood, 47 Mo. App. 465; People *v.* Marlette, 94 N. Y. App. Div. 592, 88 N. Y. Suppl. 379 [*affirming* 41 Misc. 151, 83 N. Y Suppl. 962] (wrongful filing of a certificate of abandonment); Welch *v.* Piercy, 29 N. C. 365 (where court had no jurisdiction).

72. *Maine.*— Hovey *v.* Mayo, 43 Me. 322.

Massachusetts.— Gaylord *v.* King, 142 Mass. 495, 8 N. E. 596.

Missouri.— Patten *v.* Weightman, 51 Mo. 432; Butler *v.* Barr, 18 Mo. 357.

New Hampshire.— Rossiter *v.* Russell, 18 N. H. 73, after tender of damages assessed to landowner.

New York.— Beach *v.* Furman, 9 Johns. 229.

Pennsylvania.— Cook *v.* Deerfield Tp., 64 Pa. St. 445, 3 Am. Rep. 605.

Vermont.— Morse *v.* Weymouth, 28 Vt. 824 (when done in a reasonable manner); Patchin *v.* Doolittle, 3 Vt. 457.

See 25 Cent. Dig. tit. "Highways," § 314.

73. Caldwell *v.* Evans, 85 Ill. 170 (valid order on lay-out proceedings); Craigie *v.* Mellen, 6 Mass. 7 (although the time for appeal from the lay-out has not passed); Robinson *v.* Winch, 66 Vt. 110, 28 Atl. 884 (although land damages not assessed).

The defense offered held to be no justification see Smithers *v.* Fitch, 82 Cal. 153, 22 Pac. 935 (where defendant failed to prove notice); Sherman *v.* Buick, 32 Cal. 241, 91 Am. Dec. 577 (where all statutory requirements in laying out a road were not complied with); Marvin *v.* Pardee, 64 Barb. (N. Y.) 353 (where the lay-out was not legal); Kelsey *v.* Burgess, 12 N. Y. Suppl. 169 (where the certificate was insufficient); Beckwith *v.* Beckwith, 22 Ohio St. 180. In an action of trespass against an overseer of highways, he cannot justify by showing an order from the commissioners to open a road, unless it be shown to have been legally laid out. Caldwell *v.* Evans, 85 Ill. 170; Guptail *v.* Teft, 16 Ill. 365.

74. *Connecticut.*— Bronson *v.* Washington, 57 Conn. 346, 18 Atl. 264.

Maine.— Getchell *v.* Oakland, 89 Me. 426, 36 Atl. 627; Haskell *v.* Knox, 3 Me. 445.

Massachusetts.— Hawks *v.* Charlemont, 107 Mass. 414.

Minnesota.— Hutchinson Tp. *v.* Filk, 44 Minn. 536, 47 N. W. 255; Woodruff *v.* Glendale, 23 Minn. 537.

Nebraska.— Denver *v.* Myers, 63 Nebr. 107, 88 N. W. 191; Douglas County *v.* Taylor, 50 Nebr. 535, 70 N. W. 27, county authorized to improve through its own agents.

Texas.—Watkins *v.* Walker County, 18 Tex. 585, 70 Am. Dec. 298, overseers agents of county.

Wisconsin.— See Dodge *v.* Ashland County, 88 Wis. 577, 60 N. W. 830.

See 25 Cent. Dig. tit. "Highways," § 315.

The municipality is liable for trespass committed by its officers in entering on private property in road work. Platter *v.* Seymour, 86 Ind. 323; Hendershott *v.* Ottumwa, 46 Iowa 658, 26 Am. Rep. 182; Waldron *v.* Haverhill,

authority;[75] nor is the municipality liable when the board or officer upon whom the duty of road work is imposed by statute acts as a public officer carrying into effect a public law for the public good and not as agent of the particular municipality in which he is working,[76] unless a statute expressly or impliedly so provides.[77]

7. Actions and Proceedings — a. Civil. Actions by or against highway officers should join the parties interested,[78] by their official names,[79] and should be brought in the county where the cause of action arose.[80] The officer may set up any competent evidence in defense bearing on the question.[81] The local statutes

143 Mass. 582, 10 N. E. 481. But see District of Columbia *v.* Robinson, 14 App. Cas. (D. C.) 512 [*affirmed* in 180 U. S. 92, 21 S. Ct. 283, 45 L. ed. 440].

75. Goddard *v.* Harpswell, 88 Me. 228, 33 Atl. 980 (selectmen); Wheeler *v.* Essex Public Road Bd., 39 N. J. L. 291; Niland *v.* Bowron, 193 N. Y. 180, 85 N. E. 1012 [*affirming* 113 N. Y. App. Div. 661, 99 N. Y. Suppl. 914]; Atcheson *v.* Portage La Prairie, 10 Manitoba 39.

76. *California.*— Crowell *v.* Sonoma Co., 25 Cal. 313.

Indiana.— Jackson County *v.* Branaman, 169 Ind. 80, 82 N. E. 65; Pittsburgh, etc., R. Co. *v.* Iddings, 28 Ind. App. 504, 62 N. E. 112; Union Civil Tp. *v.* Berryman, 3 Ind. App. 344, 28 N. E. 774.

Kentucky.— Hutchison *v.* Pulaski County Ct., 11 S. W. 607, 11 Ky. L. Rep. 117.

Maine.— Emerson *v.* Washington County, 9 Me. 98.

Maryland.— Anne Arundel County *v.* Duvall, 54 Md. 350, 39 Am. Rep. 393.

Massachusetts.— MacManus *v.* Weston, 164 Mass. 263, 41 N. E. 301, 31 L. R. A. 174; Pratt *v.* Weymouth, 147 Mass. 245, 17 N. E. 538, 9 Am. St. Rep. 691; Clark *v.* Easton, 146 Mass. 43, 14 N. E. 795; Barney *v.* Lowell, 98 Mass. 570; Walcott *v.* Swampscott, 1 Allen 101; White *v.* Phillipston, 10 Metc. 108.

Missouri.— Swineford *v.* Franklin County, 73 Mo. 279 [*affirming* 6 Mo. App. 39, and *following* Reardon *v.* St. Louis County, 36 Mo. 555, holding that a county court in repairing a county road acts for the state and not for the county].

New Hampshire.— O'Brien *v.* Derry, 73 N. H. 198, 60 Atl. 843; Hall *v.* Concord, 71 N. H. 367, 52 Atl. 864, 58 L. R. A. 455; Hardy *v.* Keene, 52 N. H. 370; Ball *v.* Winchester, 32 N. H. 435.

New York.— Winchell *v.* Camillus, 190 N. Y. 536, 83 N. E. 1134 [*affirming* 109 N. Y. App. Div. 341, 95 N. Y. Suppl. 688]; People *v.* Esopus, 74 N. Y. 310; Robinson *v.* Fowler, 80 Hun 101, 30 N. Y. Suppl. 25; Lyth *v.* Evans, 33 Misc. 221, 68 N. Y. Suppl. 356.

Rhode Island.— Smart *v.* Johnston, 17 R. I. 778, 24 Atl. 830.

Wisconsin.— Dodge *v.* Ashland County, 88 Wis. 577, 60 N. W. 830.

See 25 Cent. Dig. tit. "Highways," § 315.

77. Clapper *v.* Waterford, 131 N. Y. 382, 30 N. E. 240; Winchell *v.* Camillus, 109 N. Y. App. Div. 341, 95 N. Y. Suppl. 688 [*affirmed* in 190 N. Y. 536, 83 N. E. 1134]. See also Swineford *v.* Franklin County, 73 Mo. 279.

78. *Illinois.*— Blanchard *v.* La Salle, 99 Ill. 278, by town against treasurer of highway commissioners, remedy on bond being cumulative.

Indiana.— White River Tp. *v.* Cottom, 11 Ind. 216, by township treasurer.

Iowa.— Wells *v.* Stombock, 59 Iowa 376, 13 N. W. 339, by township clerk on supervisor's bond.

Mississippi.— Attala *v.* Niles, 58 Miss. 48, supervisors allowed to defend when overseer did not.

New York.— Babcock *v.* Gifford, 29 Hun 186 (against one commissioner for acts of negligence imputable to all); Gailor *v.* Herrick, 42 Barb. 79 (supervisor who had no right to certain fund cannot sue on bond of commissioner for neglect to deliver it); People *v.* Highland, 8 N. Y. St. 531 (highway commissioner may prosecute overseer).

Texas.— Thornton *v.* Springer, 5 Tex. 587, individual cannot sue overseer for penalty under statute.

Vermont.— Newbury *v.* Johnson, Brayt. 24, by town in case for damages paid to individual injured on unrepaired road.

On change in the personnel of a board those who are its members at the time suit is brought are the proper parties. Armstrong *v.* Landers, 1 Pennew. (Del.) 449, 42 Atl. 617; Hitchman *v.* Baxter, 5 N. Y. Civ. Proc. 226 (successor in office not substituted where statute provides that execution be collected out of the officer's property); Miller *v.* Ford, 4 Rich. (S. C.) 376, 55 Am. Dec. 687 (not members when contract made).

79. Sheaff *v.* People, 87 Ill. 189, 29 Am. Rep. 49 (commissioners of highways are a quasi-corporation, and need not be named individually in an action against them); Rutland Highway Com'rs *v.* Dayton Highway Com'rs, 60 Ill. 58; Lange *v.* Soffell, 33 Ill. App. 624; St. Bartholomew's Parish Road Com'rs *v.* Murray, 1 Rich. (S. C.) 335 (may object only by plea in abatement that they should have sued individually); St. Peter's Parish Road Com'rs *v.* McPherson, 1 Speers (S. C.) 218 (can sue in names of members for the time being). See O'Fallon *v.* Ohio, etc., R. Co., 45 Ill. App. 572 (a suit against a railroad company to recover the cost of constructing and maintaining proper approaches to its crossing is properly brought by the highway commissioners in the name of the town); St. Peter's Parish Road Com'rs *v.* Guerard, 1 Speers (S. C.) 215 (fact that names of commissioners are not set out is not a ground for attacking decree).

80. People *v.* Hayes, 7 How. Pr. (N. Y.) 248.

81. Yealy *v.* Fink, 43 Pa. St. 212, 82 Am. Dec. 556, that townspeople did not want

commonly determine the liability for costs in actions brought by or against highway officers.[82]

b. Penal or Criminal — (i) *In General.* Statutes often impose liabilities for penalties,[83] and commonly provide for indictment of road officers,[84] for misfeasance or neglect of their duties in regard to road work and repairs. Under such statutes road officers cannot be prosecuted for misuse of their discretion,[85] and it is a good defense that the work was rendered impossible by facts not attributable to the officer's fault.[86]

(ii) *Indictment.* The indictment of a highway officer for a criminal offense should contain plain averments of the offense charged,[87] stating the

bridge. See Jewett *v.* Sweet, 178 Ill. 96, 52 N. E. 962 [*affirming* 77 Ill. App. 641] (commissioners cannot set up rights of adjacent owners); Rex *v.* Norfolk, [1901] 2 K. B. 268, 65 J. P. 454, 70 L. J. K. B. 575, 84 L. T. Rep. N. S. 822, 17 T. L. R. 437, 49 Wkly. Rep. 543 (power of county council to defend an action brought against surveyor or against individuals).

82. See the statutes of the several states. And see People *v.* Madison County, 125 Ill. 334, 17 N. E. 802 [*affirming* 23 Ill. App. 386] (liable as commissioners and not individually); Lyons *v.* People, 38 Ill. 347.

Costs held not recoverable against supervisors see Bettis *v.* Nicholson, 1 Stew. (Ala.) 349; Bittle *v.* Hay, 5 Ohio 269; Carter *v.* Hawley, Wright (Ohio) 74.

Liability of town for costs.— Town held liable see Sebrell *v.* Fall Creek Tp., 27 Ind. 86; McCoy *v.* McClarty, 53 Misc. (N. Y.) 69, 104 N. Y. Suppl. 80. Town held not liable see Gardner *v.* Chambersburgh, 19 Ill. 99.

83. See the statutes of the several states. And see Hizer *v.* Rockford, 86 Ill. 325 (penalty imposed on overseer for neglect to obey order of commissioners); Salt Creek *v.* Mason County Highway Com'rs, 25 Ill. App. 187; Bentley *v.* Phelps, 27 Barb. (N. Y.) 524; State *v.* Chappell, 2 Hill (S. C.) 391.

A statute as to guide-boards does not apply to roads by dedication or use. State *v.* Siegel, 54 Wis. 86, 11 N. W. 435.

Acts held not to subject the officer to the penalty see Moll *v.* Pickaway, 14 Ill. App. 343 (removing plank put down by individual); Com. *v.* House, 4 Pa. L. J. 327 (refusing to open road pending petition for review); U. S. *v.* Custis, 25 Fed. Cas. No. 14,909, 1 Cranch C. C. 417 (overseer not notified of his appointment).

The neglect of a town to erect and maintain guide-posts at all intersections of highways within its limits is one entire offense, and a separate penalty does not accrue for each intersection of roads at which the town has neglected to erect guide-posts. Clark *v.* Lisbon, 19 N. H. 286.

84. See the statutes of the several states. And see the following cases:

Alabama.— Williams *v.* State, 45 Ala. 55.

Illinois.— Lequat *v.* People, 11 Ill. 330. But see Zorger *v.* People, 25 Ill. 193.

Indiana.— State *v.* Hogg, 5 Ind. 515, for failing to repair.

Kentucky.—Com. *v.* Thompson, 4 Bibb 230; Read *v.* Com., 3 Bibb 484.

Michigan.— Hatch *v.* Calhoun Cir. Judge, 127 Mich. 174, 86 N. W. 518.

Mississippi.— State *v.* Adams County, Walk. 368.

New York.— People *v.* Adsit, 2 Hill 619.

North Carolina.— State *v.* Long, 81 N. C. 563. See also State *v.* Britt, 118 N. C. 1255, 24 S. E. 216.

Pennsylvania.— Edge *v.* Com., 7 Pa. St. 275, although supervisors are also liable to civil action for neglect of duty as overseers of the poor.

Virginia.— Com. *v.* Piper, 9 Leigh 657.

See 25 Cent. Dig. tit. "Highways," § 320.

Number of offenses.— However long a road may have been out of repair before indictment, it is but one offense; but if, after conviction, it still continues out of repair, the commissioner may again be indicted. State *v.* Chappell, 2 Hill (S. C.) 391.

Where a court directs a road wider than the law requires, a presentment may be sustained against the surveyor for not keeping it in repair to the legal width. Com. *v.* Caldwell, Litt. Sel. Cas. (Ky.) 168.

Failure to maintain guide-posts when required by law is punishable under the statutes. Lequat *v.* People, 11 Ill. 330; State *v.* Nicholson, 6 N. C. 135. But see State *v.* Smith, 25 Tex. Suppl. 64.

85. Eyman *v.* People, 6 Ill. 4; Shanks *v.* Pearson, 66 Kan. 168, 71 Pac. 252; Com. *v.* Thompson, 126 Pa. St. 614, 17 Atl. 754.

86. Mendham Tp. *v.* Losey, 2 N. J. L. 347 (where township had not furnished money for repair); State *v.* Small, 33 N. C. 571 (bad weather); State *v.* Broyles, 1 Bailey (S. C.) 134 (defense by one commissioner of roads for not repairing his division of a road that it was ordered discontinued by the whole board); Howell *v.* State, 29 Tex. App. 592, 16 S. W. 533 (road abandoned and overseer could not determine its location); Parker *v.* State, 29 Tex. App. 372, 16 S. W. 186 (that inhabitants refused to work or pay and work too expensive); Moore *v.* State, 27 Tex. App. 439, 11 S. W. 457 (impossible to make road passable if overseer had worked all his hands full time).

That defendants opened the road on a different location is no defense. Com. *v.* Johnson, 134 Pa. St. 635, 19 Atl. 803.

87. McCullough *v.* State, 63 Ala. 75 ("failed to discharge his duties as such overseer" held sufficient); State *v.* Brown, 8 Blackf. (Ind.) 69 (road so obstructed by trees as to be nearly impassable).

qualification [88] and duties [89] of the officer, the place [90] and time [91] of the offense, with a proper conclusion.[92]

(III) *Proof.* As in other criminal prosecutions, the evidence must show the elements of the crime beyond a reasonable doubt, as that the road is public,[93] as described in the indictment,[94] the appointment,[95] notification,[96] and qualification [97] of the officers, and the offense complained of.[98] The burden of proving matter of defense is on defendant.[99]

A presentment need not be in the form of an indictment. Blankenship *v.* State, 40 Ga. 680.

Indictments held bad for not negativing defenses see State *v.* Shields, 8 Blackf. (Ind.) 151; State *v.* Mathis, 30 Tex. 506 (failing to negative existence of intermediate town from which mile-posts might be reckoned); State *v.* Smith, 25 Tex. Suppl. 64.

Duplicity held no defense to the indictment see Edge *v.* Com., 7 Pa. St. 275 (neglect to open and repair may be joined in one count); State *v.* Jopling, 10 Humphr. (Tenn.) 418 (to mile-mark and put up pointers at forks). But see Greenlow *v.* State, 4 Humphr. (Tenn.) 25, holding that charges of failure to repair and to mile-mark a road cannot be joined in one count.

Wilfulness if an element of the offense should be set out. State *v.* Walker, 82 Mo. 489; State *v.* Levens, 22 Mo. 469; State *v.* Miller, 100 N. C. 543, 5 S. E. 925.

88. State *v.* Hageman, 13 N. J. L. 314, when defendant was elected, when his office commenced and terminated, and that he was in office during the period complained of.

89. Ward *v.* State, (Ala. 1905) 39 So. 923; State *v.* Halifax, 15 N. C. 345 (holding that commissioners of towns are not of common right bound to repair the streets, and an indictment against them for not repairing must set forth how the obligation arises, charging what duty neglected); Massure *v.* State, 36 Tex. 377 (must show that overseer bound by law to keep road in repair). See also State *v.* Kopper, 65 Mo. 478, holding that the order of court designating how much inhabitants shall work on the roads should be set forth.

Where the duty is imposed by general law it need not be alleged. State *v.* Miller, 100 N. C. 543, 5 S. E. 925.

Indictments held bad as not pointing out the officers' district see State *v.* McElroy, 3 Heisk. (Tenn.) 69; State *v.* Hale, 21 Tex. 587.

The means available should be set out where the officer's duty was conditioned on a sufficiency. Lequat *v.* People, 11 Ill. 330 (labor); People *v.* Adsit, 2 Hill (N. Y.) 619 (funds). In some cases it is held, however, that lack of means is matter of defense which need not be set out in the indictment. State *v.* Brown, 8 Blackf. (Ind.) 69; State *v.* Harsh, 6 Blackf. (Ind.) 346; Tate *v.* State, 5 Blackf. (Ind.) 73.

90. Lequat *v.* People, 11 Ill. 330 (should allege what crossings neglected); State *v.* Tuley, 20 Mo. 422 (that fork where finger-board lacking is within road district of overseer); State *v.* Hageman, 13 N. J. L. 314; Howell *v.* State, 29 Tex. App. 592, 16 S. W. 533. But see State *v.* Lee, 15 Tex. 252, holding that where the offense is charged to be committed in the county, the indictment need not aver that road was in the county.

A description of the particular road should be given. State *v.* McMurrin, 1 Ind. 44; Spear *v.* State, 1 Blackf. (Ind.) 517 (must allege in which county certain road lying in two counties is out of repair); Hardeman *v.* State, 25 Tex. 179 ("road number seven" is insufficient description); Sigler *v.* State, 17 Tex. 304 (description of road by its course as traveled). See also Com. *v.* Howard, 1 Gratt. (Va.) 554. But the description of the road in the indictment need not include its termini, but may describe it simply as running from S in said county in the direction of G in said county. State *v.* Harsh, 6 Blackf. (Ind.) 346.

91. Read *v.* Com., 3 Bibb (Ky.) 484; State *v.* Forrest, 30 Tex. 503; Hardeman *v.* State, 25 Tex. 179. But see Howell *v.* State, 29 Tex. App. 592, 16 S. W. 533.

Indictments held bad for failure to state the time accurately see Com. *v.* McDowell, 3 Bibb (Ky.) 24; State *v.* Chinn, 29 Tex. 497.

92. Graffins *v.* Com., 3 Penr. & W. (Pa.) 502, to the common nuisance of the citizens.

93. Savell *v.* State, 150 Ala. 97, 43 So. 201; State *v.* Moore, 23 Ark. 550. See also East Hawkesbury *v.* Lochiel, 34 Can. Sup. Ct. 513.

94. Dormar *v.* State, 31 Ark. 49.

95. *Alabama.*— Savell *v.* State, 150 Ala. 97, 43 So. 201 (by original commission); Alexander *v.* State, 16 Ala. 661.

Arkansas.— State *v.* Hester, 21 Ark. 193, holding the order appointing sufficient evidence of appointment.

Idaho.— Meservey *v.* Gulliford, 14 Ida. 133, 93 Pac. 780.

New Hampshire.— Dow *v.* Epping, 48 N. H. 75.

New York.— Dominick *v.* Hill, 6 N. Y. St. 329.

See 25 Cent. Dig. tit. "Highways," § 321.

Evidence held sufficient see Chiles *v.* State, 45 Ark. 143; Dominick *v.* Hill, 6 N. Y. St. 329 (admission by officer is sufficient); State *v.* Long, 76 N. C. 254.

96. State *v.* Moore, 23 Ark. 550; Sigler *v.* State, 17 Tex. 304.

97. State *v.* Stroope, 20 Ark. 202; Palmer *v.* Carroll, 24 N. H. 314; Andrews *v.* Chase, 5 Vt. 409.

98. Ward *v.* State, (Ala. 1905) 39 So. 923, holding that the condition of county roads cannot be judicially noticed but must be proved.

99. Savell *v.* State, 150 Ala. 97, 43 So. 201

V. CONSTRUCTION, IMPROVEMENT, AND REPAIR.

A. Statutory Regulation. The construction, improvement, and repair of highways is regulated largely by statutes,[1] the general rules relating to statutes[2] being applicable,[3] as to constitutionality[4] and construction,[5] which must be reasonable.[6] Statutes relating to construction and repair have in some instances been construed as directory rather than mandatory.[7]

B. Mode, Plan, and Sufficiency[8] **— 1. In General.** The method or plan of work is in the discretion of the road officers,[9] within the restrictions of

(whether road in as good condition as other roads in community held irrelevant); Ward *v.* State, (Ala. 1905) 39 So. 923; Tate *v.* State, 5 Blackf. (Ind.) 73 (that defendant could not keep road in repair through default of county commissioners); Com. *v.* Cassatt, 3 Montg. Co. Rep. (Pa.) 19; Sennett *v.* State, 17 Tex. 308 (must prove failure of other overseers to set up milestones as alleged which prevented him from setting up his); Sigler *v.* State, 17 Tex. 304. See also Com. *v.* Johnson, 134 Pa. St. 635, 19 Atl. 803.

1. See the statutes of the several states. And see cases cited *infra*, note 3.

2. See STATUTES, 36 Cyc. 929.

3. *Kansas.*— State *v.* Shawnee County, 28 Kan. 431.

Massachusetts.— Scituate *v.* Weymouth, 108 Mass. 128.

Minnesota.— Thorn *v.* Washington County, 14 Minn. 233.

Washington.— Lewis County *v.* Hays, 1 Wash. Terr. 109.

Wisconsin.— State *v.* Hogue, 71 Wis. 384, 36 N. W. 860.

See 25 Cent. Dig. tit. "Highways," § 324.

4. State *v.* Marion County, 170 Ind. 595, 85 N. E. 513; People *v.* Springwells Tp. Bd., 25 Mich. 153; Jensen *v.* Polk County, 47 Wis. 298, 2 N. W. 320, holding that an act which provides for the laying out and opening of a state road, and imposes the cost of the road upon the towns and counties through which it is to pass, is not in conflict with Const. art. 8, § 10, forbidding the state to carry on works of internal improvement.

Action under unconstitutional statute.—A contemplated road improvement, voted under an unconstitutional statute, is not made lawful by the fact that a majority of those voting on the subject voted in favor of it. Hixson *v.* Burson, 54 Ohio St. 470, 43 N. E. 1000.

5. *Georgia.*— Howell *v.* Chattooga County, 118 Ga. 635, 45 S. E. 241.

Indiana.— Findling *v.* Foster, 170 Ind. 325, 84 N. E. 529, 81 N. E. 480. See also State *v.* Marion County, 170 Ind. 595, 85 N. E. 513.

Maryland.— Fout *v.* Frederick County, 105 Md. 545, 66 Atl. 487.

Mississippi.— Madison County *v.* Stewart, 74 Miss. 160, 20 So. 857, special act not repealed by general statute.

New Jersey.— Oakes *v.* Glen Ridge, 60 N. J. L. 130, 36 Atl. 708.

New York.— McGuinness *v.* Westchester, 66 Hun 356, 21 N. Y. Suppl. 290, holding that appointment of commissioners of improvements under certain act does not abridge the powers of highway commissioners.

Ohio.— State *v.* Hamilton County, 9 Ohio Dec. (Reprint) 243, 11 Cinc. L. Bul. 274. See also State *v.* Craig, 22 Ohio Cir. Ct. 135, 12 Ohio Cir. Dec. 189.

Texas.— Plowman *v.* Dallas County, (Civ. App. 1905) 88 S. W. 252.

See 25 Cent. Dig. tit. "Highways," § 324.

A codification may repeal by implication prior special acts. Findling *v.* Foster, 170 Ind. 325, 81 N. E. 480, 84 N. E. 529.

6. Smith *v.* Helmer, 7 Barb. (N. Y.) 416, road leading "from" H construed to include portion in H.

7. See Fresno County *v.* Fowler Switch Canal Co., 68 Cal. 359, 9 Pac. 309; Clark Civil Tp. *v.* Brookshire, 114 Ind. 437, 16 N. E. 132.

8. **Construction, improvement, and repair of city streets** see MUNICIPAL CORPORATIONS, 28 Cyc. 946.

9. Dennis *v.* Osborn, 75 Kan. 557, 89 Pac. 925 (error in judgment held no ground for injunction); Cunningham *v.* Frankfort, 104 Me. 208, 70 Atl. 441; Steele *v.* Glen Park, 193 N. Y. 341, 86 N. E. 26 [*affirming* 119 N. Y. App. Div. 918, 105 N. Y. Suppl. 1144]; Smith *v.* Grayson County, 18 Tex. Civ. App. 153, 44 S. W. 921.

Whether the result fulfils the requirement of the statute must be ultimately passed upon by the court and jury when the question arises. Cunningham *v.* Frankfort, 104 Me. 208, 70 Atl. 441.

Only one system can be in force in a county at a time. Wright *v.* Sheppard, 5 Ga. App. 298, 63 S. E. 48.

The order of construction cannot be attacked collaterally except on the ground of fraud. Le Moyne *v.* Washington County, 213 Pa. St. 123, 62 Atl. 516.

The side-path commissioners of a county have authority to take up a curbstone and relocate it so as to make room for a side-path along the sidewalk. O'Donnell *v.* Preston, 74 N. Y. App. Div. 86, 77 N. Y. Suppl. 305.

Under authority "to grade hills" in laying out a way, the commissioners may fill the valleys. Acton *v.* York County, 77 Me. 128.

A change of the line of road may be authorized in improvement (Knox County *v.* Kennedy, 92 Tenn. 1, 20 S. W. 311), or in altering or straightening an existing road

law,[10] and subject to the rights of abutting owners.[11] They may direct how much of the road shall be improved [12] and provide for railroad rights of way.[13] Their duties extend to remedying defects and obstructions caused by snow.[14]

2. Taking Material From Abutters. Statutes sometimes authorize road officers to take materials from the land of abutters, due compensation being provided.[15] The officer is the sole judge of the necessity of the taking,[16] and so long as he does not wilfully annoy the owners of property a court of equity will not restrain him;[17] but the officer cannot pass over cultivated or improved land for this purpose;[18] nor can an overseer take for public use timber prepared for the owner's own use;[19] and purchase of material at a specified price is not authorized under a statute allowing the overseer to take.[20] In the absence of statute no authority to take from abutters exists.[21]

3. Removal of Fences, Buildings, and Other Property. Road officers are commonly required by statute to give a reasonable time on laying out or altering a road for the removal of timber, fences, buildings, or other property,[22] after notice

(Crow *v.* Judy, 139 Ind. 562, 38 N. E. 415; McClure *v.* Franklin County, 124 Ind. 154, 24 N. E. 741; Gipson *v.* Heath, 98 Ind. 100).

10. *Indiana.*— Weaver *v.* Templin, 113 Ind. 298, 14 N. E. 600.

Kansas.— Barker *v.* Wyandotte County, 45 Kan. 681, 26 Pac. 585.

Maine.— Acton *v.* York, 77 Me. 128.

Nebraska.— Hitchcock *v.* Zink, 80 Nebr. 29, 113 N. W. 795, 127 Am. St. Rep. 743, 13 L. R. A. 1110.

New Jersey.— State *v.* Passaic, 46 N. J. L. 124.

New York.— People *v.* Waterford, etc., Turnpike Co., 3 Abb. Dec. 580, 2 Keyes 327.

See 25 Cent. Dig. tit. "Highways," § 323 *et seq.*

Building a new bridge is not repairing highway. State *v.* White, 16 R. I. 591, 18 Atl. 179, 1038.

11. Tatnall *v.* Shallcross, 4 Del. Ch. 634.

12. *Illinois.*— Trotter *v.* Barrett, 164 Ill. 262, 45 N. E. 149; Waugh *v.* Leech, 28 Ill. 488.

Maine.— Brown *v.* Skowhegan, 82 Me. 273, 19 Atl. 399, holding that they need not work the entire width of street or connect the traveled portion with abutters.

Massachusetts.— Metcalf *v.* Boston, 158 Mass. 284, 33 N. E. 586; Com. *v.* Boston, etc., R. Corp., 12 Cush. 254.

Vermont.— Hutchinson *v.* Chester, 33 Vt. 410.

England.— Sandgate Urban Dist. Council *v.* Kent, 79 L. T. Rep. N. S. 425, 15 T. L. R. 59 [*reversing* 61 J. P. 517, 13 T. L. R. 476].

See 25 Cent. Dig. tit. "Highways," § 335.

13. *In re* Sterrett Tp. Road, 114 Pa. St. 627, 7 Atl. 765; Williamsport, etc., R. Co. *v.* Supervisors, 4 Pa. Co. Ct. 588.

14. Loker *v.* Brookline, 13 Pick. (Mass.) 343; Brohm *v.* Somerville Tp., 11 Ont. L. Rep. 588, 7 Ont. Wkly. Rep. 721.

15. See the statutes of the several states. And see the following cases:

Indiana.— Warren County *v.* Mankey, 29 Ind. App. 55, 63 N. E. 864.

Kansas.— Barrett *v.* Nelson, 29 Kan. 594.

Maine.— Wellman *v.* Dickey, 78 Me. 29, 2 Atl. 133; Keene *v.* Chapman, 25 Me. 126.

Massachusetts.— Hatch *v.* Hawkes, 126 Mass. 177, holding that any earth, gravel, or stone suitable may be removed by ordinary excavation.

North Carolina.— Collins *v.* Creecy, 53 N. C. 333, holding that the officer may cut poles on any land adjoining his section and is not confined to land immediately adjoining the spot where the work is done.

Ohio.— Burrows *v.* Cosler, 33 Ohio St. 567.

Oregon.— Kendall *v.* Post, 8 Oreg. 141.

South Carolina.— State *v.* Huffman, 2 Rich. 617; State *v.* Dawson, Riley 103, timber.

Texas.— N. A. Matthews Lumber Co. *v.* Van Zandt County, (Civ. App. 1903) 77 S. W. 960.

Wisconsin.— Jackson *v.* Rankin, 67 Wis. 285, 30 N. W. 301; Goodman *v.* Bradley, 2 Wis. 257.

See 25 Cent. Dig. tit. "Highways," § 336.

Trespass quare clausum does not lie under these circumstances, the remedy which must be pursued for compensation being that specified in the statute. Keene *v.* Chapman, 25 Me. 126.

16. Kendall *v.* Post, 8 Oreg. 141.

For obstructing the officer indictment will sometimes lie. State *v.* Huffman, 2 Rich. (S. C.) 617.

17. Kendall *v.* Post, 8 Oreg. 141.

18. Barrett *v.* Nelson, 29 Kan. 594; Wellman *v.* Dickey, 78 Me. 29, 2 Atl. 133; Jackson *v.* Rankin, 67 Wis. 285, 30 N. W. 301.

19. Goodman *v.* Bradley, 2 Wis. 257.

20. N. A. Matthews Lumber Co. *v.* Van Zandt County, (Tex. Civ. App. 1903) 77 S. W. 960.

21. Reynolds *v.* Speers, 1 Stew. (Ala.) 34. See also Ward *v.* Folly, 5 N. J. L. 485; Scott *v.* Towyn Rural District Council, 5 Loc. Gov. 1050.

A town is not liable for material unlawfully taken and used in the construction of a town road by the proper officers without any directions or interference on its part. Goddard *v.* Harpswell, 84 Me. 499, 24 Atl. 958, 30 Am. St. Rep. 373.

22. White *v.* Foxborough, 151 Mass. 28, 23 N. E. 652 [*distinguishing* Murray *v.* Norfolk County, 149 Mass. 328, 21 N. E. 757]; Com.

to the landowner or occupant,[23] which notice, under some statutes, must not specify a period which will expire in the winter months.[24] If the owners neglect to remove the property within the time specified it is the duty of the officer to do so,[25] but in removing without notice the officer is a trespasser.[26] Failure to give the notice does not, however, affect the validity of the lay-out.[27] County commissioners have no authority to allow a portion of a building to remain.[28]

4. Guide-Posts. Statutes sometimes require the erection of guide-posts,[29] or guide-boards on trees.[30]

C. Roads Affected — 1. In General. Such highways must be repaired, and only such may be repaired, as have a legal existence, either by having been formally opened[31] and accepted,[32] or created by prescription,[33] or by alterations of

v. Noxon, 121 Mass. 42; Dwight *v.* Springfield, 6 Gray (Mass.) 442.

23. *Illinois.*— Linblom *v.* Ramsey, 75 Ill. 246; Taylor *v.* Marcy, 25 Ill. 518.

Indiana.— Conley *v.* Grove, 124 Ind. 208, 24 N. E. 731; Rutherford *v.* Davis, 95 Ind. 245; Porter *v.* Stout, 73 Ind. 3.

Massachusetts.—White *v.* Foxborough, 151 Mass. 28, 23 N. E. 652.

New York.— Case *v.* Thompson, 6 Wend. 634; Kelley *v.* Horton, 2 Cow. 424.

Wisconsin.— Morris *v.* Edwards, 132 Wis. 91, 112 N. W. 248; Kellar *v.* Earl, 98 Wis. 488, 74 N. W. 364.

See 25 Cent. Dig. tit. "Highways," § 337.

Where part of a highway previously opened but not used is cleared, notice is not necessary. Baker *v.* Hogaboom, 12 S. D. 405, 81 N. W. 730.

24. Conley *v.* Grove, 124 Ind. 208, 24 N. E. 731; Kellar *v.* Earl, 98 Wis. 488, 74 N. W. 364.

25. Brock *v.* Hishen, 40 Wis. 674, holding also that the officer's delay to so remove does not render a new notice necessary.

26. Taylor *v.* Marcy, 25 Ill. 518.

27. Robinson *v.* Winch, 66 Vt. 110, 28 Atl. 884.

28. Colburn *v.* Kittridge, 131 Mass. 470.

A vote of a town that landowners might allow fences to remain one year after lay-out is ineffective. Mann *v.* Marston, 12 Me. 32.

29. Anderson *v.* New Canaan, 66 Conn. 54, 33 Atl. 593; State *v.* Swanville, 100 Me. 402, 61 Atl. 833.

30. See Sharon *v.* Smith, 180 Mass. 539, 62 N. E. 981.

31. *Connecticut.*—Anderson *v.* New Canaan, 70 Conn. 99, 38 Atl. 944.

Indiana.— State *v.* Marion County, 170 Ind. 595, 85 N. E. 513.

Iowa.— State *v.* Stoke, 80 Iowa 68, 45 N. W. 542.

Kansas.— Barker *v.* Wyandotte County, 45 Kan. 681, 698, 26 Pac. 585, 591.

Maine.— Coombs *v.* Franklin County, 71 Me. 239.

Mississippi.— Tegarden *v.* McBean, 33 Miss. 283.

New Hampshire.— Smith *v.* Northumberland, 36 N. H. 38.

New Jersey.— Vantilburgh *v.* Shann, 24 N. J. L. 740.

Ohio.— De Forest *v.* Wheeler, 5 Ohio St. 286.

Wisconsin.—Beyer *v.* Crandon, 98 Wis. 306, 73 N. W. 771.

England.—Reg. *v.* Worthing, etc., Turnpike Road, 2 C. L. R. 1678, 3 E. & B. 989, 23 L. J. M. C. 187, 2 Wkly. Rep. 478, 77 E. C. L. 989; Rex *v.* Llandilo Dist. Road Com'rs, 2 T. R. 232, 100 Eng. Reprint 126.

See 25 Cent. Dig. tit. "Highways," § 326.

Town held bound to repair see Paulsen *v.* Wilton, 78 Conn. 58, 61 Atl. 61 (although title to some of the highway is not in the town); Bradbury *v.* Benton, 69 Me. 194 (where the road was used by the public merely a year after its location); Proctor *v.* Andover, 42 N. H. 348 (although the road was laid out for the accommodation of an individual and subject to gates and bars); Naylor *v.* Beeks, 1 Oreg. 216; Pittsburgh, etc., R. Co. *v.* Com., 104 Pa. St. 583; Newlin Tp. *v.* Davis, 77 Pa. St. 317; Baker *v.* Hogaboom, 12 S. D. 405, 81 N. W. 730; Powers *v.* Woodstock, 38 Vt. 44; State *v.* Shrewsbury, 15 Vt. 283; Warren *v.* Bunnell, 11 Vt. 600.

Town held not bound to repair see Barker *v.* Wyandotte County, 45 Kan. 681, 26 Pac. 585, 45 Kan. 698, 26 Pac. 591 (strip laid out as a street but never used or traveled as a road); Lowell *v.* Moscow, 12 Me. 300; State *v.* Kent County, 83 Md. 377, 35 Atl. 62, 33 L. R. A. 291; Clark *v.* Waltham, 128 Mass. 567; McKeller *v.* Monitor Tp., 78 Mich. 485, 44 N. W. 412 (where bridge not used as a highway for ten years); State *v.* Rye, 35 N. H. 368; Young *v.* Wheelock, 18 Vt. 493.

Where a town has notice that a highway was opened for public use it will be liable. Drury *v.* Worcester, 21 Pick. (Mass.) 44; Stark *v.* Lancaster, 57 N. H. 88.

A sidewalk must be maintained as a road. Manchester *v.* Hartford, 30 Conn. 118.

32. Hayden *v.* Attleborough, 7 Gray (Mass.) 338; Jordan *v.* Otis, 37 Barb. (N. Y.) 50 (holding that repair of a road by a pathmaster does not constitute an acceptance of it); Whitney *v.* Essex, 42 Vt. 520; Barton *v.* Montpelier, 30 Vt. 650; Blodget *v.* Royalton, 14 Vt. 288. See also Hyde *v.* Jamaica, 27 Vt. 443; Page *v.* Weathersfield, 13 Vt. 424.

33. *Maine.*— Chadwick *v.* McCausland, 47 Me. 342; Rowell *v.* Montville, 4 Me. 270 (holding, however, that no use less than twenty years will impose upon the town the obligation); Todd *v.* Rome, 2 Me. 55.

old roads.[34] The proper authorities are not bound to repair a highway discontinued [35] or abandoned,[36] but are bound to make passable necessary temporary by-ways.[37]

2. Roads in Different Jurisdictions. Where the center of the road forms the line between two municipalities and no crosswise division has been made, each must repair the portion on its side of the line.[38] To avoid the inconvenience of this, however, statutory provision is sometimes made for a crosswise division, whereby each municipality repairs the part of the road assigned to it,[39] or requiring the joint action of the two;[40] but unless under some such arrangement a road officer cannot extend improvements into adjacent road districts;[41] and if he does so any improvements he may make are under the control of the supervisor of the district into which they have been so extended.[42] When a municipal corporation is created over territory lying within a township or county the power and duty to repair roads therein depends upon the statutes,[43] which sometimes give the municipality power over that part of the highway within its limits, but allow the township to retain possession over the highways of the town outside of the city limits,[44] or which may allow the county officers to improve a state, county, or township road, although the improvement embraces part of the highway within the limits of the municipal corporation.[45] But the liability of a town to build a highway pursuant to decree is not discharged by severance from the town of that part of its territory in which the road has been laid out and incorporating it

Massachusetts.—Whitford *v.* Southbridge, 119 Mass. 564; Jennings *v.* Tisbury, 5 Gray 73.

Michigan.— Peninsula Iron, etc., Co. *v.* Crystal Falls Tp., 60 Mich. 510, 27 N. W. 666.

New Hampshire.— Ruland *v.* South Newmarket, 59 N. H. 291; Smith *v.* Northumberland, 36 N. H. 38; Willey *v.* Portsmouth, 35 N. H. 303.

New York.— Ivory *v.* Deerpark, 116 N. Y. 476, 22 N. E. 1080.

See 25 Cent. Dig. tit. "Highways," § 326.

Roads held not subject to repair under this rule see Mayberry *v.* Standish, 56 Me. 342; State *v.* Calais, 48 Me. 456 (overflowed by dam and only traveled on ice in winter); Estes *v.* Troy, 5 Me. 368 (ten years' user); Stockwell *v.* Fitchburg, 110 Mass. 305 (travel on strip between highway and buildings); State *v.* Johnson, 33 N. C. 647 (twelve years' user).

34. Cyr *v.* Dufour, 68 Me. 492; Welton *v.* Crystal Tp., 152 Mich. 486, 116 N. W. 390; Blodgett *v.* Royalton, 17 Vt. 40, 42 Am. Dec. 476, where selectmen permitted travel over a new road and closed up the old. See also Madill *v.* Caledon Tp., 3 Ont. L. Rep. 66, holding a township liable for a sidewalk built by voluntary contributions, over which town had never assumed actual control.

Where the alteration is not official there is no liability to repair the road as altered. Hill *v.* Laurens County, 34 S. C. 141, 13 S. E. 318.

35. Tinker *v.* Russell, 14 Pick. (Mass.) 279, highway discontinued by canal.

36. State *v.* Alstead, 18 N. H. 59; Zimmermann *v.* Bergen Tp., etc., Committee, 57 N. J. L. 68, 30 Atl. 180.

37. Dickinson *v.* Rockingham, 45 Vt. 99; Batty *v.* Duxbury, 24 Vt. 155; Willard *v.* Newbury, 22 Vt. 458, temporary way during construction of railroad. But see Hyde *v.* Jamaica, 27 Vt. 443; Bogie *v.* Waupun, 75 Wis. 1, 43 N. W. 667, 6 L. R. A. 59, by-way to avoid snowdrifts. And see cases cited *supra*, note 31.

The old English rule that if an occupant of land along a highway inclosed his land, so that travelers could not pass over it when the road was out of repair, he thereby became bound to keep the highway in good order, does not prevail in New Jersey. Weller *v.* McCormick, 47 N. J. L. 397, 1 Atl. 516, 54 Am. Rep. 175.

38. Rodenbarger *v.* State, 165 Ind. 685, 76 N. E. 398; State *v.* Thomaston, 74 Me. 198; Rothwell *v.* California Borough, 21 Pa. Super. Ct. 234 [*followed* in Haggart *v.* California Borough, 21 Pa. Super. Ct. 210].

Neither can so change the grade as to interfere with the use of the whole road. Rothwell *v.* California Borough, 21 Pa. Super. Ct. 234 [*followed* in Haggart *v.* California Borough, 21 Pa. Super. Ct. 210].

Bridge over boundary stream.— Where the duty of maintenance and repair of a bridge over a boundary stream rests upon two townships jointly they cannot by arrangement or custom relieve themselves from the joint liability. Black Tp. *v.* Milton Tp., 32 Pa. Co. Ct. 64.

39. State *v.* Thomaston, 74 Me 198; State *v.* Childs, 109 Wis. 233, 85 N. W. 374; Montgomery *v.* Scott, 34 Wis. 338.

40. Atcheson *v.* Portage La Prairie Rural Municipality, 10 Manitoba 39.

41. Grove *v.* Mikesell, 13 Ohio St. 158.

42. Grove *v.* Mikesell, 13 Ohio St. 158.

43. See McNeal Pipe, etc., Co. *v.* Lippincott, 57 N. J. L. 540, 31 Atl. 399.

44. McNeal Pipe, etc., Co. *v.* Lippincott, 57 N. J. L. 540, 31 Atl. 399.

45. Lewis *v.* Laylin, 46 Ohio St. 663, 23

into a new town,[46] or by the fact that a county or town road had been previously laid out over a part of the same route.[47]

D. Upon Whom Duty to Do Road Work Rests — 1. Municipality and Municipal Officers — a. In General. The care and maintenance of highways is vested directly in towns under some statutes,[48] in counties under others.[49] The power and duty to improve and repair lies on the officer designated by statute,[50] such as commissioners of highways,[51] county commissioners,[52] overseers,[53] police juries,[54] surveyors of highways,[55] or township trustees,[56] who must do the work within a reasonable time,[57] in the manner prescribed,[58] after the statutory

N. E. 288; State *v.* Craig, 22 Ohio Cir. Ct. 135, 12 Ohio Cir. Dec. 189.

46. *In re* Page, 37 Me. 553.

47. *In re* Page, 37 Me. 553; Sanger *v.* Kennebec County, 25 Me. 291.

48. *Connecticut.*— Munson *v.* Derby, 37 Conn. 298, 9 Am. Rep. 332.

Iowa.— Nolan *v.* Reed, 139 Iowa 68, 117 N. W. 25; Theulen *v.* Viola Tp., 139 Iowa 61, 117 N. W. 26.

Maine.— State *v.* Boardman, 93 Me. 73, 44 Atl. 118, 46 L. R. A. 750; Rogers *v.* Newport, 62 Me. 101; Emerson *v.* Washington County, 9 Me. 98.

Minnesota.— Hutchinson Tp. *v.* Filk, 44 Minn. 536, 47 N. W. 255; Woodruff *v.* Glendale, 23 Minn. 537, holding that under the statutes the care and maintenance of highways are vested in the towns in their corporate capacity, the supervisors being merely their officers and agents.

Nebraska.— Goes *v.* Gage County, 67 Nebr. 616, 93 N. W. 923.

New Jersey.— Kinmonth *v.* Wall Tp. Committee, 73 N. J. L. 440, 63 Atl. 861.

New York.— People *v.* Vandewater, 176 N. Y. 500, 68 N. E. 876 [*reversing* 83 N. Y. App. Div. 54, 82 N. Y. Suppl. 627]; Matter of Gilroy, 43 N. Y. App. Div. 359, 60 N. Y. Suppl. 200 [*affirmed* in 164 N. Y. 576, 58 N. E. 1087]. But see Rhines *v.* Royalton, 11 N. Y. St. 231.

Pennsylvania.— Chartiers Tp. *v.* Langdon, 114 Pa. St. 541, 7 Atl. 84; Chartiers *v.* Nester, 4 Pa. Cas. 110, 7 Atl. 162; Lower Merion Tp. *v.* Postal Tel. Cable Co., 25 Pa. Super. Ct. 306.

South Carolina.— Shoolbred *v.* Charleston, 2 Bay 63.

Vermont.— Wardsboro *v.* Jamaica, 59 Vt. 514, 9 Atl. 11.

Canada.— Lalonge *v.* St. Vincent de Paul, 27 Quebec Super. Ct. 218.

See 25 Cent. Dig. tit. "Highways," § 323.

49. *Maryland.*— Garrett County *v.* Blackburn, 105 Md. 226, 66 Atl. 31.

Massachusetts.— Springfield *v.* Hampden County, 10 Pick. 59.

South Carolina.— Shoolbred *v.* Charleston, 2 Bay 63.

England.— Derby *v.* Urban Dist., [1896] A. C. 315, 60 J. P. 676, 65 L. J. Q. B. 419, 74 L. T. Rep. N. S. 395, for paved foot-paths.

Canada.— St. Jean *v.* St. Jacques-le-Mineur, 14 Quebec K. B. 343.

See 25 Cent. Dig. tit. "Highways," § 323.

50. *California.*— Ludy *v.* Colusa County, (1895) 41 Pac. 300.

Idaho.— Genesee *v.* Latah County, 4 Ida. 141, 36 Pac. 701.

Indiana.— State *v.* Marion County, (1907) 82 N. E. 482; Driftwood Valley Turnpike Co. *v.* Bartholomew County, 72 Ind. 226.

Kansas.— Hanselman *v.* Born, 71 Kan. 573, 81 Pac. 192 (duty to open roads on section lines); Keiper *v.* Hawk, 7 Kan. App. 271, 53 Pac. 837 (under direction of township trustee).

Kentucky.— Beckham *v.* Slayden, 107 S. W. 324, 32 Ky. L. Rep. 944, 1348.

Louisiana.— Barrow *v.* Hepler, 34 La. Ann. 362.

Massachusetts.— Harvey *v.* Easton, 189 Mass. 505, 75 N. E. 948; New Haven, etc., Co. *v.* Hampshire County, 173 Mass. 12, 52 N. E. 1076; Austin *v.* Carter, 1 Mass. 231.

Michigan.— Peninsular Sav. Bank *v.* Ward, 118 Mich. 87, 76 N. W. 161, 79 N. W. 911.

New York.— Bruner *v.* Lewis, 4 N. Y. Suppl. 403; Rhines *v.* Royalton, 11 N. Y. St. 231.

North Carolina.— Wynn *v.* Beardsley, 126 N. C. 116, 35 S. E. 237.

Ohio.— State *v.* Craig, 22 Ohio Cir. Ct. 135, 12 Ohio Cir. Dec. 189.

Pennsylvania.— *In re* Wilkes-Barre Tp., 8 Kulp 516.

Canada.— Longueuil *v.* Montreal, 16 Quebec Super. Ct. 351.

See 25 Cent. Dig. tit. "Highways," § 323.

51. Bruner *v.* Lewis, 4 N. Y. Suppl. 403; Rhines *v.* Royalton, 11 N. Y. St. 231.

52. State *v.* Craig, 22 Ohio Cir. Ct. 135, 12 Ohio Cir. Dec. 189.

53. Ludy *v.* Colusa County, (Cal. 1895) 41 Pac. 300; Genesee *v.* Latah County, 4 Ida. 141, 36 Pac. 701.

54. Barrow *v.* Hepler, 34 La. Ann. 362.

55. Austin *v.* Carter, 1 Mass. 231; Wynn *v.* Beardsley, 126 N. C. 116, 35 S. E. 237.

56. Keiper *v.* Hawk, 7 Kan. App. 271, 53 Pac. 837.

57. Atwood *v.* Partree, 56 Conn. 80, 14 Atl. 85; Boxford *v.* Essex County, 7 Pick. (Mass.) 337, holding that over three years' delay is unreasonable.

58. *Connecticut.*— Goodspeed's Appeal, 75 Conn. 271, 53 Atl. 728; Wolcott *v.* Pond, 19 Conn. 597.

Massachusetts.— Loker *v.* Brookline, 13 Pick. 343.

New York.— Peckham *v.* Henderson, 27 Barb. 207.

Pennsylvania.— Com. *v.* Reiter, 78 Pa. St. 161.

preliminaries as may have been prescribed by the statutes of their particular states.[59]

b. As Dependent Upon Availability of Funds. The duty to repair and consequent liability for failure has in many cases been held to be dependent upon availability of funds for the work.[60] On the other hand it has been held that the duty to repair is absolute,[61] and that a statute providing therefor is peremptory, and that the question of ability is not open in an action for a defective highway;[62] and this rule applies where a portion of the expense is to be borne by the state,[63] or where, under the statute, if the town is poor a proceeding is provided for casting the expense of the road upon the county;[64] nor can liability be avoided where the means of raising sufficient funds were at hand, as by additional assessment,[65] by borrowing,[66] or by making the repairs upon the credit of the town as authorized by statute;[67] nor where the amount needed to repair was small and could be taken from funds due for repairs already made,[68] or transferred from a fund not exhausted by the building of another road;[69] nor will a town be relieved where failure of funds in the hands of road officers is due to the fault of another town officer,[70] or where the defect has existed during a time within which funds could have been had.[71] Similarly, that there are no funds on hand to meet the cost of opening a road is no answer for failure to open the road, when it is not shown that the officers had exhausted the power of taxation,[72] or when town funds were available,[73] or if, as is sometimes provided, the road committee has power to call out the inhabitants to do the work.[74] Nor have supervisors the right to refuse to open a road merely because funds in their hands are necessary for other purposes,[75] or because sufficient funds are not on hand at any one time to make all necessary improvements.[76] But a township committee

Vermont.— Patchin *v.* Doolittle, 3 Vt. 457; Patchen *v.* Morrison, 3 Vt. 590.

See 25 Cent. Dig. tit. "Highways," § 323.

59. Chiles *v.* State, 45 Ark. 143; People *v.* Studwell, 179 N. Y. 520, 71 N. E. 1137 [*affirming* 91 N. Y. App. Div. 469, 86 N. Y. Suppl. 967]; People *v.* Early, 106 N. Y. App. Div. 269, 94 N. Y. Suppl. 640; State *v.* Hamilton County, 39 Ohio St. 58.

60. *Illinois.*— Carney *v.* Marseilles, 136 Ill. 401, 26 N. E. 491, 29 Am. St. Rep. 328 (repair of bridges); Hall *v.* Rogers, 57 Ill. 307; Klein *v.* People, 31 Ill. App. 302.

Kansas.— Walnut Tp. *v.* Heth, 9 Kan. App. 498, 59 Pac. 289.

Maine.— Studly *v.* Geyer, 72 Me. 286.

New Hampshire.— Patterson *v.* Colebrook, 29 N. H. 94.

New Jersey.— Warner *v.* Reading, 46 N. J. L. 519.

New York.— Flynn *v.* Hurd, 118 N. Y. 19, 22 N. E. 1109; Monk *v.* New Utrecht, 104 N. Y. 552, 11 N. E. 268; Garlinghouse *v.* Jacobs, 29 N. Y. 297.

Texas.— Parker *v.* State, 29 Tex. App. 372, 16 S. W. 186.

Wisconsin.— State *v.* Wood County, 72 Wis. 629, 40 N. W. 381.

See 25 Cent. Dig. tit. "Highways," § 325.

The highway should be closed and warnings given to the public if the highway is unsafe and funds unavailable. Carney *v.* Marseilles, 136 Ill. 401, 26 N. E. 491, 29 Am. St. Rep. 328.

61. Stockwell *v.* Dummerston, 45 Vt. 443; Burns *v.* Elba, 32 Wis. 605.

A distinction is made in Pennsylvania between liability of a town for non-repair and for original construction, and a town may not be liable for failure to construct under circumstances which would render it liable for failure to repair. Perry Tp. *v.* John, 79 Pa. St. 412.

62. Winship *v.* Enfield, 42 N. H. 197.

63. La Monte *v.* Somerset County, (N. J. Sup. 1896) 35 Atl. 1.

64. Glaub *v.* Goshen Tp., 7 Kulp (Pa.) 292.

65. Weed *v.* Ballston Spa, 76 N. Y. 329. See also Scott Tp. *v.* Montgomery, 95 Pa. St. 444.

66. Ivory *v.* Deepark, 116 N. Y. 476, 22 N. E. 1080.

67. Whitlock *v.* Brighton, 2 N. Y. App. Div. 21, 37 N. Y. Suppl. 333 [*affirmed* in 154 N. Y. 781, 49 N. E. 1106].

68. Rhines *v.* Royalton, 15 N. Y. Suppl. 944.

69. Queens County *v.* Phipps, 28 N. Y. App. Div. 521, 51 N. Y. Suppl. 203.

70. Clapper *v.* Waterford, 62 Hun (N. Y.) 170, 16 N. Y. Suppl. 640 [*reversed* on other grounds in 131 N. Y. 382, 30 N. E. 240].

71. Whitlock *v.* Brighton, 2 N. Y. App. Div. 21, 37 N. Y. Suppl. 333 [*affirmed* in 154 N. Y. 781, 49 N. E. 1106].

72. *In re* Lower Merion Tp. Road, 8 Pa. Dist. 561, 22 Pa. Co. Ct. 297, 15 Montg. Co. Rep. 79.

73. Com. *v.* Reiter, 78 Pa. St. 161.

74. Kinmonth *v.* Wall Tp. Committee, 73 N. J. L. 440, 63 Atl. 861.

75. *In re* Roaring Brook Tp. Road, 28 Wkly. Notes Cas. (Pa.) 141.

76. Welch *v.* State, 164 Ind. 104, 72 N. E. 1043.

will not be required to appropriate to the opening of a new road the moneys voted expressly for reparation of the old highways.[77]

2. Individual Duty and Liability; Exoneration of Municipality. A private individual or corporation may be bound to maintain a highway,[78] as when he obstructs an existing highway,[79] or when the way is built for his convenience;[80] and the municipality may delegate to individuals authority to improve,[81] and may recover over of one who failed to do his duty in road work,[82] or the expense of restoring a road he has damaged;[83] or, on the other hand, may reimburse individuals for work done for the public benefit.[84] But the fact that an individual is under a duty to repair does not exonerate the municipality,[85] unless the sole duty is imposed upon the individual by express statutory provision.[86]

E. Drainage[87] **— 1. Right and Manner; Casting Water Upon Adjoining Land.** An authority conferred on officers to determine where drains shall be built is in the nature of a judicial duty involving the exercise of a large discretion, and therefore no action lies for the adoption of a particular system within that authority, or for mere inadvertence or error of judgment,[88] or for a necessary diversion in

77. Whitenock *v.* Bernards Tp. Committee, 39 N. J. L. 60.

78. Jackson County *v.* Branaman, 169 Ind. 80, 82 N. E. 65. See also Atty.-Gen. *v.* Day, [1900] 1 Ch. 31, 64 J. P. 88, 69 L. J. Ch. 8, 81 L. T. Rep. N. S. 806 (trust for repair of road construed and found still subsisting); Scott *v.* Brown, 69 J. P. 89.

79. *Idaho.*— Lewiston *v.* Booth, 3 Ida. 692, 34 Pac. 809.

Illinois.— Haines *v.* People, 19 Ill. App. 354.

Massachusetts.—Middlefield *v.* Church Mills Knitting Co., 160 Mass. 267, 35 N. E. 780 (by damming water across highway); Lowell *v.* Proprietors Merrimack River Locks, etc., 104 Mass. 18.

Michigan.— Richmond Tp. Highway Com'rs *v.* Martin, 88 Mich. 115, 50 N. W. 113.

New Jersey.— *In re* Trenton Water Power Co., 20 N. J. L. 659.

Ohio.— Burton Tp. *v.* Tuttle, 30 Ohio St. 62.

Wisconsin.— West Bend *v.* Mann, 59 Wis. 69, 17 N. W. 972.

See 25 Cent. Dig. tit. "Highways," § 329.

But see Wallace *v.* Evans, 43 Kan. 509, 23 Pac. 596, 8 L. R. A. 52, where causeway built was used by public and repaired by overseer.

80. Shattuck *v.* York County, 76 Me. 167; Shattuck's Appeal, 73 Me. 318; Proctor *v.* Andover, 42 N. H. 362. See also U. S. *v.* Georgetown Bridge Co., 25 Fed. Cas. No. 15,202, 3 Cranch C. C. 369.

81. Hitchcock *v.* Zink, 80 Nebr. 29, 113 N. W. 795, 127 Am. St. Rep. 743, 13 L. R. A. N. S. 1110; Lewis *v.* Washington, 5 Gratt. (Va.) 265. And see *infra*, V, H.

82. Union Tp. *v.* Anthony, 26 Ind. 487; O'Reilly *v.* McLeod, 2 La. Ann. 146; Pennsylvania R. Co. *v.* Duquesne Borough, 46 Pa. St. 223; West Bend *v.* Mann, 59 Wis. 69, 17 N. W. 972. See also Hunter *v.* Campbell County Justices, 7 Coldw. (Tenn.) 49.

83. Wednesbury *v.* Lodge Holes Colliery Co., [1907] 1 K. B. 78, 71 J. P. 73, 76 L. J. K. B. 68, 5 Loc. Gov. 43, 95 L. T. Rep. N. S. 815, 23 T. L. R. 80.

84. Curran *v.* Holliston, 130 Mass. 272; Wilcox *v.* Deer Lodge County, 2 Mont. 574. But see Graham *v.* Carroll, 27 W. Va. 790, holding that a county has no power to authorize individuals to make a county road established by the county court, and to charge toll for a number of years to reimburse them for making such road.

A person who voluntarily and at his own expense constructs and opens a public road which has previously been laid out under the provisions of "An act concerning roads" is not entitled to be reimbursed therefor by the township in which such road is located, and a resolution of a town meeting voting such reimbursement is illegal and void. Bradshaw *v.* Parker, 60 N. J. L. 107, 37 Atl. 444.

85. *Arkansas.*— State *v.* Moore, 23 Ark. 550.

Florida.— State *v.* Putnam County, 23 Fla. 632, 3 So. 164.

Maine.— Veazie *v.* Penobscot R. Co., 49 Me. 119; Phillips *v.* Veazie, 40 Me. 96.

Massachusetts.— Hawks *v.* Northampton, 116 Mass. 420; Davis *v.* Leominster, 1 Allen 182; Merrill *v.* Wilbraham, 11 Gray 154; Currier *v.* Lowell, 16 Pick. 170.

New Hampshire.— Sides *v.* Portsmouth, 59 N. H. 24.

New York.— Bryant *v.* Randolph, 133 N. Y. 70, 30 N. E. 657 [*affirming* 14 N. Y. Suppl. 844].

Pennsylvania.— Aston Tp. *v.* McClure, 102 Pa. St. 322; Snow *v.* Deerfield Tp., 78 Pa. St. 181; Ashton Tp. *v.* Chester Creek R. Co., 2 Del. Co. 9.

Vermont.— Batty *v.* Duxbury, 24 Vt. 155; Willard *v.* Newbury, 22 Vt. 458.

Wisconsin.— Hammond *v.* Mukwa, 40 Wis. 35.

See 25 Cent. Dig. tit. "Highways," § 330. And see *infra*, V, J, 2.

86. White *v.* Quincy, 97 Mass. 430; Sawyer *v.* Northfield, 7 Cush. (Mass.) 490. See also Riley *v.* Greenburgh, 3 N. Y. Suppl. 322, culvert for aqueduct.

87. See, generally, Drains, 14 Cyc. 1018.

Drains in city streets see Municipal Corporations, 28 Cyc. 1113.

88. *Illinois.*— Dunn *v.* Youmans, 224 Ill.

a stream in consequence thereof.[89] But the actual construction of the drains is a mere ministerial duty, and if it is not performed with care and skill any person injured may have an action against the municipality;[90] and the duty of keeping the drains in repair and free from obstructions after they have been constructed and become the property of the municipality is also a ministerial duty, for neglect of which it is liable to any person injured.[91] Highway officers may commonly

34, 79 N. E. 321; Baughman *v.* Heinselman, 180 Ill. 251, 54 N. E. 313.

Iowa.— Packard *v.* Voltz, 94 Iowa 277, 62 N. W. 757, 58 Am. St. Rep. 396.

Kansas.— Dennis *v.* Osborn, 75 Kan. 557, 89 Pac. 925.

Massachusetts.—Emery *v.* Lowell, 104 Mass. 13; Benjamin *v.* Wheeler, 15 Gray 486.

Michigan.— Dean *v.* Millard, 151 Mich. 582, 115 N. W. 739.

New York.— Gould *v.* Booth, 66 N. Y. 62; Barber *v.* New Scotland, 88 Hun 522, 34 N. Y. Suppl. 968; Acker *v.* New Castle, 48 Hun 312, 1 N. Y. Suppl. 223.

Pennsylvania.— Sheib *v.* Collier Tp., 8 Pa. Cas. 526, 11 Atl. 366.

Wisconsin.— Merkel *v.* Germantown, 120 Wis. 494, 98 N. W. 210 (where flood caused by change of culvert); Champion *v.* Crandon, 84 Wis. 405, 54 N. W. 775, 19 L. R. A. 856.

United States.— See Johnston *v.* District of Columbia, 118 U. S. 19, 6 S. Ct. 923, 30 L. ed. 75.

See 25 Cent. Dig. tit. "Highways," § 374 *et seq.*

For errors in judgment in devising a plan there is no liability, but there is liability where the lack of care and skill in devising the plan is so great as to constitute negligence. North Vernon *v.* Voegler, 103 Ind. 314, 2 N. E. 821.

Authority to open necessary ditches does not include ditches to discharge surface water without compensation. Seaver *v.* Hartshorn, 6 N. J. L. J. 26.

Access to adjacent property by covering the ditch must be provided, under some statutes. Sell *v.* Ernsberger, 8 Ohio Cir. Ct. 499, 4 Ohio Cir. Dec. 100.

89. Davis *v.* McLean County Highway Com'rs, 143 Ill. 9, 33 N. E. 58 [*affirming* 42 Ill. App. 422] (may fill up ditch which leads water out of its natural course to the highway); Crohen *v.* Ewers, 39 Ill. App. 34 (giving natural drainage a clearer flow); Walter *v.* Wicomico County, 35 Md. 385; Kellogg *v.* Thompson, 66 N. Y. 88 (may turn back stream to original channel); Warfel *v.* Cochran, 34 Pa. St. 381; Taylor *v.* Canton Tp., 30 Pa. Super. Ct. 305 (may collect and direct waters which would naturally flow on the land); Warner *v.* Muncy Tp., 18 Pa. Co. Ct. 582. But see Maquon Tp. Highway Com'rs *v.* Young, 134 Ill. 569.

90. *Indiana.*— McOsker *v.* Burrell, 55 Ind. 425, by application for assessment of damages.

Maryland.— Kent County *v.* Godwin, 98 Md. 84, 56 Atl. 478, although plaintiff's negligence increased the injury.

Massachusetts.— Emery *v.* Lowell, 104 Mass. 13; Elder *v.* Bemis, 2 Metc. 599.

Minnesota.— Gunnerus *v.* Spring Prairie, 91 Minn. 473, 98 N. W. 340, 974; Peters *v.* Fergus Falls, 35 Minn. 549, 29 N. W. 586.

New Hampshire.— Bartlett *v.* Bristol, 66 N. H. 420, 24 Atl. 906; Rowe *v.* Addison, 34 N. H. 306 (must make culverts or bridges for water to pass across roads); Ball *v.* Winchester, 32 N. H. 435.

Pennsylvania.— Taylor *v.* Canton Tp., 30 Pa. Super. Ct. 305, flood caused by change in highway.

Texas.— Nussbaum *v.* Bell County, 97 Tex. 86, 76 S. W. 430; Voss *v.* Harris County, 33 Tex. Civ. App. 249, 76 S. W. 600. See, however, Zavalla County *v.* Akers, (Civ. App. 1906) 91 S. W. 245.

England.— Mersey Docks, etc., Bd. *v.* Gibbs, L. R. 1 H. L. 93, 11 H. L. Cas. 686, 12 Jur. N. S. 571, 35 L. J. Exch. 225, 14 L. T. Rep. N. S. 677, 14 Wkly. Rep. 872, 11 Eng. Reprint 1500.

Canada.—Atcheson *v.* Portage La Prairie, 10 Manitoba 39.

See 25 Cent. Dig. tit. "Highways," § 374 *et seq.*

Unless the damage is the proximate result of defendant's negligence there can be no recovery. Baldwin *v.* Ohio Tp., 70 Kan. 102, 78 Pac. 424, 109 Am. St. Rep. 414, 67 L. R. A. 642 (where overflow not due to defendant's acts); Kent County *v.* Godwin, 98 Md. 84, 56 Atl. 478.

Ratification of work done may make the municipality liable for it. Wendel *v.* Spokane County, 27 Wash. 121, 67 Pac. 576, 91 Am. St. Rep. 825, by using the road and maintaining the ditch. But see Matlack *v.* Callahan, 25 Pa. Super. Ct. 454, holding that repair of manhole does not show that town has assumed control of a sewer system.

Other officers than highway officers may be authorized to lay drains in highways. Kiley *v.* Bond, 114 Mich. 447, 72 N. W. 253.

Provision for watercourses should be made. State *v.* Ousatonic Water Co., 51 Conn. 137; Groton *v.* Haines, 36 N. H. 388, holding that a culvert should be built for artificial watercourse unless expense unreasonable.

That plaintiff worked as a laborer in constructing the drain complained of is no defense to the action; nor is it a defense that he negligently contributed to and increased the injury. Kent County *v.* Godwin, 98 Md. 84, 56 Atl. 478. See also West Bellevue *v.* Huddleson, (Pa. 1889) 16 Atl. 764.

91. Valparaiso *v.* Cartwright, 8 Ind. App. 429, 35 N. E. 1051; Peck *v.* Ellsworth, 36 Me. 393.

The road surveyor may enter on private land to remove obstruction. Johnson *v.* Dunn, 134 Mass. 522.

divert surface water on to the land of an abutting owner,[92] and may enter upon his land for that purpose,[93] but none other,[94] and only in the manner and after the preliminaries provided by statute;[95] and highway officers cannot in an artificial manner collect water in a body and cast it on the abutting premises.[96] Proceedings for drainage must be prosecuted by the officer specified in the statutes regulating the proceedings.[97]

2. Personal Liability of Officer. The highway officials may be liable personally for negligence in the performance of their duties.[98] They are also liable for

92. *Connecticut.*— Sisson *v.* Stonington, 73 Conn. 348, 47 Atl. 662; Byrne *v.* Farmington, 64 Conn. 367, 30 Atl. 138.

Indiana.— Hart *v.* Sigman, 32 Ind. App. 227, 69 N. E. 262.

Maine.— Gardiner *v.* Camden, 86 Me. 377, 30 Atl. 13, by cleaning out culverts.

Massachusetts.— Kennison *v.* Beverly, 146 Mass. 467, 16 N. E. 278.

Michigan.—Dean *v.* Millard, 151 Mich. 582, 115 N. W. 739.

Nebraska.— Hopper *v.* Douglas County, 75 Nebr. 332, 106 N. W. 331; Hopper *v.* Douglas County, 75 Nebr. 329, 106 N. W. 330; Churchill *v.* Beethe, 48 Nebr. 87, 66 N. W. 992, 35 L. R. A. 442; Stocker *v.* Nemaha County, 4 Nebr. (Unoff.) 230, 93 N. W. 721.

New York.—Winchell *v.* Camillus, 190 N. Y. 536, 83 N. E. 1134 [*affirming* 109 N. Y. App. Div. 341, 95 N. Y. Suppl. 688]; Acker *v.* Newcastle, 48 Hun 312, 1 N. Y. Suppl. 223.

North Dakota.— Carroll *v.* Rye Tp., 13 N. D. 458, 101 N. W. 894.

Pennsylvania.—West Bellevue *v.* Huddleson, (1889) 16 Atl. 764; Lorah *v.* Amity Tp., 35 Pa. Super. Ct. 529.

South Carolina.— Heape *v.* Berkeley County, 80 S. C. 32, 61 S. E. 203.

Wisconsin.— Merkel *v.* Germantown, 120 Wis. 494, 98 N. W. 210.

See 25 Cent. Dig. tit. "Highways," § 375 *et seq.*

Road drainage is to be governed by the same rules as farm drainage. Commissioners of highways may collect surface water and discharge it into a natural watercourse, although the flow of water over the servient estate is increased. Pre-emption Highway Com'rs *v.* Whitsitt, 15 Ill. App. 318.

Drainage into front door yards is sometimes prohibited by statute. Torrington *v.* Messenger, 74 Conn. 321, 50 Atl. 873.

A prescriptive right in the public to flow the land may exist. West Bellevue *v.* Huddleson, (Pa. 1889) 16 Atl. 764. See also Atty.-Gen. *v.* Copeland, [1902] 1 K. B. 690, 66 J. P. 420, 71 L. J. K. B. 472, 86 L. T. Rep. N. S. 486, 18 T. L. R. 394, 50 Wkly. Rep. 490.

Conversely the landowner has a right to drain reasonably into the highway if not interfering with the public convenience. Thom *v.* Dodge County, 64 Nebr. 845, 90 N. W. 763.

93. See Dierks *v.* Addison Tp. Highway Com'rs, 142 Ill. 197, 31 N. E. 496.

94. Dierks *v.* Addison Tp. Highway Com'rs, 142 Ill. 197, 31 N. E. 496, holding that road officers cannot enter land adjacent to a highway for the purpose of carrying over such land the sewage deposited on the highway by village drains.

Authority to drain to a watercourse does not give authority to drain to a pond. McLaughlin *v.* Sandusky, 17 Nebr. 110, 22 N. W. 241.

95. Cauble *v.* Hultz, 118 Ind. 13, 20 N. E. 515.

96. *Connecticut.*— Rudnyai *v.* Harwinton, 79 Conn. 91, 63 Atl. 948.

Illinois.— Jewett *v.* Sweet, 178 Ill. 96, 52 N. E. 962 [*affirming* 77 Ill. App. 641]; Graham *v.* Keene, 143 Ill. 425, 32 N. E. 180 [*affirming* 34 Ill. App. 87]; Young *v.* Maquon Tp. Highway Com'rs, 134 Ill. 569, 25 N. E. 689; Younggreen *v.* Shelton, 101 Ill. App. 89.

Indiana.— Patoka Tp. *v.* Hopkins, 131 Ind. 142, 30 N. E. 896, 31 Am. St. Rep. 417.

Iowa.— Schofield *v.* Cooper, 126 Iowa 334, 102 N. W. 110.

Kansas.— Dennis *v.* Osborn, 75 Kan. 557, 89 Pac. 925.

Massachusetts.— Wheeler *v.* Worcester, 10 Allen 591; Perry *v.* Worcester, 6 Gray 544, 66 Am. Dec. 431; Lawrence *v.* Fairhaven, 5 Gray 110; Anthony *v.* Adams, 1 Metc. 284.

Michigan.— Smith *v.* Eaton Tp., 138 Mich. 511, 101 N. W. 661.

Minnesota.— Gunnerus *v.* Spring Prairie, 91 Minn. 473, 98 N. W. 340, 974; Blakely Tp. *v.* Devine, 36 Minn. 53, 29 N. W. 342.

Nebraska.— Roe *v.* Howard County, 75 Nebr. 448, 106 N. W. 587, 5 L. R. A. N. S. 831; Churchill *v.* Beethe, 48 Nebr. 87, 66 N. W. 992, 35 L. R. A. 442.

New Jersey.— Slack *v.* Lawrence Tp., (Ch. 1890) 19 Atl. 663.

New York.— Moran *v.* McClearns, 63 Barb. 185, 44 How. Pr. 30.

Washington.—Wendel *v.* Spokane County, 27 Wash. 121, 67 Pac. 576.

One buying after the work was finished may recover where the nuisance was continuing. Stillman *v.* Pendleton, 26 R. I. 585, 60 Atl. 234.

97. Jones *v.* Dunn, 90 Ind. 78.

98. *Illinois.*— Tearney *v.* Smith, 86 Ill. 391; Allen *v.* Michel, 38 Ill. App. 313.

Indiana.— McOsker *v.* Burrell, 55 Ind. 425.

Michigan.— Breen *v.* Hyde, 130 Mich. 1, 89 N. W. 732; Cubit *v.* O'Dett, 51 Mich. 347, 16 N. W. 679.

New Hampshire.— Rowe *v.* Addison, 34 N. H. 306.

New York.—Wendell *v.* Troy, 39 Barb. 329 [*affirmed* in 4 Abb. Dec. 563, 4 Keyes 261].

Pennsylvania.—Warfel *v.* Cochran, 34 Pa. St. 381.

See 25 Cent. Dig. tit. "Highways," § 378.

malicious[99] or corrupt [1] action, or for acting without authority [2] in constructing or maintaining drains, but not for damage caused by drainage established by them within their authority.[3]

3. Abatement of Drainage Nuisance. If drainage upon adjacent land is in the nature of a nuisance the landowner may have a right to cure the trouble himself by peaceable abatement,[4] as by filling a ditch,[5] or opening one,[6] or filling his land to bar surface water from the highway.[7]

4. Enjoining Wrongful Drainage. Injunction may be allowed to protect individual landowners from irreparable injury from wrongful drainage,[8] only, however, where the work is clearly improper,[9] and not to prevent flowing which is the natural consequence of the building of the road;[10] and it is held that courts ought not to control by injunction the action of road commissioners in deciding on the necessity of a change of drainage and the mode of doing it.[11] Where the facts are in dispute an injunction will not be granted until they are established by a jury.[12]

F. Expenses [13] — 1. Apportionment. The statutes of the several states provide that the expense of road work shall be apportioned among the districts, towns, or counties benefited, the manner of apportionment differing widely under the different statutes.[14] A town not in the district in which the road exists may

99. Warfel *v.* Cochran, 34 Pa. St. 381.

1. McOsker *v.* Burrell, 55 Ind. 425.

2. Daum *v.* Cooper, 103 Ill. App. 4 [*affirmed* in 200 Ill. 538, 65 N. E. 1071] (changing system without consent); Plummer *v.* Sturtevant, 32 Me. 325; Conrad *v.* Smith, 32 Mich. 429.

3. Conwell *v.* Emrie, 4 Ind. 209; Eagle Tp. Highway Com'rs *v.* Ely, 54 Mich. 173, 19 N. W. 940 (holding that injury by rendering land more difficult of access is *damnum absque injuria*); Nussbaum *v.* Bell County, 97 Tex. 86, 76 S. W. 430. See also Eldorado Tp. Highway Com'rs *v.* Foster, 134 Ill. App. 520; Packard *v.* Voltz, 94 Iowa 277, 62 N. W. 757, 58 Am. St. Rep. 396.

Successors of negligent commissioners are not liable for their predecessors' acts. Gould *v.* Booth, 66 N. Y. 62.

4. Thompson *v.* Allen, 7 Lans. (N. Y.) 459.

5. Schofield *v.* Cooper, 126 Iowa 334, 102 N. W. 110; Thompson *v.* Allen, 7 Lans. (N. Y.) 459.

6. Groton *v.* Haines, 36 N. H. 388.

7. Murphy *v.* Kelley, 68 Me. 521; Bangor *v.* Lansil, 51 Me. 521.

8. *Illinois.*— Eldorado Tp. Highway Com'rs *v.* Foster, 134 Ill. App. 520; Hotz *v.* Hoyt, 34 Ill. App. 488, so holding, although plaintiff had improperly fenced as his own a portion of the public highway.

Indiana.— Cauble *v.* Hultz, 118 Ind. 13, 20 N. E. 515, so holding where the supervisor was acting without authority and irreparable injury would result.

Michigan.— Smith *v.* Eaton Tp., 138 Mich. 511, 101 N. W. 661 (although the officials intended to carry water along in a public sewer); Conrad *v.* Smith, 32 Mich. 429 (where no need was shown for the ditch).

Nebraska.— Fokenga *v.* Churchill, 2 Nebr. (Unoff.) 304, 96 N. W. 143.

New Jersey.— Slack *v.* Lawrence Tp., (Ch. 1890) 19 Atl. 663.

Pennsylvania.—Woodroffe *v.* Hagerty, 35 Pa. Super. Ct. 576.

Vermont.—Whipple *v.* Fair Haven, 63 Vt. 221, 21 Atl. 533.

See 25 Cent. Dig. tit. "Highways," § 377.

Damages may be allowed upon granting the injunction. Whipple *v.* Fair Haven, 63 Vt. 221, 21 Atl. 533.

9. Hotz *v.* Hoyt, 135 Ill. 388, 25 N. E. 753.

10. Kiley *v.* Bond, 114 Mich. 447, 72 N. W. 253; Churchill *v.* Beethe, 48 Nebr. 87, 66 N. W. 992, 35 L. R. A. 442.

11. Warfel *v.* Cochran, 34 Pa. St. 381.

12. Woodroffe *v.* Hagerty, 35 Pa. Super. Ct. 576.

13. **Fund created by sale of liquor licenses used to repair roads** see Intoxicating Liquors, 23 Cyc. 152 note 40.

Payment as prerequisite to municipal improvements see Municipal Corporations, 28 Cyc. 1088.

14. See the statutes of the different states. And see the following cases:

Illinois.— Elmira Highway Com'rs *v.* Osceola Highway Com'rs, 74 Ill. App. 185.

Indiana.— Sim *v.* Hurst, 44 Ind. 579.

Massachusetts.— Provincetown *v.* Truro, 135 Mass. 263 (holding that a rule of apportionment under a special act to share the expense of a bridge does not cover a highway constructed later); *In re* Ipswich, 24 Pick. 343; Parsons *v.* Goshen, 11 Pick. 396.

New Hampshire.— O'Neil *v.* Walpole, 74 N. H. 197, 66 Atl. 119; Campton *v.* Plymouth, 64 N. H. 304, 8 Atl. 824; Whittredge *v.* Concord, 36 N. H. 530; *In re* Reed, 13 N. H. 381; Peirce *v.* Somersworth, 10 N. H. 369.

New Jersey.— Newark *v.* Essex County, 40 N. J. L. 595 (holding that apportionment covers principal and interest until debt paid); State *v.* Cannon, 33 N. J. L. 218; *In re* Newark Plank Road, etc., 63 N. J. Eq. 710, 53 Atl. 5 (apportionment by ascertaining the proportion of through traffic to the total use of the road).

New York.— Matter of Newburg's Business Men's Assoc., 54 Misc. 13, 103 N. Y. Suppl. 843.

under some statutes be forced to contribute toward it, particularly if greatly benefited,[15] even though not adjoining.[16] The statutes specify by whom the apportionment is to be made, and in order to be valid the apportionment must be made by the officers or court specified,[17] in the manner and upon the proceedings specified in the statute.[18] The apportionment can be attacked only by parties interested in a direct proceeding for that purpose.[19]

2. Liability of Municipality to Laborer or Materialman. The municipality is responsible to one who furnishes labor or material for road work on authority,[20] and for road machinery purchased by road officers within their authority;[21] but persons who improve roads without authority may not recover,[22] although in some cases authority may be presumed.[23] Assignments to road officers of claims

Ohio.— Lake County *v.* Ashtabula, 24 Ohio St. 393.

Pennsylvania.— Mahanoy Tp. *v.* Comry, 103 Pa. St. 362.

Vermont.— Sheldon *v.* State, 59 Vt. 36, 7 Atl. 901; Platt *v.* Milton, 58 Vt. 608, 5 Atl. 558 (holding that benefit to town and not merely its business interests must be shown); Weybridge *v.* Addison, 57 Vt. 569; Fairfax *v.* Fletcher, 47 Vt. 326 (allowing no contribution where portion of a road in the town was not of value to it); Londonderry *v.* Peru, 45 Vt. 424.

Wisconsin.— Neis *v.* Franzen, 18 Wis. 537.

See 25 Cent. Dig. tit. "Highways," § 357.

15. Langley *v.* Barnstead, 63 N. H. 246; Hodgson *v.* New Hampton, 56 N. H. 332 (holding that county commissioners may assign expense to town in adjoining county); People *v.* Queens County, 112 N. Y. 585, 20 N. E. 549; Wardsboro *v.* Jamaica, 59 Vt. 514, 9 Atl. 11; Jamaica *v.* Wardsboro, 47 Vt. 451; State *v.* Woodbury, 27 Vt. 731 (although towns not in the same county). But see *In re* Sanborn, 33 N. H. 71; Parker *v.* East Montpelier, 59 Vt. 632, 10 Atl. 463.

16. Langley *v.* Barnstead, 63 N. H. 246; People *v.* Queens County, 112 N. Y. 585, 20 N. E. 549.

17. *In re* Ipswich, 24 Pick. (Mass.) 343; Springfield *v.* Hampden County, 10 Pick. (Mass.) 59; Gaines *v.* Hudson County Ave. Com'rs, 37 N. J. L. 12; *In re* Newark Plank Road, etc., 63 N. J. Eq. 710, 53 Atl. 5; People *v.* Queens County, 48 Hun (N. Y.) 324, 1 N. Y. Suppl. 382 [*affirmed* in 112 N. Y. 585, 20 N. E. 549]; Londonderry *v.* Peru, 45 Vt. 424; Jamaica *v.* Wardsboro, 45 Vt. 416.

Mandamus does not lie to compel the county commissioners to order a part of the expense incurred by a town in making a highway to be repaid out of the county treasury. *In re* Ipswich, 24 Pick. (Mass.) 343; Springfield *v.* Hampden County, 10 Pick. (Mass.) 59.

18. *Indiana.*— State *v.* Marion County, (1907) 82 N. E. 482.

Maine.— Howe *v.* Aroostook County, 46 Me. 332, holding also that the record must show at whose expense the road was laid out.

New Hampshire.— O'Neil *v.* Walpole, 74 N. H. 197, 66 Atl. 119; Rye *v.* Rockingham County, 68 N. H. 268, 34 Atl. 743; Whittredge *v.* Concord, 36 N. H. 530.

New Jersey.— Marlboro Tp. *v.* Van Derveer, 47 N. J. L. 259.

New York.— *In re* Newburg's Business Men's Assoc., 54 Misc. 11, 103 N. Y. Suppl. 847.

See 25 Cent. Dig. tit. "Highways," § 357.

19. Bronnenburg *v.* O'Bryant, 139 Ind. 17, 38 N. E. 416; Pierson *v.* Newark, 44 N. J. L. 424; Seanor *v.* Whatcom County, 13 Wash. 48, 42 Pac. 552.

20. Blackford County *v.* Shrader, 36 Ind. 87; Center Tp. *v.* Davis, 24 Ind. App. 603, 57 N. E. 283 (where township directed road supervisor to employ labor); Bryant *v.* Westbrook, 86 Me. 450, 29 Atl. 1109; Morrell *v.* Dixfield, 30 Me. 157; Whately *v.* Franklin County, 1 Metc. (Mass.) 336; Dull *v.* Ridgway, 9 Pa. St. 272.

Work outside the jurisdiction cannot be authorized. Sault Ste. Marie Highway Com'rs *v.* Van Dusan, 40 Mich. 429.

Fees of an attorney hired by petitioner to advise the board are not part of the expenses. Overmeyer *v.* Cass County, 43 Ind. App. 403, 86 N. E. 77.

21. *Iowa.*— Harrison County *v.* Ogden, 133 Iowa 9, 110 N. W. 32.

Michigan.— Pape *v.* Benton Tp., 140 Mich. 165, 103 N. W. 591, payment enforced by mandamus to compel tax levy and not by action for purchase-price.

New York.— People *v.* Montgomery, 48 N. Y. App. Div. 550, 62 N. Y. Suppl. 993. But see Acme Road Machinery Co. *v.* Bridgewater, 185 N. Y. 1, 77 N. E. 879.

Pennsylvania.— F. C. Austin Mfg. Co. *v.* Ayr, 31 Pa. Super. Ct. 356; Climax Road Mach. Co. *v.* Allegheny Tp., 10 Pa. Super. Ct. 437.

Wisconsin.— Western Wheeled Scraper Co. *v.* Chippewa County, 102 Wis. 614, 78 N. W. 764.

22. Bain *v.* Knox County Ct., 13 Ky. L. Rep. 784; Branch *v.* Pointe Coupee Police Jury, 26 La. Ann. 150; Anderson *v.* Hamilton Tp., 25 Pa. St. 75; Bryant *v.* Spring Brook Tp., 5 Luz. Leg. Reg. (Pa.) 203; Bill *v.* Woodbury, 54 Vt. 251; Lamphire *v.* Windsor, 27 Vt. 544; Pratt *v.* Swanton, 15 Vt. 147. But see Police Jury *v.* Hampton, 5 Mart. N. S. (La.) 389.

A road overseer is not an agent of the county to bind it for the price of supplies. N. A. Matthews Lumber Co. *v.* Van Zandt, (Tex. Civ. App. 1903) 77 S. W. 960.

23. Harris *v.* Carson, 40 Ill. App. 147.

against the county for road work are valid,[24] provided of course that they are not fraudulent.[25]

3. Improvement Bonds or Certificates. Under some statutes payment may be made by giving improvement bonds,[26] or certificates.[27]

4. Work or Material on Credit. Some,[28] but not all,[29] statutes authorize the furnishing of road work or material on credit, not, however, beyond funds on hand or appropriated,[30] or taxes levied.[31]

5. Recovery of Advances Made by Highway Officer. Highway officers may recover advances made by them of the amount necessary to put roads in repair,[32] only, however, where the expenditures were within their authority,[33] and for work within their district.[34]

G. Contracts For Road Work — 1. Execution; Form and Validity.[35] Many statutes authorize the making of contracts by certain highway authorities for road work by individuals, whereby the contractor agrees to maintain the road in good condition for the time contracted for.[36] Under these statutes such a contract must be executed by the municipal officers authorized by statute,[37] in the required

24. Robertson *v.* King County, 20 Wash. 259, 55 Pac. 52.

25. Webster *v.* Douglas County, 102 Wis. 181, 77 N. W. 885, 78 N. W. 451, 72 Am. St. Rep. 870.

26. McMahon *v.* San Mateo County, 46 Cal. 214; Strieb *v.* Cox, 111 Ind. 299, 12 N. E. 481; Ricketts *v.* Spraker, 77 Ind. 371; Knapp *v.* Newtown, 1 Hun (N. Y.) 268, 3 Thomps. & C. 748; Braun *v.* Benton County, 70 Fed. 369, 17 C. C. A. 166.

27. Com. *v.* Thompson, 86 Pa. St. 442; *In re* Porter Tp. Road, 1 Walk. (Pa.) 10. But see McFarlan *v.* Cedar Creek Tp., 93 Mich. 558, 53 N. W. 782; Lansdale First Nat. Bank *v.* Wyandotte County, 68 Fed. 878, 16 C. C. A. 56.

28. Blanchard *v.* Ayer, 148 Mass. 174, 19 N. E. 209; Chalmers *v.* Andover, 63 N. H. 3; Rollins *v.* Chester, 46 N. H. 411 (surveyor may purchase material but cannot charge the town with labor); Wells *v.* Goffstown, 16 N. H. 53 (only after all money voted for the object has been spent); Brown *v.* Rundlett, 15 N. H. 360.

29. Tufts *v.* Lexington, 72 Me. 516; Mather *v.* Crawford, 36 Barb. (N. Y.) 564; People *v.* Burrell, 14 Misc. (N. Y.) 217, 35 N. Y. Suppl. 608; Barker *v.* Loomis, 6 Hill (N. Y.) 463, holding that commissioners of highways are not bound to pay a note given by their predecessors in office for the repair of bridges and roads. But see Potter *v.* Davis, Lalor (N. Y.) 394.

30. Wiegel *v.* Pulaski County, 61 Ark. 74, 32 S. W. 116; Hardwood *v.* Hamilton, 13 Ill. App. 358; State *v.* Snodgrass, 98 Ind. 546; Field *v.* Towle, 34 Me. 405; Wayne Tp. *v.* Cahill, 49 N. J. L. 144, 6 Atl. 621.

31. Sullivan *v.* Highway Com'rs, 114 Ill. 262, 29 N. E. 688; Brauns *v.* Peoria, 82 Ill. 11; Highway Com'rs *v.* Newell, 80 Ill. 587; Harwood *v.* Hamilton, 13 Ill. App. 358.

32. *Indiana.*— Clark Civil Tp. *v.* Brookshire, 114 Ind. 437, 16 N. E. 132.

Massachusetts.— Emerson *v.* Newbury, 13 Pick. 377; Wood *v.* Waterville, 5 Mass. 294.

New Hampshire.— Palmer *v.* Carroll, 24 N. H. 314.

New York.— Bruner *v.* Lewis, 4 N. Y. Suppl. 403.

Pennsylvania.— *In re* Porter Tp. Road, 1 Walk. 10.

Vermont.— Gassett *v.* Andover, 21 Vt. 342.

See 25 Cent. Dig. tit. "Highways," § 353.

33. Willey *v.* Windham, 95 Me. 482, 50 Atl. 281; Getchell *v.* Wells, 55 Me. 433; Ingalls *v.* Auburn, 51 Me. 352; Morrell *v.* Dixfield, 30 Me. 157; Goddard *v.* Petersham, 136 Mass. 235; Sikes *v.* Hatfield, 13 Gray (Mass.) 347; Armstrong *v.* Wendell, 9 Metc. (Mass.) 522; State *v.* Bourn, 75 Mo. 473; Ewell *v.* Virgil Tp., 65 Mo. 657; Callahan *v.* Morris Tp., 30 N. J. L. 160; Mendham Tp. *v.* Losey, 2 N. J. L. 327.

34. Jones *v.* Lancaster, 4 Pick. (Mass.) 149; Cloud *v.* Norwich, 57 Vt. 448; Lamphire *v.* Windsor, 27 Vt. 544.

35. Right of officers to bind road districts by contracts see *supra*, IV, B, 5, a.

36. See the statutes of the several states. And see cases cited *infra*, note 37 *et seq.*

37. *Indiana.*— Dewey *v.* State, 91 Ind. 173 (board of county commissioners); Driftwood Valley Turnpike Co. *v.* Bartholomew County, 72 Ind. 226 (township officers).

Iowa.— Long *v.* Boone County, 32 Iowa 181.

Massachusetts.— Brookfield *v.* Reed, 152 Mass. 568, 26 N. E. 138, contract with private persons to raise grade.

New Jersey.— Union Tp. Committee *v.* Rader, 41 N. J. L. 617, township committee.

Pennsylvania.— Childs *v.* Brown Tp., 40 Pa. St. 332.

See 25 Cent. Dig. tit. "Highways," § 348.

The whole board should act. Furman *v.* Taylor, 16 N. Y. Suppl. 703; Batten *v.* Brandywine Tp., 5 Pa. L. J. 546, holding a contract by one supervisor only void.

The board may not alter the contract after execution. Jackson County *v.* Branaman, (Ind. App. 1907) 79 N. E. 923.

An unsuccessful bidder cannot question the contract. Middle Valley Trap Rock Min. Co. *v.* Morris County, 71 N. J. L. 333, 60 Atl. 358 [*affirming* 70 N. J. L. 625, 57 Atl. 258].

form,[38] for purposes allowed by the statute,[39] and with the persons entitled by the statute,[40] and after the required preliminaries,[41] such as the advertisement for competitive bids,[42] in accordance with plans and specifications,[43] and the giving of the statutory bond,[44] and after the proper vote authorizing the contract;[45] and a contractor is bound by all statutory limitations on governmental authority to contract.[46] The decision of the municipal authorities in awarding contracts to the best bidder is quasi-judicial and will not be upset by the courts unless fraudulent.[47] Unauthorized contracts may be ratified.[48]

2. Construction. Road contracts should be reasonably construed in view of all the circumstances.[49]

Such a contract does not relieve the town from the duty to repair. Wagner *v.* Hazle Tp., 215 Pa. St. 219, 64 Atl. 405.

Contract void as not executed by authorized officer see Perry *v.* Engle, 116 Ky. 594, 76 S. W. 382, 25 Ky. L. Rep. 813; Bean *v.* Hyde Park, 143 Mass. 245, 9 N. E. 638; Clark *v.* Russell, 116 Mass. 455; Parsons *v.* Goshen, 11 Pick. (Mass.) 396; Hosier *v.* Higgins Tp. Bd., 45 Mich. 340, 7 N. W. 897; People *v.* Ulster County, 93 N. Y. 397; People *v.* Esopus, 10 Hun (N. Y.) 551 [*affirmed* in 74 N. Y. 310]; Huston *v.* Sioux Falls Tp., 17 S. D. 260, 96 N. W. 88.

38. State *v.* Vice, 71 Miss. 912, 15 So. 129; Le Moyne *v.* Washington County, 213 Pa. St. 123, 62 Atl. 516.

A receipt of orders payable in future years does not invalidate contract which did not provide for it. Sullivan *v.* Highway Com'rs, 114 Ill. 262, 29 N. E. 688.

Contracts held void for improper execution see Russell *v.* Minteer, 83 Ill. 150; Huntington *v.* Force, 152 Ind. 368, 53 N. E. 443; People *v.* Baraga Tp., 39 Mich. 554; Deichsel *v.* Maine, 81 Wis. 553, 51 N. W. 880.

Mere informalities are not necessarily fatal. Dewey *v.* State, 91 Ind. 173; Taymouth Tp. *v.* Koehler, 35 Mich. 22.

39. Bean *v.* Hyde Park, 143 Mass. 245, 9 N. E. 638 (holding that a vote for "highways" authorizes only repairs on existing roads); Keyes *v.* Westford, 17 Pick. (Mass.) 273 (where the committee's special authority was held not to extend to completing contract left unfinished); Keyes *v.* Westford, 17 Pick. (Mass.) 273; Follmer *v.* Nuckolls County, 6 Nebr. 204.

40. Middle Valley Trap Rock Min. Co. *v.* Morris County, 71 N. J. L. 333, 60 Atl. 358 [*affirming* 70 N. J. L. 625, 57 Atl. 258], awarded only to bidder for whole supply. See also Riggs *v.* Winterode, 100 Md. 439, 59 Atl. 762.

Where the officers contracting are personally interested the contract is void. Brauns *v.* Peoria, 82 Ill. 11; Nelson *v.* Harrison County, 126 Iowa 436, 102 N. W. 197; Com. *v.* Lane, 125 Ky. 725, 102 S. W. 313, 31 Ky. L. Rep. 311 (where member of court worked with his teams on the road by the day); Coxe's Case, 1 Pa. Dist. 702, 11 Pa. Co. Ct. 639 (holding that a statute forbidding an officer to be interested forbids employing his own teams and children). See also Buckley *v.* Hanson, 18 Cox C. C. 688, 62 J. P. 119, 77 L. T. Rep. N. S. 664. But a partner of a city official who did not vote on award may take contract. Moreland *v.* Passaic, 63 N. J. L. 208, 42 Atl. 1058. And one who as city official voted for improvement may resign and then bid for contract. White *v.* Alton, 149 Ill. 626, 37 N. E. 96.

41. Dunn *v.* Sharp, 4 Ida. 98, 35 Pac. 842, only after survey.

42. Kelley *v.* Torrington, 80 Conn. 378, 68 Atl. 855; Loesnitz *v.* Seelinger, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 887; McKissick *v.* Mt. Pleasant Tp., 48 Mo. App. 416; Middle Valley Trap Rock Min. Co. *v.* Morris County, 71 N. J. L. 333, 60 Atl. 358 [*affirming* 70 N. J. L. 625, 57 Atl. 258]; Curley *v.* Hudson County, 66 N. J. L. 401, 49 Atl. 471.

43. Nash *v.* St. Paul, 11 Minn. 174; State *v.* Jersey City, 58 N. J. L. 262, 33 Atl. 740; Mazet *v.* Pittsburgh, 137 Pa. St. 548, 20 Atl. 693. See also *In re* Marsh, 83 N. Y. 431.

44. See *infra*, V, G, 4.

45. Sikes *v.* Hatfield, 13 Gray (Mass.) 347.

Authority given held insufficient see Jackson *v.* Belmont, 12 Me. 494; Matter of Niland, 113 N. Y. App. Div. 661, 99 N. Y. Suppl. 914.

46. *Illinois.*— Littler *v.* Jayne, 124 Ill. 123, 16 N. E. 374.

Indiana.— Clements *v.* Lee, 114 Ind. 397, 16 N. E. 799.

Kentucky.— Central Covington *v.* Weighans, 44 S. W. 985, 19 Ky. L. Rep. 1979.

Maine.— Emerson *v.* Washington County, 9 Me. 88.

Missouri.— Thornton *v.* Clinton, 148 Mo. 648, 50 S. W. 295.

New York.— Brady *v.* New York, 20 N. Y. 312.

Ohio.— Comstock *v.* Nelsonville, 61 Ohio St. 288, 56 N. E. 15.

Pennsylvania.— See Thompson *v.* Com., 81 Pa. St. 314.

See 25 Cent. Dig. tit. "Highways," § 348 *et seq.*

47. People *v.* Kent, 160 Ill. 655, 43 N. E. 760; East River Gaslight Co. *v.* Donnelly, 93 N. Y. 557; American Pavement Co. *v.* Wagner, 139 Pa. St. 623, 21 Atl. 160.

Contracts held valid see *In re* New Salem, 6 Pick. (Mass.) 470; East Union Tp. *v.* Comrey, 100 Pa. St. 362; Harshman *v.* Dunbar Tp., 11 Pa. Super. Ct. 638.

48. Taymouth Tp. *v.* Koehler, 35 Mich. 22; McKissick *v.* Mt. Pleasant Tp., 48 Mo. App. 416; Harshman *v.* Dunbar Tp., 11 Pa. Super. Ct. 638.

49. Saxton Nat. Bank *v.* Haywood, 62 Mo.

3. Performance and Payment. Payment should be made only on fulfilment of the contract according to its terms,[50] and on acceptance of the work,[51] in accordance with the decision of the engineer, or architect, or other officer named in the contract.[52]

4. Contractor's Bonds.[53] Under many statutes authorizing contracts for road work contractors are required to give bonds,[54] which must follow the statute,[55] although mere informalities in the bond or in its execution will not necessarily avoid the bond.[56]

5. Actions. The manner of enforcement of payment for road work depends on local law[57] which governs the parties,[58] pleadings,[59] evidence,[60] and defenses.[61] The public officials should enforce the contracts as made,[62] or avoid them when

App. 550 (paving contract construed not to include part of road between railway tracks); State *v.* Cuyahoga County, 9 Ohio S. & C. Pl. Dec. 76, 6 Ohio N. P. 405 ("earth" includes material costing about the same as earth to remove); Elma *v.* Carney, 9 Wash. 466, 37 Pac. 707 (contract for grading or paving includes only the way between the sidewalks).

50. *Connecticut.*— Jones *v.* Marlborough, 70 Conn. 583, 40 Atl. 460, holding that the contractor cannot recover in *quantum meruit* where he has not complied with contract.

Indiana.— Jackson County *v.* Branaman, 169 Ind. 80, 82 N. E. 65; Laporte County *v.* Wolff, (1904) 72 N. E. 860.

Massachusetts.— Reed *v.* Scituate, 5 Allen 120.

Michigan.— Olds *v.* State Land Office Com'r, 134 Mich. 442, 86 N. W. 956, 96 N. W. 508.

New York.— Brown *v.* New York, 72 N. Y. App. Div. 420, 76 N. Y. Suppl. 26.

Washington.— State *v.* Van Wyck, 20 Wash. 39, 54 Pac. 768.

See 25 Cent. Dig. tit. "Highways," § 349.

An extra sum allowed for work included in the contract is void. State *v.* Cuyahoga County, 9 Ohio S. & C. Pl. Dec. 76, 6 Ohio N. P. 405. See also Olds *v.* State Land Office Com'r, 134 Mich. 442, 86 N. W. 956, 96 N. W. 508.

51. Jones *v.* Marlborough, 70 Conn. 583, 40 Atl. 460.

Mere use of a road is not evidence of its acceptance. Reed *v.* Scituate, 5 Allen (Mass.) 120; Wrought Iron Bridge Co. *v.* Jasper Tp., 68 Mich. 441, 36 N. W. 213; Davis *v.* Barrington, 30 N. H. 517.

52. Mercer Bd. of Internal Imp. *v.* Dougherty, 3 B. Mon. (Ky.) 446; Curley *v.* Hudson County, 66 N. J. L. 401, 49 Atl. 471. See also Ripley County *v.* Hill, 115 Ind. 316, 16 N. E. 156.

The architect's certificate is not conclusive. Campbell County *v.* Youtsey, 12 S. W. 305, 11 Ky. L. Rep. 529; Grass *v.* Haynes, 15 La. Ann. 181.

53. Liability on bonds generally see Bonds, 5 Cyc. 721.

54. See the statutes of the several states. And see Hart *v.* State, 120 Ind. 83, 21 N. E. 654, 24 N. E. 151; Faurote *v.* State, 110 Ind. 463, 11 N. E. 472, 111 Ind. 73, 11 N. E. 476, 119 Ind. 600, 21 N. E. 663; State *v.* Sullivan, 74 Ind. 121; Swindle *v.* State, 15 Ind. App. 415, 44 N. E. 60; Brookfield *v.* Reed, 152 Mass. 568, 26 N. E. 138; *In re* Bern Tp., etc., Road, (Pa. 1889) 17 Atl. 205.

Obligors are liable only according to the terms of the bond, and liability cannot be extended. Moss *v.* Rowlett, 112 Ky. 121, 65 S. W. 153, 358, 23 Ky. L. Rep. 1411.

55. Hart *v.* State, 120 Ind. 83, 21 N. E. 654, 24 N. E. 151; Faurote *v.* State, 119 Ind. 600, 21 N. E. 663; Lane *v.* State, 14 Ind. App. 573, 43 N. E. 244.

56. Byrne *v.* Luning Co., (Cal. 1894) 38 Pac. 454 (bond dated one day earlier than contract); Larned *v.* Maloney, 19 Ind. App. 199, 49 N. E. 278 (bond dated two days late).

57. See Lexington *v.* Middlesex County, 165 Mass. 296, 43 N. E. 110; Hull *v.* Berkshire, 9 Pick. (Mass.) 553; Hill *v.* Sunderland, 7 Vt. 215; Bromley Rural Dist. Council *v.* Chittenden, 70 J. P. 409, 4 Loc. Gov. 967; Paré *v.* Deschamps, 7 Quebec Pr. 4.

Mandamus will lie on the relation of a highway supervisor to compel the township trustee to pay out of moneys in his hands applicable thereto an order given by such supervisor to a laborer for work lawfully done on a highway. Potts *v.* State, 75 Ind. 336; Lanesborough *v.* Berkshire County, 6 Metc. (Mass.) 329.

Summary rights to seize and sell the property of landowners liable for road work exist in Louisiana. Pointe Coupée Police Jury *v.* Gardiner, 2 Rob. (La.) 139; Morgan *v.* Pointe Coupée Police Jury, 11 La. 157.

58. Little *v.* Hamilton County, 7 Ind. App. 118, 34 N. E. 499; *In re* Wilkes-Barre Tp., 8 Kulp (Pa.) 516, against township. See also Travis *v.* Ward, 2 Wash. 30, 25 Pac. 908.

59. Clark Civil Tp. *v.* Brookshire, 114 Ind. 437, 16 N. E. 132; Bell *v.* Pavey, 7 Ind. App. 19, 33 N. E. 1011.

60. Barren County Ct. *v.* Kinslow, 9 Ky. L. Rep. 108 (holding the certificate of the surveyor conclusive as to amount and necessity of use of carriage); Grass *v.* Haynes, 15 La. Ann. 181 (holding that evidence must show that the law was fully complied with); McCormick *v.* Boston, 120 Mass. 499 (holding that the questions of the authority to make and ratify contract are for the jury); Snow *v.* Ware, 13 Metc. (Mass.) 42.

61. McDermott *v.* Laporte Tp., 2 Pa. Cas. 105, 3 Atl. 437.

62. Corker *v.* Elmore County, 10 Ida. 255,

illegal,[63] and the contractor has the usual rights of action on the contract,[64] and may sue in *quantum meruit* for work done in good faith.[65]

H. Establishment, Construction, Repair, and Improvement of Free Gravel Roads and Turnpikes — 1. In General. In some jurisdictions statutory provision is made for the establishment, construction, improvement, or repair of free gravel roads or turnpikes,[66] the establishment of which does not differ materially from the establishment of other highways.[67] The statutes require the filing of a petition,[68] with a specified board or officer,[69] signed by a specified number of persons interested,[70] describing properly the construction

77 Pac. 633 (commissioners should not release bidders); Middlefield *v.* Church Mills Knitting Co., 160 Mass. 267, 35 N. E. 780 (town may enforce a covenant to repair).

Defenses see Brookfield *v.* Reed, 152 Mass. 568, 26 N. E. 138 (contractor may show that town repaired road in a too costly manner); Kingsley *v.* Butterfield, 35 Nebr. 228, 52 N. W. 1101 (no defense that location of railroad prevented opening).

63. Monroe County *v.* Conner, 155 Ind. 484, 58 N. E. 828.

Orders issued on an illegal contract may be recovered by the town. Buckeye Tp. *v.* Clark, 90 Mich. 432, 51 N. W. 528.

64. King *v.* Martin County, 34 Ind. App. 231, 72 N. E. 616; Lane *v.* State, 14 Ind. App. 573, 43 N. E. 244; Semel *v.* Gould, 12 La. Ann. 225; Michel *v.* Terrebonne Police Jury, 9 La. Ann. 67; McCormick *v.* Boston, 120 Mass. 499; Moore *v.* Ramsey County, 104 Minn. 30, 115 N. W. 750.

65. Hayden *v.* Madison, 7 Me. 76; Reed *v.* Scituate, 5 Allen (Mass.) 120; Walker *v.* Orange, 16 Gray (Mass.) 193; Moore *v.* Ramsey County, 104 Minn. 30, 115 N. W. 750; Davis *v.* Barrington, 30 N. H. 517. But see Kelley *v.* Torrington, 80 Conn. 378, 68 Atl. 855; Huston *v.* Sioux Falls Tp., 17 S. D. 260, 96 N. W. 88.

66. See the statutes of the several states. And see cases cited *infra*, note 68 *et seq.*

67. See *supra*, II, C, 5.

68. Smyth *v.* State, 158 Ind. 332, 62 N. E. 449; McClure *v.* Franklin County, 124 Ind. 154, 24 N. E. 741; Clarke County *v.* Gilbert, 27 Ohio St. 258; McGonnigle *v.* Arthur, 27 Ohio St. 251; Hays *v.* Jones, 27 Ohio St. 218; Burgett *v.* Norris, 25 Ohio St. 308.

Where the board acts on its own initiative a petition is unnecessary. McClure *v.* Franklin County, 124 Ind. 154, 24 N. E. 741.

Agreement among owners as not invalidating petition.— It is no ground for enjoining proceedings for a road improvement that one or more signed the petition therefor upon the promise of others to pay all assessments that might be made on his or their lands to defray the cost of construction. Makemson *v.* Kauffman, 35 Ohio St. 444.

Notice of filing the petition is unnecessary. Thompson *v.* Love, 42 Ohio St. 61.

69. Todd *v.* Crail, 167 Ind. 48, 77 N. E. 402; Switzerland County *v.* Reeves, 148 Ind. 467, 46 N. E. 995.

70. Conrad *v.* Hansen, 171 Ind. 43, 85 N. E. 710; Kemp *v.* Goodnight, 168 Ind. 174, 80 N. E. 160; Brown *v.* Miller, 162 Ind. 684, 71 N. E. 122; Fleming *v.* Hight, 101 Ind. 466; Davern *v.* Decatur County, 34 Ind. App. 44, 72 N. E. 268; Barker *v.* Wyandotte County, 45 Kan. 681, 698, 26 Pac. 585, 591; Shattuck's Appeal, 73 Me. 318; Makemson *v.* Kauffman, 35 Ohio St. 444; Burgett *v.* Norris, 25 Ohio St. 308; State *v.* McClymon, 7 Ohio Dec. (Reprint) 109, 1 Cinc. L. Bul. 116. See also Bloomington *v.* Reeves, 177 Ill. 161, 52 N. E. 278.

Objection to lack of requisite number must be made before the report of viewers is made. Miller *v.* Burks, 146 Ind. 219, 43 N. E. 930.

Resident tenants in common are counted as if owning in severalty. Makemson *v.* Kauffman, 35 Ohio St. 444.

The burden is on petitioners to show that the proper number have signed. Fleming *v.* Hight, 101 Ind. 466.

Withdrawal or addition of petitioners.— Petitioners may withdraw (Black *v.* Campbell, 112 Ind. 122, 13 N. E. 409; Dunham *v.* Fox, 100 Iowa 131, 69 N. W. 436, holding that signing of remonstrance operates as a withdrawal; Hays *v.* Jones, 27 Ohio St. 218), or may be added (Black *v.* Campbell, *supra*; Parker *v.* Burgett, 29 Ohio St. 513), before final action, but a petitioner cannot withdraw after a finding by the board (Ralston *v.* Beall, 171 Ind. 719, 30 N. E. 1095).

Signatures held sufficient see State *v.* Somerset County, (N. J. Sup. 1896) 35 Atl. 1 (names signed by authority or ratified); St. Bernard *v.* Kemper, 60 Ohio St. 244, 54 N. E. 267, 45 L. R. A. 662.

Signatures held insufficient see Rector *v.* Hot Springs Bd. of Imp., 50 Ark. 116, 6 S. W. 519; Atlanta *v.* Smith, 99 Ga. 462, 27 S. E. 696; Merritt *v.* Kewanee, 175 Ill. 537, 51 N. E. 867; Kemp *v.* Goodnight, 168 Ind. 174, 80 N. E. 160; Baltimore *v.* Boyd, 64 Md. 10, 20 Atl. 1028 (tenant); Auditor-Gen. *v.* Fisher, 84 Mich. 128, 47 N. W. 574; Arnold *v.* Cumberland, 72 N. J. L. 448, 60 Atl. 1132; State *v.* Trenton, 40 N. J. L. 89.

Combining petitions.— Duplicate or triplicate petitions may be combined and treated as one original. Brown *v.* Miller, 162 Ind. 684, 71 N. E. 122; Putnam County *v.* Young, 36 Ohio St. 288; Makemson *v.* Kauffman, 35 Ohio St. 444; Campbell *v.* Park, 32 Ohio St. 544; Braden *v.* Logan County, 31 Ohio St. 386. But names on a former abandoned petition cannot be counted (Makemson *v.* Kauffman, *supra*); and parties signing only one of two successive petitions cannot be combined to make requisite total (Auditor-Gen. *v.* Fisher, 84 Mich. 128, 47 N. W. 574).

Death of one petitioner before final order

or improvement proposed,[71] and containing all other matters required by the statute.[72] Pleadings in reply should be according to the statute.[73]

2. Commissioners or Viewers. The statutes provide for the appointment of commissioners or viewers, who must be appointed in accordance therewith,[74] and who must make a report,[75] which forms the basis of further proceedings.[76] If the desired improvement or construction is decided upon the viewers should make an order,[77] which must follow the petition.[78] The order may be vacated for sufficient reasons,[79] but is conclusive unless directly attacked.[80]

3. Hearing. The hearing upon the petition must be in accordance with the statute,[81] and must be held after the prescribed notice.[82]

4. Record. The record need not show that the improvement was necessary,[83] unless the statute so requires,[84] and the adoption of the order may be a sufficient statement of necessity.[85]

5. Appeal. The proceedings may be reviewed by appeal.[86]

is not fatal where his heirs do not withdraw. Makemson *v.* Kauffman, 35 Ohio St. 444.

71. Cincinnati, etc., R. Co. *v.* People, 206 Ill. 565, 69 N. E. 628; Stoddard *v.* Johnson, 75 Ind. 20.

A petition setting forth two alternative routes is void. *In re* Middletown Road, 15 Pa. Super. Ct. 167.

That the petition asks for two improvements instead of one, because the work contemplated includes part of a road already constructed, does not render the proceedings void. Evans *v.* West, 138 Ind. 621, 38 N. E. 65.

72. Cottrell *v.* Middlesex County, 55 N. J. L. 238, 26 Atl. 94, holding that statement in petition that petitioners will pay one tenth of actual benefit does not comply with law requiring promise to pay up to ten per cent of entire cost.

73. Kemp *v.* Goodnight, 168 Ind. 174, 80 N. E. 160.

74. Fulton *v.* Cummings, 132 Ind. 453, 30 N. E. 949.

Fraud in obtaining the appointment of commissioners to lay out and construct a turnpike is no ground for a suit to enjoin them. Louisville, etc., R. Co. *v.* McVean, 34 S. W. 525, 17 Ky. L. Rep. 1283.

Personal interest of commissioners does not necessarily disqualify them. Carroll County *v.* Justice, 133 Ind. 89, 30 N. E. 1085, 36 Am. St. Rep. 528 (where one of commissioners was a landowner and no other landowner objected); Thompson *v.* Love, 42 Ohio St. 61 (holding that a county commissioner may act, although a landowner and petitioner). But see Tolland *v.* Berkshire County, 13 Gray (Mass.) 12, where one commissioner resided in town where highway was, and this was held to disqualify him.

75. Thompson *v.* Love, 42 Ohio St. 61; Makemson *v.* Kauffman, 35 Ohio St. 444; *In re* East Whiteland Tp. Road, 30 Pa. Super. Ct. 211; *In re* Roaring Brook Tp. Road, 28 Wkly. Notes Cas. (Pa.) 141.

76. Makemson *v.* Kauffman, 35 Ohio St. 444; Robinson *v.* Logan, 31 Ohio St. 466; Burgett *v.* Norris, 25 Ohio St. 308.

77. Ralston *v.* Beall, 171 Ind. 719, 30 N. E. 1095; Lowe *v.* White County, 156 Ind. 163, 59 N. E. 466; West Baton Rouge Police Jury *v.* Crosely, 14 La. Ann. 164; *In re* Pitt Tp. Public Road, 1 Pa. St. 356; Pope *v.* Dykes, 116 Tenn. 230, 93 S. W. 85. But see Miller *v.* Hinke, 135 Iowa 520, 113 N. W. 325.

78. Lowe *v.* Brannan, 105 Ind. 247, 4 N. E. 580; Day *v.* Ridgefield, 49 N. J. L. 180, 6 Atl. 504; Parker *v.* Burgett, 29 Ohio St. 513.

79. Cass County *v.* Logansport, etc., Gravel Road Co., 88 Ind. 199; Makemson *v.* Kauffman, 35 Ohio St. 444. But see State *v.* Marion County, 170 Ind. 595, 85 N. E. 513; Bruce *v.* Saline County, 26 Mo. 262.

80. Kemp *v.* Goodnight, 168 Ind. 174, 80 N. E. 160; Osborn *v.* Sutton, 108 Ind. 443, 9 N. E. 410 (formal order that it has jurisdiction); Million *v.* Carroll County, 89 Ind. 5. But see Auditor-Gen. *v.* Fisher, 84 Mich. 128, 47 N. W. 574.

81. Fleener *v.* Claman, 126 Ind. 166, 25 N. E. 900; Anderson *v.* Claman, 123 Ind. 471, 24 N. E. 175; Stipp *v.* Claman, 123 Ind. 532, 24 N. E. 131; Loesnitz *v.* Seelinger, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 887; White *v.* Fleming, 114 Ind. 560, 16 N. E. 487; Osborn *v.* Sutton, 108 Ind. 443, 9 N. E. 410; Stoddard *v.* Johnson, 75 Ind. 20; Brown *v.* Mosher, 83 Me. 111, 21 Atl. 835; *In re* Delaware River Road, 5 Pa. Dist. 694, 18 Pa. Co. Ct. 165. See also Thompson *v.* Love, 42 Ohio St. 61.

Formal errors in the proceedings do not affect their regularity. Stoddard *v.* Johnson, 75 Ind. 20; Woodman *v.* Somerset County, 25 Me. 300.

Omission to enter a formal continuance is not fatal to the proceedings. Osborn *v.* Sutton, 108 Ind. 443, 9 N. E. 410; Stoddard *v.* Johnson, 75 Ind. 20.

82. Conrad *v.* Hansen, 171 Ind. 43, 85 N. E. 710; Bigelow *v.* Worcester, 169 Mass. 390, 48 N. E. 1; Barry *v.* Deloughrey, 47 Nebr. 354, 66 N. W. 410.

83. Raleigh *v.* Peace, 110 N. C. 32, 14 S. E. 521, 17 L. R. A. 330.

84. Hoyt *v.* East Saginaw, 19 Mich. 39, 2 Am. Rep. 76; *In re* Delaware River Road, 5 Pa. Dist. 694, 18 Pa. Co. Ct. 165.

85. Com. *v.* Abbott, 160 Mass. 282, 35 N. E. 782; State *v.* Engelmann, 106 Mo. 628, 17 S. W. 759; Connor *v.* Paris, 87 Tex. 32, 27 S. W. 88.

86. Strebin *v.* Lavengood, 163 Ind. 478, 71

I. Proceedings Regulating — 1. In General. Various statutory proceedings are provided for enforcing the construction and repair of roads;[87] and in addition mandamus is an available remedy to compel road repairs by a private corporation bound to construct and repair,[88] or by public officers or municipalities.[89]

2. Criminal.[90] In some jurisdictions towns may be proceeded against criminally for failure to repair or to construct highways,[91] and similarly individuals bound to repair may be indicted.[92] The proceedings must be properly commenced,[93] and the indictment must contain a complete, accurate, and concise statement of the crime charged,[94] and must be founded upon sufficient evidence.[95]

N. E. 494; Pruden *v.* Jackson County, 156 Ind. 325, 58 N. E. 437 (holding that appeal lies from order submitting only the second of two petitions to the voters); Cason *v.* Harrison, 135 Ind. 330, 35 N. E. 268; Fleener *v.* Claman, 126 Ind. 166, 25 N. E. 900; Stipp *v.* Claman, 123 Ind. 532, 24 N. E. 131; Black *v.* Campbell, 112 Ind. 122, 13 N. E. 409; Osborn *v.* Sutton, 108 Ind. 443, 9 N. E. 410; Cass *v.* Logansport, etc., Gravel Road Co., 88 Ind. 199; *In re* Middletown Road, 15 Pa. Super. Ct. 167; Robson *v.* Byler, 14 Tex. Civ. App. 374, 37 S. W. 872. But see Southard *v.* Stephens, 27 Ohio St. 649.

87. See the statutes of the several states. And see the following cases:

Connecticut.—Goodspeed's Appeal, 75 Conn. 271, 53 Atl. 728; Havens *v.* Wethersfield, 67 Conn. 533, 35 Atl. 503.

Indiana.— Brown *v.* Miller, 162 Ind. 684, 71 N. E. 122; Davern *v.* Decatur, 34 Ind. App. 44, 72 N. E. 268.

Maine.— *Ex p.* Baring, 8 Me. 137.

Nebraska.— Fokenga *v.* Churchill, 2 Nebr. (Unoff.) 304, 96 N. W. 143.

Pennsylvania.— Com. *v.* Holland, 153 Pa. St. 233, 25 Atl. 1123.

Vermont.— Mason *v.* St. Albans, 68 Vt. 66, 33 Atl. 1068 [*following* Landon *v.* Rutland, 41 Vt. 681]; Taft *v.* Pittsford, 28 Vt. 286.

See 25 Cent. Dig. tit. "Highways," § 331.

88. See Mandamus, 26 Cyc. 369.

89. See Mandamus, 26 Cyc. 296.

90. Criminal liability of municipality generally see Municipal Corporations, 28 Cyc. 1775.

Indictment of municipal corporations for failure to keep highways in repair see Corporations, 10 Cyc. 1229.

91. Bragg *v.* Bangor, 51 Me. 532 (although town had no notice of defect); State *v.* Fryeburg, 15 Me. 405 (delay in not putting any one road in repair); State *v.* Kittery, 5 Me. 254 (for not opening as well as for not keeping in repair); Com. *v.* Petersham, 4 Pick. (Mass.) 119; Com. *v.* Springfield, 7 Mass. 9; State *v.* Canterbury, 40 N. H. 307 (six years' neglect); State *v.* Canterbury, 28 N. H. 195 (neglect of bridges); State *v.* Landaff, 22 N. H. 588 (holding eighteen months an unreasonable delay). But see State *v.* Bradbury, 40 Me. 154.

92. Patillo *v.* Cutliff, 56 Ga. 689 (presentment by a grand jury against one who has taken an assignment of a public road); Gilmore *v.* State, (Miss. 1903) 33 So. 171; Phillips *v.* Com., 44 Pa. St. 197; *In re* Hamiltonban Tp., 11 Pa. Co Ct. 368.

93. State *v.* Concord, 20 N. H. 295.

94. *Alabama.*— Ward *v.* State, (1905) 39 So. 923.

Maine.— State *v.* Madison, 63 Me. 546; State *v.* Bangor, 30 Me. 341.

Massachusetts.— Com. *v.* Wilmington, 105 Mass. 599; Com. *v.* Newbury, 2 Pick. 51, way by prescription should be described as a public way.

Mississippi.— Burkett *v.* State, (1903) 33 So. 221; McElmore *v.* State, 81 Miss. 422, 33 So. 225; Gilmore *v.* State, (1903) 33 So. 171, holding that the indictment should show that road law has been put in operation in county in question.

New Hampshire.— State *v.* Canterbury, 28 N. H. 195; State *v.* Raymond, 27 N. H. 388; Walpole *v.* State, 16 N. H. 157; State *v.* Gilmanton, 14 N. H. 467; State *v.* Dover, 10 N. H. 394.

Vermont.— State *v.* Fletcher, 13 Vt. 124; State *v.* Newfane, 12 Vt. 422; State *v.* Whitingham, 7 Vt. 390; State *v.* Brookfield, 2 Vt. 548.

Wisconsin.— Byron *v.* State, 35 Wis. 313.

England.— Rex *v.* Crompton Urban Dist. Council, 20 Cox C. C. 243, 66 J. P. 566, 86 L. T. Rep. N. S. 762.

See 25 Cent. Dig. tit. "Highways," § 332.

Indictments held bad see State *v.* Milo, 32 Me. 55 (alternative allegation); Com. *v.* North Brookfield, 8 Pick. (Mass.) 463 (uncertain in which town way is); State *v.* Burkett, 83 Miss. 301, 35 So. 689 (failing to state adoption of certain system in county); Burkett *v.* State, (Miss. 1903) 33 So. 221 (failure to state that defendants had time and opportunity to repair); State *v.* Canterbury, 28 N. H. 195 (failure to allege that highway needs making or is impassable); Lodi Tp. *v.* State, 53 N. J. L. 259, 21 Atl. 457 (where town line ran to center of road only, and indictment alleged that road was in township).

Streets on town lines; joinder of towns.— Where towns are so situated that the center of a street is the dividing line between them, each town being liable for the defects in the highway within its limits, and neither being liable for neglect of the other, they cannot be jointly indicted for a defect in the highway. State *v.* Thomaston, 74 Me. 198.

95. State *v.* Strong, 25 Me. 297 (proof of the existence of a town way necessary); Com. *v.* Taunton, 16 Gray (Mass.) 228;

Defendants may introduce any competent evidence tending to show freedom from guilt;[96] but that the original lay-out of the road was defective is not a defense to an indictment for failure to repair.[97] Where the obstruction complained of has ceased to exist at the time of trial a nominal fine and costs may be imposed.[98]

3. Injunction Against Illegal Work. Construction or improvement in violation of or non-compliance with law may be restrained by injunction,[99] not, however, where the injury would be slight,[1] and not irreparable,[2] or where there is an adequate remedy at law.[3] The injunction will be granted only to citizens or taxpayers,[4] and upon joining the proper parties.[5] The usual defenses to an injunction are available.[6]

J. Damages [7] **— 1. Right — a. In General.** One whose land has been taken for or injured by the construction, improvement, or repair of a highway is entitled

State *v.* Northumberland, 46 N. H. 156; State *v.* Canterbury, 40 N. H. 307; State *v.* Gilmanton, 14 N. H. 467; State *v.* Cumberland, 6 R. I. 496. See also Ward *v.* State, (Ala. 1905) 39 So. 923.

96. Ward *v.* State, (Ala. 1905) 39 So. 923 (as that defendant worked the road within a reasonable time of his appointment); State *v.* Strong, 25 Me. 297 (holding that the town may deny the existence of the highway); State *v.* Canterbury, 40 N. H. 307; State *v.* Canterbury, 28 N. H. 195 (holding that where it is alleged that the neglect to repair a highway is a nuisance, evidence that the highway for which an indictment is found is not connected with any other highway is admissible, as bearing on the question of nuisance).

Claims held insufficient as a defense see Ward *v.* State, (Ala. 1905) 39 So. 923 (failure of apportioner to furnish a written list of hands); State *v.* Madison, 59 Me. 538 (that road was within toll-road limits); Com. *v.* Deerfield, 6 Allen (Mass.) 449 (that destruction of bridge beyond town limits made road useless); State *v.* Canterbury, 40 N. H. 307 (that no inconvenience has resulted to the public); State *v.* Landaff, 22 N. H. 588; State *v.* Fletcher, 13 Vt. 124 (discontinuance by town); State *v.* Brookfield, 2 Vt. 548.

97. State *v.* Weare, 38 N. H. 314; State *v.* Raymond, 27 N. H. 388; State *v.* Richmond, 26 N. H. 232; State *v.* Gilmanton, 14 N. H. 467; State *v.* Alburgh, 23 Vt. 262.

98. State *v.* Fryeburg, 15 Me. 405.

99. *Illinois.*— Green *v.* Green, 34 Ill. 320. opening road prematurely.

Indiana.— Kern *v.* Isgrigg, 132 Ind. 4, 31 N. E. 455 (although supervisors are also punishable for contempt); Erwin *v.* Fulk, 94 Ind. 235 (where cutting farm showed more than an ordinary trespass).

Iowa.— Morgan *v.* Miller, 59 Iowa 481, 13 N. W. 643.

Kansas.— Poirier *v.* Fetter, 20 Kan. 47.

Massachusetts.— Craigie *v.* Mellen, 6 Mass. 7.

Nevada.— Champion *v.* Sessions, 2 Nev. 271, until county commissioners comply with the law.

Texas.— Floyd *v.* Turner, 23 Tex. 292; McCown *v.* Hill, (Civ. App. 1903) 73 S. W. 850.

See 25 Cent. Dig. tit. "Highways," § 334.

Compare Nichols *v.* Sutton, 22 Ga. 369.

A railroad company, having built a platform on land already dedicated to public use as a highway, cannot prevent the opening of the highway on the ground that the platform is necessary for transaction of its business. New York, etc., R. Co. *v.* Drummond, 45 N. J. L. 511.

Curing objection pending suit.— Pending a suit by a landowner to enjoin the opening of a road through its lands, the public officers may take steps to acquire the right to use the land for a road, although, by reason of ineffectual efforts on their part in that direction, there was ground for injunction when the suit was brought; and therefore an answer alleging facts showing that such steps have been taken is not subject to demurrer. Evans *v.* Santana Live-Stock, etc., Co., 81 Tex. 622, 17 S. W. 232.

Town officers are town agents and may be restrained as such. Wetherell *v.* Newington, 54 Conn. 67, 5 Atl. 858; Kyle *v.* Kosciusko County, 94 Ind. 115; Woodruff *v.* Glendale, 23 Minn. 537.

1. Brown *v.* Gardner, Harr. (Mich.) 291.

2. Prospect Park, etc., R. Co. *v.* Williamson, 24 Hun (N. Y.) 216 [*reversed* on other grounds in 91 N. Y. 552]. But see Harris *v.* Township Bd., 22 Mo. App. 462, holding that, although injury is not irreparable and defendant not insolvent, injunction may be granted.

3. Nichols *v.* Sutton, 22 Ga. 369.

4. Sunderland *v.* Martin, 113 Ind. 411, 15 N. E. 689 (strangers may not enjoin); Sparling *v.* Dwenger, 60 Ind. 72.

5. Myers *v.* Daubenbiss, 84 Cal. 1, 23 Pac. 1027 (joining county supervisors with the road overseer); Carpenter *v.* Grisham, 59 Mo. 247 (county court which ordered taking a necessary party).

6. Sunderland *v.* Martin, 113 Ind. 411, 15 N. E. 689 (holding that strangers who have stood by during construction cannot object); Stewart *v.* Beck, 90 Ind. 458 (estoppel); *In re* Adams, 10 Pick. (Mass.) 273 (refusing injunction while certiorari pending).

7. Damages for alteration of city streets see Municipal Corporations, 28 Cyc. 1069.

Damages for vacation of city streets see Municipal Corporations, 28 Cyc. 1073.

to be compensated in damages for the taking or injury,[8] unless he has waived his rights,[9] or is estopped,[10] as by having accepted an award.[11] But damages to be recoverable must be direct, and not remotely consequential or problematical.[12]

b. Change of Grade.[13] In the absence of statute a change of grade gives no

8. *District of Columbia.*— Quackenbush *v.* District of Columbia, 20 D. C. 300, holding that the rule applies to all owners alike, and not merely to those who have appeared and objected.

Illinois.— Gordon *v.* Wabash County Highway Com'rs, 169 Ill. 510, 48 N. E. 451.

Massachusetts.—Hobart *v.* Plymouth County, 100 Mass. 159.

Missouri.— Wilkerson *v.* Buchanan, 12 Mo. 328; Galbraith *v.* Prentice, 109 Mo. App. 498, 84 S. W. 997.

New Jersey.— Thompson *v.* Emmons, 24 N. J. L. 45.

Pennsylvania.— *In re* Newville Road, 8 Watts 172; Wagoner *v.* Dismant, 2 Chest. Co. Rep. 371. But see Warner *v.* Muncy Tp., 18 Pa. Co. Ct. 582, holding that no damages can ordinarily be given for the mere repair of a road.

Vermont.— Warren *v.* Bunnell, 11 Vt. 600. See 25 Cent. Dig. tit. "Highways," § 358. But see Clark *v.* Saybrook, 21 Conn. 313.

The ownership relates to the time of the taking or injury. Sargent *v.* Machias, 65 Me. 591.

One merely entitled to maintain water pipes under a highway is not a landowner entitled. Jamaica Pond Aqueduct Corp. *v.* Brookline, 121 Mass. 5.

A private turnpike and bridge is not land within the meaning of a statute relating to land taken for a highway. *In re* Bergen County, etc., Public Highway, 22 N. J. L. 293.

Those who have encroached on a highway by fences are not entitled to damages on a resurvey establishing the original boundaries. Hogaboon *v.* Highgate, 55 Vt. 412.

Damages to landowners in one township cannot be assessed to landowners in another township. Abrey *v.* Cannon, 33 N. J. L. 218.

Consequential damages occasioned by the necessary improvement of a highway cannot be recovered. Tyson *v.* Baltimore County, 28 Md. 510. See also White *v.* Blanchard Bros. Granite Co., 178 Mass. 363, 59 N. E. 1025.

Where no land of the owner is taken a party is not entitled to damages to land adjoining the highway. Hoag *v.* Switzer, 61 Ill. 294; *In re* Kennett, 24 N. H. 139.

The mere recording of a map under the statute does not entitle to damages. Bauman *v.* Ross, 167 U. S. 548, 17 S. Ct. 966, 42 L. ed. 270.

A discontinuance of a highway will not ordinarily affect the owner's rights to damages assessed for its laying out. Kirtland *v.* Meriden, 39 Conn. 107. See also Hampton *v.* Coffin, 4 N. H. 517, holding that a town cannot recover back damages paid on discontinuance of highway before road made.

9. Barrickman *v.* Harford County, 11 Gill & J. (Md.) 50 (holding that where an owner releases damages on discontinuance of road he is not entitled on revival of old road); Ashley *v.* Burt County, 73 Nebr. 159, 102 N. W. 272. But see Mitchell *v.* Bridgewater, 10 Cush. (Mass.) 411, holding that waiver of damages is no estoppel to claim for deposit of gravel from sidewalk.

Retraction of waiver.—Waiver at time of adjudication of necessity cannot be retracted on the location of the way. White *v.* Norfolk County, 2 Cush. (Mass.) 361.

10. Hogsett *v.* Harlan County, 4 Nebr. (Unoff.) 310, 97 N. W. 316.

11. Page *v.* Boehmer, 154 Mich. 693, 118 N. W. 602; Stocker *v.* Nemaha County, 72 Nebr. 255, 100 N. W. 308.

12. *Connecticut.*— Rudnyai *v.* Harwinton, 79 Conn. 91, 63 Atl. 948; Clark *v.* Saybrook, 21 Conn. 313.

Indiana.— Pichon *v.* Martin, 35 Ind. App. 167, 73 N. E. 1009.

Missouri.— Galbraith *v.* Prentice, 109 Mo. App. 498, 84 S. W. 997.

New Hampshire.— Dana *v.* Craddock, 66 N. H. 593, 32 Atl. 757.

New York.— Matter of Pugh, 22 Misc. 43, 49 N. Y. Suppl. 398 [*reversed* on other grounds in 46 N. Y. App. Div. 634, 61 N. Y. Suppl. 1145].

See 25 Cent. Dig. tit. "Highways," § 358 *et seq.*

Interest.—A township is not liable for interest on damages appraised for laying out a highway, except by custom or statute. People *v.* La Grange Tp. Bd., 2 Mich. 187.

Damages disallowed see Jewett *v.* Israel, 35 Iowa 261 (where damages for the new road in view of vacation of old road are less than damages from old road); Allaire *v.* Woonsocket, 25 R. I. 414, 56 Atl. 262 (where owner had himself laid out street on a plat and sold lots thereon); *Ex p.* Parlee, 25 N. Brunsw. 51.

The destruction of trees planted on the highway is not a foundation for damages by an abutting owner. Sherman *v.* Butcher, 72 N. J. L. 53, 60 Atl. 336. But see Pinkerton *v.* Randolph, 200 Mass. 24, 85 N. E. 892, holding that loss from qualified right to maintain trees and shrubs on highway may be recovered.

Injury to business is not to be considered by itself (Huff *v.* Donehoo, 109 Ga. 638, 34 S. E. 1035, where the opening of a new road attracted travel and customers away from plaintiff's land on the old road left open; Hudson County *v.* Emmerich, 57 N. J. Eq. 535, 42 Atl. 107), nor on the other hand will future benefit from possible increase of business be considered (Boston, etc., R. Co. *v.* Middlesex County, 1 Allen (Mass.) 324).

Subsequent damages after the award are not recoverable. Farmer *v.* Hooksett, 28 N. H. 244.

13. **Damages for change of grade of streets** see MUNICIPAL CORPORATIONS, 28 Cyc. 1069.

cause of action for consequential damages caused thereby.[14] In many states, however, this rule is changed by express statutory enactment allowing such damages.[15] It is held furthermore that compensation for damages to property directed by constitutional provision will include consequential damages caused by change of grade or other highway work.[16]

c. For Unauthorized Acts. A municipality is not liable for damages caused by its officers acting without authority,[17] but is liable for improper construction within their authority.[18]

2. Liability. The municipality is liable in general for damages caused by the establishment, relocation, or alteration of highways.[19] While this liability generally rests on the municipality, yet individuals also may be liable under some circumstances for damages caused by road work.[20] Thus a private individual may be liable as a trespasser to the owner of land over which there is a highway for injury done in widening or repairing the highway outside the traveled part,[21]

14. *Connecticut.*— Skinner *v.* Hartford Bridge Co., 29 Conn. 523; Hooker *v.* New Haven, etc., Co., 14 Conn. 146, 36 Am. Dec. 477.

Illinois.— Boester *v.* Kuhlengel, 136 Ill. App. 17.

Nebraska.— Omaha L. & T. Co. *v.* Douglas County, 62 Nebr. 1, 86 N. W. 936.

New Hampshire.— Benden *v.* Nashua, 17 N. H. 477.

New York.— Smith *v.* Boston, etc., R. Co., 181 N. Y. 132, 73 N. E. 679 [*affirming* 99 N. Y. App. Div. 94, 91 N. Y. Suppl. 412].

Pennsylvania.— Winner *v.* Graner, 173 Pa. St. 43, 33 Atl. 698; Henry *v.* Pittsburgh, etc., Bridge Co., 8 Watts & S. 85; Smith *v.* Cheltenham Tp., 35 Pa. Super. Ct. 507.

Rhode Island.— O'Rourke *v.* Bain, (1887) 12 Atl. 407. See also Sweet *v.* Conley, 20 R. I. 381, 39 Atl. 326.

See 25 Cent. Dig. tit. "Highways," § 358 *et seq.*

In Ohio, however, the rule is otherwise. Akron *v.* Chamberlain Co., 34 Ohio St. 328, 32 Am. Rep. 367; Cheseldine *v.* Hamilton County, 6 Ohio Cir. Ct. 450, 3 Ohio Cir. Dec. 533.

15. See the statutes of the several states. And see the following cases:

Connecticut.— Gorham *v.* New Haven, 76 Conn. 700, 58 Atl. 1; Griswold *v.* Guilford, 75 Conn. 192, 52 Atl. 742.

Indiana.— Anderson *v.* Bain, 120 Ind. 254, 22 N. E. 323.

Massachusetts.— Woodbury *v.* Beverly, 153 Mass. 245, 26 N. E. 851; Allen *v.* Gardner, 147 Mass. 452, 18 N. E. 222; Burr *v.* Leicester, 121 Mass. 241; Buell *v.* Worcester County, 119 Mass. 372; Snow *v.* Provincetown, 109 Mass. 123; Page *v.* Boston, 106 Mass. 84; Stoughton *v.* Norfolk County, 5 Gray 372.

New Jersey.— Ackerman *v.* Nutley, 70 N. J. L. 438, 57 Atl. 150; Brower *v.* Tichenor, 41 N. J. L. 345.

New York.— Smith *v.* Boston, etc., R. Co., 181 N. Y. 132, 73 N. E. 679 [*affirming* 99 N. Y. App. 94, 91 N. Y. Suppl. 412].

Pennsylvania.— New Brighton *v.* United Presb. Church, 96 Pa. St. 331; Harp *v.* Glenolden Borough, 28 Pa. Super. Ct. 116; *In re* West Chester Alley, 1 Chest. Co. Rep. 525.

Wisconsin.— Walish *v.* Milwaukee, 95 Wis. 16, 69 N. W. 818.

16. Rigney *v.* Chicago, 102 Ill. 64; O'Brien *v.* Philadelphia, 150 Pa. St. 589, 24 Atl. 1047, 30 Am. St. Rep. 832; Chicago *v.* Taylor, 125 U. S. 161, 8 S. Ct. 820, 31 L. ed. 638.

17. Pinkerton *v.* Randolph, 200 Mass. 24, 85 N. E. 892; Morgan *v.* Oliver, 98 Tex. 218, 82 S. W. 1028 [*reversing* (Civ. App. 1904) 80 S. W. 111]. See also Overmeyer *v.* Cass County, 43 Ind. App. 403, 86 N. E. 77; Voss *v.* Harris County, 33 Tex. Civ. App. 249, 76 S. W. 600; State *v.* Leon, 66 Wis. 199, 28 N. W. 140. *Compare* Allen *v.* Gardner, 147 Mass. 452, 18 N. E. 222.

18. Dorman *v.* Jacksonville, 13 Fla. 538, 7 Am. Rep. 253; Hendershott *v.* Ottumwa, 46 Iowa 658, 26 Am. Rep. 182; Carpenter *v.* Nashua, 58 N. H. 37, although original contract was unauthorized.

19. *Connecticut.*— Mootry *v.* Danbury, 45 Conn. 550, 29 Am. Rep. 703, for flooding plaintiff's land by bridge.

Georgia.— Westbrook *v.* Baldwin County, 121 Ga. 442, 49 S. E. 286.

Massachusetts.— Livermore *v.* Norfolk County, 189 Mass. 326, 75 N. E. 724; Livermore *v.* Norfolk County, 186 Mass. 133, 71 N. E. 305; Brigham *v.* Worcester County, 147 Mass. 446, 18 N. E. 220. But see Westport *v.* Bristol County, 9 Allen 203.

Michigan.— People *v.* Lowell Tp. Bd., 9 Mich. 144.

Missouri.— Galbraith *v.* Prentice, 109 Mo. App. 498, 84 S. W. 997.

Nebraska.— Palmer *v.* Vance, 44 Nebr. 348, 62 N. W. 857; Ackerman *v.* Thummel, 40 Nebr. 95, 58 N. W. 738.

Pennsylvania.— *In re* Milton Road, 40 Pa. St. 300; Feree *v.* Meily, 3 Yeates 153.

Canada.— Reg. *v.* Kent, 8 N. Brunsw. 118.

See 25 Cent. Dig. tit. "Highways," § 362.

But see Ellis *v.* Swanzey, 26 N. H. 266.

20. See cases cited *infra*, note 21 *et seq.*

21. Hollenbeck *v.* Rowley, 8 Allen (Mass.) 473, holding that this is so, although a highway surveyor might properly have done the same acts.

and a highway officer negligently or without authority injuring the owner's land may also be personally liable.[22]

3. Payment or Assessment as Prerequisite to Road Work. The statutes often provide that road work shall not be begun until the landowner is protected, as by payment[23] or assessment,[24] unless there has been a release,[25] or agreement,[26] as to damages.

4. Measure of Damages; Offsetting Benefits. The damages recoverable are to be based on the difference in market value of the land before and after the work,[27] including compensation for all land actually taken,[28] and actual damage to the remaining land,[29] deducting benefits accruing because of the construction or improvement,[30] which deduction must, however, be confined to direct benefits

22. Linblom *v.* Ramsey, 75 Ill. 246; Pinkerton *v.* Randolph, 200 Mass. 24, 85 N. E. 892 (selectmen for *ultra vires* acts); Dennistón *v.* Clark, 125 Mass. 216; Rainey *v.* Hinds County, 79 Miss. 238, 30 So. 636 (negligence of overseer); Adams *v.* Richardson, 43 N. H. 212 (trespass or statutory remedy). But see Weir *v.* Owensboro, etc., R. Co., 21 S. W. 643, 14 Ky. L. Rep. 875, holding an individual not liable for completing an unfinished fill after rescission of order for it.

Officer not bound to restore street at his own expense.—A surveyor of highways will not be compelled by mandamus to restore at his own expense a street grade which he had changed by order of the town council, although the council had no right to order a change of grade, and the surveyor had no right to comply with such order. Sweet *v.* Conley, 20 R. I. 381, 39 Atl. 326.

23. Brady *v.* Bronson, 45 Cal. 640 (holding that recovery of judgment is insufficient, unless it is satisfied); Sangamon County *v.* Brown, 13 Ill. 207. But see Dronberger *v.* Reed, 11 Ind. 420 (holding that taking land for highways is a taking by the state for which compensation need not be made before the taking under Const. art. 1, § 21); Rossiter *v.* Russell, 18 N. H. 73 (holding that after the right to build a road has once attached, it is not divested by a subsequent demand of, and refusal to pay, the damages assessed).

But the report of commissioners laying out a highway may be accepted before the jury assesses damages of a dissatisfied landowner. Lyman's Bridge Co. *v.* Lebanon, 59 N. H. 196.

24. *Illinois.*— Norton *v.* Studley, 17 Ill. 556; Dunning *v.* Matthews, 16 Ill. 308; People *v.* Ruby, 59 Ill. App. 653; North Henderson Highway Com'rs *v.* People, 2 Ill. App. 24.

Michigan.— Weber *v.* Stagray, 75 Mich. 32, 42 N. W. 665.

Minnesota.— Goodnow *v.* Ramsey County, 11 Minn. 31.

Nebraska.— Lewis *v.* Lincoln, 55 Nebr. 1, 75 N. W. 154; Hogsett *v.* Harlan County, 4 Nebr. (Unoff.) 310, 97 N. W. 316.

New Hampshire.— State *v.* Reed, 38 N. H. 59.

New Jersey.— See Fowler *v.* Larabee, 59 N. J. L. 259, 35 Atl. 911.

New York.— People *v.* Griswold, 2 Thomps. & C. 351.

Tennessee.— Wetherspoon *v.* State, Mart. & Y. 119.

West Virginia.— Seibert *v.* Linton, 5 W. Va. 57.

Wisconsin.— McKee *v.* Hull, 69 Wis. 657, 35 N. W. 49.

See 25 Cent. Dig. tit. "Highways," § 359.

But see *Ex p.* Hebert, 8 N. Brunsw. 108.

25. People *v.* Griswold, 2 Thomps. & C. (N. Y.) 351. See also *In re* Essex Ave., 121 Mo. 98, 25 S. W. 891.

26. Norton *v.* Studley, 17 Ill. 556.

27. *Indiana.*— Fisher *v.* Hobbs, 42 Ind. 276; Sidener *v.* Essex, 22 Ind. 201; Pichon *v.* Martin, 35 Ind. App. 167, 73 N. E. 1009.

Kansas.— Van Bentham *v.* Osage County, 49 Kan. 30, 30 Pac. 111.

Maine.— Ford *v.* Lincoln County, 64 Me. 408.

Massachusetts.— Damon *v.* Reading, 2 Gray 274.

Missouri.— Chouteau *v.* St. Louis, 8 Mo. App. 48.

See 25 Cent. Dig. tit. "Highways," § 361.

28. Fulton County *v.* Amorous, 89 Ga. 614, 16 S. E. 201; Allen *v.* Hopson, 119 Ky. 215, 83 S. W. 575, 26 Ky. L. Rep. 1148; Allaire *v.* Woonsocket, 25 R. I. 414, 56 Atl. 262.

29. *Iowa.*— Bland *v.* Hixenbaugh, 39 Iowa 532.

Massachusetts.— Edmands *v.* Boston, 108 Mass. 535.

Michigan.— Schneider *v.* Brown Tp., 142 Mich. 45, 105 N. W. 13 (placing embankment on land adjoining street); Grand Rapids *v.* Luce, 92 Mich. 92, 52 N. W. 635.

New Hampshire.— *In re* Mt. Washington Road Co., 35 N. H. 134.

Rhode Island.— Allaire *v.* Woonsocket, 25 R. I. 414, 56 Atl. 262.

See 25 Cent. Dig. tit. "Highways," § 361.

See also District of Columbia *v.* Robinson, 14 App. Cas. (D. C.) 512 [*affirmed* in 180 U. S. 92, 21 S. Ct. 283, 45 L. ed. 440].

The cost of fencing the remaining land should be considered in determining damages. Hopkins *v.* Contra Costa County, 106 Cal. 566, 39 Pac. 933; Peoria, etc., R. Co. *v.* Sawyer, 71 Ill. 361; Hire *v.* Knisley, 130 Ind. 295, 29 N. E. 1132; Marsden *v.* Cambridge, 114 Mass. 490; North Bridgewater First Parish *v.* Plymouth, 8 Cush. (Mass.) 475; Com. *v.* Boston, etc., R. Co., 3 Cush. (Mass.) 25; Thompson *v.* Milwaukee, etc., R. Co., 27 Wis. 93. But see *In re* Kennett, 24 N. H. 139.

30. *District of Columbia.*— District of Columbia *v.* Armes, 8 App. Cas. 393 [*reversed*

peculiar to the particular property;[31] and compensation for the value of the land taken cannot be reduced by offsetting special benefits which should only be applied against incidental injuries to the remaining land.[32]

on other grounds in 167 U. S. 548, 17 S. Ct. 966, 42 L. ed. 270].

Illinois.— Gordon *v.* Wabash County Highway Com'rs, 169 Ill. 510, 48 N. E. 451; Deitrick *v.* Bishop Tp. Highway Com'rs, 6 Ill. App. 70. But see Carpenter *v.* Jennings, 77 Ill. 250.

Indiana.— Sterling *v.* Frick, 171 Ind. 710, 86 N. E. 65, 87 N. E. 237; Renard *v.* Grande, 29 Ind. App. 579, 64 N. E. 644.

Kansas.— Pottawatomie County *v.* O'Sullivan, 17 Kan. 58.

Massachusetts.—Cross *v.* Plymouth County, 125 Mass. 557; Hilbourne *v.* Suffolk County, 120 Mass. 393, 21 Am. Rep. 522; Wood *v.* Hudson, 114 Mass. 513; Green *v.* Fall River, 113 Mass. 262; Meacham *v.* Fitchburg R. Co., 4 Cush. 291; Com. *v.* Justices of Sess. Middlesex County, 9 Mass. 388; Com. *v.* Justices Norfolk County Ct. of Sess., 5 Mass. 435; Com. *v.* Coombs, 2 Mass. 489.

Minnesota.— State *v.* Leslie, 30 Minn. 533, 16 N. W. 408.

New Jersey.— Mangles *v.* Hudson County, 55 N. J. L. 88, 25 Atl. 322, 17 L. R. A. 785.

New York.— *In re* Borup, 182 N. Y. 222, 74 N. E. 838, 108 Am. St. Rep. 796 [*affirming* 102 N. Y. App. Div. 262, 92 N. Y. Suppl. 624]; Eldridge *v.* Binghamton, 120 N. Y. 309, 24 N. E. 462.

North Carolina.— Asheville *v.* Johnston, 71 N. C. 398.

Ohio.— Symonds *v.* Cincinnati, 14 Ohio 147, 45 Am. Dec. 529.

Pennsylvania.— Root's Case, 77 Pa. St. 276; Watson *v.* Pittsburgh, etc., R. Co., 37 Pa. St. 469; Perrysville, etc., Plank-Road Co. *v.* Rea, 20 Pa. St. 97; Schuylkill Nav. Co. *v.* Thoburn, 7 Serg. & R. 411.

Rhode Island.— Allaire *v.* Woonsocket, 25 R. I. 414, 56 Atl. 262.

United States.— Bauman *v.* Ross, 167 U. S. 548, 17 S. Ct. 966, 42 L. ed. 270.

See 25 Cent. Dig. tit. "Highways," § 371.

Benefits shared with estates from which no land has been taken can be set off. Hilbourne *v.* Suffolk County, 120 Mass. 393, 21 Am. Rep. 522.

Different tracts used together may be considered as one piece for the purpose of estimating benefits. Tehama County *v.* Bryan, 68 Cal. 57, 8 Pac. 673; Chicago, etc., R. Co. *v.* Dresel, 110 Ill. 89; Speck *v.* Kenoyer, 164 Ind. 431, 73 N. E. 896 (all land in one body used for a common purpose, although part cut off by an intervening road); Reisner *v.* Atchison Union Depot, etc., Co., 27 Kan. 382; Port Huron, etc., R. Co. *v.* Voorheis, 50 Mich. 506, 15 N. W. 882; Hannibal Bridge Co. *v.* Schaubacher, 57 Mo. 582. But see Natchez, etc., R. Co. *v.* Currie, 62 Miss. 506.

That no damages result may be the effect of offsetting benefits and does not render the taking unconstitutional as a taking without compensation (Trinity College *v.* Hartford, 32 Conn. 452; Rassier *v.* Grimmer, 130 Ind. 219, 28 N. E. 866, 29 N. E. 918; Trosper *v.* Saline County, 27 Kan. 391; Comm. *v.* Justices of Sess. Middlesex County, 9 Mass. 388; Bennett *v.* Hall, 184 Mo. 407, 83 S. W. 439; Lingo *v.* Burford, (Mo. 1892) 18 S. W. 1081), for while the owner of the property taken is entitled to a full compensation for the damage he sustains thereby, if the taking of his property for the public improvement is a benefit rather than an injury to him, he certainly has no equitable claim to damages (Livingston *v.* New York, 8 Wend. (N. Y.) 85, 22 Am. Dec. 622 [*explained* in Bauman *v.* Ross, 167 U. S. 548, 17 S. Ct. 966, 42 L. ed. 270]).

Set-off of benefits against damages for municipal improvements see MUNICIPAL CORPORATIONS, 28 Cyc. 1079.

Although owners may be assessed again.— It is no objection to the statute that the owners of lands assessed for benefits under one proceeding will be left liable to be assessed anew under future proceedings for establishing other highways in other subdivisions. Bauman *v.* Ross, 167 U. S. 548, 17 S. Ct. 966, 42 L. ed. 270.

31. *Indiana.*— Pichon *v.* Martin, 35 Ind. App. 167, 73 N. E. 1009.

Massachusetts.— White *v.* Foxborough, 151 Mass. 28, 23 N. E. 652; Parks *v.* Hampden County, 120 Mass. 395; Upham *v.* Worcester, 113 Mass. 97; Farwell *v.* Cambridge, 11 Gray 413; Dwight *v.* Hampden County, 11 Cush. 201.

Missouri.— Newby *v.* Platte County, 25 Mo. 258; Galbraith *v.* Prentice, 109 Mo. App. 498, 84 S. W. 997.

New Jersey.— Mangles *v.* Hudson County, 55 N. J. L. 88, 25 Atl. 322, 17 L. R. A. 785.

Oregon.— Masters *v.* Portland, 24 Oreg. 161, 33 Pac. 540.

Rhode Island.— Tingley *v.* Providence, 8 R. I. 493.

See 25 Cent. Dig. tit. "Highways," § 371.

But that others on the same highway are benefited is not a reason for not deducting such benefits. Trinity College *v.* Hartford, 32 Conn. 452; Brokaw *v.* Highway Com'rs, 99 Ill. App. 415; Abbott *v.* Cottage City, 143 Mass. 521, 10 N. E. 325, 58 Am. Rep. 143; Howard *v.* Providence, 6 R. I. 514.

Benefits from possible increase of business should not be taken into account. Old Colony, etc., R. Co. *v.* Plymouth County, 14 Gray (Mass.) 155; State *v.* Shardlow, 43 Minn. 524, 46 N. W. 74; Watterson *v.* Allegheny Valley R. Co., 74 Pa. St. 208; Dullea *v.* Taylor, 35 U. C. Q. B. 395.

32. *Georgia.*— Augusta *v.* Marks, 50 Ga. 612.

Illinois.— Shawneetown *v.* Mason, 82 Ill. 337, 25 Am. Rep. 321.

Maryland.— Shipley *v.* Baltimore, etc., R. Co., 34 Md. 336.

Nebraska.— Fremont, etc., R. Co. *v.* Whalen, 11 Nebr. 585, 10 N. W. 491.

Texas.— Dulaney *v.* Nolan County, 85 Tex.

5. Actions or Proceedings to Recover — a. Jurisdiction and Venue. The jurisdiction and venue of proceedings for damages depend on local statutes.[33]

b. Form of Action. Damages may be enforced by action[34] or other proceeding, such as mandamus,[35] or a special statutory proceeding established for the purpose, generally in the nature of a petition for a jury to assess damages,[36] the award being sometimes enforceable by warrant of distress.[37] The statutory proceeding is held to be exclusive of other remedies.[38]

c. Parties. Whatever the form of proceeding, seasonable notice thereof must be given to all interested,[39] and they must be joined in the proceeding.[40]

d. Application, Complaint, or Petition. The petition or other pleading must

225, 20 S. W. 70; Paris *v.* Mason, 37 Tex. 447.

Virginia.— Mitchell *v.* Thornton, 21 Gratt. 164.

Wisconsin.— Washburn *v.* Milwaukee, etc., R. Co., 59 Wis. 364, 18 N. W. 328.

See 25 Cent. Dig. tit. "Highways," § 371.

33. See the statutes of the several states. And see Walker *v.* West Boylston, 128 Mass. 550; Bean *v.* Warner, 38 N. H. 247; *Ex p.* Parlee, 25 N. Brunsw. 51.

Transfer on creation of new county.— Where a new county was created pending proceedings for an increase of damages for the location of a highway, and included the highway location, the court should transfer the proceedings to the new county. Waterhouse *v.* Cumberland County, 44 Me. 368.

34. *Michigan.*— Lull *v.* Curry, 10 Mich. 397.

Mississippi.— Copiah County *v.* Lusk, 77 Miss. 136, 24 So. 972.

New Hampshire.— Fiske *v.* Chesterfield, 14 N. H. 240.

Texas.— Holt *v.* Rockwell County, 27 Tex. Civ. App. 365, 65 S. W. 389 (holding that on rejecting award landowner may bring suit without first presenting a claim); Cunningham *v.* San Saba County, 1 Tex. Civ. App. 480, 20 S. W. 941.

Vermont.— Felch *v.* Gilman, 22 Vt. 38.

35. Montgomery Tp. Highway Com'rs *v.* Snyder, 15 Ill. App. 645 (holding that the petition for mandamus to compel commissioners of highways to issue order for payment must show funds on hand); Miller *v.* Bridgewater Tp., 24 N. J. L. 54; *In re* Pringle St., 167 Pa. St. 646, 31 Atl. 948; Brodhead *v.* Lower Saucon Tp., 2 Lehigh Val. L. Rep. (Pa.) 381. But see Boone County *v.* State, 38 Ind. 193.

36. Gordon *v.* Road Dist. No. 3 Highway Com'rs, 169 Ill. 510, 48 N. E. 451; Taylor *v.* Marcy, 25 Ill. 518; Sangamon *v.* Brown, 13 Ill. 207; Highway Com'rs *v.* Jackson, 61 Ill. App. 381 [*affirmed* in 165 Ill. 17, 45 N. E. 1000]; Turner *v.* Wright, 13 Ill. App. 191; Lisbon *v.* Merrill, 12 Me. 210; Golding *v.* North Attleborough, 172 Mass. 223, 51 N. E. 1076; Keith *v.* Brockton, 147 Mass. 618, 18 N. E. 585; Childs *v.* Franklin County, 128 Mass. 97; Higginson *v.* Nahant, 11 Allen (Mass.) 530; Monagle *v.* Bristol County, 8 Cush. (Mass.) 360; Eaton *v.* Framington, 6 Cush. (Mass.) 245; *In re* Lewistown Road, 8 Pa. St. 109; *In re* West Whiteland Road, 4 Pa. Co. Ct. 511.

37. Onset St. R. Co. *v.* Plymouth County, 154 Mass. 395, 28 N. E. 286 (separate distress warrants, although separate lot owners joined in one petition); Gedney *v.* Tewsbury, 3 Mass. 307 (not debt on award but warrant of distress on order of payment).

38. Golding *v.* North Attleborough, 172 Mass. 223, 51 N. E. 1076; Gedney *v.* Tewksbury, 3 Mass. 307. But see Fiske *v.* Chesterfield, 14 N. H. 240.

39. *Maryland.*— George's Creek Coal, etc., Co. *v.* New Central Coal Co., 40 Md. 425.

Massachusetts.— Brown *v.* Lowell, 8 Metc. 172; *In re* Central Turnpike Corp., 7 Pick. 13 (notice to those interested to show cause why a jury should not be impaneled); Barre Turnpike Corp. *v.* Appleton, 2 Pick. 430.

Nebraska.— Pawnee County *v.* Storm, 34 Nebr. 735, 52 N. W. 696, holding actual and not mere notice by advertisement necessary.

New York.— Matter of New York El. R. Co., 70 N. Y. 327; *In re* Feeney, 20 Misc. 272, 45 N. Y. Suppl. 830.

Pennsylvania.— Zack *v.* Pennsylvania R. Co., 25 Pa. St. 394.

Vermont.— Thetford *v.* Kilburn, 36 Vt. 179, notice to town.

See 25 Cent. Dig. tit. "Highways," § 366.

But see Crane *v.* Camp, 12 Conn. 464 (holding that no previous notice to landowners of the appointment of freeholders to assess damages is necessary); Morgan *v.* Oliver, 98 Tex. 218, 82 S. W. 1028 [*reversing* (Civ. App. 1904) 80 S. W. 111].

40. *Connecticut.*— Cullen *v.* New York, etc., R. Co., 66 Conn. 211, 33 Atl. 910, abutter.

Indiana.— Rudisill *v.* State, 40 Ind. 485.

Maine.— Lisbon *v.* Merrill, 12 Me. 210.

Massachusetts.—Dana *v.* Boston, 170 Mass. 593, 49 N. E. 1013; Onset St. R. Co. *v.* Plymouth County, 154 Mass. 395, 28 N. E. 286; Dwight *v.* Hampden County, 7 Cush. 533; Kent *v.* Essex County, 10 Pick. 521.

Nebraska.— Hogsett *v.* Harlan County, 4 Nebr. (Unoff.) 310, 97 N. W. 316.

New Hampshire.— Jewell *v.* Holderness, 41 N. H. 161.

New Jersey.— Hopewell Tp. *v.* Welling, 24 N. J. L. 127.

Pennsylvania.— *In re* Pringle St., 7 Kulp 346.

South Dakota.— Lawrence County *v.* Deadwood, etc., Toll-Road Co., 11 S. D. 74, 75 N. W. 817.

See 25 Cent. Dig. tit. "Highways," § 366.

set out the facts on which the claim for damages is based,[41] strict technical accuracy not, however, being necessary,[42] and failure to object to the sufficiency waives the objection.[43] Amendments are allowed liberally.[44]

e. Limitations. Damages must be claimed within the period fixed by law[45] after lay-out[46] and entry.[47]

f. Assessment of Damages by Commissioners or Jurors. The person entitled to damages for the construction or repair of a highway usually has the right to have the damages assessed by a jury,[48] or under some statutes by commissioners,[49] duly

41. Layman *v.* Hughes, 152 Ind. 484, 51 N. E. 1058.

Lack of written application for a jury is fatal to the jurisdiction. State *v.* Varnum, 81 Wis. 593, 51 N. W. 958.

42. Offutt *v.* Montgomery County, 94 Md. 115, 50 Atl. 419; Sawyer *v.* Keene, 47 N. H. 173, holding the petition sufficient if it can be fully understood.

Petitions held sufficient see Livermore *v.* Norfolk County, 186 Mass. 133, 71 N. E. 305 (statement of alteration of highway in words "widened, straightened and relocated"); Allen *v.* Gardner, 147 Mass. 452, 18 N. E. 222 (although inaccurate); Mill Creek Road Com'rs *v.* Fickinger, 51 Pa. St. 48.

An immaterial variance between summons and complaint is not fatal. Mills Creek Road Com'rs *v.* Fickinger, 51 Pa. St. 48.

43. Lake Erie, etc., R. Co. *v.* Spidel, 19 Ind. App. 8, 48 N. E. 1042.

44. Winchester *v.* Middlesex County, 114 Mass. 481; Sawyer *v.* Keene, 47 N. H. 173.

45. *Illinois.*— Taylor *v.* Marcy, 25 Ill. 518.

Massachusetts.— Everett *v.* Fall River, 189 Mass. 513, 75 N. E. 946 (within one year from date of entry); Keith *v.* Brockton, 147 Mass. 618, 18 N. E. 585; Childs *v.* Franklin County, 128 Mass. 97; Monagle *v.* Bristol County, 8 Cush. 360; Eaton *v.* Framingham, 6 Cush. 245.

Ohio.— Viers' Petition, Tapp. 88.

Pennsylvania.—*In re* Lewiston Road, 8 Pa. St. 109 (within one year from time road opened in front of each lot); *in re* Sharpless St., 1 Chest. Co. Rep. 147 ("may" construed as "must"); *In re* Pringle St., 7 Kulp 346.

Texas.— Cunningham *v.* San Saba County, 1 Tex. Civ. App. 480, 20 S. W. 941, two years from time work began.

Wisconsin.— Tomlinson *v.* Wallace, 16 Wis. 224, ten years' delay fatal.

See 25 Cent. Dig. tit. "Highways," § 365.

Objections to proceedings from length of time elapsed cannot be taken by a petition to set aside the jury's verdict. Wood *v.* Quincy, 11 Cush. (Mass.) 487.

Against those who are under disability such as exempts them from its provisions the statute does not run. Cunningham *v.* San Saba County, 1 Tex. Civ. App. 480, 20 S. W. 941.

46. People *v.* Scio, 3 Mich. 121.

47. Everett *v.* Fall River, 189 Mass. 513, 75 N. E. 946; La Croix *v.* Medway, 12 Metc. (Mass.) 123.

48. *Connecticut.*—Avery *v.* Groton, 36 Conn. 304.

Indiana.— Heath *v.* Sheetz, 164 Ind. 665, 74 N. E. 505.

Massachusetts.— Gilman *v.* Haverhill, 128 Mass. 36; Fowler *v.* Middlesex County, 6 Allen 92; Dwight *v.* Springfield, 6 Gray 442; West Newbury *v.* Chase, 5 Gray 421; Hadley *v.* Middlesex County, 11 Cush. 394; Worcester County *v.* Leicester, 16 Pick. 39; Merrill *v.* Berkshire, 11 Pick. 269; Com. *v.* Justices of Sess. Middlesex County, 9 Mass. 388; Com. *v.* Justices Norfolk County Ct. of Sess., 5 Mass. 435. See also Flagg *v.* Worcester, 8 Cush. 69.

Missouri.— Thurlow *v.* Ross, 144 Mo. 234, 45 S. W. 1125.

New Hampshire.— Baker *v.* Holderness, 26 N. H. 110.

Ohio.— Lamb *v.* Lane, 4 Ohio St. 167.

Pennsylvania.— *In re* West Whiteland Road, 4 Pa. Co. Ct. 511.

Texas.— Galveston, etc., R. Co. *v.* Baudat, 18 Tex. Civ. App. 595, 45 S. W. 939.

Canada.— *Ex p.* Hebert, 8 N. Brunsw. 108.

See 25 Cent. Dig. tit. "Highways," § 367.

But there is no constitutional right to a jury trial. Hymes *v.* Aydelott, 26 Ind. 431; Bauman *v.* Ross, 167 U. S. 548, 17 S. Ct. 966, 42 L. ed. 270.

The jury's verdict is commonly conclusive (Hook *v.* Chicago, etc., R. Co., 133 Mo. 313, 34 S. W. 549; Foster *v.* Dunklin, 44 Mo. 216; People *v.* Kings County, 16 Wend. (N. Y.) 520; *In re* Brandywine Ave., 2 Chest. Co. Rep. (Pa.) 314; *In re* Verree Road, 1 Leg. Gaz. (Pa.) 18. But see People *v.* Kings County, 7 Wend. (N. Y.) 530), only, however, when acting within its jurisdiction (Clark *v.* Saybrook, 21 Conn. 313), and not if the damages it awards are excessive (Com. *v.* Justices Norfolk County Ct. of Sess., 5 Mass. 435).

On disagreement of the jury another jury may be summoned. Hicks *v.* Foster, 32 Ga. 414; Mendon *v.* Worcester County, 10 Pick. (Mass.) 235.

The verdict may be affirmed as to one owner and rejected as to another. Lanesborough *v.* Berkshire County, 22 Pick. (Mass.) 278; Anthony *v.* Berkshire County, 14 Pick. (Mass.) 189.

Selectmen are presumed to be authorized to apply to reduce damages. La Croix *v.* Medway, 12 Metc. (Mass.) 123.

49. Sangamon County *v.* Brown, 13 Ill. 207; Sangamon County Highway Com'rs *v.* Deboe, 43 Ill. App. 25; Baker *v.* Holderness, 26 N. H. 110 (court reference to road commissioners); Dalton *v.* North Hampton, 19 N. H. 362; Matter of Pugh, 22 Misc. 43, 49 N. Y. Suppl. 398 [*reversed* on other grounds

qualified,[50] who must give a hearing to the claimant,[51] and make a report to the proper tribunal.[52]

g. Arbitration or Agreement. The proper officers may submit claims to arbitration,[53] or make agreements of compromise.[54]

h. Costs. Costs as between the parties do not follow an award for damages under the highway statutes,[55] unless it is so specially provided by the statute.[56]

i. Appeal; Reassessment or Recommittal. Appeal from an assessment of damages is commonly allowed[57] by statutes governing the proceedings,[58] the method,[59] jurisdiction,[60] parties,[61] costs,[62] and what is open on the appeal.[63] Under

in 46 N. Y. App. Div. 134, 61 N. Y. Suppl. 1145]. See Parsell *v.* State, 30 N. J. L. 530.

The jurisdiction of such commissioners is confined to damages. Wilcox *v.* Oakland, 49 Cal. 29 (cannot adjudicate title); Schuylkill County's Appeal, 38 Pa. St. 459.

The assessment is conclusive. Sunderland Bridge Case, 122 Mass. 459; People *v.* St. Lawrence, 5 Cow. (N. Y.) 292.

50. Bennett *v.* Hall, 184 Mo. 407, 83 S. W. 439; Warren *v.* Gibson, 40 Mo. App. 469; State *v.* Crane, 36 N. J. L. 394; Fairbanks *v.* Rockingham, 72 Vt. 419, 48 Atl. 654.

51. Dwight *v.* Hampden County, 11 Cush. (Mass.) 201.

52. Rose *v.* Kansas City, 128 Mo. 135, 30 S. W. 518; Goodwin *v.* Milton, 25 N. H. 458; *In re* Knowles, 22 N. H. 361; Beauchemin *v.* Roxton Tp., 31 Quebec Super. Ct. 86. See also Betts *v.* New Hartford, 25 Conn. 180.

A report by two out of three commissioners may be valid. Williams *v.* Little White Lick Gravel Road Co., Wils. (Ind.) 7; Turlow *v.* Ross, 144 Mo. 234, 45 S. W. 1125.

The failure of the commission to assess damages is equivalent to a finding that there were no damages. Hafey *v.* Com., 189 Mass. 540, 76 N. E. 208; Monagle *v.* Bristol County, 8 Cush. (Mass.) 360; *In re* North Franklin Tp. Road, 8 Pa. Super. Ct. 358, 43 Wkly. Notes Cas. 102.

53. Mallory *v.* Huntington, 64 Conn. 88, 29 Atl. 245. *Contra*, Mann *v.* Richardson, 66 Ill. 481, holding that commissioners of highways cannot bind the town by submitting to arbitration.

54. Brown *v.* Robertson, 123 Ill. 631, 15 N. E. 30 [*affirming* 23 Ill. App. 461]; Turner *v.* Wright, 13 Ill. App. 191; Barrickman *v.* Harford County, 11 Gill & J. (Md.) 50. See also Sturtevant *v.* Plymouth County, 12 Metc. (Mass.) 7; Williams *v.* Mitchell, 49 Wis. 284, 5 N. W. 798.

55. Gifford *v.* Dartmouth, 129 Mass. 135; Baker *v.* Thayer, 3 Metc. (Mass.) 312; Matter of David, 44 Misc. (N. Y.) 192, 89 N. Y. Suppl. 812. See also St. Louis, etc., R. Co. *v.* Martin, 29 Kan. 750.

56. Hamblin *v.* Barnstable County, 16 Gray (Mass.) 256; McCall *v.* Marion County, 43 Oreg. 536, 73 Pac. 1030, 75 Pac. 140.

57. *Illinois.*— Schlattweiler *v.* St. Clair County, 63 Ill. 449.

Iowa.— Spray *v.* Thompson, 9 Iowa 40, appeal and not certiorari the proper remedy.

Maine.— *In re* Penley, 89 Me. 313, 36 Atl. 397; Conant, Appellant, 83 Me. 42, 21 Atl. 172. But see Stetson *v.* Bangor, 73 Me. 357, holding that where land is dedicated to the public no appeal is allowed from an award of nominal damages.

Massachusetts.— Hamblin *v.* Barnstable County, 16 Gray 256; Harding *v.* Medway, 10 Metc. 465.

Rhode Island.— See Whittier *v.* North Providence, 10 R. I. 266.

See 25 Cent. Dig. tit. "Highways," § 370.

Appeal denied see *In re* Hatch, 74 N. Y. 611; Hancock *v.* Richmond, etc., R. Co., 3 Gratt. (Va.) 328.

58. See the statutes of the several states. And see the following cases:

Indiana.— Grant County *v.* Small, 61 Ind. 318.

Iowa.— *In re* Dugan, 129 Iowa 241, 105 N. W. 514; Deaton *v.* Polk County, 9 Iowa 594.

Minnesota.— Schwede *v.* Burnstown, 35 Minn. 468, 29 N. W. 72.

Oregon.— McCall *v.* Marion County, 43 Oreg. 536, 73 Pac. 1030, 75 Pac. 140.

Pennsylvania.— *In re* First St., 7 Pa. Dist. 403; Sherfy *v.* Gettysburg Battlefield Memorial Assoc., 3 Pa. Co. Ct. 58.

See 25 Cent. Dig. tit. "Highways," § 370.

59. *In re* Dugan, 129 Iowa 241, 105 N. W. 514 (notice of appeal); McCall *v.* Marion County, 43 Oreg. 536, 73 Pac. 1030, 75 Pac. 140.

Conflicting statutes as to appeal reconciled see Boston, etc., R. Co. *v.* York, 78 Me. 169, 3 Atl. 273; Richardson *v.* Miles, 14 Nebr. 311, 16 N. W. 150.

60. Logan *v.* Kiser, 25 Ind. 393; Washington Tp. *v.* Butler, 13 Ind. 390; McCall *v.* Marion County, 43 Oreg. 536, 73 Pac. 1031, 75 Pac. 140; Bexar County *v.* Terrell, (Tex. 1890) 14 S. W. 62.

61. Sangamon County *v.* Brown, 13 Ill. 207 (holding that under statute parties having different interests cannot join in an appeal); Turner *v.* Wright, 13 Ill. App. 191; Denny *v.* Bush, 95 Ind. 315; Conaway *v.* Ascherman, 94 Ind. 187; Smith *v.* Scearce, 34 Ind. 285; Lyon County *v.* Coman, 43 Kan. 676, 23 Pac. 1038.

62. Centreville, etc., Turnpike Co. *v.* Jarrett, 4 Ind. 213.

63. Hartshorn *v.* Worcester, 113 Mass. 111 (presumption that petitioner proved his title below); Parker *v.* Framingham, 8 Metc. (Mass.) 260; Sawyer *v.* Keene, 47 N. H. 173; McCall *v.* Marion County, 43 Oreg. 536, 73 Pac. 1031, 75 Pac. 140; *In re* Newville Road, 8 Watts (Pa.) 172.

most statutes in a proper case damages may be reassessed,[64] or the report of the commissioners may be recommitted.[65]

VI. Obstruction and Encroachment.[66]

A. As Nuisance. Any unauthorized obstruction of a public highway is a nuisance.[67]

B. What Constitutes. The obstruction or encroachment may consist of anything which renders the highway less commodious,[68] such as buildings or other structures,[69] fences,[70] projections over the highway,[71] ditches cut across the high-

64. Clark *v.* Saybrook, 21 Conn. 313; Kline *v.* Huntington County, 152 Ind. 321, 51 N. E. 476; Danvers *v.* Essex County Highway Com'rs, 6 Pick. (Mass.) 20. See also Readington Tp. *v.* Dilley, 24 N. J. L. 209.

65. Farmer *v.* Hooksett, 28 N. H. 244; Covert *v.* Hulick, 33 N. J. L. 307.

66. On city streets see Municipal Corporations, 28 Cyc. 892.

67. *California.*— People *v.* McCue, 150 Cal. 195, 88 Pac. 899.

Illinois.— Garibaldi *v.* O'Connor, 210 Ill. 284, 71 N. E. 379, 66 L. R. A. 73 [*affirming* 112 Ill. App. 53]; Nelson *v.* Fehd, 203 Ill. 120, 67 N. E. 828 [*affirming* 104 Ill. App. 114].

Indiana.— Bybee *v.* State, 94 Ind. 443, 48 Am. Rep. 175.

Maine.— Sevey's Case, 6 Me. 118.

Massachusetts.— Rockport *v.* Rockport Granite Co., 177 Mass. 246, 58 N. E. 1017.

Michigan.— Langworthy *v.* Green Tp., 88 Mich. 207, 50 N. W. 130 (logs and stumps); People *v.* Carpenter, 1 Mich. 273.

New York.— Eldert *v.* Long Island Electric R. Co., 28 N. Y. App. Div. 451, 51 N. Y. Suppl. 186 [*affirmed* in 165 N. Y. 651, 59 N. E. 1122]; Anderson *v.* Young, 66 Hun 240, 21 N. Y. Suppl. 172; Strickland *v.* Woolworth, 3 Thomps. & C. 286; Adams *v.* Beach, 6 Hill 271.

Oregon.— Van Buskirk *v.* Bond, 52 Oreg. 234, 96 Pac. 1103; Luhrs *v.* Sturtevant, 10 Oreg. 170.

South Carolina.— State *v.* Harden, 11 S. C. 360.

Virginia.— Dimmett *v.* Eskridge, 6 Munf. 308, even partial obstruction.

Wisconsin.— Hughes *v.* Fond du Lac, 73 Wis. 380, 41 N. W. 407; State *v.* Carpenter, 68 Wis. 165, 31 N. W. 730, 732, 60 Am. Rep. 848.

See 25 Cent. Dig. tit. "Highways," § 417.

68. *Alabama.*— State *v.* Mobile, 5 Port. 279, 30 Am. Dec. 564.

Iowa.— Davis *v.* Pickerell, 139 Iowa 186, 117 N. W. 276, excavation.

Kentucky.— Smith *v.* Illinois Cent. R. Co., 105 S. W. 96, 31 Ky. L. Rep. 1323, stationary steam engine.

Missouri.— Wright *v.* Doniphan, 169 Mo. 601, 70 S. W. 146.

New Hampshire.— Graves *v.* Shattuck, 35 N. H. 257, 69 Am. Dec. 536.

New York.— Lewis *v.* Ballston Terminal R. Co., 45 N. Y. App. Div. 129, 60 N. Y. Suppl. 1035, blowing off steam from locomotive.

Wisconsin.— Jones *v.* Tobin, 135 Wis. 286, 115 N. W. 807.

United States.— Mackall *v.* Ratchford, 82 Fed. 41.

See 25 Cent. Dig. tit. "Highways," § 417.

Posts, hay scales, and hydrants' steps held not nuisances see People *v.* Carpenter, 1 Mich. 273.

An impediment only may not be an encroachment. Gorham *v.* Withey, 52 Mich. 50, 17 N. W. 272.

69. *Louisiana.*— New Basin Canal, etc., Bd. of Control *v.* H. Weston Lumber Co., 109 La. 925, 33 So. 923.

Maine.— Sevey's Case, 6 Me. 118.

Massachusetts.— Com. *v.* Blaisdell, 107 Mass. 234, steps part of a building.

Missouri.— Wright *v.* Doniphan, 169 Mo. 601, 70 S. W. 146.

Nebraska.— Bischof *v.* Merchants' Nat. Bank, 75 Nebr. 838, 106 N. W. 996, 5 L. R. A. N. S. 486.

New York.— Eldert *v.* Long Island Electric R. Co., 165 N. Y. 651, 59 N. E. 1122 [*affirming* 28 N. Y. App. Div. 451, 51 N. Y. Suppl. 186], street railway structure.

Wisconsin.— Jones *v.* Tobin, 135 Wis. 286, 115 N. W. 807.

See 25 Cent. Dig. tit. "Highways," § 418.

70. *Illinois.*— Seidschlag *v.* Antioch, 207 Ill. 280, 69 N. E. 949 [*affirming* 109 Ill. App. 291]; O'Connell *v.* Bowman, 45 Ill. App. 654.

Iowa.— Quinn *v.* Baage, 138 Iowa 426, 114 N. W. 205; Mosher *v.* Vincent, 39 Iowa 607, holding that a fence along a highway is an obstruction thereof if it prevents public travel from being perfectly safe, although it does not extend across the track.

New York.— People *v.* Fowler, 17 N. Y. Suppl. 744.

Oregon.— Van Buskirk *v.* Bond, 52 Oreg. 234, 96 Pac. 1103.

Pennsylvania.— Com. *v.* McNaugher, 131 Pa. St. 55, 18 Atl. 934.

England.— Abercromby *v.* Fermoy Town Com'rs, [1900] 1 Ir. 302, across promenade.

See 25 Cent. Dig. tit. "Highways," § 418.

Fences so situated as not to be obstructions see Sadorus *v.* Black, 65 Ill. App. 72 (fences to ends of bridge); State *v.* Schilb, 47 Iowa 611 (on boundary); Ayres *v.* Trenton, etc., Turnpike Co., 9 N. J. L. 33 (gate at end of highway where it joins a turnpike road); Strickland *v.* Woolworth, 3 Thomps. & C. (N. Y.) 286; State *v.* Pomeroy, 73 Wis. 664, 41 N. W. 726.

71. Bybee *v.* State, 94 Ind. 443, 48 Am.

way,[72] interference with drainage system,[73] or any other temporary obstruction [74] within the highway limits,[75] on any part thereof,[76] or some source of danger close to the roadway; [77] but not trees or shrubs by the side of the road not interfering with the use of the highway.[78]

C. Existence or Legality of Highway.[79] The rules against obstruction or encroachment apply to all highways having a legal existence, those established by statutory proceedings in the exercise of the right of eminent domain,[80]

Rep. 175; Rockport *v.* Rockport Granite Co., 177 Mass. 246, 58 N. E. 1017, 51 L. R. A. 779 (derrick guy so low as to be dangerous); Hyde *v.* Middlesex County, 2 Gray (Mass.) 267 (steps, eaves, and bay windows); State *v.* Kean, 69 N. H. 122, 45 Atl. 256, 48 L. R. A. 102 (bay window over eight feet above street); Hardy *v.* Keene, 52 N. H. 370 (derrick improperly placed or fastened); Griffin *v.* Baust, 26 N. Y. App. Div. 553, 50 N. Y. Suppl. 905.

Structures or projections in city streets see MUNICIPAL CORPORATIONS, 28 Cyc. 859.

72. Dunn *v.* Gunn, 149 Ala. 583, 42 So. 686; Nelson *v.* Fehd, 203 Ill. 120, 67 N. E. 828 [*affirming* 104 Ill. App. 114]; Davis *v.* McLean County Highway Com'rs, 143 Ill. 9, 33 N. E. 58 [*affirming* 42 Ill. App. 422]; Venard *v.* Cross, 8 Kan. 248; Com. *v.* McNaugher, 131 Pa. St. 55, 18 Atl. 934.

73. *California.*— Myers *v.* Nelson, (1896) 44 Pac. 801.

New Jersey.— Hamilton Tp. *v.* Wainwright, 52 N. J. Eq. 419, 29 Atl. 200.

New York.— Dominick *v.* Hill, 6 N. Y. St. 329.

Vermont.— State *v.* Smith, 54 Vt. 403.

Virginia.— Dimmett *v.* Eskridge, 6 Munf. 308.

See 25 Cent. Dig. tit. "Highways," § 419.

But see Roberts *v.* State, 84 Ark. 477, 106 S. W. 938 (holding that the obstruction of the mouth of a slough is not an obstruction of a road, although it resulted in washing out the road at high water); Hamilton Tp. *v.* Wainwright, 52 N. J. Eq. 419, 29 Atl. 200 (holding that increased flow may be cut off by owner).

74. Smith *v.* McDowell, 148 Ill. 51, 35 N. E. 141, 22 L. R. A. 393.

75. State *v.* Merrit, 35 Conn. 314; Dickey *v.* Maine Tel. Co., 46 Me. 483; Morton *v.* Moore, 15 Gray (Mass.) 573; Com. *v.* Pittston Ferry Bridge Co., 176 Pa. St. 394, 35 Atl. 240.

76. *California.*—Williams *v.* San Francisco, etc., R. Co., 6 Cal. App. 715, 93 Pac. 122.

Iowa.— Mosher *v.* Vincent, 39 Iowa 607.

New Jersey.— Tompkins *v.* North Hudson R. Co., 63 N. J. L. 322, 43 Atl. 885.

New York.— Anderson *v.* Young, 66 Hun 240, 21 N. Y. Suppl. 172, 174.

Pennsylvania.— Com. *v.* McNaugher, 131 Pa. St. 55, 18 Atl. 934.

Texas.— Robinson *v.* State, (Cr. App. 1898) 44 S. W. 509.

See 25 Cent. Dig. tit. "Highways," § 417 *et seq.*

Although space is left for the passage of the public, any permanent obstruction is a nuisance *per se*, and may be abated, for public highways belong to the public from side to side, and end to end. State *v.* Berdetta, 73 Ind. 185, 38 Am. Rep. 117; Savage *v.* Salem, 23 Oreg. 381, 31 Pac. 832, 37 Am. St. Rep. 688, 24 L. R. A. 787.

77. Horr *v.* New York, etc., R. Co., 193 Mass 100, 78 N. E. 776 (mail bags); Winship *v.* Enfield, 42 N. H. 197 (lumber tending to frighten horses); Temperance Hall Assoc. *v.* Giles, 33 N. J. L. 260 (area unguarded); Brown *v.* Eastern, etc., R. Co., 22 Q. B. D. 391, 58 L. J. Q. B. 212 [*affirming* 53 J. P. 342, 60 L. T. Rep. N. S. 266] (heap beside road); Reg. *v.* United Kingdom Tel. Co., 2 B. & S. 647 note, 3 F. & F. 732, 31 L. J. M. C. 166, 8 Jur. N. S. 1153, 6 L. T. Rep. N. S. 378, 10 Wkly. Rep. 538, 9 Cox C. C. 174, 110 E. C. L. 647 (telegraph pole). But see Haines *v.* Barclay Tp., 181 Pa. St. 521, 37 Atl. 560, holding a log chute near highway not to be an impediment.

78. Crismon *v.* Deck, 84 Iowa 344, 51 N. W. 55; Quinton *v.* Burton, 61 Iowa 471, 16 N. W. 569; Bills *v.* Belknap, 36 Iowa 583; Clark *v.* Dasso, 34 Mich. 86; People *v.* Carpenter, 1 Mich. 273; Wheatfield *v.* Shasley, 23 Misc. (N. Y.) 100, 51 N. Y. Suppl. 835. See also Eaves *v.* Terry, 4 McCord (S. C.) 125.

79. **With regard to criminal liability** see *infra*, VI, F, 8.

80. *Arkansas.*— Draper *v.* Mackey, 35 Ark. 497.

Illinois.— Galbraith *v.* Littiech, 73 Ill. 209; Clifford *v.* Eagle, 35 Ill. 444; Town *v.* Blackberry, 29 Ill. 137; Dumoss *v.* Francis, 15 Ill. 543 (although little used); Ferris *v.* Ward, 9 Ill. 409 (although defendant had no actual notice of its existence). See also Old Town *v.* Dooley, 81 Ill. 255.

Iowa.— State *v.* Robinson, 28 Iowa 514, although less than statutory width.

Kansas.— State *v.* Hedeen, 47 Kan. 402, 28 Pac. 203.

New York.— Chapman *v.* Gates, 54 N. Y. 132.

Ohio.— See Ingersoll *v.* Herider, 12 Ohio 527.

South Carolina.— State *v.* Mobley, 1 McMull. 44.

Tennessee.— Elkins *v.* State, 2 Humphr. 543.

United States.— Felton *v.* Ackerman, 61 Fed. 225, 9 C. C. A. 457.

Canada.— Rex *v.* Bennett, (Mich. T.) Stevens N. Brunsw. Dig. 400, although part obstructed had never been used.

See 25 Cent. Dig. tit. "Highways," § 421.

A mere informality in establishing the road or failure to observe all the statutory requirements is no defense if the road in fact

as well as those existing by dedication[81] or by recognition, user, or prescription.[82]

D. Authorized Obstructions; Prescription. Obstructions in a highway may be authorized by act of legislature,[83] or by the municipality in which the road lies,[84] the obstruction being, however, strictly confined to the authority granted.[85] No right to maintain an encroachment upon or obstruction in a highway by an individual can be gained by lapse of time,[86] unless by statute,[87]

has a legal existence. Draper *v.* Mackey, 35 Ark. 497; Galbraith *v.* Littiech, 73 Ill. 209; Clifford *v.* Eagle, 35 Ill. 444; Town *v.* Blackberry, 29 Ill. 137; State *v.* Hedeen, 47 Kan. 402, 28 Pac. 203; Chapman *v.* Gates, 54 N. Y. 132; Ward *v.* State, 42 Tex. Cr. 435, 60 S. W. 757. But a road not legally laid out may be obstructed. Roberts *v.* Cottrellville Highway Com'rs, 25 Mich. 23 (absence of petition by landowners); Christy *v.* Newton, 60 Barb. (N. Y.) 332.

81. Dunn *v.* Gunn, 149 Ala. 583, 42 So. 686; Reg. *v.* Petrie, 3 C. L. R. 829, 6 Cox C. C. 512, 4 E. & B. 737, 1 Jur. N. S. 752, 24 L. J. Q. B. 167, 3 Wkly. Rep. 243, 82 E. C. L. 737. See also Roberts *v.* Cottrellville Highway Com'rs, 25 Mich. 23; Mercer *v.* Woodgate, L. R. 5 Q. B. 26, 39 L. J. M. C. 21, 21 L. T. Rep. N. S. 458, 18 Wkly. Rep. 116.

Where the street dedicated has never been used or opened there is no right to remove an obstruction. Pavonia Land Assoc. *v.* Temfer, (N. J. Ch. 1887) 7 Atl. 423; Roller *v.* Kirby, 1 Ohio Dec. (Reprint) 76, 1 West. L. J. 550.

82. *Alabama.*— Dunn *v.* Gunn, 149 Ala. 583, 42 So. 686.

Iowa.— State *v.* McGee, 40 Iowa 595.

Kentucky.— Smith *v.* Illinois Cent. R. Co., 105 S. W. 96, 31 Ky. L. Rep. 1323.

Michigan.— Krueger *v.* Le Blanc, 62 Mich. 70, 28 N. W. 757. See also Roberts *v.* Cottrellville Highway Com'rs, 25 Mich. 23, under the statute of 1861, p. 153.

New York.— Chapman *v.* Gates, 54 N. Y. 132 [*affirming* 46 Barb. 313]; West Union *v.* Richey, 64 N. Y. App. Div. 156, 71 N. Y. Suppl. 871; People *v.* Hunting, 39 Hun 452. See Doughty *v.* Brill, 1 Abb. Dec. 524, 3 Keyes 612, 3 Transcr. App. 326 [*affirming* 36 Barb. 488].

Ohio.— Arnold *v.* Flattery, 5 Ohio 271.

See 25 Cent. Dig. tit. "Highways," § 421.

83. *Maine.*— State *v.* Webb's River Imp. Co., 97 Me. 559, 55 Atl. 495, right to maintain dams.

New York.— Scofield *v.* Poughkeepsie, 122 N. Y. App. Div. 868, 107 N. Y. Suppl. 767, telephone pole erected under license.

Ohio.— Bingham *v.* Doane, 9 Ohio 165.

Pennsylvania.— Pittsburgh, etc., Bridge Co. *v.* Com., 4 Pa. Cas. 153, 8 Atl. 217. See also Mellick *v.* Pennsylvania R. Co., 203 Pa. St. 457, 53 Atl. 340 [*reversing* 17 Pa. Super. Ct. 12]; Com. *v.* Ruddle, 142 Pa. St. 144, 21 Atl. 814.

Rhode Island.— Sullivan *v.* Webster, 16 R. I. 33, 11 Atl. 771.

See 25 Cent. Dig. tit. "Highways," § 420.

Right of railroad to use highways see RAILROADS, 34 Cyc. 191 *et seq.*

84. Leavenworth *v.* Douglass, 59 Kan. 416, 53 Pac. 123. But see Atty.-Gen. *v.* Barker, 83 L. T. Rep. N. S. 245, 16 T. L. R. 502.

85. Bingham *v.* Doane, 9 Ohio 165; Pittsburgh, etc., Bridge Co. *v.* Com., 4 Pa. Cas. 153, 8 Atl. 217.

A license to place a gate across a road does not empower the licensee to keep the gate locked, with the key in his own possession, which is equivalent to stopping up the road. Com. *v.* Carr, 143 Mass. 84, 9 N. E. 28.

86. *Connecticut.*— Blakeslee *v.* Tyler, 55 Conn. 387, 11 Atl. 291.

Indiana.— State *v.* Phipps, 4 Ind. 515; Terre Haute, etc., R. Co. *v.* Zehner, 15 Ind. App. 273, 42 N. E. 756.

Iowa.— Quinn *v.* Monona County, 140 Iowa 105, 117 N. W. 1100; Quinn *v.* Baage, 138 Iowa 426, 114 N. W. 205.

Kansas.— Eble *v.* State, 77 Kan. 179, 93 Pac. 803, 127 Am. St. Rep. 412.

Maine.—Charlotte *v.* Pembroke Iron Works, 82 Me. 391, 19 Atl. 902, 8 L. R. A. 828.

Massachusetts.— New Salem *v.* Eagle Mill Co., 138 Mass. 8; Morton *v.* Moore, 15 Gray 573.

Missouri.— Wright *v.* Doniphan, 169 Mo. 601, 70 S. W. 146.

New Jersey.— State *v.* Pierson, 37 N. J. L. 222; State *v.* Pierson, 37 N. J. L. 216; Tainter *v.* Morristown, 19 N. J. Eq. 46; Cross *v.* Morristown, 18 N. J. Eq. 305.

New York.— Slattery *v.* McCaw, 44 Misc. 426, 90 N. Y. Suppl. 52 (encroachments); Wildrick *v.* Hager, 10 N. Y. St. 764 [*affirmed* in 119 N. Y. 657, 23 N. E. 1150].

Pennsylvania.— Philadelphia's Appeal, 78 Pa. St. 33; Pittsburgh, etc., Bridge Co. *v.* Com., 4 Pa. Cas. 153, 8 Atl. 217.

Rhode Island.— Foley *v.* Ray, 27 R. I. 127, 61 Atl. 50.

Wisconsin.— State *v.* Wertzel, 62 Wis. 184, 22 N. W. 150.

See 25 Cent. Dig. tit. "Highways," § 422.

87. *Maine.*— Farnsworth *v.* Rockland, 83 Me. 508, 22 Atl. 394.

Massachusetts.— Winslow *v.* Nason, 113 Mass. 411; Com. *v.* Blaisdell, 107 Mass. 234. See also Morton *v.* Moore, 15 Gray 573.

Michigan.— Gregory *v.* Knight, 50 Mich. 61, 14 N. W. 700.

Missouri.— See State *v.* Warner, 51 Mo. App. 174.

New Jersey.— See Tainter *v.* Morristown, 19 N. J. Eq. 46.

New York.— Peckham *v.* Henderson, 27 Barb. 207.

North Carolina.— State *v.* Marble, 26 N. C. 318.

See 25 Cent. Dig. tit. "Highways," § 422.

Compare Henline *v.* People, 81 Ill. 269.

and a statute under which an individual may acquire such a right will be strictly construed.[88]

E. Persons Liable — 1. In General. Any one who causes or permits an obstruction to be placed on the highway is liable therefor.[89] Thus the owner is liable where a contractor abandons a contract to move a building and leaves it in the road,[90] and a landowner is similarly liable for the acts of his licensee.[91] Corporations are liable in like manner as natural persons,[92] and a municipality may itself be liable.[93]

2. Necessity of Notice to Charge Defendant. In some jurisdictions notice to defendant is necessary before liability for obstructions.[94] Thus notice has been held to be necessary before action,[95] indictment,[96] or summary removal.[97] But the requirement is limited to the cases covered by the statute, and thus under the particular circumstances notice has been held unnecessary [98] before summary removal,[99] indictment,[1] or suit to remove,[2] or before an action for a penalty.[3]

F. Remedies [4] — 1. Action For Damages — a. By Private Person — (i) *Right; Procedure.* A private person can bring action for the unlawful obstruction of a public way only if he has sustained special damage thereby, different not merely in degree, but in kind, from that suffered by the community at large.[5] Such actions are governed by the ordinary rules of law and

Evidence that shade trees have been suffered to stand more than twenty years where they were planted, in a public way, raises the presumption that they were planted under lawful authority. Bliss *v.* Ball, 99 Mass. 597.

88. Farnsworth *v.* Rockland, 83 Me. 508, 22 Atl. 394.

89. Dunn *v.* Gunn, 149 Ala. 583, 42 So. 686; Langsdale *v.* Bonton, 12 Ind. 467; Weathered *v.* Bray, 7 Ind. 706; Holliston *v.* New York Cent., etc., R. Co., 195 Mass. 299, 81 N. E. 204; Rockport *v.* Rockport Granite Co., 177 Mass. 246, 58 N. E. 1017, 51 L. R. A. 779; Wartman *v.* Philadelphia, 33 Pa. St. 202; Pennsylvania R. Co. *v.* Kelly, 31 Pa. St. 372; Com. *v.* Milliman, 13 Serg. & R. (Pa.) 403. But see New Basin Canal, etc., Bd. of Control *v.* H. Weston Lumber Co., 109 La. 925, 33 So. 923.

It is the duty of a person who has made an excavation in a highway to restore the road to a safe condition. Elzig *v.* Bales, 135 Iowa 208, 112 N. W. 540.

That the highway is obstructed by others at other places is no defense. Littiech *v.* Mitchell, 73 Ill. 603; Robinson *v.* State, (Tex. Cr. App. 1898) 44 S. W. 509.

That defendant has opened a new road is no defense to obstruction of a public highway. State *v.* Harden, 11 S. C. 360.

90. Caldwell *v.* Pre-emption, 74 Ill. App. 32.

91. Rockport *v.* Rockport Granite Co., 177 Mass. 246, 58 N. E. 1017, 51 L. R. A. 779.

92. Holliston *v.* New York Cent., etc., R. Co., 195 Mass. 299, 81 N. E. 204; Rockport *v.* Rockport Granite Co., 177 Mass. 246, 58 N. E. 1017, 51 L. R. A. 779; Wartman *v.* Philadelphia, 33 Pa. St. 202; Pennsylvania R. Co. *v.* Kelly, 31 Pa. St. 372.

93. Lamb *v.* Pike Tp., 215 Pa. St. 516, 64 Atl. 671; Hughes *v.* Fond du Lac, 73 Wis. 380, 41 N. W. 407. But see Miner *v.* Hopkinton, 73 N. H. 232, 60 Atl. 433.

94. Carver *v.* Com., 12 Bush (Ky.) 264; Hurst *v.* Cassiday, 5 Ky. L. Rep. 771; Le Blanc *v.* Kruger, 75 Mich. 561, 42 N. W. 980; Cooper *v.* Bean, 5 Lans. (N. Y.) 318; Spicer *v.* Slade, 9 Johns. (N. Y.) 359; State *v.* Egerer, 55 Wis. 527, 13 N. W. 461. See Cronenwaite *v.* Hoffman, 88 Mich. 617, 50 N. W. 656.

95. People *v.* Smith, 42 Mich. 138, 3 N. W. 302; Dodge *v.* Stacy, 39 Vt. 558; Wyman *v.* State, 13 Wis. 663, where obstruction was not wilful.

96. Sweeney *v.* People, 28 Ill. 208; State *v.* Robinson, 52 Iowa 228, 2 N. W. 1104; State *v.* Ratliff, 32 Iowa 189; Com. *v.* Noxon, 121 Mass. 42.

97. Cook *v.* Gaylord, 91 Iowa 219, 59 N. W. 30, fences interfering with foot travel outside of cut in road.

98. Carver *v.* Com., 12 Bush (Ky.) 264 (to remove fence erected by owner); Hunter *v.* Jones, 13 Minn. 307; Wyman *v.* State, 13 Wis. 663.

99. Ely *v.* Parsons, 55 Conn. 83, 10 Atl. 499; Davis *v.* Pickerell, 139 Iowa 186, 117 N. W. 276 (fences connected with cattleway across highway); Cool *v.* Commet, 13 Me. 250; Hunter *v.* Jones, 13 Minn. 307.

1. Kelly *v.* Com., 11 Serg. & R. (Pa.) 345.

2. Epler *v.* Niman, 5 Ind. 459.

3. Corning *v.* Head, 86 Hun (N. Y.) 12, 33 N. Y. Suppl. 360.

4. Action for abatement of obstruction in city streets see Municipal Corporations, 28 Cyc. 899.

Ejectment for encroachments on city streets see Municipal Corporations, 28 Cyc. 896.

5. *California.*— San José Ranch Co. *v.* Brooks, 74 Cal. 463, 16 Pac. 250; Lewiston Turnpike Co. *v.* Shasta, etc., Wagon Road Co., 41 Cal. 562; Blanc *v.* Klumpke, 29 Cal. 156.

Connecticut.— Clark *v.* Saybrook, 21 Conn. 313.

Delaware.— Johnson *v.* Stayton, 5 Harr. 362.

Indiana.— Sohn *v.* Cambern, 106 Ind. 302, 6 N. E. 813; Powell *v.* Bunger, 91 Ind. 64.

procedure as to jurisdiction [6] and parties,[7] by the ordinary rules of pleading[8]

Iowa.— Miller *v.* Schenck, 78 Iowa 372, 43 N. W. 225; Brant *v.* Plumer, 64 Iowa 33, 19 N. W. 842.

Maryland.— Schall *v.* Nusbaum, 56 Md. 512.

Minnesota.— Guilford *v.* Minneapolis, etc., R. Co., 94 Minn. 108, 102 N. W. 365; Gundlach *v.* Hamm, 62 Minn. 42, 64 N. W. 50; Dawson *v.* St. Paul F. & M. Ins. Co., 15 Minn. 136, 2 Am. Rep. 109.

New Hampshire.— Lamphier *v.* Worcester, etc., R. Co., 33 N. H. 495.

New Jersey.— Morris, etc., R. Co. *v.* Newark Pass R. Co., 51 N. J. Eq. 379, 29 Atl. 184.

Oregon.— Luhrs *v.* Sturtevant, 10 Oreg. 170.

Pennsylvania.— Fisher *v.* Farley, 23 Pa. St. 501.

Rhode Island.— Hughes *v.* Providence, etc., R. Co., 2 R. I. 493.

South Carolina.— Smith *v.* Gilreath, 69 S. C. 353, 48 S. E. 262; Carey *v.* Brooks, 1 Hill 365.

Tennessee.— Lowery *v.* Petree, 8 Lea 674.

Texas.— Haney *v.* Gulf, etc., R. Co., 3 Tex. App. Civ. Cas. § 278.

Vermont.— Baxter *v.* Winooski Turnpike Co., 22 Vt. 114, 52 Am. Dec. 84.

Wisconsin.— Tilly *v.* Mitchell, etc., Co., 121 Wis. 1, 98 N. W. 969, 105 Am. St. Rep. 1007; Carpenter *v.* Mann, 17 Wis. 155.

Special injury warranting recovery see Blanc *v.* Klumpke, 29 Cal. 156; Spencer *v.* New York, etc., R. Co., 62 Conn. 242, 25 Atl. 350; McNary *v.* Chamberlain, 34 Conn. 384, 91 Am. Dec. 732 (contractor alleging that obstruction by another interfered with his work); Brown *v.* Watson, 47 Me. 161, 74 Am. Dec. 482 (one stopped and compelled to take a more circuitous route with loaded team); Stetson *v.* Faxon, 19 Pick. (Mass.) 147, 31 Am. Dec. 123 (rendering warehouse less valuable for business); Coatsworth *v.* Lehigh Valley R. Co., 156 N. Y. 451, 51 N. E. 301 [*affirming* 24 N. Y. App. Div. 273, 48 N. Y. Suppl. 511]; Wakeman *v.* Wilbur, 147 N. Y. 657, 42 N. E. 341 [*reversing* 4 N. Y. Suppl. 938]; Lansing *v.* Wiswall, 5 Den. (N. Y.) 213 [*affirmed* in 5 How. Pr. 77]; Pierce *v.* Dart, 7 Cow. (N. Y.) 609 (detained on way in removing obstruction); Milarkey *v.* Foster, 6 Oreg. 378, 25 Am. Rep. 531; Knowles *v.* Pennsylvania R. Co., 175 Pa. St. 623, 34 Atl. 974, 52 Am. St. Rep. 860 (fence across road which plaintiff had contracted to use in hauling dirt); Heilbron *v.* St. Louis Southwestern R. Co., (Tex. Civ. App. 1908) 113 S. W. 979; Hall *v.* Austin, 20 Tex. Civ. App. 59, 48 S. W. 53 (prescriptive right in public easement); Baier *v.* Schermerhorn, 96 Wis. 372, 71 N. W. 600 (necessity of taking circuitous route).

Interference with free access to adjoining premises is special damage for which the one injured can recover. Blanc *v.* Klumpke, 29 Cal. 156; Spencer *v.* New York, etc., R. Co., 62 Conn. 242, 25 Atl. 350; Fossion *v.* Landry, 123 Ind. 136, 24 N. E. 96 (cutting off access to plaintiff's buildings); Cincinnati, etc., R. Co. *v.* Miller, 36 Ind. App. 26, 72 N. E. 827, 73 N. E. 1001 (access to adjacent property); Miller *v.* Schenck, 78 Iowa 372, 43 N. W. 225 (only available access); Park *v.* Chicago, etc., R. Co., 43 Iowa 636; Piper *v.* Boonville, 32 Mo. App. 138 (obstructing access to plaintiff's quarry); Ryerson *v.* Morris Canal, etc., Co., 69 N. J. L. 505, 55 Atl. 98 (access between plaintiff's farms). Not, however, if others similarly situated suffer damages from the same cause similar in kind, although less in degree. Willard *v.* Cambridge, 3 Allen (Mass.) 574.

Special injury held not to exist see Atwood *v.* Partree, 56 Conn. 80, 14 Atl. 85; Storm *v.* Barger, 43 Ill. App. 173; Dantzer *v.* Indianapolis Union R. Co., 141 Ind. 604, 39 N. E. 223, 50 Am. St. Rep. 343, 34 L. R. A. 769; Sunderland *v.* Martin, 113 Ind. 411, 15 N. E. 689 (access to public cemetery in which plaintiff's family buried); Sohn *v.* Cambern, 106 Ind. 302, 6 N. E. 813 (that citizen's route to market is interfered with); Holmes *v.* Corthell, 80 Me. 31, 12 Atl. 730; Shaw *v.* Boston, etc., R. Co., 159 Mass. 597, 35 N. E. 92; Geer *v.* Fleming, 110 Mass. 39 (tenant inconvenienced in driving cattle, unless injury to reversionary interest shown); Shero *v.* Carey, 35 Minn. 423, 29 N. W. 58 (plaintiff had to drive by longer roads); Bailey *v.* Culver, 84 Mo. 531 [*affirming* 12 Mo. App. 175]; Griffin *v.* Sanbornton, 44 N. H. 246 (total obstruction of highway by snow); Higbee *v.* Camden, etc., R. Co., 19 N. J. Eq. 276; McLauchlin *v.* Charlotte, etc., R. Co., 5 Rich. (S. C.) 583 (cutting off chance to make new entrance to lot); Baxter *v.* Winooski Turnpike Co., 22 Vt. 114, 52 Am. Dec. 84 (plaintiff not attempting at certain times to travel because of its general condition); Burton *v.* Dougherty, 19 N. Brunsw. 51 (where plaintiff hearing of the obstruction went by another route at increased expense but did not actually attempt to go upon the road); Meloche *v.* Davidson, 11 Quebec K. B. 302 [*affirming* 20 Quebec Super. Ct. 26].

But a landowner not suffering special damage may be relator in an information by the attorney-general for an obstruction or encroachment. Gray *v.* Greenville, etc., R. Co., 59 N. J. Eq. 372, 46 Atl. 638.

6. Allard *v.* Lobau, 2 Mart. N. S. (La.) 317, district court.

7. Pettibone *v.* Hamilton, 40 Wis. 402, holding that parties owning severally may join.

A subsequent conveyance of the property will not defeat the right of the owner at the time of the injury to recover. Sell *v.* Ernsberger, 8 Ohio Cir. Ct. 449, 4 Ohio Cir. Dec. 100.

8. Albert Lea *v.* Knatvoid, 89 Minn. 480, 95 N. W. 309; Thelan *v.* Farmer, 36 Minn. 225, 30 N. W. 670 (holding that the complaint must set out clearly the character of the injury); Smith *v.* Gilreath, 69 S. C. 353, 48 S. E. 262.

and evidence,[9] and by the ordinary rules governing trial,[10] verdict,[11] and decree,[12] and also appeal.[13]

(II) *DAMAGES.* Damages recoverable are such as proximately result from the wrong complained of,[14] and may consist of the difference between the rental value of property affected with and without the nuisance,[15] or the diminished value of plaintiff's land,[16] and the length of time the obstruction remained may be taken into account,[17] and the cost of removal of the obstruction may be allowed where it could be removed at trifling cost.[18] Punitive damages may be allowed for wilful obstructions.[19] On the question of damages in an action by a private person a road is not to be considered a public way unless actually in condition for use.[20]

b. By Municipality. A town [21] or county [22] may maintain an action for damages against one who injures the roads, and ejectment by the town will lie against those encroaching.[23]

2. INJUNCTION [24] — a. In General. Injunction will commonly lie to compel the removal of an obstruction,[25] on showing that it exists in a public highway,[26]

Special damages must be alleged. Waltman *v.* Rund, 94 Ind. 225; Roberts *v.* Fitzgerald, 33 Mich. 4, holding that plaintiff must plead specially damage by reason of a third person passing over plaintiff's land to avoid obstruction.

Complaint held sufficient see Leslie County *v.* Southern Lumber Co., 89 S. W. 242, 28 Ky. L. Rep. 335.

9. Wicks *v.* Ross, 37 Mich. 464, quantity of wood plaintiff might have taken to market held inadmissible in absence of evidence that he desired to do so.

Notice to the owner of a telegraph wire of its condition should be shown. Smith *v.* Gilreath, 69 S. C. 353, 48 S. E. 262.

The burden of proof is on plaintiff. Lewiston Turnpike Co. *v.* Shasta, etc., Wagon Road Co., 41 Cal. 562; Waddle *v.* Duncan, 63 Ill. 223 (to show he is an elector of the town as statute requires); Matlock *v.* Hawkins, 92 Ind. 225 (existence of highway).

10. Smith *v.* Illinois Cent. R. Co., 105 S. W. 96, 31 Ky. L. Rep. 1323.

The court should instruct that to wantonly destroy property in removing an obstruction is a trespass. Beardslee *v.* French, 7 Conn. 125, 18 Am. Dec. 86.

Whether a stepping-stone is a nuisance in fact is a question for the jury. Nutter *v.* Pearl, 71 N. H. 247, 51 Atl. 897.

11. Fossion *v.* Landry, 123 Ind. 136, 24 N. E. 96.

12. Wickham *v.* Twaddell, 25 Pa. Super. Ct. 188, decree allowing time to remove hedge at proper season.

13. Turpin *v.* Dennis, 139 Ill. 274, 28 N. E. 1065 (holding that objection to parties must be made in the lower court); Bradford *v.* Hume, 90 Me. 233, 38 Atl. 143 (verdict on conflicting evidence not disturbed).

14. Goggans *v.* Myrick, 131 Ala. 286, 31 So. 22; Bembe *v.* Anne Arundel County Com'rs, 94 Md. 321, 51 Atl. 179, 57 L. R. A. 279; Galveston, etc., R. Co. *v.* Baudat, 21 Tex. Civ. App. 236, 51 S. W. 541 (loss of sales of plaintiff's produce by cutting off access to road).

15. Jackson *v.* Kiel, 13 Colo. 378, 22 Pac. 504, 16 Am. St. Rep. 207, 6 L. R. A. 254.

16. Martin *v.* Marks, 154 Ind. 549, 57 N. E. 249.

17. Louisville, etc., R. Co. *v.* Whitley County Ct., 49 S. W. 332, 20 Ky. L. Rep. 1367.

18. Mellick *v.* Pennsylvania R. Co., 203 Pa. St. 457, 53 Atl. 340 [*reversing* 17 Pa. Super. Ct. 12].

19. Tutwiler Coal, etc., Co. *v.* Nail, 141 Ala. 374, 37 So. 634.

20. Wicks *v.* Ross, 37 Mich. 464.

21. Freedom *v.* Weed, 40 Me. 383, 63 Am. Dec. 670; Monroe *v.* Connecticut River Lumber Co., 68 N. H. 89, 39 Atl. 1019; Southeast *v.* New York, 96 N. Y. App. Div. 598, 89 N. Y. Suppl. 630; Georgetown Street Com'rs *v.* Taylor, 1 Brev. (S. C.) 129.

22. Leslie County *v.* Southern Lumber Co., 89 S. W. 242, 28 Ky. L. Rep. 335.

23. Riverside Tp. *v.* Pennsylvania R. Co., 74 N. J. L. 476, 66 Atl. 433.

Injunction against obstruction in city street see MUNICIPAL CORPORATIONS, 28 Cyc. 899.

24. **Injunction against nuisances** generally see NUISANCES, 29 Cyc. 1219.

25. *Alabama.*— Hoole *v.* Atty.-Gen., 22 Ala. 190.

Louisiana.— McDonough *v.* Calloway, 7 Rob. 442.

New Jersey.— Morris Canal, etc., Co. *v.* Fagan, 18 N. J. Eq. 215.

New York.— Flood *v.* Van Wormer, 70 Hun 415, 24 N. Y. Suppl. 460 [*affirmed* in 147 N. Y. 284, 41 N. E. 569], after order for removal served by road officer.

Pennsylvania.— Philadelphia's Appeal, 78 Pa. St. 33; Scranton *v.* Griffin, 8 Leg. Gaz. 86; Philadelphia *v.* Pennsylvania R. Co., 1 Leg. Gaz. 163.

Canada.— Gloucester Tp. *v.* Canada Atlantic R. Co., 3 Ont. L. Rep. 85, 1 Ont. Wkly. Rep. 18 [*affirmed* in 4 Ont. L. Rep. 262, 1 Ont. Wkly. Rep. 485].

See 25 Cent. Dig. tit. "Highways," § 430.

26. Clements *v.* Logan, 44 Ga. 30; Simpson *v.* Wright, 21 Ill. App. 67; Gloucester Tp. *v.* Canada Atlantic R. Co., 3 Ont. L. Rep. 85, 1 Ont. Wkly. Rep. 18 [*affirmed* in 4 Ont. L. Rep. 262, 1 Ont. Wkly. Rep. 485].

special damage,[27] an irreparable injury,[28] and the non-existence of an adequate remedy at law,[29] although in some cases injunction has been held to be a cumulative remedy.[30]

b. By Public Authorities. The suit for injunction may be maintained by the county[31] or municipality,[32] or by the state,[33] or by road officers,[34] only, however, on a proper bill in equity[35] showing danger of great and irreparable injury.[36]

c. By Private Person. A private individual is entitled to an injunction

Injunction will be refused where it is not shown that the highway ever has been opened or used. Seeger *v.* Mueller, 133 Ill. 86, 24 N. E. 513 [*affirming* 28 Ill. App. 28] (where highway had never been used and could be opened only at disproportionate expense); Atty.-Gen. *v.* Brown, 24 N. J. Eq. 89 (way disused); Wakeman *v.* Wilbur, 4 N. Y. Suppl. 938 [*reversed* on other grounds in 147 N. Y. 657, 42 N. E. 341]; Bunnell's Appeal, 69 Pa. St. 59; Biddle *v.* Ash, 2 Ashm. (Pa.) 211. But see Burkitt *v.* Battle, (Tenn. Ch. App. 1900) 59 S. W. 429.

27. Givens *v.* McIlroy, 79 Mo. App. 671; Redman *v.* Monongahela Boulevard Co., 189 Pa. St. 437, 42 Atl. 133; Atty.-Gen. *v.* London, etc., R. Co., [1900] 1 Q. B. 78, 63 J. P. 772, 69 L. J. Q. B. 26, 81 L. T. Rep. N. S. 649, 16 T. L. R. 30 [*affirming* [1899] 1 Q. B. 72, 68 L. J. Q. B. 4, 79 L. T. Rep. N. S. 412, 15 T. L. R. 39].

Injunction refused for lack of showing of special damage see Needham *v.* New York, etc., R. Co., 152 Mass. 61, 25 N. E. 20; Putnam *v.* Valentine, 5 Ohio 187; Walts *v.* Foster, 12 Oreg. 247, 7 Pac. 24.

28. Stearns County *v.* St. Cloud, etc., R. Co., 36 Minn. 425, 32 N. W. 91; Atty.-Gen. *v.* Brown, 24 N. J. Eq. 89; Huddleston *v.* Killbuck Tp., 4 Pa. Cas. 176, 7 Atl. 210; Keystone Bridge Co. *v.* Summers, 13 W. Va. 476.

29. *Maine.*— Rockland *v.* Rockland Water Co., 86 Me. 55, 29 Atl. 935.

Massachusetts.— Atty.-Gen. *v.* Bay State Brick Co., 115 Mass. 431.

Michigan.— Lebanon Tp. *v.* Burch, 78 Mich. 641, 44 N. W. 148.

New Jersey.— Raritan Tp. *v.* Port Reading R. Co., 49 N. J. Eq. 11, 23 Atl. 127; Woodbridge Tp. *v.* Inslee, 37 N. J. Eq. 397; Atty.-Gen. *v.* Heishon, 18 N. J. Eq. 410.

New York.— Rozell *v.* Andrews, 103 N. Y. 150, 8 N. E. 513.

Pennsylvania.— Com. *v.* Croushore, 145 Pa. St. 157, 22 Atl. 807.

30. Clayton County *v.* Herwig, 100 Iowa 631, 69 N. W. 1035; Hutchinson Tp. *v.* Filk, 44 Minn. 536, 47 N. W. 255; State *v.* Dayton, etc., R. Co., 36 Ohio St. 434.

31. *California.*— Sierra County *v.* Butler, 136 Cal. 547, 69 Pac. 418.

Iowa.— Clayton County *v.* Herwig, 100 Iowa 631, 69 N. W. 1035.

Kansas.— Eble *v.* State, 77 Kan. 179, 93 Pac. 803, 127 Am. St. Rep. 412.

Minnesota.— Stearns County *v.* St. Cloud, etc., R. Co., 36 Minn. 425, 32 N. W. 91.

Texas.— Franklin County *v.* Huff, 43 Tex. Civ. App. 355, 95 S. W. 41.

Washington.— Lincoln County *v.* Fish, 38 Wash. 105, 80 Pac. 435.

See 25 Cent. Dig. tit. "Highways," §§ 430, 431.

But see Trumbull County *v.* Pennsylvania Co., 24 Ohio Cir. Ct. 550.

32. *Connecticut.*— Burlington *v.* Schwarzman, 52 Conn. 181, 52 Am. Rep. 571.

Kansas.— Council Grove Tp. *v.* Bowman, 76 Kan. 563, 92 Pac. 550.

Kentucky.— Owensboro *v.* Hope, 110 S. W. 272, 33 Ky. L. Rep. 426.

Michigan.— Bangor Tp. *v.* Bay City Traction, etc., Co., 147 Mich. 165, 110 N. W. 490, 7 L. R. A. N. S. 1187; Merritt Tp. *v.* Harp, 131 Mich. 174, 91 N. W. 156.

New Jersey.— Easton, etc., R. Co. *v.* Greenwich Tp., 25 N. J. Eq. 565; Greenwich Tp. *v.* Easton, etc., R. Co., 24 N. J. Eq. 217, threatening special injury to township.

New York.— Eastchester *v.* New York, etc., Traction Co., 30 Misc. 571, 63 N. Y. Suppl. 1032.

Pennsylvania.— North Manheim Tp. *v.* Reading, etc., R. Co., 10 Pa. Cas. 261, 14 Atl. 137.

Wisconsin.— Oshkosh *v.* Milwaukee, etc., R. Co., 74 Wis. 534, 43 N. W. 489, 17 Am. St. Rep. 175, by city for interruptions and inconveniences of travel.

Canada.— Gloucester *v.* Canada Atlantic R. Co., 4 Ont. L. Rep. 262, 1 Ont. Wkly. Rep. 485 [*affirming* 3 Ont. L. Rep. 85, 1 Ont. Wkly. Rep. 18].

See 25 Cent. Dig. tit. "Highways," §§ 430, 431.

Further litigation of the public rights may be enjoined. Hutchinson Tp. *v.* Filk, 44 Minn. 536, 47 N. W. 255; Weston *v.* Ralston, 48 W. Va. 170, 36 S. E. 446; Neshkoro *v.* Nest, 85 Wis. 126, 55 N. W. 176.

33. State *v.* Louisiana, etc., Gravel Road Co., 116 Mo. App. 175, 92 S. W. 153; Morris, etc., R. Co. *v.* Prudden, 20 N. J. Eq. 530.

34. Meservey *v.* Gulliford, 14 Ida. 133, 93 Pac. 780; Lebanon Tp. *v.* Burch, 78 Mich. 641, 44 N. W. 148; Williams *v.* Riley, 79 Nebr. 554, 113 N. W. 136. But see Coykendall *v.* Durkee, 13 Hun (N. Y.) 260.

35. Morris, etc., R. Co. *v.* Prudden, 20 N. J. Eq. 530.

36. Council Grove Tp. *v.* Bowman, 76 Kan. 563, 92 Pac. 550; Newcastle *v.* Haywood, 67 N. H. 178, 37 Atl. 1040 (holding that injunction will not lie to restrain defendants from maintaining a fence in a highway, where it does not appear that the public will suffer irreparable damage by reason of it, or that constant travel is totally or dangerously obstructed, and where the question of right

against encroachments on or obstructions in a public road,[37] when, and only when, he is specially injured thereby,[38] and it is necessary to preserve his rights[39] from

has not been determined at law); Irwin *v.* Dixion, 9 How. (U. S.) 10, 13 L. ed. 25.

37. *Alabama.*— Jones *v.* Bright, 140 Ala. 268, 37 So. 79.

California.— Gardner *v.* Stroever, 89 Cal. 26, 26 Pac. 618.

Missouri.— Peterson *v.* Beha, 161 Mo. 513, 62 S. W. 462, although error in lay-out.

Oregon.— Van Buskirk *v.* Bond, 52 Oreg. 234, 96 Pac. 1103.

Virginia.— Terry *v.* McClung, 104 Va. 599, 52 S. E. 355.

See 25 Cent. Dig. tit. "Highways," § 435.

38. *Alabama.*— Jones *v.* Bright, 140 Ala. 268, 37 So. 79; Cabbell *v.* Williams, 127 Ala. 320, 28 So. 405.

California.— Helm *v.* McClure, 107 Cal. 199, 40 Pac. 437; Gardner *v.* Stroever, 89 Cal. 26, 26 Pac. 618.

Georgia.— Coast Line R. Co. *v.* Cohen, 50 Ga. 451.

Illinois.— Nelson *v.* Randolph, 222 Ill. 531, 78 N. E. 914.

Indiana.— Strunk *v.* Pritchett, 27 Ind. App. 582, 61 N. E. 973.

Iowa.— Kelley *v.* Briggs, 58 Iowa 332, 12 N. W. 299; Hougham *v.* Harvey, 33 Iowa 203; Ewell *v.* Greenwood, 26 Iowa 377.

Kansas.— Hayden *v.* Stewart, 71 Kan. 11, 80 Pac. 43; Dyche *v.* Weichselbaum, 9 Kan. App. 360, 58 Pac. 126.

Kentucky.— Bohne *v.* Blankenship, 77 S. W. 919, 25 Ky. L. Rep. 1645.

Louisiana.— Allard *v.* Lobau, 2 Mart. N. S. 317 (although defendant be also indictable); New Orleans *v.* Gravier, 11 Mart. 620.

Maryland.— Gore *v.* Brubaker, 55 Md. 87; Baltimore, etc., R. Co. *v.* Strauss, 37 Md. 237.

Michigan.— Nye *v.* Clark, 55 Mich. 599, 22 N. W. 57.

Minnesota.— Wilder *v.* De Cou, 26 Minn. 10, 1 N. W. 48.

Nebraska.— Letherman *v.* Hauser, 77 Nebr. 731, 110 N. W. 745; Eldridge *v.* Collins, 75 Nebr. 65, 105 N. W. 1085.

New York.— De Witt *v.* Van Schoyk, 110 N. Y. 7, 17 N. E. 425, 6 Am. St. Rep. 342 [*affirming* 35 Hun 103]; Eldert *v.* Long Island Electric R. Co., 28 N. Y. App. Div. 451, 51 N. Y. Suppl. 186 [*affirmed* in 165 N. Y. 651, 59 N. E. 1122]; Purroy *v.* Schuyler, 15 N. Y. St. 337.

Ohio.— McQuigg *v.* Cullins, 56 Ohio St. 649, 47 N. E. 595; Cincinnati Methodist Protestant Church *v.* Laws, 13 Ohio Cir. Ct. 147, 6 Ohio Cir. Dec. 178; Mondle *v.* Toledo Plow Co., 9 Ohio S. & C. Pl. Dec. 281, 6 Ohio N. P. 294.

Oregon.— Luhrs *v.* Sturtevant, 10 Oreg. 170.

Pennsylvania.— Lehigh Coal, etc., Co. *v.* Inter-County St. R. Co., 167 Pa. St. 75, 31 Atl. 471; Wickham *v.* Twaddell, 25 Pa. Super. Ct. 188; Yost *v.* Philadelphia, etc., R. Co., 29 Leg. Int. 85; Smith *v.* Union Switch & Signal Co., 31 Pittsb. Leg. J. 21.

South Carolina.— Gray *v.* Charleston, etc., R. Co., 81 S. C. 370, 62 S. E. 442, holding that there must be a direct and special damage different in kind from that sustained by the public.

Tennessee.— Burkitt *v.* Battle, (Ch. App. 1900) 59 S. W. 429; Hill *v.* Hoffman, (Ch. App. 1899) 58 S. W. 929; Raht *v.* Southern Ry. Co., (Ch. App. 1897) 50 S. W. 72.

Texas.— Evans *v.* Scott, (Civ. App. 1906) 97 S. W. 116; Parsons *v.* Hunt, (Civ. App. 1904) 81 S. W. 120 [*reversed* on other grounds in 98 Tex. 420, 84 S. W. 644].

Virginia.— Terry *v.* McClung, 104 Va. 599, 52 S. E. 355.

West Virginia.— Bent *v.* Trimboli, 61 W. Va. 509, 56 S. E. 881; Wees *v.* Coal, etc., R. Co., 54 W. Va. 421, 46 S. E. 166; Clifton *v.* Weston, 54 W. Va. 250, 46 S. E. 360; Keystone Bridge Co. *v.* Summers, 13 W. Va. 476.

Wisconsin.— Pettibone *v.* Hamilton, 40 Wis. 402.

United States.— Mackall *v.* Ratchford, 82 Fed. 41.

See 25 Cent. Dig. tit. "Highways," § 435.

Injunction refused for failure to show special damage see Wellborn *v.* Davies, 40 Ark. 83; Aram *v.* Schallenberger, 41 Cal. 449 (although access hindered); Clark *v.* Donaldson, 104 Ill. 639 (only an inconvenience shown); Richeson *v.* Richeson, 8 Ill. App. 204; McCowan *v.* Whitesides, 31 Ind. 235; Bell *v.* Edwards, 37 La. Ann. 475; Robinson *v.* Brown, 182 Mass. 266, 65 N. E. 377; Hartshorn *v.* South Reading, 3 Allen (Mass.) 501; Currier *v.* Davis, 68 N. H. 596, 41 Atl. 239; Grey *v.* Greenville, etc., R. Co., 59 N. J. Eq. 372, 46 Atl. 638; West Jersey R. Co. *v.* Camden, etc., R. Co., 52 N. J. Eq. 31, 29 Atl. 423; Perkins *v.* Morristown, etc., Turnpike Co., 48 N. J. Eq. 499, 22 Atl. 180; Halsey *v.* Rapid Transit St. R. Co., 47 N. J. Eq. 380, 2 Atl. 859; Van Wegenen *v.* Cooney, 45 N. J. Eq. 24, 16 Atl. 689; Wakeman *v.* Wilbur, 4 N. Y. Suppl. 938 [*reversed* on other grounds in 147 N. Y. 657, 42 N. E. 341]; Van Buskirk *v.* Bond, 52 Oreg. 234, 96 Pac. 1103; Philadelphia, etc., R. Co. *v.* Philadelphia, etc., Pass. R. Co., 6 Pa. Dist. 487; Wees *v.* Coal, etc., R. Co., 54 W. Va. 421, 46 S. E. 166.

A difference not only in degree but in kind of damage from that suffered by the public must appear. Bigley *v.* Nunan, 53 Cal. 403; Jacksonville, etc., R. Co. *v.* Thompson, 34 Fla. 346, 16 So. 282, 26 L. R. A. 410; Dantzer *v.* Indianapolis Union R. Co., 141 Ind. 604, 39 N. E. 223, 50 Am. St. Rep. 343, 34 L. R. A. 769 (different from damage suffered by those who have property rights in the vicinity); Matlock *v.* Hawkins, 92 Ind. 225; Crook *v.* Pitcher, 61 Md. 510; Houck *v.* Wachter, 34 Md. 265, 6 Am. Rep. 332; Fort *v.* Groves, 29 Md. 188.

39. Stone *v.* Peckham, 12 R. I. 27 (dam not removed when injury to plaintiff can be re-

irreparable injury[40] in a plain case,[41] having due regard to the public interest,[42] and where plaintiff is not himself estopped.[43] Such suits are governed by the usual rules as to parties,[44] pleading,[45] evidence,[46] defenses,[47] trial,[48] and judgment.[49]

3. MANDAMUS AGAINST PUBLIC OFFICER TO COMPEL REMOVAL. Removal of obstructions or encroachments in a highway may be compelled by mandamus against the officers whose duty it is to remove them,[50] on petition setting out the necessary

lieved by altering it); Fielden *v.* Cox, 22 T. L. R. 411.

40. *California.*— Gardner *v.* Stroever, 81 Cal. 148, 22 Pac. 483, 6 L. R. A. 90.

Missouri.— Bailey *v.* Culver, 84 Mo. 531, holding that injunction will be refused unless irreparable damage will take place.

New Jersey.— Halsey *v.* Rapid Transit St. R. Co., 47 N. J. Eq. 380, 20 Atl. 859.

Oregon.— Van Buskirk *v.* Bond, 52 Oreg. 234, 96 Pac. 1103.

Pennsylvania.— Neill *v.* Gallagher, 1 Wkly. Notes Cas. 99.

South Carolina.— Northrop Simpson, 69 S. C. 551, 48 S. E. 613.

See 25 Cent. Dig. tit. "Highways," § 435.

One who has erected costly buildings may enjoin the obstruction of the highway, constituting his only means of ingress and egress to the buildings, before he has suffered actual damage from the obstruction. Ross *v.* Thompson, 78 Ind. 90.

The fact that no actual damages can be proved, so that in an action at law the jury could award nominal damages only, often furnishes the very best reason why a court of equity should interfere in cases where the nuisance is a continuous one. Newell *v.* Sass, 142 Ill. 104, 31 N. E. 176. See also Clowes *v.* Staffordshire Potteries Water-Works Co., L. R. 8 Ch. 125, 42 L. J. Ch. 107, 27 L. T. Rep. N. S. 521.

41. Green *v.* Oakes, 17 Ill. 249; Hill *v.* Hoffman, (Tenn. Ch. App. 1899) 58 S. W. 929.

Where the existence of the highway is in issue an injunction will be refused. Van Buskirk *v.* Bond, 52 Oreg. 234, 96 Pac. 1103.

42. Wees *v.* Coal, etc., R. Co., 54 W. Va. 421, 46 S. E. 166, injunction refused where public benefit outweighs private inconvenience.

43. Richeson *v.* Richeson, 8 Ill. App. 204 (estoppel three years' delay unaccounted for); Brutsche *v.* Bowers, 122 Iowa 226, 97 N. W. 1076 (plaintiff himself an obstructer); Williams *v.* Poole, 103 S. W. 336, 31 Ky. L. Rep. 757.

44. Hill *v.* Hoffman, (Tenn. Ch. App. 1899) 58 S. W. 929, holding that omission of abutting owner is immaterial.

45. *Alabama.*— Cabbell *v.* Williams, 127 Ala. 320, 28 So. 405.

Indiana.— Strunk *v.* Pritchett, 27 Ind. App. 582, 61 N. E. 973.

Iowa.— Brutsche *v.* Bowers, 122 Iowa 226, 97 N. W. 1076.

Kentucky.— Newcome *v.* Crews, 98 Ky. 339, 32 S. W. 947, 17 Ky. L. Rep. 899, holding that an answer founded on prescription must allege actual possession.

New York.— Jones *v.* Doherty, 163 N. Y. 558, 57 N. E. 1113.

Ohio.— Ett *v.* Snyder, 5 Ohio Dec. (Reprint) 523, 6 Am. L. Rec. 415, bill must state that obstruction unlawful.

Tennessee.— Hill *v.* Hoffman, (Ch. App. 1899) 58 S. W. 929.

See 25 Cent. Dig. tit. "Highways," § 435.

46. *Arkansas.*— Halliday *v.* Smith, 67 Ark. 310, 54 S. W. 970.

Indiana.— Martin *v.* Marks, 154 Ind. 549, 57 N. E. 249.

Kentucky.— Evans *v.* Cook, 111 S. W. 326, 33 Ky. L. Rep. 788.

Missouri.— Carlin *v.* Wolff, 154 Mo. 539, 51 S. W. 679, 55 S. W. 441, injunction refused on vague, uncertain, and contradictory evidence.

Texas.— Evans *v.* Scott, 37 Tex. Civ. App. 373, 83 S. W. 874.

See 25 Cent. Dig. tit. "Highways," § 435.

47. Allen *v.* Hopson, 119 Ky. 215, 83 S. W. 575, 26 Ky. L. Rep. 1148 (holding that a denial of relief in special statutory proceeding is no bar to another proceeding); Grace *v.* Walker, 95 Tex. 39, 64 S. W. 930, 65 S. W. 482 [*modifying* (Civ. App. 1901) 61 S. W. 1103] (holding that persons not interested in land over which a highway was constructed cannot interpose the defense that the consent of the owners had not been obtained for the highway, in an action for the obstruction thereof). See also Lawrence *v.* Ewert, 21 S. D. 580, 114 N. W. 709, holding that injunction lies, although defendants are liable criminally.

48. Evans *v.* Scott, (Tex. Civ. App. 1906) 97 S. W. 116 (questions of dedication and prescription for the jury); Evans *v.* Scott, 37 Tex. Civ. App. 373, 83 S. W. 874 (instruction presenting issue not raised by pleadings, error).

49. Peterson *v.* Beha, 161 Mo. 513, 62 S. W. 462.

The judgment must be definite in description (Peterson *v.* Beha, 161 Mo. 513, 62 S. W. 462), but need not recite in what part of road the line between certain sections came (Wilson *v.* Hull, 7 Utah 90, 24 Pac. 799).

50. Peck *v.* Los Angeles County, 90 Cal. 384, 27 Pac. 301 (road overseer); Cook *v.* Gaylord, 91 Iowa 219, 59 N. W. 30; Patterson *v.* Vail, 43 Iowa 142.

Mandamus refused see State *v.* Thompson, 6 N. J. L. J. 214.

It is a good defense that the officer had already served notice to remove (Cook *v.* Gaylord, 91 Iowa 219, 59 N. W. 30), or that the road commissioner believes after investigation that no unlawful encroachment exists (White *v.* Leonidas Tp. Highway Com'rs, 95 Mich. 288, 54 N. W. 875).

Although indictment lies for the officer's neglect, yet mandamus may issue. Brokaw *v.* Bloomington Tp. Highway Com'rs, 130 Ill. 482, 22 N. E. 596, 6 L. R. A. 161. But see

facts.[51] It will be granted only in a clear case and not where the rights of the parties are in dispute.[52]

4. Action Against Obstructer to Compel Removal[53] — a. In General. Proceedings at law can commonly be brought to obtain an order for the removal or abatement of an obstruction,[54] with proper parties,[55] upon sufficient pleadings,[56] and on proper evidence.[57]

b. Order and Notice. The order or notice to remove obstructions should be issued by the proper court,[58] and served on the party interested,[59] and must be in the form required by statute,[60] containing a specific description of the encroachment,[61] allowing a proper length of time for removal,[62] and ordering the removal to be made at the proper time.[63]

c. Appeal or Certiorari. The decision as to removal may be reviewed by appeal,[64] or by certiorari.[65]

5. Summary Proceedings For Removal. Proceedings are often provided for

Hale Highway Com'rs *v.* People, 73 Ill. 203; Yorktown Highway Com'rs *v.* People, 66 Ill. 339, both holding *contra*, under an earlier statute.

51. Peck *v.* Los Angeles County, 90 Cal. 384, 27 Pac. 301.

52. Yorktown Highway Com'rs *v.* People, 66 Ill. 339; Hunt *v.* Highway Com'rs, 43 Ill. App. 279.

53. Removal of obstructions from city streets see Municipal Corporations, 28 Cyc. 896.

54. *California.*— People *v.* McCue, 150 Cal. 195, 88 Pac. 899 (under statute); Smith *v.* Glenn, (1900) 62 Pac. 180; People *v.* Blake, (1884) 3 Pac. 102.

Idaho.— Meservey *v.* Gulliford, 14 Ida. 133, 93 Pac. 780.

Kentucky.— Allen *v.* Hopson, 119 Ky. 215, 83 S. W. 575, 26 Ky. L. Rep. 1148; Witt *v.* Hughes, 66 S. W. 281, 23 Ky. L. Rep. 1836, gate removed.

Maine.— Rockland *v.* Rockland Water Co., 86 Me. 55, 29 Atl. 935.

New York.— Howard *v.* Robbins, 1 Lans. 63.

South Carolina.— Smith *v.* Gilreath, 69 S. C. 353, 48 S. E. 262.

55. Hall *v.* Kauffman, 106 Cal. 451, 39 Pac. 756 (in name of road commissioner); San Benito County *v.* Whitesides, 51 Cal. 416 (in name of road overseer); Grandville *v.* Jenison, 84 Mich. 54, 47 N. W. 600; North Manheim Tp. *v.* Reading, etc., R. Co., 10 Pa. Cas. 261, 14 Atl. 137.

56. Meservey *v.* Gulliford, 14 Ida. 133, 93 Pac. 780; Sloan *v.* Rebman, 66 Iowa 81, 23 N. W. 274.

57. Whaley *v.* Wilson, 120 Ala. 502, 24 So. 855; Eaton *v.* People, 30 Colo. 345, 70 Pac. 426; Savannah, etc., R. Co. *v.* Gill, 118 Ga. 737, 45 S. E. 623. See also Shepherd *v.* Turner, 129 Cal. 530, 62 Pac. 106.

58. Churchill *v.* Com., 13 B. Mon. (Ky.) 333.

59. Krueger *v.* Le Blanc, 62 Mich. 70, 28 N. W. 757; State *v.* Egerer, 55 Wis. 527, 13 N. W. 461.

60. Witt *v.* Hughes, 66 S. W. 281, 23 Ky. L. Rep. 1836; James *v.* Sammis, 132 N. Y. 239, 30 N. E. 502; Olendorf *v.* Sullivan, 13 N. Y. Suppl. 6.

Proper proceedings must be shown on the face of the order. Phillips *v.* Schumacher, 10 Hun (N. Y.) 405 (notice to all commissioners to attend); Fitch *v.* Kirkland Highway Com'rs, 22 Wend. (N. Y.) 132; Spicer *v.* Slade, 9 Johns. (N. Y.) 359.

Failure to comply with the provisions of the statute as to notice does not make the road officer a trespasser. Hathaway *v.* Jenks, 67 Hun (N. Y.) 289, 22 N. Y. Suppl. 421.

61. Ferris *v.* Ward, 9 Ill. 499; Krueger *v.* Le Blanc, 62 Mich. 70, 28 N. W. 757; Vantilburgh *v.* Shann, 24 N. J. L. 740; Hathaway *v.* Jenks, 67 Hun (N. Y.) 289, 22 N. Y. Suppl. 421; Mott *v.* Rush Highway Com'rs, 2 Hill (N. Y.) 472.

Notice held defective in not stating the legal width of the highway (see Cook *v.* Covil, 18 Hun (N. Y.) 288; Mott *v.* Rush Highway Com'rs, 2 Hill (N. Y.) 472; Spicer *v.* Slade, 9 Johns. (N. Y.) 359), or the extent and location of the encroachment (see Le Blanc *v.* Kruger, 75 Mich. 561, 42 N. W. 980; Sardinia *v.* Butler, 149 N. Y. 505, 44 N. E. 179 [*reversing* 78 Hun 527, 29 N. Y. Suppl. 481]).

62. Cook *v.* Gaylord, 91 Iowa 219, 59 N. W. 30; Blackburn *v.* Powers, 40 Iowa 681; Smithtown *v.* Ely, 75 N. Y. App. Div. 309, 11 N. Y. Annot. Cas. 459, 78 N. Y. Suppl. 178 [*affirmed* in 178 N. Y. 624, 70 N. E. 1110]; Spicer *v.* Slade, 9 Johns. (N. Y.) 359.

63. State *v.* Egerer, 55 Wis. 527, 13 N. W. 461.

64. Hall *v.* Kauffman, 106 Cal. 451, 39 Pac. 756; Jameson *v.* Hoppock, 46 N. J. L. 516; Miller *v.* Rose, 21 W. Va. 291. See also Sandy *v.* Lindsay, 6 Ky. L. Rep. 737; Wildrick *v.* Hager, 10 N. Y. St. 764 [*affirmed* in 119 N. Y. 657, 23 N. E. 1150].

65. Roberts *v.* Cottrellville Highway Com'rs, 25 Mich. 23; Newbold *v.* Taylor, 46 N. J. L. 133; Gulick *v.* Groendyke, 38 N. J. L. 114; Warford *v.* Smith, 25 N. J. L. 212; People *v.* East Hampton Highway Com'rs, 30 N. Y. 72. See also Low *v.* Rogers, 8 Johns. (N. Y.) 321.

Certiorari refused see People *v.* East Hampton Highway Com'rs, 30 N. Y. 72; Pearsall *v.* North Hempstead Highway Com'rs, 17 Wend. (N. Y.) 15; Pugsley *v.* Anderson, 3 Wend. (N. Y.) 468.

the summary removal of obstructions in highways,[66] where the location of the highway is not in question.[67] The proceedings should include proper notice to parties interested,[68] should be tried by the tribunal appointed by statute,[69] on proper pleadings,[70] and be supported by sufficient evidence.[71] The findings should be specific,[72] and will be binding upon the parties.[73]

6. Summary Removal Without Legal Formality [74] — a. By Public Officer. Municipalities have authority to summarily remove obstructions in highways through the proper officers; [75] but not where the road is not open and legal; [76] nor

66. Voorhees *v.* Bound Brook, 55 N. J. L. 548, 26 Atl. 710.

The statutory remedy does not supersede the common-law remedy but is cumulative merely. Hurst *v.* Cassiday, 5 Ky. L. Rep. 771; Whittier *v.* McIntyre, 59 Me. 143; Cook *v.* Harris, 61 N. Y. 448; Wetmore *v.* Tracy, 14 Wend. (N. Y.) 250, 28 Am. Dec. 525.

67. Willson *v.* Gifford, 42 Mich. 454, 4 N. W. 170; Gregory *v.* Stanton, 40 Mich. 271 (holding that proceedings to remove encroachments will not lie so long as the location of the highway is in question); Campau *v.* Button, 33 Mich. 525; Roberts *v.* Cottrellville Highway Com'rs, 25 Mich. 23; Talmage *v.* Huntting, 29 N. Y. 447 [*affirming* 39 Barb. 654]; Alpaugh *v.* Bennett, 59 Hun (N. Y.) 45, 12 N. Y. Suppl. 398; Com. *v.* Pittston Ferry Bridge Co., 176 Pa. St. 394, 35 Atl. 240. See also Darby *v.* Nash, 52 N. J. L. 127, 18 Atl. 682.

68. State *v.* Pierson, 37 N. J. L. 216; Vantilburgh *v.* Shann, 24 N. J. L. 740.

69. People *v.* East Hampton Highway Com'rs, 30 N. Y. 72; Mott *v.* Rush Highway Com'rs, 2 Hill (N. Y.) 472; Pugsley *v.* Anderson, 3 Wend. (N. Y.) 468.

It is a question for the jury whether obstructions are a nuisance. Blanc *v.* Klumpke, 29 Cal. 156; People *v.* Carpenter, 1 Mich. 273; Vantilburgh *v.* Shann, 24 N. J. L. 740; Winter *v.* Peterson, 24 N. J. L. 524, 61 Am. Dec. 678; Anderson *v.* Young, 66 Hun (N. Y.) 240, 21 N. Y. Suppl. 172; Griffith *v.* McCullum, 46 Barb. (N. Y.) 561; State *v.* Caldwell, 2 Speers (S. C.) 162; Galesville *v.* Parker, 107 Wis. 363, 83 N. W. 646.

70. Thurston County *v.* Walker, 27 Wash. 500, 67 Pac. 1099.

71. Konkel *v.* Pella, 122 Wis. 143, 99 N. W. 453. See also Roberts *v.* Cottrellville Highway Com'rs, 25 Mich. 23.

72. Gregory *v.* Knight, 50 Mich. 61, 14 N. W. 700; State *v.* Pierson, 37 N. J. L. 216; Lindsley *v.* Freeman, 27 N. J. L. 250; Vantilburgh *v.* Shann, 24 N. J. L. 740; Briggs *v.* Doughty, 7 Hun (N. Y.) 82; Kerr *v.* Hammer, 15 N. Y. Suppl. 605; Fitch *v.* Kirkland Highway Com'rs, 22 Wend. (N. Y.) 132.

73. Amerman *v.* Briggs, 50 N. J. L. 114, 11 Atl. 423; Hyatt *v.* Bates, 40 N. Y. 164 [*affirming* 35 Barb. 308]; Paine *v.* East, 15 N. Y. Wkly. Dig. 281; Bronson *v.* Mann, 13 Johns. (N. Y.) 460.

74. **Summary removal of obstruction in city streets** see Municipal Corporations, 28 Cyc. 897.

75. *Alabama.*— Oliver *v.* Loftin, 4 Ala. 240.
California.— Bequette *v.* Patterson, 104 Cal. 282, 37 Pac. 917.
Connecticut.— Martin *v.* Lemon, 26 Conn. 192.
Georgia.— Jones *v.* Williams, 70 Ga. 704.
Illinois.— Caldwell *v.* Pre-emption, 74 Ill. App. 32.
Indiana.— Hymes *v.* Aydelott, 26 Ind. 431.
Iowa.— Davis *v.* Pickerell, 139 Iowa 186, 117 N. W. 276; Quinn *v.* Baage, 138 Iowa 426, 114 N. W. 205.
Kentucky.— Gray *v.* Henry County, 42 S. W. 333, 19 Ky. L. Rep. 885.
Louisiana.— Henderson *v.* New Orleans, 3 La. 563; New Orleans *v.* Magnon, 4 Mart. 2.
Massachusetts.— Morrison *v.* Howe, 120 Mass. 565.
Michigan.— Labo *v.* Asam, 143 Mich. 24, 106 N. W. 281; Neal *v.* Gilmore, 141 Mich. 519, 104 N. W. 609.
New Jersey.— Winter *v.* Peterson, 24 N. J. L. 524, 61 Am. Dec. 678. But see Campbell *v.* Hale, 25 N. J. L. 324.
New York.— Slattery *v.* McCaw, 44 Misc. 426, 90 N. Y. Suppl. 52; Van Wyck *v.* Lent, 33 Hun 301; Northrop *v.* Burrows, 10 Abb. Pr. 365; McFadden *v.* Kingsbury, 11 Wend. 667; Bronson *v.* Mann, 13 Johns. 460. But see Wheatfield *v.* Shasley, 23 Misc. 100, 51 N. Y. Suppl. 835.
Ohio.— Bartin *v.* Campbell, 54 Ohio St. 147, 42 N. E. 698; Baird *v.* Clark, 12 Ohio St. 87.
Pennsylvania.— Crouse *v.* Miller, 19 Pa. Super. Ct. 384.
Rhode Island.— Knowles *v.* Narragansett Dist., 23 R. I. 339, 50 Atl. 386.
Texas.— Schott *v.* State, 7 Tex. App. 616.
Utah.— Whittaker *v.* Ferguson, 16 Utah 240, 51 Pac. 980.
Washington.— Miller *v.* Pierce County, 34 Wash. 592, 76 Pac. 103.
Wisconsin.—Nicolai *v.* Davis, 91 Wis. 370, 64 N. W. 1001; Hubbell *v.* Goodrich, 37 Wis. 84; Neff *v.* Paddock, 26 Wis. 546. But see Konkel *v.* Pella, 122 Wis. 143, 99 N. W. 453.
England.— Dixon *v.* Chester, 70 J. P. 380, 4 Loc. Gov. 1127, 22 T. L. R. 501.
See 25 Cent. Dig. tit. "Highways," § 423 *et seq.*

Notice and opportunity for the owner to dispose of his property should usually be accorded. Clark *v.* Dasso, 34 Mich. 86; Kurz *v.* Turley, 54 Mo. App. 237; State *v.* Reed, 38 N. H. 59.

76. *Florida.*— Bowden *v.* Adams, 22 Fla. 208.
Georgia.— Glaze *v.* Bogle, 105 Ga. 295, 31 S. E. 169.
Idaho.—Meservey *v.* Gulliford, 14 Ida. 133, 93 Pac. 780.

have they authority thus to proceed summarily where the obstruction is not a nuisance.[77]

b. By Private Person. A traveler actually hindered may personally remove an obstruction in a highway,[78] as may any one else if specially injured,[79] and not otherwise,[80] although there are cases which uphold the doctrine that special damage is not necessary.[81]

c. Notice of Claim by Landowner. Statutes sometimes provide that, on receiving notice to remove, the landowner may prevent summary action by serving on the road officers a notice of his claim of right;[82] but failure to give the notice will not estop the owner from setting up his title.[83]

7. Penalties[84] — a. Statutory Provision. In addition to the civil remedies just enumerated, it is frequently provided by statute that a penalty may be imposed for encroachments and obstructions[85] made wilfully,[86] or after warn-

Ohio.— Low *v.* Leichty, 25 Ohio Cir. Ct. 240.

Pennsylvania.— Brake *v.* Crider, 107 Pa. St. 210.

77. Griffith *v.* McCullum, 46 Barb. (N. Y.) 561; Hubbell *v.* Goodrich, 37 Wis. 84. See also Hall *v.* Wakefield, 184 Mass. 147, 68 N. E. 15.

78. *Illinois.*— Earp *v.* Lee, 71 Ill. 193; Marcy *v.* Taylor, 19 Ill. 634; Brooke *v.* O'Boyle, 27 Ill. App. 384.

Kentucky.— Hurst *v.* Cassiday, 5 Ky. L. Rep. 771.

Maine.— Corthell *v.* Holmes, 88 Me. 376, 34 Atl. 173; Mann *v.* Marston, 12 Me. 32.

Massachusetts.— Harvard College *v.* Stearns, 15 Gray 1; Arundel *v.* McCulloch, 10 Mass. 70; Wales *v.* Stetson, 2 Mass. 143, 3 Am. Dec. 39.

Michigan.— Clark *v.* Lake St. Clair, etc., Ice Co., 24 Mich. 508.

New York.— Wetmore *v.* Tracy, 14 Wend. 250, 28 Am. Dec. 525. But see Anderson *v.* Young, 66 Hun 240, 21 N. Y. Suppl. 172.

Washington.— Johnson *v.* Maxwell, 2 Wash. 482, 27 Pac. 1071.

See 25 Cent. Dig. tit. "Highways," § 423 *et seq.*

Neglect to replace bars.— One passing over a road obstructed by movable bars does not become a trespasser *ab initio* by his neglect to replace the bars. Hinks *v.* Hinks, 46 Me. 423.

A statute as to removal of obstructions is cumulative merely. Neal *v.* Gilmore, 141 Mich. 519, 104 N. W. 609.

79. Reed *v.* Cheney, 111 Ind. 387, 12 N. E. 717; Graves *v.* Shattuck, 35 N. H. 257, 69 Am. Dec. 536.

80. *Indiana.*— Bidinger *v.* Bishop, 76 Ind. 244.

Maine.— Mathews *v.* Kelsey, 58 Me. 56, 4 Am. Rep. 248.

Nevada.— Fogg *v.* Nevada, etc., R. Co., 20 Nev. 429, 23 Pac. 840.

New Hampshire.— Graves *v.* Shattuck, 35 N. H. 257, 69 Am. Dec. 536; Hopkins *v.* Crombie, 4 N. H. 520.

New York.— Harrower *v.* Ritson, 37 Barb. 301; Goldsmith *v.* Jones, 43 How. Pr. 415.

Ohio.— Phifer *v.* Cox, 21 Ohio St. 248, 8 Am. Rep. 58.

South Carolina.— State *v.* Creighton, 6 Rich. 125.

Wisconsin.— Godsell *v.* Fleming, 59 Wis. 52, 17 N. W. 679; Williams *v.* Fink, 18 Wis. 265.

England.—Bateman *v.* Bluck, 18 Q. B. 870, 17 Jur. 386, 21 L. J. Q. B. 406, 83 E. C. L. 870, 14 Eng. L. & Eq. 69.

See 25 Cent. Dig. tit. "Highways," § 423.

81. Gunter *v.* Geary, 1 Cal. 462; Burnham *v.* Hotchkiss, 14 Conn. 311; Gates *v.* Blincoe, 2 Dana (Ky.) 158, 26 Am. Dec. 440.

82. Osborn *v.* Longsduff, 70 Mich. 127, 37 N. W. 923 (notice of claim required only after notice received from road officer); Lane *v.* Cary, 19 Barb. (N. Y.) 537.

83. Brownell *v.* Palmer, 22 Conn. 107; Borries *v.* Horton, 16 Hun (N. Y.) 139.

84. **Penalty for obstructing city streets** see Municipal Corporations, 28 Cyc. 906.

85. See the statutes of the several states. And see the following cases:

California.— Smith *v.* Talbot, 77 Cal. 16, 18 Pac. 795.

Illinois.— Boyd *v.* Farm Ridge, 103 Ill. 408; Williams *v.* Hardin, 46 Ill. App. 67; Brown *v.* Barrett, 38 Ill. App. 248; Canoe Creek *v.* McEniry, 23 Ill. App. 227.

Iowa.— Davis *v.* Pickerell, 139 Iowa 186, 117 N. W. 276.

New York.— Wiggins *v.* Tallmadge, 11 Barb. 457; Fleet *v.* Youngs, 7 Wend. 291.

Ohio.— Lawrence R. Co. *v.* Mahoning County, 35 Ohio St. 1.

Wisconsin.— State *v.* Pomeroy, 73 Wis. 664, 41 N. W. 726; State *v.* Leaver, 62 Wis. 387, 22 N. W. 576.

See 25 Cent. Dig. tit. "Highways," § 437 *et seq.*

The penalty may be refused for slight encroachment (Lovington Tp. *v.* Adkins, 232 Ill. 510, 83 N. E. 1043), or for mere encroachment of a fence which did not interfere with travel (Higgins *v.* Grove, 40 Ohio St. 521).

This remedy has been held cumulative. Wragg *v.* Penn Tp., 94 Ill. 11, 34 Am. Rep. 199; State *v.* Wilkinson, 2 Vt. 480, 21 Am. Dec. 560.

86. Ely Tp. Highway Com'rs *v.* Ely, 54 Mich. 173, 19 N. W. 940 (holding that it is a wilful obstruction to knowingly fill up a ditch); State *v.* Castle, 44 Wis. 670.

Obstructions held not wilful see Meacham *v.* Lacey, 133 Ill. App. 208 (violation unintentional and technical merely); State *v.*

ing,[87] on a highway legally laid out,[88] but not generally on a highway by user,[89] although under some statutes roads by prescription are held to be included.[90]

b. Recovery; Procedure. The jurisdiction of the court is governed by local law,[91] and in many states it is conferred upon justices of the peace.[92] The usual rules of local practice in like cases govern[93] as to parties,[94] pleading,[95] evidence,[96]

Smith, 52 Wis. 134, 8 N. W. 870; State *v.* Preston, 34 Wis. 675 (obstruction created in good faith).

87. Menard County Road Dist. No. 1 *v.* Beebe, 231 Ill. 147, 83 N. E. 131 [*affirming* 134 Ill. App. 583]; Seidschlag *v.* Antioch, 207 Ill. 280, 69 N. E. 949 [*affirming* 109 Ill. App. 291]; Fleet *v.* Youngs, 7 Wend. (N. Y.) 291.

88. *Illinois.*— Ohio, etc., R. Co. *v.* People, 39 Ill. App. 473.

Indiana.— Davis *v.* Nicholson, 81 Ind. 183.

Mississippi.— Illinois Cent. R. Co. *v.* State, 71 Miss. 253, 14 So. 459.

Missouri.— Wright *v.* Doniphan, 169 Mo. 601, 70 S. W. 146.

New York.— Fowler *v.* Lansing, 9 Johns. 349.

Ohio.— Bisher *v.* Richards, 9 Ohio St. 495.

Pennsylvania.— Clark *v.* Com., 33 Pa. St. 112; Calder *v.* Chapman, 8 Pa. St. 522; Com. *v.* Alexander, 2 Chest. Co. Rep. 267.

Tennessee.— Blackmore *v.* Penn, 4 Sneed 447.

Virginia.— Bailey *v.* Com., 78 Va. 19.

Wisconsin.— Racine *v.* Chicago, etc., R. Co., 92 Wis. 118, 65 N. W. 857; State *v.* Paine Lumber Co., 84 Wis. 205, 54 N. W. 503.

See 25 Cent. Dig. tit. "Highways," § 438.

That the road was traveled for a greater width than laid out does not subject any person to a penalty for obstructing the extra width. Harding *v.* Hale, 61 Ill. 192.

89. Freshour *v.* Hihn, 99 Cal. 443, 34 Pac. 87; Parker *v.* People, 22 Mich. 93; Doughty *v.* Brill, 1 Abb. Dec. (N. Y.) 524, 3 Keyes 612, 3 Transcr. App. 326 [*affirming* 36 Barb. 488]; State *v.* Leaver, 62 Wis. 387, 22 N. W. 576; State *v.* Wertzel, 62 Wis. 184, 22 N. W. 150; State *v.* Babcock, 42 Wis. 138.

90. Scott *v.* New Boston, 26 Ill. App. 108; Littel *v.* Denn, 34 N. Y. 452; Devenpeck *v.* Lambert, 44 Barb. (N. Y.) 596; Fowler *v.* Mott, 19 Barb. (N. Y.) 204; Baylis *v.* Rooe, 1 Silv. Sup. (N. Y.) 356, 5 N. Y. Suppl. 279.

91. See the statutes of the several states. And see Brushy Mound *v.* McClintock, 146 Ill. 643, 35 N. E. 159; Tully *v.* Northfield, 6 Ill. App. 356; Parker *v.* Van Houten, 7 Wend. (N. Y.) 145; Woodward *v.* South Carolina, etc., R. Co., 47 S. C. 233, 25 S. E. 146; State *v.* Egerer, 55 Wis. 527, 13 N. W. 461.

92. *Illinois.*— Chatham *v.* Mason, 53 Ill. 411; Crosby *v.* Gipps, 19 Ill. 309 (for obstructing but not for continuing); Ferris *v.* Ward, 9 Ill. 499.

Indiana.— Aldrich *v.* Hawkins, 6 Blackf. 125.

Kentucky.— Cincinnati, etc., R. Co. *v.* Baughman, 116 Ky. 479, 76 S. W. 351, 25 Ky. L. Rep. 705.

Massachusetts.— Hall *v.* Kent, 11 Gray 467.

Mississippi.— Hairston *v.* Francher, 7 Sm. & M. 249, only after judgment of board of police.

New York.— Chapman *v.* Swan, 65 Barb. 210.

See 25 Cent. Dig. tit. "Highways," § 439.

If a question of title is raised the justice has no jurisdiction. State *v.* Huck, 29 Wis. 202; State *v.* Doane, 14 Wis. 483.

93. Fleet *v.* Youngs, 7 Wend. (N. Y.) 291; Justice *v.* Com., 2 Va. Cas. 171.

94. Samuell *v.* Sherman, 170 Ill. 265, 48 N. E. 576; Allen *v.* Hiles, 67 N. J. L. 135, 50 Atl. 440.

95. Sierra County *v.* Butler, 136 Cal. 547, 69 Pac. 418 (penalty not recovered in an action for an injunction); Lovington Tp. *v.* Adkins, 232 Ill. 510, 83 N. E. 1043 (place must be clearly stated); State *v.* Childs, 109 Wis. 233, 85 N. W. 374 (formal complaint unnecessary).

Variance see Hill *v.* Stonecreek Tp. Road Dist. No. 6, 10 Ohio St. 621, holding that an allegation of obstructing a road by erecting a fence across it is not proved by evidence of erecting a fence away from the road causing water to flow on it and obstruct it.

96. Evidence held admissible see Lovington Tp. *v.* Adkins, 232 Ill. 510, 83 N. E. 1043 (plat of surveyor); Bethel *v.* Pruett, 215 Ill. 162, 74 N. E. 111 (statements of road officers); Seidschlag *v.* Antioch, 207 Ill. 280, 69 N. E. 949 [*affirming* 109 Ill. App. 291]; Parkey *v.* Galloway, 147 Mich. 693, 111 N. W. 348; West Union *v.* Richey, 64 N. Y. App. Div. 156, 71 N. Y. Suppl. 871; Meeker *v.* Com., 42 Pa. St. 283.

Evidence held inadmissible see Lovington Tp. *v.* Adkins, 232 Ill. 510, 83 N. E. 1043 (order laying out road not of the statutory width); Kyle *v.* Logan, 87 Ill. 64 (survey made *post litem motam*); State *v.* Babcock, 42 Wis. 138.

Sufficiency of evidence.— Evidence held sufficient see Lowe *v.* Aroma, 21 Ill. App. 598; State *v.* Dehn, 126 Wis. 168, 105 N. W. 795. Evidence held insufficient see Dickerman *v.* Marion, 122 Ill. App. 154.

The burden of proof is upon plaintiff. Bethel *v.* Pruett, 215 Ill. 162, 74 N. E. 111; Kane *v.* Farrelly, 192 Ill. 521, 61 N. E. 648; Havana *v.* Biggs, 58 Ill. 483; Grube *v.* Nichols, 36 Ill. 92 (as to continuance of obstruction); Lewiston *v.* Proctor, 27 Ill. 414 (as to existence of road between points named); Chicago, etc., R. Co. *v.* People, 44 Ill. App. 632; Tully *v.* Northfield, 6 Ill. App. 356 (not only as to the placing of the obstruction but that it was on a public highway).

trial,[97] defenses,[98] and appeal.[99] The amount of the penalty is estimated in accordance with the statute,[1] and is sometimes required by the statute to be paid into the road fund.[2] Where the statutory penalty is for obstructing a road, treated as a continuing offense, limitations run only as to matters occurring before the statutory period.[3]

8. Criminal Prosecution[4] — a. In General. In most jurisdictions it is a criminal offense to obstruct a public highway,[5] and this is so both at common

A preponderance is sufficient; proof beyond a reasonable doubt is unnecessary. Lewiston *v.* Proctor, 27 Ill. 414.

97. Seidschlag *v.* Antioch, 207 Ill. 280, 69 N. E. 949, holding that it is a question for the jury whether the place was a highway.

Instructions: Correct see Bethel *v.* Pruett, 215 Ill. 162, 74 N. E. 111. Erroneous see Whitley Tp. *v.* Linville, 174 Ill. 579, 51 N. E. 832; Wheatfield *v.* Grundmann, 164 Ill. 250, 45 N. E. 164; Louisville, etc., R. Co. *v.* Whitley County Ct., 49 S. W. 332, 20 Ky. L. Rep. 1367, on hypothesis not supported by evidence.

98. Hines *v.* Darling, 99 Mich. 47, 57 N. W. 1081 (no defense that ditch obstructed was not properly laid); Little *v.* Denn, 34 How. Pr. (N. Y.) 68; Bisher *v.* Richards, 9 Ohio St. 495; Com. *v.* Lucas, 23 Pa. Co. Ct. 277.

99. *Illinois.*— Partridge *v.* Snyder, 78 Ill. 519.

Missouri.— Pearce *v.* Myers, 3 Mo. 31.

New York.— Cooper *v.* Bean, 5 Lans. 318.

Ohio.— Bittle *v.* Hay, 5 Ohio 269.

Pennsylvania.— Com. *v.* Keane, 21 Pa. Co. Ct. 327.

Wisconsin.— State *v.* Duff, 83 Wis. 291, 53 N. W. 446; State *v.* Hayden, 32 Wis. 663.

See 25 Cent. Dig. tit. "Highways," § 443.

1. See the statutes of the several states. And see the following cases:

Illinois.— Menard County Road Dist. No. 1 *v.* Beebe, 231 Ill. 147, 83 N. E. 131 [*affirming* 134 Ill. App. 583]; Ferris *v.* Ward, 9 Ill. 499. See also Meacham *v.* Lacey, 133 Ill. App. 208.

Indiana.— Martin *v.* Marks, 154 Ind. 549, 57 N. E. 249.

Kentucky.— Big Sandy R. Co. *v.* Floyd County, 125 Ky. 345, 101 S. W. 354, 31 Ky. L. Rep. 17.

Massachusetts.—Andover *v.* Sutton, 12 Metc. 182.

Michigan.—Shepard *v.* Gates, 50 Mich. 495, 15 N. W. 878, treble damages for wilful wrong.

New Hampshire.— Monroe *v.* Connecticut River Lumber Co., 68 N. H. 89, 39 Atl. 1019, additional expense of maintaining new road included.

New York.— Fleet *v.* Youngs, 7 Wend. 291.

Ohio.— Lawrence R. Co. *v.* Mahoning County, 35 Ohio St. 1, cost of removing obstructions.

Texas.— Fuller *v.* State, 41 Tex. 140, repeal by statute prescribing a different penalty.

See 25 Cent. Dig. tit. "Highways," § 442.

2. See Bailey *v.* Dale, 71 Cal. 34, 11 Pac. 804.

3. Bufford *v.* Hinson, 3 Head (Tenn.) 573; Londonderry *v.* Arnold, 30 Vt. 401. But see Wallingford *v.* Hall, 64 Conn. 426, 30 Atl. 47.

4. Criminal prosecution for obstructing city streets see Municipal Corporations, 28 Cyc. 906.

5. *Alabama.*— Georgia Cent. R. Co. *v.* State, 145 Ala. 99, 40 So. 991.

Connecticut.— State *v.* Gorham, 11 Conn. 233, stone wall.

Delaware.— State *v.* Southard, 6 Pennew. 247, 66 Atl. 372, fence.

Illinois.— Henline *v.* People, 81 Ill. 269 (new offense to replace gates removed by commissioners); Wiley *v.* Brimfield, 59 Ill. 306.

Maryland.— Schall *v.* Nusbaum, 56 Md. 512; State *v.* Price, 21 Md. 448.

Massachusetts.— Com. *v.* Wilkinson, 16 Pick. 175, 26 Am. Dec. 654; Com. *v.* Boston, etc., R. Corp., 12 Cush. (Mass.) 254.

Minnesota.— Hutchinson *v.* Filk, 44 Minn. 536, 47 N. W. 255.

Missouri.— State *v.* Campbell, 80 Mo. App. 110.

New Hampshire.— Bryant *v.* Tamworth, 68 N. H. 483, 39 Atl. 431.

New Jersey.— Raritan Tp. *v.* Port Reading R. Co., 49 N. J. Eq. 11, 23 Atl. 127; Atty.-Gen. *v.* Heishon, 18 N. J. Eq. 410.

New York.— Harrower *v.* Ritson, 37 Barb. 301. But see People *v.* Crounse, 51 Hun 489, 4 N. Y. Suppl. 266, 7 N. Y. Cr. 11.

North Carolina.— State *v.* Brown, 109 N. C. 802, 13 S. E. 940, 942; State *v.* Yarrell, 34 N. C. 130. But see State *v.* Pollock, 26 N. C. 303.

Pennsylvania.— Com. *v.* Croushore, 145 Pa. St. 157, 22 Atl. 807; Biddle *v.* Ash, 2 Ashm. 211; Barker *v.* Com., 19 Pa. St. 412 (collecting crowd); Com. *v.* Milliman, 13 Serg. & R. 403 (constables conducting sales); Com. *v.* Spratt, 14 Phila. 365

England.— Hind *v.* Evans, 70 J. P. 548, 4 Loc. Gov. 1152.

See 25 Cent. Dig. tit. "Highways," § 444 *et seq.*

But see Pettinger *v.* People, 20 Mich. 336.

That mandamus is a remedy for obstruction of a highway does not bar an indictment therefor. State *v.* Baltimore, etc., R. Co., 120 Ind. 298, 22 N. E. 307.

Offense held not to have been committed see People *v.* Young, 72 Ill. 411; Wiley *v.* Brimfield, 59 Ill. 306; People *v.* Jackson, 7 Mich. 432, 74 Am. Dec. 729, where obstruction does not affect rights of public but only of individuals.

A landlord is not criminally liable for the act of his tenant. Com. *v.* Switzer, 134 Pa. St. 383, 19 Atl. 681.

law [6] and by statute.[7] Thus indictment lies for obstructing any portion [8] of a public highway,[9] when and only when the road has been properly laid out,[10] or exists

Obstructing way and continuing obstruction are separate offenses. Burke *v.* People, 23 Ill. App. 36.

6. State *v.* Holman, 29 Ark. 58 (if a common nuisance); Com. *v.* Illinois Cent. R. Co., 104 Ky. 366, 47 S. W. 258, 20 Ky. L. Rep. 606 (not restoring bridge after repairs); Gregory *v.* Com., 2 Dana (Ky.) 417 (fence); Com. *v.* American Tel., etc., Co., 84 S. W. 519, 27 Ky. L. Rep. 29; Com. *v.* Enders, 8 Ky. L. Rep. 522; Com. *v.* Blaisdell, 107 Mass. 234 (placing or maintaining); State *v.* Turner, 21 Mo. App. 324.

7. See the statutes of the several states. And see the following cases:

Connecticut.— State *v.* Brown, 16 Conn. 54.

Illinois.— Sweeney *v.* People, 28 Ill. 208.

Indiana.— State *v.* Craig, 23 Ind. 185; State *v.* Miskimmons, 2 Ind. 440.

Iowa.— State *v.* Berry, 12 Iowa 58.

South Carolina.— State *v.* Wolfe, 61 S. C. 25, 39 S. E. 179, statute applying only to temporary obstructions.

Texas.— Rankin *v.* State, 25 Tex. App. 694, 8 S. W. 932.

See 25 Cent. Dig. tit. "Highways," § 444 *et seq.*

But see Eaton *v.* People, 30 Colo. 345, 70 Pac. 426.

These statutes give a cumulative remedy. St. Louis, etc. R. Co. *v.* State, 52 Ark. 51, 11 S. W. 1035; State *v.* Virt, 3 Ind. 447; Com. *v.* Illinois Cent. R. Co., 92 S. W. 944, 29 Ky. L. Rep. 102; Com. *v.* American Tel., etc., Co., 84 S. W. 519, 27 Ky. L. Rep. 29; State *v.* Turner, 21 Mo. App. 324; State *v.* Wilkinson, 2 Vt. 480, 21 Am. Dec. 560. But see Eaton *v.* People, 30 Colo. 345, 70 Pac. 426; State *v.* Smith, 54 Vt. 403, under statute for enforcement of penalty. A statutory civil remedy for obstructing a highway does not bar an indictment therefor (St. Louis, etc., R. Co. *v.* State, *supra*; State *v.* Virt, *supra*); neither does a statutory fine (State *v.* Wilkinson, *supra*).

8. Com. *v.* King, 13 Metc. (Mass.) 115 (although not on traveled part); Kelley *v.* State, 46 Tex. Cr. 23, 80 S. W. 382 (although enough open way left for travel).

9. *Indiana.*— Indianapolis *v.* Higgins, 141 Ind. 1, 40 N. E. 671, 673; Bybee *v.* State, 94 Ind. 443, 48 Am. Rep. 175.

Massachusetts.— Com. *v.* Gowen, 7 Mass. 378, town way.

Minnesota.— State *v.* Bradford, 78 Minn. 387, 81 N. W. 202, 47 L. R. A. 144; State *v.* Eisele, 37 Minn. 256, 33 N. W. 785.

North Carolina.— State *v.* Eastman, 109 N. C. 785, 13 S. E. 1019.

Pennsylvania.— Glenn *v.* Com., 8 Pa. Cas. 134, 6 Atl. 919.

South Carolina.— State *v.* Harden, 11 S. C. 360; State *v.* Duncan, 1 McCord 404, way leading from one highway to another.

Texas.— Kelley *v.* State, 46 Tex. Cr. 23, 80 S. W. 382.

Vermont.— State *v.* Atkinson, 24 Vt. 448.

West Virginia.— Wees *v.* Coal, etc., R. Co., 54 W. Va. 421, 46 S. E. 166; State *v.* Dry Fork R. Co., 50 W. Va. 235, 40 S. E. 447.

Canada.— Reg. *v.* Davis, 11 U. C. Q. B. 340.

See 25 Cent. Dig. tit. "Highways," § 445.

Public highway held not to exist see Bagley *v.* People, 43 Mich. 355, 5 N. W. 415, 38 Am. Rep. 192; State *v.* Lucas, 124 N. C. 804, 32 S. E. 553; State *v.* McDaniel, 53 N. C. 284, narrow road to a church.

10. *Alabama.*— Knuckols *v.* State, 136 Ala. 108, 34 So. 375.

Arkansas.— Howard *v.* State, 47 Ark. 431, 2 S. W. 331.

Georgia.— McGowan *v.* State, 124 Ga. 422, 52 S. E. 738.

Iowa.— State *v.* Shinkle, 40 Iowa 131.

Kentucky.— Gedge *v.* Com., 9 Bush 61.

Maine.— State *v.* Sturdivant, 18 Me. 66, in the statutory mode.

Maryland.— State *v.* Price, 21 Md. 448.

Massachusetts.— Com. *v.* Weiher, 3 Metc. 445, although below high-water mark.

Mississippi.— State *v.* Morgan, 79 Miss. 659, 31 So. 338.

Missouri.— State *v.* Gilbert, 73 Mo. 20; Golahar *v.* Gates, 20 Mo. 236; State *v.* Macy, 67 Mo. App. 326.

New Hampshire.— State *v.* Reed, 38 N. H. 59.

North Carolina.— State *v.* Smith, 100 N. C. 550, 6 S. E. 251; State *v.* Davis, 68 N. C. 297; State *v.* Spainhour, 19 N. C. 547.

Ohio.— State *v.* Carman, Tapp. 194.

Pennsylvania.— Com. *v.* Dicken, 145 Pa. St. 453, 22 Atl. 1043; Com. *v.* McNaugher, 131 Pa. St. 55, 18 Atl. 934; Com. *v.* Slagel, 33 Pa. Super. Ct. 514; Com. *v.* Llewellyn, 14 Pa. Super. Ct. 214.

South Carolina.— State *v.* Mobley, 1 McMull. 44.

Tennessee.—Ward *v.* State, 12 Lea 469.

Texas.— Green *v.* State, 49 Tex. Cr. 156, 90 S. W. 1098; Kelley *v.* State, 46 Tex. Cr. 23, 80 S. W. 382; Hatfield *v.* State, (Cr. App. 1902) 67 S. W. 110; Skinner *v.* State, (Cr. App. 1901) 65 S. W. 1073; Eweing *v.* State, (Cr. App. 1897) 38 S. W. 618; Meers *v.* State, (App. 1891) 16 S. W. 653; Owen *v.* State, 24 Tex. App. 201, 5 S. W. 830.

Virginia.— Bailey *v.* Com., 78 Va. 19.

United States.— U. S. *v.* Schwartz, 27 Fed. Cas. No. 16,237, 4 Cranch C. C. 160.

See 25 Cent. Dig. tit. "Highways," § 445.

A road on paper only and never actually opened is not one for the obstruction of which an indictment will lie. Willey *v.* People, 36 Ill. App. 609; Com. *v.* Jackson, 10 Pa. Super. Ct. 524; Georgetown Street Com'rs *v.* Taylor, 2 Bay (S. C.) 282, 1 Am. Dec. 647; Kennedy *v.* State, (Tex. Cr. App. 1897) 40 S. W. 590; Rankin *v.* State, 25 Tex. App. 694, 8 S. W. 932; Day *v.* State, 14 Tex. App. 26; Bailey *v.* Com., 78 Va. 19; Com. *v.* Beeson, 3 Leigh (Va.) 821. But see State *v.* Frazer, 28 Ind. 196; Harrow *v.* State, 1 Greene (Iowa) 439.

by user[11] or dedication,[12] but not where the road,[13] or the portion obstructed,[14] has been abandoned. The usual defenses may be made.[15]

b. Jurisdiction. The jurisdiction of the offense depends on local statute,[16] and is commonly given to justices of the peace.[17]

c. Indictment.[18] The indictment should charge all the elements of the crime,[19]

11. *Indiana.*— Hays *v.* State, 8 Ind. 425.
Missouri.— State *v.* Proctor, 90 Mo. 334, 2 S. W. 472; State *v.* Transue, 131 Mo. App. 323, 111 S. W. 523; State *v.* Baldridge, 53 Mo. App. 415; State *v.* Bradley, 31 Mo. App. 308.
Pennsylvania.— Com. *v.* Slagel, 33 Pa. Super. Ct. 514; Com. *v.* Christie, 13 Pa. Co. Ct. 149.
South Carolina.— State *v.* Washington, 80 S. C. 376, 61 S. E. 896; State *v.* Sartor, 2 Strobh. 60.
Texas.— Lensing *v.* State, (Cr. App. 1898) 45 S. W. 572.
Canada.— Reg. *v.* Buchanan, 5 N. Brunsw. 674.
See 25 Cent. Dig. tit. "Highways," § 445.
But see State *v.* Snyder, 25 Iowa 208 (holding that an indictment charging obstruction of a county road is not met by proof of a "highway" by use); Com. *v.* Low, 3 Pick. (Mass.) 408.
Statute not retrospective.—A statute providing that highways not laid out according to statute shall not be deemed highways is not retroactive as to a highway theretofore lawfully existing; hence prosecution on an indictment then pending as to a nuisance in such highway is not barred by such enactment. State *v.* Atherton, 16 N. H. 203.

12. *Illinois.*— Salter *v.* People, 92 Ill. App. 481.
Kentucky.— Evans *v.* Cook, 111 S. W. 326, 33 Ky. L. Rep. 788; Hughes *v.* Holbrook, 108 S. W. 225, 32 Ky. L. Rep. 1210.
Missouri.— State *v.* Transue, 131 Mo. App. 323, 111 S. W. 523; Power *v.* Dean, 112 Mo. App. 288, 86 S. W. 1100.
Vermont.— State *v.* Wilkinson, 2 Vt. 480, 21 Am. Dec. 560.
England.— Reg. *v.* Londonderry Justices, [1902] 2 Ir. 266.
See 25 Cent. Dig. tit. "Highways," § 445.

13. Com. *v.* Belding, 13 Metc. (Mass.) 10; Shelby *v.* State, 10 Humphr. (Tenn.) 165, nonuser for three years. But see State *v.* Shuford, 28 N. C. 162, holding that there is liability where discontinuance was void.

14. Hamilton *v.* State, 106 Ind. 361, 7 N. E. 9.

15. State *v.* Webb's River Imp. Co., 97 Me. 559, 55 Atl. 495; Com. *v.* Belding, 13 Metc. (Mass.) 10; *Ex p.* Morrison, 6 N. Brunsw. 203.

16. See the statutes of the several states. And see the following cases:
Connecticut.— State *v.* Hyde, 11 Conn. 541; State *v.* Knapp, 6 Conn. 415, 16 Am. Dec. 68.
Kentucky.— Com. *v.* Illinois Cent. R. Co., 104 Ky. 366, 47 S. W. 258, 20 Ky. L. Rep. 606 (circuit court); Evans *v.* Cook, 111 S. W. 326, 33 Ky. L. Rep. 788 (county judge).
Minnesota.— State *v.* Sweeney, 33 Minn. 23, 21 N. W. 847; State *v.* Cotton, 29 Minn. 187, 12 N. W. 529 (district court where title to real estate involved); State *v.* Galvin, 27 Minn. 16, 6 N. W. 380.
Missouri.— State *v.* Bradley, 31 Mo. App. 308.
New Hampshire.— State *v.* Lord, 16 N. H. 357.
South Carolina.— State *v.* Wolfe, 61 S. C. 25, 39 S. E. 179, court of session and magistrate court.
Virginia.— Justice *v.* Com., 2 Va. Cas. 171, superior court.
See 25 Cent. Dig. tit. "Highways," § 447.

17. *Illinois.*— Dolton *v.* Dolton, 201 Ill. 155, 66 N. E. 323, where determination of ownership was incidental only.
Indiana.— Miller *v.* State, 72 Ind. 421.
Louisiana.— West Baton Rouge *v.* Robertson, 8 La. Ann. 69.
Minnesota.— State *v.* Sweeney, 33 Minn. 23, 21 N. W. 847; State *v.* Cotton, 29 Minn. 187, 12 N. W. 529.
Canada.— Reg. *v.* Buchanan, 5 N. Brunsw. 674, although title to land comes in question.
See 25 Cent. Dig. tit. "Highways," § 447.

18. **Indictment against private corporation for obstructing a public highway** see CORPORATIONS, 10 Cyc. 1227.

19. Gregory *v.* Com., 2 Dana (Ky.) 417 (must aver that defendant was the owner); State *v.* Webb's River Imp. Co., 97 Me. 559, 55 Atl. 495; State *v.* Craig, 79 Mo. App. 412; State *v.* Dry Fork R. Co., 50 W. Va. 235, 40 S. E. 447.
Indictments held sufficient see Georgia Cent. R. Co. *v.* State, 145 Ala. 99, 40 So. 991 (although not alleging want of consent by commissioners); Alexander *v.* State, 117 Ala. 220, 23 So. 48; Palatka, etc., R. Co. *v.* State, 23 Fla. 546, 3 So. 158, 11 Am. St. Rep. 395; Com. *v.* American Tel., etc., Co., 84 S. W. 519, 27 Ky. L. Rep. 29; Com. *v.* King, 13 Metc. (Mass.) 115 (indictment good at common law, although statutory remedy provided in addition); State *v.* McCray, 74 Mo. 303; State *v.* Spurgeon, 102 Mo. App. 34, 74 S. W. 453; State *v.* Lucas, 124 N. C. 804, 32 S. E. 553; Richardson *v.* State, 46 Tex. Cr. 83, 79 S. W. 536.
Indictments held insufficient see Com. *v.* Walters, 6 Dana (Ky.) 290 (not alleging that defendant the owner of the land); Com. *v.* Collier, 75 S. W. 236, 25 Ky. L. Rep. 312 (not sufficiently alleging that defendant directed water causing obstruction); Gilbert *v.* State, 78 Nebr. 636, 111 N. W. 377, 78 Nebr. 637, 112 N. W. 293 (omitting allegation that road or track was in common use).
Matters of defense or mitigation need not be alleged. Thus an indictment for obstructing a public road need not allege the materiality of the obstruction, or that the road had been laid off by the proper authorities as a

specifying the obstruction complained of,[20] and identifying the highway obstructed[21] as a public highway.[22] The indictment should be confined to one crime,[23] and founded on proper affidavit.[24] In some states special defenses should be specially pleaded.[25]

d. Evidence — (i) *In General.* Applying the rule applicable in criminal cases generally, the burden of proving an obstruction of a highway rests on the prosecution,[26] which must prove the crime charged by competent evidence,[27]

public highway, or negative the right of defendant to place the obstructions in the road. State *v.* Collins, 38 Tex. 189.

20. Com. *v.* King, 13 Metc. (Mass.) 115.

Statements held sufficient see Thompson *v.* State, 20 Ala. 54 (quantity of logs); State *v.* Holman, 29 Ark. 58 (affecting entire community); Palatka, etc., R. Co. *v.* State, 23 Fla. 546, 3 So. 158, 11 Am. St. Rep. 395 (complete and absolute closing); State *v.* Day, 52 Ind. 483 (although failing to allege depth of ditch and height of embankment); Boyer *v.* State, 16 Ind. 451 (erecting and maintaining a fence and stable); Lydick *v.* State, 61 Nebr. 309, 85 N. W. 70 (leaving a large number of posts near the center of a public road); State *v.* Atherton, 16 N. H. 203; Respublica *v.* Arnold, 3 Yeates (Pa.) 417; State *v.* Collins, 38 Tex. 189 (holding that in an indictment for obstructing a public road, it is not necessary to allege the materiality of the obstruction, or to negative the idea that defendant was authorized to maintain the obstruction).

Indictments held insufficient see Malone *v.* State, 51 Ala. 55; Johnson *v.* State, 32 Ala. 583; State *v.* Baker, 58 Ind. 417; Com. *v.* Illinois Cent. R. Co., 104 Ky. 366, 47 S. W. 258, 20 Ky. L. Rep. 606; Com. *v.* Hall, 15 Mass. 240; Cornell *v.* State, 7 Baxt. (Tenn.) 520.

21. Thompson *v.* State, 20 Ala. 54; State *v.* Southern Indiana Gas Co., 169 Ind. 124, 81 N. E. 1149; Com. *v.* Dunivant, 3 Ky. L. Rep. 694; State *v.* Price, 21 Md. 448.

Identification held sufficient see Alexander *v.* State, 16 Ala. 661; Patton *v.* State, 50 Ark. 53, 6 S. W. 227; State *v.* Lemay, 13 Ark. 405; Palatka, etc., R. Co. *v.* State, 23 Fla. 546, 3 So. 158, 11 Am. St. Rep. 395; Martin *v.* People, 23 Ill. 395; Nichols *v.* State, 89 Ind. 298; State *v.* Buxton, 31 Ind. 67; Rosedale *v.* Ferguson, 3 Ind. App. 596, 30 N. E. 156; State *v.* Finney, 99 Iowa 43, 68 N. W. 568; Com. *v.* Hall, 15 Mass. 240; State *v.* Pullen, 43 Mo. App. 620; Territory *v.* Ashby, 2 Mont. 89; State *v.* Smith, 100 N. C. 550, 6 S. E. 251; State *v.* Long, 94 N. C. 896; Matthews *v.* State, 25 Ohio St. 536; State *v.* Hume, 12 Oreg. 133, 6 Pac. 427; Anderson *v.* State, 10 Humphr. (Tenn.) 119; Conner *v.* State, 21 Tex. App. 176, 17 S. W. 157; State *v.* Atkinson, 24 Vt. 448.

Identification held insufficient see State *v.* Withrow, 47 Ark. 551, 2 S. W. 184; State *v.* Lemay, 13 Ark. 405; State *v.* Southern Indiana Gas Co., 169 Ind. 124, 81 N. E. 1149; State *v.* Stewart, 66 Ind. 555 (giving only name of township, county, and state); Louisville, etc., R. Co. *v.* Com., 8 Ky. L. Rep. 521; State *v.* Crumpler, 88 N. C. 647; McClanahan *v.* State, 21 Tex. App. 429, 2 S. W. 813.

The charge of continuing the obstruction may be set out. State *v.* Lemay, 13 Ark. 405 (holding that for daily penalty *continuando* should be used); Wroe *v.* State, 8 Md. 416. But see State *v.* Bradley, 31 Mo. App. 308.

22. State *v.* Price, 21 Md. 448; State *v.* Bradford, 78 Minn. 387, 81 N. W. 202, 47 L. R. A. 144; State *v.* Collins, 38 Tex. 189; Reg. *v.* Brittain, 4 N. Brunsw. 614.

How ancient highway came into existence need not be alleged. Cincinnati, etc., R. Co. *v.* Miller, 36 Ind. App. 26, 72 N. E. 827, 73 N. E. 1001.

23. Georgia Cent. R. Co. *v.* State, 145 Ala. 99, 40 So. 991.

Indictments held not duplicitous see Clift *v.* State, 6 Ind. App. 199, 33 N. E. 211; State *v.* Finney, 99 Iowa 43, 68 N. W. 568; State *v.* Middlesex, etc., Traction Co., 67 N. J. L. 14, 50 Atl. 354; State *v.* Eastman, 109 N. C. 785, 13 S. E. 1019; Laroe *v.* State, 30 Tex. App. 374, 17 S. W. 934; Smith *v.* Perry, [1906] 1 K. B. 262, 21 Cox C. C. 98, 70 J. P. 93, 75 L. J. K. B. 124, 4 Loc. Gov. 224, 94 L. T. Rep. N. S. 140, 22 T. L. R. 158.

24. Jeffries *v.* McNamara, 49 Ind. 142; State *v.* Buxton, 31 Ind. 67.

25. Com. *v.* American Tel., etc., Co., 84 S. W. 519, 27 Ky. L. Rep. 29.

26. Sullivan *v.* State, 52 Ind. 309; State *v.* Cipra, 71 Kan. 714, 81 Pac. 488.

As to defenses the burden is on defendant. Com. *v.* Cornell, 2 Dana (Ky.) 136, holding that one justifying under an order of the county court must show that he conformed to it.

27. See cases cited *infra*, this note.

Evidence held admissible see Martin *v.* People, 23 Ill. 395; State *v.* Vale Mills, 63 N. H. 4; Hatfield *v.* State, (Tex. Cr. App. 1902) 67 S. W. 110 (county court records as to road); Dodson *v.* State, (Tex. Cr. App. 1899) 49 S. W. 78 (prior conviction); Laroe *v.* State, 30 Tex. App. 374, 17 S. W. 934; Sneed *v.* State, 28 Tex. App. 56, 11 S. W. 834 (*res gestæ*).

Evidence held inadmissible see Knuckols *v.* State, 136 Ala. 108, 34 So. 375; Thompson *v.* State, 20 Ala. 54 (record of lower court since quashed); State *v.* Hunter, 68 Iowa 447, 27 N. W. 375 (that defendant's acts benefited highway); Harrow *v.* State, 1 Greene (Iowa) 439; Clark *v.* Com., 14 Bush (Ky.) 166; Lydick *v.* State, 61 Nebr. 309, 85 N. W. 70; Com. *v.* Northern Cent. R. Co., 7 Pa. Super. Ct. 234; State *v.* Toale, 74

and beyond a reasonable doubt,[28] showing the existence of a highway by legal lay-out,[29] dedication,[30] or user.[31] The usual rule against variance applies.[32]

(II) *Intent; Wilfulness.* The general rule of criminal law that a criminal intent is a necessary element has been held to apply to the crime of obstructing a highway,[33] although a majority of cases hold the intent of the obstructer immaterial.[34] But in some states the statutes specifically require that wilfulness be proved,[35] and under such a statute there can be no legal conviction where

S. C. 425, 54 S. E. 608; Isham *v.* State, 49 Tex. Cr. 324, 92 S. W. 808; Richardson *v.* State, 47 Tex. Cr. 592, 85 S. W. 282; Torno *v.* State, (Tex. Cr. App. 1903) 75 S. W. 500; Hatfield *v.* State, (Tex. Cr. App. 1902) 67 S. W. 110; Dodson *v.* State, (Tex. Cr. App. 1899) 49 S. W. 78; State *v.* Horlacher, 16 Wash. 325, 47 Pac. 748.

28. See cases cited *infra*, this note.

Evidence held sufficient see Brumley *v.* State, 83 Ark. 236, 103 S. W. 615; Johns *v.* State, 104 Ind. 557, 4 N. E. 153; Hays *v.* State, 8 Ind. 425; Clift *v.* State, 6 Ind. App. 199, 33 N. E. 211; Zimmerman *v.* State, 4 Ind. App. 583, 31 N. E. 550; Com. *v.* Carr, 143 Mass. 84, 9 N. E. 28; State *v.* Lord, 16 N. H. 357; Com. *v.* New Bethlehem Borough, 15 Pa. Super. Ct. 158; State *v.* Kendall, 54 S. C. 192, 32 S. E. 300; State *v.* Sartor, 2 Strobh. (S. C.) 60.

Evidence held insufficient see People *v.* Young, 72 Ill. 411; Houston *v.* People, 63 Ill. 185; State *v.* Weimer, 64 Iowa 243, 20 N. W. 171; State *v.* Campbell, 80 Mo. App. 110; People *v.* Livingston, 27 Hun (N. Y.) 105, 63 How. Pr. 242; Farrier *v.* State, 54 Tex. Cr. 536, 113 S. W. 763; Isham *v.* State, 49 Tex. Cr. 324, 92 S. W. 808; McMillan *v.* State, (Tex. Cr. App. 1903) 77 S. W. 790; Hatfield *v.* State, (Tex. Cr. App. 1902) 67 S. W. 110; Watson *v.* State, 25 Tex. App. 651, 8 S. W. 817; Baker *v.* State, 21 Tex. App. 264, 17 S. W. 144; State *v.* Horlacher, 16 Wash. 325, 47 Pac. 748; U. S. *v.* Tucker, 28 Fed. Cas. No. 16,543*a*, Hayw. & H. 269.

Words alone are not an obstruction. Chaffin *v.* State, (Tex. Cr. App. 1893) 24 S. W. 411, threatening language used to road overseer causing him to desist removing fence.

29. *Iowa.*— State *v.* Glass, 42 Iowa 56, holding that where establishment was on condition it must appear that the condition was performed.

Michigan.— Moore *v.* People, 2 Dougl. 420.

Missouri.— State *v.* Ramsey, 76 Mo. 398; State *v.* Cunningham, 61 Mo. App. 188; State *v.* Parsons, 53 Mo. App. 135; State *v.* Scott, 27 Mo. App. 541.

North Carolina.— State *v.* Stewart, 91 N. C. 566.

Pennsylvania.— Com. *v.* Oliphant, Add. 345.

Virginia.— Bailey *v.* Com., 78 Va. 19.

See 25 Cent. Dig. tit. "Highways," § 451.

30. State *v.* Eisele, 37 Minn. 256, 33 N. W. 785. See also State *v.* Dubuque, etc., R. Co., 88 Iowa 508, 55 N. W. 727.

31. *Arkansas.*— Howard **v. State, 47 Ark.** 431, 2 S. W. 331.

Kentucky.— Com. **v. Abney, 4 T. B. Mon.** 477.

Massachusetts.—Com. *v.* Coupe, 128 Mass. 63.

Missouri.— State *v.* Ramsey, 76 Mo. 398; State *v.* Davis, 27 Mo. App. 624; State *v.* Bishop, 22 Mo. App. 435.

New Jersey.— State *v.* New Jersey Cent. R. Co., 32 N. J. L. 220.

Texas.— McWhorter *v.* State, 43 Tex. 666; Hall *v.* State, 13 Tex. App. 269; Michel *v.* State, 12 Tex. App. 108. But see Meuly *v.* State, 3 Tex. App. 382.

See 25 Cent. Dig. tit. "Highways," § 451 *et seq.*

32. *Illinois.*— Lowe *v.* People, 28 Ill. 518; Martin *v.* People, 23 Ill. 395.

Kentucky.— Illinois Cent. R. Co. *v.* Com., 104 Ky. 362, 47 S. W. 255, 20 Ky. L. Rep. 748, 990, near a town and within the town.

North Carolina.—State *v.* Purify, 86 N. C. 681, "public highway and private cartway."

Ohio.— State *v.* Carman, Tapp. 162.

South Carolina.—State *v.* Graham, 15 Rich. 310.

Texas.— Woody *v.* State, (Cr. App. 1902) 69 S. W. 155.

See 25 Cent. Dig. tit. "Highways," § 452.

Variance held not to exist see Palatka, etc., R. Co. *v.* State, 23 Fla. 546, 3 So. 158, 11 Am. St. Rep. 395; State *v.* Teeters, 97 Iowa 458, 66 N. W. 754 (under indictment averring obstruction of highway, conviction for obstruction of highway by dedication or prescription); State *v.* Beeman, 35 Me. 242; State *v.* Transue, 131 Mo. App. 323, 111 S. W. 523.

Immaterial variance see State *v.* Southard, 6 Pennew. (Del.) 247, 66 Atl. 372; State *v.* Weese, 67 Mo. App. 466; State *v.* Pullen, 43 Mo. App. 620; State *v.* Rhodes, 35 Mo. App. 360; Skinner *v.* State, (Tex. Cr. App. 1901) 65 S. W. 1073.

33. Freeman *v.* State, 6 Port. (Ala.) 372; Lensing *v.* State, (Tex. Cr. App. 1898) 45 S. W. 572.

34. *Arkansas.*— McKibbin *v.* State, 40 Ark. 480.

Indiana.— State *v.* Baltimore, etc., R. Co., 120 Ind. 298, 22 N. E. 307; Nichols *v.* State, 89 Ind. 298; State *v.* Phipps, 4 Ind. 515.

Iowa.— State *v.* Gould, 40 Iowa 372.

Pennsylvania.— Com. *v.* Dicken, 145 Pa. St. 453, 22 Atl. 1043.

West Virginia.—State *v.* Chesapeake, etc., R. Co., 24 W. Va. 809.

Wisconsin.— State *v.* Dehn, 126 Wis. 168, 105 N. W. 795.

See 25 Cent. Dig. tit. "Highways," § 446.

35. See the statutes of the several states. And see the following cases:

Alabama.— Prim *v.* State, 36 Ala. 244.

Florida.— Savannah, etc., R. Co. *v.* State, 23 Fla. 579, 3 So. 204.

the circumstances negative the existence of a wilful intent.[36] A highway is "wilfully" and "knowingly" obstructed if the accused did the act intentionally, and knew that it would obstruct or lessen the facilities for travel, although he did not know that the road was a legal highway;[37] and an obstruction maintained in direct disobedience to orders of the road officers is wilful within the meaning of the statutes;[38] nor is ignorance or mistake of law a defense.[39]

e. Trial; Appeal. The general rules of criminal practice as they exist in the several states govern the conduct of trial,[40] the issues,[41] the verdict,[42] questions for the court and for the jury,[43] and instructions to the jury.[44] In some jurisdictions

Iowa.— State *v.* Teeters, 97 Iowa 458, 66 N. W. 754.

Kansas.—State *v.* Raypholtz, 32 Kan. 450, 4 Pac. 851.

Michigan.— Tittabawassee Tp. Highway Com'r *v.* Sperling, 120 Mich. 493, 79 N. W. 693.

New York.— People *v.* Fowler, 17 N. Y. Suppl. 744; People *v.* Gillies, 57 Misc. 568, 109 N. Y. Suppl. 945, 21 N. Y. Cr. 412.

South Carolina.— State *v.* Harden, 11 S. C. 360.

Texas.— Richardson *v.* State, 47 Tex. Cr. 592, 85 S. W. 282; Kelley *v.* State, 46 Tex. Cr. 23, 80 S. W. 382; Woody *v.* State, (Cr. App. 1902) 69 S. W. 155; Skinner *v.* State, (Cr. App. 1901) 65 S. W. 1073; Dyrley *v.* State, (Cr. App. 1901) 63 S. W. 631; Karney *v.* State, (Cr. App. 1901) 62 S. W. 754; Ward *v.* State, 42 Tex. Cr. 435, 60 S. W. 757; Cornelison *v.* State, 40 Tex. Cr. 159, 49 S. W. 384; Dodson *v.* State, (Cr. App. 1899) 49 S. W. 78; Murphy *v.* State, 23 Tex. App. 333, 4 S. W. 906; Baker *v.* State, 21 Tex. App. 264, 17 S. W. 144; Trice *v.* State, 17 Tex. App. 43; Shubert *v.* State, 16 Tex. App. 645; Brinkoeter *v.* State, 14 Tex. App. 67.

Virginia.— Bailey *v.* Com., 78 Va. 19.

See 25 Cent. Dig. tit. "Highways," § 446.

36. People *v.* Goodin, 136 Cal. 455, 69 Pac. 85 (where defendant believed the old road was altered); State *v.* Cummerford, 16 Kan. 507 (where community never believed road to have existence); State *v.* White, 96 Mo. App. 34, 69 S. W. 684 (president of corporation taking no personal share in the matter); People *v.* Crounse, 51 Hun (N. Y.) 489, 4 N. Y. Suppl. 266, 7 N. Y. Cr. 11 (acted under direction of highway commissioner); Dyerle *v.* State, (Tex. Cr. App. 1902) 68 S. W. 174 (defendant had reasonable ground to believe act to be lawful); Hatfield *v.* State, (Tex. Cr. App. 1902) 67 S. W. 110 (where defendant applied to the county commissioners for permission to "gate" the road); Meyer *v.* State, 37 Tex. Cr. 460, 36 S. W. 255; Meers *v.* State, (Tex. App. 1891) 16 S. W. 653 (where defendant acted in honest belief that he was entitled to compensation); Johnson *v.* State, (Tex. App. 1890) 14 S. W. 396 (acting under advice of expert surveyor); Parsons *v.* State, 26 Tex. App. 192, 9 S. W. 490 (where defendant honestly believed road to be on his own land); Sanborn *v.* State, 21 Tex. App. 155, 17 S. W. 475 (acting under mistake of fact). But see Cornelison *v.* State, 40 Tex. Cr. 159, 49 S. W. 384.

See 25 Cent. Dig. tit. "Highways," § 446.

37. State *v.* Bradley, 31 Mo. App. 308.

38. State *v.* Raypholtz, 32 Kan. 450, 4 Pac. 851. See also State *v.* Castle, 44 Wis. 670.

39. Nichols *v.* State, 89 Ind. 298 (where town trustee told defendant he had a right to fence up road); State *v.* Wells, 70 Mo. 635; Crouch *v.* State, 39 Tex. Cr. 145, 45 S. W. 578 (advice of attorneys that order was void). But see Meers *v.* State, (Tex. App. 1891) 16 S. W. 652.

40. Rather *v.* State, 1 Port. (Ala.) 132, holding continuance proper.

It is not error to refuse to compel the state to elect whether it will rely on prescription, user, dedication, or legal establishment to show the existence of the highway. State *v.* Horlacher, 16 Wash. 325, 47 Pac. 748.

41 Com. *v.* Northern Cent. R. Co., 7 Pa. Super. Ct. 234, question whether bridge was an unreasonable obstruction.

42. Bolo Tp. *v.* Liszewski, 116 Ill. App. 135 (held verdict conclusive); Com. *v.* Milliman, 13 Serg. & R. (Pa.) 403; Justice *v.* Com., 2 Va. Cas. 171.

Adverse user.— On trial of an indictment for obstructing a road not established pursuant to statute or by dedication a special verdict which does not affirm that the user of the road by the public was adverse and of right is defective. State *v.* Stewart, 91 N. C. 566.

43. Zimmerman *v.* State, 4 Ind. App. 583, 31 N. E. 550, holding that on a prosecution for obstructing a public highway, it is for the court to tell the jury what facts are necessary to establish the existence of a highway, and for the jury to determine the existence of those facts.

Questions of fact are for the jury. Com. *v.* Franklin, 133 Mass. 569 (whether sidewalk an obstruction); Pittsburgh, etc., Bridge Co. *v.* Com., 4 Pa. Cas. 153, 8 Atl. 217; Com. *v.* Jackson, 10 Pa. Super. Ct. 524.

44. *Illinois.*— Martin *v.* People, 13 Ill. 341.

Indiana.— Sullivan *v.* State, 52 Ind. 309; State *v.* Trove, 1 Ind. App. 553, 27 N. E. 878.

Iowa.— State *v.* Minneapolis R. Co., 88 Iowa 689, 56 N. W. 400.

Missouri.— State *v.* Craig, 79 Mo. App. 412.

South Carolina.— State *v.* Tyler, 54 S. C. 294, 32 S. E. 422; State *v.* Kendall, 54 S. C. 192, 32 S. E. 300; State *v.* Floyd, 39 S. C. 23, 17 S. E. 505.

Texas.—Kelley *v.* State, 46 Tex. Cr. 23, 80

appeals are allowed in this class of prosecutions, the practice therein being governed by the local law.[45]

f. Punishment. The punishment for obstructing a highway is prescribed by local law.[46]

VII. USE OF HIGHWAY, AND LAW OF THE ROAD.[47]

A. Right and Mode of Use — 1. In General. A public highway is open for use by the entire public,[48] or any part thereof,[49] simply for passage,[50] in any

S. W. 382; Skinner *v.* State, (Cr. App. 1901) 65 S. W. 1073.

England.— Rex *v.* North-Eastern R. Co., 19 Cox C. C. 682, 70 L. J. K. B. 548, 84 L. T. Rep. N. S. 502, 49 Wkly. Rep. 524.

See 25 Cent. Dig. tit. "Highways," § 453.

Instructions held improper see State *v.* Gould, 40 Iowa 372; State *v.* Craig, 79 Mo. App. 412 ("practically" maintained fence at given point misleading); State *v.* Cardwell, 44 N. C. 245; Isham *v.* State, 49 Tex. Cr. 324, 92 S. W. 808; Torno *v.* State, (Tex. Cr. App. 1903) 75 S. W. 500; Pierce *v.* State, (Tex. Cr. App. 1893) 22 S. W. 587.

The court should define "wilful," when requested. Lensing *v.* State, (Tex. Cr. App. 1898) 45 S. W. 572; Sneed *v.* State, 28 Tex. App. 56, 11 S. W. 834.

Instructions must be considered as a whole to determine their correctness and sufficiency. State *v.* Craig, 79 Mo. App. 412; State *v.* Tyler, 54 S. C. 294, 32 S. E. 422.

45. Sanders *v.* State, 18 Ark. 198; Com. *v.* Feriel, 75 S. W. 231, 25 Ky. L. Rep. 314 (only where fine is more than fifty dollars); Conner *v.* State, 21 Tex. App. 176, 17 S. W. 157 (where the record does not show that defendant disobeyed the order).

Appeal refused see Chapin *v.* State, 24 Conn. 236 (although title to land in question); Gregory *v.* Com., 2 Dana (Ky.) 417.

46. *Connecticut.*— State *v.* Smith, 7 Conn. 428.

Illinois.— See Gilbert *v.* People, 121 Ill. App. 423.

Indiana.— State *v.* Southern Indiana Gas Co., 169 Ind. 124, 81 N. E. 1149; Hoch *v.* State, 20 Ind. App. 64, 50 N. E. 93, twenty-five dollars held not excessive.

Kentucky.— Com. *v.* Enders, 8 Ky. L. Rep. 522, fine and imprisonment.

New York.— Syracuse, etc., Plank Road Co. *v.* People, 66 Barb. 25, common-law punishment.

Pennsylvania.— Taggart *v.* Com., 21 Pa. St. 527, fine and abatement of nuisance.

South Carolina.— State *v.* Floyd, 39 S. C. 23, 17 S. E. 505.

See 25 Cent. Dig. tit. "Highways," § 454. And see *supra*, V, I, 2.

47. Use of city street generally see MUNICIPAL CORPORATIONS, 28 Cyc. 907 *et seq.*

Use of city street by municipality for purpose other than highway see MUNICIPAL CORPORATIONS, 28 Cyc. 853.

Grants of right to use city streets see MUNICIPAL CORPORATIONS, 28 Cyc. 866.

Temporary use of city streets by abutters see MUNICIPAL CORPORATIONS, 28 Cyc. 864.

48. *Connecticut.*— Goodwin *v.* Avery, 26 Conn. 585, 68 Am. Dec. 410, right of hackman assigned to place in funeral procession.

Louisiana.— Barbin *v.* Police Jury, 15 La. Ann. 544, even strangers and foreigners.

Maine.— See Wight *v.* Phillips, 36 Me. 551, invitee before road opened.

Mississippi.— Covington County *v.* Collins, 92 Miss. 330, 45 So. 854, 131 Am. St. Rep. 527, 14 L. R. A. 1087.

New York.— Galen *v.* Clyde Plank Road Co., 27 Barb. 543. See People *v.* Moore, 50 Hun 356, 3 N. Y. Suppl. 159, holding that one who builds a village upon his land, reserving the title to the thoroughfares, over which the public officers exercise no authority, cannot prevent tradesmen from entering it for the purpose of delivering their wares, in order to compel the inhabitants to deal with those nominated by him.

Ohio.— Ferris *v.* Bramble, 5 Ohio St. 109.

See 25 Cent. Dig. tit. "Highways," § 456 *et seq.*

Contest for position.— Where two parties, each without any better right than the other, strive to occupy the same place in the public highway, he is in the wrong who first uses force. Goodwin *v.* Avery, 26 Conn. 585, 68 Am. Dec. 410. Thus where plaintiff's cab occupied a position in the line at a cab stand which defendant was entitled to, defendant had no right to take forcible possession of the position by backing his cab against plaintiff's horse, to its injury. Curley *v.* Electric Vehicle Co., 68 N. Y. App. Div. 18, 74 N. Y. Suppl. 35. But see Bundy *v.* Carter, 21 Nova Scotia 296.

49. Dunham *v.* Rackliff, 71 Me. 345; Foster *v.* Goddard, 40 Me. 64; Palmer *v.* Barker, 11 Me. 338; Brooks *v.* Hart, 14 N. H. 307; Reg. *v.* Pratt, L. R. 3 Q. B. 64, 37 L. J. M. C. 23, 16 Wkly. Rep. 146, riding on foot-paths beside roads. But see Compton *v.* Revere, 179 Mass. 413, 60 N. E. 931, holding that the fact that some wagons passed over the highway was insufficient to show that it was open for public travel.

Use of sidewalk by bicyclists and others on city streets see MUNICIPAL CORPORATIONS, 28 Cyc. 911.

50. Gurnsey *v.* Northern California Power Co., 7 Cal. App. 534, 94 Pac. 858 (holding that a county board can only control road to facilitate travel); Smith *v.* Leavenworth, 15 Kan. 81; State *v.* Buckner, 61 N. C. 558, 98 Am. Dec. 83.

In Louisiana the right of passage over a highway is, under Civ. Code, art. 727, a discontinuous servitude, which, under article 766, can be established only by title, immemorial

reasonable manner,[51] as to drive cattle,[52] or for haulage,[53] but not for sports or diversions.[54] But even one using the highway unlawfully has rights against the negligence of others.[55]

2. By Vehicles [56] — a. Automobiles. Automobiles are a reasonable means of using the public highways.[57] Their owners are, however, subject to reasonable and

possession itself not being sufficient. Lawson *v.* Shreveport Waterworks Co., 111 La. 73, 35 So. 390.

51. *Indiana.*— Ft. Wayne Cooperage Co. *v.* Page, (App. 1907) 82 N. E. 83.

Michigan.— Macomber *v.* Nichols, 34 Mich. 212, 22 Am. Rep. 522.

Mississippi.— Covington County *v.* Collins, 92 Miss. 330, 45 So. 854, 131 Am. St. Rep. 527, 14 L. R. A. 1087.

New Hampshire.— Graves *v.* Shattuck, 35 N. H. 257, 69 Am. Dec. 536.

New York.— Burley *v.* New York, etc., Brewing Co., 13 N. Y. App. Div. 167, 43 N. Y. Suppl. 259.

North Carolina.— State *v.* Holloman, 139 N. C. 642, 52 S. E. 408.

Ohio.— Hamilton, etc., Electric Transit Co. *v.* Hamilton, 4 Ohio S. & C. Pl. Dec. 10, 1 Ohio N. P. 366.

England.— See Alliance Consumers Gas Co. *v.* Dublin County, [1901] 1 Ir. 492, gas company protected against use of steam rollers breaking its pipes.

See 25 Cent. Dig. tit. "Highways," § 456 *et seq.*

An unreasonable use is a trespass. Hickman *v.* Maisey, [1900] 1 Q. B. 752, 69 L. J. Q. B. 511, 82 L. T. Rep. N. S. 321, 16 T. L. R. 274, 48 Wkly. Rep. 385.

52. Smith *v.* Matteson, 41 Hun (N. Y.) 216. See also Heist *v.* Jacoby, 71 Nebr. 395, 98 N. W. 1058.

There is no right to have cattle drink out of a ditch in a highway. Van Roy *v.* Watermolen, 125 Wis. 333, 104 N. W. 97.

Regulation.— The driving of cattle may be limited to certain hours. Cooper *v.* Schultz, 32 How. Pr. (N. Y.) 107. Persons driving animals over highways may be made liable for special damages caused. Brimm *v.* Jones, 11 Utah 200, 39 Pac. 825, 29 L. R. A. 97.

Rights of abutting owner.— As from the nature of cattle it is impossible even with care to keep them upon the highways, unless the adjoining land is properly fenced, it has been settled that the owner of unfenced lands upon such ways cannot seize as *damage feasant,* or sustain an action for the injury caused by cattle that wander thereupon, if reasonable care has been used in driving them along the highway, or if they have so escaped, having been properly managed, if reasonable effort has been made to remove them. Hartford *v.* Brady, 114 Mass. 466, 19 Am. Rep. 377 [*citing* Lord *v.* Wormwood, 29 Me. 282, 50 Am. Dec. 586]; Mills *v.* Stark, 4 N. H. 512, 17 Am. Dec. 444; Avery *v.* Maxwell, 4 N. H. 36; Goodwyn *v.* Cheveley, 4 H. & N. 631, 28 L. J. Exch. 298, 7 Wkly. Rep. 631. And see Animals, 2 Cyc. 443.

Animals on city streets see Animals, 2 Cyc. 374.

53. Kennamer *v.* State, 150 Ala. 74, 43 So. 482; Com. *v.* Conly, 10 Ky. L. Rep. 875. See also Bueck *v.* Lindsay, 65 Mich. 105, 31 N. W. 768, chain dragging.

The highway may be used to move a house. Graves *v.* Shattuck, 35 N. H. 257, 69 Am. Dec. 536; Rice *v.* Buffalo Steel House Co., 17 N. Y. App. Div. 462, 45 N. Y. Suppl. 277; Telegraph Co. *v.* Wilt, 1 Phila. (Pa.) 270. *Contra,* Dickson *v.* Kewanee Electric Light, etc., Co., 53 Ill. App. 379.

Moving buildings on city streets see Municipal Corporations, 28 Cyc. 909.

54. Vosburgh *v.* Moak, 1 Cush. (Mass.) 453, 48 Am. Dec. 613; Haden *v.* Clarke, 10 N. Y. Suppl. 291 (toboggan slide); Ricketts *v.* Markdale, 31 Ont. 180. But see Lydston *v.* Rockingham County Light, etc., Co., 75 N. H. 23, 70 Atl. 385, holding that as to incidental diversions of travelers of mature years, the rule is that the point at which such diversions pass the bounds of legitimate recreation as a proper use of a highway is to be found by solving the question of reasonable use as a question of fact.

55. Bigelow *v.* Reed, 51 Me. 325; Kidder *v.* Dunstable, 11 Gray (Mass.) 342, driving sleigh without bells. See also Belleveau *v.* S. C. Lowe Supply Co., 200 Mass. 237, 86 N. E. 301 (holding that violation of law as to numbers on automobile lights is immaterial unless it contributed to the accident); Schaffer *v.* Baker Transfer Co., 29 N. Y. App. Div. 459, 51 N. Y. Suppl. 1092.

A child playing in a street is not a trespasser, so far as concerns his right not to be run over by a traveler, so as to make the traveler liable only for wilful injury; but he is bound to use due care. O'Brien *v.* Hudner, 182 Mass. 381, 65 N. E. 788.

Although a display of fireworks on a highway be unauthorized, a voluntary spectator present thereat cannot recover for injuries from the fireworks not caused by negligence. Scanlon *v.* Wedger, 156 Mass. 462, 31 N. E. 642, 16 L. R. A. 395.

Effect of violation by defendant of ordinance as to city streets see Municipal Corporations, 28 Cyc. 914, 915.

56. Vehicles on city streets see Municipal Corporations, 28 Cyc. 910.

Matters relating to motor vehicles generally see Motor Vehicles, 28 Cyc. 21.

57. *Indiana.*— McIntyre *v.* Orner, 166 Ind. 57, 76 N. E. 750, 117 Am. St. Rep. 359, 4 L. R. A. N. S. 1130; Indiana Springs Co. *v.* Brown, 165 Ind. 465, 74 N. E. 615, 1 L. R. A. N. S. 238.

Iowa.— House *v.* Cramer, 134 Iowa 374, 112 N. W. 3, 10 L. R. A. N. S. 655, by statute.

Maine.— Towle *v.* Morse, 103 Me. 250, 68 Atl. 1044.

Maryland.— Fletcher *v.* Dixon, 107 Md. 420, 68 Atl. 875.

proper regulations[58] concerning registration and license;[59] and travelers by automobile have equal rights and liabilities with other forms of travel.[60]

b. Traction Engines and Other Heavy Equipment.[61] Traction engines or other heavy vehicles may be used on highways under proper regulations,[62] such as a requirement that the engine be accompanied by a flagman to warn travel.[63] The use must be reasonable,[64] and not to the inconvenience of other means of travel or to the damage of the road.[65]

c. Bicycles.[66] A bicycle is a vehicle which has a right to use the highway

Michigan.—Wright *v.* Crane, 142 Mich. 508, 106 N. W. 71.

New York.— Nason *v.* West, 31 Misc. 583, 65 N. Y. Suppl. 651.

But not automobile races. Atty.-Gen. *v.* Blackpool, 71 J. P. 478.

58. *California.*— *In re* Berry, 147 Cal. 523, 82 Pac. 44, 109 Am. St. Rep. 160, prohibiting use on country roads at night.

Missouri.— State *v.* Swagerty, 203 Mo. 517, 102 S. W. 483, 10 L. R. A. N. S. 601; Hall *v.* Compton, 130 Mo. App. 675, 108 S. W. 1122.

New Jersey.— State *v.* Unwin, 75 N. J. L. 500, 68 Atl. 110 [*affirming* 73 N. J. L. 529, 64 Atl. 163].

Pennsylvania.— Radnor Tp. *v.* Bell, 27 Pa. Super. Ct. 1.

England.— Musgrave *v.* Kennison, 20 Cox C. C. 874, 69 J. P. 341, 3 Loc. Gov. 932, 92 L. T. Rep. N. S. 865, 21 T. L. R. 600; Troughton *v.* Manning, 20 Cox C. C. 861, 69 J. P. 207, 3 Loc. Gov. 548, 92 L. T. Rep. N. S. 855, 21 T. L. R. 408, 53 Wkly. Rep. 493, prohibition against reckless driving in statute held to mean reckless as to public and not as to passengers.

See 25 Cent. Dig. tit. "Highways," § 457 *et seq.*

59. State *v.* Unwin, 75 N. J. L. 500, 68 Atl. 110 [*affirming* 73 N. J. L. 529, 64 Atl. 163].

60. *Delaware.*— Simeone *v.* Lindsay, 6 Pennew. 224, 65 Atl. 778.

Indiana.— Indiana Springs Co. *v.* Brown, 165 Ind. 465, 74 N. E. 615, 1 L. R. A. N. S. 238.

Iowa.— House *v.* Cramer, 134 Iowa 374, 112 N. W. 3, 10 L. R. A. N. S. 655, by statute.

Kentucky.— Shinkle *v.* McCullough, 116 Ky. 960, 77 S. W. 196, 25 Ky. L. Rep. 1143, 105 Am. St. Rep. 249.

Maine.— Towle *v.* Morse, 103 Me. 250, 68 Atl. 1044.

Massachusetts.— Hennessey *v.* Taylor, 189 Mass. 583, 76 N. E. 224, 3 L. R. A. N. S. 345.

Michigan.—Wright *v.* Crane, 142 Mich. 508, 106 N. W. 71.

Missouri.— Hall *v.* Compton, 130 Mo. App. 675, 108 S. W. 1122; McFern *v.* Gardner, 121 Mo. App. 1, 97 S. W. 972.

New York.— Lorenz *v.* Tisdale, 127 N. Y. App. Div. 433, 111 N. Y. Suppl. 173; Thies *v.* Thomas, 77 N. Y. Suppl. 276.

61. Weight of loads on city streets see MUNICIPAL CORPORATIONS, 28 Cyc. 911.

62. State *v.* Kowolski, 96 Iowa 346, 65 N. W. 306.

63. State *v.* Kowolski, 96 Iowa 346, 65 N. W. 306, holding a flagman necessary even where horses are going in the same direction as the engine.

Such a statute does not apply to machines not in operation (Keeley *v.* Shanley, 140 Pa. St. 213, 21 Atl. 305), or where horses are standing (Cudd *v.* Larson, 117 Wis. 103, 93 N. W. 810).

Where the whistle on a steam roller is operated with no flagman ahead the operator is guilty of negligence. Buchanan *v.* Cranford Co., 112 N. Y. App. Div. 278, 98 N. Y. Suppl. 378.

64. Miller *v.* Addison, 96 Md. 731, 54 Atl. 967; Macomber *v.* Nichols, 34 Mich. 212, 22 Am. Rep. 522, holding further that reasonableness is a question of fact for the determination of the jury.

65. Covington County *v.* Collins, 92 Miss. 330, 45 So. 854, 131 Am. St. Rep. 527, 14 L. R. A. N. S. 1087; Com. *v.* Allen, 148 Pa. St. 358, 23 Atl. 1115, 33 Am. St. Rep. 830, 16 L. R. A. 148 (holding that to run a traction engine, drawing unusually large loads, back and forth several times a day over an ordinary country highway, to the inconvenience and danger of all other travelers and the damage of the road and bridges, which were constructed for ordinary and probable use, constitutes a public nuisance); Reg. *v.* Chittenden, 15 Cox C. C. 725, 49 J. P. 503; Jeffery *v.* St. Pancras Vestry, 63 L. J. Q. B. 618, 10 Reports 554 (steam roller). See also Macomber *v.* Nichols, 34 Mich. 212, 22 Am. Rep. 522, holding that the question cannot depend on whether the engine was calculated to frighten horses of ordinary gentleness.

Expenses of extraordinary traffic consisting of the damages wrought by traction engines may be considered. Chichester *v.* Foster, [1906] 1 K. B. 167, 70 J. P. 73, 75 L. J. K. B. 33, 4 Loc. Gov. 205, 93 L. T. Rep. N. S. 750, 22 T. L. R. 18, 54 Wkly. Rep. 199; Atty.-Gen. *v.* Scott, [1905] 2 K. B. 160, 69 J. P. 109, 74 L. J. K. B. 803, 3 Loc. Gov. 272, 93 L. T. Rep. N. S. 249, 21 T. L. R. 211 [*affirming* [1904] 1 K. B. 404, 68 J. P. 137, 73 L. J. K. B. 196, 2 Loc. Gov. 461, 89 L. T. Rep. N. S. 726]; London County *v.* Wood, [1897] 2 Q. B. 482, 18 Cox C. C. 637, 61 J. P. 567, 66 L. J. Q. B. 712, 77 L. T. Rep. N. S. 312, 13 T. L. R. 558, 46 Wkly. Rep. 143; Reigate Rural Dist. *v.* Sutton District Water Co., 71 J. P. 405, 5 Loc. Gov. 917; High Wycombe Rural Dist. *v.* Palmer, 69 J. P. 167; Hemsworth Rural Dist. *v.* Micklethwaite, 68 J. P. 345, 2 Loc. Gov. 1084; Wycombe Rural Dist. *v.* Smith, 67 J. P. 75; Pethick *v.* Dorset County, 62 J. P. 579, 14 T. L. R. 548; Driscoll *v.* Poplar Bd. of Works, 62 J. P. 40, 14 T. L. R. 99.

66. Use of bicycles on sidewalk on city streets see MUNICIPAL CORPORATIONS, 28 Cyc. 911.

equally with other vehicles,[67] subject to legislative or municipal regulation.[68] Bicyclists should use due care to avoid pedestrians,[69] but are not liable merely for fright of horses caused without the bicyclist's negligence.[70]

3. STOPPING AND STANDING.[71] Travelers may within reason stop temporarily on the highway;[72] but not unreasonably, or to such an extent as to interfere with other travelers or to prevent the free use of the road.[73]

B. Law of the Road — 1. TO WHAT ROADS APPLICABLE. The law of the road extends to all public highways however created,[74] and may also be applicable to roads not public highways.[75]

67. *Illinois.*— North Chicago St. R. Co. *v.* Cossar, 203 Ill. 608, 68 N. E. 88.

Indiana.— Holland *v.* Bartch, 120 Ind. 46, 22 N. E. 83, 16 Am. St. Rep. 307.

Minnesota.— Thompson *v.* Dodge, 58 Minn. 555, 60 N. W. 545, 49 Am. St. Rep. 533, 28 L. R. A. 608.

Pennsylvania.— Lacy *v.* Winn, 4 Pa. Dist. 409; Lacey *v.* Winn, 3 Pa. Dist. 811.

Rhode Island.— State *v.* Collins, 16 R. I. 371, 17 Atl. 131, 3 L. R. A. 394.

England.—Hatton *v.* Treeby, [1897] 2 Q. B. 452, 18 Cox C. C. 633, 61 J. P. 586, 66 L. J. Q. B. 729, 77 L. T. Rep. N. S. 309, 13 T. L. R. 556, 46 Wkly. Rep. 6.

68. Twilley *v.* Perkins, 77 Md. 252, 26 Atl. 286, 39 Am. St. Rep. 408, 19 L. R. A. 632 (excluded from bridge for fear of frightening horses); State *v.* Bradford, 78 Minn. 387, 81 N. W. 202, 47 L. R. A. 144; State *v.* Yopp, 97 N. C. 477, 2 S. E. 458, 2 Am. St. Rep. 305; Radnor Tp. *v.* Bell, 27 Pa. Super. Ct. 1 (speed regulated).

But a bicycle is not a carriage within the meaning of a statute relating to carriages (Richardson *v.* Danvers, 176 Mass. 413, 57 N. E. 688, 79 Am. St. Rep. 320, 50 L. R. A. 127), nor need a bicycle avoid an ordinary team under a law that light vehicles must give way to heavily laden wagons (Foote *v.* American Product Co., 195 Pa. St. 190, 45 Atl. 934, 78 Am. St. Rep. 806, 49 L. R. A. 764. See also Taylor *v.* Union Traction Co., 184 Pa. St. 465, 40 Atl. 159, 47 L. R. A. 289).

69. North Chicago St. R. Co. *v.* Cossar, 203 Ill. 608, 68 N. E. 88.

70. Thompson *v.* Dodge, 58 Minn. 555, 60 N. W. 545, 49 Am. St. Rep. 533, 28 L. R. A. 608; Haines *v.* Moore, 10 N. J. L. J. 122.

71. **Automobile standing on road** see MOTOR VEHICLES, 28 Cyc. 30.

Stopping or standing on city, town, or village streets see MUNICIPAL CORPORATIONS, 28 Cyc. 910.

72. *Iowa.*— Duffy *v.* Dubuque, 63 Iowa 171, 18 N. W. 900, 50 Am. Rep. 743.

Louisiana.— Mahan *v.* Everett, 50 La. Ann. 1162, 23 So. 883.

Maryland.— Murray *v.* McShane, 52 Md. 217, 36 Am. Rep. 367.

Massachusetts.— Smethurst *v.* Barton Square Independent Cong. Church, 148 Mass. 261, 19 N. E. 387, 12 Am. St. Rep. 550, 2 L. R. A. 695; Britton *v.* Cummington, 107 Mass. 347, holding that a person journeying on a highway does not necessarily forfeit his rights as a traveler by temporarily leaving his horse and wagon in charge of a boy of twelve.

New York.— Nead *v.* Roscoe Lumber Co., 54 N. Y. App. Div. 621, 66 N. Y. Suppl. 419, to water horses.

Ohio.— Clark *v.* Fry, 8 Ohio St. 358, 72 Am. Dec. 590.

Pennsylvania.— Lacy *v.* Winn, 4 Pa. Dist. 409, 3 Pa. Dist. 811, bicycle left temporarily beside street.

England.— Goodman *v.* Taylor, 5 C. & P. 410, 24 E. C. L. 630; Rex *v.* Russell, 6 East 427, 2 Smith K. B. 424, 8 Rev. Rep. 506, 102 Eng. Reprint 1350.

See 25 Cent. Dig. tit. "Highways," § 467.

One may turn to the left to stop at his own home. Peltier *v.* Bradley, etc., Co., 67 Conn. 42, 34 Atl. 712, 32 L. R. A. 651; Palmer *v.* Barker, 11 Me. 338; Young *v.* Cowden, 98 Tenn. 577, 40 S. W. 1088 (notwithstanding statute requiring turning to right on stopping). But see Heffernan *v.* Barber, 36 N. Y. App. Div. 163, 55 N. Y. Suppl. 418, holding that the driver must turn to the right, although the stop is near by.

A sudden stop may be negligent. Maas *v.* Fauser, 36 Misc. (N. Y.) 813, 74 N. Y. Suppl. 861.

Whether leaving a team across a street is negligent is a question for the jury. Nesbit *v.* Crosby, 74 Conn. 554, 51 Atl. 550.

Whether defendant was negligent in rolling hogsheads down skids from a truck to the sidewalk without using danger signals or stationing any one to warn pedestrians is a question for the jury. Blaustein *v.* Guindon, 146 N. Y. 368, 41 N. E. 88 [*affirming* 83 Hun 5, 31 N. Y. Suppl. 559].

73. Turner *v.* Holtzman, 54 Md. 148, 39 Am. Rep. 361; Lippincott *v.* Lasher, 44 N. J. Eq. 120, 14 Atl. 103; Atty.-Gen. *v.* Brighton, etc., Co-operative Supply Assoc., [1900] 1 Ch. 276, 69 L. J. Ch. 204, 81 L. T. Rep. N. S. 762, 16 T. L. R. 144, 48 Wkly. Rep. 314 (holding as to stopping of teams on street to unload that if this use prevents the use of the highway to the extent allowed by law it must be stopped); Rex *v.* Jones, 3 Campb. 230, 13 Rev. Rep. 797; Rex *v.* Cross, 3 Campb. 224, 13 Rev. Rep. 794; Martin *v.* London County Council, 80 L. T. Rep. N. S. 866, 15 T. L. R. 431.

74. See cases cited *infra*, note 75 *et seq.*

75. Jaquith *v.* Richardson, 8 Metc. (Mass.) 213; Com. *v.* Gammons, 23 Pick. (Mass.) 201.

The rule extends to all places appropriated either de jure or de facto, to the purpose of passing with carriages, etc., whether they are

2. To What Situations Applicable[76]—a. Meeting—(i) *In General.* The law of the road requires conveyances[77] on meeting to keep to the left in England,[78] and to the right in the United States,[79] of the traveled part of the road,[80] and each should try to avoid accident at all events.[81] A traveler is ordinarily liable for accidents caused by failure to keep to the right,[82] but may not be liable even though

so appropriated by public authority or by the general license of the owners thereof, express or implied; and such owners themselves, while using their land as a road, must conform to this law. Com. *v.* Gammons, 23 Pick. (Mass.) 201.

76. Applicability of rule to motor vehicle see Motor Vehicles, 28 Cyc. 28.

77. Fahrney *v.* O'Donnell, 107 Ill. App. 608 (one pushing hand mower); Payne *v.* Nelson, 16 Ky. L. Rep. 239; State *v.* Collins, 16 R. I. 371, 17 Atl. 131, 3 L. R. A. 394 (bicycle); Turley *v.* Thomas, 8 C. & P. 103, 34 E. C. L. 633 (holding that law of the road applies to saddle horses). But see Graves *v.* Shattuck, 35 N. H. 257, 69 Am. Dec. 536, holding that the law of the road does not apply to buildings being moved.

Stage-coach statute construed see Hageman *v.* Van Doren, 6 N. J. L. J. 310.

78. Turley *v.* Thomas, 8 C. & P. 103, 34 E. C. L. 633.

79. *Delaware.*— McLane *v.* Sharpe, 2 Harr. 481.

Louisiana.— Lee *v.* Foley, 113 La. 663, 37 So. 594, unless special circumstances require turning to the left.

Maine.— Neal *v.* Rendall, 98 Me. 69, 56 Atl. 209, 63 L. R. A. 688; Kennard *v.* Burton, 25 Me. 39, 43 Am. Dec. 249, holding that one should stop and wait if he cannot keep to the right.

New Hampshire.—Brooks *v.* Hart, 14 N. H. 307.

New York.— Wright *v.* Fleischman, 41 Misc. 533, 85 N. Y. Suppl. 62 [*modified* in 99 N. Y. App. Div. 547, 91 N. Y. Suppl. 116] (holding that the statute merely recognizes the law of the road); Simmonson *v.* Stellenmerf, 1 Edm. Sel. Cas. 194.

See 25 Cent. Dig. tit. "Highways," § 461.

The turn must be in such season that neither shall be retarded by reason of the other occupying his half of the way. Neal *v.* Rendall, 98 Me. 69, 56 Atl. 209, 63 L. R. A. 688.

80. *Iowa.*— Needy *v.* Littlejohn, 137 Iowa 704, 115 N. W. 483, although statute requires giving up one half of the whole road.

Massachusetts.— Com. *v.* Allen, 11 Metc. 403; Clark *v.* Com., 4 Pick. 125.

New York.— Smith *v.* Dygert, 12 Barb. 613 (when covered with snow without reference to the worked part); Wright *v.* Fleischman, 41 Misc. 533, 85 N. Y. Suppl. 62 [*affirmed* in 99 N. Y. App. Div. 547, 91 N. Y. Suppl. 116] (rule applied to vehicles passing on the same side of wide roads); Earing *v.* Lansingh, 7 Wend. 185.

Pennsylvania.— Brooks *v.* Thomas, 17 Phila. 45.

Rhode Island.— Winter *v.* Harris, 23 R. I. 47, 49 Atl. 398, 54 L. R. A. 643, holding defendant liable, although the left portion of the road was macadamized and the right was cobblestones.

See 25 Cent. Dig. tit. "Highways," § 461.

How far.— One driving on a highway need not turn to the right, so that all of his vehicle is to the right of the center, if he turns far enough so that a passing vehicle, without turning at all, could pass safely. Buxton *v.* Ainsworth, 138 Mich. 532, 101 N. W. 817; Crampton *v.* Ivie, 124 N. C. 591, 32 S. E. 968 (holding it enough that he turns as far as he can); Quinn *v.* O'Keeffe, 9 N. Y. App. Div. 68, 41 N. Y. Suppl. 116 (need not turn to the extreme right). But see Needy *v.* Littlejohn, 137 Iowa 704, 115 N. W. 483, driver compelled to give one half by statute.

81. *Illinois.*— Ford *v.* Hine Bros. Co., 115 Ill. App. 153.

Massachusetts.— Wrinn *v.* Jones, 111 Mass. 360, holding a driver bound to turn to the left to avoid accident.

Michigan.— Pigott *v.* Engle, 60 Mich. 221, 27 N. W. 3.

New Hampshire.— Gilbert *v.* Burque, 72 N. H. 521, 57 Atl. 927, at crossing.

North Carolina.— Crampton *v.* Ivie, 124 N. C. 591, 32 S. E. 968.

Wisconsin.— Neanow *v.* Uttech, 46 Wis. 581, 1 N. W. 221, holding that one must delay if necessary, and may recover for injury caused by the delay.

England.— Turley *v.* Thomas, 8 C. & P. 103, 34 E. C. L. 633.

See 25 Cent. Dig. tit. "Highways," § 461 *et seq.*

Although the statute requires a traveler to keep to the right, this does not justify him in stubbornly keeping on that side, and thus causing a collision which a slight change on his part might have avoided. O'Maley *v.* Dorn, 7 Wis. 236, 73 Am. Dec. 403.

82. *California.*— Diehl *v.* Roberts, 134 Cal. 164, 66 Pac. 202, defendant turning out to avoid a street car, where vehicle turned out of car track to left.

Delaware.—Schockley *v.* Shepherd, 9 Houst. 270, 32 Atl. 173.

Illinois.— Fahrney *v.* O'Donnell, 107 Ill. App. 608; Dunn *v.* Moratz, 92 Ill. App. 477.

Iowa.— Needy *v.* Littlejohn, 137 Iowa 704, 115 N. W. 483.

Maine.— Palmer *v.* Barker, 11 Me. 338.

Massachusetts.— Spofford *v.* Harlow, 3 Allen 176.

Michigan.— Tyler *v.* Nelson, 109 Mich. 37, 66 N. W. 671, so holding even though plaintiff turned in the wrong direction.

New Hampshire.— Brooks *v.* Hart, 14 N. H. 307.

New Jersey.— State *v.* Unwin, 75 N. J. L. 500, 68 Atl. 110 [*affirming* 73 N. J. L. 529, 64 Atl. 163].

he drove to the left, if that was not the proximate cause of the accident;[83] and on the other hand one may recover, although he drove to the left, if his act was not the proximate cause of the injury;[84] and even though defendant was on the wrong side of the road plaintiff cannot recover if the injury was proximately caused by his own negligence.[85]

(II) *Horseman or Light Vehicle Passing Heavier Vehicle.* A horseman[86] or light vehicle[87] is ordinarily bound to avoid a heavier vehicle, and should wait where dangerous.[88] On the other hand, it is the duty of heavy vehicles to keep well to one side to allow lighter vehicles to pass, and failure to do so will render the former liable for accidents directly attributable thereto.[89]

New York.— Quinn *v.* Pietro, 38 N. Y. App. Div. 484, 56 N. Y. Suppl. 419; Heffernan *v.* Barber, 36 N. Y. App. Div. 163, 55 N. Y. Suppl. 418 (so holding, although the other driver could have avoided a collision); Schimpf *v.* Sliter, 64 Hun 463, 19 N. Y. Suppl. 644; Burdick *v.* Worrall, 4 Barb. 596; Pike *v.* Bosworth, 7 N. Y. St. 665; Simmonson *v.* Stellenmerf, 1 Edm. Sel. Cas. 194 (even though defendant had no time to turn out after discovering plaintiff).

Rhode Island.— Pick *v.* Thurston, 25 R. I. 36, 54 Atl. 600; Angell *v.* Lewis, 20 R. I. 391, 39 Atl. 521, 76 Am. St. Rep. 881.

Wisconsin.— Luedtke *v.* Jeffery, 89 Wis. 136, 61 N. W. 292.

England.— Pluckwell *v.* Wilson, 5 C. & P. 375, 24 E. C. L. 612; Chaplin *v.* Hawes, 3 C. & P. 554, 14 E. C. L. 711.

Canada.— White *v.* Gnaedinger, 7 Quebec Q. B. 156.

See 25 Cent. Dig. tit. "Highways," § 461 *et seq.*

A traveler has a right to presume that one whom he sees approaching will comply with the statute directing the manner of passing, and will not be precluded from recovering damages for a collision resulting from the other's want of care and skill, merely because, when first observing him approaching, the injured party had ample space to pass in safety. Wood *v.* Luscomb, 23 Wis. 287.

83. *Iowa.*— Cook *v.* Fogarty, 103 Iowa 500, 72 N. W. 677, 39 L. R. A. 488, collision at night with plaintiff on a bicycle.

Massachusetts.— Meservey *v.* Lockett, 161 Mass. 332, 37 N. E. 310.

New Hampshire.— Lyons *v.* Child, 61 N. H. 72, holding that it is not negligence *per se* to drive on the wrong side.

New York.— Quinn *v.* O'Keeffe, 9 N. Y. App. Div. 68, 41 N. Y. Suppl. 116; Simmonson *v.* Stellenmerf, 1 Edm. Sel. Cas. 194.

Rhode Island.— Angell *v.* Lewis, 20 R. I. 391, 39 Atl. 521, 78 Am. St. Rep. 881, where a traveler turned out to the left at night to pass other teams.

Texas.— Landa *v.* McDermott, (1891) 16 S. W. 802, where plaintiff might easily have turned to the left of defendant's hay wagon.

Canada.— Stout *v.* Adams, 35 N. Brunsw. 118; Brownstein *v.* Imperial Electric Light Co., 17 Quebec Super. Ct. 292, where plaintiff, a bicycle rider, lost his balance.

See 25 Cent. Dig. tit. "Highways," § 461.

Failure to seasonably turn to the right in meeting a team on the highway is not negligence *per se.* Neal *v.* Rendall, 98 Me. 69, 56 Atl. 209, 63 L. R. A. 688.

84. Riepe *v.* Elting, 89 Iowa 82, 56 N. W. 285, 48 Am. St. Rep. 356, 26 L. R. A. 769; Payne *v.* Nelson, 16 Ky. L. Rep. 239; Loyacano *v.* Jurgens, 50 La. Ann. 441, 23 So. 717 (where right side not in proper condition); Spofford *v.* Harlow, 3 Allen (Mass.) 176.

85. *Louisiana.*— Lee *v.* Foley, 113 La. 663, 37 So. 594.

Massachusetts.—Parker *v.* Adams, 12 Metc. 415, 46 Am. Dec. 694.

New Hampshire.— Brember *v.* Jones, 67 N. H. 374, 30 Atl. 411, 26 L. R. A. 408.

New York.— Heffernan *v.* Barber, 36 N. Y. App. Div. 163, 55 N. Y. Suppl. 418.

Pennsylvania.— Rowland *v.* Wanamaker, 193 Pa. St. 598, 44 Atl. 918.

Wisconsin.— Neanow *v.* Uttech, 46 Wis. 581, 1 N. W. 221.

England.— See Turley *v.* Thomas, 8 C. & P. 103, 34 E. C. L. 633.

See 25 Cent. Dig. tit. "Highways," § 461 *et seq.*

Plaintiff held not negligent see Heffernan *v.* Barber, 36 N. Y. App. Div. 163, 55 N. Y. Suppl. 418; Schimpf *v.* Sliter, 64 Hun (N. Y.) 463, 19 N. Y. Suppl. 644; Bush *v.* Murphy, 85 N. Y. Suppl. 361.

86. Dudley *v.* Bolles, 24 Wend. (N. Y.) 465; Grier *v.* Sampson, 27 Pa. St. 183; Beach *v.* Parmeter, 23 Pa. St. 196; Landa *v.* McDermott, (Tex. 1891) 16 S. W. 802; Washburn *v.* Tracy, 2 D. Chipm. (Vt.) 128, 15 Am. Dec. 661.

87. Peltier *v.* Bradley, 67 Conn. 42, 34 Atl. 712, 32 L. R. A. 651; Graves *v.* Shattuck, 35 N. H. 257, 69 Am. Dec. 536 (building moving); Grier *v.* Sampson, 27 Pa. St. 183. But see Foote *v.* American Product Co., 195 Pa. St. 190, 45 Atl. 934, 78 Am. St. Rep. 806, 49 L. R. A. 764, holding that a bicycle need not avoid an ordinary team under statute that light vehicle must give way to a heavily laden wagon.

An express wagon must turn to the right on meeting a bicycle under a statute which requires vehicles to so turn on meeting. State *v.* Collins, 16 R. I. 371, 17 Atl. 131, 3 L. R. A. 394.

88. Kennard *v.* Burton, 25 Me. 39, 43 Am. Dec. 249.

89. Standard Oil Co. *v.* Hartman, 102 Md. 563, 62 Atl. 805.

b. Overtaking and Passing. Unless there is a statute or municipal regulation to the contrary,[90] one overtaking and passing another may pass on either side,[91] using proper caution,[92] and keeping a safe distance behind when not passing.[93] The leading team may travel anywhere it pleases,[94] using, however, due care.[95]

c. Turning Across Road. A driver must use due care in turning across a road,[96] but need not necessarily anticipate that a team is behind,[97] or give a signal,[98] and may recover from another whose carelessness causes a collision.[99]

d. Meeting at Cross Roads. The law of the road requiring turning to the right does not apply to persons meeting at cross streets,[1] but each must use due care,[2] and approaching at speed a turn without ability to see up the cross road is commonly negligence.[3] One turning a corner should keep away from the left curb.[4]

90. State *v.* Unwin, 75 N. J. L. 500, 68 Atl. 110 [*affirming* 73 N. J. L. 529, 64 Atl. 163], to the left, by statute.

91. Clifford *v.* Tyman, 61 N. H. 508.

Rule applied to motor vehicles see MOTOR VEHICLES, 28 Cyc. 28.

In England the leading team should bear to the left. Elliott Roads & St. § 829.

92. *Arizona.*— Stanfield *v.* Anderson, 5 Ariz. 1, 43 Pac. 221.

Connecticut.— Knowles *v.* Crampton, 55 Conn. 336, 11 Atl. 593; Hotchkiss *v.* Hoy, 41 Conn. 568.

Delaware.— Simeone *v.* Lindsay, 6 Pennew. 224, 65 Atl. 778.

Louisiana.— Odom *v.* Schmidt, 52 La. Ann. 2129, 28 So. 350 (holding it negligence to drive into vehicle standing still); Avegno *v.* Hart, 25 La. Ann. 235, 13 Am. Rep. 133.

Massachusetts.— Gifford *v.* Jennings, 190 Mass. 54, 76 N. E. 233, automobile bound by statute to signal on approaching.

New York.— Lorenz *v.* Tisdale, 127 N. Y. App. Div. 433, 111 N. Y. Suppl. 173; Northridge *v.* Atlantic Ave. R. Co., 15 Misc. 66, 36 N. Y. Suppl. 263.

Tennessee.— Young *v.* Cowden, 98 Tenn. 577, 40 S. W. 1088, holding that the one behind should give warning.

See 25 Cent. Dig. tit. "Highways," § 465.

93. Adams *v.* Swift, 172 Mass. 521, 52 N. E. 1068 (where one ahead stopped suddenly); Post *v.* Olmsted, 47 Nebr. 893, 66 N. W. 828; Bierbach *v.* Goodyear Rubber Co., 14 Fed. 826.

94. *Iowa.*— Elenz *v.* Conrad, 123 Iowa 522, 99 N. W. 138, holding that it need not turn out if it leaves room to pass.

Maine.— Foster *v.* Goddard, 40 Me. 64.

Massachusetts.— Holt *v.* Cutler, 185 Mass. 24, 69 N. E. 333, where driver did not know that bicyclist was trying to pass and swerved into her.

New York.— Lorenz *v.* Tisdale, 127 N. Y. App. Div. 433, 111 N. Y. Suppl. 173.

Pennsylvania.— Bolton *v.* Colder, 1 Watts 360, holding that the follower cannot justify running into leading team by the fact that he failed to turn to the right.

See 25 Cent. Dig. tit. "Highways," § 465.

If one has reason to believe that another is behind him or at his side, it is his duty not to obstruct him and to use reasonable care, in passing from one side of the road to another, not to injure him. It is not the duty of a traveler under all circumstances, before crossing from one side of a sidewalk or road to the other, to look behind him or sideways. Rand *v.* Syms, 162 Mass. 163, 38 N. E. 196.

95. Newhouse *v.* Miller, 35 Ind. 463 (where one team was standing still); Aznoe *v.* Conway, 72 Iowa 568, 34 N. W. 422; Moulton *v.* Aldrich, 28 Kan. 300; Brennan *v.* Richardson, 38 N. Y. App. Div. 463, 56 N. Y. Suppl. 428.

96. Hill *v.* Moebus, 56 N. Y. App. Div. 354, 67 N. Y. Suppl. 756; Ferguson *v.* Ehret, 14 Misc. (N. Y.) 454, 35 N. Y. Suppl. 1020; Bush *v.* Murphy, 85 N. Y. Suppl. 361. But see Young *v.* Cowden, 98 Tenn. 577, 40 S. W. 1088, holding that one may turn to stop notwithstanding statute requiring turning to right on stopping.

97. Crabtree *v.* Otterson, 22 N. Y. App. Div. 393, 47 N. Y. Suppl. 977; Northridge *v.* Atlantic Ave. R. Co., 15 Misc. (N. Y.) 66, 36 N. Y. Suppl. 263; Young *v.* Cowden, 98 Tenn. 577, 40 S. W. 1088.

98. Bierbach *v.* Goodyear Rubber Co., 14 Fed. 826.

99. Northridge *v.* Atlantic Ave. R. Co., 15 Misc. (N. Y.) 66, 36 N. Y. Suppl. 263; Dater *v.* Fletcher, 14 Misc. (N. Y.) 288, 35 N. Y. Suppl. 686.

1. Morse *v.* Sweenie, 15 Ill. App. 486; Norris *v.* Saxton, 158 Mass. 46, 32 N. E. 954; Smith *v.* Gardner, 11 Gray (Mass.) 418; Lovejoy *v.* Dolan, 10 Cush. (Mass.) 495. *Contra*, F. W. Cook Brewing Co. *v.* Ball, 22 Ind. App. 656, 52 N. E. 1002, holding that in Indiana the law of the road requiring turning to the right applies.

In England the team crossing should pass behind the team on the main road. Turley *v.* Thomas, 8 C. & P. 103, 34 E. C. L. 633.

2. Morse *v.* Sweenie, 15 Ill. App. 486; Garrigan *v.* Berry, 12 Allen (Mass.) 84; Gilbert *v.* Burque, 72 N. H. 521, 57 Atl. 927; Koester *v.* Decker, 22 Misc. (N. Y.) 353, 49 N. Y. Suppl. 276. See also Boyle *v.* McWilliams, 69 Conn. 201, 37 Atl. 501.

3. McCorkle *v.* Anheuser-Busch Brewing Assoc., 107 La. 461, 31 So. 762; Taylor *v.* Long Island R. Co., 16 N. Y. App. Div. 1, 44 N. Y. Suppl. 820; Hurley *v.* New York, etc., Brewing Co., 13 N. Y. App. Div. 167, 43 N. Y. Suppl. 259; Nelson *v.* Braman, 22 R. I. 283, 47 Atl. 696, bicyclist crossing sidewalk from behind fence.

4. Henning *v.* Rothschild, 34 Misc. (N. Y.)

e. Pedestrians — (i) *In General.* The law of the road does not apply to pedestrians, who may pass on either side of vehicles,[5] may walk on any part of the road,[6] and need not cross at a regular crossing.[7] Persons driving vehicles are bound to use due care to avoid pedestrians,[8] who, however, have no right of way,[9] and who cannot recover when negligent.[10]

(ii) *Crossing Road.* A pedestrian need not cross at a regular crossing,[11] and wherever he crosses he may recover for injuries sustained if he has not been guilty of contributory negligence,[12] although he does not stop, look, and listen,[13]

773, 68 N. Y. Suppl. 840; Foote *v.* American Product Co., 195 Pa. St. 190, 45 Atl. 934, 78 Am. St. Rep. 806, 49 L. R. A. 764.

5. Yore *v.* Mueller Coal, etc., Co., 147 Mo. 679, 49 S. W. 855; Savage *v.* Gerstner, 36 N. Y. App. Div. 220, 55 N. Y. Suppl. 306; Lloyd *v.* Ogleby, 5 C. B. N. S. 667, 94 E. C. L. 667; Cotterill *v.* Starkey, 8 C. & P. 691, 34 E. C. L. 965. See also Schaffer *v.* Baker Transfer Co., 29 N. Y. App. Div. 459, 51 N. Y. Suppl. 1092, where a truck was on the left side of the road, and plaintiff was held not necessarily negligent, as he had a right to expect it to be on the right side.

But a pedestrian should not compel a vehicle to leave the beaten track. Beach *v.* Parmeter, 23 Pa. St. 196.

6. McManus *v.* Woolverton, 19 N. Y. Suppl. 545 [*affirmed* in 138 N. Y. 648, 34 N. E. 513], in the center.

7. See *infra*, note 11.

8. *California.*— Sykes *v.* Lawlor, 49 Cal. 236.

Delaware.—Simeone *v.* Lindsay, 6 Pennew. 224, 65 Atl. 778.

Missouri.— Lee *v.* Jones, 181 Mo. 291, 79 S. W. 927, 103 Am. St. Rep. 596; Vaughn *v.* Scade, 30 Mo. 600 (in crowded street); O'Hara *v.* Globe Iron, etc., Co., 66 Mo. App. 53.

New York.— Seaman *v.* Mott, 127 N. Y. App. Div. 18, 110 N. Y. Suppl. 1040; Schaffer *v.* Baker Transfer Co., 29 N. Y. App. Div. 459, 51 N. Y. Suppl. 1092; Murphy *v.* Weidmann Cooperage, 1 N. Y. App. Div. 283, 37 N. Y. Suppl. 151; McManus *v.* Woolverton, 19 N. Y. Suppl. 545 [*affirmed* in 138 N. Y. 648, 34 N. E. 513], holding that extra care must be used in fog.

Pennsylvania.— Streitfeld *v.* Shoemaker, 185 Pa. St. 265, 39 Atl. 967; Kleinert *v.* Rees, 6 Pa. Super. Ct. 594.

Rhode Island.— Nelson *v.* Braman, 22 R. I. 283, 47 Atl. 696; Bennett *v.* Lovell, 12 R. I. 166, 34 Am. Rep. 628.

Vermont.— Thompson *v.* National Express Co., 66 Vt. 358, 29 Atl. 311.

United States.— Garside *v.* New York Transp. Co., 146 Fed. 588.

Persons approaching from rear or sides.— It is not the duty of the driver of a wagon to look out for persons who may approach the wagon from the rear or the sides, and warn them of the danger of falling under the wheels. Rice *v.* Buffalo Steel House Co., 17 N. Y. App. Div. 462, 45 N. Y. Suppl. 277.

Driver held not negligent see McNamara *v.* Beck, 21 Ind. App. 483, 52 N. E. 707 (two-year-old child not seen by driver); Young *v.* Omnibus Co. Gen., 180 Pa. St. 75, 36 Atl. 403 (where plaintiff skating fell against horses whose driver was looking the other way).

9. Belton *v.* Baxter, 54 N. Y. 245, 13 Am. Rep. 578, 14 Abb. Pr. N. S. 404; Barker *v.* Savage, 45 N. Y. 191, 6 Am. Rep. 66; Seaman *v.* Mott, 127 N. Y. App. Div. 18, 110 N. Y. Suppl. 1040; Savage *v.* Gerstner, 36 N. Y. App. Div. 220, 55 N. Y. Suppl. 306; Reens *v.* Mail, etc., Pub. Co., 10 Misc. (N. Y.) 122, 30 N. Y. Suppl. 913 [*affirmed* in 150 N. Y. 582, 44 N. E. 1128].

10. Simeone *v.* Lindsay, 6 Pennew. (Del.) 224, 65 Atl. 778; Moebus *v.* Herrmann, 108 N. Y. 349, 15 N. E. 415, 2 Am. St. Rep. 440 (holding, however, that a pedestrian need not necessarily look both ways before crossing street); Kleinert *v.* Rees, 6 Pa. Super. Ct. 594. See also Quirk *v.* St. Louis United El. Co., 126 Mo. 279, 28 S. W. 1080.

Heedlessly standing in the street is negligence. Evans *v.* Adams Express Co., 122 Ind. 362, 23 N. E. 1039, 7 L. R. A. 678; Joslin *v.* Le Baron, 44 Mich. 160, 6 N. W. 214; Stiles *v.* Geesey, 71 Pa. St. 439.

11. Simons *v.* Gaynor, 89 Ind. 165; Moebus *v.* Herrmann, 108 N. Y. 349, 15 N. E. 415, 2 Am. St. Rep. 440; Denver *v.* Sherret, 88 Fed. 226, 31 C. C. A. 499.

12. Crowley *v.* Strouse, (Cal. 1893) 33 Pac. 456 (so holding, although plaintiff failed to use the best course); Carland *v.* Young, 119 Mass. 150; Fales *v.* Dearborn, 1 Pick. (Mass.) 345; Belton *v.* Baxter, 58 N. Y. 411 (holding also that it is a question for the jury whether plaintiff should have known of the relative speed of two vehicles approaching); Williams *v.* Richards, 3 C. & K. 81.

A pedestrian crossing need not anticipate recklessness of vehicles. Stringer *v.* Frost, 116 Ind. 477, 19 N. E. 331, 9 Am. St. Rep. 875, 2 L. R. A. 614; O'Reilly *v.* Utah, etc., Stage Co., 87 Hun (N. Y.) 406, 34 N. Y. Suppl. 358.

The high degree of diligence required at a railroad crossing is not required of a person about to cross a public street, to avoid contact with vehicles. Eaton *v.* Cripps, 94 Iowa 176, 62 N. W. 687.

Plaintiff held negligent see Belton *v.* Baxter, 54 N. Y. 245, 13 Am. Rep. 578, 14 Abb. Pr. N. S. 404, miscalculation where plaintiff's chances were close.

13. Orr *v.* Garabold, 85 Ga. 373, 11 S. E. 778; Shea *v.* Reems, 36 La. Ann. 966; Purtell *v.* Jordan, 156 Mass. 573, 31 N. E. 652 (plaintiff passing from behind team); Shapleigh *v.* Wyman, 134 Mass. 118; Bowser *v.* Wellington, 126 Mass. 391; Moebus *v.* Herrmann, 108 N. Y. 349, 15 N. E. 415, 2 Am. St. Rep. 440; Barker *v.* Savage, 45 N. Y.

where he is run down and injured by a team recklessly driven by defendant or his servant.[14]

f. Vehicles Having the Right of Way. Certain vehicles have by law the right of way in the streets,[15] such as fire apparatus,[16] ambulances,[17] and mail wagons.[18]

C. Care and Negligence in Use of Road[19] **— 1. In General.** The nature and degree of care to be exercised in the use of highways depends entirely on the circumstances of each particular case,[20] and the duty of care is in general mutual.[21] There is no liability for the effects of an unavoidable accident,[22] and plaintiff can recover when,[23] and only when,[24] defendant's wrongful act or negligence is the

191, 6 Am. Rep. 66; Reens *v.* Mail, etc., Pub. Co., 10 Misc. (N. Y.) 122, 30 N. Y. Suppl. 913 [*affirmed* in 150 N. Y. 582, 44 N. E. 1128]; Chisholm *v.* Knickerbocker Ice Co., 1 N. Y. Suppl. 743 (not watching to see which side a wagon went of a street car).

Wagon passing road corner.— One crossing a street at a corner is not bound to guard against a wagon which may be passing around the corner. Dater *v.* Fletcher, 14 Misc. (N. Y.) 288, 35 N. Y. Suppl. 686; Rottenberg *v.* Segelke, 6 Misc. (N. Y.) 3, 25 N. Y. Suppl. 997 [*affirmed* in 148 N. Y. 734, 42 N. E. 725]; Harris *v.* Commercial Ice Co., 153 Pa. St. 278, 25 Atl. 1133.

14. Orr *v.* Garabold, 85 Ga. 373, 11 S. E. 778; Simons *v.* Gaynor, 89 Ind. 165; Moebus *v.* Herrmann, 108 N. Y. 349, 15 N. E. 415, 2 Am. St. Rep. 440; Van Houten *v.* Fleischman, 1 Misc. (N. Y.) 130, 20 N. Y. Suppl. 643 [*affirmed* in 142 N. Y. 624, 37 N. E. 565]; Cotton *v.* Wood, 8 C. B. N. S. 568, 7 Jur. N. S. 168, 29 L. J. C. P. 333, 98 E. C. L. 568.

15. See Kansas City *v.* McDonald, 50 Kan. 481, 57 Pac. 123, 45 L. R. A. 429.

16. Farley *v.* New York, 152 N. Y. 222, 46 N. E. 506, 57 Am. St. Rep. 511, holding that a statute limiting speed does not apply to the fire department. But see Morse *v.* Sweenie, 15 Ill. App. 486, holding that even the fire department has no right to drive immoderately.

17. Smith *v.* American S. P. C. A., 7 Misc. (N. Y.) 158, 27 N. Y. Suppl. 315.

18. Bolton *v.* Colder, 1 Watts (Pa.) 360. See also POST-OFFICE, 31 Cyc. 1000 *et seq.*

19. **Negligence in operation of automobile** see MOTOR VEHICLES, 28 Cyc. 37.

20. *Alabama.*— Carter *v.* Chambers, 79 Ala. 223.

Colorado.—Adams Express Co. *v.* Aldridge, 20 Colo. App. 74, 77 Pac. 6, holding that travelers must so use highway as not necessarily to injure others traveling thereon.

Maine.— Towle *v.* Morse, 103 Me. 250, 68 Atl. 1044, mutual rights between driver of horse and automobile.

Missouri.— Quirk *v.* St. Louis United El. Co., 126 Mo. 279, 28 S. W. 1080.

New York.— Nead *v.* Roscoe Lumber Co., 54 N. Y. App. Div. 621, 66 N. Y. Suppl. 419.

See 25 Cent. Dig. tit. "Highways," § 459 *et seq.*

A bicyclist is bound to exercise what is under the circumstances due care (Cook *v.* Fogarty, 103 Iowa 500, 72 N. W. 677, 39 L. R. A. 488), the question of his negligence being for the jury (Peltier *v.* Bradley, 67 Conn. 42, 34 Atl. 712, 32 L. R. A. 651; Shortsleeve *v.* Stebbins, 77 N. Y. App. Div. 588, 79 N. Y. Suppl. 40, frightening horse; Hershinger *v.* Pennsylvania R. Co., 25 Pa. Super. Ct. 147, driver suddenly turning). No negligence found in bicyclist see Lee *v.* Jones, 181 Mo. 291, 79 S. W. 927, 103 Am. St. Rep. 596; Pick *v.* Thurston, 25 R. I. 36, 54 Atl. 600.

Whether leading a horse in the street is negligent is a question for the jury. Grinnell *v.* Taylor, 85 Hun (N. Y.) 85, 32 N. Y. Suppl. 684 [*affirmed* in 155 N. Y. 653, 49 N. E. 1097].

21. Fletcher *v.* Dixon, 107 Md. 420, 68 Atl. 875; Baker *v.* Fehr, 97 Pa. St. 70.

A traveler upon a public highway has a right to assume within reasonable limits that others using it will exercise reasonable care. Indianapolis St. R. Co. *v.* Hoffman, 40 Ind. App. 508, 82 N. E. 543.

22. Newcomb *v.* Van Zile, 34 Hun (N. Y.) 275 (vehicle sliding down hill); Center *v.* Finney, 17 Barb. (N. Y.) 94 (when defendant not negligent); Miller *v.* Cohen, 173 Pa. St. 488, 34 Atl. 219.

23. *Massachusetts.*— Turner *v.* Page, 186 Mass. 600, 72 N. E. 329 (endeavor of third person to stop horses); McDonald *v.* Snelling, 14 Allen 290, 92 Am. Dec. 768.

Minnesota.— Griggs *v.* Fleckenstein, 14 Minn. 81, 100 Am. Dec. 199, where defendant's team ran away and caused horses of A to run away and injure plaintiff, and defendant was held liable.

New York.— Engelbach *v.* Ibert, 10 Misc. 535, 31 N. Y. Suppl. 438.

Texas.— Houston Transfer Co. *v.* Renard, (Civ. App. 1904) 79 S. W. 838.

Canada.— Bundy *v.* Carter, 21 Nova Scotia 296, where defendant's wrongful displacing of plaintiff in a line of vehicles was held the proximate cause of injuries occurring in plaintiff's struggle to recover his place.

See 25 Cent. Dig. tit. "Highways," § 459 *et seq.*

24. *Illinois.*— North Chicago St. R. Co. *v.* Cossar, 203 Ill. 608, 68 N. E. 88.

Maine.— Smith *v.* French, 83 Me. 108, 21 Atl. 739, 23 Am. St. Rep. 761, holding an owner of cattle not liable for actions of another in driving them out of his field.

Missouri.— Haller *v.* St. Louis, 176 Mo. 606, 75 S. W. 613, where failure to have a flagman was held not the proximate cause of fright of horse at steam roller.

New York.— Berman *v.* Schultz, 84 N. Y. Suppl. 292, boys starting automobile — owner not liable.

proximate cause of the injury. Responsibility for an accident on the highway falls on the person whose negligence caused it,[25] and all persons engaged in it are jointly liable.[26] A town is ordinarily not liable for the manner of use of a way by travelers.[27]

2. Care Required of Drivers of Teams — a. In General. Drivers of vehicles in a public highway must not drive recklessly, but must use due care to prevent injury to others in the highway [28] to avoid collisions,[29] and to avoid pedestrians,[30]

Canada.— Flett *v.* Coulter, 5 Ont. L. Rep. 375, 2 Ont. Wkly. Rep. 142.

See 25 Cent. Dig. tit. "Highways," § 459 *et seq.*

25. Camp *v.* Rogers, 44 Conn. 291; Coursen *v.* Ely, 37 Ill. 338; Foster *v.* Goddard, 40 Me. 64.

26. Vosburgh *v.* Moak, 1 Cush. (Mass.) 453, 48 Am. Dec. 613.

27. Davis *v.* Bangor, 42 Me. 522; Ray *v.* Manchester, 46 N. H. 59, 88 Am. Dec. 192.

28. Currie *v.* Consolidated R. Co., 81 Conn. 383, 71 Atl. 356 (in view of distance which one can see at night); Ledig *v.* Germania Brewing Co., 153 Pa. St. 298, 25 Atl. 870 (barrel thrown from wagon).

The driver need not ordinarily look behind. Hebard *v.* Mabie, 98 Ill. App. 543 (holding that an omnibus driver need not keep a lookout behind to see whether persons are riding behind); Chicago Consol. Bottling Co. *v.* McGinnis, 51 Ill. App. 325 (holding that drivers of wagons are not required, before starting their wagons after a temporary stop, to look to see if children have got on the wagon, so as to be injured by its starting).

29. *Maryland.*— Standard Oil Co. *v.* Hartman, 102 Md. 563, 62 Atl. 805.

Michigan.—Joslin *v.* Grand Rapids Ice, etc., Co., 53 Mich. 322, 19 N. W. 17, even though improper construction of railroad track caused accident.

Texas.— McGee *v.* West, (Civ. App. 1900) 57 S. W. 928, holding that he must try to avoid accident from the time he sees danger.

Vermont.— Claflin *v.* Wilcox, 18 Vt. 605.

Wisconsin.— Rood *v.* American Express Co., 46 Wis. 639, 1 N. W. 190, on breaking of axle.

See 25 Cent. Dig. tit. "Highways," § 459 *et seq.*

The driver's negligence in a collision is a question for the jury— Park *v.* O'Brien, 23 Conn. 339; Blakeslee's Express, etc., Co. *v.* Ford, 215 Ill. 230, 74 N. E. 135; Lee *v.* Foley, 113 La. 663, 37 So. 594; Neal *v.* Rendall, 98 Me. 69, 56 Atl. 209, 63 L. R. A. 688; Standard Oil Co. *v.* Hartman, 102 Md. 563, 62 Atl. 805; Vonderhorst Brewing Co. *v.* Amrhine, 98 Md. 406, 56 Atl. 833; Perlstein *v.* American Express Co., 177 Mass. 530, 59 N. E. 194, 52 L. R. A. 959; Rand *v.* Syms, 162 Mass. 163, 38 N. E. 196 (question whether defendant should have looked behind); Reynolds *v.* Hanrahan, 100 Mass. 313; Buxton *v.* Ainsworth, 153 Mich. 315, 116 N. W. 1094; Silsby *v.* Michigan Car Co., 95 Mich. 204, 54 N. W. 761; Kayse *v.* Randle, (Miss. 1903) 35 So. 422; Johnson *v.* Duncan, 98 N. Y. App. Div. 322, 90 N. Y. Suppl. 660; McGahie *v.* McClennen, 86 N. Y. App. Div. 263, 83 N. Y. Suppl. 692; Cohn *v.* Palmer, 78 N. Y. App. Div. 506, 79 N. Y. Suppl. 762; Crozier *v.* Read, 78 Hun (N. Y.) 181, 28 N. Y. Suppl. 914, 10 N. Y. App. Div. 627, 41 N. Y. Suppl. 1110; Ferguson *v.* Ehret, 10 Misc. (N. Y.) 217, 30 N. Y. Suppl. 1063; Rauch *v.* Smedley, 208 Pa. St. 175, 57 Atl. 359 (so holding, although defendant's evidence wholly relieved the driver from blame); Wolf *v.* Hemrich Bros. Brewing Co., 28 Wash. 187, 68 Pac. 440; Morgan *v.* Pleshek, 120 Wis. 306, 97 N. W. 916.

30. Bigelow *v.* Reed, 51 Me. 325; Dieter *v.* Zbaren, 81 Mo. App. 612. See also Motor Vehicles, 28 Cyc. 28.

Whether defendant was negligent in running down a pedestrian is a question for the jury. Wolfskill *v.* Los Angeles R. Co., 129 Cal. 114, 61 Pac. 775; Crowley *v.* Strouse, (Cal. 1893) 33 Pac. 456; Adams Express Co. *v.* Aldridge, 20 Colo. App. 74, 77 Pac. 6; Riepe *v.* Elting, 89 Iowa 82, 56 N. W. 285, 48 Am. St. Rep. 356, 26 L. R. A. 769; Douglas *v.* Faust, 112 La. 1050, 36 So. 850; Drew *v.* Farnsworth, 186 Mass. 365, 71 N. E. 783; Doherty *v.* Rice, 182 Mass. 182, 64 N. E. 967; Schienfeldt *v.* Norris, 115 Mass. 17; Graham *v.* Evening Press Co., 135 Mich. 298, 97 N. W. 697; Stroub *v.* Meyer, 132 Mich. 75, 92 N. W. 779; Burt *v.* Staffeld, 121 Mich. 390, 80 N. W. 236 (sled running into plaintiff); Lazell *v.* Kapp, 83 Mich. 36, 46 N. W. 1028; Boick *v.* Bissell, 80 Mich. 260, 45 N. W. 55; Post *v.* U. S. Express Co., 76 Mich. 574, 43 N. W. 636; Dieter *v.* Zbaren, 81 Mo. App. 612 (whether if driver had been watchful he could have avoided the accident); Gulick *v.* Clarke, 51 Mo. App. 26; Bresnehan *v.* Gove, 71 N. H. 236, 51 Atl. 916; Kennedy *v.* Sullivan, 66 N. J. L. 185, 48 Atl. 535; Norton *v.* Webber, 174 N. Y. 514, 66 N. E. 1112 [*affirming* 69 N. Y. App. Div. 130, 74 N. Y. Suppl. 524]; Seaman *v.* Mott, 127 N. Y. App. Div. 18, 110 N. Y. Suppl. 1040; Griffin *v.* Bell, 119 N. Y. App. Div. 673, 104 N. Y. Suppl. 295; Connaughton *v.* Sun Printing, etc., Assoc., 73 N. Y. App. Div. 316, 76 N. Y. Suppl. 755; Nead *v.* Roscoe Lumber Co., 54 N. Y. App. Div. 621, 66 N. Y. Suppl. 419; Keller *v.* Haaker, 2 N. Y. App. Div. 245, 37 N. Y. Suppl. 792; Ottendorff *v.* Willis, 80 Hun (N. Y.) 262, 30 N. Y. Suppl. 168 [*affirmed* in 154 N. Y. 753, 49 N. E. 1101]; Atkinson *v.* Oelsner, 57 Hun (N. Y.) 592, 10 N. Y. Suppl. 822; Williams *v.* O'Keefe, 9 Bosw. (N. Y.) 536, 24 How. Pr. 16; Schwartz *v.* Brahm, 130 Pa. St. 411, 18 Atl. 643; Smith *v.* O'Connor, 48 Pa. St. 218, 86 Am. Dec. 582.

Evidence insufficient to show negligence see Osterheldt *v.* Peoples, 208 Pa. St. 310, 57 Atl. 703.

children,[31] or persons working in the highway.[32] A driver is in general negligent if he fails to have a proper equipment.[33]

b. Reckless Driving or Racing. One may under some circumstances drive rapidly,[34] but not at reckless speed,[35] and racing in the highway is negligence *per se*.[36]

31. *California.*— Wikberg *v.* Olson Co., 138 Cal. 479, 71 Pac. 511.

Illinois.— Heldmaier *v.* Taman, 188 Ill. 283, 58 N. E. 960 [*affirming* 88 Ill. App. 209]. But see Hebard *v.* Mabie, 98 Ill. App. 543, holding that the driver need not prevent them from climbing on vehicle.

Kentucky.— Wathen *v.* Pool, 80 S. W. 439, 25 Ky. L. Rep. 2294.

New York.— Scotti *v.* Behsmann, 81 Hun 604, 30 N. Y. Suppl. 990 (although boy runs in wrong direction); Thies *v.* Thomas, 77 N. Y. Suppl. 276 (holding that, although not exceeding speed limit, extra care is necessary in meeting children).

Pennsylvania.— Brown *v.* Schellenberg, 19 Pa. Super. Ct. 286.

Vermont.— Robinson *v.* Cone, 22 Vt. 213, 54 Am. Dec. 67.

See 25 Cent. Dig. tit. "Highways," § 459 *et seq.*

Whether defendant was negligent in injuring a child is a question for the jury. Kaufman *v.* Bush, 69 N. J. L. 645, 56 Atl. 291; Rottenberg *v.* Segelke, 148 N. Y. 734, 42 N. E. 725 [*affirming* 6 Misc. 3, 25 N. Y. Suppl. 997] (where driver was ignorant that he had knocked down the children); Moskovitz *v.* Lighte, 140 N. Y. 619, 35 N. E. 890 [*affirming* 68 Hun 102, 22 N. Y. Suppl. 732]; Barrett *v.* Smith, 128 N. Y. 607, 28 N. E. 23 [*reversing* 59 N. Y. Super. Ct. 250, 14 N. Y. Suppl. 307]; Birkett *v.* Knickerbocker Ice Co., 110 N. Y. 504, 18 N. E. 108; Murphy *v.* Orr, 96 N. Y. 14; Dehmann *v.* Beck, 61 N. Y. App. Div. 505, 70 N. Y. Suppl. 29; Shoenblum *v.* New York, 58 N. Y. App. Div. 285, 68 N. Y. Suppl. 1005; Pressman *v.* Mooney, 5 N. Y. App. Div. 121, 39 N. Y. Suppl. 44; Cowan *v.* Snyder, 1 Silv. Sup. (N. Y.) 396, 5 N. Y. Suppl. 340; Birnbaum *v.* Lord, 7 Misc. N. Y.) 493, 28 N. Y. Suppl. 17 [*affirming* 6 Misc. 535, 27 N. Y. Suppl. 135]; Finkelstein *v.* Crane, 2 Misc. (N. Y.) 545, 22 N. Y. Suppl. 399; Elze *v.* Baumann, 2 Misc. (N. Y.) 72, 21 N. Y. Suppl. 782 (where horses swerved); McCloskey *v.* Chautauqua Lake Ice Co., 174 Pa. St. 34, 34 Atl. 287; Summers *v.* Bergner Brewing Co., 143 Pa. St. 114, 22 Atl. 707, 24 Am. St. Rep. 518.

32. Riley *v.* Farnum, 62 N. H. 42; Norton *v.* Webber, 69 N. Y. App. Div. 130, 74 N. Y. Suppl. 524 [*affirmed* in 174 N. Y. 514, 66 N. E. 1112]; Campbell *v.* Wood, 22 N. Y. App. Div. 599, 48 N. Y. Suppl. 46 (wire stretched temporarily across street); Anselment *v.* Daniell, 4 Misc. (N. Y.) 144, 23 N. Y. Suppl. 875; Jones *v.* Swift, 30 Wash. 462, 70 Pac. 1109 (knocking barrel on to plaintiff).

Contributory negligence of the workman will bar recovery if the proximate cause. Campbell *v.* Wood, 22 N. Y. App. Div. 599, 48 N. Y. Suppl. 46 (lamp cleaner with back to teams held negligent); Jones *v.* Swift, 30 Wash. 462, 70 Pac. 1109. But see Lyons *v.* Avis, 5 N. Y. App. Div. 193, 38 N. Y. Suppl. 1104.

33. Welsh *v.* Lawrence, 2 Chit. 262, 18 E. C. L. 624; Cotterill *v.* Starkey, 8 C. & P. 691, 34 E. C. L. 965, reins break.

34. Carter *v.* Chambers, 79 Ala. 223. See also Foote *v.* American Product Co., 201 Pa. St. 510, 51 Atl. 364.

35. *Delaware.*— Simeone *v.* Lindsay, 6 Pennew. 224, 65 Atl. 778, holding that one driving an automobile so fast as to lose control of it is negligent.

Kentucky.— Payne *v.* Smith, 4 Dana 497.

New York.— Canton *v.* Simpson, 2 N. Y. App. Div. 561, 38 N. Y. Suppl. 13; Moody *v.* Osgood, 60 Barb. 644 [*affirmed* in 54 N. Y. 488] (mile in three minutes and ten seconds where law limits speed to mile in eleven minutes); Kahn *v.* Eisler, 22 Misc. 350, 49 N. Y. Suppl. 135.

Pennsylvania.— Freel *v.* Wanamaker, 208 Pa. St. 279, 57 Atl. 563.

Tennessee.— State *v.* Battery, 6 Baxt. 545, holding that to run a horse along a public road to the inconvenience of people is a common-law misdemeanor unless necessitated by great danger to property or person from sickness or otherwise.

England.—Mayhew *v.* Sutton, 20 Cox C. C. 146, 71 L. J. K. B. 46, 86 L. T. Rep. N. S. 18, 18 T. L. R. 52, 50 Wkly. Rep. 216; Smith *v.* Boon, 19 Cox C. C. 698, 65 J. P. 486, 84 L. T. Rep. N. S. 593, 17 T. L. R. 472, 49 Wkly. Rep. 480, automobile statute.

See 25 Cent. Dig. tit. "Highways," § 466.

Criminal liability for reckless driving see *infra*, VII, D, 2.

Urgent necessity is no defense to reckless speed. Green *v.* Eden, 24 Ind. App. 583, 56 N. E. 240; Eaton *v.* Cripps, 94 Iowa 176, 62 N. W. 687.

36. *Delaware.*— Ford *v.* Whiteman, 2 Pennew. 355, 45 Atl. 543.

Iowa.— Osborn *v.* Jenkinson, 100 Iowa 432, 69 N. W. 548.

Michigan.— Mahnke *v.* Freer, 126 Mich. 572, 85 N. W. 1099; Potter *v.* Moran, 61 Mich. 60, 27 N. W. 854.

New York.— Hanrahan *v.* Cochran, 12 N. Y. App. Div. 91, 42 N. Y. Suppl. 1031, one crossing street in front of racers held not negligent.

Wisconsin.— Mittelstadt *v.* Morrison, 76 Wis. 265, 44 N. W. 1103.

United States.— See Rahn *v.* Singer Mfg. Co., 26 Fed. 912 [*affirmed* in 132 U. S. 518, 10 S. Ct. 175, 33 L. ed. 440].

See 25 Cent. Dig. tit. "Highways," § 466.

Automobile racing upon public highway see MOTOR VEHICLES, 28 Cyc. 30.

Racing in highway as a crime see *infra*, VII, D, 2.

3. Frightening Horses. A person frightening horses on a highway is not liable for injury resulting therefrom if he has been guilty of no wrong or negligence;[37] but an action lies for negligently frightening horses and so causing damage,[38] as by automobiles.[39] But persons making use of horses as the means of travel or traffic on the highways have no rights therein superior to those who make use of the ways in other permissible modes; improved methods of locomotion are admissible, and cannot be excluded from existing public roads if not inconsistent with the present methods,[40] and thus automobile noises are not of themselves evidence of negligence,[41] although the operator must take care so to operate his machine as not to frighten horses,[42] and must stop on signal,[43] and even without signal on seeing the fright of horses.[44]

4. Runaways; Horses Left Unhitched in the Road.[45] A person is liable where his horses run away on account of his lack of due care,[46] considering the character

37. Myers *v.* Lape, 101 Ill. App. 182 (horse frightened at pony of small size and unusual color); Pigott *v.* Lilly, 55 Mich. 150, 20 N. W. 879 (shouting directions in endeavor to prevent accident); Heist *v.* Jacoby, 71 Nebr. 395, 98 N. W. 1058; Keeley *v.* Shanley, 140 Pa. St. 213, 21 Atl. 305; Piollet *v.* Simmers, 106 Pa. St. 95, 51 Am. Rep. 496 (whitewashing barrel left beside road); *In re* Upper Mahanoy Tp. Road, 2 Chest. Co. Rep. (Pa.) 375 (from steam locomotive).

38. *Indiana.*— Howe *v.* Young, 16 Ind. 312, by reckless and noisy driving.

Iowa.— Schmid *v.* Humphrey, 48 Iowa 652, 30 Am. Rep. 414, by dogs barking.

Kentucky.—Thomas *v.* Royster, 98 Ky. 206, 32 S. W. 613, 17 Ky. L. Rep. 783, driving by in a gallop.

Maine.— Lynn *v.* Hooper, 93 Me. 46, 44 Atl. 127, 47 L. R. A. 752 (hay cap on side of highway); Jewett *v.* Gage, 55 Me. 538, 92 Am. Dec. 615 (hog loose in road).

Michigan.—Barnes *v.* Brown, 95 Mich. 576, 55 N. W. 439, rope dragging.

Minnesota.— Jones *v.* Snow, 56 Minn. 214, 57 N. W. 478, wagon covered with flags.

Missouri.— Haller *v.* St. Louis, 176 Mo. 606, 75 S. W. 613; Forney *v.* Geldmacher, 75 Mo. 113, 42 Am. Rep. 388 (turning hose on horses); Atkinson *v.* Illinois Milk Co., 44 Mo. App. 153 (driving rapidly up with decorated horse to horse standing).

New York.— Buchanan *v.* Cranford Co., 112 N. Y. App. Div. 278, 98 N. Y. Suppl. 378, whistle on steam roller.

See 25 Cent. Dig. tit. "Highways," § 469.

One transporting unusual articles in a highway should give suitable warning of that fact. McCann *v.* Consolidated Traction Co., 59 N. J. L. 481, 36 Atl. 888, 38 L. R. A. 236; Bennett *v.* Lovell, 12 R. I. 166, 34 Am. Rep. 628.

39. Mason *v.* West, 61 N. Y. App. Div. 40, 70 N. Y. Suppl. 478.

Contributory negligence.— One riding in a carriage who saw that the horses were frightened at an approaching automobile was not guilty of contributory negligence in remaining in the carriage. McIntyre *v.* Orner, 166 Ind. 57, 76 N. E. 750, 117 Am. St. Rep. 359, 4 L. R. A. N. S. 1130.

40. Macomber *v.* Nichols, 34 Mich. 212, 22 Am. Rep. 522.

41. House *v.* Cramer, 134 Iowa 374, 112 N. W. 3, 10 L. R. A. N. S. 655 (engine running while operator leaves car temporarily); Hall *v.* Compton, 130 Mo. App. 675, 108 S. W. 1122; O'Donnell *v.* O'Neill, 130 Mo. App. 360, 109 S. W. 815 (where operator backed machine away and stopped as soon as the horse showed fright); Davis *v.* Maxwell, 108 N. Y. App. Div. 128, 96 N. Y. Suppl. 45 (where horse displayed no sign of fright till automobile got opposite).

42. McIntyre *v.* Orner, 166 Ind. 57, 76 N. E. 750, 117 Am. St. Rep. 359, 4 L. R. A. N. S. 1130; Indiana Springs Co. *v.* Brown, 165 Ind. 465, 74 N. E. 615, 1 L. R. A. N. S. 238; Brinkman *v.* Pacholke, 41 Ind. App. 662, 84 N. E. 762; House *v.* Cramer, 134 Iowa 374, 112 N. W. 3, 10 L. R. A. N. S. 655.

43. *Illinois.*— Ward *v.* Meredith, 220 Ill. 66, 77 N. E. 118 [*affirming* 122 Ill. App. 159].

Indiana.— State *v.* Goodwin, 169 Ind. 265, 82 N. E. 459, statutory signal to stop may be given by any occupant.

Maine.— Towle *v.* Morse, 103 Me. 250, 68 Atl. 1044.

Minnesota.— Mahoney *v.* Maxfield, 102 Minn. 377, 113 N. W. 904, 14 L. R. A. N. S. 251, holding, however, that the automobile driver need not necessarily stop engine.

New York.— Murphy *v.* Wait, 102 N. Y. App. Div. 121, 92 N. Y. Suppl. 253.

See 25 Cent. Dig. tit. "Highways," § 469.

But see Hall *v.* Compton, 130 Mo. App. 675, 108 S. W. 1122, where horse unexpectedly became frightened when stopping machine would have been of no help.

44. Walkup *v.* Beebe, 139 Iowa 395, 116 N. W. 321; Strand *v.* Grinnell Automobile Garage Co., 136 Iowa 68, 113 N. W. 488.

45. Leaving motor vehicle unattended see Motor Vehicles, 28 Cyc. 30.

46. Ford *v.* Whiteman, 2 Pennew. (Del.) 355, 45 Atl. 543 (rapid and careless driving); Bigelow *v.* Reed, 51 Me. 325 (although falling of icicles frightened horses); Hall *v.* Huber, 61 Mo. App. 384 (where team is vicious); West *v.* Woodruff, 112 N. Y. App. Div. 133, 97 N. Y. Suppl. 1054; Lynch *v.* Brooklyn City R. Co., 1 Silv. Sup. (N. Y.) 361, 5 N. Y. Suppl. 311 [*affirmed* in 123 N. Y. 657, 25 N. E. 955].

of the horse,[47] or under some circumstances, when the driver could not control the horse,[48] or where the horse was left on the highway unattended and unhitched.[49]

The burden of proving negligence in allowing horses to run away is upon the one injured. Garlick *v.* Dorsey, 48 Ala. 220; O'Brien *v.* Miller, 60 Conn. 214, 22 Atl. 544, 25 Am. St. Rep. 320; Simeone *v.* Lindsay, 6 Pennew. (Del.) 224, 65 Atl. 778; Robinson *v.* Simpson, 8 Houst. (Del.) 398, 32 Atl. 287; Brettman *v.* Braun, 37 Ill. App. 17; Bennett *v.* Ford, 47 Ind. 264; Birdsell Mfg. Co. *v.* Loughman, 26 Ind. App. 359, 59 N. E. 872 (nut working off a bolt); Cunningham *v.* Belknap, 60 S. W. 837, 22 Ky. L. Rep. 1580; Shawhan *v.* Clarke, 24 La. Ann. 390; New Orleans *v.* Heres, 23 La. Ann. 782; McGahie *v.* McClennen, 86 N. Y. App. Div. 263, 83 N. Y. Suppl. 692; Kahn *v.* Eisler, 22 Misc. (N. Y.) 350, 49 N. Y. Suppl. 135; Gray *v.* Tompkins, 15 N. Y. Suppl. 953; Coller *v.* Knox, 222 Pa. St. 362, 71 Atl. 539, 23 L. R. A. N. S. 171; Kennedy *v.* Way, Brightly (Pa.) 186; Fleming *v.* Anawomscott Mills, 22 R. I. 211, 47 Atl. 215 (driving green horse at night at speed). The circumstances may, however, be such that negligence will be presumed. Gannon *v.* Wilson, 1 Pa. Cas. 422, 5 Atl. 381, horse found running on street.

Negligence held not to have existed see Holliday *v.* Gardner, 27 Ind. App. 231, 59 N. E. 686, 61 N. E. 16; Hausser *v.* Ader, 108 La. 108, 32 So. 366.

It is for the jury to determine the cause of the runaway (Lynch *v.* Brooklyn City R. Co., 123 N. Y. 657, 25 N. E. 955) and the question of negligence (West *v.* Woodruff, 112 N. Y. App. Div. 133, 97 N. Y. Suppl. 1054).

47. Benoit *v.* Troy, etc., R. Co., 77 Hun (N. Y.) 576, 28 N. Y. Suppl. 1024; Lynch *v.* Kineth, 36 Wash. 368, 78 Pac. 923, 104 Am. St. Rep. 958 (holding that more care is required in driving dangerous horses); Huntoon *v.* Trumbull, 12 Fed. 844, 2 McCrary 314.

Negligence see Hall *v.* Huber, 61 Mo. App. 384; Trow *v.* Thomas, 70 Vt. 580, 41 Atl. 652.

No negligence see Cadwell *v.* Arnheim, 152 N. Y. 182, 46 N. E. 310 [*reversing* 81 Hun 39, 30 N. Y. Suppl. 573] (where horse was frightened by being struck by gravel); Young *v.* Cowden, 98 Tenn. 577, 40 S. W. 1088 (horse which had on rare occasions shied).

Scienter held not shown see Vonderhorst Brewing Co. *v.* Amrhine, 98 Md. 406, 56 Atl. 833 (from fact that horses had run away previously when water squirted on them); Creamer *v.* McIlvain, 89 Md. 343, 43 Atl. 935, 73 Am. St. Rep. 186, 45 L. R. A. 531.

The driver of a horse need not discontinue his drive simply because the horse, which has always been gentle and easily managed, shows signs of being unruly. Creamer *v.* McIlvain, 89 Md. 343, 43 Atl. 935, 73 Am. St. Rep. 186, 45 L. R. A. 531.

48. Holmes *v.* Halde, 74 Me. 28, 43 Am. Rep. 567. And see Foster *v.* Goddard, 40 Me. 64. But see Haines *v.* Keahon, 46 N. Y. App. Div. 164, 61 N. Y. Suppl. 757, holding that there is no negligence where the horse suddenly swerved on being struck by a wagon.

Whether a runaway team can be kept on the proper side of the road by the coachman is a question for the jury. Cadwell *v.* Arnheim, 81 Hun (N. Y.) 39, 30 N. Y. Suppl. 573 [*affirmed* in 152 N. Y. 182, 46 N. E. 310].

49. *Colorado.*— Pierce *v.* Conners, 20 Colo. 178, 37 Pac. 721, 46 Am. St. Rep. 279, spirited horses.

Delaware.— Higgins *v.* Wilmington City Ry. Co., 1 Marv. 352, 41 Atl. 86; Jones *v.* Belt, 8 Houst. 562, 32 Atl. 723.

Georgia.— Phillips *v.* Dewald, 79 Ga. 732, 7 S. E. 151, 11 Am. St. Rep. 458.

Kansas.— Moulton *v.* Aldrich, 28 Kan. 300.

Louisiana.— Gambelli *v.* F. Johnson, etc., Co., 115 La. 483, 39 So. 501.

Minnesota.— Griggs *v.* Fleckenstein, 14 Minn. 81, 100 Am. Dec. 199.

Missouri.— Groom *v.* Kavanagh, 97 Mo. App. 362, 71 S. W. 362 (where defendant knew team to be high spirited); Becker *v.* Schutte, 85 Mo. App. 57 (holding an action founded on an ordinance really an action for negligence).

New York.— Dickson *v.* McCoy, 39 N. Y. 400; Kelly *v.* Adelmann, 72 N. Y. App. Div. 590, 76 N. Y. Suppl. 574 (*prima facie* negligent); Manthey *v.* Rauenbuehler, 71 N. Y. App. Div. 173, 75 N. Y. Suppl. 714; Watters *v.* John Simmons Co., 59 N. Y. App. Div. 616, 69 N. Y. Suppl. 325 (where plaintiff's horse standing unattended shied); Pearl *v.* Macaulay, 6 N. Y. App. Div. 70, 39 N. Y. Suppl. 472; Wasmuth *v.* Butler, 86 Hun 1, 33 N. Y. Suppl. 108; Doherty *v.* Sweetser, 82 Hun 556, 31 N. Y. Suppl. 649; Howley *v.* Kraemer, 36 Misc. 190, 73 N. Y. Suppl. 142; Wagner *v.* New York Condensed Milk Co., 21 Misc. 62, 46 N. Y. Suppl. 939; Rompillon *v.* Abbott, 1 N. Y. Suppl. 662.

Texas.— Houston Transfer Co. *v.* Renard, (Civ. App. 1904) 79 S. W. 838.

Utah.— Griffiths *v.* Clift, 4 Utah 462, 11 Pac. 609.

Vermont.— Rumsey *v.* Nelson, 58 Vt. 590, 3 Atl. 484.

Virginia.— Bowen *v.* Flanagan, 84 Va. 313, 4 S. E. 724.

Canada.— Laflamme *v.* Staines, 18 Quebec Super. Ct. 105.

See 25 Cent. Dig. tit. "Highways," § 468.

Presumption; evidence.— Leaving a team unhitched and unattended may be presumed to be negligent (Davis *v.* Kallfelz, 22 Misc. (N. Y.) 602, 50 N. Y. Suppl. 928), and is certainly evidence of negligence (Hensley *v.* Davidson Bros. Co., (Iowa 1905) 103 N. W. 975; Prieur *v.* E. H. Stafford Co., 126 Mich. 169, 85 N. W. 469; Doyle *v.* Detroit Omnibus Line Co., 105 Mich. 195, 62 N. W. 1031; Courternier *v.* Secombe, 8 Minn. 299; Hill *v.* Scott, 38 Mo. App. 370; Koonz *v.* New York Mail Co., 72 N. J. L. 530, 63 Atl. 341; Howley *v.* Kraemer, 36 Misc. (N. Y.) 190,

or improperly hitched,[50] or attended only by one incapable of controlling the horse,[51] and it is commonly not negligent to fail to avoid runaways,[52] or to attempt to stop them.[53]

5. Traction Engines; Automobiles.[54] Due care must be used in the management of traction engines[55] and automobiles,[56] taking into account all the circumstances, and in view of the statutes.[57]

6. Contributory or Imputed Negligence.[58] Contributory negligence on the part of the person injured proximately causing the injury will bar recovery by him,[59]

73 N. Y. Suppl. 142), but may not be necessarily under all circumstances conclusive proof of negligence (Broult *v.* Hanson, 158 Mass. 17, 32 N. E. 900, where horse standing was run into; Griggs *v.* Fleckenstein, 14 Minn. 81, 100 Am. Dec. 199; Belles *v.* Kellner, 66 N. J. L. 561, 48 Atl. 1010; Potter, etc., Co. *v.* New York Cent., etc., R. Co., 22 Misc. (N. Y.) 10, 48 N Y Suppl. 446).

Proof that the owner knew of a habit of running away is unnecessary. Haywood *v.* Hamm, 77 Conn. 158, 58 Atl. 695.

50. *Colorado.*— Denver *v.* Utzler, 38 Colo. 300, 88 Pac. 143, 8 L. R. A. N. S. 77.

Indiana.— Wagner *v.* Goldsmith, 78 Ind. 517, hitched by the lines only.

Michigan.— Sinsabaugh *v.* Brown, 126 Mich. 538, 85 N. W. 1110; Le Baron *v.* Joslin, 41 Mich. 313, 2 N. W. 36.

Missouri.— Becker *v.* Schutte, 85 Mo. App. 57.

New York.— Thompson *v.* Plath, 44 N. Y. App. Div. 291, 60 N. Y. Suppl. 621; Pearl *v.* Macaulay, 6 N. Y. App. Div. 70, 39 N Y. Suppl. 472; McCahill *v.* Kipp, 2 E. D. Smith 413.

Vermont.— Rumsey *v.* Nelson, 58 Vt. 590, 3 Atl. 484.

See 25 Cent. Dig. tit. "Highways," § 468.

Hitching held not negligent see Caughlin *v.* Campbell-Sell Baking Co., 39 Colo. 148, 89 Pac. 53, 121 Am. St. Rep. 158, 8 L. R. A. N. S. 1001 (weight of fifty-six pounds attached to horse); Belles *v.* Kellner, 67 N. J. L. 255, 51 Atl. 700, 54 Atl. 99, 91 Am. St. Rep. 429, 57 L. R. A. 627 [*affirming* 66 N. J. L. 561, 48 Atl. 1010] (holding that a gentle horse need not be tied); Davis *v.* Kallfelz, 22 Misc. (N. Y.) 602, 50 N. Y. Suppl. 928 (although in violation of an ordinance); Wagner *v.* New York Condensed Milk Co., 21 Misc. (N. Y.) 62, 46 N. Y. Suppl. 939.

51. Miller *v.* Strivens, 48 Nebr. 458, 67 N. W. 458 (cripple); Frazer *v.* Kimler, 2 Hun (N. Y.) 514, 5 Thomps. & C. 16 (a boy).

52. *Indiana.*— Scofield *v.* Myers, 27 Ind. App. 375, 60 N. E. 1005.

Kansas.— Moulton *v.* Aldrich, 28 Kan. 300, holding that one need not look behind to discover runaway team.

Massachusetts.— Greenwood *v.* Callahan, 111 Mass. 298.

Washington.— Abby *v.* Wood, 43 Wash. 379, 86 Pac. 558.

Canada.— Stout *v.* Adams, 35 N. Brunsw. 118, although defendant is on the wrong side of the road.

See 25 Cent. Dig. tit. "Highways," § 468.

53. Manthey *v.* Rauenbuehler, 71 N. Y. App. Div. 173, 75 N. Y. Suppl. 714, unless the effort is rash and reckless. But see Flett *v.* Coulter, 5 Ont. L. Rep. 375, 2 Ont. Wkly. Rep. 142.

54. See, generally, Motor Vehicles, 28 Cyc. 27, 31.

55. Miller *v.* Addison, 96 Md. 731, 54 Atl. 967; Macomber *v.* Nichols, 34 Mich. 212, 22 Am. Rep. 522, holding also that due care is a question for the jury.

56. Christy *v.* Elliott, 216 Ill. 31, 74 N. E. 1035, 108 Am. St. Rep. 196, 1 L. R. A. N. S. 215; Needy *v.* Littlejohn, 137 Iowa 704, 115 N. W. 483. See also Davis *v.* Maxwell, 108 N. Y. App. Div. 128, 96 N. Y. Suppl. 45. And see *supra*, VII, C, 3.

Defendant's negligence is a question for the jury. Brinkman *v.* Pacholke, 41 Ind. App. 662, 84 N. E. 762; Horak *v.* Dougherty, (Iowa 1908) 114 N. W. 883; Strand *v.* Grinnell Automobile Garage Co., 136 Iowa 68, 113 N. W. 488; Weiskopf *v.* Ritter, 97 S. W. 1120, 29 Ky. L. Rep. 1268 (whether automobilist guilty of gross negligence); Gifford *v.* Jennings, 190 Mass. 54, 76 N. E. 233; Wright *v.* Crane, 142 Mich. 508, 106 N. W. 71 (whether negligent to run automobile at night without a headlight); Hall *v.* Compton, 130 Mo. App. 675, 108 S. W. 1122; Rochester *v.* Bull, 78 S. C. 249, 58 S. E. 766; Garside *v.* New York Transp. Co., 146 Fed. 588.

57. McFern *v.* Gardner, 121 Mo. App. 1, 97 S. W. 972.

58. Rule applied to use of city streets see Municipal Corporations, 28 Cyc. 913.

Contributory negligence barring recovery for injury by automobile see Motor Vehicles, 28 Cyc. 37.

59. *Maine.*— Coombs *v.* Purrington, 42 Me. 332; Kennard *v.* Burton, 25 Me. 39, 43 Am. Dec. 249.

Massachusetts.— Counter *v.* Couch, 8 Allen 436.

Michigan.— La Pontney *v.* Shedden Cartage Co., 116 Mich. 514, 74 N. W. 712 (by motorman on foggy night); Daniels *v.* Clegg, 28 Mich. 32.

Missouri.— Schaabs *v.* Woodburn Sarven Wheel Co., 56 Mo. 173.

New Hampshire.—Brooks *v.* Hart, 14 N. H. 307.

New Jersey.— Menger *v.* Laur, 55 N. J. L. 205, 26 Atl. 180, 20 L. R. A. 61, where defendant ran over plaintiff's transit carelessly left in road.

New York.— Gray *v.* Second Ave. R. Co., 34 N. Y. Super. Ct. 519 [*affirmed* in 65 N Y. 561]; Jacobs *v.* Duke, 1 E. D. Smith 271;

even though he is a child,[60] or is infirm,[61] and the same rule applies where the

Harpell *v.* Curtis, 1 E. D. Smith 78; Kettle *v.* Turl, 13 Misc. 156, 34 N. Y. Suppl. 75 [*reversed* on other grounds in 162 N. Y. 255, 156 N. E. 626]; Eckensberger *v.* Amend, 10 Misc. 145, 30 N. Y. Suppl. 915 [*reversing* 7 Misc. 452, 27 N. Y. Suppl. 941], where child fell in street where it could see defendant's team.

Pennsylvania.— Pryor *v.* Valer, 9 Phila. 95.

Vermont.— Howard *v.* Tyler, 46 Vt. 683; Washburn *v.* Tracy, 2 D. Chipm. 128, 15 Am. Dec. 661.

Wisconsin.— Mills *v.* Conley, 110 Wis. 525, 86 N. W. 203.

United States.—Bierbach *v.* Goodyear Rubber Co., 14 Fed. 826.

See 25 Cent. Dig. tit. "Highways," § 460.

Vehicles having the right of way must be avoided by turning out and a failure to do this is contributory negligence. Smith *v.* American S. P. C. A., 7 Misc. (N. Y.) 158, 27 N. Y. Suppl. 315, ambulance.

That defendant's negligence is gross does not affect the rule. Mangam *v.* Brooklyn City R. Co., 36 Barb. (N. Y.) 230 [*affirmed* in 38 N. Y. 455, 98 Am. Dec. 66].

Question for jury.—Contributory negligence in a collision is a question for the determination of the jury (Blakeslee's Express, etc., Co. *v.* Ford, 215 Ill. 230, 74 N. E. 135 [*affirming* 106 Ill. App. 109]; Standard Oil Co. *v.* Hartman, 102 Md. 563, 62 Atl. 805; Vonderhorst Brewing Co. *v.* Amrhine, 98 Md. 406, 56 Atl. 833; Meaney *v.* Kehoe, 181 Mass. 424, 63 N. E. 925; Hall *v.* Ripley, 119 Mas. 135; Fox *v.* Sackett, 10 Allen (Mass.) 535, 87 Am. Dec. 682; McFern *v.* Gardner, 121 Mo. App. 1, 97 S. W. 972; Bachmann *v.* Paul Weidmann Brewing Co., 80 N. Y. App. Div. 634, 80 N. Y. Suppl. 931; Hubner *v.* Metropolitan St. R. Co., 77 N. Y. App. Div. 290, 79 N. Y. Suppl. 153 [*affirmed* in 177 N. Y. 523, 69 N. E. 1124]; Lonergan *v.* Martin, 4 Misc. (N. Y.) 624, 23 N. Y. Suppl. 968; Morgan *v.* Pleshek, 120 Wis. 306, 97 N. W. 916. See also Holliday *v.* Gardner, 27 Ind. App. 231, 59 N. E. 686, 61 N. E. 16; Lee *v.* Foley, 113 La. 663, 37 So. 594), as is also the contributory negligence of a pedestrian (Wolskill *v.* Los Angeles R. Co., 129 Cal. 114, 61 Pac. 775; Kendall *v.* Kendall, 147 Mass. 482, 18 N. E. 233; Graham *v.* Evening Press Co., 135 Mich. 298, 97 N. W. 697; Stroub *v.* Meyer, 132 Mich. 75, 92 N. W. 779; Groom *v.* Kavanagh, 97 Mo. App. 362, 71 S. W. 362; Bresnehan *v.* Gove, 71 N. H. 236, 51 Atl. 916; McManus *v.* Woolverton, 138 N. Y. 648, 34 N. E. 513 [*affirming* 19 N. Y. Suppl. 545]; Sheehy *v.* Burger, 62 N. Y. 558, failure to estimate sweep of planks dragging; Griffin *v.* Bell, 119 N. Y. App. Div. 673, 104 N. Y. Suppl. 295; Connaughton *v.* Sun Printing, etc., Assoc., 73 N. Y. App. Div. 316, 76 N. Y. Suppl. 755; Kelly *v.* Adelmann, 72 N. Y. App. Div. 590, 76 N. Y. Suppl. 574; Nead *v.* Roscoe Lumber Co., 54 N. Y. App. Div. 621, 66 N. Y. Suppl. 419; Welling *v.* Judge, 40 Barb. (N. Y.) 193; Deegan *v.* Cappel, 1 Silv. Sup. (N. Y.) 563, 6 N. Y. Suppl. 166; Wiel *v.* Wright, 8 N. Y. Suppl. 776; Thompson *v.* National Express Co., 66 Vt. 358, 29 Atl. 311; Mills *v.* Conley, 110 Wis. 525, 86 N. W. 203; Vollner *v.* Berens, 50 Wis. 494, 7 N. W. 371; Garside *v.* New York Transp. Co., 146 Fed. 588), and where an automobile frightens horses (McIntyre *v.* Orner, 166 Ind. 57, 76 N. E. 750, 117 Am. St. Rep. 359, 4 L. R. A. N. S. 1130; Strand *v.* Grinnell Automobile Garage Co., 136 Iowa 68, 113 N. W. 488; Murphy *v.* Wait, 102 N. Y. App. Div. 121, 92 N. Y. Suppl. 253; Shaffer *v.* Coleman, 35 Pa. Super. Ct. 386).

60. Hoff *v.* Hahn, 73 S. W. 1015, 24 Ky. L. Rep. 2267; Montfort *v.* Schmidt, 36 La. Ann. 750, **child** running under mule; Young *v.* Small, 188 Mass. 4, 73 N. E. 1019, 108 Am. St. Rep. 457 (absorbed in play, running under team); Clinton *v.* Boston Beer Co., 164 Mass. 541, 41 N. E. 1070; Messenger *v.* Dennie, 141 Mass. 335, 5 N. E. 283, 137 Mass. 197, 50 Am. Rep. 295; Dehmann *v.* Beck, 61 N. Y. App. Div. 505, 70 N. Y. Suppl. 29 (negligence of parents of child); Hartfield *v.* Roper, 21 Wend. (N. Y.) 615, 34 Am. Dec. 273 (child allowed unattended in street).

The question of the child's contributory negligence is for the jury. Glickson *v.* Shannon, 88 Ill. App. 240; O'Brien *v.* Hudner, 182 Mass. 381, 65 N. E. 788 (not seeing team approaching on the wrong side of the street); Johnson *v.* Kelleher, 155 Mass. 125, 29 N. E. 200; Brown *v.* Sherer, 155 Mass. 83, 29 N. E. 50 ("skipping" across street); Dealey *v.* Muller, 149 Mass. 432, 21 N. E. 763; O'Shaughnessy *v.* Suffolk Brewing Co., 145 Mass. 569, 14 N. E. 779; Mattey *v.* Whittier Mach. Co., 140 Mass. 337, 4 N. E. 575; Turner *v.* Hall, 74 N. J. L. 214, 64 Atl. 1060; Moskovitz *v.* Lighte, 140 N. Y. 619, 35 N. E. 890 [*affirming* 68 Hun 102, 22 N. Y. Suppl. 732]; Keller *v.* Haaker, 2 N. Y. App. Div. 245, 37 N. Y. Suppl. 792; Scotti *v.* Behsmann, 81 Hun (N. Y.) 604, 30 N. Y. Suppl. 990; Eckensberger *v.* Amend, 10 Misc. (N. Y.) 145, 30 N. Y. Suppl. 915 [*reversing* 7 Misc. 452, 27 N. Y. Suppl. 941]; Birnbaum *v.* Lord, 7 Misc. (N. Y.) 493, 28 N. Y. Suppl. 17 [*affirming* 6 Misc. 535, 27 N. Y. Suppl. 135]; Finkelstein *v.* Crane, 2 Misc. (N. Y.) 545, 22 N. Y. Suppl. 399; Thies *v.* Thomas, 77 N. Y. Suppl. 276 (playing in street); Summers *v.* Bergner Brewing Co., 143 Pa. St. 114, 22 Atl. 707, 24 Am. St. Rep. 518 (holding that there is no inference of negligence from the fact that the child is found between the horses's legs).

61. See *infra*, this note.

A deaf person should be more careful than one who can hear. Fenneman *v.* Holden, 75 Md. 1, 22 Atl. 1049.

A blind man should use ordinary care in view of his infirmities. Neff *v.* Wellesley, 148 Mass. 487, 20 N. E. 111, 2 L. R. A. 500, holding, however, that it is not, as matter of law, negligence for a blind person to walk unattended on a public road.

negligence of plaintiff's driver is imputed to him.[62] Negligence on the part of the injured not proximately contributing to the injury is no defense;[63] and the mere fact that the injured person made a wrong choice in an emergency caused by defendant's negligence is not contributory negligence.[64]

D. Actions and Proceedings For Misuse — 1. Civil — a. Pleading[65] and Proof. The declaration in an action for an injury on a highway should specify the negligence relied on,[66] and a declaration on a statute must set out all the requirements of the statute.[67] The evidence must substantially conform to and support the pleadings.[68]

b. Evidence — (i) *Burden of Proof.*[69] The burden is upon plaintiff to prove that defendant was negligent,[70] and in those states which in actions for

62. See Negligence, 29 Cyc. 547 *et seq.* See also Motor Vehicles, 28 Cyc. 38.

63. *Delaware.*— Jones *v.* Belt, 8 Houst. 562, 32 Atl. 723.

Maine.— Kennard *v.* Burton, 25 Me. 39, 43 Am. Dec. 249, holding that if plaintiff's carelessness did not contribute to the injury he may recover.

Maryland.— Grabrues *v.* Klein, 81 Md. 83, 31 Atl. 504.

Massachusetts.— Spofford *v.* Harlow, 3 Allen 176, riding on fender or platform of omnibus sleigh.

Michigan.— Cleveland *v.* Newsom, 45 Mich. 62, 7 N. W. 222.

New York.— Connolly *v.* Knickerbocker Ice Co., 114 N. Y. 104, 21 N. E. 101, 11 Am. St. Rep. 617; Canton *v.* Simpson, 2 N. Y. App. Div. 561, 38 N. Y. Suppl. 13 (although plaintiff in his fright turns in the wrong direction); Center *v.* Finney, 17 Barb. 94; Anselment *v.* Daniell, 4 Misc. 144, 23 N. Y. Suppl. 875 (workman on road).

See 25 Cent. Dig. tit. "Highways," § 460.

Looking behind is unnecessary by one walking on the highway. Undhejem *v.* Hastings, 38 Minn. 485, 38 N. W. 488; Wiel *v.* Wright, 8 N. Y. Suppl. 776.

64. *Michigan.*— Tyler *v.* Nelson, 109 Mich. 37, 66 N. W. 671.

New York.— Scotti *v.* Behsmann, 81 Hun 604, 30 N. Y. Suppl. 990; Schimpf *v.* Sliter, 64 Hun 463, 19 N. Y. Suppl. 644.

North Carolina.— Crampton *v.* Ivie, 124 N. C. 591, 32 S. E. 968.

Pennsylvania.— Vallo *v.* U. S. Express Co., 147 Pa. St. 404, 23 Atl. 594, 30 Am. St. Rep. 741, 14 L. R. A. 743.

United States.— Bierbach *v.* Goodyear Rubber Co., 14 Fed. 826.

See 25 Cent. Dig. tit. "Highways," § 460. See also Motor Vehicles, 28 Cyc. 37.

65. **Pleading in action for negligent injury by motor vehicle** see Motor Vehicles, 28 Cyc. 45.

66. *Indiana.*— Holland *v.* Bartch, 120 Ind. 46, 22 N. E. 83, 16 Am. St. Rep. 307; Van Camp Hardware, etc., Co. *v.* O'Brien, 28 Ind. App. 152, 62 N. E. 464; Hindman *v.* Timme, 8 Ind. App. 416, 35 N. E. 1046.

Iowa.— Meek *v.* Barton, 123 Iowa 601, 99 N. W. 177.

Maryland.— Fletcher *v.* Dixon, 107 Md. 420, 68 Atl. 875.

Michigan.—Sinsabaugh *v.* Brown, 126 Mich. 538, 85 N. W. 1110; Post *v.* U. S. Express Co., 76 Mich. 574, 43 N. W. 636. See also Bradford *v.* Ball, 38 Mich. 673.

Missouri.— Taylor *v.* Scherpe, etc., Architectural Iron Co., 133 Mo. 349, 34 S. W. 581, holding also that wilfulness must be plainly set out.

New York.— Burdick *v.* Worrall, 4 Barb. 596.

Wisconsin.— Hanson *v.* Anderson, 90 Wis. 195, 62 N. W. 1055.

See 25 Cent. Dig. tit. "Highways," § 471.

67. Rowell *v.* Crothers, 75 Conn. 124, 52 Atl. 818 (holding that it must allege that defendant was driving vehicle "for the conveyance of persons" to recover treble damages under statute); Stevens *v.* Kelley, 66 Conn. 570, 34 Atl. 502.

68. Trout Brook Ice, etc., Co. *v.* Hartford Electric Light Co., 77 Conn. 338, 59 Atl. 405; Hoyt *v.* Garlock, 145 Mich. 632, 108 N. W. 1074.

No material variance found see Brinkman *v.* Pacholke, 41 Ind. App. 662, 84 N. E. 762; Robbins *v.* Diggins, 78 Iowa 521, 43 N. W. 306; Neal *v.* Rendall, 100 Me. 574, 62 Atl. 706 (holding that evidence that defendant's team is slower than plaintiff's is not a fatal variance from declaration that defendant's team ran into plaintiff's team); Wolf *v.* Hemrich Bros. Brewing Co., 28 Wash. 187, 68 Pac. 440. See also Motor Vehicles, 28 Cyc. 47.

69. **Burden of proof in action for injury by motor vehicle** see Motor Vehicles, 28 Cyc. 46.

70. *Connecticut.*— Button *v.* Frink, 51 Conn. 342, 50 Am. Rep. 24.

Delaware.— Simeone *v.* Lindsay, 6 Pennew. 224, 65 Atl. 778.

Illinois.— Brettman *v.* Braun, 37 Ill. App. 17, runaway horses.

Maryland.— Miller *v.* Addison, 96 Md. 731, 54 Atl. 967.

Massachusetts.— Lane *v.* Crombie, 12 Pick. 177.

Missouri.— Lee *v.* Jones, 181 Mo. 291, 79 S. W. 927, 103 Am. St. Rep. 596, holding that there is no inference of negligence of bicyclist, although plaintiff was a child and defendant a man.

Pennsylvania.— Waters *v.* Wing, 59 Pa. St. 211; Hershberger *v.* Lynch, 9 Pa. Cas. 91, 11 Atl. 642.

See 25 Cent. Dig. tit. "Highways," § 472.

Shifting burden.— Proof by plaintiff of accident from defendant's team running away,

negligence require plaintiff to negative contributory negligence, the burden is on plaintiff to prove the absence of such negligence,[71] although the rule is otherwise and the burden of proving contributory negligence is upon defendant where contributory negligence is considered a defense.[72] The burden is on defendant to show that the driver of the vehicle in which he was was not his agent or servant.[73]

(II) *Admissibility; Weight and Sufficiency.*[74] As in other civil actions, plaintiff must prove the facts necessary to recovery by a preponderance [75] of competent, material, and relevant [76] evidence. That the driver was a careful

without a driver, on a public road, makes a *prima facie* case of negligence, putting the burden of explanation on defendant. Gorsuch *v.* Swan, 109 Tenn. 36, 69 S. W. 1113, 97 Am. St. Rep. 836.

71. *Connecticut.*—Park *v.* O'Brien, 23 Conn. 339.

Massachusetts.— Counter *v.* Couch, 8 Allen 436; Lane *v.* Crombie, 12 Pick. 177.

Michigan.— Myers *v.* Hinds, 110 Mich. 300, 68 N. W. 156, 64 Am. St. Rep. 345, 33 L. R. A. 356, holding that the burden is on the bicyclist who strikes the pedestrian from behind to show that he is not negligent.

New Hampshire.— Nadeau *v.* Sawyer, 73 N. H. 70, 59 Atl. 369.

New York.— See Finkelstein *v.* Crane, 2 Misc. 545, 22 N. Y. Suppl. 399.

See 25 Cent. Dig. tit. "Highways," § 472. And see, generally, Negligence, 29 Cyc. 601.

The evidence cannot be mathematically balanced. Moody *v.* Osgood, 54 N. Y. 488.

72. Standard Oil Co. *v.* Hartman, 102 Md. 563, 62 Atl. 805.

73. Vonderhorst Brewing Co. *v.* Amrhine, 98 Md. 406, 56 Atl. 833.

74. **Admissibility and sufficiency of evidence in action for injury by motor vehicle** see Motor Vehicles, 28 Cyc. 47.

75. Bigelow *v.* Reed, 51 Me. 325; Scribner *v.* Kelley, 38 Barb. (N. Y.) 14, horse frightened at an elephant. See also Cook *v.* Fogarty, 103 Iowa 500, 72 N. W. 677, 39 L. R. A. 488.

Evidence held sufficient see Reichmann *v.* Baier, 46 Ill. App. 346 (that defendant's forewheel struck plaintiff's rear wheel); Kleihauer *v.* Shedd, (Iowa 1905) 102 N. W. 497 (of unlawful driving); Patten *v.* Paul, (Me. 1886) 7 Atl. 267; Vonderhorst Brewing Co. *v.* Amrhine, 98 Md. 406, 56 Atl. 833 (holding that the fact that a vehicle bore defendant's name is sufficient to show ownership); Seiter *v.* Bischoff, 63 Mo. App. 157 (inference of negligence from circumstances); Dickey *v.* Kurzenberger, 8 N. J. L. J. 306; Van Houten *v.* Fleischmann, 142 N. Y. 624, 37 N. E. 565 [*affirming* 1 Misc. 130, 20 N. Y. Suppl. 643] (that one driving at speed was negligent); Kelly *v.* Adelmann, 72 N. Y. App. Div. 590, 76 N. Y. Suppl. 574 (of identity); Mooney *v.* Trow Directory, etc., Co., 2 Misc. (N. Y.) 238, 21 N. Y. Suppl. 957 (that horse was severely injured and could not be stopped for some time); Moriarty *v.* Zepp, 17 N. Y. Suppl. 28; Baumann *v.* Gilmour, 10 N. Y. Suppl. 534 (truck turning into light wagon); Pick *v.* Thurston, 25 R. I. 36, 54 Atl. 600 (that plaintiff was riding on left side of road); Jones *v.* Swift, 30 Wash. 462, 70 Pac. 1109 (identity).

Evidence held insufficient see O'Brien *v.* Miller, 60 Conn. 214, 22 Atl. 544, 25 Am. St. Rep. 320 (no evidence of cause of accident); Perrin *v.* Devendorf, 22 Ill. App. 284; Walkup *v.* May, 9 Ind. App. 409, 36 N. E. 917; Strand *v.* Grinnell Automobile Garage Co., 136 Iowa 68, 113 N. W. 488 (holding that evidence as to the condition of a highway three hundred feet away from where accident occurred is too remote); Stock *v.* Wood, 136 Mass. 353; Munroe *v.* Leach, 7 Metc. (Mass.) 274 (holding that evidence that the drivers of two coaches on the same route mutually attempted, several times, to intercept each other's progress by "cutting each other off," is not sufficient to prove that, in a subsequent collision on the same trip, they were both in fault); Richard *v.* Sanford, 78 Hun (N. Y.) 133, 28 N. Y. Suppl. 956 (lacking proof that horse or wagon knocked down plaintiff); Dudley *v.* Westcott, 18 N. Y. Suppl. 130 [*reversing* 15 N. Y. Suppl. 952] (holding that evidence that a wagon was being driven too fast was immaterial where accident would have happened anyway); Gray *v.* Tompkins, 15 N. Y. Suppl. 953.

Inevitable accident without fault appeared in Strouse *v.* Whittlesey, 41 Conn. 559, and Westchester Hardwood Co. *v.* Manhattan Electric Light Co., 10 Misc. (N. Y.) 415, 31 N. Y. Suppl. 140, where wheel dropping into hole swung shaft.

76. See cases cited *infra*, this note.

Evidence held competent see Stringer *v.* Frost, 116 Ind. 477, 19 N. E. 331, 9 Am. St. Rep. 875, 2 L. R. A. 614; Dolfinger *v.* Fishback, 12 Bush (Ky.) 474 (that ordinance forbade hitching horses to shade trees); Fletcher *v.* Dixon, 107 Md. 420, 68 Atl. 875 (in an action for frightening a horse that an automobile made more noise than any other witness ever saw); Belleveau *v.* S. C. Lowe Supply Co., 200 Mass. 237, 86 N. E. 301; Sullivan *v.* Scripture, 3 Allen (Mass.) 564; Boick *v.* Bissell, 80 Mich. 260, 45 N. W. 55 (as to where driving in a straight line would have landed defendant); Courternier *v.* Secombe, 8 Minn. 299 (that defendant claimed the runaway horse immediately after the accident); Thies *v.* Thomas, 77 N. Y. Suppl. 276; Shaffer *v.* Coleman, 35 Pa. Super. Ct. 386 (speed of automobile); Rogers *v.* Mann, (R. I. 1908) 70 Atl. 1057 (collision with automobile); Fleming *v.* Anawomscott

driver is inadmissible;[77] but declarations are admissible if part of *res gestæ*,[78] and the law of the road is admissible,[79] and may be judicially noticed.[80]

c. Trial — (i) *Questions For Court and For Jury.*[81] Conflicting evidence is for the jury as to questions of fact.[82]

(ii) *Instructions.*[83] The court should instruct the jury as to the general principles of law applicable,[84] as to the burden of proof,[85] as to the rights of the parties,[86] as to contributory negligence,[87] and the negligence of defendant,[88] and

Mills, 22 R. I. 211, 47 Atl. 215 (habits of horse); Elwes *v.* Hopkins, [1906] 2 K. B. 1, 21 Cox C. C. 133, 70 J. P. 262, 75 L. J. K. B. 450, 4 Loc. Gov. 615, 94 L. T. Rep. N. S. 547 (evidence of other traffic on road); Plancq *v.* Marks, 21 Cox C. C. 157, 70 J. P. 216, 4 Loc. Gov. 503, 94 L. T. Rep. N. S. 577, 22 T. L. R. 432 (stop-watch as to speed of automobile).

Evidence held incompetent see Belleveau *v.* S. C. Lowe Supply Co., 200 Mass. 237, 86 N. E. 301 (violation of law immaterial unless it contributed to the accident); Hill *v.* Snyder, 44 Mich. 318, 6 N. W. 674 (as to plaintiff's habits of running horses or being intoxicated where it was not claimed that he was intoxicated or running horses at the time); Whissler *v.* Walsh, 165 Pa. St. 352, 30 Atl. 981 (holding that where a driver failed to use care to relieve his horse, who was entangled in a harness whereby he ran away, the disposition of the horse was immaterial on the question of negligence); Bolton *v.* Colder, 1 Watts (Pa.) 360 (custom for leading carriage to incline to right).

77. Dunham *v.* Rackliff, 71 Me. 345; Maguire *v.* Middlesex R. Co., 115 Mass. 239; Tenney *v.* Tuttle, 1 Allen (Mass.) 185; Boick *v.* Bissell, 80 Mich. 260, 45 N. W. 55; O'Neil *v.* Dry Dock, etc., R. Co., 59 N. Y. Super. Ct. 123, 15 N. Y. Suppl. 84 [*affirmed* in 129 N. Y. 125, 29 N. E. 84, 26 Am. St. Rep. 512]; Jacobs *v.* Duke, 1 E. D. Smith (N. Y.) 271.

78. Walkup *v.* Beebe, 139 Iowa 395, 116 N. W. 321 (that another called to defendant to stop his automobile to help plaintiff); Adams *v.* Swift, 172 Mass. 521, 52 N. E. 1068.

Admissions by acts see Adams *v.* Swift, 172 Mass. 521, 52 N. E. 1068.

79. Nadeau *v.* Sawyer, 73 N. H. 70, 59 Atl. 369 (reading statute to jury); Foote *v.* American Product Co., 195 Pa. St. 190, 45 Atl. 934, 78 Am. St. Rep. 806, 49 L. R. A. 764.

80. Turley *v.* Thomas, 8 C. & P. 103, 34 E. C. L. 633.

81. **In action for injury by motor vehicle** see Motor Vehicles, 28 Cyc. 48.

82. *Illinois.*— Schweinfurth *v.* Dover, 91 Ill. App. 319, identity.

Iowa.— Needy *v.* Littlejohn, 137 Iowa 704, 115 N. W. 483, proximate cause.

Michigan.— Burt *v.* Staffeld, 121 Mich. 390, 80 N. W. 236, negligence of one coasting.

Missouri.— De Maet *v.* Fidelity Storage, etc., Co., 121 Mo. App. 92, 96 S. W. 1045.

Nebraska.— Weber *v.* Lockman, 66 Nebr. 469, 92 N. W. 591, 60 L. R. A. 313.

New York.— Dehmann *v.* Beck, 61 N. Y. App. Div. 505, 70 N. Y. Suppl. 29.

Washington.— Lynch *v.* Kineth, 36 Wash. 368, 78 Pac. 923, 104 Am. St. Rep. 958, character of runaway horses.

See 25 Cent. Dig. tit. "Highways," § 473.

83. **In action for injury by motor vehicle** see Motor Vehicles, 28 Cyc. 49.

84. Matson *v.* Maupin, 75 Ala. 312; Bennett *v.* Hazen, 66 Mich. 657, 33 N. W. 876; Jennings *v.* Schwab, 64 Mo. App. 13; Lyons *v.* Avis, 5 N. Y. App. Div. 193, 38 N. Y. Suppl. 1104 (duty of care); Moody *v.* Osgood, 60 Barb. (N. Y.) 644 [*affirmed* in 54 N. Y. 488]; Keck *v.* Sandford, 2 Misc. (N. Y.) 484, 22 N. Y. Suppl. 78 (should instruct that fast driving is not of itself evidence of negligence); Newman *v.* Ernst, 10 N. Y. Suppl. 310.

The province of the jury must not be invaded. Christy *v.* Elliott, 216 Ill. 31, 74 N. E. 1035, 108 Am. St. Rep. 196, 1 L. R. A. N. S. 215; Wolf *v.* Hemrich Bros. Brewing Co., 28 Wash. 187, 68 Pac. 440.

85. Brettman *v.* Braun, 37 Ill. App. 17; Smith *v.* Conway, 121 Mass. 216.

86. *Connecticut.*— Plumb *v.* Maher, 76 Conn. 706, 56 Atl. 494.

Illinois.— Ward *v.* Meredith, 220 Ill. 66, 77 N. E. 118 [*affirming* 122 Ill. App. 159]; Christy *v.* Elliott, 216 Ill. 31, 74 N. E. 1035, 108 Am. St. Rep. 196, 1 L. R. A. N. S. 215.

Indiana.— F. W. Cook Brewing Co. *v.* Ball, 22 Ind. App. 656, 52 N. E. 1002, holding that "persons" in charge includes vehicles.

Iowa.— Walkup *v.* Beebe, 139 Iowa 395, 116 N. W. 321 (rights to run automobile); Cook *v.* Fogarty, 103 Iowa 500, 72 N. W. 677, 39 L. R. A. 488; State *v.* Kowolski, 96 Iowa 346, 65 N. W. 306.

Maryland.— Fletcher *v.* Dixon, 107 Md. 420, 68 Atl. 875.

Massachusetts.— Murley *v.* Roche, 130 Mass. 330, plaintiff sitting on sidewalk.

See 25 Cent. Dig. tit. "Highways," § 474.

87. Wells *v.* Gunn, 33 Colo. 217, 79 Pac. 1029; Christy *v.* Elliott, 216 Ill. 31, 74 N. E. 1035, 108 Am. St. Rep. 196, 1 L. R. A. N. S. 215; North Chicago St. R. Co. *v.* Cossar, 203 Ill. 608, 68 N. E. 88; Buxton *v.* Ainsworth, 153 Mich. 315, 116 N. W. 1094; Wright *v.* Fleischmann, 90 N. Y. App. Div. 547, 91 N. Y. Suppl. 116 [*modifying* 41 Misc. 533, 85 N. Y. Suppl. 62]; Cohn *v.* Palmer, 78 N. Y. App. Div. 506, 79 N. Y. Suppl. 762.

88. *Illinois.*— Ward *v.* Meredith, 220 Ill. 66, 77 N. E. 118 [*affirming* 122 Ill. App. 159] (duty of automobilist to stop on frightening horse); Christy *v.* Elliott, 216 Ill. 31, 74

as to what is pertinent evidence.[89] The charge should be confined to the evidence,[90] and to the issues raised by the pleadings,[91] and should cover all the circumstances, not ignoring part of the evidence,[92] or setting out only isolated facts,[93] although pertinent questions may be submitted.[94] Instructions must not be conflicting or confusing,[95] but they must be considered as a whole, and a mistake may be cured by an additional charge.[96]

(III) *FINDINGS.* Findings must be consistent,[97] and supported by the evidence,[98] and should be reasonably construed.[99]

d. Punitive Damages. In a proper case punitive damages may be imposed for inflicting an injury through improper use of a highway;[1] but the owner of a horse which ran away, injuring plaintiff, is not liable for punitive damages, although it was in the habit of running away, and was negligently left by the driver unhitched in the street, the owner not having authorized, approved, or ratified this.[2]

2. PENAL OR CRIMINAL. Statutory penalties for not turning to the right are sometimes imposed,[3] and in addition a misuse of the highway is in many states

N. E. 1035, 108 Am. St. Rep. 196, 1 L. R. A. N. S. 215.

Iowa.— Meek *v.* Barton, 123 Iowa 601, 99 N. W. 177.

Maryland.— Fletcher *v.* Dixon, 107 Md. 420, 68 Atl. 875; Vonderhorst Brewing Co. *v.* Amrhine, 98 Md. 406, 56 Atl. 833.

New York.— Davis *v.* Maxwell, 108 N. Y. App. Div. 128, 96 N. Y. Suppl. 45.

Washington.— Wolf *v.* Hemrich Bros. Brewing Co., 28 Wash. 187, 68 Pac. 440.

See 25 Cent. Dig. tit. "Highways," § 474.

89. Randolph *v.* O'Riordon, 155 Mass. 331, 29 N. E. 583; Eckensberger *v.* Amend, 10 Misc. (N. Y.) 145, 30 N. Y. Suppl. 915 [*reversing* 7 Misc. 452, 27 N. Y. Suppl. 941]; Henry *v.* Klopfer, 147 Pa. St. 178, 23 Atl. 337, 338, holding that the court should instruct that defendant had just bought horse was pertinent on *scienter.*

90. Van Camp Hardware, etc., Co. *v.* O'Brien, 28 Ind. App. 152, 62 N. E. 464; Fletcher *v.* Dixon, 107 Md. 420, 68 Atl. 875; Crampton *v.* Ivie, 124 N. C. 591, 32 S. E. 968.

91. Plumb *v.* Maher, 76 Conn. 706, 56 Atl. 494; Elenz *v.* Conrad, 123 Iowa 522, 99 N. W. 138.

92. *Colorado.*— Adams Express Co. *v.* Aldridge, 20 Colo. App. 74, 77 Pac. 6.

Illinois.— Christy *v.* Elliott, 216 Ill. 31, 74 N. E. 1035, 108 Am. St. Rep. 196, 1 L. R. A. N. S. 215.

Indiana.— Hudson *v.* Houser, 123 Ind. 309, 24 N. E. 243; Brinkman *v.* Pacholke, 41 Ind. App. 662, 84 N. E. 762.

Maryland.— Fenneman *v.* Holden, 75 Md. 1, 22 Atl. 1049.

Massachusetts.— Jones *v.* Shattuck, 175 Mass. 415, 56 N. E. 736; Neff *v.* Wellesley, 148 Mass. 487, 20 N. E. 111, 2 L. R. A. 500.

Michigan.—Williams *v.* Edmunds, 75 Mich. 92, 42 N. W. 534.

Missouri.— McMahon *v.* Pacific Express Co., 132 Mo. 641, 34 S. W. 478.

New Jersey.— Belles *v.* Kellner, 66 N. J. L. 561, 48 Atl. 1010.

New York.— Weintraub *v.* Guilfoyle, 89 N. Y. App. Div. 328, 85 N. Y. Suppl. 827; Collard *v.* Beach, 81 N. Y. App. Div. 582, 81 N. Y. Suppl. 619.

Texas.— McGee *v.* West, (Civ. App. 1900) 57 S. W. 928.

See 25 Cent. Dig. tit. "Highways," § 474.

93. Nesbit *v.* Crosby, 74 Conn. 554, 51 Atl. 550 (holding that instructions should recognize excusing or modifying circumstances); Dexter *v.* McCready, 54 Conn. 171, 5 Atl. 855; Trott *v.* Wolfe, 35 Ill. App. 163. See also McManus *v.* Wolverton, 19 N. Y. Suppl. 545 [*affirmed* in 138 N. Y. 648, 34 N. E. 513], where in an action for negligence in driving over plaintiff, it was held that the court did not unduly emphasize the duty of drivers with relation to foot passengers by charging that they had "as much right in the center of the street as a coach driven by a millionaire, and drawn by four horses."

94. Eaton *v.* Cripps, 94 Iowa 176, 62 N. W. 687; Wrinn *v.* Jones, 111 Mass. 360.

95. Fletcher *v.* Dixon, 107 Md. 420, 68 Atl. 875; Edwards *v.* Gimbel, 187 Pa. St. 78, 41 Atl. 39.

96. Manthey *v.* Rauenbuehler, 71 N. Y. App. Div. 173, 75 N. Y. Suppl. 714; Brennan *v.* Richardson, 38 N. Y. App. Div. 463, 56 N. Y. Suppl. 428.

97. Walkup *v.* Beebe, 139 Iowa 395, 116 N. W. 321; Mills *v.* Conley, 110 Wis. 525, 86 N. W. 203.

98. Berman *v.* Schultz, 84 N. Y. Suppl. 292.

99. McGee *v.* West, (Tex. Civ. App. 1900) 57 S. W. 928, finding that accident unavoidable construed as meaning that plaintiff was not negligent.

1. Kleihauer *v.* Shedd, (Iowa 1905) 102 N. W. 497. See also MOTOR VEHICLES, 28 Cyc. 47.

2. Haywood *v.* Hamm, 77 Conn. 158, 58 Atl. 695.

3. Com. *v.* Allen, 11 Metc. (Mass.) 403; Jaquith *v.* Richardson, 8 Metc. (Mass.) 213; Earing *v.* Lansingh, 7 Wend. (N. Y.) 185, holding that wilfulness of defendant must be shown.

a misdemeanor,[4] and criminal liability for racing,[5] reckless driving,[6] or heavy hauling[7] is often imposed. The complaint should plainly set forth the crime charged,[8] its time,[9] and its place[10] in the public highway.

E. Injuries From Defects or Obstructions — 1. Care and Duty as to Condition of Road[11] — a. In General. Municipalities must use, and are liable to any one injured by their failure to use, at least ordinary diligence[12] at all

4. *Iowa.*— State *v.* Kowolski, 96 Iowa 346, 65 N. W. 306.

Minnesota.— State *v.* Bradford, 78 Minn. 387, 81 N. W. 202, 47 L. R. A. 144, driving team or vehicle on bicycle path.

Pennsylvania.— Com. *v.* Allen, 148 Pa. St. 358, 23 Atl. 1115, 33 Am. St. Rep. 830, 16 L. R. A. 148.

Tennessee.— State *v.* Battery, 6 Baxt. 545, running horse.

England.— Hind *v.* Evans, 70 J. P. 458, 4 Loc. Gov. 1152, leaving horse on road.

Canada.— Reg. *v.* Yates, 6 Can. Cr. Cas. 282, students obstructing sidewalk by marching four abreast.

See 25 Cent. Dig. tit. "Highways," § 476.

But see Posey Tp. *v.* Senour, 42 Ind. App. 580, 86 N. E. 440.

Defacing signboards is a crime by statute, although the boards are erected by an individual. Pullum *v.* State, 88 Ala. 190, 7 So. 148.

Misuse by motor vehicle see Motor Vehicles, 28 Cyc. 49.

Violations of ordinances as to use of city streets see Municipal Corporations, 28 Cyc. 915.

5. Redman *v.* State, 33 Ala. 428; State *v.* New, 165 Ind. 571, 76 N. E. 400 [*reversing* 36 Ind. App. 521, 76 N. E. 181]; Watson *v.* State, 3 Ind. 123 (holding that the prosecution need not prove that a bet was made, or the distance or judges appointed); State *v.* Ness, 1 Ind. 64; Goldsmith *v.* State, 1 Head (Tenn.) 154; State *v.* Fidler, 7 Humphr. (Tenn.) 502; Reg. *v.* Swindall, 2 C. & K. 230, 2 Cox C. C. 141, 61 E. C. L. 230.

Permitting one's horse to race and riding in a race are two separate offenses. State *v.* New, 165 Ind. 571, 76 N. E. 400 [*reversing* 36 Ind. App. 521, 76 N. E. 181]; State *v.* Ness, 1 Ind. 64.

Indictments for racing held good see Robb *v.* State, 52 Ind. 218; State *v.* Wagster, 75 Mo. 107 (holding also that an indictment for running a horse-race on a public road will be supported by proof that defendant procured another to ride his horse in the race); Goldsmith *v.* State, 1 Head (Tenn.) 154; State *v.* Catchings, 43 Tex. 654.

6. *Illinois.*— Belk *v.* People, 125 Ill. 584, 17 N. E. 744.

Massachusetts.— Com. *v.* Sherman, 191 Mass. 439, 78 N. E. 98, holding that the fact that the owner was in tonneau of automobile was *prima facie* evidence that he was guilty.

Pennsylvania.— Kennedy *v.* Way, Brightly 186.

Rhode Island.— State *v.* McCabe, (1908) 69 Atl. 1064; State *v.* Smith, 29 R. I. 245, 69 Atl. 1061, "common traveling pace" construed.

Wisconsin.— McCummins *v.* State, 132 Wis. 236, 112 N. W. 25.

See 25 Cent. Dig. tit. "Highways," §§ 476, 477.

7. Kennamer *v.* State, 150 Ala. 74, 43 So. 482; Hamilton *v.* State, 22 Ind. App. 479, 52 N. E. 419. But see Com. *v.* Conley, 10 Ky. L. Rep. 875, hauling logs held not an offense.

8. Kennamer *v.* State, 150 Ala. 74, 43 So. 482; State *v.* New, 165 Ind. 571, 76 N. E. 400 [*reversing* 36 Ind. App. 521, 76 N. E. 181]; State *v.* Messenger, 63 Ohio St. 398, 59 N. E. 105 (should allege weight of load and size of tires); McCummins *v.* State, 132 Wis. 236, 112 N. W. 25.

Charging both failing to stop and failing to keep man in front of locomotive is not duplicitous. State *v.* Kowolski, 96 Iowa 346, 65 N. W. 306.

A criminal intent may be unnecessary under a statute forbidding heavy hauling. Hamilton *v.* State, 22 Ind. App. 479, 52 N. E. 419.

9. State *v.* New, 165 Ind. 571, 76 N. E. 400 [*reversing* 36 Ind. App. 521, 76 N. E. 181].

10. State *v.* New, 165 Ind. 571, 76 N. E. 400 [*reversing* 36 Ind. App. 521, 76 N. E. 181]; Watson *v.* State, 3 Ind. 123; State *v.* Burgett, Smith (Ind.) 340 (holding, however, that the termini of the road may be omitted); State *v.* Fleetwood, 16 Mo. 448.

11. **As to city streets** see Municipal Corporations, 28 Cyc. 1358 *et seq.*

12. *Connecticut.*— Biesiegel *v.* Seymour, 58 Conn. 43, 19 Atl. 372.

Indiana.— State *v.* Kamman, 151 Ind. 407, 51 N. E. 483; Porter County *v.* Dombke, 94 Ind. 72.

Maine.— Cunningham *v.* Frankfort, 104 Me. 208, 70 Atl. 441; Moriarty *v.* Lewiston, 98 Me. 482, 57 Atl. 790.

New York.— Lane *v.* Hancock, 142 N. Y. 510, 37 N. E. 473 [*reversing* 67 Hun 623, 22 N. Y. Suppl. 470]; Scofield *v.* Poughkeepsie, 122 N. Y. App. Div. 868, 107 N. Y. Suppl. 767; Farman *v.* Ellington, 46 Hun 41 [*affirmed* in 124 N. Y. 662, 27 N. E. 413].

Pennsylvania.— Fry *v.* Perkiomen Tp., 1 Montg. Co. Rep. 25, holding that more care is required where water is likely to accumulate.

Vermont.— Batty *v.* Duxbury, 24 Vt. 155.

Wisconsin.— Parish *v.* Eden, 62 Wis. 272, 22 N. W. 399, holding that the overseer must see that his orders are obeyed.

See 25 Cent. Dig. tit. "Highways," § 478 *et seq.*

Ordinary care is not enough if the road remained defective. Cunningham *v.* Clay Tp., 69 Kan. 373, 76 Pac. 907; George *v.* Haver-

times[13] to keep the road reasonably safe[14] in view of the probable traffic,[15] but only for ordinary travel in the usual vehicles.[16]

b. Roads and Portions Thereof to Which Duty Extends — (i) *In General.* A municipality or public board charged with the duty of maintaining public roads is liable for injuries received on and only on a regular public highway,[17] from the time it is regularly opened for travel,[18] and not for injuries received on a road not public,[19] or one abandoned,[20] unless the road is apparently still open,[21] or for an injury occurring beyond the highway lines,[22] although the line of the highway is not marked.[23] Moreover, the law commonly holds a municipality only to a duty to keep in repair the traveled portion of its roads,[24] if reasonably

hill, 110 Mass. 506; Horton *v.* Ipswich, 12 Cush. (Mass.) 488; Prindle *v.* Fletcher, 39 Vt. 255.

In removing an obstruction placed in a highway by an individual a town is bound to exercise a higher degree of care than in removing equally dangerous objects which are incident to the nature of the soil or to the construction of the road, since a traveler has reason to expect that the highway will have some natural obstructions. Morse *v.* Richmond, 41 Vt. 435, 98 Am. Dec. 600.

13. Farman *v.* Ellington, 46 Hun (N. Y.) 41 [*affirmed* in 124 N. Y. 662, 27 N. E. 413] (holding two days' delay after washout negligent); Glaub *v.* Goshen Tp., 7 Kulp (Pa.) 292 (by night and in storm); Spear *v.* Lowell, 47 Vt. 692; Clark *v.* Corinth, 41 Vt. 449.

Where immediate attempt to repair would be fruitless, as in the case of a thaw of snow, it is sufficient if repairs are made as soon as practicable. Spear *v.* Lowell, 47 Vt. 692.

Sunday work may be necessary. Flagg *v.* Millbury, 4 Cush. (Mass.) 243; Alexander *v.* Oshkosh, 33 Wis. 277.

14. Moriarty *v.* Lewiston, 98 Me. 482, 57 Atl. 790; Church *v.* Cherryfield, 33 Me. 460; Lamb *v.* Pike Tp., 215 Pa. St. 516, 64 Atl. 671; Ackley *v.* Bradford Tp., 32 Pa. Super. Ct. 487; Archibald *v.* Lincoln County, 50 Wash. 55, 96 Pac. 831.

15. Church *v.* Cherryfield, 33 Me. 460; Brader *v.* Lehman Tp., 34 Pa. Super. Ct. 125, mountain roads.

16. Johnson *v.* Highland, 124 Wis. 597, 102 N. W. 1085. See also Doherty *v.* Ayer, 197 Mass. 241, 83 N. E. 677, 125 Am. St. Rep. 355, 14 L. R. A. N. S. 816, holding an automobile not a carriage under a statute requiring highways to be kept safe for carriages.

Merely because not fit for bicycles does not render a road defective (Rust *v.* Essex, 182 Mass. 313, 65 N. E. 397), but defects which make a road insufficient for other vehicles give a bicyclist a right to recover (Hendry *v.* North Hampton, 72 N. H. 351, 56 Atl. 922, 101 Am. St. Rep. 68, 64 L. R. A. 70).

17. *Maine.*— Todd *v.* Rome, 2 Me. 55.

Massachusetts.— Kellogg *v.* Northampton, 8 Gray 504; Hayden *v.* Attleborough, 7 Gray 338; Stedman *v.* Southbridge, 17 Pick. 162; Jones *v.* Andover, 6 Pick. 59.

New Jersey.— Carter *v.* Rahway, 55 N. J. L. 177, 178, 26 Atl. 96.

North Dakota.— Coulter *v.* Great Northern R. Co., 5 N. D. 568, 67 N. W. 1046.

Vermont.— Loveland *v.* Berlin, 27 Vt. 713 (pent road); Hyde *v.* Jamaica, 27 Vt. 443 (when opened under statute or dedication accepted).

Wisconsin.— Donohue *v.* Warren, 95 Wis. 367, 70 N. W. 305.

Canada.— Kennedy *v.* Portage la Prairie, 12 Manitoba 634; Holland *v.* York Tp., 7 Ont. L. Rep. 533, 3 Ont. Wkly. Rep. 287; Lalongé *v.* St. Vincent de Paul Parish, 27 Quebec Super. Ct. 218 (road used by permission of owners); Duchene *v.* Beauport, 23 Quebec Super. Ct. 80 (winter road).

See 25 Cent. Dig. tit. "Highways," § 479.

Rule applied to city streets see MUNICIPAL CORPORATIONS, 28 Cyc. 1346.

Ways held public with the operation of the rule see Paulsen *v.* Wilton, 78 Conn. 58, 61 Atl. 61 (vote of town directing repair); Green *v.* Canaan, 29 Conn. 157; Bliss *v.* Deerfield, 13 Pick. (Mass.) 102 (road paid for by order of the commissioners and traveled); Whitney *v.* Essex, 42 Vt. 520; Blodget *v.* Royalton, 14 Vt. 288 (conviction of town for not repairing).

18. Drury *v.* Worcester, 21 Pick. (Mass.) 44; Bliss *v.* Deerfield, 13 Pick. (Mass.) 102; Hunter *v.* Weston, 111 Mo. 176, 19 S. W. 1098, 17 L. R. A. 633; Madill *v.* Caledon Tp., 3 Ont. L. Rep. 555, 1 Ont. Wkly. Rep. 299 [*affirming* 3 Ont. L. Rep. 66], although town had not assumed control.

19. *New Hampshire.*—Watson *v.* Grand Trunk R. Co., 68 N. H. 170, 36 Atl. 555, where lay-out quashed.

Pennsylvania.— Kaseman *v.* Sunbury, 197 Pa. St. 162, 46 Atl. 1032, railroad embankment in street.

Texas.— Worthington *v.* Wade, 82 Tex. 26, 17 S. W. 520.

Vermont.— Blodget *v.* Royalton, 14 Vt. 288.

Wisconsin.— Bogie *v.* Waupun, 75 Wis. 1, 43 N. W. 667, 6 L. R. A. 59, temporary road across fields.

See 25 Cent. Dig. tit. "Highways," § 479.

20. Bills *v.* Kaukauna, 94 Wis. 310, 68 N. W. 992.

21. Bills *v.* Kaukauna, 94 Wis. 310, 68 N. W. 992.

Revocation of the right to use a road without notice of such revocation does not constitute a defense to an action for injuries caused by an obstruction placed thereon. Dunn *v.* Gunn, 149 Ala. 583, 42 So. 686.

22. Doyle *v.* Vinalhaven, 66 Me. 348.

23. Doyle *v.* Vinalhaven, 66 Me. 348; Spaulding *v.* Groton, 68 N. H. 77, 44 Atl. 88.

24. *Maine.*— Dickey *v.* Maine Tel. Co., 46 Me. 483. But see Savage *v.* Bangor, 40 Me.

straight[25] and wide enough[26] for passing,[27] but must take care of the whole of this.[28] Towns are commonly liable for a defective sidewalk.[29]

(II) *Roads Under Repair.*[30] A duty rests upon the municipality to care for travelers while a highway is undergoing repair,[31] as by a barrier[32] or fencing,[33] mere warning being held insufficient.[34] But reasonable obstructions for repair work are not defects upon which liability can be predicated,[35] nor will defects in a temporary road cause liability.[36]

c. Defects and Obstructions Causing Injury — (I) *General Nature; Enumeration.* A defect or obstruction in a roadway subjecting the municipality to liability is in general any object in, upon, or near the traveled path, which would necessarily obstruct or hinder one in the use of the road for the purpose of traveling, or which from its nature and position would be likely to produce that result by impeding, embarrassing, or opposing passage along the road,[37] as by a

176, 63 Am. Dec. 658 (holding that where the traveled part is obstructed with snow a town is liable for injuries on a way broken out at the side); Bryant *v.* Biddeford, 39 Me. 193 (holding that there may be localities where it is the duty of the town to make the road safe for travel over the whole width laid out).

Massachusetts.—Doherty *v.* Ayer, 197 Mass. 241, 83 N. E. 677, 125 Am. St. Rep. 355, 14 L. R. A. N. S. 816; Moran *v.* Palmer, 162 Mass. 196, 38 N. E. 442; Howard *v.* North Bridgewater, 16 Pick. 189.

New Hampshire.— Saltmarsh *v.* Bow, 56 N. H. 428.

New York.— Newell *v.* Stony Point, 59 N. Y. App. Div. 237, 69 N. Y. Suppl. 583.

Wisconsin.— Hammacher *v.* New Berlin, 124 Wis. 249, 102 N. W. 489; Hebbe *v.* Maple Creek, 121 Wis. 668, 99 N. W. 442; Wheeler *v.* Westport, 30 Wis. 392.

25. Wheeler *v.* Westport, 30 Wis. 392, holding a town liable for line of boulders beside way.

The narrowness and crookedness of a highway duly located does not render a town liable for injury resulting therefrom, as it is only for defects in construction that the town is liable. Smith *v.* Wakefield, 105 Mass. 473.

26. Seeley *v.* Litchfield, 49 Conn. 134, 44 Am. Rep. 213; Perkins *v.* Fayette, 68 Me. 152, 28 Am. Rep. 84. See also Smith *v.* Kanawha County Court, 33 W. Va. 713, 11 S. E. 1, 8 L. R. A. 82, holding that there is no liability where horses are frightened by calves, although the road is only half the statutory width.

27. Mochler *v.* Shaftsbury, 46 Vt. 580, 14 Am. Rep. 634; Hull *v.* Richmond, 12 Fed. Cas. No. 6,861, 2 Woodb. & M. 337.

28. Potter *v.* Castleton, 53 Vt. 435; Bagley *v.* Ludlow, 41 Vt. 425; Matthews *v.* Baraboo, 39 Wis. 674, so holding, although the road is wide enough for three or four teams abreast.

29. Gould *v.* Boston, 120 Mass. 300; Birngruber *v.* Eastchester, 54 N. Y. App. Div. 80, 66 N. Y. Suppl. 278; Hammacher *v.* New Berlin, 124 Wis. 249, 102 N. W. 489. But see Dupuy *v.* Union Tp., 46 N. J. L. 269; Siegler *v.* Mellinger, 203 Pa. St. 256, 52 Atl. 175, 93 Am. St. Rep. 767, holding a side-path five or six feet above the road not negligence.

30. **Injury through repair of city street** see Municipal Corporations, 28 Cyc. 1401.

31. *Maine.*—Jacobs *v.* Bangor, 16 Me. 187, 33 Am. Dec. 652.

New York.— Buffalo *v.* Holloway, 7 N. Y. 493, 57 Am. Dec. 550; Snowden *v.* Somerset, 52 N. Y. App. Div. 84, 64 N. Y. Suppl. 1088; Tompert *v.* Hastings Pavement Co., 35 N. Y. App. Div. 578, 55 N. Y. Suppl. 177.

Vermont.— Bates *v.* Sharon, 45 Vt. 474; Batty *v.* Duxbury, 24 Vt. 155; Kelsey *v.* Glover, 15 Vt. 708.

Wisconsin.—Bills *v.* Kaukana, 94 Wis. 310, 68 N. W. 992.

England.— Hurst *v.* Taylor, 14 Q. B. D. 918, 49 J. P. 359, 54 L. J. Q. B. 310, 33 Wkly. Rep. 582.

See 25 Cent. Dig. tit. "Highways," § 483 *et seq.*

32. Snowden *v.* Somerset, 52 N. Y. App. Div. 84, 64 N. Y. Suppl. 1088.

33. Hurst *v.* Taylor, 14 Q. B. D. 918, 49 J. P. 359, 54 L. J. Q. B. 310, 33 Wkly. Rep. 582.

34. Tompert *v.* Hastings Pavement Co., 35 N. Y. App. Div. 578, 55 N. Y. Suppl. 177.

35. Farrell *v.* Oldtown, 69 Me. 72; Morton *v.* Frankfort, 55 Me. 46. See also Mills *v.* Philadelphia, 187 Pa. St. 287, 40 Atl. 821, holding that where a light left burning went out no liability existed.

36. Nicodemo *v.* Southborough, 173 Mass. 455, 53 N. E. 887; Brewer *v.* Sullivan County, 199 Pa. St. 594, 49 Atl. 259.

37. *Connecticut.*— Hewison *v.* New Haven, 34 Conn. 136, 142, 91 Am. Dec. 718.

Kansas.— Reading Tp. *v.* Telfer, 57 Kan. 798, 48 Pac. 134, 57 Am. St. Rep. 355.

Massachusetts.— Cook *v.* Charlestown, 13 Allen 190 note; Hixon *v.* Lowell, 13 Gray 59.

New York.— Whitney *v.* Ticonderoga, 53 Hun 214, 6 N. Y. Suppl. 844 [*affirmed* in 127 N. Y. 40, 27 N. E. 403].

Pennsylvania.— Com. *v.* Erie, etc., R. Co., 27 Pa. St. 339, 67 Am. Dec. 471.

Wisconsin.— Chase *v.* Oshkosh, 81 Wis. 313, 51 N. W. 560, 29 Am. St. Rep. 898, 15 L. R. A. 553.

See 25 Cent. Dig. tit. "Highways," § 483.

The term "defective highways" as used in a statute imposing upon towns liability for damage by reason of defective highways is used in reference to their condition for pub-

ditch across[38] or unguarded beside[39] the way, a hole in the roadway[40] or so near the traveled way that travelers are likely to fall into it in avoiding another obstruction,[41] an uneven surface,[42] projections across the highway,[43] or railroad crossings;[44] objects falling upon the road,[45] except where liability is predicated upon peculiar local statutes not covering such cases,[46] structures in the highway,[47] posts,[48] trees,[49] fences,[50] piles of material,[51] or other objects upon the

lic travel upon them which their designation as highway imports and in view of the purpose for which they are established and maintained (Whitney *v.* Ticonderoga, 127 N. Y. 40, 27 N. E. 403), and such a statute as to defects applies only to defects interfering with travel and not to failure to keep a sluiceway clear, causing water to set back on land of an abutter (Winchell *v.* Camillus, 190 N. Y. 536, 83 N. E. 1134 [*affirming* 109 N. Y. App. Div. 341, 95 N. Y. Suppl. 688].

The obstruction need not wholly stop travel to render the town liable, it is sufficient if travel be impeded. Chase *v.* Oshkosh, 81 Wis. 313, 51 N. W. 560, 29 Am. St. Rep. 898, 15 L. R. A. 553.

38. Nicol *v.* Beaumont, 53 L. J. Ch. 853, 50 L. T. Rep. N. S. 112.

39. Whyler *v.* Bingham Rural Dist., [1901] 1 K. B. 45, 64 J. P. 771, 70 L. J. K. B. 207, 83 L. T. Rep. N. S. 652, 17 T. L. R. 23. But see Brown *v.* Skowhegan, 82 Me. 273, 19 Atl. 399, disallowing recovery where the person injured never became a traveler but was approaching the traveled part.

40. Gale *v.* Dover, 68 N. H. 403, 44 Atl. 535 (defective cover to opening); Schaeffer *v.* Jackson Tp., 150 Pa. St. 145, 24 Atl. 629, 30 Am. St. Rep. 792, 18 L. R. A. 100; Wertz *v* Girardville Borough, 30 Pa. Super. Ct. 260; Bathurst *v.* Macpherson, 4 App. Cas. 256, 48 L. J. P. C. 61. But see Grant *v.* Enfield, 11 N. Y. App. Div. 358, 42 N. Y. Suppl. 107, holding that a depression several inches deep is not a defect.

41. Wakeham *v.* St. Clair Tp., 91 Mich. 15, 51 N. W. 696.

42. Rust *v.* Essex, 182 Mass. 313, 65 N. E. 397 (stone projecting six inches in country road); Pratt *v.* Cohasset, 177 Mass. 488, 59 N. E. 79 (drop of about a foot from graveled part of road to road not so covered); Elliot *v.* Concord, 27 N. H. 104 (embankment); Osterhout *v.* Bethlehem, 55 N. Y. App. Div. 198, 66 N. Y. Suppl. 845 (hole or rut ten inches deep); Lamb *v.* Pike Tp., 215 Pa. St. 516, 64 Atl. 671 (gas pipe projecting).

Unevenness not causing see Brader *v.* Lehman Tp., 34 Pa. Super. Ct. 125 (level flat stone in mountain road); Messenger *v.* Bridgetown, 33 Nova Scotia 291 (projecting surface on filling up excavation).

43. Beecher *v.* People, 38 Mich. 289, 31 Am. Rep. 316 (roof over alley twelve feet high); Hardy *v.* Keene, 52 N. H. 370 (derrick ropes); Hume *v.* New York, 74 N. Y. 264; Embler *v.* Wallkill, 57 Hun (N. Y.) 384, 10 N. Y. Suppl. 797 [*affirmed* in 132 N. Y. 222, 30 N. E. 404] (branches of tree hanging low); Champlin *v.* Penn Yan, 34 Hun (N. Y.) 33 [*affirmed* in 102 N. Y. 680].

Objects overhanging city streets see MUNICIPAL CORPORATIONS, 28 Cyc. 1378.

44. Dixon *v.* Butler Tp., 4 Pa. Dist. 754, 17 Pa. Co. Ct. 114. See also RAILROADS, 33 Cyc. 920 *et seq.*

45. Grove *v.* Ft. Wayne, 45 Ind. 429, 15 Am. Rep. 262; West *v.* Lynn, 110 Mass. 514; Ferguson *v.* Southwold Tp., 27 Ont. 66.

46. See Pratt *v.* Weymouth, 147 Mass. 245, 17 N. E. 538, 9 Am. St. Rep. 691; West *v.* Lynn, 110 Mass. 514; Wakefield *v.* Newport, 62 N. H. 624; Oak Harbor *v.* Kallagher, 52 Ohio St. 183, 39 N. E. 144; Taylor *v.* Peckham, 8 R. I. 349, 91 Am. Dec. 235, 5 Am. Rep. 578; Watkins *v.* County Ct., 30 W. Va. 657, 5 S. E. 654.

Awnings may become defects in the highway when they are not mere incidents or attachments of the building but adapted to the sidewalk and a part of its construction and arrangement for use as such. Day *v.* Milford, 5 Allen (Mass.) 98; Pedrick *v.* Bailey, 12 Gray (Mass.) 161; Drake *v.* Lowell, 13 Metc. (Mass.) 292.

47. Elzig *v.* Bales, 135 Iowa 208, 112 N. W. 540; Hill *v.* Hoffman, (Tenn. Ch. App. 1899) 58 S. W. 929; State *v.* Leaver, 62 Wis. 387, 22 N. W. 576 (a barn occupying nearly one half the width of the highway in a populous village, although travel on the highway could pass it); Rex *v.* Gregory, 5 B. & Ad. 555, 3 L. J. M. C. 25, 2 N. & M. 478, 27 E. C. L. 236; Reg. *v.* Lepine, 15 L. T. Rep. N. S. 158, 15 Wkly. Rep. 45.

48. Coggswell *v.* Lexington, 4 Cush. (Mass.) 307 (near line of highway); Yeaw *v.* Williams, 15 R. I. 20, 23 Atl. 33. But see Macomber *v.* Taunton, 100 Mass. 255; Young *v.* Yarmouth, 9 Gray (Mass.) 386.

49. Patterson *v.* Vail, 43 Iowa 142; Tilton *v.* Wenham, 172 Mass. 407, 52 N. E. 514. But see Washburn *v.* Easton, 172 Mass. 525, 52 N. E. 1070 (holding otherwise as to shade trees not in dangerous position); Bullen *v.* Wakely, 18 Cox C. C. 692, 62 J. P. 166, 77 L. T. Rep. N. S. 689.

50. Smith *v.* Putnam, 62 N. H. 369; Hill *v.* Hoffman, (Tenn. Ch. App. 1899) 58 S. W. 929; Cornelison *v.* State, (Tex. Cr. App. 1899) 49 S. W. 384; Reg *v.* Burrell, 10 Cox C. C. 462, 16 L. T. Rep. N. S. 572, 15 Wkly. Rep. 879.

51. Ring *v.* Cohoes, 77 N. Y. 83, 33 Am. Rep. 574; Schaeffer *v.* Jackson Tp., 150 Pa. St. 145, 24 Atl. 629, 30 Am. St. Rep. 792, 18 L. R. A. 100; Reg. *v.* Longton Gas Co., 8 Cox C. C. 317, 2 E. & E. 651, 6 Jur. N. S. 601, 29 L. J. M. C. 118, 2 L. T. Rep. N. S. 14, 8 Wkly. Rep. 293, 105 E. C. L. 651; Dixon *v.* Chester, 70 J. P. 380, 4 L. G. R. 1127, 22 T. L. R. 501; Preston *v.* Fullwood

roadway;[52] but an obstruction outside the traveled part of the highway is not ordinarily a defect,[53] unless so near as likely to be dangerous to travelers,[54] as by frightening horses;[55] and the activity of persons on the highway is not a defect therein,[56] as in case of persons coasting;[57] nor are towns commonly liable for latent defects in the roads,[58] unless the town should have known of the defect and repaired it,[59] nor for obstructions casually placed there,[60] nor for mere accidents,[61] nor extraordinary events.[62]

Local Bd., 50 J. P. 228, 53 L. T. Rep. N. S. 718, 34 Wkly. Rep. 196.

52. *Illinois.*— Galt *v.* Woliver, 103 Ill. App 71, machine.

Kansas.— Pleasant Grove Tp. *v.* Ware, 7 Kan. App. 648, 53 Pac. 885, rendering it difficult to turn corner.

Maine.— Frost *v.* Portland, 11 Me. 271.

Massachusetts.— Maccarty *v.* Brookline, 114 Mass. 527 (stone, although changed in position by human agency); Stone *v.* Hubbardston, 100 Mass. 49 (causing horse to step outside traveled path).

New Hampshire.— Paine *v.* Grand Trunk R. Co., 58 N. H. 611, 63 N. H. 623, 3 Atl. 634, a derailed car.

New York.— Gulliver *v.* Blauvelt, 14 N. Y. App. Div. 523, 43 N. Y. Suppl. 935 (chain on road, used to tether cow); Whitney *v.* Ticonderoga, 53 Hun 214, 6 N. Y. Suppl. 844 [*affirmed* in 127 N. Y. 40, 27 N. E. 403] (wagon).

Pennsylvania.— Munley *v.* Sugar Notch Borough, 215 Pa. St. 228, 64 Atl. 377 [*affirming* 13 Luz. Leg. Reg. 44], mortar boxes.

South Carolina.— Handy *v.* Greenville County, 71 S. C. 174, 50 S. E. 777; Duncan *v.* Greenville County, 71 S. C. 170, 50 S. E. 776, wagon.

England.— Atty.-Gen. *v.* Mayo County, [1902] 1 Ir. 13.

See 25 Cent. Dig. tit. "Highways," § 483.

53. *Connecticut.*— Tiesler *v.* Norwich, 73 Conn. 199, 47 Atl. 161, ice carriage block.

Maine.— Blake *v.* Newfield, 68 Me. 365 (stone); Perkins *v.* Fayette, 68 Me. 152, 28 Am. Rep. 84.

Massachusetts.—Smith *v.* Wendell, 7 Cush. 498. See also Snow *v.* Adams, 1 Cush. 443.

New York.— Sutphen *v.* North Hempstead, 80 Hun 409, 30 N. Y. Suppl. 128, injury to bicyclist in gutter.

Pennsylvania.— Schaeffer *v.* Jackson Tp., 150 Pa. St. 145, 24 Atl. 629, 30 Am. St. Rep. 792, 18 L. R. A. 100; Worrilow *v.* Upper Chichester Tp., 149 Pa. St. 40, 24 Atl. 85 (tree); Jackson Tp. *v.* Wagner, 127 Pa. St. 184, 17 Atl. 903, 14 Am. St. Rep. 833.

Vermont.— Cassedy *v.* Stockbridge, 21 Vt. 391, forced into ditch by accident.

See 25 Cent. Dig. tit. "Highways," § 483.

Holes near city streets see MUNICIPAL CORPORATIONS, 28 Cyc. 1383.

54. *Iowa.*— Mosher *v.* Vincent, 39 Iowa 607, fence.

Maine.—Johnson *v.* Whitefield, 18 Me. 286, 36 Am. Dec. 721.

New York.— Eggleston *v.* Columbia Turnpike Road, 82 N. Y. 278, 281 [*affirming* 18 Hun 146].

Pennsylvania.— Weida *v.* Hanover Tp., 30 Pa. Super. Ct. 424, pool filled with acids.

Wisconsin.—Carlon *v.* Greenfield, 130 Wis. 342, 110 N. W. 208; Boltz *v.* Sullivan, 101 Wis. 608, 77 N. W. 870; Kelley *v.* Fond du Lac, 31 Wis. 179 (where a harness became disarranged and the horses ran against a tree twelve feet distant from the highway); Wheeler *v.* Westport, 30 Wis. 392.

England.—Fisher *v.* Prowse, 2 B. & S. 770, 8 Jur. N. S. 1208, 31 L. J. Q. B. 212, 6 L. T. Rep. N. S. 711, 110 E. C. L. 770; Shoreditch *v.* Bull, 68 J. P. 415, 2 Loc. Gov. 756, 90 L. T. Rep. N. S. 210, 20 T. L. R. 254.

See 25 Cent. Dig. tit. "Highways," § 483.

Where causes outside the highway combined with causes within the highway to cause the accident there is no liability. Richards *v.* Enfield, 13 Gray (Mass.) 344; Rowell *v.* Lowell, 7 Gray (Mass.) 100, 66 Am. Dec. 464.

55. See *infra*, VII, E, 1, c, (III).

56. Ray *v.* Manchester, 46 N. H. 59, 88 Am. Dec. 192.

57. Ray *v.* Manchester, 46 N. H. 59, 88 Am. Dec. 192; Hutchinson *v.* Concord, 41 Vt. 271, 98 Am. Dec. 584.

58. Wakeham *v.* St. Clair Tp., 91 Mich. 15, 51 N. W. 696; Wendell *v.* Troy, 39 Barb. (N. Y.) 329 [*affirmed* in 4 Abb. Dec. 563, 4 Keyes 261] (from insufficient supervision of the construction and condition of an unauthorized structure); Murdaugh *v.* Oxford Borough, 214 Pa. St. 384, 63 Atl. 696; Rapho, etc., Tps. *v.* Moore, 68 Pa. St. 404, 8 Am. Rep. 202; Ozier *v.* Hinesburgh, 44 Vt. 220; Prindle *v.* Fletcher, 39 Vt. 255.

59. Ozier *v.* Hinesburgh, 44 Vt. 220.

60. Farrell *v.* Oldtown, 69 Me. 72; Johnson *v.* Haverhill, 35 N. H. 74.

61. Seidel *v.* Woodbury, 81 Conn. 65, 70 Atl. 58; Elseeck *v.* Capwell, (R. I. 1907) 67 Atl. 421, stumbling horse.

62. *Connecticut.*— Wilson *v.* Granby, 47 Conn. 59, 36 Am. Rep. 51.

Maine.— Morse *v.* Belfast, 77 Me. 44.

Massachusetts.— Hutchins *v.* Littleton, 124 Mass. 289, new defect from storm.

Pennsylvania.— Schaeffer *v.* Jackson Tp., 150 Pa. St. 145, 24 Atl. 629, 30 Am. St. Rep. 792, 18 L. R. A. 100; Bishop *v.* Schuylkill Tp., 5 Pa. Cas. 330, 8 Atl. 449; Russell *v.* Westmoreland County, 26 Pa. Super. Ct. 425; Cage *v.* Franklin Tp., 11 Pa. Super. Ct. 533, holding a town not bound to provide for balky horses.

Washington.— Dignan *v.* Spokane County, 43 Wash. 419, 86 Pac. 649, runaway.

Wisconsin.— Schrunk *v.* St. Joseph, 120 Wis. 223, 97 N. W. 946; Hopkins *v.* Rush River, 70 Wis. 10, 34 N. W. 909, 35 N. W. 939, freshet.

See 25 Cent. Dig. tit. "Highways," § 484.

(II) *Defects Caused by the Elements; Snow and Ice.*[63] The municipality will be liable, although the defect is caused by the elements, if it should have known of the condition,[64] as where a way is defective from the presence upon it of snow and ice in large quantities negligently permitted to remain by the municipal authorities[65] after the lapse of sufficient time to clear the way;[66] but a municipality is not ordinarily liable for injuries resulting from mere slipperiness from ice.[67]

(III) *Obstructions Calculated to Frighten Horses.*[68] Objects calculated to frighten horses in or near the road constitute defects in the road rendering the municipality liable for injuries caused thereby,[69] although not

63. **Ice and snow in city streets** see Municipal Corporations, 28 Cyc. 1372.

64. Tripp *v.* Lyman, 37 Me. 250; Blood *v.* Hubbardston, 121 Mass. 233 (danger from defect increased through elements); Hedricks *v.* Schuylkill Tp., 16 Pa. Super. Ct. 508 (mire). But see Brendlinger *v.* New Hanover Tp., 148 Pa. St. 93, 23 Atl. 1105.

65. *Connecticut.*— Congdon *v.* Norwich, 37 Conn. 414.

Maine.— Rogers *v.* Newport, 62 Me. 101 (town held liable, although wood placed on the road by individuals caused a snowdrift); Savage *v.* Bangor, 40 Me. 176, 63 Am. Dec. 658 (holding that a passageway must be kept clear even after a heavy storm).

Massachusetts.— Rooney *v.* Randolph, 128 Mass. 580.

New Hampshire.— Dutton *v.* Weare, 17 N. H. 34, 43 Am. Dec. 590. But see Drew *v.* Bow, 74 N. H. 147, 65 Atl. 831, holding a gutter not a sluiceway, within a statute imposing liability for injury from defective sluiceway.

New York.— Schrank *v.* Rochester R. Co., 83 Hun 290, 31 N. Y. Suppl. 922, snow piled up by snow-plow.

See 25 Cent. Dig. tit. "Highways," § 483.

But statutes sometimes provide that no actionable defect exists unless something beside the snow and ice contributed to cause it. See the statutes of the several states. And see Miner *v.* Hopkinton, 73 N. H. 232, 60 Atl. 433; McCloskey *v.* Moies, 19 R. I. 297, 33 Atl. 225 (ice on water collected in defective depression); Barton *v.* Montpelier, 30 Vt. 650.

66. Hayes *v.* Cambridge, 136 Mass. 402; Kleng *v.* Buffalo, 156 N. Y. 700, 51 N. E. 1091. See also Dorn *v.* Oyster Bay, 84 Hun (N. Y.) 510, 32 N. Y. Suppl. 341 [*affirmed* in 158 N. Y. 731, 53 N. E. 1124].

67. *Maine.*— Smyth *v.* Bangor, 72 Me. 249.

Massachusetts.— Stone *v.* Hubbardston, 100 Mass. 49.

New York.— Kinney *v.* Troy, 108 N. Y. 567, 15 N. E. 728.

Ohio.— Chase *v.* Cleveland, 44 Ohio St. 505, 9 N. E. 225, 58 Am. Rep. 843.

Pennsylvania.— Mauch Chunk *v.* Kline, 100 Pa. St. 119, 45 Am. Rep. 364.

Canada.— Ringland *v.* Toronto, 23 U. C. C. P. 93.

See 25 Cent. Dig. tit. "Highways," § 483.

68. **Frightening animals in city streets** see Municipal Corporations, 28 Cyc. 1380.

Lack of railings see VII, E, 1, d, (III).

Liability for accidents caused by objects outside the traveled portion of the highway see *supra*, VII, E, 1, b, (I).

69. *Connecticut.*— Clinton *v.* Howard, 42 Conn. 294 (pile of stones); Ayer *v.* Norwich, 39 Conn. 376, 12 Am. Dec. 396; Dimock *v.* Suffield, 30 Conn. 129. But see Lee *v.* Barkhampstead, 46 Conn. 213, holding that a moving train is not a structure rendering the town liable.

Illinois.— Galt *v.* Woliver, 103 Ill. App. 71, machine.

Maine.— York *v.* Athens, 99 Me. 82, 58 Atl. 418, pile of rocks.

Minnesota.— Nye *v.* Dibley, 88 Minn. 465, 93 N. W. 524, pile of material.

New York.— Mullen *v.* Glens Falls, 11 N. Y. App. Div. 275, 42 N. Y. Suppl. 113 (steam roller); Wilson *v.* Spafford, 10 N. Y. Suppl. 649 (holding the rule applicable if the object would naturally frighten horses, although not necessarily so). See Burns *v.* Farmington, 31 N. Y. App. Div. 364, 52 N. Y. Suppl. 229.

Pennsylvania.— Baker *v.* North East Borough, 151 Pa. St. 234, 24 Atl. 1079 (water-pipe from which water escaped with hissing sound); Curry *v.* Luzerne Borough, 24 Pa. Super. Ct. 514 (holding that it is not necessary for borough authorities or supervisors to examine the highways and determine what is likely to frighten horses, as well as where they are likely to be frightened; but it is necessary for such officers to provide at all points a reasonably safe highway, even when a horse is frightened).

Rhode Island.— Bennett *v.* Fifield, 13 R. I. 139, 43 Am. Rep. 17.

Vermont.— Morse *v.* Richmond, 41 Vt. 435, 98 Am. Dec. 600.

Canada.— Kelly *v.* Whitchurch Tp., 12 Ont. L. Rep. 83, 7 Ont. Wkly. Rep. 279 [*affirming* 11 Ont. L. Rep. 155, 6 Ont. Wkly. Rep. 839], piles of lumber.

Objects not rendering municipality liable see Farrell *v.* Oldtown, 69 Me. 72 (granite blocks); Nichols *v.* Athens, 66 Me. 402 (common riding wagon); Cushing *v.* Bedford, 125 Mass. 526 (bright red trough); Cook *v.* Montague, 115 Mass. 571 (stone pile in grass beside road); Bemis *v.* Arlington, 114 Mass. 507; Kingsbury *v.* Dedham, 13 Allen (Mass.) 186, 90 Am. Dec. 191; Keith *v.* Easton, 2 Allen (Mass.) 552 (vehicle used as daguerreotype saloon); Hebbard *v.* Berlin, 66 N. H.

dangerously near the traveled way,[70] and although there is ample room to pass around them.[71]

d. Precautions — (i) *Against Travel on Unsuitable Roads.* The municipality must use reasonable precaution to prevent travelers from passing over an abandoned [72] or temporary [73] path or road, or over unsafe bridges,[74] and must close the way or bridge if unsafe, and not simply warn ;[75] but it is not liable if a barricade erected by it is torn down in the night.[76]

(ii) *Lighting Highways.*[77] It is not an actionable defect for a municipality to fail to light its highways,[78] unless required by statute to do so.[79]

(iii) *Railings or Barriers.*[80] The municipality is liable for neglect to furnish suitable barriers wherever necessary for the safety of travelers,[81] but not otherwise,[82] it being a question for the jury whether a railing is neces-

623, 32 Atl. 229 (engine) ; Barrett *v.* Walworth, 64 Hun (N. Y.) 526, 19 N. Y. Suppl. 557 (huge rock dividing road) ; Ebert *v.* Pickaway County, 75 Ohio St. 474, 80 N. E. 5 (pile of stones used in repairing road).

That defendant owns the fee in a highway in which was placed an obstruction frightening plaintiff's horses is no defense to plaintiff's action therefor. Tinker *v.* New York, etc., R. Co., 157 N. Y. 312, 51 N. E. 1031 [*affirming* 92 Hun 269, 36 N. Y. Suppl. 672].

70. Bartlett *v.* Hooksett, 48 N. H. 18; Foshay *v.* Glen Haven, 25 Wis. 288, 3 Am. Rep. 73.

71. Morse *v.* Richmond, 41 Vt. 435, 98 Am. Dec. 600.

72. Munson *v.* Derby, 37 Conn. 298, 9 Am. Rep. 332; Schuenke *v.* Pine River, 84 Wis. 669, 54 N. W. 1007; Cartwright *v.* Belmont, 58 Wis. 370, 17 N. W. 237.

73. Bates *v.* Sharon, 45 Vt. 474; Batty *v.* Duxbury, 24 Vt. 155, where railroads obstructed road.

74. Humphreys *v.* Armstrong County, 56 Pa. St. 204; Moody *v.* Bristol, 71 Vt. 473, 45 Atl. 1038; Mullen *v.* Rutland, 55 Vt. 77.

75. Humphreys *v.* Armstrong County, 56 Pa. St. 204.

76. Mullen *v.* Rutland, 55 Vt. 77.

77. Failure to light city streets see Municipal Corporations, 28 Cyc. 1403.

78. Freeport *v.* Isbell, 83 Ill. 440, 25 Am. Rep. 407; Randall *v.* Eastern R. Co., 106 Mass. 276, 8 Am. Rep. 327.

79. Butler *v.* Bangor, 67 Me. 385.

80. Barriers, guards, etc., in city streets see Municipal Corporations, 28 Cyc. 1403.

81. *Illinois.*— Skinner *v.* Morgan, 21 Ill. App. 209, open ditch beside road.

Maine.— Haskell *v.* New Gloucester, 70 Me. 305; Cobb *v.* Standish, 14 Me. 198, where hole which looked harmless was a miry pit.

Massachusetts.— Cutting *v.* Shelburne, 193 Mass. 1, 78 N. E. 752; Carville *v.* Westford, 163 Mass. 544, 40 N. E. 893 (rounded roadway with gutter in brook) ; Hudson *v.* Marlborough, 154 Mass. 218, 28 N. E. 147; Woods *v.* Groton, 111 Mass. 357; Hayden *v.* Attleborough, 7 Gray 338; Collins *v.* Dorchester, 6 Cush. 396; Palmer *v.* Andover, 2 Cush. 600.

New Hampshire.— Seeton *v.* Dunbarton, 72 N. H. 269, 56 Atl. 197; Davis *v.* Hill, 41 N. H. 329; Willey *v.* Portsmouth, 35 N. H. 303.

New York.— Bryant *v.* Randolph, 133 N. Y. 70, 30 N. E. 657 [*affirming* 14 N. Y. Suppl. 844] (at dangerous approach to crossing) ; Ivory *v.* Deer Park, 116 N. Y. 476, 22 N. E. 1080; Jewhurst *v.* Syracuse, 108 N. Y. 303, 15 N. E. 409; Morrell *v.* Peck, 88 N. Y. 398 (bridge unrailed) ; Roblee *v.* Indian Lake, 11 N. Y. App. Div. 435, 42 N. Y. Suppl. 326; Maxim *v.* Champion, 50 Hun 88, 4 N. Y. Suppl. 515 [*affirmed* in 119 N. Y. 626, 23 N. E. 1144]; Warren *v.* Clement, 24 Hun 472; Hyatt *v.* Rondout, 44 Barb. 385 [*affirmed* in 41 N. Y. 619]; Holcomb *v.* Champion, 12 N. Y. Suppl. 882; Fay *v.* Lindley, 11 N. Y. Suppl. 355.

Pennsylvania.— Davis *v.* Snyder Tp., 196 Pa. St. 273, 46 Atl. 301 (failure to guard abrupt descent at side to river) ; Yoders *v.* Amwell Tp., 172 Pa. St. 447, 33 Atl. 1017, 51 Am. St. Rep. 750; Kitchen *v.* Union Tp., 171 Pa. St. 145, 33 Atl. 76; Trexler *v.* Greenwich Tp., 168 Pa. St. 214, 31 Atl. 1090 (declivity) ; Lower Macungie Tp. *v.* Merkhoffer, 71 Pa. St. 276; Russell *v.* Westmoreland County, 26 Pa. Super. Ct. 425 (horse becoming frightened backing over precipice) ; Snyder *v.* Penn Tp., 14 Pa. Super. Ct. 145.

Vermont.— Drew *v.* Sutton, 55 Vt. 586, 45 Am. Rep. 644, off embankment.

Wisconsin.— Wells *v.* Remington, 118 Wis. 573, 95 N. W. 1094; Houfe *v.* Fulton, 29 Wis. 296, 9 Am. Rep. 568.

Canada.— Plant *v.* Normanby Tp., 10 Ont. L. Rep. 16, 6 Ont. Wkly. Rep. 31.

See 25 Cent. Dig. tit. "Highways," § 486.

The railings should be sufficient for the purpose indicated. Lyman *v.* Amherst, 107 Mass. 339; Adams *v.* Natick, 13 Allen (Mass.) 429, holding, however, that they need not be heavy enough to stop frightened animals.

Whether proximate cause of accident.— Where a timber was removed from an embankment, and not replaced, it was not the fact of such removal, but that there was no guard there at the time a wagon was backed over the embankment, that was the proximate cause. Wallace *v.* New Albion, 192 N. Y. 544, 84 N. E. 1122 [*affirming* 121 N. Y. App. Div. 66, 105 N. Y. Suppl. 524].

82. *Connecticut.*— Seidel *v.* Woodbury, 81 Conn. 65, 70 Atl. 58, to avoid change of grade inside roadway.

Massachusetts.— Shea *v.* Whitman, 197 Mass. 374, 83 N. E. 1096, 20 L. R. A. N. S.

sary,[83] unless the facts are such that only one conclusion can be drawn by reasonable minds.[84] A lack of railing commonly gives no right of action to the owner of a horse running away or beyond the control of the driver,[85] unless the statute providing for railings clearly contemplates protection even against the fright of horses.[86]

e. Necessity of Notice of Defect to Charge Municipality.[87] A municipality is liable for injuries only when it has had notice of a defect, either actual[88] or

980 (stone outside limits of highway); Doherty *v.* Ayer, 197 Mass. 241, 83 N. E. 677, 125 Am. St. Rep. 355, 14 L. R. A. N. S. 816 (to guard against sand beside highway); Hudson *v.* Marlborough, 154 Mass. 218, 28 N. E. 147 (accident twenty-five feet from roadway); Barnes *v.* Chicopee, 138 Mass. 67, 52 Am. Rep. 259 (thirty-four feet from traveled part); Puffer *v.* Orange, 122 Mass. 389, 23 Am. Rep. 368 (where no dangerous place near enough to be reached without straying); Marshall *v.* Ipswich, 110 Mass. 522 (round pile of brick); Murphy *v.* Gloucester, 105 Mass. 470 (to prevent travelers driving on to dock twenty-five feet distant).

Michigan.— Kuhn *v.* Walker Tp., 97 Mich. 306, 56 N. W. 556, driving strange hired horse unnecessarily within three feet of the embankment.

New Hampshire.— Miner *v.* Hopkinton, 73 N. H. 232, 60 Atl. 433, a cut is not a dangerous embankment and railing.

New York.— Monk *v.* New Utrecht, 104 N. Y. 552, 11 N. E. 268 (mere error of judgment; certain slope an error in the plan); Patchen *v.* Walton, 17 N. Y. App. Div. 158, 45 N. Y. Suppl. 145; Glasier *v.* Hebron, 82 Hun 311, 31 N. Y. Suppl. 236 (where highway seventeen feet wide and level); Stacy *v.* Phelps, 47 Hun 54 (where absence of warning of trench would not have prevented accident).

Pennsylvania.— Heister *v.* Fawn Tp., 189 Pa. St. 253, 42 Atl. 121, cow scaring horse over unguarded embankment.

Rhode Island.— Waterhouse *v.* Calef, 21 R. I. 470, 44 Atl. 591 (boulders guarding embankment); Chapman *v.* Cook, 10 R. I. 304, 14 Am. Rep. 686 (to mark deviation of private way).

Wisconsin.— Hammacher *v.* New Berlin, 124 Wis. 249, 102 N. W. 489.

United States.— Schimberg *v.* Cutler, 142 Fed. 701, 74 C. C. A. 33.

Where the accident is rare and unexpected defendant ought not to be charged for failure to guard against it. Hubbell *v.* Yonkers, 104 N. Y. 434, 10 N. E. 858, 58 Am. Rep. 522; Glazier *v.* Hebron, 62 Hun (N. Y.) 137, 16 N. Y. Suppl. 503 [*reversed* on other grounds in 131 N. Y. 447, 30 N. E. 239] (no liability, although accident was rare and unforeseen); Beardslee *v.* Columbia Tp., 5 Lack. Leg. N. (Pa.) 290. As to absence of similar accidents see *infra*, VII, E, 4, f, (II).

83. Harris *v.* Great Barrington, 169 Mass. 271, 47 N. E. 881; Babson *v.* Rockport, 101 Mass. 93 (horse backing over embankment); Malloy *v.* Walker Tp., 77 Mich. 448, 43 N. W. 1012, 6 L. R. A. 695; Seeton *v.* Dunbarton, 72 N. H. 269, 56 Atl. 197; Roblee *v.* Indian Lake, 11 N. Y. App. Div. 435, 42 N. Y. Suppl. 326; Wood *v.* Gilboa, 76 Hun (N. Y.) 175, 27 N. Y. Suppl. 586 [*affirmed* in 146 N. Y. 383]; Glazier *v.* Hebron, 62 Hun (N. Y.) 137, 16 N. Y. Suppl. 503 [*reversed* on other grounds in 131 N. Y. 447, 30 N. E. 239]; Maxim *v.* Champion, 50 Hun (N. Y.) 88, 4 N. Y. Suppl. 515 [*affirmed* in 119 N. Y. 626, 23 N. E. 1144] (although the same conditions had existed for sixty-eight years with no accident); Hyatt *v.* Rondout, 44 Barb. (N. Y.) 385 [*affirmed* in 41 N. Y. 619].

84. Seeton *v.* Dunbarton, 72 N. H. 269, 56 Atl. 197.

85. Kingsley *v.* Bloomingdale Tp., 109 Mich. 340, 67 N. W. 333; Glasier *v.* Hebron, 131 N. Y. 447, 30 N. E. 239 [*reversing* 62 Hun 137, 16 N. Y. Suppl. 503]; Waller *v.* Hebron, 5 N. Y. App. Div. 577, 39 N. Y. Suppl. 381; Lane *v.* Wheeler, 35 Hun (N. Y.) 606; Dignan *v.* Spokane County, 43 Wash. 419, 86 Pac. 649. But see Hinckley *v.* Somerset, 145 Mass. 326, 14 N. E. 166 (holding otherwise where loss of control was only momentary and could have been regained if wall had been of sufficient height); Russell *v.* Westmoreland County, 26 Pa. Super. Ct. 425.

The backing of a buggy over an embankment which constituted an approach to a bridge and which was unguarded was not, as a matter of law, such an accident as could not reasonably have been apprehended or expected to occur. Wallace *v.* New Albion, 192 N. Y. 544, 84 N. E. 1122 [*affirming* 121 N. Y. App. Div. 66, 105 N. Y. Suppl. 524].

86. Upton *v.* Windham, 75 Conn. 288, 53 Atl. 660, 96 Am. Rep. 197.

87. **Evidence of notice of defect in city street** see MUNICIPAL CORPORATIONS, 28 Cyc. 1486.

Notice of defect or obstruction in city street see MUNICIPAL CORPORATIONS, 28 Cyc. 1384.

88. *Indiana.*— Rosedale *v.* Ferguson, 3 Ind. App. 596, 30 N. E. 156.

Maine.— Pease *v.* Parsonsfield, 92 Me. 345, 42 Atl. 502.

Massachusetts.— Doherty *v.* Waltham, 4 Gray 596, notice of removal of barrier placed by town.

New Hampshire.— Chamberlain *v.* Enfield, 43 N. H. 356; Johnson *v.* Haverhill, 35 N. H. 74.

Pennsylvania.— North Manheim Tp. *v.* Arnold, 119 Pa. St. 380, 13 Atl. 444, 4 Am. St. Rep. 650.

Rhode Island.— Seamons *v.* Fitts, 20 R. I. 443, 40 Atl. 3; McCloskey *v.* Moies, 19 R. I. 297, 33 Atl. 225, ice and snow.

Wisconsin.— Boltz *v.* Sullivan, 101 Wis. 608, 77 N. W. 870; Bloor *v.* Delafield, 69 Wis. 273, 34 N. W. 115.

Liability held not to exist for want of notice see Young *v.* Macomb, 11 N. Y. App. Div. 480, 42 N. Y. Suppl. 351 (bridge); Otto Tp.

constructive,[89] as where the condition of the road was notorious for a considerable period.[90] The notice need not be to the town in its corporate capacity,[91] but may be to the road officer,[92] and need not be in writing.[93] Notice should be of the

v. Wolf, 106 Pa. St. 608 (gas pipe broken); Brader *v.* Lehman Tp., 34 Pa. Super. Ct. 125; Allen *v.* East Buffalo Tp., 22 Pa. Co. Ct. 346 (ditch not properly filled); Carroll *v.* Allen, 20 R. I. 541, 40 Atl. 419 (soft spot in road).

89. *Maine.*— Savage *v.* Bangor, 40 Me. 176, 63 Am. Dec. 658, thaw where road obstructed with snow.

Massachusetts.— Tilton *v.* Wenham, 172 Mass. 407, 52 N. E. 514; Reed *v.* Northfield, 13 Pick. 94, 23 Am. Dec. 662.

New Hampshire.— Howe *v.* Plainfield, 41 N. H. 135; Johnson *v.* Haverhill, 35 N. H. 74.

Pennsylvania.— Meachem *v.* Corapolis Borough, 31 Pa. Super. Ct. 150; Rech *v.* Borough, 10 North. Co. Rep. 230.

Rhode Island.— Seamons *v.* Fitts, 21 R. I. 236, 42 Atl. 863.

Vermont.— Brown *v.* Swanton, 69 Vt. 53, 37 Atl. 280 (water flowing over road); Clark *v.* Corinth, 41 Vt. 449; Prindle *v.* Fletcher, 39 Vt. 255.

Wisconsin.— Boltz *v.* Sullivan, 101 Wis. 608, 77 N. W. 870; Wiltse *v.* Tilden, 77 Wis. 152, 46 N. W. 234; McCabe *v.* Hammond, 34 Wis. 590; Ward *v.* Jefferson, 24 Wis. 342.

Canada.— Couch *v.* Louise, 16 Manitoba 656 (barbed wire fence across road for three months); Hogg *v.* Brooke, 7 Ont. L. Rep. 273, 2 Ont. Wkly. Rep. 139, 3 Ont. Wkly. Rep. 120.

See 25 Cent. Dig. tit. "Highways," § 487 *et seq.*

But "actual notice" in a statute is not satisfied by evidence of gross inattention. Littlefield *v.* Webster, 90 Me. 213, 38 Atl. 141.

No notice is inferred as the result of heavy rain the previous night. Riley *v.* Eastchester, 18 N. Y. App. Div. 94, 45 N. Y. Suppl. 448.

The sufficiency of notice is a question for the jury. Bunker *v.* Gouldsboro, 81 Me. 188, 16 Atl. 543; Bradbury *v.* Falmouth, 18 Me. 64; Springer *v.* Bowdoinham, 7 Me. 442; Thompson *v.* Bolton, 197 Mass. 311, 83 N. E. 1089 (where defect had existed two years); McCarthy *v.* Dedham, 188 Mass. 204, 74 N. E. 319; Kortendick *v.* Waterford, 135 Wis. 77, 115 N. W. 331; Kennedy *v.* Lincoln, 122 Wis. 301, 99 N. W. 1038.

Notice held sufficiently shown see Howard *v.* Mendon, 117 Mass. 585 (knowledge of town that barriers placed had been constantly taken and left down); Shaw *v.* Potsdam, 11 N. Y. App. Div. 508, 42 N. Y. Suppl. 779 (declarations by commissioner); Brown *v.* Swanton, 69 Vt. 53, 37 Atl. 280 (evidence of plaintiff that while acting as selectman, about a year before the accident, he was told that the sluice was not sufficient to carry off water in spring); Redepenning *v.* Rock, 136 Wis. 372, 117 N. W. 805.

Notice held not sufficiently shown see Valley Tp. *v.* Stiles, 77 Kan. 557, 95 Pac. 572; Hinckley *v.* Somerset, 145 Mass. 326, 14 N. E. 166, conversations between persons not officers of the town.

90. *Indiana.*— Porter County *v.* Dombke, 94 Ind. 72.

Maine.— Colley *v.* Westbrook, 57 Me. 181, 2 Am. Rep. 20; Holt *v.* Penobscot, 56 Me. 15, 96 Am. Dec. 429.

Michigan.— Malloy *v.* Walker Tp., 77 Mich. 448, 43 N. W. 1012, 6 L. R. A. 695, where town officers frequently passed over the road.

New York.— Burns *v.* Farmington, 31 N. Y. App. Div. 364, 52 N. Y. Suppl. 229; Rankert *v.* Junius, 25 N. Y. App. Div. 470, 49 N. Y. Suppl. 850 (open ditch); Pettingill *v.* Olean, 20 N. Y. Suppl. 367.

Pennsylvania.— Brader *v.* Lehman, 34 Pa. Super. Ct. 125.

Wisconsin.— Schuenke *v.* Pine River, 84 Wis. 669, 54 N. W. 1007.

Canada.— Kennedy *v.* Portage la Prairie, 12 Manitoba 634.

See 25 Cent. Dig. tit. "Highways," § 487 *et seq.*

But see Hari *v.* Ohio Tp., 62 Kan. 315, 62 Pac. 1010.

91. French *v.* Brunswick, 21 Me. 29, 38 Am. Dec. 250.

In Maine notice may be to some of the inhabitants. Mason *v.* Ellsworth, 32 Me. 271 (notice to two inhabitants, although not among the principal men); Tuell *v.* Paris, 23 Me. 556; French *v.* Brunswick, 21 Me. 29, 38 Am. Dec. 250; Springer *v.* Bowdoinham, 7 Me. 442. But see Ham *v.* Wales, 58 Me. 222, holding that there is no duty on the inhabitant who receives notice to remove the obstruction.

92. *Kansas.*— Madison Tp. *v.* Scott, 9 Kan. App. 871, 61 Pac. 967.

Maine.— Barnes *v.* Rumford, 96 Me. 315, 52 Atl. 844 (where notice was given to an officer of a previous year); Bunker *v.* Gouldsboro, 81 Me. 188, 16 Atl. 543 (although another is acting surveyor).

New Hampshire.—Hardy *v.* Keene, 52 N. H. 370, so holding, although highway surveyor was not the agent of the town but was a public officer.

Pennsylvania.— Platz *v.* McKean Tp., 178 Pa. St. 601, 36 Atl. 136.

Rhode Island.— Seamons *v.* Fitts, 21 R. I. 236, 42 Atl. 863, 20 R. I. 443, 40 Atl. 3.

Wisconsin.— Goldsworthy *v.* Linden, 75 Wis. 24, 43 N. W. 656.

United States.— Eastman *v.* Clackamas County, 32 Fed. 24, 12 Sawy. 613.

See 25 Cent. Dig. tit. "Highways," § 489.

Notice to one commissioner of a board of town commissioners of highways of a defect is insufficient to charge the board with notice. Malloy *v.* Pelham, 4 N. Y. St. 828.

Although the defect is out of the surveyor's jurisdiction, if he does not so inform the citizen, the town may be held bound thereby. Rogers *v.* Shirley, 74 Me. 144.

93. Erie Tp. *v.* Beamer, 71 Kan. 182, 79 Pac. 1070.

particular defect which caused the accident,[94] and should be notice not only that the defect existed but that it might become dangerous,[95] and that the object complained of is unnecessarily in the highway.[96] Notice is immaterial where the defect was caused by the town's servant,[97] or where the town could not have prevented the accident if notified.[98]

2. Rights and Duties of Person Injured — a. Who Can Recover[99] — (i) *Traveler* — (a) *In General.* A traveler on the highway may recover for injuries from defects or obstructions therein,[1] although he stops temporarily.[2] But one who is not in any sense a traveler cannot usually recover for defects.[3]

(b) *Outside of Traveled Path.*[4] Municipalities are held to have fully performed their duty when they have constructed highways of reasonable width and smoothness, and if a traveler chooses, without reasonable cause, to travel outside such way, he assumes the risk,[5] and thus ordinarily there is no liability

94. McFarland *v.* Emporia Tp., 59 Kan. 568, 53 Pac. 864 (that fence insufficient); Littlefield *v.* Webster, 90 Me. 213, 38 Atl. 141 (holding that notice of another defect or of a cause likely to produce a defect is insufficient); Hurley *v.* Bowdoinham, 88 Me. 293, 34 Atl. 72; Pendleton *v.* Northport, 80 Me. 598, 16 Atl. 253 (holding that notice to municipal officers that a culvert was not of sufficient size readily to vent the water, seeking its way through it in time of a freshet, is not notice of a defect in the way produced by an overflow of the water at such a time); Osterhout *v.* Bethlehem, 55 N. Y. App. Div. 198, 66 N. Y. Suppl. 845.

95. Cunningham *v.* Clay Tp., 69 Kan. 373, 76 Pac. 907.

Diligence after notice.— The fact that defendant town had no reason to expect that the stoppage of the water in a highway would render the road unsafe did not relieve it from liability for failure to exercise diligence after the defect had been developed. Brown *v.* Swanton, 69 Vt. 53, 37 Atl. 280.

Notice of the actual condition is sufficient, although town officers may think it is not a defect. Hinckley *v.* Somerset, 145 Mass. 326, 14 N. E. 166.

96. Bartlett *v.* Kittery, 68 Me. 358.

97. Holmes *v.* Paris, 75 Me. 559; Pratt *v.* Cohasset, 177 Mass. 488, 59 N. E. 79; Hager *v.* Wharton Tp., 200 Pa. St. 281, 49 Atl. 757. See also Brooks *v.* Somerville, 106 Mass. 271.

98. Chamberlain *v.* Enfield, 43 N. H. 356.

99. **Persons entitled to redress for injury in city street** see Municipal Corporations, 28 Cyc. 1414.

1. Dumas *v.* Hampton, 58 N. H. 134 (span turned loose and driven along road); Elliott *v.* Lisbon, 57 N. H. 27; Howrigan *v.* Bakersfield, 79 Vt. 249, 64 Atl. 1130; Sykes *v.* Pawlet, 43 Vt. 446, 5 Am. Rep. 595.

The purpose of the travel is immaterial. Schatz *v.* Pfeil, 56 Wis. 429, 14 N. W. 628; Hammond *v.* Mukwa, 40 Wis. 35.

"Team" in a statute may include horses or cattle in droves driven along the highway. Elliott *v.* Lisbon, 57 N. H. 27.

A blind mare walking unattended on a highway is a traveler only if her owner was not negligent in letting her out. Howrigan *v.* Bakersfield, 79 Vt. 249, 64 Atl. 1130.

It is a question for the jury whether one was traveling on a highway (Sleeper *v.* Worcester, etc., R. Co., 58 N. H. 520; Cummings *v.* Center Harbor, 57 N. H. 17; Hardy *v.* Keene, 52 N. H. 370), unless no evidence exists on which to find that plaintiff was not a traveler (Norris *v.* Haverhill, 65 N. H. 89, 18 Atl. 85).

2. *Iowa.*— Duffy *v.* Dubuque, 63 Iowa 171, 18 N. W. 900, 50 Am. Rep. 743, drinking water.

Maryland.— Murray *v.* McShane, 52 Md. 217, 36 Am. Rep. 367.

Massachusetts.— Smethurst *v.* Barton Square Independent Cong. Church, 148 Mass. 261, 19 N. E. 387, 12 Am. St. Rep. 550, 2 L. R. A. 695 (unloading wagon); Britton *v.* Cummington, 107 Mass. 347 (to pick berries); Babson *v.* Rockport, 101 Mass. 93 (to fill up hole in roadway). But see Richards *v.* Enfield, 13 Gray 344, holding that a traveler upon a highway who stops and ties his horse outside of the limits of the highway using due care cannot, if the horse gets loose and runs upon the highway, and suffers an injury from a defect therein, maintain an action against the town.

New Hampshire.— Varney *v.* Manchester, 58 N. H. 430, 40 Am. Rep. 592 (to see procession pass); Hardy *v.* Keene, 52 N. H. 370 (stopping to watch work).

Wisconsin.— Busse *v.* Rogers, 120 Wis. 443, 98 N. W. 219, 64 L. R. A. 183, turning aside to play for brief time.

3. Lyons *v.* Brookline, 119 Mass. 491 (child sitting on sidewalk); Blodgett *v.* Boston, 8 Allen (Mass.) 237; Fay *v.* Kent, 55 Vt. 557 (boy entering sand put beside road).

Children playing on the highway have been held entitled to recover in some cases (Chicago *v.* Keefe, 114 Ill. 222, 2 N. E. 267, 55 Am. Rep. 860; McGuire *v.* Spence, 91 N. Y. 303, 43 Am. Rep. 668), and not entitled in others (Stinson *v.* Gardiner, 42 Me. 248, 66 Am. Dec. 281; Tighe *v.* Lowell, 119 Mass. 472).

Plaintiff held not a traveler see Brown *v.* Skowhegan, 82 Me. 273, 19 Atl. 399 (crossing ditch approaching road); McCarthy *v.* Portland, 67 Me. 167, 24 Am. Rep. 23 (horse-racing); Leslie *v.* Lewiston, 62 Me. 468.

4. **Negligence in leaving the traveled way on city streets** see Municipal Corporations, 28 Cyc. 1430.

5. Orr *v.* Oldtown, 99 Me. 190, 58 Atl. 914.

upon the municipality for accidents outside the traveled path;[6] but the circumstances may be such that even in such a case the municipality may be held, if the injury is not proximately due to the negligence of the traveler.[7]

(II) *LAWBREAKERS.*[8] A person injured may recover, although he was at the time violating the law by driving on the wrong side of the road,[9] or by driving on Sunday.[10] Under some statutes if the load is heavier than permitted by law the town is not liable.[11]

(III) *PERSONS BOUND TO REPAIR.* Persons bound to repair a road cannot recover for injuries from defects which they should have remedied,[12] but anything less than a duty to repair will not bar plaintiff.[13]

b. Contributory Negligence [14] — (I) *IN GENERAL.* A person using a highway must show such care as a prudent person would use,[15] measured in view of the

6. *Maine.*— Tasker *v.* Farmingdale, 88 Me. 103, 33 Atl. 785; Tasker *v.* Farmingdale, 85 Me. 523, 27 Atl. 464; Hall *v.* Unity, 57 Me. 529, way to watering trough.

Massachusetts.— Dickinson *v.* Boston, 188 Mass. 595, 75 N. E. 68, 1 L. R. A. 664; Carey *v.* Hubbardston, 172 Mass. 106, 51 N. E. 521; Harwood *v.* Oakham, 152 Mass. 421, 25 N. E. 625; Little *v.* Brockton, 123 Mass. 511; Shepardson *v.* Colerain, 13 Metc. 55; Tisdale *v.* Norton, 8 Metc. 388.

New York.— Cleveland *v.* Pittsford, 72 Hun 552, 25 N. Y. Suppl. 630 [*affirmed* in 146 N. Y. 384, 42 N. E. 543].

Vermont.—Whitney *v.* Essex, 38 Vt. 270.

Wisconsin.— Stricker *v.* Reedsburg, 101 Wis. 457, 77 N. W. 897; Welsh *v.* Argyle, 89 Wis. 649, 62 N. W. 517; Cartright *v.* Belmont, 58 Wis. 370, 17 N. W. 237.

See 25 Cent. Dig. tit. "Highways," § 503.

It is a question for the jury whether a side-track appeared to have been traveled to a considerable extent as a part of the public highway and was reasonably accessible. Hebbe *v.* Maple Creek, 121 Wis. 668, 99 N. W. 442.

7. Wakeham *v.* St. Clair Tp., 91 Mich. 15, 51 N. W. 696 (where there was no visible sign to indicate that any portion of roadbed was unsafe); Glidden *v.* Reading, 38 Vt. 52, 88 Am. Dec. 639 (blind man leaving road to avoid approaching team); Coppins *v.* Jefferson, 126 Wis. 578, 105 N. W. 1078 (where only slight deviation would cause wheels to strike obstruction); Boltz *v.* Sullivan, 101 Wis. 608, 77 N. W. 870 (accidental deviation); Wheeler *v.* Westport, 30 Wis. 392 (walking outside traveled track but near to it); Kelly *v.* Whitchurch Tp., 12 Ont. L. Rep. 83, 7 Ont. Wkly. Rep. 279 [*affirming* 11 Ont. L. Rep. 155, 6 Ont. Wkly. Rep. 839] (horse shying and swerving); Hogg *v.* Brooke, 7 Ont. L. Rep. 273, 2 Ont. Wkly. Rep. 139, 3 Ont. Wkly. Rep. 120.

8. Injury sustained in city street while violating law see MUNICIPAL CORPORATIONS, 28 Cyc. 1417.

9. *Connecticut.*— O'Neil *v.* East Windsor, 63 Conn. 150, 27 Atl. 237.

Massachusetts.— Damon *v.* Scituate, 119 Mass. 66, 20 Am. Rep. 315.

Missouri.— Beckerle *v.* Weiman, 12 Mo. App. 354.

New Hampshire.— Gale *v.* Lisbon, 52 N. H. 174.

Pennsylvania.— Grier *v.* Sampson, 27 Pa. St. 183.

A bicyclist riding on path not a sidewalk may recover. Schell *v.* German Flatts, 123 N. Y. App. Div. 197, 108 N. Y. Suppl. 219 [*affirming* 54 Misc. 445, 104 N. Y. Suppl. 116].

10. Platz *v.* Cohoes, 89 N. Y. 219, 42 Am. Rep. 286; Sutton *v.* Wauwatosa, 29 Wis. 21, 9 Am. Rep. 534; Armstrong *v.* Toler, 11 Wheat. (U. S.) 258, 6 L. ed. 468. *Contra*, Hinckley *v.* Penobscot, 42 Me. 89; Davis *v.* Somerville, 128 Mass. 594, 35 Am. Rep. 399; Johnson *v.* Irasburgh, 47 Vt. 28, 19 Am. Rep. 111. And see SUNDAY.

11. Howe *v.* Castleton, 25 Vt. 162.

12. Todd *v.* Rowley, 8 Allen (Mass.) 51. But see Wood *v.* Waterville, 4 Mass. 422.

13. Barstow *v.* Augusta, 17 Me. 199; Reed *v.* Northfield, 13 Pick. (Mass.) 94, 23 Am. Dec. 662 (inhabitant who knew of the defect and gave no notice); Doan *v.* Willow Springs, 101 Wis. 112, 76 N. W. 1104 (mere authority to fix bad places).

14. Negligence contributing to injury in city street see MUNICIPAL CORPORATIONS, 28 Cyc. 1418, 1493.

15. *Delaware.*— Ford *v.* Whiteman, 2 Pennew. 355, 45 Atl. 543.

Indiana.— Chicago, etc., R. Co. *v.* Leachman, 161 Ind. 512, 69 N. E. 253.

Kansas.— Missouri, etc., Tel. Co. *v.* Vandervort, 71 Kan. 101, 79 Pac. 1068; Cunningham *v.* Clay Tp., 69 Kan. 373, 76 Pac. 907.

Maine.— Farrar *v.* Greene, 32 Me. 574; Jacobs *v.* Bangor, 16 Me. 187, 33 Am. Dec. 652, road being repaired.

Maryland.— Harford County *v.* Hamilton, 60 Md. 340, 45 Am. Rep. 739.

Massachusetts.—Hill *v.* Seekonk, 119 Mass. 85; Thompson *v.* Bridgewater, 7 Pick. 188, holding, however, that a traveler need not look far ahead to guard against obstructions which ought not to exist.

New Hampshire.— Tucker *v.* Henniker, 41 N. H. 317.

New York.— Griffin *v.* New York, 9 N. Y. 456, 61 Am. Dec. 700; Harlow *v.* Humiston, 6 Cow. 189.

Wisconsin.— Groundwater *v.* Washington, 92 Wis. 56, 65 N. W. 871 (holding it misleading to charge that driver was justified in driving over place unless it was rashness to do so); Duthie *v.* Washburn, 87 Wis. 231, 58

character of the horse he is driving,[16] and is bound to use suitable and safe harness and equipment;[17] and where plaintiff's negligence contributes materially to or is the proximate cause of his injury the municipality is not liable, although the way may have been defective,[18] as where the traveler is injured by a defect which

N. W. 380; Wall *v.* Highland, 72 Wis. 435, 39 N. W. 560. See Doan *v.* Willow Springs, 101 Wis. 112, 76 N. W. 1104, drawing a distinction between slight negligence, which will not bar recovery, and failure in a slight degree to use due care.

See 25 Cent. Dig. tit. "Highways," § 498.

Presumption of safety of road.— A traveler has a right to rely to some extent on the duty of the municipality to make its roads safe and to presume that they are so. Neal *v.* Wilmington, etc., Electric R. Co., 3 Pennew. (Del.) 467, 53 Atl. 338; Atchison *v.* Plunkett, 8 Kan. App. 308, 55 Pac. 677; Glidden *v.* Reading, 38 Vt. 52, 88 Am. Dec. 639 (holding that a traveler knowing nothing of a road, and being unable to discover anything to the contrary, has a right to presume that the road is reasonably safe in its surface and margin); Seward *v.* Milford, 21 Wis. 485 (travel by night).

Where a person is riding with another in the same carriage and has an opportunity to observe and give notice of dangers that may be avoided, he is not in law relieved of all care because the other is the one driving. It is the duty of a passenger, when he has opportunity to do so, as well as of the driver, to learn of any danger in a highway, and avoid it, if practicable. Whitman *v.* Fisher, 98 Me. 575, 57 Atl. 895.

Driving at night.— It is not necessarily negligent to drive at night if care commensurate with such travel is shown. Salem *v.* Walker, 16 Ind. App. 687, 46 N. E. 90; Rysdyke *v.* Mt. Hope, 46 N. Y. App. Div. 624, 61 N. Y. Suppl. 645; Bailey *v.* Brown Tp., 190 Pa. St. 530, 42 Atl. 951; Glaub *v.* Goshen Tp., 7 Kulp (Pa.) 292 (driving at night in thunderstorm); Watts *v.* Southern Bell Tel., etc., Co., 100 Va. 45, 40 S. E. 107 (hitting telegraph pole in dark); Hinkley *v.* Rosendale, 95 Wis. 271, 70 N. W. 158 (hitting stump); Bills *v.* Kaukauna, 94 Wis. 310, 68 N. W. 992 (running into barbed wire fence); Rumrill *v.* Delafield, 82 Wis. 184, 52 N. W. 261; Seward *v.* Milford, 21 Wis. 485; Huffman *v.* Bayham, 26 Ont. App. 514. But a higher degree of care is required at night than in the day, and failure to use the higher degree may bar plaintiff's recovery. Cook *v.* Fogarty, 103 Iowa 500, 72 N. W. 677. 39 L. R. A. 488 (riding bicycle without lights); Whitman *v.* Fisher, 98 Me. 575, 57 Atl. 895 (horse blind); Mueller *v.* Ross Tp., 152 Pa. St. 399, 25 Atl. 604 (letting horses find road in dark). Duty to light roads see *supra*, VII, E, 1, d, (II). Driving at night on city street see MUNICIPAL CORPORATIONS, 28 Cyc. 1431.

16. Dimock *v.* Suffield, 30 Conn. 129 (holding that there must be extra care when horse shies); Murdock *v.* Warwick, 4 Gray (Mass.) 178; Tucker *v.* Henniker, 41 N. H. 317; Clark *v.* Barrington, 41 N. H. 44.

Plaintiff held not negligent as to animal driven see Daniels *v.* Saybrook, 34 Conn. 377 (where he had no knowledge of viciousness of the horse); Centralia *v.* Scott, 59 Ill. 129 (although horses had run away before); Wright *v.* Templeton, 132 Mass. 49 (although vision of horse imperfect); Woods *v.* Groton, 111 Mass. 357 (although horse sometimes shied); Wood *v.* Gilboa, 76 Hun (N. Y.) 175, 27 N. Y. Suppl. 586 [*affirmed* in 146 N. Y. 383, 42 N. E. 544] (colt); Chamberlain *v.* Wheatland, 4 Silv. Sup. (N. Y.) 165, 7 N. Y. Suppl. 190 (horse balky); Glaub *v.* Goshen Tp., 7 Kulp (Pa.) 292.

Evidence of the character and actions of the horse is admissible. Patterson *v.* South Alabama, etc., R. Co., 89 Ala. 318, 7 So. 437 (mule's habit of stumbling); Bailey *v.* Belfast, (Me.) 10 Atl. 452; Dennett *v.* Wellington, 15 Me. 27 (previous bad behavior of horse); Blood *v.* Tyngsborough, 103 Mass. 509 (driving gentle horse in usual ruts); Todd *v.* Rowley, 8 Allen (Mass.) 51 (horse shying before and after accident); Judd *v.* Claremont, 66 N. H. 418, 23 Atl. 427 (that horse had stumbled before); Reid *v.* Ripley, 14 N. Y. Suppl. 124; Wilson *v.* Spafford, 10 N. Y. Suppl. 649 (that horse shied at same place the day after the accident); Stone *v.* Pendleton, 21 R. I. 332, 43 Atl. 643 (that horse had shown no signs of fright previously). But see Crafts *v.* Boston, 109 Mass. 519, holding inadmissible evidence that horse was safe where there was no other evidence that plaintiff careful.

17. Clark *v.* Barrington, 41 N. H. 44; Fry *v.* Perkiomen Tp., 1 Montg. Co. Rep. (Pa.) 25, holding, however, that the rule does not go to the length of requiring the safest form of vehicle.

Plaintiff's negligence in having unfit tackle barring him from recovery see Coombs *v.* Topsham, 38 Me. 204; Moore *v.* Abbot, 32 Me. 46; Fogg *v.* Nahant, 106 Mass. 278; Jenks *v.* Wilbraham, 11 Gray (Mass.) 142 (where driver proceeded after his axle was injured by defect in highway); Tucker *v.* Henniker, 41 N. H. 317; Patchen *v.* Walton, 17 N. Y. App. Div. 158, 45 N. Y. Suppl. 145; Card *v.* Columbia Tp., 191 Pa. St. 254, 43 Atl. 217; Jackson *v.* Bellevieu, 30 Wis. 250.

No negligence of plaintiff barring him from recovery see Lindsey *v.* Danville, 45 Vt. 72 (although traveler's hold-back buckled loosely); Fletcher *v.* Barnet, 43 Vt. 192 (although plaintiff's gig not properly made); Luedke *v.* Mukwa, 90 Wis. 57, 62 N. W. 931 (broken spring).

18. *Georgia.*— Kent *v.* Southern Bell Tel., etc., Co., 120 Ga. 980, 48 S. E. 399, ditch.

Maine.— Tasker *v.* Farmingdale, 91 Me. 521, 40 Atl. 544 (driving over culvert to

is visible and patent;[19] but plaintiff may recover where his own fault did not contribute to the injury,[20] although he may himself have been in some degree

avoid car); Gleason *v.* Bremen, 50 Me. 222; Farrar *v.* Greene, 32 Me. 574.

Maryland.— Knight *v.* Baltimore, 97 Md. 647, 55 Atl. 388, did not look to see hole.

Massachusetts.— Damon *v.* Scituate, 119 Mass. 66, 20 Am. Rep. 315 (plaintiff attempting to pass another when injured); Smith *v.* Smith, 2 Pick. 621, 13 Am. Dec. 464.

Michigan.— Tracey *v.* South Haven Tp., 132 Mich. 492, 93 N. W. 1065; Smith *v.* Walker Tp., 117 Mich. 14, 75 N. W. 141, urging horses through deep water.

Minnesota.— Skjeggerud *v.* Minneapolis, etc., Ry. Co., 38 Minn. 56, 35 N. W. 572.

New Hampshire.— Guertin *v.* Hudson, 71 N. H. 505, 53 Atl. 736; Sprague *v.* Bristol, 63 N. H. 430; Chamberlin *v.* Ossipee, 60 N. H. 212; Aldrich *v.* Monroe, 60 N. H. 118 (where plaintiff failed to chain wheels descending a steep hill); Lavery *v.* Manchester, 58 N. H. 444 (falling into a cellar which plaintiff maintained as a nuisance).

New York.—Clapper *v.* Waterford, 62 Hun 170, 16 N. Y. Suppl. 640; Lieberman *v.* Stanley, 88 N. Y. Suppl. 360.

Pennsylvania.— Conrad *v.* Upper Augusta Tp., 200 Pa. St. 337, 49 Atl. 770; Winner *v.* Oakland Tp., 158 Pa. St. 405, 27 Atl. 1110, 1111; Bechtel *v.* Mahanoy City Borough, 30 Pa. Super. Ct. 135 (driving through narrow passage where safer way was at hand); Morford *v.* Sharpsville Borough, 28 Pa. Super. Ct. 544 (driving horse over embankment where there was no guard-rail); Jejorek *v.* Nanticoke, 9 Kulp 501.

South Carolina.— Duncan *v.* Greenville County, 73 S. C. 254, 53 S. E. 367.

Vermont.— Bovee *v.* Danville, 53 Vt. 183; Clark *v.* Corinth, 41 Vt. 449.

Washington.— Baldwin *v.* Lincoln County, 29 Wash. 509, 69 Pac. 1081, instruction refused that person may use defective highway when necessity demands.

Wisconsin.— Schrunk *v.* St. Joseph, 120 Wis. 223, 97 N. W. 946 (driving over narrow fill covered with water); Krause *v.* Merrill, 115 Wis. 526, 92 N. W. 231; Seaver *v.* Union, 113 Wis. 322, 89 N. W. 163; Carpenter *v.* Rolling, 107 Wis. 559, 83 N. W. 953 (drunkenness); Doan *v.* Willow Springs, 101 Wis. 112, 76 N. W. 1104; Hawes *v.* Fox Lake, 33 Wis. 438.

See 25 Cent. Dig. tit. "Highways," § 498.

Evidence that plaintiff was commonly careful and skilful is incompetent on the question of plaintiff's negligence (McDonald *v.* Savoy, 110 Mass. 49), as is also evidence as to the habits of plaintiff (Langworthy *v.* Green Tp., 88 Mich. 207, 50 N. W. 130), or plaintiff's anxiety to reach home (Harris *v.* Clinton Tp., 64 Mich. 447, 31 N. W. 425, 8 Am. St. Rep. 842), or that plaintiff was habitually reckless (Brennan *v.* Friendship, 67 Wis. 233, 29 N. W. 902).

Evidence of plaintiff's due care held sufficient see Rusch *v.* Davenport, 6 Iowa 443 (inference from circumstances that plaintiff was not negligent); Foster *v.* Dixfield, 18 Me. 380; Carville *v.* Westford, 163 Mass. 544, 40 N. E. 893 (attempt to pull wagon back in road); Snow *v.* Provincetown, 120 Mass. 580.

The negligence of a driver of a vehicle may be imputed to the passengers and so prevent their recovery for a defect in the road. Bartram *v.* Sharon, 71 Conn. 686, 43 Atl. 143, 71 Am. St. Rep. 225, 46 L. R. A. 144; Petrich *v.* Union, 117 Wis. 46, 93 N. W. 819, negligence of husband driving imputed to wife injured by defect. *Compare* Plant *v.* Normanby Tp., 10 Ont. L. Rep. 16, 6 Ont. Wkly. Rep. 31. See, generally, NEGLIGENCE, 29 Cyc. 547 *et seq.*

19. *Connecticut.*— Fox *v.* Glastenbury, 29 Conn. 204, causeway under water.

Massachusetts.— Horton *v.* Ipswich, 12 Cush. 488, snow.

Michigan.— Wakeham *v.* St. Clair Tp., 91 Mich. 15, 51 N. W. 696, driving into open mudhole.

New York.— Sutphen *v.* North Hempstead, 80 Hun 409, 30 N. Y. Suppl. 128, riding bicycle on edge of gutter.

South Carolina.— Magill *v.* Lancaster County, 39 S. C. 27, 17 S. E. 507; Laney *v.* Chesterfield Co., 29 S. C. 140, 7 S. E. 56.

West Virginia.—Phillips *v.* Ritchie County Ct., 31 W. Va. 477, 7 S. E. 427, dangerous landslide.

Wisconsin.— Hopkins *v.* Rush River, 70 Wis. 10, 34 N. W. 909, 35 N. W. 939, flooded ford.

See 25 Cent. Dig. tit. "Highways," § 502.

But although a defect or obstruction may be visible, yet if plaintiff did not in fact see it and was not guilty of negligence in not seeing it he may still recover (Embler *v.* Wallkill, 132 N. Y. 222, 30 N. E. 404, plaintiff swept off load of hay by overhanging limb of tree; Rumrill *v.* Delafield, 82 Wis. 184, 52 N. W. 261, in dark), as for instance in the case of a dangling telegraph or telephone wire (Hayes *v.* Hyde Park, 153 Mass. 514, 27 N. E. 522, 12 L. R. A. 249; Sheldon *v.* Western Union Tel. Co., 51 Hun (N. Y.) 591, 4 N. Y. Suppl. 526 [*affirmed* in 121 N. Y. 697, 24 N. E. 1099].) And see, generally, TELEGRAPHS AND TELEPHONES.

20. *Georgia.*— Branan *v.* May, 17 Ga. 136.

Indiana.— Chicago, etc., R. Co. *v.* Leachman, 161 Ind. 512, 69 N. E. 253.

Maryland.— Charles County *v.* Mandanyohl, 93 Md. 150, 48 Atl. 1058, so holding, although plaintiff might have avoided known defects by going through field.

New Hampshire.— Farnum *v.* Concord, 2 N. H. 392.

New Jersey.—Morhart *v.* North Jersey St. R. Co., 64 N. J. L. 236, 45 Atl. 812, bicyclist riding bent over his wheel.

New York.— Clark *v.* Kirwan, 4 E. D. Smith 21.

Pennsylvania.— Bitting *v.* Maxatawny Tp., 180 Pa. St. 357, 36 Atl. 855; Sprowls *v.* Morris Tp., 179 Pa. St. 219, 36 Atl. 242;

negligent,[21] and although a latent defect in his harness or team existing without his fault was one of the concurring causes of the accident.[22]

(II) *Competency or Infirmity of Person Injured.*[23] Recovery may be had, although the driver of a team is a child,[24] or a woman,[25] an intoxicated person,[26] or a blind man,[27] if the negligence of such person did not directly contribute to or cause the injury.

(III) *Knowledge of Defect as Evidence of Contributory Negligence.*[28] A traveler being bound simply to use ordinary care on the highway,[29] mere knowledge of a defect in the highway, causing injury, does not of itself, as a matter of law, constitute contributory negligence, if the traveler has, after knowledge of the defect, exhibited ordinary care to avoid injury,[30] although it is

Smith *v.* Jackson Tp., 26 Pa. Super. Ct. 234 (holding that plaintiff need not keep his eyes constantly fixed on road-bed); Hookey *v.* Oakdale, 5 Pa. Super. Ct. 404.

Vermont.— Templeton *v.* Montpelier, 56 Vt. 328, so holding, although he took road nearest railroad and horses became frightened.

See 25 Cent. Dig. tit. "Highways," § 498.

Evidence held not to show contributory negligence see Davis *v.* Guilford, 55 Conn. 351, 11 Atl. 350 (driving load of hay downhill with chained wheel); Kent *v.* Southern Bell Tel., etc., Co., 120 Ga. 980, 48 S. E. 399 (unknown defects, like undermining); Branan *v.* May, 17 Ga. 136 (where servant reported stream fordable); Evansville, etc., R. Co. *v.* Carvener, 113 Ind. 51, 14 N. E. 738 (holding that plaintiff need not lighten his load where obstruction was not to be foreseen); Birdsell Mfg. Co. *v.* Loughman, 26 Ind. App. 359, 59 N. E. 872; Ryerson *v.* Abington, 102 Mass. 526 (ruptured person walking without a truss); Reed *v.* Deerfield, 8 Allen (Mass.) 522; Brown *v.* Swanton, 69 Vt. 53, 37 Atl. 280; Nichols *v.* Brunswick, 18 Fed. Cas. No. 10,238, 3 Cliff. 81 (horse backing into cellar).

That plaintiff might have used another road safely is no defense. Calvert County *v.* Gibson, 36 Md. 229. Choice of ways on city streets see MUNICIPAL CORPORATIONS, 28 Cyc. 1428.

Position of plaintiff on vehicle.— It is not negligent for a traveler to drive sitting in the ordinary position (Stevens *v.* Boxford, 10 Allen (Mass.) 25, 87 Am. Dec. 616, riding bareback; Hunt *v.* Lincoln Tp., 131 Mich. 637, 92 N. W. 288, riding on load over mud-hole; Jennings *v.* Albion, 90 Wis. 22, 62 N. W. 926, riding on seat not anchored to wagon); but if the traveler's unusual situation on the vehicle contributes to the injury it will bar recovery (Nebraska Tel. Co. *v.* Jones, 60 Nebr. 396, 83 N. W. 197 [*affirming* 59 Nebr. 510, 81 N. W. 435], plaintiff seated on top of high load driving spirited team down a steep hill; Bailey *v.* Brown Tp., 190 Pa. St. 530, 42 Atl. 951, where plaintiff had straps of horses he was leading round his waist). See also Nelson *v.* Shaw, 102 Wis. 274, 78 N. W. 417, holding negligence to be a question for the jury where plaintiff was sitting on a load with no brace for his feet.

21. Bloor *v.* Delafield, 69 Wis. 273, 34 N. W. 115; Griffin *v.* Willow, 43 Wis. 509; Hammond *v.* Mukwa, 40 Wis. 35. But see Cremer *v.* Portland, 36 Wis. 92.

22. *Illinois.*— Joliet *v.* Shufeldt, 144 Ill. 403, 32 N. E. 969, 36 Am. St. Rep. 453, 18 L. R. A. 750.

Massachusetts.— Palmer *v.* Andover, 2 Cush. 600, where there would have been no injury but for the defect in the highway.

New Hampshire.— Clark *v.* Barrington, 41 N. H. 44.

Vermont.— Fletcher *v.* Barnet, 43 Vt. 192; Hunt *v.* Pownal, 9 Vt. 411.

Wisconsin.— Hammond *v.* Mukwa, 40 Wis. 35.

23. **Competency or infirmity of person injured on city street** see MUNICIPAL CORPORATIONS, 28 Cyc. 1422.

24. Bronson *v.* Southbury, 37 Conn. 199 (using reasonable care in view of his age); Parish *v.* Eden, 62 Wis. 272, 22 N. W. 399.

25. Cobb *v.* Standish, 14 Me. 198.

26. Stuart *v.* Machias Port, 48 Me. 477, holding that intoxication alone does not show lack of care.

But if the intoxication causes or contributes to the injury it bars recovery. Woods *v.* Tipton County, 128 Ind. 289, 27 N. E. 611; Monk *v.* New Utrecht, 104 N. Y. 552, 11 N. E. 268; Cassedy *v.* Stockbridge, 21 Vt. 391.

27. Sleeper *v.* Sandown, 52 N. H. 244; Glidden *v.* Reading, 38 Vt. 52, 88 Am. Dec. 639.

28. **Effect of knowledge of defect in city street** see MUNICIPAL CORPORATIONS, 28 Cyc. 1422.

29. Thomas *v.* Western Union Tel. Co., 100 Mass. 156; Coates *v.* Canaan, 51 Vt. 131.

30. *Indiana.*— Ohio, etc., R. Co. *v.* Trowbridge, 126 Ind. 391, 26 N. E. 64; Evansville, etc., R. Co. *v.* Carvener, 113 Ind. 51, 14 N. E. 738; Gosport *v.* Evans, 112 Ind. 133, 13 N. E. 256, 2 Am. St. Rep. 164; Wilson *v.* Trafalgar, etc., Gravel Road Co., 93 Ind. 287; Henry County Turnpike Co. *v.* Jackson, 86 Ind. 111, 44 Am. Rep. 274.

Iowa.— Overhouser *v.* American Cereal Co., 118 Iowa 417, 92 N. W. 74.

Kansas.— Erie Tp. *v.* Beamer, 71 Kan. 182, 79 Pac. 1070; Missouri, etc., Tel. Co. *v.* Vandervort, 71 Kan. 101, 79 Pac. 1068; Atchison *v.* Plunkett, 8 Kan. App. 308, 55 Pac. 677; Falls Tp. *v.* Stewart, 3 Kan. App. 403, 42 Pac. 926, where there was no other route and plaintiff drove carefully.

admissible evidence of contributory negligence,[31] and taken into consideration with other competent evidence may establish that issue.[32]

c. Doctrine of Proximate Cause.[33] To render a municipality liable in an action for an injury resulting from a defective highway the defect must have proximately contributed to the injury complained of.[34] It should be observed,

Maryland.— Charles County *v.* Mandanyohl, 93 Md. 150, 48 Atl. 1058.

Massachusetts.— Pratt *v.* Cohasset, 177 Mass. 488, 59 N. E. 79 (horse stumbling on loose gravel at night); Pomeroy *v.* Westfield, 154 Mass. 462, 28 N. E. 899; Hawks *v.* Northampton, 121 Mass. 10; Lyman *v.* Amherst, 107 Mass. 339; Mahoney *v.* Metropolitan R. Co., 104 Mass. 73; Whittaker *v.* West Boyleston, 97 Mass. 273; Frost *v.* Waltham, 12 Allen 85; Gilman *v.* Deerfield, 15 Gray 577; Reed *v.* Northfield, 13 Pick. 94, 23 Am. Dec. 662.

Michigan.— Whoram *v.* Argentine Tp., 112 Mich. 20, 70 N. W. 341 (knowledge several months before injury); Bouga *v.* Weare Tp., 109 Mich. 520, 67 N. W. 557; Harris *v.* Clinton Tp., 64 Mich. 447, 31 N. W. 425, 8 Am. St. Rep. 842.

Missouri.— Smith *v.* St. Joseph, 45 Mo. 449; Foster *v.* Swope, 41 Mo. App. 137.

New York.— Rysdyke *v.* Mt. Hope, 46 N. Y. App. Div. 624, 61 N. Y. Suppl. 645, where plaintiff watched for the defect and thought he had passed it.

Oregon.— Gardner *v.* Wasco County, 37 Oreg. 392, 61 Pac. 834, 62 Pac. 753.

Pennsylvania.— Stokes *v.* Ralpho Tp., 187 Pa. St. 333, 40 Atl. 958; Humphreys *v.* Armstrong County, 56 Pa. St. 204; Millcreek Tp. *v.* Perry, 8 Pa. Cas. 474, 12 Atl. 149; Wilson *v.* O'Hara Tp., 14 Pa. Super. Ct. 258; Allen *v.* Warwick Tp., 9 Pa. Super. Ct. 507.

Texas.— Pecos, etc., R. Co. *v.* Bowman, 34 Tex. Civ. App. 98, 78 S. W. 22.

Washington.— Archibald *v.* Lincoln County, 50 Wash. 55, 96 Pac. 831.

Wisconsin.— Doan *v.* Willow Springs, 101 Wis. 112, 76 N. W. 1104; Hinkley *v.* Rosendale, 95 Wis. 271, 70 N. W. 158; Kenworthy *v.* Ironton, 41 Wis. 647; Kavanaugh *v.* Janesville, 24 Wis. 618.

Canada.— Madill *v.* Caledon Tp., 3 Ont. L. Rep. 66 [*affirmed* in 3 Ont. L. Rep. 555, 1 Ont. Wkly. Rep. 299].

See 25 Cent. Dig. tit. "Highways," § 501.

Previous knowledge of a defect is not in itself sufficient to prevent recovery. Qualey *v.* Scranton, 7 Lack. Jur. (Pa.) 123.

Whether it is negligence to forget a defect seen previously on the same day is for the jury. Bouga *v.* Weare Tp., 109 Mich. 520, 67 N. W. 557. See also Whoram *v.* Argentine Tp., 112 Mich. 20, 70 N. W. 341.

31. Gardner *v.* Wasco County, 37 Oreg. 392, 61 Pac. 834, 62 Pac. 753; Forks Tp. *v.* King, 84 Pa. St. 230.

32. *Georgia.*— Kent *v.* Southern Bell Tel., etc., Co., 120 Ga. 980, 48 S. E. 399.

Indiana.— Salem *v.* Walker, 16 Ind. App. 687, 46 N. E. 90.

Maine.— Merrill *v.* North Yarmouth, 78 Me. 200, 3 Atl. 575, 57 Am. Rep. 794.

Massachusetts.— Compton *v.* Revere, 179 Mass. 413, 60 N. E. 931.

New Hampshire.— Farnum *v.* Concord, 2 N. H. 392.

New York.— Shepard *v.* Bellew, etc., Co., 101 N. Y. App. Div. 257, 91 N. Y. Suppl. 999; Cleveland *v.* Pittsford, 72 Hun 552, 25 N. Y. Suppl. 630 [*affirmed* in 146 N. Y. 384, 42 N. E. 543]; Day *v.* Crossman, 4 Thomps. & C. 122.

Pennsylvania.— Wellman *v.* Susquehanna Depot, 167 Pa. St. 239, 31 Atl. 566; Winner *v.* Oakland Tp., 158 Pa. St. 405, 27 Atl. 1110, 1111; Hill *v.* Tionesta Tp., 146 Pa. St. 11, 23 Atl. 204; Snyder *v.* Penn Tp., 14 Pa. Super. Ct. 145; Walters *v.* Wayne Tp., 16 Pa. Co. Ct. 613.

Vermont.— Hyde *v.* Jamaica, 27 Vt. 443.

Wisconsin.— Nicks *v.* Marshall, 24 Wis. 139.

Canada.— Messenger *v.* Bridgetown, 33 Nova Scotia 291.

See 25 Cent. Dig. tit. "Highways," § 501.

33. As to city streets see MUNICIPAL CORPORATIONS, 28 Cyc. 1407.

Proximate cause a question for the jury as to city streets see MUNICIPAL CORPORATIONS, 28 Cyc. 1509.

34. Judd *v.* Claremont, 66 N. H. 418, 23 Atl. 427; West Mahanoy Tp. *v.* Watson, 112 Pa. St. 574, 3 Atl. 866, 56 Am. Rep. 336, 116 Pa. St. 344, 9 Atl. 430, 2 Am. St. Rep. 604; Schuenke *v.* Pine River, 84 Wis. 669, 54 N. W. 1007; Beaulieu *v.* St. Urban Premier, 22 Quebec Super. Ct. 208.

Defect held to be the proximate cause of the accident see De Long *v.* Miller, 151 Cal. 227, 90 Pac. 925; Davidson *v.* Portland, 69 Me. 116, 31 Am. Rep. 253; Clark *v.* Lebanon, 63 Me. 393; Brown *v.* Wabash R. Co., 90 Mo. App. 20; Gilbert *v.* Burque, 72 N. H. 521, 57 Atl. 927; Roblee *v.* Indian Lake, 11 N. Y. App. Div. 435, 42 N. Y. Suppl. 326 (horse shying at wave where was no barrier); Curry *v.* Luzerne Borough, 24 Pa. Super. Ct. 514; Fenna *v.* Clare, [1895] 1 Q. B. 199, 64 L. J. Q. B. 238, 15 Reports 220.

Defect held not to be the proximate cause of the accident see Moulton *v.* Sanford, 51 Me. 127; Smith *v.* Walker Tp., 117 Mich. 14, 75 N. W. 141 (hole three and one-half feet deep not proximate cause of drowning of horse in flood); Owen *v.* Derry, 71 N. H. 405, 52 Atl. 926 (tripping over piece of abandoned sewer pipe formerly a part of a culvert not an injury from defective culvert); Hulse *v.* Goshen, 71 N. Y. App. Div. 436, 75 N. Y. Suppl. 723 (dog frightening horse into rock); Ohl *v.* Bethlehem Tp., 199 Pa. St. 588, 49 Atl. 288 (decayed fence pushed over and confusing plaintiff); West Mahanoy Tp. *v.* Watson, 116 Pa. St. 344, 9 Atl. 430, 2 Am. St. Rep. 604, 112 Pa. St. 574, 3 Atl.

however, that the chain of legal cause is not broken by the intervention of an accident, not the fault of the person injured,[35] by the traveler's unconscious act or attempt in an emergency to avoid injury,[36] by the intervention of the act of a third person coöperating with the defect to cause the injury,[37] or where the defect is one of several concurring causes,[38] unless the intervening act constitutes an independent and the real efficient cause.[39] Thus the municipality is liable where damage ensues from the fright of a traveler's horse caused by a defect in a highway,[40]

866 (where horses after original fright were deflected in their course by one railroad train and then killed by another); Ford *v.* Braintree, 64 Vt. 144, 23 Atl. 633 (injury from hole caused by water set back by defective culvert not an injury from insufficiency of culvert); Smith *v.* County Ct., 33 W. Va. 713, 11 S. E. 1, 8 L. R. A. 82; Zopfi *v.* Postal Tel. Cable Co., 60 Fed. 987, 9 C. C. A. 308.

It is for the jury to determine whether the defect was the proximate cause of the injury (Overhouser *v.* American Cereal Co., 118 Iowa 417, 92 N. W. 74; Lake *v.* Milliken, 62 Me. 240, 16 Am. Rep. 456; Cutting *v.* Shelburne, 193 Mass. 1, 78 N. E. 752; Briggs *v.* Pine River Tp., 150 Mich. 381, 114 N. W. 221; Malloy *v.* Walker Tp., 77 Mich. 448, 43 N. W. 1012, 6 L. R. A. 695; Hendry *v.* North Hampton, 72 N. H. 351, 56 Atl. 922, 101 Am. St. Rep. 681, 64 L. R. A. 70; Hendry *v.* North Hampton, 71 N. H. 26, 51 Atl. 283; Snowden *v.* Somerset, 100 N. Y. App. Div. 39, 90 N. Y. Suppl. 885; Lewis *v.* Ballston Terminal R. Co., 45 N. Y. App. Div. 129, 60 N. Y. Suppl. 1035; Gardner *v.* Wasco County, 37 Oreg. 392, 61 Pac. 834, 62 Pac. 753; Card *v.* Columbia Tp., 191 Pa. St. 254, 43 Atl. 217; Bitting *v.* Maxatawny Tp., 177 Pa. St. 213, 35 Atl. 715; Kelsey *v.* Glover, 15 Vt. 708; Kortendick *v.* Waterford, 135 Wis. 77, 115 N. W. 331; Kennedy *v.* Lincoln, 122 Wis. 301, 99 N. W. 1038; Jenewein *v.* Irving, 122 Wis. 228, 99 N. W. 346, 903; Laird *v.* Otsego, 90 Wis. 25, 62 N. W. 1042), unless the evidence is so insufficient that a finding thereon would not be sustained (Scofield *v.* Poughkeepsie, 122 N. Y. App. Div. 868, 107 N. Y. Suppl. 767; Eckert *v.* Shawangunk, 77 N. Y. App. Div. 645, 78 N. Y. Suppl. 994; Stringert *v.* Ross Tp., 179 Pa. St. 614, 36 Atl. 345).

Duty performed without negligence.— The principle of the common law that a duty performed without negligence cannot be the proximate cause of an actionable injury to another applies to cases of highway injuries, although the liability is there dependent upon statutory provisions. Fehrman *v.* Pine River, 118 Wis. 150, 95 N. W. 105.

35. Baldwin *v.* Greenwoods Turnpike Co., 40 Conn. 238, 16 Am. Rep. 33; Winship *v.* Enfield, 42 N. H. 197.

36. *Alabama.*— Wells *v.* Gallagher, 144 Ala. 363, 39 So. 747, 113 Am. St. Rep. 50, 3 L. R. A. N. S. 759.

Maine.— Page *v.* Bucksport, 64 Me. 51, 18 Am. Rep. 239.

Massachusetts.— Davis *v.* Longmeadow, 169 Mass. 551, 48 N. E. 774; Sears *v.* Dennis, 105 Mass. 310; Tuttle *v.* Holyoke, 6 Gray 447; Lund *v.* Tyngsboro, 11 Cush. 563, 59 Am. Dec. 159.

Oregon.— Nosler *v.* Coos Bay R. Co., 39 Oreg. 331, 64 Pac. 644.

Vermont.— Stickney *v.* Maidstone, 30 Vt. 738.

Canada.— Hogg *v.* Brooke Tp., 7 Ont. L. Rep. 273, 2 Ont. Wkly. Rep. 139, 3 Ont. Wkly. Rep. 120.

See 25 Cent. Dig. tit. "Highways," § 494 *et seq.*

37. *Massachusetts.*— Hayes *v.* Hyde Park, 153 Mass. 514, 27 N. E. 522, 12 L. R. A. 249; Flagg *v.* Hudson, 142 Mass. 280, 8 N. E. 42, 56 Am. Rep. 674. But see Bemis *v.* Arlington, 114 Mass. 507; Kidder *v.* Dunstable, 7 Gray 104.

New Hampshire.— Norris *v.* Litchfield, 35 N. H. 271, 69 Am. Dec. 546.

New York.— Glazier *v.* Hebron, 62 Hun 137, 16 N. Y. Suppl. 503 [*reversed* on other grounds in 131 N. Y. 447, 30 N. E. 239]; Clarke *v.* Crimmins, 10 N. Y. Suppl. 868.

Pennsylvania.— Burrell Tp. *v.* Uncapher, 117 Pa. St. 353, 11 Atl. 619, 2 Am. St. Rep. 664.

Canada.— Holland *v.* York Tp., 7 Ont. L. Rep. 533, 3 Ont. Wkly. Rep. 287.

See 25 Cent. Dig. tit. "Highways," § 497.

But see Mahogany *v.* Ward, 16 R. I. 479, 17 Atl. 860, 27 Am. St. Rep. 753.

38. Lincoln Tp. *v.* Koenig, 10 Kan. App. 504, 63 Pac. 90; Ivory *v.* Deerpark, 116 N. Y. 476, 22 N. E. 1080; Dreher *v.* Fitchburg, 22 Wis. 675, 99 Am. Dec. 91. But see Orr *v.* Oldtown, 99 Me. 190, 58 Atl. 914.

39. Horrigan *v.* Clarksburg, 150 Mass. 218, 22 N. E. 897, 5 L. R. A. 609; Howe *v.* Lowell, 101 Mass. 99.

40. *Indiana.*— Sullivan County *v.* Sisson, 2 Ind. App. 311, 28 N. E. 374.

Maine.— Carleton *v.* Caribou, 88 Me. 461, 34 Atl. 269; Card *v.* Ellsworth, 65 Me. 547, 20 Am. Rep. 722; Willey *v.* Belfast, 61 Me. 569. See also Spaulding *v.* Winslow, 74 Me. 528.

Massachusetts.— Cushing *v.* Bedford, 125 Mass. 526.

Michigan.— Simons *v.* Casco Tp., 105 Mich. 588, 63 N. W. 500.

New Hampshire.— Merrill *v.* Claremont, 58 N. H. 468.

Rhode Island.— Stone *v.* Pendleton, 21 R. I. 332, 43 Atl. 643; Lee *v.* Union R. Co., 12 R. I. 383, 34 Am. Rep. 668.

Virginia.— Watts *v.* Southern Bell Tel., etc., Co., 100 Va. 45, 40 S. E. 107.

Wisconsin.— Donohue *v.* Warren, 95 Wis. 367, 70 N. W. 305.

See 25 Cent. Dig. tit. "Highways," § 496.

although the horse gets beyond the control of the driver;[41] and even where the horse is not frightened at a defect in the highway, provided the accident would not have happened but for the defect,[42] although some cases are decided upon the doctrine that where the primary cause of the injury is the loss of control of the horse the municipality is not liable, although the defect may have contributed to the injury,[43] unless the injury would have occurred even if the horse had not been uncontrollable,[44] it being held that a municipality is not required to keep its roads in such condition that unmanageable horses may be driven thereon without risk.[45]

3. Liability For Injury[46] — a. General Nature. Liability for injuries on public roads is statutory only,[47] being generally confined to some defect in the way,[48] and generally arising whenever an indictment would lie.[49]

But see West Mahanoy Tp. *v.* Watson, 116 Pa. St. 344, 9 Atl. 430, 2 Am. St. Rep. 604.

41. *Kansas.*— Union St. R. Co. *v.* Stone, 54 Kan. 83, 37 Pac. 1012.

Minnesota.— Campbell *v.* Stillwater, 32 Minn. 308, 20 N. W. 320, 50 Am. Rep. 567.

North Carolina.— Dillon *v.* Raleigh, 124 N. C. 184, 32 S. E. 548.

Pennsylvania.— Wagner *v.* Jackson Tp., 133 Pa. St. 61, 19 Atl. 312.

United States.— Wolfe *v.* Erie Tel., etc., Co., 33 Fed. 320.

Canada.— Thomas *v.* North Norwich Tp., 9 Ont. L. Rep. 666, 6 Ont. Wkly. Rep. 13.

See 25 Cent. Dig. tit. "Highways," § 496.

42. *California.*— Williams *v.* San Francisco, etc., R. Co., 6 Cal. App. 715, 93 Pac. 122.

Connecticut.— Upton *v.* Windham, 75 Conn. 288, 53 Atl. 660, 96 Am. St. Rep. 197; Ward *v.* North Haven, 43 Conn. 148.

Maine.— Aldrich *v.* Gorham, 77 Me. 287; Verrill *v.* Minot, 31 Me. 299.

Massachusetts.— Harris *v.* Great Barrington, 169 Mass. 271, 47 N. E. 881; Cushing *v.* Bedford, 125 Mass. 526.

Michigan.— Simons *v.* Casco Tp., 105 Mich. 588, 63 N. W. 500.

New York.—Holcomb *v.* Champion, 12 N. Y. Suppl. 882.

Pennsylvania.— Davis *v.* Snyder Tp., 196 Pa. St. 273, 46 Atl. 301; Boone *v.* East Norwegian Tp., 192 Pa. St. 206, 43 Atl. 1025; Yoders *v.* Amwell Tp., 172 Pa. St. 447, 33 Atl. 1017, 51 Am. St. Rep. 750; Kitchen *v.* Union Tp., 171 Pa. St. 145, 33 Atl. 76.

Rhode Island.— Yeaw *v.* Williams, 15 R. I. 20, 23 Atl. 33.

Canada.— Thomas *v.* North Norwich Tp., 9 Ont. L. Rep. 666, 6 Ont. Wkly. Rep. 13.

See 25 Cent. Dig. tit. "Highways," § 496.

A township is bound to take notice that horses are sometimes skittish and timid, and to use reasonable care to guard its roads accordingly. Glaub *v.* Goshen Tp., 7 Kulp (Pa.) 292.

Defect held not the proximate cause of the accident see Anderson *v.* Schurke, 121 Iowa 340, 96 N. W. 862, 100 Am. St. Rep. 358; Bell *v.* Wayne, 123 Mich. 386, 82 N. W. 215, 81 Am. St. Rep. 204, 48 L. R. A. 644; Nichols *v.* Pittsfield Tp., 209 Pa. St. 240, 58 Atl. 283; Card *v.* Columbia Tp., 191 Pa. St. 254, 43 Atl. 217; Cage *v.* Franklin Tp., 11 Pa. Super. Ct. 533; Ehleiter *v.* Milwaukee, 121 Wis. 85, 98 N. W. 934, 105 Am. St. Rep. 1027, 66 L. R. A. 915.

43. *Maine.*— Perkins *v.* Fayette, 68 Me. 152, 28 Am. Rep. 84.

Massachusetts.— Fogg *v.* Nahant, 106 Mass. 278; Howe *v.* Lowell, 101 Mass. 99; Davis *v.* Dudley, 4 Allen 557.

South Carolina.— Mason *v.* Spartanburg County, 40 S. C. 390, 19 S. E. 15, 42 Am. St. Rep. 887; Brown *v.* Laurens County, 38 S. C. 282, 17 S. E. 21.

West Virginia.— Smith *v.* Kanawha County Ct., 33 W. Va. 713, 11 S. E. 1, 8 L. R. A. 82.

Wisconsin.— Jackson *v.* Bellevieu, 30 Wis. 250.

See 25 Cent. Dig. tit. "Highways," § 496.

44. Titus *v.* Northbridge, 97 Mass. 258, 93 Am. Dec. 91.

Momentary loss of control will not relieve the town. Hinckley *v.* Somerset, 145 Mass. 326, 14 N. E. 166; Babson *v.* Rockport, 101 Mass. 93; Titus *v.* Northbridge, 97 Mass. 258, 93 Am. Dec. 91.

45. Trexler *v.* Greenwich Tp., 168 Pa. St. 214, 31 Atl. 1090.

46. Constitutionality of statute creating liability of municipal corporation for injuries from defective highway see Constitutional Law, 8 Cyc. 1098.

47. Seidel *v.* Woodbury, 81 Conn. 65, 70 Atl. 58; Willey *v.* Ellsworth, 64 Me. 57; Van Vane *v.* Centre Tp., 67 N. J. L. 587, 52 Atl. 359; Uecker *v.* Clyman, 137 Wis. 38, 118 N. W. 247.

Authority of legislature.— In the absence of special constitutional restraint and subject to the property rights and easements of abutting owners, the state legislature has full paramount authority over all public ways and places. Scovel *v.* Detroit, 146 Mich. 93, 109 N. W. 20.

At common law no liability existed. Seidel *v.* Woodbury, 81 Conn. 65, 70 Atl. 58; Uecker *v.* Clyman, 137 Wis. 38, 118 N. W. 247.

Common-law liability for injury on city street see Municipal Corporations, 28 Cyc. 1340.

48. See Cunningham *v.* Frankfort, 104 Me. 208, 70 Atl. 441; Chamberlain *v.* Enfield, 43 N. H. 356.

49. Anne Arundel County *v.* Duckett, 20 Md. 468, 83 Am. Dec. 557. See also Gold-

b. Who Liable — (i) *Abutting Owner.*[50] An abutting owner is liable for an injury caused by his encroachment,[51] by an obstruction originating on his premises,[52] or by his unreasonable or negligent use of the highway,[53] but he is not liable for a proper temporary use of the highway,[54] or of that portion of the land between the highway fences not subject to the right of way,[55] or for the condition of a sidewalk in front of the premises.[56]

(ii) *Road Officer.*[57] Under some statutes it is held that an individual specially damaged by a defect on the highway can maintain an action against a highway officer who having funds in his hands negligently fails to perform his duty,[58] other cases, however, taking an opposite view,[59] particularly where the officer is also liable to a penalty.[60]

thwait *v.* East Bridgewater, 5 Gray (Mass.) 61.

50. Liability of abutting owner for injury in city street see Municipal Corporations, 28 Cyc. 1345, 1354, 1435.

51. Davenport *v.* Ruckman, 37 N. Y. 568, 5 Transcr. App. 254 [*affirming* 10 Bosw. 20, 16 Abb. Pr. 341].

A buyer of land, not having the right to remove a trap door illegally constructed in the highway by his vendor, is not liable for an injury therefrom. Ewing *v.* Hewitt, 27 Ont. App. 296.

In Pennsylvania it has been held that in the absence of title papers it will be presumed that a lot of land bounded by a highway extends to the middle thereof; and the owner will be held liable accordingly for accidents caused by want of repair. Grier *v.* Sampson, 27 Pa. St. 183.

52. Nagle *v.* Brown, 37 Ohio St. 7 [*affirming* 7 Ohio Dec. (Reprint) 316, 2 Cinc. L. Bul. 98]; Busse *v.* Rogers, 120 Wis. 443, 98 N. W. 219, 64 L. R. A. 183, negligently piling timber.

53. Palmer *v.* Silverthorn, 32 Pa. St. 65.

54. Davis *v.* Thompson, 134 Mo. App. 13, 114 S. W. 550; Tinker *v.* New York, etc., R. Co., 157 N. Y. 312, 51 N. E. 1031 [*affirming* 92 Hun 269, 36 N. Y. Suppl. 672].

55. Harlow *v.* Humiston, 6 Cow. (N. Y.) 189.

56. Fletcher *v.* Scotten, 74 Mich. 212, 41 N. W. 901; Sneeson *v.* Kupfer, 21 R. I. 560, 45 Atl. 579; Rundle *v.* Hearle, [1898] 2 Q. B. 83, 67 L. J. Q. B. 741, 78 L. T. Rep. N. S. 561, 14 T. L. R. 440, 46 Wkly. Rep. 619.

57. Personal liability of public officers generally see Officers, 29 Cyc. 1440 *et seq.*

58. *California.*— Doeg *v.* Cook, 126 Cal. 213, 58 Pac. 707, 77 Am. St. Rep. 171, town marshal acting as street commissioner.

Illinois.— Harris *v.* Carson, 40 Ill. App. 147; Skinner *v.* Morgan, 21 Ill. App. 209.

Iowa.— Theulen *v.* Viola Tp., 139 Iowa 61, 117 N. W. 26.

Maryland.— Garrett County *v.* Blackburn, 105 Md. 226, 66 Atl. 31; Baltimore County *v.* Wilson, 97 Md. 207, 54 Atl. 71, 56 Atl. 596; Calvert County *v.* Gibson, 36 Md. 229. But see Baltimore County *v.* Wilson, 97 Md. 207, 54 Atl. 71, 56 Atl. 596.

New Hampshire.— Downes *v.* Hopkinton, 67 N. H. 456, 40 Atl. 433.

New York.— People *v.* Little Valley, 75 N. Y. 316; Hover *v.* Barkhoof, 44 N. Y. 113; Wendell *v.* Troy, 39 Barb. 329 [*affirmed* in 4 Abb. Dec. 563, 4 Keyes 261]; Smith *v.* Wright, 24 Barb. 170; Bartlett *v.* Crozier, 17 Johns. 439, 8 Am. Dec. 428 [*reversing* 15 Johns. 250].

North Carolina.— Hathaway *v.* Hinton, 46 N. C. 243.

England.— See Smith *v.* Perry, [1906] 1 K. B. 262, 21 Cox C. C. 98, 70 J. P. 93, 75 L. J. K. B. 124, 4 Loc. Gov. 224, 94 L. T. Rep. N. S. 140, 22 T. L. R. 158.

See 25 Cent. Dig. tit. "Highways," § 507.

To exonerate themselves from personal liability to one injured by a defect in a highway, the commissioners of highways of a town must show, not only that they had no funds with which to make repairs, but that they had applied for such funds through the proper channels. Warren *v.* Clement, 24 Hun (N. Y.) 472.

Failure to repair a nuisance.— A failure to keep a public highway in repair by those who have assumed that duty from the state, so that it is unsafe to travel over, is a public nuisance, making the party bound to repair liable to indictment for the nuisance, and to an action at the suit of any one who has sustained special damage. Robinson *v.* Chamberlain, 34 N. Y. 389, 90 Am. Dec. 713.

59. *Idaho.*— Worden *v.* Witt, 4 Ida. 404, 39 Pac. 1114, 95 Am. St. Rep. 70.

Indiana.— Lynn *v.* Adams, 2 Ind. 143.

Nebraska.— McConnell *v.* Dewey, 5 Nebr. 385.

New York.— Garlinghouse *v.* Jacobs, 29 N. Y. 297; Dorn *v.* Oyster Bay, 84 Hun 510, 32 N. Y. Suppl. 341 [*affirmed* in 158 N. Y. 731, 53 N. E. 1124].

North Carolina.— Nobles *v.* Langly, 66 N. C. 287.

Ohio.— Smith *v.* Williams County, 29 Ohio Cir. Ct. 610.

South Carolina.— McKenzie *v.* Chovin, 1 McMull. 222.

Vermont.— Daniels *v.* Hathaway, 65 Vt. 247, 26 Atl. 970, 21 L. R. A. 377; Battey *v.* Duxbury, 23 Vt. 714.

See 25 Cent. Dig. tit. "Highways," § 507.

The successor of the negligent officer is not liable. Lament *v.* Haight, 44 How. Pr. (N. Y.) 1.

60. Sussex County *v.* Strader, 18 N. J. L. 108, 35 Am. Dec. 530; Dunlap *v.* Knapp, 14 Ohio St. 64, 82 Am. Dec. 468; Thornton *v.*

(III) *COUNTY.* Counties are considered as quasi-corporations rather than corporate entities and are therefore not generally, in the absence of statute, liable even for defects in roads under their control; [61] but in many states statutes imposing liability exist, and under such statutes the county may be held.[62]

(IV) *ROAD DISTRICTS.* In the absence of statute road districts are not responsible for injuries caused by defects in roads under their control.[63]

(V) *TOWN.* Towns, being mere quasi-corporations or political subdivisions of the state, are generally not liable to action for defects in their highways, in the absence of statute,[64] particularly where no duty to repair rests on

Springer, 5 Tex. 587. But see Hayes *v.* Porter, 22 Me. 371.

Whether penalty imposed on public officer is exclusive of civil liability see ACTIONS, 1 Cyc. 679.

61. *Arkansas.*—Granger *v.* Pulaski County, 26 Ark. 37.

California.— Barnett *v.* Contra Costa County, 67 Cal. 77, 7 Pac. 177.

Illinois.— Guinnip *v.* Carter, 58 Ill. 296; White *v.* Bond County, 58 Ill. 297, 11 Am. Rep. 65.

Indiana.— Cones *v.* Benton County, 137 Ind. 404, 37 N. E. 272; Abbett *v.* Johnson County, 114 Ind. 61, 16 N. E. 127; Shrum *v.* Washington County, 13 Ind. App. 585, 41 N. E. 349.

Iowa.—Wilson *v.* Wapello County, 129 Iowa 77, 105 N. W. 363.

Kentucky.— Sinkhorn *v.* Lexington, etc., Turnpike Co., 112 Ky. 205, 65 S. W. 356, 23 Ky. L. Rep. 1479.

Massachusetts.—Bliss *v.* Deerfield, 13 Pick. 102.

Nebraska.— Goes *v.* Gage County, 67 Nebr. 616, 93 N. W. 923.

Ohio.— Grimwood *v.* Summit County, 23 Ohio St. 600.

Oregon.— Schroeder *v.* Multnomah County, 45 Oreg. 92, 76 Pac. 772.

Washington.— Clark *v.* Lincoln County, 1 Wash. 518, 20 Pac. 576.

England.— Russell *v.* Devon, 2 T. R. 667, 1 Rev. Rep. 585, 100 Eng. Reprint 359.

See 25 Cent. Dig. tit. "Highways," § 504.

62. See the statutes of the several states. And see Morgan County *v.* Penick, 131 Ga. 385, 62 S. E. 300; Calvert County *v.* Gibson, 36 Md. 229; Anne Arundel County *v.* Duckett, 20 Md. 468, 83 Am. Dec. 557.

Liability as affected by contract.— The lessor of the road having surrendered entire control to the county as lessee is not liable for the county's negligent failure to repair the road, and therefore the undertaking of the county to save the lessor harmless from any suits that might be brought against the lessor by reason of failure to repair the road does not render the county liable. Sinkhorn *v.* Lexington, etc., Turnpike Co., 112 Ky. 205, 65 S. W. 356, 23 Ky. L. Rep. 1479.

63. White *v.* Road Dist. No. 1, 9 Iowa 202; Eikenberry *v.* Bazaar Tp., 22 Kan. 556, 31 Am. Rep. 198.

64. *California.*— Barnett *v.* Contra Costa County, 67 Cal. 77, 7 Pac. 177.

Connecticut.— Beardsley *v.* Hartford, 50 Conn. 529, 47 Am. Rep. 677.

Illinois.— Bussell *v.* Steuben, 57 Ill. 35; Waltham *v.* Kemper, 55 Ill. 346, 8 Am. Rep. 652.

Kansas.— Quincy Tp. *v.* Sheehan, 48 Kan. 620, 29 Pac. 1084; Eikenberry *v.* Bazaar Tp., 22 Kan. 556, 31 Am. Rep. 198.

Maine.— Frazer *v.* Lewiston, 76 Me. 531.

Massachusetts.— Nicodemo *v.* Southborough, 173 Mass. 455, 53 N. E. 887; Fowler *v.* Gardner, 169 Mass. 505, 48 N. E. 619; Brailey *v.* Southborough, 6 Cush. 141; Mower *v.* Leicester, 9 Mass. 247, 6 Am. Dec. 63. See also Hill *v.* Boston, 122 Mass. 344, 23 Am. Rep. 332.

Michigan.—Doak *v.* Saginaw Tp., 119 Mich. 680, 78 N. W. 883; Niles Tp. Highway Com'rs *v.* Martin, 4 Mich. 557, 69 Am. Dec. 333.

Minnesota.—Weltsch *v.* Stark, 65 Minn. 5, 67 N. W. 648; Altnow *v.* Sibley, 30 Minn. 186, 14 N. W. 877, 44 Am. Rep. 191.

Nebraska.—Wilson *v.* Ulysses Tp., 72 Nebr. 807, 101 N. W. 986.

New Hampshire.— Sargent *v.* Gilford, 66 N. H. 543, 27 Atl. 306. But see Wheeler *v.* Troy, 20 N. H. 77.

New Jersey.— Von Vane *v.* Centre Tp., 67 N. J. L. 587, 52 Atl. 359.

Oklahoma.— James *v.* Wellston Tp., 18 Okla. 56, 90 Pac. 100, 13 L. R. A. N. S. 1219.

United States.— See Barnes *v.* District of Columbia, 91 U. S. 540, 23 L. ed. 440.

See 25 Cent. Dig. tit. "Highways," § 505.

The custom of the inhabitants of towns to join and break paths through the snow in highways, if ancient, general, and reasonable, excuses the selectmen from action in ordinary cases. Seeley *v.* Litchfield, 49 Conn. 134, 44 Am. Rep. 213. See also Barnett *v.* Contra Costa County, 67 Cal. 77, 7 Pac. 177.

Lack of funds as affecting liability on city streets see MUNICIPAL CORPORATIONS, 28 Cyc. 1343.

Misfeasance distinguished from nonfeasance.— In England it has been held that a local board, being the highway authority of the district, is not liable for damages caused to a person in consequence of the highway being out of repair where such non-repair is a mere nonfeasance. Sydney *v.* Bourke, [1895] A. C. 433, 59 J. P. 659, 64 L. J. P. C. 140, 72 L. T. Rep. N. S. 605, 11 Reports 482; Pictou *v.* Geldert, [1893] A. C. 524, 63 L. J. P. C. 37, 69 L. T. Rep. N. S. 510, 1 Reports 447, 42 Wkly. Rep. 114; Cowley *v.* Newmarket Local Bd., [1892] A. C. 345, 56 J. P. 805, 62 L. J. Q. B. 65, 67 L. T. Rep. N. S. 486, 1 Reports 45; Maguire *v.* Liverpool, [1905]

them;[65] but in many states statutes are in force imposing liability upon towns,[66] their liability being unaffected by the fact that the defect in question was caused by an independent contractor,[67] or by the neglect of a highway officer who is personally liable,[68] and towns may be liable for obstructions placed on a highway by individuals;[69] but they are not liable for an unforeseen accident,[70] or for a defect in a district assigned to another town.[71]

(VI) *PERSON CAUSING DEFECT.*[72] A person causing a defect in a highway

1 K. B. 767, 69 J. P. 153, 74 L. J. K. B. 369, 3 Loc. Gov. 485, 92 L. T. Rep. N. S. 374, 21 T. L. R. 278, 53 Wkly. Rep. 449; Whyler *v.* Bingham Rural Dist., [1901] 1 K. B. 45, 64 J. P. 77, 70 L. J. K. B. 207, 83 L. T. Rep. N. S. 652, 17 T. L. R. 23; Thompson *v.* Brighton, [1894] 1 Q. B. 332, 58 J. P. 297, 63 L. J. Q. B. 181, 70 L. T. Rep. N. S. 206, 42 Wkly. Rep. 161, 9 Reports 111; Holloway *v.* Birmingham, 69 J. P. 358, 3 Loc. Gov. 878 (holding it mere nonfeasance to allow tar to ooze up and become slippery); Barham *v.* Ipswich Dock Com'rs, 54 L. T. Rep. N. S. 23. In America the distinction has been denied. Weltsch *v.* Stark, 65 Minn. 5, 67 N. W. 648. See also Biggar *v.* Crowland Tp., 13 Ont. L. Rep. 164, 8 Ont. Wkly. Rep. 819.

65. Yeager *v.* Tippecanoe Tp., 81 Ind. 46; Chartiers Tp. *v.* Langdon, 114 Pa. St. 541, 7 Atl. 84.

66. See the statutes of the several states. And see the following cases:

Connecticut.— Mead *v.* Derby, 40 Conn. 205.

Indiana.— Centerville *v.* Woods, 57 Ind. 192.

Maine.— Merrill *v.* Hampden, 26 Me. 234.

Massachusetts.— Nicodemo *v.* Southborough, 173 Mass. 455, 53 N. E. 887; Sawyer *v.* Northfield, 7 Cush. 490.

Michigan.— Gage *v.* Pittsfield Tp., 120 Mich. 436, 79 N. W. 687; Frary *v.* Allen Tp., 91 Mich. 666, 52 N. W. 78 (township liable for injury from defect in unincorporated village); Sharp *v.* Evergreen Tp., 67 Mich. 443, 35 N. W. 67; Burnham *v.* Byron Tp., 46 Mich. 555, 9 N. W. 851.

New Hampshire.— O'Brien *v.* Derry, 73 N. H. 198, 60 Atl. 843; Judd *v.* Claremont, 66 N. H. 418, 23 Atl. 427; Cofran *v.* Sanbornton, 56 N. H. 12; Winship *v.* Enfield, 42 N. H. 197; Willey *v.* Portsmouth, 35 N. H. 303; Elliot *v.* Concord, 27 N. H. 204.

New Jersey.— See Van Vane *v.* Centre Tp., 67 N. J. L. 587, 52 Atl. 359, certain township excepted from liability.

New York.— Winchell *v.* Camillus, 190 N. Y. 536, 83 N. E. 1134; Lane *v.* Hancock, 142 N. Y. 510, 37 N. E. 473 [*reversing* 67 Hun 623, 22 N. Y. Suppl. 470]; Davenport *v.* Ruckman, 37 N. Y. 568, 5 Transcr. App. 541 [*affirming* 10 Bosw. 20, 16 Abb. Pr. 341]; Conrad *v.* Ithaca, 16 N. Y. 158; Hutson *v.* New York, 9 N. Y. 162, 59 Am. Dec. 526; Rankert *v.* Junius, 25 N. Y. App. Div. 470, 49 N. Y. Suppl. 850; Riley *v.* Eastchester, 18 N. Y. App. Div. 94, 45 N. Y. Suppl. 448; McGuinness *v.* Westchester, 66 Hun 356, 21 N. Y. Suppl. 290; Farman *v.* Ellington, 46 Hun 41 [*affirmed* in 124 N. Y. 662, 27 N. E. 413]; Mackey *v.* Locke, 5 Silv. Sup. 394, 8 N. Y. Suppl. 210. But see Morey *v.* Newfane, 8 Barb. 645.

Pennsylvania.— Wagner *v.* Hazle Tp., 215 Pa. St. 219, 64 Atl. 405; North Manheim Tp. *v.* Arnold, 119 Pa. St. 380, 13 Atl. 444, 4 Am. St. Rep. 650; Burrell Tp. *v.* Uncapher, 117 Pa. St. 353, 11 Atl. 619, 2 Am. St. Rep. 664; Mahanoy Tp. *v.* Scholly, 84 Pa. St. 136; Dean *v.* New Milford Tp., 5 Watts & S. 545. But see Haines *v.* Barclay Tp., 181 Pa. St. 521, 37 Atl. 560.

Rhode Island.— Foley *v.* Ray, 27 R. I. 127, 61 Atl. 50; Stone *v.* Pendleton, 21 R. I. 332, 43 Atl. 643; Stone *v.* Langworthy, 20 R. I. 602, 40 Atl. 832; Seamons *v.* Fitts, 20 R. I. 443, 40 Atl. 3.

Vermont.— Baxter *v.* Winooski Turnpike Co., 22 Vt. 114, 52 Am. Dec. 84; Kelsey *v.* Glover, 15 Vt. 708.

Wisconsin.— Wolfgram *v.* Schoepke, 119 Wis. 258, 96 N. W. 556; Bills *v.* Kaukauna, 94 Wis. 310, 68 N. W. 992; Stilling *v.* Thorp, 54 Wis. 528, 11 N. W. 906, 41 Am. Rep. 60; Burns *v.* Elba, 32 Wis. 605. But see Uecker *v.* Clyman, 137 Wis. 38, 118 N. W. 247.

Canada.— Couch *v.* Louise, 16 Manitoba 656; Gilchrist *v.* Carden Tp., 26 U. C. C. P. 1; Young *v.* Stanstead Tp., 21 Quebec Super. Ct. 148.

A statute creating liability is not retrospective. Frasier *v.* Tompkins, 30 Hun (N Y.) 168.

67. Mahanoy Tp. *v.* Scholly, 84 Pa. St. 136.

68. Rapho Tp. *v.* Moore, 68 Pa. St. 404, 8 Am. Rep. 202.

A remote obligation of the highway surveyor to respond to the town for the damages caused by his negligence does not relieve the town from its liability for injuries caused by a defective highway, although arising directly from such surveyor's negligence. Hardy *v.* Keene, 52 N. H. 370.

69. Snow *v.* Adams, 1 Cush. (Mass.) 443; Bigelow *v.* Weston, 3 Pick. (Mass.) 267 (stones placed in highway by contractor repairing it and left there); Palmer *v.* Portsmouth, 43 N. H. 265; Winship *v.* Enfield, 42 N. H. 197; Whitney *v.* Ticonderoga, 53 Hun (N. Y.) 214, 6 N. Y. Suppl. 844 [*affirmed* in 127 N. Y. 40, 27 N. E. 403].

70. Lane *v.* Hancock, 142 N. Y. 510, 37 N. E. 473 [*reversing* 67 Hun 623, 22 N. Y. Suppl. 470].

71. Jones *v.* Utica, 16 Hun (N. Y.) 441.

72. **Liability of person causing defect in city street** see MUNICIPAL CORPORATIONS, 28 Cyc. 1434.

Obstructions of highway by gas company see GAS, 20 Cyc. 1179.

is liable for injury resulting therefrom,[73] as where a contractor under contract to repair a highway fails to do so.[74] A town suffering a pecuniary loss through an injury to the road may recover from the wrong-doer.[75]

4. Actions — a. Nature of Action; Parties.[76] An action for damages from a defect on the highway is transitory.[77] All persons interested may be joined as parties.[78]

73. *Alabama.*— Wells *v.* Gallagher, 144 Ala. 363, 39 So. 747, 113 Am. St. Rep. 50, 3 L. R. A. N. S. 759.

Delaware.— Mills *v.* Wilmington City R. Co., 1 Marv. 269, 40 Atl. 1114.

Idaho.— Horn *v.* Boise City Canal Co., 7 Ida. 640, 65 Pac. 145.

Illinois.— Clark *v.* Lake, 2 Ill. 229.

Indiana.— Southern Indiana R. Co. *v.* Norman, 165 Ind. 126, 74 N. E. 896; Pittsburgh, etc., Co. *v.* Iddings, 28 Ind. App. 504, 62 N. E. 112.

Iowa.— Elzig *v.* Bales, 135 Iowa 208, 112 N. W. 540; Overhouser *v.* American Cereal Co., 118 Iowa 417, 92 N. W. 74.

Maine.— Portland *v.* Richardson, 54 Me. 46, 89 Am. Dec. 720; French *v.* Camp, 18 Me. 433, 36 Am. Dec. 728.

Massachusetts.— Stoughton *v.* Porter, 13 Allen 191; Taylor *v.* Boston Water Power Co., 12 Gray 415.

Missouri.— Brown *v.* Wabash R Co., 90 Mo. App. 20; Golden *v.* Chicago, etc., R. Co., 84 Mo. App. 59; Matthews *v.* Missouri Pac. R. Co., 26 Mo. App. 75.

New Hampshire.— Harriman *v.* Moore, 74 N. H. 277, 67 Atl. 225; Paine *v.* Grand Trunk R. Co., 58 N. H. 611, 63 N. H. 623, 3 Atl. 634.

New York.— Congreve *v.* Morgan, 18 N. Y. 79, 84, 72 Am. Dec. 495; Sweet *v.* Perkins, 115 N. Y. App. Div. 784, 101 N. Y. Suppl. 163; Mulholland *v* McKeever, 64 N. Y. App. Div. 617, 72 N. Y. Suppl. 138; Lawton *v.* Olmstead, 40 N. Y. App. Div. 544, 58 N. Y. Suppl. 36; Gulliver *v.* Blauvelt, 14 N. Y App. Div. 523, 43 N. Y. Suppl. 935; Macauley *v.* Schneider, 9 N. Y. App. Div. 279, 41 N. Y. Suppl. 519; Osborn *v.* Union Ferry Co., 53 Barb. 629; Wendell *v.* Troy, 39 Barb. 329 [*affirmed* in 4 Abb. Dec. 563, 4 Keyes 261]; McDermott *v.* Conley, 11 N. Y. Suppl. 403.

Pennsylvania.—Nicholas *v.* Keeling, 21 Pa. Super. Ct. 181.

Rhode Island.—Foley *v.* Ray, 27 R. I. 127, 61 Atl. 50.

Texas.—San Antonio, etc., R. Co. *v.* Wood, 41 Tex. Civ. App. 226, 92 S. W. 259; Pecos, etc., R. Co. *v.* Bowman, 34 Tex. Civ. App. 98, 78 S. W. 22.

Canada.— Wells *v.* Western Union Tel. Co., 40 Nova Scotia 81.

See 25 Cent. Dig. tit. "Highways," § 509.

An independent contractor for the erection of a building is liable for defects in or obstructions upon the highway caused by him (Jones *v.* Chantry, 4 Thomps. & C. (N. Y.) 63; Hundhausen *v.* Bond, 36 Wis. 29; Knight *v.* Fox, 5 Exch. 721, 14 Jur. 963, 20 L. J. Exch. 9. But see Moss *v.* Rowlett, 112 Ky. 121, 65 S. W. 153, 358, 23 Ky. L. Rep. 1411), as may be also the owner (Ohio Southern R. Co. *v.* Morey, 47 Ohio St. 207, 24 N. E. 269, 7 L. R. A. 701; Hundhausen *v.* Bond, 36 Wis. 29).

One coasting on a street, and injured by colliding with a vehicle left standing in the street, cannot recover of the one who left the vehicle there, but did not know that the street was being used for coasting. Reusch *v.* Licking Rolling Mill Co., 118 Ky. 369, 80 S. W. 1168, 26 Ky. L. Rep. 249.

That the highway was not legally established is no defense. Pewonka *v.* Stewart, 13 N. D. 117, 99 N. W. 1080.

Liability as insurer.— One who unlawfully obstructs the free use of a highway is charged as an insurer against accident to one properly traveling the highway and injured by such obstruction; but where the highway is obstructed under license, the person responsible therefor is chargeable only with ordinary care to see that the obstruction does not cause injury to persons lawfully using the highway. Stockton Automobile Co. *v.* Confer, 154 Cal. 402, 97 Pac. 881. See also State *v.* Miller, 110 Mo. App. 542, 85 S. W. 912; Watts *v.* Southern Bell Tel., etc., Co. 100 Va. 45, 40 S. E. 107. Nor can the principle which makes a person interfering with the safety of a public highway as such, and for private ends, an insurer of the safety of all persons traveling over the same who may be injured in consequence thereof without fault on their part be extended to cover a case where a contractor is engaged in taking down a building, and there is no excavation or obstruction in the street by reason of said work. Eccles *v.* Darragh, 46 N. Y. Super. Ct. 186.

Where one person's property is made an obstruction by another the former if not a party to the wrong is not liable. Davis *v.* Williams, 4 Ind. App. 487, 31 N. E. 204. But see Linsley *v.* Bushnell, 15 Conn. 225, 38 Am. Dec. 79, holding that one permitting property to remain on a road is liable, although the property was placed there by a trespasser.

74. Theulen *v.* Viloa Tp., 139 Iowa 61, 117 N. W. 26.

The municipality which hires him may also be responsible. Clements *v.* Tyrone, [1905] 2 Ir. 542.

75. Pittsburgh, etc., R. Co. *v.* Iddings, 28 Ind. App. 504, 62 N. E. 112.

76. Parties to action for injury in city street see MUNICIPAL CORPORATIONS, 28 Cyc. 1463.

77. Burbank *v.* Auburn, 31 Me. 590; Titus *v.* Frankfort, 15 Me. 89.

78. Doeg *v.* Cook, 126 Cal. 213, 58 Pac. 707, 77 Am. St. Rep. 171. See also Pittsburgh, etc., R. Co. *v.* Iddings, 28 Ind. App. 504, 62 N. E. 112.

b. Notice of Injury as Condition Precedent — (i) *Necessity; Waiver.*[79] Notice of an injury from a defect in a highway is often required by statute to be served within a specified time.[80] This statutory notice cannot be waived.[81]

(ii) *Form and Contents.* The notice should be in the name of the person claiming damages,[82] addressed to all parties liable,[83] and should set out distinctly the claim[84] in writing,[85] and describe the nature[86] and cause of the injury,[87] the time[88]

79. **Notice or presentment of claim for injury on city street** see MUNICIPAL CORPORATIONS, 28 Cyc. 1447.

80. Clark *v.* Tremont, 83 Me. 426, 22 Atl. 378 (holding that a vote of a town to pay damages passed before notice given is a mere gratuity on which no action can be brought); Greenleaf *v.* Norridgwock, 82 Me. 62, 19 Atl. 91; Jackman *v.* Garland, 64 Me. 133; Madden *v.* Springfield, 131 Mass. 441; Holland *v.* Cranston, 12 Fed. Cas. No. 6,606, 1 Curt. 497; Chartrand *v.* Montreal, 17 Quebec Super. Ct. 143.

Notice to a property-owner liable for a defect is unnecessary. Stevenson *v.* Joy, 152 Mass. 45, 25 N. E. 78; Fisher *v.* Cushing, 134 Mass. 374.

Incapacity to give notice is a question for the jury. Welch *v.* Gardner, 133 Mass. 529; Page *v.* Campton, 63 N. H. 197.

81. Gay *v.* Cambridge, 128 Mass. 387; Gregg *v.* Weathersfield, 55 Vt. 385 (holding a vote of a town to pay a person who has lost his legal rights without consideration and void); Wheelock *v.* Hardwick, 48 Vt. 19. See also Hoyle *v.* Putnam, 46 Conn. 56; Hubbard *v.* Fayette, 70 Me. 121, holding that denying the claim of a husband is no waiver of notice of a claim by the wife. *Compare* Jones *v.* Stephenson, 32 Ont. 226.

82. Keller *v.* Winslow, 84 Me. 147, 24 Atl. 796; Hubbard *v.* Fayette, 70 Me. 121; Sargent *v.* Gilford, 66 N. H. 543, 27 Atl. 306.

Notice by husband does not include claim of wife (Keller *v.* Winslow, 84 Me. 147, 24 Atl. 796; Hubbard *v.* Fayette, 70 Me. 121. But see Carberry *v.* Sharon, 166 Mass. 32, 43 N. E. 912), and conversely (Sargent *v.* Gilford, 66 N. H. 543, 27 Atl. 306).

Notice held sufficient see Dean *v.* Sharon, 72 Conn. 667, 45 Atl. 963 (although the husband signed with the claimant); Carberry *v.* Sharon, 166 Mass. 32, 43 N. E. 912 (signed by plaintiff's husband saying, "We will be obliged to make a claim"); Taylor *v.* Woburn, 130 Mass. 494 (by a father for a minor daughter and for a deceased son); Ayer *v.* Somersworth 66 N. H. 476, 30 Atl. 1119 (by agent); Church *v.* Westminster, 45 Vt. 380 (by married woman alone); Carpenter *v.* Rolling, 107 Wis. 559, 83 N. W. 953; Parish *v.* Eden, 62 Wis. 272, 22 N. W. 399 (by administrator); Teegarden *v.* Caledonia, 50 Wis. 292, 6 N. W. 875 (served by party; signed by attorneys).

83. Jones *v.* Stephenson, 32 Ont. 226.

84. Wagner *v.* Camden, 73 Me. 485; Leonard *v.* Holyoke, 138 Mass. 78; Lyman *v.* Hampshire County, 138 Mass. 74; Taylor *v.* Woburn, 130 Mass. 494; Harris *v.* Newbury, 128 Mass. 321; Elson *v.* Waterford, 138 Fed. 1004 [*affirmed* in 149 Fed. 91, 78 C. C. A. 675].

That defendant was not misled may cure the defect in the notice. Fortin *v.* Easthampton, 142 Mass. 486, 8 N. E. 328.

85. Chapman *v.* Nobleboro, 76 Me. 427.

86. Joy *v.* York, 99 Me. 237, 58 Atl. 1059.

Statement of injuries held sufficient see Dean *v.* Sharon, 72 Conn. 667, 45 Atl. 963; Manning *v.* Woodstock, 59 Conn. 224, 22 Atl. 42; Lilly *v.* Woodstock, 59 Conn. 219, 22 Atl. 40; Brown *v.* Southbury, 53 Conn. 212, 1 Atl. 819; White *v.* Vassalborough, 82 Me. 67, 19 Atl. 99; Low *v.* Windham, 75 Me. 113; Wadleigh *v.* Mt. Vernon, 75 Me. 79; Blackington *v.* Rockland, 66 Me. 332; Robin *v.* Bartlett, 64 N. H. 426, 13 Atl. 645; Willard *v.* Sherburne, 59 Vt. 361, 8 Atl. 735.

Statement of injuries held insufficient see Joy *v.* York, 99 Me. 237, 58 Atl. 1059; Goodwin *v.* Gardiner, 84 Me. 278, 24 Atl. 846; Low *v.* Windham, 75 Me. 113; Boyd *v.* Readsboro, 55 Vt. 163; Bartlett *v.* Cabot, 54 Vt. 242; Nourse *v.* Victory, 51 Vt. 275.

87. See cases cited *infra*, this note.

Notice held sufficient as to cause of injury see Breen *v.* Cornwall, 73 Conn. 309, 47 Atl. 322; Tiesler *v.* Norwich, 73 Conn. 199, 47 Atl. 161; Dean *v.* Sharon, 72 Conn. 667, 45 Atl. 963; Manning *v.* Woodstock, 59 Conn. 224, 22 Atl. 42; Lilly *v.* Woodstock, 59 Conn. 219, 22 Atl. 40; White *v.* Vassalborough, 82 Me. 67, 19 Atl. 99; Carberry *v.* Sharon, 166 Mass. 32, 43 N. E. 912; Pendergast *v.* Clinton, 147 Mass. 402, 18 N. E. 75; Fortin *v.* Easthampton, 142 Mass. 486, 8 N. E. 328; Bailey *v.* Everett, 132 Mass. 441; Post *v.* Foxborough, 131 Mass. 202; Taylor *v.* Woburn, 130 Mass. 494; Soper *v.* Greenwich, 48 N. Y. App. Div. 354, 62 N. Y. Suppl. 1111; Cook *v.* Barton, 66 Vt. 65, 28 Atl. 631; Redepenning *v.* Rock, 136 Wis. 372, 117 N. W. 805; Garske *v.* Ridgeville, 123 Wis. 503, 102 N. W. 22; Althouse *v.* Jamestown, 91 Wis. 46, 64 N. W. 423; Wieting *v.* Millston, 77 Wis. 523, 46 N. W. 879.

Notice held insufficient as to cause of injury see Biesiegel *v.* Seymour, 58 Conn. 43, 19 Atl. 372; Hubbard *v.* Fayette, 70 Me. 121; Farnsworth *v.* Mt. Holly, 63 Vt. 293, 22 Atl. 459 (notice not stating how the culvert was out of repair or that it was in defendant town); Bartlett *v.* Cabot, 54 Vt. 242 (not stating the respect or particular in which the highway was out of repair).

88. Taylor *v.* Woburn, 130 Mass. 494.

The date is sufficient. Lilly *v.* Woodstock, 59 Conn. 219, 22 Atl. 40; Pendergast *v.* Clinton, 147 Mass. 402, 18 N. E. 75; Welch *v.* Gardner, 133 Mass. 529 (holding the time of day unnecessary); Sherry *v.* Rochester,

and place [89] of the accident, and the damages claimed.[90] The sufficiency of the notice is a question of law for the court.[91] Whether what it describes is a defect is a question of fact for the jury.[92] It cannot usually be amended.[93]

(III) *SERVICE.* The notice must be served as the statute provides,[94] and must be received in time;[95] but under exceptional circumstances not attributable to the fault of the claimant a notice made later than provided for in the statute has been held good.[96]

62 N. H. 346. But see White *v.* Stowe, 54 Vt. 510.

89. Horne *v.* Rochester, 62 N. H. 347; Fassett *v.* Roxbury, 55 Vt. 552 (holding that the place must be shown with such certainty that it can be ascertained); Underhill *v.* Washington, 46 Vt. 767; Law *v.* Fairfield, 46 Vt. 425. See also Tobin *v.* Brimfield, 182 Mass. 117, 65 N. E. 28, holding that plaintiff has the burden of proving that defendant was not misled by an inaccurate description of the place.

Description held sufficient see Brown *v.* Southbury, 53 Conn. 212, 1 Atl. 819; Tuttle *v.* Winchester, 50 Conn. 496; Tobin *v.* Brimfield, 182 Mass. 117, 65 N. E. 28 (although inaccurate where there was no intention to mislead); Coffin *v.* Palmer, 162 Mass. 192, 38 N. E. 509; Pendergast *v.* Clinton, 147 Mass. 402, 18 N. E. 75; Lyman *v.* Hampshire County, 138 Mass. 74; Welch *v.* Gardner, 133 Mass. 529; Taylor *v.* Woburn, 130 Mass. 494; Robin *v.* Bartlett, 64 N. H. 426, 13 Atl. 645 (although monuments mentioned are unknown to town officers); Carr *v.* Ashland, 62 N. H. 665; Harris *v.* Townshend, 56 Vt. 716; Melendy *v.* Bradford, 56 Vt. 148; Bliss *v.* Whitingham, 54 Vt. 172; Ranney *v.* Sheffield, 49 Vt. 191; Redepenning *v.* Rock, 136 Wis. 372, 117 N. W. 805; Laird *v.* Otsego, 90 Wis. 25, 62 N. W. 1042; Salladay *v.* Dodgeville, 85 Wis. 318, 55 N. W. 696, 20 L. R. A. 541; Wieting *v.* Millston, 77 Wis. 523, 46 N. W. 879; Fopper *v.* Wheatland, 59 Wis. 623, 18 N. W. 514; Waterford *v.* Elson, 149 Fed. 91, 78 C. C. A. 675 [*affirming* 138 Fed. 1004].

Description held insufficient see Biesiegel *v.* Seymour, 58 Conn. 43, 19 Atl. 372 (holding also that an offer to point out the place does not cure insufficient notice of it); Rogers *v.* Shirley, 74 Me. 144; Gardner *v.* Weymouth, 155 Mass. 595, 30 N. E. 363; Post *v.* Foxborough, 131 Mass. 202; Butts *v.* Stowe, 53 Vt. 600; Purrington *v.* Warren, 49 Vt. 19; Bean *v.* Concord, 48 Vt. 30; Reed *v.* Calais, 48 Vt. 7; Babcock *v.* Guilford, 47 Vt. 519; Law *v.* Fairfield, 46 Vt. 425; Weber *v.* Greenfield, 74 Wis. 234, 42 N. W. 101.

Location in the town must appear. Graves *v.* Waitsfield, 81 Vt. 84, 69 Atl. 137 (holding that "traveling on the public highway in your town" sufficiently locates it in town); White *v.* Stowe, 54 Vt. 510.

That the town officers had seen the defect is to be considered in weighing the sufficiency of the notice. Taylor *v.* Woburn, 130 Mass. 494; Redepenning *v.* Rock, 136 Wis. 372, 117 N. W. 805; Salladay *v.* Dodgeville, 85 Wis. 318, 55 N. W. 696, 20 L. R. A. 541.

90. Sawyer *v.* Naples, 66 Me. 453, holding, however, that it need not be stated in dollars and cents.

91. York *v.* Athens, 99 Me. 82, 58 Atl. 418; Chapman *v.* Nobleboro, 76 Me. 427; Larrabee *v.* Searsport, 42 Me. 202; Robin *v.* Bartlett, 64 N. H. 426, 13 Atl. 645. But see Horne *v.* Rochester, 62 N. H. 347.

92. York *v.* Athens, 99 Me. 82, 58 Atl. 418.

93. Leonard *v.* Bath, 61 N. H. 67.

94. Garske *v.* Ridgeville, 123 Wis. 503, 102 N. W. 22.

Service held sufficient see McCarthy *v.* Dedham, 188 Mass. 204, 74 N. E. 319 (placed in control of a selectman); Taylor *v.* Woburn, 130 Mass. 494 (to one selectman); Ayer *v.* Somersworth, 66 N. H. 476, 30 Atl. 1119 (by agent); Soper *v.* Greenwich, 48 N. Y. App. Div. 354, 62 N. Y. Suppl. 1111 (mailing to a town board of which supervisor is a member, which was actually received by the supervisor); Seamons *v.* Fitts, 21 R. I. 236, 42 Atl. 863 (to treasurer or town clerk); Wieting *v.* Millston, 77 Wis. 523, 46 N. W. 879 (delivery to third person with directions to serve on chairman).

Service held insufficient see Sowter *v.* Grafton, 65 N. H. 207, 19 Atl. 572 (mailing to town clerk); Seamons *v.* Fitts, 21 R. I. 236, 42 Atl. 863 (service on members of town council while not in session); Campbell *v.* Fair Haven, 54 Vt. 336 (holding notice to a trustee of a village not notice to the town).

95. Tiesler *v.* Norwich, 73 Conn. 199, 47 Atl. 161; Chase *v.* Surry, 88 Me. 468, 34 Atl. 270 (holding that mailing in time is insufficient); Giddings *v.* Ira, 54 Vt. 346; Groundwater *v.* Washington, 92 Wis. 56, 65 N. W. 871; Berry *v.* Wauwatosa, 87 Wis. 401, 58 N. W. 751; Goldsworthy *v.* Linden, 75 Wis. 24, 43 N. W. 656.

96. Perkins *v.* Oxford, 66 Me. 545 (notice by administrator of person instantly killed); Owen *v.* Derry, 71 N. H. 405, 52 Atl. 926; Hendry *v.* North Hampton, 71 N. H. 26, 51 Atl. 283; Kelsea *v.* Manchester, 64 N. H. 570, 15 Atl. 206 (tardiness due to ignorance of counsel); Hayes *v.* Rochester, 64 N. H. 41, 6 Atl. 274; Bartlett *v.* Lee, 60 N. H. 168 (filed in wrong county and transferred); Bolles *v.* Dalton, 59 N. H. 479 (tardiness due to plaintiff's ignorance of law); Gitchell *v.* Andover, 59 N. H. 363 (plaintiff was unavoidably prevented); Eames *v.* Brattleboro, 54 Vt. 471; Gonyeau *v.* Milton, 48 Vt. 172 (claimant bereft of reason by the injury). But see Nash *v.* South Hadley, 145 Mass. 105, 13 N. E. 376, holding death no excuse where claimant lived ten days in condition in which he might have given notice.

c. Time to Sue.[97] An action may be brought within the time allowed for notice,[98] the right of action accruing when the injury has been consummated.[99]

d. Pleading — (i) *Declaration or Complaint.* In actions for injury from a defect in a highway the general rules of pleading governing civil cases[1] apply. Plaintiff's pleadings should contain a full, clear statement of the alleged grounds of liability,[2] setting out the particulars[3] and the place[4] of the defect, as within a highway[5] duly established,[6] alleging also notice to defendant,

97. **Time to sue and limitations of action for injury in city street** see MUNICIPAL CORPORATIONS, 28 Cyc. 1462.

98. Harris *v.* Newbury, 128 Mass. 321.

99. Pittsburgh, etc., R. Co. *v.* Iddings, 28 Ind. App. 504, 62 N. E. 112.

1. See PLEADING, 31 Cyc. 1.

2. Barbour County *v.* Horn, 41 Ala. 114 (holding that the complaint must allege that no guaranty was taken by the town from the contractor); Griswold *v.* Gallup, 22 Conn. 208; Corey *v.* Bath, 35 N. H. 530; Bodah *v.* Deer Creek, 99 Wis. 509, 75 N. W. 75 (holding that the complaint must state that the defect was the cause of the accident). But see Read *v.* Chelmsford, 16 Pick. (Mass.) 128, holding a declaration sufficient which did not state that the town was bound to maintain the road.

A declaration against "inhabitants of the town" instead of against the town is good. Flanders *v.* Stewartstown, 47 N. H. 549.

Surplusage may be struck out and if not prejudicial is not ground for a new trial. Smith *v.* Piermont, 31 N. H. 343.

Sufficiency of funds for repair need not be alleged, but is a matter of defense. Hayner *v.* Schaghticoke, 126 N. Y. App. Div. 498, 110 N. Y. Suppl. 714. But see Eveleigh *v.* Hounsfield, 34 Hun (N. Y.) 140.

Defendant's negligence held properly alleged see Dean *v.* Sharon, 72 Conn. 667, 45 Atl. 963 (holding that the complaint may allege several acts of negligence); Huntington County *v.* Huffman, 134 Ind. 1, 31 N. E. 570; Roblee *v.* Indian Lake, 11 N. Y. App. Div. 435, 42 N. Y. Suppl. 326; Ivory *v.* Deerpark, 6 N. Y. St. 2.

A conclusion contra formam statuti is unnecessary. Read *v.* Chelmsford, 16 Pick. (Mass.) 128. See also Reed *v.* Northfield, 13 Pick. (Mass.) 94, 23 Am. Dec. 662, holding that the complaint need not allege that negligence was *contra formam statuti* where the action is remedial and not based on an offense.

3. Ashborn *v.* Waterbury, 70 Conn. 551, 40 Atl. 458 (holding that plaintiff must plead the same defect as caused the injury); Elson *v.* Waterford, 138 Fed. 1004 [*affirmed* in 149 Fed. 91, 78 C. C. A. 675] (holding that the complaint must show the same defect as set out in notice).

The particulars in which the highway was defective need not be set out. It is sufficient to allege generally that the injury was caused by the defect, insufficiency, and want of repairs of the highway. Corey *v.* Bath, 35 N. H. 530.

Pleadings held sufficiently to particularize defect see Lewman *v.* Andrews, 129 Ala. 170, 29 So. 692 (ditch open); Penick *v.* Morgan County, 131 Ga. 385, 62 S. E. 300; State *v.* Kamman, 151 Ind. 407, 51 N. E. 483; Perry *v.* Barnett, 65 Ind. 522; Shea *v.* Whitman, 197 Mass. 374, 83 N. E. 1096, 20 L. R. A. N. S. 980 (holding "out of repair" broad enough to cover a want of a railing); Taylor *v.* Constable, 131 N. Y. 597, 30 N. E. 63 [*affirming* 15 N. Y. Suppl. 795] (holding complaint sufficient, although not expressly alleging that fall of the bridge was due to its defective condition); Curry *v.* Luzerne Borough, 24 Pa. Super. Ct. 514 (holding that plaintiff may show that the horse was frightened first by steam escaping from a boiler, under a claim for absence of a railing); Stone *v.* Pendleton, 21 R. I. 332, 43 Atl. 643 (holding that plaintiff's allegation that the horse became frightened by heaps of sand which obstructed a highway is sufficient, without stating that the sand was such an obstruction as was calculated to frighten horses of ordinary gentleness); Powers *v.* Woodstock, 38 Vt. 44; Stauffacher *v.* Sylvester, 113 Wis. 559, 89 N. W. 495 (injury on a traction engine); Paulson *v.* Pelican, 79 Wis. 445, 48 N. W. 715 (snow and ice in "uneven and slippery" condition); Cremer *v.* Portland, 36 Wis. 92 (stump).

Statement of defect held insufficient see Uecker *v.* Clyman, 137 Wis. 38, 118 N. W. 247 (an allegation that snow and ice had accumulated two weeks or more not a statement that it had continued for three weeks); Susenguth *v.* Rantoul, 48 Wis. 334, 4 N. W. 328.

4. *Alabama.*— Goggans *v.* Myrick, 131 Ala. 286, 31 So. 22, sufficient to notify defendant.

Massachusetts.— Snow *v.* Adams, 1 Cush. 443.

Michigan.— Whoram *v.* Argentine Tp., 112 Mich. 20, 70 N. W. 341.

Vermont.— Hodge *v.* Bennington, 43 Vt. 450; Fletcher *v.* Barnet, 43 Vt. 192.

Wisconsin.— Doan *v.* Willow Springs, 101 Wis. 112, 76 N. W. 1104.

See 25 Cent. Dig. tit. "Highways," § 522.

Description of locus held insufficient see Kellogg *v.* Northampton, 4 Gray (Mass.) 65, "near the house of said George Kellogg."

5. Penick *v.* Morgan County, 131 Ga. 385, 62 S. E. 300; Snow *v.* Adams, 1 Cush. (Mass.) 443.

An inference that the highway was within the town at the point where the injury was sustained may be drawn. Read *v.* Chelmsford, 16 Pick. (Mass.) 128; Corey *v.* Bath, 35 N. H. 530.

6. Hurley *v.* Manchester, 39 N. H. 289, holding, however, that the complaint need

actual [7] or constructive,[8] showing that plaintiff was not in fault,[9] and specifying his injuries [10] and the damages claimed.[11] The declaration may be amended to better state the same cause of action,[12] and after verdict will be presumed sufficient.[13] The declaration may be good, although differing somewhat from the statutory notice.[14]

(II) *Plea or Answer.* As in other actions, the plea or answer must clearly state facts sufficient to constitute a good legal defense.[15] The town may deny the existence of the road as a public highway,[16] even though it has repaired

not allege establishment in the mode authorized by statute.

7. Smiley *v.* Merrill Plantation, 84 Me. 322, 24 Atl. 872 (holding, however, that the complaint need not allege the place of delivery); Low *v.* Windham, 75 Me. 113; Berry *v.* Wauwatosa, 87 Wis. 401, 58 N. W. 751 (holding that an admission in an answer that some notice was served is not an admission that the notice required was duly served); Paulson *v.* Pelican, 79 Wis. 445, 48 N. W. 715; Susenguth *v.* Rantoul, 48 Wis. 334, 4 N. W. 328. *Contra,* Kent *v.* Lincoln, 32 Vt. 591, holding that notice, being no part of the cause of action, need not be alleged.

A general allegation that the required notice was given is sufficient. Cairncross *v.* Pewaukee, 78 Wis. 66, 47 N. W. 13, 10 L. R. A. 473.

8. Reusch *v.* Licking Rolling Mill Co., 118 Ky. 369, 80 S. W. 1168, 26 Ky. L. Rep. 249; Moody *v.* Shelby Tp., 110 Mich. 396, 68 N. W. 259 [*following* Storrs *v.* Grand Rapids, 110 Mich. 483, 68 N. W. 258], that defendant by reasonable care might have known and thereafter had sufficient time to repair. See also Thornton *v.* Springer, 5 Tex. 587, petition defective as not alleging that the road was out of repair for twenty days, and that the overseer had been notified of his appointment. *Compare* Dean *v.* Sharon, 72 Conn. 667, 45 Atl. 963, holding that knowledge is presumed and need not be alleged.

9. *Connecticut.*— Clinton *v.* Howard, 42 Conn. 294.

Georgia.— Penick *v.* Morgan County, 131 Ga. 385, 62 S. E. 300; Kent *v.* Southern Bell Tel., etc., 120 Ga. 980, 48 S. E. 399.

Indiana.— Mt. Vernon *v.* Dusouchett, 2 Ind. 586, 54 Am. Dec. 467.

Massachusetts.— Raymond *v.* Lowell, 6 Cush. 524, 53 Am. Dec. 57; May *v.* Princeton, 11 Metc. 442.

South Carolina.— Walker *v.* Chester County, 40 S. C. 342, 18 S. E. 936.

See 25 Cent. Dig. tit. "Highways," § 522.

No express denial of contributory negligence is required in some jurisdictions. See Reading Tp. *v.* Telfer, 57 Kan. 798, 48 Pac. 134, 57 Am. St. Rep. 355; Corey *v.* Bath, 35 N. H. 530. And see, generally, Negligence, 29 Cyc. 575 *et seq.*

10. Corey *v.* Bath, 35 N. H. 530.

11. See cases cited *infra,* this note.

Double damages.— In actions on the case, under Mass. St. (1786) c. 81, § 7, to recover double damages for defects in highways or bridges, it is not necessary to allege that plaintiff is entitled to double damages. Worster *v.* Proprietors Canal Bridge, 16 Pick. (Mass.) 541; Clark *v.* Worthington, 12 Pick. (Mass.) 571.

12. Chapman *v.* Nobleboro, 76 Me. 427; Davis *v.* Hill, 41 N. H. 329; Elson *v.* Waterford, 138 Fed. 1004 [*affirmed* in 149 Fed. 91].

13. Barker *v.* Koozier, 80 Ill. 205 (omission to state that defendant refused to turn); Raymond *v.* Lowell, 6 Cush. (Mass.) 524, 53 Am. Dec. 57; Corey *v.* Bath, 35 N. H. 530.

14. Breen *v.* Cornwall, 73 Conn. 309, 47 Atl. 322 (holding that it may allege cause more specifically in complaint than in notice); Wadleigh *v.* Mt. Vernon, 75 Me. 79; Young *v.* Douglas, 157 Mass. 383, 32 N. E. 354; Spooner *v.* Freetown, 139 Mass. 235, 29 N. E. 662. See also Farlow *v.* Camp Point, 186 Ill. 256, 57 N. E. 781.

15. Dunn *v.* Gunn, 149 Ala. 583, 42 So. 686 (holding insufficient an answer that it was not obvious to defendant that the ditch would be dangerous, as not denying defendant's knowledge that the road was traveled); Wickham *v.* Twaddell, 25 Pa. Super. Ct. 188 (holding insufficient an answer that travel did not need the obstructed space); Carpenter *v.* Rolling, 107 Wis. 559, 83 N. W. 953 (holding that a denial of legal lay-out is not a denial putting the existence of the road in issue); Cuthbert *v.* Appleton, 24 Wis. 383 (holding that a denial that a highway was "in a dangerous condition to travelers exercising ordinary care and diligence" was not a sufficient denial that it was out of repair).

But the purpose for which the material was placed on the highway need not be pleaded. Carlon *v.* Greenfield, 130 Wis. 342, 110 N. W. 208.

16. Todd *v.* Rome, 2 Me. 55; Jones *v.* Andover, 9 Pick. (Mass.) 146; Wentworth *v.* Rochester, 63 N. H. 244; Wooley *v.* Rochester, 60 N. H. 467; Tilton *v.* Pittsfield, 58 N. H. 327; Eames *v.* Northumberland, 44 N. H. 67; Hall *v.* Manchester, 39 N. H. 295.

Mere irregularities in the lay-out cannot be set up. Norris *v.* Haverhill, 65 N. H. 89, 18 Atl. 85 (as for instance that a petition on which the lay-out was made was insufficient in form); Randall *v.* Conway, 63 N. H. 513, 3 Atl. 635 (that the return was made late); Horne *v.* Rochester, 62 N. H. 347; Haywood *v.* Charlestown, 43 N. H. 61; Proctor *v.* Andover, 42 N. H. 348 (that lay-out was wider than petition prayed for).

If the inhabitants of a town, in making a road, deviate from the true location, they are estopped to deny their liability to maintain it as constructed, in an action against them for injury occasioned by want of repair.

it,[17] although in some cases it has been held that a town was estopped by repairs to deny that the road was public.[18]

e. Issues, Proof, and Variance. As in other actions,[19] the evidence must conform to the pleadings,[20] a material variance having a fatal effect.[21] The usual defenses are open under the general issue.[22]

f. Evidence — (I) *Presumptions and Burden of Proof.*[23] The burden is on plaintiff to prove his injury,[24] due notice thereof to the municipality,[25] that he was on the highway legally,[26] and in the exercise of due care,[27] except in those

Williams *v.* Cummington, 18 Pick. (Mass.) 312.

17. Reed *v.* Cornwall, 27 Conn. 48; Bogie *v.* Waupun, 75 Wis. 1, 43 N. W. 667, 6 L. R. A. 59, by work on a temporary road to avoid snow drifts.

18. State *v.* Wilson, 42 Me. 9; Houfe *v.* Fulton, 34 Wis. 608, 17 Am. Rep. 463; Codner *v.* Bradford, 3 Pinn. (Wis.) 259, 3 Chandl. 291.

19. See, generally, Pleading, 31 Cyc. 700.

20. Farlow *v.* Camp Point, 186 Ill. 256, 57 N. E. 781; Baxter *v.* Winooski Turnpike Co., 22 Vt. 114, 52 Am. Dec. 84, holding the evidence to be confined to the single injury alleged. But see Davis *v.* Guilford, 55 Conn. 351, 11 Atl. 350, holding a complaint stating too much not fatal as not misleading.

21. *Indiana.*— Perry *v.* Barnett, 65 Ind. 522, bridge defective, declaration stating defect in highway.

Massachusetts.— Lund *v.* Tyngsboro, 11 Cush. 563, 59 Am. Dec. 159, allegation that plaintiff was violently thrown from wagon; evidence that he leaped to avoid injury.

Michigan.—Smith *v.* Walker Tp., 117 Mich. 14, 75 N. W. 141, failure to repair alleged; evidence of failure to give notice that road was dangerous.

New Hampshire.— Edgerley *v.* Concord, 59 N. H. 78, declaration alleging a defective highway; proof of act of fireman frightening horse.

New York.— Getty *v.* Hamlin, 46 Hun 1.

Rhode Island.— Potts *v.* Allen, 19 R. I. 489, 34 Atl. 993, failure to prove obstruction within highway.

See 25 Cent. Dig. tit. "Highways," § 624.

No material variance found see Linsley *v.* Bushnell, 15 Conn. 225, 38 Am. Dec. 79 (holding that a statement that defendant placed a cart in a highway and negligently permitted it to remain there is sustained by evidence that he placed the cart in highway, that it was moved, and that defendant allowed it to remain); Holt *v.* Penobscot, 56 Me. 15, 96 Am. Dec. 429 (breaking down of causeway); Tripp *v.* Lyman, 37 Me. 250 (an allegation of accident on December 18 held sufficient if proved in the month of December); Goldthwait *v.* East Bridgewater, 5 Gray (Mass.) 61 (an allegation that a horse fell into a pond and broke his shoulder; evidence that he broke his shoulder on stone post in road); Stedman *v.* Southbridge, 17 Pick. (Mass.) 162 ("town way or road" in declaration; ancient highway proved); Merkle *v.* Bennington Tp., 68 Mich. 133, 35 N. W. 846 (allegation that planks were loose; evidence that horses stepped into hole in bridge); Smith *v.* Sherwood Tp., 62 Mich. 159, 28 N. W. 806 (whether precipitated from bridge itself or from embankments); Brown *v.* Wabash R. Co., 90 Mo. App. 20 (horse's hoof entangled in wire); Davis *v.* Oregon Short Line R. Co., 31 Utah 307, 88 Pac. 2 (dedication allowed to be proved under allegation that road was a public highway); Luce *v.* Hassam, 76 Vt. 450, 58 Atl. 725 (allegation of a wagon; proof of a two-wheeled vehicle); Barber *v.* Essex, 27 Vt. 62 (declaration that injury took place on highway; evidence that it took place on abandoned portion of highway; declaration also of road "out of repair and insufficient"; evidence of lack of fence).

22. *Alabama.*— Dunn *v.* Gunn, 149 Ala. 583, 42 So. 686, denial of existence of road.

Maine.— Low *v.* Windham, 75 Me. 113, insufficiency of notice.

Massachusetts.— Jones *v.* Andover, 10 Allen 18, that plaintiff was traveling on Sunday.

New Hampshire.— Hall *v.* Manchester, 39 N. H. 295, legality of lay-out.

Vermont.— Brown *v.* Swanton, 69 Vt. 53, 37 Atl. 280 (that defendant knew of the gully or should have known of it); Matthie *v.* Barton, 40 Vt. 286 (that notice was not given).

See 25 Cent. Dig. tit. "Highways," § 524.

23. **In action for injury on city street** see Municipal Corporations, 28 Cyc. 1477.

24. Lester *v.* Pittsford, 7 Vt. 158.

25. Cunningham *v.* Frankfort, 104 Me. 208, 70 Atl. 441; Bailey *v.* Spring Lake, 61 Wis. 227, 20 N. W. 920.

26. Bosworth *v.* Swansey, 10 Metc. (Mass.) 363, 43 Am. Dec. 441, holding that plaintiff must prove that traveling on Sunday was from necessity or charity.

That an automobile was not registered and the driver not licensed is a matter of defense. Doherty *v.* Ayer, 197 Mass. 241, 83 N. E. 677, 125 Am. St. Rep. 355, 14 L. R. A. N. S. 816.

27. *Iowa.*— Rusch *v.* Davenport, 6 Iowa 443.

Kansas.— Falls Tp. *v.* Stewart, 3 Kan. App. 403, 42 Pac. 926.

Maine.— Cunningham *v.* Frankfort, 104 Me. 208, 70 Atl. 441; Tripp *v.* Wells, 104 Me. 29, 70 Atl. 533, 18 L. R. A. N. S. 1145; Orr *v.* Oldtown, 99 Me. 190, 58 Atl. 914 (also that plaintiff's driver was not negligent); Mosher *v.* Smithfield, 84 Me. 334, 24 Atl. 876; Merrill *v.* North Yarmouth, 78 Me. 200, 3 Atl. 575, 57 Am. Rep. 794; Moore *v.* Abbot, 32 Me. 46; Merrill *v.* Hampden, 26 Me. 234.

cases [28] in which negligence is treated as a defense.[29] Plaintiff must further prove the existence of the highway,[30] the defect therein,[31] and that the defect existed through defendant's negligence [32] and proximately contributed to the injury.[33] The burden of proving any affirmative defense rests upon defendant.[34] Plaintiff need not prove that defendant had funds for the work.[35]

(II) *ADMISSIBILITY.* The usual rules applicable in civil cases govern the competency of evidence as to the negligence of defendant [36] and the cause of the

Massachusetts.—Adams *v.* Carlisle, 21 Pick. 146; Lane *v.* Crombie, 12 Pick. 177.

New Hampshire.—Winship *v.* Enfield, 42 N. H. 197, that did not know of defects.

New York.—Atwater *v.* Veteran, 6 N. Y. Suppl. 907, ordinary care.

South Carolina.—Duncan *v.* Greenville County, 73 S. C. 254, 53 S. E. 367.

Vermont.—Bovee *v.* Danville, 53 Vt. 183.

28. See NEGLIGENCE, 29 Cyc. 601.

29. Daniels *v.* Saybrook, 34 Conn. 377; Hill *v.* New Haven, 37 Vt. 501, 88 Am. Dec. 613; Gallagher *v.* Buckley, 31 Wash. 380, 72 Pac. 79.

Where the answer pleads particular facts in support of contributory negligence the burden as to these facts is on defendant. Falls Tp. *v.* Stewart, 3 Kan. App. 403, 42 Pac. 926.

Inference of care in a woman passenger seated in a wagon see Newell *v.* Stony Point, 59 N. Y. App. Div. 237, 69 N. Y. Suppl. 583.

Negligence is presumed in one walking on side-path at night. Siegler *v.* Mellinger, 203 Pa. St. 256, 52 Atl. 175, 93 Am. St. Rep. 767.

That a horse turned slightly does not raise a presumption that plaintiff was negligent. Coppins *v.* Jefferson, 126 Wis. 578, 105 N. W. 1078.

30. Kennedy *v.* Williamsport, 11 Pa. Super. Ct. 91, holding that evidence of opening and use is enough to shift the burden. But see Coffin *v.* Plymouth, 49 N. H. 173 (holding that plaintiff need not show that part of track actually traveled for twenty years); McGuinness *v.* Westchester, 66 Hun (N. Y.) 356, 21 N. Y. Suppl. 290 (holding that plaintiff need not prove defect in a portion of the highway which the commissioners undertook to repair).

Presumption from use see Coates *v.* Canaan, 51 Vt. 131.

31. Cunningham *v.* Frankfort, 104 Me. 208, 70 Atl. 441; Hunt *v.* Rich, 38 Me. 195 (holding also that a jury cannot infer, from the mere existence of a road, that it was wide enough to be safe and convenient); Church *v.* Cherryfield, 33 Me. 460 (holding that a defect is not inferred merely from the injury); Moore *v.* Abbot, 32 Me. 46; Lester *v.* Pittsford, 7 Vt. 158; Schillinger *v.* Verona, 88 Wis. 317, 60 N. W. 272.

32. Murphy *v.* Worcester, 159 Mass. 546, 34 N. E. 1080; Ammerman *v.* Coal Tp., 187 Pa. St. 326, 40 Atl. 1005; Lynn *v.* Ralpho Tp., 186 Pa. St. 420, 40 Atl. 568; Schillinger *v.* Verona, 88 Wis. 317, 60 N. W. 272.

33. Cunningham *v.* Frankfort, 104 Me. 208, 70 Atl. 441; Moore *v.* Abbot, 32 Me. 46; Libbey *v.* Greenbush, 20 Me. 47.

34. *Connecticut.*—Daniels *v.* Saybrook, 34 Conn. 377, that injury was not caused by plaintiff's negligence.

Georgia.—Atlanta, etc., Air Line R. Co. *v.* Wood, 48 Ga. 565, that route of road had been changed.

New York.—Lewis *v.* Ballston Terminal R. Co., 45 N. Y. App. Div. 129, 60 N. Y. Suppl. 1035 (necessity for obstruction); Quinn *v.* Sempronius, 33 N. Y. App. Div. 70, 53 N. Y. Suppl. 325 (want of funds to repair).

Pennsylvania.—Glaub *v.* Goshen Tp., 7 Kulp 292, that plaintiff might have taken a safer road.

Wisconsin.—Althouse *v.* Jamestown, 91 Wis. 46, 64 N. W. 423, allowance of plaintiff's claim.

See 25 Cent. Dig. tit. "Highways," § 526.

35. Quinn *v.* Sempronius, 33 N. Y. App. Div. 70, 53 N. Y. Suppl. 325; Whitlock *v.* Brighton, 2 N. Y. App. Div. 21, 37 N. Y. Suppl. 333 [*affirmed* in 154 N. Y. 781, 49 N. E. 1106].

36. See cases cited *infra*, this note.

Evidence held competent see Wells *v.* Gallagher, 144 Ala. 363, 39 So. 747, 113 Am. St. Rep. 50, 3 L. R. A. N. S. 759 (evidence that children were playing in an alley held admissible to show wantonness in leaving bomb there); Ashborn *v.* Waterbury, 70 Conn. 551, 40 Atl. 458; Clinton *v.* Howard, 42 Conn. 294 (knowledge of neighborhood as to horse running away proper to show damages to its market value); Overhouser *v.* American Cereal Co., 118 Iowa 417, 92 N. W. 74 (city ordinance); Chapman *v.* Nobleboro, 76 Me. 427 (distance of defect from point named in notice); Hawks *v.* Hawley, 123 Mass. 210 (holding that on the issue whether an alleged defect was within the traveled part of a highway, the fact that it was a county road may be considered, together with the possible narrowness of such roads); Judd *v.* Fargo, 107 Mass. 264 (that highway was little frequented); Harris *v.* Clinton Tp., 64 Mich. 447, 31 N. W. 425, 8 Am. St. Rep. 842 (condition of highway); Plummer *v.* Ossipee, 59 N. H. 55 (prior wheel marks on other end of log which caused accident); Whitney *v.* Ticonderoga, 53 Hun (N. Y.) 214, 6 N. Y. Suppl. 844 [*affirmed* in 127 N. Y. 40, 27 N. E. 403 (holding allegations in answer admissions against town); Sherman *v.* Kortright, 52 Barb. (N. Y.) 267 (consultation by defendant overseer with others); Stone *v.* Langworthy, 20 R. I. 602, 40 Atl. 832 (evidence of another who had tried the horse); Luce *v.* Hassam, 76 Vt. 450, 58 Atl. 725; Brown *v.* Swanton, 69 Vt. 53, 37 Atl. 280; Garske *v.* Ridgeville, 123 Wis. 503, 102 N. W. 22.

injury.[37] The ability of the town to repair is admissible in evidence,[38] as is also evidence of the condition of the road in question at other times[39] and places[40]

Evidence held incompetent see Davis *v.* Guilford, 55 Conn. 351, 11 Atl. 350 (that plaintiff would not have sued if the town had repaired the injury); Creamer *v.* McIlvain, 89 Md. 343, 43 Atl. 935, 73 Am. St. Rep. 186, 45 L. R. A. 531 (that another riding with plaintiff had previously driven recklessly); Brown *v.* Lawrence, 120 Mass. 1 (holding that evidence of a vote to repair is not evidence that they did repair); Brooks *v.* Acton, 117 Mass. 204 (depth of snow in neighboring woods); Wheeler *v.* Framingham, 12 Cush. (Mass.) 287 (report of a committee that a certain way is unsafe, which report was accepted); Dudley *v.* Weston, 1 Metc. (Mass.) 477 (reports of committees and votes of town not setting forth facts showing liability); Langworthy *v.* Green Tp., 88 Mich. 207, 50 N. W. 130 (that plaintiff had made no claim on the town); Harris *v.* Clinton Tp., 64 Mich. 447, 31 N. W. 425, 8 Am. St. Rep. 842 (whether the road was safe is held incompetent, as town is only bound to keep roads reasonably safe); Clark *v.* Kirwan, 4 E. D. Smith (N. Y.) 21 (as to where materials were to be delivered under contract); Stone *v.* Pendleton, 21 R. I. 332, 43 Atl. 643 (whether plaintiff would have gone that way had he known of the defect); Burt *v.* Utah Light, etc., Co., 26 Utah 157, 72 Pac. 497; Cheney *v.* Ryegate, 55 Vt. 499 (that the team of a third person which ran into plaintiff had a habit of running away); Fehrman *v.* Pine River, 118 Wis. 150, 95 N. W. 105 (whether during summer and fall preceding accident); Prahl *v.* Waupaca, 109 Wis. 299, 85 N. W. 350 (measurements of highway after changes); Stricker *v.* Reedsburg, 101 Wis. 457, 77 N. W. 897 (where fences extended by user would lead to a stump); Doan *v.* Willow Springs, 101 Wis. 112, 76 N. W. 1104.

Admissions held competent see Guertin *v.* Hudson, 71 N. H. 505, 53 Atl. 736 (statement by plaintiff that he was going on an improper expedition); Grimes *v.* Keene, 52 N. H. 330 (payment to another passenger in the same carriage); Coffin *v.* Plymouth, 49 N. H. 173 (that selectmen had paid a claim for damages of the owner of a wagon in which plaintiff was riding).

37. Libbey *v.* Greenbush, 20 Me. 47, horse falling through a causeway held not *prima facie* evidence that subsequent illness was result of fall.

Evidence held admissible see Whitney *v.* Leominster, 136 Mass. 25 (that horse had a track record); Maggi *v.* Cutts, 123 Mass. 535 (horse's habits before and after the accident); Postal Tel. Cable Co. *v.* Zopfi, 73 Fed. 609, 19 C. C. A. 605 (slipping while stepping over a telegraph pole).

38. Weekes *v.* Needham, 156 Mass. 289, 31 N. E. 8 (population of town, length of roads, amounts raised and expended); Sanders *v.* Palmer, 154 Mass. 475, 28 N. E. 778; Rooney *v.* Randolph, 128 Mass. 580 (cost of clearing snow); Malloy *v.* Pelham, 4 N. Y. St. 828 (holding that proof that the commissioners of highways had sufficient money to have made certain repairs on the highway in question is sufficient, it not being necessary to show that they had sufficient to make all desirable improvements). *Contra*, Winship *v.* Enfield, 42 N. H. 197.

Lack of funds eighteen months before the accident cannot be shown. Bryant *v.* Randolph, 2 Silv. Sup. (N. Y.) 381, 6 N. Y. Suppl. 438.

39. *Iowa.*—Faulk *v.* Iowa County, 103 Iowa 442, 72 N. W. 757, that part of railing was missing before the accident occurred.

Maryland.— Hartford County *v.* Hause, 106 Md. 439, 67 Atl. 273.

Massachusetts.— Stone *v.* Hubbardston, 100 Mass. 49, holding admissible evidence that ice usually formed at the point in question.

Michigan.— Langworthy *v.* Green Tp., 88 Mich. 207, 50 N. W. 130, measurements of log imbedded in road four weeks after accident.

New York.— Stone *v.* Poland, 81 Hun 132, 30 N. Y. Suppl. 748; Clapper *v.* Waterford, 62 Hun 170, 16 N. Y. Suppl. 640 [*reversed* on other grounds in 131 N. Y. 382, 30 N. E. 240 (condition on morning after accident); Maxim *v.* Champion, 50 Hun 88, 4 N. Y. Suppl. 515 [*affirmed* in 119 N. Y. 626, 23 N. E. 1144] (that highway had been in the same condition without accident for sixty-eight years); Bryant *v.* Randolph, 2 Silv. Sup. 381, 6 N. Y. Suppl. 438.

Pennsylvania.— North Manheim Tp. *v.* Arnold, 119 Pa. St. 380, 13 Atl. 444, 4 Am. St. Rep. 650, that lumber was piled on the road previously held admissible to show notice of obstruction.

Utah.— Burt *v.* Utah Light, etc., Co., 26 Utah 157, 72 Pac. 497.

Vermont.— Brown *v.* Swanton, 69 Vt. 53, 37 Atl. 280; Cook *v.* Barton, 66 Vt. 65, 28 Atl. 631; Cheney *v.* Ryegate, 55 Vt. 499; Walker *v.* Westfield, 39 Vt. 246.

Wisconsin.— Salladay *v.* Dodgeville, 85 Wis. 318, 55 N. W. 696, 20 L. R. A. 541; Schuenke *v.* Pine River, 84 Wis. 669, 54 N. W. 1007.

See 25 Cent. Dig. tit. "Highways," § 531.

Rule applied to action for injury in city street see MUNICIPAL CORPORATIONS, 28 Cyc. 1484.

Evidence of condition at other times held inadmissible as being too remote see Hutchinson *v.* Methuen, 1 Allen (Mass.) 33 (between two and three months before accident); Whitney *v.* Londonderry, 54 Vt. 41 (several years after); Coates *v.* Canaan, 51 Vt. 131 (five days before).

A former failure of a culvert may be evidence of defective construction, and of the knowledge of the fact by the town authorities. Willey *v.* Portsmouth, 35 N. H. 303.

40. *Connecticut.*—Wilson *v.* Granby, 47 Conn. 59, 36 Am. Rep. 51, evidence that such loads had broken through sluice bridge in a neighboring town held admissible.

not too remote to lack probative force. Evidence of similar accidents at the same place where plaintiff was injured has been variously held to be admissible [41] and inadmissible.[42] Evidence of subsequent repairs is commonly inadmissible,[43] except under special circumstances,[44] as is also as a general rule evidence of the custom and practice in the neighborhood as to the care of roads,[45] although

Indiana.— Porter County *v.* Dombke, 94 Ind. 72.

Kansas.— Cunningham *v.* Clay Tp., 69 Kan. 373, 76 Pac. 907, similar stones in other places to show stone in question not unusual in appearance.

Maine.— Verrill *v.* Minot, 31 Me. 299.

Massachusetts.— Ghenn *v.* Provincetown, 105 Mass. 313.

Wisconsin.— Conrad *v.* Ellington, 104 Wis. 367, 80 N. W. 456.

See 25 Cent. Dig. tit. "Highways," § 531.

Rule applied to action for injury in city street see MUNICIPAL CORPORATIONS, 28 Cyc. 1489.

Condition at other places held immaterial under the particular circumstances see Whitley Tp. *v.* Linville, 174 Ill. 579, 51 N. E. 832 (width in other places held immaterial); Tripp *v.* Lyman, 37 Me. 250; Stoddard *v.* Winchester, 157 Mass. 567, 32 N. E. 948; Schoonmaker *v.* Wilbraham, 110 Mass. 134; Burt *v.* Utah Light, etc., Co., 26 Utah 157, 72 Pac. 497; Coats *v.* Canaan, 51 Vt. 131.

41. Bailey *v.* Trumbull, 31 Conn. 581 (accident fifteen or twenty feet away); Cook *v.* New Durham, 64 N. H. 419, 13 Atl. 650; Griffin *v.* Auburn, 58 N. H. 121; Kent *v.* Lincoln, 32 Vt. 591.

That other horses were frightened is evidence of the dangerous character of the road. Galt *v.* Woliver, 103 Ill. App. 71; Crocker *v.* McGregor, 76 Me. 282, 49 Am. Rep. 611; Nye *v.* Dibley, 88 Minn. 465, 93 N. W. 524; Golden *v.* Chicago, etc., R. Co., 84 Mo. App. 59; Seeton *v.* Dunbarton, 72 N. H. 269, 56 Atl. 197; Darling *v.* Westmoreland, 52 N. H. 401, 13 Am. Rep. 55; Wilson *v.* Spafford, 10 N. Y. Suppl. 649.

Rule applied in action for injury in city street see MUNICIPAL CORPORATIONS, 28 Cyc. 1490.

The absence of such accidents is also held to be admissible. Gould *v.* Hutchins, 73 N. H. 69, 58 Atl. 1046; Embler *v.* Wallkill, 132 N. Y. 222, 30 N. E. 404; Glasier *v.* Hebron, 131 N. Y. 447, 30 N. E. 239, 597 [*reversing* 62 Hun 137, 16 N. Y. Suppl. 503]; Waller *v.* Hebron, 5 N. Y. App. Div. 577, 39 N. Y. Suppl. 381; Maxim *v.* Champion, 50 Hun (N. Y.) 88, 4 N. Y. Suppl. 515 [*affirmed* in 119 N. Y. 626, 23 N. E. 1144]; Stone *v.* Pendleton, 21 R. I. 332, 43 Atl. 643; Garske *v.* Ridgeville, 123 Wis. 503, 102 N. W. 22. *Contra*, Lutton *v.* Vernon, 62 Conn. 1, 23 Atl. 1020, 27 Atl. 589 (in the absence of evidence that the experience of other persons was similar to decedent's); Taylor *v.* Monroe, 43 Conn. 36 (where accident was peculiar); Branch *v.* Libbey, 78 Me. 321, 5 Atl. 71, 57 Am. Rep. 810; Schoonmaker *v.* Wilbraham, 110 Mass. 134; Kidder *v.* Dunstable, 11 Gray (Mass.) 342; Aldrich *v.* Pelham, 1 Gray (Mass.) 510; Langworthy *v.* Green Tp., 88 Mich. 207, 50 N. W. 130.

42. Cunningham *v.* Clay Tp., 69 Kan. 373, 76 Pac. 907; Bremner *v.* Newcastle, 83 Me. 415, 22 Atl. 382, 23 Am. St. Rep. 782; Blair *v.* Pelham, 118 Mass. 420; Merrill *v.* Bradford, 110 Mass. 505; Collins *v.* Dorchester, 6 Cush. (Mass.) 396; Phillips *v.* Willow, 70 Wis. 6, 34 N. W. 731, 5 Am. St. Rep. 114.

43. *Indiana.*—Wabash County *v.* Pearson, 129 Ind. 456, 28 N. E. 1120.

Massachusetts.— Spooner *v.* Freetown, 139 Mass. 235, 29 N. E. 662, so holding in the absence of evidence that the town voted for the repairs or ratified them.

Michigan.— Langworthy *v.* Green Tp., 88 Mich. 207, 50 N. W. 130.

New Hampshire.— Seeton *v.* Dunbarton, 72 N. H. 269, 56 Atl. 197; Dow *v.* Weare, 68 N. H. 345, 44 Atl. 489, such evidence given and stricken out.

New York.— Clapper *v.* Waterford, 131 N. Y. 382, 30 N. E. 240 [*reversing* 62 Hun 170, 16 N. Y. Suppl. 640] (commenting on the danger of such evidence); Getty *v.* Hamlin, 127 N. Y. 636, 27 N. E. 399 [*reversing* 8 N. Y. Suppl. 190]. But see Stone *v.* Poland, 58 Hun 21, 11 N. Y. Suppl. 498 [*distinguishing* Corcoran *v.* Peekskill, 108 N. Y. 151, 15 N. E. 309]; Getty *v.* Hamlin, 46 Hun 1.

Utah.— Burt *v.* Utah Light, etc., Co., 26 Utah 157, 72 Pac. 497.

Wisconsin.— Redepenning *v.* Rock, 136 Wis. 372, 117 N. W. 805; Jennings *v.* Albion, 90 Wis. 22, 62 N. W. 926.

See 25 Cent. Dig. tit. "Highways," § 532.

44. Morrell *v.* Peck, 88 N. Y. 398 (to show control and funds in the hands of defendant); Redepenning *v.* Rock, 136 Wis. 372, 117 N. W. 805 (to contradict claim of town that misled by notice; and to refute defendant's claim that the road was too wet to be repaired). See also Carlon *v.* Greenfield, 130 Wis. 342, 110 N. W. 208.

45. *Connecticut.*— Tiesler *v.* Norwich, 73 Conn. 199, 47 Atl. 161, custom to maintain carriage blocks.

Massachusetts.— Hinckley *v.* Barnstable, 109 Mass. 126 (usage to leave drains uncovered); Judd *v.* Fargo, 107 Mass. 264 (that neighbors were accustomed to obstruct highway with sleds as he did); Kidder *v.* Dunstable, 11 Gray 342.

Michigan.— Malloy *v.* Walker Tp., 77 Mich. 448, 43 N. W. 1012, 6 L. R. A. 695.

New Hampshire.— Rowell *v.* Hollis, 62 N. H. 129; Littleton *v.* Richardson, 32 N. H. 59.

Wisconsin.—Kenworthy *v.* Ironton, 41 Wis. 647, custom to construct highway on hillsides.

See 25 Cent. Dig. tit. "Highways," § 527 *et seq.*

even such evidence has been admitted in some cases.[46] The opinion of witnesses as to the condition of the road is inadmissible.[47] Evidence may be admissible, although differing somewhat from the statutory notice.[48]

g. Trial — (i) *Questions For Court and For Jury.*[49] As in other actions,[50] disputed questions of fact are for the jury in an action for injuries from defects or obstructions in a highway.[51] Thus it is usually a question for the jury whether the highway is sufficient,[52] as is also the negligence of defendant.[53]

46. Kenney *v.* Hampton, 73 N. H. 45, 58 Atl. 1046; T. A. Gillespie Co. *v.* Cumming, 62 N. J. L. 370, 41 Atl. 693, 868, evidence of usual practice to place red light at each end of obstruction.

47. Albion *v.* Hetrick, 90 Ind. 545, 46 Am. Rep. 230; Langworthy *v.* Green Tp., 88 Mich. 207, 50 N. W. 130. See Card *v.* Columbia Tp., 191 Pa. St. 254, 43 Atl. 217, as to opinions as to course of plaintiff's wagon.

48. Cook *v.* Barton, 66 Vt. 65, 28 Atl. 631; Knox *v.* Wheelock, 56 Vt. 191; Fassett *v.* Roxbury, 55 Vt. 552; Salladay *v.* Dodgeville, 85 Wis. 318, 55 N. W. 696, 20 L. R. A. 541 (notice, loose stones; evidence, stone imbedded in road); Wall *v.* Highland, 72 Wis. 435, 39 N. W. 560. But see Perry *v.* Putney, 52 Vt. 533.

49. In action for injury on city street see Municipal Corporations, 28 Cyc. 1500 *et seq.*

50. See Trial.

51. Taylor *v.* Woburn, 130 Mass. 494 (question as to agency of one assuming to speak for plaintiff); Robin *v.* Bartlett, 64 N. H. 426, 13 Atl. 645 (where the accident happened).

Rights in a highway commonly depend on questions of fact for the jury. House *v.* Metcalf, 27 Conn. 631 (acquirement by prescription); Texas Midland R. Co. *v.* Johnson, 20 Tex. Civ. App. 572, 50 S. W. 1044 (where witnesses spoke of road as public and one testified he was supervisor of it); Cairncross *v.* Pewaukee, 78 Wis. 66, 47 N. W. 13, 10 L. R. A. 473 (whether steamboat unlawfully on a street).

52. *Maine.*— Morse *v.* Belfast, 77 Me. 44; Weeks *v.* Parsonsfield, 65 Me. 285; Tripp *v.* Lyman, 37 Me. 250 (holes); Merrill *v.* Hampden, 26 Me. 234.

Maryland.— Rowe *v.* Baltimore, etc., R. Co., 82 Md. 493, 33 Atl. 761, stones falling from overhanging rock.

Massachusetts.— Taylor *v.* Woburn, 130 Mass. 494 (post); Hodgkins *v.* Rockport, 116 Mass. 573; Myers *v.* Springfield, 112 Mass. 489; Warner *v.* Holyoke, 112 Mass. 362 (whether dangerous place outside limits was too near the highway).

New Hampshire.— Johnson *v.* Haverhill, 35 N. H. 74.

New York.— Maxim *v.* Champion, 50 Hun 88, 4 N. Y. Suppl. 515 [*affirmed* in 119 N. Y. 626, 23 N. E. 1144]; Bryant *v.* Randolph, 14 N. Y. Suppl. 844; Bryant *v.* Randolph, 2 Silv. Sup. 381, 6 N. Y. Suppl. 438, considering the fact that a defective highway was on land belonging to the railroad.

Pennsylvania.— Ginley *v.* Ashley Borough, 215 Pa. St. 80, 64 Atl. 330 (removal of sidewalk); Milliren *v.* Sandy Tp., 29 Pa. Super. Ct. 580.

Rhode Island.— McCloskey *v.* Moies, 19 R. I. 297, 33 Atl. 225.

Vermont.— Washburn *v.* Woodstock, 49 Vt. 503 (loose stones); Bagley *v.* Ludlow, 41 Vt. 425 (log lying wholly or in part in the grass); Sessions *v.* Newport, 23 Vt. 9; Cassedy *v.* Stockbridge, 21 Vt. 391; Kelsey *v.* Glover, 15 Vt. 708; Green *v.* Danby, 12 Vt. 338 (snowdrifts).

Wisconsin.— Slivitski *v.* Wein, 93 Wis. 460, 67 N. W. 730; Draper *v.* Ironton, 42 Wis. 696; McCabe *v.* Hammond, 34 Wis. 590, removal of snowdrifts.

United States.— Providence *v.* Clapp, 17 How. 161, 15 L. ed. 72, treading down snow.

See 25 Cent. Dig. tit. "Highways," § 536.

53. In action for injury on city street see Municipal Corporations, 28 Cyc. 1504.

California.— Williams *v.* San Francisco, etc., R. Co., 6 Cal. App. 715, 93 Pac. 122.

Illinois.— West Chicago St. R. Co. *v.* Coit, 50 Ill. App. 640.

Indiana.— Hindman *v.* Timme, 8 Ind. App. 416, 35 N. E. 1046, where defendant left sick cow to die on highway.

Iowa.— Overhouser *v.* American Cereal Co., 118 Iowa 417, 92 N. W. 74, cause of loose stones in road.

Maine.— Larrabee *v.* Sewall, 66 Me. 376.

Maryland.— Charles County *v.* Mandanyohl, 93 Md. 150, 48 Atl. 1058.

Massachusetts.— Horr *v.* New York, etc., R. Co., 193 Mass. 100, 78 N. E. 776.

Michigan.— Tracey *v.* South Haven Tp., 132 Mich. 492, 93 N. W. 1065; Miller *v.* Meade Tp., 128 Mich. 98, 87 N. W. 131.

Missouri.— Atkinson *v.* Illinois Milk Co., 44 Mo. App. 153.

New York.— Clapper *v.* Waterford, 131 N. Y. 382, 30 N. E. 240 [*reversing* 62 Hun 170, 16 N. Y. Suppl. 640] (whether a commissioner did his full duty in obtaining funds); Whitney *v.* Ticonderoga, 127 N. Y. 40, 27 N. E. 403 [*affirming* 53 Hun 214, 6 N. Y. Suppl. 844]; Hanney *v.* Wren, 105 N. Y. App. Div. 59, 93 N. Y. Suppl. 827; Lewis *v.* Ballston Terminal R. Co., 45 N. Y. App. Div. 129, 60 N. Y. Suppl. 1035; Deegan *v.* Cappel, 1 Silv. Sup. 563, 6 N. Y. Suppl. 166; Rattagliata *v.* Hubbell, 7 Misc. 103, 27 N. Y. Suppl. 409; Lonergan *v.* Martin, 4 Misc. 624, 23 N. Y. Suppl. 968; Earl *v.* Crouch, 10 N. Y. Suppl. 882 (piling lumber so that a child could pull it over); Wiel *v.* Wright, 8 N. Y. Suppl. 776.

North Carolina.— Davis *v.* Thornburg, 149 N. C. 233, 62 S. E. 1088, delay in removing engine.

Pennsylvania.— Ackley *v.* Bradford Tp., 32

So also the question of plaintiff's contributory negligence is one for the jury,[54]

Pa. Super. Ct. 487; Milliren *v.* Sandy Tp., 29 Pa. Super. Ct. 580; Maus *v.* Mahoning Tp., 24 Pa. Super. Ct. 624; Prenter *v.* Keeling, 37 Pittsb. Leg. J. N. S. 6.

Rhode Island.— Foley *v.* Ray, 27 R. I. 127, 61 Atl. 50.

Utah.— Davis *v.* Oregon Short Line R. Co., 31 Utah 307, 88 Pac. 2, car run off track into highway.

Vermont.—Brown *v.* Mt. Holly, 69 Vt. 364, 38 Atl. 69, whether defect should have been anticipated.

Washington.— Selby *v.* Vancouver Water Works Co., 32 Wash. 522, 73 Pac. 504; Jones *v.* Swift, 30 Wash. 462, 70 Pac. 1109, whether defendant knew or should have known of plaintiff's presence.

Wisconsin.— Carlon *v.* Greenfield, 130 Wis. 342, 100 N. W. 208; Vollner *v.* Berens, 50 Wis. 494, 7 N. W. 371.

In action for injury on city street see MUNICIPAL CORPORATIONS, 28 Cyc. 1482.

54. *Connecticut.*— Peltier *v.* Bradley, 67 Conn. 42, 34 Atl. 712, 32 L. R. A. 651; Lutton *v.* Vernon, 62 Conn. 1, 23 Atl. 1020, 27 Atl. 589.

Georgia.— Kent *v.* Southern Bell Tel., etc., Co., 120 Ga. 980, 48 S. E. 399, one stepping over a ditch held not chargeable with the risk of its caving in from a cut under which plaintiff could not see.

Illinois.—Pontiac *v.* Grandy, 108 Ill. App. 466.

Iowa.—Overhouser *v.* American Cereal Co., 118 Iowa 417, 92 N. W. 74, riding seven miles an hour.

Maine.— Morse *v.* Belfast, 77 Me. 44; Whitney *v.* Cumberland, 64 Me. 541.

Maryland.—Allegheny County *v.* Broadwaters, 69 Md. 533, 16 Atl. 223, although plaintiff walked at night near the edge, and failed to carry a light.

Massachusetts.— Thompson *v.* Bolton, 197 Mass. 311, 83 N. E. 1089; Cutting *v.* Shelburne, 193 Mass. 1, 78 N. E. 752 (although traveler knew of the defect); Wood *v.* Westport, 185 Mass. 567, 70 N. E. 1018; Kelly *v.* Blackstone, 147 Mass. 448, 18 N. E. 217, 9 Am. St. Rep. 730; Flagg *v.* Hudson, 142 Mass. 280, 8 N. E. 42, 56 Am. Rep. 674; Harris *v.* Newbury, 128 Mass. 321; Snow *v.* Provincetown, 120 Mass. 580 (plaintiff's previous knowledge); Williams *v.* Leyden, 119 Mass. 237 (whether the horse had any vicious habit which contributed to injury); Joyner *v.* Great Barrington, 118 Mass. 463; Schienfeldt *v.* Norris, 115 Mass. 17; Fox *v.* Sackett, 10 Allen 535, 87 Am. Dec. 682; Gregory *v.* Adams, 14 Gray 242 (question if elephant a proper animal to drive over highway); Rindge *v.* Coleraine, 11 Gray 157 (although ford unsafe through freshets); Bigelow *v.* Rutland, 4 Cush. 247; Munroe *v.* Leach, 7 Metc. 274.

Michigan.— Judd *v.* Caledonia Tp., 150 Mich. 480, 114 N. W. 346; Hunt *v.* Lincoln Tp., 131 Mich. 637, 92 N. W. 288 (driving over a mudhole); McTiver *v.* Grant Tp., 131 Mich. 456, 91 N. W. 736 (knowing that the road was in a dangerous condition but not knowing of the particular defect); Lazell *v.* Kapp, 83 Mich. 36, 46 N. W. 1028; Boick *v.* Bissell, 80 Mich. 260, 45 N. W. 55; Malloy *v.* Walker Tp., 77 Mich. 448, 43 N. W. 1012, 6 L. R. A. 695 (one pushing attempting to prevent load from sliding over embankment).

Missouri.— Haller *v.* St. Louis, 176 Mo. 606, 75 S. W. 613 (woman driving while road roller in operation); Gulick *v.* Clarke, 51 Mo. App. 26.

Nebraska.— Nebraska Tel. Co. *v.* Jones, 60 Nebr. 396, 83 N. W. 197, 59 Nebr. 510, 81 N. W. 435, plaintiff endeavoring to save horses; driving downhill.

New Hampshire.— Hendry *v.* North Hampton, 72 N. H. 351, 56 Atl. 922, 101 Am. St. Rep. 681, 64 L. R. A. 70; Sleeper *v.* Worcester, etc., R. Co., 58 N. H. 520; Daniels *v.* Lebanon, 58 N. H. 284 (traveling at night without a light); Griffin *v.* Auburn, 58 N. H. 121; Tuttle *v.* Farmington, 58 N. H. 13 (care in selection and management of team); Carlton *v.* Bath, 22 N. H. 559.

New York.— Littebrant *v.* Sidney, 77 N. Y. App. Div. 545, 78 N. Y. Suppl. 890 (driving over an icy road along the edge of an embankment); Hubner *v.* Metropolitan St. R. Co., 77 N. Y. App. Div. 290, 79 N. Y. Suppl. 153 [*affirmed* in 177 N. Y. 523, 69 N. E. 1124]; Hewett *v.* Thurman, 41 N. Y. App. Div. 6, 58 N. Y. Suppl. 83; Chamberlain *v.* Wheatland, 4 Silv. Sup. 165, 7 N. Y. Suppl. 190 (balky horse); Bryant *v.* Randolph, 2 Silv. Sup. 381, 6 N. Y. Suppl. 438 (whether plaintiff could use brake); Williams *v.* O'Keefe, 9 Bosw. 536, 24 How. Pr. 16; Holcomb *v.* Champion, 12 N. Y. Suppl. 882 (whether woman drove an unsafe horse); Atwater *v.* Veteran, 6 N. Y. Suppl. 907 (where plaintiff could not turn back).

Oregon.— Nosler *v.* Coos Bay R. Co., 39 Oreg. 331, 64 Pac. 644, 40 Oreg. 305, 63 Pac. 1050, 64 Pac. 855; Gardner *v.* Wasco County, 37 Oreg. 392, 61 Pac. 834, 62 Pac. 753.

Pennsylvania.— Mechesney *v.* Unity Tp., 164 Pa. St. 358, 30 Atl. 263; Sutter *v.* Young Tp., 130 Pa. St. 72, 18 Atl. 610; Smith *v.* O'Connor, 48 Pa. St. 218, 86 Am. Dec. 582; Millcreek Tp. *v.* Perry, 8 Pa. Cas. 474, 12 Atl. 149; Kingston Tp. *v.* Gibbons, 3 Pa. Cas. 398, 6 Atl. 115; Ackley *v.* Bradford Tp., 32 Pa. Super. Ct. 487; Milliren *v.* Sandy Tp., 29 Pa. Super. Ct. 580; Fetterman *v.* Rush Tp., 28 Pa. Super. Ct. 77 (where plaintiff might have taken other roads); Stanton *v.* Scranton Traction Co., 11 Pa. Super. Ct. 180; Fry *v.* Perkiomen Tp., 1 Montg. Co. Rep. 25 (position of plaintiff on wagon).

Rhode Island.— Cassidy *v.* Angell, 12 R. I. 447, 34 Am. Rep. 690, habits of intestate and knowledge of locality.

Utah.— Davis *v.* Oregon Short Line R. Co., 31 Utah 307, 88 Pac. 2.

Vermont.— Howrigan *v.* Bakersfield, 79 Vt. 249, 64 Atl. 1130; Durgin *v.* Danville, 47 Vt. 95 (driving through snowdrifts); Walker *v.* Westfield, 39 Vt. 246; Hill *v.* New Haven, 37

as is also the question of what is a defect[55] or an obstruction[56] in a public highway.

(II) *INSTRUCTIONS.*[57] The general rules governing instructions to the jury in civil actions[58] apply to actions for injury resulting from a defective highway.[59] Instructions in such actions should give the rule of law only[60] applicable to the pleadings[61] and to the evidence,[62] and they should cover

Vt. 501, 88 Am. Dec. 613; Sessions *v.* Newport, 23 Vt. 9; Allen *v.* Hancock, 16 Vt. 230 (horse's shoes smooth); Kelsey *v.* Glover, 15 Vt. 708.

Washington.—Archibald *v.* Lincoln County, 50 Wash. 55, 96 Pac. 831.

Wisconsin.— Dralle *v.* Reedsburg, 130 Wis. 347, 110 N. W. 210; Coppins *v.* Jefferson, 126 Wis. 578, 105 N. W. 1078 (forgetting defect); Johnson *v.* Highland, 124 Wis. 597, 102 N. W. 1085; Lynch *v.* Waldwick, 123 Wis. 351, 101 N. W. 925 (walking uphill behind loaded sleigh); Kennedy *v.* Lincoln, 122 Wis. 301, 99 N. W. 1038; Jenewein *v.* Irving, 122 Wis. 228, 99 N. W. 346, 903; Wells *v.* Remington, 118 Wis. 573, 95 N. W. 1094 (where the circumstances were conflicting as to how plaintiff's intestate was drowned); Petrich *v.* Union, 117 Wis. 46, 93 N. W. 819 (woman riding with husband, not holding on to anything, not remembering defect she knew about); Slivitski *v.* Wein, 93 Wis. 460, 67 N. W. 730; Salladay *v.* Dodgeville, 85 Wis. 318, 55 N. W. 696, 20 L. R. A. 541; Wiltse *v.* Tilden, 77 Wis. 152, 46 N. W. 234; Seymer *v.* Lake, 66 Wis. 651, 29 N. W. 554; Hart *v.* Red Cedar, 63 Wis. 634, 24 N. W. 410.

See 25 Cent. Dig. tit. "Highways," § 537.

Evidence held sufficient to show care in plaintiff see Brooks *v.* Petersham, 16 Gray (Mass.) 181 (evidence that a companion seized the reins and turned the horse from the road); Chisholm *v.* State, 141 N. Y. 246, 36 N. E. 184 (evidence that plaintiff knew nothing of the defect and that the night was dark); Pick *v.* Thurston, 25 R. I. 36, 54 Atl. 600.

Evidence held insufficient to show care in plaintiff see Tripp *v.* Wells, 104 Me. 29, 70 Atl. 533, 18 L. R. A. N. S. 1145; Whitman *v.* Fisher, 98 Me. 575, 57 Atl. 895; Wood *v.* Westport, 185 Mass. 567, 70 N. E. 1018.

Contributory negligence a question for the jury as to city street see MUNICIPAL CORPORATIONS, 28 Cyc. 1510.

55. *Kansas.*— Cunningham *v.* Clay Tp., 69 Kan. 373, 76 Pac. 907; Lincoln Tp. *v.* Koenig, 10 Kan. App. 504, 63 Pac. 90.

Maine.— York *v.* Athens, 99 Me. 82, 58 Atl. 418.

Massachusetts.— Thompson *v.* Bolton, 197 Mass. 311, 83 N. E. 1089; Harris *v.* Newbury, 128 Mass. 321.

Nebraska.— Vanderveer *v.* Moran, 79 Nebr. 431, 112 N. W. 581, barbed wire fence.

New Hampshire.— Secton *v.* Dunbarton, 73 N. H. 134, 59 Atl. 944; Downes *v.* Hopkinton, 67 N. H. 456, 40 Atl. 433.

Pennsylvania.— Sutter *v.* Young Tp., 130 Pa. St. 72, 18 Atl. 610; Zirkman *v.* Philadelphia, etc., Traction Co., 33 Pa. Super. Ct. 85 (loose stones); Newman *v.* Bullskin Tp., 28 Pa. Super. Ct. 170; Nicholas *v.* Keeling, 21 Pa. Super. Ct. 181; Wright *v.* Lehman Tp., 19 Pa. Super. Ct. 653.

Vermont.— Kelsey *v.* Glover, 15 Vt. 708.

Wisconsin.— Dralle *v.* Reedsburg, 130 Wis. 347, 110 N. W. 210; Johnson *v.* Highland, 124 Wis. 597, 102 N. W. 1085; Kennedy *v.* Lincoln, 122 Wis. 301, 99 N. W. 1038 (rut); Jenewein *v.* Irving, 122 Wis. 228, 99 N. W. 346, 903 (defect not in traveled track); Carpenter *v.* Rolling, 107 Wis. 559, 83 N. W. 953; Draper *v.* Ironton, 42 Wis. 696.

See 25 Cent. Dig. tit. "Highways," § 535 *et seq.*

56. Bryant *v.* Biddeford, 39 Me. 193; Hayes *v.* Hyde Park, 153 Mass. 514, 27 N. E. 522, 12 L. R. A. 249 (wire hanging); Dowd *v.* Chicopee, 116 Mass. 93; Chamberlain *v.* Enfield, 43 N. H. 356; Winship *v.* Enfield, 42 N. H. 197; Johnson *v.* Haverhill, 35 N. H. 74; Zopfi *v.* Postal Tel. Cable Co., 60 Fed. 987, 9 C. C. A. 308 (where one slipped in jumping over an obstruction).

57. In action for injury on city street see MUNICIPAL CORPORATIONS, 28 Cyc. 1515.

58. See TRIAL.

59. Larrabee *v.* Sewall, 66 Me. 376; Brohl *v.* Lingeman, 41 Mich. 711, 3 N. W. 199; Henderson *v.* Knickerbocker Ice Co., 1 Silv. Sup. (N. Y.) 487, 5 N. Y. Suppl. 909 [*affirmed* in 119 N. Y. 619, 23 N. E. 1143]; Delaware, etc., R. Co. *v.* Cadow, 120 Pa. St. 559, 14 Atl. 450, 6 Am. St. Rep. 730; Goshorn *v.* Smith, 92 Pa. St. 435; Rauch *v.* Lloyd, 31 Pa. St. 358, 72 Am. Dec. 747.

60. Colby *v.* Wiscasset, 61 Me. 304 (holding an instruction erroneous when based on the assumption that injuries were permanent, which was a question for the jury); Handy *v.* Meridian Tp., 114 Mich. 454, 72 N. W. 251 (holding it error to charge that a statute "must be construed reasonably").

61. McClure *v.* Feldmann, 184 Mo. 710, 84 S. W. 16; Holcomb *v.* Danby, 51 Vt. 428.

62. *California.*— Lewis *v.* Riverside Water Co., 76 Cal. 249, 18 Pac. 314.

Connecticut.— Lutton *v.* Vernon, 62 Conn. 1, 23 Atl. 1020, 27 Atl. 589.

Massachusetts.— Taylor *v.* Woburn, 130 Mass. 494; Williams *v.* Leyden, 119 Mass. 237; Pinkham *v.* Topsfield, 104 Mass. 78.

Michigan.— Wakeham *v.* St. Clair Tp., 91 Mich. 15, 51 N. W. 696.

New York.— Embler *v.* Wallkill, 132 N. Y. 222, 30 N. E. 404; Jacobs *v.* O'Gorman, 13 Misc. 171, 34 N. Y. Suppl. 108.

Vermont.— Bagley *v.* Ludlow, 41 Vt. 425.

Wisconsin.— Wall *v.* Highland, 72 Wis. 435, 39 N. W. 560.

See 25 Cent. Dig. tit. "Highways," § 538.

In case of collision while traveling on a highway, the question of negligence or fault,

all material questions,[63] as the burden of proof,[64] contributory negligence,[65] defendant's duty and liability,[66] and proximate cause,[67] the necessity and sufficiency of railings or barriers,[68] and whether objects were calculated

under the statute, is one of law arising upon the facts proved. Brooks *v.* Hart, 14 N. H. 307.

Matters not in evidence should not be included in the instructions. Bunker *v.* Gouldsboro, 81 Me. 188, 16 Atl. 543; Handy *v.* Meridian Tp., 114 Mich. 454, 72 N. W. 251; Monk *v.* New Utrecht, 104 N. Y. 552, 11 N. E. 268; Pettingill *v.* Olean, 20 N. Y. Suppl. 367.

63. Wells *v.* Gallagher, 144 Ala. 363, 39 So. 747, 113 Am. St. Rep. 50, 3 L. R. A. N. S. 759; McClure *v.* Feldmann, 184 Mo. 710, 84 S. W. 16; Brown *v.* Mt. Holly, 69 Vt. 364, 38 Atl. 69; Jenewein *v.* Irving, 122 Wis. 228, 99 N. W. 346, 903; Schrunk *v.* St. Joseph, 120 Wis. 223, 97 N. W. 946.

64. McGuinness *v.* Westchester, 66 Hun (N. Y.) 356, 21 N. Y. Suppl. 290; Welling *v.* Judge, 40 Barb. (N. Y.) 193; Schillinger *v.* Verona, 88 Wis. 317, 60 N. W. 272.

65. *Connecticut.*—Williams *v.* Clinton, 28 Conn. 264.

Maine.— Garmon *v.* Bangor, 38 Me. 443.

Maryland.— Alleghany County *v.* Broadwaters, 69 Md. 533, 16 Atl. 223.

New Hampshire.— Hendry *v.* North Hampton, 72 N. H. 351, 56 Atl. 922, 101 Am. St. Rep. 681, 64 L. R. A. 70; Guertin *v.* Hudson, 71 N. H. 505, 53 Atl. 736.

Pennsylvania.— Long *v.* Milford Tp., 137 Pa. St. 122, 20 Atl. 425; Chartiers Tp. *v.* Phillips, 122 Pa. St. 601, 16 Atl. 26; Millcreek Tp. *v.* Perry, 8 Pa. Cas. 474, 12 Atl. 149.

Vermont.— Walker *v.* Westfield, 39 Vt. 246; Rice *v.* Montpelier, 19 Vt. 470.

Wisconsin.— Kenworthy *v.* Ironton, 41 Wis. 647; Dreher *v.* Fitchburg, 22 Wis. 675, 99 Am. Dec. 91.

The burden of proof as to contributory negligence should be explained to the jury. Welling *v.* Judge, 40 Barb. (N. Y.) 193.

Instructions held erroneous see Calvert County *v.* Gibson, 36 Md. 229 (in not submitting to jury plaintiff's knowledge of two roads); Templeton *v.* Warriorsmark Tp., 200 Pa. St. 165, 49 Atl. 950 (suggesting that plaintiff may have been negligent in joining sleighing party over public highway); Collins *v.* Leafey, 124 Pa. St. 203, 16 Atl. 765 (instruction that is the duty of everyone to occupy the highway with such care that no injury can happen to another, where the legal standard of negligence was not defined); Reynolds *v.* Burlington, 52 Vt. 300; Petrich *v.* Union, 117 Wis. 46, 93 N. W. 819.

66. *Connecticut.*— Masters *v.* Warren, 27 Conn. 293.

Kansas.— Cunningham *v.* Clay Tp., 69 Kan. 373, 76 Pac. 907.

Kentucky.— Floyd *v.* Henderson, etc., Gravel Road Co., 56 S. W. 6, 21 Ky. L. Rep. 1718.

Maryland.— Garrett County *v.* Blackburn, 105 Md. 226, 66 Atl. 31.

Massachusetts.— Moran *v.* Palmer, 162 Mass. 196, 38 N. E. 442; Lowe *v.* Clinton, 136 Mass. 24; Taylor *v.* Woburn, 130 Mass. 494; Lyman *v.* Amherst, 107 Mass. 339 (holding that if the judge requires the jury to find that the want of a sufficient railing along the bank was the sole cause of the injury, in order to return a verdict for plaintiff, defendants have no ground of exceptions to his refusal of rulings as to whether the highway was defective from the nature of its material at the place where the horse slipped); Stevens *v.* Boxford, 10 Allen 25, 37 Am. Dec. 616; Kellogg *v.* Northampton, 4 Gray 65; Collins *v.* Dorchester, 6 Cush. 396.

Michigan.— Whoram *v.* Argentine Tp., 112 Mich. 20, 70 N. W. 341.

New York.— Young *v.* Macomb, 11 N. Y. App. Div. 480, 42 N. Y. Suppl. 351.

Rhode Island.— Stone *v.* Pendleton, 21 R. I. 332, 43 Atl. 643.

Vermont.— Rice *v.* Montpelier, 19 Vt. 470; Blodget *v.* Royalton, 14 Vt. 288.

Washington.— Gallagher *v.* Buckley, 31 Wash. 380, 72 Pac. 79.

Wisconsin.— Fehrman *v.* Pine River, 118 Wis. 150, 95 N. W. 105; Vass *v.* Waukesha, 90 Wis. 337, 63 N. W. 280; Goldsworthy *v.* Linden, 75 Wis. 24, 43 N. W. 656; Kenworthy *v.* Ironton, 41 Wis. 647.

See 25 Cent. Dig. tit. "Highways," § 540.

Instructions held erroneous see Lewman *v.* Andrews, 129 Ala. 170, 29 So. 692 (that there was no evidence that there was a public road where plaintiff fell into ditch); Tiesler *v.* Norwich, 73 Conn. 199, 47 Atl. 161 (that carriage block was not an obstruction); Kennedy *v.* Cecil County, 69 Md. 65, 14 Atl. 524 (that no liability attached unless mules frightened by defect); Golden *v.* Chicago, etc., R. Co., 84 Mo. App. 59 ("necessary" effect to frighten horses); Duthie *v.* Washburn, 87 Wis. 231, 58 N. W. 380 (tending to confuse the jury); Draper *v.* Ironton, 42 Wis. 696.

67. Kennedy *v.* Cecil County, 69 Md. 65, 14 Atl. 524; Langworthy *v.* Green, 95 Mich. 93, 54 N. W. 697; Beall *v.* Athens Tp., 81 Mich. 536, 45 N. W. 1014; Fulsome *v.* Concord, 46 Vt. 135.

Whether negligence was the proximate cause of the accident should be brought to the jury's consideration. Kennedy *v.* Cecil County, 69 Md. 65, 14 Atl. 524; Walker *v.* Westfield, 39 Vt. 246.

68. *Kansas.*—Wetmore Tp. *v.* Chamberlain, 64 Kan. 327, 67 Pac. 845, removable barriers.

Massachusetts.— Howard *v.* Mendon, 117 Mass. 585; Lyman *v.* Amherst, 107 Mass. 339, weight falling on railing.

Michigan.— Ross *v.* Ionia Tp., 104 Mich. 320, 62 N. W. 401.

New Hampshire.— Seeton *v.* Dunbarton, 72 N. H. 269, 56 Atl. 197.

to,[69] and did,[70] frighten horses. It is not error to fail to instruct in the absence of request.[71] A mistake in an instruction may be cured by a direction to the jury to disregard it,[72] and may be rendered immaterial by a finding upon another ground.[73]

(III) *VERDICT AND FINDINGS.*[74] The verdict or findings must conform to the issues,[75] and must be consistent.[76]

h. Damages.[77] The general rules of damages [78] apply to actions for injuries from a defective highway. Thus damages should be compensatory, including all the natural and probable consequences of the injury,[79] punitive or exemplary

New York.— Snowden *v.* Somerset, 171 N. Y. 99, 63 N. E. 952 [*reversing* 61 N. Y. App. Div. 624, 70 N. Y. Suppl. 1149]; Littebrant *v.* Sidney, 77 N. Y. App. Div. 545, 78 N. Y. Suppl. 890; Coney *v.* Gilboa, 55 N. Y. App. Div. 111, 67 N. Y. Suppl. 116; Hewett *v.* Thurman, 41 N. Y. App. Div. 6, 58 N. Y. Suppl. 83; Burns *v.* Yonkers, 83 Hun 211, 31 N. Y. Suppl. 757; Van Gaasbeck *v.* Saugerties, 82 Hun 415, 31 N. Y. Suppl. 354 [*affirmed* in 154 N. Y. 767, 49 N. E. 1105].

Pennsylvania.— Bitting *v.* Maxatawny Tp., 177 Pa. St. 213, 35 Atl. 715; Wellman *v.* Susquehanna Depot, 167 Pa. St. 239, 31 Atl. 566; Ewing *v.* North Versailles Tp., 146 Pa. St. 309, 23 Atl. 338; Plymouth Tp. *v.* Graver, 125 Pa. St. 24, 17 Atl. 249, 11 Am. St. Rep. 867; Wilson *v.* O'Hara Tp., 14 Pa. Super. Ct. 258; Closser *v.* Washington Tp., 11 Pa. Super. Ct. 112; Beardslee *v.* Columbia Tp., 5 Lack. Leg. N. 290.

Vermont.— Leicester *v.* Pittsford, 6 Vt. 245.

Wisconsin.— Prahl *v.* Waupaca, 109 Wis. 299, 85 N. W. 350; Schillinger *v.* Verona, 88 Wis. 317, 60 N. W. 272.

See 25 Cent. Dig. tit. "Highways," § 538 *et seq.*

69. Ayer *v.* Norwich, 39 Conn. 376, 12 Am. Rep. 396; Laird *v.* Otsego, 90 Wis. 25, 62 N. W. 1042.

Plaintiff's evidence held sufficient see Smith *v.* Clarkstown, 69 Hun (N. Y.) 155, 23 N. Y. Suppl. 245.

70. Lewis *v.* Ballston Terminal R. Co., 45 N. Y. App. Div. 129, 60 N. Y. Suppl. 1035; Houghtaling *v.* Shelley, 51 Hun (N. Y.) 598, 3 N. Y. Suppl. 904; Laird *v.* Otsego, 90 Wis. 25, 62 N. W. 1042.

71. Powers *v.* Woodstock, 38 Vt. 44.

72. Gallagher *v.* Buckley, 31 Wash. 380, 72 Pac. 79.

73. Spurr *v.* Shelburne, 131 Mass. 429; Goldsworthy *v.* Linden, 75 Wis. 24, 43 N. W. 656.

74. **In action for injury on city street** see MUNICIPAL CORPORATIONS, 28 Cyc. 1524.

75. Schelske *v.* Orange Tp., 147 Mich. 135, 110 N. W. 506 (holding that finding a highway dangerous is equivalent to finding it not reasonably safe); Whitney *v.* Londonderry, 54 Vt. 41; Schrunk *v.* St. Joseph, 120 Wis. 223, 97 N. W. 946. See also Du Cate *v.* Brighton, 133 Wis. 628, 114 N. W. 103.

76. Schelske *v.* Orange Tp., 147 Mich. 135, 110 N. W. 506. See Stricker *v.* Reedsburg, 101 Wis. 457, 77 N. W. 897, holding a finding that the highway was safe not inconsistent with a finding that a stump made it defective.

77. **In action for injury in city street** see MUNICIPAL CORPORATIONS, 28 Cyc. 1526.

78. See DAMAGES, 13 Cyc. 1.

79. *Connecticut.*— Brown *v.* Southbury, 53 Conn. 212, 1 Atl. 819; Burr *v.* Plymouth, 48 Conn. 460; Wilson *v.* Granby, 47 Conn. 59, 36 Am. Rep. 51; Linsley *v.* Bushnell, 15 Conn. 225, 38 Am. Dec. 79.

Georgia.— Telfair County *v.* Clements, 1 Ga. App. 437, 57 S. E. 1059.

Maine.— Stover *v.* Bluehill, 51 Me. 439; Sanford *v.* Augusta, 32 Me. 536; Littlefield *v.* Biddeford, 29 Me. 310; Watson *v.* Lisbon Bridge, 14 Me. 201, 31 Am. Dec. 49.

New Hampshire.— Woodman *v.* Nottingham, 49 N. H. 387, 6 Am. Rep. 526; Conway *v.* Jefferson, 46 N. H. 521.

Pennsylvania.— Scott Tp. *v.* Montgomery, 95 Pa. St. 444.

Vermont.— Bovee *v.* Danville, 53 Vt. 183; Harding *v.* Townshend, 43 Vt. 536, 5 Am. Rep. 304; Wheeler *v.* Townshend, 42 Vt. 15.

Wisconsin.— Oliver *v.* La Valle, 36 Wis. 592; Hunt *v.* Winfield, 36 Wis. 154, 17 Am. Rep. 482.

See 25 Cent. Dig. tit. "Highways," § 533.

The following items have been allowed: Loss of use of horse (Brown *v.* Southbury, 53 Conn. 212, 1 Atl. 819; Telfair County *v.* Clements, 1 Ga. App. 437, 57 S. E. 1059); damage to person, clothing, horses, harness, and wagon (Woodman *v.* Nottingham, 49 N. H. 387, 6 Am. Rep. 526); injury to sled loaded with coal (Conway *v.* Jefferson, 46 N. H. 521); loss of use of wagon (Wheeler *v.* Townshend, 42 Vt. 15); value of horse killed (Littlefield *v.* Biddeford, 29 Me. 310); reasonably incurred expenses in attempt to cure horse (Watson *v.* Lisbon Bridge, 14 Me. 201, 31 Am. Dec. 49); trouble and expense of prosecution (Linsley *v.* Bushnell, 15 Conn. 225, 38 Am. Dec. 79); increased damages caused by unskilful treatment by surgeon of ordinary skill (Stover *v.* Bluehill, 51 Me. 439); loss of time and expenses of cure of person injured (Sanford *v.* Augusta, 32 Me. 536); privation, inconvenience, bodily and mental suffering, and pecuniary loss likely during remainder of life (Scott Tp. *v.* Montgomery, 95 Pa. St. 444); physical and mental suffering from premature birth of children, but not mental suffering following their loss (Bovee *v.* Danville, 53 Vt. 183); miscarriage (Oliver *v.* La Valle, 36 Wis. 592); and loss of services of wife and expenses of her sick-

damages being allowed only in exceptional cases,[80] and mental suffering being compensated only when accompanied by actual injury.[81] Damages are confined to damages stated in the notice [82] and consequences directly resulting.[83]

i. Appeal and Error.[84] The right of appeal in actions for injuries resulting from defects or obstructions depends on local practice,[85] and is only open on points made in the lower court,[86] and not as to facts found by the jury,[87] or where no substantial error was committed.[88]

VIII. ROAD TAXES.

A. In General — 1. Statutory Regulation — a. In General. The imposition of road taxes is a matter of statutory regulation,[89] being within the constitutional power of the legislature,[90] which must observe the constitutional limits,[91]

ness (Hunt *v.* Winfield, 36 Wis. 154, 17 Am. Rep. 482).

Items held not recoverable see Chidsey *v.* Canton, 17 Conn. 475 (consequential damages, loss of service, expense of nursing); Dubuque Wood, etc., Assoc. *v.* Dubuque, 30 Iowa 176 (loss of goods which plaintiff could not move over the roads); McLaughlin *v.* Bangor, 58 Me. 398 (loss of use of coach held not "damage in his property," within the meaning of the declaration); Brown *v.* Watson, 47 Me. 161, 74 Am. Dec. 482 (being compelled to take circuitous route); Sargent *v.* Hampden, 38 Me. 581 (interest); Weeks *v.* Shirley, 33 Me. 271 (loss of time and expenses held not included under "damage in one's property"); Reed *v.* Belfast, 20 Me. 246 (loss of services of minor son); Smith *v.* Dedham, 8 Cush. (Mass.) 522 (damage from loss of access to highway); Harwood *v.* Lowell, 4 Cush. (Mass.) 310 (mere consequential damages); Lavery *v.* Manchester, 58 N. H. 444 (for injuries caused by falling into cellar which plaintiff maintained as a nuisance); Griffin *v.* Sanbornton, 44 N. H. 246 (damage from obstruction suffered in common with general public); Page *v.* Sumpter, 53 Wis. 652, 11 N. W. 60 (use of mare between injury and her death, including plaintiff's services in taking care of her).

Damages are for the jury and an instruction should not be based on the assumption that injuries will be permanent. Colby *v.* Wiscasset, 61 Me. 304.

New action for incurable injuries discovered after settlement of previous action dismissed see Chartrand *v.* Montreal, 17 Quebec Super. Ct. 143.

Insurance received need not be deducted. Harding *v.* Townshend, 43 Vt. 536, 5 Am. Rep. 304.

80. Burr *v.* Plymouth, 48 Conn. 460; Wilson *v.* Granby, 47 Conn. 59, 36 Am. Rep. 51 (holding damages compensatory merely except for gross negligence, when expenses of suit may be included); Woodman *v.* Nottingham, 49 N. H. 387, 6 Am. Rep. 526); Hull *v.* Richmond, 12 Fed. Cas. No. 6,861, 2 Woodb. & M. 337 (not aggravated where road had been in same condition many years without complaint).

81. Canning *v.* Williamstown, 1 Cush. (Mass.) 451.

82. Boyd *v.* Readsboro, 55 Vt. 163.

83. Noble *v.* Portsmouth, 67 N. H. 183, 30 Atl. 419; Robin *v.* Bartlett, 64 N. H. 426, 13 Atl. 645.

84. **In action for injury in city street** see Municipal Corporations, 28 Cyc. 1530.

85. See Strout *v.* Durham, 23 Me. 483.

86. Griffin *v.* Johnson, 84 Ga. 279, 10 S. E. 719; Talbot *v.* Taunton, 140 Mass. 552, 5 N. E. 616.

87. Upton *v.* Windham, 75 Conn. 288, 53 Atl. 660, 96 Am. St. Rep. 197; O'Neil *v.* East Windsor, 63 Conn. 150, 27 Atl. 237; Lee *v.* Barkhampsted, 46 Conn. 213; Burrell Tp. *v.* Uncapher, 117 Pa. St. 353, 11 Atl. 619, 2 Am. St. Rep. 664; Swift *v.* Newbury, 36 Vt. 355; Chappell *v.* Oregon, 36 Wis. 145.

88. Little *v.* Iron River, 102 Wis. 250, 78 N. W. 416.

89. See the statutes of the several states. And see cases cited *infra*, note 90 *et seq.*

Municipal authority to tax for street improvement see Municipal Corporations, 28 Cyc. 1669.

90. *California.*— Miller *v.* Kern County, 137 Cal. 516, 70 Pac. 549.

Colorado.— Fairplay *v.* Park County, 29 Colo. 57, 67 Pac. 152.

Illinois.— Butz *v.* Kerr, 123 Ill. 659, 14 N. E. 671.

Indiana.— Gilson *v.* Rush County, 128 Ind. 65, 27 N. E. 235, 11 L. R. A. 835.

North Carolina.— Holton *v.* Mecklenburg County, 93 N. C. 430, although tax is paid in labor in one district and in another in money.

Pennsylvania.— *In re* Middletown Road, 15 Pa. Super. Ct. 167.

Vermont.— Highgate *v.* State, 59 Vt. 39, 7 Atl. 898.

Virginia.— Washington County *v.* Saltville Land Co., 99 Va. 640, 39 S. E. 704.

Wisconsin.— Jensen *v.* Polk County, 47 Wis. 298, 2 N. W. 320.

See 25 Cent. Dig. tit. "Highways," § 380.

Rates may differ in different counties. Haney *v.* Bartown County, 91 Ga. 770, 18 S. E. 28.

91. *California.*— People *v.* Seymour, 16 Cal. 332, 76 Am. Dec. 521.

Idaho.— Humbird Lumber Co. *v.* Kootenai County, 10 Ida. 490, 79 Pac. 396.

Nebraska.— Dixon County *v.* Chicago, etc., R. Co., 1 Nebr. (Unoff.) 240, 95 N. W. 340.

New York.— People *v.* Flagg, 46 N. Y. 401.

and purpose of the acts.[92] Two different systems may be in effect at the same time,[93] although property may be liable only to a road tax by one authority.[94] A statute as to road taxes will be applied only to districts expressly designated.[95]

b. Amendment and Repeal. Statutes inconsistent with earlier law may be regarded as amendments to it,[96] and a road tax statute may be repealed by implication by a later act[97] or general revenue law,[98] and a general law may be repealed by a later special act.[99]

2. Levy and Assessment — a. In General. As in other cases of taxation, public officers may levy taxes only in accordance with the statute[1] and

North Carolina.— Crocker *v.* Moore, 140 N. C. 429, 53 S. E. 229; State *v.* Godwin, 123 N. C. 697, 31 S. E. 221.

See 25 Cent. Dig. tit. "Highways," § 380.

Statute imposing taxes held invalid see O'Kane *v.* Treat, 25 Ill. 557 (exempting city from taxes outside its limits, although within the limits of the town in which it lies); Sperry *v.* Flygare, 80 Minn. 325, 83 N. W. 177, 81 Am. St. Rep. 261, 49 L. R. A. 757; State *v.* Hudson County Ave. Com'rs, 37 N. J. L. 12 (leaving it to a board to determine the apportionment); Hanlon *v.* Westchester County, 57 Barb. (N. Y.) 383 (tax not sufficiently stated); Fellows *v.* Denniston, 5 Wall. (U. S.) 761, 18 L. ed. 708 [*reversing* 23 N. Y. 420] (contrary to compact and treaties exempting Indian lands); Dawson *v.* Barron, 9 Ohio S. & C. Pl. Dec. 706, 8 Ohio N. P. 354.

92. Lowe *v.* White County, 156 Ind. 163, 59 N. E. 466.

93. State *v.* Marion County, 170 Ind. 595, 85 N. E. 513; Sefton *v.* Howard County, 160 Ind. 357, 66 N. E. 891. See also Martin *v.* Aston, 60 Cal. 63; Boas *v.* Ft. Hunter Road Commission, 20 Pa. Co. Ct. 482, holding that annexation to city did not diminish the power of the commission to tax the property which remains.

A provision expressly limited to one system of levying and enforcing a tax may not by implication be extended to the other system. Wilson *v.* Cedarville, 109 Ill. App. 316.

Separation of taxes.— Taxes cannot be levied separately for public roads, or conjunctively for roads and bridges (Haisten *v.* Glower, 114 Ga. 992, 41 S. E. 48); but summer and winter tax may be separated (Bradford *v.* Newport, 42 N. H. 338).

94. Martin *v.* Aston, 60 Cal. 63; Cooper *v.* Ash, 76 Ill. 11; State *v.* Arnold, 136 Mo. 446, 38 S. W. 79; State *v.* Wabash, etc., R. Co., 90 Mo. 166, 2 S. W. 275.

95. Maxwell *v.* Willis, 123 Ga. 319, 51 S. E. 416.

96. Durrett *v.* Kenton County, 87 S. W. 1070, 27 Ky. L. Rep. 1173; Madison County *v.* Collier, 79 Miss. 220, 30 So. 610.

97. *Kentucky.*— Johnson *v.* Boske, 66 S. W. 400, 23 Ky. L. Rep. 1845.

Nebraska.— Dundy *v.* Richardson County, 8 Nebr. 508, 1 N. W. 565.

North Carolina.— State *v.* Davis, 129 N. C. 570, 40 S. E. 112.

Pennsylvania.— *In re* Philadelphia, etc., Coal, etc., Co., 200 Pa. St. 352, 49 Atl. 797.

Vermont.— See Grand Isle *v.* Milton, 68 Vt. 234, 35 Atl. 71.

See 25 Cent. Dig. tit. "Highways," § 380.

Repeal by implication held not to have occurred see Maxwell *v.* Willis, 123 Ga. 319, 51 S. E. 416; Kansas City, etc., R. Co. *v.* Tontz, 29 Kan. 460; State *v.* Piper, 214 Mo. 439, 114 S. W. 1; Haines *v.* Burlington County, 73 N. J. L. 82, 62 Atl. 186; Southern R. Co. *v.* Kay, 62 S. C. 28, 39 S. E. 785. See also Burlington, etc., R. Co. *v.* Saunders County, 9 Nebr. 507, 4 N. W. 240; Burlington, etc., R. Co. *v.* York County, 7 Nebr. 487.

98. Hudson *v.* Claiborne Parish Police Jury, 107 La. 387, 31 So. 868; Saginaw County *v.* Hubinger, 137 Mich. 72, 100 N. W. 261; Denton *v.* Walla Walla County, 50 Wash. 77, 96 Pac. 824.

Such repeal held not to have occurred see Johnson *v.* Boske, 66 S. W. 400, 23 Ky. L. Rep. 1845; Hall *v.* Anne Arundel County, 94 Md. 282, 51 Atl. 86; Jones *v.* Tonawanda, 35 N. Y. App. Div. 151, 55 N. Y. Suppl. 115; Tacoma Land Co. *v.* Pierce County, 1 Wash. 482, 25 Pac. 904.

99. Bertha Zinc Co. *v.* Pulaski County, 88 Va. 371, 13 S. E. 740. But see Bennehoff *v.* Mansfield, 2 Ohio S. & C. Pl. Dec. 404, 2 Ohio N. P. 225.

1. *Kentucky.*— Spencer County Ct. *v.* Com., 84 Ky. 36.

Maine.— Hodgdon *v.* Aroostook County, 72 Me. 246.

Michigan.—Hoffman *v.* Lynburn, 104 Mich. 494, 62 N. W. 728.

Missouri.— Johnson *v.* Scott, 133 Mo. App. 689, 114 S. W. 45.

North Carolina.— State *v.* Haywood County, 122 N. C. 812, 30 S. E. 352; Herring *v.* Dixon, 122 N. C. 420, 29 S. E. 368, each board acting for its own county.

Ohio.— State *v.* Fayette County, 37 Ohio St. 526.

Pennsylvania.— See Scraper Co. *v.* Pine Tp., 4 Pa. Dist. 501, holding the statute mandatory.

West Virginia.— Davis *v.* Wayne County Ct., 38 W. Va. 104, 18 S. E. 373.

See 25 Cent. Dig. tit. "Highways." § 384.

Compare Deer Park Highway Com'rs *v.* O'Sullivan, 16 Ill. App. 34.

Levy held void see Chicago, etc., R. Co. *v.* People, 193 Ill. 539, 61 N. E. 1068 (where a town meeting action could be had only after the filing of petition and official notice); Butz *v.* Kerr, 123 Ill. 659, 14 N. E. 671 (because highway commissioner had no power in incorporated places); Leachman *v.* Dougherty, 81 Ill. 324; Hawley St. Com'rs *v.* Hoops, 12 Iowa 506; Stiles *v.* Guthrie, 3 Okla. 26, 41 Pac. 383 (levy only after vote

constitution,[2] and when necessary [3] at meetings held according to law,[4] at the proper time.[5] The levy and assessment should be made by the parties specified in the statute,[6] and the taxes should be properly apportioned according to the statute,[7] only for the current year.[8] Road tax levies and assessments will be construed valid if possible.[9]

b. Formalities. In the levy and assessment of highway taxes, as in other cases, the statutory formalities of the assessment roll,[10] certificates,[11] and proper

of people); Aldrich *v.* Collins, 3 S. D. 154, 52 N. W. 854; Rocan *v.* St. Vincent de Paul, 16 Quebec Super. Ct. 379.

The levy must be under the proper statute. People *v.* Chicago, etc., R. Co., 228 Ill. 102, 81 N. E. 813; Toledo, etc., R. Co. *v.* People, 226 Ill. 557, 80 N. E. 1059; Litchfield, etc., R. Co. *v.* People, 225 Ill. 301, 80 N. E. 335; Cleveland, etc., R. Co. *v.* People, 212 Ill. 551, 72 N. E. 790; Chicago, etc., R. Co. *v.* People, 184 Ill. 174, 56 N. E. 365; Reed *v.* Chatsworth, 109 Ill. App. 332; Kuntz *v.* Cedarville, 109 Ill. App. 330; Wilson *v.* Cedarville, 109 Ill. App. 316; Gallia County *v.* State, 67 Ohio St. 412, 66 N. E. 524. See also Haisten *v.* Glower, 114 Ga. 992, 41 S. E. 48.

2. Logan *v.* Ouachita Parish, 105 La. 499, 29 So. 975.

3. Goshen Highway Com'rs *v.* Jackson, 165 Ill. 17, 45 N. E. 1000; Thayer Lumber Co. *v.* Springfield Tp., 131 Mich. 12, 90 N. W. 677, holding that the tax may be necessary although funds are on hand. See also Huntington *v.* Smith, 25 Ind. 486.

4. St. Louis Bridge, etc., R. Co. *v.* People, 127 Ill. 627, 21 N. E. 348; St. Louis Nat. Stock Yards *v.* People, 127 Ill. 22, 20 N. E. 84; Sioux City, etc., R. Co. *v.* Osceola County, 45 Iowa 168; Iowa R. Land Co. *v.* Sac County, 39 Iowa 124.

A meeting may be adjourned and a valid tax levied at the adjourned meeting. St. Louis Bridge, etc., R. Co. *v.* People, 127 Ill. 627, 21 N. E. 348.

5. Walton *v.* Riley, 85 Ky. 413, 3 S. W. 605, 9 Ky. L. Rep. 29.

Statute as to time of determining tax held merely directory where no hearing was required see Fay *v.* Wood, 65 Mich. 390, 32 N. W. 614.

Taxes assessed at the wrong time held void see Indiana, etc., R. Co. *v.* People, 201 Ill. 351, 66 N. E. 293; Chicago, etc., R. Co. *v.* People, 197 Ill. 411, 64 N. E. 380; Chicago, etc., R. Co. *v.* People, 193 Ill. 594, 61 N. E. 1100.

6. *Illinois.*— Peoria, etc., R. Co. *v.* People, 116 Ill. 232, 5 N. E. 389 (county board to review estimates of highway commissioners); Peoria, etc., R. Co. *v.* People, 116 Ill. 232, 5 N. E. 389; Thatcher *v.* People, 79 Ill. 597 (by vote in town meeting).

Indiana.— Huntington *v.* Smith, 25 Ind. 486.

Michigan.— F. & F. Lumber Co. *v.* Thompson Tp., 139 Mich. 698, 103 N. W. 188; Thayer Lumber Co. *v.* Springfield Tp., 131 Mich. 12, 90 N. W. 677 (holding that where electors do not vote, because the commissioner submits no report, this is not a neglect or refusal giving the commissioners authority to assess); Auditor-Gen. *v.* Duluth, etc., R. Co., 116 Mich. 122, 74 N. W. 505.

New Jersey.— Paterson *v.* Passaic County, 56 N. J. L. 459, 29 Atl. 331.

South Dakota.— Custer County Bank *v.* Custer County, 18 S. D. 274, 100 N. W. 424.

Canada.—St. Jean *v.* St. Jacques-le-Mineur, 14 Quebec K. B. 343.

See 25 Cent. Dig. tit. "Highways," § 384.

The discretion of the local authorities may be the test. See People *v.* Vermilion County, 47 Ill. 256; Thompson *v.* Fellows, 21 N. H. 425; Aldridge *v.* Essex Public Road Bd., 46 N. J. L. 126; Blanchard *v.* Tioga Imp. Co., 3 Grant (Pa.) 216.

7. Fairplay *v.* Park County, 29 Colo. 57, 67 Pac. 152; Stone *v.* Bean, 15 Gray (Mass.) 42 (one sixth on polls); State *v.* Piper, 214 Mo. 439, 114 S. W. 1. See also Chicago, etc., R. Co. *v.* People, 174 Ill. 80, 50 N. E. 1057.

8. Ohio, etc., R. Co. *v.* People, 123 Ill. 648, 15 N. E. 276; Michigan Land, etc., Co. *v.* Republic Tp., 65 Mich. 628, 32 N. W. 882; People *v.* Clark, 45 N. Y. App. Div. 65, 60 N. Y. Suppl. 1045 (holding that it cannot create a debt for the past year); Blanchard *v.* Tioga Imp. Co., 3 Grant (Pa.) 216; *In re* Wilkes Barre Tp., 8 Kulp (Pa.) 516. But see Michigan Land, etc., Co. *v.* Republic Tp., 65 Mich. 628, 32 N. W. 882, holding that an error in date must be proved and is not presumed.

9. Lima *v.* McBride, 34 Ohio St. 338 (levy construed as based on statute under which it is valid); Arnold *v.* Juneau County, 43 Wis. 627 (levy as preliminary presumed). See, however, Peninsular Sav. Bank *v.* Ward, 118 Mich. 87, 76 N. W. 161, 79 N. W. 911, where excess in highway tax was not treated as labor tax for the purpose of upholding it.

10. Ensign *v.* Barse, 107 N. Y. 329, 14 N. E. 400, 15 N. E. 401 (holding, however, that neither the date of warrant nor number of district need appear on the roll); People *v.* Pierce, 31 Barb. (N. Y.) 138 (all on the assessment roll assessed).

11. Miller *v.* Kern County, 137 Cal. 516, 70 Pac. 549; Hall *v.* Anne Arundel, 94 Md. 282, 51 Atl. 86. See also Cincinnati, etc., R. Co. *v.* People, 213 Ill. 558, 73 N. E. 310.

Signatures of a majority of commissioners may be sufficient to a road tax list. Chicago, etc., R. Co. *v.* People, 174 Ill. 80, 50 N. E. 1057.

The statutes govern the contents (see the statutes of the several states. And see People *v.* Kankakee, etc., R. Co., 218 Ill. 588, 75 N. E. 1063, showing amount levied per one hundred dollars without showing amount for each purpose or the total amount; People

record[12] must be complied with, failure to do so rendering the proceedings void,[13] although no mere informality will invalidate a levy or assessment,[14] and a defect through informality may in some instances be cured by amendment.[15]

c. Purposes. Road taxes can be assessed only for public purposes,[16] authorized by law, and included within the levy,[17] and commonly only for existing roads.[18]

v. Chicago, etc., R. Co., 214 Ill. 190, 73 N. E. 315; Illinois Cent. R. Co. *v.* People, 213 Ill. 174, 72 N. E. 1006, certificate of gross total sufficient; Cincinnati, etc., R. Co. *v.* People, 212 Ill. 518, 72 N. E. 770, stating gross amount necessary; Cincinnati, etc., R. Co. *v.* People, 207 Ill. 566, 69 N. E. 938), and delivery (Cincinnati, etc., R. Co. *v.* People, 213 Ill. 197, 72 N. E. 774, certificate for levy by town clerk to county clerk; Chicago, etc., R. Co. *v.* People, 184 Ill. 174, 56 N. E. 365, statement by highway officers of tax must be delivered; Chicago, etc., R. Co. *v.* People, 171 Ill. 249, 49 N. E. 542, delay in submitting statement not fatal; Kuntz *v.* Cedarville, 109 Ill. App. 330, statement not delivered to proper officers).

The original must be used. Toledo, etc., R. Co. *v.* People, 226 Ill. 557, 80 N. E. 1059; Chicago, etc., R. Co. *v.* People, 225 Ill. 519, 80 N. E. 336; Litchfield, etc., R. Co. *v.* People, 225 Ill. 301, 80 N. E. 335, tax held void as assessed on copy of certificate only. See also People *v.* Kankakee, etc., R. Co., 237 Ill. 362, 86 N. E. 742.

12. *Illinois.*— Chicago, etc., R. Co. *v.* People, 190 Ill. 20, 60 N. E. 69; Wabash R. Co. *v.* People, 138 Ill. 316, 28 N. E. 57; Peoria, etc., R. Co. *v.* People, 116 Ill. 232, 5 N. E. 389; Wabash, etc., R. Co. *v.* Binkert, 106 Ill. 298; Thatcher *v.* People, 79 Ill. 597.

Kansas.—Kansas City, etc., R. Co *v.* Scammon, 45 Kan. 481, 25 Pac. 858; Kansas City, etc., R. Co., *v.* Tontz, 29 Kan. 460.

Maine.— Greene *v.* Martin, 101 Me. 232, 63 Atl. 814.

Michigan.—Hoffman *v.* Lynburn, 104 Mich. 494, 62 N. W. 728.

Ohio.— Lima *v.* McBride, 34 Ohio St. 338. See 25 Cent. Dig. tit. "Highways," § 334.

13. Chicago, etc., R. Co. *v.* People, 200 Ill. 237, 65 N. E. 701 (notices not properly posted); Chicago. etc., Ry. Co. *v.* People, 171 Ill. 525, 49 N. E. 538 (failure to give notice and afford opportunity to pay in labor); People *v.* Chicago, etc., R. Co., 164 Ill. 506, 45 N. E. 989 (lists not submitted for correction); Hamilton, etc., Co. *v.* L'Anse Tp., 107 Mich. 419, 65 N. W. 282 (lists returned without signature or verification); Gamble *v.* Auditor Gen., 78 Mich. 302, 44 N. W. 329; State *v.* Piper, 214 Mo. 439, 114 S. W. 1; Langdon *v.* Poor, 20 Vt. 13 (road not included under "bridges" in advertisement).

14. People *v.* Chicago, etc., R. Co., 214 Ill. 190, 73 N. E. 315 (certificate of levy not delivered at time set); Indiana, etc., R. Co. *v.* People, 201 Ill. 351, 66 N. E. 293 (meeting to levy tax on wrong date); Wabash R. Co. *v.* People, 138 Ill. 316, 28 N. E. 57 (neglect to swear to delinquent list held a mere informality); Auditor-Gen. *v.* Longyear, 110 Mich 223, 68 N. W. 130; Hamilton, etc., Co. *v.* L'Anse Tp., 107 Mich. 419, 65 N. W. 282; Turnbull *v.* Alpena Tp., 74 Mich. 621, 42 N. W. 114 (where commissioner made no estimate and surveyed townships not distinguished); Orford *v.* Benton, 36 N. H. 395 (amount placed in two columns). See also Sioux City, etc., R. *v.* Osceola County, 45 Iowa 168; Iowa R. Land Co. *v.* Sac County, 39 Iowa 124.

15. Ohio, etc., R. Co. *v.* People, 119 Ill. 207, 10 N. E. 545.

The record may be amended when defective. Cincinnati, etc., R. Co. *v.* People, 212 Ill. 518, 72 N. E. 770.

16. Will County *v.* People, 110 Ill. 511 (holding that the expense of town bridges is not a strictly local corporate purpose); State *v.* Marion County, 170 Ind. 595, 85 N. E. 513; Libby *v.* State, 59 Nebr. 264, 80 N. W. 817 (limited to county purposes). But see Dixon County *v.* Chicago, etc., R. Co., 1 Nebr. (Unoff.) 240, 95 N. W. 340, holding that authority to levy to pay indebtedness means prior indebtedness.

The legislature has been held to be the sole judge whether the purpose is public or private. Guilford *v.* Chenango County, 13 N. Y. 143 [*restricted* in effect by Weismer *v.* Douglas, 64 N. Y. 91, 21 Am. Rep. 586].

Toll turnpike construction is commonly held a proper use of the public funds. Stockton, etc., R. Co. *v.* Stockton, 41 Cal. 147; Columbia County *v.* King, 13 Fla. 451; Augusta Bank *v.* Augusta, 49 Me. 507; Rome Bank *v.* Rome, 18 N. Y. 38; Goshorn *v.* Ohio County, 1 W. Va. 308; Gelpcke *v.* Dubuque, 1 Wall. (U. S.) 175, 17 L. ed. 520; Amey *v.* Allegheny City, 24 How. (U. S.) 364, 16 L. ed. 614.

A judgment against commissioners of highways is not a judgment against the town, and the county board of supervisors will not be compelled to levy the amount against the property of the town. People *v.* Ulster County, 29 Hun (N. Y.) 185 [*affirmed* in 93 N. Y. 397].

17. Southern R. Co. *v.* Cherokee County, 144 Ala. 579, 42 So. 66 (to meet expense of contemplated repairs); People *v.* Chicago, etc., R. Co., 214 Ill. 190, 73 N. E. 315; Peopie *v.* Finley, 97 Ill. App. 214; Dexter *v.* Hamilton County, 10 Ohio Dec. (Reprint) 338, 20 Cinc. L. Bul. 364 (holding that where levy for bridge tax only is authorized, a levy for road and bridge fund is void); Dunne *v.* Deegan, 43 Pa. St. 334.

18. Philbrook *v.* Kennebec County, 17 Me. 196; Joy *v.* Oxford County, 3 Me. 131, only highways laid out by order of court of sessions. See also Tufts *v.* Somerville, 122 Mass. 273.

Part not included in whole.— A statutory provision for taxation for improving any state, county, or turnpike road does not authorize a tax to improve any specified portion

A tax or license on vehicles using a public highway is enforced in some jurisdictions.[19]

d. Amount. The amount of highway taxes is commonly limited by general law,[20] and any tax assessed exceeding that authority is void;[21] but a further levy is sometimes provided for on occasion,[22] and upon specified proceedings.[23]

3. Persons and Property Taxed — a. Property. Subject to the restriction that property is liable only as described in the tax proceeding,[24] and except as

of such road. Elliott *v.* Berry, 41 Ohio St. 110.

In Michigan roads in contemplation are proper subjects of taxation, although not laid out. Michigan Land, etc., Co. *v.* L'Anse Tp., 63 Mich. 700, 30 N. W. 331; Sawyer-Goodman Co. *v.* Crystal Falls Tp., 56 Mich. 597, 23 N. W. 334.

19. Tomlinson *v.* Indianapolis, 144 Ind. 142, 43 N. E. 9, 36 L. R. A. 413; Armitage *v.* Crawford County, 24 Pa. Co. Ct. 207, on bicycles for construction of side path.

20. See the statutes of the several states. And see the following cases:

Illinois.— People *v.* Cairo, etc., R. Co., 231 Ill. 438, 83 N. E. 116; Chicago, etc., R. Co. *v.* People, 214 Ill. 302, 73 N. E. 312; Chicago, etc., R. Co. *v.* People, 200 Ill. 237, 65 N. E. 701; Mee *v.* Paddack, 83 Ill. 494.

Michigan.— Peninsular Sav. Bank *v.* Ward, 118 Mich. 87, 76 N. W. 161, 79 N. W. 911; Longyear *v.* Auditor-Gen., 72 Mich. 415, 40 N. W. 738; Mills *v.* Richland Tp., 72 Mich. 100, 40 N. W. 183.

New Jersey.— Norcross *v.* Veal, 51 N. J. L. 87, 16 Atl. 159; Paterson Ave., etc., Road Com'rs *v.* Hudson County, 45 N. J. L. 173; State *v.* Cannon, 33 N. J. L. 218.

North Dakota.— Beggs *v.* Paine, 15 N. D. 436, 109 N. W. 322.

Pennsylvania.— Elsbree *v.* Keller, 35 Pa. Super. Ct. 497; Com. *v.* Crane, 5 Pa. Co. Ct. 421.

South Carolina.— State *v.* Odom, 1 Speers 263.

Wisconsin.— Mueller *v.* Cavour, 107 Wis. 599, 83 N. W. 944; Bigelow *v.* Washburn, 98 Wis. 553, 74 N. W. 362 (computed on assessed valuation for the previous year); Sage *v.* Fifield, 68 Wis. 546, 32 N. W. 629.

United States.— C. N. Nelson Lumber Co. *v.* Loraine, 24 Fed. 456.

Limitation held not to apply see State *v.* Wirt County Ct., 63 W. Va. 230, 59 S. E. 884, 981.

21. Wright *v.* Wabash, etc., R. Co., 120 Ill. 541, 12 N. E. 240; State *v.* Fulmore, (Tex. Civ. App. 1902) 71 S. W. 418; C. N. Nelson Lumber Co. *v.* Loraine, 24 Fed. 456.

22. People *v.* Peoria, etc., R. Co., 232 Ill. 540, 83 N. E. 1054 (only to amount necessary); Cleveland, etc., R. Co. *v.* People, 223 Ill. 17, 79 N. E. 17 (on certificate of highway commissioners); People *v.* Bloomington Tp. Highway Com'rs, 118 Ill. 239, 8 N. E. 684 (in discretion of board); Mee *v.* Paddock, 83 Ill. 494; Longyear *v.* Auditor-Gen., 72 Mich. 415, 40 N. W. 738 (for extraordinary expenses). But see People *v.* Atchison, etc., R. Co., 201 Ill. 365, 66 N. E. 232.

In Illinois an additional levy on a contingency is provided for on a certificate that such contingency exists (People *v.* Cincinnati, etc., R. Co., 213 Ill. 503, 72 N. E. 1119; Cleveland, etc., R. Co. *v.* People, 205 Ill. 582, 69 N. E. 89, only amount certified may be authorized; Chicago, etc., R. Co. *v.* People, 200 Ill. 237, 65 N. E. 701; Chicago, etc., R. Co. *v.* People, 200 Ill. 141, 65 N. E. 705), describing the contingency (St. Louis, etc., R. Co. *v.* People, 224 Ill. 155, 79 N. E. 664; Cleveland, etc., R. Co. *v.* People, 205 Ill. 582, 69 N. E. 89), which certificate is subject to amendment (Cleveland, etc., R. Co. *v.* People, *supra*; Chicago, etc., R. Co. *v.* People, 200 Ill. 141, 65 N. E. 705). No proper contingency was set out in the following cases: People *v.* Belleville, etc., R. Co., 232 Ill. 454, 83 N. E. 950; People *v.* Kankakee, etc., R. Co., 231 Ill. 490, 83 N. E. 117 (needed "to build two bridges"); People *v.* Chicago, etc., R. Co., 231 Ill. 454, 83 N. E. 213; People *v.* Cairo, etc., R. Co., 231 Ill. 438, 83 N. E. 116 (existing contingencies not stated); People *v.* Toledo, etc., R. Co., 231 Ill. 390, 83 N. E. 186; People *v.* Cincinnati, etc., R. Co., 231 Ill. 363, 83 N. E. 119; People *v.* Toledo, etc., R. Co., 231 Ill. 125, 83 N. E. 118; People *v.* Kankakee, etc., R. Co., 231 Ill. 109, 83 N. E. 115; Toledo, etc., R. Co. *v.* People, 226 Ill. 557, 80 N. E. 1059; Chicago, etc., R. Co. *v.* People, 225 Ill. 519, 80 N. E. 336; Litchfield, etc., R. Co. *v.* People, 225 Ill. 301, 80 N. E. 335. A consent to an additional levy may be valid (Cleveland, etc., R. Co. *v.* People, 205 Ill. 582, 69 N. E. 89, consent of town auditors held valid, although not specifying amounts applicable to each improvement); but not if not sufficiently specific (Chicago, etc., R. Co. *v.* People, 206 Ill. 296, 69 N. E. 93), or where only two out of five members intended to comply with the law (Cleveland, etc., R. Co. *v.* People, *supra*).

The invalidity of the additional levy leaves the first levy standing. Cincinnati, etc., R. Co. *v.* People, 207 Ill. 566, 69 N. E. 938.

23. Miller *v.* Kern County, 137 Cal. 516, 70 Pac. 549; Comstock *v.* Yolo County, 71 Cal. 599, 12 Pac. 728; Cincinnati, etc., R. Co. *v.* People, 205 Ill. 538, 69 N. E. 40; Sage *v.* Stevens, 72 Mich. 638, 40 N. W. 919 (on certificate of clerk that tax voted); Michigan Land, etc., Co. *v.* L'Anse Tp., 63 Mich. 700, 30 N. W. 331; Jefferson Iron Co. *v.* Hart, 18 Tex. Civ. App. 525, 45 S. W. 321.

24. Nehasane Park Assoc. *v.* Lloyd, 167 N. Y. 431, 60 N. E. 741; Westgate *v.* Spalding, 8 Pa. Dist. 490, on bicycles for construction of side paths.

A slight misdescription is immaterial. Lloyd *v.* Thomson, 60 N. Y. Suppl. 72.

exempt by law,[25] taxes may be levied on all property in the township [26] or county,[27] or in taxing districts created by law,[28] and all property in a district may be liable for taxes levied for a road in one subdivision only.[29]

b. Persons. Unless within a statutory exemption,[30] owners are liable where resident,[31] and under some statutes the occupier is liable for repairs.[32]

4. Collection and Payment — a. Collection [33] — (i) *In General.* The manner of collection of highway taxes is a matter exclusively of statutory regulation.[34] The statutes variously provide for collection by action,[35] distress,[36] sale,[37] arrest,[38] and by warrant to collect.[39] Such proceedings must be brought at the proper time,[40] and within the statutory period,[41] by the proper officers,[42] on

25. Auditor-Gen. *v.* Duluth, etc., R. Co., 116 Mich. 122, 74 N. W. 505.

Village exempt by special charter see Shapter *v.* Carroll, 18 N. Y. App. Div. 390, 46 N. Y. Suppl. 202.

26. People *v.* Peoria, etc., R. Co., 232 Ill. 540, 83 N. E. 1054; Peoria, etc., R. Co. *v.* People, 144 Ill. 458, 33 N. E. 873; Sim *v.* Hurst, 44 Ind. 579; Perrizo *v.* Stephenson Tp., 141 Mich. 167, 104 N. W. 417; Auditor-Gen. *v.* Duluth, etc., R. Co., 116 Mich. 122, 74 N. W. 505; Ne-Ha-Sa-Ne Park Assoc. *v.* Lloyd, 25 Misc. (N. Y.) 207, 55 N. Y. Suppl. 108 [*affirmed* in 45 N. Y. App. Div. 631, 61 N. Y. Suppl. 1143].

A village is not liable for a road tax voted before it was reincorporated. Bradish *v.* Lucken, 38 Minn. 186, 36 N. W. 454.

The non-residence of the owners does not affect the liability of the lands to taxation. Van Dien *v.* Hopper, 5 N. J. L. 764; Ensign *v.* Barse, 107 N. Y. 329, 14 N. E. 400, 15 N. E. 401.

27. Genesee *v.* Latah County, 4 Ida. 141, 36 Pac. 701; Osborne *v.* Mecklenburg County, 82 N. C. 400, whether within or without cities and villages.

28. State *v.* Marion County, 170 Ind. 595, 85 N. E. 513; State *v.* Marion County, (Ind. 1907) 82 N. E. 482, without regard to county or municipal boundaries.

29. Chicago, etc., R. Co. *v.* Murphy, 106 Iowa 43, 75 N. W. 680; King *v.* Aroostock County, 63 Me. 567. See also Byram *v.* Marion County, 145 Ind. 240, 44 N. E. 357, 33 L. R. A. 476.

30. See State *v.* Hannibal, etc., R. Co., 101 Mo. 120, 13 S. W. 406, holding a road tax exempted under exemption of county taxes.

31. Helle *v.* Deerfield Tp., 96 Ill. App. 642; Thompson *v.* Love, 42 Ohio St. 61, holding that vendee in possession, life-tenants, and guardians are landowners to be assessed, under Rev. St. §§ 4829–4864, relating to the improvement of roads. See also Deerfield Tp. *v.* Harper, 115 Mich. 678, 74 N. W. 207.

A county buying in at tax-sale is not liable for road taxes. Rush Tp. *v.* Schuylkill County, 2 Leg. Rec. (Pa.) 117, 257.

An exemption from working on roads does not exempt from paying tax. McDonald *v.* Madison County, 43 Ill. 22.

32. Esher, etc., Dist. *v.* Marks, 66 J. P. 243, 71 L. J. K. B. 309, 86 L. T. Rep. N. S. 222, 18 T. L. R. 333, 50 Wkly. Rep. 330. See also Daventry Rural Dist. *v.* Parker, [1900] 1 Q. B. 1, 69 L. J. Q. B. 105, 81 L. T. Rep. N. S. 403, 16 T. L. R. 5, 48 Wkly. Rep. 68; Cuckfield Rural Dist. *v.* Goring, [1898] 1 Q. B. 865, 62 J. P. 358, 67 L. J. Q. B. 539, 78 Loc. Gov. 530, 14 T. L. R. 362, 46 Wkly. Rep. 541.

33. **Collection of municipal taxes** see Municipal Corporations, 28 Cyc. 1709.

Lien of municipal taxes see Municipal Corporations, 28 Cyc. 1704.

34. See the statutes of the several states. And see cases cited *infra*, note 35 *et seq.*

The statutes regulate the officer to receive payment. Britten *v.* Clinton, 8 Ill. App. 164; Coleman *v.* Coleman, 148 N. C. 299, 62 S. E. 415.

The amount to be paid is that specified in the statute. Wallace *v.* International Paper Co., 53 N. Y. App. Div. 41, 65 N. Y. Suppl. 543; Kemmerer *v.* Foster Tp., 120 Pa. St. 153, 13 Atl. 556, discount for prompt payment.

35. *California.*— San Luis Obispo County *v.* White, 91 Cal. 432, 24 Pac. 864, 27 Pac. 756.

Idaho.— Kootenai County *v.* Hope Lumber Co., 13 Ida. 262, 89 Pac. 1054.

Pennsylvania.— Creswell *v.* Montgomery, 13 Pa. Super. Ct. 87.

Tennessee.— McKinnie *v.* Whitehorn, 5 Yerg. 433.

West Virginia.— Ingersoll *v.* Buchanan, 1 W. Va. 181.

See 25 Cent. Dig. tit. "Highways," § 385.

36. Mason *v.* Thomas, 36 N. H. 302.

37. McQuilkin *v.* Doe, 8 Blackf. (Ind.) 581; Wallace *v.* International Paper Co., 53 N. Y. App. Div. 41, 65 N. Y. Suppl. 543. See also Greene *v.* Martin, 101 Me. 232, 63 Atl. 814.

38. Marshall *v.* Wadsworth, 64 N. H. 386, 10 Atl. 685.

39. Thompson *v.* Fellows, 21 N. H. 425; Davis *v.* Clements, 2 N. H. 390; Pearce *v.* Torrence, 2 Grant (Pa.) 82.

40. McKinnie *v.* Whitehorn, 5 Yerg. (Tenn.) 433 (the next day after the penalty accrues); Lane *v.* James, 25 Vt. 481 (only after expiration of time for payment).

41. Rush Tp. *v.* Schuylkill County, 100 Pa. St. 356; Wells *v.* Austin, 59 Vt. 157, 10 Atl. 405.

42. Stephens *v.* Wilkins, 6 Pa. St. 260; Pearce *v.* Torrence, 2 Grant (Pa.) 82; Barnett Tp. *v.* Jefferson County, 9 Watts (Pa.) 166.

evidence of compliance with law.[43] Such proceedings are open to the usual defenses.[44]

(II) *Remedies Against Tax.*[45] The assessment may be attacked by the town,[46] or by a receiver,[47] by injunction,[48] by action against the highway officer,[49] by certiorari,[50] or by application for abatement.[51]

5. Distribution of Proceeds. Taxes collected must be used for the purposes provided by statute,[52] which may direct that they be disbursed to towns,[53] or to the highway officers,[54] or may be turned over by the counties to the towns,[55]

43. Toledo, etc., R. Co. *v.* People, 225 Ill. 425, 80 N. E. 283; People *v.* Chicago, etc., R. Co., 214 Ill. 190, 73 N. E. 315; Cleveland, etc., R. Co. *v.* People, 212 Ill. 551, 72 N. E. 790; Cincinnati, etc., R. Co. *v.* People, 212 Ill. 518, 72 N. E. 770; Cincinnati, etc., R. Co. *v.* People, 207 Ill. 566, 69 N. E. 938; Cincinnati, etc., R. Co. *v.* People, 206 Ill. 565, 69 N. E. 628; Thompson *v.* Fellows, 21 N. H. 425, on vote of the town.

Presumption of regularity.—Where it is shown that the list of delinquent road taxes was laid before the board of supervisors, and was afterward filed with the county clerk, it will be presumed that the list was approved by the board and filed by it with the county clerk. Wabash R. Co. *v.* People, 138 Ill. 303, 28 N. E. 134.

44. Fanning *v.* Wilkes County, 119 Ga. 315, 46 S. E. 410, that defendant relied on another's promise to pay tax.

That a tax is illegally assessed is a good defense for non-payment. Cincinnati, etc., R. Co. *v.* People, 212 Ill. 518, 72 N. E. 770 (so holding, although other taxpayers paid the full amount of a tax lawfully levied); State *v.* Edwards, 81 Miss. 399, 33 So. 172.

45. Refunding or recovery of taxes paid see Municipal Corporations, 28 Cyc. 1707.

46. Grand Isle *v.* Milton, 68 Vt. 234, 35 Atl. 71, not needed.

47. People *v.* Pierce, 31 Barb. (N. Y.) 138.

The burden of proof is on him who attacks the tax. Toledo, etc., R. Co. *v.* People, 225 Ill. 425, 80 N. E. 283; Cleveland, etc., R. Co. *v.* People, 212 Ill. 551, 72 N. E. 790.

48. Dunne *v.* Deegan, 43 Pa. St. 334, invalid assessment. But see Sage *v.* Fifield, 68 Wis. 546, 32 N. W. 629, holding the only remedy to be by action to recover taxes paid or by suit in equity to relieve cloud on title.

That the wrong officer is collecting is not ground for enjoining the collection. Pettyjohn *v.* Parmenter, 10 Oreg. 341.

49. Treat *v.* Orono, 26 Me. 217; Eames *v.* Johnson, 4 Allen (Mass.) 382; Grafton Bank *v.* Kimball, 20 N. H. 107 (so holding whether the tax is void as raised for an illegal object or as not voted in a legal manner); Sage *v.* Fifield, 68 Wis. 546, 32 N. W. 629. But see Hampton *v.* Hamsher, 124 N. Y. 634, 26 N. E. 540 [*affirming* 46 Hun 144] (holding the commissioner not liable for mistake in assessment roll); Potter *v.* Benniss, 1 Johns. (N. Y.) 515.

50. United New Jersey R., etc., Co. *v.* Gummere, 69 N. J. L. 111, 54 Atl. 520; Essex Public Road Bd. *v.* Speer, 48 N. J. L. 372, 9 Atl. 197.

51. Treat *v.* Orono, 26 Me. 217.

52. *California.*— Potter *v.* Fowzer, 78 Cal. 493, 21 Pac. 118.

Iowa.— Cass County Bank *v.* Conrad, 81 Iowa 482, 46 N. W. 1055, must be apportioned among road districts in town.

Maine.— Barnard *v.* Argyle, 20 Me. 296.

Missouri.— Rozier *v.* St. Francois County, 34 Mo. 395, to purchase a plank road.

Nebraska.— Follmer *v.* Nuckolls County, 6 Nebr. 204; Clark *v.* Dayton, 6 Nebr. 192.

New Hampshire.— Kimball *v.* Russell, 56 N. H. 488, holding that selectmen may not require payment to them of unexpended balance of highway taxes.

North Carolina.— Elizabeth City *v.* Pasquotank County, 146 N. C. 539, 60 S. E. 416, statute construed prospectively.

Ohio.— McGill *v.* Hamilton County, 8 Ohio Dec. (Reprint) 439, 8 Cinc. L. Bul. 9.

Pennsylvania.— Lumber Tp. *v.* Cameron County, 134 Pa. St. 105, 19 Atl. 498; *In re* Porter Tp. Road, 1 Walk. 10.

See 25 Cent. Dig. tit. "Highways," § 387.

A resident taxpayer has such an interest in funds for the construction of a road to which funds his assessment has contributed, as to give him a right to prevent their wrongful application. Miller *v.* Bowers, 30 Ind. App. 116, 65 N. E. 559.

53. Stone *v.* Woodbury County, 51 Iowa 522, 1 N. W. 745; Aldrich *v.* Collins, 3 S. D. 154, 52 N. W. 854, ordinary town funds.

54. People *v.* Suppiger, 103 Ill. 434; Henderson *v.* Simpson, 45 Iowa 519; Willard *v.* Parker, 1 Rawle (Pa.) 448.

55. *Florida.*— Duval County *v.* Jacksonville, 36 Fla. 196, 18 So. 339, 29 L. R. A. 416, turning one half of county tax over to city for streets.

Idaho.— Genesee *v.* Latah County, 4 Ida. 141, 36 Pac. 701.

Illinois.— Baird *v.* State, 83 Ill. 387; Wilson *v.* Cedarville, 109 Ill. App. 316; Rushville *v.* Rushville, 32 Ill. App. 320; People *v.* Wilson, 3 Ill. App. 368; Galena *v.* Highway Com'rs, 2 Ill. App. 255.

Mississippi.— Lincoln County *v.* Brookhaven, 90 Miss. 5, 41 So. 449.

Nebraska.— Chadron *v.* Dawes County, 82 Nebr. 614, 118 N. W. 469 (holding that the county holds such funds as trustee and cannot gain title by lapse of time); Libby *v.* State, 59 Nebr. 264, 80 N. W. 817.

Pennsylvania.— See Rush Tp. *v.* Schuylkill County, 2 Leg. Rec. 400.

See 25 Cent. Dig. tit. "Highways," § 387.

within the limits of the town or district where raised.[56] They are not to be used to pay indebtedness incurred in a previous year.[57]

B. Local Assessment and Special Taxes[58] — **1. Statutory Regulation.** Money for the construction, improvement, or maintenance of a highway may be raised by local taxes on abutting owners specially benefited, although the public also receives a benefit.[59] The power to lay special assessments is not inherent in a municipality and must be expressly given by the legislature,[60] statutes providing therefor being strictly construed;[61] but the power once given includes all the incidents of the principal power.[62] Such local assessments are not ordinary taxes laid for supporting the government but are special charges on property,[63] the statutes commonly providing that special assessments shall be

56. *Idaho.*— Genesee *v.* Latah County, 4 Ida. 141, 36 Pac. 701.

Iowa.— Newton *v.* Jasper County, 135 Iowa 27, 112 N. W. 167, 124 Am. St. Rep. 256.

Minnesota.— Clayton *v.* Bennington, 24 Minn. 14.

Mississippi.—McComb City *v.* Pike County, 86 Miss. 647, 38 So. 721.

Nebraska.— Chadron *v.* Dawes County, 82 Nebr. 614, 118 N. W. 469; Libby *v.* State, 59 Nebr. 264, 80 N. W. 817.

New York.— People *v.* George, 14 N. Y. Suppl. 475.

North Carolina.— See Elizabeth City *v.* Pasquotank County, 146 N. C. 539, 60 S. E. 416.

Oregon.— Oregon City *v.* Clackamas County, 32 Oreg. 491, 52 Pac. 310; Oregon City *v.* Moore, 30 Oreg. 215, 46 Pac. 1017, 47 Pac. 851; Salem *v.* Marion County, 25 Oreg. 449, 36 Pac. 163.

Wisconsin.— Webster *v.* Douglas County, 102 Wis. 181, 77 N. W. 885, 78 N. W. 451, 72 Am. St. Rep. 870.

See 25 Cent. Dig. tit. "Highways," § 387.

57. Chestnut Tp. Highway Com'rs *v.* Newell, 80 Ill. 587.

58. **Drainage assessments** see Drains, 14 Cyc. 1058.

Special municipal assessments see Municipal Corporations, 28 Cyc. 55, 1102 *et seq.*

59. Montgomery County *v.* Fullen, 111 Ind. 410, 12 N. E. 298; *In re* Elizabeth, 49 N. J. L. 488, 10 Atl. 363; Raleigh *v.* Peace, 110 N. C. 32, 14 S. E. 521, 17 L. R. A. 330; St. Benedict's Abbey *v.* Marion County, 50 Oreg. 411, 93 Pac. 231. See also Cooley Const. Lim. (5th ed.) 619. But see Fields *v.* Highland County, 36 Ohio St. 476, statute held unconstitutional as locally restricted.

Courts are not authorized to resort to any refined construction in order to subject lands to special burdens not fairly within the words or general scope of the statute. The boundaries of a district specifically described in the statute to be taxed for a local improvement cannot be enlarged by construction. The power to levy an assessment for a local improvement exists only where it is clearly and distinctly conferred by legislative authority, and, if not so conferred, the assessment is void. If there is any necessity to resort to construction at all it must be in favor of the property-owner rather than against him. Nehasane Park Assoc. *v.* Lloyd, 167 N. Y. 431, 60 N. E. 741. See also White *v.* Gove, 183 Mass. 333, 67 N. E. 359.

60. *Illinois.*— Chicago *v.* Wright, 32 Ill. 192.

Indiana.— Niklaus *v.* Conkling, 118 Ind. 289, 20 N. E. 797.

New York.— *In re* Second Ave. M. E. Church, 66 N. Y. 395.

Texas.— Connor *v.* Paris, 87 Tex. 32, 27 S. W. 88.

Virginia.— Green *v.* Ward, 82 Va. 324; Richmond *v.* Daniel, 14 Gratt. 385.

See 25 Cent. Dig. tit. "Highways," § 392.

Property liable under municipal assessments see Municipal Corporations, 28 Cyc. 1115.

Power to levy special assessments see Municipal Corporations, 28 Cyc. 1102.

61. Sperry *v.* Flygare, 80 Minn. 325, 83 N. W. 177, 81 Am. St. Rep. 261, 49 L. R. A. 757.

62. Cone *v.* Hartford, 28 Conn. 363; Raleigh *v.* Peace, 110 N. C. 32, 14 S. E. 521, 17 L. R. A. 330.

63. *Colorado.*— Denver *v.* Knowles, 17 Colo. 204, 30 Pac. 1041, 17 L. R. A. 135.

Connecticut.— Bridgeport *v.* New York, etc., R. Co., 36 Conn. 255, 4 Am. Rep. 63.

Illinois.— Illinois, etc., Canal *v.* Chicago, 12 Ill. 403.

Maryland.—Baltimore *v.* Proprietors Green Mount Cemetery, 7 Md. 517.

New Jersey.— Paterson *v.* Society for Establishing Useful Manufactures, 24 N. J. L. 385.

New York.— Buffalo City Cemetery *v.* Buffalo, 46 N. Y. 506.

North Carolina.— Crocker *v.* Moore, 140 N. C. 429, 53 S. E. 229.

Virginia.— Violett *v.* Alexandria, 92 Va. 561, 23 S. E. 909, 53 Am. St. Rep. 825, 31 L. R. A. 382.

United States.— Illinois Cent. R. Co. *v.* Decatur, 147 U. S. 190, 13 S. Ct. 293, 37 L. ed. 132.

See 25 Cent. Dig. tit. "Highways," § 388 *et seq.*

Directory or mandatory.— Provisions for the guidance of the officer are generally merely directory, while those for the protection of the taxpayer are mandatory. Torrey *v.* Millburg, 21 Pick. (Mass.) 64; Lyon *v.* Alley, 130 U. S. 177, 9 S. Ct. 480, 32 L. ed. 899.

liens on the property assessed.[64] The repeal of an assessment statute takes away the right to act further under it; but vested rights of contractors or others will be protected by the courts.[65]

2. Levy and Assessment — a. Method; Uniformity. The plan and mode of assessment of highway taxes is in the discretion of the legislature.[66] Although a special assessment is not a tax within the meaning of constitutional provisions requiring uniformity of taxation,[67] yet such assessments are commonly held to be valid when imposed proportionally on the whole of the land benefited,[68] in the district

64. Sanders *v.* Brown, 65 Ark. 498, 47 S. W. 461 (holding that the entire lien attaches at once, although payable in instalments); Murphy *v.* Beard, 138 Ind. 560, 38 N. E. 33 (the lien precedes a mortgage executed before the act passed); Kirkpatrick *v.* Pearce, 107 Ind. 520, 8 N. E. 573 (at the time of the final order of the county board); Craig *v.* Heis, 30 Ohio St. 550.

65. Houston *v.* McKenna, 22 Cal. 550; Cincinnati *v.* Seasongood, 46 Ohio St. 296, 21 N. E. 630. See also Palmer *v.* Danville, 166 Ill. 42, 46 N. E. 629; Cortelyou *v.* Anderson, 73 N. J. L. 427, 63 Atl. 1095.

66. *Indiana.*— Monroe County *v.* Harrell, 147 Ind. 500, 46 N. E. 124; Byram *v.* Marion County, 145 Ind. 240, 44 N. E. 357, 33 L. R. A. 476.

New Jersey.— Anderson *v.* Cortelyou, 75 N. J. L. 532, 68 Atl. 118 [*reversing* 73 N. J. L. 427, 63 Atl. 1095].

North Dakota.— Rolph *v.* Fargo, 7 N. D. 640, 76 N. W. 242, 42 L. R. A. 646.

Oregon.— St. Benedict's Abbey *v.* Marion County, 50 Oreg. 411, 93 Pac. 231, holding that the legislature may fix the amount and district or leave it to a local body.

United States.— Bauman *v.* Ross, 167 U. S. 548, 17 S. Ct. 966, 42 L. ed. 270, holding that the legislature may decide what lands are to be assessed.

See 25 Cent. Dig. tit. "Highways," § 392.

67. Denver *v.* Knowles, 17 Colo. 204, 30 Pac. 1041, 17 L. R. A. 135; State *v.* Warren County, 17 Ohio St. 558. See also Bryan *v.* Greene County, 1 Ohio S. & C. Pl. Dec. 661, 32 Cinc. L. Bul. 140.

68. *New Jersey.*— Essex Public Road Bd. *v.* Alby, 52 N. J. L. 414, 21 Atl. 953 [*affirming* 51 N. J. L. 439, 17 Atl. 951]; Aldridge *v.* Essex Public Road Bd., 51 N. J. L. 166, 16 Atl. 695; State *v.* Union Tp., 37 N. J. L. 268; State *v.* Cannon, 33 N. J. L. 218.

Ohio.— Putnam County *v.* Young, 36 Ohio St. 288; Foster *v.* Wood County, 9 Ohio St. 540.

Oregon.— St. Benedict's Abbey *v.* Marion County, 50 Oreg. 411, 93 Pac. 231.

United States.— French *v.* Barber Asphalt Paving Co., 181 U. S. 324, 21 S. Ct. 625, 45 L. ed. 879; Norwood *v.* Baker, 172 U. S. 269, 19 S. Ct. 187, 43 L. ed. 443; Bauman *v.* Ross, 167 U. S. 548, 17 S. Ct. 966, 42 L. ed. 270.

Canada.— Therriault *v.* Du Lac, 24 Quebec Super. Ct. 217; Therriault *v.* St. Alexandre, 20 Quebec Super. Ct. 45.

See 25 Cent. Dig. tit. "Highways," § 393.

Compare Green *v.* Fall River, 113 Mass. 262, allowance made for benefit set off under another statute.

The change of a turnpike to a common free public road confers no special benefit upon the landowner, and the statutory provision authorizing the assessment of the price of the turnpike upon the landowners is unconstitutional and void. Essex Public Road Bd. *v.* Speer, 48 N. J. L. 372, 9 Atl. 197 [*affirming* 47 N. J. L. 101]; Aldridge *v.* Essex Public Road Bd., 48 N. J. L. 366, 5 Atl. 784. See also State *v.* Laverack, 34 N. J. L. 201.

The assessment must not exceed the benefits. Montgomery County *v.* Fullen, (Ind. 1887) 13 N. E. 574.

Front foot assessments are commonly upheld (Bacon *v.* Savannah, 86 Ga. 301, 12 S. E. 580; Wilbur *v.* Springfield, 123 Ill. 395, 14 N. E. 871; Sears *v.* Boston, 173 Mass. 71, 53 N. E. 138, 43 L. R. A. 834; State *v.* St. Louis County Dist. Ct., 61 Minn. 542, 64 N. W. 190; McKeesport Borough *v.* Busch, 166 Pa. St. 46, 31 Atl. 49; Harrisburg *v.* McCormick, 129 Pa. St. 213, 18 Atl. 126. See also White *v.* Gove, 183 Mass. 333, 67 N. E. 359), but may be void (White *v.* Gove, *supra*; New York, etc., R. Co. *v.* Kearney Tp. Committee, 55 N. J. L. 463, 26 Atl. 800; State *v.* Gardner, 34 N. J. L. 327; Hutcheson *v.* Storrie, 92 Tex. 685, 51 S. W. 848, 71 Am. St. Rep. 884, 45 L. R. A. 289; French *v.* Barber Asphalt Paving Co., 181 U. S. 324, 21 S. Ct. 625, 45 L. ed. 879. See also Norwood *v.* Baker, 172 U. S. 269, 19 S. Ct. 187, 43 L. ed. 443), and the front foot rule is not a proper basis when not authorized expressly by the legislature (Clapp *v.* Hartford, 35 Conn. 66; Reynolds *v.* Paterson, 48 N. J. L. 435, 5 Atl. 896).

Area is upheld as a basis of assessment. Egyptian Levee Co. *v.* Hardin, 27 Mo. 495, 72 Am. Dec. 276; Walston *v.* Nevin, 128 U. S. 578, 9 S. Ct. 192, 32 L. ed. 544.

Value is held to be a proper basis of assessment. Snow *v.* Fitchburg, 136 Mass. 183.

The entire expense in front of each lot may be assessed. Morrison *v.* Hershire, 32 Iowa 271; Weeks *v.* Milwaukee, 10 Wis. 242.

The expense of improving an ordinary county road cannot be taxed against the land only which fronts on it, on the theory that such land is specially benefited. The improvement benefits and must be paid for by the whole county. Conger *v.* Graham, 11 S. W. 467, 11 Ky. L. Rep. 12.

Special privileges given to certain owners of lands render a tax for highway purposes

indicated,[69] considering also benefits from other roads in the vicinity,[70] and should be only to an amount needed.[71] The levy must be made after fulfilment of all the statutory prerequisites,[72] only where the road is public,[73] and within the time limited,[74] on proper authority,[75] after notice,[76] and on all the lands benefited;[77] but may be valid notwithstanding irregularities,[78] and defective assessments, as in

void. King *v.* Duryee, 48 N. J. L. 372, 6 Atl. 524, special exemptions to owners releasing damages, and provision that percentage of the assessment paid by certain towns applied to relieve such lands as the board might determine.

A collusive conveyance of a strip on a street assessed will not prevent the assessment extending over the balance of the lot owned by the grantor. Eagle Mfg. Co. *v.* Davenport, 101 Iowa 493, 70 N. W. 707, 38 L. R. A. 480.

69. Spaulding *v.* Mott, 167 Ind. 58, 76 N. E. 620; Monroe County *v.* Harrell, 147 Ind. 500, 46 N. E. 124 (on property of townships through which roads extend); Byram *v.* Marion County, 145 Ind. 240, 44 N. E. 357, 33 L. R. A. 476; Erisman *v.* Burlington County, 64 N. J. L. 516, 45 Atl. 998 (abutting lands); Lear *v.* Halstead, 41 Ohio St. 566 (on property within one mile on each side of road held not to authorize a levy on property within one mile of the termini); Dawson *v.* Barron, 9 Ohio S. & C. Pl. Dec. 706, 8 Ohio N. P. 354 (at right angles to the end of the road); Williams *v.* Eggleston, 170 U. S. 304, 18 S. Ct. 617, 42 L. ed. 1047; Bauman *v.* Ross, 167 U. S. 548, 17 S. Ct. 966, 42 L. ed. 270.

All real estate within a district indicated may be assessed uniformly for highway purposes. Goodrich *v.* Winchester, etc., Turnpike Co., 26 Ind. 119 (within three quarters of a mile of the road); Carlisle *v.* Hetherington, 47 Ohio St. 235, 24 N. E. 488 [*overruling* Bowler *v.* Biddinger, Free Turnpike Co., 8 Ohio Dec. (Reprint) 237, 6 Cinc. L. Bul. 404].

An assessment to the depth of eight hundred feet on either side of a county road macadamized is void. Graham *v.* Conger, 85 Ky. 582, 4 S. W. 327, 9 Ky. L. Rep. 133; Conger *v.* Bergman, 11 S. W. 84, 10 Ky. L. Rep. 899.

Only property expressly subjected by statute to the assessment can be assessed for highway taxes. Niklaus *v.* Conkling, 118 Ind. 289, 20 N. E. 797; Griswold *v.* Pelton, 34 Ohio St. 482.

70. Cornell *v.* Franklin County, 67 Ohio St. 335, 65 N. E. 998; Lear *v.* Halstead, 41 Ohio St. 566 (not on unimproved county road); Dawson *v.* Barron, 9 Ohio S. & C. Pl. Dec. 706, 8 Ohio N. P. 354; St. Benedict's Abbey *v.* Marion County, 50 Oreg. 411, 93 Pac. 231; Allegheny *v.* Black, 99 Pa. St. 152 (holding that the possibility of owner laying out another street on his own land should be considered in determining the benefits); Bauman *v.* Ross, 167 U. S. 548, 17 S. Ct. 966, 42 L. ed. 270.

Corner lots may be assessed for road taxes on both frontages. Wolf *v.* Keokuk, 48 Iowa 129; Tripp *v.* Yankton, 10 S. D. 516, 74 N. W. 447.

Where the rear of a lot abuts on an improved street it may be not assessable. Philadelphia *v.* Eastwick, 35 Pa. St. 75.

71. Manor *v.* Jay County, 137 Ind. 367, 34 N. E. 959, 36 N. E. 1101; Flint, etc., R. Co. *v.* Auditor-Gen., 41 Mich. 635, 2 N. W. 835. But see Loesnitz *v.* Seelinger, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 887, holding that erroneously including costs for bridges will not invalidate the proceedings.

Although based on an insufficient estimate the assessment may be valid. Loesnitz *v.* Seelinger, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 887.

72. Chase *v.* Springfield, 119 Mass. 556, on completion of road. See also People *v.* Illinois Cent. R. Co., 237 Ill. 154, 86 N. E. 720.

73. Pierce *v.* Franklin County, 63 Me. 252; Flint, etc., R. Co. *v.* Auditor-Gen., 41 Mich. 635, 2 N. W. 835.

74. Janvrin *v.* Poole, 181 Mass. 463, 63 N. E. 1066 (within two years of the acceptance of the highway); Hitchcock *v.* Springfield, 121 Mass. 382.

75. Manor *v.* Jay County, 137 Ind. 367, 34 N. E. 959, 36 N. E. 1101; Hendricks *v.* Gilchrist, 76 Ind. 369; Lewis *v.* Laylin, 46 Ohio St. 663, 23 N. E. 288. See also Florer *v.* McAffee, 135 Ind. 540, 35 N. E. 277 (assessments divided by the county auditor); Therriault *v.* Du Lac, 24 Quebec Super. Ct. 217.

A town vote may be necessary. Flint, etc., R. Co. *v.* Auditor-Gen., 41 Mich. 635, 2 N. W. 835.

Only at regular meetings can assessments be made. Mansur *v.* Aroostook County, 83 Me. 514, 22 Atl. 358; Appleton *v.* Piscataquis County, 80 Me. 284, 14 Atl. 284, before first regular session after appeal disposed of.

Commissioners interested cannot make a valid assessment. State *v.* Bergen County Cir. Ct., 64 N. J. L. 536, 45 Atl. 981 (commissioner a property-owner in the village); Kingsland *v.* Union Tp., 37 N. J. L. 268.

76. Wells County *v.* Fahlor, 132 Ind. 426, 31 N. E. 1112; Tucker *v.* O'Neal, 130 Ind. 597, 30 N. E. 533; Tucker *v.* Sellers, 130 Ind. 514, 30 N. E. 531; Johnson *v.* Wells County, 107 Ind. 15, 8 N. E. 1; Fahlor *v.* Wells County, 101 Ind. 167. See also Paulsen *v.* Portland, 149 U. S. 30, 13 S. Ct. 750, 37 L. ed. 637.

77. Kilburn *v.* Essex Public Road Bd., 37 N. J. L. 273. But see Spaulding *v.* Mott, 167 Ind. 58, 76 N. E. 620; State *v.* Essex Public Road Bd., 46 N. J. L. 126.

78. Spaulding *v.* Mott, 167 Ind. 58, 76 N. E. 620 (failure to list lands benefited corrected); Ludlow *v.* Union Tp. Gravel Road Co., 77 Ind. 409 (holding that the sufficiency of the petition cannot be attacked after the

the case of tax assessments generally, may generally be cured by subsequent legislation.[79]

b. Reassessment. Authority usually exists to reassess,[80] when prior assessments prove invalid,[81] to provide additional funds needed,[82] or to supply omission in lands liable.[83] Such reassessment is usually required to be on notice.[84]

3. Liability and Exemption. Personal liability,[85] or liability for personal property,[86] is opposed to the nature of special assessments. Public property is usually[87] but not always[88] deemed to be exempt from local assessment; but exemption from taxation under a general law does not exempt from local assessments.[89]

4. Collection and Enforcement. The assessments, as in the case of tax assessments generally, must be collected by the method authorized by statute,[90] and

assessment has been placed); Ricketts *v.* Spraker, 77 Ind. 371 (sale of bonds at less than par); Hendricks *v.* Gilchrist, 76 Ind. 369 (small parcel of township land listed to another).

79. Mattingly *v.* District of Columbia, 97 U. S. 687, 24 L. ed. 1098. See also Marion, etc., Gravel Road Co. *v.* McClure, 66 Ind. 468.

80. See Goodwin *v.* Warren County, 146 Ind. 164, 44 N. E. 1110; Manor *v.* Jay County, 137 Ind. 367, 34 N. E. 959, 36 N. E. 1101; Tucker *v.* O'Neal, 130 Ind. 597, 30 N. E. 533; Tucker *v.* Sellers, 130 Ind. 514, 30 N. E. 531; Montgomery County *v.* Fullen, (Ind. 1887) 13 N. E. 574; Montgomery County *v.* Fullen, 111 Ind. 410, 12 N. E. 298; Tufts *v.* Lexington, 72 Me. 516; Aldridge *v.* Essex Public Road Bd., 46 N. J. L. 126, holding that the power to appoint new assessors continues until a valid assessment is made.

So long as the original assessment stands no reassessment can be made. Aldridge *v.* Essex Public Road Bd., 51 N. J. L. 166, 16 Atl. 695.

Benefits must not be exceeded on reassessment. Guckien *v.* Rothrock, 137 Ind. 355, 37 N. E. 17; Campbell *v.* Munroe County, 118 Ind. 119, 20 N. E. 772.

81. Aldridge *v.* Essex Public Road Bd., 51 N. J. L. 166, 16 Atl. 695, holding that the power includes an assessment set aside *in toto*, which was itself a reassessment in lieu of one made before, which had been set aside only as to the prosecutors of the writs of certiorari; when assessment set aside before or after the statute was enacted.

82. Goodwin *v.* Warren County, 146 Ind. 164, 44 N. E. 1110; Manor *v.* Jay County, 137 Ind. 367, 34 N. E. 959, 36 N. E. 1101; Montgomery County *v.* Fullen, 111 Ind. 410, 12 N. E. 298.

83. Ricketts *v.* Spraker, 77 Ind. 371; Sand Creek Turnpike Co. *v.* Robbins, 41 Ind. 79; Parker *v.* Burgett, 29 Ohio St. 513. See also Aldridge *v.* Essex Public Road Bd., 51 N. J. L. 166, 16 Atl. 695. *Compare* Glenn *v.* Waddel, 23 Ohio St. 605.

84. Manor *v.* Jay County, 137 Ind. 367, 34 N. E. 959, 36 N. E. 1101; Guckien *v.* Rothrock, 137 Ind. 355, 37 N. E. 17; Wells County *v.* Gruver, 115 Ind. 224, 17 N. E. 290; Wells County *v.* Fahlor, 114 Ind. 176, 15 N. E. 830; Gavin *v.* Wells County, 104 Ind. 201, 3 N. E. 846.

The time and place of meeting of the county board need not be inserted in the notice. Manor *v.* Jay County, 137 Ind. 367, 34 N. E. 959, 36 N. E. 1101.

85. *Illinois.*— Shepherd *v.* Sullivan, 166 Ill. 78, 46 N. E. 720.

Missouri.— Higgins *v.* Ausmuss, 77 Mo. 351.

North Carolina.— Raleigh *v.* Peace, 110 N. C. 32, 14 S. E. 521, 17 L. R. A. 330.

Oregon.— Ivanhoe *v.* Enterprise, 29 Oreg. 245, 45 Pac. 771, 35 L. R. A. 58.

Virginia.— McCrowell *v.* Bristol, 89 Va. 652, 16 S. E. 867, 20 L. R. A. 653.

86. Wyandotte County *v.* Abbott, 52 Kan. 148, 34 Pac. 416. But see Armitage *v.* Crawford County, 24 Pa. Co. Ct. 207, where a tax on bicycles for construction of bicycle sidepath was upheld.

87. *Connecticut.*— State *v.* Hartford, 50 Conn. 89, 47 Am. Rep. 622.

Indiana.— Edgerton *v.* Huntington School Tp., 126 Ind. 261, 26 N. E. 156.

Iowa.— Polk County Sav. Bank *v.* State, 69 Iowa 24, 28 N. W. 416.

Massachusetts.—Worcester County *v.* Worcester, 116 Mass. 193, 17 Am. Rep. 159.

Michigan.— Big Rapids *v.* Mecosta County, 99 Mich. 351, 58 N. W. 358.

New York.— Smith *v.* Buffalo, 159 N. Y. 427, 54 N. E. 62.

88. Bennett *v.* Seibert, 10 Ind. App. 369, 35 N. E. 35, 37 N. E. 1071; Franklin County *v.* Ottawa, 49 Kan. 747, 31 Pac. 788, 33 Am. St. Rep. 396; Boyd *v.* Milwaukee, 92 Wis. 456, 66 N. W. 603; Warner *v.* New Orleans, 87 Fed. 829, 31 C. C. A. 238.

89. *Illinois.*— Illinois, etc., Canal *v.* Chicago, 12 Ill. 403.

Maryland.—Baltimore *v.* Proprietors Green Mount Cemetery, 7 Md. 517.

New Jersey.— Paterson *v.* Society for Establishing Useful Manufactures, 24 N. J. L. 385.

New York.— Buffalo City Cemetery *v.* Buffalo, 46 N. Y. 506. See Fellows *v.* Denniston, 23 N. Y. 420, not a general or state tax.

United States.— Illinois Cent. R. Co. *v.* Decatur, 147 U. S. 190, 13 S. Ct. 293, 37 L. ed. 132.

But see Harvard College *v.* Boston, 104 Mass. 470.

90. Smyth *v.* State, 158 Ind. 332, 62 N. E. 449; Ludlow *v.* Union Tp. Gravel Road Co.,

within the time limited.[91] Payment of an assessment is void unless made to the proper officer.[92]

5. **Disposition of Proceeds.** The money raised must be spent in accordance with statute.[93]

6. **Landowners' Remedies; Costs.** An assessment for highway purposes may be attacked in the manner provided by statute, as by certiorari,[94] objection or remonstance;[95] injunction,[96] or appeal[97] by parties interested,[98] unless the owner is

77 Ind. 409; Odell *v.* De Witt, 53 N. Y. 643; Morse *v.* Williamson, 35 Barb. (N. Y.) 472; Cordes *v.* Brooks, 18 Ohio Cir. Ct. 801, 6 Ohio Cir. Dec. 128; Thompson *v.* Com., 81 Pa. St. 314. See also Morrow *v.* Shober, 19 Ind. App. 127, 49 N. E. 189.

As by sale of the property see Bothwell *v.* Millikan, 104 Ind. 162, 2 N. E. 959, 3 N. E. 816; Longfellow *v.* Quimby, 33 Me. 457, although sale did not bring enough to pay the whole assessment.

More than one system for their enforcement may be available. Napa *v.* Easterby, 76 Cal. 222, 18 Pac. 253; Robinson *v.* Rippey, 111 Ind. 112, 12 N. E. 141.

Recording the fact of completion of a highway is not essential to the collection of the benefits assessed in case of a highway laid out by the superior court. Fenwick Hall Co. *v.* Old Saybrook, 69 Conn. 32, 36 Atl. 1068.

Recovery of money refunded.— The county may obtain by suit a recovery of money refunded on a road tax in reliance on a fraudulent certificate. Walla Walla County *v.* Oregon R., etc., Co., 40 Wash. 398, 82 Pac. 716. But see Dreake *v.* Beasley, 26 Ohio St. 315.

91. Reynolds *v.* Green, 27 Ohio St. 416; Seattle *v.* O'Connell, 16 Wash. 625, 48 Pac. 412. But see Magee *v.* Com., 46 Pa. St. 358, holding that the ordinary statute of limitations does not apply to special assessments.

92. Baier *v.* Hosmer, 107 Wis. 380, 83 N. W. 645.

In an action on gravel road certificates pleading payment but failing to allege payment before assignment or before notice thereof is insufficient. Farmers' Bank *v.* Orr, 25 Ind. App. 71, 55 N. E. 35.

93. Texarkana *v.* Edwards, 76 Ark. 22, 88 S. W. 862; Manor *v.* Jay County, 137 Ind. 367, 34 N. E. 959, 36 N. E. 1101 (paying road bonds); Loesnitz *v.* Seelinger, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 887; New York, etc., R. Co. *v.* Marion County, 48 Ohio St. 249, 27 N. E. 548.

94. Erisman *v.* Burlington County, 64 N. J. L. 516, 45 Atl. 998; Harris County Dist. No. 25 School Trustees *v.* Farmer, 23 Tex. Civ. App. 39, 56 S. W. 555.

95. Sandford *v.* Kearny Tp., 51 N. J. L. 473, 18 Atl. 349, holding that on motion on receipt of report of commissioners the landowner may object to the conduct of commissioners. See Dawson *v.* Barron, 9 Ohio S. & C. Pl. Dec. 706, 8 Ohio N. P. 354, holding that a remonstrance on a separate paper was insufficient as a withdrawal of a petition where it did not indicate whether it was prior or subsequent to the petition.

Objection held to be without merit see Carroll County *v.* Justices, 133 Ind. 89, 30 N. E. 1085, 36 Am. St. Rep. 528 (that some petioners signed under false representations); Fulton *v.* Cummings, 132 Ind. 453, 30 N. E. 949 (that land not assessed would be benefited); Sandford *v.* Kearny Tp., 51 N. J. L. 473, 18 Atl. 349; State *v.* Hudson, 34 N. J. L. 531.

Agreements should be in writing. Janvrin *v.* Poole, 181 Mass. 463, 63 N. E. 1066. See also *In re* Loyalsock Tp. Road, 26 Pa. Super. Ct. 219.

Objection barred by delay see Bergen County Sav. Bank *v.* Union Tp., 44 N. J. L. 599.

96. Tucker *v.* O'Neal, 130 Ind. 597, 30 N. E. 533; Tucker *v.* Sellers, 130 Ind. 514, 30 N. E. 531; Ludlow *v.* Union Tp. Gravel Road Co., 77 Ind. 409; Stoddard *v.* Johnson, 75 Ind. 20; Paulson *v.* Portland, 16 Oreg. 450, 19 Pac. 450, 1 L. R. A. 673. See also Wardsboro *v.* Jamaica, 59 Vt. 514, 9 Atl. 11.

Injunction refused see Fenwick Hall Co. *v.* Old Saybrook, 69 Conn. 32, 36 Atl. 1068 (although the town failed to construct the road); Florer *v.* McAffee, 135 Ind. 540, 35 N. E. 277 (on ground that money not yet actually needed for bonds or interest); Tucker *v.* O'Neal, 130 Ind. 597, 30 N. E. 533; Tucker *v.* Sellers, 130 Ind. 514, 30 N. E. 531; Loesnitz *v.* Seelinger, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 887; Ricketts *v.* Spraker, 77 Ind. 371 (on ground that county auditor increased the assessment, and that commissioners benefited); Lewis *v.* Laylin, 46 Ohio St. 663, 23 N. E. 288 (for apparent irregularities); Muchmore *v.* Miller, 9 Ohio Dec. (Reprint) 176, 11 Cinc. Bul. 160 (for failure to publish notice of time of meeting).

Where all the land is not assessed that should be an injunction will lie. Hendricks *v.* Indianapolis, etc., Gravel Road Co., 42 Ind. 562; Pavy *v.* Greensburgh, etc., Turnpike Co., 42 Ind. 400; Williams *v.* Greensburgh, etc., Turnpike Co., 42 Ind. 171; Hopkins *v.* Greensburg, etc., Turnpike Co., 40 Ind. 44; Scott *v.* Mt. Auburn, etc., Turnpike Co., 39 Ind. 271; Forgey *v.* Northern Gravel Road Co., 37 Ind. 118; Greencastle, etc., Turnpike Co. *v.* Albin, 34 Ind. 554.

97. Campbell *v.* Munroe County, 118 Ind. 119, 20 N. E. 772 (from order directing reassessment); Nichols *v.* Voorhis, 74 N. Y. 28; *In re* Emmons Ave., 1 N. Y. Suppl. 829.

98. Swindler *v.* Monrovia, etc., Gravel Road Co., 33 Ind. 160, holding that one not a party to the record must file an affidavit of interest.

Only the landowner appealing can take any

estopped,[99] or where the petitioner's land is benefited by the improvement;[1] and statutes sometimes provide for settling assessment disputes by arbitration.[2] A remedy given by statute to the landowner to attack the assessment is commonly exclusive.[3] Costs are awarded in accordance with statute.[4]

C. Poll Taxes. Poll taxes for road purposes are sometimes imposed on able-bodied men,[5] to be collected as provided by statute,[6] upon pleadings setting out the necessary facts.[7]

benefit under it. Stipp *v.* Claman, 123 Ind. 532, 24 N. E. 131; Anderson *v.* Claman, 123 Ind. 471, 24 N. E. 175; Hight *v.* Claman, 121 Ind. 447, 23 N. E. 279.

The whole record is involved in the appeal. Montgomery County *v.* Fullen, 118 Ind. 158, 20 N. E. 771. But see Hildreth *v.* Rutherford, 52 N. J. L. 501, 20 Atl. 60.

Proceedings allowed by statute should be taken on such appeal. Manor *v.* Jay County, 137 Ind. 367, 34 N. E. 959, 36 N. E. 1101; Fleener *v.* Claman, 112 Ind. 288, 14 N. E. 76; State *v.* Essex Public Road Bd., (N. J. Sup. 1889) 17 Atl. 776.

99. Cason *v.* Harrison, 135 Ind. 330, 35 N. E. 268 (where the owner did not appeal); Stipp *v.* Claman, 123 Ind. 532, 24 N. E. 131 (by receiving money for dismissing an appeal from establishment of road); Williams *v.* Pendleton, etc., Turnpike Co., 76 Ind. 87 (by joining to have the road completed and giving note for the amount of the assessment); Marion, etc., Gravel Road Co. *v.* McClure, 66 Ind. 468 (where plaintiff's stood by, having notice of facts rendering the assessments void); Wyandotte County *v.* Arnold, 49 Kan. 279, 30 Pac. 486 (by signing, circulating, and presenting a petition for the improvement, staying in neighborhood during the work); Downs *v.* Wyandotte County, 48 Kan. 640, 29 Pac. 1077; Wyandotte County *v.* Hoag, 48 Kan. 413, 29 Pac. 758; Stewart *v.* Wyandotte County, 45 Kan. 708, 26 Pac. 683, 23 Am. St. Rep. 746.

Mere delay held not to work an estoppel see Speir *v.* Utrecht, 121 N. Y. 420, 24 N. E. 692; Lewis *v.* Symmes, 61 Ohio St. 471, 56 N. E. 194, 76 Am. St. Rep. 428.

Facts held not to constitute estoppel see Pavy *v.* Greensburgh, etc., Turnpike Co., 42 Ind. 400 (not as to stock-holders of a turnpike company who have paid a portion of assessments and stood by while work proceeded); Wyandotte County *v.* Browne, 49 Kan. 291, 30 Pac. 483 (signing a petition in ignorance that it was defective); Barker *v.* Wyandotte County, 45 Kan. 698, 26 Pac. 591 (no knowledge of the defect); Barker *v.* Wyandotte County, 45 Kan. 681, 26 Pac. 585; Dawson *v.* Barron, 9 Ohio S. & C. Pl. Dec. 706, 8 Ohio N. P. 354 (on the ground that the petitioners were too few to give jurisdiction).

1. Downs *v.* Wyandotte County, 48 Kan. 640, 29 Pac. 1077; Burgett *v.* Norris, 25 Ohio St. 308, although assessment was irregular. See also Fenwick Hall Co. *v.* Old Saybrook, 69 Conn. 32, 36 Atl. 1068.

2. Essex Public Road Bd. *v.* Skinkle, 49 N. J. L. 65, 6 Atl. 435 [*affirmed* in 49 N. J. L. 641, 10 Atl. 379], holding that the only parties are the road board and the applicant, and that the only assessments against the applicant are to be considered.

When an assessment is prima facie unjust arbitration may be resorted to in New Jersey on application of a party interested, on which evidence should be taken, and a report made. Essex Public Road Bd. *v.* Skinkle, 49 N. J. L. 65, 6 Atl. 435 [*affirmed* in 49 N. J. L. 641, 10 Atl. 379].

3. Aldridge *v.* Essex Public Road Bd., 51 N. J. L. 166, 16 Atl. 695; St. Benedict's Abbey *v.* Marion County, 50 Oreg. 411, 93 Pac. 231, holding the statutory remedy exclusive unless the method adopted amounts to a fraud. See also State *v.* Marion County, (Ind. 1907) 82 N. E. 482; Ribble *v.* Mathis, 29 Ind. 434.

The burden of proof is on the property-owner. Dawson *v.* Barron, 9 Ohio S. & C. Pl. Dec. 706, 8 Ohio N. P. 354.

4. Montgomery County *v.* Fullen, 118 Ind. 158, 20 N. E. 771, holding that landowners successfully resisting assessments cannot be compelled to pay the attorney's fees of the board.

5. Sherrick *v* Houston, 29 Ill. App. 381; Moore *v.* Vaughan, 127 Mo. 538, 30 S. W. 162 (proceedings to obtain exemption); Plattekill *v.* Lounsbery, 54 Misc. (N. Y.) 492, 106 N. Y. Suppl. 139 (only where an incorporated village exists in the town). See also Hassett *v.* Walls, 9 Nev. 387.

An able-bodied man within the meaning of the statute is one ordinarily physically able to perform the labor usually performed by able-bodied men on the public roads. Sherrick *v.* Houston, 29 Ill. App. 381.

6. Kinney *v.* People, 52 Ill. App. 359 (holding a provision for complaint within twenty days directory merely); State *v.* Cox, 52 La. Ann. 2049, 28 So. 356 (by judgment ordering a fine or that debtor work); Stone *v.* Bean, 15 Gray (Mass.) 42; Greece *v.* Vick, 126 N. Y. App. Div. 171, 110 N. Y. Suppl. 338 (holding the penalties recoverable only if the town has changed from the labor to the money system).

The county is liable for costs where the proceeding fails. State *v.* Lamping, 31 Wash. 652, 72 Pac. 476.

The remedies are cumulative. Kootenai County *v.* Hope Lumber Co., 13 Ida. 262, 89 Pac. 1054, holding an action for seizure and sale simply an additional remedy. But see Mason County *v.* Simpson, 13 Wash. 250, 43 Pac. 33, holding the remedy to be by seizure and sale of property and not by action on an agreement of the employer of men liable.

7. Lanter *v.* Lathrop, 6 Ohio Dec. (Reprint) 1137, 10 Am. L. Rep. 569 (stating defend-

D. Work on Roads by Taxpayers[8] — **1. Statutory Regulation.** The law in some states allows the taxpayer opportunity to elect to work out his road tax instead of paying it,[9] in which case the work[10] and roads to be worked[11] must be as indicated by statute, as must be also the assessment,[12] assignment,[13] and apportionment of labor.[14]

2. Notice. Notice to work is commonly necessary,[15] in the prescribed form,[16]

ant's age); Mason County *v.* Simpson, 13 Wash. 250, 43 Pac. 33 (residence).

8. **Road work by inhabitants of cities** see Municipal Corporations, 28 Cyc. 854.

9. Taylor *v.* State, 147 Ala. 131, 41 So. 776 (holding that the payment of street taxes in an incorporated town or city is a substitute for the performance of road duty, and one is not liable to both for the same period); Maxwell *v.* Willis, 123 Ga. 319, 51 S. E. 416; Ryerson *v.* State, 24 N. J. L. 622; Miller *v.* Gorman, 38 Pa. St. 309 (holding that there must be an opportunity to work before a warrant for collection issues); Pennsylvania Coal Co. *v.* Kelley, 2 Kulp (Pa.) 41; Utt *v.* Yocum, 8 Luz. Leg. Reg. (Pa.) 277; Alderfer *v.* Snyder, 2 Montg. Co. Rep. (Pa.) 53 (holding that the taxpayer must show a willingness to work). See also Varner *v.* Thompson, 3 Ga. App. 415, 60 S. E. 216; People *v.* Toledo, etc., R. Co., 231 Ill. 514, 83 N. E. 193; People *v.* Toledo, etc., R. Co., 231 Ill. 390, 83 N. E. 186; Cleveland, etc., R. Co. *v.* Randle, 183 Ill. 364, 55 N. E. 728; Ferguson *v.* Moore, 5 Pa. Super. Ct. 353; Ferguson *v.* Moore, 5 Pa. Super. Ct. 349.

After taxes are worked out it is too late to object that the owners have no right to work out taxes in that manner. Com. *v.* Colley Tp., 29 Pa. St. 121.

A second payment on an unauthorized demand of work is voluntary, and gives no right of action against the town. Tufts *v.* Lexington, 72 Me. 516.

This is not in the nature of a poll tax (Pleasant *v.* Kost, 29 Ill. 490; Leedy *v.* Bourbon, 12 Ind. App. 486, 489, 40 N. E. 640; Osborne *v.* Mecklenburg County, 82 N. C. 400), but is more in the nature of a military or jury service (Leedy *v.* Bourbon, *supra*; State *v.* Sharpe, 125 N. C. 628, 34 S. E. 264, 74 Am. St. Rep. 663).

The constitutionality of road work statutes is upheld. Dennis *v.* Simon, 51 Ohio St. 233, 36 N. E. 832; *In re* Foster Tp. Road Tax, 32 Pa. Super. Ct. 51.

10. Tufts *v.* Lexington, 72 Me. 516 (labor performed under contract not allowed as road work); Prince William's Parish Road Com'rs *v.* Blake, 5 Rich. (S. C.) 241. See also State *v.* James, 74 N. C. 393.

It is not for the taxpayer to say what kind of work he will do, or to dictate the time and place when and where he will do it. Pennsylvania Coal Co. *v.* Kelley, 2 Kulp (Pa.) 41.

11. St. Bartholomew's Parish Lower Bd. of Road Com'rs *v.* Murray, 1 Rich. (S. C.) 335, within ten miles of plantation. See also Glover *v.* Simmons, 4 McCord (S. C.) 67, holding that the commissioners of roads have no power to compel an individual to work on his own road.

12. *In re* Hagan, (Kan. 1902) 68 Pac. 1104; Libby *v.* Burnham, 15 Mass. 144; Hampton *v.* Hamsher, 124 N. Y. 634, 26 N. E. 540 [*affirming* 46 Hun 144] (must follow assessment roll); Rinehart *v.* Young, 2 Lans. (N. Y.) 354; Wilson *v.* Bryan, 6 Yerg. (Tenn.) 485 (by county court). See also Hampton *v.* Hamsher, 46 Hun (N. Y.) 144 [*affirmed* in 124 N. Y. 634, 26 N. E. 540, 3 Silv. App. 348].

Assessments held void see Pickering *v.* Pickering, 11 N. H. 141 (value not specified); Wallace *v.* Bradshaw, 55 N. J. L. 117, 25 Atl. 271 (road money on hand for work). See also Libby *v.* Burnham, 15 Mass. 144.

13. Cubit *v.* O'Dett, 51 Mich. 347, 16 N. W. 679 (limited by rights of individuals); State *v.* Clayton, 146 N. C. 599, 60 S. E. 415 (holding that work cannot be adjourned arbitrarily in the middle of the day); State *v.* Yoder, 132 N. C. 1111, 44 S. E. 689; State *v.* Baker, 108 N. C. 799, 13 S. E. 214. See also Creswell *v.* Montgomery, 13 Pa. Super. Ct. 87; Pennsylvania Coal Co. *v.* Kelley, 2 Kulp (Pa.) 41; St. John's Parish Road Com'rs *v.* Keckely, 4 McCord (S. C.) 463; Wilson *v.* Bryan, 6 Yerg. (Tenn.) 485.

No valid assignment held to exist see Tarkington *v.* McRea, 47 N. C. 47 (notwithstanding acquiescence for twenty-five years); Sloan *v.* Hannah, 1 Head (Tenn.) 43 (by county judge sitting alone).

14. Wallace *v.* Bradshaw, 56 N. J. L. 339, 29 Atl. 156; People *v.* Hall, 15 How. Pr. (N. Y.) 76; Buffalo, etc., Plank Road Co. *v.* Lancaster Highway Com'rs, 10 How. Pr. (N. Y.) 237.

15. Chicago, etc., R. Co. *v.* People, 183 Ill. 196, 55 N. E. 643 (holding, however, that notice to a railroad is not required where it has no agent or station); Hamilton *v.* Michel, 12 Rob. (La.) 593; Patterson *v.* Creighton, 42 Me. 367; Burlington, etc., R. Co. *v.* Lancaster County, 4 Nebr. 293 (holding that the fact that the law requires notice to be given to residents only does not invalidate tax on non-residents). But see Sioux City, etc., R. Co. *v.* Osceola County, 45 Iowa 168, holding that lack of notice to work out part of the tax is no authority to restrain collection of the entire tax.

Notice must be proved. Cleveland, etc., R. Co. *v.* Randle, 183 Ill. 364, 55 N. E. 728. See also Hamilton *v.* Michel, 12 Rob. (La.) 593, holding that an inspector's certificate of notice is not conclusive.

16. State *v.* Wainright, 60 Ark. 280, 29 S. W. 981 (need not state what tools to bring); Miller *v.* Gorman, 38 Pa. St. 309

of the requisite time,[17] naming a proper place and time,[18] and must be properly served.[19]

3. Liability and Exemption. The liability is imposed only on able-bodied [20] male [21] residents,[22] between specified ages,[23] with certain exemptions of men engaged in work of a public nature,[24] and other exemptions allowed by law,[25] or defenses

(to non-residents by advertisement); Williams *v.* Wright, 6 Pa. Co. Ct. 497; St. Bartholomew's Parish Lower Bd. of Road Com'rs *v.* Murray, 1 Rich. (S. C.) 335. But see State *v.* Yoder, 132 N. C. 1111, 44 S. E. 689, holding that notice called for three days' labor is no defense for failure to work the two days for which defendant was liable.

Oral notice may be sufficient. Lowry *v.* State, 52 Ark. 270, 12 S. W. 563 (conversation); Sims *v.* Hutcheson, 72 Ga. 437; State *v.* Telfair, 130 N. C. 645, 40 S. E. 976; State *v.* Baker, 108 N. C. 799, 13 S. E. 214.

17. Moore *v.* State, 52 Ark. 265, 12 S. W. 562, holding that where three days' notice is required notice on Saturday is bad as to Tuesday but good as to Wednesday.

18. Mason *v.* Thomas, 36 N. H. 302; Biss *v.* New Haven, 42 Wis. 605.

19. State *v.* Covington, 125 N. C. 641, 34 S. E. 272; State *v.* Sharp, 125 N. C. 628, 34 S. E. 264, 74 Am. St. Rep. 663; St. John's Parish Road Com'rs *v.* Keckely, 4 McCord (S. C.) 463.

Service is void when made on the wife of defendant (Lowry *v.* State, 52 Ark. 270, 12 S. W. 563), or to a third person for delivery to him (State *v.* Wainright, 60 Ark. 280, 29 S. W. 981); or to the overseer of slaves instead of to the owner (James *v.* Clarke County, 33 Ala. 51; Cocke *v.* Copial County Police Bd., 38 Miss. 340).

20. Moss *v.* State, 143 Ala. 86, 39 So. 198; Martin *v.* Gadd, 31 Iowa 75.

Sickness is a valid excuse. Watkins *v.* State, (Miss. 1892) 11 So. 532; State *v.* Covington, 125 N. C. 641, 34 S. E. 272.

21. Wright *v.* Sheppard, 5 Ga. App. 298, 63 S. E. 48. See Beach *v.* Furman, 9 Johns. (N. Y.) 229, *quœre* as to woman freeholder.

22. Helle *v.* Deerfield Tp., 96 Ill. App. 642 (residence held a question for the jury); People *v.* Hall, 15 How. Pr. (N. Y.) 76 (occupant, although not the owner in fee); Woolard *v.* McCullough, 23 N. C. 432; Fraser *v.* Christ Church Parish Road Com'rs, 3 Rich. (S. C.) 326 (islanders held not liable to work on mainland); State *v.* St. George's Parish Road Com'rs, Cheves (S. C.) 95 (the road duty of hired slaves).

The inhabitants of an incorporated city (*Ex p.* Roberts, 28 Tex. App. 43, 11 S. W. 782) or town (De Tavernier *v.* Hunt, 6 Heisk. (Tenn.) 599) cannot be forced to work the roads outside the city or town limits.

Mere sojourners are not commonly liable. Taylor *v.* State, 147 Ala. 131, 41 So. 776; Barber *v.* State, 83 Ark. 246, 103 S. W. 724; State *v.* Hinton, 131 N. C. 770, 42 S. E. 611; Cantrell *v.* Pinkney, 30 N. C. 436 (holding, however, that one residing four months of the year regularly in the state on an estate of his own is liable, although one traveling and remaining more than that would not be); Chinese Tax Cases, 14 Fed. 338, 8 Sawy. 384 (Chinese laborers engaged temporarily in railroad work in district). But liability has been held to exist as to a railroad overseer (English *v.* Batton, 73 Ga. 146), a non-resident laborer for an indefinite period (State *v.* Johnston, 118 N. C. 1188, 23 S. E. 921), and a section hand on a government railroad (Fillmore *v.* Colburn, 28 Nova Scotia 292).

23. Wright *v.* Sheppard, 5 Ga. App. 298, 63 S. E. 48.

24. Lewin *v.* State, 77 Ala. 45 (employee at insane hospital); Dees *v.* State, (Miss. 1890) 7 So. 326 (overseer of another road); Harrington *v.* Newberry Dist. Road Com'rs, 2 McCord (S. C.) 400 (clerks of court); Jackson *v.* State, 101 Tenn. 138, 46 S. W. 450 (national guard). But see State *v.* Craig, 81 N. C. 588, holding a pilot not exempt but excusable when engaged.

Firemen are exempt.— Lewin *v.* State, 77 Ala. 45 (by charter of incorporated fire company); Porter *v.* State, 141 Ind. 488, 40 N. E. 1061; Leedy *v.* Bourbon, 12 Ind. App. 486, 40 N. E. 640. But see Chidsey *v.* Scranton, 70 Miss. 449, 12 So. 545, holding exemption of members of fire company unconstitutional.

Railroad men.— Railroad men have been held exempt (State *v.* Womble, 112 N. C. 862, 17 S. E. 491, 19 L. R. A. 827; State *v.* Hathcock, 20 S. C. 419, 47 Am. Rep. 842; Hawkins *v.* Small, 7 Baxt. (Tenn.) 193. But see State *v.* St. George's Parish Road Com'rs, Cheves (S. C.) 95), while on the other hand exemption of railroad men has been held unconstitutional (Johnson *v.* State, 91 Ala. 70, 9 So. 71. See also Johnson *v.* State, 88 Ala. 176, 7 So. 253).

Exemptions disallowed see James *v.* State, 41 Ark. 451 (mail riders); State *v.* Lawren's Dist. Road Com'rs, Cheves (S. C.) 210 (postmasters); State *v.* Lancaster Dist. Road Com'rs, 3 Hill (S. C.) 314 (warner of the hands).

Exemption at the time of the summons must be shown. Lewin *v.* State, 77 Ala. 45.

25. Ward *v.* State, 88 Ala. 202, 7 So. 298 (one under contract to work for surety); Ithaca Bank *v.* King, 12 Wend. (N. Y.) 390 (banks).

The incorporation into a town of a certain district does not form an exemption. Sanders *v.* Levi, 42 La. Ann. 406, 7 So. 692. See also Ferrand *v.* Bingley, [1903] 2 K. B. 445, 67 J. P. 370, 72 L. J. K. B. 734, 1 Loc. Gov. 845, 89 L. T. Rep. N. S. 333, 19 T. L. R. 592, 52 Wkly. Rep. 79. But see Maus *v.* Logansport, etc., R. Co., 27 Ill. 77, holding inhabitants of corporations not bound to work outside the corporate limits.

to prosecutions.[26] The determination of the question of exemption may be intrusted to the court,[27] or may lie in the exclusive determination of some specified officer.[28]

4. Effect of Failure or Refusal to Work and Proceedings Thereon. Failure to work the roads may subject the delinquent to a fine,[29] which may be collected by civil action,[30] regulated by statute as to the proper court,[31] the party plaintiff,[32] the pleadings,[33] notice,[34] and hearing.[35] Such an action is subject to the usual rules as to evidence,[36] defenses,[37] and appeal.[38] The delinquent may be subjected

That a man works on a cut is no exemption from road duty. St. Bartholomew's Parish Lower Bd. of Road Com'rs *v.* Murray, 1 Rich. (S. C.) 335; State *v.* St. Bartholomew's Parish Road Com'rs, Cheves (S. C.) 109.

26. State *v.* Yoder, 129 N. C. 544, 40 S. E. 3, that defendant presented himself on the appointed day, although the foreman had postponed the work unknown to him. See also Fenton *v.* Peters, 50 Ill. App. 41, holding a denial of liability presumed to cover assessment in any form.

Defense held insufficient see Morris *v.* Greenwood, 73 Miss. 430, 19 So. 105 (payment to employer); State *v.* Gillikin, 114 N. C. 832, 19 S. E. 152 (that defendant did not use the road); State *v.* James, 74 N. C. 393 (that one who cut ditch across road should bridge it). See also Johnson *v.* Scott, 133 Mo. App. 689, 114 S. W. 45, holding that by attempting to obtain a discharge a taxpayer waives the requirement of listing.

The last assignment for highway duty cancels the first. State *v.* Yoder, 132 N. C. 1111, 44 S. E. 689.

27. Moss *v.* State, 143 Ala. 86, 39 So. 198 (question for jury); Forbes *v.* Hunter, 46 N. C. 231 (to court of seven justices); Harmon *v.* Taylor, 15 Lea (Tenn.) 535 (county court); Willaford *v.* Pickle, 13 Lea (Tenn.) 672.

28. Winfield Tp. *v.* Wise, 73 Ind. 71; State *v.* Lancaster Dist. Road Com'rs, 3 Hill (S. C.) 314.

A certificate of exemption is *prima facie* proof. Shideler *v.* Clinton Tp., 23 Ind. 479.

29. Bettis *v.* Nicholson, 1 Stew. (Ala.) 349; Sims *v.* Hutcheson, 72 Ga. 437; State *v.* Sikes, 44 La. Ann. 949, 11 So. 588; New Town Cut *v.* Seabrook, 2 Strobh. (S. C.) 560.

Imprisonment for non-payment of the fine is lawful. Sims *v.* Hutcheson, 72 Ga. 437; Singleton *v.* Holmes, 70 Ga. 407.

The judgment imposing the fine is conclusive.— Rinehart *v.* Young, 2 Lans. (N. Y.) 354; Road Com'rs *v.* Rumph, 10 Rich. (S. C.) 303.

The constitutionality of an ordinance imposing a fine is upheld. St. Martin Parish *v.* Delahoussaye, 30 La. Ann. 1092.

30. Barney *v.* Bush, 9 Ala. 345; Sims *v.* Hutcheson, 72 Ga. 437 (enforced by execution or imprisonment); Prince William's Parish Lower Bd. of Road Com'rs *v.* Trescot, 5 Rich. (S. C.) 278 (after the board itself has ascertained and fixed the fines); St. Peter's Parish Lower Bd. of Road Com'rs *v.* McPherson, 1 Speers (S. C.) 218 (by action of debt).

31. Geneva County *v.* Hall, 93 Ala. 488, 9 So. 727 (justice); Cocke *v.* Copiah County Police Bd., 38 Miss. 340 (circuit court for penalty exceeding fifty dollars); State *v.* Craig, 82 N. C. 668 (justices of the peace); Forbes *v.* Hunter, 46 N. C. 231 (jurisdiction tested by plea in abatement); St. Peter's Parish Lower Bd. of Road Com'rs *v.* Guerard, 1 Speers (S. C.) 215; State *v.* St. Bartholomew's Parish Road Com'rs, Cheves (S. C.) 109 (road commissioners up to twenty dollars).

32. Barney *v.* Bush, 9 Ala. 345 (road overseer); Bettis *v.* Nicholson, 1 Stew. (Ala.) 349; Firebaugh *v.* Blount, 52 Ill. App. 288 (town); Duffy *v.* Averitt, 27 N. C. 455.

33. Slover *v.* Muncy, 22 Mo. 391; Brown *v.* Pratte, 9 Mo. 335; Duffy *v.* Averitt, 27 N. C. 455, holding that the warrant need not show the location of the road.

34. Sims *v.* Hutcheson, 72 Ga. 437; Glover *v.* Simmons, 4 McCord (S. C.) 67. But see Bouton *v.* Neilson, 3 Johns. (N. Y.) 474, holding notice unnecessary.

35. Sims *v.* Hutcheson, 72 Ga. 437, holding a premature hearing valid if defaulter appears.

36. *Alabama.*— Brown *v.* State, 63 Ala. 97, oral evidence that defendant was on the list of those liable for road duty.

Arkansas.— Ford *v.* State, 51 Ark. 103, 10 S. W. 14.

Illinois.— Fenton *v.* Peters, 50 Ill. App. 41, presumption that assessing officers did their duty.

Indiana.— Winfield Tp. *v.* Wise, 73 Ind. 71.

New York.—Walker *v.* Moseley, 5 Den. 102.

North Carolina.— Colvert *v.* Whittington, 33 N. C. 278, presumption that commissioners were sworn.

Texas.— Gross *v.* State, 4 Tex. App. 249, tender to one not authorized to receive it.

The burden of proof is on him who has the affirmative of the issue. Fenton *v.* Peters, 50 Ill. App. 41 (burden of proving payment on defendant); State *v.* Clayton, 146 N. C. 599, 60 S. E. 415 (burden to show overseer's exercise of sound discretion on the state).

37. Sumner *v.* Gardiner, 88 Me. 584, 34 Atl. 524 (defense that chairman of road commissioners not appointed and no bond given); State *v.* Witherspoon, 75 N. C. 222 (defense that report of commissioners is vague); State *v.* Brown, 14 S. C. 380 (defense that rights of landowners are being invaded); St. Paul's Parish Road Com'rs *v.* Morris, 2 Rich. (S. C.) 320 (limitations). See also Reynolds *v.* Foster, 89 Ill. 257.

38. State *v.* Wikoff, 28 La. Ann. 654, holding that the fact that ordinance was claimed

to criminal liability,[39] on proper complaint,[40] warrant,[41] indictment,[42] and evidence.[43]

5. Collection of Taxes Not Worked Out. In those jurisdictions in which the working out of taxes is allowed taxpayers must commonly be given an opportunity to work out their taxes;[44] and when they fail to do the work the taxes may be collected in money by the supervisors or collector of taxes,[45] on demand,[46] and notice of time and place for payment.[47]

STREET USE. A term used to define a judicial limitation upon the general power of the state to devote the highways to uses for the best interests of the public.[1]

STREET WALKING. Parading in the streets by lewd women, to the encouragement or advertisement of their means of livelihood;[2] the offense of a common prostitute offering herself for sale upon the streets at unusual or unreasonable hours, endeavoring to induce men to follow her for the purpose of prostitution.[3] (See Common Night-Walkers, 8 Cyc. 390; and, generally, Prostitution, 32 Cyc. 731.)

STREET WORK. Work upon a street — work in repairing or making a street.[4]

STRESS. Pressure; strain.[5]

STRESS OF WEATHER. Constraint imposed by continued bad weather.[6]

STRETCHING. See Boundaries, 5 Cyc. 868 note 4.

STRICT. Exacting; rigorous; severe;[7] strenuously enjoined and maintained;

to be unconstitutional did not render the case appealable.

39. Waters *v.* State, 117 Ala. 189, 23 So. 28; State *v.* Joyce, 121 N. C. 610, 28 S. E. 366.

Officers acting without authority are liable for maliciously imprisoning another on the ground that he was a road defaulter. Varner *v.* Thompson, 3 Ga. App. 415, 60 S. E. 216.

That after receiving warning defendant worked in another district is a good defense. James *v.* State, 41 Ark. 451.

40. Brown *v.* State, 63 Ala. 97; State *v.* Tracy, 82 Minn. 317, 84 N. W. 1015, holding that the complaint must negative exceptions to act and state for what year assessment was made.

41. State *v.* Yoder, 132 N. C. 1111, 44 S. E. 689; State *v.* Telfair, 130 N. C. 645, 40 S. E. 976 (warrant amended); State *v.* Neal, 109 N. C. 859, 13 S. E. 784 (must negative payment of money in discharge); State *v.* Baker, 108 N. C. 799, 13 S. E. 214 (facts necessary); Glover *v.* Simmons, 4 McCord (S. C.) 67 (must specify amount of fines).

A justice of the peace cannot issue the warrant. State *v.* Sikes, 44 La. Ann. 949, 11 So. 588.

42. State *v.* Snyder, 41 Ark. 226 (holding that it need not show how notice given); State *v.* Covington, 125 N. C. 641, 34 S. E. 272 (need not allege wilfulness); State *v.* Pool, 106 N. C. 698, 10 S. E. 1033 (must state that offense was committed in defendant's territory or that he was notified to attend, and describe the road); State *v.* Smith, 98 N. C. 747, 4 S. E. 517 (must allege liability to work "as a hand"); Bennett *v.* State, 26 Tex. App. 671, 14 S. W. 336 (must allege liability).

43. Waters *v.* State, 117 Ala. 189, 23 So. 28, evidence held competent that defendant was notified by the overseers to work two different roads at about the same time.

44. Miller *v.* Gorman, 38 Pa. St. 309 (injunction against premature collection); Coxe *v.* Sweeney, 10 Pa. Co. Ct. 289; Delaware, etc., R. Co. *v.* O'Hara, 1 Lanc. L. Rev. (Pa.) 147.

45. Barnard *v.* Argyle, 16 Me. 276; Magill *v.* Hellyer, 2 Pa. Dist. 644; Magill's Case, 13 Pa. Co. Ct. 257. See also Dalton Parish Overseers of Poor *v.* North Eastern R. Co., [1900] A. C. 345, 64 J. P. 612, 69 L. J. Q. B. 650, 82 L. T. Rep. N. S. 693, 16 T. L. R. 419; Dent *v.* Labelle, 27 Quebec Super. Ct. 171.

46. Chinese Tax Cases, 14 Fed. 338, 8 Sawy. 384.

47. Dearing *v.* Heard, 15 Me. 247.

1. Sauer *v.* New York, 40 Misc. (N. Y.) 585, 586, 83 N. Y. Suppl. 27.

2. Callaway *v.* Mims, 5 Ga. App. 9, 16, 62 S. E. 654.

3. Pinkerton *v.* Verberg, 78 Mich. 573, 577, 44 N. W. 579, 18 Am. St. Rep. 473, 7 L. R. A. 507.

4. Mill Valley *v.* House, 142 Cal. 698, 700, 76 Pac. 658; Electric Light, etc., Co. *v.* San Bernardino, 100 Cal. 348, 351, 34 Pac. 819; Tanner *v.* Auburn, 37 Wash. 38, 40, 79 Pac. 494, in all of which cases the following language occurs: "'Street work' is a phrase of common usage, and has a well-defined signification."

5. Webster Dict. [*quoted* in Huntington, etc., Transp. Co. *v.* Western Assur. Co., 61 W. Va. 324, 326, 57 S. E. 140].

6. Huntington, etc., Transp. Co. *v.* Western Assur. Co., 61 W. Va. 324, 326, 57 S. E. 140.

7. Century Dict. [*quoted* in Bowman *v.* Little, 101 Md. 273, 299, 61 Atl. 223, 657, 1084].

observed, kept or enforced with rigid exactness; accurate; not wide or loose.[8] (Strict: Construction of — Bond, see Bonds, 5 Cyc. 758; Guaranty, see Guaranty, 20 Cyc. 1425; Statute, see Statutes. Foreclosure of Mortgage, see Mortgages, 27 Cyc. 1647.)

STRICT FORECLOSURE. See Mortgages, 27 Cyc. 1647.

STRICTI JURIS. Literally "Of strict right or law; according to strict law."[9]

STRICTLY. In a strict manner.[10]

STRIFE. Antagonistic contention; contention characterized by anger or enmity; discord; conflict; quarrel.[11]

STRIKE. See Labor Unions, 24 Cyc. 833 note 64; Mines and Minerals, 27 Cyc. 537.

STRIKE OFF. Synonymous with Knock Down,[12] *q. v.*

STRIKING. A term said to imply force, applied with an impetus; a blow.[13]

STRIKING FROM ROLL OF ATTORNEYS. See Attorney and Client, 4 Cyc. 905.

STRIKING OUT. Effacing with a stroke of a pen; removing from a record as being rejected, erroneous, or obsolete.[14] (Striking Out: Appearance in Justice's Court, see Justices of the Peace, 24 Cyc. 532. Application For Rehearing, see Appeal and Error, 3 Cyc. 219. Bill of Exceptions, see Appeal and Error, 3 Cyc. 52. Brief, see Appeal and Error, 2 Cyc. 1018. Cause Which Does Not Survive, see Abatement and Revival, 1 Cyc. 86 note 24. Evidence, see Criminal Law, 12 Cyc. 564; Trial. Indorsement of — Negotiable Instrument, see Commercial Paper, 7 Cyc. 796; Payment on Negotiable Instrument Entered by Mistake, see Commercial Paper, 7 Cyc. 1039. Lien, Claim, or Statement, see Mechanics' Liens, 27 Cyc. 209. Matter in — Deed, see Deeds, 13 Cyc. 722; Instrument in General, see Alterations of Instruments, 2 Cyc. 137; Note as Affecting Bona Fides of Purchaser, see Commercial Paper, 7 Cyc. 949; Pleading,

8. Standard Dict. [*quoted* in People *v.* Gardiner, 33 N. Y. App. Div. 204, 207, 53 N. Y. Suppl. 451].

"There are degrees of strictness, and 'strict' proof is not 'strictest' proof." Bowman *v.* Little, 101 Md. 273, 299, 61 Atl. 223, 657, 1084.

"Strict care" see Hayes *v.* Continental Casualty Co., 98 Mo. App. 410, 418, 72 S. W. 135.

"Strict compliance" may be satisfied by substantial but not by mere formal compliance. Hoormann *v.* Climax Cycle Co., 9 N. Y. App. Div. 579, 585, 41 N. Y. Suppl. 710.

"Strict construction" see Barber Asphalt Paving Co. *v.* Watt, 51 La. Ann. 1345, 1351, 26 So. 70 [*citing* Black L. Dict.].

"Strict measure" see Andrews *v.* Rue, 34 N. J. L. 402, 403.

"Strictest vigilance" see Waller *v.* Hannibal, etc., R. Co., 83 Mo. 608, 615.

9. Black L. Dict.

"A license to trade with the enemy in time of war, is said to be *stricti juris.* By this is meant, in its ordinary application, that the license granted to the person, is to be construed strictly, as to the extent of the power granted to him by it; in respect to the manner in which he may exercise it; the objects in which he may trade; the person with whom he may deal; the times and circumstances in which he may exercise the power; the good faith on his part in his use of it; the inability to transfer it to others or enable others to trade under it." Graham *v.* Merrill, 5 Coldw. (Tenn.) 622, 629.

10. Century Dict.

"Strictly alimentary" see *In re* FitzGerald, [1904] 1 Ch. 573, 595, 73 L. J. Ch. 436, 90 L. T. Rep. N. S. 266, 20 T. L. R. 332, 52 Wkly. Rep. 432.

"Strictly choice" see Ennis Brown Co. *v.* Hurst, 1 Cal. App. 752, 761, 82 Pac. 1056; Long *v.* J. K. Armsby Co., 43 Mo. App. 253, 260.

"Strictly confidential relation" see Confidential Relations, 8 Cyc. 564 note 1.

"Strictly in rem" see Bartero *v.* Real Estate Sav. Bank, 10 Mo. App. 76, 78.

11. Century Dict.

It does not necessarily imply blows. It may be evidenced by passionate words, looks, and gestures. State *v.* Warner, 34 Conn. 276, 279.

12. State *v.* Hoboken Second Nat. Bank, 84 Md. 325, 331, 35 Atl. 889; Sherwood *v.* Reade, 7 Hill (N. Y.) 431, 439.

13. Com. *v.* Gallagher, 6 Metc. (Mass.) 565, 568, where it is held that evidence of throwing a person to the ground and holding him "jammed down" to the ground did not support an allegation of "striking."

"Striking a balance" in the sense of agreeing upon a balance see Rose *v.* Bradley, 91 Wis. 619, 622, 65 N. W. 509.

Striking jury see Juries, 24 Cyc. 96.

A verdict of guilty of "striking with intent to kill" will not authorize a sentence for "striking with a dangerous weapon with intent to kill." State *v.* Bellard, 50 La. Ann. 594, 595, 23 So. 504, 69 Am. St. Rep. 461.

14. Century Dict.

see PLEADING, 31 Cyc. 615; Will as Revocation, see WILLS. Motion, see MOTIONS, 28 Cyc. 15. Parties — In General, see PLEADING, 31 Cyc. 480; Power of Appellate Court, see APPEAL AND ERROR, 3 Cyc. 429. Pleading — In General, see EQUITY, 16 Cyc. 315; PLEADING, 31 Cyc. 615, 616; Admissibility of Evidence Under Allegation Stricken Out, see PLEADING, 31 Cyc. 684.)

STRING. A term said to mean, broadly, a ribbon.[15]

STRINGER. In mining parlance, a seam; a term commonly understood to be a crack or crevice filled by mineral deposit, and occurring in the country rock.[16]

STRIP. A narrow piece, comparatively long.[17]

STRONG. As applied to evidence, cogent; powerful; calculated to make a deep or effectual impression upon the mind.[18]

STRONG BEER. A malt inebriating liquor;[19] the name of a species of beer made of malt and hops.[20]

STRUCK JURY. See JURIES, 24 Cyc. 96.

STRUCK OFF. See STRIKE OFF, *ante*, p. 336.

STRUCTURAL DAMAGES. A term which has been used as referring to injuries to property caused by shocks of explosions of dynamite, flying stones, etc., during the progress of work upon a railroad.[21]

STRUCTURE. In its widest sense, any production or piece of work artificially built up, or composed of parts joined together in some definite manner; any construction;[22] a joining together, to construct; connected construction;[23] something composed of parts or portions which have been put together by human exertion.[24] In a more restricted sense, a building of any kind, but chiefly a building of some size or of magnificence; an edifice;[25] something joined together, built, constructed;[26] something which is arranged, built, or constructed;[27] that which is built; a building; especially a building of some size or magnificence; an edifice;[28] that which is built or constructed;[29] an edifice or building of any kind;[30] a fit-

15. William Mann Co. *v.* Kalamazoo Loose Leaf Binder Co., 168 Fed. 284, 289.

16. McShane *v.* Kenkle, 18 Mont. 208, 215, 44 Pac. 979, 56 Am. St. Rep. 579, 33 L. R. A. 851.

"Country rock" defined see 11 Cyc. 617.

"Seam" defined see MINES AND MINERALS, 27 Cyc. 539.

17. Century Dict.; Webster Dict. [both *quoted* in Magone *v.* Vom Cleff, 70 Fed. 980, 981, 17 C. C. A. 549].

"Strip of land" see Sisson *v.* Cummings, 35 Hun (N. Y.) 22, 25.

Steel strips see 36 Cyc. 1272.

18. Hernandez *v.* State, 18 Tex. App. 134, 150, 51 Am. Rep. 295.

"The words 'strong' and 'weak' are relative terms, both having reference to the medium of the class to which they are applied — one being above and the other below it." People *v.* Crilley, 20 Barb. (N. Y.) 246, 248.

As used in a representation for the purpose of securing credit that the company was "strong," the term means financially strong or able. People *v.* Jefferey, 82 Hun (N. Y.) 409, 413, 31 N. Y. Suppl. 267.

"Strong corroborating circumstances" see Russell *v.* Com., 3 Bush (Ky.) 469, 470.

"Strong implication" see *Ex p.* Lewis, 45 Tex. Cr. 1, 19, 73 S. W. 811, 108 Am. St. Rep. 929.

"Strongly corroborated" see Hernandez *v.* State, 18 Tex. App. 134, 150, 51 Am. Rep. 295.

19. People *v.* Wheelock, 3 Park. Cr. (N. Y.) 9, 15, where it is said that it is similar in character to "Dutch beer," which is also "a malt inebriating liquor."

20. Black Intox. Liquors [*quoted* in Potts *v.* State, 50 Tex. Cr. 368, 369, 97 S. W. 477, 123 Am. St. Rep. 847, 7 L. R. A. N. S. 194, where it is distinguished from "small beer"].

21. *Re* Toronto, etc., R. Co., 28 Ont. 14, 18.

22. Favro *v.* State, 39 Tex. Cr. 452, 453, 46 S. W. 932, 73 Am. St. Rep. 950; Century Dict. [*quoted* in Lewis *v.* State, 69 Ohio St. 473, 482, 69 N. E. 980; Karasek *v.* Peier, 22 Wash. 419, 425, 61 Pac. 33, 50 L. R. A. 345].

23. Webster Dict. [*quoted* in Phœnix Ins. Co. *v.* Luce, 11 Ohio Cir. Ct. 476, 483, 5 Ohio Cir. Dec. 210].

24. Haskell *v.* Gallagher, 20 Ind. App. 224, 50 N. E. 485, 67 Am. St. Rep. 250.

25. Conley *v.* Lackawanna Iron, etc., Co., 94 N. Y. App. Div. 149, 152, 88 N. Y. Suppl. 123; Webster Dict. [*quoted* in Anderson *v.* State, 17 Tex. App. 305, 310].

26. Worcester Dict. [*quoted* in Giant Powder Co. *v.* Oregon Pac. R. Co., 42 Fed. 470, 473, 8 L. R. A. 700].

27. Webster Dict. [*quoted* in Chaffee *v.* Union Dry Dock Co., 68 N. Y. App. Div. 578, 583, 73 N. Y. Suppl. 908].

28. Webster Dict. [*quoted* in Karasek *v.* Peier, 22 Wash. 419, 424, 61 Pac. 33, 50 L. R. A. 345].

29. Favro *v.* State, 39 Tex. Cr. 452, 453, 46 S. W. 932, 73 Am. St. Rep. 950; Bouvier L. Dict. [*quoted* in Chaffee *v.* Union Dry Dock Co., 68 N. Y. App. Div. 578, 583, 73 N. Y. Suppl. 908].

30. Favro *v.* State, 39 Tex. Cr. 452, 453, 46 S. W. 932, 73 Am. St. Rep. 950.

ting together, adjustment, building, erection; a building; edifice; structure; the act of building or constructing; a building up; that which is built or constructed; an edifice or building of any kind.[31]

STRUMPET. See BAWD, 5 Cyc. 676; COMMON NIGHT-WALKERS, 8 Cyc. 390; NIGHT-WALKER, 29 Cyc. 1047; PROSTITUTION, 32 Cyc. 733.

STUBBLE. A term applied to the roots from which sugar cane has been cut.[32]

STUB-BOOK. A term which, it is said, can hardly be called a book of account.[33]

STUB TRAIN. A term sometimes used in referring to a train composed of but two cars.[34]

STUDENT. A person who is engaged in a course of study, either general or special.[35] (Student: Child of Chinese Laborer, see ALIENS, 2 Cyc. 125 note 77. Domicile, see DOMICILE, 14 Cyc. 850. In College or University — Limiting Credit of, see COLLEGES AND UNIVERSITIES, 7 Cyc. 298; Regulation of Conduct of, see COLLEGES AND UNIVERSITIES, 7 Cyc. 288. In Naval Academy, see ARMY AND NAVY, 3 Cyc. 836. In School, see SCHOOLS AND SCHOOL-DISTRICTS, 35 Cyc. 1110. Qualification as Voter, see ELECTIONS, 15 Cyc. 292. Sale of Liquor to, see INTOXICATING LIQUORS, 23 Cyc. 197.)

STUD POKER or **STUD-HORSE POKER.** A game of chance played with cards said to come within the class of games designated by the term "poker."[36] (See POKER, 31 Cyc. 899. See, generally, GAMING, 25 Cyc. 873.)

31. Century Dict. [*quoted* in Lewis *v.* State, 69 Ohio St. 473, 482, 69 N. E. 980].

When a building has been torn down it ceases to be a "building or structure" which may be the subject of arson. Mulligan *v.* State, 25 Tex. App. 199, 202, 7 S. W. 664, 8 Am. St. Rep. 435.

The term has been held to include: A bay window. State *v.* Kean, 69 N. H. 122, 126, 45 Atl. 256, 48 L. R. A. 102. A boiler and engine constructed upon permanent foundations. Phœnix Ins. Co. *v.* Luce, 11 Ohio Cir. Ct. 476, 483, 5 Ohio Cir. Dec. 210. A car. Caddy *v.* Interborough Rapid Transit Co., 125 N. Y. App. Div. 681, 683, 110 N. Y. Suppl. 162. A fence. Karasek *v.* Peier, 22 Wash. 419, 424, 61 Pac. 33, 50 L. R. A. 345. An office in the corner of a hardware room made of pickets four feet high, one inch square, and three inches apart, in which the account books, etc., of a lumber company were kept. Anderson *v.* State, 17 Tex. App. 305, 310. Railroad tracks. New York, etc., R. Co. *v.* New Haven, 70 Conn. 390, 396, 39 Atl. 597. A vessel. Chaffee *v.* Union Dry Dock Co., 68 N. Y. App. Div. 578, 583, 73 N. Y. Suppl. 908; Gruner *v.* Texas Co., 117 N. Y. Suppl. 741, 742.

The term has been held not to include: A fence inclosing a right of way. State *v.* Walsh, 43 Minn. 444, 445, 45 N. W. 721. A portable boiler. Conley *v.* Lackawanna Iron, etc., Co., 94 N. Y. App. Div. 149, 152, 88 N. Y. Suppl. 123. A train. Lee *v.* Barkhampsted, 46 Conn. 213, 217.

In mechanic's lien laws.— The term has been held to include: An aqueduct. Nash *v.* Com., 174 Mass. 335, 336, 54 N. E. 865. A building. Collins *v.* Drew, 50 How. Pr. (N. Y.) 477, 479. A canal partly constructed. Pacific Rolling Mill Co. *v.* Bear Valley Irr. Co., 120 Cal. 94, 96, 52 Pac. 136, 65 Am. St. Rep. 158. A mine or pit sunk within a mining claim. Helm *v.* Chapman, 66 Cal. 291, 292, 5 Pac. 352. An oil well with derrick, engine, boiler, pumps, piping, and other appliances attached thereto. Haskell *v.* Gallagher, 20 Ind. App. 224, 50 N. E. 485, 67 Am. St. Rep. 250. Poles planted in the ground and connected together by wires and insulators for the transmission of electricity. Forbes *v.* Willamette Falls Electric Co., 19 Oreg. 61, 62, 23 Pac. 670, 20 Am. St. Rep. 793. A railroad. Ban *v.* Columbia So. R. Co., 117 Fed. 21, 31, 54 C. C. A. 407; Giant Powder Co. *v.* Oregon Pac. R. Co., 42 Fed. 470, 473, 8 L. R. A. 700. See *contra*, Rutherfoord *v.* Cincinnati, etc., R. Co., 35 Ohio St. 559, 565. A reservoir for an electric light plant for the purpose of storing water sufficient to supply a steam engine operating such plant. Brush Electric Co. *v.* Warwick Electric Mfg. Co., 6 Ohio S. & C. Pl. Dec. 475, 478, 7 Ohio N. P. 279. On the other hand the term has been held not to include: A mining claim. Williams *v.* Mountaineer Gold Min. Co., 102 Cal. 134, 139, 34 Pac. 702. Swings or seats in a dancing hall. Lothian *v.* Wood, 55 Cal. 159, 163.

32. Viterbo *v.* Freidlander, 120 U. S. 707, 734, 7 S. Ct. 962, 30 L. ed. 776.

As used in the contract, the term may be shown to include and designate whatever is left on the ground after the harvest time. Callahan *v.* Stanley, 57 Cal. 476, 478.

33. Noble *v.* Douglass, 56 Kan. 92, 96, 42 Pac. 328.

34. Carl *v.* Chicago, etc., R. Co., 63 Iowa 417, 425, 426, 16 N. W. 69, 19 N. W. 308.

35. Century Dict.

36. See Flynn *v.* State, 34 Ark. 441, 442, where it is said that the proof showed that defendant bet chips or checks, at a game played with cards, called "stud" or "stud-horse" poker — and that the game was a variation of the game of poker, being somewhat different from certain other games called "straight poker" and "draw poker," but decided, as to results, by show of the cards, and by high cards, pairs, and threes, as in common poker.

STUFF. A generic term signifying material;[37] a material out of which anything can be made;[38] trash; nonsense; foolish or irrational language.[39]

STUFFING THE BALLOT-BOX. The offense of fraudulently and clandestinely putting and placing in a ballot-box, ballots which have not been voted at the election before the ballots, then and there lawfully deposited in the same ballot-box, have been counted, with intent thereby to affect such election and the result thereof.[40] (See ELECTIONS, 15 Cyc. 442.)

STUMP. The part of the tree or plant remaining in the earth after the stem or trunk is cut off; the stub.[41]

STUMPAGE. See LOGGING, 25 Cyc. 1547.

STUMP-TAIL. A term applied to depreciated currency.[42]

STUPID MAN. A man who is very dull, wanting in understanding.[43]

STUPOR. A suspension or great diminution of sensibility; a state in which the faculties are deadened or dazed.[44]

STYLE. MODE (*q. v.*) or MANNER (*q. v.*).[45]

SUA CUIQUE DOMUS ARX ESTO. A maxim meaning "Let every man's house be his castle."[46]

SUA SPONTE. Literally "Of his or its own will or motion; voluntarily; without prompting or suggestion."[47] (Sua Sponte: Amendment or Correction of Judgment, see JUDGMENTS, 23 Cyc. 876. Assumption of Jurisdiction, see COURTS, 11 Cyc. 670. Continuance of Action, see CONTINUANCES IN CIVIL CASES, 9 Cyc. 81; CONTINUANCES IN CRIMINAL CASES, 9 Cyc. 166. Direction of Verdict, see TRIAL. Dismissal of — Action on, see DISMISSAL AND NONSUIT, 14 Cyc. 458; Appeal, see APPEAL AND ERROR, 3 Cyc. 182. New Trial, see NEW TRIAL, 29 Cyc. 921. Reference, see REFERENCES, 34 Cyc. 794. Rejection of Juror, see JURIES, 24 Cyc. 312. Vacation — Of Judgment, see JUDGMENTS, 23 Cyc. 948; Or Modification of Order, see ORDERS, 29 Cyc. 1520.)

SUBAGENT. An under agent; a substituted agent; an agent appointed by one who is himself an agent.[48] (Subagent: Admissions by, see EVIDENCE, 16 Cyc. 1014. Authority — Of Agent to Employ, see PRINCIPAL AND AGENT, 31 Cyc. 1380, 1429; Of Factor or Broker to Employ, see FACTORS AND BROKERS, 5 Cyc. 152, 192; Of General Manager of Insurance Company to Employ, see INSURANCE, 22 Cyc. 1431; To Bind Common Carrier, see CARRIERS, 6 Cyc. 431 note 78; To Make Commercial Paper For Corporations, see CORPORATIONS, 10 Cyc. 931. Employment of in Collection of Paper by Bank, see BANKS AND BANKING, 5 Cyc. 502. Liability of Principal For — Compensation of, see PRINCIPAL AND AGENT, 31 Cyc. 1519; Torts of, see PRINCIPAL AND AGENT, 31 Cyc. 1587. Notice to as Notice to Principal, see PRINCIPAL AND AGENT, 31 Cyc. 1597. Right of Agent to Commissions on Business Done by, see INSURANCE, 22 Cyc. 1441.)

SUB CLYPEO LEGIS NEMO DECIPITUR. A maxim meaning "No one is deceived under the protection of the law."[49]

37. Walker Dict. [*quoted* in *In re* St. Luke's Parish, [1904] P. 257, 267, 20 T. L. R. 422].

38. Johnson Dict. [*quoted* in *In re* St. Luke's Parish, [1904] P. 257, 267, 20 T. L. R. 422].

39. State *v.* Weems, 96 Iowa 426, 442, 443, 65 N. W. 387, where it was held that the meaning of the term as used in a question to a witness, asking him if "it is going to benefit you to tell that stuff," is "falsehood" and was properly excluded as incompetent.

40. *Ex p.* Siebold, 100 U. S. 371, 378, 25 L. ed. 717.

41. Webster Dict. [*quoted* in Cremer *v.* Portland, 36 Wis. 92, 96, where it was held that in a complaint alleging that the injuries to plaintiff were caused by a large stump in the road, it was unnecessary to allege that the stump was attached to the soil].

42. Webster *v.* Pierce, 35 Ill. 158, 163.

43. Ryan *v.* Canada Southern R. Co., 10 Ont. 745, 753.

"**Stupidly drunk**" see 14 Cyc. 1088 note 19.

44. Baldridge *v.* State, 45 Tex. Cr. 193, 197, 74 S. W. 916, where it is said that it means a different thing from "excitement."

45. Gorey *v.* Kelly, 64 Nebr. 605, 608, 90 N. W. 554, where such is held to be the meaning of the term when used in reference to the manner of living of a person.

46. Morgan Leg. Max [*citing* Halkerstone Leg. Max.].

47. Black L. Dict.

48. Black L. Dict.

49. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].

SUB CONDITIONE. Literally "Upon condition."[50] Words of condition.[51] (See ITA QUOD, 23 Cyc. 371; PROVISO, 32 Cyc. 744 note 59; and, generally, COVENANTS, 11 Cyc. 1035; DEEDS, 13 Cyc. 505.)

SUBCONTRACT. A contract by one who has contracted for the performance of labor or service with a third party for the whole or part performance of that labor or service;[52] a contract under another.[53]

SUBCONTRACTOR. An under contractor — one who takes under the original contract, and is to perform in accordance with the original contract, and presumably with knowledge of the terms and conditions of the original contract;[54] one who contracts for the principal contractor.[55] (Subcontractor: Action Against County by, see COUNTIES, 11 Cyc. 488. As Independent Contractor, see MASTER AND SERVANT, 26 Cyc 1552. Distinguished From Contractor, see MECHANICS' LIENS, 27 Cyc. 92. Liability For Injuries to Third Persons, see MASTER AND SERVANT, 26 Cyc. 1556. Oral Agreement With by Owner of Building in Course of Construction Under Contract, see FRAUDS, STATUTE OF, 20 Cyc. 182. Payment to, Effect on Lien of — Contractor, see MECHANICS' LIENS, 27 Cyc. 303; His Employees, see MECHANICS' LIENS, 27 Cyc. 304. Right of to Complain of Alteration of Instrument, see ALTERATIONS OF INSTRUMENTS, 2 Cyc. 189 note 46. Rights and Remedies — As to Building Contract, see BUILDERS AND ARCHITECTS, 6 Cyc. 80, 83; As to Contracts For Public Improvement, see MUNICIPAL CORPORATIONS, 28 Cyc. 1063; SCHOOLS AND SCHOOL-DISTRICTS, 35 Cyc. 968; As to Mechanics' Liens, see MECHANICS' LIENS, 27 Cyc. 96, 231, 314, 325; Of Government Subcontractor, see STATES, 36 Cyc. 871; UNITED STATES; Of Railroad Subcontractor, see RAILROADS, 33 Cyc. 341, 349.)

SUBDITIS ET OBEDIENTIBUS NISI, LEGES FRUSTRA FERUNTUR. A maxim meaning "Laws are made to no purpose, unless those for whom they are made are subject and obedient."[56]

SUBDIVIDE. To divide into smaller parts the same thing or subject matter.[57]

SUBDIVISION. The act of redividing, or separating into smaller parts.[58] (See DIVISION, 14 Cyc. 554; SECTION, 35 Cyc. 1282.)

SUBFREIGHTS. An expression in common use and easily understood, embracing all freights which a charterer stipulates to receive for the carriage of goods,

50. Black L. Dict.

51. Brown *v.* Caldwell, 23 W. Va. 187, 190, 48 Am. Rep. 376 [*citing* Portington's Case, 10 Coke 35*b*, 42*a*, 77 Eng. Reprint 976; Coke Litt. 203*a*, 203*b*].

"For time out of mind, conditions have usually been preceded by such words as *proviso, ita quod* and *sub conditione,* or their modern equivalents." Graves *v.* Deterling, 120 N. Y. 447, 456, 24 N. E. 655; Union College *v.* New York, 65 N. Y. App. Div. 553, 555, 73 N. Y. Suppl. 51.

52. Bouvier L. Dict. [*quoted* in Smith *v.* Wilcox, 44 Oreg. 323, 325, 74 Pac. 708, 75 Pac. 710].

53. Webster Dict.; Worcester Dict. [both *quoted* in Central Trust Co. *v.* Richmond, etc., R. Co., 54 Fed. 723, 724].

54. Avery *v.* Ionia County, 71 Mich. 538, 547, 39 N. W. 742; Erath *v.* Allen, 55 Mo. App. 107, 115.

55. Worcester Dict. [*quoted* in Central Trust Co. *v.* Richmond, etc., R. Co., 54 Fed. 723, 724].

Statutory definition see Herrmann *v.* New York, 130 N. Y. App. Div. 531, 536, 114 N. Y. Suppl. 1107.

For other definitions of the term see MECHANICS' LIENS, 27 Cyc. 96.

56. Morgan Leg. Max. [*citing* Calvin's Case, 7 Coke 1*a*, 13*b*, 77 Eng. Reprint 377].

57. Kansas City *v.* Neal, 122 Mo. 232, 234, 26 S. W. 695.

"Subdivide" counties into school-districts see Reynolds Land, etc., Co. *v.* McCabe, 72 Tex. 57, 59, 12 S. W. 165.

58. Century Dict.

The term embraces a county, which is an established political subdivision of a state, and a precinct, which is an established political subdvision of a county. Caudle *v.* Talladega County, 144 Ala. 502, 504, 39 So. 307.

Justice precincts, cities, and towns are divisions or subdivisions of a county, but where the term "subdivision" was used in reference to the enactment of a local option law, in addition to "justice precincts, cities and towns," it was held that such term was used to point out other subdivisions than those enumerated. *Ex p.* Mills, 46 Tex. Cr. 224, 226, 79 S. W. 555. See also Gilley *v.* Haddox, (Tex. App. 1891) 15 S. W. 714, 715.

A school-district is not a "political subdivision of the State" within the meaning of a state constitution giving the supreme court jurisdiction of an appeal case in which a political subdvision of the state is a party. School Dist. *v.* Boyle, 182 Mo. 347, 348, 81 S. W. 409.

whether he takes the ship by demise or otherwise.[59] (See FREIGHT, 20 Cyc. 844, and Cross-References Thereunder.)

SUBJACENT SUPPORT. See ADJOINING LANDOWNERS, 1 Cyc. 790.

SUBJECT.[60] As an adjective, liable, subordinate, obedient, submissive.[61] As a noun, the thing forming the groundwork;[62] that concerning which something is done;[63] that on which any operation, either mental or material, is performed;[64] that on which anything may be affirmed or predicated;[65] that which is brought under thought or examination; that which is taken up for discussion;[66] that of which anything is affirmed or predicated; the theme of a proposition or discussion; that which is spoken of.[67] In grammatical analysis, that concerning which something is asserted.[68] In government, a term which refers to one who owes obedience

59. American Steel Barge Co. *v.* Chesapeake, etc., Coal Agency Co., 115 Fed. 669, 672, 53 C. C. A. 301.

60. Derived from the Latin *subjectus*, participle of *subjicio*, to lie under. O'Leary *v.* Cook County, 28 Ill. 534, 537.

61. Webster Dict. [*quoted* in People's Bank, etc., Co. *v.* Tissier Hardware Co., 154 Ala. 103, 108, 45 So. 624].

Used in connection with other words.— "Subject always to the approval of the mayor" see Doty *v.* Lyman, 166 Mass. 318, 321, 44 N. E. 337. "Subject to all incumbrances" see Carter *v.* Cemansky, 126 Iowa 506, 510, 102 N. W. 438. "Subject . . . to all lawful claims" see Reed *v.* Penrose, 2 Grant (Pa.) 472, 499. "Subject to an easement or right" see Spero *v.* Shultz, 14 N. Y. App. Div. 423, 425, 43 N. Y. Suppl. 1016. "Subject to average" see Acme Wood Flooring Co. *v.* Marten, 90 L. T. Rep. N. S. 313, 314, 20 T. L. R. 229. "Subject to coinsurance clause" see Phenix Ins. Co. *v.* Wilcox, etc., Guano Co., 65 Fed. 724, 729, 13 C. C. A. 88. "Subject to fires" see Higgins *v.* Long Island R. Co., 129 N. Y. App. Div. 415, 417, 114 N. Y. Suppl. 262. "Subject to jurisdiction thereof" see U. S. *v.* Wong Kim Ark, 169 U. S. 649, 680, 18 S. Ct. 456, 42 L. ed. 890; Elk *v.* Wilkins, 112 U. S. 94, 102, 5 S. Ct. 41, 28 L. ed. 643; Butchers Benev. Assoc. *v.* Crescent City Livestock Landing, etc., Co., 16 Wall. (U. S.) 36, 73, 21 L. ed. 394; *In re* Look Tin Sing, 21 Fed. 905, 906, 10 Sawy. 353. "Subject to law" see Head *v.* Missouri Univ., 19 Wall. (U. S.) 526, 530, 22 L. ed. 160. "Subject to legal investigation" see Middleton *v.* Findla, 25 Cal. 76, 80. "Subject to mortgage" see Hall *v.* Morgan, 79 Mo. 47, 52; Learn *v.* Bagnall, 1 Ont. L. Rep. 472, 475. "Subject to no extrinsic jurisdiction" see Winebrenner *v.* Colder, 43 Pa. St. 244, 253. "Subject to objection" see Morrison *v.* Turnbaugh, 192 Mo. 427, 441, 91 S. W. 152. "Subject to strikes" see Hesser-Milton-Renahan Coal Co. *v.* La Crosse Fuel Co., 114 Wis. 654, 658, 90 N. W. 1094. "Subject to the agreement" see St. Louis Consol. Coal Co. *v.* Peers, 166 Ill. 361, 372, 46 N. E. 1105, 38 L. R. A. 624. "Subject to the condition" see Skinner *v.* Shepard, 130 Mass. 180, 181. "Subject to the debts" see King *v.* Isreal, 19 Misc. (N. Y.) 159, 160, 43 N. Y. Suppl. 306. "Subject to the payment" see Stebbins *v.* Hall, 29 Barb. (N. Y.) 524, 529. "Subject to the terms and conditions" see Whipple *v.* North British, etc., F. Ins. Co., 11 R. I. 139, 140. "Subject to waiver" see Morrison *v.* Insurance Co. of North America, 69 Tex. 353, 362, 6 S. W. 605, 5 Am. St. Rep. 63. "Under and subject" see American Academy of Music *v.* Smith, 54 Pa. St. 130, 132.

Distinguished from "liable" see Webster Dict. [*quoted* in Albert *v.* Gibson, 141 Mich. 698, 703, 105 N. W. 19; Beasley *v.* Linehan Transfer Co., 148 Mo. 413, 421, 50 S. W. 87].

The phrase "shall be subject to taxation" means "shall be liable to taxation." Mississippi Mills *v.* Cook, 56 Miss. 40, 52.

"Subject to a mortgage" means "subject to the debt secured by the mortgage." Colt *v.* Sears Commercial Co., 20 R. I. 64, 72, 37 Atl. 311.

"There is a significant difference between the expression 'subject to a mortgage,' and 'subject to "the payment" of a certain debt.'" Dingeldein *v.* Third Ave. R. Co., 37 N. Y. 575, 578.

62. O'Leary *v.* Cook County, 28 Ill. 534, 537, where it is said: "It may contain many particulars which grow out of it, and are germain to it, and which if traced back, will lead the mind to it as the generic head."

63. Miller *v.* Miller, 104 Iowa 186, 189, 73 N. W. 484.

64. Glen, etc., Mfg. Co. *v.* Hall, 61 N. Y. 226, 236, 19 Am. Rep. 278.

65. *In re* Mayer, 50 N. Y. 504, 507; Yellow River Imp. Co. *v.* Arnold, 46 Wis. 214, 226, 49 N. W. 971.

66. Webster Dict. [*quoted* in People *v.* Parvin, (Cal. 1887) 14 Pac. 783, 784].

67. Webster Dict. [*quoted* in State *v.* King County Super. Ct., 28 Wash. 317, 325, 68 Pac. 957, 92 Am. Rep. 831].

A broader term than object.— "One 'subject' may contain many 'objects.'" *Ex p.* Hernan, 45 Tex. Cr. 343, 346, 77 S. W. 225.

Not synonymous with "substance" see *Ex p.* Black, 144 Ala. 1, 6, 40 So. 133.

"Subject of the court's jurisdiction" and "subject-matter of the particular action" distinguished see Jackson *v.* Smith, 120 Ind. 520, 523, 22 N. E. 431.

"Subject of bankruptcy" see U. S. *v.* Pusey, 27 Fed. Cas. No. 16,098, 6 Nat. Bankr. Reg. 284.

"Subject of insurance" see Mecca F. Ins. Co. *v.* Wilderspin, (Tex. Civ. App. 1909) 118 S. W. 1131, 1132.

"Subjects of taxation" see Capital City Water Co. *v.* Montgomery County Bd. of Revenue, 117 Ala. 303, 309, 23 So. 970.

68. Bourland *v.* Hildreth, 26 Cal. 161, 232.

to the laws, and is entitled to partake of the elections into the public office.[69] As a verb, to become subservient to; to cause to become subject or subordinate;[70] to make liable; to bring under the control or action of; to make subservient;[71] to become subservient to or subordinate to.[72]

SUBJECTIVE SYMPTOMS. A term said to refer to symptoms that are related by the patient, that cannot be obtained by the physician, but are learned by questioning the patient.[73]

SUBJECT-MATTER. The cause; the object; the thing in dispute;[74] the matter or thought presented for consideration in some statement or discussion.[75] (Subject-Matter: Of Accord and Satisfaction, see ACCORD AND SATISFACTION, 1 Cyc. 309. Of Account Stated, see ACCOUNTS AND ACCOUNTING, 1 Cyc. 364. Of Action — As Determining Jurisdiction in General, see COURTS, 11 Cyc. 669, 773, 857; JUSTICES OF THE PEACE, 24 Cyc. 445; As Determining Right to Review Decision of Justice of the Peace, see JUSTICES OF THE PEACE, 24 Cyc. 641; As Determining Venue, see VENUE; Identity as Affecting Question of Res Judicata, see JUDGMENTS, 23 Cyc. 1165, 1298; Identity of to Sustain Plea of Former Action Pending, see ABATEMENT AND REVIVAL, 1 Cyc. 27; In Which Attachment Is Authorized, see ATTACHMENT, 4 Cyc. 439; In Which Garnishment Is Authorized, see GARNISHMENT, 20 Cyc. 979; In Which Set-Off or Counter-Claim Is Available, see RECOUPMENT, SET-OFF, AND COUNTER-CLAIM 34 Cyc. 665; Jurisdiction in Cases

69. Respublica *v.* Chapman, 1 Dall. (Pa.) 53, 60, 1 L. ed. 33.

It means a subjection to some sovereign power, and is not barely connected with the idea of territory. Respublica *v.* Chapman, 1 Dall. (Pa.) 53, 60, 1 L. ed. 33.

As used in a treaty with a nation having a monarchical form of government, the term, as applied to persons owing allegiance to such government, must be construed in the same sense as "citizens" or "inhabitants," when applied to persons owing allegiance to the United States. The Pizarro, 2 Wheat. (U. S.) 227, 245, 4 L. ed. 226. See also U. S. *v.* Chong Sam, 47 Fed. 878, 885.

"**'British subject'** means any person who owes permanent allegiance to the Crown. . . . 'Natural-born British subject' means a British subject who has become a British subject at the moment of his birth." Dicey Confl. Laws [*quoted* in U. S. *v.* Wong Kim Ark, 169 U. S. 649, 18 S. Ct. 456, 42 L. ed. 890].

70. Byrne *v.* Drain, 127 Cal. 663, 667, 60 Pac. 433.

71. Shepard, etc., Lumber Co. *v.* Hurd, 128 N. Y. App. Div. 28, 32, 112 N. Y. Suppl. 401; Thorp *v.* Munro, 47 Hun (N. Y.) 246, 249.

72. Century Dict. [*quoted* in Coffey *v.* Sacramento County Super. Ct., 147 Cal. 525, 535, 82 Pac. 75].

As used in an assignment of property "subject to" a deed of trust, the term means "charged with." Bredell *v.* Fair Grounds Real Estate Co., 95 Mo. App. 676, 686, 69 S. W. 635. See also *In re* Hammond, 197 Pa. St. 119, 122, 46 Atl. 935, where it is said that "subject to" and "charged with" are equivalent terms.

A transfer of property "subject to" an existing agreement gives the transferee the benefits as well as the disadvantages provided for in the agreement. Bacon *v.* Grossmann, 71 N. Y. App. Div. 574, 578, 76 N. Y. Suppl. 188.

73. Abbot *v.* Heath, 84 Wis. 314, 316, 54 N. W. 574.

74. Bouvier L. Dict. [*quoted* in Hunt *v.* Hunt, 72 N. Y. 217, 228, 28 Am. Rep. 129; Parker *v.* Lynch, 7 Okla. 631, 650, 56 Pac. 1082].

75. Webster Dict. [*quoted* in Hunt *v.* Hunt, 72 N. Y. 217, 228, 28 Am. Rep. 129].

Distinguished from "cause of action" see State *v.* Torinus, 28 Minn. 175, 180, 9 N. W. 725; Hunt *v.* Hunt, 72 N. Y. 217, 228, 28 Am. Rep. 129. But, as used in a statute, providing that the provisions of a statute, limiting the time for the commencement of a suit for a "cause of action" of which the courts of law and equity have concurrent jurisdiction, shall not extend to suits, over the subject-matter of which a court of equity has peculiar and exclusive jurisdiction, the term is held to be synonymous with "cause of action." Borst *v.* Corey, 15 N. Y. 505, 509.

"Subject-matter of the particular action" distinguished from "subject of the court's jurisdiction" see Jackson *v.* Smith, 120 Ind. 520, 523, 22 N. E. 431.

Subject-matter of suit or action defined with reference to jurisdiction see State *v.* Wolever, 127 Ind. 306, 315, 26 N. E. 762; Hope *v.* Blair, 105 Mo. 85, 93, 16 S. W. 595, 24 Am. St. Rep. 366; Hughes *v.* Cuming, 165 N. Y. 91, 95, 58 N. E. 794; Cooper *v.* Reynolds, 10 Wall. (U. S.) 308, 316, 19 L. ed. 931.

"Subject matter of the action" in personal injury suits are the circumstances and facts out of which the cause of action arises. McAndrews *v.* Chicago, etc., R. Co., 162 Fed. 856, 858, 89 C. C. A. 546.

"The subject-matter [involved in a litigation] is that right which one party claims against the other, and demands judgment of the court upon" (Reed *v.* Muscatine, 104 Iowa 183, 184, 73 N. W. 579; Jacobson *v.* Miller, 41 Mich. 90, 93, 1 N. W. 1013); that which is to be directly affected by the action (Coleman *v.* Chauncey, 7 Rob. (N. Y.) 578, 579).

of Judgment In Rem, see JUDGMENTS, 23 Cyc. 1407; Lis Pendens as Dependent on Jurisdiction of, see LIS PENDENS, 25 Cyc. 1461; Necessity of Justice's Court Record Showing Jurisdiction of, see JUSTICES OF THE PEACE, 24 Cyc. 634; Objection to Jurisdiction of, see APPEAL AND ERROR, 2 Cyc. 680; Validity of Judgment as Dependent on Jurisdiction of, see JUDGMENTS, 23 Cyc. 683; Want of Jurisdiction as Affecting Operation in Other States of Judgments of State Courts, see JUDGMENTS, 23 Cyc. 1563. Of Allegations — In Indictment or Information, see INDICTMENTS AND INFORMATIONS, 22 Cyc. 301; In Pleading in General, see PLEADING, 31 Cyc. 47. Of Alteration, see ALTERATIONS OF INSTRUMENTS, 2 Cyc. 193. Of Arbitration, see ARBITRATION AND AWARD, 3 Cyc. 589. Of Assignment, see ASSIGNMENTS, 4 Cyc. 12. Of Award of Arbitrators, see ARBITRATION AND AWARD, 3 Cyc. 674. Of Bailment, see BAILMENTS, 5 Cyc. 166. Of Chattel Mortgage, see CHATTEL MORTGAGES, 6 Cyc. 1037. Of Compromise, see COMPROMISE AND SETTLEMENT, 8 Cyc. 504. Of Contract — In General, see CONTRACTS, 9 Cyc. 273; Construction and Operation of Contract as to, see CONTRACTS, 9 Cyc. 577; INDEMNITY, 22 Cyc. 84; Of Sale, see SALES, 34 Cyc. 44; VENDOR AND PURCHASER; Sufficiency of Description to Authorize Specific Performance, see SPECIFIC PERFORMANCE, 36 Cyc. 591. Of Counterfeit, see COUNTERFEITING, 11 Cyc. 303. Of Covenant, see COVENANTS, 11 Cyc. 1058. Of Deed, see DEEDS, 13 Cyc. 528. Of Discovery, see DISCOVERY, 14 Cyc. 306. Of Easement, see EASEMENTS, 14 Cyc. 1139. Of Employment to Constitute Relation of Attorney and Client, see ATTORNEY AND CLIENT, 4 Cyc. 928. Of Exceptions, see APPEAL AND ERROR, 2 Cyc. 714. Of Gambling Contract see GAMING, 20 Cyc. 924. Of Gift, see GIFTS, 20 Cyc. 1211, 1237. Of Inspection, see INSPECTION, 22 Cyc. 1365. Of Insurance Policy, see ACCIDENT INSURANCE, 1 Cyc. 238; FIDELITY INSURANCE, 19 Cyc. 516; FIRE INSURANCE, 19 Cyc. 591; LIFE INSURANCE, 25 Cyc. 703; LIVE-STOCK INSURANCE, 25 Cyc. 1516; MARINE INSURANCE, 26 Cyc. 586; PLATE-GLASS INSURANCE, 30 Cyc. 1642. Of Judgment, Construction of Judgments as to, see JUDGMENTS, 23 Cyc. 1104. Of Lease, see LANDLORD AND TENANT, 24 Cyc. 879. Of Lien — In General, see LIENS, 25 Cyc. 669; Of Attorney, see ATTORNEY AND CLIENT, 4 Cyc. 1012. Of Mechanic's Lien, see MECHANICS' LIENS, 27 Cyc. 17. Of Mortgage, see MORTGAGES, 27 Cyc. 1034. Of Partnership, see PARTNERSHIP, 30 Cyc. 354. Of Pledge, see PLEDGES, 31 Cyc. 793. Of Reference, see REFERENCES, 34 Cyc. 777. Of Release, see RELEASE, 34 Cyc. 1090. Of Set-Off or Counter-Claim, see RECOUPMENT, SET-OFF, AND COUNTER-CLAIM, 34 Cyc. 665. Of Statute, see STATUTES, 36 Cyc. 929, and Cross-References. Of Stipulation, see STIPULATIONS. Of Submission of Controversy, see SUBMISSION OF CONTROVERSY. Of Treaty, see TREATIES. Of Trust, see TRUSTS. Of Will, see WILLS.)

SUBJECT OF ACTION. The thing or subject-matter to which the litigation pertains;[76] the ultimate or primary title, right, or interest which a plaintiff seeks to enforce or protect;[77] the facts constituting plaintiff's cause of action;[78] the thing, the wrongful act for which damages are sought, the contract which is broken, the act which is sought to be restrained, the property of which recovery is asked.[79] (See CASE, 6 Cyc. 679; CAUSE, 6 Cyc. 704; CAUSE OF ACTION, 6 Cyc. 705; SUBJECT-MATTER, *ante*, p. 342.)

76. Revere F. Ins. Co. *v.* Chamberlain, 56 Iowa 508, 511, 8 N. W. 338, 9 N. W. 386; Lapham *v.* Osborne, 20 Nev. 168, 172, 18 Pac. 881.

77. McCormick Harvesting Mach. Co. *v.* Hill, 104 Mo. App. 544, 559, 79 S. W. 745, where it is said that it does not signify merely the wrong to be redressed in the particular case.

78. Rothschild *v.* Whitman, 132 N. Y. 472, 476, 30 N. E. 858; Sugden *v.* Magnolia Metal Co., 58 N. Y. App. Div. 236, 240, 68 N. Y. Suppl. 809; Hall *v.* Werney, 18 N. Y. App. Div. 565, 567, 46 N. Y. Suppl. 33; Lehmair *v.* Griswold, 40 N. Y. Super. Ct. 100, 101.

79. Lassiter *v.* Norfolk, etc., R. Co., 136 N. C. 89, 91, 48 S. E. 642.

"The subject of an action is either property (as illustrated by a real action), or a violated right." Glen, etc., Mfg. Co. *v.* Hall, 61 N. Y. 226, 236, 19 Am. Rep. 278.

It is what was formerly understood as "the subject-matter of the action." Box *v.* Chicago, etc., R. Co., 107 Iowa 660, 666, 78 N. W. 694; Baltimore, etc., R. Co. *v.* Hollen-

SUB JUDICE. Literally "Under or before a judge or court; under judicial consideration; undetermined." [80]

SUBLATA CAUSA TOLLITUR EFFECTUS. A maxim meaning "Remove the cause, and the effect will cease." [81]

SUBLATA VENERATIONE MAGISTRATUUM, RESPUBLICA RUIT. A maxim meaning "When respect for magistrates is taken away, the commonwealth falls." [82]

SUBLATO FUNDAMENTO, CADIT OPUS. A maxim meaning "Remove the foundation, the structure falls." [83]

SUBLATO PRINCIPALI, TOLLITUR ADJUNCTUM. A maxim meaning "When the principal is taken away, the incident is taken also." [84]

SUBLEASE. A lease by a tenant to another person of a part of the premises held by him; an underlease.[85] (Sublease: By Husband of Wife's Leasehold Estate, see HUSBAND AND WIFE, 21 Cyc. 1168. Liability For Rent Under, see LANDLORD AND TENANT, 24 Cyc. 1183. Of Railroad, see RAILROADS, 33 Cyc. 402. Of Term For Years, see LANDLORD AND TENANT, 24 Cyc. 962. Persons Entitled to Rent Under, see LANDLORD AND TENANT, 24 Cyc. 1176.)

SUBMERGED LAND. (As Subject of — Appropriation to Public Use, see EMINENT DOMAIN, 15 Cyc. 609; Dedication, see DEDICATION, 13 Cyc. 451. Grants to and Acquisition of Title by Private Owners, see NAVIGABLE WATERS, 29 Cyc. 367. Ownership and Rights in General, see NAVIGABLE WATERS, 29 Cyc. 355. Reclamation and Improvement, see NAVIGABLE WATERS, 29 Cyc. 339. Survey and Disposal of, see PUBLIC LANDS, 32 Cyc. 901.)

SUBMISSION. A yielding to authority.[86] (Submission: Of Case as Waiving — Objections to Pleadings or Want Thereof, see PLEADING, 31 Cyc. 724; Want of Stipulation or Issue Thereon, see PLEADING, 31 Cyc. 735. Of Case on Agreed Statement of Facts, see JUDGMENTS, 23 Cyc. 732; SUBMISSION OF CONTROVERSY. Of Controversy, see SUBMISSION OF CONTROVERSY, *post*, p. 346. Of Issue to Referee, Court, or Jury, Subsequent Amendment of Pleadings, see PLEADING, 31 Cyc. 401, 402. Of Matters in Controversy to Arbitration on Settlement and Accounting of Partnership, see PARTNERSHIP, 30 Cyc. 708. Of Partnership Matters to Arbitration by Individual Partner, see PARTNERSHIP, 30 Cyc. 517. Of Question of — Aiding

berger, 76 Ohio St. 177, 182, 81 N. E. 184; Rodgers *v.* Mutual Endowment Assessment Assoc., 17 S. C. 406, 410. See also Merchants' Nat. Bank *v.* Hagemeyer, 4 N. Y. App. Div. 52, 56, 38 N. Y. Suppl. 626; Parker *v.* Lynch, 7 Okla. 631, 650, 56 Pac. 1082; Bush *v.* Froelick, 8 S. D. 353, 357, 66 N. W. 939.

Distinguished from "cause of action" see Pomeroy Rem. & Rem. Rights [*quoted* in Rodgers *v.* Mutual Endowment Assessment Assoc., 17 S. C. 406, 410].

Not synonymous with "cause of action" see McKinney *v.* Collins, 88 N. Y. 216, 221; Rogers *v.* Wheeler, 89 N. Y. App. Div. 435, 440, 85 N. Y. Suppl. 981; Baltimore, etc., R. Co. *v.* Hollenberger, 76 Ohio St. 177, 181, 81 N. E. 184. See also McCormick Harvesting Mach. Co. *v.* Hill, 104 Mo. App. 544, 559, 79 S. W. 745.

"Jurisdiction of the subject of the action" and "jurisdiction of the action" distinguished see Hartzell *v.* Vigen, 6 N. D. 117, 126, 69 N. W. 203, 66 Am. St. Rep. 589, 35 L. R. A. 451.

In a statute providing that an action for a nuisance must be brought in the county in which the "subject of the action" or some part thereof is situated, the term means that which is to be directly affected, in case the relief demanded by the plaintiff is granted. Horne *v.* Buffalo, 49 Hun (N. Y.) 76, 78, 1 N. Y. Suppl. 801, discussing and construing N. Y. Code Civ. Proc. §§ 982, 983.

80. Black L. Dict. See also Winona, etc., Land Co. *v.* Ebilcisor, 52 Minn. 312, 321, 54 N. W. 91; Crosby *v.* Leng, 12 East 409, 413, 11 Rev. Rep. 437, 104 Eng. Reprint 160.

81. Peloubet Leg. Max. [*citing* 2 Blackstone Comm. 203].

82. Burrill L. Dict. [*citing* Jenkins Cent. 43 case 81].

83. Bouvier L. Dict. [*citing* Jenkins Cent.].

Applied in: Citizens' Bank *v.* Marr, 120 La. 236, 242, 45 So. 115; South Louisiana Land Co. *v.* Riggs Cypress Co., 119 La. 193, 200, 43 So. 1003.

84. Black L. Dict. [*citing* Coke Litt. 389*a*].

85. Black L. Dict.

The employment by a farm tenant of a third person to work thereon, to whom is given possession of a house on the premises, does not constitute a subletting of any part of the premises, within the provisions of the lease prohibiting a subletting without the written consent of the landlord. Vincent *v.* Crane, 134 Mich. 700, 702, 97 N. W. 34.

86. Black L. Dict.

Distinguished from "consent" see State *v.* Cross, 12 Iowa 66, 70, 79 Am. Dec. 519; Reg. *v.* Day, 9 C. & P. 722, 724, 38 E. C. L. 419.

Submission to arbitration see ARBITRATION AND AWARD, 3 Cyc. 587.

Corporation, and Subscribing to or Purchasing Corporate Stock to Popular Vote, see COUNTIES, 11 Cyc. 522; MUNICIPAL CORPORATIONS, 28 Cyc. 1558; Alteration of County to Popular Vote, see COUNTIES, 11 Cyc. 351; Alteration of Municipality to Inhabitants or Owners, see MUNICIPAL CORPORATIONS, 28 Cyc. 209; Amendment of Constitution, see CONSTITUTIONAL LAW, 8 Cyc. 723; Construction of Public Buildings, see COUNTIES, 11 Cyc. 461; Creating New School-Districts to Popular Vote, see SCHOOLS AND SCHOOL-DISTRICTS, 35 Cyc. 839; Expenditure by City to Popular Vote, see MUNICIPAL CORPORATIONS, 28 Cyc. 1548; Grant of License to Use Street to Vote, see MUNICIPAL CORPORATIONS, 28 Cyc. 879; Issue of County Bonds to Popular Vote, see COUNTIES, 11 Cyc. 556; Issue of Municipal Bonds to Popular Vote, see MUNICIPAL CORPORATIONS, 28 Cyc. 1588; Issue of School Bonds to Popular Vote, see SCHOOLS AND SCHOOL-DISTRICTS, 35 Cyc. 990; Levying Taxes by County to Popular Vote, see COUNTIES, 11 Cyc. 580; Levying Taxes by Municipality to Popular Vote, see MUNICIPAL CORPORATIONS, 28 Cyc. 1662; Local Option to Popular Vote, see INTOXICATING LIQUORS, 23 Cyc. 95; Public Improvements to Particular Officer or Board, see MUNICIPAL CORPORATIONS, 28 Cyc. 984; Public Improvements to Popular Vote, see MUNICIPAL CORPORATIONS, 28 Cyc. 957. Of Special Interrogatories, see TRIAL. Of Special Question to Voters, see ELECTIONS, 15 Cyc. 318. To Arbitration — In General, see ARBITRATION AND AWARD, 3 Cyc. 588; Contracts of Municipality, see MUNICIPAL CORPORATIONS, 28 Cyc. 641; Powers of Agents as to, see PRINCIPAL AND AGENT, 31 Cyc. 1392; Powers of Attorney as to, see ATTORNEY AND CLIENT, 4 Cyc. 938; Question of Boundaries, see BOUNDARIES, 5 Cyc. 944. To Competition For Contract For Public Improvement, see MUNICIPAL CORPORATIONS, 28 Cyc. 1025. To Jury — Of Issues in Suits in Equity, see EQUITY, 16 Cyc. 413; Right to, see JURIES, 24 Cyc. 100.)

SUBMISSION OF CONTROVERSY

By Alexander Karst*

I. Definition and Nature, 346
II. Courts Having Jurisdiction, 347
III. Controversies Which May Be Submitted, 348
IV. Requisites of the Submission, 350
A. *Agreement of Facts*, 350
B. *Affidavit of Reality of Controversy*, 352
C. *Pleadings*, 353
D. *Entry of Agreement on Record*, 353
V. Scope of Inquiry and Powers of Court, 353
A. *General Rules*, 353
B. *Inferences of Fact*, 354
C. *Amendment*, 355
VI. Parties, 355
VII. Judgment, Dismissal, and Cancellation, 357
VIII. Costs, 358
IX. Review, 358

CROSS-REFERENCES

For Matters Relating to:
Arbitration and Award, see Arbitration and Award, 3 Cyc. 568.
Entry of Judgment on Consent, Offer, or Admission, see Judgments, 28 Cyc. 728.
Trial, see Trial.
Writ of Error Upon Judgment Rendered Upon Submission of Controversy, see Appeal and Error, 2 Cyc. 622.

I. DEFINITION AND NATURE.

Submission of controversy is a proceeding of statutory origin,[1] whereby the parties submit any matter of real controversy between them for final determination,[2] to any court that would otherwise have jurisdiction,[3] upon an agreed statement of facts,[4] signed by the parties,[5] and supported by an affidavit that the

1. Marx *v.* Brogan, 188 N. Y. 431, 432, 81 N. E. 231 (holding that in New York the practice seems to have had its origin in the report of the commissioners appointed to revise New York practice and procedure under the constitution of 1846); Campbell *v.* Cronly, 150 N. C. 457, 64 S. E. 213; Grandy *v.* Gulley, 120 N. C. 176, 26 S. E. 779 (holding that the practice was unknown at common law); Derby *v.* Jacques, 7 Fed. Cas. No. 3,817, 1 Cliff. 425 (holding that judgments upon agreed statements of fact were unknown at common law, but the general usage of the courts have sanctioned it and it has now become a part of the common law).

Failure to observe the statutory provisions will deprive the court of jurisdiction. Odell *v.* Cromwell, 10 N. Y. Wkly. Dig. 273. But where a complaint is filed giving jurisdiction, and a stipulation is then filed, treated by the court and parties as amending the complaint and raising an issue, the case is not an agreed case, which has to be submitted with the formalities required by the statute to give jurisdiction. Bickford *v.* Kirwin, 30 Mont. 1, 75 Pac. 518.

2. See *infra*, III.
3. See *infra*, II.
4. See *infra*, IV, A.
5. See *infra*, VI.

*Author of "Real Actions," 33 Cyc. 1541; "Slaves," 36 Cyc. 465; "Sodomy," 36 Cyc. 501; "Summary Proceedings," *post*, p. 528; "Leading Principles of Bailments," etc. Joint author of "Religious Societies," 34 Cyc. 1112; Editor of "Seamen," 35 Cyc. 1176.

controversy is real and the proceeding in good faith to determine the rights of the parties.[6] It is a very old practice,[7] and is a substitute for an action,[8] and stands in lieu of a special verdict,[9] and is entirely different from an agreed statement of facts used merely as evidence upon the trial,[10] which is simply the result of an agreement of the parties as to what the evidence in the case will prove.[11] The practice is encouraged whenever the facts can be agreed upon.[12]

II. COURTS HAVING JURISDICTION.

What courts have jurisdiction of a controversy submitted without action, or upon an agreed case, depends upon the statutes regulating the proceeding,[13] it

6. See *infra*, IV, B.

Illustration.— Where it was agreed, in an action to compel an administrator to account, that the court below might decide from the pleadings, admissions, and inspection of an account offered in evidence, whether plaintiff was entitled to judgment, it was in effect a submission of the case as a case agreed. Grant *v.* Hughes, 94 N. C. 231.

Distinguished from trying a case before court without jury.— This practice is quite distinct from the right given by constitution to try a case by consent before the court without a jury. In the former case the court is in the exercise of its inherent functions to decide questions of law submitted to it, while in a trial before the court, sitting, by consent, without a jury, it deals with the facts in all respects as a jury would do. Tyson *v.* Western Nat. Bank, 77 Md. 412, 26 Atl. 520, 23 L. R. A. 161.

Distinguished from arbitration.— A proceeding under the act of June 17, 1887, providing for submission of all matters in controversy to a circuit court judge, from whose decree no appeal shall be taken, is not an arbitration, but is a proceeding in a court of general jurisdiction, either at law or in chancery, according to its nature. Farwell *v.* Sturges, 165 Ill. 252, 46 N. E. 189.

Effect of misnomer of agreement.— Where two persons cause to be filed in the records of the court of common pleas as of a certain term a paper, the caption of which shows that the parties have assumed the positions of plaintiff and defendant, and the body of the paper stipulates that the cause shall be tried by the court without a jury, the court will construe the paper as an agreement for an amicable action under the act of June 13, 1836 (Pamphl. Laws 568), although the parties may have designated the papers as a case stated. Miller *v.* Cambria County, 25 Pa. Super. Ct. 591.

In North Carolina, Code Civ. Proc. § 315, relating to submission of controversy, is still in force, notwithstanding Acts (1868–1869), c. 76, suspending the code in certain cases. Hervey *v.* Edmunds, 68 N. C. 243.

7. Tyson *v.* Western Nat. Bank, 77 Md. 412, 26 Atl. 520, 23 L. R. A. 161.

8. Chicago, etc., R. Co. *v.* Central Trust Co., 41 N. Y. App. Div. 495, 58 N. Y. Suppl. 809 (holding that where a submission, under the code of civil procedure, on agreed facts provided therein that "none of the admissions herein contained are in any wise to affect either party, or to be regarded as made except for the purpose of this controversy upon the foregoing statement," it must be dismissed, for admissions therein must have all the effect which they could have if in pleadings and a judgment thereon); Berlin Iron Bridge Co. *v.* Wagner, 10 N. Y. Suppl. 215.

A submission of controversy must be tried at general term not at special term. Waring *v.* O'Neill, 15 Hun (N. Y.) 105.

A code provision allowing submission of controversy contains no authority for the submission of an action, but relates solely to the submission of questions of difference without action. Smith *v.* Smith, 111 Mo. App. 683, 86 S. W. 586 (holding that Rev. St. (1899) § 793, providing for the submission of controversies without action, does not apply to the submission of an ordinary action on an agreed statement of facts); Van Sickle *v.* Van Sickle, 8 How. Pr. (N. Y.) 265.

9. Kinkle *v.* Kerr, 148 Mo. 43, 49 S. W. 864; Rannells *v.* Isgrigg, 99 Mo. 19, 12 S. W. 343; Peake *v.* Webb, 132 Mo. App. 601, 112 S. W. 13; Hughes *v.* Moore, 17 Mo. App. 148.

10. Truesdale *v.* Montrose County, 44 Colo. 416, 99 Pac. 63; Zeller *v.* Crawfordsville, 90 Ind. 262.

Where the record shows pleadings, and an issue and trial by the court, and a general finding, although the facts are agreed on in writing, with an affidavit annexed showing that the controversy is real, it is not an agreed case, but simply a trial upon an agreed statement of facts used as evidence. Pennsylvania County *v.* Niblack, 99 Ind. 149; Reddick *v.* Pulaski County, 14 Ind. App. 598, 41 N. E. 834, 43 N. E. 238.

11. Witz *v.* Dale, 129 Ind. 120, 27 N. E. 498; Reddick *v.* Pulaski County, 14 Ind. App. 598, 41 N. E. 834, 43 N. E. 238.

A motion for a new trial and exceptions are necessary where there is an agreed state of facts used as evidence, but the rule is otherwise where there is an agreed case. Witz *v.* Dale, 129 Ind. 120, 27 N. E. 498.

A case agreed upon by the parties is not a mere stipulation concerning evidence, from which inference of fact may be drawn; but it is equivalent to a finding of facts by a court, or the special verdict of a jury, in which every fact necessary to a recovery must be expressly found. Goodrich *v.* Detroit, 12 Mich. 279.

12. Smith *v.* Eline, 4 Pa. Dist. 490.

13. See the codes and statutes of the sev-

being generally provided that the court must be one which would have had jurisdiction if an action had been brought; [14] and the submission of facts must represent a statement of a controversy existing between the parties, on the determination of which a judgment which the court would have jurisdiction to enter in an action brought to determine the controversy could be granted; [15] and where a court has only appellate jurisdiction the agreed case and the decision of the court below should be regularly certified into the appellate court, which otherwise has no jurisdiction of the case.[16] Submission of a controversy without action will be dismissed where the effect of the decision would be to modify or change a decree of another court in the state of equal jurisdiction.[17]

III. Controversies Which May Be Submitted.

The controversies which may be submitted depend upon the statutes granting the right, it being usually provided that any question may be submitted which might be the subject of a civil action, between the parties,[18] and under these provisions questions which could not be the subject of an action between the parties cannot be entertained,[19] nor can a controversy be submitted where the

eral states. And see People *v.* Boughton, 5 Colo. 487 (holding that, under Code Civ. Proc. c. 28, the supreme court has no jurisdiction of a controversy submitted without action); Chase *v.* Miller, 41 Pa. St. 403 (holding that the authority of the supreme court to revise and correct the proceedings of inferior courts extends to all cases except where expressly excluded by statute, or where a case is stated by the parties, where they agree to submit their disputes to the common pleas, without expressly reserving their right to a writ of error).

Estoppel or waiver of want of jurisdiction, by submission.— A party, by joining in a case stated in a court of equity submitting the question of the validity of an award, is not precluded from objecting to the want of jurisdiction. The consent of parties cannot give jurisdiction which does not exist. Beeson *v.* Elliott, 1 Del. Ch. 368.

14. White *v.* Clarke, 111 Cal. 425, 44 Pac. 164 (holding that an agreed case shows that the right of action of one party depends on his right to enter certain lands under the homestead laws of the United States presents a question which cannot be the subject of an action in the state courts, and cannot be entertained); Territory *v.* Clark, 2 Okla. 82, 35 Pac. 882.

15. Kelley *v.* Hogan, 69 N. Y. App. Div. 251, 74 N. Y. Suppl. 682.

16. Plumleigh *v.* White, 9 Ill. 387, holding that where a case is pending in the circuit court the parties cannot, under Rev. St. c. 29, §§ 16, 17, agree upon the facts, and file such agreement originally in the supreme court, without any record of the court below; but the circuit court must first pass upon the case made. See also Appeal and Error, 2 Cyc. 536.

17. Gregory *v.* Perdue, 29 Ind. 66.

18. See the codes and statutes of the several states. And see White *v.* Clarke, 111 Cal. 425, 44 Pac. 164; West Hartford *v.* Hartford Water Com'rs, 68 Conn. 323, 36 Atl. 786; Marx *v.* Brogan, 188 N. Y. 431, 81 N. E. 231; Cunard Steam-Ship Co. *v.* Voorhis, 104 N. Y. 525, 11 N. E. 49; Hobart College *v.* Fitzhugh, 27 N. Y. 130; Patterson *v.* Mutual Life Assoc., 58 N. Y. Super. Ct. 290, 11 N. Y. Suppl. 636; Newark, etc., R. Co. *v.* Perry County Com'rs, 30 Ohio St. 120.

Where the writ of quo warranto is abolished and it is provided that the remedies heretofore obtainable in that form may be obtained by a civil action, a controversy to determine the right to an elective office which might have been determined in an action in the nature of quo warranto may be submitted on an agreed case without action. Alexander *v.* McKenzie, 2 S. C. 81.

Relief by injunction in such a proceeding is expressly prohibited by N. Y. Code Civ. Proc. § 1281. Cunard Steam-Ship Co. *v.* Voorhis, 104 N. Y. 525, 11 N. E. 49; Patterson *v.* Mutual Life Assoc., 58 N. Y. Super. Ct. 290, 11 N. Y. Suppl. 636. But where a controversy is submitted whereby an injunction is sought to restrain defendant from continuing business in an alleged unlawful manner, and to recover a penalty for an alleged violation of law, the proceeding as to the injunction will be dismissed, but the case may be retained for disposition as to the penalty. People *v.* Binghamton Trust Co., 65 Hun (N. Y.) 384, 20 N. Y. Suppl. 179 [*affirmed* in 139 N. Y. 185, 34 N. E. 898].

An application for mandamus requiring the construction of a statute may be submitted to the supreme court by agreement without process, under St. (1893) c. 66, art. 21, § 541, providing that the parties to a question which might be the subject of a civil action may agree on a case, and submit the same to any court which would have jurisdiction if an action had been brought. Territory *v.* Clark, 2 Okla. 82, 35 Pac. 882.

Claims against decedents' estates, the filing and allowance of which are governed by a special statute, cannot be adjusted by submission of controversy. Henes *v.* Henes, 5 Ind. App. 100, 31 N. E. 832.

19. *In re* De Lucca, 146 Cal. 110, 79 Pac. 853; Bates *v.* Lilly, 65 N. C. 232 (holding that a mere dispute between creditors

relief sought could not be given in an action, such as is sought to be submitted.[20] The controversy must be real,[21] and not a merely colorable dispute suggested in order to have the law in the case ascertained,[22] nor a mere abstract question presented to get the advice of the court, the decision of which will not terminate the controversy between the parties,[23] and by which only a preliminary question will

for the possession of a fund, in the hands of the sheriff, raised under different executions against the same defendant, does not constitute such a case as may, under the code of procedure, be submitted to a judge, without a suit between the adverse claimants, because no action could be brought, the parties having no claim one against the other, although they both may have claims against the sheriff who is not a party to the controversy).

Where an action could not be brought within a certain period no controversy can be submitted within that time. Hobart College *v.* Fitzhugh, 27 N. Y. 130.

Unless determinable in an action as distinguished from a special proceeding the controversy cannot be submitted. Woodruff *v.* People, 193 N. Y. 560, 86 N. E. 562, holding that a controversy cannot be submitted where, if the questions are answered in plaintiff's favor, judgment is to be entered directing defendant highway commissioners to lay out a highway petitioned for by plaintiff, such relief being properly granted through mandamus, and where, if the questions are answered in defendant's favor, a judgment is to be entered affirming defendant's order denying plaintiff's petition — relief properly awarded on certiorari.

20. People *v.* Mutual Endowment, etc., Assoc., 92 N. Y. 622, holding that where, in a controversy sought to be submitted, under Code Civ. Proc. § 1279, between the state and a corporation, the only relief to which the former is entitled, if any, is to restrain the corporation from exercising franchises unlawfully, the proceeding should be dismissed, as that relief may not be given therein.

Where the right to salary depended upon the right to a public office, and the right to public office could only be tried in an action in the name of the people, the submission of a controversy by a city as to which of the two defendants was entitled to the office of health physician, in order that it might pay him the salary, could not be had. Buffalo *v.* Mackay, 15 Hun (N. Y.) 204.

21. Kelley *v.* Hogan, 69 N. Y. App. Div. 251, 74 N. Y. Suppl. 682; Williams *v.* Rochester, 2 Lans. (N. Y.) 169; Bloomfield *v.* Ketcham, 5 N. Y. Civ. Proc. 407; Van Sickle *v.* Van Sickle, 8 How. Pr. (N. Y.) 265; Berks County *v.* Jones, 21 Pa. St. 413; Forney *v.* Huntingdon, 6 Pa. Super. Ct. 397; Mudey *v.* Schuylkill County, 2 Leg. Rec. (Pa.) 178; Dunn *v.* Meixell, 1 Lehigh Val. L. Rep. (Pa.) 168.

Where the same attorney prepared the statement and briefs of both parties, a decision of the general term in a controversy submitted on an agreed statement under Code Civ. Proc. § 1279, which provides for such submission, in good faith, of a real controversy, for the purpose of determining the rights of the parties, will be set aside, as not of the independent character contemplated by the code. Wood *v.* Nesbitt, 19 N. Y. Suppl. 423.

There must be an actual dispute between real parties. Witz *v.* Dale, 129 Ind. 120, 27 N. E. 498. The parties must be adversely interested. Champlin, Petitioner, 17 R. I. 512, 23 Atl. 25, holding that Pub. Laws (1876), c. 563, § 16, which provides that any persons interested in any question of the construction of any statute may concur in stating such question to the supreme court, and court of common pleas, in the form of a special case for the opinion of said court, etc., does not authorize the rendition of an opinion as to the construction and constitutionality of a statute upon the petition of persons who are not parties to a case involving adversary claims for decision.

Controversy held to be real within the meaning of the statute see Com. *v.* Cleveland, etc., R. Co., 29 Pa. St. 370; Greene, Petitioner, 17 R. I. 509, 23 Atl. 29.

22. Berks County *v.* Jones, 21 Pa. St. 413; Forney *v.* Huntingdon, 6 Pa. Super. Ct. 397; James *v.* Fennicle, 21 Pa. Co. Ct. 91 (holding that the court will not consider an agreed case which is not based upon a real case, but is simply intended to secure the opinion of the court as a guide to executors in the distribution of an estate); Mudey *v.* Schuylkill County, 2 Leg. Rec. (Pa.) 178; Dunn *v.* Meixell, 1 Lehigh Val. L. Rep. (Pa.) 168.

23. Capen *v.* Washington Ins. Co., 12 Cush. (Mass.) 517 (holding that the court will not give an opinion upon a statement of facts which presents merely a speculative or abstract question, the decision of which either way will not terminate the controversy between the parties; but the agreed statement will be discharged); Woodruff *v.* People, 193 N. Y. 560, 86 N. E. 562; People *v.* Mutual Endowment, etc., Assoc., 92 N. Y. 622 (holding that to give the court cognizance of a case submitted, the facts stated must show that there was, at the time the submission was made, a controversy or question of difference between the parties on the point presented for decision, and that a judgment can be rendered thereon, for the court may not pass upon a mere abstract question); Troy Waste Mfg. Co. *v.* Harrison, 73 Hun (N. Y.) 528, 26 N. Y. Suppl. 109; James *v.* Fennicle, 21 Pa. Co. Ct. 91; Pittsburgh *v.* Allegheny, 1 Pittsb. (Pa.) 97.

The remedy is not intended to enable parties to use the court as advisory in their cases, but is intended as a convenient form of submission of a controversy upon an agreed state of facts for the judgment of the court

be settled, leaving the merits undecided,[24] and the court will not entertain a question of law presented by agreement of the parties, but which does not arise out of the facts in the case.[25]

IV. REQUISITES OF THE SUBMISSION.

A. Agreement of Facts. The submission must contain an agreement as to the facts which are admitted, for the court cannot be required to take the evidence in a case and ascertain the facts from the testimony which is thus admitted,[26] and all the facts agreed on must be distinctly stated, and not left to inference,[27] so that the court may have nothing to do but pronounce the law arising out of them.[28] A controversy submitted for the opinion of the court contain-

as in a civil action, which would have the same force and effect on the case agreed upon that it would have if the case had gone through the ordinary course of a civil action. Newark, etc., R. Co. *v.* Perry County Com'rs, 30 Ohio St. 120. Any attempt to obtain the opinion of the court upon a question of law, through the instrumentality of a mere supposititious case, is reprehensible, and the parties offending may be punished for a contempt of court. Washburn *v.* Baldwin, 10 Phila. (Pa.) 472.

24. Austin *v.* Wilson, 7 Mass. 205; Clapp *v.* Guy, 31 N. Y. App. Div. 535, 52 N. Y. Suppl. 33, holding that the opinion of the court cannot be obtained in a proceeding of this character upon a mooted question of law merely because the answer thereto would or might be a guide to the determination of a lawsuit between the parties interested, to be instituted upon other and further facts than those stated.

25. Smith *v.* Cudworth, 24 Pick. (Mass.) 196; Blair *v.* Illinois State Bank, 8 Mo. 313, holding that, although parties to a suit may agree on the facts of a case and submit the law to the court, they may not agree on facts not in the cause, and thus obtain the opinion of the court on matters wholly disconnected with the suit.

26. Woodman *v.* Eastman, 10 N. H. 359; Clark *v.* Wise, 46 N. Y. 612 (holding that unless, in a controversy submitted without action, a case is presented in which there is no dispute as to facts, the court cannot pronounce judgment; and thus where a question is involved in a controversy as to the intent of a transfer of property, and there is no agreement as to that fact in the statement of facts, the proceeding must be dismissed); Begen *v.* Curtis, 81 N. Y. App. Div. 91, 80 N. Y. Suppl. 929 (holding that where, on a submission of controversy without action, there is opposite the title a memorandum to the effect that it is a case agreed upon in a controversy submitted without action, pursuant to the code of civil procedure, but it is not stated that the case agreed upon contains a statement of the facts, as required by the code, and there is no stipulation between the parties that the papers constitute a case containing a statement of the facts which have been agreed upon, the submission will be dismissed); Newark, etc., R. Co. *v.* Perry County Com'rs, 30 Ohio St. 120 (holding that an agreed case will be dismissed, where only questions of law are propunded without an agreed statement of facts).

27. Phelps *v.* Phelps, 145 Mass. 416, 14 N. E. 625 (holding that a case cannot be submitted on a statement of facts imperfect and inconclusive in itself, with an agreement that if, on any facts, plaintiff's case can be maintained, the case may be referred to a master or assessor to determine whether such vital facts exist); Hughes *v.* Moore, 17 Mo. App. 148; Kelly *v.* Kelly, 72 N. Y. App. Div. 487, 76 N. Y. Suppl. 558; Schuylkill County *v.* Shoener, 205 Pa. St. 592, 55 Atl. 791; Com. *v.* Howard, 149 Pa. St. 302, 24 Atl. 308; Berks County *v.* Pile, 18 Pa. St. 493; Rockwell *v.* Warren County, 34 Pa. Super. Ct. 584; Washburn *v.* Baldwin, 10 Phila. (Pa.) 472 (holding that a case stated must contain a full and certain statement of all the facts belonging to the case, so that when a judgment is entered thereon it shall be capable of enforcement to the same extent as though reached by the verdict of a jury); Lippincott *v.* Ledyard, 8 Phila. (Pa.) 18 (holding that the court, upon a case stated, is not to exercise the functions of a jury, or find facts, and hence the case submitted must be free from ambiguity, and contain all the facts necessary to a precise application of the law); James *v.* McWilliams, 6 Munf. (Va.) 301.

If there be any ambiguity or lack of certainty on a material point, the case will be dismissed. Gage *v.* Gates, 62 Mo. 412; Hughes *v.* Moore, 17 Mo. App. 148.

An agreed case in ejectment, admitting lease, entry, and ouster, sufficiently admits that all of defendants are in possession of the land in controversy. Mooberry *v.* Marye, 2 Munf. (Va.) 453.

28. Holmes *v.* Wallace, 46 Pa. St. 266; Com. *v.* Baum, 1 Lehigh Val. L. Rep. (Pa.) 187; Royall *v.* Eppes, 2 Munf. (Va.) 479. See Henniker *v.* Hopkinton, 18 N. H. 98, holding that if a court cannot determine a controversy submitted without action upon the facts stated, the case must be dismissed.

The remedy is not intended to embrace issues where any dispute of fact is involved but is confined to causes depending wholly upon questions of law. Marx *v.* Brogan, 188 N. Y. 431, 81 N. E. 231.

If legal conclusions or principles are included in the statement the court will disregard them. Southern R. Co. *v.* Greenville City Council, 49 S. C. 449, 27 S. E. 652.

ing mere evidence of facts is insufficient.[29] The agreement of facts must show the kind of action,[30] and a cause of action,[31] jurisdiction of the court over the parties,[32] and what relief is desired or proper, and the general nature of the judgment to be entered;[33] and a controversy submitted which fails to recite that it is submitted to the court for its opinion on the law, and that it is requested to render judgment in accordance therewith, gives the court no jurisdiction to render judgment;[34] and if the case agreed is such that the court cannot render judgment either for plaintiff or for defendant, as the court might conclude the law to be for the one or the other, the case agreed is defective, and the court will refuse to render any judgment and will proceed with the case as if no such agreement had been entered into.[35] The court will dismiss a case agreed to by the parties which

29. Powers *v.* Provident Sav. Inst., 122 Mass. 443; Pray *v.* Burbank, 11 N. H. 290 (holding that where parties submit a case to the determination of the court, upon a mere statement of the proofs or evidence tending to establish the facts necessary to its rightful decision, the court will go no further than to decide whether, upon such proof, it would be competent for a jury to find such facts, and to find a verdict for one of the parties, or incompetent to return a verdict for the other party); Union Sav. Bank *v.* Fife, 101 Pa. St. 388 (holding that a case stated, being a substitute for and in the nature of a special verdict, must present facts and not the evidence); Diehl *v.* Ihrie, 3 Whart. (Pa.) 143 [*cited* and *approved* in Holmes *v.* Wallace, 46 Pa. St. 266]; Lippincott *v.* Ledyard, 8 Phila. (Pa.) 18; Burr *v.* Des Moines R., etc., Co., 1 Wall. (U. S.) 99, 17 L. ed. 561.

Where the evidence is given instead of the facts, it has been held that the court will treat the case as in the nature of a demurrer to evidence in which they may draw every inference against the party demurring which a party may reasonably draw. Ament *v.* Sarver, 2 Grant (Pa.) 34.

30. Berks County *v.* Jones, 21 Pa. St. 413.

31. Clapp *v.* Guy, 31 N. Y. App. Div. 535, 52 N. Y. Suppl. 33 (holding that there must be the existence and presentation of a state of facts upon which the person named as plaintiff in the submission could bring an action at law or in equity against the person named therein as defendant, and which of themselves, if established by proof in such an action, would entitle the person named as plaintiff to some sort of a judgment against his adversary, if the court agreed with plaintiff as to the law applicable to the facts); Berks County *v.* Jones, 21 Pa. St. 413; Pittsburgh *v.* Allegheny, 1 Pittsb. (Pa.) 97.

32. Forney *v.* Huntingdon, 6 Pa. Super. Ct. 397.

33. Central City Water Co. *v.* Kimber, 1 Colo. 475 (holding that when parties waive all preliminary process and pleading, and bring a controversy before the court for decision, upon a naked statement of facts, it is necessary that the agreed statement of facts should show what relief is desired, as the court acquires jurisdiction only by force of the agreement, and if that expresses nothing as to the judgment or decree to be rendered, the court is not empowered to adjudge or decree anything); Woodruff *v.* People, 193 N. Y. 560, 86 N. E. 562; Dickinson *v.* Dickey, 76 N. Y. 602; Wood *v.* Squires, 60 N. Y. 191 (holding that a submission is not allowed which propounds certain interrogatories to the court, not decisive of the proper judgment to be rendered on the facts stated, and then fixes the judgment to be rendered as they shall be answered; and the court is not required to answer such questions, particularly where the effect of the answers would be to foreclose the rights of other parties who cannot be heard, although it may lead to a settlement of the controversy between the parties to the submission); Marshall *v.* Hayward, 67 N. Y. App. Div. 137, 73 N. Y. Suppl. 592; Williams *v.* Rochester, 2 Lans. (N. Y.) 169; Rush Tp. *v.* Schuylkill County, 100 Pa. St. 356 (holding that where the parties to a case stated neglect to ascertain the sum for which judgment is to be entered in the event of an opinion favorable to plaintiff, the court should refuse to proceed to argument until the case is perfected, and if the parties refuse to amend, the case stated should be set aside); Berks County *v.* Pile, 18 Pa. St. 493 (holding that, in a case stated in the nature of a special verdict, it should be agreed what judgment should be given if the law is for plaintiff, or a rule agreed on by which the amount shall be liquidated); Forney *v.* Huntingdon, 6 Pa. Super. Ct. 397; Schonawolff *v.* Schuylkill County, 5 Pa. Co. Ct. 329 (holding that where the case stated does not stipulate for judgment, none will be entered by the court). But see Williams *v.* Iredell County Com'rs, 132 N. C. 300, 43 S. E. 896, holding that it is not necessary that there be a prayer for judgment, but the court may enter any judgment to which the party is entitled.

If a case is submitted in which the damages are not fixed or an assignment thereof provided for, the judgment, if for plaintiff, will be for nominal damages only. McAneaney *v.* Jewett, 10 Allen (Mass.) 151.

34. Tyson *v.* Western Nat. Bank, 77 Md. 412, 26 Atl. 520, 23 L. R. A. 161; Marshall *v.* Hayward, 67 N. Y. App. Div. 137, 73 N. Y. Suppl. 592; Morgan *v.* Mercer County, 8 Pa. Super. Ct. 96, 42 Wkly. Notes Cas. 536, holding that the failure to inform the court respecting the form and substance of the judgment to be entered, and to specifically agree that it should be entered, is fatal.

35. Zarkowski *v.* Schroeder, 60 N. Y. App. Div. 457, 69 N. Y. Suppl. 893; Stockton *v.* Copeland, 23 W. Va. 696, holding that where, on submission of controversy, an agreed state-

through some fraud, accident, mistake, or misapprehension, embraces matters which did not exist,[36] or which does not contain all the facts which did exist at the time, and which are material to effectuate the rights and objects of the parties,[37] and to a complete determination of the controversy,[38] or by which the claim of either party can be verified.[39]

B. Affidavit of Reality of Controversy. The agreed case must be supported by an affidavit that the controversy is real and the proceeding in good faith to determine the rights of the parties;[40] and, in some jurisdictions, that the court would have jurisdiction if the proceeding was by summons;[41] and the court does not acquire jurisdiction in the absence of such affidavit,[42] and cannot render such a judgment as may be enforced or appealed, a judgment so made being at most an award as in a common-law arbitration.[43] The affidavit must be made by a party, not by his attorney, when there is a natural person, a party, who may make it;[44] but it has been held that it is not necessary that such affidavit be made by more than one of the parties.[45]

ment of facts provided that, if the court should find for defendant, judgment should be entered for him, subject to any writ of error to which plaintiff might be entitled, but if the court should find the law for plaintiff, no judgment should be entered, but the case should then be tried by the jury, and that defendant might rely on any defense he might legally set up or prove, and the agreed facts should not be used by either party against the other, this was not a submission of controversy, and the court should have set it aside as a nullity.

36. Heywood *v.* Wingate, 14 N. H. 73.

37. Old Colony R. Co. *v.* Wilder, 137 Mass. 536 (holding that where a case stated is imperfect for failure to state a vital fact, the proof of which is manifestly within reach of the parties, the case will be discharged, and the parties left to their remedy before a jury); Gage *v.* Gates, 62 Mo. 412; Hughes *v.* Moore, 17 Mo. App. 148; Heywood *v.* Wingate, 14 N. H. 73; Robinson *v.* Spencer, 72 N. Y. App. Div. 493, 76 N. Y. Suppl. 598; Clapp *v.* Guy, 31 N. Y. App. Div. 535, 52 N. Y. Suppl. 33.

38. Isbell *v.* Stone, 14 N. C. 410, holding that where the agreed case on which the controversy was submitted below fails to state all the facts necessary to a determination, the judgment will be reversed on appeal.

39. Zarkowski *v.* Schroeder, 60 N. Y. App. Div. 457, 69 N. Y. Suppl. 893.

40. *California.*— White *v.* Clarke, 111 Cal. 425, 44 Pac. 164, holding that an affidavit to an agreed case which states that the "statement" is a real controversy, and that the "contention" is in good faith, does not comply with Code Civ. Proc. § 1138, which requires it to state that the controversy is real and the proceedings in good faith.

Indiana.— Witz *v.* Dale, 129 Ind. 120, 27 N. E. 498; Myers *v.* Lawyer, 99 Ind. 237; Godfrey *v.* Wilson, 70 Ind. 50; Machester *v.* Dodge, 57 Ind. 584 (holding that where, in an action in which pleadings are filed, an agreed case is submitted, but the affidavit required by such statute is not filed, the agreement can be regarded at most as an agreed statement of evidence, and if such evidence fails to sustain the material allegations of the complaint, the judgment must be for defendant); Sharpe *v.* Sharpe, 27 Ind. 507.

Iowa.— Donald *v.* St. Louis, etc., R. Co., 52 Iowa 411, 3 N. W. 462.

Kentucky.— Canaday *v.* Hopkins, 7 Bush 108; Jones *v.* Hoffman, 18 B. Mon. 656.

North Carolina.— Wilmington *v.* Atkinson, 88 N. C. 54; Grant *v.* Newsom, 81 N. C. 36.

Oklahoma.— Johnson *v.* Cameron, 2 Okla. 266, 37 Pac. 1055.

South Carolina.— Reeder *v.* Workman, 37 S. C. 413, 16 S. E. 187.

United States.— Goodrum *v.* Buffalo, 162 Fed. 817, 89 C. C. A. 525 [*affirming* 7 Indian Terr. 711, 104 S. W. 942], holding that an affidavit merely that the proceeding is in good faith to determine the rights of the parties without affidavit that the controversy is real is insufficient.

See 44 Cent. Dig. tit. "Submission of Controversy," § 10.

41. Grandy *v.* Gulley, 120 N. C. 176, 26 S. E. 779; Arnold *v.* Porter, 119 N. C. 123, 25 S. E. 785.

42. *California.*— White *v.* Clarke, 111 Cal. 425, 44 Pac. 164.

Indiana.— Geisen *v.* Reder, 151 Ind. 529, 51 N. E. 353, 1060; Selbyville *v.* Phillips, 149 Ind. 552, 48 N. E. 626, holding that the supreme court cannot determine the validity of a city ordinance, where, in an attempt to make an agreed case, under Rev. St. (1894) § 562 (Rev. St. (1881) § 553), there was no affidavit that the controversy is real and the proceedings in good faith, as is required by said section.

New York.— Lax *v.* Fourteenth St. Store, 49 Misc. 627, 97 N. Y. Suppl. 396.

North Carolina.— Grandy *v.* Gulley, 120 N. C. 176, 26 S. E. 779; Arnold *v.* Porter, 119 N. C. 123, 25 S. E. 785.

South Carolina.— Reeder *v.* Workman, 37 S. C. 413, 16 S. E. 187.

See 44 Cent. Dig. tit. "Submission of Controversy," § 10.

43. Plainfield *v.* Plainfield, 67 Wis. 525, 527, 30 N. W. 673 [*quoted* in Goodrum *v.* Buffalo, 162 Fed. 817, 89 C. C. A. 525].

44. Bloomfield *v.* Ketcham, 95 N. Y. 657.

45. Booth *v.* Cottingham, 126 Ind. 431, 26 N. E. 84.

C. Pleadings. An agreed case does not require any pleadings,[46] and should they be filed they must be disregarded,[47] for an agreed case takes the place of pleading,[48] the very purpose of the proceeding being to dispose of the formalities of a summons, complaint, and answer, and upon an agreed statement of the facts to submit the case to the court for decision;[49] and it has been held that where a submission is made upon an agreed case the pleadings should be dismissed;[50] and where an action is commenced, and thereafter a case containing the facts upon which the controversy depends is agreed on and submitted, if the action is not thereby discontinued, it is so discontinued when judgment is entered upon the submission, and until that time it is suspended.[51]

D. Entry of Agreement on Record. Under some statutes the agreement to submit the controversy must be entered on the record of the case.[52]

V. SCOPE OF INQUIRY AND POWERS OF COURT.

A. General Rules. Only the determination of questions between the parties affecting their interests may be made, and the court cannot go beyond a decision affecting such interests;[53] and the inquiry is confined to the precise question put in issue;[54] and the court has no power to permit either party against

46. Warrick Bldg., etc., Assoc. *v.* Hougland, 90 Ind. 115; Donald *v.* St. Louis, etc., R. Co., 52 Iowa 411, 3 N. W. 462; Fay *v.* Duggan, 135 Mass. 242, holding that the submission of a case upon agreed facts is a waiver of all questions of pleading, and the case is to be determined on its merits on the facts agreed as if the question relating to them had been presented upon proper pleadings; and matters which can be taken advantage of only by plea in abatement are not open in a case so submitted unless specially reserved.

The court has a right to order that an issue be formed upon an agreed case, especially where the agreement in express terms provided that the court was to try the issue upon the facts as agreed, and has a right to inquire whether such agreement was obtained by fraud. Keith *v.* Rucker, 16 Ill. 389.

47. Warrick Bldg., etc., Assoc. *v.* Hougland, 90 Ind. 115; Sharpe *v.* Sharpe, 27 Ind. 507; Chappell *v.* McIntyre, 9 Tex. 161, holding that when a statement of facts, agreed to by the parties, is submitted to the court for their opinion on the law arising from the facts, all other pleadings will be disregarded.

48. Day *v.* Day, 100 Ind. 460.

49. McKethan *v.* Ray, 71 N. C. 165.

Estoppel or waiver by submission.— Submission to a court for adjudication on an agreed statement of facts of a controversy of which and of the parties to which the court has jurisdiction waives all objections to the form of the proceedings and technical defects in the pleadings. *In re* Blake, 150 Fed. 279, 80 C. C. A. 167.

Plaintiff is entitled to the benefit of being considered as having filed his declaration, according to the facts set forth in the case agreed. Gerrish *v.* Johnson, 46 N. C. 335.

50. Elder *v.* Taylor, 5 Ohio Dec. (Reprint) 461, 6 Am. L. Rec. 73, holding that after a demurrer had been filed to a petition, the parties agreed on a submission of the controversy, in which the facts agreed on were the same as stated in the petition, and the issue on the demurrer to the petition was reserved by the court below for hearing before the judges at general term, when the submission was made on the agreed case, the case on the pleadings should have been dismissed, but that nevertheless the court would hear the case as submitted.

51. Van Sickle *v.* Van Sickle, 8 How. Pr. (N. Y.) 265.

52. See the statutes of the several states. And see Farwell *v.* Sturges, 58 Ill. App. 462 [*affirmed* in 165 Ill. 275, 46 N. E. 197 (holding that the act of June 17, 1887, section 1, requiring the agreement by which matters in controversy are submitted for determination to be "entered of record" is merely directory and not mandatory or jurisdictional, and that it is a sufficient compliance with the act for the clerk to spread the agreement on the records as part of the final decree); Burr *v.* Des Moines R., etc., Co., 1 Wall. (U. S.) 99, 17 L. ed. 561.

53. Union Nat. Bank *v.* Kupper, 63 N. Y. 617; Fisher *v.* Wilcox, 77 Hun (N. Y.) 208, 28 N. Y. Suppl. 327. See also State *v.* Smithson, 106 Mo. 149, 17 S. W. 221.

54. Brundin *v.* Supreme Council O. C. F., 13 N. Y. App. Div. 147, 42 N. Y. Suppl. 1043; Schuylkill County *v.* Shoener, 205 Pa. St. 592, 55 Atl. 791; Northampton County *v.* Easton Pass. R. Co., 148 Pa. St. 282, 23 Atl. 895; Philadelphia, etc., R. Co. *v.* Waterman, 54 Pa. St. 337 (holding that a case stated, when well drawn, is like an issue developed by special pleading, and presents, in a single point or a series of points, the very matter that is up for judgment, and the court cannot go beyond the point presented for decision, however much justice would be advanced by so doing); Higgins *v.* Price, 36 Pa. Super. Ct. 215. See also Arapahoe County *v.* Hall, 9 Colo. App. 538, 49 Pac. 370.

But under an agreement that the court may make any order or judgment in the case which they shall think it may require, the whole controversy is submitted, without limitation.

the objection of the other to adduce other facts or introduce evidence of any character;[55] and where, without proof of further facts, plaintiff's case is not made out, the court ought simply to render judgment against plaintiff without further suggestions, and it is error to make an order based upon the supposition that plaintiff might establish other facts.[56] Under some statutes parties adversely interested in the construction of any will, writing, statute, or other document may concur in stating the case for the opinion of the court, and the court may declare the opinion of the rights involved without administering any relief,[57] or may decline to answer such questions as in its opinion it cannot properly decide.[58] An application to the court of a party to an agreed case to be relieved from his agreement and for a trial of the questions of fact is to be considered under the rules of law applicable to petitions for a new trial.[59]

B. Inferences of Fact. Where an agreed case is submitted, the consideration of the court is restricted to the facts admitted,[60] the presumption being that what is not included is kept out for a sufficient reason,[61] or does not exist;[62] and the agreed case is to be considered as showing the facts of the controversy, even though they should constitute a different cause of action in favor of plaintiff from that shown by an accompanying complaint;[63] and the court cannot depart from or go beyond the statement presented, and can draw no inferences of fact, for to balance evidence, or draw conclusions from circumstances proved, and thereby to determine controverted questions of fact, are not among the ordinary duties of the court upon a submission of controversy;[64] nor does the assent, or

Derby *v.* Jacques, 7 Fed. Cas. No. 3,817, 1 Cliff. 425.

55. State *v.* McCune, 129 Mo. App. 511, 107 S. W. 1030 (holding that this follows from the fact that the jurisdiction of the court is founded on the contract of submission and should the court permit either party to inject new matter into the case that contract would be broken); Knowles *v.* Jacobs, 4 Pa. Super. Ct. 268.

56. Crandall *v.* Amador County, 20 Cal. 72.

57. See the statutes of the several states. And see *In re* Guild, 28 R. I. 88, 65 Atl. 605.

58. *In re* Guild, 28 R. I. 88, 65 Atl. 605.

59. Dame *v.* Woods, 73 N. H. 391, 62 Atl. 379.

60. Crandall *v.* Amador County, 20 Cal. 72; Andrus *v.* Shippen Tp., 36 Pa. Super. Ct. 22, holding that the judgment of the court on a case stated must be on facts agreed upon, and it will not go outside of the case stated by assuming that which is not agreed to by the litigants.

Judgment must be based on the agreed facts, and the appointment of a master "to report the facts in the case," and the entry of judgment on such report is error for which the judgment will be reversed, and the case stated quashed. Frailey *v.* Supreme Council A. L. H., 132 Pa. St. 578, 20 Atl. 684.

61. Philadelphia, etc., R. Co. *v.* Waterman, 54 Pa. St. 337; Higgins *v.* Price, 36 Pa. Super. Ct. 215.

62. Berks County *v.* Pile, 18 Pa. St. 493 [*followed* in Driesbach *v.* Grover, 1 C. Pl. (Pa.) 39].

63. Warrick Bldg., etc., Assoc. *v.* Hougland, 90 Ind. 115; Manchester *v.* Dodge, 57 Ind. 584.

Construction of agreed cases see Burns *v.* Keas, 21 Iowa 257; Jennison *v.* Roxbury, 9 Gray (Mass.) 32.

64. *Indiana.*— Day *v.* Day, 100 Ind. 460.

Massachusetts.— Gallagher *v.* Hathaway Mfg. Corp., 169 Mass. 578, 48 N. E. 844; Old Colony R. Co. *v.* Wilder, 137 Mass. 536.

New Hampshire.— Pray *v.* Burbank, 11 N. H. 290.

New York.— Marx *v.* Brogan, 188 N. Y. 431, 81 N. E. 231; Fearing *v.* Irwin, 55 N. Y. 486 [*affirming* 4 Daly 385, and *followed* in Crosby *v.* Thedford, 7 N. Y. Civ. Proc. 245]; Clark *v.* Wise, 46 N. Y. 612 [*overruling* Clark *v.* Wise, 39 How. Pr. (N. Y.) 97]; Wetyen *v.* Fick, 90 N. Y. App. Div. 43, 85 N. Y. Suppl. 592 [*affirmed* in 178 N. Y. 223, 70 N. E. 497] (holding that on submission of a controversy, although it is agreed that defendants collected the rents and profits of the premises, it cannot be inferred that there was an actual occupant of the premises, against whom, under Code Civ. Proc. § 1597, action for dower could be maintained); Tanenbaum *v.* Simon, 71 N. Y. App. Div. 611, 75 N. Y. Suppl. 922; American Box Mach. Co. *v.* Zentgraf, 45 N. Y. App. Div. 522, 61 N. Y. Suppl. 417. But see Knickerbocker Trust Co. *v.* King, 126 N. Y. App. Div. 691, 111 N. Y. Suppl. 192.

Pennsylvania.— Com. *v.* Howard, 149 Pa. St. 302, 24 Atl. 308; Berks County *v.* Pile, 18 Pa. St. 493; Driesbach *v.* Grover, 1 C. Pl. 39. But see Parker *v.* Urie, 21 Pa. St. 305, holding that where, in a case stated, the facts are admitted, and plaintiff's right to recover is submitted to the court, and judgment is rendered for defendants in the common pleas, the supreme court will treat the case on appeal as a demurrer to evidence, and will draw all proper inferences from the facts.

Virginia.— Ramsey *v.* McCue, 21 Gratt. 349.

even the request, of the parties, in a case agreed, impose upon the court any such duty.[65] Inferences of fact cannot be drawn by the court on submission of a controversy on agreed facts, unless as matter of law they are necessary inferences,[66] and whenever it appears that a submitted controversy necessarily involves the duty of drawing inferences from inconclusive, equivocal, or evidentiary facts before a legal conclusion can be formed the issue will not be decided.[67]

C. Amendment. Where there is a clear and palpable mistake in figures or amounts in an agreed case and in the record thereof, the court may correct it on the motion or petition of either party,[68] and may allow amendment when the agreed facts improvidently admit the existence, as a fact, of something which is not a fact,[69] or where sufficient facts are not stated; [70] but after a case has been submitted on agreed facts the court cannot, without setting aside the submission, allow one party, over the other's objection, to introduce additional facts, the existence of which was known to the former before the submission.[71] Under some statutes it is held that the court has no power to amend an agreed case.[72]

VI. PARTIES.

A submission of controversy, being substantially in the nature of a contract, can only be made by the parties to be affected by the judgment [73] or by their

United States.— Burr *v.* Des Moines R., etc., Co., 1 Wall. 99, 17 L. ed. 561, holding that the statement must be sufficient in itself, without inferences or comparisons, or balancing of testimony, or weighing evidence, to justify the application of the legal principles which must determine the case. It must leave none of the functions of a jury to be discharged by this court, but must have all the sufficiency, fulness, and perspicuity of a special verdict. If it necessarily requires of the court to weigh conflicting testimony, or to balance admitted facts, and deduce from these the propositions of fact on which alone a legal conclusion can rest, then it is not such a statement as this court can act upon.

See 44 Cent. Dig. tit. "Submission of Controversy," § 14.

In Maryland the former rule was as stated in the text. Vansant *v.* Roberts, 3 Md. 119 (holding that, where a case is submitted on an agreed statement of facts, the court was bound to decide upon the facts as presented in the record, and they could make no inferences, unless of law, or such as were undeniable consequences resulting from the facts agreed on); Neptune Ins. Co. *v.* Robinson, 11 Gill & J. 256; Hysinger *v.* Baltzell, 3 Gill & J. 158. But under Code Pub. Gen. Laws, art. 26, § 15, the court may draw all inferences of fact or law that court or jury could have drawn from the facts agreed on as if they had been offered in evidence on a trial. Baltimore *v.* Consolidated Gas Co., 99 Md. 540, 58 Atl. 216.

No findings of fact by the court are necessary, the only question being what is the law applicable to the facts agreed on. McMenomy *v.* White, 115 Cal. 339, 47 Pac. 109.

65. Pray *v.* Burbank, 11 N. H. 290; Shankland *v.* Washington, 5 Pet. (U. S.) 390, 8 L. ed. 166, holding that parties to a suit, by agreeing on a case in which they stipulate that the court may draw all inferences from the facts that a jury might draw, cannot impose on the supreme court the duties properly belonging to a jury.

66. Mayhew *v.* Durfee, 138 Mass. 584.

Separate conclusions of law and fact are never necessary upon submission of controversy, there being no trial of facts and nothing submitted to the court but questions of law. Owensboro *v.* Weir, 95 Ky. 158, 24 S. W. 115, 15 Ky. L. Rep. 506 [*affirming* 14 Ky. L. Rep. 710].

67. Pray *v.* Burbank, 11 N. H. 290; Marx *v.* Brogan, 188 N. Y. 431, 81 N. E. 231.

68. State *v.* Porter, 86 Ind. 404.

69. Fearing *v.* Irwin, 4 Daly (N. Y.) 385, holding that where the agreed facts on a submission of controversy without action improvidently admit the existence of a fact which is not such, the injured party has his remedy by motion to strike out or amend the admission. But see Kingsland *v.* New York, 42 Hun (N. Y.) 599, holding that where, on submission of controversy without action, and pursuant to the stipulation defining the relief to which plaintiff would be entitled if successful, a judgment was ordered for plaintiff, and after judgment had been entered on this decision, the court of appeals handed down a decision which would enlarge plaintiff's rights, a motion by plaintiff to amend his prayer for relief in the case submitted, so as to secure to him the benefit of this decision, should be denied, since even if the court had power to allow an amendment of the submission at that stage of the proceedings, it would not be a provident use of the power to grant such an amendment after the case itself had been heard and decided, and the rights of the parties had been defined by the judgment already entered.

70. Matter of Yerks, 97 N. Y. App. Div. 632, 89 N. Y. Suppl. 869.

71. Wilcox *v.* San José Fruit-Packing Co., 113 Ala. 519, 21 So. 376, 59 Am. St. Rep. 135.

72. Peake *v.* Webb, 132 Mo. App. 601, 112 S. W. 13.

73. Dickinson *v.* Dickey, 76 N. Y. 602.

attorneys;[74] and under some statutes it is held that in the case of natural parties the agreement for submission must be signed by the parties, and not by the attorneys, to give the court jurisdiction.[75] The court, on submission of controversy without action, cannot determine a question of difference in which it appears that an infant is legally interested,[76] nor can a controversy be submitted by any person not *sui juris*;[77] and the submission of a controversy to which a third party who is interested in the result has not been made a party,[78] or to which a necessary party to the complete determination of

Question whether the receiver of an insolvent insurance company has power to submit a controversy adverted to but not decided in Waring *v.* O'Neill, 15 Hun (N. Y.) 105, holding, however, that a submission of controversy must be made at general term not at special term.

A tax collector may not submit an agreed case involving the validity of a tax, since the county, and not the tax collector, is a party to such question. Bailey *v.* Johnson, 121 Cal. 562, 54 Pac. 80.

Designation of parties.—On submission of a controversy one of the parties should be designated as plaintiff and the other as defendant, and the claim of each set forth in the nature of a prayer for judgment, so as to permit the application of Code Civ. Proc. § 1280, declaring that after the filing of the submission the controversy becomes an action, subject to each provision of law relating to proceedings in an action. Matter of Yerks, 97 N. Y. App. Div. 632, 89 N. Y. Suppl. 869.

74. Farwell *v.* Sturges, 165 Ill. 252, 46 N. E. 189; Booth *v.* Cottingham, 126 Ind. 431, 26 N. E. 84 (holding that an agreed statement signed by appellant and by the attorney in both courts for appellee, which was submitted to the trial court, and on which it based its judgment, is binding on appellee, where there is nothing beyond the statement of counsel to show that appellee repudiated his attorney's act); Whitcomb *v.* Kephart, 50 Pa. St. 85 (holding that an attorney at law has authority to bind his client by stating a case for the judgment of the court); Cook *v.* Gilbert, 8 Serg. & R. (Pa.) 567 (holding that independently of the act of March 21, 1806, an amicable action may be entered by attorney); Wilmington Mills Mfg. Co. *v.* Gardner, 2 Wkly. Notes Cas. (Pa.) 486; Angell *v.* Angell, 28 R. I. 330, 67 Atl. 325 (holding also if made by an attorney on behalf of any party there must be such evidence of authority so to represent the party to the statement as to prevent any question arising in future as to the authorized representation of the parties before the court).

A warrant of attorney to appear in an action and confess judgment therein is a sufficient authority to an attorney to agree to an amicable action. Van Beil *v.* Shive, 17 Phila. (Pa.) 104.

75. Salamanca *v.* Cattaraugus County, 81 Hun (N. Y.) 282, 30 N. Y. Suppl. 790 (holding that if the parties to the submission are natural persons they should execute the agreement, and that the attorney employed by a county board to attend to the county interest in a claim by a town against the county for part of the expense of building a bridge, pending before the board, has no authority to submit the case under Code Civ. Proc. § 1279); Bradford *v.* Buchanan, 39 S. C. 237, 17 S. E. 501 (holding that the code, section 374, providing that in submission of a controversy without action "the parties" may agree on a case, renders necessary the agreement of the parties themselves, and not merely the agreement of counsel, and the record must show this fact by the signature of the parties); Reeder *v.* Workman, 37 S. C. 413, 16 S. E. 187.

76. Coughlin *v.* Fay, 68 Hun (N. Y.) 521, 22 N. Y. Suppl. 1095; Lathers *v.* Fish, 4 Lans. (N. Y.) 213 (holding that an infant cannot, by himself, or by his guardian, submit a controversy without action); Baumgrass *v.* Brickell, 7 N. Y. St. 685; Fisher *v.* Stilson, 9 Abb. Pr. (N. Y.) 33. And see Angell *v.* Angell, 28 R. I. 330, 67 Atl. 325, holding that under Court & Pr. Act (1905), § 323, providing that parties having adversary interests in any question of the construction of a will may concur in stating the question in the form of a special case, a petition, seeking the determination of questions under a trust deed and will, is insufficient where two of the respondents are minors and non-residents stated to be under guardianship, it not appearing that they have a legal guardian within the state, where two other parties are non-residents, where none has signed the petition in person, and there is no showing of authority to any one to sign in the parties' behalf.

77. Goodrum *v.* Buffalo, 162 Fed. 817, 89 C. C. A. 525 [*affirming* 7 Indian Terr. 711, 104 S. W. 942], holding that a submission to the United States court in Indian Territory, under a stipulation between a Quapaw Indian and a white man, of the question as to the power of alienation of allotted lands by the Indian allottee within the limitation period of twenty-five years, was invalid; the Indian not being a person *sui juris*.

78. Hodgdon *v.* Darling, 61 N. H. 582 (holding that an agreed case in which defendant has no interest does not authorize a decision of a controversy between plaintiff and other persons who are not parties to the suit); Hobart College *v.* Fitzhugh, 27 N. Y. 130 [*approved* and *followed* in Davin *v.* Davin, 105 N. Y. App. Div. 580, 94 N. Y. Suppl. 281] (holding that where a controversy as to the person entitled to the proceeds of a benefit certificate in a mutual benefit society was submitted without action, and the determination thereof depended on a construction of important provisions of the society's charter, the society was a necessary party to the sub-

the controversy is lacking,[79] will be dismissed, and where the decision of a controversy submitted will indirectly affect persons other than the parties and property other than that involved in the submission, the court will be very careful to insist on the observance of all the forms of law intended to prevent the submission of any but real controversies.[80]

VII. JUDGMENT, DISMISSAL, AND CANCELLATION.

On submission of controversy the court is bound to render such judgment as the facts call for, whether legal or equitable;[81] but statutory provisions allowing submission of controversy are held not to contemplate the entry of a judgment by default,[82] nor the direction of a judgment against an undisclosed defendant.[83] The court will dismiss the submission where it may properly decline deciding the questions submitted,[84] or where it appears that a decision would work injustice;[85] and a contract submitting an agreed case may be canceled by a suit in equity for fraud, duress, or mutual mistake;[86] but where an agreed case might be set aside on a motion to discharge, equity will not relieve on bill to set aside such case for fraud, accident, and mistake, there being an adequate remedy at law.[87] The mere inartificiality in the drawing of the case stated is not sufficient ground to set it aside.[88] The submission of a controversy will not be dismissed upon the motion of one who is not a party to it.[89]

mission); Heasty *v.* Lambert, 98 N. Y. App. Div. 177, 90 N. Y. Suppl. 595 (holding that a submission of controversy on agreed facts between the parties to a contract for sale of real estate, as to the validity of an assessment against it, will not be considered, defendant having made default and presented no argument, and the persons interested in enforcement and collection of the assessment not being made parties); Kelley *v.* Hogan, 69 N. Y. App. Div. 251, 74 N. Y. Suppl. 682; St. Louis Smelting, etc., Co. *v.* Kemp, 103 U. S. 666, 26 L. ed. 313.

Joining third person as party without his consent.— An order by which a third party, a stranger to the suit, without his consent is made a party to an agreed case, is without authority of law, and all the proceedings thereunder are *coram non judice.* Potter *v.* Talkington, 6 Ida. 649, 59 Pac. 362.

79. Kennedy *v.* New York, 79 N. Y. 361; Schreyer *v.* Arendt, 83 N. Y. App. Div. 333, 82 N. Y. Suppl. 122; Baumgrass *v.* Brickell, 7 N. Y. St. 685; Wavle *v.* Tuttle, 11 N. Y. Wkly. Dig. 186; *In re* Guild, 28 R. I. 88, 65 Atl. 605. See Woodruff *v.* Oswego Starch Factory, 66 N. Y. App. Div. 617, 74 N. Y. Suppl. 443 (holding that where a submitted controversy necessitates the determination of the validity of a municipal tax, and the city is not a party, it should not be determined without giving the city a hearing on this branch of the case, but holding that the city's appearance in the controversy is not compulsory); Fisher *v.* Wilcox, 77 Hun (N. Y.) 208, 28 N. Y. Suppl. 327.

80. Bloomfield *v.* Ketcham, 5 N. Y. Civ. Proc. 407. But see State *v.* Wilson, 2 Lea (Tenn.) 204, holding that, if the demand is genuine, an agreed case will not be considered fictitious merely because containing no reference to the rights of third parties.

81. Graves *v.* Brinkerhoff, 4 Hun (N. Y.) 305.

82. Heasty *v.* Lambert, 98 N. Y. App. Div. 177, 90 N. Y. Suppl. 595.

83. Davin *v.* Davin, 105 N. Y. App. Div. 580, 94 N. Y. Suppl. 281.

84. Heywood *v.* Wingate, 14 N. H. 73, holding also that the court will not discharge an agreed case for the reason alone that since the submission defendant has become a voluntary bankrupt. But see Neilson *v.* Commercial Mut. Ins. Co., 3 Duer (N. Y.) 455, holding that when a controversy is submitted under the code, the court, at general term, can only determine the questions of law arising from the facts agreed on by the parties, it cannot vacate the submission, or refer the facts to the determination of a jury.

Where a case agreed is too imperfectly stated for the court to proceed to judgment it will be set aside and new proceedings ordered. Thompson *v.* Miller, 14 Leg. Int. (Pa.) 132; Brewer *v.* Opie, 1 Call (Va.) 212.

85. Bell *v.* Twilight, 17 N. H. 528, holding also that, on an application to discharge an agreed case, for this reason it must appear that the agreement was entered into under some misapprehension of facts, or that material facts had been discovered, that due diligence was used in preparation, and due caution exercised in entering into the agreement.

86. Peake *v.* Webb, 132 Mo. App. 601, 112 S. W. 13 (holding that an agreed submission may be set aside in equity when there has been a mutual mistake, and where, in a submission of a controversy, there was a mutual mistake as to the ownership of certain land involved, the court had power to set aside the submission); State *v.* McCune, 129 Mo. App. 511, 107 S. W. 1030.

87. Brewster *v.* Page, 58 N. H. 4.

88. Morgan *v.* Mercer County, 8 Pa. Super. Ct. 96, 42 Wkly. Notes Cas. 536.

89. Berlin Iron Bridge Co. *v.* Wagner, 10 N. Y. Suppl. 215, holding that the general term will not, on the motion of the attorney-

VIII. Costs.

Where a cause is submitted by agreement and the submission does not provide for costs, the awarding of costs is discretionary with the court; [90] and upon the dismissal of an agreed case because the facts stated will not warrant a judgment for either party,[91] or because the case is submitted without plaintiff or defendant,[92] the costs should be divided. The parties may, however, stipulate regarding costs, and where the submission of the controversy provides that no costs shall be awarded to plaintiff against defendant, the judgment will provide that no costs be recovered.[93] Where a submission of controversy provides that judgment shall be given with costs and disbursements, no additional allowance to counsel can be made.[94]

IX. Review.

An exception to the decision on the trial of an agreed case is necessary to a review thereof,[95] and an appeal cannot be taken before judgment below; [96] and where an order of the inferior court directs that an agreed statement of facts be discharged on account of a mistake or misunderstanding, and that a trial be had, the discharge and trial cannot be carried to the appellate court by bill of exceptions before the trial so directed.[97] Where the case submitted fails to show what the controversy was, or that there was a controversy between the parties, the decision of the court on the question submitted is not appealable; [98] but where a controversy involving a question of importance to the public is submitted, the appellate court may properly determine the question of law raised, although the statement of facts is not full enough to enable it to render judgment between the parties.[99] The transcript on appeal must contain a copy of the affidavit required by statute,[1] showing the reality of the controversy and the good faith of the proceeding; [2] and the appellate court will not indulge in any presumption in favor of the judgment of the court below on a case submitted there without action, inasmuch as the upper court has the same means of reaching a correct conclusion

general, who is not a party to the controversy, dismiss a submission of the controversy intended to establish the right of the sole highway commissioner of a town to make a contract for the building of a bridge, on the ground that certain commissioners appointed by the supervisors, and claiming the right to make such contract, were not parties to the submission, and that such commissioners might be bound by the decision.

90. Herkimer County Light, etc., Co. *v.* Johnson, 37 N. Y. App. Div. 257, 55 N. Y. Suppl. 924.

91. Frazer *v.* Miller, 12 Kan. 459.

92. Frazer *v.* Miller, 12 Kan. 459.

93. McDonald *v.* Ross-Lewin, 29 Hun (N. Y.) 87.

Amount of costs recoverable under earlier New York practice see Neilson *v.* Commercial Mut. Ins. Co., 3 Duer (N. Y.) 683.

94. Fish *v.* Coster, 28 Hun (N. Y.) 64 [*affirmed* in 92 N. Y. 627].

95. Geisen *v.* Reder, 151 Ind. 529, 51 N. E. 353, 1060; Thatcher *v.* Ireland, 77 Ind. 486.

In Pennsylvania, where an agreed case does not reserve a right of appeal, an appeal, if taken, will be quashed. Morgan *v.* Mercer County, 8 Pa. Super. Ct. 96, 42 Wkly. Notes Cas. 536. See Chase *v.* Miller, 41 Pa. St. 403.

In Illinois, the act of June 17, 1887, allows parties to submit to a judge of the circuit court, orally and without formal pleadings, any matter in controversy, having first executed a written agreement, to be entered of record, which, *inter alia,* shall waive the right of appeal, and release all errors that may intervene, and shall provide that such release may be pleaded in bar of any writ of error, and on writ of error from a decree on such submission the release of errors in the written agreement need not be pleaded, such release appearing from the record itself. Farwell *v.* Sturges, 165 Ill. 252, 46 N. E. 189.

96. Moore *v.* Hinnant, 87 N. C. 505 (holding, however, that where the appellate court having ordered a controversy submitted without action to be remanded because an appeal had been taken before judgment had been entered below, the parties proposed by consent to file the record of the judgment as an amendment in the appellate court, on so doing the order of remand would be withdrawn, and the cause allowed to remain on the docket for future hearing as amended); Aldrich *v.* Pickard, 12 Lea (Tenn.) 657.

97. West *v.* Platt, 124 Mass. 353.

98. Jefferson County *v.* Gilliam, 17 Mont. 333, 42 Pac. 852.

99. Farthing *v.* Carrington, 116 N. C. 315, 22 S. E. 9.

1. See *supra,* IV, B.

2. Mellois *v.* Chaine, 20 Cal. 679, holding that a statement in the record that the cause was heard below on an agreed statement of facts, and the affidavit of defendant that the

of law upon the agreed facts of the case as the lower court had.[3] Where the parties so agree judgment is final upon a question submitted, and will not be reviewed upon appeal.[4]

SUBMIT. To commit to the discretion or judgment of another;[1] to propound, as an advocate, a proposition for the approval of the court;[2] to leave or commit to the discretion or judgment of another or others.[3] (See SUBMISSION, *ante*, p. 344, and Cross-References Thereunder.)

SUB MODO. Literally "Under a qualification;" "Subject to a restriction or condition."[4]

SUB NOMINE. Literally "Under the name;" "In the name of;" "Under the title of."[5]

SUBORDINATE. In reference to a class of servants, an employee who has no power to direct or control in the branch or department in which he is employed.[6]

SUBORNARE EST QUASI SUBTUS IN AURE IPSUM MALE ORNARE, UNDE SUBORNATIO DICITUR DE FALSI EXPRESSIONE, AUT DEVERI SUPPRESSIONE. A maxim meaning "To suborn is to adorn that which is bad subtilely to the ear; and subornation is equally the expression of what is false, or the suppression of what is true."[7]

SUBORNATION OF PERJURY. See PERJURY, 30 Cyc. 1423.

SUBPARTNERSHIP. See PARTNERSHIP, 30 Cyc. 381.

SUBPŒNA.[8] The process by which the attendance of a witness is required; a writ or order directed to a person and requiring his attendance at a particular

controversy was real, will not be sufficient to prevent the dismissal of the appeal.

3. Day *v.* Day, 100 Ind. 460.

4. Strafford County *v.* Rockingham County, 71 N. H. 37, 51 Atl. 677, holding that where it was agreed between the commissioners of two counties that the question as to which county was liable for the support of a certain pauper should be submitted to the presiding justice of the supreme court at a certain term of one of the counties, and that his decision should be final, his decision was conclusive on that question.

1. Cherokee County Bd. of Education *v.* Cherokee County, 150 N. C. 116, 126, 63 S. E. 724.

2. Rapalje & L. L. Dict. [*quoted* in State *v.* Davis, 20 Nev. 220, 225, 19 Pac. 894].

"**The word . . . as applied to a cause,** is in common use. Parties submit a cause when they refer it to the court or referee for disposition. The word . . . is sometimes used as applied to evidence, though not, perhaps, with the same accuracy." Miller *v.* Wolf, 63 Iowa 233, 235, 18 N. W. 889. See also Toronto Public School Bd. *v.* Toronto, 4 Ont. L. Rep. 468, 472.

"**Submitted," in proceedings of courts of chancery,** means that the parties leave it to the chancellor to determine without argument. "Like other terms indeed, it may be modified, or qualified by concomitant words, such as 'submitted' on notes of the counsel 'filed' or 'to be filed.' But never yet was the term 'submitted' in this Court, without such modification or qualification, understood to mean otherwise than that the party or parties who 'submitted' dispensed with the benefit of argument." Ridgely *v.* Carey, 4 Harr. & M. (Md.) 167, 174.

3. Webster Dict. [*quoted* in McNulta *v.* Corn Belt Bank, 63 Ill. App. 593, 608].

Submitting to and abiding by a law, an order, a decision, means, in common parlance, to obey it, to comply with it, to act in accordance with it, and perform its requirements. Washburne *v.* Lufkin, 4 Minn. 466, 470.

4. Black L. Dict.; Grattan L. Gloss. See also State *v.* Warner, 197 Mo. 650, 666, 94 S. W. 962.

5. Black L. Dict.

6. Kane *v.* Erie R. Co., 142 Fed. 682, 685, 73 C. C. A. 672. See also Railroad Co. *v.* Margrat, 51 Ohio St. 130, 145, 37 N. E. 11.

The test by which to determine whether a board of assessors for local improvements of a city are subordinates is not whether a review of such of their determinations as are quasi-judicial may be had, but whether, in the performance of their various duties, they are subject to the direction and control of a superior officer, or are independent officers, subject only to such directions as the statute gives. People *v.* Van Wyck, 157 N. Y. 495, 506, 52 N. E. 559.

"**Officers, subordinate officials, or employees,**" not including a board of visiting physicians of a city hospital consisting of specialists or experts in the various departments of medical science see Com. *v.* Fitler, 147 Pa. St. 288, 296, 23 Atl. 568, 15 L. R. A. 205.

President of a railroad company is not a subordinate officer. Bedford Belt R. Co. *v.* McDonald, 17 Ind. App. 492, 46 N. E. 1022, 60 Am. St. Rep. 172.

"**Subordinate officers of customs**" see Childs *v.* Comstock, 69 N. Y. App. Div. 160, 165, 74 N. Y. Suppl. 643.

7. Morgan Leg. Max. [*citing* 3 Inst. 167].

8. **By etymology** the term signifies an order with a penalty for disobedience. Burns

time and place to testify as a witness;[9] a process to cause a witness to appear and give testimony, commanding him to lay aside all pretenses and excuses, and appear before a court or magistrate therein named under a penalty therein mentioned.[10] (Subpœna: Delay in Issuance, see CONTINUANCES IN CIVIL CASES, 9 Cyc. 116. For Parties, see EQUITY, 16 Cyc. 209. For Witness — In General, see DEPOSITIONS, 13 Cyc. 920; WITNESSES; Compensation of Sheriff or Constable For Serving, see SHERIFFS AND CONSTABLES, 35 Cyc. 1568. Recovery of Witness' Fees as Costs — Person Living Beyond Reach of, see COSTS, 11 Cyc. 116; Person Subpœnaed But Not Examined, see COSTS, 11 Cyc. 115. Reliance on as Proper Exercise of Diligence in Application For Continuance, see CONTINUANCES IN CRIMINAL CASES, 9 Cyc. 197. Service on Married Woman, see HUSBAND AND WIFE, 21 Cyc. 1495.)

SUBPŒNA AD TESTIFICANDUM. A process to compel a witness to appear and give testimony, commanding him to appear before a court or magistrate therein named, at a time therein mentioned, to testify for a party named, under a penalty therein mentioned.[11] (See SUBPŒNA, *ante*, p. 359.)

SUBPŒNA DUCES TECUM. A process whereby a court, at the instance of a suitor, commands a person, who has, in his possession or control, some document or paper that is pertinent to the issues of the pending controversy, to produce it for use at the trial;[12] a process of compulsory obligation on the witness to produce the deed or writing required of him, if he has it in his possession and has no lawful excuse for withholding it.[13] (Subpœna Duces Tecum: In General, see EVIDENCE, 17 Cyc. 457; WITNESSES. Appealability of Order, see APPEAL AND ERROR, 2 Cyc. 597. In Proceedings on Examination in Supplementary Proceedings, see EXECUTIONS, 17 Cyc. 1439.)

SUBPŒNA SERVERS. The designation of a class of persons by the district attorney's office, who are engaged in serving subpœnas, as well as in other work.[14]

SUBROGATIO EST TRANSFUSIO UNIUS CREDITORIS IN ALIUM, EADEM VEL MITIORI CONDITIONE. A maxim meaning "Subrogation is the substituting one creditor in the place of another, in the same, or a better condition."[15] (See SUBROGATION, *post*, p. 361.)

v. San Francisco Super. Ct., 140 Cal. 1, 3, 73 Pac. 597.

9. Scott *v.* Shields, 8 Cal. App. 12, 15, 96 Pac. 385 [*citing* Code Civ. Proc. § 1985].

10. Bouvier L. Dict. [*quoted* in Alexander *v.* Harrison, 2 Ind. App. 47, 28 N. E. 119, 121].

Its purpose is to compel the attendance of a person whom it is desired to use as a witness. Dishaw *v.* Wadleigh, 15 N. Y. App. Div. 205, 211, 44 N. Y. Suppl. 207. "A 'subpœna' to attend as a witness in a cause is a personal order, and imports that the individual therein named is connected with the cause by his personal acquaintance with the matters involved in it." Miller *v.* Knox, 4 Bing. N. Cas. 572, 602, 6 Scott 1, 33 E. C. L. 865.

Distinguished from "summons" see Bleecker *v.* Carroll, 2 Abb. Pr. (N. Y.) 82. A subpœna is not a writ, the power of which must be exhausted before it can be pronounced served, but one capable of and intended for many services. Murphy *v.* Fayette County, 13 Montg. Co. Rep. (Pa.) 81, 83.

A subpœna ticket carries no authority but is a mere request made to the witness to attend court. Bratton *v.* Clendenin, Harp. (S. C.) 454.

A subpœna in chancery brings the party into court. It is a process which precedes judicial action and is distinguished from process which follows. Rodney Commercial Bank *v.* State, 4 Sm. & M. (Miss.) 439, 515. See also Seattle, etc., R. Co. *v.* Union Trust Co., 79 Fed. 179, 187, 24 C. C. A. 512.

11. Matter of Strauss, 30 N. Y. App. Div. 610, 613, 52 N. Y. Suppl. 392.

It is an expression, whatever the official hand clothed with the right to issue it, of inherent power possessed by courts having the power to hear and determine causes of controversy, to call for proofs of the facts involved and to summon and compel the attendance of witnesses before them. Jackson *v.* Mobley, 157 Ala. 408, 412, 47 So. 590.

12. Hoyt's Estate, 7 N. Y. Civ. Proc. 374, 376, 3 Dem. Surr. 388. See also Matter of Strauss, 30 N. Y. App. Div. 610, 613, 52 N. Y. Suppl. 392.

13. *In re* O'Toole, Tuck. Surr. (N. Y.) 39, 40. See also Finnick *v.* Peterson, 6 Philippine 172, 176.

This is the usual method of requiring the production of a paper on the trial of a case. Murphy *v.* Russell, 8 Ida. 133, 147, 67 Pac. 421.

It can only be used to compel the production of books, papers, documents, accounts, and the like, and not for the production of property of other kinds. *In re* Shephard, 3 Fed. 12, 13, 18 Blatchf. 225.

14. People *v.* Gardner, 157 N. Y. 520, 523, 52 N. E. 564.

15. Peloubet Leg. Max. [*citing* Merlin Qu. de Dr.].

SUBROGATION

By Sir Henri Elzear Taschereau, of Ottawa
Member of the Judicial Committee of the Privy Council of Great Britain; and formerly Chief Justice of the Supreme Court of Canada

I. Definition and Nature, 363
- A. *In General,* 363
- B. *Conventional Subrogation,* 367

II. Extent and Limitation of Right, 370
- A. *In General,* 370
- B. *Tendency to Extend Scope,* 373
- C. *Application to Subrogation of the Ordinary Equity Maxims,* 373
- D. *Inapplicability of Doctrine to Primary Liability,* 374

III. Necessity For and Sufficiency of Payment of Debt or Encumbrance, 374
- A. *In General,* 374
- B. *Voluntary Payment,* 375
- C. *Part Payment,* 379

IV. Manner and Effect of Subrogation, 380
- A. *In General,* 380
- B. *Benefit of Mortgage Security,* 381
  1. *In General,* 381
  2. *Payment by Mortgagor,* 382
  3. *Payment by Tenant For Life or For Years,* 382

V. Waiver or Loss of Right, 383

VI. Actions and Other Proceedings For Enforcement, 383
- A. *Nature and Form,* 383
- B. *Limitations and Laches,* 385
  1. *Limitations,* 385
  2. *Laches,* 387
- C. *Notice of Indebtedness and Demand,* 388
- D. *Parties,* 388
- E. *Pleading and Proof,* 390
- F. *Evidence,* 391
- G. *Judgment or Decree,* 392
- H. *Review,* 392

VII. Application of Doctrine to Particular Relations, 392
- A. *Persons Interested in the Administration of Estates,* 392
- B. *Persons Liable For Loss or Injury Caused by Fault of Another,* 394
- C. *Persons Jointly or Jointly and Severally Liable For the Same Debt,* 395
  1. *General Rule,* 395
  2. *Joint Mortgagors,* 395
  3. *Joint Judgment Debtors,* 396
  4. *Partners,* 397
  5. *Tenants in Common,* 398
- D. *Parties to Bills or Notes,* 399
- E. *Sureties or Guarantors,* 402
  1. *General Rule Stated,* 402
  2. *Necessity For and Sufficiency of Payment,* 406

a. *In General*, 406
b. *Necessity That Payment Be Under Compulsion*, 407
c. *Part Payment*, 408
d. *Effect of Payment as Extinguishing Debt*, 410
3. *To What the Surety Is Subrogated*, 414
a. *Rights and Securities of Creditor*, 414
(I) *In General*, 414
(II) *Judgments*, 418
(III) *Mortgages*, 422
(IV) *Liens*, 424
(A) *In General*, 424
(B) *Vendor's Lien*, 425
b. *Priority of Creditor*, 426
c. *Rights of Principal*, 427
d. *Rights of Cosurety*, 428
4. *Against Whom Surety Is Subrogated*, 428
5. *Extent and Limitation of Right*, 429
6. *Waiver or Loss of Right*, 431
7. *Sureties For Particular Classes of Persons*, 431
a. *Sheriffs and Other Officers*, 431
b. *Guardians*, 433
c. *Trustees*, 434
d. *Executors or Administrators*, 434
e. *Surety of Surety*, 434
f. *Successive Sureties*, 434
g. *Sureties on Judicial Bonds*, 435
F. *Subrogation of Creditor to Rights of Surety*, 437
G. *Persons Acting in Representative, Fiduciary, or Official Capacity*, 439
1. *In General; Agents*, 439
2. *Sheriffs*, 440
3. *Executors and Administrators*, 440
4. *Guardians and Trustees*, 442
H. *Persons Discharging Encumbrances on Property*, 443
1. *In General*, 443
2. *Purchasers of Encumbered Property*, 446
a. *Rules Stated*, 446
b. *Liens Discharged*, 448
(I) *Judgment Liens*, 448
(II) *Deed of Trust or Mortgage Liens*, 449
3. *Purchasers of Equity of Redemption*, 452
4. *Purchasers at Execution, Foreclosure, Judicial, and Other Sales*, 453
a. *In General*, 453
b. *Invalid Sales*, 454
(I) *General Rules*, 454
(II) *Executors' or Administrators' Sales*, 457
5. *Junior Mortgagees, Judgment Creditors, or Encumbrancers*, 458
a. *General Rule*, 458
b. *Effect of Invalidity, Fraud, or Want of Notice*, 462
c. *Part Payment*, 465
6. *Vendors and Mortgagors Paying After Transfer of Mortgaged Property*, 465
I *Persons Making Improvements on Land of Another*, 466
J. *Persons Making Advancements For Necessaries For One Incompetent to Contract*, 467
K. *Persons Owning Funds or Property Applied by Others to Debts or Encumbrances*, 467

L. *Persons Advancing Money to Pay the Debt of Another or Discharging Liens on Another's Property*, 468
1. *In General*, 468
2. *Mortgage Lien*, 471
3. *Vendor's Lien*, 476
4. *Maritime Lien*, 477
5. *Wages*, 478

CROSS-REFERENCES

For Matters Relating to:
Contribution, see CONTRIBUTION, 9 Cyc. 792.
Control of Execution:
By Co-Defendant, see EXECUTIONS, 17 Cyc. 1388.
By Officer Paying the Judgment Debt, see EXECUTIONS, 17 Cyc. 1389.
By Third Person Paying the Judgment Debt, see EXECUTIONS, 17 Cyc. 1388.
Effect of Payment of Judgment by Joint Party or Third Person, see JUDGMENTS, 23 Cyc. 1470.
Equitable Jurisdiction Over Matters of Account Through Subrogation, see ACCOUNTS AND ACCOUNTING, 1 Cyc. 417.
Equity, see EQUITY, 16 Cyc. 1.
Execution, see EXECUTIONS, 17 Cyc. 878.
Principal and Surety, see PRINCIPAL AND SURETY, 32 Cyc. 1.
Subrogation as a Method of Marshaling Assets, see MARSHALING ASSETS, 26 Cyc. 938.
Subrogation in Creditors' Suits, see CREDITORS' SUITS, 12 Cyc. 45.
Subrogation of Particular Classes of Persons:
Directors of Corporation:
With Respect to Statutory Liability, see CORPORATIONS, 10 Cyc. 897.
With Respect to Ultra Vires Debts, see CORPORATIONS, 10 Cyc. 1149.
Fidelity Insurer to Rights of Employer of Dishonest Employee, see FIDELITY INSURANCE, 19 Cyc. 526.
Fire Insurer to Rights of Insured, see FIRE INSURANCE, 19 Cyc. 893.
Fraudulent Grantee of Creditor to Rights of Creditor Whom He Has Paid, see FRAUDULENT CONVEYANCES, 20 Cyc. 626.
Life Insurer to Rights Against One Causing Death, see LIFE INSURANCE, 25 Cyc. 903.
Marine Insurer to Rights of the Insured in Regard to the Loss, see MARINE INSURANCE, 26 Cyc. 710, 713.
Materialman to Lien of Contractor, see MECHANICS' LIENS, 27 Cyc. 91.
Subcontractor to Lien of Contractor, see MECHANICS' LIENS, 27 Cyc. 91.
Trustee in Bankruptcy to Rights of Creditor, see BANKRUPTCY, 5 Cyc. 369.
Workman to Lien of Contractor, see MECHANICS' LIENS, 27 Cyc. 91.

I. DEFINITION AND NATURE.

A. In General. Subrogation is the substitution of another person in the place of a creditor, so that the person in whose favor it is exercised succeeds to the rights of the creditor in relation to the debt.[1] The doctrine is one of equity and

1. Liles *v.* Rogers, 113 N. C. 197, 199, 18 S. E. 104, 37 Am. St. Rep. 627; Sheldon Subr. § 1. To the same effect see Brown *v.* Rouse, 125 Cal. 645, 650, 58 Pac. 267; Johnson *v.* Barrett, 117 Ind. 551, 554, 19 N. E. 199, 10 Am. St. Rep. 83; Boston Safe Deposit, etc., Co. *v.* Thomas, 59 Kan. 470, 475, 53 Pac. 472; Staples *v.* Fox, 45 Miss. 667, 680 [*quoting* Dixon Subr.]; Colt *v.* Sears Commercial Co., 20 R. I. 64, 71, 37 Atl. 311.

Other definitions are: "A substitution, ordinarily the substitution of another person in the place of one creditor, so that the person in whose favor it is exercised succeeds to the rights of the creditor in relation to the debt. More broadly, it is the substitution of one person in the place of another, whether as creditor, or as the possessor of any other rightful claim. The substitute is put in all respects in the place of the party to whose rights he is subrogated." Sheldon Subr. 1, 2 [*quoted* in Townsend *v.* Cleveland

benevolence,[2] and like contribution and other similar equitable rights was

Fire Proofing Co., 18 Ind. App. 568, 47 N. E. 707, 709].

"The equity, by which a person who is secondarily liable for a debt, and has paid the same, is put in the place of the creditor so as to entitle him to make use of all the securities and remedies possessed by the creditor, in order to enforce the right of exoneration as against the principal debtor, or of contribution against others who are liable in the same rank with himself." Schoonover *v.* Allen, 40 Ark. 132, 137; Talbot *v.* Wilkins, 31 Ark. 411, 421; Fuller *v.* John S. Davis' Sons Co., 184 Ill. 505, 513, 56 N. E. 791; Sands *v.* Durham, 98 Va. 392, 395, 36 S. E. 472, 54 L. R. A. 614.

"The demanding of something under the right of another, to which right the claimant is entitled for the purposes of justice to be substituted in place of the original holder. . . . It is the machinery by which the equity of one man is worked out through the legal rights of another." Chaffe *v.* Oliver, 39 Ark. 531, 542.

"The substitution of one person in place of another, whether as a creditor or as the possessor of any other rightful claim, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim and its rights, remedies or securities." Leavitt *v.* Canadian Pac. R. Co., 90 Me. 153, 160, 37 Atl. 886, 38 L. R. A. 152.

"The act of putting, by a transfer, a person in the place of another, or a thing in the place of another thing. It is the substitution of a new for an old creditor and the succession to his rights, *transfusio unius creditoris in alium*." Spray *v.* Rodman, 43 Ind. 225, 228. See Townsend *v.* Cleveland Fire Proofing Co., 18 Ind. App. 568, 47 N. E. 707 [*quoting* Anderson L. Dict.].

"A fiction of the law, which in the language of the Code [of Louisiana], 'is the right of a creditor in favor of a third person who pays him." Bradford *v.* Damare, 46 La. Ann. 1530, 1534, 16 So. 487 [*quoting* Roman *v.* Forstall, 11 La. Ann. 717].

"The act of putting one person in the place of another, or the substitution of another person in the place of the creditor, to whose rights he succeeds in relation to the debt." Heuser *v.* Sharman, 89 Iowa 355, 359, 56 N. W. 525, 48 Am. St. Rep. 390.

"Subrogation is simply asking something in the right of another, or as it were, under another, which that other ought in justice and equity to accord the use of to the person asking." Goldsmith *v.* Stewart, 45 Ark. 149, 154.

"Putting a third person who has paid the amount due the creditor in his place." Connecticut Mut. L. Ins. Co. *v.* Cornwell, 72 Hun (N. Y.) 199, 201, 25 N. Y. Suppl. 348.

"A substitution of one person or thing for another." Swarts *v.* Siegel, 117 Fed. 13, 15, 54 C. C. A. 399.

"The equitable result of payment." Nesbit *v.* Martin, 4 Pa. Co. Ct. 95, 97.

In a more restricted sense a remedy afforded by courts of equity to the surety, upon paying the debt of his principal. Lee County Justices *v.* Fulkerson, 21 Gratt. (Va.) 182, 193. The right of the surety, when he pays the debt of his principal, to be subrogated to whatever security the creditor had. Richeson *v.* Crawford, 94 Ill. 165, 173.

In Louisiana, under Civ. Code, art. 2157, subrogation is legal or conventional, and takes place of right in favor of one paying a debt he is interested in discharging, when he is bound for or with another, or for the same debt for which another is bound, and he who is bound for another, or for the same debt as another, and pays, is subrogated to all the creditor's rights against the principal; but, as to those with whom he is bound, he will be subrogated only for their virile portions. Howe *v.* Frazer, 2 Rob. (La.) 424.

Sometimes denominated a fictitious cession made to one who has a right to offer or make payment to the creditor. Staples *v* Fox, 45 Miss. 667, 680. The cession of remedies. Furnold *v.* Missouri Bank, 44 Mo. 336.

It is used synonymously with substitution. See Pryor *v.* Davis, 109 Ala. 117, 19 So. 440; Loeb *v.* Fleming, 15 Ill. App. 503; Ducker *v.* Stubblefield, 9 B. Mon. (Ky.) 577; Staples *v.* Fox, 45 Miss. 667; Greenwell *v.* Heritage, 71 Mo. 459; Springs *v.* Harven, 56 N. C. 96; Cottrell's Appeal, 23 Pa. St. 294; Kyner *v.* Kyner, 6 Watts (Pa.) 221; Erb's Appeal, 2 Penr. & W. (Pa.) 296; Lee County Justices *v.* Fulkerson, 21 Gratt. (Va.) 182; Davis *v.* McConiff, 2 Rev. de Jur. 543; Chapdelaine *v.* Chevallier, 10 Rev. Leg. 687; Gingras *v.* Gingras, 16 Quebec 292; Stewart *v.* Metropolitan Bldg. Soc., 1 Dorion (L. C.) 324; Berthelet *v.* Dease, 12 L. C. Jur. 336; Quebec F. Ins. Co. *v.* Molson, 1 L. C. Rep. 222; Renny *v.* Moat, 2 Montreal Leg. N. 97, 4 Montreal Leg. N. 195; Owens *v.* Bedell, 7 Montreal Q. B. 395.

2. *Missouri.*— Crump *v.* McMurtry, 8 Mo. 408 (holding the doctrine to be a principle of pure equity, founded on the dictates of refined justice); Moore *v.* Lindsey, 52 Mo. App. 474.

New Jersey.— New Jersey Midland R. Co. *v.* Wortendyke, 27 N. J. Eq. 658.

New York.— Dunlop *v.* James, 174 N. Y. 411, 67 N. E. 60; Pease *v.* Egan, 131 N. Y. 262, 30 N. E. 102.

Oregon.— House *v.* Fowle, 22 Oreg. 303, 29 Pac. 890.

Pennsylvania.— Sower's Appeal, (1888) 15 Atl. 898; Miller's Appeal, 119 Pa. St. 620, 13 Atl. 504; Williamson's Appeal, 94 Pa. St. 231; Mosiers' Appeal, 56 Pa. St. 76, 93 Am. Dec. 783; Hoover *v.* Epler, 52 Pa. St. 522; Cottrell's Appeal, 23 Pa. St. 294; Fink *v.* Mahaffy, 8 Watts 384; Kyner *v.* Kyner, 6 Watts 221.

South Carolina.—Gadsden *v.* Brown, Speers Eq. 37, 41.

South Dakota.— Ipswich Bank *v.* Brock, 13 S. D. 409, 83 N. W. 436.

It has been variously described as: A device to promote justice (Acer *v.* Hotchkiss,

adopted from the civil law,[3] and its basis is the doing of complete, essential, and perfect justice between all the parties without regard to form,[4] and its object

97 N. Y. 395 [*quoted* in Cornell Steamboat Co. *v.* The Jersey City, 43 Fed. 166]); a creature of equity designed for the promotion of justice (Ohmer *v.* Boyer, 89 Ala. 273, 7 So. 663); a doctrine founded on pure equity (Erb's Appeal, 2 Penr. & W. (Pa.) 296); the offspring of natural justice (Royalton Nat. Bank *v.* Cushing, 53 Vt. 321; Douglass *v.* Fagg, 8 Leigh (Va.) 588); a principle elevated and pure (Gowing *v.* Bland, 2 How. (Miss.) 813); one of the benevolences of the law, created, fostered, and enforced in the interest and for the promotion of justice (Sands *v.* Durham, 99 Va. 263, 38 S. E. 145, 86 Am. St. Rep. 884, 54 L. R. A. 614); and an equitable device (Opp *v.* Ward, 125 Ind. 241, 24 N. E. 974, 21 Am. St. Rep. 220).

Equitable assignment and subrogation distinguished.— As soon as the sum justly due on a joint obligation or on equitable contribution is enforced, all subrogated rights cease. This is not so in an equitable assignment, as in such case the whole face of the debt, although purchased for a much less sum, can be collected; the purchase of a chose in action by a stranger to the instrument, accompanied by delivery of possession, would be an equitable assignment; but, where one of two joint debtors pays off the debt, between him and his coöbligee there is some equitable reason why the other should have paid it. Chancery gives relief by subrogation, and this is the true distinction between an equitable assignment and subrogation. Nesbit *v.* Martin, 4 Pa. Co. Ct. 95; Buchanan's Estate, 2 Chest. Co. Rep. (Pa.) 74. Furthermore, assignment is the act of the parties, and depends generally upon intention; but where the nature of the transaction is such as imports a payment of the debt, and a consequent discharge of the mortgage, there can of course be no assignment, for the lien of the mortgage is extinguished by the payment. C. M. Hapgood Shoe Co. *v.* Crockett First Nat. Bank, 23 Tex. Civ. App. 506, 56 S. W. 995 (holding that a distinction must be observed between subrogation to and an assignment of a mortgage, for subrogation is an act of law, and not of contract, and the doctrine of subrogation does not apply to a case where it was the agreement and intention of the parties that the mortgage should be kept alive for the protection of the assignees against judgments in favor of other parties); Gatewood *v.* Gatewood, 75 Va. 407 [*cited* in Fulkerson *v.* Taylor, 100 Va. 426, 41 S. E. 863]. And while subrogation is predicated upon payment of the debt, the whole doctrine of equitable assignment is based upon an assumption of the continuation of the indebtedness. Ellsworth *v.* Lockwood, 42 N. Y. 89. See Lamb *v.* Montague, 112 Mass. 352. The two terms are, however, often used synonymously without strict regard to technical accuracy. Crippen *v.* Chappel, 35 Kan. 495, 11 Pac. 453, 57 Am. Rep. 187; Everston *v.* Central Bank, 33 Kan. 352, 357, 6 Pac. 605 (where the court uses the expression: "The rule of 'subrogation' or in other words, the rule of 'equitable assignment'"). And see Faires *v.* Cockerell, 88 Tex. 428, 31 S. W. 190, 639, 28 L. R. A. 528 (holding that subrogation is but an equitable assignment, and puts the parties where they would be if an actual assignment had been made). In the case of The Sarah J. Weed, 21 Fed. Cas. No. 12,350, 2 Lowell 555 [*cited* in Dunlop *v.* James, 174 N. Y. 411, 67 N. E. 60], subrogation is defined as an equitable assignment operated by the law itself, when justice requires it.

It is of grace and not of force. Rice *v.* Winters, 45 Nebr. 517, 63 N. W. 830; South Omaha Nat. Bank *v.* Wright, 45 Nebr. 23, 63 N. W. 126; Eaton *v.* Hasty, 6 Nebr. 419, 20 Am. Rep. 365 (holding that, although the right of subrogation is one of the highest equity, still it is purely an equitable result); *In re* Shimp, 197 Pa. St. 128, 46 Atl. 1037; Budd *v.* Olver, 148 Pa. St. 194, 197, 23 Atl. 1105; *In re* Hennessy, 4 L. T. N. S. (Pa.) 9; National Surety Co. *v.* State Sav. Bank, 156 Fed. 21, 84 C. C. A. 187, 14 L. R. A. N. S. 155.

The equity of subrogation springs out of the right to contribution and is only one of the means by which that right is enforced. Dowdy *v.* Blake, 50 Ark. 205, 6 S. W. 897, 7 Am. St. Rep. 88 [*citing* Bisph. Eq. § 335].

3. *Alabama.*— Knighton *v.* Curry, 62 Ala. 404.

Indiana.— Spray *v.* Rodman, 43 Ind. 225.

Kentucky.—Flannery *v.* Utley, 3 S. W. 412, 5 S. W. 878, 8 Ky. L. Rep. 776, 9 Ky. L. Rep. 581.

Missouri.— Furnold *v.* State Bank, 44 Mo. 336; Bissett *v.* Grantham, 67 Mo. App. 23.

New Jersey.— Young *v.* Vough, 23 N. J. Eq. 325; Shinn *v.* Budd, 14 N. J. Eq. 234.

New York.— Durante *v.* Eannaco, 65 N. Y. App. Div. 435, 72 N. Y. Suppl. 1048, holding that "subrogation" was a creation of the civil law, but was never recognized to its full extent by the common law. It was called by the civilians a "species of spontaneous agency." To lay a foundation for a claim of recompense or remuneration on the part of the *negotiorum gestor*, the labor or expense must be bestowed either with the direct intention of benefiting the third party, against whom the claim is made, or in the *bona fide* belief that the subject belongs to the person by whom the expense or labor is bestowed.

Pennsylvania.— Springer *v.* Springer, 43 Pa. St. 518.

Vermont.—McDaniels *v.* Flower Brook Mfg. Co., 22 Vt. 274.

Virginia.— Enders *v.* Brune, 4 Rand. 438, holding that the doctrine is one of the most beautiful features of that system.

West Virginia.— McNeil *v.* Miller, 29 W. Va. 480, 2 S. E. 335.

United States.—Ætna Ins. Co. *v.* Middleport, 124 U. S. 534, 8 S. Ct. 625, 31 L. ed. 537.

4. *Kentucky.*— Albro *v.* Robinson, 93 Ky.

is the prevention of injustice.[5] The right does not necessarily rest on contract or privity, but upon principles of natural equity,[6] and does not depend upon

195, 19 S. W. 587, 14 Ky. L. Rep. 124; Kelley *v.* Ball, 19 S. W. 581, 582, 14 Ky. L. Rep. 132; Flannery *v.* Utley, 3 S. W. 412, 5 S. W. 878, 8 Ky. L. Rep. 776, 9 Ky. L. Rep. 581.

Maine.— Stevens *v.* King, 84 Me. 291, 24 Atl. 850.

Missouri.— Furnold *v.* State Bank, 44 Mo. 336; Moore *v.* Lindsey, 52 Mo. App. 474.

Nebraska.— Rice *v.* Winters, 45 Nebr. 517, 63 N. W. 830.

New York.—Acer *v.* Hotchkiss, 97 N. Y. 395; Wells *v.* Salina, 71 Hun 559, 25 N. Y. Suppl. 134.

Vermont.— Royalton Nat. Bank *v.* Cushing, 53 Vt. 321.

Virginia.— Hudson *v.* Dismukes, 77 Va. 242 [*quoting* Enders *v.* Brune, 4 Rand. 438, where the court says that it has nothing of form, nothing of technicality about it, and "he who in administering it would stick to the letter, forgets the end of its creation, and perverts the spirit which gave it birth"]; Douglas *v.* Fagg, 8 Leigh 588.

West Virginia.— McNeil *v.* Miller, 29 W. Va. 480, 2 S. E. 335.

It construes payment to be purchase, and purchase to be payment, as justice may demand. It substitutes one person for another or property for property. Stevens *v.* King, 84 Me. 291, 24 Atl. 850.

5. Moring *v.* Privott, 146 N. C. 558, 60 S. E. 509.

The doctrine is not a fixed and inflexible rule. It is a creature of the equity courts, invented and applied by them to do justice, or prevent an injustice being done in a particular case and under a particular state of facts. Arlington State Bank *v.* Paulsen, 57 Nebr. 717, 78 N. W. 303. It does not flow from any fixed rule of law but is used to prevent a miscarriage of justice. Ocobock *v.* Baker, 52 Nebr. 447, 72 N. W. 582, 66 Am. St. Rep. 519.

6. *Alabama.*— Ohmer *v.* Boyer, 89 Ala. 273, 7 So. 663; Watts *v.* Eufaula Nat. Bank, 76 Ala. 474; Knighton *v.* Curry, 62 Ala. 404; Smith *v.* Harrison, 33 Ala. 706.

Arkansas.— Talbot *v.* Williams, 31 Ark. 411.

Connecticut.— Smith *v.* Foran, 43 Conn. 244, 21 Am. Rep. 647.

Delaware.— Miller *v.* Stout, 5 Del. Ch. 259.

Illinois.— Devine *v.* Harkness, 117 Ill. 145, 7 N. E. 52; Hughes *v.* Hartford F. Ins. Co., 17 Ill. App. 518.

Indiana.— Davis *v.* Schlemmer, 150 Ind. 472, 50 N. E. 373; Huffmond *v.* Bence, 128 Ind. 131, 27 N. E. 347; Johnson *v.* Barrett, 117 Ind. 551, 19 N. E. 199, 10 Am. St. Rep. 83; Rooker *v.* Benson, 83 Ind. 250; White River School Tp. *v.* Dorrell, 26 Ind. App. 538, 59 N. E. 867.

Kansas.— Crippen *v.* Chappel, 35 Kan. 495, 11 Pac. 453, 57 Am. Rep. 187.

Kentucky.—Havens *v.* Foudry, 4 Metc. 247.

Maine.— Stevens *v.* King, 84 Me. 291, 24 Atl. 850.

Maryland.— Orem *v.* Wrightson, 51 Md. 34, 34 Am. Rep. 286.

Massachusetts.—Amory *v.* Lowell, 1 Allen 504. But see Bock *v.* Gallagher, 114 Mass. 28; Holmes *v.* Day, 108 Mass. 563.

Minnesota.— Stewart *v.* Parcher, 91 Minn. 517, 98 N. W. 650; Emmert *v.* Thompson, 49 Minn. 386, 52 N. W. 31, 32 Am. St. Rep. 566; Knoblauch *v.* Foglesong, 38 Minn. 459, 38 N. W. 366; Felton *v.* Bissel, 25 Minn. 15; McArthur *v.* Martin, 23 Minn. 74.

Mississippi.— Union Mortg. Banking, etc., Co. *v.* Peters, 72 Miss. 1058, 18 So. 497, 30 L. R. A. 829 (holding that the principle of equitable subrogation does not arise from contract, for that is conventional subrogation, but is a creation of the court of equity, and is applied in the absence of an agreement between the parties, where otherwise there would be a manifest failure of justice); Conway *v.* Strong, 24 Miss. 665; Gowing *v.* Bland, 2 How. 813.

Nebraska.— South Omaha Nat. Bank *v.* Wright, 45 Nebr. 23, 63 N. W. 126 [*following* Rice *v.* Winters, 45 Nebr. 517, 63 N. W. 830 (*cited* in Aultman *v.* Bishop, 53 Nebr. 545, 74 N. W. 455)] (holding that the doctrine of subrogation is not administered by courts of equity as a legal right, but the principle is applied to subserve the ends of justice, and to do equity in the particular case under consideration; and it does not rest on contract, and no general rule can be laid lown which will afford a test in all cases for its application, and whether the doctrine is applicable to any particular case depends upon the peculiar facts and circumstances of such case); Eaton *v.* Hasty, 6 Nebr. 419, 29 Am. Rep. 365.

New Hampshire.— Philbrick *v.* Shaw, 61 N. H. 356.

New York.— Morehouse *v.* Brooklyn Heights R. Co., 185 N. Y. 520, 78 N. E. 179, 6 L. R. A. N. S. 746; Dunlap *v.* James, 174 N. Y. 411, 67 N. E. 60; Pease *v.* Egan, 131 N. Y. 262, 30 N. E. 102; Arnold *v.* Green, 116 N. Y. 566, 23 N. E. 1; Gans *v.* Thieme, 93 N. Y. 225; Mathews *v.* Aikin, 1 N. Y. 595; Wells *v.* Salina, 71 Hun 559, 25 N. Y. Suppl. 134; Smith *v.* National Surety Co., 28 Misc. 628, 59 N. Y. Suppl. 789; Sandford *v.* McLean, 3 Paige 117, 23 Am. Dec. 773; Hayes *v.* Ward, 4 Johns. Ch. 123.

North Carolina.— Moring *v.* Privott, 146 N. C. 558, 60 S. E. 509; Grainger *v.* Lindsay, 123 N. C. 216, 31 S. E. 473; Springs *v.* Harven, 56 N. C. 96; Brinson *v.* Thomas, 55 N. C. 414; Scott *v.* Dunn, 21 N. C. 425, 30 Am. Dec. 174.

Ohio.— Dempsey *v.* Bush, 18 Ohio St. 376.

Pennsylvania.—*In re* Hoge, 188 Pa. St. 527, 41 Atl. 621; Sowers' Appeal, (1888) 15 Atl. 898; Miller's Appeal, 119 Pa. St. 620, 13 Atl. 504; Williamson's Appeal, 94 Pa. St. 231; Bender *v.* George, 92 Pa. St. 36; Wallace's Estate, 59 Pa. St. 401; Mosier's Appeal, 56 Pa. St. 76, 93 Am. Dec. 783; Hoover *v.* Epler, 52 Pa. St. 522; McCormick *v.* Irwin,

the act of the creditor, but may be independent of him and also of the debtor.[7] The right may, however, be modified or extinguished by contract,[8] and subrogation cannot be invoked to override and displace the real contract of the parties;[9] and thus if the facts and circumstances show definitely that at the time of payment the right of subrogation was not intended to be exercised, but, on the contrary, that the purpose was not to keep the debt alive but to extinguish it, then the right of subrogation cannot be held to exist.[10] While subrogation is not founded on contract, there must, in every case where the doctrine is invoked, in addition to the inherent justice of the case, concur therewith some principle of equity jurisprudence as recognized and enforced by courts of equity.[11] Where the right of subrogation exists it is subject to prior equities and all the rules of equity.[12]

B. Conventional Subrogation. The subrogation just described[13] is very generally referred to as legal subrogation[14] to differentiate it from conventional subrogation or subrogation arising from express contract between the payer and

35 Pa. St. 111; Cottrell's Appeal, 23 Pa. St. 294; Kyner *v.* Kyner, 6 Watts 221; Burns *v.* Huntington Bank, 1 Penr. & W. 395.

South Carolina.— Gadsden *v.* Brown, Speers Eq. 37.

South Dakota.— Ipswich Bank *v.* Brock, 13 S. D. 409, 83 N. W. 436.

Texas.— Tarver *v.* Land Mortg. Bank, 7 Tex. Civ. App. 425, 27 S. W. 40 [*citing* Gans *v.* Thieme, *supra*; Cottrell's Appeal, *supra*].

Vermont.— Royalton Nat. Bank *v.* Cushing, 53 Vt. 321; Chandler *v.* Dyer, 37 Vt. 345; Stevens *v.* Goodenough, 26 Vt. 676.

Virginia.— Hudson *v.* Dismukes, 77 Va. 242; Gatewood *v.* Gatewood, 75 Va. 407; Harnsberger *v.* Yancey, 33 Gratt. 527.

West Virginia.—McNeil *v.* Miller, 29 W. Va. 480, 2 S. E. 335.

United States.— Ætna L. Ins. Co. *v.* Middleport, 124 U. S. 534, 8 S. Ct. 625, 31 L. ed. 537; Memphis, etc., R. Co. *v.* Dow, 120 U. S. 287, 7 S. Ct. 482, 30 L. ed. 595; Matthews *v.* Fidelity Title, etc., Co., 52 Fed. 687.

England.— Duncan *v.* North Wales, etc., Bank, 6 App. Cas. 1, 50 L. J. Ch. 355, 43 L. T. Rep. N. S. 706, 29 Wkly. Rep. 763; Lanoy *v.* Athol, 2 Atk. 447, 26 Eng. Reprint 668; Parsons *v.* Briddock, 2 Vern. Ch. 608, 23 Eng. Reprint 997; Reeve *v.* Reeve, 1 Vern. Ch. 219, 23 Eng. Reprint 426; Dering *v.* Winchelsea, 1 White & T. Lead. Cas. Eq. 114.

A matter resting in conscience and not in consent.— Miller *v.* Stout, 5 Del. Ch. 259.

Nor is it founded on the absence of contract. Traders' Bank *v.* Myers, 3 Kan. App. 636, 44 Pac. 292, 294 [*citing* Crippen *v.* Chappel, 35 Kan. 495, 11 Pac. 453, 57 Am. Rep. 187].

7. Slaton *v.* Alcorn, 51 Miss. 72.

8. *Illinois.*— Hughes *v.* Hartford F. Ins. Co., 17 Ill. App. 518.

Kentucky.— Whitman *v.* Gaddie, 7 B. Mon. 591.

Nebraska.— Dillon *v.* Scofield, 11 Nebr. 419, 9 N. W. 554.

Ohio.— Hartwell *v.* Smith, 15 Ohio St. 200.

Pennsylvania.— Yeager's Appeals, 19 Wkly. Notes Cas. 151.

Tennessee.— Cowan *v.* Duncan, Meigs 470.

Virginia.—Harnsberger *v.* Yancey, 33 Gratt. 527.

9. Union Mortg., etc., Co. *v.* Peters, 72 Miss. 1058, 1070, 18 So. 497, 30 L. R. A. 829.

10. McDonald *v.* Cutter, 120 Cal. 44, 52 Pac. 120; Greenlaw *v.* Pettit, 87 Tenn. 467, 11 S. W. 357; Belcher *v.* Wickersham, 9 Baxt. (Tenn.) 111. But see Parker's Appeal, (Pa. 1888) 13 Atl. 481.

11. Meeker *v.* Larsen, 65 Nebr. 158, 90 N. W. 958, 57 L. R. A. 901; Seieroe *v.* Homan, 50 Nebr. 601, 70 N. W. 244.

Its application is not controlled alone by the chancellor's conception of right (Flannery *v.* Utley, 3 S. W. 412, 5 S. W. 876, 8 Ky. L. Rep. 776, 9 Ky. L. Rep. 581); but its exercise must be governed by judicial discretion (Crawford *v.* Richeson, 101 Ill. 351; Forest Oil Co.'s Appeal, 118 Pa. St. 138, 12 Atl. 442, 4 Am. St. Rep. 584; *In re* Wallace, 59 Pa. St. 401; McGinnis' Appeal, 16 Pa. St. 445).

The right is not naked, barren, and unsupported in its character. It must have its root in and be founded upon an equity; an equity, just and reasonable, upon general principles, and sustainable against the parties to the controversy. Massie *v.* Mann, 17 Iowa 131.

Subrogation involves the idea of a right existing in one, with which another, under certain circumstances, is clothed — a right capable of enforcement (Lawrence *v.* U. S., 71 Fed. 228, 230), and contemplates some original privilege on the part of him to whose place substitution is claimed (Merchants', etc., Bank *v.* Tillman, 106 Ga. 55, 31 S. E. 794).

12. Allen *v.* Perrine, 103 Ky. 516, 45 S. W. 500, 20 Ky. L. Rep. 202, 41 L. R. A. 351; Rockefeller *v.* Larick, (Nebr. 1907) 110 N. W. 1022, holding that where a bank takes collateral under such circumstances as not to be an innocent holder, a surety of the principal debtor who pays the debt and receives the collateral takes it subject to equities existing between the parties thereto.

13. See *supra*, I, A.

14. See Home Sav. Bank *v.* Bierstadt, 168 Ill. 618, 48 N. E. 161, 61 Am. St. Rep. 146; Gordon *v.* Stewart, 4 Nebr. (Unoff.) 852, 96 N. W. 624; Gore *v.* Brian, (N. J. Ch. 1896) 35 Atl. 897; Seeley *v.* Bacon, (N. J. Ch. 1896) 34 Atl. 139; Connecticut Mut. L. Ins. Co. *v.*

the debtor or creditor that the payer shall be subrogated, rather than from the automatic operation of a rule of law upon a given set of circumstances.[15] Conventional subrogation or subrogation by act of parties may take place by the debtor's agreement that one paying a claim shall stand in the creditor's shoes;[16]

Cornwell, 72 Hun (N. Y.) 199, 25 N. Y. Suppl. 348. And see cases cited *supra*, note 1.

15. Gordon *v.* Stewart, 4 Nebr. (Unoff.) 852, 96 N. W. 624; Freehold First Nat. Bank *v.* Thompson, 61 N. J. Eq. 188, 48 Atl. 333; Seeley *v.* Bacon, (N. J. Ch. 1896) 34 Atl. 139; Connecticut Mut. L. Ins. Co. *v.* Cornwell, 72 Hun (N. Y.) 199, 25 N. Y. Suppl. 348.

In Louisiana under Civ. Code, §§ 2159–2162, subrogation to the right of a creditor in favor of a third person who pays him is either conventional or legal. The subrogation is conventional: (1) When the creditor, receiving his payment from a third person, subrogates him in his rights, actions, privileges, and mortgages against the debtor, and this must be expressed and made at the same time as the payment; (2) when the debtor borrows a sum for the purpose of paying his debts, and intending to subrogate the lender in the rights of the creditor. To make this subrogation valid, it is necessary that the act of borrowing and the receipt be executed in presence of a notary and two witnesses; that in the act of borrowing it be declared that the sum was borrowed to make the payment, and that in the receipt it be declared that the payment has been made with the money furnished for that purpose by the new creditor. That subrogation takes place independently of the will of the creditor. Legal subrogation takes place of right: (1) For the benefit of him who, being a preferred creditor, pays another creditor, whose claim is preferable to his by reason of his privileges or mortgages; (2) for the benefit of the purchaser of any immovable property who employs the price of his purchase in paying the creditors, to whom this property was mortgaged; (3) for the benefit of him who, being bound with others, for the payment of the debt, had an interest in discharging it; (4) for the benefit of the beneficiary heir, who has paid with his own funds the debts of the succession. See Spiller *v.* His Creditors, 16 La. Ann. 292; Wiggin *v.* Flower, 5 Rob. (La.) 406. The subrogation established by these articles takes place as well against the sureties as against the debtors. It cannot injure the creditor, since, if he has been paid but in part, he may exercise his right for what remains due, in preference to him from whom he has received only a partial payment. See Torregano *v.* Segura, 2 Mart. N. S. (La.) 158.

In Canada, under the civil code of the Province of Quebec, (arts. 1154 to 1158), the law is the same as under the Louisiana code, with the exception that in the case of a debtor borrowing money with subrogation of the lender, the written act of loan need not be notarial but may be executed before two subscribing witnesses. And, there also, the whole matter of subrogation is ruled by the maxim of the civil law, *Subrogatum sapit naturam subrogati.* 5 Mignault, 561.

16. Gashe *v.* Ohio Lumber Co., 5 Ohio S. & C. Pl. Dec. 130, 31 Cinc. L. Bul. 189; Fears *v.* Albea, 69 Tex. 437, 6 S. W. 286, 5 Am. St. Rep. 78; Fievel *v.* Zuber, 67 Tex. 275, 3 S. W. 273.

Conventional subrogation of joint judgment debtor.— It is proper to award subrogation against one of the parties bound by a judgment, and not against the others, where one of several defendants procures the means of satisfying the demands of plaintiffs from a third person, and agrees that a suit may be marked to the vendor's use. Eddy *v.* Reed, 4 Phila. (Pa.) 116.

Doctrine applied to mortgages.— One who pays a mortgage debt, under an agreement for an assignment of the mortgage, or that he shall have the benefit of it, is subrogated to the rights of the mortgagee (Thompson *v.* Connecticut Mut. L. Ins. Co., 139 Ind. 325, 38 N. E. 796; Shreve *v.* Hankinson, 34 N. J. Eq. 76; Miller *v.* Rutland, etc., R. Co., 40 Vt. 399, 94 Am. Dec. 414), but a court of equity will not convert a payment into a purchase in favor of a party advancing the money where there is a superior countervailing equity in another party (Miller *v.* Rutland R. Co., *supra*), and an agreement which amounts to no more than a promise to pay off the sum advanced on mortgage is not sufficient to subrogate the promisor to the rights of the mortgagee (Desot *v.* Ross, 95 Mich. 81, 54 N. W. 694). The mortgagee cannot, by executing and recording a release, without consent, cut off the rights of a person who pays the obligation at its maturity, under an agreement with the mortgagor that he shall be substituted in the place of such mortgagee (Citizens' Nat. Bank *v.* Wert, 26 Fed. 294); nor can the holder of a second mortgage object to the substitution (Citizens' Nat. Bank *v.* Wert, *supra*).

Doctrine applied to judgments.— Although ordinarily where a judgment debtor borrows money with which to pay off a judgment against him, and uses the money for this purpose, the judgment becomes satisfied and is no longer operative as a lien upon the debtor's property (Patterson *v.* Clark, 96 Ga. 494, 23 S. E. 496; Downer *v.* Miller, 15 Wis. 612); and while a mere understanding between a borrower and a lender that the sum loaned shall be applied in a judgment does operate to transfer the lien to the lender, although the loan is so applied (Unger *v.* Leiter, 32 Ohio St. 210), if a judgment debtor agrees with one who lends him money for such a purpose that the judgment and execution shall not be satisfied by the payment to the holder but shall be transferred to the lender as security for the loan, the agreement will be enforced (Patterson *v.*

and furthermore can arise only by reason of an express or implied agreement between the payer and either the debtor or the creditor,[17] and the agreement, like other agreements, must be supported by a consideration.[18] It is not essential to subrogation by convention that the creditor should be a party to the agreement between the debtor and a third party, provided no intervening rights to the security have occurred;[19] but subrogation by convention is not applicable where it would prejudice the rights of innocent parties.[20] A stranger who by the authority and consent of the debtor and on his agreement that he shall be subrogated to the rights of the creditor makes payment for the debtor will be subrogated if the payment is made with the express declaration of the subrogation in the release made by the creditor.[21]

Clark, 96 Ga. 494, 23 S. E. 496; Potts *v.* Richardson, 2 Bailey (S. C.) 15, holding that where money was advanced by a third person to procure indulgence for a defendant on an execution, and payment was made to the plaintiff, under an agreement that the lien of the judgment should be preserved, a subsequent assignment to the person who advanced the money operated to vest the judgment in him with all its incidents. And see More *v.* Trumpbour, 5 Cow. (N. Y.) 488); and where a judgment has been recovered against the principal debtor and his sureties, and a third person afterward agrees with the creditor to become surety for the payment of the debt, upon an agreement with such creditor that the new surety shall have the benefit of the judgment for his protection and indemnity, he has a prior equity over the first sureties, and is entitled to enforce the collection of the judgment for his own benefit and protection (La Grange *v.* Merrill, 3 Barb. Ch. (N. Y.) 625; Downer *v.* Miller, *supra*); and although the judgment was discharged by the debtor fraudulently, the lender is entitled to be subrogated to priority over other encumbrancers whose rights existed at the time of the discharge and were not acquired upon faith of the discharge (Downer *v.* Miller, *supra*). Similarly where, before becoming a surety on a note given for money borrowed to pay a judgment against the principal, a party stipulates with the principal that the judgment shall remain open against the principal in order to indemnify the surety against loss by reason of the suretyship, the payment of the judgment by the principal with money raised on a note on which the surety was indorser does not extinguish the same (Patterson *v.* Clark, *supra*. And see Perry *v.* Miller, 54 Iowa 277, 5 N. W. 727, 6 N. W. 302), and a surety advancing the amount of a judgment to plaintiff may stipulate for substitution and for the control of the judgment and execution (Morris *v.* Evans, 2 B. Mon. (Ky.) 84, 36 Am. Dec. 591); and if money is paid by a surety to plaintiff in an execution, on an understanding that the judgment is to be assigned to a third person, for the benefit of the surety, and such assignment is subsequently made, this is not a payment of the judgment, but it may be enforced against the principal, in the name of plaintiff, for the benefit of the sureties (Barringer *v.* Boyden, 52 N. C. 187; Sherwood *v.* Collier, 14 N. C. 380, 24 Am. Dec. 264; Hodges *v.* Armstrong, 14 N. C. 253). A joint obligor may properly advance the amount of a judgment against himself and another, and contract with the creditor for the control of the execution, and will be therein protected by a court of law until he has reimbursed his proportion, in opposition to the wish of the creditor (Morris *v.* Evans, 2 B. Mon. (Ky.) 84, 36 Am. Dec. 591).

17. Gore *v.* Brian, (N. J. Ch. 1896) 35 Atl. 897; Seeley *v.* Bacon, (N. J. Ch. 1896) 34 Atl. 139; *In re* North River Constr. Co., 38 N. J. Eq. 433; Coe *v.* New Jersey Midland R. Co., 31 N. J. Eq. 105; New Jersey Midland R. Co. *v.* Wortendyke, 27 N. J. Eq. 658; Baker *v.* New York, etc., R. Co., 162 Fed. 496 [*affirmed* in 168 Fed. 248].

In Louisiana by the code conventional subrogation in favor of a third person who pays the debt must be express and made at the time of payment (Brice *v.* Watkins, 30 La. Ann. 21; Durac *v.* Ferrari, 26 La. Ann. 114; Surghnor *v.* Beauchamp, 24 La. Ann. 471; Levy *v.* Baer, 19 La. Ann. 468; Sewall *v.* Howard, 15 La. Ann. 400; Harrison *v.* Bisland, 5 Rob. (La.) 204), and facts to show the parties' unexecuted intention will not suffice (Chambliss *v.* Miller, 15 La. Ann. 713; Shaw *v.* Grand, 13 La. Ann. 52; Harrison *v.* Bisland, *supra*), nor can it be inferred from an agreement to transfer the obligation or credit in satisfaction of which the payment is made (Wilson's Succession, 11 La. Ann. 294).

18. Underwood *v.* Metropolitan Nat. Bank, 144 U. S. 669, 12 S. Ct. 784, 36 L. ed. 586.

19. Bissett *v.* Grantham, 67 Mo. App. 23; Citizens' Nat. Bank *v.* Wert, 26 Fed. 294.

But in Louisiana the creditor must be a party to the agreement. Hoyle *v.* Cazabat, 25 La. Ann. 438; Nugent *v.* Potter, 21 La. Ann. 746; Virgin's Succession, 18 La. Ann. 42.

The fact that a wife was not a party to the agreement by her husband did not entitle her to hold the property free from the lien which plaintiff's money discharged, while refusing to abide by the contract under which it was paid. Heuser *v.* Sharman, 89 Iowa 355, 56 N. W. 525, 48 Am. St. Rep. 390.

20. Bissett *v.* Grantham, 67 Mo. App. 23.

21. Shreve *v.* Hankinson, 34 N. J. Eq. 76 [*citing* Dixon Subr. 164]. And see *infra*, III, B.

II. EXTENT AND LIMITATION OF RIGHT.

A. In General. Formerly the right of subrogation was limited to transactions between principals and sureties;[22] but it is no longer confined to cases of strict suretyship, but is broad enough to include every instance in which one party is required to pay a debt for which another is primarily answerable, and which, in equity and good conscience, ought to be discharged by the latter, and is the mode which equity adopts to compel the ultimate discharge of the debt by him who, in good conscience, ought to pay it, and to relieve him whom none but the creditor could ask to pay.[23] Thus where two or more persons are equally liable to the creditor, if as between themselves there is a superior obligation resting on one to pay the debt, the other after paying it may use the creditor's security to obtain

22. Heuser *v.* Sharman, 89 Iowa 355, 56 N. W. 525, 48 Am. St. Rep. 390.

23. *Arkansas.*— Dowdy *v.* Blake, 50 Ark. 205, 6 S. W. 897, 7 Am. St. Rep. 88; Schoonover *v.* Allen, 40 Ark. 132.

Idaho.— Wilson *v.* Wilson, 6 Ida. 597, 57 Pac. 708.

Illinois.— Darst *v.* Thomas, 87 Ill. 222.

Indiana.— Huffmond *v.* Bence, 128 Ind. 131, 27 N. E. 347; Johnson *v.* Barrett, 117 Ind. 551, 19 N. E. 190, 10 Am. St. Rep. 83; Rooker *v.* Benson, 83 Ind. 250.

Kansas.— Van Pelt *v.* Strickland, 60 Kan. 584, 57 Pac. 498; Boston Safe Deposit, etc., Co. *v.* Thomas, 59 Kan. 470, 53 Pac. 472.

Maine.— Stevens *v.* King, 84 Me. 291, 24 Atl. 850.

Minnesota.— Stewart *v.* Parcher, 91 Minn. 517, 98 N. W. 650; Vega Steamship Co. *v.* Consolidated El. Co., 75 Minn. 308, 77 N. W. 973, 74 Am. St. Rep. 484, 43 L. R. A. 843; Emmert *v.* Thompson, 49 Minn. 386, 52 N. W. 31, 32 Am. St. Rep. 566.

New Jersey.— Polhemus *v.* Prudential Realty Corp., 74 N. J. L. 570, 67 Atl. 303, holding that a person who, although not the real debtor, is liable for the payment of the debt, may pay the same, and is thereupon entitled to be subrogated to the rights of the creditor in any pledge or collateral security.

New York.— Arnold *v.* Green, 116 N. Y. 566, 23 N. E. 1 [*citing* Harris Sub.]; Jones *v.* Bacon, 72 Hun 506 25 N. Y. Suppl. 212 [*affirmed* in 145 N. Y. 446, 40 N. E. 216, and *citing* Wilkes *v.* Harper, 2 Barb. Ch. 338] (holding that the right of subrogation is not necessarily dependent upon the conventional relation of principal and surety, and in behalf of the latter; but when a person is compelled to pay a claim, or has legitimately an interest to protect in doing so, he is entitled to his remedy against the person primarily liable to pay it, and when a person is liable to be charged with that which primarily ought to be borne by another, the former is entitled to the equity of a surety, and, on payment, to the remedies of the creditor against the person so primarily liable); Smith *v.* National Surety Co., 28 Misc. 628, 59 N. Y. Suppl. 789 [*affirmed* in 46 N. Y. App. Div. 633, 62 N. Y. Suppl. 1105].

North Carolina.— Grainger *v.* Lindsay, 123 N. C. 216, 31 S. E. 473.

Pennsylvania.— Grand Council R. A. *v.* Cornelius, 198 Pa. St. 46, 47 Atl. 1124, 1125 [*citing* Sheldon Subr. § 11]; Cook *v.* Berry, 193 Pa. St. 377, 44 Atl. 771; Miller's Appeal, 119 Pa. St. 620, 13 Atl. 504; Bender *v.* George, 92 Pa. St. 36; McCormick *v.* Irwin, 35 Pa. St. 111, 117; Cottrell's Appeal, 23 Pa. St. 294; Morris *v.* Oakford, 9 Pa. St. 498.

Rhode Island.— *In re* Martin, 25 R. I. 1, 54 Atl. 589.

South Carolina.— Spratt *v.* Pierson, 4 S. C. 301, holding that the doctrine of subrogation, however limited and restrained its application in the earlier cases in which it was accepted as a principle properly appertaining to the relation between principal and surety, has in more recent times been extended to cases where the nature and character of the transaction clearly brought it within the justice and equity of the doctrine, of which the court had already taken cognizance between principal and surety.

Vermont.— Royalton Nat. Bank *v.* Cushing, 53 Vt. 321; Stevens *v.* Goodenough, 26 Vt. 676.

Virginia.— Sands *v.* Durham, 99 Va. 263, 38 S. E. 145, 86 Am. St. Rep. 884, 54 L. R. A. 614; Nalle *v.* Farish, 98 Va. 130, 34 S. E. 985; Sherman *v.* Shaver, 75 Va. 1; Harnsberger *v.* Yancey, 33 Gratt. 527.

West Virginia.— McNeil *v.* Miller, 29 W. Va. 480, 2 S. E. 335.

United States.— Cobb *v.* Crittenden, 161 Fed. 510, 88 C. C. A. 452; *In re* Bruce, 158 Fed. 123; National Surety Co. *v.* State Sav. Bank, 156 Fed. 21, 84 C. C. A. 187, 14 L. R. A. N. S. 155; Matthews *v.* Fidelity Title, etc., Co., 52 Fed. 687; Cornell Steamboat Co. *v.* The Jersey City, 43 Fed. 166.

England.— 1 White & T. Lead. Cas. Eq. Pt. 1 (4th Am. ed.) 148, notes to Dering *v.* Winchelsea, and cases cited.

Scope of the remedy defined.— Subrogation takes place as follows: (1) For the benefit of insurers; (2) for a surety who pays the debt of his principal; (3) for one cosurety against another cosurety, to compel contribution; (4) for a purchaser who extinguishes an encumbrance on an estate purchased; (5) for a creditor who satisfies a lien for a prior creditor; (6) for an heir who pays the debt of the succession; (7) for one who has paid his own debt, which, for a valuable considera-

reimbursement;[24] or where one has performed the obligations of another, or has paid his own debt, the burden of which has, for a valuable consideration, been assumed by another, or when he has paid encumbrances for the protection of his own title or interest, the payment of which he has not assumed by contract,[25] or has been compelled to pay the debt of a third person in order to protect his own rights or to save his own property,[26] and generally where it is equitable that a person, not a mere stranger, intermeddler, or volunteer,[27] furnishing money to pay a debt should be substituted for or in the place of the creditor, such person will be so substituted.[28] But subrogation is not intended to be applied in all cases without regard to circumstances where there is security for a debt, but in those only in which justice demands its application,[29] and thus it will not be ordered where it can be of no real benefit to the one seeking to be subrogated,[30] or when the party claiming it has in fact been reimbursed and has thus sustained no loss,[31] and the rights of one seeking subrogation must have a greater equity than those who oppose him;[32] the burden being upon the would-be subrogee to establish his right,[33] for subrogation will be ordered only in a clear case of pure equity.[34] The right is never allowed one who would thereby reap advantage in

tion, was assumed by another, but not paid. Townsend *v.* Cleveland Fire Proofing Co., 18 Ind. App. 568, 47 N. E. 707.

24. Bender *v.* George, 92 Pa. St. 36.

25. *Indiana.*— Birke *v.* Abbott, 103 Ind. 1, 1 N. E. 485, 53 Am. Rep. 474.

Maine.— Kinnear *v.* Lowell, 34 Me. 299.

New York.— Acer *v.* Hotchkiss, 97 N. Y. 395.

Texas.— Henson *v.* Reed, 71 Tex. 726, 10 S. W. 522.

United States.— Cornell Steamboat Co. *v.* The Jersey City, 43 Fed. 166.

26. Beifeld *v.* International Cement Co., 79 Ill. App. 318; Cockrum *v.* West, 122 Ind. 372, 23 N. E. 140 [*citing* Lowrey *v.* Byers, 80 Ind. 443]; Cole *v.* Malcolm, 66 N. Y. 363; Blair *v.* Mounts, 41 W. Va. 706, 24 S. E. 620 (holding that the doctrine is that one who has the right to pay a debt which ought to have been paid by another is entitled to exercise all the remedies which the creditor possesses against that other, and to indemnify from the fund out of which should have been made the payment which he has made); McNeil *v.* Miller, 29 W. Va. 480, 2 S. E. 335; McClaskey *v.* O'Brien, 16 W. Va. 791.

27. See *infra*, III, B.

28. Yaple *v.* Stephens, 36 Kan. 680, 14 Pac. 222.

Subrogation of state to rights of city.— Where judgments for tort were obtained against a city in such a manner as to give it a recovery over against a water board representing the commonwealth, or against contractors acting under contract with the water board — such contractors being the parties ultimately liable — and the commonwealth paid the judgment, it was subrogated to the rights of the city against the contractors. Cambridge *v.* Hanscom, 186 Mass. 54, 70 N. E. 1030.

29. Crump *v.* McMurtry, 8 Mo. 408, holding that to apply it indiscriminately, without regard to circumstances, would be to convert a mild rule of equity into one of stern law, working its way regardless of the injustice which may follow.

30. Joliet, etc., R. Co. *v.* Healy, 94 Ill. 416; Lynn *v.* Richardson, 78 Me. 367, 5 Atl. 877; Shermer *v.* Merrill, 33 Mich. 284.

As where the one invoking it will himself eventually be liable. Stewart *v.* Com., 104 Ky. 489, 47 S. W. 332, 20 Ky. L. Rep. 686; Smith *v.* Cornell, 52 N. Y. Super. Ct. 499.

31. Eaton *v.* Hasty, 6 Nebr. 419, 29 Am. Rep. 365.

A surety who has obtained otherwise all that this right could possibly secure to him is not entitled to subrogation. Marshall *v.* Dixon, 82 Ga. 435, 9 S. E. 167.

32. *Illinois.*— Hotchkiss *v.* Makeel, 87 Ill. App. 623 [*affirmed* in 190 Ill. 311, 60 N. E. 524, 83 Am. St. Rep. 131], disallowing plaintiff subrogation which would defeat the equal equity of defendant, and give plaintiff an advantage from the violation of his covenant.

Iowa.— Ft. Dodge Bldg., etc., Assoc. *v.* Scott, 86 Iowa 431, 53 N. W. 283.

North Carolina.— Vaughan *v.* Jeffreys, 119 N. C. 135, 26 S. E. 94; Tarboro *v.* Micks, 118 N. C. 162, 24 S. E. 729.

Pennsylvania.— Grand Council R. A. *v.* Cornelius, 198 Pa. St. 46, 47 Atl. 1124; Musgrave *v.* Dickson, 172 Pa. St. 629, 632, 33 Atl. 705, 51 Am. St. Rep. 765 (holding that subrogation will not be enforced against superior equities); *In re* Wallace, 59 Pa. St. 40]; Ziegler *v.* Long, 2 Watts 205; *In re* Goswiler, 3 Penr. & W. 200; Erb's Appeal, 2 Penr. & W. 296.

Virginia.— Lee *v.* Swepson, 76 Va. 173.

Between parties equally bound the right of subrogation does not exist. *In re* Strough, 2 Chest. Co. Rep. (Pa.) 291.

The equities being equal the law will prevail. Ritter *v.* Cost, 99 Ind. 80.

33. Myers *v.* Sierra Valley Stock, etc., Assoc., 122 Cal. 669, 55 Pac. 689; Hunnicutt *v.* Summey, 63 Ga. 586; Binford *v.* Adams, 104 Ind. 41, 3 N. E. 753; Wilkinson *v.* Babbitt, 29 Fed. Cas. No. 17,668, 4 Dill. 207. See Griffith *v.* Townley, 69 Mo. 13, 33 Am. Rep. 476.

34. Grand Council R. A. *v.* Cornelius, 198 Pa. St. 46, 47 Atl. 1124; *In re* Wallace, 59

any way from his own wrong-doing,[35] nor to relieve a party from the consequences of his own unlawful act,[36] nor where it would be contrary to public policy;[37] and subrogation will not be allowed to accomplish by indirection that which a statute forbids to be done by direction;[38] and as its purpose is only to prevent fraud or subserve justice, it will not be applied where its exercise would promote injustice,[39] and thus can be applied only with a due regard to the legal and equitable rights of others.[40]

Pa. St. 401; Lloyd *v.* Galbraith, 32 Pa. St. 103; Coates' Appeal, 7 Watts & S. (Pa.) 99; Erb's Appeal, 2 Penr. & W. (Pa.) 296; Nesbit *v.* Martin, 4 Pa. Co. Ct. 95; *In re* Hennessy, 4 L. T. N. S. (Pa.) 9. See Lawrence *v.* Cornell, 4 Johns. Ch. (N. Y.) 545.

Where property is purchased with trust funds, one to whom the purchaser mortgaged the land with notice of the facts could not, upon the recovery of the land by the *cestui que trust*, be substituted to her rights against the vendor. Royalty *v.* Shirley, 53 S. W. 1044, 21 Ky. L. Rep. 1015.

35. Brown *v.* Sheldon State Bank, 139 Iowa 83, 117 N. W. 289; Rowley *v.* Towsley, 53 Mich. 329, 19 N. W. 20 (holding that a guardian who has made an unwarranted investment of the funds in his hands, and who has been compelled to account for such funds, cannot be subrogated to the benefits of the investment); Bates *v.* Swiger, 40 W. Va. 420, 21 S. E. 874; Wilkinson *v.* Babbitt, 29 Fed. Cas. No. 17,668, 4 Dill. 207. See Martin *v.* Parsons, 50 Cal. 498; Ft. Dodge Bldg., etc., Assoc. *v.* Scott, 86 Iowa 431, 53 N. W. 283, holding that the right to subrogation is never granted as a reward for negligence.

A second purchaser who, with notice of the rights of the first purchaser, pays off a lien on the land, cannot be subrogated to the lienor's rights thereunder, he having been in effect guilty of fraud. Bates *v.* Swiger, 40 W. Va. 420, 21 S. E. 874.

36. Johnson *v.* Moore, 33 Kan. 90, 5 Pac. 406 (holding that a mortgagee who unlawfully altered a mortgage intended to pay off a prior mortgage was not entitled to be subrogated to the prior mortgage); Rowley *v.* Towsley, 53 Mich. 329, 19 N. W. 20; Spratt *v.* Pierson, 4 S. C. 301.

37. Aymett *v.* Citizens' Nat. Bank, (Tenn. Ch. App. 1901) 64 S. W. 302 (refusing subrogation in contravention of registration laws as promoting confusion and injustice); Williams *v.* Ford, (Tex. Civ. App. 1894) 27 S. W. 723; Coonrod *v.* Kelly, 119 Fed. 841, 56 C. C. A. 353; U. S. *v.* Ryder, 110 U. S. 729, 4 S. Ct. 196, 28 L. ed. 308.

It is applied only to lawful and meritorious transactions. Farmers' L. & T. Co. *v.* Carroll, 5 Barb. (N. Y.) 613; *In re* Schaller, 10 Daly (N. Y.) 57; Spratt *v.* Pierson, 4 S. C. 301.

The law exempting the homestead from debt is to be liberally construed. It is not its policy to apply the fiction of subrogation in order that the property may be subrogated to encumbrances not created by the debtor himself. Talladega First Nat. Bank *v.* Browne, 128 Ala. 557, 29 So. 552, 86 Am. St. Rep. 156.

38. Clifton *v.* Anderson, 47 Mo. App 35; Dunn *v.* Missouri Pac. R. Co., 45 Mo. App. 29.

39. *Kansas.*— Traders' Bank *v.* Myers, 3 Kan. App. 636, 44 Pac. 292.

Michigan.— *In re* Warner, 82 Mich. 624, 47 N. W. 102; Kelly *v.* Kelly, 54 Mich. 30, 19 N. W. 580.

Minnesota.— Heisler *v.* Aultman, 56 Minn. 454, 57 N. W. 1053, 45 Am. St. Rep. 486, holding that the doctrine of subrogation is enforced solely for the purpose of accomplishing substantial justice, and, being administered upon equitable principles, it is only when an applicant has an equity to invoke and when innocent persons will not be injured that a court can interfere.

Nebraska.— Eaton *v.* Hasty, 6 Nebr. 419, 29 Am Rep. 365.

North Carolina.— Moring *v.* Privott, 146 N. C. 558, 60 S. E. 509.

Oregon.— House *v.* Fowle, 22 Oreg. 303, 29 Pac. 890.

Pennsylvania.— Wagner *v.* Elliott, 95 Pa. St. 487; Keely *v.* Cassidy, 93 Pa. St. 318 [*affirming* 13 Phila. 112]; Gring's Appeal, 89 Pa. St. 336; Russell's Appeal, 59 Pa. St. 401; Lloyd *v.* Galbraith, 32 Pa. St. 103 (holding that it will never be decreed in favor of a subsequent lien-holder, not a surety, to the prejudice of intervening rights); McGinnis' Appeal, 16 Pa. St. 445; Ziegler *v.* Long, 2 Watts 205; Erb's Appeal, 2 Penr. & W. 296; *In re* Hennessy, 4 L. T. N. S. 9 (holding that it cannot be allowed when by laches or neglect a subsequent lien creditor may be thrown off his guard when bidding at a public sale).

West Virginia.— Bates *v.* Swiger, 40 W. Va. 420, 21 S. E. 874.

See 44 Cent. Dig. tit. "Subrogation," § 1.

40. *California.*— Redington *v.* Cornwell, 90 Cal. 49, 27 Pac. 40.

Illinois.— Schmitt *v.* Henneberry, 48 Ill. App. 322 [*citing* Powell *v.* Allen, 11 Ill. App. 129]; Suppiger *v.* Garrels, 20 Ill. App. 625.

Indiana.— Barlow *v.* Deibert, 39 Ind. 16.

Iowa.— Dillow *v.* Warfel, 71 Iowa 106, 32 N. W. 194.

Kentucky.— Flannery *v.* Utley, 3 S. W. 412, 5 S. W. 876, 8 Ky. L. Rep. 776, 9 Ky. L. Rep. 581.

Maine.— Hatch *v.* Kimball, 16 Me. 146.

Michigan.— Kelly *v.* Kelly, 54 Mich. 30, 19 N. W. 580.

Minnesota.— Knoblauch *v.* Foglesong, 38 Minn. 459, 38 N. W. 366.

Nebraska.— Rice *v.* Winters, 45 Nebr. 517, 63 N. W. 830.

New Jersey.— Rankin *v.* Coar, 46 N. J. Eq. 566, 22 Atl. 177, 11 L. R. A. 661.

B. Tendency to Extend Scope. The nature and grounds of subrogation are very clear. The difficulties arise in its application to the innumerable complications of business.[41] The courts incline, however, rather to extend than restrict the principle;[42] and the doctrine has been steadily growing and expanding in importance, and becoming more general in its application to various subjects and classes of persons, the principle being modified to meet the circumstances of cases as they have arisen,[43] and the doctrine has been applied much more extensively in American than in English jurisprudence,[44] under the initial guidance of Chancellor Kent.[45]

C. Application to Subrogation of the Ordinary Equity Maxims. The ordinary equity maxims[46] are applicable to the equitable remedy of subrogation. Thus subrogation is not allowed where there is an adequate remedy at law,[47] and, as in other cases of equitable relief, the party seeking subrogation must not be guilty of laches;[48] and the familiar rule in equity, that where one of two innocent parties must suffer by the fraudulent conduct of a third, the one who has, by his negligence or failure to do something that a prudent man under the circumstances should have done, enabled the fraud to be committed, must suffer the loss occasioned thereby, applies.[49] Nor can the doctrine be extended so as to authorize the application of the principle for the relief and benefit of a party who voluntarily surrenders a right or suffers an injury, the consequence of his own wilful neglect or wrong, or who has connived at and assisted in the wrong,[50] for one seeking subrogation must come into court with clean hands.[51] The rule

Pennsylvania.— Grand Council R. A. *v.* Cornelius, 198 Pa. St. 46, 47 Atl. 1124; *In re* Shimp, 197 Pa. St. 128, 46 Atl. 1037; Budd *v.* Olver, 148 Pa. St. 194, 23 Atl. 1105; Wagner *v.* Elliott, 95 Pa. St. 487; Knouf's Appeal, 91 Pa. St. 78; Webster's Appeal, 86 Pa. St. 409; Lloyd *v.* Galbraith, 32 Pa. St. 103; McGinnis' Appeal, 16 Pa. St. 445; Armstrong's Appeal, 5 Watts & S. 352; Fink *v.* Mahaffy, 8 Watts 384; Erb's Appeal, 2 Penr. & W. 296.

Vermont.— Gerrish *v.* Bragg, 55 Vt. 329.

Virginia.— Jones *v.* Covington, 84 Va. 778, 6 S. E. 212.

United States.— U. S. Bank *v.* Winston, 2 Fed. Cas. No. 944, 2 Brock. 252.

See 44 Cent. Dig. tit. "Subrogation," § 1.

Not to the prejudice of creditors.—Harlan *v.* Sweeny, 1 Lea (Tenn.) 682.

Subrogation by agreement with the debtor alone, to the equities and liens of a creditor whose debt is paid off by one under no obligation, will be enforced in equity only when the agreement creates equitable rights against the debtor, which will not impair or overthrow equitable rights of the creditor or of innocent third persons. Browder *v.* Hill, 136 Fed. 821, 69 C. C. A. 499.

41. Schoonover *v.* Allen, 40 Ark. 132.

42. Gowing *v.* Bland, 2 How. (Miss.) 813.

43. Emmert *v.* Thompson, 49 Minn. 386, 52 N. W. 31, 32 Am. St. Rep. 566; Furnold *v.* State Bank, 44 Mo. 336; Snelling *v.* McIntyre, 6 Abb. N. Cas. (N. Y.) 469; Ipswich Bank *v.* Brock, 13 S. D. 409, 83 N. W. 436.

44. Flannery *v.* Utley, 3 S. W. 412, 5 S. W. 876, 8 Ky. L. Rep. 776, 9 Ky. L. Rep. 581.

In Virginia the doctrine has been very firmly adhered to and more liberally expounded and applied to meet the exigencies of particular cases than in many states. See Sands *v.* Durham, 99 Va. 263, 267, 38 S. E. 145, 86 Am. St. Rep. 884, 54 L. R. A. 614.

45. Furnold *v.* State Bank, 44 Mo. 336.

46. See EQUITY, 16 Cyc. 133 *et seq.*

47. Myers *v.* Sierra Valley Stock, etc., Assoc., 122 Cal. 669, 55 Pac. 689; Magee *v.* McManus, 70 Cal. 553, 12 Pac. 451; Carstenbrook *v.* Wedderien, 7 Cal. App. 465, 94 Pac. 372 (holding that equitable subrogation implies that there is no adequate remedy at law); Davis *v.* Fuller, 84 Ill. App. 295 [*affirmed* in 184 Ill. 505, 56 N. E. 791]; Grainger *v.* Lindsay, 123 N. C. 216, 31 S. E. 473; Sioux Nat. Bank *v.* Cudahy Packing Co., 58 Fed. 20.

But a court of equity has original jurisdiction to subrogate a surety of a partnership to the rights of the partnership's execution creditor against one of the partners, even though the surety has a remedy at law. Shirey *v.* Bicknell, 87 Ill. App. 429.

48. See *infra*, IV, B, 2.

49. Porter *v.* Ourada, 51 Nebr. 510, 71 N. W. 52; Coonrod *v.* Kelly, 119 Fed. 841, 56 C. C. A. 353.

50. Starke *v.* Bernheim, 102 Ala. 464, 14 So. 770.

Complainant, upon satisfying a judgment based upon his own delinquency, cannot recover the amount from the party for whose benefit the judgment was recovered. The statement of the proposition carries with it its refutation. Lee County Justices *v.* Fulkerson, 21 Gratt. (Va.) 182.

51. *Alabama.*— Wiley *v.* Boyd, 38 Ala. 625.

Georgia.— Lowry Banking Co. *v.* Empire Lumber Co., 91 Ga. 624, 17 S. E. 968.

Illinois.— Ramsay *v.* Whitbeck, 183 Ill. 550, 56 N. E. 322; Devine *v.* Harkness, 117 Ill. 145, 7 N. E. 52.

Indiana.— Wilson *v.* Murray, 90 Ind. 477.

Iowa.— Brown *v.* Sheldon State Bank, 139

that he who seeks equity must do equity applies,[52] and the pleading seeking equity must offer to do it where others have rights and must not seek to set them off.[53]

D. Inapplicability of Doctrine to Primary Liability. Subrogation is allowed only in favor of one who under some duty or compulsion, legal or moral, pays the debt of another;[54] and not in favor of him who pays a debt in performance of his own covenants,[55] for the right of subrogation never follows an actual primary liability,[56] and there can be no right of subrogation in one whose duty it is to pay, or in one claiming under him against one who is secondarily liable, or not liable at all. In such cases payment is extinguishment.[57]

III. Necessity For and Sufficiency of Payment of Debt or Encumbrance.[58]

A. In General. It is a well-settled rule that before subrogation can be enforced the debt must be paid, and substitution cannot be made as long as

Iowa 83, 117 N. W. 289; Everett *v.* Beebe, 37 Iowa 452.

Kansas.— Johnson *v.* Moore, 33 Kan. 90, 5 Pac. 406.

Michigan.— *In re* Warner, 82 Mich. 624, 47 N. W. 102; Rowley *v.* Towsley, 53 Mich. 329, 19 N. W. 20.

Mississippi.— White *v.* Trotter, 14 Sm. & M. 30, 53 Am. Dec. 112.

New York.— Guckenheimer *v.* Angevine, 81 N. Y. 394; Farmers' L. & T. Co. *v.* Carroll, 5 Barb. 613.

Pennsylvania.— Boyer *v.* Bolender, 129 Pa. St. 324, 18 Atl. 127, 15 Am. St. Rep. 723.

South Carolina.— Greig *v.* Rice, 66 S. C. 171, 44 S. E. 729; Spratt *v.* Pierson, 4 S. C. 301.

West Virginia.— Bates *v.* Swiger, 40 W. Va. 420, 21 S. E. 874.

United States.— German Bank *v.* U. S., 148 U. S. 573, 13 Sup. Ct. 702, 37 L. ed. 564; Milwaukee, etc., R. Co. *v.* Soutter, 13 Wall. 517, 20 L. ed. 543; Wilkinson *v.* Babbitt, 29 Fed. Cas. No. 17,668, 4 Dill. 207.

Wrong-doers cannot be subrogated to the rights of those whose interests have been impaired by their acts. German Bank *v.* U. S., 26 Ct. Cl. 198 [*affirmed* in 148 U. S. 573, 13 S. Ct. 703, 37 L. ed. 564].

52. Bruschke *v.* Wright, 166 Ill. 183, 46 N. E. 813, 57 Am. St. Rep. 125; Atchison, etc., R. Co. *v.* Eaton, 9 Kan. App. 678, 59 Pac. 604; Stump *v.* Warfield, 104 Md. 530, 65 Atl. 346; Ocobock *v.* Baker, 52 Nebr. 447, 72 N. W. 582, 66 Am. St. Rep. 519.

53. New England Mortg. Security Co. *v.* Fry, 143 Ala. 637, 42 So. 57, 111 Am. St. Rep. 62.

54. Traders' Bank *v.* Myers, 3 Kan. App. 636, 44 Pac. 292; Webster's Appeal, 86 Pa. St. 409; Flick *v.* Weller, 2 Kulp (Pa.) 258.

55. Crane *v.* Noel, 103 Mo. App. 122, 78 S. W. 826; Home Sav. Bank *v.* Shallenberger, 82 Nebr. 507, 118 N. W. 76; McLure *v.* Melton, 34 S. C. 377, 13 S. E. 615, 27 Am. St. Rep. 820, 13 L. R. A. 723.

56. *Arkansas.*— Pickett *v.* Merchants' Nat. Bank, 32 Ark. 346.

California.— Sacramento Bank *v.* Pacific Bank, 124 Cal. 147, 56 Pac. 787, 71 Am. St. Rep. 36, 45 L. R. A. 863.

Georgia.— Nunn *v.* Burger, 76 Ga. 705.

Illinois.— Beaver *v.* Slanker, 94 Ill. 175; Rogers *v.* Meyers, 68 Ill. 92 (holding that the doctrine of subrogation does not extend to one paying his own debt). See Hazle *v.* Bondy, 173 Ill. 302, 50 N. E. 671.

Indiana.— Wilson *v.* Murray, 90 Ind. 477.

Iowa.— Brown *v.* Sheldon State Bank, 139 Iowa 83, 117 N. W. 289; Witt *v.* Rice, 90 Iowa 451, 57 N. W. 951; Kellogg *v.* Colby, 83 Iowa 513, 49 N. W. 1001; Bolton *v* Lambert, 72 Iowa 483, 34 N. W. 294.

Kentucky.— Clay *v.* Clay, 72 S. W. 810, 24 Ky. L. Rep. 2016.

Louisiana.— Sturges *v.* Taylor, 15 La. Ann. 285.

Pennsylvania.— Grand Council R. A. *v.* Cornelius, 198 Pa. St. 46, 47 Atl. 1124.

South Carolina.— Hardin *v.* Clark, 32 S. C. 480, 11 S. E. 304.

Vermont.— Royalton Nat. Bank *v.* Cushing, 53 Vt. 321.

Virginia.— Auld *v.* Alexander, 6 Rand. 98.

Wisconsin.— Martin *v.* Aultman, 80 Wis. 150, 49 N. W. 749.

United States.— Underwood *v.* Metropolitan Nat. Bank, 144 U. S. 669, 12 S. Ct. 784, 36 L. ed. 586. See Equitable L. Assur. Soc. *v.* Wetherill, 127 Fed. 947, 62 C. C. A. 579.

Where a city was not primarily liable to a contractor for making improvements, but only in the event it failed to protect him in establishing a lien on the property benefited, and it paid him for work under a mistake as to its liability, it was subrogated to his rights against the property-owner. Nickels *v.* Frankfort, 111 S. W. 706, 33 Ky. L. Rep. 918.

A stock-holder of an insolvent bank, who has been compelled to pay the claim of a creditor because of his additional statutory liability, is, under Cal. Civ. Code, § 309, not entitled to be subrogated to the creditor's interests in the assets of the corporation. Sacramento Bank *v.* Pacific Bank, 124 Cal. 147, 56 Pac. 787, 71 Am. St. Rep. 36, 45 L. R. A. 863.

57. Grand Council R. A. *v.* Cornelius, 198 Pa. St. 46, 47 Atl. 1124.

58. **Necessity for payment in order to entitle a surety to subrogation** see *infra*, VII, E, 2, a.

the debt of the party whose rights are claimed to be used for the purpose of protecting the interest of the applicant for substitution remains unsatisfied, although it be in part only,[59] and the payment must have been of the debt of another.[60] It is not necessary, however, that payment be in money; anything accepted by the creditor is sufficient, provided it is actually accepted.[61]

B. Voluntary Payment.[62] It always requires something more than the mere payment of a debt in order to entitle the person paying the same to be substituted in the place of the original creditor.[63] There must be the discharge of a legal obligation for another, who is under a primary obligation, for no man can make another his debtor without his consent;[64] and only a creditor or person under liability can invoke the doctrine — there being no debt, there can be no ground for subrogation.[65] Furthermore the payer must have acted on compulsion to save himself from loss, and it is only in cases where the person paying the debt of another stands in the relation of a surety or is compelled to pay in order to protect his own interests, or by virtue of legal process, that equity substitutes him in the place of the creditor without any agreement to that effect; in other cases the debt is absolutely extinguished,[66] and thus a mere volunteer or inter-

59. *Kentucky.*— McClure *v.* King, 126 Ky. 675, 104 S. W. 711, 31 Ky. L. Rep. 1085.

Maryland.— Swan *v.* Patterson, 7 Md. 164; Union Bank *v.* Edwards, 1 Gill & J. 346 (holding that relief is never extended by substitution in the place of the creditor, but upon the assumption that the creditor has obtained, or is to obtain, full satisfaction of his claim, and that his farther detention of securities for the debt is against equity and good conscience).

Mississippi.— Weir-Booger Dry Goods Co. *v.* Kelly, 80 Miss. 64, 31 So. 808; Magee *v.* Leggett, 48 Miss. 139.

New Jersey.— New Jersey Midland R. Co. *v.* Wortendyke, 27 N. J. Eq. 658.

Pennsylvania.— Forest Oil Co.'s Appeals, 118 Pa. St. 138, 12 Atl. 442, 4 Am. St. Rep. 584; Pennsylvania Bank *v.* Potius, 10 Watts 148; Kyner *v.* Kyner, 6 Watts 221.

United States.— Ætna L. Ins. Co. *v.* Middleport, 124 U. S. 534, 8 S. Ct. 625, 31 L. ed. 537.

England.— Farebrother *v.* Wodehouse, 23 Beav. 18, 2 Jur. N. S. 1178, 26 L. J. Ch. 81, 5 Wkly. Rep. 12, 53 Eng. Reprint 7.

See 44 Cent. Dig. tit. "Subrogation," § 47.

A tender by the lessee of land to a judgment creditor of the amount due, accompanied with a demand that the judgment be assigned to him, could not in any event entitle such lessee to subrogation, since the tender, accompanied by the demand, was not equivalent to payment. Forest Oil Co.'s Appeals, 118 Pa. St. 138, 12 Atl. 442, 4 Am. St. Rep. 584.

One who gives a note to secure the debt is not entitled to subrogation till the note is paid. Sickels *v.* Herold, 15 Misc. (N. Y.) 116, 36 N. Y. Suppl. 488 [*modified* in 149 N. Y. 332, 43 N. E. 852].

Where land of the vendee is seized on execution against the vendor, and the vendee pays the execution, he is not entitled to be subrogated to the rights of plaintiff, where he has only given bonds for the purchase-money, as payment of the execution would be a defense to the bonds, although assigned by the vendor. *In re* McGill, 6 Pa. St. 504.

60. Vaughan *v.* Jeffreys, 119 N. C. 135, 26 S. E. 94.

Denial of subrogation to one satisfying a primary liability see *supra*, II, D.

61. Combs *v.* Candler, 95 Va. 7, 27 S E. 815, holding, however, that where land was sold under liens against vendor existing prior to the transfer to vendees, and vendees purchased at the sale, and gave their bonds in payment of the price, they were not entitled to be subrogated to the rights of the lien creditors, in the absence of proof that the creditors accepted the bonds in payment of vendor's indebtedness.

62. Voluntary payment by surety see *infra*, VII, E, 2, b.

63. Gray *v.* Zellmer, 66 Kan. 54, 72 Pac. 228 [*citing* Crippen *v.* Chappel, 35 Kan. 495, 11 Pac. 453, 57 Am. Rep. 187].

64. Staples *v.* Fox, 45 Miss. 667.

65. Mobile Bank *v.* Mobile, etc., R. Co., 69 Ala. 305; McMullen *v.* Neal, 60 Ala. 552.

Some debt due a third person must have been paid. Jones Lumber Co. *v.* Villegas, 8 Tex. Civ. App. 669, 28 S. W. 558.

66. *District of Columbia.*— Richards Brick Co. *v.* Rothwell, 18 App. Cas. 516.

Georgia.— Martin *v.* Walker, 94 Ga. 477, 21 S. E. 223. See Merchants', etc., Bank *v.* Tillman, 106 Ga. 55, 31 S. E. 794.

Illinois.— Pearce *v.* Bryant Coal Co., 121 Ill. 590, 13 N. E. 561 [*affirming* 25 Ill. App. 51]; Hough *v.* Ætna L. Ins. Co., 57 Ill. 318, 11 Am. Rep. 18; Bouton *v.* Cameron, 99 Ill. App. 600; Suppiger *v.* Garrels, 20 Ill. App. 625.

Indiana.— Thompson *v.* Connecticut Mut. L. Ins. Co., 139 Ind. 325, 38 N. E. 796; Binford *v.* Adams, 104 Ind. 41, 3 N. E. 753; McClure *v.* Andrews, 68 Ind. 97; Richmond *v.* Marston, 15 Ind. 134.

Louisiana.— Oliver *v.* Bragg, 15 La. Ann. 402.

Maryland.— Swan *v.* Patterson, 7 Md. 164.

Missouri.— Fowler *v.* Fowler, 78 Mo. App. 330; Dunn *v.* Missouri Pac. R. Co., 45 Mo. App. 29.

meddler who, having no interest to protect and without any legal or moral obligation, pays the debt of another is not entitled to subrogation without an agreement to that effect or an assignment of the debt, the payment in his case absolutely extinguishing the debt.[67] Such persons in the absence of some special circum-

New Jersey.— Shinn *v.* Budd, 14 N. J. Eq. 234

New York.— Acer *v.* Hotchkiss, 97 N. Y. 396; Miller *v.* Moreau, 10 N. Y. St. 711; Sandford *v.* McLean, 3 Paige 117, 23 Am. Dec. 773.

Pennsylvania.— Webster's Appeal, 86 Pa. St. 409.

South Dakota.— Pollock *v.* Wright, 15 S. D. 134, 87 N. W. 584.

Texas.— Jones Lumber Co. *v.* Villegas, 8 Tex. Civ. App. 669, 28 S. W. 558.

Vermont.— Royalton Nat. Bank *v.* Cushing, 53 Vt. 321.

West Virginia.—McNeil *v.* Miller, 29 W. Va. 480, 2 S. E. 335.

Wisconsin.— Downer *v.* Miller, 15 Wis. 612.

United States.— Lawrence *v.* U. S., 71 Fed. 228; U. S. Bank *v.* Winston, 2 Fed. Cas. No. 252, 2 Brock. 252.

Directors and stock-holders are not strangers with respect to a debt of the corporation. Redington *v.* Cornwell, 90 Cal. 49, 27 Pac. 40; Wright *v.* Oroville Gold, etc., Min. Co., 40 Cal. 20; Harts *v.* Brown, 77 Ill. 226; Liles *v.* Rogers, 113 N. C. 197, 18 S. E. 104, 37 Am. St. Rep. 627. *Compare* Eastman *v.* Crosby, 8 Allen (Mass.) 206.

Payment of a note secured by mortgage by one not bound for it, and who had no interest in discharging it, will not subrogate him to the rights of the party to whom he paid; but the payment will extinguish the debt, and the mortgage given to secure it; and the claim for reimbursement will constitute the party who paid an ordinary creditor of him for whose benefit the payment was made (Weil *v.* Enterprise Ginnery, etc., Co., 42 La. Ann. 492, 7 So. 622 [*following* Nicholls *v.* His Creditors, 9 Rob. (La.) 476]; Bunn *v.* Lindsay, 95 Mo. 250, 7 S. W. 473, 6 Am. St. Rep. 48 (deed of trust); in the absence of evidence of an assignment (Johnson *v.* Goldsby, 32 Mo. App. 560).

67. *California.*— Redington *v.* Cornwell, 90 Cal. 49, 27 Pac. 40; Guy *v.* Duprey, 16 Cal. 195, 76 Am. Dec. 518.

District of Columbia.— Parsons *v.* John Hancock Mut. L. Ins. Co., 20 App. Cas. 263.

Florida.— Griffin *v.* Orman, 9 Fla. 22.

Georgia.— Webb *v.* Harris, 124 Ga. 723, 53 S. E. 247; Sackett *v.* Stone, 115 Ga. 466, 41 S. E. 564; Wilkins *v.* Gibson, 113 Ga. 31, 38 S. E. 374, 84 Am. St. Rep. 204; Merchants', etc., Bank *v.* Tillman, 106 Ga. 55, 31 S. E. 794.

Idaho.— Wilson *v.* Wilson, 6 Ida. 597, 57 Pac. 708.

Illinois.— Bouton *v.* Cameron, 205 Ill. 50, 68 N. E. 800 [*affirming* 99 Ill. App. 600]; Bennett *v.* Chandler, 199 Ill. 97, 64 N. E. 1052; Antigo Bank *v.* Union Trust Co., 149 Ill. 343, 36 N. E. 1029, 23 L. R. A. 611; Beaver *v.* Slanker, 94 Ill. 175; Young *v.* Morgan, 89 Ill. 199; Lewis *v.* Cairo City Nat. Bank, 72 Ill. 543; Hough *v.* Ætna L. Ins. Co., 57 Ill. 318, 11 Am. Rep. 18; Beifeld *v.* International Cement Co., 79 Ill. App. 318; Suppiger *v.* Garrels, 20 Ill. App. 625.

Indiana.— Thompson *v.* Connecticut Mut. L. Ins. Co., 139 Ind. 325, 38 N. E. 796; Shattuck *v.* Cox, 128 Ind. 293, 27 N. E. 609; Opp *v.* Ward, 125 Ind. 241, 24 N. E. 974, 21 Am. St. Rep. 220; Binford *v.* Adams, 104 Ind. 41, 3 N. E. 753; Reeves *v.* Isenhour, 59 Ind. 478; Spray *v.* Rodman, 43 Ind. 225; Richmond *v.* Marston, 15 Ind. 134; Townsend *v* Cleveland Fire Proofing Co., 18 Ind. App. 568, 47 N. E. 707.

Iowa.— Matteson *v.* Dent, 112 Iowa 551, 84 N. W. 710; Kennedy *v.* Hensley, 94 Iowa 629, 63 N. W. 343; Heuser *v.* Sharman, 89 Iowa 355, 56 N. W. 525, 48 Am. St. Rep. 390; Wormer *v.* Waterloo Agricultural Works, 62 Iowa 699, 14 N. W. 331; Gilbert *v.* Gilbert, 39 Iowa 657.

Kansas.— Crippen *v.* Chappel, 35 Kan. 495, 11 Pac. 453, 57 Am. Rep. 187; Traders' Bank *v.* Myers, 3 Kan. App. 636, 44 Pac. 292.

Kentucky.— Griffin *v.* Proctor, 14 Bush 571; Wilkerson *v.* Tichenor, 62 S. W. 870, 23 Ky. L. Rep. 244; Flannery *v.* Utley, 3 S. W. 412, 5 S. W. 876, 8 Ky. L. Rep. 776, 9 Ky. L. Rep. 581.

Louisiana.— Coco *v.* Gumbel, 47 La. Ann. 966, 17 So. 421; Roth *v.* Harkson, 18 La. Ann. 705 (an often cited case holding that where a drayman, having delivered a quantity of cotton to the officers of a vessel, was obliged to pay his employer for one bale, which was lost or stolen after the cotton had been delivered, and it was held that, in action brought by him against the vessel, the mere payment by him did not subrogate him to his employer's right of action); Oliver *v.* Bragg, 15 La. Ann. 402; Fort *v.* Union Bank, 11 La. Ann. 708; Harrison *v.* Bisland, 5 Rob. 204; Nolte *v.* His Creditors, 7 Mart. N. S. 602; Curtis *v.* Kitchen, 8 Mart. 706.

Maine.— Stevens *v.* King, 84 Me. 291, 24 Atl. 850.

Maryland.— Swan *v.* Patterson, 7 Md. 164; Gillespie *v.* Creswell, 12 Gill & J. 36; Winder *v.* Diffenderffer, 2 Bland 166.

Michigan.— Kitchell *v.* Mudgett, 37 Mich. 81; Smith *v.* Austin, 9 Mich. 465.

Minnesota.— Stewart *v.* Parcher, 91 Minn. 517, 98 N. W. 650; Emmert *v.* Thompson, 49 Minn. 386, 32 Am. St. Rep. 566, 52 N. W. 31; Felton *v.* Bissel, 25 Minn. 15.

Mississippi.— Berry *v.* Bullock, 81 Miss. 463, 33 So. 410; Demourelle *v.* Piazza, 77 Miss. 433, 27 So. 623; Good *v.* Golden, 73 Miss. 91, 19 So. 100, 55 Am. St. Rep. 486; Union Mortg. Banking, etc., Co. *v.* Peters, 72 Miss. 1058, 18 So. 497, 30 L. R. A. 829; Slaton *v.* Alcorn, 51 Miss. 72.

Missouri.— Grady *v.* O'Reilly, 116 Mo. 346, 22 S. W. 798; Kleimann *v.* Gieselmann, 114

stance upon which they can base their claims can obtain the equitable right to be

Mo. 437, 21 S. W. 796, 35 Am. St. Rep. 761; Bunn *v.* Lindsay, 95 Mo. 250, 7 S. W. 473, 6 Am. St. Rep. 48; Norton *v.* Highleyman, 88 Mo. 621; Brown *v.* Merchants' Bank, 66 Mo. App. 427; Dunn *v.* Missouri Pac. R. Co., 45 Mo. App. 29.

Nebraska.— Aultman *v.* Bishop, 53 Nebr. 545, 74 N. W. 55; Seieroe *v.* Homan, 50 Nebr. 601, 70 N. W. 244; Rice *v.* Winters, 45 Nebr. 517, 63 N. W. 830; South Omaha Nat. Bank *v.* Wright, 45 Nebr. 23, 63 N. W. 126; Washburn *v.* Osgood, 38 Nebr. 804, 57 N. W. 529.

New Hampshire.—Contoocook Fire Precinct *v.* Hopkinton, 71 N. H. 574, 53 Atl. 797; Woodbury *v.* Butler, 67 N. H. 545, 38 Atl. 379.

New Jersey.— Fay *v.* Fay, 43 N. J. Eq. 438, 11 Atl. 122; Tradesmen's Bldg., etc., Assoc. *v.* Thompson, 32 N. J. Eq. 133; Coe *v.* New Jersey Midland R. Co., 31 N. J. Eq. 105; Shinn *v.* Budd, 14 N. J. Eq. 234 (holding that the principle of subrogation has been rigidly restrained within these limits); Wilson *v.* Brown, 13 N. J. Eq. 277.

New York.— Koehler *v.* Hughes, 148 N. Y. 507, 42 N. E. 1051; Pease *v.* Egan, 131 N. Y. 262, 30 N. E. 102; Arnold *v.* Green, 116 N. Y. 566, 23 N. E. 1; Clute *v.* Emmerich, 99 N. Y. 342, 2 N. E. 6; Acer *v.* Hotchkiss, 97 N. Y. 395; Gans *v.* Thieme, 93 N. Y. 225; Wilkes *v.* Harper, 1 N. Y. 586; Finegan *v.* New York, 4 N. Y. App. Div. 15, 38 N. Y. Suppl. 358 (holding that a purchaser at a tax-sale, who is a mere volunteer, and pays his money on a bid and receives certificates, does not thereby become entitled to be subrogated to the right to receive the taxes from the owner of the premises); Walther *v.* Wetmore, 1 E. D. Smith 7; Matter of Plopper, 15 Misc. 202, 37 N. Y. Suppl. 33; Miller *v.* Moreau, 10 N. Y. St. 711.

North Carolina.— Howerton *v.* Sprague, 64 N. C. 451.

Ohio.— Miller *v.* Stark, 61 Ohio St. 413, 56 N. E. 11.

Pennsylvania.— Campbell *v.* Foster Home Assoc., 163 Pa. St. 609, 30 Atl. 222, 43 Am. St. Rep. 818, 26 L. R. A. 117; *In re* Clippinger, 162 Pa. St. 627, 29 Atl. 705; Breneman's Appeal, 121 Pa. St. 641, 15 Atl. 650; Miller's Appeal, 119 Pa. St. 620, 13 Atl. 504; Williamson's Appeal, 94 Pa. St. 231; Webster's Appeal, 80 Pa. St. 409; *In re* Wallace 59 Pa. St. 401; Mosier's Appeal, 56 Pa. St. 76, 93 Am. Dec. 783; Hoover *v.* Epler, 52 Pa. St. 522; McCleary's Appeal, 9 Pa. Cas. 271, 12 Atl. 158; Thompson *v.* Griggs, 31 Pa. Super. Ct. 608; Flick *v.* Weller, 2 Kulp 258; Titzel *v.* Smeigh, 2 Leg. Chron. 271. But see Brice's Appeal, 95 Pa. St. 145, holding that a stranger to an obligation, who pays a part or the whole of the debt, becomes, in absence of any evidence to the contrary, a purchaser of the debt and the accompanying security, to the extent of his payment.

Rhode Island.— *In re* Martin, 25 R. I. 1, 54 Atl. 589.

South Carolina.—Gadsden *v.* Brown, Speers Eq. 37.

South Dakota.—Pollock *v.* Wright, 15 S. D. 134, 87 N. W. 584; Ipswich Bank *v.* Brock, 13 S. D. 409, 83 N. W. 436.

Tennessee.— Motley *v.* Harris, 1 Lea 577.

Texas.— Willis *v.* Chowning, 90 Tex. 617, 40 S. W. 395; Faires *v.* Cockerell, 88 Tex. 428, 31 S. W. 190, 639, 28 L. R. A. 528; Darrow *v.* Summerhill, 24 Tex. Civ. App. 208, 58 S. W. 158; M. T. Jones Lumber Co. *v.* Villegas, 8 Tex. Civ. App. 669, 28 S. W. 558; Tarver *v.* Land Mortg. Bank, 7 Tex. Civ. App. 425, 27 S. W. 40.

Vermont.—Royalton Nat. Bank *v.* Cushing, 53 Vt. 321.

Virginia.— Burton *v.* Mill, 78 Va. 468.

Washington.— Murray *v.* Meade, 5 Wash. 693, 32 Pac. 780. See Washington L. & T. Co. *v.* Ritz, 37 Wash. 642, 80 Pac. 174.

West Virginia.—Blair *v.* Mounts, 41 W. Va. 706, 24 S. E. 620; Bates *v.* Swiger, 40 W. Va. 420, 21 S. E. 874; Crumlish *v.* Central Imp. Co., 38 W. Va. 390, 18 S. E. 456, 45 Am. St. Rep. 872, 23 L. R. A. 120; McNeil *v.* Miller, 29 W. Va. 480, 2 S. E. 335.

Wisconsin.— Watson *v.* Wilcox, 39 Wis. 643, 20 Am. Rep. 63.

United States.—Underwood *v.* Metropolitan Nat. Bank, 144 U. S. 669, 12 S. Ct. 784, 36 L. ed. 586; Ætna L. Ins. Co. *v.* Middleport, 124 U. S. 534, 8 S. Ct. 625, 31 L. ed. 537; Beardsley *v.* Lampasas, 127 Fed. 819, 62 C. C. A. 126; O'Brien *v.* Wheelock, 78 Fed. 673; Mercantile Trust Co. *v.* Hart, 76 Fed. 673, 22 C. C. A. 473, 35 L. R. A. 352; Lawrence *v.* U. S., 71 Fed. 228; Cotton *v.* Dacey, 61 Fed. 481; Matthews *v.* Fidelity Title, etc. Co., 52 Fed. 687; Cornell Steamboat Co. *v.* The Jersey City, 43 Fed. 166; Lewis *v.* Chittick, 25 Fed. 176.

A famous and often quoted exposition of the doctrine.— Chancellor Johnson, in Gadsden *v.* Brown, Speers Eq. (S. C.) 37, 41, says: "The doctrine of subrogation is a pure unmixed equity, having its foundation in the principles of natural justice, and from its very nature, never could have been intended for the relief of those who were in a condition in which they were at liberty to elect whether they would or would not be bound, and as far as I have been enabled to learn its history, it never has been so applied. If one with the perfect knowledge of the facts, will part with his money, or bind himself by his contract, in a sufficient consideration, any rule of law which would restore him his money or absolve him from his contract, would subvert the rules of such order. It has been directed in its application exclusively to the relief of those that were already bound, who could not but choose to abide the penalty. . . . . But I have seen no case, and none has been referred to in the argument, in which a stranger, who was in a condition to make terms for himself, and demand any security he might require, has been protected by the principle." Quoting the above in

subrogated only by virtue of an agreement, express or implied,[68] or by request from the debtor to pay, which is in effect an implied contract,[69] by ratification,[70] or by taking an assignment of the debt.[71] But payments made in ignorance of the real state of facts cannot be said to be voluntary,[72] and a person who has paid a debt under a colorable obligation to do so, that he may protect his own claim, or under an honest belief that he is bound, will be subrogated;[73] and a person who mistakenly but in good faith believes that he has an interest in property, to protect which

Ætna L. Ins Co. *v.* Middleport, 124 U. S. 534, 8 S. Ct. 625, 31 L. ed. 537, the court says: "This is perhaps as clear a statement of the doctrine on this subject as is to be found anywhere. . . . Subrogation as a matter of right, as it exists in the civil law, from which the term has been borrowed and adopted in our own, is never applied in aid of a mere volunteer."

A stranger, within the meaning of this rule, is not necessarily one who has nothing to do with the transaction out of which the debt grew; any one being under no legal obligation or liability to pay the debt is a stranger, and if he pays the debt, a mere volunteer. Suppiger *v.* Garrels, 20 Ill. App. 625 [*quoted* and *approved* in Traders' Bank *v.* Myers, 3 Kan. App. 636, 44 Pac. 292, 295].

One having a contract to purchase land, who is insisting on its being carried out, is not a volunteer for the purpose of subrogation. Landis *v.* Wolf, 119 Ill. App. 11.

Subrogation as a matter of right as it exists in the civil law is never applied in favor of a mere volunteer. Legal substitution into the rights of a creditor takes place only for his benefit who, being himself a creditor, satisfies the lien of a prior creditor or for the benefit of a purchaser who extinguishes the encumbrances upon his estate, or of a coöbligor or surety who discharges the debt, or of an heir who pays the debt of the succession (Shinn *v.* Budd, 14 N. J. Eq. 234); and a person will not, under the civil law, be subrogated to the rights of the original creditors without a deed of subrogation, unless he was bound for the debtor, in which case subrogation takes place by action of law (Virgin's Succession, 18 La. Ann. 42; Harrison *v.* Bisland, 5 Rob. (La.) 204), for every one who furnishes money or binds himself unconditionally for a debt does not thereby entitle himself to the creditor's rights; a legal subrogation exists in favor, not of all who pay a debt, but of those only who, being bound for, discharge it (Harrison *v.* Bisland, *supra*; Nolte *v.* His Creditors, 7 Mart. N. S. (La.) 602), and it is of the essence of legal subrogation that the person making the payment should be a third person in respect to the obligee of the debt he is seeking to prime thereby, and that he should himself be a creditor of inferior rank of the common debtor whose debt he pays (New Orleans Nat. Bank *v.* Eagle Cotton Warehouse, etc., Co., 43 La. Ann. 814, 9 So. 442).

One who claims the ownership of a note secured by a mortgage, who is not shown to have been a creditor, is not entitled to legal subrogation. Coco *v.* Gumbel, 47 La. Ann. 966, 17 So. 421.

One who voluntarily pays a tax to a city, for which neither he nor his property is liable, is not entitled to be subrogated in equity to the rights of the city as against the property or its owner. Montgomery *v.* Charleston, 99 Fed. 825, 40 C. C. A. 108, 48 L. R. A. 503. Thus, where a county treasurer, without any previous request or subsequent promise of indemnity, voluntarily paid taxes on the land of another, he was not entitled to be subrogated to the rights of the state and county. Repass *v.* Moore, 98 Va. 377, 36 S. E. 474. And see *In re* Brinker, 128 Fed. 634.

Payment after the statute of limitations has run is voluntary. Collings *v.* Collings, 92 S. W. 577, 29 Ky. L. Rep. 51. But see *infra*, text and note 77.

Where one furnishes material or performs labor for a contractor charged with the erection of a public building, or other public work, where there is no statute, and no contract to effect the status of the parties, the simple relation of a debtor and creditor exists between the materialman, laborer, and contractor, and the former can resort only to the remedies common to such creditors for the collection of their debts. Townsend *v.* Cleveland Fire-Proofing Co., 18 Ind. App. 568, 47 N. E. 707 [*citing* Riggin *v.* Hillard, 56 Ark. 476, 20 S. W. 402, 35 Am. St. Rep. 113].

Where the same person is administrator and guardian to the heirs, the fund held by him in one capacity cannot be subjected to the relief of another, on the principle of substitution, unless it appear clearly that the former fund was liable to the debt which the latter has discharged. Greenlee *v.* McDowell, 56 N. C. 325.

68. Richmond *v.* Marston, 15 Ind. 134; Williamson's Appeal, 94 Pa. St. 231 (holding that volunteers can obtain the right of subrogation only by contract); Mosier's Appeal, 56 Pa. St. 76, 93 Am. Dec. 783; *In re* Martin, 25 R. I. 1, 54 Atl. 589.

69. Wilson *v.* Brown, 13 N. J. Eq. 277; Miller *v.* Moreau, 10 N. Y. St. 711.

70. Bowen *v.* Gilbert, 122 Iowa 448, 98 N. W. 273, holding that where, after a junior lien-holder had paid the senior mortgage without the mortgagor's consent, the latter paid him one or more instalments thereon, and tendered still others, the mortgagor thereby ratified the payment.

71. Clark *v.* Moore, 76 Va. 262.

72. Durante *v.* Eannaco, 65 N. Y. App. Div. 435, 72 N. Y. Suppl. 1048; Lewis *v.* Chittick, 25 Fed. 176.

73. Muir *v.* Berkshire, 52 Ind. 149; Cobb *v.* Dyer, 69 Me. 494.

Subrogation of one paying under mistaken belief of suretyship see *infra*, VII, I, 2, a, b.

he discharges a lien, is subrogated to the lien for his repayment; [74] and subrogation is sometimes extended to cases of payment by persons not legally bound to pay, but who do so, not as volunteers, but with a well-founded expectation, justified by the conduct or contract of the debtor, that they will be entitled to hold all the securities for their indemnity which the creditor had against the debtor; [75] and in one jurisdiction it has been held that a stranger who pays a debt without request by the debtor, when his payment is not ratified by the debtor, may bring a suit in equity praying relief in the alternative, that if the debtor do not ratify such payment, the debt may be enforced in his favor, as its equitable assignee, or, if so ratified, that he be decreed repayment of the amount paid for the use of the debtor.[76] Payment under a moral obligation is not voluntary.[77]

C. Part Payment. There can be no subrogation to the rights of another unless the claim of that other is fully satisfied; and, until the whole debt is paid there can be no interference with the creditor's rights or securities which might, even by bare possibility, prejudice him in the collection of the residue of his claim,[78] for a right of subrogation is rather against the debtor than against the creditor,[79] and subrogation will be denied one who did not pay or furnish the means to pay the entire debt.[80] But if by some error or mistake of calculation as to interest or costs not quite enough is paid to meet the whole debt, when the intention was to pay the whole debt, equity under its general power to relieve from mistake will grant subrogation *pro tanto*; [81] and one who endeavored but failed to ascertain the exact amount due, and then paid into court a sum in excess of the debt, interest, and costs is entitled to subrogation; [82] and where a creditor to whose rights subrogation is claimed has been satisfied in full, the fact that such satisfaction has been brought about by two persons will not prevent each

74. Kapena *v.* Kaleleonalani, 6 Hawaii 579, 8 Hawaii 697; Cockrum *v.* West, 122 Ind. 372, 23 N. E. 140; Fowler *v.* Parsons, 143 Mass. 401, 9 N. E. 799.

75. Schoonover *v.* Allen, 40 Ark. 132.

76. Crumlish *v.* Central Imp. Co., 38 W. Va. 390, 18 S. E. 456, 45 Am. St. Rep. 872, 23 L. R. A. 120.

77. Slack *v.* Kirk, 67 Pa. St. 380, 5 Am. Rep. 438.

78. *Indiana.*—Anderson *v.* Wilson, 100 Ind. 402, holding that where a purchaser of land pays the mortgage thereon, he is not subrogated to the mortgagee's right, unless he pays the purchase-price.

New Jersey.— Wyckoff *v.* Noyes, 36 N. J. Eq. 227; New Jersey Midland R. Co. *v.* Wortendyke, 27 N. J. Eq. 658.

Pennsylvania.— Musgrave *v.* Dickson, 172 Pa. St. 629, 33 Atl. 705, 51 Am. St. Rep. 765; Hoover *v.* Epler, 52 Pa. St. 522; Delaware, etc., Canal Co.'s Appeal, 38 Pa. St. 512; Commonwealth Bank *v.* Potius, 10 Watts 148; Kyner *v.* Kyner, 6 Watts 221; Allegheny Nat. Bank *v.* Petty, 4 Pa. Cas. 456, 7 Atl. 788; Nesbit *v.* Martin, 4 Pa. Co. Ct. 95.

Tennessee.— Harlan *v.* Sweeny, 1 Lea 682.

Utah.— Featherstone *v.* Emerson, 14 Utah 12, 45 Pac. 713.

England.— Dering *v.* Winchelsea, 1 White & T. Lead. Cas. Eq. 120.

See 44 Cent. Dig. tit. "Subrogation," § 52.

And see Fayetteville Bank *v.* Lorwein, 76 Ark. 245, 88 S. W. 919.

A third person who pays a portion of a debt secured by a lien, at the instance of the debtor, will not be subrogated in equity to such lien, to the prejudice of the original creditor with respect to the remainder of his debt. Browder *v.* Hill, 136 Fed. 821, 69 C. C. A. 499.

Where the purchaser of mortgaged property paid only a part of such mortgage debt, as a consideration for the sale of the property, he was not entitled to subrogation to the mortgagee's rights, since the right of subrogation exists only on full satisfaction of the encumbrance. Hubbard *v.* Le Barron, 110 Iowa 443, 81 N. W. 681.

In Louisiana, although Rev. Civ. Code, art. 2160, c. 2, declares that a debtor borrowing a sum of money to pay his debt by public notarial act may subrogate the lender to the rights of the creditor, and that such subrogation takes place independently of the creditor, such recital is controlled by article 2162, providing that, in case of subrogation made by the debtor, the creditor may exercise his right for what remains due him in preference to the debtor's subrogee. Hutchinson *v.* Rice, 105 La. 474, 29 So. 898. And it has been held that one who advances money to the mortgage creditor of his debtor, in the payment of interest accumulations on the mortgage debt, becomes legally subrogated *pro tanto* to the mortgage creditor's right. Hobgood *v.* Schuler, 44 La. Ann. 537, 10 So. 812.

79. Delaware, etc., Canal Co.'s Appeal, 38 Pa. St. 512.

80. Strickland *v.* Magoun, 119 N. Y. App. Div. 113, 104 N. Y. Suppl. 425 [*affirmed* in 190 N. Y. 545, 83 N. E. 1132].

81. Sowers' Appeal, 1 Mona. (Pa.) 49.

82. Snook *v.* Munday, 96 Md. 514, 54 Atl. 77.

from setting up the right of subrogation as against the other, to the extent of the payments made by them, although the payments may have been made at different times.[83] A judgment creditor is not bound to accept his debt from a stranger to the judgment, and a refusal of such tender is not equivalent to payment, for the purpose of subrogation, nor will it work an equitable assignment.[84]

IV. MANNER AND EFFECT OF SUBROGATION.

A. In General. Subrogation, legal or conventional, passes all the creditor's rights, privileges, liens, judgments, and mortgages,[85] and an actual assignment is not necessary.[86] Furthermore a subrogee is entitled to the benefit of all the remedies of the creditor and may use all the means which he could to enforce payment.[87] He stands in the shoes of the creditor; [88] and hence can be subrogated to no greater rights than the one in whose place he is substituted; if the latter had no rights the subrogee can have none; [89] and where a creditor is seeking to

83. Wilkins *v.* Gibson, 113 Ga. 31, 38 S. E. 374, 84 Am. St. Rep. 204.

84. Nesbit *v.* Martin, 4 Pa. Co. Ct. 95.

85. King *v.* Dwight, 3 Rob. (La.) 2; Baker *v.* Guarantee Trust, etc., Co., (N. J. Ch. 1895) 31 Atl. 174; Cullinan *v.* Union Surety, etc., Co., 79 N. Y. App. Div. 409, 80 N. Y. Suppl. 58; Mutual L. Ins. Co. *v.* Forty Second St., etc., Ferry R. Co., 74 Hun (N. Y.) 505, 26 N. Y. Suppl. 545; Allegheny Nat. Bank *v.* McCutcheon, 23 Pittsb. Leg. J. N. S. (Pa.) 376.

86. Fidelity, etc., Co. *v.* Jordan, 134 N. C. 236, 46 S. E. 496.

87. Long *v.* Deposit Bank, 90 S. W. 961, 28 Ky. L. Rep. 913; Durac *v.* Ferrari, 25 La. Ann. 80; Millaudon *v.* Colla, 15 La. 213; Baldwin *v.* Thompson, 6 La. 474; Thayer *v.* Goodale, 4 La. 221; Suares *v.* His Creditors, 3 La. 341; Nichol *v.* De Ende, 3 Mart. N. S. (La.) 310; Arnold *v.* Green, 116 N. Y. 566, 23 N. E. 1; Smith *v.* National Surety Co., 28 Misc. (N. Y.) 628, 59 N. Y. Suppl. 789 [*affirmed* in 46 N. Y. App. Div. 633, 62 N. Y. Suppl. 1105].

Where judgments for tort were obtained against a city in such a manner as to give it a recovery over against a water board representing the commonwealth, or against contractors acting under contract with the water board, the commonwealth having paid the judgment, was subrogated to the rights of the city against the contractors, and the city should enforce the commonwealth's right of subrogation in an action against the contractors for the use of the commonwealth, although the judgments were never paid by the city, but by the commonwealth directly to the judgment creditors. Cambridge *v.* Hanscom, 186 Mass. 54, 70 N. E. 1030.

There may be subrogation to the right to claim estoppel. Colonel, etc., Mortg. Co. *v.* Tubbs, (Tex. Civ. App. 1898) 45 S. W. 623.

88. Ohio L. Ins., etc., Co. *v.* Winn, 4 Md. Ch. 253.

Where a lien of the state for taxes is a subject of private ownership, the purchaser from the state takes it with the state's right of priority over all liens of the city for local assessments existing at the time of his purchase (White *v.* Thomas, 91 Minn. 395, 98 N. W. 101), but while a mortgagee entitled to be subrogated to the county's lien for taxes paid by him, as against a subsequent encumbrancer, who has been accorded priority, may have judgment for the amount paid with legal interest, he cannot recover penalties (Dunsmuir *v.* Port Angeles Gas, etc., Co., 30 Wash. 586, 71 Pac. 9).

89. *Alabama.*— Rothschild *v.* Bay City Lumber Co., 139 Ala. 571, 36 So. 785; Teague *v.* Corbitt, 57 Ala. 529.

Delaware.— Miller *v.* Stout, 5 Del. Ch. 259.

Georgia.— Macon City Bank *v.* Smisson, 73 Ga. 422.

Illinois.— Oglesby *v.* Foley, 153 Ill. 19, 38 N. E. 557.

Kentucky.— Havens *v.* Foudry, 4 Metc. 247; Commonwealth Bank *v.* Milton, 12 B. Mon. 340; Price *v.* Big Sandy Co., 107 S. W. 725, 32 Ky. L. Rep. 969; Miller *v.* Knight Mfg. Co., 83 S. W. 631, 26 Ky. L. Rep. 1201.

Maine.— Leavitt *v.* Canadian Pac. R. Co., 90 Me. 153, 37 Atl. 886, 38 L. R. A. 152, holding that one cannot by subrogation succeed to or acquire any claim or right which the party for whom he is substituted did not have.

North Carolina.— Liles *v.* Rogers, 113 N. C. 197, 18 S. E. 104, 37 Am. St. Rep. 627; Clark *v.* Williams, 70 N. C. 679.

Texas.— Mumme *v.* McCloskey, 28 Tex. Civ. App. 83, 66 S. W. 853.

United States.— The Livingstone, 104 Fed. 918; German Sav., etc., Soc. *v.* De Lashmutt, 67 Fed. 399.

An administrator who pays claims or funeral expenses, and subsequently obtains a judgment on such claims against the surviving husband of his intestate, thereby acquires no greater right than the original creditors to reach exempt property belonging to the husband. Weaver *v.* Gray, 37 Ind. App. 35, 76 N. E. 795.

Holders of bonds of a county are not entitled to subrogation to the rights of creditors, whose claims were paid from their proceeds, so as to render such bonds enforceable beyond the county's constitutional limit of indebtedness. Ætna L. Ins. Co. *v.* Lyon County, 95 Fed. 325.

Where a trustee of stock wrongfully pledged it for his own debt, and then assigned

obtain satisfaction of his claim through subrogation to the rights of his debtor against a third party, the utmost good faith on his own part will not entitle him to prevail, if it appears that his debtor has been guilty of such fraud as to defeat his rights against said third party.[90] Furthermore, subrogation, being purely an equitable right, is limited only by equitable considerations, and it is not therefore available or enforceable where there are subsisting and countervailing equities,[91] and the equities being equal the law will prevail.[92] Subrogation cannot take place by effect of law beyond the amount actually disbursed,[93] under legal necessity.[94] In conventional subrogation the extent of the right is measured by the agreement for subrogation,[95] and by the rights of the one granting the right.[96]

B. Benefit of Mortgage Security — 1. In General. A person who, under such circumstances that he is entitled to subrogation, pays a debt of another secured by mortgage is subrogated to the rights under the mortgage and can enforce the same for his own benefit,[97] and is subrogated to the priority of the mortgage

for the benefit of creditors, the fact that the assignee discharged the debt secured by the pledge with funds of the estate did not entitle him to subrogation to the rights of the pledgee against the stock. Woodside *v.* Grafflin, 91 Md. 422, 46 Atl. 968.

90. Green *v.* Turner, 80 Fed. 41.

91. *Alabama.*— Sawyers *v.* Baker, 77 Ala. 461.

Connecticut.— Orvis *v.* Newell, 17 Conn. 97.

Delaware.— Miller *v.* Stout, 5 Del. Ch. 259.

Kentucky.— Dunlap *v.* O'Bannon, 5 B. Mon. 393.

Missouri.—Wolff *v.* Walter, 56 Mo. 292.

New York.— Union Trust Co. *v.* Monticello, etc., R. Co., 63 N. Y. 311, 20 Am. Rep. 541.

Pennsylvania.— Budd *v.* Oliver, 148 Pa. St. 194, 23 Atl. 1105; McCurdy *v.* Conner, 1 Walk. 155, holding that bail for stay of execution is not entitled to subrogation against a terretenant or creditors.

Virginia.— Exchange Bldg., etc., Co. *v.* Bayless, 91 Va. 134, 21 S. E. 279.

United States.— Gunby *v.* Armstrong, 133 Fed. 417, 66 C. C. A. 627.

92. Ritter *v.* Cost, 99 Ind. 80; Edmunds *v.* Venable, 1 Patt. & H. (Va.) 121.

93. Mallory *v.* Dauber, 83 Ky. 239; Shropshire *v.* His Creditors, 15 La. Ann. 705; Bailey *v.* Warner, 28 Vt. 87 (holding that a party who pays, by agreement, money due on a mortgage, will be subrogated to the rights of the mortgagee only so far as to save him harmless).

If a mortgagor's vendee, before foreclosure, is not a party to a foreclosure decree, a purchaser of all the land thereunder is entitled to be substituted to the mortgagee's rights only to the amount which he paid and they received for the parcel at the sale. Martin *v.* Kelly, 59 Miss. 652.

Where a sale under a power is void for irregularity, the purchaser, or those claiming under him, although subrogated to the rights of the mortgage, can only enforce the mortgage to the extent of the amount paid at the illegal sale under the power. Givens *v.* Carroll, 40 S. C. 413, 18 S. E. 1030, 42 Am. St. Rep. 889.

94. Walker *v.* Municipality No. 1, 5 La. Ann. 10. And see *supra*, III, B.

95. Raleigh Nat. Bank *v.* Moore, 94 N. C. 734; Academy of Music Co. *v.* Davidson, 85 Wis. 129, 55 N. W. 172; Huntington *v.* The Advance, 72 Fed. 793, 19 C. C. A. 194. See Patterson *v.* Clark, 96 Ga. 494, 23 S. E. 496.

The legal subrogation is as extensive as express subrogation. Cox *v.* Baldwin, 1 La. 401.

96. Surghnor *v.* Beauchamp, 24 La. Ann. 471.

97. Kinnah *v.* Kinnah, 184 Ill. 284, 56 N. E. 376; Smith *v.* Dinsmore, 119 Ill. 656, 4 N. E. 648; Jacques *v.* Fackney, 64 Ill. 87; McGuffey *v.* McClain, 130 Ind. 327, 30 N. E. 296; Foley *v.* Gibson, 15 S. W. 780, 12 Ky. L. Rep. 885; Chouler *v.* Smith, 3 Desauss. Eq. (S. C.) 12.

A wife is entitled to be subrogated to the rights of trust creditors of her husband, whose debts against their property she has paid. Roach *v.* Hacker, 2 Lea (Tenn.) 633.

Where a note secured by a chattel mortgage is indorsed to a bank, and a third person, under an agreement with the maker, takes up the note by paying to the bank the amount due thereon, the note not being canceled, such person is subrogated to the rights of the bank in the chattel mortgage. Ploeger *v.* Johnson, (Tex. Civ. App. 1894) 26 S. W. 432.

The ordinary creditor paying the debt of the mortgage creditor is subrogated of right to the mortgage, under Rev. Civ. Code, art. 2160, 2161, providing that a creditor who pays another creditor whose claim is preferable by reason of his privileges shall be subrogated. Hall *v.* Hawley, 49 La. Ann. 1046, 22 So. 205; Ziegler *v.* Creditors, 49 La. Ann. 144, 21 So. 666.

A finding that most of a certain fund went to pay a mortgage is not sufficiently definite to authorize a decree reviving a mortgage for the benefit of the owner of the fund. Bourne *v.* Bourne, 69 Vt. 251, 37 Atl. 1049.

If one of two joint makers of a note secured by a mortgage paid the same before maturity, the payment of the debt acted as an equitable assignment to him of the mortgage, and he was subrogated to the rights of the original creditor, as against his co-maker, for the latter's share of the debt. Truss *v.* Miller, 116 Ala. 494, 22 So. 863.

over subsequent liens existing at the time of payment.[98] In general, any person having a subsequent interest in the premises and not primarily liable for the mortgage debt, who pays off the mortgage, thereby becomes an equitable assignee of it, and may keep the mortgage alive and enforce the lien for his own benefit.[99] Under the doctrine that the debt of the creditor must be fully paid,[1] one paying an instalment of a debt secured by mortgage while subrogated to the mortgage security will be postponed as to the mortgage creditor until the debt is fully paid,[2] unless the creditor has waived his right to priority;[3] and the payee of several notes secured by a mortgage who transfers such notes by indorsement to a third person, and assigns the mortgage to such transferee, is not entitled, when afterward compelled to pay one of such notes, to an assignment of a proportionate interest in the mortgage security.[4] But one who, on a verbal agreement that he should be reimbursed out of the mortgage, pays instalments of interest due thereon, and who afterward, as assignee of the mortgagor for the benefit of creditors, pays the balance of a judgment rendered on the mortgage, is entitled to be subrogated to the rights of the mortgagee.[5] One who pays a debt secured by a mortgage for the express purpose of discharging the lien cannot be subrogated to the rights thereunder;[6] and voluntary payment of a mortgage debt by a third person does not subrogate him to the mortgagee's rights, in the absence of an agreement to that effect;[7] and one who, by paying a mortgage, only does that which he is bound to do, cannot claim to be subrogated to the rights of the mortgagee.[8] One seeking to be subrogated to the lien of a mortgage which he has paid must show that the owner of the mortgaged premises at the time of such payment was in good conscience bound to pay the debt.[9]

2. Payment by Mortgagor. The person paying off a mortgage can, as a general rule, be substituted to the rights of the mortgagee only where the mortgage is taken up by a third person, and not where it is satisfied by the mortgagor himself;[10] but where a mortgage, after being pledged as security for a note, was assigned, and the mortgagor thereafter paid the note and received the note and mortgage, he is subrogated in the place of the payee of the note as his assignee, and will be allowed the amount paid as credit on the mortgage on foreclosure by the assignee thereof;[11] and the maker of a mortgage note, which a third person agrees, but fails, to pay, is subrogated, on paying it, to all the holder's mortgage rights, even against a third possessor;[12] and where a mortgage is foreclosed without making the holder of a second mortgage a party, and afterward the mortgagor pays off the second mortgage, he is entitled to subrogation to the rights of the holder of the second mortgage.[13]

3. Payment by Tenant For Life or For Years. A tenant for years, who pays off a mortgage debt, stands by redemption in the place of the mortgagee, and will be subrogated to his rights against the mortgagor and the reversioner;[14] but

98. Smith *v.* Dinsmoor, 119 Ill. 656, 4 N. E. 648.

99. Fears *v.* Albea, 69 Tex. 437, 6 S. W. 286, 5 Am. St. Rep. 78; 3 Pomeroy Eq. Jur. § 1212.

1. See *supra*, III, C.

2. Carithers *v.* Stuart, 87 Ind. 424.

3. Morrow *v.* U. S. Mortgage Co., 96 Ind. 21.

4. London, etc., Mortg. Co. *v.* Fitzgerald, 55 Minn. 71, 56 N. W. 464.

5. Brice's Appeal, 95 Pa. St. 145.

6. Loomer *v.* Wheelwright, 3 Sandf. Ch. (N. Y.) 135.

7. Martin *v.* Martin, 164 Ill. 640, 45 N. E. 1007, 56 Am. St. Rep. 219. And see Mahanes *v.* Dartmouth Sav. Bank, 4 Kan. App. 464, 46 Pac. 412; Hutchinson *v.* Rice, 105 La. 474, 29 So. 898.

8. Acer *v.* Hotchkiss, 97 N. Y. 395 (especially where to apply the doctrine of subrogation would operate to reduce the value of the security of a junior encumbrancer whose equity to resist the application of the doctrine is superior to that of the party claiming it); Thompson *v.* Griggs, 31 Pa. Super. Ct. 608; Isensee *v.* Austin, 15 Wash. 352, 46 Pac. 394.

9. Phœnix Mut. L. Ins. Co. *v.* Beaman, 5 Kan. App. 772, 48 Pac. 1007.

10. Garwood *v.* Eldridge, 2 N. J. Eq. 145, 34 Am. Dec. 195.

11. Kamena *v.* Huelbig, 23 N. J. Eq. 78.

12. Baldwin *v.* Thompson, 6 La. 474. And see *infra*, VII, H, 6.

13. Semon *v.* Terhune, 40 N. J. Eq. 364, 2 Atl. 18.

14. Hamilton *v.* Dobbs, 19 N J. Eq. 227; Averill *v.* Taylor, 8 N. Y. 44.

where the life-tenant paid off a mortgage and took no assignment thereof, and manifests a purpose to make a gift of the payment to the estate, the inference is that he so intended the payment; and he is not entitled to subrogation to the rights of the mortgagee.[15]

V. Waiver or Loss of Right.

Subrogation, being an equity springing from the relation between the parties, and created and enforced for the benefit and protection of the one in whose favor it is originated, may be asserted or waived at pleasure,[16] either expressly [17] or by implication,[18] but not to the detriment of the subrogee's creditors, who, in turn, are entitled to subrogation to his right of subrogation,[19] and may be assigned and enforced by the assignee.[20] The ordinary doctrine of estoppel also applies.[21] Thus the equitable right to substitution is waived by the conduct of a would-be subrogee in urging another person to buy land without disclosing to him an intention to assert, in any event, any sort of claim to it, resulting from facts or rights then existing, and without notifying him of the existence of any such facts or contingent claim.[22] A creditor is not entitled to subrogation to a lien which, but for his own laches, he might have had.[23]

VI. Actions and Other Proceedings For Enforcement.

A. Nature and Form. While the doctrine of subrogation is held to be purely a creature of equity,[24] and to have no application to an action at

15. Wandell's Estate, 13 Wkly. Notes Cas. (Pa.) 143.

16. Watts *v.* Eufaula Bank, 76 Ala. 474; Harbeck *v.* Vanderbilt, 20 N. Y. 395; Douglass' Appeal, 48 Pa. St. 223; Campbell *v.* Sloan, 21 S. C. 301; Richardson *v.* Traver, 112 U. S. 423, 5 S. Ct. 201, 28 L. ed. 804; U. S. Bank *v.* Peters, 13 Pet. (U. S.) 123, 10 L. ed. 89.

Surety for purchase-money purchasing at sale of land on execution.—Where a vendor having a lien on land, instead of pursuing his remedy in equity, prosecutes an action at law against the purchaser and the surety on a note given for the purchase-money, obtains a judgment, levies an execution on the purchaser's equitable estate, and on a sale thereof such surety becomes the purchaser, the extinguishment of the vendor's lien deprives the surety of any right of subrogation. Hall *v.* Jones, 21 Md. 439.

Unsecured creditors, who surrender their claims against the debtor, and, in lieu thereof, accept the notes of one upon whose land the debtor has a lien, with the knowledge and understanding that the lien is thereby paid, cannot thereafter claim to be subrogated to such lien. Leydon *v.* Malloy, 10 Ohio Cir. Ct. 442, 6 Ohio Cir. Dec. 820.

Mere delay does not operate as waiver. Armstrong *v.* Farmers' Nat. Bank, 130 Ind. 508, 30 N. E. 695.

17. Tyus *v.* De Jarnette, 26 Ala. 280.

18. See cases cited *infra*, the following notes.

19. Huston's Appeal, 69 Pa. St. 485 [*overruling* Harrisburg Bank *v.* German, 3 Pa. St. 300].

20. *California.*— San Francisco Sav. Union *v.* Long, (1898) 53 Pac. 907.

Georgia.— Fuller *v.* Dowdell, 85 Ga. 463, 11 S. E. 773.

Illinois.— Peirce *v.* Garrett, 65 Ill. App. 682.

Indiana.— Frank *v.* Traylor, 130 Ind. 145, 29 N. E. 486, 16 L. R. A. 115; Manford *v.* Frith, 68 Ind. 83.

New Jersey.— Hare *v.* Headley, 54 N. J. Eq. 545, 35 Atl. 445.

West Virginia.—Weimer *v.* Talbot, 56 W. Va. 257, 49 S. E. 372.

21. *In re* Warner, 82 Mich. 624, 47 N. W. 102; *In re* Hays, 159 Pa. St. 381, 28 Atl. 158.

But a surety who has attacked a trust assignment of his principal for fraud, the benefits of which have been accepted by the creditor and the assignment sustained, is not thereby estopped from the right of subrogation to the creditor. Motley *v.* Harris, 1 Lea (Tenn.) 577.

22. Kleiser *v.* Scott, 6 Dana (Ky.) 137.

23. Mechling's Appeal, 1 Pa. Cas. 135, 1 Atl. 326.

24. *Alabama.*—Watts *v.* Eufaula Nat. Bank, 76 Ala. 474; *Ex p.* Brown, 58 Ala. 536; Smith *v.* Harrison, 33 Ala. 706.

California.— Redington *v.* Cornwell, 90 Cal. 49, 27 Pac. 40.

Delaware.— Miller *v.* Stout, 5 Del. Ch. 259.

Illinois.— Devine *v.* Harkness, 117 Ill. 145, 7 N. E. 52; Meyer *v.* Mintonye, 106 Ill. 414.

Indiana.— Townsend *v.* Cleveland Fire Proofing Co., 18 Ind. App. 568, 47 N. E. 707.

Iowa.— Sheppard *v.* Messenger, 107 Iowa 717, 77 N. W. 515.

Kentucky.— Flannery *v.* Utley, 3 S. W. 412, 5 S. W. 876, 8 Ky. L. Rep. 776, 9 Ky. L. Rep. 581.

Massachusetts.—Amory *v.* Lowell, 1 Allen 504.

Minnesota.— Stewart *v.* Parcher, 91 Minn. 517, 98 N. W. 650.

Missouri.— Furnold *v.* State, 44 Mo. 336.

New York.— Mathews *v.* Aikin, 1 N. Y.

law,[25] the enforcement being in general confined to equitable tribunals,[26] the right of subrogation is sometimes recognized at law as well as in equity.[27] In some states

595; Wells *v.* Salina, 71 Hun 559, 25 N. Y. Suppl. 134; Farmers' L. & T. Co. *v.* Carroll, 5 Barb. 613.

North Carolina.— Moring *v.* Privott, (1908) 60 S. E. 509; Liles *v.* Rogers, 113 N. C. 197, 199, 18 S. E. 104, 37 Am. St. Rep. 627; Brinson *v.* Thomas, 55 N. C. 414.

Pennsylvania.— Musgrave *v.* Dickson, 172 Pa. St. 629, 33 Atl. 705, 51 Am. St. Rep. 765; Mosier's Appeal, 56 Pa. St. 76, 93 Am. Dec. 783; Nesbit *v.* Martin, 4 Pa. Co. Ct. 95.

South Carolina.—Gadsden *v.* Brown, Speers Eq. 37.

Tennessee.— Harlan *v.* Sweeny, 1 Lea 682.

Vermont.— Davis *v.* Hulett, 58 Vt. 90, 4 Atl. 139; Gerrish *v.* Bragg, 55 Vt. 329; Royalton Nat. Bank *v.* Cushing, 53 Vt. 318; Chandler *v.* Dyer, 37 Vt. 345.

West Virginia.—McNeil *v.* Miller, 29 W. Va. 480, 2 S. E. 335.

An equitable result.— Richards *v.* Cowles, 105 Iowa 734, 75 N. W. 648.

The principle has been long recognized by courts of equity, and is well established. Stevenson *v.* Austin, 3 Metc. (Mass.) 474.

25. Meyer *v.* Mintonye, 106 Ill. 414 (as in ejectment); Farmers' L. & T. Co. *v.* Carroll, 5 Barb. (N. Y.) 613.

26. *Alabama.*— Smith *v.* Harrison, 33 Ala. 706.

California.— Allen *v.* Phelps, 4 Cal. 256.

Delaware.— Miller *v.* Stout, 5 Del. Ch. 259.

Massachusetts.—Foote *v.* Cotting, 195 Mass. 55, 80 N. E. 600, 1 L. R. A. N. S. 693.

Mississippi.— Evans *v.* Robertson, 54 Miss. 683.

Missouri.— Miller *v.* Woodward, 8 Mo. 169.

North Carolina.— Brinson *v.* Thomas, 55 N. C. 414.

Rhode Island.— Moore *v.* Watson, 20 R. I. 495, 40 Atl. 345 (holding that subrogation is the doctrine of equity jurisprudence, and is not usually applied in courts of common law, except in those states in which equitable remedies are administered through the forms of law. It is a substitution of one person for another, so that the same rights and duties which attach to the original person will attach to the substituted one, and, owing to the strict rules of common-law pleading, this cannot be done in actions at law, except, at any rate, where some statutory provision enables the court to permit the substitution to be made.

Virginia.— McIlvane *v.* Big Stony Lumber Co., 105 Va. 613, 54 S. E. 473.

But in Ohio it has been held that an action brought by one of the sureties on a note who had paid the judgment obtained thereon, praying that he might be subrogated to the rights of the judgment creditor, and enforce contribution against his cosureties, is an action for legal, and not equitable, relief. Neilson *v.* Fry, 16 Ohio St. 552, 91 Am. Dec. 110.

In Pennsylvania while the better practice is held to be to raise the question of subrogation by petition and rule, the court will enter a decree after a hearing before an auditor to distribute the proceeds of a sheriff's sale of the real estate of one of the cosureties. Bunting *v.* Riehl, 2 Pa. Co. Ct. 450.

In Louisiana the right of a third possessor, on relinquishing the mortgaged property, to be subrogated to the rights of the mortgage creditor, against the mortgage debtor, can be exercised only in an action in warranty against the latter. Smith *v.* Lewis, 45 La. Ann. 1457, 14 So. 221.

Injunction.—A subsequent mortgagee, who has been made a party to a foreclosure of a prior mortgage, cannot maintain a separate action to enjoin a sale under the judgment and to be subrogated to the rights of plaintiff, on the ground of a tender of the amount due on the judgment, his remedy being by motion in the action foreclosing the mortgage. Ketchum *v.* Crippen, 37 Cal. 223.

Subrogation does not extend to the form or forum of the remedy, where the extent of the remedy is not affected by the form or forum. McDonald *v.* Asay, 37 Ill. App. 469 [*affirmed* in 139 Ill. 123, 27 N. E. 929].

Subrogation of sureties of administrator — Where an administrator, having failed to collect and pay over the purchase-money of land sold by him to pay a debt which had been allowed against the estate of his decedent, was sued by the creditor on his bond, and his sureties were compelled to pay the debt, the proper mode to enforce their right of subrogation was to procure an order of the probate court for the sale of the real estate of the deceased to satisfy the creditor's allowance, but they were not entitled to have the probate court allow as a claim against the estate of the deceased a judgment which they had obtained against the administrator for the amount of the debt paid by them, together with costs and expenses. Wernecke *v.* Kenyon, 66 Mo. 275.

Substitution may be had in probate courts. — McNeill *v.* McNeill, 36 Ala. 109, 76 Am. Dec. 320. But under Utah Comp. Laws (1888), § 4130, providing that an action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, it is not necessary for one claiming subrogation under a mortgage to present his claim for allowance to the probate court, but he may bring his action by virtue of his equitable claim and lien, without invoking the aid of the administrator or the probate court. Fullerton *v.* Bailey, 17 Utah 85, 53 Pac. 1020. And rights of subrogation are held to be peculiarly in the jurisdiction of the chancery court, and therefore an action by the executrix to enforce such rights acquired by the testator was held properly brought there, rather than in probate. Wilder *v.* Wilder, 75 Vt. 178, 53 Atl. 1072.

27. *Maine.*— Rollins *v.* Taber, 25 Me. 144.

Massachusetts.— Granite Nat. Bank *v.* Fitch, 145 Mass. 567, 14 N. E. 650, 1 Am. St. Rep. 484.

statutory and code provisions exist prescribing the mode of enforcing the right in particular cases and allow its enforcement at law,[28] and relief may be had at law where the equity and law procedure are blended;[29] and it is held in a very recent case that, although when the right of subrogation is in question the remedy is in equity, when the right itself is conceded, and there remains to be enforced only the right of realizing the value of the subject-matter, such right may be within the cognizance of a court of law.[30] The right of a surety to subrogation need not be determined in the suit between the creditor and the principal;[31] and one who has paid a judgment as surety before the question of his suretyship has been determined may have that relation established by applying to the court that rendered the original judgment, and become thus subrogated to the rights of the judgment creditor.[32]

B. Limitations and Laches — 1. Limitation. The right of subrogation, like other rights of action, is barred by failure to take steps to enforce it within the time prescribed by the statute of limitations;[33] and thus where a surety who

New Hampshire.— Edgerly *v.* Emerson, 23 N. H. 555, 55 Am. Dec. 207.

New York.— Dunlop *v.* James, 174 N. Y. 411, 67 N. E. 60; Boyd *v.* Finnegan, 3 Daly, 222.

United States.— Wilkinson *v.* Babbitt, 29 Fed. Cas. No. 17,668, 4 Dill. 207.

England.— Coles *v.* Bulman, 6 C. B. 184, 12 Jur. 586, 17 L. J. C. P. 302, 60 E. C. L. 184.

In Georgia, Code, §§ 2176, 2177, made subrogation a legal as well as an equitable right. Hull *v.* Myers, 90 Ga. 674, 16 S. E. 653. See Ezzard *v.* Bell, 100 Ga. 150, 28 S. E. 28.

28. See cases cited *infra*, this note.

In Maryland a surety on a bond, who has paid it, cannot recover by suit in the name of the obligee against himself and his coöbligor, but must proceed under Code, art. 5, § 9, authorizing him to demand an assignment of the bond, "and by virtue of such assignment, to maintain an action in his own name against the principal debtor." Martindale *v.* Brock, 41 Md. 571.

In North Carolina under the code the right of a surety who has paid the debt of his principal to be substituted to all the rights, liens, and securities which the creditor held can only be asserted by a civil action, commenced by the service of a summons (Calvert *v.* Peebles, 82 N. C. 334); but the rule was formerly otherwise (Allen *v.* Wood, 38 N. C. 386).

In Pennsylvania, under the act of May 19, 1887 (Pamphl. Laws 132) where a scire facias has been issued by a surety claiming subrogation on a judgment paid by him for the original debtor the surety has the right to have the question of subrogation tried out on the scire facias he has issued, instead of on a motion summarily to set aside the execution. Thompson *v.* Reash, 15 Pa. Super. Ct. 102; Hutcheson *v.* Reash, 15 Pa. Super. Ct. 96.

In Montana subrogation — an equitable defense — may be pleaded to a legal cause of action. Potter *v.* Lohse, 31 Mont. 91, 77 Pac. 419.

29. Toronto Bank *v.* Hunter, 4 Bosw. (N. Y.) 646, 20 How. Pr. 292 (holding that in an action against the accommodation acceptor by a non-resident holder of the bill, the drawers having become insolvent, defendant may, under the code, which authorizes the court to give equitable, as well as legal, relief in the same action, file an answer, in the nature of a cross bill in equity, demanding subrogation on payment of an amount due plaintiffs); Moore *v.* Watson, 20 R. I. 495, 40 Atl. 345.

A surety may apply to the court by motion to compel the assignment of a judgment against him and his principal on his offer to pay the judgment. Tyler *v.* Hildreth, 77 Hun (N. Y.) 580, 28 N. Y. Suppl. 1042.

30. Polhemus *v.* Prudential Realty Corp., 74 N. J. L. 570, 67 Atl. 303.

31. Grant *v.* Ludlow, 8 Ohio St. 1.

Under Nebr. Code Civ. Proc. § 511, if an issue has been presented and a finding made that one of defendants in a suit is the principal and the other a surety, the relation need not be relitigated in an action for subrogation. Nelson *v.* Webster, 72 Nebr. 332, 100 N. W. 411, 117 Am. St. Rep. 799, 68 L. R. A. 513.

But in proceedings to foreclose a mortgage the guarantor of the mortgage note is entitled, even before payment of the note, to have provision made for his subrogation to the rights of the mortgagors. Manning *v.* Ferguson, 103 Iowa 561, 72 N. W. 762.

32. Todd *v.* Oglebay, 158 Ind. 595, 64 N. E. 32.

33. Kreider *v.* Isenbice, 123 Ind. 10, 23 N. E. 786; Ball *v.* Miller, 17 How. Pr. (N. Y.) 300; Bledsoe *v.* Nixon, 68 N. C. 521. But see Caldwell *v.* Palmer, 6 Lea (Tenn.) 652, holding that neither the statute of limitations nor lapse of time will affect the right of a purchaser at a judicial sale, declared to be void at the instance of the heir of the former owner, to be subrogated to the rights of those creditors whose debts were paid by the purchase-money, and to have the amount of such proceeds received by the heir refunded.

Where one of four joint and several obligors pays the note, he is subrogated to the rights of the payee, and his cause of action for contribution is founded on the written instrument, and therefore the two-year statute of limitations does not apply to his claim.

has paid the debt does not act before his claim is barred by the statute of limitations manifesting an intention to put himself in the place of the creditor and to subrogate himself to the creditor's rights, equity will not subrogate him to those rights.[34] But limitations against actions by a surety run only from the time of

Murphy *v.* Gage, (Tex. Civ. App. 1893) 21 S. W. 396.

Where one paid a mortgage debt, and thereby became entitled to be subrogated to the rights of the mortgagee, limitations against the enforcement of such right of subrogation began to run from the maturity of the debt secured by the mortgage, not from the date such person paid the debt. Fullerton *v.* Bailey, 17 Utah 85, 53 Pac. 1020.

Where a life-tenant, seeking to recover for assessments made on the property, based her claim on the doctrine of subrogation, the action was governed by Rev. St. § 4985, providing that an action for relief not thereinbefore provided for can only be brought within ten years after the cause of action accrues, and not by section 4981, prescribing six years' limitation as to actions on contracts, either express or implied, and on liabilities created by statute other than forfeitures or penalties. Eddy *v.* Leath, 26 Ohio Cir. Ct. 645.

Where money is fraudulently obtained and used at the instance of the mortgagors to pay off prior valid liens, such liens will be considered to be alive so long as equity and the rights of the parties require; and the holder of the defective mortgage, who had no notice of the fraud or defect until the answers of the mortgagors were filed in a foreclosure action, is not barred by the statute of limitations from asking subrogation to the prior liens, although more than five years have elapsed since they were paid off and discharged. Zinkeison *v.* Lewis, 63 Kan. 590, 66 Pac. 644.

In Georgia, under Code, §§ 2176, 2177, which made subrogation a legal as well as an equitable right, accommodation indorsers who have paid more than their *pro rata* share of the debt may sue jointly a co-indorser for contribution, founding their action on the indorsed note, and will have the same time in which to bring suit as the creditor would have had on the same instrument, which, under Code, § 2917, is six years after the note becomes due and payable. Hull *v.* Myers, 90 Ga. 674, 16 S. E. 653.

34. *Illinois.*— Junker *v.* Rush, 136 Ill. 179, 26 N. E. 499, 11 L. R. A. 183 (holding that the equitable right of a surety who has paid a judgment rendered against his principal and himself to be subrogated to the rights of the judgment creditor cannot be enforced after his right of action against his principal on the latter's implied promise to reimburse him has become barred by the statute of limitations); Simpson *v.* McPhail, 17 Ill. App. 499 (holding that a delay for five years in which the surety might have sued at law will be a complete bar to a right of subrogation in equity).

Indiana.— Kreider *v.* Isenbice, 123 Ind. 10, 23 N. E. 786 (holding that where a judgment is against two obligors on a note which fails to show any suretyship, and the judgment is paid by one of them without raising any issue as to which was surety, an action by the surety to collect from the other judgment defendants is on the principal's implied promise of indemnity, and is governed by Rev. St. (1881) § 292, which provides that all actions on accounts and contracts not in writing shall be brought within six years after the cause of action accrued); Arbogast *v.* Hays, 98 Ind. 26 (holding that where a surety, paying the debt of his principal, becomes subrogated to the rights of the creditor in a mortgage given by the principal debtor to the creditor, his action to foreclose the mortgage for reimbursement is limited to six years, even where the mortgage contains an express covenant to pay the debt secured thereby).

Iowa.— Johnston *v.* Belden, 49 Iowa 301, holding that where a surety pays a judgment, his right to maintain an action to be subrogated to the rights of the judgment creditor is barred in five years from the date of paying the judgment.

Mississippi.— See Rucks *v.* Taylor, 49 Miss. 552.

Pennsylvania.— Rittenhouse *v.* Levering, 6 Watts & S. 190; Commonwealth Bank *v.* Potius, 10 Watts 148 (holding that where sureties are subrogated to the rights of the principal debtor against the sheriff and his sureties on his official bond, if they omit to sue the bond until the lapse of time has barred an action on it, they will not be entitled to substitution in an action by the original plaintiffs to recover the balance of the debt still unpaid to them); Fink *v.* Mahaffy, 8 Watts 384; Hutcheson *v.* Reash, 15 Pa. Super. Ct. 96.

United States.— Pickering *v.* Leiberman, 41 Fed. 376.

See 44 Cent. Dig. tit. "Subrogation," § 112.

Merger of note in judgment.—Where an indorser has been legally subrogated by payment of a judgment, to the rights of the creditor against the drawer, the note is merged in the judgment, and is not barred by the prescription applicable to promissory notes. Dorsey's Succession, 7 La. Ann. 34.

The personal representatives of a surety on a sealed note, who paid the same without taking an assignment thereof, and begin an action against the principal in their own names, cannot after an unexplained delay of four years from beginning suit, amend by substituting the personal representative of the payee as plaintiff for their use, such amendment being a subrogation to the rights of the paid creditor, and not allowable where those rights are barred by limitation. Stout *v.* Stout, 44 Pa. St. 457.

In Ohio the statutory period of limitation applicable to an action merely for subrogation is ten years. Neal *v.* Nash, 23 Ohio St. 483 [*distinguishing* Neilson *v.* Fry, 16 Ohio

payment by the surety.[35] A surety, upon payment of the debt, has a right of action for indemnity from his principal, and as this right arises under an implied contract, it would be barred, in most states, sooner than the right of action which the creditor had on the written instrument or judgment. For this reason, where the surety is subrogated to the rights of the creditor on a written contract, or has taken an assignment thereof, he will possess rights superior to those which he had on his implied contract for indemnity.[36]

2. Laches. The right of subrogation is one of equity merely, and due diligence must be exercised in ascertaining it. Laches in taking advantage of the right will forfeit it;[37] and subrogation is not allowed in favor of one who has permitted

St. 552, 91 Am. Dec. 110], holding that an action by one of several cosureties paying a joint judgment against them for subrogation to the rights of the creditor is limited to six years, under Code, § 14, as an action on an implied promise, and not merely for equitable relief.

An application by a cosurety on a bond, as co-defendant, who paid the same, to be subrogated to the rights of plaintiff as against the principal debtor and defendant, must be made within six years from the date of payment (Com. *v.* Marshall, 2 Woodw. (Pa.) 117), and the same period applies in Ohio to a cosurety who has paid a judgment (Neilson *v.* Fry, 16 Ohio St. 552, 91 Am. Dec. 110).

35. See Limitations of Actions, 25 Cyc. 1113.

36. *Alabama.*— Giddens *v.* Williamson, 65 Ala. 439. See Hughes *v.* Howell, 152 Ala. 295, 44 So. 410.

Georgia.— Hull *v.* Myers, 90 Ga. 674, 16 S. E. 653.

Indian Territory.— Sparks *v.* Childers, 2 Indian Terr. 187, 47 S. W. 316.

Mississippi.— Partee *v.* Mathews, 53 Miss. 140.

South Carolina.— Smith *v.* Swain, 7 Rich. Eq. 112.

Texas.— Sublett *v.* McKinney, 19 Tex. 438.

Virginia.— Cromer *v.* Cromer, 29 Gratt. 280.

See 44 Cent. Dig. tit. "Subrogation," § 112.

A surety subrogated to a judgment cannot maintain an action against his principal after the expiration of the time limited for bringing an action thereon by the creditor (Cathcart *v.* Bryant, 28 Wash. 31, 68 Pac. 171); and a surety on a judgment, who pays the judgment, must take steps to enforce his right of subrogation within the period prescribed as a limitation to the enforcement of simple contracts, for this merely equitable right will not be enforced at the expense of a legal one (Hutcheson *v.* Reash, 15 Pa. Super. Ct. 96).

If the surety enforces contribution through the claim of the creditor, his right is not barred until the statute would have run as to the creditor (Northwestern Nat. Bank *v.* Great Falls Opera-House Co., 23 Mont. 1, 57 Pac. 440, holding that under Code Civ. Proc. § 1242, providing that a surety paying a judgment shall be entitled to its benefit to enforce contribution, his right is not barred so long as the judgment is alive), and although a judgment creditor held no securities for his debt, a surety of the judgment debtor having satisfied the judgment, there was an equitable assignment to him, and he might maintain an action against his cosurety after the running of limitations against the statutory actions for contribution, and within the period within which the judgment creditor might have asserted his rights against the principal (Burrus *v.* Cook, 117 Mo. App. 385, 93 S. W. 888).

A surety on a note, who pays the same, and thereby becomes subrogated to the rights of the holder of the note, may pursue upon the note itself, in equity, the same course, within the same limitation period, that the creditor could have pursued at law, had he remained the owner of the note, regardless of the fact that limitations have run against the surety's action at law to recover the money paid out by him on the principal's account. Ferd Heim Brewing Co. *v.* Jordan, 110 Mo. App. 286, 85 S. W. 927.

In South Dakota under Comp. Laws, § 4856, providing that an action for relief for which no period of limitation is provided must be commenced within ten years after the cause of action shall have accrued, an equity suit, by persons voluntarily paying off a mortgage, to be subrogated to the rights of the mortgagee, will be deemed barred within that period after payment. Pollock *v.* Wright, 15 S. D. 134, 87 N. W. 584.

37. *Arkansas.*—Dyer *v.* Jacoway, 76 Ark. 171, 88 S. W. 901 (holding that creditors cannot, because of laches, procure subrogation to the rights of sureties in an indemnity mortgage by a proceeding brought thirty years after the execution of a release by the sureties); Boone County Bank *v.* Byrum, 68 Ark. 71, 56 S. W. 532.

Indiana.— Smith *v.* Harbin, 124 Ind. 434, 24 N. E. 1051.

Kansas.— Hargis *v.* Robinson, 63 Kan. 686, 66 Pac. 988 (holding that equity does not encourage or reward negligence, and subrogation, which is founded on principles of equity and benevolence, is never enforced in favor of one who has been negligent in asserting an equity and to the prejudice of innocent parties who have acquired intervening rights); Hofman *v.* Demple, 52 Kan. 756, 35 Pac. 803.

Maryland.— Noble *v.* Turner, 69 Md. 519, 16 Atl. 124.

Nebraska.— Ocobock *v.* Baker, 52 Nebr. 447, 72 N. W. 582, 66 Am. St. Rep. 519.

Pennsylvania.— *In re* Searight, 163 Pa. St. 222, 29 Atl. 973; Gring's Appeal, 89 Pa. St. 336; Douglass' Appeal, 48 Pa. St. 223;

the equity he asserts to sleep in secrecy until the rights of others would be injuriously affected by its assertion and enforcement.[38] Thus a surety who for an unreasonably long time has permitted himself to appear in the light of the principal debtor cannot be subrogated, to the prejudice of intervening equities,[39] although the rule is otherwise where there are no supervenient equities;[40] and where the rights of third persons have not intervened, it has been held that a delay, short of the statutory period of limitations, will not bar a party of his right to be subrogated to the rights of another.[41]

C. Notice of Indebtedness and Demand. Demand on the person whose liability is sought to be fixed by subrogation is not necessary before suit,[42] and a surety may, without first proceeding at law, file his bill in equity for subrogation,[43] upon notice to the principal.[44]

D. Parties. The right of subrogation, being equitable in its nature,[45] cannot be enforced in proceedings to which those whose equities are affected are not

In re Goswiler, 3 Penr. & W. 200; Mechling's Appeal, 1 Pa. Cas. 135, 1 Atl. 326; Hutcheson *v.* Reash, 15 Pa. Super. Ct. 96 (holding that a surety in a judgment who has paid the debt is not for all time to be regarded as standing in the shoes of plaintiff in the judgment; but he may lose that right by his laches); Seibert's Estate, 4 Pa. Super. Ct. 514, 40 Wkly. Notes Cas. 278; Nesbit *v.* Martin, 4 Pa. Co. Ct. 95; *In re* Hennessy, 4 L. T. N. S. 9.

See 44 Cent. Dig. tit. "Subrogation," § 112.

Negligence which does not increase the burdens of any lien-holder does not have the effect to prevent subrogation or destroy the right to subrogation. Miller *v.* Stark, 61 Ohio St. 413, 56 N. E. 11.

38. Thomas *v.* Stewart, 117 Ind. 50, 18 N. E. 505, 1 L. R. A. 715; Gring's Appeal, 89 Pa. St. 336.

39. Smith *v.* Harbin, 124 Ind. 434, 24 N. E. 1051; Gring's Appeal, 89 Pa. St. 336; *In re* Goswiler, 3 Penr. & W. (Pa.) 200.

40. Home Inv. Co. *v.* Clarson, 15 S. D. 513, 90 N. W. 153. And see Anthes *v.* Schroeder, 74 Nebr. 172, 103 N. W. 1072; Kinkead *v.* Ryan, 64 N. J. Eq. 454, 53 Atl. 1053.

Where a judgment has been kept alive by the issuance of successive executions, under Code (1899), c. 139, § 10, and finally satisfied out of the lands of one of several cosureties, and a suit by the assignee of such surety against other sureties is brought for enforcement of the right of subrogation against the lands of one of the other sureties within ten years from the return-day of the last execution, and the rights of no third parties have intervened, the suit is not barred by either limitations or laches. Weimer *v.* Talbot, 56 W. Va. 257, 49 S. E. 372.

41. Hughes *v.* Thomas, 131 Wis. 315, 111 N. W. 474, 11 L. R. A. N. S. 744. See Kinkead *v.* Ryan, 64 N. J. Eq. 454, 53 Atl. 1053.

42. Clark *v.* Marlow, 149 Ind. 41, 48 N. E. 359; Opp *v.* Ward, 125 Ind. 241, 24 N. E. 974, 21 Am. St. Rep. 220; Rodenbarger *v.* Bramblett, 78 Ind. 213.

Tender.—Where the accommodation maker of a note paid it to a bank to which it had been transferred by the payee, and the bank held certain securities deposited with it by the payee to protect it against any loss by reason of any dealings with the payer, in an action by plaintiff to have the amount which the payee owed the bank ascertained, and to be subrogated to the rights of the bank to the securities, a tender of the amount due the bank was not necessary to the bringing of the action. Koehler *v.* Farmers', etc., Nat. Bank, 5 N. Y. Suppl. 745.

43. Bittick *v.* Wilkins, 7 Heisk. (Tenn.) 307; Tinsley *v.* Oliver, 5 Munf. (Va.) 419.

Necessity for payment of debt or encumbrance see *supra*, III.

A subsequent indorser of a negotiable note paying a judgment on it against the maker, a prior indorser, and himself, which judgment is a lien on land of the prior indorser, may sue in equity to enforce substitution to the lien of the judgment against the land of the prior indorser, without first getting a judgment at law against the prior indorser for the money paid by him. Schilb *v.* Moon, 50 W. Va. 47, 40 S. E. 329.

Sureties of a receiver, subrogated to the rights of the beneficiaries to follow the trust funds into the hands of one who has, with notice, accepted them from the receiver in payment of an individual debt, may maintain a bill against him therefor without first obtaining a judgment against the receiver. Clark *v.* Harrisonville First Nat. Bank, 57 Mo. App. 277.

In Wisconsin, under Rev. St. § 3020, a surety, in order to preserve the lien of a judgment to enforce contribution, is required to file an affidavit showing the payment and his claim to use the execution. Mason *v.* Pierron, 69 Wis. 585, 34 N. W. 921.

44. Veach *v.* Wickersham, 11 Bush (Ky.) 261; Irick *v.* Black, 17 N. J. Eq. 189; Bittick *v.* Wilkins, 7 Heisk. (Tenn.) 307.

Where, by motion for judgment in an action to foreclose the senior mortgage in which the junior mortgagee is a party, the holder of the junior mortgage seeks to be subrogated to the rights of the senior mortgage on payment thereof, plaintiff cannot object on such motion, that defendants other than the moving party have not had notice. Twombly *v.* Cassidy, 82 N. Y. 155 [*affirming* 21 Hun 277].

45. See *supra*, I, A.

parties.[46] Creditors to whose rights a party seeks to be subrogated are necessary parties to an action to obtain such subrogation;[47] and plaintiff cannot be subrogated to the rights of a defendant under a contract with a third person in an action to which such third person is not made a party.[48] But a judgment creditor, against whom no decree is prayed, is not a necessary party to a suit in which plaintiff seeks to be subrogated to satisfied judgment liens.[49] It has been held

46. *Arkansas.*— Dyer *v.* Jacoway, 76 Ark. 171, 88 S. W. 901 (holding that creditors cannot obtain subrogation to a deceased surety's right in an indemnity mortgage by a proceeding against the other sureties, to which none of the heirs or legal representatives of the deceased surety are parties); Bond *v.* Montgomery, 56 Ark. 563, 20 S. W. 525, 35 Am. St. Rep. 119.

Georgia.— Wilkins *v.* Gibson, 113 Ga. 31, 38 S. E. 374, 84 Am. St. Rep. 204, holding that a creditor who is the holder of a junior encumbrance, but who claims to have been subrogated to the rights of the senior encumbrancer, as against the rights of an intervening encumbrancer, in setting up the right of subrogation must make the senior encumbrancer a party to the proceeding, or allege a sufficient reason for not doing so, and must also make such allegations and ask for such relief as the senior encumbrancer should make and ask for if he were proceeding in his own right.

Indiana.— Rush *v.* State, 20 Ind. 432.

Kentucky.— Guill *v.* Corinth Deposit Bank, 68 S. W. 870, 24 Ky. L. Rep. 482.

New Jersey.— Schneider *v.* Schmidt, (Ch. 1908) 70 Atl. 688. And see Boice *v.* Conover, 69 N. J. Eq. 580, 61 Atl. 159, holding that where one was subrogated to a judgment lien, all persons interested in the judgment were entitled to be heard.

North Carolina.— Brinson *v.* Thomas, 55 N. C. 414.

South Dakota.— Muller *v.* Flavin, 13 S. D. 595, 83 N. W. 687.

See 44 Cent. Dig. tit. "Subrogation," § 113.

But see Connecticut Mut. L. Ins. Co. *v.* Cornwell, 72 Hun (N. Y.) 199, 25 N. Y. Suppl. 348.

The right to subrogation under a prior mortgage can be litigated only in a proceeding to foreclose said mortgage, in which the junior lien-holders are made parties. Farm, etc., Co. *v.* Meloy, 11 S. D. 7, 75 N. W. 207.

Non-joinder of insolvent debtor immaterial. — In a suit to subrogate a surety who has paid certain debts, to the rights and liens of the creditors against the property of one of the principal debtors, the failure to join the other principal debtor is immaterial, where he is insolvent, and his property is brought into court, and his non-joinder does not affect any rights defendant may have against him. Cauthorn *v.* Berry, 69 Mo. App. 404.

In an action by a creditor partner to be subrogated to a mortgage given by a debtor partner to secure a firm creditor on payment by the creditor partner of a firm debt, the debtor partner is not a necessary party. Schuyler *v.* Booth, 37 Misc. (N. Y.) 35, 74 N. Y. Suppl. 733 [*affirmed* in 76 N. Y. App. Div. 619, 79 N. Y. Suppl. 1146].

Where a bill seeks subrogation to a lien on land, and there are other persons holding liens on the land in conflict with such claims of subrogation, they must be made parties to the bill. Gall *v.* Gall, 50 W. Va. 523, 40 S. E. 380.

An administrator is a proper party defendant to a bill claiming subrogation to a vendor's lien on land of an intestate. Allen *v.* Caylor, 120 Ala. 251, 24 So. 512, 74 Am. St. Rep. 31.

47. Harris *v.* Watson, 56 Ark. 574, 20 S. W. 529; Aultman *v.* Bishop, 53 Nebr. 545, 74 N. W. 55 (holding that the party to whom the debt of another has been paid, the payment of which furnishes the basis of the claim for subrogation, is a proper and necessary party to the action for subrogation); Schilb *v.* Moon, 50 W. Va. 47, 40 S. E. 329 (holding that the judgment creditor in a judgment on a negotiable note must be a party to a suit in equity by a subsequent indorser to enforce substitution to the lien of the judgment against the land of the prior indorser); Hoffman *v.* Shields, 4 W. Va. 490 (holding that it is necessary in a bill to enforce a judgment lien by a surety, where such surety has paid the judgment, that the original judgment creditors whose judgment he has paid be made parties). But see Towe *v.* Newbold, 57 N. C. 212, where the court seems to hold by implication that where a surety has paid money he is entitled to an assignment of all the securities that the creditor held, and to substitution, and the creditor need not be a party.

But where a surety pays a judgment rendered in favor of the state against him and his principal, he may maintain a suit to enforce the lien thereof for his benefit, without making the state a party to the suit. Pickens *v.* Wood, 57 W. Va. 480, 50 S. E. 818.

Where an original creditor has satisfied his claim by a formal instrument sufficient for that purpose, he is not a necessary party to a suit for subrogation to his rights. Boevink *v.* Christiaanse, 69 Nebr. 256, 95 N. W. 652.

48. Citizens' St. R. Co. *v.* Robbins, 144 Ind. 671, 42 N. E. 916, 43 N. E. 649.

49. Fridenburg *v.* Wilson, 20 Fla. 359; McNairy *v.* Eastland, 10 Yerg. (Tenn.) 310.

Similarly in an action for conversion by the mortgagor of a chattel against a purchaser from the mortgagee, who has therefore become subrogated to the rights of such mortgagee by operation of law, the mortgagee is not a necessary party to give defendant complete protection against plaintiff. Potter *v.* Lohse, 31 Mont. 91, 77 Pac. 419.

Conversely in a suit by a judgment creditor, who had purchased his debtor's land

that cosureties may maintain a joint bill in equity to enforce their right of subrogation.[50]

E. Pleading and Proof. Subrogation is not a universal remedy for parties who have lost their money. It has its sphere of relief plainly limited by its nature;[51] and before subrogation can be decreed, the facts on which it arises must be distinctly and appropriately alleged and shown, and the equity plainly appear, and the complaint to enforce a right acquired by subrogation should state the facts which give rise to the right claimed.[52] The issue of subrogation must be

at a sale under his judgment, in which such creditor claimed the right to be subrogated to the benefits of a trust deed prior to his judgment, neither the trustees in the deed of trust nor the grantors are necessary parties, as they cannot be affected by the judgment therein. Swain *v.* Stockton Sav., etc., Soc., 78 Cal. 600, 21 Pac. 365, 12 Am. St. Rep. 118.

50. Kleiser *v.* Scott, 6 Dana (Ky.) 137.

Under Georgia Code, §§ 2176, 2177, which makes subrogation a legal, as well as an equitable, right, accommodation indorsers who have paid more than their *pro rata* share of the debt may sue jointly a co-indorser for contribution, founding their action on the indorsed note. Hull *v.* Myers, 90 Ga. 674, 16 S. E. 653.

A surety who has not contributed to the payment of the principal's judgment debt is not a necessary party to the determination of a right of lien claimed by the assignee of his cosureties by subrogation to the rights of the judgment creditor. San Francisco Sav. Union *v.* Long, (Cal. 1898) 53 Pac. 907.

51. Berry *v.* Bullock, 81 Miss. 463, 33 So. 410.

52. *Alabama.*—Watts *v.* Eufaula Nat. Bank, 76 Ala. 474.

Arkansas.— Bond *v.* Montgomery, 56 Ark. 563, 20 S. W. 525, 35 Am. St. Rep. 119.

Indiana.— Lilly *v.* Dunn, 96 Ind. 220. But see Townsend *v.* Cleveland Fire Proofing Co., 18 Ind. App. 568, 47 N. E. 707, where, while there was no prayer in the complaint for subrogation nor sufficient facts alleged to entitle plaintiff to subrogation, the court tried the case on that theory.

Iowa.— Richards *v.* Cowles, 105 Iowa 734, 75 N. W. 648.

Missouri.— Clark *v.* Harrisonville First Nat. Bank, 57 Mo. App. 277; Johnson *v.* Goldsby, 32 Mo. App. 560.

Pennsylvania.— Forest Oil Co.'s Appeal, 118 Pa. St. 138, 12 Atl. 442, 4 Am. St. Rep. 584; Mosier's Appeal, 56 Pa. St. 76, 93 Am. Dec. 783 (holding that subrogation is purely an equitable result and depends like other controversies in equity on facts to develop its necessity in order that justice may be done); Hughes *v.* Miller, 7 Pa. Dist. 686.

See 44 Cent. Dig. tit. "Subrogation," § 114.

Petitions and complaints held sufficient see Risk *v.* Hoffman, 69 Ind. 137; Muir *v.* Berkshire, 52 Ind. 149 (complaint by heirs of a purchaser of lands at a void mortgage sale to be subrogated to the mortgagee's rights against subsequent purchasers); Schuyler *v.* Booth, 76 N. Y. App. Div. 619, 79 N. Y. Suppl. 1146; Home Inv. Co. *v.* Clarson, 15 S. D. 513, 90 N. W. 153.

Insufficient bills see Merrill *v.* Witherby, 120 Ala. 418, 23 So. 994, 26 So. 974, 74 Am. St. Rep. 39; Tait *v.* American Freehold Land Mortg. Co., 132 Ala. 193, 31 So. 623.

A mere allegation of belief that there was fraud and collusion in the sale of the property sought to be reached, unaccompanied by any averment of fact, is not sufficient to charge fraudulent collusion. Smith *v.* Providence County Sav. Bank, 18 R. I. 705, 30 Atl. 342, holding also that in an action for subrogation it is not necessary to allege that defendant obtained the property sought to be reached by fraud and collusion, it being sufficient to allege that he purchased the same with notice of plaintiff's equity therein.

Prayer for relief held sufficient.— The prayer of the petition of one of the sureties of a trustee for an order for payment from a new trustee of money paid for their principal, and for such relief as to the court may seem proper, is sufficient. John's Estate, 2 Chest. Co. Rep. (Pa.) 77.

Description of land held sufficient in a proceeding to subrogate a judgment creditor to the landlord's lien on crops, although insufficient in a proceeding to foreclose such lien see Kelly *v.* Gibbs, 84 Tex. 143, 19 S. W. 380, 563.

It is too late for appellee to question the sufficiency of the pleading on appeal from a judgment denying the right of substitution, where, although the pleading asserting the right to be substituted to a vendor's lien does not allege that the lien was retained in the deed, no objection being made to the pleading, and the case being prepared for trial upon the idea that the lien was retained in the deed, and it being agreed at the trial that the lien had not been released. Greishaber *v.* Farmer, 42 S. W. 742, 19 Ky. L. Rep. 1028.

Cross petition for subrogation not an amendment.—Where a vendor sues the maker and indorsers of the purchase-money note, and in the same action seeks enforcement of the vendor's lien, the cross petition of defendant indorsers, filed on their paying the note, after judgment for plaintiff, and thus becoming subrogated to the vendor's lien, seeking enforcement of the lien, is not an amendment, which can be filed only by permission of the court, but a supplemental pleading in the nature of an interpleader which can be filed in vacation. Matney *v.* Williams, 89 S. W. 678, 28 Ky. L. Rep. 494.

Where a purchaser at a void sale under a mortgage sues to subrogate himself to the

pleaded,[53] and the subrogee who, on paying the debt, is entitled to be subrogated to the rights of plaintiff, must ask for such relief in his answer;[54] and plaintiff cannot be subrogated to the rights of a defendant under a contract with a third person in an action in which the terms of the contract are not alleged.[55] But it is held that, although a party does not specifically claim the right of subrogation, equity will grant the relief, where it is justified by the facts alleged and established,[56] under the prayer for general relief.[57] The petition need not anticipate defenses,[58] and the sufficiency of the complaint must be judged from the pleading as a whole.[59] Proof must conform to the pleadings.[60]

F. Evidence. The rules of evidence in civil actions and proceedings generally[61] apply to proceedings to enforce subrogation,[62] the burden of proof being upon claimant to establish his right by clear evidence.[63] It is held, however, that where a stranger to an obligation pays a part of the whole of the debt, there is a presumption that the transaction was a purchase of the debt and accompanying security to the extent of the payment.[64]

rights of the mortgagee, the complaint should allege that the purchaser bought with the belief that he was obtaining the legal title, and should set forth the amount of the price. Griffin *v.* Griffin, 70 S. C. 220, 49 S. E. 561.

Every intendment is to be made against the pleader in an action for subrogation as in other actions. Fidelity, etc., Co. *v.* Jordan, 134 N. C. 236, 46 S. E. 496.

Complaint not demurrable as disclosing no lack of an adequate remedy at law see Home Inv. Co. *v.* Clarson, 15 S. D. 513, 90 N. W. 153.

In an action by a creditor partner to be subrogated to a mortgage given by a debtor partner to secure a firm creditor, on payment by the creditor partner of a firm debt, complaint held to show sufficiently an equitable right to subrogation on payment of the debt, see Schuyler *v.* Booth, 37 Misc. (N. Y.) 35, 74 N. Y. Suppl. 733 [*affirmed* in 76 N. Y. App. Div. 619, 79 N. Y. Suppl. 1146].

53. Crebbin *v.* Moseley, (Tex. Civ. App. 1903) 74 S. W. 815; Strnad *v.* Strnad, 29 Tex. Civ. App. 124, 68 S. W. 69.

In trespass to try title by heirs against one purchasing land at a void administrator's sale to recover the land, if the purchaser wishes to assert an equity of subrogation to the amount of his purchase-money, he must plead it. Wilkin *v.* Owens, (Tex. 1908) 114 S. W. 104, 115 S. W. 1174, 117 S. W. 425 [*reversing* on other grounds (Civ. App. 1908) 110 S. W. 552].

54. Barton *v.* Moore, 45 Minn. 98, 47 N. W. 460. But see Boone County Bank *v.* Byrum, 68 Ark. 71, 56 S. W. 532; Hawpe *v.* Bumgardner, 103 Va. 91, 48 S. E. 554, holding that where a creditor's bill alleges a state of facts entitling plaintiff to be subrogated in equity under the prayer for general relief to the rights of a judgment creditor whose debt he had paid as defendant's surety, the failure to ask specifically for such relief is not ground for dismissing the bill on demurrer.

A junior mortgagee who has the right of subrogation for all prior mortgages paid off by him for the purpose of protecting his lien, when made a defendant in chancery proceedings, should ask for the enforcement of such right in his answer. Ball *v.* Callahan, 95 Ill. App. 615 [*affirmed* in 197 Ill. 318, 64 N. E. 295].

Answer sufficiently raising the issue of subrogation see Sternback *v.* Frieeman, 23 Misc. (N. Y.) 173, 50 N. Y. Suppl. 1025 [*modified* in 34 N. Y. App. Div. 534, 54 N. Y. Suppl. 608].

In an action to quiet title, where defendants rely on rights derived from the purchase of a mortgage, and an assignment, and deny any payment thereof, and the court finds that the mortgage has been paid, defendants have no claim for subrogation. Miller *v.* Stevenson, 58 Nebr. 305, 78 N. W. 626.

55. Citizens' St. R. Co. *v.* Robbins, 144 Ind. 671, 42 N. E. 916, 43 N. E. 649.

Allegation of insolvency of judgment debtor unnecessary.—A complaint by one who has paid a judgment, seeking subrogation to the lien thereof as against one having subsequent lien, need not allege insolvency of the judgment debtor, since the right to subrogation depends on the circumstances attending the payment of the judgment, and not on the debtor's insolvency. Spaulding *v.* Harvey, 129 Ind. 106, 28 N. E. 323, 28 Am. St. Rep. 176, 13 L. R. A. 619.

56. Bankers' Loan, etc., Co. *v.* Hornish, 94 Va. 608, 27 S. E. 459.

57. Berry *v.* Bullock, 81 Miss. 463, 33 So. 410.

58. Richards *v.* Yoder, 10 Nebr. 429, 6 N. W. 629.

59. Bunting *v.* Gilmore, 124 Ind. 113, 24 N. E. 583, holding that the fact that the complaint contains no allegation that the land described in defendant's mortgage is the same as that contained in the mortgage under which complainant redeemed does not affect its sufficiency when that fact appears from all the averments.

60. Weil *v.* Enterprise Ginnery, etc., Co., 42 La. Ann. 492, 7 So. 622; Davis *v.* Evans, 102 Mo. 164, 14 S. W. 875; Weimer *v.* Talbot, 56 W. Va. 257, 49 S. E. 372.

61. See EVIDENCE, 16 Cyc. 821.

62. Thompson *v.* Humphrey, 83 N. C. 416.

63. Weaver *v.* Norwood, 59 Miss. 665.

64. Neilson *v.* Frey, 16 Ohio St. 552, 91

G. Judgment or Decree. One who is entitled to subrogation may have a judgment or decree entered in his favor which will best insure to him the enjoyment of his equitable right.[65] Thus where a surety pays off a debt for which he is bound, during the prosecution of an action by the creditor, he may ask the court to render judgment for him instead of for the creditor;[66] but where the right demanded is disputed by other parties to the action having adverse interests, the court will go no further than to direct the subrogation on such terms as may be justified, leaving the conflicting claims to be determined by future adjudication.[67] A plaintiff, in a judgment against several defendants, by one of whom it was paid, cannot interfere to prevent a decree of subrogation in favor of the party paying against another one of the defendants for his proportion of the debt.[68]

H. Review. It has been held that subrogation being an equitable remedy can be properly reviewed in higher courts only by appeal,[69] and the proceedings therein should be in analogy to equity practice, as by petition and answer and not on mere notice.[70]

VII. APPLICATION OF DOCTRINE TO PARTICULAR RELATIONS.

A. Persons Interested in the Administration of Estates. A person who, being interested in the administration of an estate, pays claims against the estate, is entitled to subrogation of the creditor's right to recover the amount paid.[71] Thus a legatee or devisee whose legacy or devise has been absorbed in

Am. Dec. 110; Brice's Appeal, 95 Pa. St. 145; Walker *v.* King, 44 Vt. 601, 45 Vt. 525. But see Koehler *v.* Hughes, 148 N. Y. 507, 42 N. E. 1051.

65. Perkins *v.* Scott, 7 Ky. L. Rep. 608; De Forest *v.* Peck, 84 Hun (N. Y.) 299, 32 N. Y. Suppl. 413.

66. Perkins *v.* Scott, 7 Ky. L. Rep. 608.

67. McLean *v.* Tompkins, 18 Abb. Pr. (N. Y.) 24.

68. Springer *v.* Springer, 43 Pa. St. 518.

69. Springer *v.* Springer, 43 Pa. St. 518.

The question cannot be raised for the first time on appeal.— McMaken *v.* Nyes, 91 Iowa 628, 60 N. W. 499.

70. Springer *v.* Springer, 43 Pa. St. 518.

71. Chaplin *v.* Sullivan, 128 Ind. 50, 27 N. E. 425.

If the life-tenant pay out money which he was not required to pay, or more than his proportionate share, he becomes to that extent creditor of the estate, and subrogated to the rights of the parties whose claims he has bought or paid off, and he, and those claiming under him, occupy a position analogous to a mortgagee in possession after condition broken, and cannot be evicted until all sums due them from the estate have been repaid. Whitney *v.* Salter, 36 Minn. 103, 30 N. W. 755, 1 Am. St. Rep. 656.

Where a widow paid claims against her deceased husband's estate, she is entitled to subrogation to the rights of the creditors whose claims were so paid (Jefferson *v.* Edrington, 53 Ark. 545, 14 S. W. 99, 903, holding also that the fact that the widow suppressed assets of the estate in rendering her accounts as executrix should not defeat her right to subrogation where the funds unaccounted for, or wrongfully diverted, are subsequently restored; Brown *v.* Forst, 95 Ind. 248, holding that the widow's right to recover against the estates rests in the doctrine of subrogation and derives no force from any contract with the executor or administrator; Neptune *v.* Tyler, 15 Ind. App. 132, 41 N. E. 965; Kelley *v.* Ball, 19 S. W. 581, 14 Ky. L. Rep. 132. But see Skinner *v.* Chapman, 78 Ala. 376), although the evidence does not affirmatively show that when she furnished it she had any intention of requiring it to be repaid, where it does not appear that she made a gift of it (Neptune *v.* Tyler, *supra* [*following* Brown *v.* Forst, 95 Ind. 248]); and where a vendor has two funds to resort to for the payment of unpaid purchase-money, the real estate sold by him, on which his lien especially rests, and the personal and other estate of his deceased vendee, which has been devised to the widow in lieu of her dower, and he resorts to the legatee, who discharges his claim, and by that means and to that extent diminishes her legacy, a court of equity will relieve the legatee, and subrogate her to the rights of the creditor (Durham *v.* Rhodes, 23 Md. 233). Similarly where a creditor of an insolvent testator holding a vendor's lien on real estate refused to file such claim against the estate, but sold the property on foreclosure of his lien, the testator's personal estate being the primary fund for the payment of such debt, and the widow's homestead and dower claim being superior to that of general creditors, she was entitled to subrogation to the rights of the lien creditor as against the personal estate, and to the allowance of dower and homestead from the surplus arising on the sale of the real estate, and from the *pro rata* share of the personal estate to which a lien creditor would have been entitled had he filed a claim against the estate. Whitmore *v.* Rascoe, 112 Tenn. 621, 85 S. W. 860.

payment of the debts of the testator may have it out of other property of the testator by subrogation to the debts of creditors, and may enforce contribution by other members of the same class,[72] and the same rule applies to heirs who have paid or whose property has been taken to pay debts of the intestate;[73] and where some of the heirs, after division of the realty, discharge a debt, which is a common liability upon the realty, by agreement with the rest, or pay more than their proportionate share, they are subrogated to the creditors' rights to proceed against the lands of the others.[74] But where heirs of an estate, supposing it to be solvent, pay off mortgages on lands, and, on learning afterward that the estate is insolvent, claim to be subrogated to the rights of the mortgages, if the intent to be subrogated did not exist at the time of payment of the mortgages, the claim cannot be maintained.[75] Where a wife paid a balance due on a mortgage of land in which she had a life-interest, executed by the husband and wife for his debt, her devisees

Where a widow elected to take a legacy bequeathed to her in lieu of dower, and a portion of the amount necessary to satisfy the legacy was used for the payment of testator's debts, she was entitled to be subrogated to the rights of creditors against testator's real estate for the recovery of the amount so taken. Overton *v.* Lea, 108 Tenn. 505, 68 S. W. 250.

If a widow, before the appointment of an administrator, incurs the expense of erecting a suitable monument over the grave of her husband, she is entitled to be subrogated to the rights of the dealer who erected the monument, and may recover therefor against the administrator. Pease *v.* Christman, 158 Ind. 642, 64 N. E. 90.

72. Rhoods' Estate, 3 Rawle (Pa.) 420; Hope *v.* Wilkinson, 82 Tenn. 21, 52 Am. Rep. 149; Foster *v.* Crenshaw, 3 Munf. (Va.) 514; Gallagher *v.* Redmond, 64 Tex. 622.

Cestuis que trustent under a will, whose income is taken to pay debts of the estate, are entitled to be subrogated to the rights of the creditor. Amory *v.* Lowell, 1 Allen (Mass.) 504.

If there be no devise of real estate, if the creditors exhaust the personal estate, then as against the heir at law the legatees may stand in the place of the creditors and come upon the real estate which has descended. Alexander *v.* Miller, 7 Heisk. (Tenn.) 65.

Where legatees pay off and discharge a judgment against the executors of the estate, which constituted a lien on the estate, they are substituted to the rights of the judgment creditor. Place *v.* Oldham, 10 B. Mon. (Ky.) 400; Mitchell *v.* Mitchell, 8 Humphr. (Tenn.) 359.

A devisee whose devise has been sold to pay the debts of the estate, the personal estate being insufficient to pay the debts, is entitled to reimbursement by way of subrogation out of the assets subsequently received and discovered by the executors, the personal estate being the primary fund for the payment of debts, and being charged with the debts. Couch *v.* Delaplaine, 2 N. Y. 397. And where a devisee of land, which by the direction of the devisor was levied on during his life under an execution against himself, after his death bought the land at the execution sale to relieve it of the encumbrance, he is entitled to be subrogated to the rights of the creditor, and to have the amount which he advanced paid out of the personal estate or out of the residuum; but it would not be so if it not only had been levied on but sold during the life of the testator. Redmond *v.* Borroughs, 63 N. C. 242.

73. *Alabama.*—Winston *v.* McAlpine, 65 Ala. 377.

Kentucky.— Place *v.* Oldhams, 10 B. Mon. 400 (holding that heirs against whom a judgment has been recovered in conjunction with the administrator, and who paid the judgment, may in equity be substituted to the rights which the judgment creditor had to file his bill against the administrator to have a discovery of assets and be reimbursed in case there has been a maladministration of assets); Taylor *v.* Taylor, 8 B. Mon. 419, 48 Am. Dec. 400.

Mississippi.— McPike *v.* Wells, 54 Miss. 136.

New Hampshire.— Jenness *v.* Robinson, 10 N. H. 215, holding that where some of the heirs, who hold a mortgage upon the real estate of an intestate to secure a debt due from him, in order to prevent a sale of the land, give a bond for the payment of the debts, and thereby discharge the mortgage as a security for the entire debt, they are entitled to hold the land against the other heirs, respectively, as if the mortgage subsisted until they contributed their several shares toward redemption.

Pennsylvania.— Guier *v.* Kelley, 2 Binn. 294.

South Carolina.— Lyles *v.* Lyles, 1 Hill Eq. 76.

See 44 Cent. Dig. tit. "Subrogation," § 7.

Where the tenant by the curtesy conveys in fee with warranty lands belonging to his children in which he has only a life-estate, and then dies intestate, leaving a widow and children surviving him who are entitled to his personal estate, the children on confirming the title of the purchaser are entitled to be substituted as creditors of the estate of their father for the amount for which the personal representatives of the intestate are liable on the covenant of warranty. House *v.* House, 10 Paige (N. Y.) 158.

74. Winston *v.* McAlpine, 65 Ala. 377.

75. Belcher *v.* Wickersham, 9 Baxt. (Tenn.) 111.

are entitled, as against his heir, to be subrogated to the right of the mortgagee to the extent of the amount so paid.[76] As in other cases of subrogation the person seeking contribution must be personally bound for the debt paid, or it must be a charge on his estate; a volunteer or stranger cannot claim subrogation against the estate,[77] and it must have been actually paid by him or with his money.[78] A person seeking rights of subrogation against an estate can stand in no better position than the person to whose rights he claims subrogation.[79]

B. Persons Liable For Loss or Injury Caused by Fault of Another. A person liable for and who has paid for a loss or injury caused by fault of another is subrogated to the rights of the injured party against the wrong-doer;[80] but a person damnified by the acts of a wrong-doer has no right to be subrogated to an indemnity which the latter may have taken against liability from his wrongful act,[81] and a creditor is not subrogated to his debtor's rights against one who injures the latter, although the wrong may have rendered the debtor unable to pay,[82] and similarly one person cannot maintain an action against another for an injury to a third on the ground that the wrong has also indirectly injured the first by reason of his contractual relations with the third person.[83]

76. Ohmer *v.* Boyer, 89 Ala. 273, 7 So. 663.

That the mortgage debt was paid with the rents of the mortgaged premises is immaterial. Ohmer *v.* Boyer, 89 Ala. 273, 7 So. 663.

77. Wilkes *v.* Harper, 1 N. Y. 586 [*affirming* 2 Barb. Ch. 338]. See Wilson *v.* Holt, 91 Ala. 204, 8 So. 794.

One who pays taxes for an executor is not subrogated to the rights of the executor for reimbursement from the funds of the estate, if it appears that the executor has wasted the assets of the estate. Wilson *v.* Fridenberg, 21 Fla. 386.

78. Dean *v.* Rounds, 18 R. I. 436, 27 Atl. 515, 28 Atl. 802, holding that where the amount of a mortgage, given to an executor by a legatee and her husband, to secure notes which are equitably her debt, is deducted from her legacy, her legatees are not entitled to be subrogated to the rights of the mortgagee.

79. Cooke *v.* Moore, 2 S. C. 52.

80. Mausert *v.* Feigenspan, 68 N. J. Eq. 671, 63 Atl. 610, 64 Atl. 801; Texas, etc., R. Co. *v.* Eastin, 100 Tex. 556, 102 S. W. 105; Gulf, etc., R. Co. *v.* North Texas Grain Co., 32 Tex. Civ. App. 93, 74 S. W. 567; Cornell Steamboat Co. *v.* The Jersey City, 43 Fed. 166.

An executor who is liable for the default of his co-executor is entitled to be subrogated to whatever compensation he has a right to, and his right cannot be defeated by his co-executor electing after he becomes insolvent not to assert the claim. Albro *v.* Robinson, 93 Ky. 195, 19 S. W. 587, 14 Ky. L. Rep. 124.

Subrogation to rights against sheriff for nonfeasance or misfeasance.—Where a consignee recovers judgment against a carrier for failure to deliver goods upon which he has a lien for advances, the same having been wrongfully attached, the carrier is subrogated to the rights of the consignee, and may maintain an action against the officer who levied the attachment, but cannot recover the costs and expenses of the suit against the carrier by the consignee, for these should not have been incurred. Holmes *v.* Balcom, 84 Me. 226, 24 Atl. 821. And where the assignee of a bond recovers judgment thereon, and, after execution against the obligor is returned unsatisfied because of the sheriff's neglect or malfeasance, sues and recovers from his assignor, the latter has a right of action against the sheriff for his misconduct. Smith *v.* Triplett, 4 Leigh (Va.) 590.

A sheriff liable for a fine against his prisoner, who paid the amount pursuant to orders of the county court, became subrogated to all rights of the county in the obligation executed by the prisoner and defendant as surety (Wilson *v.* White, 82 Ark. 407, 102 S. W. 201); and an officer who becomes liable for the amount of a judgment by reason of his failure to discharge his official duty under an execution in his hands may, on payment of the judgment debt, be subrogated to the rights of the judgment creditor (Bennett *v.* Chandler, 199 Ill. 97, 64 N. E. 1052).

An executor is bound to account for money belonging to the state which has been collected by his attorney, and the payment thereof subrogates him as an individual to all rights theretofore existing in favor of the trust estate. Lupton *v.* Taylor, 39 Ind. App. 412, 78 N. E. 689, 79 N. E. 523.

81. McGay *v.* Keilback, 14 Abb. Pr. (N. Y.) 142.

82. Green *v.* Kimble, 6 Blackf. (Ind.) 552.

As where one converted property of the debtor, making it impossible for the creditor to collect his judgment (Wellington *v.* Small, 3 Cush. (Mass.) 145, 50 Am. Dec. 719; Lamb *v.* Stone, 11 Pick. (Mass.) 527. But see Murtha *v.* Curley, 90 N. Y. 372, 12 Abb. N. Cas. 12, 3 N. Y. Civ. Proc. 1), unless before the conversion the creditor had obtained a right of property in the goods converted, as by a judicial seizure (Brown *v.* Castles, 11 Cush. (Mass.) 348; Bates *v.* Plonsky, 62 How. Pr. (N. Y.) 429).

83. *Connecticut.*— Connecticut Mut. L. Ins. Co. *v.* New York, etc., R. Co., 25 Conn. 265, 65 Am. Dec. 571.

C. Persons Jointly or Jointly and Severally Liable For the Same Debt — 1. General Rule. Although it has been held in a minority of cases that a joint debtor is not entitled to subrogation,[84] his remedy being a suit for contribution,[85] other cases hold that where there is a joint duty, and one or more of the obligors discharges the common liability after maturity, the law raises the duty and obligation of payment of a proportionate share, which may be enforced by subrogation,[86] each joint debtor being regarded as the principal debtor for that part of the debt which he ought to pay, and as a surety for his creditor as to that part of the debt which ought to be discharged by the other joint debtor, and he has the same right to be subrogated to the securities held by the creditor that exists in behalf of a surety who pays in excess of his share of the burden.[87] But subrogation takes place only for the share of his co-debtor,[88] except where there is some equitable reason why the whole debt should have been paid by the others alone, when equity will allow subrogation to the entire amount.[89] Subrogation is not allowed at all where there was some sufficient consideration for the excessive payment;[90] and where as between two joint debtors there rests upon one the ultimate obligation of paying it, there cannot arise any rights of subrogation in his favor, for the reason that the payment by the one, whose obligation it was to pay, operates as an extinguishment of the debt and a discharge of all liens held by the creditor for his security.[91]

2. Joint Mortgagors. If two or more persons mortgage their joint property to secure a joint debt, and each agrees to take up a proportionate part of the debt, and one defaults, whereby the other mortgagor is compelled to take up the whole of the debt, a lien in equity is thereby created upon the mortgaged property, to the amount of the part due by the other in favor of that mortgagor who took up the whole,[92] and the same rule applies to a purchase-money mortgage;[93] and defendant who has made payment for his co-defendant toward satisfying a prior mortgage and beyond his proportion of the burden will be substituted for plaintiff on a sale

Massachusetts.— Smith *v.* Hurd, 12 Metc. 371, 46 Am. Dec. 690.

New Jersey.— Dale *v.* Grant, 34 N. J. L. 142.

New York.— Braem *v.* Merchants' Nat. Bank, 127 N. Y. 508, 28 N. E. 597.

England.— Lumley *v.* Gye, 2 E. & B. 216, 22 L. J. Q. B. 463, 75 E. C. L. 216, a famous case.

84. Engles *v.* Engles, 4 Ark. 286, 38 Am. Dec. 37; Clark *v.* Warren, 55 Ga. 575; Singizer's Appeal, 28 Pa. St. 524; *In re* Mowry, 1 Kulp (Pa.) 271; Pearce *v.* Yost, 1 Wkly. Notes Cas. (Pa.) 472; Royalton Nat. Bank *v.* Cushing, 53 Vt. 321; Benton *v.* Bailey, 50 Vt. 137. See Hogan *v.* Reynolds, 21 Ala. 56, 56 Am. Dec. 236.

85. Pearce *v.* Yost, 1 Wkly. Notes Cas. (Pa.) 472.

86. *Alabama.*— Winston *v.* McAlpine, 65 Ala. 377.

Connecticut.— Sumner *v.* Rhodes, 14 Conn. 135.

Kentucky.— Smith *v.* Latimer, 15 B. Mon. 75.

Louisiana.— Shropshire *v.* His Creditors, 15 La. Ann. 705; Whitehead's Succession, 3 La. Ann. 396.

Virginia.— Dobyns *v.* Rawley, 76 Va. 537.

See 44 Cent. Dig. tit. "Subrogation," § 8 *et seq.*

87. Owen *v.* McGehee, 61 Ala. 440; Collins *v.* Carlisle, 7 B. Mon. (Ky.) 13; Newton *v.* Newton, 53 N. H. 537; Henderson *v.* McDuffee, 5 N. H. 38, 20 Am. Dec. 557; Greenlaw *v.* Pettit, 87 Tenn. 467, 11 S. W. 357.

88. Shropshire *v.* His Creditors, 15 La. Ann. 705.

89. *Illinois.*— Shinn *v.* Shinn, 91 Ill. 477.

New York.— Cherry *v.* Monroe, 2 Barb. Ch. 618.

Pennsylvania.—Buchanan's Estate, 2 Chest. Co. Rep. 74.

Vermont.—Royalton Nat. Bank *v.* Cushing, 53 Vt. 321.

Virginia.— Buchanan *v.* Clark, 10 Gratt. 164; Douglass *v.* Fagg, 8 Leigh 588, a strong case, holding that when, by subsequent arrangement, the relation of two parties are so changed that it becomes the duty of one to pay a debt for which the other was originally liable, thereafter the latter, as between them, will be treated as a surety for the former for its payment, and be entitled to all the rights by way of subrogation.

90. Greenlaw *v.* Pettit, 87 Tenn. 467, 11 S. W. 357.

91. Greenlaw *v.* Pettit, 87 Tenn. 467, 11 S. W. 357.

Subrogation as not applying to primary liability see *supra*, II, D.

92. Randolph *v.* Stark, 51 La. Ann. 1121, 26 So. 59; Pratt *v.* Law, 9 Cranch (U. S.) 456, 3 L. ed. 791. And see Cherry *v.* Monroe, 2 Barb. Ch. (N. Y.) 618.

93. Wheatley *v.* Calhoun, 12 Leigh (Va.) 264, 37 Am. Dec. 654. See Tompkins *v.* Mitchell, 2 Rand. (Va.) 428.

of the premises to that extent.[94] Similarly where a joint tenant to whom his cotenant had assigned his interest pays a mortgage on the land in ignorance that his joint tenant had previously conveyed his interest to another by deed of trust, he is subrogated to the rights of the mortgagee, and one half of the land will be considered as his, and the other half sold to satisfy one half of the mortgage debt;[95] and one who has paid off a mortgage, the interest on which was to be proportionately borne by another, becomes subrogated to the right to receive from that other his proportion of the interest,[96] and one of two co-contractors not bound may, upon paying the debt, take an assignment of the mortgage security and enforce it against the contractor bound.[97] In all these cases the mortgage may be treated as still subsisting for the protection of the party making the payment or the delinquent's share in the mortgaged property may be regarded as subject to a lien for the amount paid for his benefit.[98] But as in other cases of subrogation the subrogee's rights cannot be allowed to interfere with the creditor's full satisfaction of the debt.[99]

3. Joint Judgment Debtors. Subrogation has been refused to one joint judgment debtor paying off the entire debt.[1] But the better and more generally followed rule of the civil law is to the contrary;[2] and one of several coöbligors, against whom judgment is rendered, may advance the amount of the judgment and contract for the control of the execution, and will be protected until he is

94. Lawrence *v.* Cornell, 4 Johns. Ch. (N. Y.) 545.

95. Shaffer *v.* McCloskey, 101 Cal. 576, 36 Pac. 196, holding also that it is immaterial that the deed of trust was recorded.

The survivor in community, transferee, is subrogated to the mortgagee's right, and entitled to the balance, after its deduction, upon settlement of accounts. Caire *v.* Creditors, 45 La. Ann. 461, 12 So. 624.

96. Corner *v.* Mackey, 147 N. Y. 574, 42 N. E. 29; Thompson *v.* Griggs, 31 Pa. Super. Ct. 608, holding that where one of two mortgagors has been compelled to pay a balance of debt, interest, and costs due on the mortgage in order to save the land, he is entitled to collect one half of the sum so paid, out of the interest of the co-mortgagor.

97. Baer *v.* Ballingall, 37 Oreg. 416, 61 Pac. 852.

98. Look *v.* Horn, 97 Me. 283, 54 Atl. 725. And see Vincent *v.* Logsdon, 17 Oreg. 284, 20 Pac. 429, holding that where one of two joint debtors, at the request of the other, deposits a note and mortgage, held by the former against a third person, with the creditor, to realize thereon and satisfy the debt, and the creditor fails to realize, and the other debtor is obliged to pay the debt, he has a lien on the note and mortgage for the share of his co-debtor in the debt.

99. Kramer *v.* Carter, 136 Mass. 504.

1. Towe *v.* Felton, 52 N. C. 216; Mehaffy *v.* Share, 2 Penr. & W. (Pa.) 361; *In re* Mowry, 1 Kulp (Pa.) 271.

2. Coffee *v.* Tevis, 17 Cal. 239; Theus *v.* Armistead, 116 La. 795, 41 So. 95 (holding that one of two debtors *in solido* on payment of a judgment against both is subrogated to the rights of the judgment creditor against his co-defendant to the extent of his portion of the debt, including interest and costs); Buchanan *v.* Clark, 10 Gratt. (Va.) 164 (holding that where one of two joint debtors fails to keep his agreement to pay to the creditor money received from the other, and a judgment is rendered against them, the latter, on payment by him of the judgment, is entitled to be subrogated to the rights of the creditor in enforcing the judgment against the former out of land which the former had conveyed after the rendition of the judgment, as against alienees who have no better equity).

In Minnesota, under Gen. St. (1878) c. 66, § 330, where one of several debtors, against whom there is a joint judgment, pays more than his proportion, and files notice of his payment and claim to contribution, he is *ipso facto* subrogated to the right of the judgment creditor in the judgment and may issue execution thereon to enforce contribution from the other judgment debtors, and it is not necessary that his property should have been levied upon before he paid the judgment. Ankeny *v.* Moffett, 37 Minn. 109, 33 N. W. 320.

In Indiana, under Rev. St. (1881) §§ 1214, 1215 (Rev. St. (1894) §§ 1228, 1229), where any one of several judgment defendants satisfies plaintiff, the judgment is not discharged, but remains in force to collect of the others the ratable proportion each is equitably bound to pay. Harter *v.* Songer, 138 Ind. 161, 37 N. E. 595. But the statute is held to apply where the judgment is against two obligors on a promissory note which fails to show any suretyship, and the judgment is paid by one of them without raising any issue as to which was surety. Kreider *v.* Isenbice, 123 Ind. 10, 23 N. E. 786; Dewitt *v.* Boring, 123 Ind. 4, 23 N. E. 1085.

Similarly, one of two debtors in a joint judgment note, compelled to pay the entire amount, is entitled to subrogation against the estate of his coöbligor. Ackerman's Appeal, 106 Pa. St. 1. But see West Branch Bank *v.* Armstrong, 40 Pa. St. 278, holding that the joint indorsers of negotiable paper,

reimbursed his proportion of the demand;[3] but it is held that to entitle a joint debtor on a judgment to subrogation to the rights of the judgment creditors upon a purchase by him of the judgment, it must appear that it was his intention, in making the purchase, to acquire these rights.[4]

4. Partners. A partner who on the dissolution of the partnership pays partnership debts is subrogated to the creditor's rights in the joint property to obtain contribution,[5] and where partners agree that one shall pay a firm debt, the other becomes a surety for him, and, upon making a payment, is subrogated to the rights of the creditor against his copartner;[6] and thus if upon dissolution one partner assumes to pay firm debts, he becomes the principal as between the partners and the other members merely sureties, although as to the creditor they are both principals;[7] and where one partner after going out of the firm under covenant by his partners that they will pay the firm debts and indemnify him against them pays debts he becomes their surety, and is entitled to come in as a creditor and be subrogated to the rights of the creditors whom he has paid.[8] The retiring partner, occupying the position of surety as to a firm debt assumed by his former copartners, who continue the business as a new firm, has the right, upon his being compelled to pay such debt, to a surrender to him by the creditors

who are liable as co-promisors, have no rights of subrogation against each other.

3. Morris *v.* Evans, 2 B. Mon. (Ky.) 84, 36 Am. Dec. 591.

4. Huggins *v.* White, 7 Tex. Civ. App. 563, 27 S. W. 1066.

5. *Illinois.*— Downs *v.* Jackson, 33 Ill. 464, 85 Am. Dec. 289.

Louisiana.—Rowlett *v.* Grieve, 8 Mart. 483, 13 Am. Dec. 296.

New York.— Schuyler *v.* Booth, 76 N. Y. App. Div. 619, 79 N. Y. Suppl. 1146 [*affirming* 37 Misc. 35, 74 N. Y. Suppl. 733], holding that where a partnership has been dissolved and an accounting shows one of the partners to be the creditor of the other, and such creditor partner pays an outstanding firm debt, he will be subrogated to the rights of the creditor whose debt he has paid in mortgages which the debtor partner gave him to secure the firm debt.

South Carolina.— Eakin *v.* Knox, 6 S. C. 14.

Virginia.— Sands *v.* Durham, 99 Va. 263, 38 S. E. 145, 86 Am. St. Rep. 884, 54 L. R. A. 614, 98 Va. 392, 36 S. E. 472, holding that where a partnership has been dissolved, the social assets exhausted in the payment of partnership debts, and a settlement of the partnership accounts made, from which it appears that one partner was in advance to the firm, and with his individual means has paid judgment against it, he is entitled to be subrogated to the rights of the judgment creditors whose judgments he has discharged, and to subject the land owned by his copartner at the time of the docketing of the judgments to their satisfaction.

See 44 Cent. Dig. tit. "Subrogation," § 10.

6. Field *v.* Hamilton, 45 Vt. 35.

7. Conwell *v.* McCowan, 81 Ill. 285 (holding that where, on dissolution of partnership, one partner assumes the payment of a partnership note, and executes a mortgage to the payee of the note to secure its payment, and to indemnify his copartner against the payment thereof, such copartner will be entitled to be subrogated to the rights of the mortgagee to the extent of any payment he may have to make on such partnership note); *In re* McGee, 1 Pearson (Pa.) 42 (holding that when, on the dissolution of the firm, one of the partners assumes a particular debt, he is bound to pay it, and, if another partner discharges it, he is entitled to be subrogated to the claims of the creditor against the one who assumed it); Royalton Nat. Bank *v.* Cushing, 53 Vt. 321 (holding that when upon the dissolution or reconstruction of a firm, one or more of the partners promises to pay the partnership debts in consideration of receiving or retaining the assets, this will place the rest in the position of sureties); Ætna Ins. Co. *v.* Wires, 28 Vt. 93 (holding that where, upon the dissolution of a copartnership, one partner assumes a liability, he does it *prima facie* upon sufficient consideration, leaving his copartners liable only as sureties, and they may take measures to have the claim assigned and collected from the partner liable). And see Tibbetts *v.* Magruder, 9 Dana (Ky.) 79.

The rule applies where one partner is bankrupt.— Thus where a creditor of a partnership, which has been dissolved and the debts thereof assumed by one of the partners, thereby constituting him the principal debtor and the other partner surety, has proved the debt in bankruptcy against the principal debtor, the surety may have himself subrogated to the creditor's rights on paying the balance due on the debt. Schmitt *v.* Greenberg, 58 Misc. (N. Y.) 570, 109 N. Y. Suppl. 881.

8. Olson *v.* Morrison, 29 Mich. 395; Burnside *v.* Fetzner, 63 Mo. 107; Merrill *v.* Green, 55 N. Y. 270; Gilfillan *v.* Dewoody, 157 Pa. St. 601, 27 Atl. 782; Scott's Appeal, 88 Pa. St. 173. But see Griffin *v.* Orman, 9 Fla. 22, holding that where a continuing partner agreed with the retiring partners to pay the firm debts and gave his bond and security to that effect, but no arrangement was made with the creditors, they did not take the continuing partner as principal and the retiring partners as sureties, and the latter, on pay-

of a mortgage given by one of the copartners to secure the debt; and such right is not defeated by the bankruptcy discharge of the members of the new firm from personal liability.[9] A surety for the partner relieved of the debts has the same right of subrogation upon paying a firm indebtedness,[10] as have likewise his creditors.[11] A surviving partner who has paid joint judgments against himself and the estate of a deceased partner is entitled to subrogation to the amount equitably due from the estate of the deceased partner;[12] and conversely, where partnership creditors proceed against the estate of a deceased partner, his representatives will stand in their place, and be substituted to their rights against the other partners;[13] and a partner who pays a judgment against the firm on an acceptance in the firm's name by a copartner for his private account may, by subrogation to the creditor's rights, recover the amount from such copartner.[14] But it has been held that where one of two partners pays a partnership debt by compromise with the creditor, the latter cannot keep the debt alive and authorize the partner paying to enforce it against the other;[15] and after the satisfaction of a judgment for a partnership debt by one of the partners sued, equity will not extend or preserve the vitality of the legal security, under the guise of an assignment, so as to charge the bail of the other partner.[16] In any event a partner who has paid a firm debt is held not to be entitled to subrogation against his partner until an account has been settled between them.[17]

5. Tenants in Common. Where a tenant in common pays off an encumbrance on the common estate, equity will consider the encumbrance as still existing, in order to enforce contribution from the cotenant, or as extinguished, according to the justice of the case.[18] Generally as between tenants in common of an estate bound by a joint lien, the part of each is held liable to contribute only its proportion toward the discharge of the common burden, and beyond this is regarded as the surety for the remaining part, and if the part of one is called on to pay more than its proportion, the tenant, or his lien creditors, are entitled to stand in the place of the satisfied creditor to the extent of the excess which ought to have been paid out of the other shares;[19] and the same rule applies where the parties are owners

ing the debts, were not entitled to be subrogated to the rights of the creditors.

9. Moore *v.* Topliff, 107 Ill. 241.

10. Highland *v.* Highland, 5 W. Va. 63.

11. *In re* Swayne, 1 Pa. L. J. Rep. 457.

12. Harter *v.* Songer, 138 Ind. 161, 37 N. E. 595, under statute.

13. Dahlgren *v.* Duncan, 7 Sm. & M. (Miss.) 280 (under statute); Sell *v.* Hubbell, 2 Johns. Ch. (N. Y.) 394.

14. Hall *v.* Gaiennie, 18 La. 442.

15. Le Page *v.* McCrea, 1 Wend. (N. Y.) 164, 19 Am. Dec. 469. And see Evans *v.* Rhea, 14 S. W. 82, 12 Ky. L. Rep. 224.

16. Hinton *v.* Odenheimer, 57 N. C. 406.

17. Bittner *v.* Hartman, 139 Pa. St. 632, 22 Atl. 646; Fessler *v.* Hickernell, 82 Pa. St. 150; Wilson *v.* Ritchie, 4 Wkly. Notes Cas. (Pa.) 37; Reddington *v.* Franey, 131 Wis. 518, 111 N. W. 725. And see Le Page *v.* McCrea, 1 Wend. (N. Y.) 164, 19 Am. Dec. 469.

18. Kinkead *v.* Ryan, 64 N. J. Eq. 454, 53 Atl. 1053, 65 N. J. Eq. 726, 55 Atl. 730 (holding also that where a cotenant pays off an encumbrance with intent to have it completely extinguished no right of subrogation remains); Haverford Loan, etc., Assoc. *v.* Philadelphia Fire Assoc., 180 Pa. St. 522, 37 Atl. 179, 57 Am. St. Rep. 657 (holding that if one tenant removes a mortgage, tax lien, or other encumbrance upon the property, he may be regarded as subrogated to such lien to secure contribution from his cotenant or as having an equitable lien upon their interest of the same character as that removed).

19. Young *v.* Williams, 17 Conn. 393 (holding that if one tenant in common of an equity of redemption is compelled to pay off the whole encumbrance, and takes a transfer of the legal title, the share of the mortgage which it belonged to him to pay becomes extinguished, his title to his portion of the property is perfected, and he is subrogated to the rights of the first mortgagee, and has a right to call upon his cotenant to pay him that share or be foreclosed of his right to redeem); Miller's Appeal, 119 Pa. St. 620, 13 Atl. 504; Watson's Appeal, 90 Pa. St. 426; Gearhart *v.* Jordan, 11 Pa. St. 325. But see Leach *v.* Hall, 95 Iowa 611, 64 N. W. 790 (holding that a tenant in common, who pays off a mortgage, is only entitled to contribution from his cotenants, and he cannot acquire an outstanding encumbrance as against them, so as to be subrogated to the rights of the mortgagee); Ohio Iron Co. *v.* Auburn Iron Co., 64 Minn. 404, 67 N. W. 221 (holding that if defendant, to protect and preserve its own interests and rights, was compelled to pay a sum which should have been paid by a cotenant on account of royalty due the lessor, it would be entitled to reimbursement, by way of an equitable lien on the cotenant's

of distinct parcels,[20] or joint devisees of land charged with the payment of legacies, the entire amount of which is paid by one devisee.[21] Where property owned by two is subject to a mortgage, and as between the two it is the duty of one to discharge it, and the other pays the debt on condition that the mortgage shall inure to his benefit, an equity arises in his favor entitling him to indemnity through the mortgage;[22] but payment by the one whose duty it is to pay extinguishes the debt,[23] and a vendee who pays a part of the consideration after notice of the adverse equity is not a *bona fide* purchaser as to the amount paid.[24] Similarly one of two cotenants of land subject to a purchase-money mortgage who redeems the mortgage to protect the property is entitled to be subrogated to the rights of the mortgagee under the mortgage, and equity will keep the encumbrance alive for his benefit;[25] he occupies the position of a surety and is entitled to set up the bond as a specialty debt against the estate of his cotenant,[26] and may purchase the mortgage, and enforce its payment out of the joint estate;[27] and where one of two joint owners of lands subject to a purchase-money mortgage dies and the survivor pays the mortgage debt he is entitled to be subrogated to the rights of the mortgagee to the extent of a moiety of the debt, so as to take precedence over a claim of dower by the widow of the deceased joint owner.[28]

D. Parties to Bills or Notes. By paying a bill or note an indorser who is actually bound becomes subrogated to all the rights under the note against prior parties;[29] and one who is bound as indorser for the payment of a note secured by

estate, enforced by subrogation in equity, but it cannot through subrogation have the right of immediate reëntry).

The grantee of a tenant in common, who took up the bond secured by the mortgage, which he and the other cotenant as tenants in common were jointly obligated to pay, thereby acquired a right to collect one half thereof out of the estate of the cotenant, and was entitled to all the securities and remedies given by the mortgage, which by assignment passed to his assignees. Watson's Appeal, 90 Pa. St. 426.

Where the executors of two deceased tenants in common sold the real estate of the decedents, some of the encumbrances on which were joint liens, and paid off the liens in order to make title clear, one paying a larger amount than the other on an agreement that on distribution of the estate the proper adjustment should be made, he was entitled to be subrogated to the lien creditor's rights to the extent of the overpayment. Strough's Estate, 2 Chest. Co. Rep. (Pa.) 291.

20. Hubbard *v.* Ascutney Mill Dam Co., 20 Vt. 402, 50 Am. Dec. 41.

Where tenants in common of land have mortgaged it for their joint debt, either of them, on paying the mortgage before sale on foreclosure, is subrogated to the rights of the mortgagee as against his cotenant. McLaughlin *v.* Curts, 27 Wis. 644.

21. Miller's Appeal, 119 Pa. St. 620, 13 Atl. 504.

22. Laylin *v.* Knox, 41 Mich. 40, 1 N. W. 913; Swan *v.* Smith, 57 Miss. 548, holding that the relation of the parties is principal and surety.

23. Birdsall *v.* Cropsey, 29 Nebr. 679, 45 N. W. 921, holding that where lands were sold to two persons as cotenants, one of whom afterward sold to the other, the vendee agreeing to pay the balance of the original purchase-money, and this vendee afterward granted to a third party under a similar contract, the latter was not, by reason of discharging such balance, subrogated to the lien of the original vendor so as to prevent a lien from attaching in favor of the one who sold to his cotenant.

24. Birdsall *v.* Cropsey, 29 Nebr. 679, 45 N. W. 921.

25. Newbold *v.* Smart, 67 Ala. 326; Simpson *v.* Gardiner, 97 Ill. 237 (allowing the same rate of interest as the original debt called for); Lowrey *v.* Byers, 80 Ind. 443; Brooks *v.* Harwood, 8 Pick. (Mass.) 497; Dobyns *v.* Rawley, 76 Va. 537.

Where two partners purchase lands in trust for the firm, giving a mortgage back to secure the purchase-money, which the whole firm is to pay, but neglects to do so, and one of the partners is compelled to pay the debt to protect his own interest and save the land from sale under a power in the mortgage, he will have a clear right to be subrogated to the lien of the mortgagee. McMillan *v.* James, 105 Ill. 194.

26. Stokes *v.* Hodges, 11 Rich. Eq. (S. C.) 135.

27. Harrison *v.* Ingham, 3 Walk. (Pa.) 403. And see Moroney *v.* Copeland, 5 Whart. (Pa.) 407, holding that where the interest of one of two tenants in common was sold on execution, and the money was brought into court, and certain statutory liens were divested by the sale, and consequently were payable out of the proceeds of the sale, the tenant whose interest was sold is entitled to be subrogated to the liens of these claims on the other tenant's interest, so far as respects the half of them thus paid.

28. Wheatley *v.* Calhoun, 12 Leigh (Va.) 264, 37 Am. Dec. 654.

29. *Illinois.*— Dooley *v.* Lackey, 55 Ill. App. 30.

pledge is legally subrogated to all the rights of the pledgee by the payment of the note,[30] and indorsers on a note will be subrogated, on paying the note, to the

Louisiana.— Seixas *v.* Gonsoulin, 40 La. Ann. 351, 4 So. 453.

Massachusetts.— Parker *v.* Sanborn, 7 Gray 191. See Stevenson *v.* Austin, 3 Metc. 474.

New Jersey.— Young *v.* Vough, 23 N. J. Eq. 325.

New York.— Cassebeer *v.* Kalbfleisch, 11 Hun 119; Concord Granite Co. *v.* French, 3 N. Y. Civ. Proc. 56 [*affirmed* in 12 Daly 228, 3 N. Y. Civ. Proc. 445, 65 How. Pr. 317].

United States.— Bird *v.* Louisiana State Bank, 93 U. S. 96, 23 L. ed. 818.

See 44 Cent. Dig. tit. "Subrogation," § 14.

A bank, as indorsee of notes, takes them with all privileges securing their ultimate payment; and when afterward taken up by the indorsers they return with a subrogation of the same privileges, and must be regarded in their hands as if never negotiated in bank. Wiggin *v.* Flower, 5 Rob. (La.) 406; Saul *v.* Nicolet, 15 La. 246.

The indorser of a note for the price of goods sold is by its payment subrogated to the vendor's rights, and may rescind the sale. Torregano *v.* Segura, 2 Mart. N. S. (La.) 158.

An accommodation indorser of a bill or note is to be regarded as standing in the character of a surety, and, in the event of his paying, is to be subrogated to all the rights and remedies of a creditor. Hoffman *v.* Butler, 105 Ind. 371, 4 N. E. 681; Yates *v.* Mead, 68 Miss. 787, 10 So. 75 [*explaining* Dibrell *v.* Dandridge, 51 Miss. 55] (construing Code (1880), §§ 998, 1140); Boyd *v.* Finnegan, 3 Daly (N. Y.) 222; Gunnis *v.* Weigley, 114 Pa. St. 191, 6 Atl. 465; McDonald Mfg. Co. *v.* Moran, 52 Wis. 203, 8 N. W. 864. But he must have actually paid. Malone Third Nat. Bank *v.* Shields, 55 Hun (N. Y.) 274, 8 N. Y. Suppl. 298.

The payment of an accommodation draft by the accepter entitles him to be regarded in the light of a surety, and he has equal claims to enforce its payment against the drawer as any other surety who has the draft of his principal. The doctrine is that the payment entitles the surety to be subrogated to all the rights of the creditor. Hoffman *v.* Bignall, 1 Tex. App. Civ. Cas. § 702. Conversely, where one procures bills to be drawn for his accommodation, and gives a deed of trust to the accepter, and negotiable notes for the amount of the acceptance, as well as for an account stated, as collateral security, the holders of the bills may resort to the trust property for the payment of them when dishonored, if the notes have not been negotiated to *bona fide* holders for value. Toulmin *v.* Hamilton, 7 Ala. 362.

Where the indorsers of the paper of a firm dissolved by death of a member indorse on his credit the paper of the surviving partner who pays the former note with the proceeds thereof, but without any arrangement to that effect with the indorsers, the indorsers are not entitled to be subrogated to the rights of the creditors who were paid, in the realty of the partnership. Holland *v.* Fuller, 13 Ind. 195.

A subsequent indorser of a negotiable note, who pays a judgment on it in favor of the holder against the maker, a prior indorser and the subsequent indorser, the maker being insolvent, is entitled in equity to substitution to the lien of the judgment against such prior indorser. Schilb *v.* Moon, 50 W. Va. 47, 40 S. E. 329.

30. Woodward *v.* American Exposition R. Co., 39 La. Ann. 566, 2 So. 413.

An accommodation indorser stands in the light of a surety to the maker, and upon payment is subrogated to the rights of the holder of securities pledged to the holder by the maker. Toler *v.* Cushman, 12 La. Ann. 733; Humphreys *v.* Vertner, Freem. (Miss.) 251; Riverside Bank *v.* Totten, 11 N. Y. Suppl. 519; Cleveland Second Nat. Bank *v.* Mirrison, 3 Ohio Dec. (Reprint) 534, Ohio L. J. 534. Yet, as between him and a *bona fide* holder, where his liability has become fixed, he becomes the principal debtor, and if he desires the benefit of any security held by the creditor, he must first pay the paper, assert his right of subrogation, and himself enforce the security, and the fact that other parties are similarly interested with him in enforcing the security is immaterial; he is only entitled to such benefit as is conferred by the security as it is (Buffalo First Nat. Bank *v.* Wood, 71 N. Y. 405, 27 Am. Rep. 66).

An accommodation maker of a note, transferred for value to a bank, is entitled to have the amount which the payee owed the bank ascertained, and to be subrogated to the rights of the bank as to the securities, upon paying the amount so ascertained, the expense incurred by the bank in relation to the securities, and the costs of the action (Koehler *v.* Farmers', etc., Bank, 5 N. Y. Suppl. 745), and where the payee and first indorser of an accommodation note induces a subsequent indorser to take up the note, and gives him security therefor, the security will inure to the benefit of the maker, if he be obliged to pay the note and afterward sue the payee (Ward *v.* Wick, 17 Ohio St. 159).

Accommodation accepter.— Although a drawee who accepts a bill for the accommodation of the drawer is regarded, in favor of a *bona fide* holder, as a principal debtor, yet, as between such accepter and the drawer, the former stands in the relation of surety, and he is entitled on payment of the bill to be subrogated to the position of the holder of the bill in respect to any securities of the drawer held by such holder to secure the payment thereof. Toronto Bank *v.* Hunter, 4 Bosw. (N. Y.) 646, 20 How. Pr. 292.

In the District of Columbia the holder of a note secured by collateral is required by law, on payment of the note by an indorser or guarantor, to deliver to the latter the note

rights of the owner in a mortgage given him as security.[31] An indorser of a note, after its maturity, who joins with the maker in giving a bond for the debt, is entitled, upon a tender of the debt, to an assignment of the bond;[32] and although by statute the indorser of a note is not liable thereon until the holder has exhausted his remedies against the maker, yet if the indorser waives that privilege and pays the amount due, he becomes subrogated to the rights of the holder, since such a payment cannot be considered as a voluntary one.[33] Thus where the money of an indorser of a note upon which judgment is obtained is used to satisfy the judgment, the indorser has a right to be subrogated to plaintiff's rights and to keep the judgment alive.[34] No entry on the judgment of such payment is required, in order that the indorser may have the right of subrogation; and an entry of satisfaction, made by plaintiff without the authority of the indorser, will not defeat the latter's right to enforce the judgment in his own favor against the land of the principal debtor;[35] and one who indorses a note to pay a judgment with the express understanding that the judgment shall be assigned is subrogated to the rights of the judgment creditor.[36] Conversely, where the makers and indorsers of negotiable paper are insolvent, the holders thereof may, upon the principle of subrogation, avail themselves of the right of such indorsers arising under a chattel mortgage

and collateral as means of indemnity to him, and he is subrogated to the rights of the maker, if he pays the note, and is entitled to receive the collateral in the same condition in which it stood in the maker's hands, and to all remedies thereon available to the latter; and this right does not depend on contract, but rests on principles of justice and equity. Mankey *v.* Willoughby, 21 App. Cas. 314.

31. Millaudon *v.* Colla, 15 La. 213; Baldwin *v.* Thompson, 6 La. 474; Suares *v.* His Creditors, 3 La. 341; Nichol *v.* De Ende, 3 Mart. N. S. (La.) 310; Kingman *v.* Cornell-Tebbetts Mach., etc., Co., 150 Mo. 282, 51 S. W. 727 (holding that, where the payee of a note secured by a trust deed has compelled the indorser thereof to pay the note, he becomes subrogated to the payee's rights under the deed); Ætna Ins. Co. *v.* Thompson, 68 N. H. 20, 40 Atl. 396, 73 Am. St. Rep. 552 (holding that where sureties on a note secured by mortgage pay the same, they are subrogated to the rights of the mortgagee to the proceeds of an insurance policy on the property); Malone Third Nat. Bank *v.* Shields, 55 Hun (N. Y.) 274, 8 N. Y. Suppl. 298.

Similarly the indorser of a draft is, upon payment thereof by him, entitled to be subrogated to the security in the hands of the accepter. Stevenson *v.* Austin, 3 Metc. (Mass.) 474.

32. Merriken *v.* Goodwin, 2 Del. Ch. 236.

33. Telford *v.* Garrels, 132 Ill. 550, 24 N. E. 573 [*affirming* 31 Ill. App. 441].

But where an administrator renews a note due from the estate giving security thereon, the administrator having no power to impose a direct liability upon the estate he represents by executing a note or other security for money in his representative character (see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 252), the parties to the renewal note are liable individually, and upon payment thereof by the surety he is not entitled to subrogation to the creditor's right against the estate, but only to subject the interest of the administrator to the amount paid as his indorser (Brown *v.* Lang, 4 Ala. 50).

34. Dorsey's Succession, 7 La. Ann. 34; Shaw *v.* McClellan, 1 Pa. L. J. Rep. 384 (holding that the indorser has a right to judgment against the maker of a note, and to the benefit of the recognizance for stay entered on it); Abrams *v.* Ingram, 1 Phila. (Pa.) 398.) And see Johnson *v.* Webster, 81 Iowa 581, 47 N. W. 769.

The judgment passes, however, with all its privileges and infirmities and the surety is subrogated to the rights of the creditor but no more. Partee *v.* Mathews, 53 Miss. 140.

The indorser of a note, given by a creditor to prevent a sale of his debtor's effects under a judgment in favor of a creditor with a prior lien, who paid the latter, and to whom the judgment was afterward assigned, was substituted for the judgment creditor. Cottrell's Appeal, 23 Pa. St. 294.

In Nebraska it is held that an indorser must, in order to have the benefit of the judgment, make and prove his defense of suretyship in the original action and have the judgment against himself and his principal assigned to him. Potvin *v.* Meyers, 27 Nebr. 749, 44 N. W. 25.

Where separate judgments are recovered by the same plaintiff against the maker and indorser of a note, the indorser, upon the payment of the judgment against himself, is entitled to be substituted in equity to the judgment against the maker (Lyon *v.* Bolling, 9 Ala. 463, 44 Am. Dec. 444); and where one judgment was obtained against the maker and another against the indorser, and upon the latter judgment suit was brought in another state, and a judgment recovered, which the indorser paid, he was entitled to be subrogated to the lien of the judgment against the maker of the note (Old Dominion Bank *v.* Allen, 76 Va. 200).

35. Tates *v.* Mead, 68 Miss. 787, 10 So. 75.

36. Treadway *v.* Pharis, 18 S. W. 225, 13 Ky. L. Rep. 787.

given them by the makers to secure them against loss because of their liability as indorsers;[37] and similarly, a surety on a note, on payment by him, is entitled to be subrogated to all the rights and securities of the payee or holder, for the purpose of obtaining reimbursement;[38] and if the note has been reduced to judgment, he may pay the amount due, take an assignment, and become subrogated to the rights of the judgment creditors, and sell and assign his interest, before having any adjudication of his suretyship.[39] It is not necessary that the payment should have been made in money. Anything which the creditor is willing to accept in satisfaction of the debt is sufficient.[40] But the right to subrogation of a surety on a note is confined to the rights and securities of the contract for which he was surety, and do not extend to rights against one as to whom he was a stranger.[41]

E. Sureties or Guarantors — 1. General Rule Stated. A surety who has paid the debt of the principal is at once subrogated to all the rights, remedies, securities, liens, and equities of the creditor, for the purpose of obtaining his reimbursement from the principal debtor.[42] This subrogation to the remedies

37. Harmony Nat. Bank's Appeal, 101 Pa. St. 428 (holding that where a mortgage is given by the maker of a note to secure the indorser, and both become insolvent, the holder of the note is entitled to the benefit of the security; but he can have no higher rights than could the indorser); National Shoe, etc., Bank *v.* Small, 7 Fed. 837. But see Seward *v.* Huntington, 94 N. Y. 104 [*reversing* 26 Hun 217].

Where two persons exchange notes, each note is the proper debt of the maker, and each maker is a purchaser for value of the note received, and thus the relation of principal and surety does not exist, and no promise of either to indemnify the other can be implied, and no rights of subrogation are created. Stickney *v.* Mohler, 19 Md. 490; Coburn *v.* Baker, 6 Duer (N.Y.) 532; Smith's Appeal, 125 Pa. St. 404, 17 Atl. 344; Battin *v.* Meyer, 5 Phila. (Pa.) 73 [*modified* in Taylor's Appeal, 45 Pa. St. 71].

38. Cummings *v.* Little, 45 Me. 183; Myres *v.* Yaple, 60 Mich. 339, 27 N. W. 536 (holding that a surety in a note for the purchase of a chattel by paying the note is subrogated to the rights of the payee); Carpenter *v.* Minter, 72 Tex. 370, 12 S. W. 180. And see Schoonover *v.* Allen, 40 Ark. 132.

A surety on a sealed note, paying it, is entitled to be subrogated to the rights of the holder. Smith *v.* Swain, 7 Rich. Eq. (S. C.) 112.

The guarantor of a note for accommodation is subrogated to the rights of the holder to whom he has made payment against the maker. Babcock *v.* Blanchard, 86 Ill. 165.

A surety in a note for two principal promisors, one deceased, having paid it, may recover the amount paid from the surviving principal promisor. Riddle *v.* Bowman, 27 N. H. 236.

Where a third person assumes payment of a note, and the surety for the maker is compelled thereafter to pay the note, he is entitled to be subrogated to the right of action which the maker would have against the third person. Rodenbarger *v.* Bramblett, 78 Ind. 213.

An action on a promissory note from ostensible partners, accepted by one unacquainted with the existence of a dormant partner, may be brought against all the partners, and where a surety pays the note he is entitled to the usual remedies of sureties, and may be subrogated to the remedy on the contract, or he may have his action for money paid for the use of the partnership. Hill *v.* Voorhies, 22 Pa. St. 68.

39. Frank *v.* Traylor, 130 Ind. 145, 29 N. E. 486, 16 L. R. A. 115; Manford *v.* Firth, 68 Ind. 83, holding that where a surety on a note satisfied the judgment upon it, rendered against him and the maker, and had it assigned to him on the record, he should be subrogated to all the rights of the judgment creditor in and to the judgment, previous to and subsisting at the time of it.

40. Humphreys *v.* Vertner, Freem. (Miss.) 251.

41. Flannery *v.* Utley, 3 S. W. 412, 5 S. W. 776, 8 Ky. L. Rep. 776, 9 Ky. L. Rep. 581.

42. *Alabama.*—Fawcetts *v.* Kimmey, 33 Ala. 261; Houston *v.* Huntsville Branch Bank, 25 Ala. 250; Brown *v.* Lang, 4 Ala. 50; Foster *v.* Athenæum, 3 Ala. 302; Cullum *v.* Emanuel, 1 Ala. 23, 34 Am. Dec. 757.

Arkansas.— Talbot *v.* Wilkins, 31 Ark. 411.

Connecticut.— Stamford Bank *v.* Benedict, 15 Conn. 437; Belcher *v.* Hartford Bank, 15 Conn. 381.

Delaware.— McDowell *v.* Wilmington, etc., Bank, 1 Harr. 369; Miller *v.* Stout, 5 Del. Ch. 259.

Georgia.— Worthy *v.* Battle, 125 Ga. 415, 54 S. E. 667; Ezzard *v.* Bell, 100 Ga. 150, 28 S. E. 28; Davis *v.* Smith, 5 Ga. 274, 47 Am. Dec. 279; Lumpkin *v.* Mills, 4 Ga. 343.

Illinois.— Lochenmeyer *v.* Fogarty, 112 Ill. 572; Moore *v.* Topliff, 107 Ill. 241; Conwell *v.* McCowan, 53 Ill. 363; Billings *v.* Sprague, 49 Ill. 509; Foss *v.* Chicago, 34 Ill. 488; Peirce *v.* Garrett, 65 Ill. App. 682.

Indiana.— Opp *v.* Ward, 125 Ind. 241, 243, 24 N. E. 974, 21 Am. St. Rep. 220; Peirce *v.* Higgins, 101 Ind. 178; Gipson *v.* Ogden, 100 Ind. 20; Pence *v.* Armstrong, 95 Ind. 191;

and remedial rights of the creditor attaches for the purpose not only of enforc-

Vert *v.* Voss, 74 Ind. 565; Gerber *v.* Sharp, 72 Ind. 553; Josselyn *v.* Edwards, 57 Ind. 212; Zook *v.* Clemmer, 44 Ind. 15; Jones *v.* Tincher, 15 Ind. 308, 77 Am. Dec. 92; Townsend *v.* Cleveland Fire Proofing Co., 18 Ind. App. 568, 47 N. E. 707.

Iowa.— Gilbert *v.* Adams, 99 Iowa 519, 68 N. W. 883 (holding that a surety may rely on and enforce a contract made by a third person with the principal to pay the debt, and that a surety on a note is subrogated, on payment, to the rights of the payee, as against one assuming payments of the note by contract with the maker); Hollingsworth *v.* Pearson, 53 Iowa 53, 3 N. W. 818; James *v.* Day, 37 Iowa 164; Massie *v.* Mann, 17 Iowa 131. But see Knoll *v.* Marshall County, 114 Iowa 647, 87 N. W. 657, denying the applicability of the rule where the relation of the parties rested upon statute rather than upon contract.

Kansas.— See Traders' Bank *v.* Myers, 3 Kan. App. 636, 44 Pac. 393.

Kentucky.— Glass *v.* Pullen, 6 Bush 346; Storms *v.* Storms, 3 Bush 77; Havens *v.* Foudry, 4 Metc. 247; Rice *v.* Downing, 12 B. Mon. 44; Morris *v.* Evans, 2 B. Mon. 84, 36 Am. Dec. 591; Highland *v.* Anderson, 17 S. W. 866, 13 Ky. L. Rep. 710, holding that the surety of a purchaser of lands sold at a judicial sale, who is compelled to pay the bonds of such purchaser, is entitled to a lien on the lands so purchased for the amount so paid by him); Bickel *v.* Judah, 3 Ky. L. Rep. 728.

Louisiana.— Davidson *v.* Carroll, 20 La. Ann. 199; Grieff *v.* The D. S. Stacy, 12 La. Ann. 8; Calliham *v.* Tanner, 3 Rob. 299; St John *v.* Sanderson, 15 La. 346, holding that an intervener, on whose credit and acceptance, given for the price, defendant has by fraudulent pretenses purchased goods, and who, on discovering the fraud, with defendant's consent takes them into his possession before they are attached, may be said to be subrogated to the right of the vendors, and so is entitled to recover.

Maine.— Leavitt *v.* Canadian Pac. R. Co., 90 Me. 153, 37 Atl. 886, 38 L. R. A. 152; Stevens *v.* King, 84 Me. 291, 293, 24 Atl. 850; Norton *v.* Soule, 2 Me. 341.

Maryland.— American Bonding Co. *v.* National Mechanics' Bank, 97 Md. 598, 55 Atl. 395; Crisfield *v.* State, 55 Md. 192; McKnew *v.* Duvall, 45 Md. 501; Winder *v.* Diffenderffer, 2 Bland 166; Neptune Ins. Co. *v.* Dorsey, 3 Md. Ch. 334.

Massachusetts.— Blake *v.* Traders' Nat. Bank, 145 Mass. 13, 12 N. E. 414.

Minnesota.— Lumbermen's Ins. Co. *v.* Sprague, 59 Minn. 208, 60 N. W. 1101; Torp *v.* Gulseth, 37 Minn. 135, 33 N. W. 550.

Mississippi.— Magee *v.* Leggett, 48 Miss. 139; Staples *v.* Fox, 45 Miss. 667 (holding that equity makes a full investiture of all the securities with which the creditor was provided); Dozier *v.* Lewis, 27 Miss. 679; Conway *v.* Strong, 24 Miss. 665.

Missouri.— Grady *v.* O'Reilly, 116 Mo. 346, 22 S. W. 798; Allison *v.* Sutherlin, 50 Mo. 274; Furnold *v.* State Bank, 44 Mo. 336; Seeley *v.* Beck, 42 Mo. 143; McCune *v.* Belt, 38 Mo. 281; Cole County *v.* Angeny, 12 Mo. 132; Miller *v.* Woodward, 8 Mo. 169; Bissett *v.* Grantham, 67 Mo. App. 23; Fisher *v.* Columbia Bldg., etc., Assoc., 59 Mo. App. 430; Rubey *v.* Watson, 22 Mo. App. 428; Callaway County Sav. Bank *v.* Terry, 13 Mo. App. 99.

Nebraska.— Guthrie *v.* Ray, 36 Nebr. 612, 54 N. W. 971; Mendel *v.* Boyd, 3 Nebr. (Unoff.) 473, 91 N. W. 860.

New Hampshire.— Ætna Ins. Co. *v.* Thompson, 68 N. H. 20, 40 Atl. 396, 73 Am. St. Rep. 552; Brewer *v.* Franklin Mills, 42 N. H. 292.

New Jersey.— St. Peter's Catholic Church *v.* Vannote, 66 N. J. Eq. 78, 56 Atl. 1037; Price *v.* Truesdale, 28 N. J. Eq. 200; Coe *v.* New Jersey Midland R. Co., 27 N. J. Eq. 110; Irick *v.* Black, 17 N. J. Eq. 189.

New York.—Morehouse *v.* Brooklyn Heights R. Co., 185 N. Y. 520, 78 N. E. 179; Dunlop *v.* James, 174 N. Y. 411, 67 N. E. 60; Mansfield *v.* New York, 165 N. Y. 208, 58 N. E. 889; Lock Haven State Bank *v.* Smith, 155 N. Y. 185, 49 N. E. 680; Lewis *v.* Palmer, 28 N. Y. 271; Mathews *v.* Aikin, 1 N. Y. 595; City Trust, etc., Co. *v.* Haaslocher, 101 N. Y. App. Div. 415, 91 N. Y. Suppl. 1022; People *v.* Anthony, 7 N. Y. App. Div. 132, 40 N. Y. Suppl. 279 [*affirmed* in 151 N. Y. 620, 45 N. E. 1133]; Finegan *v.* New York, 4 N. Y. App. Div. 15, 38 N. Y. Suppl. 358 [*citing* Cole *v* Malcolm, 66 N. Y. 363]; Dings *v.* Parshall, 7 Hun 522; Martin *v.* Wagener, 60 Barb. 435; Goodyear *v.* Watson, 14 Barb. 481; Elwood *v.* Deifendorf, 5 Barb. 398; Gifford *v.* Rising, 12 N. Y. Suppl. 430; Dundee Nat. Bank *v.* Wood, 9 N. Y. Suppl. 351; Kilpatrick *v.* Dean, 3 N. Y. Suppl. 60 [*affirmed* in 15 Daly 708, 4 N. Y. Suppl. 708]; Gould *v.* Central Trust Co., 6 Abb. N. Cas. 381; Warner *v.* Beardsley, 8 Wend. 194; Clason *v.* Morris, 10 Johns. 524; Eddy *v.* Traver, 6 Paige 521, 31 Am. Dec. 261; Hayes *v.* Ward, 4 Johns. Ch. 123, 8 Am. Dec. 554; King *v.* Baldwin, 2 Johns. Ch. 554; Cheesebrough *v.* Millard, 1 Johns. Ch. 409, 7 Am. Dec. 494; Wheelwright *v.* Depeyster, 4 Edw. 232; Ottman *v.* Moak, 3 Sandf. Ch. 431; Loomer *v.* Wheelwright, 3 Sandf. Ch. 135; Wilkes *v.* Harper, 3 Sandf. Ch. 6; Marsh *v.* Pike, 1 Sandf. Ch. 210 [*affirmed* in 10 Paige 595].

North Carolina.— Tatum *v.* Tatum, 36 N. C. 113.

North Dakota.— Thurston *v.* Osborne-McMillan El. Co., 13 N. D. 508, 101 N. W. 892.

Ohio.— Butler *v.* Birkey, 13 Ohio St. 514.

Oklahoma.— McClure *v.* Johnson, 10 Okla. 663, 65 Pac. 103.

Pennsylvania.— Williamson's Appeal, 94 Pa. St. 231; Bender *v.* George, 92 Pa. St. 36; Mosier's Appeal, 56 Pa. St. 76, 93 Am. Dec. 783; Klopp *v.* Lebanon Bank, 46 Pa. St. 88; McCormick *v.* Irwin, 35 Pa. St. 111; Cottrell's Appeal, 23 Pa. St. 294; Sheidle *v.*

ing reimbursement from the principal, but of obtaining contribution from a

Weishlee, 16 Pa. St. 134; Gossin *v.* Brown, 11 Pa. St. 527; Neff *v.* Miller, 8 Pa. St. 347; *In re* Greiner, 2 Watts 414; Campbell *v.* Foster Home Assoc., 2 Pa. Dist. 845; *In re* Albright, 10 Lanc. Bar 57. But see Rittenhouse *v.* Levering, 6 Watts & S. 190, holding that a surety is not *ipso facto*, on payment of the debt of his principal, subrogated to the creditor's rights. His remedy is not *prima facie* on the bond, but for money paid, although he may, if he chooses, invoke the equitable aid of subrogation.

South Carolina.— Muller *v.* Wadlington, 5 S. C. 342; Wilson *v.* Wright, 7 Rich. 399; Rhame *v.* Lewis, 13 Rich. Eq. 269; Perkins *v.* Kershaw, 1 Hill Eq. 344; McNeil *v.* Morrow, Rich. Eq. Cas. 172; Lowndes *v.* Chisholm, 2 McCord Eq. 455, 16 Am. Dec. 667.

Tennessee.— Henry *v.* Compton, 2 Head 549; Dechard *v.* Edwards, 2 Sneed 93; Wade *v.* Green, 3 Humphr. 547; Delaney *v.* Tipton, 3 Hayw. 14.

Texas.— Willis *v.* Chowning, 90 Tex. 617, 40 S. W. 395, 59 Am. St. Rep. 842; Fairis *v.* Cockerell, 88 Tex. 428, 31 S. W. 190, 639, 28 L. R. A. 528; Oury *v.* Saunders, 77 Tex. 278, 13 S. W. 1030; Carpenter *v.* Minter, 72 Tex. 370, 12 S. W. 180; Fears *v.* Albea, 69 Tex. 437, 6 S. W. 286, 5 Am. St. Rep. 78; Willson *v.* Phillips, 27 Tex. 543; James *v.* Jacques, 26 Tex. 320, 82 Am. Dec. 613; Henderson *v.* Kissam, 8 Tex. 46; Darrow *v.* Summerhill, 24 Tex. Civ. App. 208, 58 S. W. 158; Beville *v.* Boyd, 16 Tex. Civ. App. 491, 41 S. W. 670, 42 S. W. 318.

Vermont.— Royalton Nat. Bank *v.* Cushing, 53 Vt. 321; McDaniels *v.* Flower Brook Mfg. Co., 22 Vt. 274.

Virginia.— Harnsberger *v.* Yancey, 33 Gratt. 527; Hill *v.* Manser, 11 Gratt. 522; Robinson *v.* Sherman, 2 Gratt. 178, 44 Am. Dec. 381; Kent *v.* Matthews, 12 Leigh 573; Epps *v.* Randolph, 2 Call 125.

West Virginia.— Hall *v.* Hyer, 48 W. Va. 353, 37 S. E. 594; McNeil *v.* Miller, 29 W. Va. 480, 2 S. E. 335; Conaway *v.* Odbert, 2 W. Va. 25.

United States.— Prairie State Nat. Bank *v.* U. S., 164 U. S. 227, 17 S. Ct. 142, 41 L. ed. 412; Lidderdale *v.* Robinson, 12 Wheat. 594, 6 L. ed. 740; Moody *v.* Huntley, 149 Fed. 797 (subrogation to an attachment lien); Swarts *v.* Siegel, 117 Fed. 13, 54 C. C. A. 399; *In re* Stout, 109 Fed. 794; Montgomery *v.* Charleston, 99 Fed. 825, 40 C. C. A. 108, 48 L. R. A. 503; Lawrence *v.* U. S., 71 Fed. 228; Equitable Mortg. Co. *v.* Lowry, 55 Fed. 165; U. S. Bank *v.* Winston, 2 Fed. Cas. No. 944, 2 Brock. 252; Sarah J. Weed, 21 Fed. Cas. No. 12,350, 2 Lowell 555.

England.— Heyman *v.* Dubois, L. R. 13 Eq. 158, 41 L. J. Ch. 224, 25 L. T. Rep. N. S. 558; Wooldridge *v.* Norris, L. R. 6 Eq. 410, 37 L. J. Ch. 640, 19 L. T. Rep. N. S. 144, 16 Wkly. Rep. 965; *Ex p.* Crisp, 1 Atk. 133, 26 Eng. Reprint 87; Lake *v.* Brutton, 8 De G. M. & G. 440, 2 Jur. N. S. 839, 25 L. J. Ch. 842, 57 Eng. Ch. 343, 44 Eng. Reprint 460; Goddard *v.* Whyte, 2 Giffard 449, 6 Jur. N. S. 1364, 3 L. T. Rep. N. S. 313, 66 Eng. Reprint 188; Yonge *v.* Reynell, 9 Hare 809, 41 Eng. Ch. 809, 68 Eng. Reprint 744; Hodgson *v.* Shaw, 3 L. J. Ch. 190, 3 Myl. & K. 183, 10 Eng. Ch. 183, 40 Eng. Reprint 70 (a famous case, by Lord Brougham); Copis *v.* Middleton, 2 L. J. Ch. O. S. 82, Turn. & R. 224, 12 Eng. Ch. 224, 37 Eng. Reprint 1083; Mayhew *v.* Crickett, 2 Swanst. 185, 36 Eng. Reprint 585, 1 Wils. Ch. 418, 37 Eng. Reprint 178, 19 Rev. Rep. 57, 61; Craythorne *v.* Swinburne, 14 Ves. Jr. 160, 9 Rev. Rep. 264, 33 Eng. Reprint 482.

See 44 Cent. Dig. tit. "Subrogation," § 16 *et seq.*

As soon as the surety has paid the debt, an equity arises in his favor to have all the securities, original and collateral, which the creditor held against the person or property of the principal debtor, transferred to him, and to avail himself of them as fully as the creditor could have done, for the purpose of obtaining indemnity from the principal. He is considered as at once subrogated to all the rights, remedies, and securities of the creditor — as substituted in the place of the creditor — and entitled to enforce all his liens, priorities, and means of payment as against the principal, and to have the benefit of even securities that were given without his knowledge. Furnold *v.* State Bank, 44 Mo. 336.

The converse is not true; a principal who pays is subrogated to no rights against the surety. Union Nat. Bank *v.* Legendre, 35 La. Ann. 787.

A statute providing that a surety may by contract be substituted to the rights of a creditor whose debt he pays does not *per se* make the assignment. It only entitles him to an assignment on demand. Joyce *v.* Joyce, 1 Bush (Ky.) 474.

No doctrine of equity jurisprudence is more firmly established, or founded on more substantial and fundamental principles of right and justice, than the rule which subrogates a surety, who has paid the debt of his principal, to all the rights, remedies, and securities held or acquired by the creditor against the person or property of the principal debtor, with the same rights to resort to them that the creditor would have had if the surety had not paid the debt. The rule rests on the superior equity of the surety to be reimbursed out of any fund to which the creditor could have resorted, in the first instance, for his relief, and upon the natural equity, that the person primarily bound shall pay the debt. Watts *v.* Eufaula Nat. Bank, 76 Ala. 474.

A surety on the bond of a contractor with a city for public work, who assumes and completes the work after its abandonment by his principal, is subrogated, so far as necessary to protect him from loss, to all rights which the city might have enforced against the contractor if it had declared the contract forfeited, and completed the work itself. Seattle

cosurety.[43] The surety is subrogated without any special agreement to that effect,[44] and although bound by a different instrument than the principal; [45] and he need not,

First Nat. Bank *v.* Philadelphia City Trust, etc., Co., 114 Fed. 529, 52 C. C. A. 313. And similarly where a federal contractor's surety was compelled to pay labor and material claims to an amount exceeding the amount due from the government to the contractor, it was entitled to subrogation to the rights of the laborers and materialmen so paid against such sum which claim was prior to that of a mere voluntary lender of funds to the contractor, not shown to have been used in the performance of the contract. Henningsen *v.* U. S. Fidelity, etc., Co., 143 Fed. 810, 74 C. C. A. 484 [*affirmed* in 208 U. S. 404, 28 S. Ct. 389, 52 C. C. A. 547]. And a surety on a contractor's bond who, at the request of the principal, and in reliance on his supposed liability under the bond, pays out money, is entitled to be subrogated in the place of the creditors as against the principal, although the creditors had no right of action against said surety. Lyth *v.* Green, 21 N. Y. App. Div. 300, 47 N. Y. Suppl. 478. Where a contractor gave a bond stipulating that, if he abandoned the contract, the surety might complete the work, and that any deferred payments due to the contractor should be paid to the surety, and the contractor abandoned the work, and the surety completed the contract, the amount due to the contractor at the date of the abandonment belonged to the surety, because of the contract of suretyship, and by reason of subrogation. Stehle *v.* United Surety Co., 107 Md. 470, 68 Atl. 600.

A surety who has paid the debt is treated as a fictitious assignee. Stables *v.* Fox, 45 Miss. 667 [*citing* as an instance Croft *v.* Moore, 9 Watts (Pa.) 451].

Directors of a corporation who have become its sureties to creditors will, on insolvency, be subrogated to the rights of the creditors. Gray *v.* Taylor, (N. J. Ch. 1897) 38 Atl. 951 [*modified* in 59 N. J. Eq. 621, 44 Atl. 668].

43. *Arkansas.*— Dowdy *v.* Blake, 50 Ark. 205, 6 S. W. 897, 7 Am. St. Rep. 88.

Connecticut.— Sumner *v.* Rhodes, 14 Conn. 135.

Illinois.— Simpson *v.* Gardiner, 97 Ill. 237; Schoenewald *v.* Dieden, 8 Ill. App. 389.

Indiana.— Hall *v.* Hall, 34 Ind. 314.

Iowa.— Koboliska *v.* Swehla, 107 Iowa 124, 77 N. W. 576.

Kentucky.— Smith *v.* Latimer, 15 B. Mon. 75.

Louisiana.— Whitehead's Succession, 3 La. Ann. 396.

Michigan.— Smith *v.* Rumsey, 33 Mich. 183.

Missouri.— Furnold *v.* State Bank, 44 Mo. 336.

New York.— Cincinnati Fifth Nat. Bank *v.* Woolsey, 21 Misc. 757, 48 N. Y. Suppl. 148 [*affirmed* in 31 N. Y. App. Div. 61, 52 N. Y. Suppl. 827], holding that where, after the action was brought, defendant's co-guarantors paid to plaintiff the amount owing from defendant, they thereby became subrogated to the rights of plaintiff, and that the action might, for their benefit, proceed to judgment in the name of the original plaintiff.

Oregon.— Vincent *v.* Logsdon, 17 Oreg. 284, 20 Pac. 429.

Tennessee.— Greenlaw *v.* Pettit, 87 Tenn. 467, 11 S. W. 357.

Vermont.— Stebbins *v.* Willard, 53 Vt. 665.

Virginia.— Pace *v.* Pace, 95 Va. 792, 30 S. E. 361, 44 L. R. A. 459.

Wisconsin.— German-American Sav. Bank *v.* Fritz, 68 Wis. 390, 32 N. W. 123.

United States.—Campbell *v.* Pratt, 5 Wheat. 429, 5 L. ed. 126; Pratt *v.* Law, 9 Cranch 456, 3 L. ed. 791.

England.— *In re* McMyn, 33 Ch. D. 575, 55 L. J. Ch. 845, 55 L. T. Rep. N. S. 834, 35 Wkly. Rep. 179; *In re* Cochrane Estate, L. R. 5 Eq. 209, 37 L. J. Ch. 293, 17 L. T. Rep. N. S. 487, 16 Wkly. Rep. 324.

See 44 Cent. Dig. tit. "Subrogation," § 16 *et seq.*

Cosureties who pay are subrogated proportionately. Commonwealth Bank *v.* Potius, 10 Watts (Pa.) 148.

Guarantors who pay a co-guarantor's part of the debt become subrogated to the creditor's rights, and can prosecute the recreant contributor in the creditor's name. Cincinnati Fifth Nat. Bank *v.* Woolsey, 21 Misc. (N. Y.) 757, 48 N. Y. Suppl. 148.

44. Murrell *v.* Henry, 70 Ark. 161, 66 S. W. 647; Miller *v.* Stout, 5 Del. Ch. 259; Bray *v.* First Ave. Coal Min. Co., 148 Ind. 599, 47 N. E. 1073.

The right of a surety to be subrogated to the rights of the creditor does not depend on contract, but rests alone upon principles of justice and equity. Peirce *v.* Higgins, 101 Ind. 178 (holding that the surety's right to subrogation comes into existence with his contract; his rights flow from that contract and accrue when it is executed. His own acts may impair them; the acts of others cannot. These rights continue in undiminished vigor from their inception until the termination of his liability. It needs no particular form of contract to create them, for they are created by law and are legal incidents of the undertaking); Eaton *v.* Hasty, 6 Nebr. 419, 29 Am. Rep. 365 (holding that when such claim is contested it depends upon facts to develop and determine the rights of the parties in interest); Mathews *v.* Aikin, 1 N. Y. 595 (holding that the surety's right of subrogation does not depend at all upon a request or contract on the part of the debtor with the surety, but grows rather out of the relations existing between the surety and the creditor).

45. Havens *v.* Willis, 100 N. Y. 482, 3 N. E. 313 (holding that guarantors of a mortgage, compelled to pay deficiency thereon, are entitled to be subrogated to all the securities which are held as collateral to the debts secured by the original mortgage, and are so

to entitle him to the right of subrogation at the time of payment, signify his election and acceptance of such right; but it is sufficient if he show suretyship, payment of the debt, and a right held by the creditor, in the absence of some act by him which amounts to a waiver.[46] The surety's rights pass to his creditors,[47] to mortgagees of the surety whose rights are affected by enforcing the debt against the property of the surety,[48] and to the surety's personal representatives,[49] devisees,[50] or heirs.[51] Where a surety furnishes money to his principal, to be applied on the debt of the principal, and the money is thus applied by the principal, the surety is as fully entitled to be subrogated to any securities held by the creditor as if he had paid the debt in person.[52] This equitable right is cumulative, and exists entirely independently of any statutory provisions, and is equally available to the surety, except when the rights of innocent purchasers intervene, whether the question of suretyship has or has not been determined in the statutory method.[53] The surety cannot acquire greater rights than the creditor possessed, and if the creditor has lost a lien on the assets of the principal the surety does not acquire any.[54]

2. Necessity For and Sufficiency of Payment[55] — a. In General. A surety is not entitled to be substituted to the rights of the creditor until he has paid the debt for which he is surety,[56] or has at least secured the payment of the debt due

entitled to a subsequent mortgage obtained by the mortgagee as additional security; and a subsequent grantee cannot claim that such guarantors have no right to enforce the lien of such second mortgage); Enders *v.* Brune, 4 Rand. (Va.) 438.

46. Watts *v.* Eufaula Nat. Bank, 76 Ala. 474.

47. *Kentucky.*—Morris *v.* Evans, 2 B. Mon. 84, 36 Am. Dec. 591.

Nebraska.— Griffith *v.* Lehman, 5 Nebr. (Unoff.) 22, 96 N. W. 991.

North Carolina.— York *v.* Landis, 65 N. C. 535.

Pennsylvania.— Moore *v.* Bray, 10 Pa. St. 519.

Vermont.— Royalton Nat. Bank *v.* Cushing, 53 Vt. 321.

Virginia.— Watts *v.* Kinney, 3 Leigh 272, 23 Am. Dec. 266.

Canada.— Garrett *v.* Johnstone, 13 Grant Ch. (U. C.) 36.

48. Quay *v.* Sculthorpe, 16 Grant Ch. (U. C.) 449.

49. McWilliams *v.* Lee, 76 Ga. 838; Harris *v.* Wynne, 4 Ga. 521.

50. Darrow *v.* Summerhill, 24 Tex. Civ. App. 208, 58 S. W. 158, holding that where devisees of property against which there was a judgment lien, by reason of their testator's liability as surety for the payment of another judgment paid the judgment, they are not obliged to sue on the original judgment against the principal, but for the purpose of subrogation can pursue an action to subject the land for the purchase-price of which that judgment was obtained to the payment of their claims.

51. Meador *v.* Meador, 88 Ky. 217, 10 S. W. 651, 10 Ky. L. Rep. 783.

52. Zuellig *v.* Hemerlie, 60 Ohio St. 27, 53 N. E. 447, 71 Am. St. Rep. 707.

53. Thomas *v.* Stewart, 117 Ind. 50, 18 N. E. 505, 1 L. R. A. 715.

54. Coltraine *v.* Spurgin, 31 N. C. 52; Jackson *v.* Hobhouse, 2 Meriv. 483, 16 Rev. Rep. 200, 35 Eng. Reprint 1025.

55. Necessity for and sufficiency of payment generally see *supra*, III, A.

56. *Alabama.*— Turner *v.* Teague, 73 Ala. 554.

Arkansas.— McConnell *v.* Beattie, 34 Ark. 113.

Illinois.—Conwell *v.* McCowan, 53 Ill. 363; Darst *v.* Bates, 51 Ill. 439; Steingrebe *v.* French Mirror, etc., Beveling Co., 83 Ill. App. 587.

Indiana.— Johnson *v.* Amana Lodge No. 82 I. O. O. F., 92 Ind. 150.

Kentucky.— Glass *v.* Pullen, 6 Bush 346; Rice *v.* Downing, 12 B. Mon. 44.

Louisiana.— Grieff *v.* The D. S. Stacy, 12 La. Ann. 8.

Michigan.— See Smith *v.* Austin, 11 Mich. 34, holding that one whose sole interest in land is under a trust deed, by virtue of which he is to become entitled to the land after the payment of the mortgage on it and certain other demands, cannot make any arrangements with the holder of the mortgage by virtue of which he is entitled to be subrogated to the rights of the mortgagee, without paying the other demands specified in the deed of trust.

Minnesota.— Lumbermen's Ins. Co. *v.* Sprague, 59 Minn. 208, 60 N. W. 1101, holding that one seeking to be subrogated to the rights of another owning a mortgage security must pay the secured debt with accrued interest before he is entitled to the security.

Mississippi.— Lee *v.* Griffin, 31 Miss. 632.

Nebraska.— See Lichty *v.* Moore, 38 Nebr. 269, 56 N. W. 965.

North Carolina.— Booe *v.* Wilson, 46 N. C. 182.

Ohio.— Connor *v.* Stewart, 2 Ohio S. & C. Pl. Dec. 466, 7 Ohio N. P. 167.

Pennsylvania.— Kemmerer's Appeal, 125 Pa. St. 283, 17 Atl. 420, 802; Pennsylvania Bank *v.* Potius, 10 Watts 148; Hexter *v.* Kessler, 2 Leg. Rec. 380.

Rhode Island.— Church *v.* Petitioner, 16 R. I. 231, 14 Atl. 874.

by his principal,[57] because until payment is made he is regarded as in default to the creditor.[58] But the surety is entitled to subrogation, although payment was made before maturity,[59] or although payment was involuntary as the result of legal proceedings against him;[60] and a surety against whom judgment has been obtained is entitled, even before paying the debt, to bring a bill asking that a mortgage given by the principal to the creditor be applied in payment of the debt, and that upon payment of the debt he shall have the benefit of the mortgage security;[61] and although the surety on a note given for purchase-money due for land cannot be subrogated to the lien on the land until he has paid the debt to the creditor, equity will enforce the lien in an action on the note, to save a multiplicity of suits, especially when the creditor asks that it should be done.[62] It is not essential that payment be in money; whatever the creditor accepts in satisfaction will operate as payment.[63]

b. Necessity That Payment Be Under Compulsion. In order to be entitled to subrogation the surety must have been under some legal obligation to pay, and a surety who pays a debt for which he is not liable is not entitled to subrogation, as he occupies no better position than a stranger or volunteer.[64] However, one paying a debt under the mistaken belief that he is bound as surety is entitled to subrogation,[65] and the levy of execution on sufficient property of the principal to pay the judgment does not divest a surety of the judgment debtor of all interest in the judgment, so as to render his subsequent payment of the judgment a voluntary payment, and to deprive him of all recourse against the sheriff for the latter's wrongful release of the levy.[66] After a surety becomes

Tennessee.— Gilliam *v.* Esselman, 5 Sneed 86; Delaney *v.* Tipton, 3 Hayw. 14.

England.— Evart *v.* Latta, 4 Macq. 983; *Ex p.* Rushforth, 10 Ves. Jr. 409, 8 Rev. Rep. 10, 32 Eng. Reprint 903.

See 44 Cent. Dig. tit. "Subrogation," § 47.

Although an execution has been returned indorsed "Fully paid," through mistake, and the officer's liability thereon has been fixed by a court of competent jurisdiction, to entitle him to substitution to the rights of the execution creditor he must show that the judgment has been satisfied. Beal *v.* Smithpeter, 6 Baxt. (Tenn.) 356.

The surety is not obliged to pay subsequent or other debts of the principal. Forbes *v.* Jackson, 19 Ch. D. 615, 51 L. J. Ch. 690, 30 Wkly. Rep. 652; *In re* Kirkwood, L. R. 1 Ir. 108; *In re* Jeffery, 20 Wkly. Rep. 857; *In re* Hamilton Trusts, 10 Manitoba 573.

57. Lee *v.* Griffin, 31 Miss. 632.

58. Lusk *v.* Hopper, 3 Bush (Ky.) 179.

59. Wiggin *v.* Flower, 5 Rob. (La.) 406.

60. Ezzard *v.* Bell, 100 Ga. 150, 28 S. E. 28; *In re* Hamilton Trusts, 10 Manitoba 573.

A surety whose property has been sold by legal process to satisfy the creditor's claim stands in no better position as to being subrogated to the right of the creditor than one who has paid the debt. Hutcheson *v.* Reash, 15 Pa. Super. Ct. 96.

61. Moore *v.* Topliff, 107 Ill. 241. And see Bunting *v.* Ricks, 22 N. C. 130, 32 Am. Dec. 699.

Right of surety to compel the payment by principal see PRINCIPAL AND SURETY, 32 Cyc. 234, 248.

62. Lusk *v.* Hopper, 3 Bush (Ky.) 179.

63. Knighton *v.* Curry, 62 Ala. 404.

64. Kimble *v.* Cummins, 3 Metc. (Ky.) 327 (under the general principle that no one can make himself the creditor of another without his consent or against his will); Dawson *v.* Lee, 6 Ky. L. Rep. 413 [*affirmed* in 83 Ky. 49] (holding that a surety paying, when not liable, cannot subject lands sold by the principal to a third person, although a lien may have existed on the land for a debt); Dunn *v.* Missouri Pac. R. Co., 45 Mo. App. 29 (holding that where the return of the officer serving a garnishee summons is insufficient to confer jurisdiction over the *res*, the judgment is void, and, if the garnishee pays such judgment, he cannot be subrogated to the rights of plaintiff in the garnishment); Shillito Co. *v.* Henderson-Achert Lith. Co., 9 Ohio S. & C. Pl. Dec. 7, 6 Ohio N. P. 25 (holding that a surety, for whose indemnification against loss the principal directed a third person to retain certain property, has no rights against such third person, to which the creditor might be subrogated, until an action has been brought on the surety's obligation); Fink *v.* Mahaffy, 8 Watts (Pa.) 384; Hexter *v.* Kessler, 2 Leg. Rec. (Pa.) 380.

Voluntary payment as not entitling the payer to subrogation see *supra*, III, B.

65. Lyth *v.* Green, 21 N. Y. App. Div. 300, 47 N. Y. Suppl. 478; Capehart *v.* Mhoon, 58 N. C. 178. But see Dawson *v.* Lee, 83 Ky. 49 (holding that one not in fact bound who pays the debt stands in no better position than a stranger, although he *bona fide* believed himself bound. Decided, however, under a statute expressly declaring how a surety could be bound, the provisions of which were not followed); Fink *v.* Mahaffy, 8 Watts (Pa.) 384.

Effect of payment under a mistake as to legal obligation generally see *supra*, III, A, B.

66. Murray *v.* Meade, 5 Wash. 693, 32 Pac. 780.

chargeable by a forfeiture of the contract or its performance by the principal, he may insure a prompt prosecution by immediately discharging the obligation and becoming by subrogation entitled to all the remedies possessed by the creditor,[67] for the rights of a surety when subrogated, whether payment is made before or after his obligation, become absolute, result from his original contract, and are restrained by it.[68]

c. Part Payment. The creditor's right to the possession of all the securities and rights attaching to the debt is superior to the equity of the surety or guarantor, and the creditor is not obliged to suffer the inconvenience or risk of parting with any of his resources until the debt is paid in full. In order that the surety may have subrogation the debt must be fully paid;[69] and a surety can, neither at law

67. Barnes *v.* Crandell, 11 La. Ann. 119 (holding that a surety for a debt after he becomes chargeable is at liberty, if he thinks the creditor not sufficiently energetic, to pay the debt and become subrogated to the creditor's rights therein); Sasscer *v.* Young, 6 Gill & J. (Md.) 243; Whitridge *v.* Durkee, 2 Md. Ch. 442.

A surety may purchase the debt for which he is bound, and take an assignment thereof and of a mortgage by which it is secured, and maintain an action thereon against the principal. Wilkerson *v.* Tichenor, 62 S. W. 870, 23 Ky. L. Rep. 244. And where a surety for a decedent is compelled to pay a claim while pending against the estate of his principal, he may take an assignment of the claim, and proceed thereon in the name of the original claimant, or may be substituted and proceed in his own name. Harman *v.* Harman, 62 Nebr. 452, 87 N. W. 177.

68. Coons *v.* Graham, 12 Rob. (La.) 206; Wiggin *v.* Flower, 5 Rob. (La.) 406.

69. *Arkansas.*— Schoonover *v.* Allen, 40 Ark. 132; McConnell *v.* Beattie, 34 Ark. 113, holding that a surety cannot have subrogation to liens until he pays the entire debt.

Connecticut.— Stamford Bank *v.* Benedict, 15 Conn. 437.

Georgia.— Bridges *v.* Nicholson, 20 Ga. 90.

Illinois.— Conwell *v.* McCowan, 53 Ill. 363; Darst *v.* Bates, 51 Ill. 439; Loeb *v.* Fleming, 15 Ill. App. 503.

Indiana.— Opp *v.* Ward, 125 Ind. 241, 24 N. E. 974, 21 Am. St. Rep. 220; Vert *v.* Voss, 74 Ind. 565; Covey *v.* Neff, 63 Ind. 391; Zook *v.* Clemmer, 44 Ind. 15.

Iowa.— Keokuk *v.* Love, 31 Iowa 119.

Kansas.— Bartholomew *v.* Salina First Nat. Bank, 57 Kan. 594, 47 Pac. 519.

Kentucky.— Rice *v.* Downing 12 B. Mon. 44; Willingham *v.* Ohio Valley Banking, etc., Co., 56 S. W. 706, 57 S. W. 467, 22 Ky. L. R. 158.

Louisiana.— Grieff *v.* The D. S. Stacy, 12 La. Ann. 8.

Maryland.—Com. *v.* Chesapeake, etc., Canal Co., 32 Md. 501; Swan *v.* Patterson, 7 Md. 164; Hollingsworth *v.* Floyd, 2 Harr. & G. 87; Neptune Ins. Co. *v.* Dorsey, 3 Md. Ch. 334.

Massachusetts.— Wilcox *v.* Fairhaven Bank, 7 Allen 270.

Mississippi.— Magee *v.* Leggett, 48 Miss. 139.

Missouri.— Fisher *v.* Columbia Bldg., etc., Assoc., 59 Mo. App. 430; Ames *v.* Huse, 55 Mo. App. 422.

New Hampshire.— Gannett *v.* Blodgett, 39 N. H. 150.

New Jersey.— Freehold Nat. Banking Co. *v.* Brick, 37 N. J. L. 307; Coe *v.* New Jersey Midland R. Co., 31 N. J. Eq. 105; New Jersey Midland R. Co. *v.* Wortendyke, 27 N. J. Eq. 658.

Pennsylvania.— Musgrave *v.* Dickson, 172 Pa. St. 629, 33 Atl. 705, 51 Am. St. Rep. 765; *In re* Brough, 71 Pa. St. 460; Hoover *v.* Epler, 52 Pa. St. 522; Coates's Appeal, 7 Watts & S. 99; Pennsylvania Bank *v.* Potius, 10 Watts 148; Kyner *v.* Kyner, 6 Watts 221. But see Burns *v.* Huntington Bank, 1 Penr. & W. 395.

Rhode Island.—Church, Petitioners, 16 R. I. 231, 14 Atl. 874.

Tennessee.— Harlan *v.* Sweeny, 1 Lea 682; Gilliam *v.* Esselman, 5 Sneed 86.

Vermont.— Field *v.* Hamilton, 45 Vt. 35.

Virginia.— Barton *v.* Brent, 87 Va. 385, 13 S. E. 29.

United States.— Columbia Finance, etc., Co. *v.* Kentucky Union R. Co., 60 Fed. 794, 9 C. C. A. 264.

See 44 Cent. Dig. tit. "Subrogation," § 54.

Compare Thompson *v.* Humphrey, 83 N. C. 416, holding that where a surety on the bond of a deceased guardian, having paid the amount recovered by a ward in a suit on such bond, sued to be subrogated to the claim of the guardian against the person to whom the guardian loaned the money, although plaintiff at this stage of the case was not entitled to have the debt assigned to him, it not appearing that the other wards of the deceased guardian had been paid in full, he was entitled to have the money paid into court, to await final adjustment of the rights of the several parties.

A surety who has paid a part of the amount due on a fieri facias had no right to control it, so as to reimburse himself, and his rights were secondary to those of the holder of the fieri facias, although a transferee who had bought property from the principal debtor had purchased the fieri facias to protect such property. Cherry *v.* Singleton, 66 Ga. 206.

Argument in support of rule see Columbia Finance, etc., Co. *v.* Kentucky Union R. Co., 60 Fed. 794, 9 C. C. A. 264.

The surety before payment cannot maintain a bill to indemnify himself from secu-

nor in equity, call for an assignment of the claim against his principal, or be clothed by mere operation of law, and upon principles of equity, with the rights of an assignee of such claim, unless the entire debt of the creditor has been paid. A *pro tanto* assignment or subrogation will not be allowed;[70] and the same rule applies to an indorser.[71] But although the rule is sometimes narrowly stated that the surety is not entitled to subrogation till he has paid the entire debt,[72] if a surety pays part of the debt and the principal the balance, the surety will be subrogated to all the benefits which the creditor had against the principal to the extent of his payment,[73] and in general it is sufficient if the balance of the creditor's debt has been otherwise satisfied.[74] Nor is it essential that the surety should have paid the full amount of the debt in money, provided the creditor be satisfied; if he has discharged the burden, leaving in the creditor nothing further to demand, he will be entitled to subrogation, but only for indemnity to the extent of the money paid or value of the property applied.[75] But if the surety has made only part payment and any balance remains unpaid, he can have no subrogation,[76] the essence of the rule being that the creditor must be fully paid.[77] Thus a surety liable for only a part or instalment of a debt who pays that part is not entitled to be subrogated to the securities held by the creditor, unless the whole demand has been paid;[78] but the surety, in such cases, has a lien on the security, subor-

rity (Gilliam *v.* Esselman, 5 Sneed (Tenn.) 86), although the creditor assents to the proceeding (Gilliam *v.* Esselman, *supra*), unless the principal is insolvent (Henry *v.* Compton, 2 Head (Tenn.) 549. *Compare* Hatcher *v.* Hatcher, 1 Rand. (Va.) 53).

70. Neptune Ins. Co. *v.* Dorsey, 3 Md. Ch. 334; Gannett *v.* Blodgett, 39 N. H. 150.

The creditor's rights must be entirely divested before another can be substituted by mere operation of law in his place as respects those rights, so as to have them vest in him. Gannett *v.* Blodgett, 39 N. H. 150 [*quoted* and *followed* in Magee *v.* Leggett, 48 Miss. 139].

71. Stamford Bank *v.* Benedict, 15 Conn. 437; Gannett *v.* Blodgett, 39 N. H. 150; Clapp *v.* Cooper, 31 Misc. (N. Y.) 466, 64 N. Y. Suppl. 446.

72. See cases cited *supra*, note 69.

73. Magee *v.* Leggett, 48 Miss. 139; *In re* Hess, 69 Pa. St. 272; Neal *v.* Buffington, 42 W. Va. 327, 26 S. E. 172.

Thus a surety who has paid part of the debt may, in a suit in equity against the principal and the creditor, be subrogated to the creditor's liens, after satisfaction out of the debtor's property of the balance due the creditor. Neal *v.* Buffington, 42 W. Va. 327, 26 S. E. 172.

Transfer of notes after part payment.—Payment will be deemed to have been made when the surety pays part and the principal transfers notes of a third party. Carter *v.* Sims, 2 Heisk. (Tenn.) 166.

74. Vert *v.* Voss, 74 Ind. 565; Zook *v.* Clemmer, 44 Ind. 15; *In re* Lawrence, 5 Fed. 349.

75. Schoonover *v.* Allen, 40 Ark. 132, holding that the general rule that subrogation will not be allowed for partial payment extends only so far as its reason goes. The reason is that the creditor cannot equitably be compelled to split his securities, or give up control of any part until he is fully satisfied. It accords with the limitation that subrogation will not be enforced against a superior equity.

76. Magee *v.* Leggett, 48 Miss. 139; Ames *v.* Huse, 55 Mo. App. 422.

77. James *v.* Day, 37 Iowa 164; Gifford *v.* Rising, 12 N. Y. Suppl. 430.

78. *Indiana.*— Carithers *v.* Stuart, 87 Ind. 424.

Iowa.— Massie *v.* Mann, 17 Iowa 131.

Kentucky.— Willingham *v.* Ohio Valley Banking, etc., Co., 56 S. W. 706, 57 S. W. 467, 22 Ky. L. Rep. 158.

Massachusetts.—Wilcox *v.* Fairhaven Bank, 7 Allen 270.

Tennessee.— Menken *v.* Taylor, 4 Lea 445.

Virginia.— Sipe *v.* Taylor, 106 Va. 231, 55 S. E. 542; Grubbs *v.* Wysors, 32 Gratt. 127.

England.— *Ex p.* Marshal, 1 Atk. 129, 26 Eng. Reprint 85; Farebrother *v.* Wodehouse, 23 Beav. 18, 2 Jur. N. S. 1178, 26 L. J. Ch. 81, 5 Wkly. Rep. 12, 53 Eng. Reprint 7.

See 44 Cent. Dig. tit. "Subrogation," § 54.

Sureties on the recognizance of a county treasurer are not entitled to subrogation as long as there are debts due by the treasurer to the crown, although not covered by the recognizance. Reg. *v.* O'Callaghan, 1 Ir. Eq. 439, J. & C. 154.

Application of proceeds of security.—Where a creditor realizes upon property of the debtor which was security for a large indebtedness including notes with surety, he is not bound to apply the proceeds to reduce the liability of the surety unless the amount is sufficient to cancel the whole indebtedness. Denniston *v.* Hill, 173 Pa. St. 633, 34 Atl. 452. And see Belcher *v.* Hartford Bank, 15 Conn. 381.

Where several notes are secured by one mortgage, and judgment is obtained on the note first due, a surety for stay of execution, who pays it, cannot be subrogated to the mortgage without paying the other notes. Rice *v.* Morris, 82 Ind. 204 [*distinguishing* Gerber *v.* Sharp, 72 Ind. 553]; Vert *v.* Voss, 74 Ind. 565. But see Nettleton *v.* Ramsey

dinate to that of the creditor;[79] and only a creditor holding the securities can object to a subrogation *pro tanto* of a surety who has paid a portion of the debt, whether the surety has entirely satisfied the debt or not,[80] and the creditor may allow the surety to be subrogated before the indebtedness is wholly extinguished.[81]

d. Effect of Payment as Extinguishing Debt. In England the earliest rule seems to have been that upon payment of the debt the surety became subrogated not only to collateral security but to the very debt and evidence of indebtedness itself;[82] but under later English decisions prior to the enactment of the Mercantile Law Amendment Act, it was held that the surety upon payment became subrogated to the collateral securities but not to the debt itself, and that the payment of a judgment or specialty rendered it *functus officio* and that the surety could not be subrogated to it;[83] and this rule has been in some degree followed in the United States, particularly in the earlier cases.[84] This qualification of the equity of the

County Land, etc., Co., 54 Minn. 395, 56 N. W. 128, 40 Am. St. Rep. 342, holding that the grantee of land, who has assumed a mortgage debt represented by notes payable at different dates, cannot object against an indorser of said notes, who has taken one of them up, and is suing as subrogated to the holder's rights, that, not having paid the entire debt, he is not subrogated as to any part.

Where a surety pays part of a judgment against his principal and himself, such partial payment does not operate as an assignment to the surety *pro tanto*, so as to enable him to exercise any control over the judgment or execution (McKnew *v.* Duvall, 45 Md. 501), and a surety's settlement by payment of part of a judgment does not operate as an assignment of the judgment against defendant, so as to authorize the surety to recover the whole amount of such judgment (McDermott *v.* Mitchell, 53 Cal. 616); but he possesses an inchoate equitable interest in the judgment to the extent of his judgment which may be released or transferred (Grove *v.* Brein, 1 Md. 438).

79. Grubbs *v.* Wysors, 32 Gratt. (Va.) 127; Gedye *v.* Matson, 25 Beav. 310, 53 Eng. Reprint 655; Goodwin *v.* Gray, 22 Wkly. Rep. 312.

80. Fisher *v.* Columbia Bldg., etc., Assoc., 59 Mo. App. 430; Motley *v.* Harris, 1 Lea (Tenn.) 577, holding that the creditors in a deed of trust other than the one to whom the surety is bound cannot object to any arrangement between such creditor and surety by which the latter is substituted to the rights and remedies of the creditor under the assignment, whether the surety has entirely satisfied the debt or not.

81. Fisher *v.* Columbia Bldg., etc., Assoc., 59 Mo. App. 430; New Jersey Midland R. Co. *v.* Wortendyke, 27 N. J. Eq. 658; Motley *v.* Harris, 1 Lea (Tenn.) 577, holding that neither the principal nor other creditor of the principal can object.

82. *Ex p.* Crisp, 1 Atk. 133, 26 Eng. Reprint 87; Parsons *v.* Briddock, 2 Vern. Ch. 608, 23 Eng. Reprint 997. See Knighton *v.* Curry, 62 Ala. 404, and comments therein upon the opinion of Chancellor Kent in Cheesebrough *v.* Millard, 1 Johns. Ch. (N. Y.) 409, 7 Am. Dec. 494.

83. Knighton *v.* Curry, 62 Ala. 404 (holding that there was a conflict between the English court of chancery and the current decisions in this country, as to the extent of the right of the surety to subrogation to the rights and remedies of the principal, in England, it seeming to have been limited to independent collateral securities for the payment of the debt, held by the creditor, and was not permitted to embrace "collateral incidents and dependent rights growing out of the original debt"); Liles *v.* Rogers, 113 N. C. 197, 18 S. E. 104, 37 Am. St. Rep. 627; Hodgson *v.* Shaw, 3 L. J. Ch. 190, 3 Myl. & K. 190, 10 Eng. Ch. 183, 40 Eng. Reprint 70.

Thus in Copis *v.* Middleton, Turn. & R. 224, 229, 12 Eng. Ch. 224, 37 Eng. Reprint 1083, Lord Eldon said: "The general rule therefore must be qualified, by considering it to apply to such securities as continue to exist, and do not get back upon payment to the person of the principal debtor. In the case for instance where in addition to the bond there is a mortgage, with a covenant on the part of the principal debtor to pay the money, the surety paying the money would be entitled to say, 'I have lost the benefit of the bond, but the creditor has a mortgage, and I have a right to the benefit of the mortgaged estate, which has not got back to the debtor.'"

84. *Alabama.*— Foster *v.* Athenæum, 3 Ala. 302.

California.—Crystal *v.* Hutton, 1 Cal. App. 251, 81 Pac. 1115.

Maine.—Whittier *v.* Heminway, 22 Me. 238, 38 Am. Dec. 309; Morse *v.* Williams, 22 Me. 17.

Massachusetts.— Slade *v.* Mutrie, 156 Mass. 19, 30 N. E. 168; New Bedford Sav. Inst. *v.* Hathaway, 134 Mass. 69, 45 Am. Rep. 289; Adams *v.* Drake, 11 Cush. 504; Pray *v.* Maine, 7 Cush. 253; Brackett *v.* Winslow, 17 Mass. 153; Hammatt *v.* Wyman, 9 Mass. 138.

Nevada.— Frevert *v.* Henry, 14 Nev. 191, holding that a surety who has paid the note and had it assigned to him may maintain an action as of assumpsit for the amount paid, but not an action on the note.

South Carolina.— Cunningham *v.* Smith, Harp. Eq. 90.

Tennessee.—Uzzell *v.* Mack, 4 Humphr. 319, 40 Am. Dec. 648.

Texas.— Holliman *v.* Rogers, 6 Tex. 91.

surety was never consistent with the spirit of legislation which favors sureties, nor with the liberal application of the doctrine of subrogation in other cases,[85] and so it was expressly provided by the Mercantile Law Amendment Act [86] that payment by the surety should not satisfy the debt, and that the surety should be entitled to have assigned to him as a trustee every judgment, specialty, or other security held by the creditor in respect to the debt whether or not deemed at law to have been satisfied, and this is the rule supported by the great weight of authority in America.[87] The principal obligation is discharged as respects

Virginia.— Cromer *v.* Cromer, 29 Gratt. 280.

United States.— Dennis *v.* Rider, 7 Fed. Cas. No. 3,797, 2 McLean 451; McLean *v.* Lafayette Bank, 16 Fed. Cas. No. 8,888, 3 McLean 587; U. S. *v.* Preston, 27 Fed. Cas. No. 16,087, 4 Wash. 446.

See 44 Cent. Dig. tit. "Subrogation," § 55.

In North Carolina the courts continue to follow the original doctrine as declared by the courts of England, the only modification of the rule being in favor of a surety who has paid the debt of a deceased principal. Liles *v.* Rogers, 113 N. C. 197, 18 S. E. 104, 37 Am. St. Rep. 627, holding that as soon as a surety has paid the debt an equity arises in his favor to have all of the securities which the creditor holds against the principal debtor transferred to him, and to avail himself of them as fully as the creditor could have done, but the securities referred to do not include those which are extinguished by the payment of the debt, such as the bond securing such principal debt, and unless the security procures it to be assigned for his benefit to a third person, it is utterly extinguished both at law and in equity, and he becomes a simple contract creditor. And see Tiddy *v.* Harris, 101 N. C. 589, 8 S. E. 227; McCoy *v.* Wood, 70 N. C. 125; Briley *v.* Sugg, 21 N. C. 366, 30 Am. Dec. 172; Sherwood *v.* Collier, 14 N. C. 380, 24 Am. Dec. 264; Hodges *v.* Armstrong, 14 N. C. 253. To prevent a satisfaction when a surety pays money to a creditor, and to preserve the security for the benefit of the surety paying it, it must be assigned to a trustee, and it can be kept alive in no other way. Tiddy *v.* Harris, *supra.* See also the North Carolina cases cited *supra,* this note.

The reason for this rule is held to be that the whole doctrine of subrogation is predicated entirely upon the discharge of the original obligation. Liles *v.* Rogers, *supra.*

85. Knighton *v.* Curry, 62 Ala. 404.

86. St. 19 & 20 Vict. c. 97, § 5.

87. *California.*— Dow *v.* Nason, (1894) 38 Pac. 54.

Delaware.— Miller *v.* Stout, 5 Del. Ch. 259.

Georgia.— Livingston *v.* Anderson, 80 Ga. 175, 5 S. E. 48; Lumpkin *v.* Mills, 4 Ga. 343.

Illinois.— Allen *v.* Powell, 108 Ill. 584.

Indiana.— Davis *v.* Schlemmer, 150 Ind. 472, 50 N. E. 373.

Indian Territory.— Sparks *v.* Childers, 2 Indian Terr. 187, 47 S. W. 316.

Louisiana.— Tardy *v.* Allen, 3 La. Ann. 66.

Massachusetts.— Washington Bank *v.* Shurtleff, 4 Metc. 30.

Minnesota.— Felton *v.* Bissel, 25 Minn. 15 [*citing* Folsom *v.* Carli, 5 Minn. 333, 80 Am. Dec. 429].

Missouri.—Ferguson *v.* Carson, 86 Mo. 673; Berthold *v.* Berthold, 46 Mo. 557 [*affirmed* in 22 How. (U. S.) 334, 16 L. ed. 318.

New Hampshire.— Low *v.* Blodgett, 21 N. H. 121.

New York.— Fairchild *v.* Lynch, 99 N. Y. 359, 2 N. E. 20; Townsend *v.* Whitney, 75 N. Y. 425; Cincinnati Fifth Nat. Bank *v.* Woolsey, 21 Mich. 757, 48 N. Y. Suppl. 148.

Oregon.— Brown *v.* Whittington, 39 Oreg. 300, 64 Pac. 649.

Pennsylvania.— Elkinton *v.* Newman, 20 Pa. St. 281; Oneil *v.* Whitaker, 1 Am. L. J. 225.

Texas— Hollimon *v.* Karger, 30 Tex. Civ. App. 558, 71 S. W. 299; Beville *v.* Boyd, 16 Tex. Civ. App. 491, 41 S. W. 670, 42 S. W. 318.

Virginia.— Hill *v.* Manser, 11 Gratt. 522; Powell *v.* White, 11 Leigh 309, a carefully considered early case repudiating the English doctrine after an elaborate discussion.

Washington.— Murray *v.* Meade, 5 Wash. 693, 32 Pac. 780.

United States.— Brown *v.* Decatur, 4 Fed. Cas. No. 2,001, 4 Cranch C. C. 477.

England.— *In re* Churchill, 39 Ch. D. 174, 58 L. J. Ch. 136, 59 L. T. Rep. N. S. 597, 36 Wkly. Rep. 805.

Canada.— Rigney *v.* Vanzandt, 5 Grant Ch. (U. C.) 494.

See 44 Cent. Dig. tit. "Subrogation," § 55. And see Brandt Suretyship, § 274.

By the civil law not only is the surety entitled in such cases to the benefit of all the collateral securities taken by the creditor, but he is also entitled to be substituted as to the very debt itself, to the creditor, by way of cession of assignment. And upon payment of the debt by the surety, the debt is in favor of the surety, treated not so much as paid, as sold; not as extinguished, but as transferred with all its obligatory force against the principal. After quoting at length from the Digest of Justinian the provisions of the Roman law, which support this view of the subject, Mr. Justice Story says: "We have here the doctrine distinctly put, the objection to it stated, and the ground upon which its solution depends, affirmed. The reasoning may seem a little artificial; but it has a deep foundation in natural justice. The same doctrine stands in substance approved in all the countries which derive their jurisprudence from the civil law." Carroll *v.* The Leathers, 5 Fed. Cas. No. 2,455, Newb. Adm. 432, 435 [*citing* 1 Story Eq. Jur. § 500; Dig. lib. 46, tit. 1, 1, 17, 36; Pothier

the creditor, but is kept alive between the creditor, the debtor, and the surety, for the purpose of enforcing the rights of the surety,[88] with its liens and priorities.[89] Thus a surety has the right, when paying the creditor, to take an assignment of the evidence of indebtedness, and can enforce it against his principal;[90] and upon the doctrine that equity considers that as done which ought to be done, although no actual assignment is made, the debt is considered the payer's,[91] payment by the surety being equivalent to a purchase from the creditor, and operating as an equitable assignment of the debt, and all its incidents, to the

Pand. lib. 46, tit. 1, n. 46; 1 Domesday-Book 3, tit. 1, § 3, arts. 6, 7].

In Alabama the statute compels the creditor to assign to a surety paying the debt any judgment the creditor may have obtained upon it, and authorizes the surety to assert "in law or equity any right or lien against the principal debtor, which the plaintiff could assert, if the debt had not been paid." Code (1876), § 3418; Knighton *v.* Curry, 62 Ala. 404. The rule was formerly otherwise. Foster *v.* Athenæum, 3 Ala. 302. And see McNeill *v.* McNeill, 36 Ala. 109, 76 Am. Dec. 320.

In Missouri a surety, by paying the debt of his principal, becomes entitled to be subrogated to all the rights of the creditor, so as to have the benefit of all the securities which the creditor had for the payment of the debt, without any exception, as well those which became extinct (at law, at least) by the act of the surety's paying the debt, as all collateral securities which the creditor held for the payments which have not been considered as directly extinguished by the surety's paying the debt. These decisions have been made upon a principle of equity which, for the purpose of doing justice to the surety who has paid the debt, interposes to prevent the judgment or security which has been so extinguished at law from being so considered as between the surety and the principal or his subsequent lien creditors. Allison *v.* Sutherlin, 50 Mo. 274; Furnold *v.* State Bank, 44 Mo. 336; Cowgill *v.* Linnville, 20 Mo. App. 138.

This was formerly the rule in Texas (Jackson *v.* Murray, 77 Tex. 644, 14 S. W. 235; Tutt *v.* Thornton, 57 Tex. 35; Sublett *v.* McKinney, 19 Tex. 438; Jordan *v.* Hudson, 11 Tex. 82; Bell *v.* Gammon, 3 Tex. App. Civ. Cas. § 404; Hoffman *v.* Bignall, 1 Tex. App. Civ. Cas. § 703), although not without some conflict (See Holliman *v.* Rogers, 6 Tex. 91). But after an elaborate discourse in Faires *v.* Cockerell, 88 Tex. 428, 31 S. W. 190, 639, 28 L. R. A. 528, the court held, reviewing all the cases in Texas and in other jurisdictions, that payment extinguishes the debt and the surety's action is not upon the debt itself but upon the contract implied by law, and this case is followed in Halbert *v.* Paddleford, (Tex. Civ. App. 1896) 33 S. W. 592. See also Missouri, etc., R. Co. *v.* Ferris, (Civ. App. 1906) 99 S. W. 896.

In Oklahoma under St. (1893) § 2951, providing that a surety, on satisfying an obligation, is entitled to every remedy which the creditor has against the principal, to the extent of reimbursing what he has expended, the right of a surety who has discharged a promissory note is against the principal on the note, and not on an implied promise to pay. McClure *v.* Johnson, 10 Okla. 668, 65 Pac. 103. See Keokuk Falls Imp. Co. *v.* Kinsland, etc., Mfg. Co., 5 Okla. 32, 47 Pac. 484.

88. Miller *v.* Stout, 5 Del. Ch. 259.

89. Berthold *v.* Berthold, 46 Mo. 557 [*affirmed* on other grounds in 22 How. (U. S.) 334, 16 L. ed. 318]. But see Cureton *v.* Cureton, 120 Ga. 559, 48 S. E. 162, holding that a surety who pays the full amount due on a fieri facias, but does not have any entry of payment indorsed thereon, and allows the judgment to become dormant, is not equitably subrogated to the rights of plaintiff in the judgment, so as to enforce contribution against a cosurety. The surety must not only pay the amount due on the fieri facias but must also have the entry of payment made thereon before he can control the judgment and fieri facias against a cosurety.

90. Cochran *v.* Shields, 2 Grant (Pa.) 437.

Although the assignment stated that it was made with the "intention" of subrogating. People *v.* Anthony, 7 N. Y. App. Div. 132, 40 N. Y. Suppl. 279 [*affirmed* in 151 N. Y. 620, 45 N. E. 1133] where defendant contended unsuccessfully that these words did not import subrogation but only an unexecuted intention to subrogate.

A surety can have a judgment assigned to him. Bragg *v.* Patterson, 85 Ala. 233, 4 So. 716; Harris *v.* Frank, 29 Kan. 200; Smith *v.* Wells, 4 Bush (Ky.) 92; Morris *v.* Evans, 2 B. Mon. (Ky.) 84, 36 Am. Dec. 591; Creager *v.* Brengle, 5 Harr. & J. (Md.) 234, 9 Am. Dec. 516; Benne *v.* Schnecko, 100 Mo. 250, 13 S. W. 82; Townsend *v.* Whitney, 75 N. Y. 425; Goodyear *v.* Watson, 14 Barb. (N. Y.) 481; Cottrell's Appeal, 23 Pa. St. 294; Sublett *v.* McKinney, 19 Tex. 438.

A surety can have an attachment assigned to him. Brewer *v.* Franklin Mills, 42 N. H. 292.

Where plaintiff had been a surety on a note, but subsequently bought it, the assignment to him was not a discharge of the note, but entitled him to be subrogated to the rights of the creditor against his principal, and to foreclose a mortgage given to secure the note. Marsters *v.* Umpqua Oil Co., 49 Oreg. 374, 90 Pac. 151, 12 L. R. A. N. S. 825.

91. Sublett *v.* McKinney, 19 Tex. 438. But see Mudd *v.* Mullican, 12 S. W. 263, 385, 11 Ky. L. Rep. 417, holding that a claim against the estate of his principal, by a surety, for payment of a bond which is not assigned to him, is on an account, and not on the bond.

former.[92] But the rule has not been carried so far as to allow sureties to say they will not pay until an assignment is executed. The surety must pay in order to have any right of subrogation at all,[93] although it has been held that where a defendant, upon paying a debt sued for, will be subrogated to the rights of plaintiff in a security for the debt, he may in his answer allege the facts showing that he will be so entitled to subrogation; and the court, before rendering judgment, may require plaintiff to execute and file a transfer to defendant of the security to be delivered on payment of the judgment,[94] and a surety who pays the debt may stipulate for an assignment of the collateral securities held by a creditor, and the debt will be unpaid so far as the securities are concerned,[95] although the right of a surety to be subrogated on the payment of the debt to the securities held by the creditor does not depend upon any contract or request by the principal debtor, but rests upon principles of justice and equity.[96] The rule of non-extinguishment of the indebtedness applies not only to true sureties but to all who stand in the light of having paid as surety the debt of another; [97] but an advancement by a junior mortgagee of a judgment debt to a creditor, who also holds a judgment against another as surety therefor, is a final satisfaction of the latter, where the principal's estate suffices to pay the advance, and the advancing creditor is not therefore entitled to an assignment of such security; [98] and it has been held in a

92. *California.*— Waldrip *v.* Black, 74 Cal. 409, 16 Pac. 226, holding that where one has signed a note as surety, and received from the makers a mortgage to secure him, and pays the note on their failure so to do, he becomes an equitable assignee of the note, and can enforce its payment, and foreclose the mortgage, to recover the money paid by him, with legal interest.

Indiana.— Opp *v.* Ward, 125 Ind. 241, 24 N. E. 974, 21 Am. St. Rep. 220; Thomas *v.* Stewart, 117 Ind. 50, 18 N. E. 505, 1 L. R. A. 715; Arbogast *v.* Hays, 98 Ind. 26; Pence *v.* Armstrong, 95 Ind. 191.

Maryland.— Merryman *v.* State, 5 Harr. & J. 423.

Minnesota.— McArthur *v.* Martin, 23 Minn. 74.

Missouri.—Benne *v.* Schnecko, 100 Mo. 250, 13 S. W. 82; Taylor *v.* Tarr, 84 Mo. 420; Ferd Heim Brewing Co. *v.* Jordan, 110 Mo. App. 286, 85 S. W. 927.

New Hampshire.— Bacon *v.* Goodnow, 59 N. H. 415.

New York.— Acer *v.* Hotchkiss, 97 N. Y. 395; McLean *v.* Towle, 3 Sandf. Ch. 117.

Pennsylvania.— Deitzler *v.* Mishler, 37 Pa. St. 82.

See 44 Cent. Dig. tit. "Subrogation," § 55.

Payment of execution by joint defendant.— While it has been held that payment of an execution by one of the several defendants so far extinguishes the same that the doctrine of subrogation does not apply and it cannot be subsequently assigned to the debtor paying it and be levied by him on land of the other debtors (Stevens *v.* Morse, 7 Me. 36, 20 Am. Dec. 337, where payment was made by the brother of one of several judgment debtors who afterward approved the act; Holmes *v.* Day, 108 Mass. 563; Adams *v.* Drake, 11 Cush. (Mass.) 504; Harbeck *v.* Vanderbilt, 20 N. Y. 395; Lowdermilk *v.* Corpening, 92 N. C. 333), other cases hold that where one of several co-defendants pay the judgment, and procures an assignment thereof, such payment will not operate as a satisfaction of the judgment as to any of the other defendants, unless an intention that it shall so operate plainly appears (Coffee *v.* Tevis, 17 Cal. 239; *In re* Wheeler, 1 Md. Ch. 80; Campbell *v.* Pope, 96 Mo. 468, 10 S. W. 187; Brown *v.* White, 29 N. J. L. 514), and as has been said to construe that as a payment which was meant to be an assignment is a contradiction in terms (McIntyre *v.* Miller, 2 D. & L. 708, 14 L. J. Exch. 180, 13 M. & W. 725 [*quoted* and *followed* in Campbell *v.* Pope, *supra*].

Effect of payment of judgment by joint party or third person, such as surety, stranger, or officer generally see JUDGMENTS, 23 Cyc. 1472 *et seq.*

93. Wadley *v.* Poucher, 9 N. Y. Suppl. 50, holding in application of this rule that sureties on an appeal-bond are not, on affirmance of the order appealed from, entitled to an assignment of it as a condition of their making payment.

94. Knoblauch *v.* Foglesong, 37 Minn. 320, 33 N. W. 865.

95. Brewer *v.* Franklin Mills, 42 N. H. 292.

96. Mathews *v.* Aikin, 1 N. Y. 595. And see *supra*, I, B.

97. *Alabama.*— Wright *v.* Robinson, 94 Ala. 479, 10 So. 319; Harwood *v.* Harper, 54 Ala. 659.

Louisiana.— Pritchard *v.* Louisiana State Bank, 2 La. 415.

Minnesota.— Nettleton *v.* Ramsey County Land, etc., Co., 54 Minn. 395, 56 N. W. 128, 40 Am. St. Rep. 342.

Missouri.— Berthold *v.* Berthold, 46 Mo. 557.

Tennessee.— Lintz *v.* Thompson, 1 Head 456, 73 Am. Dec. 182.

Texas.— Fears *v.* Albea, 69 Tex. 437, 6 S. W. 286, 5 Am. St. Rep. 78; Hoffman *v.* Bignall, 1 Tex. App. Civ. Cas. § 703.

See 44 Cent. Dig. tit. "Subrogations," § 55.

98. Gratz *v.* Farmers' Bank, 5 Watts (Pa.) 99.

case which recognizes the doctrine that in equity payment by one of several joint judgment debtors did not extinguish the lien of the judgment, which could be enforced for contribution, that where one of two joint obligors on a judgment pays the judgment before it has become a lien on their land by record of the abstract, the judgment is discharged, and the obligor making the payment cannot, under the doctrine of subrogation, by subsequently recording the judgment, render it an equitable lien on the land of the other for the amount due by way of contribution.[99]

3. To What the Surety Is Subrogated — a. Rights and Securities of Creditor — (i) *In General.* It is a clear principle of equity that a surety has the right of subrogation to all the securities which the creditor has against the principal debtor,[1] to the extent necessary to protect him from loss,[2] and a surety is subro-

99. Morris *v.* Davis, (Tex. Civ. App. 1895) 31 S. W. 850.

1. *Alabama.*—Houston *v.* Huntsville Branch Bank, 25 Ala. 250; Colvin *v.* Owens, 22 Ala. 782.

Connecticut.—Belcher *v.* Hartford Bank, 15 Conn. 381; New London Bank *v.* Lee, 11 Conn. 112, 27 Am. Dec. 713.

Delaware.— Dodd *v.* Wilson, 4 Del. Ch. 399.

Illinois.— Rice *v.* Rice, 108 Ill. 199; Richeson *v.* Crawford, 94 Ill. 165; Simpson *v.* McPhail, 17 Ill. App. 499.

Iowa.—Knoll *v.* Marshall County, 114 Iowa 647, 87 N. W. 657; Manning *v.* Ferguson, 103 Iowa 561, 72 N. W. 762; Gilbert *v.* Adams, 99 Iowa 519, 68 N. W. 883; Sears *v.* Laforce, 17 Iowa 473.

Minnesota.—Conner *v.* Howe, 35 Minn. 518, 29 N. W. 314.

Mississippi.— Dozier *v.* Lewis, 27 Miss. 679.

Missouri.— Reyburn *v.* Mitchell, 106 Mo. 365, 16 S. W. 592, 27 Am. St. Rep. 350; Taylor *v.* Tarr, 84 Mo. 420; May *v.* Burk, 80 Mo. 675; Orrick *v.* Durham, 79 Mo. 174; Berthold *v.* Berthold, 46 Mo. 557; Arnot *v.* Woodburn, 35 Mo. 99; Schell City Bank *v.* Reed, 54 Mo. App. 94; Rubey *v.* Watson, 22 Mo. App. 428; Bauer *v.* Gray, 18 Mo. App. 164.

Nebraska.— Guthrie *v.* Ray, 36 Nebr. 612, 54 N. W. 971; Wilson *v.* Burney, 8 Nebr. 39, holding that the rule entitles the surety to a security held by the principal, although in the form of an order upon garnishees to pay money into court.

New Jersey.— Freehold Nat. Banking Co. *v.* Brick, 37 N. J. L. 307.

New York.—Lewis *v.* Palmer, 28 N. Y. 271; Schroeppell *v.* Shaw, 3 N. Y. 446; Sternbach *v.* Friedman, 34 N. Y. App. Div. 534, 54 N. Y. Suppl. 608; Loud *v.* Sergeant, 1 Edw. 164.

North Carolina.— Carlton *v.* Simonton, 94 N. C. 401; York *v.* Landis, 65 N. C. 535; Towe *v.* Newbold, 57 N. C. 212.

Ohio.— Pullan *v.* De Camp, 9 Ohio Dec. (Reprint) 344, 12 Cinc. L. Bul. 199.

Pennsylvania.— Vail *v.* Hartman, 1 C. Pl. 132.

Tennessee.— Rodes *v.* Crockett, 2 Yerg. 346, 24 Am. Dec. 489; Mechanics' Sav. Bank, etc., Co. *v.* Scoggin, (Ch. App. 1899) 52 S. W. 718.

Texas.— Murrell *v.* Scott, 51 Tex. 520.

United States.— Wiggin *v.* Dorr, 29 Fed. Cas. No. 17,625, 3 Sumn. 410.

See 44 Cent. Dig. tit. "Subrogation," § 72.

Where a principal debtor assigns a fund to trustees to pay a creditor whom the surety afterward pays, and the proceeds of the fund are then paid over by the trustee, the surety is entitled to the benefit of the fund and may recover it from the person who possessed it, in an action for money had and received. Miller *v.* Ord, 2 Binn. (Pa.) 382.

One who guarantees the payment of rent. when he assigns it, and who is subsequently compelled to pay the rent under the guaranty, is subrogated to all securities which the assignee has for the collection of the rent. Newman *v.* Elkinton, 1 Phila. (Pa.) 357.

Subrogation to lien of bank on stock of indebted stock-holder.— The sureties of an indebted stock-holder of a bank are in equity entitled to be subrogated to the security held by the bank, under the act prohibiting any transfer of the stock of a stock-holder who is indebted to the bank, which equitable right attaches the instant the lien of the bank commences, and is consummated by payment of the debt for which they were surety. Klopp *v.* Lebanon Bank, 46 Pa. St. 88.

Where the estate of a surety pays the debt the administrator of such estate is entitled to be subrogated to the security against the principal. Ward's Appeal, 100 Pa. St. 289.

Where the securities have been released the right of subrogation is not affected (Atwood *v.* Vincent, 17 Conn. 575; Stevens *v.* Cooper, 1 Johns. Ch. (N. Y.) 430; Lichtenthaler *v.* Thompson, 13 Serg. & R. (Pa.) 157, 15 Am. Dec. 581; Drew *v.* Lockett, 32 Beav. 499, 9 Jur. N. S. 786, 8 L. T. Rep. N. S. 782, 11 Wkly. Rep. 843, 55 Eng. Reprint 196), in the absence of intervening and countervailing equities of *bona fide* purchasers (Ottawa City Bank *v.* Dudgeon, 65 Ill. 11).

The right is established by the common law, as well as the civil law, a creditor in such case holding them under a trust for the indemnity of the surety. Burk *v.* Chrisman, 3 B. Mon. (Ky.) 50.

Where a surety on a clerk's official bond has paid the state a judgment recovered for the clerk's breach of trust, it is subrogated to every right of the state in respect to the claim, including the state's exemption from the running of limitation against it. American Bonding Co. *v.* National Mechanics' Bank, 97 Md. 598, 55 Atl. 395, 99 Am. St. Rep. 466.

2. Seattle First Nat. Bank *v.* Philadelphia

gated to all defenses which his principal had;[3] and is entitled to be substituted in the place of the creditors as to all means and remedies which the creditors possess to enforce payment of the debt secured from the principal debtors,[4] and the doctrine is sufficiently broad to entitle a surety who has paid the debt of his principal to be subrogated to the remedies and rights which the creditor had, not only against the principal, but against others,[5] and as against his cosureties, in the same manner as against the principal debtor.[6] The surety's right of subrogation extends to mortgages [7] and other liens [8] held by the creditor, and to funds [9]

City Trust, etc., Co., 114 Fed. 529, 52 C. C. A. 313.

3. Morehouse *v.* Brooklyn Heights R. Co., 185 N. Y. 520, 78 N. E. 179.

4. *Alabama.*— Saint *v.* Ledyard, 14 Ala. 244.

Arkansas.—Talbot *v.* Wilkins, 31 Ark. 411.

Indiana.— Rush *v.* State, 20 Ind. 432; Nunemacher *v.* Ingle, 20 Ind. 135; Hubbard *v.* Security Trust Co., 38 Ind. App. 156, 78 N. E. 79.

Iowa.— Skiff *v.* Cross, 21 Iowa 459.

Maryland.— Stehle *v.* United Surety Co., 107 Md. 470, 68 Atl. 600; Merryman *v.* State, 5 Harr. & J. 423.

Missouri.— Sweet *v.* Jeffries, 48 Mo. 279.

New York.— Kolb *v.* Nat. Surety Co., 176 N. Y. 233, 68 N. E. 247; State Bank *v.* Fletcher, 5 Wend. 85; Boughton *v.* Orleans Bank, 2 Barb. Ch. 458; Hayes *v.* Ward, 4 Johns. Ch. 123.

North Carolina.—Tatum *v.* Tatum, 36 N. C. 113.

Where land was sold for partition, the title to be retained as security for the price, for which the purchaser gave his bond, with surety, and became insolvent, the surety who had discharged the bond was entitled to a resale of the land for reimbursement. Arnold *v.* Hicks, 38 N. C. 17; Bittick *v.* Wilkins, 7 Heisk. (Tenn.) 307; *Ex p.* Rushforth, 10 Ves. Jr. 409, 8 Rev. Rep. 10, 32 Eng. Reprint 903; *Ex p.* Turner, 3 Ves. Jr. 243, 3 Rev. Rep. 90, 30 Eng. Reprint 991.

Surety of administrator.— As the creditors and distributees of an intestate have an equity, as against the administrator, that the assets shall be applied exclusively for the purposes of the administration, the surety of an administrator, who has been compelled to answer to the creditors and distributees, or either, for the default of the administrator resulting from his misapplication of his assets, is entitled to be subrogated to this equity, and have it enforced for his indemnity against one who has knowingly contributed to the default by taking from the administrator the assets *mala fide* or without value. Rhame *v.* Lewis, 13 Rich. Eq. (S. C.) 269. Similarly where an administrator sold the land of the estate, but failed to collect the purchase-money, and his sureties, who had been compelled to pay a debt against the estate, brought suit to have his deed to the land set aside as fraudulent, they were entitled to be subrogated to the rights of the creditors, and their claim enforced against the land by an order of the probate court for its sale. Wernecke *v.* Kenyon, 66 Mo. 275.

Where the sureties of a receiver paid the amount due by him in his settlement, they are subrogated to the rights of the beneficiaries to whom they paid the money to follow the trust funds into the hands of one who, with notice, accepted it in payment of the receiver's individual debt (Clark *v.* Harrisonville First Nat. Bank, 57 Mo. App. 277), and where the creditors, or the obligee in a bond given by a receiver for the faithful performance of his duties, on a breach of trust by the receiver, participated in by the bank in which he deposited the funds, of which he had charge, brought suit and recovered judgment against the receiver and the surety on his bond, and the surety paid the judgment, such surety is subrogated to the rights of the creditors to enforce the liability incurred by the bank on account of its participation in the breach of trust by the fiduciary (American Nat. Bank *v.* Fidelity, etc., Co., 129 Ga. 126, 58 S. E. 867).

The sureties of a deputy sheriff, who paid the amount of his defalcation resulting from his failure to account to the state and county for taxes collected by him, are subrogated to the rights of the sheriff, or the state and county, and are entitled to pursue a fund impressed with a trust in favor of the state and county. Hill *v.* Fleming, 128 Ky. 201, 107 S. W. 764, 32 Ky. L. Rep. 1065.

Subrogation to right to collect tax.— If, under the code of Virginia of 1860, a sheriff settles in full with the auditor, and pays all the state taxes not returned delinquent, he cannot thereafter, by distraint, or in any other manner, make out of any taxpayer not returned delinquent the amount so advanced for him by the sheriff, as he cannot be subrogated to the state's rights or remedy for such tax. Hinchman *v.* Morris, 29 W. Va. 673, 2 S. E. 863.

A surety compelled to pay a debt to the state has in general whatever rights the state had to enforce its rights. Dias *v.* Bouchaud, 10 Paige (N. Y.) 445; U. S. *v.* Hunter, 26 Fed. Cas. No. 15,426, 5 Mason 62; Reg. *v.* Robinson, H. & N. 275 note.

5. National Surety Co. *v.* State Sav. Bank, 156 Fed. 21, 84 C. C. A. 187, 14 L. R. A. N. S. 155.

6. Pond *v.* Dougherty, 6 Cal. App. 686, 92 Pac. 1035.

7. See *infra*, VII, E, 3, a, (III).

8. Williams *v.* Jones, Bunb. 275.

9. St. Peter's Catholic Church *v.* Vannote, 66 N. J. Eq. 78, 56 Atl. 1037; Gastonia *v.* McEntee-Peterson Engineering Co., 131 N. C. 359, 42 S. E. 857.

Fund in court.— Where the interest of the principal in a fund in court was assigned to

or other property[10] of the principal in the possession of the creditor, and to rights of action generally,[11] and the surety is also entitled to an assignment or the benefit of all indemnity given to secure the debt,[12] as well those which become extinct, at least at law, by the act of the surety's paying the debt, as all collateral securities which the creditor held for the payment, which have not been considered as directly extinguished by the surety paying the debt;[13] and a surety by subrogation is entitled to dividends from the estate of his bankrupt principal,[14]

the creditor to secure the repayment of a loan which the surety afterward was compelled to pay, the surety, by petition to the court, can reach so much of the fund as is necessary to satisfy her demand against the principal. Allen *v.* De Lisle, 3 Jur. N. S. 928, 5 Wkly. Rep. 158.

10. *Illinois.*— Breese *v.* Schuler, 48 Ill. 329, holding that a surety can compel the creditor to apply on the debt, property of the principal which the creditor has obtained from the principal through an illegal contract, the surety not being connected with the illegality.

New Jersey.— Price *v.* Trusdell, 28 N. J. Eq. 200.

New York.— Alston *v.* Conger, 66 Barb. 272.

North Carolina.— Walker *v.* Crowder, 37 N. C. 478.

England.— Munnings *v.* Bury, Taml. 147, 12 Eng. Ch. 147, 48 Eng. Reprint 59.

Canada.—Lee *v.* Ellis, 27 Ont. 608.

Bonds.— Colegate *v.* Frederick Town Sav. Inst., 11 Gill & J. (Md.) 114; Chester *v.* Kingston Bank, 16 N. Y. 336 [*affirming* 17 Barb. 271]; Howell *v.* Reams, 73 N. C. 391; Danier *v.* Myers, 20 Ohio St. 336; Bender *v.* George, 92 Pa. St. 36; Winchester *v.* Beardin, 10 Humphr. (Tenn.) 247, 51 Am. Dec. 702; Hanby *v.* Henritze, 85 Va. 177, 7 S. E. 204.

Insurance policies.— Forbes *v.* Jackson, 19 Ch. D. 615, 51 L. J. Ch. 690, 30 Wkly. Rep. 652; Heyman *v.* Dubois, L. R. 13 Eq. 158, 41 L. J. Ch. 224, 25 L. T. Rep. N. S. 558.

Land.— Egerton *v.* Alley, 41 N. C. 188; Carter *v.* Sims, 2 Heisk. (Tenn.) 166; Forbes *v.* Jackson, 19 Ch. D. 615, 51 L. J. Ch. 690, 30 Wkly. Rep. 652.

11. *Arkansas.*— Meyer Bros. Drug Co. *v.* Davis, 68 Ark. 112, 56 S. W. 788.

Illinois.— Friberg *v.* Donovan, 23 Ill. App. 58.

Indiana.— Opp *v.* Ward, 125 Ind. 241, 24 N. E. 974, 21 Am. St. Rep. 220.

Kentucky.— Smith *v.* Latimer, 15 B. Mon. 75.

Maine.— Stevens *v.* King, 84 Me. 291, 24 Atl. 850.

Michigan.— Myres *v.* Yaple, 60 Mich. 339, 27 N. W. 536.

Minnesota.— Felton *v.* Bissel, 25 Minn. 15 [*citing* McCormick *v.* Irwin, 35 Pa. St. 111].

New York.— Tobin *v.* Kirk, 73 Hun 229, 25 N. Y. Suppl. 931; Miller *v.* O'Kain, 13 Hun 594; Martin *v.* Walker, 12 Hun 46.

Ohio.— Harris *v.* Carlisle, 12 Ohio 169.

Pennsylvania.— King *v.* Blackmore, 72 Pa. St. 347, 13 Am. Rep. 684.

Texas.— Denson *v.* Ham, (App. 1891) 16 S. W. 182.

Right to follow misapplication of trust fund see Wilson *v.* Doster, 42 N. C. 231, holding that where an administrator pays his own debts with assets of the estate, his creditor having knowledge thereof, his surety, on paying a claim of the next of kin, can recover such assets.

Right to accounting for use of property see Wood *v.* Tompkins, 28 Ga. 159, holding that an agreement, by defendant in an action of trover, with other persons that they shall have the property until judgment, on condition of becoming sureties on a forthcoming bond, will not protect them from rendering an account to surety on an appeal-bond, who has paid part of the judgment.

Right of creditor to set aside a fraudulent conveyance see McConnel *v.* Dickson, 43 Ill. 99, holding that as the surety does not acquire any greater right than the creditor, in order to set aside a fraudlent conveyance he must first exhaust his remedy at law.

Right of creditor against sheriff for neglect in levying upon the property of principal see Wilkins *v.* Bobo, 13 La. Ann. 430.

A right of distress is not a security or remedy to the benefit of which a surety paying rent is entitled under the Mercantile Law Amendment Act (19 & 20 Vict. c. 97, § 5). *In re* Russell, 29 Ch. D. 254, 53 L. T. Rep. N. S. 365.

But a surety on an official bond cannot, as relator, bring an action at law against his cosureties for a default of his principal. He cannot recover the whole amount but the loss must be apportioned and this a court of law cannot do. Mitchell *v.* Turner, 37 Ala. 660; Sanders *v.* Bean, 44 N. C. 318. Thus where a surety pays a duty bond to the United States, he cannot maintain an action on it in the name of the obligee against his coöbligors. U. S. *v.* Preston, 27 Fed. Cas No. 16,087, 4 Wash. 446.

12. Fawcetts *v.* Kimmey, 33 Ala. 261; Keith *v.* Hudson, 74 Ind. 333 (a title bond); People *v.* Schuyler, 4 N. Y. 173; Cornwell's Appeal, 7 Watts & S. (Pa.) 305.

13. Hackett *v.* Watts, 138 Mo. 502, 40 S. W. 113; Furnold *v.* State Bank, 44 Mo. 336; Cowgill *v.* Linnville, 20 Mo. App. 138.

But the effect of a bond given for the release of a vessel after its seizure by a court of admiralty in a suit *in rem* is to extinguish the lien of the libellant on the vessel, and a surety on such bond who pays the claim of the libellant after the vessel has been sold in subsequent proceedings to enforce other liens does not by such payment become subrogated to any right in the fund produced by the sale. The Evangel, 94 Fed. 680.

14. *Ex p.* Johnson, 3 De G. M. & G. 218,

or a right to distrain,[15] to follow funds misappropriated by the principal,[16] or to set aside a fraudulent conveyance by the principal.[17] The right of substitution is everything, actual substitution nothing, for by a fiction the law has made the assignment already; and hence the right of the party entitled by no means depends on the willingness of the creditor to transfer the security;[18] and it is the duty of a creditor, who has also taken collateral security from the principal, to appropriate the avails of that security to the payment of the debt, or to hold it for the benefit of the surety who, if he pay the debt, will be subrogated to the rights of the creditor.[19] It is immaterial when the creditor received the security,[20] or whether the surety was aware of its having been given,[21] or whether the creditor had notice of the relation of suretyship.[22] And the surety can have subrogation, although he took other security for the debt.[23] No subsequent deal or manipulation of the securities without the consent of the surety can affect his rights, for such rights accrued at the time he entered into the obligation of surety;[24] and all mortgages or other securities held by the creditor are held by him as a trustee when dealing with the rights of the surety; he cannot without the surety's assent divert the securities to other purposes,[25] especially he cannot burden the securities with subsequent debts, for if he could the surety would be wholly in his power; nor can his assignee, with notice of the suretyship, do so.[26] But a

22 L. J. Bankr. 65, 52 Eng. Ch. 172, 43 Eng. Reprint 86. And see Nat. Bankr. Act July 1, 1898, 30 U. S. St. at L. 560, c. 541, § 57 [U. S. Comp. St. (1901) p. 3443].

15. Hall *v.* Hoxsey, 84 Ill. 616.

16. Blake *v.* Traders' Nat. Bank, 145 Mass. 13, 12 N. E. 414; Pierce *v.* Holzer, 65 Mich. 263, 32 N. W. 431; Neely *v.* Rood, 54 Mich. 134, 19 N. W. 920, 52 Am. Rep. 802; Clark *v.* Harrisonville First Nat. Bank, 57 Mo. App. 277.

17. Martin *v.* Walker, 12 Hun (N. Y.) 46; Tatum *v.* Tatum, 36 N. C. 113.

18. Dowdy *v.* Blake, 50 Ark. 205, 6 S. W. 897, 7 Am. St. Rep. 88; Newton *v.* Field, 16 Ark. 216; Fleming *v.* Beaver, 2 Rawle (Pa.) 128, 19 Am. Dec. 629.

19. New Hampshire Sav. Bank *v.* Colcord, 15 N. H. 119, 41 Am. Dec. 685.

20. *Illinois.*— Lochenmeyer *v.* Fogarty, 112 Ill. 572.

Kentucky.— Alexander *v.* Ellison, 79 Ky. 148

New York.— Havens *v.* Willis, 100 N. Y. 482, 3 N. E. 313; Malone Third Nat. Bank *v.* Shields, 55 Hun 274, 8 N. Y. Suppl. 298; Green *v.* Milbank, 3 Abb. N. Cas. 138.

Pennsylvania.— Fegley *v.* McDonald, 89 Pa. St. 128.

Tennessee.— Scanland *v.* Settle, Meigs 169.

Texas.—Mitchell *v.* De Witt, 25 Tex. Suppl. 180, 78 Am. Dec. 561.

England.— Brandon *v.* Brandon, 3 De G. & J. 524, 5 Jur. N. S. 256, 28 L. J. Ch. 147, 7 Wkly. Rep. 250, 60 Eng. Ch. 407, 44 Eng. Reprint 1371; Scott *v.* Knox, 2 Jones Exch. 778; Campbell *v.* Rothwell, 47 L. J. Q. B. 144, 38 L. T. Rep. N. S. 33.

21. Smith *v.* McLeod, 38 N. C. 390; Dempsey *v.* Bush, 18 Ohio St. 376; Rice's Appeal, 79 Pa. St. 168; Kramer's Appeal, 37 Pa. St. 71; Hevener *v.* Berry, 17 W. Va. 474; Duncan, etc., Co. *v.* North Wales Bank, 6 App. Cas. 1, 50 L. J. Ch. 355, 43 L. T. Rep. N. S. 706, 29 Wkly. Rep. 763; Pearl *v.* Deacon, 24 Beav. 186, 3 Jur. N. S. 879, 5 Wkly. Rep. 702, 53 Eng. Reprint 328; Strange *v.* Fooks, 4 Giffard 408, 9 Jur. N. S. 943, 8 L. T. Rep. N. S. 789, 2 New Rep. 507, 11 Wkly. Rep. 983, 66 Eng. Reprint 765; Scott *v.* Knox, 2 Jones Exch. 778.

22. Kirby *v.* Coolbaugh, 7 Pa. Super. Ct. 91.

23. Crawford *v.* Richeson, 101 Ill. 351; Wesley Church *v.* Moore, 10 Pa. St. 273; West *v.* Rutland Bank, 19 Vt. 403.

24. Schell City Bank *v.* Reed, 54 Mo. App. 94, holding that the rights of the surety accrue at the time he enters into the obligation; and when he pays the debt it operates as an equitable assignment of all securities in the hands of the creditor relating back to the time his obligation was incurred, and carrying such securities as may be in the hands of the creditor's assignees, if they had notice of the relations.

25. Schell City Bank *v.* Reed, 54 Mo. App. 94.

26. Schell City Bank *v.* Reed, 54 Mo. App. 94, 98, where the court says: "We are cited by plaintiff to some authority in seeming contradiction to what we have said," viz.: 1 Hillard on Mortgages (4th ed.) 342; 1 Jones on Mortgages, sec. 834; Sheldon on Subrogation, sec. 148. Each of these authors, although the law is stated by them in other parts of their works in conformity to the principles we have mentioned, yet on the authority of an English case (Williams *v.* Owens, 7 Jur. 1145, 13 L. J. Ch. 105, 13 Sim. 597, 36 Eng. Ch. 597, 60 Eng. Reprint 232), state that a mortgagee who also has a surety for the debt may afterwards make a further advance on the mortgage to the mortgagor, and the surety cannot be subrogated to the mortgage without paying both the original sum and the subsequent advance. This statement can only be upheld under the rule of tacking, a rule not recognized here and no longer in vogue in England."

surety has no ground for relief under a contract with the creditor to transfer to the surety the collaterals received from his principal, on payment of the sum for which he is surety, where it appears that the principal has himself paid the debt,[27] and where the whole security placed in the hands of a creditor has been applied to the debt, without extinguishing it, and the surety has been compelled to pay the deficiency, he cannot claim the right of subrogation as to such security, as this would defeat the very object for which it was taken.[28] And a creditor who holds security without special stipulation for its application for various notes due from his debtor, some of which bear the name of sureties, may, in case of the insolvency of the principal debtor and some of the sureties, apply the same toward the payment of such of the notes as may be necessary for his own protection, and solvent sureties upon others of the notes cannot avail themselves thereof in any way in equity with paying or offering to pay the whole of the notes for which the surety was given;[29] and although, where the surety pays the debt, he may be substituted for a creditor who has collateral security therefor, he cannot be substituted in relation to another credit, when the effect will be to deprive the creditor of one of his resources, thereby causing a partial loss of his debt.[30] It has been held that a surety for the payment of part of the indebtedness of his principal by paying the same becomes entitled to a *pro rata* or proportionate share with the other creditors of the proceeds arising from the sale of the debtor's property, and for that purpose may be subrogated to all the rights of the remaining creditors so as to have the benefit of all the securities which they had;[31] but the surety is not entitled to the benefit of security given for other specific debts,[32] or for another part of the debt for which he is liable,[33] and is subrogated only to security or funds which the creditor holds for the debt which he secures and cannot interfere with the creditor's use of property of the principal which he holds for a different object.[34] In some states the right of a surety to be subrogated to collateral for the debt is made statutory.[35]

(II) *JUDGMENTS.* Although it is held that where a surety pays a judgment against himself and his principal it is discharged at law,[36] and that the only way

27. Dilburn *v.* Youngblood, 85 Ala. 449, 5 So. 175; Shackleford *v.* Stockton, 6 B. Mon. (Ky.) 390; Stafford *v.* New Bedford Five Cents Sav. Bank, 132 Mass. 315 (holding that the rule that a surety, upon paying the debt of the principal, is entitled to the securities in the hands of the creditor, does not apply to a case where the creditor had with the surety's knowledge taken stock in a new corporation as a payment *pro tanto* of its debt against an old one); Tarbell *v.* Parker, 101 Mass. 165.

28. *Alabama.*— Sawyers *v.* Baker, 72 Ala. 49.

Connecticut.— Belcher *v.* Hartford Bank, 15 Conn. 381.

Georgia.— Marshall *v.* Dixon, 82 Ga. 435, 9 S. E. 167.

Maryland.— Schaeffer *v.* Bond, 72 Md. 501, 20 Atl. 176.

Massachusetts.— Stafford *v.* New Bedford Five Cents Sav. Bank, 132 Mass. 315.

North Carolina.— Stirewalt *v.* Martin, 84 N. C. 4.

United States.— Marchand *v.* Frellsen, 105 U. S. 423, 26 L. ed. 1057.

29. Wilcox *v.* Fairhaven Bank, 7 Allen (Mass.) 270; Richardson *v.* Washington Bank, 3 Metc. (Mass.) 536.

30. Crump *v.* McMurtry, 8 Mo. 408.

31. Allison *v.* Sutherlin, 50 Mo. 274. But see Child *v.* New York, etc., R. Co., 129 Mass. 170.

32. New York L. Ins., etc., Co. *v.* Howard, 2 Sandf. Ch. (N. Y.) 183.

A surety is entitled to the benefit of any surplus after the creditor has applied security on prior debts of the principal for which it was given, and for which the surety was not liable. Praed *v.* Gardiner, 2 Cox Ch. 86, 2 Rev. Rep. 8, 30 Eng. Reprint 40.

33. Wade *v.* Coope, 2 Sim. 155, 29 Rev. Rep. 70, 2 Eng. Ch. 155, 57 Eng. Reprint 747.

34. Voss *v.* German American Bank, 83 Ill. 599, 25 Am. Rep. 415; Newburgh Nat. Bank *v.* Smith, 66 N. Y 271, 23 Am. Rep. 48; Grissom *v.* Commercial Nat. Bank, 87 Tenn. 350, 10 S. W. 774, 10 Am. St. Rep. 669, 3 L. R. A. 273.

35. See the statutes of the several states. And see Park *v.* Robinson, 15 S. D. 551, 91 N. W. 344, holding that under Comp. Laws, § 4309, providing that a surety is entitled to the benefit of every security held by the creditor of a cosurety, where the maker of a collateral security note given to further secure the payment of another's note, already secured by a mortgage, pays the collateral note, and takes an assignment of the original note and the mortgage, such note and mortgage may be enforced by such assignee.

36. Chollar *v.* Temple, 39 Ark. 238; New-

for a surety to preserve the lien of the judgment against his principal in his own favor is, upon payment by him of the same, to have the judgment assigned to a trustee for his use, for if he permitted the judgment to be satisfied without any assignment, the remedy of subrogation is lost,[37] yet where justice requires, the judgment will be kept alive in equity for the benefit of a surety who has paid the demand;[38] and in equity a surety paying a judgment recovered against himself and his principal is entitled to be subrogated to all the rights of the original creditor, and to have the judgment assigned to himself or a third person for his benefit,[39]

ton *v.* Field, 16 Ark. 216; Drefahl *v.* Tuttle, 42 Iowa 177; Bones *v.* Aiken, 35 Iowa 534; Dunlap *v.* O'Bannon, 5 B. Mon. (Ky.) 393 (holding that a surety in a judgment has a right in equity, on paying the judgment, to be substituted to the equity of the judgment creditor for the assignee of the receipt given an attorney as collector of the judgment); Sotheren *v.* Reed, 4 Harr. & J. (Md.) 307.

37. Peebles *v.* Gay, 115 N. C. 38, 40, 41, 20 S. E. 173, 44 Am. St. Rep. 429; Liles *v.* Rogers, 113 N. C. 197, 18 S. E. 104, 37 Am. St. Rep. 627; Tiddy *v.* Harris, 101 N. C. 589, 8 S. E. 227; Sherwood *v.* Collier, 14 N. C. 380, 24 Am. Dec. 264; Hodges *v.* Armstrong, 14 N. C. 253.

38. Cottrell's Appeal, 23 Pa. St. 294.

Where the principal alone appeals after a judgment against him and the surety, and the surety is obliged to pay the debt, he is entitled to have a judgment of affirmance against his principal assigned to him, and to recover against the sureties on his principal's supersedeas bond. Mitchell *v.* De Witt, 25 Tex. Suppl. 180, 78 Am. Dec. 561.

Where sureties received a void mortgage from their principal to indemnify them, which mortgage, from defect of execution, was not valid as to creditors, they were subrogated to the rights of a judgment creditor of the principal, who had levied on the property. Miller *v.* Pendleton, 4 Hen. & M. (Va.) 436.

39. *Alabama.*— Bragg *v.* Patterson, 85 Ala. 233, 4 So. 716; Turner *v.* Teague, 73 Ala. 554.

Arkansas.—Wilks *v.* Vaughan, 73 Ark. 174, 83 S. W. 913.

Delaware.— Miller *v.* Stout, 5 Del. Ch. 259.

Georgia.— Davenport *v.* Hardeman, 5 Ga. 580; Lumpkin *v.* Mills, 4 Ga. 343.

Illinois.— Chandler *v.* Higgins, 109 Ill. 602.

Indiana.— See Davis *v.* Schlemmer, 150 Ind. 472, 50 N. E. 373.

Iowa.—Anglo-American Land, etc., Co. *v.* Bush, 84 Iowa 272, 50 N. W. 1063; Searing *v.* Berry, 58 Iowa 20, 11 N. W. 708.

Kansas.— Harris *v.* Frank, 29 Kan. 200.

Kentucky.— Morris *v.* Evans, 2 B. Mon. 84, 36 Am. Dec. 591; Wilson *v.* Wilson, 50 S. W. 260, 20 Ky. L. Rep. 1971.

Louisiana.— Sprigg *v.* Beaman, 6 La. 59.

Maine.— Norton *v.* Soule, 2 Me. 341.

Maryland.— Crisfield *v.* State, 55 Md. 192; Creager *v.* Brengle, 5 Harr. & J. 234, 9 Am. Dec. 516.

Missouri.—Benne *v.* Schnecko, 100 Mo. 250, 13 S. W. 82.

New York.— Townsend *v.* Whitney, 75 N. Y. 425 [*affirming* 15 Hun 93]; Smith *v.* National Surety Co., 46 N. Y. App. Div. 633, 62 N. Y. Suppl. 1105; Townsend *v.* Whitney, 15 Hun 93 [*affirmed* in 75 N. Y. 425]; Goodyear *v.* Watson, 14 Barb. 481; Alden *v.* Clark, 11 How. Pr. 209.

North Carolina.— Person *v.* Perry, 70 N. C. 697; Hanner *v.* Douglass, 57 N. C. 262. But see Sherwood *v.* Collier, 14 N. C. 380, 24 Am. Dec. 264.

Ohio.— Hill *v.* King, 48 Ohio St. 75, 26 N. E. 988.

Pennsylvania.— Jennings *v.* Hare, 104 Pa. St. 489; Duffield *v.* Cooper, 87 Pa. St. 443 (holding that if the surety pays a judgment against the principal and himself, he succeeds to the rights of the creditor and is entitled to collect the judgment, and it is not necessary that he must be subrogated under Act April 22, 1856, § 9, as that act applies to judgment liens on real estate, and is intended to adjust and protect the equities of persons holding such liens, and is not designed to prescribe remedies between principal and surety); *In re* Hess, 69 Pa. St. 272; Schnitzel's Appeal, 49 Pa. St. 23 (holding that if, after a judgment entered jointly against two, one of whom is named on the record as surety, a third person intervenes solely at the request of the principal, and becomes bail for stay of execution, taking indemnity from him therefor, and at the expiration of the stay the surety is compelled to pay the judgment, he is entitled to subrogation, as against the bail, to obtain reimbursement); Cottrell's Appeal, 23 Pa. St. 294; Yard *v.* Patton, 13 St. 278; Gearhart *v.* Jordan, 11 Pa. St. 325; Lloyd *v.* Barr, 11 Pa. St. 41; Moore *v.* Bray, 10 Pa. St. 519; Morris *v.* Oakford, 9 Pa. St. 498; Lathrop's Appeal, 1 Pa. St. 512; Foster *v.* Fox, 4 Watts & S. 92; Pott *v.* Nathans, 1 Watts & S. 155, 37 Am. Dec. 456; Burson *v.* Kincaid, 3 Penr. & W. 57; Burns *v.* Huntington Bank, 1 Penr. & W. 395; Buchanan's Estate, 2 Chest. Co. Rep. 74.

South Carolina.— McIntosh *v.* Wright, Rich. Eq. Cas. 385; Lenoir *v.* Winn, 4 Desauss. Eq. 65, 6 Am. Dec. 597.

Tennessee.— Floyd *v.* Goodwin, 8 Yerg. 484, 29 Am. Dec. 130.

Texas.— Sublett *v.* McKinney, 19 Tex. 438.

Vermont.— Bellows *v.* Allen, 23 Vt. 169.

Virginia.— Flood *v.* Hutter, (1898) 32 S. E. 64; Eidson *v.* Huff, 29 Gratt. 338.

West Virginia.— Hawker *v.* Moore, 40 W. Va. 49, 20 S. E. 848.

England.— Parsons *v.* Briddock, 2 Vern. Ch. 608, 23 Eng. Reprint 997.

See 44 Cent. Dig. tit. "Subrogation," § 83.

A surety on an appeal-bond, who pays the judgment, becomes subrogated to all the rights of the creditor. Rodes *v.* Crockett, 2

and has a right to the benefit of the lien of the judgment,[40] and may enforce

Yerg. (Tenn.) 346, 24 Am. Dec. 489; Black *v.* Epperson, 40 Tex. 162; McClung *v.* Beirne, 10 Leigh (Va.) 394, 34 Am. Dec. 739.

Where one of several joint sureties pays the whole debt, he will be entitled to the judgment to enforce contribution by his cosurety (Wagner *v.* Olds, 6 Ohio Dec. (Reprint) 739, 7 Am. L. Rec. 611; Croft *v.* Moore, 9 Watts (Pa.) 451; Packer *v.* Vandevender, 13 Pa. Co. Ct. 31); and if he pays a joint judgment with the intention to save his right to be subrogated to the place of the judgment creditor, he may afterward sustain an action to be subrogated, notwithstanding the legal extinguishment of the judgment (Neilson *v.* Fry, 16 Ohio St. 552, 91 Am. Dec. 110).

In Ohio by express provision of law, Rev. St. § 5836, payment by a surety does not end the judgment so far as the principal debtor is concerned, but the surety is subrogated to the rights of the judgment creditor, and the judgment remains in force against the principal debtor for the benefit of the surety. There is no provision or rule of law, however, keeping life in the judgment as against a surety. The rule is to the contrary, and payment of a judgment, by one surety, inures to the benefit of a cosurety, and cancels and ends it as to both of them, only leaving to the paying surety a right of action against his cosurety, for contribution. But as to all sureties, payment of a judgment by one cancels and ends it as to all. Nestlerode *v.* Foster, 8 Ohio Cir. Ct. 70, 4 Ohio Cir. Dec. 385.

Sureties who take an assignment of a decree against their principal, on paying it, are entitled to have it kept alive for their benefit. Allen *v.* Powell, 108 Ill. 584 [*reversing* 11 Ill. App. 129].

But a surety on a twelve months' bond, given on a purchase at execution sale, compelled to pay it, is subrogated to the rights of the creditor in the bond against the principal bondsman, but not to any rights of the judgment creditor under the judgment. Crow *v.* Walsh, 3 La. Ann. 540. See Trent *v.* Calderwood, 2 La. Ann. 942.

Real estate, owned by replevin bail when he replevied the judgment, but since conveyed, which is sold to satisfy the judgment, is, as between it and the property of the principal in the judgment subject to the lien thereof, secondarily liable, and the person who owned it when so taken is subrogated to the rights of the judgment plaintiff against the property primarily liable. Wilson *v.* Murray, 90 Ind. 477.

In Iowa it is held that a surety who has paid a judgment is not subrogated to the rights of the judgment creditor until he has maintained an action to enforce his lien. Johnston *v.* Belden, 49 Iowa 301.

In Kansas, under Civ. Code, § 480, a surety who has paid a judgment is subrogated to such judgment not only to compel repayment from the principal but also to enforce contribution from cosureties. Honce *v.* Schram, 73 Kan. 368, 85 Pac. 535.

Where a surety on a judgment note pays the note after default by the principal on the maturity of the note, he may have the note entered up to his own use, and the wife of the principal, without authority from the husband, and without interest on the note, has no standing to apply to the court to have the judgment stricken off. Lawrence County Nat. Bank *v.* Gray, 23 Pa. Super. Ct. 62.

Where one of two joint and several obligors, cosureties for a third, under the pressure of an execution and a levy upon his personal property, and real estate, pays the judgment for which all are jointly and severally liable, such surety may, on a rule to show cause, enforce subrogation to the rights of plaintiff as against his cosurety, and his right to subrogation cannot be defeated by satisfaction of the judgment. Shaffer *v.* Messner, 27 Pa. Super. Ct. 191.

A surety on a court clerk's official bond, who has paid a judgment recovered by the state, is subrogated to the rights of the state against a bank which participated in the clerk's breach of trust. American Bonding Co. *v.* National Mechanics' Bank, 97 Md. 598, 55 Atl. 395, 99 Am. St. Rep. 466.

40. *Alabama.*— Bragg *v.* Patterson, 85 Ala. 233, 4 So. 716.

Delaware.—Hardcastle *v.* Commercial Bank, 1 Harr. 374 note.

Illinois.— Chandler *v.* Higgins, 109 Ill. 602.

Iowa.— Searing *v.* Berry, 58 Iowa 20, 11 N. W. 708.

Michigan.— Smith *v.* Rumsey, 33 Mich. 183.

Pennsylvania.— Boltz's Estate, 133 Pa. St. 77, 19 Atl. 303.

South Carolina.— Garvin *v.* Garvin, 27 S. C. 472, 4 S. E. 148.

Texas.— Rickards *v.* Bemis, (Civ. App. 1903) 78 S. W. 239.

Virginia.— Rorer *v.* Ferguson, 96 Va. 411, 31 S. E. 817; Coffman *v.* Hopkins, 75 Va. 645; Eidson *v.* Huff, 29 Gratt. 338; Burwell *v.* Fauber, 21 Gratt. 446; Rodgers *v.* McCluer, 4 Gratt. 81, 47 Am. Dec. 715; Watts *v.* Kinney, 3 Leigh 272, 23 Am. Dec. 266, in preference to a foreign attachment sued out by another creditor of the principal under the judgment.

West Virginia.— Woods *v.* Douglas, 46 W. Va. 657, 33 S. E. 771.

Wisconsin.— German-American Sav. Bank *v.* Fritz, 68 Wis. 390, 32 N. W. 123.

See 44 Cent. Dig. tit. "Subrogation," § 83.

But see Harper *v.* Kemble, 65 Mo. App. 514, holding that when a surety pays the amount of a judgment against his principal and himself, and thereon receives an assignment of the judgment, he is in equity entitled to the same rights which the judgment creditor would have at law, and therefore to the enforcement of the judgment by execution and to a revival of the judgment lien on real estate of the debtor; but, even in equity, he cannot procure a continuous lien from the date of the rendition of the judgment, if that

it against his principal's estate,[41] particularly where the surety pays the amount thereof, with the understanding that the judgment shall remain in force and be assigned to him, and procures the assignment thereof,[42] and in the assignment of a judgment the legal and express subrogation are of equal extent, and all the creditor's rights pass to a surety making payment.[43] This right of the surety is not defeated by the fact that he paid the judgment in ignorance of such right and without stipulating therefor,[44] for an actual assignment to the paying surety is not necessary to enable him to collect the judgment against his principal, the surety succeeding to the rights of the creditor by mere operation of law;[45] and although a surety who has paid part of a judgment against the principal, which has been in fact satisfied by the principal himself, is barred by limitation from recovering the amount paid, he may still have his right of subrogation to the security of the judgment;[46] and a surety who has paid a judgment against the principal has preference over a subsequent judgment creditor of the principal.[47] But while it is true that a surety may be subrogated to the rights of the creditor, in reference to any collateral security which the creditor may hold, and that he may be subrogated to the creditor in the judgment for the purpose of keeping it alive and enforcing it for his own benefit against his co-defendants, yet this doctrine, being one of mere equity and benevolence, will not be enforced at the expense of a legal right;[48] and a surety whose claims against his principal for money paid on a judgment against them has been defeated at law cannot be substituted for plaintiff in the original judgment;[49] and where a surety, on paying a judgment against his principal, has noted on the record that it was paid by him and "fully satisfied," he cannot assert the judgment lien, as against a *bona fide* purchaser of the debtor's land;[50] and a surety who pays the debt must, as a condition of compelling an assignment by the creditor of a judgment obtained by him against the principal, pay the costs incurred by the creditor in obtaining the judgment.[51] Furthermore, a surety having the means of payment put into his hands by the debtor thereby becomes the principal debtor, and, having reconveyed the property to the debtor, it is not competent for him, in order to avoid the effect of this, to allege that the conveyance to him was fraudulent, and to seek to be subrogated to the rights of the judgment.[52] A surety's rights are limited to a judgment on the debt for which he was surety,[53] and a surety bound only for part of the principal's indebtedness cannot be subrogated to security taken by the creditor for another part of the same debt and at another time.[54] In some states this equitable right of the surety to be subrogated to a judgment is incorporated into statutes which declare the paying surety's rights to the benefit

lien has expired by limitation of time before he has instituted a proceeding to keep it in force.

Expired lien.— The lien which a creditor acquires by a levy of his execution on personal property is, if not enforced by sale thereof, only temporary, and expires with the authority to sell under the execution, and therefore a surety of the debtor, who afterward pays the debt, has no right to be subrogated to the lien of the execution on the property. Carr *v.* Glasscock, 3 Gratt. (Va.) 343.

A subsequent transaction of the debtor with a third person cannot impair the equitable right of a surety to substitution to the lien of a creditor's judgment. Johnson *v.* Young, 20 W. Va. 614.

41. Kinard *v.* Baird, 20 S. C. 377.

42. Neal *v.* Nash, 23 Ohio St. 483; Utah Nat. Bank *v.* Forbes, 18 Utah 225, 55 Pac. 61.

43. Sprigg *v.* Beaman, 6 La. 59.

44. Dempsey *v.* Bush, 18 Ohio St. 376.

45. Duffield *v.* Cooper, 87 Pa. St. 443.

46. Kinard *v.* Baird, 20 S. C. 377.

47. Fleming *v.* Beaver, 2 Rawle (Pa.) 128, 19 Am. Dec. 629.

48. Junker *v.* Rush, 136 Ill. 179, 26 N. E. 499, 11 L. R. A. 183; Schmitt *v.* Henneberry, 48 Ill. App. 322; Rittenhouse *v.* Levering, 6 Watts & S. (Pa.) 190; Fink *v.* Mahaffy, 8 Watts (Pa.) 384.

49. Fink *v.* Mahaffy, 8 Watts (Pa.) 384 [*approved* in Rittenhouse *v.* Levering, 6 Watts & S. (Pa.) 190].

50. Taylor *v.* Alliance Trust Co., 71 Miss. 694, 15 So. 121.

51. McKenna *v.* Corcoran, 70 N. J. Eq. 627, 61 Atl. 1026.

52. Monroe *v.* Wallace, 2 Penr. & W. (Pa.) 173.

53. Wagner *v.* Elliott, 95 Pa. St. 487.

54. Crump *v.* McMurtry, 8 Mo. 408 (holding that the doctrine of substitution is not applicable to a case where a creditor having a security for his debt, but fearing that it will prove insufficient, obtains additional se-

of the judgment and to an assignment of the judgment;[55] but if a statute does not afford the surety an adequate remedy he still may enforce his purely equitable right to an assignment of the judgment;[56] and such a statute is held to be intended to adjust and protect the equities of parties holding such liens, but not to settle the liens or prescribe the remedy between principal and surety.[57] It is held that a judgment in favor of the state, when paid by a surety, cannot be assigned to such surety by any officer or agent of the state.[58]

(III) *MORTGAGES.* A surety, having been compelled to pay a debt, may be subrogated to the creditor's rights under a mortgage or deed of trust given by the principal to secure the debt,[59] although the taking of the mortgage was sub-

curity); Wade *v.* Coope, 2 Sim. 155, 29 Rev. Rep. 70, 2 Eng. Ch. 155, 57 Eng. Reprint 747.

55. See the statutes of the several states. And see Schuessler *v.* Dudley, 80 Ala. 547, 2 So. 526, 60 Am. Rep. 124 (holding that under Code (1876), the surety of a defaulting tax collector who satisfies the judgment obtained by the state against such collector is entitled to an assignment of the judgment, and to be subrogated to the rights of the state and county, and to enforce for his own indemnity the lien created by the bond by suit in his own name); Alexander *v.* Lewis, 1 Metc. (Ky.) 407 (holding that Rev. St. c. 97, § 8, authorizing an assignment of a judgment in behalf of plaintiff against the debtor and his surety to the surety on payment by him, is not repealed by the civil code; and a judgment against principal and surety may be assigned to the surety, on payment by him); Wilkins *v.* Bobo, 13 La. Ann. 430 (holding that under the act of March 16, 1854, a person bound as security upon a twelve-months' bond, when he has paid the same, is subrogated to all the rights which the original creditor had at the time the bond was given, or at the time it was paid by the security, when the property had been adjudicated to the defendant in the judgment, and he is the principal upon the bond); Kinard *v.* Baird, 20 S. C. 377 (under Gen. St. § 2180, which declares that the payment by a surety of a debt secured by judgment or decree shall not operate as a satisfaction thereof against the principal debtor, but by such payment such surety shall be entitled to all the rights and privileges of plaintiff in such judgment or decree).

Statute limited to assignments by legal plaintiff.— Md. Acts (1763), c. 23, which provides that, where a judgment against a principal debtor and surety is satisfied by the surety, the creditor shall be obliged to assign the judgment to such surety, is held to contemplate only assignments by legal plaintiffs, and therefore the *cestui que use* of a judgment against a principal debtor and his surety cannot, on receiving payment from the latter, make such an assignment of the judgment as is provided for by the act. Creager *v.* Brengle, 5 Harr. & J. (Md.) 234, 9 Am. Dec. 516.

In Texas, prior to the act of Feb. 5, 1858, relating to principal and surety, the cosurety in an execution who paid the debt of the principal could not be subrogated to the rights of plaintiff in the execution as to lien and levies; but since the passage of that act a surety who pays has these rights. Raymond *v.* Cook, 31 Tex. 373.

In New Jersey, under Gen. St. p. 2538, § 36, and Pamphl. Laws (1903), p. 543, § 35, requiring the sheriff, in levying execution in actions on bills and notes, to make the money out of the property of defendant primarily liable if possible, and providing that if the judgment be paid by defendant secondarily liable it shall not be considered satisfied as against any primary defendant, a separate judgment entered against the maker of a note is security in the hands of the judgment creditor for the debt due by the maker and indorser, and the latter, on paying a judgment entered against him for the amount of the note, is entitled to an assignment of the judgment against the maker. McKenna *v.* Corcoran, 70 N. J. Eq. 627, 61 Atl. 1026.

56. Harper *v.* Rosenberger, 56 Mo. App. App. 388, holding that Rev. St. (1889) § 8151, which provides that any surety paying a judgment rendered against his principal and himself on a note may have judgment against his principal on motion for the amount paid, with ten per cent interest, does not afford an adequate remedy to a surety who pays a judgment which is a lien on lands of the principal, and is collectable therefrom; and such surety, on the payment of such judgment, is entitled to have it assigned to him, and to be subrogated to the rights of the judgment plaintiff.

A statute which provides that a surety, certified as such, who pays the judgment or any part thereof, shall, to the extent of such payment, have all the rights and remedies against the principal debtor that plaintiff had at the time of such payment, does not affect the right of the surety, who is not certified in the judgment to be such, to be subrogated to the rights of plaintiff on payment of the judgment. Hill *v.* King, 48 Ohio St. 75, 26 N. E. 988.

57. Duffield *v.* Cooper, 87 Pa. St. 443, holding that, in a judgment against principal and surety, if the surety pays the amount of the judgment, he succeeds to the rights of the creditor, and it is not necessary that he should be subrogated under Act April 22, 1856, § 9.

58. Peacock *v.* Pembroke, 8 Md. 348.

59. *Alabama.*— Fawcetts *v.* Kimmey, 33 Ala. 261.

Illinois.— Ottawa City Nat. Bank *v.* Dud-

sequent to the creation of the obligation,[60] in the absence of proof of a contrary intent; [61] and a surety upon a mortgage debt need not pay off a subsequent mort-

geon, 65 Ill. 11; Jacques *v.* Fackney, 64 Ill. 87.

Indiana.— Whiteman *v.* Harriman, 85 Ind. 49; Jones *v.* Tincher, 15 Ind. 308, 77 Am. Dec. 92.

Iowa.— Murray *v.* Catlett, 4 Greene 108.

Kentucky.— Storms *v.* Storms, 3 Bush 77; Morris *v.* McRoberts, 4 Ky. L. Rep. 825.

Mississippi.— Dickson *v.* Sledge, (1905) 38 So. 673.

Missouri.— Hackett *v.* Watts, 138 Mo. 502, 40 S. W. 113; Grady *v.* O'Reilly, 116 Mo. 346, 22 S. W. 798; Taylor *v.* Tarr, 84 Mo. 420; Brown *v.* Kirk, 20 Mo. App. 524.

New Jersey.— Tiffany *v.* Crawford, 14 N. J. Eq. 278.

New York.— Lewis *v.* Palmer, 28 N. Y. 271; McLean *v.* Towle, 3 Sandf. Ch. 117, a famous case.

North Dakota.— Thurston *v.* Osborne-McMilan El. Co., 13 N. D. 508, 101 N. W. 892, holding that payment by a surety on a note secured by a chattel mortgage given by the principal vests the ownership of the note and mortgage in him, so that he could recover the value of the mortgaged property to the extent of his lien from one who had converted it.

Pennsylvania.—Gossin *v.* Brown, 11 Pa. St. 527.

South Carolina.— Muller *v.* Wadlington, 5 Rich. 342; State Bank *v.* Rose, 1 Strobh. Eq. 257; Lowndes *v.* Chisholm, 2 McCord Eq. 455, 16 Am. Dec. 667.

Tennessee.— Motley *v.* Harris, 1 Lea 577; Scanland *v.* Settle, Meigs 169.

Texas.— James *v.* Jacques, 26 Tex. 320, 82 Am. Dec. 613, holding, however, that while a surety upon a note secured by deed of trust, who pays off the note of the creditor, becomes substituted to all the creditor's rights under the deed of trust, and is entitled to enforce the lien on the property for his reimbursement, he cannot do so in such manner as to affect the owner of the equity of redemption.

Vermont.—McDaniels *v.* Flower Brook Mfg. Co., 22 Vt. 274.

Virginia.— Miller *v.* Pendleton, 4 Hen. & M. 436.

England.— *In re* Kirkwood, L. R. 1 Ir. 108; Parteriche *v.* Powlet, 2 Atk. 384, 26 Eng. Reprint 632; Drew *v.* Lockett, 32 Beav. 499, 9 Jur. N. S. 786, 8 L. T. Rep. N. S. 782, 11 Wkly. Rep. 843, 55 Eng. Reprint 196; Goddard *v.* White, 2 Giffard 449, 6 Jur. N. S. 1364, 3 L. T. Rep. N. S. 313, 66 Eng. Reprint 188; Copis *v.* Middleton, 2 L. J. Ch. O. S. 82, Turn. & R. 224, 12 Eng. Ch. 224, 37 Eng. Reprint 1083. See also Forbes *v.* Jackson, 19 Ch. D. 615, 51 L. J. Ch. 690, 30 Wkly. Rep. 652.

Canada.— Garrett *v.* Johnstone, 13 Grant Ch. (U. C.) 36.

See 44 Cent. Dig. tit. "Subrogation," § 77.

But bail for stay of execution is not entitled to subrogation to the rights of the mortgagee against the terretenant or creditors, because but for his intervention the debt might be paid by the debtor or out of his property. McCurdy *v.* Conner, 1 Walk. (Pa.) 155.

Guarantors of a mortgage, compelled to pay a deficiency thereon, are entitled to be subrogated to all the securities which are held by the mortgagee as collateral, and so are entitled to a subsequent mortgage obtained by the mortgagee as additional security. Havens *v.* Willis, 100 N. Y. 482, 3 N. E. 313.

A surety who gave a separate mortgage on conveying a part of his lands in satisfaction of the debt is entitled to be subrogated to the mortgagee's claim on the mortgage of the principal debtor. Loomer *v.* Wheelwright, 3 Sandf. Ch. (N. Y.) 135.

Rule applied to statutory mortgage.— Under a statute which gives an administrator or executor a mortgage on lands purchased at a sale of the property of decedent, a surety upon a note given to an administrator will be subrogated to the rights of the administrator in his statutory mortgage, to satisfy the amount he has paid as surety. Stanwood *v.* Clampitt, 23 Miss. 372.

Sureties on an appeal-bond in mortgage foreclosure proceedings, who, after having been compelled to pay the decree against their principal, take an assignment of the mortgage debt and decree of foreclosure, may maintain a bill to set aside a modification of the decree entered on a supplemental bill to which they are not made parties. Allen *v.* Powell, 108 Ill. 584.

The reason is held to be that the debt, and not the pledgee, is protected by the pledge, and any person liable for the payment of the debt, into whose hands it came, until payment by the original debtor, was entitled to the security, and however it may be modified or into whose hands it may come until the debt is paid the fund or pledge accompanies it and remains for its redemption. Belcher *v.* Hartford Bank, 15 Conn. 381.

On payment by a surety in an injunction bond of a debt whose collection was enjoined, secured by a deed of trust, he will be substituted in equity to the lien under the trust deed. Billings *v.* Sprague, 49 Ill. 509.

Where a wife, as surety for her husband, joined him in a mortgage which stated that "the debt is a joint and several one," in an action praying leave to pay the debt and be subrogated to the rights of the mortgagee, she may show that she was simply surety, although she could not do so to defeat the mortgage. Snook *v.* Munday, 96 Md. 514, 54 Atl. 77.

60. Scott *v.* Featherston, 5 La. Ann. 306.

61. McArthur *v.* Martin, 23 Minn. 74, holding that where a surety redeems from a mortgage of his principal, in the absence of proof to the contrary it will be presumed that the act was done with the intent that would be most for the interest of the surety; that

gage securing a distinct debt in order to be subrogated to the rights of the holder of the debt for which he is surety.[62] A surety for part of a debt secured by mortgage is upon paying the entire debt subrogated to the creditor's rights under the mortgage;[63] and where a surety on a mortgage note pays part of it, he is entitled to be subrogated to the right of the mortgagee, and to receive payment out of the proceeds after the mortgage is satisfied, before subsequent judgment creditors.[64] Where a creditor recovers judgment against the principal debtor, sells his goods on execution, and takes a mortgage to secure the payment, and a surety of the original debtor subsequently pays the debt, the surety is entitled to the benefit of the mortgage;[65] and as a mortgage to secure a debt stands as security for the judgment thereon, a surety who pays the judgment may be subrogated to the mortgage lien.[66] A surety who pays the debt and takes a conveyance of all the creditor's interest in land mortgaged to secure it becomes by substitution, in effect, the mortgagee for the security of his advances,[67] for, in equity, the payment by a surety of his principal's note, secured by a mortgage, is regarded as a purchase of the debt, rather than a payment of it; and he is entitled to have the note assigned to him, and to have the benefit of the mortgage.[68] But one who stands in the position of principal cannot have subrogation upon payment;[69] and where one of several notes secured by a mortgage is not yet due, and a surety pays the notes, his right of subrogation to the security does not become perfect, or the assignment thereof operative, until the time when it falls due, and an attempted foreclosure of the mortgage securing it before that time is void.[70]

(IV) *LIENS* — (A) *In General.* Where a surety pays the debt, he is substituted to the rights of the creditor in respect to liens therefor, and to their priority over other creditors;[71] and it is immaterial that the surety did not enter into the relation in reliance upon the security or even know of it;[72] but it must be shown that at the time the surety paid the debt the creditor had a valid and subsisting lien

is, that he might be subrogated to the rights of the mortgagee.

62. Schell City Bank *v.* Reed, 54 Mo. App. 94.

63. Gerber *v.* Sharp, 72 Ind. 553.

64. Bowen *v.* Barksdale, 33 S. C. 142, 11 S. E. 640.

65. Ottman *v.* Moak, 3 Sandf. Ch. (N. Y.) 431.

66. Peirce *v.* Garrett, 65 Ill. App. 682.

67. Norton *v.* Soule, 2 Me. 341; Dearborn *v.* Taylor, 18 N. H. 153.

A surety for the mortgagor of chattels, who pays the judgment awarded against the mortgagor in foreclosure proceedings and takes an assignment of the mortgage, is entitled to the possession of the property by subrogation to the mortgagee's rights. Riemer *v.* Schlitz, 49 Wis. 273, 5 N. W. 493.

68. Rand *v.* Barrett, 66 Iowa 731, 24 N. W. 530.

69. Massie *v.* Mann, 17 Iowa 131.

70. Felton *v.* Bissel, 25 Minn. 15.

71. *Kentucky.*— Lang *v.* Constance, 46 S. W. 693, 20 Ky. L. Rep. 502; Perkins *v.* Scott, 7 Ky. L. Rep. 608, holding that a surety who satisfies the debt for which he is bound is entitled to an attachment as well as mortgage lien held by the creditor for his security.

New York.— Goodyear *v.* Watson, 14 Barb. 481.

North Carolina.— Barnes *v.* Morris, 39 N. C. 22.

Ohio.— Dempsey *v.* Bush, 18 Ohio St. 376.

Pennsylvania.—Fleming *v.* Benson, 2 Rawle 128, 19 Am. Dec. 629.

South Carolina.— Garvin *v.* Garvin, 27 S. C. 472, 4 S. E. 148.

Tennessee.— Whiteside *v.* Latham, 2 Coldw. 91.

Texas.— Jordan *v.* Hudson, 11 Tex. 82.

Virginia.— Buchanan *v.* Clark, 10 Gratt. 164.

See 44 Cent. Dig. tit. "Subrogation," § 87.

Such as statutory liens.— Cummings *v.* May, 110 Ala. 479, 20 So. 307; Hook *v.* Richeson, 115 Ill. 431, 5 N. E. 98; Richeson *v.* Crawford, 94 Ill. 165; McCoy *v.* Wood, 70 N. C. 125.

72. Hevener *v.* Berry, 17 W. Va. 474. But see Glasgow Deposit Bank *v.* Munford, 5 Ky. L. Rep. 249, holding that the lien given to appellant by its charter upon the stock of stock-holders to secure all indebtedness from them is for the protection of the bank, in regard to which it can make any valid agreement and that therefore, where a stockholder has become a debtor to the bank to the limit of his stock, the bank can make other loans on personal security alone, and sureties, not becoming such on the faith of the stock, have no right to it as a security.

Damages sustained by a charterer of a ship by a breach of the charter contract, in the loss or delay of his voyage through the negligence or fault of the owner, are a lien upon the vessel; and, if a mortgagee satisfied the demand and takes an assignment of the claim, he is entitled to come in upon remnants in

or equity, such as a court of equity would have enforced at his instance for the satisfaction of his debt.[73]

(B) *Vendor's Lien.* One who pays purchase-money as surety of the vendee is entitled to the vendor's lien,[74] and his equity is superior to the widow's right of dower.[75] But to entitle him to relief he must actually have been surety for the purchaser, must have paid the debt, and the vendor's lien must not have been waived, abandoned, or extinguished;[76] and as one who merely lends money to another to pay off a lien does not thereby become subrogated to the lien,[77] the fact that a note paid by a surety was executed by the principal for money borrowed to pay for land does not entitle the surety to a lien on the land to secure the repayment of the money; the payee of the note himself having no lien.[78] In those cases which sustain the theory that payment of the indebtedness destroys

court for repayment. The Panama, 18 Fed. Cas. No. 10,703, Olcott 343.

73. Brown *v.* Connell, 89 Ky. 235, 12 S. W. 267, 11 Ky. L. Rep. 427; Havens *v.* Foudry, 4 Metc. (Ky.) 247.

The provision in a corporate charter making stock a pledge for the owner's debt to the corporation may be enforced for the protection of the debtor's indorser, who has the right to be subrogated to the corporation's lien. Young *v.* Vough, 23 N. J. Eq. 325; Klopp *v.* Lebanon Bank, 46 Pa. St. 88; Petersburg Sav., etc., Co. *v.* Lumsden, 75 Va. 327. But see Cross *v.* Phenix Bank, 1 R. I. 39, holding that such a provision was not adopted to secure indorsers, although they may be entitled to relief against any abuse of the power which it confers.

74. *Arkansas.*— Beattie *v.* Dickinson, 39 Ark. 205.

Indiana.— Ballew *v.* Roler, 124 Ind. 557, 24 N. E. 976, 9 L. R. A. 481.

Kentucky.— Burk *v.* Chrisman, 3 B. Mon. 50; Kleiser *v.* Scott, 6 Dana 137; Barnes *v.* Barnes, 72 S. W. 282, 24 Ky. L. Rep. 1732; Riggs *v.* Chapman, 46 S. W. 692, 20 Ky. L. Rep. 473 (as against an execution creditor of the principal); Highland *v.* Anderson, 17 S. W. 866, 13 Ky. L. Rep. 710; Allen *v.* State Bank, 4 Ky. L. Rep. 257. But see Adair *v.* Campbell, 4 Bibb 13 (holding that the vendor's lien is founded on the presumed intention of the parties, and the fact that the vendor takes a surety from the vendee repels the presumption that a lien was intended, and there being no lien the surety cannot be subrogated); Grover *v.* Wilson, 37 S. W. 60, 18 Ky. L. Rep. 467.

Louisiana.— Davidson *v.* Carroll, 20 La. Ann. 199.

Maryland.— Walsh *v.* McBride, 72 Md. 45, 19 Atl. 4; Carrico *v.* Farmers, etc., Nat. Bank, 33 Md. 235; Welch *v.* Parran, 2 Gill 320; Magruder *v.* Peter, 11 Gill & J. 217; Ghiselin *v.* Fergusson, 4 Harr. & J. 522 (holding that a surety of the vendee on a bond for the payment of the purchase-price of land, who is obliged to satisfy the bond, is entitled to subrogation to the vendor's lien against a party purchasing of the vendee with notice); Winder *v.* Dieffenderffer, 2 Bland 166, 189. But see Hall *v.* Jones, 21 Md. 439.

Michigan.— Myres *v.* Yaple, 60 Mich. 339, 27 N. W. 536.

Minnesota.— Torp *v.* Gulseth, 37 Minn. 135, 33 N. W. 550.

Missouri.— Fulkerson *v.* Brownlee, 69 Mo. 371.

North Carolina.— Stenhouse *v.* Davis, 82 N. C. 432; Schoffner *v.* Fogleman, 60 N. C. 564, holding that where land is sold, and the purchaser gives a bond, with a security, for the purchase-money, and the title is retained as a further security for its payment, the surety for the original purchase-money has the first equity to be indemnified and his claim is preferred to that of a purchaser of an equity of redemption at a sheriff's sale, or of any encumbrancer who comes in by assignment, or otherwise; and the question of notice has no relation to such cases, because neither party has the legal estate.

Pennsylvania.— Deitzler *v.* Mishler, 37 Pa. St. 82.

Tennessee.— Galliher *v.* Galliher, 10 Lea 23; Carter *v.* Sims, 2 Heisk. 166; Uzzell *v.* Mack, 4 Humphr. 319, 40 Am. Dec. 648.

See 44 Cent. Dig. tit. "Subrogation," § 88. And see Sheldon Subr. § 97.

Subrogation of stayer of execution.— Where execution on a judgment for the amount of a note secured by an express lien on land sold has been stayed, the stayer who is compelled to pay it is entitled to be substituted to the rights of the vendor in the enforcement of the lien. Ellis *v.* Roscoe, 4 Baxt. (Tenn.) 418.

If the land be sold to several subpurchasers, they are to be charged ratably. Burk *v.* Chrisman, 3 B. Mon. (Ky.) 50.

75. Ballew *v.* Roler, 124 Ind. 557, 24 N. E. 976, 9 L. R. A. 481.

76. Walsh *v.* McBride, 72 Md. 45, 19 Atl. 4.

77. Reid *v.* Jackson, 6 Ky. L. Rep. 743. And see *infra*, VII, L, 3.

78. Jones *v.* Talbott, 13 Ky. L. Rep. 303; Reid *v.* Jackson, 6 Ky. L. Rep. 743.

The husband who pays the wife's debt must be regarded as doing it for her benefit and is not entitled to subrogation in the absence of circumstances showing a clear equitable right. Chilton *v.* Chilton, 13 Ky. L. Rep. 830, where a note, executed by husband and wife for a deferred payment on land purchased by the wife, is subsequently paid by the husband, he is not entitled to be substituted to the vendor's lien.

the original security or debt itself [79] it is held that where sureties for the purchase-price of land are compelled to pay part of such price they do not thereby acquire the vendor's lien on the land for reimbursement.[80]

b. Priority of Creditor. Where preference is given to a debt on account of its character, a surety upon paying the debt is entitled to the same preference to which the creditor was entitled,[81] and to the dignity of such claim,[82] and the same rule applies where a state or the United States is the creditor.[83] Thus a surety

79. See *supra*, VII, E, 2, d.

80. Foster *v.* Athenæum, 3 Ala. 302 [*followed* in McNeill *v.* McNeill, 36 Ala. 109, 76 Am. Dec. 320], holding that an administrator who pays, as surety, a part of the purchase-money of land bought by his intestate, is not entitled to be subrogated to the vendor's lien upon the land.

81. *Indiana.*— Smith *v.* Harbin, 124 Ind. 434, 24 N. E. 1051.

Kentucky.— Muldoon *v.* Crawford, 14 Bush 125; Schoolfield *v.* Rudd, 9 B. Mon. 291.

Maryland.— Orem *v.* Wrightson, 51 Md. 34, 34 Am. Rep. 286.

Missouri.— Grady *v.* O'Reilly, 116 Mo. 346, 22 S. W. 798.

North Carolina.— Drake *v.* Coltrane, 44 N. C. 300, holding also that the priority in the administration of the assets of the principal, which the debt, if unpaid, would have had, applies to any such claim, whether payment be made before or after the death of the principal.

Ohio.— Oneil *v.* Whitaker, 1 Am. L. J. 225.

Virginia.— Robertson *v.* Trigg, 32 Gratt. 76.

United States.— Lidderdale *v.* Robinson, 12 Wheat. 594, 6 L. ed. 740.

England.— *In re* Kirkwood, L. R. 1 Ir. 108; Drew *v.* Lockett, 32 Beav. 499, 9 Jur. N. S. 786, 8 L. T. Rep. N. S. 782, 11 Wkly. Rep. 843, 55 Eng. Reprint 196; Williams *v.* Jones, Bunb. 275. See also *In re* Churchill, 39 Ch. D. 174, 58 L. J. Ch. 136, 59 L. T. Rep. N. S. 597, 36 Wkly. Rep. 805; Forbes *v.* Jackson, 19 Ch. D. 615, 51 L. J. Ch. 690, 30 Wkly. Rep. 652.

See 44 Cent. Dig. tit. "Subrogation," § 18.

A surety to the crown, having paid the debt of his deceased principal, is entitled to the priority of the crown in the administration of the estate of the principal. *In re* Churchill, 39 Ch. D. 174, 58 L. J. Ch. 136, 59 L. T. Rep. N. S. 597, 36 Wkly. Rep. 805. But sureties on the recognizance of a county treasurer are not entitled to priority over the crown in regard to debts due by the treasurer to the crown beyond the amount of the recognizance. Reg. *v.* O'Callaghan, 1 Ir. Eq. 439, J. & C. 154.

82. Burrows *v.* McWhann, 1 Desauss. Eq. (S. C.) 409, 1 Am. Dec. 677; Kent *v.* Canter, Wallis 364, 366 note.

A surety paying the debt of his deceased principal is entitled in equity to be paid as of the same class as the obligation discharged by him; but it is otherwise at law. Lenoir *v.* Winn, 4 Desauss. Eq. (S. C.) 65, 6 Am. Dec. 597. N. C. Rev. St. c. 113, § 4, confers on the claim of a surety the dignity in the administration of the debts of the principal which the debt, if unpaid, would have had; and it does not make any difference whether payment be made before or after the death of the principal. Drake *v.* Coltrane, 44 N. C. 300.

If the debt be evidenced by a sealed instrument, the sureties will rank as specialty creditors of the principal. Howell *v.* Reams, 73 N. C. 391; *Ex p.* Ware, 5 Rich. Eq. (S. C.) 473; Shultz *v.* Carter, Speers Eq. (S. C.) 533; Powell *v.* White, 11 Leigh (Va.) 309; Robinson *v.* Wilson, 2 Madd. 434, 56 Eng. Reprint 395.

A surety paying costs after the passing of 19 & 20 Vict. c. 97, § 5, is entitled to claim as a specialty creditor of the estate of the principal. Lockhart *v.* Reilly, 1 De G. & J. 464, 27 L. J. Ch. 54, 58 Eng. Ch. 360, 44 Eng. Reprint 803.

83. Jackson *v.* Davis, 4 Mackey (D. C.) 194; Richeson *v.* Crawford, 94 Ill. 165; Orem *v.* Wrightson, 51 Md. 34, 34 Am. Rep. 286.

A surety on a custom-house bond after paying it has, under statute, the same priority as the United States against the estate of his principal in the hands of an assignee. Reed *v.* Emory, 1 Serg. & R. (Pa.) 339; U. S. *v.* Hunter, 26 Fed. Cas. No. 15,426, 5 Mason 62. And where a person gives his bond for duties on imported goods, he will be subrogated, not under the statute but upon the general principles of equity, to the priorities of the United States, although the importer is not bound in the bond (Enders *v.* Brune, 4 Rand. (Va.) 438); but it has been held that a surety on a custom-house bond, who has paid it, is not entitled under the statute to be subrogated to the rights of the United States as against his cosurety, so as to give his demand for contribution a preference over other creditors of the cosurety (State Bank *v.* Adger, 2 Hill Eq. (S. C.) 262. But see Jackson *v.* Davis, 4 Mackey (D. C.) 194); and the statute is held to apply only to an assignment for the benefit of creditors in general, and not to an assignment by an insolvent debtor in trust for the benefit of single creditor or surety (Bouchaud *v.* Dias, 1 N. Y. 201 [*reversing* 3 Edw. 485]); and a surety who has discharged a duty bond to the United States is entitled to be subrogated only to the preferences and priorities of the United States to be first paid out of the estate of the principal, and to no other advantages secured to the United States (U. S. *v.* Preston, 27 Fed. Cas. No. 16,087, 4 Wash. 446). The act has no application when the person seeking subrogation is not a surety. Wilkinson *v.* Babbitt, 29 Fed. Cas. No. 17,668, 4 Dill. 207.

upon a bond, who pays it off after the death of the principal debtor, is subrogated to the same right of priority in the distribution of assets in the hands of the executor which the law confers on bond creditors.[84] The doctrine is extended to apply against a cosurety [85] or his estate.[86]

c. Rights of Principal. A surety is entitled to be subrogated to rights and privileges and securities which belong to the principal whose debt he has paid, in so far as these are connected with the debt,[87] such as the right of set-off,[88] or defense,[89] or to have a judgment against the principal reviewed,[90] and to have the benefit of any fund or collateral provided by the principal for the payment

The sureties on a state treasurer's bond who are compelled to pay his deficiency are subrogated to the rights of the state, and their claim against his estate for repayment of the amount paid by them is entitled to preference, as the state funds in his possession were trust funds, and therefore preferred. Whitbeck *v.* Ramsay, 74 Ill. App. 524.

84. Orem *v.* Wrightson, 51 Md. 34, 34 Am. Rep. 286; Powell *v.* White, 11 Leigh (Va.) 309.

85. Jackson *v.* Davis, 4 Mackey (D. C.) 194; Orem *v.* Wrightson, 51 Md. 34, 34 Am. Rep. 286.

86. Robertson *v.* Trigg, 32 Gratt. (Va.) 76, holding that two of the sureties of a United States collector, who has made default and died insolvent, are entitled to be subrogated to the right of priority of the United States in payment of the debt, when they have paid it, as against the estate of another surety, who died before the insolvency of the collector. But see State Bank *v.* Adger, 2 Hill Eq. (S. C.) 262.

87. *Alabama.*— Baldwin *v.* Alexander, 145 Ala. 186, 40 So. 391.

Arkansas.— American Land Co. *v.* Grady, 33 Ark. 550.

Massachusetts.— Jennings *v.* Moore, 189 Mass. 197, 75 N. E. 214.

Michigan.— Campau *v.* Miller, 46 Mich. 148, 9 N. W. 140 (holding that one who is compelled to pay money on behalf of persons who, if they had paid it, would be entitled to indemnity therefor from a certain estate, will be subrogated to the rights of such persons, and may present his claim directly against the estate); Myres *v.* Yaple, 65 Mich. 403, 32 N. W. 442.

Missouri.— Bushong *v.* Taylor, 82 Mo. 660 (holding that a surety on the note of trustees for a church, given for money borrowed by them to build a church edifice, who is obliged to pay the debt, is entitled to be subrogated to the trustees' rights to subject the church property to its payment); Rubey *v.* Watson, 22 Mo. App. 428.

Oregon.— Ausplund *v.* Ætna Indemnity Co., 47 Oreg. 10, 81 Pac. 577, 82 Pac. 12, holding that where a surety, either corporate or individual, assumes, in pursuance of the terms of his undertaking, the performance of the principal's contract, it is subrogated to the rights of the principal in such contract.

Pennsylvania.— Bldg. Assoc. *v.* Benore, 1 Lack. L. Rec. 399.

See 44 Cent. Dig. tit. "Subrogation," § 19.

A judgment permitting a surety on the bond of one purchasing land at a judicial sale, and who has paid the purchase-price, to be subrogated to the purchaser's rights and have the title made to himself, is irregular, unless notice be given to the parties affected thereby. Dawkins *v.* Dawkins, 93 N. C. 283.

The surety on the bond of a public contractor, conditioned, in compliance with statute, for the faithful performance of the contract, and the prompt and full payment of laborers and materialmen, has an equity, under the doctrine of subrogation, in the sums due from the government under the contract, which is superior to the claim of a bank under an assignment from the contractor to secure the repayment of money loaned, to be used as he saw fit, either in the performance of his building contract or in any other way. Henningsen *v.* U. S. Fidelity Guaranty Co., 208 U. S. 404, 28 S. Ct. 389, 52 L. ed. 547 [*affirming* 143 Fed. 810, 74 C. C. A. 484].

A surety on a mortgage bond who paid the deficiency on a sale under the mortgage was thereby subrogated to the rights of his principal under an agreement by a purchaser of the mortgaged premises to assume payment of the mortgage debt. Van Meter *v.* Poole, 130 Mo. App. 43, 110 S. W. 5.

Indemnitors of sureties on the bond of a contractor for the erection of a county building compelled to pay judgments against the contractor, who was subsequently declared a bankrupt, were entitled to an equitable lien on a balance due from the county to the bankrupt, which the trustee subsequently recovered, to the amount of the judgments so paid. Reid *v.* Pauly, 121 Fed. 652, 58 C. C. A. 152.

88. *Alabama.*— Cole *v.* Justice, 8 Ala. 793.

Illinois.— Waterman *v.* Clark, 76 Ill. 428.

Missouri.— Rubey *v.* Watson, 22 Mo. App. 428.

Wisconsin.— McDonald Mfg. Co. *v.* Moran, 52 Wis. 203, 8 N. W. 864.

England.— Bechervaise *v.* Lewis, L. R. 7 C. P. 372, 41 L. J. C. P. 161, 26 L. T. Rep. N. S. 848, 20 Wkly. Rep. 726; Murphy *v.* Glass, L. R. 2 P. C. 408, 20 L. T. Rep. N. S. 461, 6 Moore P. C. N. S. 1, 17 Wkly. Rep. 592, 16 Eng. Reprint 627.

See 44 Cent. Dig. tit. "Subrogation," § 19.

89. Baines *v.* Barnes, 64 Ala. 375; Huntress *v.* Patten, 20 Me. 28; Jarratt *v.* Martin, 70 N. C. 459; Gill *v.* Morris, 11 Heisk. (Tenn.) 614, 27 Am. Rep. 744, judgment estoppel.

90. Farrar *v.* Parker, 3 Allen (Mass.) 556.

of the debt.[91] But the surety is entitled to subrogation only in regard to the contract upon which he was surety,[92] and a surety for the purchase-price of property cannot interpose as a defense the failure of title to the property,[93] and he cannot, unless the principal is insolvent,[94] thus bringing the matter within the scope of equitable set-off,[95] set off a demand in favor of the principal not connected with the subject of the action or growing out of the same transaction.[96]

d. Rights of Cosurety. One cosurety who pays the whole debt has the same remedy by subrogation against his cosurety for his proportionate part as a surety has against the principal,[97] and if a cosurety takes counter security from his principal for his own indemnity, his cosurety upon contributing will be subrogated to the benefit of the counter security.[98]

4. Against Whom Surety Is Subrogated. Generally the right of the surety to subrogation can be enforced against all persons claiming under the principal,[99] with notice of the facts, actual [1] or constructive,[2] or with knowledge that the principal is committing a breach of trust in disposing of property; [3] and the right of the surety is superior to that of other creditors of the principal as to property in the hands of the creditor.[4] But sureties cannot follow the property of the

91. Rubey *v.* Watson, 22 Mo. App. 428.

92. Tardy *v.* Allen, 3 La. Ann. 66.

93. Lyon *v.* Leavitt, 3 Ala. 430; Ross *v.* Woodville, 4 Munf. (Va.) 324; Osborne *v.* Bryce, 23 Fed. 171.

94. Patterson *v.* Gibson, 81 Ga. 802, 10 S. E. 9, 12 Am. St. Rep. 356; Coffin *v.* McLean, 80 N. Y. 560; Morgan *v.* Smith, 70 N. Y. 537.

95. **Equitable set-off** see Recoupment, Set-Off, and Counter-Claim, 34 Cyc. 638.

96. Woodruff *v.* State, 7 Ark. 333; Morgan *v.* Smith, 70 N. Y. 537; Springer *v.* Dwyer, 50 N. Y. 19; Baltimore, etc., R. Co. *v.* Bitner, 15 W. Va. 455, 36 Am. Rep. 820.

97. Pond *v.* Dougherty, 6 Cal. App. 686, 92 Pac. 1035; Croft *v.* Moore, 9 Watts (Pa.) 451; Bunting *v.* Riehl, 2 Pa. Co. Ct. 450.

Where collateral was deposited by a surety to secure the principal debt without an agreement with defendant, his cosurety, defendant will be subrogated to the rights of the creditor in such collateral on payment of the debt only by virtue of his suretyship, and not because of his contract. North Ave. Sav. Bank *v.* Hayes, 188 Mass. 135, 74 N. E. 311.

98. Stanwood *v.* Clampitt, 23 Miss. 372 (holding that if one of several sureties pays the debt, and insists upon contribution by his cosurety, he must also permit the cosurety to be subrogated to his rights under the creditor's mortgage); Paulin *v.* Kaighn, 29 N. J. L. 480.

99. Drew *v.* Lockett, 32 Beav. 499, 9 Jur. N. S. 786, 8 L. T. Rep. N. S. 782, 11 Wkly. Rep. 843, 55 Eng. Reprint 196.

Where there was collusion between the principal and the surety in causing a sale of the property of the principal to a third person, the court will not interfere to protect the interests of the surety. Stratton *v.* Thomas, 133 Mich. 281, 94 N. W. 1053.

1. Atwood *v.* Vincent, 17 Conn. 575; Drew *v.* Lockett, 32 Beav. 499, 9 Jur. N. S. 843, 8 L. T. Rep. N. S. 782, 11 Wkly. Rep. 843, 55 Eng. Reprint 196.

A note drawn to be discounted by a bank was delivered to a creditor of the maker to get it discounted, and to apply the proceeds in discharge of a smaller note of the maker held by the bank, and on other debts of the creditor. The bank refusing to discount the note, the maker agreed that the creditor should hold it as collateral security for the debts due the latter, and it was held that the proceeds of a judgment on the notes should be applied first to indemnify a surety on the note held by the bank, and the balance to the claims of the creditor. Tysor *v.* Lutterloh, 57 N. C. 247.

2. Anderson *v.* Walton, 35 Ga. 202 (holding that, an insolvent principal having sold property after the rendition of a judgment against him, an injunction against the purchaser, who was about to remove the property from the county, was properly granted at the instance of the surety, although he had not paid the debt); Oglebay *v.* Todd, 166 Ind. 250, 76 N. E. 238 (holding that where the records showed an assignment of a judgment, it was sufficient to put a person on inquiry which, if pursued, would have disclosed that the assignee was a surety, and entitled to enforce the judgment for his benefit).

3. Pinckard *v.* Woods, 8 Gratt. (Va.) 140, holding that where an executor sold bonds at a discount to one who knew that the sale was not necessary for purposes of administration, the purchaser will be liable to the sureties of the executor who have been compelled to pay legatees on the insolvency of the executor.

Where a clerk of a court sold a note belonging to a suitor to one having notice of the trust, the sureties for the clerk, upon judgment being obtained against them by the owner of the note, can compel the purchaser to pay the amount of the note into court. Bunting *v.* Ricks, 22 N. C. 130, 32 Am. Dec. 699.

4. Gastonia *v.* McEntee-Peterson Engineering Co., 131 N. C. 359, 42 S. E. 857; McMullen *v.* Ritchie, 64 Fed. 253.

An accommodation accepter, having paid the drafts, is entitled to the proceeds of an execution against the accommodated payee to the exclusion of subsequent execution credit-

principal into the hands of purchasers for value without notice,[5] or assert their rights as against prior assignees,[6] mortgagees,[7] or execution creditors,[8] or against third persons whose equities were acquired without objection on the part of the sureties,[9] although they can assert their right of subrogation against land of the principal, where title has been withheld, as against those who are under contract to purchase.[10] The surety has no rights superior to those of the principal, and cannot enforce a lien which the latter could not have enforced.[11] Persons dealing with public officers, and receiving money in the course of business, are not responsible to the sureties of such officers when the latter become defaulters.[12]

5. Extent and Limitation of Right. While it is a general rule, founded on principles of natural reason and justice, that a surety, paying off a debt, shall stand in the place of the creditor, and have all the rights which the creditor has for the purpose of reimbursing himself,[13] he takes the claim subject to all its disqualifications and limitations,[14] and he can acquire no greater rights than the creditor had [15] at the time of payment,[16] nor a priority of lien which the creditor did not have;[17] for the surety cannot be placed in a more favorable condition than the principal,[18] and where the creditor had no rights there is nothing to which

ors of the payee. Rigney *v.* Vanzandt, 5 Grant Ch. (U. C.) 494.

5. Vanderveer *v.* Ware, 69 Ala. 38; Fitch *v.* Conyne, 65 Ill. 83; Towe *v.* Newbold, 57 N. C. 212; Findlay *v.* U. S. Bank, 9 Fed. Cas. No. 4,791, 2 McLean 44.

Property in possession of principal.— The surety has no lien, as against third persons, on personal property left in the possession of the principal. Bower *v.* Repsher, 2 Walk. (Pa.) 387. So a surety in a replevin bond does not acquire, by his undertaking, a lien on the property of his principal attached, and it is held that while the surety, upon paying the debt, may be substituted in equity to the lien of the creditor, such right will not overreach the claims or liens of other intervening creditors. Johnson *v.* Morrison, 5 B. Mon. (Ky.) 106.

6. People *v.* Syracuse Third Nat. Bank, 159 N. Y. 382, 54 N. E. 35.

7. New York Security, etc., Co. *v.* Louisville, etc., R. Co., 79 Fed. 386.

8. Patterson *v.* Clark, 101 Ga. 214, 28 S. E. 623.

9. Sawyers *v.* Baker, 77 Ala. 461.

10. Beattie *v.* Dickinson, 39 Ark. 205; Fulkerson *v.* Brownlee, 69 Mo. 371; Polk *v.* Gallant, 22 N. C. 395, 34 Am. Dec. 410; Green *v.* Crockett, 22 N. C. 390.

Where sureties bid in the property of the principal at an execution sale, the fact that the sureties previously had given the creditor their note as collateral security in anticipation of bidding in the property does not constitute payment of the debt to the creditor so as to give a purchaser of the land under contract from the principal superior rights. Adcock *v.* Patton, 2 Baxt. (Tenn.) 436.

11. Warren *v.* Sennett, 4 Pa. St. 114.

12. Clore *v.* Bailey, 6 Bush (Ky.) 77.

Where a master in chancery unlawfully assigns notes taken by him in payment of land officially sold, and embezzles the money received therefor, his sureties have no right to compel the makers of the notes to pay them a second time after they in good faith have paid the assignee. Oglesby *v.* Foley, 153 Ill. 19, 38 N. E. 557.

A surety for a tax collector cannot recover the amount of a defalcation from one who borrowed money from the collector, not knowing that the money was tax money, and who, in good faith, delivered goods in repayment of the loan. Brown *v.* Houck, 41 Hun (N. Y.) 16.

13. See *supra*, VII, E, 3, a, (I).

14. Swarts *v.* Siegel, 117 Fed. 13, 54 C. C. A. 399.

15. *Alabama.*—Houston *v.* Huntsville Branch Bank, 25 Ala. 250; Colvin *v.* Owens, 22 Ala. 782.

Indiana.— Fairman *v.* Heath, 19 Ind. 63.

Kentucky.— Flannary *v.* Utley, 3 S. W. 412, 5 S. W. 878, 8 Ky. L. Rep. 776, 9 Ky. L. Rep. 581; Kirkland *v.* Burton, 2 Ky. L. Rep. 319.

Massachusetts.— Dewey *v.* Living, 3 Allen 22; Nelson *v.* Harrington, 16 Gray 139; Putnam *v.* Tash, 12 Gray 121.

New York.— Tickel *v.* Quinn, 1 Dem. Surr. 425.

Pennsylvania.— Sellers *v.* Heinbaugh, 117 Pa. St. 218, 11 Atl. 550, holding that the sureties on a note given by a married woman for money borrowed for repairs to her separate estate, which is not binding upon her, having paid it, are merely subrogated to the rights of the holder, and are not therefore entitled to recover from the married woman.

South Carolina.— Smith *v.* Smith, 2 Hill Eq. 112, holding that the costs of a judgment on an administrator's bond against a surety or co-administrator who has been subrogated to the rights of the creditor cannot rank as a bond debt.

Vermont.— Pierson *v.* Catlin, 18 Vt. 77.

Virginia.— Barton *v.* Brent, 87 Va. 385, 13 S. E. 29.

16. Carpentier *v.* Brenham, 40 Cal. 221; The Evangel, 94 Fed. 680.

17. Duncan *v.* Gainey, 108 Ind. 579, 9 N. E. 470.

18. Lyon *v.* Leavitt, 3 Ala. 430.

the subrogee can be subrogated.[19] Whether the right of subrogation will be extended to the extremest point, so as to include all the rights and remedies of the creditor, must often depend on whether it is necessary for the protection of the surety that it should be so, and subrogation to a right which would be of no practical advantage to him will be refused, particularly where to grant it would work detriment to others;[20] and thus where a creditor makes a partial payment to one holding a prior special mortgage, subrogating him *pro tanto* to the rights of such mortgagee, he is subrogated subordinately to the rights of that creditor to be paid the balance,[21] the surety's equity of subrogation being measured by the contract which he secures and being limited by it,[22] and the surety is thus not subrogated to rights of the creditor relating to other and separate debts.[23] A surety will not be substituted to the rights and liens of the creditor so as to defeat an interest acquired and held by a third person, when that interest, although subordinate to that of the creditor, is prior in date to the undertaking of the surety;[24] and where the equity of the surety is a secret one it will not be allowed to the detriment of one whose rights were acquired without notice of the suretyship.[25] Furthermore a surety cannot speculate upon his principal's misfortune,[26] his right being limited to actual repayment and indemnification,[27] with legal

A surety for the purchase-money of land is bound in the same manner and to the same extent as his principal, and, if the latter is satisfied with the purchase, it cannot be rescinded by the surety for a defect in the security afforded by the title executed. Lyon *v.* Leavitt, 3 Ala. 430.

19. *Delaware.*— Miller *v.* Stout, 5 Del. Ch. 259, holding that he who asks subrogation must work out his equities through those of the party to whose equities he seeks to be subrogated, and he can have no equity if such party has no equity.

Illinois.— Franklin Sav. Bank *v.* Taylor, 131 Ill. 376, 23 N. E. 397.

Iowa.— Hipwell *v.* National Surety Co., 130 Iowa 655, 105 N. W. 318.

Kentucky.— Brown *v.* Connell, 89 Ky. 235, 12 S. W. 267, 10 Ky. L. Rep. 427; Commonwealth Bank *v.* Milton, 12 B. Mon. 340.

Missouri.—George *v.* Somerville, 153 Mo. 7, 54 S. W. 491, holding that where a bank has cut itself off from asserting any claim against land under a deed of trust securing a note held by it, the sureties on the note are not, after paying it, entitled by subrogation to assert any such claim.

United States.— Richards *v.* Haliday, 92 Fed. 798.

20. *In re* Hewitt, 25 N. J. Eq. 210.

21. Walmsley *v.* Theus, 107 La. 417, 31 So. 869.

22. *Indiana.*— Gerdone *v.* Gerdone, 70 Ind. 62.

Kentucky.— Duncan *v.* Lewis, 1 Duv. 183.

Louisiana.— Trent *v.* Calderwood, 2 La. Ann. 942.

Michigan.— Gunn *v.* Geary, 44 Mich. 615, 7 N. W. 235.

North Carolina.— Carlton *v.* Simonton, 94 N. C. 401.

Pennsylvania.— Wagner *v.* Elliott, 95 Pa. St. 487.

South Carolina.— Mathews *v.* Colburn, 1 Strobh. 258; McMullen *v.* Cathcart, 4 Rich. Eq. 117.

Compare March *v.* Barnet, 121 Cal. 419, 53 Pac. 933, 66 Am. St. Rep. 44.

23. Bain *v.* Atkins, 181 Mass. 240, 63 N. E. 414, 92 Am. St. Rep. 411, 57 L. R. A. 791.

24. Fishback *v.* Bodman, 14 Bush (Ky.) 117; Farmers', etc., Bank *v.* Sherley, 12 Bush (Ky.) 304; Hopkinsville Bank *v.* Rudy, 2 Bush (Ky.) 326 [*following* Paterson *v.* Pope, 5 Dana (Ky.) 241]; Johnson *v.* Morrison, 5 B. Mon. (Ky.) 106.

A surety on an appeal-bond is, upon paying the judgment secured, entitled to be subrogated to the rights of the creditor under the judgment extinguished at the time he signed the undertaking on appeal. Green *v.* Milbank, 3 Abb. N. Cas. (N. Y.) 138.

25. Budd *v.* Olver, 148 Pa. St. 194, 23 Atl. 1105.

26. *Arkansas.*— Schoonover *v.* Allen, 40 Ark. 132.

Illinois.— Coggeshall *v.* Ruggles, 62 Ill. 401.

Maryland.— Gillespie *v.* Greswell, 12 Gill & J. 36, holding that a surety who pays the debt of his principal at par and in vitiated notes can only recover the amount given for them, and in the absence of proof the payment will be estimated by the current market price at the time of payment.

Texas.— Hicks *v.* Bailey, 16 Tex. 229.

Virginia.— Robinson *v.* Sherman, 2 Gratt. 178, 44 Am. Dec. 381.

England.— Reed *v.* Norris, 1 Jur. 233, 6 L. J. Ch. 197, 2 Myl. & C. 361, 14 Eng. Ch. 361, 40 Eng. Reprint 678.

27. Waldrip *v.* Black, 74 Cal. 409, 16 Pac. 226; Stanford *v.* Connery, 84 Ga. 731, 11 S. E. 507; Union Stone Co. *v.* Hudson County, 71 N. J. Eq. 657, 65 Atl. 466; Boltz's Estate, 133 Pa. St. 77, 19 Atl. 303; Batsell *v.* Richards, 80 Tex. 505, 16 S. W. 313.

Application of rule.— A surety paying in a depreciated currency (Jordan *v.* Adams, 7 Ark. 348; Miles *v.* Bacon, 4 J. J. Marsh. (Ky.) 457; Martin *v.* Turner, 2 Heisk. (Tenn.) 384), or vitiated notes (Gillespie *v.* Cres-

interest;[28] nor can he base a claim for subrogation upon a payment intended as a gift and made without intent for subrogation;[29] and a surety cannot be substituted for the creditor in relation to another security for another part of the debt where the effect would be to deprive the creditor of one of his resources, and thereby cause a partial loss of the debt.[30] It has been held that a surety who has been fully compensated according to his contract for assuming the debt of another is not entitled to subrogation to the rights of the creditor.[31]

6. Waiver of Loss of Right. The surety may permit security taken for the debt to be returned to the debtor, thus extinguishing his rights in them;[32] and generally it is a question of intention, with the presumption that the surety intends to keep the debt alive and claim the right of subrogation, but if it clearly appears that the intention was to satisfy and extinguish the debt or demand not only as to the creditor but as between the surety and the principal debtor, the right of subrogation is waived.[33] The taking of additional security by the surety does not of itself affect his right to subrogation to securities of the creditor;[34] and a surety does not lose his right to be subrogated to a lien upon the principal's real estate from the fact that he received a mortgage from the principal to secure him, and afterward released a part of it, without notice of any interest or equity of defendants, who were purchasers from the principal,[35] unless superior equities in third persons have intervened.[36] But accepting an independent security, which is not cumulative merely, and the enforcement of which is not consistent, and cannot be concurrent with the enforcement of the right of subrogation, displaces and defeats the latter right;[37] and a surety who has paid the judgment against himself and his principal, and who has been defeated in an action to recover of the principal the amount paid, cannot be substituted to the rights of plaintiff in the original action.[38]

7. Sureties For Particular Classes of Persons — a. Sheriffs and Other Officers. Sureties of a sheriff who have been compelled to pay a judgment, because of the sheriff's failure to return an execution, are subrogated to the right of the sheriff to recover the amount from plaintiff and his attorneys, who subse-

well, 12 Gill & J. (Md.) 36), is entitled to subrogation only to the extent of the actual value of the depreciated medium at the time of payment.

Right to statutory penalty against sheriff. — A defendant in an execution, surety for the other defendants therein, who pays the amount thereof to plaintiff after the sheriff has failed to return it for thirty days after the return-day, has no right to the thirty per cent damages which the law imposes, for the benefit of such plaintiff, on the sheriff for such failure. Sanders *v.* Commonwealth Bank, 2 Metc. (Ky.) 327.

Where the sureties have allowed a set-off to part of the creditors' demand, their right of subrogation is not limited to the amount of the judgment against them for the balance, but extends to the whole amount of the creditor's claim. Keokuk *v.* Love, 31 Iowa 119.

28. Miles *v.* Bacon, 4 J. J. Marsh. (Ky.) 457; Eaton *v.* Lambert, 1 Nebr. 339. And see Comer *v.* Mackey, 73 Hun (N. Y.) 236, 25 N. Y. Suppl. 1023 [*affirmed* in 147 N. Y. 574, 42 N. E. 29].

29. Scott *v.* Scott, 83 Vt. 251, 2 S. E. 431.

Injunction to limit surety's recovery.— Where a surety has paid a judgment against his principal and takes an assignment of it, an injunction against his enforcing the judgment, except as to the portion of the debt due from his cosureties, will be granted. McDaniels *v.* Lee, 37 Mo. 204.

30. Crump *v.* McMurtry, 8 Mo. 408. See Vance *v.* Monroe, 4 Gratt. (Va.) 52.

31. Culbertson *v.* Salinger, 131 Iowa 307, 108 N. W. 454.

32. Tyus *v.* De Jarnette, 26 Ala. 280; Cooper *v.* Jenkins, 32 Beav. 337, 1 New Rep. 383, 55 Eng. Reprint 132.

33. Watts *v.* Eufaula Nat. Bank, 76 Ala. 474; Houston *v.* Huntsville Branch Bank, 25 Ala. 250. See Croft *v.* Moore, 9 Watts (Pa.) 451.

34. Ballew *v.* Roler, 124 Ind. 557, 24 N. E. 976, 9 L. R. A. 481.

35. Crawford *v.* Richeson, 101 Ill. 351.

Where three of several sureties settled with the creditor by giving a new bond, in which their principal did not appear, and one of them paid it, he was entitled in equity to recover from his principal; the second bond extinguishing liability on the first only as to the creditor, and the surety being subrogated to the rights of the creditor under the first bond. Dodd *v.* Wilson, 4 Del. Ch. 108, 399.

36. Henley *v.* Stemmons, 4 B. Mon. (Ky.) 131.

37. Watts *v.* Eufaula Nat. Bank, 76 Ala. 474; Cornwell's Appeal, 7 Watts & S. (Pa.) 305; Cooper *v.* Jenkins, 32 Beav. 337, 1 New Rep. 383, 55 Eng. Reprint 132.

38. Fink *v.* Mahaffy, 8 Watts (Pa.) 384.

quently recovered the amount of the judgment from the judgment debtor;[39] and where the sureties of a sheriff discharge a judgment obtained against them by plaintiff in execution, for default of the principal, they are subrogated to all the rights of plaintiff, both against the sheriff and defendant in execution;[40] and, upon paying the owner for property wrongfully levied upon by the sheriff and turned over to the execution creditor, they are entitled to be subrogated to the sheriff's rights against the creditor;[41] and the surety of a sheriff who was compelled to pay over to heirs the amount due them on the sale of lands in partition may be joined with the sheriff's administrator as plaintiff and may sue on the note given for the purchase-price of the land.[42] Sureties on the official bond of a sheriff, on being compelled to make good the default of their principal, will, by the fact of payment, become equitable assignees and be subrogated to the position of the state in respect of all its securities, liens, and priorities, for the purpose of enforcing reimbursement from their principal.[43] If a party as surety for a sheriff has to pay the amount of a judgment or decree in whole or in part on account of the default of a deputy to said sheriff, he may obtain a judgment or decree against such deputy and his sureties and their personal representatives for the amount so paid by him.[44] But a sheriff who by his act or the act of his deputy, in violation of his official duty, has suffered property, liable to levy and which has been levied on by him or his deputy, to be converted by the debtor to his own use, cannot be allowed, as against and to the prejudice of creditors holding liens on the debtor's remaining property, to have indemnity thereout to the use of another by substitution for what he has been compelled to pay on account of official delinquency or misconduct. The remaining fund ought not to be taken from these lien creditors by the agency of a court of equity and appropriated to the indemnity of one whose claim to priority rests on the title of a wrong-doer.[45] The sureties of an insolvent clerk of court, on a breach of trust by their principal, will be entitled to be subrogated to all the remedies and securities that were in the power of the creditor against one who coöperated in the breach of trust.[46] The same rules of subrogation apply to sureties of other officers who have been compelled to answer for the default of their principal.[47]

39. Sayles *v.* Taylor, 36 Tex. 507.

Sureties of a deceased deputy sheriff, compelled to pay for his default in not levying the proper execution, are entitled in equity to be substituted to his rights against the creditor by whose direction the default was occasioned, and to resort to a bond taken by him from the creditor as an indemnity against the consequences of such default. Philbrick *v.* Shaw, 61 N. H. 356.

40. Saint *v.* Ledyard, 14 Ala. 244. But see Dillon *v.* Cook, 5 Sm. & M. (Miss.) 773.

41. Skiff *v.* Cross, 21 Iowa 459. But see Wright *v.* Fitzgerald, 17 Ohio St. 635.

42. Sweet *v.* Jeffries, 48 Mo. 279.

43. Commonwealth Bank *v.* Potius, 10 Watts (Pa.) 148 (holding that, if sureties be compelled to pay a debt by reason of the neglect of the sheriff to collect it from the principal debtor, they will have a right of action against the sheriff and his sureties on his official bond); Myers *v.* Miller, 45 W. Va. 595, 31 S. E. 976.

44. Liles *v.* Rogers, 113 N. C. 197, 18 S. E. 104, 37 Am. St. Rep. 627; Brinson *v.* Thomas, 55 N. C. 414; Nebergall *v.* Tyree, 2 W. Va. 474 (under Va. Code, c. 49, § 42).

Where the sureties pay for the default of a deputy in not taking a bail-bond from a defendant in a writ, they have a right in equity to be substituted to the rights of the sheriff against such deputy, and to resort to a fund which such deputy had secured from defendant in the original writ to indemnify himself against the consequences of the same default. Philbrick *v.* Shaw, 61 N. H. 356; Blalock *v.* Peake, 56 N. C. 323.

45. Sherman *v.* Shaver, 75 Va. 1. And see Ciples *v.* Blair, Rice Eq. (S. C.) 60.

46. Bunting *v.* Ricks, 22 N. C. 130, 32 Am. Dec. 699.

47. See *infra*, this note.

The sureties of a defaulting tax collector, who have been compelled to make good the default of their principal, are entitled to be subrogated to the rights of the state or county, and to have the lien created by the bond in favor of the state or county enforced for their indemnity (Turner *v.* Teague, 73 Ala. 554; Boone County Bank *v.* Byrum, 68 Ark. 71, 56 S. W. 532; Irby *v.* Livingston, 81 Ga. 281, 6 S. E. 591; Baker *v.* Maryland Fidelity, etc., Co., 73 S. W. 1025, 24 Ky. L. Rep. 2196); and this although the collector who was absent from the state was not proceeded against by the state or county, and the sureties paid the judgment against them for their principal's default (Knighton *v.* Curry, 62 Ala. 404); and where the sureties of a county collector are compelled to

b. Guardians. A surety of a guardian paying the debts of his principal has the right to be subrogated to all the ward's securities and rights against the principal,[48] such as the right of the ward to subject the homestead of the guardian to

pay money to the state or county for the default of the collector after he has transferred his real estate after the statutory lien is attached thereto, they will be entitled to be subrogated to the lien of the state, and may enforce the same against the grantee of the collector by a bill in chancery to reimburse themselves for the amount paid (Richeson *v.* Crawford, 94 Ill. 165); and under Ala. Code, § 527, declaring the bond of a tax collector a lien upon the property of sureties from the date of his default, the sureties, upon payment of a judgment against them for the default as a tax collector, are subrogated to the rights of the county therein, and, as against a non-contributing surety, acquire a lien for his share superior to any mortgage or other lien of date subsequent to such default (Cummings *v.* May, 110 Ala. 479, 20 So. 307). Sureties on a defaulting tax collector's bond, after discharging the fieri facias issued against them and their insolvent principal, and thus satisfying the state for all taxes for the given year, are subrogated to the rights of the state for the uncollected tax of that year, and, when executions for unpaid state taxes have not been issued, may recover such taxes by bill in equity, there being no strictly legal remedy available (Livingston *v.* Anderson, 80 Ga. 175, 5 S. E. 48; Prather *v.* Johnson, 3 Harr. & J. (Md.) 487. But see Jones *v.* Gibson, 82 Ky. 561, holding that, if a sheriff's surety pays the unpaid taxes due the state, he cannot be subrogated to the state's rights against delinquent taxpayers upon the ground that it would subject taxpayers to tedious and expensive litigations). But sureties on a defaulting collector's bond, who purchased lands of his sold on execution for an income sufficient to satisfy the judgment and received a conveyance to themselves, were not entitled to be subrogated to the statutory lien, which the state had in priority of a subsequent mortgage (Turner *v.* Teague, *supra*); and as the bond required of a tax collector is to secure the faithful performance of his duties, including the payment of all taxes collected by him, and although his bond may be insufficient, the purpose of the contract is that the obligee shall be held harmless up to the amount of the bond, where a surety pays the amount called for by such bond, he does not become subrogated to the right of a creditor to the prejudice of a balance due the latter in order that the surety may recoup himself and sustain no loss, while the creditor remains the loser in a matter with respect to which the bond was intended to protect him (State *v.* Perkins, 114 La. 301, 38 So. 196).

Sureties on a county treasurer's bond, who have been compelled to pay to the county moneys used by the treasurer in a firm in which he was a member, with the acquiescence of his copartners, will be subrogated to the rights of the county, against the partnership, and given priority over the claims of the partners for money paid out on ordinary partnership business. Stokes *v.* Little, 65 Ill. App. 255. Similarly where a county treasurer deposits county moneys with a bank, which, knowing the nature of such money, appropriates it to the payment of a private debt against the treasurer, who defaults in such sum, the sureties on his bond, against whom suit is brought by the county, may be subrogated to the rights of the county against the bank for the amount of the judgment rendered against them, since the county could have joined the bank as a party defendant (Skipwith *v.* Hurt, 94 Tex. 322, 60 S. W. 423); and where the state auditor issued a distress warrant against the collector's bondsmen for taxes which the collector had failed to pay over to the state, the bank was liable to the bondsmen in the respective amounts paid by each of them to discharge the collector's liability to the state, since they were entitled to be subrogated to the rights of the state to the funds deposited with the bank (Carroll County Bank *v.* Rhodes, 69 Ark. 43, 63 S. W. 68).

Where a sheriff deposited in a bank a portion of the taxes collected by him, and the bank appropriated the funds to the payment of an individual indebtedness of the sheriff, sureties on the sheriff's bond who had paid to the state the amount misappropriated were entitled as against the bank to be subrogated to the state's rights to the deposit, although they had not paid the interest or penalty which accrued to the state by the sheriff's default, since only the state could make such objection. Boone County Bank *v.* Byrum, 68 Ark. 71, 56 S. W. 532.

48. Reaves *v.* Coffman, 87 Ark. 60, 112 S. W. 194; Gilbert *v.* Neely, 35 Ark. 24; Harris *v.* Harrison, 78 N. C. 202; Fox *v.* Alexander, 36 N. C. 340; McNeil *v.* Morrow, Rich. Eq. Cas. (S. C.) 172. See Walker *v.* Crowder, 37 N. C. 478; Edmunds *v.* Venable, 1 Patt. & H. (Va.) 121.

Subrogation may be had between cosureties for a guardian, in like manner as between other cosureties. Com. *v.* Marsh, 149 Pa. St. 239, 24 Atl. 339.

Where a surety for a defaulting guardian settles with his successor, he is subrogated to the rights of the wards, and entitled to recover from debtors of their estate, whose claims the defaulting guardian compromised without authority, such amounts as the wards themselves were entitled to recover. Brown *v.* Maryland Fidelity, etc., Co., (Tex. Civ. App. 1903) 76 S. W. 944 [*affirmed* in 98 Tex. 55, 80 S. W. 593].

But he cannot rise higher than his principal in right, and must stand in his shoes and take his remedies with all the equities and limitations existent against the ward. Adams *v.* Gleaves, 10 Lea (Tenn.) 367.

sale for the payment of claims owing by him in his fiduciary capacity;[49] and if, on the application of the sureties of a guardian, he is required to give further security, and the sureties on the first bond afterward pay the whole amount of the guardian's deficiency, equity will subrogate them to the rights of the ward so far as to allow them to use the second bond to enforce contribution.[50] It is held that a guardian's sureties are entitled to be subrogated to the remedies of the ward against their principal, even before payment, when the principal is insolvent.[51]

c. Trustees. A surety of a trustee may be subrogated to the right of the latter to be reimbursed from the trust fund for money properly paid out in its behalf by the trustee;[52] and a surety of a trustee, who has been compelled to account for the defalcation of his principal, is entitled to be subrogated to the rights of the *cestui que trust*, against one who has wrongfully appropriated part of the trust estate.[53]

d. Executors or Administrators. The surety of an administrator who has disbursed his funds for the benefit of the estate may be subrogated to the right of his principal;[54] and is entitled to the same lien on the estate which such payment by the administrator would have given him,[55] and to the rights of the creditors paid,[56] or of an administrator *de bonis non*,[57] and an administrator's surety upon payment of a devastavit is subrogated to the rights of the estate.[58] But a surety for an executor or administrator must exhaust his remedies against the executor or administrator individually before resorting to the assets of the estate.[59] An executor liable for the default of his co-executor is entitled to be subrogated to whatever compensation the co-executor is entitled to.[60]

e. Surety of Surety. A surety of a surety is entitled to all the rights of the surety, and is to be substituted in his place as to all remedies against the principal or his estate,[61] and to the benefit of mortgage security given to secure the debt.[62] But the surety of a surety, although compelled to pay the creditor, cannot be so substituted if the debtor has paid his immediate surety,[63] and in any event he can have no greater right than the surety for whom he is surety would have upon payment of the debt.[64]

f. Successive Sureties. One who becomes a surety in the course of legal

49. State *v.* Atkins, 53 Ark. 303, 13 S. W. 1097; Gilbert *v.* Neely, 35 Ark. 24. See Pierce *v.* Holzer, 65 Mich. 263, 32 N. W. 431.

50. Com. *v.* Cox, 36 Pa. St. 442.

51. Adams *v.* Gleaves, 10 Lea (Tenn.) 367.

52. Boyd *v.* Myers, 12 Lea (Tenn.) 175.

Subrogation of trustee to rights of new trustee.— Where a trustee received the money of the estate, and filed an account showing the amount for which he was responsible, and his sureties were compelled to pay for him, they were entitled to be subrogated to the rights of a new trustee, who received some moneys of the estate. John's Estate, 2 Chest. Co. Rep. (Pa.) 77.

53. Farmers', etc., Bank *v.* Maryland Fidelity, etc., Co., 108 Ky. 384, 56 S. W. 671, 22 Ky. L. Rep. 22.

54. Taylor *v.* Taylor, 8 B. Mon. (Ky.) 419, 48 Am. Dec. 400; Clark *v.* Williams, 70 N. C. 679 (holding that a surety on an administration bond, who has paid a debt recovered against the insolvent administrator, is subrogated, not to the rights of the creditor, but to those of the administrator).

55. Gowing *v.* Bland, 2 How. (Miss.) 813. See Taylor *v.* Taylor, 8 B. Mon. (Ky.) 419, 48 Am. Dec. 400.

56. Worthy *v.* Battle, 125 Ga. 415, 54 S. E. 667; Pierce *v.* Holzer, 65 Mich. 263, 32 N. W. 431; Wernecke *v.* Kenyon, 66 Mo. 275; Cowgill *v.* Linnville, 20 Mo. App. 138; Kennedy *v.* Pickens, 38 N. C. 147. But see Clark *v.* Williams, 70 N. C. 679.

57. Caviness *v.* Maryland Fidelity, etc., Co., 140 N. C. 58, 52 S. E. 265.

58. Caviness *v.* Maryland Fidelity, etc., Co., 140 N. C. 58, 52 S. E. 265.

Where the sale of bonds taken by an executor from the sale of purchasers of the property amounts to a devastavit, and such bonds are paid by the sureties of the executor, the sureties are entitled to be substituted to the rights of the legatees. Pinckard *v.* Woods, 8 Gratt. (Va.) 140.

59. Hazen *v.* Durling, 2 N. J. Eq. 133.

60. Albro *v.* Robinson, 93 Ky. 195, 19 S. W. 587, 14 Ky. L. Rep. 124.

61. Elwood *v.* Deifendorf, 5 Barb. (N. Y.) 398; Rittenhouse *v.* Levering, 6 Watts & S. (Pa.) 190; McDaniels *v.* Flower Brook Mfg. Co., 22 Vt. 274.

62. McDaniels *v.* Flower Brook Mfg. Co., 22 Vt. 274.

63. New York State Bank *v.* Fletcher, 5 Wend. (N. Y.) 85.

64. Putnam *v.* Tash, 12 Gray (Mass.) 121.

proceedings against the principal has no right of subrogation against the original surety for the debt; but the latter is entitled to be subrogated to the creditor's right against him;[65] and where the interposition of the second surety has been the means of involving the first in ultimate liability to pay, the equity of the first surety preponderates and gives him precedent right to the assignment of collaterals.[66] Indemnity given to a surety is extinguished by the release of the surety and does not pass to a subsequent surety.[67]

g. Sureties on Judicial Bonds. The bail on a replevin bond is upon payment of the bond entitled to subrogation to the rights of the creditor.[68] Similarly the surety of a joint debtor in a forthcoming bond becomes, on forfeiture thereof, surety for the debt, and, when he has discharged it he is entitled to be substituted to all the rights of the creditor against the original debtor subsisting at the time he became bound for the debt;[69] and where, on a judgment against the subsequent indorser, the liability of the prior indorser is fixed, security of the subsequent indorser in a forthcoming bond is entitled to be substituted to the rights of the principal to the extent of that liability;[70] but as the equitable lien of a creditor on securities given by the principal to the surety to indemnify the latter is derived through the sureties and is thus discharged by any act which discharges the sureties from liability, subsequent sureties on a replevin bond, deriving their right of subrogation through the creditor, lose the right of subrogation to the securities by any act which discharges the original sureties.[71] Where a judgment is affirmed on appeal the sureties on an error or appeal-bond, being liable, may at any time pay the judgment,[72] and upon doing so they become subrogated to all the rights of the judgment creditor at the time of payment,[73] and their equity is superior to

65. Hammock *v.* Baker, 3 Bush (Ky.) 208; Daniel *v.* Joyner, 38 N. C. 513; Dent *v.* Wait, 9 W. Va. 41, holding that if the principal debtor brings in a second surety in such a way as to discharge the first one, and the second surety afterward pays the debt, he cannot come upon the surety who has been discharged, upon the ground of subrogation, although he may upon the principal.

The reason is that the new surety, by joining the principal in a bond by which he obtains time in the collection of the debt, changed the terms upon which the original surety was bound and prejudiced his rights. Moore *v.* Lassiter, 16 Lea (Tenn.) 630.

A supplemental surety is entitled to be subrogated to any rights which the creditor has against the surety. Bender *v.* George, 92 Pa. St. 36. Thus sureties on a bond can recover from bail given on arrest of the principal (Parsons *v.* Briddock, 2 Vern. Ch. 608, 23 Eng. Reprint 997); but a surety is not subrogated to rights against a supplemental surety (March *v.* Barnet, 121 Cal. 419, 53 Pac. 933, 66 Am. St. Rep. 44, holding that sureties on a bond for the release of attachment against the property of the principal given after a judgment against the principal and an indorser of a note are not entitled to subrogation against such indorser).

66. Pott *v.* Nathans, 1 Watts & S. (Pa.) 155, 37 Am. Dec. 456; Burns *v.* Huntington Bank, 1 Penr. & W. (Pa.) 395; Mitchell *v.* De Witt, 25 Tex. Suppl. 180, 78 Am. Dec. 561; Parsons *v.* Briddock, 2 Vern. Ch. 608, 23 Eng. Reprint 997.

67. Hunter *v.* Richardson, 1 Duv. (Ky.) 247.

68. Kane *v.* State, 78 Ind. 103, holding that where the bail on a replevin bond has been compelled to pay fines assessed against a liquor seller for violation of the bond, he is entitled to be subrogated to the rights of the state on such bond against the principal.

Thus a person who becomes replevin bail upon a judgment rendered upon a note secured by a mortgage, and who is compelled to pay the same, is entitled to be subrogated to the mortgagee or any holder of the mortgage. Pence *v.* Armstrong, 95 Ind. 191.

Where a surety on a delivery bond for property levied on was required to pay the amount of the judgment, he is subrogated to all the rights of the original creditor as against the property or its proceeds. Hubbard *v.* Security Trust Co., 38 Ind. App. 156, 78 N. E. 79.

69. Leake *v.* Ferguson, 2 Gratt. (Va.) 419; Robinson *v.* Sherman, 2 Gratt. (Va.) 178, 44 Am. Dec. 381.

70. Conaway *v.* Odbert, 2 W. Va. 25.

71. Havens *v.* Foudry, 4 Metc. (Ky.) 247.

72. Black *v.* Epperson, 40 Tex. 162.

73. Foster *v.* Whitaker, 12 Ga. 57 (holding that when plaintiff recovers specifically in trover certain property and the value of its use during conversion from an insolvent defendant whose surety on appeal is obliged to pay the value of the use, such surety, being subrogated to the rights of plaintiff, can collect the value of the use from the person who by contract with defendant had such use during the conversion); State Bank *v.* Kahn, 49 Misc. (N. Y.) 500, 98 N. Y. Suppl. 858; Smith *v.* National Surety Co., 28 Misc. (N. Y.) 628, 59 N. Y. Suppl. 789 [*affirmed* in 46 N. Y. App. Div. 633, 62 N. Y. Suppl. 1105] (hold-

that of a purchaser of the land in good faith, after the execution of the bond,[74] and to that of general creditors.[75] Thus it has been held that where sureties on an appeal-bond pay the judgment to relieve themselves from liability, and with no intent to discharge bail undertaking to pay the judgment recovered against their principal, or to render his body amenable to process, they become subrogated to the rights of the judgment creditor against the bail;[76] and where one as surety on an appeal-bond pays a part of the claim, he becomes subrogated *pro tanto* to the rights of the creditor.[77] But in other cases it is held that bail for stay of execution is not entitled, on payment, to be subrogated to the rights of plaintiff as against the surety in the judgment, whose rights have been affected by the postponement obtained by the bail for the stay;[78] and that the prior surety is entitled to be subrogated to a bail or other security given for the purpose of obtaining a delay or suspension of legal proceedings against the principal, although he has assented to the giving of such new security, unless the evidence goes far enough to show that the new security was given at his request, and that he consequently stands relatively to it in the position of surety.[79] Sureties on an attach-

ing that a surety on appeal, who has been compelled to pay a judgment founded on tort against several defendants, is entitled to be subrogated to plaintiff's rights under a contract with one of them, made pending the appeal, without the surety's knowledge or consent, binding such defendant to pay part of the judgment on condition of his release therefrom); Black *v.* Epperson, 40 Tex. 162; Conaway *v.* Odbert, 2 W. Va. 25. But see Powell *v.* Allen, 11 Ill. App. 129 [*reversed* on other grounds in 108 Ill. 584], holding that where the sureties on an appeal-bond paid the amount found due on a mortgage in pursuance of their obligation, they were not entitled to be subrogated to the rights of the mortgagee in the mortgage and decree, as against holders of encumbrances subsequent to the mortgage, but prior to the appeal.

The surety upon an error bond sued out by one of several joint defendants, paying the debt after the judgment has been affirmed, is subrogated to the rights of plaintiffs as against all defendants. Taul *v.* Epperson, 38 Tex. 492.

74. Peirce *v.* Higgins, 101 Ind. 178.

75. Winebrener's Appeal, 7 Pa. St. 333.

76. Howe *v.* Frazer, 2 Rob. (La.) 424 (holding that the surety in an appeal-bond, who pays plaintiff, may, on a rule to show cause being made absolute, take out a fieri facias against bail in the suit, whose liablity has been fixed, for the whole amount paid); Culliford *v.* Walser, 3 N. Y. App. Div. 266, 38 N. Y. Suppl. 199 [*reversed* on other grounds in 158 N. Y. 65, 52 N. E. 648, 70 Am. St. Rep. 437].

Where the sureties on an attachment bond paid a judgment for all damages accruing up to the final discharge of the attachment by the general term, and filed a petition against the sureties on the bond in error for contribution *pro rata*, the two sets of sureties were not cosureties, with any right of subrogation or contribution, and, plaintiffs being liable as principal, defendants were not liable. Bradford *v.* Mooney, 2 Cinc. Super. Ct. (Ohio) 468.

77. Comins *v.* Culver, 35 N. J. Eq. 94.

Where the surety on an injunction bond to restrain the enforcement of a judgment based on vendor's lien notes had, in discharge of the bond on the dismissal of the injunction, paid off the judgment, he was entitled to be subrogated to the vendor's lien. Darrow *v.* Summerhill, 93 Tex. 92, 53 S. W. 680, 77 Am. St. Rep. 833.

78. *In re* Wallace, 59 Pa. St. 401; Lathrop's Appeal, 1 Pa. St. 512; Armstrong's Appeal, 5 Watts & S. (Pa.) 352; Pott *v.* Nathans, 1 Watts & S. (Pa.) 155, 37 Am. Dec. 456; Burns *v.* Huntington Bank, 1 Penr. & W. (Pa.) 395; Keller *v.* Roop, 2 Wkly. Notes Cas. (Pa.) 207. See Harnsberger *v.* Yancey, 33 Gratt. (Va.) 527. *Compare* Davis *v.* Schlemmer, 150 Ind. 472, 50 N. E. 373; Semmes *v.* Naylor, 12 Gill & J. (Md.) 358.

But the rule is held to be otherwise where the later surety is surety for the other sureties for the debt as well as for the principal. Dessar *v.* King, 110 Ind. 69, 10 N. E. 621, 80 Ind. 307. And thus the surety on a joint appeal-bond by two defendants, who has paid the bond, may recover of either defendant, although judgment on appeal was in favor of one and against the other. Cotton *v.* Alexander, 32 Kan. 339, 4 Pac. 259.

Subrogation of sureties on an administration bond to remedy of creditor on appeal-bond.— When a creditor of a deceased person recovered a personal decree against the administrator, who appealed therefrom, and on the appeal the decree was affirmed, and, having given an appeal-bond, the surety therein made an arrangement with the creditor, by which he obtained a transfer of the decree, and made a part of it out of the administrator, and afterward recovered judgment on the administration bond, in an action brought in the name of the creditor as relator, for a sum less than the damages incurred by the appeal, the sureties in the administration bond could not be substituted to the remedy of the creditor on the appeal-bond. Brown *v.* Glascock, 1 Rob. (Va.) 461.

79. Clay *v.* Schnitzell, 5 Phila. (Pa.) 441; Harnsberger *v.* Yancey, 33 Gratt. (Va.) 527.

ment bond are subrogated to the rights of the attaching creditors in the attached property.[80] Subrogation of a surety on bail-bonds in criminal cases to the remedies of the government is held to be contrary to public policy and subversive of the purposes of the recognizance.[81]

F. Subrogation of Creditor to Rights of Surety. A creditor whose debt is due is subrogated to the benefit of securities and indemnity furnished by the principal to the surety,[82] and the creditor's rights are not affected by the

80. Gray *v.* Taylor, (N. J. Ch. 1897) 38 Atl. 951, holding, however, that where sureties on the bond of a defendant corporation in an attachment suit paid the attaching creditors' demand, and procured the discharge of the attachment lien, and afterward the corporation became insolvent, and its property was placed in the hands of a receiver, although the sureties could prove against the insolvent corporation as creditors, since they were subrogated to the rights of the attaching creditors in all the attached property in existence at the time of the appointment of the receiver, this lien could not follow property converted into money prior to the insolvency, or the proceeds of such conversion; nor could it reach general assets.

81. U. S. *v.* Ryder, 110 U. S. 729, 4 S. Ct. 196, 28 L. ed. 308, holding also that U. S. Rev. St. (1878) § 3468 [U. S. Comp. St. (1901) p. 2314], which declares that sureties on bonds given to the United States shall, upon default of the principal obligor, be remitted to the rights of the United States against him, has no application to bail bonds in criminal cases.

82. *Alabama.*— Smith *v.* Gillam, 80 Ala. 296.

California.— Van Orden *v.* Durham, 35 Cal. 136.

Connecticut.— Lewis *v.* De Forest, 20 Conn. 427.

Georgia.— Importers, etc., Bank *v.* McGhees, 88 Ga. 702, 16 S. E. 27.

Illinois.— Darst *v.* Bates, 51 Ill. 439.

Indiana.— Griffis *v.* Connersville First Nat. Bank, (App. 1906) 79 N. E. 230.

Iowa.— Rankin *v.* Wilsey, 17 Iowa 463.

Kansas.— Seibert *v.* True, 8 Kan. 52.

Kentucky.— Moore *v.* Moberly, 7 B. Mon. 299.

Maine.— Steward *v.* Welch, 84 Me. 308, 24 Atl. 860.

Maryland.— Baltimore, etc., R. Co. *v.* Trimble, 51 Md. 99.

Massachusetts.— Franklin County Nat. Bank *v.* Greenfield First Nat. Bank, 138 Mass. 515; Rice *v.* Dewey, 13 Gray 47.

Michigan.— Union Nat. Bank *v.* Rich, 106 Mich. 319, 64 N. W. 339; Butler *v.* Ladue, 12 Mich. 173.

Missouri.— Tolle *v.* Boeckeler, 12 Mo. App. 54.

Nebraska.— Longfellow *v.* Barnard, 58 Nebr. 612, 79 N. W. 255, 76 Am. St. Rep. 117.

New Hampshire.— Newport First Nat. Bank *v.* Hunton, 70 N. H. 224, 46 Atl. 1049; Barton *v.* Croydon, 63 N. H. 417.

New Jersey.— Meyers *v.* Campbell, 59 N. J. L. 378, 35 Atl. 788; Demott *v.* Stockton Paper Ware Mfg. Co., 32 N. J. Eq. 124.

New York.— Merchants', etc., Nat. Bank *v.* Cumings, 149 N. Y. 360, 44 N. E. 173; Newburgh Nat. Bank *v.* Bigler, 83 N. Y. 51. But see Albany *v.* Andrews, 29 N. Y. App. Div. 20, 52 N. Y. Suppl. 1129.

North Carolina.— Sherrod *v.* Dixon, 120 N. C. 60, 26 S. E. 770.

Ohio.— Coons *v.* Clifford, 58 Ohio St. 480, 51 N. E. 39; Green *v.* Dodge, 6 Ohio 80, 25 Am. Dec. 736.

Pennsylvania.— Mifflin County Nat. Bank's Appeal, 98 Pa. St. 150; Cornwell's Appeal, 7 Watts & S. 305.

Rhode Island.— Thompson *v.* Taylor, 12 R. I. 109.

Tennessee.— See Walker *v.* Oglesby, 85 Tenn. 321, 3 S. W. 504.

Texas.— Bellville First Nat. Bank *v.* Wheeler, 12 Tex. Civ. App. 489, 33 S. W. 1093.

Vermont.— Morrill *v.* Morrill, 53 Vt. 74, 38 Am. Rep. 659.

Virginia.— Commonwealth Bank *v.* Boisseau, 12 Lehigh 387.

United States.— Brown, etc., Co. *v.* Ligon, 92 Fed. 851; Branch *v.* Macon, etc., R. Co., 4 Fed. Cas. No. 1,808, 2 Woods 385.

In England the rule has been repudiated. *In re* Walker, [1892] 1 Ch. 621, 61 L. J. Ch. 234, 66 L. T. Rep. N. S. 315, 40 Wkly. Rep. 327 (holding that the proposition that the principal creditor is entitled to the benefit of all counter bonds or collateral security given by the debtor to the surety cannot be supported, and that Maure *v.* Harrison [*cited* in 1 Eq. Cas. Abr. 93, pl. 5, 21 Eng. Reprint 904], as the authority for that proposition is not a decision to that effect); Royal Bank *v.* Commercial Bank, 7 App. Cas. 366, 47 L. T. Rep. N. S. 360, 31 Wkly. Rep. 49.

Basis of the rule.— "The whole doctrine of subrogation rests upon equitable considerations and principles. The purpose, at last, is to make that thing or person bear a common burthen, which or who ought, in equity and good conscience, to bear it primarily, in relief or ease of another, only secondarily liable as between the two. Therefore it is that, generally, whenever a security is given by the principal debtor, either to the surety, or to the common creditor, for the payment of the debt, a court of equity will lay hold of it as a trust for the security of the debt, and will so execute the trust that the debt be paid. When the security is given to the surety, if the court subrogates the creditor to it, the surety is benefited — it is for his case. He is relieved from the vexation of suit, from payment of the debt, or from resorting to the legal remedies against the principal, or remedies to make the security avail-

wrongful release of the securities of the surety,[83] or by the fact that his rights against the surety personally are barred by statute,[84] the surety being treated as a trustee of the securities for the benefit of the creditor.[85] The rule extends to guarantors [86] and indorsers,[87] and where a third person, for a present consideration, guarantees the payment of an existing debt, and the debtor executes to him a mortgage conditioned for the payment of the indebtedness to the creditor and the indemnification of the guarantor, the creditor, by substitution, is entitled to the benefit of the security; [88] but where a creditor accepts a guarantor, and the guarantor receives indemnity from the principal debtor, the creditor is subrogated to the rights of the guarantor in only such of the security as subsists at the time he asserts his right thereto by action.[89] The creditor is not subrogated to securities held by the surety for other purposes,[90] or given to take effect upon a con-

able. The liability of the principal is extinguished, to the extent of the security, and justice is done to all parties in interest." Colt *v.* Barnes, 64 Ala. 108, 126.

If one of two principal debtors binds himself to the other to pay the whole debt, and gives security for the performance, the creditor of both is entitled to the benefit of that security. Cornwell's Appeal, 7 Watts & S. (Pa.) 305.

The right may be waived.— Franklin County Nat. Bank *v.* Greenfield First Nat. Bank, 138 Mass. 515; New Bedford Sav. Inst. *v.* Fairhaven Bank, 9 Allen (Mass.) 175; *Ex p.* Morris, 17 Fed. Cas. No. 9,823, 2 Lowell 424.

83. Dyer *v.* Jacoway, 76 Ark. 171, 88 S. W. 901; Jones *v.* Quinnipiack Bank, 29 Conn. 25; McCracken *v.* German F. Ins. Co., 43 Md. 471; Eastman *v.* Foster, 8 Metc. (Mass.) 19.

84. Helm *v.* Young, 9 B. Mon. (Ky.) 394; Eastman *v.* Foster, 8 Metc. (Mass.) 19; Long *v.* Miller, 93 N. C. 227; Jack *v.* Morrison, 48 Pa. St. 113.

85. *Alabama.*— Smith *v.* Gillam, 80 Ala. 296; Daniel *v.* Hunt, 77 Ala. 567.

Connecticut.— Stearns *v.* Bates, 46 Conn. 306.

Illinois.—Chambers *v.* Prewitt, 172 Ill. 615, 50 N. E. 145.

Indiana.— Plaut *v.* Storey, 131 Ind. 46, 30 N. E. 886.

Maine.— In re Fickett, 72 Me. 266.

Maryland.— Owens *v.* Miller, 29 Md. 144.

Massachusetts.— Aldrich *v.* Blake, 134 Mass. 582.

Missouri.— Thornton *v.* National Exch. Bank, 71 Mo. 221.

Nebraska.— Richards *v.* Yoder, 10 Nebr. 429, 6 N. W. 629.

New Jersey.— Price *v.* Trusdell, 28 N. J. Eq. 200.

New York.— Vail *v.* Foster, 4 N. Y. 312; Auburn Bank *v.* Throop, 18 Johns. 505.

North Carolina.— Long *v.* Miller, 93 N. C. 227.

Pennsylvania.— Rice's Appeal, 79 Pa. St. 168.

Vermont.— Paris *v.* Hulett, 26 Vt. 308.

Virginia.— Roberts *v.* Colvin, 3 Gratt. 358.

A creditor will not be subrogated to the rights of a surety in a mortgage given by his debtor to indemnify the surety, since the mortgage is in the nature of trust property for the satisfaction of the debt. Whitehead *v.* Henderson, 67 Ark. 200, 56 S. W. 1065.

Where one accepts a mortgage as security for assuming a debt of the mortgagor, the creditor may, in equity, be subrogated to the rights of the mortgagor, and enforce the debt against the mortgagee. Greene *v.* McDonald, 70 Vt. 372, 40 Atl. 1035.

A distinction is made, however, and it is held that where security is given, with the intention that it shall be applied to the payment of the debt, and be an indemnity to the surety, the surety is a mere trustee for the creditor, and subrogation of the creditor may be decreed; but where the surety is indemnified only against the payment of the debt, it is personal to him, and there can be no substitution or subrogation. John Shillito Co. *v.* Henderson-Achert Lith. Co., 9 Ohio S. & C. Pl. Dec. 7, 6 Ohio N. P. 25. And see Pool *v.* Doster, 59 Miss. 258 [*followed* in Clay *v.* Freeman, 74 Miss. 816, 20 So. 871] (holding that to make a security available to the creditor, it must be conditioned for the payment of the debt, and for enforcement on default in its payment, in other words, it must be expressed to be for the security of the debt, and to be enforceable for its payment, or otherwise it will not be held to be enforceable in behalf of the creditor. And even if the security is conditioned for payment of the debt, but stipulates for its enforcement in a specified contingency, it will be held to be a mere indemnity to the surety, and only enforceable as such according to its terms); McLean *v.* Ragsdale, 31 Miss. 701; Albany *v.* Andrews, 29 N. Y. App. Div. 20, 52 N. Y. Suppl. 1129.

86. Barton *v.* Martin, 54 Mo. App. 134.

87. *Iowa.*— Updegraft *v.* Edwards, 45 Iowa 513.

Maryland.— Boyd *v.* Parker, 43 Md. 182.

Missouri.— Potter *v.* Stevens, 40 Mo. 229.

Pennsylvania.— Harmony Nat. Bank's Appeal, 101 Pa. St. 428.

Wisconsin.— Kelley *v.* Whitney, 45 Wis. 110, 30 Am. Rep. 697.

88. Butterworth *v.* Kritzer Mill Co., 115 Mich. 1, 72 N. W. 990.

89. Poole *v.* Lowe, 24 Colo. 475, 52 Pac. 741.

90. *Alabama.*— Russell *v.* La Roque, 13 Ala. 149.

California.— Van Orden *v.* Durham, 35 Cal. 136.

tingency which has not yet occurred;[91] nor does the right extend to security given to the surety by a third person.[92]

G. Persons Acting in Representative, Fiduciary, or Official Capacity — 1. In General; Agents. One who, acting in a representative or fiduciary capacity, incurs and satisfies obligations to the benefit of his principal, is subrogated to the rights of the principal against others primarily liable,[93] and to the rights of the creditor against the principal.[94] Thus an agent who is compelled by his mistake or mismanagement of his principal's affairs to pay his principal for a debt or default primarily due by a third person is subrogated to the rights of the principal against that person,[95] unless the agent was not merely negligent but his conduct was such that he is not entitled to the consideration of a court of equity;[96] and a general agent upon being compelled to pay a debt which should be satisfied by a subagent is subrogated to the creditor's right against the latter;[97] and generally an agent who uses his private means to protect the estate of his principal is entitled to be subrogated to the position and rights of his principal.[98]

Georgia.— Importers', etc., Bank *v.* McGhees, 88 Ga. 702, 16 S. E. 27.

Illinois.— Constant *v.* Matteson, 22 Ill. 546.

Iowa.— Rankin *v.* Wilsey, 17 Iowa 463.

Kentucky.— Tilford *v.* James, 7 B. Mon. 336.

Maine.— Sumner *v.* Bachelder, 30 Me. 35.

New York.— Albany *v.* Andrews, 29 N. Y. App. Div. 20, 52 N. Y. Suppl. 1129.

North Carolina.— Sherrod *v.* Dixon, 120 N. C. 60, 26 S. E. 770.

Ohio.— Ohio L. Ins., etc., Co. *v.* Reeder, 18 Ohio 35.

Virginia.— Schmelz *v.* Rix, 95 Va. 509, 28 S. E. 890.

91. Pool *v.* Doster, 59 Miss. 258; Bush *v.* Stamps, 26 Miss. 463.

92. *Kentucky.*— Black *v.* Kaiser, 91 Ky. 422, 16 S. W. 89, 13 Ky. L. Rep. 11; Taylor *v.* Farmers' Bank, 87 Ky. 398, 9 S. W. 240, 10 Ky. L. Rep. 368; Macklin *v.* Northern Bank, 83 Ky. 314.

Montana.— O'Neill *v.* State Sav. Bank, 34 Mont. 521, 87 Pac. 970.

New York.— Seward *v.* Huntington, 94 N. Y. 104.

Ohio.—Leggett *v.* McClelland, 39 Ohio St. 624.

United States.— Hampton *v.* Phipps, 108 U. S. 260, 2 S. Ct. 622, 27 L. ed. 719.

93. Lilianthal *v.* Lesser, 185 N. Y. 557, 77 N. E. 1190; State Bank *v.* Campbell, 2 Rich. Eq. (S. C.) 179, holding that where the trustees of a company borrowed money for the use of the company, and mortgaged property which they had held for the use of the company to secure payment of the money borrowed, and afterward conveyed the mortgaged premises to the corporation, they stood as sureties for the corporation, and on payment of the debt were entitled to the security of the mortgage given by them.

A tutor is subrogated to the rights of a creditor of the estate paid by him. Ballio *v.* Wilson, 8 Mart. N. S. (La.) 344.

94. Bush *v.* Wadsworth, 60 Mich. 255, 27 N. W. 532, holding that a president of a corporation who, to preserve the property for the parties he represents, pays the interest due on a mortgage of such property out of his individual fund, is entitled to be subrogated to their rights.

But a director, against whom a judgment has been rendered for assenting to a dividend greater than the profits has no right of subrogation against the company; he is sued as a wrong-doer, and wrong-doers have no recourse over either against those *in pari delicto* or anybody else. Hill *v.* Frazier, 22 Pa. St. 320.

95. *Arkansas.*— Murrell *v.* Henry, 70 Ark. 161, 66 S. W. 647.

Iowa.— Freeburg *v.* Eksell, 123 Iowa 464, 99 N. W. 118.

Minnesota.— Nichols *v.* Wadsworth, 40 Minn. 547, 43 N. W. 541.

Tennessee.— Smith *v.* Alexander, 4 Sneed 482.

United States.— Brinckerhoff *v.* Holland Trust Co., 159 Fed. 191.

See 44 Cent. Dig. tit. "Subrogation," § 30 *et seq.*

Thus where an agent by mistake satisfies for his principal a mortgage for a less sum than is actually due, and thereafter repays to his principal the difference he may sue the debtor to reimburse himself. Kempker *v.* Roblyer, 29 Iowa 274.

An insurance agent is subrogated to the rights of the insurer to collect premiums advanced by him, and may maintain an action, in his own name, against the holders of notes secured by a trust deed, to recover the amount of premiums advanced by him which the insured failed to pay, and for which, by the terms of the policy, the beneficiary thereupon became liable. Boston Safe Deposit, etc., Co. *v.* Thomas, 59 Kan. 470, 53 Pac. 472.

An attorney compelled by his neglect to pay his client the amount of a judgment collected by the sheriff is subrogated to the rights of the client against the sheriff. Governor *v.* Raley, 34 Ga. 173.

96. Brinckerhoff *v.* Holland Trust Co., 159 Fed. 191.

97. Hough *v.* Ætna L. Ins. Co., 57 Ill. 318, 11 Am. Rep. 18. See Young *v.* Morgan, 89 Ill. 199.

98. Bennett *v.* Chandler, 199 Ill. 97, 64 N. E. 1052. But see Brice *v.* Watkins, 30 La. Ann. 21.

A court of equity will not allow an agent to use trust funds in any manner by which he himself acquires a special benefit to the detriment of his principal, and it will not allow him to invest the funds in securities which he himself held, and in such case equity will allow the principal to be subrogated to the rights which the agent had at the time of the transaction, even though the original securities are canceled of record.[99] Where assignees of an insolvent debtor give their joint note to a creditor of the insolvent in payment of such creditor's debt, relying for the means of paying the note on the funds in their hands by virtue of the assignment, specially appropriated for that purpose, such assignees will be considered, both in law and equity, as substituted for such creditor in reference to such fund.[1]

2. Sheriffs. A sheriff who has satisfied a judgment rendered against him on account of his deputy's failure to pay money collected on an execution is entitled to be subrogated to the deputy's rights.[2] Similarly if personal property be sold under execution after satisfaction of the judgment, and under such circumstances as amount to notice to the purchaser of such satisfaction, the sheriff or his sureties, upon having been compelled by the execution debtor to repay the value of the property sold, will be entitled to the money taken or bid at the sale;[3] but where the maker of a note, which defendant has guaranteed conditionally, is sued, and his property attached, and the attaching officer is obliged to pay the debt through the failure of the receiptors of the attached property, the suit and attachment are for the benefit of the guarantor, as well as the creditor, and the officer is not subrogated to the rights of the creditor against the guarantor. It is only against the maker of the note that this right exists.[4] Upon satisfying a judgment based upon his own delinquency, a sheriff cannot thereupon recover the amount from the party for whose benefit the judgment was recovered.[5]

3. Executors and Administrators. Although in a few cases the right has been denied,[6] as a general rule an executor or administrator who with his own funds pays debts or charges upon the estate is entitled to be subrogated to the rights of those paid for the collection of the amounts so paid,[7] and he may apply assets

99. Dorrah *v.* Hill, 73 Miss. 787, 19 So. 961, 32 L. R. A. 631.

1. Rollins *v.* Taber, 25 Me. 144.

2. Downer *v.* South Royalton Bank, 39 Vt. 25.

3. Morgan *v.* Oberly, 85 Ill. 74.

4. Hammond *v.* Chamberlin, 26 Vt. 406.

5. Lee County Justices *v.* Fulkerson, 21 Gratt. (Va.) 182.

6. Slaton *v.* Alcorn, 51 Miss. 72 (holding that since an administrator is under no personal obligation to pay, with his own funds, a judgment against his intestate, his doing so will not entitle him to be subrogated to the judgment creditor's rights); Evans *v.* Halleck, 83 Mo. 376 (where subrogation was denied an administrator who voluntarily paid a debt secured by trust deed under the mistake that there were sufficient personal assets to reimburse him); *In re* Greiner, 2 Watts (Pa.) 414 (holding that an executor who advances money of his own to pay simple contract debts when there are specialties has no claim to preference on a deficiency of assets). See Shinn *v.* Budd, 14 N. J. Eq. 234; Blank's Appeal, 3 Grant (Pa.) 192, holding that a debt paid by an administrator is not assigned to him, but extinguished, and he has no right of subrogation to the original creditor; but after he has shown in the legal manner that there is a balance due him from the estate he has a right to recover it out of the personalty, if there be any left, or out of the lands, and in no other way can he be permitted to assert that he has paid as administrator more than he has received.

7. *Kentucky.*— Smith *v.* Hoskins, 7 J. J. Marsh. 502.

Maryland.— Tuck *v.* Calvert, 33 Md. 209.

Massachusetts.— Stetson *v.* Moulton, 140 Mass. 597, 5 N. E. 809.

New Jersey.—Suydam *v.* Voorhees, 58 N. J. Eq. 157, 43 Atl. 4.

New York.— Lilianthal *v.* Lesser, 102 N. Y. App. Div. 500, 92 N. Y. Suppl. 619 [*affirmed* in 185 N. Y. 557, 77 N. E. 1190]; Matter of O'Brien, 39 N. Y. App. Div. 321, 56 N. Y. Suppl. 925; Ball *v.* Miller, 17 How. Pr. 300.

North Carolina.— Turner *v.* Shuffler, 108 N. C. 642, 13 S. E. 243.

Pennsylvania.— Breckenridge's Appeal, 127 Pa. St. 81, 17 Atl. 874; Williamson's Appeal, 94 Pa. St. 231; Kelchner *v.* Forney, 29 Pa. St. 47; *In re* Wilkins, 9 Watts 132.

Texas.— Lockhart *v.* White, 18 Tex. 102.

See 44 Cent. Dig. tit. "Subrogation," § 32.

An administrator induced by fraud to credit an alleged assigned allowance on the purchase-price of land sold by the estate, and subsequently compelled individually to pay the allowance to the real owner, is subrogated to the right to enforce the vendor's lien against one who received a voluntary conveyance from the purchaser. Thomas *v.* Bridges, 73 Mo. 530.

in his possession to his reimbursement,[8] and he is entitled to have the decedent's land sold, and to be repaid out of the proceeds of the sale if no fraud is shown [9] and his equity is superior to that of legatees,[10] devisees,[11] or heirs.[12] A personal representative who pays a debt, or makes an advance to creditors, legatees, or distributees, will, to the extent of the assets for which he is liable, be subrogated to all the rights of such creditors, legatees, or distributees, including priority and dignity of claim; [13] and the right of the executor will extend to one for whom

If an administrator pendente lite has paid debts of the estate and costs of litigation exceeding the amount of the personal estate, he is entitled to be subrogated to the rights of the creditors against the lands of the estate, and may subject the lands in the hands of the heirs, and the lands in the hands of the devisee, if necessary, to his reimbursement. Woolley *v.* Pemberton, 41 N. J. Eq. 394, 5 Atl. 139.

Where an administrator advances money to complete the purchase of, or pay a lien on, the trust estate, he is entitled to stand in the place of the creditor, whose claim he has paid. Robb's Appeal, 41 Pa. St. 45.

Subrogation to right of distributee against third person.— Where a husband has received property from his wife's father as advancements on her share of the property, and after the father's death the administrator, in a suit by the wife, is compelled to pay her her full share of the estate, such administrator is subrogated to her rights against her husband. Stayner *v.* Bower, 42 Ohio St. 314.

An administrator who pays a debt guaranteed by his intestate becomes subrogated to the rights of the creditor in the collateral security. Lee *v.* Butler, 167 Mass. 426, 46 N. E. 52, 57 Am. St. Rep. 466.

Where an administrator charges himself in his account with the debt of a debtor to the estate, he is subrogated to the rights of the estate against the debtor. Parker *v.* Smith, (Tex. 1889) 11 S. W. 909.

8. Milam *v.* Ragland, 19 Ala. 85; Livingston *v.* Newkirk, 3 Johns. Ch. (N. Y.) 312.

9. Crowley *v.* Mellon, 52 Ark. 1, 11 S. W. 876; Denton *v.* Tyson, 118 N. C. 542, 24 S. E. 116; Pea *v.* Waggoner, 5 Hayw. (Tenn.) 242; Gaw *v.* Huffman, 12 Gratt. (Va.) 628; Kinney *v.* Harvey, 2 Leigh (Va.) 70, 21 Am. Dec. 597.

Subrogation to mortgage discharged.— If the executrix, the widow of the deceased, pays a mortgage out of her individual funds, she is entitled to be subrogated to the mortgage lien (Jefferson *v.* Edrington, 53 Ark. 545, 14 S. W. 99, 903, holding, however, that where a widow, who was also executrix of her husband's estate, paid off one mortgage on his lands out of her individual means, and another out of the funds of the estate, but on her final accounting as executrix she was credited with having paid both out of her individual means, she must release all claims against the estate based on the showing in her final account as to the payment of the two mortgages out of her individual means; Pineo *v.* Goodspeed, 22 Ill. App. 59 [*affirmed* in 120 Ill. 524, 12 N. E. 196]); without proof of specific intent at the time of payment to keep the mortgage alive (Jefferson *v.* Edrington, *supra*). Similarly, an administrator who sells land subject to a mortgage, and afterward pays off the mortgage out of the general assets of the estate, will have a clear equity against the purchaser, and be entitled to reimbursement out of the land (Greenwell *v.* Heritage, 71 Mo. 459 [*following* Welton *v.* Hull, 50 Mo. 296]); and administrators, having redeemed the decedent's lands from mortgage, are subrogated to the right of the mortgagees to collect so much of the mortgage debt as is equal to the widow's share of the amount paid to redeem, by causing the interest assigned to her as dower to be sold for the purpose of foreclosing the mortgage to that extent, without an assignment or act of transfer of the mortgages, since they hold such right for the benefit of the creditors, as quasi-assignees for the purpose of contribution (Salinger *v.* Black, 68 Ark. 449, 60 S. W. 229).

Where an administrator purchases for his own benefit a portion of the trust property, and pays off a mortgage thereon, the court, upon setting aside the sale, will allow the administrator to stand in the place of the mortgagee as to the amount so paid. Woodruff *v.* Cook, 2 Edw. (N. Y.) 259.

Where land is charged with the payment of debts by will, and the executrix advances the money and pays the debts, she should be substituted to the rights of the creditors whose demands she had paid, and authorized to sell for her own benefit. Ducker *v.* Stubblefield, 9 B. Mon. (Ky.) 577.

10. Pendergass *v.* Pendergass, 26 S. C. 19, 1 S. E. 45.

11. Gaw *v.* Huffman, 12 Gratt. (Va.) 628, holding that if, after exhausting testator's personal estate, there still remains a balance due the executor on account of debts paid by him, which would be binding on the heirs, the executor is entitled to stand in the place of the creditors, and charge the balance to testator's real estate, which is liable in the hands of the devisees in proportion to the value at the time of his death of the estate devised to each devisee.

12. Collinson *v.* Owens, 6 Gill & J. (Md.) 4. See McCullough *v.* Wise, 57 Ala. 623.

13. Bennett *v.* Chandler, 199 Ill. 97, 64 N. E. 1052 [*modifying* 101 Ill. App. 409].

An executor, who has made advances to legatees from his own funds, is entitled to be subrogated to their rights, but can be credited only with a *pro rata* share of the assets available for distribution at the time of the accounting. Tickel *v.* Quinn, 1 Dem. Surr. (N. Y.) 425.

he holds the right in trust.[14] Where an administrator pays debts in full, with entire confidence that the assets are sufficient for all purposes, and the estate subsequently is found to be insolvent, he will be entitled to subrogation as to other claims against the estate in favor of the same creditors, even after audit, to the extent of overpayment on the first claim;[15] and thus an administrator who, at his own risk, pays debts not of the preferred class before he has had time to ascertain the insolvency of the estate, may be subrogated to the rights of the creditors whose claims he has paid, the estate being in fact insolvent;[16] and one who to protect his own interests furnishes the administrator funds with which to pay the debts is subrogated to the claims paid to the extent to which the administrator himself could have been subrogated.[17] Similarly a widow of the maker of a note who, before her appointment as administratrix, pays the note, which is thereupon delivered to her by the holder, will be subrogated to the rights of the holder.[18] But as in other cases,[19] the executor or administrator must not be guilty of laches.[20]

4. Guardians and Trustees. A guardian who extends time to his ward's debtor until he becomes insolvent, relying on his promise to pay, and settles the debt in his accounts, can recover it as a debt due to himself;[21] and similarly a guardian compelled by suit to pay his ward a sum of money on the account of his neglect to sue a former guardian, by whom the sum was due the ward and unaccounted for, is subrogated to the rights of the ward, and may recover the amount from the former guardian or from the sureties on his bond;[22] and a court of equity, independently of any agreement, will consider money advanced by a trustee to purchase in an outstanding title as an advance for the benefit of his *cestui que trust*, and not for his own use, giving him a lien on the property until he is reimbursed for the advancement.[23] But a guardian who has for a valuable consideration promised to pay to the ward the amount of the ward's interest in land is not upon payment thereof subrogated to the interest of the ward in the land, for so to subrogate him would be to pay him twice.[24] In case of a mixed sale of property under a decree for the payment of debts, where the trustees making the sale

14. De Concillio *v.* Brownrigg, 51 N. J. Eq. 532, 25 Atl. 383, holding that one who loans money to an executor to pay the debts of the estate is entitled to be subrogated to the rights of the creditors, but only after an account showing the indebtedness which has been discharged, and the balance due the executor from the estate.

15. Weil's Estate, 1 Kulp (Pa.) 339.

16. Hullett *v.* Hood, 109 Ala. 345, 19 So. 419; Pryor *v.* Davis, 109 Ala. 117, 19 So. 440; McNeill *v.* McNeill, 36 Ala. 109, 76 Am. Dec. 320; Woolley *v.* Pemberton, 41 N. J. Eq. 394, 5 Atl. 139; Pierce *v.* Allen, 12 R. I. 510.

But he is not entitled to the full amount of a claim, his only right as against the estate being to stand substituted for the creditors whose claims he has discharged as a claimant against the insolvent estate and to take the same distributive share to which those creditors would have been entitled. McNeill *v.* McNeill, 36 Ala. 109, 76 Am. Dec. 320, holding that if an administrator who is also surety for the intestate on a note given for the purchase-price of land pays the note with his own funds, he merely becomes a creditor of the estate, and is not entitled to be subrogated to the vendor's lien on the land.

17. Freehold First Nat. Bank *v.* Thompson, 61 N. J. Eq. 188, 48 Atl. 333, holding, however, that where an administrator of an insolvent estate, who was also an heir, paid claims which were charges on the realty, he being unauthorized to pay such claims, the presumption was that the payment was not as administrator, but as heir, and therefore creditors who had loaned him money under an agreement that it was to be employed in paying claims against the estate were not entitled, as against other creditors, to be subrogated to the rights of those whose liens were so discharged, although such right might have existed as against the heirs.

18. Matter of Plopper, 15 Misc. (N. Y.) 202, 37 N. Y. Suppl. 33, Gibb Surr. 439.

19. See *supra*, VI, B, 2.

20. Foster's Succession, 4 La. Ann. 479; Lambert *v.* Hobson, 56 N. C. 424; Loomis' Appeal, 29 Pa. St. 237.

21. Breneman's Appeal, 121 Pa. St. 641, 15 Atl. 650.

22. Smith *v.* Alexander, 4 Sneed (Tenn.) 482.

A guardian who advances the balance found on settlement of his account is entitled to subrogation to the remedies of his late ward, as against his agent who had wrongfully retained possession of the assets represented by the decree. *In re* Calhoun, 27 Pittsb. Leg. J. N. S. (Pa.) 414.

23. Bennett *v.* Chandler, 199 Ill. 97, 64 N. E. 1052 [*modifying* 101 Ill. App. 409].

24. Steinreide *v.* Tegge, 29 S. W. 626, 10 Ky. L. Rep. 687.

have exceeded in their payments their cash receipts, they may be subrogated, as to the excess, to the rights of the creditors paid off, but only for the benefit of unsatisfied creditors and not for their individual benefit.[25]

H. Persons Discharging Encumbrances on Property — 1. In General. A person who, in order to protect his own interests or rights in property, is compelled to pay an existing obligation against the same, such as a mortgage or other lien, is entitled to be subrogated to the rights of the creditor whose debt he paid, and to the lien of the encumbrance discharged;[26] and he thereby becomes an

25. Ellicott *v.* Ellicott, 6 Gill & J. (Md.) 35.

26. *Arkansas.*— Jefferson *v.* Edrington, 53 Ark. 545, 14 S. W. 99.

California.— Darrough *v.* Herbert Kraft Co. Bank, 125 Cal. 272, 57 Pac. 983, holding that where the owner of premises pays off a senior lien, without actual knowledge of the existence of a junior lien, it will be presumed that he made the payment for his own benefit, and for the protection of his interests; and equity will treat such owner as the assignee of the original senior lienholder, and will revive and enforce it for his benefit.

Illinois.— Blue *v.* Blue, 38 Ill. 9, 87 Am. Dec. 267; Landis *v.* Wolf, 119 Ill. App. 11; Beifeld *v.* International Cement Co., 79 Ill. App. 318.

Indiana.— Shirk *v.* Whitten, 131 Ind. 455, 31 N. E. 87; Hines *v.* Dresher, 93 Ind. 551; Lowrey *v.* Byers, 80 Ind. 443, holding that subrogation takes place where one pays a debt which another was justly liable to pay, and the payment is made to discharge the property of the person paying from an encumbrance.

Iowa.— Bennett *v.* First Nat. Bank, 128 Iowa 1, 102 N. W. 129.

Kentucky.— Ft. Jefferson Imp. Co. *v.* Dupoyster, 112 Ky. 792, 66 S. W. 1048, 24 Ky. L. Rep. 499, 2 L. R. A. N. S. 263; Riddle *v.* Riddle, 80 S. W. 1129, 26 Ky. L. Rep. 231.

Michigan.— See Dayton *v.* Stahl, 132 Mich. 360, 93 N. W. 878.

Minnesota.— Elliott *v.* Tainter, 88 Minn 377, 93 N. W. 124.

Mississippi.— Staples *v.* Fox, 45 Miss. 667, holding that whenever a party has such an interest in property as makes it incumbent on him to get in an outstanding claim or equity for its protection, good conscience dictates that he shall have all the rights which the holder of the equity had. See Ramoneda *v.* Loggins, (1906) 39 So. 1007.

Missouri.— Allen *v.* Dermott, 80 Mo. 56; Wolff *v.* Walter, 56 Mo. 292.

Nebraska.—Aultman *v.* Bishop, 53 Nebr. 545, 74 N. W. 55; Rice *v.* Winters, 45 Nebr. 517, 63 N. W. 830; South Omaha Nat. Bank *v.* Wright, 45 Nebr. 23, 63 N. W. 126.

New Hampshire.— Jenness *v.* Robinson, 10 N. H. 215.

New York.— Dunlop *v.* James, 174 N. Y. 411, 67 N. E. 60 [*affirming* 70 N. Y. App. Div. 71, 75 N. Y. Suppl. 65]; Cole *v.* Malcolm, 66 N. Y. 363 [*cited* in Finegan *v.* New York, 4 N. Y. App. Div. 15, 38 N. Y. Suppl. 358]; Sampers *v.* Conolly, 115 N. Y. App. Div. 364, 100 N. Y. Suppl. 806; Tompkins *v.* Seely, 29 Barb. 212.

Ohio.— Knox *v.* Carr, 26 Ohio Cir. Ct. 345 [*affirmed* in 69 Ohio St. 575, 70 N. E. 1125]; Crouse *v.* Caldwell, 1 Ohio Dec. (Reprint) 359, 8 West. L. J. 256.

Pennsylvania.— Phinney *v.* Timmins, 1 C. Pl. 2.

Texas.— Galbraith *v.* Howard, 11 Tex. Civ. App. 230, 32 S. W. 803.

Vermont.—Walker *v.* King, 44 Vt. 601, 45 Vt. 525; Downer *v.* Wilson, 33 Vt. 1.

Virginia.— Gatewood *v.* Gatewood, 75 Va. 407.

West Virginia.— McNeil *v.* Miller, 29 W. Va. 480, 2 S. E. 335.

Canada.— Goldie *v.* Hamilton Bank, 27 Ont. App. 619.

See 44 Cent. Dig. tit. "Subrogation," § 48.

Where a life-tenant pays assessments, which the remainder-men were bound to pay under a contract with him, and such assessments had become a lien on the property, and it was liable to be sold therefor, he was entitled to a lien on the premises by subrogation (Eddy *v.* Leath, 26 Ohio Cir. Ct. 645), and a life-tenant who pays a mortgage on the premises is entitled to be subrogated to the rights of the mortgagee; and the cancellation of the mortgage by inadvertence will not alter such right, where no other rights have been affected thereby (Kocher *v.* Kocher, 56 N. J. Eq. 545, 39 Atl. 535), and a devisee of a life-interest in lands of the testator, who pays with his own funds a debt of the testator, which is either charged on the land by the will, or payable out of the land by statute, will be subrogated to the creditor's right (Suydam *v.* Voorhees, 58 N. J. Eq. 157, 43 Atl. 4); and where a life-tenant from time to time made payments on a mortgage on the property in order to protect her life-estate, such payments were not to be regarded as *pro tanto* satisfactions and releases of the original indebtedness, but the tenant had, as to the remainder-men, the right to keep the mortgage alive for the protection of her rights and interest (Bonhoff *v.* Wiehorst, 57 Misc. (N. Y.) 456, 108 N. Y. Suppl. 437, holding, however, that where a life-tenant of mortgaged property, for the protection of her life-estate, paid off the mortgage, she was entitled to recover from the remainder-men only the principal sum advanced by her, since it was her duty as life-tenant to keep down the interest charge, and since as such tenant she was entitled to all income derived from the property in excess of such interest charge). Similarly the payment of a mortgage on land by the tenant for life, who

equitable assignee and may keep the mortgage alive and enforce the lien for his own benefit;[27] and plaintiff in an action for foreclosure of a mortgage, on the payment or tender of his mortgage and costs, can make no resistance to a claim for subrogation on the part of any one who has an interest in the property which can only be saved by, or which would be seriously injured without, the proposed substitution;[28] and the same principle applies if, instead of the property which he seeks to protect being his absolutely, there is a contingency upon which it may be his and he desires to protect it and therefore pays the debt.[29] Where a per-

was also a tenant in remainder of an interest in the land, made after she had made her will giving all her property to one of the tenants in remainder, will not be presumed to be a gift to both the other tenants in common, although she immediately caused the mortgage to be canceled of record. Kinkead *v.* Ryan, 64 N. J. Eq. 454, 53 Atl. 1053. But vendees of the life-tenant and her grantor, who paid the mortgage given by her to such grantor for the purchase-price of the land, conveyed to her for life and to her husband's children in remainder, did not thereby become subrogated to the rights of the mortgagee, as they purchased the land with notice of the rights of the remainder-men. Robinson *v.* Lowery, 52 S. C. 464, 30 S. E. 487.

A widow in possession, whose dower has not been assigned, by paying a mortgage on the land, becomes subrogated to the mortgagor's rights, as against decedent's heirs (Becker *v.* Carey, (N. J. Ch. 1897) 36 Atl. 770); and where a widow, entitled to dower and homestead in land, relieves a portion thereof from the lien of a deed of trust in order to protect her interests, she is entitled to have the whole of such payment refunded to her, in case no portion of the land covered by the trust deed is required to satisfy her dower and homestead rights (Kopp *v.* Thele, 104 Minn. 267, 116 N. W. 472, 17 L. R. A. N. S. 981; Smith *v.* Stephens, 164 Mo. 415, 64 S. W. 260). Similarly, a wife who on the death of her husband paid off a mortgage on the homestead with her own money is entitled to subrogation to the mortgage security on the theory that she paid her own money for the protection of a vested interest in the land. Fowler *v.* Fowler, 78 Mo. App. 330. See Literer *v.* Huddleston, (Tenn. Ch. App. 1898) 52 S. W. 1003.

Where the beneficiaries of a life policy elect to allow the proceeds to be applied to a mortgage on the decedent's realty, and to take as heirs, under his will, and the estate becomes insolvent, the beneficiaries are entitled, on completing the payment of the mortgage, to be subrogated to the rights of the mortgagee, as against other devisees and creditors. Cutchin *v.* Johnston, 120 N. C. 51, 26 S. E. 698.

On failure of a trustee to pay or secure certain debts, a beneficiary who has been compelled to pay one of them intended to be provided for in order to protect her interest is entitled to be subrogated to the rights of the creditor so paid. Walsh *v.* Walsh, 4 Nebr. (Unoff.) 683, 95 N. W. 1025.

A third possessor who pays off a special mortgage becomes thereby subrogated to the rights of the mortgagee who has been paid, and the right is not lost because the third possessor may be subsequently evicted. Walmsley *v.* Theus, 107 La. 417, 31 So. 869, holding also that where the wife was the owner of a separate interest in property owned by her husband, she being his creditor, she had a right to pay a debt against him, and to legal subrogation, if it did not come in conflict with the transferrer's mortgage, who retained all his rights on unpaid notes in his hands.

A third mortgagee, who has taken title from the owner, and pays a first mortgage to protect his title, taking an assignment thereof, is entitled to subrogation to the lien of the first mortgage, on foreclosure of the second mortgage. Hagan *v.* Sheridan, 10 Kan. App. 22, 61 Pac. 756.

A beneficiary under a second trust deed who purchases the creditor's interest in a first trust deed, and also the interest of a purchaser by an invalid sale thereunder, is subrogated to all the rights and remedies of the creditor. Long *v.* Long, 141 Mo. 352, 44 S. W. 341. But where the holder of a second deed of trust paid to the trustee the sum secured by the first deed of trust, and the note and deed were surrendered to her, she was not, as to the grantor's creditors, entitled to be subrogated to the rights of the orginal holder of said note and deed, if her deed of trust was fraudulent as to creditors. Mansur, etc., Implement Co. *v.* Jones, 143 Mo. 253, 45 S. W. 41.

A junior mortgagee who purchases the mortgaged premises to protect his own interest at a sale on foreclosure of a first mortgage is entitled to be subrogated to all rights and equities of the first mortgagee. Benton *v.* Shreeve, 4 Ind. 66.

27. Capitol Nat. Bank *v.* Holmes, 43 Colo. 154, 95 Pac. 314, 127 Am. St. Rep. 108, 16 L. R. A. N. S. 470; Arnold *v.* Green, 116 N. Y. 566, 23 N. E. 1; Fears *v.* Albea, 69 Tex. 437, 6 S. W. 286, 5 Am. St. Rep. 78.

Whether he does so is a question of intention.— Capitol Nat. Bank *v.* Holmes, 43 Colo. 154, 95 Pac. 314, 127 Am. St. Rep. 108, 16 L. R. A. N. S. 470; Bennett *v.* First Nat. Bank, 128 Iowa 1, 102 N. W. 129.

28. McLean *v.* Tompkins, 18 Abb. Pr. (N. Y.) 24, holding also that it is not a valid objection to the subrogation of a defendant in foreclosure in the place of plaintiff that the sale may be abandoned, and subsequent encumbrancers miss their opportunity of reaching the surplus moneys.

29. Pease *v.* Egan, 131 N. Y. 262, 30 N. E. 102 [*reversing* 15 N. Y. Suppl. 200]; Lings-

son in good faith assumes and pays an encumbrance on land, to which he has no title, but believes in good faith that he is the owner, he becomes the equitable owner of the encumbrance, and the same constitutes a lien on the land;[30] and one who at the time of paying the mortgage debt erroneously believes himself the owner of the property, while in fact the record shows him entitled to but a life-estate, is nevertheless entitled to subrogation against the remainder-man to the extent to which such remainder-man was bound to pay the mortgage to protect his estate;[31] but a person is not entitled to subrogation for purposes of contribution on payment of a mortgage secured in part on his own land, and in part on that of another, unless he has paid the entire mortgage debt,[32] and the owner of mortgaged property is not entitled to be subrogated to the rights of a mortgagee because of other liens against the property subsequent to the mortgage.[33] One who, not being a mere volunteer, pays the purchase-price of land instead of the purchaser is subrogated to the vendor's lien;[34] but only as to the lien on the land purchased, not that covering other land;[35] and a purchaser under a judgment against the

weiler *v.* Hart, 10 N. Y. App. Div. 156, 41 N. Y. Suppl. 862 [*affirmed* in 159 N. Y. 543, 54 N. E. 1093]. But see Blydenburgh *v.* Seabury, 104 N. Y. App. Div. 141, 93 N. Y. Suppl. 330, holding that the mere possibility that a person making a payment on a real estate mortgage might become the owner of the premises, as an heir of the holder of the title, did not give her such an interest in the mortgaged property as to entitle her to subrogation to the rights of the holder of the mortgage as to such payment.

Where a person having a future interest in property on which there is a judgment lien, for the purpose of protecting such interest, pays the judgment debt, he becomes an equitable assignee of the judgment, and may keep alive and enforce the lien, so far as necessary, for his own benefit. Sutton *v.* Sutton, 26 S. C. 33, 1 S. E. 19.

30. Simpson *v.* Ennis, 114 Ga. 202, 39 S. E. 853; Bayard *v.* McGraw, 1 Ill. App. 134 [*affirmed* in 96 Ill. 146]; Taylor *v.* Roniger, 147 Mich. 99, 110 N. W. 503; Gooch *v.* Botts, 110 Mo. 419, 20 S. W. 192. See Roberts *v.* Best, 172 Mo. 67, 72 S. W. 657; Murphy *v.* Smith, (Tex. Civ. App. 1899) 50 S. W. 1040.

But the origin or source of the payer's title must be shown in order that it may appear that he justifiably believed he had title. Wadsworth *v.* Blake, 43 Minn. 509, 45 N. W. 1131, holding that upon these facts alone appearing, where one claiming title to land voluntarily discharges a mortgage thereon given by his grantor, and a third party is subsequently adjudged to be the owner in fee, the former is not entitled to have the amount so paid adjudged a charge upon the land.

31. Wilder *v.* Wilder, 75 Vt. 178, 53 Atl. 1072.

32. Springer *v.* Foster, 27 Ind. App. 15, 60 N. E. 720.

33. Pulitzer *v.* National L. Assoc., 24 Misc. (N. Y.) 18, 53 N. Y. Suppl. 94.

34. *Iowa.*— Dillow *v.* Warfel, 71 Iowa 106, 32 N. W. 194.

Kentucky.—Woodland Cemetery Co. *v.* Ellison, 80 S. W. 169, 25 Ky. L. Rep. 2069.

Missouri.— Lewis *v.* Chapman, 59 Mo. 371.

Texas.— Ford *v.* Ford, 22 Tex. Civ. App. 453, 54 S. W. 773.

Virginia.— Fulkerson *v.* Taylor, 100 Va. 426, 41 S. E. 863.

See 44 Cent. Dig. tit. "Subrogation," § 88.

One who has paid off an encumbrance upon land, which the grantee assumed and agreed to pay as part of the purchase-money, is entitled to the benefit of a vendor's lien against the land to the amount so paid. Williams *v.* Crow, 84 Mo. 298.

A purchaser under a decree, obtained without appearance of defendant, on an attachment upon land as the property of defendant, in which he has only an equity, without designating it to be such, who has paid off the vendor's lien, will be subrogated to the vendor's rights. Lane *v.* Marshall, 1 Heisk. (Tenn.) 30.

Where purchase-money notes and the land are transferred by the vendor to a third person, and a lien retained for payment, the transfer subrogates such person to all the rights of the vendor against the original vendee. Polk *v.* Kyser, 21 Tex. Civ. App. 676, 53 S. W. 87 [*citing* Hamblen *v.* Folts, 70 Tex. 132, 7 S. W. 834].

Where an owner of land finds it bound by a lien for the purchase-money due by his grantor, and, to protect himself, pays off the lien, he is entitled to be subrogated to the rights of the holder of the lien. Fulkerson *v.* Taylor, 100 Va. 426, 41 S. E. 863.

Where two purchasers of land give their joint note for part of the price, the vendor retaining his lien, and one of them pays the note, he does not discharge the lien, but becomes subrogated thereto, and can enforce it against a third person, who has purchased, subject to the vendor's lien, the interest of the co-purchaser after a partition. Dowdy *v.* Blake, 50 Ark. 205, 6 S. W. 897, 7 Am. St. Rep. 88. But where no lien was retained for property sold to persons who gave their joint note for the price, one of the makers, by paying the note, cannot obtain any relief against the property on the ground of subrogation, since he merely stands in the vendor's shoes. Harris *v.* Elliott, 45 W. Va. 245, 32 S. E. 176.

35. Larson *v.* Oisefos, 118 Wis. 368, 95 N. W. 399.

vendor is not subrogated to the latter's lien for the price where notes were given for it which are in the possession of third parties.[36] The same rules apply where one having an interest in land discharges the lien of a judgment or decree thereon;[37] and, although the lien is lost at law, equity will keep it alive until the obligation impressed upon the legal title in favor of the payer is met.[38] But a third person who, having no interest in encumbered premises nor believing that he has, voluntarily pays the indebtedness secured is not entitled merely by such payment to be subrogated to the rights of the lien discharged.[39]

2. Purchasers of Encumbered Property — a. Rule Stated. As a general rule a purchaser will be subrogated to whatever rights in the property belonged to the vendor;[40] and the purchaser of land subject to a prior encumbrance has the

36. Lyle *v.* Clark, (Miss. 1899) 24 So. 966.

37. Hughes *v.* Howell, 152 Ala. 295, 44 So. 410 (holding that where one, having an interest in property upon which a decree is a lien, advances money to pay the same, he becomes an equitable assignee thereof, and is subrogated to all the rights thereunder); Harvey *v.* Warren, 31 Nebr. 155, 47 N. W. 747; Hackensack Sav. Bank *v.* Terhune Mfg. Co., 45 N. J. Eq. 610, 18 Atl. 155; Darrow *v.* Summerhill, 93 Tex. 92, 53 S. W. 680, 77 Am. St. Rep. 833.

A valid tender of the amount of the judgment, interest, and costs has the same effect as payment. Cole *v.* Malcolm, 66 N. Y. 363.

So if a purchaser of attached property from defendant even after suit pays the price in discharge of executions which are existing liens upon the attached property at the filing of the bill, and the property be decreed to be sold, the purchaser should be indemnified by a repayment of his money before the attaching creditor is paid. Beall *v.* Barclay, 10 B. Mon. (Ky.) 261.

38. Watson *v.* Gardner, 119 Ill. 312, 10 N. E. 192; Grady *v.* O'Reilly, 116 Mo. 346, 22 S. W. 798; Gooch *v.* Botts, 110 Mo. 419, 20 S. W. 192.

39. *California.*— Guy *v.* Du Uprey, 16 Cal. 195, 76 Am. Dec. 518, holding that a mere stranger, who voluntarily pays off a mortgage, but who fails to take an assignment and allows the mortgage to be canceled and discharged, cannot afterward come into equity, and in the absence of fraud, accident, or mistake, have the mortgage reinstated and himself substituted in the place of the mortgagee.

Illinois.— Doxey *v.* Western State Bank, 113 Ill. App. 442.

Missouri.— Roberts *v.* Best, 172 Mo. 67, 72 S. W. 657; Norton *v.* Highleyman, 88 Mo. 621; Evans *v.* Halleck, 83 Mo. 376; Wolff *v.* Walter, 56 Mo. 292 (holding that the rule of equity that a third person who pays a mortgage note for his own protection is subrogated to the rights of the creditor does not apply where the owner of the mortgaged property is a married woman, and neither a party to the note nor to its payment).

Nebraska.—Washburn *v.* Osgood, 38 Nebr. 804, 57 N. W. 529. But see Mavity *v.* Stover, 68 Nebr. 602, 94 N. W. 834, holding that, although one who pays a mortgage covering lands in which he has no legal interest, and who is in no way liable for the mortgage, is not entitled to be subrogated to the rights of the mortgagee; if in possession, he may be allowed a credit for such payments as against an action by the mortgagor for an accounting for rents and profits.

New York.— Blydenburgh *v.* Seabury, 104 N. Y. App. Div. 141, 93 N. Y. Suppl. 330, holding that where defendant, who was not a party to a mortgage, made a payment thereon, she was not entitled to subrogation to the rights of the holder of the mortgage, to the extent of such payment, unless the payment was made under an agreement that it should constitute a lien on the property, or unless she was compelled to make the same to protect an interest of her own in the mortgaged premises.

Pennsylvania.— See *In re* Clippinger, 162 Pa. St. 627, 29 Atl. 705.

South Dakota.—Pollock *v.* Wright, 15 S. D. 134, 87 N. W. 584.

Texas.— See Schneider *v.* Sellers, (Civ. App. 1904) 81 S. W. 126.

Vermont.— Downer *v.* Wilson, 33 Vt. 1.

See 44 Cent. Dig. tit. "Subrogation," § 48.

Rule applied to chattel mortgage.—One not an indorser or surety on a note, who pays it, has no claim against the maker on such note, so as to give him any right in chattels mortgaged to secure such note together with others, nor entitled to share in the proceeds of the mortgaged property sold on foreclosure. Ackley Bank *v.* Porter, 116 Iowa 377, 89 N. W. 1094.

40. *California.*— Heinlen *v.* Martin, 53 Cal. 321.

Louisiana.— Castle *v.* Floyd, 38 La. Ann. 583.

Massachusetts.— Thompson *v.* Kenyon, 100 Mass. 108.

Texas.— Peters *v.* Clements, 52 Tex. 140.

United States.— Chicago *v.* Tebbetts, 104 U. S. 120, 26 L. ed. 655.

England.— Donald *v.* Suckling, L. R. 1 Q. B. 585, 7 B. & S. 783, 12 Jur. N. S. 795, 35 L. J. Q. B. 232, 14 L. T. Rep. N. S. 772, 15 Wkly. Rep. 13.

See 44 Cent. Dig. tit. "Subrogation," § 35 *et seq.*

A fraudulent grantee is not subrogated to the rights of lien-holders whom he paid out of the purchase-money, although taking assignments from them of their liens. Greig *v.* Rice, 66 S. C. 171, 44 S. E. 729.

Grantees of a mortgagee in possession, al-

right to pay off the debt and thus relieve his land, and, if such payment is not made under a previous contract with the party owing the same, he is entitled to be subrogated to all the rights of the holder of the indebtedness;[41] and the same rule applies to a purchaser of encumbered personalty,[42] and his equity is superior to the vendor's surety's right to be subrogated upon payment, to the lien secured.[43] Similarly subrogation may be allowed to one holding an invalid or verbal contract for the conveyance of the land he has freed from encumbrance;[44] and a grantee of the purchaser is entitled to be subrogated to the purchaser's rights under a bond from the original grantor conditioned for the conveyance of a clear title.[45] But in all these instances not only must the purchaser have, by his payment, extinguished an encumbrance or charge upon the estate purchased, but, before he can be subrogated to the rights of the party holding such encumbrance, lien,

though affected with record notice of the rights of the mortgagor's heirs to redeem, are subrogated to all the rights of their grantor. Francis *v.* Francis, 78 S. C. 178, 58 S. E. 804.

41. *Colorado.*— Capitol Nat. Bank *v.* Holmes, 43 Colo. 154, 95 Pac. 314, 127 Am. St. Rep. 108, 16 L. R. A. N. S. 470.

Illinois.— Stiger *v.* Bent, 111 Ill. 328; Young *v.* Morgan, 89 Ill. 199.

Indiana.— Chaplin *v.* Sullivan, 128 Ind. 50, 27 N. E. 425; Weiss *v.* Guerineau, 109 Ind. 438, 9 N. E. 399; Duncan *v.* Gainey, 108 Ind. 579, 9 N. E. 470; Morrow *v.* U. S. Mortgage Co., 96 Ind. 21; Carithers *v.* Stuart, 87 Ind. 424; Braden *v.* Graves, 85 Ind. 92; Vert *v.* Voss, 74 Ind. 565; Muir *v.* Berkshire, 52 Ind. 149.

Louisiana.— Hobgood *v.* Schuler, 44 La. Ann. 537, 10 So. 812.

Maryland.— Gibson *v.* McCormick, 10 Gill & J. 65.

Nebraska.— Brownell *v.* Stoddard, 42 Nebr. 177, 60 N. W. 380.

New York.— Clute *v.* Emmerich, 99 N. Y. 342, 2 N. E. 6; Alford *v.* Cobb, 28 Hun 22.

North Carolina.— Moring *v.* Privott, 146 N. C. 558, 60 S. E. 509.

Tennessee.— Hurt *v.* Reeves, 5 Hayw. 56.

Texas.—Vasser *v.* Liberty, (Civ. App. 1908) 110 S. W. 119.

West Virginia.—Blair *v.* Mounts, 41 W. Va. 706, 24 S. E. 620; Hoke *v.* Jones, 33 W. Va. 501, 10 S. E. 775.

See 44 Cent. Dig. tit. "Subrogation," § 36.

A purchaser from a surety whose property is under a lien is subrogated to all his rights and equities. Wooten *v.* Buchanan, 49 Miss. 386.

Purchaser from heir.— If an heir, to whom lands have descended subject to his ancestor's debts, sells with general warranty, without administration, to a *bona fide* purchaser, who discharges liens and claims thereon created by the ancestor, the purchaser is entitled to be subrogated to rights of lienees and claimants. Eddy *v.* Traver, 6 Paige (N. Y.) 521, 31 Am. Dec. 261; Sidener *v.* Hawes, 37 Ohio St. 532.

Where a judgment creditor purchased land from the judgment debtor, and payment thereof was made in satisfaction of the judgment and partly in money, to be in satisfaction of lien notes held by another person, but it appeared that the debtor did not have good title to the land, the creditor is entitled to enforce the liens held by said other person for the money paid to her, and to that extent was entitled to priority over her. Christian *v.* Clark, 10 Lea (Tenn.) 630.

In an action by a wife to set aside for duress a deed of the homestead, which was subject to a mortgage, where it appears that she took no steps for more than eighteen months to set it aside, and acquiesced with her husband in its validity, and the grantee, before any attempt was made to cancel it, paid the mortgage and tax liens, he is entitled, on a cancellation of the deed, to be subrogated to the rights of the original mortgagee and to have the mortgaged property sold to repay the amount expended on the mortgage and tax liens. Hofman *v.* Demple, 52 Kan. 756, 35 Pac. 803.

The grantee in a quitclaim deed, who pays valid outstanding claims against the premises, will be subrogated to the rights of such claimants in case of ouster by superior title. Lowden *v.* Wilson, 233 Ill. 340, 84 N. E. 245.

42. Shearer *v.* City Nat. Bank, 115 Ala. 352, 22 So. 151.

43. Rush *v.* State, 20 Ind. 432.

44. Nixon *v.* Jullian, 72 Miss. 570, 18 So. 366; Champlin *v.* Williams, 9 Pa. St. 341.

A purchaser by parol of part of a tract of land, who pays off a mortgage on the whole to prevent a sale, is entitled to be subrogated to the mortgage and a judgment recovered thereon. Champlin *v.* Williams, 9 Pa. St. 341.

Failure of title.—When a purchaser of real property assumes and agrees to pay encumbrances on the property as part of the purchase-money, and does pay the same, believing in good faith that he is the owner of the real estate, when in fact he has no title, he is entitled to be subrogated to such encumbrances as are valid liens, and can enforce them against the property. Goring *v.* Shreve, 7 Dana (Ky.) 64. And see Betts *v.* Sims, 35 Nebr. 840, 53 N. W. 1005, 37 Am. St. Rep. 470.

45. Smith *v.* Peace, 1 Lea (Tenn.) 586.

Conversely one who contracts to sell land, subject to a mortgage, but afterward pays the same, and has it satisfied of record, is entitled, when sued for specific performance, to be subrogated to the rights of the mortgagee. Arnold *v.* Green, 116 N. Y. 566, 23 N. E. 1.

or charge the purchaser must be able to show that his payment was made either as the result of compulsion, or for the protection of some interest he had in the property that was threatened or imperiled by the encumbrance, lien, or charge;[46] and where a person under a legal as well as an equitable obligation to discharge an encumbrance discharges it accordingly, he cannot have such encumbrance alive for his benefit to the detriment of another adversely interested;[47] nor where the purchaser having notice of another charge on the land deliberately and intentionally has part of the purchase-money paid to extinguish encumbrances is he subrogated to them or against the other encumbrance.[48] Where a purchaser or junior encumbrancer is given the right of subrogation, it must be in a case where the lien discharged rests upon the land purchased, and not upon any other lands.[49]

b. Liens Discharged — (i) *Judgment Liens.* A purchaser who takes land without knowledge of a judgment, which is a lien on it, is, as respects the land, a surety of the payment of the judgment to the extent of the value of the land, and upon payment is entitled to be subrogated to the rights of the judgment creditor;[50] and he may be subrogated to the judgment creditor's lien against other property of the judgment debtor;[51] and if, to save his land from sale, he has paid several judgment liens, he is entitled to be subrogated to the liens of such creditors against any other land of his vendor.[52] In like manner the vendee of land encumbered with two judgment liens who deposits money in court to pay the senior judgment becomes subrogated to the rights of such judgment creditor

46. Roberts *v.* Best, 172 Mo. 67, 72 S. W. 657.

47. Shirk *v.* Whitten, 131 Ind. 455, 31 N. E. 87; Caley *v.* Morgan, 114 Ind. 350, 16 N. E. 790; Bunch *v.* Grave, 111 Ind. 351, 12 N. E. 514.

48. Brooks *v.* Wentz, 61 N. J. Eq. 474, 49 Atl. 147.

49. Smith *v.* Dinsmoor, 119 Ill. 656, 4 N. E. 648.

50. Barnes *v.* Mott, 16 Abb. Pr. N. S. (N. Y.) 57 [*affirmed* in 6 Daly 150 (*affirmed* in 64 N. Y. 397, 21 Am. Rep. 625)]; Hamilton *v.* Huston, 1 Pa. Cas. 143, 1 Atl. 549; Hurt *v.* Reeves, 5 Hayw. (Tenn.) 50. See also Davenport *v.* Bartlett, 9 Ala. 179; Mississippi, etc., Ship Canal Co. *v.* Noyes, 25 La. Ann. 62; Hutson *v.* Sadler, 31 W. Va. 358, 6 S. E. 920.

Where a judgment of foreclosure by scire facias is obtained by the mortgagee, and one of several purchasers from the mortgagor subsequent to the mortgage pays the judgment, equity will work a subrogation of such purchaser to the rights of the mortgagee, so far as to enable him to compel contributions from persons liable thereto. Matteson *v.* Thomas, 41 Ill. 110.

The buyer of lands under a decree in partition, who has paid the full purchase-price, and afterward, discovering judgments which are liens against the individual interests of some of the owners, pays them off, is entitled to be subrogated to the rights of the distributee who should have paid such judgments, and to receive out of the distributee's share of the money in the hands of the commissioner the amount paid by him to satisfy such judgments. Spray *v.* Rodman, 43 Ind. 225. And if land which is subject to a lien for the judgment debts of its deceased owner is sold in partition proceedings, the purchaser is subrogated to the rights of the judgment creditors, and is entitled to enforce such rights against purchase-money due from him to the heirs. Dunning *v.* Seward, 90 Ind. 63.

A party who purchases at a sheriff's sale is subrogated to all the rights and remedies of the judgment creditor. Dunning *v.* Seward, 90 Ind. 63; Seller *v.* Lingerman, 24 Ind. 264.

Where two persons bought separate pieces of land of a common grantor, upon each of which there was a judgment lien, but upon one of the pieces the grantor had placed a trust deed as a separate lien for the amount of the judgments, and the holder of the judgments to which the land was subject levied execution upon the piece of land upon which there was no special lien, and the owner was compelled to buy off the execution, the piece of land subject to the special lien was primarily liable for the judgments as between the two purchasers, and the purchaser of the other piece being compelled to pay the judgments to save its land was entitled to be subrogated to the rights of the owner of the trust deed on the tract subject to the special lien. Pleasant Hill Light, etc., Co. *v.* Quinlan, 130 Mo. App. 487, 109 S. W. 1061.

51. *In re* McGill, 6 Pa. St. 504.

If judgment is recovered against a number of cosureties, who subsequently sell lands owned by them, respectively, and subject to the lien of the judgment, and the purchaser of one parcel, in order to prevent sale under the judgment, pays the amount due thereon, he is in equity subrogated to the rights of his grantor, and the lands in the hands of other sureties, or their grantees who purchased with notice, are bound by the lien. Furnold *v.* State Bank, 44 Mo. 336.

52. Beall *v.* Walker, 26 W. Va. 741.

to the extent of his payment, as against the junior judgment creditor,[53] although by mistake the amount deposited is not quite enough to satisfy the senior judgment in full.[54] Similarly where one against whom there is a judgment conveys part of the land, on which it is a lien, subject thereto, with a provision in the deed that the grantee shall pay it all, one claiming under foreclosure of a mortgage subsequently given thereon holds the land subject to the right of enforcement against same of the amount of the judgment by the grantee of the remainder of the land, who was obliged to pay it for his own protection, and who thereby becomes entitled to be subrogated to the rights of the common grantor, and the purchaser under the mortgage is affected by the assumption of the judgment in the deed to the one under whom he claims.[55] Where a person purchases land under execution for less than its value, agreeing with defendant in execution to release it to him whenever he will reimburse the sum bid, a vendee of defendant will be entitled by subrogation to redeem.[56]

(II) *Deed of Trust or Mortgage Liens.* Although it has been held that the mere payment of a mortgage on property by the purchaser of the property will not entitle such purchaser to subrogation to the rights of the mortgage discharged,[57] one who buys property encumbered with a mortgage or trust deed may, as a general rule, be subrogated to the rights and lien of the original mortgagee, so far as he has paid and discharged the mortgage.[58] This does not depend

53. Sower's Appeal, (Pa. 1888) 15 Atl. 898.

54. Sower's Appeal, (Pa. 1888) 15 Atl. 898.

55. Barr *v.* Patrick, 52 Iowa 704, 3 N. W. 743.

56. Dupuy *v.* McMillan, 2 Duv. (Ky.) 555.

57. Bentley *v.* Whittemore, 18 N. J. Eq. 366; Guernsey *v.* Kendall, 55 Vt. 201.

If a mortgage is given on land owned in common by husband and wife to secure a debt of the husband, a purchaser of the husband's interest in the land, who pays off the mortgage debt, is not entitled to be subrogated to the mortgagee's rights as against the wife's interest in the land, since she was only surety for her husband, and was as effectually released by the payment of the debt by the purchaser as if her husband, the principal debtor, had paid it (Zeller *v.* Henry, 157 Pa. St. 1, 27 Atl. 559); but when a husband conveys land subject to encumbrances, without his wife joining in the deed, and the grantee, who has assumed the encumbrances, pays them off without knowledge of the wife's inchoate one-third interest, he is entitled, as against the wife's claim, to be subrogated to the rights of the holders of the encumbrances (Fowler *v.* Maus, 141 Ind. 47, 40 N. E. 56).

Where a man's property has been sold under a judgment to which he was not a party, it is held that the purchaser acquires no right thereby against such owner of the property. McCammant *v.* Roberts, 87 Tex. 241, 27 S. W. 86 [*reversing* (Civ. App. 1894) 25 S. W. 731]. But see Bailey *v.* Bailey, 41 S. C. 337, 19 S. E. 669, 728, 44 Am. St. Rep. 713.

58. *Arkansas.*— Neff *v.* Elder, 84 Ark. 277, 105 S. W. 260.

Georgia.— Simpson *v.* Ennis, 114 Ga. 202, 39 S. E. 853.

Illinois.— Hazel *v.* Bondy, 173 Ill. 302, 50 N. E. 671; Stiger *v.* Bent, 111 Ill. 328; Smith *v.* Dinsmore, 16 Ill. App. 115 [*reversed* on other grounds in 119 Ill. 656, 4 N. E. 648].

Indiana.— Farmers' Bank *v.* Butterfield, 100 Ind. 229. And see Rardin *v.* Walpole, 38 Ind. 146.

Mississippi.—Nixon *v.* Julian, 72 Miss. 570, 18 So. 366.

Missouri.— Roberts *v.* Best, 172 Mo. 67, 72 S. W. 657.

Nebraska.— Betts *v.* Sims, 35 Nebr. 840, 53 N. W. 1005, 37 Am. St. Rep. 470.

South Carolina.— Cape Fear Lumber Co. *v.* Evans, 69 S. C. 93, 48 S. E. 108.

South Dakota.— Home Inv. Co. *v.* Clarson, 15 S. D. 513, 90 N. W. 153.

Texas.— Fears *v.* Albea, 69 Tex. 437, 6 S. W. 286, 5 Am. St. Rep. 78 (holding, however, that a party who is subrogated to a first deed of trust on land, and is also the purchaser of the land after a second deed of trust is executed and duly recorded, has only the rights of the first mortgagee, and the land should be sold upon the suit to enforce subrogation, and the proceeds be applied first to the satisfaction to the first lien, and the balance to the payment of the second lien); Schneider *v.* Sellers, 25 Tex. Civ. App. 226, 61 S. W. 541.

Vermont.— See Tarbell *v.* Durant, 61 Vt. 516, 17 Atl. 44.

Virginia.—Hudson *v.* Dismukes, 77 Va. 242; Gatewood *v.* Gatewood, 75 Va. 407; Armentrout *v.* Gibbons, 30 Gratt. 632 [*cited* in McNeil *v.* Miller, 29 W. Va. 480, 2 S. E. 335].

Wisconsin.— Stewart *v.* Stewart, 90 Wis. 516, 63 N. W. 886, 48 Am. St. Rep. 949.

See 44 Cent. Dig. tit. "Subrogation," § 38.

But see Gerber *v.* Upton, 123 Mich. 605, 82 N. W. 363.

But in New Jersey it is held in a late case that where the owner or purchaser of property subject to several encumbrances pays off a prior encumbrance with his own money, the payment inures to the benefit of the subsequent encumbrances, against which the prior encumbrances cannot be kept alive for the owner's benefit, even by express agreement,

upon his not being otherwise secured, and he may be subrogated, although he has

and on such payment by the owner, without any agreement for subrogation or keeping the security alive, a court will not revive the prior encumbrances by application of the equitable doctrine of subrogation in favor of the owner. Avon-by-the-Sea Land, etc., Co. *v.* McDowell, 71 N. J. Eq. 116, 62 Atl. 865.

A purchaser paying under a mistake of law, and not of fact, cannot be subrogated. Deavitt *v.* Ring, 76 Vt. 216, 56 Atl. 978.

In an action by a mortgage creditor's assignee who, at a sale by the mortgagee made under a power in the deed, had bought the mortgaged land, against a tenant of a purchaser of the mortgagor's interest in possession, defendant had a right to inquire by an account whether the price given by plaintiff exceeded the amount due him as assignee, and if it did defendant was entitled to be subrogated to the surplus. Jones *v.* Hill, 64 N. C. 198.

Subrogation pro tanto.—Where mortgaged land is sold by the mortgagor for full value, and the purchase-money applied in payment of the mortgage debt, the purchaser is subrogated to the rights of the mortgagee, as against encumbrances subsequent to the mortgage, and, if the purchase-money so applied is only a partial payment of the mortgage debt, he is subrogated *pro tanto* (Joyce *v.* Dauntz, (Ohio 1896) 45 N. E. 900, holding also that his right to subrogation is not affected by notice of the encumbrances when he bought and paid for the land; nor is it necessary that he show that he intended to keep the mortgage alive, for such intention will be presumed; as to which see further *infra*, note 63) and if the purchaser after taking possession pays the mortgagee part of the money secured to protect the land against the lien of the mortgage, he is entitled, on foreclosure of the mortgage for the unpaid balance, to be subrogated to the rights of the mortgagee, as against other parties interested in the land, in the amount paid to the mortgagee (Fuller *v.* Irvin, 1 Kan. App. 248, 42 Pac. 1094).

Purchaser from pledgee or chattel mortgagee.— A *bona fide* purchaser of property for value from a plegdee of the same, who sold it in violation of the pledge, succeeds to all the rights of the pledgee, and a purchaser from a chattel mortgagee will likewise succeed to the rights of his grantor with respect to the property purchased, on the principle of subrogation, although there is no contract of assignment between him and his grantee. Potter *v.* Lohse, 31 Mont. 91, 77 Pac. 419, under Civ. Code, § 4602.

A purchaser of chattel property from a mortgagee in possession will, in equity, be subrogated to all the rights and equities of such mortgagee to the extent of his interest therein, as against a subsequent mortgagee. O. S. Kelly Co. *v.* Lobenthal, 15 Ohio Cir. Ct. 343, 8 Ohio Cir. Dec. 300. Similarly a vendee of a chattel mortgage, being called upon to pay off the mortgage, is entitled to be subrogated to the rights of the mortgagee in any other security he may have for the payment of the mortgage debt. Illinois Trust, etc., Bank *v.* Alexander Stewart Lumber Co., 119 Wis. 54, 94 N. W. 777.

Where defendant purchased mortgaged lands from a husband by a deed in which the wife did not join, paying off the mortgage as the consideration for the conveyance of the land to him, he was entitled to subrogation to the rights of the mortgagee, and to have the mortgage treated as an existing encumbrance on the land as against the alleged rights of the grantor's widow in the land. Overturf *v.* Martin, 170 Ind. 308, 84 N. E. 531.

A purchaser at a second mortgage sale, of which the third mortgagee had no notice, which fact was not known to the purchaser, purchased a release of the first mortgage, and subsequently sued to be subrogated to the rights of the first and second mortgagees, and it was held that the fact that he was a stranger to the matters at the time of his purchase was no bar to relief. Home Inv. Co. *v.* Clarson, 15 S. D. 513, 90 N. W. 153.

In Louisiana it is held that the subrogation acquired under Rev. Civ. Code, art. 2161, by a purchaser who employs the price of his purchase in paying the creditors to whom the property is mortgaged is a special one, so that when the amount paid by the purchaser to the mortgage creditors does not exceed the purchase-price, the subrogation acquired by him is limited to the property purchased, and does not confer rights on him to be actively exercised against third parties. Randolph *v.* Stark, 51 La. Ann. 1121, 26 So. 59.

Purchaser paying taxes.—Where land of an insolvent is sold by the assignee with a statement that taxes would be paid by the estate, a purchaser, on payment of the taxes, is subrogated to the right to prove them in insolvency as a privileged claim. Taylor *v.* Wilcox, 167 Mass. 572, 46 N. E. 115.

Where plaintiff purchased real estate from the guardian of an insane person, the guardian agreeing to pay off a mortgage thereon, and although Rev. St. § 3515, provides that in sales of property of wards the court shall make an order for the application and disposition of the proceeds of such sale, no order was made directing the guardian to pay off the mortgage, and he thereafter embezzled the purchase-price paid by plaintiff, and plaintiff was subsequently obliged to pay off the mortgage, the failure of the guardian to pay the mortgage did not amount to a breach of duty, in the absence of an order of the court to pay it; and hence there were no rights existing in either the ward or the mortgagee, as creditors as against the guardian, to which plaintiff could be subrogated. Evison *v.* Hallock, 108 Wis. 249, 83 N. W. 1102.

One purchasing land pending attachment proceedings, and paying a mortgage existing on the land before the attachment was levied, while believing that such payment was neces-

other security from his grantor.[59] When the money due on the mortgage is paid by him it is in the nature of an equitable assignment of the mortgage, substituting him who pays in the place of the mortgagee;[60] and it makes no difference whether he took an assignment of the mortgage as a release, or whether a discharge was made and evidence of the debt canceled;[61] the debt itself may be held still to subsist in him who paid the money as assignee, so far as it ought to subsist, in the nature of a lien on the land, and the mortgage be considered in force for his benefit, so far as he ought in justice to hold the land under it, as if it had been actually assigned;[62] and no proof of intention on his part to keep the mortgage alive is necessary to give him the benefit of it;[63] and being subrogated to the rights of the mortgagee, it follows that he is entitled to the money thus paid, with interest at the rate specified in the mortgage.[64] Similarly, a grantee of land who, through neglect to record his deed, has had the land taken from him on execution issued upon a judgment rendered against his grantor, in an action on a debt secured by a mortgage of the grantor's other land, may maintain a bill in equity against his grantor and the judgment creditor to be subrogated, to the extent of his loss by the levy, to all the rights of the latter under the mortgage not required for the full satisfaction of the debt;[65] and a grantee by warranty deed who is compelled to pay a mortgage released by a guardian without authority is entitled to be subrogated to the security taken by said guardian from his grantor in lieu of the mortgage;[66] and where a person, in good faith, takes a mortgage upon land to which the mortgagor has fraudulently obtained a patent, the real owner, on paying such mortgage, will be subrogated to the mortgagee's rights.[67] But the principle has no application where, at the time of the purchase, the purchaser knew of the existence of the mortgage debt, and, in the contract, provided a mode by which it was to be extinguished;[68] nor does the benefit of the rule extend to a fraudulent purchaser.[69] Thus a purchaser of mortgaged premises who pays the mortgage debt pursuant to his agreement to assume the same as a part of the purchase-price extinguishes the lien, and he cannot by subrogation avail himself of the mortgagee's lien to the prejudice of a junior lien claimant;[70] nor

sary to protect his own interest, is entitled to be subrogated to the rights of the mortgagee. Davis *v.* John V. Farwell Co., (Tex. Civ. App. 1899) 49 S. W. 656.

59. Smith *v.* Dinsmore, 16 Ill. App. 115.

60. Robinson *v.* Leavitt, 7 N. H. 100; Houston First Nat. Bank *v.* Ackerman, 70 Tex. 315, 8 S. W. 45.

61. Braden *v.* Graves, 85 Ind. 92; Snow *v.* Stevens, 15 Mass. 278; Houston First Nat. Bank *v.* Ackerman, 70 Tex. 315, 8 S. W. 45; Hudson *v.* Dismukes, 77 Va. 242.

62. Houston First Nat. Bank *v.* Ackerman, 70 Tex. 315, 8 S. W. 45.

63. Jefferson *v.* Edrington, 53 Ark. 545, 14 S. W. 99, 903; Braden *v.* Graves, 85 Ind. 92; Hudson *v.* Dismukes, 77 Va. 242.

64. Braden *v.* Graves, 85 Ind. 92; Walker *v.* King, 45 Vt. 525.

65. Wall *v.* Mason, 102 Mass. 313.

One induced by fraud to convey land subject to a prior mortgage to one who mortgaged the land, and after selling the mortgage to a third person reconveyed the land to the defrauded grantor is, upon paying the prior mortgage, subrogated to the rights of the first mortgage, as against the third person. Simpson *v.* Del Hoyo, 94 N. Y. 189.

Where a vendor forecloses his purchase-money mortgage, and a third person becomes the purchaser, the vendor is estopped from controverting his title or taking advantage of irregularities in the proceeding of foreclosure, and if it is necessary to the security of a purchaser of land at a sale under the foreclosure of a vendor's lien equity will subrogate him to the rights of the vendor under the foreclosure. Peters *v.* Clements, 46 Tex. 114.

66. Freiberg *v.* De Lamar, 7 Tex. Civ. App. 263, 27 S. W. 151, holding, however, that the creditor was not obliged first to resort to that security.

67. Warner *v.* Hall, 53 Mich. 371, 19 N. W. 40.

68. Crouse *v.* Caldwell, 1 Ohio Dec. (Reprint) 359, 8 West. L. J. 256.

One purchasing land with notice in his deed of an existing mortgage by his grantor cannot be subrogated to the rights of the mortgagee by the payment of the mortgage. Morrison *v.* Morrison, 38 Iowa 73. But see Hudson *v.* Dismukes, 77 Va. 242, holding that the doctrine includes all purchasers of equity of redemption whether with or without notice of existing liens.

69. Milwaukee, etc., R. Co. *v.* Soutter, 80 U. S. 517, 20 L. ed. 543.

70. *Georgia.*— Ragan *v.* Standard Scale Co., 128 Ga. 544, 58 S. E. 31.

Indiana.— Anderson *v.* Wilson, 100 Ind. 402.

Iowa.— Stastny *v.* Pease, 124 Iowa 587, 100

can his grantee,[71] since the price thus used was in fact the money of the vendor;[72] and neither a purchaser of land subject to a mortgage, which he assumed and paid, and which formed part of the purchase-price, nor his grantee is entitled to subrogation to the rights of the mortgagor as against a judgment creditor of the mortgagor whose judgment had been rendered at the time the land was bought,[73] even though he expended large sums of money in improving the premises and assumed and paid other liens thereon prior to such judgment,[74] and although the judgment was rendered subsequent to the execution of the mortgage,[75] and although he had no actual notice of the judgment;[76] nor is he entitled to be subrogated to the rights of the mortgagee to have the mortgage foreclosed as against the purchaser of the land under a foreclosure of a second mortgage.[77] Similarly, where the purchaser agrees, for part payment of the purchase-money, to pay the amounts needed to redeem from a foreclosure sale, and also for accrued taxes, he can acquire no lien or interest by such redemption and payments other than his grantor would have acquired by paying the same debts.[78]

3. Purchasers of Equity of Redemption. The purchaser of an equity of redemption upon paying off prior mortgages is subrogated to the rights of the mortgagees paid off, the mortgages paid being considered part of the purchaser's title to the premises,[79] with interest thereon from the time of payment, at the

N. W. 482. See Hubbard *v.* Le Barron, 110 Iowa 443, 81 N. W. 681, holding that where it clearly appeared that the greater part of the consideration for the purchase of mortgaged stock was a payment on the mortgage the purchaser was not entitled to subrogation to the rights of the mortgagee as against one claiming a landlord's lien on the stock.

Missouri.— McDonald *v.* Quick, 139 Mo. 484, 41 S. W. 208.

Nevada.— See Gulling *v.* Washoe County Bank, 24 Nev. 477, 56 Pac. 580.

New York.— Kentona Land Co. *v.* Wire, 35 N. Y. App. Div. 181, 54 N. Y. Suppl. 751.

South Carolina.— Coleman *v.* Coleman, 74 S. C. 567, 54 S. E. 758.

Tennessee.— Campbell *v.* Hamilton, (Ch. App. 1897) 39 S. W. 895.

Texas.— McDowell *v.* M. T. Jones Lumber Co., 42 Tex. Civ. App. 260, 93 S. W. 476.

Virginia.— Auld *v.* Alexander, 6 Rand. 98.

See 44 Cent. Dig. tit. "Subrogation," § 38.

But see Faulk *v.* Calloway, 123 Ala. 325, 26 So. 504, holding that where complainant in good faith bought land, assuming as part of the consideration a mortgage on the land, and complainant's grantor had bought the land from defendant, and had assumed the same mortgage as part consideration, and the deed from defendant was void because not separately acknowledged by his wife, and complainant paid off the mortgage, and later defendant reclaimed the land, complainant is entitled to be subrogated to the rights of the mortgagee.

A vendee who has assumed a debt which is a lien on the premises cannot take an assignment of or be subrogated to the debt and lien as against his vendor and those claiming under him. Menefee *v.* Marge, (Va. 1888) 4 S. E. 726. But see Peet *v.* Beers, 4 Ind. 46, holding that a judgment attaches on land subsequently purchased by the debtor, subject to the vendor's lien for the purchase-money, and a third party, who pays off the vendor's lien, is entitled, as against the judgment creditor, to be subrogated to the vendor's rights and equities.

A purchaser of mortgaged lands, pending proceedings to establish a ditch, who afterward pays the mortgage, pays it as owner, and presumptively as part of the purchase-money, and thereby extinguishes it; and he is not entitled to be subrogated to the lien of the mortgage, so as to defeat the lien of the assessment for constructing the ditch. Shirk *v.* Whitten, 131 Ind. 455, 31 N. E. 87.

71. De Roberts *v.* Stiles, 24 Wash. 611, 64 Pac. 795.

72. Abbeville Rice Mill *v.* Shambaugh, 115 La. 1047, 40 So. 453.

73. Goodyear *v.* Goodyear, 72 Iowa 329, 33 N. W. 142; Dieboldt Brewing Co. *v.* Grabski, 28 Ohio Cir. Ct. 91; Crouse *v.* Caldwell, 1 Ohio Dec. (Reprint) 359, 8 West. L. J. 256. But see Johnson *v.* Tootle, 14 Utah 482, 47 Pac. 1033.

74. Afton First Nat. Bank *v.* Thompson, 72 Iowa 417, 34 N. W. 184. And see Witt *v.* Rice, 90 Iowa 451, 57 N. W. 951.

The reason for the rule is that the purchaser derives his right of subrogation through the vendor, and as the vendor in such case would not be entitled to priority upon payment of the mortgage, the vendee is not (Afton First Nat. Bank *v.* Thompson, 72 Iowa 417, 34 N. W. 184; Goodyear *v.* Goodyear, 72 Iowa 329, 33 N. W. 142); and the vendee in paying the mortgage does no more than he agrees to do (Martin *v.* Aultman, 80 Wis. 150, 49 N. W. 749).

75. Martin *v.* Aultman, 80 Wis. 150, 49 N. W. 749.

76. Hayden *v.* Huff, 60 Nebr. 625, 83 N. W. 920; Chandler *v.* Dyer, 37 Vt. 345.

77. Kellogg *v.* Colby, 83 Iowa 513, 49 N. W. 1001. And see Witt *v.* Rice, 90 Iowa 451, 57 N. W. 951.

78. Caley *v.* Morgan, 114 Ind. 350, 16 N. E. 790.

79. Ulrich *v.* Drischell, 88 Ind. 354; Braden *v.* Graves, 85 Ind. 92; Ayers *v.* Adams, 82 Ind.

rate specified in such mortgages, in a suit for the foreclosure thereof;[80] but, although the owner of a first mortgage, or his assignee, will be protected to the extent of such mortgage, in case he becomes the owner of the equity of redemption, as against any subsequent encumbrance existing at the time he becomes such owner, and may foreclose such subsequent encumbrance, or require the holder thereof to redeem, this right will not be extended so as to permit such first mortgagee, after he has purchased the equity of redemption, or his grantee, to give a mortgage which shall take precedence, by way of subrogation, of the encumbrance existing at the time he became the owner of the equity of redemption;[81] and one who has contracted to purchase land and has redeemed the same from an existing lien is not deemed the legal owner of the land for the purpose of subrogation where such contract has not been fully carried out;[82] and where an equity of redemption in mortgaged property is sold under execution for a debt other than the debt secured by the mortgage, the sale vests the estate sold in the purchaser subject to the payment of the mortgage debt.[83] But the purchaser cannot hold the entire interest in the land, having paid only the value of the equity of redemption, and if the mortgage debt is satisfied from other property the original holder of the equity of redemption will be subrogated to the rights of the mortgagee to enable him to indemnify himself out of the mortgaged premises;[84] and if the purchaser of the equity of redemption by words in the conveyance assumes the mortgage, upon a foreclosure bringing an amount less than the debt, the mortgagee is entitled to be subrogated to the rights of the mortgagor, and the purchaser will be compelled to pay the balance.[85] It seems that where the purchaser of land at an execution sale accepts money tendered for redemption by a person not entitled to redeem, the person paying the money will be subrogated to the purchaser's right to the deed.[86]

4. Purchasers at Execution, Foreclosure, Judicial, and Other Sales — a. In General. A purchaser at an execution or judicial sale is subrogated to the rights of the creditor;[87] and upon paying off encumbrances is entitled to be subrogated to

109; Walker *v.* King, 45 Vt. 525; McNeil *v.* Miller, 29 W. Va. 480, 2 S. E. 335. But see Schreyer *v.* Saunders, 39 N. Y. App. Div. 8, 56 N. Y. Suppl. 921, 38 N. Y. App. Div. 627, 56 N. Y. Suppl. 1116.

Estoppel to assert prior mortgage against purchaser of equity of redemption see Bunting *v.* Gilmore, 124 Ind. 113, 24 N. E. 583.

Where a widow sues for dower in land sold by the administrator of her husband, out of the proceeds of which sale a judgment on a mortgage by husband and wife was satisfied, the purchaser cannot be subrogated to the rights of the mortgagee. Sweaney *v.* Mallory, 62 Mo. 485; Jones *v.* Bragg, 33 Mo. 337, 84 Am. Dec. 49 [*distinguishing* Valle *v.* Fleming, 29 Mo. 152, 77 Am. Dec. 557]. And see Cox *v.* Garst, 105 Ill. 342. But on the other hand it has been held that where the proceeds of decedent's lands, sold by order of court, were applied to the payment of a mortgage made by him and his widow, the purchaser was subrogated to the rights of the mortgagee as against the widow's claim to dower. House *v.* Fowle, 22 Oreg. 303, 29 Pac. 890.

80. Braden *v.* Graves, 85 Ind. 92.

81. Dugan *v.* Lyman, (N. J. Ch. 1892) 23 Atl. 657.

The payment of a purchase-money mortgage by a firm on lands standing in the individual names of the partners does not subrogate it to the vendor's lien. Ratcliff *v.* Mason, (Ky. 1890) 14 S. W. 960.

82. Landis *v.* Wolf, 119 Ill. App. 11, holding that where one who has contracted to purchase land redeems the same from an existing lien, he is not, for the purpose of subrogation, to be deemed the legal owner thereof merely because there has been offered to him a deed of such land which he did not, and was not bound to, accept.

83. Funk *v.* McReynolds, 33 Ill. 481.

84. Funk *v.* McReynolds, 33 Ill. 481.

85. Davis *v.* Hulett, 58 Vt. 90, 4 Atl. 139. But see Weeks *v.* Garvey, 56 N. Y. Super. Ct. 557, 4 N. Y. Suppl. 890.

86. *In re* Eleventh Ave., 81 N. Y. 436.

87. *Indiana.*— Hines *v.* Dresher, 93 Ind. 551; Whitehead *v.* Cummins, 2 Ind. 58.

Kentucky.— Case *v.* Woolley, 6 Dana 17, 32 Am. Dec. 54.

Missouri.— See Duke *v.* Brandt, 51 Mo. 221.

North Carolina.— Conner *v.* Gwin, 2 N. C. 121.

Pennsylvania.— McGuire *v.* Warren, Wilcox 193.

Texas.—Willson *v.* Phillips, 27 Tex. 543. See 44 Cent. Dig. tit. "Subrogation," § 41.

The purchaser at a road tax-sale is entitled to be subrogated to the rights of the county, and to have a lien upon the real estate for all taxes paid by him, with interest from the dates of such payments. Bois *v.* Merriam, 5 Fed. 439.

In Alabama it is held that a purchaser of

the rights and liens of the encumbrance paid off;[88] and when, on default in the conditions of a trust deed, a sale is made of the property covered thereby, the purchaser becomes subrogated to all of the rights of the beneficiary of the deed.[89] Thus a purchaser at an execution sale may, before the time for redemption expires, pay the debt secured by a prior trust deed, and be subrogated thereto;[90] and a party having purchased at a foreclosure sale and paid the purchase-money, in the event of the sheriff declining to make a deed of the property on account of the delay in paying such purchase-money, is still entitled to subrogation.[91] But the execution debtor will not be substituted to the rights of the holder of the prior lien by paying the debt which it secures, but the lien is thereby discharged; and this rule also holds where the lien is enforced by a sale of the property, and is purchased by a third party with the funds of the execution debtor;[92] and a purchaser at a foreclosure sale who buys goods which are sold subject to a lien is not upon payment of the lien entitled to be subrogated to the lienor's rights,[93] although it is held that a purchaser on an execution, who has satisfied a judgment, has a right to be subrogated in the place of the execution creditor, although he knew that the property sold belonged to a stranger.[94] Where goods are attached and sold by the sheriff, who pays liens out of the proceeds, one of the attaching creditors who is not paid in full is not entitled to be subrogated to the rights of the lien discharged.[95]

b. Invalid Sales — (i) *General Rules.* A purchaser in good faith at a void judicial or execution sale is subrogated to the rights of the creditor whose debts he has paid;[96] and when the property is recovered from him or his vendee

land at a sale under execution issued on a moneyed judgment, in paying the purchase-money, pays his own debt, and not the debt of the obligor, against whom the judgment was rendered, and is not entitled to subrogation. Gray *v.* Denson, 129 Ala. 406, 30 So. 595.

Ohio Rev. St. (1892) § 5410, providing that if on sale of property on execution the title of the purchaser is invalid by reason of any defect in the proceedings, the purchaser may be subrogated, etc., does not give the purchaser at a sale under a creditor's bill a right to be subrogated to a mortgage on the property, the proceedings in the creditor's suit being regular. Jewett *v.* Feldheiser, 68 Ohio St. 523, 67 N. E. 1072, holding also that a purchaser at sheriff's sale under a creditor's suit, not being in privity with a mortgage on the land, is not entitled to be subrogated to any supposed rights of the mortgagee.

88. Baylor *v.* Scott, 2 Port. (Ala.) 315; Lane *v.* Hallum, 38 Ark. 385; McLaughlin *v.* Dana, 8 Dana (Ky.) 182.

If the property is purchased under attachment in chancery to satisfy the same debt, where the decree subjects it to the attachment debt, he may be reimbursed out of the attached property to the extent of the payment made on the execution. Beall *v.* Barclay, 10 B. Mon. (Ky.) 261.

89. Ingle *v.* Culbertson, 43 Iowa 265.

90. Swain *v.* Stocton Sav., etc., Soc., 78 Cal. 600, 21 Pac. 365, 12 Am. St. Rep. 118; Chandler *v.* Dyer, 37 Vt. 345.

91. Bodkin *v.* Merit, 102 Ind. 293, 1 N. E. 625.

92. Atkins *v.* Emison, 10 Bush (Ky.) 9.

93. Bolton *v.* Lambert, 72 Iowa 483, 34 N. W. 294.

94. McLaughlin *v.* Daniel, 8 Dana (Ky.) 182.

95. Wohner *v.* Handy, 68 Miss. 153, 8 So. 331.

96. *Arkansas.*— Bond *v.* Montgomery, 56 Ark. 563, 20 S. W. 525, 35 Am. St. Rep. 119.

Georgia.— Hamilton *v.* Rogers, 126 Ga. 27, 54 S. E. 926, under statute.

Illinois.— St. Louis, etc., Coal, etc., Co. *v.* Sandoval Coal, etc., Co., 116 Ill. 770, 5 N. E. 370; McHany *v.* Schenk, 88 Ill. 357; Kinney *v.* Knoebel, 51 Ill. 112.

Kentucky.— Weakley *v.* Davis, (1898) 44 S. W. 637.

Missouri.— Burden *v.* Johnson, 81 Mo. 318 (holding, however, that a purchaser at a perfectly regular sale, the purchase-money for which has been applied to satisfy the lien for which the sale was ordered, is not, in the absence of fraud, subrogated to the rights of the lien-holder); Valle *v.* Fleming, 29 Mo. 152, 77 Am. Dec. 557.

Texas.— Jones *v.* Smith, 55 Tex. 383; Burns *v.* Ledbetter, 54 Tex. 374 (holding, however, that where plaintiff's attorney purchases at a sale under a valid judgment, but an invalid execution, and the money paid liquidates but a part of the judgment, he cannot hold the property until reimbursed, but is subrogated to the judgment lien for the amount paid by him, less the value of the use and occupation for the time during which he held the property); Brown *v.* Lane, 19 Tex. 203; Teas *v.* McDonald, 13 Tex. 349, 65 Am. Dec. 65; Howard *v.* North, 5 Tex. 290, 51 Am. Dec. 769. But see Campbell *v.* Elliott, 52 Tex. 151.

See 44 Cent. Dig. tit. "Subrogation," § 42.

Where the land of a lunatic has been sold in proceedings instituted by his committee, and the proceeds applied to the payment of the lunatic's debts, and the purchaser of the

by virtue of a superior title, he may be substituted for the creditor and have the amount of his purchase-money refunded him;[97] and, if his bid discharges an encumbrance on the land, he can have restitution to the extent of the lien discharged before defendant in the bond proceeding or his heirs can recover the lands so purchased by him, if his purchase is made in good faith under the belief that he is acquiring title.[98] Similarly a purchaser at a void sale to foreclose a mortgage is subrogated to all the rights and remedies of the mortgagee and can enforce them as the mortgagee could have done had the sale not been

land has erected valuable improvements thereon, and the lunatic, after recovering the use of his reason, procures the proceedings to be set aside for informality, the purchaser is subrogated to the rights of the creditors whose claims were paid from the purchaser's money. Cathcart *v.* Sugenheimer, 18 S. C. 123 [*cited* with approval in Bailey *v.* Bailey, 41 S. C. 337, 19 S. E. 669, 728, 44 Am. St. Rep. 713].

In Indiana it was formerly held that the purchase-money paid by an ordinary vendee at sheriff's sale operates as a *pro tanto* discharge of the judgment, and hence he cannot be substituted to the rights of the judgment plaintiff, if the sale should prove to have been void. Richmond *v.* Marston, 15 Ind. 134. But the broad doctrine announced in this case that a volunteer purchaser at a sale made by a public officer is not entitled to the right of subrogation in case the sale is ineffectual to convey title has been overthrown by the later decisions of the courts of this state, which take the ground that the policy of the law is to hold out inducements to persons to become purchasers at such sales, and therefore whenever a sale is ineffectual to pass the title to the property offered for sale equity recognizes the right of subrogation. Bunting *v.* Gilmore, 124 Ind. 113, 24 N. E. 583; Bodkin *v.* Merit, 102 Ind. 293, 1 N. E. 625 (holding that it is a familiar principle of equity, and is fully recognized by the decisions, that payment of a debt by a purchaser at an invalid's sheriff sale subrogates the purchaser to the rights of the creditor, and that the invalidity of the sale does not destroy the right of subrogation, and it would be against good conscience and natural justice to permit mortgagors to hold property pledged for a debt against one who had paid their debt, expecting to secure a title to the land pledged as security for its payment); Short *v.* Sears, 93 Ind. 505; Ray *v.* Detchon, 79 Ind. 56 (holding that the purchaser at a sheriff's sale, void for want of notice, nevertheless takes color of title by his deed, and his grantee is entitled to be subrogated to all the rights of the judgment creditor); Muir *v.* Berkshire, 52 Ind. 149.

In Louisiana, Code, art. 2157, specifies the cases in which payment, by another than the debtor, produces a transfer of the creditor's rights; and the discharging a judgment debt, by a purchaser at a forced sale, is not one of them. It is there held that such an act, indeed, cannot be satisfactorily distinguished from payment made to the creditor, without a sale of the debtor's property, by a person not having an interest to discharge the debt. Under art. 2130, the law only permits this on the condition that the party paying should not be subrogated, by the act of payment, to the rights of the creditor. The 711th article of the code of practice, it is true, gives an action of warranty against the debtor, where the purchaser is evicted by a better title in a third person. But this action only arises on a sale legally made. Where the alienation takes place contrary to law, the debtor in execution may sue for and recover the thing sold. Although in such a case there is no warranty which prevents him being restored to the possession of the object sold, he must return the money which has been applied to the discharge of his debt. But this is not because the purchaser is subrogated to the rights of the creditor; for subrogation, even admitting it to arise on a sale regularly made, could not take place on one made contrary to law; but because it is unjust that the debtor should enrich himself at the expense of another. Childress *v.* Allen, 3 La. 477, holding that the purchaser of property at a sale on execution is not subrogated to the rights of the judgment creditor. See Dufour *v.* Camfranc, 11 Mart. (La.) 655, 13 Am. Dec. 360.

In North Carolina it was held in an early case that a purchaser at sheriff's sale who acquires a defective title has no right to take the place of the creditor by substitution, and thus bring to his aid the dignity of such creditor's debt. Laws *v.* Thompson, 49 N. C. 104. But the doctrine is now well established that a purchaser at a void execution sale is subrogated to the rights of the execution creditor to the extent such creditor was benefited and the execution debtor was exonerated by the sale. Pemberton *v.* McRae, 75 N. C. 497. And see Myrover *v.* French, 73 N. C. 609. And similarly, where the purchaser of land of a *cestui que trust* agreed to pay for the same by releasing to the trustee a debt due from him personally, and in lieu of the money the trustee agreed to convey a tract of land to the *cestui*, although the contract cannot be enforced against the *cestui*, yet, if the purchaser acted in good faith as regards his actual intentions in paying the trustee by a cancellation of the latter's indebtedness, he will, upon paying to the *cestui* the amount of his bid, be subrogated to her title to the tract of land acquired from the trustee. Kemp *v.* Kemp, 85 N. C. 491.

97. McLaughlin *v.* Daniel, 8 Dana (Ky.) 182; Bright *v.* Boyd, 4 Fed. Cas. No. 1,875, 1 Story 478.

98. Meher *v.* Cole, 50 Ark. 361, 7 S. W. 451, 7 Am. St. Rep. 101; Waggener *v.* Lyles, 29 Ark. 47; Huse *v.* Den, 85 Cal. 390, 24

made;[99] and the purchaser's grantee has the same rights and remedies as the

Pac. 790, 20 Am. St. Rep. 232; Weaver *v.* Norwood, 59 Miss. 665; McGee *v.* Wallis, 57 Miss. 638; Ragland *v.* Green, 14 Sm. & M. (Miss.) 194; French *v.* Grenet, 57 Tex. 273.

99. *Georgia.*— Dutcher *v.* Hobby, 86 Ga. 198, 12 S. E. 356, 22 Am. St. Rep. 444, 10 L. R. A. 472.

Illinois.— Bruschke *v.* Wright, 166 Ill. 183, 46 N. E. 813, 57 Am. St. Rep. 125.

Indiana.— Muir *v.* Berkshire, 52 Ind. 149.

Kansas.— Equitable Mortg. Co. *v.* Gray, 68 Kan. 100, 74 Pac. 614.

Michigan.— Lillibridge *v.* Tregent, 30 Mich. 105; Johnstone *v.* Scott, 11 Mich. 232; Gilbert *v.* Cooley, Walk. 494.

Mississippi.— Clark *v.* Wilson, 56 Miss. 753.

Missouri.— Honaker *v.* Shough, 55 Mo. 472; Jones *v.* Mack, 53 Mo. 147; Moore *v.* Lindsey, 52 Mo. App. 474; Wells *v.* Lincoln County, 10 Mo. App. 588 [*affirmed* in 20 Mo. 424]. And see Wilcoxon *v.* Osborn, 77 Mo. 621.

New York.— Jackson *v.* Bowen, 7 Cow. 13.

Rhode Island.—Brewer *v.* Nash, 16 R. I. 458, 17 Atl. 857, 27 Am. St. Rep. 749.

South Carolina.— Griffin *v.* Griffin, 75 S. C. 249, 55 S. E. 317, 117 Am. St. Rep. 899.

Virginia.— Gatewood *v.* Gatewood, 75 Va. 407.

United States.— Brobst *v.* Brock, 10 Wall. 519, 19 L. ed. 1002.

But see Peacock *v.* Barnes, 142 N. C. 215, 55 S. E. 99.

In Ohio the rule is made statutory in Rev. St. §§ 5410, 5411, providing that, on sales by order of the court, where the title proves invalid by reason of defect in proceedings, a purchaser may be subrogated to the rights of a creditor against the debtor to the extent of the money paid, and thus a purchaser under a void execution rendered on foreclosure of a mortgage after the mortgagor's death, whereby other lands were sold to satisfy a deficiency, is subrogated for the amount of money so paid, and his right is a lien on the land sold to the extent of money paid, as against the heirs and legatees of the deceased mortgagor. Doyle *v.* Breneman, 4 Ohio S. & C. Pl. Dec. 22, 2 Ohio N. P. 415. The rule prescribed by the statute is recognized as having long been in vogue in sister states, and the statute is held to be merely declaratory of the rule of equity so followed. Doyle *v.* Breneman, *supra.*

Where the purchaser at foreclosure sale redeems from tax-sales made before foreclosure, he is entitled to be subrogated to the rights of the state as against a judgment creditor of the mortgagor redeeming from foreclosure. Northern Inv. Co. *v.* Frey Real Estate, etc., Co., 33 Colo. 480, 81 Pac. 300, 108 Am. St. Rep. 104.

Subrogation of purchaser at foreclosure sale void as to heirs of mortgagor.— The mortgagor of land having died, and the mortgage foreclosed against his administrator without making his heirs or devisees parties, the purchaser and his grantees will be subrogated to the rights of the mortgagee (Jellison *v.* Halloran, 44 Minn. 199, 46 N. W. 332), and so also as to the enforcement of a vendor's lien (Jones *v.* McKenna, 4 Lea (Tenn.) 630); and similarly, although a foreclosure sale in an action against the heirs of the mortgagor is void for defective service of process, a purchaser for valuable consideration at such sale, who has improved the property, is entitled, on showing that the foreclosure money, or any part of it, went to pay the mortgagor's debts, to be subrogated to the claims so paid (Bailey *v.* Bailey, 41 S. C. 337, 19 S. E. 669, 728, 44 Am. St. Rep. 713).

Justification of the rule.— It is an equitable principle, which secures justice to the parties immediately interested, tends to give confidence in judicial sales, and encourages purchasers to bid fair prices, because it assures to them that, happen what may, they will get back the money paid by them. Bunting *v.* Gilmore, 124 Ind. 113, 24 N. E. 583; Jones *v.* French, 92 Ind. 138; Sidener *v.* Hawes, 37 Ohio St. 532.

A judgment in ejectment that purchasers at a foreclosure sale had not acquired title as against the remainder-men does not preclude the purchasers from maintaining a suit in equity to be subrogated to the rights of a former mortgage which was valid as against the remainder-men. Stump *v.* Warfield, 104 Md. 530, 65 Atl. 346.

A purchaser at a sale to enforce the state's lien for a drainage assessment is, in case the sale is invalid, subrogated to the lien of the state to the extent of the amount thereof discharged by the money paid by him. Reed *v.* Kalfsbeck, 147 Ind. 148, 45 N. E. 476, 46 N. E. 466.

The grounds of the rule are, that while ordinarily a stranger to the estate who voluntarily pays off a mortgage thereon is not entitled to subrogation to the rights of the mortgagee, a purchaser at the mortgagee's sale, even when the sale is void, is not to be regarded as a mere stranger; but that, having bid off the estate in good faith on the invitation of the mortgagee to do so, when, supposing his bid to have been effectual to invest him with the equitable or executory title, he pays the amount of his bid and the same is applied to the mortgage debt, he has a most persuasive equity to be subrogated to at least the rights of the mortgagee who invited his confidence. In such a case the court does simply what the mortgagee would be bound in conscience to do himself, if he could, when it treats the purchaser as the assignee of the mortgage. And of course, where the purchaser has entered under the mortgagee's deed and made improvements, this equity is strengthened. Brewer *v.* Nash, 16 R. I. 458, 17 Atl. 857, 27 Am. St. Rep. 749.

The purchaser of land sold under a school-fund mortgage may be subrogated to the rights of the state in the mortgage, if the sale is set aside as invalid. Such a purchaser is not a volunteer, nor is the doctrine of

purchaser.[1] But the right extends only to a purchaser in good faith.[2] Furthermore if there was no subsisting lien to be discharged by the purchaser at the sale made under a decree of foreclosure there is no room for subrogation, as the purchaser could not occupy a better position than plaintiff in the void decree.[3]

(II) *Executors' or Administrators' Sales.* On a void sale by an executor or administrator the purchaser in good faith, without notice, may be substituted to the rights of the creditors whose debts were paid by his money;[4] even though the administrator was guilty of a misdemeanor in attempting to sell,[5] and the same rule is held to apply to a purchaser at a sale by one assuming, without authority, to act as executor,[6] and although a foreign administrator who has not complied with the statute requiring such administrators to record their letters and give a bond has no authority to exercise a power of sale contained in

caveat emptor applicable in such case. Willson *v.* Brown, 82 Ind. 471.

One who buys in land at a judicial sale under partition proceedings by the purchaser's heirs, although the deed given him is without warranty, acquires all the rights of the heirs at the time of sale. Givens *v.* Carroll, 40 S. C. 413, 18 S. E. 1030, 42 Am. St. Rep. 889.

Effect of conveyance to third party.—Where the mortgagee or a stranger to the record purchases the mortgaged premises at a void sale under foreclosure proceedings, and then conveys by warranty deed said premises to a third party, the latter becomes subrogated in equity to the rights of the mortgagee in said mortgaged premises, as well as the mortgage debt thereon, to the extent of his purchase, and may demand a valid foreclosure of said mortgage for his protection. Jordan *v.* Sayre, 29 Fla. 100, 10 So. 823.

1. Jordan *v.* Sayre, 29 Fla. 100, 10 So. 823; Bruschke *v.* Wright, 166 Ill. 183, 46 N. E. 813, 57 Am. St. Rep. 125; Rogers *v.* Benton, 39 Minn. 39, 38 N. W. 765, 12 Am. St. Rep. 613; Finlayson *v.* Peterson, 11 N. D. 45, 89 N. W. 855, holding also that where the one subrogated takes possession by express consent of the mortgagor after default, he cannot be ejected until his debt and just claims for taxes are paid.

2. King *v.* Huni, 118 Ky. 450, 81 S. W. 254, 25 Ky. L. Rep. 2266, 85 S. W. 723, 27 Ky. L. Rep. 528. But see McLaughlin *v.* Daniel, 8 Dana (Ky.) 182, holding that the right of a purchaser of property sold under execution to be substituted to the place of the creditor, when the property is recovered from him or his vendee by virtue of superior title, is not affected by his knowing at the time of his purchase that the property so belonged to a stranger and was not subject to the execution.

A purchaser at a void guardian's sale who fraudulently prevented competition of bidding will not be subrogated to the rights of encumbrancers whose claims he has paid off in part payment of the purchase-price. Devine *v.* Harkness, 117 Ill. 145, 7 N. E. 52.

3. Meher *v.* Cole, 50 Ark. 361, 7 S. W. 451, 7 Am. St. Rep. 101.

4. *Arkansas.*— Harris *v.* Watson, 56 Ark. 574, 20 S. W. 529; Bond *v.* Montgomery, 56 Ark. 563, 20 S. W. 525, 35 Am. St. Rep. 119.

Illinois.— Kinney *v.* Knoebel, 51 Ill. 112.

Indiana.— Jones *v.* French, 92 Ind. 138, holding that a purchaser in good faith of land from an administrator, where the purchase-money paid by him is applied to the payment of the intestate's debts, will, if the sale be set aside, be entitled to a lien on the land for the amount of money paid, even though there may have been sufficient personal property to pay the debts, and although no additional bond was filed by the administrator, and although another tract of land was sold for a sufficient sum to pay the debts.

Mississippi.— Pool *v.* Ellis, 64 Miss. 555, 1 So. 725; Short *v.* Porter, 44 Miss. 533.

Missouri.— Valle *v.* Fleming, 29 Mo. 152, 77 Am. Dec. 557, holding that where land is purchased in good faith at an administrator's sale, which is void because the requirements of the statute are not pursued, and the purchase-money is applied in extinguishment of a mortgage to which such land was subject, the purchaser will be subrogated to the rights of the mortgagee to the extent of the purchase-money applied in the extinguishment of the mortgage, and the owner will not be entitled to recover possession until he repays such purchase-money.

Nebraska.— Veeder *v.* McKinley-Lanning L. & T. Co., 61 Nebr. 892, 86 N. W. 982.

New Jersey.— Merselis *v.* Vreeland, 8 N. J. Eq. 575.

North Carolina.— Lanier *v.* Heilig, 149 N. C. 384, 63 S. E. 69; Perry *v.* Adams, 98 N. C. 167, 3 S. E. 729, 2 Am. St. Rep. 326; Springs *v.* Harvan, 56 N. C. 96; Scott *v.* Dunn, 21 N. C. 425, 30 Am. Dec. 174.

South Carolina.— Hunter *v.* Hunter, 63 S. C. 78, 41 S. E. 33, 90 Am. St. Rep. 663.

Tennessee.— Caldwell *v.* Palmer, 6 Lea 652; Bennett *v.* Coldwell, 8 Baxt. 483.

Virginia.— Hudgin *v.* Hudgin, 6 Gratt. 320, 52 Am. Dec. 124.

Wisconsin.— Blodgett *v.* Hitt, 29 Wis. 169. See 44 Cent. Dig. tit. "Subrogation," § 43.

But see Beall *v.* Price, 13 Ohio 368, 42 Am. Dec. 204, holding that where a purchaser at a void administrator's sale sells to another with warranty, the latter cannot, upon the death and insolvency of his vendor, be substituted for him in his claim against the estate of the decedent for advances made.

5. Bond *v.* Montgomery, 56 Ark. 563, 20 S. W. 525, 35 Am. St. Rep. 119.

6. Waggener *v.* Lyles, 29 Ark. 47.

a mortgage to his intestate as a domestic administrator, yet, if such a sale is ratified by the heirs and the proceeds are properly applied by the foreign administrator, the purchaser will be regarded as an equitable assignee of the mortgage, and will be subrogated to the rights of the heirs and the domestic administrator.[7] But purchasers of land at void sales by executors can claim no rights of subrogation where they knew that the land was subject to a trust, and that the executors had no authority to sell, and where the purchase-money was applied to various purposes indiscriminately with money arising from sales of personalty;[8] and it has been held further that the remedy is limited to the case where the heir files a bill to redeem, and then, not upon the doctrine of subrogation, but under the maxim that "he who seeks equity must do equity," and thus it is held that a purchaser of land at an invalid administrator's sale to pay debts is not subrogated to the rights of the creditors whose claims are paid out of the purchase-money paid by him.[9] Where land of a decedent is sold by decree of court in aid of assets, a purchaser, to be subrogated to the rights of creditors as against a devisee in remainder not a party to the proceedings, must show, beyond an order for payment of the claims made, that such claims existed as a charge on the land.[10]

5. Junior Mortgagees, Judgment Creditors, or Encumbrancers — a. General Rule. A subsequent mortgagee or encumbrancer who in order to preserve his own security is compelled to pay a prior encumbrance held by another creditor is entitled to be subrogated to the rights of the prior mortgagee or lienor whose mortgage or lien he has paid, to the extent of the amount so paid, the payment

7. Sloan *v.* Frothingham, 72 Ala. 589.

8. Huse *v.* Den, 85 Cal. 390, 24 Pac. 790, 20 Am. St. Rep. 232.

9. Borders *v.* Hodges, 154 Ill. 498, 39 N. E. 597 [*following* Bishop *v.* O'Connor, 69 Ill. 431], holding that a purchaser of land at an administrator's sale is not entitled in equity to be subrogated to the claims of creditors which have been paid by the purchase-money, where the title fails for a want of jurisdiction in the court ordering the sale over the persons of the heirs, because of want of service. And see McCammant *v.* Roberts, 87 Tex. 241, 27 S. W. 86.

Development of rule.— Originally this relief was granted in equity only to *bona fide* purchasers whom the holder of the legal title had called to an account in that court, and was not extended beyond allowing him to set up, as against the holder of the legal title, meliorations to the estate to an extent equal to the rents demanded (Weaver *v.* Norwood, 59 Miss. 665); and when his Treatise on Equity Jurisprudence was first published, Judge Story intimated that such cases were beyond the reach of equity courts, except when the party seeking to recover the estate required and called for aid from a court of equity, or unless there was some fraud; and that, where the party could recover the estate at law, a court of equity could not, unless there was some fraud, relieve the purchaser (2 Story Eq. § 1238. See Valle *v.* Fleming, 29 Mo. 152, 158, 77 Am. Dec. 557). But the right to charge the land purchased with repayment of the purchase-money, which has been appropriated to the payment of a charge previously existing upon it, is of the same character as that to charge it with the value of improvements, and is held to be of a more persuasive equity, since the *status quo* is precisely restored, and no charge is put upon the property which before did not exist. In cases where the *bona fide* purchaser has been permitted to charge the land with the purchase-money paid by him, courts of equity, while proceeding on the theory of substituting him to the right of the creditor whose debt has been paid, in fact give a broader right to the purchaser than was held by the creditor. They have, while professing to grant a charge only on the land, really treated the purchaser as the equitable owner, and protected his possession as such against the holder of the legal title by enjoining any interference with the possession until payment is made of the equitable charge (Weaver *v.* Norwood, *supra*); and the rule established in Bright *v.* Boyd, 4 Fed. Cas. No. 1,875, 1 Story 478, was that where a party, if called in equity, might have asserted a claim to reimbursement, then he may himself go into equity for the purpose of asserting this demand (Weaver *v.* Norwood, *supra*), and this rule is now generally followed throughout the several states (see *supra*, this section), and is not limited to cases granted where the court is appealed to by the opposite party for its aid (Caldwell *v.* Palmer, 6 Lea (Tenn.) 652); and it is held immaterial under what form equity in such case is administered; whether under the name of compensation, as it was done in the case of Bright *v.* Boyd, *supra*, or under the name of substitution, as in the case of Hudgin *v.* Hudgin, 6 Gratt. (Va.) 320, 52 Am. Dec. 124, or, as it is sometimes more conveniently effected, by reviving the encumbrance, which the purchase-money has extinguished, and permitting it to be used as a shield against a recovery at law (Valle *v.* Fleming, *supra*; Peltz *v.* Clarke, 5 Pet. (U. S.) 481, 8 L. ed. 199).

10. Rice *v.* Bamberg, 72 S. C. 384, 51 S. E. 987.

not extinguishing the prior lien, which is kept alive for his benefit,[41] and which

11. *California.*— Swain *v.* Stockton Sav., etc., Soc., 78 Cal. 600, 21 Pac. 365, 12 Am. St. Rep. 118 (under Civ. Code, § 2904); Combs *v.* Hawes, (1885) 8 Pac. 597. But see Austin *v.* Pulschen, (1895) 42 Pac. 306 [decided by a divided court], holding that where plaintiff, in possession of land, which she held under a recorded contract of sale, and upon which there was a lien for the purchase-price, agreed to sell the same in consideration that the vendee discharge said lien and give his notes to her for the payment of a further sum, and that she retain possession until they were paid, and the vendee borrowed money from another, giving him a mortgage on the land therefor, and the sum borrowed was paid to the holder of the first lien, who conveyed directly to the vendee, the mortgage must be postponed to plaintiff's lien; the mortgagee not being entitled to be subrogated to the original lien.

Connecticut.— Young *v.* Williams, 17 Conn. 393. See Quinnipiac Brewing Co. *v.* Fitzgibbons, 73 Conn. 191, 47 Atl. 128.

District of Columbia.— Pleasants *v.* Fay, 13 App. Cas. 237.

Florida.— McMahon *v.* Russell, 17 Fla. 698.

Illinois.— Illinois Nat. Bank *v.* School Trustees, 211 Ill. 500, 71 N. E. 1070 [*affirming* 111 Ill. App. 189]; Magill *v.* De Witt County Sav. Bank, 126 Ill. 244, 19 N. E. 295; Ebert *v.* Gerding, 116 Ill. 216, 5 N. E. 591; Chicago, etc., R. Land Co. *v.* Peck, 112 Ill. 408; Tyrrell *v.* Ward, 102 Ill. 29; Darst *v.* Bates, 95 Ill. 493; Lamb *v.* Richards, 43 Ill. 312; Ball *v.* Callahan, 95 Ill. App. 615 [*affirmed* in 197 Ill. 318, 64 N. E. 295].

Indiana.— Milburn *v.* Phillips, 143 Ind. 93, 42 N. E. 461, 52 Am. St. Rep. 403; Abbott *v.* Union Mut. L. Ins. Co., 127 Ind. 70, 26 N. E. 153; Erwin *v.* Acker, 126 Ind. 133, 25 N. E. 888; Ulrich *v.* Drischell, 88 Ind. 354.

Iowa.— Bowen *v.* Gilbert, 122 Iowa 448, 98 N. W. 273; Shimer *v.* Hammond, 51 Iowa 401, 1 N. W. 656; Gilbert *v.* Gilbert, 39 Iowa 657; Marshall *v.* Ruddick, 28 Iowa 487.

Kansas.— Washburn *v.* Thomas, 8 Kan. App. 856, 56 Pac. 539. But see Watkins Land Mortg. Co. *v.* Williams, 63 Kan. 30, 64 Pac. 976, holding that a second mortgagee, who voluntarily pays and consents to the cancellation of interest coupons secured by the first mortgage, in an action subsequently brought to foreclose the prior mortgage, cannot be subrogated to the rights of the first mortgagee as to such coupons; and a decree allowing such indebtedness to participate *pro rata* with the unpaid principal and interest on the first mortgage bond in the proceeds of sale in such foreclosure proceedings is erroneous.

Louisiana.— Ventress *v.* His Creditors, 20 La. Ann. 359.

Maine.— Frisbee *v.* Frisbee, 86 Me. 444, 29 Atl. 1115; Cobb *v.* Dyer, 69 Me. 494.

Maryland.— State *v.* Brown, 73 Md. 484, 21 Atl. 374; Rappanier *v.* Bannon, (1887) 8 Atl. 555; Reigle *v.* Leiter, 8 Md. 405.

Massachusetts.— Washburn *v.* Hammond, 151 Mass. 132, 24 N. E. 33; Ryer *v.* Gass, 130 Mass. 227.

Michigan.— Draper *v.* Ashley, 104 Mich. 527, 62 N. W. 707; Powers *v.* Golden Lumber Co., 43 Mich. 468, 5 N. W. 656; Baker *v.* Pierson, 6 Mich. 522.

Minnesota.— Whittacre *v.* Fuller, 5 Minn. 508. See Webber *v.* Hausler, 77 Minn. 48, 79 N. W. 580.

Mississippi.— Ligon *v.* Barton, 88 Miss. 135, 40 So. 555.

Missouri.— Reyburn *v.* Mitchell, 106 Mo. 365, 16 S. W. 592, 27 Am. St. Rep. 350.

Nebraska.— Milligan *v.* Gallen, 64 Nebr. 561, 90 N. W. 541; Southard *v.* Dorrington, 10 Nebr. 119, 4 N. E. 935; Lincoln *v.* Lincoln St. R. Co., 5 Nebr. (Unoff.) 56, 97 N. W. 255.

New Hampshire.— Hinds *v.* Ballou, 44 N. H 619.

New Jersey.— New Jersey Bldg., etc., Co. *v.* Cumberland Land, etc., Co., 53 N. J. Eq. 644, 33 Atl. 964 (holding that a second mortgagee making payments on the first mortgage will, under ordinary circumstances, be subrogated under the first mortgage to the extent of such payments, the residue of the claim of the first mortgage having priority to the lien acquired by such subrogation, and that this measure is to be thus applied: A decree should be entered for the first mortgagee for the entire amount of the money due him, without deducting therefrom the sums in question which have been paid by the said second mortgagee, and which decree should be directed to stand as security, in the first place, for the sum due the first mortgagee minus such payments; and, secondly, as security for the second mortgagee to the extent of said payments made by him; the lien of the first mortgagee will thus have priority, and the lien of the second mortgagee will be the second one in the premises); Denman *v.* Nelson, 31 N. J. Eq. 452; Allen *v.* Wood, 31 N. J. Eq. 103; Barnett *v.* Griffith, 27 N. J. Eq. 201.

New York.— Clute *v.* Emmerich, 99 N. Y. 342, 2 N. E. 6 [*affirmed* in 114 N. Y. 634, 21 N. E. 1021]; Twombly *v.* Cassidy, 82 N. Y. 155; Patterson *v.* Birdsall, 64 N. Y. 294, 21 Am. Rep. 609 [*affirming* 6 Hun 632]; Brainard *v.* Cooper, 10 N. Y. 356; Louis *v.* Bauer, 33 N. Y. App. Div. 287, 53 N. Y. Suppl. 985; Dings *v.* Parshall, 7 Hun 522; Jenkins *v.* Continental Ins. Co., 12 How. Pr. 66; Silver Lake Bank *v.* North, 4 Johns. Ch. 370; Matter of Coster, 2 Johns. Ch. 503.

Ohio.— Joyce *v.* Dauntz, 55 Ohio St. 538, 45 N. E. 900; Amick *v.* Woodworth, 9 Ohio Cir. Ct. 556, 6 Ohio Cir. Dec. 496; Penn *v.* Atlantic, etc., R. Co., 3 Ohio Dec. (Reprint) 508, 11 Am. L. Reg. N. S. 576.

Oregon.— Capital Lumbering Co. *v.* Ryan, 34 Oreg. 73, 54 Pac. 1093.

Pennsylvania.— Haverford Loan, etc., Assoc. *v.* Fire Assoc., 180 Pa. St. 522, 37 Atl. 179, 57 Am. St. Rep. 657; Mosier's Appeal, 56 Pa. St. 76, 93 Am. Dec. 783.

South Dakota.— Home Inv. Co. *v.* Clarson, 21 S. D. 72, 109 N. W. 507, under Rev. Civ. Code, § 2035.

Tennessee.— Carter *v.* Taylor, 3 Head 30.

Texas.— Miles *v.* Dorn, 40 Tex. Civ. App. 298, 90 S. W. 707; Southern Bldg., etc., Assoc.

does not become subordinated to intervening encumbrances, but, on the contrary,

v. Skinner, (Civ. App. 1897) 42 S. W. 320; Land Mortg. Bank *v.* Quanah Hotel Co., (Civ. App. 1895) 32 S. W. 573; Tarver *v.* Land Mortg. Bank, 7 Tex. Civ. App. 425, 27 S. W. 40.

Vermont.— Wheeler *v.* Willard, 44 Vt. 640; Walker *v.* King, 44 Vt. 601, 45 Vt. 525; Warren *v.* Warren, 30 Vt. 530; Downer *v.* Fox, 20 Vt. 388.

United States.— Memphis, etc., R. Co. *v.* Dow, 120 U. S. 287, 7 S. Ct. 482, 30 L. ed. 595 (holding that if trustees under a trust deed given to secure railroad bondholders, which contains covenants of title, are obliged to pay off a preëxisting encumbrance held by the state, in order to save the road from a judgment sale, they are entitled, upon such payment, to be subrogated to the rights of the state, and to indemnify themselves from the property); U. S. Bank *v.* Peter, 13 Pet. 123, 10 L. ed. 89; Russell *v.* Howard, 21 Fed. Cas. No. 12,156, 2 McLean 489.

England.— Greswold *v.* Marsham, 2 Ch. Cas. 170, 22 Eng. Reprint 898.

See 44 Cent. Dig. tit. "Subrogation," § 44.

This right is often effectuated by compelling an assignment to him of the prior encumbrance. Knoblauch *v.* Foglesong, 37 Minn. 320, 33 N. W. 865; Clark *v.* Mackin, 95 N. Y. 346; Lyon's Appeal, 61 Pa. St. 15. But although it has been held in some cases that the right to compel an assignment of the prior mortgage is necessarily incident to the right of redemption and subrogation (Pardee *v.* Van Anken, 3 Barb. (N. Y.) 534; Jenkins *v.* Continental Ins. Co., 12 How. Pr. (N. Y.) 66), although the junior encumbrancer does not occupy the position of a surety (Twombly *v.* Cassidy, 82 N. Y. 155), it is held that, to entitle a subsequent mortgagee to compel the assignment to himself of a prior mortgage, there must be some equitable reason for it, such as suretyship for the debt, and the mere fact that he is a subsequent mortgagee does not constitute such reason (Bigelow *v.* Cassedy, 26 N. J. Eq. 557; Nelson *v.* Loder, 132 N. Y. 288, 30 N. E. 369; Johnson *v.* Zink, 51 N. Y. 333; Ellsworth *v.* Lockwood, 42 N. Y. 89; Vandercook *v.* Cohoes Sav. Inst., 5 Hun (N. Y.) 641; Hubbard *v.* Ascutney Mill Dam Co., 20 Vt. 402, 50 Am. Dec. 41. See Holland *v.* Citizens Sav. Bank, 16 R. I. 734, 19 Atl. 654, 8 L. R. A. 553); and upon the ground that the right of subrogation arises only upon payment and extinguishment of the mortgage and an assignment implies the continued existence of the debt some cases go so far as to deny entirely the right to an assignment of the mortgage, the mortgagee's right being in effect, if not actually, that of an assignee (Lamb *v.* Montague, 112 Mass. 352; Lamson *v.* Drake, 105 Mass. 564).

Rule applied on petition by second mortgagee's administrator to foreclose, although at the time of such payment a petition was pending to foreclose the second see Wood *v.* Hubbard, 50 Vt. 82.

The mortgagee of firm property to secure an individual debt having paid a firm debt secured by a mortgage on firm property, to protect his own interest, is entitled to be subrogated to the lien. Reyburn *v.* Mitchell, 106 Mo. 365, 16 S. W. 592, 27 Am. St. Rep. 350.

The holder of a subsequent execution lien on mortgaged chattels may pay off the prior encumbrance to prevent his own lien from being cut off, and is then entitled to be subrogated to the right of the person from whom he redeemed. Lucking *v.* Wesson, 25 Mich. 443. Similarly when an execution creditor, in order to make an effective levy on mortgaged chattels, pays off the mortgage, and afterward the lien of his execution fails, such person acquires an equitable interest in the mortgaged chattels to the extent of the money advanced, and, while the lien of the mortgage becomes discharged, equity will substitute a lien for his benefit. Moore *v.* Calvert, 8 Okla. 358, 58 Pac. 627.

Thus a judgment creditor is subrogated to all the rights of the purchaser under a foreclosure, from whom he, *bona fide* and before the expiration of the statutory limitation, redeems (Lamb *v.* Richards, 43 Ill. 312); and a judgment creditor after purchasing his debtor's land at a sale under his judgment and before the statutory period of redemption expires, has a lien on the land giving him the right to be subrogated to the benefit of a trust deed prior to his judgment (Swain *v.* Stockton Sav., etc., Soc., 78 Cal. 600, 21 Pac. 365, 12 Am. St. Rep. 118).

If a creditor who has a lien on two funds, on one of which another creditor has a junior lien, elects to take his whole amount out of the fund on which the junior creditor has a lien, the latter will be subrogated to the right of the prior lien. Anthes *v.* Schroeder, 68 Nebr. 370, 94 N. W. 611; Lathrop's Appeal, 1 Pa. St. 512; Ebenhardt's Appeal, 8 Watts & S. (Pa.) 327. And see, generally, MARSHALING ASSETS AND SECURITIES, 26 Cyc. 938.

A junior mortgage lien-holder who has paid taxes and reduced an outstanding mortgage to protect his interests is entitled to be subrogated as against the rights of a dower claimant where the lien so protected existed at the time of the marriage of the deceased owner, although the payments were subsequently made. Lidster *v.* Poole, 122 Ill. App. 227. And a mortgagee who in good faith pays delinquent taxes to protect his lien may be subrogated to the county's lien therefor, and recover the amount paid as against a subsequent mortgagee, whose encumbrance has been accorded priority. Dunsmuir *v.* Port Angeles Gas, etc., Co., 30 Wash. 586, 71 Pac. 9. See Frankenstein *v.* Hamburger, 73 N. Y. App. Div. 352, 76 N. Y. Suppl. 818. And a mortgagee of part of certain premises who, in order to secure a release of a municipal tax lien which existed against the entire tract, paid it, may be subrogated to the rights of the city against the owner. Pittsburgh *v.* O'Reilly, 7 Pa. Dist. 758.

The assignee of a junior encumbrance, who within the time allowed by statute deposits the amount of money bid for the premises at

retains its priority over such intervening encumbrances,[12] although the junior mortgagee has taken a deed of trust or another mortgage covering the same property;[13] and if a second encumbrancer takes up a prior encumbrance, which was also a lien on property other than that bound by the second, the second encumbrancer may resort to the property bound by the first encumbrance and not bound by the second, and enforce the lien of the first upon it;[14] and a junior judgment creditor who, upon the fraudulent representations of his debtor that there are no other liens, advances money to redeem lands from a prior judgment sale, is entitled to be subrogated to the lien of the purchaser at such sale, in order to protect himself from the lien of a judgment prior to his own, of which he was ignorant at the time of the redemption, although the owner of such judgment was innocent of the fraud.[15] In such cases the person discharging the superior lien is treated as its purchaser or assignee, unless the facts show that it was intended as an absolute payment,[16] although no assignment is made to him,[17] and he is also entitled to all securities held by the prior encumbrancer.[18] The prior mortgage must, however, be actually discharged, and a tender which fails to discharge the prior lien because accompanied with conditions which the subsequent mortgagee is not entitled to make will not subrogate the subsequent mortgagee to the lien of the prior mortgage;[19] and if payment of the prior lien is neither made nor tendered, but the junior lien-holder assumes and maintains the attitude of denying both the validity and superiority of such prior lien, the right to make payment and of subrogation will be deemed to have been waived,[20] although a good legal tender will be as effective in subrogating the one making it as a payment would be.[21] Furthermore the equitable rule under which the holder of a junior mortgage is entitled to tender to the holder of a senior mortgage the amount due thereon, and demand an assignment of the same, is not applicable unless the former shows that such an assignment is necessary to his protection; nor can this rule be invoked by a mortgagee against a judgment creditor of his mortgagor having equities at least equal to those of the mortgagee,[22] and a creditor is not entitled to subrogation to a lien

a foreclosure sale, with interest, thereby renders the certificate of purchase null and void, and becomes subrogated to the rights of the original purchaser, subject to the obligations to sell the premises under his decree. Illinois Nat. Bank *v.* School Trustees, 111 Ill. App. 189 [*affirmed* in 211 Ill. 500, 71 N. E. 1070].

12. Erwin *v.* Acker, 126 Ind. 133, 25 N. E. 888; Connecticut Mut. L. Ins. Co. *v.* Bulte, 45 Mich. 113, 7 N. W. 707; Allen *v.* Wood, 31 N. J. Eq. 103.

Such as an attachment.—Ward *v.* Seymour, 51 Vt. 320; Downer *v.* Fox, 20 Vt. 388. See Flacks *v.* Kelly, 30 Ill. 462.

Where a purchase-money mortgage executed by the husband alone during coverture is paid off and discharged by a junior mortgagee, as allowed by the decree in his action to foreclose, under which he has bid in the property, he is subrogated to the rights of the mortgagee in the purchase-money mortgage as against the widow's claim of dower. Sheldon *v.* Hoffnagle, 51 Hun (N. Y.) 478, 4 N. Y. Suppl. 287.

A subsequent encumbrancer, purchasing at a sale under a decree in behalf of a prior encumbrancer, has a right to be substituted to the prior lien to the extent of the amount paid, subject to a deduction for rents and profits received by him from the same. Portwood *v.* Outton, 3 B. Mon. (Ky.) 247.

13. Worcester Nat. Bank *v.* Cheeney, 87 Ill. 602; Burchard *v.* Phillips, 11 Paige (N. Y.) 66.

14. Peter *v.* Smith, 19 Fed. Cas. No. 11,020, 5 Cranch C. C. 383.

15. Backer *v.* Pyne, 130 Ind. 288, 30 N. E. 21, 30 Am. St. Rep. 231.

16. Ebert *v.* Gerding, 116 Ill. 216, 5 N. E. 591.

17. Frisbee *v.* Frisbee, 86 Me. 444, 29 Atl. 1115. But see Gardenville Permanent Loan Assoc. *v.* Walker, 52 Md. 452.

18. Dings *v.* Parshall, 7 Hun (N. Y.) 522. See Southworth *v.* Scofield, 51 N. Y. 513.

19. Schmittdiel *v.* Moore, 101 Mich. 590, 60 N. W. 279.

20. Shattuck *v.* Belknap Sav. Bank, 63 Kan. 443, 65 Pac. 643.

Similarly where a curator, with the sanction of the probate court, executed a mortgage on his ward's land to obtain money to satisfy a preëxisting encumbrance under which the land was about to be sold, and the lender expressly refused to accept a transfer of the old encumbrance, and insisted upon the making of a new mortgage, he was not entitled to be subrogated to the rights of the mortgagee in the first mortgage. Capen *v.* Garrison, 193 Mo. 335, 92 S. W. 368, 5 L. R. A. N. S. 838.

21. Davis *v.* Cook, 65 Ala. 617; Emigrant Industrial Sav. Bank *v.* Clute, 33 Hun (N. Y.) 82.

22. Tillman *v.* Stewart, 104 Ga. 687, 30

which but for his own laches he could have had himself;[23] nor where he has been guilty of laches in asserting the right to subrogation,[24] for the right of the redeeming party to subrogation does not necessarily follow the right of redemption, but depends upon the relation of the parties liable to be foreclosed, to each other, and upon the circumstances in which the right of redemption is sought to be exercised;[25] and the mere fact that inferior lienors who, acting in their own interests and to accomplish a purpose of their own, have incidentally benefited a superior lienor, does not thereby subrogate the rights of the superior lienor.[26] The right does not exist in favor of the holder of a second mortgage to the prejudice of the paramount lien;[27] and a mortgagee in a mortgage prior in date and subsequent in record to a mortgage subsequent in date and prior in record, who pays a former mortgage of record at the time of the recording of the subsequent mortgage, cannot be subrogated to the rights of the paid mortgagee, as against an assignee of the subsequent mortgage, the latter relying on the record, and believing the mortgage to be a first lien;[28] and the right to subrogation of one who, having a lien on the property, pays off for his protection a prior encumbrance, will not prevail against intervening *bona fide* purchasers without notice;[29] but notwithstanding the fact that the rights of a third person have intervened where the third person has in no respect changed position, and done nothing upon the faith of the acts performed by the party who invokes the doctrine of subrogation the latter may still have subrogation.[30] Ordinarily a junior mortgagee is not entitled to be subrogated to a lien which did not exist when his mortgage was taken;[31] and on paying a first mortgage the holder of the second is not subrogated to a judgment of foreclosure, under which the time for redemption by the mortgagor has expired.[32]

b. Effect of Invalidity, Fraud, or Want of Notice. Where a mortgage is paid by the mortgagor or his assignee equity will not substitute him in place of the mortgagee, no assignment of the payment and mortgages having been taken and the evident intention being to cancel the same;[33] but where an invalid or defective mortgage is given to secure an advancement of money made for the express purpose of paying off a prior encumbrance, the mortgagee in the defective mortgage

S. E. 949, 69 Am. St. Rep. 192, disallowing subrogation for the purpose of compelling the judgment creditor to assign to the mortgagee an older mortgage executed by their common debtor and to which the judgment creditor had acquired title for the express purpose of practising his junior judgment lien.

A junior mortgagee whose mortgage is not yet payable cannot maintain an action to enable him to pay and be subrogated to a prior mortgage, unless he shows it to be necessary for his protection. Jenkins *v.* Continental Ins. Co., 12 How. Pr. (N. Y.) 66.

23. Mechling's Appeal, 1 Pa. Cas. 135, 1 Atl. 326, holding that where a judgment creditor issues a fieri facias and attaches a bank balance, and the judgment is paid by a sale under the fieri facias, a subsequent judgment creditor, who has not issued an attachment, cannot be subrogated to the attachment of the first, to the prejudice of one subsequent to both, who has also attached the balance.

24. Hargis *v.* Robinson, 63 Kan. 686, 66 Pac. 988.

25. Jenkins *v.* Continental Ins. Co., 12 How. Pr. (N. Y.) 66.

Where an anterior lien has been paid by the debtor, or one who stands in the debtor's shoes, a posterior lien creditor cannot be subrogated to the rights of the anterior. Sheffy's Appeal, 97 Pa. St. 317; Royalton Nat. Bank *v.* Cushing, 53 Vt. 321.

26. McCormick *v.* Bauer, 122 Ill. 573, 13 N. E. 852.

27. Skinkle *v.* Huffman, 52 Nebr. 20, 71 N. W. 1004.

28. Coonrod *v.* Kelly, 113 Fed. 378.

29. Amick *v.* Woodworth, 58 Ohio St. 86, 50 N. E. 427.

30. Backer *v.* Pyne, 130 Ind. 288, 30 N. E. 21, 30 Am. St. Rep. 231.

But where the equity is a latent one, it is held that the lien will not be kept alive to the prejudice of a subsequent *bona fide* holder, as where it appears that the lien had been discharged, and the subsequent *bona fide* holder did not have knowledge of the equities on which alone it could be kept alive after being discharged. Richards *v.* Griffith, 92 Cal. 493, 28 Pac. 484, 27 Am. St. Rep. 156 [*following* Persons *v.* Shaeffer, 65 Cal. 79, 3 Pac. 94].

31. Anthes *v.* Schroeder, 74 Nebr. 172, 103 N. W. 1072.

32. Ward *v.* Seymour, 51 Vt. 320.

33. Garwood *v.* Eldridge, 2 N. J. Eq. 145, 34 Am. Dec. 195. And see Kitchell *v.* Mudgett, 37 Mich. 81.

will be subrogated to the lien of the encumbrance so discharged,[34] in the absence of intervening encumbrances,[35] and mere constructive notice of the invalidity based upon a presumption of knowledge of the law,[36] or upon the recording acts,[37] is not sufficient to prevent the right from attaching if the mortgagee did not

34. *Alabama.*— Bolman *v.* Lohman, 74 Ala. 507; Fry *v.* Hamner, 50 Ala. 52.

Arkansas.— Davies *v.* Pugh, 81 Ark. 253, 99 S. W. 78; Wyman *v.* Johnson, 68 Ark. 369, 59 S. W. 250; Chaffe *v.* Oliver, 39 Ark. 531.

Indiana.— Thompson *v.* Connecticut Mut. L. Ins. Co., 139 Ind. 325, 38 N. E. 796; Sidener *v.* Pavey, 77 Ind. 241.

Iowa.— Gilbert *v.* Gilbert, 39 Iowa 657.

Kansas.— Warne *v.* Morgan, 68 Kan. 450, 75 Pac. 480; Crippen *v.* Chappel, 35 Kan. 495, 11 Pac. 453, 57 Am. Rep. 187; Everston *v.* Central Bank, 33 Kan. 352, 6 Pac. 605; Gano *v.* Martin, 10 Kan. App. 384, 61 Pac. 460.

Kentucky.— Connor *v.* Home, etc., Fund Co. Bldg. Assoc., 80 S. W. 797, 26 Ky. L. Rep. 109; State Nat. Bank *v.* Vicroy, 70 S. W. 183, 24 Ky. L. Rep. 892 (coverture); Wilson *v.* Wilson, 50 S. W. 260, 20 Ky. L. Rep. 1971 (infancy).

Maryland.— Milholland *v.* Tiffany, 64 Md. 455, 2 Atl. 831.

Michigan.— Scriven *v.* Hursh, 68 Mich. 176, 36 N. W. 54.

Missouri.— Sears *v.* Patterson, 54 Mo. App. 278.

Nebraska.— Boevink *v.* Christiaanse, 69 Nebr. 256, 95 N. W. 652; Arlington State Bank *v.* Paulsen, 57 Nebr. 717, 78 N. W. 303; Gordon *v.* Stewart, 4 Nebr. (Unoff.) 852, 96 N. W. 624. But see Rice *v.* Winters, 45 Nebr. 517, 63 N. W. 830, holding that one who furnished money to a mortgagor for the payment of a first mortgage, and accepted an apparent first mortgage to secure the loan, was not entitled to be subrogated to the rights of the first mortgagee, as against a second mortgagee, whose mortgage was released without authority, although the record showed the second mortgage to be released at the time the first mortgage was paid.

New Jersey.— Homœopathic Mut. L. Ins. Co. *v.* Marshall, 32 N. J. Eq. 103.

New York.— Emigrant Industrial Sav. Bank *v.* Clute, 33 Hun 82. And see New York Public Library *v.* Tilden, 39 Misc. 169, 79 N. Y. Suppl. 161, holding that where a conveyance by a failing debtor to trustees is void, but the trustees subsequently raise money, on their own notes, and, in reliance on the assignment, pay a percentage on his just debts, they are subrogated to the rights of the creditors in the funds representing the estate whose debts they have paid.

Virginia.— Helm *v.* Lynchburg Trust, etc., Bank, 106 Va. 603, 56 S. E. 598.

Washington.— Wilson *v.* Hubbard, 39 Wash. 671, 82 Pac. 154.

Wisconsin.— Hughes *v.* Thomas, 131 Wis. 315, 111 N. W. 474, 11 L. R. A. N. S. 744; Lashua *v.* Myhre, 117 Wis. 18, 93 N. W. 811.

United States.— Coffin *v.* Kearney County, 114 Fed. 518 [*modified* in 126 Fed. 689, 61 C. C. A. 607]; Equitable Mortg. Co. *v.* Lowry, 85 Fed. 165.

See 44 Cent. Dig. tit. "Subrogation," § 45.

Where a person makes a loan to a party at the time insane, but not knowing such fact of insanity, and at the request of the borrower pays a previous encumbrance secured by trust deed and causes such trust deed to be released, he may, notwithstanding such second trust deed is void, have a foreclosure of the first trust deed on the theory that the release of the same was a mistake of fact; no rights of *bona fide* purchasers or encumbrancers having intervened. Doxey *v.* Western State Bank, 113 Ill. App. 442.

Where money borrowed by an executor was used to pay debts of the estate, the lender was entitled to subrogation to the rights of the creditors whose debts were thus discharged, although a mortgage given by the executor to secure the loan was unauthorized. Talliferro *v.* Thornton, 80 S. W. 1097, 26 Ky. L. Rep. 183.

The invalidity of the new security must be alleged and proved.—Where in a proceeding by a purchaser at a foreclosure sale under his mortgage to be subrogated to the rights of the mortgagee, to pay whose mortgage he paid the loan, there was neither averment nor proof that a satisfaction of a second mortgage appearing of record at the time of the execution of complainant's mortgage was invalid, it had no right of subrogation in equity, but had a plain defense at law against ejectment by the second mortgagee, claiming under a deed from the mortgagor subsequent to complainant's purchase. Tait *v.* American Freehold Land Mortg. Co., 132 Ala. 193, 31 So. 623; Powers *v.* McKnight, (Tex. Civ. App. 1903) 73 S. W. 549.

Where money is loaned to a husband and wife on the faith of a mortgage on land, for the purpose of paying off prior valid mortgages on the same land, and is so used, and it turns out that the husband signed his wife's name to the mortgage without authority, of which execution she was immediately informed, but, instead of disclosing the fraud, she allows the mortgagee to pay off the prior mortgages, and to believe that he has a valid security, the holder of such mortgage is entitled to be substituted to all the rights and interests of the prior mortgagees. Zinkeison *v.* Lewis, 63 Kan. 590, 66 Pac. 644.

Where invalid county bonds are voluntarily paid by a county, the funds being secured by sale or other similar bonds, which are subsequently repudiated for the same illegality, equities, if any existed, of the holders of the first issue, are extinguished by the payment, and the holders of the second issue cannot be subrogated thereto. Lyon County *v.* Ashuelot Nat. Bank, 87 Fed. 137, 30 C. C. A. 582.

35. Kitchell *v.* Mudgett, 37 Mich. 81.

36. Chaffe *v.* Oliver, 39 Ark. 531.

37. Cobb *v.* Dyer, 69 Me. 494.

have actual knowledge, and the failure of actual knowledge was not *mala fides*.[38] Similarly one who makes a loan to discharge a first mortgage, pursuant to an agreement with the mortgagor that he shall have a first mortgage on the same land to secure it, there being at the time another mortgage on the land of which the lender is ignorant, will be subrogated to the rights of the first mortgagee;[39] and one who advances money on a mortgage to pay a prior mortgage on the same premises, and afterward learns that the mortgagor has no title because of the conveyance after making the prior mortgage and before making the latter one, will be subrogated to the rights of the prior mortgagee, although the property was a homestead;[40] and where one pays off an existing mortgage at the request of the mortgagor, in just expectation that he would have like security for his money, he thereby, under the doctrine of equitable assignment, becomes entitled to subrogation to the lien of the mortgage so paid off, even though the mortgage given to him was inoperative as against the owners of an equity, because of the pendency of a bill filed by them to enforce their equity and establish a trust in the premises;[41] and similarly, where the holder of a mortgage has foreclosed the same, and, under a mistake as to the correctness of the proceedings, and the consequent validity of the foreclosure, has paid prior encumbrances which he was equitably entitled to have kept alive for his protection, equity will relieve from the mistake except as against innocent grantees and purchasers without notice, and allow him to be subrogated to the rights of the holders of such prior encumbrances.[42] But to entitle the lender to subrogation it is essential that the money be advanced for the very purpose of discharging the senior lien, and it must have been in fact so applied;[43] and one who has loaned money on a void mortgage, a part of which was used to pay a previously executed void mortgage, may not be subrogated to a lien discharged with the proceeds of the latter-mentioned mortgage;[44] nor can subrogation to the rights of a prior mortgagee be claimed, where his mortgage has been paid, without the consent of the mortgagor, out of the proceeds of a subsequent invalid mortgage executed by an agent without authority.[45] One to whom a mortgage has been given, and who to protect the mortgage pays off in good faith a judgment against the mortgagor, is not a stranger or a volunteer, and is entitled to be subrogated to the lien of the judgment, although the mortgage may turn out to be void because of want of capacity in the mortgagor to execute it.[46]

38. Gerdine *v.* Menage, 41 Minn. 417, 43 N. W. 91.

39. Merchants', etc., Bank *v.* Tillman, 106 Ga. 55, 31 S. E. 794 (holding that one who advances money to pay off an encumbrance upon realty, at the instance of the owner thereof, and upon the express understanding that the advance made is to be secured by the immediate execution of papers which will constitute a first lien on the property, is not a mere volunteer, and, in the event the new security thus taken turns out to be defective, the person parting with his money on the faith thereof, if not chargeable with culpable and inexcusable neglect in the premises, will be subrogated to the rights of the prior encumbrancer); Home Sav. Bank *v.* Bierstadt, 68 Ill. App. 656 [*affirmed* in 168 Ill. 618, 48 N. E. 161, 61 Am. St. Rep. 146] (holding also that his right to be subrogated in such case is not affected by the fact that the record shows a release of the first mortgage, where it appears from all the facts in the case that the position of the second mortgagee has not been changed because of the record showing such release).

40. Sproal *v.* Larsen, 138 Mich. 142, 101 N. W. 213.

41. Bigelow *v.* Scott, 135 Ala. 236, 33 So. 546.

But if subsequently another person advances money to the mortgagor for the purpose of paying off the mortgage given to the mortgagee who was thus entitled to subrogation, the right of subrogation to the lien of said prior existing mortgage cannot be extended to the last mortgagee, and the mortgage given to said last mortgagee is not available as against the owners of the equity to said premises. Bigelow *v.* Scott, 135 Ala. 236, 33 So. 546.

42. Gerdine *v.* Menage, 41 Minn. 417, 43 N. W. 91.

43. Barber *v.* Lyon, 15 Iowa 37; Flannary *v.* Utley, 5 S. W. 878, 9 Ky. L. Rep. 581.

44. Henry *v.* Henry, 73 Nebr. 746, 103 N. W. 441, 107 N. W. 789.

45. Gray *v.* Zellmer, 66 Kan. 514, 72 Pac. 228.

46. Spaulding *v.* Harvey, 129 Ind. 106, 28 N. E. 323, 28 Am. St. Rep. 176, 13 L. R. A. 619.

c. Part Payment. As a general rule a junior mortgagee, who claims to be an equitable assignee or entitled to subrogation, stands in the same position in respect to a partial payment of the senior mortgage debt as a surety does in respect to a partial payment of a claim against his principal;[47] and a junior mortgagee, by the payment of part of the senior mortgage, is not subrogated *pro tanto* to the senior mortgagee's interest;[48] and the mere fact that part of the proceeds of a subsequent mortgage was applied by the mortgagor in discharge of a purchase-money mortgage does not entitle the subsequent mortgagee to subrogation to the rights of the purchase-money mortgage.[49] But when the right of subrogation is the result of an express agreement, it is no objection that it extends only to a part of the mortgage or other security;[50] and a second mortgagee who, for the protection of his own security, pays an instalment due on the first mortgage, will, to the extent of such advancement, as against the mortgagor, be subrogated to the rights of the holder of the first mortgage, and may, upon payment by the mortgagor of the balance due on the prior mortgage, enforce by action his lien for the amount so advanced;[51] and it has even been held broadly that a second mortgagee making payments on the first mortgage will, under ordinary circumstances, be subrogated under the first mortgage to the extent of such payments, the residue of the claim of the first mortgagee having priority to the lien acquired by such subrogation.[52] If the junior mortgagee has paid a part of the prior mortgage under the belief arising from the conduct or representations of the senior mortgagee that this was the full extent of his claim, he may be allowed a priority of his claim before the senior mortgagee could participate.[53]

6. Vendors and Mortgagors Paying After Transfer of Mortgaged Property. A mortgagor who, after selling the land to one who assumes and agrees to pay the mortgage debt, is compelled to pay the debt himself, is entitled to be subrogated to the rights of the mortgagee and may foreclose the mortgage for his own benefit, for the vendor becomes in effect the surety and the vendee the principal;[54] and

47. See *supra*, VII, E, 2, c.

48. Loeb *v.* Fleming, 15 Ill. App. 503; Stuckman *v.* Roose, 147 Ind. 402, 46 N. E. 680. See Chapman *v.* Cooney, 25 R. I. 657, 57 Atl. 928.

49. Ayers *v.* Staley, (N. J. Ch. 1889) 18 Atl. 1046.

50. Loeb *v.* Fleming, 15 Ill. App. 503; Shreve *v.* Hankinson, 34 N. J. Eq. 76; Brice's Appeal, 95 Pa. St. 145; Cason *v.* Connor, 83 Tex. 26, 18 S. W. 668, holding that on foreclosure of a chattel mortgage, intervener, who was a junior mortgagee, and had paid to plaintiff a part of the claim secured by his mortgage, was not entitled, by virtue of such payment, in the absence of conduct creating an estoppel against plaintiff, to a decree placing him upon an equal footing with plaintiff in the distribution of the proceeds of the mortgaged property.

51. Skinkle *v.* Huffman, 52 Nebr. 20, 71 N. W. 1004.

52. New Jersey Bldg., etc., Co. *v.* Cumberland Land, etc., Co., 53 N. J. Eq. 644, 33 Atl. 964. And see Plapp *v.* Meyer, 40 Iowa 705.

53. Cason *v.* Connor, 83 Tex. 26, 18 S. W. 668.

54. *Illinois.*— Flagg *v.* Geltmacher, 98 Ill. 293; Kinney *v.* Wells, 59 Ill. App. 271.

Indiana.— Todd *v.* Oglebay, 158 Ind. 595, 64 N. E. 32 (holding, however, that it appearing on the face of the record that the mortgagor was a principal debtor, he was not entitled to a resale of the property until it had been judicially established that he paid the deficiency judgment as surety); Begein *v.* Brehm, 123 Ind. 160, 23 N. E. 496; Wright *v.* Briggs, 99 Ind. 563; Josselyn *v.* Edwards, 57 Ind. 212.

Iowa.— Barr *v.* Patrick, 52 Iowa 704, 3 N. W. 743; Corbett *v.* Waterman, 11 Iowa 86.

Louisiana.— Baldwin *v.* Thompson, 6 La. 474.

Maine.— Kinnear *v.* Lowell, 34 Me. 299.

Massachusetts.— Locke *v.* Homer, 131 Mass. 93, 41 Am. Rep. 199; Dean *v.* Toppin, 130 Mass. 517; Furnas *v.* Durgin, 119 Mass. 500, 20 Am. Rep. 341.

Minnesota.— Baker *v.* Terrell, 8 Minn. 195. But see Knoblauch *v.* Foglesong, 38 Minn. 459, 38 N. W. 366.

Missouri.— Orrick *v.* Durham, 79 Mo. 174; Wayman *v.* Jones, 58 Mo. App. 313.

Nebraska.— Hubbard *v.* Knight, 52 Nebr. 400, 72 N. W. 473.

New Hampshire.— Passumpsic Sav. Bank *v.* Weeks, 59 N. H. 239; Hoysradt *v.* Holland, 50 N. H. 433; Fiske *v.* McGregory, 34 N. H. 414.

New Jersey.— Bolles *v.* Beach, 22 N. J. L. 680, 53 Am. Dec. 263; Stillman *v.* Stillman, 21 N. J. Eq. 126.

New York.— Ayers *v.* Dixon, 78 N. Y. 318; Paine *v.* Jones, 76 N. Y. 274; Johnson *v.* Zink, 51 N. Y. 333 [*affirming* 52 Barb. 396]; Taintor *v.* Heimmingway, 18 Hun 458 [*affirmed* in 83 N. Y. 610]; Ferris *v.* Crawford, 2 Den. 595; Cherry *v.* Monro, 2 Barb. Ch. 618; Marsh *v.* Pike, 10 Paige 595; Halsey *v.* Reed, 9 Paige 446; McLean *v.* Towle, 3 Sandf. Ch. 117.

his right to be subrogated to the position of the prior mortgagee is not defeated by his having taken a second mortgage as security for the payment of the first,[55] and the same right extends against any one claiming under the purchaser with notice,[56] or where several successive grantees assume the mortgage.[57] The mortgagee and mortgagor, on notice to the former of a sale of the mortgaged property by the latter, and an assumption of the mortgage debt by the grantee, are placed in the relation of principal and surety to such an extent that the former cannot do any act which will prejudice the rights of the mortgagor, or defeat his right of being subrogated to the mortgagee on his payment of the mortgage debt, although the mortgagee may proceed in the first instance against the mortgagor to collect such debt;[58] and conversely the mortgagee's rights are not affected by the agreement between the mortgagor and the purchaser.[59] Where the mortgage debt forms a part of the consideration of the purchase, although the purchaser has not entered into any contract to pay it, he is bound to that extent to indemnify the debtor, who is subrogated to all the rights of the mortgagee in the security;[60] and similarly if the property is sold subject to the mortgage, although the purchaser has not assumed or agreed to pay it, he is, as to the mortgage, the principal debtor, and the land the primary fund.[61] Satisfaction of a judgment for a mortgage debt by the levying of an execution on property of the mortgagor other than that mortgaged is a payment of the debt which keeps the mortgage on foot for the benefit of the mortgagor.[62]

I. Persons Making Improvements on Land of Another. Where a person has materially improved land under the belief, honestly entertained with reasonable grounds, that he is the owner of the land, and the aid of a court of equity is sought by the true owner to enforce his title, it will be granted only on condition that such innocent person shall be compensated to the extent of the benefit which he has conferred on the owner; and this right may be enforced by subrogation,[63] and the same rule applies where a senior creditor enforces a lien or charge against the land;[64] and, generally, where the one making improvements

Ohio.— See Warner *v.* York, 25 Ohio Cir. Ct. 310.

Pennsylvania.— Taylor *v.* Preston, 79 Pa. St. 436; Lowry *v.* McKinney, 68 Pa. St. 294; Morris *v.* Oakford, 9 Pa. St. 498; Stanhope's Estate, 6 Pa. Dist. 179.

Vermont.— Stevens *v.* Goodenough, 26 Vt. 676

Virginia.— Francisco *v.* Shelton, 85 Va. 779, 8 S. E. 789.

United States.— Union Mut. L. Ins. Co. *v.* Hanford, 143 U. S. 187, 12 S. Ct. 437, 36 L. ed. 118.

England.— Kinnaird *v.* Trollope, 39 Ch. D. 636, 57 L. J. Ch. 905, 59 L. T. Rep. N. S. 433, 37 Wkly. Rep. 234.

See 44 Cent. Dig. tit. "Subrogation," § 6.

This rule rests upon the principle that in equity the property becomes a primary fund for payment of the debt. Wayman *v.* Jones, 58 Mo. App. 313; Johnson *v.* Zink, 51 N. Y. 333 [*affirming* 52 Barb. 396].

Where a mortgagor sells his interest in the mortgaged premises to his co-mortgagor under an agreement that the latter should pay the mortgage debt, and is subsequently compelled to pay any part of the debt, he is entitled to be subrogated to the rights of the mortgagee. Shinn *v.* Shinn, 91 Ill. 477. But the principle has been held not to be available in a court of law under these circumstances. Allison *v.* Pattison, 96 Ala. 159, 11 So. 194.

Where land on which taxes were assessed to plaintiff was sold on foreclosure subject to the tax, plaintiff, on being compelled to pay the same, was entitled to subrogation to the rights of the collector as against the purchasers. Webber Lumber Co. *v.* Shaw, 189 Mass. 366, 75 N. E. 640.

55. Passumpsic Sav. Bank *v.* Weeks, 59 N. H. 239. See Patterson *v.* Birdsall, 64 N. Y. 294, 21 Am. Rep. 609.

56. Orrick *v.* Durham, 79 Mo. 174.

57. Oglebay *v.* Todd, 166 Ind. 250, 76 N. E. 238; Hoffman *v.* Risk, 58 Ind. 113 [*following* Josselyn *v.* Edwards, 57 Ind. 212]; McLean *v.* Towle, 3 Sandf. Ch. (N. Y.) 117; Knox *v.* McCain, 13 Lea (Tenn.) 197.

58. Laird *v.* Wittkowski, 67 N. Y. App. Div. 476, 73 N. Y. Suppl. 1115.

59. Meyer *v.* Lathrop, 10 Hun (N. Y.) 66 [*affirmed* in 73 N. Y. 315].

60. Wood *v.* Smith, 51 Iowa 156, 50 N. W. 581.

61. Townsend *v.* Ward, 27 Conn. 610; Brewer *v.* Staples, 3 Sandf. Ch. (N. Y.) 579; Sweetzer *v.* Jones, 35 Vt. 317, 82 Am. Dec. 639.

62. Woodbury *v.* Swan, 58 N. H. 380.

63. Pratt *v.* Thornton, 28 Me. 355, 48 Am. Dec. 492.

64. Troost *v.* Davis, 31 Ind. 34 (holding that where a mortgagee who has become the purchaser of the real estate subject to the lien of a judgment and without actual notice

on the land of another was not a mere stranger or intermeddler, but under a duty to do so.[65]

J. Persons Making Advancements For Necessaries For One Incompetent to Contract. A person making an advancement for necessaries, and to pay off an encumbrance on the real estate of one mentally incompetent to contract, is entitled to a charge against his estate, and to be subrogated to the benefit of the encumbrance discharged;[66] and one who furnishes money and service in good faith for one for whose support land is charged is entitled to be subrogated to the rights of the beneficiaries and has a lien on the land.[67]

K. Persons Owning Funds or Property Applied by Others to Debts or Encumbrances. One whose property is applied by others to the satisfaction of a debt or encumbrance is subrogated to the rights of the creditor or encumbrancer;[68] and subrogation may also be allowed where funds to which one is

of such encumbrance expends money in valuable permanent improvements, where without such improvements the value of the property would not exceed the mortgages, equity will compel the judgment creditors to exercise their legal right, subject to the equitable right of the vendee, for whom the mortgage will be kept on foot, and to whom the value of the improvements will be allowed); Dawson *v.* Lee, 83 Ky. 49 (holding that where one purchases land of a defaulting sheriff with no knowledge of such default, and makes improvements thereon, he is entitled, on sale of the land by the sureties of the sheriff, who had become subrogated to the lien of the commonwealth, to be first paid out of the proceeds to the extent that he had increased the vendible value of the land); Stewart *v.* Wilson, 5 Dana (Ky.) 50 (holding that where one as the owner in fee of land gives a bond for conveyance with warranty, and a holder of a paramount title subsequently recovers judgment for the land, by which he is required to pay the vendor the value of improvements thereon, a bill in equity will lie by the vendee, he having paid a large part of the purchase-price, to have the judgment, in so far as it required the payment to the vendor of the value of the improvements, declared to be for his benefit).

65. Talbott *v.* Lancaster, 9 S. W. 694, 10 Ky. L. Rep. 475; Northern Cent. R. Co. *v.* United R. Co., 105 Md. 345, 66 Atl. 444; Collins *v.* Collins, 6 Lans. (N. Y.) 368.

66. Coleman *v.* Frazer, 3 Bush (Ky.) 300. And see Huffmond *v.* Bence, 128 Ind. 131, 27 N. E. 347.

Whenever money is loaned or advanced to a person under disabilities and incapacitated from making a binding contract, as to an infant, a lunatic, and the like, and the money is thus loaned or advanced and actually used for the purpose of paying for necessaries, or necessary expenses of the party borrowing, although no legal debt arises and the lender can maintain no action at law to recover back the amount, yet, since his money was advanced and used for the purpose of paying debts which would be recoverable at law, he can sue in a court of equity and stand in the place of those creditors whose debts have been so paid, and recover back the amount of his advance. An equitable debt thus arises under the principle of subrogation. Wells *v.* Saline, 71 Hun (N. Y.) 559, 25 N. Y. Suppl. 134 [*quoting* 3 Pomeroy Eq. Jur. § 1300]. But the doctrine of equitable subrogation will not be invoked in favor of one advancing money under an invalid mortgage on a lunatic's property, where the money advanced was used simply to pay debts of the lunatic, for which the mortgagee was not answerable, and the payment of which was not necessary in any way for his protection (Corbin *v.* Dwyer, 30 Misc. (N. Y.) 488, 63 N. Y. Suppl. 822 [*modified* in 57 N. Y. App. Div. 630, 68 N. Y. Suppl. 1136]), and it has been held that as the deed of an insane grantor is absolutely void, the fact that he received and used the consideration for his support and maintenance creates no equity to which a *bona fide* purchaser from the grantee can be subrogated (German Sav., etc., Soc. *v.* De Lashmutt, 67 Fed. 399).

67. Cutter *v.* Burroughs, 100 Me. 379, 61 Atl. 767.

68. *Kentucky.*— Ferguson *v.* Staton, 42 S. W. 732, 19 Ky. L. Rep. 979.

Louisiana.— Mississippi, etc., Gulf Ship Canal Co. *v.* Noyes, 25 La. Ann. 62.

Maryland.— Barron *v.* Whiteside, 89 Md. 448, 43 Atl. 825, holding that where a trustee, under an assignment for the benefit of creditors, takes possession of mortgaged leasehold property, and collects rents therefrom, the mortgage debt being overdue at the date of the assignment, and taxes, ground-rent, and interest being in arrear, and the mortgage security being insufficient, and fails, after demand by the mortgagee, to apply the rents to such taxes and ground-rent, and the mortgagee is forced to pay them, such mortgagee is entitled to be subrogated to the rights of the state and city, and the owner of the ground-rent, against the trustee.

Michigan.— Coulter *v.* Minion, 139 Mich. 200, 102 N. W. 660; Markillie *v.* Allen, 120 Mich. 360, 79 N. W. 568, holding that where a fund equitably belonging to complainant is used to discharge a mortgage, equity will if the circumstances require revive the lien, and subrogate complainant to the rights of the original mortgagee, although the property be a homestead.

Minnesota.—Webber *v.* Hausler, 77 Minn. 48, 79 N. W. 580.

equitably entitled has been applied to the payment of debts of another, in which case the former is subrogated to the position of the latter.[69]

L. Persons Advancing Money to Pay the Debt of Another or Discharging Liens on Another's Property — 1. In General. It has been broadly stated that wherever a payment is made by a stranger to a debtor, in the expectation of being substituted in the place of the creditor, he is entitled to subrogation;[70] but unless the transaction takes the form of a purchase rather than payment,[71] the mere fact that one pays off a debt at the instance of the debtor, or lends money with which to pay it, does not entitle him to subrogation to a lien or securities which the creditor held for the enforcement of the obligation,[72]

New Jersey.— Boice *v.* Conover, 69 N. J. Eq. 580, 61 Atl. 159, holding that where a chattel mortgagee failed to comply with the recording acts, and the property was taken by a judgment creditor, who had levied on the mortgaged chattels and on lands of the mortgagor, the mortgagee was entitled to be subrogated to the lien of the judgment on the payment thereof out of the proceeds of the sale.

South Carolina.— Pelzer Mfg. Co. *v.* Pitts, 76 S. C. 349, 57 S. E. 29, where partnership assets were taken to pay a debt assumed by an individual partner.

Texas.— Oury *v.* Saunders, 77 Tex. 278, 13 S. W. 1030; Young *v.* Pecos County, 46 Tex. Civ. App. 319, 101 S. W. 1055 (holding that a county is subrogated to the rights of the mortgagee under the mortgage, where the husband of the mortgagor used money held by him as county treasurer to pay the mortgage).

United States.— Farmers' L. & T. Co. *v.* Detroit, etc., R. Co., 71 Fed. 29; Cotton *v.* Dacey, 61 Fed. 481; Matthews *v.* Fidelity Title, etc., Co., 52 Fed. 687.

See 44 Cent. Dig. tit. "Subrogation," § 50.

And see O'Brien *v.* Bradley, 28 Ind. App. 487, 61 N. E. 942, holding that the holder of a mortgage on realty sold under a precept for the collection of costs of a sewer assessment, for the protection of his mortgage lien, may be subrogated to the right of the holder of the assessment lien.

But if a guardian use the ward's money to pay off a vendor's lien on the former's land, it has been held that the ward is not subrogated to the vendor's lien which is discharged. French *v.* Sheplor, 83 Ind. 266, 43 Am. Rep. 67.

Where a payment by a bidder at a void sale under a decree in a partition suit was applied to the satisfaction of a tax lien on the land, the bidder was subrogated to the rights of the holder of the tax lien, and a decree for the sale of the land in a subsequent suit for partition should direct the payment of such sum to the bidder. Liverman *v.* Lee, 86 Miss. 370, 38 So. 658.

Where a guardian mingled funds of his ward and of his wife, and invested them in real estate, and the property was subjected to a debt due by the guardian for failing to collect money due the ward, the wife should be subrogated to the guardian's right to receive any sum subsequently collected on the claim due the ward. Byrom *v.* Gunn, 102 Ga. 565, 31 S. E. 560.

69. Evans *v.* Robertson, 54 Miss. 683, holding that if an executor or administrator has raised a crop in carrying on the farm of the decedent by aid of advances or supplies, but, instead of paying the creditor with the proceeds, applies them to the general debts of the estate, the creditor has a right, on the principles of subrogation, to be repaid out of the general assets for his advances and supplies.

70. Tradesmen's Bldg., etc., Assoc. *v.* Thompson, 32 N. J. Eq. 133.

71. Campbell's Appeal, 29 Pa. St. 401, 72 Am. Dec. 641, holding that it is not payment and satisfaction of a judgment where a third person pays the amount of the judgment against defendant, with the intention of holding it for his own use, although he takes no transfer to himself.

72. *Arkansas.*— Riggin *v.* Hillard, 56 Ark 476, 20 S. W. 402, 35 Am. St. Rep. 113; Kline *v.* Ragland, 47 Ark. 111, 14 S. W. 474; Rodman *v.* Sanders, 44 Ark. 504.

California.— Brown *v.* Rouse, 125 Cal. 645, 58 Pac. 267.

Illinois.— Bouton *v.* Cameron, 99 Ill. App. 600 [*affirmed* in 205 Ill. 50, 68 N. E. 800].

Indiana.— Nash *v.* Taylor, 83 Ind. 347.

Kansas.— Dreese *v.* Myers, 52 Kan. 126, 34 Pac. 349, 39 Am. St. Rep. 336.

Kentucky.— Griffin *v.* Proctor, 14 Bush 571.

Maine.— Moody *v.* Moody, 68 Me. 155.

Maryland.— Gardenville Permanent L. Assoc. *v.* Walker, 52 Md. 452.

Massachusetts.— Falmouth Nat. Bank *v.* Cape Cod Ship Canal Co., 166 Mass. 550, 44 N. E. 617.

Mississippi.— Hitt *v.* Applewhite, (1896) 20 So. 161; Good *v.* Golden, 73 Miss. 91, 19 So. 100, 55 Am. St. Rep. 486.

Missouri.— Price *v.* Courtney. 87 Mo. 387, 56 Am. Rep. 453; Hays *v.* The Columbus, 23 Mo. 232.

Nebraska.— Meeker *v.* Larsen, 65 Nebr. 158, 90 N. W. 958, 57 L. R. A. 901.

New Jersey.— Seeley *v.* Bacon, (Ch. 1896) 34 Atl. 139; Troxall *v.* Silverthorne, (Ch. 1887) 11 Atl. 684.

South Carolina.— Bostick *v.* Ammons, 63 S. C. 302, 41 S. E. 310, where plaintiff advanced to a tenant the money necessary to pay the rent of land, and charged it to him, he is not subrogated to the landlord's lien.

Tennessee.— Bradshaw *v.* Van Valkenburg, 97 Tenn. 316, 37 S. W. 88; Loftis *v.* Loftis, 94 Tenn. 232, 28 S. W. 1091; Belcher *v.* Wilkersham, 9 Baxt. 111; Durant *v.* Davis, 10 Heisk. 522; Bible *v.* Wisecarver, (Ch. App.

unless there is an agreement to that effect,[73] for the money so applied is in fact the money of the borrower borrowed for that purpose;[74] and thus the narrower and more accurate rule seems to be that where a third person pays the debt at the instance of the debtor, and with an agreement or understanding with the debtor that he shall be entitled to the benefit of the security held by the creditor, equity will subrogate the person who discharges the debt to all the rights of the creditor whose claim the third person has discharged, as against the debtor.[75]

1898) 50 S. W. 670; Mellon *v.* Morristown, etc., R. Co., (Ch. App. 1895) 35 S. W. 464.

Wisconsin.—Watson *v.* Wilcox, 39 Wis. 643, 20 Am. Rep. 63 [*quoted* and *approved* in Traders' Bank *v.* Myers, 3 Kan. App. 636, 44 Pac. 292] (holding that no case has ever carried the doctrine of subrogation so far as to hold that a mere loan of money, for the purpose of enabling the borrower to pay a debt, entitled the lender to be subrogated to the rights of the creditor whose debt was thus paid.

England.— *In re* Wrexham, etc., R. Co., 68 L. J. Ch. 28, [1898] 2 Ch. 663, 79 L. T. Rep. N. S. 463.

See 44 Cent. Dig. tit. "Subrogation," §§ 60–63.

The same rule applies to one who furnishes materials for use by a contractor in repairing a court-house for a county, merely upon the contractor's promise to pay, and in the absence of any statute or other agreements he is not entitled to subrogation to the rights of the contractor in a fund set apart by the county to pay for the repairs, although the contractor is insolvent. Riggin *v.* Hillard, 56 Ark. 476, 20 S. W. 402, 35 Am. St. Rep. 113.

One who loaned securities to another personally, with no agreement as to their use, acquires no equity in property of a third person by reason of the fact that the borrower voluntarily paid off an encumbrance thereon from the proceeds of such securities. Springs *v.* Brown, 97 Fed. 405.

A person who furnishes money for purchasing rights of way for a railroad company has not, in the absence of a specific agreement, a lien on rights of way obtained with the money. McDonald *v.* Charleston, etc., R. Co., 93 Tenn. 281, 24 S. W. 252.

Where a son loaned his father money with which to pay assessments which were a lien on a lot, he was not entitled to be subrogated to such lien. Kocher *v.* Kocher, 56 N. J. Eq. 547, 39 Atl. 536.

One advancing to a manufacturing concern money, which is used by it in paying labor claims constituting liens on the manufactured product and entitled to preference, is not, on the subsequent insolvency of the concern, entitled to a preference by being subrogated to the rights of the laborers; the advance being merely a voluntary loan to the concern. Bank of Commerce *v.* Lawrence County Bank, 80 Ark. 197, 96 S. W. 749, 117 Am. St. Rep. 85.

The mere fact that money loaned to a devisee of real estate charged with the payment of legacies is appropriated by him to pay such legacies does not entitle the lender to be subrogated to the rights of the legatees against the land. Sommers *v.* Schrader, 59 N. Y. App. Div. 340, 69 N. Y. Suppl. 866.

One who furnishes an heir money to discharge mortgage liens on real estate descended from his ancestor, without any agreement to purchase the lien debt, or that it is to be kept alive for his benefit, and who has no interest in the real estate, cannot be subrogated to the rights of the mortgagee, as against general creditors of the ancestor, who have their claims duly allowed in the probate court. Lemmon *v.* Lincoln, 68 Mo. App. 76.

73. Baker *v.* Ward, 7 Bush (Ky.) 240; Browder *v.* Hill, 136 Fed. 821, 69 C. C. A. 499 (holding that it is not enough that there is an understanding on his part and that of the debtor that the right of subrogation will result from such payment in the absence of an express agreement). And see McCowan *v.* Brooks, 113 Ga. 532, 39 S. E. 115, holding that an understanding between the owner of land and one who, having no interest to protect, pays off an encumbrance thereon, that the latter shall be given "a deed to the land," and shall "hold the land as collateral security," will not, alone, have the effect of subrogating the person discharging the encumbrance to the rights of the holder of the same.

Where plaintiffs advanced money to pay the customs duties on goods imported by defendants, the advances being made under an agreement that plaintiffs should have a lien on the goods for the money so advanced, they are entitled by subrogation to the lien of the government for the duties. Sgobel *v.* Cappadonia, 8 N. Y. App. Div. 303, 40 N. Y. Suppl. 946.

74. Virginia *v.* Chesapeake, etc., Canal Co., 32 Md. 501.

75. *Arkansas.*— Rodman *v.* Sanders, 44 Ark. 504.

Illinois.— Caudle *v.* Murphy, 89 Ill. 352.

Iowa.— Heuser *v.* Sharman, 89 Iowa 355, 56 N. W. 525, 48 Am. St. Rep. 390 [*distinguishing* Bailey *v.* Malvin, 53 Iowa 371, 5 N. W. 515].

Kansas.— Crippen *v.* Chappel, 35 Kan. 495, 11 Pac. 453, 57 Am. Rep. 187.

Kentucky.— Barker *v.* Boyd, 71 S. W. 528, 24 Ky. L. Rep. 1389; Dillon *v.* Dillon, 69 S. W. 1099, 24 Ky. L. Rep. 781.

Michigan.— Detroit F. & M. Ins. Co. *v.* Aspinwall, 48 Mich. 238, 12 N. W. 214; Edwards *v.* Frank, 40 Mich. 616, holding that one who has discharged a lien on goods by advancing money therefor at the request of the owner has a right to the possession of the goods till reimbursed.

Minnesota.— Emmert *v.* Thompson, 49

It always requires something more than the mere payment of the debt in order to entitle the person paying the same to be substituted in the place of the original creditor;[76] nor can one by making advances without a debtor's knowledge be subrogated to the creditor's lien, being a mere volunteer.[77] It is not, however, necessary that there be an express contract that the substitution shall be made, but the right may be enforced because of a mere understanding or expectation of the transfer of the security,[78] or because it would amount to a fraud upon the payer if the payment were construed to effect a discharge of the security;[79] and, generally, where it is equitable that a person furnishing money to pay a debt of another should be substituted for the creditor or in the place of the creditor such person will be so subrogated;[80] but as this is a kind of conventional subrogation resting upon an implied agreement,[81] it is held not to arise in the absence of the apparent intention of the parties to the transaction,[82] as where the creditor takes or relies on a new security,[83] unless the new security fails,[84] in which latter case it would become, however, more in the nature of a pure equitable subrogation vesting upon the ground of mistake, or failure of consideration and not a conventional subrogation. The right has accordingly been denied, where one who paid off and discharged prior mortgages and took another mortgage expressly refused to take an assignment of the prior mortgages and voluntarily paid and

Minn. 386, 52 N. W. 31, 32 Am. St. Rep. 566.

Missouri.— Kleimann *v.* Geiselmann, 45 Mo. App. 497.

New Jersey.— Denton *v.* Cole, 30 N. J. Eq. 244; Wilson *v.* Brown, 13 N. J. Eq. 277.

New York.— Gans *v.* Thilme, 93 N. Y. 225.

Vermont.— Stebbins *v.* Willard, 53 Vt. 665.

See 44 Cent. Dig. tit. "Subrogation," § 61.

Where defendant, at the request of plaintiff's husband, redeemed her jewelry from pawn, defendant was entitled to be subrogated to the pawnbroker's lien. Lesser *v.* Steindler, 110 N. Y. App. Div. 262, 97 N. Y. Suppl. 255.

A mortgage given to a surety to indemnify him against loss will pass to a third person, who paid the money for the surety on the faith of an agreement that the mortgage should be assigned to him. Brien *v.* Smith, 9 Watts & S. (Pa.) 78.

76. Crippen *v.* Chappel, 35 Kan. 495, 11 Pac. 453, 57 Am. Rep. 187 (holding that it requires an assignment, legal or equitable, from the original creditor or an agreement or understanding on the part of the party liable to pay the debt that the person furnishing the money to pay the same shall in effect become the creditor or the person furnishing the money must furnish the same either because he is liable as surety or liable in some other secondary character, or for the purpose of saving or protecting some right or interest or supposed right or interest of his own); Virginia *v.* Chesapeake, etc., Canal Co., 32 Md. 501 (holding that one who advances money to a corporation to pay coupons on preferred bonds is not thereby subrogated to the rights of the original holders of the coupons thus paid).

77. Gerson *v.* Norman, 111 Ala. 433, 20 So. 453 [*following* Clanton *v.* Eaton, 92 Ala. 612, 8 So. 823].

78. Heuser *v.* Sharman, 89 Iowa 355, 56 N. W. 525, 48 Am. St. Rep. 390 [*distinguishing* Bailey *v.* Malvin, 53 Iowa 371, 5 N. W. 515].

79. Stevens *v.* King, 84 Me. 291, 24 Atl. 850; Lockwood *v.* Marsh, 3 Nev. 138; Vaughn *v.* Vaughn, 100 Tenn. 282, 45 S. W. 677. And see Koppang *v.* Steenerson, 100 Minn. 239, 111 N. W. 153.

80. Yaple *v.* Stephens, 36 Kan. 680, 14 Pac. 222; Crippen *v.* Chappel, 35 Kan. 495, 11 Pac. 453, 57 Am. Rep. 187; Mills *v.* Hendershot, 70 N. J. Eq. 258, 62 Atl. 542. See Griffin *v.* Burtnett, 4 Edw. (N. Y.) 673.

One whose money has discharged claims against a trust estate, which it was bound to pay, is substituted in equity to the rights of the holder of such claims, but cannot maintain an action at law against the trust estate or *cestui.* Hines *v.* Potts, 56 Miss. 346.

81. Kleimann *v.* Geiselmann, 45 Mo. App. 497; Brice's Appeal, 95 Pa. St. 145.

82. Bunn *v.* Lindsay, 95 Mo. 250, 7 S. W. 473, 6 Am. St. Rep. 48; Kleimann *v.* Geiselmann, 45 Mo. App. 497; Gashe *v.* Ohio Lumber Co., 5 Ohio S. & C. Pl. Dec. 130, 31 Cinc. L. Bul. 189, holding that a mortgagee whose loan went to pay off a purchase-money mortgage is not subrogated to the latter's priority, where there was no intention to that effect in the transaction.

83. Draper *v.* Ashley, 104 Mich. 527, 62 N. W. 707; Kleimann *v.* Geiselmann, 45 Mo. App. 497; Kelsey *v.* Welch, 8 S. D. 255, 66 N. W. 390. See Watson *v.* Wilcox, 39 Wis. 643, 20 Am. Rep. 63.

Where a third party advances to a sheriff the amount due on a judgment, taking at the same time a mortgage from defendant, as security for such advance, it must be presumed that such party intended to extinguish the judgment and rely exclusively on the mortgage. Phillips *v.* Behn, 19 Ga. 298.

84. Kleimann *v.* Geiselmann, 45 Mo. App. 497; Snelling *v.* McIntyre, 6 Abb. N. Cas. (N. Y.) 469.

discharged them from the record, because he preferred to have the one mortgage securing the entire amount.[85]

2. Mortgage Lien. The rules just laid down[86] apply in full force to an advancement of money to discharge a mortgage lien. One who, having no interest to protect, voluntarily loans money to a mortgagor for the purpose of satisfying and canceling the mortgage, taking a new mortgage for his own security, cannot have the former mortgage revived and himself subrogated to the rights of the mortgagee therein;[87] nor does the fact alone that, from the proceeds of a later mortgage, prior mortgages have been paid that the lien might be removed, afford ground for subrogation thereto; but the claim must be based upon some recognized principle of equity jurisprudence, such as a fraud, mistake, or an agreement that the loan should be applied for the express purpose of discharging the prior lien.[88] *A fortiori* where there is no evidence that he gave or loaned the money, expecting it to be paid on the mortgage or on any particular indebtedness, the right of subrogation to the mortgage does not exist;[89] and a person advancing money to another to enable him therewith to make a loan to a third person, on the security of an equitable mortgage, is not entitled to subrogation thereby;[90] and where the payment of the prior mortgage was made without the mortgagor's knowledge by a mere volunteer, under no compulsion to make the payment for the protection of his own interests, no right to subrogation arises.[91] But a party who advances

85. Morris *v.* White, 36 N. J. Eq. 324.

Void foreclosure.—Where a foreclosure under a power of sale in a mortgage was void because of defects in the deed of sale, and the purchaser was subrogated to the mortgagor's rights, the mortgagor or those claiming under him are entitled to have the mortgage debt credited with the amount of the bid at the sale. Griffin *v.* Griffin, 75 S. C. 249, 55 S. E. 317, 117 Am. St. Rep. 899.

86. See *supra*, VII, L, 1.

87. Rice *v.* Winters, 45 Nebr. 517, 63 N. W. 830; Watson *v.* Wilcox, 39 Wis. 643, 20 Am. Rep. 63 [*followed* in Pollock *v.* Wright, 15 S. D. 134, 87 N. W. 584].

Reason for the rule.—A person who is in no manner bound and who on his own motion, in the absence of a contract or expectation that he will be substituted in the place of the creditor, pays the debt will be regarded as an intermeddler and thus like other intermeddlers and voluntary payers not entitled to subrogation. Wormer *v.* Waterloo Agricultural Works, 62 Iowa 699, 14 N. W. 331; Shinn *v.* Budd, 14 N. J. Eq. 234.

88. *Alabama.*— New England Mortg. Security Co. *v.* Fry, 143 Ala. 637, 42 So. 57, 111 Am. St. Rep. 62; Bigelow *v.* Scott, 135 Ala. 236, 33 So. 546.

Indiana.— Ætna L. Ins. Co. *v.* Buck, 108 Ind. 174, 9 N. E. 153; Nash *v.* Taylor, 83 Ind. 347 [*distinguishing* Muir *v.* Berkshire, 52 Ind. 149].

Maryland.— See Gardenville Permanent Loan Assoc. *v.* Walker, 52 Md. 452. *Compare* Reimler *v.* Pfingsten, (1893) 28 Atl. 24, holding that where a husband, while in failing circumstances, paid off a mortgage with money advanced to him for such purpose by his wife on an express promise of repayment, and then deeded the property to a person who redeeded it to the husband and wife, after the deeds were set aside, and the property sold at the suit of the husband's creditors, the wife was entitled to a lien on the proceeds of the sale for the amount advanced by her.

Missouri.— Norton *v.* Highleyman, 88 Mo. 621; Brown *v.* Merchants' Bank, 66 Mo. App. 427.

Nebraska.— Hoagland *v.* Green, 54 Nebr. 164, 74 N. W. 424; Bohn Sash, etc., Co. *v.* Case, 42 Nebr. 281, 60 N. W. 576.

South Carolina.— Gunter *v.* Addy, 58 S. C. 178, 36 S. E. 553; Jeffries *v.* Allen, 29 S. C. 501, 7 S. E. 828.

Tennessee.— Bradshaw *v.* Van Valkenburg, 97 Tenn. 316, 37 S. W. 88.

See 44 Cent. Dig. tit. "Subrogation," §§ 60–63.

Facts held sufficient to show an agreement see Seeley *v.* Bacon, (N. J. Ch. 1896) 34 Atl. 139.

Where a second mortgagee loans the mortgagor money, not on the security of the first mortgage, but of the land, and the mortgagor uses it to pay the first mortgage, and this is canceled, the second mortgagee cannot be subrogated to the rights of the first mortgagee, although the second mortgage is ineffectual against a purchaser of the property, because not properly acknowledged. Cumberland Bldg., etc., Assoc. *v.* Sparks, 106 Fed. 101.

89. Hickey *v.* Conine, 27 Ohio Cir. Ct. 369.

90. Van Winkle *v.* Williams, 38 N. J. Eq. 105.

91. *Michigan.*— Desot *v.* Ross, 95 Mich. 81, 54 N. W. 694; Smith *v.* Austin, 9 Mich. 465.

Missouri.— Grady *v.* O'Reilly, 116 Mo. 346, 22 S. W. 798; Norton *v.* Highleyman, 88 Mo. 621.

New York.— Gans *v.* Thieme, 93 N. Y. 225; Wilkes *v.* Harper, 1 N. Y. 586; Sandford *v.* McLean, 3 Paige 117, 23 Am. Dec. 773.

Pennsylvania.— Campbell *v.* Foster Home Assoc., 163 Pa. St. 609, 30 Atl. 222, 43 Am. St. Rep. 818, 26 L. R. A. 117.

Texas.— Fievel *v.* Zuber, 67 Tex. 275, 3 S. W. 273.

money to another that is used to discharge a valid preëxisting lien on real estate, if not a mere volunteer, is entitled by subrogation to all the remedies which the original lien-holder possessed as against the property;[92] and generally, where one pays or advances money to pay a mortgage debt with the understanding that he is to have the benefit of the mortgage, he becomes the holder of the lien by subrogation,[93]

United States.— Cotton *v.* Dacey, 61 Fed. 481.

See 44 Cent. Dig. tit. "Subrogation," §§ 60–63.

The assignee of a second mortgage is not entitled to be subrogated to the rights of one holding another mortgage given on the same land by the mortgagor before his conveyance of the land, and which has been paid out of the proceeds of the sale of other land conveyed by the mortgage to the assignee. Martin *v.* Martin, 24 S. C. 446.

Where land is mortgaged by an agent having no authority to mortgage it, and the mortgagee, for the protection of his supposed mortgage, pays liens on the mortgaged premises, he is a mere volunteer, and, as such, is not entitled to subrogation to the rights of the lien creditors. Campbell *v.* Foster Home Assoc., 2 Pa. Dist. 845, 33 Wkly. Notes Cas. 217. And see Titzel *v.* Smeigh, 2 Leg. Chron. (Pa.) 271.

The rule is otherwise where the evidence shows a purchase and not a payment of the debt. Campbell Printing Press, etc., Co. *v.* Roeder, 44 Mo. App. 324 [*distinguishing* Bunn *v.* Lindsay, 95 Mo. 250, 7 S. W. 473, 6 Am. St. Rep. 48], holding that where defendant took up notes of a third person, held by plaintiff, and indorsed by him without recourse, which, together with others, also held by plaintiff, were secured by a chattel mortgage given by the maker, the evidence showing a purchase and not a payment of the notes by defendant, as between him and plaintiff.

92. Spratt *v.* Pierson, 4 S. C. 301; Baker *v.* Baker, 2 S. D. 261, 49 N. W. 1064, 39 Am. St. Rep. 776; Edwards *v.* Davenport, 20 Fed. 756, 4 McCrary 34.

Where a loan to discharge a mortgage was secured by false representations, and was in fact appropriated to that purpose, the lender should be subrogated to the rights under said mortgage. Bolman *v.* Lohman, 74 Ala. 507.

Payment of judgment by attorney.— Whether an attorney at law charged with the collection of a debt be authorized to receive money on an execution of a stranger, under an agreement with him that the execution shall remain open for his benefit, is not material, if the money thus received is paid over to plaintiff in the judgment. In such case the party thus paying the money is entitled to an execution for his reimbursement. Leach *v.* Williams, 8 Ala. 759.

That the lender charged usury would not deprive him of the right to be subrogated to the rights of the prior encumbrancer to the extent of the principal of the loan and lawful interest thereon. Wilkins *v.* Gibson, 113 Ga. 31, 38 S. E. 374, 84 Am. St. Rep. 204.

93. *Alabama.*— Motes *v.* Robertson, 133 Ala. 630, 32 So. 225.

Illinois.— Loewenthal *v.* McCormick, 101 Ill. 143.

Missouri.— George *v.* Somerville, 153 Mo. 7, 54 S. W. 491; Cornwell *v.* Orton, 126 Mo. 355, 27 S. W. 536.

Texas.— Fieval *v.* Zuber, 67 Tex. 275, 3 S. W. 273; Powers *v.* McKnight, (Civ. App. 1903) 73 S. W. 549.

United States.— Rachal *v.* Smith, 101 Fed. 159, 42 C. C. A. 297.

See 44 Cent. Dig. tit. "Subrogation," §§ 60–63.

The same rule applies to a chattel mortgage. Yaple *v.* Stephens, 36 Kan. 680, 14 Pac. 222.

Payment of encumbrances on land under a verbal agreement that the land shall be conveyed to the person paying them may be ground for subrogating him to the rights of the encumbrancers to the extent of the payment subject to such rights as may have arisen meanwhile. Caudle *v.* Murphy, 89 Ill. 352; Kelly *v.* Kelly, 54 Mich. 30, 19 N. W. 580. But where the owner of property mortgaged is no party to the note secured by the mortgage, and is a stranger to the transaction by which the note was paid, and, further, is a married woman not holding land in her own separate right, the party so paying the note cannot be subrogated to the creditors' rights as against the owner of the mortgaged property. Wolff *v.* Walter, 56 Mo. 292.

The same right will pass to a third person who in turn repaid the money loaned, to the lender. Loewenthal *v.* McCormick, 101 Ill. 143.

One who pays a mortgage debt under an agreement for an assignment or for a new mortgage for his own benefit or protection, acquires a right to the security held by the other. Moore *v.* Lindsey, 52 Mo. App. 474.

A third party, who has taken up a lien note for the payer, with the understanding that he was to hold it just as it was held by the original holder, is entitled to the lien by which it was secured in the hands of the latter, although it may have been the understanding of the original holder that the note was simply paid off, and not purchased. Louisville Banking Co. *v.* Reinhardt, 4 Ky. L. Rep. 620.

If payment is made by one of the note of another, pursuant to a contract that he shall pay the same, the party paying it may be regarded as the agent of the debtor, and as such is entitled to receive and hold the note as evidence of having made payment, as well as for his own protection (Stiger *v.* Bent, 111 Ill. 328); and where a judgment debtor whose land has been sold in part satisfaction of the judgment requested a third person to give his note to the judgment creditor, and obtain from him an assignment of the judgment and

although the creditor is not a party to the agreement;[94] and thus where one advances money upon real estate security for the express purpose of paying off a mortgage or other encumbrance on the same property, upon an understanding express or implied that his security will be subrogated in place of that which he discharged, and that he should have a first lien on the property, he is not a volunteer nor is the original encumbrance considered extinguished; and if for any reason his security turns out not to be a first lien, he will be subrogated to the extent of the encumbrances paid with the money loaned by him,[95] if not

the certificate of sale, which was done, and the note was duly paid by the maker, the third person thereby became subrogated to all the rights of the judgment creditor, and was also entitled to judgment against the judgment debtor for the difference between the amount due him and the value of the land (Shattuck *v.* Cox, 128 Ind. 293, 27 N. E. 609).

A person who pays rent for a lessee in pursuance of an agreement so to do is subrogated by law to the right and privilege of the lessors. Stiewell *v.* Burdell, 18 La. Ann. 17.

One who at the request and for the benefit of a tenant in common of mortgaged premises tenders to the mortgagee the full amount due under the mortgage, and requests an assignment thereof, at the same time stating that he is acting at the tenant's request, is not a mere volunteer, to whom the right of subrogation should be denied. Simonson *v.* Lauck, 105 N. Y. App. Div. 82, 93 N. Y. Suppl. 965.

A part payment will not subrogate the one paying upon request to subrogation *pro tanto* without consent of the mortgagee. Conser *v.* Coleman, 31 Oreg. 550, 50 Pac. 914.

94. Fievel *v.* Zuber, 67 Tex. 275, 3 S. W. 273.

95. *Indiana.*— Backer *v.* Pyne, 130 Ind. 288, 30 N. E. 21, 30 Am. St. Rep. 231; Sidener *v.* Pavey, 77 Ind. 241.

Iowa.— Heuser *v.* Sharman, 89 Iowa 355, 56 N. W. 525, 48 Am. St. Rep. 390.

Kansas.— Armstead *v.* Neptune, 56 Kan. 750, 44 Pac. 998; Crippen *v.* Chappel, 35 Kan. 495, 11 Pac. 453, 57 Am. Rep. 187.

Michigan.— Palmer *v.* Sharp, 112 Mich. 420, 70 N. W. 903.

Minnesota.— Emmert *v.* Thompson, 49 Minn. 386, 52 N. W. 31, 32 Am. St. Rep. 566.

Mississippi.— Union Mortg. Banking, etc., Co. *v.* Peters, 72 Miss. 1058, 18 So. 497, 30 L. R. A. 829; Clark *v.* Clark, 58 Miss. 68.

Missouri.— See Moore *v.* Lindsey, 52 Mo. App. 474.

Nebraska.— Bohn Sash, etc., Co. *v.* Case, 42 Nebr. 281, 60 N. W. 576 [*quoting* and *following* Emmert *v.* Thompson, *supra*], holding that the real question in all such cases is whether the payment by the stranger was a loan to the debtor through a mere desire to aid him or whether it was made with the expectation of being substituted in the place of a creditor. If the former is the case, he is not entitled to subrogation; if the latter, he is.

New Hampshire.— Hoysradt *v.* Holland, 50 N. H. 433.

New York.—Union Trust Co. *v.* Monticello, etc., R. Co., 63 N. Y. 311, 20 Am. Rep. 541; Snelling *v.* McIntyre, 6 Abb. N. Cas. 469; Green *v.* Milbank, 3 Abb. N. Cas. 138.

Ohio.— Straman *v.* Rechtine, 58 Ohio St. 443, 51 N. E. 44; Amick *v.* Woodworth, 58 Ohio St. 86, 50 N. E. 437.

Texas.— Whiteselle *v.* Texas Loan Agency, (Civ. App. 1896) 39 S. W. 194; Brown *v.* Dennis, (Civ. App. 1895) 30 S. W. 272; Whiteselle *v.* Texas Loan Agency, (Civ. App. 1894) 27 S. W. 309.

Utah.— George *v.* Butler, 16 Utah 111, 50 Pac. 1032.

Vermont.— Payne *v.* Hathaway, 3 Vt. 212 [*followed* in Barnett *v.* Griffith, 27 N. J. Eq. 201].

West Virginia.— Southern Bldg., etc., Assoc. *v.* Page, 46 W. Va. 302, 33 S. E. 336.

See 44 Cent. Dig. tit. "Subrogation," §§ 60–63.

Fuller statement of rule.— One who advances money to pay off an encumbrance on realty, at the instance either of the owner of the property or the holder of the encumbrance, either on the express understanding, or under circumstances from which an understanding will be implied, that the advance made is to be secured by a first lien on the property, is not a mere volunteer; and, in the event the new security is for any reason not a first lien on the property, the holder of such security, if not chargeable with culpable and inexcusable neglect, will be subrogated to the rights of the prior encumbrancer under the security held by him, unless the superior or equal equities of others would be prejudiced thereby, and to this end equity will set aside a cancellation of such security, and revive the same for his benefit. Wilkins *v.* Gibson, 113 Ga. 31, 38 S. E. 374, 84 Am. St. Rep. 204.

One who at the request of a mortgagor's widow paid a mortgage on the homestead, and a purchase-money lien, and took a new mortgage out under such circumstances as indicated that he intended to look also to the old mortgage, is subrogated to the rights of the lien and mortgage discharged as against the creditors of the deceased husband. Ogden *v.* Totten, 34 S. W. 1081, 17 Ky. L. Rep. 1390.

If only part of the money was so applied, the second mortgagee upon paying the balance of the first mortgage is subrogated thereto. Quinlan *v.* Stratton, 128 N. Y. 659, 28 N. E. 529 [*affirming* 10 N. Y. Suppl. 152].

One lending money to an administrator upon a void mortgage to pay a prior mortgage is subrogated to the rights of the mortgage discharged (Crippen *v.* Chappel, 35 Kan.

chargeable with culpable and inexcusable neglect,[96] and if his security is otherwise insufficient,[97] and such subrogation is necessary for the better security of his mortgage debt,[98] notwithstanding the mortgage itself may have been canceled and not assigned and the mortgage debt discharged,[99] and even after such first mortgage is paid and delivered up to the mortgagor, and such lender has foreclosed his mortgage and takes possession;[1] and this same rule applies, although the lender's money was so applied without his knowledge or consent;[2] and where the junior mortgagee is placed in no worse attitude than he formerly was, he cannot defeat the right of subrogation.[3] But one who advances money on a mortgage on the strength of false representations that there was but one other mortgage on the premises, and that such money would be applied to the payment thereof, but which was in fact applied in payment of notes secured by another mortgage, could not be subrogated to the rights of the mortgagee in the second mortgage, since there was no intention on his part to keep such second mortgage in existence, and since he was not compelled to advance the money to protect any

495, 11 Pac. 453, 57 Am. Rep. 187); and where an administrator mortgaged land of the estate, and with the proceeds purchased for the heirs the widow's dower interest in the estate, although the mortgage be void, the debt secured thereby was properly declared a lien on the dower interest (Campbell *v.* Smith, 103 Mich. 427, 61 N. W. 654); but a person who loans or advances money to an administrator acquires no right at law or in equity against the estate, unless the money has in fact been applied to pay debts of the estate, in which case, however, the creditor of the administrator will be permitted to take his place, and be subrogated to his rights (Woods *v.* Ridley, 27 Miss. 119; Williamson's Appeal, 94 Pa. St. 231).

Facts held not to constitute waiver of the right.—When one advances money to another upon an agreement that the lender is to have a first lien on described property, and to secure the debt thus created the lender takes a security deed, the mere fact that the lender has sought to enforce the collection of his debt by the remedies appropriate in such a case will not alone amount to a waiver of the right to be subrogated to the claim of a prior encumbrancer, when, in his efforts to follow the remedies above referred to, he discovers that such subrogation is necessary to his protection. Wilkins *v.* Gibson, 113 Ga. 31, 38 S. E. 374, 84 Am. St. Rep. 204.

Where money is loaned to a trustee of real estate with which to pay taxes thereon, and it is so used, the creditors, on establishing the insolvency of the trustee, by exhausting legal remedies, can only be subrogated to the trustee's rights against the trust estate when by settlement of his administration it is shown indebted to him. Dantzler *v.* McInnis, 151 Ala. 293, 44 So. 193, 125 Am. St. Rep. 28, 13 L. R. A. N. S. 297.

In Louisiana where the parties interested in a mortgage note are unable to satisfy at maturity the claims of the holder, they may by a collateral agreement made between themselves, the holder, and a third person succeed in having the holder's claim satisfied and extinguished without having by that fact the note itself extinguished with its accessory mortgages or privileges; and the title to the note with its mortgages passes to the party satisfying the claim of the holder without any assignment of the note being made by the holder. Pellerin *v.* Sanders, 116 La. 616, 40 So. 917 [*citing* Walmsley *v.* Theus, 107 La. 426, 31 So. 869].

Evidence held admissible to show knowledge of prior encumbrance see Lanier *v.* Hoadley, 42 N. Y. App. Div. 6, 58 N. Y. Suppl. 665.

96. Wilkins *v.* Gibson, 113 Ga. 31, 38 S. E. 374, 84 Am. St. Rep. 204.

97. Johnson *v.* Barrett, 117 Ind. 551, 19 N. E. 199, 10 Am. St. Rep. 83; Edinburg American Land Mortg. Co. *v.* Latham, 88 Ind. 88.

98. Thompson *v.* Connecticut Mut. L. Ins. Co., 139 Ind. 325, 38 N. E. 796; Johnson *v.* Barrett, 117 Ind. 551, 19 N. E. 199, 10 Am. St. Rep. 83.

99. *Indiana.*— Thompson *v.* Connecticut Mut. L. Ins. Co., 139 Ind. 325, 38 N. E. 796; Johnson *v.* Barrett, 117 Ind. 551, 19 N. E. 199, 10 Am. St. Rep. 83.

Iowa.— Bennett *v.* First Nat. Bank, 128 Iowa 1, 102 N. W. 129.

Michigan.— Detroit F., etc., Ins. Co. *v.* Aspinall, 48 Mich. 238, 12 N. W. 214.

New York.— King *v.* McVicker, 3 Sandf. Ch. 192.

Wisconsin.— Levy *v.* Martin, 48 Wis. 198, 4 N. W. 35 (where the mortgagor refused to assign the mortgage); Morgan *v.* Hammett, 23 Wis. 30; Downer *v.* Miller, 15 Wis. 612.

See 44 Cent. Dig. tit. "Subrogation," §§ 60–63.

But see Owens *v.* Johnson, 8 Baxt. (Tenn.) 265.

The right does not depend upon the insolvency of the mortgagor. Johnson *v.* Barrett, 117 Ind. 551, 19 N. E. 199, 10 Am. St. Rep. 83.

1. Union Mortg. Banking, etc., Co. *v.* Peters, 72 Miss. 1058, 18 So. 497, 30 L. R. A. 829.

2. Dorrah *v.* Hill, 73 Miss. 787, 19 So. 961, 32 L. R. A. 631.

3. Union Mortg. Banking, etc., Co. *v.* Peters, 72 Miss. 1058, 18 So. 497, 30 L. R. A. 829 [*approving* and *following* Cansler *v.* Sallis, 54 Miss. 446].

interest of his own;[4] and it is held that it is only where the party advancing money to pay off a prior mortgage is ignorant of the existence of a second mortgage that subrogation to the lien of the first mortgage takes place;[5] and the remedy of restoration and consequent subrogation cannot be enforced to the prejudice of an innocent third person,[6] and is subject to such rights as may have arisen meanwhile;[7] and thus one who loans money to satisfy a mortgage on property, and takes another mortgage on the property, without examining the records, and relying merely on an abstract not entirely up to date, which fails to notice the rendition of a recent judgment, is not entitled to subrogation under said mortgage to rights paramount to the judgment;[8] nor can one who has advanced money to pay a lien note be subrogated to the lien to the prejudice of a lien held by the creditor to secure other notes.[9] Furthermore where one takes a mortgage and loans money on condition that it be used to pay certain lienable claims against the premises, and to obtain releases, and there is no evidence of an intention on the part of the mortgagee to keep the claims alive, he is not entitled to be subrogated to the rights of the holders of such claims as have been paid,[10] particularly where the evidence rebuts the assumption of intention to be subrogated;[11] and of course payment of the debt by one primarily liable extinguishes the debt and destroys the lien of a mortgage securing it.[12] The principle which it seems may be abstracted from the cases is that where money due upon a mortgage is paid it may operate to cancel the mortgage, or in the nature of an assignment of it, placing the person who pays in the shoes of the mortgagee as may best subserve the purposes of justice and the true intent of the parties;[13] but that a mortgage

4. Barber *v.* Lyon, 15 Iowa 37; Flannary *v.* Utley, 5 S. W. 878, 9 Ky. L. Rep. 581.

5. London, etc., Mortg. Co. *v.* Tracy, 58 Minn. 201, 59 N. W. 1001 [*distinguishing* Emmert *v.* Thompson, 49 Minn. 386, 52 N. W. 31, 32 Am. St. Rep. 566], holding that the prime consideration in such cases is that the restoration of the discharged lien may be made without putting the holder of the second encumbrance in any worse position than if the prior lien had not been discharged, and where it was discharged under a mistake of fact of the party paying the money to discharge it to refuse to restore it for his protection would be permitting the second lien-holder to profit at the expense of that party and from his mistake. And where the mistake was in supposing the second lien to be discharged, it is held that the situation is the same as where the mistake was as to whether there ever was such a second lien.

6. London, etc., Mortg. Co. *v.* Tracy, 58 Minn. 201, 59 N. W. 1001.

Knowledge of the existence of an intervening encumbrance will not alone prevent the person advancing the money from claiming the right of subrogation, when the exercise of such right will not in any substantial way prejudice the rights of the intervening encumbrancer. Wilkins *v.* Gibson, 113 Ga. 31, 38 S. E. 374, 84 Am. St. Rep. 204; Amick *v.* Woodworth, 9 Ohio Cir. Ct. 556, 6 Ohio Cir. Dec. 496 (holding that one who furnishes money to pay off subsisting mortgages will be subrogated to the rights of the mortgagees so paid off, as against the holder of a mortgage subsequently executed on the land, if such subsequent mortgagee had notice, at the time his mortgage was executed, of the transaction by which the lender paid off the prior mortgage and took what he thought to be a valid security); Conrood *v.* Kelly, 119 Fed. 841, 56 C. C. A. 353.

7. Kelly *v.* Kelly, 54 Mich. 30, 19 N. W. 580; Gerrish *v.* Bragg, 55 Vt. 329.

8. Ft. Dodge Bldg., etc., Assoc. *v.* Scott, 86 Iowa 431, 53 N. W. 283; Mather *v.* Jenswold, 72 Iowa 550, 32 N. W. 512, 34 N. W. 327; Rice *v.* Winters, 45 Nebr. 517, 63 N. W. 830.

9. Gaskill *v.* Huffaker, 49 S. W. 770, 20 Ky. L. Rep. 1555.

10. Wentworth *v.* Tubbs, 53 Minn. 388, 55 N. W. 543.

11. Ferris *v.* Van Ingen, 110 Ga. 102, 35 S. E. 347; Weiser *v.* Weisel, 53 N. Y. Suppl. 578, 5 N. Y. Annot. Cas. 196; Bible *v.* Wisecarver, (Tenn. Ch. App. 1898) 50 S. W. 670.

12. Cornwell *v.* Orton, 126 Mo. 355, 27 S. W. 536; Brown *v.* Merchants' Bank, 66 Mo. App. 427; Dollar Sav. Bank *v.* Burns, 87 Pa. St. 491. And see Poole *v.* Kelsey, 95 Ill. App. 233, holding that where a mortgagor sold a part of the mortgaged premises with full covenants of warranty, and the remainder to one who assumed the mortgage debt, and the latter paid the mortgage, and it was marked "Canceled," he can have no right of subrogation against the purchaser with warranty, even by agreement, as the mortgage is extinguished.

13. Bullard *v.* Leach, 27 Vt. 491.

The payment of a prior mortgage by an attaching creditor is not regarded as a voluntary payment, and, as against the mortgagor and those holding under him and subsequent to the creditor's attachment, the effect of a redemption by the creditor is not to extinguish the mortgage so redeemed, but to keep it alive as a subsisting lien on the land, whether the creditor pursued his attachment lien or not. Chandler *v.* Dyer, 37 Vt. 345.

security will not be kept alive in equity if it appears that there are no equities requiring it.[14]

3. Vendor's Lien. A voluntary payment by a stranger of a debt due to the vendor of real estate and which is a charge upon it extinguishes the debt and the lien and the payer is not entitled to subrogation;[15] and the mere fact that borrowed money was used to discharge a vendor's lien did not entitle the lender to be subrogated to the rights of the vendor. Thus one who loans money to be applied in payment of part of the purchase-price of land, there being no agreement or understanding that he should be substituted to the lien of the vendor, nor that he might in any way look to the land as equity for payment, is not entitled to the rights of the vendor;[16] and one who lends money to pay off a note given for the purchase-money of land is not entitled to be subrogated to the lien of the vendor, although the money so borrowed is applied to paying off the lien.[17] But one who pays the lien at the special instance of the debtor is not a volunteer if when he made the payment he manifested an intention to keep the prior lien alive for his protection and he will be deemed in equity a purchaser rather than a payer and be subrogated to the lien paid off;[18] and his right is superior to the dower right of

Although the clerk certifies that the money paid fully discharged the decree, a party paying a decree of foreclosure becomes invested with the rights of the mortgagee. Wheeler *v.* Willard, 44 Vt. 640.

Accommodation indorser.— Under Code, §§ 2176, 2177, which makes subrogation a legal, as well as an equitable, right, accommodation indorsers who have paid more than their *pro rata* share of the debt may sue jointly a co-indorser for contribution, founding their action on the indorsed note. Hull *v.* Myers, 90 Ga. 674, 16 S. E. 653.

14. Barlow *v.* Deibert, 39 Ind. 16.

15. Rodman *v.* Sanders, 44 Ark. 504; Nichol *v.* Dunn, 25 Ark. 129.

16. Rodman *v.* Sanders, 44 Ark. 504; Boughner *v.* Laughlin, 64 S. W. 856, 23 Ky. L. Rep. 1166. See also Griffin *v.* Proctor, 14 Bush (Ky.) 571; Reid *v.* Jackson, 6 Ky. L. Rep. 743.

17. Cornwell *v.* Orton, 126 Mo. 355, 27 S. W. 536; Wooldridge *v.* Scott, 69 Mo. 669, See Price *v.* Estill, 87 Mo. 378. But see Aiken *v.* Taylor, (Tenn. Ch. App 1900) 62 S. W. 200.

One who loans money to pay purchase-money notes, and takes a deed of trust as security, with the understanding that the vendor's lien was to be extinguished, is not entitled to be subrogated to the rights of the holders of the notes. Shappard *v.* Cage, 19 Tex. Civ. App. 206, 46 S. W. 839.

Where a vendor of land retains the legal title until full payment of the price, so that he has no lien, one loaning the price to the vendee, who agrees to give a mortgage as security after receiving the legal title, which he refuses to do, has no claim to subrogation. Campan *v.* Molle, 124 Cal. 415, 57 Pac. 208.

18. *Alabama.*— Scott *v.* Land, etc., Co., 127 Ala. 161, 28 So. 709.

Arkansas.— Rodman *v.* Sanders, 44 Ark. 504.

Indiana.— Warford *v.* Hankins, 150 Ind. 489, 50 N. E. 468.

Kentucky.— Greishaber *v.* Farmer, 42 S. W. 742, 19 Ky. L. Rep. 1028, where the facts were held to justify the conclusion that there was an agreement to that effect.

Minnesota.— Heyderstadt *v.* Whalen, 54 Minn. 199, 55 N. W. 958, holding that where a person lends to a vendee money with which to pay for the land, and as security therefor obtains from the vendor a conveyance of the title to the land, he is subrogated to the rights of the vendor.

Virginia.— Price *v.* Davis, 88 Va. 939, 14 S. E. 704. And see Kline *v.* Triplett, (1896) 25 S. E. 886.

West Virginia.— Hulings *v.* Hulings Lumber Co., 38 W. Va. 351, 18 S. E. 620.

Wisconsin.— Carey *v.* Boyle, 53 Wis. 574, 11 N. W. 47, holding, however, that the right of a person advancing money for the purchase of land to a vendor's lien, by subrogation, is strictly confined to those who furnish or advance the purchase-money to the purchaser in such a manner that they can be said either to have paid it, or caused it to be paid, to the vendor, on behalf or for the benefit of the purchaser.

See 44 Cent. Dig. tit. "Subrogation," §§ 60–63.

Where one advances money to pay off a vendor's lien upon a homestead and the money is so applied, the creditor becomes subrogated to the vendor's lien as against the homestead rights. Mustain *v.* Stokes, 90 Tex. 358, 38 S. W. 758 [*reversing* (Civ. App. 1896) 37 S. W. 602]; Bridgen *v.* Warn, 79 Tex. 588, 15 S. W. 559 [*followed* in Ivory *v.* Kennedy, 57 Fed. 340, 6 C. C. A. 365]; Roy *v.* Clarke, 75 Tex. 28, 12 S. W. 845; Hicks *v.* Morris, 57 Tex. 658; Park *v.* Kribs, 24 Tex. Civ. App. 650, 60 S. W. 905; Dixon *v.* National Loan, etc., Co., (Tex. Civ. App. 1897) 40 S. W. 541 (holding that where a portion of a loan for which a mortgage on a homestead was taken by agreement of the parties used to pay a vendor's lien on the homestead, the mortgagee is subrogated to the rights of the vendor); Pioneer Sav., etc., Co. *v.* Paschall, 12 Tex. Civ. App. 613, 34 S. W. 1001 (holding that a mortgagee in a mortgage on a homestead, executed by husband and wife as security for money furnished to pay off

the widow of the vendee.[19] *A fortiori* a third person who pays the purchase-money on behalf of the purchaser to the vendor, upon an express agreement between the three that he shall have a lien for it upon the land, will be held in equity to succeed to the vendor's lien,[20] although the agreement be in parol;[21] but not where the intention of the parties was to clear the title of the liens.[22] Similarly, if payment of the vendor's lien is made under such circumstances as would operate as a fraud if the vendee should be permitted to insist that the security for the debt was discharged by the payment, he will be subrogated to the lien.[23] But a person advancing money to a purchaser of land, which is used in completing his payment of the purchase-money, who at the time takes a deed of trust on the premises to secure himself, there being no privity or arrangement between him and the vendor that he shall succeed to the lien of the vendor, will not be entitled to be subrogated to the rights of the vendor, so as to hold the entire premises against a second purchaser from the first of a part of the land, who was in possession under his contract before the execution of the trust deed.[24]

4. Maritime Liens. A creditor to whom a ship has been hypothecated for advances made before it was built, without an agreement that upon the payment the lien should be continued in his favor, or an assignment of the debt, does not become subrogated to the privilege of materialmen by reason of having paid the orders drawn by the builder in favor of the materialmen;[25] and while a surety on a bond given to release a vessel from attachment in admiralty who has been compelled to pay the whole amount decreed against his principal is entitled to be subrogated to the rights of the libellants against the principal, he has no lien

vendor's lien notes, is entitled to be subrogated to the rights of the holders of the notes); Western Mortg., etc., Co. *v.* Ganzer, 63 Fed. 647, 11 C. C. A. 371. And where a person loans money on a homestead, such loan being invalid, but, before paying over the money, he has part of it applied to discharge a vendor's lien on the land, he is entitled to subrogation to all the rights of the vendor (Texas Land, etc., Co. *v.* Blalock, 76 Tex. 85, 13 S. W. 12); and he does not waive this lien by taking a mortgage upon the land to further secure himself, unless such was the intention of the parties (Harrod *v.* Johnson, 5 Ky. L. Rep. 247); and it has been held that where a vendor's lien note, secured on the maker's homestead, having been indorsed by the payee to a third party, plaintiff, at the instance of the maker and payee, paid the note when due, and in lieu thereof took another note for a like amount, secured on the same premises, plaintiff, although he had notice that the property was a homestead, would be subrogated to the rights of the indorsee, so that he could enforce the note against the homestead if such indorsee was a *bona fide* purchaser for value (Denecamp *v.* Townsend, (Tex. Civ. App. 1895) 33 S. W. 254). Similarly a person who discharged a vendor's lien against a homestead by paying the vendor's lien notes at the maker's request, which request contemplated that the person paying such notes should hold the lien, was entitled to be subrogated thereto (Mergele *v.* Felix, 45 Tex. Civ. App. 55, 99 S. W. 709); and where notes were secured by a deed of trust covering land, part of which was the homestead of the grantor in the deed, and which was encumbered by vendor's liens which the beneficiary in the trust deed paid off with a part of the money secured by the trust deed, the beneficiary was entitled to be subrogated to the rights of the holders of such liens, even though at the time subrogation was asked the notes secured by the trust deed were barred by limitations (Flynt *v.* Taylor, 100 Tex. 60, 93 S. W. 423).

19. Fisher *v.* Johnson, 5 Ind. 492.

20. Mitchell *v.* Butt, 45 Ga. 162; Gunn *v.* Orndorff, 67 S. W. 372, 68 S. W. 461, 23 Ky. L. Rep. 2369; Johnson *v.* Portwood, 89 Tex. 235, 34 S. W. 596, 787.

21. Allen *v.* Caylor, 120 Ala. 251, 24 So. 512, 74 Am. St. Rep. 31.

22. Blake *v.* Pine Mountain Iron, etc., Co., 76 Fed. 624, 22 C. C. A. 430.

23. Hart *v.* Davidson, 84 Tex. 112, 19 S. W. 454.

24. Small *v.* Stagg, 95 Ill. 39. But see Ruse *v.* Bromberg, 88 Ala. 619, 7 So. 384, holding that, although at law an absolute deed intended to operate merely as a mortgage is absolutely void as to the existing creditors of the grantor, yet in equity, where no actual fraud is proven, the grantee, who assumed the payment of the grantor's unpaid purchase-money notes, will be permitted to hold his deed as a means of reimbursement from freeing the land from the purchase-money lien.

A trustee who advances money to his cestui que trust, with which to extinguish a vendor's lien on the trust property, and who takes an imperfect mortgage and bonds as security, is not entitled to be subrogated to the vendor's lien. Norris *v.* Woods, 89 Va. 873, 17 S. E. 552.

25. The Hull of a New Ship, 12 Fed. Cas. No. 6,859, 2 Ware 203; Stalker *v.* The Henry Kneeland, 22 Fed. Cas. No. 13,282.

upon the vessel.[26] The maritime lien of a materialman does not transfer itself to a third party who at the request of the master pays the claim. It is money advanced for the necessities of the boat; but, if the lender fails to acquire a lien by taking a bottomry bond, it is considered as advanced on personal credit only;[27] and where a person lends securities for the general use of a ship-owner, who gets them discounted and applies part of the proceeds in satisfaction of a bottomry upon the ship, this raises no equity in behalf of the lender to be subrogated to the lien of a bottomry creditor;[28] and the same rule applies to a party advancing money to an owner of a steamer to pay for stores and provisions, and he is not legally subrogated to the privileges of the furnishers of provisions and the crew.[29] But where the master of a ship obtained money from another for purposes which were maritime in their character, and subsequently borrowed money of libellant and repaid the lender, libellant was entitled to a lien on the vessel, as standing in the same position in which the lender stood.[30]

5. WAGES. While it has been held that one not a mere volunteer who, with an honest purpose to relieve the wage-earner, and not for the purpose of personal gain, advances money in payment of wages earned, is entitled to be subrogated to the rights of the employee paid, including the statutory right of preference,[31]

26. Carroll *v.* The Leathers, 5 Fed. Cas. No. 2,455, Newb. Adm. 432. And see The Robertson, 20 Fed. Cas. No. 11,923, 8 Biss. 180, holding that one who, at the request of the owner of a vessel seized in a foreign port for supplies furnished, has signed a stipulation for her release, and afterward paid the amount decreed against her, does not become subrogated to the rights of the libellant, so as to require a lien upon the vessel.

27. Carroll *v.* The Leathers, 5 Fed. Cas. No. 2,455, Newb. Adm. 432.

28. Stalker *v.* The Henry Kneeland, 22 Fed. Cas. No. 13,282.

29. Hill *v.* The Phœnix Tow Boat Co., 2 Rob. (La.) 35; Mississippi Agricultural Bank *v.* The Jane, 19 La. 1; Grant *v.* Fiol, 17 La. 158.

The surety of the captain on a note given for supplies furnished to a boat to a lien accorded by statute to one who furnishes such supplies does not come within the principle which entitles the surety to the benefit of securities furnished by the debtor to the creditor. Hays *v.* The Columbus, 23 Mo. 232.

30. The Thomas Sherlock, 22 Fed. 253.

31. Putnam *v.* News Pub. Co., 9 Ohio Dec. (Reprint) 479, 14 Cinc. L. Bul. 109 (holding that one who carries on the business of a publishing corporation under an agreement whereby the directors and himself are to contribute money for that purpose, which the directors fail to perform, and who, relying upon their assurances of performance, pays the employees out of his own funds, will be subrogated to the right of such employees to preference when the proceeds of the sale of the corporation's property is distributed by a receiver according to the laws relating to estates of insolvent debtors); *In re* Standard Wagon Co., 4 Ohio S. & C. Pl. Dec. 188, 3 Ohio N. P. 168 (holding that where the foreman of a manufacturing company, with the consent of the company, and in order to prevent trouble, advanced money to pay wages of workmen employed by the company, he is entitled to be subrogated to the rights of such workmen).

Wages of seamen.—Where a part-owner of a vessel pays the wages of seamen, he may be subrogated to the rank of the seamen as against the mortgagee of the share of another part-owner (The J. A. Brown, 13 Fed. Cas. No. 7,118, 2 Lowell 464), but a volunteer cannot (The P. H. White *v.* Levy, 10 Ark. 411), and the general agent of a ship at her home port is not entitled to be subrogated to the lien of seamen whose wages he has paid in the regular course of his agency (The Sarah J. Weed, 21 Fed. Cas. No. 12,350, 2 Lowell 555); but the clerk of a steamboat who, having received an order from the captain on the company, which was accepted, paid the crew their wages out of his own money, and the company became insolvent, acquired and held the rights of the crew, and was entitled to be paid in full (Abbott *v.* Baltimore, etc., Steam Packet Co., 4 Md. Ch. 310). Where assignees of the owner sold a fishing vessel for its full value, without taking into account any secret liens, and the purchasers were afterward obliged, on a libel against the vessel, to pay wages of some of the fishermen for the preceding voyage, such purchasers of the vessel were subrogated to the lien of the seamen against the fish and their proceeds, and might recover of the assignees such proportion of those proceeds as the wages so paid bore to the whole amount of wages. *In re* Low, 15 Fed. Cas. No. 8,558, 2 Lowell 264. A bottomry creditor may, by payment of the seamen's wages, entitle himself to a novation in their place for recovery of their demands against the vessel. But he has no right to exact of them a formal assignment of their wages, or the payment of his proctor's fees; nor, on an offer to satisfy their wages, can he require them to defer the prosecution of their demands until he chooses to institute a suit on the bottomry. The Cabot, 4 Fed. Cas. No. 2,277, Abb. Adm. 150.

other cases decided upon a similar state of facts hold the one advancing the money to be a volunteer, and deny the right.[32]

SUBSCRIBE.[1] To attest or give consent or evidence knowledge, by underwriting, usually, (but not necessarily) the name of the subscriber;[2] to write one's name beneath or at the end of an instrument;[3] to write underneath;[4] to set one's hand to a writing;[5] to write under; to write at the bottom or end of a writing or instrument; to write the name under;[6] to give consent by underwriting the name; to attest by writing the name;[7] to sign in witness or attestation; to assent or consent; to witness or attest.[8] In reference to an agreement, to agree in writing to furnish a sum of money or its equivalent for a designated purpose.[9] (See SIGN, 35 Cyc. 441; and, generally, SUBSCRIPTIONS, *post*, p. 481.)

32. Macon Exch. Bank *v.* Macon Constr. Co., 97 Ga. 1, 25 S. E. 326, 33 L. R. A. 800 (holding that one who advanced money to a construction company, with which the employees of a railroad company were paid, was not entitled, as against the bondholders, to subrogation to the rights of the employees on distribution of the earnings of the road by a receiver thereof); Suddath *v.* Gallagher, 126 Mo. 393, 28 S. W. 880 (holding that a president of a corporation who, previous to its insolvency, voluntarily pays labor claims of the corporation with money borrowed upon its note indorsed by himself, in the absence of special agreement does not become subrogated to the rights of the laborers to be preferred under Rev. St. § 2538, so as to enable him, after insolvency, to hold out of any moneys of the corporation in his hands enough to pay the note); *In re* North River Constr. Co., 38 N. J. Eq. 433 (holding that a superintendent of the construction of a railroad who, supposing the company was solvent, and merely to befriend the working men, advanced his own money to pay for their work, without any assignment of their claims, or agreement that he was to have the benefit of their liens. The company turned out insolvent, and was not entitled to be subrogated to the workmen's statutory lien).

The payment of the planter's drafts in favor of his laborers and workmen does not subrogate the party so paying to the privileges of the laborers and workmen. Shaw *v.* Grant, 13 La. Ann. 52.

1. **Derived from** the Latin *subscribo*, "to write under" or "underneath" see James *v.* Patten, 6 N. Y. 9, 12, 55 Am. Dec. 376; Atty.-Gen. *v.* Clarke, 26 R. I. 470, 59 Atl. 395, 396.

2. California Canneries Co. *v.* Scatena, 117 Cal. 447, 450, 49 Pac. 462; *In re* Walker, 110 Cal. 387, 393, 42 Pac. 815, 52 Am. St. Rep. 104, 30 L. R. A. 460.

3. Matter of Griffin, 56 Misc. (N. Y.) 21, 25, 106 N. Y. Suppl. 24.

4. Matter of Strong, 16 N. Y. Suppl. 104, 2 Connoly Surr. 574, 576.

5. Pridgen *v.* Pridgen, 35 N. C. 259, 260, where it is said that "sign" and "subscribe" are nearly convertible terms.

6. Burrill L. Dict. [*quoted* in Wild Cat Branch *v.* Ball, 45 Ind. 213, 216].

7. Johnson Dict. [*quoted* in Roberts *v.* Phillips, 4 E. & B. 450, 455, 1 Jur. N. S. 444, 24 L. J. Q. B. 171, 82 E. C. L. 450, 30 Eng. L. & Eq. 147].

8. Richardson Dict. [*quoted* in Roberts *v.* Phillips, 4 E. & B. 450, 455, 1 Jur. N. S. 444, 24 L. J. Q. B. 171, 82 E. C. L. 450, 30 Eng. L. & Eq. 147].

"Attest" distinguished see ATTEST, 4 Cyc. 888 note 14. See also Tobin *v.* Haack, 79 Minn. 101, 106, 81 N. W. 758.

Equivalent to "execute" see EXECUTIONS, 17 Cyc. 877 note 51.

Distinguished from "sign" see Davis *v.* Shields, 26 Wend. (N. Y.) 341, 358; Miller *v.* Pelletier, 4 Edw. (N. Y.) 102, 106; Matter of Strong, 16 N. Y. Suppl. 104, 2 Connoly Surr. (N. Y.) 574, 576; Lawson *v.* Dawson, 21 Tex. Civ. App. 361, 362, 53 S. W. 64.

It ordinarily implies that the name of the party who subscribes is set by him or by his authority at the bottom or end of the writing or document. Stone *v.* Marvel, 45 N. H. 481; American Surety Co. *v.* Worcester Cycle Mfg. Co., 100 Fed. 40, 41.

The primary meaning of the term is to write underneath, as one's name; but it also means to give consent to something written, to assent, to agree. Ashton *v.* Stoy, 96 Iowa 197, 201, 64 N. W. 804, 30 L. R. A. 584.

The etymology and definition of the word as given by lexicographers shows that its meaning, when applied to a signature to an instrument in writing, is the signature or writing of one's name beneath or at the end of an instrument. James *v.* Patten, 6 N. Y. 9, 12, 55 Am. Dec. 376 [*reversing* 8 Barb. 344]; Atty.-Gen. *v.* Clarke, 26 R. I. 470, 59 Atl. 395, 396. See also Davis *v.* Shields, 26 Wend. (N. Y.) 341, 357.

9. Anderson L. Dict. [*quoted* in Heller *v.* Ellwood Bd. of Trade, 18 Ind. App. 188, 47 N. E. 649, 650; Strong *v.* Eldridge, 8 Wash. 595, 600, 36 Pac. 696].

As used in reference to contracts for stock in a corporation to be organized, the term has a definite technical sense, including in it the idea of a promise to pay the amount subscribed in the manner agreed upon. Cheraw, etc., R. Co. *v.* White, 14 S. C. 51, 62. "To 'subscribe for' shares in one of the ordinary significations of the word, subscribe, is to promise to give the thing subscribed for, or to contribute to the undertaking accordingly." Sagory *v.* Dubois, 3 Sandf. Ch. (N. Y.) 466, 493.

SUBSCRIBER. One who becomes bound by a subscription to the capital stock of a corporation;[10] one who subscribes; one who contributes to an undertaking by subscribing; one who enters his name for a paper, book, map, or the like.[11] (See SUBSCRIBE.)

SUBSCRIBING WITNESS. One who writes his name under an attesting clause;[12] one who sees a writing executed, or hears it acknowledged and at the request of the party thereupon signs his name as a witness;[13] one who was present when the instrument was executed, and who at that time, at the request or with the assent of the party, subscribed his name to it, as a witness of the execution.[14] (Subscribing Witness: Attestation — By Means of Defective Acknowledgment, see ACKNOWLEDGMENTS, 1 Cyc. 531; Of Assignment, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 155; Of Award, see ARBITRATION AND AWARD, 3 Cyc. 669; Of Bond, see BONDS, 5 Cyc. 738; Of Commercial Paper, see COMMERCIAL PAPER, 7 Cyc. 618; Of Deed, see DEEDS, 13 Cyc. 557; Of Documentary Evidence, see EVIDENCE, 17 Cyc. 341, 348; Of Instrument at Time Subsequent to Execution, see ALTERATIONS OF INSTRUMENTS, 2 Cyc. 206; Of Mortgage, see CHATTEL MORTGAGES, 6 Cyc. 1005; MORTGAGES, 27 Cyc. 1108; Of Undertaking For Costs, see COSTS, 11 Cyc. 182 note 96; Of Will, see WILLS. Erasure of Attestation, see ALTERATIONS OF INSTRUMENTS, 2 Cyc. 205.)

It may mean actual payment of money, or the putting down of his name by a person, binding himself to contribute. Thames Tunnel Co. *v.* Sheldon, 6 B. & C. 341, 347, 9 D. & R. 278, 5 L. J. K. B. O. S. 157, 13 E. C. L. 161.

As used in a statute providing that an original notice in a justice's court "must be subscribed by the plaintiff, his attorney, or the justice of the peace before whom it is returnable," the term means to set under or to write under, as opposed to a signature at some other place. Loughren *v.* Bonniwell, 125 Iowa 518, 519, 520, 101 N. W. 287, 106 Am. St. Rep. 319.

"Subscribe for, take or hold" see Atty.-Gen. *v.* New York, etc., R. Co., 198 Mass. 413, 426, 84 N. E. 737.

"Subscribed capital stock" see Moore *v.* Lent, 81 Cal. 502, 505, 22 Pac. 875.

10. Reid *v.* De Jarnette, 123 Ga. 787, 790, 51 S. E. 770, where the term "stockholder" is distinguished.

11. Webster Dict. [*quoted* in Ashton *v.* Stoy, 96 Iowa 197, 201, 64 N. W. 804, 30 L. R. A. 584].

"To become a subscriber to a newspaper includes some voluntary act on the part of the subscriber, or something which is in effect an assent by him to the use of his name as a subscriber." It does not include a person to whom a paper is sent without his knowledge or consent. Ashton *v.* Stoy, 96 Iowa 197, 201, 64 N. W. 804, 30 L. R. A. 584.

The term may apply either to those who have advanced money or to those stipulating for a future advance. Thames Tunnel Co. *v.* Sheldon, 6 B. & C. 341, 347, 9 D. & R. 278, 5 L. J. K. B. O. S. 157, 13 E. C. L. 161.

12. Smith *v.* Crotty, 112 Ga. 905, 906, 38 S. E. 110 [*citing* Abbott L. Dict.; Anderson L. Dict.; Black L. Dict.; Bouvier L. Dict.; Rapalje & L. L. Dict.].

13. Luper *v.* Werts, 19 Oreg. 122, 135, 23 Pac. 850 [*citing* Annot. Code, § 757].

14. Greenleaf Ev. [*quoted* in Houston *v.* State, 114 Ala. 15, 17, 21 So. 813; Huston *v.* Ticknor, 99 Pa. St. 231, 238; Tate *v.* Lawrence, 11 Heisk. 503, 510]. See also *In re* Clute, 37 Misc. (N. Y.) 586, 588, 75 N. Y. Suppl. 1059.

Technically construed the term applies only to a written instrument, but in construing a statute providing that all beneficial devises, etc., made or given in any will, to a subscribing witness thereto, shall be wholly void unless there be two other competent subscribing witnesses to the same, the term was treated as synonymous with "attesting witness." Godfrey *v.* Smith, 73 Nebr. 756, 767, 103 N. W. 450.

In the sense of a registry law it has been held that a subscribing witness is one who becomes a witness at the request of the bargainor, either in his presence or at his special request, or with his assent upon his acknowledgment of the execution of the deed. Tate *v.* Lawrence, 11 Heisk. (Tenn.) 503, 515.

"A subscribing witness to a deed is one who sees it signed, sealed and delivered, or hears it acknowledged, and signs his name as a witness, at the instance of the maker." Gaskill *v.* King, 34 N. C. 211, 217.

SUBSCRIPTIONS

By Edwin H. Woodruff
Professor of Law, Cornell University College of Law *

I. **Definition and Nature,** 482

II. **Form, Execution, and Delivery,** 483

A. *In General,* 483
B. *Date and Signature,* 483
C. *Designation of Payee,* 483
D. *Expression of Consideration,* 484
E. *Separate Documents,* 484
F. *Alteration,* 484
G. *Delivery,* 484

III. **Acceptance,** 484

IV. **Consideration,** 485

A. *In General,* 485
B. *Work Done or Money Expended in Reliance Upon the Subscription,* 486
C. *Mutual Promises of the Subscribers,* 488
D. *Mutual Promises of Subscribers and Payee or Beneficiary,* 489
E. *Request,* 490
F. *Benefit to the Promisor,* 491
G. *Statutory Duty of the Promisee to Disburse the Fund,* 491
H. *Moral Obligation,* 491

V. **Estoppel,** 492

VI. **Revocation and Lapse,** 492

A. *Revocation by Notice,* 492
B. *Lapse by Death or Insanity,* 493

VII. **Fraud and Misrepresentation,** 493

A. *In General,* 493
B. *Fictitious Subscriptions,* 493
C. *Opinions,* 494
D. *Innocent Misrepresentation,* 494
E. *Promissory Representations,* 494

VIII. **Illegality,** 494

A. *In General,* 494
B. *Subscriptions Made on Sunday,* 494
C. *Contracts Ultra Vires,* 494

IX. **Construction,** 495

X. **Assignment,** 496

XI. **Title to Funds Subscribed,** 496

XII. **Performance of Conditions,** 496

A. *In General,* 496
B. *Substantial Performance,* 497
C. *Performance of Collateral Agreements,* 497
D. *Time of Performance,* 497
E. *Change of Plan or Purpose,* 498
F. *Abandonment of the Undertaking,* 499
G. *Subscriptions Conditioned Upon Other Subscriptions,* 499

* Author of "Cases on Quasi-Contracts"; "Cases on Domestic Relations"; "Cases on Insurance"; Introduction to the Study of Law." Joint author of "Cases on Contracts."

XIII. PAYMENT OF THE SUBSCRIPTION, 500
A. *Time of Payment*, 500
B. *Demand*, 500
C. *Abatement of Subscriptions*, 500
XIV. RELEASE OR DISCHARGE OF SUBSCRIBER, 500
XV. RECOVERY BACK OF SUBSCRIPTION, 501
XVI. ACTIONS, 501
A. *Jurisdiction*, 501
B. *Parties*, 501
1. *Parties Plaintiff*, 501
a. *In General*, 501
b. *Corporations*, 502
2. *Parties Defendant*, 502
C. *Pleading*, 503
D. *Evidence*, 503
1. *Presumptions and Burden of Proof*, 503
2. *Admissibility*, 503
a. *In General*, 503
b. *Parol Evidence*,504
3. *Weight and Sufficiency*, 504

CROSS-REFERENCES

For Matters Relating to:
Constitutionality of Statute Validating Subscription, see CONSTITUTIONAL LAW, 8 Cyc. 1024.
Over Subscription to Bank Stock, see BANKS AND BANKING, 5 Cyc. 436.
Parol Evidence, see EVIDENCE, 17 Cyc. 612.
Power of Corporation to Take Subscription, see CORPORATIONS, 10 Cyc. 1130.
Seal, see SEALS, 35 Cyc. 1165 *et seq.*
Signature, see SIGNATURES, 36 Cyc. 442.
Subscription by:
County in Aid of Railroad, see COUNTIES, 11 Cyc. 529.
Private Person in Aid of Railroad, see RAILROADS, 33 Cyc. 88.
Subscription Made on Sundays, see SUNDAY.
Subscription of:
Party to:
Deed, see DEEDS, 13 Cyc. 554.
Mortgage, see MORTGAGES, 27 Cyc. 1105.
Witness to Deposition, see DEPOSITIONS, 13 Cyc. 939.
Written Instruments in General, see SIGNATURES, 36 Cyc. 442.
Subscription to:
Return of Deposition, see DEPOSITIONS, 13 Cyc. 956.
Stock of:
Building and Loan Association, see BUILDING AND LOAN SOCIETIES, 6 Cyc. 124.
Corporation, see CORPORATIONS, 10 Cyc. 380.
Joint Stock Company, see JOINT STOCK COMPANIES, 23 Cyc. 468.
Railroad, see RAILROADS, 33 Cyc. 54.

I. DEFINITION AND NATURE.

A subscription contract is a legal obligation to make a payment in money or its equivalent in furtherance of a charitable, business, or other undertaking.[1]

1. Other definitions.— A subscription is "the act by which a person makes an agreement over his signature in writing, to furnish a sum of money for a particular pur-

The offer from which the obligation proceeds generally assumes the form of an express written promise [2] to pay money for a stated purpose and becomes binding when accepted,[3] and founded upon a consideration [4] or when the offerer is estopped to deny the validity of the promise.[5] The promise need not be to pay money, but may be to give a note,[6] to convey land,[7] or to furnish labor and material.[8]

II. Form, Execution, and Delivery.

A. In General. The subscription may be made either by the promisor or his agent.[9]

B. Date and Signature. The paper is not invalid if undated.[10] The signature of the promisor need not be his personal name. Such words as he adopts for his signature will serve for that purpose.[11] The subscription paper need not be signed by the payee.[12]

C. Designation of Payee. It is not necessary that the payee should be named in the subscription paper; it is sufficient if there is an acceptance by the party intended;[13] and this is so even if the payee was not in existence at the time the subscription was made.[14] But there can be no recovery by a payee who was not contemplated.[15]

pose; as, a subscription to a charitable institution, a subscription for a book, for a newspaper, and the like." Bouvier L. Dict. To subscribe is "to agree in writing to furnish a sum of money, or its equivalent, for a designated purpose; as to assist a charitable or religious object, or to take stock in a corporation." Anderson L. Dict.

2. **Agreement to subscribe.**—An instrument by which defendant "agrees to subscribe" is construed to be a present subscription. Strong *v.* Eldridge, 8 Wash. 595, 36 Pac. 696.

Written contract.—A subscription paper to a church fund, containing an unqualified promise to pay, was read to the congregation, and the parties desiring to subscribe announced the amount, and the name and amount were placed on the list by those acting for the church, with the consent of said subscribers; it was held that defendant's subscription so obtained constituted a contract in writing, actions on which are governed by the ten-year statute of limitations. Ft. Madison First M. E. Church *v.* Donnell, 95 Iowa 494, 64 N. W. 412.

3. See *infra*, III.

4. See *infra*, IV.

5. See *infra*, V.

6. Chicago University *v.* Emmert, 108 Iowa 500, 79 N. W. 285.

7. North Ecclesiastical Soc. *v.* Matson, 36 Conn. 26; Harrisburg Bd. of Trade *v.* Eby, 1 Dauph. Co. Rep. (Pa.) 99.

8. State University *v.* Buell, 2 Vt. 48.

9. Rawlings *v.* Young Men's Christian Assoc., 48 Nebr. 216, 66 N. W. 1124.

10. Allen *v.* Clinton County, 101 Ind. 553.

11. Where a subscriber signed only his surname with the addition of the word "family," he bound himself by such adopted signature as though he had signed his full name. Hodges *v.* Nalty, 113 Wis. 567, 89 N. W. 535.

12. Turner *v.* Baker, 30 Ark. 186.

13. *Georgia.*— Wilson *v.* Savannah First Presb. Church, 56 Ga. 554.

Illinois.— Merchants' Bldg. Imp. Co. *v.* Chicago Exch. Bldg. Co., 210 Ill. 26, 71 N. E. 22, 102 Am. St. Rep. 145 [*affirming* 106 Ill. App. 17]; Hall *v.* Virginia, 91 Ill. 535; Friedline *v.* Carthage College, 23 Ill. App. 494.

Indiana.— Bingham *v.* Marion County, 55 Ind. 113.

Kansas.—Fulton *v.* Sterling Land, etc., Co., 47 Kan. 621, 28 Pac. 720.

Michigan.— Detroit First Universalist Church *v.* Pungs, 126 Mich. 670, 86 N. W. 235; Allen *v.* Duffie, 43 Mich. 1, 4 N. W. 427, 38 Am. Rep. 159; Comstock *v.* Howd, 15 Mich. 237.

Missouri.— Swain *v.* Hill, 30 Mo. App. 436.

Texas.— Darnell *v.* Lyon, 85 Tex. 455, 22 S. W. 304, 960.

Vermont.— Shelburne M. E. Soc. *v.* Lake, 51 Vt. 353.

See 45 Cent. Dig. tit. "Subscriptions," § 2.

Illustration.— In Hall *v.* Virginia, 91 Ill. 535, where the subscription was made for the purpose of building a house in a certain town, to be donated to the county, and no payee was named, it was held that the town which advanced money for the purpose, on the faith of the subscription, became the payee.

14. Merchants' Bldg. Imp. Co. *v.* Chicago Exch. Bldg. Co., 210 Ill. 26, 71 N. E. 22, 102 Am. St. Rep. 145; Willard *v.* Rockhill Centre M. E. Church, 66 Ill. 55; Miller *v.* Ballard, 46 Ill. 377; Johnston *v.* Ewing Female University, 35 Ill. 518; Griswold *v.* Peoria University, 26 Ill. 41, 79 Am. Dec. 361; Sherwin *v.* Fletcher, 168 Mass. 413, 47 N. E. 197; Thompson *v.* Page, 1 Metc. (Mass.) 565; New Lindell Hotel Co. *v.* Smith, 13 Mo. App. 7; Westfield Reformed Protestant Dutch Church *v.* Brown, 4 Abb. Dec. (N. Y.) 31, 24 How. Pr. 76 [*affirming* 29 Barb. 335, 17 How. Pr. 287].

Illustration.— One making a subscription to a corporation not in being at the time is liable for the payment of such subscription when the corporation is formed. New Lindell Hotel Co. *v.* Smith, 13 Mo. App. 7.

15. Warwick Turnpike Road Co. *v.* Hutchinson, 56 S. W. 806, 22 Ky. L. Rep. 201; Wheeler *v.* Floral Mill, etc., Co., 9 Nev. 254;

D. Expression of Consideration. The consideration need not be expressed except where, by the law of the particular jurisdiction, the contract falls within the statute of frauds, and there may thus be a requirement that the consideration be expressed.[16]

E. Separate Documents. The subscription contract may consist of separate sheets or documents if they are properly related.[17]

F. Alteration. An immaterial alteration of the subscription paper will not invalidate the subscription,[18] nor will any alteration, if it is subsequently ratified.[19]

G. Delivery. There must be an actual or constructive delivery of the subscription paper.[20]

III. ACCEPTANCE.

And it is also essential that there should be an acceptance of the offered subscription,[21] although the acceptance need not be express; it may be implied,[22] as where liability or expense are incurred on the faith of the offer,[23] or the condi-

Wayne, etc., Collegiate Inst. *v.* Devinney, 43 Barb. (N. Y.) 220. But this case is said in 41 N. Y. 620, to have been reversed by the court of appeals in December, 1869).

16. Barnes *v.* Perine, 15 Barb. (N. Y.) 249 [*affirmed* in 12 N. Y. 18].

17. *Connecticut.*— North Ecclesiastical Soc. *v.* Matson, 36 Conn. 26.

Iowa.— Davis *v.* Campbell, 93 Iowa 524, 61 N. W. 1053.

Kentucky.— Tompkins *v.* Southern Baptist Theological Seminary, 8 Ky. L. Rep. 191.

Michigan.—Waters *v.* Union Trust Co., 129 Mich. 640, 89 N. W. 687.

Ohio.— Ohio Wesleyan Female College *v.* Higgins, 16 Ohio St. 20.

Tennessee.— Davis, etc., Bldg., etc., Co. *v.* Dickson, (Ch. App. 1899) 53 S. W. 237.

Virginia.— Catt *v.* Olivier, 98 Va. 580, 36 S. E. 980.

See 45 Cent. Dig. tit. "Subscriptions," § 3.

Illustration.— Where one in response to a circular soliciting subscriptions for the benefit of religious institutions wrote a letter saying: "I have concluded to subscribe $1,000," and referred to the circular for the terms upon which he made the subscription, the contract was complete; the circular specifying the instalments, and the time for the payment of each. Tompkins *v.* Southern Baptist Theological Seminary, 8 Ky. L. Rep. 191. So when several subscribers were entered on the same page of a subscription book, a revenue stamp sufficient in amount to cover the aggregate of the stamp duties on all of the subscriptions entered on that page is sufficient, and each subscription need not be separately stamped. St. Louis, etc., R. Co. *v.* Eakins, 30 Iowa 279. The decision of an internal revenue collector as to the amount of the stamps required on each sheet of a subscription paper which he affixes and cancels is conclusive. Green Mountain Cent. Inst. *v.* Britain, 44 Vt. 13.

18. Whittlesey *v.* Frantz, 74 N. Y. 456.

19. Landwerlen *v.* Wheeler, 106 Ind. 523, 5 N. E. 888; Workman *v.* Campbell, 57 Mo. 53.

20. Rothenberger *v.* Glick, 22 Ind. App. 288, 52 N. E. 811; Heller *v.* Ellwood Bd. of Trade, 18 Ind. App. 188, 47 N. E. 649; White *v.* Crosby, (Tex. Civ. App. 1899) 51 S. W. 350; White *v.* Crosby, (Tex. Civ. App. 1897) 43 S. W. 532; Michels *v.* Rustemeyer, 20 Wash. 597, 56 Pac. 380.

Delivery to agent of subscriber.— In Merchants' Bldg. Imp. Co. *v.* Chicago Exch. Bldg. Co., 210 Ill. 26, 71 N. E. 22, 102 Am. St. Rep. 145, it was held that a written subscription of a certain sum annually, given to secure the location of the Chicago stock exchange in a building about to be erected, payable to the owner or owners of the premises if the stock exchange should be located there free of rent, did not require a formal delivery, the delivery to the person taking the subscription making him the subscribers' agent to communicate it to any one that would comply with it.

21. *Idaho.*— Broadbent *v.* Johnson, 2 Ida. (Hasb.) 325, 13 Pac. 83.

Indiana.— Smith *v.* Davidson, 45 Ind. 396.

Massachusetts.— Athol Music Hall Co. *v.* Carey, 116 Mass. 471.

Oklahoma.— Powers *v.* Rude, 14 Okla. 381, 79 Pac. 89.

Pennsylvania.— *In re* Helfenstein, 77 Pa. St. 328, 18 Am. Rep. 449; Phipps *v.* Jones, 20 Pa. St. 260, 59 Am. Dec. 708.

Texas.— White *v.* Crosby, (Civ. App. 1897) 43 S. W. 532.

Virginia.— Galt *v.* Swain, 9 Gratt. 633, 60 Am. Dec. 311.

Washington.— Strong *v.* Eldridge, 8 Wash. 595, 36 Pac. 696.

Wisconsin.— Leonard *v.* Lent, 43 Wis. 83; Sun Prairie M. E. Church *v.* Sherman, 36 Wis. 404.

See 45 Cent. Dig. tit. "Subscriptions," § 5.

22. *Alabama.*— Jones *v.* Florence Wesleyan University, 46 Ala. 626.

California.— Grand Lodge I. O. G. T. *v.* Farnham, 70 Cal. 158, 11 Pac. 592.

Illinois.— Richelieu Hotel Co. *v.* International Military Encampment Co., 140 Ill. 248, 29 N. E. 1044, 33 Am. St. Rep. 234.

New York.— Wayne, etc., Collegiate Inst. *v.* Smith, 36 Barb. 576.

Wisconsin.—Hodges *v.* Nalty, 113 Wis. 567, 89 N. W. 535; Superior Consol. Land Co. *v.* Bickford, 93 Wis. 220, 67 N. W. 45.

See 45 Cent. Dig. tit. "Subscriptions," § 5.

23. Jones *v.* Florence Wesleyan University, 46 Ala. 626; Grand Lodge I. O. G. T. *v.* Farn-

tions stipulated are complied with.[24] However, if the subscription prescribes an express method of acceptance this requirement must be complied with.[25] It is not necessary that the subscriber should be notified that the subscription has been accepted.[26] A subscription solicited without previous authorization may be subsequently ratified and accepted by the payee.[27]

IV. CONSIDERATION.[28]

A. In General. A subscription is usually regarded as merely an offer to contribute toward the accomplishment of a proposed object, and being no more than an offer it does not become a contractual promise until supported by a consideration.[29] The statement of the subscription in the form of a loan by the payee to the subscriber will not evade this result.[30] It has even been held that a sub-

ham, 70 Cal. 158, 11 Pac. 592; Wayne, etc., Collegiate Inst. *v.* Smith, 36 Barb. (N. Y.) 576.

24. Superior Consol. Land Co. *v.* Bickford, 93 Wis. 220, 67 N. W. 45.

25. Wiswell *v.* Bresnaham, 84 Me. 397, 24 Atl. 885 (holding that where there was a stipulation that the trustees of a shoe factory fund to be raised by subscription should signify their acceptance in writing such method of acceptance was a condition precedent to enforcing the subscription); Powers *v.* Rude, 14 Okla. 381, 79 Pac. 89.

26. Merchants' Bldg. Imp. Co. *v.* Chicago Exch. Bldg. Co., 210 Ill. 26, 71 N. E. 22, 102 Am. St. Rep. 145; Richelieu Hotel Co. *v.* International Military Encampment Co., 140 Ill. 248, 29 N. E. 1044, 33 Am. St. Rep. 234; Doherty *v.* Arkansas, etc., R. Co., 5 Indian Terr. 537, 82 S. W. 899 [*reversed* on other grounds in 142 Fed. 104, 73 C. C. A. 328]; Emerson *v.* Gano, 19 Ohio Cir. Ct. 655, 10 Ohio Cir. Dec. 813. But see *dictum* in Galt *v.* Swain, 9 Gratt. (Va.) 633, 60 Am. Dec. 311.

27. Middlebury College *v.* Williamson, 1 Vt. 212; Leonard *v.* Lent, 43 Wis. 83.

28. See also CONTRACTS, 9 Cyc. 320 *et seq.*

29. *California.*— Smith *v.* Truebody, 2 Cal. 341.

Massachusetts.— Phillips Limerick Academy *v.* Davis, 11 Mass. 113, 6 Am. Dec. 162; Boutell *v.* Cowdin, 9 Mass. 254.

Minnesota.— Culver *v.* Banning, 19 Minn. 303.

New York.— Twenty-Third St. Baptist Church *v.* Cornell, 117 N. Y. 601, 23 N. E. 177, 6 L. R. A. 807; Albany Presb. Church *v.* Cooper, 112 N. Y. 517, 20 N. E. 352, 8 Am. St. Rep. 767, 3 L. R. A. 468; Hull *v.* Pearson, 38 N. Y. App. Div. 588, 56 N. Y. Suppl. 518; Stoddard *v.* Cleveland, 4 How. Pr. 148.

Ohio.— Johnson *v.* Otterbein University, 41 Ohio St. 527 [*distinguished* in Irwin *v.* Lombard University, 56 Ohio St. 9, 46 N. E. 63, 60 Am. St. Rep. 727, 36 L. R. A. 239]; Sutton *v.* Otterbein University, 7 Ohio Cir. Ct. 343, 4 Ohio Cir. Dec. 627.

Pennsylvania.— Lippincott's Estate, 21 Pa. Super. Ct. 214; Thum's Estate, 5 Pa. Dist. 739, 18 Pa. Co. Ct. 615.

Tennessee.— Foust *v.* Cumberland Presb. Church, 8 Lea 552.

See 45 Cent. Dig. tit. "Subscriptions," § 6.

Necessity of consideration discussed.— In Twenty-Third St. Baptist Church *v.* Cornell, 117 N. Y. 601, 604, 23 N. E. 177, 6 L. R. A. 807, action was brought to recover a subscription made by Mrs. Weeks, defendant's testatrix. The court, in stating the requirement of consideration, said: "It is an insuperable barrier to a recovery by the plaintiff that the subscription of Mrs. Weeks to the fund for the erection of a new church building was merely an executory gift, unsupported by any consideration. The doctrine settled in the recent case of Albany Presb. Church *v.* Cooper, 112 N. Y. 517, 20 N. E. 352, 8 Am. St. Rep. 767, 3 L. R. A. 468, is decisive upon the facts here presented. Since the subscriptions of several furnished no consideration for the promise of any one; since the decedent did not request the corporation to build a new edifice, and the church did not promise that it would; since no endeavor to obtain subscribers was occasioned by the expressed wish or direction of testatrix, but began and was continued irrespective of it; since these facts exclude the existence of a consideration at the date of the promise; the plaintiff is compelled to rely and does rely upon one originating later. The contention is, that the church corporation erected its new edifice and incurred the large cost of its construction in reliance upon these subscriptions, and so in the end, if not in the beginning, a consideration arose to support the promise. That may happen where the expenditure can be said to have proceeded with the knowledge and assent of the subscribers; but here, before any expenditure was made, or any work begun, Mrs. Weeks died. Her gift was unexecuted at her death and revoked by that event; and no after action of the church corporation could change or affect the result. Her executors could not create a new liability where none existed before, and had no authority to bind the estate by any assent to the work of construction, or convert an invalid promise of the testatrix into an enforceable liability of her estate. The promise died when she died, and was merely a good intention which did not survive her." As to what is sufficient ground for recovery in New York see the New York cases cited *infra*, IV, E.

30. Butler University *v.* Scoonover, 114 Ind. 381, 16 N. E. 642, 5 Am. St. Rep. 627.

scription does not amount to so much as an offer which contemplates the formation of a contract, but is simply a statement of an intention to make a gift.[31] Nevertheless the meritorious purposes which are usually the object of subscriptions, or the acts done by way of expenditure of labor or money upon the faith of the subscriptions, have led the courts in the great majority of cases to hold that subscribers' promises are enforceable upon one or more of the grounds enumerated in subsequent sections of this chapter.[32]

B. Work Done or Money Expended in Reliance Upon the Subscription. It is generally held that if work has been done or expenditure has been made upon the faith of, and in reliance upon, the subscription, a consideration is thus furnished for the support of the subscriber's promise.[33] The gratuitous

But if the promise thus reciting that it is a loan assumes the form of a promissory note there is a rebuttable presumption of consideration. Fisher *v.* Ellis, 3 Pick. (Mass.) 322.

31. *In re* Hudson, 54 L. J. Ch. 811, 815, 33 Wkly. Rep. 819, where it is said: "The whole thing from beginning to end was nothing more than this: an intention of this gentleman to contribute to the fund, and an intention of the committee . . . to dispose of that fund according to the purposes for which it was contributed." But in 1881, four years previous to the report of this case, it is stated that Earl Cowper, having been sued upon a subscription made by him paid upon the eve of trial, by the advice of the attorney-general, it having apparently been the opinion of the latter that since work had been done upon the faith of the subscription it was enforceable. *Law Times*, Lond. May 21, 1881. These two cases seem to be the only reported instances of attempted recovery upon subscriptions in England.

32. See *infra*, IV, B, C, D, E, F, G, H; V.

Tendency to allow recovery.—"These subscription contracts are favored in law, and are calculated to foster and encourage public and quasi public enterprises." Merchants' Bldg. Imp. Co. *v.* Chicago Exch. Bldg. Co., 210 Ill. 26, 33, 71 N. E. 22, 102 Am. St. Rep. 145. "The general course of decisions is favorable to the binding obligation of such promises." Irwin *v.* Lombard University, 56 Ohio St. 9, 22. "An attempt to reconcile all the cases which have been adjudged, touching the validity of voluntary engagements to pay money for charitable, educational, religious or other public purposes, would be fruitless; for, while circumstantial differences in the cases will explain and satisfactorily account for some of the diversities in the decisions, it will be found that there is, to some extent, a want of harmony in the principles and rules applied as tests of validity to that class of undertakings. The general principle is recognized in every case, that all simple contracts executory, whether in writing or verbal, must be founded upon a good consideration, and that the want of a legally adequate consideration, that is, a consideration recognized as sufficient in law, will vitiate every executory contract not under seal; still, the objection of a want of consideration for promises like the one before us has not always been regarded with favor; and judges, considering defences of that character as breaches of faith towards the public, and especially towards those engaged in the same enterprise, and an unwarrantable disappointment of the reasonable expectations of those interested, have been willing, nay apparently anxious, to discover a consideration which would uphold the undertaking as a valid contract; and it is not unlikely that some of the cases, in which subscriptions have been enforced at law, have been border cases, distinguished by slight circumstances from agreements held void for a want of consideration." Barnes *v.* Perine, 12 N. Y. 18, 23. See also to the same effect Martin *v.* Meles, 179 Mass. 114, 60 N. E. 397, a case which contains a critical review by Holmes, C. J., of the various theories upon which recovery has been allowed against promisors in subscription papers. And see Gittings *v.* Mayhew, 6 Md. 113, 131, and Presbyterian Bd. of Foreign Missions *v.* Smith, 209 Pa. St. 361, 367, 58 Atl. 689, for other comments upon this tendency to permit recovery.

33. *Alabama.*— Jones *v.* Florence Wesleyan University, 46 Ala. 626.

Arkansas.—Rogers *v.* Galloway Female College, 64 Ark. 627, 44 S. W. 454, 39 L. R. A. 636.

California.— Lasar *v.* Johnson, 125 Cal. 549, 58 Pac. 161; Grand Lodge I. O. G. T. *v.* Farnham, 70 Cal. 158, 11 Pac. 592.

Connecticut.— Berkeley Divinity School *v.* Jarvis, 32 Conn. 412.

Delaware.—Norton *v.* Janvier, 5 Harr. 346.

Georgia.— Wilson *v.* Savannah First Presb. Church, 56 Ga. 554.

Illinois.— Richelieu Hotel Co. *v.* International Military Encampment Co., 140 Ill. 248, 29 N. E. 1044, 33 Am. St. Rep. 234; Hudson *v.* Green-Hill Seminary Corp., 113 Ill. 618; Whitsitt *v.* Pre-emption Presb. Church, 110 Ill. 125; Beach *v.* First M. E. Church, 96 Ill. 177; Pratt *v.* Elgin Baptist Soc., 93 Ill. 475, 34 Am. Rep. 187; Kentucky Baptist Education Soc. *v.* Carter, 72 Ill. 247; Snell *v.* Clinton M. E. Church Soc., 58 Ill. 290; Illiopolis M. E. Church *v.* Garvey, 53 Ill. 401, 5 Am. Rep. 51; Miller *v.* Ballard, 46 Ill. 377; McClure *v.* Wilson, 43 Ill. 356; Thompson *v.* Mercer County, 40 Ill. 379; Griswold *v.* Peoria University, 26 Ill. 41, 79 Am. Dec. 361; Pryor *v.* Cain, 25 Ill. 292; Robertson *v.* March, 4 Ill. 198; Augustine *v.* Methodist Episcopal Soc., 79 Ill. App. 452; Miller *v.* Western College, 71 Ill. App. 587; Kinsley *v.* International Military Encampment Co., 41

promise is by such work done or such expenditure made upon the faith of and

Ill. App. 259; Vierling *v.* Horton, 27 Ill. App. 263; Friedline *v.* Carthage College, 23 Ill. App. 494.

Indiana.—Landwerlen *v.* Wheeler, 106 Ind. 523, 5 N. E. 888; Petty *v.* Church of Christ, 95 Ind. 278; Mullen *v.* Beech Grove Driving Park, 64 Ind. 202; Roche *v.* Roanoke Classical Seminary, 56 Ind. 198; Bingham *v.* Marion County Com'rs, 55 Ind. 113; Northwestern Conference *v.* Myers, 36 Ind. 375; Franklin College *v.* Hurlburt, 28 Ind. 344; Peirce *v.* Ruley, 5 Ind. 69; Johnson *v.* Wabash College, 2 Ind. 555; Woodworth *v.* Veitch, 29 Ind. App. 589, 64 N. E. 932; Garrigus *v.* Home Frontier, etc., Missionary Soc., 3 Ind. App. 91, 28 N. E. 1009, 50 Am. St. Rep. 262.

Indian Territory.— Doherty *v.* Arkansas, etc., R. Co., 5 Indian Terr. 537, 82 S. W. 899 [*reversed* in 142 Fed. 104, 73 C. C. A. 328, upon the ground that there had been no acceptance].

Iowa.— Ft. Madison First M. E. Church *v.* Donnell, 110 Iowa 5, 81 N. W. 171, 46 L. R. A. 858; McCabe *v.* O'Connor, 69 Iowa 134, 28 N. W. 573; Des Moines University *v.* Livingston, 65 Iowa 202, 21 N. W. 564, 57 Iowa 307, 10 N. W. 738, 42 Am. Rep. 42; United Presb. Church *v.* Baird, 60 Iowa 237, 14 N. W. 303; McDonald *v.* Gray, 11 Iowa 508, 79 Am. Dec. 509.

Maine.— Carr *v.* Bartlett, 72 Me. 120; Foxcroft Academy *v.* Favor, 4 Me. 382.

Maryland.—Gittings *v.* Mayhew, 6 Md. 113.

Massachusetts.— Robinson *v.* Nutt, 185 Mass. 345, 70 N. E. 198; Martin *v.* Meles, 179 Mass. 114, 60 N. E. 397; Sherwin *v.* Fletcher, 168 Mass. 413, 47 N. E. 197; Cottage St. M. E. Church *v.* Kendall, 121 Mass. 528, 23 Am. Rep. 286 (*semble*); Davis *v.* Smith, American Oregon Co., 117 Mass. 456; Athol Music Hall Co. *v.* Carey, 116 Mass. 471; Mirick *v.* French, 2 Gray 420; Worcester Medical Inst. *v.* Harding, 11 Cush. 285; Watkins *v.* Ames, 9 Cush. 537; Thompson *v.* Page, 1 Metc. 565; Amherst Academy *v.* Cowls, 6 Pick. 427, 17 Am. Dec. 387; Pembroke Second Precinct Church, etc. *v.* Stetson, 5 Pick. 506; Bryant *v.* Goodnow, 5 Pick. 228; Bridgewater Academy *v.* Gilbert, 2 Pick. 579, 13 Am. Dec. 457; Farmington Academy *v.* Allen, 14 Mass. 172, 7 Am. Dec. 201; Homes *v.* Dana, 12 Mass. 190, 7 Am. Dec. 55.

Michigan.—Waters *v.* Union Trust Co., 129 Mich. 640, 89 N. W. 687; Underwood *v.* Waldron, 12 Mich. 73.

Minnesota.— Albert Lea College *v.* Brown, 88 Minn. 524, 93 N. W. 672, 60 L. R. A. 870; Laramee *v.* Tanner, 69 Minn. 156, 71 N. W. 1028; Bohn Mfg. Co. *v.* Lewis, 45 Minn. 164, 47 N. W. 652.

Missouri.— Kansas City School Dist. *v.* Scheidley, 138 Mo. 672, 40 S. W. 656, 60 Am. St. Rep. 576, 37 L. R. A. 406; Corrigan *v.* Detsch, 61 Mo. 290; Pitt *v.* Gentle, 49 Mo. 74; Workman *v.* Campbell, 46 Mo. 305; Westminster College *v.* Gamble, 42 Mo. 411; Koch *v.* Lay, 38 Mo. 147; Heinrich *v.* Missouri, etc., Coal Co., 102 Mo. App. 229, 76 S. W. 674; Christian University *v.* Hoffman, 95 Mo. App. 488, 69 S. W. 474; McClanahan *v.* Payne, 86 Mo. App. 284; Swain *v.* Hill, 30 Mo. App. 436; James *v.* Clough, 25 Mo. App. 147; Conn *v.* McCollough, 12 Mo. App. 356; Methodist Orphans' Home Assoc. *v.* Sharp, 6 Mo. App. 150.

Montana.— Kane *v.* Downing, 14 Mont. 343, 36 Pac. 355.

New Hampshire.— Osborn *v.* Crosby, 63 N. H. 583, 3 Atl. 429; George *v.* Harris, 4 N. H. 533, 17 Am. Dec. 446.

New Mexico.— Miller *v.* Preston, 4 N. M. 396, 17 Pac. 565.

New York.—Knoxboro Presb. Soc. *v.* Beach, 74 N. Y. 72; Syracuse First Baptist Soc. *v.* Robinson, 21 N. Y. 234 (*semble*); Hull *v.* Pearson, 38 N. Y. App. Div. 588, 56 N. Y. Suppl. 518; Stewart *v.* Hamilton College, 2 Den. 403; McAuley *v.* Billenger, 20 Johns. 89; Whitestown First Religious Soc. *v.* Stone, 7 Johns. 112. For the present New York doctrine see *infra*, IV, E.

North Carolina.— Baptist Female Seminary *v.* Borden, 132 N. C. 476, 44 S. E. 47, 1007.

Ohio.— Irwin *v.* Lombard University, 56 Ohio St. 9, 46 N. E. 63, 60 Am. St. Rep. 727, 36 L. R. A. 239 [*affirming* 7 Ohio Cir. Ct. 269, 4 Ohio Cir. Dec. 590]; Ohio Wesleyan Female College *v.* Higgins, 16 Ohio St. 20; Sperry *v.* Johnson, 11 Ohio 452; Canal Fund Com'rs *v.* Perry, 5 Ohio 56; Farmers' College *v.* McMicken, 2 Disn. 495.

Pennsylvania.— Presbyterian Bd. of Foreign Missions *v.* Smith, 209 Pa. St. 361, 58 Atl. 689; Pierson's Estate, 6 Pa. Dist. 23, 18 Pa. Co. Ct. 651; Kane First Cong. Church *v.* Gillis, 17 Pa. Co. Ct. 614; Stokes' Estate, 14 Phila. 251, 9 Wkly. Notes Cas. 439; Baird's Estate, 13 Phila. 241, 7 Wkly. Notes Cas. 439; *In re* Lippincott, 31 Pittsb. Leg. J. N. S. 219.

Tennessee.— Mt. Carmel Church *v.* Journey, 9 Lea 215; Macon *v.* Sheppard, 2 Humphr. 335; Davis, etc., Bldg., etc., Co. *v.* Caigle, (Ch. App. 1899) 53 S. W. 240.

Texas.— Gulf, etc., R. Co. *v.* Neely, 64 Tex. 344; Cooper *v.* McCrimmin, 33 Tex. 383, 7 Am. Rep. 268, 27 Tex. 113; Doyle *v.* Glasscock, 24 Tex. 200; Hopkins *v.* Upshur, 20 Tex. 89, 70 Am. Dec. 375.

Vermont.— Grand Isle *v.* Kinney, 70 Vt. 381, 41 Atl. 130.

Virginia.— Galt *v.* Swain, 9 Gratt. 633, 60 Am. Dec. 311.

Washington.— Strong *v.* Eldridge, 8 Wash. 595, 36 Pac. 696.

Wisconsin.— Hodges *v.* Nalty, 113 Wis. 567, 89 N. W. 535, 104 Wis. 464, 80 N. W. 726; Superior Consol. Land Co. *v.* Bickford, 93 Wis. 220, 67 N. W. 45; Gibbons *v.* Grinsel, 79 Wis. 365, 48 N. W. 255; La Fayette County Monument Corp. *v.* Magoon, 73 Wis. 627, 43 N. W. 17, 3 L. R. A. 761; Eycleshimer *v.* Van Antwerp, 13 Wis. 546.

United States.— Capelle *v.* Trinity M. E. Church, 5 Fed. Cas. No. 2,392, 11 Nat. Bankr. Reg. 536; Sturgis *v.* Colby, 23 Fed. Cas. No.

in reliance upon the subscription converted into a valid and enforceable contract.[34] The reliance that furnishes a ground for recovery need not have been exclusively upon the promise of the subscriber.[35]

C. Mutual Promises of the Subscribers. Many of the cases allowing recovery upon subscription promises proceed in whole or in part upon the ground that the consideration for a subscriber's promise is to be found in the promises of the other subscribers.[36] But in those jurisdictions where there exists a limitation upon the right of a beneficiary to sue upon a contract to which he is not a party, this doctrine that regards the mutual promises of the subscribers as consideration

13,566, 2 Flipp. 163, 18 Nat. Bankr. Reg. 168.

England.— *In re* Hudson, 54 L. J. Ch. 811, 33 Wkly. Rep. 819.

See 45 Cent. Dig. tit. "Subscriptions," § 7.

34. Kansas City School Dist. *v.* Sheidley, 138 Mo. 672, 40 S. W. 656, 60 Am. St. Rep. 576, 37 L. R. A. 406.

35. Miller *v.* Ballard, 46 Ill. 377.

36. *California.*— Christian College *v.* Hendley, 49 Cal. 347.

Connecticut.— Berkeley Divinity School *v.* Jarvis, 32 Conn. 412 (*semble*); Somers *v.* Miner, 9 Conn. 458.

Georgia.— Rogers *v.* Burr, 105 Ga. 432, 31 S. E. 438, 70 Am. St. Rep. 50; Wilson *v.* Savannah First Presb. Church, 56 Ga. 554; Worth *v.* Daniel, 1 Ga. App. 15, 57 S. E. 898.

Indiana.— Petty *v.* Church of Christ, 95 Ind. 278; Higert *v.* Indiana Asbury University, 53 Ind. 326; Jewett *v.* Salisbury, 16 Ind. 370; Peirce *v.* Ruley, 5 Ind. 69; Rothenberger *v.* Glick, 22 Ind. App. 288, 52 N. E. 811; Current *v.* Fulton, 10 Ind. App. 617, 38 N. E. 419.

Kansas.— White *v.* Scott, 26 Kan. 476, *semble.*

Kentucky.— Curry *v.* Kentucky Western R. Co., 78 S. W. 435, 25 Ky. L. Rep. 1372.

Massachusetts.—Watkins *v.* Eames, 9 Cush. 537; Ives *v.* Sterling, 6 Metc. 310; Pembroke Second Precinct Church, etc. *v.* Stetson, 5 Pick. 506; Phillips Limerick Academy *v.* Davis, 11 Mass. 113, 6 Am. Dec. 162, although it was held in this case that while the promises were upon the same subscription they were not mutual. But these earlier Massachusetts cases which hold that the mutual promises of the subscribers furnish the consideration for a contract upon which the beneficiary or payee may sue have been overruled by Cottage St. M. E. Church *v.* Kendall, 121 Mass. 528, 23 Am. Rep. 286.

Michigan.—Waters *v.* Union Trust Co., 129 Mich. 640, 89 N. W. 687; First Universalist Church *v.* Pungs, 126 Mich. 670, 86 N. W. 235; Allen *v.* Duffie, 43 Mich. 1, 4 N. W. 427, 38 Am. Rep. 159; Comstock *v.* Howd, 15 Mich. 237; Underwood *v.* Waldron, 12 Mich. 73.

Missouri.— McClanahan *v.* Payne, 86 Mo. App. 284; New Lindell Hotel Co. *v.* Smith, 13 Mo. App. 7.

Nevada.—Wheeler *v.* Floral Mill, etc., Co., 9 Nev. 254.

New Hampshire.— Osborn *v.* Crosby, 63 N. H. 583, 3 Atl. 429; Curry *v.* Rogers, 21 N. H. 247; Moore *v.* Chesley, 17 N. H. 151; Congregational Soc. *v.* Perry, 6 N. H. 164, 25 Am. Dec. 455; George *v.* Harris, 4 N. H. 533, 17 Am. Dec. 446. In Curry *v.* Rogers, *supra*, the court says that, although the mutual promises of the subscribers furnish a consideration for a contract, yet the contract is between the subscribers alone and can be enforced only by one who is a subscriber and not by one who is merely a beneficiary. This limitation was, however, not followed in the later case of Osborn *v.* Crosby, *supra.*

New York.— Stewart *v.* Hamilton College, 2 Den. 403 [*overruled* by Hamilton College *v.* Stewart, 1 N. Y. 581, which has since been followed upon this point in New York].

North Carolina.— Baptist Female University *v.* Borden, 132 N. C. 476, 44 S. E. 47, 1007; Pipkin *v.* Robinson, 48 N. C. 152.

Ohio.— Irwin *v.* Lombard University, 56 Ohio St. 9, 46 N. E. 63, 60 Am. St. Rep. 727, 36 L. R. A. 239.

Pennsylvania.— Hostetter *v.* Hollinger, 117 Pa. St. 606, 12 Atl. 741; Pierson's Estate, 6 Pa. Dist. 23, 18 Pa. Co. Ct. 651; Harrisburg Bd. of Trade *v.* Eby, 1 Dauph. Co. Rep. 99; Stokes' Estate, 14 Phila. 251, 9 Wkly. Notes Cas. 439; Hart's Estate, 13 Phila. 226.

Wisconsin.— Lathrop *v.* Knapp, 27 Wis. 214.

United States.— Capelle *v.* Trinity M. E. Church, 5 Fed. Cas. No. 2,392.

New Zealand.—Williams *v.* Hales, 8 New Zealand 100.

See 45 Cent. Dig. tit. "Subscriptions," § 15.

The signing by children of a mutual subscription for the support of their parent is valid, under Civ. Code (1895), § 3661, providing that in mutual subscriptions for a common object the promise of the others is a good consideration for the promise of each, it not being unilateral. Worth *v.* Daniel, 1 Ga. App. 15, 57 S. E. 898.

In Nebraska the doctrine of mutual promises of subscribers as consideration is stated with a modification as follows: Where several promise to contribute to a common object desired by all, the promise of each is a good consideration for the promise of the others, and can be enforced by suit, when the person to whom the subscription runs has incurred obligations on the faith of such subscriptions. Armann *v.* Buel, 40 Nebr. 803, 59 N. W. 515; Homan *v.* Steele, 18 Nebr. 652, 26 N. W. 472; Fremont Ferry, etc., Co. *v.* Fuhrman, 8 Nebr. 99; Mefford *v.* Sell, 3 Nebr. (Unoff.) 566, 92 N. W. 148.

must be rejected and some other consideration be found, in order to enable a beneficiary to sue.[37]

D. Mutual Promises of Subscribers and Payee or Beneficiary. There are cases in which the consideration for the subscriber's promise is found either in the express promise, or in what is regarded as the implied promise, of the payee or beneficiary, to carry out the purpose for which the subscription is made; the acceptance of the subscription being evidence of the implied promise of the payee or beneficiary.[38] But this view has been rejected by some courts, which have urged the objection that the duty of the payee as a recipient of a subscriber's money to carry out the purpose of the subscription would arise from his trusteeship and not from a contractual promise to accomplish the object.[39]

37. Objection to the doctrine of the mutual promises of subscribers as consideration.— In Albany Presb. Church *v.* Cooper, 112 N. Y. 517, 521, 20 N. E. 352, 8 Am. St. Rep. 767, 3 L. R. A. 468, the objection is stated as follows: "It has sometimes been supposed that when several persons promise to contribute to a common object, desired by all, the promise of each may be a good consideration for the promise of others, and this although the object in view is one in which the promisors have no pecuniary or legal interest, and the performance of the promise by one of the promisors would not in a legal sense be beneficial to the others. This seems to have been the view of the chancellor as expressed in Hamilton College *v.* Stewart, when it was before the court of errors (2 Den. (N. Y.) 403, 417), and *dicta* of judges will be found to the same effect in other cases (Pembroke Second Precinct Church *v.* Stetson, 5 Pick. (Mass.) 506, 508; Watkins *v.* Eames, 9 Cush. (Mass.) 537). But the doctrine of the chancellor, as we understand, was overruled when the Hamilton college case came before this court (1 N. Y. 581), as have been also the *dicta* in the Massachusetts cases, by the court in that state, in the recent case of Cottage St. M. E. Church *v.* Kendall, 121 Mass. 528, 23 Am. Rep. 286. The doctrine seems to us unsound in principle. It proceeds on the assumption that a stranger both to the consideration and the promise, and whose only relation to the transaction is that of donee of an executory gift, may sue to enforce the payment of the gratuity for the reason that there has been a breach of contract between the several promisors and a failure to carry out as between themselves their mutual engagement. It is in no proper sense a case of mutual promises, as between the plaintiff and defendant." On the other hand, in Irwin *v.* Lombard University, 56 Ohio St. 9, 20, 46 N. E. 63, 60 Am. St. Rep. 727, 36 L. R. A. 239 the court in discussing mutual promises as consideration for a subscription contract says: "It is true that this doctrine is rejected by the supreme court of Massachusetts in Church *v.* Kendall. But in that state, one for whose benefit a contract is made by others, cannot maintain an action on it for want of privity. While in this state it has long been established that one for whose benefit others contract, upon a consideration sufficient as between themselves, may maintain an action for its enforcement. Emmitt *v.* Brophy, 42 Ohio St. 82; Thompson *v.* Thompson, 4 Ohio St. 333; Crumbaugh *v.* Kugler, 3 Ohio St. 544."

38. *Connecticut.*—North Ecclesiastical Soc. *v.* Matson, 36 Conn. 26.

Indiana.— Rothenberger *v.* Glick, 22 Ind. App. 288, 52 N. E. 811.

Kentucky.— Berryman *v.* Cincinnati Southern R. Co., 14 Bush 755, *semble.*

Maine.— Maine Cent. Inst. *v.* Haskell, 73 Me. 140, 143 (the court saying: "The promise to pay and at least the implied promise to execute, each being a consideration for the other"); Fryeburg Parsonage Fund *v.* Ripley, 6 Me. 442.

Massachusetts.—Martin *v.* Meles, 179 Mass. 114, 60 N. E. 397; Cottage St. M. E. Church *v.* Kendall, 121 Mass. 528, 23 Am. Rep. 286; Ladies' Collegiate Inst. *v.* French, 16 Gray 196; Williams College *v.* Danforth, 12 Pick. 541.

North Carolina.— Baptist Female University *v.* Borden, 132 N. C. 476, 44 S. E. 47, 1007, *semble.*

Ohio.— Ohio Wesleyan Female College *v.* Higgins, 16 Ohio St. 20, *semble.* But see Ohio decision cited in the following note.

Pennsylvania.— Presbyterian Bd. of Foreign Missions *v.* Smith, 209 Pa. St. 361, 58 Atl. 689.

Texas.—Williams *v.* Rogan, 59 Tex. 438.

Vermont.— Troy Conference Academy *v.* Nelson, 24 Vt. 189; State Treasurer *v.* Cross, 9 Vt. 289, 31 Am. Dec. 626 (*semble*); State University *v.* Buell, 2 Vt. 48 (*semble*).

See 45 Cent. Dig. tit. "Subscriptions," § 6.

39. This objection is stated in Johnson *v.* Otterbein University, 41 Ohio St. 527, 531, as follows: "But grant, that by acceptance of the [subscription] note, the university impliedly agreed to comply with the direction, that is to apply the proceeds to the payment of its indebtedness. Is that a promise to do an act of advantage to Johnson, or of detriment to the institution in the sense requisite to constitute it a legal consideration? We think it is not. If the writing had been in form a promissory note, or a mere promise to make a donation without any qualification, a necessary implication of duty to apply its proceeds to proper corporate objects would arise upon acceptance. In the absence of special circumstances we fail to see how a duty to apply the fund to a particular corporate purpose, can better serve as a consideration than a duty to apply it to

E. Request. Recovery is allowed where the promisor expressly requests that acts be done in furtherance of the purpose of the subscription and they are performed pursuant to the request,[40] or where the subscription paper and other facts of the case warrant the inference of an implied request to accomplish the object.[41] The request may be subsequent to the execution of the subscription

corporate purposes not specified. The duty in either case is implied. The claim made involves the proposition that a promise in writing to make a gift to an educational institution is valid on acceptance. This is denied in Ohio Wesleyan Female College *v.* Higgins, 16 Ohio St. 20. It, however, finds some support in the authorities." Another statement of the objection is found in Albany Presb. Church *v.* Cooper, 112 N. Y. 517, 523, 20 N. E. 352, 8 Am. St. Rep. 767, 3 L. R. A. 468, the court saying: "It may be assumed from the fact that the subscriptions were to be paid to the trustees of the church for the purpose of paying the mortgage, that it was understood that the trustees were to make the payment out of the moneys received. But the duty to make such payment, in case they accepted the money, would arise out of their duty as trustees. This duty would arise upon the receipt of the money, although they had no antecedent knowledge of the subscription. They did not assume even this obligation by the terms of the subscription, and the fact that the trustees applied money, paid on subscriptions, upon the mortgage debt, did not constitute a consideration for the promise of the defendant's intestate."

40. Richmondville Union Seminary, etc. *v.* Brownell, 37 Barb. (N. Y.) 535 [*affirmed* in 34 N. Y. 379]; Reformed Protestant Dutch Church *v.* Brown, 29 Barb. (N. Y.) 335, 17 How. Pr. 287 [*affirmed* in 4 Abb. Dec. 31, 24 How. Pr. 76].

41. Rogers *v.* Galloway Female College, 64 Ark. 627, 44 S. W. 454, 39 L. R. A. 636; Keuka College *v.* Ray, 167 N. Y. 96, 60 N. E. 325; Eastern Plank Road Co. *v.* Vaughan, 14 N. Y. 546; Barnes *v.* Perine, 12 N. Y. 18; Hamilton College *v.* Stewart, 1 N. Y. 581; Hull *v.* Pearson, 38 N. Y. App. Div. 588, 56 N. Y. Suppl. 518; Rochester Cent. Presb. Church *v.* Thompson, 8 N. Y. App. Div. 565, 40 N. Y. Suppl. 912; Hutchins *v.* Smith, 46 Barb. (N. Y.) 235; Van Rensselaer *v.* Aikin, 44 Barb. (N. Y.) 547 [though *reversed* upon another point in 44 N. Y. 126]; Wayne, etc., Collegiate Inst. *v.* Smith, 36 Barb. (N. Y.) 576; Reformed Protestant Dutch Church *v.* Hardenbergh, 48 How. Pr. (N. Y.) 414; Hammond *v.* Shepard, 29 How. Pr. (N. Y.) 188; Philomath College *v.* Hartless, 6 Oreg. 158, 25 Am. Rep. 510; Pierson's Estate, 6 Pa. Dist. 23, 18 Pa. Co. Ct. 651, *semble*.

The doctrine of implied request as a foundation for recovery in subscription cases is stated and applied as follows in Keuka College *v.* Ray, 167 N. Y. 96, 100, 60 N. E. 325, the action having been brought against Ray who had subscribed upon the solicitation of Ball, the president of the board of trustees of plaintiff college: "In this peculiar class of agreements to pay money, those which are conditioned, merely, upon all subscriptions for a like purpose aggregating a certain amount by a certain day, are deemed to lack the legal consideration to make them enforceable. The doctrine, however, may be regarded as well established that, if money is promised to be paid upon the condition that the promisee will do some act, or perform certain services, then the latter, upon performance of the condition, may compel payment. Nor need a request to the promisee to perform the services be expressed in the instrument; it may be implied. (Hamilton College *v.* Stewart, 1 N. Y. 581; Barnes *v.* Perine, 12 N. Y. 18; Albany Presb. Church *v.* Cooper, 112 N. Y. 517, 20 N. E. 352, 8 Am. St. Rep. 767, 3 L. R. A. 468.) In the latter case, Judge Andrews reasserts the doctrine, as laid down in earlier cases, that a naked promise to pay money, bare of any condition, accepted by the promisee, to do something, will not be sustained; but he, very distinctly, recognizes the rule that where there is a request to the promisee to go on and render services, or to incur liabilities, on the faith of a subscription, which request is complied with, the subscription would be binding. It may be observed that the difficulty in the case last mentioned, and which prevented the maintenance of the action upon the defendant's subscription, was, as Judge Andrews stated, that there was 'no evidence, express or implied, on the face of the subscription paper, nor any evidence outside of it, that the corporation, or its trustees, did, or undertook to do, anything on the invitation or request of the subscribers.' Now the evidence of the witness Ball showed that the plaintiff was provisionally chartered as a college and that it was necessary to raise a certain sum of money to entitle it to a full charter; that a large sum had been promised, conditionally upon $20,000 being raised by a certain time from others, and that the defendant's promise to pay $500 was a step in the plaintiff's proceeding, which invited it to continue its efforts and whereby it was, impliedly, requested to do so and to expend the incidental time and money in accomplishing the purpose." In Philomath College *v.* Hartless, 6 Oreg. 158, 164, 25 Am. Rep. 510, the doctrine is stated as follows: "While the courts, rather than violate an old and established rule of law, hold that a naked promise to pay money for a public object cannot be enforced for the want of a consideration, they have also decided, with great unanimity, that if the promise itself, or any other promise upon which it is founded, contains a request, or that which by any fair construction can be construed as a request, to the trustees, or others representing the institution for whose benefit the promise is made, to do any act, or to incur any expense, or to undergo any inconvenience, and such institution does the

paper.[42] A subscription invalid at the time for want of consideration may be made valid and binding by a consideration arising subsequently between the subscriber and the beneficiary.[43]

F. Benefit to the Promisor. It has been held occasionally that the object being meritorious, and beneficial to the promisor, this benefit to him, although it is to be enjoyed by him in common with other persons, or even with the public generally, furnishes a consideration for the promise.[44]

G. Statutory Duty of the Promisee to Disburse the Fund. In a few cases the promise has been supported partly or wholly upon the theory that if the beneficiary has been authorized, by its own charter or by other legislation, to receive money and appropriate it to the purpose of the subscription, then such legislation together with the promise of the subscriber creates a legal obligation to pay the subscription,[45] the court saying either that the legal duty imposed upon the beneficiary to expend the fund constitutes a consideration,[46] or expressly placing the right to recover under these circumstances upon the ground of public policy.[47]

H. Moral Obligation. While in most instances there is undoubtedly a

act, or incurs the expense, or submits to the inconvenience, this request and performance on the behalf of the institution, is a sufficient consideration to support the promise." For further discussion of implied request see also Barnes *v.* Perine, 12 N. Y. 18.

42. Lasar *v.* Johnson, 125 Cal. 549, 58 Pac. 161; Roberts *v.* Cobb, 103 N. Y. 600, 9 N. E. 500; Barnes *v.* Perine, 12 N. Y. 18.

43. Albany Presb. Church *v.* Cooper, 112 N. Y. 517, 20 N. E. 352, 8 Am. St. Rep. 767, 3 L. R. A. 468.

44. Detroit First Universalist Church *v.* Pungs, 126 Mich. 670, 86 N. W. 235; Comstock *v.* Howd, 15 Mich. 237; Underwood *v.* Waldron, 12 Mich. 73; Pitt *v.* Gentle, 49 Mo. 74; Thomas *v.* Grace, 15 U. C. C. P. 462; Hammond *v.* Small, 16 U. C. Q. B. 371.

Benefit to the promisor.— In Pitt *v.* Gentle, 49 Mo. 74, 77, defendant was sued upon a subscription made to aid in rebuilding a mill, and the court said: "In the West, mills of this kind are essential to enable families to carry on an important branch of domestic industry; and besides, they form *nuclei* of settlements and enhance the value of property where they are located. The defendant, as well as his neighbors, was personally interested in having this one rebuilt, and may be supposed to have been moved in making his subscription by considerations of private interest as well as of benevolence. I have, then, no hesitation in holding that the defendant and the public had sufficient interest in the undertaking to authorize the plaintiffs to trust to his promise to aid." And in Comstock *v.* Howd, 15 Mich. 237, 244, the court says: "We see no difficulty upon the question of a consideration. The object was a meritorious one, for which people generally are willing to expend money, and which, therefore, 'must be regarded as worth money when it is promised: Underwood *v.* Waldron, 12 Mich. 73, 90."

45. Kentucky Female Orphan School *v.* Fleming, 10 Bush (Ky.) 234; Collier *v.* Baptist Education Soc., 8 B. Mon. (Ky.) 68; Irwin *v.* Lombard University, 56 Ohio St. 9, 46 N. E. 63, 60 Am. St. Rep. 727, 36 L. R. A. 239; Ohio Wesleyan Female College *v.* Higgins, 16 Ohio St. 20; Canal Fund Com'rs *v.* Perry, 5 Ohio 56.

46. In Kentucky Female Orphan School *v.* Fleming, 10 Bush (Ky.) 234, 238, where the action was brought upon a subscription note the court said: "The note was no doubt given for a donation intended to be made to appellants, which by section 2 of their charter (Sess. Acts 1846–47, p. 216) they were authorized to receive. The law made it their duty to apply the fund to carrying out the charitable and benevolent purpose of the institution and the donor. This obligation furnished consideration enough to uphold the promise to pay. (Collier *v.* Baptist Education Soc., 8 B. Mon. (Ky.) 68)."

47. **Public policy.**— In Irwin *v.* Lombard University, 56 Ohio St. 9, 21, 46 N. E. 63, 60 Am. St. Rep. 727, 36 L. R. A. 239, the court in stating the grounds of public policy which underlie the right to recover, says: "Institutions of this character are incorporated by public authority for defined purposes. Money recovered by them on promises of this character, cannot be used for the personal and private ends of an individual, but must be used for the purposes defined. To this use the university is restricted not only by the law of its being but as well by the obligations arising from its acceptance of the promise. A promise to give money to one to be used by him according to his inclination and for his personal ends is prompted only by motive. But a promise to pay money to such an institution to be used for such defined and public purposes rests upon consideration. The general course of decisions is favorable to the binding obligation of such promises. They have been influenced, not only by such reasons as those already stated, but in some cases, at least by state policy as indicated by constitutional and statutory provisions. The policy of this state, as so indicated, is promotive of education, religion and philanthropy. In addition to the declarations of the constitution upon the subject, the policy of the state is indicated by numerous legislative enactments providing for the incor-

strong moral obligation to pay a promised subscription, and such obligation has generally moved the courts to discover a technical consideration for the promise, nevertheless, in apparently only two cases have the subscriptions been enforced explicitly upon the ground that the promise is supported by the moral obligation.[48]

V. ESTOPPEL.

While the cases that allow recovery of subscriptions upon the ground of expenditure made, or work done, in reliance upon the subscription, usually state the reason in terms of consideration,[49] it has been held that the promise can really be operative only by way of estoppel;[50] and there are some cases where expenditure having been made or work done, on the faith of the subscription, the court has placed the right of recovery clearly upon the ground of an estoppel invoked against the promisor.[51]

VI. REVOCATION AND LAPSE.

A. Revocation by Notice. The subscription may be revoked upon notice[52] by the subscriber, if the subscription has not yet been accepted and no consid-

poration of colleges, churches and other institutions of philanthropy, which are intended to be perpetual, and which not only for their establishment, but for their perpetual maintenance, are authorized to receive contributions from those who are in sympathy with their purposes and methods — the only source from which, in view of their nature, their support can be derived. Looking to the plainly declared purpose of the law making department, promises made with a view to discharging the debts of such institutions, to providing the means to give them greater stability and the means for the employment of teachers, to establish endowment funds to give them greater stability and efficiency, and whatever may be necessary or helpful to accomplish their purposes or secure their permanency must be held valid. A view which omits considerations of this character is too narrow to be technically correct."

Where the purpose is discretionary.— But in Kansas City School Dist. *v.* Sheidley, 138 Mo. 672, 40 S. W. 656, 60 Am. St. Rep. 576, 37 L. R. A. 406, it was held that where the discretion to establish a library is to be exercised by a board of education, in view of all the circumstances, the rule that the performance of an act legally incumbent on the party performing is not a sufficient consideration has no application to a subscription made in consideration of the undertaking of the board to establish a library, they not being bound by law to erect the library.

48. Caul *v.* Gibson, 3 Pa. St. 416; Hart's Estate, 13 Phila. (Pa.) 226.

49. **Expenditures or work as consideration.** — In commenting upon expenditures or work in reliance upon the subscription as furnishing a legal consideration, Holmes, C. J., says in Martin *v.* Meles, 179 Mass. 114, 116, 60 N. E. 397: "In the later Massachusetts cases more weight has been laid on the incurring of other liabilities and making expenditures on the faith of the defendant's promise than on the counter promise of the plaintiff. Sherwin *v.* Fletcher, 168 Mass. 413, 47 N. E. 197; Cottage St. M. E. Church *v.* Kendall, 121 Mass. 528, 23 Am. Rep. 286. Of course the mere fact that a promisee relies upon a promise made without other consideration does not impart validity to what before was void. Bragg *v.* Danielson, 141 Mass. 195, 196, 4 N. E. 622. There must be some ground for saying that the acts done in reliance upon the promise were contemplated by the form of the transaction either impliedly or in terms as the conventional inducement, motive and equivalent for the promise. But courts have gone very great lengths in discovering the implication of such an equivalence, sometimes perhaps even having found it in matters which would seem to be no more than conditions or natural consequences of the promise."

50. **Upon estoppel** as constituting the true ground of recovery, the court, in Reimensnyder *v.* Gans, 110 Pa. St. 17, 20, 2 Atl. 425, says: "A subscription to a charity embodies in it no previous consideration; hence . . . it can be operative only by way of estoppel; and unless others have been thereby induced to subscribe, or some undertaking has been commenced, or continued, on the faith of it, it cannot be regarded as a binding contract." A contract of this kind is enforceable rather by way of estoppel than on the ground of consideration.

51. *Illinois.*— Beatty *v.* Toledo Western College, 177 Ill. 280, 52 N. E. 432, 69 Am. St. Rep. 242, 42 L. R. A. 797.

Indiana.— Landwerlen *v.* Wheeler, 106 Ind. 523, 5 N. E. 888.

Iowa.— Simpson Centenary College *v.* Tuttle, 71 Iowa 596, 33 N. W. 74.

Michigan.—Wesleyan Seminary *v.* Fisher, 4 Mich. 515.

Missouri.— Kansas City School Dist. *v.* Sheidley, 138 Mo. 672, 40 S. W. 656, 60 Am. St. Rep. 576, 37 L. R. A. 406.

Ohio.— Doane *v.* Pickaway Treasurer, Wright 752.

Pennsylvania.— Reimensnyder *v.* Gans, 110 Pa. St. 17, 2 Atl. 425; Ryerss *v.* Blossburg Presb. Cong., 33 Pa. St. 114.

Vermont.— Troy Conference Academy *v.* Nelson, 24 Vt. 189.

52. Davis, etc., Bldg., etc., Co. *v.* Caigle,

eration has been furnished therefor,[53] but not after there has been an acceptance and a consideration furnished.[54]

B. Lapse by Death or Insanity. A subscription lapses by the death of the subscriber, if that event occurs before there is an acceptance and before a consideration is furnished,[55] but not thereafter.[56] The lapse of the subscription by the subsequent insanity of the subscriber is controlled by the same rules that govern the lapse of the subscription by death.[57]

VII. FRAUD AND MISREPRESENTATION.

A. In General. If the execution of a contract to give a subscription is induced by a fraudulent representation of fact, it is not binding upon the subscriber; the fraud affords a defense.[58] It is essential, however, that the fraud should relate to the subject-matter of the contract.[59]

B. Fictitious Subscriptions. One of the more common forms of fraudulent representation in subscription contracts is the fictitious subscription, made only for the purpose of inducing others to subscribe in good faith.[60] While such

(Tenn. Ch. App. 1899) 53 S. W. 240; Hodges *v.* Nalty, 113 Wis. 567, 89 N. W. 535.

53. *California.*— Grand Lodge I. O. G. T. *v.* Farnham, 70 Cal. 158, 11 Pac. 592.

Illinois.— Beach *v.* First M. E. Church, 96 Ill. 177; Augustine *v.* Methodist Episcopal Soc., 79 Ill. App. 452.

Iowa.—American L. Ins. Co. *v.* Melcher, 132 Iowa 324, 109 N. W. 805.

Michigan.— Solomon *v.* Penoyar, 89 Mich. 11, 50 N. W. 644.

Missouri.— McClanahan *v.* Payne, 86 Mo. App. 284.

United States.— Doherty *v.* Arkansas, etc., R. Co., 142 Fed. 104, 73 C. C. A. 328 [*reversing* 5 Indian Terr. 537, 82 S. W. 899].

See 45 Cent. Dig. tit. "Subscriptions," § 20.

Notice to agent.— Persons making a gratuitous subscription were justified in giving notice of withdrawal to the person who had possession of the paper and secured the names thereto, whether he held the same in his own right or as agent for the real party in interest. American L. Ins. Co. *v.* Melcher, 132 Iowa 324, 109 N. W. 805.

Insufficient notice.— Removal from a city where the church for which the subscription was given is located does not operate as notice of revocation. Wilson *v.* Savannah First Presb. Church, 56 Ga. 554.

54. *Illinois.*— Snell *v.* Clinton M. E. Church Soc., 58 Ill. 290.

Indiana.— Bingham *v.* Marion County, 55 Ind. 113; Rothenberger *v.* Glick, 22 Ind. App. 288, 52 N. E. 811; Current *v.* Fulton, 10 Ind. App. 617, 38 N. E. 419.

Indian Territory.— Doherty *v.* Arkansas, etc., R. Co., 5 Indian Terr. 537, 82 S. W. 899 [*reversed* on other grounds in 142 Fed. 104, 73 C. C. A. 328].

Iowa.— Davis *v.* Campbell, 93 Iowa 524, 61 N. W. 1053.

Massachusetts.—Athol Music Hall Co. *v.* Carey, 116 Mass. 471.

Michigan.— Conrad *v.* La Rue, 52 Mich. 83, 17 N. W. 706.

See 45 Cent. Dig. tit. "Subscriptions," § 20.

55. Grand Lodge I. O. G. T. *v.* Farnham, 70 Cal. 158, 11 Pac. 592; Beach *v.* Fairbury First M. E. Church, 96 Ill. 177; Pratt *v.* Elgin Baptist Soc., 93 Ill. 475, 34 Am. Rep. 187; Twenty-Third St. Baptist Church *v.* Cornell, 117 N. Y. 601, 23 N. E. 177, 6 L. R. A. 807; *In re* Helfenstein, 77 Pa. St. 328, 18 Am. Rep. 449; Phipps *v.* Jones, 20 Pa. St. 260, 59 Am. Dec. 708; Kane First Cong. Church *v.* Gillis, 17 Pa Co. Ct. 614; Stokes' Estate, 9 Wkly. Notes Cas. (Pa.) 439.

Where a subscription has lapsed by the subscriber's death, it cannot thereafter, by any acts showing acceptance, be made good as against his estate. Grand Lodge I. O. G. T. *v.* Farnham, 70 Cal. 158, 11 Pac. 592.

56. Friedline *v.* Carthage College, 23 Ill. App. 494; Waters *v.* Union Trust Co., 129 Mich. 640, 89 N. W. 687; Albert Lea College *v.* Brown, 88 Minn. 524, 93 N. W. 672, 60 L. R. A. 870.

57. Beach *v.* Fairbury First M. E. Church, 96 Ill. 177; Kansas City School Dist. *v.* Sheidley, 138 Mo. 672, 40 S. W. 656, 60 Am. St. Rep. 576, 37 L. R. A. 406.

58. Highland University Co. *v.* Long, 7 Kan. App. 173, 53 Pac. 766; Chicago Bldg., etc., Co. *v.* Yell, 129 Mich. 517, 89 N. W. 329; Moore *v.* Universal El. Co., 122 Mich. 48, 80 N. W. 1015; Gerner *v.* Church, 43 Nebr. 690, 62 N. W. 51. See also Richelieu Hotel Co. *v.* International Military Encampment Co., 140 Ill. 248, 29 N. E. 1044, 33 Am. St. Rep. 234.

What does not constitute fraud.— The mere fact that the person who wrote down names and amounts to a subscription paper had no authority to do so does not raise a presumption that the person taking the subscription had notice of that fact and his statement to a subscriber that the persons thus put down as subscribers were subscribers does not indicate a fraudulent purpose. Scott *v.* Blanton, 7 Ky. L. Rep. 379.

59. Blair *v.* Buttolph, 72 Iowa 31, 33 N. W. 349, holding that where the condition of a subscription was that a railroad should be constructed to a designated point, the subscriber was not relieved of liability on the subscription because of false representations that the company intended to construct an additional line of road.

60. New London Literary, etc., Inst. *v.* Prescott, 40 N. H. 330; New York Exch. Co.

fictitious subscription is a defense to those who subscribe in good faith, the fictitious subscriber himself is estopped by his fraudulent representation from denying the validity of his own promise.[61]

C. Opinions. A subscription contract is, however, not affected by representations that are so loose and general,[62] or are so manifestly mere statements of opinion,[63] that the promisee cannot be deemed to have relied upon them as being statements of fact.

D. Innocent Misrepresentation. A false representation if made innocently has been held to be no defense to a subscriber.[64]

E. Promissory Representations. Where a representation which induced the subscription is promissory in its nature, and not a statement of existing fact, it has been held that the contract cannot be avoided by the subscriber because of such misrepresentation,[65] although there is authority to the contrary.[66]

VIII. ILLEGALITY.

A. In General. A subscription which has for its purpose the accomplishment of ends that are in contravention of public policy is invalid; for example, a subscription to secure the location of a railway station on a particular site, if such location is at the sacrifice of the interests of the public.[67] A contract whereby certain citizens of a town agreed to pay a specified sum to aid in the erection of a power plant, in order to increase the facilities for furnishing electric light to the town, is not illegal on its face.[68]

B. Subscriptions Made on Sunday. Whether a Sunday subscription is illegal depends upon the construction which in any particular state is put upon the state statute providing against the violation of Sunday. As these statutes usually except from their operation works of charity or necessity, Sunday subscriptions have been held not to come within their prohibition.[69]

C. Contracts Ultra Vires. The legality of subscriptions made to public officers or to public corporations in aid of public works has occasionally been contested upon the ground of lack of authority in the beneficiary to accept and use the subscriptions, but the legality of such subscriptions has been upheld.[70] So too the validity of subscriptions to private corporations has in some cases been contested upon the same ground.[71]

v. De Wolf, 31 N. Y. 273; Blodgett *v.* Morrill, 20 Vt. 509; Middlebury College *v.* Loomis, 1 Vt. 189.

61. Blodgett *v.* Morrill, 20 Vt. 509.

62. Gorman *v.* Carroll, 7 Allen (Mass.) 199.

63. Davis *v.* Campbell, 93 Iowa 524, 61 N. W. 1053; Chambers *v.* Kentucky Baptist Education Soc., 1 B. Mon. (Ky.) 215.

64. Scott *v.* Blanton, 7 Ky. L. Rep. 379.

65. Paddock *v.* Bartlett, 68 Iowa 16, 25 N. W. 906; Perkins *v.* Bakrow, 45 Mo. App. 248.

66. Collinson *v.* Jefferies, 21 Tex. Civ. App. 653, 54 S. W. 28.

67. Berryman *v.* Cincinnati Southern R. Co., 14 Bush (Ky.) 755; Workman *v.* Campbell, 46 Mo. 305.

68. Sutton *v.* Rann, 149 Mich. 35, 112 N. W. 721.

69. Bryan *v.* Watson, 127 Ind. 42, 26 N. E. 666, 11 L. R. A. 63 [*overruling* Catlett *v.* Sweetser Station M. E. Church, 62 Ind. 365, 30 Am. Rep. 197]; Ft. Madison First M. E. Church *v.* Donnell, 110 Iowa 5, 81 N. W. 171, 46 L. R. A. 858; Allen *v.* Duffie, 43 Mich. 1, 4 N. W. 427, 38 Am. Rep. 159; Dale *v.* Knepp, 98 Pa. St. 389, 38 Am. Rep. 165 note.

70. Hall *v.* Virginia, 91 Ill. 535; Bingham *v.* Marion County, 55 Ind. 113; Stilson *v.* Lawrence County, 52 Ind. 213; State *v.* Johnson, 52 Ind. 197; Canal Fund Com'rs *v.* Perry, 5 Ohio 56; Hassenzahl *v.* Bevins, 24 Ohio Cir. Ct. 173; State Treasurer *v.* Cross, 9 Vt. 289, 31 Am. Dec. 626.

The fact that the whole sum subscribed exceeded the amount to be raised is no defense to an action to recover a subscription, but the subscription should abate *pro tanto*. State Treasurer *v.* Cross, 9 Vt. 289, 31 Am. Dec. 626.

71. Instances.— In Amherst Academy *v.* Cowls, 6 Pick. (Mass.) 427, 17 Am. Dec. 387, it was held that the trustees of an academy incorporated "to promote morality, piety and religion, and for the instruction of youth in the learned languages, and in such arts and sciences as are usually taught in other academies," are capable of procuring subscriptions and taking notes to constitute a fund to found an institution "for the classical or academical and collegiate education of indigent young men, with a sole view to the christian ministry," to be incorporated with the academy. In Underwood *v.* Waldron, 12 Mich. 73, where the charter of a college located it at S, and a

IX. CONSTRUCTION.

The rules applicable generally to the construction of written contracts [72] govern the construction of subscription contracts. The contract will be construed with reference to the intent of the parties at the time, and the court will consider the subject-matter of the agreement, the inducement which influenced the sub-

subscription was given for the purpose of erecting a college building therefor at H, the subscription was held invalid, as for a purpose not authorized by law, in the absence of a showing that it was given as an inducement to the college to obtain legislative authority to remove it to H.

72. See CONTRACTS, 9 Cyc. 577 *et seq.*

Instances.— Rogers *v.* Galloway Female College, 64 Ark. 627, 44 S. W. 454, 39 L. R. A. 636 (where citizens of the town of S had subscribed a fund for the location of a college "in" S, and the town was in part outside the corporate limits, and it was held that the college representatives were bound to locate the college in the town, but not necessarily inside the corporate limits); Lasar *v.* Johnson, 125 Cal. 549, 58 Pac. 161 (where the word "entertainment," as used in a subscription for the purpose of entertaining a large number of strangers, constituting an organized body, by the resident and business men of a city, was held not synonymous with "board," and limited to the ordinary necessaries of life); Merchants' Bldg. Imp. Co. *v.* Chicago Exch. Bldg. Co., 210 Ill. 26, 71 N. E. 22, 102 Am. St. Rep. 145 (where a subscription was on condition that the Chicago stock exchange should occupy the first or second floor, or both, of a building about to be erected, and that one of the main entrances to the stock exchange room should be from a certain street, and there was an entrance to the building from that street, but the stock exchange occupied the second floor, it was held to be a question for the jury whether the entrance was a main entrance; also where the subscription of a certain sum annually was payable to the owners of certain premises while the Chicago stock exchange should occupy them, for not more than fifteen years, and by another writing the payments were to be made only on condition that the owners should, before a certain date, enter into a contract with the stock exchange to occupy the premises in accordance with the terms of the subscription, it was held not necessary that the contract with the stock exchange should be binding on it for fifteen years, to make the subscription binding); Richelieu Hotel Co. *v.* International Military Encampment Co., 140 Ill. 248, 29 N. E. 1044, 33 Am. St. Rep. 234 (where a subscription paper reciting that the signers "subscribe the sums set opposite our respective names" and containing other language indicating that the intention was to subscribe sums of money, followed by subscribers' names, with figures opposite, of which one has the figures "1,000" opposite, was taken to be, as to such subscriber, a subscription of one thousand dollars); Cottage Hospital *v.* Merrill, 92 Iowa 649, 61 N. W. 490 (where a subscription paper recited that, whereas the managers of a certain hospital are about to erect a building, "I do hereby subscribe for this purpose the sum of one hundred dollars. . . . And, further, as a soldiers' memorial, I agree to support three beds in said hospital, at a cost of two hundred and fifty dollars each per annum, for ten years from date of completion of said building. . . . These beds all for the use of soldiers, but always for use when there are no soldier applicants"; and it was held that the instrument should not be construed as two separate contracts — one for one hundred dollars, and one for the support of the beds — so as to make the latter void for want of consideration, because there was no promise by the hospital to set apart such beds for the use and benefit of soldiers); Gittings *v.* Mayhew, 6 Md. 113 (where M, as treasurer of a subscription fund for the purpose of erecting an "athenæum," sued G, one of the subscribers, for the amount by him subscribed, and it was held that the objection that the term "athenæum" conveyed to the mind no definite idea, and that the altered contract is therefore void for want of a sufficient and certain subject, was not a sufficient objection to the validity of the subscription); Syracuse First Baptist Soc. *v.* Robinson, 21 N. Y. 234 (where a promise to give toward building a church "a lease of [a certain house] for three years, which at present rent, is $516," was construed, not as giving a lease of the house, but as a contract to pay the amount receivd from the rent); Boyce *v.* Stringfellow, (Tex. Civ. App. 1908) 114 S. W. 652 (a contract between a promoter of a proposed railroad and certain subscribers provided that the promoter would cause the railroad company to be organized, and that the company would build a line to A, where it would connect with two specified railroads; and the subscribers agreed to procure a right of way, depot grounds, etc., at their expense, according to a proposition of a general solicitor attached to the contract, and which contained a provision to "give the company whatever right of way, depot grounds, etc., it may 'require' at A;" and it was held, in view of the object to be attained — the connection with the other railroads — all that the company could "require" of the subscribers were right of way, depot grounds, etc., reasonably necessary to accomplish the connection, and it was not entitled to a right of way through the town beyond the point of connection required by the road for an ultimate extension in that direction.

scription, the circumstances under which it was made, and the phraseology thereof.[73]

X. ASSIGNMENT.

The contractual right against the subscriber is assignable if the subscription paper expressly [74] or by implication [75] contemplates an assignment.

XI. TITLE TO FUNDS SUBSCRIBED.

The title to funds subscribed and paid upon a subscription, or to property purchased with the funds, depends upon the intention of the subscribers.[76] It has been held that where the subscribed funds have been paid to the committee which raised the subscription, the title to the funds did not thereby pass to the beneficiary.[77] If, however, the subscription list to which the subscribers' names are signed is headed, "Subscriptions and donations to" the beneficiary, and the money is received by its treasurer, title to the funds passes to the beneficiary.[78]

XII. PERFORMANCE OF CONDITIONS.[79]

A. In General. The conditions prescribed by the subscription contract must be complied with before recovery can be had thereon,[80] and that too, although

73. St. Louis, etc., R. Co. *v.* Houck, 120 Mo. App. 634, 97 S. W. 963. See also Rogers *v.* Galloway Female College, 64 Ark. 627, 44 S. W. 454, 39 L. R. A. 636; State *v.* Old Town Bridge Corp., 85 Me. 17, 26 Atl. 947.

74. Vannoy *v.* Duprez, 72 Ind. 26; Eastern Plank Road Co. *v.* Vaughan, 14 N. Y. 546.

75. *Massachusetts.*—Amherst Academy *v.* Cowls, 6 Pick. 427, 17 Am. Dec. 387.

Missouri.—Southern Hotel Co. *v.* Chouteau, 53 Mo. 572.

Nebraska.—Gerner *v.* Church, 43 Nebr. 690, 62 N. W. 51.

New York.— Van Rensselaer *v.* Aikin, 44 N. Y. 126.

Tennessee.— Mt. Carmel Church *v.* Journey, 9 Lea 215.

Vermont.— Grand Isle *v.* Kinney, 70 Vt. 381, 41 Atl. 130.

Washington.— Mann *v.* O'Neil, 29 Wash. 115, 69 Pac. 635.

Wisconsin.— Rockwell *v.* Daniels, 4 Wis. 432.

See 45 Cent. Dig. tit. "Subscriptions," § 18.

76. Downes *v.* Francestown Union Cong. Soc., 63 N. H. 151.

77. Larrimer *v.* Murphy, 72 Ark. 552, 82 S. W. 168; Bayou Sara *v.* Harper, 15 La. Ann. 233; Commercial Travelers' Home Assoc. *v.* McNamara, 95 N. Y. App. Div. 1, 88 N. Y. Suppl. 443.

78. Church of Redeemer *v.* Crawford, 43 N. Y. 476 [*reversing* 5 Rob. 100].

79. **Performance of contracts** generally see CONTRACTS, 9 Cyc. 601 *et seq.*

80. *Indiana.*— Suit *v.* Warren School Tp., 8 Ind. App. 655, 36 N. E. 291.

Iowa.— Keys *v.* Weaver, 95 Iowa 13, 63 N. W. 357; Patrick *v.* Barker, 35 Iowa 451.

Mississippi.— Pratt *v.* Canton Cotton Co., 51 Miss. 470.

Missouri.— St. Louis, etc., R. Co. *v.* Houck, 120 Mo. App. 634, 97 S. W. 963.

Nebraska.— Fremont Ferry, etc., Co. *v.* Fuhrman, 8 Nebr. 99.

New Hampshire.— Porter *v.* Raymond, 53 N. H. 519.

New York.— Giles *v.* Crosby, 5 Bosw. 389.

South Dakota.— South Dakota Cent. R. Co. *v.* Smith, (1908) 116 N. W. 1120.

Vermont — Felt *v.* Davis, 48 Vt. 506.

Virginia.— Galt *v.* Swain, 9 Gratt. 633, 60 Am. Dec. 311.

See 45 Cent. Dig. tit "Subscriptions," § 14.

Performance of various conditions.— The following cases afford instances involving the determination of the question as to the fulfilment of various conditions: Completion of railroad. Doherty *v.* Arkansas, etc., R. Co., 5 Indian Terr. 537, 82 S. W. 899 [*reversed* on other grounds in 142 Fed. 104, 73 C. C. A. 328]; Garrison *v.* Cooke, 96 Tex. 228, 72 S. W. 54, 97 Am. St. Rep. 906, 61 L. R. A. 342. Removal of county-seat. Thompson *v.* Mercer County, 40 Ill. 379. Removal of manufactory. Ft. Wayne Electric Light Co. *v.* Miller, 131 Ind. 499, 30 N. E. 23, 14 L. R. A. 804. Location of bridge. Fremont Ferry, etc., Co. *v.* Fuhrman, 8 Nebr. 99. Location of church. Rothenberger *v.* Glick, 22 Ind. App. 288, 52 N. E. 811; Burlington First M. E. Church *v.* Sweny, 85 Iowa 627, 52 N. W. 546. Location of corporation. Keys *v.* Weaver, 95 Iowa 13, 63 N. W. 357. Location of college. Judson University *v.* Kinkaid, 50 Kan. 369, 31 Pac. 1074. Erection of bridge. Wrought Iron Bridge Co. *v.* Greene, 53 Iowa 562, 5 N. W. 770. Erection of church. Snell *v.* Clinton M. E. Church, 58 Ill. 290; Patrick *v.* Barker, 35 Iowa 451; Newburyport First Universalist Soc. *v.* Currier, 3 Metc. (Mass.) 417; Galt *v.* Swain, 9 Gratt. (Va.) 633, 60 Am. Dec. 311. Erection of college. Johnston *v.* Ewing Female University, 35 Ill. 518; Underwood *v.* Waldron, 12 Mich. 73. Erection and operation of a mill. Martin *v.* Creech, 58 Mo. App. 391. Erection of hotel. Conn *v.* McCollough, 12 Mo. App. 356. Completion of walls. Worcester Medical Inst. *v.* Harding, 11 Cush. (Mass.) 285. Acceptance of mill by com-

the expenses of an improvement for which the subscription was taken is decreased by changes in the plan of improvement originally adopted.[81]

B. Substantial Performance. Recovery is allowed, however, where there has been a substantial, although not literal, performance of the conditions.[82] By substantial performance it is understood that, although the conditions of the subscription be deviated from in trifling particulars, such deviation does not materially detract from the benefit the subscriber would derive from literal performance, but leaves the subscriber substantially the benefit he expected.[83]

C. Performance of Collateral Agreements. The performance of a collateral and contemporaneous promise is not a condition precedent to recovery upon the subscription.[84]

D. Time of Performance. According to the weight of authority the time of performance, when prescribed by the subscription contract, is of the essence of the contract, and a non-compliance with this requirement is a defense to the subscriber,[85] although performance was completed shortly after the time stipu-

mittee. Mefford *v.* Sell, 3 Nebr. (Unoff.) 566, 92 N. W. 148. Seating capacity of theater. Gerner *v.* Church, 43 Nebr. 690, 62 N. W. 51. Establishing hospital ward. Cottage Hospital *v.* Merrill, 92 Iowa 649, 61 N. W. 490. Establishing milk station. Northwestern Creamery Co. *v.* Lanning, 83 Minn. 19, 85 N. W. 823. Establishing school. Northwestern Conference *v.* Myers, 36 Ind. 375; Foxcroft Academy *v.* Favor, 4 Me. 382. Personnel of church membership. Leland Norwegian Lutheran Cong. *v.* Larson, 121 Iowa 151, 96 N. W. 706. Personnel of payees. Wayne, etc., Collegiate Inst. *v.* Blackmar, 48 N. Y. 663. Suffering financial loss. Kentucky Live Stock Breeders' Assoc. *v.* Miller, 119 Ky. 393, 84 S. W. 301, 27 Ky. L. Rep. 39. Approval of minister by ministerial association. Somers *v.* Miner, 9 Conn. 458. Furnishing a guaranty. Porter *v.* Raymond, 53 N. H. 519. Carrying on work of university. Lincoln University *v.* Hepley, 28 Ill. App. 629. Refraining from pursuing a debtor. Felt *v.* Davis, 48 Vt. 506. Building railroad into town. Hanna *v.* Mosher, (Okla. 1908) 98 Pac. 358. Raising funds from other sources. St. Paul's Episcopal Church *v.* Fields, 81 Conn. 670, 72 Atl. 145.

81. Giles *v.* Crosby, 5 Bosw. (N. Y.) 389.

82. *Illinois.*— Merchants' Bldg. Imp. Co. *v.* Chicago Exch. Bldg. Co., 210 Ill. 26, 71 N. E. 22, 102 Am. St. Rep. 145; Hall *v.* Virginia City, 91 Ill. 535; Illiopolis M. E. Church *v.* Garvey, 53 Ill. 401, 5 Am. Rep. 51.

Indiana.—Sult *v.* Warren School Tp., 8 Ind. App. 655, 36 N. E. 291.

Indian Territory.— Doherty *v.* Arkansas, etc., R. Co., 5 Indian Terr. 537, 82 S. W. 899 [*reversed* on other grounds in 142 Fed. 104, 73 C. C. A. 328].

Massachusetts.— Atty.-Gen. *v.* Greenfield Library Assoc., 135 Mass. 563; Ives *v.* Sterling, 6 Metc. 310; Torrey *v.* Milbury, 21 Pick. 64.

Missouri.—Missouri Pac. R. Co. *v.* Tygard, 84 Mo. 263, 54 Am. Rep. 97; St. Louis, etc., R. Co. *v.* Houck, 120 Mo. App. 634, 97 S. W. 963.

New York.— Wayne, etc., Collegiate Inst. *v.* Greenwood, 40 Barb. 72 [*reversed* on other grounds in 41 N. Y. 620].

Washington.— Hunt *v.* Upton, 44 Wash. 124, 87 Pac. 56.

See 45 Cent. Dig. tit "Subscriptions," § 14.

Substantial compliance illustrated.— The condition of a subscription for a building that it shall be donated to the county is substantially complied with by leasing the building to the county without rent for ninety-nine years. Hall *v.* Virginia City, 91 Ill. 535. And where a contract required plaintiff to construct a certain railroad in consideration of defendants' subscription, and it became necessary for plaintiff to organize a corporation to construct such road in order to condemn a right of way, in which corporation plaintiff held a majority of the stock, the construction of the road by the corporation constituted a sufficient compliance with the contract. Hunt *v.* Upton, 44 Wash. 124, 87 Pac. 56.

83. St. Louis, etc., R. Co. *v.* Houck, 120 Mo. App. 634, 97 S. W. 963.

84. Merchants' Bldg. Imp. Co. *v.* Chicago Exch. Bldg. Co., 210 Ill. 26, 71 N. E. 22, 102 Am. St. Rep. 145; Howell *v.* Methodist Episcopal Church, 61 Ill. App. 121.

85. *Alabama.*— Thornton *v.* Sheffield, etc., R. Co., 84 Ala. 109, 4 So. 197, 5 Am. St. Rep. 337.

Connecticut.— St. Paul's Episcopal Church *v.* Fields, 81 Conn. 670, 72 Atl. 145.

Florida.— Persinger *v.* Bevill, 31 Fla. 364, 12 So. 366.

Iowa.— Burlington, etc., R. Co. *v.* Bœstler, 15 Iowa 555.

Kansas.— Memphis, etc., R. Co. *v.* Thompson, 24 Kan. 170.

Michigan.— Jordan *v.* Newton, 116 Mich. 674, 75 N. W. 130; Port Huron, etc., R. Co. *v.* Richards, 90 Mich. 577, 51 N. W. 680.

Minnesota.— Bohn Mfg. Co. *v.* Lewis, 45 Minn. 164, 47 N. W. 652.

Ohio.—Johnson *v.* College Hill Narrow Gauge R. Co., 7 Ohio Dec. (Reprint) 466, 3 Cinc. L. Bul. 410.

Oklahoma.— Cooper *v.* Ft. Smith, etc., R. Co., (1909) 99 Pac. 785; Powers *v.* Rude, 14 Okla. 381, 79 Pac. 89.

Oregon.— Coos Bay, etc., R., etc., Co. *v.* Nosher, 30 Oreg. 547, 48 Pac. 361.

Texas.— Garrison *v.* Cooke, 96 Tex. 228, 72

lated.[86] There are, however, decisions in which this rule is limited or denied.[87] If no time for performance is prescribed then performance must be within a reasonable time, and what is a reasonable time is a question for the jury.[88]

E. Change of Plan or Purpose.[89] Any material change in the plan or purpose for which the subscription was made cannot be effected without the consent of the subscriber.[90] He is thereby released unless there has been a waiver,[91] or unless he has estopped himself to deny his consent to the change.[92]

S. W. 54, 97 Am. St. Rep. 906, 61 L. R. A. 342.

United States.— Cincinnati, etc., R. Co. *v.* Bensley, 51 Fed. 738, 2 C. C. A. 480, 19 L. R. A. 796.

See 45 Cent. Dig. tit "Subscriptions," § 16.

Reason for rule.— Such agreement is *stricti juris*, and the obligation of the promisor is akin to that of a guarantor who receives no personal benefit from the performance of the act for which he agrees to become responsible, at least none to which he would not have been entitled if the promise had not been made. Cincinnati, etc., R. Co. *v.* Bensley, 51 Fed. 738, 2 C. C. A. 480, 19 L. R. A. 796.

86. Memphis, etc., R. Co. *v.* Thompson, 24 Kan. 170.

87. Homan *v.* Steele, 18 Nebr. 652, 26 N. W. 472; Seley *v.* Texas, etc., R. Co., 2 Tex. App. Civ. Cas. § 87.

88. *Iowa.*— Paddock *v.* Bartlett, 68 Iowa 16, 25 N. W. 906.

Massachusetts.— Carter *v.* Carter, 14 Pick. 424.

Michigan.— Waters *v.* Union Trust Co., 129 Mich. 640, 89 N. W. 687.

Oklahoma.— Powers *v.* Rude, 14 Okla. 381, 79 Pac. 89.

Wisconsin.— Hodges *v.* O'Brien, 113 Wis. 97, 88 N. W. 901.

See 45 Cent. Dig. tit "Subscriptions," § 16.

89. See also *supra*, XII, A.

90. *Indiana.*— Rothenberger *v.* Glick, 22 Ind. App. 288, 52 N. E. 811.

Indian Territory.— Doherty *v.* Arkansas, etc., R. Co., 5 Indian Terr. 537, 82 S. W. 899 [*reversed* on other grounds in 142 Fed. 104, 73 C. C. A. 328].

Maine.— Fryeburg Parsonage Fund *v.* Ripley, 6 Me. 442.

Massachusetts.— Worcester Medical Inst. *v.* Bigelow, 6 Gray 498.

Minnesota.— Brimhall *v.* Van Campen, 8 Minn. 13, 82 Am. Dec. 118.

Mississippi.— Pratt *v.* Canton Cotton Co., 51 Miss. 470.

New Hampshire.— Troy Cong. Soc. *v.* Goddard, 7 N. H. 430.

New York.— Giles *v.* Crosby, 5 Bosw. 389.

Wisconsin.— La Fayette County Monument Corp. *v.* Ryland, 80 Wis. 29, 49 N. W. 157.

Change of location.—Where subscriptions to public improvements are made with reference to their location, any material subsequent change of location without the consent of a subscriber releases him from his subscription. Pratt *v.* Canton Cotton Co., 51 Miss. 470.

Subsequent formation of corporation.— When the fund is raised by mutual subscriptions, the fact that the purpose is carried out by a subsequently formed corporation of subscribers, of which defendant subscriber does not choose to become a member, does not relieve him from liability upon his subscription. Carr *v.* Bartlett, 72 Me. 120; Osborn *v.* Crosby, 63 N. H. 538, 3 Atl. 429.

Return to original plan.— In Anderson *v.* West Kentucky College, 10 Ky. L. Rep. 725, a subscriber was to pay when fifteen thousand dollars had been subscribed. Afterward the plan was changed so as to limit the amount to be raised to ten thousand dollars but fifteen thousand dollars was in fact subscribed. The subscriber was still held liable.

Directing verdict.— In Wrought Iron Bridge Co. *v.* Greene, 53 Iowa 562, 5 N. W. 770, it was held that where the petition in an action to recover defendant's subscription to a fund for the erection of a bridge fails to aver compliance with a provision to the subscription requiring the bridge to be of a certain character, and the defect is not assailed by demurrer or other pleading, it is error to direct a verdict for defendant on the ground that such condition has not been established.

91. *Kansas.*— Schuler *v.* Myton, 48 Kan. 282, 29 Pac. 163.

Massachusetts.— Mirick *v.* French, 2 Gray 420; Bryant *v.* Goodnow, 5 Pick. 228.

Michigan.— First Universalist Church *v.* Pungs, 126 Mich. 670, 86 N. W. 235.

Mississippi.— Chicago Bldg., etc., Co. *v.* Higginbotham, (1901) 29 So. 79.

Montana.— Kane *v.* Downing, 14 Mont. 343, 36 Pac. 355.

New York.— Hutchins *v.* Smith, 46 Barb. 235; Reformed Protestant Dutch Church *v.* Brown, 29 Barb. 335, 17 How. Pr. 287 [*affirmed* in 4 Abb. Dec. 31].

Ohio.— Doane *v.* Pickaway, Wright 752.

See 45 Cent. Dig. tit "Subscriptions," § 17.

What constitutes waiver.— Part payment of a subscription and a promise to pay the balance, the subscriber not then knowing that a condition of his subscription had not been complied with, was held not a waiver of the condition. Albany First Presb. Church *v.* Cooper, 45 Hun (N. Y.) 453, 10 N. Y. St. 142 [*affirmed* in 112 N. Y. 517, 20 N. E. 352, 8 Am. St. Rep. 767, 3 L. R. A. 468]; Felt *v.* Davis, 48 Vt. 506. See also upon what constitutes waiver Holbrook *v.* Wilson, 4 Bosw. (N. Y.) 64; Catt *v.* Olivier, 98 Va. 580, 36 S. E. 980.

92. *Ex p.* Booker, 18 Ark. 338; Petty *v.* Church of Christ, 95 Ind. 278; McCleary *v.*

F. Abandonment of the Undertaking. If the enterprise is abandoned before the accomplishment of the purpose contemplated by the subscription paper, no recovery can be had against the subscriber;[93] but if the purpose which is fairly to be deemed the object of the subscription is substantially accomplished a subsequent cessation of the enterprise will not ordinarily relieve the subscriber from liability.[94]

G. Subscriptions Conditioned Upon Other Subscriptions.[95] A subscription conditioned upon other subscriptions requires that they shall be made in good faith, by responsible persons,[96] and to the amount designated.[97] It is

Chipman, 32 Ind. App. 489, 68 N. E. 320; Hall *v.* Thayer, 12 Metc. (Mass.) 130.

What constitutes estoppel.—Where a subscriber to a public work permits it to be carried on for a length of time without objection, he will be regarded in equity as acquiescing in the acts done, and will not be relieved from the payment of his subscription on the ground that the plan has been changed and the work is of no benefit. *Ex p.* Booker, 18 Ark. 338.

93. Smith *v.* Davidson, 45 Ind. 396; Church of Redeemer *v.* Crawford, 43 N. Y. 476; Commercial Travelers' Home Assoc. *v.* McNamara, 95 N. Y. App. Div. 1, 88 N. Y. Suppl. 443; Baird's Estate, 13 Phila. (Pa.) 241; McCrimmin *v.* Cooper, 27 Tex. 113.

Evidence of abandonment.—Mann *v.* O'Neil, 29 Wash. 115, 69 Pac. 635 (where a committee was appointed by a meeting to raise subscriptions to a corporation on condition that it would erect a factory in a certain county, the committee being instructed to hold the subscription contracts until assurances of the erection of the factory were given, correspondence between the corporation's representative and the committee was held admissible, in an action for such subscriptions, to show that the corporation had abandoned the enterprise); Michels *v.* Rustemeyer, 20 Wash. 597, 56 Pac. 380 (where, after subscriptions were made to the building of a church, collection of the subscriptions was temporarily deferred, owing to the poor financial condition of the subscribers, two plans were submitted to the building committee, one of which was disapproved of by part of the committee, who withdrew dissatisfied, and desired to abandon the project; but a majority of the committee adopted one of the plans, and the construction of the building proceeded, it was held insufficient to show an abandonment of construction in accordance with the original determination, on which the subscriptions were based); Hodges *v.* O'Brien, 113 Wis. 97, 88 N. W. 901 (where it was held that, in an action to recover on subscription notes, which defendant has secured possession of, there is evidence that the required amount of subscriptions were not secured when defendant was transferred to another church, and after his successor was installed the project was revived, and the former subscriptions were not considered binding, it is error to refuse to submit to the jury whether the building had not been given up, and the subscribers released, when defendant regained such possession).

94. Franklin College *v.* Hurlburt, 28 Ind. 344; Ayres *v.* Dutton, 87 Mich. 528, 49 N. W. 897, 13 L. R. A. 698; Barnes *v.* Baylies, 18 Vt. 430. But see Cushman *v.* Church of Good Shepherd, 162 Pa. St. 280, 29 Atl. 872.

95. See also *supra*, VII, B.

96. Somers *v.* Miner, 9 Conn. 458; New London Literary, etc., Inst. *v.* Prescott, 40 N. H. 330; Albany Presb. Church *v.* Cooper, 45 Hun (N. Y.) 453, 10 N. Y. St. 142 [*affirmed* on other grounds in 112 N. Y. 517, 20 N. E. 352, 8 Am. St. Rep. 767, 2 L. R. A. 468]; Stewart *v.* Trustees of Hamilton College, 2 Den. (N. Y.) 403.

But it was held in Chicago Bldg., etc., Co. *v.* Higginbotham, (Miss.) 1901) 29 So. 79, that where parties sign a subscription contract by the terms of which so much money was to be raised for the company constructing a plant, adult signers cannot defeat their liability thereon by showing that some of the subscribers were minors or insolvents, since the loss resulting therefrom would fall on the company and not on the subscribers.

97. *Arkansas.*— Rogers *v.* Galloway Female College, 64 Ark. 627, 44 S. W. 454, 39 L. R. A. 636; Turner *v.* Baker, 30 Ark. 186.

Delaware.— Norton *v.* Janvier, 5 Harr. 346.

Kentucky.— Anderson *v.* West Kentucky College, 10 Ky. L. Rep. 725.

Michigan.— Miller *v.* Parke's Estate, 131 Mich. 310, 91 N. W. 151; Waters *v.* Union Trust Co., 129 Mich. 640, 89 N. W. 687.

New York.— Twenty-Third St. Baptist Church *v.* Cornell, 117 N. Y. 601, 23 N. E. 177, 6 L. R. A. 807 [*affirming* 56 N. Y. Super. Ct. 260, 3 N. Y. Suppl. 51]; McAuley *v.* Billenger, 20 Johns. 89.

North Carolina.— Pipkin *v.* Robinson, 48 N. C. 152.

Pennsylvania.—Garard *v.* Monongahela College, 114 Pa. St. 337, 6 Atl. 701.

Vermont.— Smith *v.* Burton, 59 Vt. 408, 10 Atl. 536; Middlebury College *v.* Williamson, 1 Vt. 212.

Wisconsin.— Hodges *v.* O'Brien, 113 Wis. 97, 88 N. W. 901.

See 45 Cent. Dig. tit. "Subscriptions," § 15.

A subscriber may be estopped to deny the good faith of other subscribers. In Rogers *v.* Galloway Female College, 64 Ark. 627, 44 S. W. 454, 39 L. R. A. 636, it was held that one who has taken a prominent part in getting up a subscription list as a consideration for the location of a college, and knows how the individual subscriptions were taken, and makes no objection when the list is pre-

essential that there should be no conditions as to the liability of any of the subscribers not applicable to all,[98] except where there is consent to a variation of conditions as to some of the subscribers.[99]

XIII. PAYMENT OF THE SUBSCRIPTION.

A. Time of Payment. The liability of the subscriber becomes fixed when there has been an acceptance [1] of the subscription and a consideration furnished.[2] Payment is due after the conditions precedent to payment have been complied with,[3] and upon the date prescribed, if one is stated in the subscription.[4]

B. Demand. An action upon a subscription will lie without first making a demand for payment.[5]

C. Abatement of Subscriptions. If less than the amount subscribed is expended upon the undertaking, each subscriber is liable only for his *pro rata* share of the total sum expended.[6]

XIV. RELEASE OR DISCHARGE OF SUBSCRIBER.

The subscriber is released from his obligation if the conditions of the subscription have not been fulfilled by the other party.[7] He is not discharged, however, simply because he ceases to benefit by the enterprise for which he has incurred

sented to and accepted by the college representatives, is estopped to allege that certain subscribers were acting in bad faith, and that the list was in fact short of the total amount necessary to bind subscribers.

98. Smith *v.* Truebody, 2 Cal. 341; New York Exch. Co. *v.* De Wolf, 31 N. Y. 273.

99. North Ecclesiastical Soc. *v.* Matson, 36 Conn. 26.

1. See *supra*, III.

2. See *supra*, IV.

3. See *supra*, XII.

4. *Indiana.*— Petty *v.* Church of Christ, 95 Ind. 278; Franklin College *v.* Hurlburt, 28 Ind. 344.

Iowa.— McCormack *v.* Reece, 3 Greene 591.

Massachusetts.— Martin *v.* Males, 179 Mass. 114, 118, 60 N. E. 379. This case was an action brought by a committee who were the payees of the subscription and were to carry out the project. In discussing the time when payment became due the court says: "A more serious difficulty if the acts are the consideration, is that it seems to lead to the dilemma that either all acts to be done by the commitee must be accomplished before the consideration is furnished, or else that the defendant's promise is to be taken distributively and divided up into distinct promises to pay successive sums as successive steps of the committee may make further payment necessary and may furnish consideration for requiring them. The last view is artificial and may be laid on one side. In the most noticeable cases where a man has been held entitled to stop before he has finished his payments, the ground has not been the divisibility of his undertaking but the absence of consideration, which required the court to leave things where it found them. Albany Presb. Church *v.* Cooper, 112 N. Y. 517, 20 N. E. 352, 8 Am. St. Rep. 767, 3 L. R. A. 468; *In re* Hudson, 54 L. J. Ch. 811, 33 Wkly. Rep. 819. As against the former view, if necessary, we should assume that the first substantial act done by the committee was all that was required in the way of acts to found the defendants' obligation. See Amherst Academy *v.* Cows, 6 Pick. 427, 438, 17 Am. Dec. 387."

Minnesota.— Brimhall *v.* Van Campen, 8 Minn. 13, 82 Am. Dec. 118.

Mississippi.— Chicago Bldg., etc., Co. *v.* Higginbotham, (1901) 29 So. 79.

Missouri.— Stilwell *v.* Glascock, 47 Mo. App. 554.

New York.—Wayne, etc., Collegiate Inst. *v.* Smith, 36 Barb. 576; McAuley *v.* Billenger, 20 Johns. 89.

Ohio.— Farmers' College *v.* McMicken, 2 Disn. 495.

Oregon.— Coos Bay, etc., R. etc., Co. *v.* Dixon, 30 Oreg. 584, 48 Pac. 360.

Interest.— Hall *v.* Virginia, 91 Ill. 535 (where it was held that interest on a subscription against a delinquent subscriber cannot be allowed in the absence of proof showing when the money was expended by the promisee); Chicago Bldg., etc., Co. *v.* Higginbotham, (Miss. 1901) 29 So. 79 (where it was held that where the time of payment of a subscription is extended, the subscriber can only be charged with interest from the time to which it is extended).

5. Allen *v.* Clinton County, 101 Ind. 553; Higert *v.* Indiana Asbury University, 53 Ind. 326; McDonald *v.* Gray, 11 Iowa 508, 79 Am. Dec. 509; State University *v.* Buell, 2 Vt. 48.

6. Los Angeles Nat. Bank *v.* Vance, 9 Cal. App. 57, 98 Pac. 58; Miller *v.* Ballard, 46 Ill. 377; State Treasurer *v.* Cross, 9 Vt. 289, 31 Am. Dec. 626. And see Hodges *v.* Nalty, 104 Wis. 464, 80 N. W. 726. But in Martin *v.* Creech, 58 Mo. App. 391, it was held that the fact that plaintiff, having agreed to erect and operate a described mill, really erected such a mill upon the subscription of a smaller amount did not prevent him from recovering from the subscribers the amount they had agreed to pay.

7. See *supra*, XII.

the obligation,[8] nor because of the fact that the beneficiary requires that the subscriptions be guaranteed, which is done;[9] nor because the beneficiary releases the guarantor;[10] nor because an extension of time was given to another subscriber who subsequently paid.[11]

XV. Recovery Back of Subscription.

A paid subscription may be recovered back if such recovery be expressly provided for,[12] if the condition upon which it was paid has not been fulfilled,[13] or if the subscription was fraudulently procured;[14] but there can be no recovery back where there is an implied condition against recovery of the sum paid.[15]

XVI. Actions.

A. Jurisdiction. Where the subscribers to a fund are numerous, many of whom deny liability on various grounds, equity has jurisdiction to administer relief in a suit to enforce the subscriptions.[16]

B. Parties — 1. Parties Plaintiff — a. In General. An action upon the subscription is properly brought by the other party to the subscription contract.[17] A beneficiary who is not a party to the contract may sue a delinquent subscriber in those jurisdictions where a third person is allowed to sue upon a contract made for his benefit.[18] But in those cases where the only consideration is to be found

8. Wilson *v.* Savannah First Presb. Church, 56 Ga. 554; Woodstock First Cong. Soc. *v.* Swan, 2 Vt. 222.

9. Hill *v.* City Electric R. Co., 69 Ill. App. 441; Deming *v.* Ohio Agricultural, etc., College, 31 Ohio St. 41.

10. Deming *v.* Ohio Agricultural, etc., College, 31 Ohio St. 41.

11. Wilson *v.* Savannah First Presb. Church, 56 Ga. 554.

12. Russell *v.* South Britain Soc., 9 Conn. 508; Bohn Mfg. Co. *v.* Lewis, 45 Minn. 164, 47 N. W. 652; Horton *v.* Howe, 13 Hun (N. Y.) 57.

Illustration.— Plaintiff made a subscription to defray the expense of grading a fair ground on defendant's land, the instrument reciting that the subscribers should be repaid the amount of the subscription when the net receipts of the grounds amounted to the sum subscribed. Defendant subsequently discontinued the track and constructed another at a different place. It was held that as plaintiff was entitled to be repaid out of the net receipts of the grounds which defendant had discontinued he could recover the full amount of his subscription. Horton *v.* Howe, 13 Hun (N. Y.) 571.

13. Carter *v.* Carter, 14 Pick. (Mass.) 424; Batsell *v.* St. Louis, etc., R. Co., 4 Tex. Civ. App. 580, 23 S. W. 552.

14. Moore *v.* Universal El. Co., 122 Mich. 48, 80 N. W. 1015.

15. Locke *v.* Belmont Cong. Soc., 157 Mass. 589, 32 N. E. 949; Coos Bay, etc., R., etc., Co. *v.* Nosler, 30 Oreg. 547, 48 Pac. 361.

Refunding a subscription.— Langdon *v.* Plymouth Cong. Soc., 12 Conn. 113 (where it was held that, where subscriptions have been contributed to the establishment of a permanent fund for an association, the fund cannot be returned to the subscribers by a majority vote of the members of the association, since the fund thus created was a trust fund); La Fayette County Monument Corp. *v.* Magoon, 73 Wis. 627, 42 N. W. 17, 3 L. R. A. 761 (where it was held that the possible or probable failure of plaintiff to raise six thousand dollars for the monument fund within one year after defendant's subscription to the fund became due, required as a condition subsequent by the terms of the subscription, is no defense to an action on a check given in payment thereof, in which judgment was rendered prior to that date, and defendant has a remedy by motion in the circuit court to have the judgment discharged, if it shall be made to appear that such condition is valid, and that it has been broken since the rendition of the judgment).

16. Kentucky Live Stock Breeders' Assoc. *v.* Miller, 119 Ky. 393, 84 S. W. 301, 27 Ky. L. Rep. 39.

Jurisdiction of courts of law.—Where various persons subscribed for shares in a meeting-house and a committee erected the meeting-house, recovery can be had against the subscribers in actions at law, and it is not necessary to resort to a bill in equity, since the promises are several, the proportionate shares being distinctly defined. Hall *v.* Thayer, 12 Metc. (Mass.) 130.

17. White *v.* Scott, 26 Kan. 476; Heinrich *v.* Missouri, etc., Coal Co., 102 Mo. App. 229, 76 S. W. 674; Bort *v.* Snell, 39 Hun (N. Y.) 388.

18. *Arkansas.*— Rogers *v.* Galloway Female College, 64 Ark. 627, 44 S. W. 454, 39 L. R. A. 636.

California.— Western Dev. Co. *v.* Emery, 61 Cal. 611.

Illinois.— McClure *v.* Wilson, 43 Ill. 356.

Kentucky.— McCurdy *v.* Dudley, 1 A. K. Marsh. 288.

New York.— Stewart *v.* Hamilton College, 2 Den. 403; Barnes *v.* Perine, 9 Barb. 202 [*affirmed* on other grounds in 12 N. Y. 18]. But unless a consideration was furnished by

in the mutual promises of the subscribers, and the jurisdiction is one where a beneficiary who is not a party to the contract cannot sue upon the contract, such subscribers, and not the beneficiary, are the only proper parties plaintiff.[19] Where the subscription calls for payment to designated persons,[20] the action upon the subscription may be brought by them; as for example where the paper provides for payment to a committee,[21] to a trustee,[22] or to a treasurer.[23] The assignee of a subscription right is the proper party plaintiff in those jurisdictions where the action must be brought by the real party in interest.[24]

b. Corporations. Where the subscription runs to a contemplated corporation the corporation may sue if, when it is formed, it accepts the subscription and furnishes the consideration, or is the contemplated beneficiary in a jurisdiction where the beneficiary is permitted to sue.[25]

2. Parties Defendant. Where two or more persons sign a subscription paper, each promising to pay a stated sum, the liability of the subscribers is several and not joint, and in consequence they must be sued severally on their undertakings.[26]

the beneficiary it is now held in New York that he cannot sue upon the contract. Albany Presb. Church *v.* Cooper, 112 N. Y. 517, 20 N. E. 352, 8 Am. St. Rep. 767, 3 L. R. A. 468.

Pennsylvania.— Hostetter *v.* Hollinger, 117 Pa. St. 606, 12 Atl. 741.

See 45 Cent. Dig. tit. "Subscriptions," § 26.

19. See *supra*, IV, C.

In Wisconsin it was held under section 2604 of the Revised Statutes of 1898, which provides that when the question is of common interest to many persons, or when the parties are very numerous, one or more may sue or defend for the benefit of the whole, that a part of the subscribers to the fund to build a church, there being about seventy-five subscribers, can sue for the benefit of all the subscribers, where the subscriptions were made and expenses were incurred on the faith of defendant's subscription. Hodges *v.* Nalty, 104 Wis. 464, 80 N. W. 726.

20. See *supra*, II, C.

21. *Maine.*— Carr *v.* Bartlett, 72 Me. 120.

Maryland.— Gittings *v.* Mayhew, 6 Md. 113.

Massachusetts.— Davis *v.* Smith American Organ Co., 117 Mass. 456.

Pennsylvania.— Chambers *v.* Calhoun, 18 Pa. St. 13, 55 Am. Dec. 583.

Wisconsin.—Hodges *v.* Nalty, 104 Wis. 464, 80 N. W. 726.

See 45 Cent. Dig. tit. "Subscriptions," § 26.

22. Lasar *v.* Johnson, 125 Cal. 549, 58 Pac. 161; Paddock *v.* Bartlett, 68 Iowa 16, 25 N. W. 906. And see Dunnigan *v.* Kathan, 56 Misc. (N. Y.) 103, 106 N. Y. Suppl. 1111 [*affirmed* in 127 N. Y. App. Div. 931, 111 N. Y. Suppl. 1117]. In this case a subscription agreement with a local manufacturer authorized a person named to pay the subscription money to the manufacturers proposing to operate a factory in the village on the completion of the building with one hundred machines ready for work; on their failure to do so, the money to be returned to the contributors. It was held that the quasi-trustee alone could maintain an action against one of the signers; the subscribers apparently reposing in him a special trust.

23. Norton *v.* Janvier, 5 Harr (Del.) 346; McDonald *v.* Gray, 11 Iowa 508, 79 Am. Dec. 509; Blodgett *v.* Morrill, 20 Vt. 509. But in Friedline *v.* Carthage College, 23 Ill. App. 494, it was held that where a subscription is payable to an officer of a corporation without naming him, the right of action is in the corporation. And in Peirce *v.* Ruley, 5 Ind. 69, it was held that where a subscription was payable to the treasurer of Grant county and the subscription was addressed "To the Commissioners of Grant County," the action should be brought by the commissioners and not by the treasurer.

24. Gerner *v.* Church, 43 Nebr. 690, 62 N. W. 51.

25. *California.*—Christian College *v.* Hendley, 49 Cal. 347.

Illinois.— Whitsitt *v.* Pre-emption Presb. Church, 110 Ill. 125.

Kentucky.— Brooksville R. Co. *v.* Byron, 50 S. W. 530, 20 Ky. L. Rep. 1941.

New York.— Knoxboro Presb. Soc. *v.* Beach, 74 N. Y. 72; Westfield Reformed Protestant Dutch Church *v.* Brown, 4 Abb. Dec. 31, 24 How. Pr. 76.

Pennsylvania.—Shober *v.* Lancaster County Park Assoc., 68 Pa. St. 429; Edinboro Academy *v.* Robinson, 37 Pa. St. 210, 78 Am. Dec. 421.

See 45 Cent. Dig. tit. "Subscriptions," § 26.

26. *California.*— Los Angeles Nat. Bank *v.* Vance, 9 Cal. App. 57, 98 Pac. 58.

Georgia.— Wilson *v.* Savannah First Presb. Church, 56 Ga. 554; Beck *v.* Pounds, 20 Ga. 36.

Illinois.— Robertson *v.* March, 4 Ill. 198.

Indiana.— Landwerlen *v.* Wheeler, 106 Ind. 523, 5 N. E. 888.

Kentucky.— Kentucky Live Stock Breeders' Assoc. *v.* Miller, 119 Ky. 393, 84 S. W. 301, 27 Ky. L. Rep. 39.

Massachusetts.— Hall *v.* Thayer, 12 Metc. 130; Carter *v.* Carter, 14 Pick. 424.

Michigan.— Davis *v.* Belford, 70 Mich. 120, 37 N. W. 919.

Minnesota.— Laramee *v.* Tanner, 69 Minn. 156, 71 N. W. 1028.

New Mexico.— Miller *v.* Preston, 4 N. M. 314, 17 Pac. 565.

New York.— Erie, etc., R. Co. *v.* Patrick, 2 Abb. Dec. 72; Bort *v.* Snell, 39 Hun 388.

Texas.— Darnell *v.* Lyon, 85 Tex. 455, 22 S. W. 304, 960; McFarland *v.* Lyon, 4 Tex.

But there are cases where the subscribers are found in fact to be joint principals acting through the payee as their agent for the purpose of carrying out the enterprise for which the subscription is made, and as a consequence in such cases the subscribers must be sued jointly.[27] It has been held, however, that if one is sued alone, he can only avail himself of the non-joinder of his co-subscribers by plea in abatement.[28]

C. Pleading. In jurisdictions where a written contract of subscription imports a consideration the complaint in an action to recover a subscription need not allege a consideration;[29] and where the consideration for each subscription is the other subscriptions, the complaint need not allege the completion of the work for which it was taken,[30] and such allegation if made may be treated as surplusage.[31] Where the subscription is due, it is not necessary to allege a damand.[32] If by the terms of the subscription contract the subscriber's liability is mainly to pay a *pro rata* share of any excess of expenses above receipts of an enterprise to be undertaken, a complaint in an action to recover on such subscription must show the total amount subscribed and the amount of the loss.[33] Where the answer sets up want of consideration, no reply is necessary under a statute providing that there shall be no reply except in cases where matter in confession and avoidance is relied on.[34] In an action to recover a subscription, evidence is admissible under a plea of the general issue that defendant signed the subscription contract on condition that it should not be delivered without his consent, and that he did not consent.[35]

D. Evidence — 1. Presumptions and Burden of Proof. There is a rebuttable presumption of consideration for the subscription paper where, as in some states, by statute, a promise in writing imports a consideration,[36] or where the promise assumes the form of a promissory note.[37] It has been held also that such presumption exists where the subscription paper recites that the promise is given for "value received."[38] Where money is subscribed on condition that other subscriptions aggregating a certain sum are obtained, and subsequent subscribers know of the former subscription, it will be presumed that their subscriptions are made in reliance on the earlier subscription, although it is an instrument complete in itself and separate from the other subscription.[39] If the contract provides that any surplus of subscription over the price for erecting the plant should belong to the subscribers, the burden is on a delinquent subscriber to show that there was a surplus.[40] In an action to recover a subscription given on condition that a certain amount be subscribed, which was done, the burden is on defendant to show that any of the subscriptions were invalid.[41]

2. Admissibility — a. In General. The subscription list is competent evidence

Civ. App. 586, 23 S. W. 554; Batsell *v.* St. Louis, etc., R. Co., 4 Tex. Civ. App. 580, 23 S. W. 552.

Wisconsin.— Hodges *v.* Nalty, 104 Wis. 464, 80 N. W. 726.

Canada.— Thomas *v.* Grace, 15 U. C. C. P. 462.

27. Robinson *v.* Robinson, 10 Me. 240; Davis, etc., Bldg., etc., Co. *v.* Knoke, 55 Minn. 368, 57 N. W. 62 [*distinguishing* Gibbons *v.* Bente, 51 Minn. 499, 53 N. W. 756, 22 L. R. A. 80]; Ridgely *v.* Dobson, 3 Watts & S. (Pa.) 118.

28. Robinson *v.* Robinson, 10 Me. 240.

29. Des Moines University *v.* Livingston, 57 Iowa 307, 10 N. W. 738, 42 Am. Rep. 42.

30. Petty *v.* Church of Christ, 95 Ind. 278.

31. Petty *v.* Church of Christ, 95 Ind. 278.

32. Allen *v.* Clinton County, 101 Ind. 553.

33. Laramee *v.* Tanner, 69 Minn. 156, 71 N. W. 1028, holding that a complaint which merely alleges that a certain assessment was made does not state a cause of action.

34. Des Moines University *v.* Livingston, 57 Iowa 307, 10 N. W. 738, 42 Am. Rep. 42.

35. Davis *v.* Kneale, 97 Mich. 72, 56 N. W. 220.

36. Ft. Madison First M. E. Church *v.* Donnell, 95 Iowa 494, 64 N. W. 412; McCurdy *v.* Dudley, 1 A. K. Marsh. (Ky.) 288; Christian University *v.* Hoffman, 95 Mo. App. 488, 69 S. W. 474.

37. Fisher *v.* Ellis, 3 Pick. (Mass.) 322; Patton *v.* Melville, 21 U. C. Q. B. 263.

38. Eastern Plank Road Co. *v.* Vaughan, 14 N. Y. 546 [*affirming* 20 Barb. 155].

39. Waters *v.* Union Trust Co., 129 Mich. 640, 89 N. W. 687.

40. Davis, etc., Bldg., etc., Co. *v.* Dickson, (Tenn. Ch. App. 1899) 53 S. W. 237.

41. Des Moines University *v.* Livingston, 65 Iowa 202, 21 N. W. 564.

of the contract,[42] and the admission in evidence of the paper with all the names thereon is not a variance, although only defendant's name is mentioned in the declaration.[43] On the question of consideration, it is competent to show that money had been raised and work done in reliance on the subscriptions, and the exclusion thereof is error.[44]

b. Parol Evidence. The general rules applicable to the admissibility of evidence to vary or contradict written contracts generally [45] apply to subscription contracts.[46] It is the general rule that parol evidence is not admissible to show that a subscription was not to be payable except on other conditions than those embodied in the written contract.[47] But it has been held that parol evidence is admissible to show that the contract was not intended to be wholly reduced to writing, and what terms were to remain in parol;[48] that there was an oral condition precedent which was to be complied with before the writing was to take effect as the written contract of the parties;[49] that there was a request to expend money or labor in furtherance of the project of the subscription;[50] that the subscription was fraudulently procured;[51] and who was the intended payee where none was named in the subscription.[52] It is held that parol evidence as to the circumstances under which a subscription is made is admissible as a part of the *res gestæ*.[53]

3. Weight and Sufficiency. The rules applicable in civil actions generally in respect of the weight and sufficiency of evidence [54] apply in actions to recover subscriptions.[55]

SUBSEQUENS MATRIMONIUM TOLLIT PECCATUM PRÆCEDENS. A maxim meaning "A subsequent marriage (of the parties) removes a previous fault, i. e., previous illicit intercourse, and legitimates the offspring." [1]

SUBSEQUENT. Following in time; happening or existing at any later time, indefinitely.[2] (Subsequent: Appeal, see Appeal and Error, 2 Cyc. 525; 3 Cyc.

42. Miller *v.* Preston, 4 N. M. 314, 17 Pac. 565.

43. Kingsley *v.* International Military Encampment Co., 41 Ill. App. 259.

Denial of signature.— In Willard *v.* Rockville Centre M. E. Church, 66 Ill. 55, where suit was brought on a subscription paper to which defendant's name appeared, and the execution of the same was not put in issue by a sworn plea, it was held no error to refuse to allow the subscriber to testify that he did not sign the paper.

44. Des Moines University *v.* Livingston, 57 Iowa 307, 10 N. W. 738, 42 Am. Rep. 42.

45. See, generally, Evidence, 17 Cyc. 567 *et seq.*

46. McCabe *v.* O'Connor, 69 Iowa 134, 28 N. W. 573; George *v.* Harris, 4 N. H. 533, 17 Am. Dec. 446; Smith *v.* Burton, 59 Vt. 408, 10 Atl. 536; Michels *v.* Rustemeyer, 20 Wash. 597, 56 Pac. 380; Hammond *v.* Small, 16 U. C. Q. B. 371.

47. Blair *v.* Buttolph, 72 Iowa 31, 33 N. W. 349; Farmington First Free-will Baptist Parish *v.* Perham, 84 Me. 563, 24 Atl. 958; Gerner *v.* Church, 43 Nebr. 690, 62 N. W. 51; Blodgett *v.* Morrill, 20 Vt. 509.

48. *In re* Lippincott, 31 Pittsb. Leg. J. N. S. (Pa.) 219.

49. Kelly *v.* Oliver, 113 N. C. 442, 18 S. E. 698.

50. Keuka College *v.* Ray, 167 N. Y. 96, 60 N. E. 325.

51. Middlebury College *v.* Loomis, 1 Vt. 189.

52. Strong *v.* Eldridge, 8 Wash. 595, 36 Pac. 696.

53. Burlington First M. E. Church *v.* Sweny, 85 Iowa 627, 52 N. W. 546; Hodges *v.* Nalty, 113 Wis. 567, 89 N. W. 535.

54. See Evidence, 16 Cyc. 821.

55. See Sutton *v.* Rann, 149 Mich. 35, 112 N. W. 721.

1. Black L. Dict., where such is said to be a rule of Roman law.

2. Century Dict.

The word is susceptible of different significations and is used in different senses, with an exclusive or inclusive meaning according to the subject to which it is applied. Its true meaning must be collected from its context and subject-matter. Sands *v.* Lyon, 18 Conn. 18, 27.

As used in a recording act the term has reference to the recording and not to the date of the instrument. Houlahan *v.* Finance Consol. Min. Co., 34 Colo. 365, 369, 82 Pac. 484.

A subsequent mortgagee in good faith is a mortgagee who receives his mortgage without knowledge of the existence of a prior mortgage. Vanaman *v.* Fliehr, (N. J. Ch. 1908) 71 Atl. 692, 693.

"Subsequent purchaser for a valuable consideration" as synonymous with "*bona fide* purchaser" see Van Rensselaer *v.* Clark, 17 Wend. (N. Y.) 25, 30, 31 Am. Dec. 280.

Used in connection with other words.— "Subsequent creditor" see Evans *v.* Lewis, 30 Ohio St. 11, 14; McGhee *v.* Wells, 57 S. C.

395. Attachment, Discharge of Receiptor by, see ATTACHMENT, 4 Cyc. 669. Condition — In Deed, see DEEDS, 13 Cyc. 684; In Insurance Policy, Forfeiture of Policy For Breach of, see FIRE INSURANCE, 19 Cyc. 708; LIFE INSURANCE, 25 Cyc. 821; Relief Against Forfeiture For Breach of, see EQUITY, 16 Cyc. 78. Creditor — Effect of Unacknowledged Deed as to, see ACKNOWLEDGMENTS, 1 Cyc. 517; Right to Attack Conveyance, see FRAUDULENT CONVEYANCES, 20 Cyc. 423. Purchaser of Mortgaged Property — As Party to Foreclosure Suit, see MORTGAGES, 27 Cyc. 1570; Effect of Decree of Foreclosure on, see MORTGAGES, 27 Cyc. 1795; Priority as to Other Liens, see MORTGAGES, 27 Cyc. 1177; Record as Notice to, see MORTGAGES, 27 Cyc. 1205; Right of Against Prior Assignee, see MORTGAGES, 27 Cyc. 1318; Right to Assail Corporate Mortgage, see CORPORATIONS, 10 Cyc. 1193. Purchaser of Property Fraudulently Conveyed — Presumptions as to, see FRAUDULENT CONVEYANCES, 20 Cyc. 763; Right of Fraudulent Grantee as to, see FRAUDULENT CONVEYANCES, 20 Cyc. 644; Right to Avoid Conveyance as to, see FRAUDULENT CONVEYANCES, 20 Cyc. 436.)

SUBSEQUENT APPEAL. See SUBSEQUENT, *ante*, p. 504.

SUBSEQUENT CONDITION. See SUBSEQUENT, *ante*, p. 504.

SUBSEQUENTLY. At a later time; afterwards.[3] (See SUBSEQUENT, *ante*, p. 504.)

SUBSEQUENT PURCHASER. See SUBSEQUENT, *ante*, p. 504.

SUBSERVIENT. Useful as an instrument to promote a purpose; serving to promote some end.[4]

SUBSIDY. See BOUNTIES, 5 Cyc. 977.

SUBSIST. To have existence; to live.[5]

SUBSTANCE.[6] The essential or material part; ESSENCE, *q. v.*; ABSTRACT, *q. v.*; COMPENDIUM, *q. v.*; meaning;[7] the essential or important part; the material thing; that in and for which a thing chiefly exists;[8] that which is essential;[9] that which receives modifications; essence; real or essential part; the meaning expressed by any speech, or writing; the purport; the main part;[10] the substratum; the most important element; the characteristic and essential components, the main part; essential import;[11] the essential part; the main or material part.[12] (See FORM, 19 Cyc. 1430.)

280, 288, 35 S. E. 529, 76 Am. St. Rep. 567. "Subsequent indebtedness" see Shrewsbury Tp. Poor Dist. *v.* Penn Tp. Poor Dist., 33 Pa. Super. Ct. 378, 381. "Subsequent negligence" see Holwerson *v.* St. Louis, etc., R. Co., 157 Mo. 216, 234, 57 S. W. 770, 50 L. R. A. 850. "Subsequent proceeding" see State *v.* District Ct., 38 Mont. 119, 99 Pac. 139, 140. "Subsequent ratification" see Pearson *v.* Caldwell, 70 N. C. 291, 295. "Subsequent term" see Reese *v.* U. S., 9 Wall. (U. S.) 13, 18, 19 L. ed. 541.

3. Webster Dict.; Worcester Dict. [both *quoted* in *In re* Rosenfield, 20 Fed. Cas. No. 12,058].

Although similar in meaning to "since" the terms are not identical. *In re* Rosenfield, 20 Fed. Cas. No. 12,058. But see *In re* Cretiew, 6 Fed. Cas. No. 3,390, 3,391, where the above decision was criticized as being too refined, and the term was held to be synonymous with "since."

4. Webster Dict. [*quoted* in People *v.* Graceland Cemetery Co., 86 Ill. 336, 338, 29 Am. Rep. 32]. See also Rosehill Cemetery Co. *v.* Kern, 147 Ill. 483, 494, 35 N. A. 240.

"Subservient to burial uses" see Rosehill Cemetery Co. *v.* Kern, 147 Ill. 483, 494, 35 N. E. 240.

5. Webster New Int. Dict. See also Moise's Succession, 107 La. 717, 720, 31 So. 990.

Subsisting demand see RECOUPMENT, SET-OFF, AND COUNTER-CLAIM, 34 Cyc. 666 *et seq.*

6. **Derived from** the Latin *sub stare*, to stand under. Webster Dict. [*quoted* in State *v.* Tunstall, 145 Ala. 477, 480, 40 So. 135].

7. *Ex p.* Black, 144 Ala. 1, 6, 40 So. 133; Worcester Dict. [*quoted* in State *v.* Tunstall, 145 Ala. 477, 479, 40 So. 135; State *v.* Williams, 143 Ala. 501, 504, 39 So. 276; Law *v.* State, 142 Ala. 62, 65, 38 So. 798; Wallace *v.* Jefferson County Bd. of Revenue, 140 Ala. 491, 502, 37 So. 321].

8. Abbott L. Dict.; Anderson L. Dict.; Rapalje & L. L. Dict. [all *quoted* in Rathbone *v.* Wirth, 150 N. Y. 459, 520, 45 N. E. 15, 34 L. R. A. 408, dissenting opinion].

9. Bouvier L. Dict. [*quoted* in Douglas *v.* Beasley, 40 Ala. 142, 148; State *v.* Burgdoerfer, 107 Mo. 1, 13, 17 S. W. 646, 14 L. R. A. 846].

10. Century Dict. [*quoted* in State *v.* Tunstall, 145 Ala. 477, 480, 40 So. 135].

11. Webster Dict. [*quoted* in State *v.* Tunstall, 145 Ala. 477, 480, 40 So. 135].

12. Webster Dict. [*quoted* in Com. *v.* Borden, 61 Pa. St. 272, 276; New Castle *v.* Genkinger, 37 Pa. Super. Ct. 21, 26; Com. *v.* Fuller, 4 Pa. Co. Ct. 429, 431].

Used in opposition to "form" see Bouvier

SUBSTANTIAL. Belonging to substance; actually existing; REAL, *q. v.*; not seeming or imaginary; not illusive; real; solid; true; veritable.[13] (Substantial: Affirmance as Constituting Breach of Bond to Prosecute to Effect, see APPEAL AND ERROR, 2 Cyc. 935. Damages, see DAMAGES, 13 Cyc. 1. Defects in Pleading, Aider by Verdict, see PLEADING, 31 Cyc. 768. Doubt, Instruction as to, see CRIMINAL LAW, 12 Cyc. 624.)

SUBSTANTIAL DAMAGES. See DAMAGES, 13 Cyc. 1.

SUBSTANTIALLY. Really, truly, ESSENTIALLY, *q. v.*; competently;[14] in a substantial manner; really; solidly; truly; competently;[15] in a substantial manner; in substance; essentially.[16]

L. Dict. [*quoted* in Douglas *v.* Beasley, 40 Ala. 142, 148; State *v.* Burgdoerfer, 107 Mo. 1, 13, 17 S. W. 646, 14 L. R. A. 846]. See also State *v.* Tunstall, 145 Ala. 477, 481, 40 So. 135; Stow *v.* Converse, 4 Conn. 17, 33; Hugo *v.* Miller, 50 Minn. 105, 110, 52 N. W. 381.

Distinguished from "subject" in reference to a proposed law see *Ex p.* Black, 144 Ala. 1, 5, 40 So. 133; State *v.* Williams, 143 Ala. 501, 504, 39 So. 276; Law *v.* State, 142 Ala. 62, 65, 38 So. 798; Wallace *v.* Jefferson County Bd. of Revenue, 140 Ala. 491, 502, 37 So. 321.

Distinguished from "tenor" see Wright *v.* Clements, 3 B. & Ald. 503, 506, 22 Rev. Rep. 465, 5 E. C. L. 292.

"Defect in form" and "defect in 'substance'" in pleadings distinguished see Pierson *v.* Springfield F., etc., Ins. Co., 7 Houst. (Del.) 307, 310, 31 Atl. 966.

"The substance of a contract is a mutual understanding, existing in fact or in contemplation of law." Stewart *v.* Emerson, 52 N. H. 301, 318; Rogers *v.* Virginia-Carolina Chemical Co., 149 Fed. 1, 15, 78 C. C. A. 615.

"The substance and effect of an instrument in writing cannot, either in common parlance or legal import, be understood to mean an exact copy of it." People *v.* Warner, 5 Wend. (N. Y.) 271, 273.

In the requirement that a declaration in libel or slander set out the substance of the words, the term does not mean the same idea, but means so many of the identical words as constitute the sting of the charge. Fritz *v.* Williams, (Miss. 1894) 16 So. 359, 360. See also Durrah *v.* Stillwell, 59 Ind. 139, 142.

13. Webster Dict. [*quoted* in Johnson *v.* Des Moines L. Ins. Co., 105 Iowa 273, 276, 75 N. W. 101].

Distinguished from "illusive" in reference to subjects for legislation see Foley *v.* Hoboken, 61 N. J. L. 478, 480, 38 Atl. 833.

Meaning substantially the same thing as actual, open, outward, visible see OPEN, 29 Cyc. 1494 note 11; OUTWARD, 29 Cyc. 1546 note 48.

"The term 'substantial parties' includes those persons who have some material or beneficial interest in the subject-matter of the suit." Whitehouse Eq. Jur., Pl. and Pract. [*quoted* in Perkins *v.* Hendryx, 149 Fed. 526, 529].

Used in connection with other words.— "Plain, substantial and workmanlike manner" see Smith *v.* Clark, 58 Mo. 145, 146. "Substantial commencement" see Atty.-Gen. *v.* Bournemouth, [1902] 2 Ch. 714, 725, 79 L. J. Ch. 730, 87 L. T. Rep. N. S. 252, 18 T. L. R. 661, 51 Wkly. Rep. 129. "Substantial completion" see Komp *v.* Luria, 46 Misc. (N. Y.) 339, 341, 92 N. Y. Suppl. 569. "Substantial compliance" see St. Louis, etc., R. Co. *v.* Houck, 120 Mo. App. 634, 648, 97 S. W. 963. "Substantial contribution" see Toledo, etc., R. Co. *v.* Kountz, 168 Fed. 832, 840. "Substantial dishonesty" see Godfrey *v.* Godfrey, 127 Wis. 47, 60, 106 N. W. 814. "Substantial dispute" see Day *v.* Donohue, 62 N. J. L. 380, 382, 41 Atl. 934. "Substantial doubt" see State *v.* Bateman, 198 Mo. 212, 224, 94 S. W. 843. "Substantial equivalent" see Crown Cork, etc., Co. *v.* Aluminum Stopper Co., 108 Fed. 845, 868, 48 C. C. A. 72. "Substantial evidence" see Jenkins, etc., Co. *v.* Alpena Portland Cement Co., 147 Fed. 641, 643, 77 C. C. A. 625. "Substantial householders" see Rex *v.* Stubbs, 2 T. R. 395, 406, 1 Rev. Rep. 503, 100 Eng. Reprint 213. "Substantial inclosure" see Brown *v.* Doherty, 93 N. Y. App. Div. 190, 196, 87 N. Y. Suppl. 563; Pope *v.* Hanmer, 8 Hun (N. Y.) 265, 269. "Substantial justice" see Stevens *v.* Ross, 1 Cal. 94, 98; Wells *v.* Burnham, 20 Wis. 112, 115. "Substantial performance" see Elliott *v.* Caldwell, 43 Minn. 357, 360, 45 N. W. 845, 9 L. R. A. 52; Leeds *v.* Little, 42 Minn. 414, 418, 44 N. W. 309; Spence *v.* Ham, 163 N. Y. 220, 225, 57 N. E. 412, 51 L. R. A. 238; Nesbit *v.* Braker, 104 N. Y. App. Div. 393, 394, 93 N. Y. Suppl. 856; Viles *v.* Barre, etc., Traction, etc., Co., 79 Vt. 311, 316, 65 Atl. 104; Manning *v.* Ft. Atkinson School Dist. No. 6, 124 Wis. 84, 108, 102 N. W. 356. "Substantial resemblance" see Sykes *v.* Magone, 38 Fed. 494, 497. "'Substantial' . . . similarity" see Morton *v.* State, (Tex. Cr. App. 1902) 71 S. W. 281, 282. "Substantial wrong or miscarriage" see Rex *v.* Finnessey, 10 Can. Cr. Cas. 347, 353; Rex *v.* Drummond, 10 Can. Cr. Cas. 340, 344, 10 Ont. L. Rep. 546; Rex *v.* Tutty, 9 Can. Cr. Cas. 544, 548; Reg. *v.* Theriault, 2 Can. Cr. Cas. 444, 456.

14. Cheesman *v.* Hart, 42 Fed. 98, 99. See also Com. *v.* Wentworth, 118 Mass. 441, 442.

15. Webster Dict. [*quoted* in Western Assur. Co. *v.* Altheimer, 58 Ark. 565, 575, 25 S. W. 1067].

16. Webster Dict. [*quoted* in Hardin County *v.* Weels, 108 Iowa 174, 176, 78 N. W. 908]. See also Vannest *v.* Murphy, 135 Iowa 123, 127, 112 N. W. 236.

"When we say a thing is 'substantially the same,' we mean it is the same in all im-

SUBSTANTIAL RIGHT. As used in reference to the right of a party to an action to appeal from an order affecting a substantial right, an essential legal right, not merely a technical one;[17] something to which, upon proved or conceded facts, a party may lay claim as matter of law — which a court may not legally refuse, and to which it can be seen that the party is entitled, within the well settled rules of law;[18] some legal right to which the party who appeals claims to be entitled;[19] a legal right; one which is protected by law.[20] (Substantial Right: Law Depriving Accused of as Ex Post Facto, see CONSTITUTIONAL LAW, 8 Cyc. 1031.)

SUBSTANTIA PRIOR ET DIGNIOR EST ACCIDENTE. A maxim meaning "The substance is prior and of more worth than the accident."[21]

portant particulars." Adams *v.* Edwards, 1 Fed. Cas. No. 53, 1 Fish. Pat. Cas. 1.

In reference to a prescribed form, the term is often used in the sense of comprehending all of the form given that is necessary or essential. Lineberger *v.* Tidwell, 104 N. C. 506, 513, 10 S. E. 758.

Distinguished from "tenor" see Edgerton *v.* State, (Tex. Cr. App. 1902) 70 S. W. 90, 91.

Used in connection with other words.— "Substantially as and for the purpose set forth" see Campbell Printing-Press, etc., Co. *v.* Marden, 64 Fed. 782, 786. "Substantially as described" see Westinghouse *v.* Boyden Power-Brake Co., 170 U. S. 537, 558, 18 S. Ct. 707, 42 L. ed. 1136; Brown *v.* Guild, 23 Wall. (U. S.) 181, 218, 23 L. ed. 161; Seymour *v.* Osborne, 11 Wall. (U. S.) 516, 547, 20 L. ed. 33 [*reversing* 21 Fed. Cas. No. 12,687, 6 Fish. Pat. Cas. 115, 2 Off. Gaz. 675, 9 Phila. (Pa.) 380]; Lowrie *v.* H. A. Meldrum Co., 124 Fed. 761, 764; Paul Boynton Co. *v.* Morris Chute Co., 87 Fed. 225, 227, 30 C. C. A. 617. "Substantially as set forth" see Boyden Power-Brake Co. *v.* Westinghouse Air-Brake Co., 70 Fed. 816, 826, 17 C. C. A. 430; Westinghouse *v.* New York Air-Brake Co., 59 Fed. 581, 596. "'Substantially as specified" see Lake Shore, etc., R. Co. *v.* National Car-Brake Shoe Co., 110 U. S. 229, 235, 4 S. Ct. 33, 28 L. ed. 129; O. H. Jewell Filter Co. *v.* Jackson, 140 Fed. 340, 344, 72 C. C. A. 304; Lee *v.* Pillsbury, 49 Fed. 747, 749. "Substantially a true copy" see Thomas *v.* State, 103 Ind. 419, 426, 2 N. E. 808. "Substantially commenced" see Atty.-Gen. *v.* Bournemouth, [1902] 2 Ch. 714, 725, 71 L. J. Ch. 730, 87 L. T. Rep. N. S. 252, 18 T. L. R. 661, 51 Wkly. Rep. 129. "Substantially disputed" see Frost *v.* Craig, 16 Daly (N. Y.) 107, 109, 9 N. Y. Suppl. 528. "Substantially of local or of private interest" see Atty.-Gen. *v.* Manitoba License Holders Assoc., [1902] A. C. 73, 79, 71 L. J. P. C. 28, 85 L. T. Rep. N. S. 591, 18 T. L. R. 94, 50 Wkly. Rep. 431. "Substantially true" see Jeffrey *v.* U. O. G. C., 97 Me. 176, 179, 53 Atl. 1102.

17. Clarke *v.* Nebraska Nat. Bank, 49 Nebr. 800, 802, 69 N. W. 104.

18. People *v.* New York Cent. R. Co., 29 N. Y. 418, 430; Howell *v.* Mills, 53 N. Y. 322, 329.

19. Cook *v.* Dickenson, 5 Sandf. (N. Y.) 663, 664.

20. Armstrong *v.* Herancourt Brewing Co., 53 Ohio St. 467, 480, 42 N. E. 425. See also North *v.* Smith, 73 Ohio St. 247, 249, 76 N. E. 619; Hare *v.* Sears, 17 Ohio S. & C. Pl. Dec. 590, 592.

Includes all positive, material, and absolute rights, as distinguished from those of a merely formal or essential nature. Security Bank *v.* Commonwealth Nat. Bank, 48 How. Pr. (N. Y.) 135, 137.

Is not confined to an absolute legal right. but includes matters which are discretionary. Martin *v.* Windsor Hotel Co., 70 N. Y. 101, 102. But see Howell *v.* Mills, 53 N. Y. 322, 329.

Orders affecting substantial rights: Order determining question of existence of partnership and whether certain property was partnership property. Putnam *v.* Putnam, 2 Ariz. 259, 261, 14 Pac. 356. Order directing a guardian to pay over the amount of a judgment against him as garnishee in a suit against his ward. Coffin *v.* Eisiminger, 75 Iowa 30, 31, 39 N. W. 124. Order directing an attorney to pay money collected into court. Baldwin *v.* Foss, 14 Nebr. 455, 456, 16 N. W. 480. Order directing election for directors of corporation. *In re* Fleming, 16 Wis. 70, 75. Order directing sale of premises instead of partition amongst the owners. Vesper *v.* Farnsworth, 40 Wis. 357, 360. Order discharging a person having property of a judgment debtor, or who is indebted to him, from process for contempt or refusing to answer question properly put upon examination in supplementary proceedings. Ballston Spa Bank *v.* Milwaukee Mar. Bank, 18 Wis. 490, 492. Order refusing to set aside a judgment by default in a foreclosure suit and to let in a meritorious defense not presented in time because of excusable neglect. Johnson *v.* Eldred, 13 Wis. 482, 484. Order sustaining a demurrer to a petition for the removal of an assignee in a voluntary assignment. Burtt *v.* Barnes, 87 Wis. 519, 522, 58 N. W. 790. See APPEAL AND ERROR, 2 Cyc. 591.

Orders not affecting substantial rights: Order refusing to dissolve a temporary injunction. Putnam *v.* Putnam, 2 Ariz. 259, 261, 14 Pac. 356. Order forming order refusing to open default judgment. Keller *v.* Feldman, 2 Misc. (N. Y.) 179, 180, 21 N. Y. Suppl. 581. See APPEAL AND ERROR, 2 Cyc. 591 *et seq.*

21. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].

SUBSTANTIVE. Depending upon itself.[22] (Substantive: Facts, Statement of in Chattel Mortgage, see CHATTEL MORTGAGES, 6 Cyc. 1003.)

SUBSTITUTE. That which is put in the place of another thing, or used instead of something else.[23] (Substitute: For Article of Food, Sale of, see FOOD, 19 Cyc. 1087. For Attorney-General, see ATTORNEY-GENERAL, 4 Cyc. 1027. For Bill of Exceptions, see APPEAL AND ERROR, 2 Cyc. 1089. For Lost Map, Admission of, see BOUNDARIES, 5 Cyc. 964 note 78. For Militiaman, see MILITIA, 27 Cyc. 502 note 87. For Officer Disqualified to Summon Jurors, see JURIES, 24 Cyc. 227. For Person Liable to Military Service — Furnishing by Drafted Person, see ARMY AND NAVY, 3 Cyc. 840; Right to Bounty, see BOUNTIES, 5 Cyc. 987. For Process of Notice on Appeal, see APPEAL AND ERROR, 2 Cyc. 853. For Prosecuting or District Attorney, see PROSECUTING AND DISTRICT ATTORNEYS, 32 Cyc. 718. For Transcript on Appeal, see APPEAL AND ERROR, 3 Cyc. 93. Judge, see JUDGES, 23 Cyc. 601.)

SUBSTITUTED COMPLAINT. Words which *ex vi termini* import a complaint filed to take the place of that previously filed.[24] (See PLEADING, 31 Cyc. 598.)

SUBSTITUTED SERVICE. See PROCESS, 32 Cyc. 461.

SUBSTITUTION. The act of substituting or putting (one person or thing) in the place of another; also, the state or fact of being substituted.[25] In the civil law, the putting one person in the place of another; particularly, the act of a testator in naming a second devisee or legatee who is to take the bequest either on failure of the original devisee or legatee or after him.[26] (Substitution: Alteration of Instruments by, as Element of Forgery, see FORGERY, 19 Cyc. 1375. Change of Form of Action by, see PLEADING, 31 Cyc. 429. Deed of as Estoppel, see ESTOPPEL, 16 Cyc. 687 note 12. Discharge of Surety by, see PRINCIPAL AND SURETY, 32 Cyc. 221. Obligation of Principal as to, to Responsibility of Accident Insurance For Acts of Subagent, see ACCIDENT INSURANCE, 1 Cyc. 238. Of Arbitrator, see ARBITRATION AND AWARD, 3 Cyc. 621, 659. Of Attorney, see ATTORNEY AND CLIENT, 4 Cyc. 954. Of Bequest or Devise, see WILLS. Of Bond For Another Unsupported by Consideration, see BONDS, 5 Cyc. 743 note 89. Of Bond on Refunding Debt of Railroad, see RAILROADS, 33 Cyc. 452. Of Carrier or Contractor For Carrying Mails, see POST-OFFICE, 31 Cyc. 991. Of Claimant in Interpleader, Statutory Proceedings For, see INTERPLEADER, 23 Cyc. 36. Of Commissioner — Or Other Like Officer in Proceedings to Establish Streets or Highways, see STREETS AND HIGHWAYS; To Take Deposition, see DEPOSITIONS,

22. Webster Dict. [*quoted* in State *v.* Ricker, 29 Me. 84, 89].

"**A substantive felony** is that which depends upon itself, and is not dependent upon another felony, which is established by the conviction of the one, who committed it, alone." State *v.* Ricker, 29 Me. 84, 89. See also May *v.* Pennell, 101 Me. 516, 519, 64 Atl. 885, 115 Am. St. Rep. 334, 7 L. R. A. N. S. 286, where "attempt" and "substantive offense" are distinguished.

"**Substantive law** is that portion of the law which creates rights and obligations." Sweet L. Dict. [*quoted* in Reg. *v.* Toland, 22 Ont. 505, 509, where it is distinguished from "adjective law"].

"**Substantive right**" distinguished from "remedy" see Dexter *v.* Edmands, 89 Fed. 467, 468.

23. Henderson *v.* State, 59 Ala. 89, 90.

"**Substitute, restate, restore,** and like words, may be used as implying the same general meaning." Bowman *v.* McLaughlin, 45 Miss. 461, 487.

Distinguished from "device" as used in the phrase "with cards or dice, or some device 'or substitute' for cards or dice" see Henderson *v.* State, 59 Ala. 89, 91.

Power to sell cattle subject to the lien of a deed of trust was held to be impliedly given where the deed provided that crops grown on the mortgaged land were to be used in feeding such cattle or the "substitutes" therefor. Goddard *v.* Jones, 78 Mo. 518, 520.

"**Substituted delivery**" see The St. Georg, 95 Fed. 172, 178.

"**Substituted security**" see Gartsides *v.* Inland Revenue Com'rs, 82 L. T. Rep. N. S. 686, 688, 16 T. L. R. 378.

"**Substituted trustee**" see Matter of Gueutal, 97 N. Y. App. Div. 530, 531, 90 N. Y. Suppl. 138.

24. Britz *v.* Johnson, 65 Ind. 561, 562.

25. Century Dict.

Distinguished from "amendment" in reference to a forthcoming bond in attachment see ATTACHMENTS, 4 Cyc. 698 note 65.

26. Black L. Dict.

Distinguished from "*fidei commissum*" see *In re* Billis' Will, 122 La. 539, 543, 47 So. 884.

13 Cyc. 885. Of Copy — Of Deposition Lost After Return, see Depositions, 13 Cyc. 978; Of Lost or Destroyed Record on Appeal, see Appeal and Error, 2 Cyc. 1076; Of Lost Pleading on Trial De Novo on Appeal From Justice, see Justices of the Peace, 24 Cyc. 730; On Loss or Destruction of Indictment, see Indictments and Informations, 22 Cyc. 221. Of Count in Declaration, see Assumpsit, Action of, 4 Cyc. 346. Of Devisee or Legatee, see Wills. Of Different Lease or Other Contract Between Landlord and Tenant, see Landlord and Tenant, 24 Cyc. 913. Of Driver by Hirer of Animal, see Animals, 2 Cyc. 313. Of Equivalents or Elements — In General as Infringement of Patents, see Patents, 30 Cyc. 979; As Involving Invention, see Patents, 30 Cyc. 855. Of Indemnitor as Party in Action Against Sheriff or Constable, see Sheriffs and Constables, 35 Cyc. 1804. Of Materials — As Infringement of Patents, see Patents, 30 Cyc. 978 note 16; As Involving Invention, see Patents, 30 Cyc. 856; Or Mechanical Equivalents as Involving Novelty, see Patents, 30 Cyc. 830 note 26. Of Mortgage, Effect as to Priorities, see Mortgages, 27 Cyc. 1222. Of New — Agreement, Effect as Accord and Satisfaction, see Accord and Satisfaction, 1 Cyc. 311; Bond, Discharge of Bail in Civil Actions by, see Bail, 5 Cyc. 36; Bond, Effect on Judgment Collateral to Old Bond, see Judgments, 23 Cyc. 1498 note 86; Case on Appeal as Amendment, see Appeal and Error, 3 Cyc. 64 note 95; Creditor or Debtor, see Novation, 29 Cyc. 1131; Mortgage After Sale of Equity or Assumption of Mortgagor, Effect as to Grantees, see Mortgages, 27 Cyc. 1337 note 55; Mortgage For Mortgage Prior to Mechanic's Lien, Effect on Priorities, see Mechanics' Liens, 27 Cyc. 240; Obligation Between Same Parties, see Novation, 29 Cyc. 1137; Parties to Contract of Employment, see Master and Servant, 26 Cyc. 1024; Securities by Foreign Corporations, see Foreign Corporations, 19 Cyc. 1216 note 53. Of One Note For Another as Payment of Debt, see Commercial Paper, 7 Cyc. 1011. Of Other — Bond, Effect as Payment, see Bonds, 5 Cyc. 805; Person, by Curator on Refusing Appointment, see Absentees, 1 Cyc. 204; Property, to That Described in Mortgage, see Chattel Mortgages, 6 Cyc. 1035; Mortgages, 27 Cyc. 1142; Securities, Effect on Lien of Mortgage, see Mortgages, 27 Cyc. 1413. Of Parties — In General, see Pleading, 31 Cyc. 484; Appeal From Order on Motion For, see Appeal and Error, 2 Cyc. 603; As Subject of Mandamus, see Mandamus, 26 Cyc. 204; Effect on Liability of Sureties on Appeal-Bonds, see Appeal and Error, 2 Cyc. 941 note 34; In Action By and Against Consolidated Corporation, see Corporations, 10 Cyc. 310; In Action By and Against Executor or Administrator, see Executors and Administrators, 18 Cyc. 968, 969; In Action By and Against Guardian and Ward, see Guardian and Ward, 21 Cyc. 206; In Action By and Against Religious Society, see Religious Societies, 34 Cyc. 1195 note 6; In Action For Partition, see Partition, 30 Cyc. 229; In Action of Ejectment, see Abatement and Revival, 1 Cyc. 90 note 38; Ejectment, 15 Cyc. 87; In Action to Set Aside Fraudulent Conveyance, see Fraudulent Conveyances, 20 Cyc. 718 note 43; In Appellate Court, see Appeal and Error, 2 Cyc. 773, 782; In Condemnation Proceedings, see Eminent Domain, 15 Cyc. 839; In Equity, see Equity, 16 Cyc. 200; In Justice's Court, see Justices of the Peace, 24 Cyc. 514; In Mandamus Proceedings, see Mandamus, 26 Cyc. 418; In Probate Proceedings, see Wills; In Proceedings to Foreclose Mortgage by Action, see Mortgages, 27 Cyc. 1583; In Replevin Proceedings, see Replevin, 34 Cyc. 1427; In Suit For Injunction, see Injunctions, 22 Cyc. 916; In Suit to Enforce Mechanic's Lien, see Mechanics' Liens, 27 Cyc. 359; Liability For Costs, see Costs, 11 Cyc. 94; Necessity For, on Death of Party Pending Appeal, see Appeal and Error, 2 Cyc. 774; On Change in Incumbency of Public Office, see Abatement and Revival, 1 Cyc. 121; On Change of Executor or Administrator, see Abatement and Revival, 1 Cyc. 120; On Change of Guardian, see Abatement and Revival, 1 Cyc. 120; On Change of Receiver, see Abatement and Revival, 1 Cyc. 121; On Change of Trustee, see Abatement and Revival, 1 Cyc. 121; On Death of Original Party, see Abatement and Revival, 1 Cyc. 100; Procedure For in Appellate Court After Death of Party, see Appeal and Error,

2 Cyc. 777; Suspension of Limitations by Commencement of Action or Other Proceedings as Against or in Favor of Substituted Parties, see LIMITATIONS OF ACTIONS, 25 Cyc. 1303. Of Party Having Diverse Citizenship to Effect Removal of Cause, see REMOVAL OF CAUSES, 34 Cyc. 1279. Of Persons Paying Debts and Rights of Creditors, see SUBROGATION. Of Pleading, see PLEADING, 31 Cyc. 598. Of Property, Effect as Constituting Fraudulent Conveyance, see FRAUDULENT CONVEYANCES, 20 Cyc. 389. Of Security, see PRINCIPAL AND SURETY, 32 Cyc. 221. Of Subscriber to Corporate Stock, see CORPORATIONS, 10 Cyc. 452. Of Tenant — As Constituting Release From Liability For Rent, see LANDLORD AND TENANT, 24 Cyc. 1142; As Surrender of Leased Premises, see LANDLORD AND TENANT, 24 Cyc. 1370. Of Trustee in Deed of Trust, see MORTGAGES, 27 Cyc. 1046. Of Unskilled or Incompetent Servant as Actionable Negligence, see MASTER AND SERVANT, 26 Cyc. 1298. Or Rotation of Judges, see JUDGES, 23 Cyc. 561.)

SUBSTITUTIONAL GIFT. A gift in which the share which the issue are to take is by a prior clause expressed to be given to the parent of such issue.[27] (See WILLS.)

SUBSTITUTIONARY LEGACY. A legacy subsequently given to come in the place of others given before, either in a former will, or where the legacy is given in a codicil executed at a later date than the instrument by which the legacies were given in the first instance.[28] (See WILLS.)

SUBSTRACT. To take something clandestinely away without the knowledge and, therefore, without the consent of its owner.[29]

SUBSTRUCTURE. In reference to railroads, the embankment, cuts, fills, and other things necessary to make up the road-bed.[30]

SUBSURFACE WATERS. Waters which, without any permanent, distinct, or definite channel, percolate in mere veins, ooze, or filter from the lands of one owner to the lands of another.[31] (See WATERS.)

SUBTENANT. One who leases all or a part of rented premises from the original lessee for a term less than that held by the latter.[32] (See, generally, LANDLORD AND TENANT, 24 Cyc. 845.)

SUBTERRANEAN STREAMS. Streams which flow in a permanent, distinct, and well defined channel from the lands of one to those of another proprietor.[33] (See WATERS.)

SUBTERRANEAN WATERCOURSES. Those water currents that flow under the surface of the earth.[34] (See WATERS.)

SUBURB. A region or place adjacent to a city; an outlying district of a city; a town or village so near that it may be used for residence by those who do business in the city; in the plural, collectively, environs; surroundings, outskirts, hence any adjuncts of a place.[35]

SUBVERT. To overthrow; to ruin utterly; to corrupt; to destroy.[36]

27. Acken *v.* Osborn, 45 N. J. Eq. 377, 381, 17 Atl. 767; Lanphier *v.* Buck, 2 Dr. & Sm. 484, 494, 34 L. J. Ch. 650, 62 Eng. Reprint 704, where "original gift" is distinguished.

28. Redfield Wills [*quoted* in *In re* Laveaga, 119 Cal. 651, 653, 51 Pac. 1074].

29. U. S. *v.* Gatmaitan, 4 Philippine 265, 266.

30. Louisville, etc., R. Co. *v.* U. S. Iron Co., 118 Tenn. 194, 209, 101 S. W. 414.

31. Frazier *v.* Brown, 12 Ohio St. 294, 299. See also Tampa Waterworks Co. *v.* Cline, 37 Fla. 586, 594, 20 So. 780, 53 Am. St. Rep. 262, 33 L. R. A. 376.

32. Forrest *v.* Durnell, 86 Tex. 647, 649, 26 S. W. 481; Hudgins *v.* Bowes, (Tex. Civ. App. 1908) 110 S. W. 178, 179.

33. Tampa Waterworks Co. *v.* Cline, 37 Fla. 586, 594, 20 So. 780, 53 Am. St. Rep. 262, 33 L. R. A. 376; Frazier *v.* Brown, 12 Ohio St. 294, 299.

34. Kinney Irr. [*quoted* in Los Angeles *v.* Pomeroy, 124 Cal. 597, 633, 57 Pac. 585].

35. Century Dict. [*quoted* in Piedmont Cotton Mills *v.* Georgia R., etc., Co., 131 Ga. 129, 141, 62 S. E. 52].

The "suburban" portion of city and the "residence" portion of a city do not mean the same thing. Rowland *v.* Greencastle, 157 Ind. 591, 596, 62 N. E. 474.

36. Webster Dict. [*quoted* in Chesley *v.* King, 74 Me. 164, 166, 43 Am. Rep. 569, brief of counsel].

An allegation in a declaration that defendant "subverted" the water from a spring belonging to plaintiff, did not give notice to defendant that he would be called upon to answer a charge of corrupting the waters, since the term "subvert" has no such natural

SUBWAY. An underground way; an accessible underground passage containing gas mains, water-mains, telegraph wires, etc.[37] (Subway: Constitutionality of Statute Authorizing Construction at City's Expense, see CONSTITUTIONAL LAW, 8 Cyc. 783 note 59. Mandamus — As Remedy of Company Having Right to Construct in Streets, see MANDAMUS, 26 Cyc. 300; To Company, to Compel It to Accord Space to Other Company, see MANDAMUS, 26 Cyc. 375. Rights in and Use of Street, see STREET RAILROADS, 36 Cyc. 1375.)

SUCCEED. To follow; be subsequent; come after; come next; come in the place of another or of that which has preceded.[38]

SUCCESSFUL. Having or resulting in success; obtaining or terminating in the accomplishment of what is wished or intended.[39] (Successful: Party Litigant, see COSTS, 11 Cyc. 27 *et seq.*)

SUCCESSION. The act or right of legal or official investment with a predecessor's office, dignity, possessions, or functions; also the legal or actual order of so succeeding, or that which is or is to be vested or taken;[40] a series of persons following one another; a lineage; an order of descendants.[41] In the law of descent, the coming in of another to take the property of one who dies without disposing of it by will.[42] (Succession: Alteration of in Management of Lunatic's Property, see INSANE PERSONS, 22 Cyc. 1189. Decedent's Estate in General, see DESCENT AND DISTRIBUTION, 14 Cyc. 1; EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1; WILLS. Of Corporation — On Consolidation, to Rights and Liabilities of Original Corporation, see CORPORATIONS, 10 Cyc. 303; On Reincorporation, to Rights and Liabilities of Old Corporation, see CORPORATIONS, 10 Cyc. 288. Of Municipality to Preëxisting Rights and Liabilities, see MUNICIPAL CORPORATIONS, 28 Cyc. 175

signification as applied to material objects like a vein or stream of water. Chesley *v.* King, 74 Me. 164, 170, 43 Am. Rep. 569.

37. Century Dict.

38. Century Dict.

"Succeeding," "like," "after," "from," "subsequent,' and similar words, where it is not expressly declared to be exclusive or inclusive, is susceptible of different significations and is used in different senses, with an exclusive or inclusive meaning, according to the subject to which it is applied. Sands *v.* Lyon, 18 Conn. 18, 27.

"Succeeding term" see Stripland *v.* State, 115 Ga. 578, 581, 4 S. E. 987.

39. Century Dict.

"A party . . . may be successful in a suit without winning everything that is asked for. The question whether a party is successful or not, depends upon the particular facts of each case; upon the issues raised; upon the contest made." Cole *v.* Richmond Min. Co., 18 Nev. 120, 124, 1 Pac. 663.

In a written proposition to architects for plans and specifications for a certain proposed building, providing for the payment of a certain amount to each architect for his plans, and providing that "the architect who is successful" shall be engaged as architect and superintendent and shall be paid in a specified way, the term refers to the architect whose plans are considered the most meritorious and are accepted as such. Walsh *v.* St. Louis Exposition, etc., Assoc., 16 Mo. App. 502, 507 [*affirmed* in 90 Mo. 459, 2 S. W. 842].

"Successful claimant" see Russell *v.* Woerner, 131 Mo. App. 253, 257, 110 S. W. 691; Smith *v.* Laumeier, 12 Mo. App. 546, 550 [*affirmed* in 84 Mo. 672].

"Successful party" see Norwegian Evangelical Lutheran Church *v.* Thorson, 21 Wis. 34, 35; Scatcherd *v.* Love, 166 Fed. 53, 55, 91 C. C. A. 639.

"Successful vaccination" see Sovereign Camp W. W. *v.* Woodruff, 80 Mis. 546, 554, 32 So. 4.

40. Century Dict.; Standard Dict. [both *quoted* in Glascott *v.* Bragg, 111 Wis. 605, 608, 87 N. W. 853, 56 L. R. A. 258].

41. Johnson Dict. [*quoted* in Tyrone *v.* Waterford, 1 De G. F. & J. 613, 623, 6 Jur. N. S. 567, 29 L. J. Ch. 486, 8 Wkly. Rep. 454, 62 Eng. Ch. 475, 45 Eng. Reprint 499].

42. State *v.* Payne, 129 Mo. 468, 477, 31 S. W. 797, 33 L. R. A. 576, where it is said: "The word . . . in its common legal use, denotes the devolution of title to property under the laws of descent and distribution."

For other definitions of the term see DESCENT AND DISTRIBUTION, 14 Cyc. 16 note 1.

The word is one of technical meaning and refers to those who by descent or will take the property of the decedent. It is a word which clearly excludes those who take by deed, grant, gift, or any form of purchase or contract. Quarles *v.* Clayton, 87 Tenn. 308, 315, 10 S. W. 505, 3 L. R. A. 170.

"Succession by law" is the title by which a man on the death of his ancestor intestate, acquires his estate, whether real or personal, by the right of representation as his next heir. Halifax Anal. Civ. L. [*quoted* in Hunt *v.* Hunt, 37 Me. 333, 344].

As synonymous with "descent" see DESCENT AND DISTRIBUTION, 14 Cyc. 16 note 1.

"Inheritance" compared see INHERITANCE, 22 Cyc. 722 note 28.

Statutory definition see *In re* Headen, 52 Cal. 294, 298; Blake *v.* McCartney, 3 Fed. Cas. No. 1,498, 4 Cliff. 101.

Order of, in Law of Descent and Distribution, see DESCENT AND DISTRIBUTION, 14 Cyc. 36. Proceeds of Life Insurance Policy as Part of, see LIFE INSURANCE, 25 Cyc. 887 note 65. Transfer of Patent by, see PATENTS, 30 Cyc. 954.)

SUCCESSION TAX. See INTERNAL REVUENE, 22 Cyc. 616; TAXATION.

SUCCESSIVE. A synonym of CONSECUTIVE,[43] *q. v.* (Successive: Actions — For Damages For Continuing Nuisance, see NUISANCES, 29 Cyc. 1254; Of Ejectment, see EJECTMENT, 15 Cyc. 59. Appeals, see APPEAL AND ERROR, 2 Cyc. 525. Attachments — In General, see ATTACHMENT, 4 Cyc. 553; Priorities, see ATTACHMENT, 4 Cyc. 641. Bond of — County Officer, see COUNTIES, 11 Cyc. 449; Executor or Administrator, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1251; Guardian, see GUARDIAN AND WARD, 21 Cyc. 223; Officer in General, see OFFICERS, 29 Cyc. 1458; Sheriff or Constable, see SHERIFFS AND CONSTABLES, 35 Cyc. 1495; State Officer, see STATES, *ante*, p. 859; Tax Collector, see TAXATION. Causes of Action Merged, Barred, or Concluded, see JUDGMENTS, 23 Cyc. 1181. Executions, see EXECUTIONS, 17 Cyc. 933. Findings of Trial Court, see TRIAL. Foreclosures of Mortgages, see MORTGAGES, 27 Cyc. 1537. Garnishments, see GARNISHMENT, 20 Cyc. 983. Guardians, see GUARDIAN AND WARD, 21 Cyc. 273. Judgments in Same Case, see JUDGMENTS, 23 Cyc. 772. Levies Under — Of Attachment, see ATTACHMENT, 4 Cyc. 605; Of Execution, see EXECUTIONS, 17 Cyc. 1096. Motions For — Continuance, see CONTINUANCES IN CIVIL CASES, 9 Cyc. 158; CONTINUANCES IN CRIMINAL CASES, 9 Cyc. 205; New Trial, see CRIMINAL LAW, 12 Cyc. 703; NEW TRIAL, 29 Cyc. 728. Offenses, see CRIMINAL LAW, 12 Cyc. 949. Or Renewal Notes For Illegal Consideration, Validity of, see CONTRACTS, 9 Cyc. 562 note 9. Proceedings For Review, see APPEAL AND ERROR, 2 Cyc. 525. Publications, see NOTICE, 29 Cyc. 1121; PROCESS, 32 Cyc. 486. Replevins, see JUDGMENTS, 23 Cyc. 1341. Supplementary Proceedings, see EXECUTIONS, 17 Cyc. 1429. Trustees, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 230 note 80; INSOLVENCY, 22 Cyc. 1279; TRUSTS. Verdicts, Effect of on Appeal, see APPEAL AND ERROR, 3 Cyc. 355. Writs of — Certiorari, see CERTIORARI, 6 Cyc. 750; Mandamus, see MANDAMUS, 26 Cyc 494.)

SUCCESSIVELY. By succession; in a series; one after another; consecutively;[44] in a successive manner, in a series or order; following in order or uninterrupted course.[45] (Successively: Published, see NOTICE, 29 Cyc. 1121; PROCESS, 32 Cyc. 486.)

SUCCESSOR. One who succeeds or takes the place of another;[46] one who follows another into a position;[47] he that followeth, or cometh in another's place;[48] an apt and appropriate term to designate one to whom property descends.[49]

43. Dever *v.* Cornwell, 10 N. D. 123, 130, 86 N. W. 227 [*citing* Webster Dict.].

"Successive weeks" see Thomas *v.* Issenhuth, 18 S. D. 303, 307, 100 N. W. 436.

44. Derby *v.* Dancey, 112 La. 891, 895, 36 So. 795

45. Walker *v.* Goldsmith, 14 Oreg. 125, 145, 12 Pac. 537, where such is said to be the ordinary meaning of the term.

46. State *v.* Andrews, 64 Kan. 474, 496, 67 Pac. 870.

Used in the twofold sense of one entitled to succeed and one who has in fact succeeded see People *v.* Ward, 107 Cal. 236, 239, 40 Pac. 538.

A successor to a person holding civil office under a state is one legally chosen or selected. Ballantyne *v.* Bower, 17 Wyo. 356, 99 Pac. 869, 872.

47. Hood *v.* Hayward, 26 Abb. N. Cas. (N. Y.) 271, 35 N. Y. St. 229, 239, where it is said that he is not one who went into the position with and survives such other in the position after it has been vacated by such other.

"Appointees to fill vacancies" distinguished, in a statute regulating appointments to office by the governor see State *v.* Howe, 25 Ohio St. 588, 594, 18 Am. Rep. 321.

A person elected a city officer under a charter which was revived before he was or could be qualified as an officer under it never became an officer of the city, and therefore could not be a "successor" to an officer. Crook *v.* People, 106 Ill. 237, 249.

48. Jacob L. Dict. [*quoted* in Beatty *v.* Ross, 1 Fla. 198, 209].

49. American Surety Co. *v.* McDermott, 5 Misc. (N. Y.) 298, 299, 25 N. Y. Suppl. 467 [*citing* Anderson L. Dict.; Bouvier L. Dict.; Lawson Rights & Rem.; Wharton L. Lex.].

In modern acceptation the term has a broader significance than succession in respect to the estate of a deceased. It may mean, in a proper situation, succeeding to a place, or a right, or an interest, or a power,

(Successor: As Necessary Word in Conveyance to Corporations, see CORPORATIONS, 10 Cyc. 1020. In Interest — Designation of in Deed as Affecting Estate Created and Person Entitled Thereto, see DEEDS, 13 Cyc. 658; Right to Revive or Continue Action, see ABATEMENT AND REVIVAL, 1 Cyc. 86. Power — Of County Officer to Bind by Contract, see COUNTIES, 11 Cyc. 469; Of Municipal Council to Bind by Contract, see MUNICIPAL CORPORATIONS, 28 Cyc. 654.)

SUCCINCT.[50] Brief; PRECISE, *q. v.*; EXACT,[51] *q. v.*

SUCCURRITUR MINORI; FACILIS EST LAPSUS JUVENTUTIS. A maxim meaning "A minor is [to be] aided; a mistake of youth is easy." [52]

SUCESION LEGITIMA. In Spanish law, issue.[53]

SUCH. SAME,[54] *q. v.*; the same as previously mentioned or specified; not other or different; of that class; [55] of that kind; of the like kind; LIKE, *q. v.*; resembling;

official or otherwise. It may mean succession in corporate control. American Surety Co. *v.* Campbell & Zell Co., 138 Fed. 531, 535.

In association with the words "heirs," "administrators," and "assigns," the term plainly imports a devolution of property upon the obligor's estate. American Surety Co. *v.* McDermott, 5 Misc. (N. Y.) 298, 300, 25 N. Y. Suppl. 467.

Distinguished from "assigns" as used in a statute see International, etc., R. Co. *v.* Smith County, 65 Tex. 21, 25.

"Successors and assigns" are not sufficient to make an estate of inheritance. Sedgwick *v.* Laflin, 10 Allen (Mass.) 430.

"Successor in estate" see McDonald *v.* Hanlon, 79 Cal. 442, 21 Pac. 861.

"Successor in interest" see Windhaus *v.* Bootz, (Cal. 1890) 25 Pac. 404; McNulta *v.* Huntington, 62 N. Y. App. Div. 257, 259, 70 N. Y. Suppl. 897; Northrup *v.* Smith, 58 N. Y. Super. Ct. 120, 124, 9 N. Y. Suppl. 802.

As used in the forfeiture clause of a lease the term has been held to include executor. West Shore R. Co. *v.* Wenner, 70 N. J. L. 233, 239, 57 Atl. 408, 103 Am. St. Rep. 801.

"Successors" in reference to a corporation, has reference, in its strict sense, to the succession of individuals who compose the corporation. Cumberland Bldg., etc., Assoc. *v.* Aramingo M. E. Church, 13 Phila. (Pa.) 171, 172.

It is a necessary word in most instances in grants to corporation sole in order to pass a fee; but the word in a deed to a corporation aggregate is not necessary to pass the fee. Chancellor *v.* Bell, 45 N. J. Eq. 538, 541, 17 Atl. 684.

"Successors in office" see Curtis *v.* Board of Education, 43 Kan. 138, 141, 23 Pac. 98; Hamlin *v.* Perticuler Baptist Meeting House, 103 Me. 343, 350, 69 Atl. 315.

"Their successors in said office," in a statute enacting that the overseers of the poor for the time being, be made and incorporated into a body politic, by the name, etc., and that they and their successors in said office, have a perpetual succession by said name, is equivalent to say that the overseers then in office, and those who should afterward from time to time be overseers should constitute the corporation. Boston Overseers of Poor *v.* Sears, 22 Pick. (Mass.) 122, 132.

"Successors in trust" see Langdon *v.* Thompson, 25 Minn. 509, 512.

50. Derived from the two Latin words,—*sub*, under, below; and *cingere*, to girdle,—and literally means girdled below, or from below, tucked up; hence compressed into narrow shape; concise. Webster Dict. [*quoted* in Wolf *v.* Wilsey, 2 Ind. App. 549, 28 N. E. 1004, 1007].

51. Wolfe *v.* Wilsey, 2 Ind. App. 549, 28 N. E. 1004, 1007.

A "succinct statement" of a case, required by a rule of a supreme court at the beginning of briefs, is said to be a concise statement of what is claimed to be the substance or gist or pith of the record, with references to the printed case for verification in case of any dispute. McLimans *v.* Lancaster, 63 Wis. 596, 610, 23 N. W. 689.

"Succinct and definite statement" see Woods *v.* Matlock, 19 Ind. App. 364, 48 N. E. 384, 385; Hyatt *v.* Bonham, 19 Ind. App. 256, 49 N. E. 361.

52. Burrill L. Dict. [*citing* Jenkins Cent. 47].

53. De Rodriguez *v.* Vivoni, 201 U. S. 371, 376, 26 S. Ct. 475, 50 L. ed. 792 (where it is said that it is also possible for the term to mean "lawful heirs"); Costello *v.* Pumarada, 3 Porto Rico 308, 318.

54. Ackley *v.* Fish, 55 Vt. 18, 20.

55. Century Dict. [*quoted* in Harris *v.* Nashville, etc., R. Co., 153 Ala. 139, 152, 44 So. 962, 14 L. R. A. N. S. 261; Evans *v.* State, 150 Ind. 651, 653, 50 N. E. 820; State *v.* Connors, 37 Mont. 15, 94 Pac. 199, 201; State *v.* Second Judicial Dist. Ct., 26 Mont. 396, 405, 68 Pac. 570, 69 Pac. 103].

"In this sense it is used with reference to some antecedent word or phrase, and signifies that the word or phrase of which it is made an attributive . . . is to be understood as indicating something of the same class or in the same situation as the one already described, and to which it refers." State *v.* Second Judicial Dist. Ct., 26 Mont. 396, 405, 68 Pac. 570, 69 Pac. 103.

In the sense of "previously mentioned" or "specified" see State *v.* Govan, 48 Ark. 76, 81, 2 S. W. 347; Williams *v.* State, 20 Fla. 391, 396; Daniels *v.* Clarke, 193 Mass. 84, 85, 78 N. E. 571; Walker *v.* Giddings, 103 Mich. 344, 348, 61 N. W. 512; Gage *v.* School Dist. No. 7, 64 N. H. 232, 234, 9 Atl. 387; Philadelphia *v.* River Front R. Co., 133 Pa. St. 134, 139, 19 Atl. 356; Devore's Appeal, 56 Pa. St. 163, 166; Garvin *v.* State, 13 Lea (Tenn.) 162, 172; Warner El. Mfg. Co. *v.*

SIMILAR,[56] *q. v.*; having the particular quality or character specified;[57] used to represent the object indefinitely, or particularized one way or another, or one and another not there mentioned;[58] of that kind, of the like kind.[59]

SUCKER. A person readily deceived.[60]

SUDDEN. Quick; rapid; unexpected.[61]

SUDDEN HEAT AND PASSION. Technical terms of the common law to describe the offense of manslaughter.[62] (Sudden Heat and Passion: As Reducing Grade of Offense, see HOMICIDE, 21 Cyc. 736, 789.)

Houston, (Tex. Civ. App. 1894) 28 S. W. 405, 408; Barlow *v.* Daniels, 25 W. Va. 512, 519; Ward *v.* Walters, 63 Wis. 39, 42, 22 N. W. 844.

56. Webster Dict. [*quoted* in Harris *v.* Nashville, etc., R. Co., 153 Ala. 139, 152, 44 So. 962, 14 L. R. A. N. S. 261].

57. Webster Dict. [*quoted* in Harris *v.* Nashville, etc., R. Co., 153 Ala. 139, 152, 40 So. 962, 14 L. R. A. N. S. 26; State *v.* Estep, 66 Kan. 416, 422, 71 Pac. 857].

"Such as" construed to mean "of such description as" see Reg. *v.* Randall, 4 E. & B. 564, 569, 1 Jur. N. S. 255, 24 L. J. M. C. 57, 3 Wkly. Rep. 177, 82 E. C. L. 564.

58. Webster Dict. [*quoted* in Garvin *v.* State, 13 Lea (Tenn.) 162, 172].

59. Ogden *v.* Glidden, 9 Wis. 46, 52; Worcester Dict. [*quoted* in Chesapeake, etc., R. Co. *v.* Patton, 9 W. Va. 648, 656].

It is a descriptive and relative word and as such must be referred to the last antecedent unless the meaning of the sentence would thereby be impaired. Summerman *v.* Knowles, 33 N. J. L. 202, 205. See also Steinlein *v.* Halstead, 52 Wis. 289, 291, 8 N. W. 881.

Used in the sense of "like kind" or character see Ventura County *v.* Clay, 112 Cal. 65, 73, 44 Pac. 488; Travers *v.* Wallace, 93 Md. 507, 514, 49 Atl. 415; Com. *v.* Miller, 3 Cush. (Mass.) 243, 254; State *v.* Ryan, 2 Mo. App. 303, 310; *Ex p.* Heyman, 45 Tex. Cr. 532, 542, 78 S. W. 349.

"Such term" construed to mean "a term" or "the term of" see Evans *v.* Com., 3 Metc. (Mass.) 453, 455.

In a devise to the daughters of testatrix for life and after their death, then the legal issue of said daughters and the heirs and assigns of "such issue," the word "such" does not show that by "issue" administratrix meant children. Carroll *v.* Burns, 108 Pa. St. 386, 393.

As used in a power of appointment under a will the term has been held to imply a power of selection in the donee of the power. Ingraham *v.* Meade, 13 Fed. Cas. No. 7,045, 3 Wall. Jr. 32; Doe *v.* Alchin, 2 B. & Ald. 122, 125. See also Walsh *v.* Wallinger, 9 L. J. Ch. O. S. 7, 8, 2 Russ. & M. 78, 11 Eng. Ch. 78, 39 Eng. Reprint 324.

Construed as equivalent to "any" see Struthers *v.* People, 116 Ill. App. 481, 484.

Used in connection with other words.—"In such manner" see Jenkins *v.* Ewin, 8 Heisk. (Tenn.) 456, 479; Western Union Tel. Co. *v.* Harris, (Tenn. Ch. App. 1899) 52 S. W. 748, 752. "Such accident" see Fitch *v.* Mason City, etc., Traction Co., 124 Iowa 665, 670, 100 N. W. 618. "Such action, plaint, or suit" see Ricketts *v.* Lewis, 1 B. & Ad. 197, 200, 20 E. C. L. 452. "Such allowance" see McWhorter *v.* Benson, Hopk. (N. Y.) 28, 37. "Such amount" see Hempstead *v.* Caunt, [1903] 2 K. B. 1, 5, 67 J. P. 344, 72 L. J. K. B. 440, 1 Loc. Gov. 507, 88 L. T. Rep. N. S. 599, 19 T. L. R. 407, 51 Wkly. Rep. 700. "Such appeal cases" see Collier *v.* Carter, 100 Md. 381, 385, 60 Atl. 104. "Such as heretofore furnished" see Harrow Spring Co. *v.* Whipple Harrow Co., 90 Mich. 147, 149, 51 N. W. 197, 30 Am. St. Rep. 421. "Such circumstance" see *In re* Gaskill, 130 Fed. 235, 237. "Such conveyance" see People *v.* Lewis, 127 N. Y. App. Div. 107, 113, 111 N. Y. Suppl. 398. "Such county" see Wellman *v.* Bergmann, 44 N. J. L. 613, 615. "Such date" see Campbell *v.* Elkins, 58 W. Va. 308, 316, 52 S. E. 220, 2 L. R. A. N. S. 159. "Such deer" see State *v.* Fisher, (Oreg. 1908) 98 Pac. 713, 714. "Such election" see People *v.* Weber, 222 Ill. 180, 185, 78 N. E. 56; Kemp *v.* Holland, 10 Mo. 255, 258. "Such estate" see People *v.* Koenig, 37 Colo. 283, 286, 85 Pac. 1129. "Such final judgment or decree" see U. S. *v.* Barber, 74 Fed. 483, 488, 20 C. C. A. 616. "Such injuries alone" see Moore *v.* Wildey Casualty Co., 176 Mass. 418, 422, 57 N. E. 673. "Such injury" see Coolidge *v.* Hallauer, 126 Wis. 244, 251, 105 N. W. 568. "Such manufacturer" see Robert Portner Brewing Co. *v.* Southern Express Co., 109 Va 22, 63 S. E. 6, 8. "Such period" see Benoit *v.* New York Cent., etc., R. Co., 94 N. Y. App. Div. 24, 27, 87 N. Y. Suppl. 951. "Such public service facilities and conveniences as may be reasonable and just" see Chicago, etc., R. Co. *v.* State, (Okla. 1909) 99 Pac. 901, 905. "Such refusal" see Fishkill Nat. Bank *v.* Speight, 47 N. Y. 668. "Such sum" see *In re* Andrew, 1 Ch. D. 358, 361, 45 L. J. Bankr. 57, 33 L. T. Rep. N. S. 556, 24 Wkly. Rep. 197. "Such trustee" see Walsh *v.* Miller, 51 Ohio St. 462, 481, 38 N. E. 381. "Such vehicle" see U. S. *v.* One Black Horse, 129 Fed. 167, 170. "Such warrant" see Adams *v.* Allen, 99 Me. 249, 251, 59 Atl. 62. "Such work" see St. Louis *v.* Terminal Road Assoc., 211 Mo. 364, 383, 109 S. W. 641.

60. Century Dict. [*quoted* in People *v.* Simmons, 125 N. Y. App. Div. 234, 237, 109 N. Y. Suppl. 190].

61. Webster New Int. Dict.

"Suddenly assaulted" see Spaight *v.* McGovern, 16 R. I. 658, 660, 19 Atl. 246, 7 L. R. A. 388.

"Suddenly dead" see Reg. *v.* Stephenson, 13 Q. B. D. 331, 333, 49 J. P. 486, 53 L. J. M. C. 176, 52 L. T. Rep. N. S. 267, 33 Wkly. Rep. 44, referred to and commented upon in argument of counsel.

62. State *v.* Cheatwood, 2 Hill (S. C.) 459, 462.

SUE. To seek justice or right from, by legal process;[63] to prosecute; to make legal claim; to seek for in law.[64] (See PROSECUTE, 32 Cyc. 686.)

SUE OUT. To petition for and take out, or to apply for and obtain;[65] to bring.[66]

SUERTES. In Spanish law, sowing grounds within the limits of a city, pueblo, or town, for cultivating or planting, as gardens, vineyards, orchards, etc.[67]

SUFFER. A term which has been variously defined as meaning to allow or permit;[68] to allow; to admit; to permit;[69] to refrain from hindering; ALLOW, *q. v.*; PERMIT, *q. v.*; tolerate;[70] to allow; to permit; not to forbid or hinder; to tolerate.[71]

"In sudden affray" held not a synonymous term as used in a statute defining the offense of shooting at a person by another see Violett *v.* Com., 72 S. W. 1, 24 Ky. L. Rep. 1720.

Erroneous charge.— A charge that sudden "heat of passion" in manslaughter means "a condition of quick anger or sudden injury," etc., is confused and unintelligible. The expression "quick anger" and "sudden injury" are not synonymous. State *v.* Sloan, 22 Mont. 293, 304, 305, 56 Pac. 364.

63. Webster Dict. [*quoted* in Kuklence *v.* Vocht, 4 Pa. Co. Ct. 370, 372, where it is said: "This definition is broad enough to include final process"].

64. Webster Dict. [*quoted* in U. S. *v.* Moore, 11 Fed. 248, 251].

"Sued for and recovered" meaning the same as "prosecuted for and recovered" see U. S. *v.* Moore, 11 Fed. 248, 251.

"Sue . . . to insolvency" means that the party shall exhaust the ordinary legal remedies provided for the collection of debts. Pollard *v.* Murrell, 6 Ala. 661, 662.

"Sue a labor clause" in marine insurance policy see MARINE INSURANCE, 26 Cyc. 683.

65. Webster Dict. [*quoted* in South Missouri Lumber Co. *v.* Wright, 114 Mo. 326, 333, 21 S. W. 811, where it is said that the expression is doubtless used in this sense when applied to the commencement of a suit in those jurisdictions where the first step is the issuing of a writ, followed by filing a declaration, petition, or bill].

"Suing out process" signifies to petition for and take out or to apply for and obtain; as to sue out a writ in chancery or a pardon. Kansas City Hydraulic Press Brick Co. *v.* Barker, 50 Mo. App. 60, 64 [*citing* Anderson L. Dict.; Webster Unabr. Dict.].

"Suing out process" in equity means that upon the filing of a bill, a writ or subpœna is filled out by the clerk, and is delivered for service. U. S. *v.* American Lumber Co., 85 Fed. 827, 830, 29 C. C. A. 431.

"Suing out of the summons" see West *v.* Engel, 101 Ala. 509, 511, 14 So. 333. See also ACTIONS, 1 Cyc. 748.

66. Waxahachie *v.* Coler, 92 Fed. 284, 286, 34 C. C. A. 349, applied to writs of error, where the terms "brought" and "sued out" are said to be used synonymously.

"Sued out" means obtained and issued. Burrill L. Dict. [*quoted* in Waxahachie *v.* Coler, 92 Fed. 284, 286, 34 C. C. A. 349.

67. Hart *v.* Burnett, 15 Cal. 530, 554.

68. Adams *v.* Nichols, 1 Aik. (Vt.) 316, 319. See also Dunseath *v.* Pittsburg, etc., Traction Co., 161 Pa. St. 124, 130, 28 Atl. 1021; Philadelphia, etc., R. Co. *v.* Long, 75 Pa. St. 257, 265.

69. Gregory *v.* U. S., 10 Fed. Cas. No. 5,803, 17 Blatchf. 325; Worcester Dict. [*quoted* in Ft. Wayne *v.* De Witt, 47 Ind. 391, 394; Duncan *v.* Landis, 106 Fed. 839, 849, 45 C. C. A. 666].

70. Century Dict. [*quoted* in Duncan *v.* Landis, 106 Fed. 839, 849, 45 C. C. A. 666].

71. Webster Dict. [*quoted* in Duncan *v.* Landis, 106 Fed. 839, 849, 45 C. C. A. 666].

Synonymous with "permit" see Bunnell *v.* Com., 99 S. W. 237, 238, 30 Ky. L. Rep. 491; Robertson *v.* Ongley Electric Co., 82 Hun (N. Y.) 585, 590, 31 N. Y. Suppl. 605; Duncan *v.* Landis, 106 Fed. 839, 849, 45 C. C. A. 666. But "permit" is the more positive, denoting a decided assent. Webster Dict. [*quoted* in Wilson *v.* State, 19 Ind. App. 389, 46 N. E. 1050, 1051; Board of Education *v.* Board of Education, 3 Ohio S. & C. Pl. Dec. 70, 2 Ohio N. P. 256]. See also *In re* Thomas, 103 Fed. 272, 274.

"Suffered or permitted" in bankruptcy see BANKRUPTCY, 5 Cyc. 293.

To suffer an act to be done by a person who can prevent is to permit or consent to it; to approve of it, and not to hinder it. It implies a willingness of the mind. Selleck *v.* Selleck, 19 Conn. 501, 505.

As used in a statute providing that no woman endowed of lands, tenements, or hereditaments shall permit or suffer waste on the same, etc., the term does not render the dowress liable for acts amounting to waste committed without her permission by third persons. Willey *v.* Laraway, 64 Vt. 559, 561, 25 Atl. 436.

Distinguished from "procure" see Campbell *v.* Traders' Nat. Bank, 4 Fed. Cas. No. 2,370, 2 Biss. 423; *In re* Dibblee, 7 Fed. Cas. No. 3,884, 3 Ben. 283.

The word sometimes implies a mere indifference. *In re* Thomas, 103 Fed. 272, 274, 4 Am. Bankr. Rep. 575.

Willfulness or carelessness implied in the phrase "to suffer such animals to run at large" see Pittsburg, etc., R. Co. *v.* Howard, 40 Ohio St. 6, 8.

As used in a covenant against encumbrances in a deed the term is held to imply a responsible control, and it cannot be held to apply to a thing not caused by the act of the party, nor within his power to prevent. Smith *v.* Eigerman, 5 Ind. App. 269, 31 N. E. 862, 892, 51 Am. St. Rep. 281.

A lessee entering into a covenant not to "make or suffer any waste, or any unlawful, improper, or offensive use of the said prem-

The word has also been frequently employed as meaning to bear; to undergo; to endure; to support.[72]

SUFFERANCE. Toleration; negative permission by not forbidding; passive consent; license implied from the omission or neglect to enforce an adverse right.[73] (Sufferance: Estate by as Subject to Execution, see EXECUTIONS, 17 Cyc. 954. Tenancy at, see LANDLORD AND TENANT, 24 Cyc. 1041.)

SUFFICIENCY. The state or character of being sufficient; adequacy.[74]

SUFFICIENT. Enough; what may be necessary to accomplish an object;[75] adequate to suffice; equal to the end proposed; COMPETENT,[76] *q. v.*

SUFFICIENT CONSIDERATION. See CONTRACTS, 9 Cyc. 311.

SUFFICIENT EVIDENCE.[77] See EVIDENCE, 17 Cyc. 574.

SUFFIXES. See NAMES, 29 Cyc. 267.

SUFFOCATED. Choked or killed by stopping respiration.[78]

ises" may well be held to "suffer" an unlawful use of the property if he does not take effectual measures to prevent such use by those who occupy by his authority. Miller *v.* Prescott, 163 Mass. 12, 13, 39 N. E. 409, 47 Am. St. Rep. 434.

72. Johnson Dict. [*quoted* in Roffey *v.* Bent, L. R. 3 Eq. 759, 761].

"Damages . . . suffered."—A guaranty that a person shall become liable for damages "suffered" means damages paid. Beekman *v.* Van Dolsen, 70 Hun (N. Y.) 288, 294, 24 N. Y. Suppl. 414.

"Suffering condition" see Sturges *v.* Raymond, 27 Conn. 473, 477.

73. Black L. Dict.

74. Century Dict.

"Sufficiency . . . of a highway" see Hutchinson *v.* Concord, 41 Vt. 271, 273, 98 Am. Dec. 584.

75. Varnum *v.* Thruston, 17 Md. 470, 498. See also Sandwich Mfg. Co. *v.* Feary, 22 Nebr. 53, 67, 33 N. W. 485, holding that the term, in the provision of a contract that a party should allow sufficient time for the performance of an act, meant "reasonable."

76. Webster Dict. [*quoted* in Pensacola, etc., R. Co. *v.* State, 25 Fla. 310, 334, 5 So. 833, 3 L. R. A. 661].

Discretion is implied from the use of "sufficient for," in a statute providing for the levying of a tax sufficient for the payment of principal and interest of municipal indebtedness. Barr *v.* Philadelphia, 191 Pa. St. 438, 446, 43 Atl. 335.

"Good" and "sufficient," as used in an instruction, are substantially the same as the words "suitable" and "safe," of a statute requiring a railroad company to maintain suitable and safe cattle guards. Kansas City Southern R. Co. *v.* Greer, (Ark. 1909) 119 S. W. 1121, 1123.

"Is shown to have means" in a request to charge, is held to have the same meaning as "of sufficient ability," in a statute providing that "the father, mother and children of sufficient ability of a poor person who is insane, blind . . . so as to be unable by work to maintain himself, must, at their own charge, relieve and maintain him." Keenan *v.* Brooklyn City R. Co., 145 N. Y. 348, 350, 40 N. E. 15.

Used in connection with other words.—"Sufficient ability" see Chapin *v.* McCurdy, 196 Mass. 63, 65, 81 N. E. 652; PAUPERS, 30 Cyc. 1122. "Sufficient barrier" see Myers *v.* Springfield, 112 Mass. 489, 491. "Sufficient cause" see People *v.* Coombs, 9 Cal. App. 262, 264, 98 Pac. 686; State *v.* Duluth, 53 Minn. 238, 244, 55 N. W. 118, 39 Am. St. Rep. 595; Wright County School Dist. No. 7 *v.* Thompson, 5 Minn. 280, 283; Matter of Donlon, 66 Hun (N. Y.) 199, 200, 21 N. Y. Suppl. 114; Matter of Beach, 3 Misc. (N. Y.) 393, 394, 24 N. Y. Suppl. 717, 1 Pow. Surr. 469; People *v.* Murray, 2 Misc. (N. Y.) 152, 155, 23 N. Y. Suppl. 160; Matter of Odell, 1 Misc. (N. Y.) 390, 393, 23 N. Y. Suppl. 143; Tomlinson *v.* Board of Equalization, 88 Tenn. 1, 5, 12 S. W. 414, 6 L. R. A. 207; Hossein *v.* Bechunnissa, L. R. 3 Indian App. 209, 213. "Sufficient consideration" see Golson *v.* Dunlap, 73 Cal. 157, 162, 14 Pac. 576. "Sufficient distress" see Van Rensselaer *v.* Snyder, 13 N. Y. 299, 303; Hosford *v.* Ballard, 39 How. Pr. (N. Y.) 162, 167. "Sufficient draft" see Brummett *v.* Nemo Heater Co., 177 Mass. 480, 484, 59 N. E. 58. "Sufficient effects" see Bowerbank *v.* Monteiro, 4 Taunt. 844, 847, 14 Rev. Rep. 679. "Sufficient evidence" see EVIDENCE, 17 Cyc. 574. "'Sufficient' fence" see Albright *v.* Bruner, 14 Ill. App. 319, 320; Robison *v.* Fetterman, 9 Pa. Cas. 604, 607, 14 Atl. 245. "Sufficient grounds" see Davidor *v.* Rosenberg, 130 Wis. 22, 25, 109 N. W. 925. "Sufficient repair" see Richmond, etc., R. Co. *v.* Burnett, 88 Va. 538, 541, 14 S. E. 372. "Sufficient samples" see Jenson *v.* Perry, 126 Pa. St. 495, 499, 17 Atl. 665, 12 Am. St. Rep. 888. "Sufficient sureties" see State *v.* Fitch, 30 Minn. 532, 533, 16 N. W. 411. "Sufficient water" see Cargill *v.* Thompson, 50 Minn. 211, 217, 52 N. W. 644. "Without sufficient cause" see The George W. Wells, 118 Fed. 761, 763.

"Sufficiently" construed as "securely" see Evansville, etc., R. Co. *v.* Tipton, 101 Ind. 197, 198.

77. Interpreted "*prima facie*" in a statute providing what shall be sufficient evidence see State *v.* Newton, 33 Ark. 276, 284; Parker *v.* Overman, 18 How. (U. S.) 137, 142, 15 L. ed. 318.

78. Webster Dict. [*quoted* in U. S. *v.* Barber, 20 D. C. 79, 93, where "asphyxiated" is given as a synonym].

"Asphyxia" defined see 3 Cyc. 1013.

Suffocated by drowning see 14 Cyc. 1077.

SUFFRAGE. A vote; the act of voting; the right or privilege of casting a vote at public elections.[79] (Suffrage: Exercise of as Showing Domicile, see HOMESTEADS, 21 Cyc. 607. Indian's Right of, see INDIANS, 22 Cyc. 115. Nature and Source of Right of, see ELECTIONS, 15 Cyc. 280. Power of State Legislature to Confer Right of on Women, see ELECTIONS, 15 Cyc. 298. Power to Confer and Regulate Right of, see ELECTIONS, 15 Cyc. 280. Qualifications as Voter Determining Competency of Juror, see GRAND JURIES, 20 Cyc. 1297; JURIES, 24 Cyc. 203. Right to Vote at Corporate Elections, see CORPORATIONS, 10 Cyc. 331. Waiver of Objection to Juror on Account of Not Being an Elector, see JURIES, 24 Cyc. 318.)

SUGAR.[80] See CUSTOMS DUTIES, 12 Cyc. 1121.

SUGGESTIO FALSI. An affirmative fraudulent act as distinguished from a negative act of fraud, known as *suppressio veri.*[81] (See, generally, FRAUD, 20 Cyc. 15.)

SUGGESTION. In practice, a statement, formally entered on the record, of some fact or circumstance which will materially affect the further proceedings in the cause, or which is necessary to be brought to the knowledge of the court in order to its right disposition of the action, but which, for some reason, cannot be pleaded.[82] In reference to wills, a term applied specially to those means of persuasion employed to alter the will of a testator, and to prompt him to make a disposition different from that which he had in view.[83] (Suggestion: Of Breaches in Action on Bond After Issue Joined, see BONDS, 5 Cyc. 854. Of Death of Party — As Ground For Abatement, see ABATEMENT AND REVIVAL, 1 Cyc. 80; For Purpose of Revival, see ABATEMENT AND REVIVAL, 1 Cyc. 99; In Writ of Execution Issued in the Name of All the Parties, see EXECUTIONS, 17 Cyc. 996; Necessity For on Motion to Dismiss Action, see DISMISSAL AND NONSUIT, 14 Cyc. 428; Procedure in Appellate Court After Death of Party, see APPEAL AND ERROR, 2 Cyc. 778. Of Prior Affirmance of Judgments on Motion to Dismiss Writ of Error, see APPEAL AND ERROR, 3 Cyc. 196 note 16. To Inventor as Barring Right to Patent, see PATENTS, 30 Cyc. 873 note 15.)

79. Black L. Dict.

80. **Sugar-cane-seed** see GRAIN, 1289.

Sugar refined see REFINED SUGAR, 34 Cyc. 897.

"**Sugar refiner**" see Zimmerling *v.* Harding, 95 Fed. 129, 130.

81. Newman *v.* Kay, 57 W. Va. 98, 109, 49 S. E. 926, 68 L. R. A. 908.

One of the most usual modes of establishing fraud is by proving a *suggestio falsi.* Crislip *v.* Cain, 19 W. Va. 438, 464.

82. Black L. Dict.

83. Zerega *v.* Percival, 46 La. Ann. 590, 606, 15 So. 476 [*citing* Bouvier L. Dict.], where it is said the term is often used as a synonym for "captation."

"**Captation**" has already been defined in 6 Cyc. 349.

SUICIDE

By Isaac Franklin Russell

Professor of Law, New York University Law School, and Chief Justice of the Court of Special Sessions of the City of New York

I. Definition and Nature of Act, 518
A. *Definition*, 518
B. *Nature of Act*, 520
II. Attempt to Commit Suicide, 520
III. Killing Another in Attempting to Commit Suicide, 521
IV. Advising or Aiding to Commit Suicide, 521
V. Punishment, 521

CROSS-REFERENCES

For Matters Relating to:

Evidence of Suicide of Deceased in Prosecution For Homicide, see Homicide, 21 Cyc. 902.

Suicide by Insured, see Accident Insurance, 1 Cyc. 251, 265, 296; Life Insurance, 25 Cyc. 731, 876, 930, 940; Mutual Benefit Insurance, 29 Cyc. 139, 227, 235.

I. Definition and Nature of Act.

A. Definition. In a broad sense the word "suicide" is sufficiently specific and comprehensive to cover all kinds of human self-destruction;[1] but in legal acceptation and popular use suicide is something more than self-sought and self-inflicted death, and the word "suicide" is generally employed to characterize a crime or offense, and in such a sense it is the act of voluntarily and intentionally destroying one's own life, committed by a person of years of discretion and of sound mind.[2] In order that suicide may constitute an offense or crime within

1. See John Hancock Mut. L. Ins. Co. *v.* Moore, 34 Mich. 41, 45; Shipman *v.* Protected Home Circle, 174 N. Y. 398, 405, 67 N. E. 83, 63 L. R. A. 347; Coffey *v.* Home L. Ins. Co., 35 N. Y. Super. Ct. 314, 329, 44 How. Pr. 481; Knights Templars', etc., Life Indemnity Co. *v.* Jarman, 187 U. S. 197, 202, 23 S. Ct. 108, 47 L. ed. 139 [*affirming* 104 Fed. 638, 44 C. C. A. 93].

2. For cases recognizing or upholding the above definition see the following:

Alabama.—Supreme Commandery K. G. R. *v.* Ainsworth, 71 Ala. 436, 447, 46 Am. Rep. 332.

Georgia.— Life Assoc. of America *v.* Waller, 57 Ga. 533, 536.

Illinois.— Supreme Lodge O. M. P. *v.* Gelbke, 198 Ill. 365, 370, 64 N. E. 1058 [*reversing* 100 Ill. App. 190].

Kansas.— Hart *v.* Modern Woodmen of America, 60 Kan. 678, 683, 57 Pac. 936, 72 Am. St. Rep. 380; Grand Legion S. K. A. O. U. W. *v.* Korneman, (App. 1901) 63 Pac. 292, 293.

Kentucky.— St. Louis Mut. L. Ins. Co. *v.* Graves, 6 Bush 268, 269.

New York.— Breasted *v.* Farmers' L. & T. Co., 8 N. Y. 299, 303, 59 Am. Dec. 482, Seld. 114 [*affirming* 4 Hill 73].

Pennsylvania.— Connecticut Mut. L. Ins. Co. *v.* Groom, 86 Pa. St. 92, 97, 27 Am. Rep. 689.

United States.— Connecticut Mut. L. Ins. Co. *v.* Akens, 150 U. S. 468, 472, 14 S. Ct. 155, 37 L. ed. 1148; Bigelow *v.* Berkshire L. Ins. Co., 93 U. S. 284, 287, 23 L. ed. 918.

England.— Clift *v.* Schwabe, 3 C. B. 437, 458, 54 E. C. L. 437, 2 C. & K. 137, 61 E. C. L. 137, 17 L. J. C. P. 2.

Other definitions are: "[One] who deliberately puts an end to his own existence, or commits any unlawful, malicious act, the consequence of which is his own death." 4 Blackstone Comm. 189 [*quoted* in Life Assoc. of America *v.* Waller, 57 Ga. 533, 536; Moore *v.* Connecticut Mut. L. Ins. Co., 17 Fed. Cas. No. 9,755, 1 Flipp. 363, 365].

"The deliberate act of self-destruction by a person of sound mind and having attained years of discretion." Johnson New Univ. Encycl.

"The crime of self-murder." Encycl. Brit.

the meaning of such definition, it is essential that there should be an intent to commit the act;[3] and as such an intent presupposes reason or sanity, it is also essential that the person committing suicide should be of years of discretion and of sound mind.[4] A death by accident even though it be the result of one's own act is not suicide,[5] and upon this principle self-destruction by an insane man or a lunatic is not an act of suicide within the meaning of the law.[6]

[*quoted* in Life Assoc. of America *v.* Waller, 57 Ga. 533, 536].

A *felo de se*, or suicide, is "where a man of the age of discretion, and *compos mentis*, voluntarily kills himself by stabbing, poison, or any other way." 1 Hale P. C. 411. See also Clift *v.* Schwabe, 3 C. B. 437, 54 E. C. L. 437, 2 C. & K. 137, 61 E. C. L. 137, 17 L. J. C. P. 2.

N. Y. Pen. Code, § 172 (Pen. Laws, § 2300), defines suicide as the intentional taking of one's own life. See Shipman *v.* Protected Home Circle, 174 N. Y. 398, 67 N. E. 83, 63 L. R. A. 347.

Origin.— The word "suicide" is of modern origin; it does not occur in the Bible, or in any English author before the reign of Charles II; probably, not till after the reign of Anne. It first occurs as an English word in Hale's Pleas of the Crown. It is not in Hawkins, first published in 1716; but it is to be found in Blackstone. Clift *v.* Schwabe, 3 C. B. 437, 54 E. C. L. 437, 2 C. & K. 137, 61 E. C. L. 137, 17 L. J. C. P. 2.

For a good history of the word "suicide" see Clift *v.* Schwabe, 3 C. B. 437, 54 E. C. L. 437, 2 C. & K. 137, 61 E. C. L. 137, 17 L. J. C. P. 2.

Synonymous terms.— The word "suicide" is synonymous with other phrases employed to convey the idea of voluntary, intentional self-destruction, such as "death by his own act," "death by his own hand," "taking his own life," "self-destruction," "self-murder," and like phrases or terms. See Supreme Lodge O. M. P. *v.* Gelbke, 198 Ill. 365, 370, 64 N. E. 1058 [*reversing* 100 Ill. App. 190]; Grand Lodge I. O. M. A. *v.* Wieting, 168 Ill. 408, 419, 48 N. E. 59, 61 Am. St. Rep. 123 [*affirming* 68 Ill. App. 125]; New Home Life Assoc. *v.* Hagler, 29 Ill. App. 437, 439; New York Mut. L. Ins. Co. *v.* Wiswell, 56 Kan. 765, 768, 44 Pac. 996, 35 L. R. A. 258; Grand Legion S. K. A. O. U. W. *v.* Korneman, (Kan. App. 1901) 63 Pac. 292, 293; St. Louis Mut. L. Ins. Co. *v.* Graves, 6 Bush (Ky.) 268; Eastabrook *v.* Union Mut. L. Ins. Co., 54 Me. 224, 89 Am. Dec. 743; Cooper *v.* Massachusetts Mut. L. Ins. Co., 102 Mass. 227, 3 Am. Rep. 451; Blackstone *v.* Standard L., etc., Ins. Co., 74 Mich. 592, 42 N. W. 156, 3 L. R. A. 486; De Gogorza *v.* Knickerbocker L. Ins. Co., 65 N. Y. 232; Spruill *v.* Northwestern Mut. L. Ins. Co., 120 N. C. 141, 27 S. E. 39; Schultz *v.* Insurance Co., 40 Ohio St. 217, 48 Am. Rep. 676; Hartman *v.* Keystone Ins. Co., 21 Pa. St. 466; Billings *v.* Accident Ins. Co. of North America, 64 Vt. 78, 24 Atl. 656, 33 Am. St. Rep. 913, 17 L. R. A. 89; Pierce *v.* Travelers' L. Ins. Co., 34 Wis. 389; Bigelow *v.* Berkshire L. Ins. Co., 93 U. S. 284, 23 L. ed. 918; Moore *v.* Connecticut Mut. L. Ins. Co., 17 Fed. Cas. No. 9,755, 1 Flipp. 363; Borradaile *v.* Hunter, 7 Jur. 443, 12 L. J. C. P. 225, 5 M. & G. 639, 5 Scott N. R. 418, 44 E. C. L. 335. In popular language the term "death by his own hand" means the same as suicide or *felo de se*. Breasted *v.* Farmers' L. & T. Co., 8 N. Y. 299, 59 Am. Dec. 482, Seld. 114 [*affirming* 4 Hill 73]. "Suicide sane or insane" is equivalent to "suicide felonious or otherwise." Spruill *v.* Northwestern Mut. L. Ins. Co., 120 N. C. 141, 27 S. E. 39.

3. Equitable L. Assur. Soc. *v.* Paterson, 41 Ga. 338, 5 Am. Rep. 535; Shipman *v.* Protected Home Circle, 174 N. Y. 398, 67 N. E. 83, 63 L. R. A. 347.

4. Shipman *v.* Protected Home Circle, 174 N. Y. 398, 67 N. E. 83, 63 L. R. A. 347; Weber *v.* Supreme Tent K. M. W., 172 N. Y. 490, 65 N. E. 258, 92 Am. St. Rep. 753; Moore *v.* Connecticut Mut. L. Ins. Co., 17 Fed. Cas. No. 9,755, 1 Flipp. 363; 4 Blackstone Comm. 189 [*quoted* in Life Assoc. of America *v.* Waller, 57 Ga. 533, 536].

Suicide might, if standing alone, be construed to imply a felonious self-destruction, or self-destruction by a sane man, or one capable of understanding the nature and consequences of his own act. De Gogorza *v.* Knickerbocker L. Ins. Co., 65 N. Y. 232; Pierce *v.* Travelers' L. Ins. Co., 34 Wis. 389.

An infant killing himself under the age of discretion cannot be a *felo de se*. 1 Hawkins P. C. 67.

5. Equitable L. Assur. Soc. *v.* Paterson, 41 Ga. 338, 5 Am. Rep. 535; Grand Legion S. K. A. O. U. W. *v.* Korneman, (Kan. App. 1901) 63 Pac. 292; Penfold *v.* Universal L. Ins. Co., 85 N. Y. 317, 39 Am. Rep. 660; Union Mut. L. Ins. Co. *v.* Payne, 105 Fed. 172, 45 C. C. A. 193.

Presumption.—Where the evidence as to the death being accidental or suicidal is so nearly balanced as to leave the question in doubt, the presumption is in favor of the theory of accidental death. New York Mut. L. Ins. Co. *v.* Wiswell, 56 Kan. 765, 44 Pac. 996, 35 L. R. A. 258.

6. See St. Louis Mut. L. Ins. Co. *v.* Graves, 6 Bush (Ky.) 268; Eastabrook *v.* Union Mut. L. Ins. Co., 54 Me. 224, 89 Am. Dec. 743; Knickerbocker L. Ins. Co. *v.* Peters, 42 Md. 414; Connecticut Mut. L. Ins. Co. *v.* Groom, 86 Pa. St. 92, 27 Am. Rep. 689; 1 Hale P. C. 412; 1 Hawkins P. C. 67. But *compare* Cooper *v.* Massachusetts Mut. L. Ins. Co., 102 Mass. 227, 3 Am. Rep. 451; Dean *v.* American Mut. L. Ins. Co., 4 Allen (Mass.) 96; John Hancock Mut. L. Ins. Co.

B. Nature of Act. At common law suicide was considered both criminal and felonious, although the punishment except of an anticipatory dread was of necessity visited upon the innocent,[7] and under some statutes it is still so regarded.[8] Under other statutes, however, it is held that suicide is not a crime since the person guilty of the act cannot be punished,[9] although an attempt to commit suicide is criminal.[10]

II. ATTEMPT TO COMMIT SUICIDE.

If the act of suicide fails to accomplish its purpose, it constitutes an attempt to commit suicide,[11] which is an indictable offense both at common law,[12] and under some statutes.[13] Under other statutes, however, an attempt to commit suicide is not an indictable offense on the ground that no penalty of any kind attaches to the suicide if actually committed.[14]

v. Moore, 34 Mich. 41, holding that the word "suicide" means self-killing, and is not restricted to a wrongful act of self-murder, although if *non compos mentis* the actor in suicide commits no crime.

Legally speaking, self-destruction by a person bereft of reason can with no more propriety be ascribed to his own hand than to the deadly instrument that may be used for the purpose, and whether it is by drowning or poison or hanging or any other manner, is no more his act in the sense of the law than if he is impelled by irresistible physical power. Breasted *v.* Farmers' L. & T. Co., 8 N. Y. 299, 59 Am. Dec. 482, Seld. 114 [*affirming* 4 Hill 73]; Manhattan L. Ins. Co. *v.* Broughton, 109 U. S. 121, 3 S. Ct. 99, 27 L. ed. 878. See also New Home Life Assoc. *v.* Hagler, 29 Ill. App. 437.

Death by accident, and death by one's own hand, when deprived of reason, stand on principle in the same category, as in both cases the act is done without a controlling mind. Breasted *v.* Farmers' L. & T. Co., 8 N. Y. 299, 59 Am. Dec. 482, Seld. 114 [*affirming* 4 Hill 73].

7. 1 Hale P. C. 411. See also Life Assoc. of America *v.* Waller, 57 Ga. 533; Com. *v.* Mink, 123 Mass. 422, 25 Am. Rep. 109; Campbell *v.* Supreme Conclave I. O. H., 66 N. J. L. 274, 49 Atl. 550, 54 L. R. A. 576; Coffey *v.* Home L. Ins. Co., 35 N. Y. Super. Ct. 314, 44 How. Pr. 481.

8. Com. *v.* Mink, 123 Mass. 422, 25 Am. Rep. 109; State *v.* Carney, 69 N. J. L. 478, 55 Atl. 44 [*overruling* Campbell *v.* Supreme Conclave I. O. H., 66 N. J. L. 274, 49 Atl. 550, 54 L. R. A. 576] (holding that suicide is none the less criminal because no punishment can be inflicted); State *v.* Levelle, 34 S. C. 120, 13 S. E. 319, 27 Am. St. Rep. 799.

9. Royal Circle *v.* Achterrath, 204 Ill. 549, 68 N. E. 492, 98 Am. St. Rep. 224, 63 L. R. A. 452 [*affirming* 106 Ill. App. 439]; Grand Lodge I. O. M. A. *v.* Wieting, 168 Ill. 408, 48 N. E. 59, 61 Am. St. Rep. 123 [*affirming* 68 Ill. App. 125]; Meacham *v.* New York State Mut. Ben. Assoc., 120 N. Y. 237, 24 N. E. 283 [*affirming* 46 Hun 363]; Darrow *v.* Family Fund Soc., 116 N. Y. 537, 22 N. E. 1093, 15 Am. St. Rep. 430, 6 L. R. A. 495 [*affirming* 42 Hun 245]; Freeman *v.* National Ben. Soc., 42 Hun (N. Y.) 252, 5 N. Y. St. 82; Blackburn *v.* State, 23 Ohio St. 146; Grace *v.* State, 44 Tex. Cr. 193, 69 S. W. 529.

Suicide, although strictly a crime, is not reckoned among offenses or violations of law. Kerr *v.* Minnesota Mut. Ben. Assoc., 39 Minn. 174, 39 N. W. 312, 12 Am. St. Rep. 631.

In New York, under Pen. Code, § 173 (Pen. Laws, § 2301), suicide is a grave public wrong, but is not a crime. Shipman *v.* Protected Home Circle, 174 N. Y. 398, 67 N. E. 83, 63 L. R. A. 347.

10. See *infra*, II.

11. Darrow *v.* Family Fund Soc., 116 N. Y. 537, 22 N. E. 1093, 15 Am. St. Rep. 430, 6 L. R. A. 495 [*affirming* 42 Hun 245].

One who actually accomplishes the commission of suicide is not guilty of an attempt to commit suicide. Royal Circle *v.* Achterrath, 204 Ill. 549, 68 N. E. 492, 98 Am. St. Rep. 224, 63 L. R. A. 452 [*affirming* 106 Ill. App. 439].

12. Reg. *v.* Burgess, 9 Cox C. C. 247, 9 Jur. N. S. 28, L. & C. 258, 32 L. J. M. C. 55, 7 L. T. Rep. N. S. 472, 11 Wkly. Rep. 96; Reg. *v.* Doody, 6 Cox C. C. 463. See also Com. *v.* Mink, 123 Mass. 422, 25 Am. Rep. 109.

The questions for the jury upon such an indictment are whether the prisoner had a mind capable of contemplating the act charged, and whether he did in fact intend to take away his life. Reg. *v.* Doody, 6 Cox C. C. 463.

13. State *v.* Carney, 69 N. J. L. 478, 55 Atl. 44 [*overruling* Campbell *v.* Supreme Conclave I. O. H., 66 N. J. L. 274, 49 Atl. 550, 54 L. R. A. 576]; Meacham *v.* New York State Mut. Ben. Assoc., 120 N. Y. 237, 24 N. E. 283 [*affirming* 46 Hun 363]; Darrow *v.* Family Fund Soc., 116 N. Y. 537, 22 N. E. 1093, 15 Am. St. Rep. 430, 6 L. R. A. 495 [*affirming* 42 Hun 245]; Freeman *v.* National Ben. Soc., 42 Hun (N. Y.) 252, 5 N. Y. St. 82.

14. May *v.* Pennell, 101 Me. 516, 64 Atl. 885, 115 Am. St. Rep. 334, 7 L. R. A. N. S. 286 (holding that Rev. St. c. 132, § 9, providing punishment for an attempt to commit an offense, does not render an at-

III. Killing Another in Attempting to Commit Suicide.

In some states, unintentionally killing another in attempting to commit suicide is manslaughter, while in others it is murder.[15]

IV. Advising or Aiding to Commit Suicide.

Where one person advises, aids, or abets another to commit suicide, and the other by reason thereof kills himself, and the adviser is present when he does so, he is guilty of murder as a principal,[16] or in some jurisdictions of manslaughter;[17] or if two persons mutually agree to kill themselves together, and the means employed to produce death take effect upon one only, the survivor is guilty of murder of the one who dies.[18] But if the one who encourages another to commit suicide is not present when the act is done, he is an accessary before the act and at common law escapes punishment because his principal cannot be first tried and convicted.[19] The abolition of the distinction between aiders and accessaries in some jurisdictions, has, however, carried away this distinction, so that a person may now be convicted of murder for advising a suicide, whether absent or present at the time it is committed, provided the suicide is the result of his advice.[20]

V. Punishment.

Formerly by the common law of England, the penalty attached to an act of suicide consisted in giving the body of the criminal an ignominious burial in the highway, and in the forfeiture of his lands and chattels to the king;[21] but the law

tempt to commit suicide an indictable offense, since no penalty of any kind attaches to suicide if actually committed); Com. *v.* Mink, 123 Mass. 422, 25 Am. Rep. 109; Com. *v.* Dennis, 105 Mass. 162 [*distinguishing* Com. *v.* Bowen, 13 Mass. 356, 7 Am. Dec. 154]; Com. *v.* Wright, 26 Pa. Co. Ct. 666 (holding that an attempt to commit suicide is not an offense under the constitution and statutes of Pennsylvania).

15. See Homicide, 21 Cyc. 718 text and note 62, 764 text and note 70.

16. Com. *v.* Mink, 123 Mass. 422, 25 Am. Rep. 109; Com. *v.* Bowen, 13 Mass. 356, 7 Am. Dec. 154 (holding that where a prisoner under sentence of death was repeatedly urged and advised by another to commit suicide, and the person thus advised actually hanged himself, the court properly charged that the jury might convict of murder); Rex *v.* Dyson, R. & R. 389.

Proof that accused induced another to commit suicide by taking poison is sufficient to warrant his conviction for murder, but in such a case strict proof that the poison was taken by his procurement is required. Burnett *v.* People, 204 Ill. 208, 68 N. E. 505, 98 Am. St. Rep. 206, 66 L. R. A. 304.

In Ohio, suicide not being a crime, there can be no accessaries or principals in the second degree; but this rule has no application where one is charged with administering poison, although to another intending to commit suicide. Blackburn *v.* State, 23 Ohio St. 146.

In Texas suicide is not a crime, and the punishment of persons connected with the suicide, by furnishing the means or other agencies, does not obtain. Grace *v.* State, 44 Tex. Cr. 193, 69 S. W. 529.

17. State *v.* Ludwig, 70 Mo. 412, holding that one who is present aiding and abetting another to hang himself is guilty of manslaughter in the first degree.

18. Burnett *v.* People, 204 Ill. 208, 68 N. E. 505, 98 Am. St. Rep. 206, 66 L. R. A. 304 (holding, however, that the survivor cannot be convicted of murder in the absence of evidence that he actually killed deceased or that he did or said something which aided or encouraged deceased to kill himself); Com. *v.* Mink, 123 Mass. 422, 25 Am. Rep. 109; Reg. *v.* Jessop, 16 Cox C. C. 204, 10 Cr. L. Mag. 862; Reg. *v.* Alison, 8 C. & P. 418, 34 E. C. L. 813; Rex *v.* Dyson, R. & R. 389.

If it be uncertain whether the deceased really killed himself or whether he came to his death by accident before the moment when he meant to destroy himself, it will not be murder in either. Rex *v.* Dyson, R. & R. 389.

19. Com. *v.* Mink, 123 Mass. 422, 25 Am. Rep. 109; Reg. *v.* Leddington, 9 C. & P. 79, 38 E. C. L. 58; Rex *v.* Russell, 1 Moody C. C. 356.

20. Com. *v.* Hicks, 118 Ky. 637, 82 S. W. 265, 26 Ky. L. Rep. 511, holding that under Ky. St. (1903) § 1128, providing that in all felonies, accessaries before the fact shall be liable to the same punishment as the principals, and may be prosecuted jointly with the principal or severally, although the principal be not taken or tried, an accessary before the fact to a suicide is guilty of murder as a principal in the second degree, although he was absent at the time of the suicide.

21. 1 Hawkins P. C. 68. See also Com. *v.* Mink, 123 Mass. 422, 25 Am. Rep. 109; Cof-

was later altered, so that now the only consequence following an act of self-destruction is the denial of christian burial.[22] In this country there is generally neither forfeiture of goods, nor other penalty attached to suicide.[23]

SUI GENERIS. Of its own kind or class; that is, the only one of its own kind; peculiar.[1]

SUI JURIS. Of his own right; possessing full social and civil rights; not under any legal disability, or the power of another, or guardianship.[2] (Sui Juris: Effect on Capacity to Change Domicile, see DESCENT AND DISTRIBUTION, 14 Cyc. 23; GUARDIAN AND WARD, 21 Cyc. 25.)

SUIT. A. Broad Meaning — 1. IN GENERAL. Prosecution or pursuit of some claim, demand or request;[3] the act of suing; the process by which one endeavors to gain an end or object; attempt to attain a certain result;[4] the act of suing; the process by which one gains an end or object.[5]

2. IN LAW. An action or process for the recovery of a right or claim;[6] the prosecution of some demand in a court of justice;[7] any proceeding in a court of justice in which plaintiff pursues his remedy to recover a right or claim;[8] the mode and manner adopted by law to redress civil injuries;[9] a proceeding in a court of justice for the enforcement of a right;[10] a contest between two parties in a court of justice; the one seeking, and the other withholding the thing in contest;[11]

fey *v.* Home L. Ins. Co., 35 N. Y. Super. Ct. 314, 44 How. Pr. 481; Com. *v.* Wright, 26 Pa. Co. Ct. 666; Hales *v.* Petit, 1 Plowd. 253, 75 Eng. Reprint 387.

The Athenian law provided for cutting off the hand which committed the act. 4 Blackstone Comm. 189 [*quoted* in Com. *v.* Wright, 26 Pa. Co. Ct. 666, 667].

22. See Com. *v.* Wright, 26 Pa. Co. Ct. 666.

23. Campbell *v.* Supreme Conclave I. O. H., 66 N. J. L. 274, 49 Atl. 550, 54 L. R. A. 576; Com. *v.* Wright, 26 Pa. Co. Ct. 666.

Under N. Y. Pen. Code, § 173 (Pen. Laws, § 2301), although suicide is deemed a grave public wrong, yet from the impossibility of reaching the perpetrator no forfeiture is imposed. Shipman *v.* Protected Home Circle, 174 N. Y. 398, 67 N. E. 83, 63 L. R. A. 347.

Under the Massachusetts act of 1660, suicides were denied the privilege of christian burial, and were directed to be buried in the highway, with a cart-load of stones laid upon the grave, "as a brand of infamy." Com. *v.* Mink, 123 Mass. 422, 25 Am. Rep. 109.

1. Black L. Dict.

Proceedings held to be sui generis. — Contempt proceedings see Marinan *v.* Baker, 12 N. M. 451, 452, 78 Pac. 531. Disbarment proceedings see *In re* Burnette, 70 Kan. 229, 232, 78 Pac. 440.

2. Black L. Dict.; Grattan L. Gloss.

"**What age is sufficient** to constitute a child *sui juris* is a difficult question, and has been a fruitful source of controversy in the courts, and no definite or fixed age has ever . . . been agreed upon." Macdonald *v.* O'Reilly, 45 Oreg. 589, 599, 78 Pac. 753.

In reference to the liability of a child for contributory negligence, the phrase means that the child was of sufficient age and discretion to care for his own safety and render it prudent to permit him to go about alone. Kostenbaum *v.* New York City R. Co., 120 N. Y. App. Div. 160, 163, 105 N. Y. Suppl. 65.

3. Appleton *v.* Turnbull, 84 Me. 72, 76, 24 Atl. 592; Clayton Overseers of Poor *v.* Beedle, 1 Barb. (N. Y.) 11, 15; Callen *v.* Ellison, 13 Ohio St. 446, 453, 82 Am. Dec. 448; *In re* Jenckes, 6 R. I. 18, 22; *In re* Booth, 3 Wis. 1, 39; Cohens *v.* Virginia, 6 Wheat. (U. S.) 264, 407, 5 L. ed. 257; Wilt *v.* Stickney, 30 Fed. Cas. No. 17,854, 15 Nat. Bankr. Reg. 23.

4. Webster Dict. [*quoted* in McPike *v.* McPike, 10 Ill. App. 332, 333].

5. Webster Dict. [*quoted* in New Orleans, etc., R. Co. *v.* Mississippi, 102 U. S. 135, 143, 26 L. ed. 96]. See also Mississippi, etc., Boom Co. *v.* Paterson, 98 U. S. 403, 406, 25 L. ed. 206.

6. Philadelphia, etc., Coal, etc., Co. *v.* Chicago, 158 Ill. 9, 14, 41 N. E. 1102.

7. Appleton *v.* Turnbull, 84 Me. 72, 76, 24 Atl. 592; Clayton Overseers of Poor *v.* Beedle, 1 Barb. (N. Y.) 11, 15; Callen *v.* Ellison, 13 Ohio St. 446, 453, 82 Am. Dec. 448; *In re* Jenckes, 6 R. I. 18, 22; *Ex p.* Towles, 48 Tex. 413, 433; Myers *v.* State, 47 Tex. Civ. App. 336, 338, 105 S. W. 48; Cohens *v.* Virginia, 6 Wheat. (U. S.) 264, 407, 5 L. ed. 257; Wilt *v.* Stickney, 30 Fed. Cas. No. 17,854, 15 Nat. Bankr. Reg. 23.

8. Eckerle *v.* Wood, 95 Mo. App. 378, 384, 69 S. W. 45; Grover, etc., Sewing Mach. Co. *v.* Florence Sewing Mach. Co., 18 Wall. (U. S.) 553, 585, 21 L. ed. 914; Gurnee *v.* Brunswick, 11 Fed. Cas. No. 5,872, 1 Hughes 270.

9. Leonardo *v.* Territory, 1 N. M. 291, 296.

10. Drake *v.* Gilmore, 52 N. Y. 389, 394.

11. Pearson *v.* Nesbit, 12 N. C. 315, 316, 17 Am. Dec. 569; Monmouth Inv. Co. *v.* Means, 151 Fed. 159, 163, 80 C. C. A. 527.

any legal proceeding of a civil kind;[12] an action of any kind in a court of justice, whether commenced by writ, bill, or petition, or by information or indictment;[13] a proceeding in court according to the forms of law to enforce the remedy to which a party deems himself entitled;[14] the pursuit of a right or remedy in form of law;[15] any legal proceeding of a civil kind brought by one person against another;[16] an action or process for the recovery of a right or claim, legal application to a court for justice, prosecution of right before any tribunal;[17] any legal proceeding of a civil kind by one person against another;[18] an action at law, or proceeding by bill in chancery; a prosecution, a petition to a court, etc.;[19] an attempt to gain an end by legal process;[20] the attempt to gain an end by legal process; an action or process for the recovery of a right or claim; legal application to a court of justice; prosecution of right before any tribunal;[21] the prosecution of some claim or demand in a court of justice; judicial prosecution.[22]

12. *In re* Oliver, 77 Ohio St. 474, 479, 83 N. E. 795.

"Suit and action" import the legal demand of a "civil right." Cannon *v.* Phillips, 2 Sneed (Tenn.) 185, 190.

13. *In re* Grape St., 103 Pa. St. 121, 124.

14. Kuhl *v.* Chicago, etc., R. Co., 101 Wis. 42, 53, 77 N. W. 155.

15. Burrill L. Dict. [*quoted* in *In re* Jenckes, 6 R. I. 18, 22].

16. Coke Litt. [*quoted* in Appleton *v.* Turnbull, 84 Me. 72, 76, 24 Atl. 592]; Bouvier L. Dict. [*quoted* in State *v.* Riley, 203 Mo. 175, 186, 101 S. W. 567, 12 L. R. A. N. S. 900].

17. Imperial Dict. [*quoted* in Elliott *v.* Queen City Assur. Co., 6 Ont. Pr. 30, 31]; Hendrix *v.* Kellogg, 32 Ga. 435, 437.

18. Rapalje & L. L. Dict. [*quoted* in Branyan *v.* Kay, 33 S. C. 283, 285, 11 S. E. 970].

19. Wharton L. Lex. [*quoted* in Elliott *v.* Queen City Assur. Co., 6 Ont. Pr. 30, 31].

20. Webster Dict. [*quoted* in Dobbins *v.* Peoria First Nat. Bank, 112 Ill. 553, 566; New Orleans, etc., R. Co. *v.* Mississippi, 102 U. S. 135, 143, 26 L. ed. 96].

21. Webster Dict. [*quoted* in State *v.* Riley, 203 Mo. 175, 186, 101 S. W. 567, 12 L. R. A. N. S. 900].

22. Worcester Dict. [*quoted* in New Orleans, etc., R. Co. *v.* Mississippi, 102 U. S. 135, 143, 26 L. ed. 96].

"The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice, which the law affords him." The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought is a suit. Appleton *v.* Turnbull, 84 Me. 72, 76, 24 Atl. 592; Eckerle *v.* Wood, 95 Mo. App. 378, 384, 69 S. W. 45; Cass County *v.* Sarpy County, 83 Nebr. 435, 437, 119 N. W. 685; Rowan *v.* Shapard, 2 Tex. App. Civ. Cas. §§ 295, 302; Nichols *v.* Bingham, 70 Vt. 320, 324, 40 Atl. 827; Upshur County *v.* Rich, 135 U. S. 467, 474, 10 S. Ct. 651, 34 L. ed. 196; Kohl *v.* U. S., 91 U. S. 367, 375, 23 L. ed. 449; *Ex p.* Milligan, 4 Wall. (U. S.) 2, 112, 18 L. ed. 281; Weston *v.* Charleston, 2 Pet. (U. S.) 449, 464, 7 L. ed. 481; Waha-Lewiston Land, etc., Co. *v.* Lewiston-Sweetwater Irr. Co., 158 Fed. 137, 140; South Dakota Cent. R. Co. *v.* Chicago, etc., R. Co., 141 Fed. 578, 580, 73 C. C. A. 176; Ward *v.* Congress Constr. Co., 99 Fed. 598, 603, 39 C. C. A. 669; Mooney *v.* Buford, etc., Mfg. Co., 72 Fed. 32 36, 18 C. C. A. 421; The Jarnecke Ditch, 69 Fed. 161, 166; *In re* Chicago, 64 Fed. 897, 898; McCullough *v.* Large, 20 Fed. 309, 311. See also Claflin *v.* Robbins, 5 Fed. Cas. No. 2,776, 1 Flipp. 603; Lenoir *v.* Ritchie, 3 Can. Sup. Ct. 575, 601.

It is a more general and comprehensive term than "action" and includes proceedings at law and in equity. State *v.* Curran, 12 Ark. 321, 348; McPike *v.* McPike, 10 Ill. App. 332, 333; Marion *v.* Ganby, 68 Iowa 142, 143, 26 N. W. 40; Appleton *v.* Turnbull, 84 Me. 72, 76, 24 Atl. 592 [*citing* Bouvier L. Dict.]; Morgan *v.* Hazlehurst Lodge, 53 Miss. 665, 680; State *v.* Riley, 203 Mo. 175, 186, 101 S. W. 567, 12 L. R. A. N. S. 900 [*citing* Bouvier L. Dict.]; Eckerle *v.* Wood, 95 Mo. App. 378, 385, 69 S. W. 45; Sherrill *v.* O'Brien, 188 N. Y. 185, 218, 81 N. E. 124, 117 Am. St. Rep. 841; Tilden *v.* Aitkin, 37 N. Y. App. Div. 28, 31, 55 N. Y. Suppl. 735; Didier *v.* Davison, 10 Paige (N. Y.) 515, 517; Kuhl *v.* Chicago, etc., R. Co., 101 Wis. 42, 53, 77 N. W. 155; Wisconsin Cent. R. Co. *v.* Cornell Univ., 49 Wis. 162, 164, 5 N. W. 331; L. Bucki, etc., Lumber Co. *v.* Atlantic Lumber Co., 128 Fed. 332, 340, 63 C. C. A. 62 [*citing* Bouvier L. Dict.]; Minnett *v.* Milwaukee, etc., R. Co., 17 Fed. Cas. No. 9,636, 3 Dill. 460, 13 Alb. L. J. (N. Y.) 254.

Criminal prosecutions have been held included by the term as well as civil proceedings. Com. *v.* Moore, 143 Mass. 136, 137, 9 N. E. 25, 58 Am. Rep. 128; U. S. *v.* Mann, 26 Fed. Cas. No. 15,718, 1 Gall. 177; Bouvier L. Dict. [*quoted* in Snowden *v.* State, 69 Md. 203, 208, 14 Atl. 528]. But it properly designates a civil proceeding. Hodges *v.* Lassiter, 96 N. C. 351, 353, 2 S. E. 923; U. S. *v.* Mann, *supra*. See also Leonardo *v.* Territory, 1 N. M. 291, 296.

The term includes: A foreign attachment. Harris *v.* Phœnix Ins. Co., 35 Conn. 310, 312. An attachment. Gibson *v.* Sidney, 50 Nebr. 12, 15, 69 N W. 314; Jordan *v.* Dewey, 40 Nebr. 639, 644, 59 N. W. 88; Matter of Aycinena, 1 Sandf. (N. Y.) 690, 692; Rowan *v.* Shapard, 2 Tex. App. Civ. Cas. §§ 295, 302; Barney *v.* Globe Bank, 2 Fed. Cas. No. 1,031, 5 Blatchf. 107. An execution. Dobbins *v.*

B. Technical Meaning. The appropriate term to designate a proceeding

Peoria First Nat. Bank, 112 Ill. 553, 566; Vanderveer *v.* Conover, 16 N. J. L. 487, 496. An indictment. U. S. *v.* Illinois Cent. R. Co., 156 Fed. 182, 185. Application for assignment of dower to a widow. Farmer *v.* Ray, 42 Ala. 125, 126, 94 Am. Dec. 633. Application of a poor debtor before a master in chancery to be admitted to the poor debtor's oath. *In re* Jenckes, 6 R. I. 18, 22. Certiorari. Hendrix *v.* Kellogg, 32 Ga. 435, 437. Condemnation proceedings. Marion *v.* Ganby, 68 Iowa 142, 143, 26 N. W. 40; Searl *v.* Lake County School-Dist. No. 2, 124 U. S. 197, 199, 8 S. Ct. 460, 31 L. ed. 415; U. S. *v.* Inlots, 26 Fed. Cas. No. 15,441; Warren *v.* Wisconsin Valley R. Co., 29 Fed. Cas. No. 17,204, 6 Biss. 425. Filing claims against estate of a decedent as required by order of court. Reynolds *v.* Crook, 95 Ala. 570, 578, 11 So. 412. Habeas corpus proceedings. Holmes *v.* Jennison, 14 Pet. (U. S.) 540, 566, 614, 10 L. ed. 579, 618. But see McFarland *v.* Johnson, 27 Tex. 105, 109, where it was held that a proceeding upon a writ of habeas corpus was not a civil suit, when not used to relieve against illegal restraint under a criminal charge. Objections to the discharge of a bankrupt. *In re* Guilbert, 154 Fed. 676, 677. Proceeding against a national bank to compel the issuance of a duplicate certificate of stock for a certificate which has been lost. Matter of Hayt, 39 Misc. (N. Y.) 356, 358, 79 N. Y. Suppl. 845. Proceeding before county commissioners on petition to lay out a highway. Hyde Park *v.* Wiggin, 157 Mass. 94, 98, 31 N. E. 693; Dunn *v.* Pownal, 65 Vt. 116, 120, 26 Atl. 484. Proceeding for discovery of the assets of an estate alleged to be concealed. *Ex p.* Gfeller, 178 Mo. 248, 263, 77 S. W. 552; Eckerle *v.* Wood, 95 Mo. App. 378, 384, 69 S. W. 45. Proceeding for mandamus. Roodhouse *v.* Briggs, 194 Ill. 435, 437, 62 N. E. 778; McBane *v.* People, 50 Ill. 503, 507; *In re* Sloan, 5 N. M. 590, 611, 25 Pac. 930. But see *contra*, Rosenbaum *v.* Board of Sup'rs, 28 Fed. 223, 224. Proceeding for the collection of delinquent taxes. *In re* Stutsman County, 88 Fed. 337, 341. Proceeding in court on petition, report, and remonstrances in proceedings to establish a drain. *In re* Jarnecke Ditch, 69 Fed. 161, 166. Proceeding in probate court to establish a will of land. Haven *v.* Hilliard, 23 Pick. (Mass.) 10, 19. See also Southworth *v.* Adams, 4 Fed. 1, 4, 9 Biss. 521. Proceeding to charge a stock-holder for the amount of his unpaid stock after the return *nulla bona* of an execution against a corporation. Lackawanna Coal, etc., Co. *v.* Bates, 56 Fed. 737, 738. Proceeding to establish claim in a probate court. Hanson *v.* Towle, 19 Kan. 273, 279. Proceeding under fugitive slave law. *In re* Booth, 3 Wis. 1, 39. Scire facias. White *v.* Washington School Dist., 45 Conn. 59, 60. But see *contra*, Heath *v.* Bates, 70 Ga. 633, 635. Writ of prohibition. Weston *v.* Charleston, 2 Pet. (U. S.) 449, 463, 7 L. ed. 481.

The term does not include: An appeal from an assessment of property for taxation. Upshur County *v.* Rich, 135 U. S. 467, 470, 10 S. Ct. 651, 34 L. ed. 196. An arbitration. Crook *v.* Chambers, 40 Ala. 239, 243; Henderson *v.* Adams, 5 Cush. (Mass.) 610, 612. An election contest. Williamson *v.* Lane, 52 Tex. 335, 345. An order of court authorizing an administrator to sell the lands of his intestate, remaining unexecuted. Ludlow *v.* Wade, 5 Ohio 494, 508. A petition to a county board for the allowance of a claim. Fuller *v.* Colfax County, 14 Fed. 177, 178, 4 McCrary 535; Gurnee *v.* Brunswick, 11 Fed. Cas. No. 5,872, 1 Hughes 270. Assessment proceedings for municipal improvements. *In re* Chicago, 64 Fed. 897, 900. A void attachment. Edwards *v.* Ross, 58 Ga. 147, 149. Proceeding by appeal, error, or review, unless context requires it. Franks *v.* Chapman, 61 Tex. 576, 580 [*citing* Abbott L. Dict.] Proceeding for review or a decree in equity. Wilt *v.* Stickney, 30 Fed. Cas. No. 17,854, 15 Nat. Bankr. Reg. 23. Proceeding in a county court for the alteration, establishment, or discontinuance of a public road. Hawkins *v.* Robinson, 5 J. J. Marsh. (Ky.) 8, 9. Proceedings before railroad commissioners. Burlington *v.* Burlington Traction Co., 70 Vt. 491, 496, 41 Atl. 514. Proceedings for ecclesiastical, admiralty, and military courts under the English system of jurisprudence. Gaines *v.* Fuentes, 92 U. S. 10, 24, 23 L. ed. 524. Proceeding to foreclose a mortgage by advertisement. Hall *v.* Bartlett, 9 Barb. (N. Y.) 297, 300, such being merely an "act" of the mortgagee.

"Suits at common law" in the constitutional guaranty of right to trial by jury embrace those suits which are not of equity or admiralty jurisdiction. Bradford *v.* Territory, 1 Okla. 366, 370, 34 Pac. 66; Boyd *v.* Clark, 13 Fed. 908, 910; Bains *v.* The James & Catherine, 2 Fed. Cas. No. 756, Baldw. 544; Baker *v.* Biddle, 2 Fed. Cas. No. 764, Baldw. 394; U. S. *v.* The Queen, 27 Fed. Cas. No. 16,107, 4 Ben. 237.

By "suits of a civil nature at common law or in equity" used in the federal statute conferring jurisdiction in such suits on the circuit courts is meant the old and settled proceedings as recognized at common law or in equity and in contradistinction to cases in admiralty or criminal law. U. S. *v.* Block 121, 24 Fed. Cas. No. 14,610, 3 Biss. 208, 214. See also Brisenden *v.* Chamberlain, 53 Fed. 307, 309. The phrase "'suits' of a civil nature" in this statute is less comprehensive than "cases" used in the federal constitution, providing that the judicial power of the United States extends to all cases in law and equity arising under it. San Mateo County *v.* Southern Pac. R. Co., 13 Fed. 145, 147.

"Suits of a civil nature" in a statute relative to the jurisdiction of courts interpreted to mean private suits for private wrongs. See Koch *v.* Vanderhoof, 49 N. J. L. 619, 623, 9 Atl. 771.

in a court of equity; [23] a usual and technical designation of a proceeding in equity; [24] a proceeding in equity; [25] the proper word for a litigation in chancery.[26]

C. Original Meaning. The following of a person.[27] (See Actions, 1 Cyc. 634; Case, 6 Cyc. 679; Cause, 6 Cyc. 704; Controversy, 9 Cyc. 813.)

SUITABLE. Likely to suit; capable of suiting; adapted; [28] Fitting, *q. v.*; capable of suiting or Appropriate,[29] *q. v.*

The term has been construed as synonymous with: "Action." Magill *v.* Parsons, 4 Conn. 317, 322; McPike *v.* McPike, 10 Ill. App. 332, 333; Miller *v.* Rapp, 7 Ind. App. 89, 34 N. E. 125, 126; Hall *v.* Bartlett, 9 Barb. (N. Y.) 297, 300; Clayton Overseers of Poor *v.* Beedle, 1 Barb. (N. Y.) 11, 15; Whitfield *v.* Burrell, (Tex. Civ. App. 1909) 118 S. W. 153, 156; Calderwood *v.* Calderwood, 38 Vt. 171, 175; Clarkson *v.* Manson, 4 Fed. 257, 261, 18 Blatchf. 443; Wilt *v.* Stickney, 30 Fed. Cas. No. 17,854, 15 Nat. Bankr. Reg. 23. "Case." Magill *v.* Parsons, 4 Conn. 317, 322; New Brunswick Steamboat, etc., Transp. Co. *v.* Baldwin, 14 N. J. L. 440, 443; Clarkson *v.* Manson, 4 Fed. 257, 261, 18 Blatchf. 443. "Cause." *Ex p.* Milligan, 4 Wall. (U. S.) 2, 112, 18 L. ed. 281; Clarkson *v.* Manson, 4 Fed. 257, 261, 18 Blatchf. 443. "Controversy." Anderson *v.* Snyder, 21 W. Va. 632, 645.

Code definition see Chisholm *v.* Lewis, 66 Ga. 729, 731.

Distinguished from "cause of action" see Fish *v.* Farwell, 160 Ill. 236, 250, 43 N. E. 367; Koon *v.* Nichols, 85 Ill. 155, 156.

Distinguished from "libel" see The Little Ann, 15 Fed. Cas. No. 8,397, 1 Paine 40.

"The phrase, 'suit for divorce,' is often used in statutes and in the decisions of the courts to include not only the proceeding more accurately so termed, which has for its object the dissolution of the bonds of an existing legal marriage, but also those which seek to annul asserted marriages on grounds that render them either void or voidable from the beginning; and when used in its most general sense it may justly be held to embrace all of these proceedings." Schneider *v.* Rabb, 100 Tex. 211, 212, 97 S. W. 463.

"Collected by suit" see Branyan *v.* Kay, 33 S. C. 283, 284, 11 S. E. 970.

23. Miller *v.* Rapp, 7 Ind. App. 89, 34 N. E. 125, 126.

24. Niantic Mills Co. *v.* Riverside, etc., Mills, 19 R. I. 34, 36, 31 Atl. 432.

25. Sutton *v.* Sutton, 22 Ch. D. 511, 516, 52 L. J. Ch. 333, 48 L. T. Rep. N. S. 95, 31 Wkly. Rep. 369. See also Hall *v.* Bartlett, 9 Barb. (N. Y.) 297, 300.

26. Rapalje & L. L. Dict. [*quoted* in Branyan *v.* Kay, 33 S. C. 283, 285, 11 S. E. 970, where the term is distinguished from "action"].

Distinguished from "action" see Giant Powder Co. *v.* Oregon Western R. Co., (Oreg. 1909) 103 Pac. 501, 502.

Although frequently used to include an action in a court of law, as well as a suit in a court of equity, the term is more appropriately applied to the latter. McPike *v.* McPike, 10 Ill. App. 332, 333; Mathis *v.* Stevenson, (N. J. Ch. 1908) 71 Atl. 267, 268 [*citing* Black L. Dict.].

"Suits in equity" statutory definition see Leatherman *v.* Orange County, 22 Ind. App. 700, 47 N. E. 347, 348.

Mandamus is not a "suit . . . in equity" under the California civil code. Rosenbaum *v.* Board of Sup'rs, 28 Fed. 223, 224.

27. The Little Ann, 15 Fed. Cas. No. 8,397, 1 Paine 40.

Derivation is from the Latin, *sectâ*; from Latin *sequi*, to follow. Bouvier L. Dict. [*quoted* in Kennedy *v.* Thompson, 3 Ohio Cir. Ct. 446, 447, 2 Ohio Cir. Dec. 254]. "It is undoubtedly derived originally from *the sectâ* or suit of witnesses, which every plaintiff was required to produce or offer to produce when he preferred his claim in court. *In de producit sectâm* — thereupon he brings suit — a form of words still continued." Ulshafer *v.* Stewart, 71 Pa. St. 170, 174 [*citing* 3 Blackstone Comm. 295].

28. St. Anthony Falls Water-Power Co. *v.* Eastman, 20 Minn. 277, 296.

29. Century Dict.; Webster Dict. [both *quoted* in White *v.* U. S., 69 Fed. 93].

Construed as meaning "safe or not defective" when applied to machinery which a master is required to furnish his servant see Davis *v.* Northwestern R. Co., 75 S. C. 303, 308, 55 S. E. 526.

Distinguished from "adequate" see St. Anthony Falls Water-Power Co. *v.* Eastman, 20 Minn. 277, 296.

In connection with other words.—"Suitable age and discretion" of a person under a statute regulating service of process see Temple *v.* Norris, 53 Minn. 286, 289, 55 N. W. 133, 20 L. R. A. 159. "Suitable air starting device" for gas engine see Van Pub. Co. *v.* Westinghouse, 72 N. Y. App. Div. 121, 127, 76 N. Y. Suppl. 340. "Suitable bridges" see Worcester *v.* Railroad Com'rs, 113 Mass. 161, 171. "Suitable connection" under a statute providing for such connection by a subway with a surface car line see Browne *v.* Turner, 174 Mass. 150, 161, 54 N. E. 510. "Suitable fences" see Eames *v.* Salem, etc., R. Co., 98 Mass. 560, 565, 96 Am. Dec. 676. "Suitable for cultivation" applied to state lands see Robinson *v.* Eberhart, 148 Cal. 495, 499, 83 Pac. 452; Albert *v.* Hobler, 111 Cal. 398, 400, 43 Pac. 1104; Fulton *v.* Brannan, 88 Cal. 454, 457, 26 Pac. 506; Manley *v.* Cunningham, 72 Cal. 236, 241, 13 Pac. 622; Sanford *v.* Maxwell, 3 Cal. App. 242, 245, 84 Pac. 1000. "Suitable frame" for an awning see State *v.* Clarke, 69 Conn. 371, 375, 37 Atl. 975, 61 Am. St. Rep. 45, 39 L. R. A. 670. "Suitable index" of records see Smith *v.* Royalton, 53 Vt. 604, 608. "Suitable means and appliances" necessary to be provided by a common carrier to prevent cotton catching

SUIT MONEY. An allowance which is required to be paid by the husband to the wife pending suit for divorce, for the expenses of such suit.[30]

SUITOR. A party to a suit or action in court;[31] one who solicits a woman in marriage;[32] one who solicits a woman in marriage; a wooer.[33] (See DEFENDANT, 13 Cyc. 762; PARTIES, 30 Cyc. 1; PLAINTIFF, 30 Cyc. 1636.)

SULPHATE OF AMMONIA. A commercial article, large quantities of which are used for making aqua ammonia, anhydrous ammonia, alum, nitrate of ammonia, and many ammoniacal compounds, as well as in making ammoniated fertilizers, much the larger quantity being used, not for fertilizers, but in the arts.[34]

SULPHIDE. A binary compound of sulphur, or one so regarded.[35]

SULPHOTOLUIC ACID. An acid prepared from coal tar, used in making coal-tar colors.[36]

SULPHURETS. An absolescent synonym of SULPHIDE,[37] *q. v.*

SUM. Amount or aggregate;[38] a quantity of money or currency; any amount indefinitely.[39]

fire see Chicago, etc., R. Co. *v.* Moss, 60 Miss. 1003, 1011, 45 Am. Rep. 428. "Suitable monument" at testator's grave see Bainbridge's Appeal, 97 Pa. St. 482, 485. See also Batters *v.* Dunning, 49 Conn. 479, 480. "Suitable package" for oleomargarine see U. S. *v.* Dougherty, 101 Fed. 439, 441. "Suitable person" for license to sell liquor see Moynihan's Appeal, 75 Conn. 358, 362, 53 Atl. 903; Malmo's Appeal, 72 Conn. 1, 8, 43 Atl. 485; Smith's Appeal, 65 Conn. 135, 138, 31 Atl. 529. "Suitable person" to act as administrator see Peters *v.* Public Administrator, 1 Bradf. Surr. (N. Y.) 200, 207. "Suitable person" to serve process see Mudrock *v.* Killips, 65 Wis. 622, 626, 28 N. W. 66. "Suitable place" for public cemetery see Crowell *v.* Londonderry, 63 N. H. 42, 48. "Suitable place" for discharging cargo of a vessel see Teilman *v.* Plock, 21 Fed. 349, 350. "Suitable time" for discharging of goods by carrier see The Surrey, 26 Fed. 791, 793. "Suitable watch" required in a policy of insurance on a factory see Percival *v.* Maine M. M. Ins. Co., 33 Me. 242, 249. "Suitable" water-closets or privies at passenger stations see Missouri, etc., R. Co. *v.* State, (Tex. Civ. App. 1906) 97 S. W. 720, 722.

"Good" and "sufficient," applied to cattle guards held to be substantially the same as the words "suitable" and "safe" see Kansas City R. Co. *v.* Greer, (Ark. 1909) 119 S. W. 1121, 1123.

"The word 'suitable' unquestionably cannot carry with it this consequence, that a trade may be carried on in a particular locality, the consequence of which trade may be injury and destruction to the neighboring property." Susquehanna Fertilizer Co. *v.* Spangler, 86 Md. 562, 571, 39 Atl. 270, 63 Am. St. Rep. 533; St. Helen's Smelting Co. *v.* Tipping, 11 H. L. Cas. 642, 651, 11 Jur. N. S. 785, 35 L. J. Q. B. 66, 12 L. T. Rep. N. S. 776, 13 Wkly. Rep. 1083, 11 Eng. Reprint 1483.

30. Yost *v.* Yost, 141 Ind. 584, 587, 41 N. E. 11; Davis *v.* Davis, 141 Ind. 367, 373, 40 N. E. 803.

31. Black L. Dict.

"A suitor is but a witness, after all. Time was when a party litigant was not entitled to testify and must rely solely upon the evidence of others. A suitor, being but a witness, may be allowed to have the common infirmities of this kind, e. g., lapses of memory, inability to see things precisely as others do, and may not hear or may forget things actually said or done. It would be a harsh rule that would cast a litigant because he did not agree *in toto* with his witnesses." Knorpp *v.* Wagner, 195 Mo. 637, 661, 93 S. W. 961.

32. Carney *v.* State, 79 Ala. 14, 18.

33. Weaver *v.* Ritter, 14 Pa. Co. Ct. 486, 489.

34. Marine *v.* Bartol, 60 Fed. 601.

35. Webster New Int. Dict.

"Sulphide of antimony" is the product of a process by which the gangue or slag is separated from the ore by heat. McKesson *v.* U. S., 113 Fed. 996, 997.

"Sulphide of zinc" see Gabriel *v.* U. S., 114 Fed. 401 [*affirmed* in 123 Fed. 296, 59 C. C. A. 352].

36. Matheson *v.* U. S., 65 Fed. 422, 423. See also Matheson *v.* U. S., 71 Fed. 394, 18 C. C. A. 143, where it is said not to be a color or dye.

37. Webster New Int. Dict. See also Fox *v.* Hale, etc., Silver Min. Co., 108 Cal. 369, 397, 41 Pac. 308.

38. Anderson L. Dict. [*quoted* in Swartley *v.* McCracken, 7 Montg. Co. L. Rep. (Pa.) 49, 50].

39. Webster Dict. [*quoted* in U. S. *v.* Van Auken, 96 U. S. 366, 368, 24 L. ed. 852].

The term is most commonly used as meaning "money." Kelly *v.* Sullivan, 201 Mass. 34, 36, 87 N. E. 72; Wetz *v.* Elliott, 4 Okla. 618, 623, 51 Pac. 657 [*citing* Webster Dict.]; U. S. *v.* Van Auken, 96 U. S. 366, 368, 24 L. ed. 852. See also Matter of Hulburt, 89 N. Y. 259, 262; Lynes *v.* Townsend, 33 N. Y. 558, 568, where the term is construed as referring to "money."

Construed as "share" in a will directing the executors to pay the whole sum belonging to each child's share upon her attaining a certain age. Clarke's Appeal, 70 Conn. 195, 216, 39 Atl. 155.

Equivalent to "debt" in a statute giving a court authority to try actions of assumpsit, covenant, and debt, etc., in trespass or trover, provided the sum or damages sought to be recovered shall not exceed a certain

SUMMA CARITAS EST FACERE JUSTITIAM SINGULIS ET OMNI TEMPORE QUANDO NECESSE FUERIT. A maxim meaning "The greatest charity is to do justice to individuals, and at any time whenever it may be necessary." [40]

SUMMA EST LEX QUÆ PRO RELIGIONE FACIT. A maxim meaning "That is the highest law which favors religion." [41]

SUMMA RATIO EST QUÆ RELIGIONE FACIT. A maxim meaning "That rule of conduct is to be deemed binding which religion dictates." [42]

SUMMARILY. A term which, in reference to the trial of certain cases before a justice of the peace or other officer authorized by law, on information under oath, without indictment or intervention of a grand jury, is said to imply a trial without a jury.[43]

SUMMARY. SHORT, *q. v.*; concise; reduced into a narrow compass, or into a few words.[44] Applied to process, immediate, instantaneous.[45] (Summary: Conviction, see CONVICTION, 9 Cyc. 868 note 61. Judgment For Costs on Detinue Bond, see DETINUE, 14 Cyc. 279 note 58. Proceeding, see SUMMARY PROCEEDINGS, *post*, p. 528. Remedy — For Enforcement of Drainage Assessment, see DRAINS, 14 Cyc. 1067; On Bond of Depositary, see DEPOSITARIES, 13 Cyc. 820. Trial of Criminal Case, see CRIMINAL LAW, 12 Cyc. 321.)

SUMMARY CONVICTION. See CONVICTION, 9 Cyc. 868 note 61.

amount. Joule *v.* Taylor, 7 Exch. 58, 66, 21 L. J. Exch. 31, 2 L. M. & P. 615.

"**Sum demanded**" as used in statutes relating to the jurisdiction of courts see Hoit *v.* Molony, 2 N. H. 322, 324; Morris *v.* Saunders, 85 N. C. 138, 140; Bryan *v.* Rousseau, 71 N. C. 194; Fell *v.* Porter, 69 N. C. 140, 141; Hedgecock *v.* Davis, 64 N. C. 650, 651; Smith *v.* Fitzgerald, 59 Vt. 451, 454, 9 Atl. 604.

"**Sum in controversy**" as used in statutes relating to the jurisdiction of courts see Heilman *v.* Martin, 2 Ark. 158, 169; Kline *v.* Wood, 9 Serg. & R. (Pa.) 294, 300; Ancora *v.* Burns, 5 Binn. (Pa.) 522, 523.

"**Sum in gross**" applies only to one single, entire sum, and not to several sums. Hawley *v.* James, 16 Wend. (N. Y.) 61, 262.

"**Sums collected**" see State *v.* Smith, 13 Mo. App. 421, 423.

"**Sums due to employes**" see Dickinson *v.* Saunders, 129 Fed. 16, 21, 63 C. C. A. 666.

"**Sum in question**" see Moore *v.* Darrow, 11 Nebr. 462, 464, 9 N. W. 637.

"**Sum paid**" see Sprigg *v.* Rutland R. Co., 77 Vt. 347, 354, 60 Atl. 143; Thompson *v.* Reynolds, 7 E. & B. 172, 175, 3 Jur. N. S. 464, 26 L. J. Q. B. 93, 90 E. C. L. 172.

40. Peloubet Leg. Max. [*citing* Magdalen College Case, 11 Coke 66*b*, 70*b*, 77 Eng. Reprint 1235].

41. Bouvier L. Dict. See also Thornby *v.* Fleetwood, 10 Mod. 114, 117, 119, 88 Eng. Reprint 651.

42. Morgan Leg. Max. [*citing* Coke Litt. 341*a*; Broom Leg. Max.].

43. State *v.* Williams, 40 S. C. 373, 378, 19 S. E. 5.

"**Summarily recoverable**" is a term of art, confined to cases in which, after summons and hearing, the justice awards a sum to be paid. Reg. *v.* Pratt, L. R. 5 Q. B. 176, 181, 39 L. J. M. C. 73, 21 L. T. Rep. N. S. 750, 18 Wkly. Rep. 626.

44. Webster Dict. [*quoted* in Ricker *v.* Leavitt, (Me. 1886) 3 Atl. 180].

"**In a summary manner,**" as used in a statute requiring exceptions to be so presented, is held to mean "within a narrow compass" (McKown *v.* Powers, 86 Me. 291, 295, 29 Atl. 1079), "stated separately, pointedly and concisely" (Toole *v.* Bearce, 91 Me. 209, 212, 39 Atl. 558).

"**Summary application**" in a statute giving appeal in certain cases upon such application see Ernst *v.* The Brooklyn, 24 Wis. 616, 617.

By "summary way," in an agreement that in case of dispute between parties to a contract, the matters in dispute are to be referred to a named person in a summary way, is meant "without ceremony or delay." Sale *v.* Lake Erie, etc., R. Co., 32 Ont. 159, 161 [*citing* Standard Dict. *sub nom.* "Summary"], opinion of Rose, J.

45. Gaines *v.* Travis, 9 Fed. Cas. No. 5,180, Abb. Adm. 422, 8 N. Y. Leg. Obs. 45.

SUMMARY PROCEEDINGS

By Alexander Karst*

I. Definition and Nature, 528

II. Statutes Authorizing Remedy, 528

A. *Necessity and Construction*, 528

B. *Constitutionality*, 529

III. Procedure, 530

A. *Process and Pleading*, 530

B. *Record*, 530

IV. Enumeration of Summary Proceedings, 531

CROSS-REFERENCES

For Matters Relating to:

Summary Conviction in Criminal Case, see Criminal Law, 12 Cyc. 331.

Summary Proceeding:

Abatement of, by Death of Party, see Abatement and Revival, 1 Cyc. 59.

Appeal or Writ of Error to Review, see Appeal and Error, 2 Cyc. 514.

Conclusiveness of Adjudication in, see Judgments, 23 Cyc. 1224.

I. Definition and Nature.

Proceedings have been classified as regular or summary.[1] When a court acts or professes to act upon common-law principles, its proceedings are called regular, and not summary, however expeditiously it may act;[2] but when a court of common-law jurisdiction is by some law authorized to act different from the common-law mode it is called a summary proceeding,[3] a summary proceeding being defined to be a form of trial in which the ancient established course of a legal proceeding is disregarded, especially in the matter of trial by jury, and in the case of the heavier crimes, presentment by a grand jury.[4] Summary proceedings are not, however, as might be inferred from this definition, exclusively criminal in their nature but are more often available to enforce civil rights.[5] They are generally held to be cumulative in their nature.[6]

II. Statutes Authorizing Remedy.

A. Necessity and Construction. Except in those rare instances in which summary procedure was allowed at common law, such as punishment for con-

1. 4 Blackstone Comm. 280.

2. Phillips *v.* Phillips, 8 N. J. L. 122, 124.

3. Phillips *v.* Phillips, 8 N. J. L. 122, 124.

4. Bouvier L. Dict. [*quoted* in Govan *v.* Jackson, 32 Ark. 553, 557].

"Summary," as applied to process, means immediate, instantaneous, in contradistinction from the ordinary course, by emanating and taking effect without intermediate applications or delays. Gaines *v.* Travis, 8 N. Y. Leg. Obs. 45, 49.

5. See *infra*, IV.

6. *Alabama.*— Chapman *v.* Weaver, 19 Ala. 626.

Arkansas.— Levy *v.* Lawson, 5 Ark. 212.

Delaware.— Pettyjohn *v.* Hudson, 4 Harr. 468.

Georgia.— French *v.* Kemp, 64 Ga. 749; Wood *v.* Hunt, 23 Ga. 379 (holding, however, that plaintiff must elect and cannot pursue both a summary proceeding and an action at the same time); Currell *v.* Phillips, 18 Ga. 469.

Illinois.— Beaird *v.* Foreman, 2 Ill. 40.

Kentucky.— Mars *v.* Buckler, 1 Bibb 267.

Missouri.— State *v.* Durant, 53 Mo. App. 493.

New York.— Beckwith *v.* Smith, 4 Lans. 182; Hatfield *v.* Hatfield, 15 N. Y. St. 788; Wilson *v.* Wright, 9 How. Pr. 459; Gibbs *v.*

* Author of "Real Actions." 33 Cyc. 1541; "Slaves," 36 Cyc. 465; "Sodomy," 36 Cyc. 501; "Submission of Controversy," *ante*, p. 346; "Leading Principles of Bailments," etc. Joint author of "Religious Societies," 34 Cyc 1112. Editor of "Seamen," 35 Cyc. 1177.

tempt,[7] and suspension or disbarment of attorney,[8] express authority is essential to the validity of a summary proceeding,[9] and such proceedings being in derogation of common law must very closely conform to the statutes authorizing them, which are strictly construed and which are not extended by implication or intendment, and the mode of procedure indicated in the statute must be closely followed.[10]

B. Constitutionality. The question of the constitutionality of statutes authorizing summary proceedings arises more particularly in regard to infringement of the right to trial by jury guaranteed by the federal and state constitutions, and the due process of law clause. But these constitutions have been uniformly construed as not conferring a right to trial by jury in all cases and as not extending the right to cases in which it was not allowed at common law, but simply as guaranteeing that right unchanged as it existed at common law or by statute in the particular state at the time of the adoption of the constitution,[11] and since at common law the right to trial by jury did not exist in summary proceedings these proceedings are still triable without a jury, and are not within the constitutional guaranty.[12]

Bull, 18 Johns. 435; Burk *v.* Campbell, 15 Johns. 456; Stoors *v.* Kelsey, 2 Paige 418.

South Carolina.— State *v.* Charleston Dist., 1 Mill 145.

Tennessee.— Rader *v.* Davis, 5 Lea 536.

7. See CONTEMPT, 9 Cyc. 33.

8. See ATTORNEY AND CLIENT, 4 Cyc. 905.

9. *Alabama.*— Halsey *v.* Murray, 112 Ala. 185, 20 So. 575.

Georgia.— Offerman, etc., R. Co. *v.* Waycross Air-Line R. Co., 112 Ga. 610, 37 S. E. 871.

Kansas.—Waysman *v.* Updegraff, McCahon 88.

Kentucky.— Stephens *v.* Miller, 3 Ky. L. Rep. 523.

Louisiana.— Monroe *v.* Hardy, 46 La. Ann. 1232, 15 So. 696.

Michigan.— Booth *v.* Radford, 57 Mich. 357, 24 N. W. 102; Willard *v.* Fralick, 31 Mich. 431.

Nebraska.— Miller *v.* Hogeboom, 56 Nebr. 434, 76 N. W. 888.

New York.— See People *v.* Van Houten, 13 Misc. 603, 35 N. Y. Suppl. 186 [*affirmed* in 91 Hun 638, 36 N. Y. Suppl. 1130].

Tennessee.— *Ex p.* Miller, 1 Yerg. 435.

Texas.— Blair *v.* Sanborn, 82 Tex. 686, 18 S. W. 159; Cooper *v.* Harris, 46 Tex. 189.

Statute repealed.—When a statute authorizing a summary judgment is repealed without a saving clause, there can be no judgment subsequently entered thereunder, even in proceedings begun before the repeal. Williams *v.* McCurdy, 22 Ala. 696.

10. *Alabama.*— Chandler *v.* Francis Vandegrift Shoe Co., 94 Ala. 233, 10 So. 353; Caldwell *v.* Dunklin, 65 Ala. 461; Evans *v.* Stevens, 8 Ala. 517; Gary *v.* McCown, 6 Ala. 370; Magee *v.* Childers, 6 Ala. 196; Sample *v.* Royall, 4 Ala. 344; Baylor *v.* Scott, 2 Port. 315.

Georgia.— Stallings *v.* Harrold, 60 Ga. 478.

Louisiana.— Saulet *v.* Trepagnier, 7 Rob. 227.

Michigan.— People *v.* Griswold, 64 Mich. 722, 31 N. W. 809.

Mississippi.— Connell *v.* Lewis, Walk. 251.

Missouri.— Edina *v.* Brown, 19 Mo. App. 672.

New York.— People *v.* Andrews, 52 N. Y. 445 (so holding as to summary proceeding by purchaser at tax-sale, instituted for possession); People *v.* Phillips, 1 Park. Cr. 95.

North Carolina.— Summey *v.* Johnston, 60 N. C. 98.

Pennsylvania.— Com. *v.* Hardy, 1 Ashm. 410; Com. *v.* Liller, 12 Lanc. Bar 188; Com. *v.* Morey, 3 Pittsb. 530.

Porto Rico.—Desola *v.* Willoughby, 1 Porto Rico 344, 347, holding that due process of law is not interfered with by summary remedy, such as forfeiture for non-payment of taxes, but that statutes providing therefor must be construed strictly.

South Carolina.— Jones *v.* Clarkson, 16 S. C. 628; Sternberger *v.* McSween, 14 S. C. 35.

Tennessee.— Erkman *v.* Carnes, 101 Tenn. 136, 45 S. W. 1067; Prowell *v.* Fowlkes, 5 Baxt. 649; Allen *v.* Wood, 2 Baxt. 401; Wingfield *v.* Crosby, 5 Coldw. 241; State *v.* Deberry, 9 Humphr. 605; Wood *v.* Orr, 10 Yerg. 505; Smith *v.* Wells, 5 Yerg. 202.

Texas.— Hamilton *v.* Ward, 4 Tex. 356.

Virginia.—Waugh *v.* Carter, 2 Munf. 333.

11. See JURIES, 24 Cyc. 101.

The provisions of the federal constitution as to trial by jury apply only to the federal courts. See JURIES, 24 Cyc. 103.

12. *Arkansas.*— State *v.* Johnson, 26 Ark. 281.

California.— Koppikus *v.* State Capitol Com'rs, 16 Cal. 248.

Louisiana.— Monroe *v.* Hardy, 46 La. Ann. 1232, 15 So. 696.

New York.— Metropolitan Bd. of Health *v.* Heister, 37 N. Y. 661; Sands *v.* Kimbark, 27 N. Y. 147; People *v.* Van Houten, 13 Misc. 603, 35 N. Y. Suppl. 186; *In re* Newcomb, 18 N. Y. Suppl. 16.

North Carolina.— Porter *v.* Armstrong, 134 N. C. 447, 46 S. E. 997.

Oklahoma.— Light *v.* Canadian County Bank, 2 Okla. 543, 37 Pac. 1075.

Pennsylvania.— *In re* Pennsylvania Hall, 5 Pa. St. 204.

Rhode Island.— Crandall *v.* James, 6 R. I. 144.

This question has been considered and so adjudicated with regard to summary proceedings to recover possession of land,[13] to remove public officers,[14] to disbar and otherwise proceed against attorneys,[15] to enforce penalties and forfeitures,[16] and with regard to statutes providing for summary trial of small offenses against the state or of violations of municipal ordinances.[17] Indeed, if the procedure under the statute is to be without a jury, a jury cannot be called.[18] But a legislature cannot authorize a summary procedure in controversies properly triable by jury at common law or according to the practice of the particular jurisdiction prior to the adoption of the constitution.[19]

III. PROCEDURE.

A. Process and Pleading. Procedure in summary proceedings is governed by the provisions of the statute or statutes under which the proceedings are instituted, and such provisions must be strictly complied with and followed.[20] Defendant must be notified or summoned to appear,[21] and must be apprised of the nature and purpose of the proceeding either by notice or motion,[22] or complaint or affidavit,[23] which must show all the facts necessary to support the proceeding.[24] Formal pleading is not, however, usually necessary in summary proceedings,[25] and unless the statute otherwise provides all defenses except the statute of limitations, set-off, or matters in abatement may be given in evidence without a plea.[26]

B. Record.[27] Every fact necessary to warrant and sustain a recovery or a legal conviction should appear in the record,[28] nothing being taken by intend-

Texas.— Janes *v.* Reynolds, 2 Tex. 250.

Wyoming.—Wearne *v.* France, 3 Wyo. 273, 21 Pac. 703.

United States.— *In re* Chow Goo Pooi, 25 Fed. 77.

13. See JURIES, 24 Cyc. 137.

14. See JURIES, 24 Cyc. 135.

15. See JURIES, 24 Cyc. 137. See also, generally, ATTORNEY AND CLIENT, 4 Cyc. 90 *et seq.*

Summary remedies of client generally see ATTORNEY AND CLIENT, 4 Cyc. 975, 997.

16. See JURIES, 24 Cyc. 137.

17. See CRIMINAL LAW, 12 Cyc. 321.

18. St. Peter *v.* Bauer, 19 Minn. 327.

19. See JURIES, 24 Cyc. 129.

20. See *supra*, I.

21. *Alabama.*— Caldwell *v.* Guinn, 54 Ala. 64; Evans *v.* Stevens, 8 Ala. 517; Baylor *v.* Scott, 2 Port. 315. See also Chandler *v.* Francis Vandegrift Shoe Co., 94 Ala. 233, 10 So. 353.

Georgia.— Foster *v.* Justices of Cherokee County Inferior Ct., 9 Ga. 185.

Mississippi.— Adams *v.* Arnold, 76 Miss. 655, 24 So. 868.

New Jersey.—State *v.* Handlin, 16 N. J. L. 96.

New York.— Buttling *v.* Hatton, 33 N. Y. App. Div. 551, 53 N. Y. Suppl. 1009; Bigelow *v.* Stearns, 19 Johns. 39, 10 Am. Dec. 189.

Pennsylvania.— Corn *v.* Kernery, 2 Leg. Chron. 321; Northern Liberties *v.* O'Neill, 1 Phila. 427.

Tennessee.— State *v.* Deberry, 9 Humphr. 605; Wingfield *v.* Crosby, 5 Coldw. 241; Smith *v.* Wells, 5 Yerg. 202.

Texas.— Robinson *v.* Schmidt, 48 Tex. 13.

Virginia.— Hall *v.* Ratliff, 93 Va. 327, 24 S. E. 1011.

England.— Reg. *v.* Venables, 2 Ld. Raym. 1405, 92 Eng. Reprint 415, 1 Str. 630, 93 Eng. Reprint 744; Reg. *v.* Barret, 1 Salk. 383, 91 Eng. Reprint 334; Reg. *v.* Dyer, 1 Salk. 181, 91 Eng. Reprint 165; 4 Blackstone Comm. 382.

22. Stanley *v.* Mobile Bank, 23 Ala. 652; Sanford *v.* Frankhouser, 24 Kan. 98; Bellanfont *v.* Coleman, 7 Heisk. (Tenn.) 559.

Whether the motion or notice commences the proceeding see ACTIONS, 1 Cyc. 751.

23. Powell *v.* Weaver, 56 Ga. 288; Scroggins *v.* State, 55 Ga. 380; Gunn *v.* Pattishal, 48 Ga. 405; State *v.* Pendleton, 65 N. C. 617.

Complaint or information in trial without jury for petty misdemeanor see CRIMINAL LAW, 12 Cyc. 323.

24. Lindsay *v.* Lowe, 64 Ga. 438; Moore *v.* Martin, 58 Ga. 411; Powell *v.* Weaver, 56 Ga. 288; Gunn *v.* Pattishal, 48 Ga. 405; Brogden *v.* Privett, 67 N. C. 45; Segler *v.* Coward, 24 S. C. 119.

25. Moundsville *v.* Melton, 35 W. Va. 217, 13 S. E. 373, holding that a conviction will not be reversed for want of a plea by defendant. See also Cail *v.* Brookfield, 4 Ark. 554.

26. Zorger *v.* Greensburgh, 60 Ind. 1; St. Louis *v.* Knox, 74 Mo. 79; Lexington *v.* Curtin, 69 Mo. 626.

27. Record on summary conviction in criminal trial see CRIMINAL LAW, 12 Cyc. 328.

28. *Alabama.*—Weeks *v.* Yeend, 104 Ala. 546, 16 So. 421; Rutherford *v.* Smith, 27 Ala. 417; Broughton *v.* Robinson, 11 Ala. 922; Martin *v.* Avery, 8 Ala. 430; Levert *v.* Planters', etc., Bank, 8 Port. 104; Bates *v.* Planters', etc., Bank, 8 Port. 99; Barton *v.* McKinney, 3 Stew. & P. 274.

Arkansas.— McKisick *v.* Brodie, 6 Ark. 375; Pelham *v.* Page, 6 Ark. 148; McKnight *v.* Smith, 5 Ark. 409.

ment.[29] Thus the record must show jurisdiction of the court,[30] opportunity to be heard after notice [31] duly apprising defendant of the facts or of the charges against him,[32] the statute authorizing the proceeding,[33] a regular trial,[34] and the evidence.[35] However, it has been held that on appeal the same presumptions as to jurisdictional facts are indulged in as in the case of actions upon summons and complaint.[36]

IV. ENUMERATION OF SUMMARY PROCEEDINGS.

Among the more important summary proceedings are proceedings against clerks of court for breach of duty,[37] against sheriffs and constables for misconduct in office,[38] and against an attorney for wrongs done in a professional capacity;[39] proceedings for a forcible entry,[40] or for judgment on motion;[41] proceedings to abate nuisances generally,[42] and specifically a liquor nuisance;[43] to collect bills and notes [44] and taxes,[45] specifically municipal [46] and school [47] taxes; to enforce contribution by sureties against their cosureties,[48] a crop lien,[49] a bid at a judgment sale,[50] and liability on bonds, such as appeal,[51] county official,[52] distress,[53] executors' and administrators',[54] forthcoming,[55] garnishment,[56] guardians',[57] prison limits,[58] replevin,[59] and general official [60] bonds, to enforce forfeited recognizances,[61] homestead rights,[62] liens,[63] payment of costs,[64] and the right of exemption;[65] to

Illinois.— Chicago *v.* Rock Island R. Co., 20 Ill. 286.

Indiana.— Batson *v.* Lasselle, 1 Blackf. 119.

Mississippi.— Hyman *v.* Seaman, 33 Miss. 185.

New York.— Buttling *v.* Hatton, 33 N. Y. App. Div. 551, 53 N. Y. Suppl. 1009.

Tennessee.—Crockett *v.* Parkison, 3 Coldw. 219; Hamilton *v.* Burum, 3 Yerg. 355.

West Virginia.— Mayer *v.* Adams, 27 W. Va. 244.

Illustrations of insufficient record see Elizabeth *v.* Central R. Co., 66 N. J. L. 568, 49 Atl. 682; Jersey City *v.* Neihaus, 66 N. J. L. 554, 49 Atl. 444.

Everything necessary to sustain a lawful summary conviction must appear upon the face of the record. Philadelphia *v.* Campbell, 11 Phila. (Pa.) 163.

29. Barton *v.* McKinney, 3 Stew. & P. (Ala.) 274.

30. Jersey City *v.* Neihaus, 66 N. J. L. 554, 49 Atl. 444; Jones *v.* Wilkes-Barre, 2 Kulp (Pa.) 68; Philadelphia *v.* Roney, 2 Phila. (Pa.) 43.

31. Gallitzin Borough *v.* Gains, 15 Pa. Co. Ct. 337, 7 Kulp 479; Lancaster *v.* Baer, 5 Lanc. Bar (Pa.) Dec. 6, 1873.

32. Elizabeth *v.* Central R. Co., 66 N. J. L. 568, 49 Atl. 682; Boothe *v.* Georgetown, 3 Fed. Cas. No. 1,651, 2 Cranch C. C. 356.

33. Com. *v.* Hill, 3 Pa. Dist. 216, 12 Pa. Co. Ct. 559.

34. Elizabeth *v.* Central R. Co., 66 N. J. L. 568, 49 Atl. 682; Keeler *v.* Milledge, 24 N. J. L. 142; Gallitzin Borough *v.* Gains, 15 Pa. Co. Ct. 337, 7 Kulp 479; Com. *v.* Cane, 2 Pars. Eq. Cas. (Pa.) 265; Jones *v.* Wilkes-Barre, 2 Kulp (Pa.) 68; Lancaster *v.* Baer, 5 Lanc. Bar (Pa.) Dec. 6, 1873; Philadelphia *v.* Cohen, 13 Wkly. Notes Cas. (Pa.) 468.

35. Lancaster *v.* Baer, 5 Lanc. Bar (Pa.) Dec. 6, 1873.

Evidence in extenso must be set forth upon the record. Com. *v.* Cane, 2 Pars. Eq. Cas. (Pa.) 265.

36. Shouse *v.* Lawrence, 51 Ala. 559.

37. See CLERKS OF COURT, 7 Cyc. 255.

38. See SHERIFFS AND CONSTABLES, 35 Cyc. 1858, 1895.

39. See ATTORNEY AND CLIENT, 4 Cyc. 975, 997.

40. See FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1118.

41. See JUDGMENTS, 23 Cyc. 768, 1119, 1225.

42. See MUNICIPAL CORPORATIONS, 28 Cyc. 756; NUISANCES, 29 Cyc. 1214.

The abatement of a nuisance by the municipal authorities, after investigation and determination that a nuisance exists, on their order, by a police officer, is a summary proceeding. Western, etc., R. Co. *v.* Atlanta, 113 Ga. 537, 38 S. E. 996, 54 L. R. A. 294.

43. See INTOXICATING LIQUORS, 23 Cyc. 302.

44. See COMMERCIAL PAPER, 8 Cyc. 20.

45. See TAXES.

46. See MUNICIPAL CORPORATIONS, 28 Cyc 1711, 1715 note 99.

47. See SCHOOLS AND SCHOOL-DISTRICTS, 35 Cyc. 1032.

48. See PRINCIPAL AND SURETY, 32 Cyc. 296.

49. See AGRICULTURE, 2 Cyc. 68.

50. See JUDICIAL SALES, 24 Cyc. 52.

51. See APPEAL AND ERROR, 2 Cyc. 961.

52. See COUNTIES, 11 Cyc. 455.

53. See LANDLORD AND TENANT, 24 Cyc. 1324.

54. See EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1279.

55. See EXECUTIONS, 17 Cyc. 1134.

56. See GARNISHMENT, 20 Cyc. 1157.

57. See GUARDIAN AND WARD, 21 Cyc. 240.

58. See EXECUTIONS, 17 Cyc. 1536.

59. See REPLEVIN, 34 Cyc. 1588.

60. See OFFICERS, 29 Cyc. 1463.

61. See RECOGNIZANCES, 34 Cyc. 558 text and note 27.

62. See HOMESTEADS, 21 Cyc. 633.

63. See LIENS, 25 Cyc. 683.

64. See COSTS, 11 Cyc. 195.

65. See EXEMPTIONS, 18 Cyc. 1487.

investigate municipal finances; [66] to punish petty crimes,[67] and violations of municipal ordinances; [68] to remove officers holding over; [69] to recover compensation from client by attorney,[70] damages for injuries to animals on or near railroad track,[71] penalties,[72] and possession of land; [73] to suspend and disbar attorneys; [74] and to transfer possession of personalty to await the main trial of a civil suit.[75]

SUMMARY WAY. Without ceremony or delay.[1]

SUMMER. A term which strictly perhaps, includes only the months of June, July, and August, yet is frequently used in a more general sense to indicate the warmest period of the year.[2]

SUMMER ROAD. In Pennsylvania, the name given to the smooth surface of sod or earth on each side of the paved strip of road and at the same level but inclining gradually to the sides, used by many travelers in good weather in preference to the macadamized stone.[3]

SUMMI CUJUSQUE BONITAS COMMUNE PERFUGIUM OMNIBUS. A maxim meaning "The goodness of the great is the common refuge of all." [4]

SUMMING UP. On the trial of an action by a jury, a recapitulation of the evidence adduced in order to draw the attention of the jury to the salient points.[5] (Summing Up: By Attorneys, see CRIMINAL LAW, 12 Cyc. 568; TRIAL. By Court, see CRIMINAL LAW, 12 Cyc. 611; TRIAL.)

SUMMON. In practice, to serve a summons; to cite a defendant to appear in court to answer a suit which has been begun against him; to notify the defendant that an action has been instituted against him, and that he is required to answer it at a time and place named.[6] (To Summon: Grand Juror, see GRAND JURIES, 20 Cyc. 1311. Juror — In General, see JURIES, 24 Cyc. 222, 238, 246; Compensation of Sheriffs and Constables For, see SHERIFFS AND CONSTABLES, 35 Cyc. 1583. Witness — In General, see WITNESSES; Before Grand Jury, see GRAND JURIES, 20 Cyc. 1342.)

SUMMONITIONES AUT CITATIONES NULLÆ LICEANT FIERI INTRA PALATIUM REGIS. A maxim meaning "Let no summonses or citations be served within the king's palace." [7]

SUMMONS. The name of a writ commanding the sheriff or other authorized officer to notify a party to appear in court to answer a complaint made against him, and in said writ specified, on a day therein mentioned; [8] the instrument

66. See MUNICIPAL CORPORATIONS, 28 Cyc. 1742.

67. See CRIMINAL LAW, 12 Cyc. 321 *et seq.*

68. See MUNICIPAL CORPORATIONS, 28 Cyc. 785.

Constitutionality see JURIES, 24 Cyc. 138.

69. See MUNICIPAL CORPORATIONS, 28 Cyc. 507.

70. See ATTORNEY AND CLIENT, 4 Cyc. 997.

71. See RAILROADS, 33 Cyc. 1253.

72. See PENALTIES, 30 Cyc. 1344.

73. See LANDLORD AND TENANT, 24 Cyc. 1407.

Summary proceeding against municipality to recover land see LANDLORD AND TENANT, 24 Cyc. 1417.

Constitutionality see JURIES, 24 Cyc. 137.

74. See ATTORNEY AND CLIENT, 4 Cyc. 912.

75. See POSSESSORY WARRANT, 31 Cyc. 954.

1. Sale *v.* Lake Erie, etc., R. Co., 32 Ont. 159, 161 [*citing* Standard Dict.].

2. De Witt *v.* Wheeler, etc., Sewing Mach. Co., 17 Nebr. 533, 535, 23 N. W. 506 [*citing* Webster Dict.].

Equivalent of "farming season" see Vanderhoef *v.* Agricultural Ins. Co., 46 Hun (N. Y.) 328, 335.

"Until the summer of 1871" construed to mean until the first of June see Abel *v.* Alexander, 45 Ind. 523, 528, 15 Am. Rep. 270.

3. Emery *v.* Philadelphia, 208 Pa. St. 492, 497, 57 Atl. 977.

4. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].

5. Black L. Dict. See also Johnson *v.* Kinsey, 7 Ga. 428, 431.

It is a technical phrase which expresses the scope and extent of the power which a judge has in stating the testimony to the jury under a constitutional provision giving him the right to "state the testimony and declare the law." State *v.* Ezzard, 40 S. C. 312, 323, 18 S. E. 1025; Benedict *v.* Rose, 16 S. C. 629, 630.

6. Black L. Dict.

7. Black L. Dict. [*citing* 3 Inst. 141].

8. Johns *v.* Phœnix Nat. Bank, 6 Ariz. 290, 295, 56 Pac. 725.

Properly speaking, a summons is only a process when issued from the office of a court of justice requiring the person to whom it

running in the name of the state, issuing out of court having jurisdiction of the action, directed to the ministerial officer, commanding him to execute the same, and certify to the court how he executes it;[9] a citation proceeding upon an information or complaint laid before the magistrate who issues the summons and conveying to the person cited the fact that the magistrate is satisfied that there is a *prima facie* case against him.[10] (Summons: In General, see PROCESS, 32 Cyc. 412. Amendment or Correction of, see JUDGMENTS, 23 Cyc. 872 note 47. As Mode of Compelling Appearance of Corporation to Answer Criminal Charge, see CORPORATIONS, 10 Cyc. 1233. As Notice of Application to Correct Bill of Exceptions, see APPEAL AND ERROR, 3 Cyc. 51 note 46. Commencing Action by as Waiver of Right to Arrest in Civil Action, see ARREST, 3 Cyc. 915. Conformity of Declaration, Complaint, Petition, or Statement to, see PLEADING, 31 Cyc. 113. In Action on Bail-Bond — In Civil Case, see BAIL, 5 Cyc. 55 note 33; In Criminal Prosecution, see BAIL, 5 Cyc. 139. In Action to Recover Penalty For Insertion of False Notice of Copyright, see COPYRIGHT, 9 Cyc. 926. In Criminal Prosecution Under Liquor Laws, see INTOXICATING LIQUORS, 23 Cyc. 215. Indorsement of Notice of Lien of Attorney on, Sufficiency, see ATTORNEY AND CLIENT, 4 Cyc. 1009 note 56. Indorsement on, of Amount of Plaintiff's Demand, Effect on Amount of Recovery, see JUDGMENTS, 23 Cyc. 795. In Garnishment, see GARNISHMENT, 20 Cyc. 1044; JUSTICES OF THE PEACE, 24 Cyc. 549. In Justice's Court, see JUSTICES OF THE PEACE, 24 Cyc. 515. Issuance of as Constituting Commencement of Action — In General, see ACTIONS, 1 Cyc. 747; For Issuing Writ of Attachment, see ATTACHMENT, 4 Cyc. 542. Service of as Constituting Commencement of Action, see ACTIONS, 1 Cyc. 749. To Officers Designated as Court-Martial, see ARMY AND NAVY, 3 Cyc. 851. To Show Cause, Revival of Judgment by, see JUDGMENTS, 23 Cyc. 1449.)

SUMMONS AND SEVERANCE. A remedy formerly allowed when more than one person was interested jointly in a cause of action or other proceeding; and one

is addressed to attend the court for the purposes therein stated. Whitney *v.* Blackburn, 17 Oreg. 564, 571, 21 Pac. 874, 11 Am. St. Rep. 857.

At common law synonymous with "process" see Ackermann *v.* Berriman, 61 Misc. (N. Y.) 165, 169, 114 N. Y. Suppl. 937 [*citing* Nicholls Pr.].

In modern practice used interchangeably with "process" see Horton *v.* Kansas City, etc., R. Co., 26 Mo. App. 349, 355.

Under code procedure, it is not a process but merely a notice given by the plaintiff's attorney to the defendant that proceedings have been instituted, and that judgment therein will be taken against him if he fails to answer (Plano Mfg. Co. *v.* Kaufert, 86 Minn. 13, 16, 89 N. W. 1124; Whitewater First Nat. Bank *v.* Estenson, 68 Minn. 28, 70 N. W. 775); a notice to bring a party into court (Riesterer *v.* Horton Land, etc., Co., 160 Mo. 141, 155, 61 S. W. 238); the process used to commence a civil action (Whitney *v.* Blackburn, 17 Oreg. 564, 571, 21 Pac. 874, 11 Am. St. Rep. 857); the paper which gives jurisdiction to the court over the person of the party brought in (Adkins *v.* Moore, 43 S. C. 173, 175, 20 S. E. 985; Simmons *v.* Cochran, 29 S. C. 31, 33, 6 S. E. 859); a mere notice addressed to defendant giving him information that a certain proceeding has been commenced for a certain purpose (Prince *v.* Dickson, 39 S. C. 477, 484, 18 S. E. 33). See also Genobles *v.* West, 23 S. C. 154, 168.

"The office of a summons is to bring the defendant to whom it is directed into court to answer the petition of the plaintiff." Mansur *v.* Pacific Mut. L. Ins. Co., 136 Mo. App. 726, 727, 118 S. W. 1193.

It is not a process or writ against the body; it is only a notice and therefore an exemption of jurors from process against their bodies does not cover it. Grove *v.* Campbell, 9 Yerg. (Tenn.) 7, 9.

The return being a part of the summons, it is sufficiently described by the word "summons." Casety *v.* Jamison, 35 Wash. 478, 480, 77 Pac. 800.

Process issuing on filing of a libel for divorce is held to be in the nature of a summons issued by a common-law court and not as in the nature of a citation from an ecclesiastical or civil court. It cannot, therefore, be served by a private person. Leavitt *v.* Leavitt, 135 Mass. 191, 192.

Notice of an application to admit to probate an alleged will, or to admit a copy of a foreign will with an authenticated probate thereof is not "a summons, notice, or advertisement . . . required to be published" in a "State Paper." *In re* Miller, 39 Cal. 550, 554.

9. Burrill L. Dict. [*quoted* in Horton *v.* Kansas City, etc., R. Co., 26 Mo. App. 349, 355].

10. Dixon *v.* Wells, 25 Q. B. D. 249, 257, 17 Cox C. C. 48, 54 J. P. 725, 59 L. J. M. C. 116, 62 L. T. Rep. N. S. 812, 38 Wkly. Rep. 606.

of them refused to participate in the legal assertion of the joint rights involved in the matter. In such case the other party issued a writ or summons by which the one who refused to proceed was brought before the court, and if he still refused, an order or judgment of severance was made by the court, whereby the party who wished to do so could sue alone.[11] (See APPEAL AND ERROR, 2 Cyc. 761.)

SUMMUM JUS, SUMMA INJURIA. A maxim meaning "Rigid law is the greatest injustice — or too strict interpretation of the law is frequently productive of the greatest injustice."[12]

SUMP. In mining parlance, a rude well or cistern in which the water in a mine is trained to collect, and from which it is pumped out of the mine by the steam engine which moves the cars in the shaft.[13]

SUM UP. A term which, *ex vi termini*, means to present all the proof to the consideration of the jury.[14] (See SUMMING UP, *ante*, p. 532.)

11. Masterson *v.* Howard, 10 Wall. (U. S.) 416, 417, 19 L. ed. 953.

12. Caldwell *v.* Ryan, 210 Mo. 17, 43, 108 S. W. 533, 124 Am. St. Rep. 717, 16 L. R. A. N. S. 494.

Applied in McNair *v.* Boyd, 14 Ont. Pr. 132, 143.

13. Woodward Iron Co. *v.* Jones, 80 Ala. 123, 124.

14. Johnson *v.* Kinsey, 7 Ga. 428, 431.

SUNDAY

EDITED BY N. W. HOYLES, B. A., K. C., LL.D.
Principal of The Law School, Osgoode Hall, Toronto, Canada

I. DEFINITION AND NATURE, 539
- A. *Definition and Distinctions,* 539
- B. *Origin and Nature,* 539
  - 1. *As Religious Institution,* 539
  - 2. *As Civil Institution,* 540
- C. *Duration of Day,* 540

II. STATUTORY PROVISIONS, 540
- A. *Historical,* 540
- B. *Constitutionality,* 541
  - 1. *In General,* 541
  - 2. *As Affected by Specific Constitutional Provisions,* 542
  - 3. *Canadian Acts,* 543
  - 4. *Provision For Penalty,* 543
  - 5. *Ambiguity,* 543
  - 6. *Who May Question,* 543
- C. *Construction,* 543
- D. *Repeal,* 544

III. ACTS PROHIBITED, 544
- A. *In General,* 544
- B. *Work and Labor,* 544
  - 1. *In General,* 544
  - 2. *Barbering,* 545
- C. *Business or Occupation,* 545
  - 1. *In General,* 545
  - 2. *Keeping Open Place of Business For Purpose of Traffic,* 547
    - a. *In General,* 547
    - b. *Elements of Offense,* 547
    - c. *Statutory Exceptions,* 548
    - d. *Persons Liable,* 548
    - e. *Violation of Other Statutes,* 548
  - 3. *Operation of Trains and Public Conveyances,* 548
    - a. *Passenger Trains,* 548
    - b. *Freight Trains,* 549
    - c. *Street Cars,* 549
    - d. *Excursion Boats and Trains,* 549
    - e. *Canal-Boats,* 550
    - f. *Other Public Conveyances,* 550
  - 4. *Publication and Sale of Newspapers,* 550
- D. *Sports and Amusements,* 550
  - 1. *In General,* 550
  - 2. *Base-Ball Playing,* 551
  - 3. *Theatrical Performances,* 551
  - 4. *Gaming,* 552
  - 5. *Shooting,* 552
  - 6. *Fishing,* 552
- E. *Works of Necessity and Charity,* 552
  - 1. *In General,* 552

2. *Necessity*, 552
a. *Meaning of Term*, 552
b. *Acts Included or Excluded*, 553
(I) *Matters of Convenience*, 553
(II) *Care of Animals*, 553
(III) *Furnishing Food and Refreshment*, 553
(IV) *Furnishing Water and Artificial Light*, 554
(V) *Exigencies of Trade or Business*, 554
(VI) *Acts to Secure Public Safety*, 555
(VII) *Avoidable Acts*, 555
(VIII) *Traveling*, 555
(IX) *Transmittal of Telegrams*, 556
3. *Charity*, 556
F. *Acts of Persons Observing Other Day*, 556

IV. VALIDITY OF PRIVATE ACTS AND TRANSACTIONS, 557
A. *Incomplete Transaction*, 557
B. *Gifts*, 557
C. *Acts Affecting Past Indebtedness*, 557
D. *Competency as Evidence*, 557
E. *Acts of Benevolent or Religious Societies*, 557
F. *Giving of Notice*, 557
G. *Enlistment*, 557

V. VALIDITY OF CONTRACTS AND OTHER WRITTEN INSTRUMENTS, 557
A. *At Common Law*, 557
B. *By Statute*, 558
C. *Contracts Made in Another State*, 559
D. *Nature of Contract*, 559
1. *Executed and Executory*, 559
2. *Contracts Not Within Ordinary Calling of Parties*, 559
3. *Contracts For Purpose of Necessity or Charity*, 560
4. *Specific Contracts Considered*, 560
a. *Transportation of Goods and Live Stock*, 560
b. *Hiring Horse*, 560
c. *Use of Land*, 560
d. *Loaning Money*, 561
e. *Creation of Agency*, 561
f. *Extension of Time*, 561
g. *Partnership Agreement*, 561
h. *Sale or Exchange of Property*, 561
E. *Negotiation on Sunday*, 561
F. *Execution of Instrument on Sunday*, 562
1. *In General*, 562
2. *Guaranties*, 562
3. *Assignments*, 563
4. *Bills and Notes*, 563
5. *Bonds*, 564
6. *Conveyances*, 564
7. *Insurance*, 565
8. *Marriage Contract*, 565
9. *Wills*, 565
G. *Delivery on Sunday*, 565
H. *Ratification*, 565
I. *Rescission and Rights of Third Persons*, 567
1. *Rescission*, 567
a. *On Sunday*, 567
b. *Of Contract Made on Sunday*, 567

2. *Rights of Third Persons*, 567
J. *Performance of Contract on Sunday*, 568

VI. ACTIONS ON SUNDAY CONTRACTS AND TRANSACTIONS, 569
A. *Right of Action*, 569
1. *Existence of Right*, 569
a. *In General*, 569
b. *Breach of Warranty*, 570
c. *Deceit*, 570
d. *Conversion or Damages For Injury to Property Hired*, 570
2. *Conditions Precedent to Exercise of Right*, 570
B. *Defenses*, 570
1. *In General*, 570
2. *Restoration of Consideration or Benefit*, 571
C. *Pleadings*, 571
1. *In Anticipation of Defense*, 571
2. *Defense of Illegality*, 571
a. *Necessity of Pleading*, 571
b. *Form of Pleading*, 571
c. *Particularity Required*, 571
3. *Reply or Replication*, 572
D. *Evidence*, 572
1. *Presumptions and Burden of Proof*, 572
2. *Admissibility*, 572
3. *Weight and Sufficiency*, 572
E. *Trial and Review*, 573
1. *Province of Court and Jury*, 573
2. *Instructions*, 573
3. *Opening of Judgment*, 573
4. *Appeal and Error*, 573

VII. INJURIES RECEIVED OR INFLICTED WHILE VIOLATING LAW, 573
A. *Liability*, 573
1. *Rule Stated*, 573
2. *Application of Rule*, 574
B. *Actions*, 575
1. *Burden of Proof*, 575
2. *Province of Court and Jury*, 575

VIII. PENALTIES, 576
A. *In General*, 576
B. *Proceedings to Enforce*, 576
1. *Petition*, 576
a. *Joinder of Offenses*, 576
b. *Charging Part*, 576
2. *Judgment and Costs*, 576
3. *Appeal*, 576
C. *Disposition of Fines*, 577

IX. CRIMINAL PROSECUTIONS FOR VIOLATION OF LAW, 577
A. *Jurisdiction*, 577
B. *Complaint, Indictment, or Information*, 577
1. *When Indictment Lies*, 577
2. *Sufficiency*, 578
a. *In General*, 578
b. *Venue*, 578
c. *Seal*, 578
d. *Allegation of Intent*, 578

c. *Grammatical Errors*, 578
f. *Following Language of Statute*, 578
g. *Negativing Exceptions*, 578
h. *Certainty and Particularity*, 579
(I) *In General*, 579
(II) *Ownership*, 579
(III) *Time*, 579
(IV) *Nature of Labor or Business*, 580
(V) *Information and Belief*, 580
3. *Joinder and Election*, 580
C. *Evidence*, 580
1. *Presumptions and Burden of Proof*, 580
2. *Judicial Notice*, 580
3. *Admissibility*, 580
4. *Proof and Variance*, 581
D. *Trial*, 581
1. *Province of Court and Jury*, 581
2. *Instructions*, 582
3. *Conviction*, 582
a. *Joint*, 582
b. *Summary*, 582
E. *Review*, 583

X. JUDICIAL PROCEEDINGS AND OTHER OFFICIAL ACTS, 583
A. *In General*, 583
B. *Arbitration and Award*, 585
C. *Taking of Depositions*, 585
D. *Filing Pleadings*, 585
E. *Process*, 585
1. *Civil*, 585
a. *In General*, 585
b. *Notice of Proceedings*, 586
c. *Publication*, 587
d. *Process or Notice Returnable on Sunday*, 587
2. *Criminal*, 587
F. *Bonds and Recognizances*, 588
G. *Holding Court*, 588
H. *Judgment and Verdict*, 589
1. *Judgment*, 589
2. *Verdict*, 589
I. *Discharge of Jury on Disagreement*, 590
J. *Appeal and Bill of Exceptions*, 590
K. *Proceedings Against Persons Observing Seventh Day*, 590
L. *Objection to Irregularity and Waiver*, 591
M. *Registration*, 591

CROSS-REFERENCES

For Matters Relating to:

Acquittal on Sunday as Constituting Jeopardy, see CRIMINAL LAW, 12 Cyc. 275.

Compulsory Sunday Labor:

By Apprentice, see APPRENTICES, 3 Cyc 563 note 78.

By Seaman, see SEAMEN, 35 Cyc. 1193.

Computation of Time, Inclusion, or Exclusion of Sunday:

Generally, see TIME.

In Loading or Unloading Cargo, see SHIPPING, 36 Cyc. 369.

In Taking Appeal, see APPEAL AND ERROR, 2 Cyc. 794.

Extra Compensation For Sunday Work, see MASTER AND SERVANT, 26 Cyc. 1037 note 86.

For Matters Relating to — (*continued*)

Holiday, see HOLIDAYS, 21 Cyc. 440, 441.

Illegal Contract Generally, see CONTRACTS, 9 Cyc. 465; GAMING, 19 Cyc. 921; USURY.

Interstate Commerce, Applicability of Sunday Laws to, see COMMERCE, 7 Cyc. 428.

Judicial Notice of Sunday, see EVIDENCE, 16 Cyc. 856.

Keeping Open Saloon on Sunday, see INTOXICATING LIQUORS, 23 Cyc. 190.

Municipal Corporation, Power to Regulate Sunday Observance, see MUNICIPAL CORPORATIONS, 28 Cyc. 743.

Prohibition of Sunday Operation of Interstate Trains, see COMMERCE, 7 Cyc. 448.

Sale of Intoxicants on Sunday, see INTOXICATING LIQUORS, 23 Cyc. 163.

I. DEFINITION AND NATURE.

A. Definition and Distinctions. Sunday is a day of the week — the first day of the week;[1] a holy day;[2] the day set apart for cessation from all secular employment by the Christian world.[3] Legally considered, Sunday is merely a day of rest.[4] Although the words "Sabbath" and "Sunday" are not strictly synonymous, the one signifying the Jewish Sabbath, which is the seventh day of the week, and the other, the first day of the week,[5] yet the expressions "the first day of the week," the "Sabbath," the "Lord's day," and "Sunday" are used interchangeably and synonymously both in legislation,[6] and in common parlance.[7] It is not generally comprehended within the meaning of the term "holiday."[8]

B. Origin and Nature — 1. As Religious Institution. Sunday is among the first and most sacred institutions of the Christian religion.[9] The fourth commandment directs abstention from labor on the Sabbath, but the day there designated is the seventh day of the week, and the injunction has been deemed to apply to the Hebrews only.[10] There is nothing in the New Testament relating to Sunday or the Sabbath;[11] but by common consent, the Christians at an early

1. Schenck *v.* Schenck, 52 La. Ann. 2102, 2107, 28 So. 302. See also *Ex p.* Koser, 60 Cal. 177, 197, concurring opinion of McKee, J., where it is said: "Sunday is only a designation for the first day of the week."

Included in word "daily."— London County Council *v.* South Metropolitan Gas Co., [1904] 1 Ch. 76, 68 J. P. 5, 2 Loc. Gov. 161.

2. Weldon *v.* Colquitt, 62 Ga. 449, 451, 35 Am. Rep. 128.

3. District of Columbia *v.* Robinson, 30 App. Cas. (D. C.) 283, 287.

4. Bloom *v.* Richards, 2 Ohio St. 387, 405. See also Sparhawk *v.* Union Pass. R. Co., 54 Pa. St. 401, 433, where it is said: "The first day of the week, the Lord's day, commonly called Sunday, is a day for worship and rest as regulated by the civil authority."

Other definitions are: "Not an ordinary working day." Georgia R., etc., Co. *v.* Maddox, 116 Ga. 64, 81, 42 S. E. 315.

"Not a business day." Merritt *v.* Robinson, 35 Ark. 483, 491.

"The name of the civil day." State *v.* Green, 37 Mo. 466, 469.

Derivation of term.— "The Day of the Sun, *Dies Solis*, was used at a very early period as synonymous with *Dies Dominicus*, the Lord's Day." Campbell *v.* International L. Assur. Soc., 4 Bosw. (N. Y.) 298, 314.

5. State *v.* Drake, 64 N. C. 589, 591.

6. Gunn *v.* State, 89 Ga. 341, 342, 15 S. E. 458; Com. *v.* Newton, 8 Pick. (Mass.) 234. See also *Ex p.* Newman, 9 Cal. 502, 521, dissenting opinion of Field, J.

7. Shover *v.* State, 10 Ark. 259, 262; Kilgour *v.* Miles, 6 Gill & J. (Md.) 268, 270; State *v.* Drake, 64 N. C. 589, 591. *Compare* State *v.* Green, 37 Mo. 466, where it is said that "Sunday is the name of the civil day, and it does not necessarily refer to the Christian festival or Lord's day."

8. Moore *v.* Hagan, 2 Duv. (Ky.) 437, 439; Glenn *v.* Eddy, 51 N. J. L. 255, 257, 17 Atl. 145, 14 Am. St. Rep. 684; Spalding *v.* Bernhard, 76 Wis. 368, 372, 44 N. W. 643, 20 Am. St. Rep. 75, 7 L. R. A. 423. *Compare Ex p.* Koser, 60 Cal. 177; Phillips *v.* Innes, 4 Cl. & F. 234.

9. Shover *v.* State, 10 Ark. 259; Matter of Rupp, 33 N. Y. App. Div. 468, 53 N. Y. Suppl. 927; Campbell *v.* International L. Ins. Soc., 4 Bosw. (N. Y.) 298.

10. People *v.* Poole, 44 Misc. (N. Y.) 118, 89 N. Y. Suppl. 773; Rodman *v.* Robinson, 134 N. C. 503, 47 S. E. 19, 101 Am. St. Rep. 877, 65 L. R. A. 682; Sparhawk *v.* Union Pass. R. Co., 54 Pa. St. 401.

11. Pearce *v.* Atwood, 13 Mass. 324; People *v.* Poole, 44 Misc. (N. Y.) 118, 89 N. Y. Suppl. 773; Rodman *v.* Robinson, 134 N. C. 503, 47 S. E. 19, 101 Am. St. Rep. 877, 65

date substituted the first day of the week for the seventh, and have since observed it as a day of rest and worship, in commemoration of the resurrection.[12]

2. As Civil Institution. As a day set apart for rest and cessation from labor, Sunday has long been recognized as a civil institution.[13]

C. Duration of Day. In the absence of a statute providing otherwise, Sunday is identical with the natural day, beginning at midnight between Saturday and Sunday and continuing twenty-four hours.[14] Under the statutes of some jurisdictions, the day begins at midnight and ends at sunset,[15] while in others, it comprises the solar day only, that is, from sunrise to sunset.[16] A reference in a statute to the evening of the Lord's day refers to Sunday evening, and not Saturday evening.[17]

II. Statutory Provisions.

A. Historical. Sunday legislation is more than fifteen centuries old. It originated in Rome in A. D. 321, when Constantine the Great passed an edict commanding all judges and inhabitants of cities to rest on the venerable day of the sun.[18] Sunday statutes were passed at an early date in England, and 29 Chas. II, c. 7, has been made the basis of similar legislation in the United States.[19]

L. R. A. 682; Sparhawk *v.* Union Pass. R. Co., 54 Pa. St. 401.

12. *District of Columbia.*— District of Columbia *v.* Robinson, 30 App. Cas. 283.
Maryland.— Kilgour *v.* Miles, 6 Gill & J. 268.
Massachusetts.— Pearce *v.* Atwood, 13 Mass. 324.
Nebraska.— State *v.* O'Rourk, 35 Nebr. 614, 53 N. W. 591, 17 L. R. A. 830.
New York.— Campbell *v.* International L. Assur. Soc., 4 Bosw. 298; People *v.* Hoym, 20 How. Pr. 76.
North Carolina.— Rodman *v.* Robinson, 134 N. C. 503, 47 S. E. 19, 101 Am. St. Rep. 877, 65 L. R. A. 682.
Pennsylvania.— Johnston *v.* Com., 22 Pa. St. 102.
Texas.— Gabel *v.* Houston, 29 Tex. 335.
United States.— Swann *v.* Swann, 21 Fed. 299, 308 note.
"Christians vary in their opinions of the manner in which the Lord's day ought to be kept. In Continental Europe, sports, games, and practices are freely indulged in on that day, with the approval of the church, which the larger number of Protestant churches of England and this country do not approve." Swann *v.* Swann, 21 Fed. 299, 305.

13. *Arkansas.*— Turner *v.* State, 85 Ark. 188, 107 S. W. 388; Scales *v.* State, 47 Ark. 476, 1 S. W. 769, 58 Am. Rep. 768.
Maryland.— Judefind *v.* State, 78 Md. 510, 28 Atl. 405, 22 L. R. A. 721.
New York.— People *v.* Havnor, 149 N. Y. 195, 43 N. E. 541, 52 Am. St. Rep. 707, 31 L. R. A. 689 [*affirming* 1 N. Y. App. Div. 459, 37 N. Y. Suppl. 314]; People *v.* Moses. 140 N. Y. 214, 35 N. E. 499; Matter of Hammerstein, 57 Misc. 52, 108 N. Y. Suppl. 197; People *v.* Zimmerman, 48 Misc. 203, 95 N. Y. Suppl. 136.
Pennsylvania.— Omit *v.* Com., 21 Pa. St. 426.
Texas.— Gabel *v.* Houston, 29 Tex. 335.
One of the leading features of the christian Sabbath as one of our civil institutions, inherited from our ancestors who settled this country, is that all people should abstain from pursuing their ordinary week-day occupation on Sunday and that it should be given up to rest and religious observances. Moore *v.* Owen, 58 Misc. (N. Y.) 332, 109 N. Y. Suppl. 585.

14. *Georgia.*— Henderson *v.* Reynolds, 84 Ga. 159, 10 S. E. 734, 7 L. R. A. 327, holding that meridian and not railroad or "standard" time controls in determining when midnight arrives and Sunday begins.
Illinois.— Kroer *v.* People, 78 Ill. 294.
Louisiana.—State *v.* Heard, 107 La. 60, 31 So. 384.
Maryland.— Philadelphia, etc., R. Co. *v.* Lehman, 56 Md. 209, 40 Am. Rep. 415; Kilgour *v.* Miles, 6 Gill & J. 268.
Missouri.— State *v.* Green, 37 Mo. 466.
New Hampshire.— Shaw *v.* Dodge, 5 N. H. 462.
New York.— Pulling *v.* People, 8 Barb. 384; Schwab *v.* Mayforth, 1 N. Y. City Ct. 177.
South Carolina.— Hiller *v.* English, 4 Strobh. 486.
See 45 Cent. Dig. tit. "Sunday," § 1.

15. Bryant *v.* Biddeford, 39 Me. 193; Nason *v.* Dinsmore, 34 Me. 391; Johnson *v.* Day, 17 Pick. (Mass.) 106; Tracy *v.* Jenks, 15 Pick. (Mass.) 465.

16. Fox *v.* Abel, 2 Conn. 541; Mumford *v.* Buel, 1 Root (Conn.) 145; Carpenter *v.* Crane, 1 Root (Conn.) 98.

17. Com. *v.* Newton, 8 Pick. (Mass.) 234.

18. Carver *v.* State, 69 Ind. 61, 35 Am. Rep. 205; Campbell *v.* International L. Assur. Soc., 4 Bosw. (N. Y.) 298; Rodman *v.* Robinson, 134 N. C. 503, 47 S. E. 19, 101 Am. St. Rep. 877, 65 L. R. A. 682; Com. *v.* Hoover, 25 Pa. Super. Ct. 133.

19. McCain *v.* State, 2 Ga. App. 389, 58 S. E. 550; Rodman *v.* Robinson, 134 N. C. 503, 47 S. E. 19, 101 Am. St. Rep. 877, 65 L. R. A. 682; Com. *v.* Hoover, 25 Pa. Super. Ct. 133.

A few colonial statutes regulating the observance of Sunday were enacted in the United States during the seventeenth century.[20]

B. Constitutionality[21] — **1. In General.** As statutes which designate Sunday as a day of rest and prohibit the doing of specified acts on that day have for their object the promotion of the health, peace, and good order of society by requiring man to take a periodical day of rest, they have, from the beginning, been constantly upheld as constitutional on the ground that they are within the domain of the police power.[22] They are essentially civil, and not religious, regulations, whose validity is neither strengthened nor weakened by the fact that the day of rest they enjoin is the Sabbath.[23] The few instances in which such

20. Rodman *v.* Robinson, 134 N. C. 503, 47 S. E. 19, 101 Am. St. Rep. 877, 65 L. R. A. 682; Com. *v.* Nesbit, 34 Pa. St. 398.

The earliest law passed in the United States for the observance of Sunday was an enactment of the Virginia colony in 1617, three years before the pilgrims landed at Plymouth. See 10 Va. L. Reg. 64.

21. **Validity of municipal ordinance** regulating observance of Sunday see Municipal Corporations, 28 Cyc. 743.

22. *Alabama.*— Frolickstein *v.* Mobile, 40 Ala. 725.

California.— *Ex p.* Koser, 60 Cal. 177 [*distinguishing Ex p.* Westerfield, 55 Cal. 550, 36 Am. Rep. 47]; *Ex p.* Bird, 19 Cal. 130; *Ex p.* Andrews, 18 Cal. 678. An earlier statute was held unconstitutional in *Ex p.* Newman, 9 Cal. 502.

District of Columbia.— District of Columbia *v.* Robinson, 30 App. Cas. 283.

Georgia.— Hennington *v.* State, 90 Ga. 396, 17 S. E. 1009 [*affirmed* in 163 U. S. 299, 16 S. Ct. 1086, 41 L. ed. 166]; Gunn *v.* State, 89 Ga. 341, 15 S. E. 458.

Idaho.— State *v.* Dolan, 13 Ida. 693, 92 Pac. 995, 14 L. R. A. N. S. 1259 [*followed* in *In re* Jacobs, 13 Ida. 720, 92 Pac. 1003]; People *v.* Griffin, 1 Ida. 476.

Indiana.— State *v.* Hogreiver, 152 Ind. 652, 53 N. E. 921, 45 L. R. A. 504; Foltz *v.* State, 33 Ind. 215; Voglesong *v.* State, 9 Ind. 112.

Kansas.— Nesbit *v.* State, 8 Kan. App. 104, 54 Pac. 326.

Kentucky.—Com. *v.* Louisville, etc., R. Co., 3 Ky. L. Rep. 788.

Louisiana.— State *v.* Judge, 39 La. Ann. 132, 1 So. 437.

Massachusetts.— Com. *v.* Has, 122 Mass. 40.

Minnesota.—State *v.* Weiss, 97 Minn. 125, 105 N. W. 1127.

Missouri.—State *v.* Campbell, 206 Mo. 579, 105 S. W. 637.

New York.— People *v.* Moses, 140 N. Y. 214, 35 N. E. 499; Neuendorff *v.* Duryea, 69 N. Y. 557, 25 Am. Rep. 235; Lindenmuller *v.* People, 33 Barb. 548; Moore *v.* Owen, 58 Misc. 332, 109 N. Y. Suppl. 585; People *v.* Zimmerman, 48 Misc. 203, 95 N. Y. Suppl. 136; Harrison *v.* Wallis, 44 Misc. 492, 90 N. Y. Suppl. 44; People *v.* Hagan, 36 Misc. 349, 73 N. Y. Suppl. 564; People *v.* Hoym, 20 How. Pr. 76.

North Carolina.— State *v.* Southern R. Co., 119 N. C. 814, 25 S. E. 862, 56 Am. St. Rep. 689.

Ohio.— Stanfeal *v.* State, 78 Ohio St. 24, 84 N. E. 419; State *v.* Powell, 58 Ohio St. 324, 50 N. E. 900, 41 L. R. A. 854 [*reversing* 7 Ohio S. & C. Pl. Dec. 164, 4 Ohio N. P. 302]; Bloom *v.* Richards, 2 Ohio St. 387.

Texas.— *Ex p.* Kennedy, 42 Tex. Cr. 148, 58 S. W. 129, 57 L. R. A. 270; *Ex p.* Sundstrom, 25 Tex. App. 133, 8 S. W. 207; Bohl *v.* State, 3 Tex. App. 683.

Utah.— State *v.* Sopher, 25 Utah 318, 71 Pac. 482, 95 Am. St. Rep. 845, 60 L. R. A. 468.

Washington.— *In re* Donnellan, 49 Wash. 460, 95 Pac. 1085; State *v.* Herald 47 Wash. 538, 92 Pac. 376, 20 L. R. A. N. S. 433; State *v.* Nichols, 28 Wash. 628, 69 Pac. 372 [*overruling* Tacoma *v.* Krech, 15 Wash. 296, 46 Pac. 255, 34 L. R. A. 68].

United States.— Petit *v.* Minnesota, 177 U. S. 164, 20 S. Ct. 666, 44 L. ed. 716 [*affirming* 74 Minn. 376, 77 N. W. 225, and *approving* Hennington *v.* Georgia, 163 U. S. 299, 16 S. Ct. 1086, 41 L. ed. 166].

Canada.— *In re* Legislation, etc., 35 Can. Sup. Ct. 581, holding that legislation respecting the observance of Sunday is within the jurisdiction of the Dominion Parliament.

See 45 Cent. Dig. tit. "Sunday," § 2.

Sanitary reasons.— In People *v.* Bellet, 99 Mich. 151, 57 N. W. 1094, 41 Am. St. Rep. 589, 22 L. R. A. 696, it is said that the better reason for maintaining the police power to prohibit citizens from engaging in secular pursuits on Sunday is the necessity of such regulation as a sanitary measure; that experience has demonstrated that one day's rest is requisite for the health of most individuals, and not all individuals possess the power to observe a day of rest of their own volition. See to same effect State *v.* Petit, 74 Minn. 376, 77 N. W. 225 [*followed* in State *v.* Weiss, 97 Minn. 125, 105 N. W. 1127; State *v.* Justus, 91 Minn. 447, 98 N. W. 325, 103 Am. St. Rep. 521, 64 L. R. A. 510]; People *v.* Havnor, 149 N. Y. 195, 43 N. E. 541, 52 Am. St. Rep. 707, 31 L. R. A. 689 [*affirming* 1 N. Y. App. Div. 459, 37 N. Y. Suppl. 314].

The Texas Sunday law is not violative of Const. art. 16, § 20, known as the local option section of the constitution. Bennett *v.* State, 49 Tex. Cr. 294, 92 S. W. 415.

23. *California.*— *Ex p.* Koser, 60 Cal. 177; *Ex p.* Andrews, 18 Cal. 678.

statutes have been held to be invalid are cases where a single class of persons has been singled out and legislated against, and the classification was so arbitrary and the discrimination so unreasonable as to fall under the head of class legislation.[24]

2. As Affected by Specific Constitutional Provisions. Statutes of this character have been held not to abridge the privileges and immunities of citizens;[25] affect vested rights;[26] deny the equal protection of the laws;[27] or to deprive a person of his liberty or property without due process of law.[28] Neither are they obnoxious as class legislation,[29] nor do they invade the religious liberty and the freedom of conscience guaranteed by the constitution, because no exception is made in favor of persons who observe the seventh day of the week as their Sabbath.[30] A statute is not unconstitutional because it excepts from its operation those who observe a day other than Sunday as the Sabbath;[31] or because it excepts such person as to servile labor only, and not as to the selling of goods.[32] Of course the statute, to be valid, must not contravene constitutional provisions that no bill shall embrace more than one subject, which shall be expressed in the title.[33]

District of Columbia.— District of Columbia *v.* Robinson, 30 App. Cas. 283.

Illinois.— Richmond *v.* Moore, 107 Ill. 429, 47 Am. Rep. 445.

Maryland.— Judefind *v.* State, 78 Md. 510, 28 Atl. 405, 22 L. R. A. 721.

North Carolina.—Rodman *v.* Robinson, 134 N. C. 503, 47 S. E. 19, 101 Am. St. Rep. 877, 65 L. R. A. 682.

Ohio.— State *v.* Powell, 58 Ohio St. 324, 50 N. E. 900, 41 L. R. A. 854; McGatrick *v.* Wason, 4 Ohio St. 566; Bloom *v.* Richards, 2 Ohio St. 387.

Pennsylvania.— Specht *v.* Com., 8 Pa. St. 312, 49 Am. Dec. 518.

West Virginia.— State *v.* Baltimore, etc., R. Co., 15 W. Va. 362, 36 Am. Rep. 803, 24 W. Va. 783, 49 Am. Rep. 290.

United States.— Hennington *v.* Georgia, 163 U. S. 299, 16 S. Ct. 1086, 41 L. ed. 166 [*affirming* 90 Ga. 396, 17 S. E. 1009]; Swann *v.* Swann, 21 Fed. 299. In Soon Hing *v.* Crowley, 113 U. S. 703, 710, 5 S. Ct. 730, 28 L. ed. 1145, the court, per Field, J., said: "Laws setting aside Sunday as a day of rest are upheld, not from any right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor."

Canada.— *Re* Greene, 4 Can. Cr. Cas. 182.

In some jurisdictions the Sunday laws seem to be upheld, in part, upon the ground that orderly and decent respect should be paid to the religious institutions of the people. State *v.* Ambs, 20 Mo. 214; State *v.* Schatt, 128 Mo. App. 622, 107 S. W. 10; St. Joseph *v.* Elliott, 47 Mo. App. 418; Lindenmuller *v.* State, 33 Barb. (N. Y.) 548; Moore *v.* Owen, 58 Misc. (N. Y.) 332, 109 N. Y. Suppl. 585; People *v.* Zimmerman, 48 Misc. (N. Y.) 203, 95 N. Y. Suppl. 136; Gabel *v.* Houston, 29 Tex. 336.

24. *Ex p.* Jentzsch, 112 Cal 468, 44 Pac. 803, 32 L. R. A. 664; *Ex p.* Westerfield, 55 Cal. 550, 36 Am. Rep. 47; Eden *v.* People, 161 Ill. 296, 43 N. E. 1108, 52 Am. St. Rep. 365, 32 L. R. A. 659; State *v.* Granneman, 132 Mo. 326, 33 S. W. 784; Ragio *v.* State, 86 Tenn. 272, 6 S. W. 401.

Unless the classification is manifestly arbitrary and not founded upon any natural distinction or apparent natural reason which suggests the necessity or propriety of different legislation, the courts have no right to interfere with the exercise of legislative discretion. State *v.* Petit, 74 Minn. 376, 77 N. W. 225 [*followed* and *approved* in State *v.* Justus, 91 Minn. 447, 98 N. W. 325, 103 Am. St. Rep. 521, 64 L. R. A. 510]; *In re* Caldwell, 82 Nebr. 544, 118 N. W. 133; State *v.* Nichols, 28 Wash. 628, 69 Pac. 372.

25. See Constitutional Law, 8 Cyc. 1046 text and note 80.

26. People *v.* Griffin, 1 Ida. 476; State *v.* Bott, 31 La. Ann. 663, 33 Am. Rep. 224; Lindenmuller *v.* People, 33 Barb. (N. Y.) 548.

27. See Constitutional Law, 8 Cyc. 1070.

28. See Constitutional Law, 8 Cyc. 1113 text and note 63.

Personal liberty.— Laws requiring rest from secular pursuits on Sunday, being to promote the peace, health, and the well-being of society, are within the power of the general assembly to adopt, and do not violate the personal liberty of the individual secured by the Bill of Rights, section 1. State *v.* Powell, 58 Ohio St. 324, 50 N. E. 900, 41 L. R. A. 854.

29. See Constitutional Law, 8 Cyc. 1052 text and note 59.

30. See Constitutional Law, 8 Cyc. 885.

Declaration of rights.— The Arkansas statute for the punishment of Sabbath-breaking is not in derogation of the liberty of conscience, secured by the declaration of rights. Shover *v.* State, 10 Ark. 259.

31. Johns *v.* State, 78 Ind. 332, 41 Am. Rep. 577; People *v.* Bellet, 99 Mich. 151, 57 N. W. 1094, 41 Am. St. Rep. 589, 22 L. R. A. 696.

32. State *v.* Weiss, 97 Minn. 125, 105 N. W. 1127.

33. Ragio *v.* State, 86 Tenn. 272, 6 S. W. 401.

Sufficient titles.— It is proper to legislate

3. Canadian Acts. Legislation in regard to the profanation of the Lord's Day is criminal legislation, and as the British North America act placed the criminal law under the exclusive authority of the parliament of Canada, any attempt of the provincial legislatures to amend the existing ante-confederation legislation or enact new legislation is *ultra vires*.[34]

4. Provision For Penalty. The failure to provide for a maximum penalty for the first offense does not render the law unconstitutional.[35]

5. Ambiguity. A statute making it unlawful to engage in any game of base-ball on Sunday "where any fee is charged" is not void for uncertainty and ambiguity.[36]

6. Who May Question. A defendant who does not assert that he belongs to the class that observes the seventh day of the week as Sunday is not in a position to assert the invalidity of the statute because of the lack of such exception.[37]

C. Construction.[38] The authorities are not harmonious as to whether statutes regulating the observance of the Sabbath should receive a strict or liberal construction. In some jurisdictions it is held that, as these statutes are penal, they are to be strictly construed and are not to be extended by construction;[39] while, in other jurisdictions, it is held that, as they are in harmony with the religious sentiment of the public, and also tend to promote public morals and good order, they must be liberally construed.[40] In the interpretation of such statutes the maxims of construction, *in pari materia*[41] and *ejusdem generis*,[42] apply.

against Sunday theatrical entertainments under a title, "To preserve the public peace and order on the first day of the week, commonly called Sunday." Neuendorff *v.* Duryea, 69 N. Y. 557, 25 Am. Rep. 235 [*affirming* 6 Daly 276]. Also, when the Sunday legislation is part of a penal code, the title of the latter, "An act relative to crimes and punishments and proceedings in criminal cases," is sufficient, as the title of the act need not be a complete index thereof. *In re* Donnellan, 49 Wash. 460, 95 Pac. 1085. Where hunting and fishing have always associated together in the legislation of a state, they may be combined in the title of an act prohibiting them on Sunday. Com. *v.* Rothermel, 27 Pa. Super. Ct. 648. See also Statutes, 36 Cyc. 1017.

34. Atty.-Gen. *v.* Hamilton St. R. Co., [1903] A. C. 524, 72 L. J. P. C. 105, 89 L. T. Rep. N. S. 107, 19 T. L. R. 612 [*followed* in *In re* Legislation, etc., 35 Can. Sup. Ct. 581]; Reg. *v.* Halifax Electric Tramway Co., 30 Nova Scotia 469. *Compare Re* Greene, 4 Can. Cr. Cas. 182, holding that until parliament legislates on the subject, the provinces have, each for itself, the same power.

35. Stanfeal *v.* State, 78 Ohio St. 24, 83 N. E. 419 [*affirming* 29 Ohio Cir. Ct. 664].

36. State *v.* Hogreiver, 152 Ind. 652, 53 N. E. 921, 45 L. R. A. 504.

37. Stanfeal *v.* State, 78 Ohio St. 24, 84 N. E. 419. *Compare* Canton *v.* Nist, 9 Ohio St. 439, wherein a municipal ordinance was held void because of the absence of such an exception, although it did not appear from the record in the case that defendant was a person who conscientiously observed the seventh day of the week as the Sabbath day was observed by others.

38. Construing statutory exceptions see *infra*, III, C, 2, c.

39. *Indiana.*— State *v.* Hogreiver, 152 Ind. 652, 53 N. E. 921, 45 L. R. A. 504.

Massachusetts.— Com. *v.* Alexander, 185 Mass. 551, 70 N. E. 1017.

Missouri.— St. Louis Agricultural, etc., Assoc. *v.* Delano, 108 Mo. 217, 18 S. W. 1101 [*affirming* 37 Mo. App. 284].

Ohio.— Bloom *v.* Richards, 2 Ohio St. 387.

Oklahoma.— Helm *v.* Briley, 17 Okla. 314, 87 Pac. 595.

Canada.— Reg. *v.* Albertie, 3 Can. Cr. Cas. 356.

40. Tucker *v.* West, 29 Ark. 386; Smith *v.* Wilcox, 24 N. Y. 353, 82 Am. Dec. 302; People *v.* Zimmerman, 48 Misc. (N. Y.) 203, 95 N. Y. Suppl. 136; Northrup *v.* Foot, 14 Wend. (N. Y.) 248; Fennell *v.* Ridler, 5 B. & C. 406, 8 D. & R. 204, 4 L. J. K. B. O. S. 207, 29 Rev. Rep. 278, 11 E. C. L. 517; Smith *v.* Sparrow, 4 Bing. 84, 13 E. C. L. 411, 2 C. & P. 544, 12 E. C. L. 723, 5 L. J. C. P. O. S. 80, 12 Moore C. P. 266, 29 Rev. Rep. 514.

41. See Grattan L. Gloss.

Thus a statute which prohibits the carrying on of one business only on Sunday, although in the form of an independent enactment, must be regarded as *in pari materia* with the general laws upon the same subject. Stanfeal *v.* State, 78 Ohio St. 24, 84 N. E. 419.

42. See 15 Cyc. 247; Grattan L. Gloss.

Thus where the statute, in addition to the general prohibition, enumerates specific classes of persons or acts, the doctrine of *ejusdem generis* is applicable in determining whether a person or act not specifically named is within the general prohibition. Eden Musee American Co. *v.* Bingham, 58 Misc. (N. Y.) 644, 108 N. Y. Suppl. 200 [*reversed* on other grounds in 125 N. Y. App. Div. 780, 110 N. Y. Suppl. 210]; People *v.* Finn, 57 Misc. (N. Y.) 659, 110 N. Y. Suppl. 22; Keith, etc., Amusement Co. *v.* Bingham, 108 N. Y. Suppl. 205 [*reversed* on other grounds in 125 N. Y. App. Div. 791, 110 N. Y. Suppl.

D. Repeal. Sunday laws may be repealed not only by non-user,[43] but by implication, where subsequent statutes cover the same ground.[44] In one jurisdiction at least a section excepting those who observe the seventh day of the week may be repealed by reference to its title only and without reënacting the whole law.[45]

III. ACTS PROHIBITED.

A. In General. Statutes which make it unlawful to do certain acts on the Sabbath do not apply to government servants,[46] or to interstate commerce,[47] and it is doubtful whether they will be recognized in the maritime law.[48] However, a city cannot abrogate the general state law, by refusing to exercise its power to enforce it.[49] Although the closing of a public library on Sunday is in harmony with the spirit of the law,[50] the proprietors of a public navigation, in the absence of specific statutory authority, have no power to pass a by-law forbidding navigation on Sunday.[51]

B. Work and Labor[52] **— 1. In General.** The statutes of nearly all jurisdictions prohibit the performance of work and labor in one's ordinary calling on the Sabbath.[53] Under these statutes the words "ordinary calling" mean that which the ordinary duties of the calling bring into continued action.[54] The words "labor" and "laboring" are used in their ordinary sense, and should not receive a strained construction.[55] Where the statute excepts works of necessity and charity,

219]; Sandiman *v.* Breach, 7 B. & C. 96, 9 D. & R. 796, 5 L. J. K. B. O. S. 298, 31 Rev. Rep. 169, 14 E. C. L. 52; Reg. *v.* Cleworth, 4 B. & S. 927, 10 Jur. N. S. 360, 33 L. J. M. C. 79, 9 L. T. Rep. N. S. 682, 12 Wkly. Rep. 375, 116 E. C. L 927; Peate *v.* Dicken, 1 C. M. & R. 422, 3 Dowl. P. C. 171, 4 L. J. Exch. 28, 5 Tyrw. 116; Reg. *v.* Budway, 8 Can. L. T. Occ. Notes 269; Hamren *v.* Mott. 5 Northwest Terr. 400, 7 Can. Cr. Cas. 188; Atty.-Gen. *v.* Hamilton St. R. Co., 24 Ont. App. 170 [*affirming* 27 Ont. 49]. See also STATUTES. However, the doctrine should be adopted only when the intent to limit the general words is clear. Moore *v.* Owen, 58 Misc. (N. Y.) 332, 109 N. Y. Suppl. 585; Matter of Hammerstein, 57 Misc. (N. Y.) 52, 108 N. Y. Suppl. 197.

43. District of Columbia *v.* Robinson, 30 App. Cas. (D. C.) 283; O'Hanlon *v.* Myers, 10 Rich. (S. C.) 128.

Where the statute has been reenacted several times, it will not be regarded as obsolete. Cain *v.* Daly, 74 S. C. 480, 55 S. E. 110.

44. District of Columbia *v.* Robinson, 30 App. Cas. (D. C.) 283; Johns *v.* State, 78 Ind. 332, 41 Am. Rep. 577; *In re* Donnellan, 49 Wash. 460. 95 Pac. 1085. See also Com. *v.* Moebius, 44 Leg. Int. (Pa.) 492.

An act prohibiting hunting and fishing on the Sabbath is not repealed by a later statute which restricts methods of fishing and establishes closed seasons for the different species. Com. *v.* Rothermel, 27 Pa. Super. Ct. 648.

45. Scales *v.* State, 47 Ark. 476, 1 S. W. 769, 58 Am. Rep. 768.

46. Reg. *v.* Berriman, 4 Ont. 282.

47. See COMMERCE, 7 Cyc. 428.

48. See Pearson *v.* Alsalfa, 44 Fed. 358. See also, generally, SEAMEN, 35 Cyc. 1193 note 56.

49. Ormsby *v.* Louisville, 2 Ky. L. Rep. 297.

50. *In re* Granger, 7 Phila. (Pa.) 350.

51. Calder, etc., Nav. Co. *v.* Pilling, 9 Jur. 377, 14 L. J. Exch. 223, 14 M. & W. 76, 3 R. & Can. Cas. 735.

52. **Labor** defined see 24 Cyc. 808.

Compelling seamen to work on Sunday see SEAMEN, 35 Cyc. 1209 note 79.

53. See the statutes of the several states.

A farmer does not come within the English or Canadian statutes, as he does not belong to the classes of persons specifically named, nor does he come within the phrase "or other person whatsoever." Reg. *v.* Cleworth, 4 B. & S. 927, 10 Jur. N. S. 360, 33 L. J. M. C. 79, 9 L. T. Rep. N. S. 682, 12 Wkly. Rep. 375, 116 E. C. L. 927; Hamren *v.* Mott, 5 Northwest Terr. 400. See also Hespeler *v.* Shaw, 16 U. C. Q. B. 104.

54. Reed *v.* State, 119 Ga. 562, 46 S. E. 837; McCain *v.* State, 2 Ga. App. 389, 58 S. E. 550; Rex *v.* Whitnash, 7 B. & C. 596, 6 L. J. M. C. O. S. 26, 1 M. & R. 452, 14 E. C. L. 268.

55. Richmond *v.* Moore, 107 Ill. 429, 47 Am. Rep. 445.

The term does not apply to an officer engaged in the performance of his official duties. Stephens *v.* Porter, 29 Tex. Civ. App. 556, 69 S. W. 423.

The insertion of a notice in the Sunday issue of a paper does not necessarily involve labor on that day. Roth *v.* Hax, 68 Mo. App. 283.

Sale of intoxicating liquor.— It was held in Cortesy *v.* Territory, 6 N. M. 682, 30 Pac. 947, 19 L. R. A. 349, that a person selling intoxicating liquor on Sunday was engaged in "labor" within the meaning of the Sunday act. On the other hand it was held in Benson *v.* State, 47 Tex. Cr. 609, 85 S. W. 800, that the isolated acts of a steward of

labor performed on Sunday is not *ipso facto* illegal.[56] It is immaterial that the work or labor performed by defendant on Sunday is not at his usual place of business, provided it is work of his ordinary calling.[57]

2. Barbering. Barbering is laboring within the meaning of general statutes prohibiting labor [58] or "worldly employment" on Sunday,[59] and is not generally considered a work of necessity.[60] However, it is not unlawful under a statute prohibiting the opening of any place of business for the purpose of trade or sale of goods, wares, and merchandise,[61] nor does it constitute a nuisance.[62] The mere keeping open of a barber shop, without performing any labor therein, does not violate a general law against Sabbath breaking.[63]

C. Business or Occupation [64] **— 1. In General.** At common law all business other than judicial proceedings [65] could be lawfully transacted on Sunday.[66] However, the carrying on of one's usual business or occupation on Sunday is

a club in separately selling two bottles of beer on Sunday did not constitute labor.

Under Ill. Cr. Code, c. 38, § 261, no offense is committed unless the labor is of such a character as to disturb the peace and good order of society. McCurdy *v.* Alaska, etc., Commercial Co., 102 Ill. App. 120; Foll *v.* People, 66 Ill. App. 405; Johnson *v.* People, 42 Ill. App. 594.

56. Sun Printing, etc., Assoc. *v.* Tribune Assoc., 44 N. Y. Super. Ct. 136. See also Cleary *v.* State, 56 Ark. 124, 19 S. W. 313.

57. McCain *v.* State, 2 Ga. App. 389, 58 S. E. 550.

58. State *v.* Nesbit, 8 Kan. App. 104, 54 Pac. 326; State *v.* Granneman, 132 Mo. 326, 33 S. W. 784; State *v.* Schatt, 128 Mo. App. 622, 107 S. W. 10; Reg. *v.* Taylor, 19 Can. L. J. N. S. 362.

The fact that the shaving is done in a clubhouse does not render it any the less the work of the ordinary calling of the barber, for the work is the same as that performed on week days, although the scene of performance is different. McCain *v.* State, 2 Ga. App. 389, 58 S. E. 550.

Hairdresser not within Englaish act.— Palmer *v.* Snow, [1900] 1 Q. B. 725, 64 J. P. 342, 69 L. J. Q. B. 356, 82 L. T. Rep. N. S. 199, 16 T. L. R. 168, 48 Wkly. Rep. 351 [*distinguishing* Phillips *v.* Innes, 4 Cl. & F. 234, 7 Eng. Reprint 90, on the ground that the Scottish act upon which that decision turned was in much more general terms]. construing 29 Car. II, c. 7, § 1.

59. Com. *v.* Waldman, 140 Pa. St. 89, 21 Atl. 248, 11 L. R. A. 563 [*affirming* 8 Pa. Co. Ct. 449]; Paizer *v.* Com., 4 Kulp (Pa.) 286; Com. *v.* Jacobus, 1 Leg. Gaz. (Pa.) 491; Stout's Case, 2 Leg. Rec. (Pa.) 311.

60. *Arkansas.*— State *v.* Frederick, 45 Ark. 347, 55 Am. Rep. 555.

Georgia.— McCain *v.* State, 2 Ga. App. 389, 58 S. E. 550.

Missouri.—State *v.* Kuehner, (App. 1908) 110 S. W. 605; State *v.* Schatt, 128 Mo. App. 622, 107 S. W. 10; State *v.* Wellott, 54 Mo. App. 310.

Ohio.— State *v.* Schuler, 10 Ohio Dec. (Reprint) 806, 23 Cinc. L. Bul. 450. *Contra*, Spaith *v.* State, 10 Ohio Dec. (Reprint) 639, 22 Cinc. L. Bul. 323.

Pennsylvania.— Com. *v.* Waldman, 140 Pa. St. 89, 21 Atl. 248, 11 L. R. A. 563 [*affirming* 8 Pa. Co. Ct. 449].

Texas.— *Ex p.* Kennedy, 42 Tex. Cr. 148, 58 S. W. 129, 51 L. R. A. 270.

Utah.— State *v.* Sopher, 25 Utah 318, 71 Pac. 482, 95 Am. St. Rep. 845, 60 L. R. A. 468.

England.— Phillips *v.* Innes, 4 Cl. & F. 234, 7 Eng. Reprint 90, interpreting the Scottish act.

Canada.— Reg. *v.* Taylor, 19 Can. L. J N. S. 362.

See 45 Cent. Dig. tit. "Sunday," § 6.

In Indiana, it is a question for the jury to determine, under proper instructions from the court, whether the shaving of a customer by a barber is a work of necessity. Ungericht *v.* State, 119 Ind. 379, 21 N. E. 1082, 12 Am. St. Rep. 419.

Accommodation to customers.— In Com. *v.* Williams, 1 Pearson (Pa.) 61, it was held that the fact that the persons shaved were sick on the preceding Saturday and that defendant shaved them on Sunday as a matter of accommodation, without compensation, was immaterial and constituted no defense.

Shaving of injured person.— In Stone *v.* Graves, 145 Mass. 353, 13 N. E. 906, the court refused to rule as a matter of law that the work of shaving an aged and infirm person whose shoulder has been injured so that he could not well shave himself in his own house on Sunday was not a work of necessity.

61. State *v.* Krech, 10 Wash. 166, 38 Pac. 1001.

62. State *v.* Lorry, 7 Baxt. (Tenn.) 95, 32 Am. Rep. 555.

63. State *v.* Frederick, 45 Ark. 347, 55 Am. Rep. 555.

64 Avocation defined see Avocation, 4 Cyc. 1075.

65. See *infra*, X, A.

66. Heisen *v.* Smith, 138 Cal. 216, 71 Pac. 180, 94 Am. St. Rep. 39 [*quoting* 2 Bouvier L. Dict. 1067]; Ward *v.* Ward, 75 Minn. 269, 77 N. W. 965; Eden Musee American Co. *v.* Bingham, 58 Misc. (N. Y.) 644, 108 N. Y. Suppl. 200 [*reversed* on other grounds in 125 N. Y. App. Div. 780, 110 N. Y. Suppl. 210]; Merritt *v.* Earle, 31 Barb. (N. Y.) 38 [*affirmed* in 29 N. Y. 115, 86 Am. Dec. 292]; Boynton *v.* Page, 13 Wend. (N. Y.) 425.

generally specifically prohibited by statutes, varying somewhat in their phraseology.[67] The evil aimed at is the engaging in one's usual business or accustomed pursuit, works of necessity and charity excepted, and when this exists, the law is violated.[68] It has been held that a single act in the exercise of one's usual avocation amounts to a violation of the law;[69] but every act done does not constitute a separate offense, as the offense consists in the exercise of an employment or business.[70] Of course it is necessary, in order to sustain a conviction, to show that the act or acts done come within the terms of the statute;[71] while, on the other

Sunday contracts not prohibited at common law see *infra*, V, A.

Exercising the trade of a butcher or baker on a Sunday was no offense at common law. Crepps *v.* Durden, Cowp. 640, 98 Eng. Reprint 1283; Rex *v.* Brotherton, Str. 702, 93 Eng. Reprint 794.

67. See the statutes of the several states.

In Ohio the buying and selling of merchandise on the Sabbath has been held to be within the prohibition of the statute against common labor. Cincinnati *v.* Rice, 15 Ohio 225.

The Pennsylvania acts for licensing inns and taverns have not repealed the act of April 22, 1794, forbidding ordinary employment on Sunday, as to innkeepers. Omit *v.* Com., 21 Pa. St. 426.

68. Mueller *v.* State, 76 Ind. 310, 40 Am. Rep. 245; State *v.* Congers, 14 Ind. 396; Voglesong *v.* State, 9 Ind. 112; Ross *v.* State, 9 Ind. App. 35, 36 N. E. 167; Bennett *v.* Brooks, 91 Mass. 118; Peate *v.* Dicken, 1 C. M. & R. 422, 3 Dowl. P. C. 171, 4 L. J. Exch. 28, 5 Tyrw. 116; Scarfe *v.* Morgan, 1 H. & H. 292, 2 Jur. 569, 7 L. J. Exch. 324, 4 M. & W. 270; Drury *v.* Defontaine, 1 Taunt. 131.

Execution of contracts and other written instruments on Sunday see *infra*, V, F.

A person engaged in several occupations violates the Sabbath law when he pursues any one of them on Sunday. Reed *v.* State, 119 Ga. 562, 46 S. E. 837.

An engagement to marry, made on Sunday, is not such "worldly employment or business" as is prohibited by the act of April 22, 1794. Fleischman *v.* Rosenblatt, 20 Pa. Co. Ct. 512.

Disturbance of others.— The New Hampshire statute prohibits no acts to be done on Sunday except such as are done to the disturbance of others (Clough *v.* Shepherd, 31 N. H. 490); a disturbance, within the meaning of this statute, has been defined to be any business which withdraws the attention of others from the appropriate duties of the Sabbath and turns it to other things, regardless of whether the other persons present do or do not object to its performance (Varney *v.* French, 19 N. H. 233). "It is a matter of law, that, whether any one besides the plaintiff and the defendant was present or not, the sale was business of the plaintiff's secular calling, done 'to the disturbance of others.'" Thompson *v.* Williams, 58 N. H. 248, 249. In State *v.* Ryan, 80 Conn. 582, 69 Atl. 536, it was held that defendant could not complain of an instruction that he was guilty, if his acts were done under such circumstances as to actually disturb the public peace and quiet.

Slot machines.— S. C. Cr. Code (1902), § 501, forbidding the sale, or exposing for sale, of goods on Sunday, applies to slot machines automatically vending wares. Cain *v.* Daly, 74 S. C. 480, 55 S. E. 110.

Complying with another's demand.—A lock-keeper, employed upon a canal which is a public highway, is not guilty of Sabbath-breaking, for opening a lock to admit the passage of a boat upon the demand of the person having her in charge. Murray *v.* Com., 24 Pa. St. 270.

Principal and agent — both liable.— Splane *v.* Com., 9 Pa. Cas. 201, 12 Atl. 431; Com. *v.* Ryan, 15 Pa. Co. Ct. 223; Seaman *v.* Com., 11 Wkly. Notes Cas. (Pa.) 14; Hall *v.* State, 41 Tex. Cr. 423, 55 S. W. 173.

69. Voglesong *v.* State, 9 Ind. 112.

Casual sales, privately made, do not constitute a violation of a statute prohibiting public selling or exposing for sale. Ward *v.* Ward, 75 Minn. 269, 77 N. W. 965; Boynton *v.* Page, 13 Wend. (N. Y.) 425. Neither is a casual purchase, for consumption, an employment or business within the meaning of the Pennsylvania statute. Com. *v.* Hoover, 25 Pa. Super. Ct. 133.

70. Scandrett *v.* State, 124 Ga. 141, 52 S. E. 160; Friedeborn *v.* Com., 113 Pa. St. 242, 6 Atl. 160, 57 Am. Rep. 464; State *v.* James, 81 S. C. 197, 62 S. E. 214, 128 Am. St. Rep. 902, 18 L. R. A. 617; Crepps *v.* Durden, Cowp. 640, 98 Eng. Reprint 1283.

71. State *v.* Binswanger, 122 Mo. App. 78, 98 S. W. 103; Hanks *v.* State, 50 Tex. Cr. 577, 99 S. W. 1011; Watson *v.* State, 46 Tex. Cr. 138, 79 S. W. 31; Todd *v.* State, 30 Tex. App. 667, 18 S. W. 642; Reg. *v.* Silvester, 10 Jur. N. S. 360, 33 L. J. M. C. 79; Reg. *v.* Howarth, 33 U. C. Q. B. 537.

Alcohol is embraced in any one of the terms "goods, wares, or merchandise," the sale of which by retail on Sunday is prohibited by Gantt's digest, section 1618. Bridges *v.* State, 37 Ark. 224.

Fruit is merchandise and the keeper of a fruit stand is a shop-keeper within the meaning of a statute prohibiting a merchant, shop-keeper, or other person from disposing of wares and merchandise on Sunday. Gulfport *v.* Stratakos, 90 Miss. 489, 43 So. 812.

Consumption on premises.—Whether the purchaser consumed the goods on the premises is immaterial in determining whether

hand, if defendant seeks to justify his acts, they must be brought within the exception of the statute.[72]

2. Keeping Open Place of Business For Purpose of Traffic — a. In General. The statutes of many jurisdictions make it unlawful to keep open a place of business on Sunday for the purpose of traffic. Statutes which, in terms, prohibit the keeping open merely have been construed to mean that the prohibition is against the keeping open for purposes of traffic.[73] This "keeping open" for the purpose of doing business with the public indiscriminately is an offense in itself, separate and distinct from that of performing labor on the Sabbath,[74] and exceptions as to necessity and charity applying to the latter do not apply to the former.[75]

b. Elements of Offense. A sale is not necessary to constitute the offense,[76] and evidence showing a sale does not conclusively establish a keeping open for the purpose of traffic.[77] The offense is complete when there exists a readiness on the part of the proprietor to carry on his usual business in his store,[78] and the public is afforded access thereto, even though part or all of the doors and entrances are closed.[79] In general the word "shop" is not the legal equivalent of the word

there was a sale on Sunday. New Castle *v.* Cummings, 36 Pa. Super. Ct. 443.

Driving cattle.— In Triggs *v.* Lester, L. R. 1 Q. B. 259, 13 L. T. Rep. N. S. 701, 14 Wkly. Rep. 279, it was held that the "driving or conducting" cattle intended in a statute prohibiting such on Sunday is the ordinary driving, when the cattle themselves are driven, and does not include their conveyance in a van driven with horses.

72. Com. *v.* Goldsmith, 176 Mass. 104, 57 N. E. 212; State *v.* Jacques, 69 N. H. 220, 40 Atl. 398; Quinlan *v.* Conlin, 13 Misc. (N. Y.) 568, 34 N. Y. Suppl. 952.

Collection of camp-meeting fee.— The collection of a compulsory admission fee at the entrance gate to camp-meeting grounds on Sunday is worldly employment or business, prohibited by the act of April 22, 1794, as it does not stand on the same plane as subscriptions solicited or collected during a religious meeting. Com. *v.* Weidner, 4 Pa. Co. Ct. 437.

Mistake.— The letting of a carriage for hire on Sunday, from a belief that it was to be used in a case of necessity or charity, when in fact it was not so used, is not an offense. Myers *v.* State, 1 Conn. 502.

Piloting canal-boat.— It is a violation of the Pennsylvania act of April 22, 1794, to pilot a canal-boat laden with coal upon a part of the Schuylkill navigation on the Lord's day, in discharge of the party's ordinary occupation, even though the locks are required to be kept open for lawful travel. Scully *v.* Com., 35 Pa. St. 511.

73. Jebeles *v.* State, 131 Ala. 41, 31 So. 377; Snider *v.* State, 59 Ala. 64.

74. *Re* Lambert, 7 Brit. Col. 396.

75. Com. *v.* Perry, (Mass. 1887) 11 N. E. 537; Com. *v.* Dale, 144 Mass. 363, 11 N. E. 534; Com. *v.* Osgood, 144 Mass. 362, 11 N. E. 536; Com. *v.* Starr, 144 Mass. 359, 11 N. E. 533; Com. *v.* Dextra, 143 Mass. 28, 8 N. E. 756; Com. *v.* Nagle, 117 Mass. 142. See, however, Mueller *v.* State, 76 Ind. 310, 40 Am. Rep. 245, where it was held that the keeping of a tobacco store open for business, without any pretense of necessity, except to sell in the ordinary way, constituted an infraction of the statute directed against any one being found "at common labor, or engaged in his usual avocation."

76. Jebeles *v.* State, 131 Ala. 41, 31 So. 377; Griffith *v.* State, 48 Tex. Cr. 575, 89 S. W. 832. *Compare* Snider *v.* State, 59 Ala. 64; Smith *v.* State, 50 Ala. 159.

77. Dixon *v.* State, 76 Ala. 89.

78. Jebeles *v.* State, 131 Ala. 41, 31 So. 377; Wright *v.* Forsyth, 116 Ga. 799, 43 S. E. 46 (holding that a barber who entered his shop for the purpose of shining his own shoes was not guilty of keeping open his shop); Lynch *v.* People, 16 Mich. 472; State *v.* Crabtree, 27 Mo. 232.

A barber by shaving customers on Sunday does not necessarily "keep open." *Re* Lambert, 7 Brit. Col. 396.

79. *Arkansas.*— Seelig *v.* State, 43 Ark. 96.

Connecticut.— State *v.* Miller, 68 Conn. 373, 36 Atl. 795.

Massachusetts.— Com. *v.* Harrison, 11 Gray 308; Com. *v.* Lynch, 8 Gray 384.

Missouri.— State *v.* Crabtree, 27 Mo. 232.

Texas.— Whitcomb *v.* State, 30 Tex. App. 269, 17 S. W. 258.

See 45 Cent. Dig. tit. "Sunday," § 7.

Keeping "wide open" unnecessary.— Thus, in Com. *v.* Kirshen, 194 Mass. 151, 152, 80 N. E. 2, the court, per Morton, J., said: "A shop, warehouse or workhouse may be kept open so as to come within the prohibition of the statute without being kept 'wide open,' or kept open in the same manner and for the same purposes in which and for which it is kept open for business on week days."

Delivery of goods only.— In Goldstein *v.* Vaughan, [1897] 1 Q. B. 549, 61 J. P. 277, 66 L. J. Q. B. 380, 76 L. T. Rep. N. S. 262, 46 Wkly. Rep. 399, it was held that a workshop was not open for traffic when all that was done was that customers with whom the business arrangements had been previously made brought or fetched away their things on Sunday.

Admission limited to club members.—A social club, to which none but members are admitted, which supplies its members with

"store," as used in a statute making it unlawful to keep "open store," [80] although a butcher shop has been considered a "store," [81] as has also a fruit stand.[82] Where the statute enumerates the different classes of proprietors which are subject to its provisions, the classes are to be construed together in determining the meaning of any one.[83]

c. Statutory Exceptions.[84] Where the statute contains no exceptions, the nature of the business of defendant is immaterial, and the fact that it is a work of necessity, or charity, or that it is not unlawful in itself, constitutes no defense.[85] In construing the statutory exceptions, the ordinary signification of the words used controls.[86]

d. Persons Liable. The ownership of the store or shop is immaterial. The person who is in charge and control keeps it open within the meaning of the law and is liable therefor.[87] A partner, even though he is only nominally so, is amenable in his individual capacity.[88]

e. Violation of Other Statutes. In a prosecution for keeping open a shop on the Sabbath, it is no defense that the business transacted is an offense under another statute.[89]

3. Operation of Trains and Public Conveyances — a. Passenger Trains. The running and operating of a passenger railroad train on the Sabbath has been held to be a work of necessity,[90] and is expressly permitted under the legislation of at least one state.[91] On the other hand, it has been considered a violation of a

liquors in the club-house without a view to profit, is a place required to be closed on Sunday, within the Sunday law. State *v.* Gelpi, 48 La. Ann. 520, 19 So. 468.

Modification of business no defense.— The facts that on Sunday there are fewer electric lights in a "penny arcade" exhibiting pictures than on other days of the week, and no music is played as on other days, constitutes no defense to a prosecution for keeping open on the Sabbath. Fitchtnberg *v.* Atlanta, 126 Ga. 62, 54 S. E. 933.

80. Sparrenberger *v.* State, 53 Ala. 481, 25 Am. Rep. 643.

81. Petty *v.* State, 58 Ark. 1, 22 S. W. 654.

82. Gulfport *v.* Stratakos, 90 Miss. 489, 43 So. 812.

83. Fitchtnberg *v.* Atlanta, 126 Ga. 62, 54 S. E. 933, holding that under a municipal ordinance declaring that any merchant, billiard table, or tenpin alley-keeper, or other dealer who shall keep open doors on the Sabbath day shall be punished, the word "dealer" includes one who operated a penny arcade or place where a number of machines were kept for profit, each of which, by a mechanical arrangement, exhibited pictures to a person dropping a penny into a slot.

84. **Keeping open of hotels and restaurants** see *infra*, III, E, 2, b, (III).

85. Com. *v.* Perry, (Mass. 1887) 11 N. E. 537; Com. *v.* Dale, 144 Mass. 363, 11 N. E. 534; Com. *v.* Osgood, 144 Mass. 362, 11 N. E. 536; Com. *v.* Starr, 144 Mass. 359, 11 N. E. 533; Com. *v.* Dextra, 143 Mass. 28, 8 N. E. 756; Com. *v.* Nagle, 117 Mass. 142.

License no defense.— The Texas Sunday law, directed against the keeping open on Sunday of a place of business for the purpose of traffic, is not suspended as to a licensed liquor dealer by reason of his license. Bennett *v.* State, 49 Tex. Cr. 294, 92 S. W. 415.

86. Com. *v.* Marzynski, 149 Mass. 68, 21 N. E. 228; Com. *v.* Crowley, 145 Mass. 430, 14 N. E. 459, holding that persons who simply deal in the products of bakeries are not bakers, and that a person whose wife sometimes baked a few cookies and ginger snaps which he sold with bread, bought elsewhere, was not a baker.

The exemption of public markets from a Sunday closing law does not include grocery stores situated within those markets, such stores when located outside the limits of the markets being required to be closed. State *v.* Fernandez, 39 La. Ann. 538, 2 So. 233.

Prohibited and unprohibited business in same store.—An ordinance against keeping open, which permits the keeping open for the sale of certain specified articles, and which limits the privilege to those dealing exclusively in such articles, does not authorize a dealer, who conducts both the prohibited and unprohibited business, to keep open for the conduct of both (Fitchtnberg *v.* Atlanta, 126 Ga. 62, 54 S. E. 933), although it is lawful for him to keep open for the sale of the unprohibited articles (Penniston *v.* Newnan, 117 Ga. 700, 45 S. E. 65).

87. Marre *v.* State, 36 Ark. 222; Com. *v.* Dale, 144 Mass. 363, 11 N. E. 534.

Agent letting premises not liable.— Reid *v.* Wilson, [1895] 1 Q. B. 315, 18 Cox C. C. 56, 59 J. P. 516, 64 L. J. M. C. 60, 71 L. T. Rep. N. S. 739, 14 Reports 94, 43 Wkly. Rep. 161, holding also that the chairman of an entertainment did not have such control of the meeting as to subject him to liability.

88. Blahut *v.* State, 34 Ark. 447; Morris *v.* State, 48 Tex. Cr. 562, 89 S. W. 832.

89. Com. *v.* Trickey, 13 Allen (Mass.) 559.

90. Com. *v.* Louisville, etc., R. Co., 80 Ky. 291, 44 Am. Rep. 475, 3 Ky. L. Rep. 788.

91. State *v.* Norfolk, etc., R. Co., 33 W. Va. 440, 10 S. E. 813.

statute forbidding the performance of any worldly employment or business whatsoever on the Lord's day.[92]

b. Freight Trains. While the legislation of some jurisdictions permits the running of freight trains on the Sabbath,[93] in others, it is expressly prohibited.[94] Under statutes prohibiting the running of freight trains on the Sabbath, the permission of the railroad company is an essential ingredient of the offense;[95] but it is no justification that the company has issued general orders to its employees not to run trains on Sunday, without also showing that in the particular instance the rules were violated without the sanction of the officer indicted.[96] The superintendent of transportation, or the officer having charge of that department of the railroad, is the only person liable to indictment.[97] Where it is provided that trains leaving their starting point on Saturday night may run through to their destination, providing they reach it before a certain hour on Sunday morning according to schedule, detention by unavoidable circumstances is a good excuse for not reaching their destination until after the hour stated,[98] provided there was good faith in establishing and maintaining the schedule.[99]

c. Street Cars. In regard to street railway cars, the authorities are conflicting, some holding that the operation of such cars on the Sabbath contravenes the Sunday statutes,[1] or constitutes a breach of the peace,[2] while others hold it to be a work of necessity.[3]

d. Excursion Boats and Trains. The operation of an excursion boat or train on Sunday is generally considered unlawful and not a work of necessity.[4]

92. Sparhawk *v.* Union Pass. R. Co., 54 Pa. St. 401.

93. State *v.* Norfolk, etc., R. Co., 33 W. Va. 440, 10 S. E. 813. The cases of State *v.* Baltimore, etc., R. Co., 24 W. Va. 783, 49 Am. Rep. 290, and State *v.* Baltimore, etc., R. Co., 15 W. Va. 362, 36 Am. Rep. 803, 24 W. Va. 783, 49 Am. Rep. 290, sustaining convictions for running freight trains on Sunday, were decided under earlier statutes.

94. Griggs *v.* State, 126 Ga. 442, 55 S. E. 179 (holding that Pen. Code (1895), § 420, as amended by Acts (1897), p. 38, and Acts (1899), p. 88, prohibiting the running of freight trains on the Sabbath, does not apply to a railroad which begins and ends in other states, and which does not run a distance greater than thirty miles in Georgia); State *v.* Atlantic Coast Line R. Co., 149 N. C. 470, 62 S. E. 755.

95. State *v.* Atlantic Coast Line R. Co., 149 N. C. 470, 62 S. E. 755.

96. Heard *v.* State, 92 Ga. 477, 17 S. E. 857.

97. Vaughan *v.* State, 116 Ga. 841, 43 S. E. 249.

Train-master as such not liable to indictment.— Craven *v.* State, 109 Ga. 266, 34 S. E. 561.

The superintendent of transportation of the division embracing that part of the railroad where the alleged violation of law occurred is the proper person to be indicted. Westfall *v.* State, 4 Ga. App. 834, 62 S. E. 558.

98. Westfall *v.* State, 4 Ga. App. 834, 62 S. E. 558; Brand *v.* State, 3 Ga. App. 628, 60 S. E. 339, holding that, in determining what is unavoidable, the train in question should not be considered as an isolated train running over the road, but it should be considered in relation to other trains, and as one unit in a complex whole.

A train not starting until Sunday morning does not come within the exception. Jackson *v.* State, 88 Ga. 787, 15 S. E. 905.

Procuring of water and food.— It is no defense that it was necessary to proceed to another station to procure water for the engine and food for the crew, where the lives and health of the crew were not in imminent danger. State *v.* Southern R. Co., 119 N. C. 814, 25 S. E. 862, 56 Am. St. Rep. 689.

99. Brand *v.* State, 3 Ga. App. 628, 60 S. E. 339.

1. Day *v.* Highland St. R. Co., 135 Mass. 113, 44 Am. Rep. 447.

2. Com. *v.* Jeandell, 2 Grant (Pa.) 506, 3 Phila. 509.

3. Augusta, etc., R. Co. *v.* Renz, 55 Ga. 126.

In Canada a person or corporation operating street cars on Sunday is deemed not to be within Ont. Rev. St. c. 203, as it is not one of the persons specifically named, nor is it *ejusdem generis* with those named. Atty.-Gen. *v.* Hamilton St. R. Co., 24 Ont. App. 170 [*affirming* 27 Ont. 49].

4. Dugan *v.* State, 125 Ind. 130, 25 N. E. 171, 9 L. R. A. 321; Com. *v.* Rees, 10 Pa. Co. Ct. 545 (holding further that the fact that the boat is licensed by the United States as a passenger vessel is no defense); Reg. *v.* Tinning, 11 U. C. Q. B. 636. *Contra*, Louisville, etc., R. Co. *v.* Com., 30 S. W. 878, 17 Ky. L. Rep. 223; Reg. *v.* Daggett, 1 Ont. 537, holding that as it was lawful to carry "passengers" it was immaterial whether the persons traveling were doing so on business or for pleasure.

Persons liable.— Under a statute providing a punishment for only the officer who is

e. Canal-Boats. It seems that, in one jurisdiction, it is unlawful to pilot a canal-boat on Sunday.[5]

f. Other Public Conveyances. The driving of an omnibus or other public conveyance on Sunday, for hire, has been held to come within a statute prohibiting worldly employment.[6]

4. Publication and Sale of Newspapers. Statutes directed against the doing of any labor, business, or worldly employment on Sunday have been held to apply to the publication, circulation, and sale of newspapers,[7] such business not being regarded as a work of necessity or charity.[8] The sale of newspapers has also been held to be within the terms of a statute prohibiting the sale of goods, wares, and merchandise on Sunday.[9] While the carrying about and selling of newspapers on Sunday may violate such statutes, it does not constitute a breach of the peace, although the "crying" of the papers on the public streets does.[10]

D. Sports and Amusements — 1. In General. To make the indulgence on Sunday in the various sports and amusements, such as hunting, fishing, and theatrical performances, unlawful, a specific statutory prohibition is necessary, as these things are not within the meaning of statutes prohibiting common labor or worldly employment.[11] However, the participation in such acts is expressly prohibited by the statute of many states. When so prohibited, the words naming the sports or amusements are used in their ordinary meaning. Thus statutes using the word "sporting" or similar words do not comprehend driving for pleasure or to make a social visit;[12] nor does it include bathing in the surf.[13] The general rule of statutory construction that where general words follow particular ones they are to be construed as applicable to things or persons of a like nature applies.[14]

primarily responsible for the running of an excursion train on Sunday, that is, the officer having charge of the transportation department, subemployees, who, under the orders of such an officer, arrange for and actually engage in the running of such a train, are not subject to indictment. Craven *v.* State, 109 Ga. 266, 34 S. E. 561.

5. Scully *v.* Com., 35 Pa. St. 511; Minock *v.* Com., 3 Phila. (Pa.) 347.

6. Johnston *v.* Com., 22 Pa. St. 102; Com. *v.* Jeandell, 2 Grant (Pa.) 506, 3 Phila. 509.

Not within English and Ontario acts.— Sandiman *v.* Breach, 7 B. & C. 96, 9 D. & R. 796, 5 L. J. K. B. O. S. 298, 31 Rev. Rep. 169, 14 E. C. L. 52; Reg. *v.* Somers, 1 Can. Cr. Cas. 46, 24 Ont. 244; Reg. *v.* Budway, 8 Can. L. T. Occ. Notes 269. *Contra*, *Ex p.* Middleton, 3 B. & C. 164, 4 D. & R. 824, 2 L. J. K. B. O. S. 220, 10 E. C. L. 83.

7. Handy *v.* St. Paul Globe Pub. Co., 41 Minn. 188, 42 N. W. 872, 16 Am. St. Rep. 695, 4 L. R. A. 466.

Liability of manager.—A manager, director, and stock-holder of a corporation publishing a newspaper on Sunday, although doing no work on that day, is guilty of carrying on the business of printing and publishing, and is liable to conviction for worldly employment on Sunday. Com. *v.* Houston, 14 Pa. Co. Ct. 395.

8. Com. *v.* Matthews, 152 Pa. St. 166, 25 Atl. 548, 18 L. R. A. 761; Com. *v.* Matthews, 2 Pa. Dist. 13, 12 Pa. Co. Ct. 149.

Where the charge is for keeping open a shop on Sunday for the purpose of doing business therein, it is immaterial whether the selling of the articles sold, for example, Sunday newspapers, was a necessity. Com. *v.* Dale, 144 Mass. 363, 11 N. E. 534.

9. Newcastle *v.* Treadwell, 35 Pa. Super. Ct. 30.

10. Com. *v.* Teamann, 1 Phila. (Pa.) 460.

11. State *v.* Conger, 14 Ind. 396 (holding that gaming is not common labor); Wirth *v.* Calhoun, 64 Nebr. 316, 89 N. W. 785; Noftsker *v.* Com., 8 Pa. Dist. 572, 22 Pa. Co. Ct. 559 (holding that worldly business does not comprehend drunkenness, swearing, and disorderly conduct). *Contra*, Topeka *v.* Crawford, 78 Kan. 583, 96 Pac. 862, holding that to keep open, manage, and superintend a theater and sell tickets therein on Sunday is "labor" within the meaning of an ordinance prohibiting labor on Sunday.

Biblical prohibition.— In People *v.* Poole, 44 Misc. (N. Y.) 118, 89 N. Y. Suppl. 773, Gaynor, J., remarked that physical exercises and games are not forbidden on the Sabbath in the ten commandments; and that in the christian church there have never been any rules prohibiting physical games and exercises on Sunday.

12. Corey *v.* Bath, 35 N. H. 530; Nagle *v.* Brown, 37 Ohio St. 7.

13. Lennig *v.* Newkirk, 7 N. J. L. J. 87.

14. *Ex p.* Neet, 157 Mo. 527, 57 S. W. 1025, 80 Am. St. Rep. 638; St. Louis Agricultural, etc., Assoc. *v.* Delano, 108 Mo. 217, 18 S. W. 1101 [*affirming* 37 Mo. App. 284, and *overruling* State *v.* Williams, 35 Mo. App. 541] (holding that a statute prohibiting "horse racing, cock fighting, or playing at cards and games of any kind" does not extend to mere athletic sports); People *v.* Hemleb, 127 N. Y. App. Div. 356, 111 N. Y. Suppl. 690.

2. Base-Ball Playing.[15] It is not illegal *per se* to play base-ball on Sunday.[16] However, where it is played in such a manner as to interrupt the repose and religious liberty of the community,[17] or when the game is public and an admission is charged directly or indirectly,[18] it becomes unlawful under statutes prohibiting sporting or public sport, but does not, under statutes prohibiting games.[19] In at least one jurisdiction there is an express statutory prohibition against playing base-ball on Sunday where a fee is charged.[20]

3. Theatrical Performances. Theatrical entertainments and performances on Sunday cause agitation and disturbance contrary to law,[21] and are generally expressly prohibited by statute or ordinance. These statutes and ordinances have been held to forbid all performances in theaters or other places of public amusement and entertainment on Sunday,[22] and to cover moving picture shows or exhibitions,[23] but not dancing other than for the purpose of an exhibition or performance.[24] The manager of the theater or opera-house may be found guilty

15. Base-ball defined see 5 Cyc. 621.

16. Ontario Field Club *v.* McAdoo, 56 Misc. (N. Y.) 285, 107 N. Y. Suppl. 295.

17. People *v.* Dennin, 35 Hun (N. Y.) 327; People *v.* Hesterberg, 43 Misc. (N. Y.) 510, 89 N. Y. Suppl. 498; People *v.* De Mott, 38 Misc. (N. Y.) 171, 77 N. Y. Suppl. 249. See also Capital City Athletic Assoc. *v* Greenbush Police Com'rs, 9 Misc. (N. Y.) 189, 29 N. Y. Suppl. 804.

18. Seay *v.* Shrader, 69 Nebr. 245, 95 N. W. 690 [*following* State *v.* O'Rourk, 35 Nebr. 614, 53 N. W. 591, 17 L. R. A. 830]; *In re* Rupp, 33 N. Y. App. Div. 468, 53 N. Y. Suppl. 927; People *v.* Demerest, 56 Misc. (N. Y.) 287, 107 N. Y. Suppl. 549; Ontario Field Club *v.* McAdoo, 56 Misc. (N. Y.) 285, 107 N. Y. Suppl. 295; Brighton Athletic Club *v.* McAdoo, 47 Misc. (N. Y.) 432, 94 N. Y. Suppl. 391; People *v.* Poole, 44 Misc. (N. Y.) 118, 89 N. Y. Suppl. 773. *Compare* Paulding *v.* Lane, 55 Misc. (N. Y.) 37, 104 N. Y. Suppl. 1051, where it is held that base-ball playing on Sunday, to which the public are invited, is a violation of law, whether an admission fee is charged or not.

Indirect charging of admission fee.— In determining whether the game is played for gain, the court will look behind the device by which the money is obtained. People *v.* Demerest, 56 Misc. (N. Y.) 287, 107 N. Y. Suppl. 549; Ontario Fleld Club *v.* McAdoo, 56 Misc. (N. Y.) 285, 107 N. Y. Suppl. 295.

19. *Ex p.* Neet, 157 Mo. 527, 57 S. W. 1025, 80 Am. St. Rep. 638, holding that, although the contra case of State *v.* Williams, 35 Mo. App. 541, was not expressly overruled or disapproved in St. Louis Agricultural, etc., Assoc. *v.* Delano, 108 Mo. 217, 18 S. W. 1101, it must be regarded as overruled.

20. State *v.* Hogreiver, 152 Ind. 652, 53 N. E. 921, 45 L. R. A. 504.

21. Neuendorff *v.* Duryea, 6 Daly (N. Y.) 276.

A place of public worship, where nothing dramatic is introduced, and where the discourses are intended to be instructive and "to make science the handmaid of religion," is not a place "used for public entertainment or amusement," within 21 Geo. III, c. 49, § 1, although the worship conducted therein is not according to any established or usual form. Baxter *v.* Langley, L. R. 4 C. P. 21, 38 L. J. M. C. 1, 19 L. T. Rep. N. S. 321, 17 Wkly. Rep. 254.

Aquarium is place of entertainment within English statute. Terry *v.* Brighton Aquarium Co., L. R. 10 Q. B. 306, 44 L. J. M. C. 173, 32 L. T. Rep. N. S. 458; Warner *v.* Brighton Aquarium Co., L. R. 10 Exch. 291, 44 L. J. M. C. 175 note.

22. New York *v.* Eden Musee American Co., 102 N. Y. 593, 8 N. E. 40; Matter of Hammerstein, 57 Misc. (N. Y.) 52, 108 N. Y. Suppl. 197.

An exhibition of paintings, statuary, wax figures, and passive works of art does not come within the prohibition of public "shows." Eden Musee American Co. *v.* Bingham, 58 Misc. (N. Y.) 644, 108 N. Y. Suppl. 200 [*reversed* on other grounds in 125 N. Y. App. Div. 780, 110 N. Y. Suppl. 210].

Entertainment of religious society is excepted from Massachusetts statute. Com. *v.* Alexander, 185 Mass. 551, 70 N. E. 1017.

23. Moore *v.* Owen, 58 Misc. (N. Y.) 332, 109 N. Y. Suppl. 585; United Vaudeville Co. *v.* Zeller, 58 Misc. (N. Y.) 16, 108 N. Y. Suppl. 789; Gale *v.* Bingham, 110 N. Y. Suppl. 12; Economopoulos *v.* Bingham, 109 N. Y. Suppl. 728. *Contra,* People *v.* Hemleb, 127 N. Y. App. Div. 356, 111 N. Y. Suppl. 690; People *v.* Lynch, 108 N. Y. Suppl. 209; Keith, etc., Amusement Co. *v.* Bingham, 108 N. Y. Suppl. 205 [*reversed* on other grounds in 125 N. Y. App. Div. 791, 110 N. Y. Suppl. 219].

Character of picture as justification.— The exhibition of pictures illustrating lectures delivered at the same time on the story of Joseph and his brethren and also an illustrated lecture on the lumber industry in California do not constitute "public sport, exercise, or show," within the intention of N. Y. Pen. Code, § 265; People *v.* Finn, 57 Misc. (N. Y.) 659, 110 N. Y. Suppl. 22. And in People *v.* Flynn, 108 N. Y. Suppl. 208, pictures shown by means of a slot machine device and certain musical selections communicated through the ears of a person who has inserted a coin in the machine were held to be not unlawful.

24. Matter of Allen, 34 Misc. (N. Y.) 698, 70 N. Y. Suppl. 1017. See also Suesskind *v.*

of violating statutes against "laboring," [25] or keeping open a "place of business," [26] the act of selling tickets not being considered a work of necessity or mercy.[27] Every performer is amenable to the statutory provisions.[28]

4. Gaming. A statute containing a general prohibition against gaming on Sunday embraces every species of gaming for money.[29] Playing and betting at cards comes within the meaning of a statute prohibiting a housekeeper from suffering gaming on Sunday,[30] but not within a statute prohibiting public games,[31] or common labor.[32] Under the statutes of some jurisdictions playing at a game with dice or dominoes at a private residence is not an offense.[33]

5. Shooting. To engage in shooting within the meaning of an act prohibiting it on Sunday, it is not necessary that the shooting be repeated; one act is sufficient.[34] It is not unlawful to shoot at a mad dog on Sunday.[35]

6. Fishing. Unless enjoined by statutes, fishing on Sunday is not unlawful.[36] However, when it is prohibited, it is unlawful to fish regardless of the place or circumstances.[37]

E. Works of Necessity and Charity [38] **— 1. In General.** All the statutes regulating the observance of Sunday and prohibiting secular labor and business on that day except from their operation works partaking of necessity or charity.[39]

2. Necessity — a. Meaning of Term. The question of what constitutes a work of necessity within the meaning of the Sunday statutes has been often mooted and much discussed in the authorities.[40] The definition adopted by the courts as most satisfactory is the one evolved in an early Massachusetts case,[41] to the effect that the necessity meant is not a physical and absolute necessity, but a moral fitness or propriety of the work and labor done under the circumstances of each particular case.[42]

Bingham, 125 N. Y. App. Div. 787, 110 N. Y. Suppl. 213.

25. Quarles *v.* State, 55 Ark. 10, 17 S. W. 269, 14 L. R. A. 192; Topeka *v.* Crawford, 78 Kan. 583, 96 Pac. 862, 17 L. R. A. N. S. 1156.

26. St. Joseph *v.* Elliott, 47 Mo. App. 418.

27. State *v.* Ryan, 80 Conn. 582, 69 Atl. 536.

28. Matter of Hammerstein, 57 Misc. (N. Y.) 52, 108 N. Y. Suppl. 197.

29. Borders *v.* State, (Tex. Cr. App. 1902) 66 S. W. 1102.

30. State *v.* Fearson, 2 Md. 310, holding that a tavern-keeper is a housekeeper within the contemplation of the act.

31. Rucker *v.* State, 67 Miss. 328, 7 So. 223.

32. State *v.* Conger, 14 Ind. 396.

33. Borders *v.* State, (Tex. Cr. App. 1902) 66 S. W. 1102.

34. Smith *v.* State, 50 Ala. 159.

35. Manning *v.* State, 6 Ga. App. 240, 64 S. E. 710.

36. Nelson *v.* Pyramid Harbor Packing Co., 4 Wash. 689, 30 Pac. 1096.

37. Baker *v.* Wentworth, 17 Me. 347; People *v.* Moses, 140 N. Y. 214, 35 N. E. 499. Sickles *v.* Sharp, 13 Johns. (N. Y.) 497.

38. **Necessity of:** Barber's business see *supra*, III, B, 2. Operation of trains and public conveyances see *supra*, III, C, 3. Publication and sale of newspapers see *supra*, III, C, 4.

39. See the cases cited *infra*, note 40 *et seq.*

40. See State *v.* Schatt, 128 Mo. App. 622, 107 S. W. 10.

41. Flagg *v.* Millbury, 4 Cush. (Mass.) 243.

42. *Alabama.*— Burns *v.* Moore, 76 Ala. 339, 52 Am. Rep. 332.

Arkansas.— Shipley *v.* State, 61 Ark. 216, 32 S. W. 489, 33 S. W. 107.

Illinois.— Johnston *v.* People, 31 Ill. 469.

Indiana.—Western Union Tel. Co. *v.* Yopst, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224; Yonoski *v.* State, 79 Ind. 393, 41 Am. Rep. 614; Edgerton *v.* State, 67 Ind. 588, 33 Am. Rep. 110; Morris *v.* State, 31 Ind. 189.

Maine.— Sullivan *v.* Maine Cent. R. Co., 82 Me. 196, 19 Atl. 169, 8 L. R. A. 427.

Massachusetts.— Doyle *v.* Lynn, etc., R. Co., 118 Mass. 195, 19 Am. Rep. 431; Com. *v.* Sampson, 97 Mass. 407; Bennett *v.* Brooks, 9 Allen 118; Com. *v.* Knox, 6 Mass. 76.

Missouri.— State *v.* Schatt, 128 Mo. App. 622, 107 S. W. 10; Burnett *v.* Western Union Tel. Co., 39 Mo. App. 599.

Pennsylvania.— Com. *v.* Fuller, 4 Pa. Co. Ct. 429.

Texas.— *Ex p.* Kennedy, 42 Tex. Cr. 148, 58 S. W. 129, 51 L. R. A. 270; Hennersdorf *v.* State, 25 Tex. App. 597, 8 S. W. 926, 8 Am. St. Rep. 448.

Vermont.— McClary *v.* Lowell, 44 Vt. 116, 8 Am. Rep. 366.

West Virginia.—State *v.* McBee, 52 W. Va. 257, 43 S. E. 121, 60 L. R. A. 638.

See 45 Cent. Dig. tit. "Sunday," § 14 *et seq.*

Other definitions are: "Not an absolute unavoidable, physical necessity . . . but rather an economic and moral necessity." Shipley *v.* State, 61 Ark. 216, 32 S. W. 489, 33 S. W. 107 [*quoted* in Barefield *v.* State, 85 Ark. 134, 107 S. W. 393; and State *v.* Col-

b. Acts Included or Excluded—(I) *Matters of Convenience.* It is well settled that the fact that it is convenient and profitable to perform certain labor or transact certain business on Sunday does not render it a necessity.[43]

(II) *Care of Animals.* The care and feeding of animals on the Sabbath is clearly lawful.[44]

(III) *Furnishing Food and Refreshment.* A bakery, restaurant, inn, or other place of a similar nature may be lawfully kept open on Sunday for the purpose of furnishing meals,[45] and meals may be prepared and served on that day,[46]

lett, 72 Ark. 167, 79 S. W. 791]. "All that is indispensable to be done on Sunday in order to secure attainment of whatever is more important to the community than its day of rest." 12 Chicago Leg. News 44 [*quoted* in Ungericht *v.* State, 119 Ind. 379, 380, 21 N. E. 1082, 12 Am. St. Rep. 419]. "The necessity which will excuse, if not a physical one, must, at least, be a moral emergency which will not reasonably admit of delay." Burns *v.* Moore, 76 Ala. 339, 342, 52 Am. Rep. 332.

General rule impossible.— In Johnston *v.* Com., 22 Pa. St. 102, it is said that it is impossible to lay down any general rule as to works of necessity and charity; that the exigencies of human life which demand works of necessity and charity are so numerous and so diversified by attending circumstances as to defy classification; but that as rest and the public worship of Almighty God are the primary objects of the institution of Sunday, both as a divine and civil appointment, "no means reasonably necessary to these ends can be regarded as prohibited." To the same effect see Ungericht *v.* State, 119 Ind. 379, 21 N. E. 1082, 12 Am. St. Rep. 419; Reg. *v.* Albertie, 3 Can. Cr. Cas. 356.

43. *Alabama.*— Burns *v.* Moore, 76 Ala. 339, 52 Am. Rep. 332.

Arkansas.— Barefield *v.* State, 85 Ark. 134, 107 S. W. 393; Shipley *v.* State, 61 Ark. 216, 32 S. W. 489, 33 S. W. 107; Cleary *v.* State, 56 Ark. 124, 19 S. W. 313. *Compare* State *v.* Collett, 72 Ark. 167, 79 S. W. 791, where it was held that it is justifiable for a few men to work on Sunday in order to save the work and wages of a large number of men for the whole of Monday.

Georgia.— Georgia, R., etc., Co. *v.* Maddox, 116 Ga. 64, 42 S. E. 315; Arnheiter *v.* State, 115 Ga. 572, 41 S. E. 989, 58 L. R. A. 392.

Indiana.— Western Union Tel. Co. *v.* Henley, 23 Ind. App. 14, 54 N. E. 775.

Massachusetts.— Com. *v.* White, 190 Mass. 578, 77 N. E. 636, 5 L. R. A. N. S. 320; Bucher *v.* Fitchburg R. Co., 131 Mass. 156, 41 Am. Rep. 216; McGrath *v.* Merwin, 112 Mass. 467, 17 Am. Rep. 119; Com. *v.* Sampson, 97 Mass. 407; Jones *v.* Andover, 10 Allen 18. See also Davis *v.* Somerville, 128 Mass. 594, 35 Am. Rep. 399.

Michigan.— Bidwell *v.* Grand Trunk Western R. Co., 148 Mich. 524, 112 N. W. 122; Allen *v.* Duffie, 43 Mich. 1, 4 N. W. 427, 38 Am. Rep. 159.

Minnesota.— Handy *v.* St. Paul Globe Pub. Co., 41 Minn. 188, 42 N. W. 872, 16 Am. St. Rep. 695, 4 L. R. A. 466.

Missouri.— State *v.* Stuckey, 98 Mo. App. 664, 73 S. W. 735.

Pennsylvania.— Johnston *v.* Com., 22 Pa. St. 102.

See 45 Cent. Dig. tit. "Sunday," § 14 *et seq.*

Repair of mill.— Thus it has been held that the repairing of a mill on Sunday in order to prevent its stoppage during the week is not a work of necessity. McGrath *v.* Merwin, 112 Mass. 467, 17 Am. Rep. 119; Hamilton *v.* Austin, 62 N. H. 575.

"A negotiation between a creditor and his debtor, or any other act done for the purposes of private gain, under no apparent or extraordinary emergency, is neither necessary or charitable, in any sense." Stanton *v.* Metropolitan R. Co., 14 Allen (Mass.) 485, 486.

Work incidental to that necessary.—While an employee is engaged in doing necessary work on the Sabbath, the doing of incidental duties does not render him guilty of violating the Sunday law. Turner *v.* State, 85 Ark. 188, 107 S. W. 388.

44. Edgerton *v.* State, 67 Ind. 588, 33 Am. Rep. 110.

Shoeing horses.— It is a work of necessity to shoe horses used by a stage company in transporting the mail when the schedule of the post-office department and the circumstances are such that it cannot be done at any other time. Nelson *v.* State, 25 Tex. App. 599, 8 S. W. 927.

Acts done in transportation of live stock.— The coaling of locomotives engaged in transporting live stock on Sunday is a work of necessity and charity within the meaning of the Sunday law. Com. *v.* Conway, 2 Leg. Chron. (Pa.) 329.

45. Com. *v.* Hengler, 15 Pa. Co. Ct. 222.

Duty of innkeeper to receive guest on Sunday.—"If a traveller come to an innkeeper on Sunday, he is bound to receive him and afford him rest and refreshment, though he may not sell him liquor. Inns are designed for public convenience, as places of rest for the stranger and traveller, and as such may be used on Sunday, without violation of the Act of 1794." Com. *v.* Naylor, 34 Pa. St. 86, 89.

46. Com. *v.* Keithan, 1 Mona. (Pa.) 368; Bullen *v.* Ward, 21 Cox C. C. 28, 69 J. P. 422, 74 L. J. K. B. 916, 93 L. T. Rep. N. S. 439, 21 T. L. R. 753, 54 Wkly. Rep. 411; Rex *v.* Younger, 5 T. R. 449, 2 Rev. Rep. 638, 101 Eng. Reprint 253 [*following* Rex *v.* Cox, 2 Burr. 785, 97 Eng. Reprint 562, and *distinguishing* Crepps *v.* Durden, Cowp. 640, 98

either with or without other articles not strictly classed as food, such as ice cream and soda water.[47] However, it is not a work of necessity to sell such articles alone, and not in connection with a meal.[48] It is immaterial whether the food is consumed on the premises, or taken away by the purchasers.[49] It has also been held that the delivery of milk on Sunday is a work of necessity,[50] but that the delivery of ice or fresh meat is not.[51] Works of necessity do not comprehend the sale or purchase of tobacco in its manufactured form;[52] the sale of fruit,[53] or the sale of intoxicating liquor.[54]

(iv) *Furnishing Water and Artificial Light.* It is unquestioned that a water company may supply water, and an electric light company light, on Sunday.[55]

(v) *Exigencies of Trade or Business.* The necessity mentioned in the statutes is often created by the exigencies of society or trade.[56] It is not unlawful to operate, on Sunday, a business which, from its very nature, must be run continuously,[57] or one the season of which is short, and a cessation of one day would entail great loss.[58] Neither is it unlawful to gather overripe crops to prevent their loss;[59] to remove property from a place of danger to one of

Eng. Reprint 1283]; Reg. *v.* Albertie, 3 Can. Cr. Cas. 356.

Reason for enactment of English statute.— In 1793, in the case of Rex *v.* Younger, 5 T. R. 449, 2 Rev. Rep. 638, 101 Eng. Reprint 253, the question was raised whether the business of a baker came within the description of necessity, and this seems to have led to the passing of 34 & 35 Geo. III, c. 61, and subsequent acts dealing with various matters arising in the exercise of the calling of a baker. Rex *v.* Mead, [1902] 2 K. B. 212, 20 Cox C. C. 337, 69 J. P. 676, 71 L. J. K. B. 871, 87 L. T. Rep. N. S. 136, 18 T. L. R. 544, 50 Wkly. Rep. 589.

47. Reg. *v.* Albertie, 3 Can. Cr. Cas. 356. See also Com. *v.* Keithan, 1 Mona. (Pa.) 368.

48. Splane *v.* Com., 9 Pa. Cas. 201, 12 Atl. 431; Com. *v.* Hengler, 15 Pa. Co. Ct. 222; Burry's Appeal, 1 Mona. (Pa.) 89; Com. *v.* Burry, 5 Pa. Co. Ct. 481. *Compare* Com. *v.* Bosch, 15 Wkly. Notes Cas. (Pa.) 316. *Contra*, Reg. *v.* Albertie, 3 Can. Cr. Cas. 356.

49. Com. *v.* Keithan, 1 Mona. (Pa.) 368; Bullen *v.* Ward, 21 Cox C. C. 28, 69 J. P. 422, 74 L. J. K. B. 916, 93 L. T. Rep. N. S. 439, 21 T. L. R. 753, 54 Wkly. Rep. 411.

50. Topeka *v.* Hempstead, 58 Kan. 328, 49 Pac. 87.

51. State *v.* James, 81 S. C. 197, 62 S. E. 214, 128 Am. St. Rep. 902, 18 L. R. A. N. S. 617.

52. Penniston *v.* Newman, 117 Ga. 700, 45 S. E. 65; State *v.* Ohmer, 34 Mo. App. 115; Anonymous, 12 Abb. N. Cas. (N. Y.) 458; Com. *v.* Hoover, 25 Pa. Super. Ct. 133; Baker *v.* Com., 5 Pa. Co. Ct. 10.

Indiana rule.—A hotel-keeper cannot keep open on Sunday a stand, bar, or other place for the purpose of selling generally cigars or tobacco to resident customers or boarders, however it may be as to the transient guest, who has no opportunity to provide for his Sunday wants. Mueller *v.* State, 76 Ind. 310, 40 Am. Rep. 245. *Contra*, see Carver *v.* State, 69 Ind. 61, 35 Am. Rep. 205.

53. Gulfport *v.* Stratakos, 90 Miss. 489, 43 So. 812.

54. Com. *v.* Naylor, 34 Pa. St. 86; Omit *v.* Com., 21 Pa. St. 426.

55. Turner *v.* State, 85 Ark. 188, 107 S. W. 388.

56. Edgerton *v.* State, 67 Ind. 588, 33 Am. Rep. 110; McGatrick *v.* Wason, 4 Ohio St. 366.

Thus "a work of necessity, within the meaning of the statute, may be that labor necessary to save the worker himself from unforeseen and irreparable loss, or it may be that necessary to the community." State *v.* James, 81 S. C. 197, 199, 62 S. E. 214, 128 Am. St. Rep. 902, 18 L. R. A. N. S. 617.

57. Crocket *v.* State, 33 Ind. 416 (turning of barley which is being manufactured into beer); Manhattan Iron Works Co. *v.* French, 12 Abb. N. Cas. (N. Y.) 446 (blast furnace); Hennersdorf *v.* State, 25 Tex. App. 597, 8 S. W. 926, 8 Am. St. Rep. 448 (ice factory).

Pumping oil well.—Where permanent loss and injury comes to the owner of an oil well by reason of not pumping, such work is deemed a work of necessity; but it is not, where there is no permanent loss of property, and he is only delayed for the time being in procuring the oil from his well. Com. *v.* Gillespie, 146 Pa. St. 546, 23 Atl. 393; State *v.* McBee, 52 W. Va. 257, 43 S. E. 121, 60 L. R. A. 638. A flow of two barrels of salt water per day into an oil well is not sufficiently injurious thereto to make the pumping of it out on Sunday a necessity. Com. *v.* Funk, 9 Pa. Co. Ct. 277.

58. Morris *v.* State, 31 Ind. 189; Whitcomb *v.* Gilman, 35 Vt. 297, both cases relating to the making of maple sugar.

59. Johnson *v.* People, 42 Ill. App. 594; Turner *v.* State, 67 Ind. 595; Wilkinson *v.* State, 59 Ind. 416, 26 Am. Rep. 84. *Contra*, State *v.* Goff, 20 Ark. 289.

In the absence of an extraordinary, sudden, and unexpected emergency, the gathering of cranberries on the Sabbath is unlawful, although the crop is large. Com. *v.* White, 190 Mass. 578, 77 N. E. 636, 5 L. R. A. N. S. 320.

Hoeing a suffering crop is not a work of necessity. Com. *v.* Josselyn, 97 Mass. 411.

safety;[60] nor to do work in shipping goods, where navigation for the season may close at any time.[61] The property saved from destruction need not be of great value if the circumstances of the owner make it of relatively large value to him.[62] However, it is only in case of actual loss or injury by reason of the delay that it becomes a work of necessity to save the property.[63]

(VI) *ACTS TO SECURE PUBLIC SAFETY.* Any work necessary to be done to secure the public safety, such as the safe-keeping of a felon[64] or the repairing of a public highway or railroad, is a necessity.[65] This rule does not include the making of the ordinary repairs which can be done with equal safety on any other day.[66]

(VII) *AVOIDABLE ACTS.* A necessity voluntarily brought about by the actor himself, and which could have been avoided by the exercise of ordinary discretion, is not allowable as a defense.[67]

(VIII) *TRAVELING.* As to whether traveling on Sunday is a necessity, within the meaning of the Sunday statutes, is dependent upon its moral fitness and propriety.[68] It has been considered morally fit and proper, and hence necessary to ride or walk for the purpose of visiting one's parents, children, or other relatives;[69] friends or relatives who are ill,[70] or to procure medicine for a sick child.[71] It is also an act of necessity to travel to a religious meeting[72] or a funeral.[73] It is lawful to ride or walk in the open air on Sunday for exercise;[74] to take a visitor home in a sleigh on a wintry night;[75] and for a servant to travel for the purpose of preparing needful food for her employer.[76] The traveling cannot be considered unlawful when it is necessary to the performance of a lawful contract.[77] However, the necessity must be a real and not a fancied one, as it is the actual existence of the necessity and not the belief of the traveler that excuses.[78] It is unlawful to travel on Sunday for the purpose of obtaining one's mail;[79] of ascertaining whether a house is ready for occupancy,[80] of either making one's self or allowing a companion to make a social call,[81] or of supplying a market with fresh meat on Monday.[82]

60. Parmalee *v.* Wilks, 22 Barb. (N. Y.) 539.

61. McGatrick *v.* Wason, 4 Ohio St. 566. *Contra*, Pate *v.* Wright, 30 Ind. 476, 95 Am. Dec. 705.

62. Johnson *v.* People, 42 Ill. App. 594.

63. State *v.* McBee, 52 W. Va. 257, 43 S. E. 121, 60 L. R. A. 638.

64. Johnston *v.* People, 31 Ill. 469.

65. Flagg *v.* Millbury, 4 Cush. (Mass.) 243; Com. *v.* Fields, 4 Pa. Co. Ct. 434; Alexander *v.* Oshkosh, 33 Wis. 277.

Putting in new switch.— It has been held that the putting in of a new switch which would take eight hours, and if done on any day except Sunday would delay four trains, was a work of necessity. Yonoski *v.* State, 79 Ind. 393, 41 Am. Rep. 614.

Car inspector is engaged in work of necessity.— Com. *v.* Robb, 3 Pa. Dist. 701, 14 Pa. Co. Ct. 473.

66. Com. *v.* Chesapeake, etc., R. Co., 128 Ky. 542, 108 S. W. 851, 32 Ky. L. Rep. 1400; Louisville, etc., R. Co. *v.* Com., 92 Ky. 114, 17 S. W. 274, 13 Ky. L. Rep. 439.

67. Shipley *v.* State, 61 Ark. 216, 32 S. W. 489, 33 S. W. 107; State *v.* Stuckey, 98 Mo. App. 664, 73 S. W. 735; State *v.* Wellott, 54 Mo. App. 310.

68. Feital *v.* Middlesex R. Co., 109 Mass. 398, 12 Am. Rep. 720.

England — traveling on Sunday not illegal. — Rex *v.* Ivens, 7 C. & P. 213, 32 E. C. L. 578.

69. Cronan *v.* Boston, 136 Mass. 384; Logan *v.* Mathews, 6 Pa. St. 417; McClary *v.* Lowell, 44 Vt. 116, 8 Am. Rep. 366.

70. Cronan *v.* Barton, 136 Mass. 384; Doyle *v.* Lynn, etc., R. Co., 118 Mass. 195, 19 Am. Rep. 431.

71. Gorman *v.* Lowell, 117 Mass. 65.

72. Feital *v.* Middlesex R. Co., 109 Mass. 398, 12 Am. Rep. 720; Com. *v.* Nesbit, 34 Pa. St. 398.

73. Davis *v.* Somerville, 128 Mass. 594, 35 Am. Rep. 399; Horne *v.* Meakin, 115 Mass. 326.

74. Sullivan *v.* Maine Cent. R. Co., 82 Me. 196, 19 Atl. 169, 8 L. R. A. 427; Davidson *v.* Portland, 69 Me. 116, 31 Am. Rep. 253; O'Connell *v.* Lewiston, 65 Me. 34, 20 Am. Rep. 673; Barker *v.* Worcester, 139 Mass. 74, 29 N. E. 474; Hamilton *v.* Boston, 14 Allen (Mass.) 475.

75. Buck *v.* Biddeford, 82 Me. 433, 19 Atl. 912.

76. King *v.* Savage, 121 Mass. 303; Crosman *v.* Lynn, 121 Mass. 301.

77. Com. *v.* Knox, 6 Mass. 76.

78. Johnson *v.* Irasburgh, 47 Vt. 28, 19 Am. Rep. 111.

79. Bucher *v.* Fitchburg R. Co., 131 Mass. 156, 41 Am. Rep. 216.

80. Cadigan *v.* Brown, 120 Mass. 493.

81. Davis *v.* Somerville, 128 Mass. 594, 35 Am. Rep. 399; Stanton *v.* Metropolitan R. Co., 14 Allen (Mass.) 485.

82. Jones *v.* Andover, 10 Allen (Mass.) 18.

(IX) *TRANSMITTAL OF TELEGRAMS.* The transmittal of a telegraphic message concerning ordinary business or social affairs cannot be regarded as a work of necessity.[83] However, a telegram announcing the death or sickness of a third person and requesting the presence of the addressee has been held to create such a moral necessity as to come within the statutory exception.[84] Likewise the sending of a message by a husband to his wife explaining his absence is a necessity within the meaning of the statute.[85]

3. CHARITY.[86] The word "charity," as used in the Sunday statutes, is intended to be understood in its ordinary sense, and to denote something more than mere alms-giving.[87] It is active goodness,[88] and includes everything which proceeds from a sense of moral duty, or a feeling of kindness and humanity, and is intended wholly for the purpose of the relief or comfort of another, and not for one's own benefit or pleasure.[89] However, the act done must be itself charitable. The act of ascertaining whether the charity is needful is not the charity contemplated.[90] It is well settled that the making or soliciting of a subscription toward the purchase or construction of a church building is a work of charity.[91] Traveling on the Sabbath is sometimes justified not only on the ground of necessity,[92] but also as a deed of charity.[93] It has also been held the taking of a recognizance on Sunday is a charitable act.[94]

F. Acts of Persons Observing Other Day. The fact that a person conscientiously observes the seventh rather than the first day of the week as the Sabbath constitutes no defense to a prosecution for performing labor or transacting business on Sunday, where the statute creates no exception in favor of that class of persons.[95] Even where there is such an exception in the statute, it does not apply to the offense of keeping open shop or store,[96] nor does it include a person who believes that the seventh day is the Sabbath, but does not observe it as such.[97]

83. Western Union Tel. Co. *v.* Hutcheson, 91 Ga. 252, 18 S. E. 297; Western Union Tel. Co. *v.* Yopst, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224; Western Union Tel. Co. *v.* Yopst, (Ind. 1887) 11 N. E. 16; Rogers *v.* Western Union Tel. Co., 78 Ind. 169, 41 Am. Rep. 558; Western Union Tel. Co. *v.* Henley, 23 Ind. App. 14, 54 N. E. 775. *Compare* Taylor *v.* Western Union Tel. Co., 95 Iowa 740, 64 N. W. 660; Western Union Tel. Co. *v.* McLaurin, 70 Miss. 26, 13 So. 36.

84. Western Union Tel. Co. *v.* Wilson, 93 Ala. 32, 9 So. 414, 30 Am. St. Rep. 23; Western Union Tel. Co. *v.* Griffin, 1 Ind. App. 46, 27 N. E. 113; Gulf, etc., R. Co. *v.* Levy, 59 Tex. 542, 46 Am. Rep. 269.

85. Burnett *v.* Western Union Tel. Co., 39 Mo. App. 599.

86. Charity defined see CHARITIES, 6 Cyc. 987.

87. Burnett *v.* Western Union Tel. Co., 39 Mo. App. 599.

88. Allen *v.* Duffie, 43 Mich. 1, 4 N. W. 427, 38 Am. Rep. 159; Dale *v.* Knepp, 98 Pa. St. 389, 38 Am. Rep. 165 note.

An auxiliary society of a church, although its acts may not be purely charitable or religious, may lawfully transact business on Sunday, provided such acts are recognized by the church as part of its active goodness. Toll *v.* Crimean, 13 Montg. L. Rep. (Pa.) 33. See also Dale *v.* Knepp, 98 Pa. St. 389, 38 Am. Rep. 165 note.

89. Doyle *v.* Lynn, etc., R. Co., 118 Mass. 195, 19 Am. Rep. 431.

90. Bucher *v.* Fitchburg, etc., R. Co., 131 Mass. 156, 41 Am. Rep. 216.

91. *Indiana.*— Bryan *v.* Watson, 127 Ind. 42, 26 N. E. 666, 11 L. R. A. 63. *Contra,* Catlett *v.* Sweetzer Station M. E. Church, 62 Ind. 365, 30 Am. Rep. 197, where it was assumed that a subscription to a church made on Sunday was void.

Iowa.— Ft. Madison First M. E. Church *v.* Donnell, 110 Iowa 5, 81 N. W. 171, 46 L. R. A. 858.

Michigan.—Allen *v.* Duffie, 43 Mich. 1, 4 N. W. 427, 38 Am. Rep. 159.

Pennsylvania.— Dale *v.* Knepp, 98 Pa. St. 389, 430, 38 Am. Rep. 165 note.

Wisconsin.— Hodges *v.* Nalty, 113 Wis. 567, 89 N. W. 535.

See 45 Cent. Dig. tit. "Sunday," § 19.

92. See *supra,* III, E, 2, b, (VIII).

93. Buck *v.* Biddeford, 82 Me. 433, 19 Atl. 912; Doyle *v.* Lynn, etc., R. Co., 118 Mass. 195, 19 Am. Rep. 431.

94. Johnston *v.* People, 31 Ill. 469.

95. State *v.* Weiss, 97 Minn. 125, 105 N. W. 1127; Anonymous, 12 Abb. N. Cas. (N. Y.) 455; Specht *v.* Com., 8 Pa. St. 312, 49 Am. Dec. 518; Com. *v.* Wolf, 3 Serg. & R. (Pa.) 48; Parker *v.* State, 16 Lea (Tenn.) 476, 1 S. W. 202.

96. Com. *v.* Kirshen, 194 Mass. 151, 80 N. E. 2; Com. *v.* Starr, 144 Mass. 359, 11 N. E. 533; Com. *v.* Has, 122 Mass. 40.

97. Liberman *v.* State, 26 Nebr. 464, 42 N. W. 419, 18 Am. St. Rep. 791 (Hebrew convicted for keeping store open on Sunday).

IV. VALIDITY OF PRIVATE ACTS AND TRANSACTIONS.

A. Incomplete Transaction. Where a portion of a transaction takes place on Sunday, but it is not completed on that day so as to become effective, it is not vitiated by the illegal, and perhaps punishable, acts of those concerned in it.[98]

B. Gifts. As a gift does not embrace the essentials of a contract, it is not void, when executed on Sunday, under a statute declaring void contracts made on that day,[99] or prohibiting work or business in one's ordinary calling.[1]

C. Acts Affecting Past Indebtedness. The payment of a debt on Sunday discharges it, if the creditor retains the money paid;[2] but a promise or part payment made on Sunday to pay a debt already barred by the statute of limitations is not sufficient to remove the bar.[3] It is not an act of bankruptcy for a debtor, who has appointed Sunday to settle an account with one of his creditors, to refuse to keep the appointment.[4]

D. Competency as Evidence. An admission made on Sunday is competent evidence, as it relates to a previously incurred liability, and the mere telling the truth on the Sabbath is not forbidden.[5] And a conversation had on a Sunday is competent for the purpose of explaining a later conversation and showing its meaning.[6] However, a book-account dated on Sunday is not competent,[7] unless it is shown that the sale was in fact made on another day.[8]

E. Acts of Benevolent or Religious Societies. The proceedings and transactions of benevolent and religious societies performed on Sunday are valid.[9] The rule has no application to societies not of a religious or charitable nature.[10]

F. Giving of Notice.[11] In general a notice given on Sunday is void and does not change or affect the rights of the parties.[12] The irregularity is not waived by the reception of the notice without objection,[13] but action upon the notice may invest it with validity.[14]

G. Enlistment. It has been held that an enlistment on Sunday is valid.[15]

V. VALIDITY OF CONTRACTS AND OTHER WRITTEN INSTRUMENTS.

A. At Common Law. At common law contracts entered into on Sunday

98. Bryant *v.* Booze, 55 Ga. 438; Bailey *v.* Blanchard, 62 Me. 168; Hilton *v.* Houghton, 35 Me. 143; Forrow *v.* Arnold, 22 R. I. 305, 47 Atl. 693.

99. Wheeler *v.* Glasgow, 97 Ala. 700, 11 So. 758.

1. Dorough *v.* Equitable Mortg. Co., 118 Ga. 178, 45 S. E. 22.

2. Johnson *v.* Willis, 7 Gray (Mass.) 164; Campbell *v.* Davis, (Miss. 1908) 47 So. 546 (part payment); Jameson *v.* Carpenter, 68 N. H. 62, 36 Atl. 554; Shields *v.* Klopf, 70 Wis. 69, 35 N. W. 284.

3. See LIMITATIONS OF ACTIONS, 25 Cyc. 1329, 1393.

4. *Ex p.* Preston, 2 Rose 21, 2 Ves. & B. 312, 35 Eng. Reprint 338.

5. Beardsley *v.* Hall, 36 Conn. 270, 4 Am. Rep. 74; Riley *v.* Butler, 36 Ind. 51; Lea *v.* Hopkins, 7 Pa. St. 492.

6. Miles *v.* Janvrin, 200 Mass. 514, 86 N. E. 785; Smith *v.* Bye, 116 Mich. 84, 74 N. W. 302.

7. Walton's Estate, 4 Kulp (Pa.) 487.

8. Bustin *v.* Rogers, 11 Cush. (Mass.) 346.

9. Arthur *v.* Norfield Parish Cong. Church Soc., 73 Conn. 718, 49 Atl. 241; Frame *v.* Sovereign Camp W. W., 67 Mo. App. 127; McCabe *v.* Father Matthew Total Abstinence Ben. Soc., 24 Hun (N. Y.) 149; People *v.* Young Men's Father Matthew Benev. Soc., 65 Barb. (N. Y.) 357; Pepin *v.* Societe St. Jean Baptiste, 24 R. I. 550, 54 Atl. 47, 60 L. R. A. 626. *Compare* Visitation of Sick, etc., Society *v.* Com., 52 Pa. St. 125, 91 Am. Dec. 139.

10. Lansing Turnverein Soc. *v.* Carter, 71 Mich. 608, 39 N. W. 851.

11. Giving of notice of legal proceedings on Sunday see *infra* X, E, 1, b.

12. Chrisman *v.* Tuttle, 59 Ind. 155; Cannon *v.* Ryan, 49 N. J. L. 314, 8 Atl. 293; Rheem *v.* Carlisle Deposit Bank, 76 Pa. St. 132 [*reversing* 10 Phila. 462]; Chesapeake, etc., Canal Co. *v.* Bradley, 5 Fed. Cas. No. 2,646, 4 Cranch C. C. 193. *Contra*, Crozier *v.* Shants, 43 Vt. 478; Allen *v.* Murray, 87 Wis. 41, 57 N. W. 979, holding that a party to a contract who notifies the other party to stop work thereunder is liable in damages, although such notice was given on Sunday.

13. Rheem *v.* Carlisle Deposit Bank, 76 Pa. St. 132 [*reversing* 10 Phila. 462].

14. Lake *v.* Hurd, 38 Conn. 536.

15. Wolton *v.* Gavin, 16 Q. B. 48, 15 Jur. 329, 20 L. J. Q. B. 73, 71 E. C. L. 48.

were as valid as those made on any other day.[16] Neither were contracts for the performance of labor or the sale of goods on Sunday illegal.[17]

B. By Statute. The doctrine that contracts made on Sunday are void depends therefore alone on statutory enactments.[18] No principle is more firmly established or better recognized than that a contract which violates a statute is void.[19] Hence a contract made on Sunday in violation of a statute is an illegal contract and void between the parties.[20] It is well settled that a contract entered into on Sunday does not violate a statute forbidding "labor" on that day and hence is not void.[21] The instances in which contracts or other written instruments have been held to be void because they violate such statutes are those of negotiable instruments, bonds, and other specialties.[22] However, contracts executed on Sunday have been held to be void under statutes prohibiting worldly

16. *Arkansas.*— Tucker *v.* West, 29 Ark. 386.

Illinois.— Richmond *v.* Moore, 107 Ill. 429, 47 Am. Rep. 445.

Indiana.— Perkins *v.* Jones, 26 Ind. 499.

Kansas.— Johnson *v.* Brown, 13 Kan. 529.

Michigan.— Steere *v.* Trebilcock, 108 Mich. 464, 66 N. W. 342; O'Rourke *v.* O'Rourke, 43 Mich. 58, 4 N. W. 531; Adams *v.* Hamell, 2 Dougl. 73, 43 Am. Dec. 455.

Missouri.— Roberts *v.* Barnes, 127 Mo. 405, 30 S. W. 113, 48 Am. St. Rep. 640; Said *v.* Stromberg, 55 Mo. App. 438; More *v.* Clymer, 12 Mo. App. 11.

Nebraska.— Horacek *v.* Keebler, 5 Nebr. 355.

New York.— Batsford *v.* Every, 44 Barb. 618; Miller *v.* Roessler, 4 E. D. Smith 234.

North Carolina.—Rodman *v.* Robinson, 134 N. C. 503, 47 S. E. 19, 101 Am. St. Rep. 877, 65 L. R. A. 682.

Oklahoma.— Helm *v.* Briley, 17 Okla. 314, 87 Pac. 595.

Pennsylvania.—Shuman *v.* Shuman, 27 Pa. St. 90.

South Carolina.— Hellams *v.* Abercrombie, 15 S. C. 110, 40 Am. Rep. 684.

Texas.— Markle *v.* Scott, 2 Tex. App. Civ. Cas. § 674.

United States.— Swann *v.* Swann, 21 Fed. 299.

England.— Drury *v.* Defontaine, 1 Taunt. 131. But see Smith *v.* Sparrow, 2 C. & P. 544, 29 R. R. 514.

See 45 Cent. Dig. tit. "Sunday," § 30.

Although a penalty was inflicted by 27 Hen. VI, c. 5, on a party who sold goods at a fair held on Sunday, a sale made on that day was not void. Comyns *v.* Boyer, Cro. Eliz. 485, 78 Eng. Reprint 736.

17. Said *v.* Stromberg, 55 Mo. App. 438.

18. Richmond *v.* Moore, 107 Ill. 429, 47 Am. Rep. 445; Morris *v.* Crane, 4 Ch. Sent. (N. Y.) 6; Lee *v.* Drake, 10 Pa. Co. Ct. 276.

Execution before sunset.— Under Me. St. c. 160, §§ 26, 28, forbidding work, labor, or business on Sunday before sunset, a contract bearing date on Sunday and proved to have been executed on Sunday is not therefore invalid, unless it be also proved to have been made before sunset. Nason *v.* Dinsmore, 34 Me. 391.

Business not prohibited.— Contracts made upon Sunday, when not made in the course of a business prohibited upon that day by statutory law, are valid. Beham *v.* Ghio, 75 Tex. 87, 12 S. W. 996; Schneider *v.* Sansom, 62 Tex. 201, 50 Am. Rep. 521; Terry *v.* French, 5 Tex. Civ. App. 120, 23 S. W. 911. Under a statute prohibiting labor and the bringing of suits on Sunday, except attachment suits, a contract in relation to the commencement of an attachment suit is not invalid because made on Sunday. Markle *v.* Scott, 2 Tex. App. Civ. Cas. § 674.

19. See CONTRACTS, 9 Cyc. 475.

20. Davis *v.* Barger, 57 Ind. 54; Johns *v.* Bailey, 45 Iowa 241; Bar Harbor First Nat. Bank *v.* Kingsley, 84 Me. 111, 24 Atl. 794. See also *infra*, V, F.

"The great weight of authority is that a contract made in violation of the Lord's day acts is void, like any other illegal or prohibited contract, and upon no other or different ground." Swann *v.* Swann, 21 Fed. 299, 306.

21. *Kansas.*— Johnson *v* Brown, 13 Kan. 529.

Missouri.—Kaufman *v.* Hamm, 30 Mo. 387; Glover *v.* Cheatham, 19 Mo. App. 656; More *v.* Clymer, 12 Mo. App. 11.

Nebraska.— Fitzgerald *v.* Andrews, 15 Nebr. 52, 17 N. W. 370; Horacek *v.* Keebler, 5 Nebr. 355.

New York.—Merritt *v.* Earle, 29 N. Y. 115, 86 Am. Dec. 292 [*affirming* 31 Barb. 38].

Ohio.— Bloom *v.* Richards, 2 Ohio St. 387 [*overruling* Sellers *v.* Dugan, 18 Ohio 489].

West Virginia.— Raines *v.* Watson, 2 W. Va. 371.

See 45 Cent. Dig. tit. "Sunday," § 30.

Disturbance of others.— In Illinois a contract made on Sunday is not void under Ill. Cr. Code, § 261, unless the peace and good order of society is thereby interfered with. Richmond *v.* Moore, 107 Ill. 429, 47 Am. Rep. 445; Ryan *v.* Schutt, 135 Ill. App. 554. However in New Hampshire a contract made on Sunday is held to be within a statute prohibiting work, labor, or business of a person's secular calling done to the disturbance of others upon the Lord's day. Smith *v.* Foster, 41 N. H. 215.

Contracts not within ordinary calling of parties see *infra*, V, D, 2.

22. See *infra*, V, F, 4; V, F, 5.

employment or business on that day,[23] and other statutes more comprehensive in their terms.[24]

C. Contracts Made in Another State. As the enforcement of a contract executed on Sunday is not contrary to public policy or good morals, the general rule that a contract valid where made is valid everywhere [25] obtains, and the contract will be enforced in a state other than the one in which it was made, where it is not shown that it violates the statutes of the state where made.[26] When it is shown to violate the statutes of the state where made, it will not be enforced by the courts of other states,[27] or by the courts of the state where delivered, although final acceptance was made in another state.[28] Likewise, as the Sunday laws of a state have no extraterritorial force, the courts of one state will enforce a contract made on Sunday within its borders, but which contemplates performance in another state, where the performance is not shown to violate the law of such other state.[29]

D. Nature of Contract — 1. Executed and Executory. In some cases the validity of a Sunday contract has been made to turn upon the question whether it was executory or executed, it being held void if executory,[30] and valid if executed.[31] On the other hand, there is authority for the proposition that the fact that the contract is executory or executed is not to be considered in determining its validity.[32]

2. Contracts Not Within Ordinary Calling of Parties. Under the statutes of some jurisdictions, a contract made on Sunday outside of the ordinary calling of the parties is valid.[33]

23. Hussey *v.* Roquemore, 27 Ala. 281; Gookin *v.* Richardson, 11 Ala. 889, 46 Am. Dec. 232; Newbury *v.* Luke, 68 N. J. L. 189, 52 Atl. 625; Reeves *v.* Butcher, 31 N. J. L. 224; Riddle *v.* Keller, 61 N. J. Eq. 513, 48 Atl. 818; Gennert *v.* Wuestner, 53 N. J. Eq. 302, 31 Atl. 609; Nibert *v.* Baghurst, 47 N. J. Eq. 201, 20 Atl. 252; Rush *v.* Rush, (N. J. Ch. 1889) 18 Atl. 221; Morgan *v.* Richards, 1 Browne (Pa.) 171.

24. *Iowa.*— P. J. Bowlin Liquor Co. *v.* Brandenburg, 130 Iowa 220, 106 N. W. 497.

Michigan.— Saginaw, etc., R. Co. *v.* Chappell, 56 Mich. 190, 22 N. W. 278; Brazee *v.* Bryant, 50 Mich. 136, 15 N. W. 49; Winfield *v.* Dodge, 45 Mich. 355, 7 N. W. 906, 40 Am. Rep. 476; Tucker *v.* Mowrey, 12 Mich. 378; Adams *v.* Hamell, 2 Dougl. 73, 43 Am. Dec. 455.

Oklahoma.— Helm *v.* Briley, 17 Okla. 314, 87 Pac. 595.

Pennsylvania.— Berrill *v.* Smith, 2 Miles 402.

Vermont.— Sumner *v.* Jones, 24 Vt. 317.

Wisconsin.— King *v.* Graef, 136 Wis. 548, 117 N. W. 1058, 128 Am. St. Rep. 1101, 20 L. R. A. N. S 86; Hill *v.* Sherwood, 3 Wis. 343.

See 45 Cent. Dig. tit. "Sunday," § 30 *et seq.*

25. See Contracts, 9 Cyc. 672.

26. *Michigan.*— Steere *v.* Trebilcock, 108 Mich. 464, 66 N. W. 342; O'Rourke *v.* O'Rourke, 43 Mich. 58, 4 N. W. 531.

Mississippi.—McKee *v.* Jones, 67 Miss. 405, 7 So. 348.

Rhode Island.— Brown *v.* Browning, 15 R. I. 422, 7 Atl. 403, 2 Am. St. Rep. 908.

Vermont.— Adams *v.* Gay, 19 Vt. 358.

United States.— Swann *v.* Swann, 21 Fed. 299.

See 45 Cent. Dig. tit. "Sunday," § 31.

Contra.— Hill *v.* Wilker, 41 Ga. 449, 5 Am. Rep. 540.

27. Hazard *v.* Day, 14 Allen (Mass.) 487, 92 Am. Dec. 790; Northrup *v.* Foot, 14 Wend. (N. Y.) 248.

28. International Textbook Co. *v.* Ohl, 150 Mich. 131, 111 N. W. 768, 121 Am. St. Rep. 612, 13 L. R. A. N. S. 1157.

29. Said *v.* Stromberg, 55 Mo. App. 438.

Performance in third state.— Where the contract contemplates performance in a state other than the one where made and the one in which the action is brought, the Sunday statutes of that state govern. Brown *v.* Gates, 120 Wis. 349, 97 N. W. 221, 98 N. W. 205.

30. Spahn *v.* Willman, 1 Pennew. (Del.) 125, 39 Atl. 787; Chestnut *v.* Harbaugh, 78 Pa. St. 473; Thomas *v.* Hatch, 53 Wis. 296, 10 N. W. 393.

31. Chestnut *v.* Harbaugh, 78 Pa. St. 473; Shuman *v.* Shuman, 27 Pa. St. 90; Scarfe *v.* Morgan, 1 H. & H. 292, 2 Jur. 569, 7 L. J. Exch. 324, 4 M. & W. 270. See also Schneider *v.* Sansom, 62 Tex. 201, 50 Am. Rep. 521; De Forth *v.* Wisconsin, etc., R. Co., 52 Wis. 320, 9 N. W. 17, 38 Am. Rep. 737; Troewert *v.* Decker, 51 Wis. 46, 8 N. W. 26, 37 Am. Rep. 808.

A judgment confessed on an instrument which was completed or delivered on Sunday is an executed contract, and will not be opened on that ground. Chambers *v.* Brew, 18 Pa. Co. Ct. 399; Lee *v.* Drake, 10 Pa. Co. Ct. 276.

32. Tucker *v.* Mowrey, 12 Mich. 378.

33. *Georgia.*— Dorough *v.* Equitable Mortg. Co., 118 Ga. 178, 45 S. E. 22; Hayden *v.* Mitchell, 103 Ga. 431, 30 S. E. 287 (marriage settlement); Sanders *v.* Johnson, 29 Ga. 526.

3. Contracts For Purpose of Necessity or Charity. A contract made on Sunday for the purpose of necessity or charity is valid.[34] Of course if the act contemplated cannot be classed as a work of necessity or charity the contract is void.[35]

4. Specific Contracts Considered — a. Transportation of Goods and Live Stock. The violation of the Sunday laws by a shipper or common carrier in contracting either on Sunday for the transportation of goods or live stock or so that their transportation on Sunday is contemplated is no defense to an action against the common carrier for their loss or for delay. The Sunday laws are not applicable to such transactions as, after the goods are received, the law imposes the obligation to transport and deliver safely and without delay.[36] However, plaintiff will not be permitted to show the Sunday market price at the destination in order to increase his damages.[37]

b. Hiring Horse. The letting of a horse on Sunday, or the making of a contract to let a horse on Sunday, by a livery-stable keeper, for purposes of business or pleasure, and not of charity or necessity, is illegal and void.[38] But it has been held that the contract is not void, unless the liveryman knows that the customer intends to use the horse for pleasure and not charity or necessity.[39]

c. Use of Land. Agreements made on the Lord's day for the use and occupation of land have been held to be void.[40]

North Carolina.— Rodman *v.* Robinson, 134 N. C. 503, 47 S. E. 19, 101 Am. St. Rep. 877, 65 L. R. A. 682; Melvin *v.* Easley, 52 N. C. 356.

Rhode Island.—Allen *v.* Gardiner, 7 R. I. 22.

South Carolina.— Mills *v.* Williams, 16 S. C. 593; Hellams *v.* Abercrombie, 15 S. C. 110, 40 Am. Rep. 684.

United States.— Swann *v.* Swann, 21 Fed. 299.

England.— Scarfe *v.* Morgan, 1 H. & H. 292, 2 Jur. 569, 7 L. J. Exch. 324, 4 M. & W. 270; Drury *v.* Defontaine, 1 Taunt. 131.

See 45 Cent. Dig. tit. "Sunday," § 32.

A contract of hiring made on Sunday between a farmer and his servant is valid as it is not within the ordinary calling of the parties. Rex *v.* Whitnash, 7 B. & C. 596, 6 L. J. M. C. O. S. 26, 1 M. & R. 452, 14 E. C. L. 268.

However a contract of sale made on Sunday between a broker and a grocer cannot be enforced. Smith *v.* Sparrow, 4 Bing. 84, 13 E. C. L. 411, 2 C. & P. 544, 12 E. C. L. 723, 5 L. J. C. P. O. S. 80, 12 Moore C. P. 266, 29 Rev. Rep. 514.

34. *Alabama.*— Hooper *v.* Edwards, 25 Ala. 528.

Indiana.—Western Union Tel. Co. *v.* Yopst, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224; Western Union Tel. Co. *v.* Yopst, (1887) 11 N. E. 16.

Massachusetts.—Aldrich *v.* Blackstone, 128 Mass. 148; Horne *v.* Meakin, 115 Mass. 326.

Michigan.— Fisher *v.* Kyle, 27 Mich. 454.

New York.— Parmalee *v.* Wilks, 22 Barb. 539.

Pennsylvania.— Logan *v.* Matthews, 6 Pa. St. 417; Stagger's Estate, 8 Pa. Super. Ct. 260.

Texas.— Gulf, etc., R. Co. *v.* Levy, 59 Tex. 542, 46 Am. Rep. 269.

Vermont.— Smith *v.* Watson, 14 Vt. 332.

See 45 Cent. Dig. tit. "Sunday," § 18.

The employment of an undertaker is a work of necessity, and hence not void if made on Sunday. McNamee *v.* McNamee, 9 N. Y. St. 720.

Protection of debt.— If the exigency of the case be such as to render it necessary that a creditor, in order to save his debt or procure indemnity against liability, should contract with the debtor on Sunday, such contract would not be void. Hooper *v.* Edwards, 18 Ala. 280.

35. Rogers *v.* Western Union Tel. Co., 78 Ind. 169, 41 Am. Rep. 558; Western Union Tel. Co. *v.* Henley, 23 Ind. App. 14, 54 N. E. 775; Mace *v.* Putnam, 71 Me. 238; Tillock *v.* Webb, 56 Me. 100.

To prevent an inconvenient delay in traveling does not make the execution of a note on Sunday a "work of necessity." Burns *v.* Moore, 76 Ala. 339, 52 Am. Rep. 332.

36. *Iowa.*— Wilde *v.* Merchants' Despatch Transp. Co., 47 Iowa 272.

Maryland.— Philadelphia, etc., R. Co. *v.* Lehman, 56 Md. 209, 40 Am. Rep. 415.

Mississippi.—Merchants' Wharf-boat Assoc. *v.* Wood, 64 Miss. 661, 2 So. 76, 60 Am. Rep. 76.

Missouri.— Guinn *v.* Wabash, etc., R. Co., 20 Mo. App. 453.

New York.— Shelton *v.* Merchants' Dispatch Transp. Co., 59 N. Y. 258; Merritt *v.* Earle, 29 N. Y. 115, 86 Am. Dec. 292 [*affirming* 31 Barb. 38]; Jones *v.* Norwich, etc., Transp. Co., 50 Barb. 193.

United States.— Powhatan Steamboat Co. *v.* Appomatox R. Co., 24 How. 247, 16 L. ed. 682 [*reversing* 19 Fed. Cas. No. 11,363].

See 45 Cent. Dig. tit. "Sunday," § 9.

37. McAbsher *v.* Richmond, etc., R. Co., 108 N. C. 344, 12 S. E. 892, 110 N. C. 338, 14 S. E. 802, 16 L. R. A. 834.

38. Stewart *v.* Davis, 31 Ark. 518, 25 Am. Rep. 576; Berrill *v.* Smith, 2 Miles (Pa.) 402; Whelden *v.* Chappel, 8 R. I. 230.

39. Powers *v.* Brooks, 7 Ky. L. Rep. 204.

40. Rainey *v.* Capps, 22 Ala. 288; Miles *v.*

d. Loaning Money. The loaning of money on the Sabbath has been held to come within the prohibition of statutes directed against the transaction of secular business on that day.[41]

e. Creation of Agency. Likewise agencies created on Sunday have been held to be void as constituting secular business.[42]

f. Extension of Time. A parol agreement extending the time of payment of a mortgage debt, entered into on Sunday, has been held to be void.[43]

g. Partnership Agreement. An agreement for the formation of a partnership *in præsenti* is void when made on Sunday.[44]

h. Sale or Exchange of Property. A sale or exchange of property on Sunday is quite generally held to be in violation of the Sunday statutes and void.[45] It is not void under statutes prohibiting merely the keeping open of a place of business,[46] the performance of labor,[47] or the exposure of property for sale, where the sale is privately made.[48] Of course if the contract has been really consummated on a previous day it is valid;[49] and if part is valid and part invalid, and the contract is severable, the invalid part will not invalidate the rest.[50] A sale on Sunday is valid as to an innocent second purchaser.[51]

E. Negotiation on Sunday. The mere carrying on of negotiations on Sunday will not invalidate a contract completed on a secular day. The final consummation of the contract on Sunday is necessary to bring it within the prohibition of the Sunday statutes.[52]

Janvrin, 200 Mass. 514, 86 N. E. 785; Stebbins *v.* Peck, 8 Gray (Mass.) 553.

An application to purchase public school land is not void because filed on Sunday. Stephens *v.* Porter, 29 Tex. Civ. App. 556, 69 S. W. 423.

41. Tamplin *v.* Still, 77 Ala. 374; Finn *v.* Donahue, 35 Conn. 216; Meader *v.* White, 66 Me. 90, 22 Am. Rep. 551; Jacobson *v.* Bentzler, 127 Wis. 566, 107 N. W. 7, 115 Am. St. Rep. 1052, 4 L. R. A. N. S. 1151; Troewert *v.* Decker, 51 Wis. 46, 8 N. W. 26, 37 Am. Rep. 808.

42. Davis *v.* Barger, 57 Ind. 54; Clough *v.* Davis, 9 N. H. 500.

43. Rush *v.* Rush, (N. J. Ch. 1889) 18 Atl. 221.

44. Durant *v.* Rhener, 26 Minn. 362, 4 N. W. 610.

45. *Alabama.*— Wadsworth *v.* Dunnam, 117 Ala. 661, 23 So. 699; Dodson *v.* Harris, 10 Ala. 566; O'Donnell *v.* Sweeney, 5 Ala. 467, 39 Am. Dec. 336.

Iowa.— Pike *v.* King, 16 Iowa 49.

Massachusetts.— Ladd *v.* Rogers, 11 Allen 209.

Michigan.—Adams *v.* Hamell, 2 Dougl. 73, 43 Am. Dec. 455.

Minnesota.— Finley *v.* Quirk, 9 Minn. 194, 86 Am. Dec. 93.

New Hampshire.— Smith *v.* Foster, 41 N. H. 215.

New Jersey.— Neibert *v.* Baghurst, (Ch. 1892) 25 Atl. 474.

Pennsylvania.— Foreman *v.* Ahl, 55 Pa. St. 325.

Vermont.— Lyon *v.* Strong, 6 Vt. 219.

Wisconsin.—Williams *v.* Lane, 87 Wis. 152, 58 N. W. 77.

Canada.— Lai *v.* Stall, 6 U. C. Q. B. 506.

See 45 Cent. Dig. tit. "Sunday," § 34.

Delivery on Sunday of goods sold on Saturday constitutes a violation of an ordinance prohibiting the sale of merchandise on Sunday, as a delivery is essential to the consummation of the sale. McDowell *v.* Murfreesboro, 103 Tenn. 726, 54 S. W. 976.

Waiver of delivery.— Where, under the statutes of a state, parties cannot make a valid contract on Sunday, they cannot agree on Sunday to waive the delivery of the property attempted to be sold. Calhoun *v.* Phillips, 87 Ga. 482, 13 S. E. 593.

46. Moore *v.* Murdock, 26 Cal. 514.

47. Birks *v.* French, 21 Kan. 238. *Contra*, Banks *v.* Werts, 13 Ind. 203. The case of Sellers *v.* Dugan, 18 Ohio 489, which held that a sale of corn on Sunday was void, was overruled in Bloom *v.* Richards, 2 Ohio St. 387, which case involved the validity of a contract made on Sunday for the sale of lands.

48. Eberle *v.* Mehrbach, 55 N. Y. 682; Batsford *v.* Every, 44 Barb. (N. Y.) 618; Miller *v.* Roessler, 4 E. D. Smith (N. Y.) 234; Boynton *v.* Page, 13 Wend. (N. Y.) 425.

49. Riley *v.* Du Bois, 14 Ill. App. 236; Peake *v.* Conlan, 43 Iowa 297; Beaumont *v.* Brengeri, 5 C. B. 301, 57 E. C. L. 301.

Bill of sale.— The fact that a bill of sale was executed on Sunday, in pursuance of the terms of a sale made on Friday, did not invalidate such sale. Foster *v.* Wooten, 67 Miss. 540, 7 So. 501. And in one jurisdiction it has been held that the fact that a bill of sale was executed on Sunday does not affect its validity. Fitzgerald *v.* Andrews, 15 Nebr. 52, 17 N. W. 370 [*following* Horacek *v.* Keebler, 5 Nebr. 355].

50. Rosenblatt *v.* Townsley, 73 Mo. 536; Foreman *v.* Ahl, 55 Pa. St. 325.

51. Horton *v.* Buffinton, 105 Mass. 399.

52. *Connecticut.*— Tyler *v.* Waddingham, 58 Conn. 375, 20 Atl. 335, 8 L. R. A. 657.

Delaware.— Terry *v.* Platt, 1 Pennew. 185, 40 Atl. 243.

F. Execution of Instrument on Sunday — 1. In General. In general a contract or other instrument completely executed on Sunday is void and not enforceable,[53] even though dated on a secular day.[54] This rule applies only where the execution is complete. An instrument requiring delivery is not void because signed on Sunday.[55] Neither is an instrument actually entered into on a secular day void by reason of its being mistakenly dated on a Sunday.[56] Before the contract will be declared void, it must appear that the party seeking to enforce it had some voluntary agency in consummating it on that day.[57]

2. Guaranties. A guaranty or agreement of indemnity executed on Sunday is void.[58] But in accordance with the rule above stated [59] the execution must be complete on Sunday to bring it within the rule.[60]

Illinois.— King *v.* Fleming, 72 Ill. 21, 22 Am. Rep. 131.

Iowa.— McKinnis *v.* Estes, 81 Iowa 749, 46 N. W. 987.

Massachusetts.— Shepley *v.* Henry Siegel Co., 203 Mass. 43, 88 N. E. 1095; Dickinson *v.* Richmond, 97 Mass. 45; Bradley *v.* Rea, 14 Allen 20; Tuckerman *v.* Hinkley, 91 Mass. 452.

Michigan.—Wooliver *v.* Boylston Ins. Co., 104 Mich. 132, 62 N. W. 149; Aspell *v.* Hosbein, 98 Mich. 117, 57 N. W. 27.

Mississippi.— Kountz *v.* Price, 40 Miss. 341.

Missouri.— Rosenblatt *v.* Townsley, 73 Mo. 536; Fritsch *v.* Heislen, 40 Mo. 555; Luebbering *v.* Oberkoetter, 1 Mo. App. 393.

New Hampshire.— McDonald *v.* Fernald, 68 N. H. 171, 38 Atl. 729; Provenchee *v.* Piper, 68 N. H. 31, 36 Atl. 552; Merrill *v.* Downs, 41 N. H. 72; Stackpole *v.* Symonds, 23 N. H. 229; Smith *v.* Bean, 15 N. H. 577.

New Jersey.—Hurr *v.* Nivinson, (Ch. 1908) 69 Atl. 1094.

South Dakota.— Evert *v.* Kleimenhagen, 6 S. D. 221, 60 N. W. 851.

Tennessee.— Moseley *v.* Vanhooser, 6 Lea 286, 40 Am. Rep. 37.

Texas.— Bland *v.* Brookshire, 3 Tex. App. Civ. Cas. § 446.

Vermont.— Lovejoy *v.* Whipple, 6 Vt. 399.

England.— Bloxsome *v.* Williams, 3 B. & C. 232, 10 E. C. L. 113, 1 C. & P. 294, 12 E. C. L. 176, 5 D. & R. 82, 2 L. J. K. B. O. S. 224, 27 Rev. Rep. 337.

See 45 Cent. Dig. tit. "Sunday," § 35.

Thus, where the contract is required to be in writing under the statute of frauds, the making of a parol agreement on Sunday will not invalidate the written contract executed on a subsequent secular day. Tyler *v.* Waddingham, 58 Conn. 375, 20 Atl. 335, 8 L. R. A. 657; Bloxsome *v.* Williams, 3 B. & C. 232, 10 E. C. L. 113, 1 C. & P. 294, 12 E. C. L. 176, 5 D. & R. 82, 2 L. J. K. B. O. S. 224, 27 Rev. Rep. 337.

53. *Georgia.*—Bendross *v.* State, 5 Ga. App. 175, 62 S. E. 728.

Indiana.— Perkins *v.* Jones, 26 Ind. 499.

New Jersey.— Riddle *v.* Keller, 61 N. J. Eq. 513, 48 Atl. 818.

Pennsylvania.— Lee *v.* Drake, 10 Pa. Co. Ct. 276.

Vermont.— Lyon *v.* Strong, 6 Vt. 219.

Wisconsin.— Smith *v.* Chicago, etc., R. Co., 83 Wis. 271, 50 N. W. 497, 53 N. W. 550; De Forth *v.* Wisconsin, etc., R. Co., 52 Wis. 320, 9 N. W. 17, 38 Am. Rep. 737.

See 45 Cent. Dig. tit. "Sunday," § 36 *et seq.*

A written memorandum, although signed on Sunday, is admissible in evidence to prove the contract made upon another day. McCalop *v.* Hereford, 4 La. Ann. 185.

A petition signed by a certain number of taxpayers on Sunday confers no authority upon a town board of supervisors to issue bonds in aid of a railroad. De Forth *v.* Wisconsin, etc., R. Co., 52 Wis. 320, 9 N. W. 17, 38 Am. Rep. 737.

Warrant of attorney.— A judgment regularly entered will not be stricken off on the ground that the warrant of attorney to confess it was dated on Sunday. Baker *v.* Lukens, 35 Pa. St. 146.

54. Horn *v.* Dorchester Mut. F. Ins. Co., 199 Mass. 534, 85 N. E. 853.

55. Harris *v.* Morse, 49 Me. 432, 77 Am. Dec. 269; Hall *v.* Parker, 37 Mich. 590, 26 Am. Rep. 540; Beitenman's Appeal, 55 Pa. St. 183; Sherman *v.* Roberts, 1 Grant (Pa.) 261; Gibbs, etc., Mfg. Co. *v.* Brucker, 111 U. S. 597, 4 S. Ct. 572, 28 L. ed. 534.

56. Lamore *v.* Frisbie, 42 Mich. 186, 3 N. W. 910; Van Sickle *v.* People, 29 Mich. 61.

57. Collins *v.* Collins, 139 Iowa 703, 117 N. W. 1089, 18 L. R. A. N. S. 1176; Johns *v.* Bailey, 45 Iowa 241 (holding that a written contract made on Sunday, but bearing the date of another day of the week, may be transferred, and will be enforced in the hands of a transferee in good faith and without notice); Sargeant *v.* Butts, 21 Vt. 99.

58. Carrick *v.* Morrison, 2 Marv. (Del.) 157, 42 Atl. 447; Moseley *v.* Hatch, 108 Mass. 517; International Textbook Co. *v.* Ohl, 150 Mich. 131, 111 N. W. 768, 121 Am. St. Rep. 612, 13 L. R. A. N. S. 1157; Hill *v.* Sherwood, 3 Wis. 343. See *contra,* Norton *v.* Powell, 11 L. J. C. P. 202, 4 M. & G. 42, 43 E. C. L. 31, where the giving and acceptance of the guaranty was not considered to be within the ordinary calling of the parties.

Guaranty for lease.— A guaranty for the fufilment of a lease executed and delivered on Sunday is void, although the lease itself be not executed until a week day following. Merriam *v.* Stearns, 10 Cush. (Mass.) 257.

59. See *supra,* V, F, 1.

60. Diamond Glass Co. *v.* Gould, (N. J.

3. Assignments. The annexation of a schedule on Sunday to an assignment made on a prior secular day does not invalidate it.[61] Neither is an assignment invalidated by its partial execution on Sunday.[62] A third person, not a party to the contract of assignment, cannot dispute its validity on the ground that it was made on Sunday.[63]

4. Bills and Notes. Under the statutes of most jurisdictions, a promissory note executed on Sunday is void as between the parties.[64] The indorsement of a promissory note on Sunday, by an accommodation surety or otherwise, is also void,[65] except where it does not appear on the face of the indorsement that it was made on Sunday and the note is sought to be enforced by a *bona fide* holder without notice.[66] Likewise the indorsement of a bill of exchange on Sunday renders it void in the hands of one not a *bona fide* holder,[67] but the mere drawing of the bill on Sunday does not invalidate it, in the absence of evidence showing its acceptance on that day.[68] Where the note is merely signed on Sunday but not delivered until some other day, it is valid.[69] And where it is dated on Sunday, but in fact was made and delivered on a week day, it is valid.[70] The fact that the

Sup. 1905) 61 Atl. 12; Norton *v.* Powell, 11 L. J. C. P. 202, 4 M. & G. 42, 43 E. C. L. 31.

Unauthorized acceptance.— A contract of guaranty, signed by one of the parties to it on Sunday, and delivered on that day to an agent of the other party, having no authority to accept a delivery, the assent and signature of the other party not being given until a week day, is not void. Gibbs, etc., Mfg. Co. *v.* Brucker, 111 U. S. 597, 4 S. Ct. 572, 28 L. ed. 534.

61. Clap *v.* Smith, 16 Pick. (Mass.) 247.

62. Farwell *v.* Webster, 71 Wis. 485, 37 N. W. 437, holding that where one of two partners executes an assignment on Sunday, but the other partner executes and delivers it on a secular day, the instrument is not invalid.

63. Tennent-Stribling Shoe Co. *v.* Roper, 94 Fed. 739, 36 C. C. A. 455.

Assignments in trust on Sunday valid.— Donovan *v.* McCarty, 155 Mass. 543, 30 N. E. 221; Faxon *v.* Folvey, 110 Mass. 392.

64. *Alabama.*— Dodson *v.* Harris, 10 Ala. 566; Shippey *v.* Eastwood, 9 Ala. 198; O'Donnell *v.* Sweeney, 5 Ala. 467, 39 Am. Dec. 336.

Arkansas.— Edwards *v.* Probst, 38 Ark. 661; Tucker *v.* West, 29 Ark. 386.

Connecticut.—Wight *v.* Geer, 1 Root 474.

Georgia.— Morgan *v.* Bailey, 59 Ga. 683; Hill *v.* Wilker, 41 Ga. 449, 5 Am. Rep. 540. *Compare* Sanders *v.* Johnson, 29 Ga. 526.

Indiana.— Bosley *v.* McAllister, 13 Ind. 565; Reynolds *v.* Stevenson, 4 Ind. 619.

Iowa.— Collins *v.* Collins, 139 Iowa 703, 117 N. W. 1089, 18 L. R. A. N. S. 1176 (voidable only); Clough *v.* Goggins, 40 Iowa 325; Sayre *v.* Wheeler, 32 Iowa 559.

Maine.— Pope *v.* Linn, 50 Me. 83; Cumberland Bank *v.* Mayberry, 48 Me. 198; Towle *v.* Larrabee, 26 Me. 464.

Massachusetts.— Stevens *v.* Wood, 127 Mass. 123. *Contra*, Geer *v.* Putnam, 10 Mass. 312.

Michigan.—Adams *v.* Hamell, 2 Dougl. 73, 43 Am. Dec. 455.

Minnesota.— Finney *v.* Callendar, 8 Minn. 41; Brimhall *v.* Van Campen, 8 Minn. 13, 82 Am. Dec. 118. *Contra*, as to the casual execution and delivery of a promissory note. Holden *v.* O'Brien, 86 Minn. 297, 90 N. W. 531.

Mississippi.— Miller *v.* Lynch, 38 Miss. 344.

New Hampshire.— State Capital Bank *v.* Thompson, 42 N. H. 369; Varney *v.* French, 19 N. H. 233; Allen *v.* Deming, 14 N. H. 133, 40 Am. Dec. 179.

Oklahoma.— Helm *v.* Briley, 17 Okla. 314, 87 Pac. 595.

Pennsylvania.— Kepner *v.* Keefer, 6 Watts 231, 31 Am. Dec. 460; Linden *v.* Hicks, 2 Luz. Leg. Reg. 101.

Vermont.— Goss *v.* Whitney, 27 Vt. 272; Lovejoy *v.* Whipple, 18 Vt. 379, 46 Am. Dec. 157.

Wisconsin.— Hill *v.* Sherwood, 3 Wis. 343.

Canada.— Houliston *v.* Parsons, 9 U. C. Q. B. 681.

See 45 Cent. Dig. tit. "Sunday," § 38.

Contra.— Ray *v.* Catlett, 12 B. Mon. (Ky.) 532; Kaufman *v.* Hamm, 30 Mo. 387; Glover *v.* Cheatham, 19 Mo. App. 656; More *v.* Clymer, 12 Mo. App. 11 (Illinois statute construed); Main *v.* Johnson, 7 Wash. 321, 35 Pac. 67; Barrett *v.* Aplington, 2 Fed. Cas. No. 1,045.

When payable in another state.— A note executed and delivered in Michigan on Sunday in payment of goods sold and delivered there, although payable in Ohio, where the vendors live, is void under the Michigan statute. Arbuckle *v.* Reaume, 96 Mich. 243, 55 N. W. 808.

65. Ball *v.* Powers, 62 Ga. 757 [*approved* in Harrison *v.* Powers, 76 Ga. 218]; Bar Harbor First Nat. Bank *v.* Kingsley, 84 Me. 111, 24 Atl. 794; Benson *v.* Drake, 55 Me. 555.

66. Heise *v.* Bumpass, 40 Ark. 545; Trieber *v.* Commercial Bank, 31 Ark. 128; Greathead *v.* Walton, 40 Conn. 226; Parker *v.* Pitts, 73 Ind. 597, 38 Am. Rep. 155; Gilbert *v.* Vachon, 69 Ind. 372.

67. Saltmarsh *v.* Tuthill, 13 Ala. 390.

68. Begbie *v.* Levi, 1 Cromp. & J. 180, 9 L. J. Exch. O. S. 51, 1 Tyrw. 130.

69. See Commercial Paper, 7 Cyc. 686 note 74.

70. Stacy *v.* Kemp, 97 Mass. 166; Beman

note was executed on Sunday is not a defense against a *bona fide* holder for value and without notice, where there is nothing on the face of the instrument to indicate that fact.[71] Although a recovery cannot be had on a note executed on Sunday, one may be had on the contract which is the consideration of the note, when it was entered into on a secular day;[72] but not when it too was made on Sunday.[73]

5. Bonds. A bond executed on Sunday is not binding on the surety.[74] However, the validity of a bond duly executed on a secular day is not affected by the fact that some steps toward its execution were taken on Sunday.[75] The date of its actual execution and not the date of the bond controls.[76]

6. Conveyances. The execution of mortgages,[77] deeds, or leases on Sunday render them void under the statutes of most jurisdictions.[78] It has also been held that a contract to sell land made on Sunday is void.[79] As a deed does not take effect until delivery, it is valid when delivered on a secular day, although signed and sealed or acknowledged on Sunday.[80] Where the deed is actually executed on Sunday, but is dated on a preceding day, the grantor cannot assert its invalidity against a subsequent *bona fide* purchaser.[81] However, the fact that the certificate of acknowledgment bears a secular date does not validate a mortgage actually executed on Sunday.[82]

v. Wessels, 53 Mich. 549, 19 N. W. 179; Marshall *v.* Russell, 44 N. H. 509.

71. See Commercial Paper, 8 Cyc. 48.

72. Tucker *v.* West, 29 Ark. 386; Kepner *v.* Keefer, 6 Watts (Pa.) 231, 31 Am. Dec. 460.

73. Dodson *v.* Harris, 10 Ala. 566; Terry *v.* Platt, 1 Pennew. (Del.) 185, 40 Atl. 243.

74. Anderson *v.* Bellenger, 87 Ala. 334, 6 So. 82, 13 Am. St. Rep. 46, 4 L. R. A. 680; Pattee *v.* Greely, 13 Metc. (Mass.) 284; Fox *v.* Mensch, 3 Watts & S. (Pa.) 444.

75. Evansville *v.* Morris, 87 Ind. 269, 44 Am. Rep. 763 [*disapproving* Davis *v.* Barger, 57 Ind. 54]; Hall *v.* Parker, 37 Mich. 590, 26 Am. Rep. 540; State *v.* Young, 23 Minn. 551; Com. *v.* Kendig, 2 Pa. St. 448.

76. Pierce *v.* Richardson, 37 N. H. 306; Miley *v.* Wildermuth, 4 Wkly. Notes Cas. (Pa.) 560.

Effect of lack of notice.— A bond dated and made to take effect on a secular day will protect an obligee who had no notice that it was actually signed on a Sunday. Hall *v.* Parker, 37 Mich. 590, 26 Am. Rep. 540. See also Com. *v.* Kendig, 2 Pa. St. 448.

77. See Mortgages, 27 Cyc. 1130.

78. *Alabama.*— Williams *v.* Armstrong, 130 Ala. 389, 30 So. 553.

Indiana.— Love *v.* Wells, 25 Ind. 503, 87 Am. Dec. 375.

Minnesota.— Hanchett *v.* Jordan, 43 Minn. 149, 45 N. W. 617.

New Jersey.—Earl *v.* Steffens, 1 N. J. L. J. 53.

Wisconsin.— Ainsworth *v.* Williams, 111 Wis. 17, 86 N. W. 551; Vinz *v.* Beatty, 61 Wis. 645, 21 N. W. 787.

United States.— Hill *v.* Hite, 85 Fed. 268, 29 C. C. A. 549 [*affirming* 79 Fed. 826].

See 45 Cent. Dig. tit. "Sunday," § 40.

They are not void under statutes prohibiting labor merely or acts in the exercise of one's ordinary calling. Roberts *v.* Barnes, 127 Mo. 405, 30 S. W. 113, 48 Am. St. Rep. 640; Swisher *v.* Williams, Wright (Ohio) 754; Hellams *v.* Abercrombie, 15 S. C. 110, 40 Am. Rep. 684. A deed acknowledged in Tennessee on Sunday is not for that reason void. Lucas *v.* Larkin, 85 Tenn. 355, 3 S. W. 647.

Execution after sunset.— In Massachusetts, when the statutory prohibition of worldly business on Sunday extends only to sunset, the execution of a mortgage on Sunday evening does not affect its validity. Tracy *v.* Jenks, 15 Pick. (Mass.) 465.

Executed contract.— It was held in Greene *v.* Godfrey, 44 Me. 25, and Ellis *v.* Hammond, 57 Ga. 179, that a deed fully executed upon Sunday is sufficient to pass the title. And in Rosenbaum *v.* Hayes, 10 N. D. 311, 86 N. W. 973, it was held that the acquisition of possession by a factor of property on Sunday did not defeat his lien based thereon, as a Sunday transfer of property, although prohibited by law, is effective so far as executed.

Canada.— A mortgage of personal property does not come within the meaning of 8 Vict. c. 45, § 2, prohibiting sales and purchases on Sunday, and therefore is not void when made on Sunday. Wilt *v.* Lai, 7 U. C. Q. B. 535. See also Lai *v.* Stall, 6 U. C. Q. B. 506.

79. Nibert *v.* Baghurst, 47 N. J. Eq. 201, 20 Atl. 252.

80. Love *v.* Wells, 25 Ind. 503, 87 Am. Dec. 375; Schwab *v.* Rigby, 38 Minn. 395, 38 N. W. 101; Duggan *v.* Champlin, 75 Miss. 441, 23 So. 179; Wilson *v.* Winter, 6 Fed. 16.

81. Love *v.* Wells, 25 Ind. 503, 87 Am. Dec. 375.

82. Hill *v.* Hite, 85 Fed. 268, 29 C. C. A. 549.

Thus, where the deed was handed to the grantee on Sunday, the acknowledgment, recording, and transmission of the deed to the grantee on secular days are mere incidents of the transaction, and do not render the

7. Insurance. It is true in regard to insurance policies and applications as in the case of other contracts, that the antedating or post-dating of a contract executed on Sunday does not remove the illegality.[83] On the other hand, a policy executed and delivered on a week day is valid, although dated on Sunday.[84] The Sunday law is no excuse for not keeping a watchman in the building insured according to the terms of the policy,[85] nor does it affect the recall of a policy on Sunday.[86]

8. Marriage Contract. A marriage contract entered into on Sunday is valid, if subsequently recognized by the parties.[87]

9. Wills. A will does not come within the meaning and intent of the Sunday statutes and is valid when executed on the Sabbath.[88]

G. Delivery on Sunday. In general the delivery of an instrument on Sunday completes its execution and renders it invalid,[89] although it has been held that the delivery of a deed on Sunday is sufficient to pass the title.[90] Bills of exchange and promissory notes should not be delivered on Sunday, although an agent may, on a Sunday, legally receive an authority to deliver on a subsequent day;[91] and the delivery of a note in satisfaction of a guaranty is not invalidated by the fact that the note was handed to the transferee on Sunday, the contract having been made on another day.[92] The leaving of a note at a designated place on Sunday and the calling for it by the payee on a secular day does not constitute a delivery on Sunday, so as to invalidate the note.[93] A delivery on Sunday is not sufficient to take a contract out of the statute of frauds.[94]

H. Ratification. The authorities are not harmonious on the question whether a contract, invalid because entered into on Sunday, may be rendered valid and enforceable by ratification on a subsequent secular day. The view taken in many jurisdictions is that Sunday contracts are wholly void and incapable of ratification;[95] while in others they are not viewed as being tainted with

deed valid. Jacobson *v.* Bentzler, 127 Wis. 566, 107 N. W. 7, 115 Am. St. Rep. 1052, 4 L. R. A. N. S. 1151.

83. Heller *v.* Crawford, 37 Ind. 279.

84. Phœnix Ins. Co. *v.* Boulden, 96 Ala. 609, 11 So. 774.

85. Glendale Woolen Co. *v.* Protection Ins. Co., 21 Conn. 19, 54 Am. Dec. 309.

86. New York Lumber, etc., Co. *v.* People's F. Ins. Co., 96 Mich. 20, 55 N. W. 434.

87. Markley *v.* Kessering, 2 Pennyp. (Pa.) 187. See also *In re* Gangwere, 14 Pa. St. 417, 53 Am. Dec. 554, where the court was equally divided.

88. Rapp *v.* Reehling, 124 Ind. 36, 23 N. E. 777, 7 L. R. A. 498; Bennett *v.* Brooks, 9 Allen (Mass.) 118; George *v.* George, 47 N. H. 27; Beitenman's Appeal, 55 Pa. St. 183; Weidman *v.* Marsh, 4 Pa. L. J. Rep. 401.

89. See *supra*, V, F, 1.

90. Shuman *v.* Shuman, 27 Pa. St. 90.

91. See Commercial Paper, 7 Cyc. 686 note 74.

92. Steere *v.* Trebilcock, 108 Mich. 464, 66 N. W. 342.

93. Goss *v.* Whitney, 24 Vt. 187.

94. Ash *v.* Aldrich, 67 N. H. 581, 39 Atl. 442; Schmidt *v.* Thomas, 75 Wis. 529, 44 N. W. 771. See, generally, Frauds, Statutes of, 20 Cyc. 245.

95. *Alabama.*— Butler *v.* Lee, 11 Ala. 885, 46 Am. Dec. 230; Shippey *v.* Eastwood, 9 Ala. 198.

Maine.— Meader *v.* White, 66 Me. 90, 22 Am. Rep. 551; Tillock *v.* Webb, 56 Me. 100; Pope *v.* Linn, 50 Me. 83.

Massachusetts.— Miles *v.* Janvrin, 200 Mass. 514, 86 N. E. 785; Stevens *v.* Wood, 127 Mass. 123; Bradley *v.* Rea, 103 Mass. 188, 4 Am. Rep. 524; Ladd *v.* Rogers, 11 Allen 209; Day *v.* McAllister, 15 Gray 433, 434 [*explaining* Stebbins *v.* Peck, 8 Gray 553], where Hoar, J., remarked: "The defendant could not ratify the illegal contract, because its want of validity did not depend in any degree upon his choice. The law annulled it, and there was no subject of ratification."

Michigan.— Acme Electrical Illustrating, etc., Co. *v.* Van Derbeck, 127 Mich. 341, 86 N. W. 786; Pillen *v.* Erickson, 125 Mich. 68, 83 N. W. 1023; Winfeld *v.* Dodge, 45 Mich. 355, 7 N. W. 906, 40 Am. Rep. 476; Tucker *v.* Mowrey, 12 Mich. 378.

Minnesota.— Handy *v.* St. Paul Globe Pub. Co., 41 Minn. 188, 42 N. W. 872, 16 Am. St. Rep. 695, 4 L. R. A. 466.

Mississippi.— Kountz *v.* Price, 40 Miss. 341.

New Hampshire.— Allen *v.* Deming, 14 N. H. 133, 40 Am. Dec. 179 [*distinguishing* Clough *v.* Davis, 9 N. H. 500].

New Jersey.—Brewster *v.* Banta, 66 N. J. L. 367, 49 Atl. 718; Reeves *v.* Butcher, 31 N. J. L. 224; Riddle *v.* Keller, 61 N. J. Eq. 513, 48 Atl. 818; Gennert *v.* Wuestner, 53 N. J. Eq. 302, 31 Atl. 609; Ryno *v.* Darby, 20 N. J. Eq. 231.

Wisconsin.— King *v.* Graef, 136 Wis. 548,

any general illegality, but, being illegal only as to the time in which they are entered into, they are capable of being made valid by affirmation and ratification on a subsequent day.[96] But even in those jurisdictions where a Sunday contract is considered incapable of ratification, it is held that there is nothing to prevent the parties from making the same contract over again on a week day, and that the consideration emanating from the tainted contract is sufficient to form the foundation for a new express promise on which recovery may be had.[97] In those jurisdictions where a ratification of a Sunday contract is sustained, a contract is held to be ratified by complying with its terms;[98] by making and accepting a

117 N. W. 1058, 128 Am. St. Rep. 1101, 20 L. R. A. N. S. 86; Jacobson *v.* Bentzler, 127 Wis. 566, 107 N. W. 7, 115 Am. St. Rep. 1052, 4 L. R. A. N. S. 1151; Sherry *v.* Madler, 123 Wis. 621, 101 N. W. 1095; Vinz *v.* Beatty, 61 Wis. 645, 21 N. W. 787; Troewert *v.* Decker, 51 Wis. 46, 8 N. W. 26, 37 Am. Rep. 808. *Compare* Schmidt *v.* Thomas, 75 Wis. 529, 44 N. W. 771; Taylor *v.* Young, 61 Wis. 314, 21 N. W. 408.

See 45 Cent. Dig. tit. "Sunday," § 46.

The removal of the statutory prohibition does not authorize the ratification of an agreement made before its removal. Handy *v.* St. Paul Globe Pub. Co., 41 Minn. 188, 42 N. W. 872, 16 Am. St. Rep. 695, 4 L. R. A. 466.

96. *Arkansas.*—Hoyt *v.* Western Union Tel. Co., 85 Ark. 473, 108 S. W. 1056; McKinney *v.* Demby, 44 Ark. 74; Tucker *v.* West, 29 Ark. 386.

Georgia.— Bendross *v.* State, 5 Ga. App. 175, 62 S. E. 728.

Illinois.— King *v.* Fleming, 72 Ill. 21, 22 Am. Rep. 131.

Indiana.— Kuhns *v.* Gates, 92 Ind. 66; Heavenridge *v.* Mondy, 34 Ind. 28; Perkins *v.* Jones, 26 Ind. 499; Love *v.* Wells, 25 Ind. 503, 87 Am. Dec. 375; Banks *v.* Werts, 13 Ind. 203; Williamson *v.* Brandenburg, 6 Ind. App. 97, 32 N. E. 1022.

Indian Territory.— J. S. Bostic Co. *v.* Eggleston, 7 Indian Terr. 134, 104 S. W. 566.

Iowa.— Orr *v.* Kenworthy, (1909) 121 N. W. 539; P. J. Bowlin Liquor Co. *v.* Brandenburg, 130 Iowa 220, 106 N. W. 497; Russell *v.* Murdock, 79 Iowa 101, 44 N. W. 237, 18 Am. St. Rep. 348; Harrison *v.* Colton, 31 Iowa 16.

Kentucky.— Campbell *v.* Young, 9 Bush 240.

Maryland.— Haacke *v.* Social, etc., Club K. L., 76 Md. 429, 25 Atl. 422.

Missouri.— Wilson *v.* Milligan, 75 Mo. 41.

Oregon.— Smith *v.* Case, 2 Oreg. 190.

Pennsylvania.—Cook *v.* Forker, 193 Pa. St. 461, 44 Atl. 560, 74 Am. St. Rep. 699; Whitmire *v.* Montgomery, 165 Pa. St. 253, 30 Atl. 1016; Uhler *v.* Applegate, 26 Pa. St. 140. *Compare* Lee *v.* Drake, 10 Pa. Co. Ct. 276.

Rhode Island.— Flynn *v.* Columbus Club, 21 R. I. 534, 45 Atl. 551; Sayles *v.* Wellman, 10 R. I. 465.

Vermont.— Flinn *v.* St. John, 51 Vt. 334; Sumner *v.* Jones, 24 Vt. 317; Sargeant *v.* Butts, 21 Vt. 99; Adams *v.* Gay, 19 Vt. 358.

United States.— Tennent-Strubling Shoe Co. *v.* Roper, 94 Fed. 739, 36 C. C. A. 455; Van Hoven *v.* Irish, 10 Fed. 13, 3 McCrary 443.

England.— Williams *v.* Paul, 6 Bing. 653, 8 L. J. C. P. O. S. 280, 4 M. & P. 532, 31 Rev. Rep. 512, 19 E. C. L. 295.

See 45 Cent. Dig. tit. "Sunday," § 46.

Where a debt was assigned on Sunday, its ratification by the assignor on a subsequent week day renders it valid from the date of the actual assignment for the purpose of an attachment thereon procured by the assignee on that day. Tennent-Strubling Shoe Co. *v.* Roper, 94 Fed. 739, 36 C. C. A. 455.

97. *Alabama.*— Butler *v.* Lee, 11 Ala. 885, 46 Am. Dec. 230.

Massachusetts.— Miles *v.* Janvrin, 200 Mass. 514, 86 N. E. 785; Winchell *v.* Carey, 115 Mass. 560, 15 Am. Rep. 151; Stebbins *v.* Peck, 8 Gray 553 [*explained* in Day *v.* McAllister, 15 Gray 433].

Missouri.— Gwinn *v.* Simes, 61 Mo. 335.

New Jersey.— Brewster *v.* Banta, 66 N. J. L. 367, 49 Atl. 718; Reeves *v.* Butcher, 31 N. J. L. 224; Ryno *v.* Darby, 20 N. J. Eq. 231.

Oklahoma.— Helm *v.* Briley, 17 Okla. 314, 87 Pac. 595.

Wisconsin.— King *v.* Graef, 136 Wis. 548, 117 N. W. 1058, 128 Am. St. Rep. 1101, 20 L. R. A. N. S. 86; Sherry *v.* Madler, 123 Wis. 621, 101 N. W. 1095; Hopkins *v.* Stefan, 77 Wis. 45, 45 N. W. 676; Schmidt *v.* Thomas, 75 Wis. 529, 44 N. W. 771; Melchoir *v.* McCarty, 31 Wis. 252, 11 Am. Rep. 605.

See 45 Cent. Dig. tit. "Sunday," § 46.

An admission of the previous execution of the instrument, coupled with a denial of its binding force, does not amount to a re-creation and new delivery of the instrument. Riddle *v.* Keller, 61 N. J. Eq. 513, 48 Atl. 818.

The payment of interest does not imply any intention to create a new obligation and is not sufficient as a new contract, under the above rule. Reeves *v.* Butcher, 31 N. J. L. 224.

Mutual assent essential to new contract.— Winfield *v.* Dodge, 45 Mich. 355, 7 N. W. 906, 40 Am. Rep. 476. See also Brazee *v.* Bryant, 50 Mich. 136, 15 N. W. 49.

98. Banks *v.* Werts, 13 Ind. 203; Orr *v.* Kenworthy, (Iowa 1909) 121 N. W. 539 (surrender of notes by payee); Uhler *v.* Applegate, 26 Pa. St. 140; Flinn *v.* St. John, 51 Vt. 334.

The appointment of an officer of a corporation as collector of rents at a meeting held on Sunday may be rendered valid by the sub-

delivery of the property;[99] by partial payments;[1] by an express promise to pay,[2] especially when coupled with a retention of the property sold;[3] by the giving or delivery of a note[4] or a receipt;[5] by the collection of a check;[6] and by demanding payment.[7] It is not ratified by mere acquiescence,[8] by a request to forbear suit,[9] by retaining a payment after a demand for its return,[10] by allowing the vendor credit on an account, of which he does not take advantage,[11] or by a declaration of an intention to pay, when supported by no consideration.[12]

I. Rescission and Rights of Third Persons — 1. Rescission — a. On Sunday. The rescission of a contract stands on a level with the making of a contract so far as the Sunday statutes are concerned, and, when done on Sunday, is void.[13]

b. Of Contract Made on Sunday. It is the rule in a few jurisdictions that a contract void because made on Sunday may be rescinded,[14] provided the party rescinding restore to the other party whatever he has received under the agreement.[15] However, the weight of authority is to the effect that such a contract may not be rescinded on account of its illegality, as the parties are *in pari delicto* and the court will refuse its aid to either. Neither party may recover back the property or the purchase-money.[16]

2. Rights of Third Persons. A third person, not a party to the contract,

sequent receipt of the rents from him on repeated occasions on a week day. Flynn *v.* Columbus Club, 21 R. I. 534, 45 Atl. 551.

99. P. J. Bowlin Liquor Co. *v.* Brandenburg, 130 Iowa 220, 106 N. W. 497.

1. Russell *v.* Murdock, 79 Iowa 101, 44 N. W. 237, 18 Am. St. Rep. 348; Sayles *v.* Wellman, 10 R. I. 465; Sumner *v.* Jones, 24 Vt. 317, payment accompanied by retention of the property sold.

Payment of interest sufficient ratification. —Whitmire *v.* Montgomery, 165 Pa. St. 253, 30 Atl. 1016.

2. Tucker *v.* West, 29 Ark. 386; Williamson *v.* Brandenberg, 6 Ind. App. 97, 32 N. E. 1022; Sargeant *v.* Butts, 21 Vt. 99; Williams *v.* Paul, 6 Bing. 653, 8 L. J. C. P. O. S. 280, 4 M. & P. 532, 31 Rev. Rep. 512, 19 E. C. L. 295.

3. Williamson *v.* Brandenberg, 6 Ind. App. 97, 32 N. E. 1022; Williams *v.* Paul, 6 Bing. 653, 8 L. J. C. P. O. S. 280, 4 M. & P. 532, 31 Rev. Rep. 512, 19 E. C. L. 295.

An express promise to pay after the retention of the goods on a secular day is necessary. Simpson *v.* Nicholls, 6 Dowl. P. C. 355, 1 H. & H. 12, 7 L. J. Exch. 117, 3 M. & W. 240.

4. King *v.* Fleming, 72 Ill. 21, 22 Am. Rep. 131; Sayles *v.* Wellman, 10 R. I. 465.

5. Wilson *v.* Milligan, 75 Mo. 41.

6. Campbell *v.* Young, 9 Bush (Ky.) 240; Cook *v.* Forker, 193 Pa. St. 461, 44 Atl. 560, 74 Am. St. Rep. 699.

7. McKinney *v.* Demby, 44 Ark. 74.

8. Hill *v.* Hite, 79 Fed. 826. *Compare* Helm *v.* Briley, 17 Okla. 314, 87 Pac. 595.

9. Parker *v.* Pitts, 73 Ind. 597, 38 Am. Rep. 155.

10. Perkins *v.* Jones, 26 Ind. 499.

11. Calhoun *v.* Phillips, 87 Ga. 482, 13 S. E. 593.

12. Catlett *v.* Sweetser Station M. E. Church, 62 Ind. 365, 30 Am. Rep. 197.

13. Merritt *v.* Robinson, 35 Ark. 483; Benedict *v.* Bachelder, 24 Mich. 425, 9 Am. Rep. 130. *Contra*, Pence *v.* Langdon, 99 U. S. 578, 25 L. ed. 420.

14. Brazee *v.* Bryant, 50 Mich. 136, 15 N. W. 49; Tucker *v.* Mowrey, 12 Mich. 378; Maurer *v.* Wolf, 21 N. Y. Suppl. 202; Adams *v.* Gay, 19 Vt. 358; Bloxsome *v.* Williams, 3 B. & C. 232, 10 E. C. L. 113, 1 C. & P. 294, 12 E. C. L. 176, 5 D. & R. 82, 2 L. J. K. B. O. S. 224, 27 Rev. Rep. 337, plaintiff not a *particeps criminis*.

In Ohio money paid on void Sunday contracts may be recovered back so long as the contract remains executory, but not after it has been executed. Brown *v.* Timmany, 20 Ohio 81.

15. Hale *v.* Harris, 91 S. W. 660, 28 Ky. L. Rep. 1172, 5 L. R. A. N. S. 295; Tucker *v.* Mowrey, 12 Mich. 378.

Money paid under a Sunday contract to a party who afterward refuses to perform may be recovered back on the common money counts, and it is not culpable negligence for the attorney of defendant not to put forward the defense that the agreement was made on Sunday. Vail *v.* Duggan, 7 U. C. Q. B. 568.

16. *Alabama.*— Thornhill *v.* O'Rear, 108 Ala. 299, 19 So. 382, 31 L. R. A. 792.

Georgia.— Ellis *v.* Hammond, 57 Ga. 179.

Indiana.— Jordan *v.* Moore, 10 Ind. 386.

Iowa.— Kelley *v.* Cosgrove, 83 Iowa 229, 48 N. W. 979, 17 L. R. A. 779; Kinney *v.* McDermot, 55 Iowa 674, 8 N. W. 656, 39 Am. Rep. 191.

Maine.— Plaisted *v.* Palmer, 63 Me. 576.

Massachusetts.— Myers *v.* Meinrath, 101 Mass. 366, 3 Am. Rep. 368 (executed contract); King *v.* Green, 6 Allen 139.

Mississippi.— Block *v.* McMurry, 56 Miss. 217, 31 Am. Rep. 357.

South Dakota.— Calkins *v.* Seabury-Calkins Consol. Min. Co., 5 S. D. 299, 58 N. W. 797.

Wisconsin.— Cohn *v.* Heimbauch, 86 Wis. 176, 56 N. W. 638; Moore *v.* Kendall, 2 Pinn. 99, 1 Chandl. 33, 52 Am. Dec. 145.

cannot dispute its validity on the ground that it was made on Sunday.[17] Neither is a sale of a chattel made on Sunday invalid as to an innocent second purchaser.[18] The sale or contract, when untainted with fraud, is good as against the creditors of the vendor;[19] and the property sold is no longer subject to attachment as his property.[20]

J. Performance of Contract on Sunday.[21] A contract requiring or contemplating the doing of an act on Sunday which is within the prohibition of the Sunday statutes is absolutely void and unenforceable.[22] However, where the contract does not require performance on Sunday, but simply names Sunday as a means of estimating the compensation, it is valid.[23] Where no time for performance is stipulated by the parties, performance on Sunday cannot be legally demanded.[24] And where the contract does not in terms require the performance of labor on Sunday, and it is doubtful if it contemplated such performance, it will be presumed that it did not.[25] No implied promise based on work done on

See 45 Cent. Dig. tit. "Sunday," § 47.

17. Greene *v.* Godfrey, 44 Me. 25; Richardson *v.* Kimball, 28 Me. 463; Swisher *v.* Williams, Wright (Ohio) 755; Moore *v.* Kendall, 2 Pinn. (Wis.) 99, 1 Chandl. 33, 52 Am. Dec. 145; Tennent-Stribling Shoe Co. *v.* Roper, 94 Fed. 739, 36 C. C. A. 455.

18. Horton *v.* Buffinton, 105 Mass. 399.

19. Smith *v.* Bean, 15 N. H. 577; Chestnut *v.* Harbaugh, 78 Pa. St. 473.

20. Blass *v.* Anderson, 57 Ark. 483, 22 S. W. 94; Foster *v.* Wooten, 67 Miss. 540, 7 So. 501.

21. **At common law** see *supra*, V, A.

22. *Indiana.*— Pate *v.* Wright, 30 Ind. 476, 95 Am. Dec. 705.

Kansas.— Johnson *v.* Brown, 13 Kan. 529.

Massachusetts.— Stewart *v.* Thayer, 168 Mass. 519, 47 N. E. 420, 60 Am. St. Rep. 407.

Minnesota.— Handy *v.* St. Paul Globe Pub. Co., 41 Minn. 188, 42 N. W. 872, 16 Am. St. Rep. 695, 4 L. R. A. 466.

New York.— Smith *v.* Wilcox, 24 N. Y. 353, 82 Am. Dec. 302 [*affirming* 25 Barb. 341]; Brunnett *v.* Clark, Sheld. 500; Bilordeaux *v.* H. Bencke Lith. Co., 16 Daly 78, 9 N. Y. Suppl. 507; Matter of Hammerstein, 57 Misc. 52, 108 N. Y. Suppl. 197; Hallen *v.* Thompson, 48 Misc. 642, 96 N. Y. Suppl. 142.

Ohio.—Warren *v.* Fountain Square Theater Co., 5 Ohio S. & C. Pl. Dec. 559, 7 Ohio N. P. 538.

Pennsylvania.— Berrill *v.* Smith, 2 Miles 402.

Wisconsin.—Walsh *v.* Chicago, etc., R. Co., 42 Wis. 23, 24 Am. Rep. 376.

United States.— La Crandall *v.* Ledbetter, 159 Fed. 702, 86 C. C. A. 570.

See 45 Cent. Dig. tit. "Sunday," §§ 48, 49.

Contra, in Tennessee, where the thing covenanted to be done does not fall within the ordinary callings of the parties, according to the Tennessee statute. Amis *v.* Kyle, 2 Yerg. (Tenn.) 31, 24 Am. Dec. 463. And *contra,* where the work contemplated does not come within the statute. Sandiman *v.* Breach, 7 B. & C. 96, 9 D. & R. 796, 5 L. J. K. B. O. S. 298, 31 Rev. Rep. 169, 14 E. C. L. 52.

In Illinois a contract which contemplates labor on Sunday not tending to disturb the peace and good order of society or constituting a violation of the criminal code is valid and enforceable. Collins Ice-Cream Co. *v.* Stephens, 189 Ill. 200, 59 N. E. 524; McCurdy *v.* Alaska, etc., Commercial Co., 102 Ill. App. 120.

Part performance in foreign country.—A contract to run a steamboat on Sundays is void, and its invalidity is not affected by the fact that it was to run partly through Canadian waters. Gauthier *v.* Cole, 17 Fed. 716.

Return of checked baggage.— In Stallard *v.* Great Western R. Co., 2 B. & S. 419, 8 Jur. N. S. 1076, 31 L. J. Q. B. 137, 6 L. T. Rep. N. S. 217, 10 Wkly. Rep. 488, 110 E. C. L. 419, it appeared that defendant railroad company had undertaken to keep plaintiff's portmanteau safely for a certain reward, and it was held that it must deliver up the property in a reasonable time after demand therefor, even though the demand is made on Sunday, as it is notorious that people travel on Sunday.

Application of rule.— Contracts have been held void which pertained to the publication of advertisements in Sunday newspapers (Handy *v.* St. Paul Globe Pub. Co., 41 Minn. 188, 42 N. W. 872, 16 Am. St. Rep. 695, 4 L. R. A. 466; Smith *v.* Wilcox, 24 N. Y. 353, 82 Am. Dec. 302 [*affirming* 25 Barb. 341]. *Contra,* Sheffield *v.* Balmer, 52 Mo. 474, 14 Am. Rep. 430), or which called for a concert or theatrical performance on Sunday (Stewart *v.* Thayer, 168 Mass. 519, 47 N. E. 420, 60 Am. St. Rep. 407; Hallen *v.* Thompson, 48 Misc. (N. Y.) 642, 96 N. Y. Suppl. 142; La. Crandall *v.* Ledbetter, 159 Fed. 702, 86 C. C. A. 570), a balloon ascension (Brunnett *v.* Clark, Sheld. (N. Y.) 500; Bilordeaux *v.* H. Bencke Lith. Co., 16 Daly (N. Y.) 78, 9 N. Y. Suppl. 507), or the use of horses on a pleasure excursion (Berrill *v.* Smith, 2 Miles (Pa.) 402).

23. Alfree *v.* Gates, 82 Iowa 19, 47 N. W. 993; Porter *v.* Sanderson, 37 Wis. 41.

24. Brackett *v.* Edgerton, 14 Minn. 174, 100 Am. Dec. 211; Delamater *v.* Miller, 1 Cow. (N. Y.) 75, 13 Am. Dec. 512.

Contracts maturing on Sunday see TIME.

25. Alfree *v.* Gates, 82 Iowa 19, 47 N. W. 993.

the Lord's day will be recognized by the courts.[26] Although the contract also contemplates the doing of other acts on secular days, the illegality taints the whole contract and renders it void.[27] Although performance on Sunday of a valid contract will not be treated as a nullity,[28] it will not be given an independently affirmative effect beyond mere performance.[29]

VI. ACTIONS ON SUNDAY CONTRACTS AND TRANSACTIONS.

A. Right of Action — 1. Existence of Right — a. In General. It is frequently declared by the courts that no action can be maintained in a court of law or equity for the enforcement of, or relief from, Sunday contracts and transactions.[30] However, it has been held that an instrument executed on Sunday may be canceled in equity.[31] The courts will neither enforce such void contracts,[32] nor will they entertain actions to recover back the property sold or the consideration paid.[33] Thus one cannot recover for services performed on Sun-

Thus a contract contemplating that one of the parties shall take a train on Sunday to proceed to the place where he is to perform his services does not necessarily call for services on Sunday and will not be so interpreted. Goddard *v.* Morrissey, 172 Mass. 594, 53 N. E. 207.

The making of a payment on Sunday, which payment was not returned, will not invalidate the contract. Lamore *v.* Frisbie, 42 Mich. 186, 3 N. W. 910.

26. Carson *v.* Calhoun, 101 Me. 456, 64 Atl. 838.

27. Handy *v.* St. Paul Globe Pub. Co., 41 Minn. 188, 42 N. W. 872, 16 Am. St. Rep. 695, 4 L. R. A. 466; Hallen *v.* Thompson, 48 Misc. (N. Y.) 642, 96 N. Y. Suppl. 142. *Compare* Merritt *v.* Earle, 29 N. Y. 115, 86 Am. Dec. 292 [*affirming* 31 Barb. 38]. *Contra*, La Crandall *v.* Ledbetter, 159 Fed. 702, 86 C. C. A. 570.

28. Gordon *v.* Levine, 197 Mass. 263, 83 N. E. 861, 125 Am. St. Rep. 361, 15 L. R. A. N. S. 243.

29. Horn *v.* Dorchester Mut. F. Ins. Co., 199 Mass. 534, 85 N. E. 853.

30. *Alabama.*— Dodson *v.* Harris, 10 Ala. 566; O'Donnell *v.* Sweeney, 5 Ala. 467, 39 Am. Dec. 336.

Georgia.— Ellis *v.* Hammond, 57 Ga. 179.

Iowa.— Pike *v.* King, 16 Iowa 49.

Maine.— Morton *v.* Gloster, 46 Me. 520.

Massachusetts.— Gordon *v.* Levine, 197 Mass. 263, 83 N. E. 861, 125 Am. St. Rep. 361, 15 L. R. A. N. S. 243; Myers *v.* Meinrath, 101 Mass. 366, 3 Am. Rep. 368.

Mississippi.— Foster *v.* Wooten, 67 Miss. 540, 7 So. 501.

Pennsylvania.— Lee *v.* Drake, 10 Pa. Co. Ct. 276.

Tennessee.— Berry *v.* Planters' Bank, 3 Tenn. Ch. 69.

Vermont.—Adams *v.* Gay, 19 Vt. 358.

Wisconsin.— Jacobson *v.* Bentzler, 127 Wis. 566, 107 N. W. 7, 115 Am. St. Rep. 1052, 4 L. R. A. N. S. 1151; Pearson *v.* Kelly, 122 Wis. 660, 100 N. W. 1064.

See 45 Cent. Dig. tit. "Sunday," § 50.

Contra.— It has been held in Michigan that if one party to a Sunday contract performs his part of it on secular days and the other accepts what is done he must pay for what he receives. Bollin *v.* Hooper, 127 Mich. 287, 86 N. W. 795.

"The ground upon which courts have refused to maintain actions in contracts made in contravention of statutes for the observance of the Lord's day is the elementary principle that one who has himself participated in a violation of law cannot be permitted to assert in a court of justice any right founded upon or growing out of the illegal transaction." Gibbs, etc., Mfg. Co. *v.* Brucker, 111 U. S. 597, 601, 4 S. Ct. 572, 28 L. ed. 534.

A judgment entered on a judgment note bearing a Sunday date will not be stricken off because of its execution on Sunday. Hodgson *v.* Nesbit, 25 Pa. Co. Ct. 78. But equity will enjoin the collection of an unjust judgment obtained without defendant's knowledge after an agreement for settlement and discontinuance with plaintiff, although such agreement is void by reason of being made on Sunday. Blakesley *v.* Johnson, 13 Wis. 530.

Injunction.— The fact that plaintiff affixed his signature on Sunday to a petition for the issue of bonds to aid in the construction of a railroad will not prevent him from obtaining an injunction against the issue of the bonds on the ground that the required number of signatures were not affixed on any secular day. De Forth *v.* Wisconsin, etc., R. Co., 52 Wis. 320, 9 N. W. 17, 38 Am. Rep. 737.

31. Smith *v.* Pearson, 24 Ala. 355.

32. *Kentucky.*—Slade *v.* Arnold, 14 B. Mon. 287.

Missouri.— Bernard *v.* Lupping, 32 Mo. 341.

New Hampshire.—Allen *v.* Deming, 14 N. H. 133, 40 Am. Dec. 179.

New Jersey.— Crocket *v.* Vanderveer, 3 N. J. L. 856.

Ohio.— Fountain Square Theater Co. *v.* Evans, 4 Ohio S. & C. Pl. Dec. 151, 3 Ohio N. P. 245.

Pennsylvania.— Linden *v.* Hicks, 2 Luz. Leg. Reg. 101.

Wisconsin.— Pearson *v.* Kelly, 122 Wis. 660, 100 N. W. 1064.

See 45 Cent. Dig. tit. "Sunday," § 50.

33. See *supra*, V, I, 1. b.

day,[34] for property let on that day,[35] for money loaned,[36] or the price of goods sold.[37]

b. Breach of Warranty.[38] An action is not maintainable on a warranty made during the course of a sale or exchange of property on Sunday.[39]

c. Deceit.[40] Neither is an action maintainable for damages resulting from fraudulent representation made during the transaction.[41]

d. Conversion or Damages For Injury to Property Hired.[42] In regard to an action for conversion or for damages for injury to property hired on Sunday, a different rule applies, and the action may be maintained, as it rests in tort, independent of the contract of hiring or bailment.[43]

2. Conditions Precedent to Exercise of Right. In at least one jurisdiction, the maker of a note given on Sunday cannot have it declared void without restoring the consideration he received for it.[44]

B. Defenses — 1. In General. Where the contract was really consummated on Sunday, the defense of illegality may be set up.[45] It is not available in an action on incidental agreements consummated prior[46] or subsequent to

34. *Maine.*— Carson *v.* Calhoun, 101 Me. 456, 64 Atl. 838.
Massachusetts.— Stewart *v.* Thayer, 170 Mass. 560, 49 N. E. 1020.
Missouri.— Barney *v.* Spangler, 131 Mo. App. 58, 109 S. W. 855.
New Hampshire.—Williams *v.* Hastings, 59 N. H. 373.
New York.— Brunnett *v.* Clark, Sheld. 500; Watts *v.* Van Ness, 1 Hill 76.
See 45 Cent. Dig. tit. "Sunday," § 50.

35. Nodine *v.* Doherty, 46 Barb. (N. Y.) 59; Berrill *v.* Smith, 2 Miles (Pa.) 402.

36. Finn *v.* Donahue, 35 Conn. 216.

37. Strouse *v.* Lanctot, (Miss. 1900) 27 So. 606; Thompson *v.* Williams, 58 N. H. 248.
The subsequent possession and use of an article purchased under an illegal contract made on Sunday will not enable the vendor to maintain an action of contract for the value of the same; but the remedy is by an action of tort in the nature of trover. Ladd *v.* Rogers, 11 Allen (Mass.) 209.

38. **Breach of warranty** generally see Sales, 35 Cyc. 434.

39. Murphy *v.* Simpson, 14 B. Mon. (Ky.) 419; Finley *v.* Quirk, 9 Minn. 194, 86 Am. Dec. 93; Lyon *v.* Strong, 6 Vt. 219; Fennell *v.* Ridler, 5 B. & C. 406, 8 D. & R. 204, 4 L. J. K. B. O. S. 207, 29 Rev. Rep. 278, 11 E. C. L. 517 [*distinguishing* Bloxome *v.* Williams, 3 B. & C. 332, 10 E. C. L. 113, 1 C. & P. 294, 12 E. C. L. 176, 5 D. & R. 82, 2 L. J. K. B. O. S. 224, 27 Rev. Rep. 337, on the ground that in that case plaintiff was ignorant of the fact that defendant was exercising his ordinary calling within the meaning of the statute].

40. **Action for deceit** generally see 20 Cyc. 1 *et seq.*

41. Grant *v.* McGrath, 56 Conn. 333, 15 Atl. 370; Gunderson *v.* Richardson, 56 Iowa 56, 8 N. W. 683, 41 Am. Rep. 81; Robeson *v.* French, 12 Metc. (Mass.) 24, 45 Am. Dec. 236. *Contra*, O'Shea *v.* Kohn, 33 Hun (N. Y.) 114, holding that one who, on Sunday, procures goods by false representations, is subject to arrest in a civil action.

42. **Action for conversion** generally see Trover and Conversion.

43. *Alabama.*— Tamplin *v.* Still, 77 Ala. 374.
Connecticut.— Frost *v.* Plumb, 40 Conn. 111, 16 Am. Rep. 18.
Iowa.— Doolittle *v.* Shaw, 92 Iowa 348, 60 N. W. 621, 54 Am. St. Rep. 562.
Maine.— Morton *v.* Gloster, 46 Me. 520, conversion. *Contra*, Parker *v.* Latner, 60 Me. 528, 11 Am. Rep. 210, immoderate driving.
Massachusetts.— Hall *v.* Corcoran, 107 Mass. 251, 9 Am. Rep. 30 [*overruling* Gregg *v.* Wyman, 4 Cush. 322, and *distinguishing* Cox *v.* Cook, 14 Allen 165; Way *v.* Foster, 1 Allen 408].
Michigan.— Costello *v.* Ten Eyck, 86 Mich. 348, 49 N. W. 152, 24 Am. St. Rep. 128; Brazee *v.* Bryant, 50 Mich. 136, 15 N. W. 49.
New Hampshire.—Woodman *v.* Hubbard, 25 N. H. 67, 57 Am. Rep. 310. *Contra*, Chenette *v.* Teehan, 63 N. H. 149, negligent driving.
New Jersey.— Newbury *v.* Luke, 68 N. J. L. 189, 52 Atl. 625.
New York.— Nodine *v.* Doherty, 46 Barb. 59; Harrison *v.* Marshall, 4 E. D. Smith 271.
See 45 Cent. Dig. tit. "Sunday," § 52.
Contra.— Whelden *v.* Chappel, 8 R. I. 230.
An action for negligent and careless driving is not maintainable, as the contract of bailment has not terminated, and the action is for breach of contract. Parker *v.* Latner, 60 Me. 528, 11 Am. Rep. 210; Way *v.* Foster, 1 Allen (Mass.) 408; Chenette *v.* Teehan, 63 N. H. 149; Berrill *v.* Gibbs, 1 Pa. L. J. Rep. 313.

44. Greene *v.* Southworth, 2 Ky. L. Rep. 233.

45. Thompson *v.* Williams, 58 N. H. 248 (holding that a vendee may set up the defense, although he has successfully sued the vendor in trespass for taking the goods from him); Lee *v.* Drake, 10 Pa. Co. Ct. 276.
Right after judgment set aside.— The right of a maker of a note executed on Sunday to show its invalidity is not impaired by the entry of judgment on the note, which is afterward set aside. Whitmire *v.* Montgomery, 165 Pa. St. 253, 30 Atl. 1016.

46. Boland *v.* Kistle, 92 Iowa 369, 60 N. W.

Sunday,[47] nor can it be set up as a defense to an otherwise well-grounded cause of action.[48] Of course it is not available when the act is a work of necessity within the meaning of the statutory exception.[49]

2. Restoration of Consideration or Benefit. Under the statutes of some jurisdictions, a person who receives a valuable consideration for a contract made on Sunday is not permitted to defend an action on the contract on the ground that it was so made until he restores the consideration.[50] The fact that the consideration is of such a nature that it cannot be restored does not defeat the operation of the statute.[51]

C. Pleadings[52] **— 1. In Anticipation of Defense.** Plaintiff is not required to anticipate the defense of illegality and plead that the act or persons were within the exceptions of the statute.[53]

2. Defense of Illegality — a. Necessity of Pleading. The defense that the contract is illegal because executed on Sunday, to be made available, must be raised by the pleadings,[54] at the outset of the case, and not by amendment at the trial.[55]

b. Form of Pleading. The validity of a contract, which appears to have been executed on Sunday, cannot be attacked by demurrer, but only by plea or answer.[56] The defense must be specifically pleaded or notice of it given,[57] and cannot be proved under a general denial,[58] or a plea of *non est factum*,[59] unless plaintiff's pleadings disclose the fact that the contract was consummated on Sunday.[60]

c. Particularity Required. The facts showing a violation of the Sunday law

632, holding that the fact that an agreement for the sale of land to a purchaser procured by plaintiff was made on Sunday does not affect plaintiff's right of action on a prior agreement to pay him for securing a purchaser.

Work done on week days — used on Sunday.— A recovery may be had for work done on secular days, but used on Sundays, where there is no evidence showing knowledge on the part of plaintiff of the unlawful use. Cornelius *v.* Reiser, 18 N. Y. Suppl. 113 [*affirming* 11 N. Y. Suppl. 904].

47. Haacke *v.* Social, etc., Club K. L., 76 Md. 429, 25 Atl. 422, action on new promise.

One who reaffirms a Sunday contract by receiving the consideration on a week day will not be permitted to set up its invalidity. Meriwether *v.* Smith, 44 Ga. 541.

48. Horn *v.* Dorchester Mut. F. Ins. Co., 199 Mass. 534, 85 N. E. 853.

49. Perkins *v.* O'Mahoney, 131 Mass. 546.

50. Wetherell *v.* Hollister, 73 Conn. 622, 48 Atl. 826; Knights *v.* Brown, 93 Me. 557, 45 Atl. 827; Bar Harbor First Nat. Bank *v.* Kingsley, 84 Me. 111, 24 Atl. 794; Wentworth *v.* Woodside, 79 Me. 156, 8 Atl. 763.

Does not apply to actions for negligence.— Wheelden *v.* Lyford, 84 Me. 114, 24 Atl. 793.

51. Wheelden *v.* Lyford, 84 Me. 114, 24 Atl. 793.

52. Pleading generally see 31 Cyc. 1 *et seq.*

53. Bassett *v.* Western Union Tel. Co., 48 Mo. App. 566; De Forth *v.* Wisconsin, etc., R. Co., 52 Wis. 320, 9 N. W. 17, 38 Am. Rep. 737. *Contra*, Willingham *v.* Western Union Tel. Co., 91 Ga. 449, 18 S. E. 298.

54. Lee *v.* Lee, 83 Iowa 565, 50 N. W. 33. *Contra*, Pearson *v.* Kelly, 132 Wis. 660, 100 N. W. 1064; Jacobson *v.* Bentzler, 127 Wis. 566, 107 N. W. 7, 115 Am. St. Rep. 1052, 4 L. R. A. N. S. 1151.

55. Chlein *v.* Kabat, 72 Iowa 291, 33 N. W. 771.

Ontario — amendment permissible.— Crosson *v.* Bigley, 12 Ont. App. 94.

56. Newby *v.* Rogers, 40 Ind. 9; Heavenridge *v.* Mondy, 34 Ind. 28; Western Union Tel. Co. *v.* Eskridge, 7 Ind. App. 208, 33 N. E. 238; Clough *v.* Goggins, 40 Iowa 325; Crosson *v.* Bigley, 12 Ont. App. 94.

57. Riech *v.* Bolch, 68 Iowa 526, 27 N. W. 507; Finley *v.* Quirk, 9 Minn. 194, 86 Am. Dec. 93; Fox *v.* Mensch, 3 Watts & S. (Pa.) 444. *Compare* Lee *v.* Drake, 10 Pa. Co. Ct. 276, where it is said that, as special pleading is abolished by the practice act of 1887, probably the defense would not need to be specially pleaded.

Action for penalty.— In Bassett *v.* Western Union Tel. Co., 48 Mo. App. 566, it was held that if a telegraph company, sued for the statutory penalty for failure to send a telegram received on Sunday, desired to avail itself of the defense that the telegram was not a work of necessity or charity, it must aver and prove the facts taking the case out of the operation of Rev. St. (1889) § 3850, which provides that the Sunday statute shall not be a defense in a suit for damages or penalties against any person or corporation voluntarily contracting or engaging in business on Sunday.

58. Herndon *v.* Henderson, 41 Miss. 584; St. Louis Agricultural, etc., Assoc. *v.* Delano, 108 Mo. 217, 18 S. W. 1101. *Contra*, Hulet *v.* Stratton, 5 Cush. (Mass.) 539.

59. Fox *v.* Mensch, 3 Watts & S. (Pa.) 444.

60. Cardoze *v.* Swift, 113 Mass. 250.

must be stated as fully as is required in framing an indictment for such violation,[61] although it has been held sufficient to allege the date of the instrument in defense, without stating that the day was Sunday.[62] An allegation of execution on Sunday is too indefinite.[63]

3. Reply or Replication. Where a ratification of a Sunday sale is relied on to take the case out of the statute, the replication should state an express promise to pay by the purchaser after his retention of the goods on a secular day.[64]

D. Evidence[65] **— 1. Presumptions and Burden of Proof.**[66] The party who desires to have the act or instrument declared invalid because entered into on Sunday has the burden of showing that it comes within the terms of the statute,[67] and the party who seeks to sustain its validity has the burden of showing that it comes within the exception to the statutes.[68] To sustain the burden of showing that the instrument or transaction comes within the statute defendant must show that the instrument was fully executed or the transaction completed on Sunday, as the court will not assume that it was.[69] However, where the instrument in question is dated on Sunday, it is presumed to have been delivered on that date, and the burden is on the party asserting its validity to show that it was in fact executed on a day other than Sunday.[70]

2. Admissibility. As between the original parties, evidence is admissible to show that an instrument, although purporting to be of a different date, was executed on Sunday.[71] However, where it purports on its face to have been executed on Sunday, evidence that it was executed on some other day, is incompetent, in the absence of any such allegation in the pleadings.[72] A deposition showing deponent's refusal to answer questions concerning his purchase of a bill of exchange on Sunday on the ground that his answer would incriminate him, is not admissible as tending to show that he did buy such bill on Sunday.[73]

3. Weight and Sufficiency.[74] Where the testimony is equally balanced on the question whether an instrument was delivered on Saturday or Sunday, a finding that it was delivered on Saturday will not be disturbed, as the burden of proof is on the party contending that it was delivered on Sunday.[75]

61. Ray *v.* Catlett, 12 B. Mon. (Ky.) 532; Powers *v.* Brooks, 7 Ky. L. Rep. 204. See also Crosson *v.* Bigley, 12 Ont. App. 94.

Where performance in another state is contemplated, the act must be shown by the pleadings to be prohibited by the laws of that state. Waters *v.* Richmond, etc., R. Co., 108 N. C. 349, 12 S. E. 950.

62. Finney *v.* Callendar, 8 Minn. 41.

63. Stevens *v.* Hallock, 7 Kulp (Pa.) 260.

64. Simpson *v.* Nicholls, 6 Dowl. P. C. 355, 1 H. & H. 12, 7 L. J. Exch. 117, 3 M. & W. 240.

Contra in Arkansas, as under the Arkansas code there can be no reply except upon a set-off or counter-claim. Tucker *v.* West, 29 Ark. 386.

65. **Evidence** generally see 16 Cyc. 821, 17 Cyc. 1.

66. **Presumptions and burden of proof** generally see 16 Cyc. 926, 1050.

67. Sanders *v.* Johnson, 29 Ga. 526; Conrad *v.* Kinzie, 105 Ind. 281, 4 N. E. 863; Phillips *v.* Phillips, 83 Mich. 259, 47 N. W. 110.

Presumption arising from delivery.— In an action on a contract for the sale of a chattel, evidence that the vendee received the chattel from a third person on Sunday does not raise such a presumption that the contract was made on Sunday as will defeat the action. Hadley *v.* Snevily, 1 Watts & S. (Pa.) 477.

68. Sayre *v.* Wheeler, 32 Iowa 559; Hinckley *v.* Penobscot, 42 Me. 89; Bosworth *v.* Swansey, 10 Metc. (Mass.) 363, 43 Am. Dec. 441; Troewert *v.* Decker, 51 Wis. 46, 8 N. W. 26, 37 Am. St. Rep. 808.

There is no presumption in aid of a contract which appears to have been executed on Sunday that the parties were observers of Saturday as their Sabbath and therefore at liberty to contract on Sunday. Sayre *v.* Wheeler, 31 Iowa 112. However it has been held that the allowance by an auditor of a charge in an account for services rendered on Sunday will be presumed to be for lawful services, unless the contrary affirmatively appears. Bates *v.* Sabin, 64 Vt. 511, 24 Atl. 1013.

69. Conrad *v.* Kinzie, 105 Ind. 281, 4 N. E. 863; Toll *v.* Crimean, 13 Montg. Co. Rep. (Pa.) 33.

70. Williams *v.* Armstrong, 130 Ala. 389, 30 So. 553; Hauerwas *v.* Goodloe, 101 Ala. 162, 13 So. 567.

71. Cumberland Bank *v.* Mayberry, 48 Me. 198.

72. McIntosh *v.* Lee, 57 Iowa 356, 10 N. W. 895.

73. Harrison *v.* Powers, 76 Ga. 218.

74. **Weight and sufficiency** of evidence generally see 17 Cyc. 753.

75. Phillips *v.* Phillips, 83 Mich. 259, 47 N. W. 110.

E. Trial and Review — 1. Province of Court and Jury.[76] It is within the province of the jury to determine whether the transaction was closed on Sunday,[77] and if so, whether it was justified on the ground of necessity or charity.[78] Where the facts are not in dispute, it is a question of law whether the sale is to the disturbance of others within the meaning of a statute prohibiting business on Sunday to the disturbance of others.[79]

2. Instructions.[80] An instruction that no recovery may be had on Sunday agreements is justified by evidence tending to prove that the agreement in question was made on Sunday.[81]

3. Opening of Judgment.[82] It is no ground for opening or arresting a judgment that the note on which it is based was executed on Sunday.[83] However, the rendition of judgment on a note executed on Sunday does not impart validity to an accompanying agreement of indemnity.[84]

4. Appeal and Error.[85] An attack upon the validity of the contract will not be noticed when made for the first time in the appellate court.[86]

VII. Injuries Received or Inflicted While Violating Law.

A. Liability — 1. Rule Stated. It is a general rule of law that no man shall be allowed to found any claim upon his own iniquity.[87] In accordance with this rule, it has been held in a few jurisdictions that no liability attaches for injuries received by a person while violating the Sabbath laws, as his own illegal act necessarily contributes to the injury.[88] This rule, confined in its application to some of the New England states, has been held to be against reason and the great weight of authority,[89] and has in at least two jurisdictions been superseded by positive statutory enactment.[90] The more enlightened rule, and the one supported by the great weight of authority, is that a violation of the Sunday law by the person injured does not prevent a recovery, as such violation is not the efficient or proximate cause of the injury, or an essential element of the cause of action; and as the time when the injury was inflicted is only an incident and not the foundation

76. **Province of court and jury** generally see Trial.

77. Bradley *v.* Rea, 103 Mass. 188, 4 Am. Rep. 524; Hill *v.* Dunham, 7 Gray (Mass.) 543. See also Cameron *v.* Peck, 37 Conn. 555.

78. Hooper *v.* Edwards, 18 Ala. 280; Rogers *v.* Western Union Tel. Co., 78 Ind. 169, 41 Am. Rep. 558. *Contra,* Allen *v.* Duffie, 43 Mich. 1, 4 N. W. 427, 38 Am. Rep. 159; Toll *v.* Crimean, 13 Montg. Co. Rep. (Pa.) 33, holding that it is a question of law for the court whether a religious or charitable association is of such a character that its acts fall within the statutory exception of charity.

79. Thompson *v.* Williams, 58 N. H. 248.

80. **Instructions** generally see Trial.

81. Hanchett *v.* Jordan, 43 Minn. 149, 45 N. W. 617.

82. **Opening judgment** generally see Judgments, 23 Cyc. 889.

83. Hill *v.* Dunham, 7 Gray (Mass.) 543; Lee *v.* Drake, 10 Pa. Co. Ct. 276; Linden *v.* Hicks, 2 Luz. Leg. Reg. (Pa.) 101.

84. Hill *v.* Sherwood, 3 Wis. 343.

85. **Appeal and error** generally see Appeal and Error, 2 Cyc. 474; 3 Cyc. 1.

86. Roop *v.* Roop, 35 Pa. St. 59.

87. See Actions, 1 Cyc. 674 text and note 87. See also, generally, Torts.

88. Day *v.* Highland St. R. Co., 135 Mass. 113, 46 Am. Rep. 447; Bucher *v.* Fitchburg R. Co., 131 Mass. 156, 41 Am. Rep. 216; Davis *v.* Somerville, 128 Mass. 594, 35 Am. Rep. 390; Lyons *v.* Desotelle, 124 Mass. 387; Hyde Park *v.* Gay, 120 Mass. 589; Smith *v.* Boston, etc., R. Co., 120 Mass. 490, 21 Am. Rep. 538; McGrath *v.* Merwin, 112 Mass. 467, 17 Am. Rep. 119; Beacham *v.* Portsmouth Bridge, 68 N. H. 382, 40 Atl. 1066, 73 Am. St. Rep. 607, in which case, however, the injury was received in Maine before the enactment of Me. Laws (1895), c. 129, which changed the rule in Maine on the subject.

89. Gross *v.* Miller, 93 Iowa 72, 61 N. W. 385, 26 L. R. A. 605; Kansas City *v.* Orr, 62 Kan. 61, 61 Pac. 397, 50 L. R. A. 783. In Solarz *v.* Manhattan R. Co., 8 Misc. (N. Y.) 656, 658, 29 N. Y. Suppl. 1123, 31 Abb. N. Cas. 426 [*affirmed* in 11 Misc. 715, 32 N. Y. Suppl. 1149], the court, per McAdam, J., said: "The decisions of the Massachusetts courts to the contrary depend so much on the peculiar legislation and customs of that commonwealth as to be regarded inapplicable to injuries received in this state."

90. Bridges *v.* Bridges, 93 Me. 557, 45 Atl. 827; Jordan *v.* New York, etc., R. Co., 165 Mass. 346, 43 N. E. 111, 52 Am. St. Rep. 522, 32 L. R. A. 101; Read *v.* Boston, etc., R. Co., 140 Mass. 199, 4 N. E. 227, holding, however, that St. (1889) c. 37, did not apply to an action for injuries incurred before its passage

of the action.[91] There is a similar rule to the effect that a person engaged in employment upon the Sabbath, in violation of a statute, is not liable for injuries inflicted by him without other fault or negligence on his part.[92]

2. Application of Rule. The rule above stated, namely, that a person violating the Sunday law is not precluded from recovering damages for injuries received, has been applied to a variety of injuries, including those caused by the negligence or wrongful act of a common carrier,[93] injuries to vessels,[94] injuries to servants, [95] and various injuries received while traveling on Sunday in violation of the stat-

91. *Arkansas.*— Arkansas, etc., R. Co. *v.* Lee, 79 Ark. 448, 96 S. W. 148.

Connecticut.— See Horton *v.* Norwalk Tramway Co., 66 Conn. 272, 33 Atl. 914.

Georgia.— Wallace *v.* Cannon, 38 Ga. 199, 95 Am. Dec. 385, the decision being placed upon the ground that both parties were not engaged in the same illegal transaction.

Indiana.— Louisville, etc., R. Co. *v.* Frawley, 110 Ind. 18, 30, 9 N. E. 594, where it is said: "The fact that one who sustains an injury by the negligent or wrongful act of another, may have been, at the time of such injury, acting in disobedience to his collateral obligation to the State, which required of him the observance of the Sunday laws, will not prevent a recovery from one whose wrongful or negligent act or omission was the proximate cause of such injury."

Iowa.— Taylor *v.* Star Coal Co., 110 Iowa 40, 81 N. W. 249; Gross *v.* Miller, 93 Iowa 72, 61 N. W. 385, 26 L. R. A. 605; Schmid *v.* Humphrey, 48 Iowa 652, 30 Am. Rep. 414.

Kansas.— Kansas City *v.* Orr, 62 Kan. 61, 61 Pac. 397, 50 L. R. A. 783.

Minnesota.— Opsahl *v.* Judd, 30 Minn. 126, 14 N. W. 575.

New York.— Etchberry *v.* Levielle, 2 Hilt. 40; Solarz *v.* Manhattan R. Co., 8 Misc. 656, 29 N. Y. Suppl. 1123 [*affirmed* in 32 N. Y. Suppl. 1149].

Rhode Island.— Eagan *v.* Maguire, 21 R. I. 189, 42 Atl. 506; Baldwin *v.* Barney, 12 R. I. 392, 34 Am. Rep. 670.

Vermont.— Hoadley *v.* International Paper Co., 72 Vt. 79, 47 Atl. 169 [*distinguishing* Duran *v.* Standard L., etc., Ins. Co., 63 Vt. 437, 22 Atl. 530, 25 Am. St. Rep. 773, 13 L. R. A. 637; Holcomb *v.* Danby, 51 Vt. 428; Johnson *v.* Irasburgh, 47 Vt. 28, 19 Am. Rep. 111; Boyden *v.* Fitchburg R. Co., 70 Vt. 125, 39 Atl. 771.

United States.—Philadelphia, etc., R. Co. *v.* Philadelphia, etc., Steam Towboat Co., 23 How. 209, 16 L. ed. 433.

See 45 Cent. Dig. tit. "Sunday," § 59 *et seq.*

Mitigation of damages.— The violation of the Sabbath laws cannot be taken into consideration either as a defense or in mitigation of damages. Etchberry *v.* Levielle, 2 Hilt. (N. Y.) 40.

The duty of a city to keep its streets in proper repair is the same on Sunday as on any other day. Snook *v.* Anaconda, 26 Mont. 128, 66 Pac. 756.

92. Tingle *v.* Chicago, etc., R. Co., 60 Iowa 333, 14 N. W. 320.

93. *Indiana.*— Chicago, etc., R. Co. *v.* Graham, 3 Ind. App. 28, 29 N. E. 170, 50 Am. St. Rep. 256.

Kentucky.— Opsahl *v.* Judd, 5 Ky. L. Rep. 187 note.

Minnesota.— Opsahl *v.* Judd, 30 Minn. 126, 14 N. W. 575.

New Jersey.— Delaware, etc., R. Co. *v.* Trautwein, 52 N. J. L. 169, 19 Atl. 178, 19 Am. St. Rep. 442, 7 L. R. A. 435; Smith *v.* New York, etc., R. Co., 46 N. J. L. 7; Smith *v.* Susquehanna, etc., R. Co., 6 N. J. L. J. 188.

New York.— Carroll *v.* Staten Island R. Co., 58 N. Y. 126, 17 Am. Rep. 221; Landers *v.* Staten Island R. Co., 13 Abb. Pr. N. S. 338.

Vermont.— Boyden *v.* Fitchburg R. Co., 70 Vt. 125, 39 Atl. 771.

Wisconsin.— Knowlton *v.* Milwaukee City R. Co., 59 Wis. 278, 18 N. W. 17, 16 Am. & Eng. R. Cas. 330.

See 45 Cent. Dig. tit. "Sunday," § 62.

For contra cases under the former rule in Massachusetts see Bucher *v.* Fitchburg R. Co., 131 Mass. 156, 41 Am. Rep. 216; Stanton *v.* Metropolitan R. Co., 14 Allen (Mass.) 485.

94. Mohney *v.* Cook, 26 Pa. St. 342, 67 Am. Dec. 419; Strickler *v.* Hough, 1 Pittsb. (Pa.) 239; McArthur *v.* Green Bay, etc., Canal Co., 34 Wis. 139; Philadelphia, etc., R. Co. *v.* Philadelphia, etc., Steam Towboat Co., 23 How. (U. S.) 209, 16 L. ed. 433; Sawyer *v.* Oakman, 21 Fed. Cas. No. 12,402, 7 Blatchf. 290 [*affirming* 21 Fed. Cas. No. 12,404, 1 Lowell 134]. *Contra,* Wallace *v.* Merrimack River Nav., etc., Co., 134 Mass. 95, 45 Am. Rep. 301.

95. Louisville, etc., R. Co. *v.* Buck, 116 Ind. 566, 19 N. E. 453, 9 Am. St. Rep. 883, 2 L. R. A. 520; Taylor *v.* Star Coal Co., 110 Iowa 40, 81 N. W. 249; Solarz *v.* Manhattan R. Co., 8 Misc. (N. Y.) 656, 29 N. Y. Suppl. 1123, 31 Abb. N. Cas. 426 [*affirmed* in 11 Misc. 715, 32 N. Y. Suppl. 1149]; Hoadley *v.* International Paper Co., 72 Vt. 79, 47 Atl. 169. *Contra,* Read *v.* Boston, etc., R. Co., 140 Mass. 199, 4 N. E. 227; Day *v.* Highland St. R. Co., 135 Mass. 113, 44 Am. Rep. 447. In Solarz *v.* Manhattan R. Co., 8 Misc. (N. Y.) 656, 657, 29 N. Y. Suppl. 1123, 31 Abb. N. Cas. 426 [*affirmed* in 11 Misc. 715, 32 N. Y. Suppl. 1149], it appeared that plaintiff was required to report for work by defendant on Sunday, and while working was injured. The court said: "A party violating the law is not on that account put at the mercy of others. Cooley Torts 159. He may not be able to recover for services ren-

ute,[96] such as those caused by a defective highway.[97] However, a person injured while traveling and hunting on the Sabbath cannot recover on an accident insurance policy which expressly excepts from its operation injuries resulting from or effected by a violation of law.[98]

B. Actions — 1. Burden of Proof.[99] In jurisdictions where a violation of the Sunday statute precludes a person from recovering for injuries received on that day, the burden of proof is on him to show that the work in which he was engaged was a work of necessity or charity.[1] However, in jurisdictions where such violation does not prevent recovery, he is not required to show that he was engaged in a work of necessity at the time of the accident.[2]

2. Province of Court and Jury.[3] The question of whether plaintiff was engaged in an act of necessity or charity, when it becomes an issue in actions of this nature, is for the jury to determine.[4] In an action for death by wrongful act the trial court should not submit to the jury the question whether decedent's

dered on the faith of the contract; but he is not for that reason to be physically disabled. In other words, defendant, in order to escape from liability for its negligence, cannot plead a violation of the Sunday law which it invited."

In Nebraska the right of the father of a section hand employed by a railroad company to recover for his death resulting from the negligence of the company was upheld on the ground that one of the exceptions of the Sunday statute was the running of necessary trains, and the railroad company, having itself decided that the work of the deceased was a work of necessity, could not assert that it was not. Johnson *v.* Missouri Pac. R. Co., 18 Nebr. 690, 26 N. W. 347.

The rule as to fellow servants is not changed or affected by the fact that the accident happened and the injury was received on Sunday. Houston, etc., R. Co. *v.* Rider, 62 Tex. 267.

96. *Iowa.*— Schmid *v.* Humphrey, 48 Iowa 652, 30 Am. Rep. 414, frightening of horse by dog.

Kentucky.— Illinois Cent. R. Co. *v.* Dick, 91 Ky. 434, 15 S. W. 665, 12 Ky. L. Rep. 772.

Maine.— Knights *v.* Brown, 93 Me. 557, 45 Atl. 827, injuries caused by unsafe condition of carriage.

Massachusetts.— White *v.* Lang, 128 Mass. 598, 35 Am. Rep. 402, injury by dog. *Contra*, Lyons *v.* Desotelle, 124 Mass. 387; Smith *v.* Boston, etc., R. Co., 120 Mass. 490, 21 Am. Rep. 538.

Michigan.— Van Auken *v.* Chicago, etc., R. Co., 96 Mich. 307, 55 N. W. 971, 22 L. R. A. 33.

Rhode Island.— Baldwin *v.* Barney, 12 R. I. 392, 34 Am. Rep. 670, collision of two vehicles.

United States.— Morris *v.* Chicago, etc., R. Co., 26 Fed. 22.

See 45 Cent. Dig. tit. "Sunday," § 60.

Contra.—Beacham *v.* Portsmouth Bridge, 68 N. H. 382, 40 Atl. 1066, 73 Am. St. Rep. 607, where the injury in question was incurred in Maine before the abrogation of the old rule in Maine by Acts (1895), c. 129.

97. Sharp *v.* Evergreen Tp., 67 Mich. 443, 35 N. W. 67; Wentworth *v.* Jefferson, 60 N. H. 158; Sewell *v.* Webster, 59 N. H. 586; Corey *v.* Bath, 35 N. H. 530; Platz *v.* Cohoes, 89 N. Y. 219, 42 Am. Rep. 286 [*affirming* 24 Hun 101]; Sutton *v.* Wauwatosa, 29 Wis. 21, 9 Am. Rep. 534. See also Dutton *v.* Weare, 17 N. H. 34, 43 Am. Dec. 590.

Contra.— Under the former rule in Maine, Massachusetts, and Vermont no recovery could be had unless plaintiff came within some of the exceptions of the statute, and hence was not really violating the law. Cleveland *v.* Bangor, 87 Me. 259, 32 Atl. 892, 47 Am. St. Rep. 326; Buck *v.* Biddeford, 82 Me. 433, 19 Atl. 912; Davidson *v.* Portland, 69 Me. 116, 31 Am. Rep. 253; O'Connell *v.* Lewiston, 65 Me. 34, 20 Am. Rep. 673; Cratty *v.* Bangor, 57 Me. 423, 2 Am. Rep. 56; Bryant *v.* Biddeford, 39 Me. 193; Barker *v.* Worcester, 139 Mass. 74, 29 N. E. 474; Cronan *v.* Boston, 136 Mass. 384; Davis *v.* Somerville, 128 Mass. 594, 35 Am. Rep. 399; Gorman *v.* Lowell, 117 Mass. 65; Connolly *v.* Boston, 117 Mass. 64, 19 Am. Rep. 396; Hamilton *v.* Boston, 14 Allen (Mass.) 475; Bosworth *v.* Swansey, 10 Metc. (Mass.) 363, 43 Am. Dec. 441; Holcomb *v.* Danby, 51 Vt. 428; Johnson *v.* Irasburgh, 47 Vt. 28, 19 Am. Rep. 111 (holding that town is not bound to maintain highway for unlawful travel); McClary *v.* Lowell, 44 Vt. 116, 8 Am. Rep. 366.

98. Duran *v.* Standard L., etc., Ins. Co., 63 Vt. 437, 22 Atl. 530, 25 Am. St. Rep. 773, 13 L. R. A. 637.

A person injured while returning from a funeral on Sunday is not precluded from recovering on an accident policy containing such an exception. Eaton *v.* Atlas Accident Ins. Co., 89 Me. 570, 36 Atl. 1048.

99. **Burden of proof** generally see 16 Cyc. 926 *et seq.*

1. Hinckley *v.* Penobscot, 42 Me. 89; Bosworth *v.* Swansey, 10 Metc. (Mass.) 363, 43 Am. Dec. 441.

2. Black *v.* Lewiston, 2 Ida. (Hasb.) 276, 13 Pac. 80, holding that a motion for nonsuit on that ground was properly overruled.

3. **Province of court and jury** generally see Trial.

4. Feital *v.* Middlesex R. Co., 109 Mass. 398, 12 Am. Rep. 720.

working on Sunday was the proximate cause of the injury, but should instruct it that it constitutes no defense.[5]

VIII. PENALTIES.[6]

A. In General. In some jurisdictions a violator of the Sunday statutes is subject to a penalty recoverable in a civil action.[7] Such violator is subject to no other penalty than that named in the indictment.[8] Where criminal punishment is also provided for, both remedies may be pursued together or independently,[9] and a conviction under the criminal statutes is not a condition precedent to the maintenance of an action for the penalty.[10]

B. Proceedings to Enforce — 1. Petition — a. Joinder of Offenses. Although a separate penalty may be imposed for each distinct violation of the law by the same person and on the same day,[11] several causes of action against the same person may be combined in one action, and the state cannot be required to elect which cause of action it will prosecute.[12]

b. Charging Part. Where the statute of limitation is not involved, it is sufficient to allege that the act was done on the Sabbath, without naming the day and month.[13] And the omission of the name of the state where the alleged acts were committed is not fatal where the county is mentioned, as the court will take judicial notice that the county is within the state.[14] In accordance with the general rules of pleading[15] facts and not conclusions must be stated;[16] and the petition is demurrable if it shows on its face that the work was an act of necessity or charity.[17] No more need be alleged than is sufficient to bring the case within the statute.[18]

2. Judgment and Costs. A judgment which does not respond to the issue raised by the complaint or petition is erroneous.[19] On the quashal of a conviction, costs will be awarded against the prosecutor in a case where he would have been entitled to a moiety of the penalty.[20]

3. Appeal. Although the penalty named in the statute is not large enough

5. Hoadley *v.* International Paper Co., 72 Vt. 79, 47 Atl. 169.

6. Penalty and enforcement thereof generally see Penalties, 30 Cyc. 1331.

7. See the statutes of the several states.

The forfeiture mentioned in Va. Code (1904), § 5799, for violation of the Sabbath laws, is recoverable only by civil warrant, and is not recoverable by indictment for a misdemeanor. Puckett *v.* Com., 107 Va. 844, 57 S. E. 591; Wells *v.* Com., 107 Va. 834, 57 S. E. 588.

An employee, as well as his employer, is liable for the forfeiture (Puckett *v.* Com., 107 Va. 844, 57 S. E. 591); but where the facts are such that the employer is not liable, neither is the employee (Reg. *v.* Reid, 30 Ont. 732).

8. Tingle *v.* Chicago, etc., R. Co., 60 Iowa 333, 14 N. W. 320.

Proceedings on default.— Under 29 Car. 2, § 1, defendant may be put in stocks in default of sufficient distress after he has failed to pay the penalty assessed, but not for failure to pay the costs. Reg. *v.* Barton, 13 Q. B. 389, 13 Jur. 232, 18 L. J. M. C. 56, 3 New Sess. Cas. 470, 66 E. C. L. 389.

9. New York *v.* Williams, 48 Misc. (N. Y.) 77, 96 N. Y. Suppl. 237.

10. New York *v.* Williams, 48 Misc. (N. Y.) 77, 96 N. Y. Suppl. 237.

11. Reiff *v.* Com., 1 Montg. Co. Rep. (Pa.) 24. *Contra*, see Frideborn *v.* Com., 2 Montg. Co. Rep. (Pa.) 149.

12. Com. *v.* Chesapeake, etc., R. Co., 128 Ky. 542, 108 S. W. 851, 32 Ky. L. Rep. 1400.

13. Louisville, etc., R. Co. *v.* Com., 92 Ky. 114, 17 S. W. 274, 13 Ky. L. Rep. 439 [*affirming* 12 Ky. L. Rep. 603].

14. Louisville, etc., R. Co. *v.* Com., 12 Ky. L. Rep. 603.

15. See Pleading, 31 Cyc. 49.

16. Louisville, etc., R. Co. *v.* Com., 92 Ky. 114, 17 S. W. 274, 13 Ky. L. Rep. 439.

17. Com. *v.* Chesapeake, etc., R. Co., 128 Ky. 542, 108 S. W. 851, 32 Ky. L. Rep. 1400; Louisville, etc., R. Co. *v.* Com., 92 Ky. 114, 17 S. W. 274, 13 Ky. L. Rep. 439.

18. Crippen *v.* Byron, 4 Gray (Mass.) 314, holding that in an action to recover the penalty imposed by Rev. St. c. 19, § 22, on the owner of a horse going at large on the highway on the Lord's day, and not under the care of a keeper, the declaration need not allege that defendant was guilty of any act or omission which caused the horse to go at large, and sufficiently describes the penalty by alleging it to be the same amount of fees which the field driver would have been entitled to receive if he had distrained and impounded the horse.

19. Schneider *v.* Marinelli, 62 N. J. L. 739, 42 Atl. 1077.

20. Reg. *v.* Reed, 30 Ont. 732.

to give a court jurisdiction of the appeal, yet jurisdiction is conferred where several causes of action are combined and the maximum amount of the penalties exceed the amount required for jurisdiction.[21]

C. Disposition of Fines. An act providing for the disposition of fines collected under the Sunday law is not repealed by a later act providing for the disposition of fines and penalties collected by certain officers.[22]

IX. CRIMINAL PROSECUTIONS FOR VIOLATION OF LAW.[23]

A. Jurisdiction. In some states and countries inferior courts have jurisdiction to try offenses against the Sunday laws,[24] even though the prosecution is under a city ordinance, and the act is also a violation of the state law.[25] A court of last resort has no original jurisdiction.[26]

B. Complaint, Indictment, or Information[27] — **1. When Indictment Lies.** At common law the performance of labor or business on the Sabbath was not indictable.[28] An indictment will lie under a statute prohibiting the doing of certain acts on the Sabbath, under a penalty certain, although no mention is made of an indictment,[29] unless some other specific mode of recovery is specified, such as summary proceedings before a justice of the peace.[30] Even though for a single offense a person is liable to a penalty, yet a succession of such acts, performed in such manner as to become a nuisance, is indictable.[31] Where the statutes authorize an indictment for selling and bartering on Sunday, an indictment

21. Com. *v.* Chesapeake, etc., R. Co., 128 Ky. 542, 108 S. W. 851, 32 Ky. L. Rep. 1400. See also Appeal and Error, 2 Cyc. 566.

22. Allegheny County *v.* Com., 1 Mona. (Pa.) 119.

23. **Criminal law and criminal procedure** generally see Criminal Law, 12 Cyc. 70.

24. Erbe *v.* Monteverde, 13 Misc. (N. Y.) 404, 35 N. Y. Suppl. 102, police justice.

In Massachusetts a justice of the peace has no jurisdiction if defendant lives outside the county. Pearce *v.* Atwood, 13 Mass. 324.

Leave of designated official.— Under the Lord's Day Act, Can. Rev. St. (1906) c. 153, § 17, leave of the attorney-general for the province in which the offense is alleged to have been committed must be obtained and proper evidence of such leave presented to the magistrates before they have jurisdiction to start the proceedings by taking an information. Rex *v.* Canadian Pac. R. Co., 12 Can. Cr. Cas. 549. And in England no step can be taken in cases to which the Sunday Observance Prosecution Act (1871) (34 & 35 Vict. c. 87) applies, except by or with the written consent of the chief officer of police, or with the consent of the magistrate. This written consent must be obtained when the information is laid. Thorpe *v.* Priestnall, [1897] 1 Q. B. 159, 60 J. P. 821, 66 L. J. Q. B. 248, 45 Wkly. Rep. 223. However, this act applies only to prosecutions begun under the act of 29 Chas. II, and not to those begun under 3 Geo. IV, c. cvi, which prohibits a baker from baking bread on the Lord's day. Rex *v.* Mead, [1902] 2 K. B. 212, 20 Cox C. C 337, 69 J. P. 676, 71 L. J. K. B. 871, 87 L. T. Rep. N. S. 136, 18 T. L. R. 544, 50 Wkly. Rep. 589.

The jurisdiction of the justice may be inquired into in an action of trespass for levying the penalties. Crepps *v.* Durden, Cowp. 640, 98 Eng. Reprint 1283.

25. Hood *v.* Von Glahn, 88 Ga. 405, 14 S. E. 564.

26. Com. *v.* Johnson, 8 Mass. 87.

27. **Criminal complaint** generally see Criminal Law, 12 Cyc. 290.

Indictment and information see Indictments and Informations, 22 Cyc. 157.

For forms of indictments, informations, and complaints in whole or in part see Stockden *v.* State, 18 Ark. 186; Seale *v.* State, 121 Ga. 741, 742, 49 S. E. 740; McCarthy *v.* State, 56 Ind. 203, 204; Eitel *v.* State, 33 Ind. 201, 203; State *v.* Nickelson, 137 Mo. App. 24, 25, 118 S. W. 1192; New Castle *v.* Cummings, 36 Pa. Super. Ct. 443, 445; Seaman *v.* Com., 11 Wkly. Notes Cas. (Pa.) 14; State *v.* Baltimore, etc., R. Co., 15 W. Va. 362, 364, 36 Am. Rep. 803; Connor *v.* Quest, 71 J. P. 62, 96 L. T. Rep. N. S. 28.

28. State *v.* Williams, 26 N. C. 400 [*followed* in State *v.* Brooksbank, 28 N. C. 73]; *In re* King, 46 Fed. 905; Rex *v.* Brotherton, Str. 702, 93 Eng. Reprint 794. See also Rex *v.* Cox, 2 Burr. 785, 97 Eng. Reprint 562. *Compare* Parker *v.* State, 84 Tenn. 476, 1 S. W. 202; Gunter *v.* State, 1 Lea (Tenn.) 129. In 2 Chitty Cr. L. 20, there is a precedent, adopted from the crown circuit companion, of an indictment against a butcher as a common Sabbath-breaker.

29. State *v.* Meyer, 1 Speers (S. C.) 305 [*followed* in State *v.* Helgen, 1 Speers (S. C.) 310].

30. State *v.* Williams, 26 N. C. 400 [*followed* in State *v.* Brooksbank, 28 N. C. 73]. See, generally, Indictments and Informations, 22 Cyc. 176.

31. Com. *v.* Depuy, 6 Pa. L. J. 223; Parker *v.* State, 84 Tenn. 476, 1 S. W. 202; Gunter *v.*

will lie for each separate act of barter and sale;[32] but where the offense consists in exercising one's ordinary calling, there can be but one offense for one and the same day, and convictions for more than one are in excess of jurisdiction.[33]

2. Sufficiency — a. In General. The indictment, information, or complaint must embrace all the element of the offense as defined by the statute under which the prosecution is brought and the decisions construing it, or it will be deemed insufficient.[34]

b. Venue. Not only the place where the alleged offense was committed,[35] but also the fact that it was committed in the county where the prosecution is brought, must be affirmatively alleged.[36]

c. Seal. When not required by statute, the complaint need not be under the seal of the court.[37]

d. Allegation of Intent. An indictment for keeping open a store or shop on Sunday need not aver a criminal intent.[38]

e. Grammatical Errors. It is not a valid objection to the indictment, information, or complaint that it is inartificial and ungrammatical, provided it contains, in substance, a sufficient statement of the facts constituting the offense intended to be charged.[39]

f. Following Language of Statute. An indictment which charges the offense in the language of the statute is sufficient,[40] although it is not essential to use the precise language, provided the substance of it is embraced in the words used.[41]

g. Negativing Exceptions. Although it is held in a few jurisdictions that the exceptions in the statute need not be negatived,[42] and that any attempt to do so is mere surplusage,[43] the weight of authority seems to be that an indictment which does not negative such exception is insufficient.[44]

State, 1 Lea (Tenn.) 129. See also *In re* King, 46 Fed. 905.

32. Albrecht *v.* State, 8 Tex. App. 313.

33. Crepps *v.* Durden, Cowp. 640, 98 Eng. Reprint 1283.

34. State *v.* Carpenter, 62 Mo. 594; People *v.* Hesterberg, 43 Misc. (N. Y.) 510, 89 N. Y. Suppl. 498; People *v.* De Mott, 38 Misc. (N. Y.) 171, 77 N. Y. Suppl. 249.

Averment of all substantial and jurisdictional facts is sufficient. New Castle *v.* Cummings, 36 Pa. Super. Ct. 443.

35. People *v.* Lyons, 5 Hun (N. Y.) 643.

36. Com. *v.* Phelps, 170 Pa. St. 430, 32 Atl. 1092; Noftsker *v.* Com., 8 Pa. Dist. 572, 22 Pa. Co. Ct. 559; Miller *v.* Com., 24 Pa. Co. Ct. 513.

37. Com. *v.* De Voe, 159 Mass. 101, 34 N. E. 85.

38. Brittin *v.* State, 10 Ark. 299; Shover *v.* State, 10 Ark. 259.

In Massachusetts the statute against keeping open has been construed to prohibit only the keeping open for the purpose of work or the transaction of business, hence the unlawful purpose must be alleged, but a general allegation is sufficient. Com. *v.* Wright, 12 Allen 187; Com. *v.* Collins, 2 Cush. 556.

39. People *v.* Maguire, 26 Cal. 635.

40. Cleary *v.* State, 56 Ark. 124, 19 S. W. 313; State *v.* Crabtree, 27 Mo. 232. See also State *v.* Nesbit, 8 Kan. App. 104, 54 Pac. 326.

41. People *v.* Maguire, 26 Cal. 635.

Failure to pursue the scope and intention of the statute renders the indictment invalid. State *v.* Carpenter, 62 Mo. 594.

Following statute but not form.—An indictment which pursues the statute in its averments is sufficient, although it does not contain all the averments of the form prescribed by another statute. Jebeles *v.* State, 131 Ala. 41, 31 So. 377.

42. *Georgia.*— Seale *v.* State, 121 Ga. 741, 49 S. E. 740.

Kansas.— State *v.* Nesbit, 8 Kan. App. 104, 54 Pac. 326.

Massachusetts.— Com. *v.* De Voe, 159 Mass. 101, 34 N. E. 85; Com. *v.* Shannihan, 145 Mass. 99, 13 N. E. 347; Com. *v.* Dextra, 143 Mass. 28, 8 N. E. 756; Com. *v.* Sampson, 97 Mass. 407; Com. *v.* Trickey, 95 Mass. 559.

Ohio.— Billigheimer *v.* State, 32 Ohio St. 435.

West Virginia.— State *v.* Baltimore, etc., R. Co., 15 W. Va. 362, 36 Am. Rep. 803.

See 45 Cent. Dig. tit. "Sunday," § 69.

Exception in enacting clause.— In Massachusetts the rule is otherwise when the offense charged is that of an innkeeper entertaining on the Lord's day persons who are not travelers, strangers, or lodgers, as the exceptions are contained in the enacting clause of the statute, and not in a separate clause. Com. *v.* Crowther, 117 Mass. 116; Com. *v.* Maxwell, 2 Pick. (Mass.) 139.

43. Seale *v.* State, 121 Ga. 741, 49 S. E. 740; Com. *v.* Dextra, 143 Mass. 28, 8 N. E. 756.

44. *Arkansas.*— Halliburton *v.* State, 71 Ark. 474, 75 S. W. 929.

Delaware.— Wright *v.* State, 6 Pennew. 461, 69 Atl. 1003; Mott *v.* State, 5 Pennew. 474, 62 Atl. 301.

Indiana.— Russell *v.* State, 50 Ind. 174.

h. Certainty and Particularity — (I) *In General.* The indictment must contain such a statement of the particular circumstances constituting the offense charged that the court can say as a matter of law that, admitting the allegations to be true, there has been a violation of the statute.[45] However, facts sufficient to show the gist of the offense is all that is required. Attending facts and circumstances, which are not essential ingredients of the offense, need not be alleged;[46] but if alleged, they must be proved.[47]

(II) *Ownership.* In an indictment for keeping open on Sunday, it is not necessary to allege that defendant is the owner of the building kept open.[48]

(III) *Time.* As an offense against the Sunday laws consists in the doing of an act on a prohibited day, time is of the essence of the offense, and it must be affirmatively alleged that the act complained of was performed on a Sunday,[49] although the particular Sunday is not important,[50] provided it is within the statute of limitations.[51] An indictment is sufficient which alleges the commission of the offense on Sunday, but which fails to state the day of the month[52] or refers to a wrong date.[53] Likewise an indictment which names the day of the month and year but does not allege that it was Sunday is good, as the court will take judicial notice that the date named was Sunday.[54]

Missouri.— State *v.* Carpenter, 62 Mo. 594; State *v.* Stone, 15 Mo. 513.

New Jersey.— State *v.* Peters, 51 N. J. L. 244, 17 Atl. 113.

Vermont.— State *v.* Barker, 18 Vt. 195.

Wisconsin.— Jensen *v.* State, 60 Wis. 577, 19 N. W. 374.

See 45 Cent. Dig. tit. "Sunday," § 69; and, generally, Indictments and Informations, 22 Cyc. 344.

All the exceptions, and not part, must be fully and completely negatived. Russell *v.* State, 50 Ind. 174; State *v.* Carpenter, 62 Mo. 594. An indictment charging that the labor was not "a work of daily necessity" is insufficient to negative an exception, "or other works of necessity," leaving out the word "daily," as a work of necessity contemplated by the statute may not always be a work of "daily" necessity. State *v.* Stone, 15 Mo. 513.

45. Com. *v.* Louisville, etc., R. Co., 12 Ky. L. Rep. 505; Mosely *v.* State, 18 Tex. App. 311.

Sufficient allegation.—An information alleging that defendant did on a certain Sunday named sell and expose for sale goods at his place of business, describing it particularly, contrary to the acts of assembly in such case made and provided, is sufficient. Denzin *v.* Com., 3 Pa. Co. Ct. 654.

46. State *v.* Hogreiver, 152 Ind. 652, 53 N. E. 921, 45 L. R. A. 504; State *v.* Saurbaugh, 122 Ind. 208, 23 N. E. 720; McCarthy *v.* State, 56 Ind. 203; Com. *v.* De Voe, 159 Mass. 101, 34 N. E. 85; Com. *v.* Caldwell, 14 Mass. 320; State *v.* Meyer, 1 Speers (S. C.) 305.

Card-playing.— Thus an indictment for playing cards on Sunday need not allege the name of the game played; the names of the persons with whom defendant played; that defendant bet on the game; or that it was played for amusement. State *v.* Jeffrey, 33 Ark. 136; State *v.* Anderson, 30 Ark. 131; State *v.* Grace, 21 Ark. 227; Stockden *v.* State, 18 Ark. 186; State *v.* Kellar, 53 Mo. App. 32. *Contra,* Shook *v.* State, 25 Tex. App. 345, 8 S. W. 329. In Com. *v.* Hallahan, 143 Mass. 167, 9 N. E. 523, it was held that a complaint for unlawfully taking part in a game of cards on the Lord's day was only formally defective, if at all, in not alleging that a game of cards is an unlawful game.

47. State *v.* Jeffrey, 33 Ark. 136; State *v.* Anderson, 30 Ark. 131; State *v.* Grace, 21 Ark. 227; Shover *v.* State, 10 Ark. 259.

48. Shover *v.* State, 10 Ark. 259.

49. Robinson *v.* State, 38 Ark. 548; Com. *v.* Gelbert, 170 Pa. St. 426, 32 Atl. 1091; State *v.* Baltimore, etc., R. Co., 15 W. Va. 362, 36 Am. Rep. 803. In Jackson *v.* State, 88 Ga. 787, 789, 15 S. E. 905, the court, per Simmons, J., said: "While it is true that time is of the essence of this offence, it is so only to the extent that the act must be on Sunday. When it is shown that the act was on Sunday, the day of the month is not essential in order to make out the offence."

Sufficient allegation.— In State *v.* Nickelson, 137 Mo. App. 24, 118 S. W. 1192, it was held that an allegation that defendant "on the 18th day August, A. D. 1907, did on the first day of the week, commonly called Sunday, keep open," etc., contains a direct statement of the fact that the date mentioned was Sunday, and is sufficient.

"On or about."— The use of the phrase "on or about" renders the indictment bad for indefiniteness. State *v.* Land, 42 Ind. 311. *Contra,* where it is definitely alleged that the labor was performed on a Sunday. State *v.* Nesbit, 8 Kan. App. 104, 54 Pac. 326.

50. Robinson *v.* State, 38 Ark. 548.

51. See Jackson *v.* State, 88 Ga. 787, 15 S. E. 905.

52. Topeka *v.* Crawford, 78 Kan. 583, 96 Pac. 862.

53. State *v.* Drake, 64 N. C. 589; State *v.* Eskridge, 1 Swan (Tenn.) 413.

54. State *v.* Bergfeldt, 41 Wash. 234, 83 Pac. 177. *Contra,* Gilbert *v.* State, 81 Ind. 565.

(iv) *Nature of Labor or Business.* It has been held sufficient to designate in general the nature of defendant's avocation or business without specifying the particular business he was engaged in.[55] However, where the offense charged is that of engaging in common labor, the specific kind of labor must be stated.[56]

(v) *Information and Belief.* An information otherwise sufficiently specific, certain, and positive is not invalidated by an additional statement that the charge is made on information and belief.[57]

3. Joinder and Election. An indictment charging defendant with keeping open his shop on Sunday for the purpose of doing business therein does not charge two distinct offenses.[58] Counts for selling and trading may be joined in the same indictment;[59] and where there are separate counts for keeping open and selling, an election cannot be compelled, as it is not necessary to set out such different states of fact in separate counts.[60] It is proper to charge in one count the running of six freight trains through the county on the same Sunday, for while the running of each train may be a separate violation of the law, they may be grouped and treated as but one offense.[61] Where the offense charged is that of keeping open store, the fact that several sales may have been made does not render applicable the doctrine of election.[62]

C. Evidence[63] — **1. Presumptions and Burden of Proof.** The burden of proving the essential ingredients of the crime is upon the state;[64] but, upon proof of the matters charged, the law presumes a criminal intent,[65] and the burden is then cast upon defendant to show that the act comes within the exception to the statute.[66]

2. Judicial Notice. The courts will take judicial notice that the running of trains on Sunday is a work of necessity.[67]

3. Admissibility. It is competent to show defendant's conduct immediately before his arrest.[68] Also testimony in relation to sales to others than the person named in the indictment is competent on a prosecution for keeping open for the purpose of traffic and sale.[69] Testimony concerning defendant's purpose in keeping open or his statements at the time of the sale is properly excluded when it has no tendency to bring his acts within the protection of the statute.[70] Where

55. McCarthy *v.* State, 56 Ind. 203; Griffith *v.* State, 48 Tex. Cr. 575, 89 S. W. 832; Day *v.* State, 21 Tex. App. 213, 17 S. W. 262.

Sufficient allegation.— See State *v.* Miller, 68 Conn. 373, 36 Atl. 795 (holding that a complaint charging defendant with keeping open on Sunday a place in which certain sports known as "billiards" are carried on charges an offense, within Gen. St. § 3097, providing that every person who on Sunday shall keep open any place "in which any sports or games of chance are at any time carried on or allowed" shall be fined); Foltz *v.* State, 33 Ind. 215; Ross *v.* State, 9 Ind. App. 35, 36 N. E. 167.

56. Eitel *v.* State, 33 Ind. 201; Spaith *v.* State, 10 Ohio Dec. (Reprint) 639, 22 Cinc. L. Bul. 323; Paizer *v.* Com., 4 Kulp (Pa.) 286; Seaman *v.* Com., 11 Wkly. Notes Cas. (Pa.) 14.

57. Knorr *v.* Com., 4 Pa. Co. Ct. 32.

58. Com. *v.* Wright, 12 Allen (Mass.) 187.

59. Elsner *v.* State, 30 Tex. 524.

60. Brown *v.* State, 38 Tex. Cr. 597, 44 S. W. 176.

61. Westfall *v.* State, 4 Ga. App. 834, 62 S. E. 558.

62. Snider *v.* State, 59 Ala. 64.

63. Evidence generally see Criminal Law, 12 Cyc. 379; Evidence, 16 Cyc. 821; 17 Cyc. 1.

64. State *v.* Atlantic Coast Line R. Co., 149 N. C. 470, 62 S. E. 755.

65. Shover *v.* State, 10 Ark. 259.

66. Shipley *v.* State, 61 Ark. 216, 32 S. W. 489, 33 S. W. 107; Cleary *v.* State, 56 Ark. 124, 19 S. W. 313; Shover *v.* State, 10 Ark. 259; Brand *v.* State, 3 Ga. App. 628, 60 S. E. 339; Com. *v.* Bobb, 17 Pa. Co. Ct. 350; Com. *v.* Gillespie, 10 Pa. Co. Ct. 89.

Proof necessary.— It cannot be assumed that the accused was engaged in a work of actual necessity. Proof is necessary. People *v.* Hagan, 36 Misc. (N. Y.) 349, 73 N. Y. Suppl. 564.

67. Com. *v.* Louisville, etc., R. Co., 12 Ky. L. Rep. 505.

Judicial notice of concurrence of date and Sunday see, generally, Evidence, 16 Cyc. 856.

Judicial notice of necessity of barber's business see Evidence, 16 Cyc. 874 text and note 60.

68. Ward *v.* Green, 11 Conn. 455.

69. Brown *v.* State, 38 Tex. Cr. 597, 44 S. W. 176.

70. Com. *v.* Goldsmith, 176 Mass. 104, 57 N. E. 212; Com. *v.* Starr, 144 Mass. 359, 11 N. E. 533, holding that it was not competent for defendant, a Hebrew, to prove that he kept his shop open for the sole purpose of selling meat to Hebrews.

the charge is for playing in a game on Sunday where an admission fee is charged, evidence of the payment of a fee to see the game by one or more persons is competent proof that a fee was charged, although other persons saw the game for nothing.[71]

4. Proof and Variance. The state is not limited in its proof to the particular day named in the indictment, but may show a violation of the law on any Sunday preceding the finding of the indictment and within the statute of limitations.[72] The proof need not be as broad as that charged in the indictment, provided a distinct violation of the law is shown.[73] Affirmative testimony as to the commission of the act charged controls over negative testimony as to defendant's general habits on Sunday.[74] Where a principal is sought to be made criminally liable for the act of his agent, either knowledge on his part must be shown [75] or such a habitual recurrence of the act that his assent is implied.[76] In general the proof must correspond with the allegations of the indictment,[77] and a conviction is not warranted when the evidence is so doubtful or conflicting as to raise a reasonable doubt concerning the guilt of defendant.[78] On the other hand, a conviction must be sustained where the evidence clearly shows a commission of the act prohibited by statute.[79]

D. Trial [80] — **1. Province of Court and Jury.**[81] It is for the jury to determine, under proper instructions from the court, whether defendant performed an act which brought him within the statute,[82] and whether the act was under the circum-

71. Heigert *v.* State, 37 Ind. App. 398, 75 N. E. 850.

72. *Arkansas.*— Marre *v.* State, 36 Ark. 222.

Connecticut.— State *v.* Brunker, 46 Conn. 327.

Georgia.— Seale *v.* State, 121 Ga. 741, 49 S. E. 740; Jackson *v.* State, 88 Ga. 787, 15 S. E. 905.

Massachusetts.— Com. *v.* Harrison, 11 Gray 308; Com. *v.* Newton, 8 Pick. 234.

North Carolina.— State *v.* Seaboard Air Line R. Co., 149 N. C. 508, 62 S. E. 1088.

West Virginia.— State *v.* Baltimore, etc., R. Co., 15 W. Va. 362, 36 Am. Rep. 803.

See 45 Cent. Dig. tit. "Sunday," § 70.

73. Com. *v.* Josselyn, 97 Mass. 411.

74. Elsner *v.* State, 30 Tex. 524.

75. Wetzler *v.* State, 18 Ind. 35.

76. State *v.* Baltimore, etc., R. Co., 15 W. Va. 362, 36 Am. Rep. 803.

77. McNealy *v.* State, 94 Ga. 592, 21 S. E. 581.

A verdict without any evidence to support it must be set aside as contrary to law. Westfall *v.* State, 4 Ga. App. 834, 62 S. E. 558.

78. Mayer *v.* State, 33 Ind. 203; Crawford *v.* State, (Tex. Cr. App. 1905) 89 S. W. 1079; Todd *v.* State, 30 Tex. App. 667, 18 S. W. 642; Reg. *v.* Howarth, 33 U. C. Q. B. 537.

Violation of bond.—Where one bought whisky on Saturday and it was delivered to him on Sunday, the fact that the seller violated a stipulation of his bond in selling to the purchaser in question would not authorize a conviction for violating the Sunday law. Crawford *v.* State, (Tex. Cr. App. 1905) 89 S. W. 1079.

Opening for ventilation.—A conviction for exposing and selling goods on Sunday is not sustained by evidence that nothing was sold on that day and that the door was open merely for the purpose of ventilation. City Council *v.* Talck, 3 Rich. (S. C.) 299.

79. Bennett *v.* State, 13 Ark. 694 (retailing); Seale *v.* State, 126 Ga. 644, 55 S. E. 472 (running freight train); Scandrett *v.* State, 124 Ga. 141, 52 S. E. 160 (selling); Gunn *v.* State, 89 Ga. 341, 15 S. E. 458; Savage *v.* State, (Tex. Cr. App. 1906) 93 S. W. 114 (selling); Armstrong *v.* State, 47 Tex. Cr. 510, 84 S. W. 827 (keeping open); Caskey *v.* State, (Tex. Cr. App. 1901) 62 S. W. 753 (keeping open). See also State *v.* Crabtree, 27 Mo. 232.

80. Right to trial by jury see Juries, 24 Cyc. 144 note 62.

Trial generally see Criminal Law, 12 Cyc. 504 *et seq.*

81. Province of court and jury generally see Criminal Law, 12 Cyc. 587.

82. Manning *v.* State, 6 Ga. App. 240, 64 S. E. 710; Heigert *v.* State, 37 Ind. App. 398, 75 N. E. 850 (holding that in a prosecution for playing baseball on Sunday, in a game where a fee was charged, the question whether an admission fee was charged, within the meaning of the statute, was properly submitted to the jury); State *v.* Atlantic Coast Line R. Co., 149 N. C. 470, 62 S. E. 755.

The purpose for which a person keeps open store on Sunday is necessarily a question of fact and intent to be found by the jury under proper instructions. Snider *v.* State, 59 Ala. 64.

Where the evidence strictly conforms to the charge that the common labor was that of operating a barber shop, then whether that conduct amounts to common labor is a matter of law for the magistrate to decide. *In re* Caldwell, 82 Nebr. 544, 118 N. W. 133.

stances of the case one of necessity of charity within the meaning of the statutory exception.[83]

2. Instructions.[84] It is not incumbent upon the court to define the business or occupation of defendant,[85] but the meaning of the statutory terms must be given.[86] The court should not submit to the jury all the phases of the statute, but should restrict them to the consideration of the one charged in the indictment.[87] Neither should the court give any instruction which deprives defendant of the presumption of innocence.[88] Defendant has no ground of exception when the charge given correctly states all the law applicable to the prosecution,[89] and the charges refused did not correctly state it.[90] It is error to refuse to charge that the knowledge or consent of the accused to the performance of the acts complained of must be shown before a conviction may be had.[91] A harmless charge, even though erroneous, cannot be complained of as error.[92]

3. Conviction — a. Joint. On proof of a joint act, a joint conviction is authorized.[93]

b. Summary. In a few jurisdictions the proper mode of proceeding for violation of the Sabbath laws is by summary conviction.[94] In such jurisdictions the conviction must be had within the time limited by statute,[95] and the record must

83. Ungericht *v.* State, 119 Ind. 379, 21 N. E. 1082, 12 Am. St. Rep. 419; Edgerton *v.* State, 67 Ind. 588, 33 Am. Rep. 110; State *v.* McBee, 52 W. Va. 257, 43 S. E. 121, 60 L. R. A. 638; State *v.* Knight, 29 W. Va. 340, 1 S. E. 569. See also Reg. *v.* Cleworth, 4 B. & S. 927, 9 L. T. Rep. N. S. 682, 12 Wkly. Rep. 375, 116 E. C. L. 927.

Whether pumping an oil well on the Sabbath is a work of necessity is a question of fact. Com. *v.* Gillespie, 146 Pa. St. 546, 23 Atl. 393.

Missouri rule.— In State *v.* Schatt, 128 Mo. App. 622, 107 S. W. 10, it was held that if the labor in question is so clearly a work of necessity, or is so clearly not, that no two reasonable minds could differ on the proposition, then the court may treat it as a matter of law; but that if the question is one about which reasonable minds might well differ, then it is essentially one of fact, and as such within the province of the jury. In State *v.* Campbell, 206 Mo. 579, 105 S. W. 637, it was held that the court should have declared as a matter of law that lemons are an article of necessity.

84. **Instructions** generally see Criminal Law, 12 Cyc. 611.

85. Smith *v.* State, 48 Tex. Cr. 509, 90 S. W. 37.

86. Manning *v.* State, 6 Ga. App. 240, 64 S. E. 710.

87. Whitcomb *v.* State, 30 Tex. App. 269, 17 S. W. 258.

88. Johnson *v.* People, 42 Ill. App. 594; Com. *v.* Mason, 12 Allen (Mass.) 185.

When presumption affected by statute.— Under a statute providing that on the trial of an officer in charge of the transportation department of a railroad company for running a train on Sunday, "the simple fact of the train being run" need only be proved, an instruction that the jury are authorized to infer that a freight train run on Sunday was run in violation of law, unless it appears that it was loaded with live stock, or that it was delayed, is not erroneous as depriving defendant of the presumption of his innocence. Jackson *v.* State, 88 Ga. 787, 15 S. E. 905.

89. Com. *v.* Harrison, 11 Gray (Mass.) 308; Smith *v.* State, 48 Tex. Cr. 509, 90 S. W. 37.

Failure to correctly charge concerning defense is error. Westfall *v.* State, 4 Ga. App 834, 62 S. E. 558; Brand *v.* State, 3 Ga. App. 628, 60 S. E. 339; State *v.* Campbell, 206 Mo. 579, 105 S. W. 637.

Withholding from jury question of intent is error. State *v.* Crabtree, 27 Mo. 232.

90. Com. *v.* Graham, 176 Mass. 5, 56 N. E. 829 (holding that, although a room kept open by a common victualer merely as a dining-room is not a shop within the meaning of Pub. St. (1895) c. 434, § 2, prohibiting the keeping open of shops on Sunday, it was not error to refuse a ruling that, if one keeping open such a dining-room on Sunday sold cigars in the course of business, she had not violated the law, since, if one of the purposes in keeping open the shop was the sale of cigars, she was guilty, and the question of such purpose was for the jury); State *v.* Baltimore, etc., R. Co., 15 W. Va. 362, 36 Am. Rep. 803.

91. State *v.* Atlantic Coast Line R. Co., 149 N. C. 470, 62 S. E. 755; Whitcomb *v.* State, 30 Tex. App. 269, 17 S. W. 258.

92. Seale *v.* State, 121 Ga. 741, 49 S. E. 740.

93. Com. *v.* Sampson, 97 Mass. 407.

94. Com. *v.* Wolf, 3 Serg. & R. (Pa.) 48; Com. *v.* Rosenthal, 3 Pa. Co. Ct. 26.

Commitment.— Persons summarily convicted under the Pennsylvania statute against Sabbath-breaking should be committed to the county prison instead of the house of correction. Com. *v.* Stodler, 15 Phila. (Pa.) 418. The commitment is irregular if it commands the officer to convey defendant at once to jail without giving him an opportunity to produce goods and chattels whereon the forfeiture may be levied. Paizer *v.* Com., 4 Kulp (Pa.) 286.

95. West *v.* Com., 2 Woodw. (Pa.) 61.

show the calling of defendant or the specific act of worldly employment which he performed on the Sabbath.[96] However, it is sufficient if the form prescribed by statute is followed,[97] or if the description of the work appear in any part of the record.[98] Technical niceties are not required.[99] The evidence should be returned with, or made a part of, the record;[1] and when it appears from the evidence returned, but not made a part of the record, that the act done was one of necessity, the conviction will be reversed.[2]

E. Review.[3] Certiorari is the proper remedy to bring up a conviction obtained without jurisdiction.[4] On application for such a writ, new evidence cannot be taken to bolster up the lack of evidence of jurisdiction before the magistrate.[5] However, questions of fact within the magistrate's jurisdiction will not be reviewed on certiorari. Defendant's remedy, if any, is by appeal.[6] Habeas corpus is not a proper remedy for attacking the validity of the judgment of the trial court.[7]

X. JUDICIAL PROCEEDINGS AND OTHER OFFICIAL ACTS.

A. General Rule. It is universally recognized that, at common law, Sunday is *dies non juridicus*.[8] The prohibition of the common law extends only to judicial acts, and not to acts performed in a cause which were ministerial in their

96. Com. *v.* Antrim, 9 Pa. Dist. 374, 23 Pa. Co. Ct. 48, 15 Montg. Co. Rep. 212; Noftsker *v.* Com., 8 Pa. Dist. 572, 22 Pa. Co. Ct. 559; Sackville *v.* Com., 24 Pa. Co. Ct. 565; Com. *v.* Fuller, 4 Pa. Co. Ct. 429; Com. *v.* Kemery, 2 Leg. Chron. (Pa.) 321; Hespeler *v.* Shaw, 16 U. C. Q. B. 104.

Thus a record of a summary conviction, setting out that defendant pursued his worldly employment as a ticket agent of a certain railroad and sold tickets on a Sunday named, is defective in not stating what kind of tickets were sold, to whom sold, and for what purpose they were to be used. Com. *v.* Fuller, 4 Pa. Co. Ct. 429.

97. Com. *v.* Wolf, 3 Serg. & R. (Pa.) 48.

98. Johnston *v.* Com., 22 Pa. St. 102; Com. *v.* Johnston, 2 Am. L. Reg. (Pa.) 517.

99. Com. *v.* Jacobus, 1 Leg. Gaz. (Pa.) 491.

Surplusage.—When the judgment specifically states that the offense was committed on a certain Sunday, the additional designation of it as the "seventh" day may be disregarded as surplusage. New Castle *v.* Cummings, 36 Pa. Super. Ct. 443.

1. Com. *v.* Fuller, 4 Pa. Co. Ct. 429; Com. *v.* Patton, 4 Pa. Co. Ct. 135.

2. Com. *v.* Fields, 4 Pa. Co. Ct. 434.

3. **Appeal and error** generally see CRIMINAL LAW, 12 Cyc. 792.

4. Rex *v.* Canadian Pac. R. Co., 12 Can. Cr. Cas. 549; Hespeler *v.* Shaw, 16 U. C. Q. B. 104.

5. Rex *v.* Canadian Pac. R. Co., 12 Can. Cr. Cas. 549.

6. Reg. *v.* Urquhart, 4 Can. Cr. Cas. 256; Hespeler *v.* Shaw, 16 U. C. Q. B. 104.

In Pennsylvania the court of quarter sessions, and not the court of common pleas, has jurisdiction of an appeal. Com. *v.* Rosenthal, 3 Pa. Co. Ct. 26.

In British Columbia the judgment of the county court judge reviewing a conviction before a magistrate is final, and no appeal lies from his decision. *Re* Lambert, 7 Brit. Col. 396, construing the Provincial Summary Convictions Act.

Jury trial on appeal.— On appeal from a summary conviction to the quarter sessions, 13 & 14 Vict. c. 54, authorizes a trial by jury. Hespeler *v.* Shaw, 16 U. C. Q. B. 104.

Appeal as waiver of defects.— In New Castle *v.* Cummings, 36 Pa. Super. Ct. 443, it was held that, as defendant had appealed from the judgment of the mayor and gone to trial in the court of quarter sessions, he must be deemed to have waived any defects in the information which were not substantial and jurisdictional.

7. *In re* Caldwell, 82 Nebr. 544, 118 N. W. 133, holding that the judgment of guilty carried with it of necessity the judgment of the magistrate that the complaint charged defendant with unlawfully engaging in common labor on Sunday, and that he was not within any of the exceptions of the statute.

8. *Alabama.*— Matthews *v.* Ansley, 31 Ala. 20; Nabors *v.* State, 6 Ala. 200; Haynes *v.* Sledge, 2 Port. 530, 27 Am. Dec. 665.

Arkansas.— Tucker *v.* West, 29 Ark. 386.

California.— Sacramento County Reclamation Dist. No. 535 *v.* Hamilton, 112 Cal. 603, 44 Pac. 1074.

Georgia.— Sawyer *v.* Cargile, 72 Ga. 290; Neal *v.* Crew, 12 Ga. 93.

Illinois.— Scammon *v.* Chicago, 40 Ill. 146; Johnston *v.* People, 31 Ill. 469; Baxter *v.* People, 8 Ill. 368.

Indiana.— Qualter *v.* State, 120 Ind. 92, 22 N. E. 100; Cory *v.* Silcox, 5 Ind. 370; Chapman *v.* State, 5 Blackf. 111.

Iowa.— Davis *v.* Fish, 1 Greene 406, 48 Am. Dec. 387.

Kansas.— Parsons *v.* Lindsay, 41 Kan. 336, 21 Pac. 227, 13 Am. St. Rep. 290, 3 L. R. A. 658.

Kentucky.— Meece *v.* Com., 78 Ky. 586.

Maine.— State *v.* Conwell, 96 Me. 172, 51 Atl. 873, 90 Am. St. Rep. 333.

Massachusetts.— Johnson *v.* Day, 17 Pick. 106; Pearce *v.* Atwood, 13 Mass. 324.

nature.[9] In several jurisdictions statutes have been passed which reaffirm the common-law rule, in whole or in part;[10] but numerous exceptions to the rule

Montana.— Hauswirth *v.* Sullivan, 6 Mont. 203, 9 Pac. 798.

Nevada.— State *v.* California Min. Co., 13 Nev. 203.

New Hampshire.— Frost *v.* Hull, 4 N. H. 153.

New York.— People *v.* New York State Reformatory for Women, 73 N. Y. App. Div. 174, 76 N. Y. Suppl. 728; Merritt *v.* Earle, 31 Barb. 38 [*affirmed* in 29 N. Y. 115, 86 Am. Dec. 292]; Pulling *v.* People, 8 Barb. 384; Harrison *v.* Wallis, 44 Misc. 492, 90 N. Y. Suppl. 44; People *v.* Walton, 35 Misc. 320, 71 N. Y. Suppl. 85; People *v.* Dewey, 23 Misc. 267, 50 N. Y. Suppl. 1013; Boynton *v.* Page, 13 Wend. 425; Story *v.* Elliot, 8 Cow. 27, 18 Am. Dec. 423; Van Vechten *v.* Paddock, 12 Johns. 178, 7 Am. Dec. 303.

North Carolina.— State *v.* Howard, 82 N. C. 623.

Pennsylvania.— Stern's Appeal, 64 Pa. St. 447.

Tennessee.— Styles *v.* Harrison, 99 Tenn. 128, 41 S. W. 333, 63 Am. St. Rep. 824.

Texas.— Hanover F. Ins. Co. *v.* Shrader, 89 Tex. 35, 32 S. W. 872, 33 S. W. 112, 59 Am. St. Rep. 25, 30 L. R. A. 498; Crabtree *v.* Whiteselle, 65 Tex. 111; Stinson *v.* State, 5 Tex. App. 31.

Vermont.— Blood *v.* Bates, 31 Vt. 147.

Virginia.— Read *v.* Com., 22 Gratt. 924; Michie *v.* Michie, 17 Gratt. 109.

Washington.— Byers *v.* Rothschild, 11 Wash. 296, 39 Pac. 688.

United States.— Kirkpatrick *v.* Baltimore, etc., R. Co., 14 Fed. Cas. No. 7,847; *In re* Worthington, 30 Fed. Cas. No. 18,051, 7 Biss. 455, 16 Nat. Bankr. Reg. 52 [*reversing* 30 Fed. Cas. No. 18,052, 14 Nat. Bankr. Reg. 388, 14 Alb. L. J. (N. Y.) 153].

England.— Swann *v.* Broome, 3 Burr. 1595, 97 Eng. Reprint 999; Waite *v.* Hundred, Cro. Jac. 496, 79 Eng. Reprint 423; Bedoe *v.* Alpe, W. Jones 156, 82 Eng. Reprint 83.

Canada.— Reg. *v.* Cavelier, 11 Manitoba 333.

See 45 Cent. Dig. tit. "Sunday," § 73 *et seq.*

Anciently the courts of justice sat on Sundays. Two reasons for this are given in Sir Henry Spelman's Original of the Terms, one being that the christians laid aside all observance of days in opposition to the heathen who were superstitious about the observance of days and times; and the other being that, by keeping their own courts always open, they would prevent christian suitors from resorting to the heathen courts. But in 517, a canon was passed exempting Sunday from the judicial days, which, with other canons passed later, was received and adopted by the Saxon kings and embodied in the constitution of Edward the Confessor. These canons and constitutions were all confirmed by William the Conqueror and Henry the Second, and so became part of the common law of England. Swann *v.* Broome, 3 Burr. 1595, 97 Eng. Reprint 999. To same effect see Neal *v.* Crew, 12 Ga. 93; Baxter *v.* People, 8 Ill. 368; Kiger *v.* Coats, 18 Ind. 153, 81 Am. Dec. 351; Davis *v.* Fish, 1 Greene (Iowa) 406, 48 Am. Dec. 387; Merritt *v.* Earle, 31 Barb. (N. Y.) 38 [*affirmed* in 29 N. Y. 115, 86 Am. Dec. 292]; Story *v.* Elliott, 8 Cow. (N. Y.) 27, 18 Am. Dec. 423; Hastings *v.* Columbus, 42 Ohio St. 585; Stapleton *v.* Reynolds, 5 Ohio Dec. (Reprint) 374, 5 Am. L. Rec. 242; Hiller *v.* English, 4 Strobh. (S. C.) 486.

Effect on term.— The fact that Sunday is not a judicial day does not render it any less a day of a term of court. Brown *v.* Leet, 136 Ill. 203, 26 N. E. 639; Coleman *v.* Keenan, 76 Ill. App. 315.

9. *Alabama.*— Matthews *v.* Ansley, 31 Ala. 20.

Indiana.— Kiger *v.* Coats, 18 Ind. 153, 81 Am. Dec. 351.

Iowa.— State *v.* Ryan, 113 Iowa 536, 85 N. W. 812, characterizing the contra statements in Davis *v.* Fish, 1 Greene 406, 48 Am. Dec. 387, as mere *dicta.*

Maine.— State *v.* Conwell, 96 Me. 172, 51 Atl. 873, 90 Am. St. Rep. 333.

Massachusetts.— Johnson *v.* Day, 17 Pick. 106.

Texas.— Hanover F. Ins. Co. *v.* Shrader, 89 Tex. 35, 32 S. W. 872, 33 S. W. 112, 59 Am. St. Rep. 25, 30 L. R. A. 498.

United States.— *In re* Worthington, 30 Fed. Cas. No. 18,051, 7 Biss. 455, 16 Nat. Bankr. Reg. 52, 16 Alb. L. J. (N. Y.) 63 [*reversing* 30 Fed. Cas. No. 18,052, 14 Nat. Bankr. Reg. 388, 14 Alb. L. J. (N. Y.) 153].

England.— Mackalley's Case, 9 Coke 65*b*, 77 Eng. Reprint 828, Cro. Jac. 279, 79 Eng. Reprint 239. See also Swann *v.* Broome, 3 Burr. 1595, 97 Eng. Reprint 999; Waite *v.* Hundred, Cro. Jac. 496, 79 Eng. Reprint 423.

See 45 Cent. Dig. tit. "Sunday," § 73 *et seq.*

"A coroner's inquisition being judicial, must not be conducted on a Sunday." 1 Burns Justice 1212 [*quoted* in Reg. *v.* Cavelier, 11 Manitoba 333, 338]; *In re* Cooper, 5 Ont. Pr. 256. *Contra*, Blaney *v.* State, 74 Md. 153, 21 Atl. 547, on the ground that the acts of the coroner are ministerial.

10. *Alabama.*— Haynes *v.* Sledge, 2 Port. 530, 27 Am. Dec. 665.

Louisiana.— Foy *v.* Harper, 3 La. Ann. 275.

Nevada.— State *v.* California Min. Co., 13 Nev. 203.

New York.—Pulling *v.* People, 8 Barb. 384; People *v.* Walton, 35 Misc. 320, 71 N. Y. Suppl. 85; People *v.* Dewey, 23 Misc. 267, 40 N. Y. Suppl. 1013.

Oregon.— *Ex p.* Tice, 32 Oreg. 179, 49 Pac. 1038.

Pennsylvania.— Stern's Appeal, 64 Pa. St. 447.

Texas.— Crabtree *v.* Whiteselle, 65 Tex. 111; Stinson *v.* State, 5 Tex. App. 31.

have been established, both at common law and by statute, so that the rule can no longer be accepted in its entirety.[11]

B. Arbitration and Award. In some jurisdictions the making and publishing of an award is considered a judicial act and hence void when done on Sunday.[12] In others an award is considered more in the nature of a contract and therefore does not come within the prohibition of judicial business.[13] An award is valid when not really published until a week day, although some of the proceedings were had on Sunday.[14]

C. Taking of Depositions. A deposition taken on Sunday must be rejected.[15] Likewise the adjournment of the taking of depositions from Saturday to Sunday and from Sunday to Monday is without authority of law, and the deposition will be suppressed.[16]

D. Filing Pleadings. As the filing of a complaint and its reception by the clerk are ministerial acts, they are not void when done on Sunday, under statutes prohibiting the opening of courts and the transaction of judicial business.[17] The mere filing of an affidavit and bond on Sunday does not come within the meaning of a statute prohibiting the issuance of process.[18] Neither is an information void because filed on Sunday, where the statute prohibits the commencement only of civil suits.[19]

E. Process — 1. Civil — a. In General. At common law, the award of a judicial writ was a judicial act and void if done on Sunday, but the issuance and service of original civil process were mere ministerial acts and could lawfully be done on Sunday.[20] However, both the issuance and service of civil process on Sunday is now quite generally void under statutes specifically prohibiting the same,[21]

England.— Rawlins *v.* Ellis, 10 Jur. 1039, 16 L. J. Exch. 5, 16 M. & W. 172.

See 45 Cent. Dig. tit. "Sunday," § 73 *et seq.*

11. See *infra*, X, E, 2; X, F; X, H.

12. Story *v.* Elliott, 8 Cow. (N. Y.) 27, 18 Am. Dec. 423; Morris *v.* Crane, 4 Ch. Sent. (N. Y.) 6, holding further that subsequent ratification by the parties renders the award binding.

13. Crosby *v.* Blanchard, 50 Vt. 696; Blood *v.* Bates, 31 Vt. 147; Sargeant *v.* Butts, 21 Vt. 99.

The giving of a notice of an award on Sunday is a mere ministerial act, in connection with a judicial proceeding, and is valid, especially where the notice is received without objection. Kiger *v.* Coate, 18 Ind. 153, 81 Am. Dec. 351.

14. Isaacs *v.* Beth Hamedash Soc., 1 Hilt. (N. Y.) 469 [*affirmed* in 19 N. Y. 584]; Ehrlich *v.* Pike, 53 Misc. (N. Y.) 328, 104 N. Y. Suppl. 818.

15. Sloan *v.* Williford, 25 N. C. 307.

16. Kirkpatrick *v.* Baltimore, etc., R. Co., 14 Fed. Cas. No. 7,847.

Adjournment of taking of deposition over Sunday see DEPOSITIONS, 13 Cyc. 923 text and note.

17. Havens *v.* Stiles, 8 Ida. 250, 67 Pac. 919, 101 Am. St. Rep. 195, 56 L. R. A. 736.

The handing of a confession of judgment to the prothonotary on Sunday does not invalidate a judgment rendered on Monday, as the prothonotary's acceptance of it is not official but as agent of plaintiff. Kauffman's Appeal, 70 Pa. St. 261.

18. Schow *v.* Gatesville City Nat. Bank, (Tex. Civ. App. 1897) 40 S. W. 166.

19. Stinson *v.* State, 5 Tex. App. 31.

20. *Alabama.*—Matthews *v.* Ansley, 31 Ala. 20.

Massachusetts.— Johnson *v.* Day, 17 Pick. 106.

New Hampshire.— Clough *v.* Shepherd, 31 N. H. 490.

New York.— People *v.* Dewey, 23 Misc. 267, 50 N. Y. Suppl. 1013; Van Vechten *v.* Paddock, 12 Johns. 178, 7 Am. Dec. 303.

Ohio.— Hastings *v.* Columbus, 42 Ohio St. 585.

United States.— *In re* Worthington, 30 Fed. Cas. No. 18,051, 7 Biss. 455, 16 Nat. Bankr. Reg. 52, 16 Alb. L. J. (N. Y.) 63 [*reversing* 30 Fed. Cas. No. 18,052, 14 Nat. Bankr. Reg. 388, 14 Alb. L. J. (N. Y.) 153].

England.—White *v.* Hundred, Cro. Jac. 496, 79 Eng. Reprint 423; Mackalley's Case, Cro. Jac. 279, 9 Coke 65*b*, 77 Eng. Reprint 828, Cro. Jac. 279, 79 Eng. Reprint 239 (arrest in civil case); Bedoe *v.* Alpe, W. Jones 156, 82 Eng. Reprint 83.

See 45 Cent. Dig. tit. "Sunday," § 75.

Compare Crabtree *v.* Whiteselle, 65 Tex. 111.

Teste of scire facias.— In Barret *v.* Cleydon, Dyer 168*a*, 73 Eng. Reprint 368, there was held to be error because the teste of the scire facias was upon a Sunday.

21. *Alabama.*— Cotton *v.* Huey, 4 Ala. 56; Peirce *v.* Hill, 9 Port. 151, 33 Am. Dec. 306; Haynes *v.* Sledge, 2 Port. 530, 27 Am. Dec. 665. The territorial statute of 1803 (Clay Dig. 593), under which the above cases were decided, was not incorporated into the code. Matthews *v.* Ansley, 31 Ala. 20.

Kentucky.— Moore *v.* Hagan, 2 Duv. 437.

Louisiana.— Foy *v.* Harper, 3 La. Ann. 275.

except in cases for attachment [22] and other cases of urgent necessity; [23] and in some jurisdictions it is held that the general statutes regulating the observance of Sunday apply and forbid the issuance and service of civil process on Sunday.[24] A state statute which forbids the service of civil process on Sunday can control only the process in the state courts, and cannot be made to apply to process out of a court of admiralty.[25]

b. Notice of Proceedings. It has been held that the notice of a hearing is

Michigan.— Anderson *v.* Birce, 3 Mich. 280.

Montana.— Hauswirth *v.* Sullivan, 6 Mont. 203, 9 Pac. 798.

Nebraska.— Bryant *v.* State, 16 Nebr. 651, 21 N. W. 406, applying the English statute as common law.

New Jersey.— Jewett *v.* Bowman, 27 N. J. Eq. 275.

New York.— Scott Shoe Mach. Co. *v.* Dancel, 63 N. Y. App. Div. 172, 71 N. Y. Suppl. 263; People *v.* Dewey, 23 Misc. 267, 50 N. Y. Suppl. 1013; Van Vechten *v.* Paddock, 12 Johns. 178, 7 Am. Dec. 303; Rob *v.* Moffat, 3 Johns. 257; Vanderpoel *v.* Wright, 1 Cow. 209.

North Carolina.— Devries *v.* Summit, 86 N. C. 126; Bland *v.* Whitfield, 46 N. C. 122.

Tennessee.— Helm *v.* Rodgers, 5 Humphr. 105.

Texas.— Crabtree *v.* Whiteselle, 65 Tex. 111.

Vermont.—Cavendish *v.* Weathersfield Turnpike Co., 2 Vt. 531, holding that, under the Vermont statute, the service of a petition and citation must not be made after sunset Saturday evening, but the court can, in some cases, abate the citation, retain the petition, and make an order of notice returnable the next term.

England.— Walker *v.* Towne, Barnes Notes 309, 94 Eng. Reprint 929; Doe *v.* Roe, 5 B. & C. 764, 2 D. & R. 232, 11 E. C. L. 672; Doe *v.* Roe, 8 D. & R. 342, 16 E. C. L. 344; Taylor *v.* Phillips, 3 East 155, 6 Rev. Rep. 575, 102 Eng. Reprint 550; Taylor's Case, 12 Mod. 667, 88 Eng. Reprint 1590; Waldegrave's Case, 12 Mod. 606, 88 Eng. Reprint 1552; Hoyle *v.* Cornwallis, Str. 387, 93 Eng. Reprint 584; McIlleham *v.* Smith, 8 T. R. 86, 101 Eng. Reprint 1281.

See 45 Cent. Dig. tit. "Sunday," § 75.

Arrest in civil action on Sunday is void. Valentine *v.* Roberts, 1 Alaska 536; White *v.* Morris, 107 N. C. 92, 12 S. E. 80.

Under a statute prohibiting judicial business on Sunday the issuance of a summons is not illegal as it is only a ministerial act. Havens *v.* Stiles, 8 Ida. 250, 67 Pac. 919, 101 Am. St. Rep. 195, 56 L. R. A. 736.

Summoning of jurors.— In State *v.* Gilbert, 8 Ida. 346, 69 Pac. 62, it was held that there is nothing in the Idaho statute which renders void the summoning of jurors for a special venire by a sheriff on Sunday.

Partial service.—Where service is begun prior to Sunday, it may be completed on that day as the statute refers to the commencement of the service. Fifield *v.* Wooster, 21 Vt. 215; Pearson *v.* French, 9 Vt. 349. And the levy of an attachment on Monday on property taken possession of by the officer on the previous Sunday under another order of attachment is not absolutely void, and its validity cannot be questioned in an action of replevin by the debtor against the officer. Blair *v.* Shew, 24 Kan. 280.

Countermanding of order to sheriff.—An order given on a secular day to a sheriff directing him not to proceed under an execution in his hands cannot be legally countermanded by an order given to him on a Sunday, and the latter order is void. Stern's Appeal, 64 Pa. St. 447.

In Ohio summons may be served on Sunday. Stapleton *v.* Reynolds, 5 Ohio Dec. (Reprint) 374, 5 Am. L. Rec. 242. See also Hastings *v.* Columbus, 42 Ohio St. 585.

Sheriff is not liable for failure to serve writ on Sunday. Whitney *v.* Butterfield, 13 Cal. 335, 73 Am. Dec. 584.

Provisional remedies.— It has been held that the goods of a tenant are privileged on Sunday from seizure for rent (Mayfield *v.* White, 1 Browne (Pa.) 241), and that a person's swine cannot be lawfully impounded on the Sabbath by a hogreeve (Frost *v.* Hull, 4 N. H. 153); while on the other hand it has been held that a sheriff may proceed on Sunday by distress to enforce a penalty for peddling without a license; the statutory prohibition against service of "writs or other process" on Sunday being confined to such original or judicial process as may as well be executed on any other day (Cowles *v.* Brittain, 9 N. C. 204).

22. See ATTACHMENT, 4 Cyc. 544.

Priority of writs issued on Saturday and Sunday see ATTACHMENT, 4 Cyc. 579 note 83.

23. Langabier *v.* Fairbury, etc., R. Co., 64 Ill. 243, 16 Am. Rep. 550; Volz *v.* Tutt, 12 Ky. L. Rep. 506; Brookbanck *v.* Allenson, 12 Mod. 275, 88 Eng. Reprint 1318.

Admiralty.—A warrant of arrest may issue in admiralty on Sunday, where a vessel has changed her day for sailing, and proposes to sail on that day, and a libellant for seaman's wages did not learn that his wages would not be paid in time to begin his case before that day. Pearson *v.* The Alsalfa, 44 Fed. 358.

24. Scammon *v.* Chicago, 40 Ill. 146; Johnson *v.* Day, 17 Pick. (Mass.) 106; Shaw *v.* Dodge, 5 N. H. 462. See also Morris *v.* Shew, 29 Kan. 661, where it is held that the Kansas statutes impliedly recognize the continuance of the common-law rule of the invalidity of the service upon Sunday of ordinary civil process.

25. Pearson *v.* The Alsalfa, 44 Fed. 358.

good, although it has been dated on Sunday.[26] A notice of the examination of a witness is good, although given on Sunday.[27] On the other hand, it has been held that the service on Sunday of notice of a motion [28] or of plea filed [29] is irregular and void; as is also a notice to take a deposition on Sunday.[30]

c. Publication. The weight of authority supports the proposition that the publication, in whole or in part, of a summons or other legal notice in a newspaper published on Sunday is invalid.[31] A notice required to be published each day for a week need not be published on Sunday.[32]

d. Process or Notice Returnable on Sunday. As courts do not sit on Sunday, a process or notice returnable on that day is void and no proceedings may be had thereon.[33]

2. Criminal. Both at common law and under statute warrants may issue and arrests be made on Sunday.[34] In those jurisdictions where the service of a warrant of arrest on the Sabbath is forbidden by statute,[35] exception is made in the cases of treason, felony, and breach of the peace.[36] Even under these

26. Taylor *v.* Thomas, 2 N. J. Eq. 106.

27. State *v.* Ryan, 113 Iowa 536, 85 N. W. 812.

28. Field *v.* Park, 20 Johns. (N. Y.) 140.

29. Roberts *v.* Monkhouse, 8 East 547, 9 Rev. Rep. 497, 103 Eng. Reprint 453.

30. Sloan *v.* Williford, 25 N. C. 307.

31. *Colorado.*— Schwed *v.* Hartwitz, 23 Colo. 187, 47 Pac. 295, 58 Am. St. Rep. 221.

Georgia.— Sawyer *v.* Cargile, 72 Ga. 290.

Illinois.— Scammon *v.* Chicago, 40 Ill. 146.

Indiana.— Shaw *v.* Williams, 87 Ind. 158, 44 Am. Rep. 756.

Kentucky.— Ormsby *v.* Louisville, 79 Ky. 197, 2 Ky. L. Rep. 66; Brannin *v.* Louisville, 2 Ky. L. Rep. 384.

South Dakota.— McLaughlin *v.* Wheeler, 2 S. D. 379, 50 N. W. 834.

See 45 Cent. Dig. tit. "Sunday," § 77.

Contra.— Heisen *v.* Smith, 138 Cal. 216, 71 Pac. 180, 94 Am. St. Rep. 39; Savings, etc., Soc. *v.* Thompson, 32 Cal. 347 (holding that a part publication in a Sunday newspaper did not vitiate the service); Nixon *v.* Burlington, 141 Iowa 316, 115 N. W. 239; Schenck *v.* Schenck, 52 La. Ann. 2102, 28 So. 302; Hastings *v.* Columbus, 42 Ohio St. 585 (holding that, under the Ohio statute, a summons may be served on Sunday, and that the publication of an ordinance is of a similar nature).

The burden of showing that the publication comes within the terms of the Sunday statute is on defendant. Harrison *v.* Wallis, 44 Misc. (N. Y.) 492, 90 N. Y. Suppl. 44.

32. Matter of Excelsior F. Ins. Co., 16 Abb. Pr. (N. Y.) 8 [*reversed* on other grounds in 38 Barb. 297, 16 Abb. Pr. 11].

33. McRee *v.* McRee, 34 Ala. 165; Peck *v.* Cavell, 16 Mich. 9; Arctic F. Ins. Co. *v.* Hicks, 7 Abb. Pr. (N. Y.) 204; Boyd *v.* Vanderkemp, 1 Barb. Ch. (N. Y.) 273; Gould *v.* Spencer, 5 Paige (N. Y.) 541; Swann *v.* Broome, 3 Burr. 1595, 97 Eng. Reprint 999, holding that a defendant cannot be misled by a notice to appear on Sunday, as the notice must necessarily relate to Monday, when the court does sit. See also Loveridge *v.* Plaistow, 2 H. Bl. 29.

The proceeding to effect a statutory foreclosure of a mortgage is not a judicial proceeding and hence it is not invalidated by the fact that the day appointed in the published notice is Sunday. Sayles *v.* Smith, 12 Wend. (N. Y.) 57, 27 Am. Dec. 117.

Intervention of Sunday in computation of time which must elapse before summons in justice's court is returnable see Justices of the Peace, 24 Cyc. 519 note 96.

34. *Alabama.*— Parish *v.* State, 130 Ala. 92, 30 So. 474.

Connecticut.—Ward *v.* Green, 11 Conn. 455.

Georgia.— Weldon *v.* Colquitt, 62 Ga. 449, 35 Am. Rep. 128.

Kentucky.— Watts *v.* Com., 5 Bush 309; Rice *v.* Com., 3 Bush 14.

Maine.— State *v.* Conwell, 96 Me. 172, 51 Atl. 873, 90 Am. St. Rep. 333 (search warrant); Keith *v.* Tuttle, 28 Me. 326.

Massachusetts.—Wright *v.* Dressel, 140 Mass. 147, 3 N. E. 6 (search warrant); Pearce *v.* Atwood, 13 Mass. 324 (holding, however, that an arrest for violation of the Sabbath laws could not lawfully be made on Sunday).

Canada.— *Re* McGillivray, 13 Can. Cr. Cas. 113, 41 Nova Scotia 321; Reg. *v.* Cavelier, 11 Manitoba 333.

See 45 Cent. Dig. tit. "Sunday," § 79.

35. Wood *v.* Brooklyn, 14 Barb. (N. Y.) 425; Wilson *v.* Tucker, 1 Salk. 78, 91 Eng. Reprint 74; Matter of Eggington, 2 C. L. R. 385, 2 E. & B. 717, 18 Jur. 224, 23 L. J. M. C. 41, 2 Wkly. Rep. 10, 76, 75 E. C. L. 717.

Where a prisoner is regularly discharged on Saturday, he cannot be lawfully arrested in another suit on Sunday. Atkinson *v.* Jameson, 5 T. R. 25, 101 Eng. Reprint 14.

36. *Ex p.* Carroll, 9 Ohio Dec. (Reprint) 261, 12 Cinc. L. Bul. 9; Com. *v.* De Puyter, 16 Pa. Co. St. 589; Corbett *v.* Sullivan, 54 Vt. 619.

English statute construed.— In Rawlins *v.* Ellis, 10 Jur. 1039. 16 L. J. Exch. 5, 16 M. & W. 172, it was held that 29 Car. II, c. 7, § 6, authorizes the arrest on a Sunday of all persons who have been guilty of an indictable offense.

statutes, it has been held that a man may voluntarily surrender himself to a warrant on Sunday;[37] that he may be lawfully arrested on Sunday for contempt in not performing an order of court;[38] and that he may be retaken on a Sunday after he has escaped from the custody of an officer, except where the escape was voluntary.[39] However, one who has been convicted under a penal statute cannot be lawfully arrested on Sunday for non-payment of the penalty.[40]

F. Bonds and Recognizances.[41] It is well settled that a bail-bond or recognizance entered into on Sunday, for the purpose of securing the release of a person in custody and his appearance for trial, is valid, the entering into such bond being considered as an act of necessity and charity and not judicial business.[42] The rule has been extended to appeal and supersedeas bonds [43] but not to replevin bonds.[44]

G. Holding Court. In the absence of a permissive statute, a judge or magistrate has no authority to hold court or conduct a trial on Sunday.[45] An exception is made in the case of a judge instructing a jury that has disagreed.[46] The continuing of a cause from Saturday to Monday does not constitute a keeping open of the court on Sunday,[47] and even where a trial is conducted on Sunday, the justice does not thereby lose jurisdiction of the cause.[48] As no court may lawfully sit on Sunday it is proper to adjourn from Saturday to Monday;[49] and when, by mistake, a hearing is set for Sunday, the meeting of the court on that

37. *Ex p.* Whitchurch, 1 Atk. 55, 26 Eng. Reprint 37.

38. *Ex p.* Whitchurch, 1 Atk. 55, 26 Eng. Reprint 37.

39. *Ex p.* Whitchurch, 1 Atk. 55, 26 Eng. Reprint 37; Featherstonehaugh *v.* Atkinson, Barnes Notes 373, 94 Eng. Reprint 961; Atkinson *v.* Jameson, 5 T. R. 25, 101 Eng. Reprint 14.

Arrest of principal by bail on Sunday see BAIL, 5 Cyc. 50 note 94.

40. King *v.* Myers, 1 T. R. 265, 99 Eng. Reprint 1086; *Ex p.* Frecker, 33 Can. L. J. N. S. 248.

41. **Validity of Sunday bonds in general** see *supra*, V, F, 5.

42. *Alabama.*— Hammons *v.* State, 59 Ala. 164, 31 Am. Rep. 13.

Georgia.— Weldon *v.* Colquitt, 62 Ga. 449, 35 Am. Rep. 128; Salter *v.* Smith, 55 Ga. 244.

Illinois.— Johnston *v.* People, 31 Ill. 469.

Indiana.— State *v.* Douglass, 69 Ind. 544; King *v.* Strain, 6 Blackf. 447.

Kentucky.— Watts *v.* Com., 5 Bush 309; Rice *v.* Com., 3 Bush 14.

Louisiana.— State *v.* Wyatt, 6 La. Ann. 701.

Texas.— Lindsay *v.* State, 39 Tex. Cr. 468, 46 S. W. 1045. See also *Ex p.* Millsap, 39 Tex. Cr. 93, 45 S. W. 20.

See 45 Cent. Dig. tit. "Sunday," § 80.

Expiration on Sunday of time for entering into bail see BAIL, 5 Cyc. 14 note 41.

43. State *v.* California Min. Co., 13 Nev. 203. See also Babcock *v.* Carter, 117 Ala. 575, 23 So. 487, 67 Am. St. Rep. 193, where the bond was signed but not delivered on Sunday. *Contra*, State *v.* Suhur, 33 Me. 539.

Exclusion of Sunday in computation of time for filing undertaking on appeal see APPEAL AND ERROR, 2 Cyc. 846 note 63.

44. Link *v.* Clemmons, 7 Blackf. (Ind.) 479.

Signing on Sunday.— In Prather *v.* Harlan, 6 Bush (Ky.) 185, a replevin bond, signed but not delivered on Sunday, was held valid.

45. *Georgia.*—Weldon *v.* Colquitt, 62 Ga. 449, 35 Am. Rep. 128; Bass *v.* Irvin, 49 Ga. 436.

Indiana.— Chapman *v.* State, 5 Blackf. 111.

Missouri.— State *v.* Green, 37 Mo. 466.

New York.— Pulling *v.* People, 8 Barb. 384.

Canada.— Reg. *v.* Cavelier, 11 Manitoba 333.

See 45 Cent. Dig. tit. "Sunday," § 81.

Long settled practice.— In State *v.* Howard, 82 N. C. 623, 626, it is said: "The holding court on the Sabbath is not forbidden by the common law or any statute in this state, but it has been the long settled and almost universal practice of our courts, when a term continues so long that a Sunday intervenes, to adjourn over until Monday, and 'long practice makes the law of a court.'"

In the absence of malice a justice of the peace is not personally liable for trying and convicting a person accused of crime on Sunday. Kraft *v.* De Verneuil, 105 N. Y. App. Div. 43, 94 N. Y. Suppl. 230.

An affidavit will be rejected when it appears from the jurat that it was sworn to in court on a Sunday. Doe *v.* Roe, 3 D. & L. 328, 15 L. J. Q. B. 39.

46. Jones *v.* Johnson, 61 Ind. 257; State *v.* McGimsey, 80 N. C. 377, 30 Am. Rep. 90. See also Stone *v.* U. S., 167 U. S. 178, 17 S. Ct. 778, 42 L. ed. 127 [*affirming* 64 Fed. 667, 12 C. C. A. 451], where the question as to the right of the court on Sunday to deliver to the jury special questions to be answered by them was raised but not decided.

47. Vanderwerker *v.* People, 5 Wend. (N. Y.) 530.

48. People *v.* Luhrs, 79 Hun (N. Y.) 415, 29 N. Y. Suppl. 789.

49. State *v.* Howard, 82 N. C. 623.

day and its adjournment over until the next day does not invalidate the proceedings.[50] It is lawful for a court to adjourn to Sunday for the purpose of receiving a verdict.[51] By statute in some jurisdictions, court may be held for certain purposes on Sunday.[52]

H. Judgment and Verdict [53] — **1. Judgment.** As the rendition of a judgment, order, or decree is a judicial act, it is void when done on Sunday.[54] An exception has been established in cases where a verdict was received on Sunday, and the statute directed the court or justice of the peace to render judgment immediately or forthwith.[55] Where a verdict is rendered on Sunday, it will be presumed, in the absence of anything to the contrary in the record, that the judgment on the verdict was rendered on a subsequent day.[56] And even when the judgment is rendered on the same day, although it is void, it does not vitiate the verdict.[57]

2. Verdict. In regard to the delivery and reception of verdicts, a different rule applies, as the rendering of a verdict is a mere ministerial act and it is an act of necessity and charity to receive it and not keep the jurors confined until Monday. It is well established, both at common law and by statute, that a verdict in civil as well as criminal cases may be delivered, received, and entered on Sunday.[58] It has also been held that the deliberation of the jury on

50. Cheeseborough *v.* Van Ness, 12 Ga. 380.

51. State *v.* Wilson, 121 Mo. 434, 26 S. W. 357.

52. Watts *v.* Com., 5 Bush (Ky.) 309; Rice *v.* Com., 3 Bush (Ky.) 14.

New York city magistrates.— In People *v.* Walton, 35 Misc. 320, 71 N. Y. Suppl. 85, it was held that Code Civ. Proc. § 6, which authorized a magistrate to commit or discharge on Sunday a person charged with an offense, did not permit of a trial on Sunday, but only permitted a discharge or commitment for a hearing. But in People *v.* New York State Reformatory for Women, 73 N. Y. App. Div. 174, 76 N. Y. Suppl. 728, it was held that the word "commit" covers committing after conviction as well as committing to await trial. It was further held that the above statute has been superseded in the city of New York by Laws (1897), c. 378, as amended by Laws (1901), c. 466, which confer authority for the opening of magistrates' courts at certain hours on Sunday.

53. Acquittal on Sunday constituting former jeopardy see Criminal Law, 12 Cyc. 275 text and note 28.

54. *Illinois.*— Baxter *v.* People, 8 Ill. 368.

Iowa.— Davis *v.* Fish, 1 Greene 406, 48 Am. Dec. 387.

Kansas.— Parsons *v.* Lindsay, 41 Kan. 336, 21 Pac. 227, 13 Am. St. Rep. 290, 3 L. R. A. 658.

Kentucky.— Coleman *v.* Henderson, Litt. Sel. Cas. 171, 12 Am. Dec. 290; Arthur *v.* Mosby, 2 Bibb 589.

Michigan.— Hemmens *v.* Bentley, 32 Mich. 89.

Mississippi.— Barber *v.* Manier, 71 Miss. 725, 15 So. 890, holding that an order appointing a receiver made on Sunday, without notice and before the complainant has filed his bill, is invalid.

Nevada.— *Ex p.* White, 15 Nev. 146, 37 Am. Rep. 466.

New York.— Hoghtaling *v.* Osborn, 15 Johns. 119.

Tennessee.— Styles *v.* Harrison, 99 Tenn. 128, 41 S. W. 333, 63 Am. St. Rep. 824.

Texas.— Shearman *v.* State, 1 Tex. App. 215, 28 Am. Rep. 402.

Vermont.— Blood *v.* Bates, 31 Vt. 147.

United States.— Ball *v.* U. S., 140 U. S. 118, 11 S. Ct. 761, 35 L. ed. 377.

England.— Swann *v.* Broome, 3 Burr. 1595, 97 Eng. Reprint 999.

See 45 Cent. Dig. tit. "Sunday," § 82.

As the presumption is in favor of a judgment, it will not be declared void because rendered on Sunday, unless the evidence clearly establishes without doubt that it was so rendered. Bishop *v.* Carter, 29 Iowa 165.

Entry on Sunday.—As, under the Virginia code, a vacation decree only becomes effective from the time it is entered in the chancery order book of the clerk's office of the court in which the case is pending, when so entered on Sunday, it is void. Lee *v.* Willis, 99 Va. 16, 37 S. E. 826.

55. Thompson *v.* Church, 13 Nebr. 287, 13 N. W. 626; Taylor *v.* Ervin, 119 N. C. 274, 25 S. E. 875; Wearne *v.* Smith, 32 Wis. 412. *Contra,* Allen *v.* Godfrey, 44 N. Y. 433, holding that the statute means that the justice must render judgment on the next day when business may be transacted.

56. Simmons *v.* State, 129 Ala. 41, 29 So. 929; Moore *v.* State, 49 Tex. 499, 96 S. W. 321.

57. Baxter *v.* People, 8 Ill. 368; Hoghtaling *v.* Osborn, 15 Johns. (N. Y.) 119; Shearman *v.* State, 1 Tex. App. 215, 28 Am. Rep. 402.

58. *Alabama.*— Sanford *v.* State, 143 Ala. 78, 39 So. 370; Simmons *v.* State, 129 Ala. 41, 29 So. 929; Chamblee *v.* State, 78 Ala. 466; Reid *v.* State, 53 Ala. 402, 25 Am. Rep. 627; Sorrelle *v.* Craig, 9 Ala. 534.

Florida.— Hodge *v.* State, 29 Fla. 500, 10 So. 556.

Sunday,[59] or their agreeing on a verdict and sealing it up,[60] does not invalidate the verdict when it is delivered on Monday. Where a term of court expires by its legal limitation on Saturday, a verdict received on Sunday is invalid.[61]

I. Discharge of Jury on Disagreement. It has been held that the court may, on Sunday, adjudicate the fact that the jury cannot agree and discharge it.[62] A positive finding that the jury cannot agree is necessary before the power may be exercised.[63]

J. Appeal and Bill of Exceptions.[64] It has been held that an application for a writ of error may be lawfully filed on Sunday.[65] On the other hand it has been held that, in the absence of a showing of necessity, a bill of exceptions is void when signed on Sunday,[66] and that a clerk of court is not bound to take appeals on Sunday when not required to by statute.[67]

K. Proceedings Against Persons Observing Seventh Day. Under statute in some jurisdictions, it is held that a summons on Saturday against a

Georgia.— Rawlins *v.* State, 124 Ga. 31, 52 S. E. 1 [*affirmed* in 201 U. S. 638, 26 S. Ct. 560, 50 L. ed. 899]; Weaver *v.* Carter, 101 Ga. 206, 28 S. E. 869; Bernstein *v.* Myer, 99 Ga. 90, 24 S. E. 854; Henderson *v.* Reynolds, 84 Ga. 159, 10 S. E. 734, 7 L. R. A. 327 [*distinguishing* Bass *v.* Irvin, 49 Ga. 436]. In Weldon *v.* Colquitt, 62 Ga. 449, 35 Am. Rep. 128, it is said, *obiter dictum*, that the reception of a verdict on Sunday is illegal.

Illinois.— Baxter *v.* People, 8 Ill. 368; Kankakee, etc., R. Co. *v.* Horan, 23 Ill. App. 259.

Indiana.— Jones *v.* Jackson, 61 Ind. 257; Joy *v.* State, 14 Ind. 39; McCorkle *v.* State, 14 Ind. 39; Rosser *v.* McColly, 9 Ind. 587; Cory *v.* Silcox, 5 Ind. 370.

Kansas.— Stone *v.* Bird, 16 Kan. 488.

Kentucky.— Meece *v.* Com., 78 Ky. 586, 1 Ky. L. Rep. 337; Bales *v.* Com., 11 S. W. 470, 11 Ky. L. Rep. 297.

Louisiana.— State *v.* Ford, 37 La. Ann. 443.

Missouri.— State *v.* Crisp, 126 Mo. 605, 29 S. W. 699; State *v.* Wilson, 121 Mo. 434, 26 S. W. 357.

Nevada.— State *v.* Rover, 13 Nev. 17.

New Hampshire.— Webber *v.* Merrill, 34 N. H. 202.

New Jersey.— Van Riper *v.* Van Riper, 4 N. J. L. 156, 7 Am. Dec. 576.

New Mexico.— Territory *v.* Nichols, 3 N. M. 76, 2 Pac. 78.

New York.— Allen *v.* Godfrey, 44 N. Y. 433; Butler *v.* Kelsey, 15 Johns. 177; Hoghtaling *v.* Osborn, 15 Johns. 119.

North Carolina.—Tuttle *v.* Tuttle, 146 N. C. 484, 59 S. E. 1008, 125 Am. St. Rep. 481; Taylor *v.* Ervin, 119 N. C. 274, 25 S. E. 875; State *v.* Penley, 107 N. C. 808, 12 S. E. 455; State *v.* McGimsey, 80 N. C. 377, 30 Am. Rep. 90; State *v.* Ricketts, 74 N. C. 187.

Oklahoma.— Milligan *v.* Territory, 2 Okla. 164, 37 Pac. 1059.

Pennsylvania.— Huidekoper *v.* Cotton, 3 Watts 56; Com. *v.* Marrow, 3 Brewst. 402; Com. *v.* Marra, 8 Phila. 440.

South Carolina.— Hiller *v.* English, 4 Strobh. 486 [*distinguishing* Shaw *v.* McCombs, 2 Bay 232], holding that the case was incorrectly reported.

Texas.— Moore *v.* State, 49 Tex. Cr. 499, 96 S. W. 321; Brown *v.* State, 32 Tex. Cr. 119, 22 S. W. 596; Huffman *v.* State, 28 Tex. App. 174, 12 S. W. 588; McKinney *v.* State, 8 Tex. App. 626; Shearman *v.* State, 1 Tex. App. 215, 28 Am. Rep. 402.

Washington.— State *v.* Straub, 16 Wash. 111, 47 Pac. 227.

United States.— Stone *v.* U. S., 167 U. S. 178, 17 S. Ct. 778, 42 L. ed. 127 [*affirming* 64 Fed. 667, 12 C. C. A. 451].

Canada.— *Re* McGillivray, 13 Can. Cr. Cas. 113, 41 Nova Scotia 321.

See 45 Cent. Dig. tit. "Sunday," § 82.

Compare Reg. *v.* Winsor, 10 Cox C. C. 276, where it was doubted whether a verdict delivered, received, and rendered on Sunday would be valid.

Contra.— Davis *v.* Fish, 1 Greene (Iowa) 406, 48 Am. Dec. 387. However, Iowa Code (1897), § 285, expressly authorizes the reception of a verdict on Sunday.

The power to receive the verdict includes the power to make orders incidental thereto, as, to have the verdict recorded or discharge the jury. McCorkle *v.* State, 14 Ind. 39; State *v.* Rover, 13 Nev. 17.

59. Gholston *v.* Gholston, 31 Ga. 625.

60. True *v.* Plumley, 36 Me. 466.

61. Nabors *v.* State, 6 Ala. 200; Davis *v.* Fish, 1 Greene (Iowa) 406, 48 Am. Dec. 387; Harper *v.* State, 43 Tex. 431. And see, generally, COURTS, 11 Cyc. 735; TIME.

62. People *v.* Lightner, 49 Cal. 226.

The Oregon statutes have been construed to mean that, while a court may receive the verdict of a jury on Sunday, it is powerless to discharge them on that day, without their agreement or some immediate necessity. *Ex p.* Tice, 32 Oreg. 179, 49 Pac. 1038.

63. State *v.* McGimsey, 80 N. C. 377, 30 Am. Rep. 90.

64. **Exclusion of Sunday in computing time for taking appeal** see APPEAL AND ERROR, 2 Cyc. 795 text and note; JUSTICES OF THE PEACE, 24 Cyc. 663 note 67.

65. Hanover F. Ins. Co. *v.* Shraeder, 89 Tex. 35, 32 S. W. 872, 33 S. W. 112, 59 Am. St. Rep. 25, 30 L. R. A. 498.

66. Roberts *v.* Farmers', etc., Bank, 136 Ind. 154, 36 N. E. 128.

67. Russell *v.* Pickering, 17 Ill. 31. In Neal *v.* Crew, 12 Ga. 93, it was assumed

person who keeps that day as a holy time is void.[68] A witness who refuses to be sworn on Saturday, on the ground that it is his Sabbath, is subject to a fine.[69]

L. Objection to Irregularity and Waiver. There is some confusion in the authorities as to the proper method of objecting to the service of process or other proceedings in a cause done on Sunday. It has been held that the objection cannot be urged for the first time on appeal, but that the irregularity is waived by appearance and going to trial without objection.[70] On the other hand it has been held that the irregularity cannot be waived,[71] and that the court is bound to take notice of it without its being especially assigned for error.[72] Process issued or served on Sunday is the proper subject of abatement by plea.[73] In criminal cases the irregularity cannot be inquired into on certiorari,[74] but may be, on either habeas corpus or appeal.[75]

M. Registration. It has been held that there is nothing unlawful in the registration of voters' names on a Sunday.[76]

SUNDAY-SCHOOL. One of the common means of religious instruction.[1] (See, generally, RELIGIOUS SOCIETIES, 34 Cyc. 1112.)

SUNDRY. Several; DIVERS, *q. v.*; more than one or two; various.[2] (Sundry: Clause in Tariff Schedule, see CUSTOMS DUTIES, 12 Cyc. 1126.)

SUNK. Lying at the bottom of a river or other water.[3] (See MARINE INSURANCE, 26 Cyc. 688; SHIPPING, 36 Cyc. 426.)

SUNSET. A term not always used in its accurate sense.[4]

that an appeal entered on the Sabbath would be void.

68. Martin *v.* Goldstein, 39 N. Y. Suppl. 254.

Under N. Y. Pen. Code, § 2150, the service of process on Saturday on a person who observes that day as a holy day must be done knowingly and maliciously to be void (Marks *v.* Wilson, 11 Abb. Pr. 87); and under a prior statute, now repealed, it was held that a judgment rendered on Saturday against that class of persons was not void (Maxson *v.* Annas, 1 Den. 204).

69. Stansbury *v.* Marks, 2 Dall. (Pa.) 213, 1 L. ed. 353.

70. Venable *v.* Ebenezer Baptist Church, 25 Kan. 177; Pierce *v.* Rehfuss, 35 Mich. 53; White *v.* Morris, 107 N. C. 92, 12 S. E. 80; Stinson *v.* State, 5 Tex. App. 31.

Notice of retainer not waiver.—The irregularity arising from the service of a capias ad respondendum on Sunday is not waived by the giving of a general notice of retainer in the cause by the attorney of defendant, as this does not constitute an appearance. Vanderpoel *v.* Wright, 1 Cow. (N. Y.) 209.

71. Valentine *v.* Roberts, 1 Alaska 536; Taylor *v.* Phillips, 3 East 155, 6 Rev. Rep. 575, 102 Eng. Reprint 556. *Contra*, Walgrave *v.* Taylor, 1 Ld. Raym. 705, 91 Eng. Reprint 1370, where the court refused to intervene after defendant had appeared and a writ of inquiry had been executed.

72. Hoyle *v.* Cornwallis, 1 Str. 387, 93 Eng. Reprint 584.

73. Helm *v.* Rodgers, 5 Humphr. (Tenn.) 105. *Contra*, Cotton *v.* Huey, 4 Ala. 56, holding that the service cannot be objected to by plea, but should be by motion to set aside the process for irregularity.

In New Hampshire, the plea is defective unless it alleges that the issuance of the process was done to the disturbance of others. Clough *v.* Shepherd, 31 N. H. 490.

74. *Ex p.* Garland, 8 Can. Cr. Cas. 385.

75. People *v.* Luhrs, 79 Hun (N. Y.) 415, 29 N. Y. Suppl. 789.

76. State *v.* Schnierle, 5 Rich. (S. C.) 299.

1. Eutaw Place Baptist Church *v.* Shively, 67 Md. 493, 496, 10 Atl. 244, 1 Am. St. Rep. 412.

2. Century Dict. See also Com. *v.* Butts, 124 Mass. 449, 452.

A synonym of "many" see Hilton Bridge Constr. Co. *v.* Foster, 26 Misc. (N. Y.) 338, 340, 57 N. Y. Suppl. 140.

3. Webster New Int. Dict. See also U. S. *v.* Dewey, 188 U. S. 254, 264, 23 S. Ct. 415, 47 L. ed. 463; The Glenlivet, [1893] P. 164, 170, 62 L. J. P. D. & Adm. 55, 68 L. T. Rep. N. S. 860, 41 Wkly. Rep. 671.

"Sunk or burnt" see The Glenlivet, [1893] P. 164, 171, 62 L. J. P. D. & Adm. 55, 68 L. T. Rep. N. S. 860, 41 Wkly. Rep. 671.

"Sunk or otherwise destroyed" held to mean "destroyed by sinking or otherwise" in U. S. *v.* Dewey, 188 U. S. 254, 261, 23 S. Ct. 415, 47 L. ed. 463.

4. People *v.* Bishop, 111 Ill. 124, 135, 53 Am. Rep. 605.

In an election statute requiring the polls to be kept open for the reception of ballots until "sunset" of the day of the election, the term was not used in any accurate sense to be determined by calculation, but all that was meant was that the polls should be kept open until it should appear to be sunset, as that fact might be ascertained by the judges from observation, or from the best information obtainable. People *v.* Bishop, 111 Ill. 124, 135, 53 Am. Rep. 605.

Bicycle ordinance.—Under the Local Government Act requiring that a person riding a bicycle shall carry attached to it a lamp

SUNSTROKE. Acute prostration from excessive heat of weather;[5] any affection produced by the action of the sun on some part of the body; especially, a sudden prostration of the physical powers, with symptoms resembling those of apoplexy, occasioned by exposure to excessive heat and often terminating fatally;[6] a sudden cerebral disturbance, often with apoplectic symptoms, due to exposure to excessive heat, generally that of the sun;[7] heat-stroke; especially that due to exposure to the sun's rays;[8] a condition resulting from exposure to the heat of the sun or to heat from other sources;[9] a popular term for isolation or heat-stroke;[10] heat-stroke, especially from direct sun rays;[11] certain pathological conditions resulting from exposure to solar or artificial heat;[12] a term applied to the effects produced upon the central nervous system, and through it upon other organs of the body, by exposure to the sun or to overheated air;[13] prostration due to exposure to intense external heat.[14] (See ACCIDENT INSURANCE, 1 Cyc. 249.)

SUPERANNUATED. Impaired or disabled through old age.[15]

lighted during the period between one hour after "sunset" and one hour before sunrise, it is held that one hour after sunset does not mean an hour after sunset according to Greenwich mean time, but according to the time of sunset as it varies at different places in England. Gordon *v.* Cann, 63 J. P. 324, 68 L. J. Q. B. 434, 435, 80 L. T. Rep. N. S. 20, 15 T. L. R. 165, 47 Wkly. Rep. 269.

5. Century Dict. [*quoted* in Supreme Lodge O. M. P. *v.* Gelbke, 100 Ill. App. 190, 196; Continental Casualty Co. *v.* Johnson, 74 Kan. 129, 131, 85 Pac. 545, 6 L. R. A. N. S. 609], where two forms are distinguished, and where it is said: "The same effects may be produced by heat which is not of solar origin."

6. Webster Dict. [*quoted* in Continental Casualty Co. *v.* Johnson, 74 Kan. 129, 131, 85 Pac. 545, 6 L. R. A. N. S. 609].

7. Standard Dict. [*quoted* in Continental Casualty Co. *v.* Johnson, 74 Kan. 129, 131, 85 Pac. 545, 6 L. R. A. N. S. 609].

8. Billings Nat. Med. Dict. [*quoted* in Continental Casualty Co. *v.* Johnson, 74 Kan. 129, 132, 85 Pac. 545, 6 L. R. A. N. S. 609].

9. J. K. Fowler Dict. Pract. Med. [*quoted* in Continental Casualty Co. *v.* Johnson, 74 Kan. 129, 132, 85 Pac. 545, 6 L. R. A. N. S. 609].

10. Gould New Med. Dict. [*quoted* in Continental Casualty Co. *v.* Johnson, 74 Kan. 129, 132, 85 Pac. 545, 6 L. R. A. N. S. 609].

11. Keating New Pron. Dict. Med. [*quoted* in Continental Casualty Co. *v.* Johnson, 74 Kan. 129, 132, 85 Pac. 545, 6 L. R. A. N. S. 609].

12. Quain Dict. Med. [*quoted* in Continental Casualty Co. *v.* Johnson, 74 Kan. 129, 132, 85 Pac. 545, 6 L. R. A. N. S. 609].

13. Encycl. Britannica [*quoted* in Continental Casualty Co. *v.* Johnson, 74 Kan. 129, 131, 85 Pac. 545, 6 L. R. A. N. S. 609; Dozier *v.* New York Fidelity, etc., Co., 46 Fed. 446, 447, 13 L. R. A. 114].

"While attacks of sunstroke are frequently precipitated by exposure, especially during fatigue, to the direct rays of the sun, in a large number of instances they come on under other circumstances. Cases are of not unfrequent occurrence among soldiers in hot climates where there is over-crowding or bad ventilation in their barracks, and sometimes several will be attacked in the course of a single night. The same remark applies to similar conditions existing on shipboard. Further, persons whose occupation exposes them to excessive heat, such as stokers, laundry workers, &c., are apt to suffer, particularly in hot seasons." Encycl. Britannica [*quoted* in Continental Casualty Co. *v.* Johnson, 74 Kan. 129, 131, 85 Pac. 545, 6 L. R. A. N. S. 609].

14. Encycl. Americana [*quoted* in Continental Casualty Co. *v.* Johnson, 74 Kan. 129, 131, 85 Pac. 545, 6 L. R. A. N. S. 609], adding: "Such exposure may be to the direct or indirect rays of a tropical sun or to the excessive heat of an engine-room. In either case heat and physical exertion combine to bring about the results. A high degree of humidity of the atmosphere is one of the most important features, since this hinders free evaporation from the body."

A man working in the heat, exposed to the rays of the sun, may be overcome by the heat to the point of exhaustion, so as to be prostrated with weakness, and even fall into insensibility and unconsciousness, without having a sunstroke in its technical sense. Knickerbocker L. Ins. Co. *v.* Trefz, 104 U. S. 197, 208, 26 L. ed. 708.

Accident insurance.— Sunstroke is held to be a disease, and death resulting from it does not come within the terms of a policy of insurance against bodily injuries sustained through external, violent, and accidental means. Dozier *v.* New York Fidelity, etc., Co., 46 Fed. 446, 447, 13 L. R. A. 114; Sinclair *v.* Maritime Passengers' Ins. Co., 3 E. & E. 478, 486, 7 Jur. N. S. 367, 30 L. J. Q. B. 77, 4 L. T. Rep. N. S. 15, 9 Wkly. Rep. 342, 107 E. C. L. 476.

15. Hood *v.* Dorer, 107 Wis. 149, 154, 82 N. W. 546 [*citing* Century Dict.].

"Superannuated preachers" see Hood *v.* Dorer, 107 Wis. 149, 154, 82 N. W. 546 [*citing* Century Dict.].

A police constable is "superannuated," within the meaning of an act providing for the creation of a superannuation fund, and providing that no constable shall be entitled to be superannuated, if under fifty years of age, unless reported unfit for service, whenever he receives any superannuation allow-

SUPERCARGO. See MARINE INSURANCE, 26 Cyc. 558; SHIPPING, 36 Cyc. 318.

SUPER FIDEM CHARTARUM, MORTUIS TESTIBUS, ERIT AD PATRIAM DE NECESSITATE RECURRENDUM. A maxim meaning "The truth of charters is necessary to be referred to a jury, when the witnesses are dead." [16]

SUPERFLUA NON NOCENT. A maxim meaning "Superfluities do not prejudice." [17]

SUPERFLUA OBSTANT; DEFECTIVA PERIMUNT. A maxim meaning "Superfluous things oppose; defective things destroy." [18]

SUPERFLUOUS LANDS. In English law, lands acquired by a railway company under its statutory powers, and not required for the purpose of its undertaking.[19]

SUPERINTEND.[20] To have charge and direction of; [21] to have charge and direction of; direct the course and oversee the details of; regulate with authority; manage; [22] to have or exercise the charge and oversight of; to oversee with the power of direction; to take care of with authority; [23] to oversee; to overlook; to have the care and direction of.[24]

SUPERINTENDENCE. Oversight or inspection; [25] the act of superintending; care and oversight for the purpose of direction, and with authority to direct; [26] the act of superintending; oversight; superior care; direction; inspection.[27] (Superintendence: Of Construction of Building, see BUILDERS AND ARCHITECTS, 6 Cyc. 32. Of Work, Mechanic's Lien For, see MECHANICS' LIENS, 27 Cyc. 42. See also SUPERVISION, and Cross-References Thereunder.)

ance from the superannuation fund. Hobson *v.* Kingston Upon Hull, 4 E. & B. 986, 991, 82 E. C. L. 986.

16. Peloubet Leg. Max. [*citing* Coke Litt. 6. b.].

17. Black L. Dict. [*citing* Jenkins Cent. 184].

Applied in Schenck *v.* Voorhees, 7 N. J. L. 383, 390.

18. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].

19. Black L. Dict. [*citing* Sweet Dict. Eng. L.]. See also Great Western R. Co. *v.* May, L. R. 7 H. L. 283, 292, 43 L. J. Q. B. 233, 31 L. T. Rep. N. S. 137, 23 Wkly. Rep. 141, where four different ways are pointed out in which land may become "superfluous."

20. **Derived from** the Latin, *superintendo; super,* over, and *intendo,* to direct one's attention to; into, towards, and *tendo,* to stretch see Worcester Dict. [*quoted* in Dantzler *v.* De Bardeleben Coal, etc., Co., 101 Ala. 309, 315, 14 So. 10, 22 L. R. A. 361].

21. Sanders *v.* Belue, 78 S. C. 171, 176, 58 S. E. 762.

22. Century Dict. [*quoted* in Dantzler *v.* De Bardeleben Coal, etc., Co., 101 Ala. 309, 315, 14 So. 10, 22 L. R. A. 361].

23. Webster Dict. [*quoted* in Dantzler *v.* De Bardeleben Coal, etc., Co., 101 Ala. 309, 314, 14 So. 10, 22 L. R. A. 361].

24. Worcester Dict. [*quoted* in Dantzler *v.* De Bardeleben Coal, etc., Co., 101 Ala. 309, 315, 14 So. 10, 22 L. R. A. 361].

"Superintended" construed as synonymous with "managed" as used in a statute prohibiting a wife from carrying on a business in her own name "when the same is managed or superintended by her husband" see Youngworth *v.* Jewell, 15 Nev. 45, 48.

In a by-law authorizing a police officer "to superintend the police of the town," the language is sufficiently broad to include an authority to exercise his powers as a police officer for the arrest of a person who had committed a misdemeanor within the limits of the town, although after the commission of the offense he left the town, and was found and arrested elsewhere. Com. *v.* Martin, 98 Mass. 4, 5.

"Superintending control" see Carnall *v.* Crawford County, 11 Ark. 604, 615; Levy *v.* Lychinski, 8 Ark. 113, 115.

25. Moffitt *v.* Asheville, 103 N. C. 237, 256, 257, 9 S. E. 695, 14 Am. St. Rep. 810, holding that the term, as used in the state constitution providing that "it shall be required by competent legislation, that the 'structure' and 'superintendence' of the penal institutions of the State, the county jails and city police prisons, secure the health and comfort of the prisoners," &c., was intended to impose upon the governing officials of a municipal corporation the duty of exercising ordinary care in procuring articles essential for the health and comfort of prisoners, and of overlooking their subordinates in immediate control of the prisons (so far at least as to replenish the supply of such necessary articles when notified that they are needed), and of employing such agents and raising and appropriating such amounts of money as may be necessary to keep the prison in such condition as to secure the comfort and health of the inmates.

26. Webster Dict. [*quoted* in Dantzler *v.* De Bardeleben Coal, etc., Co., 101 Ala. 309, 315, 14 So. 10, 22 L. R. A. 361; Ure *v.* Ure, 185 Ill. 216, 218, 56 N. E. 1087].

27. Worcester Dict. [*quoted* in Dantzler *v.* De Bardeleben Coal, etc., Co., 101 Ala. 309, 315, 14 So. 10, 22 L. R. A. 361].

Synonyms of the term are: "Inspection;" "oversight;" "care;" "direction;" "control;" "guidance." Webster Dict. [*quoted* in Dantzler *v.* De Bardeleben Coal, etc., Co., 101 Ala. 309, 315, 14 So. 10, 22 L. R. A. 361].

SUPERINTENDENT.[28] One who superintends; a DIRECTOR, *q. v.*; an OVERSEER,[29] *q. v.*; one who has the oversight and charge of something with the power of direction.[30] (Superintendent: Of City School, see MUNICIPAL CORPORATIONS, 28 Cyc. 579. Of Corporation — Power of in General, see CORPORATIONS, 10 Cyc. 932; Power to Execute Corporate Mortgage, see CORPORATIONS, 10 Cyc. 1200. Of County School, see SCHOOLS AND SCHOOL-DISTRICTS, 35 Cyc. 859. Of Work Under County Contract, Acceptance by, see COUNTIES, 11 Cyc. 487 note 16. Under Employers' Liability Act, see MASTER AND SERVANT, 26 Cyc. 1363.)

SUPERIOR. Higher in dignity, quality, or excellency.[31] (Superior: Court — In General, see COURTS, 11 Cyc. 658; Power to Punish Contempt, see CONTEMPT, 9 Cyc. 26. Military Officer, Obedience to as Excuse For Contempt, see CONTEMPT, 9 Cyc. 26 note 36. Servant, see MASTER AND SERVANT, 26 Cyc. 1307, 1361. Title as Exception to Rule That Party Cannot Deny Title Under Which He Claimed, see EJECTMENT, 15 Cyc. 50.)

SUPERIOR COURT. See COURTS, 11 Cyc. 658.

SUPERIOR FORCE. In the law of Louisiana, an accident which human prudence can neither foresee nor prevent.[32] (See ACT OF GOD, 1 Cyc. 758.)

"The word 'superintendence' seems properly to imply the exercise of some authority or control over the person or thing subjected to oversight." Roberts & W. Duty & Liability Employers [*quoted* in Dantzler *v.* De Bardeleben Coal, etc., Co., 101 Ala. 309, 315, 14 So. 10, 22 L. R. A. 361].

In a contract to build a sewer "under the immediate direction and superintendence of the commissioner of public works, and to his entire satisfaction, approval and acceptance," the term relates to results — to the character of the workmanship — and not to the methods, unless by the use of improper methods the character of the workmanship was rendered unsatisfactory. Foster *v.* Chicago, 197 Ill. 264, 267, 64 N. E. 322.

28. Derived from the Latin *super*, and *intendere*, meaning to oversee. People *v.* Steele, 2 Barb. (N. Y.) 397, 409, 6 N. Y. Leg. Obs. 54.

29. Salem *v.* McClintock, 16 Ind. App. 656, 46 N E. 39, 40, 59 Am. St. Rep. 330; Worcester Dict. [*quoted* in St. Louis, etc., R. Co. *v.* De Ford, 38 Kan. 299, 300, 16 Pac. 442].

30. Webster Dict. [*quoted* in Sacalaris *v.* Eureka, etc., R. Co., 18 Nev. 155, 161, 1 Pac. 835, 51 Am. Rep. 737].

"There is nothing in the word . . . in the common use of it, which implies that he shall be a collector of moneys, much less a financial agent for the settlement of accounts and the handling of the revenues of a city or town." Salem *v.* McClintock, 16 Ind. App. 656, 46 N. E. 39, 40, 59 Am. St. Rep. 330.

The word implies, *ex vi termini*, not mere momentary usurpation, but a regular and recognized authority, hence under a statute making it an offense for any owner or tenant of a house, outhouse, or arbor to permit unlawful gaming in any such house, etc., and providing that such owner, tenant, or other "superintendent" shall forfeit a certain sum for every such offense, a person who enters a house without authority and assumes temporary control is not included. Calvert *v.* Com., 5 B. Mon. (Ky.) 264, 265.

Railroad service.— There are in the railway service everywhere in this country "officers known as 'superintendents' in the operating department of the road, general superintendents of the whole line, and superintendents of divisions. The general duties of such superintendents are intimately connected with the movement of trains and cars. . . . The position of superintendent in the railway service is as definitely and well known as that of train dispatcher, telegraph operator, conductor, or engineer." The term cannot be applied to a mere foreman of a repair shop. Hartford *v.* Northern Pac. R. Co., 91 Wis. 374, 378, 64 N. W. 1033.

"Superintendents of repairs on the canals" see People *v.* Benton, 27 N. Y. 387.

31. Worcester Dict. [*quoted* in Gilman *v.* Jones, 87 Ala. 691, 704, 5 So. 785, 7 So. 48, 4 L. R. A. 113].

"Superior lien" means "prior lien." Gilman *v.* Jones, 87 Ala. 691, 704, 5 So. 785, 7 So. 48, 4 L. R. A. 113.

When used as descriptive of the rights which an electric car has in a street, it has been held to mean no more than the right which such a car has to demand that other travelers shall turn off from its track in reasonable time to allow it to pass, but that the car itself must be so managed as not to do any unreasonable injury to the travelers, and must be stopped if it appears that the other traveler is not turning out. Laufer *v.* Bridgeport Traction Co., 68 Conn. 475, 491, 37 Atl. 379, 37 L. R. A. 533.

32. Lehman *v.* Morgan's, etc., R., etc., Co., 115 La. 1, 4, 38 So. 873, 112 Am. St. Rep. 259, 70 L. R. A. 562.

"The term vis major (superior force) is used in the civil law in the same way that the words 'act of God' are used in the common law." Brousseau *v.* The Hudson, 11 La. Ann. 427, 428.

A proceeding of a commanding general of the United States in putting a bank in liquidation, notwithstanding the protest of the bank officers, and transmitting the bank's effects to commissioners appointed by him, who sold the choses in action held by the bank as collateral security at the time of the transfer for less than their face value,

SUPERNUMERARY. A term used during the period of the Revolution, to designate an officer who was thrown out and became unattached by the breaking up or consolidation of his regiment.[33]

SUPERPHOSPHATE. A fertilizer prepared by treating ground bones, bone black, or phosphoric with sulphuric acid, whereby a portion of the insoluble phosphoric acid is rendered soluble in water.[34]

SUPERSEDE. To set aside; to annul.[35] (See SUPERSEDEAS, *post*, p. 596.)

constitutes "superior force," which no prudent administrator of the affairs of a corporation could resist, so that the bank was neither responsible for such proceedings nor for a loss occasioned thereby. McLemore *v.* Louisiana State Bank, 91 U. S. 27, 29, 23 L. ed. 196.

33. Williams *v.* U. S., 137 U. S. 113, 127, 11 S. Ct. 43, 34 L. ed. 590.

"**He is just as much an officer** as any other: but his battalion or corps has been reduced or disbanded, or so arranged in some way, as to leave him, for the present, no command; and the state, to save the expence of full pay and subsistence, discharges him from actual service." Com. *v.* Lilly, 1 Leigh (Va.) 525, 529.

34. Webster Dict. [*quoted* in Goodman *v.* Beard, 93 S. W. 666, 667, 29 Ky. L. Rep. 544].

35. New River Mineral Co. *v.* Seeley, 117 Fed. 981, 982, where it is said: "An order which sets aside or annuls a decree dissolving an injunction must *ipso facto* reinstate the injunction."

"**In a military sense** 'to be superseded' means to have one put in the place, which, by the ordinary course of military promotion, belongs to another." *Ex p.* Hall, 1 Pick. (Mass.) 261, 262.

SUPERSEDEAS

By Edward C. Ellsbree*

I. Definition, 597
II. Nature and Scope of Remedy, 597
A. *Nature of Remedy*, 597
B. *Scope of Remedy*, 597
III. What May Be Superseded, 598
IV. Jurisdiction and Authority to Grant Supersedeas, 599
V. The Application or Petition, 600
A. *In General*, 600
B. *Amendment*, 601
C. *Verification*, 601
VI. Writ or Order, and Service Thereof, 601
A. *In General*, 601
B. *Waiver of Irregularities*, 602
VII. Operation and Effect, 602
VIII. Violation of Writ or Order, 603
IX. Bonds, 603
X. Costs, 604

CROSS-REFERENCES

For Matters Relating to:

Certiorari as Supersedeas, see Certiorari, 6 Cyc. 800.

Restraining Enforcement of Judgment Pending Appeal, see Judgments, 23 Cyc. 1037.

Stay of:

Action as Ground For Involuntary Dismissal, see Dismissal and Nonsuit, 14 Cyc. 447.

Execution:

In General, see Executions, 17 Cyc. 1135.

Against the Person, see Executions, 17 Cyc. 1515.

Proceedings Pending Appeal:

In General, see Appeal and Error, 2 Cyc. 885 *et seq.*

From Decree Foreclosing Mortgage, see Mortgages, 27 Cyc. 1677.

From Justices of the Peace, see Justices of the Peace, 24 Cyc. 697.

From Report of Referee, see References, 34 Cyc. 891.

In Action Against Principal or Surety by Creditor, see Principal and Surety, 32 Cyc. 142 note 15.

In Admiralty, see Admiralty, 1 Cyc. 902.

In Criminal Prosecution, see Criminal Law, 12 Cyc. 830 *et seq.*

In Forcible Entry and Detainer, see Forcible Entry and Detainer, 19 Cyc. 1185.

In Habeas Corpus Proceedings, see Habeas Corpus, 21 Cyc. 342.

In Mandamus, see Mandamus, 26 Cyc. 506.

In Partition, see Partition, 30 Cyc. 331, 332.

In Replevin, see Replevin, 34 Cyc. 1554 note 65.

---

* Author of "Inspection," 22 Cyc. 1363; "Novation," 29 Cyc. 1129; "Obscenity," 29 Cyc. 1314; "Piracy," 30 Cyc. 1626; "Post-Office," 31 Cyc. 970; "Salvage," 35 Cyc. 716. Joint author of "Religious Societies," 34 Cyc. 1112.

For Matters Relating to — (*continued*)
Stay of — (*continued*)
Proceedings Pending Appeal — (*continued*)
In Summary Proceedings by Landlord For Possession, see LANDLORD AND TENANT, 24 Cyc. 1455.
Proceedings Pending Review, see REVIEW, 34 Cyc. 1715 notes 65, 66.
Supersedeas as Subject of Relief by Mandamus, see MANDAMUS, 26 Cyc. 216.

I. DEFINITION.

A supersedeas is in practice a writ containing a command to stay a proceeding at law.[1] Originally it was a writ directed to an officer, commanding him to desist from enforcing the execution of another writ which he was about to execute, or which might come in his hands.[2] In modern times the term is often used synonymously with a "stay of proceedings;"[3] and by an extension of the term it has come to be used as a designation of the effect of any proceeding or act in a cause, which, of its own force, causes a suspension or stay of proceedings.[4]

II. NATURE AND SCOPE OF REMEDY.

A. Nature of Remedy. A proceeding by supersedeas is not a proceeding at common law in the strict sense of that term.[5] It is said to be a substitute for the writ of audita querela;[6] and the same rule which governs the one, regulates the other, with but slight exceptions.[7] The writ and the proceeding on which it is founded are regarded as in the nature of a bill in equity,[8] where the matter of discharge set forth in the petition does not appear in the record.[9] While a supersedeas is in one sense a continuation of the original suit,[10] yet in another sense it is the commencement of a new suit, and it is generally so regarded.[11]

B. Scope of Remedy. The primary and principal object of the remedy by the writ of supersedeas is to prevent the abuse of the process of the court.[12] In a proceeding for a supersedeas, that which forms the ground for relief must either

1. Bouvier L. Dict.
Other definitions are: "A writ ordering the suspension or superseding of another writ previously issued." Black L. Dict.
"A writ issued for the purpose of relieving a party from the operation of another writ, which has been or may be issued against him." Burrill L. Dict.
The term signifies, in general, the command to stay some ordinary proceeding at law, on good cause shown, which ought otherwise to proceed. Perteet *v.* People, 70 Ill. 171, 177 [*citing* Jacob L. Dict.]

2. Dulin *v.* Pacific Wood, etc., Co., 98 Cal. 304, 306, 33 Pac. 123; Tyler *v.* Presley, 72 Cal. 290, 291, 13 Pac. 856 [*citing* Abbott L. Dict.; Burrill L. Dict.]; Black L. Dict.; Bouvier L. Dict.

3. Dulin *v.* Pacific Wood, etc., Co., 98 Cal. 304, 306, 33 Pac. 123; Bouvier L. Dict. See APPEAL AND ERROR, 2 Cyc. 885 *et seq.*

4. Dulin *v.* Pacific Wood, etc., Co., 98 Cal. 304, 306, 33 Pac. 123; Black L. Dict.; Bouvier L. Dict.

5. Mobile Branch Bank *v.* Coleman, 20 Ala. 140.

6. Thompson *v.* Lassiter, 86 Ala. 536, 6 So. 33; Payne *v.* Thompson, 48 Ala. 535; Pearsall *v.* McCartney, 28 Ala. 110; Bruce *v.* Barnes, 20 Ala. 219; Mobile Branch Bank *v.* Coleman, 20 Ala. 140; Dunlap *v.* Clements, 18 Ala. 778; Edwards *v.* Lewis, 16 Ala. 813; Rutland *v.* Pippin, 7 Ala. 469; Lockhart *v.* McElroy, 4 Ala. 572; Marsh *v.* Haywood, 6 Humphr. (Tenn.) 210.
Audita querela see AUDITA QUERELA, 4 Cyc. 1058.
In Alabama the writ of audita querela has gone into disuse, and the proceeding by petition and supersedeas has been substituted for it. Dunlap *v.* Clements, 18 Ala. 778; Lockhart *v.* McElroy, 4 Ala. 572.

7. Mobile Branch Bank *v.* Coleman, 20 Ala. 140.

8. Thompson *v.* Lassiter, 86 Ala. 536, 6 So. 33; Mobile Branch Bank *v.* Coleman, 20 Ala. 140.
A proceeding by supersedeas is preferable to a bill in equity, as it saves the right of trial by jury and is more speedy and less expensive. Dunlap *v.* Clements, 18 Ala. 778.

9. Jesse French Piano, etc., Co. *v.* Bradley, 143 Ala. 530, 39 So. 47; Mobile Branch Bank *v.* Coleman, 20 Ala. 140.

10. Nadenbousch *v.* Sharer, 2 W. Va. 285.

11. Pearsall *v.* McCartney, 28 Ala. 110; Edwards *v.* Lewis, 16 Ala. 813; Shearer *v.* Boyd, 10 Ala. 279; Nadenbousch *v.* Sharer, 2 W. Va. 285.

12. Jesse French Piano, etc., Co. *v.* Bradley, 143 Ala. 530, 39 So. 47; Mobile Branch Bank *v.* Coleman, 20 Ala. 140; Lockhart *v.* McElroy, 4 Ala. 572.

rest on facts accruing subsequent to the decree,[13] such as satisfaction;[14] or, if it relates to antecedent facts, must show fraud in the decree,[15] or want of jurisdiction in the court, apparent on the face of the record,[16] or a denial of the relation which authorizes execution.[17]

III. WHAT MAY BE SUPERSEDED.[18]

The proceeding by supersedeas, being substituted for the writ of audita querela,[19] generally will lie in all cases where that writ would lie at common law.[20] The writ is most frequently used to suspend and quash executions,[21] either when they are improperly issued,[22] or where an unjust or improper use is attempted to be made of them.[23] In at least one state power is conferred upon the supreme court, in term, and any of the judges, in vacation, to grant writs of supersedeas to interlocutory orders and decrees, as in case of final decrees.[24] This power to

13. Jesse French Piano, etc., Co. *v.* Bradley, 143 Ala. 530, 39 So. 46; Randall *v.* Wadsworth, 130 Ala. 633, 31 So. 555; Thompson *v.* Lassiter, 86 Ala. 536, 6 So. 33; Gravett *v.* Malone, 54 Ala. 19; State *v.* Beasley, 45 Ala. 81; Marshall *v.* Caudler, 21 Ala. 490; Matthews *v.* Robinson, 20 Ala. 130; Holloway *v.* Washington, 3 Ala. 668.

14. Randall *v.* Wadsworth, 130 Ala. 633, 31 So. 555.

15. Randall *v.* Wadsworth, 130 Ala. 633, 31 So. 555; Gravett *v.* Malone, 54 Ala. 19.

16. Randall *v.* Wadsworth, 130 Ala. 633, 31 So. 555; Gravett *v.* Malone, 54 Ala. 19.

17. Randall *v.* Wadsworth, 130 Ala. 633, 31 So. 555; Gravett *v.* Malone, 54 Ala. 19.

18. **Judgments or orders which may be superseded or stayed pending appeal** see APPEAL AND ERROR, 2 Cyc. 887 *et seq.*

19. See *supra*, II, A.

20. Thompson *v.* Lassiter, 86 Ala. 536, 6 So. 33; *Ex p.* Caldwell, 5 Ark. 390.

Limitation.— But the remedy by supersedeas is unfit for many cases in which the audita querela is used in England, and in none more so than an attempt to vacate and correct a judgment for usury. White *v.* Harris, 5 Humphr. (Tenn.) 420.

21. *Ex p.* Pearl Roller Mill Co., 154 Ala. 232, 45 So. 423.

22. Thompson *v.* Lassiter, 86 Ala. 536, 6 So. 33; *Ex p.* Brown, 58 Ala. 536; Payne *v.* Thompson, 48 Ala. 535; Hill *v.* McKenzie, 39 Ala. 314; Del Barco *v.* Mobile Branch Bank, 12 Ala. 238; Crenshaw *v.* Hardy, 3 Ala. 653.

Issuance of execution after judgment satisfied.— If a judgment upon which an execution is issued has been paid prior to the issue of such execution, the debtor's remedy is by petition for a supersedeas. Mason *v.* Vance, 1 Sneed (Tenn.) 178, 60 Am. Dec. 144; Marsh *v.* Haywood, 6 Humphr. (Tenn.) 210. Matter which operates as an equitable satisfaction of a judgment may be inquired into by this proceeding. Thompson *v.* Lassiter, 86 Ala. 536, 6 So. 33; Mobile Branch Bank *v.* Coleman, 20 Ala. 140.

In Alabama the matter, to some extent, is regulated by statute, which directs the allowance of a supersedeas on application to a judge at chambers, whenever an execution has improperly issued. Aiken Dig. 208, § 38. This statute was at first considered as extending only to cases where the execution issued irregularly. Holloway *v.* Washington, 3 Ala. 668; Clemens *v.* Prout, 3 Stew. & P. 345; Fryer *v.* Austill, 2 Stew. 119. Subsequently, however, it has been held to apply to all cases where executions are improperly sued out, whether on account of mere irregularity or because plaintiff has no just right to enforce process. Shearer *v.* Boyd, 10 Ala. 279; Lockhart *v.* McElroy, 4 Ala. 572.

In the English courts of common law, the practice, when an execution has issued improperly, is to obtain a judge's order to stay proceedings until defendant can submit a motion in court; and this summary mode of redress by motion, it is said, obtains in all cases, when it would be allowed by audita querela. Lister *v.* Mundell, 1 B. & P. 427; Nathans *v.* Giles, 1 Marsh. 226, 5 Taunt. 558, 15 Rev. Rep. 581, 1 E. C. L. 286.

Necessity of showing want of jurisdiction. — In Arkansas, to entitle a party to a writ of supersedeas as a principal remedy, such facts must be established as show that the inferior tribunal had no jurisdiction at the time of pronouncing judgment. *Ex p.* Davis, 5 Ark. 405; *Ex p.* Caldwell, 5 Ark. 390; Dunn *v.* State, 2 Ark. 229, 35 Am. Dec. 54. In Louisiana to entitle a party to a supersedeas to stay a writ of possession issued from the district, on a judgment from the supreme, court, he must show affirmatively that it issued in contravention of the latter's decree. Crane *v.* Allen, 11 La. Ann. 496.

23. Rutland *v.* Pippin, 7 Ala. 469; Lockhart *v.* McElroy, 4 Ala. 572.

Where two judgments exist for the same debt, the payment of one is a satisfaction of both, and the attempt to coerce the payment afterward, by execution, is an abuse of the province of the court, which may be arrested by supersedeas. Lockhart *v.* McElroy, 4 Ala. 572.

24. Tenn. Code, §§ 3933, 3934, 4512, 4513.

The object of these provisions is to enable the court, or one of its judges, to stay the execution of an order or decree of the chancery court which, in advance of the final hearing, undertakes to deprive the litigant of money or property. Gwynne *v.* Memphis Appeal-Avalanche Co., 93 Tenn. 603, 30 S. W. 23; Blake *v.* Dodge, 8 Lea (Tenn.) 465; Redmond *v.* Redmond, 9 Baxt. (Tenn.) 561.

supersede the orders and decrees of inferior courts does not authorize the supreme court to supervise the discretion of a chancellor in the exercise of a conceded power for the protection of property *pendente lite*.[25] That court can simply suspend or supersede, for the time being, the execution of such orders and decrees as are of a nature to be actively and affirmatively enforced,[26] and are *in fieri*;[27] but have no power, in this mode, to reverse the action of the inferior court, or to set aside, or annul, or supersede orders or decrees, which are merely of a negative or prohibitory character,[28] or such as have been executed.[29] Nor has the supreme court, in a proceeding of this character, the power to supersede the fiat of a chancellor awarding extraordinary process.[30]

IV. JURISDICTION AND AUTHORITY TO GRANT SUPERSEDEAS.[31]

A court has authority, under its general powers, to supersede its own executions in a proper case, especially when it has general jurisdiction of the subject.[32] The subject is, however, usually regulated by statute.[33] Thus in some states the judges of the circuit court may issue the writ of supersedeas in vacation, returnable to the court in term-time.[34] But a circuit court judge has no power or jurisdiction to grant an order for supersedeas to the judgments or decrees of the supreme

25. Roberson *v.* Roberson, 3 Lea (Tenn.) 50; Bramley *v.* Tyree, 1 Lea (Tenn.) 531; Baird *v.* Cumberland, etc., Turnpike Co., 1 Lea (Tenn.) 394.

Appointment of receiver.—Where the court has the discretionary power to appoint a receiver, the order making the appointment cannot be reversed by the supreme court on writ of supersedeas. Troughber *v.* Akin, 109 Tenn. 451, 73 S. W. 118; Enochs *v.* Wilson, 11 Lea (Tenn.) 228; Roberson *v.* Roberson, 3 Lea (Tenn.) 50; Bramley *v.* Tyree, 1 Lea (Tenn.) 531; Baird *v.* Cumberland, etc., Turnpike Co., 1 Lea (Tenn.) 394. Matters of mere form, not going to the jurisdiction of the chancellor to appoint the receiver, cannot in general be considered when collaterally presented. Troughber *v.* Akin, *supra*. But if the court had not the power to appoint a receiver, the supreme court may supersede the appointment. Roberson *v.* Roberson, *supra*; Baird *v.* Cumberland, etc., Turnpike Co., 1 Lea (Tenn.) 394; Richmond *v.* Yates, 3 Baxt. (Tenn.) 204; Cone *v.* Paute, 12 Heisk. (Tenn.) 506.

26. Blake *v.* Dodge, 8 Lea (Tenn.) 465; Roberson *v.* Roberson, 3 Lea (Tenn.) 50; Baird *v.* Cumberland, etc., Turnpike Co., 1 Lea (Tenn.) 394; Redmond *v.* Redmond, 9 Baxt. (Tenn.) 561; McMinnville, etc., R. Co. *v.* Huggins, 7 Coldw. (Tenn.) 217.

27. Redmond *v.* Redmond, 9 Baxt. (Tenn.) 561.

28. Redmond *v.* Redmond, 9 Baxt. (Tenn.) 561; McMinnville, etc., R. Co. *v.* Huggins, 7 Coldw. (Tenn.) 217.

An injunction is a prohibitory writ, and its office is to restrain, and not to compel, performance. It does not authorize any act to be done; and there can be no proceeding under it capable of being stayed by a supersedeas. Baird *v.* Cumberland, etc., Turnpike Co., 1 Lea (Tenn.) 394; Park *v.* Meek, 1 Lea (Tenn.) 78; Redmond *v.* Redmond, 9 Baxt. (Tenn.) 561; McMinnville, etc., R. Co. *v.* Huggins, 7 Coldw. (Tenn.) 217; Mabry *v.* Ross, 1 Heisk. (Tenn.) 769.

Other illustrations.— Under the authority given to the supreme court by Tenn. Code, §§ 3833, 3934, 4512, 4513, authorizing the court to supersede interlocutory orders and decrees, that court cannot supersede the decree of a chancellor refusing to dismiss a bill upon motion; nor a decree refusing to quash attachments and discharge levies, such orders being of a mere negative or prohibitory character. Redmond *v.* Redmond, 9 Baxt. (Tenn.) 561.

29. Redmond *v.* Redmond, 9 Baxt. (Tenn.) 561.

30. Woods *v.* Batey, 15 Lea (Tenn.) 733; Baird *v.* Cumberland, etc., Turnpike Co., 1 Lea (Tenn.) 394; Redmond *v.* Redmond, 9 Baxt. (Tenn.) 561.

The appointment of a receiver is ordinarily in the nature of extraordinary process. Baird *v.* Cumberland, etc., Turnpike Co., 1 Lea (Tenn.) 394.

31. **To allow stay pending appeal** see APPEAL AND ERROR, 2 Cyc. 891 *et seq.*

32. Payne *v.* Thompson, 48 Ala. 535; Lockhart *v.* McElroy, 4 Ala. 572.

33. **In Alabama** the practice is regulated by statute. Aiken Dig. 208. § 38.

34. *Ex p.* Pearl Roller Mill Co., 154 Ala. 232, 45 So. 423.

In Alabama there is an act declaring that "the Judges of the Circuit Courts respectively shall have power and authority in vacation to supersede any execution when it shall satisfactorily appear to them that the same shall have improperly issued from the clerk's office of any of the Circuit Courts." Lockhart *v.* McElroy, 4 Ala. 572.

In New York, an application, under 2 Rev. St. p. 556, §§ 36, 37, for an order of supersedeas, may be made to a judge of the first district, although the action is triable elsewhere. Wells *v.* Jones, 2 Abb. Pr. 20; Sturgess *v.* Weed, 13 How. Pr. 130.

court.[35] So also the supreme court, or any judge thereof, is often granted express authority to issue writs of supersedeas.[36] But an application for a supersedeas of execution issuing on a judgment from the court below must first be made to that court, and refused by it, before the supreme court will hear such application.[37] A proceeding in supersedeas should be granted out of the court where the record upon which it is procured remains, or be returnable in the same court.[38] It cannot be granted out of any court returnable in the same court, where the record upon which it is returnable is not there.[39] If the record is not brought into the court where the writ is sued, there should be judgment against plaintiff.[40]

V. THE APPLICATION OR PETITION.[41]

A. In General. A proceeding by supersedeas to arrest and have entry of satisfaction of an execution is a suit between the parties to the judgment [42] and the pleadings must be made in their names.[43] The petition is regarded in the nature of a declaration or statement of facts, and, as such, it may be pleaded or demurred to.[44] But the same strictness in pleading is not required as in an ordi-

35. Dibrell *v.* Eastland, 3 Yerg. (Tenn.) 507.

36. **The Arkansas constitution** gives the supreme court, by express grant, power to issue writs of supersedeas, but omits to define under what circumstances the writ may issue; nor has the legislature prescribed any rule to be observed in regard to such writs. *Ex p.* Caldwell, 5 Ark. 390; *Ex p.* Woods, 3 Ark. 532. Under such circumstances, the rule of the common law will govern in a proceeding of this kind, the court possessing over this subject the whole power, as exercised by the courts of England. This power results from the general grant of authority to this court, of supervising the adjudications of inferior tribunals, and to correct their proceedings if they assume to act without authority of law, or oppressively, or in a manner not authorized by law. *Ex p.* Caldwell, 5 Ark. 390.

Under the Indiana statute any judge of the supreme court, either in term-time or vacation, has authority to issue writs of supersedeas. Northern Indiana R. Co. *v.* Michigan Cent. R. Co., 2 Ind. 670.

In Tennessee the supreme court in term-time, or any judge thereof in vacation, may grant a writ of supersedeas to an interlocutory order or decree, or execution thereon, if such decree, etc., is of a nature to be actively and affirmatively enforced, but not if it is merely negative and prohibitory as an injunction. McMinnville, etc., R. Co. *v.* Huggins, 7 Coldw. 217. And see *supra*, III.

In Virginia a supersedeas, auxiliary to other proceedings, is not within the meaning of St. (1806) § 4, concerning the court of appeals, which provides that no appeal, writ of error, or supersedeas shall be granted in court by the court of appeals to the decree of the chancery court, but only by a judge in term-time or in vacation. Cheshire *v.* Atkinson, 1 Hen. & M. 210.

37. Hofler *v.* State, 16 Ark. 214; *Ex p.* Bixley, 13 Ark. 286.

If the error be one for which the judgment might be reversed in an appellate court, no appeal, writ of error, or supersedeas should be allowed until after motion to the court or judge has been made and overruled. Davis *v.* Com., 16 Gratt. (Va.) 134.

38. Payne *v.* Thompson, 48 Ala. 535.

39. Payne *v.* Thompson, 48 Ala. 535.

A circuit judge has jurisdiction to grant a writ of supersedeas returnable into the probate court, where the record upon which it is founded remains. But he could not make it returnable into his court, unless under some process the record was to be brought there. Payne *v.* Thompson, 48 Ala. 535.

40. Payne *v.* Thompson, 48 Ala. 535.

41. **Application for stay pending appeal** see APPEAL AND ERROR, 2 Cyc. 894.

42. See *supra*, II, A.

Right to relief in several causes.— It is incompetent for a petitioner for a supersedeas to ask by the same petition relief in several causes, and it makes no difference in this respect whether the parties are the same or different. Shearer *v.* Boyd, 10 Ala. 279.

To whom addressed.—An application for a supersedeas should be addressed to the court, and not to one of its members. Haskell *v.* Hazard, 33 Me. 585.

Notice of application and hearing.—A plaintiff in execution is not entitled to notice of the filing of an application in vacation for the writ of supersedeas, but is entitled to notice of the hearing in term-time. *Ex p.* Pearl Roller Mill Co., 154 Ala. 232, 45 So. 423.

43. Edwards *v.* Lewis, 16 Ala. 813.

Defendant in a judgment, who applies for a supersedeas, is plaintiff in the proceeding subsequently had on his petition, and is therefore entitled to open and conclude the argument. Pearsall *v.* McCartney, 28 Ala. 110.

An assignee of a judgment is a proper defendant to a petition for supersedeas of an execution issuing thereon. Eslava *v.* Farley, 72 Ala. 214.

44. Pearsall *v.* McCartney, 28 Ala. 110; Bruce *v.* Barnes, 20 Ala. 219; Powell *v.* Washington, 15 Ala. 803; Shearer *v.* Boyd, 10 Ala. 279; Mabry *v.* Herndon, 8 Ala. 848; Spence *v.* Walker, 7 Ala. 568.

nary bill in equity.[45] When an issue is formed on the facts set forth in a petition for a supersedeas of an execution, it may properly be submitted to a jury for decision,[46] and should then be tried as other issues of fact submitted in ordinary cases and under the same rules of evidence.[47]

B. Amendment. Since a petition for supersedeas stands in lieu of a declaration, it may be amended by leave of court, on demurrer sustained to the original,[48] provided the amendment does not make an entirely different case.[49]

C. Verification. It is not required that the petition presented should be verified by the oath of the person in whose name, and on whose behalf, it is filed;[50] any person who knows the matters set forth in the petition to be true may verify it.[51]

VI. Writ or Order, and Service Thereof.[52]

A. In General. The order for a supersedeas is not a supersedeas of itself;[53] it is but the declaration of the judge that it is fit under the circumstances that a supersedeas should issue;[54] and may be recalled by him at any time before it is complied with, if upon consideration he deems it improper or improvident.[55] The supersedeas issued should conform to the order,[56] and if there is a substantial variance between the two, the writ will be quashed.[57] Unless required, it is not essential to the efficacy of a supersedeas that it should be executed by a sheriff or other officer; but a delivery of the supersedeas by defendant in execution, or other person, to the officer who has in his hands the process to be superseded, is effectual for all legal purposes.[58] A supersedeas issued improvidently or without warrant of law will be quashed or vacated on motion.[59] Moreover if a supersedeas

Effect of overruling of demurrer.—A petition for a supersedeas of an execution is regarded, under the Alabama practice, in the nature of a statement or declaration of facts, and when demurred to, if the demurrer is overruled and the respondent declines to answer over, the court may take the facts as admitted and render judgment thereon. Powell *v.* Washington, 15 Ala. 803; Spence *v.* Walker, 7 Ala. 568.

45. Thompson *v.* Lassiter, 86 Ala. 536, 6 So. 33. And see Alabama, etc., R. Co. *v.* Queen City Electric Light Co., 121 Ala. 300, 25 So. 824.

A petition for a supersedeas is sufficient on demurrer which alleges that the judgment is satisfied. Rice *v.* Dillahunty, 20 Ala. 399.

A petition for a supersedeas to prevent the sale of exempt property must set forth under oath that petitioner is a resident of the state (Felner *v.* Bumgarner, (Ark. 1891) 17 S. W. 709; May *v.* Hutson, 54 Ark. 226, 15 S. W. 606; Brown *v.* Peters, 53 Ark. 182, 13 S. W. 729), and must contain a description of all his property, real and personal (May *v.* Hutson, *supra*; Brown *v.* Peters, *supra*).

46. Mobile Branch Bank *v.* Coleman, 20 Ala. 140; Dunlap *v.* Clements, 18 Ala. 778; Edwards *v.* Lewis, 16 Ala. 813.

47. Bower *v.* Saltmarsh, 19 Ala. 274.

48. Pearsall *v.* McCartney, 28 Ala. 110; May *v.* Hutson, 54 Ark. 226, 15 S. W. 606.

49. Pearsall *v.* McCartney, 28 Ala. 110.

50. Mobile Branch Bank *v.* Coleman, 20 Ala. 140.

51. Mobile Branch Bank *v.* Coleman, 20 Ala. 140.

Verification by an agent is sufficient. Mobile Branch Bank *v.* Coleman, 20 Ala. 140.

52. **Modifying or vacating supersedeas or stay pending appeal** see Appeal and Error, 2 Cyc. 906 *et seq.*

53. Anderson *v.* Lively, 6 Leigh (Va.) 77. See also Farris *v.* State, 33 Ark. 70; *Ex p.* Layton, 6 Ves. 434; *Ex p.* Leicester, 6 Ves. 429.

54. Anderson *v.* Lively, 6 Leigh (Va.) 77.

55. Anderson *v.* Lively, 6 Leigh (Va.) 77.

56. *Ex p.* Woods, 3 Ark. 532.

57. *Ex p.* Woods, 3 Ark. 532, holding that where the order for a supersedeas directs the proceedings to be immediately stayed, the execution having been improvidently and illegally issued, and the writ only directs them to be suspended, omitting to set forth the facts for reason of which they are to be stayed, it is a variance for which the writ will be quashed.

58. Welch *v.* Jones, 11 Ala. 660.

In Virginia the writ of supersedeas is directed to the sheriff. See 4 Minor Inst. Pt. 1, pp. 854, 855. In giving notice of a writ of supersedeas, the sheriff must pursue the mode required by the act for giving notice upon replevy bonds. Mackey *v.* Fuqua, 2 Call (Va.) 496.

59. Baltimore, etc., R. Co. *v.* Annon, 18 W. Va. 393. And see cases citel *infra*, this note.

A supersedeas, granted upon an ex parte application, may be vacated upon a proper showing at a subsequent term. Farrelly *v.* Cross, 10 Ark. 197.

A supersedeas issued by an inferior court to a judgment of the supreme court will be quashed on motion. Dibrell *v.* Eastland, 3 Yerg. (Tenn.) 507.

A writ of supersedeas which embraces several judgments, although between the same parties and upon claims of a like nature,

is not given within the time limited by statute, the right to the remedy is lost; and if given thereafter it is ineffective.[60] The order of the judge allowing a supersedeas is to be taken as the commencement of the proceeding, in reference to the operation of the statute of limitations.[61]

B. Waiver of Irregularities. By appearing and filing an answer to the petition, plaintiff in execution waives any irregularity in the issuance and return of the writ.[62]

VII. Operation and Effect.[63]

A supersedeas suspends the efficacy of a judgment,[64] but does not, like a reversal, annul the judgment itself.[65] Its object and effect are to stay future proceedings,[66] and not to undo what is already done.[67] Whatever is lawfully done under the judgment before the supersedeas takes effect is valid and must stand.[68] Anything done afterward is unauthorized by the judgment, and must be set aside.[69] A supersedeas takes effect not at the moment when it is issued, but when the proper evidence of its existence has been furnished.[70] When ordered

and although the question is the same in all the cases, is irregular, and will be quashed as improvidently allowed; the supersedeas partaking of the character of a writ of error. Ayres *v.* Lewellin, 3 Leigh (Va.) 609. But see Jones *v.* Welch, 15 Ala. 306, holding that a writ of supersedeas, which embraces two separate executions, and commands the officer to suspend proceedings on each, is not a nullity.

A motion to discharge a supersedeas suspending an interlocutory decree for the appointment of a receiver to take possession of and rent out land will not be granted, if the proper parties in interest are not before the court, and if the proof of such party has not been taken and the cause not ready for hearing. Richmond *v.* Yates, 3 Baxt. (Tenn.) 204. Under the Tennessee code the only question before the court on a motion to discharge the writ is whether the order sought to be superseded was one to be actively enforced, and which might deprive petitioner of money or property in advance of the final hearing. Blake *v.* Dodge, 8 Lea (Tenn.) 465.

Discharge by lapse of time.—A supersedeas to stay proceedings until the next term is discharged of course at the end of the term, and therefore an order of the court discharging it during the term, which merely produced the same effect, is not erroneous. Benton *v.* Engleman, Cooke (Tenn.) 496.

60. Anderson *v.* Lively, 6 Leigh (Va.) 77.

In Virginia the law forbids the emanation of a supersedeas after five years have elapsed from the date of the judgment. Anderson *v.* Lively, 6 Leigh 77. The order for the supersedeas should therefore either be construed to imply a compliance within the limited period, or it should impose a limitation. Anderson *v.* Lively, *supra*. The fair construction of such an order would require the party to sue out the writ, and execute the bond, at a date anterior to the first term to which it could be made returnable. Anderson *v.* Lively, *supra*. And if this be not done, then a new order should be obtained. Anderson *v.* Lively, *supra*. If there was no clerk, then, as the party was not in default, it would be competent to direct it to issue *nunc pro tunc*, provided the motion was addressed to the court in due season. Anderson *v.* Lively, *supra*. But it would be a gross abuse to permit the party, at any length of time, however remote, to have his supersedeas, after having so long held up the order. Anderson *v.* Lively, *supra*.

61. Anderson *v.* Lively, 6 Leigh (Va.) 77.

62. *Ex p.* Pearl Roller Mill Co., 154 Ala. 232, 45 So. 423.

63. **Supersedeas or stay pending appeal** see Appeal and Error, 2 Cyc. 908 *et seq.*

Suspending limitations see Limitations of Actions, 25 Cyc. 1282 *et seq.*

Restraining effect of supersedeas see Injunctions, 22 Cyc. 811.

64. Polk County *v.* Johnson, 21 Fla. 577; Runyon *v.* Bennett, 4 Dana (Ky.) 598, 29 Am. Dec. 431.

A supersedeas to an interlocutory decree does not operate as an appeal or writ of error to bring the cause into the appellate court. The cause remains in the court below, and the effect of the writ is merely to suspend the operation of the decree until the final hearing. Blake *v.* Dodge, 8 Lea (Tenn.) 465; Redmond *v.* Redmond, 9 Baxt. (Tenn.) 561; McMinnville, etc., R. Co. *v.* Huggins, 7 Coldw. (Tenn.) 217.

An order for a supersedeas has no effect until the writ issues. Farris *v.* State, 33 Ark. 70; *Ex p.* Layton, 6 Ves. Jr. 434, 31 Eng. Reprint 1131; *Ex p.* Leicester, 6 Ves. Jr. 429, 31 Eng. Reprint 1128. See also Anderson *v.* Lively, 6 Leigh (Va.) 77.

65. Runyon *v.* Bennett, 4 Dana (Ky.) 598, 29 Am. Dec. 431.

66. Runyon *v.* Bennett, 4 Dana (Ky.) 598, 29 Am. Dec. 431.

67. Polk County *v.* Johnson, 21 Fla. 577; Runyan *v.* Bennett, 4 Dana (Ky.) 598, 29 Am. Dec. 431.

68. Runyon *v.* Bennett, 4 Dana (Ky.) 598, 29 Am. Dec. 431.

69. Runyon *v.* Bennett, 4 Dana (Ky.) 598, 29 Am. Dec. 431; Hey *v.* Harding, 78 S. W. 136, 25 Ky. L. Rep. 1454; Webber *v.* Tanner, 64 S. W. 741, 23 Ky. L. Rep. 1107.

70. Runyon *v.* Bennett, 4 Dana (Ky.) 598,

and issued to an officer by proper authority, he is bound to obey it,[71] and if he holds property in his custody under an attachment, the supersedeas operates to release the property, and authorizes the officer to return it to the debtor,[72] without requiring a bond that it shall be forthcoming at the end of the suit.[73]

VIII. VIOLATION OF WRIT OR ORDER.[74]

A violation of a supersedeas is a contempt.[75]

IX. BONDS.[76]

A bond is usually required to be given by the person obtaining the supersedeas,[77] which bond, if the supersedeas is set aside, is given the force and effect of a judgment.[78] Actions on supersedeas bonds are governed by the rules applicable to actions on bonds generally.[79] Money judgments are sometimes authorized on supersedeas bonds.[80]

29 Am. Dec. 431, holding that a supersedeas takes effect, not at the moment when it is issued, but when the certificate is filed in the office of the clerk of the court below, and when due notice is given to the officers or party to be restrained by it.

71. Williams *v.* Stewart, 12 Sm. & M. (Miss.) 533; McCamy *v.* Lawson, 3 Head (Tenn.) 256.

72. Fry *v.* Manlove, 1 Baxt. (Tenn.) 256, 25 Am. Rep. 775; McCamy *v.* Lawson, 3 Head (Tenn.) 256, holding further that this is so, although the writ is sued out *in forma pauperis*.

An order to issue a supersedeas against the sale of property seized under attachment and claimed by defendant as exempt does not authorize the constable to restore the property before the supersedeas was actually issued. Farris *v.* State, 33 Ark. 70.

73. McCamy *v.* Lawson, 3 Head (Tenn.) 256.

74. **Violation of supersedeas or stay pending appeal** see APPEAL AND ERROR, 2 Cyc. 915.

75. Manhattan Electric Light Co. *v.* Harlem Lighting Co., 18 N. Y. Suppl. 371.

Illustration.— Where the order staying proceedings provided "that all proceedings for the collection and enforcement of the said judgment, and all proceedings in which the said judgment is used as a basis or foundation, shall be stayed," etc., any proceeding for the ultimate enforcement of the judgment, and of which the judgment is the basis and foundation, constitutes a contempt, although it is not a direct proceeding for the collection of the judgment. Manhattan Electric Light Co. *v.* Harlem Lighting Co., 18 N. Y. Suppl. 371.

Contempt generally see CONTEMPT, 9 Cyc. 1.

76. **In granting supersedeas pending appeal** see APPEAL AND ERROR, 2 Cyc. 895 *et seq.*

77. See the statutes of the several states. And see Lockhart *v.* McElroy, 4 Ala. 572.

Effect of failure to require bond.— Where a supersedeas was allowed, without requiring a supersedeas bond, when one ought to have been required, and the cause was docketed without objection, it was held that this was not good cause to dismiss the supersedeas on motion made after lapse of six years from the time of awarding it. Pugh *v.* Jones, 6 Leigh (Va.) 299.

Where execution has been improvidently issued the supreme court will issue a supersedeas without recognizance. *Ex p.* Smith, 4 Ark. 601.

78. See Lockhart *v.* McElroy, 4 Ala. 572.

Dismissal of supersedeas in chancery cause. — In the absence of statutory provisions regulating the practice on the dismissal of a supersedeas in a pending chancery cause, the chancellor may, on such dismissal, render a final decree against the principal and sureties on the supersedeas bond for the amount of the suspended decree, with interest thereon and costs. Mead *v.* Christian, 50 Ala. 561.

Although the condition of a bond does not conform to the statute, yet, if the bond is effectual to delay the collection of the execution, it becomes absolute upon the discharge of the supersedeas, and may be prosecuted as an obligation at common law. Hester *v.* Keith, 1 Ala. 316.

79. See BONDS, 5 Cyc. 811.

Pleading.— It is no ground of demurrer to a declaration upon a supersedeas bond that it does not aver the issuance and return of the writ of supersedeas; the bond admits the existence of the writ, and any defects in it are matters of defense upon issue; if indeed the execution of the bond does not waive all objections to previous proceedings. Harper *v.* Montgomery, 11 Sm. & M. (Miss.) 611. It is likewise no ground of objection to a declaration upon such a bond that it does not set forth with sufficient averments the judgment and execution, in consequence of which the writ of supersedeas was sued out; the bond narrates the judgment, and the execution of the bond is a waiver of the objections. Harper *v.* Montgomery, *supra*. The averment, in such declaration, that the writ was not prosecuted with effect, but was discharged, and that defendant in the execution superseded by the writ has not paid the judgment, interest, and damages, whereby the bond became forfeited, is a sufficient averment of damages to plaintiff. Harper *v.* Montgomery, *supra*.

80. Randall *v.* Wadsworth, 130 Ala. 633, 31 So. 555, holding, however, that the provisions

X. COSTS.

A petition in supersedeas is regarded as the commencement of a suit, and on its determination costs are due to the successful party, in the same manner as in any other suit.[81]

SUPERSTITIOUS USE. See CHARITIES, 6 Cyc. 920.

SUPERSTRUCTURE. In railroad engineering, the sleepers, rails and fastenings, in distinction from the roadbed.[1]

SUPERVISE. To oversee; have charge of, with the authority to direct or regulate;[2] to oversee for direction; to superintend;[3] to inspect;[4] to inspect with authority.[5] (See SUPERVISION.)

SUPERVISING FARMER. In the classification of life insurance risks, one who has supervision of a farm only and who does no manual labor.[6]

SUPERVISION. Having general oversight of, especially as an officer vested with authority; oversight; the act of supervising;[7] the act of overseeing;[8] INSPECTION, *q. v.*; SUPERINTENDENCE,[9] *q. v.* (Supervision: Of Charities — In General, see CHARITIES, 6 Cyc. 965; By Legislature, see CHARITIES, 6 Cyc. 967. Of County Officers, see COUNTIES, 11 Cyc. 390. Of Electric Companies, see ELECTRICITY, 15 Cyc. 468. Of Execution of Power, see POWERS, 31 Cyc. 1133. Of Fellow Servants, see MASTER AND SERVANT, 26 Cyc. 1292. Of Foreign Insurance Companies, see INSURANCE, 22 Cyc. 1394. Of Hospitals, see HOSPITALS, 21 Cyc. 1107. Of Insurance Companies, see INSURANCE, 22 Cyc. 1388. Of Maintenance and Repair of Turnpikes and Toll-Roads, see TOLL-ROADS. Of Munic-

of Ala. Code (1896), p. 940, c. 91, art. 9, authorizing money judgments on supersedeas bonds, do not apply to proceedings on supersedeas in the probate court, and a money judgment of the probate court on a supersedeas bond is void, and an appeal therefrom, being supported by no judgment, will be dismissed.

81. Shearer *v.* Boyd, 10 Ala. 279.

Liability of assignee for costs.— When a petition is filed for the supersedeas of an execution, sued out by an assignee in the name of the original plaintiff, the assignee may be made a defendant thereto; and if he comes in voluntarily as a party, and is unsuccessful in resisting the supersedeas, costs may be adjudged against him, as the unsuccessful party in a civil suit. Eslava *v.* Farley, 72 Ala. 214.

Costs generally see COSTS, 11 Cyc. 1.

1. Webster Dict. [*quoted* in Cass County *v.* Chicago, etc., R. Co., 25 Nebr. 348, 353, 41 N. W. 246, 2 L. R. A. 188]. See also San Francisco, etc., R. Co. *v.* State Bd. of Equalization, 60 Cal. 12, 34; Philadelphia *v.* Philadelphia, etc., R. Co., 177 Pa. St. 292, 296, 35 Atl. 610, 34 L. R. A. 564 [*citing* Century Dict.].

Has been construed to mean "the roadbed with whatever had been constructed upon it." Philadelphia *v.* Philadelphia, etc., R. Co., 177 Pa. St. 292, 297, 35 Atl. 610, 34 L. R. A. 564.

2. Century Dict. [*quoted* in New York L. Ins. Co. *v.* Rhodes, 4 Ga. App. 25, 30, 60 S. E. 828].

3. Webster Dict. [*quoted* in Vantongeren *v.* Heffernan, 5 Dak. 180, 35 N. W. 52, 56; New York L. Ins. Co. *v.* Rhodes, 4 Ga. App. 25, 30, 60 S. E. 828].

4. Webster Dict. [*quoted* in Vantongeren *v.* Heffernan, 5 Dak. 180, 35 N. W. 52, 56].

5. Webster Int. Dict. [*quoted* in New York L. Ins. Co. *v.* Rhodes, 4 Ga. App. 25, 30, 60 S. E. 828].

Synonymous with "superintend" see Webster Int. Dict. [*quoted* in New York L. Ins. Co. *v.* Rhodes, 4 Ga. App. 25, 30, 60 S. E. 828].

6. National Acc. Soc. *v.* Taylor, 42 Ill. App. 97, 102.

7. Brace *v.* Solner, 1 Alaska 361, 367.

"Supervision of instruction" in the public schools see State *v.* Bronson, 115 Mo. 271, 278, 21 S. W. 1125.

8. Webster Dict. [*quoted* in State *v.* Fremont, etc., R. Co., 22 Nebr. 313, 328, 35 N. W. 118; Great Northern R. Co. *v.* Snohomish County, 48 Wash. 478, 485, 93 Pac. 924].

9. Brace *v.* Solner, 1 Alaska 361, 367; Webster Dict. [*quoted* in State *v.* Fremont, etc., R. Co., 22 Nebr. 313, 328, 35 N. W. 118; Great Northern R. Co. *v.* Snohomish County, 48 Wash. 478, 485, 93 Pac. 924].

As comprehending official action, administrative rather than judicial in its fundamental character see Farm Inv. Co. *v.* Carpenter, 9 Wyo. 110, 141, 61 Pac. 258, 87 Am. St. Rep. 918, 50 L. R. A. 747.

"Supervision of a farm includes in its care and oversight the doing of such incidental things as may be required for keeping it in order and does not mean absolute idleness as far as physical labor is concerned." National Acc. Soc. *v.* Taylor, 42 Ill. App. 97, 102.

"Supervising does not mean 'not working.' On the contrary it means, and would be naturally understood to mean, taking part in the work. Supervising indicates work, not idleness." Schmidt *v.* American Mut. Acc. Assoc., 96 Wis. 304, 309, 71 N. W. 601.

ipal Corporations, see MUNICIPAL CORPORATIONS, 28 Cyc. 281. Of Prisons, see PRISONS, 32 Cyc. 318. Of Private Schools, see SCHOOLS AND SCHOOL-DISTRICTS, 35 Cyc. 814. Of Public Schools, see SCHOOLS AND SCHOOL-DISTRICTS, 35 Cyc. 817 *et seq.* Of Public Water-Supply, see WATERS. Of Railroads, see RAILROADS, 33 Cyc. 44, 45. Of Receivers, see RECEIVERS, 34 Cyc. 246. Of Referees, see REFERENCES, 34 Cyc. 829. Of Religious Societies, see RELIGIOUS SOCIETIES, 34 Cyc. 1182. Of Telegraph or Telephone Companies, see TELEGRAPHS AND TELEPHONES. Of Trustees, see TRUSTS. Of Warehouses, see WAREHOUSEMEN. Of Wharves, see WHARVES. Of Work, see MASTER AND SERVANT, 26 Cyc. 1292, 1549, 1565.)

SUPERVISOR. One who supervises; an OVERSEER, *q. v.*; an INSPECTOR, *q. v.*; a SUPERINTENDENT,[10] *q. v.* (Supervisor: Of County — In General, see COUNTIES, 11 Cyc. 380; Appointment of Drainage Commissioners by, see DRAINS, 14 Cyc. 1037. Of Election, see ELECTIONS, 15 Cyc. 310. Of Highways, see STREETS AND HIGHWAYS, *ante*, p. 212. Of Roads, Obstructing or Interfering With Performance of Duties of, see OBSTRUCTING JUSTICE, 29 Cyc. 1331 note 40. Of the Poor, see PAUPERS, 30 Cyc. 1068. Of Town, see TOWNS.)

SUPERVISORY CONTROL. A phrase commonly used to designate the jurisdiction of a higher court over an inferior one, and especially when referring to the actions of the latter in probate matters.[11]

SUPER VISUM CORPORIS. Literally "Upon view of the body."[12] (See CORONERS, 9 Cyc. 988.)

SUPPLEMENT. As a noun, a supplying by addition of what is wanting;[13] that which supplies a deficiency; that which fills up, completes or makes an addition to something already organized, arranged or set apart; a part added to or a continuation of;[14] that which supplies a deficiency, or meets a want; a STORE, *q. v.*; a SUPPLY, *q. v.*; that which fills up or completes something already organized, arranged or set apart specifically, something added to a book or paper to make good its deficiencies or correct its errors.[15] As a verb, to fill up or supply by addition; to add to.[16]

SUPPLEMENTAL. Something added to supply defects in the thing to which it is added, or in aid of which it is made;[17] something additional; something added to supply what is wanting;[18] that which supplies a deficiency or meets a want.[19] (Supplemental: Abstract of Record, see APPEAL AND ERROR, 3 Cyc. 89. Affidavit For Attachment, see ATTACHMENT, 4 Cyc. 521 note 76. Answer or Affidavit of

10. Century Dict.; Webster Dict. [both *quoted* in New York L. Ins. Co. *v.* Rhodes, 4 Ga. App. 25, 30, 60 S. E. 828].

Used to indicate an agent of an insurance company, the term embraces general agency, carrying with it authority to bind the company. New York L. Ins. Co. *v.* Rhodes, 4 Ga. App. 25, 30, 60 S. E. 828.

"The word . . . when applied to county officers, has a legal signification. The duties of the officer are various and manifold; sometimes judicial, and at others, legislative and executive. From the necessity of the case, it would be impossible to reconcile them to any particular head, and, therefore, in matters relating to the police and fiscal regulations of counties, they are allowed to perform such duties as may be enjoined upon them by law, without any nice examination into the exact character of the powers conferred." People *v.* El Dorado County, 8 Cal. 58, 62; State *v.* Armsby County, 7 Nev. 392, 397.

11. *In re* McIntyre, 1 Alaska 73, 79. See also *In re* Weston, 28 Mont. 207, 217, 72 Pac. 512.

12. Black L. Dict. See also Moran *v.* Territory, 14 Okla. 544, 551, 78 Pac. 111; Reg. *v.* Hammond, 1 Can. Cr. Cas. 373, 395.

13. Rahway Sav. Inst. *v.* Rahway, 53 N. J. L. 48, 51, 20 Atl. 756, where such is said to be the ordinary meaning of the term.

14. Webster Dict. [*quoted* in State *v.* Wyandot County, 16 Ohio Cir. Ct. 218, 221, 9 Ohio Cir. Dec. 90], where it is said: "It is used sometimes as a synonym of appendix." See also McCleary *v.* Babcock, 169 Ind. 228, 233, 82 N. E. 453.

15. Webster Dict. [*quoted* in Lancaster Intelligencer *v.* Lancaster County, 9 Pa. Dist. 392, 394].

16. Webster Dict. [*quoted* in Lancaster Intelligencer *v.* Lancaster County, 9 Pa. Dist. 392, 394].

17. Rapalje & L. L. Dict. [*quoted* in Lancaster Intelligencer *v.* Lancaster County, 9 Pa. Dist. 392, 394].

18. Webster Dict. [*quoted* in McCleary *v.* Babcock, 169 Ind. 228, 233, 82 N. E. 453].

19. Webster Dict. [*quoted* in Loomis *v.* Runge, 66 Fed. 856, 859, 14 C. C. A. 148, where an act of the legislature was construed as supplemental rather than mandatory].

Defense, see EQUITY, 16 Cyc. 352; PLEADING, 31 Cyc. 506, 510. Bill — In General, see EQUITY, 16 Cyc. 357; In Creditors' Suit, see CREDITORS' SUITS, 12 Cyc. 41; In the Nature of Bill of Review, see EQUITY, 16 Cyc. 518; Necessity For Process on, see EQUITY, 16 Cyc. 211. Brief, see APPEAL AND ERROR, 2 Cyc. 1019. Case on Appeal, see APPEAL AND ERROR, 3 Cyc. 76. Complaint or Petition — In General, see PLEADING, 31 Cyc. 502; In Bastardy Proceeding, see BASTARDS, 5 Cyc. 657. Information Against Clerk of Court, see CLERKS OF COURT, 7 Cyc. 206 note 66. Opinion of Court, see COURTS, 11 Cyc. 762. Pleading — In General, see PLEADING, 31 Cyc. 499; In Action For Divorce, see DIVORCE, 14 Cyc. 674; In Admiralty, see ADMIRALTY, 1 Cyc. 855; In Equity, see EQUITY, 16 Cyc. 357; On Trial De Novo on Appeal From Justice of the Peace, see JUSTICES OF THE PEACE, 24 Cyc. 727; Review of Discretion of Court, see APPEAL AND ERROR, 3 Cyc. 328; Revival of Action by Filing, see ABATEMENT AND REVIVAL, 1 Cyc. 101. Proof in Action of Ejectment, see EJECTMENT, 15 Cyc. 157. Reply, see PLEADING, 31 Cyc. 510. Statement of Accused, see CRIMINAL LAW, 12 Cyc. 552. Transcript or Return on Appeal, see APPEAL AND ERROR, 3 Cyc. 105.)

SUPPLEMENTARY. Added to supply what is wanted.[20] (Supplementary: Affidavit to Sustain Attachment, see ATTACHMENT, 4 Cyc. 793. Facts, Relevancy of as Evidence, see EVIDENCE, 16 Cyc. 118. Proceedings — In General, see EXECUTIONS, 17 Cyc. 1402; Allowance of Costs in Civil Actions, see EXECUTIONS, 17 Cyc. 1486; Appealability of Orders in, see EXECUTIONS, 17 Cyc. 1489; Authority of Judges in Chambers or in Vacation as to, see JUDGES, 23 Cyc. 556; Death of Debtor Pending Examination of Third Persons, see ABATEMENT AND REVIVAL, 1 Cyc. 69; Effect of Pendency of on Right of Creditor to Bring Suit to Set Aside Fraudulent Conveyance, see ABATEMENT AND REVIVAL, 1 Cyc. 31 note 53; For Collection of Delinquent Taxes, see TAXATION; Impairment of Vested Right to Remedy by Statute Relating to, see CONSTITUTIONAL LAW, 8 Cyc. 928; In Aid of Execution From Justice's Court, see JUSTICES OF THE PEACE, 24 Cyc. 631; Indictment and Information For Making False Oath in, see PERJURY, 30 Cyc. 1435 note 62; Judicial Notice of Court Records of, see EVIDENCE, 16 Cyc. 918; Jurisdiction of Federal Courts Over, see COURTS, 11 Cyc. 886; Nature of, see ACTIONS, 1 Cyc. 726 note 38; Necessity of to Exhaust Legal Remedies, see CREDITORS' SUITS, 12 Cyc. 8 note 9; Payment of Debt in Affecting Right to Costs, see EXECUTIONS, 17 Cyc. 1487; Removal of Actions or Proceedings Supplementary to Judgment or Execution in State Court, see REMOVAL OF CAUSES, 34 Cyc. 1229; Review of, see EXECUTIONS, 17 Cyc. 1489; Right of Receiver in to Assert Invalidity of Fraudulent Conveyance by Judgment Debtor, see FRAUDULENT CONVEYANCES, 20 Cyc. 432, Right to Trial by Jury in, see JURIES, 24 Cyc. 138; Stay of Pending Bankruptcy Proceedings, see BANKRUPTCY, 5 Cyc. 256 note 87; Sufficiency of Affidavit in, see AFFIDAVITS, 2 Cyc. 23 note 21. Proof in Action of Ejectment, see EJECTMENT, 15 Cyc. 158.)

SUPPLETORY OATH. In the civil law, the oath administered to a party examined on his own behalf to supply the necessary *q antum* of proof on which to found a sentence.[21] (See EVIDENCE, 17 Cyc. 368.)

SUPPLICAVIT. The name of a writ issuing out of the king's bench or chancery for taking sureties of the peace.[22]

20. Webster Dict. [*quoted* in Lancaster Intelligencer *v.* Lancaster County, 9 Pa. Dist. Ct. 392, 394].

In reference to a contract, a term which well comports with the idea of new provisions in a contract. Wescott *v.* Mitchell, 95 Me. 377, 383, 50 Atl. 21.

21. 3 Blackstone Comm. 370, where it is said: "As they [the civil law courts] do not allow a less number than two witnesses to be *plena probatio* (full proof), they call the testimony of one, though never so clear and positive, *semi-plena probatio* (half proof) only on which no sentence can be founded. To make up, therefore, the necessary complement of witnesses, when they have only one to a single fact, they admit the party himself (plaintiff or defendant) to be examined in his own behalf; and administer to him what is called the suppletory oath." See The David Pratt, 7 Fed. Cas. No. 3,597, Ware 495, 505.

22. 4 Blackstone Comm. 253. See Prather *v.* Prather, 4 Desauss. Eq. (S. C.) 33.

SUPPLY or **SUPPLIES.**[23] As a noun, that which is or can be supplied; available aggregate of things needed or demanded; an amount sufficient for a given use or purpose;[24] anything yielded or afforded to meet a want;[25] an amount sufficient for a given use or purpose;[26] such stores of food, etc., as are kept on hand for daily use;[27] necessaries collected and held for distribution and use;[28] that which is supplied; sufficiency of things for use or want; a quantity of something furnished or on hand;[29] the act of furnishing with what is wanted;[30] that which supplies a want; sufficiency of things for use or want; especially the food, and the like, which meets the daily necessities of an army or other large body of men.[31] As a verb, to make provision for; to provide; to serve instead of; to take the place of.[32] (Supply or Supplies: Agricultural Lien For, see AGRICULTURE, 2 Cyc. 56. Allowance to Sheriff or Constable For Office, see SHERIFFS AND CONSTABLES, 35 Cyc. 1587. Exemption of, see EXEMPTIONS, 18 Cyc. 1423. Extra Wages to Seamen as Compensation For Insufficiency of, see SEAMEN, 35 Cyc. 1213. For Prison, Purchase of, see PRISONS, 32 Cyc. 328. Furnished by Husband For Wife's Business, see HUSBAND AND WIFE, 21 Cyc. 1439 note 40. Of Electric Power or Light, see ELECTRICITY, 15 Cyc. 468. Of Gas, see GAS, 20 Cyc. 1160. Of Water, see MUNICIPAL CORPORATIONS, 28 Cyc. 636; WATERS. Power of — Clerk of Court to Purchase, see CLERKS OF COURTS, 7 Cyc. 224; Municipality to Levy Tax For, see

23. **Derived from** *sub,* meaning under, *plere,* to fill. *In re* Hazle Tp., 6 Kulp (Pa.) 491, 493.

As a noun it is generally used in the plural. *In re* Hazle Tp., 6 Kulp (Pa.) 491, 493.

24. Strickland *v.* Stiles, 107 Ga. 308, 310, 33 S. E. 85; Standard Dict. [*quoted* in Fuller *v.* Schrenk, 58 N. Y. App. Div. 222, 227, 68 N. Y. Suppl. 781].

As used in reference to a city, in its broad etymological sense, the term embraces anything which is furnished to a city or its inhabitants; but as used in the Greater New York Charter, requiring competitive bids for supplies, it has no application to contracts for furnishing water to the inhabitants of New York. Gleason *v.* Dalton, 28 N. Y. App. Div. 555, 557, 51 N. Y. Suppl. 337.

In reference to a plantation the term has been said to indicate all those things required and used by the planter in the production and preparation of the crops for consumption or for sale. Wright *v.* Walton, 56 Miss. 1, 6.

25. Farmers' L. & T. Co. *v.* New York, 4 Bosw. (N. Y.) 80, 89.

26. Waymart Water Co. *v.* Waymart, 4 Pa. Super. Ct. 211, 220, where such is said to be the primary meaning of the term.

27. Conner *v.* Littlefield, 79 Tex. 76, 77, 15 S. W. 217 [*citing* Webster Dict.].

28. Boston Blower Co. *v.* Carman Lumber Co., 94 Va. 94, 99, 26 S. E. 390.

29. Imperial Dict. [*quoted* in Fuller *v.* Schrenk, 58 N. Y. App. Div. 222, 228, 68 N. Y. Suppl. 781].

30. Webster Dict. [*quoted* in *In re* Hazle Tp., 6 Kulp (Pa.) 491, 493].

31. Webster Dict. [*quoted* in People *v.* Pullman's Palace Car Co., 175 Ill. 125, 155, 51 N. E. 664, 64 L. R. A. 366].

As applied to a vessel, in its ordinary acceptation, a term understood to mean those articles which a boat may find it necessary to purchase for consumption and use on the voyage. Gibbons *v.* The Fanny Barker, 40 Mo. 253, 255.

Has been held to include: Board furnished by a landlord to his tenant. Jones *v.* Eubanks, 86 Ga. 616, 619, 12 S. E. 1065. Money furnished by a landlord and used by a tenant in making and gathering his crop. Strickland *v.* Stiles, 107 Ga. 308, 310, 33 S. E. 85. Mules sold by a landlord to a tenant for the cultivation of his crop. Trimble *v.* Durham, 70 Miss. 295, 297, 12 So. 207. See also Robertson *v.* Ward, 12 Sm. & M. (Miss.) 490, 491. Pencils, paper, rubber bands, blanks, ink, and articles of that description, required and constantly used by county officers, as used in a statute regulating the making of contracts for supplies for county officers. Dewell *v.* Hughes County, 8 S. D. 452, 454, 66 N. W. 1079. Powder or dynamite used in the construction of a railroad, or fuses to set off the powder, shovels and carts and the like, under a statute giving a lien to persons furnishing supplies for the construction of a railroad. Carson *v.* Shelton, 128 Ky. 248, 250, 107 S. W. 793, 32 Ky. L. Rep. 1083, 15 L. R. A. N. S. 509. Wines and liquors, under an authority granted a sleeping car company to sell supplies to persons traveling on its cars. People *v.* Pullman's Palace Car Co., 175 Ill. 125, 155, 51 N. E. 664, 64 L. R. A. 366.

Does not include: A kiln for drying lumber under a statute giving a lien for "supplies necessary" furnished to certain class of corporations. Boston Blower Co. *v.* Carman Lumber Co., 94 Va. 94, 99, 26 S. E. 390. A pier hired by a city for the purpose of casting away offal, under a city charter providing that supplies furnished the city, involving the expenditure of more than a named amount, must be by contract founded on sealed bids, etc. Farmers' L. & T. Co. *v.* New York, 4 Bosw. (N. Y.) 80, 89. Sawed logs. Connor *v.* Littlefield, 79 Tex. 76, 77, 15 S. W. 217.

32. Century Dict. [*quoted* in Reading *v.* Shepp, 2 Pa. Dist. 137, 140, where in construing a statute the court held that the word was used in the sense of taking the place of the former].

Primary sense.— In a city ordinance **grant-**

MUNICIPAL CORPORATIONS, 28 Cyc. 1670. Priorities — Between Chattel Mortgage and Lien For, see CHATTEL MORTGAGES, 7 Cyc. 40; Between Landlord's Lien For and Claim of Third Person, see LANDLORD AND TENANT, 24 Cyc. 1260; Between Landlord's Lien For Rent and Claim of Third Person For, see LANDLORD and TENANT, 24 Cyc. 1259; Between Liens For Furnished Railroads and Mortgage, see RAILROADS, 33 Cyc. 529; Of Unsecured Debts For Incurred Before Receivership to Preëxisting Lien, see RECEIVERS, 34 Cyc. 362. To Loggers, Lien For, see LOGGING, 25 Cyc. 1584. To Manufacturer, Lien For, see LIENS, 25 Cyc. 672. To Paupers — Receiving as Preventing Settlement, see PAUPERS, 30 Cyc. 1097; Recovery For, see PAUPERS, 30 Cyc. 1151. To Railroad — Lien For, see RAILROADS, 33 Cyc. 465; Mortgage Including Supplies Acquired After Execution Thereof, see RAILROADS, 33 Cyc. 503; Necessity and Effect of Registration of Mortgages of Railroad Supplies, see RAILROADS, 33 Cyc. 524. To Tenant, Lien of Landlord, see LANDLORD AND TENANT, 24 Cyc. 1253. To Vessel — In General, see SEAMEN, 35 Cyc. 1198; SHIPPING, 36 Cyc. 156; Admiralty Jurisdiction, see ADMIRALTY, 1 Cyc. 833; Lien For, see MARITIME LAWS, 26 Cyc. 760; Lien of Materialmen For as Affected by Party Ordering, see MARITIME LIENS, 26 Cyc. 773; Lien on Share by Seamen in Earnings of Vessel, see SEAMEN, 35 Cyc. 1230.)

SUPPORT. As a noun, articles for the sustenance of the family;[33] MAINTENANCE,[34] *q. v.*; subsistence; sustentation; LIVELIHOOD, *q. v.*; LIVING,[35] *q. v.*; subsistence, or an income sufficient for the support of a family;[36] sustenance.[37] As a

ing a water company the right and privilege of "supplying" a city and its inhabitants for a fixed time, the word was used in its primary sense, intending thereby to give the water company the right and privilege to furnish the city and its inhabitants what water might be needed or necessary to be furnished through such a system. Brenham *v.* Brenham Water Co., 67 Tex. 542, 552, 4 S. W. 143.

A person obtaining gas from another customer of a gas company is not supplied within the meaning of a statute requiring gas companies to supply any owner or occupant of a building on compliance with certain conditions. Jones *v.* Rochester Gas, etc., Co., 168 N. Y. 65, 69, 60 N. E. 1044.

"Supplied to" see Brass *v.* London County Council, [1904] 2 K. B. 336, 340, 68 J. P. 365, 73 L. J. K. B. 336, 2 Loc. Gov. 809, 91 L. T. Rep. N. S. 344, 20 T. L. R. 464, 53 Wkly. Rep. 27.

33. Grant *v.* Dabney, 19 Kan. 388, 389, 27 Am. Rep. 125, where it is said that while the term may in some cases include medicines, such is not its ordinary meaning.

It is necessarily a flexible term. The requisite means of support varies largely with different families, and varies often at times with the same families, because they are compelled to make the character of the support harmonize with the amount of means available therefor. There may be material injury to means of support without deprivation of the actual necessaries of life, or a reduction to a state of dependence. Reath *v.* State, 16 Ind. App. 146, 44 N. E. 808, 809. See also Lake *v.* Bender, 18 Nev. 361, 407, 4 Pac. 711, 7 Pac. 74.

"Support and maintenance" as meaning food, clothing, and shelter see Kearney Electric Co. *v.* Laughlin, 45 Nebr. 390, 395, 63 N. W. 941.

34. Anderson L. Dict. [*quoted* in Winthrop Co. *v.* Clinton, 196 Pa. St. 472, 476, 46 Atl. 435, 79 Am. St. Rep. 729]; Webster Dict. [*quoted* in Wall *v.* Williams, 93 N. C. 327, 330, 53 Am. Rep. 458]; Worcester Dict. [*quoted* in Winthrop Co. *v.* Clinton, *supra*].

"Comfort and support" as synonymous with "maintenance" see COMFORT, 7 Cyc. 405 note 73.

35. Worcester Dict. [*quoted* in Winthrop Co. *v.* Clinton, 196 Pa. St. 472, 476, 46 Atl. 435, 79 Am. St. Rep. 729].

36. Webster Dict. [*quoted* in Wall *v.* Williams, 93 N. C. 327, 330, 53 Am. Rep. 458].

37. Anderson L. Dict. [*quoted* in Winthrop Co. *v.* Clinton, 196 Pa. St. 472, 476, 46 Atl. 435, 79 Am. St. Rep. 729]; Worcester Dict. [*quoted* in Winthrop Co. *v.* Clinton, *supra*].

In its ordinary signification the term includes not merely board, but everything necessary to proper maintenance. Gould *v.* Lawrence, 160 Mass. 232, 35 N. E. 462. To the same effect see Roshholt *v.* Mehus, 3 N. D. 513, 521, 57 N. W. 783, 23 L. R. A. 239; Buttles *v.* Carlton, 1 Ohio 32, 35.

Embraces: Medical attendance. Morse *v.* Powers, 45 Vt. 300, 302. Suitable education, when used in reference to infants. Addison *v.* Bowie, 2 Bland (Md.) 606, 627; Whelan *v.* Reilly, 3 W. Va. 597, 610.

Does not include: The building of a house. Morford *v.* Dieffenbacker, 54 Mich. 593, 608, 20 N. W. 600. Goods bought for the prosecution of a business from the profits of which support is to be obtained, under a statute making a husband liable "for the support of the family." Clark *v.* Hay, 98 N. C. 421, 424, 4 S. E. 190.

"Support" of a school see Mitchell *v.* Calgan, 122 Cal. 296, 300, 54 Pac. 905; Roach *v.* Gooding, 11 Ida. 244, 81 Pac. 642.

The constitutional provision that "each county and incorporated city shall make provision for the support of its own officers," has been construed to mean that the county shall make provision for the fees or *per diem* of

verb,[38] to bear by being under;[39] to sustain; to supply funds for the means of continuing.[40] (SUPPORT: Adequacy of Future Support as Consideration, see FRAUDULENT CONVEYANCES, 20 Cyc. 493. As Claim Against Decedent's Estate, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 445. Bond For, Given to Discharge Prosecution, see SEDUCTION, 35 Cyc. 1369. Charge on — Estate by Will, see WILLS; Homestead, see HOMESTEADS, 21 Cyc. 522. Condition in — Deed, see DEEDS, 13 Cyc. 695; Will, see WILLS. Contract For — Accrual of Right of Action on, see LIMITATIONS OF ACTIONS, 25 Cyc. 1105; Assignability of, see ASSIGNMENTS, 4 Cyc. 23 note 43; Measure of Damage For Breach, see DAMAGES, 13 Cyc. 163; Specific Performance, see SPECIFIC PERFORMANCE, 36 Cyc. 599. Conveyance to Child in Consideration of Future or Past, see FRAUDULENT CONVEYANCES, 20 Cyc. 533, 534. Covenant For, see COVENANTS, 11 Cyc. 1092 note 19. Deed on Consideration of as Constituting Equitable Mortgage, see MORTGAGES, 27 Cyc. 981. Devise of Bequest For, see WILLS. Failure to Support Wife, see DIVORCE, 14 Cyc. 621, 624. Garnishment of Obligor For Life-Support of Another, see GARNISHMENT, 20 Cyc. 996. Grounds of Bastardy Proceedings Based on Relief of Public, see BASTARDS, 5 Cyc. 645. Injury to Means of — As Element of Damages Under Civil Damage Laws, see INTOXICATING LIQUORS, 23 Cyc. 328; As Ground of Action Under Civil Damage Laws, see INTOXICATING LIQUORS, 23 Cyc. 312. Lateral Support — Damages For Removal of in Making Public Improvements, see MUNICIPAL CORPORATIONS, 28 Cyc. 1078; Liability For Injuries From Removal of and of Subjacent Support, see MINES AND MINERALS, 27 Cyc. 787; Remedy by Action on Case For Removal of, see CASE, ACTION ON, 6 Cyc. 692 note 35; Rights of as Between Adjoining Landowners, see ADJOINING LANDOWNERS, 1 Cyc. 775. Liability of — Estate of Insane Person For, see INSANE PERSONS, 22 Cyc. 1176; Estate of Insane Person For Support of His Family, see INSANE PERSONS, 22 Cyc. 1179; Husband and Wife to Support Family, see HUSBAND AND WIFE, 21 Cyc. 1151. Lien For on Land Conveyed in Consideration Thereof, see VENDOR AND PURCHASER. Loss of as Element of Damages in Action For Causing Death, see DEATH, 13 Cyc. 368. Mortgage For, see MORTGAGES, 27 Cyc. 1061, 1235. Of Apprentice, see APPRENTICES, 3 Cyc. 553. Of Bastard — In General, see BASTARDS, 5 Cyc. 637; Bond For, see BASTARDS, 5 Cyc. 671. Of Child — In General, see PARENT AND CHILD, 29 Cyc. 1605; On Annulment of Marriage, see MARRIAGE, 26 Cyc. 917 note 62; On Divorce of Parents, see DIVORCE, 14 Cyc. 811. Of Convict, see CONVICTS, 9 Cyc. 878. Of Grantor — Consideration For Deed, see DEEDS, 13 Cyc. 531; Construction of Condition in Deed as to, see DEEDS, 13 Cyc. 695; Performance or Breach of Condition in Deed as to, see DEEDS, 13 Cyc. 698; Reser-

these officers. Gadsden County *v.* Green, 22 Fla. 102, 110.

"Support and maintenance" of certain prisoners at so much per head, has been held not merely to require the supplying of the prisoners with houseroom, food, clothing, bedding, and fuel, but included also the salaries of officers and expenses of repairs, etc., of the prison. Reg. *v.* Gravesend, 5 E. & B. 459, 470, 1 Jur. N. S. 878, 24 L. J. M. C. 141, 85 E. C. L. 459.

Under a statute exempting from seizure under legal process the necessary food for the support of certain stock for one year, the term has been construed to mean sufficient food to feed the stock for a year. Voss *v.* Goss, 73 Kan. 120, 122, 84 Pac. 564, 117 Am. St. Rep. 457; George *v.* Hunter, 48 Kan. 651, 652, 29 Pac. 1148, 30 Am. St. Rep. 325.

"Support" and "current expenses" used in reference to common schools see 12 Cyc. 998 note 97.

"Support and take care of" see Bull *v.* McCrea, 8 B. Mon. (Ky.) 422, 424.

The irregular and infrequent bestowal of comparatively diminutive gifts upon a person cannot properly be regarded as support of a family. Gregg *v.* Brickley, 27 Ind. App. 154, 59 N. E. 1072, 1073.

38. **Derived from** *subportare*. General Electric Co. *v.* Garrett Coal Co., 141 Fed. 124, 125.

39. General Electric Co. *v.* Garrett Coal Co., 141 Fed. 124, 125.

"Not only does the word . . . include bearing weight, but it is also used by the student, and understood in common phraseology, as covering 'to keep from falling,' and other kindred expressions." Hatch Storage Battery Co. *v.* Electric Storage Battery Co., 100 Fed. 975, 981, 41 C. C. A. 133.

40. Webster Dict. [*quoted* in *In re* Opinion of Justices, 13 Fla. 687, 689].

"The word . . . has a variety of meanings. One of the illustrative examples of its use, given by Webster, is to support a student at college." Held that the cost of educating a bastard is included in the expenses for sup-

vation of as Rendering Conveyance Fraudulent, see FRAUDULENT CONVEYANCES, 20 Cyc. 559. Of Husband by Wife, see HUSBAND AND WIFE, 21 Cyc. 1412. Of Insane — Criminal, see INSANE PERSONS, 22 Cyc. 1221; Person Generally, see INSANE PERSONS, 22 Cyc. 1158. Of Legatee or Devisee, see WILLS. Of Minister, see RELIGIOUS SOCIETIES, 34 Cyc. 1144. Of Parent by — Child, see PARENT AND CHILD, 29 Cyc. 1619; Stepchild, see PARENT AND CHILD, 29 Cyc. 1669. Of Pauper — In General, see PAUPERS, 30 Cyc. 1122; Ability of Person Liable For as Determining Whether Person Is Pauper, see PAUPERS, 30 Cyc. 1065; Ability of Self-Support as Determining Whether Person Is Pauper, see PAUPERS, 30 Cyc. 1064; Nature of Right to, see CONSTITUTIONAL LAW, 8 Cyc. 908; Slave, see PAUPERS, 30 Cyc. 1127. Of Religious Worship, Liability of Members of Religious society to Taxation For, see RELIGIOUS SOCIETIES, 34 Cyc. 1124. Of Stepchild, see PARENT AND CHILD, 29 Cyc. 1668. Of Third Person, Rights and Liabilities of Purchasers of Land Burdened With, see VENDOR AND PURCHASER. Of Ward — In General, see GUARDIAN AND WARD, 21 Cyc. 65; Jurisdiction to Order Sales and Conveyances by Guardians For, see GUARDIAN AND WARD, 21 Cyc. 122. Of Widow — Husband or Children, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 378; Or Children in Administration of Community Property, see HUSBAND AND WIFE, 21 Cyc. 1715. Of Wife — And Family, see HUSBAND AND WIFE, 21 Cyc. 1151; On Divorce, see DIVORCE, 14 Cyc. 742; Separate Maintenance, see HUSBAND AND WIFE, 21 Cyc. 1598. Testamentary Character of Contract For, see WILLS. Trust For, see TRUSTS; WILLS.)

SUPPORTS. In reference to a bridge, a term which refers to that upon which the bridge stands or rests, and which supports it from beneath, such as the abutments on the banks, or piers, or trestles, standing between the abutments, and on which the string pieces rest.[41]

SUPPOSE. To IMAGINE, *q. v.*; to BELIEVE, *q. v.*; to receive as true.[42]

SUPPOSITION. What is not known to be true, or not proved.[43]

SUPPRESS. To prevent; never, therefore, to license or sanction;[44] to put a

porting the child. State *v.* Such, 53 N. J. L. 351, 354, 21 Atl. 852.

"Supporting himself and family" as synonymous with "maintains himself and family" see Craftsbury *v.* Greenboro, 66 Vt. 585, 592, 29 Atl. 1024.

"Supported" construed as "maintained" see Camden County *v.* Ritson, 68 N. J. L. 666, 669, 54 Atl. 839.

41. Abbott *v.* Wolcott, 38 Vt. 666, 668.

42. Webster Dict. [*quoted* in Parker *v.* Enslow, 102 Ill. 272, 276, 40 Am. Rep. 588].

Used in the sense of "believe" see Ward *v.* Reynolds, 32 Ala. 384, 389 (where witness testifying to the value of a slave said: "I suppose he was worth seven or eight hundred dollars"); Beach *v.* Bird, etc., Lumber Co., 135 Wis. 550, 556, 116 N. W. 245 (in a question to a witness in an action for personal injuries: "Did you up to the time you were injured suppose that it had been bolted or riveted on as it was before it had been broken?").

As meaning "surmise or think" see State *v.* Bellows, 62 Ohio St. 307, 310, 56 N. E. 1028, construing a statute providing for inquest by the coroner when a dead body is found within the county and when "death is supposed to have been caused by violence."

"Supposed" as meaning "understood" see Cole *v.* Fowler, 68 Conn. 450, 456, 36 Atl. 807.

"Supposed" is a sufficient admission of a cause of action in a plea of justification and is equivalent to "alleged." Mossman *v.* Bostridge, 76 Vt. 409, 411, 57 Atl. 995; Eavestaff *v.* Russell, 10 M. & W. 365, 366. See also Scadding *v.* Eyles, 9 Q. B. 858, 862, 15 L. J. Q. B. 364, 58 E. C. L. 855, where the term is held equivalent to "claim and demand."

"Supposed bounds" see Mizell *v.* Simmons, 79 N. C. 182, 187.

"Supposed codicil" used by a judge in an instruction to the jury in an action to determine the validity of the codicil is not equivalent to telling the jury that the codicil was not the real codicil of the testator. Smith *v.* Henline, 174 Ill. 184, 200, 51 N. E. 227.

"Supposed line" see Mizell *v.* Simmons, 79 N. C. 182, 187.

"Supposed to have been forfeited" as used in a statute of limitations see Fisher *v.* Harnden, 9 Fed. Cas. No. 4,819, 1 Paine 55, 62.

43. Webster Dict. [*quoted* in State *v.* Harras, 25 Wash. 416, 419, 65 Pac. 774, where the term was used as synonymous with "hypothesis"].

"Supposition has no legitimate sphere or habitation in judicial administration" (Johnson *v.* State, 102 Ala. 1, 18, 16 So. 99), and the use of the word in an instruction to the jury is not to be commended (Baldwin *v.* State, 111 Ala. 11, 15, 20 So. 528).

44. Anderson L. Dict. [*quoted* in Ogden *v.* Madison, 111 Wis. 413, 419, 87 N. W. 568, 55 L. R. A. 506].

No power to license is conferred on a city under a charter conferring power to suppress disorderly houses and groceries where liquors

stop to when actually existing;[45] to overpower; subdue;[46] quell; crush; stamp out;[47] to overpower and crush; to overwhelm; to subdue; to repress; to destroy;[48] to put an end to by force; overpower; crush; subdue;[49] to put down.[50]

SUPPRESSION. The act of concealing or withholding from utterance, disclosure, revelation or publication.[51] (Suppression: Of Contagious or Infectious Disease, see Animals, 2 Cyc. 339. Of Deposition After Return, see Depositions, 13 Cyc. 972. Of Disorderly House, see Disorderly Houses, 14 Cyc. 514; Municipal Corporations, 28 Cyc. 712 note 28. Of Duel, see Dueling, 14 Cyc. 1118. Of Evidence — As Contempt of Court, see Contempt, 9 Cyc. 22; Presumption Arising From, see Criminal Law, 12 Cyc. 386; Evidence, 16 Cyc. 1059. Of Insurrection by Civil Authority, see Insurrection, 22 Cyc. 1453. Of Primary Evidence, Effect on Right to Give Secondary Evidence, see Evidence, 17 Cyc. 567. Of Riot, see Riot, 34 Cyc. 1788. Of Vagrancy, see Vagrancy. See also Prohibition, 32 Cyc. 632; Regulation, 34 Cyc. 1031.)

SUPPRESSIO VERI. Literally "Suppression or concealment of the truth."[52] A suppression of facts which one party is under legal or equitable obligation to communicate, and in respect to which he cannot be innocently silent.[53] (Suppressio Veri: Affecting Validity of — Contract, see Contracts, 9 Cyc. 413; Deed, see Deeds, 13 Cyc. 581. Constituting Actionable Fraud, see Fraud, 20 Cyc. 15.)

SUPRA PROTEST. In mercantile law, a term applied to an acceptance of a bill by a third person, after protest for non-acceptance by the drawee.[54] (See Commercial Paper, 7 Cyc. 1026.)

SUPREME COURT. A court of the highest authority in the state.[55] (Supreme Court: Decisions of as Binding on Inferior Courts, see Courts, 11 Cyc. 751. Effect of Previous Adjudication as to Title to Patent in, on Motion For Preliminary Injunction Against Infringement, see Patents, 30 Cyc. 1012. Jurisdiction of to

are sold. Schwuchow *v.* Chicago, 68 Ill. 444, 448; *Ex p.* Garza, 28 Tex. App. 381, 385, 13 S. W. 779, 19 Am. St. Rep. 845.

45. Bouvier L. Dict. [*quoted* in Ogden *v.* Madison, 111 Wis. 413, 419, 87 N. W. 568, 55 L. R. A. 506].

46. Century Dict. [*quoted* in Ogden *v.* Madison, 111 Wis. 413, 419, 87 N. W. 568, 55 L. R. A. 506]; Webster Dict. [*quoted* in Chelsea *v.* King, 17 C. B. N. S. 625, 628, 10 Jur. N. S. 1150, 34 L. J. M. C. 9, 11 L. T. Rep. N. S. 419, 13 Wkly. Rep. 157, 112 E. C. L. 625].

47. Century Dict. [*quoted* in Ogden *v.* Madison, 111 Wis. 413, 419, 87 N. W. 568, 55 L. R. A. 506].

48. Webster Dict. [*quoted* in Ogden *v.* Madison, 111 Wis. 413, 419, 87 N. W. 568, 55 L. R. A. 506].

49. Standard Dict. [*quoted* in Ogden *v.* Madison, 111 Wis. 413, 419, 87 N. W. 568, 55 L. R. A. 506].

50. Century Dict.; Standard Dict.; Webster Dict. [all *quoted* in Ogden *v.* Madison, 111 Wis. 413, 419, 87 N. W. 568, 55 L. R. A. 506].

Power to "suppress" and restrain is held not to authorize a city to punish the keeper of a disorderly house. Chariton *v.* Barber, 54 Iowa 360, 361, 6 N. W. 528, 37 Am. Rep. 209; Mt. Pleasant *v.* Breeze, 11 Iowa 399, 400.

"The shade of difference in the meaning between the words 'abate' and 'suppress' is so fine that it cannot be said that the power of punishment can be exercised in one case and not in the other." Nevada *v.* Hutchins, 59 Iowa 506, 508, 13 N. W. 634.

51. Century Dict.

52. Black L. Dict.

53. Terrill *v.* Kirksey, 14 Ala. 209, 212; Juzan *v.* Toulmin, 9 Ala. 662, 684, 44 Am. Dec. 448 [*citing* 1 Story Eq. 213–224], where it is said that the other party has a right not merely *in foro conscientiæ*, but *juris et de jure*, to know.

"It is . . . a rule of equity, as well as of law, that a *suppressio veri* is equivalent to a *suggestio falsi*; and where either the suppression of the truth, or the suggestion of what is false, can be proved, in a fact material to the contract, the party injured may have relief against the contract." Fleming *v.* Slocum, 18 Johns. (N. Y.) 403, 405, 9 Am. Dec. 224. See also Juzan *v.* Toulmin, 9 Ala. 662, 684, 44 Am. Dec. 448; Torrey *v.* Buck, 2 N. J. Eq. 366, 380.

It is a negative act of fraud, as distinguished from "*suggestio falsi*" which is an affirmative fraudulent act. Newman *v.* Kay, 57 W. Va. 98, 109, 49 S. E. 926, 68 L. R. A. 908.

"Where there is an obligation to speak a failure to speak will constitute the suppression of a fact; but where there is no obligation to speak silence cannot be termed 'suppression.'" Chicora Fertilizer Co. *v.* Dunan, 91 Md. 144, 159, 46 Atl. 347, 50 L. R. A. 401.

54. Black L. Dict. [*citing* 3 Kent Comm. 87].

55. State *v.* Atherton, 19 Nev. 332, 342, 10 Pac. 901, where it is said: "Yet in New York this name is given to courts possessing similar jurisdiction to that given to the dis-

Admit to Bail, see Bail, 5 Cyc. 78 note 81. Of District of Columbia, see Courts, 11 Cyc. 964. Of States in General, see Courts, 11 Cyc. 801. Of United States, see Courts, 11 Cyc. 912.)

SUPREME LAW OF THE LAND. As used in the constitution of the United States, a phrase which only relates to those matters wherein the general government assumes to control the individual states.[56]

SUPREME LODGE. See Grand or Supreme Lodge, 20 Cyc. 1357.

SUPT. The abbreviation standing for the word "superintendent."[57]

SURCHARGE. See Accounts and Accounting, 1 Cyc. 459. See also 19 Cyc. 449 note 10.

SURCHARGING AND FALSIFYING. See Accounts and Accounting, 1 Cyc. 459. See also 19 Cyc. 449 note 10.

SURETY. See Principal and Surety, 32 Cyc. 14.

SURETY COMPANY. A company, usually incorporated, whose business is to assume the responsibility of a surety on the bonds of officers, trustees, executors, guardians, etc., in consideration of a fee proportioned to the amount of security required.[58] (Surety Company: In General, see Principal and Surety, 32 Cyc. 303. As Surety — For Executor or Administrator, see Executors and Administrators, 18 Cyc. 133 note 83; On Appeal-Bond, see Appeal and Error, 2 Cyc. 831; On Attachment Bond, see Attachment, 4 Cyc. 535. Corporation as, see Corporations, 10 Cyc. 1109. Fidelity Insurance, see Fidelity Insurance, 19 Cyc. 516. National Bank as, see Banks and Banking, 5 Cyc. 590. Taxation of, see Taxation.)

SURETY OF THE PEACE. See Breach of the Peace, 5 Cyc. 1028; Criminal Law, 12 Cyc. 973.

SURETYSHIP. See Principal and Surety, 32 Cyc. 14.

SURFACE. See Mines and Minerals, 27 Cyc. 540.

SURFACE STREAMS. Streams which flow in a permanent, distinct, and well-defined channel from the lands of one owner to those of another.[59] (See Waters.)

SURFACE WATER. Water — however originating — which, without any distinct or well-defined channel, by attraction, gravitation or otherwise, is shed and passes from the lands of one proprietor to those of another.[60] (Surface Water: In General, see Waters. Liability of City For Obstruction or Diversion, see Municipal Corporations, 28 Cyc. 1327.)

SURFACING. In reference to a railroad, filling the dirt and gravel between the ties, and dressing up the surface.[61]

SURGEON. See Physicians and Surgeons, 30 Cyc. 1546.

SURGERY. See Physicians and Surgeons, 30 Cyc. 1546.

SURNAME. See Names, 29 Cyc. 264.

SURPLUS. Overplus, *q. v.*; that which remains when use is satisfied; excess

trict courts in this state, and the name court of appeals is given to the highest court."

The word "supreme" in reference to courts means highest in the sense of final or last resort. Koonce *v.* Doolittle, 48 W. Va. 592, 594, 37 S. E. 644.

56. *In re* Rafferty, 1 Wash. 382, 386, 25 Pac. 465, holding that the requirement of a presentment by a grand jury is not such a matter. See also Jones *v.* McMahan, 30 Tex. 719, 735.

57. South Missouri Land Co. *v.* Jeffries, 40 Mo. App. 360, 361, holding that the court will take judicial notice of this abbreviation. See also Evidence, 16 Cyc. 875 note 81.

58. Black L. Dict.

59. Tampa Waterworks Co. *v.* Cline, 37 Fla. 586, 593, 20 So. 780, 53 Am. St. Rep. 262, 33 L. R. A. 376; Frazier *v.* Brown, 12 Ohio St. 294, 298.

The law applicable to such streams does not apply to subterranean streams. Roath *v.* Driscoll, 20 Conn. 533, 542, 52 Am. Dec. 352.

60. Tampa Waterworks Co. *v.* Cline, 37 Fla. 586, 593, 20 So. 780, 53 Am. St. Rep. 262, 33 L. R. A. 376; Frazier *v.* Brown, 12 Ohio St. 294, 298.

61. Heine *v.* Chicago, etc., R. Co., 58 Wis. 525, 527, 17 N. W. 420.

As used in a contract for railroad construction it seems to be a technical term among civil engineers, and does not include filling in between ties or raising the roadbed. Snell *v.* Cottingham, 72 Ill. 161, 167.

"Surfaced" in a contract with a railroad company to lay its tracks and to make the track in good running order, well surfaced, high, evenly and firmly embedded, etc., is employed in the sense of those engaged in the construction of such roads, and may be

beyond what is prescribed or wanted in law; the residue of an estate after the debts and legacies are paid;[62] that which is left from a fund which has been appropriated for a particular purpose; the remainder of a thing; the overplus; the RESIDUE,[63] *q. v.* (Surplus: Agreement to Account For as Making Deed Mortgage, see MORTGAGES, 27 Cyc. 1004. Of County Funds Raised For Special Purpose, Appropriation to General Purposes, see COUNTIES, 11 Cyc. 583. Of Insurance Company — Distribution of, see INSURANCE, 22 Cyc. 1402; Liability to Taxation, see TAXATION; Mode of Assessment For Taxation, see TAXATION. Of Judicial Sale as Property Subject to Judgment Lien, see JUDGMENTS, 23 Cyc. 1371 note 20. Of Tax-Sale, see TAXATION. On Dissolution of Bank, see BANKS AND BANKING, 5 Cyc. 573. On Enforcement of Pledge, see PLEDGES, 31 Cyc. 864. On Foreclosure of Mortgage — In General, see CHATTEL MORTGAGES, 7 Cyc. 116; MORTGAGES, 27 Cyc. 1497, 1767; Lien of Attachment on, see ATTACHMENTS, 4 Cyc. 627 note 56. On Sale of Property — By Executor or Administrator Under Order of Court, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 841; In Attachment Proceedings, see ATTACHMENT, 4 Cyc. 718; In Distress Proceedings, see LANDLORD AND TENANT, 24 Cyc. 1323; Subject to Dower, see DOWER, 14 Cyc. 900; To Enforce Vendor's Lien, see VENDOR AND PURCHASER; Under Execution, see EXECUTIONS, 17 Cyc. 1359; Under Mechanic's Lien, see MECHANICS' LIENS, 27 Cyc. 451; Upon Setting Aside Fraudulent Conveyance, see FRAUDULENT CONVEYANCES, 20 Cyc. 827. On Sale of Railroads Under Foreclosure of Liens or Mortgages, see RAILROADS, 33 Cyc. 606. On Tax-Sale, see TAXATION. Reservation of — Effect on Assignment For Benefit of Creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 184; Effect on Conveyance, see FRAUDULENT CONVEYANCES, 20 Cyc. 561, 568; To Debtor in Insolvency Proceedings, see INSOLVENCY, 22 Cyc. 1355. Right of — Creditor of Tenant to After Satisfaction of Landlord's Lien, see LANDLORD AND TENANT, 24 Cyc. 1264; Owner to on Sale of Land For Taxes, see INTERNAL REVENUE, 22 Cyc. 1610; TAXATION. When Capital Stock of Corporation Deemed to Include, see CORPORATIONS, 10 Cyc. 365.)

explained by extrinsic evidence. Western Union R. Co. *v.* Smith, 75 Ill. 496, 502.

62. State *v.* Parker, 35 N. J. L. 575, 577.

"Surplus personalty" left by decedent, as meaning what is left after payment of funeral expenses, charges of administration and debts see Towery *v.* McGaw, 56 S. W. 727, 728, 982, 22 Ky. L. Rep. 155. See also Coates' Appeal, 2 Pa. St. 129, 137.

In a will directing the payment of certain legacies out of the residue of testator's estate and providing that "if, after the payment of these legacies, there should remain any surplus undisposed of, I give and bequeath the same unto my sons," etc., the term includes real estate. Lamb *v.* Lamb, 131 N. Y. 227, 236, 30 N. E. 133. But see Allen *v.* Allen, 18 How. (U. S.) 385, 391, 15 L. ed. 396, where the term was held not to include real estate.

63. Bouvier L. Dict. [*quoted* in State *v.* Butler County, 77 Kan. 527, 536, 94 Pac. 1004]. See also McConnell *v.* Allen, 120 N. Y. App. Div. 548, 551, 105 N. Y. Suppl. 16.

In the nomenclature of bankers the term does not include "undivided profits." Leather Manufacturers' Nat. Bank *v.* Treat, 128 Fed. 262, 263, 62 C. C. A. 644.

In a war revenue act providing for payment of certain sums by bankers according to the amount of their capital stock and providing "in estimating capital surplus shall be included," the term is used in its natural and ordinary sense, as including any overplus of assets over liabilities and not in the restricted sense in which it is used in national banking legislation. Leather Manufacturers' Nat. Bank *v.* Treat, 116 Fed. 774, 775.

Distinguished from "capital stock" see Bank of Commerce *v.* Tennessee, 161 U. S. 134, 147, 16 S. Ct. 456, 40 L. ed. 645.

Meaning among insurance companies.— Expert evidence was held admissible to show that the meaning of the term, in this connection, is a sum of money or assets which has been accumulated over and above all debts and liabilities of any and all kinds whatsoever. Fry *v.* Providence Sav. L. Assur. Soc., (Tenn. Ch. App. 1896) 38 S. W. 116, 126. In a provision in an insurance policy entitling insured to participate in the distribution of the "surplus" of the company issuing it, the term is used to designate the amount of funds in the hands of the company after deducting its liabilities as ascertained by certain rules adopted by the insurance department for determining the value of each risk. Greeff *v.* Equitable L. Assur. Soc., 160 N. Y. 19, 34, 54 N. E. 712, 73 Am. St. Rep. 659, 46 L. R. A. 288.

"Surplus assets," in a statute fixing the rights of shareholders in the distribution of such assets on the winding up of a company, are held to mean that which remains after all the outside liabilities of the company have been satisfied. *In re* Crichton's Oil Co., [1902] 2 Ch. 86, 93, 71 L. J. Ch. 531, 86 L. T. Rep. N. S. 787, 18 T. L. R. 556.

SURPLUSAGE. Matter, in any instrument, foreign to the purpose; whatever is extraneous, impertinent, superfluous and unnecessary.[64] In law, matter which is not necessary or relevant to the case and may be rejected;[65] matter in any instrument that is not necessary to its meaning but does not affect its validity;[66] in pleading, an allegation without which the pleading would remain adequate at law;[67] that which is impertinent or entirely superfluous, as not being necessary either to the substance or the form of the pleading;[68] that which does not help at all;[69] in a complaint or declaration, a term which comprehends whatever may be stricken from the record without destroying the plaintiff's right of action;[70] in a verdict, that by which the verdict exceeds the issue.[71] Of property, a term of more restricted meaning than "rest" or "residue," applied more properly to money than lands.[72] (Surplusage: As Ground For Demurrer, see PLEADING, 31 Cyc. 287. Effect on Affidavit of Attachment, see ATTACHMENT, 4 Cyc. 518 note 46. In Affidavit — In General, see AFFIDAVITS, 2 Cyc. 18 note 79; For Attachment, see ATTACHMENT, 4 Cyc. 474 note 97; Of Merits in Action to Open or Set Aside Judgment, see JUDGMENTS, 23 Cyc. 965 note 4. In Answer in Replevin, see REPLEVIN, 34 Cyc. 1477. In Assignment For Creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 189 note 64. In Award, see ARBITRATION AND AWARD, 3 Cyc. 690 note 95, 694, 713 note 87. In Bail-Bond in Civil Action, see BAIL, 5 Cyc. 18. In Bond — For Appeal, see JUSTICES OF THE PEACE, 24 Cyc. 674 note 43; Of Clerk of Court, see CLERKS OF COURTS, 7 Cyc. 201 note 36. In Certificate of — Acknowledgment in General, see ACKNOWLEDGMENTS, 1 Cyc. 580 note 91, 584, 589 note 96; Acknowledgment of Married Woman, see ACKNOWLEDGMENTS, 1 Cyc. 596, 602 note 9; Location of Mineral Land, see MINES AND MINERALS, 27 Cyc. 577. In Commercial Paper Executed by Corporation, see CORPORATIONS, 10 Cyc. 1044, 1047. In Contract, see CONTRACTS, 9 Cyc. 585. In Conveyance — By Husband and Wife, see HUSBAND AND WIFE, 21 Cyc. 1206 note 24; Of Mineral Property, see MINES AND MINERALS, 27 Cyc. 679. In Copyright Notice, see COPYRIGHT, 9 Cyc. 925 note 44. In Description of Property in Mortgage, see MORTGAGES, 27 Cyc. 1091. In Forthcoming or Delivery Bond in Attachment, see ATTACHMENT, 4 Cyc. 680 note 92. In Indictment or Informa-

"**Surplus**" **earnings** see People *v.* Taxes, etc., Com'rs, 76 N. Y. 64, 74.

"**Surplus**" **proceeds** see Hannibal, etc., R. Co. *v.* Bartlett, 123 Mass. 15, 19.

"**Surplus 'profits'**" see People *v.* San Francisco Sav. Union, 72 Cal. 199, 202, 13 Pac. 498; People *v.* Knight, 96 N. Y. App. Div. 120, 122, 89 N. Y. Suppl. 72.

"**Surplus real estate**" see Abercrombie *v.* Simmons, 71 Kan. 538, 543, 81 Pac. 208, 114 Am. St. Rep. 509, 1 L. R. A. N. S. 806.

"**Surplus waters**" see Lynch *v.* Stone, 4 Den. (N. Y.) 356, 358; Eastman *v.* Parker, 65 Vt. 643, 647, 27 Atl. 611; Caledonia Milling Co. *v.* Shirra Milling Co., 9 Ont. L. Rep. 213, 217, 5 Ont. Wkly. Rep. 170.

64. Anderson L. Dict. [*quoted* in Adams *v.* Capital State Bank, 74 Miss. 307, 314, 20 So. 881].

65. Webster Int. Dict. [*quoted* in Adams *v.* Capital State Bank, 74 Miss. 307, 314, 20 So. 881].

66. Standard Dict. [*quoted* in Adams *v.* Capital State Bank, 74 Miss. 307, 314, 20 So. 881].

67. 1 Bishop Cr. Proc. § 478 [*quoted* in State *v.* Whitehouse, 95 Me. 179, 184, 49 Atl. 869; State *v.* Watson, 141 Mo. 338, 341, 42 S. W. 726; State *v.* Murphy, 102 Mo. App. 680, 682, 77 S. W. 157].

68. Gould Pl. [*quoted* in Bradley *v.* Reynolds, 61 Conn. 271, 278, 28 Atl. 928].

69. Aldis *v.* Mason, 20 L. J. C. P. 193, 194, 6 Eng. L. & Eq. 391, per Maule, J., adding: "As if you were to state that a man had a blue coat on, and did a certain thing; but it is not surplusage to say that the defendant knocked the plaintiff down, and 'also' tore his clothes, and 'also' put his eye out."

70. Greenleaf Ev. (15th ed.) § 51 [*quoted* in Prestwood *v.* McGowan, 148 Ala. 475, 478, 41 S. 779] adding: "As if, for example, in suing the defendant for a breach of warranty upon the sale of goods, he should set forth, not only that the goods were not such as the defendant warranted them to be, but that the defendant well knew that they were not."

71. See, in Traube *v.* State, 56 Miss. 153, 155, the following language: "Surplusage in a verdict is thus defined by Lord Coke: 'If the jury give a verdict of the whole issue, and of more, that which is more is surplusage, and shall not stay judgment; for *utile per inutile non vitiatur.*'"

72. See Bragaw *v.* Bolles, 51 N. J. Eq. 84, 86, 90, 25 Atl. 947, holding that, as used in a will whereby a testator leaving both real and personal estate and, in his will, making no mention of the realty, but various legacies of personalty, and adding, "Whether deficiency or surplusage, let it apply in either case *pro rata* to all, according to the sum bequeathed," the word did not carry a residue or extend the word to realty.

tion — In General, see INDICTMENTS AND INFORMATIONS, 22 Cyc. 367, 448; Allegation as to Ownership of Property as, see INDICTMENTS AND INFORMATIONS, 22 Cyc. 462; Alternative Statement as, see INDICTMENTS AND INFORMATIONS, 22 Cyc. 297; Conclusion Against Statute as, in Indictment Charging Common-Law Offense, see INDICTMENTS AND INFORMATIONS, 22 Cyc. 347; For Abduction, see ABDUCTION, 1 Cyc. 156; For Abortion, see ABORTION, 1 Cyc. 176; For Adultery, see ADULTERY, 1 Cyc. 957 note 32; For Arson, see ARSON, 3 Cyc. 989 note 11, 999 note 20, 1001 note 32; For Burglary, see BURGLARY, 6 Cyc. 226 note 36; For Conspiracy, see CONSPIRACY, 8 Cyc. 671; For Cruelty to Animals, see ANIMALS, 2 Cyc. 348; For Embezzlement, see EMBEZZLEMENT, 15 Cyc. 511 note 88; For False Pretenses, see FALSE PRETENSES, 19 Cyc. 424 note 10, 437 note 69, 438 note 74; For Forgery, see FORGERY, 19 Cyc. 1393; For Gaming, see GAMING, 20 Cyc. 900 note 59, 903 note 76, 907 note 90; For Homicide, see HOMICIDE, 21 Cyc. 834, 847, 857 note 48; For Larceny, see LARCENY, 25 Cyc. 73; For Obstructing Justice, see OBSTRUCTING JUSTICE, 29 Cyc. 1336; For Rape, see RAPE, 33 Cyc. 1448, 1451; For Slander, see LIBEL AND SLANDER, 25 Cyc. 577 note 13; For Uttering Forged Instrument, see FORGERY, 19 Cyc. 1409 note 30; For Violation of Inspection Act, see INSPECTION, 22 Cyc. 1369 note 59; For Violation of Liquor Law, see INTOXICATING LIQUORS, 23 Cyc. 227; Repugnant Allegation as, see INDICTMENTS AND INFORMATIONS, 22 Cyc. 299. In Judgment — In General, see JUDGMENTS, 23 Cyc. 795; Requiring Recall of Mandate by Appellate Court For Purpose of Striking Out, see APPEAL AND ERROR, 3 Cyc. 473 note 21; Stricken Out by Amendment, see ATTACHMENT, 23 Cyc. 867. In Notice of Appeal, see APPEAL AND ERROR, 2 Cyc. 866 note 44. In Pleading — In General, see PLEADING, 31 Cyc. 68; In Action By or Against Executor or Administrator, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 980, 982; In Action For Breach of Contract, see CONTRACTS, 9 Cyc. 757; In Action For Breach of Covenant to Repair, see LANDLORD AND TENANT, 24 Cyc. 1096 note 54; In Action For Wrongful Attachment, see ATTACHMENT, 4 Cyc. 855 note 61; In Action on Assignment, see ASSIGNMENTS, 4 Cyc. 107; In Action on Bond of Clerk of Court, see CLERKS OF COURTS, 7 Cyc. 240 note 26; In Action on Commercial Paper, see COMMERCIAL PAPER, 8 Cyc. 204; In Assumpsit, see ASSUMPSIT, ACTION OF, 4 Cyc. 339; In Dispossession Proceedings Under Statutes, see LANDLORD AND TENANT, 24 Cyc. 1437 note 23; In Mandamus, see MANDAMUS, 26 Cyc. 446; In Replevin, see REPLEVIN, 34 Cyc. 1466; Rejection of Ambiguous Statements as, in Determining Question of Joinder, see JOINDER AND SPLITTING OF ACTIONS, 23 Cyc. 389. In Sentence of One Convicted of Crime, see CRIMINAL LAW, 12 Cyc. 785. In Statute, see STATUTES, 36 Cyc. 1127. In Transcript or Return on Appeal From Justice's Court, see JUSTICES OF THE PEACE, 24 Cyc. 707 note 94. In Verdict — In General, see CRIMINAL LAW, 12 Cyc. 689; TRIAL; In Prosecution For Homicide, see HOMICIDE, 21 Cyc. 1082. In Warrant For Attachment, see ATTACHMENT, 4 Cyc. 468 note 60. In Writ — Of Attachment, see ATTACHMENT, 4 Cyc. 545 note 70, 548 note 91; To Summon Grand Jury, see GRAND JURIES, 20 Cyc. 1313 note 18. Official Designation in Written Instrument Regarded as, see CORPORATIONS, 10 Cyc. 1039, 1044, 1047. Personal Judgment in Attachment Proceedings as, see ATTACHMENT, 4 Cyc. 824 note 66. Unnecessary Order in Deportation Proceedings as, see ALIENS, 2 Cyc. 129 note 94.)

SURPRISE. The act of taking unawares, sudden confusion or perplexity;[73] a word which in its legal acceptation denotes an unforeseen disappointment against which ordinary prudence would not have afforded protection.[74] In practice, the situation in which a party is unexpectedly placed, without any fault of his own, which will be injurious to his interest.[75] In private transactions, an

73. Webster Dict. [*quoted* in Davis *v.* Steuben School Tp., 19 Ind. App. 694, 50 N. E. 1, 5].

74. See Graham & W. New Tr. [*quoted* in Fretwell *v.* Laffoon, 77 Mo. 26, 28; Peers *v.* Davis, 29 Mo. 184, 190; Patrick *v.* Boonville Gas Light Co., 17 Mo. App. 462, 465].

75. Graham & W. New Tr. [*quoted* in Gidionsen *v.* Union Depot R. Co., 129 Mo. 392, 401, 31 S. W. 800].

undue advantage taken of a party under circumstances which mislead, confuse, or disturb the just results of his judgment, and thus expose him to be the victim of the artful, the importunate, and the cunning.[76] (Surprise: Absence of in Allowing Amendment of Pleading as Ground For Refusing Continuance, see CONTINUANCES IN CIVIL CASES, 9 Cyc. 128. As Excuse For Failure to Discover and Produce Evidence, see NEW TRIAL, 29 Cyc. 895. As Ground For — Adjudging Absolute Deed to Be Mortgage, see MORTGAGES, 27 Cyc. 1014; Continuance, see CONTINUANCES IN CIVIL CASES, 9 Cyc. 87 note 59, 129; CONTINUANCES IN CRIMINAL CASES, 9 Cyc. 189; Equitable Relief Against Judgment, see JUDGMENTS, 23 Cyc. 1013; New Trial, see NEW TRIAL, 29 Cyc. 850; CRIMINAL LAW, 12 Cyc. 732; Setting Aside Award, see ARBITRATION AND AWARD, 3 Cyc. 648 note 78. As Ground For Opening or Vacating — Decree Pro Confesso, see EQUITY, 16 Cyc. 514; Judgment, see JUDGMENTS, 23 Cyc. 935. As Ground For Opening, Vacating, and Setting Aside — Foreclosure Sale, see MORTGAGES, 27 Cyc. 1713; Judicial Sale in General, see JUDICIAL SALES, 24 Cyc. 41; Settlement by Guardian, see GUARDIAN AND WARD, 21 Cyc. 182. By Variance Between Allegation and Proof, see PLEADING, 31 Cyc. 703.)

SURREBUTTER. See PLEADING, 31 Cyc. 269.

SURREJOINDER. In General, see PLEADING, 31 Cyc. 269. In Action on Bond, see BONDS, 5 Cyc. 836; EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1301.

SURRENDER. As a noun, a surrendering; a yielding or resigning one's person, or the possession of something, into the power of another;[77] in the law of

"**The terms 'accident' and 'surprise,'** though not strictly synonymous, have, as used in legal practice, substantially the same meaning, as each is used to denote some condition or situation in which a party to a cause is unexpectedly placed, to his injury, without any default or negligence of his own . . . which ordinary prudence could not have guarded against." McGuire *v.* Drew, 83 Cal. 225, 229, 23 Pac. 312 [*quoted* in Zimmerer *v.* Fremont Nat. Bank, 59 Nebr. 661, 664, 81 N. W. 849]. Surprise, as the word is used in Rev. St. (1879) § 3704, declaring it a ground for new trial, is "nearly allied to accident, which is a prominent subject for equitable relief." Fretwell *v.* Laffoon, 77 Mo. 26, 27. See also Connelly *v.* Pehle, 105 Mo. App. 407, 418, 79 S. W. 1006, where a definition, given in Story Eq. Jur. § 78, as the definition of "accident" and quoted as such in Fretwell *v.* Laffoon, *supra*, is requoted, apparently as Story's definition of "surprise," and incorrectly said to have been adopted in Fretwell *v.* Laffoon, *supra*, as such, where in fact it is used merely in pointing out the analogy between the two words.

"**The inability to produce evidence** otherwise available" is the only condition that can constitute such "surprise" as affords ground for setting aside a judgment and granting a new trial under § 224 of the Code of Civil Procedure; under such circumstances as the allowance of an amendment of a complaint to conform to the proof. Carlisle *v.* Barnes, 45 Misc. (N. Y.) 6, 10, 90 N. Y. Suppl. 810 [*affirmed* in 102 N. Y. App. Div. 582, 92 N. Y. 924].

In N. C. Code, § 274, providing for the relief of a party from a judgment, order, or other proceeding taken against him through his surprise, the word implies "not simply any," but "surprise occasioned by some fact, or something that has or has not been done, of which the complaining party ought to have knowledge, and which, if he had had such knowledge, might have prevented the judgment, order or other proceeding of which he complains." Skinner *v.* Terry, 107 N. C. 103, 106, 12 S. E. 118.

Implies active misconduct.— "Surprise, in the legal sense of the term, that would defeat a judgment, always involves the idea that there has been active misconduct on part of the plaintiff amounting to much the same thing as fraud." Turley *v.* Taylor, 6 Baxt. (Tenn.) 376, 390.

76. See Story Eq. Jur. § 251 [*adapted* and *qualified* in Turley *v.* Taylor, 6 Baxt. (Tenn.) 376, 390, in the form of a definition, by omitting the word "is," which appears in the original, and adding the qualification "In private transactions"].

Surprise such as to vitiate a deed is "either Falsehood or Forgery, that is . . . Fraud; if that be not the meaning of it . . . something done suddenly and unawares, not with all the Precaution and Deliberation as possibly a Deed may be done." Bath's Case, 3 Ch. Cas. 55, 74, 22 Eng. Reprint 963.

77. Webster Int. Dict. adding: "As, the 'surrender' of a castle to an enemy; the 'surrender' of a right."

Yielding, not sale.— "The term 'surrendered' does not express, or in any sense suggest, the transaction of a 'sale' and 'delivery.' It involves the idea of yielding, of delivering in response to a demand," and, as used in Code Civ. Proc. § 751, does not apply to the selling or delivery of a bond or other security by the county treasurer without order of court. Tompkins County *v.* Ingersoll, 81 N. Y. App. Div. 344, 347, 81 N. Y. Suppl. 242 [*affirmed* in 177 N. Y. 543, 69 N. E. 1132].

"**The surrender of a charter** can only be made by some formal solemn act of the corporation; and will be of no avail until accepted by the government. There must be

real property, the resignation of a particular estate for life or for years to one in the immediate reversion or remainder;[78] a yielding up of an estate for life or years to him that hath the immediate estate in reversion or remainder, wherein the estate for life or years may drown by mutual agreement;[79] the yielding up of an estate for life or years to the reversioner or remainderman;[80] the yielding up of the less estate to him who has the reversion or remainder;[81] the restoring and yielding up an estate or interest in lands to one who has an immediate estate in reversion or remainder;[82] a falling of a lesser estate into a greater;[83] of a lease-

the same agreement of the parties to dissolve, that there was to form the compact. It is the acceptance which gives efficacy to the surrender." Boston Glass Manufactory *v.* Langdon, 24 Pick. (Mass.) 49, 53, 35 Am. Dec. 292.

Of a policy for modification.— As used in a declaration on a policy, alleging a "surrender" of the policy at the request of the insurance company that it might be modified, the word "plainly means only a handing over of the document to the defendant for the purpose of modification." Goodhue *v.* Hartford F. Ins. Co., 175 Mass. 187, 189, 55 N. E. 1039.

Of securities, within the meaning of the Stamp Act, 1891 (54 & 55 Vict. c. 39), see Firth *v.* Inland Revenue Com'rs, [1904] 2 K. B. 205, 207, 73 L. J. K. B. 632, 91 L. T. Rep. N. S. 138, 20 T. L. R. 447, 52 Wkly. Rep. 622.

78. Comyn Dig. tit. "Surrender" A [*quoted* in Bedford *v.* Terhune, 27 How. Pr. (N. Y.) 422, 451].

Distinguished from "assignment" see Scott *v.* Scott, 18 Gratt. (Va.) 150, 159.

It "indicates a transfer of title as well as of possession" and "carries with it something more than a bare delivery." Evans *v.* U. S., 153 U. S. 584, 591, 14 S. Ct. 934, 38 L. ed. 830, construing the word as used in an indictment charging defendant with procuring "surrender and delivery" to himself of national bank funds in violation of Rev. St. § 5209.

Either express or by operation of law.— "It is either in express words by which the lessee manifests his intention to yield up his interest in the premises to the lessor, or by operation of law, when the parties, without any express surrender, do some act which implies that they have both agreed to the surrender as made." Taylor Landl. & Ten. § 507 [*quoted* in Brewer *v.* National Union Bldg. Assoc., 166 Ill. 221, 225, 46 N. E. 752]. See also LANDLORD AND TENANT, 24 Cyc. 1366, 1367.

Of prior interests.— As used in Succession Duty Act, 1853 (16 & 17 Vict. c. 251), § 15, providing for payment of duty in case of acceleration of the title "by the surrender or extinction of a prior interest," the quoted words refer "to cases of assignment by the remainderman of his remainder to the tenant for life or of release by the tenant for life of his life tenancy to the remainderman." *Ex p.* Sitwell, 21 Q. B. D. 466, 469, 59 L. T. Rep. N. S. 539, 37 Wkly. Rep. 238.

79. Coke Litt. 337*b* [*quoted* in Springstein *v.* Schermerhorn, 12 Johns. (N. Y.) 357, 361; Schieffelin *v.* Carpenter, 15 Wend. (N. Y.) 400, 404 (*cited* in Bailey *v.* Wells, 8 Wis. 141, 158, 76 Am. Dec. 233, and citing "551" instead of 337*b*); 4 Kent Comm. 103 (*quoted* as at "102" in Fisher *v.* Edington, 12 Lea (Tenn.) 189, 193) substituting "the" for "a" at the beginning and inserting "next" before "immediate"; *misquoted* in Burton *v.* Barclay, 7 Bing. 745, 757, 9 L. J. C. P. O. S. 231, 238, 5 M. & P. 785, 20 E. C. L. 331, where "may be drawn" is substituted for "may drown"].

With slight variations the same definition, substantially, is given by other authorities, as follows: "A 'yielding up of an estate for life or years to him that hath the immediate reversion or remainder, wherein the particular estate may merge or drown by mutual agreement between them.'" 2 Blackstone Comm. 326 [*quoted* in Scott *v.* Scott, 18 Gratt. (Va.) 150, 159]. See also Washburn Real Prop. § 546 [*quoted* in Fisher *v.* Edington, 12 Lea (Tenn.) 189, 193], where it is said: "If a tenant for life or years yields up his estate to him who has the immediate estate in reversion or remainder, it is called by the law a surrender, the effect of which is to extinguish all claim for rent not due at the time. The estate for years in such case is drowned by mutual agreement between them."

"A yielding up of an estate for life or years to him who has an immediate estate in reversion or remainder, by which the lesser estate is merged in the greater by mutual agreement." Bouvier L. Dict. [*quoted* in Fisher *v.* Edington, 12 Lea (Tenn.) 189, 194].

"The yielding up of an estate for life or years to him who has an immediate estate in reversion or remainder, wherein the estate for life or years may drown or merge by mutual agreement between the parties." 2 Platt Leases 499 [*quoted* in Woodward *v.* Lindley, 43 Ind. 333, 341].

"The yielding up of an estate for life or years to him that has the immediate reversion or remainder, wherein the particular estate becomes extinct by a mutual agreement between the parties." Taylor Landl. & Ten. § 507 [*quoted* in Brewer *v.* National Union Bldg. Assoc., 166 Ill. 221, 225, 46 N. E. 752; Dayton *v.* Craik, 26 Minn. 133, 136, 1 N. W. 813; Churchill *v.* Lammers, 60 Mo. App. 244, 248].

80. Welcome *v.* Hess, 90 Cal. 507, 512, 27 Pac. 369, 25 Am. St. Rep. 145.

81. Gluck *v.* Baltimore, 81 Md. 315, 324, 32 Atl. 515, 48 Am. St. Rep. 515.

82. Coe *v.* Hobby, 72 N. Y. 141, 145, 28 Am. Rep. 120.

83. Witmark *v.* New York El. R. Co., 76 Hun (N. Y.) 302, 305, 27 N. Y. Suppl. 777

hold, the yielding up of the estate to the landlord so that the lease-hold interest becomes extinct by the mutual agreement of the parties; [84] a word which applies to the termination of a running term before it has expired by the acceptance on the part of the landlord of a surrender of the premises.[85] As a verb, to yield possession of to another upon compulsion or demand, or under pressure of a superior force; to give up, especially to an enemy in warfare, as to "surrender" an army or fort; [86] to yield, render or deliver up; [87] in every connection, to yield to; to cease to resist the efforts of another; [88] as the act of one insured, with regard to his policy, to cancel or yield up.[89] (Surrender: By Prisoner Released on Bail Affecting Right to Habeas Corpus, see HABEAS CORPUS, 21 Cyc. 290. Distinguished From Abandonment, see ABANDONMENT, 1 Cyc. 4 note 1. Incidental to Cancellation of Instruments, see CANCELLATION OF INSTRUMENTS, 6 Cyc. 338. In Extradition Proceedings, see EXTRADITION (INTERNATIONAL), 19 Cyc. 79. Of Charter of Municipal Corporation, Evidence of, see MUNICIPAL CORPORATIONS, 28 Cyc. 179. Of Corporate Franchise as Means of Dissolution of Corporation, see CORPORATIONS, 10 Cyc. 1299. Of Corporate Stock on Rescission of Contract of Subscription For Shares, see CORPORATIONS, 10 Cyc. 449. Of County Warrant For Examination, Redemption, Reissue, or Funding, see COUNTIES, 11 Cyc. 542. Of Deed to Grantor, see DEEDS, 13 Cyc. 723. Of Evidence of Debt as Changing Transaction to Advancement, see DESCENT AND DISTRIBUTION, 14 Cyc. 174 note 86. Of Indemnity or Security by Surety to Principal, Right to, see PRINCIPAL AND SURETY, 32 Cyc. 243. Of Lease or Leased Premises — Affecting Estoppel to Deny Landlord's Title, see LANDLORD AND TENANT, 24 Cyc. 946; Affecting Right of Tenant to Renew Lease, see LANDLORD AND TENANT, 24 Cyc. 1004; Affecting Statutory Right to Distrain, see LANDLORD AND TENANT, 24 Cyc. 1286; As Eviction, see LANDLORD AND TENANT, 24 Cyc. 1130; At Termination of Lease, Duty of Tenant as to, see LANDLORD AND TENANT, 24 Cyc. 1054; Conditional on Pay-

[*affirmed* in 149 N. Y. 393, 44 N. E. 78], adding: "Like an estate for years into an immediate remainder in fee."

"A 'surrender' differs from a 'release' in this respect; that the release operates by the greater estate's descending upon the less,— a surrender is the falling of a less estate into a greater." Stroud Jud. Dict. [*quoting* Coke Litt. 337*b*, Butler's note].

84. Buck *v.* Lewis, 46 Mo. App. 227, 232.

Not partial but entire, "a cesser of the relation of lessor and lessee" see *Ex p.* Glegg, 19 Ch. D. 7, 17, 51 L. J. Ch. 367, 45 L. T. Rep. N. S. 484, 30 Wkly. Rep. 144, construing Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), § 23.

85. Excelsior Steam Power Co. *v.* Halsted, 5 N. Y. App. Div. 124, 125, 37 N. Y. Suppl. 43, holding that a surrender of the premises is not requisite to a surrender of the term, that at the end of the term a mere vacation of the premises is sufficient to avoid holding over.

86. Standard Dict. [*quoted* in Keppel *v.* Tiffin Sav. Bank, 197 U. S. 356, 362, 25 S. Ct. 443, 49 L. ed. 790, where it is said that "in Webster's International Dictionary, the word is primarily defined the same way," the court, no doubt, having in mind the second definition in Webster's International Dictionary which is as follows: "To yield to the power of another; to give or deliver up possession of (anything) upon compulsion or demand; as, to 'surrender' one's person to an enemy or to an officer; to 'surrender' a fort or a ship"].

The word "does not exclude compelled action, but to the contrary generally implies such action. That this is the primary and commonly accepted meaning of the word is shown by the dictionaries. . . . The word, of course, also sometimes denotes voluntary action." Keppel *v.* Tiffin Sav. Bank, 197 U. S. 356, 362, 25 S. Ct. 443, 49 L. ed. 790.

Not "to vacate, or locate," in any sense of the word see Megrue *v.* Putnam County, 15 Ohio Cir. Ct. 242, 244, 8 Ohio Cir. Dec. 262.

As used in Bankruptcy Act (1898), § 579, providing that "the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences," the word denotes an enforced, as well as a voluntary preference. Keppel *v.* Tiffin Sav. Bank, 197 U. S. 356, 360, 362, 25 S. Ct. 443, 49 L. ed. 790 [*cited* in *In re* Otto F. Lange Co., 170 Fed. 114, 116, and *distinguished* in *In re* Armstrong, 145 Fed. 202, 210].

87. See Nolander *v.* Burns, 48 Minn. 13, 17, 50 N. W. 1016, where the exact language used is "'surrender,' which undoubtedly means 'yielded, rendered, or delivered up.'"

Possession and ownership of the thing surrendered are presupposed by the word. Brown *v.* Gibson, 107 Va. 383, 387, 59 S. E. 384.

88. Megrue *v.* Putnam County, 15 Ohio Cir. Ct. 242, 244, 8 Ohio Cir. Dec. 262, construing the word as applied to the act of a county board in surrendering a portion of highway to a railroad company.

89. Wells *v.* Vermont Life Ins. Co., 28 Ind. App. 620, 62 N. E. 501, 63 N. E. 578, 88 Am. St. Rep. 208.

ment by Landlord For Improvements, see LANDLORD AND TENANT, 24 Cyc. 1105; Dispensing With Notice of Reëntry, see LANDLORD AND TENANT, 24 Cyc. 1392; Effect of Agreement For Increase or Reduction of Rent as, see LANDLORD AND TENANT, 24 Cyc. 1167; Effect of Taking New Lease on First Lease, see LANDLORD AND TENANT, 24 Cyc. 1025; Effect on Liability For Rent, see LANDLORD AND TENANT, 24 Cyc. 1162; Plea of in Action For Rent, see LANDLORD AND TENANT, 24 Cyc. 1214; Termination of Tenancy by, see LANDLORD AND TENANT, 24 Cyc. 1366, 1382, 1385, 1390. Of Levy of Execution Affecting Satisfaction of Judgment, see JUDGMENTS, 23 Cyc. 1490. Of Life-Estate as Termination Thereof, see ESTATES, 16 Cyc. 645. Of Mining Lease, see MINES AND MINERALS, 27 Cyc. 703. Of Municipal Warrant or Certificate of Indebtedness For Reissue, Funding, or Redemption, see MUNICIPAL CORPORATIONS, 28 Cyc. 1571. Of Negotiable Instrument — As Consideration For New Obligation, see COMMERCIAL PAPER, 7 Cyc. 697; As Discharge, see COMMERCIAL PAPER, 7 Cyc. 1048; On Execution of New Instrument, Necessity For, see COMMERCIAL PAPER, 7 Cyc. 1014; On Payment, see COMMERCIAL PAPER, 7 Cyc. 1017. Of Oil, Gas, or Salt Lease, see MINES AND MINERALS, 27 Cyc. 739. Of Original Patent on Reissue, see PATENTS, 30 Cyc. 926. Of Police Power by Municipality, see MUNICIPAL CORPORATIONS, 28 Cyc. 694. Of Policy of Fire Insurance — In General, see FIRE INSURANCE, 19 Cyc. 649; As Defense to Action on Premium Notes, see FIRE INSURANCE, 19 Cyc. 616; Right of Insured, see FIRE INSURANCE, 19 Cyc. 609 note 74. Of Policy of Life Insurance — In General, see LIFE INSURANCE, 25 Cyc. 783; Affecting Rights of Beneficiary Under Surrendered Policy, see LIFE INSURANCE, 25 Cyc. 892; As Fraud on Creditors, see FRAUDULENT CONVEYANCES, 20 Cyc. 361; Value on, Right of Pledgee or Assignee of Policy to Take at, see LIFE INSURANCE, 25 Cyc. 776. Of Possession — After Appeal in Action of Unlawful Detainer Affecting Amount in Controversy, see APPEAL AND ERROR, 2 Cyc. 580 note 44; By Adverse Claimant, Effect on Running of Statute, see ADVERSE POSSESSION, 1 Cyc. 1013; By Bailee as Waiver of Lien, see BAILMENTS, 5 Cyc. 196; By Covenantee to Holder of Paramount Legal Title as Constructive Eviction, see COVENANTS, 11 Cyc. 1127; Loss of Title Acquired by Adverse Possession by, see ADVERSE POSSESSION, 1 Cyc. 1139; Of Premises on Which Chattels Are Located as Delivery of Chattels, see SALES, 35 Cyc. 193; Of Public Lands, Inference From Failure to List For Taxation, see PUBLIC LANDS, 32 Cyc. 1098. Of Powers of Municipal Government Generally, see MUNICIPAL CORPORATIONS, 28 Cyc. 276. Of Power to Exempt From Taxation, see TAXATION. Of Power to Tax, see TAXATION. Of Preference as Condition of Allowance of Claim in Bankruptcy, see BANKRUPTCY, 5 Cyc. 330, 331. Of Principal by Bail in Civil Actions — In General, see BAIL, 5 Cyc. 44; As Affecting Right to Bail, see BAIL, 5 Cyc. 11; Plea of in Action on Bond, see BAIL, 5 Cyc. 59. Of Principal by Bail in Criminal Prosecution — In General, see BAIL, 5 Cyc. 126; As Affecting Right to Bail, see BAIL, 5 Cyc. 75; As Ground For Relief From Forfeiture, see BAIL, 5 Cyc. 134. Of Property — Assessed For Abatement of Nuisance by Municipality, see MUNICIPAL CORPORATIONS, 28 Cyc. 758; Assessed For Public Improvements, see MUNICIPAL CORPORATIONS, 28 Cyc. 1209; By Debtor as Ground For Discharge From Execution Against the Person, see EXECUTIONS, 17 Cyc. 1526, 1529; Held Under Forthcoming or Delivery Bond in Attachment, as Discharge of Obligors on Bond, see ATTACHMENT, 4 Cyc. 694; In Replevin, Power of Court to Compel, see REPLEVIN, 34 Cyc. 1517; Liabilities of Sheriffs and Constables For, see SHERIFFS AND CONSTABLES, 35 Cyc. 1673. Of Security — As Condition Precedent to Action on Debt or Liability Secured by Pledge, see PLEDGES, 31 Cyc. 868; As Consideration For Mortgage, see MORTGAGES, 27 Cyc. 1053, 1192; As Discharge of Negotiable Instrument, see COMMERCIAL PAPER, 7 Cyc. 1046; As Discharge of Surety, see PRINCIPAL AND SURETY, 32 Cyc. 216; For Mechanic's Lien, see MECHANICS' LIENS, 27 Cyc. 276. Subject to Statute of Frauds, see FRAUDS, STATUTE OF, 20 Cyc. 218. See also RELINQUISHMENT, 34 Cyc. 1199.)

SURREPTIO. A civil law term meaning "surprise," that is, where one man

will by false suggestions prevail upon another to do that which otherwise he would not have done.[90]

SURREPTITIOUSLY. A word which, in its ordinary use, implies fraud, secrecy or stealth, in doing.[91]

SURROGATE. In American law, the name given in some of the states to the judge or judicial officer who has the administration of probate matters, guardianships, etc.[92] A word which, as used in a statute relating specifically to the accounting and settlement of estates and lacking words conferring power to act upon any surrogate in the state, must be deemed to refer to the judicial officer who has or had general jurisdiction over the estate, its representatives, and its management and disposition.[93] In English law, he who is appointed in the stead of another, most commonly of a bishop or his chancellor.[94] (See SURROGATE'S COURT or SURROGATE COURT.)

SURROGATE'S COURT or SURROGATE COURT. One of the several denominations of distinct tribunals for the establishment of wills and the administration of the estates of men dying either with or without wills.[95] (Surrogate's Court or Surrogate Court: In General, see COURTS, 11 Cyc. 791. Ancillary and Incidental Jurisdiction of, see COURTS, 11 Cyc. 679. Authority of Legislature as to, see COURTS, 11 Cyc. 710. Conformity With Practice of Courts of Record, see COURTS, 11 Cyc. 798 note 7. Jurisdiction of — Claims Against Decedents' Estates, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 523; Proceedings For Distribution of Decedents' Estates, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 640. Power to — Amend or Correct Judgment, see JUDGMENTS, 23 Cyc. 859 note 78; Compel Application For Guardian Ad Litem, see INFANTS, 22 Cyc. 646 note 10; Issue Commission to Take Testimony, see DEPOSITIONS, 13 Cyc. 845 note 49. Probate and Construction of Wills, see WILLS. See also COURT OF PROBATE, 11 Cyc. 631; PROBATE COURT, 32 Cyc. 403, and Cross-References Thereunder.)

SURROGATUM SAPIT NATURAM SURROGATI. A maxim meaning "A thing substituted takes of the nature or character of that for which it was substituted."[96]

90. See Bath's Case, 3 Ch. Cas. 55, 74, 22 Eng. Reprint 963.

91. See Yates *v.* Huson, 8 App. Cas. (D. C.) 93, 98, 99, construing U. S. Rev. St. (1878) § 4290, requiring one who contests the validity of a patent on the ground of prior invention to show that such patent was obtained "surreptitiously or unjustly" where, in disposing of the argument of counsel that the words "surreptitiously or unjustly" implied fraud or false suggestion and required that a showing of craft or stealth on the part of the patentee be made, the court used the following language: "The argument is founded on the word 'surreptitiously,' taken in its usual signification, and completely ignores the alternative word 'unjustly,'" and, referring to the amendment of the statute to the form in question, "A learned author's view of the history . . . of the word 'surreptitiously' is that the word has thereby 'lost its former significance and become the equivalent of unjustly' (3 Rob. on Pats., sec. 960, note 1), because 'no fraud or deceit is necessary to render void a patent obtained by a later true inventor when the first inventor is complying with the obligation of diligence imposed upon him by the law.' Whether that view of the change wrought in the meaning of the word 'surreptitiously' be correct or not, it seems clear to us that . . . the word 'unjustly' was not added carelessly or without a special purpose. The words are not synonymous, and though 'unjustly' may include the idea of a thing done fraudulently, and secretly as well, its ordinary meaning is, contrary to justice or that which is right."

Distinguished from unjustly see *supra*, this note.

In pleading.— As applied to an act which is the subject of a complaint, "surreptitiously" and such epithets are "merely allegations of conclusions of law, which a demurrer does not admit." Lumley *v.* Wabash R. Co., 71 Fed. 21, 28 [*reversed* on other grounds in 76 Fed. 66, 22 C. C. A. 60].

92. Black L. Dict.

93. Kinnealy *v.* People, 98 N. Y. App. Div. 192, 194, 90 N. Y. Suppl. 587, construing Code Civ. Proc. § 2747.

94. Stroud Jud. Dict.

95. Black L. Dict. [*citing* 2 Kent Comm. 409 note b]. See Robinson *v.* Fair, 128 U. S. 53, 86, 9 S. Ct. 30, 32 L. ed. 415, where the form "Surrogate Courts" is used.

Jurisdiction in regard to wills.— A surrogate's court is a tribunal established as a means for giving effect to and carrying out the will, not superior to it or the means of defeating it. Harnett *v.* Wandell, 60 N. Y. 346, 348, 19 Am. Rep. 194 [*cited* in *In re* Cornell, 17 Misc. (N. Y.) 468, 472, 41 N. Y. Suppl. 255, which purports to, but does not, quote the words of the decision].

Surrogates' courts in New York, origin and evolution see Malone *v.* St. Peter & St. Paul's Church, 172 N. Y. 269, 274, 64 N. E. 961; *In re* Hawley, 104 N. Y. 250, 263, 10 N. E. 352.

96. Trayner Leg. Max.

SURVEY. A. AS A NOUN. Of land, in one sense, an attentive or particular view; examination of the land with a design to ascertain the condition, quantity, or value; not necessarily a paper containing the courses, distances, and quantity of land; not necessarily a plot of land made by a survey or as such;[97] a word which may apply as well to the map, plat, or chart, exhibiting the result of actual examination of the surface of the ground as it does to the examination itself;[98] the actual measurement of land ascertaining the contents by running lines and angles, marking the same and fixing corners and boundaries;[99] sometimes synonymous with "land," "grant," "location;"[1] generally, when used in relation to location of proprietary rights, a description, in words or figures, of the lands located;[2] under a proprietary title, as a means of setting off lands, an instrument *sui generis* in the nature of a partition; a customary mode in which a proprietor has set off to himself, in severalty, a part of the common estate.[3] Of logs, the act of counting

97. Fulton *v.* Dover, 6 Del. Ch. 1, 15, 6 Atl. 633.

98. Hahn *v.* Cotton, 136 Mo. 216, 224, 37 S. W. 919, construing the word "as used in the law governing the adjustment of disputes concerning boundaries of land."

Failure to mark one of the lines of a survey does not necessarily vitiate it, the survey of a quadrilateral, made by running three sides and capable of completion by running a single straight line, is a survey under the Utah laws; a quadrilateral survey so made as to establish the four corners without running any of its external lines might be a good survey. Alford *v.* Dewin, 1 Nev. 207, 214.

"Map" or "profile" is not necessarily the meaning of "survey." They "are sometimes used as convertible terms, but not always. In the act of 1719, for settling the boundary between East and West Jersey, a plain distinction is made between 'books of surveys' and 'maps' or 'draughts' of land." Atty.-Gen. *v.* Stevens, 1 N. J. Eq. 369, 385, 22 Am. Dec. 526, holding that a charter requirement that a railroad company before taking possession of its land, file a survey of its route and location is satisfied by the filing of a description by courses and distances, the road in question being the Camden and Amboy Railroad and Transportation Company.

An actual survey and not a mere declaration of opinion based on statutes and personal knowledge of the country on the part of surveyors is required by Colo. Laws (1887), p. 238, § 1, providing for survey of county boundaries disputed for indefiniteness, the use of the expressions "run out and establish," "'fix and define such boundary line' by plain and substantial mounds and marks, and unmistakeable monuments" with a provision in case the "surveyor of either of such counties, shall not appear and 'assist the state engineer in making such survey,'" leading to that conclusion. Mineral County *v.* Hinsdale County, 25 Colo. 95, 99, 100, 53 Pac. 383 [*reversing* 9 Colo. App. 368, 48 Pac. 675].

Not necessarily upon the surface.— The "survey" authorized by N. Y. Code Civ. Proc. § 1682, may be made in a tunnel, in a proper case. Howe's Cave Lime, etc., Co. *v.* Howe's Cave Assoc., 88 Hun (N. Y.) 554, 558, 34 N. Y. Suppl. 848 [*affirmed* in 147 N. Y. 721, 42 N. E. 723].

"Subject to survey."— "A demise of land at an Acreage Rent, 'subject to Survey,' means, that the acreable contents shall be ascertained by actual measurement for the purpose of fixing the amount of rent." Stroud Jud. Dict. [*citing* Persse *v.* Malcolmson, Ir. R. 5 C. L. 572].

Map and survey of the route of a railroad as required by Mich. Laws (1859), pp. 559, 560, as a prerequisite to appraisal of land for condemnation, means "not only a delineation upon paper or other material, giving a general, or approximate idea of the situation of the road, but also such full and accurate notes and data as are necessary to furnish complete means for identifying and ascertaining the precise position of every part of the line with courses and distances throughout, so that there can be no doubt as to where any portion of it is to be found. A map can be made to contain all of those data, so as to need no reference to field notes, but the information must exist somewhere." Convers' Appeal, 18 Mich. 459, 466 [*quoted* in San Francisco, etc., R. Co. *v.* Gould, 122 Cal. 601, 603, 55 Pac. 411].

99. Winter *v.* U. S., 30 Fed. Cas. No. 17,895, Hempst. 344, 371 [*citing* Jacob L. Dict. (where, however, the word is defined "to measure, lay out, or particularly describe a manor, or estate in lands; and to ascertain not only the bounds and royalties thereof, but the tenure of the respective tenants, the rent and value of the same, &c."); Webster Dict. (where the word is defined in this sense as "the act of surveying . . . the operation of finding the contour, dimensions, position, or other particulars of, as any part of the earth's surface, whether land or water; also, a measured plan and description of any portion of country")].

1. Clark *v.* Gregory, (Tex. Civ. App. 1894) 26 S. W. 244, so construing the term as used in a deed.

2. Atty.-Gen. *v.* Stevens, 1 N. J. Eq. 369, 385, 22 Am. Dec. 526, adding: "Such are all the surveys, as recorded in the surveyor general's office, and the meaning of the term is there perfectly understood."

3. Estell *v.* Bricksburg Land, etc., Co., 35 N. J. L. 235, 237 [*quoted* in Jennings *v.* Burnham, 56 N. J. L. 289, 291. 28 Atl. 1048].

Not a conveyance see Estell *v.* Bricksburg Land, etc., Co., 35 N. J. L. 235, 237 [*quoted* in Jennings *v.* Burnham, 56 N. J. L. 289, 291, 28 Atl. 1048].

"The recorded return of the survey is not a deed, but an instrument entirely unknown to the common law. It is not to be tested or

and measuring the logs and ascertaining how many feet they contain.[4] In fire insurance, the plan or application.[5] In marine insurance, a common public document looked to both by underwriters and owners as affording the means of ascertaining upon the very spot, at the very time, the state and condition of a ship and other property at hazard.[6]

B. As a verb. To inspect or take a view of; to view with attention; to view with a scrutinizing eye; to examine; to measure as land;[7] to examine with reference to condition, situation, and value;[8] to inspect with reference to condition, situation, and value; to determine the boundaries, extent, position, etc.[9] (Survey: Angles to Be Adopted in Determining Courses and Distances, see Boundaries, 5 Cyc. 877. Apportionment of Excess or Deficiency in, see Boundaries, 5 Cyc. 973. As Color of Title, see Adverse Possession, 1 Cyc. 1097. As Evidence — In General, see Evidence, 17 Cyc. 307 note 95, 308, 313; 412, 446; In Boundary Proceedings, see Boundaries, 5 Cyc. 965. As Ground of Quasi-Estoppel, see Estoppel, 16 Cyc. 804 note 18. Best and Secondary Evidence, see Evidence, 17 Cyc. 476 note 33, 522. Burden of Proof to Establish, see Boundaries, 5 Cyc. 955. By Private Parties to Establish Boundary, see Boundaries, 5 Cyc. 944. By Public Authorities to Establish Boundary, see Boundaries, 5 Cyc. 948. Calls For — Edge, Bank, or Shore of Watercourse, see Boundaries, 5 Cyc. 903; Thread of Stream as Fixing Boundary, see Boundaries, 5 Cyc. 904.

construed by the rules applicable to conveyance, but it appears to be an acknowledgment of the common owners that a certain portion of the joint estate has been assigned to one of the original proprietors, or to an assignee of such proprietor. The certainty of the party to whom the title has been passed, is to be ascertained not from the record of the survey, but from the deed of the proprietor, in those cases in which he has parted with the title: The office of the survey and return is fully discharged when it shows that a parcel of designated land has been set apart in severalty, under the title of one of the original holders; to whose benefit such allotment enures, is a matter to be settled, if a stranger claim by the ordinary proofs." Estell *v.* Bricksburg Land, etc., Co., 35 N. J. L. 235, 239.

4. Antill *v.* Potter, 69 Minn. 192, 195, 71 N. W. 935, so construing the word as used in Minn. Gen. St. (1894) §§ 2397, 2406, to the effect that no survey of any logs except the survey of the surveyor-general shall be received in any court.

5. See Albion Lead Works *v.* Williamsburg City F. Ins. Co., 2 Fed. 479, 483, where it is said that "plan," "application," and "survey" are often used synonymously, and "survey" most commonly of the three, the word having been adopted as a substitute for "application," evidently to avoid confusion between the two uses of the latter word, which, in the technical sense in which "survey," also, is used, means an application upon a form furnished for the purpose, containing details in answer to questions, but, in another sense, may mean a mere letter asking for insurance.

6. Potter *v.* Ocean Ins. Co., 19 Fed. Cas. No. 11,335, 3 Sumn. 27, 43 [*quoted* in Hathaway *v.* Sun Mut. Ins. Co., 8 Bosw. (N. Y.) 33, 68].

The object of a survey is to assist the judgment of the master, as to his proceeding to repair damage, or to sell the ship. It is designed to protect him in the fair discharge of his difficult and often critically responsible duty in great emergency, by giving him the aid of the opinion of other men of sound judgment, intelligence, and skill in naval affairs. Potter *v.* Ocean Ins. Co., 19 Fed. Cas. No. 11,335, 3 Sumn. 27, 42.

With a view to the sale of a vessel, a survey — that is, a precedent examination by competent surveyors and their report stating the condition of the vessel and advising a sale, affords authentic evidence to guide the master, but does not bind him to sell, nor, of itself, justify a sale. It is an important element in the proofs, in determining the character of the emergency and, especially, the good faith of the master. It should be deliberately made and precede the action of the master. The report should be sworn if an oath can be legally administered at the place of survey. It is not a fixed rule that all proceedings of the surveyors shall be under oath, but such a formality adds to the weight and credit of their decision. A paper signed but not subscribed or sworn until after the sale, signed by persons who were not asked to the vessel to act as surveyors, who made no joint examination of her, nor consulted with a view to a report, nor all individually inspected the vessel in such a way as to enable them to form a sound opinion as to her condition, is defective. The Henry, 11 Fed. Cas. No. 6,372, 1 Blatchf. & H. 465, 472, 474 [*cited* in Hathaway *v.* Sun Mut. Ins. Co., 8 Bosw. (N. Y.) 33, 69].

7. Fulton *v.* Dover, 6 Del. Ch. 1, 15, 6 Atl. 633, adding that the word has many other meanings.

8. Fulton *v.* Doner, 6 Del. Ch. 1, 15, 6 Atl. 633; Century Dict. [*quoted* in Howe's Cave Lime, etc., Co. *v.* Howe's Cave Assoc., 88 Hun (N. Y.) 554, 558, 34 N. Y. Suppl. 848 (*affirmed* in 147 N. Y. 721, 42 N. E. 723)].

9. Century Dict. [*quoted* in Howe's Cave Lime, etc., Co. *v.* Howe's Cave Assoc., 88 Hun (N. Y.) 554, 558, 34 N. Y. Suppl. 848 (*affirmed* in 147 N. Y. 721, 42 N. E. 723)].

Certainty of Award Leaving Line to Be Ascertained by, see ARBITRATION AND AWARD, 3 Cyc. 712 note 81. Charge of Removing Landmarks as Libel or Slander, see LIBEL AND SLANDER, 25 Cyc. 314. Conclusiveness of Approved Survey of United States, see COMMON LANDS, 8 Cyc. 357. Conflicting Surveys, Effect on Adverse Claim, see ADVERSE POSSESSION, 1 Cyc. 1131. Constituting Appropriation of Private Property by Right of Eminent Domain, see EMINENT DOMAIN, 15 Cyc. 657. Construction — Of Boundaries With Reference to Field Notes, see BOUNDARIES, 5 Cyc. 891; Of Deed as to Property Conveyed by Reference to, see BOUNDARIES, 5 Cyc. 633; Where Boundaries Are Inconsistent, see BOUNDARIES, 5 Cyc. 930. Control in Description of Land of — Artificial Monuments and Marks, see BOUNDARIES, 5 Cyc. 920; Calls For Adjoiners, see BOUNDARIES, 5 Cyc. 925; Courses and Distances, see BOUNDARIES, 5 Cyc. 927; Lines Marked or Surveyed, see BOUNDARIES, 5 Cyc. 914; Maps, Plats, and Field Notes, see BOUNDARIES, 5 Cyc. 923; Metes and Bounds, see BOUNDARIES, 5 Cyc. 926; Natural or Permanent Objects, see BOUNDARIES, 5 Cyc. 916; Quantity, see BOUNDARIES, 5 Cyc. 929. Cost of as Taxable Item, see COSTS, 11 Cyc. 113. Courses and Distances — As Question For Jury in Boundary Proceedings, see BOUNDARIES, 5 Cyc. 969; In Description, see BOUNDARIES, 5 Cyc. 875. Declarations of Surveyors as Evidence in Boundary Action, see BOUNDARIES, 5 Cyc. 957; EVIDENCE, 16 Cyc. 1239. Entry of Land to Make as Actual Possession, see ADVERSE POSSESSION, 1 Cyc. 993. For Public Improvements, see MUNICIPAL CORPORATIONS, 28 Cyc. 1011. In Condemnation Proceedings — As Evidence, see EMINENT DOMAIN, 15 Cyc. 870; Filing of as Prerequisite to Institution, see EMINENT DOMAIN, 15 Cyc. 817; Reference to in Petition or Complaint, see EMINENT DOMAIN, 15 Cyc. 857. In Ejectment — In General, see EJECTMENT, 15 Cyc. 90; Admissibility of Evidence, see EJECTMENT, 15 Cyc. 132, 133; Necessity For on Trial, see EJECTMENT, 15 Cyc. 156; Necessity of as Evidence, see EJECTMENT, 15 Cyc. 145. In Partition Suit, see PARTITION, 30 Cyc. 263. In Trespass to Try Title, see TRESPASS TO TRY TITLE. Judicial Notice of — In General, see EVIDENCE, 16 Cyc. 905; Magnetic Variation, see EVIDENCE, 16 Cyc. 856. Location of — Closing Lines, see BOUNDARIES, 5 Cyc. 887; Corners, see BOUNDARIES, 5 Cyc. 871; Lines, see BOUNDARIES, 5 Cyc. 884; Monuments and Marks as Evidence in Boundary Proceedings, see BOUNDARIES, 5 Cyc. 961; Partition and Division Lines, see BOUNDARIES, 5 Cyc. 889. Mandamus to Compel — Approval of Plat of Land, see MANDAMUS, 26 Cyc. 250; Survey of Public Lands, see MANDAMUS, 26 Cyc. 245. Marine, see MARINE INSURANCE, 26 Cyc. 731. Meandered Waters as Boundaries, see BOUNDARIES, 5 Cyc. 899. Mistake, Effect on Adverse Possession, see ADVERSE POSSESSION, 1 Cyc. 1036. Of City or Town, see MUNICIPAL CORPORATIONS, 28 Cyc. 232. Of Highway or Street, see MUNICIPAL CORPORATIONS, 28 Cyc. 838; STREETS AND HIGHWAYS, *ante*, p. 120. Of Homestead, see HOMESTEADS, 21 Cyc. 484, 627. Of Lands Conveyed, see VENDOR AND PURCHASER. Of Location of Railroad, see RAILROADS, 33 Cyc. 127. Of Logs or Lumber — In General, see LOGGING, 25 Cyc. 1562; Effect of Violation of Regulations as to on Validity of Sale, see SALES, 35 Cyc. 88. Of Mines, see MINES AND MINERALS, 27 Cyc. 669. Of Public Lands — In General, see PUBLIC LANDS, 32 Cyc. 799; As Evidence, see PUBLIC LANDS, 32 Cyc. 1043; California Lands, see PUBLIC LANDS, 32 Cyc. 1112; Granted by United States in Aid of Railroads, see PUBLIC LANDS, 32 Cyc. 942; Military Lands and Entries, see PUBLIC LANDS, 32 Cyc. 866 note 43; Spanish, Mexican, and French Grants, see PUBLIC LANDS, 32 Cyc. 1177, 1222; State Lands, Construction of Patents or Grants, see PUBLIC LANDS, 32 Cyc. 1092; Swamp and Overflowed Lands, see PUBLIC LANDS, 32 Cyc. 903, 913; Texas Lands, see PUBLIC LANDS, 32 Cyc. 1119, 1130; Town-Site Lands, see PUBLIC LANDS, 32 Cyc 843; Washington Lands, see PUBLIC LANDS, 32 Cyc. 1153. Parol Evidence Affecting, see EVIDENCE, 17 Cyc. 584. Presumptions as to in Boundary Proceedings, see BOUNDARIES, 5 Cyc. 955. Reference to in Description of Land in Deed, see DEEDS, 13 Cyc. 548. Surveying in Squares as Fixing Location of Boundaries, see BOUNDARIES, 5 Cyc. 884. Written Agreement Between Adjoining Proprietors

to Employ Surveyor to Make, as Submission to Arbitration, see ARBITRATION AND AWARD, 3 Cyc. 584 note 13.)

SURVEYOR. One who makes surveys of land, one who has the overseeing or care of another's person land or works.[10] (Surveyor: Appointment by Commissioners in Partition Suit, see PARTITION, 30 Cyc. 257. As Expert Witness, see EVIDENCE, 17 Cyc. 191. As Witness in Judicial Proceedings to Fix Boundaries, see BOUNDARIES, 5 Cyc. 967. Declarations of — Deceased, Admissibility in Boundary Proceedings, see BOUNDARIES, 5 Cyc. 957; Requirements For Relevancy, see EVIDENCE, 16 Cyc. 1239. Deputy Surveyor, see PUBLIC LANDS, 32 Cyc. 1002. Evidence as to Usual Practice of in Boundary Proceedings, see BOUNDARIES, 5 Cyc. 965 note 88. General — In General, see PUBLIC LANDS, 32 Cyc. 1002; Approval of Application to Purchase School Lands, see PUBLIC LANDS, 32 Cyc. 883; Sufficiency of Deed of to Establish Title in Ejectment, see EJECTMENT, 15 Cyc. 150. Of City, see MUNICIPAL CORPORATIONS, 28 Cyc. 583. Of County — Duties and Powers, see COUNTIES, 11 Cyc. 439; Liability For Damage Caused by Want of Professional Skill, see COUNTIES, 11 Cyc. 444 note 82. Of Customs, see CUSTOMS DUTIES, 12 Cyc. 1136 note 95. Of Highway, see STREETS AND HIGHWAYS, *ante*, p. 77. Of Lumber, see LOGGING, 25 Cyc. 1562. Of Private Road, see PRIVATE ROADS, 32 Cyc. 373. Prohibition to Purchase Public Land, see PUBLIC LANDS, 32 Cyc. 1126. Qualifications as Witness, see WITNESSES. Report of as Evidence in Proceedings to Establish Boundary, see BOUNDARIES, 5 Cyc. 965 note 87. Return of in Proceedings to Lay Out Private Road, see PRIVATE ROADS, 32 Cyc. 376. Rights, Powers, and Duties of in Establishment of Boundaries by Public Authorities, see BOUNDARIES, 5 Cyc. 949. Settlement of County Boundaries by, see COUNTIES, 11 Cyc. 348.)

10. Black L. Dict.

As defined by Public Health Act (38 & 39 Vict. c. 55), § 4, and as used in that act, "'surveyor' includes any person appointed by a rural authority to perform any of the duties of surveyor under this Act," therefore one of whom a local power, empowered, by section 189 of the act, to appoint "fit and proper persons" to be surveyors, has merely determined that he is "competent, first, to be their assistant-surveyor, and, secondly, to discharge such of the duties of surveyor as might be necessary or proper" in the absence of their officer, is not "the 'surveyor'" within the meaning of the latter section, or of section 16 making the report of the "surveyor" the test of power to extend sewers through certain places. Lewis *v.* Weston-super-Mare Local Bd., 40 Ch. D. 55, 56, 68, 69, 58 L. J. Ch. 39, 59 L. T. Rep. N. S. 769, 37 Wkly. Rep. 121 [*distinguished* in Kendal *v.* Lewisham, 19 T. L. R. 384 (*argued* on appeal but *settled* in 20 T. L. R. 21)].

"Surveyor for the time being," authorized by the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), § 105, to estimate the expenses of paving streets, does not mean the permanent surveyor or any particular officer, and his acts are therefore not open to objection for lack of appointment as permanent surveyor. Kendal *v.* Lewisham, 19 T. L. R. 384 [*argued* on appeal but *settled* in 20 T. L. R. 21, and *distinguishing* Lewis *v.* Weston-super-Mare Local Bd., 40 Ch. D. 55, 58 L. J. Ch. 39, 59 L. T. Rep. N. S. 769, 37 Wkly. Rep. 121].

"Able practical surveyor."—Under the Trustee Act (51 & 52 Vict. c. 59), § 4, indemnifying a trustee who in making a loan on mortgage "was acting upon a report as to the value of the property made by a person whom the trustee reasonably believed to be an able practical surveyor or valuer, instructed and employed independently of any owner of property" a mere assumption by the trustee that the person upon whose report the loan is made is such a surveyor is not sufficient, and proof of some knowledge on the part of the trustee is requisite. *In re* Walker, 59 L. J. Ch. 386, 391, 62 L. T. Rep. N. S. 449.

"A quantity surveyor, is a person 'whose business consists in taking out in detail the Measurements and Quantities, from plans prepared by an architect, for the purpose of enabling Builders to calculate the amount for which they could execute the plans.'" 3 Stroud Jud. Dict. 1634, tit. "Quantity Surveyor" [*citing* Taylor *v.* Hall, 4 Ir. R. C. L. 476]. There is no privity of contract between a quantity surveyor and builder who tenders for the building contract. 3 Stroud Jud. Dict. 1634 [*citing* Taylor *v.* Hall, 4 Ir. R. C. L. 476]; Priestley *v.* Stone, 4 T. L. R. 730 [*distinguished* in North *v.* Bassett, *infra*]. A quantity surveyor may recover his fees from those who have employed the architect who engaged him when it is the custom for architects to engage quantity surveyors, and this is implied in the contract between the architect and his employers. Moon *v.* Witney Union, 3 Bing. N. Cas. 814, 817, 819, 3 Hodges 206, 6 L. J. C. P. 305, 5 Scott 1, 32 E. C. L. 374. *Compare* 3 Stroud Jud. Dict. 1635 [*citing* Antisell *v.* Doyle, [1899] 2 Ir. 275], where it is said nor can the "quantity surveyor," merely as such, recover his fees against the building owner. The fees of a quantity surveyor are payable, according to valid custom, by the builder whose tender, based on the quantity surveyor's specifica-

SURVEYOR OF HIGHWAYS. In certain of the United States, a public officer clothed with certain powers and duties which are prescribed and regulated by statute;[11] merely a ministerial officer of the town council, subject to their direc-

tions, is accepted, but, if no tender is accepted, by the building owner or architect. North *v.* Bassett, [1892] 1 Q. B. 333, 335, 336, 56 J. P. 389, 61 L. J. Q. B. 177, 66 L. T. Rep. N. S. 189, 40 Wkly. Rep. 223 [*distinguishing* Priestley *v.* Stone, *supra*]. The builder who has not himself employed the quantity surveyor for negligence or breach of contract in inaccuracy in his estimates. Priestley *v.* Stone, *supra*. The builder has no action on the ground that he was misled by inaccurate specifications of the quantity surveyor, and put to unexpected expense thereby, against the owner of the building, unless he can prove three things, namely, that the quantity surveyor was the owner's agent, that the quantity surveyor was guilty of fraud or misrepresentation, and that the owner knew of, or sanctioned it. Scrivener *v.* Pask, L. R. 1 C. P. 715, 719.

11. Walcott *v.* Swampscott, 1 Allen (Mass.) 101, 102.

Function.—"They are elected by towns and cities, not because they are to render services for their peculiar benefit or advantage, but because this mode of appointment has been deemed expedient by the legislature in the distribution of public duties and burdens for the purposes of the government, and for the good order and welfare of the community. . . . Towns cannot direct or control them in the performance of these duties; they cannot remove them from office during the term for which they are chosen; . . . nor can towns exercise any right of selecting the servants or agents by whom they perform the work of repairing the highways. In the discharge of these general duties they are wholly independent of towns, and can in no sense be considered their servants or agents." Walcott *v.* Swampscott, 1 Allen (Mass.) 101, 102. "He is clothed with very limited and well defined powers and duties. . . . He has no power to change the established grade of a highway, nor has he any power to change the actual grade thereof, whether this be the record grade or not, except in so far as such change may be necessary to make the same safe and convenient for travelers. And having no power to make any such change, it necessarily follows that no duty rests upon him in this regard." Sweet *v.* Conley, 20 R. I. 381, 383, 39 Atl. 326. The powers and duties of surveyors of highways are the same as those of commissioners of highways and are "to keep the highways in repair and amended," together with such incidental and additional powers as are conferred by Pub. St. c. 65. They do not include extensions and improvements for the building or entire rebuilding of bridges and the appointment of a committee by the town council for such purposes is not a usurpation of their powers. State *v.* White, 16 R. I. 591, 594, 18 Atl. 179, 1038.

He is not the mere agent (White *v.* Phillipston, 10 Metc. (Mass.) 108, 110; Mathewson *v.* Hawkins, 19 R. I. 16, 20, 31 Atl. 430) or servant of the town (Mathewson *v.* Hawkins, *supra*).

Liability.—"They are not amenable to towns for the manner in which they discharge the trust reposed in them by law." Walcott *v.* Swampscott, 1 Allen (Mass.) 101, 102. "It has never been held that an action would lie, by the party injured, against the surveyor of the highway himself, for his alleged neglect of duty, or that such surveyor is answerable, except in the manner provided for in the statutes. . . . If in that district of the highways assigned to him to keep in repair, any deficiency exists, occasioned by his fault or neglect, he may be prosecuted for the same by indictment. And if the town also shall be sentenced to pay a fine for any such deficiency, the surveyor, within whose limits such deficiency may be found, shall be liable to the town for the amount of such fine and the costs of prosecution, to be recovered by the town in an action on the case, if such deficiency exist through his fault or neglect. Rev. Sts. c. 15, §§ 83, 84. But no other action is specially given against him, where a recovery has been had against the town. He is not treated by the statute as a mere agent or servant whom the town has employed, and to whom, as such agent or servant, he is directly responsible for any neglect of duty. . . . A judgment against the town, in a civil action, is not the ground of a suit against him." White *v.* Phillipston, 10 Metc. (Mass.) 108, 110.

Power to render town liable only exceptional.—"It is only in certain specified cases, and under carefully guarded limitations, that they can bind towns by their acts." The town is not liable in a civil action for damages due to the negligence or lack of skill of a highway surveyor or one in his employ. Walcott *v.* Swampscott, 1 Allen (Mass.) 101, 102. They have "no authority to incur any indebtedness against the town, except, perhaps, in case of emergency such as the removal of snow or other obstruction from the highways." Sweet *v.* Conley, 20 R. I. 381, 383, 39 Atl. 326. "Such officer cannot be regarded as an agent for whose acts or contracts the town can be held liable." Mathewson *v.* Hawkins, 19 R. I. 16, 20, 31 Atl. 430.

Not entitled to payment unless by contract see Sikes *v.* Hatfield, 13 Gray (Mass.) 347, 352, 353, where it is said: "It is not an office to which, by law or usage, any compensation is attached, unless the town choose to contract for it," and held that the highway surveyor cannot recover from the town for labor performed by himself merely because the money appropriated to his district is not sufficient to put the roads in a proper condition, and that the fact that the town has in some instances consented to pay for work done under like circumstances is not evidence of the contract with him; nor is the fact that they have offered to pay him a

tion and control;[12] a statutory officer appointed by the town.[13] In English law, a person elected by the inhabitants of a parish, in vestry assembled, to survey the highways therein.[14] (See STREETS AND HIGHWAYS, *ante*, p. 1; SURVEY, *ante*, p. 621; SURVEYOR, *ante*, p. 624.)

SURVEYOR OF THE PORT. A revenue officer of the United States appointed for each of the principal ports of entry, whose duties chiefly concern the importations at his station and the determination of their amount and valuation.[15] (Surveyor of the Port: Acting as Collectors of Customs, see CUSTOMS DUTIES, 12 Cyc. 1136 note 94. See also SURVEY, *ante*, p. 621.)

SURVIVABILITY. A term which has been said to be, in general, convertible with "assignability" as a quality of causes of action,[16] or things in action,[17] in the sense that in things of that nature the two conditions are co-existent.[18] (Survivability: Power of Survival Equivalent to Assignability, see ABATEMENT AND

sum which he has declined evidence of a debt.

He may testify against the town in a civil action in which the town is defendant, for a defect in that part of the highway within his district. White *v.* Phillipston, 10 Metc. (Mass.) 108, 111.

Advantages.—"The office of surveyor of highways is one which generally is quite extensively distributed, by having a considerable number of districts, in such towns as do not make the care of the highways the subject of special contract. It is an office which, according to the usual practice, affords some compensating advantages to its possessor, and is not unfrequently an object of competition. The surveyor has the opportunity to work out his own tax, where the tax is to be expended in labor, at such time as he may himself determine; and may expend, according to his best judgment, the portions of the tax which may be paid to him in money. He usually finds opportunity to employ some labor profitably in working out the taxes of his neighbors who may employ him for that purpose. But above all, he is enabled to secure at least a reasonable degree of attention to such parts of the public ways as more especially affect his personal convenience." Sikes *v.* Hatfield, 13 Gray (Mass.) 347, 352.

12. Sweet *v.* Conley, 20 R. I. 381, 383, 39 Atl. 326.

13. Mathewson *v.* Hawkins, 19 R. I. 16, 19, 31 Atl. 430.

14. Black L. Dict. [*citing* Mozley & Whitley L. Dict.], adding: "He must possess certain qualifications in point of property; and, when elected, he is compellable, unless he can show some grounds of exemption, to take upon himself the office."

By the Public Health Act (38 & 39 Vict. c. 55), § 144, every "urban authority" was made "surveyor of highways" exclusively "within their district." Therefore, after the passage of that act, where a rural district council was the "urban authority," it, as a board, was "surveyor," and an individual, although one of its members, could not be convicted of misconduct as "surveyor" under the Highway Act (5 & 6 Wm. 4, c. 50), § 46, providing a penalty for certain offenses on the part of such "surveyor." Buckley *v.* Hanson, 18 Cox C. C. 688, 691, 62 J. P. 119, 77 L. T. Rep. N. S. 664.

Powers under Bridges Act (54 & 55 Vict. c. 63), § 3, see Hertfordshire County Council *v.* Barnet, [1902] 2 K. B. 48, 52, 66 J. P. 531, 71 L. J. K. B. 610, 86 L. T. Rep. N. S. 880, 18 T. L. R. 609, 50 Wkly. Rep. 582.

15. Black L. Dict.

16. Selden *v.* Illinois Trust, etc., Bank, 239 Ill. 67, 78, 87 N. E. 860, 130 Am. St. Rep. 180.

Tests of survivability of action see ABATEMENT AND REVIVAL, 1 Cyc. 49 text and note 53 [*quoted* in Selden *v.* Illinois Trust, etc., Bank, 239 Ill. 67, 78, 87 N. E. 860, 130 Am. St. Rep. 180].

17. Hegerich *v.* Keddie, 99 N. Y. 258, 266, 1 N. E. 787, 52 Am. Rep. 25; Tanas *v.* Municipal Gas Co., 88 N. Y. App. Div. 251, 257, 84 N. Y. Suppl. 1053.

18. See Brackett *v.* Griswold, 103 N. Y. 425, 428, 9 N. E. 438 [*cited* in Selden *v.* Illinois Trust, etc., Bank, 239 Ill. 67, 78, 87 N. E. 860, 130 Am. St. Rep. 180] (where it is said: "We have not been unmindful that in our discussion of this question we have assumed the assignability of a cause of action as a test, treating that and survivability as convertible terms"); Zabriskie *v.* Smith, 13 N. Y. 322, 334, 64 Am. Dec. 551 [*cited* in Hegerich *v.* Keddie, 99 N. Y. 258, 266, 1 N. E. 787, 52 Am. Rep. 25] (where it is said: "If it be true that the executors or administrators are, as was said by Lord Abinger, in Raymond *v.* Fitch, 2 C. M. & R. 588, 597, 5 L. J. Exch. 45, 5 Tyrw. 985, the testator's assignees, it is fair to assume that they take whatever of a personal nature the deceased had which was capable of assignment, and that the power to assign and to transmit to personal representatives are convertible propositions"); People *v.* Tioga C. Pl., 19 Wend. (N. Y.) 73, 76 [*cited* in Hegerich *v.* Keddie, 99 N. Y. 258, 266, 1 N. E. 787, 52 Am. Rep. 25] (where it is said: "I have not been able to find any case in England which, in respect to personal estate, has given the assignees a greater right than would go to an executor: none which vests in them a right of action for a personal tort, or indeed any other mere tort, while there are several cases in Pennsylvania which deny that such right will pass"); Grant *v.* Ludlow, 8 Ohio St. 1, 37 [*cited* in Cardington *v.* Fredericks, 46 Ohio St. 442, 448, 21 N. E. 766 (*cited* in Selden *v.* Illinois Trust, etc., Bank, 239 Ill. 67, 78, 87 N. E. 860, 130 Am. St.

REVIVAL, 1 Cyc. 49 text and note 54. See also SURVIVAL, *post*, this page; SURVIVE, *post*, this page.)

SURVIVAL. The act of surviving or outliving; a living beyond the life of another person; in general, the fact of living or existing longer than the persons, things, or circumstances which have formed the original and natural environment.[19] (Survival: Of Action on Appeal, see APPEAL AND ERROR, 2 Cyc. 771, 772. Of Bankruptcy Proceedings, see BANKRUPTCY, 5 Cyc. 314. Of Cause of Action — In General, see ABATEMENT AND REVIVAL, 1 Cyc. 47; By Husband or Wife, see HUSBAND AND WIFE, 21 Cyc. 1524, 1530; Determining Assignability, see ASSIGNMENTS, 4 Cyc. 23; For Wrongful Death, see DEATH, 13 Cyc. 328; Vested Rights Under Statute Providing For, see CONSTITUTIONAL LAW, 8 Cyc. 920. Of Debt as Determining Whether Absolute Deed Constitutes Mortgage, see MORTGAGES, 27 Cyc. 1010. Of Obligation of Surety on Bail-Bond, see BAIL, 5 Cyc. 126. Of Power, see POWERS, 31 Cyc. 1051. Of Suit in Admiralty, see ADMIRALTY, 1 Cyc. 853 note 85. See also SURVIVABILITY, *ante*, p. 626; SURVIVE, *post*, this page; SURVIVOR, *post*, p. 628; SURVIVORSHIP, *post*, p. 629.)

SURVIVE. A word which may mean either to outlive a certain person or event, to be living still, or to be living at some designated period of time;[20] to outlive, that is, to be alive at the time of a particular event or the death of a particular person, which event or person the other is to survive;[21] primarily, to live beyond the life or existence of; to outlive;[22] also, secondarily, to live after;[23] of

Rep. 180) as having treated survivability and assignability of things in action as convertible terms], where it is said: "Whatever choses in action are transmissible by operation of law, are assignable in equity").

19. Century Dict.

20. See, in Jordan *v.* Roach, 32 Miss. 481, 613, the following language: "The word 'survive' in its popular signification, may mean 'over-living a specific individual,' or 'living beyond a specific event,' or it may mean 'still living,' or 'living at some designated period of time.'"

"Surviving" construed as synonymous with "living" (Barker's Appeal, 1 Pa. Cas. 324, 326, 3 Atl. 377); "living beyond some period" (*In re* Benn, 29 Ch. D. 839, 844, 53 L. T. Rep. N. S. 240, 34 Wkly. Rep. 6).

"Then surviving" construed "who may be alive" see Fisher *v.* Anderson, 4 Can. Sup. Ct. 406, 417.

"Remaining" construed "surviving" see Turner *v.* Withers, 23 Md. 18, 41; *Re* Garner, 3 Ont. Wkly. Rep. 584, 585.

Deceased surviving by statute.— Under the Wills Act (1 Vict. c. 26), § 33, providing that if any person being a child or other issue of the testator to whom any property shall be devised or bequeathed in the lifetime of the testator, leaving issue living at his death, "such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will," a daughter and legatee of testator who predeceased him, but left issue alive at his death, was held to have survived him for all purposes of the will, so that the share bequeathed to her, which was directed to be deemed part of her marriage settlement and subject to the trusts thereof in case she should survive him, was held a part, and subject to the trusts, of such settlement. *In re* Hone, 22 Ch. D. 663, 665, 52 L. J. Ch. 295, 48 L. T. Rep. N. S. 266, 31 Wkly. Rep. 379.

"Surviving [party] or legal representative" who may elect to prosecute an action see Saltmarsh *v.* Candia, 51 N. H. 71, 74, note, holding that in St. (1844) c. 139, providing that certain actions may be prosecuted to final judgment "at the election of the surviving representative or legal representative of the deceased party," the word "surviving" is to be taken with "party" and not with "representative."

21. Gee *v.* Liddell, L. R. 2 Eq. 341, 344, 35 Beav. 631, 12 Jur. N. S. 541, 35 L. J. Ch. 640, 14 Wkly. Rep. 853, 55 Eng. Reprint 1042, where it is said that the word appears, upon consultation of Johnson's Dictionary, Richardson's Dictionary, and the authorities cited by them, to have that meaning in all cases.

22. Bailey *v.* Brown, 19 R. I. 669, 681, 36 Atl. 581.

23. Johnson Dict. [*cited* in Bailey *v.* Brown, 19 R. I. 669, 681, 36 Atl. 581]; Webster Dict. [*cited* in Bailey *v.* Brown, *supra*].

"Who shall survive me" construed "who shall be living after me" see *In re* Clark, 3 De G. J. & S. 111, 115, 13 Wkly. Rep. 115, 68 Eng. Ch. 85, 46 Eng. Reprint 579 [*cited* in Bailey *v.* Brown, 19 R. I. 669, 682, 36 Atl. 581].

"Live after another" criticized see Gee *v.* Liddell, L. R. 2 Eq. 341, 344, 35 Beav. 631, 12 Jur. N. S. 541, 35 L. J. Ch. 640, 14 Wkly. Rep. 853, 55 Eng. Reprint 1042, where, after citing Johnson's and Richardson's Dictionaries, and the authorities on which they rely, in support of the more definite construction (see *supra*, text and note 21) it is said: "It is true that Dr. Johnson gives as one of the meanings, 'to live after another,' but all the passages from the English writers cited, tend to the conclusion that the person who

an action, to outlive the decedent.[24] (See Survivability, *ante*, p. 626; Survival, *ante*, p. 627; Survivor, *post*, this page; Survivorship, *post*, p. 629; Wills.)

Surviving administrator. See Executors and Administrators, 18 Cyc. 1347.

Surviving executor. See Executors and Administrators, 18 Cyc. 1347.

Surviving partner. See Partnership, 30 Cyc. 620 *et seq.*

Surviving trustee. See Trusts.

Survivor.[25] A relative term [26] which is dependent on context for meaning,[27] which may be either a word of limitation of an estate (denoting the interest persons are to take), or may denote a class of persons; [28] and, broadly speaking, includes all persons who outlive another, but in common parlance is universally applied only to members of a class of persons; [29] in its ordinary as well as legal signification, one who outlives another; one of two or more persons who lives after the other or others have deceased; [30] in its natural and obvious meaning, not the person who shall survive a particular event, but when it is applied to a class of persons, and individuals of that class named, the longest liver of those named; [31] in strict legal sense, the longest liver of two joint-tenants, or of any

survives an event must be living when that event takes place; and to live after is itself ambiguous."

"Not survive" construed "die in the lifetime of" see Reed *v.* Braithwaite, L. R. 11 Eq. 514, 522, 40 L. J. Ch. 355, 24 L. T. Rep. N. S. 351, 19 Wkly. Rep. 697.

24. Nations *v.* Hawkins, 11 Ala. 859, 862, adding: "In other words, that the action shall not as at common law die with the person; but as a remedy, shall retain its vitality either for or against the representatives of his estate."

To whom action survives.— Technically a right of action by husband and wife for a debt due to her, or by two partners, or by two devisees to whom land has been devised during their joint lives, and then to the survivor, survives, if one dies, to the other. But in a suit by coparceners, if one dies, the right does not survive to the other, although it may pass to him by descent. Smith *v.* Ferguson, 3 Metc. (Ky.) 424, 426.

25. **Testamentary tendency in deposit receipt.**—A deposit receipt payable to the depositor and his son, or the "survivor" of them, shows an attempt on the part of the depositor to make a gift in its nature testamentary, without due formalities, and therefore ineffectual. Hill *v.* Hill, 8 Ont. L. Rep. 710, 711, 5 Ont. Wkly. Rep. 2.

26. See *In re* Gregson, 2 De G. J. & S. 428, 438, 10 Jur. N. S. 1138, 34 L. J. Ch. 41, 11 L. T. Rep. N. S. 460, 5 New Rep. 99, 13 Wkly. Rep. 193, 67 Eng. Ch. 334, 46 Eng. Reprint 441, where it is said: "The word 'survivors' is a term of relation. It must have reference to some particular period of time."

27. See Inderwick *v.* Tatchell, [1903] A. C. 120, 123, 72 L. J. Ch. 393, 88 L. T. Rep. N. S. 399, where it is said: "I cannot help saying that the word 'survivor' is a word which requires a context. Survivor of whom? Survivor when? These are both categories of thought which must be supplied in order to give the word 'survivor' any meaning at all."

"Legal representatives" substituted for "survivors" as found in an illiterate will see *In re* Barr, 2 Pa. St. 428, 431, 45 Am. Dec. 608.

In statute of distribution.— In the provincial statute of William and Mary, concerning distribution and settlement of estates, providing that if any of the children happen to die before he or she come of age, or be married, the portion of such child deceased shall be equally divided among the survivors, the term "survivors" means the surviving children, to the exclusion of parents. Runey *v.* Edmands, 15 Mass. 291, 292.

Interested witness and survivor of deceased. — In Worth Amended Code, c. 130, § 23, providing that no interested person shall be examined as to any communication between himself and a survivor of a deceased person, except in his own behalf, "survivor" means "every person, who by reason of his surviving the deceased becomes as such survivor interested in the subject of the controversy" and includes such persons as "tenants by curtesy, tenants by dower, the survivor in a joint tenancy of land, which had been held by a deed to husband and wife, whether such survivor were the husband or the wife, a widower or widow, who by surviving . . . became a distributee" of the estate of the spouse and, doubtless, other classes of successors of deceased persons. Seabright *v.* Seabright, 28 W. Va. 412, 459, 468.

28. 3 Stroud Jud. Dict. 1998 [*citing* Theobald Constr. Wills 574].

29. See Koerts *v.* Grand Lodge O. H. S., 119 Wis. 520, 524, 97 N. W. 163, adding: "Thus we speak of the survivors of a shipwreck, or a battle, or a railroad accident, not thereby referring to the whole surviving human race, but only to the class of people who participated in the given occurrence. So, in speaking of the death of a person, we frequently say that he left surviving his widow and certain children or other relatives."

30. Blanton *v.* Mayes, 58 Tex. 422, 425 [*citing* Blackstone Comm. 183, 184 (where the word is not defined); Webster Dict. (where similar but not identical definitions are found)].

31. See Taaffe *v.* Conmee, 10 H. L. Cas. 64, 78, 8 Jur. N. S. 919, 6 L. T. Rep. N. S. 666, 11 Eng. Reprint 949.

two persons joined in the right of a thing; he that remains alive after the other be dead.[32] (See SURVIVE, *ante*, p. 627; SURVIVORSHIP, *post*, this page.)

SURVIVORSHIP. A. In General. The living of one of two or more persons after the death of the other or others.[33] In relation to property, the condition that exists where a person becomes entitled to property by reason of his having survived another person who had an interest in it.[34]

B. Words of Survivorship — 1. IN WILLS — a. In General. The several meanings of the word "survive" and its derivatives, in their relation to persons and events,[35] have puzzled the courts for centuries, especially in wills, where they have resulted in a multitude of conflicting decisions and attempts to reconcile them upon various theories.[36] The words in their natural import refer to the one

"Longest liver" as the idea carried with the word where the gift is to two and the survivor see Keating *v.* Reynolds, 1 Bay (S. C.) 80, 87. Whether such construction is to be rejected in cases of survivorship, among several, based on death without issue, a question see SURVIVORSHIP, *post*, p. 642 text and notes 86–89.

32. Jacob L. Dict. [*quoted* as "Com. Law Dict." in *In re* Barr, 2 Pa. St. 428, 411, 45 Am. Dec. 608].

33. Black L. Dict.

34. See Black L. Dict.; JOINT TENANCY, 23 Cyc. 488.

Title by survivorship exists only when the estate is held in joint ownership. The mere deposit, in a savings-bank, of money which is the wife's separate property, in the names of her husband and herself, does not show joint ownership and is not a basis of title by survivorship in the husband at her death. Denigan *v.* San Francisco Sav. Union, 127 Cal. 142, 149, 59 Pac. 390, 78 Am. St. Rep. 35.

Operation of law involved in survivorship as source of ownership see Atty.-Gen. *v.* Brown, 5 Ont. L. Rep. 167, 172, 2 Ont. Wkly. Rep. 30, where it is said: ". . . the property in question does not pass or accrue by survivorship, i. e., by operation of law," and held that such survivorship does not exist as the source of title to the subject of a transaction which, although in form a *donatio causa mortis*, is, in fact, the fulfilment of a contract that, as between the decedent and the recipient, the survivor shall take certain property; also that Ont. Rev. St. (1897) c. 24, § 4(*d*), relating to property which passes by survivorship, applies to "joint tenancies created by the deceased when absolutely entitled to the whole" and has no application to matter which passes as the subject of an express agreement taking effect as part of the contract at the death of one of the parties thereto.

35. See SURVIVE, *ante*, p. 627; SURVIVOR, *ante*, p. 628.

36. See, generally, *infra*, notes 40–99, 1–2.

Surviving executors and trustees see *infra*, p. 645.

Surviving spouse see *infra*, p. 646.

"Inextricable confusion" of the law, in England, on the subject of the use of words of survivorship said to be the result of Cripps *v.* Wolcott, 4 Madd. 11, 15, 20 Rev. Rep. 268, 56 Eng. Reprint 613 (in which it was decided that such words might refer to the period of distribution). See Vogdes' Estate, 16 Pa. Dist. 377, 379.

No certain rule of construction see Taaffe *v.* Conmee, 10 H. L. Cas. 64, 77, 8 Jur. N. S. 919, 6 L. T. Rep. N. S. 666, 11 Eng. Reprint 949, where, of the word "survivor," it is said: "I think it not possible, and I think it would be very dangerous, to attempt to derive from decisions any certain and general rule of interpretation of the word, or of the period to which it ought to be considered as referring."

Objectionable for vagueness see Graves *v.* Spurr, 97 Ky. 651, 659, 31 S. W. 483, 17 Ky. L. Rep. 411, where it is said of the word "surviving": "This objectionable term is not used. Such a word . . . might and would, unless controlled by other expressions of the will, make the person who was to take uncertain."

Two constructions in one will.—As to two constructions of the same word used once only see *infra*, p. 642 text and notes 89, 90. Where there were legacies of specific sums to the surviving children of C, and also of the interest of funded property to C for life and after her death such property to be divided among her surviving children, it was held that the first "surviving" referred to the time of the testatrix's death, and that the former use did not affect the latter. Neathway *v.* Read, 3 De G. M. & G. 18, 19, 20, 17 Jur. 169, 22 L. J. Ch. 809, 52 Eng. Ch. 14, 43 Eng. Reprint 8. It seems that "survivors" and "survivor" may have a more enlarged meaning in one part of the will than in another. Winterton *v.* Crawfurd, 1 Russ. & M. 407, 412, 5 Eng. Ch. 407, 39 Eng. Reprint 157.

Dependence on context illustrated see Hoover *v.* Gregory, 10 Yerg. (Tenn.) 444, 449, where, in construing a devise to a daughter and, if she should die without issue, to "the survivor," an allusion elsewhere in the will to testator's "two children," with the fact that he had no more, was held to show that he had the two in mind, and therefore meant by "survivor" his son.

Not implied by postponement of possession.—A devise in fee "to my grandchildren, whatever number they may be . . . share and share alike, to take possession only after the death of my said daughters" is not a grant to "'surviving' grandchildren," but, except for the postponement of possession, a present and unconditional grant of a present fee. Cheney *v.* Teese, 108 Ill. 473, 482.

who shall survive the other, and not to any particular event.[37] Such words are construed literally if no contrary intention appears [38] and the burden of proof is upon the party seeking to do violence to the literal meaning.[39]

b. Reference to Time — (i) *In General.* A word of survivorship as used in a will may refer to the survivor of the testator; it may mean the survivor at the time of some event contemplated by the will.[40] To what period survivorship relates depends not upon any technical words [41] but upon the intention of the testator [42] collected either from the particular disposition [43] or the context of the

Survivorship in order named repugnant and the order rejected in favor of the survivorship see Smith *v.* Pybus, 9 Ves. Jr. 567, 576, 32 Eng. Reprint 722 [*cited* in Mowatt *v.* Carow, 7 Paige (N. Y.) 328, 342, 32 Am. Dec. 641].

Survivor of one child held to be the only other child, although the widow also is named in the will see Hoover *v.* Gregory, 10 Yerg. (Tenn.) 444, 449.

37. White *v.* Baker, 2 De G. F. & J. 55, 6 Jur. N. S. 591, 29 L. J. Ch. 577, 2 L. T. Rep. N. S. 583, 8 Wkly. Rep. 533, 63 Eng. Ch. 43, 45 Eng. Reprint 548 [*quoted* and *distinguished* in *In re* Hill, 53 L. J. Ch. 541, 543, 50 L. T. Rep. N. S. 204, 32 Wkly. Rep. 410 (appeal *dismissed* in 54 L. J. Ch. 595, 52 L. T. Rep. N. S. 290, 33 Wkly. Rep. 570)].

38. See Duryea *v.* Duryea, 85 Ill. 41, 47; Bayless *v.* Prescott, 79 Ky. 252, 258; Anderson *v.* Brown, 84 Md. 261, 268, 35 Atl. 937; Bailey *v.* Brown, 19 R. I. 669, 681, 36 Atl. 581; Inderwick *v.* Tatchell, [1903] A. C. 120, 123, 124, 126, 72 L. J. Ch. 393, 88 L. T. Rep. N. S. 399 [*affirming* [1901] 2 Ch. 738, 71 L. J. Ch. 1, 85 L. T. Rep. N. S. 432]; *In re* Keep, 32 Beav. 122, 126, 55 Eng. Reprint 48; *Re* Corbett, Johns. 591, 597, 600, 6 Jur. N. S. 339, 29 L. J. Ch. 458, 8 Wkly. Rep. 257, 70 Eng. Reprint 555; Beckwith *v.* Beckwith, 46 L. J. Ch. 97, 99, 36 L. T. Rep. N. S. 128, 25 Wkly. Rep. 282; Milsom *v.* Awdry, 5 Ves. Jr. 465, 467, 5 Rev. Rep. 102, 31 Eng. Reprint 684.

"There is no magic in the word 'survivor.'" Cross *v.* Maltby, L. R. 20 Eq. 378, 382, 33 L. T. Rep. N. S. 300, 23 Wkly. Rep. 863 [*quoted* in Bailey *v.* Brown, 19 R. I. 669, 682, 36 Atl. 581].

39. *In re* Keep, 32 Beav. 122, 126, 55 Eng. Reprint 48. See also Waite *v.* Littlewood, L. R. 8 Ch. 70, 73, 42 L. J. Ch. 216, 28 L. T. Rep. N. S. 123, 21 Wkly. Rep. 131 [*quoted*, omitting "that" before "violence," in Ashhurst *v.* Potter, 53 N. J. Eq. 608, 611, 32 Atl. 698], where, in reference to the construction of "survivor" as "other" it is said: "There is undoubtedly a strong *onus probandi* cast upon anyone who would do violence to the literal meaning of that word."

40. Inderwick *v.* Tatchell, [1903] A. C. 120, 123, 72 L. J. Ch. 393, 88 L. T. Rep. N. S. 399 [*affirming* [1901] 2 Ch. 738, 71 L. J. Ch. 1, 85 L. T. Rep. N. S. 432]; White *v.* Baker, 2 De G. F. & J. 55, 64, 6 Jur. N. S. 591, 29 L. J. Ch. 577, 2 L. T. Rep. N. S. 583, 8 Wkly. Rep. 533, 63 Eng. Ch. 43, 45 Eng. Reprint 548 [*quoted* in *In re* Hill, 53 L. J. Ch. 541, 543, 50 L. T. Rep. N. S. 204, 32 Wkly. Rep. 410], where it is said: "Where there is a bequest to A. for life and after his death to B. and C. or the survivor of them, some meaning must of course be attached to the words 'the survivor.' They may refer to any one of three events — to one of the persons named surviving the other, to one of them only surviving the testator, or to one of them only surviving the tenant for life."

To death of testator see *infra*, p. 633.

To period of distribution see *infra*, p. 635.

Time of any of several deaths see *infra*, p. 637.

Uncertainty of the period.— "There is always considerable difficulty in fixing the precise period of survivorship, when the testator has not in so many words expressed it. It is always attended with a degree of uncertainty." Jenour *v.* Jenour, 10 Ves. Jr. 562, 567, 32 Eng. Reprint 963.

"Surviving so as to attain twenty-one" held to be the meaning of a bequest to be paid to children, as they should reach that age, or the survivors of them see Crozier *v.* Fisher, 4 Russ. 398, 401, 4 Eng. Ch. 398, 38 Eng. Reprint 855.

41. Newton *v.* Ayscough, 19 Ves. Jr. 534, 536, 34 Eng. Reprint 614.

Words of survivorship "are not technical words at all, and have a set presumptive meaning as to time, only because experience has appeared to indicate that they are most commonly used with reference to that period," *i. e.*, of the testator's death. Woelpper's Appeal, 126 Pa. St. 562, 574, 17 Atl. 870.

Not a "Procrustean bed."— "Giving them a quasi technical meaning for the purpose of aiding in the ascertainment of intention, is far short of making them a Procrustean bed on which every unfortunate testator's will shall be stretched out of its proper shape or shorn of its members, to make it conform to the arbitrary standard." Woelpper's Appeal, 126 Pa. St. 562, 574, 17 Atl. 870, per Mitchell, J.

42. Marriott *v.* Abell, L. R. 7 Eq. 478, 482, 38 L. J. Ch. 451, 20 L. T. Rep. N. S. 690, 17 Wkly. Rep. 569 [*quoted* in Ridgeway *v.* Underwood, 67 Ill. 419, 425] (where it is said: "All these are cases of intention"); *In re* Gregson, 2 De G. J. & S. 428, 437, 10 Jur. N. S. 1138, 34 L. J. Ch. 41, 11 L. T. Rep. N. S. 460, 5 New Rep. 99, 13 Wkly. Rep. 193, 67 Eng. Ch. 334, 46 Eng. Reprint 441 [*reversing* 2 Hen. & M. 504, 71 Eng. Reprint 559]; Newton *v.* Ayscough, 19 Ves. Jr. 534, 536, 34 Eng. Reprint 614.

43. Newton *v.* Ayscough, 19 Ves. Jr. 534, 536, 34 Eng. Reprint 614.

Events after testator's death as possibly affecting construction see Russell *v.* Long, 4 Ves. Jr. 551, 555, 31 Eng. Reprint 283,

will.[44] A general rule has been expressed, in varying terms, to the effect that when the gift to survivors, or, at all events the enjoyment and possession thereof, is immediate upon the death of the testator, words of survivorship are referred to that period, but, otherwise, to some later time.[45] Where, however, an estate intervenes between the death of the testator and the taking in possession of the gift qualified by words of survivorship, the question of construction is by no means settled.[46] Two conflicting general rules, each subject to intent, have been laid

where it is said: "If all these sisters had not survived their mother, [the tenant for life] possibly I might have adopted the construction, that it related to the death of the mother, and not of the testator."

44. Inderwick *v.* Tatchell, [1903] A. C. 120, 123, 72 L. J. Ch. 393, 88 L. T. Rep. N. S. 399 [*affirming* [1901] 2 Ch. 738, 71 L. J. Ch. 1, 85 L. T. Rep. N. S. 432]; Newton *v.* Ayscough, 19 Ves. Jr. 534, 536, 34 Eng. Reprint 614.

45. **General theory of construction** see Mullarky *v.* Sullivan, 136 N. Y. 227, 231, 32 N. E. 762 [*reversing* 63 Hun 156, 17 N. Y. Suppl. 715] (where, in speaking of reference of survivorship to the testator's death despite a gift over, it is said: "It is only in the case of an absolute devise or bequest to one and in case of his death to another that the words are given such a meaning, and the rule has no application to a case where the first devisee or legatee has a life estate"); Ballard *v.* Connors, 10 Rich. Eq. (S. C.) 389, 392 (where it is said: "In general, words of survivorship are significant of the death of testator, but when a future period of distribution is fixed by a will, such as the termination of a life estate, or when a legatee shall attain twenty-one years, then for the benefit of the legatees and in increase of the objects of bounty, the terms are 'referred' to the period of distribution"); *In re* Benn, 29 Ch. D. 839, 844, 53 L. T. Rep. N. S. 240, 34 Wkly. Rep. 6 (where it is said: "There is no canon as to the period to which survivorship is to be referred, except that in an immediate gift it is to be referred to the death of the testator, and if there is a life estate then to the determination of the life estate"); Theobald Wills 508, (6th ed.) 654 [*quoted* in Reiff's Estate, 124 Pa. St. 145, 151, 16 Atl. 636] (where it is said: "If there is no previous interest given in the legacy, then the period of division is the death of the testator, and the survivors on his death will take the whole legacy. But if a previous life estate be given, then the period of division is the death of the tenant for life, and survivors at such death will take the whole legacy"). See also *infra*, text and note 48.

"**Who shall survive me,**" primarily signifies, "The person or persons mentioned who shall be living at the time of the death" of the person using the phrase, but the context may show it means "who shall live after me." Bailey *v.* Brown, 19 R. I. 669, 681, 36 Atl. 581.

46. See Branson *v.* Hill, 31 Md. 181, 187, 188, 1 Am. Rep. 40 (where it is said: "Few questions in regard to the construction of wills have given rise to greater difficulty than the proper meaning of the words of survivorship, as used in the will before us, and the decisions are conflicting and irreconcilable with each other. Where the gift is to take effect in possession immediately upon the death of the testator, it is plain that the words of survivorship must refer to that time, there being no other period in the devise to which they could relate. But where the gift is not immediate (i. e., 'in possession'), there being a prior life, or other particular interest carried out, so that there is another period to which the words could refer, the question becomes one of greater difficulty. . . . An examination of the earlier English cases will show that the Courts uniformly held that words of survivorship in wills of both real and personal estate, referred to the death of the testator. Some of the cases went upon the particular phraseology and context of the will — others upon the probable intention of the testator, making allowances for the deficiency and inaccuracy of expression so commonly to be found in testamentary instruments, and the policy of the law which favors the vesting of estates — and others again upon the presumption that the testator did not intend to cut off from the provisions of his will, the children and descendants of such of the primary legatees or devisees as might happen to die before the termination of the intermediate estate. But . . . in the later English decisions, especially where there is a gift of personal estate to a person for life, and after the termination of such interests to certain persons *nominatim*, or to a class, there is a strong inclination to refer the words of survivorship to the period of distribution, or to the termination of the intermediate estate. That is to say, the legatees surviving at that time, take to the exclusion of the personal representatives of such as may have died before that period. And to this modern rule of construction such eminent elementary writers as Mr. Jarman and Mr. Redfield give their unqualified approval. . . . In this country, however, the weight of authority seems to be in favor of the earlier rule, which refers the words of survivorship to the death of the testator, and this too without recognizing any distinction between real and personal estate"); Matter of Cramer, 59 N. Y. App. Div. 541, 543, 69 N. Y. Suppl. 299 [*affirmed* in 170 N. Y. 271, 63 N. E. 279] (where it is held that the word "survivor" in a will is not necessarily restricted to death before that of the testator, and said: "While the general use of the term is limited to that sense, the rule is not a hard and fast one and yields like all arbitrary tests to the intention of the tes-

down and followed, the one referring words of survivorship to the death of the testator; the other, to the period of distribution;[47] while, according to one theory, such words are to be referred to a period, whether that of the testator's death or of the end of some estate under the will, when and because it is the period of distribution of the subject-matter of the gift.[48] But a period which is neither of

tator"); Ross *v.* Drake, 37 Pa. St. 373, 376 (to the same effect as Johnson *v.* Morton, *infra*); Johnson *v.* Morton, 10 Pa. St. 245, 250 (where it is said: "All the authorities concur, perhaps without exception, that, when the gift is 'immediate,' that is, in possession, it is to be treated as intended to provide for the death of the objects of the testator's bounty in the lifetime of the testator; the devise affording no other point of time to which they could be referred. . . . But, when the limitation was not immediate, (that is, in possession,) there being a prior life . . . or other particular interest carved out, so that there 'was' another period to which the words survivor or survivors could be referred, was a point, it seems, of more difficulty. In these cases, as well as in the cases where the gift was immediate, the courts of England, as Mr. Powell, in his Treatise on Devises, vol. 2, p. 750, very correctly observes, for a considerable period, perhaps for upwards of one hundred years, applied the words in question to the period of the death of the testator, on the idea that there was no other mode of reconciling the words of survivorship with the words of severance, creating a tenancy in common. . . . Such was the state of the question on authority when Sir J. Leach, at that time the Vice-Chancellor, in Cripps *v.* Wolcott, 4 Madd. 11, 20 Rev. Rep. 268, 56 Eng. Reprint 613, undertook to reverse the general rule, and to refer the limitation, in favor of survivors, to the death of the tenant for life, rather than the death of the testator. . . . For our part, we are inclined to adhere to the law, as settled prior to our revolution, and, however we may respect the opinions of Sir John Leach, they are no authority here. Besides, in addition to the reason that it is intended to prevent a lapse, the old rule has the further recommendation, that it preserves the rights of children, as here, intermediate between the time of the death of the testator and the time of the period of distribution. . . . Although we believe the general rule to be, that the words of survivorship must be referred to the death of the testator, whether the gift is immediate, or the limitation is after a prior life, or particular interest carved out; yet that general intent may be controlled by particular expressions in the will, indicating a contrary intent"); Martin *v.* Kirby, 11 Gratt. (Va.) 67, 68 (where it is said: "Where a devise or testamentary gift is made to several, with words of survivorship annexed, or where the gift is to such of a class as shall survive, it becomes important to ascertain to what period the words of survivorship are intended to refer. Where no previous particular estate is interposed, but the gift is to take effect in possession immediately on the death of the testator, the established rule of construction is, to refer the words of survivorship to that event, and to regard them as designed to provide against the contingency of the death of the objects of the testator's bounty in his life time. Where, however, the gift is not to take effect in possession immediately upon the death of the testator, but a previous estate for life, or other particular estate, is interposed, there is much greater difficulty in determining the construction by which the period of the survivorship is to be ascertained. The cases on the subject are numerous and would seem not to be by any means all accordant. . . . In the earlier cases, almost without an exception, it will be found that the words of survivorship have been held to refer to the period of the testator's death. . . . On the other hand, numerous cases are to be found, affirming a different rule, and referring the words of survivorship to the death of the tenant for life, or other prior particular estate); 2 Jarman Wills (3d Am. ed.) 462 [*quoted* in Ridgeway *v.* Underwood, 67 Ill. 419, 424 (*distinguished* in Grimmer *v.* Friederich, 164 Ill. 245, 249, 45 N. E. 498; Nicoll *v.* Scott, 99 Ill. 529, 538, *cited* with approval in Blatchford *v.* Newberry, 99 Ill. 11, 44 [*distinguished* in Grimmer *v.* Friederich, *supra*; Nicoll *v.* Scott, *supra*]); Roundtree *v.* Roundtree, 26 S. C. 450, 466, 2 S. E. 474] (where it is said: "In this state of the recent authorities, one scarcely need hesitate to affirm that the rule which reads a gift to survivors, simply as applying to objects living at the death of the testator, is confined to those cases in which there is no other period to which such survivorship can be referred; and that, where such gift is preceded by a life or other prior interest, it takes effect in favor of those who survive the period of distribution, and of those only").

47. Conflicting general rules.—Referring to death of testator see *infra*, p. 633 text and note 51 *et seq.* Referring to time of distribution see *infra*, p. 635 text and note 61 *et seq.*

48. Sinton *v.* Boyd, 19 Ohio St. 30, 35, 2 Am. Rep. 369 [*cited* in Blatchford *v.* Newberry, 99 Ill. 11, 44] (where it is said: "Where there is a clause of survivorship, *primâ-facie* survivorship means the time at which the property to be divided comes into enjoyment — that is to say, if there be no previous life estate, at the death of the testator; if there be a previous life estate, then at the termination of that life estate"); Young *v.* Robertson, 8 Jur. N. S. 825, 826 (where, after stating as a rule of construction finally established in England that "words of survivorship occurring in a settlement (that is, a will) should be referred to the period appointed by that settlement for the payment or distribution of the subject-matter of the gift," it is said: "Now, here

these may be selected.[49] The only sure rule seems to be that which demands construction according to intent.[50]

(II) *Time of Death of Testator.* Where the death of the testator has been taken as the period of survivorship, various reasons have been given,[51] such as a general rule of construction subject to express intent;[52] or to preserve the estate

the application of that rule would lead to this determination in two sets of events. If a testator gives a sum of money or the residue of his estate to be paid or distributed among a number of persons, and refers to the contingency of any one or more of them dying, and then gives the estate or the money to the survivor, in that simple form of gift, where the gift is to take effect immediately on the death of the testator, the period of distribution is the period of death; and accordingly the event of the death upon which that contingency is to take place is necessarily to be referred to the interval of time between the date of the will and the death of the testator. . . . Then, by parity of reasoning, or rather as a necessary consequence of the same principle, if a testator gives a life estate in a sum of money or in the residue of his estate, and at the expiration of that life estate directs the money to be paid or the residue to be divided among a number of objects, and then refers to the possibility of some one or more of those persons dying, without specifying the time, and directs, in that event, the payment to be made or the distribution to be made among the survivors, it is understood and regarded by the law that he means the contingency to extend over the whole period of time that must elapse before the payment is made or the distribution takes place. The result, therefore, is, that in the event of such a gift the survivors are to be ascertained in like manner by a reference to the period of payment or of distribution, namely, the expiration of the life estate").

Period of distribution see *infra*, p. 635.

49. Drakeford *v.* Drakeford, 33 Beav. 43, 46, 9 L. T. Rep. N. S. 10, 11 Wkly. Rep. 977, 55 Eng. Reprint 282 [*distinguished* in Howard *v.* Collins, L. R. 5 Eq. 349, 351], holding that the rule "is this: that, in cases of survivorship, the class is to be ascertained at the period of distribution, if no other time is expressed by the testator" and that, where a fund was bequeathed for life to the widow, then for life to the testator's brother, at whose death the principal was to be divided between his surviving children and another, and the widow outlived the brother, so that her death became the period of distribution, the survivorship was referred to a different period, namely, the death of the brother. *Compare* Macklin *v.* Daniel, 18 Ont. 434, 436 (where the time of distribution and of survivorship was held to be the time when the estate should have been put in order for the payment of legacies and was not postponed to their payment).

Time of exercising power.—Where a testator appointed two brothers executors and trustees and provided that in the event of death or inability or refusal to act of either trustee then his surviving brothers and sisters or a majority of them should appoint a new trustee, "surviving" related to the time of making such appointment. Saunders *v.* Bradley, 6 Ont. L. Rep. 250, 253, 2 Ont. Wkly. Rep. 697 [*affirmed* in 6 Ont. Wkly. Rep. 436].

50. Martin *v.* Kirby, 11 Gratt. (Va.) 67, 70, where it is said: "It may admit of very grave question whether this is a subject upon which anything like a fixed rule of construction can be established. The question, and the only legitimate enquiry, is, what is the intention of the testator?"

Construction subject to intent see *supra*, p. 630, text and notes 42, 43, 44; *infra*, this page, text and note 52, p. 634, text and note 53, p. 635, text and note 62.

51. See *infra*, text and notes 52–60.

For example see Moore *v.* Lyons, 25 Wend. (N. Y.) 119, 143, 150, 155, where in construing a devise to one for life "and from and after her death" to her daughters, by name, "or 'to the survivors or survivor of them,' their or her heirs and assigns forever," in one opinion [p. 143] it was said that "words of survivorship in a will should, in all cases where there is no special intent manifest to the contrary, be taken to refer to the death of the testator;" in another [p. 150], "the weight of authority, both here and in England . . . unquestionably is in favor of applying the terms of survivorship, upon the devise of a remainder, to the death of the testator, instead of the time of the termination of the particular estate, where it is necessary to give effect to the probable intention of the testator in providing for the issue of the objects of his bounty, upon the death of their parents before the time appointed for the remainder to vest in possession; and especially where the devise is to the individuals by name and not to them as a class;" in another [p. 155], "the words, 'the survivor or survivors' in a context similar to that of the present will, have acquired a technical meaning differing from that sense in which they would otherwise be taken, and referring the survivorship to the testator's own death." *Compare* Brown *v.* Bigg, 7 Ves. Jr. 279, 286 note 61, 32 Eng. Reprint 114, where it is said that a statement in the opinion as follows: "The general leaning of the Court is against construing the words of survivorship to relate to the death of the testator; if any other period can be fixed upon: the testator generally supposing, the legatee will survive him," was retracted by the master of the rolls in his judgment.

52. Eberts *v.* Eberts, 42 Mich. 404, 406, 4 N. W. 172; Embury *v.* Sheldon, 68 N. Y. 227, 235 [*distinguished* in Buel *v.* Southwick, 70 N. Y. 581, 588; Converse *v.* Kellogg, 7

to issue of a beneficiary dying before the period of distribution, where no contrary intent appears;[53] or to avoid an intestacy;[54] or that the vesting of an estate in land may not be postponed;[55] or to preserve a tenancy in common and prevent a joint tenancy;[56] or that a direct gift to persons named precedes the provision for distribution,[57] the naming of the members of the class, of whom survivors are to

Barb. (N. Y.) 590; Forster *v.* Winfield, 3 Misc. (N. Y.) 435, 439, 23 N. Y. Suppl. 169 [*reversed* on other grounds in 142 N. Y. 327, 37 N. E. 111]; Moore *v.* Lyons, 25 Wend. (N. Y.) 119, 143, 155; Renner *v.* Williams, 71 Ohio St. 340, 357, 73 N. E. 221 (where it is said: "In England from an early period to the present time and quite generally in the United States, a prevailing rule of construction has been that when the word 'survivor' occurs in a will, the survivorship is understood to relate to the time when the will shall take effect, that is, the time of the testator's death, unless a contrary intent is shown in the will. This is not an arbitrary rule, as counsel for the defendant seem to think. It is based upon clear and satisfactory reasoning. Unless it fairly appears from the will that he does not do so, the testator must be presumed to be contemplating and providing for the devolution of his property at the time of his death"); *In re* Martin, 185 Pa. St. 51, 54, 39 Atl. 841; Barker's Appeal, 1 Pa. Cas. 324, 326, 3 Atl. 377; Hubbert's Estate, 6 Pa. Dist. 96, 97, 98; Bailey *v.* Brown, 19 R. I. 669, 681, 36 Atl. 581; Ballard *v.* Connors, 10 Rich. Eq. (S. C.) 389, 392; Stone *v.* Lewis, 84 Va. 474, 476, 5 S. E. 282; Hansford *v.* Elliott, 9 Leigh (Va.) 79, 93 [*followed* in Martin *v.* Kirby, 11 Gratt. (Va.) 67, 75 (*cited* in Eberts *v.* Eberts, 42 Mich. 404, 406, 4 N. W. 172)]; *In re* Twaddell, 110 Fed. 145, 151, 6 Am. Bankr. Rep. 539.

Rule apparently regarded as arbitrary see Ross *v.* Drake, 37 Pa. St. 373, 376, 377, where it is said that the doctrine of Cripps *v.* Wolcott, 4 Madd. 11, 15, 20 Rev. Rep. 268, 56 Eng. Reprint 613, holding that survivorship may be referred to a subsequent period of distribution, has been repudiated in Pennsylvania.

53. Hempstead *v.* Dickson, 20 Ill. 193, 194, 195, 71 Am. Dec. 260; Branson *v.* Hill, 31 Md. 181, 189, 1 Am. Rep. 40; Lawrence *v.* McArter, 10 Ohio 37, 41; Johnson *v.* Morton, 10 Pa. St. 245, 252; Hubbert's Estate, 6 Pa. Dist. 96. See also Moore *v.* Lyons, 25 Wend. (N. Y.) 119, 150; Vance's Estate, 11 Pa. Dist. 197, 198.

54. Branson *v.* Hill, 31 Md. 181, 189, 1 Am. Rep. 40; Maberly *v.* Strode, 3 Ves. Jr. 450, 455, 4 Rev. Rep. 61, 30 Eng. Reprint 1100. See also Vance's Estate, 11 Pa. Dist. 197, 198; Hubbert's Estate, 6 Pa. Dist. 96, 98.

55. Grimmer *v.* Friederich, 164 Ill. 245, 249, 45 N. E. 498; Porter *v.* Porter, 50 Mich. 456, 457, 460, 15 N. W. 550; Cressons' Appeal, 76 Pa. St. 19, 20, 25 (where in construing a devise of residue to all testator's children "who shall then be living" as relating to the death of the testator, it was said: "The expression 'then' being obscure in reference, all the other considerations arise which give a preference to a vested estate instead of one that is contingent"); Doe *v.* Prigg, 8 B. & C. 231, 239, 15 E. C. L. 121 [*disapproved* in Wordsworth *v.* Wood, 1 H. L. Cas. 129, 154, 11 Jur. 593, 9 Eng. Reprint 702 (although whether on the question of survivorship, or in general, is doubtful see *In re* Gregson, 2 De G. J. & S. 428, 440, 10 Jur. N. S. 1138, 34 L. J. Ch. 41, 11 L. T. Rep. N. S. 460, 5 New Rep. 99, 13 Wkly. Rep. 193, 67 Eng. Ch. 334, 46 Eng. Reprint 441)]. See also Ball *v.* Holland, 189 Mass. 369, 372, 75 N. E. 713, 1 L. R. A. N. S. 1005 (in which the principle favoring vested estates is invoked as bearing on the decision); Kinsey *v.* Lardner, 15 Serg. & R. (Pa.) 192, 196 (where a remainder to children named, or survivors, was held to vest at once, only the enjoyment being postponed, since power was given the life-tenant to make division among them during her life or widowhood).

56. Garland *v.* Thomas, 1 B. & P. N. R. 82, 91; Rose *v.* Hill, 3 Burr. 1881, 1885, 1886, 97 Eng. Reprint 1149 [*followed* in Garland *v.* Thomas, *supra*]; Doe *v.* Sparrow, 13 East 359, 365, 104 Eng. Reprint 408. See also Clayton *v.* Lowe, 5 B. & Ald. 636, 641, 24 Rev. Rep. 509, 7 E. C. L. 347; Wilson *v.* Bayly, 3 Bro. P. C. 195, 203, 1 Eng. Reprint 1265; Stringer *v.* Phillips, 1 Eq. Cas. Abr. 292, 21 Eng. Reprint 1054 [*cited* in Russell *v.* Long, 4 Ves. Jr. 551, 554, 31 Eng. Reprint 283 (where, however, it is suggested that a different period might have been chosen), and *questioned* in *In re* Gregson, 2 De G. J. & S. 428, 438, 440, 10 Jur. N. S. 1138, 34 L. J. Ch. 41, 11 L. T. Rep. N. S. 460, 5 New Rep. 99, 13 Wkly. Rep. 193, 67 Eng. Ch. 334, 46 Eng. Reprint 441]; Edwards *v.* Symons, 6 Taunt. 213, 219, 1 E. C. L. 582; Russell *v.* Long, 4 Ves. Jr. 551, 554, 555, 31 Eng. Reprint 283.

57. Nicoll *v.* Scott, 99 Ill. 529, 538, where it is said: "It makes a difference in construing survivorship, as referring to the time of distribution or not, whether all that there is of the gift is in the 'direction to pay or distribute,' or whether there is an antecedent gift to devisees named, the enjoyment of which may be considered as postponed, survivorship being more readily referred to the period of division in the former case than in the latter." See also Ball *v.* Holland, 189 Mass. 369, 373, 75 N. E. 713, 1 L. R. A. N. S. 1005 [*citing* Bosworth *v.* Stockbridge, 189 Mass. 266, 75 N. E. 712], where the fact of a gift outright to children by name should they be alive at the time of the testator's death or to any of them that might be alive, preceding the other provisions, was taken, on a view of all the provisions of the whole will, to control the period of survivorship.

take, being of weight;[58] or that the survivorship is not dependent on a contingency;[59] or, less definitely, the intention of the testator as gathered from the context and circumstances.[60]

(III) *PERIOD OF DISTRIBUTION.* Such words are often held to relate to the time of the distribution of the subject of a devise or legacy among those to whom, or to the survivors of whom, it is given,[61] whether as a general rule, subject to intent [62] or according to the natural meaning of the words when no contrary inten-

58. See Nicoll *v.* Scott, 99 Ill. 529, 538; Ball *v.* Holland, 189 Mass. 369, 373, 75 N. E. 713, 1 L. R. A. N. S. 1005; Moore *v.* Lyons, 25 Wend. (N. Y.) 119, 150; Drayton *v.* Drayton, 1 Desauss. Eq. (S. C.) 324, 340 [*distinguished* in Swinton *v.* Legare, 2 McCord Eq. (S. C.) 440, 443 (*cited* with approval in Selman *v.* Robertson, 46 S. C. 262, 273, 24 S. E. 187, and *quoted* with approval in Roundtree *v.* Roundtree, 26 S. C. 450, 473, 2 S. E. 474)].

59. Renner *v.* Williams, 71 Ohio St. 340, 357, 73 N. E. 221, where the fact that the survivorship was to be "in case of the death" of either of the class, and that death is necessarily certain and never contingent, was taken as a ground for following what was there said to be the general rule, that survivorship should be referred to the death of the testator.

60. Hoadly *v.* Wood, 71 Conn. 452, 456, 42 Atl. 263; Ball *v.* Holland, 189 Mass. 369, 373, 75 N. E. 713, 1 L. R. A. N. S. 1005; Worcester *v.* Worcester, 101 Mass. 128, 133, 134 [*cited* in Bailey *v.* Brown, 19 R. I. 669, 682, 36 Atl. 581]; Toms *v.* Williams, 41 Mich. 552, 564, 2 N. W. 814. See also Shailer *v.* Groves, 6 Hare 162, 165, 11 Jur. 485, 16 L. J. Ch. 367, 31 Eng. Ch. 162, 67 Eng. Reprint 1124 [*quoted* in *Re* Fox, 35 Beav. 163, 11 Jur. N. S. 735, 6 New Rep. 374, 13 Wkly. Rep. 1013, 55 Eng. Reprint 857, where it is suggested that the reported judgment is not consistent with the decision] where in construing a legacy of stock in bank annuities to one for life, and at her death one half of the produce of the principal to be divided between testator's brothers and sisters and other issue, share and share alike, survivorship was held to refer to the death of the testator, although the period of distribution was later than the death of the life-tenant, on the ground that the testator had intended the period of distribution later than the gift. According to the note on the report, however, decree seems not to conform to judgment.

Survivors "or their heirs."—The substitutionary words "or their heirs," following a gift to "surviving" members of a class, render the construction "surviving the tenants-for-life" impossible and refer the survivorship to the death of the testator. *In re* Stannard, 52 L. J. Ch. 355, 356, 48 L. T. Rep. N. S. 660.

61. See *infra*, text and notes 62–66.

62. Cheney *v.* Teese, 108 Ill. 473, 482; Blatchford *v.* Newberry, 99 Ill. 11, 45 [*distinguished* in Grimmer *v.* Friederich, 164 Ill. 245, 249, 45 N. E. 498; Nicoll *v.* Scott, 99 Ill. 529, 538]; Duryea *v.* Duryea, 85 Ill. 41, 48; Ridgeway *v.* Underwood, 67 Ill. 419, 425, 426; Ridgely *v.* Ridgely, 100 Md. 230, 233, 237, 59 Atl. 731; Sinton *v.* Boyd, 19 Ohio St. 30, 35, 36, 2 Am. Rep. 369; Schoppert *v.* Gillam, 6 Rich. Eq. (S. C.) 83, 86; Carver *v.* Burgess, 18 Beav. 541, 550, 52 Eng. Reprint 212 [*affirmed* in 7 De G. M. & G. 96, 3 Eq. Rep. 421, 24 L. J. Ch. 401, 3 Wkly. Rep. 308, 56 Eng. Ch. 74, 44 Eng. Reprint 38]; McDonald *v.* Bryce, 16 Beav. 581, 17 Jur. 335, 22 L. J. Ch. 779, 1 Wkly. Rep. 261, 51 Eng. Reprint 904; Vorley *v.* Richardson, 8 De G. M. & G. 126, 129, 2 Jur. N. S. 362, 25 L. J. Ch. 335, 4 Wkly. Rep. 397, 57 Eng. Ch. 99, 44 Eng. Reprint 337; Hoghton *v.* Whitgreave, 1 Jac. & W. 146, 150, 37 Eng. Reprint 331 [*distinguished* in Leeming *v.* Sherratt, 2 Hare 14, 25, 16 Jur. 663, 11 L. J. Ch. 423, 24 Eng. Ch. 14, 67 Eng. Reprint 6]; Young *v.* Robertson, 8 Jur. N. S. 825, 826, 827, 829; Cripps *v.* Wolcott, 4 Madd. 11, 15, 20 Rev. Rep. 268, 56 Eng. Reprint 613; *Re* McCubbin, 6 Ont. Wkly. Rep. 771, 773; Edwards *v.* Smith, 25 Grant Ch. (U. C.) 159, 162.

When death without leaving issue is indicated see Edwards *v.* Edwards, 15 Beav. 357, 365, 16 Jur. 259, 21 L. J. Ch. 324, 51 Eng. Reprint 576.

Where the gift is to take effect immediately upon the end of a prior estate, such is the rule. Roundtree *v.* Roundtree, 26 S. C. 450, 464, 465, 2 S. E. 474.

Where the time of the gift is the period of distribution, the rule is that survivorship relates thereto. Reiff's Appeal, 124 Pa. St. 145, 150, 16 Atl. 636.

Applied expressly to the case of personalty see Teed *v.* Morton, 60 N. Y. 502, 506 [*cited* in Blatchford *v.* Newberry, 99 Ill. 11, 45]. *Compare* Keating *v.* Cassels, 24 U. C. Q. B. 314, 320, 321, where, without directly dissenting from the opinion of the court holding that, on the language of the will, the words of survivorship related, not to the testator's death, but to that of a life-tenant under the will, Hagarty, J., expressed a doubt whether the rule permitting such reference to the period of distribution was not confined to cases of personalty.

Surviving children of the life-tenant being remainder-men, survivorship relates to his death, for the remainders are contingent until then. Van Tilburgh *v.* Hollinshead, 14 N. J. Eq. 32, 35 [*followed* in Dutton *v.* Pugh, 45 N. J. Eq. 426, 430, 435, 18 Atl. 207; Slack *v.* Bird, 23 N. J. Eq. 238, 243]. See also Roundtree *v.* Roundtree, 26 S. C. 450, 457, 2 S. E. 474, where it is said, *obiter*: "It is unquestionably the rule in South Carolina, that where a testator gives an estate to one for life, with remainder to '"his" children surviving,' the words of survivorship must be referred to the period of distribution."

tion is expressed,[63] or on the language of the particular will.[64] So where the gift is to two and, in case of the death of either without issue, to the survivor, the

63. Turner *v.* Withers, 23 Md. 18, 41 [*cited* in Anderson *v.* Brown, 84 Md. 261, 268, 272, 35 Atl. 937]; Coveny *v.* McLaughlin, 148 Mass. 576, 577, 20 N. E. 165, 2 L. R. A. 448 (where this construction is said to be according to the natural meaning of the words when placed in close connection with the event).

"Such of my devisees as shall survive" a person specified, describes, in its natural import, any of those named as devisees who shall "live longer" than that person; the words are not equivalent to "other devisees or their survivors." Bayless *v.* Prescott, 79 Ky. 252, 254, 2 Ky. L. Rep. 262.

64 Blanchard *v.* Maynard, 103 Ill. 60, 66; Small *v.* Small, 90 Md. 550, 564, 565, 45 Atl. 190; Wood *v.* Bullard, 151 Mass. 324, 333, 334, 25 N. E. 67, 7 L. R. A. 304; Den *v.* Sayre, 3 N. J. L. 183, 190; Beatty *v.* Montgomery, 21 N. J. Eq. 324, 327; Williamson *v.* Chamberlain, 10 N. J. Eq. 373, 375; Woelpper's Appeal, 126 Pa. St. 562, 570, 574, 17 Atl. 870 (holding that the general rule referring survivorship to the time of the testator's death is subject to intent); Swinton *v.* Legare, 2 McCord Eq. (S. C.) 440, 441, 443 [*criticizing* Drayton *v.* Drayton, 1 Desauss. Eq. (S. C.) 324, 330]; Marriott *v.* Abell, L. R. 7 Eq. 478, 483, 38 L. J. Ch. 451, 20 L. T. Rep. N. S. 690, 17 Wkly. Rep. 569 [*quoted* in Ridgeway *v.* Underwood, 67 Ill. 419, 425 (*distinguished* in Nicoll *v.* Scott, 99 Ill. 529, 538, and *cited* in Blatchford *v.* Newberry, 99 Ill. 11, 44)]; Howard *v.* Collins, L. R. 5 Eq. 349, 350; *Re* Fox, 35 Beav. 163, 11 Jur. N. S. 735, 6 New Rep. 374, 13 Wkly. Rep. 1013, 55 Eng. Reprint 857; Atkinson *v.* Bartrum, 28 Beav. 219, 220, 9 Wkly. Rep. 885, 54 Eng. Reprint 349; Littlejohns *v.* Household, 21 Beav. 29, 31, 52 Eng. Reprint 769; Bindon *v.* Suffolk, 4 Bro. P. C. 574, 576, 2 Eng. Reprint 391 [*reversing* 1 P. Wms. 96, 97, 24 Eng. Reprint 309 (where, although the property was personalty, survivorship was referred to a testator's death to avoid a tenancy in common); *criticized* in Garland *v.* Thomas, 1 B. & P. N. R. 82, 90 (where 1 P. Wms. *supra*, was followed and its reversal expressly disapproved); *cited* in Russell *v.* Long, 4 Ves. Jr. 551, 554, 31 Eng. Reprint 283 (where it is said to have been very much doubted and to seem decided upon very slender ground which, however, is decisive); and *explained* in Brograve *v.* Winder, 2 Ves. Jr. 634, 638, 30 Eng. Reprint 815 (where it is said that the case was "inaccurately stated in 'Peere Williams,'" and the criticism by the same Lord Chancellor in Roebuck *v.* Dean, 2 Ves. Jr. 265, 267, 30 Eng. Reprint 626, is thereby withdrawn)]; Williams *v.* Tartt, 2 Coll. 85, 33 Eng. Ch. 85, 63 Eng. Reprint 648; *In re* Crawhall, 8 De G. M. & G. 480, 486, 2 Jur. 892, 57 Eng. Ch. 372, 44 Eng. Reprint 475; Spurrell *v.* Spurrell, 11 Hare 54, 57, 17 Jur. 755, 22 L. J. Ch. 1076, 1 Wkly. Rep. 322, 45 Eng. Ch. 54, 68 Eng. Reprint 1184; Browne *v.* Kenyon, 3 Madd. 410, 416, 18 Rev. Rep. 261, 56 Eng. Reprint 556 [*distinguished* in White *v.* Baker, 2 De G. F. & J. 55, 56, 6 Jur. N. S. 591, 29 L. J. Ch. 577, 2 L. T. Rep. N. S. 583, 8 Wkly. Rep. 533, 63 Eng. Ch. 43, 45 Eng. Reprint 548]; Newton *v.* Ayscough, 19 Ves. Jr. 534, 536, 34 Eng. Reprint 614; Jenour *v.* Jenour, 10 Ves. Jr. 562, 566, 32 Eng. Reprint 963; Daniell *v.* Daniell, 6 Ves. Jr. 297, 300, 5 Rev. Rep. 308, 31 Eng. Reprint 1060; *Re* Sandison, 6 Northwest Terr. 313, 318 [*affirming* 5 West. L. Rep. 316]; *Re* Clark, 18 Nova Scotia 96, 100, 6 Can. L. T. Occ. Notes 143; *Re* Garner, 3 Ont. Wkly. Rep. 584, 585 (where "remaining" construed "surviving" and not "other," was held to refer to the period of distribution, not the testator's death); Travers *v.* Gustin, 20 Grant Ch. (U. C.) 106, 113 (where the coming of age of the youngest child was the period of distribution); Peebles *v.* Kyle, 4 Grant Ch. (U. C.) 334; Keating *v.* Cassels, 24 U. C. Q. B. 314, 319; Wright *v.* Wright, 16 U. C. Q. B. 184, 192.

"Then," connecting the period of distribution with the provision for survivorship, see Den *v.* Fen, 24 N. J. L. 686, 689; Bedford's Appeal, 40 Pa. St. 18, 21, 22 [*distinguished* in Caulk *v.* Caulk, 3 Pennew. (Del.) 528, 541, 52 Atl. 340]; *In re* Pickworth, [1899] 1 Ch. 642, 649, 653, 68 L. J. Ch. 324, 80 L. T. Rep. N. S. 212.

Lack of evidence of intent to let in issue of members deceased before period of distribution see Seddel *v.* Wills, 20 N. J. L. 223, 228.

Where the gift is contingent up to that period see Lamb *v.* Lamb, 8 Watts (Pa.) 184, 185, 187 (construing the following provision: "When my youngest child is come to full age, and each has received their share as above stated, and there is any yet remaining, it is my request that what remains shall be equally divided betwixt the surviving heirs"); *In re* Hunter, L. R. 1 Eq. 295, 298 (referring survivorship to the majority of the youngest of the class where no interest was to vest before that time).

Where the property is then ascertainable and not sooner see Denny *v.* Kettell, 135 Mass. 138, 139.

Where the time is certain and definite, of division among survivors, see Olney *v.* Hull, 21 Pick. (Mass.) 311, 314.

To two or the survivor at a given age.—A devise to two or the survivor of them when they attain the age of twenty-one years, and if they die without issue before taking the property so devised, over, does not refer to survivorship at the testator's death, but, when one dies under twenty-five, the survivor, upon reaching that age, takes the whole. *In re* McIntosh, 13 Grant Ch. (U. C.) 309, 310.

"Surviving heirs" would be meaningless if it referred to the death of the testator, but not, where it referred to the period of distribution. Evans *v.* Godbold, 6 Rich. Eq. (S. C.) 26, 37.

"My surviving" does not necessarily refer to the testator's death, it may mean those

survivorship is not confined to a death before that of the testator.[65] A single provision for survivorship may relate to successive periods, of distribution, consisting in deaths of members of the class one after another.[66]

(iv) *Time of Any of Several Deaths.* Where there is a gift over, in case of the death of any of a number of persons, to the survivor or survivors, there may be successive survivorships at successive deaths,[67] as in case of a gift or gifts to several, with a gift over, to survivors, of the part of any of them who shall die without having issue, the survivorship there being referred to the time of the death of any one of them,[68] such being the natural sense of the words so used.[69]

c. Letting in Issue. Words of survivorship are sometimes held to include issue of deceased members of the class specified, and this result is reached by

surviving at another period. Howard *v.* Collins, L. R. 5 Eq. 349, 351.

Where the devise is not immediate the more reasonable construction selects the period of distribution. *In re* Gregson, 2 De G. J. & S. 428, 439, 10 Jur. N. S. 1138, 34 L. J. Ch. 41, 11 L. T. Rep. N. S. 460, 5 New Rep. 99, 13 Wkly. Rep. 193, 67 Eng. Ch. 334, 46 Eng. Reprint 441.

Substituted class included in the survivorship see Atkinson *v.* Bartrum, 28 Beav. 219, 220, 9 Wkly. Rep. 885, 54 Eng. Reprint 349, holding that, in a bequest in remainder, to be divided equally between the testator's surviving brothers and sisters or their children, the word "'surviving' must govern the whole sentence, and that the brothers and sisters would take if they survived the tenants for life, but, if not, the nephews and nieces who survived the tenants for life alone take" — the word to be treated as covering both the brothers and sisters and their children.

"Should none of my children survive me" as the condition of a gift over, and following a direction to trustees to divide the estate among all testator's children, and pay to each upon coming of age, his share, taking into consideration the amount necessary for education, may, in view of the carelessness of the will and a motive for such intention, be held to create a right of survivorship among the children at the time of each payment. *Re* Sandison, 6 Northwest Terr. 313, 318.

In default of a second male heir.— In a devise to testator's son for life and "at his decease to the second male heir of him and his present wife, and his heirs male for ever; and in default of a second male heir to their eldest surviving female heir or child," the survivorship is of the son and his said wife, not of the testator. *Re* Brown, 5 Ont. L. Rep. 386, 387, 2 Ont. Wkly. Rep. 101.

65. *In re* Cramer, 170 N. Y. 271, 277, 63 N. E. 279 [*affirming* 59 N. Y. App. Div. 541, 69 N. Y. Suppl. 299]; Nellis *v.* Nellis, 99 N. Y. 505, 512, 3 N. E. 59; Keating *v.* Reynolds, 1 Bay (S. C.) 80, 87, where it is said of the word "survivor" that it "carries with it the idea of the longest liver".

66. See *infra*, this page, B, 1, c, (IV).

67. Clifton *v.* Crawford, 27 Ont. App. 315, 318.

68. Marshall *v.* Safe Deposit, etc., Co., 101 Md. 1, 8, 60 Atl. 476; Anderson *v.* Brown, 84 Md. 261, 270, 35 Atl. 937; Lawrence *v.* Phillips, 186 Mass. 320, 322, 71 N. E. 541; *In re* Wilcox, 64 N. J. Eq. 322, 324, 54 Atl. 296; Ashhurst *v.* Potter, 53 N. J. Eq. 608, 610, 611, 32 Atl. 698; Mead *v.* Maben, 131 N. Y. 255, 259, 261, 30 N. E. 98 [*reversing* 60 Hun 268, 14 N. Y. Suppl. 732]; Buel *v.* Southwick, 70 N. Y. 581, 586; *In re* Robson, [1899] W. N. 260, 261; McDonnell *v.* McDonnell, 24 Ont. 468; Forsyth *v.* Galt, 21 U. C. C. P. 408, 425 [*affirmed* in 22 U. C. C. P. 115]; Ray *v.* Gould, 15 U. C. Q. B. 131, 137. *Compare infra*, p. 642, as to case of last survivor on failure of issue.

Likewise where the gift was to children named, in trust for their children, and should any of those named die without children, then to the surviving heirs. Malseed's Estate, 15 Wkly. Notes Cas. (Pa.) 368, invoking the rule which favors the vesting of estates.

Rule referring to time of distribution invoked see Ashhurst *v.* Potter, 53 N. J. Eq. 608, 610, 611, 32 Atl. 698; *In re* Mortimer, 54 L. J. Ch. 414, 415, 52 L. T. Rep. N. S. 383, 33 Wkly. Rep. 441.

Not to postpone vesting.— Marshall *v.* Safe Deposit, etc., Co., 101 Md. 1, 8, 60 Atl. 476, where the only alternative period was the end of a twenty years' trust, upon which the principal was to be divided, and it was held that the earlier period, namely, the death of any member of the class, although within the twenty years, should be preferred.

As the period of the contingency upon which survivors are to take see Den *v.* Sayre, 3 N. J. L. 183, 190; *In re* Wilcox, 64 N. J. Eq. 322, 324, 54 Atl. 296.

Death of any under a certain age without issue see Bouverie *v.* Bouverie, 11 Jur. 661, 662, 16 L. J. Ch. 411, 2 Phil. 349, 22 Eng. Ch. 349, 41 Eng. Reprint 977 [*distinguished* in Vorley *v.* Richardson, 8 De G. M. & G. 126, 129, 2 Jur. N. S. 362, 25 L. J. Ch. 335, 4 Wkly. Rep. 397, 57 Eng. Ch. 99, 44 Eng. Reprint 337]; Shergold *v.* Boone, 13 Ves. Jr. 370, 375, 9 Rev. Rep. 195, 33 Eng. Reprint 332; Ryan *v.* Cooley, 15 Ont. App. 379, 386 [*modifying* 14 Ont. 13, 18]; Cook *v.* Noble, 5 Ont. 43, 46.

Death without issue before majority of youngest see Scott *v.* Duncan, 29 Grant Ch. (U. C.) 496, 497.

69. King *v.* Frost, 15 App. Cas. 548, 554, 63 L. T. Rep. N. S. 422 (where it is said: "The obvious meaning of the words 'survivors and survivor' in that clause is — such of the sons as may be living at the time of the death on which the disposition of the property is altered"); *In re* Benn, 29 Ch. D. 839, 844, 53 L. T. Rep. N. S. 240, 34 Wkly. Rep. 6

various means,[70] sometimes by applying the words literally to the whole surviving stock of beneficiaries,[71] by construing the word "survivor" or its equivalent as "other" [72] or "surviving *stirps*," [73] or as relating to the death of the testator,[74] while, in some cases, the courts have not committed themselves to any strict construction of the words, but found the intention in the context.[75] But the

(where it is said: "Here the natural meaning of 'surviving' is living at the death of the child, the estate devised to whom for life is given over on his death"); Leeming *v.* Sherratt, 2 Hare 14, 25, 16 Jur. 663, 11 L. J. Ch. 423, 24 Eng. Ch. 14, 67 Eng. Reprint 6; Beckwith *v.* Beckwith, 46 L. J. Ch. 97, 99, 36 L. T. Rep. N. S. 128, 25 Wkly. Rep. 282; Ranelagh *v.* Ranelagh, 2 Myl. & K. 441, 448, 7 Eng. Ch. 441, 39 Eng. Reprint 1012 (where "survivors" is said to be "used in its plain and obvious sense as meaning such of the four individuals named as shall be living when any of them shall happen to die").

70. See *infra*, text and notes 71–78.

Effect of statutes see Rivenett *v.* Bourquin, 53 Mich. 10, 12, 18 N. W. 537 (holding that a provision that if any child die before testatrix, the survivors or their legal representatives shall take, is not such an unequivocal exclusion of issue of a predeceased child as to prevail against How. St. 5, 812, providing against the lapse of legacies when the legatee leaves issue surviving the testator "unless a different disposition shall be made or directed by the will"); *In re* Bentz, 221 Pa. St. 380, 384, 70 Atl. 788, holding that the "surviving issue" substituted for a deceased legatee by St. May 6, 1844 (Pub. Laws 564), so as to prevent a lapse of the bequest by reason of prior death of legatee, living issue includes the children not named in the will, although their brothers and sisters are named). See also Thorington *v.* Hall, 111 Ala. 323, 324, 331, 21 So. 335, 56 Am. St. Rep. 54, holding that a power of appointment, in favor of three named children of the testator, was restricted to the particular children named, and therefore, in the absence of any showing upon the record that the three named included all the testator's children, was not within the application of Code, § 1862, providing: "When a disposition under an appointment or power is directed to be made to the children of any person, without restricting it to any particular children, it may be exercised in favor of the grandchildren or other descendants of that person," the court declining, however, to decide what would have been the effect of the statute had such showing been made. The opinion contains no allusion to any possible effect of the word "survivors" to enlarge the scope of the power.

Agreement against divestiture see Thorington *v.* Hall, 111 Ala. 323, 330, 21 So. 335, 56 Am. St. Rep. 54, holding that a remainder to three and the survivors or survivor of them, upon death, intestate, or remarriage, of the life-tenant, subject to her power of appointment, by will, among the three exclusively, was vested in them, subject to divestiture only in favor of members of the class of three, that, therefore, an agreement between them against divestiture, letting in heirs of members deceased within the life-tenancy, was valid.

71. Dooling *v.* Hobb, 5 Harr. (Del.) 405, 407; Harris *v.* Berry, 7 Bush (Ky.) 113, 115; Kemp *v.* Bradford, 61 Md. 330, 333; Naglee's Appeal, 33 Pa. St. 89, 91 [*sustained* at least as to the rights of the parties in *In re* Devine, 199 Pa. St. 250, 256, 48 Atl. 1072 (*criticizing* Dodson *v.* Ball, 60 Pa. St. 492, 495, 100 Am. Dec. 586, where it is said that Guthrie's Appeal, 37 Pa. St. 9, 22, strongly denied some of the positions of Naglee's Appeal, *supra*)]; *In re* Cary, 81 Vt. 112, 118, 69 Atl. 736.

Flexible in meaning.— "'Survivors,' as written, is a flexible term, not necessarily meaning the testator's surviving children only, but, when molded by the context and spirit of the will, may consistently with the literal import comprehend all his surviving descendants who were intended to be beneficiaries." Harris *v.* Berry, 7 Bush (Ky.) 113, 115.

72. See *infra*, p. 640, text and note 79.

"Others who had . . . not died childless" suggested as construction of "survivors" on death without issue see Birney *v.* Richardson, 5 Dana (Ky.) 424, 429 [*distinguished* in Bayless *v.* Prescott, 79 Ky. 252, 255, 2 Ky. L. Rep. 262, and *cited* with approval in Harris *v.* Berry, 7 Bush (Ky.) 113, 115].

73. Lucena *v.* Lucena, 7 Ch. D. 255, 261, 47 L. J. Ch. 203, 37 L. T. Rep. N. S. 420, 26 Wkly. Rep. 254; Wake *v.* Varah, 2 Ch. D. 348, 358, 45 L. J. Ch. 533, 34 L. T. Rep. N. S. 437, 24 Wkly. Rep. 621.

74. See *supra*, p. 634, text and note 53.

75. Birney *v.* Richardson, 5 Dana (Ky.) 424, 429, 431 [*distinguished* and *criticized* in Bayless *v.* Prescott, 79 Ky. 252, 255, 2 Ky. L. Rep. 262; and *cited* with approval in Harris *v.* Berry, 7 Bush (Ky.) 113, 115]; Hendricks *v.* Hendricks, 177 N. Y. 402, 407, 69 N. E. 736 [*reversing* 78 N. Y. App. Div. 212, 79 N. Y. Suppl. 516]; Lewis' Appeal, 18 Pa. St. 318, 325; Buckley *v.* Reed, 15 Pa. St. 83, 86 (holding that a direction to divide a remainder, at the death of the widow, amongst testator's "surviving children, or 'the heirs,'" amounts to a direction for division "among such of the children as should then survive and the legal representatives of those then dead," adding, "when too it is realized that some of the legatees were daughters, who might marry and bear children, the legal propriety of the reading becomes more and more obvious. If essential to subserve such a possible interest, the operation of the word 'survivor' would be restrained to the period of the testator's death"); Park's Estate, 21 Wkly. Notes Cas. (Pa.) 227, 228; Malseed's Estate, 15 Wkly. Notes Cas. (Pa.) 368; Shepard *v.* Shepard, 60 Vt. 109, 119, 120, 14 Atl. 536; Waite *v.* Littlewood, L. R. 8 Ch. 70, 73, 42 L. J. Ch. 216, 28 L. T. Rep. N. S. 123,

tendency of the courts to favor the inclusion of issue among survivors must yield to plain language or clearly expressed intention to the contrary;[76] accordingly, in some wills, the intention to confine survivorship among members of the designated class has been found and has prevailed.[77] In some opinions, general rules have been set forth for the determination of the question between surviving members and issue of deceased members.[78]

21 Wkly. Rep. 131; *In re* Bowman, 41 Ch. D. 525, 529, 60 L. T. Rep. N. S. 888, 37 Wkly. Rep. 583 [*distinguished* in *Re* Rubbins, 79 L. T. Rep. N. S. 313, 314]; Peacock *v.* Stockford, 7 De G. M. & G. 129, 132, 56 Eng. Ch. 100, 44 Eng. Reprint 51; Roebuck *v.* Dean, 2 Ves. Jr. 265, 267, 30 Eng. Reprint 626.

76. Mullarky *v.* Sullivan, 136 N. Y. 227, 230, 32 N. E 762, where it is said: "While it is true that courts favor a construction which will permit the children of a deceased child to take, rather than one which will exclude them . . . yet this principle can have no application in a case where the language of the will is plain or where the intention of the testator is so clearly expressed as to leave no room for construction," and held that where a will explicitly declares that the share of a child dying without issue shall go to his brothers and sisters, such disposition necessarily excludes the issue of a deceased brother or sister.

77. Bayless *v.* Prescott, 79 Ky. 252, 254, 2 Ky. L. Rep. 262 (holding that a limitation to such of testator's devisees as shall survive "the said Phœbe" does not let in persons other than such devisees, whether related to the life-tenant or not); Best *v.* Conn, 10 Bush (Ky.) 36, 39 (holding that in a devise of specific portions to persons for life, with remainder to heirs, but if any died without issue then his share to the survivors, the word does not include the children of a deceased devisee, but only the remaining devisees for life); Seddel *v.* Wills, 20 N. J. L. 223, 229 (where the gift over was expressly to "surviving brothers and sisters"); Mullarky *v.* Sullivan, 136 N. Y. 227, 230, 32 N. E. 762, 47 N. Y. St. 333 (where the gift over was expressly to "surviving brothers and sisters"); Guernsey *v.* Guernsey, 36 N. Y. 267, 274, 2 Transcr. App. 151 (holding that the clause "The above devise to my children being to them, their heirs and assigns, and if either die without issue, then to the survivor or survivors in equal shares," in its natural import confines the survivorship to the children and does not include their issue, where the will shows no intention to do so, but rather the contrary); Mowatt *v.* Carow, 7 Paige (N. Y.) 328, 333, 343, 32 Am. Dec. 641 (holding that where a remainder of real and personal estate was limited to one if he survived the life-tenant, but if he died before the life-tenant to be divided among the children or the survivors or survivor of them, the children of a deceased member of the class of children could not take as a survivor of that class); Sinton *v.* Boyd, 19 Ohio St. 30, 36, 2 Am. Rep. 369 (where the will provided for division equally amongst all testator's children male and female or the survivors of them); *In re* Benn, 29 Ch. D. 839, 846, 53 L. T. Rep. N. S. 240, 34 Wkly. Rep. 6 (holding that the fact that shares are settled on the original devisees and gifts to surviving children settled in the same way is not a sufficient ground for letting in issue of predeceased children); *In re* Rubbins, 79 L. T. Rep. N. S. 313, 314 (where a contingent gift over to the issue of a survivor of testator's children was held not to include issue of one deceased before the contingency).

In Maryland the principle that in order to take, as a devisee, by purchase, one must answer the description of devisees in the will, has been applied toward the exclusion of issue of deceased members of the class. Turner *v.* Withers, 23 Md. 18, 40 [*cited* in Anderson *v.* Brown, 84 Md. 261, 272, 35 Atl. 937, where it is pointed out that the case, while it contained many of the conditions upon which the English courts have construed the devise to create cross remainders between the stirpes as well as between the children, refused the construction and held, on the contrary, that no one should take by purchase unless he answered to the "description of the parties as devisees"].

78. General rules.—"The following principles have been decided and considered in well adjudged cases. If there be an 'absolute' gift to several persons, with the gift to the survivors, if any die without issue 'survivors' must be construed in its ordinary sense. . . . Another principle of interpretation is, that where there is a gift over to take place only in the event on which the property is limited to the first legatees, among whom there is to be survivorship . . . survivor will be construed 'other' so as not to cause an intestacy. . . . Another principle of interpretation is, that where there is a devise to sons, and the heirs of their bodies and if any die without issue to the survivors and the heirs of their bodies, and if all die without issue over, survivorship shall be referred to the stirpes and not to the first taker, and the share of a son dying without issue will go among the issue of a son previously deceased, and the surviving sons. In such a case says Mr. Theobald, in his able and excellent treatise on wills, 'the testator has expressed his intention of benefiting the line of issue, and the survivorship contemplated is one between the respective stirpes, and not between the first takers merely, and this coupled with the gift over which can only take effect if all the sons die without issue, is sufficient to enlarge the meaning of the word survivor.' The same principle will be applied to the case where the will gives life estates with limitations expressly to issue, followed by a gift on failure of issue of any of the tenants for life to the surviving tenants for life for their lives.

d. Construed "Other." "Survivor," "surviving" or their equivalents are often construed "other" [79] to let in issue of predeceased members of a class.[80] The word "survivor" or "surviving" will be understood as the equivalent of "other," where any other construction would lead to an intestacy or to inequality

and then to their issue, and an ultimate gift over on failure of issue of all the tenants for life. 'There is here,' says the same distinguished author, 'the same evidence of intention to benefit the issue, and the gift over shows that survivorship is contemplated not merely between the first takers but between the respective stirpes.'" Cooper *v.* Cooper, 7 Houst. (Del.) 488, 513, 31 Atl. 1043. "It seems . . . that the decisions establish the following propositions:— Where the gift is to 'A.,' 'B.,' and 'C.,' equally for their respective lives, and after the death of any to his children, but if any die without children to the survivors for life with remainder to their children, only children of survivors can take under the gift over. If to similar words there is added a limitation over if all the tenants for life die without children, then the children of a predeceased tenant for life participate in the share of one who dies without children after their parent. They also participate, although there is no general gift over, where the limitations are to 'A.,' 'B.,' and 'C.' equally for their respective lives, and after the death of any to his children, and if any die without children to the surviving tenants for life and their respective children, in the same manner as their original shares." *In re* Bowman, 41 Ch. D. 525, 531, 37 Wkly. Rep. 583 [*criticized* in *In re* Robson, [1899] W. N. 260, 261 (where the first two propositions are approved and the third doubted)]. *Compare* the report of the same case and opinion in 60 L. T. Rep. N. S. 888, 891, materially at variance with the reports in 41 Ch. D. and 37 Wkly. Rep. *supra*, in placing a comma not, *ut supra*, between "their children" and "only children of survivors" but between "their children only" and "children of survivors."

79. See *infra*, text and notes 80, 81, 82, 83, 84, 85.

"Living at the age afore 'said'" as a construction similar to "other" see Wilmot *v.* Wilmot, 8 Ves. Jr. 10, 12, 6 Rev. Rep. 196, 32 Eng. Reprint 252.

80. Smith *v.* Smith, 157 Ala. 79, 89, 47 So. 220, 25 L. R. A. N. S. 1045; Cooper *v.* Cooper, 7 Houst. (Del.) 488, 516, 517, 31 Atl. 1043 (where the language of the opinion is somewhat confused by the omission of quotation marks at the end of the quotation from *In re* Horner, 19 Ch. D. 186, 51 L. J. Ch. 43, 45 L. T. Rep. N. S. 670, there cited Pomfort *v.* Graham, 19 Ch. D. 186, 189, ending with the words "in this case," the latter case not being followed, as might be gathered from a cursory reading of the opinion, but distinguished); Carter *v.* Bloodgood, 3 Sandf. Ch. (N. Y.) 293, 299, 300 (subject to the rule, however, that the word "survivors" when unexplained "must be interpreted according to its literal import"); *In re* Fox, 222 Pa. St. 108, 113, 70 Atl. 954; *In re* Bacon, 202 Pa. St. 535, 545–549, 52 Atl. 135; *In re* Devine, 199 Pa. St. 250, 257, 48 Atl. 1072; Lapsley *v.* Lapsley, 9 Pa. St. 130; Vogdes' Estate, 16 Pa. Dist. 377, 379; Hubbert's Estate, 6 Pa. Dist. 96, 97; *In re* Cary, 81 Vt. 112, 119, 69 Atl. 736 (where it is said: "True it is sometimes said that the more modern decisions lean toward the ordinary and natural meaning of the word 'survivor,' yet there is no diversity of authority that where the intention of the testator, gathered from the will itself, is plain that he meant to use it in the sense of 'other,' such a construction will be given"); *In re* Friend, [1906] 1 Ch. 47, 54, 75 L. J. Ch. 14, 93 L. T. Rep. N. S. 739, 54 Wkly. Rep. 295; Lucena *v.* Lucena, 7 Ch. D. 255, 270, 47 L. J. Ch. 203, 37 L. T. Rep. N. S. 420, 26 Wkly. Rep. 254; Wake *v.* Varah, 2 Ch. D. 348, 358, 45 L. J. Ch. 533, 34 L. T. Rep. N. S. 437, 24 Wkly. Rep. 621; Cross *v.* Maltby, L. R. 20 Eq. 378, 382, 33 L. T. Rep. N. S. 300, 23 Wkly. Rep. 863; *In re* Palmer, L. R. 19 Eq. 320, 325, 44 L. J. Ch. 247, 32 L. T. Rep. N. S. 9; Badger *v.* Gregory, L. R. 8 Eq. 78, 84, 86, 21 L. T. Rep. N. S. 107, 17 Wkly. Rep. 1090; Hurry *v.* Morgan, L. R. 3 Eq. 152, 155, 36 L. J. Ch. 105, 15 Wkly. Rep. 87; *In re* Keep, 32 Beav. 122, 127, 130, 55 Eng. Reprint 48 [*explained* in Cooper *v.* Cooper, 7 Houst. (Del.) 488, 516, 31 Atl. 1043]; *In re* Tharp, 1 De G. J. & S. 453, 458, 33 L. J. Ch. 59, 8 L. T. Rep. N. S. 558, 2 New Rep. 253, 11 Wkly. Rep. 763, 66 Eng. Ch. 352, 46 Eng. Reprint 180 (construing "such as shall survive"); Smith *v.* Osborne, 6 H. L. Cas. 375, 393, 400, 3 Jur. N. S. 1181, 6 Wkly. Rep. 21, 10 Eng. Reprint 1340 [*explained* in *In re* Bowman, 41 Ch. D. 525, 531, 60 L. T. Rep. N. S. 888, 37 Wkly. Rep. 583]; Cole *v.* Sewell, 2 H. L. Cas. 186, 227, 235, 12 Jur. 927, 9 Eng. Reprint 1062; Hawkins *v.* Hamerton, 13 Jur. 2, 4, 16 Sim. 410, 39 Eng. Ch. 410, 60 Eng. Reprint 933 [*explained* and *distinguished* in *Re* Corbett, Johns. 591, 598, 6 Jur. N. S. 339, 29 L. J. Ch. 458, 8 Wkly. Rep. 257, 70 Eng. Reprint 555 (where it is pointed out that such construction was not necessary to the decision), and *distinguished* in *In re* Arnold, L. R. 10 Eq. 252, 257, 258, 39 L. J. Ch. 875, 23 L. T. Rep. N. S. 337, 18 Wkly. Rep. 912]; Crowther *v.* Evans, 11 Jur. N. S. 902, 13 L. T. Rep. N. S. 271; Askew *v.* Askew, 57 L. J. Ch. 629, 633, 58 L. T. Rep. N. S. 472, 36 Wkly. Rep. 620; *In re* Johnson, 53 L. J. Ch. 1116, 1117; Aiton *v.* Brooks, 7 Sim. 204, 208, 8 Eng. Ch. 204, 58 Eng. Reprint 815; Barlow *v.* Salter, 17 Ves. Jr. 479, 482, 34 Eng. Reprint 185 (holding that under a devise to four, the part of the one being only for life and to be divided between the survivors, the right of the other three did not depend upon survivorship, but was absolute and transmissible to their representatives); Wilmot *v.* Wilmot, 8 Ves. Jr. 10, 12, 6 Rev.

among those standing in the same degree of relationship to the testator or to a distribution not in accordance with the general scheme of the will in its entirety;[81] or, as it has been said in one case, to take in persons not living who should be born before the period of distribution.[82] This construction depends always upon the intention of the testator as learned from the will;[83] bnt it has been said to be a

Rep. 196, 32 Eng. Reprint 252. See also *In re* Arnold, L. R. 10 Eq. 252, 258, 39 L. J. Ch. 875, 23 L. T. Rep. N. S. 337, 18 Wkly Rep. 912, where, after advocating the construction "other" to effectuate the intention, "other surviving children" was construed "other children" and the word surviving rejected.

81. *In re* Fox, 222 Pa. St. 108, 113, 70 Atl 954 *Compare Re* Usticke, 35 Beav. 338, 340, 14 Wkly. Rep. 447, 55 Eng. Reprint 926 [*criticized* in *In re* Arnold, L. R. 10 Eq. 252, 258, 39 L. J. Ch. 875, 23 L T. Rep. N. S. 337, 18 Wkly. Rep. 912], where the opinion was expressed that the tendency of all modern authorities is to hold that the word "survivor" must have its ordinary plain meaning; and it is said, further, that those cases "in which there is a gift over, if the whole class die without issue, are quite distinct, for there would be an intestacy, unless the words were construed 'others or other'").

82. See Davidson *v.* Dallas, 14 Ves. Jr. 576, 578, 9 Rev. Rep. 350, 33 Eng. Reprint 642 [*cited* in Leeming *v.* Sherratt, 2 Hare 14, 24, 16 Jur. 663, 11 L. J. Ch. 423, 24 Eng. Ch. 14, 67 Eng. Reprint 6].

83. See Duryea *v.* Duryea, 85 Ill. 41, 49, construing the word in its ordinary sense, where it is said: "The authorities seem to hold there is no rule fairly deducible from the cases on this subject, that will justify the reading of 'survivor' as equivalent to 'other,' except it is to be done whenever, from the context or other provisions of the will, it is rendered certain such must have been the intention of the testator"); Gorham *v.* Betts, 86 Ky. 164, 168, 5 S. W. 465, 9 Ky. L. Rep. 607 (where it is said of the word "survivors:" "The controversy has been whether the word should have its literal and natural meaning, or whether it should *prima facie* be construed as equivalent to the word 'others' in the absence of circumstances or something in the context showing that it was used in a strictly literal sense. There is a line of older cases, as in Wilmot *v.* Wilmot, 8 Vesey Jr. 10, 6 Rev. Rep. 196, 32 Eng. Reprint 252, holding to the latter view. Some eminent judges have also held that the words were convertible terms; but where the word 'survivor' has been given the force of 'other,' thus letting in the issue of a deceased member of a class by inheritance from the parent, it has been usually done, as was the case in Harris, &c. *v.* Berry, &c., 7 Bush, 114, to avoid some consequence which it was quite certain the testator did not intend. It was necessary in order to effect an intention appearing upon the entire will. The later cases, however, hold that the word 'survivor,' when unexplained by the context, is to be given its natural meaning, and interpreted according to its literal import. As this rule may often defeat the unexpressed intention of the testator, courts readily listen to any argument drawn from the context or other provisions of the will, showing that 'survivor' was used by him as synonymous with 'other;' but unless this appear, it may now be regarded as the settled rule that its literal meaning is to be given to it"); Anderson *v.* Brown, 84 Md. 261, 269, 35 Atl. 937 (where it is said: "All the cases to which we have been referred or examined in which 'survivor' has been construed as the equivalent of 'other' appear to have been so decided because there was something in the will to make it clear that the testator intended the issue of predeceased children to take, or that some other clearly expressed intention would otherwise be rendered inoperative"); *In re* Benn, 29 Ch. D. 839, 844, 53 L. T. Rep. N. S. 240, 34 Wkly. Rep. 6; *In re* Johnson, 53 L. J. Ch. 1116, 1117 (where it is said: "The question whether the word 'survivor' is to be read as 'other' has been the subject of innumerable cases; but there is one never-failing guide to all the authorities, namely, that it is the duty of the Court to ascertain what the meaning of the testator is, and if it can satisfy itself that the word ought to be read as 'other' it is right to substitute the one word for the other"); Beckwith *v.* Beckwith, 46 L. J. Ch. 97, 99, 36 L. T. Rep. N. S. 128, 25 Wkly. Rep. 282 (holding that "survivors" is not to be construed "others" *ex vi termini*).

Illustrated see Ashhurst *v.* Potter, 53 N. J. Eq. 608, 611, 32 Atl. 698, where it is said: "A testator, for example, after a life estate given to 'one' of his children, might well, in a gift over to his 'surviving children,' intend his '"other" children,' and they would be properly designated as the children 'other' than the life tenant," distinguishing the case at bar on the ground that there the previous estate was not that of one of the brothers and sisters of whom those surviving were to take, wherefore the construction "other" would impute to the testator the intention to substitute an inappropriate word.

Construction as "other" refused where the language of the will was precise and showed that the survivors were to take as tenants for life for their separate use, a provision wholly inconsistent with any intention that the children of a deceased member of the class should stand in his place as their parent. Winterton *v.* Crawfurd, 1 Russ. & M. 407, 411, 5 Eng. Ch. 407, 39 Eng. Reprint 157 [*cited* with approval in Taaffe *v.* Conmee, 10 H. L. Cas. 64, 77, 8 Jur. N. S. 919, 6 L. T. Rep. N. S. 666, 11 Eng. Reprint 749].

Seldom adopted unless interchangeable see Ashhurst *v.* Potter, 53 N. J. Eq. 608, 611, 32 Atl. 698 (where it is said: "But these

forced construction,[84] and that the burden of proof is on the party seeking to maintain that this is the proper construction in the particular case.[85]

e. Case of Last Survivor on Failure of Issue. Where there is a gift over to survivors of a number of persons, on the death of any of them without issue, the death of the last survivor without issue gives rise to a difficulty in construction.[86] It has been held that in such cases the construction "longest liver" is to be rejected as inconsistent with the gift over,[87] that the intended survivors include such as may be living at the time of a death without issue and do not include the last survivor at the time of his own death,[88] or as attributing two meanings to one word used once.[89] On the other hand the construction "longest liver" has been adopted so as to let in the last survivor without issue;[90] while, in cases excluding from

cases, almost, if not entirely, without exception, have been cases where the words 'survivor' and 'other' were equally apt and proper words to be used in designating the children or other relatives who were the objects of the gift over."

84. Bayless *v.* Prescott, 79 Ky. 252, 256; Davidson *v.* Dallas, 14 Ves. Jr. 576, 578, 9 Rev. Rep. 350, 33 Eng. Reprint 642 [*quoted* in Crowder *v.* Stone, 3 Russ. 217, 223, 27 Rev. Rep. 68, 3 Eng. Ch. 217, 38 Eng. Reprint 558].

85. Waite *v.* Littlewood, L. R. 8 Ch. 70, 73, 42 L. J. Ch. 216, 28 L. T. Rep. N. S. 123, 21 Wkly. Rep. 131 [*distinguished* in Lucena *v.* Lucena, 7 Ch. D. 255, 269, 47 L. J. Ch. 203, 37 L. T. Rep. N. S. 420, 26 Wkly. Rep. 254], where it is said by Lord Selborne: "I do not entirely assent to language which is to be found pervading almost all the cases upon questions of this kind, that the question is whether the word 'survivor' is to be read 'other.' I think there is certainly a very strong probability that any one using the word 'survivor' does not precisely mean 'other' by it, but has in his mind some idea of survivorship; and if the question is simply whether you are to turn it into 'other,' and say it is used merely by mistake for the word 'other,' which is the true word to express the testator's meaning, there is undoubtedly a strong *onus probandi* cast upon any one who would do that violence to the literal meaning of the word. It would be a strange thing to hold that so many testators were in the habit of using the word 'survivor' when they simply meant 'other.' Generally speaking, a reason of some kind will be found for the use of the word 'survivor' where it occurs, though it may very possibly be, and often in these cases is, an imperfect expression, not expressing completely and exhaustively the whole intention. If no such explanation can be suggested, it is a strong argument against any construction that would reject the word in its proper and primary meaning altogether, and substitute a word which has a different meaning."

Not alone sufficient, to necessitate the construction of survivors as others, is a gift over to survivors for life with remainder to children. *In re* Horner, 19 Ch. D. 186, 51 L. J. Ch. 43, 45 L. T. Rep. N. S. 670 [*distinguished*, as Pomfort *v.* Graham, in Cooper *v.* Cooper, 7 Houst. (Del.) 488, 516, 31 Atl. 1043 (where, however, the failure to mark a quotation after the passage ending "in this case" causes the language to seem rather to follow than distinguish the case cited)].

86. See *infra*, text and notes 87–92.

87. King *v.* Frost, 15 App. Cas. 548, 553, 63 L. T. Rep. N. S. 422.

88. King *v.* Frost, 15 App. Cas. 548, 553, 554, 63 L. T. Rep. N. S. 422 [*followed* in Ranelagh *v.* Ranelagh, 41 Wkly. Rep. 549, 550]; Nevill *v.* Boddam, 28 Beav. 554, 557, 6 Jur. N. S. 573, 29 L. J. Ch. 738, 8 Wkly. Rep. 490, 54 Eng. Reprint 479; *Re* Corbett, Johns. 591, 600, 6 Jur. N. S. 339, 29 L. J. Ch. 458, 8 Wkly. Rep. 257, 70 Eng. Reprint 555 (where the share of the last survivor was held to fall into the residue as the result of the natural construction of the words); Askew *v.* Askew, 57 L. J. Ch. 629, 632, 58 L. T. Rep. N. S. 472, 36 Wkly. Rep. 620; *In re* Mortimer, 54 L. J. Ch. 414, 417, 52 L. T. Rep. N. S. 383, 33 Wkly. Rep. 441.

89. Askew *v.* Askew, 57 L. J. Ch. 629, 631, 58 L. T. Rep. N. S. 472, 36 Wkly. Rep. 620 (where the expression used in objecting to the double sense is "in the same instrument," but the fact objected to is a double sense in a single provision, or more accurately a single instance of use); *In re* Mortimer, 54 L. J. Ch. 414, 417, 52 L. T. Rep. N. S. 383, 33 Wkly. Rep. 441. *Compare*, however, *infra*, note 90.

Two meanings in different places in one will permissible see *supra*, p. 629, note 36.

90. *In re* Roper, 41 Ch. D. 409, 413, 58 L. J. Ch. 439, 61 L. T. Rep. N. S. 42, 37 Wkly. Rep. 731; Davidson *v.* Kimpton, 18 Ch. D. 213, 216, 45 L. T. Rep. N. S. 132, 29 Wkly. Rep. 912 [*followed* in *In re* Roper, *supra*, and *disputed* in Askew *v.* Askew, 57 Ch. D. 629, 632, 58 L. T. Rep. N. S. 472, 36 Wkly. Rep. 620; *In re* Mortimer, 54 L. J. Ch. 414, 417, 52 L. T. Rep. N. S. 383, 33 Wkly. Rep. 441]; Maden *v.* Taylor, 45 L. J. Ch. 569, 572 [*cited* with approval in Anderson *v.* Brown, *infra*, *overruled* in King *v.* Frost, 15 App. Cas. 548, 553, 63 L. T. Rep. N. S. 422, *followed* in *In re* Roper, *supra*, and *disputed* in Askew *v.* Askew, 57 L. J. Ch. 629, 631, 58 L. T. Rep. N. S. 472, 36 Wkly. Rep. 620; *In re* Mortimer, *supra*]. See also Anderson *v.* Brown, 84 Md. 261, 270, 35 Atl. 937.

In case of survivorship between two upon death without issue, "longest liver" see Randolph *v.* Wright, 81 Va. 608, 612 (where "surviving one" was the phrase so construed); Ashbridge *v.* Ashbridge, 22 Ont.

benefit of survivorship the last survivor on his own death without issue, the construction "others" has been both rejected [91] and accepted.[92]

f. Definite Failure of Issue. Survivorship, based upon death without issue, has been held to restrict the failure of issue to a definite one [93] — since the persons described as survivors are not likely to live until a general failure occurs [94] — but only as evidence of intention,[95] and there are cases otherwise decided.[96]

146, 149, 12 Can. L. T. Occ. Notes 274 (rejecting the construction "other").

91. King *v.* Frost, 15 App. Cas. 548, 553, 63 L. T. Rep. N. S. 422.

92. Askew *v.* Askew, 57 L. J. Ch. 629, 633, 58 L. T. Rep. N. S. 472, 36 Wkly. Rep. 620.

93. Moody *v.* Walker, 3 Ark. 147, 200; Richardson *v.* Noyes, 2 Mass. 56, 62, 69, 3 Am. Dec. 24; Den *v.* Allaire, 20 N. J. L. 6, 11; Den *v.* Combs, 18 N. J. L. 27, 33 (where the words "without issue" were supplied, not expressed); Waldron *v.* Gianini, 6 Hill (N. Y.) 601, 606; Lion *v.* Burtiss, 20 Johns. (N. Y.) 483, 487; Anderson *v.* Jackson, 16 Johns. (N. Y.) 382, 436, 437, 8 Am. Dec. 330 [*explained* and *distinguished* in Wilkes *v.* Lion, 2 Cow. (N. Y.) 333, 392]; Moffat *v.* Strong, 10 Johns. (N. Y.) 12, 16; Pond *v.* Bergh, 10 Paige (N. Y.) 140, 151; Vedder *v.* Everston, 3 Paige (N. Y.) 281, 290, 293; Johnson *v.* Currin, 10 Pa. St. 498, 503; Abbott *v.* Essex County, 18 How. (U. S.) 202, 216, 15 L. ed. 352; Ranelagh *v.* Ranelagh, 2 Myl. & K. 441, 448, 7 Eng. Ch. 441, 39 Eng. Reprint 1012; Nicholls *v.* Skinner, Prec. Ch. 528, 529, 24 Eng. Reprint 236; Hughes *v.* Sayer, 1 P. Wms. 534, 535, 24 Eng. Reprint 504 (holding that the limitation over to survivors prevented the word "children" from being construed "issue" in the indefinite sense). See also Fosdick *v.* Cornell, 1 Johns. (N. Y.) 440, 452, 3 Am. Dec. 340 [*followed* as authority for the rule in Jackson *v.* Staats, 11 Johns. 337, 348, 6 Am. Dec. 376; Jackson *v.* Blanshan, 3 Johns. 292, 297, 3 Am. Dec. 485] (where the devise over to survivors, after failure of issue, was held a strong indication that the failure intended was definite); Roe *v.* Jeffery, 7 T. R. 589, 596, 101 Eng. Reprint 1147 (where such a provision was construed as intending a definite failure of issue, no direct allusion, however, being made to the force of the words of survivorship); Gould *v.* Stokes, 26 Grant Ch. (U. C.) 122, 124. *Compare* Lewis *v.* Claiborne, 5 Yerg. (Tenn.) 369, 373, 26 Am. Dec. 270 (holding that, where entails are abolished, a limitation to survivors of a class, in case of any dying without issue, applies in the construction of "dying without issue" in case of realty, as it always does in case of personalty, to a dying without issue previous to death of the first taker instead of an indefinite failure of issue); Gray *v.* Richford, 2 Can. Sup. Ct. 431, 434, 450 (where the language "die without leaving any issue . . . or the children of such issue surviving him," was held, upon much consideration of authorities, to import a definite failure of issue).

94. Johnson *v.* Currin, 10 Pa. St. 498, 503 (where it is said: "No sane man could intend to limit an estate over to persons in being upon an indefinite failure of issue of the first taker; that is, upon a failure that would happen after all those who are called survivors, and their children's children, would be in their graves"); Nicholl *v.* Skinner, Prec. Ch. 528, 529, 24 Eng. Reprint 236; Hughes *v.* Sayer, 1 P. Wms. 534, 535, 24 Eng. Reprint 504.

95. Bedford's Appeal, 40 Pa. St. 18, 23 (where the fact that the word "children" was used instead of "issue" seems to have been the main ground of decision, but it was said: "It has often been held that a limitation over by will to survivors or persons in being, after the death of the first taker without issue, raises a strong presumption that the testator did not contemplate an indefinite failure of issue"); Abbott *v.* Essex County, 18 How. (U. S.) 202, 216, 15 L. ed. 352 (where it is said: "It is true that cases may be found which decide that the term 'survivor' does not of itself necessarily import a definite failure of issue, and no doubt there are many cases where it would be necessary to disregard the obvious import of this term, in order to carry out the general intent of a testator, otherwise apparent; but a large number of English, and nearly all the American, cases acknowledge the force of this term as evidence of the testator's intending a definite contingency").

If a personal benefit to survivors is intended see Greenwood *v.* Verdon, 1 Kay & J. 74, 83, 89, 24 L. J. Ch. 65, 3 Wkly. Rep. 124, 69 Eng. Reprint 375 [*explained* in Little *v.* Billings, 27 Grant Ch. (U. C.) 353, 358]; Forsyth *v.* Galt, 21 U. C. C. P. 408, 420 [*affirmed* in 22 U. C. C. P. 115]. See also Massey *v.* Hudson, 2 Meriv. 130, 132, 16 Rev. Rep. 158, 35 Eng. Reprint 889, where, however, it was held that the presumption of such intent was destroyed by the words "executors, administrators, or assigns" in the gift to "survivor."

96. Hollett *v.* Pope, 3 Harr. (Del.) 542, 545 (holding that a legacy to three, and, in case one of them dies without issue, then to the remaining two or the survivor of them, refers to a general failure of issue); Caulk *v.* Caulk, 3 Pennew. (Del.) 528, 539, 544, 52 Atl. 340 [*repudiating* the doctrine of Anderson *v.* Jackson, 16 Johns. 382, 8 Am. Dec. 330, and *adopting*, as recognized in Delaware, the dissenting opinion therein of Chancellor Kent]; Smith's Appeal, 23 Pa. St. 9, 10 [*distinguished* in Bedford's Appeal, 40 Pa. St. 18, 23 (but only on the ground that the provision in default of issue created an entail)]; Little *v.* Billings, 27 Grant Ch. (U. C.) 353, 357 [*cited* with approval in Crawford *v.* Broddy, 25 Ont. 635, 637 (*reversed* on other grounds in 22 Ont. App. 307)].

g. Whether Creating Joint Tenancy. While words of survivorship are construed, when nothing appears to the contrary, as creating a joint tenancy,[97] they do not necessarily do so.[98] The limitation of survivorship involved in joint tenancy and that which may be annexed to a tenancy in common are not the same,[99] and tenancy in common and words of survivorship have been reconciled by referring such words to the contingency of death of one of the tenants in common under age [1] or to the death of the testator.[2]

2. In Deeds.[3] In a deed, as in a will, the question to what period words of survivorship are intended to relate is one of construction.[4] Survivorship to a

The limitation may be too remote to prevent the failure of issue on which it depends from being regarded, according to the general rule, as indefinite; as where the gift over on death without issue of either of two legatees, to the survivor of them, is followed by the words "his or her executors, administrators, or assigns," whereby the presumption, that a mere personal benefit was intended for the survivor, is excluded (Massey *v.* Hudson, 2 Meriv. 130, 132, 134, 16 Rev. Rep. 158, 35 Eng. Reprint 889); or where a gift over on death of the first taker without issue is to several, named, one of whom is to take only for life and her part to be divided between the survivors, "survivors" being construed "others" so that the gift to them does not even depend upon their being alive at the death of that life-tenant (Barlow *v.* Salter, 17 Ves. Jr. 479, 482, 484, 34 Eng. Reprint 185).

97. Barker *v.* Giles, 2 P. Wms. 280, 283, 24 Eng. Reprint 730 [*affirmed* in 3 Bro. P. C. 104, 1 Eng. Reprint 1206, and *explained* in Garland *v.* Thomas, 1 B. & P. N. R. 82, 91, as having "turned on the meaning of the word 'survivor,' to which Lord Chancellor 'King' could not give effect without making it a joint-tenancy"]; Folkes *v.* Western, 9 Ves. Jr. 456, 461, 7 Rev. Rep. 271, 32 Eng. Reprint 679. *Compare* Doe *v.* Tomkinson, 2 M. & S. 165, 170, 105 Eng. Reprint 344, where, although the court did not say that the words of survivorship created a joint tenancy, it was held that they at least prevented a tenancy in common in fee, and that if they created a tenancy in common with contingent remainder to the survivor, such remainder was not devisable, since the survivor could not be ascertained until the contingency took place.

A devise over after the death of the survivor following gift to a class has been held conclusive to show the intention to create a joint tenancy in spite of expressions in general construed to create a tenancy in common. Armstrong *v.* Eldridge, 3 Bro. Ch. 215, 216, 29 Eng. Reprint 497.

98. Perry *v.* Woods, 3 Ves. Jr. 204, 206, 30 Eng. Reprint 970; McArthur *v.* Flett, 11 Can. L. T. Occ. Notes 222 (holding that the expression "with survivorship between the different lines" merely annexed, to the tenancy in common previously bequeathed, the incident of survivorship including issue). See also *supra*, p. 634 text and note 56; *infra*, text and notes 99–1.

Accompanied by words of severance, words of survivorship do not create a joint tenancy. Fisher *v.* Anderson, 4 Can. Sup. Ct. 406, 415, 421 [*reversing* 13 Nova Scotia 177].

99. Taaffe *v.* Conmee, 10 H. L. Cas. 64, 78, 8 Jur. N. S. 919, 6 L. T. Rep. N. S. 666, 11 Eng. Reprint 949 (where it is said: "It has been sometimes objected that this interpretation of the word 'survivor,' cannot be adopted where there is a gift to several persons as tenants in common, not as joint tenants. But there is obviously a very great distinction between the limitation of survivorship that is involved in a gift of joint tenancy, and the limitation of the word 'survivor' which is annexed to a tenancy in common. The survivorship involved in an estate in joint tenancy is that which is capable of being defeated at the pleasure of the joint tenant, so that if, by alienation or otherwise, the joint tenancy is converted into a tenancy in common, the survivorship ceases; but when a gift to the 'survivor' is annexed to a tenancy in common and not to a joint tenancy, then the limitation takes effect by virtue of the gift, and not by virtue of something involved in a limitation of joint tenancy"); Quarm *v.* Quarm, [1892] 1 Q. B. 184, 186, 188, 61 L. J. Q. B. 154, 66 L. T. Rep. N. S. 418, 40 Wkly. Rep. 302 (where it is held that a devise to several "as joint tenants," and not as tenants in common, "and to the survivor or longest liver of them, his, or her heirs and assigns for ever" creates a joint tenancy for life, with a contingent remainder in fee simple to the last survivor, and said: "It is admitted that the appeal must fail if the effect of the gift . . . was to give the ultimate survivor of the joint devisees, not the mere benefit of survivorship incident to a joint estate, but a separate estate in remainder after joint life estates."

1. Haws *v.* Haws, 3 Atk. 524, 26 Eng. Reprint 1102; Stones *v.* Heurtly, 1 Ves. 165, 167, 27 Eng. Reprint 959.

2. See *supra*, p. 634 text and note 56.

3. **Wife surviving coverture** see *infra*, p. 646 text and note 11.

4. Brown *v.* Brown, 31 Gratt. (Va.) 502, 515 (where it was held that, as used in a deed of settlement or marriage contract whereby the husband covenanted that as soon as possible after his death a fund should be raised to be held in trust for the issue of the marriage, as tenants in common "with benefit of survivorship," the wife to take a child's part during her life, the words "of survivorship" did not relate to the deaths of members of the class, and did refer to the period of distribution, and the opinion was

class may be extended to the lines of issue of deceased members of the class,[5] but not against the intention of the grantor.[6]

3. Surviving Executors and Trustees. Such words, applied to executors or trustees, do not include persons who are merely nominated by the will and are not actually in the capacity.[7] Such a word may include one continuing to act, as distinguished both from those who refuse to act and those who discontinue acting.[8] A personal trust to be carried out by executors or their survivors cannot

expressed that that period was the time of the widow's death, although whether that, or the death of the husband, was practically immaterial, since all the children survived both); Westbrooke *v.* Romeyn, 29 Fed. Cas. No. 17,428, Baldw. 196, 201 (construing a deed to M, a son of grantor, and the heirs of his body, and if he die without issue "them" to the surviving sons and daughters of the grantor; two shares to a son, one to a daughter, and the heirs of their bodies, and in case any or either of said sons or daughters died without issue "then" their shares in like proportions to the survivors or their heirs, and in default of issue in them the surviving sons and daughters, over to the grantor's right heirs, and holding that in all three limitations the word "surviving" was intended to apply to those sons and daughters who should outlive M, the first taker, and not to those who should merely survive the grantor, taking into consideration the use of the word "then" [misprinted "them" in the opinion at p. 201] referring to the death of M; also the proportions of the shares; also the fact that the limitations over was on the death of all the surviving sons and daughters, which must mean those who survive M in the first place, and next, those who survive each other).

Referred to death of any of class without issue see Doe *v.* Wainewright, 5 T. R. 427, 431, 101 Eng. Reprint 240.

"Other" rejected.— In construing a deed where it was clear that the survivorship was not intended to relate to the death of the testator it was said: "Were we to substitute 'other' for 'surviving,' it would be going further in a court of law in a deed, than courts of equity have done in a will; such substitution is made only where the plain intention of the testator, or some other provision of the will would be defeated, by giving the words their natural meaning." Westbrooke *v.* Romeyn, 29 Fed. Cas. No. 17,428, Baldw. 196, 202.

Rule favoring time of distribution applied to deed see Westbrooke *v.* Romeyn, 29 Fed. Cas. No. 17,428, Baldw. 196, 202, where in construing a deed the rule for construction in wills is invoked as follows: "As a general rule, words of survivorship relate to the time or event when the thing devised is to be distributed or enjoyed, and not to the time when the will took effect by the testator's death. Their reference to the latter period, is to effectuate some special intent, to preserve an estate previously given, or to prevent a lapse, which are exceptions to the rule; . . . and were it the will" of the donor "we could not, consistently with the rules of courts of equity, give it the construction contended for," i. e. referring to testator's death.

5. Brown *v.* Brown, 31 Gratt. (Va.) 502, 515 (holding that, where the intention of the covenantor to divide equally among all his children is clear, the words "with benefit of survivorship" in the gift to them, will not alter the result, the shares of those who die at least after the period of distribution, going to their issue instead of accruing to the last survivor); Doe *v.* Wainewright, 5 T. R. 427, 431, 101 Eng. Reprint 240 [*cited* in Wake *v.* Varah, 2 Ch. D. 348, 356, 45 L. J. Ch. 533, 34 L. T. Rep. N. S. 437, 24 Wkly. Rep. 621 (a case of a will), and *distinguished* in Dooling *v.* Hobbs, 5 Harr. (Del.) 405, 407 (a case of a will)], so holding where the ultimate limitation was only to take effect on the death of all the children without issue).

6. Westbrooke *v.* Romeyn, 29 Fed. Cas. No. 17,428, Baldw. 196, 204, construing a deed where "issue" was used only as a word of limitation in tail, and not by way of description.

7. Herrick *v.* Carpenter, 92 Mich. 440, 448, 52 N. W. 747 (holding that "survivors or survivor" of executors does not include such as have not accepted the trust); Nicholson *v.* Field, [1893] 2 Ch. 511, 512, 62 L. J. Ch. 1015, 69 L. T. Rep. N. S. 299, 3 Reports 528, 42 Wkly. Rep. 48 (holding that under Conveyancing and Law of Property Act (1881), 44 & 45 Vict. c. 41), § 31, providing that a new trustee under a will may be appointed by the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, the appointment cannot be made by the survivor of two persons, neither of whom has been a trustee, so that, where both the trustees named in the will die before the testator, the personal representatives of the survivor of these cannot make the appointment).

8. Sharp *v.* Sharp, 2 B. & Ald. 405, 413, 106 Eng. Reprint 414. *Compare*, however, Blanton *v.* Mayes, 58 Tex. 422, 427, where, an estate being devised to three persons named and the survivors of them in trust and by another clause the same three named as executors, of whom only one qualified, on objection to a sale of land by that one as trustee, it was said: "In the exercise of the powers thus conferred, the contingency that would authorize less than the whole number to act independently of the court is clearly indicated by the expression 'to the survivor of them.' The death of one or more of the trustees named seems to have been intended

be carried out by new executors.[9] Directions to trustees "or their survivors" have been held to indicate an intention that they should take, not in their personal capacity, but officially as a class.[10]

4. Surviving Spouse. Either through the death of her husband or by means of divorce, a wife may survive her coverture;[11] she may be said to survive her husband by divorce[12] or her survivorship may be confined to his death.[13] Words importing survivorship between husband and wife as devisees or legatees are not necessarily confined to the case of the spouse living as such at the date of the will.[14] A devise to one for life and during the life of his wife or the survivor does not carry the life-estate after his death to the widow.[15]

5. As Used by Mutual Benefit Societies. In some cases words of survivorship used in relation to members of mutual benefit societies have needed judicial construction.[16] (Survivorship: In General, see Death, 13 Cyc. 308. Affecting — Exemption Rights, see Exemption, 18 Cyc. 1401; Homestead Rights, see Homesteads, 21 Cyc. 562; Inheritance, see Descent and Distribution, 14 Cyc. 62, 123. Allowance to Husband, Wife, or Children on, see Executors and Administrators, 18 Cyc. 373. Competency of — Parties or Persons Interested to Testify Against Survivor of Joint Parties as to Transactions With Deceased Party Thereto, see Witnesses; Survivor to Testify to Transactions With Deceased Person, see Witnesses. Construction of — Deed as to Conveyance of Estate Conditioned on, see Deeds, 13 Cyc. 648; Marriage Settlement as to Rights of Sur-

as the 'sole' event that would authorize one alone to administer the estate and execute the trust independent of the controlling power of the courts;" where, however, the real reason for the decision seems to have been the lack of any express power of sale in the will, rather than the lack of authority in the single trustee while the other nominees were alive.

9. Hibbard *v.* Lamb, Ambl. 309, 27 Eng. Reprint 209.

10. Boys' Home *v.* Lewis, 4 Ont. 18, 23, 24.

11. **Deed** so construed see *In re* Crawford, [1905] 1 Ch. 11, 14, 74 L. J. Ch. 22, 91 L. T. Rep. N. S. 683, 53 Wkly. Rep. 107, where the language was, "if she shall survive her now intended coverture."

12. **Will** so construed see Cary *v.* Slead, 220 Ill. 508, 513, 77 N. W. 234, holding that the words if she survive her "present husband" may refer to surviving either the individual or the marriage relation, and that the intent of the testator included the case of a divorce.

13. **Statute** so construed see Fletcher *v.* Monroe, 145 Ind. 56, 58, 59, 43 N. E. 1053 (holding that in Rev. St. (1894) § 2652; Rev. St. (1881) § 2491, providing for the share of a surviving wife in her husband's real estate, "surviving wife" means a surviving widow and does not include a divorced wife, although she herself has obtained the divorce). See also Wiseman *v.* Wiseman, 73 Ind. 112, 114, 38 Am. Rep. 115, where, with reference to the statutory right of the surviving wife in her husband's lands, it is said: "A woman who has been divorced from her husband cannot, of course, be deemed a surviving wife, but, unless there has been a judicial decree, dissolving the marital relation, the wife who outlives her husband is the surviving wife, no matter how bad her conduct may have been."

14. **Where no one wife is specified** a second may take as surviving the husband, although he had another living at the date of the will. *In re* Lyne, L. R. 8 Eq. 65, 67, 38 L. J. Ch. 471, 20 L. T. Rep. N. S. 735, 17 Wkly. Rep. 840; Wilmot *v.* De Mill, 32 N. Brunsw. 8, 11, 19, 24.

Confined to husband named in will see *Ex p.* Bryan, 21 L. J. Ch. 7, 8, 2 Sim. N. S. 103, 105, 42 Eng. Ch. 103, 61 Eng. Reprint 279.

15. Wilson *v.* Butler, 2 Ont. L. Rep. 576, 577, 578.

16. **Vagueness.**— The word "survivors" is too vague necessarily to include the husband and children of a deceased woman, and as used in the constitution of a mutual aid society, providing indemnity for payments to survivors of a deceased member, may be shown by evidence not to include her husband. Slavik *v.* Supreme Lodge B. L. A. S., 59 Misc. (N. Y.) 183, 185, 186, 110 N. Y. Suppl. 347.

"Assessments upon surviving members" as the phrase is used in a statute, requiring insurance companies on the assessment plan to show by their constitutions and by-laws that indemnities to beneficiaries are in the main provided for by such assessments, are understood to be assessments to meet the loss caused by the death of a member, made after his death upon those members who survive him, and "surviving" does not refer to policies, or to members whose policies have not lapsed. Mutual Ben. L. Ins. Co. *v.* Marye, 85 Va. 643, 645, 647, 8 S. E. 481.

"Survivor" does not include one who was neither a relative of deceased nor member of his household, nor connected with him by marriage, when used to describe the class to which beneficiaries' rights are limited by the laws of this society, party to the case. Koerts *v.* Grand Lodge O. H. S., 119 Wis. 520, 525, 97 N. W. 163 [*followed* in Grand Lodge O. H. S. *v.* Lemke, 124 Wis. 483, 487, 102 N. W. 911].

vivors in General, see HUSBAND AND WIFE, 21 Cyc. 1262; Will, see WILLS. Execution of Power of Sale by Surviving Trustee in Trust Deed, see MORTGAGES, 27 Cyc. 1461. Joint or Several Authority to Execute Powers, see POWERS, 31 Cyc. 1106. Of Devisees or Legatees, see WILLS. Of Executors or Administrators, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1347. Of Husband — Affecting Rights in Wife's Separate Property, see HUSBAND AND WIFE, 21 Cyc. 1412; Affecting Right to Wife's Choses in Action, see HUSBAND AND WIFE, 21 Cyc. 1179; Requisites of Common-Law Estate by the Curtesy, see CURTESY, 12 Cyc. 1008. Of Husband or Wife — Affecting Rights of Inheritance, see DESCENT AND DISTRIBUTION, 14 Cyc. 62, 123; As to Community Property, see HUSBAND AND WIFE, 21 Cyc. 1701; As to Homestead, see HOMESTEADS, 21 Cyc. 562; As to Property Conveyed to Husband and Wife, see HUSBAND AND WIFE, 21 Cyc. 1201. Of Joint — Promisees in Contract, see CONTRACTS, 9 Cyc. 656; Tenants, see JOINT TENANCY, 23 Cyc. 488. Of Partner, see PARTNERSHIP, 30 Cyc. 620. Of Trustees, see TRUSTS. Revival of Action By or Against Surviving Parties, see ABATEMENT AND REVIVAL, 1 Cyc. 97.)

SUSPECT. To imagine to exist; to have a slight or vague opinion of the existence of, without proof, and often upon weak evidence or no evidence; to mistrust; to surmise.[17] (See SUSPICION, and Cross-References Thereunder, *post*, p. 652.)

SUSPEND. To cause to cease for a time; to hinder from proceeding; to interrupt; to delay; to stay;[18] to cause to cease for a time; to interrupt; to delay;[19] to interrupt, to intermit, to cause to cease for a time, to stay and delay or hinder the proceedings for a time;[20] to cause to cease for a while;[21] a word which in its natural signification rather imports something which may not be permanent than that which necessarily is so;[22] but which, while it ordinarily implies a temporary

17. Webster Int. Dict.

Not a technical word see Com. *v.* Lottery Tickets, 5 Cush. (Mass.) 369, 373.

"Suspects" not a substitute for "believes" required in a statutory complaint for a search warrant (Com. *v.* Lottery Tickets, 5 Cush. (Mass.) 369, 373; Humes *v.* Taber, 1 R. I. 464, 470); or a customary oath for arrest on belief (Smith *v.* Boucher, Cas. t. Hardw. 62, 67, 95 Eng. Reprint 39, Ridg. t. Hardw. 136, 140, 27 Eng. Reprint 782, Str. 993, 93 Eng. Reprint 989 (*sub nom.* "Smith *v.* Bouchier") [*cited* in Com. *v.* Lottery Tickets, *supra*].

"Such suspected person" used, with reference to the preamble, in 3 Geo. IV, c. 55, § 21, relating to the apprehension of reputed thieves, seemingly taken as an indication that "reputed" as used in the statute means "generally reputed" see Cowles *v.* Dunbar, 2 C. & P. 565, 567, 12 E. C. L. 735.

"Suspected of evil" see *Ex p.* Hopkins, 17 Cox C. C. 444, 454, 61 L. J. Q. B. 240, 66 L. T. Rep. N. S. 53.

"'Suspecting' is not 'believing.'"— Smith *v.* Boucher, Cas. t. Hardw. 62, 67, 95 Eng. Reprint 39, Ridg. t. Hardw. 136, 140, 27 Eng. Reprint 782, Sta. 993, 93 Eng. Reprint 989 [*quoted* in Com. *v.* Lottery Tickets, 5 Cush. (Mass.) 364, 374].

In Diseases of Animals Act 1894 (57 & 58 Vict. c. 57, § 59), for the purposes of that statute, "suspected" is defined as "suspected of being diseased." See 3 Stroud Jud. Dict. 2001.

18. Webster Dict. [*quoted* in Little Rock *v.* Parish, 36 Ark. 166, 174].

"Suspend the operation."— The words have no technical meaning. Little Rock *v.* Parish, 36 Ark. 166, 174, construing the phrase as applied to law.

19. State *v.* Melvin, 166 Mo. 565, 573, 66 S. W. 534.

20. Webster Dict. [*quoted* in Virginia F. & M. Ins. Co. *v.* Aiken, 82 Va. 424, 428].

21. Robinson *v.* Kistler, 62 W. Va. 489, 494, 59 S. E. 505.

22. See Crook *v.* Morley, [1891] A. C. 316, 319, 61 L. J. Q. B. 97, 65 L. T. Rep. N. S. 389.

Not synonymous with "postpone."—A provision in a contract that deliveries may be "suspended" in case of strikes, does not mean that they may be "postponed," and "the two words are not synonymous." A charge to the effect that, if owing to such cause the deliveries could not be made within the period fixed by the contract, the vendor was released from his guaranty to deliver, is correct. Hull Coal, etc., Co. *v.* Empire Coal, etc., Co., 113 Fed. 256, 259, 51 C. C. A. 213. *Compare*, however, the opinion, concurring in the result, of Simonton, J., at p. 263, where to "be suspended" is explained as meaning to "cease temporarily."

A suspended member is still a member of a society whose by-laws recognize the distinction between suspension and expulsion. Palmetto Lodge No. 5 I. O. O. F. *v.* Hubbell, 2 Strobh. (S. C.) 457, 462, 49 Am. Dec. 604. Within the meaning of a provision of the by-law of a mutual benefit society that any member failing to pay his assessment within thirty days shall be "suspended" merely by such non-payment, the action of the officer in charge of the books of the lodge in drawing a black line around such a member's account therein and marking it "suspended,"

cessation, may, in certain connections, imply a termination.[23] (See SUSPENSION, and Cross-References Thereunder. See also DELAY, 13 Cyc. 767; HINDER, 21 Cyc. 436; INTERRUPT, 23 Cyc. 39; STAY, 36 Cyc. 1257.)

SUSPENDED LOAN. See BANKS AND BANKING, 5 Cyc. 583 note 19.

SUSPENSE. A temporal, that is temporary, stop of a man's right.[24] In legal understanding that which occurs when a seigniory, rent, profit apprender, etc., by reason of unity of possession of the seigniory, rent, etc., and of the land out of which they issue are not *in esse* for a time *et tunc dormiunt*, but may be revived or awaked.[25] (See also SUSPENSION.)

SUSPENSION. Temporary cessation; delay; intermission; stay;[26] a temporal,

according to custom, without any punitive action of the lodge, and where the subordinate lodge has paid the amount of the assessment to the grand lodge, does not prevent such member's widow or heirs from recovering from the grand lodge, upon his death, the sum payable on the death of a member. Scheu *v.* Grand Lodge I. F., 17 Fed. 214, 215.

Suspended business.—A corporation has "suspended business" within the meaning of Gen. St. (1899) § 1628; Gen. St. (1897) c. 66, § 45, where it has ceased to do its ordinary and usual business, even though it is engaged in such acts of business as are done with a view to a cessation of its affairs (Jones *v.* Slonecker, 66 Kan. 286, 291, 292, 71 Pac. 573; Brigham *v.* Nathan, 62 Kan. 243, 246, 62 Pac. 319; Jones *v.* Edson, 10 Kan. App. 110, 62 Pac. 249, 250); nor does a single corporate act or an occasional corporate act prevent the business from being so suspended (Jones *v.* Edson, *supra*).

Suspended not "quashed"—"Superseded" stronger.—A statute which provides that on the finding of a second indictment the first shall be "suspended" and "quashed" means only that it shall be quashed during the existence of the second indictment, by the removal of which new life and validity may be imparted to it. A stronger word than "suspended" is "superseded," used in the New York statute on the same subject, yet under that statute it has been held that the first indictment was only "liable" to be quashed and not in fact quashed. State *v.* Melvin, 166 Mo. 565, 572, 66 S. W. 534 [*overruling* a *dictum* in State *v.* Daugherty, 106 Mo. 182, 17 S. W. 303], construing Rev. St. (1899) § 2522.

Not "dissolve" relations.—A presbytery of the reformed presbyterian church passed a resolution suspending its relations with the synod until further light should be obtained, for unconstitutional interference. "It but intermitted the relations of the Presbytery and Church with the Synod, but it worked no dissolution of the organic connection." McAuley's Appeal, 77 Pa. St. 397, 418.

Applied to right of action in an agreement that the right of action on notes shall be suspended as long as certain quarterly payments were made "suspended" does not imply a legal suspension of the right, for that would result in its extinction, which was not intended, but that the creditor will forbear his suit until such payment shall cease to be made. Ford *v.* Beech, 11 Q. B. 852, 867, 868, 869, 5 D. & L. 610, 12 Jur. 310, 17 L. J. Q. B. 114, 63 E. C. L. 852.

23. See McNamara *v.* New York, 152 N. Y. 228, 232, 46 N. E. 507, where it is said: "While the word 'suspend' ordinarily means a temporary cessation, the connection in which it is used may give it a stronger meaning, and when, as in this case, the suspension was accompanied with a reason showing that there was no further right to continue the relation theretofore existing, we regard it as conclusive evidence of the intention to terminate the connection."

May be to "dispense with" a rule.—A motion that the rules be "suspended" is not substantially or materially at variance with Code, § 489, requiring that a town council for certain purposes "dispense with" a certain rule. Bayard *v.* Baker, 76 Iowa 220, 222, 40 N. W. 818.

"Suspended" whether "removed."—"Suspended" is not "removed," and as used in Comp. St. c. 18, art. 2, § 9, relating to vacancies in an office, is not synonymous with "removed" in other sections of the same article (State *v.* Meeker, 19 Nebr. 444, 447, 27 N. W. 427); but a person notified that he is "suspended from further duty," such so-called suspension being a removal in fact, is "removed" and cannot succeed in an action for unlawful suspension when reinstated. The language in which he was notified is not material if the intent to remove is clear (Donnell *v.* New York, 68 Hun (N. Y.) 55, 57, 22 N. Y. Suppl. 661).

24. See 3 Stroud Jud. Dict. 2002 [*quoting* and *explaining* Cowell L. Dict.].

25. See 3 Stroud Jud. Dict. 2002 [*quoting* Coke Litt. 313*a*].

"Suspence commeth of *suspendeo*." Stroud Jud. Dict. 2002 [*quoting* Coke Litt. 313*a*].

26. Worcester Dict. [*quoted* in McAuley's Appeal, 77 Pa. St. 397, 418].

A suspension of administration as contemplated by Pub. St. (1901) c. 191, §§ 2, 4, is "one occasioned by the death, resignation, removal, and the like of an original administrator upon a deceased debtor's estate, within the period prescribed for the presentation of claims or the bringing of suits, and has no reference to a suspension of administration upon the estate of a deceased creditor." A mere failure to apply for administration is not a suspension within the meaning of these sections. Cummings *v.* Farnham, (N. H. 1908) 71 Atl. 632, 634.

that is temporary, stop of a man's right.[27] From office, a deprivation of office for the time;[28] exclusively an interruption in the exercise of the officer's duties, of his authority.[29] Of an employee, a temporary interruption or cessation of labor.[30] Of payment, a term which contains the idea of the failure to pay from inability to do so.[31] Of a right in an estate, a partial extinguishment thereof, or an extin-

Mere suspension of the execution of a contract is not an abandonment, and such suspension under a clause of a state contract, itself providing that if the execution of the contract shall be suspended by the state at any time for any cause no claim for prospective profits of work not done shall be made or allowed, but the contractors shall complete the work when the state shall order it resumed, would not be a breach, but the termination of a contract by the state is a breach when there is no provision therefor. Baker *v.* State, 77 N. Y. App. Div. 528, 531, 78 N. Y. Suppl. 922.

Suspension of partnership distinguished from "dissolution" see Williston *v.* Camp, 9 Mont. 88, 96, 22 Pac. 501, holding that an assignment for creditors of the firm might be said correctly to have "suspended" its business without saying that it dissolved the partnership.

Suspension of rent.— "It would avoid dispute to provide that the rent shall 'cease and be suspended' or shall 'be suspended and cease to be payable'" during eviction. See 3 Stroud Jud. Dict. 2001.

27. See 3 Stroud L. Dict. 2002 [*quoting* and *explaining* Cowell L. Dict.].

28. *Ex p.* Diggs, 52 Ala. 381, 383.

Distinguished from removal see State *v.* Richmond, 29 La. Ann. 705, 706; Stack *v.* O'Hara, 98 Pa. St. 213, 232; Poe *v.* State, 72 Tex. 625, 629, 10 S. W. 737. *Compare* Nolen *v.* State, 118 Ala. 154, 159, 24 So. 251.

Permanent "suspension" equal to removal. — A "suspension" which is to continue perpetually unless the person suspended be restored to office by a joint resolution of the general assembly is in legal contemplation a removal, and St. (1886–1887) p. 1, undertaking to authorize the governor so to "suspend" tax assessors, is void as a violation of the constitution, since that prescribes the only mode by which a tax assessor can be removed. Nolen *v.* State, 118 Ala. 154, 159, 24 So. 251. *Compare*, however, Poe *v.* State, 72 Tex. 625, 629, 10 S. W. 737, where it is said: "While the suspension is by the terms of the law only a temporary deprivation of the office, it in every case may be what it in effect was in this, a permanent deprivation of the office. Still, a suspension is in no proper sense the same thing as a removal. We are not at liberty by construction or otherwise to hold that the provisions of the Constitution with regard to removals apply equally to suspensions from office."

As applied to a priest of the Roman catholic church, "suspension is a judicial act based on something which calls for such sentence" and a "sentence of suspension follows a trial for an offense, from which the priest may appeal." Suspension is not to be confounded with "removal" which is "the exercise of episcopal authority according to the bishop's judgment. It may be without supposition of wrong, and it leaves the priest . . . without employment." Stack *v.* O'Hara, 98 Pa. St. 213, 232.

A statute prescribing suspension from office as the consequence of some act or event is penal, and is therefore not to be enlarged in its scope by construction, and cannot be retroactive. *Ex p.* Diggs, 52 Ala. 381, 383, in regard to the effect of St. No. 155, March 2, 1875, providing for the suspension of a county solicitor against whom an indictment is pending.

29. State *v.* Richmond, 29 La. Ann. 705, 706.

30. Lethbridge *v.* New York, 59 N. Y. Super. Ct. 486, 487, 15 N. Y. Suppl. 562, the opinion at special term, there affirmed.

Distinguished from removal see Lethbridge *v.* New York, 59 N. Y. Super. Ct. 486, 487, 15 N. Y. Suppl. 562.

May be discharge.— See McNamara *v.* New York, 152 N. Y. 228, 233, 46 N. E. 507 (where it is said: "Suspension without pay because there is no work is a practical discharge"); Wardlaw *v.* New York, 137 N. Y. 194, 197, 33 N. E. 140 [*quoted* in McNamara *v.* New York, *supra*] (holding that if the plaintiff "understood . . . that his services were no longer required . . . and that compensation was no longer to be paid to him . . . and that such was the purpose of this notice from the commissioner and both parties acted accordingly, then the . . . notice operated to terminate the employment, though it was called a suspension instead of a dismissal").

31. See *In re* Wolf, 30 Fed. Cas. No. 17,923, 4 Sawy. 168, 169, 17 Nat. Bankr. Reg. 423, where, in holding that the fact that a note payable "one day after date" remained due forty days did not constitute such a suspension of payment as to amount to an act of bankruptcy, it was said: "Suspension of payment means something more than a failure of the maker of such paper as this to seek the holder and pay him. Business men understand very well what the term means; there is the idea in it of a failure to pay from an inability to do so."

Need not be permanent to come within the meaning of the words of the Bankr. Act (1883), § 4, subs. 1, clause h, "if the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts." Crook *v.* Morley, [1891] A. C. 316, 319, 61 L. J. Q. B. 97, 65 L. T. Rep. N. S. 389.

By trader.— A suspension of payment within the meaning of Bankrupt Law Consolidation Act (12 & 13 Vict. c. 106, § 225) takes place where a trader who is unable to meet his engagements with his creditors and is desirous of laying the state of affairs before them enters into such an arrangement as an assignment for creditors, and a plea

guishment for a time;[32] a partial extinguishment, which takes place only where the rent, or other profit *a prendre* issuing out of the land comes to him who has possession of the same land for a time only.[33] Of sentence, an interregnum of the period between sentence and final judgment.[34] Of the writ of habeas corpus, the denial to the citizen of the right to demand an investigation into the cause of his detention.[35] (Suspension: Of Absolute — Ownership of Personalty, see PERPETUITIES, 30 Cyc. 1507; Power of Alienation, see PERPETUITIES, 30 Cyc. 1502. Of Agent of Municipal Corporation — In General, see MUNICIPAL CORPORATIONS, 28 Cyc. 593; Affecting Right to Compensation, see MUNICIPAL CORPORATIONS, 28 Cyc. 603. Of Attorney, see ATTORNEY AND CLIENT, 4 Cyc. 905. Of Business — Carried on in Building as Affecting Right to Insurance, see FIRE INSURANCE, 19 Cyc. 723; Of Corporation as Dissolution Thereof, see CORPORATIONS, 10 Cyc. 1282; Through Failure to Deliver Goods as Element of Damages in Action by Buyer For Breach of Contract, see SALES, 35 Cyc. 644. Of Cause of Action, see ACTIONS, 1 Cyc. 682. Of Charter of Inferior by Superior Body of Mutual Benefit Corporation or Association, see MUTUAL BENEFIT INSURANCE, 29 Cyc. 45. Of Civilian Employee of Army or Navy, see ARMY AND NAVY, 3 Cyc. 842. Of Clerk of Court, see CLERKS OF COURTS, 7 Cyc. 204. Of Constable, see SHERIFFS AND CONSTABLES, 35 Cyc. 1514. Of County Officer, see COUNTIES, 11 Cyc. 426. Of Ecclesiastical Connections, Powers of Religious Societies as to, see RELIGIOUS SOCIETIES, 34 Cyc. 1141 note 65. Of Fireman, see MUNICIPAL CORPORATIONS, 28 Cyc. 553. Of Habeas Corpus, see HABEAS CORPUS, 21 Cyc. 352. Of Injunction, see INJUNCTIONS, 22 Cyc. 970. Of Interest, see INTEREST, 22 Cyc. 1553. Of Judgment — In General, see JUDGMENTS, 23 Cyc. 1427; Effect on Limitation of, see JUDGMENTS, 23 Cyc. 1438; Effect on Time For Appeal, see APPEAL AND ERROR, 2 Cyc. 794; Pending Appeal From Justice of the Peace, see JUSTICES OF THE PEACE, 24 Cyc. 611 note 74. Of Judgment Lien, see JUDGMENTS, 23 Cyc. 1401. Of Judicial Action by Vacancy in Office of Judge, see JUDGES, 23 Cyc. 522. Of Land Entry, see PUBLIC LANDS, 32 Cyc. 1011. Of Liquor Law by Local Option Law, see INTOXICATING LIQUORS, 23 Cyc. 93 note 45. Of Marine Insurance Risk, see MARINE INSURANCE, 26 Cyc. 601. Of Member of — Exchange, see EXCHANGES, 17 Cyc. 859; Mutual Benefit Insurance Corporation or Association, see MUTUAL BENEFIT INSURANCE, 29 Cyc. 31; Religious Society, see RELIGIOUS SOCIETIES, 34 Cyc. 1125 note 51. Of Municipal — Officer, see MUNICIPAL CORPORATIONS, 28 Cyc. 432; Ordinance, see MUNICIPAL CORPORATIONS, 28 Cyc. 387. Of Notary, see NOTARIES, 29 Cyc. 1074. Of Officer — In General, see OFFICERS, 29 Cyc. 1405; Effect on Right to Compensation, see OFFICERS, 29 Cyc. 1424; Mandamus as Remedy For Reinstatement, see MANDAMUS, 26 Cyc. 260; Right to Trial by Jury

stating that defendant was a trader and was indebted to divers persons in divers sums, and was unable to pay the same in full, is good as disclosing a suspension of payment, at least upon general demurrer, although it might perhaps not be so on special demurrer. Phillips *v.* Surridge, 9 C. B. 743, 763, 766, 67 E. C. L. 743.

32. Dyer *v.* Dyer, 17 R. I. 547, 550, 23 Atl. 910.

"It differs from an extinguishment in this: a suspended right may be revived, while one extinguished is absolutely dead." Dyer *v.* Dyer, 17 R. I. 547, 550, 23 Atl. 910.

33. See Burton *v.* Barclay, 7 Bing. 744, 759, 9 L. J. C. P. O. S. 231, 5 M. & P. 785, 20 E. C. L. 331.

34. People *v.* Webster, 14 Misc. (N. Y.) 617, 618, 36 N. Y. Suppl. 745, 11 N. Y. Cr. 484.

As suspension of judgment see People *v.* Markham, 114 N. Y. App. Div. 387, 389, 99 N. Y. Suppl. 1092.

"The distinction between a reprieve and a suspension of sentence, although the words are sometimes used interchangeably, is that a reprieve postpones the execution of the sentence to a day certain, whereas a suspension is for an indefinite time." *In re* Buchanan, 146 N. Y. 264, 273, 40 N. E. 883. To the same effect see Carnal *v.* People, 1 Park. Cr. (N. Y.) 262, 266.

Power to suspend sentence "implies the power, at the expiration of the suspension, to complete the work . . . the power is worthless, and does not in fact exist, if a suspended right to impose a sentence may not be exercised at the termination of the period of suspension." People *v.* Webster, 14 Misc. (N. Y.) 617, 618, 36 N. Y. Suppl. 745, 11 N. Y. Cr. 484.

35. State *v.* Towery, 143 Ala. 48, 39 So. 309, defining suspension of the writ of habeas corpus as prohibited by Bill of Rights (Const. (1874) § 18).

in Proceedings For, see JURIES, 24 Cyc. 134. Of Operation of Railroad as Revocation or Forfeiture of Charter or Franchise, see RAILROADS, 33 Cyc. 80. Of Payment From Police Pension or Benefit Fund, see MUNICIPAL CORPORATIONS, 28 Cyc. 532. Of Pilot's License, see PILOTS, 30 Cyc. 1612. Of Policeman — In General, see MUNICIPAL CORPORATIONS, 28 Cyc. 523; Compensation During, see MUNICIPAL CORPORATIONS, 28 Cyc. 525. Of Policy as Defense to Action on Premium Notes, see FIRE INSURANCE, 19 Cyc. 615. Of Postal Service, Effect of as to Compensation to Carrying Mails, see POST-OFFICE, 31 Cyc. 993. Of Postmaster — In General, see POST-OFFICE, 31 Cyc. 977; Compensation During, see POST-OFFICE, 31 Cyc. 977. Of Power — In General, see POWERS, 31 Cyc. 1054; Of Appointment of Judge, see JUDGES, 23 Cyc. 509; Of Sale in Mortgage, see MORTGAGES, 27 Cyc. 1452; Of Taxation, see TAXATION. Of Pupil, see SCHOOLS AND SCHOOL-DISTRICTS, 35 Cyc. 1140. Of Reading of Bills Before Legislature, see STATUTES, 36 Cyc. 951. Of Relation of Master and Servant Generally, see MASTER AND SERVANT, 26 Cyc. 1086. Of Right of Action and Remedy as Impairment of Contract, see CONSTITUTIONAL LAW, 8 Cyc. 1010. Of Rules of — Court, see COURTS, 11 Cyc. 743; Deliberative Body, see PARLIAMENTARY LAW, 29 Cyc. 1690; Order by Municipal Council in Passing Ordinance, see MUNICIPAL CORPORATIONS, 28 Cyc. 354; Procedure of Municipal Governing Body, see MUNICIPAL CORPORATIONS, 28 Cyc. 333. Of Sentence, see CRIMINAL LAW, 12 Cyc. 772; MUNICIPAL CORPORATIONS, 28 Cyc. 820. Of Sheriff, see SHERIFFS AND CONSTABLES, 35 Cyc. 1500. Of State Insolvency Law by Federal Bankruptcy Act, see BANKRUPTCY, 5 Cyc. 240. Of State Officer, see STATES, 36 Cyc. 861. Of Statute of Limitations — In General, see LIMITATIONS OF ACTIONS, 25 Cyc. 1278; As Against Surety, see PRINCIPAL AND SURETY, 32 Cyc. 229; As to Time Giving Rise to Presumption of Payment of Judgment, see JUDGMENTS, 23 Cyc. 1468; During War, see LIMITATIONS OF ACTIONS, 25 Cyc. 1287; Effect of Interruption of Possession During, on Adverse Possession, see ADVERSE POSSESSION, 1 Cyc. 1023; In Action Against Personal Representative, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 929; In Action by Personal Representative, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 918; In Criminal Prosecution, see CRIMINAL LAW, 12 Cyc. 256. Plea in — In General, see PLEADING, 31 Cyc. 168; Formal Commencement and Conclusion, see PLEADING, 31 Cyc. 160.)

SUSPENSIVE APPEAL. A term which, in Louisiana, is used to describe an appeal whereby execution and all other proceedings are stayed until definite judgment is rendered on the appeal.[36] (Suspensive Appeal: Dismissal of as Affecting Right to Devolutive Appeal, see APPEAL AND ERROR, 3 Cyc. 199 note 34. From Order Dissolving Injunction, see APPEAL AND ERROR, 2 Cyc. 913 note 72. Settlement of Case or Statement After Dismissal of, see APPEAL AND ERROR, 3 Cyc. 65 note 99.)

SUSPENSIVE CONDITION. The condition on which depends an obligation which is not to take effect until an uncertain event happens;[37] the equivalent of the condition precedent at common law.[38] (See CONDITION, 8 Cyc. 556 note 96, 557 note 3. See also CONDITION PRECEDENT, 8 Cyc. 558; SUSPEND, *ante*, p. 647; SUSPENSION, *ante*, p. 648.)

36. See Garland Rev. Code Pr. (La.) § 575.

37. See Moss *v.* Smoker, 2 La. Ann. 989, 991; La. Civ. Code, art. 2021 [*quoted* in New Orleans *v.* Texas, etc., R. Co., 171 U. S. 312, 332, 18 S. Ct. 875, 43 L. ed. 178].

Distinguished from "resolutory condition" see Moss *v.* Smoker, 2 La. Ann. 989, 991; La. Civ. Code, § 2021 [*quoted* in New Orleans *v.* Texas, etc., R. Co., 171 U. S. 312, 332, 18 S. Ct. 875, 43 L. ed. 178].

"The effect of a suspensive condition . . . is to suspend the obligation until the condition is accomplished or considered as accomplished; till then nothing is due; there is only an expectation that what is undertaken will be due." New Orleans *v.* Texas, etc., R. Co., 171 U. S. 312, 333, 18 S. Ct. 875, 43 L. ed. 178 [*citing* Pothier Traité des Obligations 218].

"The obligation contracted on a suspensive condition, is that which depends, either on a future and uncertain event, or on an event which has actually taken place, without its being yet known to the parties." La. Civ. Code, art. 2043 [*quoted* in New Orleans *v.* Texas, etc., R. Co., 171 U. S. 312, 333, 18 S. Ct. 875, 43 L. ed. 178].

38. New Orleans *v.* Texas, etc., R. Co., 171 U. S. 312, 334, 18 S. Ct. 875, 43 L. ed. 178.

SUSPICION. The act of suspecting or the state of being suspected, imagination, generally of something ill, distrust, mistrust, doubt;[39] the imagination of the existence of something without proof, or upon very slight evidence, or upon no evidence at all.[40] (Suspicion: As Ground For Arrest Without Warrant by — Peace Officer, see ARREST, 3 Cyc. 878; Private Person, see ARREST, 3 Cyc. 885. As Notice to Fraudulent Grantee, see FRAUDULENT CONVEYANCES, 20 Cyc. 483. Expression of as Libel or Slander, see LIBEL AND SLANDER, 25 Cyc. 361. See also SUSPECT, *ante*, p. 647; SUSPICIOUS APPEARANCE, *post*, this page; SUSPICIOUS CHARACTER, *post*, this page; SUSPICIOUS CIRCUMSTANCES, *post*, this page; SUSPICIOUS PERSON, *post*, this page; SUSPICIOUS PLACE, *post*, this page.)

SUSPICIOUS APPEARANCE. See ALTERATIONS OF INSTRUMENTS, 2 Cyc. 245. See also SUSPECT, *ante*, p. 647; SUSPICION, *ante*, this page.

SUSPICIOUS CHARACTER. See *post*, this page, note 41.

SUSPICIOUS CIRCUMSTANCES. See COMMERCIAL PAPER, 7 Cyc. 943; CONTINUANCES IN CIVIL CASES, 9 Cyc. 151 note 26. See also SUSPECT, *ante*, p. 647; SUSPICION.

SUSPICIOUS PERSON. A term which may be used to designate one of whom there is reasonable cause to believe that he has committed a felony.[41] (See SUSPECT, *ante*, p. 647; SUSPICION.)

SUSPICIOUS PLACE. A term of which it has been held that it does not apply to a place concerning which the police, after active vigilance consisting in frequent investigations, open and secret, have been able to discover no incriminating evidence.[42] (See SUSPECT, *ante*, p. 647; SUSPICION.)

SUSTAIN. To maintain; to keep alive; to support; to subsist; to nourish;[43]

39. McCalla *v.* State, 66 Ga. 346, 348.

"**That state of mind** which in a reasonable man would lead to inquiry is called mere 'suspicion.'" Stuart *v.* Farmers' Bank, 137 Wis. 66, 73, 117 N. W. 820.

"**The essence of a 'suspicion'** is that it is without known facts to support it, and in every case where a person has apparent ownership of goods, either through actual possession, or the possession of the muniments of title, there is room for a 'suspicion' that some other person may have an interest therein," so that a charge to the effect that if parties advancing money to others on an invoice and bill of lading, had sufficient facts at the time to arouse their suspicion as to whether the latter were the owners, it was their duty to inquire of the shippers, is erroneous. Kinston Cotton Mills *v.* Kuhne, 129 N. Y. App. Div. 250, 259, 113 N. Y. Suppl. 779.

Compared with "belief."—"'Suspicion' is weaker than 'belief.'" Giddens *v.* Mirk, 4 Ga. 364, 370. "Suspicion may be upon very slight grounds, and imports a less degree of certainty than belief." Humes *v.* Taber, 1 R. I. 464, 470.

"**Suspicion of negligence**" as affecting burden of proof as to contributory negligence see Gulf, etc., R. Co. *v.* Shieder, 88 Tex. 152, 164, 152, 165, 30 S. W. 902, 28 L. R. A. 538.

Facts resulting in mere suspicion, whether grave or light, of a defendant's guilt, are not sufficient to sustain the evidence of an alleged accomplice against him. McCalla *v.* State, 66 Ga. 346, 348.

40. Gulf, etc., R. Co. *v.* Shieder, 88 Tex. 152, 165, 30 S. W. 902, 28 L. R. A. 538.

41. See People *v.* Russell, 35 Misc. (N. Y.) 765, 766, 72 N. Y. Suppl. 1, where a bail bond, describing the principal as "Sus. Person," was held good, and it was said: "That the abbreviated term used indicates no offense in law is not so plain. Where there is reasonable cause to believe that a person has committed a felony he may be arrested without a warrant. Code Crim. Pro., § 177. Yet the belief is generally nothing more than a well-grounded suspicion. Such a person is, therefore, regarded in police parlance as a 'suspicious person,' the designation aptly denoting the offense."

"**Suspicious character**" is a term which has been defined by an ordinance as including all persons who entice any other person or persons to commit any irreputable act or deed; all persons found loitering about the city under suspicious circumstances or places and who are unable to give a proper account of themselves; all persons in the act of committing theft not amounting to a felony or misdemeanor, and all persons following any business by soliciting orders whereby the person or persons giving such orders are defrauded. McFadin *v.* San Antonio, 22 Tex. Civ. App. 140, 141, 54 S. W. 48.

42. See People *v.* Greene, 92 N. Y. App. Div. 243, 247, 87 N. Y. Suppl. 172, so holding of the term as used in rule 44 of the New York police department, requiring captains to state in their monthly reports "the location of all suspicious places;" and assuming that, the rule being silent as to what constitutes a "suspicious place," the question is to "be determined by the exercise of good judgment and discretion on the part of the captain . . . required to make the report."

43. Webster Int. Dict.

"**Maintaining and sustaining**" **a railroad,** as a power implied, when not expressed, in its charter, as necessary to the purposes thereof, "has reference to keeping it in re-

to prove; to establish by evidence; [44] to suffer; to bear; to undergo.[45] (Sustain: Distinguished From Accrue, see ACCRUE, 1 Cyc. 503 note 10. See also MAINTAIN, 25 Cyc. 1664; SUPPORT, *ante*, p. 608; SUSTENANCE.)

SUSTENANCE. That which supports life; food; victuals; provisions.[46] (See MAINTENANCE, 25 Cyc. 1664; SUPPORT, *ante*, p. 608; SUSTAIN, *ante*, p. 652.)

SUTLER. One who follows an army and sells to the troops provisions, liquors, and the like.[47]

SUUM CUIQUE INCOMMODUM FERENDUM EST POTIUS QUAM DE ALTERIUS DETRAHENDUM. A maxim meaning "Let every man bear his own grievance rather than abridge the comforts of his neighbor." [48]

S. W. An abbreviation of "southwest." [49]

SWAMP. Wet spongy land; soft low ground saturated with water, but not usually covered with it; marshy ground away from the seashore.[50] (Swamp: As a Boundary, see BOUNDARIES, 5 Cyc. 903 note 35. See also SWAMP AND OVERFLOWED LANDS; SWAMP LANDS, *post*, p. 654.)

SWAMP AND OVERFLOWED LANDS. A term which, as used in the act of congress, granting to each state its own lands of that description,[51] includes all

pairs, supplying it with machinery, and such like acts, and not to projects for extending its business, by schemes and enterprises not contemplated and expressed in clear, unambiguous terms, by the charter itself." A grant to maintain and sustain a railroad cannot "in any fair sense be construed to authorise the engaging in any enterprise which will extend the business or lessen the rivalries of the company." Central R. Co. *v.* Collins, 40 Ga. 582, 624.

44. Webster Dict. [*quoted* in Chicago *v.* Fields, 139 Ill. App. 250, 251, holding that the word as used in the phrase "evidence sustaining the plaintiff's case" can have no other meaning].

"Not sustained by sufficient evidence."— Iowa Code, § 3755, par. 6, authorizing a new trial in case of a verdict so described, applies to a verdict giving inadequate damages, and is not limited to the case of a verdict for the wrong party. Tathwell *v.* Cedar Rapids, 122 Iowa 50, 56, 58, 97 N. W. 96.

45. Webster Int. Dict.

"Sustain loss through his leaving" as used in an instrument insuring employers in a given sum in case a certain employee should leave them during a certain season and they so sustained loss, while not definite enough to cover a case of defalcation, refers, with the context, to the direct pecuniary loss that may be suffered through that employee's leaving the employment during that period. Freeman *v.* Waxman, 88 N. Y. Suppl. 129, 130.

46. Justice *v.* State, 116 Ga. 605, 606, 42 S. E. 1013, 59 L. R. A. 601.

"Distinguished from medicine" see Justice *v.* State, 116 Ga. 605, 606, 42 S. E. 1013, 59 L. R. A. 601.

"Necessary sustenance" whereof to deprive a child is a misdemeanor under Ga. Pen. Code, § 708, is "that necessary food and drink which is sufficient to support life and maintain health," and evidence of refusal to permit children to take medicine will not support a conviction under that statute. Justice *v.* State, 116 Ga. 605, 606, 42 S. E. 1013, 59 L. R. A. 601.

To widow.— "The word sustenance as used in 2d R. S., 1122, § 17, 6th edition, does not embrace the widow's mourning outfit, or any expenses to attend the funeral of her husband, and only covers her use of the supplies left on hand in the homestead during her quarantine, or her reasonable board during the same period." *In re* Miller, 1 Month. L. Bul. (N. Y.) 48.

47. Webster New Int. Dict. See Wolcott *v.* Gibson, 51 Ill. 69, 70, where it is said: "The business of a sutler often requires the employment of considerable capital."

48. Morgan Leg. Max. [*quoting* Cicero].

49. Frazer *v.* State, 106 Ind. 471, 473, 7 N. E. 203; Harrington *v.* Fish, 10 Mich. 415, 416, 419.

50. Webster Dict. [*quoted* in Lux *v.* Haggin, 69 Cal. 255, 441, 4 Pac. 919, 10 Pac. 674].

On streams in South Carolina.— The meaning of the word as used in a survey must be decided in the absence of artificial marks by the known and established understanding in the state. It may be ascertained even by more local usage. In larger streams such as Santee and Edisto the swamp is spoken of as distinct from the river, but in creeks with a margin of swamp the usage is universal in this state to speak of the creek and swamp as one. Felder *v.* Bonnett, 2 McMull. (S. C.) 44, 47, 48, 37 Am. Dec. 545.

"There may be a continuous watercourse through a body of swamp-lands." Lux *v.* Haggin, 69 Cal. 255, 413, 4 Pac. 919, 10 Pac. 674.

51. See PUBLIC LANDS, 32 Cyc. 901.

Evidence of cultivation as test.— When the character of the land is due to overflow it must, in order to come within the description, be rendered unfit for successful cultivation (Thompson *v.* Thornton, 50 Cal. 142, 145), in other words, not "susceptible of cultivation" (Keeran *v.* Griffith, 31 Cal. 461, 465 [*followed* in Keeran *v.* Allen, 33 Cal. 542, 547]), in grain or other staple productions by reason of the overflow (Thompson *v.* Thornton, 50 Cal. 142, 144; Keeran *v.* Griffith, *supra* [*followed* in Keeran *v.* Allen, *supra*]), and will not be within the description if capable of producing a fair crop of any of the staple productions (Thompson *v.* Thornton, *supra*), such as "potatoes, or corn,

legal subdivisions, the greater part of which is wet and unfit for cultivation, but when the greater part is not of that character it shall be excluded;[52] and in construing which the words "swamp and overflowed" have been distinguished,[53] but have also been construed as having together the single meaning "too wet for cultivation."[54] (Swamp and Overflowed Lands: In General, see PUBLIC LANDS, 32 Cyc. 901. Adverse Possession of, see ADVERSE POSSESSION, 1 Cyc. 995. Assignment and Transfer of Rights in, see PUBLIC LANDS, 32 Cyc. 1070. Inclusion or Exception From Grants by United States in Aid of Railroads, see PUBLIC LANDS, 32 Cyc. 951. See also OVERFLOWED LANDS, 29 Cyc. 1546; SWAMP, *ante*, p. 653.)

SWAMP LANDS.[55] See SWAMP AND OVERFLOWED LANDS, *ante*, p. 653.

SWAN MARK. See ANIMALS, 2 Cyc. 308 note 21.

SWAP. To EXCHANGE, *q. v.*; to BARTER,[56] *q. v.* (See BARTER, 5 Cyc. 621; and, generally, EXCHANGE OF PROPERTY, 17 Cyc. 829.)

SWEAR. To take an oath, to become bound by an oath duly administered;[57]

or barley, or buckwheat" (Thompson *v.* Thornton, *supra*), "wheat, rye, barley, oats, corn, buckwheat, peas or beans" (Keeran *v.* Allen, *supra*), but an annual crop of hay is not sufficient to take lands out of the description (Keeran *v.* Griffith, *supra*).

Quantity necessary.— The greater part of a legal subdivision must be wet and unfit for cultivation in order that land may pass under the act. Robinson *v.* Forrest, 29 Cal. 317, 324 [*followed* in Hogaboom *v.* Ehrhardt, 58 Cal. 231, 233 (*affirmed* in 115 U. S. 67, 5 S. Ct. 1157, 29 L. ed. 346)], *citing* 9 U. S. St. at L. 519, § 1.

Annual overflow not necessary to bring land within the description see Keller *v.* Brickey, 78 Ill. 133, 135, 3 Cent. L. J. 437.

"Land subject to periodical overflow" is not an equivalent description. Heath *v.* Wallace, 71 Cal. 50, 60, 11 Pac. 842 [*affirmed* in 138 U. S. 573, 11 S. Ct. 380, 34 L. ed. 1063].

52. Hannibal, etc., R. Co. *v.* Smith, 9 Wall. (U. S.) 95, 99, 19 L. ed. 599 [*citing* 9 U. S. St. at L. 519, § 3].

53. **Swamp lands,** as distinguished from overflowed lands, are such as require drainage to dispose of needless water or moisture on or in the lands in order to make them fit for successful or useful cultivation. State *v.* Gerbing, 56 Fla. 603, 615, 47 So. 353, 22 L. R. A. N. S. 337. "The word 'swamp,' without the addition of the word 'overflowed,' would have conveyed all lands so lacking in drainage as to be temporarily covered by water in the rainy seasons. . . . The word 'overflow' was added for the very purpose of bringing within the grant . . . permanently submerged areas." McDade *v.* Bossier Levee Bd., 109 La. 625, 633, 33 So. 628. "Swamp lands, as distinguished from overflowed lands, may be considered such as require drainage to fit them for cultivation." San Francisco Sav. Union *v.* Irwin, 28 Fed. 708, 712 [*affirmed* in 136 U. S. 578, 10 S. Ct. 1064, 34 L. ed. 540].

"Overflowed lands are those that are covered by non-navigable waters or are subject to such periodical or frequent overflows of water, salt or fresh, (not including lands between high and low water marks of navigable streams or bodies of water, nor lands covered and uncovered by the ordinary daily ebb and flow of normal tides of navigable waters), as to require drainage or levees or embankments to keep out the water, and thereby render the lands suitable for successful cultivation." State *v.* Gerbing, 56 Fla. 603, 615, 47 So. 353, 22 L. R. A. N. S. 337.

54. Miller *v.* Tobin, 18 Fed. 609, 614, 9 Sawy. 401, where it is said: "The phrase 'swamp and overflowed,' as defined by section 2 of the Arkansas swamp land act of 1850, is merely the equivalent of the phrase 'wet and unfit for cultivation,' and therefore land which is too 'wet' for cultivation is 'swamp and overflowed,' whether the water flows over it or stands upon it. In this sense the adjectives 'swamp' and 'overflowed,' taken together, qualify the noun 'land' in but one particular,— express but one fact concerning it,— that is, it is too wet for cultivation."

55. **In Manitoba.**— The transfer of swamp lands to the province of Manitoba by the Dominion of Canada, for which Can. St. 48 & 49 Vict. c. 50, provides, did not take effect by and with the statute itself, which expressly postpones the transfer to a showing to the satisfaction of the government as to what lands are to be included in the grant. Atty.-Gen. *v.* Atty.-Gen., [1904] A. C. 799, 802, 803, 73 L. J. P. C. 100, 91 L. T. Rep. N. S. 300, 20 T. L. R. 769.

A swamp land assessment is a charge imposed upon property by the authority of the legislature and is clearly "a liability created by statute" within the meaning of the statute of limitations (Code Civ. Proc. § 338, subd. 1). People *v.* Hulbert, 71 Cal. 72, 73, 12 Pac. 43.

56. Webster New Int. Dict.

A "swap" or "exchange" may, in general terms, be called a sale. And he who, by such a transaction, exchanges, barters or "swaps" one article for another, may very correctly be said to procure that article by purchase. Mosely *v.* Gordon, 16 Ga. 384, 394.

57. Black L. Dict.

Including "affirm" and "declare," by statute see Riddles *v.* State, (Tex. Cr. App. 1898) 46 S. W. 1058, 1060 [*quoting* Rev. Civ. St. art. 2370, subd. 5]. "In Acts of Parliament passed since the end of 1850, 'the words "Oath," "Swear," and "Affidavit," shall include Affirmation, Declaration, Affirming, and

to put an oath; to administer an oath to a person;[58] to use profane language.[59] (Swear: In General, see Blasphemy, 5 Cyc. 710; Profanity, 32 Cyc. 578; Oaths and Affirmations, 29 Cyc. 1296. As Administering Oath — Swearing Coroner's Jury, see Coroners, 9 Cyc. 988; Swearing Grand Jury, Showing as to in Indictment or Information, see Indictments and Informations, 22 Cyc. 235 text and note 31, 236 text and notes 32, 37, 237 text and notes 38–42; Swearing Juror as Affecting Right to Challenge, see Juries, 24 Cyc. 363; Swearing Witnesses, Record by Clerk, see Clerks of Courts, 7 Cyc. 222 note 37. As Disorderly Conduct, see Disorderly Conduct, 14 Cyc. 469, 470. As Taking Oath — In General, see Oaths and Affirmations, 29 Cyc. 1296; "Swear and Depose," Not Sufficient For Allegation of Oath in Indictment For Perjury, see Perjury, 30 Cyc. 1432 note 51; Swearing Falsely, as Crime Not Amounting to Perjury, see Perjury, 30 Cyc. 1400; Swearing Falsely, as Crime of Perjury, see Perjury, 30 Cyc. 1395; Swearing Falsely, as Subject of Libel or Slander, see Libel and Slander, 25 Cyc. 284, 441; Swearing to Affidavit, see Affidavits, 2 Cyc. 16; Swearing to Complaint, see Sworn Complaint, and Cross-References Thereunder, *post*, p. 659; Swearing to False Report of Corporation, see Corporations, 10 Cyc. 875. Evidence of in Prosecution For Disorderly Conduct, see Disorderly Conduct, 14 Cyc. 476 note 59.)

SWEARING. See Swear, and Cross-References Thereunder.

SWEATING. A term which, as used to describe a cause of damage to a cargo of grain, means moisture dropped upon the cargo from condensation, which arises if there is moisture which evaporates and then condenses in the hold.[60]

SWEATING SYSTEM. An expression, obviously figurative, which involves a system oppressive to the workman, whereby an unconscionable or unjust profit is wrung from the sweat of his brow by paying insufficient wages for his work.[61]

SWEEPAGE. A form of herbage, apparently that taken by mowing.[62] (See also Herbage, 21 Cyc. 433.)

SWEEPINGS. See Draff, 14 Cyc. 1017.

Declaring.'" Stroud Jud. Dict. [*citing* St. 13 & 14 Vict. c. 21, § 4; Interpr. Act (1889), § 3].

Judicial administration not implied.—"Any utterance or an affirmation, with an appeal to God, is to swear an oath, no matter how or before whom the utterance is made. That is its common import." The word "swore" "does not technically and necessarily imply a judicial administration of an oath." U. S. *v.* Howard, 132 Fed. 325, 340.

"Sworn to" in the verification of a plea and referring to the plea "must be taken to mean, that the testator declared on oath, the facts it set forth were true." Powers *v.* Bryant, 7 Port. (Ala.) 9, 15.

58. Black L. Dict.

"Sworn" is equivalent to "sworn to" in a magistrate's certificate to an oath. Com. *v.* Bennett, 7 Allen (Mass.) 533, 534.

"Duly sworn" or "sworn according to law" is defined by Rev. St. c. 1, § 23, rule 21, as applied to any officer who is required to take and subscribe the oath prescribed in the constitution, as meaning "that such officer had taken and subscribed the same, as well as made oath faithfully and impartially to perform the duties of the office to which he had been elected or appointed" and, when applied to any person other than such officer, "that such person had taken an oath faithfully and impartially to perform the duties assigned to him in the case specified." Bennett *v.* Treat, 41 Me. 226, 227.

"Swearing the peace" at common law see State *v.* Sargent, 74 Minn. 242, 244, 76 N. W. 1129.

59. Black L. Dict.

60. See The Pearlmoor, [1904] P. 286, 9 Aspin. 540, 73 L. J. P. D. & Adm. 50, 54, 90 L. T. Rep. N. S. 319, 20 T. L. R. 199, so construing the term when used in bills of lading to describe a cause of damage for which the owners of the vessel disclaimed responsibility, holding that the term did not include damage by heating of the grain itself, nor from contact with the iron work of the ship and the accumulation of water together. See also La Motte *v.* Angel, 1 Hawaii 237, 244; Adrian *v.* Live Yankee, 1 Fed. Cas. No. 88.

61. Collard *v.* Marshall, [1892] 1 Ch. 571, 576, 61 L. J. Ch. 268, 66 L. T. Rep. N. S. 248, 40 Wkly. Rep. 473.

"There is generally a middleman taking advantage of the circumstances in which the workman is placed, and grinding down for his own profit the wages of those employed below the fair rate." Collard *v.* Marshall, [1892] 1 Ch. 571, 576, 61 L. J. Ch. 268, 66 L. T. Rep. N. S. 248, 40 Wkly. Rep. 473.

Not constituted by employing more boys than a labor union thinks right see Collard *v.* Marshall, [1892] 1 Ch. 571, 577, 61 L. J. Ch. 268, 66 L. T. Rep. N. S. 248, 40 Wkly. Rep. 473.

62. See 2 Stroud Jud. Dict. 868, *sub. verb.* "Herbage" [*citing* Elphinstone, Norton & C. Interpr. Deeds 586].

SWEEPSTAKES or **STAKE.** A race publicly declared open to all complying with its conditions, for which the prize is the sum of the stakes which the subscribers agree to pay for each horse nominated; and, if an additional sum of money, cup, plate or other reward is offered to the winner, the race is still a sweepstakes whatever may be the name given to such addition.[63] (See also HORSE-RACE, 21 Cyc. 1103; RACING, 32 Cyc. 1469.)

SWEET CORDIAL. A plain spirit flavored by an essential oil or other aromatic substance and sweetened by some saccharine matter.[64] (See also CORDIAL, 9 Cyc. 977.)

SWEETMEAT. A fruit preserved with sugar.[65]

SWEINMOTE. See COURT OF SWEINMOTE, 11 Cyc. 632.

SWELLS. A word which, as used in the corn-canning trade, includes all cans whose contents are sour, although, according to testimony received, it refers, primarily, to cans whose ends are forced outward by the gases engendered by fermentation.[66]

SWINDLE. To cheat; to impose upon the credulity of mankind and thereby to defraud the unwary by false pretenses and fictitious assumptions.[67] (See SWINDLER; SWINDLING, *post*, p. 657.)

SWINDLER. A sharper; a cheat; [68] a cheat; a rogue; one who defrauds grossly, or one who makes a practice of defrauding others by imposition or deliberate artifice; [69] a cheat; one who lives by cheating; [70] a word which means no more than

63. American Racing Rules No. 4 [*quoted* in Stone *v.* Clay, 61 Fed. 889, 890, 10 C. C. A. 147, in the statement of facts].

"**Entry** shall be made by writing, signed by the owner of the horse" (American Racing Rules No. 15 [*quoted* in Stone *v.* Clay, 61 Fed. 889, 892, 10 C. C. A. 147]), and "it is the act of entry . . . that constitutes the subscription" (Stone *v.* Clay, *supra*).

Liability distinguished from that in free handicap.—"There is absolute liability on the part of the subscriber only in the stake race, but in both the stake race and the free handicap there is a conditional liability; the condition in one, the same as in the other, being that the horse shall not be declared out." Stone *v.* Clay, 61 Fed. 889, 892, 10 C. C. A. 147, construing American Racing Rules No. 37.

"**Three subscribers,**" unless otherwise stipulated in its conditions, make a sweepstakes, and the race is not void so long as there is a horse qualified to start." American Racing Rules No. 6 [*quoted* in Stone *v.* Clay, 61 Fed. 889, 890, 10 C. C. A. 147, in the statement of facts].

"**Sweepstake race**" **for office** between candidates see State *v.* Holman, 58 Minn. 219, 228, 59 N. W. 1006.

64. U. S. *v.* Three Hundred Casks of Juniper Cordial, 28 Fed. Cas. No. 16,511, where the definition is said to be given in the various standard works, and supported by the testimony of a chemist who had assisted in the preparation of McCulloch Commercial Dict.

Includes juniper cordial as well as Maraschino, Curaçoa and Kirschwasser, etc., which are confessedly within the class as the term is used in Customs Act (1790), § 103. U. S. *v.* Three Hundred Casks of Juniper Cordial, 28 Fed. Cas. No. 16,511.

65. Levy *v.* Robertson, 38 Fed. 714, 715, relating to customs duties.

"**Comfit**" **distinguished** see Levy *v.* Robertson, 38 Fed. 714, 715.

66. Sleeper *v.* Wood, 60 Fed. 888, 889, 9 C. C. A. 289.

67. Johnson Dict. (Todd ed.) [*quoted* in Chase *v.* Whitlock, 3 Hill (N. Y.) 139, 140].

68. Johnson Dict. (Todd ed.) [*quoted* in Chase *v.* Whitlock, 3 Hill (N. Y.) 139, 140].

69. Webster Dict. [*quoted* in Chase *v.* Whitlock, 3 Hill (N. Y.) 139, 140].

Called indefinite and of recent origin see Stevenson *v.* Hayden, 2 Mass. 406, 408 (where the word is said to be a word of indefinite meaning lately adopted into the English language, and therefore not with certainty importing an indictable offense); Chase *v.* Whitlock, 3 Hill (N. Y.) 139, 140 (where it is said to be "an exotic, which came from Germany, and has but recently become naturalized in our language"). *Compare*, however, Berryman *v.* Wise, 4 T. R. 366, 100 Eng. Reprint 1067 [*cited* in Forrest *v.* Hanson, 9 Fed. Cas. No. 4,943, 1 Cranch C. C. 63] (where an action for slander by an attorney for a charge of swindling was entertained); 'Anson *v.* Stuart, 1 T. R. 748, 755, 99 Eng. Reprint 1357 [*cited* in Forrest *v.* Hanson, *supra*] (where it is said to have been held by Ashton, J., in a case even earlier, that the word was in general use and that the court could not say they were ignorant of it). See SWINDLING, *post*, p. 657, note 72.

Not necessarily "one who obtains money or goods under false pretenses" see Weil *v.* Altenhofen, 26 Wis. 708, 711.

Used in Aberdeen Police and Waterworks Act (1862), § 240, as follows: "Every chain-dropper, thimbler, loaded dice player, and other Swindler of that or any similar description." See Stroud Jud. Dict. Suppl. (1909) 560.

70. Tomlin L. Dict. (ed. 1836) [*quoted* in Chase *v.* Whitlock, 3 Hill (N. Y.) 139, 140].

cheat or dishonest person.[71] (Swindler: As a Libelous Word Actionable *per se*, see LIBEL AND SLANDER, 25 Cyc. 261 text and note 68. In Slander Not Actionable *per se*, see LIBEL AND SLANDER, 25 Cyc. 267 text and note 16. See also SWINDLE, *ante*, p. 656; SWINDLING.)

SWINDLING. A word which has no legal and technical meaning, and commonly implies that there has been recourse to petty and mean artifices for obtaining money, which may or may not be strictly illegal;[72] cheating and defrauding grossly with deliberate artifice.[73] As defined by Texas statutes,[74] the acquisition of any personal or movable property, money, or instrument of writing conveying or securing a valuable right, by means of some false or deceitful pretense or device, or fraudulent representation, with intent to appropriate the same to the use of the party so acquiring, or destroying or impairing the rights of the party justly entitled to the same.[75] (Swindling: Imputation of as Libel, see LIBEL AND SLANDER, 25 Cyc. 282. Necessity of Injury Resulting to Constitute Offense, see FALSE PRETENSES, 19 Cyc. 411 note 48. Requisites of Pretense, see FALSE PRETENSES, 19 Cyc. 394 note 47. Statutory Offense, see FALSE PRETENSES, 19 Cyc. 392. See also CHEAT, 7 Cyc. 123; COMMON-LAW CHEAT, 8 Cyc. 389.)

SWINE. The original generic term for animals of the kind described by the word hog or shoat.[76] (Swine: In General, see ANIMALS, 2 Cyc. 288. Description

71. Savile *v.* Jardine, 2 H. Bl. 531, 532 [*cited* as to the meaning of "cheat" in Stevenson *v.* Hayden, 2 Mass. 406, 408; Weil *v.* Altenhofen, 26 Wis. 708, 710].

72. Cunningham *v.* Baker, 104 Ala. 160, 171, 16 So. 68, 53 Am. St. Rep. 27, adding: "The disappointed and vexed creditor not infrequently will apply the term swindler to a delinquent debtor, and an absconding debtor is not infrequently spoken of as having swindled his creditors."

Applicable to fraudulent sale to prevent creditors from attaching the property sold. Odiorne *v.* Bacon, 6 Cush. (Mass.) 185, 191.

That the term imports a crime is denied (Hall *v.* Rogers, 2 Blackf. (Ind.) 429, 430; Chase *v.* Whitlock, 3 Hill (N. Y.) 139, 140), but there are *dicta* to the contrary (Forrest *v.* Hansen, 9 Fed. Cas. No. 4,943, 1 Cranch C. C. 63, where it is said: "To charge a man with swindling, seems, therefore, to be substantially to charge him with an offence for which he may be liable to a prosecution at common law"; J'Anson *v.* Stewart, 1 T. R. 748, 752, 99 Eng. Reprint 1357 [*cited* in Forest *v.* Hansen, *supra*], where it is said of a defendant in libel: "When he took upon himself to justify generally the charge of swindling, he must be prepared with the facts which constitute the charge," and "If the plaintiff had been a common swindler, the defendant ought to have indicted him; but he has no right to libel him in this way").

"Implies a high degree of moral depravity . . . its essence is fraud." Forrest *v.* Hansen, 9 Fed. Cas. No. 4,943, 1 Cranch C. C. 63.

73. Wyatt *v.* Ayres, 2 Port. (Ala.) 157, 161.

74. Tex. Cr. Code 773*a*; Tex. Pen. Code (1895), art. 943; Tex. Pen. Code, art. 790.

75. Cline *v.* State, 43 Tex. 494, 497; La Moyne *v.* State, 53 Tex. Cr. 221, 228, 111 S. W. 950, 953; Cummings *v.* State, 36 Tex. Cr. 152, 153, 36 S. W. 266; Blum *v.* State, 20 Tex. App. 578, 591, 54 Am. Rep. 530; May *v.* State, 15 Tex. App. 430, 436; Stringer *v.* State, 13 Tex. App. 520, 522.

Essentials.— "(1) The intent to defraud; (2) an actual act of fraud committed; (3) false pretenses; and (4) the fraud must be committed or accomplished by means of the false pretenses made use of for the purpose,— that is, they must be the cause which induced the owner to part with his property. An essential element . . . is that the party injured must have relied upon, believed as true, and been deceived by, the fraudulent representations or devices of the party accused." Thorpe *v.* State, 40 Tex. Cr. 346, 347, 50 S. W. 383 [*quoting* and *adopting* the charge of the court below]. Intent is an essential element. Stringer *v.* State, 13 Tex. App. 520, 522. False representations must be the inducement. De Young *v.* State, (Tex. Cr. App. 1897) 41 S. W. 598, 599; Blum *v.* State, 20 Tex. App. 578, 594, 54 Am. Rep. 530; Buckalew *v.* State, 11 Tex. App. 352, 356. A mistaken opinion originally that the person defrauded will not take the place of a false pretense. Blum *v.* State, *supra*.

Not essential are benefit to the person guilty or injury to the person intended to be defrauded if the wilful design to receive benefit or cause injury is evident, under Tex. Pen. Code (1879), art. 944, subd. 4. La Moyne *v.* State, 53 Tex. Cr. 221, 228, 111 S. W. 950.

As distinguished from theft swindling must result in parting with title or property in the subject-matter. Cline *v.* State, 43 Tex. 494, 497, 498; Bink *v.* State, 50 Tex. Cr. 450, 452, 98 S. W. 249; Taylor *v.* State, 32 Tex. Cr. 110, 112, 22 S. W. 148; Curtis *v.* State, 31 Tex. Cr. 39, 40, 19 S. W. 604; Frank *v.* State, 30 Tex. App. 381, 382, 17 S. W. 936; Pitts *v.* State, 5 Tex. App. 122, 124. In swindling either of the two intents to appropriate or to deprive the owner may be sufficient, while in theft they must combine. May *v.* State, 15 Tex. App. 430, 437.

76. State *v.* Godet, 29 N. C. 210, 211.

in Indictment or Information For Larceny, see LARCENY, 25 Cyc. 84. Prohibition of Keeping Within Corporate Limits of City, see MUNICIPAL CORPORATIONS, 28 Cyc. 739.)

SWIPE. To pluck, to snatch, to steal;[77] to take with a swipe, or sweep; steal by snatching, as to swipe a watch.[78] (See, generally, LARCENY, 25 Cyc. 1.)

SWISS MUSLINS. Dotted Swisses; bleached cotton goods, which are woven upon a loom.[79]

SWITCH. Electric, in general terms, a device for opening and closing a single circuit in some regular and systematic manner;[80] any device by which one line may be electrically connected with another;[81] in switchboards in telephone exchanges, sockets set in the switchboard through which the subscribers communicate with each other;[82] also called jacks, spring-jacks, spring-jack switches, and line jacks.[83] On a railroad, a device for moving a small section of track so that rolling stock may be run or shunted from one line of track to another;[84] merely a mechanical contrivance or movable opening to pass the cars from one

Including "hog" which is synonymous see Rivers *v.* State, 10 Tex. App. 177, 178, 179, construing Pen. Code, art. 679, concerning the killing of swine among other animals, referred to in art. 680, concerning wounding of such animals.

Includes a butchered animal of the kind, as used in a statute exempting "one swine" from attachment and execution. Gibson *v.* Jenney, 15 Mass. 205, 206.

77. Webst. Int. Dict. [*quoted* in State *v.* Lee, 101 Iowa 389, 390, 70 N. W. 594].

Sufficient for confession of stealing.— It is not error to refuse to instruct the jury that the statement of defendant charged with stealing a watch from a person, that he "swiped" the watch from that person, is not a confession of guilt. State *v.* Lee, 101 Iowa 389, 390, 70 N. W. 594.

78. Standard Dict. [*quoted* in State *v.* Lee, 101 Iowa 389, 390, 70 N. W. 594].

79. U. S. *v.* Albert, 60 Fed. 1012, 1013, 9 C. C. A. 332, adding: "The warp or threads which run longitudinally, extend from one end of the piece to the other, and the filling or threads that extend from side to side, run from edge to edge through the width of the piece. In addition to the plain loom, there is an attachment which produces the spots, dots, or other figures which ornament the goods, and which are woven at the same time with the rest of the cloth."

Dutiable as bleached cotton under Tariff Act, Oct. 1, 1890, upon the number of threads to the square inch of warp, not counting the threads used in making the figures see U. S. *v.* Albert, 60 Fed. 1012, 1014, 9 C. C. A. 332 [*reversing* 57 Fed. 192].

80. Thomson-Houston Electric Co. *v.* Nassau Electric R. Co., 107 Fed. 277, 278, 46 C. C. A. 263.

The one "in ordinary commercial use 'involves two stationary terminals connected to the opposite branches of a circuit, and a removable bridging piece inserted between such two terminals to complete the continuity of the circuit, or withdrawn therefrom to interrupt the circuit.'" Thomson-Houston Electric Co. *v.* Nassau Electric R. Co., 107 Fed. 277, 278, 46 C. C. A. 263.

81. Kinloch Tel. Co. *v.* Western Electric Co., 113 Fed. 659, 660, 51 C. C. A. 369.

82. Kinloch Tel. Co. *v.* Western Electric Co., 113 Fed. 659, 660, 51 C. C. A. 369.

"The form in common use on switchboards in the telephone exchanges consists of a socket set in the switchboard containing the terminals of the two sides of the subscribers' circuit, and this is used by means of a plug which contains the terminals of the two wires that are attached to it in a cord. The insertion of the plug in the socket makes the electrical connection between the subscriber's line and the wires attached to the plug, and these wires usually lead to another similar plug or to the telephone of the operator. If they lead to another plug, electrical connection may be made between the lines of two subscribers by inserting these plugs in the respective switches of the subscribers upon the switchboard. These sockets set in the switchboard through which the subscribers communicate with each other are called 'switches' in Seely's patent." Kinloch Tel. Co. *v.* Western Electric Co., 113 Fed. 659, 660, 51 C. C. A. 369.

83. Kinloch Tel. Co. *v.* Western Electric Co., 113 Fed. 659, 660, 51 C. C. A. 369, adopting "line jacks" as the meaning in the particular case.

84. Standard Dict. [*quoted* in Erie R. Co. *v.* Steward, 61 N. Y. App. Div. 480, 482, 70 N. Y. Suppl. 698 (*affirmed* in 170 N. Y. 172, 63 N. E. 118)].

Cannot include tracks used exclusively in connection with freight yards, and as to a portion thereof, for the storing of cars, for the making up of trains, and for the transfer of trains from one yard to the other and from one railroad to another (People *v.* New York, etc., R. Co., 156 N. Y. 570, 576, 580, 51 N. E. 312); or a line running parallel to the main line at a distance of about one-half mile, and nearly three miles in length (Erie R. Co. *v.* Steward, 61 N. Y. App. Div. 480, 482, 483, 70 N. Y. Suppl. 698 [*affirmed* in 170 N. Y. 172, 63 N. E. 118]).

Location of switches is within the discretion of the company when the right to sidetracks for standing room, or to pass from the main track to the shops or yards of the company is clearly given. Cleveland, etc., R. Co. *v.* Speer, 56 Pa. St. 325, 335, 94 Am. Dec. 84.

track to another;[85] in its simplest form, two parallel lengths of rails joined together by rods, pivoted at one end and free to move at the other end, form a part of the track at its junction with a branch or siding.[86] (Switch: Connecting Different Roads by, see COMMERCE, 7 Cyc. 448 note 87. Connection of Railroad With Private, see RAILROADS, 33 Cyc. 124. Construction of — Authority For, see RAILROADS, 33 Cyc. 231; In Street or Highway, see RAILROADS, 33 Cyc. 210; Time For Commencement and Completion, see RAILROADS, 33 Cyc. 232. Duty of Railroad to Operate, see RAILROADS, 33 Cyc. 637. Flying, see RAILROADS, 33 Cyc. 953. Liability of Railroad For Injuries to Servants From — Defective, see MASTER AND SERVANT, 26 Cyc. 1127; Failure to Block, see MASTER AND SERVANT, 26 Cyc. 1128; Negligence of Employee in Charge of, Under Employers' Liability Acts, see MASTER AND SERVANT, 26 Cyc. 1375. Mandamus to Compel Construction of, see MANDAMUS, 26 Cyc. 369. Requiring Construction of, see RAILROADS, 33 Cyc. 656. Yard, Injuries to Animals at, see RAILROADS, 33 Cyc. 1190. See also SWITCHING SERVICE, SWITCH ROAD, SWITCH TRACKS, SWITCH YARD.)

SWITCHING SERVICE. A term which only relates to the removal of cars over spur tracks after they have reached the terminal point of the same road line and, after being unloaded, are transferred on a spur track, usually to the place of business of the consignee; transfer service.[87] (Switching Service: Rates For, see CARRIERS, 6 Cyc. 496 note 72. See also SWITCH, *ante*, p. 658.)

SWITCH ROAD. A term held to have been used in a certain deed synonymously with connection.[88] (See SWITCH, *ante*, p. 658.)

SWITCH TRACKS. See EMINENT DOMAIN, 15 Cyc. 590. See also SWITCH, *ante*, p. 658.

SWITCH YARD. A term doubtless synonymous with railroad yard or yard, as employed in connection with railway service, as the place where such switching is done as is essential to the proper placing of cars.[89] (Switch Yard: As Place where Fences and Cattle Guards Are Required, see RAILROADS, 33 Cyc. 1190. See also RAILROAD YARD, 33 Cyc. 1407; SWITCH, *ante*, p. 658; YARD.)

SWIVEL. Something used in or on another body so as to turn round in or upon it.[90]

SWORDS. A word which does not necessarily include ornamental or decorative bone swords.[91] (See, generally, WEAPONS.)

SWORN. See SWEAR, *ante*, p. 654.

SWORN COMPLAINT. By statute a term which includes a complaint made

85. Cleveland, etc., R. Co. *v.* Speer, 56 Pa. St. 325, 335, 94 Am. Dec. 84.

86. Century Dict. [*quoted* in Erie R. Co. *v.* Steward, 61 N. Y. App. Div. 480, 483, 70 N. Y. Suppl. 698 (*affirmed* in 170 N. Y. 172, 63 N. E. 118)].

A "derail switch," is a device, which, when set, will cause a car running loose on the side track to run off its rails to the ground before reaching the main track. Jones *v.* Kansas City, etc., R. Co., 178 Mo. 528, 537, 77 S. W. 890, 101 Am. St. Rep. 434.

87. Dixon *v.* Central of Georgia R. Co., 110 Ga. 173, 180, 181, 182, 35 S. E. 369, where the definition, stated as the contention of counsel for defendant, is said to be supported by expert evidence and the evidence held to have been properly received.

The term is applicable only in cases where such service is necessarily preceded by the payment of freight for transportation over some line of railway. Dixon *v.* Central of Georgia R. Co., 110 Ga. 173, 180, 35 S. E. 369.

Distinguished from "transportation" service see Dixon *v.* Central of Georgia R. Co., 110 Ga. 173, 180, 181, 35 S. E. 369.

88. See Palfrey *v.* Foster, 47 La. Ann. 939, 941, 17 So. 425.

89. Baltimore, etc., R. Co. *v.* Little, 149 Ind. 167, 172, 173, 48 N. E. 862.

The term is recognized in St. Louis R. Co. *v.* Robbins, 57 Ark. 377, 382, 21 S. W. 886 [*cited* in Baltimore, etc., R. Co. *v.* Little, 149 Ind. 167, 173, 48 N. E. 862, in disposing of the contention that the word did not exist in railroading and was not recognized by the lexicographers]; 5 Rapalje & M. Dig. R. L. 60, § 76 [*cited* in Baltimore, etc., R. Co. *v.* Little, *supra*].

90. Ainsworth Dict. [*quoted* in Denise *v.* Swett, 68 Hun (N. Y.) 188, 292, 22 N. Y. Suppl. 450 (*reversed* on other grounds in 142 N. Y. 602, 37 N. E. 627)].

91. See Morimura *v.* U. S., 165 Fed. 64, holding that "bone swords," so called to distinguish them from swords, and used as ornaments or for purposes of decoration, are not "swords" within the meaning of Tariff Act, July 24, 1897, c. 11, § 1, sched. C, par.

on affirmation, when the complainant is allowed to affirm.[92] (Sworn Complaint: Generally, see PLEADING, 31 Cyc. 92. Verification of Pleadings Generally, see PLEADING, 31 Cyc. 524, 526. See also SWEAR, *ante*, p. 654.)

SYCOPHANT. An informer; a talebearer;[93] a base parasite; a mean or servile flatterer, especially a flatterer of princes and great men.[94]

SYENITE. See COUNTRY ROCK, 11 Cyc. 617 text and note 13.

SYLLABUS. A head-note; a note prefixed to the report of an adjudged case, containing an epitome or brief statement of the rulings of the court upon the point or points decided in the case.[95] (Syllabus: As Component Part of a Reported Case, see REPORTS, 34 Cyc. 1611. As Subject of Copyright, see COPYRIGHT, 9 Cyc. 900. Requiring Courts to Write as Encroachment on Judiciary by Legislature, see CONSTITUTIONAL LAW, 8 Cyc. 818.)

SYLVA CÆDUA or SILVA CÆDUA. Seasonable wood, whereof, at common law, a termor might cut trees of age fixed by local custom;[96] wood to be cut down, or lopped.[97] In Roman law, an equivalent to coppice, which having been cut springs again from the trunks or roots;[98] and, more broadly, that which is kept for cutting.[99]

SYMBOL. A letter or character which is significant; a mark which stands for something; a sign.[1] (Symbol: Imitation of as Infringement of Trade-Mark, see TRADE-MARKS AND TRADE-NAMES. In Indictment of Information, see INDICTMENTS AND INFORMATIONS, 22 Cyc. 289. In Pleading, see PLEADING, 31 Cyc. 77. Of Property, Share Certificate as, see CORPORATIONS, 10 Cyc. 588. Subject of Ownership, see TRADE-MARKS AND TRADE-NAMES. See also SYMBOLICAL DELIVERY, *post*, p. 661.)

154, 30 St. 163, U. S. Comp. St. (1901) p. 1641; but "manufacturers of bone" within the same act, chapter, and section, schedule N, par. 449, 30 U. S. St. at L. 193 [U. S. Comp. St. (1901) p. 1678].

92. State *v.* Welch, 79 Me. 99, 103, 8 Atl. 348 [*quoting* Rev. St. c. 1, § 6, cl. 12].

By attorney for chief of tribe.— Under the act of congress of June 28, 1898, 30 U. S. St. at L. 497, c. 517, § 6, providing as a prerequisite to issue of summons in action by tribe to recover lands from persons claiming to be members thereof, that a "sworn complaint" be filed by the chief, or person or persons in his behalf, the complaint need not be sworn by the chief himself, and a verification by attorney is sufficient. Brought *v.* Cherokee Nation, 129 Fed. 192, 195, 63 C. C. A. 350, referring for the terms of the statute to Hargrove *v.* Cherokee Nation, 120 Fed. 192, 195.

93. Black L. Dict.

Derivation not safe criterion of meaning.— "'Sycophant' comes from Greek words meaning fig-informer; but it would scarcely be contended to-day that a man could not properly be called a sycophant unless he had dealings in figs." People *v.* Cogswell, 113 Cal. 129, 137, 45 Pac. 270, 35 L. R. A. 269.

94. Webster Int. Dict.

95. Black L. Dict.

Contents and purpose see Koonce *v.* Doolittle, 48 W. Va. 592, 594, 37 S. E. 644, where it is said: "The syllabus is never made up of finding of facts, but is limited to points of law determined. Sometimes the finding of facts are referred to for the purpose of explaining the point of law adjudicated, but only for such purpose. The opinion and not the syllabus shows the finding of facts necessary to the adjudication for the information of the circuit court and this Court only makes the more important points of law a part of the syllabus for the general information of the legal profession and public, and not for the government of the circuit court in the further progress of the case."

The omission of a conclusion of fact from the syllabus does not indicate that such matter of fact was left open for further consideration. Koonce *v.* Doolittle, 48 W. Va. 592, 594, 37 S. E. 644.

96. Anonymous, Godb. 4, 78 Eng. Reprint 3.

97. See Evans *v.* Rowe, McClell. & Y. 567, 587, 589, where it appears that it had been urged in behalf of the clergy that the king and council declare and interpret *sylva cædua*, since, in the understanding of the common people, underwood, and not older trees, was comprised in its meaning to the detriment of tithes, of which *sylva cædua* was a source.

98. Dashwood *v.* Magniac, [1891] 3 Ch. 306, 362, 60 L. J. Ch. 809, 65 L. T. Rep. N. S. 811 [*quoting* Justinian Dig. lib. 1, tit. 16, § 30, as follows: "*Quæ succisa rursus ex stirpibus aut radicibus renascitur*"].

99. See Dashwood *v.* Magniac, [1891] 3 Ch. 306, 363, 60 L. J. Ch. 809, 65 L. T. Rep. N. S. 811 [*quoting* Justinian Dig. as follows: "'*Silva cædua est, ut quidam putant, quæ in hoc habetur, ut cæderetur*," (literally, "'Silva cædua is, as some think, what is held unto this, that it might be cut")], and adding: "It is upon the interpretation of this latter text, as read by the light of the general law of usufruct, that modern commentators base a right in the usufructuary to cut such plantations as are expressly cultivated for periodical felling and sale."

1. Century Dict.

SYMBOLICAL DELIVERY. A substitute for actual delivery where the latter is impracticable.[2] (Symbolical Delivery: Of Goods Sold — In General, see SALES, 35 Cyc. 199; Effect as to Transfer of Title, see SALES, 35 Cyc. 319; Sufficiency of in Determining Whether Transfers are Fraudulent, see FRAUDULENT CONVEYANCES, 20 Cyc. 545. Of Mortgaged Chattel, see CHATTEL MORTGAGES, 6 Cyc. 1056 note 75. Sufficient to Satisfy Statute of Frauds, see FRAUDS, STATUTE OF, 20 Cyc. 251.)

SYMPATHETIC STRIKE. A term describing what is otherwise known in this country as a boycott.[3] (See also BOYCOTT, 5 Cyc. 955.)

SYMPATHY. Feeling corresponding to that which another feels.[4]

SYMPHONY. A species of musical composition designed to be interpreted by musical instruments alone, and therefore hardly to be considered a dramatic work within the meaning of the law.[5]

SYNALLAGMATIC CONTRACT. In the civil law, a bilateral or reciprocal contract, in which the parties expressly enter into mutual engagements, each binding himself to the other.[6]

SYNDIC. In the civil law, a word which corresponds very nearly to assignee in the common law.[7] At common law in England, an agent named by a corporation for the purpose of obtaining letters testamentary or of administration, to evade the difficulty occasioned by the disability of the corporation itself.[8] (Syndic: Of Insolvent Estate — In General, see INSOLVENCY, 22 Cyc. 1277; Appointment as Prerequisite to Opposition of Voluntary Petition in Insolvency, see INSOLVENCY, 22 Cyc. 1270 note 75; As Party Entitled to Review, see APPEAL AND ERROR, 2 Cyc. 638 note 3; As Party to Suit For Dissolution of Community, see HUSBAND AND WIFE, 21 Cyc. 1698; Duty to Apply Assets to Debts, see INSOLVENCY, 22 Cyc. 1325 note 55; Of Decedent, Collection and Management of, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 852.)

SYNDICATE. A term which means an association of individuals formed for the purpose of conducting and carrying out some particular business transaction, ordinarily of a financial character, in which the members are mutually interested,[9]

2. Winslow *v.* Fletcher, 53 Conn. 390, 398, 4 Atl. 250, 55 Am. Rep. 122, adding that it "leaves the real delivery to be made afterwards."

The whole title passes as between the parties when that is their real intention by such delivery, wherein it differs from the mere pledge. Winslow *v.* Fletcher, 53 Conn. 390, 398, 4 Atl. 250, 55 Am. Rep. 122.

3. Booth *v.* Brown, 62 Fed. 794, 795.

4. Webster Int. Dict.

With Southern confederacy see State *v.* Woodson, 41 Mo. 227, 234.

5. See Mikado's Case, 25 Fed. 183, 187, 23 Blatchf. 347 [*citing* Doone Copyright 599].

6. Black L. Dict. [*citing* Pothier Obl. No. 9]. See Zacharie *v.* Franklin, 12 Pet. (U. S.) 151, 162, 9 L. ed. 1035.

7. See Bouvier L. Dict. [*cited* in Mobile, etc., R. Co. *v.* Whitney, 39 Ala. 468, 471].

The powers and duties of the syndic are defined with much particularity by the Louisiana code, which provides that the syndic shall take possession of and be entitled to claim and recover the property of the debtor, and to administer and sell the same. Einer *v.* Beste, 32 Mo. 240, 245, 82 Am. Dec. 129.

8. See Minnesota L. & T. Co. *v.* Beebe, 40 Minn. 7, 9, 41 N. W. 232, 2 L. R. A. 418.

9. Hambleton *v.* Rhind, 84 Md. 456, 487, 36 Atl. 597, 40 L. R. A. 216 [in the latter report *sub nom.* Baltimore Trust, etc., Co. *v.* Hambleton], where it is said that such is the meaning according to undisputed evidence in the case.

Constituting a partnership.— A so-called "syndicate" for the purpose of buying and selling certain land and dividing expenses and profits ratably among its members has the elements of a partnership. Morrison *v.* Earls, 5 Ont. 434, 476.

To-day "they are usually combinations of capitalists to bring about changes in the markets for commodities or stocks for a specific purpose. In this manner they are the parents of corners." See Chambers' Journal, May 10, 1884, p. 289 [*quoted* in Morrison *v.* Earls, 5 Ont. 434, 476 note].

In old world commerce it meant the combination of a number of merchants for the consummation of a venture beyond the means or the inclination of any one of them. The Dutch merchants were fond of forming syndicates for large trading purposes; and the East India Company, Hudson's Bay Company, and many other concerns of our own time . . . had a similar origin. The syndicate had in it the germ of the joint stock company system, but although each member subscribed a certain amount which he would advance, or for which he would be liable, his liability could not alway be restricted thereto. The uncertainty in this respect evolved the limited liability principle now so common." See Chambers' Journal, May

but which does not indicate in what way the members are acting together;[10] a council.[11] (See, generally, JOINT ADVENTURES, 23 Cyc. 452.)

SYNOD. A meeting or assembly of ecclesiastical persons concerning religion; being the same thing in Greek, as convention in Latin.[12] In the Presbyterian and Reformed Dutch Churches, simply a meeting of the few adjoining presbyteries.[13] In the Cumberland Presbyterian Church, a governmental body consisting of all the ministers and one ruling elder from each church in a district comprising at least three presbyteries.[14] (See RELIGIOUS SOCIETIES, 34 Cyc. 1141 note 72.)

SYNONYMOUS. Conveying the same or approximately the same meaning.[15] (Synonymous: Words, to Statutory Words in Indictments and Informations, see INDICTMENTS AND INFORMATIONS, 22 Cyc. 337 text and notes 88, 90–92, 338 text and notes 93, 94.)

SYNOPSIS. A brief or partial statement; less than the whole; an epitome.[16] (Synopsis: Mere, Insufficient of — Settlement With Sheriff, as Basis For Judgment in Suit on His Bond, see COUNTIES, 11 Cyc. 454 note 87; What Attorney Deems Material to Record on Appeal, see APPEAL AND ERROR, 3 Cyc. 113 note 17. See also COMPENDIUM, 8 Cyc. 401.)

SYNOVITIS. Disease of the synovial membrane, involving one or more joints, characterized by aching pain, local elevation of temperature, a tendency to redness and swelling, rendering use of the joints difficult and distressing.[17]

SYRINGE. In mechanism, a kind of pump.[18]

SYRUP. A solution of sugar in water, made according to an official formula, whether simple, flavored, or medicated with some special therapeutic or compound;[19] a thick and viscid liquid, made from the juice of fruits, herbs, etc.,

10, 1884, p. 289 [*quoted* in Morrison *v.* Earls, 5 Ont. 434, 476 note].

Probably first came into the law relating to companies in Erlanger *v.* New Sombrero Phosphate Co., 3 App. Cas. 1218, 48 L. J. Ch. 73, 39 L. T. Rep. N. S. 269, 26 Wkly. Rep. 65. See 3 Stroud Jud. Dict. 2003.

Duty of syndicate acting as promoters of company to disclose circumstances of transaction to persons who are to be invited to become shareholders see New Sombrero Phosphate Co. *v.* Erlanger, [1877] 5 Ch. 73, 123, 46 L. J. Ch. 425, 36 L. T. Rep. N. S. 222, 25 Wkly. Rep. 436 [*affirmed* in 3 App. Cas. 1218, 48 L. J. Ch. 733, 39 L. T. Rep. N. S. 269, 26 Wkly. Rep. 65 [*quoted* in *In re* Leeds, [1902] 2 Ch. 809, 824, 72 L. J. Ch. 1, 87 L. T. Rep. N. S. 488, 10 Manson 72, 51 Wkly. Rep. 5]. *Compare In re* Lady Forrest Gold Mine, [1901] 1 Ch. 582, 70 L. J. Ch. 275, 84 L. T. Rep. N. S. 559, 8 Manson 438, 17 T. L. R. 198.

10. Tyser *v.* Shipowners Syndicate, [1896] 1 Q. B. 135, 139, 8 Aspin. 81, 65 L. J. Q. B. 238, 73 L. T. Rep. N. S. 605, 44 Wkly. Rep. 207.

11. Morrison *v.* Earls, 5 Ont. 434, 476, where, with doubt as to the legal meaning of "a council," such is said to be its "dictionary meaning."

12. Black L. Dict.

"**There are four kinds:** (1) A general or universal synod or council, where bishops of all nations meet; (2) a national synod of the clergy of one nation only; (3) a provincial synod, where ecclesiastical persons of a province only assemble, being now what is called the 'convocation;' (4) a diocesan synod, of those of one diocese." Black L. Dict.

13. Groesbeeck *v.* Dunscomb, 41 How. Pr. (N. Y.) 302, 344.

Distinguished from "ecumenical council" see Groesbeeck *v.* Dunscomb, 41 How. Pr. (N. Y.) 302, 344.

The Synod of Dort see Groesbeeck *v.* Dunscomb, 41 How. Pr. (N. Y.) 302, 344.

14. Fussell *v.* Hail, 134 Ill. App. 620, 622.

15. Hoffine *v.* Ewings, 60 Nebr. 729, 735, 84 N. W. 93.

"'**Synonymous words**' are words 'expressing the same thing,' conveying 'the same or approximately the same idea.'" Fritz *v.* Williams, (Miss. 1894) 16 So. 359, 360 [*citing* Webster Dict.].

16. Barker *v.* Barker, 43 Kan. 91, 93, 22 Pac. 1000.

More abridged than "substantial statement" see Barker *v.* Barker, 43 Kan. 91, 92, 22 Pac. 100.

17. Blackman *v.* U. S. Casualty Co., 117 Tenn. 578, 593, 103 S. W. 784, *obiter*, quoting from a policy of insurance.

18. Tagliabue *v.* Sondermann, 67 Fed. 551, 552, holding that the uses in a syringe and a pump, of the same apparatus working in the same way, are so closely analogous, that a patent on the pump precludes a later patent by another inventor on the syringe.

19. Century Dict. [*quoted* in California Fig-Syrup Co. *v.* Stearns, 73 Fed. 812, 815, 20 C. C. A. 22, 33 L. R. A. 56].

Varieties with their components enumerated see California Fig-Syrup Co. *v.* Stearns, 73 Cal. 812, 815, 20 C. C. A. 22, 33 L. R. A. 56.

"**Syrup of Figs**" is a descriptive term, therefore not available as a trade-mark. Worden *v.* California Fig Syrup Co., 187 U. S. 516, 533, 23 S. Ct. 161, 47 L. ed. 282; Cali-

boiled with sugar;[20] a thick sweet liquid.[21] Specifically, a saturated solution of sugar in water, often combined with some medicinal substance, or flavored, as with the juice of fruits, for use in confections, cookery or the preparation of beverages.[22] As defined by the United States Department of Agriculture, the product obtained by purifying and elevating the juice of a sugar-producing plant without removing any of the sugar.[23]

SYSTEM. Any complexure or combination of many things; a scheme which reduces many things to regular dependence or co-operation; a scheme which unites many things in order;[24] a plan or scheme according to which things are con-

fornia Fig-Syrup Co. *v.* Stearns, 73 Fed. 812, 816, 20 C. C. A. 22, 33 L. R. A. 56. Used to describe a medical preparation it "has a distinct and definite meaning, namely, a combination of sugar and the juice of the fig, and possibly other ingredients, in which, however, the medicinal property of the fig is the active and chief element." California Fig-Syrup Co. *v.* Stearns, 73 Fed. 812, 815, 20 C. C. A. 22, 33 L. R. A. 56.

20. Webster Dict. [*quoted* in California Fig-Syrup Co. *v.* Stearns, 67 Fed. 1008, 1011 (*affirmed* in 73 Fed. 812, 815, 20 C. C. A. 22, 33 L. R. A. 56, where the same quotation is given)].

21. Standard Dict. [*quoted* in California Fig-Syrup Co. *v.* Stearns, 67 Fed. 1008, 1011 (*affirmed* in 73 Fed. 812, 815, 20 C. C. A. 22, 33 L. R. A. 56, where the same quotation is given)].

22. Standard Dict. [*quoted* in California Fig-Syrup Co. *v.* Stearns, 67 Fed. 1008, 1011 (*affirmed* in 73 Fed. 812, 815, 20 C. C. A. 22, 33 L. R. A. 56, where the same quotation is given)], adding: "Syrups are commonly named from their source of flavoring."

23. People *v.* Harris, 135 Mich. 136, 141, 97 N. W. 402, adding that "cane syrup," "sorghum syrup," and "corn syrup" describe respectively syrups so obtained from the respective plants named.

24. Johnson Dict. [*quoted* in *In re* Kemper, MacArthur Pat. Cas. (D. C.) 1, 9].

Of government see *Ex p.* Wall, 48 Cal. 279, 318, 319, 320, 17 Am. Rep. 425 (where, in construing Const. art. 9, § 4, it is said: ". . . the Constitution commands the Legislature to establish a system of town governments. This form of expression conveyed a definite meaning, when the Constitution was adopted, and is at once understood by those familiar with the systems of town government elsewhere; it would be meaningless, unless applied with reference to organizations, in their general features at least, like those in other States, where systems of town government had been established. To establish a system of government, the duties of the several local officials must be defined, in some of whom (or in the inhabitants of the town acting in a public capacity) a discretionary action must be vested within the scope of the powers given by the organic law which creates the system. In view of the origin of towns and their history in other States, I can conceive of no system of town government which is not continuous; which does not furnish officers to whom is given (during their term of office) the management of the machinery of local government, and which does not provide a legislative assembly, whose enactments shall be the product of deliberation and mutual consultation. This last seems the very life of any such system heretofore known in the United States," and, after describing the town meeting under the system of town governments in New England, as an example of the element of deliberation among the voters of the town, and contrasting the town system in this respect with the representative system of city government) it is added: "The system of town governments, as it existed in New York prior to 1846, is fully explained in the eleventh chapter of the first part of the revised statutes of 1827–8. There, as in New England, the towns possessed certain of the faculties of a body corporate; could sue and be sued, hold lands and make contracts necessary to the exercise of their corporate powers. In New York, as elsewhere, the citizens of towns chose certain town officers, and, when assembled as a deliberative body (Justices of the Peace presiding), made 'prudential rules and regulations,' with respect to local matters committed to their discretion;" where, also it was held that the legislature of California had not yet established a "system of town governments"); McConihe *v.* State, 17 Fla. 238, 269 [*quoted* in Enterprise *v.* State, 29 Fla. 128, 149, 10 So. 740; *Ex p.* Wells, 21 Fla. 280, 305] (where it is said of the word: ". . . when used in reference to municipal government, it means simply 'rules and regulations for the organization and government' of municipal corporations," and held that that is its meaning in Const. art. 4, § 21); Martin *v.* Tyler, 4 N. D. 278, 291, 60 N. W. 392, 25 L. R. A. 838 (where the term is said to be applied in N. D. Const. § 171, to the conduct of county business by township chairmen); Bryant *v.* Robbins, 70 Wis. 258, 261, 262, 35 N. W. 545 [*quoted* in Martin *v.* Tyler, *supra*] (where it is said: "It may admit of doubt . . . whether the power to construct drains, etc., given to town and county officers under the general law, is, strictly speaking, a part of the 'system of government' belonging to those political corporations within the meaning of the constitution"); State *v.* Riordan, 24 Wis. 484, 487, 488 (where, in construing Const. art. 4,] 23, which provides for the establishment of "but one system of town and county government, which shall be as nearly uniform as practicable," it is held that the true construction of "system" in that context is not merely "plan" in such

nected or combined into a whole; an assemblage of facts, or of principles and conclusions, scientifically arranged or disposed according to certain mutual relations, so as to form a complete whole, as a system of philosophy, a system of government;[25] in its general meaning, plan, arrangement, method.[26] (System: Of Coördinated Action, see EVIDENCE, 17 Cyc. 287. See also SCHEME, 35 Cyc. 799.)

SYSTEMATIZED DELUSION. A delusion based on a false premise, pursued by a logical process of reasoning to an insane conclusion.[27] (See DELUSION, 13 Cyc. 775; MONOMANIA, 27 Cyc. 886; PARANOIA, 29 Cyc. 1556; and, generally, INSANE PERSONS, 22 Cyc. 1104.)

TABLE. A synopsis or condensed statement, bringing together numerous items or details so as to be comprehended in a single view.[28] (Table: Annuity as Evidence, see EVIDENCE, 17 Cyc. 422. Interest as Evidence, see INTEREST, 22 Cyc. 1577 note 25. Judicial Notice, see EVIDENCE, 16 Cyc. 871. Keeping or

sense that one system or plan, whereby certain general powers of local government are delegated to the counties, to be executed by a class of agents or county while the legislature is left free to determine, increase or diminish, at discretion, the number of county supervisors acting under the general law, since that would endanger the uniformity demanded by the provision).

Of numbering.—"The fact that a single block has been subdivided into lots would not constitute a 'system' of numbering" as the phrase is used in Pol. Code, § 3650, providing for assessment. Davis *v.* Pacific Imp. Co., 137 Cal. 245, 248, 70 Pac. 15.

Of pleading.— In 4 Tex. St. 88, excepting from the general adoption of the common law, the common-law system of pleading, and providing that proceedings in all civil suits shall be conducted by "petition and answer" the words "petition and answer" are intended, not as a restriction of the pleadings to the answer but as the designation of a system of pleadings. Underwood *v.* Parrott, 2 Tex. 168, 178, 179.

Of public schools see State *v.* Ogan, 159 Ind. 119, 121, 122, 63 N. E. 227 (where it is said: "The Constitution does not direct the General Assembly to provide for the organization of the common schools, but it directs that body to devise 'a "system" of common schools,'" and after quoting the definition cited in the text *supra*, "A system of school government in which the cap-sheaf is a state officer, having authority more or less broad, as the legislature may provide, but which, of necessity, reaches down to and affects the schools themselves, is a centralized, and not a localized, form of school government"); Peay *v.* Talbot, 39 Tex. 335, 346 (holding that as used in Const. art. 9, § 4, providing that the legislature shall establish a "free system" of public schools throughout the state the word "'system' means an organized plan, an institution, something established for the use and benefit of the people, so long as the want of public education will continue").

Of railroad.— What is meant by the "system" of a railroad depends upon the subject to which it is applied and the connection in which it is used. The word has not, in itself, a meaning so clear and explicit that it must be interpreted according to its ordinary and popular meaning, regardless of the consequences of interpretation. As used in Rev. St. (1883) § 42, making "the gross transportation receipts of a railroad . . . line or system" the basis of an excise tax on a railroad which lies partly within and partly without the state, or is operated as part of a line or system extending beyond the state, the words "line" or "system" cannot be separated from the word "railroad," of which they are predicated. State *v.* Canadian Pac. R. Co., 100 Me. 202, 205, 60 Atl. 901.

"Of the insured."—"Cause or causes arising within the system of the insured," as used in an accident insurance policy disclaiming liability for injury due to such causes, while the phrase includes erysipelas, when that disease is one of those enumerated among such causes, although resulting from an external injury, where the word "secondary" is also used to describe the excepted causes (Smith *v.* Accident Ins. Co., L. R. 5 Exch. 302, 306, 307, 39 L. J. Exch. 211, 22 L. T. Rep. N. S. 861, 18 Wkly. Rep. 1107), does not include [at least in a policy where the word "secondary" is not used] hernia, although specified as one of such causes, when the hernia is the direct and immediate result of an accident (Fitton *v.* Accidental Death Ins. Co., 17 C. B. N. S. 122, 136, 34 L. J. C. P. 28, 112 E. C. L. 122 [*distinguished* in Smith *v.* Accident Ins. Co., *supra*]).

Electrical system.— In an ordinance providing that a "system of electric conductors and poles provided with street lamps" be built in the streets, "the use of the word 'system' implies that the wires are connected with the power house." Ewart *v.* Western Springs, 180 Ill. 318, 326, 54 N. E. 478.

Placing ice on edge with a view to its better preservation does not constitute a "system." *In re* Kemper, MacArthur Pat. Cas. (D. C.) 1, 9, where a patent was claimed for a new method of storing ice on vessels.

25. Encyclopaedic Dict. [*quoted* in State *v.* Ogan, 159 Ind. 119, 122, 63 N. E. 227].

26. McConihe *v.* State, 17 Fla. 238, 269 [*quoted* in Enterprise *v.* State, 29 Fla. 128, 149, 10 So. 740; *Ex p.* Wells, 21 Fla. 280, 305].

27. Taylor *v.* McClintock, 87 Ark. 243, 276, 112 S. W. 405.

28. Black L. Dict.

Exhibiting Gaming, see GAMING, 20 Cyc. 906. Millwrights as Evidence, see EVIDENCE, 17 Cyc. 422. Mortality as Evidence — In General, see EVIDENCE, 17 Cyc. 422; In Action For Causing Death, see DEATH, 13 Cyc. 355; In Action For Personal Injuries, see DAMAGES, 13 Cyc. 199; Of Expectancy of Life, Relevancy of, see DAMAGES, 13 Cyc. 199; DEATH, 13 Cyc. 353. Time, see RAILROADS, 33 Cyc. 664. Within Statute Against Gaming, see GAMING, 20 Cyc. 882.)

TABLEAU OF DISTRIBUTION. In Louisiana, a list of creditors of an insolvent estate, stating what each is entitled to.[29]

TABLET. A medicine in square form; a solid kind of electuary or confection made of dry ingredients, usually with sugar and formed into little flat squares; called also lozenge and troche; also applied to anything made up in a flat square shape, as a tablet of soap.[30]

TABLOID. A term which has been, if it is not still, so nondescriptive as to be capable of use as a trade-mark.[31]

TACIT. Silent; not expressed; implied or inferred; manifested by the refraining from contradiction or objection; inferred from the situation and circumstances, in the absence of expressed matter.[32] (Tacit: Acceptance of Succession, see DESCENT AND DISTRIBUTION, 14 Cyc. 92 text and note 14. Or Legal Mortgage of — Ward Against Tutor or Guardian, see GUARDIAN AND WARD, 21 Cyc. 110; Wife Against Husband, see HUSBAND AND WIFE, 21 Cyc. 1661.)

TACITA QUÆDAM HABENTUR PRO EXPRESSIS. A maxim meaning "Certain things though unexpressed are considered as expressed." [33]

TACKING. The uniting securities given at different times, so as to prevent any intermediate purchaser from claiming a title to redeem or otherwise discharge one lien, which is prior, without redeeming or discharging the other liens also, which are subsequent to his own title.[34] (Tacking: Affecting Priority Between Mortgages, see MORTGAGES, 27 Cyc. 1221. Several Periods of Dealing or Accounts After Cessation to Save From Operation of Limitations, see LIMITATIONS OF ACTIONS, 25 Cyc. 1126. Successive Deliveries to Support Mechanic's Lien, see MECHANICS' LIENS, 27 Cyc. 126. Successive Disabilities, see LIMITATIONS OF ACTIONS, 25 Cyc. 1270. Successive Possessions — In Support of Action of Ejectment, see EJECTMENT, 15 Cyc. 39; To Complete Title by Adverse Possession, see ADVERSE POSSESSION, 1 Cyc. 1001.)

TAG. A point of metal or other hard substance at the end of a cord, string, lace, strap, or the like.[35] (Tag: On Inspected Articles in General, see INSPECTION, 22 Cyc. 1367. On Inspected Fertilizer, see AGRICULTURE, 2 Cyc. 70.)

TAIL, ESTATES. See ESTATES, 16 Cyc. 680.

TAILINGS. See MINES AND MINERALS, 27 Cyc. 785.

TAKE.[36] To receive;[37] in its general sense, to get into one's possession or

29. Black L. Dict. [*citing* Taylor *v.* Hollander, 4 Mart. N. S. (La.) 535].

30. Imperial Dict. [*quoted* in Wellcome *v.* Thompson, [1904] 1 Ch. 736, 756, 73 L. J. Ch. 474, 91 L. T. Rep. N. S. 58, 20 T. L. R. 415, 32 Wkly. Rep. 581.

31. Wellcome *v.* Thompson, [1904] 1 Ch. 736, 750, 73 L. J. Ch. 474, 91 L. T. Rep. N. S. 58, 20 T. L. R. 415, 32 Wkly. Rep. 581, sustaining the right to the word as a trade-mark when registered as early as 1884.

32. Black L. Dict.

Statutory definition see La. Civ. Code (1900), art. 3556, subd. 30.

Tacit hypothecation.—A lien by the maritime law is often called a tacit hypothecation. The Nestor, 18 Fed. Cas. No. 10,126, 1 Sumn. 73 [*citing* 1 Dom. bk. 3, tit. 1, § 5].

Tacit mortgage as a term applied to "legal mortgage" in the law of Louisiana see La. Civ. Code (1900), art. 3311. See also HUSBAND AND WIFE, 21 Cyc. 1661 note 25; LEGAL MORTGAGE, 25 Cyc. 175.

33. Bouvier L. Dict. [*citing* Bedell's Case. 7 Coke 40*a*, 40*b*, 77 Eng. Reprint 470].

34. Black L. Dict. [*citing* 1 Story Eq. Jur. § 412].

"Tacking it on as a rider" is a legislative phrase, designating the practice of putting a measure of doubtful strength on its own merits into the general appropriation bill, in order to compel members to vote for it, or bring the wheels of government to a stop. Com. *v.* Gregg, 161 Pa. St. 582, 586, 29 Atl. 297.

35. Century Dict.

36. Has many shades of meaning, the precise meaning in any case depends upon the subject in respect to which it is used. Hallenbeck *v.* Getz, 63 Conn. 385, 388, 28 Atl. 519. Over one hundred applications in popular phrase. Com. *v.* Walker, 34 Pa. Super. Ct. 14, 16.

37. Tallassee Falls Mfg. Co. *v.* Tallapoosa County, 158 Ala. 263, 268, 48 So. 354. See also Sagory *v.* Dubois, 3 Sandf. Ch. (N. Y.)

power; to acquire; to obtain; to procure;[38] in the active sense, to lay hold of; seize with hands or otherwise;[39] to obtain possession by force or artifice; to get the custody or control of; to reduce to one's power of will;[40] to carry, transport, convey; to receive what is offered;[41] to lay hold of;[42] a word which, applied to land, implies to gain or receive into possession; to seize; to deprive one of the possession; to assume ownership;[43] to move or direct the course; to proceed; to go;[44] to eat as food; to swallow;[45] to arrest, apprehend.[46] Used as the synonym of "require" or "be necessary."[47]

466, 493; Stamp *v.* Sweetland, 8 Q. B. 13, 21, 9 Jur. 939, 14 L. J. M. C. 184, 2 New Sess. Cas. 90, 55 E. C. L. 13.

In its usual signification, implies a transfer of possession, dominion, control. Jersey City *v.* Morris Canal, etc., Co., 41 N. J. L. 66, 70.

Not confined to acquisition by purchase, but is broad enough to include acquisition by descent. Billings *v.* Hauver, 65 Cal. 593, 594, 4 Pac. 639.

Does not mean the mere detention on delay of property. U. S. *v.* Irwin, 127 U. S. 125, 129, 8 S. Ct. 1033, 32 L. ed. 99.

38. Hallenbeck *v.* Getz, 63 Conn. 385, 388, 28 Atl. 519.

To "take the unlawful interest" as prohibited by a statute it is necessary to take in possession, to receive such interest. Hallenbeck *v.* Getz, 63 Conn. 385, 388, 28 Atl. 519.

39. State *v.* Hromadko, 123 Iowa 665, 666, 99 N. W. 560. See also Gettinger *v.* State, 13 Nebr. 308, 14 N. W. 403; State *v.* Chambers, 22 W. Va. 779, 789, 46 Am. Rep. 550.

As "steal."— Taking and killing construed as "stealing" see Rex *v.* Mallinson, 2 Burr. 679, 682, 97 Eng. Reprint 509. Not necessarily synonymous with "steal" see Stone *v.* Stevens, 12 Conn. 219, 229, 30 Am. Dec. 611.

40. State *v.* Hromadko, 123 Iowa 665, 666, 99 N. W. 560, where such was said to be the use of the term in a statute against forcible defilement.

41. Hamilton *v.* Com., 3 Penr. & W. (Pa.) 142, 148.

Force is not necessarily implied, although usual, and taking may be by artifice, cajolery, craft, persuasion, or promises or by purely voluntary surrender of the person taking. Com. *v.* Walker, 34 Pa. Super. Ct. 14, 16.

42. Black L. Dict. [*quoted* in Wulzen *v.* San Francisco, 101 Cal. 15, 25, 35 Pac. 353, 40 Am. St. Rep. 17]. And see Butts *v.* Woods, 4 N. M. 187, 190, 16 Pac. 617, where it is said while the term is broad enough to include "to seize" such is not its ordinary sense, and it has no such technical meaning.

43. Black L. Dict. [*quoted* in Wulzen *v.* San Francisco, 101 Cal. 15, 25, 35 Pac. 353, 40 Am. St. Rep. 17].

"Taking" and "converting" are not appropriate in speaking of real property. Merritt *v.* Carpenter, 3 Abb. Dec. (N. Y.) 285, 289.

44. Webster Dict. [*quoted* in State *v.* Johnson, 115 Mo. 480, 493, 22 S. W. 463].

Implying control or management see Marshall *v.* Boardman, 89 Me. 87, 90, 35 Atl. 1024, 56 Am. St. Rep. 392.

"Take affidavits required of their clients" as used in a statute in regard to lawyers refers not to making, but to administering oaths. Wilkowski *v.* Halle, 37 Ga. 678, 681, 95 Am. Dec. 374 [*cited* in Moultrie Lumber Co. *v.* Jenkins, 121 Ga. 721, 49 S. E. 678].

45. Webster Dict. [*quoted* in Maryland Casualty Co. *v.* Hudgins, 97 Tex. 124, 128, 76 S. W. 745, 104 Am. St. Rep. 857, 64 L. R. A. 349, where such is held to be the meaning of the term as used in an accident insurance policy exempting from the policy, injuries caused from poison or anything accidentally or otherwise taken].

46. Reg. *v.* Hughes, 2 Can. Cr. Cas. 332, 334, 26 Ont. 486, construing as "apprehended" the word "taken," used in Railway Act, 51 Vict. c. 29, § 282, and citing for the use of "take" as apprehend, Cr. Code, § 566, as "arrest" or "apprehend." Cr. Code, Schedule 1, Form OO. See also Com. *v.* Hall, 9 Gray (Mass.) 262, 267, 69 Am. Dec. 285 (where the term is used as synonymous with "arrest"); Hamilton *v.* Com., 3 Penr. & W. (Pa.) 142, 148.

47. Webster Dict. [*cited* in King *v.* Kent, 29 Ala. 542, 555].

Take care of.—An agreement to "take care" of the indebtedness against certain property does not impose an obligation to discharge such indebtedness. McBride *v.* Wakefield, 58 Nebr. 442, 444, 78 N. W. 713. An agreement to "take care of" a person does not necessarily imply that the person to be supported is not to use any exertion to support himself. Bull *v.* McCrea, 8 B. Mon. (Ky.) 422, 425. The phrase "'take care of' matured paper," as applied to matured negotiable paper, means to take up by a payment or renewal, or to secure an extension of the time of payment. Yale *v.* Watson, 54 Minn. 173, 177, 55 N. W. 957. Used in reference to a conservator of idiots' estates the phrase makes it the duty of the conservator to assume the requisite charge, in order to the preservation and profit of the estate. Treat *v.* Peck, 5 Conn. 280, 284. Construed as equivalent to support and maintenance as well as personal attention. Cabeen *v.* Gordon, 1 Hill Eq. (S. C.) 51, 56.

Take effect.— Construed in will as synonymous with or equivalent to "executed" see Jones *v.* Habersham, 107 U. S. 174, 2 S. Ct. 336, 27 L. ed. 401. In reference to statutes construed as equivalent of "be in force" or "go into operation." Maize *v.* State, 4 Ind. 342, 348.

Used in connection with other words.— "Take effect at my death" see West *v.*

TAKEN. In reference to an appeal, perfected;[48] a synonym of seized; injured; destroyed; deprived of.[49]

TAKE-UP. A device for taking up or rolling the completed fabric upon an intermittingly moving roller or cloth-beam.[50]

TAKING. The act of laying hold upon an article, with or without removing the same.[51] (Taking: Acknowledgment, see ACKNOWLEDGMENTS, 1 Cyc. 558, 559, 562. Affidavit, see AFFIDAVITS, 2 Cyc. 9. Appeal, Time For, see APPEAL AND ERROR, 2 Cyc. 789. As Element of — Larceny, see LARCENY, 25 Cyc. 18; Robbery, see ROBBERY, 34 Cyc. 1798, 1802. Deposition, see DEPOSITIONS, 13 Cyc. 913. Imputation of Larceny From Use of Word, see LIBEL AND SLANDER, 25 Cyc. 303. In Abduction, see ABDUCTION, 1 Cyc. 144. Of Insufficient Bond or Security by — Deputy, Liability of Sheriff, see SHERIFFS AND CONSTABLES, 35 Cyc. 1623; Sheriff or Constable, Liability, see SHERIFFS AND CONSTABLES, 35 Cyc. 1711. Of Property — For Public Use, see EMINENT DOMAIN, 15 Cyc. 543; Remedy For Recovery of Specific Personal Property, see REPLEVIN, 34 Cyc. 1342; Under Attachment, see ATTACHMENT, 4 Cyc. 584; Under Chattel Mortgage, see CHATTEL MORTGAGES, 7 Cyc. 80; Under Execution, see EXECUTIONS, 17 Cyc. 1082; Under Writ of Sequestration, see SEQUESTRATION, 35 Cyc. 1404; Under Writ or Order of Replevin, see REPLEVIN, 34 Cyc. 1456. Up Report of Referee, see REFERENCES, 34 Cyc. 849. Wrongful Taking of Property — As Ground For Replevin, see REPLEVIN, 34 Cyc. 1395; Civil Liability in General, see TRESPASS; TROVER AND

Wright, 115 Ga. 277, 278, 41 S. E. 602. "Take entire charge" see Seymour *v.* Warren, 179 N. Y. 1, 5, 71 N. E. 260. "Take his own life" see Supreme Commandery K. of G. R. *v.* Ainsworth, 71 Ala. 436, 448, 46 Am. Rep. 332. "Take into consideration" see Babb *v.* Carver, 7 Wis. 124, 126. "Take measures for the formation of a company" see Cooke *v.* Barr, 39 Conn. 296, 304. "Take up," used in reference to a note, construed as "pay" see Hartzell *v.* McClurg, 54 Nebr. 316, 318, 74 N. W. 626.

48. Law *v.* Nelson, 14 Colo. 409, 411, 24 Pac. 2. See also Straat *v.* Blanchard, 14 Colo. 445, 447, 24 Pac. 561; Bruiletts Creek Coal Co. *v.* Pomatto, 172 Ind. 288, 292, 88 N. E. 606. See also APPEAL AND ERROR, 2 Cyc. 805.

An appeal is taken when notice of intention to appeal is served as required by law. Saverance *v.* Lockhart, 66 S. C. 539, 541, 45 S. E. 83. "An appeal cannot be said to be 'taken' . . . until it is, in some way, presented to the court which made the decree appealed from, thereby putting an end to its jurisdiction over the cause, and making it its duty to send it to the Appellate Court." Credit Co. *v.* Arkansas Cent. R. Co., 128 U. S. 258, 261, 9 S. Ct. 107, 32 L. ed. 448.

49. Evansville, etc., R. Co. *v.* Dick, 9 Ind. 433, 436, where the term was so construed in the constitutional provision against taking private property without compensation.

In a statute prescribing punishment for administering poison to a human being with intent to kill "and which shall have been actually taken by such human being," the term means any method by which the system is made to absorb the poison administered or procured to be administered by another person, and includes every possible way that poison can be administered. State *v.* Stuart, 88 Miss. 406, 409, 40 So. 1010.

Used in connection with other words.— "Taken or reserved." Brickett *v.* Minot, 7 Metc. (Mass.) 291, 294. "Taken as true" see State *v.* Brooks, 99 Mo. 137, 143, 12 S. W. 633. "Taken in the act of adultery" see Gregory *v.* State, 50 Tex. Cr. 73, 77, 94 S. W. 1041; Price *v.* State, 18 Tex. App. 474, 481, 51 Am. Rep. 322. "Taken together" see St. Thomas First Nat. Bank *v.* Flath, 10 N. D. 281, 287, 86 N. W. 867. "To be taken as ordered" see Excelsior Wrapper Co. *v.* Messinger, 116 Wis. 549, 555, 93 N. W. 459.

50. Holmes *v.* Plainville Mfg. Co., 9 Fed. 757, 758, 20 Blatchf. 123.

51. Bouvier L. Dict.

"Taking down the testimony," as used in an act providing for the compensation of official stenographic reporters, embraces the whole process of reproducing the testimony of a witness in ordinary or intelligent writing, when necessary to comply with the law, including both the stenographic notes taken by the reporter and the translation of these notes and writing out the same in ordinary language. Where there is no conviction, so as to make it legally necessary to record the evidence, the process of taking down is complete without writing out the stenographic notes, and hence in such cases the compensation of the reporter should be limited to the time occupied in making his notes. Henderson *v.* Parry, 93 Ga. 775, 21 S. E. 144.

"Taking up" an animal, such as a horse, etc., in Texas, among stockmen, has a well defined meaning, and apprehends that the animal is running loose on the range. Cochran *v.* State, 36 Tex. Cr. 115, 117, 35 S. W. 968. "Taking up" an animal necessarily includes the idea of confining it. Jaquith *v.* Royce, 42 Iowa 406, 411.

Used in connection with other words.— "Taking by force" see North Bridgewater Second Cong. Soc. *v.* Howard, 16 Pick. (Mass.) 206, 209. "Taking of poison" see Hill *v.* Hartford Acc. Ins. Co., 22 Hun (N. Y.) 187, 189. "Taking orders" see *In re* Abel, 10 Ida. 288, 291, 77 Pac. 621. "Taking poison"

CONVERSION; Liability of Sheriff or Constable, see SHERIFFS AND CONSTABLES, 35 Cyc. 1643.)

TALC. A mineral composed chiefly of silica, magnesia, and water.[52]

TALES. A supply of such men as are summoned on the first panel in order to make up the deficiency.[53]

TALES JUROR. A juror added to a deficient panel so as to supply the deficiency.[54]

TALESMAN. A juror summoned to fill up a panel for the trial of a particular cause.[55] (See GRAND JURIES, 20 Cyc. 1321; JURIES, 24 Cyc. 240.)

TALIS CERTITUDO CERTITUDINEM CONFUNDIT. A maxim meaning "An over-nice pretence of certainty is the enemy of legal certainty, and is abhorrent to the law." [56]

TALIS INTERPRETATIO SEMPER FIENDA EST, UT EVITETUR ABSURDUM, ET INCONVENIENS, ET NE JUDICIUM SIT ILLUSORIUM. A maxim meaning "Interpretation is always to be made in such a manner that what is absurd and inconvenient is to be avoided, lest the judgment be illusory." [57]

TALIS NON EST EADEM, NAM NULLUM SIMILE EST IDEM. A maxim meaning "What is like is not the same, for nothing similar is the same." [58]

TALIS RES, VEL TALE RECTUM, QUÆ VEL QUOD NON EST IN HOMINE ADTUNC SUPERSTITE SED TANTUMMODO EST ET CONSISTIT IN CONSIDERATIONE ET INTELLIGENTIA LEGIS, ET QUOD ALII DIXERUNT TALEM REM VEL TALE RECTUM FORE IN NUBIBUS. A maxim meaning "Such a thing or such a right as is not vested in a person then living, but merely exists in the consideration and contemplation of law [is said to be in abeyance,] and others have said that such a thing or such a right is in the clouds." [59]

TALK SHOP. A phrase meaning to talk about business.[60]

TALLAGIUM.[61] A tax taken when the king or any other hath a share, or part of the value of a man's goods or chattels, or a share or part of the annual revenue of his lands, or puts any charge or burden upon another.[62] (See TALLIAGE.)

TALLIAGE. A word said to mean burdens, charges of impositions put or set upon persons or property for public uses.[63] (See TALLAGIUM.)

TALLIES OF LOAN. Words originally used in England to describe exchequer bills which are issued by the officers of the exchequer when a temporary loan was necessary to meet the exigencies of the government.[64]

TALLOW. The suet or fat of animals of the sheep or ox kinds segregated from membranous and fibrous matter by melting it down.[65]

see Travelers' Ins. Co. *v.* Dunlap, 160 Ill. 642, 645, 43 N. E. 765, 52 Am. St. Rep. 355.

52. Jenkins *v.* Johnson, 13 Fed. Cas. No. 7,271, 9 Blatchf. 516.

53. Blackstone Comm. [*quoted* in Boyer *v.* Teague, 106 N. C. 576, 621, 11 S. E. 665, 19 Am. St. Rep. 547].

54. Bouvier L. Dict. [*quoted* in Louisville, etc., R. Co. *v.* Mask, 64 Miss. 738, 744, 2 So. 360].

"There is a distinction between 'regular' jurors and 'tales' jurors; but both 'regular' and 'tales' jurors are, in the sense of the law, 'petit jurors' when they are selected and summoned to serve on a petit jury." State *v.* McCrystol, 43 La. Ann. 907, 913, 9 So. 922.

55. Shields *v.* Niagara County Sav. Bank, 3 Hun (N. Y.) 477, 479, 5 Thomps. & C. 585.

56. Morgan Leg. Max. [*citing* Broom Leg. Max.].

57. Peloubet Leg. Max. [*citing* Woods' Case, 1 Coke 40*b*, 52*a*, 76 Eng. Reprint 89].

Applied in Jackson *v.* Hogan, 3 Bro. P. C. 388, 402, 1 Eng. Rep. 1387.

58. Bouvier L. Dict. [*citing* Gerard *v.* Dickinson, 4 Coke, 18*a*, 18*b*, 76 Eng. Reprint 903].

59. Black L. Dict. [*citing* Coke Litt. 342].

60. Coveney *v.* Conlin, 20 App. Cas. (D. C.) 303, 316.

61. **Derived from the French** word "tailler," to share or cut out a part. "A general word and doth include all subsidies, taxes, tenths, fifteenths, impositions or other burthens or charges put or set upon any man." Coke Inst. [*quoted* in Bernards *v.* Allen, 61 N. J. L. 228, 232, 39 Atl. 716; People *v.* Brooklyn, 9 Barb. (N. Y.) 535, 550].

62. Coke Inst. [*quoted* in People *v.* Brooklyn, 9 Barb. (N. Y.) 535, 550].

63. State *v.* Switzler, 143 Mo. 287, 314, 45 S. W. 245, 65 Am. St. Rep. 653, 40 L. R. A. 280 [*citing* 2 Coke Inst. 532], where the principal case gives this meaning to the word "taxes." See also Lake Shore, etc., R. Co. *v.* Grand Rapids, 102 Mich. 374, 380, 60 N. W. 767, 29 L. R. A. 195, where it is used in the same sense as the word "tax."

64. Briscoe *v.* Kentucky Bank, 11 Pet. (U. S.) 257, 328*e*, 9 L. ed. 709, 928.

65. Webster Dict.

TAMEN ALIQUANDO PER SE NON SIT MALUM, SI SIT MALI EXEMPLI, NON EST FACIENDUM. A maxim meaning "When any thing by itself is not evil, if it may yet be an example for evil, it is prohibited." [66]

TAMEN EVENIT UT EXCEPTIO QUÆ PRIMA FACIE JUSTA VIDETUR TAMEN INIQUE NOCEAT. A maxim meaning "It sometimes happens that a plea which seems *prima facie* just is nevertheless injurious and unequal." [67]

TAMEN LEX GENERALITER LOQUITUR RESTRINGENDA EST, UT CESSANTE RATIONE ET IPSA CESSAT. A maxim meaning "Although the law speaks generally, it is to be restrained; since, when the reason on which it is founded fails, it fails also." [68]

TAMPER. A word which as used in a criminal statute is said to have the limited meaning of improper interference, as for the purpose of alteration and to make objectionable or unauthorized changes.[69] (To Tamper: With Juror — As Contempt of Court, see CONTEMPT, 9 Cyc. 15; As Criminal Offense, see EMBRACERY, 15 Cyc. 539. With Jury as Ground For New Trial, see CRIMINAL LAW, 12 Cyc. 717; NEW TRIAL, 29 Cyc. 796. With Witness — As Contempt of Court, see CONTEMPT, 9 Cyc. 22; As Criminal Offense, see OBSTRUCTING JUSTICE, 29 Cyc. 1332.)

TANK. An artificial receptacle for liquids; a large basin or cistern.[70]

TANNING. The art of changing a raw skin into leather;[71] the art or process of converting hides and skins into leather.[72]

TANTAN. A game of chance.[73] (See GAMING, 20 Cyc. 887.)

TANTUM BONA VALENT, QUANTUM VENDI POSSUNT. A maxim meaning "Goods are worth so much as they can be sold for." [74]

TANTUM CONCESSUM QUANTUM SCRIPTUM. A maxim meaning "The writing is the limit of the grant." [75]

TANTUM PRÆSCRIPTUM QUANTUM POSSESSUM. A maxim meaning "There is only prescription in so far as there has been possession." [76]

TANTUM VALET IN GENERALIBUS QUANTUM SINGULARE IN SINGULIS GENERALE. A maxim meaning "What is general prevails, or is worth as much, among things general as what is particular among things particular." [77]

TAPERING. Gradually converging to a point.[78]

TAPERING SOCKET. One adapted to receive a tapering screw.[79]

TAPIOCA. An article commercially known in this country, which is obtained from the tuberous roots of the cassava or manioc plant, which is a native of Brazil.[80]

As used in the revenue act does not include "stearine," the latter being a manufacture of tallow, and not tallow in its natural condition. Fairbanks *v.* Spaulding, 19 Fed. 416.

66. Morgan Leg. Max. [*citing* 2 Coke Inst. 564].

67. Morgan Leg. Max. [*citing* Coke Inst. 4, 14, 4].

68. Morgan Leg. Max. [*citing* 4 Coke Inst. 960].

69. Keefe *v.* Donnell, 92 Me. 151, 159, 42 Atl. 345 [*citing* Century Dict.], where it is said in the principal case not to mean "open" as applied to a town clerk in charge of a package of ballots who is forbidden by the statute to extract from or in any manner "tamper" with such package.

70. Webster Dict. [*quoted* in Standard Oil Co. *v.* Com., 119 Ky. 75, 84, 82 S. W. 1020, 26 Ky. L. Rep. 985, where it is said that "in bulk or tank" are used to express the same thing, tank being another word to indicate the size of the mass, the storage of which should be the subject of license tax].

71. Tannage Patent Co. *v.* Donallan, 93 Fed. 811, 817.

72. Century Dict. [*quoted* in Tannage Patent Co. *v.* Donallan, 93 Fed. 811, 817].

73. *In re* Lee Tong, 18 Fed. 253, 259, 9 Sawy. 333, where it is said that if played for anything of value the game comes within the inhibition of the statute against gambling.

74. Black L. Dict. [*citing* Shepard Touchst. 142].

75. Morgan Leg. Max. [*citing* Trayner Leg. Max. 580].

76. Morgan Leg. Max. [*citing* Trayner Leg. Max. 581].

77. Morgan Leg. Max.

78. Rex. *v.* Metcalf, 2 Stark. 249, 3 E. C. L. 397.

79. Allison *v.* New York, etc., Bridge, 29 Fed. 517, 521.

80. *In re* Townsend, 56 Fed. 222, 223, 5 C. C. A. 488, where the term is said to include tapioca flour which is used to a slight extent in the thickening of soups, but which is used mostly by calico printers and carpet manufacturers to thicken colors, and in the manufacture of a substitute for gum arabic or other gum.

TARE. The amount allowed for the outside or covering of the article imported, whether it be a box, barrel, bag, bale, mat, etc.[81]

TARIFF. A cartel of commerce; a book of rates; a table or catalogue, drawn usually in alphabetical order, containing the names of several kinds of merchandise, with the duties or customs to be paid for the same as settled by authority or agreed on between the several princes and states that hold commerce together.[82] (See, generally, CUSTOMS DUTIES, 12 Cyc. 1104.)

TAVERN. A place for the entertainment of travelers and where all their wants can be supplied; [83] a house for the entertainment of travelers as well as the sale of liquors; [84] a place for the general entertainment of all travelers and strangers who apply, paying suitable compensation; [85] a place where wine is sold and drinkers are entertained; [86] a house licensed to sell liquors in small quantities, to be drank on the spot; [87] an inn; a hotel usually licensed to sell liquors in small quantities; [88] a public house where entertainment and accommodation for travelers and other guests are provided.[89] (Tavern: In General, see INNKEEPERS, 22 Cyc. 1068. As Subject of Liquor License, see INTOXICATING LIQUORS, 23 Cyc. 117. Discrimination Against Persons by Reason of Race or Color, see CIVIL RIGHTS, 7 Cyc. 171.)

81. Napier *v.* Barney, 17 Fed. Cas. No. 10,009, 5 Blatchf. 191, 192, where it is distinguished from "draft" which is an allowance to the merchant when the duty is ascertained by weight to insure good weight to him.

82. Ft. Worth, etc., R. Co. *v.* Cushman, 92 Tex. 623, 624, 50 S. W. 1009 [*citing* Standard Dict.; Webster Dict.; Worcester Dict.].

"Tariff rate" used in a statute which provides that if no part of a railroad passenger ticket be used the holder shall be entitled to receive the full amount thereof, and if only a part is used he shall be entitled to the remainder of the price after deducting the tariff rate between the points for which the ticket was actually used, referred to the rate per mile which the law authorized railroad companies to charge for transportation of passengers within the state, and, where an excursion ticket sold at reduced rates was only partially used, the sum to be deducted was the regular rate, and not the excursion rate, per mile. Ft. Worth, etc., R. Co. *v.* Cushman, 92 Tex. 623, 624, 50 S. W. 1009.

83. People *v.* Jones, 54 Barb. (N. Y.) 311, 316, 1 Cow. Cr. 381.

84. People *v.* Jones, 54 Barb. (N. Y.) 311, 317, 1 Cow. Cr. 381 [*citing* Webster Dict.].

85. Bishop St. Cr. (2d ed.) § 297 [*quoted* in Comer *v.* State, 26 Tex. App. 509, 512, 10 S. W. 106].

86. Johnson Dict. [*quoted* in State *v.* Chamblyss, Cheves (S. C.) 220, 221, 34 Am. Dec. 593 (where it is said in some of the United States to be synonymous with "inn" or "hotel"); State *v.* Heise, 7 Rich. (S. C.) 518, 520 (where it is said that in order to constitute it a provision must be made for the receipt, relief, and lodging of wayfaring people)].

87. Webster Dict. [*quoted* in Hall *v.* State, 4 Harr. (Del.) 132, 140; Bonner *v.* Welborn, 7 Ga. 296, 306 (where it is said to mean the common inns of the common law); Rafferty *v.* New Brunswick F. Ins. Co., 18 N. J. L. 480, 484, 38 Am. Dec. 525 (where it is said to be synonymous with "hotel" or "inn"); *In re* Schneider, 11 Oreg. 288, 297, 8 Pac. 289 (where it is said to be practically synonymous with "bar-room" or "drinking shop"); State *v.* Chamblyss, Cheves (S. C.) 220, 226, 34 Am. Dec. 593 (where it is said to denote a house for the entertainment of travelers, as well as for the sale of liquors); Werner *v.* Washington, 29 Fed. Cas. No. 17,416*a*, 2 Hayw. & H. 175, 179].

88. Webster Dict. [*quoted* in St. Louis *v.* Siegrist, 46 Mo. 593, 594].

89. Webster Dict. [*quoted* in St. Louis *v.* Siegrist, 46 Mo. 593, 594 (where in this country it is said to be used synonymously with "hotel" and "public house"); Comer *v.* State, 26 Tex. App. 509, 512, 10 S. W. 106].

Used synonymously with "inn" see Matter of Brewster, 39 Misc. (N. Y.) 689, 691, 80 N. Y. Suppl. 666.

Includes every house of public resort within a statute prohibiting gambling taverns. Wortham *v.* Com., 5 Rand. (Va.) 669, 675; Linkous *v.* Com., 9 Leigh (Va.) 608, 611.

Inn and tavern are both said to be houses of public entertainment. Crown Point *v.* Warner, 3 Hill (N. Y.) 150, 156.

Distinguished from "keeper of a house of private entertainment" see Braswell *v.* Com., 5 Bush (Ky.) 544, 545.

A restaurant, where meals are furnished, is not an inn or tavern. People *v.* Jones, 54 Barb. (N. Y.) 311, 316, 1 Cow. Rep. 381.

A license to keep a "tavern" in the licensee's brick house applied to a frame room adjoining it, which was used as the bar-room. Gray *v.* Commonwealth, 9 Dana (Ky.) 300, 301, 35 Am. Dec. 136. A license to "keep a tavern" construed under the statute to include license to retail liquors as well as to keep a tavern. Hirn *v.* State, 1 Ohio St. 15, 19. A license in general terms to keep a "tavern" authorizes the tavern-keeper to vend spirituous liquors in his bar-room or tavern to his guests or others in small quantities, to be drank in the tavern or elsewhere. Com. *v.* Kamp, 14 B. Mon. (Ky.) 309.

TAVERN-KEEPER. One who obtains a license to keep a tavern and for whom it is kept;[90] a person who makes it his business to entertain travelers and passengers, and provide lodging and necessaries for them and their horses and attendants;[91] a person a part of whose business at least it is to sell intoxicating liquors;[92] a person who makes it a business to keep a house of entertainment for travelers;[93] a person who receives and entertains as guests those who choose to visit his house;[94] synonymous with "innkeepers."[95]

TAX. To assess, fix, or determine judicially.[96] (See TAXATION, *post*, p. 706.)

TAXABLE COSTS. Full indemnity for the expenses of a party who is successful in a suit between party and party whether at law or in equity;[97] such costs as a party is entitled to have taxed by law.[98] (See, generally, COSTS, 11 Cyc. 1.)

TAXABLE INHABITANT. One who is, or who may lawfully be, taxed; one who possesses all the qualifications necessary to authorize the proper taxing authorities to assess him with the tax.[99] (See TAXATION, *post*, p. 767.)

TAXABLE PROPERTY. See TAXATION, *post*, p. 767.

TAXABLE VALUE. See TAXATION, *post*, p. 1009 *et seq.*

90. Com. *v.* Burns, 4 J. J. Marsh. (Ky.) 177, 181, where it is said that this is true, although another person as his agent may actually keep it.

91. Com. *v.* Shortridge, 3 J. J. Marsh. (Ky.) 638, 640; St. Louis *v.* Siegrist, 46 Mo. 593, 595.

92. Territory *v.* Gutierrez, 12 N. M. 254, 290, 78 Pac. 139; Jensen *v.* State, 60 Wis. 577, 582, 19 N. W. 374.

93. Curtis *v.* State, 5 Ohio 324, where this is said to be true, although no liquor is kept.

94. People *v.* Jones, 54 Barb. (N. Y.) 311, 316, 1 Cow. Cr. 381.

95. Bonner *v.* Welborn, 7 Ga. 296, 306; Crown Point *v.* Warner, 3 Hill (N. Y.) 150, 156.

Does not include one who keeps a mere boarding house or lodging house, or even one who keeps a house for lodging strangers for the season (Southwood *v.* Myers, 3 Bush (Ky.) 681, 685), nor would it include one who merely keeps a restaurant where meals are furnished (People *v.* Jones, 54 Barb. (N. Y.) 311, 316, 1 Cow. Cr. 381).

To constitute an inn-keeper, a tavern-keeper, or hotel-keeper, the party so designated must receive and entertain as guests those who choose to visit his house; and a restaurant where meals are furnished is not an inn or tavern. People *v.* Jones, 54 Barb. (N. Y.) 311, 317, 1 Cow. Cr. 381.

96. Webster Dict. [*quoted* in Hewlett *v.* Nutt, 79 N. C. 263, 265]. See also Beebe *v.* Wells, 37 Kan. 472, 473, 15 Pac. 565.

97. Rowland *v.* Maddock, 183 Mass. 360, 365, 67 N. E. 347.

"Taxable," as applied to costs, having the same effect as "necessary" see Wilson *v.* Lange, 84 N. Y. Suppl. 519, 520.

98. Wright *v.* Smith, 19 Vt. 110, 112. See also Nicholls *v.* Rensselaer County Mut. Ins. Co., 22 Wend. (N. Y.) 125, 128.

Where an action was brought against several defendants on contract, and after defendants had answered separately, plaintiff was allowed to change into an action of tort on payment of the "taxable costs" the term was held to include separate costs to each defendant. George *v.* Reed, 104 Mass. 366, 367.

99. *In re* Annexation of Chester Tp., 174 Pa. St. 177, 180, 34 Atl. 457.

Construed in statute as meaning legal voters who are taxable see Elkins *v.* Deshler, 25 N. J. L. 177, 180.

TAXATION

By Henry Campbell Black*

I. Nature and Extent of Power in General, 672
II. Constitutional Requirements and Restrictions, 673
III. Liability of Persons and Property, 674
IV. Exemptions, 678
V. Place of Taxation, 680
VI. Levy and Assessment, 680
VII. Equalization and Review of Assessments, 685
VIII. Lien and Priority, 687
IX. Payment, Release or Compromise, and Refunding or Recovery of Taxes Paid, 687
X. Collection and Enforcement Against Persons and Personal Property, 689
XI. Sale of Land For Delinquent Taxes, 692
XII. Redemption From Tax-Sales, 696
XIII. Tax Deeds, 697
XIV. Tax Titles, 698
XV. Penalties and Forfeitures, 701
XVI. Legacy and Inheritance Taxes, 702
XVII. Tax on Transfers of Corporate Stock, 703
XVIII. Disposition of Taxes Collected, 703

I. Nature and Extent of Power in General, 706
A. *Definition and Nature of Taxes and Taxation,* 706
1. *Definitions,* 706
2. *Nature of Taxes,* 707
a. *In General,* 707
b. *Taxes Not Debts,* 710
c. *Taxation and Licensing Distinguished,* 711
d. *Taxes and Assessments Distinguished,* 711
e. *Fees of Public Officers Not Taxes,* 713
f. *Taxation and Eminent Domain Distinguished,* 713
3. *Kinds and Classification of Taxes,* 714
4. *Taxation and Representation,* 715
B. *Origin, Nature, and Extent of Taxing Power,* 715
1. *In General,* 715
2. *Power of United States,* 717
3. *Power of States,* 717
C. *Territorial Limitations of Taxing Power,* 718
1. *In General,* 718
2. *Property in More Than One State,* 719
3. *Property on Public or Indian Lands,* 719
D. *Purposes of Taxation,* 719

---

* Author of "Intoxicating Liquors," 23 Cyc. 43; "Judgments," 23 Cyc. 623; "Mortgages," 27 Cyc. 916. Also author of treatises on "Bankruptcy," "Constitutional Law," "Interpretation of Laws," "Intoxicating Liquors," "Judgments," "Tax Titles," etc.

1. *Necessity of Public Purpose*, 719
2. *Particular Purposes*, 720
3. *Special or Local Purposes*, 723
4. *Payment of Debts or Claims*, 723

E. *Power of Legislature and Delegation of Power*, 724
1. *Taxation a Legislative Function*, 724
2. *Delegation of Taxing Power*, 725

F. *Surrender of Power and Estoppel to Exercise*, 726
1. *Surrender of Power in General*, 726
2. *Estoppel to Impose Taxes*, 726
3. *Curing Defects and Irregularities*, 726

II. CONSTITUTIONAL REQUIREMENTS AND RESTRICTIONS, 727

A. *In General*, 727
1. *Nature and Effect of Provisions*, 727
2. *Statement of Object of Tax*, 728
3. *Restrictions as to Purposes of Taxation*, 729

B. *Equality and Uniformity*, 729
1. *In General*, 729
a. *Constitutional Provisions*, 729
b. *What Taxes Affected*, 731
(I) *In General*, 731
(II) *Business or Occupation Taxes and Licenses*, 732
(III) *Inheritance and Succession Taxes*, 733
(IV) *General Municipal Taxes*, 733
(V) *Local Taxes For Local Purposes*, 734
c. *Meaning of "Equality" and "Uniformity,"* 735
d. *What Inequality Sufficient to Invalidate Tax Law*, 736
e. *Fraud or Defects in Execution of Tax Law*, 737
f. *Exemptions*, 738
(I) *In General*, 738
(II) *Corporate Property*, 739
g. *Legal and Illegal Discriminations*, 740
(I) *Between Realty and Personalty*, 740
(II) *Between Residents and Non-Residents*, 741
(III) *Between Corporations*, 741
(IV) *As to Rate or Mode of Assessment and Valuation*, 742
(A) *In General*, 742
(B) *Provision For Deducting Indebtedness*, 744
(V) *As to Enforcement and Payment of Taxes*, 744
(A) *In General*, 744
(B) *Imposition of Penalty*, 745
h. *Fixing Situs of Property For Purpose of Taxation*, 745
i. *Discrimination in Distribution or Application of Taxes Collected*, 746
2. *Classification For Purposes of Taxation*, 746
a. *In General*, 746
b. *Corporations and Corporate Property*, 747
(I) *In General*, 747
(II) *Foreign Corporations*, 748
3. *Different Localities*, 749
a. *In General*, 749
b. *Taxing One Locality For Benefit of Another*, 749
c. *Taxing Part of State For General Benefit*, 750
d. *Urban and Suburban Lands*, 750
4. *Taxation of Individuals and Corporations*, 751

a. *Discrimination in General,* 751
b. *As to Mode of Assessment or Valuation,* 751
C. *Double Taxation,* 752
1. *In General,* 752
2. *Presumption and Construction Against Double Taxation,* 755
3. *Taxation of Same Property in Two Places,* 755
4. *Taxes on Mortgages and on Property Mortgaged,* 756
5. *Taxation of Corporations,* 756
a. *In General,* 756
b. *Tax on Property and on Capital,* 757
c. *Tax on Capital and on Shares of Stock,* 758
6. *Tax on Property and on Income Therefrom,* 759
D. *Taxation According to Value,* 760
1. *Constitutional Provisions,* 760
2. *What Taxes Affected,* 761
3. *Mode of Valuation,* 762
4. *Imposition of Penalty,* 763
E. *Limitation of Rate or Amount,* 763
1. *In General,* 763
2. *Taxation by Counties and Other Municipalities,* 764
F. *Excise, Income, and Poll Taxes,* 765
1. *Excise Taxes,* 765
2. *Taxes on Income,* 766
3. *Poll or Capitation Taxes,* 766

III. LIABILITY OF PERSONS AND PROPERTY, 767
A. *Private Persons and Property,* 767
1. *Liability to Taxation,* 767
a. *Statutory Provisions,* 767
(I) *In General,* 767
(II) *Construction,* 768
b. *Persons Liable,* 769
(I) *In General,* 769
(II) *Persons Under Disabilities,* 769
c. *Time When Liability Attaches,* 769
d. *Contracts to Assume and Pay Taxes,* 770
e. *Contracts and Transactions to Evade Taxation,* 770
f. *Persons or Property Erroneously Omitted,* 771
g. *Property Sold or Forfeited to State,* 772
h. *Estoppel to Deny Liability,* 772
2. *Nature of Property,* 773
a. *In General,* 773
b. *Real Property and Interests Therein,* 774
(I) *In General,* 774
(II) *Mines, Mining Rights, and Minerals,* 775
(III) *Riparian and Other Water Rights and Ditches,* 776
(IV) *Bridges and Wharves,* 778
(V) *Buildings and Improvements on Land,* 778
(VI) *Machinery and Fixtures,* 779
(VII) *Crops and Timber,* 780
(VIII) *Rights, Privileges, and Easements in Realty,* 780
c. *Personal Property,* 781
(I) *In General,* 781
(II) *Shipping,* 782
(III) *Merchants and Manufacturers' Stock in Trade,* 782
(IV) *Money,* 783
(V) *Credits, Investments, and Securities,* 783

(A) *In General*, 783
(B) *Debts Due From Non-Residents*, 785
(C) *Mortgages and Debts Secured*, 786
d. *Annuities*, 787
e. *Licenses, Membership Rights, and Franchises*, 787
3. *Ownership or Possession of Property and to Whom Taxable*, 788
a. *In General*, 788
b. *Particular Estates or Interests*, 790
c. *Property Leased*, 790
d. *Property Mortgaged or Subject to Other Liens*, 791
e. *Equitable Estates or Interests*, 792
f. *Interests of Vendor and Vendee*, 792
g. *Purchaser at Judicial Sale*, 792
h. *Property Held in Trust*, 793
i. *Property of Decedents' Estates*, 794
j. *Property in Custody of Agent, Factor, or Broker*, 796
k. *Property in Custody of Court or Court Officer*, 797
l. *Property Held by Assignees, Receivers, and Trustees in Bankruptcy*, 797
m. *Occupancy or Possession*, 798
(I) *In General*, 798
(II) *Property of Married Women*, 798
n. *Partnership Property*, 799
4. *Property of Non-Residents*, 799
a. *Taxability in General*, 799
b. *Property Held by Agent or Trustee*, 800
c. *Property Taxed in Another State*, 801
d. *Credits, Investments, and Securities*, 801
(I) *In General*, 801
(II) *Credits and Securities Held by Resident Agent*, 803
(III) *Mortgages*, 804
e. *Lands Owned by Non-Residents*, 804
5. *Situs of Property*, 805
a. *General Principles*, 805
b. *Intangible Personal Property*, 805
(I) *In General*, 805
(II) *Credits and Securities Held by Non-Resident Agent or Trustee*, 807
c. *Property of Decedents' Estates*, 807
d. *Shipping*, 808
e. *Property Temporarily in State or in Transit*, 809
6. *Excise, Income, and Poll Taxes*, 810
a. *Property Subject to Excise Tax*, 810
b. *Incomes Subject to Tax*, 810
c. *Persons Subject to Poll Tax*, 811
7. *Tax on Judicial Proceedings*, 812
B. *Corporations and Corporate Property*, 812
1. *In General*, 812
a. *Liability in General*, 812
b. *Corporations and Associations Subject to Taxation*, 813
(I) *In General*, 813
(II) *Corporations Chartered in Two States*, 814
c. *Corporate Property in General*, 814
d. *Real Property*, 814
e. *Deduction of Liabilities*, 815
f. *Corporate Franchises and Privileges*, 815
g. *Capital and Capital Stock*, 817

(I) *In General*, 817
(II) *Capital Representing Property Otherwise Taxed*, 819
(III) *Capital Representing Property in Another State*, 819
(IV) *Capital Invested in Non-Taxable Property*, 820
(V) *Deduction of Capital Invested in Realty*, 820
h. *Credits and Securities Owned by Corporations*, 820
i. *Corporate Business, Earnings, or Receipts*, 820
j. *Shares of Stock-Holders*, 821
k. *Dividends and Surplus*, 822
l. *Bonded and Other Debts of Corporations*, 824
m. *Ownership or Possession of Property*, 824
n. *Property Erroneously Left Untaxed*, 825
2. *Particular Kinds of Corporations*, 825
a. *Banks and Other Financial Institutions*, 825
(I) *In General*, 825
(II) *Franchises and Privileges*, 826
(III) *Capital and Stock*, 826
(IV) *Shares of Stock-Holders*, 827
(V) *Dividends and Surplus*, 828
(VI) *Deposits*, 828
(VII) *Loans and Investments*, 829
(VIII) *Ownership or Possession of Property*, 830
b. *National Banks*, 830
(I) *In General*, 830
(II) *Capital Stock*, 831
(III) *Real Estate*, 831
(IV) *Shares of Stock-Holders*, 832
(A) *In General*, 832
(B) *Non-Resident Stock-Holders*, 834
(V) *Discrimination Against National Bank Stock*, 834
(A) *In General*, 834
(B) *Meaning of "Moneyed Capital,"* 836
(C) *What Constitutes Illegal Discrimination*, 836
c. *Insurance Companies*, 839
(I) *In General*, 839
(II) *Capital and Stock*, 839
(III) *Surplus and Reserve Fund*, 840
(IV) *Premiums and Other Receipts*, 840
d. *Railroad Companies*, 841
(I) *In General*, 841
(II) *Right of Way and Other Realty*, 842
(III) *Rolling-Stock and Equipment*, 845
(IV) *Capital and Stock*, 845
(V) *Earnings or Receipts*, 846
(VI) *Dividends*, 847
(VII) *Bonded and Other Debt*, 847
(VIII) *Property Mortgaged or Leased*, 847
(IX) *Effect of Consolidation*, 848
e. *Miscellaneous Corporations*, 848
(I) *Building and Loan Associations*, 848
(II) *Street Railroads*, 850
(III) *Elevated Railroads*, 851
(IV) *Express and Other Transportation Companies*, 851
(V) *Bridge, Ferry, and Canal Companies*, 852
(VI) *Turnpike and Toll-Road Companies*, 852
(VII) *Telegraph and Telephone Companies*, 853
(VIII) *Electric Light and Power Companies*, 854

(IX) *Gas Companies*, 855
(X) *Mining Companies*, 855
(XI) *Water Companies*, 856
(XII) *Manufacturing Corporations*, 857
3. *Foreign Corporations*, 857
a. *Right to Tax Foreign Corporations*, 857
b. *Corporations Subject to Tax*, 858
(I) *In General*, 858
(II) *Carrying on Business Within State*, 859
c. *Franchise, License, or Privilege Tax*, 860
d. *Property Taxable in General*, 860
e. *Capital and Stock*, 861
(I) *In General*, 861
(II) *Capital Employed Within State*, 861
f. *Earnings or Receipts*, 863
g. *Shares in Foreign Corporations*, 864
C. *Public Property*, 865
1. *General Principles*, 865
2. *Property of United States*, 866
a. *In General*, 866
b. *Public Lands and Interests Therein*, 866
(I) *In General*, 866
(II) *Grant or Reservation of Power to Tax*, 867
(III) *Entries and Sales of Public Lands*, 867
(A) *In General*, 867
(B) *Equitable Title Before Patent*, 867
(C) *Conditions Precedent to Vesting of Equitable Title*, 868
(IV) *Possessory Rights*, 869
(V) *Improvements on Public Lands*, 869
(VI) *Grants of Public Lands*, 870
(A) *In General*, 870
(B) *Grants to States For Internal Improvements*, 870
(C) *Railroad Land Grants*, 870
(1) *In General*, 870
(2) *Equitable Title Before Patent*, 870
(3) *Conditions Precedent to Vesting of Equitable Title*, 871
(a) *In General*, 871
(b) *Selection, Survey, and Certification*, 871
(c) *Determination of Non-Mineral Character of Lands*, 872
3. *Property of States*, 872
a. *In General*, 872
b. *Lands Under Water*, 873
c. *Sales and Grants in General*, 873
d. *Terminable and Equitable Titles to State Lands*, 874
4. *Property of Municipal Corporations*, 874
a. *In General*, 874
b. *Property Held For Public Purposes*, 876
c. *Property Held For Private Purposes*, 877
d. *Municipal Water, Electric Light, and Gas Works*, 877
D. *Governmental Agencies, Obligations, and Securities*, 878
1. *Reasons For Exemption*, 878
2. *Agencies or Instrumentalities of United States*, 878
3. *Bonds and Other Securities Issued by United States*, 879

a. *In General*, 879
b. *Corporate Capital Invested in United States Securities*, 880
4. *Franchises, Patents, and Other Rights Granted by United States*, 881
5. *Corporations Created by United States*, 882
6. *Agencies and Instrumentalities of States*, 883
7. *Bonds and Other Securities of States*, 883
8. *Salaries of Public Officers*, 884

IV. EXEMPTIONS, 884
A. *Nature and Purpose of Exemption*, 884
B. *Grant or Creation*, 885
1. *Power to Exempt in General*, 885
2. *Constitutional Provisions*, 886
a. *In General*, 886
b. *Constitutional Restrictions*, 887
(I) *In General*, 887
(II) *Implied Restrictions*, 888
3. *Statutory Provisions*, 889
4. *Time When Statute Takes Effect*, 890
5. *Exemption by Commutation of Taxes*, 890
6. *Acceptance of Exemption*, 891
C. *Construction and Operation*, 891
1. *Presumption Against Exemption*, 891
2. *Rules of Construction*, 892
a. *In General*, 892
b. *Grant of Exemption by Reference to Earlier Grant*, 894
3. *Taxes Affected by Exemption*, 894
4. *Acquisition of Property by Exempt Person or Corporation*, 897
5. *Transfer of Exemption*, 897
a. *In General*, 897
b. *Purchase at Judicial Sale*, 899
6. *Commencement of Exemption*, 899
a. *In General*, 899
b. *Compliance With Conditions Precedent*, 899
7. *Computation of Period of Exemption*, 900
8. *Expiration, Revocation, and Surrender*, 900
a. *In General*, 900
b. *Earning of Specified Income or Dividend*, 901
9. *Revocable and Irrevocable Exemptions*, 901
a. *In General*, 901
b. *Exemptions in Corporate Charters*, 902
c. *Reservation of Right to Alter or Amend*, 903
d. *Consideration*, 904
10. *Waiver or Estoppel to Claim*, 904
11. *Proceedings to Establish Exemptions*, 905
12. *Actions to Enforce Exemptions*, 905
a. *In General*, 905
b. *Jurisdiction of Equity*, 906
c. *Pleading*, 907
d. *Evidence*, 907
D. *Persons and Property Affected*, 908
1. *In General*, 908
a. *Nature and Use of Property*, 908
b. *Non-Resident Property*, 909
c. *Amount of Exemption*, 909
2. *Individuals and Their Property*, 909
a. *In General*, 909

b. *Pensions and Bounties,* 909
c. *Exemption of Particular Classes of Persons,* 910
3. *Corporations and Their Property,* 911
a. *In General,* 911
b. *Capital and Stock,* 912
c. *Consolidation of Exempt Corporations,* 913
d. *Banks,* 914
e. *Building and Loan Associations,* 915
f. *Insurance Companies,* 915
g. *Railroad Companies,* 915
(I) *In General,* 915
(II) *Branch Lines,* 917
(III) *Right of Way and Other Realty,* 917
(IV) *Sale of Railroad Lands,* 918
(V) *Depots, and Other Buildings and Structures,* 918
(VI) *Rolling-Stock and Equipment,* 919
(VII) *Capital and Stock,* 920
h. *Mines and Mining Claims,* 920
i. *Water and Irrigation Companies,* 920
j. *Canal Companies,* 921
k. *Manufacturing Companies,* 921
(I) *In General,* 921
(II) *What Constitutes Manufacturing,* 922
(III) *Corporations For Manufacture of Particular Commodities,* 923
(IV) *Plant, Products, and Other Property,* 924
(V) *Capital and Stock,* 924
l. *Miscellaneous Corporations,* 925
m. *Foreign Corporations,* 925
E. *Exemption of Charitable, Educational, and Religious Institutions,* 926
1. *Charitable and Benevolent Institutions,* 926
a. *In General,* 926
b. *Rents or Income Applied to Charity,* 928
c. *Hospitals,* 929
d. *Homes, Asylums, and Reformatories,* 930
e. *Fraternal and Beneficial Associations,* 931
f. *Volunteer Military Organizations,* 932
2. *Educational Institutions,* 932
a. *In General,* 932
b. *Public or Charitable Character of Institution,* 933
c. *What Are Public Schools and Colleges,* 934
d. *Sectarian Schools,* 935
e. *What Property Exempt,* 935
(I) *In General,* 935
(II) *Nature of Ownership, Occupancy, or Use,* 935
(III) *Contiguous or Adjoining Property,* 937
(IV) *Residences of Instructors,* 937
(V) *Dormitories,* 938
(VI) *Fraternity Chapter-Houses,* 938
(VII) *Property Leased or Otherwise Used For Profit,* 938
(VIII) *Trust or Endowment Funds,* 939
f. *Literary and Scientific Societies,* 939
g. *Libraries and Museums,* 940
3. *Religious Societies and Institutions,* 940
a. *In General,* 940
b. *Ownership or Possession of Property,* 941
c. *Trust or Endowment Funds,* 942

d. *What Property Exempt*, 942
(i) *In General*, 943
(ii) *Place of Public Worship*, 943
(iii) *Rectory or Parsonage*, 943
(iv) *Property Diverted to Secular Uses*, 944
e. *Property of Young Men's Christian Association*, 945
f. *Cemeteries and Cemetery Associations*, 945

V. PLACE OF TAXATION, 946
A. *General Principles*, 946
1. *Taxing Districts*, 946
2. *Legislative Power to Fix Situs of Property*, 947
B. *Domicile or Residence of Owner*, 947
1. *In General*, 947
2. *What Constitutes Domicile*, 947
3. *Persons Having Two Residences*, 948
4. *Residence Situated Partly in Two Jurisdictions*, 949
5. *Change or Abandonment of Domicile*, 949
a. *In General*, 949
b. *Intent*, 949
c. *Evidence*, 950
C. *Nature and Location of Property*, 950
1. *Real Property*, 950
a. *In General*, 950
b. *Land in More Than One Taxing District*, 951
2. *Personal Property*, 952
a. *In General*, 952
b. *Domestic Animals*, 952
c. *Stock in Trade of Merchant or Manufacturer*, 953
d. *Logs and Timber*, 954
e. *Capital Invested in Business*, 954
f. *Credits and Securities*, 955
g. *Shipping*, 955
D. *Ownership or Possession of Property*, 956
1. *Property Held in Trust*, 956
2. *Property Held by Guardian*, 957
3. *Property of Decedent's Estate*, 958
4. *Property in Possession of Agent*, 958
5. *Partnership Property*, 958
E. *Property Temporarily in Taxing District or in Transit*, 959
F. *Corporations and Corporate Property*, 959
1. *Domicile of Corporation For Purposes of Taxation*, 959
2. *Situs of Property Generally*, 960
3. *Capital and Stock*, 961
4. *Banking Institutions*, 961
a. *In General*, 961
b. *National Bank Shares*, 961
5. *Railroad Companies*, 962
a. *In General*, 962
b. *Right of Way, Tracks, and Other Realty*, 963
c. *Rolling-Stock and Equipment*, 963
6. *Miscellaneous Corporations*, 963
7. *Foreign Corporations*, 964

VI. LEVY AND ASSESSMENT, 964
A. *Levy and Apportionment*, 964
1. *Nature of Levy*, 964
2. *Power and Authority of Legislature*, 965

a. *In General*, 965
b. *Apportionment to Municipalities*, 966
3. *Powers of Counties and Other Local Authorities*, 966
a. *In General*, 966
b. *Purposes of Taxation*, 967
(I) *In General*, 967
(II) *Aid to Railroads*, 968
c. *Rate or Amount*, 969
4. *Making of Levy by Local Authorities*, 970
a. *Necessity, Duty, and Authority to Make Levy*, 970
b. *Apportionment*, 971
5. *Requisites and Validity of Levy*, 971
a. *In General*, 971
b. *Statement of Purpose and Amount of Tax*, 972
c. *Certificate as to Rate or Amount*, 973
d. *List or Assessment as Basis For Levy*, 973
e. *Determination of Rate and Amount*, 974
f. *Time and Place of Levy*, 975
6. *Record of Levy*, 975
7. *Presumptions and Evidence as to Levy*, 976
8. *Defects and Objections*, 976
a. *In General*, 976
b. *Effect of Partial Illegality*, 977
9. *Relevy or Subsequent Levy*, 977
10. *Judicial Control of Levies*, 977
11. *Liability For Acts of Board or Officer*, 978
B. *Assessors of Taxes*, 978
1. *Appointment and Qualification*, 978
a. *Appointment, Status, and Tenure of Office*, 978
b. *Eligibility*, 979
c. *Qualification, Oath, and Bond*, 979
d. *Deputies and Assistants*, 980
2. *Compensation of Assessors*, 980
3. *Duties and Powers of Assessors*, 981
a. *In General*, 981
b. *Authority to Make Assessment*, 982
c. *Action by Majority of Board*, 983
d. *Acts of De Facto Assessors*, 984
4. *Civil Liabilities of Assessors*, 984
a. *Negligence or Misconduct in General*, 984
b. *Illegality, Mistake, Overvaluation*, 985
c. *Assessment of Exempt Property*, 986
d. *Error as to Residence*, 986
e. *Omission or Refusal to Assess*, 986
f. *Waiver and Estoppel*, 986
g. *Actions For Damages*, 986
5. *Criminal Responsibility of Assessors*, 987
C. *Assessment of Property in General*, 987
1. *General Principles*, 987
a. *Definition and Nature of Assessment*, 987
b. *Necessity of Assessment*, 987
c. *Statutory Provisions*, 988
d. *Time and Date of Assessment*, 989
e. *Evidence of Assessment*, 990
2. *List or Statement by Taxpayer*, 990
a. *Constitutional and Statutory Provisions*, 990
b. *Notice or Demand*, 991

c. *Who Should List Property*, 992
d. *Making and Requisites of List in General*, 992
e. *Property to Be Included and Valuation*, 993
f. *Statement of Debts to Be Deducted*, 994
g. *Verification of List*, 994
h. *Conclusiveness and Effect*, 994
i. *Addition of Omitted Property*, 995
3. *Proceedings on Failure to Return List or Making False List*, 995
a. *Right and Duty of Assessor to Ascertain and Value Property*, 995
(I) *In General*, 995
(II) *Examination of Witnesses and Inspection of Books*, 996
b. *Criminal Prosecution*, 996
c. *Penal Action to Impose Fine*, 997
4. *Determination as to Taxable Persons and Property*, 997
a. *In General*, 997
b. *Records or Paper Title*, 997
c. *Inspection of Property*, 998
d. *Determination as to Place of Taxation*, 998
5. *Mode of Assessment as Dependent on Nature or Ownership of Property*, 998
a. *In General*, 998
b. *Unoccupied or Unseated Land*, 999
c. *Lands of Non-Residents*, 1000
d. *Separate Parcels of Land*, 1000
e. *Necessity of Assessment to Owner*, 1002
(I) *In General*, 1002
(II) *Unknown Owners*, 1004
(III) *Effect of Mistake in Name of Owner*, 1005
(IV) *Statutes Validating Assessments in Wrong Name*, 1005
f. *Property of Partners and Joint Owners*, 1006
g. *Property of Decedents' Estates*, 1006
h. *Property Held in Trust*, 1008
i. *Assessment of Separate Interests*, 1008
6. *Valuation*, 1008
a. *In General*, 1008
(I) *Necessity of Valuation*, 1008
(II) *Determination of Value*, 1009
(III) *Unequal, Excessive, and Inadequate Valuations*, 1010
(IV) *Increasing Valuation Made by Taxpayer*, 1011
b. *Valuation of Real Estate*, 1011
(I) *General Rules*, 1011
(II) *Appurtenances, Easements, and Improvements*, 1012
(III) *Platted and Unplatted City Property*, 1013
(IV) *Property Partly Exempt*, 1013
(V) *Increasing Valuation Between Periodical Assessments*, 1013
c. *Valuation of Personal Property*, 1014
(I) *In General*, 1014
(II) *Credits, Investments, and Securities*, 1014
7. *Deduction of Indebtedness*, 1015
a. *In General*, 1015
b. *Deduction From Credits*, 1015
c. *Debts Which May Be Deducted*, 1016
d. *Deduction of Encumbrances on Real Property*, 1016
8. *Omissions of Taxable Property*, 1017

a. *Effect in General,* 1017
b. *Addition of Omitted Property,* 1017
9. *Amendment and Reassessment,* 1018
a. *Amendment or Alteration by Assessors,* 1018
b. *Reassessment,* 1019
10. *Notice of Assessment,* 1019
D. *Assessment of Corporate Stock and Property,* 1020
1. *In General,* 1020
a. *Duty and Authority of Assessors,* 1020
b. *Omitted Property,* 1020
2. *Report or Statement by Corporation,* 1020
a. *Necessity in General,* 1020
b. *Property to Be Listed,* 1021
c. *List of Stock-Holders,* 1021
d. *Who May Make Return,* 1022
e. *Conclusiveness and Effect,* 1022
f. *Failure or Refusal to Make Return,* 1022
3. *Report or Statement by Stock-Holders,* 1023
4. *Proceedings For Discovery of Property,* 1023
5. *Valuation and Determination of Taxable Property,* 1023
a. *Valuation of Corporate Property in General.* 1023
b. *Valuation of Franchises and Privileges,* 1024
c. *Valuation of Capital,* 1026
d. *Nominal or Actual Value of Stock,* 1028
e. *Deductions,* 1028
(I) *Property Not Taxable,* 1028
(II) *Indebtedness,* 1029
(III) *Real Property,* 1029
f. *Determination of Amount of Earnings or Receipts,* 1030
g. *Determination of Amount of Dividends,* 1030
h. *Valuation of Shares of Stock,* 1031
6. *Banks, Bank Stock, and Deposits,* 1031
a. *Assessment in General,* 1031
b. *Deduction of Non-Taxable Property,* 1032
c. *Deposits,* 1032
d. *Assessment of Shares of Stock,* 1033
(I) *In General,* 1033
(II) *National Bank Stock,* 1033
7. *Insurance Companies,* 1034
a. *Assessment in General,* 1034
b. *Deductions,* 1034
8. *Railroad Companies,* 1035
a. *Assessment in General,* 1035
b. *Valuation of Property,* 1037
c. *Rolling-Stock and Equipment,* 1038
d. *Valuation of Capital Stock,* 1039
e. *Earnings and Receipts,* 1039
f. *Deductions,* 1040
g. *Right of Way and Other Real Property,* 1040
(I) *Valuation in General,* 1040
(II) *Railroad Bridges,* 1041
(III) *State or Local Assessment,* 1041
(IV) *Property Included in "Right of Way," "Railroad Track," and "Road-Bed,"* 1042
(V) *Property Included in "Real Estate,"* 1043
9. *Miscellaneous Corporations,* 1043
10. *Foreign Corporations,* 1045

11. *Notice of Assessment,* 1045
E. *Assessment Rolls or Books,* 1046
1. *In General,* 1046
a. *Nature and Necessity of Roll or List,* 1046
b. *Authority and Duty to Make,* 1047
c. *Requisites in General,* 1047
2. *Form and Arrangement,* 1048
a. *In General,* 1048
b. *Classification of Subjects,* 1048
3. *Designation of Persons,* 1049
a. *Necessity of Inserting Name,* 1049
b. *Entry in Alphabetical Order,* 1050
c. *Designation of Corporation and Stock-Holders,* 1050
4. *Description of Property,* 1051
a. *In General,* 1051
(I) *Necessity and Sufficiency of Description,* 1051
(II) *Showing Taxability of Property,* 1051
(III) *Corporate Property and Stock,* 1051
(IV) *Railroad Property,* 1052
b. *Real Property,* 1052
(I) *Necessity and Sufficiency of Description,* 1052
(II) *Location According to Government Survey,* 1054
(III) *Description by Metes and Bounds,* 1055
(IV) *Description by Numbers on Recorded Map or Plat,* 1055
(V) *Name of Tract or Property,* 1056
(VI) *Description in Record Title,* 1057
(VII) *Fractional Lots or Parts of Tracts,* 1057
(VIII) *Statement of Quantity of Land,* 1058
(IX) *Separate Listing of Unseated or Non-Resident Lands,* 1058
(X) *Improvements,* 1058
(XI) *Abbreviations and Figures,* 1059
5. *Extending Amount of Tax,* 1059
6. *Authentication,* 1060
a. *Signature of Assessors,* 1060
b. *Certificate or Verification,* 1061
(I) *Necessity,* 1061
(II) *Requisites and Sufficiency,* 1062
(A) *In General,* 1062
(B) *Certificate as to Valuation,* 1063
c. *Presumptions and Evidence as to Authentication,* 1063
d. *Conclusiveness of Certificate,* 1063
7. *Completion, Return, and Filing,* 1063
a. *Return and Filing in General,* 1063
b. *Effect of Delay in Returning,* 1064
c. *Evidence of Return,* 1065
d. *Notice of Completion and Filing,* 1065
8. *Duplicate Lists or Rolls,* 1065
a. *In General,* 1065
b. *Supplying Lost or Destroyed Rolls,* 1066
9. *Errors and Omissions,* 1066
a. *In General,* 1066
b. *Omission of Dollar Mark,* 1067
c. *Amendment by Assessors,* 1067
(I) *In General,* 1067
(II) *Adding Omitted Persons or Property,* 1068
d. *Curative Statutes,* 1068

10. *Effect of Invalidity*, 1069
11. *Presumption of Validity and Correctness*, 1069
12. *Operation and Conclusiveness*, 1070
    a. *Operation and Effect*, 1070
    b. *Admissibility of Extrinsic Evidence*, 1071
    c. *Conclusiveness in General*, 1071
    d. *Conclusiveness in Collateral Proceedings*, 1072
13. *Custody of Assessment Records*, 1072
14. *Access to Rolls or Books*, 1072

VII. EQUALIZATION AND REVIEW OF ASSESSMENTS, 1073

A. *Equalization*, 1073
    1. *In General*, 1073
        a. *Meaning of Equalization*, 1073
        b. *Power to Create Boards of Equalization*, 1073
        c. *Equalization Among Classes or Kinds of Property*, 1073
    2. *Equalization by Municipal or Local Board or Officer*, 1074
        a. *Necessity of Equalization*, 1074
        b. *Powers and Proceedings of Board*, 1074
        c. *Method of Equalization*, 1075
        d. *Records of Board*, 1075
        e. *Decision of Board and Certificate*, 1076
        f. *Review of Proceedings*, 1076
    3. *Equalization by State Board*, 1076
        a. *Powers and Proceedings of Board*, 1076
        b. *Method of Equalizing*, 1077
        c. *Operation and Effect of Decision*, 1078

B. *Review and Correction of Assessments by Official Boards or Officers*, 1079
    1. *In General*, 1079
        a. *Nature and Scope of Remedy*, 1079
        b. *Necessity of Pursuing Statutory Remedy*, 1079
    2. *Grounds of Review*, 1081
        a. *Defects and Irregularities*, 1081
        b. *Error in Valuation or Amount*, 1082
    3. *Right of Review*, 1082
        a. *In General*, 1082
        b. *Persons Entitled*, 1083
        c. *Failure to Return List or Inventory*, 1083
        d. *Estoppel or Waiver*, 1085
            (I) *In General*, 1085
            (II) *By Payment or Tender of Taxes*, 1085
            (III) *By Failure to Object*, 1085
    4. *Creation and Organization of Board*, 1086
        a. *In General*, 1086
        b. *Qualification of Members*, 1086
        c. *Power to Act by Majority or by Committees*, 1086
    5. *Authority and Powers of Board or Officer*, 1087
        a. *In General*, 1087
        b. *Assessment of Omitted Property*, 1088
            (I) *In General*, 1088
            (II) *Assessment For Prior Years*, 1090
            (III) *Directing Assessor to Assess*, 1090
        c. *Change of Valuation or Amount of Tax*, 1091
        d. *Increase of Valuation or Tax*, 1091
        e. *Reduction of Valuation or Tax*, 1093
        f. *Remission of Tax and Striking Off Names or Property*, 1094
        g. *Correction of Errors and Defects*, 1094
        h. *Reassessment*, 1095

6. *Meetings of Board*, 1095
a. *Time and Place of Meetings*, 1095
(I) *In General*, 1095
(II) *Waiver of Objections*, 1096
b. *Time and Place For Objections or Application For Review*, 1097
7. *Proceedings Before Officer or Board of Review*, 1097
a. *Procedure in General*, 1097
b. *Notice to Taxpayers*, 1098
(I) *Necessity of Notice*, 1098
(II) *Requisites and Sufficiency*, 1099
(III) *Persons Notified*, 1101
(IV) *Waiver of Notice*, 1101
c. *Complaint or Application For Review*, 1102
d. *Answer and Reply*, 1103
e. *Evidence*, 1104
(I) *Presumptions and Burden of Proof*, 1104
(II) *Admissibility*, 1104
(III) *Weight and Sufficiency*, 1105
(IV) *Decision Not Based on Evidence*, 1106
(V) *Power to Call Witnesses and Compel Testimony*, 1106
f. *Judgment or Decision and Record*, 1107
(I) *Scope and Extent of Relief*, 1107
(II) *Rendition and Form of Decision*, 1107
(III) *Record of Proceedings*, 1107
(A) *In General*, 1107
(B) *Amendment and Correction*, 1108
(IV) *Conclusiveness and Effect of Decision*, 1108
(A) *In General*, 1108
(B) *Presumption of Regularity*, 1110
g. *Mode of Correction of Assessment*, 1111
C. *Judicial Remedies For Review and Correction of Assessments*, 1111
1. *Jurisdiction and Powers of Courts*, 1111
a. *In General*, 1111
b. *Assessment of Omitted Property*, 1113
2. *Appeal From Assessment*, 1113
a. *Jurisdiction and Right of Appeal*, 1113
b. *Time of Taking Appeal*, 1115
c. *Parties*, 1116
d. *Pleading and Practice*, 1116
e. *Scope of Inquiry on Appeal*, 1117
f. *Burden of Proof and Evidence*, 1118
g. *Relief Granted*, 1119
3. *Certiorari to Review Assessment*, 1120
a. *Nature and Scope of Remedy*, 1120
b. *Other Remedies Available or Appropriate*, 1122
c. *Defenses and Grounds of Opposition*, 1123
d. *Persons Entitled to Review*, 1124
e. *Parties Defendant*, 1124
f. *Time of Taking Proceedings*, 1125
g. *Petition*, 1125
h. *Writ and Return*, 1126
i. *Hearing and Evidence*, 1127
j. *Determination and Disposition of Cause*, 1129
k. *Appeal*, 1130
l. *Costs*, 1130
4. *Mandamus to Correct Assessment*, 1131

a. *Nature and Scope of Remedy,* 1131
(i) *Compelling Official Action,* 1131
(ii) *Correcting Errors in Assessment,* 1131
b. *Existence of Other Remedy,* 1132
5. *Injunction to Restrain Assessment,* 1132
a. *In General,* 1132
b. *Other Remedies Available,* 1134
c. *Parties,* 1134
6. *Action to Reduce Assessment or Abate Tax,* 1134
a. *Nature and Scope of Remedy,* 1134
b. *Conditions Precedent,* 1135
c. *Pleading and Evidence,* 1135
7. *Action to Vacate Assessment or For Reassessment,* 1135
a. *In General,* 1135
b. *Parties,* 1137
c. *Pleading and Evidence,* 1137
d. *Stay of Proceedings and Reassessment,* 1138

VIII. LIEN AND PRIORITY, 1138

A. *Nature and Creation of Lien,* 1138
1. *Tax Lien Is Statutory,* 1138
2. *Prerequisites to Attaching of Lien,* 1139
a. *Validity and Sufficiency of Assessment,* 1139
b. *Demand,* 1140
c. *Recording or Registration,* 1140
B. *Property to Which Lien Attaches,* 1140
1. *In General,* 1140
2. *Lien on Personal Property,* 1141
3. *Lien on Real Estate,* 1141
4. *Taxes Against Personal Property as Lien on Realty,* 1141
C. *Time When Lien Attaches and Priorities,* 1142
1. *When Lien Attaches in General,* 1142
2. *Priority of Tax Lien,* 1143
a. *In General,* 1143
b. *As Affected by Registration,* 1144
c. *As Against Levy or Attachment,* 1144
d. *As Against Mortgages and Other Encumbrances,* 1145
D. *Transfer of Property,* 1145
1. *In General,* 1145
2. *Judicial Sale of Property,* 1147
E. *Duration and Termination of Lien,* 1147
1. *In General,* 1147
2. *As Affected by Payment, Judgment, or Proceedings to Collect,* 1148
3. *Merger in Title,* 1149
4. *Loss or Discharge of Lien,* 1149
5. *Omission From Certificate or Statement as to Tax Liens,* 1150
6. *Sale of Property For Taxes,* 1150
F. *Protection of Lien,* 1150

IX. PAYMENT, RELEASE OR COMPROMISE, AND REFUNDING OR RECOVERY OF TAXES PAID, 1151

A. *Payment or Tender,* 1151
1. *In General,* 1151
a. *Necessity of Notice or Demand,* 1151
b. *Person by Whom Payment May Be Made,* 1152
(i) *In General,* 1152
(ii) *Payment by Claimants, Lienors, and Other Third Parties,* 1152

(A) *Effect in General,* 1152
(B) *Right to Lien,* 1154
(III) *Corporation Paying Tax on Stocks or Bonds,* 1155
(A) *In General,* 1155
(B) *Bank Stock,* 1156
(IV) *Contribution and Apportionment,* 1156
c. *Payment From Property in Custody of Law,* 1157
d. *To Whom Payment Made,* 1158
e. *Time and Place For Payment,* 1158
f. *Tender,* 1159
g. *Excuses For Non-Payment,* 1160
(I) *In General,* 1160
(II) *Mistake; Reliance on Official Statement or Certificate,* 1160
2. *Mode and Amount of Payment,* 1161
a. *Mode of Making Payment,* 1161
(I) *In General,* 1161
(II) *Set-Off or Counter-Claim,* 1162
b. *Medium of Payment,* 1162
(I) *In General,* 1162
(II) *State and Municipal Bonds, Warrants, and Other Obligations,* 1162
(III) *Bank and Treasury Notes,* 1164
(IV) *Checks, Drafts, and Notes,* 1164
c. *Amount of Payment in General,* 1164
d. *Partial Payment,* 1164
e. *Interest and Penalties,* 1165
f. *Rebates and Discounts,* 1166
3. *Evidence of Payment,* 1167
a. *Presumptions,* 1167
b. *Admissibility,* 1167
c. *Weight and Sufficiency,* 1168
4. *Application of Payments,* 1169
5. *Tax Receipts or Certificates,* 1169
6. *Operation and Effect of Payment,* 1169
B. *Release or Compromise, and Refunding of Taxes Paid,* 1170
1. *Release or Compromise,* 1170
2. *Authority to Refund,* 1172
3. *Grounds For Refunding,* 1172
a. *In General,* 1172
b. *Persons or Property Exempt or Not Liable,* 1173
4. *Proceedings to Secure Refund,* 1174
C. *Recovery of Taxes Paid,* 1174
1. *Right of Recovery in General,* 1174
2. *Other Remedies Available,* 1177
3. *Effect of Paying Over or Distributing Money,* 1177
4. *Voluntary Payment,* 1178
a. *In General,* 1178
b. *What Constitutes Voluntary Payment,* 1179
c. *Mistake of Law or Fact,* 1180
d. *Duress or Compulsion,* 1181
5. *Protest,* 1183
a. *Payment Under Protest in General,* 1183
b. *Requisites and Sufficiency of Protest,* 1185
6. *Actions or Proceedings For Recovery of Taxes,* 1185
a. *Nature and Form of Remedy,* 1185
b. *Conditions Precedent,* 1185

c. *Time to Sue and Limitations,* 1186
d. *Parties Plaintiff,* 1187
e. *Defendants,* 1187
f. *Pleading,* 1188
g. *Evidence,* 1189
h. *Amount of Recovery,* 1190

X. COLLECTION AND ENFORCEMENT AGAINST PERSONS AND PERSONAL PROPERTY, 1190

A. *Collectors and Proceedings For Collection,* 1190
1. *In General,* 1190
a. *Power to Enforce Collection,* 1190
b. *Constitutional and Statutory Provisions,* 1191
2. *Appointment, Qualification, and Tenure of Collectors,* 1191
a. *Creation and Abolition of Office,* 1191
b. *Eligibility,* 1191
c. *Other Officers as Collectors Ex Officio,* 1192
d. *Appointment or Election,* 1192
e. *Qualification,* 1194
f. *De Facto Collectors,* 1194
g. *Duration and Tenure of Office,* 1195
h. *Deputies and Assistants,* 1195
3. *Compensation of Collectors,* 1195
a. *Right to Compensation,* 1195
(I) *In General,* 1195
(II) *Nature of Services,* 1196
(III) *As Between Successive Collectors,* 1197
b. *Amount of Salary or Commissions,* 1197
c. *Allowance and Payment,* 1198
4. *Authority to Collect,* 1199
a. *In General,* 1199
b. *Taxes Within Authority of Collector,* 1200
c. *Death or Expiration of Term,* 1200
d. *Delivery of Assessment Roll, Tax List, or Duplicate,* 1200
e. *Warrant For Collection,* 1201
(I) *Nature and Necessity,* 1201
(II) *Authority to Make and Authentication,* 1202
(III) *Form and Requisites,* 1202
f. *Tax Bills,* 1204
g. *Authority to Compromise,* 1204
5. *Accounting and Paying Over Taxes Collected,* 1204
a. *Accounting by Tax Collectors,* 1204
(I) *In General,* 1204
(II) *Conclusiveness and Effect of Accounting,* 1205
b. *Responsibility For Money Collected,* 1205
c. *Duty and Liability to Pay Over Funds,* 1206
d. *Mode and Effect of Payment and to Whom Made,* 1207
e. *Application of Payments,* 1207
f. *Liability For Interest and Penalties,* 1207
g. *Lien or Security on Collector's Property,* 1208
6. *Return of Warrant and Delinquent List,* 1208
7. *Rights and Liabilities as to Taxes Uncollected,* 1209
a. *Liability of Collector in General,* 1209
b. *Excuses For Failure to Collect,* 1209
c. *Allowance of Credit For Taxes Returned Delinquent,* 1210
d. *Rights of Collector Against Taxpayer,* 1210
8. *Liability For Official Acts,* 1211
a. *Liability For Negligence or Misconduct,* 1211

b. *Protection by Warrant or Other Process,* 1211
c. *Defects in Assessment Roll or Warrant,* 1212
d. *Indemnity to Collector,* 1212
9. *Proceedings Against Defaulting Officers,* 1212
a. *Summary Proceedings in General,* 1212
b. *Execution, Distress, or Extent,* 1213
c. *Attachment of Person,* 1214
d. *Actions,* 1214
(I) *Form of Remedy,* 1214
(II) *Right of Action and Defenses,* 1214
(III) *Jurisdiction and Proceedings,* 1215
10. *Bonds of Tax Collectors,* 1215
a. *In General,* 1215
(I) *Requirements as to Execution and Amount,* 1215
(II) *Time For Making,* 1216
(III) *Requisites and Validity,* 1216
(IV) *Acceptance or Approval,* 1217
(V) *Bonds of Other Officers as Collectors,* 1217
b. *Liability on Bonds,* 1217
(I) *Scope and Extent in General,* 1217
(II) *Nature of Tax,* 1218
(III) *Amount of Liability,* 1218
(IV) *Term or Period Covered,* 1219
(V) *Breach of Condition,* 1220
(A) *Payment Without Authority,* 1220
(B) *Failure to Pay Over Collections,* 1220
(C) *Failure to Collect,* 1221
(VI) *Application of Payments,* 1221
c. *Remedies and Actions on Bonds,* 1222
(I) *Summary Remedies,* 1222
(A) *In General,* 1222
(B) *Parties and Proceedings,* 1222
(II) *Lien of Bond on Property of Collector and Sureties,* 1223
(III) *Action or Suit,* 1223
(A) *Right of Action and Conditions Precedent,* 1223
(B) *Defenses,* 1224
(1) *In General,* 1224
(2) *Estoppel to Deny Validity of Bond or Appointment,* 1225
(3) *Release or Discharge of Sureties,* 1225
(C) *Parties,* 1226
(D) *Pleading,* 1227
(E) *Evidence,* 1227
(F) *Verdict and Judgment,* 1228
11. *Criminal Responsibility of Collectors,* 1229
B. *Property Subject to Process For Collection,* 1229
1. *In General,* 1229
2. *Ownership and Possession,* 1230
3. *Liability of Personal Property For Satisfaction of Tax on Land,* 1230
4. *Property in Hands of Receiver,* 1231
C. *Actions and Proceedings For Enforcement and Collection,* 1231
1. *Summary Remedies,* 1231
a. *In General,* 1231
b. *Remedies Against Corporations,* 1232
c. *Personal Liability For Taxes,* 1232

d. *Constitutionality of Statutes,* 1233
e. *Defenses and Objections,* 1233
2. *Whether Statutory Remedies Exclusive,* 1233
3. *Tax Execution or Warrant,* 1234
a. *Issuance and Requisites,* 1234
b. *Levy and Return,* 1234
c. *Release or Delivery of Property on Bond,* 1235
d. *Supplementary Proceedings,* 1235
e. *Assignment of Tax Execution,* 1236
4. *Distress,* 1236
a. *Nature and Scope of Remedy,* 1236
b. *Conditions Precedent,* 1237
c. *Property Subject to Distraint,* 1237
d. *Proceedings on Distress,* 1238
5. *Sale of Personal Property,* 1238
a. *Conditions Essential to Legal Sale,* 1238
(I) *In General,* 1238
(II) *Notice of Sale,* 1239
b. *Time, Place, and Conduct of Sale,* 1239
c. *Return of Sale,* 1239
d. *Rights and Liabilities of Purchasers,* 1239
6. *Actions For Unpaid Taxes,* 1240
a. *Nature, Form, and Right of Action,* 1240
(I) *Right of Action in General,* 1240
(II) *Exclusiveness of Statutory Remedies,* 1241
(III) *Suits in Equity,* 1242
(IV) *Actions to Enforce Lien,* 1242
(V) *Authority of Particular Officers,* 1243
(VI) *Joinder and Consolidation,* 1243
(VII) *Persons Liable to Suit,* 1243
b. *Conditions Precedent,* 1244
(I) *In General,* 1244
(II) *Demand,* 1244
c. *Jurisdiction and Venue,* 1244
d. *Defenses,* 1245
(I) *In General,* 1245
(II) *Invalidity or Irregularity of Prior Proceedings,* 1245
(III) *Unequal or Excessive Valuation,* 1246
(IV) *Set-Off or Counter-Claim,* 1247
(V) *Limitation of Actions,* 1247
e. *Parties and Process,* 1248
(I) *Parties,* 1248
(II) *Process and Service,* 1249
f. *Pleading,* 1249
(I) *Declaration, Complaint, Petition, or Bill,* 1249
(A) *Form and Requisites in General,* 1249
(B) *Allegations,* 1249
(II) *Plea or Answer,* 1250
(III) *Issues, Proof, and Variance,* 1251
g. *Evidence,* 1251
(I) *Presumptions and Burden of Proof,* 1251
(II) *Admissibility,* 1252
(III) *Weight and Sufficiency,* 1252
h. *Trial, Judgment, and Review,* 1253
(I) *Trial,* 1253
(II) *Judgment,* 1253
(A) *In General,* 1253

(B) *Recovery of Interest*, 1254
(C) *Costs and Fees*, 1255
(III) *Appeal and Error*, 1255
7. *Attachment or Arrest*, 1255
a. *Nature of Remedy and When Available*, 1255
b. *Warrant and Proceedings Thereon*, 1256
c. *Liability of Officers*, 1256
d. *Release or Discharge*, 1257
e. *Defenses, Objections, and Review*, 1257
8. *Criminal Prosecution or Recovery of Fine*, 1257
D. *Remedies For Wrongful Enforcement*,1257
1. *Limitations of Judicial Authority*, 1257
2. *Injunction*, 1258
a. *Illegality of Tax and Irregularity in Proceedings*, 1258
(I) *General Rules*, 1258
(II) *Illegality of Tax*, 1259
(III) *Invalid Levy*, 1262
(IV) *Defects in Assessment*, 1262
(V) *Excessive or Unequal Assessment*, 1263
(VI) *Assessment of Persons or Property Not Liable*, 1265
(VII) *Defects or Errors in Proceedings For Collection*, 1266
b. *Special Grounds of Equity Jurisdiction*, 1266
(I) *In General*, 1266
(II) *Inadequacy of Remedy at Law*, 1267
(A) *In General*, 1267
(B) *Remedy in Assessment Proceedings*, 1268
(III) *Avoiding Multiplicity of Suits*, 1269
(IV) *Preventing Cloud on Title*, 1270
c. *Proceedings and Relief*, 1270
(I) *Jurisdiction and Right of Action*, 1270
(II) *Payment or Tender of Taxes Due*, 1271
(III) *Preliminary Injunction*, 1273
(IV) *Parties*, 1273
(A) *In General*, 1273
(B) *Corporation and Stock-Holders*, 1274
(V) *Pleading*, 1274
(A) *In General*, 1274
(B) *Alleging Performance of Conditions Precedent*, 1276
(VI) *Evidence*, 1276
(VII) *Scope of Inquiry*, 1277
(VIII) *Decree and Relief Granted*, 1277
3. *Actions For Wrongful Enforcement*, 1278
a. *Right of Action and Form of Remedy*, 1278
b. *Measure of Damages*, 1279
c. *Parties and Proceedings*, 1279
d. *Justification of Officer Under Warrant*, 1279

XI. SALE OF LAND FOR DELINQUENT TAXES, 1280

A. *Right or Power to Sell*, 1280
1. *In General*, 1280
2. *Authority of Municipal Corporations*, 1281
3. *Effect of Change of Boundaries*, 1281
4. *Strict Compliance With Statutes Required*, 1281
5. *What Law Governs*, 1282
B. *Conditions Precedent*, 1283
1. *Demand and Default*, 1283
a. *Necessity in General*. 1283

b. *Effect of Payment,* 1283
c. *Effect of Tender or Offer to Pay,* 1284
d. *Estoppel to Deny Payment,* 1285
2. *Exhaustion of Personalty,* 1285
a. *Necessity in General,* 1285
b. *Collector's Search For Personalty and Return,* 1286
C. *Taxes For Which Land May Be Sold,* 1287
1. *Liability of Land in General,* 1287
2. *Validity of Tax and of Levy and Assessment,* 1287
3. *Partial Illegality of Tax,* 1288
a. *In General,* 1288
b. *Statutes Validating Sales For Taxes Partly Illegal,* 1289
4. *Sale For All Taxes Due,* 1289
5. *Penalties, Costs, and Fees,* 1290
6. *Personal Taxes,* 1290
D. *Real Property Subject to Sale,* 1290
1. *In General,* 1290
2. *Seated and Unseated Lands,* 1292
3. *Validity of Sale Depending on Ownership,* 1292
a. *In General,* 1292
b. *Persons Under Disabilities,* 1293
c. *Non-Resident and Unknown Owners,* 1293
E. *Proceedings Preliminary to Sale,* 1293
1. *Delinquent List,* 1293
a. *Nature, Necessity, and Effect,* 1293
b. *Making and Requisites,* 1294
(I) *In General,* 1294
(II) *Description of Property,* 1295
(III) *Name of Owner,* 1296
(IV) *Taxes, etc., Due,* 1296
c. *Verification and Certification,* 1297
d. *Filing and Recording,* 1297
e. *Publication and Proof Thereof,* 1298
(I) *In General,* 1298
(II) *Requirements as to Newspaper and Designation of Same,* 1299
f. *Posting of List,* 1300
2. *Proceedings to Enforce Lien,* 1300
a. *Nature and Form of Proceeding and Jurisdiction,* 1300
b. *Demand, Time to Sue, and Limitations,* 1301
c. *Parties and Process or Notice,* 1301
d. *Proceedings and Judgment,* 1303
3. *Proceedings For Judgment,* 1303
a. *Nature and Form of Action,* 1303
b. *Time to Sue and Limitations,* 1304
c. *Jurisdiction,* 1305
(I) *In General,* 1305
(II) *Jurisdiction Depending on Delinquency,* 1305
d. *Process or Notice,* 1306
(I) *In General,* 1306
(II) *Notice by Publication,* 1307
e. *Parties,* 1309
f. *Defenses,* 1310
g. *Pleading,* 1310
h. *Evidence,* 1311
i. *Trial or Hearing,* 1312
j. *Judgment or Decree,* 1312

(I) *In General*, 1312
(II) *Form and Contents*, 1313
(III) *Amount of Judgment*, 1314
(IV) *Amendment and Opening or Vacating*, 1315
(V) *Conclusiveness and Effect*, 1315
(VI) *Presumption of Validity and Collateral Attack*, 1316
k. *Appeal and Review*, 1317
l. *Costs and Fees*, 1318
4. *Warrant or Execution*, 1319
a. *Nature and Necessity*, 1319
b. *Form and Contents*, 1319
c. *Levy and Return*, 1320
5. *Restraining Sale*, 1321
a. *Grounds For Injunction*, 1321
(I) *In General*, 1321
(II) *Illegal or Fraudulent Levy or Assessment*, 1321
(III) *Excessive Valuation*, 1322
(IV) *Errors and Irregularities*, 1322
(V) *Adequate Remedy at Law*, 1323
b. *Conditions Precedent*, 1323
c. *Parties and Proceedings*, 1323
d. *Operation and Effect of Decree*, 1324
F. *Notice of Sale*, 1324
1. *Requirement of Notice or Advertisement*, 1324
2. *Personal Notice to Residents*, 1325
3. *Publication of Notice*, 1326
4. *Form, Requisites, and Validity of Notice*, 1327
5. *Designation or Description of Property*, 1329
6. *Time and Number of Publications*, 1330
7. *Posting of Notices*, 1331
8. *Proof of Notice or Advertisement*, 1332
G. *Mode and Conduct of Sale*, 1334
1. *Officers Authorized to Sell*, 1334
2. *Conduct of Sale in General*, 1334
3. *Place of Sale*, 1336
4. *Time of Sale*, 1336
a. *In General*, 1336
b. *Postponement or Adjournment*, 1338
5. *Amount For Which Land May Be Sold*, 1338
a. *In General*, 1338
b. *Sale For Excessive Amount*, 1339
c. *Including Unauthorized Fees or Charges*, 1339
d. *Application of the Maxim De Minimis*, 1340
6. *Estates or Interests Sold*, 1340
7. *Quantity of Land Which May Be Sold*, 1341
a. *In General*, 1341
b. *Sale of "As Much as May Be Necessary,"* 1342
c. *Sale of "Least Quantity" Necessary*, 1343
d. *Sale of Undetermined Portion*, 1343
8. *Sale in Parcels*, 1344
H. *Persons Who May Purchase*, 1345
1. *General Rule*, 1345
2. *Owners and Others Liable*, 1346
3. *Mortgagor and Mortgagee*, 1347
4. *Lien-Holders*, 1348
5. *Dowress and Life-Tenants*, 1348
6. *Joint Tenants, Tenants in Common, Etc.*, 1348

7. *Husband and Wife,* 1350
8. *Agents and Attorneys,* 1350
9. *Landlord and Tenant,* 1351
10. *Claimants of Title,* 1351
11. *Vendors and Purchasers,* 1352
12. *Public Officers,* 1353
13. *Indirect Purchase by Disqualified Person,* 1354
14. *Purchase by State or Municipality and Resale,* 1354
    a. *Conditions Under Which Purchase May Be Made,* 1354
    b. *Amount of the Bid,* 1355
    c. *Nature of Title Acquired,* 1355
    d. *Certificate or Deed,* 1356
    e. *Resale,* 1357
    f. *Second Sale For Other Taxes,* 1358

I. *Bids and Terms of Sale,* 1359
1. *Bids and Bidders,* 1359
2. *Stifling Competition and Combinations Among Bidders,* 1359
3. *Terms of Sale,* 1361

J. *Payment of Price and Disposition of Proceeds,* 1361
1. *Payment and Recovery of Price,* 1361
2. *Surplus Bond,* 1361
3. *Disposition of Proceeds,* 1362
4. *Fees and Expenses of Sale,* 1363

K. *Report and Confirmation of Sale,* 1364
1. *Report or Return and Record,* 1364
    a. *In General,* 1364
    b. *Effect of Omission of Report or Return,* 1365
    c. *Filing and Recording Return,* 1366
    d. *Form and Contents of Report,* 1366
    e. *Amendment,* 1368
2. *Confirmation of Sale by Court,* 1368

L. *Certificate of Sale,* 1370
1. *Nature and Purpose,* 1370
2. *Time of Executing,* 1370
3. *Form and Contents,* 1370
4. *Tax Certificate as Evidence,* 1372
5. *Recording or Filing,* 1372
6. *Delinquency Certificates,* 1372

M. *Setting Aside or Canceling Sale or Certificate,* 1373
1. *Jurisdiction and Authority of Courts and Officers,* 1373
2. *Grounds For Vacating,* 1374
3. *Payment or Tender,* 1375
4. *Time For Proceedings,* 1375
5. *Parties to Proceeding,* 1375
6. *Process or Notice,* 1376
7. *Proceedings and Relief,* 1376
8. *Review,* 1377

N. *Presumptions of Validity and Collateral Attack,* 1377
1. *Right to Impeach Sale,* 1377
2. *Presumptions as to Validity,* 1377
3. *Collateral Attack,* 1378

O. *Curative Statutes,* 1378
1. *In General,* 1378
2. *Defects Curable,* 1379
3. *Construction of Curative Statutes,* 1380

P. *Wrongful Sales,* 1380

XII. REDEMPTION FROM TAX-SALES, 1381

A. *Right to Redeem,* 1381
1. *Right and Necessity in General,* 1381
2. *Statutory Provisions and Their Construction,* 1382
3. *Persons Entitled to Redeem,* 1383
a. *In General,* 1383
b. *Mortgagees, Etc.,* 1385
c. *Holder of Inchoate, Equitable, or Adverse Title,* 1386
d. *Agent or Attorney of Owner,* 1386
e. *Attempted Redemption by Stranger,* 1387
f. *Tenants in Common,* 1387
g. *Persons Under Disabilities,* 1387
4. *Time For Redemption,* 1388
a. *In General,* 1388
b. *Computation of Time,* 1389
c. *When Time Expires,* 1389
d. *Statutes Extending or Abridging Time,* 1390
e. *Time Allowed Persons Under Disabilities,* 1390
f. *Redemption After Time Expires,* 1392
5. *Actions to Foreclose Right of Redemption,* 1392
a. *In General,* 1392
b. *Parties,* 1393
c. *Process or Notice,* 1393
d. *Pleadings and Procedure,* 1394

B. *Notice to Redeem,* 1395
1. *Nature and Necessity,* 1395
2. *Effect of Want or Invalidity of Notice,* 1396
3. *Time For Giving Notice,* 1396
4. *Persons Who May Give Notice,* 1397
5. *Persons Entitled to Notice,* 1397
a. *In General,* 1397
b. *Persons to Whom Land Is Taxed,* 1397
c. *Persons in Possession or Occupancy,* 1398
d. *Mortgagees,* 1400
6. *Form and Requisites of Notice,* 1400
a. *In General,* 1400
b. *Identification of Sale,* 1401
c. *Designation of Person to Be Notified,* 1401
d. *Description of Property,* 1402
e. *Amount Necessary to Redeem,* 1402
f. *Time For Redemption,* 1403
7. *Service of Notice,* 1404
a. *Personal Service,* 1404
b. *Service by Publication or Posting,* 1405
c. *Return, Proof, and Record of Service,* 1405
(I) *In General,* 1405
(II) *Publication Service,* 1407
8. *Fees,* 1408

C. *Proceedings and Effect,* 1408
1. *Amount Required to Redeem,* 1408
a. *In General,* 1408
b. *Interest and Penalties,* 1410
c. *Subsequent Taxes,* 1410
2. *Payment or Tender,* 1411
a. *In General,* 1411
b. *To Whom Made,* 1412
3. *Proceedings on Redemption,* 1413

4. *Certificate of Redemption or Receipt,* 1414
5. *Redemption Money,* 1414
a. *Disposition in General,* 1414
b. *Estoppel by Receipt of Money,* 1415
c. *Recovery Back of Redemption Money Paid,* 1415
d. *Indemnity and Contribution,* 1415
6. *Redemption by Agreement of Parties,* 1416
7. *Operation and Effect of Redemption,* 1417
8. *Failure to Redeem,* 1418
a. *Effect in General,* 1418
b. *Fault or Mistake of Officer,* 1418
D. *Actions to Redeem,* 1419
1. *Jurisdiction and Right of Action,* 1419
2. *Parties,* 1420
3. *Pleading and Evidence,* 1420
4. *Judgment or Decree,* 1421
5. *Action to Redeem After Execution of Deed,* 1421

XIII. TAX DEEDS, 1422
A. *Nature and Necessity,* 1422
1. *In General,* 1422
2. *State or County as Purchaser,* 1422
B. *Right to Deed and Application Therefor,* 1422
1. *Right to Deed in General,* 1422
2. *Conditions and Prerequisites,* 1423
3. *Time of Issuing Deed,* 1424
4. *Application For Deed,* 1425
a. *Notice of Application,* 1425
b. *Proceedings on Application,* 1425
5. *Restraining Issuance of Deed,* 1426
a. *In General,* 1426
b. *Payment or Tender,* 1427
6. *Mandamus to Compel Execution of Deed,* 1427
C. *Making and Issuance of Deed and Recording,* 1428
1. *Authority and Duty to Make,* 1428
a. *Officer Executing Deed,* 1428
b. *Deputies,* 1428
c. *Expiration of Term of Office,* 1429
d. *Second Deed on Same Sale,* 1429
2. *Property to Be Included,* 1430
a. *In General,* 1430
b. *Conveyance of Several Tracts in One Deed,* 1430
3. *Execution, Acknowledgment, and Delivery,* 1430
a. *Execution,* 1430
(I) *In General,* 1430
(II) *Seal,* 1431
b. *Acknowledgment,* 1432
c. *Delivery,* 1432
4. *Recording or Registration,* 1433
a. *Necessity in General,* 1433
b. *Sufficiency and Effect,* 1433
5. *Cancellation by Public Officers,* 1434
D. *Form and Contents,* 1434
1. *In General,* 1434
a. *Sufficiency in General,* 1434
b. *Following Statutory Form,* 1434
c. *Omissions and Misrecitals,* 1435
d. *Covenants,* 1436
e. *Parties,* 1436

2. *Recitals,* 1436
a. *In General,* 1436
b. *Assessment and Delinquency of Tax,* 1437
c. *Proceedings Preliminary to Sale,* 1438
d. *Sale,* 1439
(I) *In General,* 1439
(II) *Time and Place of Sale,* 1441
e. *Amount of Land Offered and Sold,* 1441
f. *Consideration and Proceedings Subsequent to Sale,* 1443
g. *Tax Certificate and Assignment Thereof,* 1443
h. *Evidence to Explain, Supply, or Contradict Recitals,* 1445
3. *Description of Property,* 1445
a. *Certainty and Sufficiency in General,* 1445
b. *Undivided Interest or Part of Tract,* 1447
c. *Intendments and Inferences,* 1448
d. *Extrinsic Evidence to Identify,* 1449
e. *Variance Between Deed and Assessment,* 1449
E. *Amendment and Curative Statutes,* 1450
1. *Amendment and Correction,* 1450
a. *In General,* 1450
b. *Reformation in Equity,* 1450
2. *Curative Statutes,* 1450
F. *Construction and Operation,* 1451
1. *In General,* 1451
2. *Property Conveyed,* 1451
3. *Relation Back to Time of Sale,* 1451
4. *Priorities Between Successive Deeds,* 1452
5. *What Law Governs,* 1452
G. *Tax Deeds as Evidence,* 1452
1. *At Common Law,* 1452
a. *Presumptions and Burden of Proof,* 1452
b. *Presumptions From Possession and Lapse of Time,* 1453
c. *Effect of Tax Deed as Evidence,* 1454
d. *Proof to Be by Records,* 1455
2. *Statutes Making Tax Deeds Conclusive Evidence,* 1456
3. *Statutes Making Tax Deeds Presumptive Evidence,* 1457
4. *Effect of Statutes Making Tax Deeds Evidence,* 1459
a. *In General,* 1459
b. *Burden of Proof,* 1461
c. *Evidence of Facts Not Recited,* 1462
d. *Levy and Assessment,* 1462
e. *Fact, Regularity, and Validity of Sale,* 1463
f. *Redemption,* 1463
g. *Notice of Application For Deed,* 1464
h. *Preliminaries to Introduction of Deed in Evidence,* 1464
(I) *In General,* 1464
(II) *Objections to Form or Validity of Deed,* 1464
(III) *Judgment and Precept or Order of Sale,* 1465
i. *Effect of Such Statutes in Other States,* 1465
5. *Evidence to Impeach Deed or Title,* 1465
a. *In General,* 1465
b. *Levy and Assessment,* 1466
c. *Sale,* 1466
d. *Payment of Tax or Redemption,* 1467

XIV. TAX TITLES, 1468

A. *Title and Rights of Tax Purchaser,* 1468
1. *Nature and Effect of Sale as Transfer of Title,* 1468

a. *In General,* 1468
b. *What Law Governs,* 1468
2. *Property and Rights Passing by Sale and Deed,* 1469
a. *In General,* 1469
b. *Public and Exempt Lands,* 1469
c. *Trees and Timber,* 1470
d. *Right of Possession,* 1470
(I) *In General,* 1470
(II) *Loss of Title by Failure of Possession or by Adverse Possession,* 1471
e. *Rents and Profits and Waste,* 1472
3. *Title or Estate Acquired by Purchaser,* 1472
a. *In General,* 1472
b. *Purchase From State,* 1473
c. *Tax-Sale Creating New Title,* 1473
d. *Contingent and Expectant Interests Divested,* 1473
e. *Rights of Dower and Homestead Divested,* 1474
f. *Transfer of Title of Person Assessed,* 1474
g. *Separate Interests Separately Assessed,* 1475
4. *Liens and Encumbrances,* 1475
a. *In General,* 1475
b. *Judgment and Execution Liens,* 1476
c. *Mortgage Liens,* 1476
(I) *In General,* 1476
(II) *Mortgage to State,* 1477
d. *Lien of Prior or Coördinate Taxes,* 1477
(I) *In General,* 1477
(II) *Subsequent Taxes,* 1478
(III) *Municipal Taxes and Assessments,* 1478
5. *Effect of Defects and Irregularities in Prior Proceedings,* 1479
a. *In General,* 1479
b. *Application of Doctrine of Bona Fide Purchasers,* 1481
c. *Amendment of Records,* 1481
6. *Liability of Purchaser,* 1481
7. *Assignees and Grantees of Purchasers,* 1482
a. *Assignment of Certificate of Purchase,* 1482
(I) *In General,* 1482
(II) *Mode and Sufficiency,* 1482
(III) *Who May Take Assignment,* 1483
(IV) *Rights of Assignees,* 1483
(V) *Tax Certificates Held by County,* 1484
b. *Grantees of Tax Purchasers,* 1484
(I) *In General,* 1484
(II) *Bona Fides and Notice of Defects,* 1485
(III) *Purchase From State or County,* 1485
B. *Actions Concerning Tax Titles,* 1486
1. *Suits For Possession,* 1486
a. *Recovery of Posesssion by Tax Purchaser,* 1486
(I) *In General,* 1486
(II) *Summary Proceedings,* 1486
b. *Ejectment Against Tax Purchaser,* 1487
2. *Actions to Confirm or Quiet Tax Titles,* 1487
a. *Right of Action in General,* 1487
b. *Defenses to Purchaser's Suit,* 1488
c. *Payment or Tender as Condition to Right to Defend,* 1489
3. *Actions to Impeach or Vacate Tax Titles,* 1489
a. *Right to Attack Tax Title,* 1489

(I) *In General,* 1489
(II) *Estoppel and Ratification,* 1490
(III) *Title Necessary to Maintain Suit,* 1491
(A) *In General,* 1491
(B) *Mortgagees,* 1492
b. *Suit to Set Aside Tax-Sale and Deed,* 1492
c. *Suit to Remove Cloud on Title,* 1494
(I) *Right of Action,* 1494
(II) *What Constitutes Cloud,* 1495
(III) *Possession as Essential to Maintenance of Bill,* 1496
d. *Payment or Tender as Condition Precedent,* 1496
(I) *In General,* 1496
(II) *Payment of Taxes as Condition of Relief,* 1498
4. *Limitation of Actions and Laches,* 1499
a. *Statutes of Limitation,* 1499
(I) *In General,* 1499
(II) *To What Proceedings Applicable,* 1500
(III) *Retrospective Statutes,* 1501
(IV) *Repeal or Extension of Statute,* 1501
b. *Persons Affected by Statute of Limitations,* 1501
(I) *In General,* 1501
(II) *Persons Under Disabilities,* 1502
c. *Actions by Tax Title Claimant,* 1502
(I) *In General,* 1502
(II) *Possession or Occupation of Land,* 1503
d. *Actions Against Tax Title Claimant,* 1504
(I) *Computation of Time,* 1504
(A) *In General,* 1504
(B) *Issuance and Record of Deed,* 1504
(II) *Possession of Premises,* 1505
(A) *In General,* 1505
(B) *Vacant or Unoccupied Lands,* 1506
(III) *Sufficiency of Deed or Title,* 1507
(IV) *Defects Cured by Limitations,* 1508
(A) *In General,* 1508
(B) *Defects in Assessment and Sale,* 1509
(V) *Redemption or Payment of Taxes,* 1511
e. *Laches in Attacking Tax Title,* 1511
5. *Parties and Process,* 1512
a. *Parties,* 1512
b. *Process,* 1513
6. *Pleading,* 1513
a. *Pleading a Tax Title,* 1513
b. *Complaint or Answer Impeaching Tax Title,* 1514
c. *Issues, Proof, and Variance,* 1515
7. *Evidence,* 1516
a. *In General,* 1516
b. *Presumptions and Burden of Proof,* 1516
c. *Admissibility,* 1517
d. *Weight and Sufficiency,* 1518
8. *Trial or Hearing,* 1519
9. *Judgment or Decree,* 1520
a. *In General,* 1520
b. *Scope and Extent of Relief Granted,* 1520
(I) *In General,* 1520
(II) *Reimbursement of Tax Purchaser,* 1521
(A) *In General,* 1521

(B) *Amount of Recovery*, 1522
10. *Appeal and Review*, 1524
11. *Costs*, 1524
C. *Reimbursement of Purchaser of Invalid Title*, 1525
1. *Right to Relief in General*, 1525
a. *Application of Rule of Caveat Emptor*, 1525
b. *Covenants and Liabilities of Officers*, 1526
2. *Recovery From State or Municipality*, 1526
a. *Right of Action at Common Law*, 1526
b. *Statutes Giving Right of Action*, 1526
(I) *In General*, 1526
(II) *Retroactive Statutes*, 1527
c. *Grounds and Extent of Relief*, 1528
d. *Persons Entitled to Reimbursement*, 1529
e. *Actions to Enforce Claims*, 1529
(I) *In General*, 1529
(II) *Limitations and Laches*, 1530
f. *Authority and Duty of Public Officers to Refund*, 1531
3. *Purchaser's Lien*, 1531
a. *Right to Lien in General*, 1531
b. *Extent of Lien*, 1533
(I) *In General*, 1533
(II) *Lien For Subsequent Taxes Paid*, 1533
c. *Priorities*, 1534
d. *Enforcement and Foreclosure*, 1534
(I) *In General*, 1534
(II) *Limitations and Laches*, 1536
4. *Reimbursement by Owner*, 1537
a. *Right of Reimbursement in General*, 1537
b. *Amount Claimable by Purchaser*, 1538
c. *Action or Proceeding to Enforce Claim*, 1539
5. *Compensation For Improvements*, 1540
a. *Right to Compensation*, 1540
b. *Good Faith and Color of Title*, 1540
c. *Amount Claimable For Improvements*, 1541
d. *Enforcement of Claim*, 1542

XV. PENALTIES AND FORFEITURES, 1542

A. *Penalties*, 1542
1. *Power to Impose*, 1542
2. *Statutory Provisions*, 1542
3. *Grounds For Imposition of Penalties*, 1543
a. *In General*, 1543
b. *Failure to List or Report Property or Making False List*, 1543
c. *Failure to Pay Taxes*, 1544
4. *Excuses and Defenses*, 1544
5. *Persons Liable For Penalties*, 1545
6. *Remission or Relief From Penalty and Waiver*, 1545
7. *Actions and Proceedings to Recover Penalties*, 1546
a. *In General*, 1546
b. *Amount of Penalty and Interest*, 1546
B. *Forfeiture of Property Delinquent*, 1547
1. *Constitutionality of Statutes*, 1547
2. *Construction of Statutes*, 1548
3. *Causes of Forfeiture*, 1548
4. *Persons Against Whom Forfeiture May Be Enforced*, 1549
5. *Proceedings For Enforcement*, 1549

6. *Operation and Effect*, 1549
7. *Redemption*, 1550
8. *Setting Aside, Release, or Waiver*, 1551
9. *Sale or Other Disposition of Forfeited Lands*, 1551

XVI. LEGACY AND INHERITANCE TAXES, 1553

A. *Nature and Power to Impose*, 1553
1. *Nature of Succession Taxes*, 1553
2. *Constitutionality of Statutes*, 1554
a. *In General*, 1554
b. *Rule of Equality and Uniformity*, 1555
3. *Construction and Operation of Statutes*, 1556
a. *In General*, 1556
b. *Retroactive Operation*, 1557
4. *Amendment and Repeal of Statutes*, 1558
5. *Effect of Treaty Provisions*, 1558

B. *Property and Transfers Liable to Tax*, 1559
1. *In General*, 1559
2. *Nature of Property*, 1559
3. *Property of Non-Residents or Aliens*, 1560
a. *In General*, 1560
b. *Corporate Stocks and Bonds*, 1562
c. *Appropriation of Assets of Non-Resident to Payment of Debts or Exempt Distributive Shares*, 1563
4. *Situs of Property*, 1564
5. *Transfers Subject to Tax*, 1565
a. *In General*, 1565
b. *Execution of Power of Appointment*, 1566
c. *Ante-Mortem Deeds and Gifts*, 1567
d. *Gift or Legacy in Discharge of Debt*, 1568
6. *Estates or Interests Created by Transfer*, 1568
a. *In General*, 1568
b. *Estates in Remainder*, 1569

C. *Exemptions*, 1569
1. *Amount or Value of Estate*, 1569
2. *Funeral and Cemetery Expenses*, 1570
3. *Relationship of Parties*, 1570
a. *In General*, 1570
b. *Adopted and Putative Children*, 1571
4. *Character of Donee*, 1572
a. *In General*, 1572
b. *Charitable, Educational, and Religious Institutions*, 1572
c. *Foreign Corporations*, 1573

D. *Time of Accrual, Amount, and Incidence of Tax*, 1574
1. *Time of Accrual*, 1574
a. *In General*, 1574
b. *Postponed, Contingent, or Expectant Estates*, 1574
2. *Rate or Amount of Tax*, 1575
3. *Persons Liable For Tax*, 1575
a. *In General*, 1575
b. *Executors, Administrators, and Trustees*, 1576
c. *Provisions of Will*, 1577

E. *Assessment*, 1577
1. *Jurisdiction*, 1577
2. *Appraisement*, 1578
a. *In General*, 1578
b. *Notice and Hearing*, 1578
c. *Valuation of Estate or Interest*, 1579

(I) *In General*, 1579
(II) *Annuities, Life-Estates, and Remainders*, 1580
(III) *Corporate Stocks and Bonds*, 1580
d. *Deductions*, 1581
(I) *In General*, 1581
(II) *Federal and Other Taxes*, 1582
3. *Conclusiveness and Effect of Assessment*, 1582
4. *Review, Modification, and Reappraisement*, 1582
F. *Payment and Collection*, 1584
1. *Payment*, 1584
2. *Refunding and Recovery of Tax Paid*, 1584
3. *Collection and Enforcement*, 1585
a. *In General*, 1585
b. *Lien and Priority*, 1585
c. *Limitations*, 1586
d. *Costs and Fees*, 1586
G. *Penalties*, 1586
1. *In General*, 1586
2. *Grounds For Penalty and Excuses For Delay*, 1586

XVII. TAX ON TRANSFERS OF CORPORATE STOCK, 1587

XVIII. DISPOSITION OF TAXES COLLECTED, 1588

A. *Power to Regulate and Direct*, 1588
B. *Distribution of Taxes as Between State and Municipalities*, 1589
1. *Taxes Collected by State*, 1589
2. *General Taxes Collected by Municipalities*, 1589
a. *Rights of State in General*, 1589
b. *Interest*, 1590
c. *Default of Municipal Officers*, 1591
d. *Actions to Recover Taxes Collected*, 1591
C. *Distribution and Apportionment of Taxes Between Different Municipalities*, 1591
1. *In General*, 1591
2. *Interest*, 1592
3. *Actions For Recovery of Taxes Collected*, 1592
D. *Rights of Bond and Other Creditors*, 1593
E. *Interest and Penalties Collected*, 1594
F. *Liability of Municipalities For Uncollected Taxes*, 1594
G. *Proceedings For Apportionment, Accounting, and Settlement*, 1595
H. *Payment and Application Thereof*, 1596

CROSS-REFERENCES

For Matters Relating to:

Acquisition of Tax Title by Cotenant, see TENANCY IN COMMON.

Appeal in Cases Relating to Taxes or Revenue, see APPEAL AND ERROR, 2 Cyc. 550, 578.

Conclusiveness of Judgment in Tax Proceedings, see JUDGMENTS, 23 Cyc. 1346.

Customs Duties, see CUSTOMS DUTIES, 12 Cyc. 1104.

Delegation to Judiciary of Powers in Regard to Taxation, see CONSTITUTIONAL LAW, 8 Cyc. 836.

Disqualification by Interest as Taxpayer:

Of Judge, see JUDGES, 23 Cyc. 578.

Of Juror, see JURIES, 24 Cyc. 271, 272.

Of Justice of the Peace, see JUSTICES OF THE PEACE, 24 Cyc. 490.

Internal Revenue, see INTERNAL REVENUE, 22 Cyc. 1592.

For Matters Relating to — (*continued*)
Jurisdiction in Actions or Proceedings Relating to Taxes:
Of Federal Courts, see COURTS, 11 Cyc. 862 text and note 69.
Of Justice of the Peace, see JUSTICES OF THE PEACE, 24 Cyc. 459.
Liability For Payment of Taxes:
As Affected by Discharge in Bankruptcy, see BANKRUPTCY, 5 Cyc. 400.
As Between Mortgagor and Mortgagee, see MORTGAGES, 27 Cyc. 1253.
Of Purchaser at Foreclosure Sale, see MORTGAGES, 27 Cyc. 1491.
On Alteration of Municipality, see MUNICIPAL CORPORATIONS, 28 Cyc. 224, 229.
License-Fees, see LICENSES, 25 Cyc. 593.
Local or Special Taxes:
By:
County, see COUNTIES, 11 Cyc. 575.
Municipality, see MUNICIPAL CORPORATIONS, 28 Cyc. 1102, 1658.
Town, see TOWNS.
For:
Agricultural Societies, see AGRICULTURE, 2 Cyc. 73, 74.
Bridges, see BRIDGES, 5 Cyc. 1058 *et seq.*
Drains, see DRAINS, 14 Cyc. 1058.
Fences, see FENCES, 19 Cyc. 489.
Highways, see STREETS AND HIGHWAYS, *ante*, p. 326.
Levees, see LEVEES, 25 Cyc. 200.
Municipal Improvements, see MUNICIPAL CORPORATIONS, 28 Cyc. 1102, 1669.
Payment of Bounties For Enlistment in Army or Navy, see BOUNTIES, 5 Cyc. 977–983.
Payment of Irrigation District Bonds, see WATERS.
Relief of Poor, see PAUPERS, 30 Cyc. 1075.
School Purposes, see SCHOOLS AND SCHOOL-DISTRICTS, 35 Cyc. 998.
Toll-Road, see TOLL-ROADS.
Payment of Taxes:
As Affecting Claim of Adverse Possession, see ADVERSE POSSESSION, 1 Cyc. 992, 1106.
As Affecting Question Whether Deed Was Intended as Mortgage, see MORTGAGES, 27 Cyc. 1015.
As Negativing Intention to Dedicate Land, see DEDICATION, 13 Cyc. 476 text and note 36.
As Qualification of Juror, see JURIES, 24 Cyc. 202.
As Qualification of Voter, see ELECTIONS, 15 Cyc. 296.
By Assignee For Benefit of Creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 253.
By Executors and Administrators, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 283.
By Guardian, see GUARDIAN AND WARD, 21 Cyc. 99.
By Mortgagee, see MORTGAGES, 27 Cyc. 1076, 1254.
By Receiver Generally, see RECEIVERS, 34 Cyc. 280.
By Receiver in Foreclosure Proceedings, see MORTGAGES, 27 Cyc. 1631.
By Trustee in Bankruptcy, see BANKRUPTCY, 5 Cyc. 384.
Out of Proceeds of Sale on Foreclosure, see MORTGAGES, 27 Cyc. 1497.
Priority of Claims For Taxes:
Against Assets of Receivership, see RECEIVERS, 34 Cyc. 346.
Against Estate of Bankrupt, see BANKRUPTCY, 5 Cyc. 384.
Against Estate of Decedent, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 551.
Against Proceeds of Execution Sale, see EXECUTIONS, 17 Cyc. 1357.
As Superior to Lien of Mortgage, see MORTGAGES, 27 Cyc. 1176.

For Matters Relating to — (*continued*)
Privity Between State or Municipality and Taxpayers as Affecting Conclusiveness of Adjudication, see JUDGMENTS, 23 Cyc. 1269.
Provisions For Taxes as Affecting Validity of Assignment, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 179.
Reimbursements For Taxes Paid:
By Assignee of Mortgage, see MORTGAGES, 27 Cyc. 1308.
By Cotenant, see PARTITION, 30 Cyc. 231 text and note 75, 233 text and note 93*c*.
By Mortgagee, see MORTGAGES, 27 Cyc. 1076, 1255.
In Action For Partition, see PARTITION, 30 Cyc. 231 text and note 75, 233 text and note 93*c*.
In Action of Ejectment, see EJECTMENT, 15 Cyc. 223.
In Actions of Trespass to Try Title, see TRESPASS TO TRY TITLE.
Rights and Remedies of Taxpayers, see COUNTIES, 11 Cyc. 583; MUNICIPAL CORPORATIONS, 28 Cyc. 1732; SCHOOLS AND SCHOOL-DISTRICTS, 35 Cyc. 1049; TOWNS.
Right to Jury Trial in Actions or Proceedings Relating to Taxes, see JURIES, 24 Cyc. 116, 133, 136.
State Laws as Rules of Decision in Federal Courts as to Taxation, see COURTS, 11 Cyc. 906 text and note 57.
Stipulations as to Payment of Taxes in Mortgage, see MORTGAGES, 27 Cyc. 1100, 1254.
Taxation:
As Interference With Interstate Commerce, see COMMERCE, 7 Cyc. 470 *et seq.*
As Mode of Acquiring Settlement, see PAUPERS, 30 Cyc. 1086.
By Indian Tribal Government, see INDIANS, 22 Cyc. 120.
By Municipality of Property Taxable by State, see MUNICIPAL CORPORATIONS, 28 Cyc. 1685.
By Religious Societies, of Pew-Holders, see RELIGIOUS SOCIETIES, 34 Cyc. 1180.
In District of Columbia, see DISTRICT OF COLUMBIA, 14 Cyc. 535.
Of Commerce, see COMMERCE, 7 Cyc. 470.
Of Common Lands, see COMMON LANDS, 8 Cyc. 361.
Of Costs, see COSTS, 11 Cyc. 154.
Of Fees of Sheriffs and Constables, see SHERIFFS AND CONSTABLES, 35 Cyc. 1601.
Of Indian Lands, see INDIANS, 22 Cyc. 130, 138.
Of Indians, see INDIANS, 22 Cyc. 149.
Of License Granted Under Police Power, see MUNICIPAL CORPORATIONS, 28 Cyc. 749.
Of Licenses of Attorneys, see ATTORNEY AND CLIENT, 4 Cyc. 898.
Taxes:
As Breach of Covenant Against Encumbrances, see COVENANTS, 11 Cyc. 1113.
As Breach of Warranty, see COVENANTS, 11 Cyc. 1124.
As Constituting Cloud on Title, see QUIETING TITLE, 32 Cyc. 1326.
As Constituting Debt Provable Against Estate of Bankrupt, see BANKRUPTCY, 5 Cyc. 324, 400.
As Subject-Matter of Set-Off or Counter-Claim, see RECOUPMENT, SET-OFF, AND COUNTER-CLAIM, 34 Cyc. 692.
As Within Security of Mortgage When Paid by Mortgagee, see MORTGAGES, 27 Cyc. 1076.
On Litigation Not Recoverable as Costs, see COSTS, 11 Cyc. 131.
Recoverable in Action For Breach of Covenant, see COVENANTS, 11 Cyc. 1176.

I. NATURE AND EXTENT OF POWER IN GENERAL.

A. Definition and Nature of Taxes and Taxation — 1. DEFINITIONS.

The terms "tax" and "taxes" have been defined as[1] a rate or sum of money assessed on the person or property of a citizen by government for the use of the nation or state;[2] burdens or charges imposed by the legislative power upon persons or property to raise money for public purposes,[3] and the enforced proportional contribution of persons and property levied by authority of the state for the support of government and for all public needs.[4] Taxation is the act of laying

1. **Other definitions** than those given in the text and subsequent notes are: "Charges imposed by or under the authority of the Legislature, upon persons or property subject to its jurisdiction." People *v.* McCreery, 34 Cal. 432, 454.

"A charge levied by the sovereign power upon the property of its subjects." People *v.* Austin, 47 Cal. 353, 361.

"The revenue collected from the people for objects in which they are interested — the contributions of the people for things useful and conducive to their welfare." Hilbish *v.* Catherman, 64 Pa. St. 154, 159.

"The means by which a burden primarily bourne by the State is transferred to the citizen." Southern R. Co. *v.* Kay, 62 S. C. 28, 32, 39 S. E. 785; Morton *v.* Comptroller-Gen., 4 S. C. 430, 453.

2. Hamilton *v.* Dillin, 11 Fed. Cas. No. 5,979; Webster Dict. [*quoted* in Baltimore *v.* Green Mount Cemetery, 7 Md. 517, 535; Citizens Sav., etc., Assoc. *v.* Topeka, 20 Wall. (U. S.) 655, 664, 22 L. ed. 455].

Other similar definitions are: "A rate or sum of money assessed upon the person, property, business, or occupation of the citizen." Pullman Southern Car Co. *v.* Nolan, 22 Fed. 276, 279.

"An orderly rate levied on the property of the citizen according to its value, or a fixed sum levied on his person, for the public use." Mobile *v.* Dargan, 45 Ala. 310, 319.

"A rate or sum of money assessed upon the person or property of a citizen by government for the use of the nation, State or municipality." State *v.* Montague, 34 Fla. 32, 36, 15 So. 589.

"A sum of money assessed under the authority of the State, on the person or property of an individual for the use of the State." Allen *v.* Jay, 60 Me. 124, 127, 11 Am. Rep. 185.

3. Houghton *v.* Austin, 47 Cal. 646, 654; Trenholm *v.* Charleston, 3 S. C. 347, 349, 16 Am. Rep. 732; Day *v.* Buffington, 7 Fed. Cas. No. 3,675, 3 Cliff. 376 [*affirmed* in 11 Wall. 113, 20 L. ed. 122].

In substantially the same language as the text see Dranga *v.* Rowe, 127 Cal. 506, 509, 59 Pac. 944; San Francisco Gas Co. *v.* Brickwedel, 62 Cal. 641, 644; Santa Barbara *v.* Stearns, 51 Cal. 499, 501; McClelland *v.* State, 138 Ind. 321, 332, 37 N. E. 1089; Davidson *v.* Ramsey County Com'rs, 18 Minn. 482; State *v.* Switzler, 143 Mo. 287, 314, 45 S. W. 245, 65 Am. St. Rep. 653, 40 L. R. A. 280; Deal *v.* Mississippi County, 107 Mo. 464, 470, 18 S. W. 24, 14 L. R. A. 622; Sheehan *v.* Good Samaritan Hospital, 50 Mo. 155, 158, 11 Am. Rep. 412; North Missouri R. Co. *v.* Maguire, 49 Mo. 490, 500, 8 Am. Rep. 141; Hallenbeck *v.* Hahn, 2 Nebr. 377, 407; Pittsburg, etc., R. Co. *v.* State, 49 Ohio St. 189, 202, 30 N. E. 435, 16 L. R. A. 380; Austin *v.* Nalle, (Tex. 1909) 120 S. W. 996; Hale *v.* Kenosha, 29 Wis. 599, 605; Knowlton *v.* Rock County, 9 Wis. 410, 418; Citizens Sav., etc., Assoc. *v.* Topeka, 20 Wall. (U. S.) 655, 664, 22 L. ed. 455.

Other similar definitions are: "Burdens, charges or impositions put or set upon persons or property for public uses." Chicago *v.* Baptist Theological Union, 115 Ill. 245, 251, 2 N. E. 254; Baltimore *v.* Green Mount Cemetery, 7 Md. 517, 535; *In re* New York, 11 Johns. (N. Y.) 77, 80. See also Mitchell *v.* Williams, 27 Ind. 62, 63; Bonaparte *v.* State, 63 Md. 465, 470; Lake Shore, etc., R. Co. *v.* Grand Rapids, 102 Mich. 374, 382, 60 N. W. 767, 29 L. R. A. 195.

"A pecuniary burden, imposed for the support of the government." Leedy *v.* Bourbon, 12 Ind. App. 486, 40 N. E. 640, 641. See also U. S. *v.* Baltimore, etc., R. Co., 17 Wall. (U. S.) 322, 326, 21 L. ed. 597; Michigan Cent. R. Co. *v.* Slack, 17 Fed. Cas. No. 9,527*a*.

"A charge, especially a pecuniary burden which is imposed by authority, as a levy of any kind made upon property, for the support of a government." Webster Dict. [*quoted* in King *v.* Fountain County, 49 Ind. 13, 20].

"An impost levied by authority of government upon its citizens or subjects for the support of the State." Bailies *v.* Des Moines, 127 Iowa 124, 126, 102 N. W. 813; State *v.* Mississippi Valley Trust Co., 209 Mo. 472, 490, 108 S. W. 97; Carondelet *v.* Picot, 38 Mo. 125, 130.

"All those regular impositions or burdens laid by government upon property and persons for the purpose of raising revenue for its general needs." District of Columbia *v.* Sisters of Visitation, 15 App. Cas. (D. C.) 300, 306.

4. Taylor *v.* Boyd, 63 Tex. 533, 541.

In substantially the same language as the text see McRae *v.* Cochise County, 5 Ariz. 26, 33, 44 Pac. 299; State *v.* Montague, 34 Fla. 32, 36, 15 So. 589; Savannah *v.* Cooper, 131 Ga. 670, 673, 63 S. E. 138; Linton *v.* Childs, 105 Ga. 567, 571, 32 S. E. 617; Wagner *v.* Rock Island, 146 Ill. 139, 152, 34 N. E. 545, 21 L. R. A. 519; Jack *v.* Weiennett, 115 Ill. 105, 109, 3 N. E. 445, 56 Am. Rep. 129; Louisiana R., etc., Co. *v.* Madere,

a tax, or imposing these burdens or charges upon persons or property,[5] or in other words, the process or means by which the taxing power is exercised.[6] Other definitions relating to taxes and taxation are given in the notes and subsequent sections of this article.[7]

2. Nature of Taxes — a. In General. In a general sense the terms "tax" and "taxes" include every burden that may be lawfully laid upon the citizen by virtue of the taxing power,[8] but their application in constitutional or statutory provisions varies to some extent according to the intention and purpose of the particular provision,[9] and even the fact that a burden is imposed in the exercise

124 La. 635, 638, 50 So. 609; Opinion of Justices, 58 Me. 590, 591; Yeatman *v.* King, 2 N. D. 421, 425, 51 N. W. 721, 33 Am. St. Rep. 797; Foster *v.* Stevens, 63 Vt. 175, 184, 22 Atl. 78, 13 L. R. A. 166; Hewitt *v.* Traders' Bank, 18 Wash. 326, 51 Pac. 468.

Other similar definitions are: "A forced contribution from the citizen towards defraying the expenses of government." People *v.* Lawler, 74 N. Y. App. Div. 553, 557, 71 N. Y. Suppl. 840.

"A contribution imposed by government on individuals for the service of the State." Morgan's Steamship Co. *v.* Louisiana Bd. of Health, 118 U. S. 455, 461, 6 S. Ct. 1114, 30 L. ed. 237.

"A contribution imposed by the government upon the people for the service of the state." Union Refrigerator Transit Co. *v.* Lynch, 18 Utah 378, 385, 55 Pac. 639, 48 L. R. A. 790 [*affirmed* in 177 U. S. 149, 20 S. Ct. 631, 44 L. ed. 708].

"A contribution, which the law requires individuals to make for the support of the government." Dunn *v.* Winston, 31 Miss. 135, 137.

"The contribution which the citizen is required to pay for his share of the general expenses of government." *In re* Hun, 144 N. Y. 472, 477, 39 N. E. 376.

"The regular, uniform and equal contributions which all citizens are required to make for the support of the government." New London *v.* Miller, 60 Conn. 112, 116, 22 Atl. 499.

"A portion of the property of the citizen required by the government for its support in the discharge of its various functions and duties." Graham *v.* St. Joseph Tp., 67 Mich. 652, 655, 35 N. W. 808.

"The just proportion of the citizen's share or contribution to the support of the government." Moog *v.* Randolph, 77 Ala. 597, 602.

"The legally determined and legally collected contributions of individuals for meeting the necessary and general expenses of the state." Lamonde *v.* Lavergne, 3 Quebec Q. B. 303, 311.

5. State *v.* Thorne, 112 Wis. 81, 86, 87 N. W. 797, 55 L. R. A. 956; Knowlton *v.* Rock County, 9 Wis. 410, 418.

Other definitions are: "The process of taxing or imposing a tax." Bouvier L. Dict.

"The act of levying or imposing taxes." Louisiana R., etc., Co. *v.* Madere, 124 La. 635, 637, 50 So. 609.

"The imposition of a duty or impost for the support of government." Brewer Brick Co. *v.* Brewer, 62 Me. 62, 70, 16 Am. Rep. 395.

6. State *v.* Thorne, 112 Wis. 81, 86, 87 N. W. 797, 55 L. R. A. 956; Knowlton *v.* Rock County, 9 Wis. 410, 418.

Other definitions are: "A mode of raising revenue for public purposes." Sharpless *v.* Philadelphia, 21 Pa. St. 147, 169, 59 Am. Dec. 759.

"A certain mode of raising revenue for a public purpose in which the community that pays it has an interest." Manistee Lumber Co. *v.* Springfield Tp., 92 Mich. 277, 280, 52 N. W. 468.

"The simple operation of taking small portions from a perpetually accumulating mass, susceptible of almost infinite division." Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1, 199, 6 L. ed. 23.

7. **Assessment defined** see 3 Cyc. 1111; and *infra*, VI, C, 1, a.

Capitation or poll tax defined see 6 Cyc. 349.

Customs defined see Customs Duties, 12 Cyc. 1108.

Duty defined see 14 Cyc. 1125, 1126.

Excise defined see Internal Revenue, 22 Cyc. 1598.

Impost defined see 21 Cyc. 1741.

Income tax defined.—An income tax has been defined as: "A tax on the yearly profits arising from property, professions, trades, and offices." Black L. Dict.

One which relates "to the product or income from property, or from business pursuits." Levi *v.* Louisville, 97 Ky. 394, 401, 30 S. W. 973, 16 Ky. L. Rep. 872, 28 L. R. A. 480.

Kinds and classification of taxes see *infra*, I, A, 3.

Legacy and inheritance taxes defined see *infra*, XVI, A, 1.

Tax-sale defined see *infra*, XI.

8. Reelfoot Lake Levee Dist. *v.* Dawson, 97 Tenn. 151, 167, 36 S. W. 1041, 34 L. R. A. 725.

"**The word 'taxes' in its most extended sense,** includes all contributions imposed by the Government upon individuals, for the services of the Government, by whatever name they are called or known." Union Bank *v.* Hill, 3 Coldw. (Tenn.) 325, 327.

9. Santa Barbara *v.* Stearns, 51 Cal. 499, 501 (holding that a license-fee is within the term "tax" as used in a particular section of the code of civil procedure and as used in a particular article of the constitution but not as used in a different article of the same constitution); Tull *v.* Royston, 30 Kan. 617, 619, 2 Pac. 866 (holding that while assessments were not taxes within the meaning of

of the taxing power does not necessarily make it a tax.[10] The essential characteristics of a tax[11] are that it is not a voluntary payment or donation, but an enforced contribution,[12] exacted pursuant to legislative authority,[13] in the exercise of the taxing power,[14] the contribution being of a proportionate character,[15] and payable in money,[16] and imposed, levied, and collected for the purpose of raising

the constitution they were taxes within the application of a particular statute); Tompkins *v.* Little Rock, etc., R. Co., 15 Fed. 6, 11 (holding that the word "tax" as used in the Arkansas statute of 1868, section 7, was not used according to its strict legal signification).

Statutory definitions.— The words "tax" and "taxes" as used in particular statutes have been defined as including "any tax, special assessment, or costs, interest or penalty imposed upon property." Blake *v.* People, 109 Ill. 504, 525; State *v.* Irey, 42 Nebr. 186, 208, 60 N. W. 601.

10. *In re* Hun, 144 N. Y. 472, 477, 39 N. E. 376, holding that, although an assessment for improvements is imposed under the taxing power, this fact does not necessarily make the assessment a tax, and that it is not a tax within the application of a statute requiring executors to pay unpaid taxes See also *infra*, I, A, 2, d.

11. See the following cases:

Illinois.— De Clercq *v.* Barber Asphalt Paving Co., 167 Ill. 215, 218, 47 N. E. 367.

Maryland.— Hyattsville *v.* Smith, 105 Md. 318, 322, 66 Atl. 44.

Michigan.— People *v.* Salem Tp. Bd., 20 Mich. 452, 474, 4 Am. Rep. 400.

New York.— Heerwagen *v.* Crosstown St. R. Co., 90 N. Y. App. Div. 275, 286, 86 N. Y. Suppl. 218.

North Dakota.— Yeatman *v.* King, 2 N. D. 421, 425, 51 N. W. 721, 33 Am. St. Rep. 797.

Oregon.— State *v.* Frazier, 36 Oreg. 178, 187, 59 Pac. 5.

Taxes not the price of governmental protection.— The doctrine that a tax is a payment made to the government in consideration of the advantages which it offers, or as an equivalent for the security which it affords, or a pledge to secure the enjoyment of the remainder of one's property, rests upon a false conception of the relation of the citizen to the state. For the advantages of organized society are not a matter of bargain and sale, and protection in the enjoyment of his rights is a duty owed by the state to every citizen, whether he can or does pay taxes or not, and this duty would be just as much obligatory on the state if it needed no taxes. Black Tax Titles, § 2. See also Youngblood *v.* Sexton, 32 Mich. 406, 414, 20 Am. Rep. 654. *Compare* Union Refrigerator Transit Co. *v.* Lynch, 18 Utah 378, 385, 55 Pac. 639, 48 L. R. A. 790.

12. *Illinois.*— Wagner *v.* Rock Island, 146 Ill. 139, 152, 34 N. E. 545, 21 L. R. A. 519.

New York.— Heerwagen *v.* Crosstown St. R. Co., 90 N. Y. App. Div. 275, 286, 86 N. Y. Suppl. 218.

North Dakota.— Yeatman *v.* King, 2 N. D. 421, 425, 51 N. W. 721, 33 Am. St. Rep. 797.

Vermont.— Morgan *v.* Cree, 46 Vt. 773, 783, 14 Am. Rep. 640.

United States.— Hamilton *v.* Dillin, 11 Fed. Cas. No. 5,979.

13. Queens County Water Co. *v.* Monroe, 83 N. Y. App. Div. 105, 111, 82 N. Y. Suppl. 610; Zanesville *v.* Richards, 5 Ohio St. 589, 592.

Taxation a legislative function see *infra*, I, E, 1.

Tax legislation has been defined as "the making of laws that are to furnish the measure of every man's duty in support of the public burdens, and the means of enforcing it." Philadelphia Disabled Firemen's Relief Assoc. *v.* Wood, 39 Pa. St. 73, 82.

14. People *v.* Brooklyn, 4 N. Y. 419, 424, 55 Am. Dec. 266; Hamilton *v.* Dillin, 21 Wall. (U. S.) 73, 22 L. ed. 528 [*affirming* 11 Fed. Cas. No. 5,979].

Police power distinguished from taxing power see Holst *v.* Roe, 39 Ohio St. 340, 344, 48 Am. Rep. 459; Milwaukee Fire Dept. *v.* Helfenstein, 16 Wis. 136, 140; and *infra*, I, A, 2, c.

Right of eminent domain distinguished from taxing power see *infra*, I, A, 2, f.

War power distinguished from taxing power see Hamilton *v.* Dillin, 21 Wall. (U. S.) 73, 94, 22 L. ed. 528 [*affirming* 11 Fed. Cas. No. 5,979].

15. People *v.* Salem Tp. Bd., 20 Mich. 452, 474, 4 Am. Rep. 400; People *v.* Brooklyn, 4 N. Y. 419, 424, 55 Am. Dec. 266; Yeatman *v.* King, 2 N. D. 421, 425, 51 N. W. 721, 33 Am. St. Rep. 797; State *v.* Frazier, 36 Oreg. 178, 187, 59 Pac. 5.

16. Galloway *v.* Tavares, 37 Fla. 58, 62, 19 So. 170; Leedy *v.* Bourbon, 12 Ind. App. 486, 40 N. E. 640, 641; Shreveport *v.* Gregg, 28 La. Ann. 836, 837.

Compulsory labor on the public roads, with the privilege of providing a substitute or paying a stipulated sum in lieu of such personal service, is not a poll tax, nor a tax at all in any proper sense of the word. Galloway *v.* Tavares, 37 Fla. 58, 19 So. 170; Pleasant *v.* Kost, 29 Ill. 490; Leedy *v.* Bourbon, 12 Ind. App. 486, 40 N. E. 640; Short *v.* State, 80 Md. 392, 31 Atl. 322, 29 L. R. A. 404; Amenia *v.* Stanford, 6 Johns. (N. Y.) 92; State *v.* Wheeler, 141 N. C. 773, 53 S. E. 358, 115 Am. St. Rep. 700, 6 L. R. A. N. S. 1139; Biss *v.* New Haven, 42 Wis. 605.

Law for clearing of streams.—A statute requiring that all landowners in certain counties shall annually remove from the running streams of water running on their lands all trash, trees, rafts, and timbers, and making a violation of such requirement a misdemeanor, cannot be regarded as a law imposing a tax. State *v.* Tucker, 56 S. C. 516, 35 S. E. 215.

A so-called "commutation tax" in lieu

revenue,[17] to be used for public or governmental purposes,[18] and not as payment for some special privilege granted or service rendered.[19] Taxes and taxation are therefore distinguishable from various other contributions, charges, or burdens paid or imposed for particular purposes or under particular powers or functions of the government.[20] Whether a particular contribution, charge, or burden is to

of military service in the state militia is not a "tax" in the sense of the constitution, the practice of commuting for military service being analogous to that of commuting for highway labor. People *v.* Chenango, 8 N. Y. 317, 325.

17. Mays *v.* Cincinnati, 1 Ohio St. 268, 273; Com. *v.* Conglomerate Min. Co., 5 Dauph. Co. Rep. (Pa.) 66, 68; State *v.* Winnebago Lake, etc., Plank Road Co., 11 Wis. 35, 40.

Fees of public officers, unless for purposes of general revenue, not taxes see *infra,* I, A, 2, e.

License-fees, unless for purposes of general revenue, not taxes see *infra,* I, A, 2, c.

Export stamps.—A requirement that articles intended for exportation shall be stamped, in order to prevent fraud and secure the carrying out of the declared intent of the law, is not laying a tax or duty on such articles, although a small charge is made for the stamp. Pace *v.* Burgess, 92 U. S. 372, 23 L. ed. 657. But if the stamp were required as a source of revenue to the government, it would amount to a tax. Almy *v.* California, 24 How. (U. S.) 169, 16 L. ed. 644.

18. *Maine.*—Allen *v.* Jay, 60 Me. 124, 127, 11 Am. Rep. 185; Opinion of Justices, 58 Me. 590, 591.

Massachusetts.— Mead *v.* Acton, 139 Mass. 341, 344, 1 N. E. 413.

Michigan.— People *v.* Salem Tp. Bd., 20 Mich. 452, 474, 4 Am. Rep. 400.

Missouri.— State *v.* Switzler, 143 Mo. 287, 314, 45 S. W. 245, 65 Am. St. Rep. 653, 40 L. R. A. 280.

New Jersey.— Elizabethtown Water Co. *v.* Wade, 59 N. J. L. 78, 83, 35 Atl. 4.

New York.— Heerwagen *v.* Crosstown St. R. Co., 90 N. Y. App. Div. 275, 286, 86 N. Y. Suppl. 218, where the court said: "The crucial attributes of a tax are that it is a toll upon property without the consent of the owner, and the money secured is to be applied towards governmental expenses of the body politic for whose benefit the imposition is to be made."

North Dakota.— Yeatman *v.* King, 2 N. D. 421, 425, 51 N. W. 721, 33 Am. St. Rep. 797.

Pennsylvania.— Philadelphia Disabled Firemen's Relief Assoc. *v.* Wood, 39 Pa. St. 73, 82; Sharpless *v.* Philadelphia, 21 Pa. St. 147, 169, 59 Am. Dec. 759.

South Carolina.— Feldman *v.* Charleston, 23 S. C. 57, 62, 55 Am. Rep. 6.

United States.— Morgan's Steamship Co. *v.* Louisiana Bd. of Health, 118 U. S. 455, 461, 6 S. Ct. 1114, 30 L. ed. 237.

Necessity for public purpose see *infra,* I, D, 1.

What constitutes public purpose.— While taxation must be for a public purpose this does not necessarily mean that it must be exclusively in support of the government. Davidson *v.* Ramsey County, 18 Minn. 482. See also *infra,* I, D, 2.

19. Wagner *v.* Rock Island, 146 Ill. 139, 34 N. E. 545, 21 L. R. A. 519; Manistee River Imp. Co. *v.* Sands, 53 Mich. 593, 19 N. W. 199; St. Louis Brewing Assoc. *v.* St. Louis, 140 Mo. 419, 37 S. W. 525, 41 S. W. 911; Morgan's Steamship Co. *v.* Louisiana Bd. of Health, 118 U. S. 455, 6 S. Ct. 1114, 30 L. ed. 237; Hamilton *v.* Dillin, 11 Fed. Cas. No. 5,979.

Taxes do not include water rates paid by private consumers for water actually used to a municipality which owns and operates a waterworks system (Wagner *v.* Rock Island, 146 Ill. 139, 34 N. E. 545, 21 L. R. A. 519; Preston *v.* Detroit Water Com'rs, 117 Mich. 589, 76 N. W. 92; Jones *v.* Detroit Water Com'rs, 34 Mich. 273; St. Louis Brewing Assoc. *v.* St. Louis, 140 Mo. 419, 37 S. W. 525, 41 S. W. 911; Silkman *v.* Yonkers Water Com'rs, 152 N. Y. 327, 46 N. E. 612, 37 L. R. A. 827 [*affirming* 71 Hun 37, 24 N. Y. Suppl. 806]; Alter *v.* Cincinnati, 56 Ohio St. 47, 46 N. E. 69, 35 L. R. A. 737); tolls for the actual use of passage over land or water highways (Manistee River Imp. Co. *v.* Sands, 53 Mich. 593, 19 N. W. 199 [*affirmed* in 123 U. S. 288, 8 S. Ct. 113, 31 L. ed. 149]); wharfage charges (Keokuk Northern Line Packet Co. *v.* Keokuk, 95 U. S. 80, 24 L. ed. 377); fees of public officers (see *infra,* I, A, 2, e); or a bonus required to be paid for the renewal of the charter of a corporation (Baltimore *v.* Baltimore, etc., R. Co., 6 Gill (Md.) 288, 48 Am. Dec. 531).

20. People *v.* Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266; State *v.* Winnebago Lake, etc., Plank Road Co., 11 Wis. 35; *In re* Meador, 16 Fed. Cas. No. 9,375, 1 Abb. 317; Cooley Taxation (3d ed.) 5. See also cases cited *supra,* notes 14, 16, 17; and *infra,* this note; and, generally, *infra,* II, A, 2, b, c, d, e, f.

Duty distinguished from tax see U. S. *v.* Fifty-Nine Demijohns Aquadiente, etc., 39 Fed. 401, 402.

Excise distinguished from tax see Oliver *v.* Washington Mills, 11 Allen (Mass.) 268, 274; and INTERNAL REVENUE, 22 Cyc. 1598 note 4.

"Forfeitures, fines and penalties are in no true sense taxes levied." Allis *v.* Jefferson County, 34 Ark. 307, 310.

Judgments distinguished from taxes see Peirce *v.* Boston, 3 Metc. (Mass.) 520, 521.

Subsidies distinguished from taxes see Black L. Dict. *sub verb* "Tax."

Tolls distinguished from taxes see Manistee River Imp. Co. *v.* Sands, 53 Mich. 593, 596, 19 N. W. 199; St. Louis *v.* Western Union Tel. Co., 148 U. S. 92, 97, 13 S. Ct. 485, 37

be regarded as a tax depends upon its real nature in view of these essential characteristics,[21] and if it is in its nature a tax it is not material that it may be called by a different name;[22] and conversely if it is not in its nature a tax it is not material that it may have been so called.[23]

b. Taxes Not Debts. As the obligation to pay taxes does not rest upon any contract express or implied, or upon the consent of the taxpayer,[24] a tax is not a debt in the ordinary sense of that word;[25] and for the same reason taxes are not assignable as ordinary debts, unless it is expressly so provided,[26] nor are they the subject of set-off between the taxpayer and the state or municipality,[27] nor do they draw interest like ordinary obligations, save where the statute so declares.[28] It is, however, the individual and not his property which pays the tax,[29] although

L. ed. 380; Philadelphia, etc., R. Co. *v.* Pennsylvania, 15 Wall. (U. S.) 232, 278, 21 L. ed. 146.

21. Yeatman *v.* Foster County, 2 N. D. 421, 51 N. W. 721, 33 Am. St. Rep. 797; Pittsburgh, etc., R. Co. *v.* State, 49 Ohio St. 189, 30 N. E. 435, 16 L. R. A. 380; State *v.* Winnebago Lake, etc., Plank Road Co., 11 Wis. 35.

22. Pittsburgh, etc., R. Co. *v.* State, 49 Ohio St. 189, 30 N. E. 435, 16 L. R. A. 380; State *v.* Case, 39 Wash. 177, 81 Pac. 554, 109 Am. St. Rep. 874, 1 L. R. A. N. S. 152.

"Every burden which the State imposes upon its citizens with a view to a revenue is levied under the power of taxation, whether called a tax or some other name." Yamhill County *v.* Foster, 53 Oreg. 124, 131, 99 Pac. 286.

23. Yeatman *v.* Foster County, 2 N. D. 421, 51 N. W. 721, 33 Am. St. Rep. 797.

24. Perry *v.* Washburn, 20 Cal. 318; Brailes *v.* Des Moines, 127 Iowa 124, 102 N. W. 813; Anderson *v.* Mayfield, 93 Ky. 230, 19 S. W. 598, 14 Ky. L. Rep. 370; Jones *v.* Gibson, 82 Ky. 561; North Missouri R. Co. *v.* Maguire, 49 Mo. 490, 8 Am. Rep. 141. See also cases cited *infra*, note 58.

Taxes are forced contributions for the support of the body politic and are not debts in the ordinary sense of the word. Geren *v.* Gruber, 26 La. Ann. 694.

25. *California.*— Perry *v.* Washburn, 20 Cal. 318.

Iowa.— Brailes *v.* Des Moines, 127 Iowa 124, 102 N. W. 813.

Kentucky.— Jones *v.* Gibson, 82 Ky. 561.

Louisiana.— Shreveport *v.* Gregg, 28 La. Ann. 836; Geren *v.* Gruber, 26 La. Ann. 694.

Maryland.— Bonaparte *v.* State, 63 Md. 465.

Massachusetts.—Appleton *v.* Hopkins, 5 Gray 530, law abolishing imprisonment for debt does not apply to taxes.

Missouri.— State *v.* Mississippi Valley Trust Co., 209 Mo. 472, 108 S. W. 97; North Missouri R. Co. *v.* Maguire, 49 Mo. 490, 8 Am. Rep. 141; Carondelet *v.* Picot, 38 Mo. 125.

Nebraska.—Philadelphia Mortg., etc., Co. *v.* Omaha, 63 Nebr. 280, 88 N. W. 523, 93 Am. St. Rep. 442.

North Dakota.— Hertzler *v.* Freeman, 12 N. D. 187, 96 N. W. 294.

South Dakota.—Danforth *v.* McCook County, 11 S. D. 258, 76 N. W. 940, 74 Am. St. Rep. 808.

Washington.— Hewitt *v.* Traders' Bank, 18 Wash. 326, 51 Pac. 468.

West Virginia.— Dunn *v.* Renick, 40 W. Va. 349, 22 S. E. 66.

Wisconsin.— State *v.* Chicago, etc., R. Co., 128 Wis. 449, 108 N. W. 594.

United States.— Meriwether *v.* Garrett, 102 U. S. 472, 26 L. ed. 197; Lane County *v.* Oregon, 7 Wall. 71, 19 L. ed. 101; *In re* Duryee, 2 Fed. 68.

See 45 Cent. Dig. tit. "Taxation," § 1.

The term "debts" as used in the act of congress of 1862, providing that notes issued pursuant thereto shall be legal tender for the payment of "all debts, public and private," has been held not to include state and county taxes. Perry *v.* Washburn, 20 Cal. 318. *Contra*, Haas *v.* Misner, 1 Ida. 170.

Commuted taxes as debts.—Where the charter of a corporation conditions the exercise of a corporate privilege upon the payment by the corporation to the state of a certain proportion of its income, the acceptance of the charter, by operating under it, creates a contract between the state and the corporation, and the exaction, when plainly made for revenue, is a tax, in the broad and just sense of the term, which includes all public revenues derived from persons, natural or artificial, but it is at the same time a debt from the corporation to the state, and is not a tax in the narrower sense of the constitutional provision requiring equality and uniformity in taxation. State *v.* Chicago, etc., R. Co., 128 Wis. 449, 108 N. W. 594.

26. McInerny *v.* Reed, 23 Iowa 410; Hinchman *v.* Morris, 29 W. Va. 673, 2 S. E. 863.

27. See *infra*, X, C, 6, d, (IV); and RECOUPMENT, SET-OFF, AND COUNTER-CLAIM, 34 Cyc. 656, 692.

28. Perry County *v.* R. Co., 65 Ala. 391; Haskell *v.* Bartlett, 34 Cal. 281; Himmelman *v.* Oliver, 34 Cal. 246; Cave *v.* Houston, 65 Tex. 619; Edmonson *v.* Galveston, 53 Tex. 157; Shaw *v.* Peckett, 26 Vt. 482. And see *infra*, IX, A, 2, e; X, C, 6, h, (II), (B).

29. People *v.* Seymour, 16 Cal. 332, 76 Am. Dec. 505; Mercier's Succession, 42 La. Ann. 1135, 8 So. 732, 11 L. R. A. 817; Green *v.* Craft, 28 Miss. 70; State *v.* Camp Sing, 18 Mont. 128, 44 Pac. 516, 56 Am. St. Rep. 551, 32 L. R. A. 635. *Compare* Oakey *v.* New Orleans, 1 La. 1.

the property is resorted to for the purpose of ascertaining the amount of the tax and for the purpose of enforcing its payment where the owner makes default.[30]

c. Taxation and Licensing Distinguished.[31] While in a broad sense a license-fee may be regarded as a tax,[32] there is properly speaking and as generally understood a clear distinction between licensing and taxation,[33] and between license-fees and ordinary taxes.[34] License-fees exacted for the primary purpose of regulating or restraining occupations deemed dangerous to the public or to be specially in need of public control are imposed in the exercise of the police power, and not that of taxation;[35] and where the object of the imposition is not to raise revenue the fact that the fee demanded is greater than the expense of issuing the license, and therefore does in fact produce revenue, is not sufficient to make it a tax.[36] If, however, the fee or charge is imposed solely or primarily as a means of raising revenue it is a tax,[37] regardless of the name by which it may be called.[38]

d. Taxes and Assessments Distinguished. In a broad sense taxes may be said to include assessments for improvements,[39] since the right to impose assess-

30. Mercier's Succession, 42 La. Ann. 1135, 8 So. 732, 11 L. R. A. 817; Green *v.* Craft, 28 Miss. 70; State *v.* Camp Sing, 18 Mont. 128, 44 Pac. 516, 56 Am. St. Rep. 551, 32 L. R. A. 635.

Personal liability and actions to recover taxes see *infra*, X, C, 1, c; X, C, 6, a, (I).

31. See INTOXICATING LIQUORS, 23 Cyc. 105; LICENSES, 25 Cyc. 598.

32. Santa Barbara *v.* Stearns, 51 Cal. 499; East Feliciana Parish *v.* Levy, 40 La. Ann. 332, 4 So. 309.

33. *Georgia.*— Home Ins. Co. *v.* Augusta, 50 Ga. 530.

Iowa.— Burlington *v.* Bumgardner, 42 Iowa 673.

Michigan.— Youngblood *v.* Sexton, 32 Mich. 406, 20 Am. Rep. 654.

Nebraska.— Pleuler *v.* State, 11 Nebr. 547, 10 N. W. 481.

Ohio.— State *v.* Hipp, 38 Ohio St. 199.

Wisconsin.— State *v.* Winnebago Lake, etc., Plank Road Co., 11 Wis. 35.

There is no necessary connection between a license and a tax. A business may be licensed and yet not taxed, or it may be taxed and yet not licensed. Youngblood *v.* Sexton, 32 Mich. 406, 20 Am. Rep. 654.

34. Home Ins. Co. *v.* Augusta, 50 Ga. 530; U. S. Distilling Co. *v.* Chicago, 112 Ill. 19, 1 N. E. 166; Braun *v.* Chicago, 110 Ill. 186; Pleuler *v.* State, 11 Nebr. 547, 10 N. W. 481; *In re* Danville Rolling Mill Co., 121 Fed. 432. See also cases cited *supra*, notes 17, 33.

Not a property tax.— While a license-fee is a tax it is a license-tax and not a property tax. Morehouse Parish *v.* Brigham, 41 La. Ann. 665, 6 So. 257.

A per capita dog tax which is not based upon valuation but consists of a specific charge of so much for each dog is to be regarded rather as a license-fee than a tax, and imposed under the police power and not the power of taxation. State *v.* Sharp, 169 Ind. 128, 81 N. E. 1150; Hendrie *v.* Kalthoff, 48 Mich. 306, 12 N. W. 191; Van Horn *v.* People, 46 Mich. 183, 9 N. W. 246, 41 Am. Rep. 159; Holst *v.* Roe, 39 Ohio St. 340, 48 Am. Rep. 459; *Ex p.* Cooper, 3 Tex. App. 489, 30 Am. Rep. 152.

35. *Indiana.*— Kleizer *v.* State, 15 Ind. 449.

Michigan.— Ash *v.* People, 11 Mich. 347, 83 Am. Dec. 740.

Minnesota.— Willis *v.* Standard Oil Co., 50 Minn. 290, 52 N. W. 652.

Montana.— State *v.* McKinney, 29 Mont. 375, 74 Pac. 1095.

Nebraska.— Littlefield *v.* State, 42 Nebr. 223, 60 N. W. 724, 47 Am. St. Rep. 697, 28 L. R. A. 588; Pleuler *v.* State, 11 Nebr. 547, 10 N. W. 481.

Ohio.— State *v.* Hipp, 38 Ohio St. 199.

Pennsylvania.— Oil City *v.* Oil City Trust Co., 151 Pa. St. 454, 25 Atl. 124, 31 Am. St. Rep. 770.

Wisconsin.— Tenney *v.* Lenz, 16 Wis. 566.

Dog licenses are imposed under the police power and are not taxes. Cole *v.* Hall, 103 Ill. 30; Tenney *v.* Lentz, 16 Wis. 566.

36. Littlefield *v.* State, 42 Nebr. 223, 60 N. W. 724, 47 Am. St. Rep. 697, 28 L. R. A. 588; Tenney *v.* Lentz, 16 Wis. 566. See also cases cited *supra*, note 35.

37. *California.*— People *v.* Martin, 60 Cal. 153.

Georgia.— Home Ins. Co. *v.* Augusta, 50 Ga. 530.

Louisiana.— East Feliciana Parish *v.* Levy, 40 La. Ann. 332, 4 So. 309; New Orleans *v.* Rhenish Westphalian Lloyds, 31 La. Ann. 781.

New York.— New York *v.* Second Ave. R. Co., 32 N. Y. 261.

Ohio.— Mays *v.* Cincinnati, 1 Ohio St. 268.

South Carolina.— State *v.* Columbia, 6 S. C. 1.

Wisconsin.— State *v.* Winnebago Lake, etc., Plank Road Co., 11 Wis. 35.

United States.— Ward *v.* Maryland, 12 Wall. 418, 20 L. ed. 449.

38. New York *v.* Second Ave. R. Co., 32 N. Y. 261.

39. Chicago Great Western R. Co. *v.* Kansas City Northwestern R. Co., 75 Kan. 167, 88 Pac. 1085; Roosevelt Hospital *v.* New York, 84 N. Y. 108; *In re* Van Antwerp, 56 N. Y. 261; Illinois Cent. R. Co. *v.* Decatur, 147 U. S. 190, 13 S. Ct. 293, 37 L. ed. 132.

ments has its foundation in the taxing power of the government;[40] but in practice and as generally understood there is a clear distinction between the two terms,[41] and ordinarily such assessments are not included in the terms "taxes" or "taxation." [42] Taxes are burdens or impositions laid for purposes of general revenue, while assessments are special and local impositions upon property in the immediate vicinity of a public improvement, made for the public welfare, which are necessary to pay for the improvement and made with reference to the special benefit which such property derives from the expenditure.[43] Hence a charge imposed by law upon all taxable property in a given district is a tax and not an assessment,

The rule that taxes do not bear interest unless it is so provided by statute applies to assessments. Sargent *v.* Tuttle, 67 Conn. 162, 34 Atl. 1028, 32 L. R. A. 822.

40. *Colorado.*—Palmer *v.* Way, 6 Colo. 106.

Connecticut.— New London *v.* Miller, 60 Conn. 112, 22 Atl. 499.

Maryland.— Hagerstown *v.* Startzman, 93 Md. 606, 49 Atl. 838; Baltimore *v.* Green Mount Cemetery, 7 Md. 517.

New York.— Roosevelt Hospital *v.* New York, 84 N. Y. 108.

Tennessee.— Reelfoot Lake Levee Dist. *v.* Dawson, 97 Tenn. 151, 36 S. W. 1041, 34 L. R. A. 725.

But the exercise of the taxing power in imposing an assessment does not necessarily make the assessment a tax. *In re* Hun, 144 N. Y. 472, 39 N. E. 376.

41. De Clercq *v.* Barber Asphalt Paving Co., 167 Ill. 215, 47 N. E. 367; Reinken *v.* Fuehring, 130 Ind. 382, 30 N. E. 414, 30 Am. St. Rep. 247, 15 L. R. A. 624; Roosevelt Hospital *v.* New York, 84 N. Y. 108; Illinois Cent. R. Co. *v.* Decatur, 147 U. S. 190, 13 S. Ct. 293, 37 L. ed. 132. See also cases cited *infra*, note 42.

An assessment is not regarded as a burden imposed upon persons or property, as is a tax, but is regarded as an equivalent or compensation for the enhanced value which the property of the person assessed has derived from the improvement. Hale *v.* Kenosha, 29 Wis. 599; Illinois Cent. R. Co. *v.* Decatur, 147 U. S. 190, 13 S. Ct. 293, 37 L. ed. 132.

Two meanings of assessment.— The word "assessment" has been employed in two different senses, sometimes as expressing the appraisement or valuation of the property and entering it on the lists for the purpose of taxation, and sometimes as indicating the charge or special tax imposed on the land as its portion of the expense of a benefit conferred by a local improvement. First Div. St. Paul, etc., R. Co. *v.* St. Paul, 21 Minn. 526. See also District of Columbia *v.* Sisters of Visitation, 15 App. Cas. (D. C.) 300.

42. *Connecticut.*— New London *v.* Miller, 60 Conn. 112, 22 Atl. 499.

Illinois.— Chicago *v.* Baptist Theological Union, 115 Ill. 245, 2 N. E. 254.

Michigan.— Lake Shore, etc., R. Co. *v.* Grand Rapids, 102 Mich. 374, 60 N. W. 767, 29 L. R. A. 195.

New York.— Roosevelt Hospital *v.* New York, 84 N. Y. 108.

Texas.— Taylor *v.* Boyd, 63 Tex. 533.

Wisconsin.— Hale *v.* Kenosha, 29 Wis. 599.

United States.— Illinois Cent. R. Co. *v.* Decatur, 147 U. S. 190, 13 S. Ct. 293, 37 L. ed. 132.

Application of rule.—Assessments have been held not to be within the application of the terms "tax" and "taxes" as used in constitutional or statutory provisions requiring every law imposing a tax to state the tax and its object (*In re* Ford, 6 Lans. (N. Y.) 92); limiting the amount of taxes which a municipality may lay in any one year (Greensburg *v.* Young, 53 Pa. St. 280); providing that taxes shall be collected within a certain time after they are levied and shall not be enforced by law after such time (Gould *v.* Baltimore, 59 Md. 378); providing that the holder of a general tax certificate before bringing an action to foreclose the lien shall pay the taxes that have accrued on the property (McMillen *v.* Tacoma, 26 Wash. 358, 67 Pac. 68); subjecting homesteads to forced sale for taxes due thereon (Lovenberg *v.* Galveston, 17 Tex. Civ. App. 162, 42 S. W. 1024); authorizing a municipality to sell lands for taxes (State *v.* Irey, 42 Nebr. 186, 60 N. W. 601; Sharp *v.* Johnson, 4 Hill (N. Y.) 92, 40 Am. Dec. 259; Sharp *v.* Speir, 4 Hill (N. Y.) 76; Allen *v.* Galveston, 51 Tex. 302); imposing a penalty for wrongfully enjoining the collection of taxes (Wilson *v.* Anderson, 28 La. Ann. 261); providing that delinquent taxes shall bear interest after a certain date (Murphy *v.* People, 120 Ill. 234, 11 N. E. 202; Vicksburg, etc., R. Co. *v.* Traylor, 104 La. 284, 29 So. 141); and providing that back taxes and a penalty of twenty-five per cent shall be added to the taxes for the current year (Hosmer *v.* Hunt Drain. Dist., 134 Ill. 317, 25 N. E. 747).

But assessments have been held to be taxes within the application of particular statutory provisions. See Tull *v.* Royston, 30 Kan. 617, 2 Pac. 866; Smith *v.* Frankfort, 2 Kan. App. 411, 42 Pac. 1003; Delker *v.* Owensboro, 61 S. W. 362, 22 Ky. L. Rep. 1777; Hagerstown *v.* Startzman, 93 Md. 606, 49 Atl. 838; Sheboygan County *v.* Sheboygan, 54 Wis. 415, 11 N. W. 598.

Application to provision in lease requiring lessee to pay taxes see LANDLORD AND TENANT, 24 Cyc. 1076.

Application of constitutional provisions see *infra*, II, B, 1, b, (I); II, D, 2.

43. *California.*— Holley *v.* Orange County, 106 Cal. 420, 39 Pac. 790; Smith *v.* Farrelly, 52 Cal. 77; Taylor *v.* Palmer, 31 Cal. 240.

Connecticut.— New London *v.* Miller, 60 Conn. 112, 22 Atl. 499.

although the purpose is to make a local improvement;[44] and conversely a charge imposed only upon those property-owners who are to enjoy the benefits accruing from the improvement is an assessment, notwithstanding that the statute may call it a tax.[45]

e. Fees of Public Officers Not Taxes. Fees prescribed to be paid by individuals to public officers, whether in the judicial or executive department of government, for services rendered, are not ordinarily taxes,[46] unless the object of the requirement is to provide general revenue rather than compensation for those officers,[47] as in the case of graduated fees in probate proceedings based upon the valuation of the estate and having no relation to the services rendered or compensation received therefor by the officer.[48] On similar principles, where statutes provide for the inspection of given commodities, with a view to determine their quality and fitness for use, the fees to be paid to the inspectors are not properly classed as taxes.[49]

f. Taxation and Eminent Domain Distinguished. While both are attributes of the sovereign power and both involve the taking of private property for public use,[50] there is a clear distinction between the power of taxation and the right of

Illinois.— Chicago *v.* Baptist Theological Union, 115 Ill. 245, 2 N. E. 254; Illinois, etc., Canal *v.* Chicago, 12 Ill. 403.

Indiana.— Palmer *v.* Stumph, 29 Ind. 329.

Kentucky.— Dressman *v.* Farmers', etc., Nat. Bank, 100 Ky. 571, 38 S. W. 1052, 18 Ky. L. Rep. 1013, 36 L. R. A. 121.

Louisiana.— Vicksburg, etc., R. Co. *v.* Traylor, 104 La. 284, 29 So. 141.

Maryland.— Gould *v.* Baltimore, 59 Md. 378.

Massachusetts.— Boston Asylum, etc., *v.* Boston St. Com'rs, 180 Mass. 485, 62 N. E. 961.

Michigan.— Lake Shore, etc., R. Co. *v.* Grand Rapids, 102 Mich. 374, 60 N. W. 767, 29 L. R. A. 195.

Mississippi.—Macon *v.* Patty, 57 Miss. 378, 34 Am. Rep. 451.

Missouri.— Egyptian Levee Co. *v.* Hardin, 27 Mo. 495, 72 Am. Dec. 276.

Nebraska.— Ittner *v.* Robinson, 35 Nebr. 133, 52 N. W. 846.

New York.— *In re* Hun, 144 N. Y. 472, 39 N. E. 376; Roosevelt Hospital *v.* New York, 84 N. Y. 108; *In re* New York, 11 Johns. 77.

Ohio.— Ridenour *v.* Saffin, 1 Handy 464, 12 Ohio Dec. (Reprint) 238.

Oregon.— King *v.* Portland, 2 Oreg. 146.

Pennsylvania.— Sewickley M. E. Church's Appeal, 165 Pa. St. 475, 30 Atl. 1007.

South Dakota.— Winona, etc., R. Co. *v.* Watertown, 1 S. D. 46, 44 N. W. 1072.

Texas.— Taylor *v.* Boyd, 63 Tex. 533.

Wisconsin.— Hale *v.* Kenosha, 29 Wis. 599.

44. Williams *v.* Corcoran, 46 Cal. 553; Louisiana R., etc., Co. *v.* Madere, 124 La. 635, 50 So. 609; Howes *v.* Racine, 21 Wis. 514.

Special taxes voted for particular purposes as in aid of railroads are not local assessments. Louisiana, etc., R. Co. *v.* Shaw, 121 La. 997, 46 So. 994.

45. People *v.* Austin, 47 Cal. 353; Worsley *v.* New Orleans Second Municipality, 9 Rob. (La.) 324, 41 Am. Dec. 333; State *v.* New Orleans Nav. Co., 11 Mart. (La.) 309.

46. *Arkansas.*— Lee County *v.* Abrahams, 34 Ark. 166.

Kansas.— Beebe *v.* Wells, 37 Kan. 472, 15 Pac. 565.

Nebraska.— State *v.* Ream, 16 Nebr. 681, 21 N. W. 398.

Nevada.— State *v.* Fogus, 19 Nev. 247, 9 Pac. 123.

North Carolina.— Hewlett *v.* Nutt, 79 N. C. 263.

Ohio.— Ashley *v.* Ryan, 49 Ohio St. 504, 31 N. E. 721.

Oregon.— State *v.* Frazier, 36 Oreg. 178, 59 Pac. 5.

Texas.— Baldwin *v.* Goldfrank, 88 Tex. 249, 31 S. W. 1064 [*affirming* 9 Tex. Civ. App. 269, 26 S. W. 155].

47. Cook County *v.* Fairbank, 222 Ill. 578, 78 N. E. 895; Pittsburgh, etc., R. Co. *v.* State, 49 Ohio St. 189, 30 N. E. 435, 16 L. R. A. 380; State *v.* Case, 39 Wash. 177, 81 Pac. 554, 109 Am. St. Rep. 874, 1 L. R. A. N. S. 152.

48. *California.*— Fatjo *v.* Pfister, 117 Cal. 83, 48 Pac. 1012.

Illinois.— Cook County *v.* Fairbank, 222 Ill. 578, 78 N. E. 895.

Minnesota.— State *v.* Gorman, 40 Minn. 232, 41 N. W. 948, 2 L. R. A. 701.

Washington.— State *v.* Case, 39 Wash. 177, 81 Pac. 554, 109 Am. St. Rep. 874, 1 L. R. A. N. S. 152.

Wisconsin.— State *v.* Mann, 76 Wis. 469, 45 N. W. 526, 46 N. W. 51.

49. *Kentucky.*— Vanmeter *v.* Spurrier, 94 Ky. 22, 21 S. W. 337, 14 Ky. L. Rep. 684.

Louisiana.— Louisiana State Bd. of Health *v.* Standard Oil Co., 107 La. 713, 31 So. 1015.

Minnesota.— Willis *v.* Standard Oil Co., 50 Minn. 290, 52 N. W. 652.

Missouri.— State *v.* Bixman, 162 Mo. 1, 62 S. W. 828.

Ohio.— Cincinnati Gas Light, etc., Co. *v.* State, 18 Ohio St. 237.

Pennsylvania.— O'Maley *v.* Freeport, 96 Pa. St. 24, 42 Am. Rep. 527.

United States.— Pace *v.* Burgess, 92 U. S. 372, 23 L. ed. 657.

See also INSPECTION, 22 Cyc. 1368.

50. People *v.* Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266; *In re* Meador, 16 Fed. Cas. No.

eminent domain.[51] An appropriation under the power of eminent domain is in the nature of a forced sale to the state or municipality, affecting only the individual owner concerned, and requiring compensation by the payment of a just price in money, while taxation is laid upon a whole community, or upon a class of persons in a community, according to some rule of apportionment, and constitutes their contribution to the expenses of government, and imposes on the taxing power no duty of making compensation other than that involved in the general advantages accruing from organized and efficient civil government.[52]

3. Kinds and Classification of Taxes. Taxes are classified in various ways,[53] but ordinarily as being either direct or indirect,[54] or as being either specific or *ad valorem*.[55] There are of course various other minor classifications and desig-

9,375, 1 Abb. 317. And see cases cited *infra*, notes 51, 52.

51. Moog *v.* Randolph, 77 Ala. 597; Palmer *v.* Way, 6 Colo. 106; People *v.* Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266. See also cases cited *infra*, note 52; and Eminent Domain, 15 Cyc. 559.

52. *California.*— Emery *v.* San Francisco Gas Co., 28 Cal. 345.

Colorado.— Palmer *v.* Way, 6 Colo. 106.

Connecticut.— Booth *v.* Woodbury, 32 Conn. 118.

Michigan.— Chaffee's Appeal, 56 Mich. 244, 251, 22 N. W. 871.

New York.— People *v.* Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266.

Texas.— Austin *v.* Nalle, 102 Tex. 536, 120 S. W. 996 [*reversing* (Civ. App. 1908) 115 S. W. 126].

Utah.— Kimball *v.* Grantsville City, 19 Utah 368, 57 Pac. 1, 45 L. R. A. 628; People *v.* Daniels, 6 Utah 288, 22 Pac. 159, 5 L. R. A. 444.

United States.— Ohio Bank *v.* Knoop, 16 How. 369, 391, 14 L. ed. 977. And see Henderson Bridge Co. *v.* Henderson, 173 U. S. 592, 19 S. Ct. 553, 43 L. ed. 823; *In re* Meador, 16 Fed. Cas. No. 9,375, 1 Abb. 317.

53. See Lamonde *v.* Lavergne, 3 Quebec Q. B. 303, 311.

54. South Nashville St. R. Co. *v.* Morrow, 87 Tenn. 406, 415, 11 S. W. 348; Union Bank *v.* Hill, 3 Coldw. (Tenn.) 325, 327; Pollock *v.* Farmers' L. & T. Co., 158 U. S. 601, 618, 15 S. Ct. 912, 39 L. ed. 1108; Lamonde *v.* Lavergne, 3 Quebec Q. B. 303, 311; Choquette *v.* Levergne, 5 Quebec Super. Ct. 108, 111.

"In the sense of the Constitution, taxes are divided into two classes — direct, and indirect." Union Bank *v.* Hill, 3 Coldw. (Tenn.) 325, 327.

Direct tax defined see 14 Cyc. 293, 294.

Indirect taxes defined.— Indirect taxes have been defined as: "Those which are paid indirectly out of the revenue by falling immediately upon the expense." 3 Gallatin Writings (Adams ed.) 74, 75 [*quoted* in Pollock *v.* Farmers' L. & T. Co., 157 U. S. 429, 570, 15 S. Ct. 673, 39 L. ed. 759].

"Those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another." Mill Pol. Econ. [*quoted* in Toronto Bank *v.* Lambe, 12 App. Cas. 575, 582, 56 L. J. P. C. 87, 57 L. T. Rep. N. S. 277, 4 Cartwr. Cas. (Can.) 7; Atty.-Gen. *v.* Reed, 10 App. Cas. 141, 143, 54 L. J. P. C. 12, 52 L. T. Rep. N. S. 393, 33 Wkly. Rep. 618, 3 Cartwr. Cas. (Can.) 190; Dulmage *v.* Douglas, 3 Manitoba 562, 564; Hastings County *v.* Ponton, 5 Ont. App. 543, 548; Lamonde *v.* Lavergne, 3 Quebec Q. B. 303, 305; Choquette *v.* Lavergne, 5 Quebec Super. Ct. 108, 111].

"Those which are paid by an intermediary who reimburses himself from the real contributors, such as the customs and excise duties." Baxter Taxation of United Kingdom 20 [*quoted* in Choquette *v.* Lavergne, 5 Quebec Super. Ct. 108, 111].

"Those which the legislator does not intend should be paid at once and immediately by him who bears their burden." LeRoy-Beaulieu, Traité de la Science des Finances [*quoted* in Lamonde *v.* Lavergne, 3 Quebec Q. B. 303, 311].

"Indirect taxes are levied upon commodities before they reach the consumer, and are paid by those upon whom they ultimately fall, not as taxes, but as part of the market price of the commodity." Cooley Taxation (3d ed.) 10.

Customs duties and internal revenue taxes are included under the definition of indirect taxes and are the ones mainly thought of by the economist when he uses the term "indirect taxation." Lamonde *v.* Lavergne, 3 Quebec Q. B. 303, 312 [*quoting* Ely Taxation 68]. See also, generally, Customs Duties, 12 Cyc. 1108; Internal Revenue, 22 Cyc. 1608.

Direct and indirect taxes distinguished see Pollock *v.* Farmers' L. & T. Co., 157 U. S. 429, 570, 15 S. Ct. 673, 39 L. ed. 759; Brewers', etc., Assoc. *v.* Atty.-Gen., [1897] A. C. 231, 236, 66 L. J. P. C. 34, 76 L. T. Rep. N. S. 61; Toronto Bank *v.* Lambe, 12 App. Cas. 575, 581, 56 L. J. P. C. 87, 57 L. T. Rep. N. S. 377, 4 Cartwr. Cas. (Can.) 7; Atty.-Gen. *v.* Reed, 10 App. Cas. 141, 143, 54 L. J. P. C. 12, 33 Wkly. Rep. 618, 3 Cartwr. Cas. (Can.) 190.

55. Pingree *v.* Auditor-Gen., 120 Mich. 95, 73 N. W. 1025, 44 L. R. A. 679; Bailey *v.* Fuqua, 24 Miss. 497; Com. *v.* Lehigh Valley R. Co., 129 Pa. St. 429, 456, 18 Atl. 406. See also Customs Duties, 12 Cyc. 1117.

Specific tax defined see 36 Cyc. 796.

Ad valorem tax defined.—An *ad valorem* tax has been defined as: "A tax or duty upon the value of the article or thing subject to taxation." Bailey *v.* Fuqua, 24 Miss.

nations according to that upon which the tax is laid or the purpose for which it is imposed.[56]

4. Taxation and Representation. Taxation without representation, or without the consent in some form of those who are to be taxed, is vicious in principle and contrary to the fundamental principles of good government;[57] but the principle of representation applies to political communities, as such, and not to individuals, and is satisfied by their adequate representation in the legislative body which votes the tax.[58] Hence this principle does not prevent any state from taxing the property of persons who have not the right to vote, such as infants, married women, and non-residents.[59]

B. Origin, Nature, and Extent of Taxing Power — 1. In General. The power of taxation rests upon necessity, and is an essential and inherent attribute of sovereignty, belonging as a matter of right to every independent state or government,[60] and it is as extensive as the range of subjects over which the power of that government extends.[61] As to such subjects and in the absence of consti-

497, 501; Black L. Dict. [*quoted* in Pingree *v.* Auditor-Gen., 120 Mich. 95, 99, 78 N. W. 1025, 44 L. R. A. 679].

"A tax of so much per centum on the invoiced or appraised money value of the goods subject to the tax." Perry Princ. Pol. Econ. 557 [*quoted* in Pingree *v.* Auditor-Gen., 120 Mich. 95, 98, 78 N. W. 1025, 44 L. R. A. 679].

"'*Ad valorem*' means a quotient part of the existing value of property, not an adjustment of burdens to each individual man, in view of his particular gains or damages." Little Rock *v.* Board of Improvements, 42 Ark. 152, 162.

Specific and ad valorem taxes distinguished see Union Trust Co. *v.* Wayne Prob. Judge, 125 Mich. 487, 84 N. W. 1101; Pingree *v.* Auditor-Gen., 120 Mich. 95, 78 N. W. 1025, 44 L. R. A. 679; Bailey *v.* Fuqua, 24 Miss. 497.

These terms are ordinarily used in relation to tariff taxes, but there is nothing in the distinction itself to so limit the application. Pingree *v.* Auditor-Gen., 120 Mich. 95, 98, 78 N. W. 1025, 44 L. R. A. 679 [*quoting* Perry Princ. Pol. Econ. 557].

56. See Levi *v.* Louisville, 97 Ky. 394, 30 S. W. 973, 16 Ky. L. Rep. 872, 28 L. R. A. 480.

Particular taxes defined see *supra*, I, A, 1.

In addition to the general system of property taxation "taxation may be based on income, on licenses, and on franchises, and a head or poll tax." Levi *v.* Louisville, 97 Ky. 394, 401, 30 S. W. 973, 16 Ky. L. Rep. 872, 28 L. R. A. 480.

Capitation or poll tax see *infra*, II, F, 3; III, A, 6, c.

Excise tax see *infra*, II, F, 1; III, A, 6, a.

Income tax see *infra*, II, F, 2; III, A, 6, b.

Legacy and inheritance taxes see *infra*, XVI.

Tax on transfers of corporate stock see *infra*, XVII.

57. Gage *v.* Graham, 57 Ill. 144; Harward *v.* St. Clair, etc., Levee, etc., Co., 51 Ill. 130; Keasy *v.* Bricker, 60 Pa. St. 9.

58. *Connecticut.*— State *v.* Williams, 68 Conn. 131, 35 Atl. 24, 421, 48 L. R. A. 465.

Kentucky.— Clark *v.* Leathers, 5 S. W. 576, 9 Ky. L. Rep. 558.

Maine.— Opinion of Justices, 18 Me. 458.

New York.— People *v.* Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266.

North Carolina.— Moore *v.* Fayetteville, 80 N. C. 154, 30 Am. Rep. 75; Lockhart *v.* Harrington, 8 N. C. 408.

Virginia.— *In re* Case of the County Levy, 5 Call 139.

Wisconsin.— Chicago, etc., R. Co. *v.* State, 128 Wis. 553, 108 N. W. 557.

See 45 Cent. Dig. tit. "Taxation," § 4.

Taxation in District of Columbia.—As bearing on the question of taxation without representation, it is to be noted that the power of taxation of persons and property in the District of Columbia, where there is no direct representation of the people, is vested in congress generally and without limit. See Loughborough *v.* Blake, 5 Wheat. (U. S.) 317, 5 L. ed. 98.

59. Smith *v.* Macon, 20 Ark. 17; Wheeler *v.* Wall, 6 Allen (Mass.) 558; Moore *v.* Fayetteville, 80 N. C. 154, 30 Am. Rep. 75; Thomas *v.* Gay, 169 U. S. 264, 18 S. Ct. 340, 42 L. ed. 740.

60. *California.*— People *v.* Coleman, 4 Cal. 46, 60 Am. Dec. 581.

Illinois.— Porter *v.* Rockford, etc., R. Co., 76 Ill. 561.

Indiana.— Hanna *v.* Allen County, 8 Blackf. 352.

Maine.— Camden *v.* Camden Village, 77 Me. 530, 1 Atl. 689.

New Jersey.— New Jersey R., etc., Co. *v.* Collectors, 26 N. J. L. 519.

New York.— People *v.* Pitt, 169 N. Y. 521, 62 N. E. 662, 58 L. R. A. 372.

Ohio.— Debolt *v.* Ohio L. Ins., etc., Co., 1 Ohio St. 563.

Pennsylvania.— Commonwealth Bank *v.* Com., 19 Pa. St. 144.

Utah.— Union Refrigerator Transit Co. *v.* Lynch, 18 Utah 378, 55 Pac. 639, 48 L. R. A. 790.

Wisconsin.— State *v.* Thorne, 112 Wis. 81, 87 N. W. 797, 55 L. R. A. 956.

United States.— McCulloch *v.* Maryland, 4 Wheat. 316, 428, 4 L. ed. 579; Duer *v.* Small, 7 Fed. Cas. No. 4,116, 4 Blackf. 263, 17 How. Pr. (N. Y.) 201.

See 45 Cent. Dig. tit. "Taxation," § 2.

61. *California.*— People *v.* Coleman, 4 Cal. 46, 60 Am. Dec. 581.

tutional restrictions the power of taxation is practically absolute and unlimited,[62] the only security against an abuse of the power being found in the structure of the government itself in that in imposing a tax the legislature acts upon its constituents.[63] The sovereignty of a state or nation is said to extend to everything which exists by its own authority or is introduced by its permission,[64] and to be limited accordingly,[65] so that everything over which such sovereign power extends is an object of taxation;[66] and conversely, that over which the sovereign power of a particular government does not extend is not subject to taxation thereby.[67] The power of taxation is exercised subject to certain constitutional requirements and restrictions,[68] and restrictions of a contractual character,[69] and in practice certain implied restrictions have been recognized not based upon any express limitation or absence of sovereign power,[70] as in regard to the taxation by a state of its own property or the property of municipal corporations which is devoted to public purposes.[71] The taxing power must also be considered with reference

Illinois.— Porter *v.* Rockford, etc., R. Co., 76 Ill. 561.

Indiana.—Hanna *v.* Allen County, 8 Blackf. 252.

New Jersey.— New Jersey R., etc., Co. *v.* Collectors, 26 N. J. L. 519.

Pennsylvania.— Commonwealth Bank *v.* Com., 19 Pa. St. 144.

Utah.— Union Refrigerator Transit Co. *v.* Lynch, 18 Utah 378, 55 Pac. 639, 48 L. R. A. 790.

United States.— McCullough *v.* Maryland, 4 Wheat. 316, 4 L. ed. 579.

62. *Illinois.*— Harder's Fireproof Storage, etc., Co. *v.* Chicago, 235 Ill. 58, 85 N. E. 245.

Indiana.— State *v.* Marion County, (1907) 82 N. E. 482, 170 Ind. 595, 85 N. E. 513.

Iowa.— Judy *v.* Beckwith, 137 Iowa 24, 114 N. W. 565, 15 L. R. A. N. S. 142.

Louisiana.— Levy's Succession, 115 La. 377, 39 So. 37, 8 L. R. A. N. S. 1180 [*affirmed* in 203 U. S. 543, 27 S. Ct. 174, 51 L. ed. 310].

Missouri.— North Missouri R. Co. *v.* Maguire, 49 Mo. 490, 8 Am. Rep. 141.

Utah.— Salt Lake City *v.* Christensen Co., 34 Utah 38, 95 Pac. 523, 17 L. R. A. N. S. 898.

United States.— McCulloch *v.* Maryland, 4 Wheat. 316, 4 L. ed. 579.

63. Levy's Succession, 115 La. 377, 39 So. 37, 8 L. R. A. N. S. 1180 [*affirmed* in 203 U. S. 543, 27 S. Ct. 174, 51 L. ed. 310]; North Missouri R. Co. *v.* Maguire, 49 Mo. 490, 8 Am. Rep. 141; McCulloch *v.* Maryland, 4 Wheat. (U. S.) 316, 428, 4 L. ed. 579, where the court said: "In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation." See also Harder's Fireproof Storage, etc., Co. *v.* Chicago, 235 Ill. 58, 85 N. E. 245; State *v.* Marion County, (Ind. 1907) 82 N. E. 482.

The mere fact that taxation is oppressive is no ground for judicial interference where no constitutional provision has been violated. North Missouri R. Co. *v.* Maguire, 49 Mo. 490, 8 Am. Rep. 141.

64. Hanna *v.* Allen County, 8 Blackf. (Ind.) 352; Van Brocklin *v.* Anderson, 117 U. S. 151, 6 S. Ct. 670, 29 L. ed. 845; McCullough *v.* Maryland, 4 Wheat. (U. S.) 316, 4 L. ed. 579.

65. Union Bank *v.* Hill, 3 Coldw. (Tenn.) 325.

66. Van Brocklin *v.* Anderson, 117 U. S. 151, 6 S. Ct. 670, 29 L. ed. 845; McCullough *v.* Maryland, 4 Wheat. (U. S.) 316, 4 L. ed. 579.

In New York bay under the agreement of 1833 lands lying between the middle of the bay and the low water line on the New Jersey shore are under the sovereign power of the state of New Jersey and taxable by that state notwithstanding the exclusive jurisdiction of New York over the waters of the bay. New Jersey Cent. R. Co. *v.* Jersey City, 209 U. S. 473, 28 S. Ct. 592, 52 L. ed. 896 [*affirming* 72 N. J. L. 311, 61 Atl. 1118].

67. Union Bank *v.* Hill, 3 Coldw. (Tenn.) 325; Van Brocklin *v.* Anderson, 117 U. S. 151, 6 S. Ct. 670, 29 L. ed. 845; McCullough *v.* Maryland, 4 Wheat. (U. S.) 316, 4 L. ed. 579.

This rule applies to the federal government as well as to the government of the several states. Union Bank *v.* Hill, 3 Coldw. (Tenn.) 325.

Taxation of public property generally see *infra*, III, C.

Taxation of governmental agencies, obligations, and securities see *infra*, III, D.

68. See *infra*, II.

69. **Exemptions** see *infra*, IV.

Surrender of power see *infra*, I, F.

70. Camden *v.* Camden Village Corp., 77 Me. 530, 1 Atl. 689; Public School Trustees *v.* Trenton, 30 N. J. Eq. 667.

71. Camden *v.* Camden Village Corp., 77 Me. 530, 1 Atl. 689; Worcester County *v.* Worcester, 116 Mass. 193, 17 Am. Rep. 159; Public School Trustees *v.* Trenton, 30 N. J. Eq. 667. See also Van Brocklin *v.* Anderson, 117 U. S. 151, 6 S. Ct. 670, 29 L. ed. 845.

A state has the power in the absence of any constitutional restriction to tax its own property or that of its municipal corporations, but ordinarily the power is not exercised and such property is by implication exempt from the operation of tax laws unless there is a clear expression of an intention to include it. Public School Trustees *v.* Trenton, 30 N. J. Eq. 667. See also Norfolk *v.* Perry, 108 Va. 28, 61 S. E. 866, 128 Am. St. Rep. 940.

to the essential characteristics of a tax,[72] as the taxing power cannot be used for the imposition of burdens which are not taxes.[73]

2. Power of United States. For the purposes of the general government, congress has power to lay and collect taxes, subject to the limitations imposed by the federal constitution.[74] That instrument provides that congress shall have power "to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States;" [75] but it is the generally accepted interpretation that this clause is to be read as if it declared that "Congress shall have power to lay and collect taxes, etc., in order to pay the debts and provide for the common defense and general welfare of the United States," [76] the second clause of the provision constituting a qualification of the first and limiting the power of taxation to the objects specified.[77] So also congress has no authority to tax the state governments or the means, agencies, or instrumentalities by which they are carried on,[78] nor to interfere with state taxes either in amount, assessment, collection, or means of payment.[79]

3. Power of States. Subject to the general rules above stated,[80] under which a state cannot tax the property of the United States,[81] or its governmental agencies,[82] and except in so far as it is limited or restrained by the provisions of the constitutions, national and state, the taxing power of a state is general and absolute, and extends to all persons, property, and business within its jurisdiction or reach; [83] and the liability of the same person or property to taxation by

The reason why such property is not taxed is that it would render necessary other taxation for the payment of the taxes so laid so that the public would be taxing itself to raise money to pay over to itself. Public School Trustees *v.* Trenton, 30 N. J. Eq. 667; Norfolk *v.* Perry, 108 Va. 28, 61 S. E. 866, 128 Am. St. Rep. 940. A further reason which has been assigned is that such taxation might result in a sale of the property, thereby destroying its public character. Camden *v.* Camden Village Corp., 77 Me. 530, 1 Atl. 689.

Property of states see *infra*, III, C, 3.

Property of municipal corporations see *infra*, III, C, 4.

72. McClelland *v.* State, 138 Ind. 321, 37 N. E. 1089; Citizens Sav., etc., Assoc. *v.* Topeka, 20 Wall. (U. S.) 655, 22 L. ed. 455.

Nature of taxes see *supra*, I, A, 2, a.

73. Sharpless *v.* Philadelphia, 21 Pa. St. 147, 169, 59 Am. Dec. 759 (where the court said: "Taxation is a mode of raising revenue for public purposes. When it is prostituted to objects in no way connected with the public interests or welfare, it ceases to be taxation, and becomes plunder);" Citizens Sav., etc., Assoc. *v.* Topeka, 20 Wall. (U. S.) 655, 664, 22 L. ed. 455 (holding that to employ the power of taxation in aid of private individuals or private enterprises is not taxation and "is none the less a robbery because it is done under the forms of law and is called taxation").

"The term 'taxation' imports the raising of money for public use, and excludes the raising of it for private uses." Mead *v.* Acton, 139 Mass. 341, 344, 1 N. E. 413.

Assessments for improvements are, however, imposed under the general power of taxation, although distinguishable from ordinary taxes. See *supra*, I, A, 2, d.

74. License Tax Cases, 5 Wall. (U. S.) 462, 18 L. ed. 497; South Carolina *v.* U. S., 39 Ct. Cl. 257 [*affirmed* in 199 U. S. 437, 26 S. Ct. 110, 50 L. ed. 261].

75. U. S. Const. art. 1, § 8. See also Union Bank *v.* Hill, 3 Coldw. (Tenn.) 325; Van Brocklin *v.* Anderson, 117 U. S. 151, 6 S. Ct. 670, 29 L. ed. 845; and, generally, Customs Duties, 12 Cyc. 1108; Internal Revenue, 22 Cyc. 1600.

76. Black Const. L. (3d ed.) 207; 1 Story Const. §§ 907–921.

77. 1 Story Const. §§ 907, 908.

78. Union Bank *v.* Hill, 3 Coldw. (Tenn.) 325 (no authority to tax state courts); U. S. *v.* Baltimore, etc., R. Co., 17 Wall. (U. S.) 322, 21 L. ed. 597; Buffington *v.* Day, 11 Wall. (U. S.) 113, 20 L. ed. 122 (no authority to tax salaries of judicial officers of a state); Black Const. L. (3d ed.) 450. And see *infra*, III, D, 1.

79. Whitcaker *v.* Haley, 2 Oreg. 128.

80. See *supra*, I, B, 1.

81. Van Brocklin *v.* Tennessee, 117 U. S. 151, 6 S. Ct. 670, 29 L. ed. 845 [*reversing* 15 Lea (Tenn.) 33]. See also *infra*, III, C, 2.

82. McCullough *v.* Maryland, 4 Wheat. (U. S.) 316, 4 L. ed. 579. See also *infra*, III, D, 2.

83. *California.*— State Bank *v.* San Francisco, 142 Cal. 276, 75 Pac. 832, 100 Am. St. Rep. 130, 64 L. R. A. 918.

Idaho.— Stein *v.* Morrison, 9 Ida. 426, 75 Pac. 246.

Illinois.— Harder's Fire-Proof Storage, etc., Co. *v.* Chicago, 235 Ill. 58, 85 N. E. 245; Greenleaf *v.* Morgan County, 184 Ill. 226, 56 N. E. 295, 75 Am. St. Rep. 168; State Treasurer *v.* Wright, 28 Ill. 509.

Iowa.— Judy *v.* Beckwith, 137 Iowa 24, 114 N. W. 565, 15 L. R. A. N. S. 142.

Kentucky.— Johnson *v.* Bradley-Watkins Tie Co., 120 Ky. 136, 85 S. W. 726, 27 Ky. L. Rep. 540.

different governments is no valid reason against the existence of the state power of taxation,[84] however inexpedient it may be to exercise it.[85]

C. Territorial Limitations of Taxing Power — 1. In General. The taxing power of a state is limited to persons and property within and subject to its jurisdiction.[86] Hence it is entirely incompetent for any state to tax realty which lies within the boundaries of another state, no matter who may be the owner;[87] nor does the taxing power of a state extend to the person of a non-resident,[88] or to the personal property of non-residents unless it has an actual *situs* within the state;[89] nor to the personal property of resident citizens which has a *situs* of its own, either corporeally or by fiction of law, beyond the boundaries of the state.[90]

Minnesota.— Sanborn *v.* Rice County, 9 Minn. 273.

Missouri.— Hannibal, etc., R. Co. *v.* State Bd. of Equalization, 64 Mo. 294.

New York.— *In re* Van Antwerp, 56 N. Y. 261; People *v.* Molloy, 35 N. Y. App. Div. 136, 54 N. Y. Suppl. 1084 [*affirmed* in 161 N. Y. 621, 55 N. E. 1099]; Guilford *v.* Cornell, 18 Barb. 615 [*affirmed* in 13 N. Y. 143].

Pennsylvania.— Olyphant Borough *v.* Egreski, 29 Pa. Super. Ct. 116.

South Carolina.— Ware Shoals Mfg. Co. *v.* Jones, 78 S. C. 211, 58 S. E. 811.

Texas.— Hall *v.* Miller, 102 Tex. 289, 115 S. W. 1168 [*affirming* (Civ. App.) 110 S. W. 165]; State *v.* Fidelity, etc., Co., 35 Tex. Civ. App. 214, 80 S. W. 544.

Vermont.— Catlin *v.* Hull, 21 Vt. 152.

United States.— Dundee Mortg. Trust Inv. Co. *v.* School Dist., 19 Fed. 359; Duer *v.* Small, 7 Fed. Cas. No. 4,116, 4 Blatchf. 263.

See 45 Cent. Dig. tit. "Taxation," § 3.

Nothing but express constitutional limitation on the legislative authority can exclude anything to which the authority extends from the grasp of the taxing power if the legislature in its discretion shall at any time select it for revenue purposes. Harder's Fire-Proof Storage, etc., Co. *v.* Chicago, 235 Ill. 58, 85 N. E. 245.

Property which has escaped taxation.— It is within the power of the legislature of a state to provide for the assessment and taxation for past years of property which has escaped taxation for such years. Florida, etc., R. Co. *v.* Reynolds, 183 U. S. 471, 22 S. Ct. 176, 46 L. ed. 283; Winona, etc., Land Co. *v.* Minnesota, 159 U. S. 526, 16 S. Ct. 83, 40 L. ed. 247; Jackson Lumber Co. *v.* McCrimmon, 164 Fed. 759. See also *infra*, III, A, 1, f.

Taxing power of territories.— A provision in the organic act of a territory that "the legislative power of the territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States locally applicable" includes full and comprehensive power to legislate in the matter of taxation. Peacock *v.* Pratt, 121 Fed. 772, 58 C. C. A. 48. Under the organic act of the territory of Oklahoma it might subject any property within the territory to taxation except property of the United States which was expressly excluded. Rice *v.* Hammond, 19 Okla. 419, 91 Pac. 699.

84. Judy *v.* Beckwith, 137 Iowa 24, 114 N. W. 565, 15 L. R. A. N. S. 142; Appeal Tax Ct. *v.* Gill, 50 Md. 377.

Double taxation see *infra*, II, C.

85. Appeal Tax Ct. *v.* Gill, 50 Md. 377.

86. New Jersey Cent. R. Co. *v.* Jersey City, 70 N. J. L. 81, 56 Atl. 239; People *v.* Reardon, 184 N. Y. 431, 77 N. E. 970, 112 Am. St. Rep. 628, 8 L. R. A. N. S. 314; Lambert *v.* Jones, 2 Patt. & H. (Va.) 144; State Tax on Foreign-Held Bonds, 15 Wall. (U. S.) 300, 21 L. ed. 179; Indiana *v.* Pullman Palace Car Co., 16 Fed. 193, 11 Biss. 561.

Situs of property generally for purposes of taxation see *infra*, III, A, 5.

Taxation of property temporarily in state or in transit see *infra*, III, A, 5, e.

87. Winnipiseogee Lake Cotton, etc., Mfg. Co. *v.* Gilford, 64 N. H. 337, 10 Atl. 849.

In New York bay lands lying between the middle of the bay and the low water line on the New Jersey shore are under the agreement of 1833 between the states of New York and New Jersey under the sovereignty of New Jersey, and the exclusive jurisdiction given to the state of New York over the waters of the bay does not exclude the sovereign power of the state of New Jersey to tax such lands. New Jersey Cent. R. Co. *v.* Jersey City, 209 U. S. 473, 28 S. Ct. 592, 52 L. ed. 896 [*affirming* 72 N. J. L. 311, 61 Atl. 1118].

88. Pendleton *v.* Com., 110 Va. 229, 65 S. E. 536.

89. Liverpool, etc., Ins. Co. *v.* Board of Assessors, 51 La. Ann. 1028, 25 So. 970, 72 Am. St. Rep. 483, 45 L. R. A. 524; Baltimore *v.* Hussey, 67 Md. 112, 9 Atl. 19; Pendleton *v.* Com., 110 Va. 229, 65 S. E. 536; Murray *v.* Charleston, 96 U. S. 432, 24 L. ed. 760; State Tax on Foreign Held Bonds, 15 Wall. (U. S.) 300, 21 L. ed. 179.

Taxation of property of non-residents generally see *infra*, III, A, 4, a.

90. *Alabama.*— Varner *v.* Calhoun, 48 Ala. 178.

Connecticut.— Greenwoods Co. *v.* New Hartford, 65 Conn. 461, 32 Atl. 933.

Kansas.— Fisher *v.* Rush County, 19 Kan. 414; Wilcox *v.* Ellis, 14 Kan. 588, 19 Am. Rep. 107.

Missouri.— State *v.* Howard County Ct., 69 Mo. 454.

New Hampshire.— Berry *v.* Windham, 59 N. H. 288, 47 Am. Rep. 202.

Compare Home Ins. Co. *v.* Board of Assess-

2. Property in More Than One State. Where a continuous piece of property, such as a railroad or a bridge, extends into two or more states, each state has the right to tax so much of it as lies within its own borders.[91] But in assessing for taxation the property of an interstate railroad or telegraph line, it is proper for each state to take, as the basis for its own taxation, that proportion of the whole value of the company's whole capital stock which the length of its lines within the state bears to the whole length of all its lines.[92]

3. Property on Public or Indian Lands.[93] Persons residing on public lands, and their personal property, are not for that reason alone exempt from state taxation.[94] So a state has power to tax a railroad track and right of way through an Indian reservation lying within its own exterior limits, the same having been constructed under grant or permission of congress; [95] or to tax personal property of private individuals other than Indians located on an Indian reservation,[96] such as cattle grazing on such reservation; [97] or to tax personal property of private individuals on a military reservation.[98] Again, when a state cedes land to the United States for the purposes of a military reservation, it may reserve to itself the right to tax persons and property thereon, and the consent of congress to such saving of the power of taxation may be presumed from its acceptance of the grant.[99]

D. Purposes of Taxation — 1. Necessity of Public Purpose.[1] A legislature has no rightful power to impose taxes on the people for any other than a public purpose; it is not legal taxation if the power is exercised for the benefit of private persons or in aid of private uses or enterprises,[2] even where there is no

ors, 48 La. Ann. 451, 19 So. 280; Mechanics', etc., Ins. Co. *v.* Board of Assessors, 47 La. Ann. 1544, 18 So. 519.

91. State Treasurer *v.* Auditor-Gen., 46 Mich. 224, 9 N. W. 258.

Interest on railroad mortgage bonds.— The interest on bonds issued by a railway company, and secured by a mortgage on the whole of its road, which extends through two states, cannot legally be taxed by either of those states. Northern Cent. R. Co. *v.* Jackson, 7 Wall. (U. S.) 262, 19 L. ed. 88.

92. Western Union Tel. Co. *v.* Taggart, 163 U. S. 1, 16 S. Ct. 1054, 41 L. ed. 49 [*affirming* 141 Ind. 281, 40 N. E. 1051, 60 L. R. A. 671]; Minot *v.* Philadelphia, etc., R. Co., 18 Wall. (U. S.) 206, 21 L. ed. 888.

93. Taxation of Indian lands see Indians, 22 Cyc. 130, 138.

94. Rice *v.* Hammonds, 19 Okla. 419, 91 Pac. 698; Percival *v.* Thurston County, 14 Wash. 586, 95 Pac. 159. See also Opinion of Justices, 1 Metc. (Mass.) 580. *Compare* Foster *v.* Blue Earth County, 7 Minn. 140.

Taxation of improvements on public lands see *infra*, III, C, 2, b, (v).

Taxation of post traders on Indian or military reservations see *infra*, III, D, 2.

95. Territory *v.* Delinquent Tax List, 3 Ariz. 302, 26 Pac. 310 [*affirmed* in 156 U. S. 347, 15 S. Ct. 391, 39 L. ed. 447]; Utah, etc., R. Co. *v.* Fisher, 2 Ida. (Hasb.) 53, 3 Pac. 3; Utah, etc., R. Co. *v.* Fisher, 116 U. S. 28, 6 S. Ct. 246, 29 L. ed. 542.

96. Thomas *v.* Gay, 169 U. S. 264, 18 S. Ct. 340, 42 L. ed. 740; Truscott *v.* Hurlbut Land, etc., Co., 73 Fed. 60, 19 C. C. A. 374. See also Indians, 22 Cyc. 150. But see Foster *v.* Blue Earth County, 7 Minn. 140.

Taxation of Indians see Indians, 22 Cyc. 149.

97. Torrey *v.* Baldwin, 3 Wyo. 430, 26 Pac. 908; Wagoner *v.* Evans, 170 U. S. 588, 18 S. Ct. 730, 42 L. ed. 1154; Thomas *v.* Gay, 169 U. S. 264, 18 S. Ct. 340, 42 L. ed. 740; Truscott *v.* Hurlbut Land, etc., Co., 73 Fed. 60, 19 C. C. A. 374.

98. Rice *v.* Hammond, 19 Okla. 419, 91 Pac. 698, holding that the territory of Oklahoma might tax cattle of private individuals on a military reservation in that territory.

99. Ft. Leavenworth R. Co. *v.* Lowe, 114 U. S. 525, 5 S. Ct. 995, 29 L. ed. 264 [*affirming* 27 Kan. 749].

1. Constitutional provisions as to purpose of taxation see *infra*, II, A, 3.

Public purpose in municipal taxation see Municipal Corporations, 28 Cyc. 1663.

2. *California.*— People *v.* Parks, 58 Cal. 624.

District of Columbia.— U. S. *v.* Carlisle, 5 App. Cas. 138.

Indiana.— McClelland *v.* State, 138 Ind. 321, 37 N. E. 1089.

Louisiana.— State *v.* Maginnis, 26 La. Ann. 558.

Massachusetts.— Lowell *v.* Boston, 111 Mass. 454, 15 Am. Rep. 39.

Michigan.— Atty.-Gen. *v.* Bay County, 34 Mich. 46; People *v.* Salem Tp. Bd., 20 Mich. 452, 4 Am. Rep. 400.

Minnesota.— Minneapolis *v.* Janney, 86 Minn. 111, 90 N. W. 312.

Missouri.— State *v.* Switzler, 143 Mo. 287, 45 S. W. 245, 65 Am. St. Rep. 653, 40 L. R. A. 280; Deal *v.* Mississippi County, 107 Mo. 464, 18 S. W. 24, 14 L. R. A. 622.

New Jersey.— Elizabethtown Water Co. *v.* Wade, 59 N. J. L. 78, 35 Atl. 4.

Ohio.— Lucas County Auditor *v.* State, 75 Ohio St. 114, 78 N. E. 955.

express constitutional prohibition;[3] and it is not sufficient to justify such taxation that the private enterprise may incidentally or indirectly inure to the public benefit.[4] Whether a particular purpose is public in the sense of being a legitimate object of taxation is a question to be determined in the first instance by the legislature,[5] but its decision is not conclusive and may be reviewed by the courts;[6] and while the courts will not pronounce a tax law invalid on this ground unless the absence of a public interest in its objects is clear and palpable,[7] yet if the tax is clearly for an unauthorized purpose they will not hesitate to declare the law invalid.[8]

2. Particular Purposes. It is often difficult in practice to determine whether a particular object of taxation is public or private.[9] It has been held, however,

South Carolina.— Feldman *v.* Charleston, 23 S. C. 57, 55 Am. Rep. 6.

Wisconsin.— State *v.* Froehlich, 118 Wis. 129, 94 N. W. 50, 99 Am. St. Rep. 985, 61 L. R. A. 345; Soens *v.* Racine, 10 Wis. 271.

United States.— Cole *v.* La Grange, 113 U. S. 1, 5 S. Ct. 416, 28 L. ed. 896; Citizens Sav., etc., Assoc. *v.* Topeka, 20 Wall. 655, 663, 22 L. ed. 455; Dodge *v.* Mission Tp., 107 Fed. 827, 46 C. C. A. 661, 54 L. R. A. 242; Sutherland-Innes Co. *v.* Evart, 86 Fed. 597, 30 C. C. A. 305.

See 45 Cent. Dig. tit. "Taxation," § 55.

Particular purposes see *infra*, I, D, 2.

The rule applies to the taxing power of congress as well as to that of the legislatures of the several states. U. S. *v.* Carlisle, 5 App. Cas. (D. C.) 138.

3. People *v.* Salem Tp. Bd., 20 Mich. 452, 4 Am. Rep. 400; Feldman *v.* Charleston, 23 S. C. 57, 55 Am. Rep. 6; Cole *v.* La Grange, 19 Fed. 871 [*affirmed* in 113 U. S. 1, 5 S. Ct. 416, 28 L. ed. 896]. See also cases cited *supra*, note 2.

A constitutional provision that taxation shall be "for public purposes only" is merely declaratory of the common law and well recognized general principles. Deal *v.* Mississippi County, 107 Mo. 464, 18 S. W. 24, 14 L. R. A. 622.

4. *California.*—People *v.* Parks, 58 Cal. 624.

Michigan.— People *v.* Salem Tp. Bd., 20 Mich. 452, 4 Am. Rep. 400.

Missouri.— Deal *v.* Mississippi County, 107 Mo. 464, 18 S. W. 24, 14 L. R. A. 622.

New York.— Weismer *v.* Douglas, 64 N. Y. 91, 21 Am. Rep. 586.

South Carolina.— Feldman *v.* Charleston, 23 S. C. 57, 55 Am. Rep. 6.

United States.— Citizens Sav., etc., Assoc. *v.* Topeka, 20 Wall. 655, 22 L. ed. 455 [*affirming* 5 Fed. Cas. No. 2,734, 3 Dill. 376].

All improvements and business enterprises benefit the public to some extent, but such indirect benefit is not sufficient to constitute a public purpose. Deal *v.* Mississippi County, 107 Mo. 464, 18 S. W. 24, 14 L. R. A. 622.

Public benefit must be direct and immediate from the purpose and not merely collateral, remote or consequential. Weismer *v.* Douglas, 64 N. Y. 91, 21 Am. Rep. 586.

5. Matter of Jensen, 44 N. Y. App. Div. 509, 60 N. Y. Suppl. 933; State *v.* Nelson County, 1 N. D. 88, 45 N. W. 33, 26 Am. St. Rep. 609, 8 L. R. A. 283.

6. *Indiana.*— McClelland *v.* State, 138 Ind. 321, 37 N. E. 1089.

Maine.— Allen *v.* Jay, 60 Me. 124, 11 Am. Rep. 185.

Massachusetts.— Lowell *v.* Boston, 111 Mass. 454, 15 Am. Rep. 39.

New York.— Weismer *v.* Douglas, 64 N. Y. 91, 21 Am. Rep. 586; Matter of Jensen, 44 N. Y. App. Div. 509, 60 N. Y. Suppl. 933.

United States.— Citizens Sav., etc., Assoc. *v.* Topeka, 20 Wall. 655, 22 L. ed. 455; Dodge *v.* Mission Tp., 107 Fed. 827, 46 C. C. A. 661, 54 L. R. A. 242.

The final determination as to whether a particular object of taxation is public or private is a judicial and not a legislative function. The legislature cannot by its mere fiat make a private purpose a public one. Dodge *v.* Mission Tp., 107 Fed. 827, 46 C. C. A. 661, 54 L. R. A. 242.

Province and powers of courts.— If the expenditure is in its nature such as to justify taxation its propriety and expediency are entirely for the legislature and not subject to revision by the courts, but if it is not such as to justify taxation no stress of circumstances affecting its expediency and importance or desirableness can bring it within the scope of the legislative power. Lowell *v.* Boston, 111 Mass. 454, 15 Am. Rep. 39.

7. *Arkansas.*— English *v.* Oliver, 28 Ark. 317.

Connecticut.—Booth *v.* Woodbury, 32 Conn. 118.

Minnesota.— Minneapolis *v.* Janney, 86 Minn. 111, 90 N. W. 312.

New York.— Guilford *v.* Chenango County, 13 N. Y. 143.

North Dakota.— State *v.* Nelson County, 1 N. D. 88, 45 N. W. 33, 26 Am. St. Rep. 609, 8 L. R. A. 283.

Pennsylvania.— Speer *v.* Blairsville School Directors, 50 Pa. St. 150; Schenley *v.* Allegheny, 25 Pa. St. 128; Sharpless *v.* Philadelphia, 21 Pa. St. 147, 59 Am. Dec. 759.

Wisconsin.— Brodhead *v.* Milwaukee, 19 Wis. 624, 88 Am. Dec. 711.

8. Deal *v.* Mississippi County, 107 Mo. 464, 18 S. W. 24, 14 L. R. A. 622; Matter of Jensen, 44 N. Y. App. Div. 509, 60 N. Y. Suppl. 933; Citizens Sav., etc., Assoc. *v.* Topeka, 20 Wall. (U. S.) 655, 22 L. ed. 455. See also cases cited *supra*, notes 2, 6, 7.

9. See Allen *v.* Jay, 60 Me. 124, 11 Am. Rep. 185; State *v.* Nelson County, 1 N. D.

that the power of taxation is exerted for a public purpose when the money raised is to be applied to the payment of the salaries of the state officers,[10] to the protection of property by means of police and fire departments,[11] to the encouragement of education by means of public schools and colleges,[12] to the support of public charitable and reformatory institutions,[13] to the construction and maintenance of public roads,[14] to the construction or in aid of the construction of railroads,[15] to the establishment of public parks or pleasure-grounds,[16] to the establishment or

88, 45 N. W. 33, 26 Am. St. Rep. 609, 8 L. R. A. 283; Citizens Sav., etc., Assoc. *v.* Topeka, 20 Wall. (U. S.) 655, 22 L. ed. 455.

In determining this question in a particular case the courts should be governed largely by the course and usage of government, the objects for which taxes have been by long course of legislation levied, and what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal. Whatever lawfully pertains to this and is sanctioned by time or acquiescence of the people may well be held to belong to the public use and proper for the maintenance of good government, although this may not be the only criterion of lawful taxation. Citizens Sav., etc., Assoc. *v.* Topeka, 20 Wall. (U. S.) 655, 22 L. ed. 455.

The term "public purposes" with reference to objects for which taxes may be levied has been said to have no relation to the urgency of the public need or the extent of the public benefit which is to follow but to be merely "a term of classification, to distinguish the object for which, according to settled usage, the government is to provide, from those which, by the like usage, are left to private inclination, interest or liberality." People *v.* Salem Tp. Bd., 20 Mich. 452, 485, 4 Am. Rep. 400.

10. People *v.* Edmonds, 15 Barb. (N. Y.) 529.

11. Phœnix Assur. Co. *v.* Montgomery Fire Dep't, 117 Ala. 631, 23 So. 843, 42 L. R. A. 468; Allen *v.* Taunton, 19 Pick. (Mass.) 485; Van Sicklen *v.* Burlington, 27 Vt. 70; Kelly *v.* Pittsburgh, 104 U. S. 78, 26 L. ed. 659.

12. Merrick *v.* Amherst, 12 Allen (Mass.) 500; Cushing *v.* Newburyport, 10 Metc. (Mass.) 508; Minneapolis *v.* Janney, 86 Minn. 111, 90 N. W. 312; Holt *v.* Antrim, 64 N. H. 284, 9 Atl. 389; People *v.* Allen, 42 N. Y. 404.

But a private educational institution, in which the state or municipality, or its inhabitants as such, have no interest or power of control, is not an object for which money may lawfully be raised by taxation. People *v.* McAdams, 82 Ill. 356; Atchison, etc., R. Co. *v.* Atchison, 47 Kan. 712, 28 Pac. 1000; Jenkins *v.* Andover, 103 Mass. 94; Simmons Medicine Co. *v.* Ziegenhein, 145 Mo. 368, 47 S. W. 10; State *v.* Switzler, 143 Mo. 287, 45 S. W. 245, 65 Am. St. Rep. 653, 40 L. R. A. 280.

Scholarship fund.— While taxation for the support of a state university is for a public purpose yet taxation to provide for a scholarship fund the proceeds of which are to be paid to certain favored individuals to enable them to pay for board and clothing for their own use while students at the university is unconstitutional as being for a private rather than a public purpose. State *v.* Switzler, 143 Mo. 287, 45 S. W. 245, 65 Am. St. Rep. 653, 40 L. R. A. 280.

13. Hager *v.* Kentucky Children's Home Soc., 119 Ky. 235, 83 S. W. 605, 26 Ky. L. Rep. 1133, 67 L. R. A. 815; Shepherd's Fold *v.* New York, 96 N. Y. 137; Wallack *v.* New York, 3 Hun (N. Y.) 84, 5 Thomps. & C. 310 [*affirmed* in 67 N. Y. 23].

But the treatment and care of inebriates and persons addicted to the excessive use of drugs and narcotics has been held not to be a legitimate object of public charity or a public purpose for which the taxing power may be exercised. State *v.* Froehlich, 118 Wis. 129, 94 N. W. 50, 99 Am. St. Rep. 985, 61 L. R. A. 345; Wisconsin Keeley Inst. Co. *v.* Milwaukee County, 95 Wis. 153, 70 N. W. 68, 60 Am. St. Rep. 105, 36 L. R. A. 55.

14. State *v.* Marion County, (Ind. 1907) 82 N. E. 482; Prince *v.* Crocker, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610; Atty.-Gen. *v.* Bay County, 34 Mich. 46; Elting *v.* Hickman, 172 Mo. 237, 72 S. W. 700.

15. Prince *v.* Crocker, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610; Davidson *v.* Ramsay County, 18 Minn. 482; Sharpless *v.* Philadelphia, 21 Pa. St. 147, 59 Am. Dec. 759; Pine Grove Tp. *v.* Talcott, 19 Wall. (U. S.) 666, 22 L. ed. 227; Olcott *v.* Fond du Lac County, 16 Wall. (U. S.) 678, 21 L. ed. 382. See also COUNTIES, 11 Cyc. 579; MUNICIPAL CORPORATIONS, 28 Cyc. 1671. *Contra*, People *v.* Salem Tp. Bd., 20 Mich. 452, 4 Am. Rep. 400.

Although the road is built and owned by a private corporation the use is public and so that the legislature may impose a tax in furtherance of that use. Olcott *v.* Fond du Lac County, 16 Wall. (U. S.) 678, 21 L. ed. 382.

The building of a subway for the carriage of such passengers as pay the regular fare is for a public use and it is within the constitutional power of the legislature to order or sanction taxation therefor. Prince *v.* Crocker, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610.

16. Dunham *v.* People, 96 Ill. 331; People *v.* Brislin, 80 Ill. 423; People *v.* Salomon, 51 Ill. 37; Atty.-Gen. *v.* Burrell, 31 Mich. 25; State *v.* Leffingwell, 54 Mo. 458; Matter of Central Park, 50 N. Y. 493.

Special entertainments.— It is no part of the office of government to provide amusements for the people; and a city has no authority to furnish an entertainment for the citizens and guests of the city, on a public

encouragement of interstate or international expositions,[17] to the maintenance of the militia,[18] and to other objects affected with a similar public interest.[19] But the power of taxation is perverted when used for the benefit or advantage of any private individual,[20] or for the support of private business or manufacturing enterprises.[21] Taxation has, however, been sustained for the purpose of paying bounties to volunteers in the military service,[22] although taxation for the payment

holiday, at the public expense. Hodges *v.* Buffalo, 2 Den. (N. Y.) 110.

17. Minneapolis *v.* Janney, 86 Minn. 111, 90 N. W. 312; State *v.* Cornell, 53 Nebr. 556, 74 N. W. 59, 68 Am. St. Rep. 629, 39 L. R. A. 513. See also Hayes *v.* Douglas County, 92 Wis. 429, 65 N. W. 482, 53 Am. St. Rep. 926, 31 L. R. A. 213.

18. Hodgdon *v.* Haverhill, 193 Mass. 406, 79 N. E. 830, holding further that the legislature may reasonably treat the construction of armories as necessary for the maintenance of the militia in suitable efficiency, and may order public money to be raised by taxation for such purpose.

19. Speer *v.* Blairsville, 50 Pa. St. 150; Sharpless *v.* Philadelphia, 21 Pa. St. 147, 59 Am. Dec. 759; Kelly *v.* Pittsburgh, 104 U. S. 78, 26 L. ed. 659 (holding that taxes for schools, for the support of the poor, for protection against fire, and for waterworks are all for public purposes); Olcott *v.* Fond du Lac County, 16 Wall. (U. S.) 678, 21 L. ed. 382.

Public monuments.— A tax for the purpose of erecting a monument in honor of one who has rendered valuable service to the country is for a public purpose and valid. Dexter *v.* Raine, 10 Ohio Dec. (Reprint) 25, 18 Cinc. L. Bul. 61.

An art museum under the control of a private corporation is not a public purpose for which taxes may be imposed. State *v.* St. Louis, 216 Mo. 47, 115 S. W. 534.

20. *Arkansas.*— Davis *v.* Gaines, 48 Ark. 370, 3 S. W. 180.

Indiana.— McClelland *v.* State, 138 Ind. 321, 37 N. E. 1089.

Kansas.— State *v.* Osawkee Tp., 14 Kan. 418, 19 Am. Rep. 99.

Massachusetts.— Opinion of Justices, 186 Mass. 603, 72 N. E. 95; Mead *v.* Acton, 139 Mass. 341, 1 N. E. 413; Lowell *v.* Boston, 111 Mass. 454, 15 Am. Rep. 39.

Michigan.— Bristol *v.* Johnson, 34 Mich. 123.

Missouri.— Deal *v.* Mississippi County, 107 Mo. 464, 18 S. W. 24, 14 L. R. A. 622.

Ohio.— Lucas County Auditor *v.* State, 75 Ohio St. 114, 78 N. E. 955.

See also *supra*, I, D, 1.

But taxation has been sustained as constitutional and valid for the purpose of compensating lot owners in a certain town for damages sustained by the removal of the county-seat therefrom to another town in the same county (Wilkinson *v.* Cheatham, 43 Ga. 258), and for the purpose of procuring seed grain for needy farmers (State *v.* Nelson County, 1 N. D. 88, 45 N. W. 33, 26 Am. St. Rep. 609, 8 L. R. A. 283).

21. *District of Columbia.*— U. S. *v.* Carlisle, 5 App. Cas. 138.

Illinois.— English *v.* People, 96 Ill. 566; Bissell *v.* Kankakee, 64 Ill. 249, 21 Am. Rep. 554.

Kansas.— Cleveland Nat. Bank *v.* Iola, 9 Kan. 689.

Maine.— Brewer Brick Co. *v.* Brewer, 62 Me. 62; Allen *v.* Jay, 60 Me. 124, 11 Am. Rep. 185.

Michigan.— Clee *v.* Sanders, 74 Mich. 692, 42 N. W. 154.

New York.— Weismer *v.* Douglas, 64 N. Y. 91, 21 Am. Rep. 586.

United States.— Cole *v.* La Grange, 113 U. S. 1, 5 S. Ct. 416, 28 L. ed. 896 [*affirming* 19 Fed. 871]; Parkersburg *v.* Brown, 106 U. S. 487, 1 S. Ct. 442, 27 L. ed. 238; Citizens Sav., etc., Assoc. *v.* Topeka, 20 Wall. 655, 22 L. ed. 455; Dodge *v.* Mission Tp., 107 Fed. 827, 46 C. C. A. 661, 54 L. R. A. 242; Commercial Nat. Bank *v.* Iola, 6 Fed. Cas. No. 3,061, 2 Dill. 353.

The distinction which has been made in favor of taxation in aid of railroads on the ground that, although owned by private corporations, they are of a public character, for public use and subject to public regulation and control, is said to be going "quite to the verge of legislative authority," and the principle does not authorize taxation in aid of a manufacturing establishment or other enterprise of an essential private character. Cleveland Nat. Bank *v.* Iola, 9 Kan. 689, 701.

22. Booth *v.* Woodbury, 32 Conn. 118; Sullivan *v.* State, 66 Ill. 75; Freeland *v.* Hastings, 10 Allen (Mass.) 570; Lovell *v.* Oliver, 8 Allen (Mass.) 247; Ahl *v.* Gleim, 52 Pa. St. 432; Speer *v.* Blairsville School Directors, 50 Pa. St. 150; Felty *v.* Uhler, 1 Leg. Chron. (Pa.) 297, 30 Leg. Int. 330. *Compare* Ferguson *v.* Landram, 1 Bush (Ky.) 548 [*criticizing* and *disapproving* Booth *v.* Woodbury, 32 Conn. 118; Taylor *v.* Thompson, 42 Ill. 8, 6 Am. L. Reg. N. S. 174; Speer *v.* Blairsville School Directors, 50 Pa. St. 150, 4 Am. L. Reg. N. S 661]. But see Opinion of Justices, 186 Mass. 603, 72 N. E. 95; Mead *v.* Acton, 139 Mass. 341, 1 N. E. 413.

A distinction has, however, been made between taxation to raise money to pay bounties to soldiers to induce them to enlist or to repay money advanced for the purpose of procuring enlistment and taxation long after a war is over to raise money to pay bounties to soldiers who enlisted without any promise or inducement of this character, it being held that in the latter case the bounty is a mere gratuity not conducive to the public welfare and is therefore unauthorized as being for the benefit of particular individuals and not for

of certain other bounties has been held invalid as being for a private rather than a public purpose.[23]

3. Special or Local Purposes. A tax cannot be imposed exclusively on any district or subdivision of the state to pay any claim or indebtedness not peculiarly the debt of such subdivision, or to raise money for any purpose not peculiarly for the benefit of such subdivision;[24] but there may be special or local taxation for special or local purposes of a public character and beneficial to the community which pays the tax.[25]

4. Payment of Debts or Claims. Taxation to raise money for the payment of the public debt is always recognized as being for a public and legitimate purpose;[26] and this, although the particular debt or claim against the state or municipality rests only upon a moral obligation and would not be enforceable at law.[27] This principle cannot, however, be extended to include a mere gratuity not based

any public purpose. Opinion of Justices, 186 Mass. 603, 72 N. E. 95; Mead *v.* Acton, 139 Mass. 341, 1 N. E. 413.

Bounties for enlistment in army generally see Bounties, 5 Cyc. 977.

23. U. S. *v.* Carlisle, 5 App. Cas. (D. C.) 138 (sugar bounty granted by acts of congress, 1890); Michigan Sugar Co. *v.* Auditor-Gen., 124 Mich. 674, 83 N. W. 625, 83 Am. St Rep. 354, 56 L. R. A. 329 (sugar bounty granted by the Michigan statute of 1897); Deal *v.* Mississippi County, 107 Mo. 464, 18 S. W. 24, 14 L. R. A. 622 (tree bounty for planting forest trees on private property).

Bounties generally see Bounties, 5 Cyc. 976.

But a subsequent statute authorizing taxation to pay a bounty to which the claimant had become entitled under the prior statute authorizing the same while such statute was in force and regarded as constitutional may be sustained on the ground that it is for the payment of a debt constituting a moral obligation, although not enforceable at law. U. S. *v.* Realty Co., 163 U. S. 427, 16 S. Ct. 1120, 41 L. ed 215.

24. *Dakota.*— Farris *v.* Vannier, 6 Dak. 186, 42 N. W. 31, 3 L. R. A. 713.

Kentucky.— Scuffletown Fence Co. *v.* McAllister, 12 Bush 312.

Louisiana.— See State *v.* Merchants' Ins. Co., 12 La. Ann. 802.

Maine.—Dyar *v.* Farmington Village Corp., 70 Me. 515.

Minnesota.— Sanborn *v.* Rice County Com'rs, 9 Minn. 273.

New Jersey.— Elizabethtown Water Co. *v.* Wade, 59 N. J. L. 78, 35 Atl. 4.

Ohio.— Hubbard *v.* Fitzsimmons, 57 Ohio St. 436, 49 N. E. 477; Langdon *v.* Columbia Tp., 14 Cinc. L. Bul. 325, 9 Ohio Dec. (Reprint) 536.

Oregon.— Simon *v.* Northup, 27 Oreg. 487, 40 Pac. 560, 30 L. R. A. 171.

Pennsylvania.— Maynes *v.* Rutherford, 9 Wkly. Notes Cas. 221.

Tennessee.— Taylor *v.* Chandler, 9 Heisk. 349, 24 Am. Rep. 308; Louisville, etc., R. Co. *v.* Davidson County Ct., 1 Sneed 637, 62 Am. Dec. 424.

Wisconsin.— See Land, etc., Co. *v.* Brown, 73 Wis. 294, 40 N. W. 482, 3 L. R. A. 472.

See 45 Cent. Dig. tit. "Taxation," § 57.

Equality and uniformity.— Taxation of one locality for the benefit of another, and taxing part of the state for the general benefit, as violative of the constitutional rule of equality and uniformity see *infra*, II, B, 3, b, c.

25. Shaw *v.* Dennis, 10 Ill. 405; Walker *v.* Cincinnati, 21 Ohio St. 14, 8 Am. Rep. 24; Sharpless *v.* Philadelphia, 21 Pa. St. 147, 59 Am. Dec. 759; Louisville, etc., R. Co. *v.* Davidson County, 1 Sneed (Tenn.) 637, 62 Am. Dec. 424.

Local or special taxes for particular purposes see the cross-references given at the head of this article *supra*, p. 703.

26. Beals *v.* Amador County, 35 Cal. 624; Armstrong County *v.* Coleman, 99 Pa. St. 6; Shitz *v.* Berks County, 6 Pa. St. 80.

Property taken for public use.— The legislature has power to order the levying of a tax upon the community at large, or a portion of it, to make compensation for property taken for public use. Miller *v.* Craig, 11 N. J. Eq. 175.

Supplying deficiency in annual appropriations.—A constitutional provision that whenever the expenses of any fiscal year shall exceed the income, the legislature may provide for a tax for the ensuing year sufficient to pay the deficiency as well as the estimated expenses of the ensuing year, applies only to state taxes and not to taxes for county purposes. Mason *v.* Purdy, 11 Wash. 591, 40 Pac. 130.

27. *California.*— People *v.* Burr, 13 Cal. 343.

Massachusetts.— Friend *v.* Gilbert, 108 Mass. 408.

New York.— Brewster *v.* Syracuse, 19 N. Y. 116; Guilford *v.* Chenango County, 13 N. Y. 143 [*affirming* 18 Barb. 615].

Pennsylvania.— Lycoming County *v.* Union County, 15 Pa. St. 166, 53 Am. Dec. 575; Felty *v.* Uhler, 1 Leg. Chron. 297, 30 Leg. Int. 330.

United States.— U. S. *v.* Realty Co., 163 U. S. 427, 16 S. Ct. 1120, 41 L. ed. 215; Jefferson City Gas Light Co. *v.* Clark, 95 U. S. 644, 24 L. ed. 521.

The power of congress to levy and collect taxes to pay "debts" of the United States includes debts which rest upon a merely equitable or honorary obligation and which cannot be enforced in an action at law. U. S. *v.* Realty Co., 163 U. S. 427, 16 S. Ct. 1120, 41 L. ed. 215.

upon any obligation legal, equitable, or moral;[28] and it has also been held that the payment of claims which are void as arising under a statute which has been declared to be unconstitutional is not a legitimate object of taxation.[29] Where public officers, in the honest and faithful discharge of their duty, have been subjected to loss or damage, the responsibility for which does not properly attach to themselves, it has been held proper for the state or municipality to reimburse them, and that taxation for this purpose is legitimate,[30] although there are decisions to the contrary.[31]

E. Power of Legislature and Delegation of Power — 1. Taxation a Legislative Function. The power to impose taxes is vested exclusively in the legislative department of government, and cannot be exercised except in pursuance of its authority; neither the courts nor the executive possess any powers of taxation, this being solely the function of the legislature.[32] And further, subject to the general and constitutional limitations of state power in this respect, the legislature alone has the right and the discretion to determine the time, amount, nature, and purposes of the taxes to be levied,[33] and the means of enforcing their payment.[34] And no tax of any kind can be laid upon the citizen or his property

28. Matter of Jensen, 44 N. Y. App. Div. 509, 60 N. Y. Suppl. 933. See also Mead *v.* Acton, 139 Mass. 341, 1 N. E. 413.

29. Miller *v.* Dun, (Cal. 1886) 11 Pac. 604 (decision based upon express constitutional restrictions); State *v.* Froelich, 118 Wis. 129, 94 N. W. 50, 99 Am. St. Rep. 985, 61 L. R. A. 345. See also Sun Vapor Electric Light Co. *v.* Keenan, 88 Tex. 197, 30 S. W. 868. But see People *v.* New York, 11 Abb. Pr. (N. Y.) 114; U. S. *v.* Realty Co., 163 U. S. 427, 16 S. Ct. 1120, 41 L. ed. 215.

30. *Massachusetts.*— Fuller *v.* Groton, 11 Gray 340; Hadsell *v.* Hancock, 3 Gray 526; Bancroft *v.* Lynnfield, 18 Pick. 566, 29 Am. Dec. 623; Nelson *v.* Milford, 7 Pick. 18.

New Hampshire.— Pike *v.* Middleton, 12 N. H. 278.

New York.— Guilford *v.* Chenango County, 13 N. Y. 143.

Rhode Island.— Sherman *v.* Carr, 8 R. I. 431.

Vermont.— Briggs *v.* Whipple, 6 Vt. 95.

31. McClelland *v.* State, 138 Ind. 321, 37 N. E. 1089 (where the object was to reimburse a township trustee for public funds in his charge lost through the failure of a bank in which they were deposited); Thorndike *v.* Camden, 82 Me. 39, 19 Atl. 95, 7 L. R. A. 463 (where the purpose was to reimburse a tax collector for the amount of an unpaid note which had been taken by him in payment of taxes and accounted for to the town treasurer as money); Bristol *v.* Johnson, 34 Mich. 123 (where the purpose was to reimburse a township treasurer for a sum paid by him to make good an amount of public money of which he had been robbed); Matter of Jensen, 44 N. Y. App. Div. 509, 60 N. Y. Suppl. 933 (where the purpose was to reimburse public officers for expenses incurred in defending unsuccessful prosecutions against them for official misconduct).

32. *Alabama.*— State *v.* Mobile County Bd. of Revenue, etc., 73 Ala. 65.

California.— Hardenburgh *v.* Kidd, 10 Cal. 402.

Michigan.— See Auditor-Gen. *v.* Sage Land, etc., Co., 129 Mich. 182, 88 N. W. 468, 56 L. R. A. 105.

New York.— Matter of Lockitt, 58 Misc. 5, 110 N. Y. Suppl. 32; Shepard *v.* Wood, 13 How. Pr. 47.

North Carolina.—Russell *v.* Ayer, 120 N. C. 180, 27 S. E. 133, 37 L. R. A. 246.

Ohio.— State *v.* Guilbert, 70 Ohio St. 229, 71 N. E. 636.

Utah.— Salt Lake City *v.* Christensen, 34 Utah 38, 95 Pac. 523, 17 L. R. A. N. S. 898.

United States.— Grand County *v.* King, 67 Fed. 202, 14 C. C. A. 421; *In re* Chicago, 64 Fed. 897.

33. *Iowa.*— Iowa R. Land Co. *v.* Sac County, 39 Iowa 124.

Kentucky.— James *v.* U. S. Fidelity, etc., Co., 133 Ky. 299, 117 S. W. 406; Providence Banking Co. *v.* Webster County, 108 Ky. 527, 57 S. W. 14, 22 Ky. L. Rep. 214; Anderson *v.* Mayfield, 93 Ky. 230, 19 S. W. 598, 14 Ky. L. Rep. 370.

Louisiana.— Levy's Succession, 115 La. 377, 39 So. 37, 8 L. R. A. N. S. 1180.

Minnesota.— Sanborn *v.* Rice County, 9 Minn. 273.

Missouri.— Hannibal, etc., R. Co. *v.* State Bd. of Equalization, 64 Mo. 294.

Nebraska.— Rosenbloom *v.* State, 64 Nebr. 342, 89 N. W. 1053, 57 L. R. A. 922; Turner *v.* Althaus, 6 Nebr. 54.

New York.— People *v.* Fitch, 148 N. Y. 71, 42 N. E. 520; *In re* Van Antwerp, 56 N. Y. 261; People *v.* Molloy, 35 N. Y. App. Div. 136, 54 N. Y. Suppl. 1084 [*affirmed* in 161 N. Y. 621, 55 N. E. 1099]; Wilson *v.* New York, 4 E. D. Smith 675, 1 Abb. Pr. 4; Matter of Curren, 25 Misc. 432, 54 N. Y. Suppl. 917 [*affirmed* in 38 N. Y. App. Div. 82, 55 N. Y. Suppl. 1018].

Utah.— State *v.* Eldredge, 27 Utah 477, 76 Pac. 337.

See 45 Cent. Dig. tit. "Taxation," § 59.

The method to be employed in arriving at the valuation of property sought to be taxed must be determined by the legislature. James *v.* U. S. Fidelity, etc., Co., 133 Ky. 299, 117 S. W. 406. See also Clay County *v.* Brown Lumber Co., 90 Ark. 413, 119 S. W. 251.

34. Trainor *v.* Maverick L. & T. Co., 80 Nebr. 626, 114 N. W. 932.

save in pursuance of a positive law, nor in any other manner than in accordance with its provisions.[35]

2. Delegation of Taxing Power. It is not competent for the legislature to delegate its power of taxation, wholly or in part, to either of the other departments of government, or to any individual, private corporation, officer, board, or commission.[36] An exception exists in the case of the municipal corporations of the state, to which the legislature may lawfully delegate the power of taxation so far as necessary for their own purposes and in respect to property within their jurisdiction,[37] provided the purpose is a public one.[38] But even in this case the power must be expressly and distinctly granted,[39] and must be exercised in strict conformity to the terms of the grant;[40] and the municipality cannot delegate to an administrative officer or board the authority to determine when, to what extent, or for what purposes taxes shall be laid.[41]

35. Stanley *v.* Little Pittsburg Min. Co., 6 Colo. 415; Barlow *v.* Sumter County, 47 Ga. 639; Queens County Water Co. *v.* Monroe, 83 N. Y. App. Div. 105, 82 N. Y. Suppl. 610; Zanesville *v.* Richards, 5 Ohio St. 589.

36. *Arkansas.*— Pulaski County *v.* Irvin, 4 Ark. 473.

California.— Bixler *v.* Sacramento County, 59 Cal. 698; Smith *v.* Farrelly, 52 Cal. 77; Houghton *v.* Austin, 47 Cal. 646; Hardenburgh *v.* Kidd, 10 Cal. 402.

Illinois.— Porter *v.* Rockford, etc., R. Co., 76 Ill. 561; Wabash River Leveeing Directors *v.* Houston, 71 Ill. 318; Gage *v.* Graham, 57 Ill. 144.

Kansas.— Hovey *v.* Wyandotte County, 56 Kan. 577, 44 Pac. 17; Wyandotte County *v.* Abbott, 52 Kan. 148, 34 Pac. 416.

Kentucky.— James *v.* U. S. Fidelity, etc., Co., 133 Ky. 299, 117 S. W. 406; Cypress Pond Draining Co. *v.* Hooper, 2 Metc. 350.

Louisiana.— Flower *v.* Legras, 24 La. Ann. 204.

New Jersey.—Van Cleve *v.* Passaic Valley Sewerage Com'rs, 71 N. J. L. 574, 60 Atl. 214, 108 Am. St. Rep. 754; Bernards Tp. *v.* Allen, 61 N. J. L. 228, 39 Atl. 716.

Ohio.— See Dexter *v.* Raine, 10 Ohio Dec. (Reprint) 25, 18 Cinc. L. Bul. 61.

Pennsylvania.— Keeler *v.* Westgate, 10 Pa. Dist. 240.

Tennessee.— Reelfoot Lake Levee Dist. *v.* Dawson, 97 Tenn. 151, 36 S. W. 1041, 34 L. R. A. 725.

Texas.— Norris *v.* Waco, 57 Tex. 635.

United States.— Meriwether *v.* Garrett, 102 U. S. 472, 26 L. ed. 197; Parks *v.* Wyandotte County, 61 Fed. 436.

See 45 Cent. Dig. tit. "Taxation," § 60.

Mode of determining valuation.—The right to exercise a judgment or discretion as to the method that shall be employed in arriving at the valuation of property sought to be taxed is vested in the legislature and this power cannot be delegated. James *v.* U. S. Fidelity, etc., Co., 133 Ky. 299, 117 S. W. 406.

37. *Alabama.*—Baldwin *v.* Montgomery, 53 Ala. 437.

Arkansas.— Carson *v.* St. Francis Levee Dist., 59 Ark. 513, 27 S. W. 590.

Florida.— Moseley *v.* Tift, 4 Fla. 402.

Indiana.— Marion School City *v.* Forrest, 168 Ind. 94, 78 N. E. 187; Logansport *v.* Seybold, 59 Ind. 225.

Iowa.— State *v.* Des Moines, 103 Iowa 76, 72 N. W. 639, 64 Am. St. Rep. 157, 39 L. R. A. 285.

Kentucky.—Short *v.* Bartlett, 114 Ky. 143, 70 S. W. 283, 24 Ky. L. Rep. 932.

Louisiana.— Slack *v.* Ray, 26 La. Ann. 674.

Maryland.— Alexander *v.* Baltimore, 5 Gill 383, 46 Am. Dec. 630.

Michigan.— People *v.* Hurlbut, 24 Mich. 44, 9 Am. Rep. 103.

Missouri.—St. Louis *v.* Laughlin, 49 Mo. 559.

New Hampshire.— State *v.* Noyes, 30 N. H. 279.

New Jersey.—Van Cleve *v.* Passaic Valley Sewerage Com'rs, 71 N. J. L. 574, 60 Atl. 214, 108 Am. St. Rep. 754.

North Carolina.— Caldwell *v.* Burke County Justices, 57 N. C. 323.

Pennsylvania.— Philadelphia *v.* Philadelphia Traction Co., 206 Pa. St. 35, 55 Atl. 762; Jermyn *v.* Fowler, 186 Pa. St. 595, 40 Atl. 972; Butler's Appeal, 73 Pa. St. 448.

Texas.—Kinney *v.* Zimpleman, 36 Tex. 554.

Virginia.— Gilkeson *v.* Frederick Justices, 13 Gratt. 577; Bull *v.* Read, 13 Gratt. 78.

See also Municipal Corporations, 28 Cyc. 1659.

38. Atty.-Gen. *v.* Eau Claire, 37 Wis. 400, 438, where the court said: "In legislative grants of the power to municipal corporations, the public use must appear. . . . The legislature can delegate the power to tax to municipal corporations for public purposes only; and the validity of the delegation rests on the public purpose." See also *supra*, I, D, 1; and, generally, Municipal Corporations, 28 Cyc. 1660, 1663.

39. State *v.* Braxton County Ct., 60 W. Va. 339, 55 S. E. 382; Felton *v.* Hamilton County, 97 Fed. 823, 38 C. C. A. 432; Winnipeg Protestant School Dist. *v.* Canadian Pac. R. Co., 2 Manitoba 163.

40. Hinson *v.* Lott, 40 Ala. 123; Com. *v.* Citizens' Nat. Bank, 117 Ky. 946, 80 S. W. 158, 25 Ky. L. Rep. 2100; Judge *v.* Campbell County Ct. *v.* Taylor, 8 Bush (Ky.) 206; Maurin *v.* Smith, 25 La. Ann. 445; Montgomery County *v.* Tallant, 96 Va. 723, 32 S. E. 479; Virginia, etc., R. Co. *v.* Washington County, 30 Gratt. (Va.) 471.

41. St. Louis *v.* Clemens, 52 Mo. 133; State *v.* Koster, 38 N. J. L. 308; Davis *v.* Read, 65 N. Y. 566; Thompson *v.* Schermerhorn, 6 N. Y. 92, 55 Am. Dec. 385.

F. Surrender of Power and Estoppel to Exercise — 1. Surrender of Power in General. It is competent for the legislature of a state to release or surrender the power of taxation with respect to particular persons, corporations, or property, and when such a release is in the form of a contract, it is irrevocable.[42] But the relinquishment of this high power of sovereignty is never presumed, and the intention of the legislature in that regard must be manifested in clear and unmistakable terms;[43] and the same rule applies to any limitation upon such power as in regard to the mode or rate of taxation.[44]

2. Estoppel to Impose Taxes. The state is not estopped to levy and collect taxes on particular property by failure to assess it for a number of years, nor can the rights of the state in this respect be forfeited by the laches of its agents.[45] And it seems that the same rule applies in the case of municipal corporations.[46]

3. Curing Defects and Irregularities.[47] In respect to the exercise of the taxing power, it is competent for the legislature to cure or validate by retroactive legislation any defects or irregularities which are not jurisdictional in their nature, or, as otherwise stated, to validate retrospectively any action or proceeding which it was competent to have authorized in advance.[48] But this is not so where the statute under which the tax was attempted to be levied was absolutely void, as

42. New Jersey *v.* Wilson, 7 Cranch (U. S.) 164, 3 L. ed. 303. See also State *v.* Great Northern R. Co., 106 Minn. 303, 119 N. W. 202; Chicago, etc., R. Co. *v.* Douglas County, 134 Wis. 197, 114 N. W. 511, 14 L. R. A. N. S. 1074.

Contrary decisions in Ohio, denying the right of the legislature to abridge or surrender any portion of the taxing power of the state, and particularly with reference to a grant of exemption from taxation in the charters of certain state banks (Milan, etc., Plank Road Co. *v.* Husted, 3 Ohio St. 578; Toledo Bank *v.* Bond, 1 Ohio St. 622; Mechanics', etc., Bank *v.* Debolt, 1 Ohio St. 591), were overruled by the supreme court of the United States, on the ground that such grant of exemption constituted a contract with the banks, which, under the federal constitution, must not be impaired by any subsequent legislation of the state (Jefferson Branch Bank *v.* Skelley, 1 Black (U. S.) 436, 17 L. ed. 173; Mechanics', etc., Bank *v.* Thomas, 18 How. (U. S.) 384, 15 L. ed. 460; Mechanics', etc., Bank *v.* Debolt, 18 How. (U. S.) 380, 15 L. ed. 458; Ohio Bank *v.* Knoop, 16 How. (U. S.) 369, 14 L. ed. 977).

Grant of exemption as a restriction or relinquishment of power see *infra*, IV.

43. Stein *v.* Mobile, 17 Ala. 234; Baltimore *v.* Baltimore, etc., R. Co., 6 Gill (Md.) 288, 48 Am. Dec. 531; Central Petroleum Co. *v.* Com., 25 Leg. Int. (Pa.) 316; Erie R. Co. *v.* Pennsylvania, 21 Wall. (U. S.) 492, 22 L. ed. 595.

44. State *v.* Great Northern R. Co., 106 Minn. 303, 119 N. W. 202.

45. North Carolina R. Co. *v.* Almance County, 82 N. C. 259; State *v.* Buchanan, 24 W. Va. 362; North Carolina *v.* Seaboard, etc., R. Co., 52 Fed. 450; Hodgdon *v.* Burleigh, 4 Fed. 111.

Mere non-user by a government of its power to levy a tax however long continued is not a forfeiture of such power. Norfolk *v.* Perry Co., 108 Va. 28, 16 S. E. 867, 128 Am. St. Rep. 940.

No estoppel in pais, it has been held, can be asserted against the exercise by the state of its taxing power. Chicago, etc., R. Co. *v.* Douglas County, 134 Wis. 197, 114 N. W. 511, 14 L. R. A. N. S. 1074.

46. American Emigrant Co. *v.* Iowa R. Land Co., 52 Iowa 323, 3 N. W. 88; Covington *v.* Covington Gas-Light Co., (Ky. 1886) 2 S. W. 326; Norfolk *v.* Perry Co., 108 Va. 28, 61 S. E. 866, 128 Am. St. Rep. 940.

Estoppel against county.—Where a county refuses to fulfil an obligation resting upon it to convey its swamp lands to a railroad company, it will be thereby estopped from afterward claiming that, during such time, the title was in the company and the land therefore subject to taxation. Iowa R. Land Co. *v.* Story County, 36 Iowa 48.

47. See Constitutional Law, 8 Cyc. 765, 916, 1025, 1136.

48. *Florida.*— Jacksonville *v.* Basnett, 20 Fla. 525.

Iowa.— Chicago, etc., R. Co. *v.* Harrison County, (1901) 86 N. W. 322.

Kansas.— Atchison, etc., R. Co. *v.* Woodcock, 18 Kan. 20.

New Jersey.— *In re* Elizabeth, 49 N. J. L. 488, 10 Atl. 363.

New York.— Collins *v.* Long Island City, 132 N. Y. 321, 30 N. E. 835; People *v.* Molloy, 35 N. Y. App. Div. 136, 54 N. Y. Suppl. 1084 [*affirmed* in 161 N. Y. 621, 55 N. E. 1099]; Smith *v.* Brooklyn, 32 N. Y. App. Div. 223, 52 N. Y. Suppl. 974; People *v.* Bleckwenn, 55 Hun 169, 7 N. Y. Suppl. 914; Lloyd *v.* Thomson, 60 N. Y. Suppl. 72.

North Dakota.— Shuttuck *v.* Smith, 6 N. D. 56, 69 N. W. 5.

Rhode Island.— Kettelle *v.* Warwick, etc., Water Co., 23 R. I. 114, 49 Atl. 492.

Wisconsin.— Cross *v.* Milwaukee, 19 Wis. 509; Tallman *v.* Janesville, 17 Wis. 71.

United States.—Exchange Bank Tax Cases, 21 Fed. 99 [*affirmed* in 122 U. S. 154, 7 S. Ct. 1244, 30 L. ed. 1088].

See 45 Cent. Dig. tit. "Taxation," § 3.

for conflict with provisions of the federal or state constitution,[49] or where the proceedings under it, which it is attempted to cure, were void *ab initio*, as for fraud, want of jurisdiction or authority, or other fatal defect.[50]

II. CONSTITUTIONAL REQUIREMENTS AND RESTRICTIONS.

A. In General — 1. NATURE AND EFFECT OF PROVISIONS. Limitations upon the taxing power both of the United States and of the several states are found in the federal constitution;[51] and the general principle of the separation of the three departments of government forbids such an exercise of the power of taxation as would infringe upon the constitutional rights of the courts or of the executive.[52] There are also in the different state constitutions various provisions relating expressly to taxation,[53] such as the provisions requiring equality and uniformity in taxation,[54] or taxation according to value,[55] or imposing restrictions as to its purpose,[56] or as to its rate or amount.[57] The principle of home rule is also now generally established by constitutional provisions, its application to matters of taxation being found in the declaration that the legislature may levy taxes only for state purposes, those for the uses of municipal corporations being left entirely within the control of the latter under the general authorization of the legislature.[58] The power of taxation being essential to government, and being usually confided

49. Hawkins *v.* Mangum, 78 Miss. 97, 28 So. 872; Dean *v.* Borchsenius, 30 Wis. 236 (holding that a tax wrong in substance and in principle, and inherently unjust and vicious, cannot be legalized or made valid as a whole, or without correction by subsequent legislative enactment); First Nat. Bank *v.* Covington, 103 Fed. 523; Exchange Bank Tax Cases, 21 Fed. 99 [*affirmed* in 122 U. S. 154, 7 S. Ct. 1244, 30 L. ed. 1088]. *Compare* People *v.* Williams, 3 Thomps. & C. (N. Y.) 338.

50. People *v.* McCreery, 34 Cal. 432; Turner *v.* Pewee Valley, 100 Ky. 288, 38 S. W. 143, 688, 18 Ky. L. Rep. 755; Slaughter *v.* Louisville, 89 Ky. 112, 8 S. W. 917, 12 Ky. L. Rep. 61; Hagner *v.* Hall, 10 N. Y. App. Div. 581, 42 N. Y. Suppl. 63 [*affirmed* in 159 N. Y. 552, 54 N. E. 1092]; Selpho *v.* Brooklyn, 9 N. Y. St. 700; Evans *v.* Fall River County, 9 S. D. 130, 68 N. W. 195. But see Francklyn *v.* Long Island City, 32 Hun (N. Y.) 451 [*affirmed* in 102 N. Y. 692]; Collins *v.* Long Island City, 9 N. Y. Suppl. 866 [*affirmed* in 132 N. Y. 321, 30 N. E. 835]; Kettelle *v.* Warwick, etc., Water Co., 23 R. I. 114, 49 Atl. 492.

51. **Application to taxation of general constitutional provisions** relating to: Due process of law see CONSTITUTIONAL LAW, 8 Cyc. 1115, 1130. Equal protection of the laws see CONSTITUTIONAL LAW, 8 Cyc. 1071. Impairing obligation of contracts see CONSTITUTIONAL LAW, 8 Cyc. 936, 940, 944, 975. Privileges and immunities of citizens secured to them by constitutional provision see CONSTITUTIONAL LAW, 8 Cyc. 1047.

The fifth and seventh amendments to the constitution of the United States are designed as restrictions upon legislation by the federal government, and not upon state governments in respect to their own citizens, and therefore do not affect the validity of a state law imposing a tax on the gross earnings of a railway company. North Missouri R. Co. *v.* Maguire, 49 Mo. 490, 8 Am. Rep. 141.

Taxation of commerce see COMMERCE, 7 Cyc. 470.

52. See Black Const. L. (3d ed.) 83 *et seq.*; Cooley Taxation 41.

Taxation of property in custodia legis.—A statute providing that real estate held by a state officer in his official or judicial capacity, in trust for the benefit of some person, shall be subject to taxation, and the taxes levied thereon shall be a lien enforced as are other taxes, is not an unconstitutional invasion of the functions of the court of chancery in the administration of estates, since the law is at least valid in so far as it makes such taxes a lien on the land, which lien the chancery court can enforce by appropriate proceedings. Chancellor *v.* Elizabeth, 65 N. J. L. 479, 47 Atl. 454.

53. See the constitutions of the several states.

54. See *infra*, II, B.

55. See *infra*, II, D.

56. See *infra*, II, A, 3.

57. See *infra*, II, E.

58. See the following cases:

California.— Fatjo *v.* Pfister, 117 Cal. 83, 48 Pac. 1012.

Illinois.— Chicago *v.* Wolf, 221 Ill. 130, 77 N. E. 414; Dunnovan *v.* Green, 57 Ill. 63.

Kentucky.— Paducah St. R. Co. *v.* McCracken County, 105 Ky. 472, 49 S. W. 178, 20 Ky. L. Rep. 1294; South Covington, etc., R. Co. *v.* Bellevue, 105 Ky. 283, 49 S. W. 23, 20 Ky. L. Rep. 1184, 57 L. R. A. 50.

Louisiana.— State *v.* Police Jury, 47 La. Ann. 1244, 17 So. 792.

Missouri.— State *v.* St. Louis, 216 Mo. 47, 115 S. W. 534; State *v.* Ashbrook, 154 Mo. 375, 55 S. W. 627, 77 Am. St. Rep. 765, 48 L. R. A. 265.

Montana.— Hauser *v.* Miller, 37 Mont. 22, 94 Pac. 197.

New York.— People *v.* State Tax Com'rs, 174 N. Y. 417, 67 N. E. 69; People *v.* Ronner, 48 Misc. 436, 95 N. Y. Suppl. 518 [*affirmed* in 110 N. Y. App. Div. 816, 97 N. Y. Suppl. 550].

in the largest measure to the legislative discretion, constitutional limitations upon its exercise will not be inferred or implied, but must be distinctly and positively expressed.[59] On the other hand, such constitutional provisions as are designed for the protection of taxpayers, or such as impose penalties or forfeitures upon them, will be strictly construed.[60] In the absence of constitutional restrictions the power of the legislature in regard to taxation is practically absolute and unlimited,[61] so long as it is exercised for public purposes,[62] and taxes may be imposed which are not equal, uniform, or according to value;[63] and while such taxation may be unwise, inequitable, or oppressive, it cannot merely upon this ground be declared unconstitutional,[64] the proper remedy being by appeal to the legislature and not to the courts.[65]

2. Statement of Object of Tax. The constitutions of several states provide that every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied.[66] It is held, however, that this applies only to the ordinary and general taxes for state purposes, and such as are imposed generally on all the taxable property in the state, and not to local taxes for local purposes,[67]

Texas.— Missouri, etc., R. Co. *v.* Shannon, 100 Tex. 379, 100 S. W. 138, 10 L. R. A. N. S. 681.

59. *Alabama.*— Southern R. Co. *v.* St. Clair County, 124 Ala. 491, 27 So. 23; Capital City Water Co. *v.* Montgomery County, 117 Ala. 303, 23 So. 970.

Kentucky.— South Covington, etc., R. Co. *v.* Bellevue, 105 Ky. 283, 49 S. W. 23, 20 Ky. L. Rep. 1184, 57 L. R. A. 50.

Michigan.—Walcott *v.* People, 17 Mich. 68.

Minnesota.— See State *v.* Winona, etc., R. Co., 21 Minn. 315.

New Jersey.— State *v.* Parker, 32 N. J. L. 426.

Virginia.— Eyre *v.* Jacob, 14 Gratt. 422, 73 Am. Dec. 367.

Wisconsin.— State *v.* Thorne, 112 Wis. 81, 87 N. W. 797, 55 L. R. A. 95.

United States.— Lane County *v.* Oregon, 7 Wall. 71, 19 L. ed. 101.

60. King *v.* Hatfield, 130 Fed. 564; Denike *v.* Rourke, 7 Fed. Cas. No. 3,787, 3 Biss. 39.

61. See *supra*, I, B.

62. See *supra*, I, D.

63. *Connecticut.*— State *v.* Travelers' Ins. Co., 73 Conn. 255, 47 Atl. 299, 57 L. R. A. 481.

Mississippi.— Smith *v.* Aberdeen Corp., 25 Miss. 458.

Nebraska.— Burlington, etc., R. Co. *v.* Lancaster County, 4 Nebr. 293.

New York.— Genet *v.* Brooklyn, 99 N. Y. 296, 1 N. E. 777; People *v.* Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266.

Pennsylvania.—Weber *v.* Reinhard, 73 Pa. St. 370, 13 Am. Rep. 747.

64. State *v.* Travelers' Ins. Co., 73 Conn. 255, 47 Atl. 299, 57 L. R. A. 481; People *v.* Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266; Weber *v.* Reinhard, 73 Pa. St. 370, 13 Am. Rep. 747.

65. Genet *v.* Brooklyn, 99 N. Y. 296, 1 N. E. 777.

66. See the constitutions of the several states; and the following cases:

Michigan.—Trowbridge *v.* Detroit, 99 Mich. 443, 58 N. W. 368.

Missouri.— State *v.* Henderson, 160 Mo. 190, 60 S. W. 1093.

New York.— People *v.* Kings County, 52 N. Y. 556.

Ohio.— *In re* Oil Well, 18 Ohio Cir. Ct. 885, 9 Ohio Cir. Dec. 860; State *v.* Fangbouer, 14 Ohio Cir. Ct. 104, 12 Ohio Cir. Dec. 801.

South Carolina.— Southern R. Co. *v.* Kay, 62 S. C. 28, 39 S. E. 785.

Virginia.— Com. *v.* Brown, 91 Va. 762, 21 S. E. 357, 28 L. R. A. 110.

Washington.— Mason *v.* Purdy, 11 Wash. 591, 40 Pac. 130.

See 45 Cent. Dig. tit. "Taxation," § 66.

Stating the tax.— A law which merely directs a tax to be levied for certain purposes, leaving it to the commissioners named in the act to determine the amount to be raised, does not "state the tax" within the meaning of the constitution. Hanlon *v.* Westchester, 57 Barb. (N. Y.) 383, 8 Abb. Pr. N. S. 261.

Amendatory or supplemental legislation.— The constitutional provision applies to a tax statute, although it is merely an amendment of a former law. People *v.* Moring, 47 Barb. (N. Y.) 642 [*affirmed* in 3 Abb. Dec. 539, 3 Keyes 374, 4 Transcr. App. 522]. But see Com. *v.* Brown, 91 Va. 762, 21 S. E. 357, 28 L. R. A. 110, where it is said that a law which merely continues an old tax is not affected by the constitutional requirement, provided the act which originally imposed the tax sufficiently stated its object.

Reference to another statute.— In some states the constitution also provides that it shall not be sufficient for a tax law to refer to any other statute to fix the tax or its object. But this is not violated by a reference to another law merely for the purpose of designating the machinery to be employed in assessing and collecting the tax. Trowbridge *v.* Detroit, 99 Mich. 443, 58 N. W. 368.

Object of the tax stated by the constitution.— A statute is not invalid for failure to state the object of the tax which it levies where the constitution itself directs how that particular tax shall be appropriated. Walcott *v.* People, 17 Mich. 68.

67. Guthrie County *v.* Conrad, 133 Iowa 171, 110 N. W. 454; Guest *v.* Brooklyn, 8

or to special taxes on peculiar kinds of property or such as are in the nature of license or occupation fees;[68] nor does the provision apply to laws which merely provide or regulate the machinery for assessing and collecting the tax.[69] An exact enumeration of all the items of expenditure to which the revenue of the state may be applied is neither practicable nor required by such a constitutional provision; it is sufficient if the tax law states in general terms that the taxes are to be applied to "the ordinary and current expenses of the state," or to its "general fund," without greater detail.[70]

3. Restrictions as to Purposes of Taxation. In the absence of specific constitutional restrictions, the legislature of a state is vested with the authority to determine the objects and purposes for which the taxing power shall be exercised,[71] subject only to the condition that such purposes shall be public,[72] and lawful.[73] It is, however, commonly provided that taxes shall be imposed by the legislative authority only for state purposes,[74] and that the legislature shall not levy taxes on the inhabitants or property of municipal corporations for local or corporate purposes.[75]

B. Equality and Uniformity — 1. In General — a. Constitutional Provisions.[76] The constitutions of many of the states contain the requirement that taxation shall be equal and uniform, that all property in the state shall be taxed in proportion to its value, that all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, or that the legislature shall provide for an equal and uniform rate of assessment and taxation;[77] and in the face of such provisions a tax law which violates the prescribed

Hun (N. Y.) 97 [*affirmed* in 69 N. Y. 506]; *In re* Ford, 6 Lans. (N. Y.) 92; Sun Mut. Ins. Co. *v.* New York, 5 Sandf. (N. Y.) 10 [*affirmed* in 8 N. Y. 241]; Southern R. Co. *v.* Kay, 62 S. C. 28, 39 S. E. 785.

68. Jones *v.* Chamberlain, 109 N. Y. 100, 16 N. E. 72 (tax for bounties); *In re* McPherson, 104 N. Y. 306, 10 N. E. 685, 58 Am. Rep. 502 (succession tax on legacies to non-relatives); New York Exempt Firemen's Benev. Fund *v.* Roome, 93 N. Y. 313, 45 Am. Rep. 217; People *v.* Moring, 3 Abb. Dec. (N. Y.) 539, 3 Keyes 374, 4 Transcr. App. 522; Com. *v.* Brown, 91 Va. 762, 21 S. E. 357, 28 L. R. A. 110.

69. Trowbridge *v.* Detroit, 99 Mich. 443, 58 N. W. 368; Clark *v.* Sheldon, 106 N. Y. 104, 12 N. E. 341; People *v.* Ulster County, 36 Hun (N. Y.) 491; Michigan R. Tax Cases, 138 Fed. 223 [*affirmed* in 201 U. S. 245, 26 S. Ct. 459, 50 L. ed. 744].

70. Westinghausen *v.* People, 44 Mich. 265, 6 N. W. 641; People *v.* Home Ins. Co., 92 N. Y. 328; People *v.* Orange County, 17 N. Y. 235; Matter of Atty.-Gen., 58 Hun (N. Y.) 218, 12 N. Y. Suppl. 754; People *v.* National F. Ins. Co., 27 Hun (N. Y.) 188; People *v.* Orange County, 27 Barb. (N. Y.) 575 [*affirmed* in 17 N. Y. 245]; Mason *v.* Purdy, 11 Wash. 591, 40 Pac. 130.

71. People *v.* Pacheco, 27 Cal. 175; People *v.* Burr, 13 Cal. 343.

72. Public purpose as essential to validity of tax law see *supra*, I, D, 1.

There are express constitutional requirements in some jurisdictions that taxation shall be for public purposes only (State *v.* St. Louis, 216 Mo. 47, 115 S. W. 534; State *v.* Switzler, 143 Mo. 287, 45 S. W. 245, 65 Am. St. Rep. 653, 40 L. R. A. 280; Hauser *v.* Miller, 37 Mont. 22, 94 Pac. 197); but this is a general requirement growing out of the essential character of a tax and applies regardless of any express constitutional restriction (see *supra*, I, D, 1).

73. Marion Tp. Bd. *v.* Education *v.* State, 51 Ohio St. 531, 38 N. E. 614, 46 Am. St. Rep. 588, 25 L. R. A. 770; Debolt *v.* Ohio L. Ins., etc., Co., 1 Ohio St. 563.

74. *In re* Taxation of Min. Claims, 9 Colo. 635, 21 Pac. 476; Gooding *v.* Proffitt, 11 Ida. 380, 83 Pac. 230; Fisher *v.* Steele, 39 La. Ann. 447, 1 So. 882; State *v.* St. Louis, 216 Mo. 47, 115 S. W. 534.

Bounties for destruction of wild animals.— A statute providing a bounty for the destruction of certain wild animals is not in violation of a constitutional prohibition against the levying of taxes or the imposition of burdens on the people except to raise sufficient revenue "for the economical administration of the government." Dimmit County *v.* Frazier, (Tex. Civ. App. 1894) 27 S. W. 829.

75. People *v.* School Trustees, 78 Ill. 136; State *v.* St. Louis, 216 Mo. 47, 115 S. W. 534; *Ex p.* Loving, 178 Mo. 194, 77 S. W. 508; Hauser *v.* Miller, 37 Mont. 22, 94 Pac. 197; State *v.* Wheeler, 33 Nebr. 563, 50 N. W. 770. See also *supra*, II, A, 1.

76. Application of the 14th amendment of the federal constitution in regard to "the equal protection of the laws" see Constitutional Law, 8 Cyc. 1071.

77. See the constitutions of the several states; and the following cases:

Colorado.— Leonard *v.* Reed, 46 Colo. 307, 104 Pac. 410, 13 Am. St. Rep. 77.

Florida.— Hayes *v.* Walker, 54 Fla. 163, 44 So. 747.

Georgia.— Penick *v.* Foster. 129 Ga. 217, 58 S. E. 773, 12 L. R. A. N. S. 1159.

rule of equality and uniformity is invalid,[78] although there is sufficient difference in the wording of the different provisions to account for some lack of uniformity in the decisions as to what constitutes a violation of their requirements.[79] The requirement does not apply to every species of taxation,[80] and does not restrict the legislature to the levying of taxes upon property alone.[81] The restriction relates only to the rate or amount of taxation and its incidence upon taxable persons and property, and does not limit the legislature in regulating the mode of levying and collecting the taxes imposed,[82] and it also relates only to property within the state, and neither the statutes of another state nor the action of its taxing officers can affect the question.[83] In the absence of such a constitutional

Indiana.— Johnson County *v.* Johnson, (1909) 89 N. E. 590.

Kansas.— Kaiser *v.* State, 80 Kan. 364, 102 Pac. 454, 24 L. R. A. N. S. 295.

Kentucky.— Louisville *v.* Com., 134 Ky. 488, 121 S. W. 411.

Maine.— *In re* Opinion of Justices, 97 Me. 595, 55 Atl. 827.

Massachusetts.— *In re* Opinion of Justices, 195 Mass. 607, 84 N. E. 499.

Michigan.— Stumpf *v.* Storz, 156 Mich. 228, 120 N. W. 618, 132 Am. St. Rep. 521, 23 L. R. A. N. S. 152.

Minnesota.— State *v.* Nelson, 107 Minn. 319, 119 N. W. 1058.

Mississippi.— Gulf, etc., R. Co. *v.* Adams, 90 Miss. 559, 45 So. 91.

Missouri.— Kansas City *v.* Whipple, 136 Mo. 475, 38 S. W. 295, 58 Am. St. Rep. 657, 35 L. R. A. 747.

Montana.— Hauser *v.* Miller, 37 Mont. 22, 94 Pac. 197.

Nebraska.— Scandinavian Mut. Aid Assoc. *v.* Kearney County, 81 Nebr. 473, 118 N. W. 333, 81 Nebr. 468, 116 N. W. 155.

New Hampshire.— Wyatt *v.* State Bd. of Equalization, 74 N. H. 552, 70 Atl. 387.

New Jersey.— Bergen, etc., R. Co. *v.* State Bd. of Assessors, 74 N. J. L. 742, 67 Atl. 668.

North Carolina.— Atlantic, etc., R. Co. *v.* New Bern, 147 N. C. 165, 60 S. E. 925.

Oregon.— Yamhill County *v.* Foster, 53 Oreg. 124, 99 Pac. 286.

Pennsylvania.— Christley *v.* Butler County, 37 Pa. Super. Ct. 32.

Tennessee.— Rhinehart *v.* State, 121 Tenn. 420, 117 S. W. 508.

Texas.— Lively *v.* Missouri, etc., R. Co., 102 Tex. 545, 120 S. W. 852.

Washington.—State *v.* Parmenter, 50 Wash. 164, 96 Pac. 1047, 19 L. R. A. N. S. 707.

Wisconsin.— Strange *v.* Oconto Land Co., 136 Wis. 516, 117 N. W. 1023.

Repeal of existing statutes.— It has been held that constitutional provisions requiring equality and uniformity of taxation are not self-executing and do not *per se* repeal existing statutes which do not conform to the constitutional requirement. Lehigh Iron Co. *v.* Lower Macungie Tp., 81 Pa. St. 482; Keystone Bridge Co. *v.* Pittsburgh, 4 Pa. Cas. 409, 7 Atl. 579. *Contra*, Rankin *v.* Love, 46 N. J. L. 132.

78. *Colorado.*— Leonard *v.* Reed, 46 Colo. 307, 104 Pac. 410, 13 Am. St. Rep. 77.

Louisiana.— St. Anna's Asylum *v.* Parker, 109 La. 592, 33 So. 613.

Massachusetts.— *In re* Opinion of Justices, 195 Mass. 607, 84 N. E. 499, 196 Mass. 603, 85 N. E. 545.

Michigan.— Pingree *v.* Auditor-Gen., 120 Mich. 95, 78 N. W. 1025, 44 L. R. A. 679.

Mississippi.— State *v.* Tonella, 70 Miss. 701, 14 So. 17, 22 L. R. A. 346.

Nevada.— State *v.* Kruttschnitt, 4 Nev. 178.

South Carolina.— State *v.* Tucker, 56 S. C. 516, 35 S. E. 215.

79. See Ottawa County *v.* Nelson, 19 Kan. 234, 27 Am. Rep. 101; Roup's Case, 81* Pa. St. 211; Chesapeake, etc., R. Co. *v.* Miller, 19 W. Va. 408.

80. Ottawa County *v.* Nelson, 19 Kan. 234, 27 Am. Rep. 101.

What taxes affected see *infra*, II, B, 1, b.

81. People *v.* Naglee, 1 Cal. 232, 52 Am. Dec. 312; Cincinnati Gas Light, etc., Co. *v.* State, 18 Ohio St. 237; Chicago, etc., R. Co. *v.* State, 128 Wis. 553, 108 N. W. 557.

82. *Colorado.*— People *v.* Henderson, 12 Colo. 369, 21 Pac. 144.

Indiana.— Adamson *v.* Warren County, 9 Ind. 174.

Kansas.— Francis *v.* Atchison, etc., R. Co., 19 Kan. 303.

Michigan.— Wilcox *v.* Eagle Tp., 81 Mich. 271, 45 N. W. 987.

Minnesota.— State *v.* Cronkhite, 28 Minn. 197, 9 N. W. 681.

New Jersey.— Bergen, etc., R. Co. *v.* State Bd. of Assessors, 74 N. J. L. 742, 67 Atl. 668; Flock *v.* Smith, 65 N. J. L. 224, 47 Atl. 442.

Oklahoma.— Anderson *v.* Ritterbusch, 22 Okla. 761, 98 Pac. 1002.

Washington.—State *v.* Parmenter, 50 Wash. 164, 96 Pac. 1047, 19 L. R. A. N. S. 707.

Wisconsin.— Chicago, etc., R. Co. *v.* State, 128 Wis. 553, 108 N. W. 557; State *v.* Anderson, 90 Wis. 550, 63 N. W. 746; Smith *v.* Cleveland, 17 Wis. 556.

The method best calculated to secure equality and uniformity is left to the judgment of the legislature and its decision must be followed by all taxing officers. Clark *v.* Vandalia R. Co., 172 Ind. 409, 86 N. E. 851.

A compromise act authorizing county commissioners, when property offered at tax-sale remains unsold for three years for want of buyers, to cause a certificate to be issued for less than the full amount due thereon, does not violate the constitutional requirement that taxation shall be equal. Lincoln Mortg., etc., Co. *v.* Davis, 76 Kan. 639, 92 Pac. 707.

83. State *v.* Nelson, 107 Minn. 319, 119

requirement it is not essential to the validity of taxation that it shall be equal and uniform,[84] and in such a case a tax law cannot be declared unconstitutional merely because it operates unequally, unjustly, or oppressively.[85]

b. What Taxes Affected — (i) *In General.* The requirement of equality and uniformity applies only to taxes in the proper sense of the word, levied with the object of raising revenue for general purposes,[86] and not to such as are of an extraordinary and exceptional kind,[87] or to local assessments for improvements levied upon property specially benefited thereby,[88] or to other burdens, charges, or impositions which are not properly speaking taxes;[89] and further, such a constitutional provision is to be restricted to taxes on property,[90] as distinguished

N. W. 1058, holding that a statute providing for the taxing of all shares of stock in foreign corporations owned by residents of the state is not a violation of a constitutional requirement of equality and uniformity in taxation.

84. State *v.* Travelers' Ins. Co., 73 Conn. 255, 47 Atl. 299, 57 L. R. A. 481; Smith *v.* Aberdeen Corp., 25 Miss. 458; Genet *v.* Brooklyn, 99 N. Y. 296, 1 N. E. 777; People *v.* Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266; Weber *v.* Reinhard, 73 Pa. St. 370, 13 Am. Rep. 747.

Uniformity of duties, imposts, and excises. — The provision of article 1, section 8, of the constitution of the United States, that "all duties, imposts and excises shall be uniform throughout the United States," establishes the rule only for taxation by the federal government, and has no application to the taxing powers of a state or territorial legislature. Peacock *v.* Pratt, 121 Fed. 772, 58 C. C. A. 48.

85. People *v.* Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266; Weber *v.* Reinhard, 73 Pa. St. 370, 13 Am. Rep. 747. See also cases cited *supra*, note 84.

The remedy in such cases must be found in an appeal to the justice of the legislature and not to the courts. Genet *v.* Brooklyn, 99 N. Y. 296, 1 N. E. 777.

86. *Colorado.*—Denver *v.* Knowles, 17 Colo. 204, 30 Pac. 1041, 17 L. R. A. 135.

Kentucky.— Owensboro *v.* Sweeney, 129 Ky. 607, 111 S. W. 364, 33 Ky. L. Rep. 823, 930, 130 Am. St. Rep. 477, 18 L. R. A. N. S. 181; Gosnell *v.* Louisville, 104 Ky. 201, 46 S. W. 722, 20 Ky. L. Rep. 519.

Ohio.— Hubbard *v.* Fitzsimmons, 57 Ohio St. 436, 49 N. E. 477; Cincinnati Gas Light, etc., Co. *v.* State, 18 Ohio St. 237.

Oregon.— King *v.* Portland, 2 Oreg. 146.

Tennessee.— Rhinehart *v.* State, 121 Tenn. 420, 117 S. W. 508.

Texas.— Taylor *v.* Boyd, 63 Tex. 533.

87. Ottawa County *v.* Nelson, 19 Kan. 234, 27 Am. Rep. 101; Cincinnati Gas Light, etc., Co. *v.* State, 18 Ohio St. 237.

88. Denver *v.* Knowles, 17 Colo. 204, 30 Pac. 1041, 17 L. R. A. 135; Gosnell *v.* Louisville, 104 Ky. 201, 46 S. W. 722, 20 Ky. L. Rep. 519; King *v.* Portland, 2 Oreg. 146; Higgins *v.* Bordages, 88 Tex. 458, 31 S. W. 52, 803, 53 Am. St. Rep. 770; Taylor *v.* Boyd, 63 Tex. 533. See also, generally, MUNICIPAL CORPORATIONS, 28 Cyc. 1105.

89. Beebe *v.* Wells, 37 Kan. 472, 15 Pac. 565; Wintz *v.* Girardey, 31 La. Ann. 381; Deering *v.* Peterson, 75 Minn. 118, 77 N. W. 568; Milwaukee Fire Dept. *v.* Helfenstein, 16 Wis. 136. But see Webb *v.* Baird, 6 Ind. 13, holding that a law requiring gratuitous services from a particular class of persons, such as attorneys, in effect imposes a tax upon them to that extent and therefore violates the constitutional provisions in regard to equality of taxation.

Fees not taxes.— Fees of public officers are not taxes, and statutes regulating or providing for their payment are not within the application of constitutional provisions in regard to the equality and uniformity of taxation (Miner *v.* Solano County, 26 Cal. 115; Baldwin *v.* Goldfrank, 88 Tex. 249, 31 S. W. 1064 [*affirming* 9 Tex. Civ. App. 269, 26 S. W. 155]; Verges *v.* Milwaukee County, 118 Wis. 191, 93 N. W. 44); nor do such provisions apply to fees required for defraying the expenses of executing inspection laws (Cincinnati Gas Light, etc., Co. *v.* State, 18 Ohio St. 237); or to stenographers' fees taxes as part of the cost in an action (Beebe *v.* Wells, 37 Kan. 472, 15 Pac. 565).

A vendor's duty on goods sold at auction as required by a statute is not a tax and does not violate a requirement as to equality and uniformity in taxation. Wintz *v.* Girardey, 31 La. Ann. 381.

90. *California.*— Fatjo *v.* Pfister, 117 Cal. 83, 48 Pac. 1012; People *v.* Naglee, 1 Cal. 232, 52 Am. Dec. 312.

Indiana.— Hart *v.* Smith, 159 Ind. 182, 64 N. E. 661, 95 Am. St. Rep. 280, 58 L. R. A. 949.

Kansas.— Beebe *v.* Wells, 37 Kan. 472, 15 Pac. 565.

Maryland.— State *v.* Philadelphia, etc., R. Co., 45 Md. 361, 24 Am. Rep. 511.

New Jersey.—State *v.* Richards, 52 N. J. L. 156, 18 Atl. 582.

Ohio.— Cincinnati Gas Light, etc., Co. *v.* State, 18 Ohio St. 237; Baker *v.* Cincinnati, 11 Ohio St. 534.

Tennessee.— Rhinehart *v.* State, 121 Tenn. 420, 117 S. W. 508.

Texas.— Pullman Palace-Car Co. *v.* State, 64 Tex. 274, 53 Am. Rep. 758.

But see St. Louis *v.* Spiegel, 75 Mo. 145, decided under a constitution providing not only that "all property subject to taxation shall be taxed in proportion to its value," but also that taxation "shall be uniform upon the same class of subjects."

from such as are levied on occupations, business, or franchises, and on inheritances and successions,[91] and as distinguished also from exactions imposed in the exercise of the police power rather than that of taxation.[92]

(II) *Business or Occupation Taxes and Licenses.* The principle of equality and uniformity does not require the equal taxation of all occupations or pursuits, nor prevent the legislature from taxing some kinds of business while leaving others exempt, or from classifying the various forms of business, but only that the burdens of taxation shall be imposed equally upon all persons pursuing the same avocation,[93] or that if those following the same calling are divided into classes for the purposes of taxation, the basis of classification shall be reasonable and founded on a real distinction, and not merely arbitrary or capricious.[94] To

The provision applies only to a direct tax upon property in order to prevent arbitrary taxation from being imposed without regard to the kind, quality, or value of the property taxed. Beebe *v.* Wells, 37 Kan. 472, 15 Pac. 565.

Poll taxes see *infra*, II, F, 3.

91. See *infra*, II, B, 1, b, (II), (III).

92. *Kansas.*— Clark *v.* Atchison, etc., R. Co., 8 Kan. App. 733, 54 Pac. 930.

North Carolina.—Brooks *v.* Tripp, 135 N. C. 159, 47 S. E. 401.

South Carolina.— Thomas *v.* Moultrieville, 52 S. C. 181, 29 S. E. 649.

Tennessee.— Rhinehart *v.* State, 121 Tenn. 420, 117 S. W. 508.

Wisconsin.— Milwaukee Fire Dept. *v.* Helfenstein, 16 Wis. 136.

United States.— Boro *v.* Phillips County, 3 Fed. Cas. No. 1,663, 4 Dill. 216.

A statute requiring insurance agents to pay over a certain percentage of premiums received by them for the benefit of the fire department is not a tax on the agent or on his occupation, but a proper exercise of the police power, and is not within the application of constitutional provisions in regard to uniformity of taxation. Milwaukee Fire Dept. *v.* Helfenstein, 16 Wis. 136.

93. *Alabama.*—Phœnix Assur. Co. *v.* Montgomery F. Dept., 117 Ala. 631, 23 So. 843, 42 L. R. A. 468; McCaskell *v.* State, 53 Ala. 510.

Arkansas.— Washington *v.* State, 13 Ark. 752.

California.— Sacramento *v.* Crocker, 16 Cal. 119.

Colorado.— American Smelting, etc., Co. *v.* People, 34 Colo. 240, 82 Pac. 531.

Georgia.— Cutliff *v.* Albany, 60 Ga. 597; Decker *v.* McGowan, 59 Ga. 805; Burch *v.* Savannah, 42 Ga. 596. *Compare* Wright *v.* Southern Bell Tel., etc., Co., 127 Ga. 227, 56 S. E. 116.

Illinois.— Braun *v.* Chicago, 110 Ill. 186.

Indiana.— Anderson *v.* Kerns Draining Co., 14 Ind. 199, 77 Am. Dec. 63.

Kentucky.— Hager *v.* Walker, 128 Ky. 1, 107 S. W. 254, 32 Ky. L. Rep. 748; Schuster *v.* Louisville, 89 S. W. 689, 28 Ky. L. Rep. 588.

Louisiana.— Walters *v.* Duke, 31 La. Ann. 668; New Orleans *v.* Turpin, 13 La. Ann. 56.

Maine.— State *v.* Western Union Tel. Co., 73 Me. 518.

Massachusetts.— Connecticut Mut. L. Ins. Co. *v.* Com., 133 Mass. 161.

Missouri.— Glasgow *v.* Rowse, 43 Mo. 479.

Nevada.— *Ex p.* Robinson, 12 Nev. 263, 28 Am. Rep. 794.

North Carolina.—State *v.* Worth, 116 N. C. 1007, 21 S. E. 204; Gatlin *v.* Tarboro, 78 N. C. 119. See also Worth *v.* Wilmington, etc., R. Co., 89 N. C. 291, 45 Am. Rep. 679.

Pennsylvania.— Kittanning Coal Co. *v.* Com., 79 Pa. St. 100; Northampton County *v.* Lehigh Coal, etc., Co., 75 Pa. St. 401.

South Carolina.— Florida Cent., etc., R Co. *v.* Columbia, 54 S. C. 266, 32 S. E. 408; State *v.* Columbia, 6 S. C. 1.

Tennessee.— Rhinehart *v.* State, 121 Tenn. 420, 117 S. W. 508; State *v.* Crawford, 2 Head 460; Adams *v.* Somerville, 2 Head 363.

Texas.— State *v.* Galveston, etc., R. Co., 100 Tex. 153, 97 S. W. 71.

Virginia.— Slaughter *v.* Com., 13 Gratt. 767.

United States.— *Ex p.* Thornton, 12 Fed. 538, 4 Hughes 220.

Property taxes and business taxes distinguished.— A tax imposed on the premium receipts of an insurance company is a business tax and not a property tax (Mutual Reserve Fund L. Assoc. *v.* Augusta, 109 Ga. 73, 35 S. E. 71; Scottish Union, etc., Ins. Co. *v.* Herriott, 109 Iowa 606, 80 N. W. 665, 77 Am. St. Rep. 548); and the same is true of a tax on the gross receipts of a railroad company (State *v.* Philadelphia, etc., R. Co., 45 Md. 361, 24 Am. Rep. 511; State *v.* Northern Cent. R. Co., 44 Md. 131); and of a tax on savings banks according to the amount of their deposits (State *v.* Richards, 52 N. J. L. 156, 18 Atl. 582); but on the other hand, a license-tax on the cash value of the stock in trade of merchants in the city is a property tax and not an occupation tax (Brookfield *v.* Tooey, 141 Mo. 619, 43 S. W. 387); and so is a tax on intoxicating liquors, in stock or stored, as distinguished from a tax on the business of liquor selling (Com. *v.* Taylor, (Ky.) 38 S. W. 10).

In Texas the constitution expressly provides that "all occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax." Hoefling *v.* San Antonio, 85 Tex. 228, 20 S. W. 85, 16 L. R. A. 608.

94. Johnston *v.* Macon, 62 Ga. 645; Hager *v.* Walker, 128 Ky. 1, 107 S. W. 254, 32 Ky.

this extent also, and no further, the principle applies to license fees or taxes imposed under the police power or for the better regulation of occupations supposed to have an important public aspect.[95]

(III) *Inheritance and Succession Taxes.* A statute imposing taxes on inheritances, legacies, and successions is not within the constitutional rule of equality and uniformity, because it lays the tax not on property, but on the privilege of succeeding to the ownership of real or personal estate by will or descent.[96]

(IV) *General Municipal Taxes.* The constitutional provisions in regard to equality and uniformity of taxation are ordinarily held not to be restricted

L. Rep. 748, 129 Am. St. Rep. 238, 15 L. R. A. N. S. 495; Pullman Palace-Car Co. *v.* State, 64 Tex. 274, 53 Am. Rep. 758. See also Cook *v.* Marshall County, 119 Iowa 384, 93 N. W. 372, 104 Am. St. Rep. 283 [*affirmed* in 196 U. S. 261, 25 S. W. 233, 49 L. ed. 471].

Classification of occupations.—The constitutional provision does not prevent a classification of the various occupations subject to taxation. Thus, butchers and milk dealers may constitute separate classes, and so also retail dealers in meats and farmers who sell meats from their own wagons. Davis *v.* Macon, 64 Ga. 128, 37 Am. Rep. 60.

Classification by amount of business done. — Persons following the same calling may be classified for taxation according to the amount of their business. Sacramento *v.* Crocker, 16 Cal. 119; Johnston *v.* Macon, 62 Ga. 645; Goodwin *v.* Savannah, 53 Ga. 410; Aurora *v.* McGannon, 138 Mo. 38, 39 S. W. 469; Gatlin *v.* Tarboro, 78 N. C. 119; Western Union Tel. Co. *v.* State, 55 Tex. 314. But see Schuster *v.* Louisville, 89 S. W. 689, 28 Ky. L. Rep. 588.

Classification by population of cities.— The constitutional requirement is not violated by graduating a business tax according to the population of the city or town in which it is carried on. Blessing *v.* Galveston, 42 Tex. 641; Texas Banking, etc., Co. *v.* State, 42 Tex. 636. But see Hager *v.* Walker, 128 Ky. 1, 107 S. W. 254, 32 Ky. L. Rep. 748, 129 Am. St. Rep. 238, 15 L. R. A. N. S. 195.

Classification according to branch of business.— The legislature may lawfully discriminate, for purposes of taxation, between persons pursuing different branches of the same general business, as between brewers and distillers on the one hand, and saloon-keepers on the other, or between persons holding licenses for the sale of different kinds of liquors or between licensees in cities and in rural districts. Territory *v.* Connell, 2 Ariz. 339, 16 Pac. 209; Trimm *v.* Harrison, 109 Ill. 593; State *v.* Rolle, 30 La. Ann. 991, 31 Am. Rep. 234; Kaliski *v.* Grady, 25 La. Ann. 576; Adler *v.* Whitbeck, 44 Ohio St. 539, 9 N. E. 672.

Classification of merchants.— A statute which divides merchandise into several groups and classes and requires any person who desires to engage in the sale of articles of more than one class or group to pay a license-fee is invalid (State *v.* Ashbrook, 154 Mo. 375, 55 S. W. 627, 77 Am. St. Rep. 765, 48 L. R. A. 265); and so is a city ordinance which imposes a higher fee upon a merchant selling goods by sample and keeping his stock in trade outside the city than upon one who maintains a store in the city (*Ex p.* Frank, 52 Cal. 606, 28 Am. Rep. 642).

95. *California.*— People *v.* Naglee, 1 Cal. 232, 52 Am. Dec. 312.

Colorado.—Parsons *v.* People, 32 Colo. 355, 76 Pac. 666.

Illinois.— Braun *v.* Chicago, 110 Ill. 186; Walker *v.* Springfield, 94 Ill. 364.

Kansas.— Leavenworth *v.* Booth, 15 Kan. 627.

Kentucky.— Hays *v.* Com., 107 Ky. 655, 55 S. W. 425, 21 Ky. L. Rep. 1418.

Louisiana.—Wintz *v.* Girardey, 31 La. Ann. 381.

Maryland.— Applegarth *v.* State, 89 Md. 140, 42 Atl. 941.

Missouri.— Glasgow *v.* Rowse, 43 Mo. 479. But see St. Louis *v.* Spiegel, 75 Mo. 145, holding that under a constitutional provision that taxes "shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax," an ordinance which requires a license-fee of a certain amount in one part of a city and a different fee in a different part of the city for carrying on the same business is unconstitutional.

North Carolina.— Cobb *v.* Durham County, 122 N. C. 307, 30 S. E. 338.

Ohio.— Baker *v.* Cincinnati, 11 Ohio St. 534.

Pennsylvania.— Com. *v.* Muir, 180 Pa. St. 47, 36 Atl. 413.

Tennessee.— Rhinehart *v.* State, 121 Tenn. 420, 117 S. W. 508.

Virginia.— Norfolk *v.* Norfolk Landmark Pub. Co., 95 Va. 564, 28 S. E. 959; Slaughter *v.* Com., 13 Gratt. 767.

Wisconsin.— Tenney *v.* Lenz, 16 Wis. 566.

United States.— Humes *v.* Ft. Smith, 93 Fed. 857.

Constitutionality of license-fees and taxes generally see LICENSES, 25 Cyc. 603.

But the legislature cannot under pretense of a license-fee impose unequal taxes and establish a partial exemption. Atty.-Gen. *v.* Winnebago Lake, etc., Plank Road Co., 11 Wis. 35.

Tax on dogs.— A statute or ordinance imposing a tax on dogs is a valid exercise of the police power, and not within the constitutional requirement of equality and uniformity. Van Horn *v.* People, 46 Mich. 133, 9 N. W. 246, 41 Am. Rep. 159; Kidd *v.* Reynolds, 20 Tex. Civ. App. 355, 50 S. W. 600; Carter *v.* Dow, 16 Wis. 298.

96. See *infra*, XVI, A. 2.

to state taxes but to be equally applicable to general taxation by cities, counties, and other municipal corporations for their general purposes,[97] although provisions that taxation shall be equal and uniform throughout the state are held to apply only to state taxes,[98] or at least to be so applicable in the sense that they do not require that every tax shall be assessed throughout the entire state,[99] or prevent the several counties or municipalities from levying taxes for their own purposes according to their several needs; [1] and the legislature may authorize each to make its own valuation within its own limits so long as the principles of equality and uniformity are preserved with respect to persons and property within such limits.[2]

(v) *Local Taxes For Local Purposes.* As previously shown local assessments for improvements are not properly speaking taxes,[3] and it is ordinarily held that the constitutional provisions as to equality and uniformity of taxation do not apply to such assessments,[4] and even in the case of taxes proper it is only taxation for state purposes which must be equal and uniform throughout the entire state.[5] These constitutional provisions do not prevent local taxation for local purposes,[6] or require equality and uniformity throughout the state as between

97. *Florida.*—Pratt *v.* Jacksonville, 36 Fla. 550, 18 So. 362, holding, however, that the regulations for securing such taxation need not be prescribed by the legislature but may be prescribed by the municipal authorities.

Illinois.— Cary *v.* Pekin, 88 Ill. 154, 30 Am. Rep. 543.

Indiana.— Jackson County *v.* State, 155 Ind. 604, 58 N. E. 1037. *Compare* Hamilton *v.* Ft. Wayne, 40 Ind. 491.

Kentucky.— Schuster *v.* Louisville, 124 Ky. 189, 89 S. W. 689, 28 Ky. L. Rep. 588.

Louisiana.— Cumming *v.* Rapides Police Jury, 9 La. Ann. 503.

Mississippi.— Adams *v.* Mississippi State Bank, 75 Miss. 701, 23 So. 395.

Nebraska.— Havelock High School Dist. No. 137 *v.* Lancaster County, 60 Nebr. 147, 82 N. W. 380, 83 Am. St. Rep. 525, 49 L. R. A. 343. See also State *v.* Aitken, 62 Nebr. 428, 87 N. W. 153.

North Carolina.— Harper *v.* New Hanover County, 133 N. C. 106, 45 S. E. 526; Young *v.* Henderson, 76 N. C. 420; French *v.* Wilmington, 75 N. C. 477. See also Jones *v.* Stokes County, 143 N. C. 59, 55 S. E. 427; Carolina Cent. R. Co. *v.* Wilmington, 72 N. C. 73.

Tennessee.— Malone *v.* Williams, 118 Tenn. 390, 103 S. W. 798, 121 Am. St. Rep. 1002; Taylor *v.* Chandler, 9 Heisk. 349, 24 Am. Rep. 308.

Virginia.— Day *v.* Roberts, 101 Va. 248, 43 S. E. 362.

Wisconsin.— Hale *v.* Kenosha, 29 Wis. 599 [*distinguishing* Bond *v.* Kenosha, 17 Wis. 284]; Weeks *v.* Milwaukee, 10 Wis. 242.

See 45 Cent. Dig. tit. "Taxation," § 71. See also, generally, Municipal Corporations, 28 Cyc. 1663.

In Nebraska the constitution expressly requires that in the assessment of taxes for municipal purposes such taxes shall be uniform with respect to persons and property within the jurisdiction of the body imposing the same. State *v.* Savage, 65 Nebr. 714, 91 N. W. 716.

98. New Orleans *v.* Klein, 26 La. Ann. 493; New Orleans Second Municipality *v.* Duncan, 2 La. Ann. 182; Gilkeson *v.* Frederick County Justices, 13 Gratt. (Va.) 577; Douglass *v.* Harrisville, 9 W. Va. 162, 27 Am. Rep. 548; Louisiana *v.* Pilsbury, 105 U. S. 278, 26 L. ed. 1090 [*reversing* 31 La. Ann. 1].

99. New Orleans *v.* Klein, 26 La. Ann. 493.

1. New Orleans *v.* Klein, 26 La. Ann. 493; Daily *v.* Swope, 47 Miss. 367; Gilkeson *v.* Frederick County Justices, 13 Gratt. (Va.) 577; Louisiana *v.* Pilsbury, 105 U. S. 278, 26 L. ed. 1090 [*reversing* 31 La. Ann. 1].

Local taxes for local purposes generally see *infra*, II, B, 1, b, (v).

2. Pratt *v.* Jacksonville, 36 Fla. 550, 18 So. 362; State *v.* Aitken, 62 Nebr. 428, 87 N. W. 153.

The provisions of the Florida constitution that the legislature "shall prescribe such regulations as shall secure a just valuation of all property" does not apply to municipal taxation. Such taxation must conform to the same principles of equality, uniformity, and just valuation as are essential in state taxation, but the regulations for securing the same need not be made by the legislature but may be prescribed by the municipal authorities. Pratt *v.* Jacksonville, 36 Fla. 550, 18 So. 362.

3. See *supra*, I, A, 2, d.

4. See *supra*, II, B, 1, b, (I); and, generally, Municipal Corporations, 28 Cyc. 1105.

But the distinction must be observed between what are properly local assessments upon property in the immediate vicinity of an improvement and specially benefited thereby and what are merely local taxes for local purposes, and if the imposition is not properly an assessment but is a tax the constitutional requirements of equality and uniformity apply. Hale *v.* Kenosha, 29 Wis. 599 [*distinguishing* Bond *v.* Kenosha, 17 Wis. 284]. See also Smith *v.* Farrelly, 52 Cal. 77.

5. New Orleans *v.* Klein, 26 La. Ann. 493; Yeatman *v.* Crandall, 11 La. Ann. 220; Daily *v.* Swope, 47 Miss. 367; Gilkeson *v.* Frederick County Justices, 13 Gratt. (Va.) 577.

6. *California.*— People *v.* Burr, 13 Cal. 343. *Louisiana.*— Missouri, etc., Trust Co. *v.*

the different localities so taxed; [7] and for the purpose of local taxation the legislature may create different taxing districts,[8] even within the same county,[9] and without regard to the lines of the political or municipal subdivisions of the state,[10] provided the purpose to be accomplished by the tax pertains to the district taxed; [11] but there must be uniformity with regard to persons and property within the particular taxing district.[12]

c. Meaning of "Equality" and "Uniformity." Equality in taxation is accomplished when the burden of the tax falls equally and impartially upon all the persons and property subject to it,[13] so that no higher rate or greater levy in

Smart, 51 La. Ann. 416, 25 So. 443; New Orleans *v.* Klein, 26 La. Ann. 493; Richardson *v.* Morgan, 16 La. Ann. 429; Wallace *v.* Shelton, 14 La. Ann. 498; Yeatman *v.* Crandall, 11 La. Ann. 220; Oakey *v.* New Orleans, 1 La. 1.

Michigan.— Motz *v.* Detroit, 18 Mich. 495.

Mississippi.— Turner *v.* Cochran, 89 Miss. 206, 42 So. 876; Chrisman *v.* Brookhaven, 70 Miss. 477, 12 So. 458; Vasser *v.* George, 47 Miss. 713; Daily *v.* Swope, 47 Miss. 367; Williams *v.* Cammack, 27 Miss. 209, 61 Am. Dec. 508.

New Hampshire.— Gooch *v.* Exeter, 70 N. H. 413, 48 Atl. 1100, 85 Am. St. Rep. 637. But see *In re* House Bill, 4 N. H. 565.

New Jersey.— Herrman *v.* Guttenberg, 62 N. J. L. 605, 43 Atl. 703.

North Carolina.— Busbee *v.* Wake County, 93 N. C. 143; Cain *v.* Davie County, 86 N. C. 8.

Ohio.— State *v.* Henry County, 41 Ohio St. 423; Bowles *v.* State, 37 Ohio St. 35.

Virginia.— Gilkeson *v.* Frederick County Justices, 13 Gratt. 577.

West Virginia.— Douglass *v.* Harrisville, 9 W. Va. 162, 27 Am. Rep. 548.

Wisconsin.— Jensen *v.* Polk County, 47 Wis. 298, 2 N. W. 320.

United States.— Louisiana *v.* Pilsbury, 105 U. S. 278, 26 L. ed. 1090 [*reversing* 31 La. Ann. 1]; Boro *v.* Phillips County, 3 Fed. Cas. No. 1,663, 4 Dill. 216.

7. *Louisiana.*— New Orleans *v.* Klein, 26 La. Ann. 493; Yeatman *v.* Crandall, 11 La. Ann. 220.

Maryland.—Miller *v.* Wicomico County, 107 Md. 438, 69 Atl. 118.

Minnesota.— Maltby *v.* Tautges, 50 Minn. 248, 52 N. W. 858.

Mississippi.— Daily *v.* Swope, 47 Miss. 367.

Virginia.— Gilkeson *v.* Frederick County Justices, 13 Gratt. 577.

Wisconsin.—Jensen *v.* Polk County, 47 Wis. 298, 2 N. W. 320.

United States.— Louisiana *v.* Pilsbury, 105 U. S. 278, 26 L. ed. 1090 [*reversing* 31 La. Ann. 1].

See also *infra*, II, B, 3, a.

It is absolutely impracticable to administer the local affairs of counties, cities, and towns with their varying needs upon the basis of a given value of property paying the same amount of taxes in all parts of the state. Daily *v.* Swope, 47 Miss. 367.

8. Maltby *v.* Tautges, 50 Minn. 248, 52 N. W. 858; Bowles *v.* State, 37 Ohio St. 35.

A taxing district is fixed in most cases by the nature of the case itself. Thus if the tax is for general state purposes the whole state will constitute the taxing district, and if for general county or city purposes the whole county or city respectively will constitute the taxing district, but where it is not so fixed by the nature of the case it is within the power of the legislature to do so and its discretion will not be interfered with unless it clearly appears that the tax does not pertain to the district taxed and was imposed and apportioned without regard to any special local interest on the part of such district in the purpose to be accomplished. Maltby *v.* Tautges, 50 Minn. 248, 52 N. W. 858.

9. Devou *v.* Boske, 63 S. W. 44, 23 Ky. L. Rep. 364; Miller *v.* Wicomico County Com'rs, 107 Md. 438, 69 Atl. 118; Maltby *v.* Tautges, 50 Minn. 248, 52 N. W. 858.

School-districts.— The Georgia statute providing for the creation of local tax district schools and for the laying off of counties into school-districts is not in violation of the constitutional requirements as to uniformity of taxation. Henslee *v.* McLarty, 131 Ga. 244, 62 S. E. 66.

10. Maltby *v.* Tautges, 50 Minn. 248, 52 N. W. 858; Bowles *v.* State, 37 Ohio St. 35.

Taxing districts may be as numerous as the purposes for which the taxes are levied, and it is not essential that the political divisions of the state shall be the same as the taxing districts, but special districts may be established for special purposes wholly ignoring the lines of political subdivisions of the state. It is compulsory that these political subdivisions shall be regarded in taxation only where the tax itself is for a purpose specially pertaining to one of them in its political capacity. Maltby *v.* Tautges, 50 Minn. 248, 52 N. W. 858.

11. Maltby *v.* Tautges, 50 Minn. 248, 52 N. W. 858, holding that it is the interest of the district in the object of the tax and not the location which determines whether such object is a proper subject for district taxation, and that a particular district may be so interested in a public work which has its *situs* in a different district.

12. Cumming *v.* Rapides Police Jury, 9 La. Ann. 503; Turner *v.* Hand County, 11 S. D. 348, 77 N. W. 589; Hale *v.* Kenosha, 29 Wis. 599. See also *infra*, II, B, 3, a.

13. Sherlock *v.* Winnetka, 68 Ill. 530.

As otherwise stated, taxes are said to be equal and uniform when no person or class of persons in the taxing district, whether a state, county, or other municipal corporation, is taxed at a different rate than are

proportion to value is imposed upon one person or species of property than upon others similarly situated or of like character.[14] Uniformity requires that all taxable property shall be alike subjected to the tax,[15] and this requirement is violated if particular kinds, species, or items of property are selected to bear the whole burden of the tax, while others, which should be equally subject to it, are left untaxed.[16] Further, it is implied that each tax shall be uniform throughout the taxing district involved. A state tax must be apportioned uniformly throughout the state, a county tax throughout the county, and a city tax throughout the city.[17]

d. What Inequality Sufficient to Invalidate Tax Law. It is a matter of common experience that absolute equality in the imposition of a tax is not attainable. Nor is this the meaning of the constitutional provision. All that it requires is an aim and intention on the part of the legislature, in framing the tax law, to approximate to the ideal of absolute equality as closely as the nature of the subject

other persons in the same district upon the same value of the same thing, and where the objects of taxation are the same, by whomsoever owned, or whatsoever they may be. Norris *v.* Waco, 57 Tex. 635. Taxation is equal and uniform when the tax reaches and bears with the like burden upon all the property within the taxing district; and it bears the like burden when the valuation of each parcel is ascertained in the same mode — the mode prescribed by law — and when it is subject to the same rate of taxation as other property within the district. People *v.* Whyler, 41 Cal. 351. And see Hodgson *v.* New Orleans, 21 La. Ann. 301; Texas Banking, etc., Co. *v.* State, 42 Tex. 636; Albrecht *v.* State, 8 Tex. App. 216, 34 Am. Rep. 737.

14. Bidwell *v.* Coleman, 11 Minn. 78; State *v.* Kruttschnitt, 4 Nev. 178; Com. *v.* Anderson, 178 Pa. St. 171, 35 Atl. 632; Maenhaut *v.* New Orleans, 16 Fed. Cas. No. 8,939, 2 Woods 108.

Distribution of railroad tax according to mileage.—A scheme for assessing an entire railroad line and distributing the value over the main line to different taxing districts on a mileage basis does not violate the constitutional requirement of uniformity of valuation and assessment for taxation. State *v.* Back, 72 Nebr. 402, 100 N. W. 952, 69 L. R. A. 447.

15. Redmond *v.* Tarboro, 106 N. C. 122, 10 S. E. 845, 7 L. R. A. 539; Chicago, etc., R. Co. *v.* State, 128 Wis. 553, 108 N. W. 557.

16. *Arkansas.*— Pike *v.* State, 5 Ark. 204.

Kansas.— Hamilton *v.* Wilson, 61 Kan. 511, 59 Pac. 1069, 48 L. R. A. 238 (holding invalid a statute taxing judgments for money but excepting judgments founded on various causes of action); Atchison, etc., R. Co. *v.* Clark, 60 Kan. 831, 58 Pac. 561.

Kentucky.— Standard Oil Co. *v.* Com., 119 Ky. 75, 82 S. W. 1020, 26 Ky. L. Rep. 985.

New Jersey.—State *v.* Elizabeth, 64 N. J. L. 502, 45 Atl. 795.

North Carolina.— Redmond *v.* Tarboro, 106 N. C. 122, 10 S. E. 845, 7 L. R. A. 539; Wilson *v.* Charlotte, 74 N. C. 748.

North Dakota.— Minneapolis, etc., El. Co. *v.* Traill County, 9 N. D. 213, 82 N. W. 727, 50 L. R. A. 266.

Pennsylvania.— Juniata Limestone Co. *v.* Fagley, 187 Pa. St. 193, 40 Atl. 977, 67 Am. St. Rep. 579, 42 L. R. A. 442, holding invalid a statute taxing employers of foreign-born unnaturalized persons over twenty-one years of age. See also Ade *v.* County Com'rs, 20 Pa. Co. Ct. 672; Pennsylvania Coal Co. *v.* Com., 7 Leg. Gaz. 130, 32 Leg. Int. 336.

Wyoming.— Kelley *v.* Rhoads, 7 Wyo. 237, 51 Pac. 593, 75 Am. St. Rep. 904, 39 L. R. A. 594.

United States.—Western Union Tel. Co. *v.* Norman, 77 Fed. 13; Dundee Mortg., etc., Co. *v.* School Dist. No. 1, 21 Fed. 151, holding a statute to be unconstitutional which provided for the taxation of mortgages on land lying within the bounds of a single county, but made no provision for mortgages on land lying in several counties.

Application of rule.—A statute providing for the taxation of real and personal property held in trust by the court of chancery is unconstitutional because it does not apply to like property held in trust by other courts of the state. State *v.* Elizabeth, 64 N. J. L. 502, 45 Atl. 795. The same rule applies to a statute providing that mortgages made to the chancellor in his official capacity shall be assessed to the beneficiaries thereof, without including mortgages made to other officers of the courts and payable to beneficiaries. Shotwell *v.* Dalrymple, 49 N. J. L. 530, 10 Atl. 386; Dunham *v.* Cox, 44 N. J. Eq. 273, 14 Atl. 123. And see Cox *v.* Truitt, 57 N. J. L. 635, 31 Atl. 168.

17. *Georgia.*—Walton County *v.* Morgan County, 120 Ga. 548, 48 S. E. 243.

Indiana.— Jackson County *v.* State, 155 Ind. 604, 58 N. E. 1037.

Kentucky.— Hager *v.* Walker, 128 Ky. 1, 107 S. W. 254, 32 Ky. L. Rep. 748, 129 Am. St. Rep. 238, 15 L. R. A. N. S. 195.

Nebraska.— Pleuler *v.* State, 11 Nebr. 547, 10 N. W. 481.

New Hampshire.— State *v.* U. S., etc., Express Co., 60 N. H. 219.

Ohio.— Zanesville *v.* Richards, 5 Ohio St. 589.

Oregon.— Yamhill County *v.* Foster, 53 Oreg. 124, 99 Pac. 286; East Portland *v.* Multnomah County, 6 Oreg. 62.

and the necessities of practical administration will permit.[18] Hence the courts will not pronounce a statute invalid on this ground unless it appears that it was framed on a plan or principle not calculated to produce equality and uniformity, or that its administration will result in such flagrant injustice as to evidence an entire disregard of the constitutional requirement.[19]

e. Fraud or Defects in Execution of Tax Law. The constitutional requirement of equality and uniformity has regard to the laws which may be passed for the imposition of taxes, and not to their practical working or execution;[20] and hence a law properly framed cannot be declared invalid because injustice or inequality results from the error or misconduct of the officers charged with its administration,[21] or because it is practically possible, under the terms of the statute, to escape taxation on some kinds of property by manipulation or evasion.[22] But misconduct on the part of taxing officers resulting in an assessment which is contrary to the constitutional principles of equality and uniformity may invalidate the particular assessment so made,[23] or at least entitle those discriminated against to relief against the assessment to the extent to which it is improper.[24]

18. *California.*— People *v.* Whyler, 41 Cal. 351.

Illinois.— Crozer *v.* People, 206 Ill. 464, 69 N. E. 489.

Kansas.— McIntyre *v.* Williamson, 8 Kan. App. 711, 54 Pac. 928.

Massachusetts.— Cheshire *v.* Berkshire County Com'rs, 118 Mass. 386; Com. *v.* People's Five Cents Savings Bank, 5 Allen 428.

Minnesota.— Comer *v.* Folsom, 13 Minn. 219.

Nevada.—Virginia *v.* Chollar-Potosi Gold, etc., Min. Co., 2 Nev. 86.

New Hampshire.— Wyatt *v.* State Bd. of Equalization, 74 N. H. 552, 70 Atl. 387.

Oregon.— Yamhill County *v.* Foster, 53 Oreg. 124, 99 Pac. 286; Crawford *v.* Linn County, 11 Oreg. 482, 5 Pac. 738.

Pennsylvania.—Weber *v.* Reinhard, 73 Pa. St. 370, 13 Am. Rep. 747; Grim *v.* Weissenberg School Dist., 57 Pa. St. 433, 98 Am. Dec. 237; Kirby *v.* Shaw, 19 Pa. St. 258.

Vermont.—Allen *v.* Drew, 44 Vt. 174.

Washington.—State *v.* Parmenter, 50 Wash. 164, 96 Pac. 1047, 19 L. R. A. N. S. 707; Tekoa *v.* Reilly, 47 Wash. 202, 91 Pac. 769, 13 L. R. A. N. S. 901.

19. *Arkansas.*— Patterson *v.* Temple, 27 Ark. 202.

Connecticut.— Hopkins' Appeal, 77 Conn. 644, 60 Atl. 657. See also State *v.* Travelers' Ins. Co., 73 Conn. 255, 47 Atl. 299, 57 L. R. A. 481.

Kansas.— McIntyre *v.* Williamson, 8 Kan. App. 711, 54 Pac. 928.

Kentucky.— Slack *v.* Maysville, etc., R. Co., 13 B. Mon. 1.

Massachusetts.— White *v.* Gove, 183 Mass. 333, 67 N. E. 359; Com. *v.* People's Five Cents Savings Bank, 5 Allen 428.

Minnesota.— State *v.* Hennepin County Dist. Ct., 33 Minn. 235, 22 N. W. 625.

Nevada.— Virginia *v.* Chollar-Potosi Gold, etc., Min. Co., 2 Nev. 86.

New York.— Genet *v.* Brooklyn, 99 N. Y. 296, 1 N. E. 777.

Wisconsin.— Dean *v.* Gleason, 16 Wis. 1.

United States.— Chamberlain *v.* Walter, 60 Fed. 788; Dundee Mort., etc., Co. *v.* Multnomah County School Dist. No. 1, 19 Fed. 359.

20. Spencer *v.* People, 68 Ill. 510; Kirkpatrick *v.* New Brunswick, 40 N. J. Eq. 46; Apperson *v.* Memphis, 1 Fed. Cas. No. 497, 2 Flipp. 363.

21. Missouri, etc., Trust Co. *v.* Smart, 51 La. Ann. 416, 25 So. 443; State *v.* Maxwell, 27 La. Ann. 722; Missouri, etc., R. Co. *v.* Shannon, 100 Tex. 379, 100 S. W. 138, 10 L. R. A. N. S. 681; Dundee Mortg., etc., Co. *v.* School Dist. No. 1, 21 Fed. 151. See also Illinois Cent. R. Co. *v.* Com., 128 Ky. 268, 108 S. W. 245, 32 Ky. L. Rep. 1112, 110 S. W. 265, 33 Ky. L. Rep. 326.

A tax may be rendered illegal for lack of uniformity either in consequence of the law providing for it or the misconduct of those charged with its administration, but so long as this is not a result of the law the law cannot be held invalid on this ground and the remedy, if any, must be confined to the illegal proceedings under it. Dundee Mortg., etc., Co. *v.* School Dist. No. 1, 21 Fed. 151.

22. State *v.* Savage, 65 Nebr. 714, 91 N. W. 716; Christian Moerlein Brewing Co. *v.* Hagerty, 8 Ohio Cir. Ct. 330, 4 Ohio Cir. Dec. 276; Mercantile Nat. Bank *v.* New York, 28 Fed. 776.

23. James *v.* American Surety Co., 133 Ky. 313, 117 S. W. 411; McTwiggan *v.* Hunter, 18 R. I. 776, 30 Atl. 962 (holding that where the assessors of taxes wilfully and intentionally omit property which should be assessed for taxation, the entire assessment is rendered illegal); Marsh *v.* Clark County, 42 Wis. 502 (holding that violations or evasions of duty imposed by law to secure a just and uniform rule of assessment, whether occurring by mistake in law or fraud in fact, which go to impair the general equality and uniformity of the assessment, and thereby to defeat the uniform rule of taxation, vitiate the whole assessment as the foundation of a valid tax).

Unintentional omissions in assessing property for taxation, due merely to an error of judgment or inadvertence, will not affect the validity of the tax. Chicago, etc., R. Co. *v.* State, 128 Wis. 553, 108 N. W. 557.

24. Lively *v.* Missouri, etc., R. Co., 102 Tex. 545, 120 S. W. 852 (holding that where

f. Exemptions — (i) *In General.*[25] As to the effect of the constitutional provisions relating to equality and uniformity of taxation upon the right to grant exemptions there is some conflict of authority,[26] due in part to a difference in the wording of the constitutional provisions,[27] although the authorities are not entirely uniform as to the effect of provisions similarly worded.[28] It is generally held that an exemption from taxation granted by the legislature to particular persons or property violates the constitutional requirement of equality and uniformity and is therefore invalid, except as to particular instances in which the constitution itself permits it.[29] Still there are numerous decisions upholding such exemptions, as against the constitutional provision, provided the particular exemption is founded on some sound principle of public policy or some consideration moving to the public, and provided it does not result in unjust discriminations but is

the property of individuals was assessed at a certain percentage of its true value, and the property of a railroad company at its full value, the court would relieve against the illegal discrimination by reducing the railroad assessment to the same proportion as that applied to other property); Dundee Mortg., etc., Co. *v.* Parrish, 24 Fed. 197.

25. Constitutional restrictions as to exemptions generally see infra, IV, B, 2, b.

26. See Chesapeake, etc., R. Co. *v.* Miller, 19 W. Va. 408 [*affirmed* in 114 U. S. 176, 5 S. Ct. 813, 29 L. ed. 121]. See also cases cited *infra*, notes 29, 30.

27. Chesapeake, etc., R. Co. *v.* Miller, 19 W. Va. 408 [*affirmed* in 114 U. S. 176, 5 S. Ct. 813, 29 L. ed. 121]; Wisconsin Cent. R. Co. *v.* Taylor County, 52 Wis. 37, 8 N. W. 833, each quoting and distinguishing the varying constitutional provisions of different states.

28. Chesapeake, etc., R. Co. *v.* Miller, 19 W. Va. 408 [*citing* Williamson *v.* Massey, 33 Gratt. (Va.) 237, where a similar provision was differently construed]. See also cases cited *infra*, notes 29, 30.

29. *Arkansas.*— Davis *v.* Gaines, 48 Ark. 370, 3 S. W. 184; Fletcher *v.* Oliver, 25 Ark. 289.

California.— People *v.* Latham, 52 Cal. 598; Wilson *v.* Sutter County, 47 Cal. 91; Lick *v.* Austin, 43 Cal. 590; People *v.* Eddy, 43 Cal. 331, 13 Am. Rep. 143; Crosby *v.* Lyon, 37 Cal. 242; People *v.* Kerke, 35 Cal. 677; People *v.* McCreery, 34 Cal. 432 [*overruling* High *v.* Shoemaker, 22 Cal. 363; People *v.* Coleman, 4 Cal. 46, 60 Am. Dec. 581].

Colorado.— People *v.* Henderson, 12 Colo. 369, 21 Pac. 144; Gunnison County *v.* Owen, 7 Colo. 467, 4 Pac. 795.

Connecticut.— See Middletown Nat. Bank *v.* Middletown, 74 Conn. 449, 51 Atl. 138.

Georgia.— Brown *v.* Southern R. Co., 125 Ga. 772, 54 S. E. 729; Atlanta Nat. Bldg., etc., Assoc. *v.* Stewart, 109 Ga. 80, 35 S. E. 73.

Illinois.— People *v.* Barger, 62 Ill. 452; Jacksonville *v.* McConnel, 12 Ill. 138. *Compare* McDonough County *v.* Campbell, 42 Ill. 490.

Indiana.—Warner *v.* Curran, 75 Ind. 309; State *v.* Indianapolis, 69 Ind. 375, 35 Am. Rep. 223.

Kentucky.— Campbell County *v.* Newport, etc., Bridge Co., 112 Ky. 659, 66 S. W. 526, 23 Ky. L. Rep. 2056.

Maine.— Dyar *v.* Farmington Village Corp., 70 Me. 515; Brewer Brick Co. *v.* Brewer, 62 Me. 62, 16 Am. Rep. 395. *Compare* Portland *v.* Portland Water Co., 67 Me. 135.

Minnesota.— Little Falls Electric, etc., Co. *v.* Little Falls, 74 Minn. 197, 77 N. W. 40.

Mississippi.—Adams *v.* Yazoo, etc., R. Co., 77 Miss. 194, 24 So. 200, 317, 28 So. 956, 60 L. R. A. 33 [*affirmed* in 180 U. S. 1, 21 S. Ct. 240, 45 L. ed. 395].

Missouri.— State *v.* Wardell, 153 Mo. 319, 54 S. W. 574; Westport *v.* McGee, 128 Mo. 152, 30 S. W. 523.

Montana.— Daly Bank, etc., Co. *v.* Silver Bow County, 33 Mont. 101, 81 Pac. 950; Northwestern Mut. L. Ins. Co. *v.* Lewis & Clarke County, 28 Mont. 484, 72 Pac. 982, 98 Am. St. Rep. 572.

Nebraska.— State *v.* Insurance Co. of North America, 71 Nebr. 320, 99 N. W. 36, 100 N. W. 405, 102 N. W. 1022, 106 N. W. 767.

New Jersey.— Tippett *v.* McGrath, 71 N. J. L. 338, 59 Atl. 1118 [*affirming* 70 N. J. L. 110, 56 Atl. 134]. And see Cooper Hospital *v.* Camden, 68 N. J. L. 691, 54 Atl. 419; Kase *v.* Bennett, 54 N. J. Eq. 97, 33 Atl. 248.

Ohio.— Zanesville *v.* Richards, 5 Ohio St. 589.

Tennessee.— Jones *v.* Memphis, 101 Tenn. 188, 47 S. W. 138; Chattanooga *v.* Nashville, etc., R. Co., 7 Lea 561; Louisville, etc., R. Co. *v.* State, 8 Heisk. 663.

Texas.— *Ex p.* Jones, 38 Tex. Cr. 482, 43 S. W. 513.

Utah.— State *v.* Armstrong, 17 Utah 166, 53 Pac. 981, 41 L. R. A. 407; Judge *v.* Spencer, 15 Utah 242, 48 Pac. 1097.

Virginia.— Campbell *v.* Bryant, 104 Va. 509, 52 S. E. 638.

West Virginia.— Chesapeake, etc., R. Co. *v.* Miller, 19 W. Va. 408.

United States.— Dundee Mortg. Co. *v.* Multnomah County School-Dist. No. 1, 19 Fed. 359.

See 45 Cent. Dig. tit. "Taxation," § 310.

But the legislature may commute a tax for a payment of money or other equivalent. Hunsaker *v.* Wright, 30 Ill. 146.

In Pennsylvania the constitution in addition to the provision requiring uniformity expressly prohibits any exemptions except in

equally available to all taxpayers possessing property of the exempted class;[30] it being held that the requirement of equality and uniformity does not mean that all property must be taxed so as to prevent the granting of any exemptions, but merely that such property as is made subject to taxation shall be taxed equally and uniformly,[31] although in some cases the provisions are so worded or coupled with other provisions as to show an intention to prevent the granting of any exemptions.[32] The right to grant exemptions is, however, exclusively a legislative power, and does not belong to municipal corporations unless specifically accorded to them by statute.[33]

(II) *Corporate Property*. An exemption from taxation granted to a corporation is generally considered to be no less violative of the constitutional rule than one accorded to a private person,[34] particularly where the provision is so worded as to show an intention to prevent the granting of any exemptions,[35]

regard to certain classes of property therein specified. Christley *v.* Butler County, 37 Pa. Super. Ct. 32.

30. *Alabama.*— Daughdrill *v.* Alabama L. Ins., etc., Co., 31 Ala. 91, where the exemption was sustained as having been granted in consideration of advantages accruing to the public.

Iowa.— Leicht *v.* Burlington, 73 Iowa 29, 34 N. W. 494.

Kansas.—Ottawa County *v.* Nelson, 19 Kan. 234, 27 Am. Rep. 101.

Louisiana.— New Orleans *v.* Kennard, 34 La. Ann. 851; New Orleans *v.* Fourchy, 30 La. Ann. 910; New Orleans *v.* Davidson, 30 La. Ann. 554; Lynch *v.* Alexandria, 9 La. Ann. 498.

Maryland.— Simpson *v.* Hopkins, 82 Md. 478, 33 Atl. 714.

Michigan.— People *v.* Auditor-Gen., 7 Mich. 84.

Mississippi.— Adams *v.* Tombigbee Mills, 78 Miss. 676, 29 So. 470.

New York.— People *v.* Miller, 84 N. Y. App. Div. 168, 82 N. Y. Suppl. 621.

Oklahoma.— Pryor *v.* Bryan, 11 Okla. 357, 66 Pac. 348.

Texas.— Missouri, etc., R. Co. *v.* Shannon, 100 Tex. 379, 100 S. W. 138, 10 L. R. A. N. S. 681; Raymond *v.* Kibbe, 43 Tex. Civ. App. 209, 95 S. W. 727.

Vermont.— Colton *v.* Montpelier, 71 Vt. 413, 45 Atl. 1039.

Virginia.—Williamson *v.* Massey, 33 Gratt. 237.

Washington.— Columbia, etc., R. Co. *v.* Chilberg, 6 Wash. 612, 34 Pac. 163.

Wisconsin.—Wisconsin Cent. R. Co. *v.* Taylor County, 52 Wis. 37, 8 N. W. 833.

United States.— Peacock *v.* Pratt, 121 Fed. 772, 58 C. C. A. 48; Williams *v.* Rees, 2 Fed. 882, 9 Biss. 405.

See 45 Cent. Dig. tit. "Taxation," § 310.

Credits.— Credits are in effect the mere legal right to demand the delivery of money or other property in the future, and until such transfer of possession is made the property is taxed wherever it may be so that the total actual property of the state may be once taxed without taxing credits. State *v.* Parmenter, 50 Wash. 164, 96 Pac. 1047, 19 L. R. A. N. S. 707.

Public property.— The word "property" as used in a constitution providing that taxation shall be uniform on all property subject to be taxed within the limits of the authority levying the tax does not require the taxing of public property or any of the lawful instrumentalities of government. Penick *v.* Foster, 129 Ga. 217, 58 S. E. 773, 12 L. R. A. N. S. 1159. See also People *v.* McCreery, 34 Cal. 432.

31. New Orleans *v.* Commercial Bank, 10 La. Ann. 735; Williamson *v.* Massey, 33 Gratt. (Va.) 237; Columbia, etc., R. Co. *v.* Chilberg, 6 Wash. 612, 34 Pac. 163; Wisconsin Cent. R. Co. *v.* Taylor County, 52 Wis. 37, 8 N. W. 833. See also cases cited *supra*, notes 15, 30.

Partial exemption.—A right to exempt as a whole will not authorize a partial exemption conditional upon the property paying an arbitrary percentage, where the constitution requires that taxes shall be proportional. *In re* Opinion of Justices, 195 Mass. 607, 84 N. E. 499.

32. People *v.* McCreery, 34 Cal. 432; Chattanooga *v.* Nashville, etc., R. Co., 7 Lea (Tenn.) 561; Chesapeake, etc., R. Co. *v.* Miller, 19 W. Va. 408. See also cases cited *supra*, note 29.

33. State *v.* Hannibal, etc., R. Co., 75 Mo. 208; State *v.* Gracey, 11 Nev. 223. See also, generally, Municipal Corporations, 28 Cyc. 1686.

34. *Alabama.*— Sumter County *v.* Gainesville Nat. Bank, 62 Ala. 464, 34 Am. Rep. 30; Mobile *v.* Stonewall Ins. Co., 53 Ala. 570.

California.— Crosby *v.* Lyon, 37 Cal. 242.

Iowa.— Davenport *v.* Chicago, etc., R. Co., 38 Iowa 633.

Kentucky.— German Nat. Ins. Co. *v.* Louisville, 54 S. W. 732, 21 Ky. L. Rep. 1179.

Nebraska.— State *v.* Poynter, 59 Nebr. 417, 81 N. W. 431.

New Jersey.— State *v.* Richards, 52 N. J. L. 156, 18 Atl. 582.

Oregon.— Hogg *v.* Mackay, 23 Oreg. 339, 31 Pac. 779, 37 Am. St. Rep. 682, 19 L. R. A. 77.

Tennessee.— Chattanooga *v.* Nashville, etc., R. Co., 7 Lea 561.

West Virginia.— Chesapeake, etc., R. Co. *v.* Miller, 19 W. Va. 408.

See 45 Cent. Dig. tit. "Taxation," § 311.

35. Chattanooga *v.* Nashville, etc., R. Co.,

or where the constitution also provides that the property of corporations for pecuniary profit shall be subject to taxation the same as that of individuals;[36] but under provisions which are construed as not entirely prohibiting the granting of exemptions the legislature may grant exemptions to certain corporations or classes of corporations,[37] such as railroad companies,[38] manufacturing corporations,[39] and various other classes of corporations,[40] particularly those of a quasi-public character,[41] as well as in the case of associations organized for purely charitable purposes.[42]

g. Legal and Illegal Discriminations — (i) *Between Realty and Personalty.* Under a constitutional provision that all property shall be taxed by a uniform rule, there can be no discrimination between real and personal property, and a tax levied upon either class alone is invalid.[43] But in the absence of such

7 Lea (Tenn.) 561; Chesapeake, etc., R. Co. *v.* Miller, 19 W. Va. 408.

36. Davenport *v.* Chicago, etc., R. Co., 38 Iowa 633. *Compare* Mississippi Mills *v.* Cook, 56 Miss. 40.

Quasi-public corporations.—A constitutional provision that taxation shall be equal and uniform and that the property of corporations for pecuniary profit shall be subject to taxation the same as property of individuals will not prevent the granting of an exemption to a corporation of a quasi-public character. Yazoo, etc., R. Co. *v.* Yazoo Mississippi Delta Levee Com'rs, 37 Fed. 24 [*affirmed* in 132 U. S. 190, 10 S. Ct. 74, 33 L. ed. 308].

37. New Orleans *v.* Commercial Bank, 10 La. Ann. 735; People *v.* Auditor-Gen., 7 Mich. 84; Columbia, etc., R. Co. *v.* Chilberg, 6 Wash. 612, 34 Pac. 163; Wisconsin Cent. R. Co. *v.* Taylor County, 52 Wis. 37, 8 N. W. 833. See also cases cited *infra*, notes 38–42; and, generally, *supra*, II, B, 1, f, (I).

38. *Minnesota.*— St. Paul *v.* St. Paul, etc., R. Co., 23 Minn. 469. See also State *v.* Duluth, etc., R. Co., 77 Minn. 433, 80 N. W. 626.

North Dakota.— Northern Pac. R. Co. *v.* Barnes, 2 N. D. 310, 51 N. W. 386.

Washington.— Columbia, etc., R. Co. *v.* Chilberg, 6 Wash. 612, 34 Pac. 163.

Wisconsin.—Wisconsin Cent. R. Co. *v.* Taylor County, 52 Wis. 37, 8 N. W. 833.

United States.— Mobile, etc., R. Co. *v.* Tennessee, 153 U. S. 486, 14 S. Ct. 968, 38 L. ed. 793; Yazoo, etc., R. Co. *v.* Levee Com'rs, 37 Fed. 24 [*affirmed* in 132 U. S. 190, 10 S. Ct. 74, 33 L. ed. 308].

See 45 Cent. Dig. tit. "Taxation," § 311.

39. Com. *v.* Germania Brewing Co., 145 Pa. St. 83, 22 Atl. 240; Williams *v.* Rees, 2 Fed. 882, 9 Biss. 405.

40. *Indiana.*— State Bank *v.* New Albany, 11 Ind. 139, statute exempting from municipal taxation the capital stock of the bank of the state of Indiana.

Louisiana.— New Orleans *v.* People's Bank, 32 La. Ann. 82; Louisiana State Lottery Co. *v.* New Orleans, 24 La. Ann. 86 (exemption of a state lottery company); New Orleans *v.* Commercial Bank, 10 La. Ann. 735 (waterworks company).

Michigan.— People *v.* Auditor-Gen., 7 Mich. 84, ship canal company.

Pennsylvania.— Truby's Appeal, 96 Pa. St. 52 (bank); Fox *v.* Com'rs, 1 Pa. Co. Ct. 197 (building and loan associations); Fox *v.* Edelman, 1 Lehigh Val. L. Rep. 169 (building and loan associations).

Virginia.— Danville *v.* Shelton, 76 Va. 325, building and loan associations.

United States.— Yazoo, etc., R. Co. *v.* Levee Com'rs, 37 Fed. 24 [*affirmed* in 132 U. S. 190, 10 S. Ct. 74, 33 L. ed. 308].

See 45 Cent. Dig. tit. "Taxation," § 311.

41. Yazoo, etc., R. Co. *v.* Levee Com'rs, 37 Fed. 24 [*affirmed* in 132 U. S. 190, 10 S. Ct. 74, 33 L. ed. 308].

42. Humphreys *v.* Little Sisters of Poor, 7 Ohio Dec. (Reprint) 194, 1 Cinc. L. Bul. 286, holding that the property of a private corporation employed for purely public charitable purposes may be exempted from taxation, since in such cases the property of an individual is exempt.

43. *Georgia.*— Verdery *v.* Summerville, 82 Ga. 138, 2 S. E. 213.

Illinois.— Primm *v.* Belleville, 59 Ill. 142.

Indiana.— Bright *v.* McCullough, 27 Ind. 223.

Maryland.— Wells *v.* Hyattsville, 77 Md. 125, 26 Atl. 357, 20 L. R. A. 89.

Minnesota.— Drew *v.* Tifft, 79 Minn. 175, 81 N. W. 839, 47 L. R. A. 525, 79 Am. St. Rep. 446.

Nevada.— State *v.* Gracey, 11 Nev. 223.

North Carolina.— Harper *v.* New Hanover County, 133 N. C. 106, 45 S. E. 526; London *v.* Wilmington, 78 N. C. 109; Cobb *v.* Elizabeth City, 75 N. C. 1.

United States.— Gilman *v.* Sheboygan, 2 Black 510, 17 L. ed. 305.

See 45 Cent. Dig. tit. "Taxation," § 72.

No realty taxable.—A statute providing for the taxation of personal property alone in a district where there is no real estate subject to taxation is not in conflict with the constitutional provision. Gay *v.* Thomas, 5 Okla. 1, 46 Pac. 578.

Taxation of omitted property.— The legislature has power to provide for the taxation of real property which has escaped taxation in previous years, without also providing for the taxation of personal property of that class. Winona, etc., Land Co. *v.* Minnesota, 159 U. S. 526, 16 S. Ct. 83, 40 L. ed. 247.

Difference in date of assessment.— There is no illegal discrimination in providing that personal property shall be assessed for tax-

a specific direction, uniformity does not mean universality, but only that the tax shall be uniform on those kinds or classes of property selected to bear its burden, and it may be imposed on realty alone or on personalty alone.[44]

(II) *Between Residents and Non-Residents.* The federal constitution secures to the citizens of each state all the privileges and immunities of citizens in the several states; and this prevents a state from taxing the property of non-residents, found within its borders, at a higher rate than is imposed on its own citizens, or exacting from them higher license or privilege taxes.[45] The same result is also held to follow from the constitutional provisions requiring the taxation of all property at an equal and uniform rate.[46]

(III) *Between Corporations.* Unless restrained by some constitutional provision for the equal taxation of all property within the state, applicable as well to corporations as to individuals,[47] it is competent for the legislature to divide

ation as of the first day of May in each year and that real property may be assessed at any time between that date and the last Monday of June. Wisconsin Cent. R. Co. *v.* Lincoln County, 57 Wis. 137, 15 N. W. 121.

44. *Dakota.*— Farris *v.* Vannier, 6 Dak. 186, 42 N. W. 31, 3 L. R. A. 713.

Louisiana.— Oubre *v.* Donaldsonville, 33 La. Ann. 386.

New Jersey.— Chancellor *v.* Elizabeth, 65 N. J. L. 479, 47 Atl. 454.

Pennsylvania.— Com. *v.* Mammoth Vein Coal, etc., Co., 3 Dauph. Co. Rep. 220.

United States.— Louisiana *v.* Pilsbury, 105 U. S. 278, 26 L. ed. 1090 [*reversing* 31 La. Ann. 1].

In dividing a county or township the legislature may relieve the personal property of the detached territory from liability for the previous debts of the county or township while continuing the liability of real property. Ottawa County *v.* Nelson, 19 Kan. 234, 27 Am. Rep. 101.

45. *Alabama.*—Wiley *v.* Parmer, 14 Ala. 627.

Arkansas.— Scott *v.* Watkins, 22 Ark. 556.

Colorado.— Smith *v.* Farr, 46 Colo. 364, 104 Pac. 401; Leonard *v.* Reed, 46 Colo. 307, 104 Pac. 410, 133 Am. St. Rep. 77.

Kentucky.— Rash *v.* Halloway, 82 Ky. 674; Daniel *v.* Richmond, 78 Ky. 542.

Louisiana.— McGuire *v.* Parker, 32 La. Ann. 832.

Massachusetts.— Oliver *v.* Washington Mills, 11 Allen 268.

Missouri.— State *v.* North, 27 Mo. 464; Crow *v.* State, 14 Mo. 237.

New Hampshire.— State *v.* Lancaster, 63 N. H. 267.

United States.— Ward *v.* Maryland, 12 Wall. 418, 20 L. ed. 449; Crandall *v.* Nevada, 6 Wall. 35, 18 L. ed. 744, 745; Corfield *v.* Coryell, 6 Fed. Cas. No. 3,230, 4 Wash. 371.

46. *Arkansas.*— Redd *v.* St. Francis County, 17 Ark. 416.

Colorado.— Leonard *v.* Reed, 46 Colo. 307, 104 Pac. 410, 133 Am. St. Rep. 77.

Georgia.— Mutual Reserve Fund L. Assoc. *v.* Augusta, 109 Ga. 73, 35 S. E. 71. *Compare* Jones *v.* Columbus, 25 Ga. 610.

Indiana.— See Buck *v.* Beach, 164 Ind. 37, 71 N. E. 963, 108 Am. St. Rep. 272.

Kansas.— *In re* Page, 60 Kan. 842, 58 Pac. 478, 47 L. R. A. 68; Marion, etc., R. Co. *v.* Champlin, 37 Kan. 682, 16 Pac. 222.

Louisiana.— Amat's Succession, 18 La. Ann. 403.

Massachusetts.— See Provident Sav. Inst. *v.* Boston, 101 Mass. 575, 3 Am. Rep. 407.

Nebraska.— State *v.* Poynter, 59 Nebr. 417, 81 N. W. 431.

South Carolina.— State *v.* Charleston, 2 Speers 719.

Tennessee.— Nashville *v.* Althorp, 5 Coldw. 554.

Canada.— Hudson Bay Co. *v.* Atty.-Gen., Manitoba t. Wood 209, holding that a tax of a certain sum per acre on lands belonging to residents and of five times as much on lands of non-residents is invalid, as violating the fundamental principle of equality in taxation.

See 45 Cent. Dig. tit. "Taxation," § 73.

Tax for grazing cattle.— A state tax on cattle driven into the state for grazing purposes during a portion of the year is invalid if it is imposed on the property of non-residents alone or at a higher rate than on the cattle of resident owners. Kiowa County Com'rs *v.* Dunn, 21 Colo. 185, 40 Pac. 357; Graham *v.* Chautauqua County, 31 Kan. 473, 2 Pac. 549; Farris *v.* Henderson, 1 Okla. 384, 33 Pac. 380; Reser *v.* Umatilla County, 48 Oreg. 326, 86 Pac. 595. See also Kelley *v.* Rhoades, 7 Wyo. 237, 51 Pac. 593, 75 Am. St. Rep. 904, 39 L. R. A. 594.

Discrimination as to time of making assessment.— A statute regulating the assessment and taxation of logs belonging to non-residents is not unconstitutional in providing for an assessment in April, while logs belonging to residents are assessed in May. Nelson Lumber Co. *v.* Loraine, 22 Fed. 54.

47. Georgia State Bldg., etc., Assoc. *v.* Savannah, 109 Ga. 63, 35 S. E. 67; Hawkeye Ins. Co. *v.* French, 109 Iowa 585, 80 N. W. 660; Cumberland Tel., etc., Co. *v.* Hopkins, 121 Ky. 850, 90 S. W. 594, 28 Ky. L. Rep. 846; Detroit *v.* Mackinaw Transp. Co., 140 Mich. 174, 103 N. W. 557; Teagan Transp. Co. *v.* Detroit Bd. of Assessors, 139 Mich. 1, 102 N. W. 273.

Tax imposed on all corporations.— A franchise or other tax which applies to all corporations subject to the power of the state, without discrimination, is valid and constitutional. Paducah St. R. Co. *v.* McCracken

corporations into various classes for the purposes of taxation,[48] and a tax law satisfies the requirement of equality and uniformity which falls impartially upon all corporations of the same kind or class, as all railroads or all banks,[49] although other corporations of a different character are taxed at a different rate or not at all.[50] But a law which discriminates between corporations of the same class, taxing some at a different rate from others, is invalid.[51]

(IV) *As to Rate or Mode of Assessment and Valuation* — (A) *In General.* The principle of uniformity in taxation requires uniformity in the mode of assessment as well as in the rate charged,[52] particularly where it is expressly required to be by a uniform rule,[53] and forbids discrimination between different classes or species of property all equally subject to the tax, whether this is accomplished by taxing them at different rates on their actual value,[54] or by assessing one kind of property at a certain proportion of its real value and another kind at another proportion.[55] But so long as no such discrimination results, but an

County, 105 Ky. 472, 49 S. W. 178; Com. *v.* Delaware, etc., Canal Co., 1 Dauph. Co. Rep. (Pa.) 257.

48. See *infra*, II, B, 2, b.

49. *Alabama.*—Phœnix Carpet Co. *v.* State, 118 Ala. 143, 22 So. 627, 72 Am. St. Rep. 143; Phœnix Assur. Co. *v.* Montgomery Fire Dept., 117 Ala. 631, 23 So. 843, 42 L. R. A. 468.

Colorado.— American Refrigerator Transit Co. *v.* Thomas, 28 Colo. 119, 63 Pac. 410.

Missouri.— Northwestern Masonic Aid Assoc. *v.* Waddill, 138 Mo. 628, 40 S. W. 648.

New Hampshire.— State *v.* Manchester, etc., Co., 69 N. H. 35, 38 Atl. 736.

New Jersey.— Mechanics' Nat. Bank *v.* Baker, 65 N. J. L. 113, 46 Atl. 586.

North Carolina.—Piedmont R. Co. *v.* Reidsville, 101 N. C. 404, 8 S. E. 124, 2 L. R. A. 284.

Pennsylvania.— Iron City Bank *v.* Pittsburgh, 37 Pa. St. 340.

South Carolina.— Charlotte, etc., Co. *v.* Gibbes, 27 S. C. 385, 4 S. E. 49.

Washington.— Pacific Nat. Bank *v.* Pierce County, 20 Wash. 675, 56 Pac. 936.

United States.— McHenry *v.* Alford, 168 U. S. 651, 18 S. Ct. 242, 42 L. ed. 614.

See 45 Cent. Dig. tit. "Taxation," § 75.

50. Scobee *v.* Bean, 109 Ky. 526, 59 S. W. 860, 22 Ky. L. Rep. 1076; Louisville Tobacco Warehouse Co. *v.* Com., 106 Ky. 165, 49 S. W. 1069, 20 Ky. L. Rep. 1747, 90 Am. St. Rep. 236, 57 L. R. A. 33; Matter of Tiffany, 80 Hun (N. Y.) 486, 30 N. Y. Suppl. 494; Com. *v.* Alden Coal Co., 164 Pa. St. 284, 30 Atl. 127.

51. Worth *v.* Wilmington, etc., R. Co., 89 N. C. 291, 45 Am. Rep. 679; Com. *v.* New York, etc., R. Co., 188 Pa. St. 169, 41 Atl. 594; Com. *v.* Mammoth Vein Coal Co., 3 Dauph. Co. Rep. (Pa.) 220; Com. *v.* Jamestown, etc., R. Co., 3 Dauph. Co. Rep. (Pa.) 214; Com. *v.* Lake Shore, etc., R. Co., 3 Dauph. Co. Rep. (Pa.) 172.

Franchise tax.— That the legislature imposes on one corporation a franchise tax while it relieves another therefrom does not render the act imposing the franchise tax unconstitutional. People *v.* Glynn, 194 N. Y. 387, 87 N. E. 434 [*affirming* 127 N. Y. App. Div. 933, 111 N. Y. Suppl. 1139]. The federal constitution does not forbid state taxation of the franchise of a domestic corporation at a different rate than is assessed upon the tangible property in the state. Coulter *v.* Louisville, etc., R. Co., 196 U. S. 599, 25 S. Ct. 342, 49 L. ed. 615.

Exception as to foreign corporations.— There is no requirement either in the constitution of the United States or that of Iowa that a tax on the business of foreign corporations imposed by the state as a condition of their doing business within its limits shall be uniform upon all who are engaged in that business. Scottish Union, etc., Ins. Co. *v.* Herriott, 109 Iowa 606, 80 N. W. 665, 77 Am. St. Rep. 548.

52. Green *v.* Hutchinson, 128 Ga. 379, 57 S. E. 353; State *v.* Tonella, 70 Miss. 701, 14 So. 17, 22 L. R. A. 346; State *v.* U. S., etc., Express Co., 60 N. H. 219; Railroad, etc., Cos. *v.* Tennessee Bd. of Equalizers, 85 Fed. 302; Santa Clara County *v.* Southern Pac. R. Co., 18 Fed. 385 [*affirmed* in 118 U. S. 394, 6 S. Ct. 1132, 30 L. ed. 118]; Railroad Tax Cases, 13 Fed. 722, 8 Sawy. 238. *Compare* Pacific Nat. Bank *v.* Pierce County, 20 Wash. 675, 56 Pac. 936.

53. Carolina Cent. R. Co. *v.* Wilmington, 72 N. C. 73; Columbia Exch. Bank *v.* Hines, 3 Ohio St. 1.

54. *Georgia.*— Savannah *v.* Weed, 84 Ga. 683, 11 S. E. 235, 8 L. R. A. 270.

Massachusetts.— *In re* Opinion of Justices, 195 Mass. 607, 84 N. E. 499.

Mississippi.— Adams *v.* Mississippi State Bank, 75 Miss. 701, 23 So. 395.

Missouri.— State *v.* Switzler, 143 Mo. 287, 45 S. W. 245, 65 Am. St. Rep. 653, 40 L. R. A. 280.

Nevada. — State *v.* Eastabrook, 3 Nev. 173.

New Hampshire.— Amoskeag Mfg. Co. *v.* Manchester, 70 N. H. 336, 47 Atl. 74.

New Jersey.— Central R. Co. *v.* State Bd. of Assessors, 49 N. J. L. 1, 7 Atl. 306.

55. *Massachusetts.*— Cheshire *v.* Berkshire County Com'rs, 118 Mass. 386.

Mississippi.— Hawkins *v.* Mangum, 78 Miss. 97, 28 So. 872.

Nebraska.— State *v.* Osborn, 60 Nebr. 415, 83 N. W. 357; Havelock High School Dist. No. 137 *v.* Lancaster County, 60 Nebr. 147, 82 N. W. 380, 83 Am. St. Rep. 525, 49 L. R. A. 343.

equal distribution of the tax upon all the property subject to it, there is no constitutional objection to providing for the valuation of different kinds of property by different boards or officers,[56] or at different times,[57] or according to a different mode of procedure.[58]

New York.— People *v.* Fraser, 145 N. Y. 593, 40 N. E. 165.

Washington.—Andrews *v.* King County, 1 Wash. 46, 23 Pac. 409, 22 Am. St. Rep. 136.

Wyoming.— Frontier Land, etc., Co. *v.* Baldwin, 3 Wyo. 764, 31 Pac. 403.

United States.— Cummings *v.* Merchants' Nat. Bank, 101 U. S. 153, 25 L. ed. 903; Taylor *v.* Louisville, etc., R. Co., 88 Fed. 350, 31 C. C. A. 537; Railroad, etc., Cos. *v.* Tennessee Bd. of Equalizers, 85 Fed. 302; Shreveport First Nat. Bank *v.* Lindsay, 45 Fed. 619 [*reversed* on other grounds in 156 U. S. 485, 15 S. Ct. 472, 39 L. ed. 505]. *Compare* Bell's Gap R. Co. *v.* Com., 134 U. S. 232, 10 S. Ct. 533, 33 L. ed. 892.

Classification.— Where there is a proper ground for the classification of different kinds of property (see *infra*, II, B, 2), it is not a violation of the requirement of equality and uniformity that different classes are assessed at different rates in proportion to their values if all property of each class is assessed uniformly in proportion to its value (Smith *v.* Kelly, 24 Oreg. 464, 33 Pac. 642).

Tax on income or receipts of corporations. — A tax upon a corporation may be proportioned to its income or earnings, as well as to the value of its franchises or the property possessed. Kneeland *v.* Milwaukee, 15 Wis. 454; Milwaukee, etc., R. Co. *v.* Waukesha County, 9 Wis. 431 note; Minot *v.* Philadelphia, etc., R. Co., 18 Wall. (U. S.) 206, 21 L. ed. 888. But see State *v.* U. S., etc., Express Co., 60 N. H. 219.

Tax on rents reserved.— A statute taxing rents reserved in leases, which are to be assessed at a principal sum, the interest on which at the legal rate would produce a sum equal to such annual rents, is not invalid as fixing the valuation of a particular kind of property, instead of leaving it to be determined as in the case of other property. Livingston *v.* Hollenbeck, 4 Barb. (N. Y.) 9; Loring *v.* State, 16 Ohio 590.

Property unlawfully omitted.— There is no constitutional objection to a statute providing for the taxation of property which was unlawfully omitted from assessment, or for its reassessment where there was a gross undervaluation. State *v.* Weyerhauser, 68 Minn. 353, 71 N. W. 265.

Income not property.— A constitutional provision that "taxes shall be *ad valorem* only and uniform on all species of property taxed" does not require that the gross earnings of merchants and the interest on bonds and notes shall be taxed at the same rate as real estate; for income is not "property" in this sense. Waring *v.* Savannah, 60 Ga. 93.

Right to object to assessment.— A corporation whose franchise has been assessed at its fair cash value by the board of assessors cannot complain of the inequality caused by the fact that other officers have, in violation of the constitution and statutes, assessed property at less than its fair cash value. Louisville R. Co. *v.* Com., 105 Ky. 710, 49 S. W. 486, 20 Ky. L. Rep. 1509.

56. *Arkansas.*— Wells *v.* Crawford County, 63 Ark. 576, 40 S. W. 710, 37 L. R. A. 371.

Illinois.— People *v.* Cook County, 176 Ill. 576, 52 N. E. 334. See also Burton Stock Car Co. *v.* Traeger, 187 Ill. 9, 58 N. E. 418.

Indiana.— Whitney *v.* Ragsdale, 33 Ind. 107, 5 Am. Rep. 185.

Kentucky.— Com. *v.* Taylor, 101 Ky. 325, 41 S. W. 11, 19 Ky. L. Rep. 552.

Maryland.— State *v.* Baltimore, 105 Md. 1, 65 Atl. 369.

Nevada.— Sawyer *v.* Dooley, 21 Nev. 390, 32 Pac. 437.

New Jersey.— Bergen, etc., R. Co. *v.* State Bd. of Assessors, 74 N. J. L. 742, 67 Atl. 668; State Bd. of Assessors *v.* Central R. Co., 48 N. J. L. 146, 4 Atl. 578.

United States.— Cummings *v.* Merchants' Nat. Bank, 101 U. S. 153, 25 L. ed. 903.

Property of individuals and of corporations see *infra*, II, B, 4, b.

Necessity of equalization.— Under a constitutional provision requiring uniformity in taxation, it is the duty of a state, where different kinds of property are assessed by different boards or officers, to provide for equalization between them. Railroad, etc., Cos. *v.* Tennessee Bd. of Equalizers, 85 Fed. 302. And see Missouri, etc., R. Co. *v.* Geary County, 9 Kan. App. 350, 58 Pac. 121.

57. *Illinois.*— McVeagh *v.* Chicago, 49 Ill. 318.

Kentucky.— Worten *v.* Paducah, 123 Ky. 44, 93 S. W. 617, 29 Ky. L. Rep. 450.

Oklahoma.— Gay *v.* Thomas, 5 Okla. 1, 46 Pac. 578.

Washington.— Wright *v.* Stinson, 16 Wash. 368, 47 Pac. 761.

Wisconsin.— Wisconsin Cent. R. Co. *v.* Lincoln County, 57 Wis. 137, 15 N. W. 121.

58. *Georgia.*— McLendon *v.* La Grange, 107 Ga. 356, 33 S. E. 405.

Kansas.— Ottawa County *v.* Nelson, 19 Kan. 234, 27 Am. Rep. 101. And see Geary County *v.* Missouri, etc., R. Co., 62 Kan. 168, 61 Pac. 693.

Kentucky.— Com. *v.* Taylor, 101 Ky. 325, 41 S. W. 11, 19 Ky. L. Rep. 552.

New Jersey.— Bergen, etc., R. Co. *v.* State Bd. of Assessors, 74 N. J. L. 742, 67 Atl. 668.

Oklahoma.— Boyd *v.* Wiggins, 7 Okla. 85, 54 Pac. 411.

Texas.— Missouri, etc., R. Co. *v.* Shannon, 100 Tex. 379, 100 S. W. 138, 10 L. R. A. N. S. 681.

Virginia.— Com. *v.* Brown, 91 Va. 762, 21 S. E. 357, 28 L. R. A. 110.

Washington.— Nathan *v.* Spokane County, 35 Wash. 26, 76 Pac. 521, 102 Am. St. Rep. 888, 65 L. R. A. 336.

Wisconsin.— Chicago, etc., R. Co. *v.* State, 128 Wis. 553, 108 N. W. 557.

(B) *Provision For Deducting Indebtedness.* The rule of equality and uniformity in taxation is not violated by permitting the taxpayer, in listing or returning the amount of his taxable property, to deduct the amount of his actual present indebtedness, whether this allowance be made against personal property and credits,[59] or by the deduction of a mortgage debt from the value of the real estate on which it is a lien,[60] or by allowing a corporation to deduct from its taxable assets the value of its real estate which is separately taxed.[61] But there must be no discrimination in this respect between different classes of property,[62] or between different individuals or corporations.[63]

(V) *As to Enforcement and Payment of Taxes* — (A) *In General.* Since the constitutional rule applies to the statute imposing the tax, rather than to the details of its administration, an objection to the validity of the law on this ground cannot be predicated on the mere fact that the statute, which imposes the tax, makes different provisions for the collection and enforcement of taxes on different kinds of property or as to different classes of taxpayers,[64] as by directing that certain taxes shall be paid or collectable at an earlier date than others,[65]

59. *Alabama.*— State Bank *v.* Montgomery County Bd. of Revenue, 91 Ala. 217, 8 So. 852.

Illinois.— Edwards *v.* People, 88 Ill. 340.

Indiana.— Florer *v.* Sheridan, 137 Ind. 28, 36 N. E. 365, 23 L. R. A. 278.

Michigan.—Stumpf *v.* Storz, 156 Mich. 228, 120 N. W. 618, 132 Am. St. Rep. 521, 23 L. R. A. N. S. 152.

Minnesota.— State *v.* Northern Pac. R. Co., 95 Minn. 43, 103 N. W. 731; State *v.* London, etc., Mortg. Co., 80 Minn. 277, 83 N. W. 339; State *v.* Moffett, 64 Minn. 292, 67 N. W. 68.

Nebraska.— Scandinavian Mut. Aid Assoc. *v.* Kearney County, 81 Nebr. 473, 118 N. W. 333, 81 Nebr. 468, 116 N. W. 155.

Oregon.— Wetmore *v.* Multnomah County, 6 Oreg. 463.

See 45 Cent. Dig. tit. "Taxation," § 80.

Contra.— Columbus Exch. Bank *v.* Hinds, 3 Ohio St. 1; Cincinnati Gas Light, etc., Co. *v.* Bowman, 1 Handy (Ohio) 289; *In re* Construction of Revenue Law, 2 S. D. 58, 48 N. W. 813; Nathan *v.* Spokane County, 35 Wash. 26, 76 Pac. 521, 102 Am. St. Rep. 888, 65 L. R. A. 336.

60. State *v.* Smith, 158 Ind. 543, 63 N. E. 25, 214, 64 N. E. 18, 63 L. R. A. 116.

61. Michigan Mut. L. Ins. Co. *v.* Hartz, 129 Mich. 104, 88 N. W. 405.

62. *In re* Assessment, etc., of Taxes, 4 S. D. 6, 54 N. W. 818 (holding a statute to be invalid which allowed a deduction of debts from personal property and credits but not from the value of real estate); Pullman State Bank *v.* Manring, 18 Wash. 250, 51 Pac. 464 (holding a statute to be invalid which allowed the deduction of debts from money or credits "other than bank stock"). But see Paddell *v.* New York, 50 Misc. (N. Y.) 422, 100 N. Y. Suppl. 581 [*affirmed* in 114 N. Y. App. Div. 911, 100 N. Y. Suppl. 1133 (*affirmed* in 187 N. Y. 552, 80 N. E. 1114 [*affirmed* in 211 U. S. 446, 29 S. Ct. 139, 53 L. ed. 275])].

Discrimination against national bank stock. — That the law of a state permits the taxpayer to deduct the amount of his indebtedness from the amount of all bonds, notes, and other evidences of debt on which he is taxable does not necessarily render the assessment of shares of stock in a national bank at their market value, without allowing the holder to deduct his debts, an unlawful discrimination against such stock; and the court will not so pronounce it in the absence of any data from which to determine what proportion the moneyed capital of individual citizens included in the term "credits" bears to the amount invested in national bank stock. Wellington First Nat. Bank *v.* Chapman, 173 U. S. 205, 19 S. Ct. 407, 43 L. ed. 669; People's Nat. Bank *v.* Marye, 107 Fed. 570 [*affirmed* in 191 U. S. 272, 24 S. Ct. 68, 48 L. ed. 180].

63. *Michigan.*— Standard L., etc., Ins. Co. *v.* Detroit Bd. of Assessors, 95 Mich. 466, 55 N. W. 112.

Minnesota.— State *v.* Duluth Gas, etc., Co., 76 Minn. 96, 78 N. W. 1032, 57 L. R. A. 63.

Montana.— Clark *v.* Maher, 34 Mont. 391, 87 Pac. 272.

Ohio.— Fayette County *v.* People's, etc., Bank, 47 Ohio St. 503, 25 N. E. 697, 10 L. R. A. 196.

United States.—Wellington First Nat. Bank *v.* Chapman, 173 U. S. 205, 19 S. Ct. 407, 43 L. ed. 669.

But see Johnson County *v.* Johnson, (Ind. 1909) 89 N. E. 590.

64. Fairfield *v.* People, 94 Ill. 244; Atchison, etc., R. Co. *v.* Clark, 60 Kan. 831, 58 Pac. 561; People *v.* New York Floating Dry Dock Co., 11 Abb. N. Cas. (N. Y.) 40, 63 How. Pr. 451 [*affirmed* in 92 N. Y. 487]; Anderson *v.* Ritterbusch, 22 Okla. 761, 98 Pac. 1002.

It is uniformity of burden and not identity of methods of enforcement which is required by the constitutional provisions. Galusha *v.* Wendt, 114 Iowa 597, 87 N. W. 512.

65. Rode *v.* Siebe, 119 Cal. 518, 51 Pac. 869, 39 L. R. A. 342; Com. *v.* Taylor, 101 Ky. 325, 41 S. W. 11, 19 Ky. L. Rep. 552; Tax-Payers' Protective Assoc. *v.* Kirkpatrick, 41 N. J. Eq. 347, 7 Atl. 625. *Contra*, Atlanta, etc., R. Co. *v.* Wright, 87 Ga. 487, 13 S. E. 578.

or by allowing a discount for prompt payment to one class of taxpayers and not to another.[66]

(B) *Imposition of Penalty.*[67] A statute imposing a penalty for delinquency in the payment of taxes, or for failure or refusal to return property for assessment, is not invalid on the ground of inequality or unjust discrimination; [68] but a penalty cannot be imposed for any default or omission which is wholly that of the public officers and not of the taxpayer.[69]

h. Fixing Situs of Property For Purpose of Taxation. The legislature may, without violating the constitutional provisions in regard to equality and uniformity of taxation, fix the *situs* of personal property for purposes of taxation,[70] and give it a *situs* other than the domicile of the owner,[71] it being sufficient if the property where it is taxed is taxed equally and uniformly with other property in the same taxing locality,[72] but real property must be taxed where it is actually situated.[73]

66. Louisville, etc., R. Co. *v.* Louisville, 29 S. W. 865, 16 Ky. L. Rep. 796.

67. **As violation of provision requiring taxation according to value** see *infra*, II, D, 4.

68. *California.*— Biddle *v.* Oaks, 59 Cal. 94.

Kansas.— Missouri, etc., R. Co. *v.* Miami County Com'rs, 67 Kan. 434, 73 Pac. 103; Missouri, etc., R. Co. *v.* Labette County, 9 Kan. App. 545, 59 Pac. 383.

Nevada.—Virginia *v.* Chollar-Potosi Gold, etc., Min. Co., 2 Nev. 86.

Pennsylvania.— Fox's Appeal, 112 Pa. St. 337, 4 Atl. 149.

South Carolina.— *Ex p.* Lynch, 16 S. C. 32.

Tennessee.— Myers *v.* Park, 8 Heisk. 550.

Vermont.— Bartlett *v.* Wilson, 59 Vt. 23, 8 Atl. 321.

Washington.— State *v.* Whittlesey, 17 Wash. 447, 50 Pac. 119.

United States.— Doll *v.* Evans, 7 Fed. Cas. No. 3,969, 9 Phila. (Pa) 364.

See 45 Cent. Dig. tit. "Taxation," §§ 84, 121.

But see Scammon *v.* Chicago, 44 Ill. 269.

Where property has been omitted from the assessment of a particular year or years and has thereby escaped taxation, it is not a violation of the constitutional provision as to equality and uniformity to assess such property in a subsequent year for the back taxes which should have been paid. Biddle *v.* Oakes, 59 Cal. 94; Galusha *v.* Wendt, 114 Iowa 597, 87 N. W. 512; Redwood County *v.* Winona, etc., Land Co., 40 Minn. 512, 41 N. W. 465, 42 N. W. 473 [*affirmed* in 159 U. S. 526, 16 S. Ct. 83, 40 L. ed. 247].

A provision that taxes shall bear interest after the date on which they are payable does not violate the constitutional requirement as to equality and uniformity. Galveston, etc., R. Co. *v.* Galveston, 96 Tex. 520, 74 S. W. 537.

69. Redwood County *v.* Winona, etc., Land Co., 40 Minn. 512, 41 N. W. 465, 42 N. W. 475 [*affirmed* in 159 U. S. 526, 16 S. Ct. 83, 40 L. ed. 247], holding that where it is the duty of the taxing officers to assess land and there is no duty on the part of the owner to list them for taxation, and lands are omitted from an assessment by such officers, it is competent to reassess them in a subsequent year for the back taxes, but that no penalty can be imposed, as by the addition of interest, for the non-payment of such taxes, the owner not having been in default.

70. *Illinois.*— Mendota First Nat. Bank *v.* Smith, 65 Ill. 44.

Kansas.—Ottawa County *v.* Nelson, 19 Kan. 234, 27 Am. Rep. 101.

New Jersey.— Vanatta *v.* Runyon, 41 N. J. L. 98.

Oregon.— Crawford *v.* Linn County, 11 Oreg. 482, 5 Pac. 738.

United States.— Dundee Mortg. Trust Inv. Co. *v.* Parrish, 24 Fed. 197.

See 45 Cent. Dig. tit. "Taxation," § 83.

Mortgages.— The rule stated in the text applies to a statute authorizing mortgages to be taxed in the county where they are recorded, without reference to the residence of the owner (Crawford *v.* Linn County, 11 Oreg. 482, 5 Pac. 738; Dundee Mortg. Trust Inv. Co. *v.* Parrish, 24 Fed. 197), and to a statute requiring mortgages to be taxed in the town or city where the premises are situated (Vanatta *v.* Runyon, 41 N. J. L. 98).

Corporate property.—A statute making personal property of a domestic corporation subject to taxation in the state, although actually out of the state, does not contravene the constitutional requirement of uniformity. Com. *v.* Union Refrigerator Transit Co., 181 Ky. 131, 80 S. W. 490, 26 Ky. L. Rep. 23, 81 S. W. 268, 26 Ky. L. Rep. 397.

Shares of stock.—A statute making shares of national bank stock taxable at the place where the bank is situated without regard to the residence of the owners is not unconstitutional. Mendota First Nat. Bank *v.* Smith, 65 Ill. 44. *Contra*, Union Nat. Bank *v.* Chicago, 24 Fed. Cas. No. 14,374, 3 Biss. 82.

Railroad property.— The scope of the power of the legislature to fix the *situs* of railroad property for taxation has regard to the nature of such property as personalty. Chicago, etc., R. Co. *v.* State, 128 Wis. 553, 108 N. W. 557.

71. Mendota First Nat. Bank *v.* Smith, 65 Ill. 44; Crawford *v.* Linn County, 11 Oreg. 482, 5 Pac. 738. See also cases cited *supra*, note 70.

72. See Vanatta *v.* Runyon, 41 N. J. L. 98.

73. Com. *v.* Wyoming County, 22 Pa. Co. Ct. 418.

i. Discrimination in Distribution or Application of Taxes Collected. A constitutional provision that taxes shall be uniform applies only to their levy and assessment, not to the expenditure or distribution of the money raised by the tax.[74]

2. Classification For Purposes of Taxation — a. In General.[75] Unless specially restrained from so doing by the constitution itself,[76] it is competent for the legislature to arrange and divide the various subjects of taxation into distinct classes and to impose taxation at different rates on the several classes; this does not violate the requirement of equality and uniformity, provided the tax is uniform upon all members of the same class,[77] and provided the classification is made on a

74. Kerr *v.* Perry School Tp., 162 Ind. 310, 70 N. E. 246; Holton *v.* Mecklenburg County, 93 N. C. 430. But see Riggsbee *v.* Durham, 94 N. C. 800, and Puitt *v.* Gaston County, 94 N. C. 709, 55 Am. Rep. 638, holding that an act requiring a tax on the polls and property of colored persons to be applied exclusively to the education of their children was an unlawful discrimination and unconstitutional.

75. See, generally, Constitutional Law, 8 Cyc. 1052.

76. Adams *v.* Kuykendall, 83 Miss. 571, 35 So. 830; State *v.* Winnebago Lake, etc., Plank Road Co., 11 Wis. 35; Nashville, etc., R. Co. *v.* Taylor, 86 Fed. 168.

Provision for taxation according to value as affecting classification of property see *infra*, II, D, 1.

77. *Colorado.*— People *v.* Henderson, 12 Colo. 369, 21 Pac. 144.

Florida.— Hays *v.* Walker, 54 Fla. 163, 44 So. 747; Levy *v.* Smith, 4 Fla. 154.

Illinois.—Ayres *v.* Chicago, 239 Ill. 237, 87 N. E. 1073; Sterling Gas Co. *v.* Higby, 134 Ill. 557, 25 N. E. 660; Coal Run Coal Co. *v.* Finlen, 124 Ill. 666, 17 N. E. 11.

Indiana.— Johnson County *v.* Johnson, (1909) 89 N. E. 590.

Kentucky.—Louisville *v.* Com., 134 Ky. 488, 121 S. W. 411; Carpenter *v.* Central Covington, 118 Ky. 785, 81 S. W. 199, 26 Ky. L. Rep. 430.

Louisiana.— New Orleans *v.* Kaufman, 29 La. Ann. 283, 29 Am. Rep. 328; State *v.* Lathrop, 10 La. Ann. 398.

Maryland.— Baltimore Consol. Gas Co. *v.* Baltimore, 105 Md. 43, 65 Atl. 628, 121 Am. St. Rep. 553.

Minnesota.— Mut. Ben. L. Ins. Co. *v.* Martin County, 104 Minn. 179, 526, 116 N. W. 572, 575.

Missouri.— Elting *v.* Hickman, 172 Mo. 237, 72 S. W. 700. *Compare* Copeland *v.* St. Joseph, 126 Mo. 417, 29 S. W. 281.

New Jersey.— State Bd. of Assessors *v.* New Jersey Cent. R. Co., 48 N. J. L. 146, 4 Atl. 578.

New York.— *In re* Keeney, 194 N. Y. 281, 87 N. E. 428 [*affirming* 128 N. Y. App. Div. 893, 112 N. Y. Suppl. 1148]; People *v.* Mensching, 187 N. Y. 8, 79 N. E. 884 [*affirming* 115 N. Y. App. Div. 893, 101 N. Y. Suppl. 1138]; People *v.* Reardon, 184 N. Y. 431, 77 N. E. 970, 112 Am. St. Rep. 628, 8 L. R. A. N. S. 314.

North Carolina.— Caldwell Land, etc., Co. *v.* Smith, 151 N. C. 70, 65 S. E. 641; Atlantic, etc., R. Co. *v.* New Bern, 147 N. C. 165, 60 S. E. 925.

Oregon.— Smith *v.* Kelly, 24 Oreg. 464, 33 Pac. 642.

Pennsylvania.— Com. *v.* Germania Brewing Co., 145 Pa. St. 83, 22 Atl. 240; Com. *v.* Lehigh Valley R. Co., 129 Pa. St. 429, 18 Atl. 406, 410; Com. *v.* Halstead, 1 Pa. Co. Ct. 45; Fox *v.* Edelman, 1 Lehigh Val. L. Rep. 169.

Texas.— Kettle *v.* Dallas, 35 Tex. Civ. App. 632, 80 S. W. 874.

Wisconsin.— Beals *v.* State, 139 Wis. 544, 121 N. W. 347. But see Chicago, etc., R. Co. *v.* State, 128 Wis. 553, 108 N. W. 557, holding that for purposes of direct taxation the legislature has unlimited authority to determine what property shall be taxed and what shall not, but that this is the only classification permissible, all property which is taxed constituting one class which must be taxed uniformly.

United States.—Michigan R. Tax Cases, 138 Fed. 223 [*affirmed* in 201 U. S. 245, 26 S. Ct. 459, 50 L. ed. 744]; Singer Mfg. Co. *v.* Wright, 33 Fed. 121 [*affirmed* in 141 U. S. 696, 12 S. Ct. 103, 35 L. ed. 906].

See 45 Cent. Dig. tit. "Taxation," § 90.

Classification for purposes of inheritance or transfer taxation held valid see *In re* Keeney, 194 N. Y. 281, 87 N. E. 428 [*affirming* 128 N. Y. App. Div. 893, 112 N. Y. Suppl. 1148]; Beals *v.* State, 139 Wis. 544, 121 N. W. 347.

Poll taxes.— Individuals may be classified according to age or other circumstances and a poll tax required of some and not required of others provided the classification is based upon reasonable and substantial grounds (Bluitt *v.* State, 56 Tex. Cr. 525, 121 S. W. 168; Solon *v.* State, 54 Tex. Cr. 261, 114 S. W. 349; Tekoa *v.* Reilly, 47 Wash. 202, 91 Pac. 769, 13 L. R. A. N. S. 901 [*overruling* State *v.* Ide, 35 Wash. 576, 77 Pac. 961, 102 Am. St. Rep. 914, 67 L. R. A. 280]); but there must be no arbitrary discrimination as to persons of the same class (Kansas City *v.* Whipple, 136 Mo. 475, 38 S. W. 295, 58 Am. St. Rep. 657, 35 L. R. A. 747).

Taxing whole or constituent elements.— It is within the legislative discretion either to tax the constituent elements of the property as by taxing separately the corporate capital and corporate shares or the separate estate of the life-tenant, remainder-man, etc.,

fair and reasonable system based on grounds of public policy or on some natural and substantial difference of situation or circumstances;[78] but a classification cannot be sustained which is arbitrary, invidious, or unreasonable,[79] and the tax must be equal and uniform as to the class upon which it operates.[80]

b. Corporations and Corporate Property — (i) *In General.* Pursuant to the principles just stated, it is competent for the state to classify domestic corporations, for the purposes of taxation, according to the nature of their business,[81]

or to tax at its full value the thing which represents these various elements of property. Com. *v.* Walsh, 133 Ky. 103, 106 S. W. 240, 117 S. W. 398.

Banks and individuals may be put in separate classes and different rules applied as to the nature and amount of the deduction of debits from credits. Johnson County *v.* Johnson, (Ind. 1909) 89 N. E. 590.

Real and personal property.— The legislature has power to classify property as personal and real for purposes of taxation, and is not controlled in so doing by the common-law distinctions between those classes of property. Missouri, etc., R. Co. *v.* Miami County, 67 Kan. 434, 73 Pac. 103. But see *supra*, II, B, 1, g, (I).

Business or occupation taxes.— In respect to the classification of occupations or pursuits for purposes of taxation, a tax law possesses the requisite character of uniformity if the persons subject to it are duly divided into classes and the law operates on the members of each class uniformly under the same circumstances. Aachen, etc., F. Ins. Co. *v.* Omaha, 72 Nebr. 518, 101 N. W. 3; Rosenbloom *v.* State, 64 Nebr. 342, 89 N. W. 1053, 57 L. R. A. 922. See also *supra*, II, B, 1, b, (II).

Mining property.—A statute dividing mining property into two classes for taxation: (1) Mines producing an annual output of more than one thousand dollars; and (2) all other mining property without reference to value, is not so unreasonable as to justify judicial interference. People *v.* Henderson, 12 Colo. 369, 21 Pac. 144.

Classification of cities according to population, for the purposes of taxation, is not repugnant to the constitutional provisions. Louisville *v.* Com., 134 Ky. 488, 121 S. W. 411; Com. *v.* Mann, 168 Pa. St. 290, 31 Atl. 1003; Com. *v.* Halstead, 2 C. Pl. (Pa.) 247. *Compare* Hibbard *v.* State, 65 Ohio St. 574, 64 N. E. 109, 58 L. R. A. 654.

Corporate and individual debts.— It is competent to impose a tax on debts which is to be assessed on the actual value of debts due from individuals and on the nominal value of debts due from private corporations. Com. *v.* Lehigh Valley R. Co., 129 Pa. St. 429, 18 Atl. 406, 410; Coal Ridge Imp., etc., Co. *v.* Jennings, 127 Pa. St. 397, 17 Atl. 986; Com. *v.* Delaware Div. Canal Co., 123 Pa. St. 594, 16 Atl. 584, 2 L. R. A. 798.

Good and bad debts.—A statute making debts due from solvent debtors subject to taxation does not violate the constitutional provision, on the theory that it distinguishes between debts due from solvent and insolvent debtors. Kingsley *v.* Merrill, 122 Wis. 185, 99 N. W. 1044, 67 L. R. A. 200.

78. *Colorado.*— People *v.* Henderson, 12 Colo. 369, 21 Pac. 144.

Florida.— Hays *v.* Walker, 54 Fla. 163, 44 So. 747.

Nebraska.— Rosenbloom *v.* State, 64 Nebr. 342, 89 N. W. 1053, 57 L. R. A. 922.

North Carolina.— Caldwell Land, etc., Co. *v.* Smith, 151 N. C. 70, 65 S. E. 641.

United States.— Singer Mfg. Co. *v.* Wright, 33 Fed. 121 [*affirmed* in 141 U. S. 696, 12 S. Ct. 103, 35 L. ed. 906].

To justify judicial interference the classification adopted must be based upon an invidious and unreasonable distinction or difference with reference to similar kinds of property. People *v.* Henderson, 12 Colo. 369, 21 Pac. 144.

79. *California.*— People *v.* McCreery, 34 Cal. 432.

Colorado.— Spaulding *v.* Patterson, 46 Colo. 317, 104 Pac. 413; Leonard *v.* Reed, 46 Colo. 307, 104 Pac. 410, 133 Am. St. Rep. 77. See also People *v.* Henderson, 12 Colo. 369, 21 Pac. 144.

Kentucky.— Morrell Refrigerator Car Co. *v.* Com., 108 S. W. 926, 32 Ky. L. Rep. 1383, 1389.

Montana.— Hauser *v.* Miller, 37 Mont. 22, 94 Pac. 197.

Nebraska.— See Rosenbloom *v.* State, 64 Nebr. 342, 89 N. W. 1053, 57 L. R. A. 922.

New Jersey.— Essex County Park Commission *v.* West Orange, 77 N. J. L. 575, 73 Atl. 511 [*reversing* 75 N. J. L. 376, 67 Atl. 1065]; Lang *v.* Berrien, 77 N. J. L. 214, 71 Atl. 117; New Jersey Cent. R. Co. *v.* State Bd. of Assessors, 48 N. J. L. 1, 2 Atl. 789, 57 Am. Rep. 516; White House School Dist. No. 71 *v.* Readington Tp., 36 N. J. L. 66.

United States.— Albany City Nat. Bank *v.* Maher, 9 Fed. 884, 20 Blatchf. 341.

A classification of property according to location is improper as it is not according to any feature inherent in the property itself, but merely according to a circumstance as disconnected with the characteristics of the property as is its ownership. Essex County Park Com. *v.* West Orange, 77 N. J. L. 575, 73 Atl. 511 [*reversing* 75 N. J. L. 376, 67 Atl. 1065].

80. Cook County *v.* Fairbank, 222 Ill. 578, 78 N. E. 895; Johnson County *v.* Johnson, (Ind. 1909) 89 N. E. 590; Essex County Park Com. *v.* West Orange, 77 N. J. L. 575, 73 Atl. 511 [*reversing* 75 N. J. L. 376, 67 Atl. 1065].

81. *Georgia.*— Georgia Midland, etc., R. Co. *v.* State, 89 Ga. 597, 15 S. E. 301; Columbus

or according to their earnings or earning capacity;[82] but as in other cases a classification of corporations must have some reasonable basis and not be purely arbitrary.[83]

(II) *Foreign Corporations.* A distinction between domestic and foreign corporations, in respect to the assessment or rate of taxation on their property, franchises, or business, is a natural and reasonable one and is within the power of the legislature.[84]

Southern R. Co. *v.* Wright, 89 Ga. 574, 15 S. E. 293; Atlanta, etc., R. Co. *v.* Wright, 87 Ga. 487, 13 S. E. 578.

Illinois.— Ottawa Gas Light, etc., Co. *v.* Downey, 127 Ill. 201, 20 N. E. 20; La Salle, etc., R. Co. *v.* Donoghue, 127 Ill. 27, 18 N. E. 827, 11 Am. St. Rep. 90; Coal Run Coal Co. *v.* Finlen, 124 Ill. 666, 17 N. E. 11; Porter *v.* Rockford, etc., R. Co., 76 Ill. 561.

New Jersey.— United New Jersey R., etc., Co. *v.* Baird, 75 N. J. L. 788, 69 Atl. 472; United New Jersey R., etc., Co. *v.* State Bd. of Assessors, 75 N. J. L. 35, 67 Atl. 438.

North Carolina.— Caldwell Land, etc., Co. *v.* Smith, 151 N. C. 70, 65 S. E. 641.

Pennsylvania.— Com. *v.* Merchants', etc., Nat. Bank, 168 Pa. St. 309, 31 Atl. 1065; Kittanning Coal Co. *v.* Com., 79 Pa. St. 100; State Tax on Corporate Loan Cases, 23 Wkly. Notes Cas. 216.

Tennessee.— State *v.* Taylor, 119 Tenn. 229, 104 S. W. 242.

Texas.— Gaar *v.* Shannon, (Civ. App. 1908) 115 S. W. 361.

See 45 Cent. Dig. tit. "Taxation," § 91.

Railroad companies are properly made a separate class for purposes of taxation, the nature of their business and property differentiating them from other corporations. Ames *v.* People, 26 Colo. 83, 56 Pac. 656; Chicago, etc., R. Co. *v.* Richardson County, 72 Nebr. 482, 100 N. W. 950; State Bd. of Assessors *v.* New Jersey Cent. R. Co., 48 N. J. L. 146, 4 Atl. 578; Chicago, etc., R. Co. *v.* State, 128 Wis. 553, 108 N. W. 557.

Express companies, having no tangible property of their own, constitute a separate class from companies owning their own means of transportation; and a discrimination between them and such other companies as to the manner in which they are taxed does not violate the constitutional requirement of equality and uniformity. Pacific Express Co. *v.* Seibert, 142 U. S. 339, 12 S. Ct. 250, 35 L. ed. 1035.

82. Com. *v.* Brusl Electric Light Co., 145 Pa. St. 147, 22 Atl. 844.

83. Morrell Refrigerator Car Co. *v.* Com., 128 Ky. 447, 108 S. W. 926, 32 Ky. L. Rep. 1383, 1389. See also Gulf, etc., R. Co. *v.* Adams, 90 Miss. 559, 45 So. 91; State *v.* Taylor, 119 Tenn. 229, 104 S. W. 242.

84. *Georgia.*— Georgia R., etc., Co. *v.* Wright, 125 Ga. 589, 54 S. E. 52.

Illinois.— Home Ins. Co. *v.* Swigert, 104 Ill. 653; Walker *v.* Springfield, 94 Ill. 364; Hughes *v.* Cairo, 92 Ill. 339; Ducat *v.* Chicago, 48 Ill. 172, 95 Am. Dec. 529.

Louisiana.— State *v.* Lathrop, 10 La. Ann. 398.

Michigan.— Bacon *v.* State Tax Com'rs, 126 Mich. 22, 85 N. W. 307, 86 Am. St. Rep. 524; Graham *v.* St. Joseph Tp., 67 Mich. 652, 35 N. W. 808; Youngblood *v.* Sexton, 32 Mich. 406, 20 Am. Rep. 654.

Montana.— See Northwestern Mut. L. Ins. Co. *v.* Lewis & Clarke County, 28 Mont. 484, 72 Pac. 982, 98 Am. St. Rep. 572.

Nebraska.— Aachen, etc., F. Ins. Co. *v.* Omaha, 72 Nebr. 518, 101 N. W. 3.

Nevada.— *Ex p.* Cohn, 13 Nev. 424.

Ohio.— Lee *v.* Sturges, 46 Ohio St. 153, 19 N. E. 560, 2 L. R. A. 556.

Pennsylvania.— Germania L. Ins. Co. *v.* Com., 85 Pa. St. 513.

South Carolina.— British-American Mortg. Co. *v.* Jones, 77 S. C. 443, 58 S. E. 417.

Texas.— Gaar *v.* Shannon, (Civ. App. 1908) 115 S. W. 361.

United States.— Sturges *v.* Carter, 114 U. S. 511, 5 S. Ct. 1014, 29 L. ed. 240; Insurance Co. *v.* New Orleans, 13 Fed. Cas. No. 7,052, 1 Woods 85.

See 45 Cent. Dig. tit. "Taxation," § 92.

Corporations are not citizens within the meaning of that clause of the federal constitution which secures to the citizens of each state the privileges and immunities of citizens in the several states; and no objection to the taxation of foreign corporations at a higher rate than domestic corporations can be founded on that clause. Horn Silver Min. Co. *v.* New York, 143 U. S. 305, 12 S. Ct. 403, 36 L. ed. 164; Norfolk, etc., R. Co. *v.* Pennsylvania, 136 U. S. 114, 10 S. Ct. 958, 34 L. ed. 394; Pembina Consol. Silver Min., etc., Co. *v.* Pennsylvania, 125 U. S. 181, 8 S. Ct. 737, 31 L. ed. 650; Liverpool, etc., L., etc., Ins. Co. *v.* Oliver, 10 Wall. (U. S.) 566, 19 L. ed. 1029; Ducat *v.* Chicago, 10 Wall. (U. S.) 410, 19 L. ed. 972; Paul *v.* Virginia, 8 Wall. (U. S.) 168, 19 L. ed. 357.

Retaliatory legislation.—A retaliatory clause in a statute regulating insurance companies, which imposed additional burdens and conditions upon foreign corporations doing business in the state, when the laws of the states by which they were chartered imposed similar conditions on foreign companies, is valid and constitutional. Phœnix Ins. Co. *v.* Welch, 29 Kan. 672. See also State *v.* Insurance Co. of North America, 71 Nebr. 320, 99 N. W. 36, 100 N. W. 405, 102 N. W. 1022, 106 N. W. 767. But see Clark *v.* Mobile, 67 Ala. 217.

Franchise taxes.— A statute imposing a franchise tax on domestic and foreign corporations which imposes a like tax on all foreign corporations is not invalid as discriminating in favor of domestic corporations which are subjected to a less tax, the classification

3. DIFFERENT LOCALITIES — a. In General. While all state taxes must be uniform throughout the state,[85] and all local taxes uniform throughout the particular subdivision of the state by which they are levied,[86] this does not mean that taxes for the same purpose must be imposed in different territorial subdivisions at the same time,[87] or that one subdivision cannot be taxed for a particular local purpose unless the other subdivisions are also taxed;[88] nor does it prevent the creation of different taxing districts within the state,[89] and so there may be different rates of local taxation in such different subdivisions, provided there is uniformity within each particular county, municipality, or taxing district;[90] but to render taxation uniform each taxing district should confine itself to the objects of taxation within its limits.[91]

b. Taxing One Locality For Benefit of Another. The constitutional requirement of uniformity in taxation forbids the imposition of a tax on one municipality or part of the state for the purpose of benefiting or raising money for another.[92]

being based on legitimate distinctions and the burden being equal within the class. Gaar *v.* Shannon, (Tex. Civ. App. 1908) 115 S. W. 361.

85. *Indiana.*— Henderson *v.* London, etc., Ins. Co., 135 Ind. 23, 34 N. E. 565, 41 Am. St. Rep. 410, 20 L. R. A. 827.

Kentucky.— Hager *v.* Walker, 128 Ky. 1, 107 S. W. 254, 32 Ky. L. Rep. 748, 129 Am. St. Rep. 238, 15 L. R. A. N. S. 195.

Maine.— *In re* Opinion of Justices, 97 Me. 595, 55 Atl. 827.

Mississippi.— Murray *v.* Lehman, 61 Miss. 283.

Ohio.— Warring *v.* Hazlewood, 3 Ohio Dec. (Reprint) 315.

Oregon.— Yamhill County *v.* Foster, 53 Oreg. 124, 99 Pac. 286.

Pennsylvania.— *In re* Hannick, 4 C. Pl. 38; *In re* Collector's Bond, 4 Lanc. L. Rev. 40.

Tennessee.— State *v.* Butler, 11 Lea 410.

United States.— Dundee Mortg., etc., Inv. Co. *v.* School-Dist. No. 1, 21 Fed. 151.

See 45 Cent. Dig. tit. "Taxation," § 96. And see *supra*, II, B, 1, c.

86. Jackson County *v.* State, 155 Ind. 604, 58 N. E. 1037; Hager *v.* Walker, 128 Ky. 1, 107 S. W. 254, 32 Ky. L. Rep. 748, 129 Am. St. Rep. 238, 15 L. R. A. N. S. 195; Yamhill County *v.* Foster, 53 Oreg. 124, 99 Pac. 286.

87. Pine Grove Tp. *v.* Talcott, 19 Wall. (U. S.) 666, 22 L. ed. 227 [*affirming* 23 Fed. Cas. No. 13,735, 1 Flipp. 120].

88. Plaquemines Parish Police Jury *v.* Packard, 28 La. Ann. 199; Murph *v.* Landrum, 76 S. C. 21, 56 S. E. 850.

Local taxes for local purposes generally see *supra*, II, B, 1, b, (v).

89. Miller *v.* Wicomico County, 107 Md. 438, 69 Atl. 118; Talcott *v.* Pine Grove Tp., 23 Fed. Cas. No. 13,735, 1 Flipp. 120 [*affirmed* in 19 Wall. (U. S.) 666, 22 L. ed. 227]. See also *supra*, II, B, 1, b, (v).

Each county in the state is a separate taxing district and has public and corporate purposes to be accomplished by means of taxation limited alone to citizens or property within its territory. Murph *v.* Landrum, 76 S. C. 21, 56 S. E. 850.

90. *Georgia.*— Georgia Midland, etc., R. Co. *v.* State, 89 Ga. 597, 15 S. E. 301; Columbus Southern R. Co. *v.* Wright, 89 Ga. 574, 15 S. E. 293.

Kansas.— Baker *v.* Atchison County, 67 Kan. 527, 73 Pac. 70; Francis *v.* Atchison, etc., R. Co., 19 Kan. 303.

Kentucky.— Hager *v.* Walker, 128 Ky. 1, 107 S. W. 254, 32 Ky. L. Rep. 748, 129 Am. St. Rep. 238, 15 L. R. A. N. S. 195.

Louisiana.—Plaquemines Parish Police Jury *v.* Packard, 28 La. Ann. 199.

Maryland.— Miller *v.* Wicomico County, 107 Md. 438, 69 Atl. 118; Daly *v.* Morgan, 69 Md. 460, 16 Atl. 287, 1 L. R. A. 757.

Massachusetts.— Hodgdon *v.* Haverhill, 193 Mass. 406, 79 N. E. 830.

Missouri.— State *v.* Chicago, etc., R. Co., 195 Mo. 228, 93 S. W. 784, 113 Am. St. Rep. 661.

Nebraska.— Pleuler *v.* State, 11 Nebr. 547, 10 N. W. 481.

New York.— People *v.* Moore, 11 N. Y. St. 859.

Oregon.— East Portland *v.* Multnomah County, 6 Oreg. 62.

Virginia.— Gilkeson *v.* Frederick County Justices, 13 Gratt. 577.

Wisconsin.— Battles *v.* Doll, 113 Wis. 357, 89 N. W. 187.

United States.— Pine Grove Tp. *v.* Talcott, 19 Wall. 666, 22 L. ed. 227. See also Foster *v.* Pryor, 189 U. S. 325, 23 S. Ct. 549, 47 L. ed. 835.

See 45 Cent. Dig. tit. "Taxation," § 96.

But see Pump *v.* Lucas County, 69 Ohio St. 448, 69 N. E. 666.

Each city, county, or taxing district may have its own rate of taxation and the requirement of equality and uniformity as to local taxation is fully met if the tax is uniform throughout each particular taxing district. Miller *v.* Wicomico County, 107 Md. 438, 69 Atl. 118.

91. Berlin Mills Co. *v.* Wentworth, 60 N. H. 156.

92. *Arkansas.*— Hutchinson *v.* Ozark Land Co., 57 Ark. 554, 22 S. W. 173, 38 Am. St. Rep. 258.

California.— People *v.* Townsend, 56 Cal. 633.

Maryland.— Prince George's County *v.* Laurel, 70 Md. 443, 17 Atl. 388, 3 L. R. A. 528.

c. Taxing Part of State For General Benefit. So also, it is not permissible, in view of this constitutional provision, to lay a tax exclusively upon one municipality or portion of the state, when the proceeds are to be devoted to general state purposes or the support of a state institution.[93] But this does not forbid authorizing the counties or cities to compete with each other in offering donations for the location of a state institution and taxing the successful competitor for the payment of the donation offered,[94] or forbid a grant of authority to a municipality to levy taxes in aid of a railroad.[95]

d. Urban and Suburban Lands. It is ordinarily held that the constitutional provisions in regard to equality and uniformity of taxation prohibit any discrimination as to the rate of taxation between lands lying within and those lying without incorporated towns or cities, in the case of a state tax,[96] or, in the case of municipal taxation, between lands within the municipality which consist of city lots and those which are used for agricultural purposes,[97] notwithstanding the legislature may have acted unwisely or unjustly in extending the limits of the municipality so as to include lands of the latter character.[98] Conversely, if these different classes of lands are in fact taxed at the same rate, such taxes cannot be held to be unequal upon the ground of any inequality of benefits to the owner.[99]

Michigan.— Manistee Lumber Co. *v.* Springfield Tp., 92 Mich. 277, 52 N. W. 468.

New Jersey.— State *v.* Fuller, 39 N. J. L. 576, holding that while the burden of a particular tax may be placed exclusively upon any political district to whose benefit such tax is to inure, the legislature has no power thus to impose it upon any territory narrower in bounds than the political district of which it is a part, without having regard to the special benefit which may accrue to those upon whom it is made to fall.

Ohio.— See Cleveland *v.* Heisley, 41 Ohio St. 670.

Texas.— Mills County *v.* Brown County, 85 Tex. 391, 20 S. W. 81. See also Presidio County *v.* Jeff Davis County, 13 Tex. Civ. App. 115, 35 S. W. 177.

See 45 Cent. Dig. tit. "Taxation," § 97.

Where a new county is created by taking parts of other counties its liability for a proportion of the debts of such other counties should be measured not by the amount of territory taken but according to the taxable value of the property in the parts of the other counties taken (Mills County *v.* Brown County, 85 Tex. 391, 20 S. W. 81); and if measured in this manner there is no violation of the constitutional requirement of equality and uniformity in taxation (Presidio County *v.* Jeff Davis County, 13 Tex. Civ. App. 115, 35 S. W. 177).

93. Allhands *v.* People, 82 Ill. 234; Burr *v.* Carbondale, 76 Ill. 455; McClelland *v.* State, 138 Ind. 321, 37 N. E. 1089; Murray *v.* Lehman, 61 Miss. 283; Wasson *v.* Wayne County, 49 Ohio St. 622, 32 N. E. 472, 17 L. R. A. 795; State *v.* Kreighbaum, 9 Ohio Cir. Ct. 619, 6 Ohio Cir. Dec. 654. *Compare In re* New Orleans Draining Co., 11 La. Ann. 338.

Taxing township for county purposes.— A special tax cannot be imposed upon a particular township in a county to raise money for the general county purpose. Jackson County *v.* State, 155 Ind. 604, 58 N. E. 1037.

94. State *v.* Lawrence, 79 Kan. 234, 100 Pac. 485 (state university); Lund *v.* Chippewa County, 93 Wis. 940, 67 N. W. 927, 34 L. R. A. 131; Briggs *v.* Johnson County, 4 Fed. Cas. No. 1,872, 4 Dill. 148.

95. Talcott *v.* Pine Grove Tp., 23 Fed. Cas. No. 13,735, 1 Flipp. 120 [*affirmed* in 19 Wall. (U. S.) 666, 22 L. ed. 227].

96. *In re* Opinion of Justices, 97 Me. 595, 55 Atl. 827, holding that such discrimination in rate is in violation of a constitutional provision that "all taxes upon real and personal estate, assessed by authority of this State, shall be apportioned and assessed equally according to the just value thereof."

97. Monaghan *v.* Lewis, 5 Pennew. (Del.) 218, 59 Atl. 948; New Orleans *v.* Cazelar, 27 La. Ann. 156; Knowlton *v.* Rock County, 9 Wis. 410, holding that a different rate for agricultural lands included within an extension of city limits is in violation of a constitutional provision that "the rule of taxation shall be uniform." *Contra*, Roup's Case, 81* Pa. St. 211, holding that under the provision of the Pennsylvania constitution that "all taxes shall be uniform on the same class of subjects," the legislature may classify different kinds of land for purposes of taxation, and that it is not unconstitutional to provide that where city limits are extended so as to include rural property such property shall be taxed for city purposes at a lower rate than other lands within the city.

Exemptions.— Where a city extends its limits so as to include agricultural lands a statute exempting such lands from city taxation is unconstitutional. State *v.* Birch, 186 Mo. 205, 85 S. W. 361.

98. Knowlton *v.* Rock County, 9 Wis. 410.

99. Cary *v.* Pekin, 88 Ill. 154, 30 Am. Rep. 543; Norris *v.* Waco, 57 Tex. 635, holding that the requirement as to equality and uniformity does not mean equality of benefits to the taxpayer, but an equal rate throughout the taxing district, and that where municipal limits are extended so as to

4. Taxation of Individuals and Corporations — a. Discrimination in General. For the purposes of a general tax on property there cannot lawfully be any discrimination between that owned by individuals and that owned by corporations, but all must be taxed at the same equal rate.[1] But this rule is not violated by imposing a special franchise tax on corporations,[2] or by laying special duties upon them in the exercise of the police power, when their operations affect the general public.[3]

b. As to Mode of Assessment or Valuation. The constitutional requirement of equality and uniformity is not violated by a statute which provides a special mode of assessing or appraising the property of corporations, when this is rendered necessary by the nature or distribution of the property, and when the plan devised is inherently fair and just;[4] and on this principle, it is competent to commit the assessment of corporate property to special boards or officers.[5] But a system

include rural lands it is not unconstitutional to tax such lands at the same rate as other lands within the municipality. See also New Orleans *v.* Cazelar, 27 La. Ann. 156.

1. *Alabama.*— Mobile *v.* Stonewall Ins. Co., 53 Ala. 570.

Iowa.— Davenport *v.* Chicago, etc., R. Co., 38 Iowa 633.

Kansas.—Atchison, etc., R. Co. *v.* Howe, 32 Kan. 737, 5 Pac. 397.

Kentucky.—Vanceburg, etc., Turnpike Road Co. *v.* Maysville, etc., R. Co., 117 Ky. 275, 77 S. W. 1118, 25 Ky. L. Rep. 1404.

Maryland.— State *v.* Cumberland, etc., R. Co., 40 Md. 22.

Minnesota.— State *v.* Canda Cattle Car Co., 85 Minn. 457, 89 N. W. 66.

New Jersey.— Central R. Co. *v.* State Bd. of Assessors, 48 N. J. L. 1, 2 Atl. 789, 57 Am. Rep. 516.

Texas.— Lively *v.* Missouri, etc., R. Co., 102 Tex. 545, 120 S. W. 852.

Virginia.— Shenandoah Val. R. Co. *v.* Clarke County, 78 Va. 269.

West Virginia.— Franklin Ins. Co. *v.* State, 5 W. Va. 349.

Wisconsin.— Chicago, etc., R. Co. *v.* State, 128 Wis. 553, 108 N. W. 557. But see State *v.* Hastings, 12 Wis. 47.

See 45 Cent. Dig. tit. "Taxation," §§ 100, 101.

But see Fox *v.* Com'rs, 1 Pa. Co. Ct. 197; Michigan Cent. R. Co. *v.* Powers, 201 U. S. 245, 26 S. Ct. 459, 50 L. ed. 744 [*affirming* 138 Fed. 223] (holding that nothing in the federal constitution prevents a state from singling out railroad and other corporate property and taxing it for state purposes in a manner and at a rate different from that applicable to other property); Peacock *v.* Pratt, 121 Fed. 772, 58 C. C. A. 48; and, generally, *supra*, II, B, 2.

2. Southern R. Co. *v.* Coulter, 113 Ky. 657, 68 S. W. 873, 24 Ky. L. Rep. 203; Com. *v.* Lowell Gas Light Co., 12 Allen (Mass.) 75; Adams Express Co. *v.* Kentucky, 166 U. S. 171, 17 S. Ct. 527, 41 L. ed. 960.

3. Cincinnati, etc., R. Co. *v.* Sullivan, 32 Ohio St. 152, sustaining the validity of an ordinance which required a railroad company to light its road within the city limits and provided that on default the lighting might be done by the city at the expense of the company and an assessment levied to pay for the same.

4. *Arkansas.*— St. Louis, etc., R. Co. *v.* Worthen, 52 Ark. 529, 13 S. W. 254, 7 L. R. A. 374.

Georgia.— Columbus Southern R. Co. *v.* Wright, 89 Ga. 574, 15 S. E. 293.

Indiana.— Louisville, etc., R. Co. *v.* State, 25 Ind. 177, 87 Am. Dec. 358.

Iowa.— United States Express Co. *v.* Ellyson, 28 Iowa 370.

Nebraska.— Chicago, etc., R. Co. *v.* Richardson County, 72 Nebr. 482, 100 N. W. 950.

New Hampshire.— Wyatt *v.* State Bd. of Equalization, 74 N. H. 552, 70 Atl. 387.

New Jersey.— Bergen, etc., R. Co. *v.* State Bd. of Assessors, 74 N. J. L. 742, 67 Atl. 668.

North Carolina.—Atlantic, etc., R. Co. *v.* New Bern, 147 N. C. 165, 60 S. E. 925.

Washington.— Eureka Dist. Gold Min. Co. *v.* Ferry County, 28 Wash. 250, 68 Pac. 727.

Wisconsin.— Chicago, etc., R. Co. *v.* State, 128 Wis. 553, 108 N. W. 557.

United States.— Michigan Cent. R. Co. *v.* Powers, 201 U. S. 245, 26 S. Ct. 459, 50 L. ed. 744 [*affirming* 138 Fed. 223]; State Railroad Tax Cases, 92 U. S. 575, 23 L. ed. 663; Chamberlain *v.* Walter, 60 Fed. 788.

See 45 Cent. Dig. tit. "Taxation," §§ 102, 103.

Difference in time of assessment.— It is competent for the legislature to provide that railroad property shall be assessed annually, while ordinary real estate is assessed but once in two years (St. Louis, etc., R. Co. *v.* Worthen, 52 Ark. 529, 13 S. W. 254, 7 L. R. A. 374); or in five years (Chamberlain *v.* Walter, 60 Fed. 788).

Methods of valuing railroad property.— Method held valid see Wyatt *v.* State Bd. of Equalization, 74 N. H. 552, 70 Atl. 387; Michigan Cent. R. Co. *v.* Powers, 201 U. S. 245, 26 S. Ct. 459, 50 L. ed. 744 [*affirming* 138 Fed. 223]; State Railroad Tax Cases, 92 U. S. 575, 23 L. ed. 663. Method held invalid see Chattanooga *v.* Nashville, etc., R. Co., 7 Lea (Tenn.) 561.

The New Jersey statutes providing for the taxation of railroad and canal property are not unconstitutional. United New Jersey R., etc., Co. *v.* Baird, 75 N. J. L. 788, 69 Atl. 472; United New Jersey R., etc., Co. *v.* Parker, 75 N. J. L. 771, 69 Atl. 239 [*modifying* 75 N. J. L. 120, 67 Atl. 672, 686]; Bergen, etc., R. Co. *v.* State Bd. of Assessors, 74 N. J. L. 742, 67 Atl. 668.

5. *Arkansas.*— St. Louis, etc., R. Co. *v.*

which permits the appraisal of corporate property at a higher proportion of its market value than is adopted in the case of individuals effects an illegal discrimination,[6] and the same is true of a system which permits the deduction of indebtedness from the assessed value of property in the one case and not in the other.[7]

C. Double Taxation — 1. In General. Duplicate taxation of the same property, either to the same or different persons, is not to be entirely avoided in practice, and is within the power of the legislature unless specifically restrained by the constitution.[8] But it is so forbidden by the fundamental law of some of the states, and in all it is considered contrary to all sound principles of taxation, inherently unjust and unfair, and to be avoided wherever possible; [9] and the rule

Worthen, 52 Ark. 529, 13 S. W. 254, 7 L. R. A. 374.

Georgia.— Columbus Southern R. Co. *v.* Wright, 89 Ga. 574, 15 S. E. 293.

Indiana.— Pittsburgh, etc., R. Co. *v.* Backus, 133 Ind. 625, 33 N. E. 432.

Iowa.— Dubuque *v.* Chicago, etc., R. Co., 47 Iowa 196.

Missouri.— State *v.* Severance, 55 Mo 378.

Nevada.— Sawyer *v.* Dooley, 21 Nev. 390, 32 Pac. 437.

North Carolina.— Atlantic, etc., R. Co. *v.* New Bern, 147 N. C. 165, 60 S. E. 925.

Virginia.— Shenandoah Valley R. Co. *v.* Clarke County, 78 Va. 269.

United States.— Jennings *v.* Coal Ridge Imp., etc., Co., 147 U. S. 147, 13 S. Ct. 282, 37 L. ed. 116; State Railroad Tax Cases, 92 U. S. 575, 23 L. ed. 663; Western Union Tel. Co. *v.* Poe, 64 Fed. 9.

Railroad property.— From the peculiar nature of railroad property, its dissimilarity in use and value from the mass of other property, and its continuous extent through different localities, it is commonly regarded by the states that it cannot, in justice to the owners, be as fairly and uniformly valued by the numerous local instrumentalities provided for assessing other property as by a state board created for that purpose. St. Louis, etc., R. Co. *v.* Worthen, 52 Ark. 529, 13 S. W. 254, 7 L. R. A. 374.

6. *Illinois.*—Bureau County *v.* Chicago, etc., R. Co., 44 Ill. 229. *Compare* Illinois, etc., R. Co. *v.* Stookey, 122 Ill. 358, 13 N. E. 516.

Missouri.— State *v.* Western Union Tel. Co., 165 Mo. 502, 65 S. W. 775.

Nebraska.— Western Union Tel. Co. *v.* Omaha, 73 Nebr. 527, 103 N. W. 84.

Texas.— Lively *v.* Missouri, etc., R. Co., 102 Tex. 545, 120 S. W. 852.

Washington.— See Eureka Dist. Gold Min. Co. *v.* Ferry County, 28 Wash. 250, 68 Pac. 727, holding, however, that a law authorizing the assessment of one species of property at such price as it would bring at a fair voluntary sale for cash, and of another kind of property at the value at which it would be taken in payment of a just debt from a solvent debtor, makes no unfair discrimination, since the rules for valuing the two kinds of property are substantially the same.

United States.— Western Union Tel. Co. *v.* Poe, 61 Fed. 449. But see Chamberlain *v.* Walter, 60 Fed. 788.

7. Standard L., etc., Ins. Co. *v.* Detroit Bd. of Assessors, 95 Mich. 466, 55 N. W. 112; Treasurer *v.* People's, etc., Bank, 47 Ohio St. 503, 25 N. E. 697, 10 L. R. A. 196; Railroad Tax Cases, 13 Fed. 722, 8 Sawy. 238. *Compare* National State Bank *v.* Burlington, 119 Iowa 696, 94 N. W. 234; Parker *v.* Sun Ins. Co., 42 La. Ann. 1172, 8 So. 618; Michigan R. Tax Cases, 138 Fed. 223 [*affirmed* in 201 U. S. 245, 26 S. Ct. 459, 50 L. ed. 744].

Deduction of indebtedness generally see *supra*, II, B, 1, g. (IV), (B).

8. *Connecticut.*— Toll Bridge Co. *v.* Osborn, 35 Conn. 7.

Missouri.— St. Louis Mut. L. Ins. Co. *v.* St. Louis County Bd. of Assessors, 56 Mo. 503.

New Jersey.— Golding *v.* Chambersburg, 37 N. J. L. 258; New Jersey R., etc., Co. *v.* Newark, East, etc., Wards, etc., 25 N. J. L. 315.

New York.— People *v.* Roberts, 32 N. Y. App. Div. 113, 52 N. Y. Suppl. 859 [*affirmed* in 157 N. Y. 677, 51 N. E. 1093].

North Carolina.— State *v.* Wheeler, 141 N. C. 773, 53 S. E. 358, 115 Am. St. Rep. 700, 5 L. R. A. N. S. 1139.

Pennsylvania.— Pittsburgh, etc., R. Co. *v.* Com., 66 Pa. St. 73, 5 Am. Rep. 344; West Chester Gas Co. *v.* Chester County, 30 Pa. St. 232; Guarantee Trust Co. *v.* Loughin, 2 Pa. Co. Ct. 591; Pennsylvania L. Ins. Co. *v.* Com., 46 Leg. Int. 300.

United States.— U. S. *v.* Benson, 24 Fed. Cas. No. 14,577, 2 Cliff. 512.

See 45 Cent. Dig. tit. "Taxation," § 104.

The question of double taxation is one of expediency for the consideration of the legislature and not one of power for the consideration of the courts. People *v.* Roberts, 32 N. Y. App. Div. 113, 52 N. Y. Suppl. 859 [*affirmed* in 157 N. Y. 677, 51 N. E. 1093].

9. *Alabama.*— Montgomery County Bd. of Revenue *v.* Montgomery Gaslight Co., 64 Ala. 269.

California.— People *v.* Parks, 58 Cal. 624.

Colorado.— Leonard *v.* Reed, 46 Colo. 307, 104 Pac. 410, 133 Am. St. Rep. 77.

Georgia.— Georgia R., etc., Co. *v.* Wright, 125 Ga. 589, 54 S. E. 52 [*reversed* on other grounds in 207 U. S. 127, 28 S. Ct. 47, 52 L. ed. 134].

Idaho.— Erwin *v.* Hubbard, 4 Ida. 170, 37 Pac. 274.

Illinois.— Cooper *v.* Montgomery County Bd. of Review, 207 Ill. 472, 69 N. E. 878, 64 L. R. A. 72.

is not to be evaded by taxing the same thing under different names.[10] It is not, however, every duplication of taxation which is objectionable on this ground,[11] and the terms "double" and "duplicate" have sometimes been used to designate respectively that which is objectionable or prohibited and that which is not.[12] Double taxation in the objectionable or prohibited sense exists only where the same property is taxed twice when it ought to be taxed but once,[13] and to constitute such double taxation the second tax must be imposed upon the same property,[14] by the same state or government,[15] during the same taxing

Kentucky.— Cumberland Tel., etc., Co. *v.* Hopkins, 121 Ky. 850, 90 S. W. 594, 28 Ky. L. Rep. 846.

Maryland.— Monticello Distilling Co. *v.* Baltimore, 90 Md. 416, 45 Atl. 210.

Massachusetts.— Williams *v.* Brookline, 194 Mass. 44, 79 N. E. 779; Richards *v.* Dagget, 4 Mass. 534.

New Hampshire.— Nashua Sav. Bank *v.* Nashua, 46 N. H. 389.

Oregon.— Ellis *v.* Frazier, 38 Oreg. 462, 63 Pac. 642, 53 L. R. A. 454.

Pennsylvania.— See Com. *v.* Preston Coal Co., 2 Dauph. Co. Rep. 263.

West Virginia.— State *v.* Allen, 65 W. Va. 335, 64 S. E. 140.

United States.— San Francisco *v.* Mackey, 21 Fed. 539.

Double taxation on the same land under the same title is not permissible (State *v.* Allen, 65 W. Va. 335, 64 S. E. 140); but where there are adverse claimants to the same land it is not double taxation to require each claimant to list his claim and pay taxes upon it (Eastern Kentucky Coal Lands Corp. *v.* Com., 127 Ky. 667, 106 S. W. 260, 32 Ky. L. Rep. 129, 108 S. W. 1138, 33 Ky. L. Rep. 49).

Tax on raw material and on finished products.— It would be a case of duplicate taxation if the same article were taxed in the hands of the same person first as raw material and again, in the same year, as a finished product; but this objection does not apply to a statute which separates the raw material from the product and imposes the tax on either class only once. See Christian Moerlein Brewing Co. *v.* Hagerty, 8 Ohio Cir. Ct. 330, 4 Ohio Cir. Dec. 276.

Taxation of chattels real.— A statute providing for the taxation of chattels real as personalty is not unconstitutional as imposing double taxation. Harvey Coal, etc., Co. *v.* Dillon, 59 W. Va. 605, 63 S. E. 928, 6 L. R. A. N. S. 628.

Tax on property and on administration of same in probate court.—Where the executors of a decedent's estate had paid all the taxes due on the real and personal property of the estate for the year in which they applied for letters testamentary, a demand by the clerk of the probate court for the payment of an additional docket fee, proportioned to the size of the estate, imposed by statute, could not be enforced, as it would constitute double taxation. Cook County *v.* Fairbank, 222 Ill. 578, 78 N. E. 895.

10. State *v.* Louisiana, etc., R. Co., 196 Mo. 523, 94 S. W. 279. See also Panola County *v.* Carrier, 92 Miss. 148, 45 So. 426.

Double taxation should be avoided not only in not taxing the same property twice in the same year for the same purpose but also in not taxing the same thing twice whatever its form. Com. *v.* Walsh, 133 Ky. 103, 106 S. W. 240, 32 Ky. L. Rep. 460, 117 S. W. 398.

Omitted property.— A person should not be separately assessed on a particular article of personal property as omitted property when it is shown that he has been assessed for and paid the taxes upon a greater valuation of personal property than he actually owned. Com. *v.* Harris, (Ky. 1909) 118 S. W. 294.

Bridge and railroad property.— Where a bridge belonging to a railroad is taxed as a part of the railroad and the taxes paid, it cannot be again taxed as a bridge. State *v.* Louisiana, etc., R. Co., 196 Mo. 523, 94 S. W. 279.

11. San Francisco *v.* Fry, 63 Cal. 470; Judy *v.* Beckwith, 137 Iowa 24, 114 N. W. 565, 15 L. R. A. N. S. 142.

Tax on loans and debts.— The lender of money is not subjected to double taxation by reason of a statutory provision requiring the payment of taxes on money loaned by him and on solvent debts due him over his own indebtedness. People *v.* McCreery, 34 Cal. 432. And see Kingsley *v.* Merrill, 122 Wis. 185, 99 N. W. 1044, 67 L. R. A. 200.

Assets of insolvent bank.— Notes and solvent credits of an insolvent state bank passing to an assignee before the day for listing property for taxation may be taxed to the assignee, and the fact that the creditors of the bank have their interests in the assets of the bank assessed to them individually as an indebtedness properly collectable does not constitute double taxation. Gerard *v.* Duncan, 84 Miss. 731, 36 So. 1034, 66 L. R. A. 461.

12. Judy *v.* Beckwith, 137 Iowa 24, 114 N. W. 565, 15 L. R. A. N. S. 142.

13. Stumpf *v.* Storz, 156 Mich. 228, 120 N. W. 618, 132 Am. St. Rep. 521, 23 L. R. A. N. S. 152.

14. Montgomery County Bd. of Revenue *v.* Montgomery Gaslight Co., 64 Ala. 269; Eastern Kentucky Coal Lands Corp. *v.* Com., 127 Ky. 667, 106 S. W. 260, 32 Ky. L. Rep. 129, 108 S. W. 1138, 33 Ky. L. Rep. 49.

15. Chesebrough *v.* San Francisco, 153 Cal. 559, 96 Pac. 288; San Francisco *v.* Fry, 63 Cal. 470; Judy *v.* Beckwith, 137 Iowa 24, 114 N. W. 565, 15 L. R. A. N. S. 142; State *v.* Nelson, 107 Minn. 319, 119 N. W. 1058; Bradley *v.* Bauder, 36 Ohio St. 28, 38 Am. Rep. 547.

period,[16] and must be a burden imposed by the state and not one voluntarily assumed by agreement;[17] but there may be double taxation in requiring a double contribution to the same tax on account of the same property, although the assessments are to different persons.[18] At the same time it must be remembered that the same property may represent distinct values belonging to different persons, and the fact that each is taxed on the value which the property represents in his hands does not constitute double taxation.[19] Thus the interest of the vendor in an executory contract of sale may be taxed and also the interest of the vendee;[20] but trust property cannot be taxed both to the trustee and to the *cestui que trust*,[21] whether the trustee is a corporation or an individual.[22] There is no constitutional objection to the levy of a license-tax for the privilege of carrying on a particular business and at the same time a tax on the property employed in the business.[23] While in the case of bank deposits it has been held that the depositors may be taxed on the amount of their deposits and the bank on the money held on deposit or the property in which it has been invested,[24] it has ordinarily been held that in the case of savings banks this constitutes double taxation,[25] although it is not double taxation to tax depositors on their deposits and the savings bank upon its real estate, furniture, surplus, and undivided profits.[26] It is not double taxation

Taxation of same property in different states see *infra*, II, C, 3.

16. Montgomery County Bd. of Revenue *v.* Montgomery Gaslight Co., 64 Ala. 269; Nelson Lumber Co. *v.* Loraine, 22 Fed. 54, holding that where realty and personalty are assessed at different times the fact that land bearing growing timber is assessed for taxation in May and the logs cut therefrom are assessed for taxation in the following April, does not render the tax on the logs a second tax, since, although both assessments are made within a period of twelve months, the taxes are not paid twice upon the logs during the same taxing period, no account of the logs being taken when the land is again assessed in the following May.

17. Stumpf *v.* Storz, 156 Mich. 228, 120 N. W. 618, 132 Am. St. Rep. 521, 23 L. R. A. N. S. 152, holding that a tax upon a mortgage and a tax upon the property is not double taxation where the mortgagor contracts to pay both taxes.

18. Germania Trust Co. *v.* San Francisco, 128 Cal. 589, 61 Pac. 178.

Although property is assessed to the wrong person, if the state has collected the tax it cannot thereafter in the same year reassess the property to the true owner and collect the tax again. Com. *v.* Chicago, etc., R. Co., 105 S. W. 127, 32 Ky. L. Rep. 10.

19. Eastern Kentucky Coal Lands Corp. *v.* Com., 127 Ky. 667, 106 S. W. 260, 32 Ky. L. Rep. 129, 108 S. W. 1138, 33 Ky. L. Rep. 49; U. S. Electric Power, etc., Co. *v.* State, 79 Md. 63, 28 Atl. 768.

Where there are adverse claimants to the same land it is not double taxation to require each to list his claim and pay taxes upon it. Eastern Kentucky Coal Lands Corp. *v.* Com., 127 Ky. 667, 106 S. W. 260, 32 Ky. L. Rep. 129, 108 S. W. 1138, 33 Ky. L. Rep. 49.

20. *In re* Maplewood Coal Co., 213 Ill. 283, 72 N. E. 786; Griffin *v.* La Salle County Bd. of Review, 184 Ill. 275, 56 N. E. 397; McGregor *v.* Vanpel, 24 Iowa 436; Adams *v.* Kuykendall, 83 Miss. 571, 35 So. 830; White *v.* Lincoln, 79 Nebr. 153, 112 N. W. 369.

But a statute is invalid which in effect taxes the vendor of realty both on the land itself and on the proceeds of its sale, whether represented by cash or notes. Sheibley *v.* Rome, 107 Ga. 384, 33 S. E. 398; Fulkerson *v.* Bristol, 95 Va. 1, 27 S. E. 815.

21. Robinson *v.* Dover, 59 N. H. 521; Berry *v.* Windham, 59 N. H. 288, 47 Am. Rep. 202. See also Com. *v.* Fall Brook Coal Co., 156 Pa. St. 488, 26 Atl. 1071.

22. Berry *v.* Windham, 59 N. H. 288, 47 Am. Rep. 202.

23. State *v.* Jones, 9 Ida. 693, 75 Pac. 819; St. Louis *v.* Bircher, 7 Mo. App. 169; Morgan *v.* Com., 98 Va. 812, 35 S. E. 448.

24. Yuba County *v.* Adams, 7 Cal. 35; New London Sav. Bank *v.* New London, 20 Conn. 111; Columbus Exch. Bank *v.* Hines, 3 Ohio St. 1.

25. *Maine.*— Augusta Sav. Bank *v.* Augusta, 56 Me. 176.

Maryland.— State *v.* Central Sav. Bank, 67 Md. 290, 10 Atl. 290, 11 Atl. 357.

Massachusetts.— Worcester County Sav. Inst. *v.* Worcester, 10 Cush. 128; Com. *v.* People's Five Cents Sav. Bank, 5 Allen 428.

New Hampshire.— Robinson *v.* Dover, 59 N. H. 521; Berry *v.* Windham, 59 N. H. 288, 47 Am. Rep. 202; Nashua Sav. Bank *v.* Nashua, 46 N. H. 389.

Rhode Island.— Providence Sav. Inst. *v.* Gardiner, 4 R. I. 484.

But see New London Sav. Bank *v.* New London, 20 Conn. 111; Detroit *v.* Detroit Bd. of Assessors, 91 Mich. 78, 51 N. W. 787, 16 L. R. A. 59.

A savings bank is merely a trustee for the depositors with regard to the money deposited, and it is double taxation to tax the same property both to a trustee and the *cestui que trust.* Berry *v.* Windham, 59 N. H. 288, 47 Am. Rep. 202.

26. Collett *v.* Springfield Sav. Soc., 13 Ohio Cir. Ct. 131, 7 Ohio Cir. Dec. 146.

to require individuals to contribute to the support of relatives confined in a public institution, such as an insane asylum which is supported by general taxation,[27] or to require the different counties to contribute to the support of persons in such institutions coming from such counties;[28] nor is a requirement of compulsory labor on public highways which are maintained in part by taxation objectionable as double taxation.[29]

2. Presumption and Construction Against Double Taxation. The presumption is against the intention of the legislature to impose double taxation on the same property, and a statute will not be so construed as to produce this result unless required by its express terms or by necessary implication.[30]

3. Taxation of Same Property in Two Places. The same property cannot be legally taxed at the same time at two different places within the same jurisdiction,[31] although there is no double taxation if under the law a payment of the tax at one of such places would absolutely bar any proceedings for its enforcement at the other.[32] Each state, however, with regard to the taxation of property within its territorial limits is sovereign and independent;[33] and the taxation of property which is within the jurisdiction of the state is not rendered objectionable as double taxation by the fact that the same property is also assessed for taxation in another state.[34]

27. *In re* Yturburru, 134 Cal. 567, 66 Pac. 729; State Lunacy Commission *v.* Eldridge, 7 Cal. App. 298, 94 Pac. 597, 600; Guthrie County *v.* Conrad, 133 Iowa 171, 110 N. W. 454; Kaiser *v.* State, 80 Kan. 364, 102 Pac. 454, 24 L. R. A. N. S. 295. But see Baldwin *v.* Douglas County, 37 Nebr. 283, 55 N. W. 875, 20 L. R. A. 850.

Such a contribution is not properly a tax but rather in the nature of payment for a service rendered. Guthrie County *v.* Conrad, 133 Iowa 171, 110 N. W. 454.

28. State *v.* Douglas County, 18 Nebr. 601, 26 N. W. 378; State *v.* Lewis, (N. D. 1909) 119 N. W. 1037; Bon Homme County *v.* Berndt, 15 S. D. 494, 90 N. W. 147.

29. State *v.* Wheeler, 141 N. C. 773, 53 S. E. 358, 115 Am. St. Rep. 700, 6 L. R. A. N. S. 1139.

30. *Alabama.*— Montgomery County Bd. of Revenue *v.* Montgomery Gaslight Co., 64 Ala. 269.

Connecticut.— Osborn *v.* New York, etc., R. Co., 40 Conn. 491; Toll Bridge Co. *v.* Osborn, 35 Conn. 7; New London Sav. Bank *v.* New London, 20 Conn. 111.

Georgia.— Georgia R., etc., Co. *v.* Wright, 125 Ga. 589, 54 S. E. 52 [*reversed* on other grounds in 207 U. S. 127, 28 S. Ct. 47, 52 L. ed. 134]; State Bank *v.* Savannah, Dudley 130.

Maine.— East Livermore *v.* Livermore Falls Trust, etc., Co., 103 Me. 418, 69 Atl. 306, 15 L. R. A. N. S. 952.

Maryland.— Gordon *v.* Baltimore, 5 Gill 231; *In re* Tax Cases, 12 Gill & J. 117.

Massachusetts.— Boston Water Power Co. *v.* Boston, 9 Metc. 199; Amesbury Woollen, etc., Mfg. Co. *v.* Amesbury, 17 Mass. 461; Salem Iron Factory Co. *v.* Danvers, 10 Mass. 514.

Minnesota.— Rice County *v.* Citizens' Nat. Bank, 23 Minn. 280.

Missouri.— State *v.* Louisiana, etc., R. Co., 215 Mo. 479, 114 S. W. 956.

New Hampshire.— Kimball *v.* Milford, 54 N. H. 406; Rockingham Ten Cent Sav. Bank *v.* Portsmouth, 52 N. H. 17; Nashua Sav. Bank *v.* Nashua, 46 N. H. 389; Smith *v.* Burley, 9 N. H. 423.

New Jersey.— State *v.* Chambersburg, 37 N. J. L. 258.

New York.— People *v.* New York Tax Com'rs, 95 N. Y. 554.

Pennsylvania.— Com. *v.* Fall Brook Coal Co., 156 Pa. St. 488, 26 Atl. 1071; Guarantee Trust Co. *v.* Loughlin, 2 Pa. Co. Ct. 591; Pennsylvania L. Ins. Co. *v.* Com., 46 Leg. Int. 300.

Tennessee.— Bell *v.* Watson, 3 Lea 328.

West Virginia.— State *v.* Graybeal, 60 W. Va. 357, 55 S. E. 398.

Wisconsin.— Superior First Nat. Bank *v.* Douglas County, 124 Wis. 15, 102 N. W. 315.

See 45 Cent. Dig. tit. "Taxation," § 135.

31. *Indiana.*— Stephens *v.* Smith, 30 Ind. App. 120, 65 N. E. 546, two different townships in the same county.

Kansas.— Griffith *v.* Watson, 19 Kan. 23, two different townships in same county.

Kentucky.— Spalding *v.* O'Callaghan, 76 S. W. 189, 25 Ky. L. Rep. 629, two different counties in the same state.

New Hampshire.— Berlin Mills Co. *v.* Wentworth, 60 N. H. 156, two different taxing districts.

New York.— People *v.* O'Donnel, 183 N. Y. 9, 75 N. E. 540, two different boroughs constituting separate taxing districts.

32. People *v.* Wilkerson, 1 Ida. 619.

33. Judy *v.* Beckwith, 137 Iowa 24, 114 N. W. 565, 15 L. R. A. N. S. 142. See also cases cited *infra*, note 34.

34. *California.*— Minturn *v.* Hays, 2 Cal. 590, 56 Am. Dec. 366.

Georgia.— Georgia R., etc., Co. *v.* Wright, 125 Ga. 589, 54 S. E. 52 [*reversed* on other grounds in 207 U. S. 127, 28 S. Ct. 47, 52 L. ed. 134].

Iowa.— Judy *v.* Beckwith, 137 Iowa 24, 114 N. W. 565, 15 L. R. A. N. S. 142.

4. Taxes on Mortgages and on Property Mortgaged. The interest of a mortgagor and mortgagee in real property being distinct and separable, and each being taxable property, there is no violation of the rule against double taxation involved in laying a tax on the mortgage, or on the debt which it secures, although the land affected is also taxed to its owner, and at its full value.[35]

5. Taxation of Corporations — a. In General. The rule against double taxation applies as well to the property of corporations as to that of individuals;[36]

Louisiana.— Griggsry Constr. Co. *v.* Freeman, 108 La. 435, 32 So. 399, 58 L. R. A. 349.

Minnesota.— State *v.* Nelson, 107 Minn. 319, 119 N. W. 1058.

Oklahoma.— Prairie Cattle Co. *v.* Williamson, 5 Okla. 488, 49 Pac. 937.

Rhode Island.— Dyer *v.* Osborne, 11 R. I. 321, 23 Am. Rep. 460.

Texas.— State *v.* Maryland Fidelity, etc., Co., 35 Tex. Civ. App. 214, 80 S. W. 544.

Wyoming.— Kelley *v.* Rhoads, 7 Wyo. 237, 51 Pac. 593, 75 Am. St. Rep. 904, 39 L. R. A. 594.

United States.—Coe *v.* Errol, 116 U. S. 517, 6 S. Ct. 475, 29 L. ed. 715; Nelson Lumber Co. *v.* Loraine, 22 Fed. 54.

It is not double taxation to tax the same property in different jurisdictions where each of them has a right to tax it (Griggsry Constr. Co. *v.* Freeman, 108 La. 435, 32 So. 399, 58 L. R. A. 349; State *v.* Maryland Fidelity, etc., Co., 35 Tex. Civ. App. 214, 80 S. W. 544); since to constitute double taxation in the objectionable sense the second or additional burden must be imposed by the same sovereignty which imposed the first (Judy *v.* Beckwith, 137 Iowa 24, 114 N. W. 565, 15 L. R. A. N. S. 142).

The occasion for such duplicate taxation may arise from the removal of property from one state to another after its assessment in the former, but before the time for assessment in the latter (Griggsry Constr. Co. *v.* Freeman, 108 La. 435, 32 So. 399, 58 L. R. A. 349; Nelson Lumber Co. *v.* Loraine, 22 Fed. 54); or by reason of the fact that the owner of the property resides in another state which taxes him for such property as part of his general estate attached to his person (Coe *v.* Errol, 116 U. S. 517, 6 S. Ct. 475, 29 L. ed. 715).

35. *Alabama.*—Alabama Gold L. Ins. Co. *v.* Lott, 54 Ala. 499.

California.— Lick *v.* Austin, 43 Cal. 590; People *v.* Whartenby, 38 Cal. 461. But see Germania Trust Co. *v.* San Francisco, 128 Cal. 589, 61 Pac. 178.

Florida.— Lamar *v.* Palmer, 18 Fla. 147.

Iowa.— McGregor *v.* Vanpel, 24 Iowa 436.

Maryland.— Baltimore City Appeal Tax Ct. *v.* Rice, 50 Md. 302.

Michigan.— Stumpf *v.* Storz, 156 Mich. 228, 120 N. W. 618, 132 Am. St. Rep. 521, 23 L. R. A. N. S. 152; Detroit *v.* Detroit Bd. of Assessors, 91 Mich. 78, 51 N. W. 787, 16 L. R. A. 59; Taggart *v.* Sanilac County, 71 Mich. 16, 38 N. W. 639.

Minnesota.— State *v.* Jones, 24 Minn. 251.

Nevada.— State *v.* Carson City Sav. Bank, 17 Nev. 146, 30 Pac. 703.

New York.— People *v.* Feitner, 51 N. Y. App. Div. 178, 64 N. Y. Suppl. 539.

Utah.— Judge *v.* Spencer, 15 Utah 242, 48 Pac. 1097.

See 45 Cent. Dig. tit. "Taxation," § 107.

Although the mortgagor pays both the tax upon the property and the tax upon the mortgage, this does not constitute double taxation, since where he pays the tax upon the mortgage, this is not a burden imposed by the state but the result of a contract which he has voluntarily entered into. Stumpf *v.* Storz, 156 Mich. 228, 120 N. W. 618, 132 Am. St. Rep. 521, 23 L. R. A. N. S. 152.

36. East Livermore *v.* Livermore Falls Trust, etc., Co., 103 Me. 418, 69 Atl. 306, 15 L. R. A. N. S. 952; Detroit Citizens' St. R. Co. *v.* Detroit, 125 Mich. 673, 85 N. W. 96, 86 N. W. 809, 84 Am. St. Rep. 589; *In re* Lehigh Valley R. Co., (N. J. Sup.) 71 Atl. 126; Cleveland Trust Co. *v.* Lander, 62 Ohio St. 266, 56 N. E. 1036.

Subsidiary corporations.—Where one corporation is merely subsidiary to and owned by another, it is double taxation to tax the former separately while including the value of its franchise and property in the assessment against the latter. Com. *v.* Chesapeake, etc., R. Co., 131 Ky. 661, 117 S. W. 287.

Lessor and lessee.— The state after assessing a railroad franchise to and collecting the taxes from a lessee cannot reassess the franchises as the property of the lessor. Com. *v.* Chicago, etc., R. Co., 105 S. W. 127, 32 Ky. L. Rep. 10.

Separate assessments of different kinds of property.— The road-bed of a railroad is the foundation on which the superstructure of the railroad rests. The roadway is the right of way, which is property subject to taxation. The rails in place constitute the superstructure resting on the road-bed. An assessment of these items separately does not constitute double taxation. San Francisco, etc., R. Co. *v.* State Bd. of Equalization, 60 Cal. 12. Where a railroad company is authorized to construct a railroad to a certain terminus, a wharf subsequently purchased at but extending beyond the authorized terminus is not necessarily a part of the railroad, and a separate assessment of the wharf and of the entire railroad does not constitute double taxation, although the mileage on which the assessment of the road is based might include the length of the wharf. Pacific Coast R. Co. *v.* Ramage, (Cal. 1894) 37 Pac. 532. It is not double taxation to assess the trackage of a railroad company separately from other real estate owned by it, the valuation

but the modern scheme of taxation of gross receipts is not generally considered to be inconsistent with this principle,[37] and there are various other elements of corporate taxable values which may be separately taxed without constituting double taxation.[38] So the imposition of a franchise tax on corporations or the exaction of a license-fee is not in any sense a duplication of the taxes levied on its property,[39] except in cases where such franchise tax or fee is declared by the statute to be in lieu of all other taxes.[40]

b. Tax on Property and on Capital. To lay a tax on the capital stock of a

of each being made by distinct items. Galveston, etc., R. Co. *v.* Galveston, 33 Tex. Civ. App. 384, 77 S. W. 269.

Coöperative insurance company.—Where a coöperative insurance company is organized without stock, and its personal property consists of money contributed by its members for the payment of losses, the fact that the members pay taxes on the property insured does not exempt the company from taxes on its personalty. German Washington Mut. F. Ins. Co. *v.* Louisville, 117 Ky. 593, 78 S. W. 472, 25 Ky. L. Rep. 1697, 80 S. W. 154, 25 Ky. L. Rep. 2097.

37. See U. S. Express Co. *v.* Ellyson, 28 Iowa 370; Com. *v.* U. S. Express Co., 157 Pa. St. 579, 27 Atl. 396; Com. *v.* New York, etc., R. Co., 145 Pa. St. 38, 22 Atl. 212.

An occupation or license-tax measured by the gross earnings or receipts of a corporation does not constitute double taxation, although the franchise and tangible property of the corporation are also taxed. Lincoln Traction Co. *v.* Lincoln, 84 Nebr. 327, 121 N. W. 435; Nebraska Tel. Co. *v.* Lincoln, 82 Nebr. 59, 117 N. W. 284; State *v.* Pacific States Tel., etc., Co., 53 Oreg. 162, 99 Pac. 427.

38. Franklin County Ct. *v.* Frankfort Deposit Bank, 87 Ky. 370, 9 S. W. 212, 10 Ky. L. Rep. 506; Durham County *v.* Blackwell Durham Tobacco Co., 116 N. C. 441, 21 S. E. 423; State *v.* Pacific States Tel., etc., Co., 53 Oreg. 162, 165, 99 Pac. 427, where the court said: "Among the elements of corporate taxable values are the franchise, capital stock in the hands of the corporation, the tangible corporate property, and shares of stock in the hands of individual holders."

Distinct things or interests.— The capital stock of a corporation and shares of stock are distinct things and both may be taxed. So also the franchise, the surplus earnings, and real estate if it does not represent capital stock but only earnings, are distinct from the capital stock and from each other, and the state may tax the corporation under each of these heads without being guilty of double taxation. Franklin County Ct. *v.* Frankfort Deposit Bank, 87 Ky. 370, 9 S. W. 212, 10 Ky. L. Rep. 506.

The state may levy simultaneously any two or more of the following taxes: On the franchise, on the capital stock, on the real and personal property of the corporation, and on the shares of stock in the hands of the shareholders. Durham County *v.* Blackwell Durham Tobacco Co., 116 N. C. 441, 21 S. E. 423.

39. *Kentucky.*— German Washington Mut. F. Ins. Co. *v.* Louisville, 117 Ky. 593, 78 S. W. 472, 25 Ky. L. Rep. 1697, 80 S. W. 154, 25 Ky. L. Rep. 2097; Mason *v.* Lancaster, 4 Bush 406.

Louisiana.— New Orleans *v.* People's Ins. Co., 27 La. Ann. 519.

Massachusetts.— Com. *v.* New England Slate, etc., Co., 13 Allen 391; Com. *v.* Hamilton Mfg. Co., 12 Allen 298; Com. *v.* Lowell Gas Light Co., 12 Allen 75; Tremont Bank *v.* Boston, 1 Cush. 142.

Mississippi.— Clarksdale Ins. Agency *v.* Cole, 87 Miss. 637, 40 So. 228.

Nebraska.— Lincoln Traction Co. *v.* Lincoln, 84 Nebr. 327, 121 N. W. 435.

New York.— Monroe County Sav. Bank *v.* Rochester, 37 N. Y. 365.

North Carolina.—Wilmington, etc., R. Co. *v.* Brunswick County, 72 N. C. 10; Wilmington, etc., R. Co. *v.* Reid, 64 N. C. 226.

Oregon.— State *v.* Pacific States Tel., etc., Co., 53 Oreg. 162, 99 Pac. 427.

Pennsylvania.— Com. *v.* New York, etc., R. Co., 150 Pa. St. 234, 24 Atl. 609; Lackawanna Iron, etc., Co. *v.* Luzerne County, 42 Pa. St. 424; Carbon Iron Co. *v.* Carbon County, 39 Pa. St. 251.

United States.—Minot *v.* Philadelphia, etc., R. Co., 18 Wall. 206, 21 L. ed. 888; Bank of Commerce *v.* New York, 2 Black 620, 17 L. ed. 451.

Contra.— Southwestern Tel., etc., Co. *v.* Meerscheidt, (Tex. Civ. App. 1901) 65 S. W. 381.

An occupation tax on corporations whose franchises and property are also taxed does not constitute double taxation. Lincoln Traction Co. *v.* Lincoln, 84 Nebr. 327, 121 N. W. 435; Nebraska Tel. Co. *v.* Lincoln, 52 Nebr. 59, 117 N. W. 284.

Whether based on income or measured in some other manner a tax on the franchise and on the tangible corporate property is not double taxation. State *v.* Pacific States Tel., etc., Co., 53 Oreg. 162, 99 Pac. 427.

A tax exacted from foreign insurance companies doing business in the state, based on their premium receipts therein, is a tax on the franchise or business, as distinguished from one on property, and does not affect the right of the state to tax any property of the company having its *situs* for purposes of taxation within the state. Western Assur. Co. *v.* Halliday, 127 Fed. 830.

40. Cumberland Tel., etc., Co. *v.* Hopkins, 121 Ky. 850, 90 S. W. 594, 28 Ky. L. Rep. 846; State *v.* Berry, 17 N. J. L. 80; Covington First Nat. Bank *v.* Covington, 103 Fed. 523.

corporation and also on the property in which that capital is invested would be double taxation and illegal.[41] But this does not prevent a tax on the value of the capital stock over and above the value of the property,[42] nor will it be objectionable to tax the capital stock as a whole and also property held by the company which is not necessary to or connected with its business and therefore does not constitute a part of its plant or equipment.[43]

c. Tax on Capital and on Shares of Stock. In some jurisdictions it has been held illegal, as producing double taxation, to tax the capital stock of a corporation, or the property in which it is invested, to the corporation, and at the same time tax the shares of stock as the property of their several holders;[44] but the decisions of other states are opposed to this view, either on the ground that the local constitution does not forbid double taxation, or on the ground that the capital stock of a corporation and the shares into which it is divided are separate and distinct property interests and each of a taxable character.[45] Even in juris-

41. *Arkansas.*— Hempstead County *v.* Hempstead County Bank, 73 Ark. 515, 84 S. W. 715.

Indiana.— State Bank *v.* Brackenridge, 7 Blackf. 395.

Louisiana.— New Orleans Sugar Shed Co. *v.* Harris, 26 La. Ann. 378.

Maine.— East Livermore *v.* Livermore Falls Trust, etc., Co., 103 Me. 418, 69 Atl. 306, 15 L. R. A. N. S. 952.

Maryland.— Frederick County *v.* Farmers', etc., Nat. Bank, 48 Md. 117; State *v.* Cumberland, etc., R. Co., 40 Md. 22.

Nebraska.— Central Granaries Co. *v.* Lancaster County, 77 Nebr. 311, 109 N. W. 385.

New York.— People *v.* Barker, 29 N. Y. App. Div. 325, 51 N. Y. Suppl. 567.

Pennsylvania.— Coatesville Gas Co. *v.* Chester County, 97 Pa. St. 476.

Washington.— Lewiston Water, etc., Co. *v.* Asotin County, 24 Wash. 371, 64 Pac. 544.

Wisconsin.— Superior First Nat. Bank *v.* Douglas County, 124 Wis. 15, 102 N. W. 315.

See 45 Cent. Dig. tit. "Taxation," § 109.

42. Distilling, etc., Co. *v.* People, 161 Ill. 101, 43 N. E. 779; Danville Lumber, etc., Co. *v.* Parks, 88 Ill. 463; Panola County *v.* Carrier, 92 Miss. 148, 45 So. 426; Durham County *v.* Blackwell Durham Tobacco Co., 116 N. C. 441, 21 S. E. 423; Hamilton Mfg. Co. *v.* Massachusetts, 6 Wall. (U. S.) 632, 18 L. ed. 904.

43. State *v.* Newark East Ward, etc., 25 N. J. L. 315; Com. *v.* Hillside Cemetery Co., 170 Pa. St. 227, 32 Atl. 404; Lackawanna Iron, etc., Co. *v.* Luzerne County, 42 Pa. St. 424.

44. *California.*— San Francisco *v.* Spring Valley Water Works, 63 Cal. 524; People *v.* Badlam, 57 Cal. 594.

Maine.— East Livermore *v.* Livermore Falls Trust, etc., Co., 103 Me. 418, 69 Atl. 306, 15 L. R. A. N. S. 952.

Maryland.— Baltimore *v.* Baltimore, etc., R. Co., 6 Gill 288, 48 Am. Dec. 631; Gordon *v.* Baltimore, 5 Gill 231. But see Wilkens Co. *v.* Baltimore, 103 Md. 293, 63 Atl. 562.

Massachusetts.— Middlesex R. Co. *v.* Charleston, 8 Allen 330.

Michigan.— Stroh *v.* Detroit, 131 Mich. 109, 90 N. W. 1029.

Minnesota.—See State *v.* Nelson, 107 Minn. 319, 119 N. W. 1058, holding, however, that the rule does not apply to the taxation of resident owners on shares of stock in a foreign corporation.

New Hampshire.— Cheshire County Tel. Co. *v.* State, 63 N. H. 167; Nashua Sav. Bank *v.* Nashua, 46 N. H. 389.

New York.— People *v.* Board of Assessors, 30 N. Y. Suppl. 448.

Pennsylvania.— Com. *v.* Lehigh Coal, etc., Co., 162 Pa. St. 603, 29 Atl. 664; Com. *v.* Fall Brook Coal Co., 156 Pa. St. 488, 26 Atl. 1071; Com. *v.* Pennsylvania Co., etc., 137 Pa. St. 411, 15 Atl. 456; Com. *v.* Provident Life, etc., Co., 3 Dauph. Co. Rep. 130; Pennsylvania L. Ins. Co. *v.* Com., 46 Leg. Int. 300; Philadelphia Fund Soc.'s Appeal, 7 Pa. L. J. 186.

Rhode Island.— Newport Reading Room's Petition, 21 R. I. 440, 44 Atl. 511; American Bank *v.* Mumford, 4 R. I. 478.

United States.— San Francisco *v.* Mackey, 22 Fed. 602.

See 45 Cent. Dig. tit. "Taxation," § 110.

If the corporation is not taxed upon its capital or property there is no double taxation in requiring the individual stock-holders to pay taxes upon their shares. Chesebrough *v.* San Francisco, 153 Cal. 559, 96 Pac. 288.

Franchise tax.—A franchise tax on the gross receipts of a corporation is not double taxation, although the shares of its capital stock are taxed to their respective holders. U. S. Electric Power, etc., Co. *v.* State, 79 Md. 63, 28 Atl. 768.

The surplus fund of an incorporated bridge company, invested in mortgages and bank stock, is taxable for state and county purposes, although the dividends on the stock of the company are also taxed for the same purposes. Easton Bridge *v.* County, 9 Pa. St. 415.

45. *Alabama.*—Jefferson County Sav. Bank *v.* Hewitt, 112 Ala. 546, 20 So. 926.

Georgia.— Georgia R., etc., Co. *v.* Wright, 125 Ga. 589, 54 S. E. 52 [*reversed* on other grounds in 207 U. S. 127, 28 S. Ct. 47, 52 L. ed. 134], holding that while this is in a sense double taxation, it is not that species of double taxation which is void.

Illinois.— Illinois Nat. Bank *v.* Kinsella, 201 Ill. 31, 66 N. E. 338; Danville Banking,

dictions where the former rule prevails a distinction has been made according as to whether the corporation and the stock-holders are taxed in the same or in different jurisdictions;[46] and it is ordinarily held that shares of stock in a foreign corporation held by resident owners may be taxed to them without regard to the taxation of the capital or property of the corporation at the place of its domicile,[47] since in such cases the tax may be sustained on the ground that it is not double taxation where the taxes are imposed by different states.[48]

6. Tax on Property and on Income Therefrom. A tax may be levied on income derived from property, in the shape of rent or otherwise, although the property yielding the income is also subjected to taxation; and this does not violate the rule against double taxation, because the two interests or species of property are distinct and severable.[49]

etc., Co. *v.* Parks, 88 Ill. 170. *Compare* Republic L. Ins. Co. *v.* Pollak, 75 Ill. 292.

Indiana.— International Bldg., etc., Assoc. *v.* Marion County, 30 Ind. App. 12, 65 N. E. 297.

Iowa.— Judy *v.* Beckwith, 137 Iowa 24, 114 N. W. 565, 15 L. R. A. N. S. 142; Cook *v.* Burlington, 59 Iowa 251, 13 N. W. 113, 44 Am. Rep. 679.

Kentucky.— Franklin County Ct. *v.* Frankfort Deposit Bank, 87 Ky. 370, 9 S. W. 212, 10 Ky. L. Rep. 506; Com. *v.* Walsh, (1909) 117 S. W. 398; Com. *v.* Walsh, 106 S. W. 240, 32 Ky. L. Rep. 460.

New Jersey.— Fish *v.* Branin, 23 N. J. L. 484.

North Carolina.—Durham County *v.* Blackwell Durham Tobacco Co., 116 N. C. 441, 21 S. E. 432; Belo *v.* Forsyth County, 82 N. C. 415, 33 Am. Rep. 688.

Ohio.— Bradley *v.* Bauder, 36 Ohio St. 28, 38 Am. Rep. 547.

Tennessee.— State *v.* Bank of Commerce, 95 Tenn. 221, 31 S. W. 993; Memphis *v.* Ensley, 6 Baxt. 553, 32 Am. Rep. 532. And see South Nashville St. R. Co. *v.* Morrow, 87 Tenn. 406, 11 S. W. 348, 2 L. R. A. 853, holding that taxation of the property of a corporation, other than its capital stock, and also of the shares of stock held by its members, is not double taxation.

Virginia.— Com. *v.* Charlotteville Perpetual Bldg., etc., Co., 90 Va. 790, 20 S. E. 364, 44 Am. St. Rep. 950.

Washington.—Pacific Nat. Bank *v.* Pierce County, 20 Wash. 675, 56 Pac. 936.

United States.— Bank of Commerce *v.* Tennessee, 161 U. S. 134, 16 S. Ct. 456, 40 L. ed. 645; Mercantile Nat. Bank *v.* New York, 28 Fed. 776 [*affirmed* in 121 U. S. 138, 7 S. Ct. 826, 30 L. ed. 895].

See 45 Cent. Dig. tit. "Taxation," § 110.

Separate interests.— The capital stock of a corporation and the shares of the individual holders are distinct and separate interests and each of a taxable character. Judy *v.* Beckwith, 137 Iowa 24, 114 N. W. 565, 15 L. R. A. N. S. 142; Franklin County Ct. *v.* Frankfort Deposit Bank, 87 Ky. 370, 9 S. W. 212, 10 Ky. L. Rep. 506; Belo *v.* Forsyth County, 82 N. C. 415, 33 Am. Rep. 688; Com. *v.* Charlotteville Perpetual Bldg., etc., Co., 90 Va. 790, 20 S. E. 364, 44 Am. St. Rep. 950.

46. Chesebrough *v.* San Francisco, 153 Cal. 559, 96 Pac. 288; San Francisco *v.* Fry, 63 Cal. 470; State *v.* Nelson, 107 Minn. 319, 119 N. W. 1058.

47. *California.*— San Francisco *v.* Fry, 63 Cal. 470.

Georgia.— Georgia R., etc., Co. *v.* Wright, 125 Ga. 589, 54 S. E. 52 [*reversed* on other grounds in 207 U. S. 127, 28 S. Ct. 47, 52 L. ed. 134].

Iowa.— Judy *v.* Beckwith, 137 Iowa 24, 114 N. W. 565, 15 L. R. A. N. S. 142.

Kentucky.— Com. *v.* Walsh, 106 S. W. 240, 32 Ky. L. Rep. 460.

Maryland.— Wilkens *v.* Baltimore, 103 Md. 293, 63 Atl. 562.

Massachusetts.—Dwight *v.* Boston, 12 Allen 316, 90 Am. Dec. 149.

Minnesota.— State *v.* Nelson, 107 Minn. 319, 119 N. W. 1058.

Ohio.— Bradley *v.* Bauder, 36 Ohio St. 28, 38 Am. Rep. 547.

Rhode Island.— Dyer *v.* Osborne, 11 R. I. 321, 32 Am. Rep. 460.

But see Kimball *v.* Milford, 54 N. H. 406; Smith *v.* Exeter, 37 N. H. 556.

48. San Francisco *v.* Fry, 63 Cal. 470; Judy *v.* Beckwith, 137 Iowa 24, 114 N. W. 565, 15 L. R. A. N. S. 142; State *v.* Nelson, 107 Minn. 319, 119 N. W. 1058; Bradley *v.* Bauder, 36 Ohio St. 28, 38 Am. Rep. 547. See also *supra*, II, C, 3.

49. *Michigan.*—Comstock *v.* Grand Rapids, 54 Mich. 641, 20 N. W. 623.

New York.— Woodruff *v.* Oswego Starch Factory, 177 N. Y. 23, 22 N. E. 994.

Ohio.— Chisholm *v.* Shields, 21 Ohio Cir. Ct. 231.

Pennsylvania.— Com. *v.* New York, etc., R. Co., 150 Pa. St. 234, 24 Atl. 609; Luzerne County *v.* Hull, 1 C. Pl. 72.

Tennessee.— Memphis *v.* Ensley, 6 Baxt. 553, 32 Am. Rep. 532.

See 45 Cent. Dig. tit. "Taxation," § 113.

Contra.— Kennard *v.* Manchester, 68 N. H. 61, 36 Atl. 553.

Tax on devolution of property.— Where property is bequeathed in trust, the income thereof to be paid to a legatee for life, it would be double taxation on the remainder-man to assess upon the *corpus* of the estate a tax for the transfer of the life-estate therein, since upon the subsequent transfer of the *corpus* to the remainder-man he would have to pay the tax therefor, regardless of the

D. Taxation According to Value — 1. Constitutional Provisions. A constitutional requirement that all property shall be taxed in proportion or according to its value is mandatory upon the legislature, and imposes a rule for its assessment which cannot be varied,[50] as to such taxes as are within the application of the provision.[51] In particular, it forbids the levy of specific taxes and requires that they shall be imposed *ad valorem*.[52] Such a provision is also generally taken as prohibiting the commutation of taxes, in so far as that is involved in imposing a fixed charge on receipts, amount of business, or output in lieu of all taxes on property owned,[53] and as prohibiting a classification of property and taxation of the different classes at different rates.[54] But this provision is not intended to interfere with mere methods of administration in assessing and collecting taxes,[55] nor does it require that all property shall be taxed,[56] or restrict the power of the

previous tax with reference to the life-interest. Fitzgerald *v.* Rhode Island Hospital Trust Co., 24 R. I. 59, 52 Atl. 814.

50. *Georgia.*— Savannah *v.* Weed, 84 Ga. 683, 11 S. E. 235, 8 L. R. A. 270.

Maryland.— Daly *v.* Morgan, 69 Md. 460, 16 Atl. 287, 1 L. R. A. 757.

Missouri.— Life Assoc. of America *v.* St. Louis County Assessors, 49 Mo. 512; Hamilton *v.* St. Louis County Ct., 15 Mo. 3.

Ohio.—Wasson *v.* Wayne County, 49 Ohio St. 622, 32 N. E. 472, 17 L. R. A. 795.

South Carolina.— Southern R. Co. *v.* Kay, 62 S. C. 28, 29 S. E. 785; State *v.* Tucker, 56 S. C. 516, 35 S. E. 215; State *v.* Railroad Corps., 4 S. C. 376.

Tennessee.— Reelfoot Lake Levee Dist. *v.* Dawson, 97 Tenn. 151, 36 S. W. 1041, 34 L. R. A. 725.

See 45 Cent. Dig. tit. "Taxation," § 115 *et seq.*

The word "ought," in a constitutional provision that "all property subject to taxation ought to be taxed in proportion to its value," is not directory but mandatory. Life Assoc. of America *v.* St. Louis County Assessors, 49 Mo. 512.

51. What taxes affected see *infra*, II, D, 2.

52. *Arkansas.*— Pike *v.* State, 5 Ark. 204.

Illinois.— People *v.* Cook County, 221 Ill. 493, 77 N. E. 914.

Kentucky.— Standard Oil Co. *v.* Com., 119 Ky. 75, 82 S. W. 1020, 26 Ky. L. Rep. 985.

Louisiana.— Sims *v.* Jackson Parish, 22 La. Ann. 440.

Maryland.— State *v.* Cumberland, etc., R. Co., 40 Md. 22.

Missouri.— State *v.* North, 27 Mo. 464.

South Dakota.— Turner *v.* Hand County, 11 S. D. 348, 77 N. W. 589.

Tennessee.— Reelfoot Lake Levee Dist. *v.* Dawson, 97 Tenn. 151, 3 S. W. 1041, 34 L. R. A. 725.

Tax on bicycles and other vehicles.— A tax on bicycles and other wheeled vehicles, amounting to a fixed sum on each without regard to their varying values, is contrary to the constitutional provision under consideration and invalid. Smith *v.* County Com'rs' Ct., 117 Ala. 196, 23 So. 141; Chicago *v.* Collins, 175 Ill. 445, 51 N. E. 907, 67 Am. St. Rep. 224, 49 L. R. A. 408; Ellis *v.* Frazier, 38 Oreg. 462, 63 Pac. 642, 53 L. R. A. 454. But see as to validity of local license-tax on bicycles Green *v.* Erie, 19 Pa. Co. Ct. 491.

Specific land tax.— A road tax, levied on land without regard to its value, at the rate of four dollars per quarter section, is invalid Covell *v.* Young, 11 Nebr. 510, 9 N. W. 694; McCann *v.* Merriam, 11 Nebr. 241, 9 N. W. 96.

In Michigan the constitution, although containing a provision requiring taxation of property to be according to its value, expressly authorizes a specific tax upon corporations. See Bird *v.* Arnott, (1906) 108 N. W. 646.

53. *Georgia.*—Atlanta Nat. Bldg., etc., Assoc. *v.* Stewart, 109 Ga. 80, 35 S. E. 73.

Kentucky.—Schuster *v.* Louisville, 89 S. W. 689, 28 Ky. L. Rep. 588.

Minnesota.— State *v.* Lakeside Land Co., 71 Minn. 283, 73 N. W. 970.

Missouri.— Crow *v.* State, 14 Mo. 237.

North Dakota.— Northern Pac. R. Co. *v.* McGinnis, 4 N. D. 494, 61 N. W. 1032.

But see Stearns *v.* Minnesota, 179 U. S. 223, 21 S. Ct. 73, 45 L. ed. 162, in which case, however, a commutation of taxes on certain railroad lands was held to be in the nature of a contract made by the state in its capacity as trustee of the public lands.

Exemption by commutation of taxes generally see *infra*, IV, B, 5.

54. Savannah *v.* Weed, 84 Ga. 683, 11 S. E. 235, 8 L. R. A. 270, holding that a constitutional provision that taxation shall be "*ad valorem* on all property subject to be taxed," prevents a classification of property and taxation of the different classes at different rates, such as different rates for real and personal property or for different classes of personal property, although the provision would not apply to subjects of taxation other than property, as in the case of franchise, privilege or occupation taxes.

Provision as to equality and uniformity as affecting classification of property see *supra*, II, B, 2.

55. Baldwin *v.* Elizabeth, 42 N. J. Eq. 11, 6 Atl. 275; State *v.* Thomas, 16 Utah 86, 50 Pac. 615.

56. New Orleans *v.* Fourchy, 30 La. Ann. 910; State *v.* North, 27 Mo. 464.

What property shall be taxable is left to the discretion of the legislature, but the rule for making the assessment cannot be changed. Hamilton *v.* St. Louis County Ct., 15 Mo. 3.

Right to grant exemptions as affected by constitutional provision see *infra*, IV, B, 2.

legislature to the levying of taxes upon property alone;[57] but merely requires that all property which is taxed shall be taxed according to its value, and not specifically.[58]

2. What Taxes Affected. The constitutional provisions requiring that taxation shall be according to value do not apply to every species of taxation,[59] and are ordinarily held to apply only to ordinary taxes for purposes of general revenue,[60] and which are levied upon property.[61] So it has been held that such provisions do not apply to corporation franchise or privilege taxes,[62] or taxes upon their gross receipts,[63] or to business or occupation taxes,[64] or poll taxes,[65] or to such as are levied under the police power or by way of license-fees,[66] which

57. State *v.* Philadelphia, etc., R. Co., 45 Md. 361, 24 Am. Rep. 511; Glasgow *v.* Rowse, 43 Mo. 479; State *v.* Lancaster County, 4 Nebr. 537, 19 Am. Rep. 641; Charlotte, etc., R. Co. *v.* Gibbes, 27 S. C. 385, 4 S. E. 49.

58. New Orleans *v.* Fourchy, 30 La. Ann. 910; State *v.* North, 27 Mo. 464.

59. Glasgow *v.* Rowse, 43 Mo. 479.

60. *Alabama.*— Birmingham *v.* Klein, 89 Ala. 461, 7 So. 386, 8 L. R. A. 369.

Missouri.— Egyptian Levee Co. *v.* Hardin, 27 Mo. 495, 72 Am. Dec. 276.

Ohio.— Ridenour *v.* Saffin, 1 Handy 464, 12 Ohio Dec. (Reprint) 238.

Oklahoma.— Jones *v.* Holzapfel, 11 Okla. 405, 68 Pac. 511.

South Dakota.— Winona, etc., R. Co. *v.* Watertown, 1 S. D. 46, 44 N. W. 1072.

61. *Alabama.*— Western Union Tel. Co. *v.* State Bd. of Assessments, 80 Ala. 273, 60 Am. Rep. 99 [*reversed* on other grounds in 132 U. S. 472, 10 S. Ct. 161, 33 L. ed. 409].

Kentucky.— Southern Bldg., etc., Assoc. *v.* Norman, 98 Ky. 294, 52 S. W. 952, 56 Am. St. Rep. 367, 31 L. R. A. 41.

Maryland.— State *v.* Philadelphia, etc., R. Co., 45 Md. 361, 24 Am. Rep. 511.

Missouri.— Glasgow *v.* Rowse, 43 Mo. 479.

New Jersey.—Standard Underground Cable Co. *v.* Atty.-Gen., 46 N. J. Eq. 270, 19 Atl. 733, 19 Am. Rep. 394.

South Carolina.— Charlotte, etc., R. Co. *v.* Gibbes, 27 S. C. 385, 4 S. E. 49.

An income tax, although having a mixed effect upon both persons and property, is not a tax upon property within the application of a constitutional provision that "taxation upon property shall be in proportion to its value." Glasgow *v.* Rowse, 43 Mo. 479.

Dogs are not property within the application of a constitutional provision requiring property to be taxed according to its value. *Ex p.* Cooper, 3 Tex. App. 489, 30 Am. Rep. 152.

62. *California.*— Kaiser Land, etc., Co. *v.* Curry, 155 Cal. 638, 103 Pac. 341.

Kentucky.— Southern Bldg., etc., Assoc. *v.* Norman, 98 Ky. 294, 32 S. W. 952, 17 Ky. L. Rep. 887, 56 Am. St. Rep. 367, 31 L. R. A. 41.

Maine.— State *v.* Maine Cent. R. Co., 74 Me. 376.

Maryland.— State *v.* Philadelphia, etc., R. Co., 45 Md. 361, 24 Am. Rep. 511.

New Jersey.—Standard Underground Cable Co. *v.* Atty.-Gen., 46 N. J. Eq. 270, 19 Atl. 733, 19 Am. St. Rep. 394.

See 45 Cent Dig. tit. "Taxation," § 117.

Nature of charge.— While in one sense the franchise of a corporation is property and subject to the application of a constitutional provision requiring taxation according to value (Spring Valley Water Works *v.* Schottler, 62 Cal. 69), this does not prevent the legislature from imposing a charge in the nature of a privilege or license tax for the privilege of being or continuing to exist as a corporation in the case of a domestic corporation, or for the privilege of doing business as a corporation within the state in the case of a foreign corporation (Kaiser Land, etc., Co. *v.* Curry, 155 Cal. 638, 103 Pac. 341).

63. Western Union Tel. Co. *v.* State Bd. of Assessment, 80 Ala. 273, 60 Am. Rep. 99 [*reversed* on other grounds in 132 U. S. 472, 10 S. Ct. 161, 33 L. ed. 409] (holding that a tax on the gross receipts of telegraph companies is not a tax on property); Southern Bldg., etc., Assoc. *v.* Norman, 98 Ky. 294, 52 S. W. 952, 17 Ky. L. Rep. 887, 56 Am. St. Rep. 367, 31 L. R. A. 41 (holding that a tax on the gross receipts of foreign building and loan associations is in the nature of a franchise tax for the privilege of doing business and not a tax on property within the application of a constitutional provision requiring property to be taxed according to its value); State *v.* Philadelphia, etc., R. Co., 45 Md. 361, 24 Am. Rep. 511 (holding that a tax on the gross receipts of a railroad company is a franchise tax measured by the amount of business and not a tax on property within the application of the constitutional provision); Charlotte, etc., R. Co. *v.* Gibbes, 27 S. C. 385, 4 S. E. 49 (holding that a tax on the gross earnings of a railroad company is in the nature of a license-tax upon the business of the company and not a tax on property). But see Parker *v.* North British, etc., Ins. Co., 42 La. Ann. 428, 7 So. 599 (holding that a particular tax on the gross receipts of a foreign insurance company was not a license-tax but a tax on property and within the application of a constitutional provision requiring property to be taxed in proportion to its value); State *v.* Schoenig, 72 Minn. 528, 75 N. W. 711.

64. Atlanta Nat. Bldg., etc., Assoc. *v.* Stewart, 109 Ga. 80, 35 S. E. 73; Raymond *v.* Hartford F. Ins. Co., 196 Ill. 329, 63 N. E. 745; State *v.* Western Union Tel. Co., 73 Me. 518.

65. See Glasgow *v.* Rowse, 43 Mo. 479.

66. *Arkansas.*— Washington *v.* State, 13 Ark. 752.

include specific or *per capita* taxes on dogs,[67] or to fees of public officers,[68] or inspection fees,[69] or to assessments for local improvements[70] or a bonus for renewing a corporate charter.[71]

3. Mode of Valuation. The rule of taxation according to value has no direct relation to the methods prescribed for appraising and assessing property, and is satisfied by any plan or system which is intended and calculated to result in fixing the fair and true value of the property.[72] Nor does it prevent the legislature from directing that the value of property for the purpose of assessment shall be taken at less than its market value, unless this would be contrary to the explicit terms of the constitution,[73] provided such rule is applied without discrimination.[74]

California.— Kaiser Land, etc., Co. *v.* Curry, 155 Cal. 638, 103 Pac. 341.

Louisiana.— Clark *v.* New Orleans Bd. of Health, 30 La. Ann. 1351.

Maryland.— Waters *v.* State, 1 Gill 302.

Minnesota.— Willis *v.* Standard Oil Co., 50 Minn. 290, 52 N. W. 652.

Ohio.— Holst *v.* Rowe, 39 Ohio St. 340, 48 Am. Rep. 459.

South Carolina.— Charlotte, etc., R. Co. *v.* Gibbes, 27 S. C. 385, 4 S. E. 49.

67. *Connecticut.*— Woolf *v.* Chalker, 31 Conn. 121, 81 Am. Dec. 175.

Illinois.— Cole *v.* Hall, 103 Ill. 30.

Indiana.— State *v.* Sharp, 169 Ind. 128, 81 N. E. 1150; Shelby Tp. *v.* Randles, 57 Ind. 390.

Michigan.— Van Horn *v.* People, 46 Mich. 183, 9 N. W. 246, 41 Am. Rep. 159.

North Carolina.— Mowery *v.* Salisbury, 82 N. C. 175.

Ohio.— Holst *v.* Roe, 39 Ohio St. 340, 48 Am. Rep. 459.

Texas.— *Ex p.* Cooper, 3 Tex. App. 489, 30 Am. Rep. 152.

See 45 Cent. Dig. tit. "Taxation," § 122.

68. Lee County *v.* Abrahams, 34 Ark. 166; State *v.* Ream, 16 Nebr. 681, 21 N. W. 398.

69. Clark *v.* New Orleans Bd. of Health, 30 La. Ann. 1351; Willis *v.* Standard Oil Co., 50 Minn. 290, 52 N. W. 652.

70. *Alabama.*— Birmingham *v.* Klein, 89 Ala. 461, 7 So. 386, 8 L. R. A. 369.

Arkansas.— McGehee *v.* Mathis, 21 Ark. 40 [*reversed* on other grounds in 4 Wall. (U. S.) 143, 18 L. ed. 314].

Missouri.— Farrar *v.* St. Louis, 80 Mo. 379; Egyptian Levee Co. *v.* Hardin, 27 Mo. 495, 72 Am. Dec. 276; Garrett *v.* St. Louis, 25 Mo. 505, 69 Am. Dec. 475; Newby *v.* Platte County, 25 Mo. 258.

Ohio.— Ridenour *v.* Saffin, 1 Handy 464, 12 Ohio Dec. (Reprint) 238.

Oklahoma.— Jones *v.* Holzapfel, 11 Okla. 405, 68 Pac. 511.

South Dakota.— Winona, etc., R. Co. *v.* Watertown, 1 S. D. 46, 44 N. W. 1072.

Texas.— Higgins *v.* Bordages, 88 Tex. 458, 31 S. W. 52, 803, 53 Am. St. Rep. 770.

But see Reelfoot Lake Levee Dist. *v.* Dawson, 97 Tenn. 151, 36 S. W. 1041, 34 L. R. A. 725.

71. Baltimore *v.* Baltimore, etc., R. Co., 6 Gill (Md.) 288, 48 Am. Dec. 531.

72. *Arkansas.*— Wells *v.* Crawford County, 63 Ark. 576, 40 S. W. 710, 37 L. R. A. 371.

Colorado.— People *v.* Arapahoe County, 27 Colo. 86, 59 Pac. 733.

Kentucky.— South Covington, etc., R. Co. *v.* Bellevue, 105 Ky. 283, 49 S. W. 23, 20 Ky. L. Rep. 1184, 57 L. R. A. 50.

Michigan.— Taggart *v.* Sanilac County, 71 Mich. 16, 38 N. W. 639.

Missouri.— Ward *v.* Gentry County Bd. of Equalization, 135 Mo. 309, 36 S. W. 648.

New Jersey.— United New Jersey R., etc., Co. *v.* Parker, 75 N. J. L. 771, 69 Atl. 239 [*modifying* 75 N. J. L. 120, 67 Atl. 672, 686]; Blume *v.* Bowes, 65 N. J. L. 470, 47 Atl. 487.

Ohio.— Shotwell *v.* Moore, 45 Ohio St. 632, 16 N. E. 470.

Washington.— Nathan *v.* Spokane County, 35 Wash. 26, 76 Pac. 521, 102 Am. St. Rep. 888, 65 L. R. A. 336.

West Virginia.— Charleston, etc., Bridge Co. *v.* Kanawha County Ct., 41 W. Va. 658, 24 S. E. 1002.

See 45 Cent. Dig. tit. "Taxation," § 119.

Different times for assessing real and personal property.—A statute providing for a quadrennial assessment of real estate and an annual assessment of personal property is not in violation of the constitutional requirement that all property shall be assessed at its fair cash value. Worten *v.* Paducah, 123 Ky. 44, 93 S. W. 617, 29 Ky. L. Rep. 450.

In assessing shares of stock such a method of valuation should be adopted as will ascertain their full cash value and at the same time avoid double taxation. Chesebrough *v.* San Francisco, 153 Cal. 559, 96 Pac. 288.

A tax on railroads for county or municipal purposes must under such a provision be assessed according to the value of the property actually or constructively within the territorial limits of the county or municipality. Jessup *v.* Chicago, etc., R. Co., 13 Fed. Cas. No. 7,300.

73. Chicago *v.* Fishburn, 189 Ill. 367, 59 N. E. 791; Railroad, etc., Co.'s *v.* Tennessee Bd. of Equalization, 85 Fed. 302.

"Actual cash value."— Where the constitution directs that all taxable property shall be assessed and taxed on a valuation fixed at its actual cash value, or as near such value as is reasonably practicable, the test of such value is the cash price for which the property would sell in the open market. State *v.* Thomas, 16 Utah 86, 50 Pac. 615.

74. Lively *v.* Missouri, etc., R. Co., 102 Tex. 545, 120 S. W. 852, holding that where the property of individuals in a county is assessed at sixty-six and two-thirds per cent of its real value, according to an adopted policy, an assessment of the intangible assets

So also the rule of taxation according to value is not violated by allowing the owner of property to deduct from its assessed value an indebtedness which rests upon it,[75] or in listing personal property for taxation to deduct debits from credits.[76] But a statute is invalid which sets up an arbitrary and inflexible standard for the valuation of property, such as to prevent the assessing officers from exercising their judgment and knowledge upon it.[77]

4. Imposition of Penalty. A statute imposing a penalty for delinquency in the payment of taxes, or for neglect or refusal to list and return property for assessment, does not violate the constitutional rule of taxation according to value.[78]

E. Limitation of Rate or Amount — 1. In General.[79] A constitutional provision that taxes shall not be levied in excess of a specified rate or in excess of a maximum amount in any one year has been held to render illegal and void a tax imposed beyond the constitutional limitation,[80] at least in respect to the

of a railroad company at their full value is in violation of a constitutional provision requiring all property to be taxed in proportion to its value.

75. State *v.* Smith, 158 Ind. 543, 63 N. E. 25, 214, 64 N. E. 18, 63 L. R. A. 116; Murphy *v.* Trenton, 47 N. J. L. 79 (holding, however, that such provision must be uniform throughout the state and not applicable only to certain counties); State *v.* Runyon, 41 N. J. L. 98.

76. Stumpf *v.* Storz, 156 Mich. 228, 120 N. W. 618, 132 Am. St. Rep. 521, 23 L. R. A. N. S. 152; Hubbard *v.* Brush, 61 Ohio St. 252, 55 N. E. 829 [*disapproving* Columbus Exch. Bank *v.* Hines, 3 Ohio St. 1].

77. *Alabama.*— Railroad Co.'s Assessment Bd. *v.* Alabama Cent. R. Co., 59 Ala. 551.

Michigan.— Taggart *v.* Sanilac County, 71 Mich. 16, 38 N. W. 639.

Mississippi.— Hawkins *v.* Mangum, 78 Miss. 97, 28 So. 872.

New Jersey.— Williams *v.* State Bd. of Assessors, 51 N. J. L. 512, 18 Atl. 750.

North Carolina.—Atlantic, etc., R. Co. *v.* Carteret County, 75 N. C. 474.

Ohio.— McCurdy *v.* Prugh, 59 Ohio St. 465, 55 N. E. 154.

South Carolina.— State *v.* Charleston R. Corp., 4 S. C. 376.

Tennessee.— Reelfoot Lake Levee Dist. *v.* Dawson, 97 Tenn. 151, 36 S. W. 1041, 34 L. R. A. 725.

See 45 Cent. Dig. tit. "Taxation," §§ 119, 124.

Illustrations of rule.—A statute is unconstitutional which provides that railroad beds shall not be valued at less than eight thousand dollars per mile (Atlantic, etc., R. Co. *v.* Carteret County, 75 N. C. 474); or which makes as a standard for the valuation of railroad property the assessed value of real estate of persons other than railroad companies instead of the true value of the railroad property itself (Williams *v.* State Bd. of Assessors, 51 N. J. L. 512, 18 Atl. 750); or which provides for the assessment of railroad property at certain fixed amounts based upon the length of the road (State *v.* Charleston R. Corp., 4 S. C. 376).

78. Biddle *v.* Oaks, 59 Cal. 94; *Ex p.* Lynch, 16 S. C. 32. See also McCormick *v.* Fitch, 14 Minn. 252.

Including penalty in valuation.— It has been held that while the legislature might make provision by way of a penalty for failure to list property or swear to its value, the penalty cannot be embraced in the value of the property as by adding a certain percentage to the value of the property as returned by the assessors. McCormick *v.* Fitch, 14 Minn. 252. But see *Ex p.* Lynch, 16 S. C. 32.

Requirement of equality and uniformity as affected by imposition of penalty see *supra*, II, B, 1, g, (v), (B).

79. Limitation as to poll taxes see *infra*, II, F, 3.

80. *Alabama.*— See Hare *v.* Kennerly, 83 Ala. 608, 3 So. 683.

Colorado.— People *v.* Scott, 9 Colo. 422, 12 Pac. 608.

Missouri.— State *v.* Stephens, 146 Mo. 662, 48 S. W. 929, 69 Am. St. Rep. 625; St. Joseph Bd. of Public Schools *v.* Patten, 62 Mo. 444.

Nebraska.—Dakota County *v.* Chicago, etc., R. Co., 63 Nebr. 405, 88 N. W. 663.

Nevada.— State *v.* Storey County, 1 Nev. 264.

South Dakota.— *In re* Limitation of Taxation, 3 S. D. 456, 54 N. W. 417.

Wisconsin.— State *v.* Froelich, 118 Wis. 129, 94 N. W. 50, 99 Am. St. Rep. 985, 61 L. R. A. 345.

See 45 Cent. Dig. tit. "Taxation," § 125.

But the fact that the state debt has reached the constitutional limit is no ground for resisting a particular tax unless the object for which the tax is levied or the law authorizing it is unconstitutional and void. State *v.* Maginnis, 26 La. Ann. 558.

Taxation for state purposes.—Where the constitutional provision is that the tax for state purposes shall not exceed a certain rate, any legitimate expenditure of the state, necessary to be provided for by a state tax, is a "state purpose," and the tax therefor is a tax for a state purpose. People *v.* Scott, 9 Colo. 422, 12 Pac. 608.

Assessing omitted property.— In Maguire *v.* Mobile County Bd. of Revenue, etc., Com'rs, 71 Ala. 401, it is held that assessing and collecting taxes on property which had escaped taxation for previous years is a vio-

excess.[81] But this does not prevent the levy of a poll tax, although the tax on property has already reached the limit;[82] and there is always an implied exception as to taxes levied for the purpose of paying debts contracted before the adoption of the constitutional restriction.[83]

2. Taxation by Counties and Other Municipalities. The rule just stated applies also to taxes levied by counties and other municipal corporations, and such a tax is illegal when in excess of the limit imposed by the constitution or statute,[84] unless it is voted by a majority of the citizens, as is sometimes provided,[85] or unless the legislature, having originally prescribed the limit, legalizes a levy which was unlawful when made because transcending that limit.[86] With a limitation of this kind the courts have no power to interfere; and therefore mandamus will not issue to compel the officers of a municipal corporation to levy a greater tax than they are allowed by the law of the state to levy, or to compel the levy of a special tax when they have already, in the general levy, exercised the taxing

lation of the constitutional provision limiting the rate of taxation in any one year.

Exception as to support of state institutions.—Where the constitution limits the annual state tax levy, except for the support of state institutions, a tax levied for the completion and repair of the state penitentiary building is within the exception. State *v.* Laramie County, 8 Wyo. 104, 55 Pac. 451.

81. Union Pac. R. Co. *v.* Howard County, 66 Nebr. 663, 92 N. W. 579, 97 N. W. 280.

Priority of levies.—Where the constitutional limit for the total state levy has been exceeded, the relative priority of both general and special levies is fixed by the dates when the acts providing for each took effect, giving preference, however, to levies to meet appropriations for the support of the executive, legislative, and judicial departments. People *v.* State Bd. of Equalization, 20 Colo. 220, 37 Pac. 964.

82. People *v.* Ames, 24 Colo. 422, 51 Pac. 426.

83. *Colorado.*— *In re* State Bd. of Equalization, 24 Colo. 446, 51 Pac. 493.

Idaho.— Gooding *v.* Proffitt, 11 Ida. 380, 83 Pac. 230.

Mississippi.— Beck *v.* Allen, 58 Miss. 143.

Nebraska.— Baird *v.* Todd, 27 Nebr. 782, 43 N. W. 1143.

North Carolina.— Clifton *v.* Wynne, 80 N. C. 145; Cobb *v.* Elizabeth City Corp., 75 N. C. 1; French *v.* New Hanover County, 74 N. C. 692; Trull *v.* Madison County, 72 N. C. 388.

Wisconsin.— Hebard *v.* Ashland County, 55 Wis. 145, 12 N. W. 437.

United States.— U. S. *v.* Mobile, 12 Fed. 768, 4 Woods 536.

See 45 Cent. Dig. tit. "Taxation," §§ 125, 126.

Misappropriation of prior levy.—Where a tax in excess of the constitutional limitation is levied for the specific purpose of paying an indebtedness existing before the constitution, it cannot be declared invalid merely on showing that taxes had previously been levied for the same purpose but applied to other objects. Pope County *v.* Sloan, 92 Ill. 177.

84. *Arkansas.*— Gaither *v.* Gage, 82 Ark. 51, 100 S. W. 80.

Illinois.—Wabash R. Co. *v.* People, 213 Ill. 522, 72 N. E. 1127; Chicago, etc., R. Co. *v.* People, 213 Ill. 497, 72 N. E. 1118; Chicago, etc., R. Co. *v.* People, 213 Ill. 458, 72 N. E. 1105.

Louisiana.— State *v.* Cage, 34 La. Ann. 506.

Michigan.— Davies *v.* Saginaw County, 89 Mich. 295, 50 N. W. 862.

Mississippi.— Peterson *v.* Kittredge, 65 Miss. 33, 3 So. 65, 5 So. 824.

Missouri.— Brooks *v.* Schultz, 178 Mo. 222, 77 S. W. 861; State *v.* Missouri Pac. R. Co., 123 Mo. 72, 27 S. W. 367, 26 L. R. A. 36; Arnold *v.* Hawkins, 95 Mo. 569, 8 S. W. 718.

North Carolina.— State *v.* Currituck County, 107 N. C. 110, 12 S. E. 190.

West Virginia.— Brannon *v.* Kanawha County Ct., 33 W. Va. 789, 11 S. E. 34, 8 L. R. A. 304.

United States.— U. S. *v.* Knox County, 51 Fed. 880.

Canada.—Webster *v.* Sherbrooke, 24 Can. Sup. Ct. 268.

See 45 Cent. Dig. tit. "Taxation," § 126.

Meaning of "necessary expenses."—Where taxation by counties and towns is limited to so much as may be required for their necessary expenses, the word "necessary" does not mean "indispensable," but should be construed as a grant of discretionary powers. Cotten *v.* Leon County, 6 Fla. 610.

State tax paramount.— Under a constitutional provision that the whole tax levy for the ordinary purposes of state and county governments shall not exceed a certain rate, a tax levy for the state is paramount, and counties can only levy taxes to the extent that the power of taxation has not been exhausted by the levy for the state. State *v.* Currituck County, 107 N. C. 110, 12 S. E. 190.

85. See Surget *v.* Chase, 33 La. Ann. 833; Davies *v.* Saginaw County, 89 Mich. 295, 50 N. W. 862; *In re* House Roll 284, 31 Nebr. 505, 48 N. W. 275.

A petition by a majority of the electors of a county cannot be made the equivalent of the vote of the people required by the constitution. *In re* House Roll 284, 31 Nebr. 505, 48 N. W. 275.

86. Iowa R. Land Co. *v.* Soper, 39 Iowa 112.

power of the municipality to the established limit,[87] except in cases where the tax is required to satisfy a judgment founded on a debt incurred before the constitutional or statutory limitation became effective.[88]

F. Excise, Income, and Poll Taxes — 1. Excise Taxes.[89] Excise taxes are generally held to be within the power of the legislature, unless specifically restrained by the constitution,[90] whether laid on particular commodities,[91] on the privilege of pursuing particular occupations,[92] especially those requiring to be regulated or restrained in the interests of the public at large,[93] or on the franchises of corporations.[94]

87. Graham *v.* Parham, 32 Ark. 676; Black *v.* McGonigle, 103 Mo. 192, 15 S. W. 615; Chase County *v.* Chicago, etc., R. Co., 58 Nebr. 274, 78 N. W. 502; State *v.* Sheldon, 53 Nebr. 365, 73 N. W. 694; Louisiana *v.* Jefferson Police Jury, 116 U. S. 135, 6 S. Ct. 332, 29 L. ed. 588; Clay County *v.* U. S., 115 U. S. 616, 6 S. Ct. 199, 29 L. ed. 482; Louisiana *v.* U. S., 103 U. S. 289, 26 L. ed. 358; U. S. *v.* Macon County Ct., 99 U. S. 582, 25 L. ed. 331; U. S. *v.* New Orleans, 98 U. S. 381, 25 L. ed. 225; U. S. *v.* Clark County Ct., 95 U. S. 769, 24 L. ed. 545; Carroll County *v.* U. S., 18 Wall. (U. S.) 71, 21 L. ed. 771; Holt County *v.* National L. Ins. Co., 80 Fed. 686, 25 C. C. A. 469.

But it is competent for the court, where the taxing power of the municipality has been exhausted for the current year, to order tnat additional levies shall be made from year to year until the entire indebtedness is discharged. Coy *v.* Lyons City, 17 Iowa 1, 85 Am. Dec. 539. And where the estimate of municipal expenses is sufficient to exhaust the revenue, but such expenses can be reduced by judicious management, and a portion of the revenue applied to the payment of judgment creditors, that course ought to be pursued, and the court may, by mandamus, require that it shall be pursued. Deuel County *v.* Buchanan County First Nat. Bank, 86 Fed. 264, 30 C. C. A. 30.

88. Graham *v.* Parham, 32 Ark. 676; Louisiana *v.* St. Martin's Parish Police Jury, 111 U. S. 716, 4 S. Ct. 648, 28 L. ed. 574; U. S. *v.* New Orleans, 103 U. S. 358, 26 L. ed. 395; Memphis *v.* U. S., 97 U. S. 293, 24 L. ed. 920; Galena *v.* Amy, 5 Wall. (U. S.) 705, 18 L. ed. 560; Von Hoffman *v.* Quincy, 4 Wall. (U. S.) 535, 18 L. ed. 403.

89. **Excise defined** see Internal Revenue, 22 Cyc. 1598.

Property subject to excise tax see *infra*, III, A, 6, a.

90. Portland Bank *v.* Apthorp, 12 Mass. 252; People *v.* Reardon, 184 N. Y. 431, 77 N. E. 970, 112 Am. St. Rep. 628, 8 L. R. A. N. S. 314; Beals *v.* State, 139 Wis. 544, 121 N. W. 347; Maine *v.* Grand Trunk R. Co., 142 U. S. 217, 12 S. Ct. 121, 35 L. ed. 994.

"**The term excise** is of very general signification, meaning tribute, custom, tax, tallage, or assessment." Portland Bank *v.* Apthorp, 12 Mass. 252, 256. "The designation does not always indicate merely an inland imposition or duty on the consumption of commodities, but often denotes an impost for a license to pursue certain callings, or to deal in special commodities, or to exercise particular franchises. It is used more frequently, in this country, in the latter sense than in any other." Maine *v.* Grand Trunk R. Co., 142 U. S. 217, 227, 12 S. Ct. 163, 35 L. ed. 994.

An inheritance tax is not a tax upon property or property rights, but is an excise tax levied upon the transfer or transaction. Beals *v.* State, 139 Wis. 544, 121 N. W. 347.

Tax on transfers of stock.—A tax on transfers of stock in domestic and foreign corporations is an excise tax and not a property tax, and is valid as a transfer tax, even conceding that it could not be sustained as a property tax because not based on value, and because it affords the taxpayer no opportunity for a hearing on the valuation of his property and the amount of the tax. People *v.* Reardon, 184 N. Y. 431, 77 N. E. 970, 112 Am. St. Rep. 628, 8 L. R. A. N. S. 314.

In Massachusetts the constitution expressly authorizes excise taxes which must be reasonable but need not be proportional (*In re* Opinion of Justices, 195 Mass. 607, 84 N. E. 499); but they are restricted to "goods, wares, merchandise, and commodities" (Gleason *v.* McKay, 134 Mass. 419); and while corporate franchises are held to be "commodities" within the application of the provision (Com. *v.* Lancaster Sav. Bank, 123 Mass. 493; Portland Bank *v.* Apthorp, 12 Mass. 252), the term does not apply to the rights and privileges exercised by a copartnership (Gleason *v.* McKay, *supra*).

Federal taxation.— Congress has power, specifically granted, to lay and collect "excises," to pay the debts and provide for the common defense and general welfare of the United States; but such excises must be uniform throughout the United States. U. S. Const. art. 1, § 8. See also Internal Revenue, 22 Cyc. 1601.

91. See *infra*, III, A, 6, a.

92. Com. *v.* Lancaster Sav. Bank, 123 Mass. 493; Maine *v.* Grand Trunk R. Co., 142 U. S. 217, 12 S. Ct. 121, 35 L. ed. 994. See also State *v.* Volkman, 20 La. Ann. 585; Napier *v.* Hodges, 31 Tex. 287; and *supra*, II, B, 1, b, (II).

93. See State *v.* Volkman, 20 La. Ann. 585; Senior *v.* Ratterman, 44 Ohio St. 661, 11 N. E. 321; Napier *v.* Hodges, 31 Tex. 287; Albrecht *v.* State, 8 Tex. App. 216, 34 Am. Rep. 737; Crowley *v.* Christensen, 137 U. S. 86, 11 S. Ct. 13, 34 L. ed. 620.

94. Com. *v.* Lancaster Sav. Bank, 123 Mass. 493; Com. *v.* Hamilton Mfg. Co., 12 Allen

2. Taxes on Income.[95] Unless forbidden or restricted by the constitution,[96] a tax may lawfully be laid upon the income of the citizen.[97] But in view of the necessary independence of the federal and state governments, congress has no power to impose a tax on the salary of an officer of a state government,[98] and conversely the states have no power to lay income taxes on the salaries of judicial or other officers of the United States,[99] nor on so much of the income of a private citizen as is derived from interest on United States bonds or other securities or obligations of the federal government.[1]

3. Poll or Capitation Taxes.[2] Unless expressly forbidden by the constitution,[3] and except as so limited in regard to their amount or mode of assessment,[4] capitation or poll taxes are regarded as a lawful means of raising revenue for

(Mass.) 298; Portland Bank *v.* Apthorp, 12 Mass. 252.

Corporate franchises are "commodities" within the application of a constitutional provision authorizing excise taxes on "goods, wares, merchandise and commodities." Com. *v.* Lancaster Sav. Bank, 123 Mass. 493.

Taxation or corporate franchises generally see *infra*, III, B, 1, f.

95. Income tax defined see *supra*, I, A, 1.

Federal statutes imposing income taxes see Internal Revenue, 22 Cyc. 1611, 1614.

Incomes subject to tax see *infra*, III, A, 6, b.

Taxes not income taxes.— A tax upon the gross receipts of a railroad company arising from the transportation of passengers, freight, and baggage is not an income tax (Galveston, etc., R. Co. *v.* Davidson, (Tex. Civ. App. 1906) 93 S. W. 436); nor is a tax required to be paid by oyster tong men on the amount of their sales an income tax (Com. *v.* Brown, 91 Va. 762, 21 S. E. 357, 28 L. R. A. 110).

96. Pollock *v.* Farmers' L. & T. Co., 158 U. S. 601, 15 S. Ct. 912, 39 L. ed. 1108, holding that the income tax imposed by the federal statute of 1894 was unconstitutional in its application to income from real estate and personal property, as it was a direct tax not apportioned according to representation. See also Internal Revenue, 22 Cyc. 1614.

97. Glasgow *v.* Rowse, 43 Mo. 479. See also Drexel *v.* Com., 46 Pa. St. 31.

Exemptions.— No constitutional objection to the validity of an income tax law can be based on the fact that it excepts from its operation incomes below a certain small minimum. New Orleans *v.* Fourchy, 30 La. Ann. 910. And see *supra*, II, B, 1, f, (I).

Income is not "property" within a constitutional provision that "taxation upon property shall be in proportion to its value" (Glasgow *v.* Rowse, 43 Mo. 479); or a provision that taxes shall be "uniform on all species of property taxed" (Waring *v.* Savannah, 60 Ga. 93).

Measure of taxation.— It is perfectly constitutional as well as expedient in levying a tax upon profits or income to take as the measure of taxation the profits or income of the preceding year. Drexel *v.* Com., 46 Pa. St. 31.

98. Buffington *v.* Day, 11 Wall. (U. S.) 113, 20 L. ed. 122; Freedman *v.* Sigel, 9 Fed. Cas. No. 5,080, 10 Blatchf. 327.

99. Purnell *v.* Page, 133 N. C. 125, 45 S. E. 534; Dobbins *v.* Erie County, 16 Pet. (U. S.) 435, 10 L. ed. 1022.

But a clerk in a post-office, who is appointed by the local postmaster with the approval of the postmaster-general, is not an officer of the United States, and therefore his salary as such clerk is subject to the income tax. Melcher *v.* Boston, 9 Metc. (Mass.) 73.

1. Opinion of Justices, 53 N. H. 634. See also Chisholm *v.* Shields, 21 Ohio Cir. Ct. 231, 11 Ohio Cir. Dec. 361.

2. Capitation or poll tax defined see 6 Cyc. 349.

Persons subject to poll tax see *infra*, III, A, 6, c.

Tax on passengers see Commerce, 7 Cyc. 476.

3. Nance *v.* Howard, 1 Ill. 242; Short *v.* State, 80 Md. 392, 31 Atl. 322, 29 L. R. A. 404.

Compulsory labor on public roads with the privilege of providing a substitute or paying a stipulated sum in lieu of such personal service is not a poll tax within the application of a constitutional provision prohibiting poll taxes. Short *v.* State, 80 Md. 392, 31 Atl. 322, 29 L. R. A. 404. But see Proffit *v.* Anderson, (Va. 1894) 20 S. E. 887, holding that it is a poll tax within the application of a constitutional provision limiting the amount of a poll tax.

4. See Southern R. Co. *v.* Mecklenburg County, 148 N. C. 220, 61 S. E. 690; Jones *v.* Person County, 107 N. C. 248, 12 S. E. 69; University R. Co. *v.* Holden, 63 N. C. 410; Gardner *v.* Hall, 61 N. C. 21; Proffit *v.* Anderson, (Va. 1894) 20 S. E. 887.

Equation between property and poll taxes under the North Carolina constitution see Southern R. Co. *v.* Mecklenburg County, 148 N. C. 220, 61 S. E. 690.

Restriction on power of congress.— "No Capitation or other direct tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." U. S. Const. art. 1, § 9.

A capitation tax on passengers to be paid by the carrier, it has been held, is not a poll tax and is not in conflict with a constitutional provision limiting the amount of poll taxes. *Ex p.* Crandall, 1 Nev. 294 [*reversed* on other grounds in 6 Wall. (U. S.) 35, 18 L. ed. 744, 745].

public purposes,[5] and are in some cases expressly authorized, either generally or within certain limits, by constitutional provisions.[6] Not being laid upon property, they are not within the constitutional requirements as to equality and uniformity or as to taxation by value,[7] unless the principle of uniformity is violated by an arbitrary exemption of a certain class of persons from the tax.[8]

III. LIABILITY OF PERSONS AND PROPERTY.

A. Private Persons and Property — 1. Liability to Taxation — a. Statutory Provisions — (i) *In General.* The determination of the property or objects to be affected by a tax, as well as the rate or amount, belongs to the legislature, and except in the rare cases where the constitution itself prescribes a specific tax, the foundation for all lawful state taxation must be laid by a valid act of the legislature.[9] Like any other statute, a law imposing taxation may be repealed either by a particular declaration of the legislature to that effect or by the enactment of a wholly new statute covering the whole ground of taxation and inconsistent with the continuance in force of any earlier laws.[10] But the repeal of a tax law will not prevent the collection of taxes which had already been duly assessed or levied under it and so become a charge on the property.[11]

5. *Colorado.*— People *v.* Ames, 24 Colo. 422, 51 Pac. 426.

Illinois.— Sawyer *v.* Alton, 4 Ill. 127.

Minnesota.— Faribault *v.* Misener, 20 Minn. 396.

Tennessee.— Kuntz *v.* Davidson County, 6 Lea 65.

Washington.— Thurston County *v.* Tenino Stone Quarries, 44 Wash. 351, 87 Pac. 634, 9 L. R. A. N. S. 306.

United States.— Morgan *v.* Rowan, 17 Fed. Cas. No. 9,807, 2 Cranch C. C. 148.

Aliens may be required to pay a poll tax in the absence of any constitutional restriction, and a constitutional provision that "all male citizens" over a certain age "shall be liable to a poll tax" does not prevent the legislature from imposing a poll tax on inhabitants of the state who are not citizens of the state. Kuntz *v.* Davidson County, 6 Lea (Tenn.) 65.

6. See Southern R. Co. *v.* Mecklenburg County, 148 N. C. 220, 61 S. E. 690; Kuntz *v.* Davidson County, 6 Lea (Tenn.) 65; Solon *v.* State, 54 Tex. Cr. 261, 114 S. W. 349; Proffit *v.* Anderson, (Va. 1894) 20 S. E. 887.

7. Sawyer *v.* Alton, 4 Ill. 127; Ottawa County *v.* Nelson, 19 Kan. 234, 27 Am. Rep. 101; East Portland *v.* Multnomah County, 6 Oreg. 62; Thurston County *v.* Tenino Stone Quarries, 44 Wash. 351, 87 Pac. 634, 9 L. R. A. N. S. 306. *Compare* Nance *v.* Howard, 1 Ill. 242; Kansas City *v.* Whipple, 136 Mo. 475, 38 S. W. 295, 58 Am. St. Rep. 657, 35 L. R. A. 747.

8. State *v.* Ide, 35 Wash. 576, 77 Pac. 961, 102 Am. St. Rep. 914, 67 L. R. A. 280. See also Kansas City *v.* Whipple, 136 Mo. 475, 38 S. W. 295, 57 Am. St. Rep. 657, 35 L. R. A. 747.

But the legislature is not prohibited from exempting certain classes of persons from the payment of poll taxes if the classification is made upon a reasonable and proper basis. Bluitt *v.* State, 56 Tex. Cr. 525, 121 S. W. 168; Solon *v.* State, 54 Tex. Cr. 261, 114 S. W. 349; Tekoa *v.* Reilly, 47 Wash. 202, 91 Pac. 769, 13 L. R. A. N. S. 901.

9. Neary *v.* Philadelphia, etc., R. Co., 7 Houst. (Del.) 419, 9 Atl. 405; Webster *v.* People, 98 Ill. 343; Virginia, etc., R. Co. *v.* Washington County, 30 Gratt. (Va.) 471.

Requisites of tax statute.— A taxing act is fatally defective if the legislature does not designate the property out of which the tax is to be made and prescribe a mode of enforcing it. State *v.* Chamberlin, 37 N. J. L. 388. And see People *v.* State Tax Com'rs, 174 N. Y. 417, 67 N. E. 69, 105 Am. St. Rep. 674, 63 L. R. A. N. S. 884.

Contract to refund.— The illegality of a contract by a city to refund to an individual the amount of taxes assessed against him does not render the taxation of other property invalid. State *v.* Thayer, 69 Minn. 170, 71 N. W. 931.

10. *California.*— Crosby *v.* Patch, 18 Cal. 438.

Indiana.— State *v.* Brugh, 5 Ind. App. 592, 32 N. E. 869.

Kentucky.— Callahan *v.* Singer Mfg. Co., 92 S. W. 581, 29 Ky. L. Rep. 123; Bevins *v.* Com., 86 S. W. 544, 27 Ky. L. Rep. 735.

Louisiana.— Wintz *v.* Girardey, 31 La. Ann. 381.

New York.— Cone *v.* Lauer, 131 N. Y. App. Div. 193, 115 N. Y. Suppl. 644, holding that the general tax law of 1896 repealed by implication the special acts relating to taxation in Suffolk county.

Pennsylvania.— Philadelphia *v.* Kingsley, 5 Pa. Co. Ct. 75; Price *v.* Hunter, 21 Wkly. Notes Cas. 306.

Virginia.— Fox *v.* Com., 16 Gratt. 1.

Wyoming.— Frontier Land, etc., Co. *v.* Baldwin, 3 Wyo. 764, 31 Pac. 403.

United States.— Union Pac. R. Co. *v.* Ryan, 113 U. S. 516, 5 S. Ct. 601, 28 L. ed. 1098.

See 45 Cent. Dig. tit. "Taxation," § 134.

11. *Alabama.*— Hooper *v.* State, 141 Ala. 111, 37 So. 662; State *v.* Sloss, 83 Ala. 93, 3 So. 745.

(II) *Construction.*[12] It is the general rule that statutes providing for taxation are to be construed strictly as against the state and in favor of the taxpayers, and the burdens and liabilities which they impose are to be kept within the strict letter of the law, and not extended beyond its clear terms by any inference, implication, or analogy;[13] but this principle must not be pushed so far as to defeat the legislative purpose by mere construction, but an interpretation of the statute must be given in accordance with its real intention and meaning if that is clearly discoverable.[14] While certain classes of tax statutes may operate

Arkansas.— State *v.* Certain Lands, 40 Ark. 35.

California.— Oakland *v.* Whipple, 44 Cal. 303.

Kansas.— Gardenhire *v.* Mitchell, 21 Kan. 83.

Louisiana.— New Orleans *v.* Rhenish Westphalian Lloyds, 31 La. Ann. 781.

Maine.— State *v.* Waterville Sav. Bank, 68 Me. 515.

New Jersey.— Belvidere *v.* Warren R. Co., 34 N. J. L. 193.

Texas.— Clegg *v.* State, 42 Tex. 605.

See 45 Cent. Dig. tit. "Taxation," § 134.

Compare Gorley *v.* Sewell, 77 Ind. 316, holding that taxes levied under a statute which is afterward repealed cannot be collected unless under a saving clause in the repealing act.

Construction of repealing statutes see *infra*, III, A, 1, a, (II).

12. Construction of statutes generally see STATUTES, 36 Cyc. 1102.

Construction of revenue laws generally see CUSTOMS DUTIES, 12 Cyc. 1110; INTERNAL REVENUE, 22 Cyc. 1602; STATUTES, 36 Cyc. 1189.

Construction of tax statutes: Allowing redemption from tax-sales see *infra*, XII, A, 2. Curative statutes see *infra*, XI, O, 3. Declaring forfeitures of property delinquent see *infra*, XV, B, 2. Granting exemptions see *infra*, IV, C, 2. Granting power of taxation to municipal corporations see MUNICIPAL CORPORATIONS, 28 Cyc. 1661. To avoid double taxation see *supra*, II, C, 2.

13. *Alabama.*— New England Mortg. Security Co. *v.* Montgomery County Bd. of Revenue, 81 Ala. 110, 1 So. 30; State *v.* Brewer, 64 Ala. 287.

Florida.— Moseley *v.* Tift, 4 Fla. 402.

Georgia.— Savannah *v.* Hartridge, 8 Ga. 23.

Illinois.— Alton *v.* Ætna Ins. Co., 82 Ill. 45.

Indiana.— Smith *v.* Waters, 25 Ind. 397; Barnes *v.* Doe, 4 Ind. 132.

Maine.— East Livermore *v.* Livermore Falls Trust, etc., Co., 103 Me. 418, 69 Atl. 306, 15 L. R. A. N. S. 952; Williamsburg *v.* Lord, 51 Me. 599.

Massachusetts.— Green *v.* Holway, 101 Mass. 243, 3 Am. Rep. 339; Sewall *v.* Jones, 9 Pick. 412.

Mississippi.— Vicksburg, etc., R. Co. *v.* State, 62 Miss. 105.

New Hampshire.— Cahoon *v.* Coe, 57 N. H. 556.

New York.— People *v.* Duffy-McInnerney Co., 122 N. Y. App. Div. 336, 106 N. Y. Suppl. 878 [*affirmed* in 193 N. Y. 636, 86 N. E. 1129]; People *v.* Union Bag, etc., Co., 63 Misc. 132, 118 N. Y. Suppl. 456. *Compare* People *v.* Williams, 198 N. Y. 54, 91 N. E. 266 [*reversing* 134 N. Y. App. Div. 83, 118 N. Y. Suppl. 835].

Pennsylvania.— Boyd *v.* Hood, 57 Pa. St. 98. But see South Chester *v.* Broomall, 1 Del. Co. 58.

Wisconsin.— Wisconsin Tel. Co. *v.* Oshkosh, 62 Wis. 32, 21 N. W. 828.

United States.— Powers *v.* Barney, 19 Fed. Cas. No. 11,361, 5 Blatchf. 202; U. S. *v.* Watts, 28 Fed. Cas. No. 16,653, 1 Bond 580; U. S. *v.* Wigglesworth, 28 Fed. Cas. No. 16,690, 2 Story 369. But see U. S. *v.* Hodson, 10 Wall. 395, 19 L. ed. 937; Kelly *v.* Herrall, 20 Fed. 364.

England.— Oriental Bank Corp. *v.* Wright, 5 App. Cas. 842, 50 L. J. P. C. 1, 43 L. T. Rep. N. S. 177; Denn *v.* Diamond, 4 B. & C. 243, 6 D. & R. 328, 3 L. J. K. B. O. S. 211, 10 E. C. L. 561, 107 Eng. Reprint 1049; Warrington *v.* Furbor, 8 East 242, 6 Esp. 89, 103 Eng. Reprint 334; Gurr *v.* Scudds, 11 Exch. 190, 3 Wkly. Rep. 457; Wroughton *v.* Turtle, 11 M. & W. 561

See 45 Cent. Dig. tit. "Taxation," §§ 134, 135; and, generally, STATUTES, 36 Cyc. 1189.

A mortgage tax law is to be construed strictly, and if there is any doubt as to whether any liability has been imposed upon the mortgagor to pay the tax it should be resolved in his favor. People *v.* Union Bag, etc., Co., 63 Misc. (N. Y.) 132, 118 N. Y. Suppl. 456.

14. *Connecticut.*— Cornwall *v.* Todd, 38 Conn. 443; Hubbard *v.* Brainard, 35 Conn. 563.

Indiana.— Hasely *v.* Ensley, 40 Ind. App. 589, 82 N. E. 809.

Nebraska.— State *v.* Omaha Country Club, 78 Nebr. 178, 110 N. W. 693, holding that the courts will not aid in the depletion of the public revenues by permitting private property to escape taxation except in obedience to positive law.

New Jersey.— State *v.* Taylor, 35 N. J. L. 184.

New York.— White *v.* Walsh, 62 Misc. 423, 427, 114 N. Y. Suppl. 1015, where the court said: "The court cannot extend the fair meaning of the law so as to include things not named or described as subjects of taxation; neither will it permit parties to give new names to old forms and thus escape the letter of the law."

England.— Rein *v.* Lane, L. R. 2 Q. B. 144,

retrospectively without being unconstitutional,[15] such a statute will not be so construed unless in accordance with its plain meaning,[16] and repealing statutes will not be construed as operating retrospectively so as to remit taxes already assessed and payable under the earlier statute.[17]

b. Persons Liable — (I) *In General.* Except in so far as it may be restricted by the constitution or subject to specific exemptions, the legislative power to tax is coextensive with its general control over the inhabitants of the state and their property; and every person who subjects himself or his property to the jurisdiction of the state comes within that power.[18] The liability to personal taxation is governed not by one's citizenship but by his residence.[19]

(II) *Persons Under Disabilities.* The liability for the payment of taxes on property is not ordinarily affected by the fact that the owner is a person under disability,[20] as in the case of property, either real or personal,[21] belonging to infants,[22] insane persons,[23] or married women.[24]

c. Time When Liability Attaches. As between the state and the taxpayer, the latter is liable for the taxes on such taxable property as he owned on the day fixed by law for the completion of the assessment, or, according to the statute, on the day fixed for the filing of taxpayers' lists or schedules, his liability attaching as of that date.[25] Consequently in the absence of statute no liability for taxes

8 B. & S. 83, 36 L. J. Q. B. 81, 15 L. T. Rep. N. S. 466, 15 Wkly. Rep. 345.

Circumstances to aid construction.— A statute imposing taxes is not to be interpreted by its language alone, but in connection with other tax statutes prior and contemporaneous, and in the light of contemporaneous and subsequent practical understanding of it by taxing officers and the public. East Livermore *v.* Livermore Falls Trust, etc., Co., 103 Me. 418, 69 Atl. 306, 15 L. R. A. N. S. 952.

15. See Constitutional Law, 8 Cyc, 1022.

16. *Kentucky.*— Bierley *v.* Quick Run, etc., R. Co., 29 S. W. 874, 17 Ky. L. Rep. 36.

Louisiana.— New Orleans *v.* Rhenish Westphalian Lloyds, 31 La. Ann. 781.

New York.— People *v.* Spring Valley Hydraulic Gold Co., 92 N. Y. 383.

South Carolina.— State *v.* Burger, 1 McMull. 410.

United States.— Locke *v.* New Orleans, 4 Wall. 172, 18 L. ed. 334.

Construction against retrospective operation of statutes generally see Constitutional Law, 8 Cyc. 1022; Statutes, 36 Cyc. 1205.

17. State *v.* Certain Lands, 40 Ark. 35; Oakland *v.* Whipple, 44 Cal. 303.

18. Monticello Distilling Co. *v.* Baltimore, 90 Md. 416, 45 Atl. 210; Central Petroleum Co. *v.* Com., 25 Leg. Int. (Pa.) 316.

Women.— The personal estate of an unmarried woman is liable to taxation, although she is not allowed to vote. Wheeler *v.* Wall, 6 Allen (Mass.) 558.

A surgeon of the United States army stationed at a particular place and residing there in the performance of his duties is bound to pay taxes assessed on his household furniture. Finley *v.* Philadelphia, 32 Pa. St. 381.

Confiscated property.— The assessment of taxes against the adjudicatee of confiscated property, during his tenure thereof, is legal and valid. Brent *v.* New Orleans, 41 La. Ann. 1098, 6 So. 793.

19. Pendleton *v.* Com., 110 Va. 229, 65 S. E. 536.

Property of non-residents see *infra*, III, A, 4.

20. De Hatre *v.* Edmonds, 200 Mo. 246, 98 S. W. 744.

21. Payson *v.* Tufts, 13 Mass. 493.

22. Louisville *v.* Sherley, 80 Ky. 71; Payson *v.* Tufts, 13 Mass. 493; West Chester School Dist. *v.* Darlington, 38 Pa. St. 157; Bellefonte *v.* Spring Tp., 10 Pittsb. Leg. J. (Pa.) 450.

To whom taxable when held by a guardian see *infra*, III, A, 3, h.

23. De Hatre *v.* Edmonds, 200 Mo. 246, 98 S. W. 744. See also People *v.* Tax Com'rs, 100 N. Y. 215, 3 N. E. 85 [*reversing* 36 Hun 359]; Mason *v.* Thurber, 1 R. I. 481. But see Hunt *v.* Lee, 10 Vt. 297, holding that under a proper construction of the Vermont statutes an idiot under guardianship is not liable to be assessed and taxed for money on hand or money due, the question whether such assessment might be made against the guardian not being presented for decision.

To whom taxable when held by a committee see *infra*, III, A, 3, h.

24. De Hatre *v.* Edmonds, 200 Mo. 246, 98 S. W. 744. See also Collins *v.* Pease, 146 Mo. 135, 47 S. W. 925.

25. *Kansas.*— Long *v.* Culp, 14 Kan. 412.

Missouri.— State *v.* Snyder, 139 Mo. 549, 41 S. W. 216.

New Jersey.— State *v.* Jersey City, 44 N. J. L. 156; State *v.* Hardin, 34 N. J. L. 79.

New York.— People *v.* Chenango County, 11 N. Y. 563.

United States.— People *v.* New York Tax Com'rs, 104 U. S. 466, 26 L. ed. 632.

In Arkansas it is held that the statute requiring landowners to list their lands for taxation on or before the first day of January of each year is merely directory and does not exempt lands purchased from the state after the first day of January from taxation until

attaches during the current year or until after the next regular date for listing or assessment, with regard to property not previously subject to taxation which is acquired after the date when such liability ordinarily attaches,[26] as in the case of lands purchased from the state,[27] or personal property brought into the state from another state after such date.[28]

d. Contracts to Assume and Pay Taxes. An agreement by one holding a leasehold or other interest in property, but to whom it would not be assessable, to assume and pay the taxes thereon, may be binding as between the parties to it but does not affect the right of the state to proceed against the party assessed.[29]

e. Contracts and Transactions to Evade Taxation. It is not unlawful for the citizen to convert his taxable property into forms which are not taxable, although his only purpose is to escape taxation;[30] but if the transaction is only a temporary change or concealment of the property, made just before the time for assessment, and with the intention of restoring the property to its original form immediately after, it is a fraud on the revenue laws and the taxes may be assessed and collected on the property.[31] But notwithstanding this, if the trans-

the next year. State *v.* Certain Lands, 40 Ark. 35.

26. Long *v.* Culp, 14 Kan. 412; Creegan *v.* Hyman, 93 Miss. 481, 46 So. 952; Wildberger *v.* Shaw, 84 Miss. 442, 36 So. 539.

27. Wildberger *v.* Shaw, 84 Miss. 442, 36 So. 539.

28. Wangler *v.* Black Hawk County, 56 Iowa 384, 9 N. W. 314.

29. *Connecticut.*— Yale University *v.* New Haven, 71 Conn. 316, 42 Atl. 87, 43 L. R. A. 490.

Louisiana.— Williams *v.* Triche, 107 La. 92, 31 So. 926.

Nebraska.— Merriam *v.* Dovey, 25 Nebr. 618, 41 N. W. 550.

New Jersey.— State *v.* Blundell, 24 N. J. L. 402.

Pennsylvania.— Miles *v.* Delaware, etc., Canal Co., 5 Lanc. L. Rev. 262.

See 45 Cent. Dig. tit. "Taxation," § 140.

Compare Burr *v.* Wilcox, 13 Allen (Mass.) 269, where a tax collector was held entitled to maintain an action for such part of the taxes on a piece of realty as a part-owner had promised him to assume and pay.

Covenants or agreements in leases as to payment of taxes see LANDLORD AND TENANT, 24 Cyc. 1075.

Stipulations in mortgages as to payment of taxes upon the mortgaged premises or upon the mortgage itself or mortgage debt see MORTGAGES, 27 Cyc. 1100.

Assessors are not obliged to inquire into private contracts between parties in regard to the payment of taxes when assessing property for taxation. Milligan *v.* Drury, 130 Mass. 428.

30. *Indiana.*— Ogden *v.* Walker, 59 Ind. 460; Stilwell *v.* Corwin, 55 Ind. 433, 23 Am. Rep. 672.

Nebraska.— Dixon County *v.* Halstead, 23 Nebr. 697, 37 N. W. 621.

New York.— People *v.* Ryan, 88 N. Y. 142, 42 Am. Rep. 238; People *v.* McComber, 7 N. Y. Suppl. 71.

Texas.— Griffin *v.* Heard, 78 Tex. 607, 14 S. W. 892.

United States.— Scottish Union, etc., Ins. Co. *v.* Bowland, 196 U. S. 611, 25 S. Ct. 345, 49 L. ed. 619; Mitchell *v.* Leavenworth County, 91 U. S. 206, 23 L. ed. 302.

See 45 Cent. Dig. tit. "Taxation," § 141.

31. Crowder *v.* Riggs, 153 Ind. 158, 53 N. E. 1019; Holly Springs Sav., etc., Co. *v.* Marshall County, 52 Miss. 281, 24 Am. Rep. 668; Jones *v.* Seward Co., 10 Nebr. 154, 4 N. W. 946; Sisler *v.* Foster, 72 Ohio St. 437, 74 N. E. 639.

Buying United States bonds.— Where, under the circumstances stated in the text, a man converts his money or other taxable property into United States bonds or other non-taxable securities, he may be assessed for the amount so converted. *In re* People's Bank, 203 Ill. 300, 67 N. E. 777; Crowder *v.* Riggs, 153 Ind. 158, 53 N. E. 1019; Stilwell *v.* Corwin, 55 Ind. 433, 23 Am. Rep. 672; Mitchell *v.* Leavenworth County, 9 Kan. 344 [*affirmed* in 91 U. S. 206, 23 L. ed. 302]; Shotwell *v.* Moore, 129 U. S. 590, 9 S. Ct. 362, 32 L. ed. 827.

Changing title to property.— The same principle applies where the citizen, to evade taxation, places his property in the name of another person, particularly a non-resident, no real transfer being intended. Loud, etc., Lumber Co. *v.* Elmer Tp., 123 Mich. 61, 81 N. W. 965; Poppleton *v.* Yamhill County, 8 Oreg. 337. *Compare* O'Callaghan *v.* Owensboro, 111 Ky. 765, 64 S. W. 619, 23 Ky. L. Rep. 1099; Daniels *v.* Nelson, 41 Vt. 161, 98 Am. Dec. 577.

Covering up mortgage.— The same rule applies where a person lending money on real estate security casts the transaction in a form intended to conceal the fact that it is really a mortgage for the purpose of escaping taxation as a mortgagee. Waller *v.* Jaeger, 39 Iowa 228; Lappin *v.* Nemaha County, 6 Kan. 403; Patrick *v.* Littell, 36 Ohio St. 79, 38 Am. Rep. 552.

In Kentucky it is by statute a misdemeanor subjecting the offender to a fine and also to treble taxation to make temporary investments in non-taxable securities or to resort to any device whatever to evade taxation. Com. *v.* Harris, (1909) 118 S. W. 294, hold-

action involves the aid of a third party, who undertakes to restore the property or otherwise assist in its reconversion, it seems that the intended fraud on the state does not prevent the enforcement of such an agreement by the ordinary legal remedies.[32]

f. Persons or Property Erroneously Omitted.[33] Where any taxable property has been omitted from the assessment for a given year, through the mistake or error of the assessors or their failure to discover it, or the neglect of the owner to list or return it, it may nevertheless, under the statutes in force in most of the states, be thereafter assessed as for that year and the taxes collected;[34] and in

ing, however, that a *bona fide* sale and transfer of taxable property nearly two months before the assessment day and the investment of the proceeds in non-taxable government bonds cannot be held to be a trick or device on the part of the owner to escape taxation within the application of the statute.

32. Stilwell *v.* Corwin, 55 Ind. 433, 23 Am. Rep. 672; Patrick *v.* Littell, 36 Ohio St. 79, 38 Am. Rep. 552; Gilmore *v.* Roberts, 79 Wis. 450, 48 N. W. 522.

33. Corporate property see *infra*, III, B, 1, n.

34. *Alabama.*— Lehman *v.* Robinson, 59 Ala. 219.

California.— San Luis Obispo *v.* Pettit, 87 Cal. 499, 25 Pac. 694.

Colorado.— Aggers *v.* People, 20 Colo. 348, 38 Pac. 386.

Illinois.— Wabash R. Co. *v.* People, 196 Ill. 606, 63 N. E. 1084; Hayward *v.* People, 156 Ill. 84, 40 N. E. 287.

Indiana.— McConnell *v.* Hampton, 164 Ind. 547, 73 N. E. 1092.

Iowa.— Gibson *v.* Clark, 131 Iowa 325, 108 N. W. 527; Beresheim *v.* Arnd, 117 Iowa 83, 90 N. W. 506.

Kentucky.— James *v.* American Surety Co., 133 Ky. 313, 117 S. W. 411.

Louisiana.— New Orleans M. E. Church South *v.* New Orleans, 107 La. 611, 32 So. 101.

Mississippi.— Adams *v.* Luce, 87 Miss. 220, 39 So. 418; Adams *v.* Kuykendall, 83 Miss. 571, 35 So. 830.

Missouri.— Kansas City *v.* Hannibal, etc., R. Co., 81 Mo. 285.

Ohio.— Shields *v.* Gibson, 24 Ohio Cir. Ct. 673.

Oklahoma.— Anderson *v.* Ritterbusch, 22 Okla. 761, 98 Pac. 1002.

Oregon.— Hibernian Benev. Soc. *v.* Kelly, 28 Oreg. 173, 42 Pac. 3, 52 Am. St. Rep. 769, 30 L. R. A. 167.

Tennessee.— South Nashville St. R. Co. *v.* Morrow, 87 Tenn. 406, 11 S. W. 348, 2 L. R. A. 853.

Wisconsin.— State *v.* Pors, 107 Wis. 420, 83 N. W. 706, 51 L. R. A. 917. And see Ashland County *v.* Knight, 129 Wis. 63, 108 N. W. 208.

See 45 Cent. Dig. tit. "Taxation," § 142.

Invalid assessment.— Where property has been assessed but the assessment is invalid the property has "escaped assessment" within the meaning of the statute. San Luis Obispo *v.* Pettit, 87 Cal. 499, 25 Pac. 694.

Property of decedent's estate.— An administrator who fails to list his decedent's estate for taxation while it remains in his hands may be proceeded against, and an assessment made, even after he has settled and made distribution. Baldwin *v.* Shine, 84 Ky. 502, 2 S. W. 164, 8 Ky. L. Rep. 496.

Property in hands of purchaser.— Property which has escaped taxation through the negligence of the proper officers is subject to taxation in the hands of a subsequent purchaser for the years it has escaped. Kansas City *v.* Hannibal, etc., R. Co., 81 Mo. 285.

Taxes paid by stranger.— Where a tax on land has been assessed to and paid by another than the true owner, the state cannot again assess the land for the same year in the name of the true owner and compel him to pay the taxes. Com. *v.* Ingalls, 121 Ky. 194, 89 S. W. 156, 28 Ky. L. Rep. 164. And see Adams *v.* Schwartz, 80 Miss. 660, 32 So. 280.

Property no longer existing.— In Wisconsin it is held that the statute authorizes the reassessment of any omitted personal property, although, between the time of its omission and the reassessment, it has passed out of existence, notwithstanding the objection that if the property is not in existence it cannot be within the jurisdiction of the assessors, since the whole subject of taxation is within the control of the legislature subject only to the constitutional requirement of uniformity. State *v.* Pors, 107 Wis. 420, 83 N. W. 706, 51 L. R. A. 917.

Authority of assessor.— The statutes authorizing the county treasurer to assess omitted property confer on him no appellate jurisdiction to correct the errors of assessors or boards of review in estimating the value of property actually assessed, and their valuation, in the absence of an appeal to the district court, is final. Security Sav. Bank *v.* Carroll, 128 Iowa 230, 103 N. W. 379.

Under the Iowa statute the authority of the county auditor to "correct any error in the assessment or tax list" and to "assess and list for taxation any omitted property" applies only to the tax list of the current year, the duty of assessing and listing omitted property except for the current year resting upon the county treasurer. Mead *v.* Story County, 119 Iowa 69, 93 N. W. 88.

The Missouri statute (Rev. St. (1899) § 9199), providing that when "there has been a failure to assess the property in any county for any year or years, the assessor of said county for the time being shall assess the property for the year or years in which such failure shall have occurred," applies only where there has been a total fail-

the absence of statute back assessments for previous years on omitted property are not authorized,[35] and the laws commonly provide a period of limitation, by declaring that property shall not be assessed for back taxes for more than a certain number of years, usually five.[36] Statutes authorizing assessments for back taxes on omitted property are not unconstitutional,[37] and as affecting the right of the state to collect such taxes it is not material how the property happened to be omitted,[38] or that the public expenses for the years during which the property was omitted have been paid, or that the purposes for which the taxes were originally required have been met with other funds;[39] but in the assessment of omitted property it must be assessed for each year that it was omitted at the rate at which it would have been assessed if the assessment had been made at the proper time.[40]

g. Property Sold or Forfeited to State. Where land is sold or forfeited to the state for the non-payment of taxes upon it, it may still be listed and assessed to the former owner so long as he has a right to redeem it, and no waiver of the forfeiture is implied in so assessing it.[41] But it is otherwise when the forfeiture is absolute with no right of redemption, or when the right of redemption has expired.[42]

h. Estoppel to Deny Liability. Mere submission to illegal taxation should not, except in extreme cases, be construed into a recognition of the right so to tax, so as to estop the party from afterward denying it;[43] but one who procures

ure to make any assessment in the county and does not authorize a back assessment of the personal property of a particular taxpayer which may have been omitted. Hannibal *v.* Bowman, 98 Mo. App. 103, 71 S. W. 1122.

35. Johnson *v.* Royster, 88 N. C. 194; Whiting *v.* West Point, 89 Va. 741, 17 S. E. 1.

Municipal taxes.— In the absence of legislative authority a municipal corporation has no power to levy back taxes, and the code provision authorizing the commissioners of revenue to assess taxes for previous years on omitted property has no application to municipal taxation. Whiting *v.* West Point, 89 Va. 741, 17 S. E. 1.

36. Calhoun County *v.* Woodstock Iron Co., 82 Ala. 151, 2 So. 132; Schoonover *v.* Petcina, 126 Iowa 261, 100 N. W. 490; Siberling *v.* Cropper, 119 Iowa 420, 93 N. W. 494; Jewett *v.* Foot, 119 Iowa 359, 93 N. W. 364; Com. *v.* Thomas, 119 Ky. 208, 83 S. W. 572, 26 Ky. L. Rep. 1128; Falls Branch Jellico Land, etc., Co. *v.* Com., 83 S. W. 108, 26 Ky. L. Rep. 1028; New Orleans M. E. Church South *v.* New Orleans, 107 La. 611, 32 So. 101, limitation of three years.

37. Eastern Kentucky Coal Lands Corp. *v.* Com., 111 S. W. 362, 33 Ky. L. Rep. 857; South Nashville St. R. Co. *v.* Morrow, 87 Tenn. 406, 11 S. W. 348, 2 L. R. A. 853; State *v.* Memphis, etc., R. Co., 14 Lea (Tenn.) 56; Florida Cent., etc., R. Co. *v.* Reynolds, 183 U. S. 471, 22 S. Ct. 176, 46 L. ed. 283; Winona, etc., Land Co. *v.* Minnesota, 159 U. S. 526, 16 S. Ct. 83, 40 L. ed. 247; Jackson Lumber Co. *v.* McCrimmon, 164 Fed. 759; Western Assur. Co. *v.* Halliday, 127 Fed. 830. See also CONSTITUTIONAL LAW, 8 Cyc. 1022.

38. James *v.* American Surety Co., 133 Ky. 313, 117 S. W. 411, holding that it is not material whether the omission was due to dereliction on the part of the taxing officers or to the fault of the owner of the property.

39. Anderson *v.* Ritterbusch, 22 Okla. 761, 98 Pac. 1002.

40. James *v.* American Surety Co., 133 Ky. 313, 117 S. W. 411.

41. *Louisiana.*— Remick *v.* Lang, 47 La. Ann. 914, 17 So. 461; Reinach *v.* Duplantier, 46 La. Ann. 151, 15 So. 13; State *v.* New Orleans Mortg. Recorder, 45 La. Ann. 566, 12 So. 880. *Compare* Lisso *v.* Giddens, 117 La. 507, 41 So. 1029.

Maine.— Hodgdon *v.* Wight, 36 Me. 326.

Michigan.— Crane *v.* Reeder, 25 Mich. 303.

Missouri.— State *v.* Smith, 13 Mo. App. 421; State *v.* Heman, 7 Mo. App. 420.

United States.— Gulf States Land, etc., Co. *v.* Parker, 72 Fed. 399; Shelley *v.* St. Charles County, 28 Fed. 875.

See 45 Cent. Dig. tit. "Taxation," § 143.

42. Aztec Copper Co. *v.* Auditor-Gen., 128 Mich. 615, 87 N. W. 895; Wells *v.* Johnston, 171 N. Y. 324, 63 N. E. 1095; Rich *v.* Braxton, 158 U. S. 375, 15 S. Ct. 1006, 39 L. ed. 1022 [*affirming* 47 Fed. 178]; Clarke *v.* Strickland, 5 Fed. Cas. No. 2,864, 2 Curt. 439.

43. Langworthy *v.* Dubuque, 13 Iowa 86; Hale *v.* Jefferson County, 39 Mont. 137, 101 Pac. 973.

Where an assessment of personalty for taxation is absolutely void, the property not being liable to taxation, the taxpayer's failure to appeal to the board of review does not estop him from contesting the validity of the assessment. Woodmere Cemetery Assoc. *v.* Springwells Tp., 130 Mich. 466, 90 N. W. 277.

Validity of acts of political departments of government as ground of objection.— In 1846, congress retroceded to the state of Virginia the county of Alexandria, which previously had formed part of the District of Columbia. Very grave doubts were raised as to the validity of this action. But it was held that since the state of Virginia had ever since been in

particular property to be assessed in his name, or returns it to the assessor as his, is estopped to deny his liability for the taxes upon it;[44] and the same rule has been applied as to the amount of the tax, where he has acquiesced in its valuation at a certain sum.[45] Where the taxpayer has submitted to the payment of the tax, it is not ordinarily open to other persons, such as his creditors, to object to it.[46]

2. Nature of Property — a. In General. All property within the jurisdiction of the state is subject to its taxing power, except where specifically exempted;[47]

the *de facto* possession of Alexandria county, and the political department of her government had uniformly asserted, and her judicial department expressly affirmed, her title thereto, and congress had more than once recognized the transfer as a settled fact, a resident of that county, suing to recover taxes paid under protest upon his property there situate, was estopped to raise the question of the validity of the retrocession. Phillips *v.* Payne, 92 U. S. 130, 23 L. ed. 649.

44. *Alabama.*— Rodgers *v.* Gaines, 73 Ala. 218.

California.— People *v.* Stockton, etc., R. Co., 49 Cal. 414.

Connecticut.— Ives *v.* North Canaan, 33 Conn. 402; Goddard *v.* Seymour, 30 Conn. 394.

Idaho.—Inland Lumber, etc., Co. *v.* Thompson, 11 Ida. 508, 83 Pac. 933, 114 Am. St. Rep. 274.

Illinois.— Dennison *v.* Williamson County, 153 Ill. 516, 39 N. E. 118.

Iowa.— Slimmer *v.* Chickasaw County, 140 Iowa 448, 118 N. W. 779.

Kentucky.— Chesapeake, etc., R. Co. *v.* Com., 129 Ky. 318, 108 S. W. 248, 32 Ky. L. Rep. 1119, 111 S. W. 334, 33 Ky. L. Rep. 882; Illinois Cent. R. Co. *v.* Com., 128 Ky. 268, 108 S. W. 245, 32 Ky. L. Rep. 1112, 110 S. W. 265, 33 Ky. L. Rep. 326; Southern R. Co. *v.* Coulter, 113 Ky. 657, 68 S. W. 873, 24 Ky. L. Rep. 203.

Mississippi.— Fox *v.* Pearl River Lumber Co., 80 Miss. 1, 31 So. 583.

Wisconsin.—Hamacker *v.* Commercial Bank, 95 Wis. 359, 70 N. W. 295.

See 45 Cent. Dig. tit. "Taxation," § 144.

The same rules apply to corporations with regard to property given in for taxation by their proper officers or agents. People *v.* Stockton, etc., R. Co., 49 Cal. 414; Illinois Cent. R. Co. *v.* Com., 128 Ky. 268, 108 S. W. 245, 32 Ky. L. Rep. 1112, 110 S. W. 265, 33 Ky. L. Rep. 326.

A receiver of a bank is estopped to resist the payment of a tax based upon a property statement made to the assessor by the cashier of the bank prior to its insolvency. Hamacker *v.* Commercial Bank, 95 Wis. 359, 70 N. W. 295.

But a guardian in a proceeding to recover taxes charged against him as guardian is not estopped from making the defense that by reason of the death of the ward, and administration granted on the estate before the property was listed, he was without authority to list the same for taxation. Sommers *v.* Boyd, 48 Ohio St. 648, 29 N. E. 497.

45. Phelps Mortg. Co. *v.* Oskaloosa Bd. of Equalization, 84 Iowa 610, 51 N. W. 50. *Compare* Hale *v.* Jefferson County, 39 Mont. 137, 101 Pac. 973.

Commutation of taxes.—Where the charter of a railroad company conditions the exercise of its corporate privileges upon the payment to the state of a certain percentage of its earnings, by way of a tax, and the company actually proceeds to operate its road, there is an implied acceptance of the condition and an agreement to pay the stated tax which rests on contract and cannot be evaded or denied. State *v.* Chicago, etc., R. Co., 128 Wis. 449, 108 N. W. 594.

46. *In re* Pennsylvania Bank Assignees' Account, 39 Pa. St. 103. In this case a tax was properly laid on bank dividends actually declared, and it was held that creditors of the bank could not dispute it collaterally, although the bank was insolvent at the time and the dividend was a fraud on stock-holders and creditors.

47. *Illinois.*— People *v.* Ravenswood Hospital, 238 Ill. 137, 87 N. E. 305.

Kentucky.— Wolfe County *v.* Beckett, 127 Ky. 252, 105 S. W. 447, 32 Ky. L. Rep. 167, 17 L. R. A. N. S. 688.

Massachusetts.— *In re* Opinion of Justices, 195 Mass. 607, 84 N. E. 499.

Missouri.— State *v.* Mission Free School, 162 Mo. 332, 62 S. W. 998.

Pennsylvania.— Northampton County *v.* Glendon Iron Co., 1 Lehigh Val. L. Rep. 81.

Texas.— Hall *v.* Miller, 102 Tex. 289, 115 S. W. 1168 [*affirming* (Civ. App. 1908) 110 S. W. 165].

Subject to constitutional limitations everything to which the legislative power extends may be taxed, whether person or property, tangible or intangible, franchise, privilege, occupation, or right. Wolfe County *v.* Beckett, 127 Ky. 252, 105 S. W. 447, 32 Ky. L. Rep. 167, 17 L. R. A. N. S. 688.

Scope of term "property."— In a constitutional provision for levying a tax by valuation, so that every person shall contribute in proportion to the value of his property, the word "property" is a generic term and includes all property of whatever description, whether tangible or intangible. State *v.* Savage, 65 Nebr. 714, 91 N. W. 716.

Commodities imported from abroad.— An imported article in the importer's possession, in the original package, continues to be a part of the foreign commerce of the country and is not part of the property in the state subject to taxation; but when the article has passed into the hands of a purchaser, it is no longer an import and is subject to taxa-

but on the other hand, no property is liable to assessment under a particular tax law unless named or described in it,[48] and only that which may properly be termed property is subject to a property tax.[49] As regards the character of property for purposes of taxation the first inquiry is whether it is taxable at all;[50] and if taxable, the next inquiry is whether it shall be taxed as real or personal property;[51] and this must be determined from the provisions of the statutes and the general distinguishing characteristics of real and personal property.[52] As thus determined real property should not be assessed as personalty,[53] or personal property as realty,[54] although it has been held that such an assessment is not prejudicial where the rates are the same.[55]

b. Real Property and Interests Therein — (i) *In General.*[56] All real property within the jurisdiction of the state, unless expressly or impliedly exempt,[57] is subject to taxation,[58] although a distinction has sometimes been made as regards

tion like any other property. State *v.* Board of Assessors, 46 La. Ann. 145, 15 So. 10, 49 Am. St. Rep. 318.

48. State Tax Com'rs *v.* Holliday, 150 Ind. 216, 49 N. E. 14, 42 L. R. A. 826; People *v.* Feitner, 167 N. Y. 1, 60 N. E. 265, 82 Am. St. Rep. 698. See also People *v.* Duffy-McInnerney Co., 122 N. Y. App. Div. 336, 106 N. Y. Suppl. 878 [*affirmed* in 193 N. Y. 636, 86 N. E. 1129]. *Compare* Hope Min. Co. *v.* Kennon, 3 Mont. 35, holding that the enumeration of certain species of property liable to taxation imports no exemption of other species not enumerated.

Construction of tax statutes generally see *supra*, III, A, 1, a, (II).

49. Arapahoe County *v.* Rocky Mountain News Printing Co., 15 Colo. App. 189, 61 Pac. 494; State *v.* Wheeler, 141 N. C. 773, 53 S. E. 358, 115 Am. St. Rep. 700, 5 L. R. A. N. S. 1139.

A trade-mark used in the sale of a commodity is not property within the application of constitutional and statutory provisions requiring the taxation of all "property." Com. *v.* Kentucky Distilleries, etc., Co., 132 Ky. 521, 116 S. W. 766.

Internal revenue stamps are not property within the application of the tax laws but merely representatives of a tax levied by the national government, and are not subject to taxation, although kept in quantities by a dealer for the purpose of sale. Palfrey *v.* Boston, 101 Mass. 329, 3 Am. Rep. 364.

50. Russell *v.* New Haven, 51 Conn. 259; People *v.* Brooklyn Bd. of Assessors, 93 N. Y. 308.

51. Russell *v.* New Haven, 51 Conn. 259.

52. Russell *v.* New Haven, 51 Conn. 259; Wilgus *v.* Com., 9 Bush (Ky.) 556; Milligan *v.* Drury, 130 Mass. 428; Cincinnati College *v.* Yeatman, 30 Ohio St. 276.

Character of property as real or personal see generally, FIXTURES, 19 Cyc, 1033; IMPROVEMENTS, 22 Cyc. 1; PROPERTY, 32 Cyc. 661.

Taxation of personal property see *infra*, III, A, 2, c.

Taxation of real property see *infra*, III, A, 2, b.

Rents reserved on leases for over twenty-one years are under the New York statute of 1846 taxable as personal property (Le Couteulx *v.* Erie County, 7 Barb. (N. Y.) 249; Livingston *v.* Hollenbeck, 4 Barb. (N. Y.) 9, 3 How. Pr. 343); and the statute applies to rents reserved on a lease originally creating a term of this length, although at the time of the passage of the statute the lease had less than twenty-one years to run (Le Couteulx *v.* Erie County, *supra*); but rents reserved on ordinary leases for less than twenty-one years are not taxable as personal property (People *v.* McComber, 7 N. Y. Suppl. 71).

53. Wilson *v.* Cass County, 69 Iowa 147, 28 N. W. 483; State *v.* Minneapolis Mill Co., 26 Minn. 229, 2 N. W. 839.

54. Wilgus *v.* Com., 9 Bush (Ky.) 556.

55. Wilson *v.* Cass County, 69 Iowa 147, 28 N. W. 483, holding that while nursery stock should be assessed with the land as real estate, it is not prejudicial to assess it separately from the land as personal property where the rates on each are the same.

56. **Taxation of leasehold interests** generally, see *infra*, III, A, 3, c.

57. See Andrews *v.* Auditor, 28 Gratt. (Va.) 115.

Exemptions generally see *infra*, IV.

Public property see *infra*, III, C.

58. Lamar *v.* Sheppard, 80 Ga. 25, 5 S. E. 247; Cincinnati College *v.* Yeatman, 30 Ohio St. 276.

Forest preserve lands are taxable under the New York statute of 1886. Hyzer *v.* Ulster County, 66 Hun (N. Y.) 628, 20 N. Y. Suppl. 912.

Where makers of a plat reserved to themselves the fee to a strip of land along one avenue, giving the lot owners a right of access to the avenue over the same, such strip was held taxable like other land, although the value of the easement, as appurtenant to the several lots conveyed, was included in their assessment. Lever *v.* Grant, 139 Mich. 273, 102 N. W. 848, 103 N. W. 843.

A village within the application of a statute imposing a tax on "lots, lands," etc., within "any city, town, village, or borough," includes a place where persons assemble and reside, most of them during the summer only, but some throughout the year, whether such place is incorporated or not. Martin *v.* St. Luke's Parish Tax Collector, 1 Speers (S. C.) 343.

the rate of taxation according to the character, location, or use of different kinds of lands.[59] What are at common law chattel interests in real property should be taxed not as realty but as personal property,[60] except where by statute they are classified for purposes of taxation as real estate.[61]

(II) *Mines, Mining Rights, and Minerals.*[62] Mines in operation are taxable as real estate.[63] Moreover the mining rights in land may be severed by grant and conveyance from the surface rights or from the general ownership in fee, and thereupon become separately taxable to their owner as real estate;[64] but in the absence of statute a mere lease for a term of years of the right to mine for and extract coal or other minerals from the land does not effect such a severance of the title as to make the interest of the lessee taxable as realty,[65] and still less

59. See Indianapolis *v.* Morris, 25 Ind. App. 409, 58 N. E. 510; People *v.* Neff, 16 N. Y. App. Div. 107, 45 N. Y. Suppl. 102; Henderson Bridge Co. *v.* Henderson, 173 U. S. 592, 19 S. Ct. 553, 43 L. ed. 823.

As to the constitutional validity of such classification see *supra*, II, B, 3, d.

60. Wilgus *v.* Com., 9 Bush (Ky.) 556, holding that a lease, although for ninety-nine years, and with a privilege of perpetual renewal, is only a chattel, and should not be listed for taxation as real estate but as personal property of the lessee.

61. Elmira *v.* Dunn, 22 Barb. (N. Y.) 402; People *v.* McComber, 7 N. Y. Suppl. 71; Cincinnati College *v.* Yeatman, 30 Ohio St. 276.

62. **Mining companies** see *infra*, III, B, 2, e, (x).

63. Waller *v.* Hughes, 2 Ariz. 114, 11 Pac. 122.

64. *California.*— Graciosa Oil Co. *v.* Santa Barbara County, 155 Cal. 140, 99 Pac. 483, 20 L. R. A. N. S. 211.

Illinois.— People *v.* Bell, 237 Ill. 332, 86 N. E. 593, 19 L. R. A. N. S. 746; People *v.* O'Gara Coal Co., 231 Ill. 172, 83 N. E. 140; *In re* Maple Wood Coal Co., 213 Ill. 283, 72 N. E. 786; Sholl *v.* People, 194 Ill. 24, 61 N. E. 1122; Consolidated Coal Co. *v.* Baker, 135 Ill. 545, 26 N. E. 651, 12 L. R. A. 247; *In re* Major, 134 Ill. 19, 24 N. E. 973.

Kansas.— Kansas Natural Gas Co. *v.* Neosho County, 75 Kan. 335, 89 Pac. 750; Cherokee, etc., Coal, etc., Co. *v.* Crawford County, 71 Kan. 276, 80 Pac. 601.

Kentucky.— Wolfe County *v.* Beckett, 127 Ky. 252, 105 S. W. 447, 32 Ky. L. Rep. 167, 17 L. R. A. N. S. 688; Stuart *v.* Com., 94 Ky. 595, 23 S. W. 367, 15 Ky. L. Rep. 513.

Montana.— Murray *v.* Hinds, 30 Mont. 466, 76 Pac. 1039.

New York.— Smith *v.* New York, 68 N. Y. 552.

Ohio.— Jones *v.* Wood, 2 Ohio S. & C. Pl. Dec. 75, 1 Ohio N. P. 155.

Pennsylvania.— Delaware, etc., R. Co. *v.* Sanderson, 109 Pa. St. 583, 1 Atl. 394, 58 Am. Rep. 743; Sanderson *v.* Scranton, 105 Pa. St. 469; Logan *v.* Washington County, 29 Pa. St. 373; Berwind White Coal Min. Co. *v.* Clearfield County, 18 Pa. Co. Ct. 545; Rockwell *v.* Keefer, 39 Pa. Super. Ct. 468.

Tennessee.— Hadley *v.* Hadley, 114 Tenn. 156, 87 S. W. 250.

Vermont.— Waterman *v.* Davis, 66 Vt. 83, 28 Atl. 664.

Virginia.— Tiller *v.* Excelsior Coal, etc., Corp., 110 Va. 151, 65 S. E. 507, holding that Code (1904), § 437*a*, providing that where the surface of land is held by one person and the minerals by another, the commissioners shall ascertain the fair market value of their respective interests, makes the two holdings distinct and separate subjects of taxation, and that minerals may not be sold for delinquent taxes on the fee.

West Virginia.— Low *v.* Lincoln County Ct., 27 W. Va. 785.

See 45 Cent. Dig. tit. "Taxation," § 147.

65. *Connecticut.*— Sanford's Appeal, 75 Conn. 590, 54 Atl. 739.

Kansas.— Kansas Natural Gas Co. *v.* Neosho County, 75 Kan. 335, 89 Pac. 750, holding that to justify separate taxation there must be a severance of the title to the minerals from that of the rest of the land.

Ohio.— Jones *v.* Wood, 9 Ohio Cir. Ct. 560, 6 Ohio Cir. Dec. 538 [*modifying* 2 Ohio S. & C. Pl. Dec. 75, 1 Ohio N. P. 155, and *affirmed* in 54 Ohio St. 627, 47 N. E. 1119].

Pennsylvania.—Moore's Appeal, 4 Pa. Dist. 703.

West Virginia.— Peterson *v.* Hall, 57 W. Va. 535, 50 S. E. 603; Carter *v.* Tyler County Ct., 45 W. Va. 806, 32 S. E. 216, 43 L. R. A. 725; U. S. Coal, etc., Co. *v.* Randolph County Ct., 38 W. Va. 201, 18 S. E. 566. But see Harvey Coal, etc., Co. *v.* Dillon, 59 W. Va. 605, 53 S. E. 928, 6 L. R. A. N. S. 628, decided under the act of 1905, making any interest in coal, oil, gas, or minerals separately taxable, as realty or personalty according to whether the interest is a freehold or less than a freehold, and which therefore includes mining leases.

United States.— Barnes *v.* Bee, 138 Fed. 476 [*affirmed* in 149 Fed. 727, 79 C. C. A. 433].

The question depends upon the legal effect of the instrument rather than the name given to it or the technical terms employed, and whether it was intended to convey the whole or a specified part of the unmined minerals in a described tract of land or merely to give a right or privilege of entering upon the land for the purpose of mining and removing minerals therefrom. Sanford's Appeal, 75 Conn. 590, 54 Atl. 739.

In California it is held that, although ordinary leases are not separately assessed, a lease of mining privileges may be separately assessed as real estate as being within the

a mere license or privilege to search for and extract minerals,[66] unless granted in fee or for life and so as to create an incorporeal freehold estate in the land.[67] Mining claims duly located are property, and unless expressly exempt are taxable as such,[68] whether held under patent, application for patent, or mining location,[69] and may be sold for the non-payment of taxes without infringing the title of the United States.[70] Taxation may also be laid on the surface improvements on a mining claim.[71] Ores or minerals "in place," that is, unsevered, are taxable as real estate to their owner,[72] but minerals extracted and brought to the surface are taxable as personalty.[73] It is also customary in some states to assess and tax mines according to their annual product or output or according to the annual net proceeds of their operation, which is also a permissible form of taxation.[74]

(III) *Riparian and Other Water Rights and Ditches.* Riparian rights of an owner of shore property, unless and until there is some act of the owner indicating an intention to sever them,[75] are ordinarily regarded as mere

statutory definition of the term "real estate," which includes a "claim to" or "right to the possession" of land, and also "all rights and privileges appertaining" to mines, minerals, and quarries. Graciosa Oil Co. *v.* Santa Barbara County, 155 Cal. 140, 99 Pac. 483, 20 L. R. A. N. S. 211.

In Illinois the statute provides that "any mining right" may be conveyed "by deed or lease" and that when so conveyed it shall be considered as separated from the land and taxed separately, and it is held that an oil or gas lease is a "mining right" within the application of the statute. People *v.* Bell, 237 Ill. 332, 86 N. E. 593, 19 L. R. A. N. S. 746.

In Kentucky the court, while expressing the opinion that the wide difference between an ordinary lease of land and a mining lease would alone justify the separate assessment of the latter, held that any doubt was removed by the statute requiring the listing for taxation of "mineral rights" and of "any coal, oil or gas privileges, by lease or otherwise, or any interest therein." Wolfe County *v.* Beckett, 127 Ky. 252, 105 S. W. 447, 32 Ky. L. Rep. 167, 17 L. R. A. N. S. 688.

66. Kansas Natural Gas Co. *v.* Neosho County, 75 Kan. 335, 89 Pac. 750; Jones *v.* Wood, 9 Ohio Cir. Ct. 560, 6 Ohio Cir. Dec. 538; Hughes *v.* Vail, 57 Vt. 41.

67. State *v.* South Penn Oil Co., 42 W. Va. 80, 24 S. E. 688.

68. *Arizona.*— Waller *v.* Hughes, 2 Ariz. 114, 11 Pac. 122.

California.— Bakersfield, etc., Oil Co. *v.* Kern County, 144 Cal. 148, 77 Pac. 892 (as real property); State *v.* Moore, 12 Cal. 56.

Colorado.— Seymour *v.* Fisher, 16 Colo. 188, 27 Pac. 240; People *v.* Henderson, 12 Colo. 369, 21 Pac. 144. And see Wood *v.* McCombe, 37 Colo. 174, 86 Pac. 319.

Nevada.— Hale, etc., Gold, etc., Min. Co. *v.* Storey County, 1 Nev. 104.

United States.— Forbes *v.* Gracey, 94 U. S. 762, 24 L. ed. 313.

See 45 Cent. Dig. tit. "Taxation," § 147.

In Arizona mines for which patents have been issued are taxable as real estate but unpatented mining claims on government property are taxable as personal property. Waller *v.* Hughes, 2 Ariz. 114, 11 Pac. 122.

69. Wood *v.* McCombe, 37 Colo. 174, 86 Pac. 319.

The possessory right to a mining claim is property and subject to taxation. Bakersville, etc., Oil Co. *v.* Kern County, 144 Cal. 148, 77 Pac. 892; Hale, etc., Gold, etc., Min. Co. *v.* Storey County, 1 Nev. 104.

70. Forbes *v.* Gracey, 94 U. S. 762, 24 L. ed. 313.

71. Gold Hill *v.* Caledonia Silver Min. Co., 10 Fed. Cas. No. 5,512, 5 Sawy. 575. See also Kittow *v.* Liskeard Union, L. R. 10 Q. B. 7, 44 L. J. M. C. 23, 31 L. T. Rep. N. S. 601, 23 Wkly. Rep. 72.

A purchaser at a sheriff's sale of the unexpired term of a coal mining lease takes the lessee's place under the lease and is liable for all taxes on improvements placed by himself on the land. *In re* Huddell, 16 Fed. 373.

72. St. Louis Consol. Coal Co. *v.* Baker, 135 Ill. 545, 26 N. E. 651, 12 L. R. A. 247; Kansas Natural Gas Co. *v.* Neosho County, 75 Kan. 335, 89 Pac. 750; Cherokee, etc., Coal, etc., Co. *v.* Crawford County, 71 Kan. 276, 80 Pac. 601; Rockwell *v.* Keefer, 39 Pa. Super. Ct. 468; Carter *v.* Tyler County Ct., 45 W. Va. 806, 32 S. E. 216, 43 L. R. A. 725.

73. Palmer *v.* Corwith, 3 Chandl. (Wis.) 297.

74. *Colorado.*— Pilgrim Consol. Min. Co. *v.* Teller County, 32 Colo. 334, 76 Pac. 364; People *v.* Henderson, 12 Colo. 369, 21 Pac. 144; Stanley *v.* Little Pittsburg Min. Co., 6 Colo. 415.

Montana.— Montana Coal, etc., Co. *v.* Livingston, 21 Mont. 59, 52 Pac. 780; Hope Min. Co. *v.* Kennon, 3 Mont. 35.

Nevada.— State *v.* Kruttschnitt, 4 Nev. 178.

Utah.— Nephi Plaster, etc., Co. *v.* Juab County, 33 Utah 114, 93 Pac. 53, 14 L. R. A. N. S. 1043 (holding that a gypsum deposit is within the application of the phrase "other valuable mining deposits" as used in a constitutional provision in regard to such taxation); Centennial Eureka Min. Co. *v.* Juab County, 22 Utah 395, 62 Pac. 1024; Mercur Gold Min., etc., Co. *v.* Spry, 16 Utah 222, 52 Pac. 382.

United States.— Forbes *v.* Gracey, 9 Fed. Cas. No. 4,924.

See 45 Cent. Dig. tit. "Taxation," § 147.

75. See State *v.* St. Paul, etc., R. Co., 81 Minn. 422, 84 N. W. 302.

incidents to and a part of the abutting property and are not subject to a separate assessment for taxation,[76] but to be assessed as real property with and as a part of the riparian lands.[77] It is also held that water power for mill purposes is not a distinct subject of taxation which can be taxed independently of the land,[78] or of the mills which it drives; [79] but that a water power or mill privilege on or appurtenant to certain lands, although unimproved or unused,[80] may be considered and included as an element increasing the valuation of the land.[81] Where water power in actual use is created by a dam or reservoir in one taxing district and applied to mills situated in another district, the practice varies in different jurisdictions [82] as to whether the water power should be considered as appurtenant to and taxed in connection with the land where the dam is situated,[83] or whether the dam and land on which it is situated should be taxed at a reasonable valuation independently of the water power created thereby,[84] and the water power be taxed where it is applied in connection with and is increasing the value of the mills.[85] A right in one person to flow by means of a dam, which he does not own, the lands of another is a mere easement, and not an estate subject to separate taxation; [86] but where one person acquires title to the waters of a pond and a permanent dam and sluiceway connected therewith on the land of another, he acquires an interest taxable as real estate.[87] It has been held that a ditch for conveying water for mining purposes has no separate independent value subject to taxation; [88] but that a ditch for transporting logs has a value separate and distinct from the lands through which it runs and may be separately assessed,[89]

76. State *v.* St. Paul, etc., R. Co., 81 Minn. 422, 84 N. W. 302; State *v.* Minneapolis Mill Co., 26 Minn. 229, 2 N. W. 839. See also State *v.* Jersey City, 25 N. J. L. 525.

Where a license is given to the owner of land lying on a navigable stream to wharf out below high water mark, so far as the grant extends the property is vested in the grantee and is subject to taxation. Bentley *v.* Sippel, 25 N. J. L. 530.

Land lying between a levee and the river, although submerged at the high stage of the river, is the property of the riparian owner subject to public uses, and when used by the riparian owner for purposes of revenue or otherwise is subject to taxation. Mathis *v.* Board of Assessors, 46 La. Ann. 1570, 16 So. 454.

77. State *v.* Minneapolis Mill Co., 26 Minn. 229, 2 N. W. 839.

78. Union Water Co. *v.* Auburn, 90 Me. 60, 37 Atl. 331, 60 Am. St. Rep. 240, 37 L. R. A. 651; Boston Mfg. Co. *v.* Newton, 22 Pick. (Mass.) 22.

79. Lowell *v.* Middlesex County Com'rs, 6 Allen (Mass.) 131.

80. Saco Water Power Co. *v.* Buxton, 98 Me. 295, 56 Atl. 914.

81. Penobscot Chemical Fibre Co. *v.* Bradley, 99 Me. 263, 59 Atl. 83; Saco Water Power Co. *v.* Buxton, 98 Me. 295, 56 Atl. 914; Lowell *v.* Middlesex County, 152 Mass. 372, 25 N. E. 469, 9 L. R. A. 356; Winnipiseogee Lake Cotton, etc., Mfg. Co. *v.* Gilford, 64 N. H. 337, 10 Atl. 849. See also Quinebaug Reservoir Co. *v.* Union, 73 Conn. 294, 47 Atl. 328.

82. See Union Water Co. *v.* Auburn, 90 Me. 60, 37 Atl. 331, 60 Am. St. Rep. 240, 37 L. R. A. 651; and cases cited *infra*, notes 83–85.

83. Amoskeag Mfg. Co. *v.* Concord, 66 N. H. 562, 34 Atl. 241, 32 L. R. A. 621; Winnipiseogee Lake Cotton, etc., Mfg. Co. *v.* Gilford, 64 N. H. 337, 10 Atl. 849; Cocheco Mfg. Co. *v.* Strafford, 51 N. H. 455.

84. Union Water Co. *v.* Auburn, 90 Me. 60, 37 Atl. 331, 60 Am. St. Rep. 240, 37 L. R. A. 651.

While the water power as such is not to be included this does not mean that the capacity of the property for valuable use is to be excluded, and therefore a dam and the land which it covers with water are liable to be taxed, although independently of their use in connection with mills, the dam and the land so overflowed are only of nominal value. Pingree *v.* Berkshire County, 102 Mass. 76.

85. Union Water Co. *v.* Auburn, 90 Me. 60, 37 Atl. 331, 60 Am. St. Rep. 240, 37 L. R. A. 651; Boston Mfg. Co. *v.* Newton, 22 Pick. (Mass.) 22. See also East Granby *v.* Hartford Electric Light Co., 76 Conn. 169, 56 Atl. 514; Fall River *v.* Bristol County, 125 Mass. 567.

Power used in another state.— The Connecticut statute providing that where water power originating in one town is used in another it shall be listed for taxation where used, applies only to towns within the state, and does not prevent the taxation of water power originating in that state and used in another state. Quinebaug Reservoir Co. *v.* Union, 73 Conn. 294, 47 Atl. 328.

86. Fall River *v.* Bristol County, 125 Mass. 567.

87. Flax Pond Water Co. *v.* Lynn, 147 Mass. 31, 16 N. E. 742.

88. Hale *v.* Jefferson County, 39 Mont. 137, 101 Pac. 973.

89. Sullivan *v.* State, 117 Ala. 214, 23 So. 678.

and that a boom consisting of a line of permanent piers across a river with logs attached thereto and to the shore is taxable to the owner as real estate.[90]

(iv) *Bridges and Wharves.*[91] A permanent bridge, privately owned and for the passage of which toll is charged, is taxable as real estate.[92] In the case of a bridge over a river which forms the boundary between two states, each state possesses the right to tax so much of it as lies within the state line,[93] but only this amount.[94] A wharf or pier is also classed as real estate for the purpose of taxation,[95] and wharf privileges may in some cases be separated for taxation from the structure itself.[96]

(v) *Buildings and Improvements on Land.* Buildings and other improvements on real estate are commonly to be assessed and taxed with and as a part of it,[97] unless the statute otherwise directs.[98] But if they are erected on land which is exempt or on land owned by another person, they may be separately taxed to their owner,[99] the question whether they are taxable as realty or as

The fact that a log ditch has not been used by the owner for eighteen months does not prevent it from being subject to taxation. Sullivan *v.* State, 110 Ala. 95, 20 So. 452.

90. Hall *v.* Benton, 69 Me. 346.

91. **Bridges owned by bridge companies** see *infra*, III, B, 2, e, (v).

Railroad bridges see *infra*, III, B, 2, d, (II).

Taxation of property of bridge companies see *infra*, III, B, 2, e, (v).

92. *Connecticut.*— Toll Bridge Co. *v.* Osborn, 35 Conn. 7.

District of Columbia.—Alexandria Canal R., etc., Co. *v.* District of Columbia, 1 Mackey 217.

Maine.— Kittery *v.* Proprietors Portsmouth Bridge, 78 Me. 93, 2 Atl. 847.

New Jersey.— Delaware, etc., Bridge Co. *v.* Metz, 29 N. J. L. 122.

New York.— Hudson River Bridge Co. *v.* Patterson, 74 N. Y. 365.

See 45 Cent. Dig. tit. "Taxation," §§ 149, 253.

But see Schuylkill Bridge Co. *v.* Frailey, 13 Serg. & R. (Pa.) 422, holding that where a statute specifies the various kinds and articles of property subject to taxation for county purposes and does not expressly include bridges, a permanent toll bridge over a navigable stream is not subject to taxation and cannot be taxed under the designation of "ferries" as used in the statute.

93. *Arkansas.*— Ft. Smith Bridge Co. *v.* Hawkins, 54 Ark. 509, 16 S. W. 565, 12 L. R. A. 487, municipal taxation of bridge over a navigable river.

District of Columbia.— Alexandria Canal R., etc., Co. *v.* District of Columbia, 1 Mackey 217.

Illinois.— St. Louis Bridge Co. *v.* People, 125 Ill. 226, 17 N. E. 468; Buttenuth *v.* St. Louis Bridge Co., 123 Ill. 535, 17 N. E. 439, 5 Am. St. Rep. 545; St. Louis Bridge Co. *v.* East St. Louis, 121 Ill. 238, 12 N. E. 723.

Iowa.— Chicago, etc., R. Co. *v.* Clinton, 88 Iowa 188, 55 N. W. 462.

Missouri.— State *v.* Mississippi River Bridge Co., 134 Mo. 321, 35 S. W. 592, 109 Mo. 253, 19 S. W. 421.

New Hampshire.— Proprietors Cornish Bridge *v.* Richardson, 8 N. H. 207.

New Jersey.— Delaware, etc., Bridge Co. *v.* Metz, 29 N. J. L. 122; Grant *v.* Hull, 25 N. J. L. 561.

Pennsylvania.— Com. *v.* Trenton Bridge Co., 9 Am. L. Reg. 298.

United States.— Henderson Bridge Co. *v.* Henderson, 173 U. S. 592, 19 S. Ct. 553, 43 L. ed. 823; Union Pac. R. Co. *v.* Pottawattamie County, 24 Fed. Cas. No. 14,384, 4 Dill. 497.

Canada.—Niagara Falls Suspension Bridge Co. *v.* Gardner, 29 U. C. Q. B. 194, suspension bridge across the Niagara river.

See 45 Cent. Dig. tit. "Taxation," § 53.

94. Alexandria Canal R., etc., Co. *v.* District of Columbia, 1 Mackey (D. C.) 217.

95. Smith *v.* New York, 68 N. Y. 552; People *v.* New York Tax, etc., Com'rs, 10 Hun (N. Y.) 207.

96. People *v.* New York Tax, etc., Com'rs, 10 Hun (N. Y.) 207 [*distinguishing* Boreel *v.* New York, 2 Sandf. (N. Y.) 552]; Galveston County *v.* Galveston Wharf Co., 72 Tex. 557, 10 S. W. 587. *Compare* De Witt *v.* Hayes, 2 Cal. 463, 56 Am. Dec. 352.

97. Richards *v.* Wapello County, 48 Iowa 507; McGee *v.* Salem, 149 Mass. 238, 21 N. E. 386; Doe *v.* Tenino Coal Co., 43 Wash. 523, 86 Pac. 938. See also Andrews *v.* Auditor, 28 Gratt. (Va.) 115.

Improvements made after land is assessed for taxation are a part of the land and are not subject to assessment for taxation until the land is again assessed in the manner provided by law. Richards *v.* Wapello County, 48 Iowa 507.

98. See William Skinner, etc., Ship Bldg., etc., Co. *v.* Baltimore, 96 Md. 32, 53 Atl. 416; Wells *v.* Hyattsville, 77 Md. 125, 26 Atl. 357, 20 L. R. A. 89.

Under an ordinance providing for the assessment for taxation of all new improvements finished on or before the first of October of each year, such improvements to be construed as finished when the plastering and inside woodwork are completed, such improvements are within the ordinance if the plastering and inside woodwork are substantially although not entirely completed by that date. Hamburger *v.* Baltimore, 106 Md. 479, 68 Atl. 23.

99. *Connecticut.*— Russell *v.* New Haven, 51 Conn. 259.

personalty depending on the rules ordinarily applicable in such cases, with reference to their permanent character, the right of a lessee to remove them, and other such tests.[1]

(VI) *MACHINERY AND FIXTURES.* Machinery used in a mill or factory, constituting a part of the plant and indispensable to its operation as such, is commonly taxed with and as a part of the realty;[2] while portable engines, derricks, mill machinery, and the like, which are moved from place to place where the material for their use may be found, remain personalty and are so taxable.[3] But it is competent for the legislature to require that machinery shall be assessed as personal property, although affixed to the soil, as, by requiring it to be listed in the schedules of personalty;[4] and in some states the character of property of this kind, for purposes of taxation, is determined on the same principles which would apply as between vendor and vendee or landlord and tenant.[5]

Illinois.— *In re* Maplewood Coal Co., 213 Ill. 283, 72 N. E. 786.

Maine.— Foxcroft *v.* Straw, 86 Me. 76, 29 Atl. 950.

Massachusetts.— Milligan *v.* Drury, 130 Mass. 428.

Minnesota.—State *v.* Red River Valley El. Co., 69 Minn. 131, 72 N. W. 60.

Missouri.— State *v.* Mission Free School, 162 Mo. 332, 62 S. W. 998.

New York.— People *v.* Wells, 181 N. Y. 245, 73 N. E. 961; People *v.* Brooklyn Bd. of Assessors, 93 N. Y. 308; People *v.* New York Tax, etc., Com'rs, 82 N. Y. 459; Smith *v.* New York, 6 Daly 401 [*affirmed* in 68 N. Y. 552].

Tennessee.— East Tennessee, etc., R. Co. *v.* Morristown, (Ch. App. 1895) 35 S. W. 771.

Virginia.— Andrews *v.* Auditor, 28 Gratt. 115.

Washington.— West Seattle *v.* West Seattle Land, etc., Co., 38 Wash. 359, 80 Pac. 549.

See 45 Cent. Dig. tit. "Taxation," § 150.

Buildings exempt.—Where buildings erected on the land of another are exempt from taxation, as in the case of a church or building used for charitable purposes which is expressly exempt, or buildings erected and used by the government which are impliedly exempt, such buildings should not be included in assessing the land to the landowner. Andrews *v.* Auditor, 28 Gratt. (Va.) 115.

1. Russell *v.* New Haven, 51 Conn. 259 (building erected by lessee on land exempt from taxation under an agreement that the lessor shall purchase the building at the end of the term, taxable to the lessee as real estate); People *v.* Brooklyn Bd. of Assessors, 93 N. Y. 308 (buildings erected by lessee under a contract providing for either successive renewals of the lease or a purchase of the buildings by the lessor, taxable to the lessee as real estate); East Tennessee, etc., R. Co. *v.* Morristown, (Tenn. Ch. 1895) 35 S. W. 771 (buildings erected by lessee with right of removal, taxable to lessee as personal property). See also cases cited *supra*, note 99.

Character as realty or personalty generally see FIXTURES, 19 Cyc. 1033; IMPROVEMENTS, 22 Cyc. 1; PROPERTY, 32 Cyc. 661 *et seq.*

2. *Arkansas.*— Union Compress Co. *v.* State, 64 Ark. 136, 41 S. W. 52.

Connecticut.— Sprague *v.* Lisbon, 30 Conn. 18.

Massachusetts.— Troy Cotton, etc., Manufactory *v.* Fall River, 167 Mass. 517, 46 N. E. 99.

North Carolina.— *Ex p.* Makepeace, 31 N. C. 91.

Pennsylvania.— Patterson *v.* Delaware County, 70 Pa. St. 381; Bemis *v.* Shipe, 26 Pa. Super. Ct. 42.

Washington.— Doe *v.* Tenino Coal, etc., Co., 43 Wash. 523, 86 Pac. 938, machinery used in the operation of a coal mine.

Severance of ownership.— Where the owners of a mill building and machinery leased the property to a firm consisting of themselves and one other, the machinery must be regarded as severed and taxed as personal property, in the absence of any evidence showing that the transaction was merely for the purpose of avoiding the assessment of it as realty. Crozer *v.* Commissioners, 3 Lanc. L. Rev. (Pa.) 377.

Gas and electric light companies.— Taxation of plant, machinery, and equipment see *infra*, III, B, 2, e, (VIII), (IX).

Street railway companies.— Taxation of plant and equipment see *infra*, III, B, 2, e, (II).

Water companies. — Taxation of mains, pipes, and other fixtures see *infra*, III, B, 2, e, (XI).

3. Bradford County's Appeal, 1 Mona. (Pa.) 344 [*affirming* 5 Pa. Co. Ct. 224]; Mellon *v.* Allegheny County, 3 Pa. Dist. 422.

4. Johnson *v.* Roberts, 102 Ill. 655. And see Newport Illuminating Co. *v.* Newport Tax Assessors, 19 R. I. 632, 36 Atl. 426, 36 L. R. A. 266, construing a statute which provides that personal property for the purposes of taxation shall include "machines of all sorts propelled by steam," and holding that dynamos propelled by steam power, and which may be removed from the realty by the unscrewing of bolts, without injuring the freehold, are personal property, and also an electric switch board, with the connecting wires, which may be removed without injury to the realty.

5. People *v.* Waldron, 26 N. Y. App. Div. 527, 50 N. Y. Suppl. 523, holding that, as

(vii) *Crops and Timber.* Crops growing on the land and timber standing thereon do not become personalty until severed, and therefore are taxable as part of the realty.[6] Where the growing crop or standing trees have been sold to another, they are properly assessable to him, although not yet removed.[7]

(viii) *Rights, Privileges, and Easements in Realty.* Incorporeal hereditaments, easements, and other rights in land, as distinguished from the ownership of the soil, may possess value and are therefore taxable if the legislature so determines,[8] but not otherwise;[9] and it is ordinarily held that such special rights or interests in lands owned by another are not to be regarded as real estate or as separately taxable to the persons exercising or enjoying the same;[10] but a pipe line underlying the lands of several proprietors, such, for example, as is used in conveying petroleum, is taxable as real estate.[11]

between the people and the owner of a building, the question whether engines, shafting, and other machinery and apparatus contained therein are to be deemed real or personal property for the purpose of taxation, is to be decided on principles no less rigid than those applicable to a question of fixtures as between vendor and vendee; that in such a case the tests to be applied are the relation of the annexor to the land, the purpose of the annexation, and the method of annexation; and that the circumstance that the machinery could be removed without material injury to the building is not controlling.

6. Wilson *v.* Cass County, 69 Iowa 147, 28 N. W. 483; Williams *v.* Triche, 107 La. 92, 31 So. 926; Palfrey *v.* Connely, 106 La. 699, 31 So. 148; Fletcher *v.* Alcona Tp., 72 Mich. 18, 40 N. W. 36.

7. Williams *v.* Triche, 107 La. 92, 31 So. 926; Globe Lumber Co. *v.* Lockett, 106 La. 414, 30 So. 902; Fox *v.* Pearl River Lumber Co., 80 Miss. 1, 31 So. 583.

8. Pine County *v.* Tozer, 56 Minn. 288, 57 N. W. 796, holding that under certain contracts granting the right to enter upon railroad lands, which were not taxable to the railroad company, and to cut and remove therefrom the merchantable timber, an estate or interest was acquired which was taxable under the Minnesota statutes as real property.

9. De Witt *v.* Hays, 2 Cal. 463, 56 Am. Dec. 352; Boreel *v.* New York, 2 Sandf. (N. Y.) 552; Willis *v.* Com., 97 Va. 667, 34 S. E. 460. See also cases cited *infra*, note 10.

10. *Alabama.*— Ashe Carson Co. *v.* State, 138 Ala. 108, 35 So. 38, holding that even under a statute making "every separate or special interest in any land, such as mineral, timber, or other interest, when such interest is owned by a person other than the owner of the surface or soil" subject to taxation, a turpentine lease giving the lessee only a right to go upon the land and box trees and remove crude turpentine therefrom does not create such a separate or special interest in the land itself as is subject of taxation.

California.— De Witt *v.* Hayes, 2 Cal. 463, 56 Am. Dec. 352 (holding that a mere right to collect wharfage and dockage for a term of years is neither real estate nor personal property as defined by the statutes, but is a franchise or incorporeal hereditament, and that in the absence of any legislative provision for the taxation of such property it cannot be assessed and taxed *eo nomine*); Silva *v.* Hawn, 10 Cal. App. 544, 102 Pac. 952 (holding that the law does not require an easement to be assessed for taxation).

Massachusetts.— Hamilton Mfg. Co. *v.* Lowell, 185 Mass. 114, 69 N. E. 1080, holding that a mere easement in land terminable on the happening of a contingency is not subject to taxation.

Mississippi.— Hancock County *v.* Imperial Naval Stores Co., 93 Miss. 822, 47 So. 177, holding that a license to go on land and sever and remove the products thereof is not such an interest in land as is taxable as real property, and that the rule applies to a turpentine lease or license.

New York.— Boreel *v.* New York, 2 Sandf. 552, holding that right of wharfage is an incorporeal hereditament but is neither real nor personal property as these terms are defined in the tax law and therefore is not subject to taxation.

Vermont.— Clove Spring Iron Works *v.* Cone, 56 Vt. 603, holding that a right to go upon the land of another and cut and remove wood and timber and erect buildings with a right to remove the buildings is not such an interest in the land as can be taxed as real estate, it being, if taxable at all, in the nature of personal property.

Virginia.— Willis *v.* Com., 97 Va. 667, 34 S. E. 460, holding that the statutes providing for the taxation of real property contemplate lands and lots as popularly understood and do not include an estate or interest separate and distinct from the land itself, such as a ground-rent.

See 45 Cent. Dig. tit. "Taxation," § 151.

11. Tide Water Pipe Line Co. *v.* Berry, 53 N. J. L. 212, 21 Atl. 490; State *v.* Berry, 52 N. J. L. 308, 19 Atl. 665.

But in New York it is held that the statute authorizing taxation of "a franchise, right, authority, or permission" to lay pipes or mains in or under a public street, means some special privilege derived from some governmental body; and permission granted by the individuals owning the fee in a street to lay pipes thereunder does not constitute a franchise or right taxable under the statute. People *v.* Feitner, 99 N. Y. App. Div. 274, 90 N. Y. Suppl. 904 [*affirmed* in 181 N. Y. 549, 74 N. E. 1124]; People *v.* Priest,

c. Personal Property — (i) *In General.* Personal property of all kinds, unless exempt, is subject to taxation,[12] whether it be tangible or intangible;[13] but in order to be taxable it must come within the descriptive terms or application of the statute imposing the tax,[14] or within the statutory definitions of personal

75 N. Y. App. Div. 131, 77 N. Y. Suppl. 382 [*affirmed* in 175 N. Y. 511, 67 N. E. 1088].

12. *Georgia.*— Joiner *v.* Adams, 114 Ga. 389, 40 S. E 281.

Iowa.— Leon Loan, etc., Co. *v.* Leon Bd. of Equalization, 86 Iowa 127, 53 N. W. 94, 41 Am. St. Rep 486, 17 L. R. A. 199.

Louisiana.— Griggsry Constr. Co. *v.* Freeman, 108 La. 435, 32 So. 399, 58 L. R. A. 349.

Minnesota.— State *v.* Western Union Tel. Co., 96 Minn. 13, 104 N. W. 567.

United States.—Adams Express Co. *v.* Ohio State Auditor, 166 U. S. 185, 17 S. Ct. 607, 41 L. ed. 965.

See 45 Cent. Dig. tit. "Taxation," § 152 *et seq.*

Abstract books have been held to be personal property and taxable as such notwithstanding their manuscript character, and the fact that they are valuable only for the information which they contain, which must be obtained by consultation or extracts therefrom (Leon Loan, etc., Co. *v.* Leon Bd. of Equalization, 86 Iowa 127, 53 N. W. 94, 91 Am. St. Rep. 486, 17 L. R A. 199. *Contra*, Loomis *v.* Jackson, 130 Mich. 594, 90 N. W. 328; Perry *v* Big Rapids, 67 Mich. 146, 34 N. W. 530, 11 Am. St. Rep. 570); even where they are written largely in abbreviations and cipher peculiar to the set requiring an expert to use them (Booth, etc., Abstract Co. *v.* Phelps, 8 Wash. 549, 36 Pac. 489, 40 Am. St. Rep. 921, 23 L. R. A. 864).

Tools and commissary store goods kept by a corporation as a part of or in connection with an outfit for doing construction work are subject to taxation. Griggsry Constr. Co. *v.* Freeman, 108 La. 435, 32 So. 399, 58 L. R. A. 349.

Fertilizer owned and held by a person at the time personal property is required to be listed and assessed is subject to taxation, although it is the intention of the owner to apply it to his land which is also to be taxed. Joiner *v.* Adams, 114 Ga. 389, 40 S. E. 281.

Spirituous liquors of all kinds, although their manufacture and sale are regulated by law under the exercise of the police power, are valuable personal property and taxable as such (Louisville *v.* Louisville Pub Warehouse Co., 107 Ky. 184, 53 S. W. 291, 21 Ky. L. Rep. 867; Carstairs *v.* Cochren, 95 Md. 488, 52 Atl. 601; Fowble *v.* Kemp, 92 Md. 630, 48 Atl. 379; Monticello Distillery Co. *v.* Baltimore, 90 Md. 416, 45 Atl. 210; Dunbar *v.* Boston, 101 Mass. 317); and a dealer in spirituous liquors, in listing the amount of his purchases for taxation, is not entitled to deduct the amount of the United States internal revenue tax paid thereon (Lehman *v.* Grantham, 78 N. C. 115).

13. State *v.* Western Union Tel. Co., 96 Minn. 13, 104 N. W. 567; State *v.* Savage, 65 Nebr. 714, 91 N. W. 716; People *v.* Roberts, 159 N. Y. 70, 53 N. E. 685, 45 L. R. A. 126 [*reversing* 35 N. Y. App. Div. 624, 54 N. Y. Suppl. 1112]; Adams Express Co. *v.* Ohio State Auditor, 166 U. S. 185, 17 S. Ct. 604, 41 L. ed. 965.

It is not material in what this intangible property consists, whether privileges, corporate franchises, contracts, or obligations, it being sufficient that it is property which, although intangible, exists and has value. To ignore this intangible property or to hold that it is not subject to taxation at its accepted value would be to eliminate from the reach of the taxing power a large portion of the wealth of the country. Adams Express Co. *v.* Ohio State Auditor, 166 U. S. 185, 17 S. Ct. 604, 41 L. ed. 965.

14. Municipality No. 3 *v.* Johnson, 6 La. Ann. 20; Rising Sun St. Lighting Co. *v.* Boston, 181 Mass. 211, 63 N. E. 408.

Property leased for profit.—A statute requiring "personal property . . . leased for profit" to be assessed for taxation does not apply to lamps and lanterns owned and controlled by a company and used by it in the performance of a lighting contract with a city but not leased to the city. Rising Sun St. Lighting Co. *v.* Boston, 181 Mass. 211, 63 N. E. 408.

Household furniture.— Within the application of a statute providing for the taxation of "all household furniture" all the furnishings in a boarding-house or hotel which is the keeper's home where he eats, sleeps, and lives, except the bar furniture, bottles, wines, etc., are subject to taxation without regard to what part is used for domestic and what for business purposes, but in order to be so taxable it must appear that the keeper makes his home in such boarding-house or hotel. McWilliams *v.* Gable, 3 Pa. Co. Ct. 467.

Logs on water.—A river is a "body of water" within the application of a statute requiring timber, logs, and lumber lying "in or upon any body of water" in the state outside of boundary or limits of any town therein to be taxed in the town nearest and opposite such property. Berlin Mills Co. *v.* Wentworth's Location, 60 N. H. 156.

Good-will.— In Indiana it has been held that the good-will of a newspaper conducted by an individual or partnership is not as such property subject to taxation within the application of the Indiana statute (Hart *v.* Green, 159 Ind. 182, 64 N. E. 661, 95 Am. St. Rep. 280, 58 L. R. A. 949); but in New York it has been held that the good-will of a corporation acquired and built up in that state and having a market value there where its business is conducted is subject to taxation as "capital employed by it within this state" and is not exempt merely because it is intangible (People *v.* Roberts, 159 N. Y.

property,[15] which do not in all cases include for purposes of taxation everything which is personal property in a general sense.[16]

(II) *Shipping.* Boats and vessels are personal property and are taxable like all other such property within the jurisdiction of the state,[17] there being nothing in their floating character and habitual change of location to exempt them from taxation.[18]

(III) *Merchants and Manufacturers' Stock in Trade.*[19] The stock in trade of a merchant or manufacturer is subject to taxation,[20] unless a license-tax is required which is declared to be in lieu of all other taxes.[21] The statutes frequently contain express provisions in regard to the taxation of such property,[22] and the tax on stock in trade is usually assessed on its average value

70, 53 N. E. 685, 45 L. R. A. 126 [*reversing* 35 N. Y. App. Div. 624, 54 N. Y. Suppl. 1112]).

Domestic animals.— It has been held that a statute providing for the taxation of "sheep" for state and county purposes does not apply to unweaned lambs (*In re* McCoy, 10 Cal. App. 116, 101 Pac. 419); but it is held that in the Montana statutes the term "calf" which is used in the fourteenth and fifteenth sections of the act, is not limited by the list of property set forth in section 16, which is a mere form and not intended to exempt property not specifically mentioned therein, and that sucking calves are subject to taxation (Milligan *v.* Jefferson County, 2 Mont. 543).

A widow's interest secured to her by the orphans' court under the intestate laws in lieu of her dower at common law is not within the application of the act of 1831 specifying the personal property subject to taxation. Deitz *v.* Beard, 2 Watts (Pa.) 107.

15. Hart *v.* Smith, 159 Ind. 182, 64 N. E. 661, 95 Am. St. Rep. 280, 58 L. R. A. 949; People *v.* Feitner, 167 N. Y. 1, 60 N. E. 265, 82 Am. St. Rep. 698 [*affirming* 56 N. Y. App. Div. 280, 67 N. Y. Suppl. 893].

16. People *v.* Feitner, 167 N. Y. 1, 60 N. E. 265, 82 Am. St. Rep. 698 [*affirming* 56 N. Y. App. Div. 280, 67 N. Y. Suppl. 893].

17. *Alabama.*— National Dredging Co. *v.* State, 99 Ala. 462, 12 So. 720.

Louisiana.— Oteri *v.* Parker, 42 La. Ann. 374, 7 So. 570; State *v.* Southern Steamship Co., 13 La. Ann. 497; Board of Selectmen *v.* Spalding, 8 La. Ann. 87.

Maryland.— Gunther *v.* Baltimore, 55 Md. 457.

Massachusetts.—New England, etc., Steamship Co. *v.* Com., 195 Mass. 385, 81 N. E. 286.

New York.— People *v.* New York Tax Com'rs, 58 N. Y. 242.

United States.— State Tonnage Tax Cases, 12 Wall. 204, 20 L. ed. 370; The North Cape, 18 Fed. Cas. No. 10,316, 6 Biss. 505.

Canada.— Matter of Hatt, 7 Can. L. J. 103.

See 45 Cent. Dig. tit. "Taxation," § 156.

Sale for non-payment of taxes.—Vessels, like other property, are liable to seizure and sale for taxes due on them, and such seizure is not a proceeding *in rem* to be governed by the rules of admiralty. Oteri *v.* Parker, 42 La. Ann. 374, 7 So. 570.

Situs of shipping for purposes of taxation see *infra*, III, A, 5, d.

18. National Dredging Co. *v.* State, 99 Ala. 462, 12 So. 720. See also cases cited *supra*, note 17.

19. **License or occupation taxes** see Commerce, 7 Cyc. 483, 484; Licenses, 25 Cyc. 614 *et seq.*

Manufacturing corporations see *infra*, III, B, 2, e, (XII).

Place of taxation see *infra*, V, C, 2, c.

20. Iowa Pipe, etc., Co.'s Appeal, 101 Iowa 170, 70 N. W. 115 (manufacturer); Myers *v.* Baltimore County, 83 Md. 385, 35 Atl. 144, 55 Am. St. Rep. 349, 34 L. R. A. 309 (holding that cattle kept on hand for sale by a cattle dealer are subject to taxation as stock in trade in the same manner as the goods of a merchant); Hopkins *v.* Baker, 78 Md. 363, 28 Atl. 284, 22 L. R. A. 477 (holding that stock in trade of a partnership doing business in a city, which remains there until sold, is "goods and chattels permanently located" for the purpose of taxation).

A person is not an importer who buys goods from an importer after they are brought within the jurisdiction of the United States, but before the duties are paid or they are delivered at the port of entry, and who then transports them at his own expense to the port to which they are consigned, and such goods are subject to taxation by the state, although they are sold in unbroken packages as they were when imported. Mobile *v.* Waring, 41 Ala. 139.

Coal shipped from another state after arrival at its destination is legally taxable, although kept on board the floats which carried it and not sold or consigned to any specially authorized agent. Pittsburg, etc., Coal Co. *v.* Bates, 40 La. Ann. 226, 3 So. 642, 8 Am. St. Rep. 519 [*affirmed* in 156 U. S. 577, 15 S. Ct. 415, 39 L. ed. 538].

21. Montgomery County *v.* Tallant, 96 Va. 723, 32 S. E. 479, holding that under a provision making the license-tax "in lieu of all taxes for state purposes" the capital employed by a merchant is also exempt from county taxes.

22. *Connecticut.*— Jackson *v.* Union, 82 Conn. 266, 73 Atl. 773, holding that a firm engaged in buying standing timber in large quantities and cutting and sawing the same

during the fiscal year or on a valuation computed by equalizing the average values for successive shorter periods.[23]

(IV) *MONEY*.[24] Money is not only the standard of value, but is also taxable personal property of the owner,[25] provided he has it in his possession at the time of the assessment or it is held for him by a person from whom he is entitled to receive it on demand.[26]

(V) *CREDITS, INVESTMENTS, AND SECURITIES* — (A) *In General.* Loans and investments of money and debts due to the taxpayer are assessable for taxation as his personal property, if within the terms of the statute, whether represented by accounts receivable, pecuniary interests under contracts, promissory notes, bonds, mortgages, or otherwise.[27] To be thus taxable it is not necessary

and selling the lumber is engaged in a "trading or mercantile business" within the application of the statute.

Iowa.— Iowa Pipe, etc., Co.'s Appeal, 101 Iowa 170, 70 N. W. 115, holding that a company engaged in the manufacture and sale of sewer pipe and drain tile, made from water salt and clay, is a "manufacturer," within the application of the code, section 816.

Massachusetts.—Hittinger *v.* Westford, 135 Mass. 258, holding that within the application of the Massachusetts statute a storehouse for ice is not a "store," and that the cutting of ice upon a pond and storing it in a building is not a "manufacture."

New Hampshire.— Russell *v.* Mason, 69 N. H. 359, 41 Atl. 287, holding that the owners of land who cut timber thereon and saw it into lumber for the purpose of selling it are not "tradesmen" within the application of a statute making the stock in trade of merchants, mechanics, and tradesmen taxable at its average value for the year.

Pennsylvania.— Campbell *v.* Campbell, 26 Leg. Int. 261 (holding that a manufacturer who has no store or warehouse apart from his manufactory is not subject to taxation under the act of 1846); Hay *v.* Harding, 5 Phila. 234 (holding that "shoddy" is a manufacture within the application of the revenue law of 1862).

Tennessee.—American Steel, etc., Co. *v.* Speed, 110 Tenn. 524, 75 S. W. 1037, 100 Am. St. Rep. 814, holding that the term "merchant," as used in the Tennessee statute of 1901, includes a foreign corporation having an agent in that state to whom it ships goods to be kept in stock and used to fill contracts of sale made by the company's salesmen or orders filed by purchasers with the agent.

Wisconsin.— Sanford *v.* Spencer, 62 Wis. 230, 22 N. W. 465, holding that lumber cut for sale is "merchants' goods" within the application of the statute.

See 45 Cent. Dig. tit. "Taxation," § 157.

Internal revenue stamps are not property within the application of the tax laws and, although kept in quantities by a dealer for the purpose of sale, are not taxable as "stock in trade." Palfrey *v.* Boston, 101 Mass. 329, 3 Am. Rep. 364.

Sewing machines delivered under a contract in the form of a lease providing for the payment of certain monthly rentals until a certain sum is paid, with the option of returning the machine or purchasing it for the sum of one cent, remain the property of the sewing machine company and are taxable as a part of its "stock in trade." Singer Mfg. Co. *v.* Essex County, 139 Mass. 266, 1 N. E. 419.

23. Iowa Pipe, etc., Co.'s Appeal, 101 Iowa 170, 70 N. W. 115; Myers *v.* Baltimore County, 83 Md. 385, 35 Atl. 144, 55 Am. St. Rep. 349, 24 L. R. A. 309. See also Russell *v.* Mason, 69 N. H. 359, 41 Atl. 287.

24. **Bank deposits** see *infra*, III, B, 2, a, (VI).

25. St. John *v.* Mobile, 21 Ala. 224; Critchfield *v.* Nance County, 77 Nebr. 807, 110 N. W. 538; State *v.* Thomas, 16 Utah 86, 50 Pac. 615 (holding, however, that money cannot be assessed for more than its legal value); People *v.* New York Tax Com'rs, 104 U. S. 466, 26 L. ed. 632 (holding that property which is in fact money on the day of the assessment cannot escape taxation on the ground that it was employed in the purchase of goods for exportation).

26. Arnold *v.* Middletown, 41 Conn. 206; Com. *v.* Clarkson, 1 Rawle (Pa.) 291.

27. *Alabama.*— Alabama Gold L. Ins. Co. *v.* Lott, 54 Ala. 499.

California.— Savings, etc., Soc. *v.* San Francisco, 146 Cal. 673, 80 Pac. 1086; Security Sav. Bank *v.* San Francisco, 132 Cal. 599, 64 Pac. 898; San Francisco *v.* La Societe Francaise D'Epargnes, etc., 131 Cal. 612, 63 Pac. 1016; Savings, etc., Soc. *v.* Austin, 46 Cal. 416. But see Mendocino Bank *v.* Chalfant, 51 Cal. 471; People *v.* Hibernia Sav., etc., Soc., 51 Cal. 243, 21 Am. Rep. 704.

Illinois.— Griffin *v.* La Salle County, 184 Ill. 275, 56 N. E. 397; Jacksonville *v.* McConnel, 12 Ill. 138.

Kentucky.— Johnson *v.* Com., 7 Dana 338.

Louisiana.— Standard Mar. Ins. Co. *v.* Bd. of Assessors, 123 La. 717, 49 So. 483, outstanding accounts taxable as credits.

Maryland.— Buchanan *v.* Talbot County, 47 Md. 286.

Michigan.— Port Huron *v.* Wright, 150 Mich. 279, 114 N. W. 76; Marquette *v.* Michigan Iron, etc., Co., 132 Mich. 130, 92 N. W. 934.

Mississippi.—Adams *v.* Clarke, 80 Miss. 134, 31 So. 216.

Nebraska.— Lancaster County *v.* McDonald, 73 Nebr. 453, 103 N. W. 78; Jones *v.* Seward County, 10 Nebr. 154, 4 N. W. 946.

that a debt or claim should be immediately payable;[28] but only that it should be a legal demand such as the law will recognize and enforce,[29] fixed and certain and not indefinite or contingent,[30] and liquidated as to its amount.[31] Subject to the conditions just referred to, the rule applies to a claim for the unpaid balance of purchase-money due the vendor on a sale of land,[32] although the land is also

New Hampshire.— Glidden *v.* Newport, 74 N. H. 207, 66 Atl. 117.

Ohio.— Jackson *v.* State, 15 Ohio 652.

Texas.— Hall *v.* Miller, 102 Tex. 289, 115 S. W. 1168 [*affirming* (Civ. App. 1908) 110 S. W. 165] (notes and bonds); State *v.* Maryland Fidelity, etc., Co., 35 Tex. Civ. App. 214, 80 S. W. 544.

Vermont.— Catlin *v.* Hull, 21 Vt. 152.

Wisconsin.— Kingsley *v.* Merrill, 122 Wis. 185, 99 N. W. 1044, 67 L. R. A. 200.

See 45 Cent. Dig. tit. "Taxation," § 159.

In Alabama the act of 1903 providing for a "privilege tax" on recorded mortgages and other instruments, and making such tax a substitute so far as such instruments are concerned for *ad valorem* taxes, is construed as also exempting from taxation money lent, solvent credits, and other credits of value not secured or represented by such recorded instruments, since to exempt the one and subject the other to *ad valorem* taxation would violate the constitutional requirement as to uniformity of taxation. Barnes *v.* Moragne, 145 Ala. 313, 41 So. 947.

Credits construed as net credits.—The word "credits" as used in the Nebraska statute providing for the listing of credits for taxation, means net credits, and the indebtedness of a taxpayer may be deducted from the gross credits to find their true value for assessment. Oleson *v.* Cuming County, 81 Nebr. 209, 115 N. W. 783, holding further that a note and mortgage taken in exchange for property is not "money loaned and invested" but is a "credit" from which the holder is entitled to deduct indebtedness.

Loans secured by exempt property.— Solvent loans are subject to taxation, although they are secured by a pledge of property exempt from taxation. Security Sav. Bank *v.* San Francisco, 132 Cal. 599, 64 Pac. 898.

Royalty under coal lease.—An amount due to the lessor by the lessee by way of royalty on coal mines, bearing interest, is liable to taxation under the Pennsylvania statute. Hull *v.* Luzerne County, 93 Pa. St. 502.

Rent due.—Where the owner of land which was leased to tenants was assessed not only upon the land but also upon the amount of rent due, it was held erroneous, as the latter element was included in the former. Scully *v.* People, 104 Ill. 349.

Policy loans.—Where an insurance company makes a policy loan to a policy-holder where sufficient premiums have been paid on a policy to give it a recognized reserve value, taking the policy in pledge and requiring payment of interest, but the transaction is in effect merely an advance payment on the earned value of the policy and the interest in effect an additional premium, such a loan is not a credit on which the insurance company is subject to taxation. New York L. Ins. Co. *v.* Orleans Parish Bd. of Assessors, 158 Fed. 462 [*affirmed* in 216 U. S. 517, 30 S. Ct. 385, 54 L. ed. —].

Partnership agreement.—Although a contract for a limited partnership provides that the special partners, as their share of the profits, shall receive interest at a certain rate on the money contributed by them as capital, and that the general partners shall be responsible to them for the capital so contributed and interest, it will not be held a loan to the partnership so as to subject the sums so contributed to taxation as "credits" of the special partners. Hunter *v.* Newman, 3 Ohio S. & C. Pl. Dec. 350, 1 Ohio N. P. 307.

Judicial bonds.—A statute requiring a stamp duty on any written bond, obligation, single bill, or note does not require the bond of an executor to be stamped. *Ex p.* Burton, 3 Gill (Md.) 1.

A transaction which is in effect a bailment of bonds to a bank and not a sale is not taxable as a credit. Clark *v.* Gault, 77 Ohio St. 497, 83 N. E. 900.

28. People *v.* Arguello, 37 Cal. 524; Young *v.* Wise, 45 Ga. 81; People *v.* McComber, 7 N. Y. Suppl. 71.

Award of Alabama claims commission.— An award by the committee of arbitration on the "Alabama" claims did not constitute a debt subject to taxation until an appropriation was made by congress for the payment of the award. Bucksport *v.* Woodman, 68 Me. 33.

29. Lamb *v.* Rawles, 33 Ind. 386.

30. Allegheny County *v.* Kelly, 8 Pa. Dist. 290.

A policy of insurance issued by a fraternal benefit society is a credit subject to taxation, after the death of the insured, although before proofs thereof are made to the society. Cooper *v.* Montgomery County Bd. of Review, 207 Ill. 472, 69 N. E. 878, 64 L. R. A. 72.

"Solvent credits."—Where a statute provides for the taxation of "debts due from solvent debtors," it refers not to the general solvency of the debtor, but to the amount of the debt which may be realized or collected, that is, to the value of the debt. Lamar *v.* Palmer, 18 Fla. 147.

31. Deane *v.* Hathaway, 136 Mass. 129, where, however, it was held that a debt due from an intestate is properly assessed to the creditor, although the amount is in dispute, if it is admitted by the administrator to be as much as that taxed.

32. *Arkansas.*—Ouachita County *v.* Rumph, 43 Ark. 525.

Connecticut.— Hamersley *v.* Franey, 39 Conn. 176.

taxed;[33] to an enforceable contract for the sale of land;[34] to the amount represented by a judgment, although it is liable to be reversed, and even though proceedings in error are pending;[35] and to a claim for compensation for land taken under the power of eminent domain, if adjudicated or agreed on and fixed as to amount.[36]

(B) *Debts Due From Non-Residents.* The state has power to tax persons residing therein on debts due from non-residents,[37] although such debts are secured by mortgages on real estate outside of the state,[38] and under the statutes in most jurisdictions such debts are subject to taxation.[39]

Illinois.— Griffin *v.* La Salle County Bd. of Review, 184 Ill. 275, 56 N. E. 397; People *v.* Worthington, 21 Ill. 171, 74 Am. Dec. 86.

Iowa.— Cross *v.* Snakenberg, 126 Iowa 636, 102 N. W. 508; Perrine *v.* Jacobs, 64 Iowa 79, 19 N. W. 861.

Michigan.— Marquette *v.* Michigan Iron, etc., Co., 132 Mich. 130, 92 N. W. 934.

Minnesota.— State *v.* Rand, 39 Minn. 502, 40 N. W. 835.

Mississippi.—Adams *v.* Clarke, 80 Miss. 134, 31 So. 216.

Ohio.— Rheinboldt *v.* Raine, 52 Ohio St. 160, 39 N. E. 145.

See 45 Cent. Dig. tit. "Taxation," § 159.

Cases in which deferred payments not taxable.—Where the contract for transfer of the land does not give rise to any actual indebtedness to the vendor but amounts only to an option to buy, there is not a taxable credit (Schoonover *v.* Petcina, 126 Iowa 261, 100 N. W. 490); and the same rule applies where no note is given for the purchase-money and neither the legal nor the equitable title is transferred (Brown *v.* Thomas, 37 Kan. 282, 15 Pac. 211); or where the purchaser was a city, buying the land for use as a public park, and the agreement expressly stipulated that it should create no liability against the city (Perrigo *v.* Milwaukee, 92 Wis. 236, 65 N. W. 1025); and where the sale is made by a commissioner of the court, the notes given for the price are not taxable (Fulkerson *v.* Bristol, 95 Va. 1, 27 S. E. 815); but on the other hand, a stipulation in the contract that the agreement shall be void if the vendee makes default does not render the indebtedness created thereby unenforceable in the event of such default, and the contract is taxable (Clark *v.* Horn, 122 Iowa 375, 98 N. W. 148).

33. Ouachita County *v.* Rumph, 43 Ark. 525.

34. *In re* Boyd, 138 Iowa 583, 116 N. W. 700, 17 L. R. A. N. S. 1220; Clark *v.* Horn, 122 Iowa 375, 98 N. W. 148.

But a contract giving a mere option to purchase land in the future on the terms specified is not a taxable credit within the meaning of the tax laws. *In re* Shields, 134 Iowa 559, 111 N. W. 963, 10 L. R. A. N. S. 1061.

35. Cameron *v.* Cappeller, 41 Ohio St. 533 [*reversing* 6 Ohio Dec. (Reprint) 1089, 10 Am. L. Rec. 443]; Sherard *v.* Lindsay, 13 Ohio Cir. Ct. 315, 7 Ohio Cir. Dec. 245. See also People *v.* Halsted, 26 N. Y. App. Div. 316, 49 N. Y. Suppl. 685 [*affirmed* in 159 N. Y. 533, 53 N. E. 1130], appeal from order confirming award of commissioners in condemnation proceedings. *Compare* Smith *v.* Byers, 43 Ga. 191.

36. People *v.* Halsted, 26 N. Y. App. Div. 316, 49 N. Y. Suppl. 685 [*affirmed* in 159 N. Y. 533, 53 N. E. 1130], holding that a landowner may be taxed on the amount of an award made in condemnation proceedings where the money has been deposited to his credit in a trust company, although he has refused to accept the award on the ground of its inadequacy and has taken an appeal from the order confirming the report of the commissioners.

Amount uncertain.— The claim of an owner of land condemned under the power of eminent domain to compensation therefor does not constitute a taxable debt until the amount becomes fixed and receivable as his absolute personal estate. Lowell *v.* Boston St. Com'rs, 106 Mass. 540.

37. Kirtland *v.* Hotchkiss, 42 Conn. 426, 19 Am. Rep. 546 [*affirmed* in 100 U. S. 491, 25 L. ed. 558]; Thomas *v.* Mason County Ct., 4 Bush (Ky.) 135; Horne *v.* Green, 52 Miss. 452; Conner *v.* Wilson, 6 Ohio Dec. (Reprint) 941, 9 Am. L. Rec. 1. See also cases cited *infra*, note 39.

The situs of a debt for purposes of taxation is at the residence of the creditor, and the state where such creditor resides has power to tax it. Kirtland *v.* Hotchkiss, 100 U. S. 491, 25 L. ed. 558.

38. Kirtland *v.* Hotchkiss, 42 Conn. 426, 19 Am. Rep. 546 [*affirmed* in 100 U. S. 491, 25 L. ed. 558]. But see Fisher *v.* Rush County, 19 Kan. 414.

39. *Connecticut.*— Kirtland *v.* Hotchkiss, 42 Conn. 426, 19 Am. Rep. 546.

Illinois.— Scripps *v.* Fulton County Bd. of Review, 183 Ill. 278, 55 N. E. 700.

Iowa.— Hunter *v.* Page County, 33 Iowa 376, 11 Am. Rep. 132.

Kentucky.— Thomas *v.* Mason County Ct., 4 Bush 135.

Mississippi. — Horne *v.* Green, 52 Miss. 452.

New Jersey.— State *v.* Darcy, 51 N. J. L. 140, 16 Atl. 160, 2 L. R. A. 350.

Ohio.— Conner *v.* Wilson, 6 Ohio Dec. (Reprint) 941, 9 Am. L. Rec. 1.

South Carolina.— State *v.* Charleston, 4 Strobh. 217; Hayne *v.* Delliesseline, 3 McCord 374.

Vermont.— Bullock *v.* Guilford, 59 Vt. 516, 9 Atl. 360.

(c) *Mortgages and Debts Secured.* A debt secured by a mortgage is personal property subject to taxation, and is to be assessed and taxed to the owner at his domicile,[40] unless by statute it is taxable as an interest in real property,[41] or exempt from general taxation by reason of the payment of some other form of tax.[42] It

Wisconsin.— State *v.* Gaylord, 73 Wis. 316, 41 N. W. 521.

United States.—Kirtland *v.* Hotchkiss, 100 U. S. 491, 25 L. ed. 558.

See 45 Cent. Dig. tit. "Taxation," §§ 6, 160.

Compare Fisher *v.* Rush County, 19 Kan. 414; People *v.* Gardner, 51 Barb. (N. Y.) 352; Vaughan *v.* Murfreesboro, 96 N. C. 317, 2 S. E. 676, 60 Am. Rep. 413.

40. *Alabama.*—Alabama Gold L. Ins. Co. *v.* Lott, 54 Ala. 499. But see Barnes *v.* Moragne, 145 Ala. 313, 41 So. 947, decided under the act of 1903 imposing a "privilege tax" on recorded mortgages and abolishing other taxes thereon.

Illinois.— People *v.* Worthington, 21 Ill. 171, 74 Am. Dec. 86.

Iowa.— Meyer *v.* Dubuque County, 49 Iowa 193.

Maryland.—Allen *v.* Camden Nat. State Bank, 92 Md. 509, 48 Atl. 78, 84 Am. St. Rep. 517, 52 L. R. A. 760.

Massachusetts.— See Brooks *v.* West Springfield, 193 Mass. 190, 79 N. E. 337.

Michigan.— Latham *v.* Detroit Bd. of Assessors, 91 Mich. 509, 52 N. W. 15; Detroit *v.* Detroit Bd. of Assessors, 91 Mich. 78, 51 N. W. 787, 16 L. R. A. 59; Taggart *v.* Sanilac County, 71 Mich. 16, 38 N. W. 639.

Oregon.— Dekum *v.* Multnomah County, 38 Oreg. 253, 63 Pac. 496; Mumford *v.* Sewall, 11 Oreg. 67, 4 Pac. 585, 50 Am. Rep. 462.

Pennsylvania.—Perry County *v.* Troutman, 144 Pa. St. 361, 22 Atl. 705. See also Berks County *v.* Smith, 2 Woodw. 302.

Utah.— Judge *v.* Spencer, 15 Utah 242, 48 Pac. 1097.

Wisconsin.— State *v.* Gaylord, 73 Wis. 316, 41 N. W. 521.

United States.— Sanford *v.* Savings, etc., Soc., 80 Fed. 54; Dundee Mortg., etc., Co. *v.* Multnomah County School-Dist. No. 1, 19 Fed. 359.

See 45 Cent. Dig. tit. "Taxation," § 161.

Debts secured by mortgage due from nonresident debtors see *supra*, III, A, 2, c, (v), (B).

In New Jersey a mortgagee is taxable for the amount of the mortgage debt only in case a deduction has been claimed and allowed to the mortgagor on account thereof. See Lippincott *v.* Howell Tp., 66 N. J. L. 508, 49 Atl. 675; State *v.* Gano, (Sup. 1897) 37 Atl. 434; Newark *v.* Merchants' Ins. Co., 55 N. J. L. 145, 26 Atl. 137; State *v.* Lantz, 53 N. J. L. 578, 22 Atl. 49; State *v.* Massaker, 26 N. J. L. 564.

It is not the mortgage but the debt which is taxed. A mortgage by itself is not property or a thing of value, it is a mere incident to the debt which it secures; hence, although it is common to speak of taxation as being laid on mortgages, it is not the mortgage but the debt which is really taxed. People *v.* Whartenby, 38 Cal. 461; People *v.* Eastman, 25 Cal. 601; Falkner *v.* Hunt, 16 Cal. 167. While a mortgage is a transfer of title until redemption, it is actually but a security for a debt or an interest in land for the purpose of security, and it is the debt evidenced by it, the chose in action, which by reason of its intangible nature is drawn into the domicile of the obligee or owner for taxation. Com. *v.* Pennsylvania Coal Co., 9 Pa. Dist. 486. See also State *v.* Earl, 1 Nev. 394, where it is said that a tax on "money at interest secured by mortgage" is not a tax on the coin or notes in which the mortgage debt may be paid or in which it was made; nor is it a tax on the land covered by the mortgage; neither is it a tax on the pieces of paper on which the note and mortgage are inscribed; but it is a tax on a chose in action, that is, on the right of the creditor to receive or collect a certain sum of money.

Assignment after assessment.— Under a statute requiring mortgages to be assessed to their owner on the first Monday of March, the assignment of the mortgage after that day does not relieve the person to whom it was assessed from liability for the tax. San Gabriel Valley Land, etc., Co. *v.* Witmer Bros. Co., 96 Cal. 623, 29 Pac. 500, 31 Pac. 588, 18 L. R. A. 465, 470.

Double taxation.—A mortgagee is not bound to pay taxes assessed on his mortgage and also on a deposit of money in court made by the mortgagor for the payment of the mortgage debt. Oakland Sav. Bank *v.* Applegarth, 67 Cal. 86, 7 Pac. 139, 476. And so, where the owner of land has paid the tax on it, and in the same fiscal year sells it and takes a mortgage back, he is not liable to be assessed with the amount of the mortgage in the same year. People *v.* Kohl, 40 Cal. 127.

41. State *v.* Hinkel, 139 Wis. 41, 119 N. W. 815.

In Massachusetts loans on mortgages on real estate are taxable as real estate unless the real estate is exempt from taxation, in which case the loan is taxable as personal property. Sweetser *v.* Manning, 200 Mass. 378, 86 N. E. 897.

In Wisconsin the statute providing that "whenever taxable real estate shall be subject to mortgage" such mortgage and the indebtedness secured thereby shall be deemed an interest in real estate and taxed as such interest and not otherwise, applies where the value of the mortgaged real estate in the state exceeds the debt, although the mortgage also covers lands outside of the state or the debt is further protected by other security. State *v.* Hinkel, 139 Wis. 41, 119 N. W. 815.

42. See Barnes *v.* Moragne, 145 Ala. 313,

is immaterial what form the transaction may assume, and an absolute deed of land or any other form of conveyance which was actually intended by the parties as security for a loan is taxable as a mortgage.[43] Neither is it material that the amount of the mortgage debt is greater than the value of the premises;[44] or, on the other hand, that the mortgagor is insolvent and payment depends on the sale of the land.[45] But of course a mortgage which has been actually satisfied or canceled and discharged of record is no longer taxable,[46] nor is it taxable after it has merged in the fee by the mortgagee's purchase of the land.[47] In some jurisdictions a tax on mortgages is imposed in the form of a registration or recording tax,[48] or privilege tax.[49]

d. Annuities. In some states annuities are taxable whether created by will, settlement, or otherwise;[50] but in others, where an annuity is charged upon land, it is not taxable in addition to the land itself.[51]

e. Licenses, Membership Rights, and Franchises. A license may be regarded as property and as such subject to taxation,[52] and franchises of all kinds are property subject to taxation;[53] but membership rights in various associations, although a source of profit, are ordinarily regarded as being in the nature of a personal privilege and not subject to taxation as property.[54] So it has been held that a

41 So. 947 (privilege tax); Drummond *v.* Smith, 118 N. Y. Suppl. 718 (recording tax); and cases cited *infra*, notes 48, 49.

43. Thomas *v.* Holmes County, 67 Miss. 754, 7 So. 552; Patrick *v.* Littell, 36 Ohio St. 79, 38 Am. Rep. 552.

44. Appleby *v.* East Brunswick Tp., 44 N. J. L. 153.

45. State *v.* Jones, 24 Minn. 251.

46. McCoppin *v.* McCartney, 60 Cal. 367; Earles *v.* Ramsay, 61 N. J. L. 194, 38 Atl. 812; Ross *v.* Portland, 42 Oreg. 134, 70 Pac. 373.

47. Frick *v.* Overholt, 3 Pa. Co. Ct. 538.

48. Mutual Ben. L. Ins. Co. *v.* Martin County, 104 Minn. 179, 116 N. W. 572; People *v.* Dimond, 121 N. Y. App. Div. 559, 106 N. Y. Suppl. 277; People *v.* Gass, 120 N. Y. App. Div. 147, 104 N. Y. Suppl. 885 [*affirmed* in 190 N. Y. 565, 83 N. E. 1129]; White *v.* Walsh, 62 Misc. (N. Y.) 423, 114 N. Y. Suppl. 1015.

In New York the mortgage tax law of 1905 imposed a certain tax on mortgages and exempted mortgages on which such tax had been paid from local taxation. People *v.* Keefe, 119 N. Y. App. Div. 713, 104 N. Y. Suppl. 154 [*affirmed* in 190 N. Y. 555, 83 N. E. 1130]. This statute was superseded by the act of 1906 substituting a recording tax on mortgages recorded after July 1, 1906. People *v.* Dimond, 121 N. Y. App. Div. 559, 106 N. Y. Suppl. 277; White *v.* Walsh, 62 Misc. (N. Y.) 423, 114 N. Y. Suppl. 1015. The statute exempts mortgages so recorded from other taxation (see People *v.* Dimond, *supra*; Drummond *v.* Smith, 118 N. Y. Suppl. 718); but prior mortgages are subject to general taxation (People *v.* Dimond, *supra*); or at least are subject to such taxation where they have not been recorded and the recording tax paid (Drummond *v.* Smith, *supra*).

Transactions subject to recording tax.—An agreement for the extension or renewal of an existing mortgage is in effect a mortgage and subject to the Minnesota registry tax. Mutual Ben. L. Ins. Co. *v.* Martin County, 104 Minn. 179, 116 N. W. 572. A mortgage of a leasehold interest in land is entitled to record and subject to the New York recording tax. People *v.* Gass, 120 N. Y. App. Div. 147, 104 N. Y. Suppl. 885 [*affirmed* in 190 N. Y. 565, 83 N. E. 1129]. The New York statute also provides that executory contracts for the sale of real property under which the vendee has or is entitled to possession shall be deemed mortgages. White *v.* Walsh, 62 Misc. (N. Y.) 423, 114 N. Y. Suppl. 1015, holding that an instrument leasing property for a term of years and containing provisions for a purchase thereof by the lessee on certain contingencies is an executory contract of sale within the application of the statute.

49. Barnes *v.* Moragne, 145 Ala. 313, 41 So. 947, construing the act of 1903 imposing a privilege tax on recorded mortgages and making such tax a substitute for *ad valorem* taxes thereon.

50. Wetmore *v.* State, 18 Ohio 77; Chisholm *v.* Shields, 21 Ohio Cir. Ct. 231, 11 Ohio Cir. Dec. 361.

51. Berks County *v.* Jones, 21 Pa. St. 413. And see Richey *v.* Shute, 43 N. J. L. 414.

52. Drysdale *v.* Pradat, 45 Miss. 445; Coulson *v.* Harris, 43 Miss. 728.

License fees and taxes see, generally, LICENSES, 25 Cyc. 593.

53. California Bank *v.* San Francisco, 142 Cal. 276, 75 Pac. 832, 100 Am. St. Rep. 130, 64 L. R. A. 918 (holding that a corporate franchise is property and taxable as such); Maestri *v.* New Orleans Bd. of Assessors, 110 La. 517, 34 So. 658 (holding that an exclusive privilege of erecting and maintaining a public market in a city for a term of years is a franchise and is property subject to taxation); Coulson *v.* Harris, 43 Miss. 728 (holding that a license to retail spirituous liquors under the Mississippi statutes of 1857 and 1865, is a franchise, and that such franchise is property subject to taxation).

Corporate franchise see *infra*, III, B, 1, f.

54. San Francisco *v.* Anderson, 103 Cal.

newspaper's contract of membership in a press association, not transferable without the consent of the association, is not taxable property,[55] and also that a membership or seat in a stock exchange is not taxable as property.[56]

3. Ownership or Possession of Property and to Whom Taxable — a. In General.[57] Ordinarily and in the absence of statute to the contrary, property is taxable only to the person who is the owner thereof[58] at the date for its listing or assessment,[59] or the date fixed by statute as of which its ownership for purposes of taxation is to be determined;[60] and taxes are not a lawful charge on property unless assessed in the name of its owner, and any attempt to enforce the payment of taxes assessed and charged to the wrong person will be ineffective.[61] This does not mean that the person assessed must have a perfect and unencumbered title to the property, but only that he should be vested with the apparent legal title,[62] or with the possession coupled with such claims and evidences of owner-

69, 36 Pac. 1034, 42 Am. St. Rep. 98. See also cases cited *infra*, notes 55, 56.

55. Arapahoe County *v.* Rocky Mountain News Printing Co., 15 Colo. App. 189, 61 Pac. 494.

56. San Francisco *v.* Anderson, 103 Cal. 69, 36 Pac. 1034, 42 Am. St. Rep. 98; Baltimore *v.* Johnson, 96 Md. 737, 54 Atl. 646, 61 L. R. A. 568; People *v.* Feitner, 167 N. Y. 1, 60 N. E. 265, 82 Am. St. Rep. 698 [*affirming* 56 N. Y. App. Div. 280, 67 N. Y. Suppl. 893].

In New York it has been held that a seat or membership in a stock exchange belonging to a resident owner, while in a sense personal property, is not taxable as such because not within the definition of personal property in the tax law (People *v.* Feitner, 167 N. Y. 1, 60 N. E. 265, 82 Am. St. Rep. 698 [*affirming* 56 N. Y. App. Div. 280, 67 N. Y. Suppl. 893]); but that capital invested by a non-resident in a seat in a stock exchange is taxable as capital invested in business within the application of the statute relating to the taxation of non-residents doing business within the state upon the capital invested in such business (Matter of Glendinning, 68 N. Y. App. Div. 125, 74 N. Y. Suppl. 190 [*affirmed* in 171 N. Y. 684, 64 N. E. 1121]; Austen *v.* Brigham, 67 N. Y. Suppl. 891.

57. **Contracts to assume and pay taxes** see *supra*, III, A, 1, d.

58. Crook *v.* Anniston City Land Co., 93 Ala. 4, 9 So. 425; State *v.* Union Tp., 36 N. J. L. 309; State *v.* Hardin, 34 N. J. L. 79; New Orleans, etc., R. Co. *v.* Negrotto, 40 Fed. 428. See also cases cited *infra*, note 61.

Necessity of assessment to owner generally see *infra*, VI, C, 5, e.

59. Tackaberry *v.* Keokuk, 32 Iowa 155; State *v.* Union Tp., 36 N. J. L. 309; State *v.* Hardin, 34 N. J. L. 79.

Time when liability attaches see *supra*, III, A, 1, c.

60. Wangler *v.* Black Hawk County, 56 Iowa 384, 9 N. W. 314, holding that under the Iowa statutes personal property is to be assessed to the person owning the same on the first day of January, and that its assessment to one who acquires ownership between that date and the date when assessment is actually made is illegal.

61. *California.*— Los Angeles *v.* Los Angeles City Waterworks Co., 49 Cal. 638; People *v.* Hancock, 48 Cal. 631.

Iowa.— Tackaberry *v.* Keokuk, 32 Iowa 155.

Louisiana.— Thibodaux *v.* Keller, 29 La. Ann. 508.

Montana.— Western Ranches *v.* Custer County, 28 Mont. 278, 72 Pac. 659.

New Jersey.— Tindall *v.* Vanderbilt, 33 N. J. L. 38.

Texas.— Connell *v.* State, (Civ. App. 1900) 55 S. W. 980.

West Virginia.— Cunningham *v.* Brown, 39 W. Va. 588, 20 S. E. 615.

Wisconsin.— Wisconsin Oak Lumber Co. *v.* Laursen, 126 Wis. 484, 105 N. W. 906.

United States.— Bird *v.* Benlisa, 142 U. S. 664, 12 S. Ct. 323, 35 L. ed. 1151; New Orleans, etc., R. Co. *v.* Negrotto, 40 Fed. 428.

See 45 Cent. Dig. tit. "Taxation," § 166; and *infra*, VI, C, 5, e.

62. *California.*—Hart *v.* Plum, 14 Cal. 148.

Iowa.— Stockdale *v.* Webster County, 12 Iowa 536.

Louisiana.— Williams *v.* Landry, 47 La. Ann. 5, 16 So. 591.

New York.— People *v.* Wells, 46 Misc. 13, 89 N. Y. Suppl. 847 [*affirmed* in 179 N. Y. 524, 71 N. E. 1136].

United States.— Tracy *v.* Reed, 38 Fed. 69, 13 Sawy. 622, 2 L. R. A. 773.

In Kansas it is held that the land itself is taxed, and it matters not what may be the condition of the title or who may be the owner. Miami County Com'rs *v.* Brackenridge, 12 Kan. 114; Blue-Jacket *v.* Johnson County Com'rs, 3 Kan. 299; Newby *v.* Brownlee, 23 Fed. 320.

Property bought on credit.— The fact that the owner of property bought it on credit or with borrowed money does not exempt him from taxation on it. McConn *v.* Roberts, 25 Iowa 152.

Deed unrecorded.— The owner of land is liable for the taxes on it, although the deed under which he claims is not recorded. Francis *v.* Washburn, 5 Hayw. (Tenn.) 294.

Goods held for export.— The fact that property is held with a view of selling it out of the state, and that it is so sold, does not affect the liability of the owner for the taxes on it. McConn *v.* Roberts, 25 Iowa 152.

ship as will justify the assumption that he is the owner;[63] and assessors are not required to go behind the records and search out unrecorded transfers or anticipate the judicial settlement of a title which is in litigation.[64] But subject to these conditions, a tax cannot be legally charged against a former owner of the property who was dead at the time of the assessment,[65] or who, before that time, had aliened and transferred the property to a third person.[66] But where property is required to be assessed as of a certain day in the year, and is then properly assessed to the person owning it on that day, he is not relieved from liability for such taxes by his subsequent conveyance of it to another, although made before the tax became payable, unless the statute makes some provision for apportionment of the tax between the vendor and the vendee.[67]

63. Selby *v.* Levee Com'rs, 14 La. Ann. 434; Raymond *v.* Worcester, 172 Mass. 205, 51 N. E. 1077; Merrill *v.* P. B. Champagne Lumber Co., 75 Wis. 142, 43 N. W. 653.

Applications of text.— Where one enters upon land under claim of title in fee and continues the possession and claim so as to set the statute of limitations running in his favor, he may be taken as the owner for all purposes of taxation. Link *v.* Doerfer, 42 Wis. 391, 24 Am. Rep. 417. The same is true of the purchaser of land at a tax-sale, who has taken and recorded his deed, although the former owner may still have a right of redemption. Maina *v.* Elliott, 51 Cal. 8; Butler *v.* Stark, 139 Mass. 19, 29 N. E. 213. But on the other hand taxes cannot be assessed against one to whom a parol gift of the land has been made, never confirmed by deed. Mullikin *v.* Reeves, 71 Ind. 281. Nor against one who holds under a void conveyance from the county. Moss *v.* Kauffman, 131 Mo. 424, 33 S. W. 20. Nor against one who has nothing but a conditional certificate for the land. Pitts *v.* Booth, 15 Tex. 453.

64. Palmer *v.* Board of Assessors, 42 La. Ann. 1122, 8 So. 487; Gee *v.* Clark, 42 La. Ann. 918, 8 So. 627; Butler *v.* Stark, 139 Mass. 19, 29 N. E. 213; Forster *v.* Forster, 129 Mass. 559; Whitney *v.* Thomas, 23 N. Y. 281.

65. Walsh *v.* Harang, 48 La. Ann. 984, 20 So. 202; Kearns *v.* Collins, 40 La. Ann. 453, 4 So. 498; Sawyer *v.* Mackie, 149 Mass. 269, 21 N. E. 307; Cook *v.* Leland, 5 Pick. (Mass.) 236.

Taxation of property of decedent's estate see *infra*, III, A, 3, i.

66. *California.*— People *v.* Hancock, 48 Cal. 631.

Illinois.— Duckett *v.* Gerig, 223 Ill. 284, 79 N. E. 94.

Indiana.— Corr *v.* Martin, 37 Ind. App. 655, 77 N. E. 870.

Iowa.— Schoonover *v.* Petcina, 126 Iowa 261, 100 N. W. 490.

Kentucky.— Bell *v.* Fry, 5 Dana 341.

Massacushetts.— Sherwin *v.* Wigglesworth, 129 Mass. 64; Desmond *v.* Babbitt, 117 Mass. 233.

Minnesota.—Winston *v.* Johnson, 42 Minn. 398, 45 N. W. 958.

Missouri.— State *v.* Gibson, 12 Mo. App. 1.

New York.— Buckhout *v.* New York, 176 N. Y. 363, 68 N. E. 659; *In re* New York Bd. of Education, 169 N. Y. 456, 62 N. E. 566.

North Dakota.— State *v.* Minneapolis, etc., El. Co., 6 N. D. 41, 68 N. W. 81.

Pennsylvania.— King *v.* Mt. Vernon Bldg. Assoc., 106 Pa. St. 165.

Vermont.— See Bemis *v.* Phelps, 41 Vt. 1, where, under a statute authorizing the taxation of real property to "the owner or possessor," land was held properly assessable to a person who had conveyed it to his brother but continued to occupy it and pay taxes without objection for two years longer.

See 45 Cent. Dig. tit. "Taxation," § 166.

Abandonment of property.— The owner of an entire tract of land cannot, by abandoning a part of it as worthless, exempt himself from the taxes thereon. Patterson *v.* Blackmore, 9 Watts (Pa.) 104.

Bankruptcy sale.— Where the statute requires the assessor to ascertain the taxable property in his district, both by examination of the records and by inquiries, etc., an assessment in the name of a former owner whose title had been divested by a sale in bankruptcy and who is not in possession is void. New Orleans, etc., R. Co. *v.* Negrotto, 40 Fed. 428.

67. *Indiana.*—Corr *v.* Martin, 37 Ind. App. 655, 77 N. E. 870.

Iowa.— Cedar Rapids First Cong. Church *v.* Linn County, 70 Iowa 396, 30 N. W. 650; Wangler *v.* Black Hawk County, 56 Iowa 384, 9 N. W. 314; Shaw *v.* Orr, 30 Iowa 355.

Kansas.— Howell *v.* Scott, 44 Kan. 247, 24 Pac. 481.

Kentucky.— Commonwealth Bank *v.* Com., 94 S. W. 620, 29 Ky. L. Rep. 643.

Louisiana.— Prytania St. Market Co. *v.* New Orleans, 110 La. 835, 34 So. 797.

Missouri.— McLaren *v.* Sheble, 45 Mo. 130. And see Wilcox *v.* Phillips, 199 Mo. 288, 97 S. W. 886.

New Jersey.— Broeck *v.* Jersey City, 44 N. J. L. 156; Rutherford Park Assoc. *v.* Union Tp., 36 N. J. L. 309; Shippen *v.* Hardin, 34 N. J. L. 79.

New York.— People *v.* Wells, 179 N. Y. 524, 71 N. E. 1136.

Oregon.— Ferguson *v.* Kaboth, 43 Oreg. 414, 73 Pac. 200, 74 Pac. 466.

Pennsylvania.— May's Appeal, 218 Pa. St. 64, 67 Atl. 120.

South Carolina.— Harth *v.* Gibbes, 3 Rich. 316.

Tennessee.— Crutchfield *v.* Stambaugh, 8

b. Particular Estates or Interests. Where, as in some jurisdictions, particular estates or interests in lands are subject to taxation, such separate estates or interests should be separately assessed for taxation to their respective owners.[68] So also where a person owns an estate or interest which renders him liable for the payment of all taxes on the property during its continuance, as in the case of a life-estate,[69] he may be regarded as the owner and the entire property assessed to him.[70] It has also been held that property may be assessed for taxation to the owner of a dower interest therein,[71] or estate defeasible upon a condition subsequent.[72]

c. Property Leased. Property under lease for a term of years is taxable generally to the owner, not to the tenant.[73] But where the lease is in perpetuity,

Heisk. 832; Campbell *v.* McIrwin, 4 Hayw. 60.

Texas.— Carswell *v.* Habberzettle, 39 Tex. Civ. App. 493, 87 S. W. 911; Edwards *v.* Irvin, (Civ. App.) 45 S. W. 1026.

Virginia.— Tiller *v.* Excelsior Coal, etc., Corp., 110 Va. 151, 65 S. E. 507.

Canada.— Halifax *v.* Wallace, 38 Nova Scotia 564.

See 45 Cent. Dig. tit. "Taxation," § 166.

In Maryland, under the laws of that state, the duty devolves upon a party who has aliened property with which he stands assessed to avail himself of the means which the law provides to have the transfer noted on the tax books and to obtain allowance therefor; if he fails to do so he cannot complain of being held liable for the tax. Frederick County *v.* Clagett, 31 Md. 210.

Apportionment.— Under the Massachusetts statute relating to the apportionment of taxes where real estate is divided after its assessment, no personal liability is imposed on a purchaser of a part of a tract of land to whom a part of the tax assessed is apportioned, the only way of enforcing the collection of such tax being through the lien upon the fractional parcel. Rogers *v.* Gookin, 198 Mass. 434, 85 N. E. 405.

68. People *v.* International Salt Co., 233 Ill. 223, 84 N. E. 278; Moeller *v.* Gormley, 44 Wash. 465, 87 Pac. 507.

Leasehold interests see *infra*, III, A, 3, c.

69. *Connecticut.*— Meriden *v.* Maloney, 74 Conn. 90, 49 Atl. 897; White *v.* Portland, 67 Conn. 272, 34 Atl. 1022.

Kentucky.— Morrison *v.* Fletcher, 119 Ky. 488, 84 S. W. 548, 27 Ky. L. Rep. 124.

Maine.— Garland *v.* Garland, 73 Me. 97.

New York.— People *v.* Pulteney Bd. of Assessors, 101 N. Y. Suppl. 176; Fleet *v.* Dorland, 11 How. Pr. 489.

North Carolina.— Willard *v.* Blount, 33 N. C. 624.

Tennessee.— Ferguson *v.* Quinn, 97 Tenn. 46, 36 S. W. 576, 33 L. R. A. 688.

Vermont.— Wilmot *v.* Lathrop, 67 Vt. 671, 32 Atl. 861.

See 45 Cent. Dig. tit. "Taxation," § 167; and, generally, ESTATES, 16 Cyc. 632.

Rule as between life-tenant and remainder-man.— The duty of paying the annual taxes devolves upon the life-tenant, as being in the enjoyment of the estate and receipt of its income, and not upon the remainder-man. Sidenberg *v.* Ely, 90 N. Y. 257, 43 Am. Rep. 163; Deraismes *v.* Deraismes, 72 N. Y. 154; Anderson *v.* Hensley, 8 Heisk. (Tenn.) 834; Webb *v.* Burlington, 28 Vt. 188. See also ESTATES, 16 Cyc. 632. But where the value of the estate is enhanced by valuable improvements, the remainder-man should bear a share of the assessment on such improvements. Pratt *v.* Douglas, 38 N. J. Eq. 516. And if the life-tenant dies after the assessment of the taxes, without having paid them, the remainder-man must pay them. Joyes *v.* Louisville, 82 S. W. 432, 26 Ky. L. Rep. 713.

70. White *v.* Portland, 67 Conn. 272, 34 Atl. 1022; Ferguson *v.* Quinn, 97 Tenn. 46, 36 S. W. 576, 33 L. R. A. 688; Wilmot *v.* Lathrop, 67 Vt. 671, 32 N. W. 861. See also cases cited *supra*, note 69.

Under a statute requiring taxes on property to be assessed in the name of the owner, a life-tenant in possession of realty is to be regarded as the owner. Ferguson *v.* Quinn, 97 Tenn. 46, 36 S. W. 576, 33 L. R. A. 688.

Life-estate in personal property.— Where personal property is bequeathed to and held by a trustee, the interest or income to be paid to a person during life, it is to be assessed to the person entitled to the income. Webb *v.* Burlington, 28 Vt. 188.

The life-estate as such is not taxed but the land is taxed and the payment of the tax is left for the determination of the life-tenant and the owner of the fee. White *v.* Marion, 139 Iowa 479, 117 N. W. 254.

71. Com. *v.* Hamilton, 72 S. W. 744, 24 Ky. L. Rep. 1944, holding that the owner of a dower interest is within the application of a statute requiring real estate to be listed against "the owner of the first freehold estate therein." But see Lynde *v.* Brown, 145 Mass. 337, 9 N. E. 735, holding that a widow having only an unassigned dower right in lands and who has leased the land to a tenant who is in possession is not a person "who is either the owner or in possession" of the land to whom it should be assessed under the Massachusetts statute.

72. Baltimore Shipbuilding, etc., Co. *v.* Baltimore, 97 Md. 97, 54 Atl. 623.

73. *Illinois.*— Chicago, etc., R. Co. *v.* People, 153 Ill. 409, 38 N. E. 1075, 29 L. R. A. 69.

Louisiana.—State *v.* Campbell, 23 La. Ann. 445.

Massachusetts.— See Boston Molasses Co. *v.* Com., 193 Mass. 387, 79 N. E. 827.

or for a long term and renewable forever, it creates in the lessee a determinable or base fee, and the property is taxable to him.[74] In some states also provision is made by law for taxing the special interest or estate of a tenant for years,[75] but it is regarded as personalty or a chattel interest and not as real property,[76] unless classified by statute for purposes of taxation as real estate.[77]

d. Property Mortgaged or Subject to Other Liens. An owner of land who has encumbered the same by a mortgage or other lien does not cease to be the owner for purposes of taxation, and the taxes are properly assessed and charged to him, not to the mortgagee or lienor.[78] The same rule applies to a pledge of

Missouri.— State *v.* Thompson, 149 Mo. 441, 51 S. W. 98; State *v.* Mississippi River Bridge Co., 134 Mo. 321, 35 S. W. 592; State *v.* Mississippi River Bridge Co., 109 Mo. 253, 19 S. W. 421.

Pennsylvania.— Morgret *v.* McNaughton, 3 Pa. Co. Ct. 606.

Tennessee.— East Tennessee, etc., R. Co. *v.* Morristown, (Ch. App. 1895) 35 S. W. 771.

Canada.— McCarrall *v.* Watkins, 19 U. C. Q. B. 248.

See 45 Cent. Dig. tit. "Taxation," § 168.

Liability for taxes generally as between landlord and tenant and agreements relating thereto see LANDLORD AND TENANT, 24 Cyc. 1074.

Land held under an ordinary lease giving the right to hold the land for usufructuary purposes only is, as a general rule and in the absence of statute to the contrary, to be assessed as a whole, the assessment including both the value of the estate for years and of the remainder or reversion, and the owner of the fee being deemed the owner of the whole estate for purposes of taxation. Graciosa Oil Co. *v.* Santa Barbara County, 155 Cal. 140, 99 Pac. 483, 20 L. R. A. N. S. 211.

Under a statute requiring property to be assessed in the name of the owner the lessor is to be regarded as the owner. East Tennessee, etc., R. Co. *v.* Morristown, (Tenn. Ch. App. 1895) 35 S. W. 771.

Lands subject to a ground-rent are to be taxed as estates in fee simple subject to no encumbrance (Robinson *v.* Allegheny County, 7 Pa. St. 161); and the owner of a ground-rent is not liable for any of the taxes assessed on the land out of which the rent issues (Philadelphia Library Co. *v.* Ingham, 1 Whart. (Pa.) 72).

74. *Connecticut.*— Connecticut Spiritualist Camp-Meeting Assoc. *v.* East Lyme, 54 Conn. 152, 5 Atl. 849.

District of Columbia.—Washington Market Co. *v.* District of Columbia, 4 Mackey 416.

Michigan.— North Park Bridge Co. *v.* Walker Tp., 143 Mich. 693, 107 N. W. 711.

Mississippi.— Street *v.* Columbus, 75 Miss. 822, 23 So. 773.

New York.— Elmira *v.* Dunn, 22 Barb. 402.

Ohio.— Cincinnati College *v.* Yeatman, 30 Ohio St. 276.

See 45 Cent. Dig. tit. "Taxation," § 168.

Contra.— State *v.* Mississippi River Bridge Co., 134 Mo. 321, 35 S. W. 592.

75. See the following cases:

Alabama.—Freeman *v.* State, 115 Ala. 208, 22 So. 560.

Illinois.— La Salle County Mfg. Co. *v.* Ottawa, 16 Ill. 418.

Massachusetts.— Newburyport Turnpike Corp. *v.* Upton, 12 Mass. 575; Martin *v.* Mansfield, 3 Mass. 419.

New York.— Elmira *v.* Dunn, 22 Barb. 402.

North Carolina.— Willard *v.* Blount, 33 N. C. 624.

Pennsylvania.— Wagner *v.* Com., 15 Wkly. Notes Cas. 14.

Washington.— Moeller *v.* Gormley, 44 Wash. 465, 87 Pac. 507.

See 45 Cent. Dig. tit. "Taxation," § 168.

Lease of exempt property.— The Illinois statute provides that where real estate which is exempt from taxation is leased to another whose property is not exempt and the leasing of which does not make the real estate taxable, the leasehold estate shall be listed as the lessee's property. People *v.* International Salt Co., 233 Ill. 223, 84 N. E. 278.

76. Wilgus *v.* Com., 9 Bush (Ky.) 556; *In re* St. Thomas Ct. of Revision, 7 Can. L. J. 46.

77. People *v.* International Salt Co., 233 Ill. 223, 84 N. E. 278; Elmira *v.* Dunn, 22 Barb. (N. Y.) 402; People *v.* Gass, 53 Misc. (N. Y.) 363, 104 N. Y. Suppl. 884 [*affirmed* in 120 N. Y. App. Div. 147, 104 N. Y. Suppl. 885]; Cincinnati College *v.* Yeatman, 30 Ohio St. 276; Moeller *v.* Gormley, 44 Wash. 465, 87 Pac. 507. See also *supra*, III, A, 2, b, (I).

78. *Louisiana.*—Augusti *v.* Citizens' Bank, 46 La. Ann. 529, 15 So. 74.

Maine.— Coombs *v.* Warren, 34 Me. 89, holding that land cannot be taxed to a mortgagee not in possession.

Massachusetts.— Davis *v.* Boston, 129 Mass. 377; Westhampton *v.* Searle, 127 Mass. 502.

Nebraska.— Baker *v.* Grand Island Banking Co., 4 Nebr. (Unoff.) 100, 93 N. W. 428.

New Hampshire.— Morrison *v.* Manchester, 58 N. H. 538. But see Glidden *v.* Newport, 74 N. H. 207, 66 Atl. 117.

New Jersey.— *In re* Cox, 36 N. J. Eq. 448.

New York.— People *v.* New York Tax, etc., Com'rs, 58 N. Y. 242.

Wisconsin.— Boyington *v.* Southwick, 120 Wis. 184, 97 N. W. 903.

United States.— Greenwalt *v.* Tucker, 8 Fed. 792, 3 McCrary 166. But see Schenck *v.* Peay, 21 Fed. Cas. No. 12,451, 1 Dill. 267.

See 45 Cent. Dig. tit. "Taxation," § 169.

Liability for taxes on mortgaged property as between mortgagor and mortgagee see MORTGAGES, 27 Cyc. 1253.

personal property or a chattel mortgage, it being proper to assess and charge the tax to the pledgor or mortgagor and not to the pledgee or mortgagee.[79]

e. Equitable Estates or Interests. While ordinarily the owner of property for the purpose of taxation is the person having the legal title or estate,[80] an equitable estate or interest in land is subject to taxation, if within the terms of the statute imposing the tax;[81] but the same land ought not to be taxed both to the equitable owner and to the holder of the legal title.[82]

f. Interests of Vendor and Vendee.[83] Land may be assessed and taxed to a person who is in possession thereof under an executory contract of sale;[84] and in that case it is not taxable to the vendor, although the latter may be taxed on the notes or other securities given for the deferred payments as credits;[85] but if the contract of sale is only conditional, or reserves a life-estate to the vendor, then he is properly taxable as the owner of the premises.[86] So also in the case of an uncompleted sale of personal property where the title and possession still remain in the seller, the property is taxable to him.[87]

g. Purchaser at Judicial Sale. One who has acquired an equitable title to lands by purchase at a sale under execution or in foreclosure, bankruptcy, parti-

79. Parsons Natural Gas Co. *v.* Rockhold, 79 Kan. 661, 100 Pac. 639 (property pledged); Foy *v.* Comanche County, 69 Kan. 206, 76 Pac. 859; Gibbins *v.* Adamson, 5 Kan. App. 90, 48 Pac. 871; Waltham Bank *v.* Waltham, 10 Metc. (Mass.) 334; Union Stock Yards Nat. Bank *v.* Thurston County, 65 Nebr. 408, 91 N. W. 286, 92 N. W. 1022; Ratterman *v.* Ingalls, 48 Ohio St. 468, 28 N. E. 168.

Stock pledged as collateral.—A broker who holds as pledgee corporate stock bought for his customers on their order therefor, under an agreement that the ownership shall be in the customer subject to a lien of the broker for any debts due to him, and that the broker shall keep the stock of each customer distinct and deliver to each the identical stock bought for him, is not the owner of the stock and is not liable for taxes thereon. Chase *v.* Boston, 193 Mass. 522, 79 N. E. 736.

Sewing machines delivered under a contract in the form of a lease providing that the lessee shall pay to the sewing machine company a certain monthly rental until a certain sum has been paid, with the option of then returning the machine or purchasing it for the sum of one cent, remain the property of the company and are taxable to it as a part of its stock in trade. Singer Mfg. Co. *v.* Essex County, 139 Mass. 266, 1 N. E. 419.

In Wisconsin the statute provides that personalty shall be assessed to the pledgee thereof, and gives a pledgee paying taxes on pledged property a remedy against the pledgor. Milwaukee *v.* Wakefield, 134 Wis. 462, 113 N. W. 34, 115 N. W. 137.

80. Tracy *v.* Reed, 38 Fed. 69, 13 Sawy. 622, 2 L. R. A. 773, holding that the owner of property, for the purpose of taxation, is the person having the legal title or estate therein, and not one who, by contract or otherwise, has a mere equity therein or a right to compel a conveyance of such legal title or estate to himself.

81. Hodgdon *v.* Burleigh, 4 Fed. 111; Astrom *v.* Hammond, 2 Fed. Cas. No. 596, 3 McLean 107.

82. Whitham *v.* Sayers, 9 W. Va. 671.

83. **Effect of sale or conveyance after assessment** see *supra*, III, A, 3, a.

84. *Georgia.*— Morgan *v.* Burks, 90 Ga. 287, 15 S. E. 821; Athens Nat. Bank *v.* Danforth, 80 Ga. 55, 7 S. E. 546.

Iowa.— See Miller *v.* Corey, 15 Iowa 166.

Kansas.— Wilcox *v.* Ellis, 14 Kan. 588, 19 Am. Rep. 107.

Mississippi.— See Watson *v.* Sawyers, 54 Miss. 64.

Missouri.—Anderson *v.* Harwood, 47 Mo. App. 660. And see Farber *v.* Purdy, 69 Mo. 601.

New Hampshire.—Buttrick *v.* Nashua Iron, etc., Co., 59 N. H. 392.

Tennessee.— Guthrie *v.* South Western Iron Co., 8 Heisk. 826.

Texas.— Taber *v.* State, 38 Tex. Civ. App. 235, 85 S. W. 835.

See 45 Cent. Dig. tit. "Taxation," § 171.

Unaccepted parol offer.— One whose parol offer to purchase real estate has not been accepted has no enforceable contract or right to enter the premises, and therefore is not the equitable owner in such sense as to justify the assessment of the land to him. Fish *v.* Coggeshall, 22 R. I. 318, 47 Atl. 692.

85. Wilcox *v.* Ellis, 14 Kan. 588, 19 Am. Rep. 107. And see *supra*, III, A, 2, c, (v), (A).

86. Waller *v.* Jaeger, 39 Iowa 228; Wilcox *v.* Ellis, 14 Kan. 588, 19 Am. Rep. 107; Bates *v.* Sharon, 175 Mass. 293, 56 N. E. 586.

Taxation in case of life-estates generally see *supra*, III, A, 3, b.

87. St. Anthony, etc., El. Co. *v.* Cass County, 14 N. D. 601, 106 N. W. 41, holding that an oral sale of personal property without any actual or constructive delivery or payment of any part of the price and without special agreement as to delivery or change of title is not a completed sale and the title does not pass to the buyer but remains in the seller against whom the property should be assessed for taxation.

tion, etc., is properly taxable as the owner, although he has not yet fully complied with his bid, or although a right of redemption may still remain;[88] and the land should not in that case be assessed to the former owner, except perhaps in cases where the judicial sale was entirely null and void.[89] But the purchaser is not liable for the taxes for the current year, which had been duly assessed against the owner of the property prior to the sale.[90]

h. Property Held in Trust. Real or personal property held under a testamentary or other trust is ordinarily taxable to the trustee, as he has possession and control of it, and in this way the tax will ultimately be made to fall upon the beneficial owner.[91] But exceptions to this rule are sometimes found, the property being made assessable directly to the beneficiary,[92] and particularly in cases where the trust is not of the kind described in the tax laws, or where the person having control of the property is not vested with the rights and duties of a trustee in the true sense of the word,[93] or where it is a mere naked or dry

88. *Illinois.*—Wedgbury *v.* Cassell, 164 Ill. 622, 45 N. E. 978.

Indiana.— Miller *v.* Vollmer, 153 Ind. 26, 53 N. E. 949.

Kentucky.— Bond *v.* Brand, 115 Ky. 632, 74 S. W. 673, 25 Ky. L. Rep. 26.

New York— Roraback *v.* Stebbins, 4 Abb. Dec. 100, 3 Keyes 62, 33 How. Pr. 278; Mutual L. Ins. Co. *v.* Sage, 28 Hun 595.

Pennsylvania.— Evans' Estate, 2 Woodw. 166.

United States.— New Orleans, etc., R. Co. *v.* Negrotto, 40 Fed. 428.

Judicial sale not known to assessors.— Under the statute of New Hampshire providing that every person claiming lands may be taxed thereon, an assessment in the name of a judgment debtor is proper, although the title to his lands had passed to his judgment creditor under an execution sale, if the assessors had no knowledge of that fact at the time of the tax levy. Langley *v.* Batchelder, 69 N. H. 566, 46 Atl. 1085.

Purchaser at tax-sale.— One holding real estate under a tax deed valid on its face and duly recorded is within the application of a statute providing that taxes on real estate shall be assessed to the persons appearing of record as the owner. Roberts *v.* Welsh, 192 Mass. 278, 78 N. E. 408.

89. Martin *v.* Southern Athletic Club, 48 La. Ann. 1051, 20 So. 181. *Compare* Getman *v.* Harrison, 112 La. 435, 36 So. 486.

90. Smeich *v.* York County, 68 Pa. St. 439; Theobald *v.* Sylvester, 27 Pa. Super. Ct. 362.

91. *California.*— Title Guarantee, etc., Co. *v.* Los Angeles County, 3 Cal. App. 619, 86 Pac. 844.

Kentucky.— Elliott *v.* Louisville, 123 Ky. 278, 90 S. W. 990, 28 Ky. L. Rep. 967; Com. *v.* Riley, 115 Ky. 140, 72 S. W. 809, 24 Ky. L. Rep. 2005.

Louisiana.— Bluefields Banana Co. *v.* New Orleans Bd. of Assessors, 49 La. Ann. 43, 21 So. 627.

Maine.— Hunt *v.* Perley, 34 Me. 29.

Maryland.— Baltimore *v.* Stirling, 29 Md. 48; Latrobe *v.* Baltimore, 19 Md. 13.

Massachusetts.— Dunham *v.* Lowell, 200 Mass. 468, 86 N. E. 951 (holding that land held in trust is properly assessed to the trustee); Knight *v.* Boston, 159 Mass. 551, 35 N. E. 86; Richardson *v.* Boston, 148 Mass. 508, 20 N. E. 166; Miner *v.* Pingree, 110 Mass. 47; Hardy *v.* Yarmouth, 6 Allen 277; Gray *v.* Boston, 15 Pick. 376.

New York.— Trowbridge *v.* Horan, 78 N. Y. 439; People *v.* Wells, 118 N. Y. App. Div. 881, 103 N. Y. Suppl. 874 [*affirmed* in 192 N. Y. 566, 85 N. E. 1114]; People *v.* Feitner, 62 N. Y. App. Div. 618, 71 N. Y. Suppl. 1145 [*affirmed* in 168 N. Y. 674, 61 N. E. 1132]; Bowe *v.* McNab, 11 N. Y. App. Div. 386, 42 N. Y. Suppl. 938.

Ohio.— State *v.* Matthews, 10 Ohio St. 431.

Pennsylvania.—Carlisle *v.* Marshall, 36 Pa. St. 397; Spangler *v.* York County, 13 Pa. St. 322; Neilson *v.* Equitable Trust Co., 18 Pa. Super. Ct. 635; Landreth *v.* McCaffrey, 9 Pa. Dist. 343.

Rhode Island.— Greene *v.* Mumford, 4 R. I. 313.

Texas.— Downes *v.* State, 22 Tex. App. 393, 3 S. W. 242.

Vermont.— Catlin *v.* Hull, 21 Vt. 152.

Virginia.— Selden *v.* Brooke, 104 Va. 832, 52 S. E. 632.

United States.— Western Assur. Co. *v.* Halliday, 127 Fed. 830; Dallinger *v.* Rapallo, 15 Fed. 434.

Canada.— *In re* Smith, 35 Can. L. J. 723; *In re* McMaster, 2 Ont. L. Rep. 474; Dennison *v.* Henry, 17 U. C. Q. B. 276.

See 45 Cent. Dig. tit. "Taxation," § 172.

Land devised to an executor as trustee should be assessed to him. Dennison *v.* Henry, 17 U. C. Q. B. 276.

92. See Collins *v.* Boring, 96 Ga. 360, 23 S. E. 401; Davis *v.* Macy, 124 Mass. 193; Hathaway *v.* Fisk, 13 Allen (Mass.) 267; *In re* Ming, 39 N. J. Eq. 1; Com. *v.* Lehigh Valley R. Co., 129 Pa. St. 429, 18 Atl. 406, 410.

93. *Iowa.*— *In re* Boyd, 138 Iowa 583, 116 N. W. 700, 17 L. R. A. N. S. 1220, holding that a referee appointed by the court as commissioner to sell property in partition proceedings is not a trustee controlling and managing the property within the meaning of the Iowa statute.

Massachusetts.— Hathaway *v.* Fish, 13 Allen 267 (where the fund was held not to be a trust fund but an accumulating fund in the hands of individuals for the future

trust,[94] or the property and the beneficiaries are both outside the state, although the trustee may reside within it,[95] or where a deed or settlement in trust is a mere device to escape taxation on the part of the real owner.[96] In the case of property of infants or insane persons which is held by a guardian or a committee,[97] the practice varies in different jurisdictions as to whether it should be assessed to the ward,[98] or insane person,[99] or to the guardian.[1] Where there are joint trustees the tax should not be levied upon one alone, but should be apportioned among them,[2] each, if they reside in different taxing districts, being assessed upon his proportionate share in the taxing district where he resides.[3]

i. Property of Decedents' Estates. Personal property of a decedent's estate is taxable to his executor or administrator,[4] until the latter has made distribution

benefit of heirs and therefore taxable to the heirs); Swett *v.* Boston, 18 Pick. 123.

New Jersey.— Parker *v.* Irons, 35 N. J. L. 464, holding that commissioners appointed to divide real estate and who have invested pursuant to the statute for the benefit of the widow who has relinquished her dower, one third of the proceeds of the sale of the land, are not trustees within the application of the tax law of 1866. See also Lomasson *v.* Staats, 39 N. J. L. 653.

New York.— People *v.* New York Tax Com'rs, 100 N. Y. 215, 3 N. E. 85 [*reversing* 36 Hun 359] (holding that the committee of a lunatic is not a trustee within the application of the statute); Matter of Kellinger, 9 Paige 62 (holding that courts of chancery and the registers and clerks of such courts are not taxable as trustees of funds in court); People *v.* Cox, 14 N. Y. St. 632 (holding that the term "trustee" as used in the revenue laws is limited in its application to a person expressly authorized by statute to hold the legal title to property in trust for some specific purpose).

Pennsylvania.— Presbyterian Church Gen. Assembly *v.* Gratz, 139 Pa. St. 497, 20 Atl. 1041, holding that the governing body of a church, which holds personal property to be applied in its discretion to particular charities and religious purposes, but not for the benefit of any particular person, is not legally speaking a trustee or taxable as such.

See 45 Cent. Dig. tit. "Taxation," § 172.

94. See Neilson *v.* Equitable Trust Co., 18 Pa. Super. Ct. 635.

95. Goodsite *v.* Lane, 139 Fed. 593, 72 C. C. A. 281.

96. People *v.* Barker, 18 Misc. (N. Y.) 712, 43 N. Y. Suppl. 713.

97. Liability to taxation see *supra*, III, A, 1, b, (II).

98. Vogel *v.* Vogler, 78 Ind. 353.

99. People *v.* New York Tax Com'rs, 100 N. Y. 215, 3 N. E. 85 [*reversing* 36 Hun 359], holding that property of a lunatic in the hands of a committee should be assessed to the lunatic at the place where he resides and not to the committee.

1. Baldwin *v.* Washington County, 85 Md. 145, 36 Atl. 764; Baldwin *v.* Fitchburg First Parish, 8 Pick. (Mass.) 494; Payson *v.* Tufts, 13 Mass. 493; Kansas City *v.* Simpson, 90 Mo. App. 50.

The fact that the ward has come of age is not material if there has been no settlement of the guardianship accounts or transfer of the property to the ward. Baldwin *v.* Washington County, 85 Md. 145, 36 Atl. 764.

Assessment to guardian individually.— Where a guardian has been granted permission by the court to take and use funds belonging to his ward at a certain rate of interest, the loaning of such funds by the guardian at his own discretion and without submission to the court constitutes an appropriation thereof to his own use and renders him individually liable to taxation thereon. Clayton *v.* Tupelo, (Miss. 1901) 29 So. 994.

2. Hardy *v.* Yarmouth, 6 Allen (Mass.) 277; People *v.* Feitner, 168 N. Y. 360, 61 N. E. 280 [*reversing* 63 N. Y. App. Div. 174, 71 N. Y. Suppl. 261].

3. Hardy *v.* Yarmouth, 6 Allen (Mass.) 277; People *v.* Wells, 182 N. Y. 314, 74 N. E. 878 [*reversing* 101 N. Y. App. Div. 600, 92 N. Y. Suppl. 5]; People *v.* Feitner, 168 N. Y. 360, 61 N. E. 280 [*reversing* 63 N. Y. App. Div. 174, 63 N. Y. Suppl. 261].

Resident and non-resident trustees.— Under the New York statutes where there are several trustees of the same property, some of whom are residents and others non-residents, the value of the property should be apportioned among all the trustees and the resident trustees taxed upon their respective shares where they reside, no assessment being made against the non-resident trustees. People *v.* Wells, 182 N. Y. 314, 74 N. E. 878 [*reversing* 101 N. Y. App. Div. 600, 92 N. Y. Suppl. 5]; People *v.* Feitner, 168 N. Y. 360, 61 N. E. 280 [*reversing* 63 N. Y. App. Div. 174, 63 N. Y. Suppl. 261]. See also People *v.* Coleman, 119 N. Y. 137, 20 N. E. 488, 7 L. R. A. 407 [*reversing* 53 Hun 482, 6 N. Y. Suppl. 285].

4. *Louisiana.*— Tulane Univ. *v.* Board of Assessors, 115 La. 1025, 40 So. 445.

Maine.— Eliot *v.* Prime, 98 Me. 48, 56 Atl. 207; Dresden *v.* Bridge, 90 Me. 489, 38 Atl. 545.

Maryland.—Nicodemus *v.* Hull, 93 Md. 364, 48 Atl. 1049.

Massachusetts.— White *v.* Mott, 182 Mass. 195, 65 N. E. 38; Vaughan *v.* Street Com'rs, 154 Mass. 143, 28 N. E. 144; Smith *v.* Northampton Bank, 4 Cush. 1. And see Williams *v.* Brookline, 194 Mass. 44, 79 N. E. 779.

New Hampshire.— Willard *v.* Wetherbee, 4 N. H. 118.

New Jersey.— Dilts *v.* Taylor, 57 N. J. L. 369, 30 Atl. 599.

or has been discharged;[5] and under some statutes the executor or administrator is personally and individually liable for the payment of taxes so assessed against him in his representative capacity,[6] so that his own property may be taken to enforce the payment thereof;[7] and such liability is not relieved by a subsequent distribution of the estate.[8] As real estate upon the death of the owner ordinarily

New York.— *In re* Babcock, 115 N. Y. 450, 22 N. E. 263; People *v.* Wells, 94 N. Y. App. Div. 463, 87 N. Y. Suppl. 745, 88 N. Y. Suppl. 1113 [*affirmed* in 179 N. Y. 566, 71 N. E. 1136]; Bowe *v.* McNab, 11 N. Y. App. Div. 386, 42 N. Y. Suppl. 938; McMahon *v.* Beekman, 65 How. Pr. 427.

Ohio.— Sommers *v.* Boyd, 48 Ohio St. 648, 29 N. E. 497; *In re* Robb, 5 Ohio S. & C. Pl. Dec. 227, 5 Ohio N. P. 52.

Oregon.— Johnson *v.* Oregon City, 2 Oreg. 327.

See 45 Cent. Dig. tit. "Taxation," § 174.

Assessment to executor before probate.— A will vests in the executors named therein a legal control over the estate, which will justify an assessment of the personal property of the estate against them before the will is admitted to probate or letters testamentary are granted. People *v.* Barker, 150 N. Y. 52, 44 N. E. 785 [*affirming* 35 N. Y. Suppl. 953].

Ancillary administrator.— Money or property held by an ancillary administrator is subject to taxation in the state granting his letters, especially where taxes are not paid on it at the principal place of administration. Dorris *v.* Miller, 105 Iowa 564, 75 N. W. 482.

Credits of estates.— Where by the terms of a will the administrator was to keep the estate intact until the youngest child became of age, and in the meanwhile he loaned money to the heirs taking their notes therefor, it was held that such loans could not be considered as advances since no advances were authorized, but that the notes represented debts to the estate and were taxable as credits. *In re* Seaman, 135 Iowa 543, 113 N. W. 354.

Where administration is granted on the estate of a deceased ward the assets vest immediately in the administrator whose title by relation dates back to the time of the decease and therefore he and not the former guardian is the proper person to list the personal estate for taxation. Sommers *v.* Boyd, 48 Ohio St. 648, 29 N. E. 497.

Where a mortgage has been specifically devised to a person and the executors have no title thereto or to the money secured thereby, it is not to be assessed for taxation to them. Gray *v.* Leggett, 40 N. J. L. 308.

5. Augusta *v.* Kimball, 91 Me. 605, 40 Atl. 666, 41 L. R. A. 475; Carleton *v.* Ashburnham, 102 Mass. 348; Nelson *v.* Becker, 63 Minn. 61, 65 N. W. 119; People *v.* New York Tax Com'rs, 17 Hun (N. Y.) 293.

Legacy not delivered.— Where the statute requires the whole of an undistributed estate to be assessed to the executors, a legatee cannot be assessed for a legacy not yet due and still in the executor's hands. Barstow *v.* Big Rapids, 56 Mich. 35, 22 N. W. 103; Herrick *v.* Big Rapids, 53 Mich. 554, 19 N. W. 182.

Form of settlement.— Property should not be taxed to an administrator after there has been a settlement and distribution of the estate by amicable arrangement among all the parties interested and of which the assessors have notice, although there has been no formal settlement and decree in the probate court. Carleton *v.* Ashburnham, 102 Mass. 348.

6. New York *v.* Goss, 124 N. Y. App. Div. 680, 109 N. Y. Suppl. 151; Williams *v.* Holden, 4 Wend. (N. Y.) 223; Dennison *v.* Henry, 17 U. C. Q. B. 276. See also Dresden *v.* Bridge, 90 Me. 489, 38 Atl. 545, holding, however, that the executor or administrator, as the case may be, is not personally liable unless the assessment was made against him notwithstanding it was made after the death of the decedent.

Not personally liable for prior taxes.— An executor or administrator is not personally liable for the payment of a tax assessed against and due from decedent in his lifetime, and in an action to recover such taxes the judgment should be against the personal representative in his representative capacity. Eno *v.* Cornish, Kirby (Conn.) 296. And where an assessment is made for back taxes on omitted property for years during the lifetime of the decedent in which the property was not assessed, the executor or administrator is not personally liable for the payment of the tax, as his personal liability arises from the statutory duty of listing property in his hands for taxation, and the statutory lien on such property to secure reimbursement for the taxes paid by him, and the statute does not require him to make lists of property which the decedent has omitted to make in his lifetime. Scott *v.* People, 210 Ill. 594, 71 N. E. 582. So also the executor of a trustee who comes into possession of the trust estate but who holds it merely as a kind of bailee to preserve it intact and delivers it over to other trustees when appointed is not personally liable for the payment of taxes previously assessed upon the trust estate. State *v.* Mississippi Valley Trust Co., 209 Mo. 472, 108 S. W. 97.

7. Williams *v.* Holden, 4 Wend. (N. Y.) 223 (holding that individual property of an executor or administrator may be taken for a tax imposed upon him in his representative capacity where no property of the testator or intestate can be found); Dennison *v.* Henry, 17 U. C. Q. B. 276.

8. New York *v.* Goss, 124 N. Y. App. Div. 680, 109 N. Y. Suppl. 151.

A representative acts in his own wrong if he fails to appropriate property of the estate to the payment of a tax which should be paid out of the estate and makes a settlement or otherwise parts with the property without

vests immediately in the heirs or devisees,[9] it should not thereafter be assessed as the property of the decedent;[10] although there is some conflict of authority as to whether in assessing such property it may be designated generally as the estate of the decedent or the property of his heirs, or whether the heirs must be named.[11]

j. Property in Custody of Agent, Factor, or Broker. In the absence of statute an agent or representative of another having in his possession property of the latter is not personally liable to taxation thereon,[12] and the assessment should be made in the name of the real owner.[13] By the laws of several of the states personal property in the possession or under the actual control and management of an agent, factor, or commission merchant may be assessed and taxed in his name rather than directly to the owner, the object being to lay the tax where it can most readily be collected, and the agent having of course the right to recoup himself as against the principal.[14] This method is most commonly pursued in

retaining sufficient to pay the tax. Williams *v.* Holden, 4 Wend. (N. Y.) 223.

9. See EXECUTORS AND ADMINISTRATORS, 18 Cyc. 180.

But land devised to an executor as trustee should be assessed to the executor. Dennison *v.* Henry, 17 U. C. Q. B. 276.

10. Jackson *v.* King, 82 Ala. 432, 3 So. 232; Walsh *v.* Horang, 48 La. Ann. 984, 20 So. 202; Kearns *v.* Collins, 40 La. Ann. 453, 4 So. 498; Sawyer *v.* Mackie, 149 Mass. 269, 21 N. E. 307. See also *infra*, VI, C, 5, g.

11. See *infra*, VI, C, 5, g.

12. *In re* Boyd, 138 Iowa 583, 116 N. W. 700, 17 L. R. A. N. S. 1220.

13. Penrose *v.* Gragard, 105 La. 146, 29 So. 494, holding that property in the hands of a consignee to be sold for account of the consignor must be assessed in the name of the owner and not in the name of the consignee.

14. *Illinois.*— Matzenbaugh *v.* People, 194 Ill. 108, 62 N. E. 546, 88 Am. St. Rep. 134; Lyle *v.* Jaques, 101 Ill. 644; Walton *v.* Westwood, 73 Ill. 125.

Iowa.— Merchants' Transfer Co. *v.* Des Moines Bd. of Review, 128 Iowa 732, 105 N. W. 211, 2 L. R. A. N. S. 662; Heinz *v.* Davenport Bd. of Equalization, 121 Iowa 445, 96 N. W. 967; German Trust Co. *v.* Davenport Tp., 121 Iowa 325, 96 N. W. 878; *In re* Miller, 116 Iowa 446, 90 N. W. 89.

Michigan.— Grand Rapids Bark, etc., Co. *v.* Inland Tp., 136 Mich. 121, 98 N. W. 980; Baars *v.* Grand Rapids, 129 Mich. 572, 89 N. W. 328; Spanish River Lumber Co. *v.* Bay City, 113 Mich. 181, 71 N. W. 595; Curtis *v.* Richland Tp., 56 Mich. 478, 23 N. W. 175.

New York.— See Lord *v.* Arnold, 18 Barb. 104, holding, however, that amounts owing upon contracts for the sale of lands made by an agent are not subject to taxation against the agent as "personal estate in his possession or under his control as such agent."

North Carolina.—Murdock *v.* Iredell County, 138 N. C. 124, 50 S. E. 567.

Ohio.— Hagerty *v.* Huddleston, 60 Ohio St. 149, 53 N. E. 960. Live stock held at the stock-yards subject to the orders of a commission merchant is subject to his control and is taxable to him. Huddleston *v.* Hagerty, 1 Ohio S. & C. Pl. Dec. 331, 2 Ohio N. P. 291.

Wisconsin.— State *v.* Fisher, 129 Wis. 57, 108 N. W. 206.

See 45 Cent. Dig. tit. "Taxation," §§ 175, 176.

In Minnesota Gen. St. (1895) § 1528, provides that no consignee shall be required to list for taxation property held by him for the sole purpose of being stored or forwarded, if he has no interest in such property or profit to be derived from its sale. See State *v.* Franklin Sugar-Refining Co., 79 Minn. 127, 81 N. W. 752.

An agent cannot avoid taxation by executing a note to his principal for the money and property in his hands, simply to avoid the tax and with the understanding that such note shall create no liability on his part. Hutchinson *v.* Oskaloosa Bd. of Equalization, 67 Iowa 182, 25 N. W. 121.

Choses in action have been held to be within the application of a statute providing for the assessment of taxes upon personal property in the hands of an agent. Curtis *v.* Richland Tp., 56 Mich. 478, 23 N. W. 175. But see Lord *v.* Arnold, 18 Barb. (N. Y.) 104.

Grain in a mill or warehouse in the possession of an agent and controlled by him on the day for assessment, and which was bought by him for other parties for a commission paid by them, is properly assessed against him. Lyle *v.* Jacques, 101 Ill. 644; Walton *v.* Westwood, 73 Ill. 125. But under the statute of Minnesota, providing that the delivery of grain to any warehouseman for storage, although it be mingled with that of others or shipped or removed from the original place of storage, shall be deemed a bailment, grain controlled by an elevator company, less than the amount of outstanding warehouse receipts, is not the property of the company for the purpose of taxation. State *v.* Northwestern El. Co., 101 Minn. 192, 112 N. W. 68, 1142.

Whisky in bonded warehouse.— Under the laws of Kentucky the proprietor of a warehouse in which bonded whisky is stored, on the removal of such whisky, is liable for the annual taxes levied thereon, with interest; and it is held that this statute is not in

cases, where the property of a non-resident owner is being held by and in the possession of a resident agent.[15]

k. Property in Custody of Court or Court Officer. At common law property in the custody of the law or of a court or judicial officer is not subject to taxation.[16] But in some states statutes have been passed authorizing the taxation of clerks of court, masters in chancery, municipal treasurers, and other such officers for money paid into court and deposited with them by the court's order, or held by them under similar orders pending litigation as to its ownership;[17] and similar provisions have been made in some states as to real estate held by the courts and mortgages made to judicial officers in their official capacity.[18] Where land is sold under judicial decree and the proceeds brought into court, the proper course for the collection of taxes due thereon is to apply to the court for an order for their payment out of such proceeds.[19]

l. Property Held by Assignees, Receivers, and Trustees in Bankruptcy. Property continues to be subject to taxation, although it is in the hands of an assignee for the benefit of creditors;[20] but the statutes do not generally permit the taxation of property held by an assignee in insolvency acting under the direction of the court,[21] except perhaps in cases where he is continuing the business of the insolvent and operating it as a going concern.[22] In some states taxable property may be assessed to a receiver who is officially in charge or it,[23] and if so, the fact that the receiver was appointed by a federal court does not make him an officer of that court in such sense as to exempt the property from state and local taxes.[24] The same rule applies to property in the hands of a trustee

violation of the constitution of the United States, nor is it material, on such question, whether or not the proprietor of the warehouse is also the owner of the whisky. Thompson *v.* Com., 123 Ky. 302, 94 S. W. 654, 29 Ky. L. Rep. 705, 124 Am. St. Rep. 362; Anderson County *v.* Kentucky Distilleries, etc., Co., 146 Fed. 999.

Stock broker.— The ordinary relation between a customer buying stock on margin and his broker is not that of pledgor and pledgee, but the broker is the owner of the stock and it is taxable to him as his property, for he is not bound generally to keep the stock of any one customer distinct, but has the right to take a single certificate in his own name for several customers and power to pledge the whole as collateral for a loan made to him. Chase *v.* Boston, 180 Mass. 458, 62 N. E. 1059. But see Chase *v.* Boston, 193 Mass. 522, 79 N. E. 736.

15. See *infra*, III, A, 4, b; III, A, 4, d, (II).

16. Swope *v.* Fraser, (N. J. Ch. 1904) 58 Atl. 531; Matter of Kellinger, 9 Paige (N. Y.) 62. See also *In re* Boyd, 138 Iowa 583, 116 N. W. 700, 17 L. R. A. N. S. 1220.

17. San Luis Obispo *v.* Pettit, 87 Cal. 499, 25 Pac. 694; People *v.* Lardner, 30 Cal. 242; *Ex p.* Riddle, 8 Heisk. (Tenn.) 817; Carhart *v.* Jones, (Tenn. Ch. App. 1896) 37 S. W. 565; Thompson *v.* Evans, 2 Tenn. Ch. App. 61.

18. State Chancellor *v.* Elizabeth, 66 N. J. L. 687, 52 Atl. 1130 [*affirming* 65 N. J. L. 479, 47 Atl. 454].

Land rented by order of court.— Taxes on lands accruing while such lands are rented out under orders of the court should be paid out of the rents. Camden *v.* Haymond, 9 W. Va. 680.

19. Wheeler *v.* Addison, 54 Md. 41; Prince George's County *v.* Clarke, 36 Md. 206.

20. Ryan *v.* Gallatin County, 14 Ill. 78; State *v.* New Orleans Bank of Commerce, 50 La. Ann. 696, 23 So. 464; Gerard *v.* Duncan, 84 Miss. 731, 36 So. 1034, 66 L. R. A. 461; Briggs' Appeal, 1 Walk. (Pa.) 199; Matter of U. S. Bank, 1 Phila. (Pa.) 330.

21. McNeill *v.* Hagerty, 51 Ohio St. 255, 37 N. E. 526, 23 L. R. A. 628. *Compare* Youtsey *v.* Com., 110 Ky. 555, 62 S. W. 262, 22 Ky. L. Rep. 1914.

22. French *v.* Bobe, 64 Ohio St. 323, 60 N. E. 292; *In re* Jackson Brewing Co., 7 Ohio S. & C. Pl. Dec. 491, 5 Ohio N. P. 438.

23. Los Angeles *v.* Los Angeles City Water Co., 137 Cal. 699, 70 Pac. 770; Lamkin *v.* Baldwin, etc., Mfg. Co., 72 Conn. 57, 43 Atl. 593, 1042, 44 L. R. A. 786; Wiswall *v.* Kunz, 173 Ill. 110, 50 N. E. 184; Central Trust Co. *v.* New York, etc., R. Co., 110 N. Y. 250, 18 N. E. 92, 1 L. R. A. 260; *In re* Mallery, 2 N. Y. Suppl. 437. See also Gray *v.* Logan County, 7 Okl. 321, 54 Pac. 485. But see City Nat. Bank *v.* Charles Baker Co., 180 Mass. 40, 61 N. E. 223; Com. *v.* Lancaster Sav. Bank, 123 Mass. 493; Schoolfield *v.* Schoolfield, 103 Tenn. 63, 52 S. W. 867.

Property held by a receiver is liable to assessment for taxation, and while it should be assessed to the receiver yet the fact that it is assessed in the name of the party for whom the receiver holds possession will not affect the validity of the tax. Wiswall *v.* Kunz, 173 Ill. 110, 50 N. E. 184.

24. Bates *v.* Boston, 5 Cush. (Mass.) 93; Philadelphia, etc., R. Co. *v.* Com., 104 Pa. St. 80; Central Trust Co. *v.* Wabash, etc., R. Co., 26 Fed. 11; Stevens *v.* New York,

in bankruptcy appointed under the federal statute; it is not exempt from taxation.[25]

m. Occupancy or Possession — (i) *In General.* Taxes should ordinarily be assessed to the real owner of the property without regard to temporary occupancy;[26] and if the statute requires the assessment of real property to be made to the owner thereof, it cannot be taxed to a person who is in possession but is not the owner.[27] But in several states the laws are so framed as to permit the assessment to be made either to the owner or occupant or to a person in possession and in apparent charge and control of the property.[28] Lands held and owned by joint tenants or tenants in common may be assessed to them jointly, without specifying their respective interests;[29] or, in some states, the property may be assessed in the name of either of them alone;[30] but when part of a lot of land belongs to one person and part to another, it is the duty of the assessor to assess each part to the proper owner, if known.[31]

(ii) *Property of Married Women.* The separate property of a married woman should ordinarily be assessed to her as the owner thereof, and not to her husband.[32] In some jurisdictions, however, if a husband has the possession and the care and control of his wife's land, it may be assessed to him as the "occupant" thereof;[33] but if the husband and wife are living apart from each other, and the

etc., R. Co., 23 Fed. Cas. No. 13,405, 13 Blatchf. 104.

Insolvent national bank.— The personal property of an insolvent national bank in the hands of a receiver appointed under the federal statute is exempt from taxation under state laws. Rosenblatt *v.* Johnston, 104 U. S. 462, 26 L. ed. 832.

Collection of taxes.— Property in the hands of a receiver of a federal court cannot be reached by proceedings for the collection of state taxes without the consent of such court. *Ex p.* Tyler, 149 U. S. 164, 13 S. Ct. 785, 37 L. ed. 689; Oakes *v.* Myers, 68 Fed. 807.

25. Swarts *v.* Hammer, 194 U. S. 441, 24 S. Ct. 695, 48 L. ed. 1060 [*affirming* 120 Fed. 256, 56 C. C. A. 92]; *In re* Mitchell, 15 Fed. Cas. No. 9,658, 16 Nat. Bankr. Reg. 535, 17 Alb. L. J. (N. Y.) 26. *Contra, In re* Booth, 3 Fed. Cas. No. 1,645, 14 Nat. Bankr. Reg. 232.

26. Speed *v.* St. Louis County Ct., 42 Mo. 382, holding that the owner of real estate, which was occupied by the federal government during the Civil war but to which the government asserted no claim or title, is liable to taxation thereon during the time that it was so occupied.

27. Martin *v.* Mansfield, 3 Mass. 419. And see Foresman *v.* Chase, 68 Ind. 500.

28. *California.*— Barrett *v.* Amerein, 36 Cal. 322; People *v.* Rains, 23 Cal. 131.

Michigan.— Blackwood *v.* Van Vleit, 30 Mich. 118.

Missouri.— St. Joseph *v.* Saville, 39 Mo. 460; Eau Claire Lumber Co. *v.* Anderson, 13 Mo. App. 429.

New Hampshire.— Warren *v.* Wentworth, 45 N. H. 564.

New York.— Dubois *v.* Webster, 7 Hun 371, but the name of either the owner or occupant must be stated in the assessment.

Pennsylvania.— Spangler *v.* York County, 13 Pa. St. 322.

See 45 Cent. Dig. tit. "Taxation," § 178.

Character of occupation.— Where lots are occupied for gardens or pasture, with no dwelling-house thereon, the assessor is justified in assuming that the possession and occupancy are in the owner. Massing *v.* Ames, 37 Wis. 645. The joint custody and control of a bonded warehouse by the federal storekeeper and the warehouse proprietor, as provided by the federal statutes, does not constitute such a change of possession of the liquor stored therein as to destroy the presumption of ownership by the distiller in proceedings to assess taxes. Hannis Distilling Co. *v.* Berkeley County Ct., 62 W. Va. 442, 407, 59 S. E. 1051, 1054.

29. People *v.* McEwen, 23 Cal. 54; Howcott *v.* New Orleans, 107 La. 305, 31 So. 668; Sullivan *v.* Boston, 198 Mass. 119, 84 N. E. 443. And see Hayes *v.* Viator, 33 La. Ann. 1162.

30. Hunt *v.* Boston, 183 Mass. 303, 67 N. E. 244; Fleischauer *v.* West Hoboken, 40 N. J. L. 109.

One joint owner cannot complain that there is not a proper assessment against the other joint owners. Welles *v.* Battelle, 11 Mass. 477.

31. Knox *v.* Huidekoper, 21 Wis. 527.

32. Klumpke *v.* Baker, 68 Cal. 559, 10 Pac. 197; Hamilton *v.* Fond du Lac, 25 Wis. 496.

The husband is not individually liable for taxes upon his wife's property, although it is occupied by both as their homestead. Richards *v.* Tarr, 42 Kan. 547, 22 Pac. 557.

33. *California.*— People *v.* Rains, 23 Cal. 131. *Compare* Klumpke *v.* Baker, 68 Cal. 559, 10 Pac. 197.

Connecticut.— Guilford Union School Dist. *v.* Bishop, 76 Conn. 695, 58 Atl. 13, 66 L. R. A. 989.

Florida.— Paul *v.* Fries, 18 Fla. 573.

Massachusetts.— Southworth *v.* Edmands, 152 Mass. 203, 25 N. E. 106, 9 L. R. A. 118.

New York.— Powell *v.* Jenkins, 14 Misc. 83, 35 N. Y. Suppl. 265.

See 45 Cent. Dig. tit. "Taxation," § 179.

husband has not the charge, control, or possession of the land, it must be assessed to the wife and not to the husband.[34]

n. Partnership Property. Property owned by a partnership is properly taxed in the name of the firm, and not in the name of an individual member thereof.[35] But after the dissolution of a partnership, it is not chargeable as a firm with the future taxes on the property,[36] and as to taxes already assessed and due, the liability is apportioned among the former partners.[37]

4. Property of Non-Residents — a. Taxability in General. In respect to property which is of a tangible and corporeal nature, and so capable of having a *situs* of its own, the residence of its owner is generally immaterial, and the property is taxable where found; hence property of this character found within a given state is taxable by that state, notwithstanding the owner may be a non-resident or alien and not in any other way subject to the laws of the state.[38] But such

In Wisconsin it has been held that a husband merely by residing with his wife upon her separate property does not become an occupant thereof within the application of the statute allowing lands to be assessed to occupants (Hamilton *v.* Fond du Lac, 25 Wis. 496); but that an assessment to the husband is not sufficient to invalidate a tax based upon such an assessment (Enos *v.* Bemis, 61 Wis. 656, 21 N. W. 812), provided the assessors acted in good faith and did not know that it was her separate property (Massing *v.* Ames, 37 Wis. 645 [*distinguishing* Hamilton *v.* Fond du Lac, *supra*]).

34. Smith *v.* Read, 51 Conn. 10.

35. *Kansas.*— Swallow *v.* Thomas, 15 Kan. 66.

Louisiana.— Thibodaux *v.* Keller, 29 La. Ann. 508.

Maine.— Stockwell *v.* Brewer, 59 Me. 286.

Massachusetts.— Oliver *v.* Lynn, 130 Mass. 143.

Michigan.— Blodgett *v.* Muskegon, 60 Mich. 580, 27 N. W. 686; Hubbard *v.* Winsor, 15 Mich. 146.

New Jersey.— State *v.* Parker, 34 N. J. L. 71.

New York.— People *v.* Wells, 177 N. Y. 586, 70 N. E. 1106.

Ohio.— Robinson *v.* Ward, 13 Ohio St. 293. See 45 Cent. Dig. tit. "Taxation," § 180.

Not a fatal defect.— Under a statute providing that irregularities in the assessment shall not render any tax invalid, the assessment of firm property in the name of one of the partners is valid. Fletcher *v.* Post, 104 Mich. 424, 62 N. W. 574.

Effect of death of partner.— Where a partnership business continues after the death of one of the partners the title to the property vests in the surviving partner for the purpose of winding up the business, but it is properly listed for taxation in the firm-name. Blodgett *v.* Muskegon, 60 Mich. 580, 27 N. W. 686.

One partner in exclusive possession.— Property belonging to a company, but which is in the possession and occupancy of one of the members, who is the agent of the company, may be assessed to him. Welles *v.* Battelle, 11 Mass. 477.

Liability of partners.— Under the statute in Indiana, making each partner liable for the whole tax against the partnership, a partner is, as between himself and the state, liable for back taxes which the partnership omitted to list and return for taxation in previous years. Parkison *v.* Thompson, 164 Ind. 609, 73 N. E. 109.

Retiring partner.— One retiring from a partnership before May 1, the date of the assessment, and who retains no interest and takes no part in its management, whether he has given notice or not, is not liable for taxes assessed for that year on the property. Washburn *v.* Walworth, 133 Mass. 499.

36. Rivers *v.* New Orleans, 42 La. Ann. 1196, 8 So. 484; Von Phul *v.* New Orleans, 24 La. Ann. 261. And see People *v.* Coleman, 44 Hun (N. Y.) 20.

37. Rivers *v.* New Orleans, 42 La. Ann. 1196, 8 So. 484.

38. *California.*— Minturn *v.* Hays, 2 Cal. 590, 56 Am. Dec. 366.

Colorado.— Denver, etc., R. Co. *v.* Church, 17 Colo. 1, 28 Pac. 468, 31 Am. St. Rep. 252.

Connecticut.— Sprague *v.* Lisbon, 30 Conn. 18.

Illinois.— Tazewell County *v.* Davenport, 40 Ill. 197. And see Maxwell *v.* People, 189 Ill. 546, 59 N. E. 1101.

Indiana.— Gallup *v.* Schmidt, (1899) 54 N. E. 384; Standard Oil Co. *v.* Combs, 96 Ind. 179, 49 Am. Rep. 156; Rieman *v.* Shepard, 27 Ind. 288.

Louisiana.— Parker *v.* Strauss, 49 La. Ann. 1173, 22 So. 329.

Maine.— Desmond *v.* Machiasport, 48 Me. 478.

Massachusetts.— Lamson Consol. Store Service Co. *v.* Boston, 170 Mass. 354, 49 N. E. 630; Hunt *v.* Perry, 165 Mass. 287, 43 N. E. 103.

Minnesota.— State *v.* Deering, 56 Minn. 24, 57 N. W. 313.

Missouri.— Curtis *v.* Ward, 58 Mo. 295; St. Louis *v.* Wiggins Ferry Co., 40 Mo. 580.

New Jersey.— Beckett *v.* Bordentown Tp., 32 N. J. L. 192.

New York.— People *v.* Wells, 92 N. Y. App. Div. 622, 87 N. Y. Suppl. 1143 [*affirmed* in 180 N. Y. 506, 72 N. E. 1148]; People *v.* O'Donnel, 47 Misc. 226, 95 N. Y. Suppl. 889.

Pennsylvania.— Frantz's Appeal, 52 Pa. St. 367.

Texas.— Hall *v.* Miller, 102 Tex. 289, 115

taxes must be laid by legislative authority; and if the tax laws are restricted to the property of "citizens" or "residents," or to specific classes of property without regard to ownership, the actual assessment of the taxes can proceed on no broader lines.[39]

b. Property Held by Agent or Trustee. Under the statutes in force in many of the states, tangible personal property belonging to a non-resident, but actually within the state and there held by and in the possession of a resident agent, factor, or trustee, is taxable to such agent, factor or trustee.[40] Such property is

S. W. 1168 [*affirming* (Civ. App. 1908) 110 S. W. 165]; Hardesty *v.* Fleming, 57 Tex. 395; State *v.* Maryland Fidelity, etc., Co., 35 Tex. Civ. App. 214, 80 S. W. 544.

Wisconsin.— Palmer *v.* Corwith, 3 Chandl. 297.

United States.—Western Assur. Co. *v.* Halliday, 126 Fed. 257, 61 C. C. A. 271; Duer *v.* Small, 7 Fed. Cas. No. 4,116, 4 Blatchf. 263.

Canada.— *Ex p.* McLeod, 14 N. Brunsw. 226.

See 45 Cent. Dig. tit. "Taxation," §§ 8, 182.

Aliens.— An alien may be taxed on his property within the state, although he does not, by paying a tax, acquire any political rights. Opinion of Justices, 7 Mass. 523.

Property sold to non-resident.— The fact that tangible personal property has been sold to a non-resident, and is merely awaiting the necessary opening of navigation for its removal, does not exempt it from taxation. Carrier *v.* Gordon, 21 Ohio St. 605. But if property of a resident in the custody of a third person is sold to a non-resident and the custodian wrongfully refuses to deliver it up to the purchaser, it is not while so wrongfully withheld subject to taxation at the residence of the custodian. Frankfort *v.* Illinois L. Ins. Co., 129 Ky. 823, 112 S. W. 924, 130 Am. St. Rep. 199.

A general deposit of money of a non-resident in a bank is subject to taxation where the bank is located. Parker *v.* Strauss, 49 La. Ann. 1173, 22 So. 329; Bluefields Banana Co. *v.* New Orleans Bd. of Assessors, 49 La. Ann. 43, 21 So. 627. *Contra*, Pendleton *v.* Com., 110 Va. 229, 65 S. E. 536.

No personal liability.— Although the state has power to impose a tax on a non-resident's personal property situated within its borders, and to enforce the tax against the property, it has no power to subject him to a personal liability for the tax. New York *v.* McLean, 57 N. Y. App. Div. 601, 68 N. Y. Suppl. 606 [*affirmed* in 170 N. Y. 374, 63 N. E. 380].

What constitutes residence.— As to taxation of a citizen of another state who, during the winter months only, occupied a house in New York with his family see People *v.* O'Donnel, 47 Misc. (N. Y.) 226, 95 N. Y. Suppl. 889.

39. *Connecticut.*— Shaw *v.* Hartford, 56 Conn. 351, 15 Atl. 742.

Minnesota.— St. Paul *v.* Merritt, 7 Minn. 258.

Pennsylvania.—Lancaster County *v.* Hazlehurst, 5 Pa. L. J. 224.

Rhode Island.—Barber *v.* Potter, 8 R. I. 15.

Wisconsin.—Fond du Lac *v.* Otto, 113 Wis. 39, 88 N. W. 917.

See 45 Cent. Dig. tit. "Taxation," § 182.

But the term "persons residing," as used in a statute providing for the taxation of "all personal property of persons residing" within the state, applies to a person who at the date for listing property for taxation is outside of the state on his way to another state which he intends to make his future residence. McCutchen *v.* Rice County, 7 Fed. 558, 2 McCrary 337.

40. *Indiana.*— Schmidt *v.* Failey, 148 Ind. 150, 47 N. E. 326, 37 L. R. A. 442.

Kentucky.— Com. *v.* Gaines, 80 Ky. 489. And see Com. *v.* Dun, 126 Ky. 108, 102 S. W. 859, 31 Ky. L. Rep. 561, 10 L. R. A. N. S. 920.

Minnesota.— McCormick *v.* Fitch, 14 Minn. 252.

New York.— People *v.* Willis, 133 N. Y. 383, 31 N. E. 225 [*reversing* 12 N. Y. Suppl. 385].

Pennsylvania.— See Carlisle *v.* Marshall, 36 Pa. St. 397.

Rhode Island.— *In re* Ailman, 17 R. I. 362, 22 Atl. 279.

Vermont.— Catlin *v.* Hull, 21 Vt. 152.

Wisconsin.— Ashland County *v.* Knight, 129 Wis. 63, 108 N. W. 208.

United States.—Western Assur. Co. *v.* Halliday, 110 Fed. 259 [*affirmed* in 126 Fed. 257, 61 C. C. A. 271]; Price *v.* Hunter, 34 Fed. 355.

See 45 Cent. Dig. tit. "Taxation," §§ 183, 184.

Property in hands of administrator.— Where money and credits belonging to a deceased citizen of another state are retained within the state of Iowa by an ancillary administrator, the fact that he was wrongfully appointed does not deprive the latter state of the right to tax the property. *In re* Miller, 116 Iowa 446, 90 N. W. 89. But see Boske *v.* Security Trust, etc., Vault Co., 56 S. W. 524, 22 Ky. L. Rep. 181, holding that property in the hands of an administrator with the will annexed cannot be taxed in Kentucky for years during which the testator was a citizen of another state.

Personal liability.—Where an agent had on hand on Oct. 1, 1865, cotton of his principal, a non-resident of the state, but before the ensuing December it had been removed beyond the limits of the state and his agency had ceased, it was held that he was not personally liable for the tax laid by the act of December, 1865, on cotton on hand on the first of October of that year. State *v.* Hodges, 14 Rich. (S. C.) 256.

not taxable, however, if the custody of the agent is merely temporary and for purposes of transmission.[41]

c. Property Taxed in Another State.[42] It is perfectly competent for the state to lay a tax on tangible personal property found within its borders, notwithstanding the fact that the owner, a non-resident, is also liable to taxation on the same property in the state of his domicile.[43]

d. Credits, Investments, and Securities — (I) *In General.* As to intangible personal property, the general rule is that it can have no *situs* other than that of its owner's domicile; and therefore a state cannot tax credits, investments, and securities belonging to a non-resident, although the evidences of debt may be within the state, or although the money represented may be loaned or invested there.[44] Nor can such credits, investments, or securities be taxed by the state, even though it may be secured by mortgage or other lien on lands within the state,[45]

41. Howell *v.* Gordon, 127 Mich. 517, 86 N. W. 1042; Metropolitan L. Ins. Co. *v.* Newark, 62 N. J. L. 74, 40 Atl. 573; New York L. Ins. Co. *v.* Orleans Bd. of Assessors, 158 Fed. 462.

Temporary custody by agent.— Money belonging to a non-resident cannot be taxed in the hands of an agent within the state, where the agent has mere temporary custody of it after having collected it for his principal. Howell *v.* Gordon, 127 Mich. 517, 86 N. W. 1042.

42. **Not unconstitutional as double taxation** see *supra*, II, C, 3.

43. *Connecticut.* — Shaw *v.* Hartford, 56 Conn. 351, 15 Atl. 742.

Kansas.— Hudson *v.* Miller, 10 Kan. App. 532, 63 Pac. 21.

Massachusetts.— Leonard *v.* New Bedford, 16 Gray 292.

New Hampshire.—Winkley *v.* Newton, 67 N. H. 80, 36 Atl. 610, 35 L. R. A. 756.

Oklahoma.— Spaulding Mfg. Co. *v.* Kendall, 19 Okla. 345, 91 Pac. 1031; Collins *v.* Green, 10 Okla. 244, 62 Pac. 813.

See 45 Cent. Dig. tit. "Taxation," § 185.

In determining the validity of a tax in one state upon property of a non-resident, the only question is whether the property is subject to taxation in this state, and it is not material whether taxes have been paid or are payable on the property at the place of his residence. Theobald *v.* Clapp, 43 Ind. App. 191, 87 N. E. 100.

In Oklahoma an exception is made by statute in the case of property brought into the state between the first day of March and the first day of September in any year which has already been taxed for that year in another state (Wilson *v.* Wiggins, 7 Okla. 517, 54 Pac. 716); but the statute does not apply to property which has been brought into the state and acquired a *situs* there prior to the first of March, although it has already been taxed in another state (Spaulding Mfg. Co. *v.* Kendall, 19 Okla. 345, 91 Pac. 1031); and in cases where the statute applies the owner must claim his exemption and show the assessor that his property has already been taxed or the collection of a tax assessed thereon will not be enjoined (Wilson *v.* Wiggins, *supra*).

As between different counties of same state.— Personal property which has been listed by its owner in the county where he resides cannot be assessed also in the county where the property is situated. Wren *v.* Boske, 72 S. W. 279, 24 Ky. L. Rep. 1780.

44. *California.*— Pacific Coast Sav. Soc. *v.* San Francisco, 133 Cal. 14, 65 Pac. 16.

Georgia.—Williams *v.* Mandell, 44 Ga. 26; Collins *v.* Miller, 43 Ga. 336.

Illinois.— Goldgart *v.* People, 106 Ill. 25.

Indiana.— Theobald *v.* Clapp, 43 Ind. App. 191, 87 N. E. 100.

Kansas.— Mecartney *v.* Caskey, 66 Kan. 412, 71 Pac. 832.

Kentucky.— Com. *v.* Northwestern Mut. L. Ins. Co., 107 S. W. 233, 32 Ky. L. Rep. 796.

Louisiana.— Liverpool, etc., Ins. Co. *v.* Bd. of Assessors, 51 La. Ann. 1028, 25 So. 970, 72 Am. St. Rep. 483, 45 L. R. A. 524; Clason *v.* New Orleans, 46 La. Ann. 1, 14 So. 306; Railey *v.* Bd. of Assessors, 44 La. Ann. 765, 11 So. 93; Liverpool, etc., Ins. Co. *v.* Bd. of Assessors, 44 La. Ann. 760, 11 So. 91, 16 L. R. A. 56; Barber Asphalt Paving Co. *v.* New Orleans, 41 La. Ann. 1015, 6 So. 794; Meyer *v.* Pleasant, 41 La. Ann. 645, 6 So. 258.

Maryland.— Baltimore *v.* Hussey, 67 Md. 112, 9 Atl. 19.

Ohio.—Worthington *v.* Sebastian, 25 Ohio St. 1; Lee *v.* Dawson, 8 Ohio Cir. Ct. 365, 4 Ohio Cir. Dec. 442.

Texas.— Primm *v.* Fort, 23 Tex. Civ. App. 605, 57 S. W. 86, 972.

United States.— San Francisco *v.* Mackey, 22 Fed. 602.

See 45 Cent. Dig. tit. "Taxation," § 190.

The mere physical presence in the state of notes and mortgages belonging to a non-resident does not give them a *situs* therein for the purpose of taxation, for until the *situs* of such property is changed by law it is at the domicile of the owner and is not "within the state" for purposes of taxation. Com. *v.* Northwestern Mut. L. Ins. Co., 107 S. W. 233, 32 Ky. L. Rep. 796.

In order to establish a claim to non-residence so as to be relieved from taxes as a non-resident at the place where a person has previously resided, fact and intent must concur in order to establish a new residence in a different jurisdiction, but it is not necessary to show that the property has been elsewhere assessed. Shirk *v.* Monmouth Tp. Bd. of Review, 137 Iowa 230, 114 N. W. 884.

45. See *infra*, III, A, 4, d, (III).

or by a judgment of its courts.[46] On the same principle, shares of stock in a domestic corporation are not taxable, unless expressly so provided by statute, when owned by a non-resident;[47] nor are its bonds or other obligations when so owned.[48] But of late many states have undertaken to abrogate this rule by their legislation,[49] and it is conceded that this may be done in the case of corporate stocks and bonds, to which the state may assign a *situs* of their own, for the purpose of taxation, at the place where the corporation, rather than the stock-holder, is located.[50] So also, in several states, there are now laws taxing non-residents in respect to property or capital invested or employed in carrying on business within the state [51] and credits growing out of the business so conducted within the state.[52]

46. Kingman County *v.* Leonard, 57 Kan. 531, 46 Pac. 960, 34 L. R. A. 810; Dykes *v.* Lockwood Mortg. Co., 2 Kan. App. 217, 43 Pac. 268.

47. *Massachusetts.*— Oliver *v.* Washington Mills, 11 Allen 268.

Michigan.— Stroh *v.* Detroit, 131 Mich. 109, 90 N. W. 1029.

North Carolina.— North Carolina R. Co. *v.* Alamance County, 91 N. C. 454.

Ohio.— Bradley *v.* Bauder, 36 Ohio St. 28, 38 Am. Rep. 547.

Tennessee.— Union Bank *v.* State, 9 Yerg. 490.

48. *California.*— Mackay *v.* San Francisco, 113 Cal. 392, 45 Pac. 696.

Missouri.— State *v.* Howard County Ct., 69 Mo. 454.

Tennessee.— South Nashville St. R. Co. *v.* Morrow, 87 Tenn. 406, 11 S. W. 348, 2 L. R. A. 853.

Virginia.— Com. *v.* Chesapeake, etc., R. Co., 27 Gratt. 344.

United States.— *In re* State Tax on Foreign Held Bonds, 15 Wall. 300, 21 L. ed. 179.

49. *Indiana.*— Buck *v.* Miller, 147 Ind. 586, 45 N. E. 647, 47 N. E. 8, 62 Am. St. Rep. 436, 37 L. R. A. 384.

Louisiana.— General Electric Co. *v.* Bd. of Assessors, 121 La. 116, 46 So. 122.

Minnesota.— State *v.* London, etc., Mortg. Co., 80 Minn. 277, 83 N. W. 339.

New York.— *In re* Whiting, 150 N. Y. 27, 44 N. E. 715, 55 Am. St. Rep. 640, 34 L. R. A. 232. *Compare* People *v.* Willis, 133 N. Y. 383, 31 N. E. 225.

Oregon.— Ankeny *v.* Multnomah County, 3 Oreg. 386.

State and municipal bonds.— In the case of *In re* State Tax on Foreign Held Bonds, 15 Wall. (U. S.) 300, 323, 21 L. ed. 179, it was remarked: "The actual *situs* of personal property which has a visible and tangible existence, and not the domicile of the owner, will, in many cases, determine the State in which it may be taxed. The same thing is true of public securities consisting of State bonds and bonds of municipal bodies, and circulating notes of banking institutions; the former, by general usage, have acquired the character of, and are treated as, property in the place where they are found, though removed from the domicile of the owner; the latter are treated and pass as money wherever they are." And see State *v.* Maryland Fidelity, etc., Co., 35 Tex. Civ. App. 214, 80 S. W. 544.

The principle that movables follow the person in matters of taxation does not embrace movable property in concrete form, such as bills, notes, or other papers taken in the course of business, used here and collected here. Monongahela River Consol. Coal, etc., Co. *v.* Bd. of Assessors, 115 La. 564, 39 So. 601, 112 Am. St. Rep. 275, 2 L. R. A. N. S. 637.

50. *Illinois.*—Ottawa Glass Co. *v.* McCaleb, 81 Ill. 556; Mendota First Nat. Bank *v.* Smith, 65 Ill. 44.

Iowa.— Faxton *v.* McCosh, 12 Iowa 527.

Maryland.— American Coal Co. *v.* Allegany County, 59 Md. 185; State *v.* Mayhew, 2 Gill 487.

Ohio.— Bradley *v.* Bauder, 36 Ohio St. 28, 38 Am. Rep. 547.

Vermont.— St. Albans *v.* National Car Co., 57 Vt. 68.

United States.— Travelers' Ins. Co. *v.* Connecticut, 185 U. S. 364, 22 S. Ct. 673, 46 L. ed. 949; Tappan *v.* Merchants' Nat. Bank, 19 Wall. 490, 22 L. ed. 189; St. Louis Nat. Bank *v.* Papin, 21 Fed. Cas. No. 12,239, 4 Dill. 29.

51. See the statutes of the several states. And see Bowman *v.* Boyd, 21 Nev. 281, 30 Pac. 823; People *v.* Barker, 147 N. Y. 31, 41 N. E. 435, 29 L. R. A. 393 [*distinguishing* People *v.* Barker, 141 N. Y. 118, 35 N. E. 1073, 23 L. R. A. 95]; People *v.* Tax Com'rs, 23 N. Y. 242; Matter of Glendinning, 68 N. Y. App. Div. 125, 74 N. Y. Suppl. 190 [*affirmed* in 171 N. Y. 684, 64 N. E. 1121]; People *v.* Barker, 16 N. Y. App. Div. 266, 44 N. Y. Suppl. 718 [*affirmed* in 154 N. Y. 762, 49 N. E. 1102]; Matter of McMahon, 66 How. Pr. (N. Y.) 190; McCutchen *v.* Rice County, 7 Fed. 558, 2 McCrary 337.

52. Travelers' Ins. Co. *v.* Bd. of Assessors, 122 La. 129, 47 So. 439, 24 L. R. A. N. S. 388; General Electric Co. *v.* Bd. of Assessors, 121 La. 116, 46 So. 122; Metropolitan L. Ins. Co. *v.* New Orleans, 205 U. S. 395, 27 S. Ct. 499, 51 L. ed. 853.

Debts due on open account to a non-resident are taxable under the Louisiana statutes at the domicile of the debtor where they have arisen out of a business carried on in that state and form a part of the capital of the business. Liverpool, etc., Ins. Co. *v.* Bd. of Assessors, 122 La. 98, 47 So. 415; General Electric Co. *v.* Bd. of Assessors, 121 La. 116,

(II) *Credits and Securities Held by Resident Agent.* It is within the power of a state to tax money, investments, and credits belonging to a non-resident, when the money is placed out, the debt contracted, and the investment controlled by a resident agent of the owner, who retains in his possession the securities or evidences of indebtedness representing the investment; and this power is now exercised by most of the states.[53] This rule does not apply, however, where the agent has no control over the investment, but the securities are placed in his hands merely for convenience or for the purpose of collection and remittance only.[54] So also money deposited in a bank by a resident agent to the credit of a non-resident is taxable if it is under the control of and used by the agent in his principal's business within the state,[55] but not where it is deposited solely for the purpose of transmission through the bank to the non-resident principal in another state.[56]

46 So. 122; National F. Ins. Co. *v.* Bd. of Assessors, 121 La. 108, 46 So. 117, 126 Am. St. Rep. 313.

Loans of a foreign insurance company to its policy-holders who are residents of the state, made as a part of its business in the state, are subject to taxation in such state, although evidenced by notes held abroad. Travelers' Ins. Co. *v.* Bd. of Assessors, 122 La. 129, 47 So. 439, 24 L. R. A. N. S. 388.

53. *California.*— People *v.* Home Ins. Co., 29 Cal. 533.

Illinois.— People *v.* Davis, 112 Ill. 272; Goldgart *v.* People, 106 Ill. 25; Tazewell County *v.* Davenport, 40 Ill. 197.

Indiana.— Buck *v.* Beach, 164 Ind. 37, 71 N. E. 963, 108 Am. St. Rep. 272; Buck *v.* Miller, 147 Ind. 586, 45 N. E. 647, 47 N. E. 8, 62 Am. St. Rep. 436, 37 L. R. A. 384; Foresman *v.* Byrns, 68 Ind. 247; Hathaway *v.* Edwards, 42 Ind. App. 22, 85 N. E. 28.

Iowa.—*In re* Miller, 116 Iowa 446, 90 N. W. 89; Hutchinson *v.* Bd. of Equalization, 66 Iowa 35, 23 N. W. 249.

Kansas.— Wilcox *v.* Ellis, 14 Kan. 588, 19 Am. Rep. 107.

Kentucky.— Com. *v.* Peebles, 134 Ky. 121, 119 S. W. 774, 23 L. R. A. N. S. 1130; Baldwin *v.* Shine, 84 Ky. 502, 2 S. W. 164, 8 Ky. L. Rep. 496. And see Higgins *v.* Com., 126 Ky. 211, 103 S. W. 306, 31 Ky. L. Rep. 653.

Louisiana.—Comptoir National D'Escompte de Paris *v.* Bd. of Assessors, 52 La. Ann. 1319, 27 So. 801; Bluefields Banana Co. *v.* Bd. of Assessors, 49 La. Ann. 43, 21 So. 627. *Compare* Railey *v.* Bd. of Assessors, 44 La. Ann. 765, 11 So. 93; Liverpool, etc., Ins. Co. *v.* Bd. of Assessors, 44 La. Ann. 760, 11 So. 91, 16 L. R. A. 56.

Michigan.—Detroit *v.* Lewis, 109 Mich. 155, 66 N. W. 958, 32 L. R. A. 439.

Minnesota.— State *v.* London, etc., Mortg. Co., 80 Minn. 277, 83 N. W. 339; *In re* Jefferson, 35 Minn. 215, 28 N. W. 256.

Nebraska.— Finch *v.* York County, 19 Nebr. 50, 26 N. W. 589, 56 Am. Rep. 741.

New York.— People *v.* Ogdensburgh, 48 N. Y. 390.

North Carolina.— Redmond *v.* Rutherford, 87 N. C. 122.

Ohio.— Grant *v.* Jones, 39 Ohio St. 506. *Compare* Lee *v.* Dawson, 8 Ohio Cir. Ct. 365, 4 Ohio Cir. Dec. 442.

Oregon.— Poppleton *v.* Yamhill County, 18 Oreg. 377, 23 Pac. 253, 7 L. R. A. 449.

South Dakota.— Billinghurst *v.* Spink County, 5 S. D. 84, 58 N. W. 272.

Texas.— Hall *v.* Miller, 102 Tex. 289, 115 S. W. 1168 [*affirming* (Civ. App. 1908) 110 S. W. 165].

Vermont.— Catlin *v.* Hull, 21 Vt. 152.

United States.— State Bd. of Assessors *v.* Comptoir Nat. D'Escompte, 191 U. S. 388, 24 S. Ct. 109, 48 L. ed. 232; New Orleans *v.* Stemple, 175 U. S. 309, 20 S. Ct. 110, 44 L. ed. 174; Walker *v.* Jack, 88 Fed. 576, 31 C. C. A. 462; Price *v.* Hunter, 34 Fed. 355.

See 45 Cent. Dig. tit. "Taxation," §§ 10, 191.

But personal property belonging to a resident of the state, in the hands of an agent, also a resident but living in another county, which is subject to the order and control of the owner, is taxable to him at his place of residence and not to the agent. Boardman *v.* Tompkins County, 85 N. Y. 359.

Foreign banking company doing local business.— Money, credits, and evidences of indebtedness, employed and invested within the state by a foreign banking corporation doing business therein, are not exempt from taxation under the statute of New York exempting moneys of a non-resident under the control or in the possession of his agent within the state when transmitted to such agent for investment or otherwise, because they are not in the hands of an agent but in the corporation's own hands, and further, because they were not sent to the corporation for collection, but belonged to it and were needed and used in its business. People *v.* Raymond, 188 N. Y. 551, 80 N. E. 1117 [*affirming* 117 N. Y. App. Div. 62, 102 N. Y. Suppl. 85 (*affirming* 52 Misc. 194, 102 N. Y. Suppl. 84)].

Mortgages of non-resident in hands of local agent see *infra*, III, A, 4, d, (III).

54. Borden's Appeal, 208 Ill. 369, 70 N. E. 310; Foresman *v.* Byrns, 68 Ind. 247; Herron *v.* Keeran, 59 Ind. 472, 26 Am. Rep. 87.

55. Bluefield's Banana Co. *v.* Bd. of Assessors, 49 La. Ann. 43, 21 So. 627 [*distinguishing* Clason *v.* New Orleans, 46 La. 1. 14 So. 306]. See also Parker *v.* Strauss, 49 La. Ann. 1173, 22 So. 329.

56. Metropolitan L. Ins. Co. *v.* Newark, 62 N. J. L. 74, 40 Atl. 573; New York L. Ins.

(III) *MORTGAGES.* A mortgage on land so far partakes of the character of realty that it is competent for a legislature to provide that it shall be taxable in the county where the land lies, without regard to the domicile of the mortgagee.[57] But regarded as an investment or security, a mortgage is personal property of an intangible character, and hence follows the person of its owner and is taxable only where he resides.[58] Therefore, in the absence of a statute establishing a different rule, a mortgage on land situated within a particular state is not taxable by that state or by its authority when the owner and holder of the mortgage is a non-resident.[59] An exception is sometimes made in the case of mortgages belonging to non-residents but held and controlled by resident agents; but only when the agent is employed to invest, collect, and reinvest the moneys of his principal, as a business, and under only general directions from the latter,[60] and not where the securities are placed in his hands merely for the purpose of collection and remittance.[61]

e. Lands Owned by Non-Residents. The state has full power to levy taxes on land within its borders, although it belongs to a non-resident.[62] It should be

Co. *v.* Orleans Bd. of Assessors, 158 Fed. 462.

Property temporarily in state or in transit generally see *infra*, III, A, 5, e.

57. Allen *v.* National State Bank, 92 Md. 509, 48 Atl. 78, 84 Am. St. Rep. 517, 52 L. R. A. 760; Detroit *v.* Detroit Bd. of Assessors, 91 Mich. 78, 51 N. W. 787, 16 L. R. A. 59; Crawford *v.* Linn County, 11 Oreg. 482, 5 Pac. 738; Mumford *v.* Sewall, 11 Oreg. 67, 4 Pac. 585, 50 Am. Rep. 462; Savings, etc., Soc. *v.* Multnomah County, 169 U. S. 421, 18 S. Ct. 392, 42 L. ed. 803; Savings, etc., Soc. *v.* Multnomah County, 60 Fed. 31; Dundee Mortg., etc., Co. *v.* Multnomah County School Dist. No. 1, 19 Fed. 359.

58. Gibbins *v.* Adamson, 5 Kan. App. 90, 48 Pac. 871; Adams *v.* Colonial, etc., Mortg. Co., 82 Miss. 263, 34 So. 482, 100 Am. St. Rep. 633, 17 L. R. A. N. S. 138; Gallatin County *v.* Beattie, 3 Mont. 173; Jack *v.* Walker, 79 Fed. 138.

59. *Arizona.*— Territory *v.* Gila County Delinquent Tax List, 3 Ariz. 179, 24 Pac. 182.

Colorado.— Arapahoe County *v.* Cutter, 3 Colo. 349.

Illinois.— Goldgart *v.* People, 106 Ill. 25.

Indiana.— Buck *v.* Miller, 147 Ind. 586, 45 N. E. 647, 47 N. E. 8, 62 Am. St. Rep. 436, 37 L. R. A. 384; Senour *v.* Ruth, 140 Ind. 318, 39 N. E. 946.

Iowa.— Davenport *v.* Mississippi, etc., R. Co., 12 Iowa 539.

Kentucky.— Frankfort *v.* Fidelity Trust, etc., Co., 111 Ky. 667, 64 S. W. 470, 23 Ky. L. Rep. 908.

Maryland.— Latrobe *v.* Baltimore, 19 Md. 13.

Minnesota.— St. Paul *v.* Merritt, 7 Minn. 258.

Mississippi.— Adams *v.* Colonial, etc., Mortg. Co., 82 Miss. 263, 34 So. 482, 100 Am. St. Rep. 683, 17 L. R. A. N. S. 138; State *v.* Smith, 68 Miss. 79, 8 So. 294.

Montana.— Holland *v.* Silver Bow County, 15 Mont. 460, 39 Pac. 575, 27 L. R. A. 797.

Nevada.— State *v.* Earl, 1 Nev. 394.

New Jersey.— Crispin *v.* Vansyckle, 49 N. J. L. 366, 8 Atl. 120; Keeney *v.* Atwood, 16 N. J. Eq. 35; Dolman *v.* Cook, 14 N. J. Eq. 56.

New York.— People *v.* Barker, 135 N. Y. 656, 32 N. E. 252; People *v.* Coleman, 119 N. Y. 137, 23 N. E. 488, 7 L. R. A. 407; People *v.* Tax Com'rs, 17 N. Y. Suppl. 923; People *v.* Tax Com'rs, 21 Abb. N. Cas. 168.

Tennessee.— South Nashville St. R. Co. *v.* Morrow, 87 Tenn. 406, 11 S. W. 348, 2 L. R. A. 853.

United States.— *In re* State Tax on Foreign Held Bonds, 15 Wall. 300, 21 L. ed. 179.

See 45 Cent. Dig. tit. "Taxation," §§ 193–195.

Mortgage assigned to non-resident as collateral.— A debt due to a resident of this state, evidenced by a promissory note secured by mortgage on lands in the state, is taxable at the place of residence of the owner, notwithstanding he has transferred the same by assignment and delivery to a non-resident, but only as collateral security. Gibbins *v.* Adamson, 5 Kan. App. 90, 48 Pac. 871.

60. *Illinois.*— Goldgart *v.* People, 106 Ill. 25.

Nebraska.— Finch *v.* York County, 19 Nebr. 50, 26 N. W. 589, 56 Am. Rep. 741.

New York.— People *v.* Smith, 88 N. Y. 576.

North Carolina.— Redmond *v.* Rutherford, 87 N. C. 122.

United States.— Bristol *v.* Washington County, 177 U. S. 133, 20 S. Ct. 585, 44 L. ed. 701; Walker *v.* Jack, 100 Fed. 1006, 40 C. C. A. 689.

61. Reat *v.* People, 201 Ill. 469, 66 N. E. 242; Howell *v.* Gordon, 127 Mich. 517, 86 N. W. 1042; Myers *v.* Seaberger, 45 Ohio St. 232, 12 N. E. 796; Jack *v.* Walker, 79 Fed. 138.

62. *Connecticut.*— Rowe *v.* Blakeslee, 11 Conn. 479; Allen *v.* Gleason, 4 Day 376.

Maine.— Oldtown *v.* Blake, 74 Me. 280; Hartland *v.* Church, 47 Me. 69.

Massachusetts.— Pease *v.* Whitney, 5 Mass. 380.

New Jersey.— Potter *v.* Ross, 23 N. J. L. 517.

New York.— Johnson *v.* Learn, 30 Barb.

observed, however, that in this case the land only should be assessed and the land only is liable for the payment of the tax, there being no personal liability on the non-resident owner.[63] But in some states lands are to be assessed to the occupant when in the possession of a person other than the non-resident owner.[64]

5. Situs of Property — a. General Principles.[65] The *situs* of property for the purpose of taxation may depend either upon its physical presence within the taxing district, where it is of a corporeal nature, or upon the domicile of its owner within the jurisdiction of the taxing power, where it is of that intangible character which, by a fiction of law, follows the person of its owner.[66] Of course real estate is taxable only where it lies, and no state can impose taxes on land in another state; [67] and the same is true of movable property which has a value of its own, instead of being merely the evidence or representative of value, and which has a visible and substantial existence. If located in the state it is taxable there by whomsoever owned; [68] but if permanently situated in another state it is not taxable, although it belongs to a resident citizen.[69] If, however, the property is only temporarily out of the state, it is still subject to taxation.[70]

b. Intangible Personal Property — (i) *In General.*[71] The rule of law that *mobilia sequuntur personam* is applied to all species of personal property which

616; Calkins *v.* Chamberlain, 15 N. Y. St. 576.

Pennsylvania.— Ahl *v.* Gleim, 52 Pa. St. 432.

See 45 Cent. Dig. tit. "Taxation," § 189.

Coal oil or gas privileges, by lease or otherwise, are expressly required by the Kentucky statute to be listed for taxation in the county where the property is situated, although the owner is a non-resident. Mt. Sterling Oil, etc., Co. *v.* Ratliff, 127 Ky. 1, 104 S. W. 993, 31 Ky. L. Rep. 1229.

63. Bowles *v.* Clough, 55 N. H. 389; New York, etc., R. Co. *v.* Lyon, 16 Barb. (N. Y.) 651.

64. Brewster *v.* Hough, 10 N. H. 138; Ziuk *v.* McManus, 121 N. Y. 259, 24 N. E. 467; Butler *v.* Oswego, 56 Hun (N. Y.) 358, 10 N. Y. Suppl. 768.

65. **Place of taxation as between different taxing districts in the same state** see *infra*, V, C, 2, f.

Territorial limits of taxing power see *supra*, I, C.

66. Com. *v.* Haggin, 99 S. W. 906, 30 Ky. L. Rep. 788; Yost *v.* Lake Erie Transp. Co., 112 Fed. 746, 50 C. C. A. 511.

67. Winnipiseogee Lake Cotton, etc., Co. *v.* Gilford, 64 N. H. 337, 10 Atl. 849.

68. *Idaho.*— Parks *v.* Nez Perce County, 13 Ida. 298, 89 Pac. 949, 121 Am. St. Rep. 261.

Indiana.— Buck *v.* Beach, 164 Ind. 37, 71 N. E. 963, 108 Am. St. Rep. 272.

Kansas.— Hudson *v.* Miller, 10 Kan. App. 532, 63 Pac. 21.

Ohio.— Toledo Bridge Co. *v.* Yost, 22 Ohio Cir. Ct. 376, 12 Ohio Cir. Dec. 448.

United States.—McCutcheon *v.* Rice, 7 Fed. 558, 2 McCrary 337.

Taxation of property of non-residents in general see *supra*, III, A, 4, a.

Where goods are sent from one state to another for sale, or in consequence of a sale, they become part of its general property and subject to taxation, provided no discrimination is made against them as goods from another state and they are taxed only in the usual way as other goods are. Com. *v.* Banker Bros. Co., 38 Pa. Super. Ct. 101.

69. *Alabama.*— Varner *v.* Calhoun, 48 Ala. 178.

Mississippi.— Colbert *v.* Leake County, 60 Miss. 142.

Missouri.— State *v.* Howard County Ct., 69 Mo. 454, holding that a person is not subject to taxation in the state where he resides on property which he has sent into another state for the purpose of safekeeping and not merely to avoid taxation.

New Hampshire.— Berry *v.* Windham, 59 N. H. 288, 47 Am. Rep. 202.

New Jersey.— State *v.* Rahway Tp., 24 N. J. L. 56.

New York.— People *v.* O'Donnel, 188 N. Y. 551, 80 N. E. 1116; People *v.* New York Tax Com'rs, 23 N. Y. 224 [*reversing* 33 Barb. 116].

See 45 Cent. Dig. tit. "Taxation," §§ 51, 196.

Refrigerator cars.— Where defendant refrigerator car company, a Kentucky corporation, leased the greater number of its cars for use in another state, but operated a small number of them in this state, only those cars operated in this state are taxable here. Morrell Refrigerator Car Co. *v.* Com., 128 Ky. 447, 108 S. W. 926, 32 Ky. L. Rep. 1383, 1389.

Warehouse receipts.— A state cannot tax warehouse receipts in the hands of a resident owner as the equivalent of the goods which they represent, valuing them at the value of the goods, where it cannot tax the goods themselves because of their *situs* in another state. Selliger *v.* Com., (Ky. 1907) 213 U. S. 200, 29 S. Ct. 449, 53 L. ed. 761 [*reversing* 98 S. W. 1040].

70. Com. *v.* Hays, 8 B. Mon. (Ky.) 1.

71. **Place of taxation** as between different taxing districts in the same state see *infra*, V, C, 2, f.

Taxation of credits, investments, and securities in general see *supra*, III, A, 2, c, (v).

has no tangible existence of its own, and which is not intrinsically valuable, but has worth only as the evidence or representative of value, such as accounts and bills receivable, deposits in bank, money loaned on mortgage or other security, shares of corporate stock, and bonds; and all such property ordinarily has its *situs* for purposes of taxation only at the domicile of its owner.[72] Consequently if owned by a resident citizen, such property is taxable, although the loans or investments are made or are payable in another state,[73] or the debt is secured by a mortgage on property situated in another state.[74] But the maxim *mobilia sequuntur personam* is merely a legal fiction, and for purposes of taxation does not always or absolutely apply even in the case of intangible property,[75] and should not be applied where to do so would be productive of unjust consequences.[76] It should be observed that it is within the power of the state, unless constitutional restrictions interfere, to divorce property of this kind from the person of its owner and give it a *situs* of its own for purposes of taxation, and this is not infrequently done, particularly in regard to mortgage loans and the securities and obligations of municipal bodies.[77]

72. *Alabama.*— Boyd *v.* Selma, 96 Ala. 144, 11 So. 393, 16 L. R. A. 729.

California.— People *v.* Whartenby, 38 Cal. 461. See also Woodland Bank *v.* Pierce, 144 Cal. 434, 77 Pac. 1012.

Florida.— Hunt *v.* Turner, 54 Fla. 654, 45 So. 509.

Indiana.— Stephens *v.* Smith, 30 Ind. App. 120, 65 N. E. 546.

Iowa.—Barber *v.* Farr, 54 Iowa 57, 6 N. E. 134; Davenport *v.* Mississippi, etc., R. Co., 12 Iowa 539.

Kentucky.— Callahan *v.* Singer Mfg. Co., 92 S. W. 581, 29 Ky. L. Rep. 123.

Maryland.— Latrobe *v.* Baltimore, 19 Md. 13.

Michigan.— Detroit *v.* Detroit Bd. of Assessors, 91 Mich. 78, 51 N. W. 787, 16 L. R. A. 59.

Missouri.— State *v.* Renshaw, 166 Mo. 682, 66 S. W. 953.

Montana.— Gallatin County *v.* Beattie, 3 Mont. 173.

New Jersey.— Van Winkle *v.* Manchester Tp., 25 N. J. L. 531; Bentley *v.* Sippel, 25 N. J. L. 530.

Ohio.— Grant *v.* Jones, 39 Ohio St. 506.

Pennsylvania.— Com. *v.* Pennsylvania Coal Co., 197 Pa. St. 551, 47 Atl. 740.

Tennessee.— Grundy County *v.* Tennessee Coal, etc., Co., 94 Tenn. 295, 29 S. W. 116.

Vermont.— Bullock *v.* Guilford, 59 Vt. 516, 9 Atl. 360.

Wisconsin.— State *v.* Gaylord, 73 Wis. 316, 41 N. W. 521.

See 45 Cent. Dig. tit. "Taxation," § 197.

Money on deposit in another state.—A person who is a resident of Florida having money in another state not permanently invested or under the control of an agent in the latter state, but merely deposited in a bank and subject to withdrawal, is under the Florida statute subject to taxation thereon in that state. Hunt *v.* Turner, 54 Fla. 654, 45 So. 509.

73. *California.*— Mackay *v.* San Francisco, 113 Cal. 392, 45 Pac. 696.

Illinois.— Scripps *v.* Fulton County Bd. of Review, 183 Ill. 278, 55 N. E. 700.

Indiana.— Buck *v.* Beach, 164 Ind. 37, 71 N. E. 963, 108 Am. St. Rep. 272.

Kentucky.— Barret *v.* Henderson, 4 Bush 255.

Maryland.— Donovan *v.* Firemen's Ins. Co., 30 Md. 155.

Massachusetts.— Bemis *v.* Boston Bd. of Aldermen, 14 Allen 366.

Pennsylvania.— Guthrie *v.* Pittsburgh, etc., R. Co., 158 Pa. St. 433, 27 Atl. 1052.

Virginia.— Com. *v.* Williams, 102 Va. 778, 47 S. E. 867.

74. Mackay *v.* San Francisco, 113 Cal. 392, 45 Pac. 696; Bullock *v.* Guilford, 59 Vt. 516, 9 Atl. 360.

75. Fisher *v.* Rush County, 19 Kan. 414; Wilcox *v.* Ellis, 14 Kan. 588, 19 Am. Rep. 107; People *v.* Gardner, 51 Barb. (N. Y.) 352; Adams Exp. Co. *v.* Ohio State Auditor, 166 U. S. 185, 17 S. Ct. 604, 41 L. ed. 965.

Credits and securities held by non-resident agent see *infra*, III, A, 5, b, (II).

The situs of intangible property of a corporation whose tangible property is scattered through many states is not at its home office or in the state which gave it its corporate franchise but is distributed wherever its tangible property is located and its work is done. Adams Exp. Co. *v.* Ohio State Auditor, 166 U. S. 185, 17 S. Ct. 604, 41 L. ed. 965.

76. Fisher *v.* Rush County, 19 Kan. 414; Wilcox *v.* Ellis, 14 Kan. 588, 19 Am. Rep. 107.

No fine-spun theories about situs should interfere to enable a corporation whose business is carried on through many states to escape from bearing in each state such burden of taxation as a fair distribution of the actual value of its property among those states requires. Adams Exp. Co. *v.* Ohio State Auditor, 166 U. S. 185, 17 S. Ct. 604, 41 L. ed. 965.

77. Metropolitan L. Ins. Co. *v.* Orleans Parish Bd. of Assessors, 115 La. 698, 39 So. 846, 116 Am. St. Rep. 179. And see *supra*, III, A, 4, d, (I).

Mortgages.— See State *v.* Runyon, 41 N. J. L. 98; and, generally, *supra*, III, A, 4, d, (III).

Securities of municipal corporations.— See

(II) *Credits and Securities Held by Non-Resident Agent or Trustee.* Property in the nature of loans, investments, and securities, held and controlled by a non-resident, is not taxable, although he holds it as agent or trustee for a resident citizen, to whom the income or profits are payable,[78] unless a statute expressly makes such property taxable to the principal or beneficiary, which is the case in some states.[79]

c. Property of Decedents' Estates.[80] While ordinarily the domicile of a decedent determines the *situs* for purposes of taxation of his personal property which is of an intangible character or not permanently located elsewhere, and also the place of administering his estate,[81] the general rule is that after administration has been granted the title to such property vests in the personal representative, and that its *situs* for taxation is at the domicile of the executor or administrator,[82] notwithstanding the decedent at the time of his death was a resident of another state,[83] or the distributees are residents of another state,[84] or the will was executed in another state.[85] The domicile of a personal representative, however, for purposes of such taxation, is his official domicile, which is the place of his appointment,[86] and although the legal title to the estate is vested in

State *v.* New Orleans Bd. of Assessors, 47 La. Ann. 1544, 18 So. 519; State *v.* Fidelity, etc., Co., 35 Tex. Civ. App. 214, 80 S. W. 544; State Tax, etc., Bonds Case, 15 Wall. (U. S.) 300, 21 L. ed. 179.

78. *Kansas.*— Fisher *v.* Rush County, 19 Kan. 414, holding that a resident of Kansas who conveyed land situated in Iowa, taking in payment certain notes secured by a mortgage on the land and which are made payable in Iowa and left there for collection, is not subject to taxation on such notes in the state of Kansas. See also Wilcox *v.* Ellis, 14 Kan. 588, 19 Am. Rep. 107.

Massachusetts.— Dorr *v.* Boston, 6 Gray 131.

New York.— People *v.* Smith, 88 N. Y. 576; People *v.* Gardner, 51 Barb. 352.

Oregon.— Poppleton *v.* Yamhill County, 18 Oreg. 377, 23 Pac. 253, 7 L. R. A. 449.

Rhode Island.— Anthony *v.* Caswell, 15 R. I. 159, 1 Atl. 290.

See 45 Cent. Dig. tit. "Taxation," § 198.

But see Bullock *v.* Guilford, 59 Vt. 516, 9 Atl. 360.

This is the converse of the rule previously stated, in regard to the taxability of credits and securities belonging to a non-resident but held and controlled by a local or resident agent. See *supra*, III, A, 4, d, (II).

79. Hunt *v.* Perry, 165 Mass. 287, 43 N. E. 103; Lee *v.* Dawson, 8 Ohio Cir. Ct. 365, 4 Ohio Cir. Dec. 442; Conner *v.* Wilson, 6 Ohio Dec. (Reprint) 941, 9 Am. L. Rec. 1; Selden *v.* Brooke, 104 Va. 832, 52 S. E. 632.

Application of the New York statute in the case of property held by trustees some of whom are residents and others non-residents see People *v.* Feitner, 168 N. Y. 360, 61 N. E. 280 [*reversing* 63 N. Y. App. Div. 174, 71 N. Y. Suppl. 261]; People *v.* Barker, 135 N. Y. 656, 32 N. E. 252; People *v.* Coleman, 119 N. Y. 137, 23 N. E. 488, 7 L. R. A. 407 [*reversing* 53 Hun 482, 6 N. Y. Suppl. 285].

80. **Place of taxation** as between different taxing districts in the same state see *infra*, V, D, 3.

81. Bonaparte *v.* State, 63 Md. 465. See also People *v.* New York Tax, etc., Com'rs, 38 Hun (N. Y.) 536.

82. *Kentucky.*— Baldwin *v.* Shine, 84 Ky. 502, 2 S. W. 164, 8 Ky. L. Rep. 496.

Missouri.— State *v.* St. Louis County Ct., 47 Mo. 594.

New Jersey.— State *v.* Jones, 39 N. J. L. 650; State *v.* Holmdel Tp., 39 N. J. L. 79.

New York.— People *v.* Gaus, 169 N. Y. 19, 61 N. E. 987.

Ohio.— Tafel *v.* Lewis, 75 Ohio St. 182, 78 N. E. 1003; Brown *v.* Noble, 42 Ohio St. 405. See also Hawk *v.* Bonn, 6 Ohio Cir. Ct. 452, 3 Ohio Cir. Dec. 535.

Oregon.— Johnson *v.* Oregon City, 2 Oreg. 327.

Pennsylvania.— See Lewis *v.* Chester County, 60 Pa. St. 325.

Virginia.— Com. *v.* Williams, 102 Va. 778, 47 S. E. 867.

United States.— Dallinger *v.* Rapallo, 15 Fed. 434, 14 Fed. 32.

See 45 Cent. Dig. tit. "Taxation," § 199.

83. Baldwin *v.* Shine, 84 Ky. 502, 2 S. W. 164, 8 Ky. L. Rep. 496; Tafel *v.* Lewis, 75 Ohio St. 182, 78 N. E. 1003. See also cases cited *supra*, note 82.

Ancillary administration.— Bonds of a Missouri corporation in the hands of an ancillary administrator appointed in that state are taxable in Missouri as having an actual *situs* there, although the owner died domiciled in another state and the bonds were transferred to Missouri merely for the purpose of ancillary administration. State *v.* St. Louis County Ct., 47 Mo. 594.

84. Baldwin *v.* Shine, 84 Ky. 502, 2 S. W. 164, 8 Ky. L. Rep. 496; Tafel *v.* Lewis, 75 Ohio St. 182, 78 N. E. 1003.

85. Tafel *v.* Lewis, 75 Ohio St. 182, 78 N. E. 1003, where the will was both executed and probated in a foreign country but the executor derived his authority by appointment of the probate court in the state of his residence.

86. Gallup *v.* Schmidt, 154 Ind. 196, 56 N. E. 443; Com. *v.* Peebles, 134 Ky. 121, 119

him it does not follow him wherever he may have a residence in his individual capacity, as it would the original owner;[87] so that if a representative appointed in one state resides in another state where no administration was taken out, such residence does not give intangible property or tangible property not removed by him to the latter state a *situs* for taxation in such state,[88] although personal property actually removed to and held by him in the latter state or funds taken and invested there may be taxed there.[89]

d. Shipping.[90] Ordinarily the legal *situs* of sea-going vessels for the purpose of taxation is the port where they are registered under the laws of the United States as their home port, and this is not lost by mere absence and employment elsewhere, nor affected by the residence of their owners.[91] But this rule as to the *situs* of vessels is not absolute or conclusive;[92] and while a vessel registered and having its home port in one state is not subject to taxation in another state where it may happen to be merely temporarily and transiently as an incident to the commerce in which it is engaged,[93] a vessel which is employed exclusively or for an indefinite length of time in one state may be taxed in that state, although it is registered in another state,[94] and the owner is a non-resident.[95] It has also been held that the *situs* of vessels plying between ports of different states and engaged in the coastwise trade depends either upon the actual domicile of the owner or the permanent *situs* of the property entirely regardless of the place of enrolment,[96] and that, although a vessel may be registered or enrolled in a different

S. W. 774, 23 L. R. A. N. S. 1130; Hawk *v.* Bonn, 6 Ohio Cir. Ct. 452, 3 Ohio Cir. Dec. 535. See also Bonaparte *v.* State, 63 Md. 465.

87. Com. *v.* Peebles, 134 Ky. 121, 119 S. W. 774, 23 L. R. A. N. S. 1130.

88. Com. *v.* Peebles, 134 Ky. 121, 119 S. W. 774, 23 L. R. A. 1130; Hawk *v.* Bonn, 6 Ohio Cir. Ct. 452, 3 Ohio Cir. Dec. 535; Lewis *v.* Chester County, 60 Pa. St. 325.

89. Lewis *v.* Chester County, 60 Pa. St. 325. See also Hawk *v.* Bonn, 6 Ohio Cir. Ct. 452, 3 Ohio Cir. Dec. 535.

90. Liability to taxation generally see *supra*, III, A, 2, c, (II).

Place of taxation as between different taxing districts in the same state see *infra*, V, C, 2, g.

91. *California.*— San Francisco *v.* Talbot, 63 Cal. 485. See also California Shipping Co. *v.* San Francisco, 150 Cal. 145, 88 Pac. 704; Olson *v.* San Francisco, 148 Cal. 80, 82 Pac. 850, 113 Am. St. Rep. 191, 2 L. R. A. N. S. 197.

Florida.— Johnson *v.* De Bary-Baya Merchants' Line, 37 Fla. 499, 19 So. 640, 37 L. R. A. 518.

Illinois.— Irvin *v.* New Orleans, etc., R. Co., 94 Ill. 105, 34 Am. Rep. 208; Wilkey *v.* Pekin, 19 Ill. 160.

Indiana.— New Albany *v.* Meekin, 3 Ind. 481, 56 Am. Dec. 522.

Michigan.— Roberts *v.* Charlevoix Tp., 60 Mich. 197, 26 N. W. 878.

New Jersey.— New York, etc., R. Co. *v.* Haight, 30 N. J. L. 428.

New York.— People *v.* New York Tax, etc., Com'rs, 58 N. Y. 242; People *v.* New York Tax Com'rs, 23 N. Y. 224.

United States.— Hays *v.* Pacific Mail Steamship Co., 17 How. 596, 15 L. ed. 254; Yost *v.* Lake Erie Transp. Co., 112 Fed. 746, 50 C. C. A. 511. *Compare* St. Louis *v.* Wiggins Ferry Co., 11 Wall. 423, 20 L. ed. 192.

Canada.— Halifax *v.* Kenny, 3 Can. Sup. Ct. 497.

See 45 Cent. Dig. tit. "Taxation," §§ 13, 200.

92. National Dredging Co. *v.* State, 99 Ala. 462, 12 So. 720; Johnson *v.* De Bary-Baya Merchants' Line, 37 Fla. 499, 19 So. 640, 37 L. R. A. 518; Old Dominion Steamship Co. *v.* Com., 102 Va. 576, 46 S. E. 783, 102 Am. St. Rep. 855 [*affirmed* in 198 U. S. 299, 25 S. Ct. 686, 49 L. ed. 1059]; Norfolk, etc., R. Co. *v.* State Bd. of Public Works, 97 Va. 23, 32 S. E. 779; North Western Lumber Co. *v.* Chehalis County, 25 Wash. 95, 64 Pac. 909.

93. San Francisco *v.* Talbot, 63 Cal. 485; Johnson *v.* De Bary-Baya Merchants' Line, 37 Fla. 499, 19 So. 640, 37 L. R. A. 518; State *v.* Haight, 30 N. J. L. 428; Hays *v.* Pacific Mail Steamship Co., 17 How. (U. S.) 596, 15 L. ed. 254. See also cases cited *supra*, note 91.

94. National Dredging Co. *v.* State, 99 Ala. 462, 12 So. 720; Old Dominion Steamship Co. *v.* Com., 102 Va. 576, 46 S. E. 783, 102 Am. St. Rep. 855 [*affirmed* in 198 U. S. 299, 25 S. Ct. 686, 49 L. ed. 1059]; North Western Lumber Co. *v.* Chehalis County, 25 Wash. 95, 64 Pac. 909.

95. National Dredging Co. *v.* State, 99 Ala. 462, 12 So. 720; Old Dominion Steamship Co. *v.* Com., 102 Va. 576, 46 S. E. 783, 102 Am. St. Rep. 855 [*affirmed* in 198 U. S. 299, 25 S. Ct. 686, 49 L. ed. 1059].

96. Ayer, etc., Tie Co. *v.* Kentucky, 202 U. S. 409, 26 S. Ct. 679, 50 L. ed. 1082 [*reversing* 117 Ky. 161, 77 S. W. 686, 79 S. W. 290, 25 Ky. L. Rep. 1068, 2061, 85 S. W. 1096, 27 Ky. L. Rep. 585]. See also American Mail Steamship Co. *v.* Crowell, 76 N. J. L. 54, 68 Atl. 752.

state, its *situs* for purposes of taxation is at the domicile of the owner,[97] unless it has acquired an actual *situs* by being used exclusively in another state;[98] and also that a state has no power to tax a vessel, although both owned and registered within the state, if it has never been within the waters of the state.[99]

e. Property Temporarily in State or in Transit. Personal property which is within the borders of a state for a merely temporary purpose, not employed in a business conducted there and not intended to remain permanently within the state, or which is merely in transit through the state to a destination beyond its limits, is not taxable in the state.[1] A temporary detention of property in transit, as where it is awaiting facilities for transportation or the removal of obstructions to transportation, does not give it a *situs* for taxation at the place of detention;[2] but otherwise where it is stored or held for an indefinite time, to await the owner's pleasure or a rise in the markets, or is awaiting or undergoing a further process of manufacture.[3] Also it is competent for a state to lay taxes on cattle owned

97. Com. *v.* Southern Pac. Co., 134 Ky. 417, 120 S. W. 311; Norfolk, etc., R. Co. *v.* State Bd. of Public Works, 97 Va. 23, 32 S. E. 779; Ayer, etc., Tie Co. *v.* Kentucky, 202 U. S. 409, 26 S. Ct. 679, 50 L. ed. 1082 [*reversing* 117 Ky. 161, 77 S. W. 686, 79 S. W. 290, 25 Ky. L. Rep. 1068, 2061, 85 S. W. 1096, 27 Ky. L. Rep. 585]; St. Louis *v.* Wiggins Ferry Co., 11 Wall. (U. S.) 423, 20 L. ed. 192.

98. Old Dominion Steamship Co. *v.* Virginia, 198 U. S. 299, 25 S. Ct. 686, 49 L. ed. 1059. See also Ayer, etc., Tie Co. *v.* Kentucky, 202 U. S. 409, 26 S. Ct. 679, 50 L. ed. 1082.

99. American Mail Steamship Co. *v.* Crowell, 76 N. J. L. 54, 68 Atl. 752.

1. *Illinois.*— Irvin *v.* New Orleans, etc., R. Co., 94 Ill. 105, 34 Am. Rep. 208.

Indiana.— Standard Oil Co. *v.* Bachelor, 89 Ind. 1; Herron *v.* Keeran, 59 Ind. 472, 26 Am. Rep. 87; Simoyan *v.* Rohan, 36 Ind. App. 495, 76 N. E. 176.

Kansas.— Hull *v.* Johnston, 64 Kan. 170, 67 Pac. 548.

New Hampshire.— Coe *v.* Errol, 62 N. H. 303; Connecticut River Lumber Co. *v.* Columbia, 62 N. H. 286.

New Jersey.— Metropolitan L. Ins. Co. *v.* Newark, 62 N. J. L. 74, 40 Atl. 573; Detmold *v.* Engle, 34 N. J. L. 425. See also Berwind, etc., Coal Co. *v.* Jersey City, 75 N. J. L. 76, 67 Atl. 181.

New York.— People *v.* Feitner, 32 Misc. 84, 66 N. Y. Suppl. 179.

North Dakota.— Gaar *v.* Sorum, 11 N. D. 164, 90 N. W. 799.

Washington.— See Johnston *v.* Whatcom County, 27 Wash. 95, 67 Pac. 569.

United States.—Ogilvie *v.* Crawford County, 7 Fed. 745, 2 McCrary 148. But see Diamond Match Co. *v.* Ontonagon, 188 U. S. 82, 23 S. Ct. 266, 47 L. ed. 394, holding that forest products in transit to a point outside the state may be given by the legislature a *situs* for the purpose of taxation at the place nearest to the last boom or sorting gap of the stream in or bordering on the state in which such products naturally will be last floated during such transit.

See 45 Cent. Dig. tit. "Taxation," §§ 12, 187, 201.

Money deposited in a bank in one state solely for the purpose of transmission through such bank to another state is not subject to taxation in the state where the bank is located. Metropolitan L. Ins. Co. *v.* Newark, 62 N. J. L. 74, 40 Atl. 573; New York L. Ins. Co. *v.* Orleans Parish Bd. of Assessors, 158 Fed. 462.

A peddler who carries his property with him wherever he goes and who makes occasional or periodical visits for business purposes to a state of which he is not a resident is not there taxable on his property. Grant *v.* Jones, 39 Ohio St. 506.

A traveling circus and menagerie, owned by a non-resident and brought into the state to be exhibited at various points, the owner intending to take it into another state after such exhibitions, is not taxable in this state. Robinson *v.* Longley, 18 Nev. 71, 1 Pac. 377.

Sleeping cars and parlor cars.— As to the right of a state to tax the rolling-stock of the Pullman company and other parlor car companies used regularly in the transportation of passengers through the state see Baltimore City Appeal Tax Ct. *v.* Pullman Palace Car Co., 50 Md. 452; Pullman Southern Car Co. *v.* Gaines, 3 Tenn. Ch. 587; Pullman's Palace-Car Co. *v.* Pennsylvania, 141 U. S. 18, 11 S. Ct. 876, 35 L. ed. 613; Pickard *v.* Pullman Southern Car Co., 117 U. S. 34, 6 S. Ct. 635, 29 L. ed. 785 [*affirming* 22 Fed. 276]; Pullman's Palace Car Co. *v.* Twombly, 29 Fed. 658; Indiana *v.* Pullman Palace Car Co., 16 Fed. 193, 11 Biss. 561.

2. Burlington Lumber Co. *v.* Willetts, 118 Ill. 559, 9 N. E. 254; Brown County *v.* Standard Oil Co., 103 Ind. 302, 2 N. E. 758; Ogilvie *v.* Crawford County, 7 Fed. 745, 2 McCrary 148.

3. *Illinois.*— Burlington Lumber Co. *v.* Willetts, 118 Ill. 559, 9 N. E. 254.

Indiana.— Brown County *v.* Standard Oil Co., 103 Ind. 302, 2 N. E. 758.

Louisiana.— Rees-Scott Co. *v.* New Orleans, 124 La. 155, 49 So. 1012, holding that staves held for export and retained indefinitely are subject to taxation.

New Jersey.— Susquehanna Coal Co. *v.* South Amboy, 76 N. J. L. 412, 69 Atl. 454 (holding that coal brought into the state and stored in large quantities for an in-

by non-residents and driven into the state for grazing purposes at certain seasons of the year.[4]

6. Excise, Income, and Poll Taxes — a. Property Subject to Excise Tax.[5] As a general rule, excise taxes are laid only upon particular goods, wares, or commodities selected by the legislature to bear the burden of such a tax,[6] or upon actual sales of special kinds of merchandise,[7] although they are also sometimes made to include the right or privilege of conducting a particular business,[8] and taxes upon corporate franchises,[9] inheritance taxes,[10] and stock transfer taxes.[11]

b. Incomes Subject to Tax.[12] No taxes whatever can legally be levied upon incomes in the absence of express legislative authority therefor,[13] and only those persons are subject to the payment of an income tax who are specially described in the statute authorizing it or clearly within the meaning of the general terms which it employs,[14] and who are at the time residents of the jurisdiction seeking

definite period subject to orders for future sale and delivery in specific quantities is subject to local taxation while awaiting orders for shipment); Lehigh, etc., Coal Co. *v.* Junction, 75 N. J. L. 922, 68 Atl. 806, 15 L. R. A. N. S. 514 [*affirming* 75 N. J. L. 68, 66 Atl. 923].

United States.— Nelson Lumber Co. *v.* Loraine, 22 Fed. 54.

See 45 Cent. Dig. tit. "Taxation," §§ 12, 201.

When transit begins.— Commodities intended for shipment out of the state continue to be taxable in the state until they are actually delivered to a common carrier for transportation to the state of their destination, or actually launched on their way to such other state, and their transit has not begun while any substantial part of the work of delivery to the common carrier remains to be done. Ayer, etc., Tie Co. *v.* Keown, 122 Ky. 580, 93 S. W. 588, 29 Ky. L. Rep. 110, 400; State *v.* Taber Lumber Co., 101 Minn. 186, 112 N. W. 214, 13 L. R. A. N. S. 800.

A contractor's outfit, consisting of mules, scrapers, etc., brought from outside the state, to be used in the construction of a railroad bed, on which work it is likely to be occupied for several months, is taxable in the state. Griggsry Constr. Co. *v.* Freeman, 108 La. 435, 32 So. 399, 58 L. R. A. 349. And see Eoff *v.* Kennefick-Hammond Co., 80 Ark. 138, 96 S. W. 986, 117 Am. St. Rep. 79, 7 L. R. A. N. S. 704.

4. *Iowa.*— Fennell *v.* Pauley, 112 Iowa 94, 83 N. W. 799.

Kansas.— Hull *v.* Johnson, 10 Kan. App. 565, 63 Pac. 455.

Oklahoma.— Russell *v.* Green, 10 Okl. 340, 62 Pac. 817.

Texas.— Waggoner *v.* Whaley, 21 Tex. Civ. App. 1, 50 S. W. 153.

Wyoming.— Carton *v.* Uinta County, 10 Wyo. 416, 69 Pac. 1013; Kelley *v.* Rhoads, 7 Wyo. 237, 51 Pac. 593, 75 Am. St. Rep. 904, 39 L. R. A. 594, 9 Wyo. 352, 63 Pac. 935, 87 Am. St. Rep. 959.

5. Constitutional validity of excise taxes see *supra*, II, F, 1.

Excise defined see Internal Revenue, 22 Cyc. 1598.

6. See Gleason *v.* McKay, 134 Mass. 419.

The term "commodities" includes corporate franchises (Com. *v.* Lancaster Sav. Bank, 123 Mass. 493; Portland Bank *v.* Apthorp, 12 Mass. 252), and also applies to the transfer of shares of corporate stock (Opinion of Justices, 196 Mass. 603, 85 N. E. 545).

7. Shewalter *v.* Brown, 35 Miss. 423; Newman *v.* Elam, 26 Miss. 474; Edmonds *v.* Carpenter, 1 Hen. & M. (Va.) 340. See also Com. *v.* Banker Bros. Co., 38 Pa. Super. Ct. 101.

8. Com. *v.* Lancaster Sav. Bank, 123 Mass. 493; Maine *v.* Grand Trunk R. Co., 142 U. S. 217, 12 S. Ct. 121, 35 L. ed. 994. *Compare* O'Keefe *v.* Somerville, 190 Mass. 110, 76 N. E. 457, 112 Am. St. Rep. 316, construing a statute which provided that every person selling or giving trading stamps, in connection with a sale of merchandise, entitling the holders to receive articles other than those so sold, should pay an excise tax for carrying on such business, and holding that the right to conduct the business in the manner so described was not a "commodity," within the meaning of the constitutional provision authorizing excise taxes on commodities.

9. Com. *v.* Lancaster Sav. Bank, 123 Mass. 493; Portland Bank *v.* Apthorp, 12 Mass. 252.

10. Beals *v.* State, 139 Wis. 544, 121 N. W. 347.

11. Opinion of Justices, 196 Mass. 603, 85 N. E. 545; People *v.* Reardon, 184 N. Y. 431, 77 N. E. 970, 112 Am. St. Rep. 628, 8 L. R. A. N. S. 314.

Transfers subject to tax.—A transfer of stock in certain corporations pursuant to a sale on foreclosure of a mortgage on the stock is taxable under the New York statutes imposing a tax of two per cent on transfers of stock in corporations. Glynn *v.* Conklin, 127 N. Y. App. Div. 473, 111 N. Y. Suppl. 111.

12. **Constitutional validity of income taxes** *supra*, II, F, 2.

13. Forman *v.* Board of Assessors, 35 La. Ann. 825, holding that such taxation must be expressly provided for by the legislature, as it is of a peculiar character requiring special provisions for defning and ascertaining the income to be taxed and cannot be considered as falling within the scope of general provisions relating to the assessment and taxing of property.

14. Com. *v.* Cuyler, 5 Watts & S. (Pa.)

to collect the tax.[15] It is also necessary that the receipts in respect to which the person is sought to be taxed should be plainly within the terms, such as "income" or "profits," employed in the statute;[16] and under some laws of this kind it is held that "income" means net income, not gross receipts.[17] The income of the preceding year may be and commonly is taken as the basis of the assessment.[18]

c. Persons Subject to Poll Tax.[19] Statutes requiring male inhabitants of a state to pay poll taxes are not restricted to such inhabitants as are citizens,[20] but apply to resident aliens.[21] They do not, however, apply to persons residing only temporarily in the state for a part of the year and domiciled in another state,[22] or to persons residing on lands purchased by or ceded to the United States for navy yards, forts, or arsenals, and over which the government of the United States has sole and exclusive jurisdiction.[23] The question as to what particular inhabitants or classes of inhabitants are or are not by reason of age or other circumstances or conditions required to pay poll taxes depends upon the provisions of the statutes.[24]

275; Lining *v.* Charleston, 1 McCord (S. C.) 345; Plumer *v.* Com., 3 Gratt. (Va.) 645; Langston *v.* Glasson, [1891] 1 Q. B. 567, 55 J. P. 567, 60 L. J. Q. B. 356, 65 L. T. Rep. N. S. 159, 39 Wkly. Rep. 476; Bowers *v.* Harding, [1891] 1 Q. B. 560, 55 J. P. 376, 60 L. J. Q. B. 474, 64 L. T. Rep. N. S. 201, 39 Wkly. Rep. 558; Robson *v.* Virginia, 4 Northwest Terr. (Can.) 80. See also Goodwin *v.* Ottawa, 12 Ont. L. Rep. 236.

Salaries of ministers and teachers.— Statutes relating to income taxes have been held not to apply to the salaries of ministers (Com. *v.* Cuyler, 5 Watts & S. (Pa.) 275; Plumer *v.* Com., 3 Gratt. (Va.) 645. But see Miller *v.* Kirkpatrick, 29 Pa. St. 226), or of teachers in the public schools (Com. *v.* Cuyler, *supra*).

15. Marr *v.* Vienna, 10 Can. L. J. 275; Matter of Ashworth, 7 Can. L. J. 47.

16. New Orleans *v.* Hart, 14 La. Ann. 803 (holding that the word "income," as used in the act of 1856, means money received in compensation for labor or services, such as wages, commissions, brokerage, etc., and not the fruits of capital invested in merchandise, stocks, etc.); Wilcox *v.* Middlesex County, 103 Mass. 544; Pearson *v.* Chace, 10 R. I. 455 (annual income distinguished from annuity); Nizam's State R. Co. *v.* Wyatt, 24 Q. B. D. 548, 59 L. J. Q. B. 430, 62 L. T. Rep. N. S. 765 (government annual subvention to a railway company); Turner *v.* Cuxon, 22 Q. B. D. 150, 53 J. P. 148, 58 L. J. Q. B. 131, 60 L. T. Rep. N. S. 332, 37 Wkly. Rep. 254 (pension to a curate renewable at option of authorities).

17. See Millar *v.* Douglass, 42 Tex. 288; Lawless *v.* Sullivan, 6 App. Cas. 373, 50 L. J. P. C. 33, 44 L. T. Rep. N. S. 897, 29 Wkly. Rep. 917; Matter of Yarwood, 7 Can. L. J. 47; *In re* Hamilton Bank, 12 Brit. Col. 207; *Re* Biddle Cope, 5 Brit. Col. 37. *Compare* Lott *v.* Hubbard, 44 Ala. 593, holding that where income is taxable, a taxpayer cannot relieve himself from liability for such tax on the ground that he applied the income to the reduction of his indebtedness on a purchase of real estate on which he had paid full taxes.

18. Glasgow *v.* Rowse, 43 Mo. 479; Drexel *v.* Com., 46 Pa. St. 31; Lamontaigne *v.* Macleod, 5 Northwest Terr. (Can.) 199.

19. **Constitutional validity of poll taxes** see *supra*, II, F, 3.

20. Kuntz *v.* Davidson County, 6 Lea (Tenn.) 65.

21. Opinion of Justices, 7 Mass. 523 (holding that the terms "inhabitants" and "residents" as regards poll taxes apply to resident aliens); Kuntz *v.* Davidson County, 6 Lea (Tenn.) 65 (holding that a statute requiring every male "inhabitant" of the state to pay a poll tax applies to a resident alien, although he has never applied for naturalization papers).

22. State *v.* Ross, 23 N. J. L. 517.

Road tax.— A statute requiring persons "residing" in a road district to be listed annually and required to perform a certain amount of labor or to pay in lieu thereof a certain tax does not apply to persons temporarily in a road district engaged in the construction of a railroad but without any intention of remaining longer than such work requires. On Yuen Hai Co. *v.* Ross, 14 Fed. 338, 8 Sawy. 384.

23. Opinion of Justices, 1 Metc. (Mass.) 580, holding that persons residing on such lands where there is no reservation of jurisdiction to the state except the right to serve civil and criminal process on such lands are not subject to the payment of poll taxes.

24. See the statutes of the several states. And see Boston, etc., Glass Co. *v.* Boston, 4 Metc. (Mass.) 181; Faribault *v.* Misener, 20 Minn. 396; White *v.* Kershaw Dist. Tax Collector, 3 Rich. (S. C.) 136.

Minors.— Under a statute requiring male inhabitants over sixteen years of age to pay poll taxes, and providing that a minor having no parent, master, or guardian shall be personally taxed for his poll, and that the poll tax of every other person under guardianship shall be assessed to his guardian, the poll tax of minors in the employ of a manufacturing corporation and receiving salaries cannot be assessed to the corporation. Boston, etc., Glass Co. *v.* Boston, 4 Metc. (Mass.) 181.

7. Tax on Judicial Proceedings. It is competent for the legislature to impose a tax on suits or judicial proceedings or on the process of the courts of the state.[25] But the necessary independence of the federal and state governments forbids that either should tax the courts or the process of the other.[26]

B. Corporations and Corporate Property — 1. In General — a. Liability in General. Unless exempted in terms which amount to a contract not to tax, the property and franchises of a private corporation are as much the legitimate subjects of taxation as any other property within the sovereign power of the state;[27] and a statute imposing taxes on "persons" or "inhabitants" of the state, in general language, will include private corporations as well as natural persons.[28] All taxation of corporations, however, must rest on the basis of a valid and effective legislative enactment, either general or special, which must be construed in such a reasonable manner as to give effect to the plain intention of the legislature,[29] but not retrospectively unless such an interpretation is required by the very language of the act.[30]

Military tax.— Under the Connecticut statutes authorizing the imposition of a military tax on every person liable to military duty, one who is apparently well and strong is not exempt from the tax because of his poverty. Atwater *v.* O'Reilly, 81 Conn. 367, 71 Atl. 505.

25. State *v.* Lancaster County, 4 Nebr. 537, 19 Am. Rep. 641; Cone *v.* Donaldson, 47 Pa. St. 363; State *v.* Howran, 8 Heisk. (Tenn.) 824; Harrison *v.* Willis, 7 Heisk. (Tenn.) 35, 19 Am. Rep. 604.

In criminal cases.— The right to tax litigation includes the right to impose a tax on defendants convicted in criminal cases. State *v.* Howran, 8 Heisk. (Tenn.) 824.

Application of statutes.— A tax on "litigations on each suit" accrues when the suit is commenced. Elliston *v.* Winstead, 10 Lea (Tenn.) 472. A motion against a sheriff for an insufficient return is in legal effect a suit on which the tax must be paid. State *v.* Allison, 2 Swan (Tenn.) 373. But a statute imposing such a tax does not apply to cities and counties of the state when they are parties to suits. Bishop St. John Cathedral *v.* Arapahoe County, 28 Colo. 483, 65 Pac. 628. The tax of two dollars on suits in the parish of Orleans was abolished by the act of 1813. Orleans Parish *v.* Kennedy, 4 Mart. N. S. (La.) 511.

26. *Alabama.*— Smith *v.* Short, 40 Ala. 385.

Indiana.— Warren *v.* Paul, 22 Ind. 276.

Massachusetts.— Moore *v.* Quirk, 105 Mass. 49, 7 Am. Rep. 499.

Michigan.— Fifield *v.* Close, 15 Mich. 505.

Tennessee.— Union Bank *v.* Hill, 3 Coldw. 325.

Wisconsin.— Sayles *v.* Davis, 22 Wis. 225; Jones *v.* Keep, 19 Wis. 369.

27. *Iowa.*—Des Moines Water Co.'s Appeal, 48 Iowa 324.

Massachusetts.— Portland Bank *v.* Apthorp, 12 Mass. 252.

Minnesota.— State *v.* St. Paul Trust Co., 76 Minn. 423, 79 N. W. 543.

Mississippi.— Adams *v.* Yazoo, etc., R. Co., 77 Miss. 194, 24 So. 200, 317, 28 So. 956.

Pennsylvania.— Carbon Iron Co. *v.* Carbon County, 39 Pa. St. 251; Pennsylvania Bank *v.* Com., 19 Pa. St. 144.

Virginia.— Atlantic, etc., R. Co. *v.* Lyons, 101 Va. 1, 42 S. E. 932.

United States.— North Missouri R. Co. *v.* Maguire, 20 Wall. 46, 22 L. ed. 287.

See 45 Cent. Dig. tit. "Taxation," § 206.

Non-residence of stock-holders immaterial. — It is no defense to the payment of a tax on property of a corporation that some of its stock-holders are non-residents of the state. Com. *v.* Hamilton Mfg. Co., 12 Allen (Mass.) 298.

28. Louisville, etc., R. Co. *v.* Com., 1 Bush (Ky.) 250; Baldwin *v.* Baldwin Ministerial Fund, 37 Me. 369; People *v.* McLean, 80 N. Y. 254; People *v.* Utica Ins. Co., 15 Johns. (N. Y.) 358, 8 Am. Dec. 243; Tripp *v.* Merchants' Mut. F. Ins. Co., 12 R. I. 435.

29. State *v.* Western Union Tel. Co., 96 Minn. 13, 104 N. W. 567.

Repeal of statutes.— A general statute regulating the whole law of taxation will repeal earlier statutes relating to the taxation of certain corporations. People *v.* Gold, etc., Tel. Co., 98 N. Y. 67. But it will not repeal the provisions of the charter of an existing corporation, relative to taxation, unless plainly so intended. State *v.* Nashville Sav. Bank, 16 Lea (Tenn.) 111. Nor will a tax law relating to corporations be repealed by the general provisions of a later statute which is itself invalid. *In re* St. Louis Loan, etc., Co., 194 Ill. 609, 62 N. E. 810; State *v.* North America Ins. Co., 71 Nebr. 320, 99 N. W. 36, 100 N. W. 405, 102 N. W. 1022, 106 N. W. 767.

30. *In re* St. Louis Loan, etc., Co., 194 Ill. 609, 62 N. E. 810; Com. *v.* Dunbar Furnace Co., 4 Pa. Co. Ct. 349.

Statute taxing corporations "hereafter."— A statute declaring that certain corporations shall "hereafter" be subject to the payment of taxes does not relieve them from liability for taxes already due. People *v.* Davenport, 25 Hun (N. Y.) 630 [*affirmed* in 91 N. Y. 574]; People *v.* New York Floating Dry Dock Co., 11 Abb. N. Cas. (N. Y.) 40, 63 How. Pr. 451 [*affirmed* in 92 N. Y. 487]; Delaware Div. Canal Co. *v.* Com., 50 Pa. St. 399.

b. Corporations and Associations Subject to Taxation — (i) *In General.* If the terms of the statute are general, it will include all domestic corporations, whether they are chartered by act of the legislature or organized under a general law of the state by filing a certificate or otherwise;[31] but if it enumerates the classes or kinds of corporations to which it is intended to apply, the particular company, to be taxable, must be brought within the terms of the law.[32] A tax law applicable to corporations will include joint stock associations and limited partnerships if organized under a statute giving them substantially the rights and characteristics of corporations;[33] but not where they are formed by the private agreement of the persons concerned, without reference to the statute,[34] or the tax statute relates in terms to incorporated companies;[35] nor will the statute extend to an association which is purely and simply a partnership, in the contemplation of the law, although the articles provide for the sale of a partner's interest without dissolving the firm, for the management of its business by a board of trustees, or otherwise assimilate its organization to that of a corporation.[36] Ordinarily the liability of a corporation to taxation begins as soon as its organization is effected,[37] although in some states it will be charged with only a proportional part of the taxes for the fiscal year within which it was incorporated;[38] and its subsequent dissolution will not relieve it from taxes already due.[39] Neither is a domestic corporation released from taxation because its business is conducted and its capital employed wholly in another state or country.[40]

31. Distilling, etc., Co. *v.* People, 161 Ill. 101, 43 N. E. 779; Roland Park Co. *v.* State, 80 Md. 448, 31 Atl. 298; Trenton Iron Co. *v.* Yard, 42 N. J. L. 357; Western Union Tel. Co. *v.* Norman, 77 Fed. 13.

Corporation operated at a loss.— Moneyed or stock companies deriving a profit from their capital are liable to taxation, although their income was not equal to their expenditures for the year preceding the taxation. People *v.* New York, 18 Wend. (N. Y.) 605.

32. Standard Oil Co. *v.* Com., 119 Ky. 75, 82 S. W. 1020, 26 Ky. L. Rep. 985; Louisville Tobacco Warehouse Co. *v.* Com., 106 Ky. 165, 49 S. W. 1069, 90 Am. St. Rep. 236, 57 L. R. A. 33; Gregg *v.* Sanford, 65 Fed. 151, 12 C. C. A. 525.

Business corporations.— An incorporated social society, whose capital stock is divided into shares, is a "business corporation," in so far as its classification is necessary to bring it within a statute imposing taxes on such bodies. Newport Reading Room's Petition, 21 R. I. 440, 44 Atl. 511.

Moneyed corporations.— This term, as used in a tax law, includes all classes of corporations organized for business purposes, as distinguished from public and from charitable corporations, and thus includes a guaranty and surety company. State *v.* Fidelity, etc., Co., 35 Tex. Civ. App. 214, 80 S. W. 544.

Employing its capital stock within the state.— A statute applicable to any corporation so described will include a company whose only business is owning and managing an apartment house within the state. People *v.* Kelsey, 110 N. Y. App. Div. 617, 96 N. Y. Suppl. 745 [*affirmed* in 184 N. Y. 573, 77 N. E. 1194].

Corporation without capital stock.— A mutual life insurance company, which was incorporated without capital stock, cannot thereafter by a by-law change itself into a capital stock company, in order to reduce its taxes, the statute distinguishing between the two kinds of corporations in regard to the mode of taxing them. Mutual Benefit L. Ins. Co. *v.* Newark Receiver of Taxes, 33 N. J. L. 183.

"Every other like company."— The Kentucky statute imposing a franchise tax on every railroad company, press despatch, telephone, turnpike, palace car, sleeping car, and "every other like company" having or exercising any exclusive privileges not allowed to natural persons or for performing any public service, is held to apply to a corporation manufacturing cotton seed oil and owning tank cars by which such products are transported to its customers by railroads on a mileage basis. James *v.* Kentucky Refining Co., 132 Ky. 353, 113 S. W. 468.

33. People *v.* Wemple, 52 Hun (N. Y.) 434, 5 N. Y. Suppl. 581 [*affirmed* in 117 N. Y. 136, 22 N. E. 1046, 6 L. R. A. 303]; Sanford *v.* New York, 15 How. Pr. (N. Y.) 172; Com. *v.* Sanderson, etc., Imp. Co., 3 Dauph. Co. Rep. (Pa.) 116. See also State *v.* Louisiana, etc., R. Co., 196 Mo. 523, 94 S. W. 279.

34. People *v.* Coleman, 133 N. Y. 279, 31 N. E. 96, 16 L. R. A. 183 [*affirming* 13 N. Y. Suppl. 833]; Gregg *v.* Sanford, 65 Fed. 151, 12 C. C. A. 525.

35. Gregg *v.* Sanford, 65 Fed. 151, 12 C. C. A. 525.

36. Hoadley *v.* Essex County, 105 Mass. 519; Hoey *v.* Coleman, 46 Fed. 221.

37. See Anglo-American Ins. Co. *v.* District of Columbia, 5 Mackey (D. C.) 422.

38. People *v.* Miller, 94 N. Y. App. Div. 564, 88 N. Y. Suppl. 197 [*affirmed* in 180 N. Y. 525, 72 N. E. 931]; Com. *v.* Wyoming Valley Canal Co., 50 Pa. St. 410.

39. *In re* Welsbach Incandescent Gaslight Co., 59 N. Y. Suppl. 1006.

40. Com. *v.* Union Refrigerator Transit

(II) *Corporations Chartered in Two States.* Where the same corporation is chartered under the general or special laws of two or more states, or is formed by the consolidation of corporations chartered by different states, it remains, in each of those states, a domestic corporation and taxable as such,[41] although it is held that each state should tax only so much of the corporate property as lies within its own boundaries or a proportionate part of the capital.[42]

c. Corporate Property in General. Unless in so far as it may be exempted by charter or statute, all the property of a corporation, both real and personal, is subject to taxation in the same way as if it were held by an individual,[43] even where the franchise of the corporation is not subject to taxation,[44] and regardless of where the stock-holders reside.[45]

d. Real Property. Under the laws generally in force a corporation is taxable on its real estate, as a private individual would be,[46] although the land so taxed represents a part of the corporation's capital invested in it,[47] and although a

Co., 118 Ky. 136, 80 S. W. 490, 81 S. W. 268, 26 Ky. L. Rep. 23; People *v.* Wemple, 129 N. Y. 558, 29 N. E. 812, 14 L. R. A. 708. *Compare* People *v.* Campbell, 66 Hun (N. Y.) 146, 21 N. Y. Suppl. 7.

41. *Illinois.*— Ohio, etc., R. Co. *v.* Weber, 96 Ill. 443; Quincy R. Bridge Co. *v.* Adams County, 88 Ill. 615.

Kentucky.— Louisville, etc., Ferry Co. *v.* Com., 57 S. W. 624, 22 Ky. L. Rep. 446.

New Jersey.— Easton Delaware Bridge Co. *v.* Metz, 32 N. J. L. 199.

Pennsylvania.— Easton Bridge *v.* County, 9 Pa. St. 415; Com. *v.* Trenton Bridge Co., 9 Am. L. Reg. N. S. 298.

United States.— State *v.* Seaboard, etc., R. Co., 52 Fed. 450.

See 45 Cent. Dig. tit. "Taxation," § 210.

42. Chicago, etc., R. Co. *v.* Auditor-Gen., 53 Mich. 79, 18 N. W. 586; State Treasurer *v.* Auditor-Gen., 46 Mich. 224, 9 N. W. 258; Easton Delaware Bridge Co. *v.* Metz, 32 N. J. L. 199. *Compare* State *v.* Seaboard, etc., R. Co., 52 Fed. 450.

43. *Kentucky.*— Louisville, etc., Canal Co. *v.* Com., 7 B. Mon. 160.

Massachusetts. — Greenfield *v.* Franklin County, 135 Mass. 566.

Michigan.— Detroit Citizens' St. R. Co. *v.* Detroit, 125 Mich. 673, 85 N. W. 96, 86 N. W. 809, 84 Am. St. Rep. 589.

Ohio.— Ætna Standard Iron, etc., Co. *v.* Taylor, 13 Ohio Cir. Ct. 602, 5 Ohio Cir. Dec. 242.

Pennsylvania.— Lackawanna Iron, etc., Co. *v.* Luzerne County, 42 Pa. St. 424.

United States.—Adams Exp. Co. *v.* Ohio State Auditor, 166 U. S. 185, 17 Sup. Ct. 604, 41 L. ed. 965; Gordon *v.* Appeal Tax Ct., 3 How. 133, 11 L. ed. 529.

See 45 Cent. Dig. tit. "Taxation," § 212.

Good-will of business.— The good-will of a newspaper is property, the value of which is to be taken into account in appraising the value of stock in the company. Matter of Jones, 28 Misc. (N. Y.) 356, 59 N. Y. Suppl. 983. But in cases where the good-will of a business as such is not taxable, a corporation cannot diminish its liability for taxes by charging off a certain amount from the value of its real estate and fixtures to the account of good-will, where there has been no depreciation in the value of those items. People *v.* Neff, 19 N. Y. App. Div. 596, 46 N. Y. Suppl. 299 [*affirmed* in 154 N. Y. 437, 48 N. E. 820].

Scrip.— The fund represented by scrip, issued by a corporation to its stock-holders, the fund being retained by the corporation, and being contingently liable for its debts, forms part of its taxable property. People *v.* New York Tax, etc., Com'rs, 28 Hun (N. Y.) 261 [*affirmed* in 91 N. Y. 670].

Riparian rights owned by corporation see People *v.* Smith, 70 N. Y. App. Div. 543, 75 N. Y. Suppl. 1100 [*affirmed* in 175 N. Y. 469, 67 N. E. 1088].

Notes distributed to stock-holders.—Where a corporation owning notes secured by mortgages on lands sold by it distributed such notes, together with cash to its stock-holders, as a dividend, guaranteeing the notes and the expenses of collection, the notes to be held by the stock-holders receiving them until payment or foreclosure, it was held that the title to the notes did not pass absolutely to the stock-holders and that the corporation was subject to taxation thereon. Adams *v.* Delta, etc., Land Co., 89 Miss. 817, 42 So. 170.

44. Gordon *v.* Appeal Tax Ct., 3 How. (U. S.) 133, 11 L. ed. 529.

45. Louisville, etc., Canal Co. *v.* Com., 7 B. Mon. (Ky.) 160.

46. Society for Promotion of Learning *v.* New Brunswick, 55 N. J. L. 65, 25 Atl. 853; Carbon Iron Co. *v.* Carbon County, 39 Pa. St. 251.

Bridges belonging to a corporation are taxable as real estate. Quincy R. Bridge Co. *v.* Adams County, 88 Ill. 615. *Contra*, Middletown, etc., Bridge Co. *v.* Middletown, 77 Conn. 314, 59 Atl. 34.

47. Nashville Gas Light Co. *v.* Nashville, 8 Lea (Tenn.) 406. See also *infra*, III, B, 1, g, (II).

Where the tax imposed on a corporation is based on its capital "employed" within the state and is graduated according to dividends earned, the company cannot be taxed upon so much of its capital stock as is invested in unproductive real estate which it is holding merely as an investment. People *v.* Roberts, 157 N. Y. 677, 51 N. E. 1093.

statute provides that land held by a corporation shall be considered as personal property, this being merely intended to qualify and define the interest of the stock-holders.[48] An exception is, however, made in some jurisdictions in regard to real estate which is essential to the exercise of the franchises of quasi-public corporations.[49]

e. Deduction of Liabilities.[50] In some states the indebtedness or liabilities of a corporation may be deducted from the value of its property in assessing the latter for taxation.[51] In these cases it is the general rule that such liabilities may be deducted as are fixed and definite in amount,[52] but not mere contingent liabilities or mere estimates of probable obligations or responsibilities;[53] nor should an indebtedness incurred in the purchase of non-taxable property be deducted.[54]

f. Corporate Franchises and Privileges. The franchises possessed by a corporation are property and may be taxed as such, if the legislature shall so determine, entirely apart from or in addition to taxation on its other property or assets.[55] This includes not only special and exclusive privileges conferred by

48. Cumberland Mar. R. Co. *v.* Portland, 37 Me. 444.

49. Conoy Tp. *v.* York Haven Electric Power Plant Co., 222 Pa. St. 319, 71 Atl. 207 (water and power company); St. Mary's Gas Co. *v.* Elk County, 191 Pa. St. 458, 43 Atl. 321 (natural gas company); Southern Electric Light, etc., Co. *v.* Philadelphia, 191 Pa. St. 170, 43 Atl. 123 (electric light and power company); Northampton County *v.* Eastern Pass. R. Co., 148 Pa. St. 282, 23 Atl. 895 (street railroad company); Wayne County *v.* Delaware, etc., Canal Co., 15 Pa. St. 351 (canal company); Yellow River Imp. Co. *v.* Wood County, 81 Wis. 554, 51 N. W. 1004, 17 L. R. A. 92 (flooding dam of quasi-public corporation chartered for the purpose of improving the navigation of a river and used only for this purpose and essential to the exercise of the company's franchises).

Such corporations include turnpike, navigation, canal, railroad, street railroad, artificial and natural gas, water, and electric light and power companies. See Conoy Tp. *v.* York Haven Electric Power Plant Co., 222 Pa. St. 319, 71 Atl. 207.

The test as to whether a corporation is a public or quasi-public corporation is not what the corporation has actually done but what it is authorized to do and may be compelled to do under its charter. Conoy Tp. *v.* York Haven Electric Power Plant Co., 222 Pa. St. 319, 71 Atl. 207.

50. **Constitutionality of provisions** for deducting indebtedness see *supra*, II, B, 1, g, (IV), (B).

51. State *v.* Northern Pac. R. Co., 95 Minn. 43, 103 N. W. 731; Scandinavian Mut. Aid Assoc. *v.* Kearney County, 81 Nebr. 468, 116 N. W. 155, 81 Nebr. 473, 118 N. W. 333; People *v.* Dederick, 161 N. Y. 195, 55 N. E. 927. See also Arapahoe County *v.* Fidelity Sav. Assoc., 31 Colo. 47, 71 P. 376; Com. *v.* Jamestown, etc., R. Co., 3 Dauph. Co. Rep. (Pa.) 214; Com. *v.* Shamokin, etc., R. Co., 3 Dauph. Co. Rep. (Pa.) 168.

The New York Tax Law of 1896 does not in express terms direct a deduction of debts of corporations but is construed as permitting such deduction as it is expressly allowed in the case of persons, and under the statutory construction law the word "person" as used in the statute includes within its meaning a corporation. People *v.* Dederick, 161 N. Y. 195, 55 N. E. 927.

The receiver of an insolvent bank is liable for taxes on the full amount of personal property and assets of the bank and cannot deduct therefrom the amount of its debts. Hewitt *v.* Traders' Bank, 18 Wash. 326, 51 Pac. 468.

Private banks.— Balances carried by unincorporated banks on deposit are subject to taxation without deduction, and should be returned for taxation as cash. Patton *v.* Commercial Bank, 10 Ohio S. & C. Pl. Dec. 321, 7 Ohio N. P. 401.

52. People *v.* Neff, 15 N. Y. App. Div. 8, 44 N. Y. Suppl. 46 [*affirmed* in 156 N. Y. 701, 51 N. E. 1093], holding that unclaimed dividends which are the property of the stock-holders whenever they choose to call for them constitute a proper deduction, and that a deduction should also be allowed for a proportionate amount of the yearly interest on its outstanding mortgage debt, although the interest is not yet due.

53. People *v.* Feitner, 166 N. Y. 129, 59 N. E. 731; People *v.* Neff, 15 N. Y. App. Div. 8, 44 N. Y. Suppl. 46 [*affirmed* in 156 N. Y. 701, 51 N. E. 1093].

Of this character is an estimated reinsurance reserve, as distinguished from a fixed portion of the company's assets set apart to reinsure its risks (People *v.* Feitner, 166 N. Y. 129, 59 N. E. 731) or an indirect liability as a guarantor (People *v.* Feitner, 32 Misc. (N. Y.) 30, 66 N. Y. Suppl. 91 [*affirmed* in 171 N. Y. 641, 63 N. E. 786]); and unearned rentals of a solvent telephone company, consisting of advance payments for telephone service, refundable only in case the service is not given, are too speculative to be considered liabilities to be deducted from its assets for purposes of taxation (People *v.* Neff, 15 N. Y. App. Div. 8, 44 N. Y. Suppl. 46 [*affirmed* in 156 N. Y. 701, 51 N. E. 1093]).

54. People *v.* Barker, 165 N. Y. 305, 59 N. E. 137, 151 [*reversing* 48 N. Y. App. Div. 248, 63 N. Y. Suppl. 167].

55. *California.*— Spring Valley Water

public authority, such as involve the right to use public streets, highways, navigable streams, and the like, in a manner not permitted to the general public, or relating to the prosecution of a business affecting the public generally;[56] but also the franchise of being a corporation, that is, the privilege of carrying on business under the corporate form of organization, with its peculiar features of limited liability for debts, transferability of stock, perpetual succession, and so on.[57]

Works *v.* Schottler, 62 Cal. 69; San Jose Gas Co. *v.* January, 57 Cal. 614.

Illinois.— Ottawa Glass Co. *v.* McCaleb, 81 Ill. 556; Porter *v.* Rockford, etc., R. Co., 76 Ill. 561.

Kentucky.— Louisville Tank Line Co. *v.* Com., 123 Ky. 81, 93 S. W. 635, 29 Ky. L. Rep. 257; Louisville, etc., Ferry Co. *v.* Com., 104 Ky. 726, 47 S. W. 877, 20 Ky. L. Rep. 927; Henderson Bridge Co. *v.* Negley, 63 S. W. 989, 23 Ky. L. Rep. 746. See also Covington *v.* Covington, etc., Bridge Co., 126 Ky. 163, 103 S. W. 248, 31 Ky. L. Rep. 630.

Massachusetts.— Com. *v.* Lowell Gas Light Co., 12 Allen 75. But see American Glue Co. *v.* Com., 195 Mass. 528, 81 N. E. 302, 122 Am. St. Rep. 268, holding that a corporate franchise, considered separately, is not property subject to taxation in any other state than that which granted it.

Michigan.— Detroit Citizens' St. R. Co. *v.* Detroit, 125 Mich. 673, 85 N. W. 96, 86 N. W. 809.

Nebraska.— Western Union Tel. Co. *v.* Omaha, 73 Nebr. 527, 103 N. W. 84; State *v.* Savage, 65 Nebr. 714, 91 N. W. 716.

New Jersey.— Lumberville Delaware Bridge Co. *v.* State Bd. of Assessors, 55 N. J. L. 529, 26 Atl. 711, 25 L. R. A. 134; State Bd. of Assessors *v.* Central R. Co., 48 N. J. L. 146, 4 Atl. 578. See also North Jersey St. R. Co. *v.* Jersey City, 74 N. J. L. 761, 67 Atl. 33.

New York.— People *v.* Kelsey, 184 N. Y. 572, 77 N. E. 1194 [*affirming* 110 N. Y. App. Div. 797, 97 N. Y. Suppl. 197].

North Carolina.— Worth *v.* Petersburg R. Co., 89 N. C. 301.

Ohio.— Southern Gum Co. *v.* Laylin, 66 Ohio St. 578, 64 N. E. 564.

Pennsylvania.—Philadelphia Contributionship, etc. *v.* Com., 98 Pa. St. 48; Carbon Iron Co. *v.* Carbon County, 39 Pa. St. 251.

Washington.— Edison Electric Illuminating Co. *v.* Spokane County, 22 Wash. 168, 60 Pac. 132; Commercial Electric Light, etc., Co. *v.* Judson, 21 Wash. 49, 56 Pac. 829, 57 L. R. A. 78.

United States.— Atlantic, etc., Tel. Co. *v.* Philadelphia, 190 U. S. 160, 23 S. Ct. 817, 47 L. ed. 995; State R. Tax Cases, 92 U. S. 575, 23 L. ed. 663; Veazie Bank *v.* Fenno, 8 Wall. 533, 19 L. ed. 482; West River Bridge Co. *v.* Dix, 6 How. 507, 12 L. ed. 535.

See 45 Cent. Dig. tit. "Taxation," §§ 14, 214.

Franchise as contract.— The charter of a corporation is a franchise which is not taxable as such where the corporation has paid a price therefor which the legislature accepted. Gordon *v.* Appeal Tax Ct., 3 How. (U. S.) 133, 11 L. ed. 529.

Local taxation.— The New York statutes of 1880–1881 by express terms apply only to taxation for state purposes, and under such statutes the franchises of a street railroad company are not subject to local taxation. People *v.* Neff, 19 N. Y. App. Div. 590, 46 N. Y. Suppl. 385 [*affirmed* in 154 N. Y. 763, 49 N. E. 1102].

In Kentucky two classes of corporations are recognized by the statutes, one being required to pay a franchise tax in addition to other taxes imposed by law, and the other not required to pay a franchise tax. Com. *v.* Walsh, 133 Ky. 103, 106 S. W. 240, 117 S. W. 398.

56. *Kentucky.*— Latonia Agricultural, etc., Assoc. *v.* Donnelly, 106 Ky. 325, 50 S. W. 251, 20 Ky. L. Rep. 1891; Louisville Tobacco Warehouse Co. *v.* Com., 106 Ky. 165, 49 S. W. 1069, 20 Ky. L. Rep. 1747, 90 Am. St. Rep. 236, 57 L. R. A. 33; Henderson Bridge Co. *v.* Com., 99 Ky. 623, 31 S. W. 486, 17 Ky. L. Rep. 389, 29 L. R. A. 73.

New Jersey.— Paterson, etc., Gas, etc., Co. *v.* State Bd. of Assessors, 70 N. J. L. 825, 59 Atl. 1118; State Bd. of Assessors *v.* Plainfield Water Supply Co., 67 N. J. L. 357, 52 Atl. 230. See also North Jersey St. R. Co. *v.* Jersey City, 73 N. J. L. 481, 63 Atl. 833.

Texas.— Southwestern Tel., etc., Co. *v.* San Antonio, 32 Tex. Civ. App. 101, 73 S. W. 859.

Washington.— Chehalis Boom Co. *v.* Chehalis County, 24 Wash. 135, 63 Pac. 1123.

United States.— Henderson Bridge Co. *v.* Kentucky, 166 U. S. 150, 17 S. Ct. 532, 41 L. ed. 953.

Ultra vires business.— The term "franchise" as used in Ky. St. (1903) § 4077, imposing a franchise tax on corporations engaged in freight traffic, etc., is not the right to do the thing but the doing of it in fact, so that the liability of a corporation for such tax is not affected by the fact that its engaging in such business was *ultra vires.* James *v.* Kentucky Refining Co., 132 Ky. 353, 113 S. W. 468. So also if a railroad company having no separate franchise or authority to carry on a telegraph business assumes such a franchise and carries on a telegraph business, it is estopped to deny the existence of a franchise and is subject to taxation thereon. Minneapolis, etc., R. Co. *v.* Oppegard, (N. D. 1908) 118 N. W. 830.

57. State Bank *v.* San Francisco, 142 Cal. 276, 75 Pac. 832, 100 Am. St. Rep. 130, 64 L. R. A. 918; Spring Valley Water Works *v.* Schottler, 62 Cal. 69; People *v.* Home Ins. Co., 92 N. Y. 328; Southern Gum Co. *v.* Laylin, 66 Ohio St. 578, 64 N. E. 564, where it is stated that an excise tax may be imposed on corporations to compensate the state for the additional burden caused by the aggregation

Properly speaking, a franchise tax is one imposed only on these rights or privileges, and either consisting of a more or less arbitrary sum or measured, without appraisement, by the amount of nominal capital stock; [58] and a tax of this character is not to be regarded as a property tax.[59] In many states the tax on corporations is assessed or measured by the amount of their intangible property in general, the market value of their outstanding capital stock, the value of capital stock less all property otherwise taxable, the amount of gross or net earnings, the volume of business done, or the rate of dividends declared and paid; and it is generally held that such a tax is one on the franchise and not on the property of the corporation,[60] although it has been held that a so-called franchise tax which is in fact a tax upon all the intangible property of the corporation, including its capital, is really a property tax.[61]

g. Capital and Capital Stock — (i) *In General.* The capital of a corporation is the aggregate of its property and assets of all kinds, and is the property of the corporation and properly taxable to it; while, on the other hand, its capital stock is the property of the shareholders, and consists of the aggregate of their separate interests in the business and profits of the corporation and of their ultimate right of participation in its assets on dissolution; and this property is taxable

of capital in an artificial body and the exemption, in part at least, of the individuals composing it from liability for its debts.

In New Jersey.— In this state the legislature has not intended to tax the mere right or privilege of being a corporation; and hence a corporation which has simply preserved its organization but transacted no business is not liable to taxation. Faure Electric Light Co.'s Case, 43 N. J. Eq. 411, 5 Atl. 817. See also Passaic Water Co. *v.* Paterson, 56 N. J. L. 471, 29 Atl. 185. So a statute giving a corporation power to extend its operations does not change its character or attributes and is not a new franchise. State *v.* Manufacture Establishing Soc., 43 N. J. Eq. 410, 5 Atl. 724.

58. *Alabama.*— Southern R. Co. *v.* Greene, 160 Ala. 396, 49 So. 404.

Illinois.— Porter *v.* Rockford, etc., R. Co., 76 Ill. 561.

Mississippi.— Holly Springs Sav., etc., Co. *v.* Marshall County, 52 Miss. 281, 24 Am. Rep. 668.

New York.—See People *v.* Glynn, 194 N. Y. 387, 87 N. E. 434 [*affirming* 127 N. Y. App. Div. 933, 111 N. Y. Suppl. 1139].

North Carolina.— Worth *v.* Petersburg R. Co., 89 N. C. 301.

Ohio.— Southern Gum Co. *v.* Laylin, 66 Ohio St. 578, 64 N. E. 564.

Utah.— Blackrock Copper Min., etc., Co. *v.* Tingey, 34 Utah 369, 98 Pac. 180, 131 Am. St. Rep. 850, 25 L. R. A. N. S. 255.

United States.—Bank of Commerce *v.* New York, 2 Black 620, 17 L. ed. 451.

59. People *v.* Glynn, 194 N. Y. 387, 87 N. E. 434; Blackrock Copper Min., etc., Co. *v.* Tingey, 34 Utah 369, 98 Pac. 180, 131 Am. St. Rep. 850, 28 L. R. A. N. S. 255.

60. *Connecticut.*— Coite *v.* Connecticut Mut. L. Ins. Co., 36 Conn. 512.

Maryland.— State *v.* Philadelphia, etc., R. Co., 45 Md. 361, 24 Am. Rep. 511.

Massachusetts.— Manufacturers' Ins. Co. *v.* Loud, 99 Mass. 146, 96 Am. Dec. 715; Com. *v.* Cary Imp. Co., 98 Mass. 19; Com. *v.* Lowell Gas Light Co., 12 Allen 75; Portland Bank *v.* Apthorp, 12 Mass. 252.

New Jersey.— North Jersey St. R. Co. *v.* Jersey City, 73 N. J. L. 481, 63 Atl. 833.

New York.— People *v.* Knight, 174 N. Y. 475, 67 N. E. 65, 63 L. R. A. 87; People *v.* Roberts, 168 N. Y. 14, 60 N. E. 1043; Security Trust Co. *v.* Liberty Bldg. Co., 96 N. Y. App. Div. 436, 89 N. Y. Suppl. 340; People *v.* Neff, 26 N. Y. App. Div. 542, 50 N. Y. Suppl. 680; People *v.* Dederick, 25 Misc. 539, 55 N. Y. Suppl. 40 [*affirmed* in 41 N. Y. App. Div. 617, 58 N. Y. Suppl. 1146]. See also People *v.* Kelsey, 184 N. Y. 573, 77 N. E. 1194.

Pennsylvania.— Com. *v.* New York, etc., R. Co., 188 Pa. St. 169, 41 Atl. 594; Phœnix Iron Co. *v.* Com., 59 Pa. St. 104; Carbon Iron Co. *v.* Carbon County, 39 Pa. St. 251.

United States.— Owensboro Nat. Bank *v.* Owensboro, 173 U. S. 664, 19 S. Ct. 537, 43 L. ed. 850; Adams Express Co. *v.* Ohio State Auditor, 166 U. S. 185, 17 S. Ct. 604, 41 L. ed. 965; Adams Express Co. *v.* Kentucky, 166 U. S. 171, 17 S. Ct. 527, 41 L. ed. 960.

Capital "employed."— The New York statute providing for an annual corporation tax to be computed upon the basis of the amount of the capital stock "employed" within the state relates to the active use of capital in connection with a live business as distinguished from capital merely invested. People *v.* Miller, 179 N. Y. 49, 71 N. E. 463 [*reversing* 90 N. Y. App. Div. 588, 86 N. Y. Suppl. 420]; People *v.* Roberts, 66 N. Y. App. Div. 157, 72 N. Y. Suppl. 950; People *v.* Roberts, 30 N. Y. App. Div. 180, 51 N. Y. Suppl. 771 [*affirmed* in 157 N. Y. 676, 51 N. E. 1093]. But see People *v.* Williams, 198 N. Y. 54, 91 N. E. 266 [*reversing* 134 N. Y. App. Div. 83, 118 N. Y. Suppl. 835].

61. Com. *v.* Walsh, 133 Ky. 103, 106 S. W. 240, 117 S. W. 398; Louisville Tobacco Warehouse Co. *v.* Com., 106 Ky. 165, 49 S. W. 1069, 90 Am. St. Rep. 236, 57 L. R. A. 33; Henderson Bridge Co. *v.* Kentucky, 166 U. S. 150, 17 S. Ct. 532, 41 L. ed. 953.

to the stock-holders.[62] Still, in several states, corporations are taxed on their capital stock, although, in this case, the stock is not actually taxed as belonging to the corporation, but is taken as the measure of the value of its property, and the tax is more properly considered as imposed on the franchise or assets of the company than on its stock.[63] The capital stock taxable under a law of this kind is the aggregate of that issued and outstanding,[64] including increases or additions to the original amount of issued or authorized stock;[65] but not including stock subscribed but not paid for.[66]

62. *Illinois.*— Porter *v.* Rockford, etc., R. Co., 76 Ill. 561.

Indiana.— State *v.* Hamilton, 5 Ind. 310.

Iowa.— Judy *v.* Beckwith, 137 Iowa 24, 114 N. W. 565, 15 L. R. A. N. S. 142.

Louisiana.— Schreiber *v.* Board of Assessors, 37 La. Ann. 908, 55 Am. Rep. 528.

Minnesota.— State *v.* St. Paul Trust Co., 76 Minn. 423, 79 N. W. 543.

New Jersey.— New Jersey Hedge Co. *v.* Craig, 51 N. J. L. 437, 17 Atl. 941; North Ward Nat. Bank *v.* Newark, 39 N. J. L. 380.

New York.— People *v.* Roberts, 66 N. Y. App. Div. 157, 72 N. Y. Suppl. 950.

Ohio.— Bradley *v.* Bauder, 36 Ohio St. 28, 38 Am. Rep. 547.

Virginia.— Com. *v.* Charlottesville Perpetual Bldg., etc., Co., 90 Va. 790, 20 S. E. 364, 44 Am. St. Rep. 950.

United States.— Farrington *v.* Tennessee, 95 U. S. 679, 24 L. ed. 558; Minot *v.* Philadelphia, etc., R. Co., 18 Wall. 206, 21 L. ed. 888.

See 45 Cent. Dig. tit. "Taxation," § 215.

Shares of stock-holder generally see *infra*, III, B, 1, j.

A tax may be levied on the capital borrowed by a corporation from a citizen of another state. Maltby *v.* Reading, etc., R. Co., 52 Pa. St. 140.

63. Saup *v.* Morgan, 108 Ill. 326; Robbins *v.* Magoun, 101 Iowa 580, 70 N. W. 700; State *v.* Simmons, 70 Miss. 485, 12 So. 477; Com. *v.* Manor Gas Coal Co., 8 Pa. Dist. 258. See also St. Louis Consol. Coal Co. *v.* Miller, 236 Ill. 149, 86 N. E. 205.

What corporations taxable.— The designation "any bank or other joint-stock company," in a statute providing for the taxation of capital stock, includes all incorporated associations having stock. State *v.* Simmons, 70 Miss. 485, 12 So. 477.

Actual cash value of capital stock.— Under the statute in Pennsylvania, imposing taxes on corporations according to the actual value of their capital stock, it is held that such value is a question of fact which must be determined by considering the value of the company's tangible property and assets of every kind, including bonds, mortgages, and money at interest, and the amount of indebtedness or encumbrances on its property. Com. *v.* Ontario, etc., R. Co., 188 Pa. St. 205, 41 Atl. 607; Com. *v.* Beech Creek R. Co., 188 Pa. St. 203, 41 Atl. 605; Com. *v.* Fall Brook R. Co., 188 Pa. St. 199, 41 Atl. 606; Com. *v.* Manor Gas Coal Co., 188 Pa. St. 195, 41 Atl. 605; Com. *v.* New York, etc., R. Co., 188 Pa. St. 169, 41 Atl. 594; Com. *v.* Philadelphia, etc., R. Co., 145 Pa. St. 74, 22 Atl. 235; Com. *v.* American Coke Co., 5 Dauph. Co. Rep. (Pa.) 151.

Tax measured by dividends.— A tax on the capital stock of a corporation is not a tax on its dividends merely because the rate at which it is to be computed is measured by the amount of the dividends declared. Phœnix Iron Co. *v.* Com., 59 Pa. St. 104. And see Lehigh Crane Iron Co. *v.* Com., 55 Pa. St. 448.

64. Baltimore Consumers' Ice Co. *v.* State, 82 Md. 132, 33 Atl. 427; American Pig Iron Storage Co. *v.* State Bd. of Assessors, 56 N. J. L. 389, 29 Atl. 160.

Stock issued during fiscal year.— On shares of stock issued during the tax year the state is entitled to taxes, at the appraised valuation, only from the date of issue to the end of the tax year. Com. *v.* Union Traction Co., 1 Dauph. Co. Rep. (Pa.) 178.

Stock owned in another corporation.— Where a domestic railroad company owns the stock of a domestic transportation company, which employs its capital outside the state, such stock constitutes no part of the railroad company's taxable capital. People *v.* Knight, 173 N. Y. 255, 65 N. E. 1102.

Stock bought in by corporation issuing it. — Stock once issued is and remains outstanding, within the meaning of the franchise tax law, although owned by the corporation issuing the same, until retired and canceled in the manner provided by the statute relating to the reduction of capital stock. Knickerbocker Importation Co. *v.* State Bd. of Assessors, 74 N. J. L. 583, 65 Atl. 913, 7 L. R. A. N. S. 885 [*reversing* 73 N. J. L. 94, 62 Atl. 266].

Stock held by holding company.— A part of the stock of corporations held by a holding company, pursuant to a plan of reorganization of the corporations, which is in progress, whereby the holding company is to acquire their entire stock is as much subject to a tax as is stock held by any other owner. McCallum *v.* Corn Products Co., 131 N. Y. App. Div. 617, 116 N. Y. Suppl. 118.

The corporation cannot escape taxation by its treasurer's failure to file with the secretary of state a certificate that the capital stock has been paid up, as required by law. Atty.-Gen. *v.* Massachusetts Pipe Line Gas Co., 179 Mass. 15, 60 N. E. 389.

65. St. Louis Mut. L. Ins. Co. *v.* Charles, 47 Mo. 462; Com. *v.* American Mach. Co., 2 Dauph. Co. Rep. (Pa.) 27.

66. McIntosh *v.* Merchants', etc., Ins. Co., 9 La. Ann. 403; Com. *v.* Berkshire L. Ins. Co., 98 Mass. 25; Com. *v.* Union Traction Co., 1 Dauph. Co. Rep. (Pa.) 178. But see

(II) *Capital Representing Property Otherwise Taxed.* The revenue laws of several states, instead of taxing the entire capital stock of a corporation without reference to the property and investments which it represents, impose taxes on real and personal property owned by the corporation, and exempt so much of its capital as is invested in such property, or lay the tax on so much of the actual value of the capital stock as is in excess of the actual value of property otherwise taxed.[67] This principle is intended to prevent double taxation of the same property or value.[68]

(III) *Capital Representing Property in Another State.* While it is competent for a state to tax the entire capital of a domestic corporation without regard to the fact that it is invested in property situated and taxed in another state,[69] an exception has been made as to so much of the capital as is employed or represented by property permanently located in another state and there used in connection with the business of the company.[70] Under this rule a domestic corporation is not subject to taxation on that part of its capital which is invested in the stock of foreign corporations,[71] but is subject to taxation on capital invested in the stock of other domestic corporations,[72] or in bonds of a foreign corporation,[73] or unpaid purchase-money due for lands sold by it situated in another state,[74] or tangible property which, although in another state, is not located there permanently or intended to serve any permanent corporate purpose.[75]

Louisiana Ins. Co. *v.* Morgan, 8 Mart. N. S. (La.) 629 (holding that a tax levied on the stock in trade of a company is payable as well on the stock secured as on that paid in); People *v.* Michigan Southern, etc., R. Co., 4 Mich. 398 (making a similar ruling as to stock which had not been actually paid in but had been entered on the books of the company as part of its capital stock and had been used as money, and the holders of which were entitled to the same rates as on paid-up shares).

67. *California.*— People *v.* National Gold Bank, 51 Cal. 508.

Indiana.— Hyland *v.* Central Iron, etc., Co., 129 Ind. 68, 28 N. E. 308, 13 L. R. A. 515; Hyland *v.* Brazil Block Coal Co., 128 Ind. 335, 26 N. E. 672.

Louisiana.— Metairie Cemetery Assoc. *v.* Board of Assessors, 37 La. Ann. 32.

North Carolina.— See Wilmington, etc., R. Co. *v.* Brunswick County, 72 N. C. 10.

Pennsylvania.—Allegheny County *v.* McKeesport Diamond Market, 123 Pa. St. 164, 16 Atl. 619; West Manayunk Gas Light Co. *v.* City, 3 Pa. Dist. 52; Com. *v.* Union Traction Co., 1 Dauph. Co. Rep. 178; Com. *v.* Salt Mfg. Co., 1 Dauph. Co. Rep. 97; McGinnes *v.* South Ward Water Works, 2 Del. Co. 127; Philadelphia Sav. Fund Soc.'s Appeal, 4 Pa. L. J. Rep. 155.

Washington.— Lewiston Water, etc., Co. *v.* Asotin County, 24 Wash. 371, 64 Pac. 544.

See 45 Cent. Dig. tit. "Taxation," § 216.

Use or operation of leased property.—A corporation is not entitled to any credit on the tax assessed upon its capital stock by reason of the fact that it leases and operates the properties of other corporations, upon whose capital stock the tax has already been paid. Com. *v.* Union Traction Co., 1 Dauph. Co. Rep. (Pa.) 178.

68. See *supra*, II, C, 5, b.

69. State *v.* Travelers' Ins. Co., 70 Conn. 590, 40 Atl. 465, 66 Am. St. Rep. 138; People *v.* New York Tax, etc., Com'rs, 64 N. Y. 541; People *v.* New York Tax, etc., Com'rs, 51 Hun (N. Y.) 312, 3 N. Y. Suppl. 885.

70. People *v.* Campbell, 74 Hun 101, 26 N. Y. Suppl. 462 [*affirmed* in 143 N. Y. 625, 37 N. E. 827]; People *v.* Barker, 23 Misc. (N. Y.) 188, 51 N. Y. Suppl. 1105; Com. *v.* Westinghouse Electric, etc., Co., 151 Pa. St. 265, 24 Atl. 1107, 1111; Com. *v.* Adams Express Co., 4 Pa. Dist. 139; Com. *v.* Quaker City Dye Works Co., 5 Pa. Co. Ct. 94; Com. *v.* Montgomery Lead, etc., Min. Co., 5 Pa. Co. Ct. 89; Com. *v.* Lake Shore, etc., R. Co., 3 Dauph. Co. Rep. (Pa.) 172; Com. *v.* American Water Works, etc., Co., 8 Pa. Dist. 268; Com. *v.* Pennsylvania Coal Co., 41 Leg. Int. (Pa.) 125; San Francisco *v.* Mackey, 22 Fed. 602, 10 Sawy. 431.

Patent rights — stock of foreign corporation.—Where the main business of a domestic corporation is to perfect and protect its patents, and to grant rights to do whatever is needful and incident to such business, which is conducted from the home office, patent rights retained by it for use in territory not covered by grants made are "employed within the state," and capital represented thereby is taxable. People *v.* Campbell, 138 N. Y. 543, 34 N. E. 370, 20 L. R. A. 453.

71. People *v.* Wemple, 148 N. Y. 690, 43 N. E. 176 [*reversing* 63 Hun 444, 18 N. Y. Suppl. 511]; People *v.* Campbell, 138 N. Y. 543, 34 N. E. 370, 20 L. R. A. 453.

72. People *v.* Campbell, 138 N. Y. 543, 34 N. E. 370, 20 L. R. A. 453.

73. People *v.* Campbell, 138 N. Y. 543, 34 N. E. 370, 20 L. R. A. 453; People *v.* Campbell, 88 Hun (N. Y.) 544, 34 N. Y. Suppl. 801.

74. Com. *v.* Pennsylvania Coal Co., 197 Pa. St. 551, 47 Atl. 740.

75. Com. *v.* Pennsylvania Coal Co., 197 Pa. St. 551, 47 Atl. 740.

(iv) *Capital Invested in Non-Taxable Property.*[76] Where the tax is really laid upon the franchise of the corporation, although measured by the amount of its capital stock, the manner in which the capital is invested is not material;[77] but if the tax is really upon the property or assets of the corporation, as represented by its capital, allowance must be made for such portion of the capital as is invested in public securities or other non-taxable property.[78]

(v) *Deduction of Capital Invested in Realty.* In several states, to avoid duplicate taxation, a corporation which has invested a portion of its capital in real estate, on which it pays taxes as owner, is allowed to deduct the value thereof from the amount of its assessable capital.[79] This will exempt capital invested in a lease of lands which is for such a long term as to amount practically to the fee,[80] but not real property situated in another state.[81]

h. Credits and Securities Owned by Corporations. Bonds, mortgages, notes, contracts, accounts receivable, and other forms of intangible personal property belonging to a corporation are taxable to it, the same as to a private individual,[82] except where or in so far as such property or certain classes of such property is expressly or impliedly excluded by the statutes.[83]

i. Corporate Business, Earnings, or Receipts.[84] In some of the states there are taxes on corporations, or certain kinds of corporations, based on the volume of business transacted or on their gross receipts or net income;[85] but there is some

Unregistered vessels.— That portion of the capital of a Pennsylvania corporation represented by dredges, tug-boats, and scows, not permanently located anywhere, and not registered, but carried from state to state for dredging purposes, is taxable in Pennsylvania, although the boats were built outside the state and have never been within it. Com. *v.* American Dredging Co., 122 Pa. St. 386, 15 Atl. 443, 9 Am. St. Rep. 116, 1 L. R. A. 237.

The value of coal which a domestic mining corporation has on hand in other states, and which it has shipped to such other states for sale, and not to serve any permanent corporate purpose, is taxable to it in its home state. Com. *v.* Pennsylvania Coal Co., 197 Pa. St. 551, 47 Atl. 740.

76. **Corporate capital invested in patents or patent rights** see *infra*, III, D, 4.

Corporate capital invested in United States securities see *infra*, III, D, 3, b.

77. People *v.* Home Ins. Co., 92 N. Y. 328; Monroe County Sav. Bank *v.* Rochester, 37 N. Y. 365; Home Ins. Co. *v.* New York, 134 U. S. 594, 10 S. Ct. 593, 33 L. ed. 1025; Hamilton Mfg. Co. *v.* Massachusetts, 6 Wall. (U. S.) 632, 18 L. ed. 904; Providence Sav. Inst. *v.* Massachusetts, 6 Wall. (U. S.) 611, 18 L. ed. 907.

78. *Alabama.*— Sumter County *v.* Gainesville Nat. Bank, 62 Ala. 464, 34 Am. Rep. 30.

Illinois.— Chicago *v.* Lunt, 52 Ill. 414.

Indiana.— Whitney *v.* Madison, 23 Ind. 331.

Iowa.— German American Sav. Bank *v.* Burlington, 54 Iowa 609, 7 N. W. 105.

Louisiana.— New Orleans *v.* New Orleans Canal, etc., Co., 29 La. Ann. 851; Home Mut. Ins. Co. *v.* New Orleans, 20 La. Ann. 447. But see New Orleans *v.* Citizens' Mut. Ins. Co., 18 La. Ann. 707.

Missouri.— State *v.* Rogers, 79 Mo. 283.

New York.— People *v.* Barker, 154 N. Y. 128, 47 N. E. 973 [*affirming* 19 N. Y. App. Div. 628, 45 N. Y. Suppl. 1145]. But see People *v.* New York Assessment, etc., Com'rs, 32 Barb. 509, 20 How. Pr. 182 [*affirmed* in 23 N. Y. 192].

United States.— New York *v.* New York Tax Com'rs, 2 Wall. 200, 17 L. ed. 793.

See 45 Cent. Dig. tit. "Taxation," §§ 20, 218; and *infra*, III, D, 3, b.

79. Barrett's Appeal, 73 Conn. 288, 47 Atl. 243; Batterson's Appeal, 72 Conn. 374, 44 Atl. 546; Dennis' Appeal, 72 Conn. 369, 44 Atl. 545; *In re* St. Louis Loan, etc., Co., 194 Ill. 609, 62 N. E. 810; Wahkonsa Inv. Co. *v.* Ft. Dodge, 125 Iowa 148, 100 N. W. 517; Mechanics' Nat. Bank *v.* Concord, 68 N. H. 607, 44 Atl. 704.

80. Dennis' Appeal, 72 Conn. 369, 44 Atl. 545, lease for 999 years.

81. Commercial Nat. Bank *v.* Chambers, 21 Utah 324, 61 Pac. 560, 56 L. R. A. 346.

82. New Orleans *v.* Mechanics,' etc., Ins. Co., 30 La. Ann. 876, 31 Am. Rep. 232; New Jersey Hedge Co. *v.* Craig, 51 N. J. L. 437, 17 Atl. 941; People *v.* Campbell, 138 N. Y. 543, 34 N. E. 370, 20 L. R. A. 453; Com. *v.* Pennsylvania Coal Co., 9 Pa. Dist. 486.

83. New York Biscuit Co. *v.* Cambridge, 161 Mass. 326, 37 N. E. 438; Com. *v.* Delaware Div. Canal Co., 123 Pa. St. 594, 16 Atl. 584, 2 L. R. A. 798; Delaware Mut. Safety Ins. Co. *v.* Loughlin, 2 Pa. Co. Ct. 600; Guarantee Trust Co. *v.* Loughlin, 17 Phila. (Pa.) 123; Newport Reading Room's Petition, 21 R. I. 440, 44 Atl. 511; Poultney Cong. Soc. *v.* Ashley, 10 Vt. 241, holding that a corporation, especially an eleemosynary corporation, cannot be taxed for money on hand or debts due to it.

84. **Tax on gross receipts from interstate business** see COMMERCE, 7 Cyc. 477, 479, 481, 483.

85. *Georgia.*— Atlanta Nat. Bldg., etc., Assoc. *v.* Stewart, 109 Ga. 80, 35 S. E. 73.

Maryland.— State *v.* U. S. Fidelity, etc., Co., 93 Md. 314, 48 Atl. 918; State *v.* Phila-

difference of opinion as to whether a tax of this character should be regarded as a tax on the franchise,[86] or an excise tax,[87] or a business or occupation tax,[88] or a property tax.[89]

j. Shares of Stock-Holders. Since the capital of a corporation, which is its property, is a distinct and separate thing from the interests of the stock-holders, represented by the shares they severally hold,[90] and since the principle which forbids duplicate taxation is not violated, at least according to the decisions in many states, by assessing the capital to the corporation and the shares to their holders,[91] it follows that shares of stock in a domestic or foreign corporation may properly be assessed for taxation to their holder at the place of his domicile, irrespective of the taxes which may be imposed on the corporation itself in respect to its capital or franchises.[92] This principle, however, is not universally

delphia, etc., R. Co., 45 Md. 361, 24 Am. Rep. 511.

Massachusetts.— Connecticut Mut. L. Ins. Co. *v.* Com., 133 Mass. 161.

Minnesota.— State *v.* Northwestern Tel. Exch. Co., 107 Minn. 390, 120 N. W. 534; State *v.* Duluth Gas, etc., Co., 76 Minn. 96, 78 N. W. 1032, 57 L. R. A. 63.

New Hampshire.— State *v.* Manchester, etc., R. Co., 70 N. H. 421, 48 Atl. 1103.

New York.— People *v.* Barker, 165 N. Y. 305, 59 N. E. 137, 151 [*reversing* 48 N. Y. App. Div. 248, 63 N. Y. Suppl. 167]; People *v.* Albany Ins. Co., 92 N. Y. 458; People *v.* Roberts, 32 N. Y. App. Div. 113, 52 N. Y. Suppl. 859 [*affirmed* in 157 N. Y. 677, 51 N. E. 1093].

Pennsylvania.— Com. *v.* New York, etc., R. Co., 150 Pa. St. 234, 24 Atl. 609; Philadelphia Ins. Contributionship *v.* Com., 98 Pa. St. 48; Jones, etc., Mfg. Co. *v.* Com., 69 Pa. St. 137; Phœnix Iron Co. *v.* Com., 59 Pa. St. 104; Com. *v.* McKean County, 24 Pa. Co. Ct. 33; Com. *v.* Anthracite Sav. Bank, 2 Dauph. Co. Rep. 208.

England.— Mersey Docks, etc., Bd. *v.* Lucas, 8 App. Cas. 891, 48 J. P. 212, 53 L. J. Q. B. 4, 49 L. T. Rep. N. S. 781, 39 Wkly. Rep. 34.

See 45 Cent. Dig. tit. "Taxation," § 220.

Receipts from ultra vires business.—Within the incidence of such a tax may be included receipts by the company derived from a business in which it had no authority to engage. People *v.* Roberts, 157 N. Y. 677, 51 N. E. 1093.

86. State *v.* Philadelphia, etc., R. Co., 45 Md. 361, 24 Am. Rep. 511; People *v.* Albany Ins. Co., 92 N. Y. 458; Com. *v.* New York, etc., R. Co., 150 Pa. St. 234, 24 Atl. 609; Philadelphia Ins. Contributionship *v.* Com., 98 Pa. St. 48.

From this principle it follows that no tax measured by gross receipts can be imposed on a corporation whose franchises and property are by law exempt from taxation. State *v.* Baltimore, etc., R. Co., 48 Md. 49.

87. Connecticut Mut. L. Ins. Co. *v.* Com., 133 Mass. 161.

88. Atlanta Nat. Bldg., etc., Assoc. *v.* Stewart, 109 Ga. 80, 35 S. E. 73.

89. State *v.* Northwestern Tel. Exch. Co., 107 Minn. 390, 120 N. W. 534, holding that the gross earnings tax provided for by the Minnesota statute is a tax on the property of the corporation and not on the corporation or upon the right to engage in business. See also New York L. Ins. Co. *v.* Bradley, 83 S. C. 418, 65 S. E. 433.

90. See *supra*, III, B, 1, g.

91. See *supra*, II, C, 5, c.

92. *California.*— San Francisco *v.* Flood, 64 Cal. 504, 2 Pac. 264.

Connecticut.— State *v.* Travelers' Ins. Co., 70 Conn. 590, 40 Atl. 465, 66 Am. St. Rep. 138.

Illinois.— Danville Banking, etc., Co. *v.* Parks, 88 Ill. 170.

Iowa.— Judy *v.* Beckwith, 137 Iowa 24, 114 N. W. 565, 15 L. R. A. N. S. 142.

Kentucky.— Com. *v.* Chesapeake, etc., R. Co., 116 Ky. 951, 77 S. W. 186, 25 Ky. L. Rep. 1126.

Louisiana.— Barton *v.* Board of Assessors, 37 La. Ann. 918. But see Chassaniol *v.* Orleans Parish Bd. of Assessors, 120 La. 777, 45 So. 604, holding that under the acts 1890 and 1898, only shares of stock in banking corporations are taxable to the shareholders.

Maryland.— Corry *v.* Baltimore, 96 Md. 310, 53 Atl. 942, 103 Am. St. Rep. 364; Crown Cork, etc., Co. *v.* State, 87 Md. 687, 40 Atl. 1074, 67 Am. St. Rep. 371.

Missouri.— Ogden *v.* St. Joseph, 90 Mo. 522, 3 S. W. 25.

New York.— *In re* Jones, 172 N. Y. 575, 65 N. E. 570, 60 L. R. A. 476.

North Carolina.— Belo *v.* Forsyth County Com'rs, 82 N. C. 415, 33 Am. Rep. 688.

Ohio.— Bradley *v.* Bauder, 36 Ohio St. 28, 38 Am. Rep. 547.

Pennsylvania.— Whitesell *v.* Northampton County, 49 Pa. St. 526.

Tennessee.— South Nashville St. R. Co. *v.* Morrow, 87 Tenn. 406, 11 S. W. 348; Memphis *v.* Ensley, 6 Baxt. 553, 32 Am. Rep. 532.

Virginia.— Jennings *v.* Com., 98 Va. 80, 34 S. E. 981; Com. *v.* Charlottesville Perpetual Bldg., etc., Co., 90 Va. 790, 20 S. E. 364, 44 Am. St. Rep. 950; Commonwealth Bank *v.* Richmond, 79 Va. 113.

Washington.— See Ridpath *v.* Spokane County, 23 Wash. 436, 63 Pac. 261.

United States.— Wright *v.* Louisville, etc., R. Co., 195 U. S. 219, 25 S. Ct. 16, 49 L. ed. 167; Sturges *v.* Carter, 114 U. S. 511, 5 S. Ct. 1014, 29 L. ed. 240; Farrington *v.* Tennessee, 95 U. S. 679, 24 L. ed. 558; Nevada

admitted,[93] and in some states the laws are so framed that stock-holders in a corporation are not taxed on their shares when the company itself pays taxes on its capital or property; [94] but if a particular corporation or class of corporations is not required to pay such taxes the stock-holders are subject to taxation on their shares.[95]

k. Dividends and Surplus. A tax on a corporation measured by its dividends is properly a franchise tax rather than a tax on property,[96] and it is to be noted that a tax of this kind imposed on the corporation is not inconsistent with taxing the dividends after they have been actually paid over to the stock-holders as a part of their property or income.[97] Within the meaning of such a law, a dividend

Nat. Bank *v.* Dodge, 119 Fed. 57, 56 C. C. A. 145.

See 45 Cent. Dig. tit. "Taxation," § 221.

Taxation of non-resident stock-holders see *supra*, III, A, 4, d, (I).

Taxation of resident stock-holders in foreign corporations see *infra*, III, B, 3, g.

Illegal and void corporations.— Shares of stock in a corporation which the supreme court has declared to be void are not taxable, since shares void as to all other purposes cannot be valid for the purpose of taxation. McDonald *v.* Haggerty, 7 Ohio Cir. Ct. 508, 4 Ohio Cir. Dec. 702.

93. See *supra*, II, C, 5, c.

94. *Arkansas.*— Dallas County *v.* Banks, 87 Ark. 484, 113 S. W. 37.

Georgia.— Atlanta *v.* Bankers' Financing Co., 130 Ga. 534, 61 S. E. 122; Georgia R., etc., Co. *v.* Wright, 125 Ga. 589, 54 S. E. 52 [*reversed* on other grounds in 207 U. S. 127, 28 S. Ct. 47, 52 L. ed. 134]. *Compare* Atlanta Nat. Bldg., etc., Assoc. *v.* Stewart, 109 Ga. 80, 35 S. E. 73.

Illinois.— St. Louis Consol. Coal Co. *v.* Miller, 236 Ill. 149, 86 N. E. 205.

Indiana.— Hasely *v.* Ensley, 40 Ind. App. 598, 82 N. E. 809, holding, however, that the statute does not apply to shares of stock in a foreign corporation, and that such shares are taxable to the shareholder whether the property of the corporation is taxed in a foreign state or not.

Kentucky.— Com. *v.* Harris, (1909) 118 S. W. 294; Com. *v.* Walsh, 133 Ky. 103, 106 S. W. 240, 32 Ky. L. Rep. 460, 117 S. W. 398; Com. *v.* Ledman, 127 Ky. 603, 106 S. W. 247, 32 Ky. L. Rep. 452; Com. *v.* Steele, 126 Ky. 670, 104 S. W. 687, 31 Ky. L. Rep. 1033; Com. *v.* Thomas, 119 Ky. 208, 83 S. W. 572, 26 Ky. L. Rep. 1128, 6 L. R. A. N. S. 320; Com. *v.* Ames, 106 S. W. 306, 32 Ky. L. Rep. 569.

Louisiana.— Allgeyer *v.* Board of Assessors, 121 La. 149, 46 So. 134; Chassaniol *v.* Orleans Parish Bd. of Assessors, 120 La. 777, 45 So. 604.

Missouri.— Valle *v.* Ziegler, 84 Mo. 214.

New Jersey.— State *v.* Ramsey, 54 N. J. L. 546, 24 Atl. 445; Jersey City Gaslight Co. *v.* Jersey City, 46 N. J. L. 194.

New York.— People *v.* New York Tax, etc., Com'rs, 4 Hun 595 [*affirmed* in 62 N. Y. 630].

Texas.— Gillespie *v.* Gaston, 67 Tex. 599, 4 S. W. 248.

It is not material so long as the corporation is taxed how or in what capacity or by whom the shares are held. Com. *v.* Ledman, 127 Ky. 603, 106 S. W. 247, 32 Ky. L. Rep. 452.

Property of corporation in different states. — Shareholders are not subject to taxation on their shares if the corporation itself is taxed on its franchises and property within the state, although a part of its property is in another state. Com. *v.* Harris, (Ky. 1909) 118 S. W. 294; Com. *v.* Walsh, 133 Ky. 103, 106 S. W. 240, 32 Ky. L. Rep. 460, 117 S. W. 398.

In Louisiana with the exception of banking corporations all corporations are required to pay taxes on all of their property, and the shareholders are not subject to taxation on their shares. Chassaniol *v.* Orleans Parish Bd. of Assessors, 120 La. 777, 45 So. 604.

Under the Wisconsin statute exempting from taxation stock in any corporation of the state which is required to pay taxes upon its property "in the same manner as individuals," the exemption does not apply to stock of a corporation where the corporation is not taxed on an *ad valorem* basis as individuals are, but is required to pay a license-fee and in addition thereto a certain percentage of its net income, notwithstanding such payment is in lieu of all other taxes except taxes upon its real estate. State *v.* Hinkel, 136 Wis. 66, 116 N. W. 639.

95. See Georgia R., etc., Co. *v.* Wright, 125 Ga. 589, 54 S. E. 52 [*reversed* on other grounds in 207 U. S. 127, 28 S. Ct. 47, 52 L. ed. 134]; Hasely *v.* Ensley, 40 Ind. App. 598, 82 N. E. 809; Ogden *v.* St. Joseph, 90 Mo. 522, 3 S. W. 25.

Shares in foreign corporations see *infra*, III, B, 3, g.

96. People *v.* Roberts, 158 N. Y. 162, 52 N. E. 1102; Phœnix Iron Co. *v.* Com., 59 Pa. St. 104. See also People *v.* Albany Ins. Co., 92 N. Y. 458.

97. Montgomery County Bd. of Revenue *v.* Montgomery Gaslight Co., 64 Ala. 269; Citizens' Mut. Ins. Co. *v.* Lott, 45 Ala. 185; Cleveland Trust Co. *v.* Lander, 19 Ohio Cir. Ct. 271, 10 Ohio Cir. Dec. 452.

Dividend deposited to stock-holder's credit. — Where a dividend is declared and directed to be deposited in a bank to the credit of the stock-holder, but to be held there until further order of the court, it is the property of the stock-holder and to be so taxed, and not to the bank. Pollard *v.* Newton First Nat. Bank, 47 Kan. 406, 28 Pac. 202.

Dividend payable in future.— The amount

is any distribution made or ordered to be made to stock-holders out of the earnings or profits of the company,[98] including a stock dividend;[99] but not including a mere numerical increase in the number of shares of stock of the corporation not representing any distribution of earnings or profits,[1] or a distribution or return to shareholders of the capital stock or any part of it or the property represented by it or of the assets of the company as distinguished from earnings.[2] Taking the word "dividend" in this sense, it has been held not to be material, for the purposes of the tax law, where or how it was earned,[3] or when it was earned,[4] or if actually declared whether it was earned or not.[5] If the tax is laid upon dividends exceeding a certain percentage of the capital stock, this will be taken as meaning

of a dividend declared by a corporation before the date fixed for the assessment of property for taxation, but payable at a future date, does not constitute part of the surplus fund of the corporation, taxable to it, but is a debt which the corporation is entitled to have deducted from its taxable assets. People *v.* Barker, 86 Hun (N. Y.) 131, 33 N. Y. Suppl. 388.

98. Com. *v.* Western Land, etc., Co., 156 Pa. St. 455, 26 Atl. 1034; Com. *v.* Pittsburg, etc., R. Co., 74 Pa. St. 83.

Profits applied to betterments are not 'dividends earned," within the meaning of that phrase in a tax statute. State *v.* Comptroller, 54 N. J. L. 135, 23 Atl. 122.

Distribution among members of limited partnership.— Under the Pennsylvania statute relating to limited partnerships, which gives to such associations most of the characteristics of a corporation, they are to be taxed on their capital stock, the tax being measured by any distribution or division of profits which corresponds to dividends in a corporation. See Com. *v.* Sanderson, etc., Imp. Co., 3 Dauph. Co. Rep. (Pa.) 116.

Scrip certificates are not properly dividends and are generally taxable to the corporation rather than to the stock-holders. See Adams *v.* Shields, 7 Ohio S. & C. Pl. Dec. 193, 5 Ohio N. P. 190.

99. State *v.* Farmers' Bank, 11 Ohio 94; Allegheny *v.* Pittsburgh, etc., R. Co., 179 Pa. St. 414, 36 Atl. 161; Lehigh Crane Iron Co. *v.* Com., 55 Pa. St. 448; Com. *v.* Cleveland, etc., R. Co., 29 Pa. St. 370; Com. *v.* Western Union Tel. Co., 2 Dauph. Co. Rep. (Pa.) 30.

1. Com. *v.* Erie, etc., R. Co., 74 Pa. St. 94; Com. *v.* Pittsburg, etc., R. Co., 74 Pa. St. 83; Com. *v.* Western Union Tel. Co., 2 Dauph. Co. Rep. (Pa.) 30.

There is no presumption that an increase of stock authorized by law is a stock dividend so as to be taxable, but whether the increase is real or only a pretense is a question of fact for the jury. Com. *v.* Erie, etc., R. Co., 74 Pa. St. 94.

Consolidation of corporations.— Where a consolidation of three corporations is effected by one of them absorbing the others and increasing its capital stock by more than double and dividing the increased stock among the shareholders in all three of the corporations, such distribution cannot be considered a stock dividend. Allegheny *v.* Federal St., etc., Pass. R. Co., 179 Pa. St. 424, 36 Atl. 320.

2. People *v.* Roberts, 41 N. Y. App. Div. 21, 58 N. Y. Suppl. 254; Credit Mobilier of America *v.* Com., 67 Pa. St. 233. And see Com. *v.* Central Transp. Co., 145 Pa. St. 89, 22 Atl. 209, in which case it appeared that the par value of the shares of stock of a corporation was reduced, and the difference between the old and new par was paid to the stock-holders in cash, and it was held that this was not a dividend but a reduction of the capital stock. On the other hand, in Com. *v.* Western Land, etc., Co., 156 Pa. St. 455, 26 Atl. 1034, where an enormous distribution to stock-holders was made, nearly equal to the capital stock, it was held to be a dividend and taxable, and a division of the capital or assets of the company, because it was shown that after this payment the market value of the stock did not sink below par.

3. People *v.* Roberts, 155 N. Y. 408, 50 N. E. 53, 41 L. R. A. 228, holding that it is immaterial that the dividends were earned outside the state and that the company made no profit on its business within the state.

4. State *v.* Franklin Bank, 10 Ohio 91. *Contra,* Com. *v.* Brush Electric Light Co., 145 Pa. St. 147, 22 Atl. 844.

Profits before enactment of law.— It has been held that the state is entitled to the tax on all dividends declared after the enactment of the statute, whether the profits accrued before or after the law went into effect. State *v.* Franklin Bank, 10 Ohio 91. But see People *v.* Albany Ins. Co., 92 N. Y. 458; Com. *v.* Wyoming Valley Canal Co., 50 Pa. St. 410; Com. *v.* Pennsylvania Ins. Co., 13 Pa. St. 165.

Under the Pennsylvania statute providing for a tax on corporations according to dividends where they have "made or declared" during any year dividends amounting to six per cent or more on the par value of their capital stock, and in other cases for taxation according to the actual appraised value, a corporation is not to be taxed according to dividends where its earnings during the year are less than six per cent and it declares a dividend of over six per cent made up in part of accumulated earnings of previous years in none of which did the earnings amount to six per cent and during which it had been taxed according to the actual value of its stock. Com. *v.* Brush Electric Light Co., 145 Pa. St. 147, 22 Atl. 844.

5. Columbia Conduit Co. *v.* Com., 90 Pa. St. 307; Com. *v.* Pittsburg, etc., R. Co., 74 Pa. St. 83.

the paid-up stock, not necessarily the authorized capital.[6] But no such construction of the law will be adopted as would enable the corporation or its officers to escape taxation by juggling with the mode or time of declaring dividends.[7]

l. Bonded and Other Debts of Corporations. In some states corporations are required to pay taxes on the amount of their bonds or other evidences of indebtedness.[8] Generally this is an indirect tax on the creditors of the corporation, the latter being required to pay the tax in the first instance, but with the expectation that it will recoup itself; as in Pennsylvania, where the statute requires the treasurer of a corporation to deduct the state tax from each payment of interest on its bonded or other debt,[9] except in so far as such debt may be held by nonresidents of the state,[10] and where it is held, in consequence of this provision, that no state tax is payable for any year in which no interest has been paid or in respect to any part of the corporate debt which does not bear interest.[11] In the absence of some such statute as this, however, the bonded or other debt of a corporation is not taxable to it, but to its creditors.[12]

m. Ownership or Possession of Property. Property held for a corporation by an agent, manager, or trustee is taxable to it under the same circumstances as in the case of an individual.[13] So also the corporation may be liable for the taxes on property in its possession and use, although it does not own the same in fee.[14]

6. Philadelphia *v.* Ridge Ave. Pass. R. Co., 102 Pa. St. 190; Philadelphia *v.* Philadelphia, etc., Ferry Pass. R. Co., 52 Pa. St. 177; Second St., etc., Pass. R. Co. *v.* Philadelphia, 51 Pa. St. 465; Citizens' Pass. R. Co. *v.* Philadelphia, 49 Pa. St. 251.

7. Philadelphia *v.* Ridge Ave. Pass. R. Co., 102 Pa. St. 190.

8. Simpson *v.* Hopkins, 82 Md. 478, 33 Atl. 714 (taxation of corporate bonds secured by mortgage on land partly without the state); People *v.* Michigan Southern, etc., R. Co., 4 Mich. 398 (taxation of bonds received by a corporation in exchange for its own bonds).

9. Com. *v.* Wilkes Barre, etc., R. Co., 162 Pa. St. 614, 29 Atl. 696; Com. *v.* Delaware, etc., Canal Co., 150 Pa. St. 245, 24 Atl. 599; Com. *v.* Pennsylvania Salt Mfg. Co., 145 Pa. St. 53, 22 Atl. 215; Com. *v.* Philadelphia, etc., Coal, etc., Co., 2 Dauph. Co. Rep. (Pa.) 400.

A full year's tax cannot be recovered upon bonds which have only been in existence during a portion of the year for which the tax is charged. Com. *v.* Philadelphia Traction Co., 1 Dauph. Co. Rep. (Pa.) 117.

Mortgage indebtedness.—A corporation taking land subject to a mortgage, which it does not assume, or paying interest on a mortgage only to protect its own equity, is not liable to be taxed in respect to such debt. Com. *v.* Hillside Coal, etc., Co., 1 Pa. Dist. 742; Com. *v.* Union Traction Co., 1 Dauph. Co. Rep. (Pa.) 169; Com. *v.* Langdon, 1 Dauph. Co. Rep. (Pa.) 123.

10. Com. *v.* Lehigh Valley R. Co., 186 Pa. St. 235, 40 Atl. 491; Com. *v.* Wilkes-Barre, etc., R. Co., 14 Pa. Co. Ct. 205; Com. *v.* Thirteenth St., etc., R. Co., 2 Dauph. Co. Rep. (Pa.) 391.

Creditors unknown.—A corporation is not liable for the tax on that part of its indebtedness reported by its treasurer as held by "persons unknown," where the court finds that the treasurer made diligent efforts to discover the names and addresses of the holders of its debt, and the state does not show that any part of the debt is actually held by residents. Com. *v.* Philadelphia, etc., Coal, etc., Co., 2 Dauph. Co. Rep. (Pa.) 400.

11. Com. *v.* Union Traction Co., 192 Pa. St. 507, 43 Atl. 1010; Com. *v.* Philadelphia, etc., Coal, etc., Co., 2 Dauph. Co. Rep. (Pa.) 400; Com. *v.* Union Traction Co., 1 Dauph. Co. Rep. (Pa.) 169; Com. *v.* Langdon, 1 Dauph. Co. Rep. (Pa.) 123; Com. *v.* Philadelphia Traction Co., 1 Dauph. Co. Rep. (Pa.) 117.

12. See Germania Trust Co. *v.* San Francisco, 128 Cal. 589, 61 Pac. 178; Consolidated Gas Co. *v.* Baltimore, 101 Md. 541, 61 Atl. 532, 109 Am. St. Rep. 584, 1 L. R. A. N. S. 263; State *v.* Branin, 23 N. J. L. 484.

13. Greene Foundation *v.* Boston, 12 Cush. (Mass.) 54; State *v.* Minneapolis Millers' Assoc., 30 Minn. 429, 16 N. W. 151; Credit Mobilier of America *v.* Com., 67 Pa. St. 233; Philadelphia Ins., etc., Co.'s Appeal, 17 Wkly. Notes Cas. (Pa.) 446.

Ownership and possession of property generally as affecting taxation see *supra*, III, A, 3.

14. Flax Pond Water Co. *v.* Lynn, 147 Mass. 31, 16 N. E. 742, holding that a corporation which owns the waters of a pond and all the dams, sluices, and waterways connected therewith is liable for the taxes on the real estate underlying the dams, although it is not the owner in fee.

So the land in and under a canal is taxable to a manufacturing company which owns the fee and the right to use the water, subject to the right of other persons to have the water flow through the canal for use beyond the premises of the company. Lowell *v.* Middlesex County, 152 Mass. 372, 25 N. E. 469, 9 L. R. A. 356.

n. Property Erroneously Left Untaxed. Property of a corporation which has escaped taxation for any year in consequence of its not being discovered, or through the mistake or inadvertence of the assessors, may afterward be assessed and charged with the tax,[15] provided the statutes authorize this course to be taken, for no such retrospective assessment can be made without statutory authority.[16]

2. Particular Kinds of Corporations — a. Banks and Other Financial Institutions. — (i) *In General.* Banking corporations, unless expressly exempt, are taxable in respect to their franchises and other property,[17] and the laws providing for their taxation are ordinarily so devised as to include savings banks [18] and trust companies which engage in the business of banking as a part of their usual employment,[19] but not unincorporated banking associations and private bankers, although these are taxed under the general laws.[20] The liability of a bank to taxation begins from the date of its beginning to exercise its corporate powers or opening for business;[21] and the liability of the bank to taxation continues

15. Alexandria Canal R., etc., Co. *v.* District of Columbia, 1 Mackey (D. C.) 217; Com. *v.* Citizens' Nat. Bank, 117 Ky. 946, 80 S. W. 158, 25 Ky. L. Rep. 2100; London *v.* Hope, 80 S. W. 817, 26 Ky. L. Rep. 112; Yazoo, etc., R. Co. *v.* Adams, 81 Miss. 90, 32 So. 937.

Franchises of corporation.— Under the Kentucky statute providing for the assessment of omitted property the assessing board has power to assess the franchise of a foreign corporation according to the law in force when the assessment should have been made. James *v.* American Surety Co., 133 Ky. 313, 117 S. W. 411.

16. *Alabama.*— Perry County *v.* Selma, etc., R. Co., 58 Ala. 546.

Illinois.— Wilmerton's Appeal, 206 Ill. 15, 68 N. E. 1050.

Kentucky.— Louisville, etc., R. Co. *v.* Christian County, 70 S. W. 180, 24 Ky. L. Rep. 894.

Ohio.— Miller *v.* Cincinnati First Nat. Bank, 8 Ohio Dec. (Reprint) 785, 9 Cinc. L. Bul. 353.

United States.— Lander *v.* Mercantile Nat. Bank, 118 Fed. 785, 55 C. C. A. 523.

An agreement by a bank to pay the taxes assessed on the shares of stock-holders does not make the bank liable for an assessment not returned or admitted by the stock-holders to be assessable, nor for any other than the current tax on the duplicate. Miller *v.* Cincinnati First Nat. Bank, 8 Ohio Dec. (Reprint) 785, 9 Cinc. L. Bul. 353.

17. Commonwealth Bank *v.* Com., 19 Pa. St. 144, holding that it is not necessary for the state to make any express provision for taxation in the charter of a bank and that if the charter is silent as to taxation and contains no stipulation for an exemption none will be implied.

18. Los Angeles *v.* State L. & T. Co., 109 Cal. 396, 42 Pac. 149; Louisville Sav. Bank *v.* Com., 14 B. Mon. (Ky.) 409.

19. Shelby County Trust Co. *v.* Shelbyville, 91 Ky. 578, 16 S. W. 460, 13 Ky. L. Rep. 150. See also Stone *v.* Louisville, 57 S. W. 627, 22 Ky. L Rep. 423; State *v.* Central Trust Co., 106 Md. 268, 67 Atl. 267.

20. Bowling Green *v.* Barclay, 91 Ky. 66, 14 S. W. 968, 12 Ky. L. Rep. 676, 10 L. R. A. 778; Com. *v.* Fleming County Farmers' Bank, 39 S. W. 1041, 19 Ky. L. Rep. 266; Com. *v.* McKean County, 200 Pa. St. 383, 49 Atl. 982. But see Providence Banking Co. *v.* Webster County, 108 Ky. 527, 57 S. W. 14, 22 Ky. L. Rep. 214, holding that under the Kentucky statutes requiring certain corporations, including incorporated banks, to pay franchise taxes, and providing that persons and unincorporated associations engaged in the business of the corporations named shall be treated as corporations for purposes of taxation, an unincorporated banking company is subject to the payment of a franchise tax.

New York state banks.— Associations formed under the general banking law of New York are corporations, within the meaning of the tax laws, and liable to taxation on their capital. Niagara County *v.* People, 7 Hill (N. Y.) 504; People *v.* Watertown, 1 Hill (N. Y.) 616; Watertown Bank *v.* Watertown, 25 Wend. (N. Y.) 686.

"Banker."— Within the meaning of the United States internal revenue laws imposing a tax on banks and bankers, one whose business is buying and selling stocks for his customers and who employs capital in his business and has a regular place for transacting it is a banker. Richmond *v.* Blake, 132 U. S. 592, 10 S. Ct. 204, 33 L. ed. 481. But a trust company which loans only its own money, taking bonds and mortgages therefor, which it sells with a guaranty, and which sells only its own property and not that received from other owners for sale is not a "banker" within the meaning of the statute. Selden *v.* Equitable Trust Co., 94 U. S. 419, 24 L. ed. 249.

21. Farmers' L. & T. Co. *v.* Newton, 97 Iowa 502, 66 N. W. 784 (but no liability to taxation where the organization of the corporation was abandoned before any business was done); People *v.* Miller, 177 N. Y. 51, 69 N. E. 124 [*reversing* 85 N. Y. App. Div. 211, 83 N. Y. Suppl. 185] (but bank not liable for full year's franchise tax, where it had been in business only six days at the time of assessment); Oswego Bank *v.* Oswego, 12 Wend. (N. Y.) 544 (bank may be assessed for a village tax voted before it went into

until its voluntary liquidation or winding up in insolvency proceedings,[22] or until its charter expires.[23]

(II) *Franchises and Privileges.*[24] Banking corporations may be and frequently are required to pay franchise taxes,[25] but a bank is not liable for such a tax after it has lost or been deprived of the right to exercise its corporate franchises.[26]

(III) *Capital and Stock.*[27] The capital of a banking corporation is its property, and is liable to taxation,[28] provided the legislature so determines, for no such tax can be laid without legislative authority.[29] It is necessary in this connection to discriminate between "capital" and "capital stock," the former being, as stated, the property of the bank and rightly taxable to it, and the latter being more appropriately taxed to the shareholders according to their respective interests, or, if it is assessed to the bank, being considered rather as a measure of the value of the bank's franchise than as its property.[30] In strict propriety of

operation if, before the assessment is made, it derives an income from its capital).

22. Ryan *v.* Gallatin County, 14 Ill. 78; Metcalf *v.* Messenger, 46 Barb. (N. Y.) 325.

Liability pending insolvency proceedings.— An insolvent savings bank in the hands of a receiver for the purpose of liquidation is still liable for a property-tax (Bartlett *v.* Carter, 59 N. H. 105), but not for a franchise tax (see *infra*, III, B, 2, a, (II).

23. Jones *v.* Winthrop Sav. Bank, 66 Me. 242; State *v.* Waldo Bank, 20 Me. 470.

Change from state to national bank.— Under a statute enabling state banks to become national banks, and providing that they shall pay all taxes imposed by the state laws to the date of their becoming national banks, a state bank is liable for taxes to the date of the auditor-general's certificate of its compliance with the enabling act. Manufacturers', etc., Bank *v.* Com., 72 Pa. St. 70.

24. **Corporate franchise** generally see *supra*. III, B, 1, f.

25. *Kentucky.*— Providence Banking Co. *v.* Webster County, 108 Ky. 527, 57 S. W. 14, 22 Ky. L. Rep. 214, holding further that under the Kentucky statutes unincorporated banking companies as well as incorporated companies are liable for the franchise tax.

Louisiana.— State *v.* Citizens' Bank, 52 La. Ann. 1086, 27 So. 709.

Maryland.— Fidelity Sav. Bank *v.* State, 103 Md. 206, 63 Atl. 484; State *v.* German Sav. Bank, 103 Md. 196, 63 Atl. 481; Westminster *v.* Westminster Sav. Bank, 92 Md. 62, 48 Atl. 34; Baltimore *v.* Baltimore, etc., R. Co., 6 Gill 288, 48 Am. Dec. 531.

Massachusetts.— Com. *v.* People's Five Cents Sav. Bank, 5 Allen 428.

New York.— People *v.* Peck, 22 Misc. 477, 50 N. Y. Suppl. 820 [*affirmed* in 32 N. Y. App. Div. 624, 52 N. Y. Suppl. 259 (*affirmed* in 157 N. Y. 51, 51 N. E. 412)].

Tennessee.— State *v.* Nashville Sav. Bank, 16 Lea 111; State *v.* Lincoln Sav. Bank, 14 Lea 42.

Tax on deposits as franchise tax see *infra*, III, B, 2, a, (VI).

Foreign banks.— In New York it is held that the statutes providing for the taxation of the "privileges and franchises" of savings banks manifestly have no application to foreign savings banks. People *v.* Coleman, 135 N. Y. 231, 31 N. E. 1022.

26. Jones *v.* Winthrop Sav. Bank, 66 Me. 242 (holding that a bank whose charter has expired is not liable for a franchise tax where such tax had not become a subsisting debt against it at the time the charter expired); Com. *v.* Lancaster Sav. Bank, 123 Mass. 493 (holding that a bank which is in the hands of a receiver and perpetually enjoined from transacting business is not liable for a franchise tax); State *v.* Bradford Sav. Bank, etc., 71 Vt. 234, 44 Atl. 349 (holding that a bank is not liable for a franchise tax where it has been enjoined from transacting its business and a receiver is winding up its affairs).

But a bank continues subject to taxation if it is in the hands of its officers and not entirely deprived of the right to exercise its franchise or of the profit and benefit derived therefrom, although it is restrained by a temporary injunction from receiving deposits and paying depositors, and restricted as to the character of its investments. Com. *v.* Barnstable Sav. Bank, 126 Mass. 526 [*distinguishing* Com. *v.* Lancaster Sav. Bank, 123 Mass. 493].

27. **Capital invested in non-taxable property** generally see *supra*, III, B, 1, g, (IV).

Capital invested in United States securities generally see *infra*, III, D, 3, b.

28. State *v.* State Bank, 6 Blackf. (Ind.) 349; New Orleans *v.* People's Bank, 27 La. Ann. 646. See also Shelby County Trust Co. *v.* Shelbyville, 91 Ky. 578, 16 S. W. 460, 13 Ky. L. Rep. 150; Iron City Bank *v.* Pittsburg, 37 Pa. St. 340; *Ex p.* Lewin, 11 Can. Sup. Ct. 484.

29. Union, etc., Bank *v.* Memphis, 107 Tenn. 66, 64 S. W. 13; Union, etc., Bank *v.* Memphis, 101 Tenn. 154, 46 S. W. 557; Union Bank *v.* State, 9 Yerg. (Tenn.) 490.

Local taxation.— A banking institution is not liable to municipal or other local taxation unless specially so declared by statute. Cherokee Ins., etc., Co. *v.* Justices Whitfield County, 28 Ga. 121; Connersville *v.* State Bank, 16 Ind. 105.

30. See the cases cited *infra*, notes 31, 32; and, generally, *supra*, III, B, 1, g, (I).

language therefore the capital of a bank is the aggregate of its property invested and employed in its business, having regard to the market value of the various items rather than to the number and par value of its shares;[31] while its capital stock consists of the total amount contributed or paid in by the shareholders in exchange for their certificates of stock.[32] Ordinarily if the shareholders are taxed upon their shares the bank is not required to pay a tax upon its capital stock;[33] and under some statutes all of the capital, assets, and property of the bank other than its real estate is included in the valuation of the shares of stock as assessed to the stock-holders.[34]

(IV) *SHARES OF STOCK-HOLDERS.* Shares of stock in a banking corporation are taxable as the personal property of their respective owners,[35] and this, according to the principles stated in the preceding section,[36] is not a tax on the capital of the bank,[37] and may be laid without regard to the fact that part of the assets of the bank may be taxed separately to it or may be exempt from taxation,[38] although under some statutes if the banking corporation is taxed upon its capital or property the stock-holders are not subject to taxation on their shares.[39] The assessment is ordinarily to be made to the person appearing of record on the books of the bank as the owner of the shares;[40] but it is a perfectly proper provision,

31. *Louisiana.*— New Orleans *v.* New Orleans Canal, etc., Co., 29 La. Ann. 851.

Mississippi.— Bailey *v.* Fuqua, 24 Miss. 497.

New York.— People *v.* New York Tax, etc., Com'rs, 80 N. Y. 573.

Pennsylvania.— Com. *v.* Merchants' Nat. Bank, 19 Pa. Co. Ct. 274.

Texas.— Dallas City Bank *v.* Bogel, 51 Tex. 355.

United States.— New Orleans *v.* Citizens' Bank, 167 U. S. 371, 17 S. Ct. 905, 42 L. ed. 202.

See 45 Cent. Dig. tit. "Taxation," § 230.

32. *Indiana.*— State Bank *v.* Brackenridge, 7 Blackf. 395.

Iowa.— Iowa State Sav. Bank *v.* Burlington, 98 Iowa 737, 61 N. W. 851; Davenport Nat. Bank *v.* Davenport Bd. of Equalization, 64 Iowa 140, 19 N. W. 889 [*affirmed* in 123 U. S. 83, 8 S. Ct. 73, 31 L. ed. 94].

Kentucky.— Com. *v.* Commonwealth Bank, 9 B. Mon. 1.

New York.— People *v.* New York Tax, etc., Com'rs, 40 Barb. 334; People *v.* Lane, 41 Misc. 1, 83 N. Y. Suppl. 606.

Wisconsin.— Superior First Nat. Bank *v.* Douglas County, 124 Wis. 15, 102 N. W. 315; State Bank *v.* Milwaukee, 18 Wis. 281.

See 45 Cent. Dig. tit. "Taxation," § 230.

33. See Jefferson County Sav. Bank *v.* Hewitt, 112 Ala. 546, 20 So. 926; American Bank *v.* Mumford, 4 R. I. 478.

Taxation of shares of stock-holders see *infra*, III, B, 2, a, (IV).

34. Lenawee County Sav. Bank *v.* Adrian, 66 Mich. 273, 33 N. W. 304; American Bank *v.* Mumford, 4 R. I. 478.

35. *Connecticut.*— Barrett's Appeal, 73 Conn. 288, 47 Atl. 243.

Iowa.— Henkle *v.* Keota, 68 Iowa 334, 27 N. W. 250. *Compare* McGregor *v.* McGregor Branch State Bank, 12 Iowa 79.

Missouri.— State *v.* Shryack, 179 Mo. 424, 78 S. W. 808.

Montana.— Daly Bank, etc., Co. *v.* Silver Bow County, 33 Mont. 101, 81 Pac. 950.

Ohio.— Cleveland Trust Co. *v.* Lander, 62 Ohio St. 266, 56 N. E. 1036.

Tennessee.— Union Bank *v.* State, 9 Yerg. 490.

Texas.— Harrison *v.* Vines, 46 Tex. 15.

Utah.— Commercial Nat. Bank *v.* Chambers, 21 Utah 324, 61 Pac. 560, 56 L. R. A. 346.

Canada.— *In re* Kingston Ct. of Revision, 9 Can. L. J. N. S. 259. *Compare In re* Cobourg Ct. of Revision, 9 Can. L. J. N. S. 294.

See 45 Cent. Dig. tit. "Taxation," § 233.

Shares of stock-holders generally see *supra*, III, B, 1, j.

36. See *supra*, III, B, 2, a, (III).

37. See Gillespie *v.* Gaston, 67 Tex. 599, 4 S. W. 248; Union Bank *v.* Richmond, 94 Va. 316, 26 S. E. 821.

38. Mechanics' Nat. Bank *v.* Baker, 65 N. J. L. 113, 46 Atl. 586; People *v.* Feitner, 30 Misc. (N. Y.) 215, 63 N. Y. Suppl. 464; New Orleans *v.* Citizens' Bank, 167 U. S. 371, 17 S. Ct. 905, 42 L. ed. 202 [*reversing* 54 Fed. 73]. See also, generally, *supra*, III, B, 1, j.

An exemption of the capital of a bank from taxation does not necessarily exempt its shareholders from taxation on their shares of stock. New Orleans *v.* Citizens' Bank, 167 U. S. 371, 17 S. Ct. 905, 42 L. ed. 202.

39. Atlanta *v.* Bankers' Financial Co., 130 Ga. 534, 61 S. E. 122. See also, generally, *supra*, III, B, 1, j.

40. People *v.* Barker, 87 Hun (N. Y.) 194, 33 N. Y. Suppl. 1042 [*affirmed* in 148 N. Y. 731, 42 N. E. 725].

Subscription partly paid.— An individual who subscribes for shares of stock in a bank and pays part of the amount, and conveys his shares to the bank to secure the residue, is liable to be taxed for the amount thus paid in as the owner of the stock. Tucker *v.* Aiken, 7 N. H. 113.

Shares held for another.— The statutes authorizing the taxation of bank stock are generally construed not to include shares held by a

and one which is now quite usual, to require the bank to pay the tax in the first instance and look to the stock-holders or the dividends due them for reimbursement.[41]

(v) *Dividends and Surplus.* Banking institutions, like other corporations, may be and frequently are taxed in proportion to their dividends;[42] but this is properly a franchise tax and not a tax on profits or on their property.[43] The surplus fund or undivided profits of a bank belong to it, rather than to its stock-holders, and are therefore taxable to the bank;[44] but the rule is otherwise where a surplus fund is accumulated in accordance with statutory provisions for the security of depositors or held in reserve as a protection or guaranty for them, and which cannot be used in making dividends; this is not taxable as undivided profits.[45]

(vi) *Deposits.* In some cases it is held that money deposited with a bank in the ordinary form of general deposit becomes the property of the bank and ceases to be the property of the depositor, while at the same time the depositor becomes a creditor, and the bank a debtor, to the amount of the deposit;[46] while in other cases it is held that the depositor is to be regarded as the owner of the deposit,[47] which is to be considered as money on hand and not as a debt due from the bank,[48] the bank being regarded merely as a custodian or quasi-trustee.[49] So in some cases it is held that money thus deposited is taxable to the bank as its property,[50] while another line of cases holds that the several sums deposited should

person as trustee or in any representative capacity. Revere *v.* Boston, 123 Mass. 375; *In re* Kingston Ct. of Revision, 9 Can. L. J. N. S. 259.

Non-resident stock-holders.— It is competent for the state to assign to shares of stock in banks a *situs* at the place of business of the bank and to assess and tax the same, although held by non-resident shareholders. Abingdon Bank *v.* Washington County, 88 Va. 293, 13 S. E. 407; Scandinavian-American Bank *v.* Pierce County, 20 Wash. 155, 55 Pac. 40. *Compare* Mechanics' Bank *v.* Thomas, 26 N. J. L. 121; Nickle *v.* Douglas, 35 U. C. Q. B. 126.

41. *Alabama.*— Jefferson County Sav. Bank *v.* Hewitt, 112 Ala. 546, 20 So. 926.

Kentucky.— Hager *v.* Citizens' Nat. Bank, 127 Ky. 192, 105 S. W. 403, 914, 32 Ky. L. Rep. 95.

Missouri.— State *v.* Carterville First Nat. Bank, 180 Mo. 717, 79 S. W. 943.

Nebraska.— Bressler *v.* Wayne County, 82 Nebr. 758, 118 N. W. 1054; State *v.* Fleming, 70 Nebr. 523, 529, 97 N. W. 1063.

Pennsylvania.— Truby's Appeal, 96 Pa. St. 52.

Virginia.— Union Bank *v.* Richmond, 94 Va. 316, 26 S. E. 821.

Washington.— Jefferson County *v.* Port Townsend First Nat. Bank, 38 Wash. 255, 80 Pac. 449.

Application of rule to national bank stock see *infra*, III, B, 2, b, (IV), (A).

42. See State *v.* Commercial Bank, 7 Ohio 125; Easton Bank *v.* Com., 10 Pa. St. 442; Allegheny County *v.* Schoenberger, 1 Grant (Pa.) 35; State *v.* St. Philip Parish, etc., Tax-Collector, 2 Bailey (S. C.) 654.

43. See *supra*, III, B, 1, k.

44. Union Five Cents Sav. Bank's Petition, 68 N. H. 384, 36 Atl. 17; State *v.* Bank of Commerce, 95 Tenn. 221, 31 S. W. 993; Second Ward Sav. Bank *v.* Milwaukee, 94 Wis. 587, 69 N. W. 359; State Bank *v.* Milwaukee, 18 Wis. 281.

45. Laconia Sav. Bank *v.* Laconia, 67 N. H. 324, 38 Atl. 384; People *v.* Peck, 157 N. Y. 51, 51 N. E. 412 [*affirming* 32 N. Y. App. Div. 624, 52 N. Y. Suppl. 259 (*affirming* 22 Misc. 477, 50 N. Y. Suppl. 820)]; People *v.* Barker, 154 N. Y. 122, 47 N. E. 1103; Provident Life, etc., Co. *v.* Board of Tax Revision, 12 Pa. Dist. 613; Mechanics' Sav. Bank *v.* Granger, 17 R. I. 77, 20 Atl. 202.

46. New Orleans *v.* New Orleans Canal, etc., Co., 29 La. Ann. 851; Scammon *v.* Kimball, 92 U. S. 362, 23 L. ed. 483; Thompson *v.* Riggs, 5 Wall. (U. S.) 663, 18 L. ed. 704.

47. Branch *v.* Marengo, 43 Iowa 600; Com. *v.* Wathen, 126 Ky. 573, 104 S. W. 364, 31 Ky. L. Rep. 980.

48. Campbell *v.* Riviere, (Tex. Civ. App.) 22 S. W. 993; Campbell *v.* Wiggins, 2 Tex. Civ. App. 1, 20 S. W. 730.

49. Branch *v.* Marengo, 43 Iowa 600; Com. *v.* Wathen, 126 Ky. 573, 104 S. W. 364, 3 Ky. L. Rep. 980; Owensboro Deposit Bank *v.* Owensboro, 102 Ky. 174, 39 S. W. 1030, 19 Ky. L. Rep. 248, 44 L. R. A. 825.

50. *California.*— Los Angeles *v.* State L. & T. Co., 109 Cal. 396, 42 Pac. 149; Yuba County *v.* Adams, 7 Cal. 35.

Iowa.— State Exch. Bank *v.* Parkersburg, 112 Iowa 104, 83 N. W. 793.

Massachusetts.— Com. *v.* Barnstable Sav. Bank, 126 Mass. 526; Com. *v.* People's Five Cents Sav. Bank, 5 Allen 428.

Nevada.— State *v.* Carson City Sav. Bank, 17 Nev. 146, 30 Pac. 703.

New Hampshire.— Union Five Cents Sav. Bank's Petition, 68 N. H. 384, 36 Atl. 17. And see Somersworth Sav. Bank *v.* Somersworth, 68 N. H. 402, 44 Atl. 534.

New Jersey.—Bridgewater Tp. *v.* Amerman, 37 N. J. L. 408.

be taxed to the depositors.[51] The opinion has also been advanced that the money of a depositor may be taxed to him, and the deposits of the bank, including his, also be taxed to the bank;[52] although this has been held, particularly in the case of savings banks, to be objectionable as double taxation.[53] Still another doctrine is that while the bank may be taxed on the amount of its deposits, it is rather to be regarded as a franchise tax than as a tax on property.[54] The courts of New York maintain the rule that, for the purpose of ascertaining the amount of taxable property of a savings bank, the amount of its deposits should be deducted from its gross assets, as being a liability.[55]

(VII) *LOANS AND INVESTMENTS.* Under the general laws for the taxation of intangible personal property, or under laws relating specially to banking institutions, these corporations are held to be taxable on notes, mortgages, stocks, bonds, and other securities and evidences of indebtedness representing their loans, discounts, and investments.[56] In several states, however, it is held that savings

Ohio.— Patton *v.* Commercial Bank, 10 Ohio S. & C. Pl. Dec. 321, 7 Ohio N. P. 401.

Pennsylvania.— Philadelphia Sav. Fund Soc. *v.* Yard, 9 Pa. St. 359.

Vermont.— Montpelier Sav. Bank, etc., Co. *v.* Montpelier, 73 Vt. 364, 50 Atl. 1117.

See 45 Cent. Dig. tit. "Taxation," § 236.

Deposits invested in realty.— Under the law of Maryland, deposits in a savings bank which it has invested in real estate, on which real estate it pays taxes, are not taxable to the bank. State *v.* Central Sav. Bank, 67 Md. 290, 10 Atl. 290, 11 Atl. 357.

51. *Iowa.*— Branch *v.* Marengo, 43 Iowa 600.

Kentucky.— Com. *v.* Commerce Bank, 118 Ky. 547, 81 S. W. 679, 26 Ky. L. Rep. 407; Owensboro Deposit Bank *v.* Daviess County, 102 Ky. 174, 39 S. W. 1030, 44 L. R. A. 825.

Nebraska.— Critchfield *v.* Nance County, 77 Nebr. 807, 110 N. W. 538.

New Hampshire.— *In re* Perry, 16 N. H. 44.

Rhode Island.— Providence Sav. Inst. *v.* Gardiner, 4 R. I. 484.

Texas.— Campbell *v.* Riviere, (Civ. App. 1893) 22 S. W. 993; Campbell *v.* Wiggins, 2 Tex. Civ. App. 1, 20 S. W. 730.

See 45 Cent. Dig. tit. "Taxation," § 236.

Depositor indebted to bank.— While a bank may credit a customer's deposit on his overdue paper held by the bank, the money belongs to the customer, and is subject to his checks until the bank exercises this right; and, until this is actually done, the money is taxable in the depositor's hands as if he owed nothing to the bank. Com. *v.* Wathen, 126 Ky. 573, 104 S. W. 364, 31 Ky. L. Rep. 980.

General or special deposits.— The Nebraska statute requiring every person to list all his moneys for taxation, and providing that the word "money" shall include "money deposited in bank," is not restricted to special deposits but includes general deposits. Critchfield *v.* Nance County, 77 Nebr. 807, 110 N. W. 538.

A time deposit in a private banking institution is taxable to the depositor as a credit. Hall *v.* Greenwood County, 22 Kan. 37.

52. Yuba County *v.* Adams, 7 Cal. 35; New London Sav. Bank *v.* New London, 20 Conn. 111; Columbus Exch. Bank *v.* Hines, 3 Ohio St. 1.

53. See *supra*, II, C, 1.

54. Coite *v.* Hartford Sav. Soc., 32 Conn. 173; Jones *v.* Winthrop Sav. Bank, 66 Me. 242; Com. *v.* Lancaster Sav. Bank, 123 Mass. 493; Com. *v.* People's Five Cents Sav. Bank, 5 Allen (Mass.) 428; Provident Sav. Inst. *v.* Massachusetts, 6 Wall. (U. S.) 611, 18 L. ed. 907; Connecticut Sav. Soc. *v.* Coite, 6 Wall. (U. S.) 594, 18 L. ed. 897. *Contra*, Wyatt *v.* State Bd. of Equalization, 74 N. H. 552, 70 Atl. 387; Bartlett *v.* Carter, 59 N. H. 105.

55. People *v.* Barker, 154 N. Y. 128, 47 N. E. 973; Matter of Haight, 32 N. Y. App. Div. 496, 53 N. Y. Suppl. 226; People *v.* Barker, 19 N. Y. App. Div. 64, 45 N. Y. Suppl. 811 [*reversed* on other grounds in 154 N. Y. 122, 47 N. E. 1103]; People *v.* Beers, 67 How. Pr. (N. Y.) 219.

56. *Illinois.*— Republic Bank *v.* Hamilton, 21 Ill. 53.

Kentucky.— German Bank *v.* Louisville, 108 Ky. 377, 56 S. W. 504, 22 Ky. L. Rep. 9.

Michigan.— Latham *v.* Detroit Bd. of Assessors, 91 Mich. 509, 52 N. W. 15.

Mississippi.— U. S. Bank *v.* State, 12 Sm. & M. 456.

New York.— People *v.* Coleman, 135 N. Y. 231, 31 N. E. 1022 [*affirming* 18 N. Y. Suppl. 675].

Ohio.— Stark County Bank *v.* McGregor, 6 Ohio St. 45, holding that under the tax law of 1852, all the assets of a bank, including specie and balances in other banks, must, if employed in any way whereby the bank obtains or reserves interest, profit, or a consideration, be averaged for taxation; but specie unemployed, not on hand for sale, and from which the bank derives no profit, need not be returned to the assessor, nor balances due from other banks on which no interest, profit, or consideration is reserved or received.

Pennsylvania.— Pennsylvania Ins. Co. *v.* Loughlin, 139 Pa. St. 612, 21 Atl. 163; Philadelphia Sav. Fund Soc. *v.* Yard, 9 Pa. St. 359; Com. *v.* McKean County, 24 Pa. Co. Ct. 33. *Compare* Hunter's Appeal, 3 Pa. Cas. 1, 10 Atl. 429.

Washington.— Pacific Nat. Bank *v.* Pierce County, 20 Wash. 675, 56 Pac. 936.

banks are not taxable on loans and investments made out of the money deposited with them.[57]

(VIII) *Ownership or Possession of Property.* A banking institution is taxable on property held by it in trust in the same manner and to the same extent as other trustees.[58] It is also to be taxed for real estate which it holds, although the same is taken for a debt, or is not used in connection with its business.[59]

b. National Banks — (I) *In General.* As the national banks are agencies or instrumentalities of the general government, no state can exercise any control over them, nor subject them to taxation in any manner or to any extent, except only in so far as congress permits.[60] The only concession congress has made to the states in this respect is to allow the taxation of shares of stock in the national banks and to permit their real estate to be taxed.[61] Hence no state can require the payment of a license-tax by a national bank,[62] nor impose a tax on its franchises,[63]

Canada.— Union Bank *v.* Macleod, 4 Northwest. Terr. 407. But see *In re* Yarmouth Bank, 2 Nova Scotia Dec. 308, holding that where the statute provides for the imposition and collection of taxes on "personal chattels of every kind," loans and investments are not included in this phrase.

See 45 Cent. Dig. tit. "Taxation," § 237.

The Iowa statute provides for taxation on the average value of money and credits of corporations making loans, but does not apply where loans were made in the name of the corporation by private persons, but the corporation never had any of the money in its possession or control. Farmers' L. & T. Co. *v.* Newton, 97 Iowa 502, 66 N. W. 784.

Foreign investments.— Capital of a bank is not exempt from taxation because it is invested in foreign countries. Nevada Bank *v.* Sedgwick, 104 U. S. 111, 26 L. ed. 703.

Investments in United States securities see *infra*, III, D, 3, b.

57. Worcester County Sav. Inst. *v.* Worcester, 10 Cush. (Mass.) 128; Somersworth Sav. Bank *v.* Somersworth, 68 N. H. 402, 44 Atl. 534; Providence Sav. Inst. *v.* Gardiner, 4 R. I. 484; Rutland Sav. Bank *v.* Rutland, 52 Vt. 463.

Under the Pennsylvania statute of 1897 a savings bank which pays a tax upon its capital stock is exempt from taxation on bonds of a corporation owned by it. Peoples Sav. Bank *v.* Monongahela River Consol. Coal, etc., Co., 29 Pa. Super. Ct. 153.

58. Philadelphia Sav. Fund Soc.'s Appeal, 4 Pa. L. J. Rep. 155.

59. Bank of Commerce *v.* Tennessee, 104 U. S. 493, 26 L. ed 810 [*affirming* 6 Lea (Tenn.) 703].

60. *Alabama.*— National Commercial Bank *v.* Mobile, 62 Ala. 284, 34 Am. Rep. 15.

Georgia.— Macon *v.* Macon First Nat. Bank, 59 Ga. 648.

Idaho.— Weiser Nat. Bank *v.* Jeffreys, 14 Ida. 659, 95 Pac. 23.

Kentucky.— Schuster *v.* Louisville, 89 S. W. 689, 28 Ky. L. Rep. 588.

Maine.—Abbott *v.* Bangor, 56 Me. 310; Stetson *v.* Bangor, 56 Me. 274.

Maryland.— Frederick County *v.* Farmers', etc., Bank, 48 Md. 117.

Massachusetts.— Flint *v.* Boston Bd. of Aldermen, 99 Mass. 141, 96 Am. Dec. 713.

New York.— See People *v.* Feitner, 191 N. Y. 88, 83 N. E. 592 [*reversing* 120 N. Y. App. Div. 838, 105 N. Y. Suppl. 993].

Pennsylvania.— Pittsburg *v.* Pittsburg First Nat. Bank, 55 Pa. St. 45.

United States.— Owensboro Nat. Bank *v.* Owensboro, 173 U. S. 664, 19 S. Ct. 537, 43 L. ed. 856; Farmers', etc., Nat. Bank *v.* Dearing, 91 U. S. 29, 23 L. ed. 196; Stapylton *v.* Thaggard, 91 Fed. 93, 33 C. C. A. 353; Covington City Nat. Bank *v.* Covington, 21 Fed. 484; Paducah City Nat. Bank *v.* Paducah, 5 Fed. Cas. No. 2,743, 2 Flipp. 61; Omaha First Nat. Bank *v.* Douglas County, 9 Fed. Cas. No. 4,799, 3 Dill. 330; St. Louis Nat. Bank *v.* Papin, 21 Fed. Cas. No. 12,239, 4 Dill. 29.

See 45 Cent. Dig. tit. "Taxation," §§ 23 *et seq.*

State bank converted into national bank. —A state bank which reorganizes as a national bank is liable for the state taxes up to the time of its conversion. Manufacturers,' etc., Bank *v.* Com., 72 Pa. St. 70 And see Com. *v.* Girard Nat. Bank, 6 Phila. (Pa.) 431.

61. *California.*— San Francisco First Nat. Bank *v.* San Francisco, 129 Cal. 96, 61 Pac. 778.

Connecticut.— Middletown Nat. Bank *v.* Middletown, 74 Conn. 449, 51 Atl. 138.

Idaho.— Weiser Nat. Bank *v.* Jeffreys, 14 Ida. 659, 95 Pac. 23.

Iowa.— Oskaloosa Nat. State Bank *v.* Young, 25 Iowa 311.

Nevada.— State *v.* Nevada First Nat. Bank, 4 Nev. 348.

United States.—Albuquerque First Nat. Bank *v.* Albright, 208 U. S. 548, 28 S. Ct. 349, 52 L. ed. 614 [*affirming* 13 N. M. 514, 86 Pac. 548]; Owensboro Nat. Bank *v.* Owensboro, 173 U. S. 664, 19 S. Ct. 537, 43 L. ed. 850.

Power of territories.— The territories have the same power as the states to tax the real property and the shares of national banks situated within their limits. People *v.* Moore, 1 Ida. 504; Silver Bow County *v.* Davis, 6 Mont. 306, 12 Pac. 688; Talbott *v.* Silver Bow County, 139 U. S. 438, 11 S. Ct. 594, 35 L. ed. 210.

62. Macon *v.* Macon First Nat. Bank, 59 Ga. 648.

63. Graves County *v.* Mayfield First Nat. Bank, 108 Ky. 194, 56 S. W. 16, 21 Ky. L.

or on its furniture or other personal property,[64] nor on its mortgages or other loans or investments;[65] and a state statute laying a tax on the presidents of all banks must be held invalid so far as it purports to affect the presidents of the national banks.[66]

(II) *Capital Stock.* The capital stock of a national bank, considered as the property of the bank and as distinct from the interests of its stock-holders, as represented by their shares of stock, is not subject to any taxation by the states or by their authority, whether in the form of a franchise tax or a tax on the property itself;[67] the only way such stock can be reached being by an assessment of the shares of the different stock-holders.[68]

(III) *Real Estate.* Under the express provision of the act of congress

Rep. 1656; Schuster *v.* Louisville, 89 S. W. 689, 28 Ky. L. Rep. 588; Louisville Third Nat. Bank *v.* Stone, 174 U. S. 432, 19 S. Ct. 759, 43 L. ed. 1035; Owensboro Nat. Bank *v.* Owensboro, 173 U. S. 664, 19 S. Ct. 537, 43 L. ed. 850; Louisville First Nat. Bank *v.* Stone, 88 Fed. 409.

64. *Arizona.*— Arizona Nat. Bank *v.* Long, 6 Ariz. 311, 57 Pac. 639.

California.— San Francisco First Nat. Bank *v.* San Francisco, 129 Cal. 96, 61 Pac. 778; People *v.* Mills Nat. Bank, 123 Cal. 53, 55 Pac. 685, 69 Am. St. Rep. 32, 45 L. R. A. 747.

Iowa.— Oskaloosa Nat. State Bank *v.* Young, 25 Iowa 311.

Kentucky.— See Paducah City Nat. Bank *v.* Paducah, (1888) 9 S. W. 218.

Montana.— Billings First Nat. Bank *v.* Province, 20 Mont. 374, 51 Pac. 821.

Nevada.— State *v.* Nevada First Nat. Bank, 4 Nev. 348.

United States.— Owensboro Nat. Bank *v.* Owensboro, 173 U. S. 664, 19 S. Ct. 537, 43 L. ed. 850; San Francisco *v.* Crocker-Woolworth Nat. Bank, 92 Fed. 273; Covington City Nat. Bank *v.* Covington, 21 Fed. 484.

65. Winnemucca First Nat. Bank *v.* Kreig, 21 Nev. 404, 32 Pac. 641.

66. Linton *v.* Childs, 105 Ga. 567, 32 S. E. 617.

67. *Georgia.*— Macon *v.* Macon First Nat. Bank, 59 Ga. 648.

Idaho.— Weiser Nat. Bank *v.* Jeffreys, 14 Ida. 659, 95 Pac. 23.

Iowa.— Judy *v.* National State Bank, 133 Iowa 252, 110 N. W. 605.

Kansas.— Leoti First Nat. Bank *v.* Fisher, 45 Kan. 726, 26 Pac. 482. See also Pollard *v.* Newton First Nat. Bank, 47 Kan. 406, 28 Pac. 202.

Kentucky.— Owen County Ct. *v.* Farmers' Nat. Bank, 59 S. W. 7, 22 Ky. L. Rep. 916.

Michigan.— Smith *v.* Tecumseh First Nat. Bank, 17 Mich. 479.

New Jersey.— State *v.* Newark, 39 N. J. L. 380.

Ohio.— Miller *v.* Cincinnati First Nat. Bank, 46 Ohio St. 424, 21 N. E. 860.

Texas.— Lampasas First Nat. Bank *v.* Lampasas, 33 Tex. Civ. App. 530, 78 S. W. 42.

Utah.— Salt Lake City Nat. Bank *v.* Golding, 2 Utah 1.

United States.— Owensboro Nat. Bank *v.* Owensboro, 173 U. S. 664, 19 S. Ct. 537, 43 L. ed. 850; Bradley *v.* Illinois, 4 Wall. 459, 18 L. ed. 433; Bank of Commerce *v.* New York, 2 Black 620, 17 L. ed. 451; Brown *v.* French, 80 Fed. 166; Collins *v.* Chicago, 6 Fed. Cas. No. 3,011, 4 Biss. 472; Omaha First Nat. Bank *v.* Douglas County, 9 Fed. Cas. No. 4,809, 3 Dill. 298.

See 45 Cent. Dig. tit. "Taxation," §§ 24, 231.

Tax on surplus earnings.— In New Hampshire it has been held that a statute providing for the taxation of stock-holders on the par value of their shares and taxation of the bank on its surplus in excess of the surplus required to be kept on hand by the act of congress is not in conflict with the federal statutes, it being held that such surplus represents a voluntary accumulation of undivided profits, and that to tax the shares of the shareholders at their par value and the surplus to the bank, and the payment of such taxes by the bank out of its profits, decreasing to that extent the profits subject to division among the stock-holders, is in effect the same as taxing the stock-holders alone upon the market value of their shares. Peterborough First Nat. Bank *v.* Peterborough, 56 N. H. 38, 32 Am. Rep. 416.

Waiver or estoppel.— It has been held that where a national bank voluntarily returns its capital stock for taxation, and states, in its answer in an action to recover the taxes thereon as increased on equalization, that it is willing to pay the tax as returned, it may be held liable for the taxes on the value of its stock as returned, although an assessment thereof would be unauthorized, but will not be held liable for any amount due to the increase of valuation. Lampasas First Nat. Bank *v.* Lampasas, 33 Tex. Civ. App. 530, 78 S. W. 42. But an assessment upon the capital stock of a national bank is not merely irregular but void, and the bank is not estopped to recover taxes paid under protest under such an assessment by the fact that its cashier through mistake listed such capital for taxation or by the fact that it did not apply to the board of equalization for relief against the assessment, such board having no jurisdiction in regard to property over which the taxing authority has no jurisdiction. Weiser Nat. Bank *v.* Jeffreys, 14 Ida. 659, 95 Pac. 23.

68. Miller *v.* Cincinnati First Nat. Bank, 46 Ohio St. 424, 21 N. E. 860; Collins *v.* Chicago, 6 Fed. Cas. No. 3,011, 4 Biss. 472. See also cases cited *supra*, note 67.

Taxation of shares of stock-holders see *infra*, III, B, 2, b, (IV).

the real property of national banks is liable to taxation by the states,[69] and the right to tax such property being thus established its liability to taxation in particular states depends upon the state statutes.[70] If, however, a portion of the capital of the bank is invested in real estate and the bank is taxed upon such real estate, its value should be deducted in estimating the value of the stock for the purpose of taxing the shareholders on their shares;[71] or conversely, if the shareholders are taxed on the full market value of their shares without any deduction, such real property, in order to avoid double taxation, should not be assessed as such against the bank.[72]

(IV) *SHARES OF STOCK-HOLDERS* — (A) *In General.*[73] An owner of shares of stock in a national bank is not exempt from taxation thereon by reason of the nature of the institution or its relation to the federal government; on the contrary, by express permission of the act of congress, such shares are assessable and taxable to him, under state laws, like any other personal property.[74] But it must

69 *Alabama.*—National Commercial Bank *v.* Mobile, 62 Ala. 284, 34 Am. Rep. 15.

Idaho.—Weiser Nat. Bank *v.* Jeffreys, 14 Ida. 659, 95 Pac. 23.

Indiana.— Loftin *v.* Citizens' Nat. Bank, 85 Ind. 341.

Iowa.— National State Bank *v.* Young, 25 Iowa 311.

Nevada.— State *v.* State First Nat. Bank, 4 Nev. 348.

Pennsylvania.— Chester County *v.* Chester County Nat. Bank, 1 Chest. Co. Rep. 130.

Wisconsin.— Superior First Nat. Bank *v.* Douglas County, 124 Wis. 15, 102 N. W. 315.

United States.— McCulloch *v.* Maryland, 4 Wheat. 316, 4 L. ed. 579; Covington City Nat. Bank *v.* Covington, 21 Fed. 484; Titusville Second Nat. Bank *v.* Caldwell, 13 Fed. 429.

See 45 Cent. Dig. tit. "Taxation," § 232.

70. Superior First Nat. Bank *v.* Douglas County, 124 Wis. 15, 102 N. W. 315. See also Rosenberg *v.* Weekes, 67 Tex. 578, 4 S. W. 899.

Under the Connecticut statutes certain corporations, including banks, are taxed directly upon real estate owned by them except such as is required for the transaction of their appropriate business, but real property of the latter character is not taxed directly to the bank but indirectly through the tax laid upon the shareholders. Middletown Nat. Bank *v.* Middletown, 74 Conn. 449, 51 Atl. 138.

In Texas under Rev. St. (1879) the real estate of national banks is not subject to taxation. Rosenberg *v.* Weekes, 67 Tex. 578, 4 S. W. 899.

Under the Wisconsin statutes relating to the taxation of banks, and made applicable to national banks, a bank is not subject to taxation on real estate which is clearly shown to have been purchased with and to constitute a part of its capital as distinguished from surplus or money on deposit. Superior First Nat. Bank *v.* Douglas County, 124 Wis. 15, 102 N. W. 315.

71. Loftin *v.* Citizens' Nat. Bank, 85 Ind. 341; Morgan County *v.* Martinsville First Nat. Bank, 25 Ind. App. 94, 57 N. E. 728; People *v.* Tax, etc., Com'rs, 80 N. Y. 573.

In order to avoid discrimination if the value of real estate is deducted in valuing the capital stock in the case of state banks, such deduction must also be allowed in the case of national banks. Loftin *v.* Citizens' Nat. Bank, 85 Ind. 341.

Building on leased property.—Where the bank has invested a part of its capital in a building erected by it on leased land, the building being the property of the bank and taxable under the statutes as real estate, only the value of the building should be deducted in assessing the value of the shares of stock. People *v.* Tax, etc., Com'rs, 80 N. Y. 573.

72. Rice County *v.* Citizens' Nat. Bank, 23 Minn. 280. But see Morgan County *v.* Martinsville First Nat. Bank, 25 Ind. App. 94, 57 N. E. 728, holding that where the statutes expressly provide for an assessment of real estate to the bank and a deduction of its value in estimating the value of the shares of stock, if the shareholders are assessed without such deduction no wrong is done except to them, and that the bank is not entitled to recover the taxes paid by it upon the real estate which was properly assessed to it.

73. **Place of taxation** see *infra*, V, F, 4, b.

74. *Alabama.*— Sumter County *v.* Gainesville Nat. Bank, 62 Ala. 464, 34 Am. Rep. 30.

California.— McHenry *v.* Downer, 116 Cal. 20, 47 Pac. 779, 45 L. R. A. 737.

Idaho.—Weiser Nat. Bank *v.* Jeffreys, 14 Ida. 659, 95 Pac. 23.

Illinois.— See People *v.* McCall, 43 Ill. 286.

Iowa.—Morseman *v.* Younkin, 27 Iowa 350.

Kentucky.— Citizens' Nat. Bank *v.* Com., 118 Ky. 51, 80 S. W. 479, 25 Ky. L. Rep. 2254, 81 S. W. 686, 26 Ky. L. Rep. 62; Scobee *v.* Bean, 109 Ky. 526, 59 S. W. 860, 22 Ky. L. Rep. 1076; Com. *v.* Louisville First Nat. Bank, 4 Bush 98, 96 Am. Dec. 285.

Maine.— Stetson *v.* Bangor, 56 Me. 274.

Massachusetts.—Austin *v.* Boston, 14 Allen 359.

Minnesota.— Smith *v.* Webb, 11 Minn. 500.

Missouri.— Curtis *v.* Ward, 58 Mo. 295; Hannibal First Nat. Bank *v.* Meredith, 44 Mo. 500; Lionberger *v.* Rowse, 43 Mo. 67.

New York.— People *v.* Feitner, 191 N. Y. 88, 83 N. E. 592 [*reversing* 120 N. Y. App. Div. 838, 105 N. Y. Suppl. 993]; Utica *v.* Churchill, 33 N. Y. 161. *Compare* Sandy Hill First Nat. Bank *v.* Fancher, 48 N. Y. 524.

be distinctly borne in mind that it is the interest of the stock-holder, not of the bank, that is taxable, and hence the assessment must be made in the name of the individual shareholder; it is not permissible to assess the aggregate of shares of stock *in solido* to the bank itself.[75] At the same time the state courts have power to compel the officers of a national bank to exhibit to the assessors the lists of their shareholders,[76] and furnish information upon which the assessment of the shares may be made; [77] and the state may make the bank its agent for the collection of the tax, and may require the bank to pay the aggregate amount of the taxes assessed against its stock-holders, in the first instance, and authorize it

Ohio.— Frazer *v.* Siebern, 16 Ohio St. 614; Parker *v.* Siebern, 3 Ohio Dec. (Reprint) 441, 5 Am. L. Reg. N. S. 526.

Pennsylvania.— Mintzer *v.* Montgomery County, 54 Pa. St. 139; Strong *v.* O'Donnell, 32 Leg. Int. 283.

Texas.— Dean *v.* Kopperl, 1 Tex. App. Civ. Cas. § 746.

Utah.— Salt Lake City Nat. Bank *v.* Golding, 2 Utah 1.

West Virginia.— Old Nat. Bank *v.* State, 58 W. Va. 559, 52 S. E. 494, 3 L. R. A. N. S. 584.

Wisconsin.— Bagnall *v.* State, 25 Wis. 112.

United States.—Van Slyke *v.* Wisconsin, 154 U. S. 581, 14 S. Ct. 1168, 20 L. ed. 240; Covington First Nat. Bank *v.* Covington, 129 Fed. 792 [*affirmed* in 198 U. S. 100, 25 S. Ct. 562, 49 L. ed. 963]; Wilmington First Nat. Bank *v.* Herbert, 44 Fed. 158; Omaha First Nat. Bank *v.* Douglas County, 9 Fed. Cas. No. 4,799, 3 Dill. 330.

See 45 Cent. Dig. tit. "Taxation," §§ 27, 234.

Territories as well as the states have power to tax the shares of stock-holders of national banks. People *v.* Moore, 1 Ida. 504; Silver Bow County *v.* Davis, 6 Mont. 306, 12 Pac. 688 [*affirmed* in 139 U. S. 438, 11 S. Ct. 594, 35 L. ed. 210].

The statute permits but does not require the taxation of shares of national bank stock in the absence of local legislation providing therefor. State Nat. Bank *v.* Long, 6 Ariz. 311, 57 Pac. 639.

What interest taxed.—Where a state law taxes shares of national bank stock, it taxes the same interest of the stock-holder which he would transfer on a sale of his certificate; and hence the tax is laid on the whole interest of the stock-holder represented by his stock, including his interest as such in the surplus and undivided profits as well as in the authorized capital and assets of the bank. Covington City Nat. Bank *v.* Covington, 21 Fed. 484.

Increase of capital stock.—Where a national bank increases its capital stock, the new shares are not taxable until the increase is approved by the controller of the currency and his certificate issued, notwithstanding they are paid for before that time and included in a dividend declaration. Charleston *v.* People's Nat. Bank, 5 S. C. 103, 22 Am. Rep. 1.

Tax on business invalid.— A tax on the average quarterly business of a national bank is not a tax on the shares of stock, and is not permitted by the act of congress. Pittsburg *v.* Pittsburg First Nat. Bank, 55 Pa. St. 45.

75. *Alabama.*— Sumter County *v.* Gainesville Nat. Bank, 62 Ala. 464, 34 Am. Rep. 30; National Commercial Bank *v.* Mobile, 62 Ala. 284, 34 Am. Rep. 15.

Illinois.— Mendota First Nat. Bank *v.* Smith, 65 Ill. 44.

Kansas.— Leoti First Nat. Bank *v.* Fisher, 45 Kan. 726, 26 Pac. 482.

Missouri.— Springfield *v.* Springfield First Nat. Bank, 87 Mo. 441; State *v.* Dowling, 50 Mo. 134; Hannibal First Nat. Bank *v.* Meredith, 44 Mo. 500.

New Mexico.— Albuquerque First Nat. Bank *v.* Albright, 13 N. M. 514, 86 Pac. 548.

New York.— People *v.* Tax Com'rs, 35 N. Y. 423.

Ohio.— Miller *v.* Cincinnati First Nat. Bank, 46 Ohio St. 424, 21 N. E. 860.

Texas.—Waco Nat. Bank *v.* Rogers, 51 Tex. 606.

United States.— Stapylton *v.* Thaggard, 91 Fed. 93, 33 C. C. A. 353; Virginia Nat. Bank *v.* Richmond, 42 Fed. 877; Richmond First Nat. Bank *v.* Richmond, 39 Fed. 309. But see Aberdeen First Nat. Bank *v.* Chehalis County, 166 U. S. 440, 17 S. Ct. 629, 41 L. ed. 1069 [*affirming* 6 Wash. 64, 32 Pac. 1051], holding that if the statutes show that the intention is to tax the shareholders and not the capital of the bank, and the bank is merely required to pay the tax "as the agent" of its stock-holders and authorized to pay the same out of their individual profit account or charge the same to the expense account or to the accounts of the shareholders, the assessment may be made *in solido* to the bank direct.

See 45 Cent. Dig. tit. "Taxation," §§ 27, 234.

Bank as stock-holder.— A state may tax the shares of a national bank without regard to their ownership, the shares of stock of a national bank owned by another national bank not being exempt by reason of such ownership. Redemption Nat. Bank *v.* Boston, 125 U. S. 60, 8 S. Ct. 772, 31 L. ed. 689.

76. Paul *v.* McGraw, 3 Wash. 296, 28 Pac. 532; Youngstown First Nat. Bank *v.* Hughes, 6 Fed. 737.

Listing by stock-holders.— The owners of shares of stock in a national bank may be compelled to list them for taxation. Com. *v.* Jackson, 61 S. W. 700, 22 Ky. L. Rep. 1788.

77. Hager *v.* Citizens' Nat. Bank, 127 Ky. 192, 105 S. W. 403, 914, 32 Ky. L. Rep. 95.

to reimburse itself from them individually,[78] or at least where the bank has funds in its hands equitably belonging to the shareholders sufficient for this purpose,[79] and when this is done, the ordinary processes for the collection of taxes on personalty may be put into operation against the bank.[80]

(B) *Non-Resident Stock-Holders.* Under the federal statutes providing that shares of stock in national banks shall be taxed "at the place where said bank is located and not elsewhere," [81] and declaring such provision as to the place to mean "the state in which" the bank is located,[82] the state has jurisdiction to tax the shares of national banks within its limits, although owned by non-residents; and conversely, the owner cannot be taxed where he resides if the bank is located in another state.[83] Shares of non-residents must be taxed in the town or city where the bank is located.[84]

(V) *Discrimination Against National Bank Stock* — (A) *In General.* The national bank act of 1864 limited the right of the states to tax shares of stock

78. *Kentucky.*— Hager *v.* Citizens' Nat. Bank, 127 Ky. 192, 105 S. W. 403, 914, 32 Ky. L. Rep. 95; Com. *v.* Citizens' Nat. Bank, 117 Ky. 946, 80 S. W. 158, 25 Ky. L. Rep. 2100.

New Jersey.— Mechanics' Nat. Bank *v.* Baker, 65 N. J. L. 113, 46 Atl. 586; Farmers' Nat. Bank *v.* Cook, 32 N. J. L. 347.

New Mexico.— See Albuquerque Nat. Bank *v.* Perea, 5 N. M. 664, 25 Pac. 776.

New York.— People *v.* Feitner, 191 N. Y. 88, 83 N. E. 592 [*affirming* 120 N. Y. App. Div. 838, 105 N. Y. Suppl. 993].

Pennsylvania.— Gorley *v.* Bowlby, 8 Pa. Co. Ct. 17. *Compare* Markoe *v.* Hartranft, 15 Am. L. Reg. 487.

United States.— Merchants', etc., Nat. Bank *v.* Pennsylvania, 167 U. S. 461, 17 S. Ct. 829, 42 L. ed. 236; Aberdeen First Nat. Bank *v.* Chehalis County, 166 U. S. 440, 17 S. Ct. 629, 41 L. ed. 1069; Lionberger *v.* Rowse, 9 Wall. 468, 19 L. ed. 721; Louisville First Nat. Bank *v.* Kentucky, 9 Wall. 353, 19 L. ed. 701; Charleston Nat. Bank *v.* Melton, 171 Fed. 743; Hager *v.* American Nat. Bank, 159 Fed. 396, 86 C. C. A. 334; Whitney Nat. Bank *v.* Parker, 41 Fed. 402.

Nature of tax.—Where shares of a banking association are assessed under Laws (1896), c. 908, § 24, the tax is assessed against the shares owned by the respective shareholders and not against the capital of the bank, and the tax, although collectable by the bank, is due from the owners of the stock and is a property tax, so that the bank is not entitled to have it reduced because it has only enjoyed the benefit of government protection for a portion of the year. People *v.* Wells, 58 Misc. (N. Y.) 252, 110 N. Y. Suppl. 829.

79. Charleston Nat. Bank *v.* Melton, 171 Fed. 743, where it is said that it might be that an attempt to make the bank pay the tax of a shareholder where there were no accrued dividends or earnings upon the shares owned by the shareholder in the hands of the bank out of which such payment could be made would amount to an attempt to make one person pay the debt of another, but that no such objection can be raised where the bank does have in its hands funds equitably belonging to the shareholder sufficient for such purpose.

Effect of insolvency.— No proceedings for the collection of the tax can be maintained against the receiver of an insolvent national bank, where the property represented by the shares has disappeared, since the receiver could not in such case be reimbursed, and consequently the tax would fall on the assets of the bank, rather than on the shareholders. Baker *v.* King County, 17 Wash. 622, 50 Pac. 481; Boston *v.* Beal, 51 Fed. 306.

80. Palmer *v.* McMahon, 133 U. S. 660, 10 S. Ct. 324, 33 L. ed. 772; State Nat. Bank *v.* Morrison, 22 Fed. Cas. No. 13,325, 1 McCrary 204.

81. See State *v.* Haight, 31 N. J. L. 399; People *v.* Tax Com'rs, 35 N. Y. 423.

82. See Mendota First Nat. Bank *v.* Smith, 65 Ill. 44; Strong *v.* O'Donnell, 10 Phila. (Pa.) 575.

83. *Alabama.*— McIver *v.* Robinson, 53 Ala. 456.

Idaho.— People *v.* Moore, 1 Ida. 504.

Illinois.— Mendota First Nat. Bank *v.* Smith, 65 Ill. 44.

Maine.— See Abbott *v.* Bangor, 54 Me. 540.

Massachusetts.— Providence Sav. Inst. *v.* Boston, 101 Mass. 575, 3 Am. Rep. 407.

Minnesota.— Smith *v.* Webb, 11 Minn. 500.

New Jersey.— Crossley *v.* East Orange, 62 N. J. L. 583, 41 Atl. 712; De Baun *v.* Smith, 55 N. J. L. 110, 25 Atl. 277; Farmers' Nat. Bank *v.* Cook, 32 N. J. L. 347.

New York.— Williams *v.* Weaver, 75 N. Y. 30; People *v.* Tax Com'rs, 35 N. Y. 423.

North Carolina.— Moore *v.* Fayetteville, 80 N. C. 154, 30 Am. Rep. 75; Kyle *v.* Fayetteville, 75 N. C. 445.

Ohio.— Cleveland Trust Co. *v.* Lander, 62 Ohio St. 266, 56 N. E. 1036.

Pennsylvania.— Bucks *v.* Ely, 6 Phila. 414.

United States.—Tappan *v.* Merchants' Nat. Bank, 19 Wall. 490, 22 L. ed. 189; Lionberger *v.* Rowse, 9 Wall. 468, 19 L. ed. 721.

See 45 Cent. Dig. tit. "Taxation," § 29.

No personal liability.— Although the state may thus tax stock owned by a non-resident, it cannot impose on him any personal liability for the taxes. New York *v.* McLean, 57 N. Y. App. Div. 601, 68 N. Y. Suppl. 606.

84. See Buie *v.* Fayetteville, 79 N. C. 267; Strong *v.* O'Donnell, 10 Phila. (Pa.) 575.

in the national banks by providing that such taxation should not "exceed the rate imposed upon the shares in any of the banks organized under the authority of the state." [85] This was amended in 1868, by omitting the reference to state banks and providing that "the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State." [86] The former provision was construed as meaning that if a state imposed no taxes on shares of stock in its own banks, neither could it tax stock in the national banks at all; [87] and the same rule was applied where the state imposed a tax on the capital stock of the state banks but exempted their shares in the hands of the individual stock-holders.[88] The later statute is intended to prevent any unfair or unfriendly discrimination against the national banks,[89] and does not require a state to follow the same methods in assessing and collecting taxes on the shares of the national banks which may be adopted in the case of state banks; [90] nor does it require perfect equality as between these different classes of property,[91] and so does not prohibit a discrimination which is in favor of the national bank stock,[92] although such discrimination might be illegal as being in violation of the provisions of a state constitution.[93] The prohibition as to a discrimination in the "rate" of taxation is not, however, restricted to the rate per cent but applies to the burden of the tax,[94] whether resulting from a discrimination in the rate of taxation or in the valuation of the property.[95]

85. See Van Slyke *v.* State, 23 Wis. 655; 13 U. S. St. at L. 111.

86 See People *v.* Feitner, 191 N. Y. 88, 83 N. E. 592; Cleveland Trust Co. *v.* Lander, 62 Ohio St. 266, 56 N. E. 1036; Merchants,' etc., Bank *v.* Pennsylvania, 167 U. S. 461, 17 S. Ct. 829, 42 L. ed. 236; U. S. Rev. St. (1878) § 5219 [U. S. Comp. St. (1901) p 3502].

87. Wright *v.* Stilz, 27 Ind. 338; Hubbard *v.* Johnson County, 23 Iowa 130; Frazer *v.* Siebern, 16 Ohio St. 614; Lionberger *v.* Rowse, 9 Wall. (U. S.) 468, 19 L. ed. 721; Bradley *v.* Illinois, 4 Wall. (U. S.) 459, 18 L. ed. 433; Van Allen *v.* Assessors, 3 Wall. (U. S.) 573, 18 L. ed. 229.

Charter exemption of state banks.—Where a state lays a tax at a certain rate upon shares of stock in all banks generally, the statute is not invalid in its application to national banks merely because there are two banks of issue in the state which, by their charters, are exempted from taxation. Lionberger *v.* Rowse, 9 Wall. (U. S.) 468, 19 L. ed. 721 [*affirming* 43 Mo. 67].

88. Smith *v.* Tecumseh First Nat. Bank, 17 Mich. 479; Matheson *v.* Boyd, 32 N. J. L. 273; Salt Lake City Nat. Bank *v.* Golding, 2 Utah 1; Bradley *v.* Illinois, 4 Wall. (U. S.) 459, 18 L. ed. 433; Van Allen *v.* Assessors, 3 Wall. (U. S.) 573, 18 L. ed. 229. But see Van Slyke *v.* State, 23 Wis. 655.

89. *Iowa.*— National State Bank *v.* Burlington, 119 Iowa 696, 94 N. W. 234.

New York.— People *v.* Feitner, 191 N. Y. 88, 83 N. E. 592; People *v.* Barton, 44 Barb. 148.

Oregon.— Ankeny *v.* Blakley, 44 Oreg. 78, 74 Pac. 485.

Pennsylvania.— Boyer's Appeal, 103 Pa. St. 387.

United States.— Adams *v.* Nashville, 95 U. S. 19, 24 L. ed. 369; City Nat. Bank *v.* Paducah, 5 Fed. Cas. No. 2,743, 3 Flipp. 61; Omaha First Nat. Bank *v.* Douglas County, 9 Fed. Cas. No. 4,799, 3 Dill. 330.

90. *California.*— Crocker *v.* Scott, 149 Cal. 575, 87 Pac. 102.

Kentucky.— Owensboro Deposit Bank *v.* Daviess County, 102 Ky. 174, 39 S. W. 1030, 19 Ky. L. Rep. 248, 44 L. R. A. 825.

New Jersey.— North Ward Nat. Bank *v.* Newark, 39 N. J. L. 380.

New York.— People *v.* Feitner, 191 N. Y. 88, 83 N. E. 592.

United States.— Covington *v.* Covington First Nat. Bank, 198 U. S. 100, 25 S. Ct. 562, 49 L. ed. 963; San Francisco Nat. Bank *v.* Dodge, 197 U. S. 70, 25 S. Ct. 384, 49 L. ed. 669; Nevada Nat. Bank *v.* Dodge, 119 Fed. 57, 56 C. C. A. 145.

See also *infra*, III, B, 2, b, (v), (c).

91. Davenport Nat. Bank *v.* Davenport Bd. of Equalization, 123 U. S. 83, 8 S. Ct. 73, 31 L. ed. 94.

92. Davenport Nat. Bank *v.* Davenport Bd. of Equalization, 123 U. S. 83, 8 S. Ct. 73, 31 L. ed. 94. See also Com. *v.* Covington Nat. Bank, 7 Ky. L. Rep. 41.

93. Cleveland Trust Co. *v.* Lander, 62 Ohio St. 266, 282, 56 N. E. 1036, where the court said: "The burden must be equal. The taxation on national bank shares cannot be greater than upon capital invested in state banks by reason of said section 5219, and it cannot be less by reason of section two of article twelve of our constitution."

Constitutional provisions: Requiring equality and uniformity in taxation see *supra*, II, B. Requiring taxation according to value see *supra*, II, D.

94. Miller *v.* Heilbron, 58 Cal. 133; Cleveland Trust Co. *v.* Lander, 62 Ohio St. 266, 56 N. E. 1036; Ankeny *v.* Blakley, 44 Oreg, 78, 74 Pac. 485.

95. Cleveland Trust Co. *v.* Lander, 62 Ohio St. 266, 56 N. E. 1036; Ankeny *v.* Blakley, 44 Oreg. 78, 74 Pac. 485. See also *infra*, III, B, 2, b, (v), (c).

(B) *Meaning of "Moneyed Capital."* The term "moneyed capital," as used in the act of congress above referred to, means capital employed in the form of money and not in any other form which capital may assume and so employed in business as to yield a profit from its use as money.[96] Hence capital invested and employed in railroads, public service corporations, insurance, mining, manufacturing, and other such forms of business is not within the meaning of the statute.[97] It is restricted to capital employed in substantially the same way as the capital of the national banks, that is, in making loans and discounts,[98] and in fact there is a strong tendency to limit the phrase to banking operations pure and simple,[99] excluding on the one hand the operations of trust companies and of savings banks; [1] and on the other hand the operations of private individuals in loaning money on mortgages or other securities,[2] and to interpret the phrase "moneyed capital" as meaning no more than those forms of capital which come into actual competition with the capital of the national banks in the same kind of operations.[3]

(C) *What Constitutes Illegal Discrimination.* The act of congress is designed to prevent the taxation of national bank stock at a higher rate than is imposed on other moneyed capital; if the burden imposed is no greater, there is no legal ground of complaint.[4] The act does not require that the mode or manner of taxing such stock shall correspond in all respects to that adopted in taxing other moneyed capital,[5] and a different system may be adopted with reference to such

96. Richmond First Nat. Bank *v.* Turner, 154 Ind. 456, 57 N. E. 110; Talbott *v.* Silver Bow County, 139 U. S. 438, 11 S. Ct. 594, 35 L. ed. 210; Puget Sound Nat. Bank *v.* King County, 57 Fed. 433; Exchange Nat. Bank *v.* Miller, 19 Fed. 372.

97. Consolidated Nat. Bank *v.* Pima County, 5 Ariz. 142, 48 Pac. 291; Silver Bow County *v.* Davis, 6 Mont. 306, 12 Pac. 688; McMahon *v.* Palmer, 102 N. Y. 176, 6 N. E. 400, 55 Am. Rep. 796; Aberdeen First Nat. Bank *v.* Chehalis County, 166 U. S. 440, 17 S. Ct. 629, 41 L. ed. 1069; Talbott *v.* Silver Bow County, 139 U. S. 438, 11 S. Ct. 594, 35 L. ed. 210; Redemption Nat. Bank *v.* Boston, 125 U. S. 60, 8 S. Ct. 772, 31 L. ed. 689; Mercantile Nat. Bank *v.* New York, 121 U. S. 138, 7 S. Ct. 826, 30 L. ed. 895.

98. Talbott *v.* Silver Bow County, 139 U. S. 438, 11 S. Ct. 594, 35 L. ed. 210; Mercantile Nat. Bank *v.* New York, 121 U. S. 138, 7 S. Ct. 826, 30 L. ed. 895; Mercantile Nat. Bank *v.* Shields, 59 Fed. 952.

99. Ankeny *v.* Blakley, 44 Oreg. 78, 74 Pac. 485; Palmer *v.* McMahon, 133 U. S. 660, 10 S. Ct. 324, 33 L. ed. 772; Mercantile Nat. Bank *v.* New York, 121 U. S. 138, 7 S. Ct. 826, 30 L. ed. 895; Hepburn *v.* Carlisle School Directors, 23 Wall. (U. S.) 480, 23 L. ed. 112.

1. Jenkins *v.* Neff, 163 N. Y. 320, 57 N. E. 408 [*affirming* 47 N. Y. App. Div. 394, 62 N. Y. Suppl. 321 (*affirming* 29 Misc. 59, 60 N. Y. Suppl. 582), and *affirmed* in Jenkins *v.* Neff, 186 U. S. 230, 22 S. Ct. 905, 46 L. ed. 1140]; Redemption Nat. Bank *v.* Boston, 125 U. S. 60, 8 S. Ct. 772, 31 L. ed. 689; Mercantile Nat. Bank *v.* New York, 121 U. S. 138, 7 S. Ct. 826, 30 L. ed. 895.

2. Aberdeen First Nat. Bank *v.* Chehalis County, 6 Wash. 64, 32 Pac. 1051. But see Com. *v.* Girard Nat. Bank, 6 Phila. (Pa.) 431; Primm *v.* Fort, 23 Tex. Civ. App. 605, 57 S. W. 86, 972; Toledo First Nat. Bank *v.* Lucas County, 25 Fed. 749.

3. Mechanics' Nat. Bank *v.* Baker, 65 N. J. L. 549, 48 Atl. 582; Primm *v.* Fort, 23 Tex. Civ. App. 605, 57 S. W. 86, 972; Washington Nat. Bank *v.* King County, 9 Wash. 607, 38 Pac. 219; Commercial Nat. Bank *v.* Chambers, 182 U. S. 556, 21 S. Ct. 863, 45 L. ed. 1227; Wellington First Nat. Bank *v.* Chapman, 173 U. S. 205, 19 S. Ct. 407, 43 L. ed. 669; Aberdeen First Nat. Bank *v.* Chehalis County, 166 U. S. 440, 17 S. Ct. 629, 41 L. ed. 1069; Baltimore Nat. Bank *v.* Baltimore, 100 Fed. 24, 40 C. C. A. 254.

4. *California.*— Miller *v.* Heilbron, 58 Cal. 133.

New York.— People *v.* Neff, 29 Misc. 59, 60 N. Y. Suppl. 582.

Oregon.— Ankeny *v.* Blakley, 44 Oreg. 78, 74 Pac. 485.

Texas.— Engelke *v.* Schlenker, 75 Tex. 559, 12 S. W. 999.

United States.— Davenport Nat. Bank *v.* Davenport Bd. of Equalization, 123 U. S. 83, 8 S. Ct. 73, 31 L. ed. 94; Nevada Nat. Bank *v.* Dodge, 119 Fed. 57, 56 C. C. A. 145; Baltimore Nat. Bank *v.* Baltimore, 100 Fed. 24, 40 C. C. A. 254; Mercantile Nat. Bank *v.* New York, 28 Fed. 776.

See 45 Cent. Dig. tit. "Taxation," § 30.

Surplus as affecting value of shares.— A tax law providing for the assessment of shares in the hands of their holders, on the basis of their actual value, does not unjustly discriminate against national banks, on the ground that state banks can divide up all their surplus, while national banks are required to keep on hand an accumulated portion of their surplus. People *v.* New York Tax, etc., Com'rs, 67 N. Y. 516 [*affirmed* in 94 U. S. 415, 24 L. ed. 164].

5. National Sav. Bank *v.* Burlington, 119 Iowa 696, 94 N. W. 234; Whitbeck *v.* Mer-

property, provided there is no injustice, inequality, or intentional discrimination.[6] But the valuation is a part of the rate; and there is an illegal discrimination if the stock of national banks is appraised for taxation at a higher proportion of its actual or market value than the stock of state banks or similar institutions,[7] provided this is done systematically and intentionally by the assessors and in pursuance of a rule hostile to the national banks.[8] If the holders of other forms of moneyed capital are allowed to deduct their debts, and be taxed only on the remainder, a similar deduction must be allowed to owners of national bank shares, or the law is to that extent invalid,[9] at least if the privilege is shown to be extended

cantile Nat. Bank, 127 U. S. 193, 8 S. Ct. 1121, 32 L. ed. 118; Davenport Nat. Bank *v.* Davenport Bd. of Equalization, 123 U. S. 83, 8 S. Ct. 73, 31 L. ed. 94; Richards *v.* Rock Rapids, 31 Fed. 505. And see Primghar State Bank *v.* Rerick, 96 Iowa 238, 64 N. W. 801.

Statute creating penalties.— A retroactive provision of a statute, relating solely to national banks, by which they are charged with a liability for taxes for past years on their capital stock, whether held within or without the state, and subjected to a penalty in addition for delinquency, is an illegal discrimination against them. Covington *v.* Covington First Nat. Bank, 198 U. S. 100, 25 S. Ct. 562, 49 L. ed. 963.

Separate assessment rolls.— The use of separate assessment rolls cannot be made a means of discriminating against shares of stock in the national banks. People *v.* Coleman, 44 Hun (N. Y.) 47.

6. People *v.* Feitner, 191 N. Y. 88, 83 N. E. 592; Davenport Nat. Bank *v.* Davenport Bd. of Equalization, 123 U. S. 83, 8 S. Ct. 73, 31 L. ed. 94. See also cases cited *infra*, note 9 *et seq.*

"All that has ever been held to be necessary is, that the system of state taxation of its own citizens, of its own banks, and of its own corporations shall not work a discrimination unfavorable to the holders of the shares of the national banks." Davenport Nat. Bank *v.* Davenport Bd. of Equalization, 123 U. S. 83, 85, 8 S. Ct. 73, 31 L. ed. 94.

Effect in isolated cases.— The fact that a special system of taxation of national banks may not be as favorable as the general system of taxation in an isolated case does not render the system unlawful as discriminating against those institutions so long as there is no intentional discrimination and no inequality in the effect upon their stockholders generally. People *v.* Feitner, 191 N. Y. 88, 83 N. E. 592.

7. Estherville First Nat. Bank *v.* Estherville, 136 Iowa 203, 112 N. W. 829; Schuster *v.* Louisville, 89 S. W. 689, 28 Ky. L. Rep. 588; Williams *v.* Weaver, 75 N. Y. 30; San Francisco Nat. Bank *v.* Dodge, 197 U. S. 70, 25 S. Ct. 384, 49 L. ed. 669; Stanley *v.* Albany County, 121 U. S. 535, 7 S. Ct. 1234, 30 L. ed. 1000; Cummings *v.* Merchants' Nat. Bank, 101 U. S. 153, 25 L. ed. 903; Pelton *v.* Commercial Nat. Bank, 101 U. S. 143, 25 L. ed. 901; New York *v.* Weaver, 100 U. S. 539, 25 L. ed. 705; Hepburn *v.* Carlisle School Directors, 23 Wall. (U. S.) 480, 23 L. ed. 112; First Nat. Bank *v.* Lindsay, 45 Fed. 619 [*reversed* on other grounds in 156 U. S. 485, 15 S. Ct. 472, 39 L. ed. 505]; Toledo First Nat. Bank *v.* Lucas County, 25 Fed. 749; Covington City Nat. Bank *v.* Covington, 21 Fed. 484; Exchange Nat. Bank *v.* Miller, 19 Fed. 372; Albany City Nat. Bank *v.* Maher, 6 Fed. 417, 19 Blatchf. 175; St. Louis Nat. Bank *v.* Papin, 21 Fed. Cas. No. 12,239, 4 Dill. 29.

But there is no discrimination under a statute providing that bank shares shall be assessed "at their value" and other personal property at its "true value in cash," the expressions meaning the same thing, and the former provision not contemplating the book value but the actual value of the shares. Ankeny *v.* Blakley, 44 Oreg. 78, 74 Pac. 485.

8. Albuquerque First Nat. Bank *v.* Albright, 208 U. S. 548, 28 S. Ct. 349, 52 L. ed. 614 [*affirming* 13 N. M. 514, 86 Pac. 548]; Williams *v.* Albany County, 122 U. S. 154, 7 S. Ct. 1244, 30 L. ed. 1088; Pelton *v.* Commercial Nat. Bank, 101 U. S. 143, 25 L. ed. 901; New York *v.* Weaver, 100 U. S. 539, 25 L. ed. 705; First Nat. Bank *v.* Lindsay, 45 Fed. 619; Stanley *v.* Albany County, 15 Fed. 483, 21 Blatchf. 249; Chicago First Nat. Bank *v.* Farwell, 7 Fed. 518, 10 Biss. 270.

9. *Alabama.*— Maguire *v.* Mobile County Bd. of Revenue, etc., Com'rs, 71 Ala. 401; Pollard *v.* State, 65 Ala. 628.

California.— McHenry *v.* Downer, 116 Cal. 20, 47 Pac. 779, 45 L. R. A. 737; Miller *v.* Heilbron, 58 Cal. 133.

New Hampshire.— Peavey *v.* Greenfield, 64 N. H. 284, 9 Atl. 722.

North Carolina.— McAden *v.* Mecklenburg County, 97 N. C. 355, 2 S. E. 670.

Washington.— Newport *v.* Mudgett, 18 Wash. 271, 51 Pac. 466.

United States.— Whitbeck *v.* Mercantile Nat. Bank, 127 U. S. 193, 8 S. Ct. 1121, 32 L. ed. 118; Stanley *v.* Albany County, 121 U. S. 535, 7 S. Ct. 1234, 30 L. ed. 1000; Evansville Nat. Bank *v.* Britton, 105 U. S. 322, 26 L. ed. 1053; New York *v.* Weaver, 100 U. S. 539, 25 L. ed. 705; Charleston Nat. Bank *v.* Melton, 171 Fed. 743; Mercantile Nat. Bank *v.* Shields, 59 Fed. 952; Richards *v.* Rock Rapids, 31 Fed. 505; Evansville Nat. Bank *v.* Britton, 8 Fed. 867, 10 Biss. 503; Albany Nat. Exch. Bank *v.* Hills, 5 Fed. 248, 18 Blatchf. 478; City Nat. Bank *v.* Paducah, 5 Fed. Cas. No. 2,743, 2 Flipp. 61.

See 45 Cent. Dig. tit. "Taxation," § 30.

Stock-holder with no debts.— Although a state statute may be in conflict with the act

to moneyed capital which comes into competition with the national banks and to a large or substantial extent; [10] but this rule does not apply unless the deduction allowed affects other moneyed capital,[11] and there is no discrimination in merely allowing a deduction of debts from "credits" without allowing a similar deduction from the value of national bank stock,[12] unless the term "credits" as defined by the state statutes includes moneyed capital within the meaning of the federal statute.[13] So also no such discrimination can be charged merely because certain forms of capital are exempted altogether from taxation by the state laws,[14] unless it is shown that a relatively large amount of moneyed capital, employed in competition with the national banks, thus obtains exemption.[15] Nor is it an unlawful discrimination against the national banks that that portion of their capital which is invested in United States bonds or other non-taxable securities is not deducted in valuing the holdings of their shareholders,[16] since the tax is levied not upon the

of congress, in not permitting a stock-holder in a national bank to deduct his just debts from the assessed value of his stock, while the owners of other property can do so, it is not void as to a stock-holder who has no debts to deduct, and he cannot complain of the assessment of his stock. Albany County *v.* Stanley, 105 U. S. 305, 26 L. ed. 1044; Charleston Nat. Bank *v.* Melton, 171 Fed. 743.

Substituting lower rate for advantage of deduction.— The state is not obliged to apply the same system to the taxation of national banks that it uses in the taxation of other property, provided no injustice or intentional discrimination is inflicted upon them, but may weigh advantages and disadvantages and substitute a low flat rate of taxation, an advantage which other property does not have, in the place of the deduction of debts, which is an advantage enjoyed by other owners of personal property. People *v.* Feitner, 191 N. Y. 88, 83 N. E. 592 [*reversing* 120 N. Y. App. Div. 838, 105 N. Y. Suppl. 993].

10. Wasson *v.* Indianapolis Nat. Bank, 107 Ind. 206, 8 N. E. 97; Chapman *v.* Wellington First Nat. Bank, 56 Ohio St. 310, 47 N. E. 54 [*affirmed* in 173 U. S. 205, 19 S. Ct. 407, 43 L. ed. 669]; Garnett First Nat. Bank *v.* Ayers, 160 U. S. 660, 16 S. Ct. 412, 40 L. ed. 573; Mercantile Nat. Bank *v.* Hubbard, 98 Fed. 465 [*affirmed* in 186 U. S. 458, 22 S. Ct. 908, 46 L. ed. 1247].

11. *Indiana.*— Richmond First Nat. Bank *v.* Turner, 154 Ind. 456, 57 N. E. 110.

Nebraska.— Bressler *v.* Wayne County, 32 Nebr. 834, 49 N. W. 787, 13 L. R. A. 614.

New York.— Matter of Jenkins, 47 N. Y. App. Div. 394, 62 N. Y. Suppl. 321 [*affirmed* in 163 N. Y. 320, 57 N. E. 408 (*affirmed* in 186 U. S. 230, 22 S. Ct. 905, 46 L. ed. 1140)].

Texas.— Primm *v.* Fort, 23 Tex. Civ. App. 605, 57 S. W. 86, 972.

United States.— Wellington First Nat. Bank *v.* Chapman, 173 U. S. 205, 19 S. Ct. 407, 43 L. ed. 669 [*affirming* 56 Ohio St. 310, 47 N. E. 54].

12. *Indiana.*— Richmond First Nat. Bank *v.* Turner, 154 Ind. 456, 57 N. E. 110.

Michigan.— St. Joseph First Nat. Bank *v.* St. Joseph, 46 Mich. 526, 9 N. W. 838.

Nebraska.— Bressler *v.* Wayne County, 32 Nebr. 834, 49 N. W. 787, 13 L. R. A. 614, 25 Nebr. 468, 41 N. W. 356.

Ohio.— Chapman *v.* Wellington First Nat. Bank, 56 Ohio St. 310, 47 N. E. 54 [*reversing* 9 Ohio Cir. Ct. 79, 4 Ohio Cir. Dec. 252]; Niles *v.* Shaw, 50 Ohio St. 370, 34 N. E. 162.

Texas.— Primm *v.* Fort, 23 Tex. Civ. App. 605, 57 S. W. 86, 972.

United States.— Wellington First Nat. Bank *v.* Chapman, 173 U. S. 205, 19 S. Ct. 407, 43 L. ed. 669 [*affirming* 56 Ohio St. 310, 47 N. E. 54].

See 45 Cent. Dig. tit. "Taxation," § 30.

13. See Wellington First Nat. Bank *v.* Chapman, 173 U. S. 205, 19 S. Ct. 407, 43 L. ed. 669 [*affirming* 56 Ohio St. 310, 47 N. E. 54].

14. *California.*— Crocker *v.* Scott, 149 Cal. 575, 87 Pac. 102.

Indiana.— Richmond *v.* Scott, 48 Ind. 568.

New Jersey.— Stratton *v.* Collins, 43 N. J. L. 562.

New York.—McMahon *v.* Palmer, 102 N. Y. 176, 6 N. E. 400, 55 Am. Rep. 796.

Pennsylvania.— Gorgas' Appeal, 79 Pa. St. 149; Everitt's Appeal, 71 Pa. St. 216.

Tennessee.— McLaughlin *v.* Chadwell, 7 Heisk. 389.

United States.— National Newark Banking Co. *v.* Newark, 121 U. S. 163, 7 S. Ct. 839, 30 L. ed. 904; Mercantile Nat. Bank *v.* New York, 121 U. S. 138, 7 S. Ct. 826, 30 L. ed. 895; Boyer *v.* Boyer, 113 U. S. 689, 5 S. Ct. 706, 28 L. ed. 1089; Albany County *v.* Stanley, 105 U. S. 305, 26 L. ed. 1044; Adams *v.* Nashville, 95 U. S. 19, 24 L. ed. 369; Hepburn *v.* Carlisle School Directors, 23 Wall. 480, 23 L. ed. 112; Lionberger *v.* Rowse, 9 Wall. 468, 19 L. ed. 721; Mercantile Nat. Bank *v.* New York, 28 Fed. 776; Utica First Nat. Bank *v.* Waters, 7 Fed. 152, 19 Blatchf. 242; Albany City Nat. Bank *v.* Maher, 6 Fed. 417, 19 Blatchf. 175; City Nat. Bank *v.* Paducah, 5 Fed. Cas. No. 2,743, 2 Flipp. 61.

See 45 Cent. Dig. tit. "Taxation," § 30.

15. Primm *v.* Fort, 23 Tex. Civ. App. 605, 57 S. W. 86, 972; Boyer *v.* Boyer, 113 U. S. 689, 5 S. Ct. 706, 28 L. ed. 1089.

16. Pollard *v.* State, 65 Ala. 628; National State Bank *v.* Burlington, 119 Iowa 696, 94 N. W. 234; Concord First Nat. Bank *v.* Concord, 59 N. H. 75; Cleveland Trust Co. *v.*

capital so invested, which is the property of the bank, but upon the shares of stock which are the property of the stock-holders.[17]

c. Insurance Companies — (I) *In General.* In some jurisdictions insurance companies are subject to a privilege tax,[18] in others to a general tax on their property[19] and credits.[20] Any corporation which engages in a business which is essentially that of insurance, in any form, will be liable to be taxed as an insurance company, although its name may not indicate its business;[21] and conversely, if an insurance company engages in any other form of business, such as that of an annuity, security, or trust company, it becomes subject to taxation like other companies employed in those forms of business.[22] The laws for the taxation of insurance companies may apply to mutual companies,[23] although some of the statutes do not apply to such companies.[24]

(II) *Capital and Stock.* Insurance companies, like other corporations, may be taxed upon their capital.[25] A tax laid on the capital stock of an insurance company is sometimes regarded as a franchise tax,[26] or privilege tax;[27] but if

Lander, 184 U. S. 111, 22 S. Ct. 394, 46 L. ed. 456 [*affirming* 62 Ohio St. 266, 56 N. E. 1036]; Garnett First Nat. Bank *v.* Ayers, 160 U. S. 660, 16 S. Ct. 412, 40 L. ed. 573; People *v.* New York Tax, etc., Com'rs, 4 Wall. (U. S.) 244, 18 L. ed. 344; Charleston Nat. Bank *v.* Melton, 171 Fed. 743; Hager *v.* American Nat. Bank, 159 Fed. 396, 86 C. C. A. 334; Exchange Nat. Bank *v.* Miller, 19 Fed. 372. But see Whitney Sav. Bank *v.* Parker, 41 Fed. 402.

In Kentucky it has been held that if state banks are allowed to deduct the amount of capital invested in United States bonds a similar deduction must be allowed in the valuation of shares of national bank stock (Marion Nat. Bank *v.* Burton, 121 Ky. 876, 90 S. W. 944, 28 Ky. L. Rep. 864, 10 L. R. A. N. S. 947); but that if other banks are not allowed to deduct the value of assets invested in government bonds, no such deduction can be claimed in the valuation of shares in national banks, as this would be a discrimination in their favor as against state banks and trust companies (Hager *v.* Citizens' Nat. Bank, 127 Ky. 192, 105 S. W. 403, 914, 32 Ky. L. Rep. 95).

17. Cleveland Trust Co. *v.* Lander, 184 U. S. 111, 22 S. Ct. 394, 46 L. ed. 456. See also cases cited *supra*, note 16.

18. See Ætna L. Ins. Co. *v.* Coulter, 74 S. W. 1050, 25 Ky. L. Rep. 193; Detroit F. & M. Ins. Co. *v.* Hartz, 132 Mich. 518, 94 N. W. 7; Northwestern Mut. L. Ins. Co. *v.* Lewis, etc., County, 28 Mont. 484, 72 Pac. 982, 98 Am. St. Rep. 572; Wilmington Underwriters' Ins. Co. *v.* Stedman, 130 N. C. 221, 41 S. E. 279.

Tax on premiums as privilege tax see *infra*, III, D, 2, c, (IV).

19. German Nat. Ins. Co. *v.* Louisville, 54 S. W. 732, 21 Ky. L. Rep. 1179; Ohio Farmers' Ins. Co. *v.* Hard, 10 Ohio S. & C. Pl. Dec. 469, 8 Ohio N. P. 36.

Reinsurances, as to which suits are pending between an insurance company and the reinsurer, are proper subjects of taxation against the company. Home Ins. Co. *v.* Board of Assessors, 48 La. Ann. 451, 19 So. 280.

Deduction of debts.— Under a statute providing that in making up the amount of credits which any person is required to list, he shall be entitled to deduct from the gross amount of such credits the amount of all *bona fide* debts owing by him, an insurance company is not entitled to deduct from its credits losses by fires or policy cancellations which may thereafter occur, although they do in fact occur before the taxes become delinquent. Home F. Ins. Co. *v.* Lynch, 19 Utah 189, 56 Pac. 681.

20. State *v.* Board of Assessors, 47 La. Ann. 1498, 18 So. 462, holding that uncollected premiums are taxable as credits.

21. People *v.* Wemple, 58 Hun (N. Y.) 248, 12 N. Y. Suppl. 271 [*affirmed* in 126 N. Y. 623, 27 N. E. 410].

22. Fidelity, etc., Co. *v.* Coulter, 74 S. W. 1053, 25 Ky. L. Rep. 200; Ætna L. Ins. Co. *v.* Coulter, 74 S. W. 1050, 25 Ky. L. Rep. 193; Nelson *v.* St. Paul Title Ins., etc., Co., 64 Minn. 101, 66 N. W. 206.

23. New Orleans *v.* State Mut. Ins. Co., 18 La. Ann. 675; Lee Mut. F. Ins. Co. *v.* State, 60 Miss. 395; Ohio Farmers' Ins. Co. *v.* Hard, 10 Ohio S. & C. Pl. Dec. 469, 8 Ohio N. P. 36; Fire Ins. Co. *v.* County, 9 Pa. St. 413.

24. See Murray *v.* Berkshire L. Ins. Co., 104 Mass. 586; Worcester Mut. F. Ins. Co. *v.* Worcester, 7 Cush. (Mass.) 600; International, etc., Ins. Co. *v.* Haight, 35 N. J. L. 279.

25. New Orleans *v.* Union Ins. Co., 18 La. Ann. 416; Buffalo Mut. Ins. Co. *v.* Erie County, 4 N. Y. 442.

Corporations generally see *supra*, III, B, 1, g.

Unpaid subscriptions.— Unpaid notes given to joint stock insurance companies for unpaid subscriptions to their capital stock are taxable to them as "credits" at their true value in money. Farmers' Ins. Co. *v.* La Rue, 22 Ohio St. 630.

26. See Manufacturers' Ins. Co. *v.* Loud, 99 Mass. 146, 96 Am. Dec. 715; Com. *v.* Berkshire L. Ins. Co., 98 Mass. 25; and, generally, *supra*, III, B, 1, f, g.

27. Holly Springs Sav., etc., Co. *v.* Marshal County, 52 Miss. 281, 24 Am. Rep. 668.

treated as a property tax, it is usual to allow a deduction for property otherwise taxed,[28] and for capital invested in non-taxable securities.[29] Tax laws of this kind may apply to mutual insurance companies as well as to joint stock companies.[30]

(III) *Surplus and Reserve Fund.* Under the laws generally in force an insurance company is liable to taxation on its surplus and undivided profits,[31] and also on any fund accumulated as a reinsurance reserve or otherwise held for the protection of its policy-holders.[32]

(IV) *Premiums and Other Receipts.* Insurance companies are frequently taxed upon or according to their gross premium receipts,[33] and while money

28. See Commercial F. Ins. Co. *v.* Montgomery County Bd. of Revenue, 99 Ala. 1, 14 So. 490, 42 Am. St. Rep. 17; Standard L., etc., Ins. Co. *v.* Detroit Bd. of Assessors, 91 Mich. 517, 52 N. W. 17; Com. *v.* Provident Life, etc., Co., 9 Pa. Dist. 479.

29. State *v.* Stonewall Ins. Co., 89 Ala. 335, 7 So. 753.

Capital invested in United States bonds, etc. see *infra*, III, D, 3, b.

30. Coite *v.* Connecticut Mut. L. Ins. Co., 36 Conn. 512; Sun Mut. Ins. Co. *v.* New York, 8 Barb. (N. Y.) 450 [*affirmed* in 8 N. Y. 241, Seld. Notes 94].

What constitutes capital of mutual companies.— The capital of a mutual insurance company, for the purpose of taxation, consists of such amount of premiums as by its charter or act of incorporation it is required to have subscribed before beginning business, and of such sums as it afterward accumulates from premiums earned and other sources, and uses as capital in its business of insurance. People *v.* New York, 16 N. Y. 424; Sun Mut. Ins. Co. *v.* New York, 8 N. Y. 241, Seld. Notes 94 [*affirming* 8 Barb. 450]; Buffalo Mut. Ins. Co. *v.* Erie County, 4 N. Y. 442. But see Com. *v.* Berkshire L. Ins. Co., 98 Mass. 25, holding that mutual life insurance companies cannot be taxed on unredeemed guaranty capital.

31. State *v.* Parker, 34 N. J. L. 479; People *v.* New York Tax, etc., Com'rs, 76 N. Y. 64; People *v.* New York, 16 N. Y. 424; Equitable L. Assur. Soc. *v.* Bishop, [1900] 1 Q. B. 177, 69 L. J. Q. B. 252, 81 L. T. Rep. N. S. 693, 16 T. L. R. 74, 48 Wkly. Rep. 341.

Undivided profits.— Under a statute providing for a tax on all dividends earned but not divided, by insurance companies, such dividends are to be considered as divided and paid over to the stock-holders when the latter have received the same in money or in stock or in credits on their stock notes in possession of the company. Citizens' Mut. Ins. Co. *v.* Lott, 45 Ala. 185.

32. *Illinois.*— Republic L. Ins. Co. *v.* Pollak, 75 Ill. 292.

Kansas.— Kansas Mut. L. Assoc. *v.* Hill, 51 Kan. 636, 33 Pac. 300.

Kentucky.— Kenton Ins. Co. *v.* Covington, 86 Ky. 213, 5 S. W. 461, 9 Ky. L. Rep. 513.

New York.— Sun Mut. Ins. Co. *v.* New York, 8 N. Y. 241; People *v.* Feitner, 54 N. Y. App. Div. 633, 66 N. Y. Suppl. 1140 [*affirmed* in 166 N. Y. 129, 59 N. E. 731].

Pennsylvania.— Provident Life, etc., Trust Co. *v.* Durham, 212 Pa. St. 68, 61 Atl. 636.

Canada.— *In re* Canada L. Assur. Co., 25 Ont. App. 312; Confederation Life Assoc. *v.* Toronto Corp., 24 Ont. 643.

See 45 Cent. Dig. tit. "Taxation," § 247.

Contra.— Security Co. *v.* Hartford, 61 Conn. 89, 23 Atl. 699; Equitable L. Ins. Co. *v.* Des Moines Bd. of Equalization, 74 Iowa 178, 37 N. W. 141.

33. *Alabama.*— Citizens' Mut. Ins. Co. *v.* Lott, 45 Ala. 185.

Illinois.—German L. Ins. Co. *v.* Van Cleave, 191 Ill. 410, 61 N. E. 94; People *v.* Thurber, 13 Ill. 554.

Kentucky.— Mutual Ben. L. Ins. Co. *v.* Com., 128 Ky. 174, 107 S. W. 802, 33 Ky. L. Rep. 338.

Louisiana.— State *v.* Hibernia Ins. Co., 38 La. Ann. 465.

Maine.— Portland *v.* Union Mut. L. Ins. Co., 79 Me. 231, 9 Atl. 613.

Michigan.— People *v.* State Treasurer, 31 Mich. 6.

Minnesota.— Mutual Ben. L. Ins. Co. *v.* Martin County, 104 Minn. 179, 116 N. W. 572.

Montana.— Northwestern Mut. L. Ins. Co. *v.* Lewis, etc., County, 28 Mont. 484, 72 Pac. 982, 98 Am. St. Rep. 572.

Nebraska.—Aachen, etc., Ins. Co. *v.* Omaha, 72 Nebr. 518, 101 N. W. 3; State *v.* Fleming, 70 Nebr. 523, 529, 97 N. W. 1063; Phœnix Ins. Co. *v.* Omaha, 23 Nebr. 312, 36 N. W. 522.

Nevada.— *Ex p.* Cohn, 13 Nev. 424.

New York.— People *v.* Miller, 179 N. Y. 227, 71 N. E. 930; People *v.* Miller, 177 N. Y. 515, 70 N. E. 10; People *v.* Thames, etc., Mar. Ins. Co., 176 N. Y. 531, 68 N. E. 888; Buffalo Mut. Ins. Co. *v.* Erie County, 4 N. Y. 442.

Pennsylvania.— Germania L. Ins. Co. *v.* Com., 85 Pa. St. 513; Com. *v.* Penn Mut. L. Ins. Co., 1 Dauph. Co. Rep. 233.

Texas.— Kansas City L. Ins. Co. *v.* Love, 101 Tex. 531, 109 S. W. 863.

See 45 Cent. Dig. tit. "Taxation," § 248.

Annual profit or income.— When the tax is not imposed on gross premium receipts, but on annual income or profits or gains, it is to be ascertained by deducting losses from all income. Last *v.* London Assur. Corp., 10 App. Cas. 438, 50 J. P. 116, 55 L. J. Q. B. 92, 53 L. T. Rep. N. S. 634, 34 Wkly. Rep. 233; Kingston Corp. *v.* Canada L. Assur. Co., 19 Ont. 453.

Tax apportionable.— A tax on premiums, to be reported and paid in January and July of each year, is apportionable, and when the

received for premiums may be taxed as a part of the capital of the company,[34] and uncollected premiums as credits,[35] a tax on gross premium receipts is ordinarily imposed as a franchise, occupation, privilege, or license tax.[36] Within the meaning of such laws, a premium is earned and becomes the property of the company as soon as the risk begins, and it is immaterial that it is held subject to the future contingency of a loss by fire.[37] The law will also apply to premiums earned but unpaid and in process of collection or secured by notes;[38] and if the terms of the statutes are broad enough, the tax may be collected on premiums received for business done outside the state as well as for policies written within it,[39] although some of the statutes apply only to premiums received on business done within the state.[40] Under some of the statutes, taxing insurance companies according to their gross premium receipts, it is held that they are taxable only upon premiums actually earned or received and retained by the company,[41] excluding amounts rebated from stipulated amount of the premium,[42] or returned upon the cancellation of policies,[43] or spent in reinsurance,[44] while under others the entire gross amount of premiums received is taxed without any deduction,[45] or no deduction is allowed for amounts spent for reinsurance.[46] No deduction is made for the commissions of agents or the expenses of carrying on the business,[47] and premiums received by one company for reinsuring the risks of other companies are a part of its gross premium receipts and subject to taxation.[48]

d. Railroad Companies — (i) *In General.* Unless restrained by exemptions granted by constitutional or statutory enactments or charters,[49] and except so far as is necessary to avoid any unlawful interference with interstate commerce,[50]

company is dissolved by decree and its assets turned over to a receiver, he must pay the tax on the premiums received since the last report and payment. Com. *v.* American L. Ins. Co., 14 Pa. Co. Ct. 216.

34. New Orleans *v.* Union Ins. Co., 18 La. Ann. 416; Buffalo Mut. Ins. Co. *v.* Erie County, 4 N. Y. 442.

35. State *v.* Board of Assessors, 47 La. Ann. 1498, 18 So. 462.

36. State *v.* Hibernia Ins. Co., 38 La. Ann. 465; State *v.* Fleming, 70 Nebr. 523, 529, 97 N. W. 1063; People *v.* Miller, 177 N. Y. 515, 70 N. E. 10; Kansas City L. Ins. Co. *v.* Love, 101 Tex. 531, 109 S. W. 863.

37. People's F. Ins. Co. *v.* Parker, 35 N. J. L. 575; People *v.* New York Tax, etc., Com'rs, 76 N. Y. 64; Home F. Ins. Co. *v.* Lynch, 19 Utah 189, 56 Pac. 681.

38. Republic L. Ins. Co. *v.* Pollak, 75 Ill. 292; State *v.* Board of Assessors, 47 La. Ann. 1498, 18 So. 462; New Orleans *v.* Union Ins. Co., 18 La. Ann. 416.

39. Insurance Co. of North America *v.* Com., 87 Pa. St. 173, 30 Am. Rep. 376, holding that where the tax is imposed upon "the entire amount of premiums received" it applies to all business done whether within or without the state.

40. State *v.* Hibernia Ins. Co., 38 La. Ann. 465; Mutual Ben. L. Ins. Co. *v.* Martin County, 104 Minn. 179, 116 N. W. 572; People *v.* National F. Ins. Co., 27 Hun (N. Y.) 188; People *v.* National F. Ins. Co., 61 How. Pr. (N. Y.) 334.

41. Mutual Ben. L. Ins. Co. *v.* Com., 128 Ky. 174, 107 S. W. 802, 33 Ky. L. Rep. 338; State *v.* Hibernia Ins. Co., 38 La. Ann. 465; People *v.* Miller, 177 N. Y. 515, 70 N. E. 10.

Stipulated premiums not collected.—Where a mutual insurance company, in order to provide for whatever may be needed under extraordinary conditions, stipulates in its policy for a premium larger than it actually needs to carry the risk under ordinary conditions and collects only such amount as is necessary, it should be taxed only according to the premium actually received (Mutual Ben. L. Ins. Co. *v.* Com., 128 Ky. 174, 107 S. W. 802, 33 Ky. L. Rep. 338; Com. *v.* Penn Mut. L. Ins. Co., 1 Dauph. Co. Rep. (Pa.) 233); notwithstanding as a matter of bookkeeping the full amount of the premiums stipulated is entered on the books and the difference between this amount and the amount actually collected is credited as a "dividend" (Mutual Ben. L. Ins. Co. *v.* Com., *supra*).

42. State *v.* Hibernia Ins. Co., 38 La. Ann. 465.

43. German Alliance Ins. Co. *v.* Van Cleave, 191 Ill. 410, 61 N. E. 94; State *v.* Fleming, 70 Nebr. 529, 97 N. W. 1063; People *v.* Miller, 177 N. Y. 515, 70 N. E. 10.

44. State *v.* Fleming, 70 Nebr. 529, 97 N. W. 1063.

45. Philadelphia F. Assoc. *v.* Love, 101 Tex. 376, 108 S. W. 158, 810, holding that under the Texas statute which applies in terms to "the gross amount of premiums received," no deduction is allowable either for amounts paid for reinsurance or amounts refunded upon the cancellation of policies.

46. People *v.* Miller, 177 N. Y. 515, 70 N. E. 10.

47. People *v.* Miller, 177 N. Y. 515, 70 N. E. 10.

48. People *v.* Miller, 177 N. Y. 515, 70 N. E. 10.

49. See *infra*, IV, D, 3, g.

50. See COMMERCE, 7 Cyc. 480.

it is undoubtedly within the power of the states, and of their municipalities by their authority, to impose taxes upon railroad companies and all their taxable property,[51] by laws specifically applicable to that class of corporations and to such of them as are subject to the state's jurisdiction,[52] duly enacted for that purpose and remaining in force,[53] and not retrospective in their operation;[54] and such taxation may include the franchises of such companies,[55] as well as their personal property;[56] but property owned by the company, but not possessed or used for railroad purposes, should not be assessed and taxed as a part of the railroad but separately.[57]

(II) *Right of Way and Other Realty.*[58] Under some statutes the real property of a railroad company is subject to taxation as is other real estate,[59]

51. *Florida.*— Bloxham *v.* Florida Cent., etc., R. Co., 35 Fla. 625, 17 So. 902.

Iowa.— Iowa Homestead Co. *v.* Webster County, 21 Iowa 221; Burlington, etc., R. Co. *v.* Spearman, 12 Iowa 112.

Michigan.— People *v.* Detroit, etc., R. Co., 1 Mich. 458.

Missouri.— State *v.* Dulle, 48 Mo. 282; Hannibal, etc., R. Co. *v.* Shacklett, 30 Mo. 550.

New Hampshire.— Boston, etc., R. Co. *v.* State, 60 N. H. 87.

North Carolina.— Richmond, etc., R. Co. *v.* Alamance, 84 N. C. 504.

North Dakota.— Minneapolis, etc., R. Co. *v.* Dickey County, 11 N. D. 107, 90 N. W. 260.

Pennsylvania.— Philadelphia *v.* Philadelphia Traction Co., 206 Pa. St. 35, 55 Atl. 762.

West Virginia.— Baltimore, etc., R. Co. *v.* Wheeling, 3 W. Va. 372; Baltimore, etc., R. Co. *v.* Marshall County, 3 W. Va. 319.

Canada.— Canadian Pac. R. Co. *v.* Quebec, 30 Can. Sup. Ct. 73.

See 45 Cent. Dig. tit. "Taxation," §§ 250, 251.

52. Louisville, etc., R. Co. *v.* Com., 10 Bush (Ky.) 43 (taxation of branch road): Covington, etc., Bridge Co. *v.* O'Meara, 35 S. W. 1027, 19 Ky. L. Rep. 1438 (bridge company does not become subject to taxation as a railroad company simply by constructing and using a railroad in promotion of its bridge business); Williams *v.* Bettle, 50 N. J. L. 132, 11 Atl. 17 (terminal company is a railroad corporation); Jersey City, etc., R. Co. *v.* Haight, 30 N. J. L. 447 (what is a "toll collecting" company); Com. *v.* Cleveland, etc., R. Co., 29 Pa. St. 370 (taxation of company chartered in Ohio and authorized by the legislature of Pennsylvania to enter the latter state).

Purchaser of railroad on foreclosure.— Under statutes authorizing purchasers at foreclosure sale of railway franchises to incorporate themselves, a corporation thus created takes the property and franchises as the same then existed, and subject to taxation, although further steps may be necessary to perfect the title of the new corporation. Chesapeake, etc., R. Co. *v.* Lauderdale, 16 Lea (Tenn.) 688, 1 S. W. 48. And see Owensboro, etc., R. Co. *v.* Logan County, 11 S. W. 76, 11 Ky. L. Rep. 99.

53. State *v.* Missouri Pac. R. Co., 92 Mo. 137, 6 S. W. 862; Camden, etc., R. Co. *v.* Cook, 32 N. J. L. 338; People *v.* New York Cent. R. Co., 24 N. Y. 485 [*affirming* 34 Barb. 123]; Union Pass. R. Co. *v.* Philadelphia, 83 Pa. St. 429; Hickory Tp. School Dist. *v.* Shenango Valley R. Co., 5 Pa. Super. Ct. 79.

54. *Florida.*— Bloxham *v.* Florida Cent., etc., R. Co., 35 Fla. 625, 17 So. 902.

Georgia.— Staten *v.* Savannah, etc., R. Co., 111 Ga. 803, 36 S. E. 938.

Kentucky.— Franklin County Ct. *v.* Louisville, etc., R. Co., 84 Ky. 59.

Missouri.— State *v.* St. Louis, etc., R. Co., 77 Mo. 202.

New Jersey.— State *v.* United New Jersey R., etc., Co., (1908) 71 Atl. 228 [*affirming* 76 N. J. L. 72, 68 Atl. 796].

Pennsylvania.— Philadelphia *v.* Passenger R. Co., 23 Leg. Int. 156.

55. State *v.* Savage, 65 Nebr. 714, 91 N. W. 716; State *v.* Austin, etc., R. Co., 94 Tex. 530, 62 S. W. 1050; North Carolina *v.* Seaboard, etc., R. Co., 52 Fed. 450.

Road operated by another company.— A railroad company which, although its road is operated by another company, still owns its line of railroad and has not parted with any of the franchises granted to it, is liable to the franchise tax. Com. *v.* Kinniconick, etc., R. Co., 104 S. W. 290, 31 Ky. L. Rep. 859.

56. Wright *v.* Southwestern R. Co., 64 Ga. 783 (bonds, notes, and other evidences of debt held by a railroad company); Fitchburg R. Co. *v.* Prescott, 47 N. H. 62 (timber, ties, and lumber distributed along the line of the road for use in current repairs).

57. Savannah, etc., R. Co. *v.* Morton, 71 Ga. 24; *In re* Jersey City, etc., R. Co., 66 N. J. L. 501, 49 Atl. 437. *Compare* Hannibal, etc., R. Co. *v.* State Bd. of Equalization, 64 Mo. 294, holding that a railroad company's land contracts are to be assessed and taxed as a part of the road.

58. **Railroad land grants from United States** see *infra*, III, C, 2, b, (VI), (C).

59. Neary *v.* Philadelphia, etc., R. Co., 7 Houst. (Del.) 419, 9 Atl. 405; Muscatine *v.* Chicago, etc., R. Co., 79 Iowa 645, 44 N. W. 909; Baltimore City Appeal Tax Ct. *v.* Western Maryland R. Co., 50 Md. 274; Great Western R. Co. *v.* Rogers, 29 U. C. Q. B. 245; Great Western R. Co. *v.* Rouse, 15 U. C. Q. B. 168.

Taxation to shareholders.— Under the laws formerly in force in some of the states, real estate belonging to railroad companies could only be taxed through the shares of the

and this of course includes the right of way.[60] But the method now most in vogue is to provide that the road as a whole, including everything necessary to its operation as such, shall be assessed by a state board, the total valuation being then apportioned among the various municipalities through which the line passes, while to the local authorities is confided the duty of assessing such real property of the road within their limits as is outside the needs and uses of the company for its operation as a railroad, but held or used for separate or auxiliary purposes.[61]

stock-holders. Davenport *v.* Mississippi, etc., R. Co., 12 Iowa 539; State *v.* Hannibal, etc., R. Co., 37 Mo. 265.

In Virginia the acts of 1879–1880 authorize county supervisors to levy a tax on the real estate of railroad companies whose roads pass through their counties, but the assessment is to be based upon the assessment made by the state upon the same property for state purposes. Shenandoah Valley R. Co. *v.* Clarke County, 78 Va. 269.

60. St. Louis, etc., R. Co. *v.* Miller County, 67 Ark. 498, 55 S. W. 926; *Re* Midland R. Co., 19 Can. L. J. 330; Niagara Falls Park, etc., R. Co. *v.* Niagara, 31 Ont. 29. See also Adams *v.* Kansas City, etc., R. Co., 74 Miss. 331, 21 So. 11.

Right to use highway crossing.— The right of a domestic railroad corporation to use a highway crossing is a special franchise subject to taxation. New York, etc., R. Co. *v.* Roll, 32 Misc. (N. Y.) 321, 66 N. Y. Suppl. 748.

61. See the statutes of the several states; and the following cases:

Arkansas.— St. Louis R. Co. *v.* Worthen, 52 Ark. 529, 13 S. W. 254, 7 L. R. A. 374.

Connecticut.— Osborn *v.* Hartford, etc., R. Co., 40 Conn. 498, holding that wharves and docks, such as to accommodate the business of the road when most pressing, although not in use all the time, are so far necessary to the operation of the road as not to be subject to local taxation.

Illinois.— Illinois Cent. R. Co. *v.* Cavins, 238 Ill. 380, 87 N. E. 371. See also Chicago, etc., R. Co. *v.* People, 195 Ill. 184, 62 N. E. 869.

Indiana.— Jeffersonville *v.* Louisville, etc., Bridge Co., 169 Ind. 645, 83 N. E. 337, holding that a company incorporated as a bridge company which owns not only an interstate bridge and its approaches, together with a railroad track across the bridge, but also a terminal railroad having its own rolling-stock, and furnishing terminal facilities and facilities for the interchange of traffic between other railroads is assessable by the state board of tax commissioners as a corporation owning a railroad and not by the township assessor as a bridge company.

Iowa.— Herter *v.* Chicago, etc., R. Co., 114 Iowa 330, 86 N. W. 266, holding that grain elevators, owned by a railroad company and situated on its lands, used exclusively for taking in or storing grain for shipment over such road, are not subject to local taxation.

Kansas.— Union Pac. R. Co. *v.* Wyandotte County, 69 Kan. 572, 77 Pac. 274.

Michigan.— Detroit *v.* Detroit, etc., R. Co., 149 Mich. 530, 113 N. W. 365 (holding that a railroad constructed and used as a steam railroad and owned by a company organized under the general railroad law is assessable by the state board of assessors and not subject to local taxation, although the road is laid along the streets of a city and was originally built by a company not organized under the general railroad law); Auditor-Gen. *v.* Flint, etc., R. Co., 114 Mich. 682, 72 N. W. 992 (sidings and spur tracks used in originating and shipping freight).

Missouri.— State *v.* Wiggins Ferry Co., 208 Mo. 622, 106 S. W. 1005 (holding that under the Missouri statutes a railroad need not be owned or operated by a railroad company or be of any particular length, and that where a ferry company operated a number of tracks over which cars were drawn to and from the ferry, the tracks being also used for storage, for loading and unloading, and for regular traffic and switching purposes, the tracks constituted a railroad and were subject to assessment by the state board of equalization and not by the city assessor); State *v.* Chicago, etc., R. Co., 162 Mo. 391, 63 S. W. 495; State *v.* Severance, 55 Mo. 378.

Nebraska.— State *v.* Savage, 65 Nebr. 714, 91 N. W. 716; Adams County *v.* Kansas City, etc., R. Co., 71 Nebr. 245, 99 N. W. 245; Burlington, etc., R. Co. *v.* Lancaster County, 15 Nebr. 251, 18 N. W. 71.

New Jersey.— United New Jersey R., etc., Co. *v.* Parker, 75 N. J. L. 771, 69 Atl. 239 [*modifying* 75 N. J. L. 120, 67 Atl. 672 (Sup. 1907) 67 Atl. 686]; *In re* New Jersey Cent. R. Co., 71 N. J. L. 475, 58 Atl. 1089; National Docks R. Co. *v.* State Bd. of Assessors, 64 N. J. L. 486, 45 Atl. 783; United New Jersey R., etc., Co. *v.* Jersey City, 55 N. J. L. 129, 26 Atl. 135. See also New York Bay R. Co. *v.* Newark, 76 N. J. L. 832, 71 Atl. 276 [*reversing* 75 N. J. L. 389, 67 Atl. 1049]; United New Jersey R., etc., Co. *v.* Newark, 76 N. J. L. 830, 71 Atl. 275 [*reversing* 75 N. J. L. 385, 67 Atl. 1075].

New York.—See People *v.* Clapp, 152 N. Y. 490, 46 N. E. 842, 39 L. R. A. 237.

North Carolina.— Atlantic, etc., R. Co. *v.* New Berne, 147 N. C. 165, 60 S. E. 925, holding that under Revisal (1905), § 5290, authorizing the corporation commission to assess the right of way and superstructures thereon, the word "superstructures" covers all buildings situated on the right of way.

South Dakota.— St. Paul, etc., R. Co. *v.* Howard, 23 S. D. 34, 119 N. W. 1032.

Utah.— Rio Grande Western R. Co. *v.* Salt Lake Inv. Co., 35 Utah 528, 101 Pac. 586.

Virginia.— See Virginia, etc., R. Co. *v.* Washington County, 30 Gratt. 471.

Where the road is assessed as a whole, the assessors should include its tunnels, culverts, bridges, and other structures or works which really constitute a part of the road, and are not used separately or independently.[62] A railroad bridge is ordinarily assessed for taxation with the railroad in connection with which it is used,[63] notwithstanding it may also be used for the passage of teams or persons

Constitutionality of statutes providing special modes for assessing corporate property see *supra*, II, B, l, g, (IV), (A); II, B, 4, b.

In Pennsylvania the property of railroad companies, consisting of freight stations, offices, depots, round-houses, machine shops, passenger stations, and grounds covered by tracks and used as ways of approach to the stations and buildings in connection with the railroad, and all public works of the company used as such, with their necessary appurtenances, that is, such property as is ordinarily and properly pertinent to railroads and strictly necessary for their proper operation in exercising their several franchises, is not liable to taxation as real estate by the local authorities. Northumberland County *v.* Philadelphia, etc., R. Co., 6 Pa. Cas. 516, 9 Atl. 504. Under this rule, the following kinds of property have been held so exempt: Freight and passenger depots (Northampton County *v.* Lehigh Coal, etc., Co., 75 Pa. St. 461), depots and places to hold cars (Venango County *v.* Jamestown, etc., R. Co., 2 Leg. Chron. 325, 7 Leg. Gaz. 20), dining-room and lunch-room in a railway passenger station (Erie County *v.* Railway Co., 29 Leg. Int. 117), and water stations, offices, oil-houses, car-houses (Railroad Co. *v.* Berks County, 6 Pa. St. 70). But on the other hand, the following kinds of property have been held subject to local taxation: Machine shops for repair work, including blacksmith, carpenter, and paint shops (Pennsylvania, etc., Canal, etc., Co. *v.* Vandyke, 137 Pa. St. 249, 20 Atl. 653; Railroad Co. *v.* Berks County, 6 Pa. St. 70; East Pennsylvania R. Co.'s Case, 1 Walk. 428. But *compare* Lehigh Valley R. Co. *v.* Bradford County, 24 Pa. Co. Ct. 537; Venango County *v.* Jamestown, etc., R. Co., 2 Leg. Chron. 325, 7 Leg. Gaz. 20; Erie County *v.* Railway Co., 29 Leg. Int. 117), an ice plant (Delaware, etc., R. Co. *v.* Metzgar, 28 Pa. Super. Ct. 239), and land belonging to the company but not occupied or used by it in connection with its road (Erie County *v.* Railway Co., 29 Leg. Int. 117). And see Railroad Co. *v.* Berks County, 6 Pa. St. 70, holding that such property of a railroad as is indispensable to the construction and use of the railroad is alone exempt from taxation, not property which is only indispensable to the making of profits. Under a statute expressly authorizing a municipal corporation to tax all the real estate within its limits owned by a railroad company "the same as other real estate in said city," it has been held that the city may tax real estate used for depots, offices, and passenger or freight stations (Pennsylvania R. Co. *v.* Pittsburgh, 104 Pa. St. 522), but that it may not under such a statutory provision tax land used by the company as a right of way (Pennsylvania R. Co. *v.* Pittsburgh, 221 Pa. St. 90, 70 Atl. 271).

62. *Maryland.* — Baltimore City Appeal Tax Ct. *v.* Western Maryland R. Co., 50 Md. 274.

Missouri.— State *v.* Louisiana, etc., R. Co., 196 Mo. 523, 94 S. W. 279.

New York.— People *v.* Tax Com'rs, 101 N. Y. 322, 4 N. E. 127.

United States.— New York Guaranty, etc., Co. *v.* Tacoma R., etc., Co., 93 Fed. 51, 35 C. C. A. 192.

England.— Metropolitan R. Co. *v.* Fowler, [1893] A. C. 416, 57 J. P. 756, 62 L. J. Q. B. 553, 69 L. T. Rep. N. S. 390, 1 Reports 264, 42 Wkly. Rep. 270.

Canada.— Grand Trunk R. Co. *v.* Port Perry, 34 Can. L. J. N. S. 239.

Meaning of "roadway."— The term "roadway," within the application of Const. § 179, providing for the taxation of the franchises, roadway, etc., of all railroads, includes not only the strip of ground on which the main line is constructed, but all grounds necessary for the construction of side-tracks, turnpikes, connecting tracks, station houses, freight houses, and other accommodations reasonably necessary to accomplish the object of their incorporation. Minneapolis, etc., R. Co. *v.* Oppegard, (N. D. 1908) 118 N. W. 830.

63. People *v.* Atchison, etc., R. Co., 225 Ill. 593, 80 N. E. 272; Anderson *v.* Chicago, etc., R. Co., 117 Ill. 26, 7 N. E. 129; Campbell County Bd. of Equalization *v.* Louisville, etc., R. Co., 109 S. W. 303, 33 Ky. L. Rep. 78; State *v.* Louisiana, etc., R. Co., 215 Mo. 479, 114 S. W. 956; State *v.* Hannibal, etc., R. Co., 97 Mo. 348, 10 S. W. 436; Chicago, etc., R. Co. *v.* Richardson County, 61 Nebr. 519, 85 N. W. 532 [*overruling* Cass County *v.* Chicago, etc., R. Co., 25 Nebr. 348, 41 N. W. 246, 2 L. R. A. 188]. See also State *v.* Mutchler, 41 N. J. L. 96, holding that a railroad bridge is a part of "the main stem or road-bed and track" within the application of the act of 1873, and not subject to local taxation.

But the legislature may provide, in the absence of any constitutional restriction, for the taxation of railroad bridges separately and not as a part of the railroad. Union Pac. R. Co. *v.* Pottawattamie County, 24 Fed. Cas. No. 14,384, 4 Dill. 497.

Taxation of bridges generally see *supra*, III, A, 2, b, (IV).

Increased rate for crossing bridge.— A bridge constituting an integral part of a railroad roadway is not a "toll bridge" because the railroad company illegally charges more for carrying persons over the bridge than for carrying them the same number of miles on either side of the bridge, and is not taxable under the statutes authorizing the taxation of toll bridges. State *v.*

on foot,[64] and where it is so assessed as an integral part of the road it should be assessed by the state board and not by the local authorities;[65] but it may be separately taxed if separately owned,[66] and in such cases may be assessed by the local authorities.[67]

(III) *Rolling-Stock and Equipment.* The locomotives, cars, and other rolling-stock of a railroad are generally regarded and treated as personalty for the purpose of taxation.[68] In this character they are capable of having a *situs* of their own, and hence they are taxable to a company using them within the state, although they are owned by a foreign corporation.[69] On the other hand, the taxing power of the state is not necessarily restricted to such engines and cars as remain constantly within the state, but may extend to those which, in performing their regular journeys, pass through and out of the state,[70] but rolling-stock employed exclusively without the state is not taxable, although owned by a domestic corporation.[71]

(IV) *Capital and Stock.* As in the case of other corporations,[72] the capital or capital stock of a railroad company is distinct from the shares of stock belonging to the shareholders,[73] and may be taxed to the corporation itself;[74] and under some statutes such companies are taxable upon their capital or capital stock,[75] the tax

Louisiana, etc., R. Co., 215 Mo. 479, 114 S. W. 956.

64. People *v.* Atchison, etc., R. Co., 225 Ill. 593, 80 N. E. 272; Campbell County Bd. of Equalization *v.* Louisville, etc., R. Co., 109 S. W. 303, 33 Ky. L. Rep. 78; State *v.* Hannibal, etc., R. Co., 97 Mo. 348, 10 S. W. 436 [*distinguishing* State *v.* Hannibal, etc., R. Co., 89 Mo. 98, 14 S. W. 511], holding that under Rev. St. (1879) § 6901, a railroad bridge owned by a railroad company and constituting a part of the track is taxable only as a part of the road and not as a separate structure, notwithstanding it is used in part as a toll bridge for the passage of teams, wagons, and the like.

65. People *v.* Atchison, etc., R. Co., 225 Ill. 593, 80 N. E. 272; Anderson *v.* Chicago, etc., R. Co., 117 Ill. 26, 7 N. E. 129; Campbell County Bd. of Equalization *v.* Louisville, etc., R. Co., 109 S. W. 303, 33 Ky. L. Rep. 78; Chicago, etc., R. Co. *v.* Richardson County, 61 Nebr. 519, 85 N. W. 532 [*overruling* Cass County *v.* Chicago, etc., R. Co., 25 Nebr. 348, 41 N. W. 246, 2 L. R. A. 188].

66. St. Louis, etc., R. Co. *v.* Williams, 53 Ark. 58, 13 S. W. 796; Chicago, etc., R. Co. *v.* People, 153 Ill. 409, 38 N. E. 1075, 29 L. R. A. 69; State *v.* Mississippi River Bridge Co., 109 Mo. 253, 19 S. W. 421.

67. St. Louis, etc., R. Co. *v.* Williams, 53 Ark. 58, 13 S. W. 796; Chicago, etc., R. Co. *v.* People, 153 Ill. 409, 38 N. E. 1075, 29 L. R. A. 69.

68. Midland R. Co. *v.* State, 11 Ind. App. 433, 38 N. E. 57; State Treasurer *v.* Somerville, etc., R. Co., 28 N. J. L. 21; Toronto R. Co. *v.* Toronto, 6 Ont. L. Rep. 187, 2 Ont. Wkly. Rep. 579.

69. Denver, etc., R. Co. *v.* Church, 17 Colo. 1, 28 Pac. 468, 31 Am. St. Rep. 252; Kennedy *v.* St. Louis, etc., R. Co., 62 Ill. 395; Reinhart *v.* McDonald, 76 Fed. 403.

70. Hall *v.* American Refrigerator Transit Co., 24 Colo. 291, 51 Pac. 421, 65 Am. St. Rep. 223, 56 L. R. A. 89; Denver, etc., R. Co *v.* Church, 17 Colo. 1, 28 Pac. 468, 31 Am. St. Rep. 252; Pullman's Palace Car Co. *v.* Com., 107 Pa. St. 156 [*affirmed* in 141 U. S. 18, 11 S. Ct. 876, 35 L. ed. 613]; Com. *v.* Pullman's Palace Car Co., 4 Dauph. Co. Rep. (Pa.) 309.

71. People *v.* Knight, 173 N. Y. 255, 65 N. E. 1102; People *v.* Campbell, 88 Hun (N. Y.) 544, 34 N. Y. Suppl. 801.

72. See *supra*, III, B, 1, g.

73. Porter *v.* Rockford, etc., R. Co., 76 Ill. 561; South Nashville St. R. Co. *v.* Morrow, 87 Tenn. 406, 11 S. W. 348, 2 L. R. A. 853; Minot *v.* Philadelphia, etc., R. Co., 18 Wall. (U. S.) 206, 21 L. ed. 888.

74. Porter *v.* Rockford, etc., R. Co., 76 Ill. 561.

75. *Connecticut.*— Nichols *v.* New Haven, etc., Co., 42 Conn. 103.

Illinois.— Porter *v.* Rockford, etc., R. Co., 76 Ill. 561.

Indiana.— Michigan Cent. R. Co. *v.* Porter, 17 Ind. 380.

Pennsylvania.— Com. *v.* Ontario, etc., R., Co., 188 Pa. St. 205, 41 Atl. 607.

United States.—Minot *v.* Philadelphia, etc., R. Co., 18 Wall. 206, 21 L. ed. 888.

Charter provisions.— Under a charter provision requiring a certain tax on "capital stock paid in," stock is to be included which was not paid for in money but issued by the company and used instead of money in acquiring the rights of the original purchasers of the road and treated and considered by the company as so much stock paid in and entitling the holders thereof to all the rights and privileges of other stock-holders. People *v.* Michigan Southern, etc., R. Co., 4 Mich. 398. Under a charter provision limiting the rate of taxation upon the "stock" of a railroad company, the limitation applies only to the capital stock actually paid in, and if the value of the property of the company is greater than the capital stock paid in the excess is not stock and is subject to taxation at the ordinary rate at which the property of individuals is assessed. Goldsmith *v.* Rome R. Co., 62 Ga. 473.

being in some cases regarded as a franchise tax,[76] and in others as a property tax,[77] based not upon the par value but upon the actual value of the stock,[78] or including all the property of the corporation,[79] together with the value of its franchises,[80] or the fair cash value of the capital stock, including the franchise, over and above the assessed value of the tangible property.[81] It has also been held that as the shares of stock are distinct from the capital of the corporation the stock-holders may be taxed on their shares notwithstanding the corporation is also taxed upon its capital or property.[82] Ordinarily, however, the shares of stock-holders are not taxed where the corporation itself is taxed on its capital or property,[83] but are taxable to the shareholders where the corporation is not so taxed.[84]

(v) *Earnings or Receipts.* A tax laid upon railroad companies in proportion to their income or gross receipts is generally considered as a franchise or privilege tax.[85] Such taxes have been fully sustained by the courts; [86] and this is also true of taxes laid on gross or net receipts over and above a certain fixed sum

76. See Pratt *v.* Boston St. Com'rs, 139 Mass. 559, 2 N. E. 675; Minot *v.* Philadelphia, etc., R. Co., 18 Wall. (U. S.) 206, 21 L. ed. 888.

Under the New York statutes imposing a franchise tax on capital employed within the state a railroad company is not subject to such taxes on that part of its capital invested in cars permanently engaged outside of the state or invested in stock of foreign corporations. People *v.* Campbell, 88 Hun (N. Y.) 544, 34 N. Y. Suppl. 801.

77. Nichols *v.* New Haven, etc., Co., 42 Conn. 103; Com. *v.* Delaware, etc., R. Co., 165 Pa. St. 44, 30 Atl. 522, 523; Pullman's Palace Car Co. *v.* Com., 107 Pa. St. 156.

78. Nichols *v.* New Haven, etc., Co., 42 Conn. 103.

79. Michigan Cent. R. Co. *v.* Porter, 17 Ind. 380; Floyd County *v.* New Albany, etc., R. Co., 11 Ind. 570; Com. *v.* Ontario, etc., R. Co., 188 Pa. St. 205, 41 Atl. 607; Com. *v.* Delaware, etc., R. Co., 165 Pa. St. 44, 30 Atl. 522, 523.

80. Com. *v.* Ontario, etc., R. Co., 188 Pa. St. 205, 41 Atl. 607; Com. *v.* Delaware, etc., R. Co., 165 Pa. St. 44, 30 Atl. 522, 523.

81. Porter *v.* Rockford, etc., R. Co., 76 Ill. 561.

82. South Nashville St. R. Co. *v.* Morrow, 87 Tenn. 406, 11 S. W. 348, 2 L. R. A. 853. See also *supra*, II, C, 5, c; III, B, 1, j.

83. Michigan Cent. R. Co. *v.* Porter, 17 Ind. 380; Com. *v.* Chesapeake, etc., R. Co., 116 Ky. 951, 77 S. W. 186, 25 Ky. L. Rep. 1126. See also *supra*, III, B, 1, j.

84. Georgia R., etc., Co. *v.* Wright, 124 Ga. 596, 53 S. E. 251 [*reversed* on other grounds in 207 U. S. 127, 28 S. Ct. 47, 52 L. ed. 134]; Com. *v.* Chesapeake, etc., R. Co., 116 Ky. 951, 77 S. W. 186, 25 Ky. L. Rep. 1126; Pratt *v.* Boston St. Com'rs, 139 Mass. 559, 2 N. E. 675; Wright *v.* Louisville, etc., R. Co., 195 U. S. 219, 25 S. Ct. 16, 49 L. ed. 167 [*reversing* 117 Fed. 1007, 54 C. C. A. 672].

85. *In re* Railroad Taxation, 102 Me. 527, 66 Atl. 726; State *v.* Maine Cent. R. Co., 74 Me. 376; State *v.* Philadelphia, etc., R. Co., 45 Md. 361, 24 Am. Rep. 511; Philadelphia Contributionship *v.* Com., 98 Pa. St. 48. *Contra*, Galveston, etc., R. Co. *v.* Davidson, (Tex. Civ. App. 1906) 93 S. W. 436.

86. *Iowa.*— Dubuque *v.* Chicago, etc., R. Co., 47 Iowa 196.

Maine.— *In re* Railroad Taxation, 102 Me. 527, 66 Atl. 726.

Maryland.— State *v.* Philadelphia, etc., R. Co., 45 Md. 361, 24 Am. Rep. 511.

Michigan.— Pere Marquette R. Co. *v.* Ludington, 133 Mich. 397, 95 N. W. 417; Fort St. Union Depot Co. *v.* Railroad Com'r, 118 Mich. 340, 76 N. W. 631.

Minnesota.—State *v.* District Ct., 54 Minn. 34, 55 N. W. 816.

South Carolina.— State *v.* Hood, 15 Rich. 117.

Texas.— State *v.* Missouri, etc., R. Co., (1907) 100 S. W. 146.

United States.— U. S. *v.* Marquette, etc., R. Co., 17 Fed. 719.

See 45 Cent. Dig. tit. "Taxation," § 257.

Tolls and transportation charges.— The sums received by one railroad company from another as compensation for the use of its tracks are within the meaning of a statute taxing the gross receipts of railroads "for tolls and transportation." Com. *v.* New York, etc., R. Co., 145 Pa. St. 38, 22 Atl. 212; New York, etc., R. Co. *v.* Com., 158 U. S. 431, 15 S. Ct. 896, 39 L. ed. 1043. But not within a statute taxing receipts "from passengers and freight." Com. *v.* New York, etc., R. Co., 145 Pa. St. 200, 22 Atl. 806.

Union depot companies.— Where the several railroad companies which use the terminal facilities of a union depot, and which own all the stock of the union depot company, pay the state tax on their gross earnings, the depot company itself is not liable to such tax. State *v.* St. Paul Union Depot Co., 42 Minn. 142, 43 N. W. 840, 6 L. R. A. 234.

Receipts from carriage of mails.— A railroad company is not liable to assessment on gross earnings derived from carrying the United States mails, where such earnings include moneys received from carriage of interstate and foreign mails, and it is impossible to determine what proportion of mail originated and terminated within the state. People *v.* Morgan, 168 N. Y. 1, 60 N. E. 1041.

or percentage, the contingency that the minimum earnings may not be exceeded being a point for the consideration of the legislature, not of the courts.[87] In some states also the tax is on the value of the railroad as a whole, but is determined by capitalizing its net earnings at a fixed rate or at the current rates of interest.[88]

(VI) *DIVIDENDS.* Where a railroad is taxed on the dividends declared on its capital stock, this means the amount of capital actually paid in and not the nominal capital.[89] The law may be applicable to a stock dividend,[90] but not to a sale of stock below its par value resorted to as a means of raising money,[91] or a mere increase in the number of shares of stock not representing any distribution of profits.[92]

(VII) *BONDED AND OTHER DEBT.* In some states railroad corporations are required to pay a tax on their outstanding bonded or other debt, or on the interest paid to creditors, which, however, unless the bonds are made "tax free," is in reality a charge on the creditor rather than on the corporation.[93] For this reason the company cannot be taxed on bonds held by non-resident owners,[94] although if it accumulates and sets apart a fund to pay the interest on its foreign-held bonds, such fund, before distribution, is taxable as its own property.[95]

(VIII) *PROPERTY MORTGAGED OR LEASED.* It is generally held that in the assessment and valuation of a railroad as a whole, for the purpose of taxation, there should be included any lines which it is operating under lease as a part of its system.[96] But a contrary rule prevails in some states, and particularly where the tax laws are explicit in requiring the assessment of property to its owner.[97]

87. Fort St. Union Depot Co. *v.* Railroad Com'r, 118 Mich. 340, 76 N. W. 631; McGavisk *v.* State, 34 N. J. L. 509.

88. State *v.* Virginia, etc., R. Co., 23 Nev. 283, 46 Pac. 723, 35 L. R. A. 759. But *compare* Board for Assessment of Railroad Co.'s Property *v.* Alabama Cent. R. Co., 59 Ala. 551.

89. Citizens' Pass. R. Co. *v.* Philadelphia, 49 Pa. St. 251.

Taxation of corporate dividends generally see *supra*, III, B, 1, k.

90. Com. *v.* Cleveland, etc., R. Co., 29 Pa. St. 370. See also *supra*, III, B, 1, k.

91. Com. *v.* Erie, etc., R. Co., 10 Phila. (Pa.) 465.

92. Com. *v.* Pittsburg, etc., R. Co., 74 Pa. St. 83.

93. Boston, etc., R. Co. *v.* State, 62 N. H. 648; Sawyer *v.* Nashua, 59 N. H. 404; Com. *v.* Philadelphia, etc., R. Co., 150 Pa. St. 312, 24 Atl. 612; Maltby *v.* Reading, etc., R. Co., 52 Pa. St. 140; U. S. *v.* Balitmore, etc., R. Co., 17 Wall. (U. S.) 322, 21 L. ed. 597; Northern Cent. R. Co. *v.* Jackson, 7 Wall. (U. S.) 262, 19 L. ed. 88; Haight *v.* Pittsburg, etc., R. Co., 6 Wall. (U. S.) 15, 18 L. ed. 818.

Taxation of corporate bonds in general see *supra*, III, B, 1, l.

Double taxation.— The holder of railroad bonds may be required to pay a tax on them notwithstanding the company is taxed on its stock and its "funded and floating debt," and this is declared to be "in lieu of all other taxes on railroad property and franchises." Bridgeport *v.* Bishop, 33 Conn. 187.

94. State Tax, etc., Bonds Case, 15 Wall. (U. S.) 300, 21 L. ed. 179. And see *supra*, III, A, 4, d, (I).

95. U. S. *v.* Erie R. Co., 106 U. S. 327, 1 S. Ct. 223, 27 L. ed. 151; Michigan Cent. R. Co. *v.* Slack, 100 U. S. 595, 25 L. ed. 647.

96. *Illinois.*—Huck *v.* Chicago, etc., R. Co., 86 Ill. 352.

Kentucky.— Com. *v.* Ingalls, 121 Ky. 194, 89 S. W. 156, 28 Ky. L. Rep. 164; Jefferson County *v.* Kentucky Bd. of Valuation, etc., 117 Ky. 531, 78 S. W. 443, 25 Ky. L. Rep. 1637; Com. *v.* Kinniconick, etc., R. Co., 104 S. W. 290, 31 Ky. L. Rep. 859.

Minnesota.— State *v.* Northern Pac. R. Co., 32 Minn. 294, 20 N. W. 234.

New Hampshire.— Atlantic, etc., R. Co. *v.* State, 60 N. H. 133.

United States.— Indianapolis, etc., R. Co. *v.* Vance, 96 U. S. 450, 24 L. ed. 752. See also Marye *v.* Baltimore, etc., R. Co., 127 U. S. 117, 8 S. Ct. 1037, 32 L. ed. 94.

See 45 Cent. Dig. tit. "Taxation," § 261.

Leased line outside the state.— A railroad company is not subject to taxation in Pennsylvania on so much of its capital stock as is represented by the value of a leasehold interest in a railroad wholly beyond the borders of the state. Com. *v.* Delaware, etc., R. Co., 1 Dauph. Co. Rep. (Pa.) 153.

Privilege for joint use.— A railroad company which has the privilege of using a car hoist and third rail jointly with their owner, to whose land they are affixed, is not liable for taxes imposed on them. Irvin *v.* New Orleans, etc., R. Co., 94 Ill. 105, 34 Am. Rep. 208.

97. *Connecticut.*— State *v.* Housatonic R. Co., 48 Conn. 44.

Mississippi.— Yazoo, etc., R. Co. *v.* Adams, 76 Miss. 545, 25 So. 366.

Missouri.— State *v.* St. Louis County, 84 Mo. 234.

New Mexico.—Valencia County *v.* Atchison,

The fact that a railroad is in the hands of its mortgagees, who are operating it, does not release it from taxation or require its assessment to be made to them.[98]

(IX) *Effect of Consolidation.*[99] The consolidation of domestic corporations does not affect the taxability of their property, and unless otherwise ordered by the legislature whatever property was taxable before the consolidation remains so after it.[1] So also where a railroad corporation is formed by the consolidation of several companies chartered by different states, it remains, in each of those states, a domestic corporation for the purpose of taxation.[2]

e. Miscellaneous Corporations — (I) *Building and Loan Associations.* In the absence of any special statutory provision building and loan associations are subject to taxation in the same manner as individual or other corporations,[3] and are therefore subject to taxation upon all their property,[4] at its full value,[5] including the amount of capital paid in and accumulated surplus,[6] and notes, bonds, and mortgages representing loans made to members or others;[7] and they may be taxed upon their capital stock,[8] or the shareholders upon their shares.[9] Owing to the particular nature of such associations and the consequent difficulty of assessing all of the property represented once and only once,[10] statutes have

etc., R. Co., 3 N. M. 380, 10 Pac. 294, holding that a leased line may be assessed to the lessee if listed for taxation by such lessee; but otherwise it must be assessed to the lessor.

New York.— People *v.* Feitner, 171 N. Y. 641, 63 N. E. 786 [*affirming* 61 N. Y. App Div. 129, 70 N. Y. Suppl. 500]; People *v.* Barker, 152 N. Y. 417, 46 N. E. 875 [*reversing* 6 App. Div. 356, 39 N. Y. Suppl. 682]. But see People *v.* Reid, 64 Hun 553, 19 N. Y. Suppl. 528, holding that a foreign corporation which is in possession of and operating the road of a domestic corporation under a lease for the full term of the latter's corporate existence is subject to taxation thereon.

See 45 Cent. Dig. tit. "Taxation," § 261.

Leased rolling-stock.— A railroad company is not the "owner" of cars which it holds and uses merely under a lease, in such sense as to be taxable on them. State *v.* St. Louis County, 84 Mo. 234; State *v.* St. Louis County Ct., 13 Mo. App. 53; Marye *v.* Baltimore, etc., R. Co., 127 U. S. 117, 8 S. Ct. 1037, 32 L. ed. 94.

Property leased from railroad.— Grain elevators built by private individuals on lands leased by them from a railroad company, along and on the company's right of way, intended for the private benefit of the lessees and removable by them, are not the property of the railroad company but are taxable to the lessees. Gilkerson *v.* Brown, 61 Ill. 486.

98. New Jersey Southern R. Co. *v.* Board of R. Com'rs, 41 N. J. L. 235.

99. **Effect of consolidation of corporations generally with reference to taxation** see *supra*, III, B, 1, b, (II).

1. Michigan, etc., R. Co. *v.* Auditor-Gen., 9 Mich. 448; Chesapeake, etc., R. Co. *v.* Virginia, 94 U. S. 718, 24 L. ed. 310.

2. Ohio, etc., R. Co. *v.* Weber, 96 Ill. 443; North Carolina *v.* Seaboard, etc., R. Co., 52 Fed. 450. *Compare* State Treasurer *v.* Auditor-Gen., 46 Mich. 224, 9 N. W. 258.

3. Washington Bldg., etc., Assoc. *v.* Hornbacker, 42 N. J. L. 635 [*affirming* 41 N. J. L. 519]; Territory *v.* Co-operative Bldg., etc., Assoc., 10 N. M. 337, 62 Pac. 1097; Albany Mut. Bldg. Assoc. *v.* Laramie, 10 Wyo. 54, 65 Pac. 1011.

4. Washington Bldg., etc., Assoc. *v.* Hornbacker, 41 N. J. L. 519 [*affirmed* in 42 N. J. L. 635]; Territory *v.* Co-operative Bldg., etc., Assoc., 10 N. M. 337, 62 Pac. 1097; Albany Mut. Bldg. Assoc. *v.* Laramie, 10 Wyo. 54, 65 Pac. 1011.

Deduction of debts.— Under a statute authorizing the deduction of debts from credits the assets of a building and loan association which, when the stock matures, will be distributed to the owners of the shares, do not constitute an indebtedness which may be deducted. Albany Mut. Bldg. Assoc. *v.* Laramie, 10 Wyo. 54, 65 Pac. 1011.

5. Washington Bldg., etc., Assoc. *v.* Hornbacker, 42 N. J. L. 635.

6. State *v.* Creveling, 39 N. J. L. 465.

7. People's Loan, etc., Assoc. *v.* Keith, 153 Ill. 609, 39 N. E. 1072, 28 L. R. A. 65; Washington Bldg., etc., Assoc. *v.* Hornbacker, 42 N. J. L. 635 [*affirming* 41 N. J. L. 519]; State *v.* Creveling, 39 N. J. L. 465; Territory *v.* Co-operative Bldg., etc., Assoc., 10 N. M. 337, 62 Pac. 1097 (not material that the loans were made to the association's own members); Albany Mut. Bldg. Assoc. *v.* Laramie, 10 Wyo. 54, 65 Pac. 1011.

8. Charlotte Bldg., etc., Assoc. *v.* Mecklenburg County, 115 N. C. 410, 20 S. E. 526. See also Com. *v.* Pottsville Union Sav. Fund Assoc., 2 Chest. Co. Rep. (Pa.) 189.

Under the Wyoming statutes corporations are taxed upon their property but not upon their capital stock. Albany Mut. Bldg. Assoc. *v.* Laramie, 10 Wyo. 54, 65 Pac. 1011.

9. Territory *v.* Co-operative Bldg., etc., Assoc., 10 N. M. 337, 62 Pac. 1097 (stockholders subject to taxation on their shares whether pledged or unpledged); Ohio Valley Bldg., etc., Assoc. *v.* Cabell County Ct., 42 W. Va. 818, 26 S. E. 203 (stock-holders assessed on their shares and association not subject to taxation on its capital stock).

10. See Com. *v.* Home, etc., Fund Co. Bldg.

been enacted in a number of jurisdictions relating specifically to the taxation of these associations and their members,[11] and in such cases the statutory mode of taxation must be followed.[12] Under some of these statutes the association is not subject to taxation on notes, bonds, and mortgages representing loans;[13] but ordinarily the stock-holders are subject to taxation on their shares,[14] in which

Assoc., 127 Ky. 537, 106 S. W. 221, 32 Ky. L. Rep. 435.

11. *Georgia.*— Atlanta Nat. Bldg., etc., Assoc. *v.* Stewart, 109 Ga. 80, 35 S. E. 73; McGowan *v.* Savannah Mut. Loan Assoc., 80 Ga. 515, 5 S. E. 775.

Illinois.— Olney Loan, etc., Assoc. *v.* Parker, 196 Ill. 388, 63 N. E. 725; *In re* St. Louis Loan, etc., Co., 194 Ill. 609, 62 N. E. 810, value of real estate assessed to association and stock-holders taxed upon their shares of stock.

Indiana.— Harn *v.* Woodard, 151 Ind. 132, 50 N. E. 33; Deniston *v.* Terry, 141 Ind. 677, 41 N. E. 143, association taxed on amount paid in and on outstanding shares of stock less the amount loaned to shareholders and secured by mortgages on real property listed for taxation.

Kentucky.— Com. *v.* Home, etc., Fund Co. Bldg. Assoc., 127 Ky. 537, 106 S. W. 221, 32 Ky. L. Rep. 435 (association subject to taxation under act of 1903 on surplus funds and undivided profits and stock-holders taxed on shares of stock); Com. *v.* Fayette Bldg., etc., Assoc., 71 S. W. 5, 24 Ky. L. Rep. 1223 (act of 1894).

Minnesota.— State *v.* Redwood Falls Bldg., etc., Assoc., 45 Minn. 154, 47 N. W. 540, 10 L. R. A. 752.

Missouri.—Kansas City *v.* Mercantile Mut. Bldg., etc., Assoc., 145 Mo. 50, 46 S. W. 624, holding that the statute merely provides for the taxation of the owners of shares "on which no loan has been obtained from such association," and that there being no provision in the statute for the taxation of the property of the company or the shares of borrowing members the legislative omission cannot be supplied by the courts.

New Hampshire.— Rochester Bldg., etc., Assoc. *v.* Rochester, 69 N. H. 173, 45 Atl. 255, holding that under the statute providing that the association shall be taxed on "the whole amount paid upon its stock or shares which are in force, less the amount of notes held by it secured by mortgages upon the homestead of the debtor, upon which the debtor pays a tax in this state," the association is subject to taxation not only upon amounts paid in as monthly dues but also upon net profits which are required by law to be distributed each year and added to the dues paid.

In Wyoming the act of 1890 relating to building and loan associations was repealed by the act of 1895 providing for the taxation of corporations generally. Albany Mut. Bldg. Assoc. *v.* Laramie, 10 Wyo. 54, 65 Pac. 1011.

Unconstitutional provisions.— The legislature may tax both the property of the association and the shares of the stock-holders, and it cannot constitutionally provide that the taxation upon the shares of the stock-holders shall be in lieu of all other taxes upon the corporation. Atlanta Nat. Bldg., etc., Assoc. *v.* Stewart, 109 Ga. 80, 35 S. E. 73. The amendment of 1901 to the Illinois statute of 1895, providing that no stock of a building and loan association "while loaned upon by, and pledged as security to the association issuing it, to an amount equal to the par value of such stock, shall be subject to assessment," was held to be unconstitutional as attempting to exempt all that portion of the capital stock on which loans had been procured. *In re* St. Louis Loan, etc., Co., 194 Ill. 609, 62 N. E. 810.

When association is "doing business."— An association which has ceased to collect dues from members who have not borrowed out money, and has ceased to make loans, but is in other respects in full life, is "doing business" within the meaning of the tax law of 1879, and liable to taxation. Com. *v.* Pottsville Union Sav. Fund Assoc., 2 Chest. Co. Rep. (Pa.) 189.

12. Olney Loan, etc., Assoc. *v.* Parker, 196 Ill. 388, 63 N. E. 725; Com. *v.* Fayette Bldg., etc., Assoc., 71 S. W. 5, 24 Ky. L. Rep. 1223.

13. *In re* St. Louis Loan, etc., Co., 194 Ill. 609, 62 N. E. 810 (holding that under the act of 1895, except as to real estate, the value of which is assessed to the association, the value of the stock assessed to the shareholders includes all the assets of the association and that therefore notes and mortgages representing loans are not to be assessed to the association); Com. *v.* Home, etc., Fund Co. Bldg. Assoc., 127 Ky. 537, 106 S. W. 221, 32 Ky. L. Rep. 435 (holding that under the act of 1903 the association is not subject to taxation on notes and bonds representing loans to members). But see State *v.* Redwood Falls Bldg., etc., Assoc., 45 Minn. 154, 47 N. W. 540, 10 L. R. A. 752, holding that the act of 1885, providing that mortgages of such corporations "which are represented in their stock, and assessed as stock shall not be assessed as mortgages," justifies the taxation of such mortgages unless they are in effect taxed by a taxation of the stock.

14. Atlanta Nat. Bldg., etc., Assoc. *v.* Stewart, 109 Ga. 80, 35 S. E. 73 (holding that the tax imposed under the act of 1896 is a tax upon the shares of stock as the property of the stock-holders and not upon the property of the corporation); McGowan *v.* Savannah Mut. Loan Assoc., 80 Ga. 515, 5 S. E. 775 (holding that under the act of 1884 stock, on which no advance or loan has been made to the owner of the shares, is subject to taxation at its true market value); Olney Loan, etc., Assoc. *v.* Parker, 196 Ill. 388, 63 N. E. 725; *In re* St. Louis Loan, etc., Co., 194 Ill. 609, 62 N. E. 810 (valuation of shares to include all assets of the association except

case of course the building and loan association should not be subjected to taxation upon its capital stock.[15]

(II) *Street Railroads.* It has been held that a street railway company, whose cars are operated by motive power other than steam, is not a "railroad company," within the meaning of the tax laws relating to such companies;[16] but is subject to taxation, under statutes referring particularly to this class of corporations, on its franchises as well as other property,[17] and may be made also to pay a license-fee, either generally for the privilege of conducting its business, or specially on each car operated,[18] unless exempted from such fees by something in the nature of a contract.[19] The right of way of such a company is generally held taxable as real estate,[20] as are also its tracks, poles, wires, bridges, power-

real estate); Com. *v.* Home, etc., Fund Co. Bldg. Assoc., 127 Ky. 537, 106 S. W. 221, 32 Ky. L. Rep. 435 (stock-holders subject to taxation on shares under the act of 1903, provided that borrowing members shall not be required to list shares where the amounts borrowed equal or exceed the amounts paid in on their shares, the shares taxed to be values at the amount paid in and not withdrawn); Com. *v.* Fayette Bldg., etc., Assoc., 71 S. W. 5, 24 Ky. L. Rep. 1223; Kansas City *v.* Mercantile Mut. Bldg., etc., Assoc., 145 Mo. 50, 46 S. W. 624 (statutory provision for taxation of shares "on which no loan has been obtained from such association" but no provision in regard to taxation of borrowing members).

Under the Indiana statutes the interest of a stock-holder in a building and loan association, or at least in the case of a non-borrowing member (see Deniston *v.* Terry, 141 Ind. 677, 41 N. E. 143), while not assessed to him as stock (see Harn *v.* Woodard, 151 Ind. 132, 50 N. E. 33), is nevertheless subject to taxation at its actual value as a credit (Co-operative Bldg., etc., Assoc. *v.* State, 156 Ind. 463, 60 N. E. 146; Harn *v.* Woodard, *supra*; Deniston *v.* Terry, *supra*), whether the stock is paid up in full or not (State *v.* Real Estate Bldg., etc., Assoc., 151 Ind. 502, 51 N. E. 1061; Harn *v.* Woodard, *supra*).

Mandamus will lie to compel a building and loan association to permit the taxing officers to examine its books and records for the purpose of ascertaining if any of its stock has been omitted from taxation. Co-operative Bldg., etc., Assoc. *v.* State, 156 Ind. 463, 60 N. E. 146; State *v.* Real Estate Bldg., etc., Assoc., 151 Ind. 502, 51 N. E. 1061.

15. Olney Loan, etc., Assoc. *v.* Parker, 196 Ill. 388, 63 N. E. 725; Com. *v.* Fayette Bldg., etc., Assoc., 71 S. W. 5, 24 Ky. L. Rep. 1223. See also cases cited *supra*, note 14.

16. State *v.* Duluth St. R. Co., 76 Minn. 96, 78 N. W. 1032; Lookout Incline, etc., R. Co. *v.* King, (Tenn. Ch. App. 1900) 59 S. W. 805. See also McDonald *v.* Union Freight R. Co., 190 Mass. 123, 76 N. E. 655. *Contra*, Philadelphia *v.* Philadelphia Traction Co., 206 Pa. St. 35, 55 Atl. 762.

17. People *v.* State Tax Com'rs, 174 N. Y. 417, 67 N. E. 69; Dallas *v.* Dallas Consol. Electric St. R. Co., 95 Tex. 268, 66 S. W. 835.

Other franchises acquired.—Where a street railroad company pursuant to legislative authority acquires the franchise of an electric lighting company, such franchise is thereafter taxable to the street railroad company and not to the lighting company. State *v.* Anderson, 97 Wis. 114, 72 N. W. 386 [*overruling* State *v.* Anderson, 90 Wis. 550, 63 N. W. 746].

Franchise taxes on gross receipts.—A street railroad company which is awarded a franchise in consideration of an agreement to pay a certain percentage of its gross receipts must pay such percentage on the receipts from all tracks used by it including receipts derived from the operation under trackage agreements of tracks built and owned by other companies. New York *v.* Fulton St. R. Co., 130 N. Y. App. Div. 791, 115 N. Y. Suppl. 410 [*reversing* 59 Misc. 630, 112 N. Y. Suppl. 494].

18. Springfield *v.* Smith, 138 Mo. 645, 40 S. W. 757, 60 Am. St. Rep. 569, 37 L. R. A. 446; Pittsburgh R. Co. *v.* Pittsburgh, 211 Pa. St. 479, 60 Atl. 1077; Frankford, etc., Pass. R. Co. *v.* Philadelphia, 58 Pa. St. 119, 98 Am. Dec. 242; New Orleans City, etc., R. Co. *v.* New Orleans, 143 U. S. 192, 12 S. Ct. 406, 36 L. ed. 121; Montreal St. R. Co. *v.* Montreal, 23 Can. Sup. Ct. 259.

In Alabama a street railway company which has paid the license-tax is not liable to any other corporate or privilege tax. Montgomery Traction Co. *v.* State, 150 Ala. 664, 44 So. 541.

Tax on coaches.—Where a street railroad company agreed to pay a license-fee for each "coach" which it operated, it must pay the same fee for street cars which it substitutes for the old-fashioned coaches. New York *v.* Third Ave. R. Co., 117 N. Y. 404, 646, 22 N. E. 755.

19. Louisville *v.* Louisville R. Co., 118 Ky. 534, 81 S. W. 701, 26 Ky. L. Rep. 378, 84 S. W. 535, 27 Ky. L. Rep. 141; Detroit Citizens' St. R. Co. *v.* Detroit, 125 Mich. 673, 85 N. W. 96, 86 N. W. 809, 84 Am. St. Rep. 589; North Hudson County R. Co. *v.* Hoboken, 41 N. J. L. 71; New York *v.* Third Ave. R. Co., 33 N. Y. 42; Heerwagen *v.* Crosstown St. R. Co., 90 N. Y. App. Div. 275, 86 N. Y. Suppl. 218.

20. Newark *v.* State Bd. of Taxation, 66 N. J. L. 466, 49 Atl. 525; People *v.* Cassity, 2 Lans. (N. Y.) 294.

houses, and car barns,[21] except where such property is included in the valuation of the franchise.[22] But the rolling-stock is taxable as personalty.[23] In some states the property of a street railway company, necessary to its operation, including tracks, stables, horses, and vehicles, is exempt from taxation for local purposes.[24]

(III) *Elevated Railroads.* A railroad company of this description is taxable on substantially the same principles as a surface street railway.[25] Its foundations, columns, and superstructures are classified as real estate for the purpose of taxation;[26] and if the company, by proper condemnation proceedings and the payment of damages to abutting property-owners acquires the easements of light, air, and access of such owners and a perpetual right to operate in front of their property, the rights so acquired represent property which may be assessed as an asset of the company,[27] although where judgments are recovered against the company by such property-owners for trespass to their easements of light and air, such judgments do not result in the acquisition of rights by the company and therefore are not to be considered as increasing its assessable property, but on the contrary they create liabilities which are a deductible indebtedness in making the assessment.[28]

(IV) *Express and Other Transportation Companies.* A company engaged in the express business or other forms of the transportation of merchandise[29] may be taxed, according to the systems in vogue in different states, on its actual property within the jurisdiction of the taxing power,[30] or on its gross income or receipts.[31]

Easements in streets.— The gross earnings tax imposed on street railroads by the acts of 1882 includes as an element a tax on the easement of the company in the streets under a grant for that purpose, and no other assessment on its easement can be made without express legislative authority; but as to that part of the road located on turnpikes and private rights of way, upon the receipts from which such tax is not paid, the easements therein are subject to taxation. United R., etc., Co. *v.* Baltimore, 111 Md. 264, 73 Atl. 633.

21. *Connecticut.*— New Haven *v.* Fair Haven, etc., R. Co., 38 Conn. 422, 9 Am. Rep. 399.

New Jersey.— Newark, etc., Traction Co. *v.* North Arlington, 65 N. J. L. 150, 46 Atl. 568.

New York.—People *v.* Cassity, 46 N. Y. 46.

United States.— New York Guaranty, etc., Co. *v.* Tacoma R., etc., Co., 93 Fed. 51, 35 C. C. A. 192.

Canada.— *In re* London St. R. Co. Assessment, 27 Ont. App. 83. See also *In re* Toronto R. Co. Assessment, 25 Ont. App. 135. See 45 Cent. Dig. tit. "Taxation," § 268.

22. State *v.* Anderson, 90 Wis. 550, 63 N. W. 746 [*overruled* on other grounds in State *v.* Anderson, 97 Wis. 114, 72 N. W. 386].

23. Toronto R. Co. *v.* Toronto, [1904] A. C. 809, 73 L. J. P. C. 120, 91 L. T. Rep. N. S. 541, 20 T. L. R. 774. *Compare In re* Bell Tel. Co., 37 Can. L. J. N. S. 851; Kirkpatrick *v.* Cornwall Electric St. R. Co., 2 Ont. L. Rep. 113.

24. Middlesex R. Co. *v.* Charlestown, 8 Allen (Mass.) 330; Northampton County *v.* Easton Pass. R. Co., 148 Pa. St. 282, 23 Atl. 895; People's Pass. R. Co. *v.* Taylor, 10 Pa. Dist. 343; People's St. R. Co. *v.* Scranton, 8 Pa. Co. Ct. 633.

25. Brooklyn El. R. Co. *v.* Brooklyn, 11 N. Y. App. Div. 127, 42 N. Y. Suppl. 683.

26. People *v.* New York Tax, etc., Com'rs, 82 N. Y. 459; People *v.* New York Tax, etc., Comr's, 4 N. Y. Suppl. 41.

27. People *v.* Barker, 165 N. Y. 305, 59 N. E. 137, 151 [*reversing* 48 N. Y. App. Div. 248, 63 N. Y. Suppl. 167 (*reversing* 28 Misc. 13, 59 N. Y. Suppl. 926)].

28. People *v.* Barker, 165 N. Y. 305, 59 N. E. 137, 151.

29. **Transportation companies.**—A corporation engaged in the removal of petroleum from place to place by means of pipes is a "transportation company" within the meaning of a statute taxing such companies. Columbia Conduit Co. *v.* Com., 90 Pa. St. 307. And see Mellon Pipe Lines *v.* Allegheny County, 3 Pa. Dist. 448. So also are "slack water" companies. Com. *v.* Monongahela Nav. Co., 66 Pa. St. 81.

30. See Wells *v.* Crawford County, 63 Ark. 576, 40 S. W. 710, 37 L. R. A. 371; Erie County *v.* Erie, etc., Transp. Co., 87 Pa. St. 434; Sanford *v.* Poe, 165 U. S. 194, 17 S. Ct. 305, 41 L. ed. 683.

31. State *v.* Boston, etc., Express Co., 100 Me. 278, 61 Atl. 697; Com. *v.* Monongahela Nav. Co., 66 Pa. St. 81.

The total gross receipts of an express company are taxable without deducting amounts paid to railroads for the transportation of the goods on which such receipts were collected. Com. *v.* U. S. Express Co., 157 Pa. St. 579, 27 Atl. 396.

Franchise tax.—A tax on the gross receipts of an express company is a franchise tax. State *v.* Boston, etc., Express Co., 100 Me. 278, 61 Atl. 697.

(v) *Bridge, Ferry, and Canal Companies.* A corporation owning and maintaining a toll bridge is taxable in respect to its property under the general laws of the state,[32] unless the ordinary rules are varied in its case by a special concession or contract with the state;[33] and it is not released from taxation by the fact that its bridge is leased to or occupied by a railroad company.[34] The same general principles are applicable to companies operating canals, whether for transportation or for the creation of water power,[35] and to ferry companies.[36]

(vi) *Turnpike and Toll-Road Companies.* Turnpike and toll-road companies, unless exempt, are subject to taxation upon their franchises and property,[37] including the road-bed and right of way,[38] and if authorized by statute each county may tax so much of the road as lies within its borders.[39]

Receipts from interstate business.— It has been held that a tax on the gross receipts of such companies must be limited to the gross receipts of business arising within the state. State *v.* Fleming, 70 Nebr. 523, 97 N. W. 1063. But see State *v.* Boston, etc., Express Co., 100 Me. 278, 61 Atl. 697.

32. Toll Bridge Co. *v.* Osborn, 35 Conn. 7; Alexandria Canal R., etc., Co. *v.* District of Columbia, 1 Mackey (D. C.) 217; Cornish Bridge Proprietors *v.* Richardson, 8 N. H. 207; Hudson River Bridge Co. *v.* Patterson, 74 N. Y. 365.

As real estate.— Bridge property is properly assessed as real estate. State *v.* Metz, 29 N. J. L. 122. And a toll bridge is properly taxed as real estate, although built over a navigable river. Hudson River Bridge Co. *v.* Patterson, 74 N. Y. 365. In Illinois such structures were formerly classed as personal property but the rule was changed by the act of 1873. See Quincy R. Bridge Co. *v.* Adams County, 88 Ill. 615.

Consolidated company.— Under a statute imposing a tax on the capital stock of corporations, a bridge company formed by the consolidation of two different corporations chartered by different states may be treated as a domestic corporation and taxed upon its capital stock in one of such states, regardless of how it be regarded in the other. Quincy R. Bridge Co. *v.* Adams County, 88 Ill. 615.

Taxation of bridges in general see *supra*, III, A, 2, b, (IV).

33. Covington, etc., Bridge Co. *v.* Mayer, 31 Ohio St. 317; Sebastian *v.* Covington, etc., Bridge Co., 21 Ohio St. 451.

34. St. Louis, etc., R. Co. *v.* Williams, 53 Ark. 58, 13 S. W. 796; Chicago, etc., R. Co. *v.* People, 153 Ill. 409, 38 N. E. 1075, 29 L. R. A. 69; State *v.* Mississippi River Bridge Co., 134 Mo. 321, 35 S. W. 592.

Railroad bridges see *supra*, III, B, 2, d, (II).

35. Lowell *v.* Middlesex County, 6 Allen (Mass.) 131.

In Pennsylvania it has been held that the property of a canal company which is used in connection with its business and necessary thereto, such as the bed and banks of the canal, reservoirs, and houses for lock tenders, toll collectors, etc., is not subject to taxation. Wayne County *v.* Delaware, etc., Canal Co., 15 Pa. St. 351; Schuylkill Nav. Co. *v.* Berks County, 11 Pa. St. 202; Lehigh Coal, etc., Co. *v.* Northampton County, 8 Watts & S. 334. But under the act of 1844 the stockholders of canal companies are subject to taxation on their shares of stock for both state and county purposes. Lycoming County *v.* Gamble, 47 Pa. St. 106.

36. See Pavonia Ferry Co. *v.* Richards, 30 N. J. L. 266 (holding, however, that where a ferry company has leased its rights it cannot be assessed for boats and coal not owned by it but which are the property of the lessee, and that it is not material whether the ferry company had a right to make the lease); Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365, 2 S. Ct. 257, 27 L. ed. 419 (construing a provision in the charter of a ferry company that it should not be taxed at a higher rate than any other ferry company).

37. Estes Park Toll Road Co. *v.* Edwards, 3 Colo. App. 74, 32 Pac. 549; Frankfort, etc., Turnpike Co. *v.* Com., 82 Ky. 386.

38. Estes Park Toll Road Co. *v.* Edwards, 3 Colo. App. 74, 32 Pac. 549; Frankfort, etc., Turnpike Co. *v.* Com., 82 Ky. 386.

Grant of right of way over public lands.— Where congress grants a right of way over public lands to a toll-road company, and the company accepts the grant and constructs its road thereon, the road, including the road-bed and right of way, is the property of the company and subject to taxation in the county where it is located. Estes Park Toll Road Co. *v.* Edwards, 3 Colo. App. 74, 32 Pac. 549.

Easement in highway.— In New York where a turnpike company was authorized to improve and convert a former public highway into a toll-road, it was held that, although the company did not own the fee in the road it had an easement which was subject to taxation as real estate. The decision was reversed by the court of appeals on the ground that regardless of the nature of the company's interest, the assessment was fatally defective in not indicating in its description that it was not laid upon something other than an ownership of the fee of the land, the court being divided as to whether the company had any interest in the highway which was subject to taxation as real estate. See People *v.* Selkirk, 180 N. Y. 401, 73 N. E. 248 [*reversing* 94 N. Y. App. Div. 509, 87 N. Y. Suppl. 1104].

39. Frankfort, etc., Turnpike Co. *v.* Com., 82 Ky. 386.

In New Jersey the statutes relating to the

(VII) *Telegraph and Telephone Companies.* A telegraph or telephone company,[40] if employed in transmitting messages between points in two or more states, is within the provision of the federal constitution as to interstate commerce, and hence cannot be taxed by a state on messages so transmitted or on its receipts therefrom;[41] but each state may tax so much of the company's property as lies within its own borders, and this may be determined either on the mileage basis or as a proportional part of the value of its entire system or of its whole capital.[42] The local authorities may also impose a license-fee on interstate telegraph companies, which may be a fixed sum or graduated according to the number of poles, instruments, or messages sent, provided it is reasonably proportioned to the expense involved in the inspection and other regulation and control of such companies, and is not primarily a means of raising revenue.[43] Subject to these restrictions, and to such exemptions as the state may choose to grant,[44] or the substitution of special kinds of taxes for general taxes,[45] the prop-

taxation of turnpike companies do not authorize a division of a turnpike road-bed into sections corresponding to the different taxing districts through which it passes and their assessment in each as so much real estate. Bergen County Turnpike Co. *v.* Haas, 61 N. J. L. 174, 39 Atl. 654.

40. **A railroad company** which operates a telegraph system, but only for its own purposes and in connection with the running of its trains, is not taxable as a "telegraph company." Adams *v.* Louisville, etc., R. Co., (Miss. 1893) 13 So. 932. But if a railroad company having no separate franchise or authority to carry on a general telegraph business assumes such a franchise and carries on the business, it is estopped to deny the existence of the franchise and is subject to taxation under a statute providing for the taxation of franchises of telegraph companies. Minneapolis, etc., R. Co. *v.* Oppegard, (N. D. 1908) 118 N. W. 830.

41. Western Union Tel. Co. *v.* Seay, 132 U. S. 472, 10 S. Ct. 161, 33 L. ed. 409 [*reversing* 80 Ala. 273, 60 Am. Rep. 99]; Ratterman *v.* Western Union Tel. Co., 127 U. S. 411, 8 S. Ct. 1127, 32 L. ed. 229; Western Union Tel. Co. *v.* Pendleton, 122 U. S. 347, 7 S. Ct. 1126, 30 L. ed. 1187; Western Union Tel. Co. *v.* Texas, 105 U. S. 460, 26 L. ed. 1067. See also Commerce, 7 Cyc. 450, 482.

Interprovincial lines in Canada see Great North Western Tel. Co. *v.* Fortier, 12 Quebec K. B. 405.

42. *Alabama.*— Southern Express Co. *v.* Mobile, 49 Ala. 404.

Maine.— State *v.* Western Union Tel. Co., 73 Me. 518.

Missouri.— State *v.* Western Union Tel. Co., 165 Mo. 502, 65 S. W. 775.

New York.— People *v.* Gold, etc., Tel. Co., 98 N. Y. 67.

Pennsylvania.— Com. *v.* Western Union Tel. Co., 2 Dauph. Co. Rep. 40.

United States.—Western Union Tel. Co. *v.* Taggart, 163 U. S. 1, 16 S. Ct. 1054, 41 L. ed. 49; Postal Tel. Cable Co. *v.* Adams, 155 U. S. 688, 15 S. Ct. 268, 39 L. ed. 311; Massachusetts *v.* Western Union Tel. Co., 141 U. S. 40, 11 S. Ct. 889, 35 L. ed. 628; Western Union Tel. Co. *v.* Atty.-Gen., 125 U. S. 530, 8 S. Ct. 961, 31 L. ed. 790.

Tax on dividends.—Where telegraph companies are taxed according to their dividends, if one telegraph company leases its lines to another company, which agrees to pay an amount equal to ten per cent on the par value of all the shares except those owned by the lessee, the lessor company is liable to be taxed according to a dividend of ten per cent on the whole of its capital. Atlantic, etc., Tel. Co. *v.* Com., 66 Pa. St. 57.

43. *Maryland.*— Postal Tel. Cable Co. *v.* Baltimore, 79 Md. 502, 29 Atl. 819, 24 L. R. A. 161.

Nebraska.—Western Union Tel. Co. *v.* Fremont, 39 Nebr. 692, 58 N. W. 415, 26 L. R. A. 698.

New York.— Philadelphia *v.* Postal Tel. Co., 67 Hun 21, 21 N. Y. Suppl. 556.

Pennsylvania.— Taylor *v.* Postal Tel. Cable Co., 202 Pa. St. 583, 52 Atl. 128; New Hope Borough *v.* Postal Tel. Cable Co., 202 Pa. St. 532, 52 Atl. 127; Chester *v.* Philadelphia, etc., Tel. Co., 148 Pa. St. 120, 23 Atl. 1070; Allentown *v.* Western Union Tel. Co., 148 Pa. St. 117, 23 Atl. 1070, 33 Am. St. Rep. 820.

Virginia.— See Postal Tel. Cable Co. *v.* Richmond, 99 Va. 102, 37 Atl. 789, 86 Am. St. Rep. 877.

United States.— Atlantic, etc., Tel. Co. *v.* Philadelphia, 190 U. S. 160, 23 S. Ct. 817, 47 L. ed. 995 [*reversing* 102 Fed. 254, 42 C. C. A. 325]; Western Union Tel. Co. *v.* New Hope, 187 U. S. 419, 23 S. Ct. 204, 47 L. ed. 240; Postal Tel. Co. *v.* Charleston, 153 U. S. 692, 14 S. Ct. 1094, 38 L. ed. 871; St. Louis *v.* Western Union Tel. Co., 148 U. S. 92, 13 S. Ct. 990, 37 L. ed. 810; Sunset Tel., etc., Co. *v.* Medford, 115 Fed. 202; Philadelphia *v.* Western Union Tel. Co., 89 Fed. 454, 32 C. C. A. 246.

License fees and taxes generally see Commerce, 7 Cyc. 451; Licenses, 25 Cyc. 620.

44. See Atty.-Gen. *v.* Detroit, 113 Mich. 388, 71 N. W. 632, exemption of telephone companies from local taxation.

45. Portland *v.* New England Tel., etc., Co., 103 Me. 240, 68 Atl. 1040 (substitution of excise tax); State *v.* Northwestern Tel. Exch. Co., 84 Minn. 459, 87 N. W. 1131 (substitution of gross earnings tax).

Application of statutes.— The Minnesota

erty of these companies is taxable like other property,[46] and it is generally held that the poles, wires, conduits, and instruments are assessable as real estate.[47] Such a company may also be required to pay a franchise tax.[48] While a telegraph company which has accepted the provisions of the Post Roads Act of 1866 cannot be excluded by a state or prevented from carrying on its business,[49] it does not thereby acquire any immunity from state taxation,[50] except as regards its federal franchise.[51]

(VIII) *Electric Light and Power Companies.* Electric light and power companies, unless exempt by law, are subject to taxation.[52] Their poles, wires, switches, meters, etc., are ordinarily classed as personalty, rather than real property,[53] especially such parts thereof as are installed on the premises of patrons

statute of 1897, providing for a gross earnings tax to be in lieu of other taxes upon the property of telephone companies used in the conduct of their business, does not apply to property owned by such companies but not necessarily used by them in the conduct of their business as telephone companies. State *v.* Northwestern Tel. Exch. Co., 96 Minn. 389, 104 N. W. 1086; State *v.* Northwestern Tel. Exch. Co., 84 Minn. 459, 87 N. W. 1131.

46. See State *v.* Northwestern Tel. Exch. Co., 96 Minn. 389, 104 N. W. 1086; People *v.* Dolan, 126 N. Y. 166, 27 N. E. 269, 12 L. R. A. 251; Western Union Tel. Co. *v.* State, 9 Baxt. (Tenn.) 509, 40 Am. Rep. 90.

The payment of a privilege tax does not exempt a telegraph company from taxation on its property. Western Union Tel. Co. *v.* State, 9 Baxt. (Tenn.) 509, 40 Am. Rep. 90.

47. Western Union Tel. Co. *v.* State, 9 Baxt. (Tenn.) 509, 40 Am. Rep. 90; *In re* Canadian Pac. Tel. Co., 34 Can. L. J. 789; *In re* Bell Tel. Co., 25 Ont. App. 351; Bell Tel. Co. *v.* Ascot Tp., 16 Quebec Sup. Ct. 436. But see Portland *v.* New England Tel., etc., Co., 103 Me. 240, 68 Atl. 1040; People *v.* Hall, 57 Misc. (N. Y.) 308, 109 N. Y. Suppl. 402.

48. State *v.* Western Union Tel. Co., 73 Me. 518; People *v.* Gold, etc., Tel. Co., 98 N. Y. 67.

If a company having no franchise or authority to carry on a telegraph business assumes such a franchise and carries on a telegraph business, it is subject to taxation thereon. Minneapolis, etc., R. Co. *v.* Oppegard, (N. D. 1908) 118 N. W. 830.

Special franchises.—In New York telegraph companies are within the application of the law taxing "special franchises," which are classified for purposes of taxation as real estate and include the tangible property of the company which is situated in, upon, under, or above any street, highway, public place, or public waters in connection with the special franchises, the valuation for assessment to be made by the state board of tax commissioners. People *v.* Woodbury, 63 Misc. (N. Y.) 1, 116 N. Y. Suppl. 209. So where a telephone company shows to a town board of assessors that it has no real property in the town other than that assessed by the state board of tax commissioners, and its poles and wires in the public highway, an assessment made against it for real estate in the town is illegal. People *v.* Hall, 57 Misc. (N. Y.) 308, 109 N. Y. Suppl. 402.

49. See Western Union Tel. Co. *v.* Massachusetts, 125 U. S. 530, 8 S. Ct. 961, 31 L. ed. 790; and Telegraphs and Telephones, *post*, p. ——.

50. Western Union Tel. Co. *v.* Missouri, 190 U. S. 412, 23 S. Ct. 730, 47 L. ed. 1116; Massachusetts *v.* Western Union Tel. Co., 141 U. S. 40, 11 S. Ct. 889, 35 L. ed. 628; Western Union Tel. Co. *v.* Massachusetts, 125 U. S. 530, 8 S. Ct. 961, 31 L. ed. 790; Western Union Tel. Co. *v.* Wright, 158 Fed. 1004. See also *infra*, III, D, 4; and, generally, Telegraphs and Telephones, *post*, p. ——.

51. See *infra*, III, D, 4.

52. Com. *v.* New Castle Electric Co., 11 Pa. Dist. 389, tax on gross receipts.

Transfer of franchises and property.— If an electric light company, pursuant to legislative authority, transfers its property and franchises to a street railroad company, such property and franchises are thereafter taxable to the street railroad company and not to the lighting company. State *v.* Anderson, 97 Wis. 114, 72 N. W. 386 [*overruling* State *v.* Anderson, 90 Wis. 550, 63 N. W. 746].

"Special franchises."— Under N. Y. Laws (1896), as amended by Laws (1899), tangible property of an electric light company situated in or under public waters in connection with a special franchise cannot be assessed by the commissioners of taxes in New York city, but is to be taxed only as a part of the special franchise by the state board of tax commissioners. People *v.* New York Tax, etc., Com'rs, 58 Misc. (N. Y.) 249, 110 N. Y. Suppl. 833.

In Pennsylvania the lands, buildings, and appliances of such companies essential to the carrying out of their corporate franchises are not subject to local taxation. Southern Electric Light, etc., Co. *v.* Philadelphia, 191 Pa. St. 170, 43 Atl. 123; Lancaster *v.* Edison Electric Illuminating Co., 8 Pa. Co. Ct. 631; Scranton *v.* Scranton Electric Light, etc., Co., 8 Pa. Co. Ct. 626.

53. Shelbyville Water Co. *v.* People, 140 Ill. 545, 30 N. E. 678, 16 L. R. A. 505; People *v.* Feitner, 99 N. Y. App. Div. 274, 90 N. Y. Suppl. 904 [*affirmed* in 181 N. Y. 549, 74 N. E. 1124]; Newport Illuminating Co. *v.*

or consumers,[54] or constructed in a public highway under an ordinance subject to revocation.[55]

(IX) *GAS COMPANIES.* A corporation of this sort is taxable, according to the laws of the particular state, on its franchises,[56] on its easement of occupying the public streets,[57] on its capital and surplus or undivided profits,[58] and on its physical property;[59] and as to the latter it is generally held that gas pipes and mains laid under the streets are assessable as real estate.[60] In Pennsylvania a gas company is regarded as a "public corporation" in such sense as to be exempt from taxation for local purposes, under the laws of that state, on such of its property as is necessary for conducting its business,[61] although in some other states a contrary view prevails.[62]

(X) *MINING COMPANIES.*[63] Mining companies, unless exempt, are subject to taxation upon their property,[64] or according to the different statutes are taxable

Newport Tax Assessors, 19 R. I. 632, 36 Atl. 426, 36 L. R. A. 266. But see Herkimer County Light, etc., Co. *v.* Johnson, 37 N. Y. App. Div. 257, 55 N. Y. Suppl. 924.

54. People *v.* Feitner, 99 N. Y. App. Div. 274, 90 N. Y. Suppl. 904 [*affirmed* in 181 N. Y. 549, 74 N. E. 1124].

55. Newport Illuminating Co. *v.* Newport Tax Assessors, 19 R. I. 632, 36 Atl. 426, 36 L. R. A. 266.

56. Patterson, etc., Gas, etc., Co. *v.* State Bd. of Assessors, 69 N. J. L. 116, 54 Atl. 246; People *v.* Wells, 42 Misc. (N. Y.) 606, 87 N. Y. Suppl. 595; People *v.* Olean Assessors, 15 N. Y. St. 461.

57. Baltimore Consol. Gas Co. *v.* Baltimore, 101 Md. 541, 61 Atl. 532, 109 Am. St. Rep. 584, 1 L. R. A. N. S. 263.

58. New Orleans City Gas Light Co. *v.* Bd. of Assessors, 31 La. Ann. 475; People *v.* Brooklyn City Bd. of Assessors, 76 N. Y. 202. See also Com. *v.* Lowell Gas Light Co., 12 Allen (Mass.) 75, tax on market value of capital stock in excess of value of real estate and machinery.

59. Newport Light Co. *v.* Newport, 20 S. W. 434, 14 Ky. L. Rep. 464; Com. *v.* Lowell Gas Light Co., 12 Allen (Mass.) 75; Memphis Gaslight Co. *v.* State, 6 Coldw. (Tenn.) 310, 98 Am. Dec. 452.

As manufacturing establishment.— Under a statute providing for the taxation of "manufacturing establishments" the pipes used to convey gas from the place of manufacture to the company's customers, although laid through and under the public streets of a city, are the property of the company and taxable as a part of the establishment, but pipes owned by the city or private persons into which the company delivered gas for consumption would not be included. Memphis Gaslight Co. *v.* State, 6 Coldw. (Tenn.) 310, 98 Am. Dec. 452.

The payment of a license-tax does not exempt a gas company from *ad valorem* taxation. Newport Light Co. *v.* Newport, 20 S. W. 434, 14 Ky. L. Rep. 464.

Advance deposits.—An advance payment required of customers on account of gas to be used and as a guaranty for the return of the meter, etc., is a mere pledge so long as no unpaid obligation accrues against the customer and is not taxable to the company, but to the extent of any default it becomes a payment thereon and taxable to the company. Parsons Natural Gas Co. *v.* Rockhold, 79 Kan. 661, 100 Pac. 639.

60. Capital City Gas-Light Co. *v.* Charter Oak Ins. Co., 51 Iowa 31, 50 N. W. 579; Herkimer County Light, etc., Co. *v.* Johnson, 37 N. Y. App. Div. 257, 55 N. Y. Suppl. 924; Providence Gas Co. *v.* Thurber, 2 R. I. 15, 55 Am. Dec. 621; Consumers' Gas Co. *v.* Toronto, 27 Can. Sup. Ct. 453; *In re* Gas Company, 7 Can. L. J. 104. *Contra,* People *v.* Brooklyn Bd. of Assessors, 39 N. Y. 81; Memphis Gaslight Co. *v.* State, 6 Coldw. (Tenn.) 310, 98 Am. Dec. 452, holding that gas pipes laid in a street for distributing gas to consumers are taxable as personal property but not as realty.

Gas pipes and meters as machinery see Com. *v.* Lowell Gas Light Co., 12 Allen (Mass.) 75.

61. St. Mary's Gas Co. *v.* Elk County, 191 Pa. St. 458, 43 Atl. 321; Schuylkill County *v.* Citizens' Gas Co., 148 Pa. St. 162, 23 Atl. 1055; Pittsburgh's Appeal, 123 Pa. St. 374, 16 Atl. 621; Coatesville Gas Co. *v.* Chester County, 97 Pa. St. 476; St. Mary's Gas Co. *v.* Elk County, 15 Pa. Co. Ct. 411; Abbott *v.* Chester Gas Co., 1 Chest. Co. Rep. (Pa.) 158; Northampton County *v.* Easton Gas Co., 1 Chest. Co. Rep. (Pa.) 157.

Dwelling-houses erected for the accommodation of workmen are merely conveniences and not necessary for the company's proper work and are therefore subject to taxation. West Chester Gas Co. *v.* Chester County, 30 Pa. St. 232.

Validity of borough ordinance imposing license-tax on pipes of gas company see Kittanning Borough *v.* Kittanning Consol. Natural Gas Co., 26 Pa. Super. Ct. 355.

62. Newport Light Co. *v.* Newport, 20 S. W. 434, 14 Ky. L. Rep. 464; Com. *v.* Lowell Gas Light Co., 12 Allen (Mass.) 75.

63. Taxation of mines, mining claims, and minerals generally see *supra,* III, A, 2, b, (II).

64. Hart *v.* Plum, 14 Cal. 148 (holding that an exemption from taxation of mining claims does not include the flumes or machinery necessary to work them); People *v.* Henderson, 12 Colo. 369, 21 Pac. 144; Hope Min. Co. *v.* Kennon, 3 Mont. 35 (holding that

upon their capital employed within the state,[65] or capital stock according to the rate of dividends declared,[66] or upon the amount of the output,[67] or the annual proceeds of the mines.[68] The stock-holders in such companies may also be taxed upon their shares of stock.[69]

(xi) *Water Companies.* A corporation whose stock is held in private hands and which was formed for the purpose of supplying a city with water is not a governmental agency or a corporation of the kind properly called "public," so as to be exempt from taxation,[70] although in Pennsylvania it belongs to the class of corporations which enjoy an exemption from taxation for local purposes on so much of their property as is necessary to the conduct of their business.[71] Such companies are taxable on their franchises, including an exclusive right to supply water for the city,[72] as well as on their other property.[73] For the purpose

an exemption from taxation of "mines and mining claims" does not apply to the products of mines, and that silver bullion taken from mines is properly subject to taxation); Gold Hill *v.* Caledonia Silver Min. Co., 10 Fed. Cas. No. 5,512, 5 Sawy. 575 (holding that under a constitutional provision that all property shall be taxed except "mines and mining claims," the proceeds of which alone are to be taxed, the words "mines and mining claims" include the surface of the ground, but that surface improvements thereon are not included and are subject to taxation).

In Colorado all mining property is subject to taxation, but for the purposes of assessment is divided into two classes according to the value of the annual products of the mines. People *v.* Henderson, 12 Colo. 369, 21 Pac. 144.

65. People *v.* Roberts, 156 N. Y. 585, 51 N. E. 293, construing the corporation tax act of 1880.

66. Ebervale Coal Co. *v.* Com., 91 Pa. St. 47, construing the acts of 1874 and 1877.

67. Big Black Creek Imp. Co. *v.* Com., 94 Pa. St. 450, holding that the acts of 1874, requiring a coal company to pay "an additional tax on its corporate franchises," at the rate of three cents upon each ton of coal mined, applies to a company owning extensive coal lands which it leases to others to be worked, although by its charter it is prohibited from mining itself.

68. Montana Coal, etc., Co. *v.* Livingston, 21 Mont. 59, 52 Pac. 780 ("annual net proceeds"); State *v.* Kruttschnitt, 4 Nev. 178 (holding that a constitutional provision requiring all property to be taxed "excepting mines and mining claims, the proceeds of which alone shall be taxed," means that the entire annual proceeds of the mines are subject to taxation and not merely the proceeds on hand when the assessor happens to visit the mines); Centennial Eureka Min. Co. *v.* Juab County, 22 Utah 395, 62 Pac. 1024 ("net annual proceeds").

In Utah the net annual proceeds of mines were not subject to taxation prior to the act of 1896. Mercur Gold Min., etc., Co. *v.* Spry, 16 Utah 222, 52 Pac. 382.

69. Ryan *v.* Leavenworth County, 30 Kan. 185, 2 Pac. 156, holding that in the case of mining companies the stock is not to be listed for taxation by the company but by the different shareholders.

70. Des Moines Water Co.'s Appeal, 48 Iowa 324; People *v.* Forrest, 97 N. Y. 97. But see Milford Water Co. *v.* Hopkinton, 192 Mass. 491, 78 N. E. 451.

Taxation of municipal waterworks see *infra*, III, C, 4, d.

71. Conoy Tp. *v.* York Haven Electric Power Plant Co., 222 Pa. St. 319, 71 Atl. 207; Lehigh County *v.* Bethlehem South Gas, etc., Co., 4 Pa. Dist. 723; Roaring Creek Water Co. *v.* Northumberland County, 6 Pa. Co. Ct. 473; Spring Brook Water-Supply Co. *v.* Schadt, 3 Lack. Leg. N. (Pa.) 170.

Property not exempt.— Lands purchased and held by such a company for future use in the extension of its works are not exempt from local taxation, not being indispensably necessary to the conduct of its business. Roaring Creek Water Co. *v.* Northumberland County, 6 Pa. Co. Ct. 473. And for the same reason, where the company buys large tracts of land along the stream which is used for the water-supply, and holds them simply for fear that nuisances might be erected thereon, contaminating the water, such lands are not exempt. Roaring Creek Water Co. *v.* Girton, 142 Pa. St. 92, 21 Atl. 780.

72. *Alabama.*—Stein *v.* Mobile, 17 Ala. 234.

California.— Spring Valley Water Works *v.* Schottler, 62 Cal. 69.

Kentucky.— Owensboro Waterworks Co. *v.* Owensboro, 74 S. W. 685, 24 Ky. L. Rep. 2530.

Mississippi.—Adams *v.* Bullock, 94 Miss. 27, 47 So. 527.

New Jersey.— Trenton Water Power Co. *v.* Parker, 32 N. J. L. 426.

Wisconsin.—Washburn *v.* Washburn Waterworks Co., 120 Wis. 575, 98 N. W. 539.

See 45 Cent. Dig. tit. "Taxation," § 279.

As personal property.— The franchises of a corporation consisting of the exclusive privilege to construct waterworks in a city and use the streets for that purpose is taxable as personal property. Adams *v.* Bullock, 94 Miss. 27, 47 So. 527.

73. *California.*— Kern Valley Water Co. *v.* Kern County, 137 Cal. 511, 70 Pac. 476, irrigation canal, and weirs, dams, and embankments thereon.

Iowa.— Des Moines Water Co.'s Appeal, 48 Iowa 324.

of taxation, waterworks, reservoirs, mains, and pipes laid in the streets are usually considered real estate,[74] although in some cases pipes and mains laid in streets have been classed for taxation as personal property.[75]

(XII) *MANUFACTURING CORPORATIONS.* Unless enjoying the benefit of a constitutional or statutory exemption from taxation,[76] manufacturing corporations, no less than others, are subject to be taxed in respect to their property,[77] the tax being sometimes proportioned to the amount of their capital stock,[78] and sometimes laid upon their franchises.[79] Under some statutes certain property of such companies is not taxable to the company, but is included in the valuation for assessment of the shares of stock of the shareholders.[80]

3. FOREIGN CORPORATIONS — a. Right to Tax Foreign Corporations. No state is bound, except as a matter of comity, to recognize corporations created by other states or to permit them to transact business within its limits; [81] and therefore

Massachusetts.— Boston Water Power Co. *v.* Boston, 9 Metc. 199.

Pennsylvania.— South Ward Water Works *v.* McGinnes, 2 Del. Co. 145.

Canada.— Calgary Gas, etc., Co. *v.* Calgary, 2 Northwest. Terr. 449.

See 45 Cent. Dig. tit. "Taxation," § 279.

Water company not a manufacturing corporation.—A water company organized to conduct water into a town and distribute it by means of pipes is not a manufacturing company, so as to render pipes, gates, and faucets used by it in distributing the water taxable under a statute relating to the taxation of "machinery" of manufacturing corporations. Dudley *v.* Jamaica Pond Aqueduct Corp., 100 Mass. 183. See also Coffin *v.* Artesian Water Co., 193 Mass. 274, 79 N. E. 262.

74. *California.*— Kern Valley Water Co. *v.* Kern County, 137 Cal. 511, 70 Pac. 476; California Domestic Water Co. *v.* Los Angeles County, 10 Cal. App. 185, 101 Pac. 547.

Colorado.— Colorado Fuel, etc., Co. *v.* Pueblo Water Co., 11 Colo. App. 352, 53 Pac. 232.

Iowa.— Oskaloosa Water Co. *v.* Oskaloosa Bd. of Equalization, 84 Iowa 407, 51 N. W. 18, 15 L. R. A. 296; Des Moines Water Co.'s Appeal, 48 Iowa 324.

Maine.— Paris *v.* Norway Water Co., 85 Me. 330, 27 Atl. 143, 35 Am. St. Rep. 371, 21 L. R. A. 525.

Massachusetts.— See Coffin *v.* Artesian Water Co., 193 Mass. 274, 79 N. E. 262, holding that pipes and mains laid by a water company upon private lands under a lease from the owners of the fee are not subject to taxation as personal property, no decision being made, however, as to whether they might be taxed as real estate.

Michigan.— Grand Haven *v.* Grand Haven Waterworks, 119 Mich. 652, 78 N. W. 890; Monroe Water Co. *v.* Frenchtown Tp., 98 Mich. 431, 57 N. W. 268.

Vermont.—Willard *v.* Pike, 59 Vt. 202, 9 Atl. 907.

In Canada it has been held that reservoirs and other improvements of a water company on land owned by the company are subject to taxation as real estate, but that pipes laid under streets are not real estate but personal property. St. Croix Electric Light, etc., Co. *v.* Milltown, 31 N. Brunsw. 452.

75. Shelbyville Water Co. *v.* People, 140 Ill. 545, 30 N. E. 678, 16 L. R. A. 505; Chelsea Waterworks *v.* Bowley, 17 Q. B. 358, 15 Jur. 1129, 20 L. J. Q. B. 520, 79 E. C. L. 358; St. Croix Electric Light, etc., Co. *v.* Milltown, 31 N. Brunsw. 452.

76. **Exemption of manufacturing corporations** see *infra*, IV, D, 3, k.

77. Columbian Mfg. Co. *v.* Vanderpoel, 4 Cow. (N. Y.) 556; James H. Hawes Mfg. Co.'s Appeal, (Pa. 1889) 17 Atl. 219; John T. Dyer Co.'s Appeal, 21 Pa. Co. Ct. 442; Northampton County *v.* Glendon Iron Co., 1 Lehigh Val. L. Rep. (Pa.) 81.

78. Electric Storage Battery Co. *v.* State Bd. of Assessors, 61 N. J. L. 289, 41 Atl. 1117; Com. *v.* Jarecki Mfg. Co., 204 Pa. St. 36, 53 Atl. 517; MacKellar, etc., Co. *v.* Com., 7 Pa. Cas. 367, 10 Atl. 780.

79. People *v.* Roberts, 155 N. Y. 1, 49 N. E. 248.

80. Gardiner Cotton, etc., Factory Co. *v.* Gardiner, 5 Me. 133 (merchandise of manufacturing company not taxable to the company but to the individual shareholders); Boston, etc., Glass Co. *v.* Boston, 4 Metc. (Mass.) 181 (personal property of manufacturing company other than machinery not taxable to the company but to be included in the valuation of the shares of the stockholders); Salem Iron Factory Co. *v.* Danvers, 10 Mass. 514 (company taxable on its real property but not on personal property).

Exception as to machinery and real estate. —The Massachusetts statute makes an exception as to the machinery and real estate of manufacturing companies which is to be taxed to the company and excluded in the valuation of the shares of the stock-holders (Boston, etc., Glass Co. *v.* Boston, 4 Metc. (Mass.) 181), and under this provision it has been held that a gas company is a manufacturing company and that its pipes laid in streets are a part of its machinery (Com. *v.* Lowell Gas Light Co., 12 Allen (Mass.) 75); but that this rule does not apply to a water company or to the pipes used by it for conveying water to its customers (Dudley *v.* Jamaica Pond Aqueduct Corp., 100 Mass. 183).

81. See FOREIGN CORPORATIONS, 19 Cyc. 1218, 1222, 1251.

each state may impose such conditions and burdens, in respect to taxation, as it may choose, upon foreign corporations desiring to establish business within its borders, exploit its resources, enter its markets, and enjoy the benefit and protection of its laws,[82] subject only to the restriction that its tax laws must not operate as an interference with foreign or interstate commerce,[83] or unjustly discriminate between different foreign corporations of the same class after they have been admitted to do business within the state and complied with the conditions originally imposed.[84]

b. Corporations Subject to Tax — (i) *In General.* Foreign corporations are within such terms as "persons," "persons and associations," and "all companies and corporations," as used in general tax laws.[85] More specifically, a corporation chartered by one state is "foreign" in each of the other states,[86] although its only business outside of the state which created it is to operate a leased property or business.[87] For the purpose of taxing foreign corporations, a limited partnership association, having all the essential attributes of a corporation, may be considered as a corporation,[88] and so may a joint stock association which differs in no material point from the ordinary corporation,[89] even though the statute under which it is formed declares that it is not a corporation.[90] A foreign telegraph company does not by an acceptance of the Post Roads Act of

82. *Illinois.*— Western Union Tel. Co. *v.* Lieb, 76 Ill. 172; Cincinnati Mut. Health Assur. Co. *v.* Rosenthal, 55 Ill. 85, 8 Am. Rep. 626; Ducat *v.* Chicago, 48 Ill. 172, 95 Am. Dec. 529 [*following* Firemen's Benev. Assoc. *v.* Lounsbury, 21 Ill. 511, 74 Am. Dec. 115].

Kentucky.— Com. *v.* Milton, 12 B. Mon. 212, 54 Am. Dec. 522.

Louisiana.— State *v.* Fosdick, 21 La. Ann. 434; State *v.* Lathrop, 10 La. Ann. 398.

Maine.— State *v.* Western Union Tel. Co., 73 Me. 518.

Massachusetts.— Singer Mfg. Co. *v.* Essex County, 139 Mass. 266, 1 N. E. 419; Boston Loan Co. *v.* Boston, 137 Mass. 332; Oliver *v.* Liverpool, etc., L., etc., Ins. Co., 100 Mass. 531; Atty.-Gen. *v.* Bay State Min. Co., 99 Mass. 148, 96 Am. Dec. 717.

New Jersey.— State *v.* Berry, 52 N. J. L. 308, 19 Atl. 665; Tatem *v.* Wright, 23 N. J. L. 429.

New York.— People *v.* Equitable Trust Co., 96 N. Y. 387; People *v.* Imlay, 20 Barb. 68; New York Fire Dept. *v.* Noble, 3 E. D. Smith 440; De Groot *v.* Van Duzer, 20 Wend. 390.

Ohio.— Western Union Tel. Co. *v.* Mayer, 28 Ohio St. 521.

Pennsylvania.— Norfolk, etc., R. Co. *v.* Com., 114 Pa. St. 256, 6 Atl. 45; Com. *v.* Gloucester Ferry Co., 98 Pa. St. 105; Com. *v.* Texas, etc., R. Co., 98 Pa. St. 90.

Wisconsin.— Milwaukee Fire Dept. *v.* Helfenstein, 16 Wis. 136.

United States.— Horn Silver Min. Co. *v.* People, 143 U. S. 305, 12 S. Ct. 403, 36 L. ed. 164; Home Ins. Co. *v.* New York, 134 U. S. 594, 10 S. Ct. 593, 33 L. ed. 1025; Pembina Consol. Silver Min., etc., Co. *v.* Pennsylvania, 125 U. S. 181, 8 S. Ct. 737, 31 L. ed. 650; Liverpool, etc., L., etc., Ins. Co. *v.* Oliver, 10 Wall. 566, 19 L. ed. 1029; Ducat *v.* Chicago, 10 Wall. 410, 19 L. ed. 972; Paul *v.* Virginia, 8 Wall. 168, 19 L. ed. 357; Southern Cotton Oil Co. *v.* Wemple, 44 Fed. 24.

See also Commerce, 7 Cyc. 477; Foreign Corporations, 19 Cyc. 1253.

The validity of conditions, restrictions, and regulations generally see Foreign Corporations, 19 Cyc. 1251 *et seq.*

83. See Commerce, 7 Cyc. 477 *et seq.*; Foreign Corporations, 19 Cyc. 1228.

84. Henderson *v.* London, etc., Ins. Co., 135 Ind. 23, 34 N. E. 565, 41 Am. St. Rep. 410, 20 L. R. A. 827.

Constitutionality of statutes discriminating between foreign and domestic corporations see *supra*, II, B, 2, b, (II).

85. British Commercial L. Ins. Co. *v.* New York Tax, etc., Com'rs, 31 N. Y. 32, 1 Abb. Dec. 199, 1 Keyes 303, 18 Abb. Pr. 118, 28 How. Pr. 41; People *v.* McLean, 5 Abb. N. Cas. (N. Y.) 137 [*affirmed* in 17 Hun 204 (*affirmed* in 80 N. Y. 254)]; Central Petroleum Co. *v.* Com., 25 Leg. Int. (Pa.) 316. And see McLeod *v.* Sandall, 26 N. Brunsw. 526.

86. Lehigh Valley R. Co. *v.* Mutchler, 42 N. J. L. 461; People *v.* Roberts, 154 N. Y. 1, 47 N. E. 974; Easton Bridge *v.* County, 9 Pa. St. 415; Com. *v.* Delaware, etc., Canal Co., 2 Am. L. J. (Pa.) 89; Com. *v.* Arizona, etc., Prospecting, etc., Co., 1 Dauph. Co. Rep. (Pa.) 306.

87. Postal Tel.-Cable Co. *v.* Barnard, 37 Ill. App. 105; State *v.* Delaware, etc., R. Co., 30 N. J. L. 473. See also Woodman *v.* American Print Works, 6 R. I. 470; Western, etc., R. Co. *v.* Roberson, 61 Fed. 592, 9 C. C. A. 646.

88. Tide Water Pipe Co. *v.* State Bd. of Assessors, 57 N. J. L. 516, 31 Atl. 220, 27 L. R. A. 684.

89. Oliver *v.* Liverpool, etc., L., etc., Ins. Co., 100 Mass. 531; State *v.* Berry, 52 N. J. L. 308, 19 Atl. 665; State *v.* Adams Express Co., 3 Ohio S. & C. Pl. De 326, 2 Ohio N. P. 98. *Contra*, Sanford *v.* Gregg, 58 Fed. 620.

90. Oliver *v.* Liverpool, etc., L., etc., Ins. Co., 100 Mass. 531 [*affirmed* in 10 Wall. (U. S.) 566, 19 L. ed. 1029].

1866 acquire any immunity from state taxation, but is subject to taxation in the same manner as other foreign corporations.[91]

(II) *Carrying on Business Within State.*[92] Where the state taxes such foreign corporations as "carry on business" within its limits, it is held that an isolated or occasional sale or other business transaction does not bring a company within this description.[93] Nor does the maintenance of an office within the taxing state, which is kept merely as a convenient place for interviewing customers, or where directors' meetings are held, transfer books kept, and dividends declared,[94] nor the maintenance of an office merely for the purpose of soliciting business,[95] or an agency for the exhibition of samples and the taking of orders, when such orders must be sent to the home office to be filled and accounts settled there,[96] or the consignment of goods of a foreign corporation to a resident commission merchant for sale constitute doing business within the application of the statute;[97] and it is to be observed that if the statute requires both the carrying on of business and the employing of capital within the state, it is possible for a corporation to carry on business without employing capital within the meaning of the statute.[98] But it is not essential that the whole business of a corporation should be done within the state, it being sufficient if a substantial part of its regular business is so carried on;[99] and a foreign corporation is within the taxing law when it maintains a branch office within the state, or a sales agency, to which its goods are consigned, from whence they are sold, and where the proceeds are collected and a bank account kept.[1] A railroad corporation is considered as doing business in any state where a portion of its line is built and operated.[2] But

91. Atty.-Gen. *v.* Western Union Tel. Co., 141 U. S. 40, 11 S. Ct. 889, 35 L. ed. 628; Western Union Tel. Co. *v.* Wright, 158 Fed. 1004.

92. **What constitutes carrying on business** generally see Foreign Corporations, 19 Cyc. 1267.

93. Missouri Coal, etc., Co. *v.* Ladd, 160 Mo. 435, 61 S. W. 191; People *v.* Horn Silver Min. Co., 105 N. Y. 76, 11 N. E. 155; Kilgore *v.* Smith, 122 Pa. St. 48, 15 Atl. 698; Com. *v.* Standard Oil Co., 101 Pa. St. 119; Cooper Mfg. Co. *v.* Ferguson, 113 U. S. 727, 5 S. Ct. 739, 28 L. ed. 1137.

94. People *v.* Horn Silver Min. Co., 105 N. Y. 76, 11 N. E. 155; People *v.* Feitner, 77 N. Y. App. Div. 189, 78 N. Y. Suppl. 1017.

95. People *v.* Roberts, 30 N. Y. App. Div. 150, 51 N. Y. Suppl. 866; People *v.* Roberts, 22 N. Y. App. Div. 282, 47 N. Y. Suppl. 949.

96. People *v.* Roberts, 27 N. Y. App. Div. 455, 50 N. Y. Suppl. 355; People *v.* Roberts, 25 N. Y. App. Div. 13, 48 N. Y. Suppl. 1028; People *v.* Roberts, 22 N. Y. App. Div. 282, 47 N. Y. Suppl. 949; People *v.* Wells, 42 Misc. (N. Y.) 86, 85 N. Y. Suppl. 533 [*affirmed* in 93 N. Y. App. Div. 613, 87 N. Y. Suppl. 1144].

97. People *v.* Roberts, 25 N. Y. App. Div. 13, 48 N. Y. Suppl. 1028.

98. People *v.* Roberts, 154 N. Y. 1, 47 N. E. 974 [*reversing* 90 Hun 474, 35 N. Y. Suppl. 968]. See also *infra*, III, B, 3, e, (II).

99. People *v.* Horn Silver Min. Co., 105 N. Y. 76, 11 N. E. 155 [*affirming* 38 Hun 276].

1. Armour Packing Co. *v.* Clark, 124 Ga. 369, 52 S. E. 145; People *v.* Wells, 183 N. Y. 264, 76 N. E. 24; People *v.* Feitner, 167 N. Y. 622, 60 N. E. 1118; People *v.* Roberts, 158 N. Y. 162, 52 N. E. 1102; People *v.* Wemple, 131 N. Y. 64, 29 N. E. 1002, 27 Am. St. Rep. 542; People *v.* Horn Silver Min. Co., 105 N. Y. 76, 11 N. E. 155; People *v.* Glynn, 125 N. Y. App. Div. 328, 109 N. Y. Suppl. 868; People *v.* Feitner, 49 N. Y. App. Div. 108, 62 N. Y. Suppl. 1107; People *v.* Barker, 23 N. Y. App. Div. 530, 48 N. Y. Suppl. 558 [*affirmed* in 155 N. Y. 665, 49 N. E. 1102]; People *v.* Roberts, 91 Hun (N. Y.) 158, 36 N. Y. Suppl. 368 [*affirmed* in 149 N. Y. 608, 44 N. E. 1127 (*affirmed* in 171 U. S. 658, 19 S. Ct. 70, 43 L. ed. 323)]; People *v.* Campbell, 80 Hun (N. Y.) 466, 30 N. Y. Suppl. 472 [*affirmed* in 145 N. Y. 587, 40 N. E. 239]; People *v.* Wemple, 61 Hun (N. Y.) 83, 15 N. Y. Suppl. 446 [*affirmed* in 131 N. Y. 64, 29 N. E. 1002, 27 Am. St. Rep. 542]; People *v.* New York Tax, etc., Com'rs, 39 Misc. (N. Y.) 282, 79 N. Y. Suppl. 485; People *v.* Feitner, 31 Misc. (N. Y.) 553, 65 N. Y. Suppl. 518; Singer Mfg. Co. *v.* Adams, 165 Fed. 877, 91 C. C. A. 461; Southern Cotton Oil Co. *v.* Wemple, 44 Fed. 24. But see People *v.* Wells, 98 N. Y. App. Div. 82, 90 N. Y. Suppl. 313 [*affirmed* in 182 N. Y. 553, 75 N. E. 1132]; People *v.* Barker, 5 N. Y. App. Div. 246, 39 N. Y. Suppl. 151 [*affirmed* in 149 N. Y. 623, 44 N. E. 1128].

A foreign banking corporation having its principal office in the state, and branch offices and agencies in other cities managed from the main office, is doing business within the state, within the meaning of the tax law. People *v.* Raymond, 188 N. Y. 551, 80 N. E. 1117 [*affirming* 117 N. Y. App. Div. 62, 102 N. Y. Suppl. 85].

2. Com. *v.* New York, etc., R. Co., 129 Pa. St. 463, 18 Atl. 412, 15 Am. St. Rep. 724; Erie R. Co. *v.* Pennsylvania, 21 Wall. (U. S.) 492, 22 L. ed. 595.

on the other hand, a telephone company organized in a foreign state and which operates in the taxing state only through domestic corporations, to which it grants licenses or leases, not constituting them its agents, cannot be said to carry on business in the latter state.[3]

c. Franchise, License, or Privilege Tax. It is within the power and discretion of each state to impose an annual or other license or privilege tax on all foreign corporations doing business within its limits;[4] and it is no valid objection that such tax is higher than that imposed on similar domestic corporations.[5] Although a tax of this kind is often spoken of as a franchise tax, it is to be observed that the state cannot tax a foreign corporation in respect to its franchise of corporate existence, the right to be a corporation, but that the privilege of doing business in a given state, in its corporate character, may be considered as a franchise and taxed as such.[6]

d. Property Taxable in General. In the absence of any provision to the contrary, whatever is property for purposes of taxation in the case of a domestic corporation is property in the case of a foreign corporation,[7] and such property if situated within the state is subject to taxation like property owned by individuals or domestic corporations.[8] So in addition to the license-tax just spoken of,[9] it is competent for the state to tax such actual property of a foreign corporation as is situated within its borders, including real estate[10] and personal property of all kinds,[11] and property held in trust for the corporation, when property similarly

3. People *v.* American Bell Tel. Co., 117 N. Y. 241, 22 N. E. 1057 [*reversing* 50 Hun 114, 3 N. Y. Suppl. 733]; Com. *v.* American Bell Tel. Co., 129 Pa. St. 217, 18 Atl. 122.

4. *Kentucky.*— Com. *v.* Chesapeake, etc., R. Co., 120 Ky. 678, 87 S. W. 1077, 27 Ky. L. Rep. 1084; Com. *v.* Milton, 12 B. Mon. 212, 54 Am. Dec. 522.

Massachusetts.— Atty.-Gen. *v.* Bay State Min. Co., 99 Mass. 148, 96 Am. Dec. 717; Blackstone Mfg. Co. *v.* Blackstone, 13 Gray 488.

Mississippi.— Clarksdale Ins. Agency *v.* Cole, 87 Miss. 637, 40 So. 228.

New Jersey.— Tide Water Pipe Line Co. *v.* Berry, 53 N. J. L. 212, 21 Atl. 490; Tatem *v.* Wright, 23 N. J. L. 429.

New York.— People *v.* Horn Silver Min. Co., 105 N. Y. 76, 11 N. E. 155; People *v.* Wemple, 61 Hun 83, 15 N. Y. Suppl. 446 [*affirmed* in 131 N. Y. 64, 29 N. E. 1002, 27 Am. St. Rep. 542].

North Carolina.— New Hanover County *v.* Armour Packing Co., 135 N. C. 62, 47 S. E. 411.

Ohio.— Southern Gum Co. *v.* Laylin, 66 Ohio St. 578, 64 N. E. 564.

Pennsylvania.— Com. *v.* New York, etc., R. Co., 129 Pa. St. 463, 18 Atl. 412, 15 Am. St. Rep. 724.

Virginia.— Slaughter *v.* Com., 13 Gratt. 767.

United States.— Horn Silver Min. Co. *v.* People, 143 U. S. 305, 12 S. Ct. 403, 36 L. ed. 164; Pembina Consol. Silver Min., etc., Co. *v.* Pennsylvania, 125 U. S. 181, 8 S. Ct. 737, 31 L. ed. 650; Liverpool, etc., L., etc., Ins. Co. *v.* Oliver, 10 Wall. 566, 19 L. ed. 1029; Paul *v.* Virginia, 8 Wall. 168, 19 L. ed. 357; London, etc., Bank *v.* Block, 117 Fed. 900.

See also COMMERCE, 7 Cyc. 477; FOREIGN CORPORATIONS, 19 Cyc. 1253.

5. *Kansas.*— Phœnix Ins. Co. *v.* Welch, 29 Kan. 672.

Louisiana.— State *v.* Lathrop, 10 La. Ann. 398.

Mississippi.— Clarksdale Ins. Agency *v.* Cole, 87 Miss. 637, 40 So. 228.

Texas.— Gaar *v.* Shannon, (Civ. App. 1908) 115 S. W. 361.

United States.— Insurance Co. *v.* New Orleans, 13 Fed. Cas. No. 7,052, 1 Woods 85.

See also cases cited *supra*, note 4; and, generally, *supra*, II, B, 2, b, (II).

6. See Com. *v.* Ledman, 127 Ky. 603, 106 S. W. 247, 32 Ky. L. Rep. 452; People *v.* Equitable Trust Co., 96 N. Y. 387; Western Union Tel. Co. *v.* Mayer, 28 Ohio St. 521; London, etc., Bank *v.* Block, 117 Fed. 900.

7. Com. *v.* Walsh, 133 Ky. 103, 106 S. W. 240, 117 S. W. 398.

8. Johnson *v.* Bradley-Watkins Tie Co., 120 Ky. 136, 85 S. W. 726, 27 Ky. L. Rep. 540; Mutual Ben. L. Ins. Co. *v.* Martin County, 104 Minn. 179, 116 N. W. 572; State *v.* Berry, 52 N. J. L. 308, 19 Atl. 665.

9. See *supra*, III, B, 3, c.

10. State *v.* Berry, 52 N. J. L. 308, 19 Atl. 665; New York Milk Products Co. *v.* Damon, 172 N. Y. 661, 65 N. E. 1119. *Compare* Michigan Cent. R. Co. *v.* Porter, 17 Ind. 380.

11. Johnson *v.* Bradley-Watkins Tie Co., 120 Ky. 136, 85 S. W. 726, 27 Ky. L. Rep. 540; Ayer, etc., Tie Co. *v.* Keown, 89 S. W. 116, 28 Ky. L. Rep. 201; Boston Loan Co. *v.* Boston, 137 Mass. 332; People *v.* Coleman, 135 N. Y. 231, 31 N. E. 1022. See also Coffin *v.* Artesian Water Co., 193 Mass. 274, 79 N. E. 262. *Compare* Western Canada Oil Lands, etc., Co. *v.* Enniskillen Tp., 28 U. C. C. P. 1.

Rolling-stock of railroad companies.— See Union Tank Line Co.'s Appeal, 204 Ill. 347, 68 N. E. 504, 98 Am. St. Rep. 221; Dubuque *v.* Illinois Cent. R. Co., 39 Iowa 56; State

held for a private beneficiary is taxable.[12] Also the credits of a foreign corporation, such as accounts receivable, promissory notes, etc., are taxable when they arise out of corporate business transacted within the state.[13] So also its bonds or other obligations may be taxed when held by residents of the state.[14]

e. Capital and Stock — (I) *In General.* Although a license or privilege tax on foreign corporations may be graduated according to the amount of their capital stock,[15] and although so much of the capital of a corporation as is employed in a given state may be there taxed,[16] yet no state can impose taxes on the capital stock, as a whole, of any corporations except those which are organized under its own laws.[17]

(II) *Capital Employed Within State.* It is within the power of a state to tax so much of the capital of a foreign corporation as is invested or employed within the taxing state, and this rule is adopted in several jurisdictions.[18] For the purpose of such a statute, the amount of capital employed in the state is measured by the total value of the property within the state owned by the corporation,[19] and used by it in the transaction of its ordinary business,[20] as distinguished from a mere independent investment,[21] with a proper allowance or

v. Union Tank Line Co., 94 Minn. 320, 102 N. W. 721; Baltimore, etc., R. Co. *v.* Allen, 22 Fed. 376; and, generally, *supra*, III, B, 2, d, (III).

Sleeping cars.— See Carlisle *v.* Pullman Palace Car Co., 8 Colo. 320, 7 Pac. 164, 54 Am. Rep. 553; Covington *v.* Pullman Co., 121 Ky. 218, 89 S. W. 116, 28 Ky. L. Rep. 199; Orleans Bd. of Assessors *v.* Pullman Palace Car Co., 60 Fed. 37, 8 C. C. A. 490. And see *supra*, III, A, 5, e.

Ferry-boats plying between states.— See St. Louis *v.* Wiggins Ferry Co., 40 Mo. 580.

As to taxation of property in transit through the state see *supra*, III, A, 5, e.

12. Baltimore City Appeal Tax Ct. *v.* Gill, 50 Md. 377; People *v.* Albany, 40 N. Y. 154.

Taxation of property held in trust generally see *supra*, III, A, 3, h.

13. *Georgia.*— Armour Packing Co. *v.* Savannah, 115 Ga. 140, 41 S. E. 237.

Louisiana.— Monongahela River Consol. Coal, etc., Co. *v.* Bd. of Assessors, 115 La. 564, 39 So. 601, 112 Am. St. Rep. 275, 2 L. R. A. N. S. 637. *Compare* Barber Asphalt Pav. Co. *v.* New Orleans, 41 La. Ann. 1015, 6 So. 794.

Minnesota.— State *v.* Northern Pac. R. Co., 95 Minn. 43, 103 N. W. 731.

New York.— People *v.* Wells, 184 N. Y. 275, 77 N. E. 19, 121 Am. St. Rep. 840, 12 L. R. A. N. S. 905.

Ohio.— Hubbard *v.* Brush, 61 Ohio St. 252, 55 N. E. 829.

Texas.— Jesse French Piano, etc., Co. *v.* Dallas, (Civ. App. 1901) 61 S. W. 942.

But credits which do not originate within the state or arise out of business transacted there are not taxable. Union Tank Line Co.'s Appeal, 204 Ill. 347, 68 N. E. 504, 98 Am. St. Rep. 221; London, etc., Bank *v.* Block, 136 Fed. 138, 69 C. C. A. 136.

Money deposited in bank.— Where moneys realized in the course of a business carried on by a foreign corporation through a local agent are deposited daily in one of the banks of the state for transmission, the average daily balance is taxable in the state. New England Mut. L. Ins. Co. *v.* Bd. of Assessors, 121 La. 1068, 47 So. 27, 26 L. R. A. N. S. 1120.

14. Georgia Cent. R. Co. *v.* Wright, 124 Ga. 630, 53 S. E. 207; Baltimore City Appeal Tax Ct. *v.* Patterson, 50 Md. 354; Com. *v.* New York, etc., Co., 145 Pa. St. 57, 22 Atl. 212, 236; Pittsburg, etc., R. Co. *v.* Com., 66 Pa. St. 73, 5 Am. Rep. 344.

15. Atty.-Gen. *v.* Bay State Min. Co., 99 Mass. 148, 96 Am. Dec. 717; People *v.* Horne Silver Min. Co., 105 N. Y. 76, 11 N. E. 155 [*affirming* 38 Hun 276]; People *v.* Wemple, 61 Hun (N. Y.) 83, 15 N. Y. Suppl. 446 [*affirmed* in 131 N. Y. 64, 29 N. E. 1002, 7 Am. St. Rep. 542]. See also *supra*, III, B, 3, c.

16. See Com. *v.* Standard Oil Co., 101 Pa. St. 119; and *infra*, III, B, 3, e, (II).

17. Western Union Tel. Co. *v.* Lieb, 76 Ill. 172; Riley *v.* Western Union Tel. Co., 47 Ind. 511; Michigan Cent. R. Co. *v.* Porter, 17 Ind. 380; Foster-Cherry Commission Co. *v.* Caskey, 66 Kan. 600, 72 Pac. 268; Com. *v.* Standard Oil Co., 101 Pa. St. 119.

18. Metropolitan L. Ins. Co. *v.* Orleans Bd. of Assessors, 115 La. 698, 39 So. 846, 116 Am. St. Rep. 179; Blackstone Mfg. Co. *v.* Blackstone, 13 Gray (Mass.) 488; Matter of Tiffany, 80 Hun (N. Y.) 486, 30 N. Y. Suppl. 494. See also Commerce, 7 Cyc. 478.

19. State *v.* Western Union Tel. Co., 165 Mo. 502, 65 S. W. 775; People *v.* Wemple, 133 N. Y. 323, 31 N. E. 238; International L. Assur. Soc. *v.* Tax Com'rs, 28 Barb. (N. Y.) 318, 17 How. Pr. 206; People *v.* Roberts, 25 N. Y. App. Div. 16, 49 N. Y. Suppl. 10 [*affirmed* in 156 N. Y. 688, 50 N. E. 1120]; Beaufort County *v.* Old Dominion Steamship Co., 128 N. C. 558, 39 S. E. 18.

20. People *v.* Wemple, 150 N. Y. 46, 44 N. E. 787; People *v.* Wemple, 133 N. Y. 323, 31 N. E. 238.

21. People *v.* Wemple, 150 N. Y. 46, 44 N. E. 787 [*affirming* 78 Hun 63, 29 N. Y. Suppl. 92], holding that money invested in real estate by a foreign corporation as an

deduction for debts or liabilities,[22] and excluding such property as is shown to have been purchased out of surplus funds or undivided profits.[23] While it has been held that the basis of taxation cannot exceed the amount of the whole authorized capital stock,[24] it has also been held that money actively employed within the state is to be treated as capital stock, so as to subject the corporation to taxation,[25] although the entire amount of the authorized capital stock is invested in the foreign state,[26] and that such amount if treated as capital stock for purposes of taxation should also be so treated for the purpose of determining the percentage of taxation.[27] Subject to these limitations, the taxable capital within the state may be represented by investments in real estate from which the company derives a revenue,[28] the loans and securities of a bank or investment company,[29] book-accounts or other credits representing the proceeds of the sale of property in which capital was invested,[30] and the stock or securities of other corporations.[31] It is said, however, that no hard-and-fast rule can be laid down as to what constitutes having capital employed in business within the state,[32] and that while unusual it is quite possible for a foreign corporation to be doing business within the state without having any part of its capital employed within the state;[33] and a cor-

independent investment and not occupied by the corporation or used by it in the transaction of its ordinary business is not capital employed within the state within the application of the statute.

22. People *v.* Roberts, 19 N. Y. App. Div. 574, 46 N. Y. Suppl. 570 [*affirmed* in 154 N Y. 101, 47 N. E. 980]. See also People *v.* Feitner, 60 N. Y. App. Div. 628, 70 N. Y. Suppl. 836 [*affirmed* in 167 N. Y. 622, 60 N. E. 1118].

Nature of indebtedness.— Where the indebtedness of a foreign corporation is incurred generally in the business, and not in respect of any particular asset which is within the state, such indebtedness will be deducted from the sum of the assets of the corporation wherever found and an amount offset against the value of the assets within the state as will be proportionate, in estimating the amount of tax for which the corporation is liable. People *v.* Miller, 125 N. Y. App. Div. 296, 109 N. Y. Suppl. 866 [*affirmed* in 197 N. Y. 577, 91 N. E. 1119].

23. People *v.* Roberts, 156 N. Y. 585, 51 N. E. 293 [*reversing* 25 N. Y. App. Div. 89, 48 N. Y. Suppl. 881]; People *v.* Wemple, 150 N. Y. 46, 44 N. E. 787.

24. People *v.* Roberts, 27 N. Y. App. Div. 400, 50 N. Y. Suppl. 302 [*affirmed* in 158 N. Y. 666, 52 N. E. 1125]; People *v.* Roberts, 4 N. Y. App. Div. 288, 39 N. Y. Suppl. 448 [*affirmed* in 151 N. Y. 621, 45 N. E. 1134]. But see People *v.* Wilson, 121 N. Y. App. Div. 376, 106 N. Y. Suppl. 1 [*affirmed* in 193 N. Y. 671, 87 N. E. 1125].

25. People *v.* Glynn, 125 N. Y. App. Div. 328, 109 N. Y. Suppl. 868; People *v.* Wilson, 121 N. Y. App. Div. 376, 106 N. Y. Suppl. 1 [*affirmed* in 193 N. Y. 671, 87 N. E. 1125]. See also People *v.* Wemple, 150 N. Y. 46, 44 N. E. 787.

26. People *v.* Glynn, 125 N. Y. App. Div. 328, 109 N. Y. Suppl. 868; People *v.* Wilson, 121 N. Y. App. Div. 376, 106 N. Y. Suppl. 1 [*affirmed* in 193 N. Y. 671, 87 N. E. 1125].

27. People *v.* Glynn, 125 N. Y. App. Div. 328, 109 N. Y. Suppl. 868.

28. People *v.* Miller, 181 N. Y. 328, 73 N. E. 1102 [*affirming* 98 N. Y. App. Div. 584, 90 N. Y. Suppl. 755].

Structures on leased ground.— Money of a foreign corporation invested in structures on leased ground is capital employed within the state, although the structures may become in law the property of the owner of the ground. People *v.* Wilson, 121 N. Y. App. Div. 376, 106 N. Y. Suppl. 1 [*affirmed* in 193 N. Y. 671, 87 N. E. 1125].

29. Metropolitan L. Ins. Co. *v.* Orleans Bd. of Assessors, 115 La. 698, 39 So. 846, 116 Am. St. Rep. 179; People *v.* Raymond, 188 N. Y. 551, 80 N. E. 1117; People *v.* Miller, 182 N. Y. 521, 74 N. E. 1124; People *v.* Roberts, 25 N. Y. App. Div. 16, 49 N. Y. Suppl. 10 [*affirmed* in 156 N. Y. 688, 50 N. E. 1120].

30. People *v.* Barker, 23 N. Y. App. Div. 524, 48 N. Y. Suppl. 553, 31 N. Y. App. Div. 263, 52 N. Y. Suppl. 921 [*affirmed* in 155 N. Y. 665, 49 N. E. 1103].

31. People *v.* Miller, 125 N. Y. App. Div. 296, 109 N. Y. Suppl. 866 [*affirmed* in 197 N. Y. 577, 91 N. E. 1119]; People *v.* Miller, 90 N. Y. App. Div. 560, 86 N. Y. Suppl. 386 [*affirmed* in 182 N. Y. 521, 74 N. E. 1123]. See also People *v.* Morgan, 178 N. Y. 433, 70 N. E. 967, 67 L. R. A. 960 [*reversing* 86 N. Y. App. Div. 577, 83 N. Y. Suppl. 998]. But see Com. *v.* Standard Oil Co., 101 Pa. St. 119.

Doing business within state.— It has been held that a foreign corporation whose entire assets are invested in the stock of a domestic corporation and whose sole income is derived from the dividends upon that stock is not doing business within the state. People *v.* Kelsey, 101 N. Y. App. Div. 205, 91 N. Y. Suppl. 709.

32. People *v.* Wells, 98 N. Y. App. Div. 82, 90 N. Y. Suppl. 313 [*affirmed* in 182 N. Y. 553, 75 N. E. 1132].

33. People *v.* Roberts, 154 N. Y. 1, 47 N. E. 974 [*reversing* 90 Hun 474, 35 N. Y. Suppl. 968]. See also People *v.* Roberts, 30 N. Y. App. Div. 150, 51 N. Y. Suppl. 866.

poration cannot be said to "employ capital" in a state where it merely maintains an agency in charge of a salaried agent and owns no property but an inconsiderable amount of office furniture.[34] It is held, however, that bonds deposited with a state officer by a foreign insurance or guaranty company, as required by law as a condition to its doing business within the state, are taxable as capital employed in the state.[35]

f. Earnings or Receipts.[36] A tax on the gross earnings or receipts within the state of a foreign corporation is a proper and legitimate exercise of the taxing power,[37] as it is in reality a tax on the privilege of doing business within the state measured by the volume of business transacted;[38] but the legislature must provide

34. People *v.* Roberts, 154 N. Y. 1, 47 N. E. 974 [*reversing* 90 Hun 474, 35 N. Y. Suppl. 968]; People *v.* Campbell, 139 N. Y. 68, 34 N. E. 753; People *v.* Miller, 90 N. Y. App. Div. 545, 85 N. Y. Suppl. 849; People *v.* Roberts, 8 N. Y. App. Div. 201, 40 N. Y. Suppl. 417 [*affirmed* in 151 N. Y. 619, 45 N. E. 1134].

35. People *v.* Home Ins. Co., 29 Cal. 533; International L. Assur. Soc. *v.* Tax Com'rs, 28 Barb. (N. Y.) 318; State *v.* Maryland Fidelity, etc., Co., 35 Tex. Civ. App. 214, 80 S. W. 544; Scottish Union, etc., Ins. Co. *v.* Bowland, 196 U. S. 611, 25 S. Ct. 345, 49 L. ed. 619; Western Assur. Co. *v.* Halliday, 126 Fed. 257, 61 C. C. A. 271 [*affirmed* in 110 Fed. 259].

But on the repeal of a statute requiring such a deposit the securities deposited become subject to withdrawal and, although remaining on deposit, are not subject to taxation as money invested in business within the state. People *v.* New England Mut. L. Ins. Co., 26 N. Y. 303.

36. **Corporate earnings or receipts** generally see *supra*, III, B, 1, i.

Gross receipts from interstate business see COMMERCE, 7 Cyc. 477, 479, 481, 483.

37. *Illinois.*— Raymond *v.* Hartford F. Ins. Co., 196 Ill. 329, 63 N. E. 745.

Kansas.— McNall *v.* Metropolitan L. Ins. Co., 65 Kan. 694, 70 Pac. 604.

Kentucky.— Southern Bldg., etc., Assoc. *v.* Norman, 98 Ky. 294, 32 S. W. 952, 17 Ky. L. Rep. 887, 56 Am. St. Rep. 367, 31 L. R. A. 41.

Michigan.— Fargo *v.* Auditor-Gen., 57 Mich. 598, 24 N. W. 538.

Ohio.— State *v.* Hahn, 50 Ohio St. 714, 35 N. E. 1052; Western Union Tel. Co. *v.* Mayer, 28 Ohio St. 521.

Pennsylvania.— Com. *v.* Delaware, etc., Canal Co., 4 Dauph. Co. Rep. 154 [*affirmed* in (1888) 17 Atl. 175, 1 L. R. A. 232].

South Carolina.— Southern Express Co. *v.* Hood, 15 Rich. 66, 94 Am. Dec. 141.

United States.— British Foreign Mar. Ins. Co. *v.* Board of Assessors, 42 Fed. 90.

Canada.— Phœnix Ins. Co. *v.* Kingston Corp., 7 Ont. 343.

See 45 Cent. Dig. tit. "Taxation," § 291.

What receipts included.—A statute imposing a tax upon the gross receipts of express companies applies only to the gross receipts which a foreign express company doing business in a state has received within the state for itself, and does not include collections belonging to other express and railroad companies or amounts due to other connecting companies and received to their use. Southern Express Co. *v.* Hood, 15 Rich. (S. C.) 66, 94 Am. Dec. 141. The Ohio statute requiring foreign insurance companies to pay a tax of a certain percentage on their gross premiums relates in terms to premiums "received by it in the state" and therefore the company is not required to pay such per cent on the business done within the state or on premiums received from the state but only on the amount of premiums received "in" the state. New York Mut. L. Ins. Co. *v.* State, 79 Ohio St. 305, 87 N. E. 259.

Under the Massachusetts statute the provisions of section 24, imposing an excise tax of one fourth of one per cent on the net value of policies held by residents, and section 28, providing that if the state, where a foreign insurance company was incorporated, imposes a tax on the premiums received by Massachusetts companies doing business therein, such foreign corporation shall pay a similar tax at the highest rate so imposed in the other state, are not cumulative, and no tax should be assessed under section 28 unless the amount would be greater than the tax assessed according to section 24, and if a tax is assessed under section 28, no tax should be assessed under section 24. Metropolitan L. Ins. Co. *v.* Com., 198 Mass. 466, 84 N. E. 863.

Under the Texas statute of 1907 a lower rate of tax on gross receipts of foreign insurance companies is allowed in case the company complies with the provisions of the statute requiring the investment of a deposit of seventy-five per cent of the reserve apportioned to the policies written on the lives of citizens of that state. See Kansas City L. Ins. Co. *v.* Love, 101 Tex. 531, 109 S. W. 863.

38. Southern Bldg., etc., Assoc. *v.* Norman, 98 Ky. 294, 32 S. W. 952, 17 Ky. L. Rep. 887, 56 Am. St. Rep. 367, 31 L. R. A. 41; Western Union Tel. Co. *v.* Mayer, 28 Ohio St. 521. See also cases cited *supra*, note 37.

Invalid as a property tax.—S. C. St. (1897), Code (1892), § 1809, imposing a tax on the gross receipts of foreign corporations which is imposed in addition to certain license-taxes, and requires such receipts to be entered "with the other items now included in the taxable property" of the company, does not impose a privilege tax but a tax on property, and as it is levied not upon property within the jurisdiction of the state at the time of the assessment but upon money which has passed

some method of ascertaining the amount of the gross receipts and prescribe the rate of taxation.[39]

g. Shares in Foreign Corporations. Each state has the right and power to tax its own resident citizens on shares of stock in foreign corporations owned and held by them, the stock having its *situs* at the place of the owner's domicile;[40] and this right is not affected by the fact that the stock-holder may have been taxed upon the same stock in another state.[41] This rule also applies even where the rule in regard to domestic corporations is that the corporation shall be taxed on its capital or property and that this shall relieve the stock-holders from taxation on their shares,[42] and regardless of whether the foreign corporation pays

out of the state during the previous year, it is unconstitutional. New York L. Ins. Co. *v.* Bradley, 83 S. C. 418, 65 S. E. 433.

39. British Foreign Mar. Ins. Co. *v.* Board of Assessors, 42 Fed. 90.

40. *Alabama.*— State *v.* Kidd, 125 Ala. 413, 28 So. 480 [*overruling* Varner *v.* Calhoun, 48 Ala. 178].

California.—Stanford *v.* San Francisco, 131 Cal. 34, 63 Pac. 145; San Francisco *v.* Flood, 64 Cal. 504, 2 Pac. 264; San Francisco *v.* Fry, 63 Cal. 470.

Connecticut.— Lockwood *v.* Weston, 61 Conn. 211, 23 Atl. 9.

Georgia.— Georgia R., etc., Co. *v.* Wright, 125 Ga. 589, 54 S. E. 52 [*reversed* on other grounds in 207 U. S. 127, 28 S. Ct. 47, 52 L. ed. 134]. But see Wright *v.* Southwestern R. Co., 64 Ga. 783.

Illinois.— Greenleaf *v.* Morgan County Bd. of Review, 184 Ill. 226, 56 N. E. 295, 75 Am. St. Rep. 168; Porter *v.* Rockford, etc., R. Co., 76 Ill. 561.

Indiana.— Hart *v.* Smith, 159 Ind. 182, 64 N. E. 661, 95 Am. St. Rep. 280, 58 L. R. A. 949; Seward *v.* Rising Sun, 79 Ind. 351.

Iowa.— Judy *v.* Beckwith, 137 Iowa 24, 114 N. W. 565, 15 L. R. A. N. S. 142.

Kentucky.— Com. *v.* Lovell, 125 Ky. 491, 101 S. W. 970, 31 Ky. L. Rep. 105.

Maine.— Holton *v.* Bangor, 23 Me. 264.

Massachusetts.— Dwight *v.* Boston, 12 Allen 316, 90 Am. Dec. 149; Great Barrington *v.* Berkshire County, 16 Pick. 572.

Michigan.— Trall *v.* Guiney, 141 Mich. 392, 104 N. W. 646, 113 Am. St. Rep. 528; Bacon *v.* State Tax Com'rs, 126 Mich. 22, 85 N. W. 307, 86 Am. St. Rep. 524; Graham *v.* St. Joseph Tp., 67 Mich. 652, 35 N. W. 808.

Missouri.—Ogden *v.* St. Joseph, 90 Mo. 522, 3 S. W. 25; State *v.* Hannibal, etc., R. Co., 37 Mo. 265.

New Jersey.— Newark City Bank *v.* Newark Fourth Ward Assessor, 30 N. J. L. 13; State *v.* Branin, 23 N. J. L. 484.

North Carolina.—Worth *v.* Ashe County, 90 N. C. 409; Worth *v.* Ashe County, 82 N. C. 420, 33 Am. Rep. 692.

Ohio.— Lander *v.* Burke, 65 Ohio St. 532, 63 N. E. 69; Bradley *v.* Bauder, 36 Ohio St. 28, 38 Am. Rep. 547; Worthington *v.* Sebastian, 25 Ohio St. 1.

Pennsylvania.—Whitesell *v.* Northampton County, 49 Pa. St. 526; McKeen *v.* Northampton County, 49 Pa. St. 519, 88 Am. Dec. 515; *In re* Short, 16 Pa. St. 63.

Rhode Island.— Rhode Island Hospital Trust Co. *v.* Providence Tax Assessors, 25 R. I. 355, 55 Atl. 877; Dyer *v.* Osborne, 11 R. I. 321, 23 Am. Rep. 460.

United States.—Wright *v.* Louisville, etc., R. Co., 195 U. S. 219, 25 S. Ct. 16, 49 L. ed. 167 [*reversing* 117 Fed. 1007, 54 C. C. A. 672 (*affirming* 116 Fed. 669)]; Sturges *v.* Carter, 114 U. S. 511, 5 S. Ct. 1014, 29 L. ed. 240.

See 45 Cent. Dig. tit. "Taxation," §§ 15, 292.

In New York it has been held that a resident owner is not subject to taxation on shares of stock in a foreign corporation (People *v.* Tax Com'rs, 5 Hun 200 [*affirmed* in 64 N. Y. 541]; People *v.* Tax, etc., Com'rs, 4 Hun 595 [*affirmed* in 62 N. Y. 630]); and that such shares are not "property within this state" within the application of Laws (1885), c. 483, or amendatory acts (Matter of Thomas, 3 Misc. 388, 24 N. Y. Suppl. 713).

Pledge of stock.—A pledge by a resident owner of stock in a foreign corporation to a trust company in another state, although the stock is delivered to the pledgee and transferred to it on the books of the issuing corporation, does not transfer the *situs* of such stock but it remains taxable to the resident pledgor or a transferee in the same state who has succeeded to all of his rights. Georgia Cent. R. Co. *v.* Wright, 166 Fed. 153.

Not taxable as capital employed within the state.— Under a statute imposing a franchise tax on corporations based upon the amount of their capital stock employed within the state, stock of a foreign corporation owned by a domestic corporation is not to be considered as a part of the latter's capital employed within the state. People *v.* Knight, 173 N. Y. 255, 65 N. E. 1102; People *v.* Campbell, 138 N. Y. 543, 34 N. E. 370, 20 L. R. A. 453.

41. Judy *v.* Beckwith, 137 Iowa 24, 114 N. W. 565, 15 L. R. A. N. S. 142; Dyer *v.* Osborne, 11 R. I. 321, 23 Am. Rep. 460. See also Georgia Cent. R. Co. *v.* Wright, 166 Fed. 153.

42. *Georgia.*— Georgia R., etc., Co. *v.* Wright, 125 Ga. 589, 54 S. E. 52 [*reversed* on other grounds in 207 U. S. 127, 28 S. Ct. 47, 52 L. ed. 134].

Illinois.— Porter *v.* Rockford, etc., R. Co., 76 Ill. 561.

Indiana.— Hasely *v.* Ensley, 40 Ind. App. 598, 82 N. E. 809.

Missouri.— Ogden *v.* St. Joseph, 90 Mo. 522, 3 S. W. 25.

taxes on its capital or property in the foreign state or not;[43] but if all of its property is situated and taxed to the corporation in the same state where the stock-holders reside, the same rules should be applied as in the case of domestic corporations similarly taxed, and the stock-holders relieved from taxation on their shares.[44]

C. Public Property — 1. General Principles. The United States has no authority to tax the property of a state,[45] nor a state to extract revenue from the property of the federal government,[46] and from the nature of the case neither government will lay taxes upon its own property.[47] Hence as a general rule all public property is exempt from taxation, either by express exemption or by necessary implication,[48] including not only the property of the state itself, but also the public property of its political subdivisions, such as counties and municipal corporations.[49] While in the absence of constitutional prohibition the state may include in its scheme of taxation such property of its own or of its municipal subdivisions,[50] the presumption is always against an intention to do so, and such property is impliedly exempt unless an intention to include it is clearly mani-

Ohio.— Lee *v.* Sturges, 46 Ohio St. 153, 19 N. E. 560, 2 L. R. A. 556.

Shares of stock-holders generally see *supra*, III, B, 1, j.

43. *Indiana.*— Hasely *v.* Ensley, 40 Ind. App. 598, 82 N. E. 809.

Iowa.— Judy *v.* Beckwith, 137 Iowa 24, 114 N. W. 565, 15 L. R. A. N. S. 142.

Kentucky.— Com. *v.* Peebles, 134 Ky. 121, 119 S. W. 774, 23 L. R. A. N. S. 1130.

Missouri.—Ogden *v.* St. Joseph, 90 Mo. 522, 3 S. W. 25.

Ohio.— Lee *v.* Sturges, 46 Ohio St. 153, 19 N. E. 560, 2 L. R. A. 556.

Pennsylvania.— McKeen *v.* Northampton County, 49 Pa. St. 519, 88 Am. Dec. 515.

Rhode Island.— Dyer *v.* Osborne, 11 R. I. 321, 23 Am. Rep. 460.

Under the New Jersey statutes the shares of stock in foreign corporations are not taxable where the corporation has within twelve months paid taxes on its property in its own state. Trenton *v.* Standard F. Ins. Co., 77 N. J. L. 757, 73 Atl. 606 [*affirming* 76 N. J. L. 79, 68 Atl. 1111]; State *v.* Ramsey, 54 N. J. L. 546, 24 Atl. 445.

44. Com. *v.* Ledman, 127 Ky. 603, 106 S. W. 247, 32 Ky. L. Rep. 452; Stroh *v.* Detroit, 131 Mich. 109, 90 N. W. 1029; Hubbard *v.* Brush, 61 Ohio St. 252, 55 N. E. 829 [*affirming* 18 Ohio Cir. Ct. 884, 9 Ohio Cir. Dec. 859]. See also McLeod *v.* Sandall, 26 N. Brunsw. 526.

If only a part of the property is situated in the state and taxed to the corporation, it has been held that the rule does not apply and that the stock-holders are subject to taxation on their shares. Lee *v.* Sturges, 46 Ohio St. 153, 19 N. E. 560, 2 L. R. A. 556. But under the Kentucky statute if a foreign corporation pays taxes upon its franchises and property within the state, the stock-holders are not subject to taxation on their shares, although only a part of the property of the corporation is situated and taxed within the state. Com. *v.* Walsh, 133 Ky. 103, 106 S. W. 240, 32 Ky. L. Rep. 460, 117 S. W. 398.

45. See *infra*, III, C, 3, a.

46. See *infra*, III, C, 2, a.

47. Camden *v.* Camden Village Corp., 77 Me. 530, 1 Atl. 689; Worcester County *v.* Worcester, 116 Mass. 193, 17 Am. Rep. 159; Public School Trustees *v.* Trenton, 30 N. J. Eq. 667.

The reason of the rule is not based upon constitutional prohibition, but upon the fact that the state would merely be taxing itself to raise money to pay over to itself (Public School Trustees *v.* Trenton, 30 N. J. Eq. 667), or, as stated in one case, "would be merely taking money out of one pocket and putting it into another" (People *v.* Doe, 36 Cal. 220), so that there would be no gain in revenue, but on the contrary a loss to the extent of the cost of assessing and collecting the tax (see Biscoe *v.* Coulter, 18 Ark. 423).

48. *California.*— People *v.* Doe, 36 Cal. 220.

Connecticut.—West Hartford *v.* Hartford Water Com'rs, 44 Conn. 360.

Illinois.— People *v.* Salomon, 51 Ill. 37.

Kansas.— Blue Jacket *v.* Johnson County, 3 Kan. 299.

Kentucky.— Louisville *v.* Com., 1 Duv. 295, 85 Am. Dec. 624.

Louisiana.—Alexandria *v.* O'Shee, 51 La. Ann. 719, 25 So. 382; Tulane Education Fund *v.* New Orleans Bd. of Assessors, 38 La. Ann. 292.

New Hampshire.— Franklin St. Soc. *v.* Manchester, 60 N. H. 342.

New Jersey.— Public Schools *v.* Trenton, 30 N. J. Eq. 667.

Texas.— Traylor *v.* State, 19 Tex. Civ. App. 86, 46 S. W. 81.

See 45 Cent. Dig. tit. "Taxation," § 295.

A private alley-way is not exempt from taxation in the character of public property. Hill *v.* Williams, 104 Md. 595, 65 Atl. 413.

49. People *v.* Doe, 36 Cal. 220; Camden *v.* Camden Village Corp., 77 Me. 530, 1 Atl. 689; Worcester County *v.* Worcester, 116 Mass. 193, 17 Am. Rep. 159; Public Schools *v.* Trenton, 30 N. J. Eq. 667.

Property of municipal corporations see *infra*, III, C, 4.

Property of state see *infra*, III, C, 3.

50. Louisville *v.* Com., 1 Duv. (Ky.) 295, 85 Am. Dec. 624; Public Schools *v.* Trenton, 30 N. J. Eq. 667. See also *infra*, III, C, 3, a; III, C, 4, a.

fested.[51] So also in England and Canada, in order that a pecuniary burden may be imposed upon crown property by statute, the crown must be expressly named or it must appear by necessary implication that the crown has agreed or is intended to be bound.[52]

2. Property of United States — a. In General. All property belonging to the United States, no matter for what purpose acquired or held, is exempt from all state and local taxation, on account of the necessary and entire independence of the two systems of government.[53]

b. Public Lands and Interests Therein — (i) *In General.*[54] Land lying within the borders of a state, but which still constitutes a portion of the public domain, and the legal and beneficial title to which remains in the United States, is not subject to any species of state taxation, and any assessment of taxes upon such land is null and void and can in no way affect the interests of the government.[55]

51. *California.*— People *v.* Doe, 36 Cal. 220.

Kentucky.— Louisville *v.* Com., 1 Duv. 295, 85 Am. Dec. 624.

Maine.— Camden *v.* Camden Village Corp., 77 Me. 530, 1 Atl. 689.

Massachusetts.—Worcester County *v.* Worcester, 116 Mass. 193, 17 Am. Rep. 159.

New Jersey.— Public Schools *v.* Trenton, 30 N. J. Eq. 667.

See also *infra*, III, C, 3, a; III, C, 4, a.

52. Hornsey Urban Dist. Council *v.* Hennell, [1902] 2 K. B. 73, 71 L. J. K. B. 479.

As to taxation in Canada of crown property or of property leased for and occupied by the crown see Quirt *v.* Reg., 19 Can. Sup. Ct. 510; Atty.-Gen. *v.* Montreal, 13 Can. Sup. Ct. 352; Macdonald *v.* Edmonton, 37 Can. L. J. 438; Victoria *v.* Bowes, 8 Brit. Col. 363; Ruddell *v.* Georgeson, 9 Manitoba 43; Hudson Bay Co. *v.* Atty.-Gen., Manitoba t. Wood 209; Macleod Imp. Co. *v.* Macleod, 5 Northwest. Terr. 190; Smith *v.* Halifax, 35 Nova Scotia 373; Reg. *v.* Wellington, 17 Ont. 615 [*affirmed* in 17 Ont. App. 421]; Moffatt *v.* Scratch, 8 Ont. 147 [*affirmed* in 12 Ont. App. 157]; Shaw *v.* Shaw, 12 U. C. C. P. 456; Street *v.* Kent County Corp., 11 U. C. C. P. 255; Secretary of State for War *v.* London, 23 U. C. Q. B. 476; Secretary of State *v.* Toronto, 22 U. C. Q. B. 551.

53. *Illinois.*— People *v.* U. S., 93 Ill. 30, 34 Am. Rep. 155.

Louisiana.— Crowley *v.* Copley, 2 La. Ann. 329.

Maryland.— Howell *v.* State, 3 Gill 14, holding that the fiscal agents of the United States, the army and navy, the federal judicature, the public ships, the national institutions and property, and imported goods in the public warehouses are all exempt from state taxation.

Virginia.—Andrews *v.* Auditor, 28 Gratt. 115.

United States.—Wisconsin Cent. R. Co. *v.* Price County, 133 U. S. 496, 10 S. Ct. 341, 33 L. ed. 687; Van Brocklin *v.* Anderson, 117 U. S. 151, 6 S. Ct. 670, 29 L. ed. 845 [*reversing* 15 Lea (Tenn.) 33].

See 45 Cent. Dig. tit. "Taxation," §§ 17, 351.

54. **Taxation of Indian lands** see Indians, 22 Cyc. 130, 138.

55. *Alabama.*— Bonner *v.* Phillips, 77 Ala. 427.

California.— Central Pac. R. Co. *v.* Howard, 52 Cal. 227; People *v.* Morrison, 22 Cal. 73; Hall *v.* Dowling, 18 Cal. 619.

Idaho.— Quivey *v.* Lawrence, 1 Ida. 313.

Illinois.— People *v.* U. S., 93 Ill. 30, 34 Am. Rep. 155.

Indiana.— Doe *v.* Hearick, 14 Ind. 242.

Louisiana.— Jopling *v.* Cachere, 107 La. 522, 32 So. 243.

Mississippi.— Hoskins *v.* Illinois Cent. R. Co., 78 Miss. 768, 29 So. 518, 84 Am. St. Rep. 644; Dixon *v.* Porter, 23 Miss. 84.

Nevada.— Wright *v.* Cradlebaugh, 3 Nev. 341.

New Mexico.— Territory *v.* Delinquent Tax List, 12 N. M. 169, 76 Pac. 316.

Ohio.— Neiswanger *v.* Gwynne, 13 Ohio 74.

Oregon.—Johnson *v.* Crook County, 53 Oreg. 329, 100 Pac. 294, 133 Am. St. Rep. 834.

Wisconsin.— Wisconsin Cent. R. Co. *v.* Taylor County, 52 Wis. 37, 8 N. W. 833.

Wyoming.— Ivinson *v.* Hance, 1 Wyo. 270.

United States.— Wisconsin Cent. R. Co. *v.* Price County, 133 U. S. 496, 10 S. Ct. 341, 33 L. ed. 687; Van Brocklin *v.* Anderson, 117 U. S. 151, 6 S. Ct. 670, 29 L. ed. 845; McGoon *v.* Scales, 9 Wall. 23, 19 L. ed. 545; Bannon *v.* Burnes, 39 Fed. 892; U. S. *v.* Weise, 28 Fed. Cas. No. 16,659, 2 Wall. Jr. 72.

See 45 Cent. Dig. tit. "Taxation," §§ 31, 301.

One having a government title to land may set it up against one claiming under a tax-sale made previous to the time when the government parted with its title, notwithstanding any statutory provisions as to the effect of tax-sales. Wright *v.* Cradlebaugh, 3 Nev. 341.

Land occupied for military purposes.— Property taken and held by the national government in military occupation, but which is not owned by it, and which is afterward voluntarily relinquished and returned to its owner, is in the mean time taxable to such owner. Speed *v.* St. Louis County Ct., 42 Mo. 382.

Railroad property on military reservation. — The state has power to tax railroad property belonging to a private corporation, although it is situated exclusively within the boundaries of a United States military reser-

So land sold for direct taxes and bid in by the United States is not taxable while the government continues to hold it;[56] and property acquired from the general government after the time fixed by the state law for the completion of the assessment for the current year is exempt from taxation until the following assessment.[57]

(II) *Grant or Reservation of Power to Tax.* Congress has power to grant to the states the right to tax public property or property in which the United States retains such an interest as would otherwise exempt it;[58] and where this is done no express acceptance by the state of the authority conferred is essential to the exercise thereof.[59] So also, if a state, in ceding to the United States exclusive jurisdiction over a tract within its limits, reserves to itself the right to tax private property therein, the consent of the government to the reservation may be presumed from its acceptance of the grant.[60]

(III) *Entries and Sales of Public Lands* — (A) *In General.* After title to any portion of the public domain has passed out of the United States by sale or by entry under the public land laws, in such manner as to invest the purchaser with the legal or equitable title, it becomes at once subject to taxation by the state.[61]

(B) *Equitable Title Before Patent.* When land belonging to the United States has been entered at the land-office and paid for and a certificate has been given to the purchaser, it is liable to taxation by the state, in advance of the issuance of a patent; for in such case the contract of purchase is executed, and the land belongs to the vendee and no longer to the government; the conveyance has not been made, but the purchaser has the equitable title, and the United States merely holds the dry legal title in trust for him; the land is segregated from the public domain and is thenceforth private property and subject to taxation.[62]

vation. Fort Leavenworth R. Co. *v.* Lowe, 27 Kan. 749.

The interest of a lessee in lands leased from the United States is not exempt from state taxation. *Ex p.* Gaines, 56 Ark. 227, 19 S. W. 602.

56. People *v.* U. S., 93 Ill. 30, 34 Am. Rep. 155; Van Brocklin *v.* Anderson, 117 U. S. 151, 6 S. Ct. 670, 29 L. ed. 845.

57. Tallman *v.* Butler County, 12 Iowa 531; Des Moines Nav., etc., R. Co. *v.* Polk County, 10 Iowa 1.

58. State *v.* Central Pac. R. Co., 21 Nev. 247, 30 Pac. 686 [*affirmed* in 162 U. S. 512, 16 S. Ct. 885, 40 L. ed. 1057]. See also State *v.* Central Pac. R. Co., 20 Nev. 372, 22 Pac. 237.

59. Central Pac. R. Co. *v.* Nevada, 162 U. S. 512, 16 S. Ct. 885, 40 L. ed. 1057 [*affirming* 21 Nev. 247, 30 Pac. 686].

60. Ft. Leavenworth R. Co. *v.* Lowe, 114 U. S. 525, 5 S. Ct. 995, 29 L. ed. 264.

61. Elting *v.* Gould, 96 Mo. 535, 9 S. W. 922; Bentley *v.* Barton, 41 Ohio St. 410; Newby *v.* Brownlee, 23 Fed. 320. And see Baltimore Shipbuilding, etc., Co. *v.* Baltimore, 195 U. S. 375, 25 S. Ct. 50, 49 L. ed. 242, holding that the United States has no such interest in land conveyed by it to a corporation for dry dock purposes, with a reserved right to the free use of the dry dock, and a provision for forfeiture in case of the continued unfitness of the dry dock for use, or the use of the land for other purposes, as will prevent the state from taxing the interest of the corporation in such land.

Deed by town-site trustees.— The issuance and delivery of a deed to a lot by a board of town-site trustees appointed in pursuance of Act Cong. May 14, 1890, c. 207, 26 St. 109 (U. S. Comp. St. (1901) p. 1463), renders the same at once liable for taxes, as other real property, notwithstanding a contest may be pending between adverse claimants therefor. Brooks *v.* Garner, 20 Okla. 236, 94 Pac. 694, 97 Pac. 995.

62. *Arkansas.*— Burcham *v.* Terry, 55 Ark. 398, 18 S. W. 458, 29 Am. St. Rep. 42; Smith *v.* Hollis, 46 Ark. 17; Diver *v.* Friedheim, 43 Ark. 203; Witherspoon *v.* Duncan, 21 Ark. 240.

California.— Central Pac. R. Co. *v.* Howard, 52 Cal. 227; People *v.* Crockett, 33 Cal. 150; People *v.* Shearer, 30 Cal. 645; Hall *v.* Dowling, 18 Cal. 619; Robinson *v.* Gaar, 6 Cal. 273.

Iowa.— Herrick *v.* Sargent, 140 Iowa 590, 117 N. W. 751, 132 Am. St. Rep. 281; Iowa R. Land Co. *v.* Davis, 102 Iowa 128, 71 N. W. 229; Barrett *v.* Kevane, 100 Iowa 653, 69 N. W. 1036; Vinton *v.* Cerro Gordo County, 72 Iowa 155, 33 N. W. 618; Stryker *v.* Polk County, 22 Iowa 131. See also Churchill *v.* Sowards, 78 Iowa 472, 43 N. W. 271.

Kansas.— Goddard *v.* Storch, 57 Kan. 714, 48 Pac. 15; Logan *v.* Clark County, 51 Kan. 747, 33 Pac. 603; Kansas Pac. R. Co. *v.* Culp, 9 Kan. 38. See Missouri River, etc., R. Co. *v.* Morris, 13 Kan. 302.

Minnesota.— State *v.* Itasca Lumber Co., 100 Minn. 355, 111 N. W. 276.

Nebraska.— Graff *v.* Ackerman, 38 Nebr. 720, 57 N. W. 512; Donovan *v.* Kloke, 6 Nebr. 124; Bellinger *v.* White, 5 Nebr. 399.

New Mexico.— Territory *v.* Delinquent Tax List, 12 N. M. 62, 73 Pac. 621.

(c) *Conditions Precedent to Vesting of Equitable Title.* The equitable title just spoken of, to be subject to taxation, must be perfect and complete, without anything more to be paid or any further act to be done before the entryman is entitled to receive his patent.[63] Hence the land is not to be taxed before its survey and approval of the survey;[64] nor is it subject to taxation before full payment and acceptance of the price by the United States.[65] Again, in the case of homestead entries, the settler does not become entitled to a patent until he has completed the prescribed term of residence on the land, and his interest is not taxable before he is entitled to make his final proofs.[66] So if an entry is canceled and the issuance of patent suspended, on account of fraud, forgery, or mistake, the claimant has no taxable title while the proceedings are in this condition,[67] although his

Ohio.— Gwynne *v.* Niswanger, 20 Ohio 556; Holt *v.* Hemphill, 3 Ohio 232.

Oklahoma.— Topeka Commercial Security Co. *v.* McPherson, (1898) 52 Pac. 395.

Oregon.— Johnson *v.* Crook County, 53 Oreg. 329, 100 Pac. 294, 133 Am. St. Rep. 834.

South Dakota.— Danforth *v.* McCook County, 11 S. D. 258, 76 N. W. 940, 74 Am. St. Rep. 808.

Washington.— Puget Sound Agricultural Co. *v.* Pierce County, 1 Wash. Terr. 159.

Wisconsin.— Farnham *v.* Sherry, 71 Wis. 568, 37 N. W. 577; Ross *v.* Outagamie County, 12 Wis. 26.

United States.— Maish *v.* Arizona, 164 U. S. 599, 17 S. Ct. 193, 41 L. ed. 567; Central Colorado Imp. Co. *v.* Pueblo County, 95 U. S. 259, 24 L. ed. 495; Hunnewell *v.* Cass Co., 22 Wall. 464, 22 L. ed. 752; Union Pac. R. Co. *v.* McShane, 22 Wall. 444, 22 L. ed. 747; Kansas Pac. R. Co. *v.* Prescott, 16 Wall. 603, 21 L. ed. 373; Witherspoon *v.* Duncan, 4 Wall. 210, 18 L. ed. 339; Carroll *v.* Safford, 3 How. 441, 11 L. ed. 671; Coleman *v.* Peshtigo Lumber Co., 30 Fed. 317; Pitts *v.* Clay, 27 Fed. 635; Astrom *v.* Hammond, 2 Fed. Cas. No. 596, 3 McLean 107; Carroll *v.* Perry, 5 Fed. Cas. No. 2,456, 4 McLean 25; Lord *v.* Milwaukee, etc., R. Co., 15 Fed. Cas. No. 8,507, 17 Wis. 569 note.

Canada.— South Norfolk Rural Municipality *v.* Warren, 8 Manitoba 481; Cotter *v.* Sutherland, 18 U. C. C. P. 357; Perry *v.* Powell, 8 U. C. Q. B. 251; Doe *v.* McDonald, 1 U. C. Q. B. 432. *Compare* King *v.* Matsqui Municipality, 8 Brit. Col. 289.

See 45 Cent. Dig. tit. "Taxation," § 35.

63. *Arkansas.*— Diver *v.* Friedheim, 43 Ark. 203.

Kansas.— Douglas County *v.* Union Pac. R. Co., 5 Kan. 615.

Michigan.— Sands *v.* Davis, 40 Mich. 14.

Mississippi.— Hoskins *v.* Illinois Cent. R. Co., 78 Miss. 768, 29 So. 518, 84 Am. St. Rep. 644.

Nebraska.— Edgington *v.* Cook, 32 Nebr. 551, 49 N. W. 369.

Pennsylvania.— Mint Realty Co. *v.* Philadelphia, 218 Pa. St. 104, 66 Atl. 1130.

United States.— Kansas Pac. R. Co. *v.* Prescott, 16 Wall. 603, 21 L. ed. 373; Pitts *v.* Clay, 27 Fed. 635.

Exchange of forest reserve lands.— On an application to surrender lands within a forest reservation and select in lieu thereof vacant non-mineral lands of equal area, no equitable or legal estate or title to the latter attaches or vests until the proposition is accepted by the commissioner of the general land-office, and while the title thus remains in the United States the lands selected are not subject to taxation. Johnson *v.* Crook County, 53 Oreg. 329, 100 Pac. 294, 133 Am. St. Rep. 834. So also the title to the lands relinquished revests in the United States on the filing of the deed for record so that such lands are not subject to taxation, although there has been no selection of the lands granted in lieu thereof. Territory *v.* Perrin, 9 Ariz. 316, 83 Pac. 361.

64. Upshur *v.* Pace, 15 Tex. 531; Clearwater Timber Co. *v.* Shoshone County, 155 Fed. 612; Robertson *v.* Sewell, 87 Fed. 536, 31 C. C. A. 107. And see De La Vergne *v.* Territory, 4 Ariz. 10, 77 Pac. 617.

65. *Arkansas.*— Smith *v.* Hollis, 46 Ark. 17; Diver *v.* Friedheim, 43 Ark. 203.

California.— People *v.* Shearer, 30 Cal. 645.

Nebraska.— Donovan *v.* Kloke, 6 Nebr. 124.

Pennsylvania.— Mint Realty Co. *v.* Philadelphia, 13 Pa. Dist. 513.

United States.— Hussman *v.* Durham, 165 U. S. 144, 17 S. Ct. 253, 41 L. ed. 664; U. S. *v.* Milwaukee, 100 Fed. 828.

Paying cost of surveys.— On the confirmation of a Mexican land grant, where the confirmee is required to pay the expense of so much of the surveys as inure to his benefit, he has no title to the portion selected by the confirmatory act until such payment, nor a perfect equitable right to such title, and the land is not taxable. Central Colorado Inv. Co. *v.* Pueblo County, 95 U. S. 259, 24 L. ed. 495.

66. Moriarty *v.* Boone County, 39 Iowa 634; Long *v.* Culp, 14 Kan. 412; Hoskins *v.* Illinois Cent. R. Co., 78 Miss. 768, 29 So. 518, 84 Am. St. Rep. 644; Bellinger *v.* White, 5 Nebr. 399.

Lands entered under homestead laws of the United States are not subject to taxation until such time as the occupant is entitled to a patent (Hoskins *v.* Illinois Cent. R. Co., 78 Miss. 768, 29 So. 518, 84 Am. St. Rep. 644); but as soon as the occupant might complete his title by making final proof and paying the fees required by law the lands are subject to taxation, although such final proof has not been made (Bellinger *v.* White, 5 Nebr. 399).

67. *Iowa.*— Davis *v.* Magoun, 109 Iowa

application is afterward reinstated or he is given an opportunity to substitute a valid entry.[68] But a mere suspension of the proceedings, on account of irregularity, after the right to a patent has become complete, does not destroy the taxable interest of the claimant,[69] and the same rule applies where the issuing of the patent is merely suspended pending an investigation of the rights of different claimants.[70]

(iv) *Possessory Rights.* The possessory interests which private individuals may hold in the public lands of the United States, for mining, agricultural, and various other purposes, constitute a species of property recognized by law and which is subject to taxation by the state.[71]

(v) *Improvements on Public Lands.* The exemption of public property from taxation does not extend to improvements on the public lands made by preëmptioners, homestead, and other claimants, or occupants, at their own expense, and these are taxable by the state.[72]

308, 80 N. W. 423; Durham *v.* Hussman, 88 Iowa 29, 55 N. W. 11; Reynolds *v.* Plymouth County, 55 Iowa 90, 7 N. W. 468. *Compare* Vinton *v.* Cerro Gordo Co., 72 Iowa 155, 33 N. W. 618.

Kansas.— Kohn *v.* Barr, 52 Kan. 269, 34 Pac. 880.

Minnesota.— Wheeler *v.* Merriman, 30 Minn. 372, 15 N. W. 665.

Ohio.— Hall *v.* Prindle, 2 Ohio Dec. (Reprint) 261, 2 West. L. Month. 193.

South Dakota.— Duncan *v.* Newcomer, 9 S. D. 375, 69 N. W. 580.

Wisconsin.— Farnham *v.* Sherry, 71 Wis. 568, 37 N. W. 577; Calder *v.* Keegan, 30 Wis. 126.

United States.— Pitts *v.* Clay, 27 Fed. 635; Bronson *v.* Keokuk, 4 Fed. Cas. No. 1,929, 3 Dill. 490.

68. Kohn *v.* Barr, 52 Kan. 269, 34 Pac. 880; Calder *v.* Keegan, 30 Wis. 126; Pitts *v.* Clay, 27 Fed. 635; Bronson *v.* Keokuk, 4 Fed. Cas. No. 1,929, 3 Dill. 490. *Compare* Wheeler *v.* Merriam, 30 Minn. 372, 15 N. W. 665; Farnham *v.* Sherry, 71 Wis. 568, 37 N. W. 577.

69. Polk County *v.* Hunter, 42 Minn. 312, 44 N. W. 201. See also Wheeler *v.* Merriam, 30 Minn. 372, 15 N. W. 665; Farnham *v.* Sherry, 71 Wis. 568, 37 N. W. 577.

70. Herrick *v.* Sargent, 140 Iowa 590, 117 N. E. 751, 132 Am. St. Rep. 281, holding that where the issuance of a patent is merely suspended to investigate the rights of persons arising from a conflict of interests created by assignments of the certificate the land is subject to taxation.

71. *Arizona.*— *In re* Pima County Delinquent Tax List, 4 Ariz. 186, 37 Pac. 370, 39 Pac. 328.

Arkansas.— *Ex p.* Gaines, 56 Ark. 227, 19 S. W. 602.

California.— People *v.* Donnelly, 58 Cal. 144; People *v.* Black Diamond Coal Min. Co., 37 Cal. 54; People *v.* Cohen, 31 Cal. 210; People *v.* Frisbie, 31 Cal. 146; People *v.* Shearer, 30 Cal. 645; State *v.* Moore, 12 Cal. 56.

Nevada.— State *v.* Central Pac. R. Co., 21 Nev. 247, 30 Pac. 686, where it is stated that the possessory claim to public land, which may be taxed as something separate and distinct from the title in fee, is an actual possession, and not a mere constructive possession or a mere claim to the land; mortgaging and leasing public land do not constitute actual possession thereof.

Oklahoma.— Topeka Commercial Security Co. *v.* McPherson, (1898) 52 Pac. 395.

Washington.— Puget Sound Agricultural Co. *v.* Pierce County, 1 Wash. Terr. 159.

United States.— Elder *v.* Wood, 208 U. S. 226, 28 S. Ct. 263, 52 L. ed. 464 [*affirming* 37 Colo. 174, 86 Pac. 319].

See 45 Cent. Dig. tit. "Taxation," § 36.

Taxation of mining claims located on the public domain see *supra*, III, A, 2, b, (II).

Possession of private property taken for public use.— Where an easement in land taken for a public use involves practically the exclusive possession and control of the property by the public, and leaves the original owner with no right of substantial value, the land is exempt from taxation, although the fee remains in the owner. Lancy *v.* Boston, 186 Mass. 128, 71 N. E. 302.

72. *California.*— San Francisco *v.* McGinn, 67 Cal. 110, 7 Pac. 187; People *v.* Frisbie, 31 Cal. 146; People *v.* Shearer, 30 Cal. 645; Hall *v.* Dowling, 18 Cal. 619.

Idaho.— People *v.* Owyhee Min. Co., 1 Ida. 409; Quivey *v.* Lawrence, 1 Ida. 313.

Kansas.— Oswalt *v.* Hallowell, 15 Kan. 154. *Compare* Parker *v.* Winsor, 5 Kan. 362, as to taxation of improvements on lands affected by the Kickapoo treaty of 1862, the treaty providing that none of the lands should be subject to taxation until patents had issued.

Nebraska.— State *v.* Tucker, 38 Nebr. 56, 56 N. W. 718.

Oklahoma.— Crocker *v.* Donovan, 1 Okla. 165, 30 Pac. 374. See also Territory *v.* Clark, 2 Okla. 82, 35 Pac. 882.

Washington.—Percival *v.* Thurston County, 14 Wash. 586, 45 Pac. 159.

Wyoming.— Ivinson *v.* Hance, 1 Wyo. 270.

See 45 Cent. Dig. tit. "Taxation," §§ 37, 306.

Improvements by homestead claimants.— In regard to improvements made by homestead claimants it has been held that such improvements are not liable to taxation until the claimants are entitled to make their final proof of cultivation and settlement. Chase

(VI) *Grants of Public Lands* — (A) *In General.* Lands granted by the United States to private individuals become subject to taxation as soon as the grantee has done all that is required of him and becomes vested with the equitable title.[73] So also while congressional grants from the public domain to a state are exempt from taxation so long as the state holds the title,[74] they become subject to taxation as soon as the state has sold or granted them to private owners.[75]

(B) *Grants to States For Internal Improvements.* Lands granted by the United States to the several states in aid of their internal improvements become subject to taxation as soon as sold or granted by the state, or when earned by private parties who have become vested with everything except the dry legal title.[76]

(C) *Railroad Land Grants* — (1) In General. Lands granted by congress to a railroad company to aid in its construction are not thereby charged with a trust, but become taxable as the property of the company as soon as it is vested with the legal or equitable title,[77] unless there be a specific provision in the grant for a general or limited exemption from taxation.[78] Where the lands are granted to a state, to aid in railroad construction, they are not taxable while the state holds the title in trust for the United States,[79] but become so when the state has passed the title to the railroad company.[80]

(2) Equitable Title Before Patent. Lands granted to a railroad company by act of congress, to aid in the construction of its road, become subject to taxation by the state as soon as the company has earned the same and has become equitably entitled to receive the legal title, although the certificate or patent may not yet have issued.[81]

County *v.* Shipman, 14 Kan. 532. But see Crocker *v.* Donovan, 1 Okl. 165, 30 Pac. 374.

73. Robinson *v.* Gaar, 6 Cal. 273; Scott *v.* Chickasaw County, 46 Iowa 253; Whitney *v.* Gunderson, 31 Wis. 359; Central Colorado Imp. Co. *v.* Pueblo County, 95 U. S. 259, 24 L. ed. 495.

74. Sully *v.* Poorbaugh, 45 Iowa 453; Stoutz *v.* Brown, 23 Fed. Cas. No. 13,505, 5 Dill. 445.

75. Morgan *v.* Clay County, 27 Kan. 229; Prescott *v.* Beebe, 17 Kan. 320; Bishop *v.* Marks, 15 La. Ann. 147.

76. Mundee *v.* Freeman, 23 Fla. 529, 3 So. 153; Goodnow *v.* Wells, 67 Iowa 654, 25 N. W. 864; Litchfield *v.* Hamilton County, 40 Iowa 66; Stryker *v.* Polk County, 22 Iowa 131; Chicago, etc., R. Co. *v.* Douglas County, 134 Wis. 197, 114 N. W. 511, 14 L. R. A. N. S. 1074; Wisconsin Cent. R. Co. *v.* Taylor County, 52 Wis. 37, 8 N. W. 833; Ross *v.* Outagamie County, 12 Wis. 26. *Compare* Des Moines Nav., etc., Co. *v.* Polk County 10 Iowa 1.

Swamp and overflowed lands in Arkansas donated by the United States are, unless sooner reclaimed, exempt from taxation for ten years after they have been sold by the state. Memphis, etc., R. Co. *v.* Loftin, 105 U. S. 258, 26 L. ed. 1042.

77. Iowa Falls, etc., R. Co. *v.* Plymouth County, 40 Iowa 609; McGregor, etc., R. Co. *v.* Brown, 39 Iowa 655; Iowa Falls, etc., R. Co. *v.* Woodbury County, 38 Iowa 498; North Wisconsin R. Co. *v.* Barron County, 18 Fed. Cas. No. 10,347, 8 Biss. 414.

Adverse claims.— If railroad land grant lands are withheld from certification under the grant because of adverse claims thereto, and without fault on the part of the company, they are not taxable during the time they are so withheld. Grant *v.* Iowa R. Land Co., 54 Iowa 673, 7 N. W. 113; Dickerson *v.* Yetzer, 53 Iowa 681, 6 N. W. 41.

78. New Mexico *v.* U. S. Trust Co., 172 U. S. 171, 19 S. Ct. 128, 43 L. ed. 407 [*affirming* 8 N. M. 673, 47 Pac. 725].

79. Sullivan *v.* Van Kirk Land, etc., Co., 124 Ala. 225, 26 So. 925; Wisconsin Cent. R. Co. *v.* Price County, 133 U. S. 496, 10 S. Ct. 341, 33 L. ed. 687; Tucker *v.* Ferguson, 22 Wall. (U. S.) 527, 22 L. ed. 805.

80. Morrison County *v.* St. Paul, etc., R. Co., 42 Minn. 451, 44 N. W. 982; Tucker *v.* Ferguson, 22 Wall. (U. S.) 527, 22 L. ed. 805.

But if the state disregards the conditions imposed by congress in regard to the disposition of the lands, the title does not pass by the unauthorized conveyance but remains in the state in trust for the United States so that the lands are not subject to taxation. Sullivan *v.* Van Kirk Land, etc., Co., 124 Ala. 225, 26 So. 925.

81. *California.*— See Central Pac. R. Co. *v.* Howard, 52 Cal. 227.

Iowa.— Chicago, etc., R. Co. *v.* Hemenway, 117 Iowa 598, 91 N. W. 910; Goodnow *v.* Wells, 67 Iowa 654, 25 N. W. 864; Iowa R. Land Co. *v.* Fitchpatrick, 52 Iowa 244, 3 N. W. 40; Chicago, etc., R. Co. *v.* Holdsworth, 47 Iowa 20; Iowa Falls, etc., R., Co. *v.* Cherokee County, 37 Iowa 483; Iowa Homestead Co. *v.* Webster County, 21 Iowa 221; Burlington, etc., R. Co. *v.* Hayne, 19 Iowa 137; Stockdale *v.* Webster County Treasurer, 12 Iowa 536.

Kansas.— Missouri River, etc., R. Co. *v.* Morris, 13 Kan. 302.

(3) Conditions Precedent to Vesting of Equitable Title — (a) In General. If the grant of lands to a railroad contains any conditions by which it is liable to be defeated, or which must be complied with before the company is held to have earned the lands, such lands are not taxable while the conditions are in force and unfulfilled,[82] but become taxable as soon as such conditions are complied with.[83] So also such lands are not subject to taxation where there are obstacles in the way of a conveyance of a clear title to the company, such as undetermined homestead entries upon the land,[84] or other conflicting or adverse claims thereto;[85] but a mere contingent right of preëmption in lands granted to a railroad company, if they should not be disposed of by the company within three years after the completion of the road, does not exempt the property from taxation.[86]

(b) Selection, Survey, and Certification. Lands passing to a railroad by such a grant are not taxable until the particular lands have been selected by the company, or set apart to it, so as to become capable of identification,[87] and certified by some state or federal officer if that is required by law,[88] and the selection approved by the secretary of the interior in cases where it is made subject to his approval,[89] and the costs of surveying, selecting, and conveying the lands paid by the company.[90]

Minnesota.— Cass County *v.* Morrison, 28 Minn. 257, 9 N. W. 761.

Nebraska.— Price *v.* Lancaster County, 20 Nebr. 252, 29 N. W. 931; Welton *v.* Merrick, County, 16 Nebr. 83, 20 N. W. 111.

Nevada.— State *v.* Central Pac. R. Co., 21 Nev. 247, 30 Pac. 686 [*affirmed* in 162 U. S. 512, 16 S. Ct. 885, 40 L. ed. 1057]; State *v.* Central Pac. R. Co., 20 Nev. 372, 22 Pac. 237.

Oregon.— Oregon, etc., R. Co. *v.* Lane County, 23 Oreg. 386, 31 Pac. 964.

Wisconsin.— Wisconsin Cent. R. Co. *v.* Comstock, 71 Wis. 88, 36 N. W. 843; Wisconsin Cent. R. Co. *v.* Price County, 64 Wis. 579, 26 N. W. 93; West Wisconsin R. Co. *v.* Trempealeau County, 35 Wis. 257.

United States.— Central Pac. R. Co. *v.* Nevada, 162 U. S. 512, 16 S. Ct. 885, 40 L. ed. 1057; Wisconsin Cent. R. Co. *v.* Price County, 133 U. S. 496, 10 S. Ct. 341, 33 L. ed. 687; North Wisconsin R. Co. *v.* Barron County, 18 Fed. Cas. No. 10,347, 8 Biss. 414.

See 45 Cent. Dig. tit. "Taxation," § 41.

In Iowa it was formerly held that in the case of lands granted to the state in aid of railroads they were not earned by the railroad company so as to be taxable until they had been patented to the company by the state, in the absence of any fraud or intentional delay on the part of the company in procuring such patent (Iowa Falls, etc., R. Co. *v.* Plymouth County, 40 Iowa 609; McGregor, etc., R. Co. *v.* Brown, 39 Iowa 655; Iowa Falls, etc., R. Co. *v.* Woodbury County, 38 Iowa 498); but this rule has been changed by the act of 1884 which provides that such lands shall be subject to taxation from and after the year when they are earned, although no patent has been issued, and that parol evidence shall be admissible to prove when they were earned (Chicago, etc., R. Co. *v.* Hemenway, 117 Iowa 598, 91 N. W. 910).

82. Central Pac. R. Co. *v.* Howard, 52 Cal. 227; White *v.* Burlington, etc., R. Co., 5 Nebr. 393.

83. Cass County *v.* Morrison, 28 Minn. 257, 9 N. W. 761; Wisconsin Cent. R. Co. *v.* Price County, 133 U. S. 496, 10 S. Ct. 341, 33 L. ed. 687.

84. Central Pac. R. Co. *v.* Howard, 52 Cal. 227; Dickerson *v.* Yetzer, 53 Iowa 681, 6 N. W. 41.

85. Grant *v.* Iowa R. Land Co., 54 Iowa 673, 7 N. W. 113; Doe *v.* Iowa R. Land Co., 54 Iowa 657, 7 N. W. 118; Dickerson *v.* Yetzer, 53 Iowa 681, 6 N. W. 41.

86. Kansas Pac. R. Co. *v.* Culp, 9 Kan. 38; Union Pac. R. Co. *v.* McShane, 22 Wall. (U. S.) 444, 22 L. ed. 747.

87. Cedar Rapids, etc., R. Co. *v.* Sac County, 46 Iowa 243; Iowa R. Land Co. *v.* Story County, 36 Iowa 48; Cedar Rapids, etc., R. Co. *v.* Woodbury County, 29 Iowa 247; New Orleans Pac. R. Co. *v.* Kelly, 52 La. Ann. 1741, 28 So. 212; State *v.* Sage, 75 Minn. 448, 78 N. W. 14; State *v.* Central Pac. R. Co., 21 Nev. 94, 25 Pac. 442.

Prior to the survey of lands included in a railroad land grant, such lands are not subject to taxation. State *v.* Central Pac. R. Co., 21 Nev. 94, 25 Pac. 442.

88. Grant *v.* Iowa R. Land Co., 54 Iowa 673, 7 N. W. 113; Sioux City, etc., R. Co. *v.* Osceola County, 50 Iowa 177; Cedar Rapids, etc., R. Co. *v.* Carroll County, 41 Iowa 153; Goodrich *v.* Beaman, 37 Iowa 563.

But the railroad company cannot escape taxation on such lands by negligently failing to have the certification made. Iowa R. Land Co. *v.* Fitchpatrick, 52 Iowa 244, 3 N. W. 40.

89. State *v.* Sage, 75 Minn. 448, 78 N. W. 14; Wells County *v.* McHenry, 7 N. D. 246, 74 N. W. 241; Jackson *v.* La Moure County, 1 N. D. 238, 46 N. W. 449; Wisconsin Cent. R. Co. *v.* Price County, 133 U. S. 496, 10 S. Ct. 341, 33 L. ed. 687; Clearwater Timber Co. *v.* Shoshone County, 155 Fed. 612. *Compare* Elkhorn Land, etc., Co. *v.* Dixon County, 35 Nebr. 426, 53 N. W. 382.

90. Central Pac. R. Co. *v.* Howard, 51 Cal. 229; Tyler *v.* Cass County, 1 N. D. 369, 48

(c) Determination of Non-Mineral Character of Lands. Although the acts of congress granting lands to the railroads expressly except mineral lands, a railroad company is not exempt from taxation on its granted lands merely because there is a dispute as to the character of the land, because its non-mineral character has not been finally settled, or because the land commissioner refuses to issue patents until further satisfied as to the character of the land.[91]

3. Property of States — a. In General. The property of the several states is not subject to taxation by the federal government,[92] and while in the absence of any constitutional prohibition the state might tax its own property,[93] it is presumed that no legislature intends to lay taxes on the state's own property, and therefore such property, even when not exempted from taxation by constitutional or statutory provisions, is so exempted by necessary implication, unless unmistakably included in the tax laws.[94] The public property which is thus exempt includes all property which in fact and equitably belongs wholly to the state, no matter on what basis its title rests, and no matter in what person or body the legal title may temporarily be lodged; [95] and these rules apply not only

N. W. 232; Northern Pac. R. Co. *v.* Rockne, 115 U. S. 600, 6 S. Ct. 201, 29 L. ed. 477; Hunnewell *v.* Cass County, 22 Wall. (U. S.) 464, 22 L. ed. 752; Union Pac. R. Co. *v.* McShane, 22 Wall. (U. S.) 444, 22 L. ed. 747; Kansas Pac. R. Co. *v.* Prescott, 16 Wall. (U. S.) 603, 21 L. ed. 373. *Compare* Kansas Pac. R. Co. *v.* Culp, 9 Kan. 38.

Since the act of July 10, 1866, surveyed but unpatented lands included within a railroad land grant are subject to taxation by the state in which they are situated, although the costs of survey have not been paid. Central Pac. R. Co. *v.* Nevada, 162 U. S. 512, 16 S. Ct. 885, 40 L. ed. 1057 [*affirming* 21 Nev. 247, 30 Pac. 686]. See also State *v.* Central Pac. R. Co., 20 Nev. 372, 22 Pac. 237.

91. Northern Pac. R. Co. *v.* McGinnis, 4 N. D. 494, 61 N. W. 1032; Northern Pac. R. Co. *v.* Myers, 172 U. S. 589, 19 S. Ct. 276, 43 L. ed. 564; Central Pac. R. Co. *v.* Nevada, 162 U. S. 512, 16 S. Ct. 885, 40 L. ed. 1057; Wisconsin Cent. R. Co. *v.* Price County, 133 U. S. 496, 10 S. Ct. 341, 33 L. ed. 687; Myers *v.* Northern Pac. R. Co., 83 Fed. 358, 28 C. C. A. 412; Northern Pac. R. Co. *v.* Wright, 54 Fed. 67, 4 C. C. A. 193; Northern Pac. R. Co. *v.* Walker, 47 Fed. 681. *Compare* Oakes *v.* Myers, 68 Fed. 807.

92. See State *v.* Atkins, 35 Ga. 315, 10 Fed. Cas. No. 5,350; State *v.* Garton, 32 Ind. 1, 2 Am. Rep. 315; Camden *v.* Camden Village Corp., 77 Me. 530, 1 Atl. 689.

Agencies and instrumentalities of states see *infra*, III, D, 6.

93. State Chancellor *v.* Elizabeth, 65 N. J. L. 479, 47 Atl. 454; Public School Trustees *v.* Trenton, 30 N. J. Eq. 667; Norfolk *v.* Perry Co., 108 Va. 28, 61 S. E. 866, 128 Am. St. Rep. 940.

94. *California.*— People *v.* Doe G, 1,034, 36 Cal. 220.

Georgia.— Richmond County Academy *v.* Augusta, 90 Ga. 634, 17 S. E. 61, 20 L. R. A. 151.

Idaho.— State *v.* Stevenson, 8 Ida. 367, 55 Pac. 886.

Illinois.— People *v.* Chicago, 216 Ill. 537, 75 N. E. 239; Chicago *v.* People, 80 Ill. 384; Illinois Industrial University *v.* Champaign County, 76 Ill. 184.

Indiana.— McCaslin *v.* State, 99 Ind. 428; State *v.* Marion County Auditor, Smith 40.

Louisiana.— Bradford *v.* Lafargue, 30 La. Ann. 432.

Maine.— Stetson *v.* Grant, 102 Me. 222, 66 Atl. 480.

Minnesota.— Sanborn *v.* Minneapolis, 35 Minn. 314, 29 N. W. 126.

Mississippi.— Edwards *v.* Butler, 89 Miss. 179, 42 So. 381.

New Hampshire.— Franklin St. Society *v.* Manchester, 60 N. H. 342.

New Jersey.— Public School Trustees *v.* Trenton, 30 N. J. Eq. 667.

New York.— People *v.* Miller, 94 N. Y. App. Div. 567, 88 N. Y. Suppl. 253; Croner *v.* Cowdrey, 19 N. Y. Suppl. 908.

Ohio.— State *v.* Griftner, 61 Ohio St. 201, 55 N. E. 612.

Pennsylvania.— Troutman *v.* May, 33 Pa. St. 455.

See 45 Cent. Dig. tit. "Taxation," §§ 295, 353.

Assessment of state land to private person. — If state land is entered for taxation on the land books of a county, by a private person, and he purchases it at a sale for the non-payment of such taxes, neither he nor his grantee can acquire any title whatever. Braxton *v.* Rich, 47 Fed. 178.

95. State Agricultural College *v.* Hamilton, 28 Kan. 376.

Property taken under the power of eminent domain for a strictly public use is public property and not subject to taxation. Gasaway *v.* Seattle, 52 Wash. 444, 100 Pac. 991, 21 L. R. A. N. S. 68.

Title by escheat.— After the legal title to land has become vested in the state by escheat, there can be no valid assessment of taxes thereon. Reid *v.* State, 74 Ind. 252. But *compare* Philadelphia *v.* Linton, 10 Pa. Dist. 329.

Forfeiture for non-payment of taxes.— If land has been forfeited to the state for the non-payment of taxes thereon, it is not thereafter liable to further taxation while the

to land but also to personal property of all descriptions, including corporate stock, banks, railroads, and other institutions wholly owned and controlled by the state;[96] but it is only such property as may properly be said to belong to the state that is exempt,[97] and it is not sufficient that the state may have some indirect or expectant interest therein.[98]

b. Lands Under Water. Land under tide water and below high water mark belongs to the state and cannot be taxed so long as the state holds the title.[99] But an assessment of such property is not void *ipso facto*, since it may be the property of an individual under grant from the state.[1] And it is held that wharves and similar structures on tide lands held by a private owner under contract of purchase from the state are taxable to him.[2]

c. Sales and Grants in General. Public lands, the title to which has passed out of the state by sale or grant to private owners, become subject to taxation in the year succeeding that in which they were so granted or conveyed,[3] unless the

title remains in the state. Buckley *v.* Osburn, 8 Ohio 180. See also *supra*, III, A, 1, g. *Compare* Bonner *v.* St. Francis Levee Dist., 77 Ark. 519, 92 S. W. 1124.

Foreclosure of mortgage.— If a mortgage securing a loan from the school fund is foreclosed and the estate taken under the foreclosure, the land in fact belongs to the state, in trust for school purposes, and is exempt. Chicago *v.* People, 80 Ill. 384. But *compare* Grosse *v.* People, 218 Ill. 342, 75 N. E. 978.

96. *Georgia.*— State *v.* Atkins, 35 Ga. 315, 10 Fed. Cas. No. 5,350, railroad owned and operated by the state.

New Jersey.— Public School Trustees *v.* Trenton, 30 N. J. Eq. 667, mortgages made to the state.

North Carolina.— State *v.* Newbern Bank, 14 N. C. 372.

Pennsylvania.— National Guard *v.* Tener, 13 Wkly. Notes Cas. 310, armory for state militia.

Tennessee.— Nashville *v.* State Bank, 1 Swan 269, state bank.

State as lessee.— Cotton grown on lands leased by the state and cultivated by convict labor is not subject to taxation. State *v.* State Levee Com'rs, 75 Miss. 132, 21 So. 661.

School lands, so long as they continue to be owned by the state, are exempt from taxation. Menger *v.* Douglas County, 48 Kan. 553, 29 Pac. 588; Ottawa University *v.* Franklin County, 48 Kan. 460, 29 Pac. 599.

97. Biscoe *v.* Coulter, 18 Ark. 423; Ryan *v.* Gallatin County, 14 Ill. 78.

Property belonging to a school-district cannot escape taxation on the plea that the school-district is merely an agency of the state and that therefore the property really belongs to the state. Ft. Smith School Dist. *v.* Howe, 62 Ark. 481, 37 S. W. 717.

A railway company, in condemning land for its right of way, is not the agent of the state, and the state has no ownership in the land condemned such as to exempt it from taxation. State *v.* Missouri Pac. R. Co., 75 Nebr. 4, 105 N. W. 983.

Land held by a chancellor in trust under a will for beneficiaries who have not been ascertained cannot be considered as belonging to the state in the interval before the determination of such beneficiaries, and is therefore subject to taxation. State Chancellor *v.* Elizabeth, 65 N. J. L. 479, 47 Atl. 454 [*affirmed* in 66 N. J. L. 687, 52 Atl. 1130].

98. Biscoe *v.* Coulter, 18 Ark. 423; Ryan *v.* Gallatin County, 14 Ill. 78.

State as mortgagee.— Land belonging to a private individual is not exempt from taxation by the mere fact that it is encumbered by a mortgage given to the state to secure a loan of public money, but it may be assessed for taxes and sold for non-payment, subject of course to the state's mortgage. Harrison *v.* Williams, 39 Ark. 315; Biscoe *v.* Coulter, 18 Ark. 423; McWhinney *v.* Logansport, 132 Ind. 9, 31 N. E. 449.

The fact that the state is a stock-holder in a corporation does not exempt the corporation from taxation on its property. Ryan *v.* Gallatin County, 14 Ill. 78; Atlantic, etc., R. Co. *v.* Carteret County, 75 N. C. 474.

99. Buras Levee Dist. *v.* Mialegvich, 52 La. Ann. 1292, 27 So. 790; Colket *v.* Rightmire, 46 N. J. L. 341; New York, etc., R. Co. *v.* Yard, 43 N. J. L. 632; State *v.* Jersey City, 42 N. J. L. 349; Buffalo, etc., R. Co. *v.* Goderich Corp., 21 U. C. Q. B. 97.

1. State *v.* Haight, 35 N. J. L. 178; State *v.* Platt, 24 N. J. L. 108.

2. Gray's Harbor Co. *v.* Chehalis County, 23 Wash. 369, 63 Pac. 233.

3. *Illinois.*— Fisher *v.* State, 16 Ill. 394.

Kansas.— Dickinson County *v.* Baldwin, 29 Kan. 538.

Mississippi.— Means *v.* Haley, 84 Miss. 550, 36 So. 257, 86 Miss. 557, 38 So. 506; Wildberger *v.* Shaw, 84 Miss. 442, 36 So. 539.

Missouri.— Wilcox *v.* Phillips, 199 Mo. 288, 97 S. W. 886.

New Jersey.— State *v.* Passaic, etc., Bridge Proprietors, 21 N. J. L. 384.

Ohio.— State *v.* Purcel, 31 Ohio St. 352; Douglas *v.* Dangerfield, 14 Ohio 522.

See 45 Cent. Dig. tit. "Taxation," § 302.

Lease of state lands.— Where a lease is given by the state to an individual or private corporation, the lessee's rights and privileges are subject to taxation. Moeller *v.* Gormley, 44 Wash. 465, 87 Pac. 507. And see Corcoran *v.* Boston, 193 Mass. 586, 79 N. E. 829.

grant was cumbered with conditions which leave an equitable title in the state or create a trust in its favor,[4] or unless the sale or grant is subsequently canceled by the state for failure to comply with the terms of payment or other conditions.[5]

d. Terminable and Equitable Titles to State Lands. As in the case of public lands of the United States, so also in relation to state lands, it is held that the same become taxable as private property as soon as the purchaser or grantee has become possessed of a perfect equitable title to the land, although the naked legal title may remain in the state, no patent or deed having as yet issued;[6] and in some of the states, even though the whole of the purchase-money may not have been paid, the purchaser may be taxed to the extent of his interest.[7] But generally if any condition precedent remains to be fulfilled before the grantee becomes entitled to the fee, the property is not taxable until performance thereof.[8] Property held under a lease from the state may also be taxed to the lessee, or at least to the extent of his leasehold interest,[9] and this question does not depend upon the qualities of the estate granted, but on the legislative intention expressed in the statute.[10]

4. Property of Municipal Corporations — a. In General. While in the absence of constitutional prohibition a state may tax the property of its municipal corporations,[11] or a municipality having general powers of taxation may tax its

4. Denniston *v.* Unknown Owners, 29 Wis. 351.

5. State *v.* Frost, 25 Wash. 134, 64 Pac. 902.

6. *California.*— People *v.* Donnelly, 58 Cal. 144.

Florida.— Mundee *v.* Freeman, 23 Fla. 529, 3 So. 153.

Kansas.— Prescott *v.* Beebe, 17 Kan. 320; Oswalt *v.* Hallowell, 15 Kan. 154.

Louisiana.—Burbank *v.* Board of Assessors, 52 La. Ann. 1506, 27 So. 947.

Michigan.— Robertson *v.* State Land-office Com'r, 44 Mich. 274, 6 N. W. 659.

Minnesota.— Cannon River Mfg. Assoc. *v.* Rice County, 32 Minn. 516, 21 N. W. 738.

Pennsylvania.— Green *v.* Watson, 34 Pa. St. 332; Townsen *v.* Wilson, 9 Pa. St. 270.

See 45 Cent. Dig. tit. "Taxation," § 303.

Land occupied under a bond for a deed from the state is not subject to taxation in Massachusetts. Corcoran *v.* Boston, 193 Mass. 586, 79 N. E. 829.

In Indiana prior to the act of 1872 the purchaser of land belonging to the congressional township fund was not subject to taxation thereon until he had paid all the purchase money and received the deed. Willey *v.* Koons, 49 Ind. 272.

7. *Indiana.*— Hanna *v.* Allen County, 8 Blackf. 352. *Compare* Henderson *v.* State, 53 Ind. 60.

Kansas.— Oswalt *v.* Hallowell, 15 Kan. 154.

Montana.— Courtney *v.* Missoula County, 21 Mont. 591, 55 Pac. 359.

Nebraska.— State *v.* Tucker, 38 Nebr. 56, 56 N. W. 718; Hagenbuck *v.* Reed, 3 Nebr. 17.

Texas.— Hindes *v.* State, 28 Tex. Civ. App. 531, 67 S. W. 467.

Washington.— Washington Iron-Works *v.* King County, 20 Wash. 150, 54 Pac. 1004.

Contract for purchase.— Under the Texas statute property of the state "held under a contract for the purchase thereof" may be taxed as the property of the person so holding the same. See Taylor *v.* Robinson, 72 Tex. 364, 10 S. W. 245; Taylor *v.* Robinson, 34 Fed. 678.

8. Sioux City, etc., R. Co. *v.* Osceola County, 50 Iowa 177; Hardy *v.* Hartman, 65 Miss. 504, 4 So. 545; Pitts *v.* Booth, 15 Tex. 453; Smith *v.* State, 4 Tex. 297; Abney *v.* State, (Tex. Civ. App. 1898) 47 S. W. 1043.

9. *Illinois.*— Carrington *v.* People, 195 Ill. 484, 63 N. E. 163.

Massachusetts.— See Corcoran *v.* Boston, 193 Mass. 586, 79 N. E. 829, holding, however, that a person occupying lands of the state under a bond for a deed is not a lessee within the application of the statute.

Mississippi.— Street *v.* Columbus, 75 Miss. 822, 23 So. 773.

Nebraska.— State *v.* Tucker, 38 Nebr. 56, 56 N. W. 718.

New Jersey.— State *v.* Haight, 36 N. J. L. 471.

Texas.— See Trammell *v.* Faught, 74 Tex. 557, 12 S. W. 317, holding, however, that the Texas statute providing that property of the state "held under a lease for a term of three years or more" shall be regarded for purposes of taxation as the property of the person holding the same, does not apply to a lease where the state reserves the right to terminate the lease at any time by selling the land to any one who may purchase the same.

Washington.— Moeller *v.* Gormley, 44 Wash. 465, 87 Pac. 507.

United States.— See Taylor *v.* Robinson, 34 Fed. 678.

See 45 Cent. Dig. tit. "Taxation," § 304.

Although property of the state is exempt from taxation by express constitutional provision, this does not prevent the taxation of the leasehold interest of a lessee of state lands. Moeller *v.* Gormley, 44 Wash. 465, 87 Pac. 507.

10. State *v.* Haight, 36 N. J. L. 471.

11. See Louisville *v.* Com., 1 Duv. (Ky.)

own property,[12] an intention to tax such property of a municipality as is devoted to public or governmental purposes will not be implied, but on the contrary such property will be held to be exempt unless an intention to include it is clearly manifested.[13] Lands, buildings, and other property owned by municipal corporations and appropriated to public uses are but the means and instrumentalities used for governmental purposes, and consequently they are exempt from taxation, either by express constitutional or statutory provision or else by necessary implication.[14] This rule applies not only to counties and incorporated cities, incorporated towns, and incorporated villages, but also to such strictly public and governmental bodies as sanitary or levee districts, directors of the poor, and reclamation districts; [15] but the rule does not apply to a private corporation carrying on a business for private gain, although such a private corporation is performing a public service, such as the supplying of water, for a municipality or its inhabitants,[16]

295, 85 Am. Dec. 624; Public School Trustees *v.* Trenton, 30 N. J. Eq. 667.

12. Norfolk *v.* Perry Co., 108 Va. 28, 61 S. E. 866, 128 Am. St. Rep. 940.

13. People *v.* Doe G. 1,034, 36 Cal. 220; Louisville *v.* Com., 1 Duv. (Ky.) 295, 85 Am. Dec. 624; Camden *v.* Camden Village Corp., 77 Me. 530, 1 Atl. 689; Worcester County *v.* Worcester, 116 Mass. 193, 17 Am. Rep. 159. See also cases cited *infra*, notes 14, 18.

14. *California.*— Low *v.* Lewis, 46 Cal. 549.

Illinois.— People *v.* Salomon, 51 Ill. 37.

Iowa.— State Agricultural College *v.* Webster County, 34 Iowa 141.

Kansas.— Durkee *v.* Greenwood County, 29 Kan. 697; Ortman *v.* Giles, 9 Kan. 324.

Kentucky.— Louisville *v.* Com., 1 Duv. 295, 85 Am. Dec. 624; Frankfort *v.* Com., 94 S. W. 648, 29 Ky. L. Rep. 699.

Louisiana.— Tulane Education Fund *v.* New Orleans Bd. of Assessors, 38 La. Ann. 292.

Maine.— Camden *v.* Camden Village Corp., 77 Me. 530, 1 Atl. 689.

Massachusetts.— Corcoran *v.* Boston, 185 Mass. 325, 70 N. E. 197.

Mississippi.— Warren County *v.* Nall, 78 Miss. 726, 29 So. 755; Meridian *v.* Phillips, 65 Miss. 362, 4 So. 119.

New Hampshire.— Grafton County *v.* Haverhill, 68 N. H. 120, 40 Atl. 399.

New Jersey.— Perth Amboy *v.* Barker, 74 N. J. L. 127, 65 Atl. 201; State *v.* Roat, (Sup. 1900) 45 Atl. 910; Newark *v.* Clinton Tp., 49 N. J. L. 370, 8 Atl. 296.

New York.— People *v.* Barker, 153 N. Y. 98, 47 N. E. 46; Rochester *v.* Rush, 15 Hun 239 [*reversed* on other grounds in 80 N. Y. 302].

Texas.— Davis *v.* Burnett, 77 Tex. 3, 13 S. W. 613; Daugherty *v.* Thompson, 71 Tex. 192, 9 S. W. 99; Galveston Wharf Co. *v.* Galveston, 63 Tex. 14.

Utah.— Springville *v.* Johnson, 10 Utah 351, 37 Pac. 577.

Washington.— Gasaway *v.* Seattle, 52 Wash. 444, 100 Pac. 991, 21 L. R. A. N. S. 68.

Canada.— *Re* Orillia Tp., 7 Ont. L. Rep. 389, 3 Ont. Wkly. Rep. 91.

See 45 Cent. Dig. tit. "Taxation," §§ 295, 356.

The constitution of Illinois provides that the property of municipal corporations may be exempted from taxation, but only by general law; and hence all such property is subject to taxation unless expressly exempted by statute. Easton *v.* Peoria County Bd. of Review, 183 Ill. 255, 55 N. E. 716; *In re* Swigert, 123 Ill. 267, 14 N. E. 32; Cook County *v.* Chicago, 103 Ill. 646.

Nature of municipality's title.— A strip of land burdened with a perpetual servitude in favor of the public, which arose in the compromise of litigation between adjoining owners, does not cease to belong to the grantor of such servitude, so as to exempt it from taxation, if it has never been dedicated to public use, and can be alienated or encumbered by such owner notwithstanding the servitude. New Orleans Cotton Exch. *v.* Board of Assessors, 37 La. Ann. 423.

Land held by city as trustee.— Property held by a city as a trustee may be assessed and taxed in the same manner as other property. St. Louis *v.* Wenneker, 145 Mo. 230, 47 S. W. 105, 68 Am. St. Rep. 561. And see McChesney *v.* People, 99 Ill. 216.

City holding option to purchase.— Property which is in the possession of a city under a contract giving it the option to become the owner by making certain payments, and the right of possession until default, but which creates no obligation on its part to buy the property, is not exempt from taxation. Milwaukee *v.* Milwaukee County, 95 Wis. 424, 69 N. W. 819.

15. *California.*— Reclamation Dist. No. 551 *v.* Sacramento County, 134 Cal. 477, 66 Pac. 668, reclamation district.

Illinois.— See Chicago Sanitary Dist. *v.* Martin, 173 Ill. 243, 50 N. E. 201, 64 Am. St. Rep. 110, as to property of sanitary districts.

Michigan.— Auditor-Gen. *v.* State University, 83 Mich. 467, 47 N. W. 440, 10 L. R. A. 376, regents of state university.

Mississippi.— Mayer *v.* Peebles, 58 Miss. 628, levee board.

Pennsylvania.—Cumru Tp. *v.* Berks County Directors of Poor, etc., 1 Woodw. 175, directors of the poor.

16. Des Moines Water Co.'s Appeal, 48 Iowa 324; Bell *v.* Louisville, 106 S. W. 862, 32 Ky. L. Rep. 699; People *v.* Forrest, 97

and is subject to municipal regulation as to the rates which it may charge.[17]

b. Property Held For Public Purposes. The property of a municipal corporation which is thus exempt from taxation is such as is owned and held by it in its capacity as an integral part of the state government, or which is necessary to enable it to administer those powers of local self-government, or to perform those public functions, which have been intrusted to its care.[18] This will include property held and used for city halls, court-houses, jails, public schools, and the like,[19] and engine houses and other property used by the fire department,[20] public ferries,[21] wharves[22] or bridges,[23] public markets,[24] public parks,[25] poor-houses, pauper cemeteries and other property devoted exclusively to public charities,[26] public dispensaries,[27] and generally all such property as is used solely for legitimate municipal purposes.[28]

N. Y. 97; Godfrey *v.* Bennington Water Co., 75 Vt. 350, 55 Atl. 654.

Although a municipality has acquired all the shares of stock of a water company the property of the water company is not thereby converted into public property used for public purposes within the application of a constitutional provision exempting such property from taxation, the shares of stock not being identical with the corporate property for purposes of taxation. Bell *v.* Louisville, 106 S. W. 862, 32 Ky. L. Rep. 699. But the rule is otherwise with regard to a corporation which, although nominally it is a private corporation, was incorporated solely to perform a public municipal service, all of its stock being owned by, and all of its revenues turned over to, the municipality. Com. *v.* Newport, etc., Bridge Co., 105 S. W. 378, 32 Ky. L. Rep. 196.

17. Des Moines Water Co.'s Appeal, 48 Iowa 324.

18. *Iowa.*— Callanan *v.* Wayne County, 73 Iowa 709, 36 N. W. 654; Fort Dodge *v.* Moore, 37 Iowa 388.

Louisiana.— State *v.* New Orleans, 110 La. 405, 34 So. 582; Gachet *v.* New Orleans, 52 La. Ann. 813, 27 So. 348.

Maine.— Camden *v.* Camden Village Corp., 77 Me. 530, 1 Atl. 689.

Massachusetts.— Somerville *v.* Waltham, 170 Mass. 160, 48 N. E. 1092.

New Jersey.— Collins *v.* Camden County, 61 N. J. L. 695, 43 Atl. 1097; Newark *v.* Clinton Tp., 49 N. J. L. 370, 8 Atl. 296.

Pennsylvania.— Erie County *v.* Erie, 1 Pa. Co. Ct. 540.

Vermont.— Stiles *v.* Newport, 76 Vt. 154, 56 Atl. 662.

A sinking fund created to liquidate the bonded debt incurred by a city in the purchase of a waterworks system is but so much taxes created to liquidate a debt incurred for a public purpose, notwithstanding it is invested in interest-bearing stocks and bonds, and is exempt from taxation under a constitutional provision that public property used for public purposes shall not be taxed. Com. *v.* Lebannon Waterworks Co., (Ky. 1908) 112 S. W. 1128.

A subway owned by a city is not subject to taxation, and if operated by a special contractor or lessee the latter is not subject to a special franchise tax. People *v.* State Tax Com'rs, 126 N. Y. App. Div. 610, 110 N. Y. Suppl. 577 [*affirmed* in 195 N. Y. 618, 89 N. E. 1109].

19. *Kentucky.*— Louisville *v.* Com., 1 Duv. 295, 85 Am. Dec. 624.

Massachusetts.— Worcester County *v.* Worcester, 116 Mass. 193, 17 Am. Rep. 159.

Missouri.— St. Louis *v.* Gorman, 29 Mo. 593, 77 Am. Dec. 586.

South Carolina.— Columbia *v.* Tindal, 43 S. C. 547, 22 S. E. 341.

England.— Coomber *v.* Berks, 9 App. Cas. 61, 48 J. P. 421, 53 L. J. Q. B. 239, 50 L. T. Rep. N. S. 405, 32 Wkly. Rep. 525.

20. Owensboro *v.* Com., 105 Ky. 344, 49 S. W. 320, 20 Ky. L. Rep. 1281, 44 L. R. A. 202; Com. *v.* Paducah, 102 S. W. 882, 31 Ky. L. Rep. 528; Erie County *v.* Erie, 113 Pa. St. 360, 6 Atl. 136.

21. People *v.* Brooklyn Assessors, 111 N. Y. 505, 19 N. E. 90, 2 L. R. A. 148; Black *v.* Sherwood, 84 Va. 906, 6 S. E. 484.

22. Com. *v.* Louisville, 133 Ky. 845, 119 S. W. 161.

23. Com. *v.* Newport, etc., Bridge Co., 105 S. W. 378, 32 Ky. L. Rep. 196.

24. Carlisle Borough School Dist. *v.* Carlisle Borough, 11 Pa. Dist. 294. *Compare* Louisville *v.* Com., 1 Duv. (Ky.) 295, 85 Am. Dec. 624.

25. McChesney *v.* People, 99 Ill. 216; Owensboro *v.* Com., 105 Ky. 344, 49 S. W. 320, 20 Ky. L. Rep. 1281, 44 L. R. A. 202; Herman *v.* Omaha, 75 Nebr. 489, 106 N. W. 593; Lancaster County *v.* Lancaster, 11 Pa. Dist. 605.

26. People *v.* Doe G. 1,034, 36 Cal. 220; Louisville *v.* Com., 1 Duv. (Ky.) 295, 85 Am. Dec. 624; Newark *v.* Clinton Tp., 49 N. J. L. 370, 8 Atl. 296; Armstrong County *v.* Kittanning Borough Overseers of Poor, (Pa. 1888) 15 Atl. 892; Schuylkill County Directors of Poor *v.* North Manheim Tp. School Directors, 42 Pa. St. 21.

27. Walden *v.* Whigham, 120 Ga. 646, 48 S. E. 159. But see Sheffield *v.* Blakely Dispensary Com'rs, 111 Ga. 1, 36 S. E. 302.

28. Chicago Sanitary Dist. *v.* Hanberg, 226 Ill. 480, 80 N. E. 1012 (lands of a sanitary district used for drainage and sewage purposes); New Orleans *v.* Fredericks, 107 La. 496, 32 So. 80 (land used by municipality as

c. Property Held For Private Purposes. While it is held that an express exemption from taxation of the property of counties, townships, or municipal corporations will apply irrespective of the character or use of such property or its revenues,[29] there is no implied exemption from taxation of property owned by a municipal corporation, but which is not devoted to public or governmental uses, but held by the municipality in its private or commercial capacity and as a source of profit or to serve some mere convenience of the citizens.[30] So in the absence of an express exemption land of a city or other municipal corporation which is rented out to private parties and from which it derives a revenue is subject to taxation;[31] and the same rule applies to a toll bridge owned and operated by a city for its own profit,[32] to wharf property of a city which is in a similar manner made profitable to it,[33] to market houses from which it derives a revenue,[34] and to municipal farms operated for a profit.[35] If property is used both for public and private purposes and the parts so used cannot be separated, the whole is subject to taxation.[36]

d. Municipal Water, Electric Light, and Gas Works. Some decisions hold that taxes are properly laid on a system of waterworks owned and operated by a municipal corporation, including reservoirs, aqueducts, mains, etc., where,

a levee); Somerville *v.* Waltham, 170 Mass. 160, 48 N. E. 1092 (land bought and used by a city for the purpose of obtaining therefrom gravel for the construction and repair of its streets).

29. State *v.* Conover, 63 N. J. L. 191, 42 Atl. 838; State *v.* Belleville Tp., 61 N. J. L. 455, 39 Atl. 658; Springwell *v.* Johnson, 10 Utah 351, 37 Pac. 577.

If the exemption is not general but relates specifically to certain kinds and classes of municipal property, it will not be extended by implication, and property not within the terms of the exemption will be held subject to taxation. People *v.* Chicago, 124 Ill. 636, 17 N. E. 56.

30. *Illinois.*— Chicago Sanitary Dist. *v.* Martin, 173 Ill. 243, 50 N. E. 201, 64 Am. St. Rep. 110.

Kentucky.— Louisville *v.* Com., 1 Duv. 295, 85 Am. Dec. 624; Frankfort *v.* Com., 82 S. W. 1008, 26 Ky. L. Rep. 957; Negley *v.* Henderson, 55 S. W. 554, 21 Ky. L. Rep. 1394.

New York.— Clark *v.* Sprague, 113 N. Y. App. Div. 645, 99 N. Y. Suppl. 304.

Ohio.— Cincinnati *v.* Lewis, 66 Ohio St. 49, 63 N. E. 588.

Pennsylvania.— Robb *v.* Philadelphia, 12 Pa. Dist. 423.

31. *Arkansas.*— Ft. Smith School Dist. *v.* Howe, 62 Ark. 481, 37 S. W. 717.

Illinois.— People *v.* Chicago, 124 Ill. 636, 17 N. E. 56.

Iowa.— Mitchelville *v.* Board of Sup'rs, 64 Iowa 554, 21 N. W. 31.

Massachusetts.— Essex County *v.* Salem, 153 Mass. 141, 26 N. E. 431. See also Somerville *v.* Waltham, 170 Mass. 160, 48 N. E. 1092.

Mississippi.— Sexton *v.* Coahoma County, 86 Miss. 380, 38 So. 636.

New York.— Smith *v.* New York, 68 N. Y. 552; *In re* Long Beach Land Co., 101 N. Y. App. Div. 159, 91 N. Y. Suppl. 503.

Ohio.— Zumstein *v.* Consolidated Coal, etc., Co., 54 Ohio St. 264, 43 N. E. 329; Scott *v.* Athens, 1 Ohio S. & C. Pl. Dec. 84, 1 Ohio N. P. 94.

Tennessee.— Luttrell *v.* Knox County, 89 Tenn. 253, 14 S. W. 802.

Texas.— Davis *v.* Burnett, 77 Tex. 3, 13 S. W. 613. But see Daugherty *v.* Thompson, 71 Tex. 192, 9 S. W. 99.

England.— See Bray *v.* Lancashire, 22 Q. B. D. 484, 53 J. P. 499, 58 L. J. M. C. 54, 34 Wkly. Rep. 392.

Canada.— *In re* Canadian Pac. R. Co., 4 Ont. L. Rep. 134; Scragg *v.* London, 28 U. C. Q. B. 457.

The municipality itself may tax as against its lessee land to which the municipality has the legal title but which is held by its lessee under a perpetual lease. Norfolk *v.* Perry, 108 Va. 28, 61 S. E. 867, 128 Am. St. Rep. 940.

32. *In re* Swigert, 123 Ill. 267, 14 N. E. 32. See also Proprietors Passaic River, etc., Bridges *v.* State, 22 N. J. L. 593. But see Com. *v.* Newport, etc., Bridge Co., 105 S. W. 378, 32 Ky. L. Rep. 196.

33. Com. *v.* Louisville, 47 S. W. 865, 20 Ky. L. Rep. 893.

34. State *v.* Cooley, 62 Minn. 183, 64 N. W. 379, 29 L. R. A. 777; Atty.-Gen. *v.* Scott, 28 L. T. Rep. N. S. 302, 21 Wkly. Rep. 265. And see Louisville *v.* Com., 1 Duv. (Ky.) 295, 85 Am. Dec. 624.

35. Grafton County *v.* Haverhill, 68 N. H. 120, 40 Atl. 399; Newark *v.* Clinton Tp., 49 N. J. L. 370, 8 Atl. 296.

36. Swanton *v.* Highgate, 81 Vt. 152, 69 Atl. 667, 16 L. R. A. N. S. 867, holding that where an incorporated village had statutory authority to maintain an electric light plant to light its streets, but had no authority to furnish electricity to others, the part of the plant devoted to the latter use was subject to taxation by the town in which the village was located, and that where this part was so merged in the part devoted to public use which was exempt from taxation that it could not be separated the whole plant was taxable.

besides serving the strictly municipal uses, water rates are charged to private consumers;[37] but on the other hand, there are numerous decisions to the effect that a city, in undertaking to supply its inhabitants with water, discharges a proper municipal function, and that property used for this purpose is so far devoted to a public use as to be exempt from taxation.[38] It is clear, however, that a private water company is subject to taxation on its property notwithstanding it furnishes water to the city and is controlled in respect to the rates charged, and other matters, by the municipal authorities.[39] There is a similar conflict of authority as to whether a municipal electric light or gas plant is subject to taxation,[40] or exempt as municipal property used exclusively for public purposes.[41]

D. Governmental Agencies, Obligations, and Securities — 1. Reasons For Exemption. The necessary independence of the federal and state governments imposes a limitation upon the taxing power of each. Neither can so exercise its own power of taxation as to curtail the rightful powers of the other, or interfere with the free discharge of its constitutional functions, or obstruct, embarrass, or nullify its legitimate operations, or destroy the means or agencies employed by it in the exercise of those powers and functions.[42]

2. Agencies or Instrumentalities of United States. According to this rule,

37. Newport *v.* Unity, 68 N. H. 587, 44 Atl. 704, 73 Am. St. Rep. 626; New York *v.* Mitchell, 183 N. Y. 245, 76 N. E. 18; People *v.* De Witt, 167 N. Y. 575, 60 N. E. 1118; People *v.* Hess, 157 N. Y. 42, 51 N. E. 410; New York *v.* Husted, 106 N. Y. App. Div. 614, 94 N. Y. Suppl. 1111; People *v.* Duryea, 59 N. Y. App. Div. 488, 69 N. Y. Suppl. 388; Rochester *v.* Coe, 25 N. Y. App. Div. 300, 49 N. Y. Suppl. 502; Erie County *v.* Erie, 113 Pa. St. 368, 6 Atl. 138; Chadwick *v.* Maginnes, 94 Pa. St. 117; Dublin Corp. *v.* McAdam, L. R. 20 Ir. 497; Glasgow Corp. *v.* Miller, 50 J. P. 503. *Compare* Rochester *v.* Rush, 80 N. Y. 302; Reading *v.* Berks County, 22 Pa. Super. Ct. 373; Clinton County *v.* Lock Haven, 29 Pa. Co. Ct. 641; Allegheny Tp. *v.* Altoona, 23 Pa. Co. Ct. 381.

38. *Colorado.*— Colorado Springs *v.* Fremont County, 36 Colo. 231, 84 Pac. 1113.

Connecticut.— West Hartford *v.* Hartford Water Com'rs, 44 Conn. 360.

Kansas.— Sumner County *v.* Wellington, 66 Kan. 590, 72 Pac. 216, 97 Am. St. Rep. 396.

Kentucky.— Ryan *v.* Louisville, 133 Ky. 714, 118 S. W. 992; Com. *v.* Covington, 128 Ky. 36, 107 S. W. 231, 32 Ky. L. Rep. 837, 14 L. R. A. N. S. 1214; Covington *v.* Highlands Dist., 110 S. W. 338, 33 Ky. L. Rep. 323; Com. *v.* Newport, 107 S. W. 232, 32 Ky. L. Rep. 820. But see Covington *v.* Com., 107 Ky. 680, 19 Ky. L. Rep. 105, 39 S. W. 336; Newport *v.* Com., 106 Ky. 434, 50 S. W. 845, 51 S. W. 433, 21 Ky. L. Rep. 42, 45 L. R. A. 518; Negley *v.* Henderson, 59 S. W. 19, 22 Ky. L. Rep. 912.

Massachusetts.— Miller *v.* Fitchburg, 180 Mass. 32, 61 N. E. 277; Wayland *v.* Middlesex County, 4 Gray 500.

Michigan.— Detroit Water Com'rs *v.* Auditor-Gen., 115 Mich. 546, 73 N. W. 801.

New Jersey.— Perth Amboy *v.* Barker, 74 N. J. L. 127, 65 Atl. 201; Hackettstown *v.* Conover, 63 N. J. L. 191, 42 Atl. 838; Jersey City Water Com'rs *v.* Gaffney, 34 N. J. L. 131.

Tennessee.— Smith *v.* Nashville, 88 Tenn. 464, 12 S. W. 924, 7 L. R. A. 469; Nashville *v.* Smith, 86 Tenn. 213, 6 S. W. 273; Clarksville *v.* Montgomery County, (Ch. App. 1901) 62 S. W. 33.

Vermont.— Stiles *v.* Newport, 76 Vt. 154, 56 Atl. 662.

See 45 Cent. Dig. tit. "Taxation," §§ 296, 356.

The fact that water rents are paid by the inhabitants using the water does not alter the public character of the waterworks system nor make it subject to taxation. Com. *v.* Covington, 128 Ky. 36, 107 S. W. 231, 32 Ky. L. Rep. 837; Com. *v.* Newport, 107 S. W. 232, 32 Ky. L. Rep. 820.

If more land is purchased than is needed by a municipality for the purpose of providing a water-supply, that portion which is not needed and not used for such purposes is subject to taxation. West Hartford *v.* Hartford Water Com'rs, 44 Conn. 360. *Compare* Jersey City Water Com'rs *v.* Gaffney, 34 N. J. L. 131, 133.

39. Des Moines Water Co.'s Appeal, 48 Iowa 324; People *v.* Forrest, 97 N. Y. 97; Godfrey *v.* Bennington Water Co., 75 Vt. 350, 55 Atl. 654.

40. Negley *v.* Henderson, 55 S. W. 554, 21 Ky. L. Rep. 1394.

41. Toledo *v.* Hosler, 54 Ohio St. 418, 43 N. E. 583; Toledo *v.* Yeager, 8 Ohio Cir. Ct. 318, 6 Ohio Cir. Dec. 273; Swanton *v.* Highgate, 81 Vt. 152, 69 Atl. 667, 16 L. R. A. N. S. 867.

Nature of use.— That part of a village electric light plant used to furnish electric light to other villages and their inhabitants is not properly devoted to a public use and is not therefore exempt from taxation. Swanton *v.* Highgate, 81 Vt. 152, 69 Atl. 667, 16 L. R. A. N. S. 867.

42. State Treasurer *v.* Wright, 28 Ill. 509; State *v.* Garton, 32 Ind. 1, 2 Am. Rep. 315; M'Culloch *v.* Maryland, 4 Wheat. (U. S.) 316, 431, 4 L. ed. 579; Black Const. L. (3d ed.) p. 444; Black Tax Titles, § 5.

it is not within the power of a state to lay any tax on the instruments, means, or agencies provided or selected by the United States government to enable it to carry into execution its legitimate powers and functions;[43] but a state tax upon the property of an agent of the federal government is not prohibited merely because it is the property of such an agent.[44] State taxation of the instruments or agencies of government is not objectionable on this ground if it does not impair their usefulness or efficiency or hinder them from serving the government as they were intended to serve it;[45] and a private corporation cannot claim exemption from taxation on this ground merely because it is employed more or less in the service of the United States, as for postal, military, and other purposes,[46] although the state cannot tax its receipts derived from carrying the mails,[47] nor telegraphic messages sent by United States officers on public business.[48]

3. Bonds and Other Securities Issued by United States — a. In General. A state has no power to impose any taxes on the bonds, stock, certificates of indebtedness, or other obligations issued by the United States as security for loans contracted by the general government under its constitutional power to borrow money;[49] nor on the income derived from such bonds or other obliga-

43. Baltimore Tax Ct.'s Appeal *v.* Patterson, 50 Md. 354; Howell *v.* State, 3 Gill (Md.) 14; Ward *v.* Maryland, 12 Wall. (U. S.) 418, 20 L. ed. 449; M'Culloch *v.* Maryland, 4 Wheat. (U. S.) 316, 4 L. ed. 579.

Post traders on Indian reservations.— The fact that an Indian post trader is licensed by the government to trade with the Indians does not exempt his stock in trade from state and county taxation, as he is a mere licensee and not an agent of the government. Cosier *v.* McMillan, 22 Mont. 484, 56 Pac. 965; Noble *v.* Amoretti, 11 Wyo. 230, 71 Pac. 879; Moore *v.* Beason, 7 Wyo. 292, 51 Pac. 875. *Contra,* Fremont County *v.* Moore, 3 Wyo. 200, 19 Pac. 438.

Tax on carriage of passengers.—A state tax of a certain sum on every person leaving the state by public conveyance was held invalid, as it might hinder the general government in moving armies and munitions of war and in respect to the travel of officers and citizens on public business. Crandall *v.* Nevada, 6 Wall. (U. S.) 35, 18 L. ed. 744, 745. And see San Benito County *v.* Southern Pac. R. Co., 77 Cal. 518, 19 Pac. 827.

State taxation of liquors in bonded warehouses is not objectionable on the ground of its interfering with an agency or instrumentality of the United States (Carstairs *v.* Cochran, 193 U. S. 10, 24 S. Ct. 318, 48 L. ed. 596); particularly where the legislation does not contemplate the collection of the taxes so long as the spirits are in the custody or under the lien of the federal government (Thompson *v.* Com., 123 Ky. 302, 94 S. W. 654, 29 Ky. L. Rep. 705, 124 Am. St. Rep. 362 [*affirmed* in 209 U. S. 340, 28 S. Ct. 533, 52 L. ed. 822]).

44. Moore *v.* Beason, 7 Wyo. 292, 51 Pac. 875; Henderson Bridge Co. *v.* Henderson, 173 U. S. 592, 19 S. Ct. 553, 43 L. ed. 823; Union Pac. R. Co. *v.* Peniston, 18 Wall. (U. S.) 5, 21 L. ed. 787.

45. Union Pac. R. Co. *v.* Peniston, 18 Wall. (U. S.) 5, 21 L. ed. 787; Louisville First Nat. Bank *v.* Kentucky, 9 Wall. (U. S.) 353, 19 L. ed. 701.

46. Baltimore Shipbuilding, etc., Co. *v.* Baltimore, 97 Md. 97, 54 Atl. 623; People *v.* New York Tax, etc., Com'rs, 48 Barb. (N. Y.) 157; Western Union Tel. Co. *v.* Richmond, 26 Gratt. (Va.) 1; Central Pac. R. Co. *v.* People, 162 U. S. 91, 16 S. Ct. 766, 40 L. ed. 903; Henderson Bridge Co. *v.* Henderson, 141 U. S. 679, 12 S. Ct. 114, 35 L. ed. 900; Thomson *v.* Union Pac. R. Co., 9 Wall. (U. S.) 579, 19 L. ed. 792; Santa Clara County *v.* Southern Pac. R. Co., 18 Fed. 385; Huntington *v.* Central Pac. R. Co., 12 Fed. Cas. No. 6,911, 2 Sawy. 503.

47. Com. *v.* Lehigh Valley R. Co., 4 Dauph. Co. Rep. (Pa.) 174; Western Union Tel. Co. *v.* Richmond, 26 Gratt. (Va.) 1.

48. San Francisco *v.* Western Union Tel. Co., 96 Cal. 140, 31 Pac. 10, 17 L. R. A. 301; Western Union Tel. Co. *v.* Texas, 105 U. S. 460, 26 L. ed. 1067. And see Western Union Tel. Co. *v.* Seay, 132 U. S. 472, 10 S. Ct. 161, 33 L. ed. 409.

49. *Iowa.*— German American Sav. Bank *v.* Burlington, 54 Iowa 609, 7 N. W. 105.

Kentucky.— Commonwealth Bank *v.* Com., 9 Bush 46; Com. *v.* Morrison, 2 A. K. Marsh. 75; Com. *v.* Hearne, 100 S. W. 820, 30 Ky. L. Rep. 1195.

Nebraska.— Dixon County *v.* Halstead, 23 Nebr. 697, 37 N. W. 621.

New Hampshire.— Opinion of Justices, 53 N. H. 634.

New Jersey.— Howard Sav. Inst. *v.* Newark, 63 N. J. L. 547, 44 Atl. 654; Mutual L., etc., Ins. Co. *v.* Haight, 34 N. J. L. 128; Newark City Bank *v.* Newark Fourth Ward Assessor, 30 N. J. L. 13.

New York.— People *v.* New York Tax, etc., Com'rs, 90 N. Y. 63; Monroe County Sav. Bank *v.* Rochester, 37 N. Y. 365; People *v.* New York Tax, etc., Com'rs, 41 How. Pr. 459. But see People *v.* Gardiner, 48 Barb. 608; People *v.* New York Tax, etc., Com'rs, 37 Barb. 635.

Ohio.— Cleveland Trust Co. *v.* Lander, 62 Ohio St. 266, 56 N. E. 1036; Shotwell *v.* Moore, 45 Ohio St. 632, 16 N. E. 470; Chis-

tions;[50] nor on the premium which government bonds may bear, that is, the excess of their market value over their par value.[51] Prior to an act of congress passed in 1894,[52] the same rule applied to United States currency in the form of treasury notes, "greenbacks," or gold and silver certificates,[53] and national bank-notes;[54] but these are now taxable by the states by the express permission of congress.[55] For similar reasons internal revenue stamps are not taxable under state laws, even when in the hands of a dealer in quantities kept for sale.[56]

b. Corporate Capital Invested in United States Securities. Any portion of the capital stock of a bank or other corporation which has been invested in United States bonds is exempt from all state taxation.[57] But this rule does not apply

holm *v.* Shields, 21 Ohio Cir. Ct. 231, 11 Ohio Cir. Dec. 361.

Pennsylvania.—Pittsburg *v.* Pittsburg First Nat. Bank, 55 Pa. St. 45.

United States.— Bank of Commerce *v.* New York, 2 Black 620, 17 L. ed. 451; New York *v.* Hoffman, 7 Wall. 16, 19 L. ed. 57 [*reversing* 37 N. Y. 9]; New York *v.* New York City Tax Com'rs, 2 Wall. 200, 17 L. ed. 793, 25 How. Pr. 9; Weston *v.* Charleston, 2 Pet. 449, 7 L. ed. 481; Carroll *v.* Perry, 5 Fed. Cas. No. 2,456, 4 McLean 25.

See 45 Cent. Dig. tit. "Taxation," §§ 19, 20, 352.

Whether taxed eo nomine or included in the aggregate valuation of the taxpayer's property or capital of a corporation a state tax upon stocks of the United States is invalid. People *v.* New York Tax, etc., Com'rs, 90 N. Y. 63; Bank of Commerce *v.* New York, 2 Black (U. S.) 620, 17 L. ed. 451.

District of Columbia bonds.— Congress has constitutional power to declare that bonds issued by the District of Columbia, to be paid in part by taxation of property within the district and in part by appropriations from the revenues of the United States, shall be exempt from all taxation by state or municipal authority. Grether *v.* Wright, 75 Fed. 742, 23 C. C. A. 498.

Money borrowed on government bonds as security.— Although United States bonds are not subject to taxation, the money or property obtained by a pledge of such bonds is subject to be taxed. Hooper *v.* State, 141 Ala. 111, 37 So. 662; People *v.* Flushing, 3 N. Y. St. 148.

50. Opinion of Justices, 53 N. H. 634; Mosely *v.* State, 115 Tenn. 52, 86 S. W. 714. See also Weston *v.* Charleston, 2 Pet. (U. S.) 449, 7 L. ed. 481 [*reversing* Harp. (S. C.) 340]. But see Hibernia Sav., etc., Soc. *v.* San Francisco, 200 U. S. 310, 26 S. Ct. 265, 50 L. ed. 495 [*affirming* 139 Cal. 205, 72 Pac. 920, 96 Am. St. Rep. 100, 5 L. R. A. N. S. 608].

51. People *v.* New York Tax, etc., Com'rs, 90 N. Y. 63 [*disapproving* on this point People *v.* New York Tax, etc., Com'rs, 76 N. Y. 64]; Rhode Island Hospital Trust Co. *v.* Armington, 21 R. I. 33, 41 Atl. 570.

52. 28 U. S. St. at L. 278 [U. S. Comp. St. (1901) p. 2398].

53. *Indiana.*— Crowder *v.* Riggs, 153 Ind. 158, 53 N. E. 1019; Ogden *v.* Walker, 59 Ind. 460; Montgomery County *v.* Elston, 32 Ind. 27, 2 Am. Rep. 327.

Iowa.— Campbell *v.* Centerville, 69 Iowa 439, 29 N. W. 596.

Mississippi.— Horne *v.* Green, 52 Miss. 452.

New Jersey.— Howard Sav. Inst. *v.* Newark, 63 N. J. L. 547, 44 Atl. 654.

Ohio.— Patton *v.* Commercial Bank, 10 Ohio S. & C. Pl. Dec. 321, 7 Ohio N. P. 401.

United States.— New York *v.* New York County, 7 Wall. 26, 19 L. ed. 60 [*reversing* 37 N. Y. 21].

Deposit of treasury notes.— United States notes deposited in a bank are taxable as a credit belonging to the depositor, unless placed there under a special form of deposit requiring the return of the identical notes. Carpenter *v.* Lewis, 9 Ohio S. & C. Pl. Dec. 498, 6 Ohio N. P. 468; Griffin *v.* Heard, 78 Tex. 607, 14 S. W. 892.

54. Horne *v.* Green, 52 Miss. 452.

55. Crowder *v.* Riggs, 153 Ind. 158, 53 N. E. 1019; Patton *v.* Commercial Bank, 10 Ohio S. & C. Pl. Dec. 321, 7 Ohio N. P. 401.

But in the absence of a state statute enacted subsequently to the federal statute of 1894, and providing for the taxation of such notes, they remain exempt from taxation. Howard Sav. Inst. *v.* Newark, 63 N. J. L. 547, 44 Atl. 654.

56. Palfrey *v.* Boston, 101 Mass. 329, 3 Am. Rep. 364.

57. *Alabama.*— Sumter County *v.* Gainesville Nat. Bank, 62 Ala. 464, 34 Am. Rep. 30.

Illinois.— Chicago *v.* Lunt, 52 Ill. 414.

Indiana.— Whitney *v.* Madison, 23 Ind. 331.

Iowa.— Ottumwa Sav. Bank *v.* Ottumwa, 95 Iowa 176, 63 N. W. 672; German American Sav. Bank *v.* Burlington, 54 Iowa 609, 7 N. W. 105. *Compare* Hubbard *v.* Johnson County, 23 Iowa 130.

Louisiana.— New Orleans *v.* New Orleans Canal, etc., Co., 29 La. Ann. 851. See also Shreveport First Nat. Bank *v.* Board of Reviewers, 41 La. Ann. 181, 5 So. 408. *Compare* State *v.* Assessor, 37 La. Ann. 850.

Massachusetts.— Com. *v.* Provident Sav. Inst., 12 Allen 312.

Missouri.— State *v.* Rogers, 79 Mo. 283; St. Louis Bldg., etc., Assoc. *v.* Lightner, 42 Mo. 421.

New Jersey.— State *v.* Newark, 39 N. J. L. 380; Mutual Life, etc., Ins. Co. *v.* Haight, 34 N. J. L. 128; Newark City Bank *v.* Newark Fourth Ward Assessor, 30 N. J. L. 13.

where the tax is laid, not upon the capital or the property of the corporation, but upon its franchises.[58] And a stock-holder in a bank or other corporation of which the capital is invested in United States securities is not a holder of such securities, and therefore he is taxable in respect to his stock, as distinguished from taxing the institution on its capital without regard to the fact of such investment.[59]

4. Franchises, Patents, and Other Rights Granted by United States. The states have no power to impose any taxes on franchises granted to corporations by the laws of the United States.[60] So also the exclusive rights or privileges

New York.— People *v.* Barker, 154 N. Y. 128, 47 N. E. 973; People *v.* Norton, 53 N. Y. App. Div. 557, 65 N. Y. Suppl. 992; International L. Assur. Soc. *v.* Tax Com'rs, 28 Barb. 318, 17 How. Pr. 206 [*affirmed* in 31 N. Y. 32].

Pennsylvania.—Com. *v.* Provident Life, etc., Co., 9 Pa. Dist. 479.

Utah.— Salt Lake City Nat. Bank *v.* Golding, 2 Utah 1.

West Virginia.— Martinsburg Old Nat. Bank *v.* State, 58 W. Va. 559, 52 S. E. 494, 3 L. R. A. N. S. 584.

United States.— Home Sav. Bank *v.* Des Moines, 205 U. S. 503, 27 S. Ct. 571, 51 L. ed. 901; Louisville First Nat. Bank *v.* Kentucky, 9 Wall. 353, 19 L. ed. 701; New York *v.* New York Tax Com'rs, 2 Wall. 200, 17 L. ed. 793; New York Commerce Bank *v.* New York, 2 Black 620, 17 L. ed. 451.

See 45 Cent. Dig. tit. "Taxation," §§ 20, 26.

The undivided profits of a national bank, beyond the amount required by law to be kept as a surplus fund, are taxable, although invested in government bonds. Concord First Nat. Bank *v.* Concord, 59 N. H. 75.

58. People *v.* Home Ins. Co., 92 N. Y. 328; Monroe County Sav. Bank *v.* Rochester, 37 N. Y. 365; Home Ins. Co. *v.* New York, 134 U. S. 594, 10 S. Ct. 593, 33 L. ed. 1025; Home Ins. Co. *v.* New York, 119 U. S. 129, 8 S. Ct. 1385, 30 L. ed. 350; Hamilton Mfg. Co. *v.* Massachusetts, 6 Wall. (U. S.) 632, 18 L. ed. 904; Provident Sav. Inst. *v.* Massachusetts, 6 Wall. (U. S.) 611, 18 L. ed. 907; Connecticut Sav. Soc. *v.* Coite, 6 Wall. (U. S.) 594, 18 L. ed. 897 [*affirming* 32 Conn. 173]. See also People *v.* Morgan, 178 N. Y. 433, 70 N. E. 967, 67 L. R. A. 960 [*reversing* 86 N. Y. App. Div. 577, 83 N. Y. Suppl. 998].

59. *Alabama.*— McIver *v.* Robinson, 53 Ala. 456.

Illinois.— People *v.* Bradley, 39 Ill. 130.

Iowa.— Independence First Nat. Bank *v.* Independence, 123 Iowa 482, 99 N. W. 142; National State Bank *v.* Burlington, 119 Iowa 696, 94 N. W. 234. See also Security Sav. Bank *v.* Carroll, 128 Iowa 230, 103 N. W. 379.

Louisiana.— Shreveport First Nat. Bank *v.* Board of Reviewers 41 La. Ann. 181, 5 So. 408.

Missouri.— St. Louis Bldg., etc., Assoc. *v.* Lightner, 47 Mo. 393.

New Jersey.— Jewell *v.* Hart, 31 N. J. L. 434; Fox *v.* Haight, 31 N. J. L. 399.

New York.— Utica *v.* Churchill, 33 N. Y. 161; People *v.* Barton, 44 Barb. 148.

Ohio.— Frazer *v.* Siebern, 16 Ohio St. 614; Cleveland Trust Co. *v.* Lander, 19 Ohio Cir. Ct. 271, 10 Ohio Cir. Dec. 452.

Texas.— Harrison *v.* Vines, 46 Tex. 15; Adair *v.* Robinson, 6 Tex. Civ. App. 275, 25 S. W. 734.

United States.— Cleveland Trust Co. *v.* Lander, 184 U. S. 111, 22 S. Ct. 394, 46 L. ed. 456; New York *v.* New York Tax Com'rs, 4 Wall. 244, 18 L. ed. 344; Van Allen *v.* Assessors, 3 Wall. 573, 18 L. ed. 229; People's Sav. Bank *v.* Layman, 134 Fed. 635; Exchange Nat. Bank *v.* Miller, 19 Fed. 372; Chicago First Nat. Bank *v.* Farwell, 7 Fed. 518, 10 Biss. 270.

See 45 Cent. Dig. tit. "Taxation," § 28.

Although the assessment is against the corporation where required by statute instead of against the stock-holders individually, if the tax is in fact upon the shares of stock as distinguished from the capital of the corporation, no deduction is allowable on account of capital invested in United States bonds. German American Sav. Bank *v.* Burlington, 118 Iowa 84, 91 N. W. 829.

Valuation of shares of stock-holders see *infra*, VI, D, 5, h.

60. Western Union Tel. Co. *v.* Visalia, 149 Cal. 744, 87 Pac. 1023; San Francisco *v.* Western Union Tel. Co., 96 Cal. 140, 31 Pac. 10, 17 L. R. A. 301; San Benito County *v.* Southern Pac. R. Co., 77 Cal. 518, 19 Pac. 827; Western Union Tel. Co. *v.* Lakin, 53 Wash. 326, 101 Pac. 1094; California *v.* Central Pac. R. Co., 127 U. S. 1, 8 S. Ct. 1073, 32 L. ed. 150. See also Atlantic, etc., R. Co. *v.* Lesueur, 2 Ariz. 428, 19 Pac. 157.

But a ratification or confirmation by congress of a franchise granted by a local legislature has only the same effect as a prior authorization and does not make such franchise one granted by congress. Honolulu Rapid Transit, etc., Co. *v.* Wilder, 211 U. S. 137, 29 S. Ct. 44, 53 L. ed. 121 [*affirming* 18 Hawaii 666], franchise granted by Hawaiian government between July 7, 1898, and Sept. 28, 1899, ratified and confirmed by acts of congress of 1900.

Franchise of railroad company.—A railroad company is not subject to state taxation on a franchise granted by the United States (California *v.* Central Pac. R. Co., 127 U. S. 1, 8 S. Ct. 1073, 32 L. ed. 150); but when a railroad chartered by a state and having a state franchise to operate its road, afterward receives a franchise from the federal government, the state franchise is not merged in the federal franchise so as to prevent the state taxation of the state franchise and the physical property of the road (People *v.* Central

granted by letters patent of the United States for inventions or discoveries are exempt from all taxation by the states,[61] as is also the capital of corporations invested in or represented by such patents; [62] but this does not prevent the imposition of a franchise tax on such a corporation, its property as such not being taxed,[63] or a tax upon capital not invested in patent rights; [64] nor does it prevent the taxation of its stock-holders on the shares of stock respectively held by them.[65]

5. Corporations Created by United States. A corporation chartered by the general government, or subsidized by it, is not exempt from state taxation unless it is employed as an agency or instrumentality for the exercise of the constitutional powers of the United States.[66] If it is, the states can lay no taxes upon it which would hinder, obstruct, or interfere with its efficient discharge of its duties to the government or the government's use of it; [67] but subject to this

Pac. R. Co., 105 Cal. 576, 38 Pac. 905; Central Pac. R. Co. *v.* State Bd. of Equalization, 60 Cal. 35; Central Pac. R. Co. *v.* California, 162 U. S. 91, 16 S. Ct. 766, 40 L. ed. 903).

Telegraph companies.— The grant by the United States to a telegraph company of the right to construct and operate lines along any military or post roads of the United States is not such a grant of a franchise as to exempt such a company from taxes imposed by a state in which its lines are thus constructed and operated (State *v.* Western Union Tel. Co., 165 Mo. 502, 65 S. W. 775; Atty.-Gen. *v.* Western Union Tel. Co., 141 U. S. 40, 11 S. Ct. 889, 35 L. ed. 628; Ratterman *v.* Western Union Tel. Co., 127 U. S. 411, 8 S. Ct. 1127, 32 L. ed. 229; Western Union Tel. Co. *v.* Massachusetts, 125 U. S. 530, 8 S. Ct. 961, 31 L. ed. 790; Atty.-Gen. *v.* Western Union Tel. Co., 33 Fed. 129. See also *supra*, III, B, 2, e, (VII)); and a tax based upon the capital or property of such a company is not invalidated because no deduction in the valuation is made on account of the value of the federal franchise (Western Union Tel. Co. *v.* Taggart, 163 U. S. 1, 16 S. Ct. 1054, 41 L. ed. 49; Western Union Tel. Co. *v.* Massachusetts, 125 U. S. 530, 8 S. Ct. 961, 31 L. ed. 790); but this rule does not authorize the imposition, independently of the capital and property of the company, of an arbitrary tax upon the federal franchise as such (Western Union Tel. Co. *v.* Visalia, 149 Cal. 744, 87 Pac. 1023; Western Union Tel. Co. *v.* Lakin, 53 Wash. 326, 101 Pac. 1094. See also San Francisco *v.* Western Union Tel. Co., 96 Cal. 140, 31 Pac. 10, 17 L. R. A. 301); nor does a municipality, having no right to exclude such a company from the use of its streets but only to regulate the manner of such use, grant any new franchise which is subject to taxation by an ordinance prescribing such regulations (Western Union Tel. Co. *v.* Visalia, *supra*; Western Union Tel. Co. *v.* Lakin, *supra*). So also the state will not be permitted to enjoin such a company from transacting any business until its delinquent taxes are paid, where its lines are located upon military or post roads of the United States. Western Union Tel. Co. *v.* Massachusetts, 125 U. S. 530, 8 S. Ct. 961, 31 L. ed. 790.

Bridge company.— A state tax on the capital stock of a bridge company, formed by the consolidation of corporations of different states, which maintains an interstate bridge, is not a tax on a franchise conferred by the federal government, although the corporation has authority under an act of congress to construct the bridge. Keokuk, etc., Bridge Co. *v.* Illinois, 175 U. S. 626, 20 S. Ct. 205, 44 L. ed. 299.

61. People *v.* Brooklyn Bd. of Assessors, 156 N. Y. 417, 51 N. E. 269, 42 L. R. A. 290; People *v.* Wemple, 129 N. Y. 543, 29 N. E. 808, 14 L. R. A. 708; People *v.* Neff, 19 N. Y. App. Div. 599, 46 N. Y. Suppl. 388 [*affirmed* in 156 N. Y. 417, 51 N. E. 269, 42 L. R. A. 290]; Com. *v.* Philadelphia County, 157 Pa. St. 527, 27 Atl. 378; Com. *v.* Davis-Colby Ore Roaster Co., 1 Dauph. Co. Rep. (Pa.) 118; Holt *v.* Indiana Mfg. Co., 80 Fed. 1, 25 C. C. A. 301; *In re* Sheffield, 64 Fed. 833. But see Crown Cork, etc., Co. *v.* State, 87 Md. 687, 40 Atl. 1074, 67 Am. St. Rep. 371; People *v.* Campbell, 138 N. Y. 543, 34 N. E. 370, 20 L. R. A. 453.

62. People *v.* Neff, 156 N. Y. 701, 51 N. E. 1093 [*affirming* 15 N. Y. App. Div. 8, 44 N. Y. Suppl. 46]; Com. *v.* Westinghouse Electric, etc., Co., 151 Pa. St. 265, 34 Atl. 1107, 1111; Com. *v.* Brush Electric Light Co., 145 Pa. St. 147, 22 Atl. 844; Com. *v.* Central Dist., etc., Tel. Co., 145 Pa. St. 121, 22 Atl. 841, 27 Am. St. Rep. 677; Com. *v.* Davis-Colby Ore Roaster Co., 1 Dauph. Co. Rep. (Pa.) 118.

63. Marsden Co. *v.* State Bd. of Assessors, 61 N. J. L. 461, 39 Atl. 638; People *v.* Knight, 174 N. Y. 475, 67 N. E. 65, 63 L. R. A. 87.

64. Com. *v.* Philadelphia Co., 145 Pa. St. 142, 22 Atl. 843; Com. *v.* Central Dist., etc., Tel. Co., 145 Pa. St. 121, 22 Atl. 841, 27 Am. St. Rep. 677.

65. Crown Cork, etc., Co. *v.* State, 87 Md. 687, 40 Atl. 1074, 67 Am. St. Rep. 371, 53 L. R. A. 417.

66. State *v.* Newark, 39 N. J. L. 380; Union Pac. R. Co. *v.* Peniston, 18 Wall. (U. S.) 5, 21 L. ed. 787; Union Pac. R. Co. *v.* Lincoln County, 24 Fed Cas. No. 14,378, 1 Dill. 314.

67. Com. *v.* Morrison, 2 A. K. Marsh. (Ky.) 75; State *v.* Buchanan, 5 Harr. & J. (Md.) 317, 9 Am. Dec. 534; State *v.* Texas, etc., R. Co., 100 Tex. 179, 98 S. W. 834; Osborn *v.* U. S. Bank, 9 Wheat. (U. S.) 738, 6 L. ed. 204; McCulloch *v.* Maryland, 4 Wheat. (U. S.) 316, 4 L. ed. 579.

restriction its real and personal property is subject to state taxation like that of any other corporation.[68]

6. Agencies and Instrumentalities of States. Congress possesses no power to lay taxes which would obstruct or interfere with the legitimate and efficient working of the state governments or on the agencies or instrumentalities employed by them.[69] This exemption includes railroads, banks, and other business enterprises wholly owned and operated by a state,[70] and its municipal corporations and their revenues,[71] and also the process and proceedings of its courts.[72] Nor, as in the case of public property generally,[73] will the state itself impose taxes upon its own public or governmental agencies or instrumentalities,[74] or those of its municipal corporations,[75] or a municipality tax such agencies or instrumentalities of a state.[76]

7. Bonds and Other Securities of States. The bonds and other securities of a state or of its municipalities are generally exempt from all taxation by the state itself and its municipal corporations, either by express provisions of law or by implication; [77] and bonds of a municipal corporation, or the income derived from

68. State *v.* Western Union Tel. Co., 165 Mo. 502, 65 S. W. 775; State *v.* St. Philip's, etc., Tax Collector, 2 Bailey (S. C.) 654; Bulow *v.* Charleston, 1 Nott & M. (S. C.) 527; Union Pac. R. Co. *v.* Peniston, 18 Wall. (U. S.) 5, 21 L. ed. 787; McCulloch *v.* Maryland, 4 Wheat. (U. S.) 316, 4 L. ed. 579; U. S. Bank *v.* Deveaux, 2 Fed. Cas. No. 916.

69. State *v.* Garton, 32 Ind. 1, 2 Am. Rep. 315; Union Bank *v.* Hill, 3 Coldw. (Tenn.) 325; Merchants' Nat. Bank *v.* U. S., 101 U. S. 1, 25 L. ed. 979.

70. Nashville *v.* Tennessee Bank, 1 Swan (Tenn.) 269; Georgia *v.* Atkins, 10 Fed. Cas. No. 5,350, 1 Abb. 22, 35 Ga. 315.

But an internal revenue tax on the sale of liquors applies to the sale of liquors by the dispensary system conducted by a state. South Carolina *v.* U. S., 199 U. S. 437, 26 S. Ct. 110, 50 L. ed. 261 [*affirming* 39 Ct. Cl. 257].

71. U. S. *v.* Baltimore, etc., R. Co., 17 Wall. (U. S.) 322, 21 L. ed. 597.

But a succession tax imposed under authority of an act of congress on a bequest to a municipality for public purposes cannot be regarded as a tax upon the municipality, although it may operate incidentally to reduce the bequest by the amount of the tax. Snyder *v.* Bettman, 190 U. S. 249, 23 S. Ct. 803, 47 L. ed. 1035.

72. Smith *v.* Short, 40 Ala. 385; Union Bank *v.* Hill, 3 Coldw. (Tenn.) 325.

73. See *supra*, III, C, 3, a; III, C, 4, a.

74. Penick *v.* Foster, 129 Ga. 217, 58 S. E. 733, 12 L. R. A. N. S. 1159; Terrell County Dispensary Com'rs *v.* Thornton, 106 Ga. 106, 31 S. E. 733; Nashville *v.* Tennessee Bank, 1 Swan (Tenn.) 269.

But a corporation engaged in the publication of school books, which has obtained from the state a contract to furnish all the school books used in the public schools, is not a public agency of the state so as to be exempt from taxation. American Book Co. *v.* Shelton, 117 Tenn. 745, 100 S. W. 725.

75. Penick *v.* Foster, 129 Ga. 217, 58 S. E. 773, 12 L. R. A. N. S. 1159; Com. *v.* Newport, etc., Bridge Co., 105 S. W. 378, 32 Ky. L. Rep. 196.

Public property of municipal corporations generally see *supra*, III, C, 4, a, b.

76. Nashville *v.* State Bank, 1 Swan (Tenn.) 269, holding that a state bank is impliedly exempt from municipal taxation.

77. *Georgia.*— Penick *v.* Foster, 129 Ga. 217, 58 S. E. 773, 12 L. R. A. N. S. 1159; Miller *v.* Wilson, 60 Ga. 505.

Kentucky.— Com. *v.* Hearne, 100 S. W. 820, 30 Ky. L. Rep. 1195.

Louisiana.— State *v.* Bd. of Assessors, 111 La. 982, 36 So. 91; State *v.* Bd. of Assessors, 35 La. Ann. 651.

Maryland.— Bonaparte *v.* State, 63 Md. 465.

New Jersey.— Newark City Bank *v.* Newark Assessor, 30 N. J. L. 13.

South Carolina.— Buist *v.* Charleston, 77 S. C. 260, 57 S. E. 862.

See 45 Cent. Dig. tit. "Taxation," § 357.

Implied exemption.— State and municipal bonds and securities are impliedly exempt from taxation unless an intention to include them is clearly manifested; and they are not within the application of general constitutional or statutory provisions providing for the taxation of "all property," or including "bonds" in an enumeration of classes of property subject to taxation. State *v.* Bd. of Assessors, 111 La. 982, 36 So. 91; State *v.* Bd. of Assessors, 35 La. Ann. 651. Such bonds are instrumentalities of the government and are impliedly exempt like other governmental agencies and instrumentalities, unless an intention to include them as taxable property is clearly manifested. Penick *v.* Foster, 129 Ga. 217, 58 S. E. 773, 12 L. R. A. N. S. 1159.

A municipality cannot tax state bonds unless there is clear language in the charter conferring such power. Augusta *v.* Dunbar, 50 Ga. 387.

Deduction of state bonds from corporate capital.— Corporations are entitled to have deducted from the amount of their capital stock paid in and accumulated surplus, for purposes of taxation, the amount of the bonds of this state owned by them at the time of the assessment. Newark City Bank *v.* Newark Assessor, 30 N. J. L. 13.

them, cannot be taxed by the United States.[78] But in several states such public securities or particular issues thereof have been held subject to state taxation, because expressly made so or because the courts have denied that there was any necessary implication of an intent to exempt them;[79] and any state may tax its own citizens on their holdings of bonds or other securities of another state.[80]

8. Salaries of Public Officers. A state cannot lay any tax on the office of a judicial, military, or civilian officer of the United States or on the salary or income he derives from it,[81] although of course his mere official character does not exempt him from paying taxes on his real or personal property other than his salary or emoluments.[82] Conversely congress cannot tax the salary or compensation of officers of the states.[83]

IV. Exemptions.

A. Nature and Purpose of Exemption. The term "exemption" presupposes a liability, and in the law of taxation it is properly applied only to a grant of immunity to persons or property which otherwise would have been liable to assessment.[84] Further, an exemption is a grant; a mere omission to tax or failure of the taxing officers to perform their duty is no exemption;[85] nor can the term be applied with propriety to a release from taxation granted in return for a consideration rendered.[86] Exemption or immunity from taxation is not one of the ordinary franchises of a corporation,[87] yet it is a franchise in such sense

78. Pollock *v.* Farmers' L. & T. Co., 157 U. S. 429, 15 S. Ct. 673, 39 L. ed. 759.

79. *California.*— People *v.* Home Ins. Co., 29 Cal. 533.

Maryland.— See State *v.* Baltimore, 105 Md. 1, 65 Atl. 369.

Massachusetts.— Hall *v.* Middlesex County, 10 Allen 100.

New Jersey.— Freese *v.* Woodruff, 37 N. J. L. 139.

New York.— People *v.* Tax, etc., Com'rs, 76 N. Y. 64.

Ohio.— See Probasco *v.* Raine, 50 Ohio St. 378, 34 N. E. 536; Champaign County Bank *v.* Smith, 7 Ohio St. 42.

Pennsylvania.— Wilkes-Barre Deposit, etc., Bank *v.* Wilkes-Barre, 148 Pa. St. 601, 24 Atl. 111; Com. *v.* Philadelphia, 27 Pa. St. 497.

Tennessee.— State Nat. Bank *v.* Memphis, 116 Tenn. 641, 94 S. W. 606, 7 L. R. A. N. S. 663.

See 45 Cent. Dig. tit. "Taxation," §§ 300, 357.

80. Baltimore City Appeal Tax Ct. *v.* Patterson, 50 Md. 354; Susquehanna Canal Co. *v.* Com., 72 Pa. St. 72; Webb *v.* Burlington, 28 Vt. 188; Bonaparte *v.* Baltimore Appeal Tax Ct., 104 U. S. 592, 26 L. ed. 845.

81. Purnell *v.* Page, 133 N. C. 125, 45 S. E. 534; Ulsh *v.* Perry County, 7 Pa. Dist. 488; Dobbins *v.* Erie County, 16 Pet. (U. S.) 435, 10 L. ed. 1022. But see Dyer *v.* Melrose, 197 Mass. 99, 83 N. E. 6, 125 Am. St. Rep. 330, holding that this rule does not prevent the taxation of money or property after it has lost its identity as salary and becomes a part of the general estate of the owner, and that money which one has in a bank is not exempt from taxation because it was derived from his salary as a federal officer.

Who are federal officers.—A clerk in a post-office, who is appointed by the deputy postmaster and his appointment approved by the postmaster-general, is not an officer of the United States so as to be exempt from taxation on the income derived from his employment as such clerk. Melcher *v.* Boston, 9 Metc. (Mass.) 73. And the mere licensing of a merchant under the United States revenue laws does not make him an officer of the United States. State *v.* Bell, 61 N. C. 76.

Similar rule in Canada.—A provincial legislature has no power to impose a tax on the official income of an officer of the dominion government, or to confer such a power on its municipalities. Leprohon *v.* Ottawa, 2 Ont. App. 522.

82. Finley *v.* Philadelphia, 32 Pa. St. 381.

83. Buffington *v.* Day, 11 Wall. (U. S.) 113, 20 L. ed. 122; Freedman *v.* Sigel, 9 Fed. Cas. No. 5,080, 10 Blatchf. 327. And see New Orleans *v.* Lea, 14 La. Ann. 197.

84. Matlack *v.* Jones, 2 Disn. (Ohio) 2. See also Colorado Farm, etc., Co. *v.* Beerbohm, 43 Colo. 464, 96 Pac. 443.

Exemption defined.— "Exemption is an immunity or privilege — it is a freedom from a charge of burden to which others are subject." State *v.* Smith, 158 Ind. 543, 553, 63 N. E. 25, 214, 64 N. E. 18, 63 L. R. A. 116; Florer *v.* Sheridan, 137 Ind. 28, 42, 36 N. E. 365, 23 L. R. A. 278.

85. Church Charity Foundation *v.* People, Dem. Surr. (N. Y.) 154; Harris *v.* Stearns, 20 S D. 622, 108 N. W. 247.

86. Maine Water Co. *v.* Waterville, 93 Me. 586, 45 Atl. 830, 49 L. R. A. 294; Bartholomew *v.* Austin, 85 Fed. 359, 29 C. C. A. 568.

87. State *v.* Maine Cent. R. Co., 66 Me. 488; State *v.* Great Northern R. Co., 106 Minn. 303, 119 N. W. 202; Wilson *v.* Gaines, 9 Baxt. (Tenn.) 546 [*affirmed* in 103 U. S. 417, 26 L. ed. 401]; Morgan *v.* Louisiana, 93 U. S. 217, 23 L. ed. 860. *Compare* State *v.* Minnesota Cent. R. Co., 36 Minn. 246, 30 N. W. 816.

that it may be lost by non-user, that is, by acquiescence in actual taxation, and if this continues for a long period of years, it will raise a presumption of surrender.[88] Ordinarily an exemption from taxation is a mere personal privilege,[89] although it may be either a personal privilege or a privilege annexed to particular property.[90] The purpose of granting exemptions from taxation is ordinarily found in motives of public policy, such as the encouragement of manufacturing and other industries,[91] or the support of educational, charitable, or religious institutions; [92] but it is sometimes a proper and even necessary measure to avoid double taxation of particular persons or property,[93] although an exemption of this character is not properly speaking an exemption, but rather a mere regulation as to the mode of assessment.[94]

B. Grant or Creation — 1. Power to Exempt in General. Unless restrained by constitutional provisions, the legislature of a state has full power to exempt any persons or corporations or classes of property from taxation, according to its views of public policy or expediency.[95] But no such power or authority belongs inherently to the municipal corporations of the state; [96] and still less can a mere

88. New Jersey *v.* Wright, 117 U. S. 648, 6 S. Ct. 907, 29 L. ed. 1021.

89. Com. *v.* Owensboro, etc., R. Co., 81 Ky. 572; State *v.* Great Northern R. Co., 106 Minn. 303, 119 N. W. 202; Wilson *v.* Gaines, 9 Baxt. (Tenn.) 546 [*affirmed* in 103 U. S. 417, 26 L. ed. 401]. See also *infra*, IV, C, 5, a.

90. Grand Canyon R. Co. *v.* Treat, (Ariz. 1908) 95 Pac. 187; State *v.* Great Northern R. Co., 106 Minn. 303, 119 N. W. 202; Morris Canal, etc., Co. *v.* State Bd. of Assessors, 76 N. J. L. 627, 71 Atl. 328.

The distinction between exemptions which are personal privileges and those which are annexed to particular property is important as affecting the assignability or transfer of the exemption. State *v.* Great Northern R. Co., 106 Minn. 303, 119 N. W. 202; Morris Canal, etc., Co. *v.* State Bd. of Assessors, 76 N. J. L. 627, 71 Atl. 328. See also *infra*, IV, C, 5.

A commuted system of taxation in lieu of property taxation is a personal privilege. State *v.* Great Northern R. Co., 106 Minn. 303, 119 N. W. 202.

91. Grand Canyon R. Co. *v.* Treat, (Ariz. 1908) 95 Pac. 187; Palmes *v.* Louisville, etc., R. Co., 19 Fla. 231. See also *infra*, IV, D, 3, g, k.

92. Anniston City Land Co. *v.* State, 160 Ala. 253, 48 So. 659; Matlack *v.* Jones, 2 Disn. (Ohio) 2. See also *infra*, IV, E.

93. McIver *v.* Robinson, 53 Ala. 456; *In re* Opinion of Justices, 195 Mass. 607, 84 N. E. 499; Com. *v.* People's Five Cent Sav. Bank, 5 Allen (Mass.) 428; Trenton *v.* Standard F. Ins. Co., 77 N. J. L. 757, 73 Atl. 606 [*affirming* 76 N. J. L. 79, 68 Atl. 1111]; Jersey City Gaslight Co. *v.* Jersey City, 46 N. J. L. 194.

94. Jersey City Gaslight Co. *v.* Jersey City, 46 N. J. L. 194; Carroll *v.* Alsup, 107 Tenn. 257, 64 S. W. 193.

95. *Arizona.*— Bennett *v.* Nichols, 9 Ariz. 138, 80 Pac. 392.

Louisiana.— St. Ann's Asylum *v.* Parker, 109 La. 592, 33 So. 613.

Maryland.— William Wilkens Co. *v.* Baltimore, 103 Md. 293, 63 Atl. 562; State *v.* Baltimore, etc., R. Co., 48 Md. 49.

Massachusetts.— Day *v.* Lawrence, 167 Mass. 371, 45 N. E. 751.

Michigan.— Chippewa County *v.* Auditor-Gen., 65 Mich. 408, 32 N. W. 651.

Minnesota.— Nobles County *v.* Hamline University, 46 Minn. 316, 48 N. W. 1119; St. Paul, etc., R. Co. *v.* Parcher, 14 Minn. 297.

Mississippi.— Adams *v.* Winona Cotton Mills, 92 Miss. 743, 46 So. 401.

Missouri.— Scotland County *v.* Missouri, etc., R. Co., 65 Mo. 123; Sloan *v.* Pacific R. Co., 61 Mo. 24, 21 Am. Rep. 397; St. Louis *v.* Boatmen's Ins., etc., Co., 47 Mo. 150.

Montana.— Northern Pac. R. Co. *v.* Carland, 5 Mont. 146, 3 Pac. 134.

New Jersey.— Little *v.* Bowers, 48 N. J. L. 370, 5 Atl. 178.

New York.— Matter of Rochester Trust, etc., Co., 42 Misc. 581, 87 N. Y. Suppl. 628.

Oklahoma.— Pryor *v.* Bryan, 11 Okla. 357, 66 Pac. 348.

Oregon.— Wallace *v.* Josephine County Bd. of Equalization, 47 Oreg. 584, 86 Pac. 365.

Pennsylvania.— Butler's Appeal, 73 Pa. St. 448.

Tennessee.— Knoxville, etc., R. Co. *v.* Hicks, 9 Baxt. 442.

Texas.— State *v.* Colorado Bridge Co., (Civ. App. 1903) 75 S. W. 818.

Wisconsin.— State *v.* Winnebago Lake, etc., Plank Road Co., 11 Wis. 35.

United States.— Minot *v.* Philadelphia, etc., R. Co., 18 Wall. 206, 21 L. ed. 888; Jefferson Branch Bank *v.* Skelley, 1 Black 436, 17 L. ed. 173; Piqua Branch Ohio Bank *v.* Knoop, 16 How. 369, 14 L. ed. 977; Louisville, etc., R. Co. *v.* Gaines, 3 Fed. 266, 2 Flipp. 621; Wells *v.* Central Vermont R. Co., 29 Fed. Cas. No. 17,390, 14 Blatchf. 426.

See 45 Cent. Dig. tit. "Taxation," § 307.

The taxing power of a territory includes the power to grant exemptions from taxation. Bennett *v.* Nichols, 9 Ariz. 138, 80 Pac. 392; Pryor *v.* Bryan, 11 Okla. 357, 66 Pac. 348.

96. *Georgia.*—Augusta Factory *v.* Augusta, 83 Ga. 734, 10 S. E. 359.

executive or administrative officer exempt property from the payment of taxes.[97] The legislature may delegate to a municipal corporation the power to make particular exemptions, but then the grant of authority must be strictly pursued.[98]

2. Constitutional Provisions — a. In General. The constitutions of the different states usually either provide expressly for the exemption of certain kinds or classes of property,[99] or confer upon the legislature, in its discretion, authority to grant exemptions within certain defined limits, and statutes of exemptions thereafter passed are valid if they do not exceed the constitutional provisions; [1] but it is ordinarily held that a constitutional enumeration of exemptions which may be granted precludes the granting of any other exemptions.[2] A constitutional provision declaring that certain classes of property shall be exempt from taxation is self-executing and *proprio vigore* exempts the property specified,[3] and in such cases the legislature cannot impose any new or additional conditions as a prerequisite to the exemption; [4] but a constitutional provision

Kentucky.— Covington, etc., St. R. Co. *v.* Bellevue, 105 Ky. 283, 49 S. W. 23, 20 Ky. L. Rep. 1184, 57 L. R. A. 50; Louisville, etc., R. Co. *v.* Christian County, 70 S. W. 180, 24 Ky. L. Rep. 894.

Maine.—Brewer Brick Co. *v.* Brewer, 62 Me. 62, 16 Am. Rep. 395.

Massachusetts.— Dillingham *v.* Snow, 5 Mass. 547.

Mississippi.— Yazoo, etc., R. Co. *v.* Adams, 76 Miss. 545, 25 So. 366; Morris Ice Co. *v.* Adams, 75 Miss. 410, 22 So. 944.

Missouri.— State *v.* Hannibal, etc., R. Co., 75 Mo. 208.

Nevada.— State *v.* Gracey, 11 Nev. 223.

New Hampshire.— New London *v.* Colby Academy, 69 N. H. 443, 46 Atl. 743; Mack *v.* Jones, 21 N. H. 393.

South Carolina.— Garrison *v.* Laurens, 54 S. C. 449, 32 S. E. 696.

Tennessee.— Nashville, etc., R. Co. *v.* Wilson County, 89 Tenn. 597, 15 S. W. 446.

Texas.— Austin *v.* Austin Gas Light, etc., Co., 69 Tex. 180, 7 S. W. 200.

Wisconsin.— Weeks *v.* Milwaukee, 10 Wis. 242.

See 45 Cent. Dig. tit. "Taxation," § 307; and, generally, Municipal Corporations, 28 Cyc. 1686.

A municipality cannot commute taxes in the absence of express authority. New Orleans *v.* St. Charles St. R. Co., 28 La. Ann. 497.

97. Smith *v.* Bodfish, 27 Me. 289.

98. Chippewa County *v.* Auditor-Gen., 65 Mich. 408, 32 N. W. 651; Boody *v.* Watson, 63 N. H. 320; Colton *v.* Montpelier, 71 Vt. 413, 45 Atl. 1039; Springfield *v.* St. Boniface, 10 Manitoba 615. See also Municipal Corporations, 28 Cyc. 1687.

But under a constitutional provision requiring equality and uniformity of taxation it has been held that it is for the legislature to determine what property shall be subject to or exempt from taxation, so that all property of the same class may be taxed equally and uniformly, and that it cannot authorize different towns to determine what property within the limits of each shall be exempt. Brewer Brick Co. *v.* Brewer, 62 Me. 62, 16 Am. Rep. 395.

Discrimination.— Where a municipality is authorized by statute to give encouragement to manufacturing enterprises by exempting their property from taxation for a certain period, an ordinance exempting companies establishing woolen mills is invalid as discriminating in favor of companies and against individuals engaged in the same business. Carleton Woollen Co. *v.* Woodstock, 3 N. Brunsw. Eq. 138.

99. See Anniston City Land Co. *v.* State, 160 Ala. 253, 48 So. 659; Matter of House Bill No. 18, 9 Colo. 623, 21 Pac. 471; Washburn College *v.* Shawnee County, 8 Kan. 344; Galveston Wharf Co. *v.* Galveston, 63 Tex. 14. And see *infra*, IV, B, 2, b.

Constitutional repeal of exemption.—A new constitution, repealing all laws exempting property from taxation, except as to certain specified kinds of property, may have a retrospective as well as a prospective effect. Londonderry *v.* Berger, 7 Leg. Gaz. (Pa.) 231.

1. *Florida.*— Palmes *v.* Louisville, etc., R. Co., 19 Fla. 231.

Maryland.— See Wells *v.* Hyattsville, 77 Md. 125, 26 Atl. 357, 20 L. R. A. 89.

North Dakota.— Engstad *v.* Grand Forks County, 10 N. D. 54, 84 N. W. 577.

Ohio.— Little *v.* United Presb. Theological Seminary, 72 Ohio St. 417, 74 N. E. 193; Gerke *v.* Purcell, 25 Ohio St. 229.

Pennsylvania.— Burd Orphan Asylum *v.* Upper Darby School Dist., 2 Del. Co. 137.

South Carolina.— Chester County *v.* White, 70 S. C. 433, 50 S. E. 28.

Virginia.— Staunton *v.* Mary Baldwin Seminary, 99 Va. 653, 39 S. E. 596; Petersburg *v.* Petersburg Benev. Mechanics' Assoc., 78 Va. 431.

United States.— Northwestern University *v.* People, 99 U. S. 309, 25 L. ed. 387.

See 45 Cent. Dig. tit. "Taxation," § 314.

2. See *infra*, IV, B, 2, b, (II).

3. Anniston City Land Co. *v.* State, 160 Ala. 253, 48 So. 659.

4. Anniston City Land Co. *v.* State, 160 Ala. 253, 48 So. 659, holding that where the constitutional provision exempts property from the taxation which is "used" for a certain purpose, a statutory provision exempting such property only when "owned and used" for such purpose is ineffective as to the condition of ownership, this being an additional prerequisite to the exemption given by the constitution.

merely authorizing the legislature to exempt certain kinds of property does not of itself grant any exemption,[5] nor do constitutional provisions defining or limiting the power of the legislature in regard to the granting of exemptions affect or repeal exemptions already existing.[6]

b. Constitutional Restrictions — (i) *In General.* If the constitution of the state expressly forbids the exemption of property from taxation, or provides that all property, or all property of certain kinds, shall be subject to taxation,[7] or if the legislature attempts to exempt property not within the classes or kinds enumerated in the constitution, in either case its action is invalid and the statutory grant of exemption is of no effect; [8] and the same rule applies where the constitution

5. Philadelphia *v.* Barber, 160 Pa. St. 123, 28 Atl. 644; *In re* Blair County, 8 Pa. Dist. 41.

6. Sayers *v.* Wilmington, etc., R. Co., 3 Pennew. (Del.) 249, 49 Atl. 931; New Orleans *v.* Poydras Orphan Asylum, 33 La. Ann. 850; State *v.* Westminster College, 175 Mo. 52, 74 S. W. 990; State *v.* St. Joseph's Convent of Mercy, 116 Mo. 575, 22 S. W. 811; Scotland County *v.* Missouri, etc., R. Co., 65 Mo. 123.

7. *Arkansas.*— Files *v.* Pocahontas, etc., R. Co., 48 Ark. 529, 3 S. W. 817.

California.— Mackay *v.* San Francisco, 113 Cal. 392, 45 Pac. 696; People *v.* Eddy, 43 Cal. 331, 13 Am. Rep. 143; Minturn *v.* Hays, 2 Cal. 590, 56 Am. Dec. 366.

Colorado.— Gunnison County *v.* Owen, 7 Colo. 467, 4 Pac. 795.

Maryland.— Baltimore *v.* Starr Methodist Protestant Church, 106 Md. 281, 67 Atl. 261.

Minnesota.— State *v.* Pioneer Sav., etc., Co., 63 Minn. 80, 65 N. W. 138; Stevens County *v.* St. Paul, etc., R. Co., 36 Minn. 467, 31 N. W. 942; State *v.* Southern Minnesota R. Co., 21 Minn. 344; State *v.* Winona, etc., R. Co., 21 Minn. 315; First Div. St. Paul, etc., R. Co. *v.* Parcher, 14 Minn. 297.

Nebraska.— Lancaster County *v.* Rush, 35 Nebr. 119, 52 N. W. 837; Lancaster County *v.* Trimble, 33 Nebr. 121, 49 N. W. 938.

Ohio.— Ellis *v.* Linck, 3 Ohio St. 66, law allowing deduction of debts from assessed value of property unconstitutional.

South Carolina.— Columbia Water Power Co. *v.* Campbell, 75 S. C. 34, 54 S. E. 833.

Tennessee.— University of the South *v.* Skidmore, 87 Tenn. 155, 9 S. W. 892; Chattanooga *v.* Nashville, etc., R. Co., 7 Lea 561; Knoxville, etc., R. Co. *v.* Hicks, 9 Baxt. 442; Memphis, etc., R. Co. *v.* Gaines, 3 Tenn. Ch. 604.

See 45 Cent. Dig. tit. "Taxation," § 312.

8. *Arkansas.*— Little Rock, etc., R. Co. *v.* Worthen, 46 Ark. 312.

California.— Crocker *v.* Scott, 149 Cal. 575, 87 Pac. 102; People *v.* Latham, 52 Cal. 598; People *v.* Gerke, 35 Cal. 677; People *v.* McCreery, 34 Cal. 432.

Delaware.— Sayers *v.* Wilmington, etc., R. Co., 3 Pennew. 249, 49 Atl. 931.

Georgia.— Gate City Guard *v.* Atlanta, 113 Ga. 883, 39 S. E. 394, 54 L. R. A. 806.

Illinois.— St. Louis Consol. Coal Co. *v.* Miller, 236 Ill. 149, 86 N. E. 205; Cook County *v.* Fairbank, 222 Ill. 578, 78 N. E. 895; Northwestern University *v.* People, 86 Ill. 141.

Kentucky.— Campbell County *v.* Newport, etc., Bridge Co., 112 Ky. 659, 66 S. W. 526, 23 Ky. L. Rep. 2056.

Louisiana.— New Orleans *v.* New Orleans Waterworks Co., 36 La. Ann. 432; New Orleans *v.* Louisiana Sav. Bank, etc., 31 La. Ann. 826; New Orleans *v.* Lafayette Bank, 27 La. Ann. 376.

Minnesota.— First Div. St. Paul, etc., R. Co. *v.* Parcher, 14 Minn. 297.

Missouri.— Westport *v.* McGee, 128 Mo. 152, 30 S. W. 523; Copeland *v.* St. Joseph, 126 Mo. 417, 29 S. W. 281.

Montana.— See Daly Bank, etc. *v.* Silver Bow County, 33 Mont. 101, 81 Pac. 950.

Nebraska.— Chicago, etc., R. Co. *v.* Richardson County, 72 Nebr. 482, 100 N. W. 950; Burlington, etc., R. Co. *v.* Seward County, 10 Nebr. 211, 4 N. W. 1016.

Nevada.— State *v.* Carson City Sav. Bank, 17 Nev. 146, 30 Pac. 703.

New York.— Dutchess County Mut. Ins. Co. *v.* Poughkeepsie, 51 Hun 595, 4 N. Y. Suppl. 93.

Ohio.— Toledo *v.* Hosler, 10 Ohio Cir. Ct. 257, 6 Ohio Cir. Dec. 590.

Pennsylvania.— Iron City Bank *v.* Pittsburgh, 37 Pa. St. 340; Mott *v.* Pennsylvania R. Co., 30 Pa. St. 9, 72 Am. Dec. 664. See Hawes Mfg. Co.'s Appeal, (1889) 17 Atl. 219; Sanderson *v.* Lackawanna County, 1 Pa. Co. Ct. 342; Fox *v.* Edelman, 1 Lehigh Val. L. Rep. 169.

Tennessee.— State Nat. Bank *v.* Memphis, 116 Tenn. 641, 74 S. W. 606, 2 L. R. A. N. S. 663.

Texas.— See Missouri, etc., R. Co. *v.* Shannon, (Civ. App. 1906) 97 S. W. 527 [*affirmed* in 100 Tex. 379, 100 S. W. 138, 10 L. R. A. N. S. 681].

Utah.— State *v.* Armstrong, 17 Utah 166, 53 Pac. 981, 41 L. R. A. 407.

United States.— Little Rock, etc., R. Co. *v.* Worthen, 120 U. S. 97, 7 S. Ct. 469, 30 L ed. 588; Louisville, etc., R. Co. *v.* Palmes, 109 U. S. 244, 3 S. Ct. 193, 27 L. ed. 922; Northern Pac. R. Co. *v.* Walker, 47 Fed. 681.

Exemption of public "and other" property.— Where the constitution provides that "the property of the United States, and of the state, counties, school-districts and other municipal corporations, and such other property as the legislature may by general laws provide," shall be exempt from taxation, the words "such other property" refer to property of the same general character as that specially enumerated, and do not authorize

specifically forbids the commutation of taxes in any form.[9] But the fact that a tax law contains an unconstitutional grant of exemption in one of its sections or provisions does not necessarily invalidate the statute as a whole,[10] although it may do so.[11] In determining the validity of statutes as affected by constitutional restrictions upon the power to grant exemptions the distinction must be observed between what is in fact an exemption and what is merely a regulation as to the mode of assessment.[12]

(II) *Implied Restrictions.* Where the constitution grants to the legislature authority to exempt from taxation particular persons, corporations, or classes of property, this implies a prohibition against any other or further exemptions.[13] Implied restrictions on the power of exemption also arise from the constitutional provisions requiring equality and uniformity of taxation,[14] from the requirement that all property shall be taxed in proportion to its value,[15] from the declaration in the constitution that every person ought to contribute his proportion of public taxes according to his actual worth,[16] or that no man or set

the legislature to exempt any private property. State *v.* Daniel, 17 Wash. 111, 49 Pac. 243.

Constitutional restrictions not retrospective.— The Missouri constitutions of 1865 and 1875, limiting the power of the legislature in exempting property from taxation, were prospective and not intended to impair a charter already granted by the state to a college containing an exemption of its property. State *v.* Westminster College, 175 Mo. 52, 74 S. W. 990.

9. Raymond *v.* Hartford F. Ins. Co., 196 Ill. 329, 63 N. E. 745; Lancaster County *v.* State, 13 Nebr. 523, 14 N. W. 517; Washington County *v.* Fletcher, 12 Nebr. 356, 11 N. W. 460, 542, 855.

10. People *v.* McCreery, 34 Cal. 432; Fox's Appeal, 112 Pa. St. 337, 4 Atl. 149; State Nat. Bank *v.* Memphis, 116 Tenn. 641, 74 S. W. 606, 2 L. R. A. N. S. 663.

11. State *v.* Wardell, 153 Mo. 319, 54 S. W. 574; Copeland *v.* St. Joseph, 126 Mo. 417, 29 S. W. 281; Campbell *v.* Bryant, 104 Va. 509, 52 S. E. 638.

12. State *v.* Smith, 158 Ind. 543, 63 N. E. 25, 214, 64 N. E. 18, 63 L. R. A. 116 (holding that a statute providing for the deduction from the assessed value of real estate of the mortgage indebtedness thereon is not an exemption and is not unconstitutional); Carroll *v.* Alsup, 107 Tenn. 257, 64 S. W. 193 (holding that a statute exempting from taxation the shares of stock-holders in certain corporations, but providing for the taxation of these corporations upon all of their property and franchises, does not in fact create an exemption but merely provides a different mode of assessment and is not unconstitutional). See also *supra*, IV, A.

If the total wealth of the state can be taxed once without the taxation of credits in any form, the constitutional provision requiring all property to be taxed is satisfied without the taxation of credits, and a statute exempting credits by providing that they shall not be considered as property for purposes of taxation and that thereafter no deduction shall be allowed on account of an indebtedness owed is constitutional; but the exemption of money from taxation is invalid as an attempt to avoid the taxation of all property as required by the constitution. State *v.* Parmenter, 50 Wash. 164, 96 Pac. 1047, 19 L. R. A. N. S. 707.

13. *Arkansas.*— Fletcher *v.* Oliver, 25 Ark. 289.

Illinois.— St. Louis Consol. Coal Co. *v.* Miller, 236 Ill. 149, 86 N. E. 205; People's Loan, etc., Assoc. *v.* Keith, 153 Ill. 609, 39 N. E. 1072, 28 L. R. A. 65.

Louisiana.— Lefranc *v.* New Orleans, 27 La. Ann. 188; Morrison *v.* Larkin, 26 La. Ann. 699.

Minnesota.— Le Duc *v.* Hastings, 39 Minn. 110, 38 N. W. 803.

Nevada.— State *v.* Carson City Sav. Bank, 17 Nev. 146, 30 Pac. 703.

North Carolina.— Charlotte Bldg., etc., Assoc. *v.* Mecklenburg County, 115 N. C. 410, 20 S. E. 526.

Oregon.—Wallace *v.* Josephine County Bd. of Equalization, 47 Oreg. 584, 86 Pac. 365.

Tennessee.— State Nat. Bank *v.* Memphis, 116 Tenn. 641, 94 S. W. 606, 2 L. R. A. N. S. 603.

Utah.— State *v.* Armstrong, 17 Utah 166, 53 Pac. 981, 41 L. R. A. 407.

West Virginia.— Chesapeake, etc., R. Co. *v.* Miller, 19 W. Va. 408.

See 45 Cent. Dig. tit. "Taxation," § 313.

But where the constitution itself exempts certain property from taxation the enumeration has been held not to operate as a declaration that everything not enumerated shall be taxed. Galveston Wharf Co. *v.* Galveston, 63 Tex. 14.

14. See *supra*, II, B, 1, f.

15. People *v.* McCreery, 34 Cal. 432; People's Loan, etc., Assoc. *v.* Keith, 153 Ill. 609, 39 N. E. 1072, 28 L. R. A. 65; German Nat. Ins. Co. *v.* Louisville, 54 S. W. 732, 21 Ky. L. Rep. 1179.

A contrary doctrine is that the provision does not require that all property shall be taxed so as to prevent the granting of any exemptions, but merely that such property as is taxed shall be taxed according to its value. Mississippi Mills *v.* Cook, 56 Miss. 40; State *v.* North, 27 Mo. 464; Williamson *v.* Massey, 33 Gratt. (Va.) 237.

16. Maxwell *v.* State, 40 Md. 273.

of men are entitled to exclusive separate public emoluments or privileges, but in consideration of public services.[17] But the constitutional provisions for securing religious freedom do not prohibit the exemption from taxation of such church property as the legislature may deem proper to exempt.[18]

3. Statutory Provisions. A statute granting an exemption from taxation is generally to be construed as prospective only.[19] Except in the case of grants which are irrevocable because in the nature of contracts,[20] such a statute may be repealed or abrogated by the adoption of a new constitution or constitutional amendment which revokes the exemption,[21] by a later statute expressly repealing it,[22] by the enactment of a general revenue or tax law including in the classes of property to be taxed that which was previously exempt,[23] by any later statute containing provisions clearly inconsistent with the further continuance of the exemption,[24] or by a statute intended to cover the whole subject of exemptions from taxation and which does not include the particular property in any of the exempted classes,[25] or expressly repeals all prior statutes in regard to exemptions inconsistent with its provisions.[26] But as affecting exemptions already expressly granted the general rule applies that repeals by implication are not favored,[27] that

17. Zable *v.* Louisville Baptist Orphans' Home, 92 Ky. 89, 17 S. W. 212, 13 Ky. L. Rep. 385, 13 L. R. A. 668; Clark *v.* Louisville Water Co., 90 Ky. 515, 14 S. W. 502, 12 Ky. L. Rep. 309; Com. *v.* Makibben, 90 Ky. 384, 14 S. W. 372, 12 Ky. L. Rep. 474, 29 Am. St. Rep. 382; Barbour *v.* Louisville Bd. of Trade, 82 Ky. 645. And see Crafts *v.* Ray, 22 R. I. 179, 46 Atl. 1043, 49 L. R. A. 604, construing a similar provision of the constitution of Rhode Island, but holding it to be merely directory and not a limitation on the power of the legislature to grant exemptions.

18. Griswold College *v.* State, 46 Iowa 275, 26 Am. Rep. 138.

19. People *v.* New York Tax Com'rs, 26 N. Y. 163; Bank of Commerce *v.* New York, 2 Black (U. S.) 620, 17 L. ed. 451. See also Osborne *v.* Humphrey, 7 Conn. 335; and, generally, Statutes, 36 Cyc. 1205.

20. Irrevocable grants of exemption see *infra*, IV, C, 9.

21. Jefferson Parish Police Jury *v.* Burthe, 21 La. Ann. 325; Brewster *v.* Hough, 10 N. H. 138; State *v.* Chatham Collector, 51 N. J. L. 89, 16 Atl. 225; Mercantile Library Hall Co. *v.* Pittsburgh, 9 Pa. Cas. 59, 11 Atl. 667; Pittsburgh *v.* Mercantile Library Hall Co., 3 Pa. Co. Ct. 519; Wagner Free Institute of Science *v.* Philadelphia, 1 Pa. Co. Ct. 256.

Repeal by implication.— A general constitutional provision not expressly repealing existing exemptions will not be construed as operating retroactively or impliedly repealing such exemptions. New Orleans *v.* Poydras Orphan Asylum, 33 La. Ann. 850; State *v.* St. Joseph's Convent of Mercy, 116 Mo. 575, 22 S. W. 811.

General declarations of constitution.— A declaration in a state constitution that "the burdens of the State ought to be fairly distributed among its citizens" does not repeal a statutory grant of exemption from taxation embodied in the charter of a college. Brown University *v.* Granger, 19 R. I. 704, 36 Atl. 720, 36 L. R. A. 847.

22. Croner *v.* Cowdrey, 139 N. Y. 471, 34 N. E. 1061, 36 Am. St. Rep. 716; People *v.* Brooklyn, 18 Hun (N. Y.) 386 [*affirmed* in 84 N. Y. 610]; Chester County Nat. Bank *v.* Chester County, 14 Fed. 239.

23. Hartford First Ecclesiastical Soc. *v.* Hartford, 38 Conn. 274; Com. *v.* Owensboro, etc., R. Co., 95 Ky. 60, 23 S. W. 868, 56 S. W. 993, 15 Ky. L. Rep. 449; Pratt Institute *v.* New York, 99 N. Y. App. Div. 525, 91 N. Y. Suppl. 136 [*affirmed* in 183 N. Y. 151, 75 N. E. 1119]; Philadelphia *v.* Masonic Home, 160 Pa. St. 572, 28 Atl. 954, 40 Am. St. Rep. 736, 23 L. R. A. 545; Bourguignon Bldg. Assoc. *v.* Com., 98 Pa. St. 54; Union Imp. Co. *v.* Com., 69 Pa. St. 140.

24. James *v.* Ray, 130 Ga. 694, 61 S. E. 594; Blain *v.* Bailey, 25 Ind. 165; State *v.* Luther, 56 Minn. 156, 57 N. W. 464; Yazoo, etc., R. Co. *v.* Adams, 81 Miss. 90, 32 So. 937; Buffalo Cemetery Assoc. *v.* Buffalo, 118 N. Y. 61, 22 N. E. 962.

25. Hanover Tp. *v.* Newark Conference Camp Meeting Assoc., 76 N. J. L. 65, 68 Atl. 753 [*affirmed* in 76 N. J. L. 827, 71 Atl. 1134]; Pittsburgh *v.* Mercantile Library Hall Co., 3 Pa. Co. Ct. 519; Gulf, etc., R. Co. *v.* Hewes, 183 U. S. 66, 22 S. Ct. 26, 46 L. ed. 86.

An exception to this rule was made in New York in regard to such property of the Roosevelt hospital as was acquired from the Roosevelt estate, it being held that the statute exempting the property of the hospital from taxation was not repealed by the general statute of 1896 limiting the exemptions of such institutions to such property as was used exclusively for carrying out their corporate purposes as "the peculiar features, which attended the incorporation and characterized the endowment of the Roosevelt Hospital, differentiate its case and render inapplicable the general doctrine." People *v.* Raymond, 194 N. Y. 189, 196, 87 N. E. 90 [*reversing* 126 N. Y. App. Div. 720, 111 N. Y. Suppl. 177].

26. Wagner Free Inst. *v.* Philadelphia, 132 Pa. St. 612, 19 Atl. 297, 19 Am. St. Rep. 613.

27. Blain *v.* Bailey, 25 Ind. 165; New Orleans *v.* Poydras Orphan Asylum, 33 La. Ann.

subsequent taxing statutes will not be construed as retroactive so as to repeal such exemptions,[28] and that a general law without negative words will not repeal a prior special statute granting an exemption, although the provisions of the statutes are different unless they are irreconcilably conflicting.[29]

4. Time When Statute Takes Effect. When a constitutional or statutory provision exempting property from taxation goes into operation on a certain day in the year before the taxes for that year have been assessed, or before the day when by law they become a fixed charge on the property, the exempted property is free from the taxes for the current year;[30] but it is otherwise when the assessment is completed and the tax books closed before the day when the statute takes effect.[31]

5. Exemption by Commutation of Taxes. Unless restrained by some constitutional provision,[32] it is within the power of the legislature to provide for the payment of a fixed annual sum, or a fixed percentage of earnings or profits, by a corporation or other taxpayer, and to declare that such payment shall be in lieu of all other taxes on the property.[33] But the intention of the legislature in this respect must be entirely clear, and no exemption will be held to result from any language which does not show an unmistakable intention to accept the stated

850. See also, generally, Statutes, 36 Cyc. 1071.

28. Brooks *v.* Jasper County, 20 Ind. 416; New Orleans *v.* Poydras Orphan Asylum, 33 La. Ann. 850; State *v.* St. Joseph's Convent of Mercy, 116 Mo. 575, 22 S. W. 811. See also, generally, Statutes, 36 Cyc. 1205.

29. *Indiana.*— Blain *v.* Bailey, 25 Ind. 165.

Louisiana.— New Orleans *v.* Poydras Orphan Asylum, 33 La. Ann. 850.

Missouri.— State *v.* St. Joseph's Convent of Mercy, 116 Mo. 575, 22 S. W. 811.

New Jersey.— State *v.* Minton, 23 N. J. L. 529.

Pennsylvania.— Com. *v.* Philadelphia, etc., R. Co., 164 Pa. St. 252, 30 Atl. 145; Rounds *v.* Waymart Borough, 81 Pa. St. 395.

England.— Williams *v.* Pritchard, 4 T. R. 2, 100 Eng. Reprint 862.

Canada.—Way *v.* St. Thomas, 12 Ont. L. Rep. 240, 7 Ont. Wkly. Rep. 194, 731.

30. Havana American Co. *v.* Board of Assessors, 105 La. 471, 29 So. 938; State *v.* Academy of Science, 13 Mo. App. 213; People *v.* New York Tax, etc., Com'rs, 76 Hun (N. Y.) 491, 27 N. Y. Suppl. 1058 [*affirmed* in 142 N. Y. 348, 37 N. E. 116]; Appeals from Taxation, 1 Phila. (Pa.) 418. *Compare* Louisiana, etc., Ice Co. *v.* Parker, 42 La. Ann. 669, 7 So. 898; Ætna Ins. Co. *v.* New York, 7 N. Y. App. Div. 145, 40 N. Y. Suppl. 120 [*affirmed* in 153 N. Y. 331, 47 N. E. 593].

Apportionment of year's taxes.— Taxes on manufacturing corporations in Pennsylvania should be computed for the fraction of the year preceding the act of June 30, 1885, exempting such corporations from taxation. Com. *v.* Atlantic Refining Co., 2 Pa. Co. Ct. 62.

31. Matter of American Fine Arts Soc., 6 N. Y. App. Div. 496, 39 N. Y. Suppl. 564 [*affirmed* in 151 N. Y. 621, 45 N. E. 1131].

32. *Illinois.*— Cooper *v.* Ash, 76 Ill. 11.

Louisiana.— Louisiana Cotton Mfg. Co. *v.* New Orleans, 31 La. Ann. 440.

Mississippi.— Yazoo, etc., R. Co. *v.* Adams, 81 Miss. 90, 32 So. 937.

Missouri.— Life Assoc. of America *v.* St. Louis County Bd. of Assessors, 49 Mo. 512.

Tennessee.— Ellis *v.* Louisville, etc., R. Co., 8 Baxt. 530; Memphis, etc., R. Co. *v.* Gaines, 3 Tenn. Ch. 604.

Where the legislature cannot exempt property from taxation it has been held that it has no more right to commute taxes than to grant an entire exemption (Louisiana Cotton Mfg. Co. *v.* New Orleans, 31 La. Ann. 440; Austin *v.* Austin Gas-Light, etc., Co., 69 Tex. 180, 7 S. W. 200. *Contra*, Hunsaker *v.* Wright, 30 Ill. 146), particularly where there is not only a prohibition against exemptions but a requirement that taxation shall be according to value (Life Assoc. of America *v.* St. Louis County Bd. of Assessors, 49 Mo. 512).

33. *Delaware.*— Neary *v.* Philadelphia, etc., R. Co., 7 Houst. 419, 9 Atl. 405.

Illinois.— Hunsaker *v.* Wright, 30 Ill. 146; Illinois Cent. R. Co. *v.* McLean County, 17 Ill. 291; State Bank *v.* People, 5 Ill. 303.

Minnesota.— State *v.* Twin City Tel. Co., 104 Minn. 270, 116 N. W. 835; St. Paul *v.* St. Paul, etc., R. Co., 23 Minn. 469.

New Jersey.— Douglass *v.* Orange, etc., R. Co., 34 N. J. L. 485.

Pennsylvania.— Lackawanna County *v.* Scranton First Nat. Bank, 94 Pa. St. 221.

Texas.— See State *v.* Missouri, etc., R. Co., (1907) 100 S. W. 146.

Wisconsin.— See State *v.* Willcuts, 140 Wis. 448, 122 N. W. 1048; State *v.* Hinkel, 136 Wis. 66, 116 N. W. 639.

See 45 Cent. Dig. tit. "Taxation," §§ 307, 319.

Failure to pay special tax.— Where a corporation is required to pay a special tax, such as a percentage of its receipts or earnings and exempted from other taxation, a failure to comply with the statute does not affect the method by which its property should be taxed and does not render the property subject to taxation under the general law. State Bd. of Equalization *v.* People, 229 Ill. 430, 82 N. E. 324.

payment as a substitute for all taxes which would regularly be assessed on the property;[34] nor will an exemption of this kind be construed as intended to be irrevocable as to the mode of taxation or the amount of the payment.[35]

6. Acceptance of Exemption. Any individual or corporation entitled to the benefit of a statutory grant of exemption must in some way manifest its acceptance of the grant, in order to obtain immunity under it, and in particular must comply with all conditions imposed by the statute;[36] and the same rule applies to a statute commuting taxes or providing for the payment of a gross earnings tax or other special tax in lieu of general taxation.[37]

C. Construction and Operation — 1. Presumption Against Exemption. A grant of exemption from taxation is never presumed; on the contrary, in all cases of doubt as to the legislative intention, or as to the inclusion of particular property within the terms of the statute, the presumption is in favor of the taxing power, and the burden is on the claimant to establish clearly his right to exemption.[38] There is no real conflict between this rule and the rule that there can be no taxation except as authorized by the law-making power,[39] or at least where the exemp-

34. Kenton Ins. Co. *v.* Covington, 86 Ky. 213, 5 S. W. 461, 9 Ky. L. Rep. 513; People *v.* New York Tax, etc., Com'rs, 19 Hun (N. Y.) 460 [*affirmed* in 82 N. Y. 459]; Wilkes-Barre Deposit, etc., Bank *v.* Wilkes-Barre, 148 Pa. St. 601, 24 Atl. 111; Erie R. Co. *v.* Com., 66 Pa. St. 84, 5 Am. Rep. 351.

Bonus fee for charter.— The payment of a bonus by a company on receiving its charter will not countervail the express taxation of all property of the nature of that held by the company. New York, etc., R. Co. *v.* Sabin, 26 Pa. St. 242.

35. State *v.* Great Northern R. Co., 106 Minn. 303, 119 N. W. 202.

36. *Minnesota.*— Stevens County *v.* St. Paul, etc., R. Co., 36 Minn. 467, 31 N. W. 942.

Mississippi.— Oxford Bank *v.* Oxford, 70 Miss. 504, 12 So. 203.

New Jersey.— State Bd. of Assessors *v.* Paterson, etc., R. Co., 50 N. J. L. 446, 14 Atl. 610.

Pennsylvania.— Pennsylvania L. Ins. Co. *v.* Com., 46 Leg. Int. 300.

Tennessee.— State *v.* Planters' F. & M. Ins. Co., 95 Tenn. 203, 31 S. W. 992.

United States.— Planters' F. & M. Ins. Co. *v.* Tennessee, 161 U. S. 193, 16 S. Ct. 466, 40 L. ed. 667; Northern Pac. R. Co. *v.* Clark, 153 U. S. 252, 14 S. Ct. 809, 38 L. ed. 706.

See 45 Cent. Dig. tit. "Taxation," § 321.

37. Oxford Bank *v.* Oxford, 70 Miss. 504, 12 So. 203; Northern Pac. R. Co. *v.* Clark, 153 U. S. 252, 14 S. Ct. 809, 38 L. ed. 706. See also cases cited *supra*, note 36.

38. *Alabama.*— Mobile *v.* Stein, 54 Ala. 23.

Colorado.—American Smelting, etc., Co. *v.* People, 34 Colo. 240, 82 Pac. 531.

Georgia.— Wells *v.* Savannah, 107 Ga. 1, 32 S. E. 669.

Illinois.— North Chicago Hebrew Cong. *v.* Garibaldi, 70 Ill. App. 33.

Maryland.— Coulston *v.* Baltimore, 109 Md. 271, 71 Atl. 990; Buchanan *v.* Talbot County, 47 Md. 286.

Minnesota.— State *v.* Great Northern R. Co., 106 Minn. 303, 119 N. W. 202.

Mississippi.— Adams *v.* Yazoo, etc., R. Co., 77 Miss. 194, 24 So. 200, 317, 28 So. 956, 60 L. R. A. 33.

Missouri.— Trenton *v.* Humel, 134 Mo. App. 595, 114 S. W. 1131.

Nebraska.—Watson *v.* Cowles, 61 Nebr. 216, 85 N. W. 35.

New York.— People *v.* New York Tax Com'rs, 95 N. Y. 554; Matter of Deutsch, 107 N. Y. App. Div. 192, 95 N. Y. Suppl. 65; People *v.* Neff, 34 N. Y. App. Div. 83, 53 N. Y. Suppl. 1077.

Pennsylvania.— New York, etc., R. Co. *v.* Sabin, 26 Pa. St. 242; Com. *v.* Cover, 29 Pa. Super. Ct. 409 [*affirmed* in 215 Pa. St. 556, 64 Atl. 686].

Tennessee.—Wilson *v.* Gaines, 9 Baxt. 546 [*affirmed* in 103 U. S. 417, 26 L. ed. 401]; Union Bank *v.* State, 9 Yerg. 490.

Utah.— Parker *v.* Quinn, 23 Utah 332, 64 Pac. 961.

Virginia.— Norfolk, etc., Co. *v.* Norfolk, 105 Va. 139, 52 S. E. 851.

West Virginia.— Probasco *v.* Moundsville, 11 W. Va. 501.

United States.— Phœnix F. & M. Ins. Co. *v.* Tennessee, 161 U. S. 174, 16 S. Ct. 471, 40 L. ed. 660; Bailey *v.* Magwire, 22 Wall. 215, 22 L. ed. 850; Philadelphia, etc., R. Co. *v.* Maryland, 10 How. 376, 13 L. ed. 461.

See 45 Cent. Dig. tit. "Taxation," § 322.

Exemption is an exception to a rule and one claiming under an exemption must show himself to be within its terms. Washburn College *v.* Shawnee County, 8 Kan. 344.

If the exemption is conferred upon certain conditions the proof to secure the exemption must bring the case fairly within the terms of the statute. Coulston *v.* Baltimore, 109 Md. 271, 71 Atl. 990.

But where it has been a settled policy and custom in a state, from its foundation, to abstain from the taxation of property held for charitable and religious purposes, such taxation will not be presumed to have been intended by the legislature, in the absence of express language clearly showing such intent. Mattern *v.* Canevin, 213 Pa. St. 588, 63 Atl. 131.

39. *In re* Boyd, 138 Iowa 583, 116 N. W. 700, 17 L. R. A. N. S. 1220.

tion claimed is from the ordinary burden of taxation imposed upon property generally;[40] but if the exemption claimed is not from the ordinary burden of taxation imposed upon persons and property generally, but from a special tax relating only to special cases and affecting only a special class of persons, the burden of such a tax applies only to those who are clearly within the application of the statute.[41]

2. Rules of Construction — a. In General.[42] An alleged statutory grant of exemption from taxation will be strictly construed.[43] Such a privilege or immunity cannot be made out by inference or implication, but must be conferred in terms too clear and plain to be mistaken, and in fact admitting of no reasonable doubt,[44]

40. See *In re* Boyd, 138 Iowa 583, 116 N. W. 700, 17 L. R. A. N. S. 1220; *In re* Enston, 113 N. Y. 174, 21 N. E. 87, 3 L. R. A. 464; and cases cited *supra*, note 38.

41. *In re* Enston, 113 N. Y. 174, 21 N. E. 87, 3 L. R. A. 464; Matter of Mergentine, 129 N. Y. App. Div. 367, 113 N. Y. Suppl. 948 [*affirmed* in 195 N. Y. 572, 88 N. E. 1125]. See also *In re* Boyd, 138 Iowa 583, 116 N. W. 700, 17 L. R. A. N. S. 1220; *In re* Harbeck, 161 N. Y. 211, 55 N. E. 850 [*reversing* 43 N. Y. App Div. 188, 59 N. Y. Suppl. 362]; English *v.* Crenshaw, 120 Tenn. 531, 110 S. W. 210, 127 Am. St. Rep. 1025, 17 L. R. A. N. S. 753. But see *In re* Bull, 153 Cal. 715, 96 Pac. 366.

42. **Repealing existing exemptions** see *supra*, IV, B, 3.

43. *California.*— *In re* Bull, 153 Cal. 715, 96 Pac. 360; Savings, etc., Soc. *v.* San Francisco, 131 Cal. 356, 63 Pac. 665.

Georgia.— McLendon *v.* La Grange, 107 Ga. 356, 33 S. E. 405; Macon *v.* Central R., etc., Co., 50 Ga. 620.

Idaho.— Salisbury *v.* Lane, 7 Ida. 370, 63 Pac. 383.

Illinois.— People *v.* Watseka Camp Meeting Assoc., 160 Ill. 576, 43 N. E. 716; Illinois Cent. R. Co. *v.* Irvin, 72 Ill. 452.

Indiana.— Indianapolis *v.* McLean, 8 Ind. 328.

Kansas.— Miami County *v.* Brackenridge, 12 Kan. 114.

Kentucky.— South Covington, etc., St. R. Co. *v.* Bellevue, 105 Ky. 283, 49 S. W. 23, 20 Ky. L. Rep. 1184, 57 L. R. A. 50.

Louisiana.— State *v.* New Orleans R., etc., Co., 116 La. 144, 40 So. 597; Tulane University *v.* Board of Assessors, 115 La. 1025, 40 So. 445; State *v.* Morgan, 28 La. Ann. 482.

Maine.— Orono *v.* Sigma Alpha Epsilon Soc., 105 Me. 214, 74 Atl. 19.

Maryland.— Lauer *v.* Baltimore, 110 Md. 447, 73 Atl. 162; Sindall *v.* Baltimore, 93 Md. 526, 49 Atl. 645.

Minnesota.— St. Paul *v.* St. Paul, etc., R. Co., 23 Minn. 469.

Missouri.— State *v.* Casey, 210 Mo. 235, 109 S. W. 1.

Nebraska.—Young Men's Christian Assoc. *v.* Douglas County, 60 Nebr. 642, 83 N. W. 924, 52 L. R. A. 123.

New Jersey.— Sisters of Charity *v.* Cory, 73 N. J. L. 699, 65 Atl. 500; Hardin *v.* Morgan, 70 N. J. L. 484, 57 Atl. 155; Little *v.* Bowers, 48 N. J. L. 370, 5 Atl. 178.

New York.— Rochester *v.* Rochester R. Co., 182 N. Y. 99, 74 N. E. 953, 70 L. R. A. 773; People *v.* Davenport, 91 N. Y. 374; People *v.* Sayles, 32 N. Y. App. Div. 197, 53 N. Y. Suppl. 67 [*affirmed* in 157 N. Y. 677, 51 N. E. 1093].

Ohio.— Cincinnati College *v.* State, 19 Ohio 110; State *v.* Cappeller, 8 Ohio Dec. (Reprint) 219, 6 Cinc. L. Bul. 339.

Pennsylvania.— See Com. *v.* Delaware River Iron Ship Bldg., etc., Wks., 2 Dauph. Co. Rep. 232.

Wisconsin.— Douglas County Agricultural Soc. *v.* Douglas County, 104 Wis. 429, 80 N. W. 740. See also Milwaukee, etc., R. Co. *v.* Crawford County, 29 Wis. 116.

United States.— Tucker *v.* Ferguson, 22 Wall. 527, 22 L. ed. 805; North Missouri R. Co. *v.* Maguire, 20 Wall. 46, 22 L. ed. 287. See 45 Cent. Dig. tit. "Taxation," § 322.

44. *Alabama.*— Dauphin St., etc., R. Co. *v.* Kennerly, 74 Ala. 583; Mobile, etc., R. Co. *v.* Kennerly, 74 Ala. 566.

Arizona.—Waller *v.* Hughes, 2 Ariz. 114, 11 Pac. 122.

Arkansas.— Files *v.* Pocahontas, etc., R. Co., 48 Ark. 529, 3 S. W. 817; St. Louis, etc., R. Co. *v.* Berry, 411 Ark. 509; Cairo, etc., R. Co. *v.* Parks, 32 Ark. 131; Biscoe *v.* Coulter, 18 Ark. 423.

California.— Hart *v.* Plum, 14 Cal. 148.

Colorado.—American Smelting, etc., Co. *v.* People, 34 Colo. 240, 82 Pac. 531.

Delaware.— State *v.* Smyrna Bank, 2 Houst. 99, 73 Am. Dec. 699.

District of Columbia.—Alexandria Canal R., etc., Co. *v.* District of Columbia, 1 Mackey 217.

Idaho.— Salisbury *v.* Lane, 8 Ida. 370, 63 Pac. 383.

Illinois.— Presbyterian Theological Seminary *v.* People, 101 Ill. 578.

Kentucky.— German Bank *v.* Louisville, 108 Ky. 377, 56 S. W. 504, 22 Ky. L. Rep. 9.

Louisiana.— Louisiana, etc., R. Co. *v.* State Bd. of Appraisers, 108 La. 14, 32 So. 184; Penrose *v.* Chaffraix, 106 La. 250, 30 So. 718; Ferrell *v.* Penrose, 52 La. Ann. 1481, 27 So. 945; Ivens, etc., Mach. Co. *v.* Parker, 42 La. Ann. 1103, 8 So. 399; New Orleans *v.* New Orleans Mechanics' Soc., 27 La. Ann. 436.

Maine.— Orono *v.* Sigma Alpha Epsilon Soc., 105 Me. 214, 74 Atl. 19.

Maryland.— Schley *v.* Lee, 106 Md. 390, 67 Atl. 252; William Wilkens Co. *v.* Baltimore, 103 Md. 293, 63 Atl. 562; Frederick County *v.* St. Joseph Sisters of Charity, 48 Md. 34; Baltimore *v.* Baltimore, etc., R. Co., 6 Gill

and where it exists it should be carefully scrutinized and not permitted to extend either in scope or duration beyond what the terms of the concession clearly require,[45] or so as to create an absolute and irrevocable exemption unless the language of the statute clearly so requires.[46] But this rule of strict construction will not be applied where the statute itself prescribes the rules for its own interpretation and requires the construction to be liberal,[47] nor will it be applied to a law com-

288, 48 Am. Dec. 531; Gordon *v.* Baltimore, 5 Gill 231.

Massachusetts.— Portland Bank *v.* Apthorp, 12 Mass. 252.

Michigan.—Atty.-Gen. *v.* Detroit, 113 Mich. 388, 71 N. W. 632; East Saginaw Mfg. Co. *v.* East Saginaw, 19 Mich. 259, 2 Am. Rep. 82.

Minnesota.— State *v.* Great Northern R. Co., 106 Minn. 303, 119 N. W. 202.

Missouri.— State *v.* Casey, 210 Mo. 235, 109 S. W. 1; Pacific R. Co. *v.* Cass County, 53 Mo. 17; North Missouri R. Co. *v.* Maguire, 49 Mo. 490, 8 Am. Rep. 141; State *v.* Dulle, 48 Mo. 282; St. Louis *v.* Boatmen's Ins., etc., Co., 47 Mo. 150; Trenton *v.* Humel, 134 Mo. App. 595, 114 S. W. 1131.

New Hampshire.— Brewster *v.* Hough, 10 N. H. 138.

New Jersey.— Little *v.* Bowers, 48 N. J. L. 370, 5 Atl. 178; Freese *v.* Woodruff, 37 N. J. L. 139; State *v.* Newark Collectors, 26 N. J. L. 519; State *v.* Minton, 23 N. J. L. 529.

New York.— Rochester *v.* Rochester R. Co., 182 N. Y. 99, 74 N. E. 953, 70 L. R. A. 773; *In re* Prime, 136 N. Y. 347, 32 N. E. 1091, 18 L. R. A. 713; People *v.* Long Island City, 76 N. Y. 20; People *v.* Roper, 35 N Y. 629; Matter of Rochester Trust, etc., Co., 42 Misc. 581, 87 N. Y. Suppl. 628.

Pennsylvania.— Jones, etc., Mfg. Co. *v.* Com., 69 Pa. St. 137; Commonwealth Bank *v.* Com., 19 Pa. St. 144.

Tennessee.—Nashville, etc., R. Co. *v.* Hodges, 7 Lea 663.

Utah.— Parker *v.* Quinn, 23 Utah 332, 64 Pac. 961; Judge *v.* Spencer, 15 Utah 242, 48 Pac. 1097.

Vermont.— Herrick *v.* Randolph, 13 Vt. 525.

Washington.— Puget Sound Agricultural Co. *v.* Pierce County, 1 Wash. Ter. 159.

Wisconsin.— Douglas County Agricultural Soc. *v.* Douglas County, 104 Wis. 429, 80 N. W. 740; Weston *v.* Shawano County, 44 Wis. 242.

United States.— Mobile, etc., R. Co. *v.* Tennessee, 153 U. S. 486, 14 S. Ct. 968, 38 L. ed. 793; New Orleans City, etc., R. Co. *v.* New Orleans, 143 U. S. 192, 12 S. Ct. 406, 36 L. ed. 121; Chicago, etc., R. Co. *v.* Missouri, 120 U. S. 569; 7 S. Ct. 693, 30 L. ed. 732; Vicksburg, etc., R. Co. *v.* Dennis, 116 U. S. 665, 6 S. Ct. 625, 29 L. ed. 770; Southwestern R. Co. *v.* Wright, 116 U. S. 231, 6 S. Ct. 375, 29 L. ed. 626; Hoge *v.* Richmond, etc., R. Co., 99 U. S. 348, 25 L. ed. 303; Erie R. Co. *v.* Pennsylvania, 21 Wall. 492, 22 L. ed. 595; North Missouri R. Co. *v.* Maguire, 20 Wall. 46, 22 L. ed. 287; Minot *v.* Philadelphia, etc., R. Co., 18 Wall. 206, 21 L. ed. 888; Tomlinson *v.* Branch, 15 Wall. 460, 21 L. ed. 189; Tomlinson *v.* Jessup, 15 Wall. 454, 21 L. ed. 204; Wilmington, etc., R. Co. *v.* Reid, 13 Wall. 264, 20 L. ed. 568; Savings Soc. *v.* Coite, 6 Wall. 594, 18 L. ed. 897; Gilman *v.* Sheboygan, 2 Black 510, 17 L. ed. 305; Jefferson Branch Bank *v.* Skelley, 1 Black 436, 17 L. ed. 173; Ohio L. Ins., etc., Co. *v.* Debolt, 16 How. 416, 14 L. ed. 997; Philadelphia, etc., R. Co. *v.* Maryland, 10 How. 376, 13 L. ed. 461; Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 9 L. ed. 773, 938; Providence Bank *v.* Billings, 4 Pet. 514, 7 L. ed. 939; Davenport Nat. Bank *v.* Mittelbuscher, 15 Fed. 225, 4 McCrary 361.

Canada.— Canadian Pac. R. Co. *v.* Winnipeg, 30 Can. S. Ct. 558; Beauvais *v.* Montreal, 14 Quebec Super. Ct. 385; Limoilou *v.* Seminary of Quebec, 7 Quebec Q. B. 44.

See 45 Cent. Dig. tit. "Taxation," § 322.

Illustrations and applications of rule.— Statutory exemptions from taxation will not be extended by judicial construction to property other than that expressly designated. Thurston County *v.* House of Providence Sisters of Charity, 14 Wash. 264, 44 Pac. 252. A law exempting those persons from the payment of a poll tax who have lost a hand or foot does not exempt one who has lost part of his fingers or whose foot is useless. Bigham *v.* Clubb, 42 Tex. Civ. App. 312, 95 S. W. 675. The fact that in an act amending the charter of a railroad corporation special provision is made for ascertaining the taxes to become due by the corporation to the state, nothing being said about the manner of ascertaining other taxes, is not of itself enough to work an exemption of the property of the corporation from all taxation not levied for state purposes. Silence in regard to such other taxes cannot be construed as a waiver of the right of the state to levy them. There must be something said affirmatively, and which is explicit enough to show clearly that the legislature intended to relieve the corporation from this part of the burden borne by other real and personal property, before such an act shall amount to a contract not to levy them. Bailey *v.* Magwire, 22 Wall. (U. S.) 215, 22 L. ed. 850.

45. Morris Canal, etc., Co. *v.* State Bd. of Assessors, 76 N. J. L. 627, 71 Atl. 328; Yazoo, etc., R. Co. *v.* Thomas, 132 U. S. 174, 10 S. Ct. 68, 33 L. ed. 302; Walters *v.* Western, etc., R. Co., 68 Fed. 1002. See also cases cited *supra*, notes 43, 44.

46. State *v.* Great Northern R. Co., 106 Minn. 303, 119 N. W. 202; Little *v.* Bowers, 46 N. J. L. 300 [*affirmed* in 48 N. J. L. 370, 5 Atl. 178]; Probasco *v.* Moundsville, 11 W. Va. 501. See also *infra*, IV, C, 9, a.

47. People *v.* Chicago Theological Sem-

muting taxes, as this is not so much an exemption as a change in the method of taxation.[48] Further the rule does not call for a strained construction, adverse to the real intention of the legislature, but the judicial interpretation of it must always be reasonable and in accordance with the actual meaning of the law-making power,[49] particularly in the case of exemptions existing by virtue of a contract contained in a corporate charter.[50]

b. Grant of Exemption by Reference to Earlier Grant. An immunity from taxation may be accorded to an individual or corporation by express reference to a similar grant in an earlier statute or charter; but according to the weight of authority, when a corporation is by its charter exempt from taxation, the grant to another corporation of the same "rights, powers, and privileges" possessed by the former does not carry the exemption, these terms not being explicit enough to import a surrender of the taxing power;[51] but the term "immunities" will include an exemption from taxation.[52]

3. Taxes Affected by Exemption.[53] A general grant of exemption from "taxation" or from "all taxes" relieves the person or corporation affected from the payment of county or municipal taxes as well as from those levied for state purposes,[54] and also from special or local taxes which are properly taxes as distinguished

inary, 174 Ill. 177, 51 N. E. 198; Brown University *v.* Granger, 19 R. I. 704, 36 Atl. 720, 36 L. R. A. 847. *Compare* Salisbury *v.* Lane, 7 Ida. 370, 63 Pac. 383.

48. Traverse County *v.* St. Paul, etc, R. Co., 73 Minn. 417, 76 N. W. 217; Binghamton Trust Co. *v.* Binghamton, 72 N. Y. App. Div. 341, 76 N. Y. Suppl. 517; New York, etc., R. Co. *v.* Sabin, 26 Pa. St. 242; Merrill R., etc., Co. *v.* Merrill, 119 Wis. 249, 96 N. W. 686.

The word "owned" will in such a case under a statute exempting property "owned" be construed as including and exempting a leasehold interest. Merrill R., etc., Co. *v.* Merrill, 119 Wis. 249, 96 N. W. 686.

49. *Connecticut.*— Yale University *v.* New Haven, 71 Conn. 316, 42 Atl. 87, 43 L. R. A. 490.

Illinois.— Northwestern University *v.* Hanberg, 237 Ill. 185, 86 N. E. 734.

Minnesota.— State *v.* St. Paul, etc., R. Co., 81 Minn. 422, 84 N. W. 302.

New Jersey.— North Jersey St. R. Co. *v.* Jersey City, 74 N. J. L. 761, 67 Atl. 33.

United States.— Louisville, etc., R. Co. *v.* Gaines, 3 Fed. 266, 2 Flipp. 621.

Reënactment of statute or constitution.— Under the rule that where a statute is reënacted in the same words the interpretation put upon it is adopted with it, an exemption from taxation granted to particular forms of property or capital by a state constitution must be given the same interpretation which it had received under an earlier constitution granting the same exemption. Globe Lumber Co. *v.* Clement, 110 La. 438, 34 So. 595.

50. Northwestern University *v.* Hanberg, 237 Ill. 185, 86 N. E. 734.

51. *Kentucky.*— Nashville, etc., R. Co. *v.* Com., 97 Ky. 162, 30 S. W. 200, 17 Ky. L. Rep. 28.

Maryland.— Anne Arundel County *v.* Annapolis, etc., R. Co., 47 Md. 592.

Mississippi.— Yazoo, etc., R. Co. *v.* Adams, 77 Miss. 194, 24 So. 200, 317, 28 So. 956 [*affirmed* in 180 U. S. 1, 21 S. Ct. 240, 45 L. ed. 395].

Tennessee.— Wilson *v.* Gaines, 9 Baxt. 546.

Texas.— Galveston, etc., R. Co. *v.* State, 38 Tex. 224.

United States.— Gulf, etc., R. Co. *v.* Hewes, 183 U. S. 66, 22 S. Ct. 26, 46 L. ed. 86; Home Ins., etc., Co. *v.* Tennessee, 161 U. S. 198, 16 S. Ct. 476, 40 L. ed. 670; Phœnix F. & M. Ins. Co. *v.* Tennessee, 161 U. S. 174, 16 S. Ct. 471, 40 L. ed. 660; Annapolis, etc., R. Co. *v.* Anne Arundel County, 103 U. S. 1, 26 L. ed. 359; Memphis, etc., R. Co. *v.* Gaines, 97 U. S. 697, 24 L. ed. 1091. But see Tennessee *v.* Whitworth, 117 U. S. 139, 6 S. Ct. 649, 29 L. ed. 833; Humphrey *v.* Pegues, 16 Wall. 244, 21 L. ed. 326; Louisville, etc., R. Co. *v.* Gaines, 3 Fed. 266, 2 Flipp. 621.

See 45 Cent. Dig. tit. "Taxation," § 330; and, generally, *infra*, IV, C, 5, a.

If the word "immunities" is not used, such terms as "rights" and "privileges" are not sufficient. Phœnix F. & M. Ins. Co. *v.* Tennessee, 161 U. S. 174, 16 S. Ct. 471, 40 L. ed. 660.

52. Nichols *v.* New Haven, etc., Co., 42 Conn. 103; State Bd. of Assessors *v.* Morris, etc., R. Co., 49 N. J. L. 193, 7 Atl. 826; Memphis *v.* Phœnix F. & M. Ins. Co., 91 Tenn. 566, 19 S. W. 1044 [*affirmed* in 161 U. S. 193, 16 S. Ct. 466, 40 L. ed. 667]. See also *infra*, IV, C, 5, a.

53. **Exemption from legacy and inheritance tax** see *infra*, XVI, C.

Exemption from municipal taxes generally see MUNICIPAL CORPORATIONS, 28 Cyc. 1685.

54. *Delaware.*—Neary *v.* Philadelphia, etc., R. Co., 7 Houst. 419, 9 Atl. 405.

Louisiana.— Municipality No. 1 *v.* Louisiana State Bank, 5 La. Ann. 394.

Mississippi.— Grand Gulf, etc., R. Co. *v.* Buck, 53 Miss. 246; Southern R. Co. *v.* Jackson, 38 Miss. 334.

Missouri.— State *v.* Hannibal, etc., R. Co., 101 Mo. 136, 13 S. W. 505; Livingston County *v.* Hannibal, etc., R. Co., 60 Mo. 516.

New Jersey.— United New Jersey R., etc.,

from assessments,[55] but not from local assessments for public improvements,[56] unless the language of the grant very clearly includes burdens of this sort.[57] So

Co. *v.* Jersey City, 41 N. J. L. 471; Camden, etc., R. Co. *v.* Appeal Com'rs, 18 N. J. L. 71.

New York.— People *v.* Brooklyn Bd. of Assessors, 141 N. Y. 476, 36 N. E. 508; Johnson Home *v.* Seneca Falls, 37 N. Y. App. Div. 147, 55 N. Y. Suppl. 803; Mutual Ins. Co. *v.* Poughkeepsie, 51 Hun 595, 4 N. Y. Suppl. 93. But see People *v.* Davenport, 91 N. Y. 574, construing a particular exemption as relating only to state taxation, notwithstanding the exempting clause of the statute applied in terms to "assessment or taxation."

North Carolina.— Richmond, etc., R. Co. *v.* Orange County, 74 N. C. 506.

Ohio.— State *v.* State Auditor, 15 Ohio St. 482.

Pennsylvania.— Finney *v.* Mercer County, 1 Serg. & R. 62.

South Carolina.—State Bank *v.* Charleston, 3 Rich. 342. See also Martin *v.* Charleston, 13 Rich. Eq. 50.

Texas.— International, etc., R. Co. *v.* Anderson County, 59 Tex. 654.

United States.—Yazoo, etc., R. Co. *v.* Yazoo, etc., Levee Com'rs, 37 Fed. 24 [*affirmed* in 132 U. S. 190, 10 S. Ct. 74, 33 L. ed. 308].

See 45 Cent. Dig. tit. "Taxation," § 324.

55. Louisiana, etc., R. Co. *v.* Shaw, 121 La. 997, 46 So. 994 (special tax voted in aid of railroad); Louisiana, etc., R. Co. *v.* State Bd. of Appraisers, 120 La. 471, 45 So. 394 (special taxes levied in aid of public schools). See also New Jersey R., etc., Co. *v.* Newark, 27 N. J. L. 185. But see Hendrie *v.* Kalthoff, 48 Mich. 306, 12 N. W. 191, holding that the exemption of a street railroad company from general taxation will not relieve it from the payment of a dog tax.

56. *Arkansas.*— Ft. Smith Paving Dist. No. 5 *v.* Sisters of Mercy, 86 Ark. 109, 109 S. W. 1165, assessment not included, although exemption is from "state, county, municipal and special" taxation.

California.— San Diego *v.* Linda Vista Irr. Dist., 108 Cal. 189, 41 Pac. 291, 35 L. R. A. 33.

Connecticut.—Bridgeport *v.* New York, etc., R. Co., 36 Conn. 255, 4 Am. Rep. 63.

Illinois.— Adams County *v.* Quincy, 130 Ill. 566, 22 N. E. 624, 6 L. R. A. 155; Illinois Cent. R. Co. *v.* Decatur, 126 Ill. 92, 18 N. E. 315, 1 L. R. A. 613 (assessment not include, although exemption is from "all taxation of every kind"); Chicago *v.* Baptist Theological Union, 115 Ill. 245, 2 N. E. 254; Illinois, etc., Canal *v.* Chicago, 12 Ill. 403 (assessment not included, although exemption is from "taxation of every description").

Indiana.— Ft. Wayne First Presb. Church *v.* Ft. Wayne, 36 Ind. 338, 10 Am. Rep. 35.

Kentucky.— Kilgus *v.* Good Shepherd Orphanage, 94 Ky. 439, 444, 22 S. W. 750, 15 Ky. L. Rep. 318; Zable *v.* Louisville Baptist Orphans' Home, 92 Ky. 89, 17 S. W. 212, 13 Ky. L. Rep. 385, 13 L. R. A. 668 (assessment not included, although exemption is from "all taxation by State or local laws for any purpose whatever"); Louisville *v.* McNaughten, 44 S. W. 380, 19 Ky. L. Rep. 1695.

Maryland.—Baltimore *v.* Proprietors Green Mt. Cemetery, 7 Md. 517.

Massachusetts.— Boston Asylum, etc. *v.* Boston St. Com'rs, 180 Mass. 485, 62 N. E. 961; Worcester Agricultural Soc. *v.* Worcester, 116 Mass. 189; Boston Seamen's Friend Soc. *v.* Boston, 116 Mass. 181, 17 Am. Rep. 153.

Michigan.— Lake Shore, etc., R. Co. *v.* Grand Rapids, 102 Mich. 374, 60 N. W. 767, 29 L. R. A. 195; Lefevre *v.* Detroit, 2 Mich. 586.

Missouri.— Sheehan *v.* Good Samaritan Hospital, 50 Mo. 155, 11 Am. Rep. 412.

New Jersey.— Paterson *v.* Society for Establishing Useful Manufactures, 24 N. J. L. 385.

New York.— Roosevelt Hospital *v.* New York, 84 N. Y. 108; *In re* New York, 11 Johns. 77.

Ohio.— Lima *v.* Lima Cemetery Assoc., 42 Ohio St. 128, 51 Am. Rep. 809; Gilmour *v.* Pelton, 5 Ohio Dec. (Reprint) 447, 6 Am. L. Rec. 26.

Pennsylvania.— *In re* Broad St., 165 Pa. St. 475, 30 Atl. 1007; Northern Liberties *v.* St. John's Church, 13 Pa. St. 104; Philadelphia *v.* Franklin Cemetery, 2 Pa. Super. Ct. 569. But see Erie *v.* First Universalist Church, 105 Pa. St. 278; Olive Cemetery Co. *v.* Philadelphia, 93 Pa. St. 129, 39 Am. Rep. 732.

Rhode Island.— *In re* College St., 8 R. I. 474.

South Dakota.— Winona, etc., R. Co. *v.* Watertown, 1 S. D. 46, 44 N. W. 1072.

Wisconsin.— Yates *v.* Milwaukee, 92 Wis. 352, 66 N. W. 248.

United States.— Illinois Cent. R. Co. *v.* Decatur, 147 U. S. 190, 13 S. Ct. 293, 37 L. ed. 132.

See also MUNICIPAL CORPORATIONS, 28 Cyc. 1131.

57. *District of Columbia.*— District of Columbia *v.* Sisters of Visitation, 15 App. Cas. 300, "any and all taxes or assessments."

Massachusetts.— Harvard College *v.* Boston, 104 Mass. 470, "all civil impositions, taxes and rates."

Minnesota.— State *v.* St. Paul, 36 Minn. 529, 32 N. W. 781 ("all public taxes and assessments"); First Div. St. Paul, etc., R. Co. *v.* St. Paul, 21 Minn. 526 ("all taxes and assessments whatever"). See also St. Paul *v.* St. Paul, etc., R. Co., 23 Minn. 469.

New Jersey.— Hudson County Catholic Protectory *v.* Kearney Tp. Committee, 56 N. J. L. 385, 28 Atl. 1043 ("any tax or assessment"); State *v.* Newark, 36 N. J. L. 478, 13 Am. Rep. 464 [*reversing* 35 N. J. L. 157, 10 Am. Rep. 223] ("taxes or assessments").

Rhode Island.— Swan Point Cemetery *v.* Tripp, 14 R. I. 199, "all taxes and assessments."

Wisconsin.— Milwaukee Electric R., etc.,

also, where a tax is imposed by law on corporations of a certain kind, and it is declared to be "in lieu of all other taxation," no additional tax can be imposed upon them either by state or local authority.[58] But an exemption from state and county taxes, or from taxes levied under "a general law" or under "the revenue laws of the state," will not include municipal taxes;[59] and an exemption from municipal taxes, prescribed in the charter of the municipality or by an ordinance, will not affect taxes for county or general state purposes;[60] nor will the exemption of a corporation from taxation on its stock exempt it from the payment of a license-tax.[61]

Co. *v.* Milwaukee, 95 Wis. 42, 69 N. W. 796; Brightman *v.* Kirner, 22 Wis. 54, "any other or further assessment or tax for any purpose whatsoever."

Canada.— Ecclesiastiques de St. Sulpice *v.* Montreal, 16 Can. S. Ct. 399.

The legislature may exempt property from local assessments for improvements as well as from general taxation. Milwaukee Electric R., etc., Co. *v.* Milwaukee, 95 Wis. 42, 69 N. W. 796.

"Impositions."—An exemption of the lands of a manufacturing corporation from "taxes, charges, and impositions" does not relieve it from assessment for street improvements. Paterson *v.* Society for Establishing Useful Manufactures, 24 N. J. L. 385. So also under the charter of a railroad authorizing the taxation of its capital stock and providing that "no other or further tax or imposition" should be levied, the company may be assessed for street improvements upon houses and lots owned by it, but an assessment not upon any property but upon the company itself, without any reference to any benefits derived from the improvement, is the nature of a tax and is within the application of the exemption. New Jersey R., etc., Co. *v.* Newark, 27 N. J. L. 185.

58. *Alabama.*— Mobile, etc., R. Co. *v.* Kennerly, 74 Ala. 566.

Illinois.— Springfield *v.* London Ins. Co., 21 Ill. App. 156.

Indiana.— State Bank *v.* Madison, 3 Ind. 43.

Kentucky.— Franklin County Ct. *v.* Frankfort Deposit Bank, 87 Ky. 370, 9 S. W. 212, 10 Ky. L. Rep. 506; Farmers' Bank *v.* Com., 6 Bush 127. See also Kentucky Cent. R. Co. *v.* Bourbon County, 82 Ky. 497; Kentucky Cent. R. Co. *v.* Pendleton County, 2 S. W. 176, 8 Ky. L. Rep. 517. But see Kentucky Cent. R. Co. *v.* Pendleton County, 2 S. W. 176, 8 Ky. L. Rep. 517, construing a charter provision that a railroad company should pay into the state treasury a certain sum as taxes "and no more" to apply only to state taxes and not to exempt the company from the payment of county taxes.

Maryland.—See Donovan *v.* Baltimore Firemen's Ins. Co., 30 Md. 155.

Michigan.— Le Roy *v.* East Saginaw City R. Co., 18 Mich. 233, 100 Am. Dec. 162.

Missouri.— Mechanics' Bank *v.* Kansas City, 73 Mo. 555.

New Jersey.— Gardner *v.* State, 21 N. J. L. 557; Camden, etc., R. Co. *v.* Appeal Com'rs, 18 N. J. L. 71.

New York.— People *v.* Coleman, 121 N. Y. 542, 25 N. E. 51.

Pennsylvania.— New York, etc., R. Co. *v.* Sabin, 26 Pa. St. 242.

Tennessee.— State *v.* Bank of Commerce, 95 Tenn. 221, 31 S. W. 993; Memphis *v.* Union, etc., Bank, 91 Tenn. 546, 19 S. W. 758. See also Union, etc., Bank *v.* Memphis, (1898) 46 S. W. 557.

Canada.— Way *v.* St. Thomas, 12 Ont. L. Rep. 240.

But see Dunlieth, etc., Bridge Co. *v.* Dubuque, 32 Iowa 427 (construing a statute providing for a gross earnings tax "in lieu of all taxes for any and all purposes" as applying only to state and county taxes and not to municipal taxes); Orange, etc., R. Co. *v.* Alexandria, 17 Gratt. (Va.) 176 (construing a statute providing that a railroad company paying a certain passenger tax should not be assessed with "any tax" on its lands, buildings, or equipment, as applying only to state taxation and not exempting the company from municipal taxes).

But assessments for improvements are not included where the tax is merely declared to be "in lieu of all other taxes" (Bridgeport *v.* New York, etc., R. Co., 36 Conn. 255, 4 Am. Rep. 63), although they are included where the tax imposed is declared to be "in lieu of all taxes and assessments whatever" (First Div. St. Paul, etc., R. Co. *v.* St. Paul, 21 Minn. 526. See also St. Paul *v.* St. Paul, etc., R. Co., 23 Minn. 469).

59. State *v.* Hannibal, etc., R. Co., 113 Mo. 297, 21 S. W. 14; State *v.* Hannibal, etc., R. Co., 101 Mo. 136, 13 S. W. 505; Livingston County *v.* Hannibal, etc., R. Co., 60 Mo. 516; St. Joseph *v.* Hannibal, etc., R. Co., 39 Mo. 476; Hawes Mfg. Co.'s Appeal, 1 Mona. (Pa.) 353; Moore *v.* Holliday, 17 Fed. Cas. No. 9,765, 4 Dill. 52. And see Gorum *v.* Mills, 34 N. J. L. 177.

60. Jackson *v.* Meredith, 47 Mo. 89; Jefferson County *v.* Watertown, 98 N. Y. App. Div. 494, 90 N. Y. Suppl. 790; People *v.* Forrest, 29 Hun (N. Y.) 548 [*affirmed* in 97 N. Y. 97].

School taxes.— A railroad company is not exempt from the payment of a school tax under a city by-law which exempts it from all "municipal taxes." Winnipeg *v.* Canadian Pac. R. Co., 12 Manitoba 581. *Compare* Regina *v.* Bennett, 27 Ont. 314.

61. New Orleans *v.* New Orleans Canal, etc., Co., 32 La. Ann. 104.

But if the exemption is from any "tax or license" the words "tax or license" are not

4. Acquisition of Property by Exempt Person or Corporation. A general grant of exemption from taxation may extend to all property subsequently acquired by the exempt person or corporation, whether previously taxable or not, if such is the manifest intent of the statute;[62] but generally if a railroad or other corporation acquires the property or franchises of a similar corporation, it cannot extend its own exemption from taxation to cover the property so acquired, if that was previously taxable.[63] And even where an institution, such as a church or school, enjoys an exemption from taxes on all the property which it may acquire and hold, still it must assume the payment of taxes assessed for the current fiscal year on any property which it purchases or acquires otherwise.[64]

5. Transfer of Exemption — a. In General. Exemption from taxation granted by the legislature to an individual or a corporation is not a franchise, nor is it an estate or interest inherent in or running with the particular property exempted; but it is a mere privilege personal to the grantee; and unless there is express statutory authority therefor, the exemption will not pass to a successor of the corporation or to a person taking the property by sale, assignment, or other transfer.[65] So in construing grants of exemption they will be construed as per-

used synonymously and the company is exempt from payment of all taxes and not merely from paying a license-tax. Bowling Green *v.* Kentucky Masonic Mut. L. Ins. Co., 5 Ky. L. Rep. 697.

62. Northwestern University *v.* Hanberg, 237 Ill. 185, 86 N. E. 734; Proprietors Rural Cemetery *v.* Worcester County, 152 Mass. 408, 25 N. E. 618, 10 L. R. A. 365; Southern R. Co. *v.* Jackson, 38 Miss. 334; Franklin Needle Co. *v.* Franklin, 65 N. H. 177, 18 Atl. 318.

63. State *v.* Baltimore, etc., R. Co., 48 Md. 49; Lake Shore, etc., R. Co. *v.* Grand Rapids, 102 Mich. 374, 60 N. W. 767, 29 L. R. A. 195; State *v.* Northern Pac. R. Co., 32 Minn. 294, 20 N. W. 234; Southwestern R. Co. *v.* Wright, 116 U. S. 231, 6 S. Ct. 375, 29 L. ed. 626; Burlington, etc., R. Co. *v.* Putnam County, 4 Fed. Cas. No. 2,169, 5 Dill. 289. But see Southern R. Co. *v.* Jackson, 38 Miss. 334.

64. McHenry Baptist Church *v.* McNeal, 86 Miss. 22, 38 So. 195; People *v.* Wells, 179 N. Y. 524, 71 N. E. 1136 [*affirming* 92 N. Y. App. Div. 622, 87 N. Y. Suppl. 1143]; Ætna Ins. Co. *v.* New York, 153 N. Y. 331, 47 N. E. 593; Colored Orphans Benefit Assoc. *v.* New York, 104 N. Y. 581, 12 N. E. 279; St. Francis Sisters of Poor *v.* New York, 51 Hun (N. Y.) 355, 3 N. Y. Suppl. 433 [*affirmed* in 112 N. Y. 677, 20 N. E. 411]; People *v.* Sawyer, 27 N. Y. Suppl. 202; Humphreys *v.* Little Sisters of Poor, 7 Ohio Dec. (Reprint) 194, 1 Cinc. L. Bul. 286; Philadelphia *v.* Pennsylvania Co. for Instruction of Blind, 214 Pa. St. 138, 63 Atl. 420; Philadelphia *v.* Barber, 160 Pa. St. 123, 28 Atl. 644. See also St. James Church *v.* New York, 41 Hun (N. Y.) 309; Church of St. Monica *v.* New York, 55 N. Y. Super. Ct. 160. But see Hennepin County *v.* St. Paul, etc., R. Co., 33 Minn. 534, 24 N. W. 196.

65. *Arkansas.*— Arkansas Midland R. Co. *v.* Berry, 44 Ark. 17; Memphis, etc., R. Co. *v.* Berry, 41 Ark. 436.

Connecticut.— New Haven *v.* Sheffield, 30 Conn. 160.

District of Columbia.— Alexandria Canal R., etc., Co. *v.* District of Columbia, 1 Mackey 217.

Florida.— Bloxham *v.* Florida Cent. R. Co., 35 Fla. 625, 17 So. 902.

Iowa.— Long *v.* Olson, 115 Iowa 388, 88 N. W. 933.

Kentucky.— Com. *v.* Nashville, etc., R. Co., 93 Ky. 430, 20 S. W. 383; Com. *v.* Masonic Temple Co., 87 Ky. 349, 8 S. W. 699; Com. *v.* Owensboro, etc., R. Co., 81 Ky. 572; Evansville, etc., R. Co. *v.* Com., 9 Bush 438.

Maryland.—Baltimore, etc., R. Co. *v.* Ocean City, 89 Md. 89, 42 Atl. 922.

Minnesota.— State *v.* Great Northern R. Co., 106 Minn. 303, 119 N. W. 202; State *v.* Chicago, etc., R. Co., 106 Minn. 290, 119 N. W. 211. But see Stevens County *v.* St. Paul, etc., R. Co., 36 Minn. 467, 31 N. W. 942.

Missouri.— State *v.* Chicago, etc., R. Co., 89 Mo. 523, 14 S. W. 522; Lionberger *v.* Rowse, 43 Mo. 67.

New Jersey.— Morris Canal, etc., Co. *v.* State Assessors, 76 N. J. L. 627, 71 Atl. 328.

New York.— Rochester *v.* Rochester R. Co., 182 N. Y. 99, 74 N. E. 953 [*reversing* 98 N. Y. App. Div. 521, 91 N. Y. Suppl. 87].

Tennessee.— State *v.* Mercantile Bank, 95 Tenn. 212, 31 S. W. 989; Nashville, etc., Turnpike Co. *v.* White, 92 Tenn. 370, 22 S. W. 75; Memphis *v.* Phœnix F. & M. Ins. Co., 91 Tenn. 566, 19 S. W. 1044; State *v.* Butler, 15 Lea 104; State *v.* Whitworth, 8 Lea 594; Wilson *v.* Gaines, 9 Baxt. 546; State *v.* Hicks, 9 Yerg. 486, 30 Am. Dec. 423; Wilson *v.* Gaines, 3 Tenn. Ch. 597.

Virginia.—Lake Drummond Canal, etc., Co. *v.* Com., 103 Va. 337, 49 S. E. 506, 68 L. R. A. 92.

United States.— Rochester R. Co. *v.* Rochester, 205 U. S. 236, 7 S. Ct. 469, 51 L. ed. 784; Home Ins. Co. *v.* Tennessee, 161 U. S. 200, 16 S. Ct. 476, 40 L. ed. 670; Phœnix F. & M. Ins. Co. *v.* Tennessee, 161 U. S. 174, 16 S. Ct. 471, 40 L. ed. 660; Mercantile Bank *v.* Tennessee, 161 U. S. 161, 16 S. Ct. 461, 40 L. ed. 656; Picard *v.* East Tennessee R. Co., 130 U. S. 637, 9 S. Ct. 640, 32 L. ed. 1051; Chicago, etc., R. Co. *v.* Missouri, 122 U. S.

sonal and limited to the grantee unless a contrary intention clearly appears.[66] But the legislature may authorize a transfer of the exemption,[67] either by the act originally granting it or by a subsequent statute,[68] unless at the time of the later statute there is some constitutional prohibition against the granting of such an exemption.[69] In the absence of such constitutional prohibition a transfer of the exemption will result from a statute conferring on such successor all the rights and "immunities" of the exempt person or corporation,[70] but if the words "immunities" or "exemptions" are not used, such terms as "franchises," "rights," and "privileges" will not include an exemption from taxation.[71] An exemption may also be transferred where the original grant included the successors and assigns of the grantee;[72] and if the exemption as originally granted was not a personal privilege but an immunity annexed to specific property, it will pass with the

561, 7 S. Ct. 1300, 30 L. ed. 1135; Chesapeake, etc., R. Co. *v.* Miller, 114 U. S. 176, 5 S. Ct. 813, 29 L. ed. 121; Memphis, etc., R. Co. *v.* Berry, 112 U. S. 609, 5 S. Ct. 299, 28 L. ed. 837; Louisville, etc., R. Co. *v.* Palmes, 109 U. S. 244, 3 S. Ct. 193, 27 L. ed. 922; Morgan *v.* Louisiana, 93 U. S. 217, 23 L. ed. 860; Armstrong *v.* Athens Co., 16 Pet. 281, 10 L. ed. 965; Burlington, etc., R. Co. *v.* Putnam County, 4 Fed. Cas. No. 2,169, 5 Dill. 289.

See 45 Cent. Dig. tit. "Taxation," §§ 326–328.

Assignment of soldier's land warrant.— The exemption from taxation created by the act of congress declaring that lands given as bounty for military service shall, while they continue to be held by the patentee, be exempt from taxation for three years from the date of the patent, is a personal privilege to the soldier receiving the warrant and does not pass with the right of entry to his assignee. Herrick *v.* Sargent, 140 Iowa 590, 117 N. W. 751, 132 Am. St. Rep. 281.

A commuted system of taxation in lieu of property taxation is personal and not assignable. State *v.* Great Northern R. Co., 106 Minn. 303, 119 N. W. 202.

66. Nashville, etc., R. Co. *v.* Com., 97 Ky. 162, 30 S. W. 200, 17 Ky. L. Rep. 28; State *v.* Great Northern R. Co., 106 Minn. 303, 119 N. W. 202; Rochester *v.* Rochester R. Co., 182 N. Y. 99, 74 N. E. 953, 70 L. R. A. 773 [*affirmed* in 205 U. S. 236, 27 S. Ct. 469, 51 L. ed. 784]; Morgan *v.* Louisiana, 93 U. S. 217, 23 L. ed. 860. See also cases cited *supra*, note 65; and, generally, *supra*, IV, C, 2.

67. Grand Canyon R. Co. *v.* Treat, (Ariz. 1908) 95 Pac. 187; Knoxville, etc., R. Co. *v.* Hicks, 9 Baxt. (Tenn.) 442; Rochester R. Co. *v.* Rochester, 205 U. S. 236, 27 S. Ct. 469, 51 L. ed. 784.

68. See Rochester R. Co. *v.* Rochester, 205 U. S. 236, 27 S. Ct. 469, 51 L. ed. 784.

69. State *v.* Great Northern R. Co., 106 Minn. 303, 119 N. W. 202; Keokuk, etc., R. Co. *v.* Missouri, 152 U. S. 301, 14 S. Ct. 592, 38 L. ed. 450; Louisville, etc., R. Co. *v.* Palmes, 109 U. S. 244, 3 S. Ct. 193, 27 L. ed. 922; Trask *v.* Maguire, 18 Wall. (U. S.) 391, 21 L. ed. 938.

A constitutional prohibition against the granting of an exemption applies to the renewal of an existing exemption as well as to its original creation. Trask *v.* Maguire, 18 Wall. (U. S.) 391, 21 L. ed. 938.

70. *Connecticut.*— Nichols *v.* New Haven, etc., Co., 42 Conn. 103.

Florida.— Atlantic, etc., R. Co. *v.* Allen, 15 Fla. 637.

Kentucky.— Com. *v.* Owensboro, etc., R. Co., 81 Ky. 572; Louisville, etc., R. Co. *v.* Christian County, 70 S. W. 180, 24 Ky. L. Rep. 894.

Minnesota.— Stevens County *v.* St. Paul, etc., R. Co., 36 Minn. 467, 31 N. W. 942.

New Jersey.— State Bd. of Assessors *v.* Morris, etc., R. Co., 49 N. J. L. 193, 7 Atl. 826.

Tennessee.— State *v.* Butler, 13 Lea 400; Knoxville, etc., R. Co. *v.* Hicks, 9 Baxt. 442, "rights, privileges and immunities."

71. *Kentucky.*— Nashville R. Co. *v.* Com., 97 Ky. 162, 30 S. W. 200, 17 Ky. L. Rep. 28.

Mississippi.—Adams *v.* Yazoo, etc., R. Co., 77 Miss. 194, 24 So. 200, 317, 28 So. 956, 60 L. R. A. 33.

Tennessee.— Memphis *v.* Phœnix F. & M. Ins. Co., 91 Tenn. 566, 19 S. W. 1044 [*affirmed* in 161 U. S. 193, 16 S. Ct. 466, 40 L. ed. 667]; Wilson *v.* Gaines, 9 Baxt. 546 [*affirmed* in 103 U. S. 417, 26 L. ed. 401]; Wilson *v.* Gaines, 3 Tenn. Ch. 597.

Virginia.— Lake Drummond Canal, etc., Co. *v.* Com., 103 Va. 337, 49 S. E. 506, 68 L. R. A. 92.

United States.— Rochester R. Co. *v.* Rochester, 205 U. S. 236, 27 S. Ct. 469, 51 L. ed. 784; Phœnix F. & M. Ins. Co. *v.* Tennessee, 161 U. S. 174, 16 S. Ct. 471, 40 L. ed. 660.

See also cases cited *supra*, notes 65, 70, and *supra*, IV, C, 2, b.

There has been some conflict of authority upon this question but the rule now is that a statute authorizing or directing the transfer of the rights, privileges, and franchises of a corporation will not include an immunity from taxation. Rochester R. Co. *v.* Rochester, 205 U. S. 236, 27 S. Ct. 469, 51 L. ed. 784.

72. Grand Canyon R. Co. *v.* Treat, (Ariz. 1908) 95 Pac. 187 ("successors or assigns"); International, etc., R. Co. *v.* State, 75 Tex. 356, 12 S. W. 685 ("successors and assigns"); International, etc., R. Co. *v.* Smith County, 65 Tex. 21 ("successors and assigns"). See also State *v.* Colorado Bridge Co., (Tex. Civ. App. 1903) 75 S. W. 818.

property as an appurtenance thereto,[73] unless the continuance of the exemption is contingent upon certain conditions which would cease to exist upon a transfer of the property.[74]

b. Purchase at Judicial Sale. The rule just stated applies where the property and franchises of an exempt corporation are sold under judicial process, whether on foreclosure or otherwise; and the purchaser does not acquire the privilege of exemption,[75] unless under a statute authorizing purchasers at such sales to enjoy the rights and privileges of a corporation and containing terms broad enough to pass an exemption from taxation,[76] or where the statute granting the exemption included the successors and assigns of the grantee,[77] or created an exemption which was not personal but appurtenant to the particular property.[78]

6. Commencement of Exemption — a. In General. Unless otherwise specified, an exemption from taxation begins from the time the statute takes effect, and applies to property then owned by the exempt corporation or institution and attaches at once to that subsequently acquired.[79]

b. Compliance With Conditions Precedent. The statute granting an exemption may postpone the enjoyment of it until the performance of a condition precedent by the grantee, in which case it cannot be claimed until such performance;[80] as, where it is provided that a railroad shall be exempt from taxation upon the completion of its road or a certain portion of it,[81] or that a manufacturing company

73. *Arizona.*— Grand Canyon R. Co. *v.* Treat, (1908) 95 Pac. 187.
Minnesota.— State *v.* Great Northern R. Co., 106 Minn. 303, 119 N. W. 202.
New Jersey.— Morris Canal, etc., Co. *v.* State Bd. of Assessors, 76 N. J. L. 627, 71 Atl. 328.
South Carolina.— Columbia Water Power Co. *v.* Campbell, 75 S. C. 34, 54 S. E. 833.
Tennessee.— State *v.* Hicks, 9 Yerg. 486, 30 Am. Dec. 423.
Texas.—International, etc., R. Co. *v.* State, 75 Tex. 356, 12 S. W. 685.
United States.— New Jersey *v.* Wilson, 7 Cranch 164, 3 L. ed. 303.

74. Morris Canal, etc., Co. *v.* State Bd. of Assessors, 76 N. J. L. 627, 71 Atl. 328.

75. *Arkansas.*—Arkansas Midland R. Co. *v.* Berry, 44 Ark. 17.
Kentucky.—Kentucky Cent. R. Co. *v.* Com., 87 Ky. 661, 10 S. W. 269, 10 Ky. L. Rep. 706.
Louisiana.— State *v.* Morgan, 28 La. Ann. 482.
Maryland.— Baltimore, etc., R. Co. *v.* Wicomico County, 103 Md. 277, 63 Atl. 678.
Minnesota.— State *v.* Great Northern R. Co., 106 Minn. 303, 119 N. W. 202. *Compare* Traverse County *v.* St. Paul, etc., R. Co., 73 Minn. 417, 76 N. W. 217, where the exemption was held to pass to the purchaser but upon the ground that in this case it was not personal but annexed to the particular property.
Missouri.— State *v.* Chicago, etc., R. Co., 89 Mo. 523, 14 S. W. 522.
Tennessee.—Wilson *v.* Gaines, 9 Baxt. 546.
Virginia.— Lake Drummond Canal, etc., Co. *v.* Com., 103 Va. 337, 49 S. E. 506, 68 L. R. A. 92.
United States.— Pickard *v.* East Tennessee, etc., R. Co., 130 U. S. 637, 9 S. Ct. 640, 32 L. ed. 1051; Chesapeake, etc., R. Co. *v.* Miller, 114 U. S. 176, 5 S. Ct. 813, 29 L. ed. 121; Wilson *v.* Gaines, 103 U. S. 417, 26 L. ed. 401; East Tennessee, etc., R. Co. *v.* Hamblen County, 102 U. S. 273, 26 L. ed. 152; Morgan *v.* Louisiana, 93 U. S. 217, 23 L. ed. 860.
See 45 Cent. Dig. tit. "Taxation," § 329.
State as foreclosure purchaser.—Where the state incorporated a railroad, granted it an immunity from taxation, loaned it money on mortgage, foreclosed the mortgage, and thereby acquired all the property, rights, and franchises of the company, it was held that the grant of exemption passed to the state, if not as a franchise, yet as a right appendant to the lands, and was held by the state without merger or extinguishment; and when the state thereafter transferred to another company all the road, rights, and franchises of the former company, the right of exemption from taxation passed with the lands. First Div. St. Paul, etc., R. Co. *v.* Parcher, 14 Minn. 297. And see State *v.* Nashville, etc., R. Co., 12 Lea (Tenn.) 583; Knoxville, etc., R. Co. *v.* Hicks, 9 Baxt. (Tenn.) 442.

76. Knoxville, etc., R. Co. *v.* Hicks, 9 Baxt. (Tenn.) 442 ("rights, privileges and immunities"); Bancroft *v.* Wicomico County, 121 Fed. 874 [*affirmed* in 135 Fed. 977, 70 C. C. A. 287 (*reversed* on other grounds in 203 U. S. 112, 27 S. Ct. 21, 51 L. ed. 112)].

77. Grand Canyon R. Co. *v.* Treat, (Ariz. 1908) 95 Pac. 187; International, etc., R. Co. *v.* Smith County, 65 Tex. 21.

78. Traverse County *v.* St. Paul, etc., R. Co., 73 Minn. 417, 76 N. W. 217.

79. Hardy *v.* Waltham, 7 Pick. (Mass.) 108; Southern R. Co. *v.* Jackson, 38 Miss. 334; State *v.* Minton, 23 N. J. L. 529; State *v.* Harshaw, 76 Wis. 230, 45 N. W. 308.

80. Yazoo, etc., R. Co. *v.* Thomas, 132 U. S. 174, 10 S. Ct. 68, 33 L. ed. 302; Vicksburg, etc., R. Co. *v.* Dennis, 116 U. S. 665, 6 S. Ct. 625, 29 L. ed. 770. See also Coulston *v.* Baltimore, 109 Md. 271, 71 Atl. 990.

81. Dennis *v.* Vicksburg, etc., R. Co., 34 La. Ann. 954; Baton Rouge, etc., R. Co. *v.* Kirkland, 33 La. Ann. 622; Chicago, etc., R. Co. *v.* Pfaender, 23 Minn. 217; Yazoo, etc.,

shall be exempt if a certain amount of capital is employed in its business,[82] or that a person claiming the exemption shall furnish the assessors with a written statement of the property he claims as exempt.[83]

7. Computation of Period of Exemption. Where a statute grants exemption only for a limited number of years, it will be strictly construed, and the property will become taxable immediately upon the expiration of the term;[84] and in no case will such a grant be permitted to extend in duration beyond what the terms of the concession clearly require.[85]

8. Expiration, Revocation, and Surrender — a. In General. A grant of exemption from taxation may be terminated by the expiration of the period of time for which it was given,[86] by a constitutional or statutory provision abolishing or repealing all such exemptions,[87] by the forfeiture or withdrawal of the exempt corporation's charter,[88] by the sale or other disposition of the exempt property, where there is no provision for the exemption following it into the hands of the purchaser,[89] by the cessation of the causes and considerations which

R. Co. *v.* Thomas, 65 Miss. 553, 5 So. 108; Yazoo, etc., R. Co. *v.* Thomas, 132 U. S. 174, 10 S. Ct. 68, 33 L. ed. 302; Vicksburg, etc., R. Co. *v.* Dennis, 116 U. S. 665, 6 S. Ct. 625, 29 L. ed. 770.

82. Gardiner Cotton, etc., Factory Co. *v.* Gardiner, 5 Me. 133. And see Stuart *v.* Montreal, 6 Quebec Q. B. 555.

83. Flower Hill Cemetery Co. *v.* North Bergen Tp., 70 N. J. L. 338, 57 Atl. 1132 [*affirming* 68 N. J. L. 488, 53 Atl. 293].

84. *Alabama.*— Swann *v.* State, 77 Ala. 515.

Iowa.— Fisher *v.* Wisner, 34 Iowa 447.

Michigan.—People *v.* Auditor-Gen., 9 Mich. 134.

Missouri.— Southern Hotel Co. *v.* St. Louis County Ct., 62 Mo. 134.

Wisconsin.—Wisconsin Cent. R. Co. *v.* Comstock, 71 Wis. 88, 36 N. W. 843.

See 45 Cent. Dig. tit. "Taxation," § 334.

85. Tucker *v.* Ferguson, 22 Wall. (U. S.) 527, 22 L. ed. 805; Walters *v.* Western, etc., R. Co., 68 Fed. 1002.

Alternative provisions.— A state statute providing that swamp lands shall be exempt from taxation "for the term of ten years, or until said lands are reclaimed," does not mean an absolute exemption for ten years, but for ten years if not sooner reclaimed, and upon reclamation the exemption ceases. State *v.* Crittenden County Ct., 19 Ark. 360; Memphis, etc., R. Co. *v.* Loftin, 105 U. S. 258, 26 L. ed. 1042. So a statute exempting a railroad from taxation "until a single track of said road shall be completed, for a term, however, not exceeding ten years," imports that in no case shall the exemption continue for more than ten years from the time of the passage of the act. Poughkeepsie, etc., R. Co. *v.* Simpson, 23 Hun (N. Y.) 43 [*affirmed* in 89 N. Y. 636].

Leased railroad.—Where a state leased a railroad to certain persons who were formed into a corporation, and granted it an exemption from taxation, it was held that the exemption expired with the lease, and property of the corporation, afterward held by receivers, was liable to taxation. Walters *v.* Western, etc., R. Co., 68 Fed. 1002.

86. McClellan *v.* Memphis, etc., R. Co., 11 Lea (Tenn.) 336; Wisconsin Cent. R. Co. *v.* Lincoln County, 57 Wis. 137, 15 N. W. 121. And see *supra*, IV, C, 7.

87. *Kentucky.*— Newport *v.* Masonic Temple Assoc., 103 Ky. 592, 45 S. W. 881, 46 S. W. 697, 20 Ky. L. Rep. 266.

Michigan.— Manistee, etc., R. Co. *v.* Railroad Com'r, 118 Mich. 349, 76 N. W. 633.

Mississippi.— Adams *v.* Yazoo, etc., R. Co., 77 Miss. 194, 24 So. 200, 317, 28 So. 956, 60 L. R. A. 33.

Pennsylvania.— Com. *v.* Pittsburgh, 13 Pa. Co. Ct. 5.

Wisconsin.— South Side Gymnastic Assoc. *v.* Milwaukee, 129 Wis. 429, 109 N. W. 109.

United States.—Wicomico County *v.* Bancroft, 203 U. S. 112, 27 S. Ct. 21, 51 L. ed. 112; Yazoo, etc., R. Co. *v.* Adams, 180 U. S. 26, 21 S. Ct. 282, 45 L. ed. 408.

See also *supra*, IV, B, 3.

Constitutional provision not self-executing. — A constitutional provision abolishing all laws exempting property from taxation does not thereby impose any tax, and none can be collected which is not specially authorized by statute. Matter of House Bill No. 18, 9 Colo. 623, 21 Pac. 471; Savannah *v.* Atlantic, etc., R. Co., 21 Fed. Cas. No. 12,385, 3 Woods 432.

88. Minnesota Cent. R. Co. *v.* Donaldson, 28 Minn. 115, 35 N. W. 725. But see Burris *v.* Jessup, etc., Paper Co., 5 Pennew. (Del.) 154, 59 Atl. 860, as to the effect of amending and perpetuating, under the general corporation law, the charter of a corporation originally granted by special act, where this is done at its instance and for its own convenience.

89. Brainard *v.* Colchester, 31 Conn. 407; Ordway *v.* Smith, 53 Iowa 589, 5 N. W. 757; State *v.* Minnesota Cent. R. Co., 36 Minn. 246, 30 N. W. 816; Myers *v.* Akins, 8 Ohio Cir. Ct. 228, 4 Ohio Cir. Dec. 425. See also *supra*, IV, C, 5.

Donation lands granted to soldiers are not subject to taxation until parted with by the original owner but may be taxed after a conveyance thereof. Sandford *v.* Decamp, 8 Watts (Pa.) 542.

But where exemption land is conveyed after the date for assessing property for tax-

formed the basis of the grant [90] or of any of the conditions upon which its continuance depends,[91] by the death of the original grantee,[92] or the diversion of the property to other uses than those in consideration of which it was exempted,[93] and also by a surrender or release of the exemption, either express or implied from acquiescence in the assessment of taxes and their payment without protest.[94]

b. Earning of Specified Income or Dividend. Where exemption from taxation is granted to a corporation until it shall earn net income at a certain rate or declare a dividend, upon the happening of this event the exemption expires and the property becomes liable to taxation; [95] and it is not necessary that there should be any legislative act or resolution declaring the happening of the condition.[96]

9. Revocable and Irrevocable Exemptions — a. In General. It is in the power of a state legislature, unless restrained by some constitutional provision, to exempt property of an individual or corporation from future taxation, in whole or in part, or during a certain period, and such a grant, if plainly expressed and distinctly contractual in its nature and founded upon a consideration, constitutes a binding and irrevocable obligation on the part of the state.[97] But on the other

ation to a person in whose hands it is not exempt, it is not subject to taxation for the current year. Clearwater Timber Co. *v.* Nez Perce County, 155 Fed. 633.

90. See Myers *v.* Akins, 8 Ohio Cir. Ct. 228, 4 Ohio Cir. Dec. 425; Hand *v.* Savannah, etc., R. Co., 12 S. C. 314.

91. Morris Canal, etc., Co. *v.* State Bd. of Assessors, 76 N. J. L. 627, 71 Atl. 328.

92. Kelsey *v.* Badger, 7 Watts (Pa.) 516, holding that donation lands are exempt from taxation only during the life of the soldier who is the original grantee, and that the exemption does not extend to his devisee or heir at law.

93. Electric Traction Co. *v.* New Orleans, 45 La. Ann. 1475, 14 So. 231; Holthaus *v.* Adams County, 74 Nebr. 861, 105 N. W. 632. See also *infra*, IV, E, 2, e, (VII); IV, E, 3, d, (IV).

Use of property for charitable purposes.— Under the charter of a corporation exempting its property and income from taxation "so long as it shall be entirely devoted to Masonic and charitable purposes," a city, seeking to tax the property for a particular year, must show that it was not then used for such purposes. Newport *v.* Masonic Temple Assoc., 103 Ky. 592, 45 S. W. 881, 46 S. W. 697, 20 Ky. L. Rep. 266.

94. State *v.* Wright, 41 N. J. L. 478; New Jersey *v.* Wright, 117 U. S. 648, 6 S. Ct. 907, 29 L. ed. 1021. See also Hand *v.* Savannah, etc., R. Co., 17 S. C. 219.

95. *Arkansas.*— St. Louis, etc., R. Co. *v.* Loftin, 30 Ark. 693.

Connecticut.— State *v.* Norwich, etc., R. Co., 30 Conn. 290.

North Carolina.— Richmond, etc., R. Co. *v.* Brogden, 74 N. C. 707.

West Virginia.— Baltimore, etc., R. Co. *v.* Marshall County, 3 W. Va. 319.

United States.— Parmley *v.* St. Louis, etc., R. Co., 18 Fed. Cas. No. 10,768, 3 Dill. 25.

See 45 Cent. Dig. tit. "Taxation," § 336.

Effect of increase of capital.—Where a railroad company is exempted from taxation until its tolls are sufficient to pay a dividend of six per cent on its capital stock, and subsequently the amount of its capital stock is increased by legislative authority, the company is not liable to taxation until its tolls are sufficient to pay a dividend of six per cent upon the total amount of capital stock as increased. State *v.* Norwich, etc., R. Co., 30 Conn. 290.

96. Baltimore, etc., R. Co. *v.* Marshall County, 3 W. Va. 319.

97. *Arizona.*— Bennett *v.* Nichols, 9 Ariz. 138, 80 Pac. 392.

Connecticut.— Osborne *v.* Humphrey, 7 Conn. 335.

Georgia.— State *v.* Western, etc., R. Co., 66 Ga. 563.

Kentucky.— Hodgenville, etc., R. Co. *v.* Com., 34 S. W. 1075, 17 Ky. L. Rep. 1410; Com. *v.* Louisville, etc., R. Co., 31 S. W. 464, 17 Ky. L. Rep. 405.

Missouri.— Mechanics' Bank *v.* Kansas City, 73 Mo. 555.

New Hampshire.— *In re* Opinion of Ct., 58 N. H. 623.

Ohio.— Cincinnati Commercial Bank *v.* Bowman, 1 Handy 246.

Pennsylvania.— Coney *v.* Owen, 6 Watts 435. But see Mott *v.* Pennsylvania R. Co., 30 Pa. St. 9, 72 Am. Dec. 664, holding that the legislature has no power to grant an irrevocable exemption from taxation which will be binding upon future legislatures.

Tennessee.—Knoxville, etc., R. Co. *v.* Hicks, 9 Baxt. 442.

Texas.— International, etc., R. Co. *v.* State, 75 Tex. 356, 12 S. W. 685.

Wisconsin.— Weston *v.* Shawano County, 44 Wis. 242.

United States.— Northwestern University *v.* People, 99 U. S. 309, 25 L. ed. 387 [*reversing* 80 Ill. 333, 22 Am. Rep. 187]; Jefferson Branch Bank *v.* Skelley, 1 Black 436, 17 L. ed. 173; Louisville, etc., R. Co. *v.* Gaines, 3 Fed. 266, 2 Flipp. 621.

Canada.— Alexander *v.* Huntsville, 24 Ont. 665. See also Henderson *v.* Stisted Tp., 17 Ont. 673.

See 45 Cent. Dig. tit. "Taxation," § 338.

Exemptions in corporate charters see *infra*, IV, C, 9, b.

Constitutional prohibition.— Where the state has adopted a constitution which pro-

hand, in virtue of the control of the state over the whole subject of taxation, it is always competent for the legislature to repeal an entire or partial exemption from taxation, and to impose taxes on the property in question, or higher or additional taxes, unless there has been an express contract in limitation of the power;[98] and therefore if such a grant was not in the nature of a contract, but was a mere gratuity, or concession for which no price was paid or service rendered, it is at all times revocable at the pleasure of the legislature.[99] So also if the language of the grant is susceptible of a different construction it will not be construed as contemplating an absolute and irrevocable exemption.[1]

b. Exemptions in Corporate Charters. The charter of a private corporation is a contract between the corporation and the state, and if it contains a grant of exemption from taxation, based on a consideration and accepted by the corporation, this cannot lawfully be revoked or repealed by the legislature;[2] but even

hibits irrepealable grants of exemption, all corporate charters thereafter issued are subject to its provisions and any privilege of exemption which they may contain is revocable. New Orleans *v.* Metropolitan Loan, etc., Bank, 27 La. Ann. 648.

Erroneous belief as to existence or validity of exemption.— Where the constitution forbids the grant of exemptions from taxation, or where the statute of exemption had already been repealed, no individual or corporation can claim an exemption of property merely on the strength of having expended money, constructed its works, or otherwise acted in the erroneous belief that such property was exempt. Covington *v.* Com., 107 Ky. 680, 39 S. W. 836, 19 Ky. L. Rep. 105; Com. *v.* Owensboro, etc., R. Co., 95 Ky. 60, 23 S. W. 868, 15 Ky. L. Rep. 449.

98. State *v.* Great Northern R. Co., 106 Minn. 303, 119 N. W. 202; State *v.* Dulle, 48 Mo. 282; St. Joseph *v.* Hannibal, etc., R. Co., 39 Mo. 476. And see McGehee *v.* Mathis, 21 Ark. 40; State *v.* Wilson, 2 N. J. L. 282.

Property exempt "unless otherwise ordered."— Where the charter of a corporation provided that its property should not be subject to taxation "unless otherwise ordered" by the officers of a certain county, it was held that this provision had none of the characteristics of a contract, but was repealable. Mount Pleasant Cemetery Co. *v.* Newark, 50 N. J. L. 66, 11 Atl. 147.

Compliance with conditions.— Where an exemption from taxation is provided by the general laws of the state upon certain conditions, persons complying with the conditions do not thereby acquire such vested rights as against the state as to deprive a subsequent legislature of the power to alter the law and modify or revoke the exemption. Shiner *v.* Jacobs, 62 Iowa 392, 17 N. W. 613.

99. *Louisiana.*— Louisiana Grand Lodge F. & A. M. *v.* New Orleans, 46 La. Ann. 717, 15 So. 296.

Minnesota.— State *v.* Great Northern R. Co., 106 Minn. 303, 119 N. W. 202.

Mississippi.—Yazoo, etc., R. Co. *v.* Thomas, 65 Miss. 553, 5 So. 108.

New Jersey.—Hanover Tp. *v.* Newark Camp Meeting Assoc., 76 N. J. L. 65, 68 Atl. 753 [*affirmed* in 76 N. J. L. 827, 71 Atl. 1134].

Virginia.— Com. *v.* Hampton Normal, etc., Inst., 106 Va. 614, 56 S. E. 594.

United States.— Gulf, etc., R. Co. *v.* Hewes, 183 U. S. 66, 22 S. Ct. 26, 46 L. ed. 86; Louisiana Grand Lodge *v.* New Orleans, 166 U. S. 143, 17 S. Ct. 523, 41 L. ed. 951.

Canada.— Reg. *v.* Bennett, 27 Ont. 314.

Offer of bounty.— A law offering to all persons a bounty on salt manufactured in the state, together with an exemption of the property used for the purpose, is not a contract in any such sense that it cannot be repealed. East Saginaw Salt Mfg. Co. *v.* East Saginaw, 13 Wall. (U. S.) 373, 20 L. ed. 611.

1. *Minnesota.*— State *v.* Great Northern R. Co., 106 Minn. 303, 119 N. W. 202.

New Jersey.—Little *v.* Bowers, 46 N. J. L. 300 [*affirmed* in 48 N. J. L. 370, 5 Atl. 178].

Virginia.— Com. *v.* Chesapeake, etc., R. Co., 27 Gratt. 344.

West Virginia.— Probasco *v.* Moundsville, 11 W. Va. 501.

United States.— Wells *v.* Savannah, 181 U. S. 531, 21 S. Ct. 697, 45 L. ed. 986.

2. *Arkansas.*— Memphis, etc., R. Co. *v.* Berry, 41 Ark. 436; State *v.* Crittenden County Ct., 19 Ark. 360.

Connecticut.—Hartford First Ecclesiastical Soc. *v.* Hartford, 38 Conn. 274; Seymour *v.* Hartford, 21 Conn. 481; Landon *v.* Litchfield, 11 Conn. 251; Osborne *v.* Humphrey, 7 Conn. 335; Atwater *v.* Woodbridge, 6 Conn. 223, 16 Am. Dec. 46.

Delaware.— State *v.* Smyrna Bank, 2 Houst. 99, 73 Am. Dec. 699.

Florida.— Gonzales *v.* Sullivan, 16 Fla. 791; Atlantic, etc., R. Co. *v.* Allen, 15 Fla. 637.

Georgia.— State *v.* Georgia R., etc. Co., 54 Ga. 423; Central R., etc., Co. *v.* State, 54 Ga. 401.

Illinois.— Northwestern University *v.* Hanberg, 237 Ill. 185, 86 N. E. 734; People *v.* Soldiers' Home, 95 Ill. 561; Neustadt *v.* Illinois Cent. R. Co., 31 Ill. 484; Illinois Cent. R. Co. *v.* McLean County, 17 Ill. 291; State Bank *v.* People, 5 Ill. 303.

Kentucky.— Newport *v.* Masonic Temple Assoc., 103 Ky. 592, 45 S. W. 881, 46 S. W. 697, 20 Ky. L. Rep. 266; Colston *v.* Eastern Cemetery Co., 15 S. W. 245, 12 Ky. L. Rep. 763.

where the exemption is contained in a corporate charter it may lack the elements of a binding contract and constitute a mere gratuity subject to repeal.[3]

c. Reservation of Right to Alter or Amend. If the legislature, in creating a corporation, reserves to itself the right to alter or amend the charter, or if a similar reservation is embodied in the general statute under which corporations are organized, this constitutes a part of the contract itself, and consequently a subsequent revocation or repeal of an exemption from taxation enjoyed by the corporation is not a violation of the obligation of the contract, but is within the rightful power of the legislature.[4] And the same is true, in the absence of such a

Louisiana.— Municipality No. 1 *v.* Louisiana State Bank, 5 La. Ann. 394.

Maine.— State *v.* Knox, etc., R. Co., 78 Me. 92, 2 Atl. 846; State *v.* Dexter, etc., R. Co., 69 Me 44

Maryland.— Baltimore City Appeal Tax Ct. *v.* Baltimore Cemetery Co., 50 Md. 432; Baltimore *v.* Baltimore, etc., R. Co., 6 Gill 288, 48 Am. Dec. 531.

Minnesota.—State *v.* Sioux City, etc., R. Co., 82 Minn. 158, 84 N. W. 794.

Mississippi.— Mobile, etc., R. Co. *v.* Moseley, 52 Miss. 127; O'Donnell *v.* Bailey, 24 Miss. 386.

Missouri.— State *v.* Westminster College, 175 Mo. 52, 74 S. W. 990; State *v.* Mission Free School, 162 Mo. 332, 62 S. W. 998; St. Vincent's College *v.* Schaefer, 104 Mo. 261, 16 S. W. 395; State *v.* Hannibal, etc., R. Co., 101 Mo. 136, 13 S. W. 505; Mechanics' Bank *v.* Kansas City, 73 Mo. 555; Scotland County *v.* Missouri, etc., R. Co., 65 Mo. 123.

New Jersey.— Cooper Hospital *v.* Camden, 68 N. J. L. 691, 54 Atl. 419; State *v.* Railroad Taxation Com'r, 37 N. J. L. 240; Douglass *v.* State, 34 N. J. L. 485; State *v.* Berry, 17 N. J. L. 80.

New York.— Raquette Falls Land Co. *v.* Hoyt, 109 N. Y. App. Div. 119, 95 N. Y. Suppl. 1029 [*affirmed* in 187 N. Y. 550, 80 N. E. 1119]; People *v.* Dohling, 6 N. Y. App. Div. 86, 39 N. Y. Suppl. 765.

North Carolina.— See Raleigh, etc., R. Co. *v.* Reid, 64 N. C. 155.

Ohio.— Matheny *v.* Golden, 5 Ohio St. 361; Cincinnati Commercial Bank *v.* Bowman, 1 Handy 246, 12 Ohio Dec. (Reprint) 125.

Pennsylvania.—Wagner Free Inst. *v.* Philadelphia, 132 Pa. St. 612, 19 Atl. 297, 19 Am. St. Rep. 613; Iron City Bank *v.* Pittsburgh, 37 Pa. St. 340; Mattis *v.* Ruth, 1 Lack. Leg. N. 311. See also Com. *v.* Pottsville Water Co., 94 Pa. St. 516; Erie R. Co. *v.* Com., 3 Brewst. 368.

Rhode Island.— Brown University *v.* Granger, 19 R. I. 704, 36 Atl. 720, 36 L. R. A. 847.

South Carolina.— State *v.* Charleston, 5 Rich. 561.

Tennessee.— Knoxville, etc., R. Co. *v.* Hicks, 9 Baxt. 442; Union Bank *v.* State, 9 Yerg. 490.

Vermont.— See Herrick *v.* Randolph, 13 Vt. 525.

United States.— Gulf, etc., R. Co. *v.* Hewes, 183 U. S. 66, 22 S. Ct. 26, 46 L. ed. 86; Central R., etc., Co. *v.* Wright, 164 U. S. 327, 17 S. Ct. 80, 41 L. ed. 454; St. Anna's Asylum *v.* New Orleans, 105 U. S. 362, 26 L. ed. 1128; Northwestern University *v.* People, 99 U. S. 309, 25 L. ed. 387; Erie R. Co. *v.* Pennsylvania, 21 Wall. 492, 22 L. ed. 595; Pacific R. Co. *v.* Maguire, 20 Wall. 36, 22 L. ed. 282; Minot *v.* Philadelphia, etc., R. Co., 18 Wall. 206, 21 L. ed. 888; Humphrey *v.* Pegues, 16 Wall. 244, 21 L. ed. 326; Wilmington, etc., R. Co. *v.* Reid, 13 Wall. 264, 20 L. ed. 568; Jefferson Branch Bank *v.* Skelley, 1 Black 436, 17 L. ed. 173; Ohio L. Ins., etc., Co. *v.* Debolt, 16 How. 416, 14 L. ed. 997; Gordon *v.* Appeal Tax Ct., 3 How. 133, 11 L. ed. 529; Georgia R., etc., Co. *v.* Wright, 132 Fed. 912; Louisiana Citizens' Bank *v.* Orleans Parish Assessors, 54 Fed. 73; Tennessee *v.* Bank of Commerce, 53 Fed. 735; Yazoo, etc., R. Co. *v.* Levee Com'rs, 37 Fed. 24.

See 45 Cent. Dig. tit. "Taxation," § 399.

Grant of exemption subsequent to charter. —An exemption from taxation conferred upon a corporation subsequent to its creation, and not in the nature of an amendment to its charter, nor based on any new consideration, may be repealed. St. Louis, etc., R. Co. *v.* Loftin, 30 Ark. 693; Grand Lodge F. & A. M. *v.* New Orleans, 44 La. Ann. 659, 11 So. 148.

No exemption from municipal taxation of the business of a street railway company results from provisions in its agreement with the municipality preserving its easements for railway purposes in land to be conveyed by it to the city, and granting it the right to construct and operate its railway through certain streets, subject to the control and regulation of the city officers. Savannah, etc., R. Co. *v.* Savannah, 198 U. S. 392, 25 S. Ct. 690, 49 L. ed. 1097. And see New York *v.* State Bd. of Tax Com'rs, 199 U. S. 53, 25 S. Ct. 715, 50 L. ed. 85.

3. Hanover Tp. *v.* Newark Camp Meeting Assoc., 76 N. J. L. 65, 68 Atl. 753 [*affirmed* in 76 N. J. L. 827, 71 Atl. 1134]; Cooper Hospital *v.* Camden, 68 N. J. L. 691, 54 Atl. 419.

Each case depends on its own facts. In every case there is present the element of an agreement evinced by the acceptance of the charter, and the question necessarily is whether there is such a consideration as will make the agreement a binding contract. Hanover Tp. *v.* Newark Camp Meeting Assoc., 76 N. J. L. 65, 68 Atl. 753 [*affirmed* in 76 N. J. L. 827, 71 Atl. 1134].

Necessity for consideration generally see *infra*, IV, C, 9, d.

4. *Georgia.*— Macon, etc., R. Co. *v.* Goldsmith, 62 Ga. 463. But see Western, etc., R. Co. *v.* State, 54 Ga. 428.

reservation, where the corporation accepts an amendment to its charter,[5] or where at the time of the granting of the charter there was in force a constitutional provision that charters granted by the legislature should be subject to amendment and repeal.[6]

d. Consideration. To support a grant of exemption from taxation as an irrevocable contract there must be a consideration for it, moving to the state or the public, such as the payment of a bonus, the surrender of a right or franchise, the construction of public works, or the undertaking to perform a public service; without this it is a mere gratuity and revocable at will.[7]

10. Waiver or Estoppel to Claim.[8] An exemption from taxation may be lost or forfeited by an express waiver or renunciation of it,[9] by the acceptance of a subsequent legislative act imposing taxes or changing the rate or mode of taxa-

Indiana.— Hanna *v.* Allen County, 8 Blackf. 352.

Maryland.— Baltimore City Appeal Tax Ct. *v.* Baltimore Academy, 50 Md. 437; State *v.* Northern Cent. R. Co., 44 Md. 131; Washington County *v.* Franklin R. Co., 34 Md. 159.

Missouri.— See Mechanics' Bank *v.* Kansas City, 73 Mo. 555, where, however, no right of alteration or repeal was reserved. But see Scotland County *v.* Missouri, etc., R. Co., 65 Mo. 123.

New Jersey.— State *v.* Heppenheimer, 54 N. J. L. 439, 24 Atl. 446; State Bd. of Assessors *v.* Paterson, etc., R. Co., 50 N. J. L. 446, 14 Atl. 610; Morris, etc., R. Co. *v.* Miller, 31 N. J. L. 521.

North Carolina.— See Petersburg R. Co. *v.* Northampton, 81 N. C. 487, where, however, it was held that the reserved power had not been exercised by the legislature.

Pennsylvania.—Wagner Free Inst. *v.* Philadelphia, 132 Pa. St. 612, 19 Atl. 297, 19 Am. St. Rep. 613; Union Imp. Co. *v.* Com., 69 Pa. St. 140; Com. *v.* Fayette County R. Co., 55 Pa. St. 452.

United States.— Louisville Water Co. *v.* Clark, 143 U. S. 1, 12 S. Ct. 346, 36 L. ed. 55; Chesapeake, etc., R. Co. *v.* Miller, 114 U. S. 176, 5 S. Ct. 813, 29 L. ed. 121; Tomlinson *v.* Jessup, 15 Wall. 454, 21 L. ed. 204.

See 45 Cent. Dig. tit. "Taxation," § 340.

But see Com. *v.* Owensboro, etc., R. Co., 95 Ky. 60, 23 S. W. 868, 15 Ky. L. Rep. 449.

5. Owensboro Deposit Bank *v.* Daviess County, 102 Ky. 174, 39 S. W. 1030, 19 Ky. L. Rep. 248, 44 L. R. A. 825; Salisbury Permanent Bldg., etc., Assoc. *v.* Wicomico County, 86 Md. 615, 39 Atl. 425.

6. People *v.* Gass, 190 N. Y. 323, 83 N. E. 64 [*reversing* 119 N. Y. App. Div. 280, 104 N. Y. Suppl. 643].

A purchasing company which purchases the property of a corporation which had been held under a charter exemption from taxation takes such property subject to a constitutional provision reserving to the legislature a right to alter or amend corporate charters and in force at the date of the act creating the purchasing company. Chesapeake, etc., R. Co. *v.* Miller, 114 U. S. 176, 5 S. Ct. 813, 29 L. ed. 121.

7. *Louisiana.*— Citizens' Bank *v.* Bouny, 32 La. Ann. 239.

Maryland.—Baltimore City Appeal Tax Ct. *v.* Grand Lodge A. F. & A. M., 50 Md. 421.

Minnesota.— St. Paul, etc., R. Co. *v.* Parcher, 14 Minn. 297.

Mississippi.— Attala County *v.* Kelly, 68 Miss. 40, 8 So. 376.

New Jersey.— Hanover Tp. *v.* Newark Conference Camp Meeting Assoc., 76 N. J. L. 65, 68 Atl. 753 [*affirmed* in 76 N. J. L. 827, 71 Atl. 1134]; Cooper Hospital *v.* Camden, 68 N. J. L. 691, 54 Atl. 419.

New Mexico.— Santa Fe County *v.* New Mexico, etc., R. Co., 3 N. M. 116, 2 Pac. 376.

North Carolina.— Wilmington, etc., R. Co. *v.* Alsbrook, 110 N. C. 137, 14 S. E. 652.

Pennsylvania.— Jones, etc., Mfg. Co. *v.* Com., 69 Pa. St. 137; Londonderry *v.* Berger, 7 Leg. Gaz. 231.

United States.— Wells *v.* Savannah, 181 U. S. 531, 21 S. Ct. 697, 45 L. ed. 986.

See 45 Cent. Dig. tit. "Taxation," § 341.

Water company supplying city.— The fact that a charter amendment, granting an exemption to a water company, also imposed upon it the duty of furnishing to the city, free of charge, all water needed for fire protection, does not prevent a subsequent revenue act from operating as a repeal of the exemption, since the obligation would fall together with the exemption. Louisville Water Co. *v.* Clark, 143 U. S. 1, 12 S. Ct. 346, 36 L. ed. 55 [*affirming* 90 Ky. 515, 14 S. W. 502]. *Compare* Grant *v.* Davenport, 36 Iowa 396.

The construction of a railroad is a sufficient consideration for the grant of an exemption (Santa Fe County *v.* New Mexico, etc., R. Co., 3 N. M. 116, 2 Pac. 376), particularly where the company is also required to pay a percentage of its gross earnings (First Div. St. Paul, etc., R. Co. *v.* Parcher, 14 Minn. 297).

8. **Estoppel to deny liability for taxes** generally see *supra*, III, A, 1, h.

9. People *v.* Tax Com'rs, 26 N. Y. Suppl. 941; Seaboard, etc., R. Co. *v.* Norfolk County, 83 Va. 195, 2 S. E. 278.

But a corporation whose property is exempt from taxation because of the character and purposes of the concern is not estopped from claiming the exemption by acts or declarations of the officers of another corporation to whose property the new corporation succeeded. Michigan Sanitarium, etc., Assoc. *v.* Battle Creek, 138 Mich. 676, 101 N. W. 855.

tion,[10] by the sale or other disposition of the exempt property,[11] by a change in the organization or business of a corporation, taking it out of the exempted class,[12] by the act of the party in returning the property to the assessors as taxable,[13] or by uncomplaining payment of taxes on it for a number of years,[14] and, according to some of the authorities, by the mere neglect to assert and claim the exemption before the taxing officers.[15]

11. Proceedings to Establish Exemptions. A claim of exemption from taxation, if rejected in the first instance by those charged with the assessment and collection of the tax, may generally be asserted and established before the officer or board whose province is to review and equalize assessments,[16] an application in that behalf being supported by clear and sufficient proof.[17] The decision of such an officer or board, while it is so far in the nature of a judgment as to be protected against collateral attack,[18] is not conclusive, but is subject to review by the courts.[19]

12. Actions to Enforce Exemptions — a. In General. Where the collection of a tax on property which is legally exempt from it is threatened or has been accomplished, the owner's right to the exemption may be asserted and enforced in various forms of proceedings.[20] The existence of the facts and circumstances

10. United R., etc., Co. *v.* Railroad Taxation Com'rs, 37 N. J. L. 240; Petersburg *v.* Petersburg R. Co., 29 Gratt. (Va.) 773; Louisiana Citizens' Bank *v.* Orleans Bd. of Assessors, 54 Fed. 73.

11. Revoir *v.* State, 137 Ind. 332, 36 N. E. 1109. See also Humphreys *v.* Little Sisters of the Poor, 7 Ohio Dec. (Reprint) 194, 1 Cinc. L. Bul. 286; and *supra*, IV, C, 8.

12. Yazoo, etc., R. Co. *v.* Adams, 77 Miss. 194, 24 So. 200, 217, 28 So. 956 [*affirmed* in 180 U. S. 1, 21 S. Ct. 240, 45 L. ed. 395]; Memphis *v.* Memphis City Bank, 91 Tenn. 574, 19 S. W. 1045; Memphis City Bank *v.* Tennessee, 161 U. S. 186, 16 S. Ct. 468, 40 L. ed. 664.

13. Williams *v.* Bettle, 50 N. J. L. 132, 11 Atl. 17; Central Pac. R. Co. *v.* California, 162 U. S. 91, 16 S. Ct. 766, 40 L. ed. 903. But see Charlestown *v.* Middlesex County, 109 Mass. 270, as to effect of mistake in returning exempt property as taxable.

14. Covington Benedictine Order *v.* Central Covington, 99 Ky. 7, 34 S. W. 896, 17 Ky. L. Rep. 1293; New Jersey *v.* Wright, 117 U. S. 648, 6 S. Ct. 907, 29 L. ed. 1021. But see Landon *v.* Litchfield, 11 Conn. 251.

15. Union Waxed, etc., Paper Co. *v.* State Bd. of Assessors, 73 N. J. L. 374, 63 Atl. 1006; King *v.* American Electric Vehicle Co., 70 N. J. Eq. 568, 62 Atl. 381. But see New Jersey Zinc Co. *v.* Hancock, 63 N. J. L. 506, 44 Atl. 207; Hebrew Free School Assoc. *v.* New York, 4 Hun (N. Y.) 446.

16. See Peoria Fair Assoc. *v.* People, 111 Ill. 559 (board of supervisors); Preston *v.* Johnson, 104 Ill. 625 (county board of review); People *v.* Auditor-Gen., 9 Mich. 134 (holding that where lands exempt from taxation have been taxed the auditor-general may reject the taxes on his own motion); Meridian *v.* Phillips, 65 Miss. 362, 4 So. 119 (board of supervisors).

17. People *v.* Wabash R. Co., 138 Ill. 85, 27 N. E. 694; Edison United Phonograph Co. *v.* State Bd. of Assessors, 57 N. J. L. 520, 31 Atl. 1019; State *v.* Binninger, 42 N. J. L. 528; People *v.* New York Tax Com'rs, 64 N. Y. 541; People *v.* Coleman, 16 N. Y. Suppl. 330.

18. Matter of Peek, 80 Hun (N. Y.) 122, 30 N. Y. Suppl. 59.

19. *In re* Borden, 208 Ill. 369, 70 N. E. 310; Peoria Fair Assoc. *v.* People, 111 Ill. 559; Meridian *v.* Phillips, 65 Miss. 362, 4 So. 119. But see People *v.* Kelsey, 108 N. Y. App. Div. 138, 96 N. Y. Suppl. 42, as to review of decision of controller.

The proper remedy is by appeal from the decision of the board and not an independent suit. Adams *v.* Stonewall Cotton Mills, 89 Miss. 865, 43 So. 65.

20. *Alabama.*— Dyer *v.* Mobile Branch Bank, 14 Ala. 622, action of trespass to try title after sale of property.

Idaho.— Utah, etc., R. Co. *v.* Crawford, 1 Ida. 770, defense to action to recover assessed taxes.

Illinois.—Elmwood Cemetery Co. *v.* People, 204 Ill. 468, 68 N. E. 500, claim of exemption may be made by objection to application for judgment for sale of the property for delinquent taxes.

Indiana.— Indianapolis *v.* Langsdale, 29 Ind. 486, action to recover back purchase-money of real estate sold by a city for delinquent taxes.

Louisiana.— Taylor Bros. Iron Works Co. *v.* New Orleans, 44 La. Ann. 554, 11 So. 3, nullity of an assessment of exempt property can be urged at any time.

New York.— People *v.* New York Tax Com'rs, 144 N. Y. 483, 39 N. E. 385 [*reversing* 83 Hun 11, 31 N. Y. Suppl. 769] (certiorari to review assessment); Jamaica, etc., Road Co. *v.* Brooklyn, 123 N. Y. 375, 25 N. E. 476 (when action will lie to set aside tax-sale of land because of an alleged exemption); People *v.* Greensburgh Tax Assessors, 106 N. Y. 671, 12 N. E. 794 (certiorari to review tax assessment); Washington Heights M. E. Church *v.* New York, 20 Hun 297 (action to have tax-sale vacated).

Pennsylvania.— Philadelphia *v.* Pennsyl-

upon which the right to the exemption claimed depends is ordinarily a question of fact,[21] but where the facts are shown or admitted the right to the exemption claimed is a question of law for the court.[22] Where the taxing officers have acted in good faith, they are not to be charged with the costs of any such proceeding, although it results in favor of the exemption claimed.[23]

b. Jurisdiction of Equity. A court of equity has jurisdiction to enjoin proceedings for the enforcement or collection of a tax on property which is legally exempt from its payment,[24] provided there is no other adequate remedy,[25] and provided the complainant will do equity by tendering or offering to pay such

vania Institution, 28 Pa. Super. Ct. 421, defense in scire facias on tax lien.

Utah.— Wey *v.* Salt Lake City, 35 Utah 504, 101 Pac. 381, suit to annul assessment and quiet title.

See 45 Cent. Dig. tit. "Taxation," § 344.

Adjudging exemption for future years.— Where a corporation claimed to be exempt from local taxes, as being a manufacturer of wooden articles, under a constitutional grant of exemption to such manufacturers, not only for the current year but for three years thereafter, it was held that a judgment recognizing the right of exemption was erroneous, as the court will not adjudge a corporation to be exempt from taxation for future years, as conditions existing in one year may be entirely different in the next. Shreveport Creosoting Co. *v.* Shreveport, 119 La. 637, 44 So. 325.

A judgment by default for general taxes does not estop a landowner from raising the objection in an ction of debt for the taxes that the land was exempt from taxation. Elmwood Cemetery Co. *v.* People, 204 Ill. 468, 68 N. E. 500.

21. Swank *v.* Sweetwater Irr., etc., Co., 15 Ida. 353, 98 Pac. 297; People *v.* Illinois Cent. R. Co., (Ill. 1886) 6 N. E. 469.

Necessity for particular use.— Where a railroad company is exempt from taxation on such property as is necessary for carrying out its corporate purposes, a mere declaration under oath of an officer of the company that certain property is necessary will not entitle the company to the exemption, but the judgment of the court must be passed upon the question of necessity in each case under the facts adduced to show the purposes to which the property is devoted. Camden, etc., R., etc., Co. *v.* Woodruff, 36 N. J. L. 94.

22. People *v.* Illinois Cent. R. Co., (Ill. 1886) 6 N. E. 469.

23. Lehigh Valley R. Co. *v.* Newark, 44 N. J. L. 323; People *v.* Peterson, 31 Hun (N. Y.) 421; State *v.* Jervey, 4 Strobh. (S. C.) 304.

24. *Colorado.*— Colorado Farm, etc., Co. *v.* Beerbohm, 43 Colo. 464, 96 Pac. 443.

Illinois.— Rosehill Cemetery Co. *v.* Kern, 147 Ill. 483, 35 N. E. 240; Illinois Cent. R. Co. *v.* Hodges, 113 Ill. 323; McDonough County *v.* Campbell, 42 Ill. 490.

Iowa.— Smith *v.* Osburn, 53 Iowa 474, 5 N. W. 681.

Kentucky.— Ryan *v.* Louisville, 133 Ky. 714, 118 S. W. 992.

Missouri.— Mechanics' Bank *v.* Kansas City, 73 Mo. 555.

Montana.— Northern Pac. R. Co. *v.* Carland, 5 Mont. 146, 3 Pac. 134.

New York.—Ætna Ins. Co. *v.* New York, 153 N. Y. 331, 47 N. E. 593; Congregation Shaarai Tephila *v.* New York, 53 How. Pr. 213.

Ohio.— Matheny *v.* Golden, 5 Ohio St. 361.

Pennsylvania.— St. Mary's Gas Co. *v.* Elk County, 15 Pa. Co. Ct. 411; Scranton City Guard Assoc. *v.* Scranton, 1 Pa. Co. Ct. 550; Steinman *v.* Lancaster, 2 Lanc. Bar, Sept. 3, 1870.

Texas.— Campbell *v.* Wiggins, 2 Tex. Civ. App. 1, 20 S. W. 730.

United States.— South Univ. *v.* Jetton, 155 Fed. 182 [*reversed* on other grounds in 208 U. S. 489, 28 S. Ct. 375, 52 L. ed. 584]; Bailey *v.* Atlantic, etc., R. Co., 2 Fed. Cas. No. 732, 3 Dill. 22.

See 45 Cent. Dig. tit. "Taxation," § 345.

Enjoining delivery of deed.— Where plaintiff's lands were exempt from taxation he may maintain a suit in equity to enjoin the delivery of a deed pursuant to a sale of the land for taxes and to restrain the purchaser from transferring the certificate of sale. Congregation Shaarai Tephila *v.* New York, 53 How. Pr. (N. Y.) 213.

Jurisdiction of federal courts.— A circuit court of the United States has no jurisdiction to enjoin the collection of taxes from a railroad company, where distinct assessments in separate counties, no one of which amounts to two thousand dollars, and for which in case of payment under protest separate suits must be brought to recover back the taxes paid, are joined and make an aggregate of over two thousand dollars. Northern Pac. R. Co. *v.* Walker, 148 U. S. 391, 13 S. Ct. 650, 37 L. ed. 494 [*reversing* 47 Fed. 681].

25. Hoboken Land, etc., Co. *v.* Hoboken, 31 N. J. Eq. 461.

To prevent cloud on title.— Where the assessment of waterworks property of a city will create an apparent lien thereon and a cloud on the title in case the city should wish to contract for an improvement of the property or to sell it before litigation by the ordinary methods to determine whether the property is exempt, equity will interfere by injunction to prevent the threatened cloud. Ryan *v.* Louisville, 133 Ky. 714, 118 S. W. 992.

Failure to set up exemption as defense.— One who fails to set up an exemption by way

taxes as he admits to be due.[26] But equity will not enjoin the collection of an entire tax merely because, in determining the valuation of an aggregate property, some exempt property may have been included as a factor.[27]

c. Pleading. One who claims an exemption from taxation must allege all facts necessary to establish the claim;[28] and in a suit for equitable relief must allege all facts necessary to show the existence of the exemption and his right to the relief demanded.[29]

d. Evidence. One claiming, in any form of action or proceeding, that his property is exempt from taxation must assume the burden of establishing the exemption claimed by him by clear and satisfactory proof[30] of all the facts and

of defense in an action brought to recover the tax cannot subsequently institute an independent equitable suit to enjoin its collection. Utah, etc., R. Co. *v.* Crawford, 1 Ida. 770.

Statutory remedy not exclusive.— In Illinois it is held that the statutory remedy by application to the board of supervisors is not exclusive but merely cumulative, and that while a plaintiff who elects to resort to that remedy will be bound by his election and cannot afterward resort to a suit in equity, he may sue in equity in the first instance to enjoin the collection of a tax assessed upon exempt property. Illinois Cent. R. Co. *v.* Hodges, 113 Ill. 323 [*distinguishing* Preston *v.* Johnson, 104 Ill. 625]. See also Rosehill Cemetery *v.* Kern, 147 Ill. 483, 35 N. E. 240.

26. Louisville *v.* Louisville Bd. of Trade, 90 Ky. 409, 14 S. W. 408, 9 L. R. A. 629; Northern Pac. R. Co. *v.* Walker, 47 Fed. 681 [*reversed* on other grounds in 148 U. S. 391, 13 S. Ct. 650, 37 L. ed. 494].

27. Huck *v.* Chicago, etc., R. Co., 86 Ill. 352; Louisville *v.* Louisville Bd. of Trade, 90 Ky. 409, 14 S. W. 408, 12 Ky. L. Rep. 397, 9 L. R. A. 629.

28. *Arkansas.*—Cairo, etc., R. Co. *v.* Parks, 32 Ark. 131.

Indiana.— Indianapolis *v.* Langsdale, 29 Ind. 486.

Iowa.— Nugent *v.* Dilworth, 95 Iowa 49, 63 N. W. 448.

Ohio.— Humphreys *v.* Little Sisters of Poor, 7 Ohio Dec. (Reprint) 194, 1 Cinc. L. Bul. 286.

Texas.— Campbell *v.* Wiggins, 2 Tex. Civ. App. 1, 20 S. W. 730.

See 45 Cent. Dig. tit. "Taxation," § 344.

29. Louisville *v.* Louisville Bd. of Trade, 90 Ky. 409, 14 S. W. 408, 12 Ky. L. Rep. 397, 9 L. R. A. 629; Campbell *v.* Wiggins, 2 Tex. Civ. App. 1, 20 S. W. 730.

Sufficiency of allegations.— A petition to enjoin the levy of taxes on property only a part of which is exempt must show to what extent the property is exempt. Louisville *v.* Louisville Bd. of Trade, 90 Ky. 409, 14 S. W. 408, 12 Ky. L. Rep. 397, 9 L. R. A. 629. Under a statute exempting property devoted to religious purposes on condition that the deeds to such property shall have been previously recorded, one seeking to enjoin the sale of such property for taxes must allege that the deeds have been recorded. Nugent *v.* Dilworth, 95 Iowa 49, 63 N. W. 448. A petition in an action to enjoin the collection of taxes on money earned by a consolidated railroad company must show that it was earned on that part of the road exempt from taxation. Campbell *v.* Riviere, (Tex. Civ. App. 1893) 22 S. W. 993; Campbell *v.* Wiggins, 2 Tex. Civ. App. 1, 20 S. W. 730. In a suit to enjoin the collection of taxes on the ground that the property was exempt from taxation by reason of the fact that the statute imposed a gross earnings tax in lieu of other taxation, plaintiff must allege a payment or tender of the gross earnings tax. Northern Pac. R. Co. *v.* Walker, 47 Fed. 681 [*reversed* on other grounds in 148 U. S. 391, 13 S. Ct. 650, 37 L. ed. 494].

30. *Idaho.*—Swank *v.* Sweetwater Irr., etc., Co., 15 Ida. 353, 98 Pac. 297.

Illinois.— People *v.* Ravenswood Hospital, 238 Ill. 137, 87 N. E. 305; Sholl *v.* People, 194 Ill. 24, 61 N. E. 1122; Rosehill Cemetery Co. *v.* Kern, 147 Ill. 483, 35 N. E. 240; Illinois Cent. R. Co. *v.* People, 119 Ill. 137, 6 N. E. 451; People *v.* Illinois Cent. R. Co., (1886) 6 N. E. 469.

Iowa.— Bednar *v.* Carroll, 138 Iowa 338, 116 N. W. 315; Nugent *v.* Dilworth, 95 Iowa 49, 63 N. W. 448.

Louisiana.— Methodist Episcopal Church South *v.* New Orleans, 107 La. 611, 32 So. 101; Benedict *v.* New Orleans, 44 La. Ann. 793, 11 So. 41; Ivens, etc., Mach. Co. *v.* Parker, 42 La. Ann. 1103, 8 So. 399; Bakewell *v.* Police Jury, 20 La. Ann. 334.

Michigan.— Michigan Sanitarium, etc., Assoc. *v.* Battle Creek, 138 Mich. 676, 101 N. W. 855.

Mississippi.— Yazoo, etc., R. Co. *v.* Adams, 81 Miss. 90, 32 So. 937.

Montana.— Hale *v.* Jefferson County, 39 Mont. 137, 101 Pac. 973.

New York.— Prosser *v.* Secor, 5 Barb. 607; Jamaica, etc., Road *v.* Brooklyn, 1 N. Y. Suppl. 830.

Pennsylvania.— Com. *v.* Westinghouse Air Brake Co., 151 Pa. St. 276, 24 Atl. 1111, 1113; Delaware County *v.* Sisters of St. Francis, 2 Del. Co. 149. See also Peiper *v.* Lancaster, 10 Lanc. Bar 131.

Tennessee.— South Nashville St. R. Co. *v.* Morrow, 87 Tenn. 406, 11 S. W. 348, 2 L. R. A. 853.

See 45 Cent. Dig. tit. "Taxation," § 344.

Taxation under special law.— Where all property in the state is subject to taxation unless exempt and to be taxed under general laws unless there is some special law for its taxation, the burden of showing that prop-

of all the circumstances essential to the existence of the particular exemption under consideration.[31]

D. Persons and Property Affected — 1. In General — a. Nature and Use of Property. Where the statute enumerates the kinds of property which shall be exempt from taxation, it will be construed with proper strictness;[32] but so as to carry into effect the intention of the legislature.[33] Property belonging to the public and devoted to public uses is always exempt.[34] Where the exemption is determined rather by the use which is made of the property than by its nature, as in the case of exemptions in aid of religious, charitable, or educational institutions, or for the encouragement of manufactures and the development of the resources of the state,[35] a mere intention, at some indefinite time, to devote the property to uses which would render it exempt, will not preclude its taxation in the mean time;[36] and further, the property must be wholly employed in such a use as will render it exempt.[37] If the constitution or statute provides that property used for certain purposes shall be exempt it is the use and not the ownership which determines the right to the exemption,[38] and the owner of the property may claim the exemption, although the use is by another, such as a lessee;[39] but if the exemption applies in terms only to property "owned and used" for such purposes the ownership and use must concur.[40] So also, although the owner of the land and the fee of the land itself may be exempt from taxation, a lessee of

erty is taxable under a special law and not under the general law is upon the one claiming that it is so taxable. St. Paul, etc., R. Co. *v.* Howard, 23 S. D. 34, 119 N. W. 1032.

31. Swank *v.* Sweetwater Irr., etc., Co., 15 Ida. 353, 98 Pac. 297; People *v.* Ravenswood Hospital, 238 Ill. 137, 87 N. E. 305; Delaware County *v.* Sisters of St. Francis, 2 Del. Co. (Pa.) 149. See also cases cited *supra*, note 30.

Evidence held sufficient: To make a *prima facie* case of right to soldier's exemption. White *v.* Marion, 139 Iowa 479, 117 N. W. 254. To show that certain railroad property was exempt within the application of a statute as essential to the carrying out of the corporate purposes of the company. State *v.* Binninger, 42 N. J. L. 528.

32. New Orleans *v.* New Orleans Canal, etc., Co., 32 La. Ann. 104 (holding that the exemption applies only to what is specifically enumerated); Thurston County *v.* Sisters of Charity of House of Providence, 14 Wash. 264, 44 Pac. 252 (holding that exemptions must be strictly construed and are not to be extended by judicial construction to property other than that which is expressly designated). See also Read *v.* Yeager, 104 Ind. 195, 3 N. E. 856.

33. Gerke *v.* Purcell, 25 Ohio St. 229; Steinman *v.* Lancaster, 2 Lanc. Bar (Pa.) Sept. 3, 1870.

34. See *supra*, III, C.

Timber growing on county school lands is exempt from taxation so long as it is owned by the county, but when sold is not exempt from taxes levied after the sale, although it has not been severed from the land. Montgomery *v.* Peach River Lumber Co., (Tex. Civ. App. 1909) 117 S. W. 1061.

35. **Charitable organizations** see *infra*, IV, E, 1.

Educational institutions see *infra*, IV, E, 2.

Manufacturing corporations see *infra*, IV, D, 3, k.

Religious institutions see *infra*, IV, E, 3.

Building summer hotels.— The legislature has the same power to authorize towns to exempt from taxation capital to be invested therein in the erection of summer hotels as it has to authorize the exemption of manufacturing or ship-building establishments. *In re* Opinion of Justices, 70 N. H. 640, 50 Atl. 329.

36. Washburn College *v.* Shawnee County, 8 Kan. 344; Omaha Y. M. C. A. *v.* Douglas County, 60 Nebr. 642, 83 N. W. 924, 52 L. R. A. 123.

37. St. Mary's College *v.* Crowl, 10 Kan. 442; Kansas City Exposition Driving Park *v.* Kansas City, 174 Mo. 425, 74 S. W. 979.

38. Anniston City Land Co. *v.* State, 160 Ala. 253, 48 So. 659; St. Mary's College *v.* Crowl, 10 Kan. 442; Washburn College *v.* Shawnee County, 8 Kan. 344; Scott *v.* Society of Russian Israelites, 59 Nebr. 571, 81 N W. 624; Gerke *v.* Purcell, 25 Ohio St. 229.

If the constitution exempts property "used" for a certain purpose the legislature cannot require that it must be "owned and used" for such purpose in order to be exempt; but it may make such requirement as to property which the constitution does not exempt. Anniston City Land Co. *v.* State, 160 Ala. 253, 48 So. 659.

39. Anniston City Land Co. *v.* State, 160 Ala. 253, 48 So. 659; Scott *v.* Society of Russian Israelites, 59 Nebr. 571, 81 N. W. 624.

40. Anniston City Land Co. *v.* State, 160 Ala. 253, 48 So. 659; Douglas County Agricultural Soc. *v.* Douglas County, 104 Wis. 429, 80 N. W. 740.

Property "owned" within the rule of strict construction of statutes granting exemptions does not apply to or include property leased. Douglas County Agricultural Soc. *v.* Douglas County, 104 Wis. 429, 80 N. W. 740.

such land may be taxed on his leasehold interest therein,[41] or on improvements placed thereon by him.[42]

b. Non-Resident Property. Although it is competent for a state to tax its own citizens upon property which they own in foreign parts, particularly property of an intangible nature,[43] several of the states have chosen specifically to exempt this kind of property, owned by resident citizens, at least where taxes are assessed and paid upon it at the place of its *situs*.[44] And conversely, although credits, investments, and securities of a non-resident owner in the hands of a resident agent for management and control are ordinarily taxable where the agent resides,[45] in at least one state we find a statute exempting property in this situation from taxation.[46] A statute requiring that every person shall be listed "in the county where he resides" does not exempt from taxation property within the state owned by non-residents.[47]

c. Amount of Exemption. Where the statute granting an exemption from taxation specifically limits it to property not exceeding a certain amount or value, its terms will not be extended by implication, but all property over and above the limitation will be held subject to taxation.[48]

2. Individuals and Their Property — a. In General. In many states the revenue laws are framed with a design to prevent the burdens of taxation from falling oppressively upon the poor or indigent, either by exempting their property in general from all taxes up to a small limited amount,[49] or by exempting specifically certain kinds of property, such as the growing crops of the farmer, the tools of the mechanic, or the furniture of the householder.[50]

b. Pensions and Bounties. Money due or payable to a beneficiary under the military pension laws of the United States remains under the control of the federal

41. Jetton *v.* University of the South, 208 U. S. 489, 28 S. Ct. 375, 52 L. ed. 584 [*reversing* 155 Fed. 182].

42. Lee *v.* New Orleans, 28 La. Ann. 426.

43. See *supra*, III, A, 5, b.

44. See State *v.* Darcy, 51 N. J. L. 140, 16 Atl. 160, 2 L. R. A. 350; State *v.* Metz, 32 N. J. L. 199; Bullock *v.* Guilford, 59 Vt. 516, 9 Atl. 360.

45. See *supra*, III, A, 4, d, (II).

46. People *v.* Coleman, 128 N. Y. 524, 28 N. E. 465 [*reversing* 14 N. Y. Suppl. 565]; Williams *v.* Wayne County, 78 N. Y. 561 [*reversing* 14 Hun 343].

On the construction and application of this statute see People *v.* Coleman, 128 N. Y. 524, 28 N. E. 465 [*reversing* 14 N. Y. Suppl. 565]; Williams *v.* Wayne County, 78 N. Y. 561 [*reversing* 14 Hun 343]; People *v.* New York Tax, etc., Com'rs, 59 N. Y. 40; People *v.* Tax, etc., Com'rs, 42 Hun 560; *In re* Smith, 4 N. Y. Suppl. 467.

47. Minturn *v.* Hays, 2 Cal. 590, 56 Am. Dec. 366.

48. Grigsby *v.* Minnehaha County, 6 S. D. 492, 62 N. W. 105; Louisville *v.* Louisville Bank, 174 U. S. 439, 19 S. Ct. 753, 43 L. ed. 1037; Georgia R., etc., Co. *v.* Wright, 132 Fed. 912.

Natural increase of value.—Where the charter of a benevolent society authorizes it to hold real and personal property up to a certain amount and exempts the same from taxation, and it acquires property worth less than the limited amount but which, in the course of time and by the natural increase of value, becomes worth more than that amount, it is taxable on the excess of value over the limited sum. Evangelical Baptist Benev., etc., Soc. *v.* Boston, 192 Mass. 412, 78 N. E. 407.

Yale college.— The charter of this college provided that it should never hold within the state of Connecticut real property free from taxation affording an annual income of more than six thousand dollars. It was held that in case the productive realty of the college exceeded six thousand dollars in annual value, it must elect either to sell the excess or to list the same for taxation; also that the provision of the charter did not permit the college to deal commercially with its exemptions by speculating in vacant lands or executing long leases at nominal rents, and thus evading the public purpose of its exemption; but that vacant lots held by the college, not yielding an income and not held for speculative purposes, were not subject to taxation. Yale University *v.* New Haven, 71 Conn. 316, 42 Atl. 87, 43 L. R. A. 490.

49. Scott *v.* Kerlin, 1 Del. Co. (Pa.) 545; Morristown First Nat. Bank *v.* Morristown, 93 Tenn. 208, 23 S. W. 975, holding that a married woman is entitled to a statutory exemption of one thousand dollars' worth of personal property granted to "each taxpayer," although her husband is also entitled to and has been allowed the same exemption.

50. See the statutes of the several states. And see the cases cited *infra*, this note.

Growing crops.—Alfalfa is not exempt as a "growing crop" (Miller *v.* Kern County, 137 Cal. 516, 70 Pac. 549), nor are fruit trees (Cottle *v.* Spitzer, 65 Cal. 456, 4 Pac. 435.

government while in course of transmission to the pensioner and is not subject to attachment or seizure under any legal or equitable process, but is to inure wholly to the benefit of the pensioner.[51] It is not therefore taxable until after it reaches the exclusive possession of the pensioner, and even then, by statute in several states, it is exempt from all taxes.[52] Moreover, the laws of some of the states extend this exemption from taxation to real or personal property bought by or for the pensioner with his pension money,[53] and if the pension money formed only a part of the price, then the property is exempt to that extent,[54] but only to that extent.[55] Similar exemptions have sometimes been extended to lands granted by way of bounty to settlers, soldiers, and others.[56]

c. Exemption of Particular Classes of Persons. All classes of persons not

52 Am. Rep. 305), or growing ginseng, a plant, the roots of which are the marketable and valuable part, and which require from seven to fifteen years to mature (Kuehn *v.* Antigo, 139 Wis. 132, 120 N. W. 823, 131 Am. St. Rep. 1043).

Household furniture.— Furniture of a householder is exempt under this designation, although it is used in the bed chambers of his boarders or guests. Day *v.* Lawrence, 167 Mass. 371, 45 N. E. 751.

Libraries.—A statute exempting from taxation the "library" of every individual will include a law library owned by a private person. Patterson *v.* Grayling Tp. Bd. of Review, 125 Mich. 126, 83 N. W. 1031, 84 Am. St. Rep. 562.

Tools of mechanic.—A printer's press, types, and other implements used in his business have been held exempt from taxation as the "tools of a mechanic." Smith *v.* Osburn, 53 Iowa 474, 5 N. W. 681. But see Frantz *v.* Dobson, 64 Miss. 631, 2 So. 75, 60 Am. Rep. 68.

Arms.— Under a statute exempting from taxation such "arms and accoutrements" as it is the duty of the taxpayer to keep, beasts of the plow are not exempt. Sherwin *v.* Bugbee, 16 Vt. 439.

An exemption of "the produce of a farm, while owned and held by the producer," grown or produced during the season preceding the time of listing, includes hay cut "on shares" and stored in a barn of the landowner. Jackson *v.* Savage, 79 Conn. 294, 64 Atl. 737.

51. U. S. Rev. St. (1878) § 4747 [U. S. Comp. St. (1901) p. 3279].

52. Bednar *v.* Carroll, 138 Iowa 338, 116 N. W. 315; Manning *v.* Spry, 121 Iowa 191, 96 N. W. 873; People *v.* Williams, 90 Hun (N. Y.) 501, 36 N. Y. Suppl. 65; People *v.* Wells, 10 Misc. (N. Y.) 195, 31 N. Y. Suppl. 310.

Interest received on pension money loaned out by a pensioner is not exempt from taxation. Bednar *v.* Carroll, 138 Iowa 338, 116 N. W. 315.

53. People *v.* Feitner, 157 N. Y. 363, 51 N. E. 1002 [*affirming* 32 N. Y. App. Div. 23, 52 N. Y. Suppl. 622]; Strong *v.* Walton, 47 N. Y. App. Div. 114, 62 N. Y. Suppl. 353; People *v.* Reilly, 41 N. Y. App. Div. 378, 58 N. Y. Suppl. 558; People *v.* Williams, 90 Hun (N. Y.) 501, 36 N. Y. Suppl. 65; Toole *v.* Oneida County, 16 Misc. (N. Y.) 653, 37 N. Y. Suppl. 9 [*affirmed* in 13 N. Y. App. Div. 471, 37 N. Y. Suppl. 9, 43 N. Y. Suppl. 1160]; People *v.* Williams, 6 Misc. (N. Y.) 185, 27 N. Y. Suppl. 23.

Property purchased by the widow of a soldier with pension money received by her from the government is exempt from taxation. People *v.* Williams, 6 Misc. (N. Y.) 185, 27 N. Y. Suppl. 23.

Land purchased with money of a lunatic received as a pension from the United States is exempt from taxation, although the title is taken in the name of the committee of the lunatic. People *v.* Williams, 90 Hun (N. Y.) 50, 36 N. Y. Suppl. 65.

54. Matter of Baumgarten, 39 N. Y. App. Div. 174, 57 N. Y. Suppl. 284; Worden *v.* Oneida County, 35 N. Y. App. Div. 206, 54 N. Y. Suppl. 952; Tucker *v.* Utica, 35 N. Y. App. Div. 173, 54 N. Y. Suppl. 855; McKibben *v.* Oneida County, 25 N. Y. App. Div. 361, 49 N. Y. Suppl. 553; Matter of Peek, 80 Hun (N. Y.) 122, 30 N. Y. Suppl. 59; People *v.* Wells, 10 Misc. (N. Y.) 195, 31 N. Y. Suppl. 310.

Mode of assessment.— Under the New York statute of 1897, which introduces a more stringent exemption in regard to property purchased with pension money, such property is to be assessed in the first instance in the ordinary way, and the petitioner claiming the exemption must state in writing the facts including the amount of pension money used in the purchase. If this exceeds the assessed value of the property it is to be entered as exempt, but if the amount is less than the assessed value the property is exempt only to the extent of the amount of pension money used in the purchase. People *v.* Reilley, 21 Misc. (N. Y.) 363, 47 N. Y. Suppl. 742.

55. Matter of Peck, 80 Hun (N. Y.) 122, 30 N. Y. Suppl. 310; People *v.* Reilley, 21 Misc. (N. Y.) 363, 47 N. Y. Suppl. 742.

56. See Ballance *v.* Tesson, 12 Ill. 326; Sands *v.* Adams County, 11 Iowa 577; Platt *v.* Rice, 10 Watts (Pa.) 352.

Exemption personal.— The exemption from taxation of lands granted to soldiers during the lifetime of such soldiers does not apply to their widows or children, whether the grant is made to the soldier during his lifetime or to the widow or children after his death. Platt *v.* Rice, 10 Watts (Pa.) 352.

specifically exempted by law are subject to pay taxes.[57] In some jurisdictions, however, statutes have from time to time been enacted exempting either entirely or to a limited extent certain classes of persons,[58] such as ministers of the gospel,[59] soldiers,[60] or volunteer firemen.[61] But an exemption of this kind which is personal in its nature does not extend to the family of the person exempt,[62] or pass to one who inherits or acquires the property of such person.[63]

3. Corporations and Their Property — a. In General.[64] In pursuance of the rule of strict construction of statutes granting exemptions,[65] an exemption accorded to a corporation or to corporations of a particular class will be carefully limited to the terms of the grant;[66] and, although a general exemption of a corporation's property will cover all the property necessary to the exercise of its franchise or the accomplishment of the purposes of its incorporation,[67] it is not so as to property

57. Smith *v.* Macon, 20 Ark. 17 (lands of infants and married women are subject to taxation); Gilliland *v.* Citadel Square Baptist Church, 33 S. C. 164, 11 S. E. 684 (land not exempt because owner's name is unknown); Westville *v.* Munro, 32 Nova Scotia 511 (widow's exemption).

58. See the statutes of the several states; and the cases cited *infra*, notes 59–61.

Exemption of Indians.— See Farrington *v.* Wilson, 29 Wis. 383; *In re* New York Indians, 5 Wall. (U. S.) 761, 18 L. ed. 708.

Negroes.—An early Connecticut statute exempted from taxation the property of "persons of color." Johnson *v.* Norwich, 29 Conn. 407. See also Copp *v.* Norwich, 24 Conn. 28, holding that the exemption did not apply in the case of property conveyed by one white person to another in trust for the support of a negro.

The act for the relief of certain persons in the American bottom and granting certain exemptions from taxation applied only to residents whose farms or improvements were submerged or whose crops were damaged or destroyed by the overflow of the Mississippi river and not to owners of town lots in such territory. Wettig *v.* Bowman, 47 Ill. 17.

59. Baldwin *v.* McClinch, 1 Me. 102; Gridley *v.* Clark, 2 Pick. (Mass.) 403; Ruggles *v.* Kimball, 12 Mass. 337; Kidder *v.* French, Smith (N. H.) 155; People *v.* Peterson, 31 Hun (N. Y.) 421; Prosser *v.* Secor, 5 Barb. (N. Y.) 607.

To be entitled to the exemption the minister should be a settled minister over some particular society entitled to his services (Ruggles *v.* Kimball, 12 Mass. 337; Kidder *v.* French, Smith (N. H.) 155), although it is not necessary that the society should be under any legal obligation to pay him any fixed salary (Baldwin *v.* McClinch, 1 Me. 102); and it has also been held that one who has been a minister but has withdrawn from the active duties of his calling on account of age and infirmity is entitled to the exemption if he has not taken up any other occupation (People *v.* Peterson, 31 Hun (N. Y.) 421).

60. White *v.* Marion, 139 Iowa 479, 117 N. W. 254; People *v.* Brooklyn Assessors, 18 Hun (N. Y.) 386 [*affirmed* in 84 N. Y. 610]; Crawford *v.* Burrell Tp., 53 Pa. St. 219. See also Chauvenet *v.* Anne Arundel County, 3 Md. 259, property of officers residing within the grounds of the naval academy at Annapolis.

Valuation of property.— Under the Iowa statute giving soldiers an exemption of eight hundred dollars unless the soldier or his wife owns property of the actual value of five thousand dollars, such property for the purpose of determining the right to the exemption should be taken at its actual and not at its assessed value, and in valuing his property all property owned by him should be included, whether it is subject to taxation or exempt, and the value of a life-estate should also be included. White *v.* Marion, 139 Iowa 479, 117 N. W. 254.

But an exemption from sale under execution, or by virtue of any deed of trust or mortgage, or judgment or decree of any court, does not constitute an exemption from taxation or prevent a sale of the property for non-payment of taxes. Slane *v.* McCarroll, 40 Iowa 61.

61. See People *v.* Cahill, 181 N. Y. 403, 74 N. E. 422 [*affirming* 102 N. Y. App. Div. 620, 92 N. Y. Suppl. 1141], holding, however, that the statutes exempting volunteer firemen of the municipality of Watertown from taxation to the amount of five hundred dollars were intended to apply only to municipal and not to state and county taxes.

62. Crawford *v.* Burrell Tp., 53 Pa. St. 219, holding that a soldier's exemption is a personal privilege and does not extend to his wife.

63. Platt *v.* Rice, 10 Watts (Pa.) 352.

Transfer of exemption generally see *supra*, IV, C, 5.

64. **Liability to taxation** generally see *supra*, III, B.

65. See *supra*, IV, C, 2, a.

66. New Orleans *v.* New Orleans Canal, etc., Co., 32 La. Ann. 104; Singer Mfg. Co. *v.* Heppenheimer, 58 N. J. L. 633, 34 Atl. 1061, 32 L. R. A. 643; Union Canal Co. *v.* Dauphin County, 3 Brewst. (Pa.) 124; Gordon *v.* Appeal Tax Ct., 3 How. (U. S.) 133, 11 L. ed. 529.

A charter provision exempting the stock of a corporation from taxation implies that nothing but the stock shall be exempt and does not exempt the corporation from the payment of a license-tax. New Orleans *v.* New Orleans Canal, etc., Co., 32 La. Ann. 104.

67. Anne Arundel County *v.* Annapolis,

which is merely convenient for increasing its advantages or profits.[68] Where the exemption is made dependent on its annual gains or income not reaching a certain figure, this fact must clearly appear in order to warrant the exemption.[69] The term "residents" in an exemption statute has been held not to include corporations.[70]

b. Capital and Stock. The question as to what is included in an exemption of the "capital," "stock," or "shares of stock" of a corporation depends upon the intention of the legislature.[71] In some cases it is held that since the interests of the corporation in its stock and of the shareholders in their shares are separate and distinct, the exemption of the one does not include the other,[72] and that therefore an exemption of the capital or capital stock of the corporation will not exempt the stock-holders from taxation on their shares.[73] In other cases, however, it is held that an exemption of the corporation from taxation generally or from taxation upon its capital stock will also exempt the shareholders from taxation on their shares,[74] particularly where the charter also provides that all of the corporate property shall be vested in the shareholders;[75] and conversely that an exemption of the shares of stock also exempts the corporation from taxation on its capital stock,[76] or on the property represented thereby or essential to the proper exercise of the corporate franchises,[77] including not only the property but the franchise itself.[78] Where by its charter a corporation is required to pay "in lieu of all other taxes" an annual tax of a certain per cent on the "amount of capital" or "amount of capital stock" paid in, the charter tax is upon the capital stock of the corporation and the shares of the stock-holders are not exempt;[79] but where it is required to pay such a percentage "on each share of stock" the charter tax is upon the shares,[80] and the provision exempts the several shareholders

etc., R. Co., 47 Md. 592; New Jersey R., etc., Co. *v.* Newark Collectors, 26 N. J. L. 519.

68. New Jersey R., etc., Co. *v.* Newark Collectors, 26 N. J. L. 519.

69. Park Bank *v.* Wood, 24 N. Y. 93; Utica Cotton Mfg. Co. *v.* Oneida County, 1 Barb. Ch. (N. Y.) 432.

70. State *v.* Metz, 32 N. J. L. 199, holding that a statute exempting property out of the state belonging to residents of the state does not apply to corporations.

71. Penrose *v.* Chaffraix, 106 La. 250, 30 So. 718; State *v.* Baltimore, etc., R. Co., 48 Md. 49; Central R., etc., Co. *v.* Wright, 164 U. S. 327, 17 S. Ct. 80, 41 L. ed. 454; Tennessee *v.* Whitworth, 117 U. S. 129, 6 S. Ct. 645, 29 L. ed. 830 [*affirming* 22 Fed. 75].

72. Memphis *v.* Memphis City Bank, 91 Tenn. 574, 19 S. W. 1045 [*affirmed* in 161 U. S. 186, 16 S. Ct. 468, 40 L. ed. 664]; Memphis *v.* Home Ins. Co., 91 Tenn. 558, 19 S. W. 1042 [*affirmed* in 161 U. S. 198, 16 S. Ct. 476, 40 L. ed. 670].

73. Memphis *v.* Memphis City Bank, 91 Tenn. 574, 19 S. W. 1045 [*affirmed* in 161 U. S. 186, 16 S. Ct. 468, 40 L. ed. 664]; Memphis *v.* Home Ins. Co., 91 Tenn. 558, 19 S. W. 1042 [*affirmed* in 161 U. S. 198, 16 S. Ct. 476, 40 L. ed. 670].

But if the tax, although nominally upon the shares, is in fact a tax upon the corporation itself, as where the corporation is required to pay the tax in the first instance irrespective of any dividends or profits payable to the shareholders out of which it may repay itself, such tax is within the application of an exemption of the corporation's capital stock. New Orleans *v.* Houston, 119 U. S. 265, 7 S. Ct. 198, 30 L. ed. 411.

74. Penrose *v.* Chaffraix, 106 La. 250, 30 So. 718; State *v.* Powers, 24 N. J. L. 400; State *v.* Branin, 23 N. J. L. 484; Worth *v.* Petersburg R. Co., 89 N. C. 301; Tennessee *v.* Whitworth, 117 U. S. 129, 6 S. Ct. 645, 29 L. ed. 830 [*affirming* 22 Fed. 75] (exemption of "capital stock" construed under the circumstances of the particular case as meaning shares of the shareholders); Gordon *v.* Appeal Tax Ct., 3 How. (U. S.) 133, 11 L. ed. 529.

But the bondholders are not exempt by reason of an exemption of the corporation. State *v.* Branin, 23 N. J. L. 484.

75. Worth *v.* Petersburg R. Co., 89 N. C. 301; Com. *v.* Richmond, etc., R. Co., 81 Va. 355.

76. Hancock *v.* Singer Mfg. Co., 62 N. J. L. 289, 41 Atl. 846, 42 L. R. A. 852. See also Com. *v.* Richmond, etc., R. Co., 81 Va. 355.

77. State *v.* Baltimore, etc., R. Co., 48 Md. 49; Anne Arundel County Com'rs *v.* Annapolis, etc., R. Co., 47 Md. 592 [*affirmed* in 103 U. S. 1, 26 L. ed. 359].

78. State *v.* Baltimore, etc., R. Co., 48 Md. 49.

79. Memphis *v.* Memphis City Bank, 91 Tenn. 574, 19 S. W. 1045 [*affirmed* in 161 U. S. 186, 16 S. Ct. 468, 40 L. ed. 664]; Memphis *v.* Home Ins. Co., 91 Tenn. 558, 19 S. W. 1042 [*affirmed* in 161 U. S. 198, 16 S. Ct. 476, 40 L. ed. 670]. But see Johnson *v.* Com., 7 Dana (Ky.) 338.

80. Union, etc., Bank *v.* Memphis, 101 Tenn. 154, 46 S. W. 557.

from taxation on their shares,[81] but it does not also exempt the corporation from taxation on its capital stock,[82] or on its surplus and undivided profits,[83] or from the payment of an occupation or privilege tax.[84] In order to avoid what is sometimes regarded as double taxation,[85] the statutes frequently provide expressly for the taxation of corporations upon their capital or property and the exemption of the shareholders from taxation on their shares of stock, or *vice versa*;[86] but, strictly speaking, this is rather a mere regulation as to the mode of taxing substantially the same property than an exemption from taxation.[87] It is ordinarily held that an exemption of the capital or capital stock of a corporation includes the property represented thereby, or such as is essential to the carrying on of the corporate purposes of the corporation;[88] but this is not necessarily the case, the question being dependent upon the intention of the legislature.[89] It has been held that a charter provision exempting the stock of a corporation will not exempt the corporation from paying a license-tax.[90]

c. Consolidation of Exempt Corporations. Where a consolidation of two corporations takes place, one of which enjoyed an immunity from taxation, its property continues to be exempt in the hands of the consolidated company, if there is nothing in the statutes to prevent;[91] and conversely, all that part of the property which belonged to the non-exempt corporation continues liable to taxation as before.[92] But where the effect of the consolidation is to dissolve each of

81. Union, etc., Bank *v.* Memphis, 101 Tenn. 154, 46 S. W. 557; State *v.* Hernando Ins. Co., 97 Tenn. 85, 36 S. W. 721; Shelby County *v.* Union, etc., Bank, 161 U. S. 149, 16 S. Ct. 558, 40 L. ed. 650; Bank of Commerce *v.* Tennessee, 161 U. S. 134, 16 S. Ct. 456, 40 L. ed. 645; Farrington *v.* Tennessee, 95 U. S. 679, 24 L. ed. 558 [*reversing* 8 Baxt. (Tenn.) 539].

82. Union, etc., Bank *v.* Memphis, 101 Tenn. 154, 46 S. W. 557; State *v.* Hernando Ins. Co., 97 Tenn. 85, 36 S. W. 721 [*overruling* Memphis *v.* Union, etc., Bank, 91 Tenn. 546, 19 S. W. 758]; Shelby County *v.* Union, etc., Bank, 161 U. S. 149, 16 S. Ct. 558, 40 L. ed. 650; Union, etc., Bank *v.* Memphis, 111 Fed. 561, 49 C. C. A. 455 [*reversed* on other grounds in 189 U. S. 71, 23 S. Ct. 604, 47 L. ed. 712].

83. Shelby County *v.* Union, etc., Bank, 161 U. S. 149, 16 S. Ct. 558, 40 L. ed. 650; Bank of Commerce *v.* Tennessee, 161 U. S. 134, 16 S. Ct. 456, 40 L. ed. 645.

84. Union, etc., Bank *v.* Memphis, 101 Tenn. 154, 46 S. W. 557.

85. See McIver *v.* Robinson, 53 Ala. 456; Jersey City Gaslight Co. *v.* Jersey City, 46 N. J. L. 194; and, generally, *supra*, II, C, 5, c.

86. See McIver *v.* Robinson, 53 Ala. 456; Jersey City Gaslight Co. *v.* Jersey City, 46 N. J. L. 194; Carroll *v.* Alsup, 107 Tenn. 257, 64 S. W. 193; and, generally, *supra*, III, B, 1, g, j.

The stock-holder's exemption cannot be claimed in a case where the corporation itself is not taxed, as in the case of national banks. McIver *v.* Robinson, 53 Ala. 456.

87. Jersey City Gaslight Co. *v.* Jersey City, 46 N. J. L. 194; Carroll *v.* Alsup, 107 Tenn. 257, 64 S. W. 193.

88. *Connecticut.*— New Haven *v.* City Bank, 31 Conn. 106.

Georgia.— Rome R. Co. *v.* Rome, 14 Ga. 275.

Indiana.— Connersville *v.* State Bank, 16 Ind. 105.

Maryland.— Anne Arundel County Com'rs *v.* Annapolis, etc., R. Co., 47 Md. 592 [*affirmed* in 103 U. S. 1, 26 L. ed. 359]; Baltimore *v.* Baltimore, etc., R. Co., 6 Gill 288, 48 Am. Dec. 531.

Missouri.— Scotland County *v.* Missouri, etc., R. Co., 65 Mo. 123.

But see New Orleans Second Municipality *v.* Commercial Bank, 5 Rob. (La.) 151, holding that a provision in the charter of a bank exempting "the capital" of the bank from taxation does not exempt real or personal property of the bank, nothing being exempt except the capital paid in by the stockholders.

89. Central R., etc., Co. *v.* Wright, 164 U. S. 327, 17 S. Ct. 80, 41 L. ed. 454.

90. New Orleans *v.* New Orleans Canal, etc., Co., 32 La. Ann. 104. But see Grand Gulf, etc., R. Co. *v.* Buck, 53 Miss. 246, holding that a charter provision exempting "the capital stock" of a corporation "and all other property" belonging to it prohibits the legislature from imposing a privilege tax.

91. *Kentucky.*— Louisville, etc., R. Co. *v.* Com., 89 Ky. 531, 12 S. W. 1064, 11 Ky. L. Rep. 734.

Mississippi.— Louisville, etc., R. Co. *v.* Taylor, 68 Miss. 361, 8 So. 675.

New Jersey.— Camden, etc., R., etc., Co. *v.* Woodruff, 36 N. J. L. 94.

Texas.— Campbell *v.* Wiggins, 2 Tex. Civ. App. 1, 20 S. W. 730.

United States.— Tennessee *v.* Whitworth, 117 U. S. 139, 6 S. Ct. 649, 29 L. ed. 833; Branch *v.* Charleston, 92 U. S. 677, 23 L. ed. 750; Tomlinson *v.* Branch, 15 Wall. 460, 21 L. ed. 189.

See 45 Cent. Dig. tit. "Taxation," § 365.

Contra.— Arkansas Midland R. Co. *v.* Berry, 44 Ark. 17; St. Louis, etc., R. Co. *v.* Berry, 41 Ark. 509.

92. State *v.* Philadelphia, etc., R. Co., 45

the companies and create a new corporation, it is subject to the laws existing at the date of the consolidation; and hence, although either or both of the constituent companies may have possessed an irrevocable exemption, yet if the statute authorizing the consolidation declares that the new company shall be subject to taxation, or if, in the mean time, a constitutional provision has been adopted prohibiting all such exemptions, the consolidated company is not exempt.[93] The same rule applies if the exemption of one of the constituent companies depended on certain precedent acts which the new company is neither required nor able to do or perform;[94] and even if the new company is vested with "all the rights, privileges, and franchises" of its constituents, it acquires no greater immunity from taxation than they severally enjoyed as to the portions of the property which belonged to them under their respective charters.[95]

d. Banks.[96] In some states motives of policy have led the legislatures to grant an entire or partial exemption from taxation to banking institutions, particularly savings banks,[97] or to exempt the depositors in such banks or the banks themselves in respect to their deposits.[98] Sometimes also the exemption extends to the capital or capital stock of the banks,[99] and while this will not cover surplus

Md. 361, 24 Am. Rep. 511; Wilmington, etc., R. Co. *v.* Alsbrook, 146 U. S. 279, 13 S. Ct. 72, 36 L. ed. 972; Georgia Cent. R., etc., Co. *v.* Georgia, 92 U. S. 665, 23 L. ed. 757; Minot *v.* Philadelphia, etc., R. Co., 18 Wall. (U. S.) 206, 21 L. ed. 888; Philadelphia, etc., R. Co. *v.* Maryland, 10 How. (U. S.) 376, 13 L. ed. 461.

93. *Georgia.*—Atlanta, etc., R. Co. *v.* State, 63 Ga. 483; State *v.* Atlantic, etc., R. Co., 60 Ga. 268.

Indiana.— McMahan *v.* Morrison, 16 Ind. 172, 79 Am. Dec. 418.

Mississippi.— Yazoo, etc., R. Co. *v.* Adams, 81 Miss. 90, 32 So. 937; Adams *v.* Yazoo, etc., R. Co., 77 Miss. 194, 24 So. 200, 317, 28 So. 956, 60 L. R. A. 33.

Missouri.— State *v.* Keokuk, etc., R. Co., 99 Mo. 30, 12 S. W. 290, 6 L. R. A. 222.

Virginia.—Petersburg *v.* Petersburg R. Co., 29 Gratt. 773.

United States.— Yazoo, etc., R. Co. *v.* Vicksburg, 209 U. S. 358, 28 S. Ct. 510, 52 L. ed. 833; Yazoo, etc., R. Co. *v.* Adams, 180 U. S. 1, 21 S. Ct. 240, 45 L. ed. 395; Keokuk, etc., R. Co. *v.* Missouri, 152 U. S. 301, 14 S. Ct. 592, 38 L. ed. 450; St. Louis, etc., R. Co. *v.* Berry, 113 U. S. 465, 5 S. Ct. 529, 28 L. ed. 1055; Atlantic, etc., Co. *v.* Georgia, 98 U. S. 359, 25 L. ed. 185; Keokuk, etc., R. Co. *v.* Scotland County Ct., 41 Fed. 305.

94. State *v.* Maine Cent. R. Co., 66 Me. 488; Yazoo, etc., R. Co. *v.* Adams, 76 Miss. 545, 25 So. 366; Maine Cent. R. Co. *v.* Maine, 96 U. S. 499, 24 L. ed. 836.

95. Adams *v.* Yazoo, etc., R. Co., 77 Miss. 194, 24 So. 200, 28 So. 956; Natchez, etc., R. Co. *v.* Lambert, 70 Miss. 779, 13 So. 33; Chesapeake, etc., R. Co. *v.* Virginia, 94 U. S. 718, 24 L. ed. 310; Minot *v.* Philadelphia, etc., R. Co., 18 Wall. (U. S.) 206, 21 L. ed. 888.

96. Liability to taxation generally see *supra*, III, B, 2, a.

97. See the statutes of the several states. And see Penrose *v.* Chaffraix, 106 La. 250, 30 So. 718; Cape Fear Bank *v.* Deming, 29 N. C. 55; Cape Fear Bank *v.* Edwards, 27 N. C. 516; State Bank *v.* Charleston, 3 Rich. (S. C.) 342.

Savings and general banks.— The fact that a corporation is engaged in a general banking business, in addition to a savings bank business, does not exempt that part of its business done as a savings bank from taxation under the laws applying to other savings banks. Main St. Sav. Bank, etc. *v.* Hinton, (Cal. 1893) 32 Pac. 6.

Insolvent national banks.—As to the abatement of taxes due to the United States from a national bank on its becoming insolvent see Johnston *v.* U. S., 17 Ct. Cl. 157.

Under the Pennsylvania statute of 1897 a bank or savings institution paying a four-mill tax upon the actual value of all the shares of its stock is exempt not only from local taxation but is not required to pay any tax on personal property owned by it. Com. *v.* Clairton Steel Co., 222 Pa. St. 293, 71 Atl. 99.

98. *Massachusetts.*— Suffolk Sav. Bank for Seamen, etc., Petitioner, 149 Mass. 1, 20 N. E. 331, holding that the word "deposits" means all the funds which the bank holds for investment.

New Hampshire.— State *v.* Amoskeag Sav. Bank, 71 N. H. 535, 53 Atl. 739; Rockingham Ten Cent Sav. Bank *v.* Portsmouth, 52 N. H. 17, holding that real estate owned by a savings bank and purchased with the deposits and accumulations is not taxable.

New York.— People *v.* Dederick, 158 N. Y. 414, 53 N. E. 163 [*affirming* 35 N. Y. App. Div. 29, 54 N. Y. Suppl. 519], holding that under an exemption of "the deposits in any bank for savings which are due depositors" such deposits cannot be taxed either against the bank or the depositors.

Vermont.— State *v.* Franklin County Sav. Bank, etc., 74 Vt. 246, 52 Atl. 1069.

United States.— German Sav. Bank *v.* Archbold, 104 U. S. 708, 26 L. ed. 901.

99. State *v.* Orleans Parish Bd. of Assessors, 48 La. Ann. 35, 18 So. 753 [*affirmed* in 167 U. S. 407, 17 S. Ct. 1000, 42 L. ed. 215] (property acquired under foreclosure of

funds and undivided profits,[1] it is generally held to apply to the property in which the capital is actually invested, such as the banking house and other real estate.[2] But if the law authorizes the institution to hold real property for its "place of business," and exempts the same from taxation, portions of its building not used in connection with its banking business are not exempt.[3]

e. Building and Loan Associations.[4] Unless restrained by the constitution,[5] the legislature of a state has power to accord an exemption from taxation to institutions of this class;[6] but the tendency is to restrict such an exemption within the narrowest limits consistent with the plain meaning of the statute.[7]

f. Insurance Companies.[8] Companies of this kind are in some states favored either by an entire exemption of their personal property, or their loans or investments, from all taxation,[9] or by imposing a fixed tax on their franchises, capital, or premium receipts, which is declared to be in lieu of all other taxes.[10]

g. Railroad Companies — (i) *In General.* A statute exempting the property of railroad companies from taxation will be strictly construed and limited to the specific class of corporations intended by the act, and even to those railroads which answer the more particular requirements of the statute.[11] If the

a mortgage given to secure a stock subscription is not "capital" of the bank); People *v.* Coleman, 135 N. Y. 231, 31 N. E. 1022 (statute does not apply to a savings bank having no capital stock); State *v.* Butler, 13 Lea (Tenn.) 400 (exemption may cover an increase of capital stock).

1. People *v.* Coleman, 135 N. Y. 231, 31 N. E. 1022; State *v.* Bank of Commerce, 95 Tenn. 221, 31 S. W. 993; Bank of Commerce *v.* Tennessee, 161 U. S. 134, 16 S. Ct. 456, 40 L. ed. 645.

2. Dyer *v.* Mobile Branch Bank, 14 Ala. 622; New Haven *v.* New Haven City Bank, 31 Conn. 106; State *v.* Tunis, 23 N. J. L. 546; Lackawanna County *v.* Scranton First Nat. Bank, 94 Pa. St. 221. *Compare In re* Tax Cases, 12 Gill & J. (Md.) 117; Farmers,' etc., Nat. Bank *v.* Greene County, 1 Chest. Co. Rep. (Pa.) 129.

3. De Soto Bank *v.* Memphis, 6 Baxt. (Tenn.) 415, 32 Am. Rep. 530; Bank of Commerce *v.* Tennessee, 104 U. S. 493, 26 L. ed. 810. *Compare* New Haven *v.* New Haven City Bank, 31 Conn. 106; Suffolk Sav. Bank for Seamen, etc., Petitioner, 149 Mass. 1, 20 N. E. 331.

4. Liability to taxation generally see *supra*, III, B, 2, e, (I)

5. People's Loan, etc., Assoc. *v.* Keith, 153 Ill. 609, 39 N. E. 1072, 28 L. R. A. 65; State *v.* Workingmen's Bldg., etc., Fund, etc., Assoc., 152 Ind. 278, 53 N. E. 168; Territory *v.* Co-operative Bldg., etc., Assoc., 10 N. M. 337, 62 Pac. 1097.

In Indiana any law directly or indirectly exempting the stock of a building and loan association from assessment at its true cash value is in violation of the constitution. State *v.* Workingmen's Bldg., etc., Fund, etc., Assoc., 152 Ind. 278, 53 N. E. 168.

6. National Loan, etc., Co. *v.* Detroit, 136 Mich. 451, 99 N. W. 380.

7. Deniston *v.* Terry, 141 Ind. 677, 41 N. E. 143 (paid-up stock in a building and loan association not exempt); Marion County *v.* Marion Trust Co., 30 Ind. App. 137, 65 N. E. 589 (personal property in the possession of a receiver of a building association properly assessed for taxation); Baltimore City Appeal Tax Ct. *v.* Rice, 50 Md. 302 (exemption of "mortgages" and of "mortgage debts" does not exempt shares of stock in a building association in which all the capital and funds are invested in mortgages); Bourguignon Bldg. Assoc. *v.* Com., 98 Pa. St. 54 (building association not a "savings institution" within the meaning of the statute).

8. Liability to taxation generally see *supra*, III, B, 2, c.

9. State *v.* Insurance Co. of North America, 55 Md. 492; Ætna Ins. Co. *v.* New York, 153 N. Y. 331, 47 N. E. 593 [*affirming* 7 N. Y. App. Div. 145, 40 N. Y. Suppl. 120].

Guaranty insurance.— A statute taxing the real property of fire and marine insurance companies, and providing that "the personal property, franchise and business of all insurance companies" shall be exempt from taxation except as prescribed in that act, does not apply to a company dealing in guaranty or fidelity insurance. People *v.* Wemple, 58 Hun (N. Y.) 248, 12 N. Y. Suppl. 271 [*affirmed* in 126 N. Y. 623, 27 N. E. 410].

10. See Grennan *v.* Mississippi Home Ins. Co., 70 Miss. 531, 13 So. 228; St. Louis Mut. L. Ins. Co. *v.* St. Louis County Bd. of Assessors, 56 Mo. 503; Memphis *v.* Home Ins. Co., 91 Tenn. 558, 19 S. W. 1042.

11. *Florida.*— Atlantic, etc., R. Co. *v.* Allen, 15 Fla. 637.

Georgia.— Savannah, etc., R. Co. *v.* Morton, 71 Ga. 24.

Mississippi.— Adams *v.* Yazoo, etc., R. Co., 77 Miss. 194, 24 So. 200, 317, 28 So. 956, 60 L. R. A. 33.

Tennessee.—Louisville, etc., R. Co. *v.* State, 8 Heisk. 663.

United States.— North Missouri R. Co. *v.* Maguire, 20 Wall. 46, 22 L. ed. 287.

Canada.— Annapolis County *v.* Windsor, etc., R. Co., 8 Nova Scotia 397.

See 45 Cent. Dig. tit. "Taxation," § 371.

Private railroad.— In Louisiana the intention was to exempt any railroad open to the public and regulated by the law applicable

clause of exemption is expressed in general terms, it will be held to include the franchise of the company and its profits, as well as its physical property,[12] although not outside investments, in the stock or bonds of other companies or the like.[13] In some cases, the language of the exempting statutes has been held broad enough to include all property lawfully owned by the company, whether used in the operation of its road or for other railroad purposes or not;[14] but the tendency, especially under statutes exempting property "necessary" for the purposes of the company, is to restrict the exemption to such property as is actually used or devoted to railroad purposes, and without which the company's business could not be conducted to the full measure of its capacity or duty, and to exclude property used in other forms of business, or which is not a necessary part of the railroad, although convenient to its operation.[15]

to common carriers, whether owned and operated by a corporation, a private society, or an individual; and hence a railroad is exempt, although owned by a limited company and having for its principal function the carrying of logs to a sawmill, if it also runs regular trains for passengers and freight with a fixed schedule of charges. Amos Kent Lumber, etc., Co. *v.* St. Helena Parish Tax Assessors, 114 La. 862, 38 So. 587.

Mining company's railway.— A company incorporated as a mining company, but with authority to construct and operate a railway from its mines to the place of shipment of its coal, and also to operate its railway for general passenger and freight traffic, is entitled to exemption as a "railway company." International Coal Co. *v.* Cape Breton County, 22 Can. Sup. Ct. 305 [*reversing* 24 Nova Scotia 496].

Variations in the intended route of a railroad do not necessarily change the identity of the corporation which builds it or deprive it of its statutory exemption. Cheraw, etc., R. Co. *v.* Anson County, 88 N. C. 519.

Beginning of construction or completion of road as requisite to enjoyment of statutory grant of exemption see Ohio Valley R. Co. *v.* Com., 49 S. W. 548, 20 Ky. L. Rep. 1527; Louisiana, etc., R. Co. *v.* State Bd. of Appraisers, 108 La. 14, 32 So. 184; Manistee, etc., R. Co. *v.* Turner, 115 Mich. 291, 73 N. W. 240.

If the grant of exemption is conditional upon the railroad company relinquishing certain aid previously voted to it, it cannot claim the exemption without compliance with the condition. Shreveport, etc., R. Co. *v.* State Bd. of Appraisers, 52 La. Ann. 1931, 28 So. 246.

A company operating subways belonging to the city of New York under a lease or contract with the city is subject to taxation on any real estate owned by it, but is exempt from taxation on its right or interest acquired under its contract with the city and from taxation on its rolling-stock and equipment, and also from the payment of a special franchise tax. People *v.* State Tax Com'rs, 126 N. Y. App. Div. 610, 110 N. Y. Suppl. 577 [*affirmed* in 195 N. Y. 618, 89 N. E. 1109].

12. Raleigh, etc., R. Co. *v.* Wake County, 87 N. C. 414; Com. *v.* Richmond, etc., R. Co., 81 Va. 355; Wilmington, etc., R. Co. *v.* Reid, 13 Wall. (U. S.) 264, 20 L. ed. 568 [*reversing* 64 N. C. 226]. But see Atlantic, etc., R. Co. *v.* Mecklenburg County, 87 N. C. 129.

13. State *v.* Baltimore, etc., R. Co., 48 Md. 49; Raleigh, etc., R. Co. *v.* Wake County, 87 N. C. 414. And see Bridgeport *v.* Bishop, 33 Conn. 187.

14. Osborn *v.* New York, etc., R. Co., 40 Conn. 491; Northern Pac. R. Co. *v.* Barnes, 2 N. D. 310, 51 N. W. 386; Columbia, etc., R. Co. *v.* Chilberg, 6 Wash. 612, 34 Pac. 163; Milwaukee Electric R., etc., Co. *v.* Milwaukee, 95 Wis. 42, 69 N. W. 796.

15. *Georgia.*— State *v.* Western, etc., R. Co., 66 Ga. 563; Bibb County *v.* Central R., etc., Co., 40 Ga. 646. See also Wright *v.* Southwestern R. Co., 64 Ga. 783.

Maryland.— State *v.* Baltimore, etc., R. Co., 48 Md. 49.

Minnesota.— Whitcomb *v.* Ramsey County, 91 Minn. 238, 97 N. W. 879; St. Paul *v.* St. Paul, etc., R. Co., 39 Minn. 112, 38 N. W. 925.

Mississippi.— Mobile, etc., R. Co. *v.* Moseley, 52 Miss. 127.

New Jersey.— State *v.* Hancock, 35 N. J. L. 537; State *v.* Haight, 35 N. J. L. 40; State *v.* Newark Collectors, 25 N. J. L. 315; State *v.* Mansfield Tp., 23 N. J. L. 510, 57 Am. Dec. 409.

North Carolina.— Raleigh, etc., R. Co. *v.* Wake County, 87 N. C. 414.

Pennsylvania.— Erie County *v.* Erie, etc., Transp. Co., 87 Pa. St. 434; Wayne County *v.* Delaware, etc., Canal Co., 15 Pa. St. 351; Railroad Co. *v.* Berks County, 6 Pa. St. 70.

Wisconsin.— Chicago, etc., R. Co. *v.* Douglas County, 122 Wis. 273, 99 N. W. 1030; Milwaukee, etc., R. Co. *v.* Milwaukee, 34 Wis. 271.

United States.— Ford *v.* Delta, etc., Land Co., 164 U. S. 662, 17 S. Ct. 230, 41 L. ed. 590.

See 45 Cent. Dig. tit. "Taxation," § 371; and *infra*, IV, D, 3, g, (III).

The term "necessary" as used in this connection does not mean "indispensable," but embraces whatever is suitable and proper for carrying out the corporate purposes of the company. State *v.* Hancock, 35 N. J. L. 537 [*reversing* 33 N. J. L. 315].

Property used as a telegraph line built by a railroad company is not exempt from

(II) *Branch Lines.* An exemption from taxation granted generally to a railroad does not ordinarily extend to a branch line which it constructs under authority given by the charter or a subsequent statute,[16] especially if the branch is substantially an independent road, having different stock-holders and a separate treasury.[17]

(III) *Right of Way and Other Realty.* Under the terms ordinarily used in the statutes, an exemption from taxation granted to a railway will include its road-bed and right of way,[18] and the land used for its termini,[19] and generally also any real estate which is necessary to the proper operation of the road and is actually in use for such purposes.[20] But a contract by the state to exempt railroad lands from taxation will not be permitted to extend in scope beyond what the terms of the concession clearly require;[21] and an exemption cannot be claimed in respect to any lands held and owned by the company which are not needed for railroad purposes and are not actually devoted to such uses,[22] except perhaps

taxation as property reasonably necessary for the running of trains and transaction of railroad business, where such line is used for commercial purposes for compensation. Minneapolis, etc., R. Co. *v.* Oppegard, (N. D. 1908) 118 N. W. 830.

16. Baltimore, etc., R. Co. *v.* District of Columbia, 3 MacArthur (D. C.) 122; Wilmington, etc., R. Co. *v.* Alsbrook, 110 N. C. 137, 14 S. E. 652 [*affirmed* in 146 U. S. 279, 13 S. Ct. 72, 36 L. ed. 972]; Southwestern R. Co. *v.* Wright, 116 U. S. 231, 6 S. Ct. 375, 29 L. ed. 626 [*affirming* 68 Ga. 311]. See also Wright *v.* Southwestern R. Co., 64 Ga. 783. But see Atlantic, etc., R. Co. *v.* Allen, 15 Fla. 637.

17. State *v.* Chicago, etc., R. Co., 89 Mo. 523, 14 S. W. 522; Chicago, etc., R. Co. *v.* Missouri, 122 U. S. 561, 7 S. Ct. 1300, 30 L. ed. 1135; *In re* Canadian Pac. R. Co., 5 Northwest. Terr. 192.

18. *Arizona.*— Atlantic, etc., R. Co. *v.* Yavapai County, (1889) 21 Pac. 768; Atlantic, etc., R. Co. *v.* Lesueur, 2 Ariz. 428, 19 Pac. 157, 1 L. R. A. 244.

Massachusetts.— Charlestown *v.* Middlesex County, 1 Allen 199; Worcester *v.* Western R. Corp., 4 Metc. 564.

Montana.— Northern Pac. R. Co. *v.* Carland, 5 Mont. 146, 3 Pac. 134.

New Jersey.— State *v.* Wetherill, 41 N. J. L. 147; State *v.* Middle Tp. Collector, 38 N. J. L. 270.

New Mexico.— U. S. Trust Co. *v.* Territory, 10 N. M. 416, 62 Pac. 987.

North Carolina.— Richmond, etc., R. Co. *v.* Alamance County, 84 N. C. 504.

United States.— New Mexico *v.* U. S. Trust Co., 174 U. S. 545, 19 S. Ct. 784, 43 L. ed. 1079.

Canada.— Great Western R. Co. *v.* Rouse, 15 U. C. Q. B. 168.

See 45 Cent. Dig. tit. "Taxation," § 373.

19. State *v.* Fuller, 40 N. J. L. 328; State *v.* Camden, 38 N. J. L. 299. See also *In re* United New Jersey R., etc., Co., 75 N. J. L. 334, 68 Atl. 167.

20. *Michigan.*— Grand Rapids, etc., R. Co. *v.* Grand Rapids, 137 Mich. 587, 100 N. W. 1012; Dix *v.* Flint, etc., R. Co., 119 Mich. 682, 78 N. W. 889.

New Jersey.— New Jersey Junction R. Co. *v.* Jersey City, 63 N. J. L. 120, 43 Atl. 577; State *v.* Woodruff, 36 N. J. L. 94.

Texas.— Anderson County *v.* Kennedy, 58 Tex. 616.

Wisconsin.— State *v.* Willcuts, 140 Wis. 448, 122 N. W. 1048; Merrill R., etc., Co. *v.* Merrill, 119 Wis. 249, 96 N. W. 686; Wisconsin Cent. R. Co. *v.* Lincoln County, 57 Wis. 137, 15 N. W. 121.

United States.— McHenry *v.* Alford, 168 U. S. 651, 18 S. Ct. 242, 42 L. ed. 614.

A stone quarry owned by a railroad company and which supplies the stone and gravel for ballasting the company's tracks is exempt from taxation whether the quarry work is done by the railroad company or by a lessee. People *v.* Illinois Cent. R. Co., 231 Ill. 151, 83 N. E. 132.

Gravel land purchased to provide materials for the repair of the railroad are exempt from taxation, and the exemption also includes a branch line from the gravel pits to the main line. State *v.* Hancock, 35 N. J. L. 537 [*reversing* 33 N. J. L. 315].

21. Tucker *v.* Ferguson, 22 Wall. (U. S.) 527, 22 L. ed. 805. And see Vermont Cent. R. Co. *v.* Burlington, 28 Vt. 193; Chesapeake, etc., R. Co. *v.* Virginia, 94 U. S. 718, 24 L. ed. 310.

22. *Delaware.*— Philadelphia, etc., R. Co. *v.* Neary, 5 Del. Ch. 600, 8 Atl. 363.

Georgia.— Wright *v.* Southwestern R. Co., 64 Ga. 783; Bibb County Ordinary *v.* Central R., etc., Co., 40 Ga. 646.

Michigan.— Grand Rapids, etc., R. Co. *v.* Grand Rapids, 137 Mich. 587, 100 N. W. 1012.

Mississippi.— Lewis *v.* Vicksburg, etc., R. Co., 67 Miss. 82, 6 So. 773.

New Jersey.— State *v.* Middle Tp. Collector, 38 N. J. L. 270; Camden, etc., Transp. Co. *v.* Woodruff, 36 N. J. L. 94; New Jersey R., etc., Co. *v.* Newark Collectors, 25 N. J. L. 315. See Pennsylvania R. Co. *v.* Leggett, 41 N. J. L. 319, as to distinction between needful and actual use of land for railroad purposes and indispensable uses.

North Carolina.— Richmond, etc., R. Co. *v.* Alamance County, 76 N. C. 212.

North Dakota.— Fargo, etc., R. Co. *v.* Brewer, 3 N. D. 34, 53 N. W. 177.

United States.— Ford *v.* Delta, etc., Land Co., 43 Fed. 181.

in cases where it is reasonably certain that such lands will speedily be needed for the proper uses of the railroad and they are being prepared for such uses, or held in present contemplation of devoting them to such uses at an early day.[23] Nor is the company exempt in respect to lands which it holds for sale at a profit,[24] or for the sake of the timber on them or the gravel which they contain,[25] or which it has leased to private persons for their private uses.[26]

(iv) *Sale of Railroad Lands.* In some of the states, lands granted to a railroad company to aid in the construction of its road are by statute exempt from taxation until "sold and conveyed" by the company, and under these laws there is a sale and conveyance when the company has transferred to another the real and beneficial ownership of the property, receiving the purchase-price and retaining no lien on the lands, although it may still hold the naked legal title in the character of a trustee for the purchaser;[27] but not so if the conditions of the sale, in respect to payment of the price or otherwise, have not been fulfilled,[28] or if the company, acting within its rights, has declared the contract forfeited and canceled.[29] And generally the execution of a mortgage or trust deed on the property, or even its foreclosure, is not considered a "sale" of the lands;[30] nor is the transfer to another railroad company of the franchises, rights, and property of the exempt company, including the lands in question, such a sale of the lands as will make them subject to taxation.[31]

(v) *Depots, and Other Buildings and Structures.* A general exemption of property of a railroad will include all buildings and structures reasonably incident to the support of the road or to its proper and convenient use for the carriage of passengers and the transportation of commodities,[32] such as

See 45 Cent. Dig. tit. "Taxation," § 373.

Marsh lands adjoining a railroad right of way and originally acquired for depot grounds but never reclaimed or used for such purpose are not exempt from taxation. Milwaukee, etc., R. Co. *v.* Milwaukee, 34 Wis. 271.

23. See Ramsey County *v.* Chicago, etc., R. Co., 33 Minn. 537, 24 N. W. 313; *In re* New York Bay R. Co., 75 N. J. L. 111, 66 Atl. 916; New Jersey Junction R. Co. *v.* Jersey City, 63 N. J. L. 120, 43 Atl. 577; Cape May, etc., R. Co. *v.* Middle Tp. Collector, 38 N. J. L. 270; Morris, etc., R. Co. *v.* Haight, 35 N. J. L. 40; Chicago, etc., R. Co. *v.* Bayfield County, 87 Wis. 188, 58 N. W. 245.

Property held for future use.—Property not actually used for railroad purposes but merely held in contemplation of use at some future time is not exempt. Ramsey County *v.* Chicago, etc., R. Co., 33 Minn. 537, 24 N. W. 313; Duluth, etc., R. Co. *v.* Douglas County, 103 Wis. 75, 79 N. W. 34.

24. McCulloch *v.* Stone, 64 Miss. 378, 8 So. 236; Mobile, etc., R. Co. *v.* Moseley, 52 Miss. 127; Tucker *v.* Ferguson, 22 Wall. (U. S.) 527, 22 L. ed. 805; Northern Pac. R. Co. *v.* Walker, 47 Fed. 681.

25. Todd County *v.* St. Paul, etc., R. Co., 38 Minn. 163, 36 N. W. 109 [*affirmed* in 142 U. S. 282, 12 S. Ct. 281, 35 L. ed. 1014]; Le Blanc *v.* Illinois Cent. R. Co., 72 Miss. 669, 18 So. 381. But see State *v.* Hancock, 35 N. J. L. 537.

Lands originally bought to procure cross tires from the timber thereon are not exempt. Wright *v.* Southwestern R. Co., 64 Ga. 783.

26. St. Louis County *v.* St. Paul, etc., R. Co., 45 Minn. 510, 48 N. W. 334; State *v.* Fuller, 40 N. J. L. 328.

27. St. Paul, etc., R. Co. *v.* Robinson, 40 Minn. 360, 42 N. W. 79; Brown County *v.* Winona, etc., Land Co., 38 Minn. 397, 37 N. W. 949; State *v.* Winona, etc., R. Co., 21 Minn. 472; Winona, etc., Land Co. *v.* Minnesota, 159 U. S. 526, 16 S. Ct. 83, 40 L. ed. 247; Angus *v.* Calgary School Dist., 1 Northwest. Terr. (Can.) 111.

28. Stevens County *v.* St. Paul, etc., R. Co., 36 Minn. 467, 31 N. W. 942; Cornwallis *v.* Canadian Pac. R. Co., 19 Can. Sup. Ct. 702. See also Reg. *v.* Victoria Lumber, etc., Co., 5 Brit. Col. 288.

29. Champaign County *v.* Reed, 106 Ill. 389; Illinois Cent. R. Co. *v.* Goodwin, 94 Ill. 262.

30. Winona, etc., R. Co. *v.* Deuel County, 3 Dak. 1, 12 N. W. 561; Sioux City, etc., R. Co. *v.* Robinson, 41 Minn. 452, 43 N. W. 326; St. Paul, etc., R. Co. *v.* McDonald, 34 Minn. 182, 25 N. W. 57; State *v.* Southern Minnesota R. Co., 21 Minn. 344; State *v.* Winona, etc., R. Co., 21 Minn. 315; St. Paul, etc., R. Co. *v.* Parcher, 14 Minn. 297. See also McHenry *v.* Alford, 168 U. S. 651, 18 S. Ct. 242, 42 L. ed. 614. *Compare* Chippewa County *v.* St. Paul, etc., R. Co., 42 Minn. 295, 44 N. W. 70.

31. State *v.* Sioux City, etc., R. Co., 82 Minn. 158, 84 N. W. 794; Traverse County *v.* St. Paul, etc., R. Co., 73 Minn. 417, 76 N. W. 217; Nobles County *v.* Sioux City, etc., R. Co., 26 Minn. 294, 3 N. W. 701; Minnesota Cent. R. Co. *v.* Melvin, 21 Minn. 339.

32. Atlanta *v.* Georgia Pac. R. Co., 74 Ga. 16; State *v.* Baltimore, etc., R. Co., 48 Md. 49; Worcester *v.* Western R. Corp., 4 Metc. (Mass.) 564; Pennsylvania R. Co. *v.* Wetherill, 41 N. J. L. 147; Cape May, etc., R. Co. *v.* Middle Tp. Collector, 38 N. J. L. 270.

freight and passenger stations,[33] engine and car houses,[34] work shops and repair shops,[35] office buildings,[36] bridges,[37] wharves, piers, and docks.[38] The exemption may also include a grain elevator, provided it is necessary for use in receiving and transferring grain shipped over the company's road, although not where the company uses it for business of a general warehouseman.[39] As to railroad hotels, the rule is that such a structure may be exempt, as property "necessary" to the operation of the road, if it is needed for the safety and convenience of the traveling public and is used exclusively for persons arriving and departing on the company's trains, but not where it is conducted for the accommodation of the general public or is maintained as a place of summer resort.[40]

(VI) *ROLLING-STOCK AND EQUIPMENT.* The cars, engines, and other rolling-stock of a railroad company have been repeatedly held to be within the terms of a general exemption of its property.[41] On the other hand, it has been

33. *Massachusetts.*—Worcester *v.* Western R. Corp., 4 Metc. 564. See also Norwich, etc., R. Co. *v.* Worcester County, 151 Mass. 69, 23 N. E. 721.

Mississippi.— See Vicksburg, etc., R. Co. *v.* Lewis, 68 Miss. 29, 10 So. 32.

Montana.— Northern Pac. R. Co. *v.* Carland, 5 Mont. 146, 3 Pac. 134.

North Carolina.— Richmond, etc., R. Co. *v.* Alamance, 84 N. C. 504.

Pennsylvania.— Northampton County *v.* Lehigh Coal, etc., Co., 75 Pa. St. 461.

Virginia.— Richmond *v.* Richmond, etc., R. Co., 21 Gratt. 604.

Wisconsin.— Milwaukee, etc., R. Co. *v.* Milwaukee, 34 Wis. 271.

See 45 Cent. Dig. tit. "Taxation," § 374.

34. Worcester *v.* Western R. Corp., 4 Metc. (Mass.) 564; Vicksburg, etc., R. Co. *v.* Bradley, 66 Miss. 518, 6 So. 321. But see Boston, etc., R. Co. *v.* Cambridge, 8 Cush. (Mass.) 237, where more land was used for such purposes than the company was authorized to appropriate.

35. Northern Pac. R. Co. *v.* Carland, 5 Mont. 146, 3 Pac. 134; Richmond, etc., R. Co. *v.* Alamance, 84 N. C. 504; North Carolina R. Co. *v.* Alamance, 77 N. C. 4. See also Allegheny Valley R. Co. *v.* Verona School Dist., 29 Pittsb. Leg. J. N. S. (Pa.) 314, holding that where a railroad company's shops were used both for repairs on rolling-stock and also for the building of new stock, such shops were exempt from taxation only in the proportion that the repair business bore to the whole work.

36. Richmond, etc., R. Co. *v.* Alamance, 84 N. C. 504; Pennsylvania R. Co.'s Appeal, 3 Pa. Co. Ct. 162.

37. Central R. Co. *v.* Mutchler, 41 N. J. L. 96; Central Vermont R. Co. *v.* St. Johns, 14 Can. Sup. Ct. 288 [*affirmed* in 14 App. Cas. 590].

38. State *v.* Baltimore, etc., R. Co., 48 Md. 49; Chicago, etc., R. Co. *v.* Bayfield County, 87 Wis. 188, 58 N. W. 245. But see St. Louis County *v.* St. Paul, etc., R. Co., 45 Minn. 510, 48 N. W. 334, holding that a wharf owned by a railroad company but leased to a tenant to be used in selling and shipping coal is not exempt, although the lease binds the tenant to ship a certain quantity of coal over the lines of the railroad.

39. *Illinois.*— Illinois Cent. R. Co. *v.* People, 119 Ill. 137, 6 N. E. 451; *In re* Swigert, 119 Ill. 83, 6 N. E. 469.

Maryland.— State *v.* Baltimore, etc., R. Co., 48 Md. 49.

Michigan.— Detroit Union R. Depot, etc., Co. *v.* Detroit, 88 Mich. 347, 50 N. W. 302.

New Jersey.— *In re* Erie R. Co., 65 N. J. L. 608, 48 Atl. 601; Pennsylvania R. Co. *v.* Jersey City, 49 N. J. L. 540, 9 Atl. 782, 60 Am. Rep. 648.

Tennessee.— State *v.* Nashville, etc., R. Co., 86 Tenn. 438, 6 S. W. 880.

Wisconsin.— Chicago, etc., R. Co. *v.* Douglas County, 122 Wis. 273, 99 N. W. 1030; Chicago, etc., R. Co. *v.* Bayfield County, 87 Wis. 188, 58 N. W. 245; Milwaukee, etc., R. Co. *v.* Milwaukee, 34 Wis. 271.

See 45 Cent. Dig. tit. "Taxation," § 374.

40. State *v.* Baltimore, etc., R. Co., 48 Md. 49; Hennepin County *v.* St. Paul, etc., R. Co., 42 Minn. 238, 44 N. W. 63; Day *v.* Joiner, 6 Baxt. (Tenn.) 441 (but ticket offices in a hotel building owned by a railroad may be exempt, although the hotel itself is conducted as a source of profit to the company, and therefore is not exempt); Chicago, etc., R. Co. *v.* Crawford County, 48 Wis. 666, 5 N. W. 3; Milwaukee, etc., R. Co. *v.* Crawford County, 29 Wis. 116. See also *In re* United New Jersey R., etc., Co., 75 N. J. L. 334, 68 Atl. 167.

41. Mobile, etc., R. Co. *v.* Moseley, 52 Miss. 127.

Rolling-stock used on another road.— Rolling-stock owned by one railroad company whose property is exempt from taxation is not exempt where it is wholly employed in operating another road, although the company owning the rolling-stock is a stockholder in such road. Raleigh, etc., R. Co. *v.* Wake County, 87 N. C. 414.

Machinery, tools, and implements used in the manufacture and repair of cars and engines are exempt from taxation. Richmond, etc., R. Co. *v.* Alamance, 84 N. C. 504.

Horses and stables being indispensable to the operation of a horse-car passenger railway are exempt from taxation. Northampton County *v.* Easton, etc., Pass. R. Co., 8 Pa. Co. Ct. 442. See also People's Pass. R. Co. *v.* Taylor, 22 Pa. Super. Ct. 156. But see

held that ferry-boats or other steam vessels are not within the terms of such a general exemption unless used as a necessary part of its road.[42]

(VII) *Capital and Stock.* Where an exemption is granted to the capital stock of a railroad company, it is generally held to include the actual property in which the capital is invested, in so far as the same is necessary and appropriate to the operation of the road,[43] unless a contrary intention of the legislature is shown by a separate provision for the taxation of its physical property,[44] or unless it was the evident intention to exempt the shares of stock in the hands of their holders;[45] and conversely it has been held that an exemption of "all the property" of a railroad company will include its capital stock.[46] An exemption of the capital stock of a railroad company will include an increase of capital stock,[47] unless otherwise provided by statute.[48]

h. Mines and Mining Claims.[49] Some of the states, to aid in the development of their mineral resources, have granted exemptions from taxation to mines and mining claims.[50] But it must appear, to claim the benefit of the exemption, that the land in question is actually valuable for the minerals which it contains or is worked as a mine,[51] and the exemption does not necessarily include the plant or machinery of the mine.[52]

i. Water and Irrigation Companies.[53] In some of the states of the more arid regions, motives of public policy have induced the legislatures to exempt from taxation the property of irrigation companies, ditch and canal companies, and water systems generally,[54] and in others a similar immunity has been accorded

People's St. R. Co. *v.* Scranton, 8 Pa. Co. Ct. 633.

Railroad cars owned and used by a manufacturer for shipping his merchandise are taxable at their actual value, and not under the special provisions of a statute relating to the taxation of "car loaning companies." Comstock *v.* Grand Rapids, 54 Mich. 641, 20 N. W. 623.

Cab service.—Where a railroad company engaged in interstate commerce maintains a cab service at its terminus within the state, which carries its passengers under a separate contract, the cab business is not exempt from taxation. People *v.* Knight, 171 N. Y. 354, 64 N. E. 152, 98 Am. St. Rep. 610.

42. Illinois Cent. R. Co. *v.* Irvin, 72 Ill. 452; State *v.* Baltimore, etc., R. Co., 48 Md. 49; New Jersey R., etc., Co. *v.* Haight, 34 N. J. L. 319. See also *In re* United New Jersey R., etc., Co., 75 N. J. L. 334, 68 Atl. 167.

43. Bibb County Ordinary *v.* Central R., etc., Co., 40 Ga. 646; Rome R. Co. *v.* Rome, 14 Ga. 275; Baltimore *v.* Baltimore, etc., R. Co., 6 Gill (Md.) 288, 48 Am. Dec. 531; Scotland County *v.* Missouri, etc., R. Co., 65 Mo. 123; Secor *v.* Singleton, 9 Fed. 809, 3 McCreary 230. See also St. Louis, etc., R. Co. *v.* Loftin, 30 Ark. 693.

44. Philadelphia, etc., R. Co. *v.* Bayless, 2 Gill (Md.) 355; Memphis, etc., R. Co. *v.* Gaines, 3 Tenn. Ch. 604; St. Louis, etc., R. Co. *v.* Loftin, 98 U. S. 559, 25 L. ed. 222; Memphis, etc., R. Co. *v.* Gaines, 97 U. S. 697, 24 L. ed. 1091.

45. See Longstreet *v.* Jones, 38 N. J. L. 83; Miller *v.* Ratterman, 47 Ohio St. 141, 24 N. E. 496.

46. Santa Fe County *v.* New Mexico, etc., R. Co., 3 N. M. 116, 2 Pac. 376. *Compare* Belo *v.* Forsyth County Com'rs, 82 N. C. 415, 33 Am. Rep. 688.

47. State *v.* Norwich, etc., R. Co., 30 Conn. 290; Raleigh, etc., R. Co. *v.* Wake, 87 N. C. 414.

48. Nichols *v.* New Haven, etc., Co., 42 Conn. 103, holding, however, that a provision of the statute authorizing the increase that "the capital stock hereby created shall be assessed and taxed" applies only to the increase and not to the entire capital stock.

49. **Liability to taxation** generally see *supra*, III, A, 2, b, (II).

50. See the statutes of the several states. And see State *v.* Moore, 12 Cal. 56 (where a mining claim is exempt, the price paid for it cannot be taxed as money invested); State *v.* Northern Belle Mill, etc., Co., 13 Nev. 250; State *v.* Eureka Consol. Min. Co., 8 Nev. 15.

Title or ownership.— Mines and mineral lands, the title to which is in a private owner or claimant, and not in the United States government, are not within a statute exempting "mining claims" from taxation. Salisbury *v.* Lane, 7 Ida. 370, 63 Pac. 383.

51. Dyke *v.* Whyte, 17 Colo. 296, 29 Pac. 128.

52. Hart *v.* Plum, 14 Cal. 148. But see Mammoth Min. Co. *v.* Juab County, 10 Utah 232, 37 Pac. 348.

53. **Liability to taxation** generally see *supra*, III, B, 2, e, (XI).

54. See the statutes of the several states. And see Murray *v.* Montrose County, 23 Colo. 427, 65 Pac. 26; Empire Land, etc., Co. *v.* Rio Grande County, 21 Colo. 244, 40 Pac. 449 [*disapproving* 1 Colo. App. 205, 28 Pac. 482]; Bear Lake, etc., Water Works, etc., Co. *v.* Ogden City, 8 Utah 494, 33 Pac. 135.

to water companies which supply towns and cities, including the lands necessary for their purposes.[55] But aside from such statutes there is nothing in the character of a water company to exempt it from the ordinary burdens of taxation.[56]

j. Canal Companies. An exemption granted to a canal company will include all such property as is a constitutent part of the canal or incident thereto and serving the purposes of the company, or which is reasonably necessary to the proper conduct of its operations.[57]

k. Manufacturing Companies — (i) *In General.* In many states the laws exempt from taxation the property of corporations engaged in useful manufactures.[58] A grant of exemption of this kind ordinarily attaches upon the erection of the factory or the establishment of the business,[59] and may apply to existing companies, unless specially restricted to those to be founded in the future,[60] although in some jurisdictions the privilege is restricted to such as are carrying on business within the state or engaged wholly in manufacturing within the state.[61] The exemption usually covers so much of the company's property as is actually used in processes of manufacture,[62] although not that which may be employed

55. Com. *v.* Minersville Water Co., 13 Pa. Co. Ct. 17; Louisville Water Co. *v.* Kentucky, 170 U. S. 127, 18 S. Ct. 571, 52 L. ed. 975.

Land necessary to use of company.— Lands acquired and held by a water company, contiguous to the streams of water or reservoirs from which water is taken for public use, may properly be regarded as necessary for the purposes of the company, and are exempt from local taxation. Spring Brook Water Supply Co. *v.* Kelly, 5 Lack. Leg. N. (Pa.) 299; Roaring Creek Water Co. *v.* Snyder, 1 Northumb. Co. Leg. N. (Pa.) 181. But a water company will not be exempt from taxation on wild and uninhabited mountain lands owned by it, where it does not appear that it is necessary for the company to own the land in order to maintain the purity of the water-supply. Spring Brook Water Co. *v.* Kelly, 17 Pa. Super. Ct. 347.

56. Louisville Water Co. *v.* Hamilton, 81 Ky. 517; South Ward Water Works *v.* McGinnes, 2 Del. Co. (Pa.) 145; McGinnes *v.* South Ward Water Works, 2 Del. Co. (Pa.) 127.

Taxation of municipal waterworks see *supra*, III, C, 4, d.

Exemption of fire apparatus.—A statute exempting from taxation "implements for extinguishing fires" does not apply to the property of a water company. Des Moines Water Co.'s Appeal, 48 Iowa 324.

57. Alexandria Canal R., etc., Co. *v.* District of Columbia, 1 Mackey (D. C.) 217 (railroad bridge not exempt); Carondelet Canal Nav. Co. *v.* New Orleans, 44 La. Ann. 394, 10 So. 871; New Orleans *v.* Carondelet Canal, etc., Co., 36 La. Ann. 396 (capital stock exempt); Barataria, etc., Canal Co. *v.* Soniat, 6 La. Ann. 65; United New Jersey R., etc., Co. *v.* Jersey City, 57 N. J. L. 563, 31 Atl. 1020; State *v.* Bayonne, (N. J. Sup. 1886) 3 Atl. 123; Morris Canal, etc., Co. *v.* Cleaver, 46 N. J. L. 467 (house and lot used for the residence of an assistant superintendent not exempt); Morris Canal, etc., Co. *v.* Love, 37 N. J. L. 60 (property leased to others not exempt); Morris Canal, etc., Co. *v.* Betts, 24 N. J. L. 555 (pier and basins are exempt).

58. See the statutes of the several states; and cases cited *infra*, notes 59–67.

59. See Mengel Box Co. *v.* Louisville, 117 Ky. 735, 79 S. W. 255, 25 Ky. L. Rep. 1861; Buffalo Refrigerating Mach. Co. *v.* State Bd. of Assessors, 72 N. J. L. 127, 60 Atl. 65; Com. *v.* Wm. Mann Co., 11 Pa. Co. Ct. 290.

60. Baugh *v.* Ryan, 51 Ala. 212; Yocona Cotton Mills *v.* Duke, 71 Miss. 790, 15 So. 929; Franklin Needle Co. *v.* Franklin, 65 N. H. 177, 18 Atl. 318; Cox Needle Co. *v.* Gilford, 62 N. H. 503; *In re* Pirie, 29 U. C. Q. B. 401.

Corporations organized under special laws. — The statute in New York is not intended to limit the exemption to manufacturing corporations organized under the general law, but may apply to companies incorporated under special statutes for special lines of business. Nassau Gaslight Co. *v.* Brooklyn, 89 N. Y. 409.

61. Alton Mach. Co. *v.* State Bd. of Assessors, (N. J. Sup. 1907) 69 Atl. 451; Hardin *v.* Morgan, 70 N. J. L. 484, 57 Atl. 155; Norton Naval Constr., etc., Co. *v.* State Bd. of Assessors, 53 N. J. L. 564, 22 Atl. 352; Standard Underground Cable Co. *v.* Atty.-Gen., 46 N. J. Eq. 270, 19 Atl. 733, 19 Am. St. Rep. 394; American Glucose Co. *v.* New Jersey, 43 N. J. Eq. 280, 5 Atl. 803; People *v.* Campbell, 144 N. Y. 166, 38 N. E. 990 [*affirming* 80 Hun 95, 30 N. Y. Suppl. 50]; People *v.* Wemple, 138 N. Y. 582, 34 N. E. 386 [*affirming* 63 Hun 452, 18 N. Y. Suppl. 504]; People *v.* Horn Silver Min. Co., 105 N. Y. 76, 11 N. E. 155; Com. *v.* Cover, 29 Pa. Super. Ct. 409 [*affirmed* in 215 Pa. St. 556, 64 Atl. 686]; Com. *v.* Gillinder, 12 Pa. Dist. 635. And see Halsey Electric Generator Co. *v.* State Bd. of Assessors, 74 N. J. L. 321, 65 Atl. 837, holding that a corporation is not entitled to the exemption simply because it has a place leased within the state, in which to carry on a manufacturing business, but where no business is actually carried on.

62. Com. *v.* Wm. Mann Co., 150 Pa. St. 64, 24 Atl. 601.

in a distinct business,[63] and will remain effective so long as the factory exists and the business continues,[64] unless granted only for a limited period,[65] but is forfeited by the abandonment of the enterprise or the total discontinuance of the business.[66] An owner of property who is not engaged in manufacturing is not entitled to the exemption simply because the property is leased to another who is engaged in such business.[67]

(II) *What Constitutes Manufacturing.* The meaning of the terms "manufacture," "manufacturer," and "manufacturing corporation," and their application to particular products, processes, and industries, have been fully treated in a previous title,[68] and while there is some lack of uniformity in the decisions the principles there stated have ordinarily been followed in the case of exemption laws in determining what is exempt,[69] and what is not exempt within the

63. Southern Chemical, etc., Co. *v.* Board of Assessors, 48 La. Ann. 1475, 21 So. 31; Com. *v.* Wm. Mann Co., 150 Pa. St. 64, 24 Atl. 601; Com. *v.* Lackawanna Iron, etc., Co., 129 Pa. St. 346, 18 Atl. 133.

64. Waterbury *v.* Atlas Steam Cordage Co., 42 La. Ann. 723, 7 So. 783.

65. Tallassee Mfg. Co. *v.* Spigener, 49 Ala. 262, holding that a statute exempting buildings and machinery of certain kinds of factories "during their erection, and for one year after they commence operations," does not exempt new buildings and machinery added to a factory which has been in operation for several years.

66. Electric Tract. Co. *v.* New Orleans, 45 La. Ann. 1475, 14 So. 231; Waterbury *v.* Atlas Steam Cordage Co., 42 La. Ann. 723, 7 So. 783; Edison Phonograph Co. *v.* State Bd. of Assessors, 55 N. J. L. 55, 25 Atl. 329; Polson *v.* Owen Sound Municipal Corp., 31 Ont. 6. But see Bradford *v.* Mote, 2 Marv. (Del.) 159, 42 Atl. 445, holding that a manufacturing plant is exempt from taxation, although its operation is temporarily suspended on account of the insolvency of the owners.

67. Portsmouth Shoe Co. *v.* Portsmouth, 74 N. H. 222, 66 Atl. 1045; Com. *v.* Arrott Mills Co., 145 Pa. St. 69, 22 Atl. 243; Com. *v.* Macungie Iron Co., 9 Pa. Dist. 477.

68. See Manufactures, 26 Cyc. 517.

69. See the cases cited *infra*, this note.

Bridge building.— Com. *v.* Keystone Bridge Co., 156 Pa. St. 500, 27 Atl. 1.

Job printing and blank-book making.— Seeley *v.* Gwillim, 40 Conn. 106. *Compare* Patterson *v.* New Orleans, 47 La. Ann. 275, 16 So. 815.

Making commercial fertilizers.— Planters' Fertilizer, etc., Co. *v.* Orleans Bd. of Assessors, 116 La. 667, 40 So. 1035; Southern Chemical Co. *v.* Board of Assessors, 48 La. Ann. 1475, 21 So. 31.

Making iron and steel.— Com. *v.* Pottsville Iron, etc., Co., 157 Pa. St. 500, 27 Atl. 371, 22 L. R. A. 228.

Printing and publishing books.— Press Printing Co. *v.* State Bd. of Assessors, 51 N. J. L. 75, 16 Atl. 173; Com. *v.* D. B. Canfield Co., 7 Dauph. Co. Rep. (Pa.) 195; Com. *v.* J. B. Lippincott Co., 7 Dauph. Co. Rep. (Pa.) 193. And see People *v.* Roberts, 155 N. Y. 1, 49 N. E. 248. But it has been held that printing and publishing a newspaper is not "manufacturing." Press Printing Co. *v.* State Bd. of Assessors, 51 N. J. L. 75, 16 Atl. 173.

Production of illuminating gas.— Nassau Gaslight Co. *v.* Brooklyn, 89 N. Y. 409; Com. *v.* Chester Gas Co., 5 Dauph. Co. Rep. (Pa.) 121; Com. *v.* Allegheny Gas Co., 1 Dauph. Co. Rep. (Pa.) 93. But in Louisiana this is held not to be a "manufacture of chemicals." Shreveport Gas, etc., Co. *v.* Caddo Parish Assessor, 47 La. Ann. 65, 16 So. 650. And in Illinois gas companies are not considered as manufacturing companies, because the statutes plainly distinguish between them. Ottawa Gas Light, etc., Co. *v.* Downey, 127 Ill. 201, 20 N. E. 20. And it is otherwise as to natural gas. A company engaged in supplying natural gas to customers for light and heat is not a manufacturing corporation; for natural gas is a product of nature and not the result of any manufacturing process. Emerson *v.* Com., 108 Pa. St. 111. And see Com. *v.* Natural Gas Co., 32 Pittsb. Leg. J. N. S. (Pa.) 309.

Ship-building.— Com. *v.* Delaware River Iron Ship Bldg., etc., Works, 2 Dauph. Co. Rep. (Pa.) 232.

Other manufactures.— The following have also been held to be manufactures: Making a paving compound. People *v.* Knight, 99 N. Y. App. Div. 62, 90 N. Y. Suppl. 537. Dyeing and finishing woolen and cotton goods and yarns. Com. *v.* Quaker City Dye Works Co., 5 Pa. Co. Ct. 94. Making sewer pipe and drain tile from water, salt, and clay. Iowa Pipe, etc., Co.'s Appeal, 101 Iowa 170, 70 N. W. 115. Making a special kind of kindling wood from slabs. People *v.* Roberts, 20 N. Y. App. Div. 514, 47 N. Y. Suppl. 122. *Compare* Correio *v.* Lynch, 65 Cal. 273, 3 Pac. 889. Refining crude petroleum and obtaining therefrom illuminating oils and other products. Hawes *v.* Anglo-Saxon Petroleum Co., 101 Mass. 385; Com. *v.* Atlantic Refining Co., 7 Dauph. Co. Rep. (Pa.) 189. Making lead boilers. People *v.* Knight, 67 N. Y. App. Div. 365, 73 N. Y. Suppl. 743. Making asphalt composition for paving streets. People *v.* Morgan, 61 N. Y. App. Div. 373, 70 N. Y. Suppl. 516. Making photographs. State *v.* State Bd. of Assessors, 54 N. J. L. 430, 24 Atl. 507. Making fountain pens. People *v.* Morgan, 48 N. Y. App. Div. 395,

meaning of such terms.[70] And a corporation which owns patents, and licenses other companies, in which it is a stock-holder, to use them in manufacturing, is not a manufacturing corporation within the exemption laws.[71]

(III) *Corporations For Manufacture of Particular Commodities.* In quite a number of the states, instead of according an exemption from taxation to manufacturing corporations generally, this privilege is accorded to manufacturing companies engaged in particular lines of business, such as companies which are engaged in manufacturing furniture and other articles of wood,[72] paper and

63 N. Y. Suppl. 76. Mixing paints by a process which results in a new commodity of value, recognized by a distinctive name, different from any of its ingredients, and produced by the use of capital, labor, and machinery. People *v.* Roberts, 51 N. Y. App. Div. 77, 64 N. Y. Suppl. 494. Making artificial ice by frigorific process. People *v.* Knickerbocker Ice Co., 99 N. Y. 181, 1 N. E. 669. But *compare* Greenville Ice, etc., Co. *v.* Greenville, 69 Miss. 86, 10 So. 574. Working fire clay into brick, tiles, and other articles. Com. *v.* Savage Fire Brick Co., 157 Pa. St. 512, 27 Atl. 374. Steam flouring mill. Carlin *v.* Western Assur. Co., 57 Md. 515, 40 Am. Rep. 440. Building locomotive engines. Norris *v.* Com., 27 Pa. St. 494.

70. See the cases cited *infra*, this note.

Cutting and storing natural ice.— Hittinger *v.* Westford, 135 Mass. 258; People *v.* Knickerbocker Ice Co., 99 N. Y. 181, 1 N. E. 669. *Compare* Atty.-Gen. *v.* Lorman, 59 Mich. 157, 26 N. W. 311, 60 Am. Rep. 287.

Generating electric light, heat, and power.— Frederick Electric Light, etc., Co. *v.* Frederick City, 84 Md. 599, 36 Atl. 362, 36 L. R. A. 130; Williams *v.* Park, 72 N. H. 305, 56 Atl. 463, 64 L. R. A. 33; Electric Storage Battery Co. *v.* State Bd. of Assessors, 61 N. J. L. 289, 41 Atl. 1117; Com. *v.* Edison Electric Light, etc., Co., 170 Pa. St. 231, 32 Atl. 419; Com. *v.* Brush Electric Light Co., 145 Pa. St. 147, 22 Atl. 844; Com. *v.* Northern Electric Light, etc., Co., 145 Pa. St. 105, 22 Atl. 839, 14 L. R. A. 107; Com. *v.* Edison Electric Light, etc., Co., 1 Dauph. Co. Rep. (Pa.) 127. *Contra*, People *v.* Wemple, 129 N. Y. 543, 29 N. E. 808, 14 L. R. A. 708; People *v.* Campbell, 88 Hun (N. Y.) 527, 34 N. Y. Suppl. 711.

Generating and selling steam heat.— Com. *v.* Arrott Mills Co., 145 Pa. St. 69, 22 Atl. 243.

Laundry.— Com. *v.* Keystone Laundry Co., 203 Pa. St. 289, 52 Atl. 326; Com. *v.* Barnes Bros. Co., 26 Pa. Co. Ct. 423.

Mining and quarrying.—Wellington *v.* Belmont, 164 Mass. 142, 41 N. E. 62; Byers *v.* Franklin Coal Co., 106 Mass. 131; People *v.* Horn Silver Min. Co., 105 N. Y. 76, 11 N. E. 155; Com. *v.* Juniata Coke Co., 157 Pa. St. 507, 27 Atl. 373, 22 L. R. A. 232; Com. *v.* Lackawanna Iron, etc., Co., 129 Pa. St. 346, 18 Atl. 133; Com. *v.* Thomas Iron Co., 12 Pa. Co. Ct. 654; Com. *v.* Coplay Iron Co., 11 Pa. Co. Ct. 295; Com. *v.* East Bangor Consol. Slate Co., 10 Pa. Co. Ct. 363; Horn Silver Min. Co. *v.* New York, 143 U. S. 305, 12 S. Ct. 403, 36 L. ed. 164; *In re* Rollins Gold, etc., Min. Co., 102 Fed. 982. But see Com. *v.* East Bangor Consol. Slate Co., 162 Pa. St. 599, 29 Atl. 706, holding that a corporation owning a quarry from which it takes slate and works it up into sizes and shapes desired may be so far considered a manufacturing company as to be able to claim exemption from taxation on that part of its capital which is engaged in this part of its business.

Slaughtering cattle.— People *v.* Roberts, 155 N. Y. 408, 50 N. E. 53, 41 L. R. A. 228 [*reversing* 20 N. Y. App. Div. 521, 47 N. Y. Suppl. 123]; People *v.* Roberts, 11 N. Y. App. Div. 449, 42 N. Y. Suppl. 317. *Compare* Engle *v.* Sohn, 41 Ohio St. 691, 52 Am. Rep. 103.

Miscellaneous.— Grinding cereals and making cattle fodder. Atlas Feed Products Co. *v.* New Orleans, 113 La. 611, 37 So. 531. Mixing teas and roasting and mixing coffee. People *v.* Roberts, 82 Hun (N. Y.) 352, 31 N. Y. Suppl. 243 [*affirmed* in 145 N. Y. 375, 40 N. E. 7]. Refining bullion into standard silver bars. People *v.* Horn Silver Min. Co., 105 N. Y. 76, 11 N. E. 155. Building and operating dry docks. People *v.* New York Floating Dry-Dock Co., 92 N. Y. 487 [*affirming* 11 Abb. N. Cas. 40, 63 How. Pr. 451]. Buying and selling foreign books. People *v.* Roberts, 90 Hun (N. Y.) 533, 36 N. Y. Suppl. 73. Buying and selling securities of other corporations. Com. *v.* Westinghouse Electric, etc., Co., 151 Pa. St. 265, 24 Atl. 1107, 1111. Building and maintaining an aqueduct. Dudley *v.* Jamaica Pond Aqueduct Co., 100 Mass. 183. Planing mill. Whited *v.* Bledsoe, 49 La. Ann. 325, 21 So. 538. Saw-mill. Jones *v.* Raines, 35 La. Ann. 996. Making soda, vichy, seltzer, and similar drinks. Crescent City, etc., Co. *v.* New Orleans, 48 La. Ann. 768, 19 So. 943. Grain elevator and warehouse company. Mohr *v.* Minnesota El. Co., 40 Minn. 343, 41 N. W. 1074. And hay is not a manufactured article. Frazee *v.* Moffitt, 18 Fed. 584, 20 Blatchf. 267.

71. People *v.* Campbell, 88 Hun (N. Y.) 530, 34 N. Y. Suppl. 713 [*reversed* on other grounds in 148 N. Y. 759, 43 N. E. 177].

72. Globe Lumber Co. *v.* Clement, 110 La. 438, 34 So. 595; Chickasaw Cooperage Co. *v.* Jefferson Parish Police Jury, 48 La. Ann. 523, 19 So. 476; Brooklyn Cooperage Co. *v.* New Orleans, 47 La. Ann. 1314, 17 So. 804; Rosedale Cypress Lumber, etc., Co. *v.* Bruslé, 45 La. Ann. 459, 12 So. 484; Carpenter *v.* Brusle, 45 La. Ann. 456, 12 So. 483; Gast *v.* Board of Assessors, 43 La. Ann. 1104, 10 So. 184; Washburn *v.* New Orleans, 43 La. Ann.

stationery,[73] machinery and agricultural implements,[74] flour,[75] textile fabrics,[76] shoes and leather,[77] or articles manufactured from the produce of the state.[78]

(iv) *Plant, Products, and Other Property.* An exemption from taxation granted to manufacturing corporations will include generally the plant and all such other property as is necessary to enable the company to carry on its proper business,[79] but not property which is used for a distinct line or branch of business, not coming under the description of manufacturing,[80] nor a stock of goods carried as an incident to the general business of the company.[81] An exemption of machinery or property "employed" or "actually used" in manufacturing will be strictly limited to such as is really devoted to the purposes mentioned and necessary thereto.[82]

(v) *Capital and Stock.* Where the statute exempts the capital or capital stock of a manufacturing company, or capital employed in manufacturing, no

226, 9 So. 37; Carre *v.* New Orleans, 41 La. Ann. 996, 6 So. 893; New Orleans *v.* Le Blanc, 34 La. Ann. 596; Yellow Pine Co. *v.* State Bd. of Assessors, 70 N. J. L. 590, 57 Atl. 393.

Creosoting wooden articles.—A claim to be exempt from taxation as a manufacture of wood is not well founded where the right was based on an application of creosote to cross ties already existing as articles of wood, and which were purchased from a company which had already made them. Shreveport Creosoting Co. *v.* Shreveport, 119 La. 637, 44 So. 325.

73. Patterson *v.* New Orleans, 47 La. Ann. 275, 16 So. 815 (one who prints bill-heads on paper bought by him is not a manufacturer of stationery); Nicholson *v.* Tax Collector, 44 La. Ann. 76, 10 So. 403 (nor the publisher of a newspaper); Washburn *v.* New Orleans, 43 La. Ann. 226, 9 So. 37 (making paper boxes is not manufacturing paper).

74. Nicholson *v.* Board of Assessors, 48 La. Ann. 1570, 21 So. 167 (lines of type made by a linotype machine are not machinery); Benedict *v.* New Orleans, 44 La. Ann. 793, 11 So. 41; Greenville Ice, etc., Co. *v.* Greenville, 69 Miss. 86, 10 So. 574 (ice factory not exempt).

75. Atlas Feed Products Co. *v.* New Orleans, 113 La. 611, 37 So. 531; Martin *v.* Thibaut, 37 La. Ann. 21; State *v.* Board of Assessors, 36 La. Ann. 347.

76. Lake *v.* Guillotte, 48 La. Ann. 870, 19 So. 924; Waterbury *v.* Atlas Steam Cordage Co., 42 La. Ann. 723, 7 So. 783 (includes cordage, rope, and twine); Cohn *v.* Parker, 41 La. Ann. 894, 6 So. 718.

77. Ricks *v.* Board of Assessors, 43 La. Ann. 1075, 10 So. 202.

78. Benedict *v.* Davidson County, 110 Tenn. 183, 67 S. W. 806, holding that the term "produce of the state," as used in the exemption law, embraces whatever is produced or grown in, or is the yield of, the state, including crops, timber, coal, and iron and everything produced from or found in the soil of the state.

79. State *v.* Powers, 24 N. J. L. 406; State *v.* Flavell, 24 N. J. L. 370; Brush Electric Light Co. *v.* Philadelphia, 8 Pa. Dist. 231.

Building used partly for other purposes.—The exemption does not extend to a part of a building used for the purpose of storage and sale of manufactured articles. Victoria Lumber Co. *v.* Rives, 115 La. 996, 40 So. 382. But a factory is none the less exempt where the owner lives in a part of it, that being necessary to enable him to protect his goods. New Orleans *v.* Arthurs, 36 La. Ann. 98.

Ships for transportation.—Property exempt from taxation as "employed in manufactures" does not include vessels used to convey the raw material. Martin *v.* New Orleans, 38 La. Ann. 397, 58 Am. Rep. 194.

Property leased for manufacturing purposes is not exempt from taxation as "employed" in manufactures. State *v.* Board of Assessors, 46 La. Ann. 859, 15 So. 384. But see Colton *v.* Montpelier, 71 Vt. 413, 45 Atl. 1039.

"Water power," as the term is used in an exemption of improvements made on the water power on a stream for manufacturing purposes, does not apply to the operation of a tannery by steam, drawing water from a mill-pond by a force-pump and pipe, and located above the dam. Plaisted *v.* Lincoln, 62 Me. 91.

Houses for employees do not come under the general exemption of the property of a manufacturing corporation. Adams *v.* Tombigbee Mills, 78 Miss. 676, 29 So. 470; Com. *v.* Mahoning Rolling Mill Co., 129 Pa. St. 360, 18 Atl. 135.

80. Robertson *v.* New Orleans, 45 La. Ann. 617, 12 So. 753, 20 L. R. A. 691; Washburn *v.* New Orleans, 43 La. Ann. 226, 9 So. 37; Com. *v.* Wm. Mann Co., 150 Pa. St. 64, 24 Atl. 601. But see State *v.* Board of Assessors, 41 La. Ann. 534, 6 So. 337.

81. Taylor Bros. Iron Works Co. *v.* New Orleans, 44 La. Ann. 554, 11 So. 3; Smith *v.* Board of Assessors, 44 La. Ann. 91, 10 So. 387; Gardiner Cotton, etc., Factory *v.* Gardiner, 5 Me. 133; Kimball Carriage Co. *v.* Manchester, 67 N. H. 483, 39 Atl. 334; Souhegan Nail, etc., Factory *v.* McConihe, 7 N. H. 309; Westmore Lumber Co. *v.* Orne, 48 Vt. 90.

82. Whited *v.* Bledsoe, 49 La. Ann. 325, 21 So. 538; Jones *v.* Raines, 35 La. Ann. 996; Baltimore Consol. Gas. Co. *v.* Baltimore, 62 Md. 588, 50 Am. Rep. 237.

taxes are payable on capital invested in the factory or plant,[83] nor on such part of it as is represented by the manufactured products into which it has temporarily passed,[84] nor on patents under which the business is carried on.[85] But the company cannot claim exemption on parts of its capital invested in dwelling-houses for its employees,[86] nor in mortgages or the stocks or bonds of other corporations.[87] If part of the capital is employed in the proper business of manufacturing, and part in some other line or branch of business, not necessarily connected with the main business of the company, although more or less incident to it, this does not render the entire capital subject to taxation, but only that portion of it which is so diverted from manufacturing.[88] Although the capital stock of the corporation is exempt, the shares of stock in the hands of their respective holders may still be liable to be taxed.[89]

l. Miscellaneous Corporations. Various other kinds of corporations have from time to time been favored with exemption from taxation, either on the ground of their performing public services or for the encouragement of beneficial industries.[90] But the principle is common to all that the company can claim exemption only as to so much of its property as is necessary and proper to the actual conduct of its particular business, and not in respect to property which may be devoted to other uses or which is held as a mere convenience or incident to the business.[91]

m. Foreign Corporations.[92] Although foreign corporations are not generally relieved by statute from local taxation, yet in some states an exception is made in favor of corporations engaged in manufacturing industries and carrying on their business within the taxing state.[93] Also it is not unusual to exempt from

83. Anne Arundel County *v.* Baltimore Sugar Refining Co., 99 Md. 481, 58 Atl. 211; Adams *v.* Tombigbee Mills, 78 Miss. 676, 29 So. 470; Com. *v.* Bethlehem Iron Co., 5 Dauph. Co. Rep. (Pa.) 118; Com. *v.* Cambria Iron Co., 5 Dauph. Co. Rep. (Pa.) 101.

The capital stock of a domestic corporation which is exclusively employed in manufacturing within the state is exempt from state taxation, although it is owned or leased by a foreign corporation. Com. *v.* American Cement Co., 203 Pa. St. 298, 52 Atl. 330.

84. Electric Traction Co. *v.* New Orleans, 45 La. Ann. 1475, 14 So. 231.

85. American Mutoscope Co. *v.* State Bd. of Assessors, 70 N. J. L. 172, 56 Atl. 369.

86. Com. *v.* Westinghouse Air Brake Co., 151 Pa. St. 276, 24 Atl. 1111, 1113; Com. *v.* Mahoning Rolling-Mill Co., 129 Pa. St. 360, 18 Atl. 135.

87. Com. *v.* Lackawanna Iron, etc., Co., 129 Pa. St. 346, 18 Atl. 133; Com. *v.* Croft, etc., Co., 26 Pa. Co. Ct. 474; Com. *v.* Jarecki Mfg. Co., 5 Dauph. Co. Rep. (Pa.) 154; Com. *v.* Cambria Iron Co., 5 Dauph. Co. Rep. (Pa.) 101.

88. *In re* Consolidated Electric Storage Co., (N. J. Ch. 1893) 26 Atl. 983; People *v.* Campbell, 144 N. Y. 166, 38 N. E. 990; Com. *v.* East Bangor Consol. Slate Co., 162 Pa. St. 599, 29 Atl. 706; Com. *v.* Juniata Coke Co., 157 Pa. St. 507, 27 Atl. 373, 22 L. R. A. 232; Com. *v.* Savage Fire Brick Co., 157 Pa. St. 512, 27 Atl. 374; Com. *v.* Thackra Mfg. Co., 156 Pa. St. 510, 27 Atl. 13; Com. *v.* Westinghouse Air Brake Co., 151 Pa. St. 276, 24 Atl. 1111, 1113; Com. *v.* Wm. Mann Co., 150 Pa. St. 64, 24 Atl. 601; Com. *v.* Weikel, etc., Spice Co., (Pa. 1892) 24 Atl. 603; Com. *v.* Lackawanna Iron, etc., Co., 129 Pa. St. 346, 18 Atl. 133; Com. *v.* Cambria Iron Co., 5 Dauph. Co. Rep. (Pa.) 101.

89. State *v.* Board of Assessors, 47 La. Ann. 1498, 18 So. 462.

90. See the statutes of the several states. And see Layman *v.* Iowa Tel. Co., 123 Iowa 591, 99 N. W. 205 (commutation of taxes of telephone companies); Detroit Union R. Depot, etc., Co. *v.* Detroit, 88 Mich. 347, 50 N. W. 302 (union depot company to pay annual tax on gross earnings in lieu of other taxes on property); Detroit, etc., Plank-Road Co. *v.* Detroit, 81 Mich. 562, 46 N. W. 12 (turnpike company to pay a specific tax on net profits and exempted from all other taxes on property); Le Roy *v.* East Saginaw City R. Co., 18 Mich. 203, 100 Am. Dec. 162 (commutation of taxes of street railroad company by payment of a specific amount annually in lieu of all other taxes); Ridgway Light, etc., Co. *v.* Elk County, 191 Pa. St. 465, 43 Atl. 323 (a natural gas company is engaged in a business of a public interest and therefore exempt from taxation); Matter of Hamilton, 13 Can. L. J. 18 (gravel roads owned by a corporation exempt as public highways).

91. Louisville *v.* Louisville Bd. of Trade, 90 Ky. 409, 14 S. W. 408, 12 Ky. L. Rep. 397, 9 L. R. A. 629 (building owned by board of trade, but partly rented to third persons not exempt as to part rented); Detroit Union R. Depot, etc., Co. *v.* Detroit, 88 Mich. 347, 50 N. W. 302 (grain elevator owned by union depot company exempt); Detroit, etc., Plank-Road Co. *v.* Detroit, 81 Mich. 562, 46 N. W. 12 (toll collector's residence owned by turnpike company exempt).

92. Liability to taxation see *supra*, III, B, 3.

93. People *v.* Campbell, 145 N. Y. 587, 40 N. E. 239 [*affirming* 80 Hun 466, 30 N. Y. Suppl. 472]; People *v.* Wemple, 133 N. Y.

taxation shares of stock in foreign corporations held by resident citizens of the state, where the corporation is assessed and pays taxes on its property in its own state.[94]

E. Exemption of Charitable, Educational, and Religious Institutions — 1. Charitable and Benevolent Institutions — a. In General. Exemption from taxation is usually granted by statute or constitution to the property of charitable organizations or institutions of "purely public charity";[95] and this does not necessarily mean an institution solely controlled and administered by the state, but includes private institutions for purposes of public charity, which are not administered for private gain,[96] and may include foreign corporations,[97] unless the terms of the exempting statute are such as to exclude foreign corporations.[98] Nor is it necessary, to constitute a public charity, that it should be universal; it must not be restricted to privileged individuals; but on the other hand it need not be open to all persons without distinction; the "public" to which it ministers may be limited territorially, or with reference to particular classes of disease or forms of need, or to nationality or religious affiliations.[99] Again the

323, 31 N. E. 238 [*reversing* 16 N. Y. Suppl. 602]; Com. *v.* American Car, etc., Co., 203 Pa. St. 302, 52 Atl. 326.

94. De Baun *v.* Smith, 55 N. J. L. 110, 25 Atl. 277; State *v.* Ramsey, 54 N. J. L. 546, 24 Atl. 445; Smalley *v.* Burlington, 63 Vt. 443, 22 Atl. 611; Foster *v.* Stevens, 63 Vt. 175, 22 Atl. 78, 13 L. R. A. 166.

95. See the statutes of the several states. And see San Francisco Ladies' Protection, etc., Soc. *v.* Story, 32 Cal. 65; Hartford First Ecclesiastical Soc. *v.* Hartford, 38 Conn. 274; Howe *v.* Howe, 179 Mass. 546, 61 N. E. 225, 55 L. R. A. 626; Paterson Rescue Mission *v.* High, 64 N. J. L. 116, 44 Atl. 974.

Property devised to a charitable institution, although charged with the payment of an annuity to the donor or other persons, is exempt from taxation. State *v.* Watkins, 108 Minn. 114, 121 N. W. 390.

In the absence of express provision in the constitution or statutes charitable and benevolent institutions are not exempt from taxation. Frederick County *v.* St. Joseph Sisters of Charity, 48 Md. 34.

96. Sisters of Third Order of St. Francis *v.* Peoria County Bd. of Review, 231 Ill. 317, 83 N. E. 274; Vink *v.* Work, 158 Ind. 638, 64 N. E. 83; Gerke *v.* Purcell, 25 Ohio St. 229; Humphreys *v.* Little Sisters of the Poor, 7 Ohio Dec. (Reprint) 194, 1 Cinc. L. Bul. 286 [*affirmed* on this point in 29 Ohio St. 201]; Donohugh's Appeal, 86 Pa. St. 306; Pocono Pines Assembly *v.* Monroe County, 29 Pa. Super. Ct. 36; Burd Orphan Asylum *v.* Upper Darby School Dist., 2 Del. Co. (Pa.) 137.

Temporary organizations.— The statutory exemption is given to corporations or other permanent organizations for charitable purposes, as distinguished from mere temporary undertakings. Humphries *v.* Little Sisters of Poor, 29 Ohio St. 201.

The fact that a charitable institution pays a salary to its superintendent and his assistants does not destroy its character as a public charity so as to subject it to taxation. Paterson Rescue Mission *v.* High, 64 N. J. L. 116, 44 Atl. 974.

97. Mission of St. Vincent de Paul Cong. *v.* Brakeley, 67 N. J. L. 176, 50 Atl. 589. See also Litz *v.* Johnston, 65 N. J. L. 169, 46 Atl. 776. But see People *v.* Western Seamen's Friends Soc., 87 Ill. 246.

98. Port Huron *v.* Wright, 150 Mich. 279, 114 N. W. 76, where the exemption was restricted to benevolent and charitable institutions "incorporated under the laws of this state."

99. *Kentucky.*— Widows', etc., Home O. F. *v.* Com., 126 Ky. 386, 103 S. W. 354, 31 Ky. L. Rep. 775, 16 L. R. A. N. S. 829.

Maine.— Bangor *v.* Rising Virtue Lodge No. 10 F. & A. M., 73 Me. 428, 40 Am. Rep. 369.

New York.— People *v.* New York Tax, etc., Com'rs, 36 Hun 311 (society for relief of Swiss people only); Hebrew Benev., etc., Asylum *v.* New York, 11 Hun 116 (institution for Hebrews only). See also Matter of Wolfe, 15 N. Y. Suppl. 539, 2 Connolly Surr. 600.

Oregon.—Hibernian Benev. Soc. *v.* Kelly, 28 Oreg. 173, 42 Pac. 3, 52 Am. St. Rep. 769, 30 L. R. A. 167.

Pennsylvania.— Burd Orphan Asylum *v.* Upper Darby School Dist., 90 Pa. St. 21 (asylum for "white female orphan children," with preference given to those baptized in the communion of a certain church); Hastings *v.* Long, 11 Pa. Dist. 370.

Virginia.—Petersburg *v.* Petersburg Benev. Mechanics' Assoc., 78 Va. 431.

Restriction to members only.— An institute of science, maintaining a library and museum, the benefits of which are restricted to members, except upon conditions prescribed by a board of managers, is not a public charity. Delaware County Inst. of Science *v.* Delaware County, 94 Pa. St. 163.

Restriction to members and their families. — In several cases it is held that, to enable an institution to claim the benefit of an exemption of the property of "charitable institutions," it is not necessary that its benefits should be extended to needy persons generally without regard to the relation the recipient may bear to the society, or to dues or fees paid; but it is still "charitable," al-

word "charity" is not restricted to the relief of the sick or indigent, but extends to other forms of philanthropy or public beneficence;[1] and if an institution is essentially a public charity, free from the element of private or corporate gain, its character as such is not affected by the fact that it receives some revenue from the recipients of its bounty, which is devoted to the maintenance of the institution or purposes of its charity.[2] But as the statutes are ordinarily framed, it is necessary, to claim an exemption as to particular property, that the ownership and use of it should combine; that is, property occupied and used by a charitable institution is not exempt if a third person owns it,[3] except perhaps where the title is merely held in trust for the institution or the property has been bequeathed to it.[4] And the exemption is commonly restricted to such property as is actually devoted to and used for the proper charitable purposes of the institution,[5] or held by it with the positive intention of devoting it to such uses in the immediate

though it restricts its benefactions to its own members and their families. Indianapolis *v.* Grand Master Indiana Grand Lodge, 25 Ind. 518; Appeal Tax Ct. *v.* Grand Lodge G. O. H., 50 Md. 421; Hibernian Benev. Soc. *v.* Kelly, 28 Oreg. 173, 42 Pac. 3, 52 Am. St. Rep. 769, 30 L. R. A. 167; State *v.* Addison, 2 S. C. 499; Methodist Episcopal Church South *v.* Hinton, 92 Tenn. 188, 21 S. W. 321; Morris *v.* Lone Star Chapter No. 6 R. A. M., 68 Tex. 698, 5 S. W. 519; Petersburg *v.* Petersburg Benev. Mechanics' Assoc., 78 Va. 431. But on the other hand, where the grant of exemption is to institutions of "purely public charity," it is generally held that it does not include organizations whose benevolence is thus restricted to members and their families. Bangor *v.* Rising Virtue Lodge No. 10 F. & A. M., 73 Me. 428, 40 Am. Rep. 369; Hennepin County *v.* Brotherhood of Gethsemane, 27 Minn. 460, 8 N. W. 595, 38 Am. Rep. 298; Thomson *v.* Norris, 20 N. J. Eq. 489; Mitchell *v.* Franklin County, 25 Ohio St. 143; Philadelphia *v.* Pennsylvania Masonic Home, 160 Pa. St. 572, 28 Atl. 954, 40 Am. St. Rep. 736, 23 L. R. A. 545; Delaware County Inst. *v.* Delaware County, 94 Pa. St. 163; Burd Orphan Asylum *v.* Upper Darby School Dist., 90 Pa. St. 21; Donohugh's Appeal, 86 Pa. St. 306; Swift *v.* Easton Beneficial Soc., 73 Pa. St. 362; Babb *v.* Reed, 5 Rawle (Pa.) 151, 28 Am. Dec. 650. *Contra*, Widow's, etc., Home *v.* Com., 126 Ky. 386, 103 S. W. 354, 31 Ky. L. Rep. 775, 16 L. R. A. N. S. 829 [*overruling* Widows', etc., Home *v.* Bosworth, 112 Ky. 200, 65 S. W. 591, 23 Ky. L. Rep. 1505].

1. New Orleans *v.* Mechanics' Soc., 10 La. Ann. 282; Balch *v.* Atty.-Gen., 174 Mass. 144, 54 N. E. 490; State *v.* Academy of Science, 13 Mo. App. 213; Gerke *v.* Purcell, 25 Ohio St. 229.

Applications of rule.— The following have been held to be charitable institutions or organizations: A bible society. Montreal *v.* Montreal Auxiliary Bible Soc., 6 Quebec Q. B. 251. A missionary society. Maine Baptist Missionary Convention *v.* Portland, 65 Me. 92; Presbyterian Church Bd. of Home Missions *v.* New York, 37 N. Y. Suppl. 96; Woman's Home Missionary Soc. *v.* Taylor, 173 Pa. St. 456, 34 Atl. 42. A Sunday-school union. American Sunday School Union *v.* Philadelphia, 161 Pa. St. 307, 29 Atl. 26, 23 L. R. A. 695. A library association. Cleveland Library Assoc. *v.* Pelton, 36 Ohio St. 253; Donohugh's Appeal, 86 Pa. St. 306. A society for the prevention of cruelty to animals. State S. P. C. A. *v.* Boston, 142 Mass. 24, 6 N. E. 840. But on the other hand a corporation having for its paramount object the dissemination of theosophical ideas and the procuring of converts thereto is not a "benevolent" or "charitable" institution. New England Theosophical Corp. *v.* Boston Bd. of Assessors, 172 Mass. 60, 51 N. E. 456, 42 L. R. A. 281.

2. *In re* Vassor, 127 N. Y. 1, 27 N. E. 394 [*reversing* 58 Hun 378, 12 N. Y. Suppl. 203]; Philadelphia *v.* Women's Christian Assoc., 125 Pa. St. 572, 17 Atl. 475. See also *infra*, IV, E, 1, c, d.

3. Laurent *v.* Muscatine, 59 Iowa 404, 13 N. W. 409; Bates *v.* Sharon, 175 Mass. 293, 56 N. E. 586; Humphries *v.* Little Sisters of the Poor, 29 Ohio St. 201. *Compare* Bancroft *v.* Magill, 69 N. J. L. 589, 55 Atl. 103.

4. Norton *v.* Louisville, 118 Ky. 836, 82 S. W. 621, 26 Ky. L. Rep. 846; Presbyterian Relief Bd., etc. *v.* Fisher, 68 N. J. L. 143, 52 Atl 228; Litz *v.* Johnston, 69 N. J. L. 169, 46 Atl. 776; People *v.* Wells, 179 N. Y. 257, 71 N. E. 1126. *Compare* Richmond County Academy *v.* Bohler, 80 Ga. 159, 7 S. E. 663; Hastings Tax Collector *v.* Long, 11 Pa. Dist. 370; Com. *v.* Williams, 102 Va. 778, 47 S. E. 867.

5. Lynn Workingmen's Aid Assoc. *v.* Lynn, 136 Mass. 283; Massachusetts Gen. Hospital *v.* Somerville, 101 Mass. 319; St. Elizabeth Sisters of Charity *v.* Corey, 73 N. J. L. 699, 65 Atl. 500; St. Elizabeth Sisters of Charity *v.* Thompson, 72 N. J. L. 426, 61 Atl. 387; Cooper Hospital *v.* Camden, 68 N. J. L. 691, 54 Atl. 419; St. Vincent De Paul Cong. *v.* Brakeley, 67 N. J. L. 176, 50 Atl. 589; *In re* Vineland Historical, etc., Soc., 66 N. J. Eq. 291, 56 Atl. 1039; People *v.* Purdy, 58 Hun (N. Y.) 386, 12 N. Y. Suppl. 307; Young Women's Christian Assoc. *v.* Spencer, 29 Ohio Cir. Ct. 249. *Compare* New Orleans *v.* Poydras Asylum, 9 La. Ann. 584.

Land in another county, owned by a charitable institution, is not exempt in Pennsylvania. Delaware County *v.* Sisters of St. Francis, 2 Del. Co. (Pa.) 149.

future,[6] and does not extend to property of the institution which is held or used for purposes not connected with the charity, more especially if it is a source of revenue.[7] Further, if the statute limits the amount of property which the institution may hold, or as to which it shall be exempt, any property owned in excess of that limit is subject to taxation; [8] and the exemption is lost by an abandonment of the charitable uses to which the property was originally devoted or its diversion to other purposes.[9]

b. Rents or Income Applied to Charity. While there is some authority to the contrary,[10] the rule most generally accepted is that where property belonging to a charitable institution is rented to third persons or otherwise employed as a source of profit, it is not enough to exempt it from taxation that the rents or income are devoted exclusively to the charitable purposes for which the institution was organized; the exemption applies only to property actually occupied and used for such purposes.[11] But property which is used directly for the purposes and in

6. New England Hospital *v.* Boston, 113 Mass. 518; House of Refuge *v.* Smith, 140 Pa. St. 387, 21 Atl. 353.

But the mere fact that the institution intends at some indefinite future time to occupy land owned by it for the purposes of its charitable work is not sufficient to exempt the land from taxation. Enaut *v.* McGuire, 36 La. Ann. 804, 51 Am. Rep. 14; Boston Soc. Redemptorist Fathers *v.* Boston, 129 Mass. 178; Montana Catholic Missions *v.* Lewis, etc., County, 13 Mont. 559, 35 Pac. 2, 22 L. R. A. 684; Children's Seashore House *v.* Atlantic City, 68 N. J. L. 385, 53 Atl. 399, 59 L. R. A. 947. And although such land is purchased as a building site for the purposes of the institution, if the exempting statute is in terms restricted to lands "actually occupied," such lands while vacant will be subject to taxation. Young Women's Christian Assoc. *v.* Spencer, 29 Ohio Cir. Ct. 249.

7. *Illinois.*— People *v.* Wabash R. Co., 138 Ill. 85, 27 N. E. 694.

Iowa.— Ft. Des Moines Lodge No. 25 *v.* Polk County, 56 Iowa 34, 8 N. W. 687.

Louisiana.— New Orleans *v.* Judah Cong., 15 La. Ann. 389.

Maine.— Curtis *v.* Androscoggin Lodge No. 24 I. O. O. F., 99 Me. 356, 59 Atl. 518.

Maryland.— Redemptorists *v.* Howard County, 50 Md. 449; Appeal Tax Ct. *v.* Grand Lodge, 50 Md. 421; Frederick County *v.* St. Joseph Sisters of Charity, 48 Md. 34.

Massachusetts.— Salem Marine Soc. *v.* Salem, 155 Mass. 329, 29 N. E. 584.

New York.— People *v.* Sayles, 32 N. Y. App. Div. 203, 53 N. Y. Suppl. 65.

Pennsylvania.— Philadelphia *v.* Ladies' United Aid Soc., 154 Pa. St. 12, 25 Atl. 1042; Pittsburgh *v.* Home of Friendless, 3 Pa. Co. Ct. 390; Lancaster County *v.* Warfel, 19 Lanc. L. Rev. 78.

Texas.— Morris *v.* Lone Star Chapter No. 6 R. A. M., 68 Tex. 698, 5 S. W. 519.

England.—Inland Revenue Com'rs *v.* Scott, [1892] 2 Q. B. 152, 56 J. P. 580, 632, 61 L. J. Q. B. 432, 67 L. T. Rep. N. S. 173, 40 Wkly. Rep. 632.

Property of fraternal and beneficial associations see *infra*, IV, E, 1, e.

8. Children's Seashore House *v.* Atlantic City, 68 N. J. L. 385, 53 Atl. 399, 59 L. R. A. 947.

9. Philadelphia *v.* Jewish Hospital Assoc., 148 Pa. St. 454, 23 Atl. 1135; Pocono Pines Assembly *v.* Monroe County, 29 Pa. Super. Ct. 36.

10. *Kentucky.*— Henderson *v.* Strangers' Rest Lodge No. 13 I. O. O. F., 17 S. W. 215 [*distinguishing* Lancaster *v.* Clayton, 86 Ky. 373, 5 S. W. 864, 9 Ky. L. Rep. 611].

New Jersey.— Cooper Hospital *v.* Burdsall, 63 N. J. L. 85, 42 Atl. 853; Long Branch Firemen's Relief Assoc. *v.* Johnson, 62 N. J. L. 625, 43 Atl. 573; State *v.* Chatham, 52 N. J. L. 373, 20 Atl. 292, 9 L. R. A. 198.

Ohio.— United Presb. Theological Seminary *v.* Little, 25 Ohio Cir. Ct. 609.

Tennessee.— Methodist Episcopal Church *v.* Hinton, 92 Tenn. 188, 21 S. W. 321, 19 L. R. A. 289.

Virginia.— Staunton *v.* Mary Baldwin Seminary, 99 Va. 653, 39 S. E. 596.

United States.— See St. Anna's Asylum *v.* New Orleans, 105 U. S. 362, 26 L. ed. 1128 [*reversing* 31 La. Ann. 292].

11. *Arkansas.*— Brodie *v.* Fitzgerald, 57 Ark. 445, 22 S. W. 29.

Georgia.— Massenburg *v.* Grand Lodge F. & A. M., 81 Ga. 212, 7 S. E. 636; Richmond County Academy *v.* Bohler, 80 Ga. 159, 7 S. E. 633.

Illinois.— Chicago Theological Seminary *v.* People, 189 Ill. 439, 59 N. E. 977.

Indiana.— Indianapolis *v.* Grand Master of State Grand Lodge, 25 Ind. 518.

Iowa.— Fort Des Moines Lodge No. 25 *v.* Polk County, 56 Iowa 34, 8 N. W. 687.

Kansas.— National Council K. L. S. *v.* Phillips, 63 Kan. 808, 66 Pac. 1014.

Louisiana.— Female Orphan Soc. *v.* New Orleans Bd. of Assessors, 109 La. 537, 33 So. 592; State *v.* Orleans Parish Bd. of Assessors, 52 La. Ann. 223, 26 So. 872; New Orleans *v.* St. Patrick's Hall Assoc., 28 La. Ann. 512; New Orleans *v.* Russ, 27 La. Ann. 413. But see New Orleans Female Orphan Asylum *v.* Houston, 37 La. Ann. 68.

Maryland.— Baltimore *v.* Grand Lodge A. F. & A. M., 60 Md. 280; Redemptorists *v.* Howard County, 50 Md. 449; Appeal Tax Ct. *v.* St. Peter's Academy, 50 Md. 321.

the operation of the charity is exempt, although it may be used in a manner to yield some return and thereby reduce expenses.[12]

c. Hospitals. A public hospital is a charitable institution, or under some statutes an "almshouse," so as to be exempt from taxation;[13] but not so if it is entirely self-supporting or is conducted for private gain or as an adjunct to a medical college, or is private in the sense that the public have no right of admission to it.[14] But it is none the less a public charity because patients of sufficient pecuniary ability are required to pay for what they receive, if the proceeds are applied exclusively to the purposes of the institution and if indigent patients are treated without charge;[15] because it is not owned by the state or a municipal

Minnesota.— State *v.* St. Barnabas Hospital, 95 Minn. 489, 104 N. W. 551.

Mississippi.— Ridgeley Lodge No. 23 I. O. O. F. *v.* Redus, 78 Miss. 352, 29 So. 163.

New Jersey.— Sisters of Peace *v.* Westervelt, 64 N. J. L. 510, 45 Atl. 788 [*affirmed* in 65 N. J. L. 685, 48 Atl. 789].

New York.— People *v.* Sayles, 32 N. Y. App. Div. 197, 53 N. Y. Suppl. 67; People *v.* Brooklyn Bd. of Assessors, 27 Hun 559.

Ohio.— Humphries *v.* Little Sisters of the Poor, 29 Ohio St. 201.

Oregon.— Hibernian Benev. Soc. *v.* Kelly, 28 Oreg. 173, 42 Pac. 3, 52 Am. St. Rep. 769, 36 L. R. A. 167.

Pennsylvania.—American Sunday School Union *v.* Philadelphia, 161 Pa. St. 307, 29 Atl. 26, 23 L. R. A. 695; Pocono Pines Assembly *v.* Monroe County, 29 Pa. Super. Ct. 36; Pennsylvania Hospital *v.* Delaware County, 15 Pa. Co. Ct. 540; Young Men's Christian Assoc. *v.* Donohugh, 13 Phila. 12.

South Dakota.— State *v.* Lawrence County Bd. of Equalization, 16 S. D. 219, 92 N. W. 16.

Texas.— Morris *v.* Lone Star Chapter No. 6 R. A. M., 68 Tex. 698, 5 S. W. 519; Barbee *v.* Dallas, 26 Tex. Civ. App. 571, 64 S. W. 1018.

Utah.— Parker *v.* Quinn, 23 Utah 332, 64 Pac. 961.

12. Pennsylvania Hospital *v.* Delaware County, 169 Pa. St. 305, 32 Atl. 456; Philadelphia *v.* Pennsylvania Hospital, 154 Pa. St. 9, 25 Atl. 1076; House of Refuge *v.* Smith, 140 Pa. St. 387, 21 Atl. 353. See also *infra*, IV, E, 1, c, d.

13. *Arkansas.*— Hot Springs School Dist. *v.* Female Academy Sisters of Mercy, 84 Ark. 497, 106 S. W. 954.

Illinois.— Proctor Hospital *v.* Peoria County Bd. of Review, 233 Ill. 583, 84 N. E. 618; Cook County Bd. of Review *v.* Chicago Policlinic, 233 Ill. 268, 84 N. E. 220; Chicago German Hospital *v.* Cook County Bd. of Review, 233 Ill. 246, 84 N. E. 215.

Massachusetts.— Massachusetts Soc. for Prevention of Cruelty to Animals *v.* Boston, 142 Mass. 24, 6 N. E. 840.

New York.— People *v.* Reilly, 178 N. Y. 609, 70 N. E. 1107; Matter of Kimberly, 27 N. Y. App. Div. 470, 50 N. Y. Suppl. 586; New York Western Dispensary *v.* New York, 56 N. Y. Super. Ct. 361, 4 N. Y. Suppl. 547; Matter of Curtiss, 7 N. Y. Suppl. 207, 1 Connoly Surr. 471.

United States.— Williamson *v.* New Jersey, 130 U. S. 189, 9 S. Ct. 453, 32 L. ed. 915.

England.— Colchester *v.* Kewney, L. R. 1 Exch. 368, 4 H. & C. 445, 35 L. J. Exch. 204, 14 L. T. Rep. N. S. 888, 14 Wkly. Rep. 994 [*affirmed* in L. R. 2 Exch. 253, 36 L. J. Exch. 172, 16 L. T. Rep. N. S. 463, 15 Wkly. Rep. 930].

Canada.— Matter of Ottawa Sisters of Charity, 7 Can. L. J. 157.

See 45 Cent. Dig. tit. "Taxation," § 390.

An institution for the blind, which does not receive pay from patients under any circumstances, is an "almshouse," and a bequest to it is not liable to the legacy tax. Matter of Underhill, 20 N. Y. Suppl. 134, 2 Connoly Surr. 262.

14. *Kentucky.*— Wathen *v.* Louisville, 85 S. W. 1195, 27 Ky. L. Rep. 635; Gray St. Infirmary *v.* Louisville, 65 S. W. 11, 23 Ky. L. Rep. 1274, 55 L. R. A. 270, both applying the rule stated in the text to an infirmary run as an adjunct to a medical college.

New York.— People *v.* Nowles, 34 Misc. 501, 70 N. Y. Suppl. 277.

North Dakota.— Engstad *v.* Grand Forks County, 10 N. Dak. 54, 84 N. W. 577.

Pennsylvania.— Delaware County *v.* Sisters of St. Francis, 2 Del. Co. 149.

England.— Needham *v.* Bowers, 21 Q. B. D. 436, 59 L. T. Rep. N. S. 404, 37 Wkly. Rep. 125.

In Canada it has been held that a hospital is entitled to exemption as a "public hospital," although it is owned and carried on by and for the benefit of certain physicians, where it is subject to governmental regulation and control and public funds are by statute contributed to its support. Struthers *v.* Sudbury, 27 Ont. App. 217.

Hospital organized for profit.— To be exempt from taxation under the Illinois statutes property must belong to and stand in the name of an institution organized for public charity, and be actually and exclusively used for charitable purposes, and a hospital, if organized as a corporation for profit, cannot claim the exemption, although it is actually conducted as a public hospital. People *v.* Ravenswood Hospital, 238 Ill. 137, 87 N. E. 305.

15. *Arkansas.*— Hot Springs School Dist. *v.* Sisters of Mercy Little Rock Female Academy, 84 Ark. 497, 106 S. W. 954.

Illinois.— Cook County Bd. of Review *v.* Chicago Policlinic, 233 Ill. 268, 84 N. E. 220; German Hospital *v.* Cook County Bd. of Review, 233 Ill. 246, 84 N. E. 215; Cook County Bd. of Review *v.* Provident Hospital, etc., Assoc., 233 Ill. 242, 84 N. E. 216; St

corporation;[16] because it receives contributions from outside sources if the money received is devoted to the general purposes of the hospital;[17] or because it maintains a training school for nurses who receive board and instruction in exchange for services rendered by them in the work of the hospital.[18] The exemption will ordinarily include not only the hospital building, but also such other property as is used for the purposes of the institution and not as a source of profit.[19]

d. Homes, Asylums, and Reformatories. The same rules apply to homes for the destitute and friendless, asylums for the insane or incurable or for orphans, and reformatories for incorrigible children. These are all charitable institutions within the meaning of the exemption laws,[20] provided they are not so restricted in respect to the persons who may enjoy their privileges as to lose the character of "public" charities.[21] They do not forfeit their right to exemption by the fact

Francis Sisters of Third Order *v.* Peoria County Bd. of Review, 231 Ill. 317, 83 N. E. 272.

Louisiana.— State *v.* Orleans Parish Bd. of Assessors, 52 La. Ann. 223, 26 So. 872.

Michigan.— Michigan Sanitarium, etc., Assoc. *v.* Battle Creek, 138 Mich. 676, 101 N. W. 855.

Minnesota.— Hennepin County *v.* Brotherhood of Gethsemane, 27 Minn. 460, 8 N. W. 595, 38 Am. Rep. 298.

Missouri.— State *v.* Powers, 74 Mo. 476 [*affirming* 10 Mo. App. 263].

Pennsylvania.— Philadelphia *v.* Pennsylvania Hospital for Insane, 154 Pa. St. 9, 25 Atl. 1076.

Wisconsin.— St. Joseph's Hospital Assoc. *v.* Ashland County, 96 Wis. 636, 72 N. W. 43.

England.— Cawse *v.* Nottingham Lunatic Asylum, [1891] 1 Q. B. 585, 55 J. P. 582, 60 L. J. Q. B. 485, 65 L. T. Rep. N. S. 155, 39 Wkly. Rep. 461; Blake *v.* London, 18 Q. B. D. 437, 56 L. J. Q. B. 152.

The fact that the percentage of charity patients is small is not material if there are no obstacles thrown in the way designed to prevent charity patients from applying for treatment, and all who do apply are received without discrimination. Sisters of Third Order of St. Francis *v.* Peoria County Bd. of Review, 231 Ill. 317, 83 N. E. 272.

16. Sisters of Third Order of St. Francis *v.* Peoria County Bd. of Review, 231 Ill. 317, 83 N. E. 272. See also *supra*, IV, E, 1, a.

17. Sisters of Third Order of St. Francis *v.* Peoria County Bd. of Review, 231 Ill. 317, 83 N. E. 272. See also Pennsylvania Hospital *v.* Delaware County, 169 Pa. St. 305, 32 Atl. 456.

18. Cook County Bd. of Review *v.* Chicago Policlinic, 233 Ill. 268, 84 N. E. 220; Sisters of Third Order of St. Francis *v.* Peoria County Bd. of Review, 231 Ill. 317, 83 N. E. 272.

19. Michigan Sanitarium, etc., Assoc. *v.* Battle Creek, 138 Mich. 676, 101 N. W. 855. And see Cooper Hospital *v.* Camden, 68 N. J. L. 691, 54 Atl. 419. *Compare* Thurston County *v.* Sisters of Charity of House of Providence, 14 Wash. 264, 44 Pac. 252, holding that the word "hospital," as used in a statute exempting such institutions from taxation, will include the hospital building alone, and not the land on which it stands.

Applications of rule.—A house belonging to a hospital or asylum and occupied as the residence of the chief medical officer or superintendent, whose duties require him to live in close proximity to the institution, is regarded as a necessary part of the institution and therefore within the exemption. Jepson *v.* Gribble, 1 Ex. D. 151, 45 L. J. Exch. 502, 34 L. T. Rep. N. S. 493, 24 Wkly. Rep. 460; Wilson *v.* Fasson, 48 J. P. 361; Harrison *v.* Bulcock, 1 H. Bl. 68. So also are farms purchased and permanently used by a hospital for hospital purposes, as part of the hospital plant and as an open-air sanitarium. Pennsylvania Hospital *v.* Delaware County, 169 Pa. St. 305, 32 Atl. 456. But a building which, although originally constructed for a hospital, has not been used as such for many years is not exempt. Philadelphia *v.* Jewish Hospital Assoc., 148 Pa. St. 454, 23 Atl. 1135.

The Roosevelt hospital in New York city has been held to be exempt from taxation on its property, although not used exclusively for carrying out its corporate purposes, the decision being based upon "the peculiar features, which attended the incorporation and characterized the endowment" of that hospital. People *v.* Raymond, 194 N. Y. 189, 87 N. E. 90 [*reversing* 126 N. Y. App. Div. 720, 111 N. Y. Suppl. 177].

20. *Kentucky.*— Norton *v.* Louisville, 118 Ky. 836, 82 S. W. 621, 26 Ky. L. Rep. 846.

New York.— People *v.* New York Tax, etc., Com'rs, 36 Hun 311; New York Infant Asylum *v.* Westchester County, 31 Hun 116; *In re* Herr, 10 N. Y. Suppl. 680; *In re* Lenox, 9 N. Y. Suppl. 895; Matter of Hunter, 11 N. Y. St. 704, 22 Abb. N. Cas. 24, 6 Dem. Surr. 154.

Ohio.— Humphreys *v.* Little Sisters of Poor, 7 Ohio Dec. (Reprint) 194, 1 Cinc. L. Bul. 286.

Pennsylvania.— House of Refuge *v.* Smith, 140 Pa. St. 387, 21 Atl. 353; Cumru Tp. *v.* Berks County Poor Directors, 112 Pa. St. 264, 3 Atl. 578; Armstrong County *v.* Kittanning Borough Overseers of Poor, (1888) 15 Atl. 892.

England.— Mary Clark Home *v.* Anderson, [1904] 2 K. B. 645, 73 L. J. K. B. 806, 91 L. T. Rep. N. S. 457, 20 T. L. R. 626; Atty.-Gen. *v.* Hill, 2 M. & W. 160.

See 45 Cent. Dig. tit. "Taxation," § 391.

21. See the cases cited *infra*, this note.

What are "public" homes, asylums, etc.— An orphan asylum does not become a private

that they are partly supported by payments or fees exacted from those inmates or patients who are able to pay, provided the indigent are not for that reason excluded;[22] and the exemption extends to all property belonging to the institution which is actually used for its proper work and reasonably necessary thereto.[23]

e. Fraternal and Beneficial Associations. In some states it is considered that fraternal associations, such as the Masonic order and the Odd Fellows, are to be classed as "charitable" or "benevolent" institutions on account of their philanthropies, and therefore entitled to hold their property exempt from taxes;[24] while a contrary doctrine is that the fact of their relief work being confined to members of the order and their families removes them from the class of public charities, so that they are not entitled to exemption.[25] In some cases it is held that the question depends upon whether the exemption granted is in terms restricted to institutions of "purely public charity" or applies generally to "charitable institutions."[26] Where the principal object of a fraternal order is to provide

charity because, according to the will of its founder, a preference is given, in receiving inmates, to the children of clergymen of a particular church, if others are not absolutely excluded. Burd Orphan Asylum *v.* Upper Darby School Dist., 90 Pa. St. 21. And see Income Tax Com'rs *v.* Pemsel, [1891] A. C. 531, 55 J. P. 805, 61 L. J. Q. B. 265, 65 L. T. Rep. N. S. 621, holding that an establishment for single persons and widows belonging to the Moravian brotherhood was a charitable institution. Nor is such an institution converted into a private charity because the founder expressed a preference that the girls received should be from a particular city and should be orphans of soldiers and firemen. *In re* Foulke, etc., Inst., 26 Pa. Co. Ct. 561. Again, a discrimination may be made on lines of nationality, without forfeiting the character of a public charity. Hebrew Benev., etc., Asylum *v.* New York, 11 Hun (N. Y.) 116. Or as to the color of the inmates. Colored Orphans Ben. Assoc. *v.* New York, 104 N. Y. 581, 12 N. E. 279; Hastings *v.* Long, 11 Pa. Dist. 370. Or it may be restricted to the widows and orphans of a particular fraternal order such as the Masons or Odd Fellows. Widows', etc., Home of Odd Fellows *v.* Com., 126 Ky. 386, 103 S. W. 354, 31 Ky. L. Rep. 775, 16 L. R. A. N. S. 829 [*overruling* Widows', etc., Home of Odd Fellows *v.* Bosworth, 112 Ky. 200, 65 S. W. 591, 23 Ky. L. Rep. 1505].

22. *Colorado.*— Cathedral of St. John the Evangelist *v.* Denver, 37 Colo. 378, 86 Pac. 1021.

Louisiana.— State *v.* Orleans Parish Bd. of Assessors, 52 La. Ann. 223, 26 So. 872.

Massachusetts.— Franklin Square House *v.* Boston, 188 Mass. 409, 74 N. E. 675.

New Jersey.— Paterson Rescue Mission *v.* High, 64 N. J. L. 116, 44 Atl. 974.

New York.— *In re* Vassar, 127 N. Y. 1, 27 N. E. 394 [*reversing* 58 Hun 378, 12 N. Y. Suppl. 203]. But see *In re* Keech, 11 N. Y. Suppl. 265; Matter of Vanderbilt, 10 N. Y. Suppl. 239, 2 Connoly Surr. 319; *In re* Lenox, 9 N. Y. Suppl. 895.

Pennsylvania.— Philadelphia *v.* Women's Christian Assoc., 125 Pa. St. 572, 17 Atl. 475.

23. Home for Education, etc., of Feeble-Minded Children *v.* Landis Tp. Collector, 59 N. J. L. 343, 35 Atl. 906; Newark *v.* Verona Tp., 59 N. J. L. 94, 34 Atl. 1060; House of Refuge *v.* Smith, 140 Pa. St. 387, 21 Atl. 353 [*reversing* 8 Pa. Co. Ct. 552].

24. *Georgia.*— Massenburg *v.* Grand Lodge F. & A. M., 81 Ga. 212, 7 S. E. 636; Savannah *v.* Solomon's Lodge No. 1 F. & A. M., 53 Ga. 93.

Indiana.— Indianapolis *v.* Grand Master of State Grand Lodge, 25 Ind. 518.

Louisiana.— State *v.* Board of Assessors, 34 La. Ann. 574.

Massachusetts.— Masonic Education, etc., Trust *v.* Boston, 201 Mass. 320, 87 N. E. 602.

Nebraska.— Plattsmouth Lodge No. 6 A. F. & A. M. *v.* Cass County, 79 Nebr. 463, 113 N. W. 167.

Oregon.— Hibernian Benev. Soc. *v.* Kelly, 28 Oreg. 173, 42 Pac. 3, 52 Am. St. Rep. 769, 30 L. R. A. 167.

Virginia.— Petersburg *v.* Petersburg Benev. Mechanics' Assoc., 78 Va. 431.

See 45 Cent. Dig. tit. "Taxation," § 392.

25. *Illinois.*— Supreme Lodge M. A. F. O. *v.* Effingham County Bd. of Review, 223 Ill. 54, 79 N. E. 23.

Kentucky.— Newport *v.* Masonic Temple Assoc., 108 Ky. 333, 56 S. W. 405, 21 Ky. L. Rep. 1785, 49 L. R. A. 252. *Compare* Henderson *v.* Strangers' Rest Lodge No. 13 I. O. O. F., 17 S. W. 215, 17 Ky. L. Rep. 1041.

Maine.— Bangor *v.* Rising Virtue Lodge No. 10 F & A. M., 73 Me. 428, 40 Am. Rep. 369.

Ohio.— Morning Star Lodge No. 26 I. O. O. F. *v.* Hayslip, 23 Ohio St. 144.

Pennsylvania.— Philadelphia *v.* Masonic Home, 160 Pa. St. 572, 28 Atl. 954, 40 Am. St. Rep. 736, 23 L. R. A. 545.

South Carolina.— See State *v.* Addison, 2 S. C. 499, holding that such societies are not exempt where the exemption is in terms restricted to "charitable institutions in the nature of asylums for the infirm, deaf and dumb, blind, idictic, and indigent persons."

Wisconsin.— Green Bay Lodge No. 259 B. P. O. E. *v.* Green Bay, 122 Wis. 452, 100 N. W. 837.

See 45 Cent. Dig. tit. "Taxation." § 392.

26. Newport *v.* Masonic Temple Assoc., 108 Ky. 333, 56 S. W. 405, 21 Ky. L. Rep. 1785, 49 L. R. A. 252; Hibernian Benev. Soc. *v.* Kelly, 28 Oreg. 173, 42 Pac. 3, 52 Am. St.

for the payment of sick benefits to members and special payments to the next of kin or designated beneficiaries of deceased members, out of funds raised by dues and assessments, it is not a charitable organization, but in the nature of an insurance company, and its property is not exempt.[27] So also where a right to exemption exists it does not extend to property not occupied or used for the purposes of the association,[28] such as property which is rented out to third persons.[29]

f. Volunteer Military Organizations. In Pennsylvania a volunteer military organization is a public charity within the meaning of the constitution and the statute, so that its armory is exempt from taxation.[30]

2. Educational Institutions — a. In General. In many states an exemption from taxation is accorded to the property of "schools," "colleges," "academies," "institutions of learning," or "educational institutions."[31] Whichever of these terms may be employed, the courts show a disposition to give it a wide and liberal scope,[32] and unless the statute applies only to incorporated institu-

Rep. 769, 30 L. R. A. 167. See also cases cited *supra* note 24; and, generally, *supra*, IV, E, 1, a.

27. *Illinois.*— Supreme Lodge M. A. F. O. *v.* Effingham County Bd. of Review, 223 Ill. 54, 79 N. E. 23; State Council of Catholic Knights *v.* Effingham County Bd. of Review, 198 Ill. 441, 64 N. E. 1104.

Kansas.— National Council K. & L. S. *v.* Phillips, 63 Kan. 799, 66 Pac. 1011.

Massachusetts.— Young Men's Protestant, etc., Soc. *v.* Fall River, 160 Mass. 409, 36 N. E. 57.

Mississippi.— Ridgeley Lodge No. 23 I. O. O. F. *v.* Redus, 78 Miss. 352, 29 So. 163.

Nebraska.— Royal Highlanders *v.* State, 77 Nebr. 18, 108 N. W. 183, 7 L. R. A. N. S. 380.

New York.—Matter of Jones, 2 N. Y. Suppl. 671, 1 Connoly Surr. 125.

South Dakota.— Masonic Aid Assoc. *v.* Taylor, 2 S. D. 324, 50 N. W. 93.

England.— *In re* Linen, etc., Drapers', etc., Inst., 58 L. T. Rep. N. S. 949.

28. Hibernian Benev. Soc. *v.* Kelly, 28 Oreg. 173, 42 Pac. 3, 52 Am. St. Rep. 769, 30 L. R. A. 167; Morris *v.* Lone Star Chapter No. 6 R. A. M., 68 Tex. 698, 5 S. W. 519.

29. *Iowa.*— Lacy *v.* Davis, 112 Iowa 106, 83 N. W. 784.

Mississippi.— Ridgeley Lodge No. 23 I. O. O. F. *v.* Redus, 78 Miss. 352, 29 So. 163.

Missouri.—Adelphia Lodge No. 38 K. P. *v.* Crawford, 157 Mo. 356, 57 S. W. 1020; Fitterer *v.* Crawford, 157 Mo. 51, 57 S. W. 532, 50 L. R. A. 191.

New York.— People *v.* Brooklyn Bd. of Assessors, 27 Hun 559.

Texas.— Morris *v.* Lone Star Chapter No. 6 R. A. M., 68 Tex. 698, 5 S. W. 519.

Wisconsin.— Milwaukee Gymnastic Assoc. *v.* Milwaukee, 129 Wis. 429, 109 N. W. 109.

30. Philadelphia *v.* Keystone Battery A, National Guard, 169 Pa. St. 526, 32 Atl. 428; Scranton City Guard Assoc. *v.* Scranton, 2 C. Pl. (Pa.) 217.

31. See the statutes of the several states; and the following cases:

Georgia.— Linton *v.* Lucy Cobb Inst., 117 Ga. 678, 45 S. E. 53.

Illinois.— People *v.* St. Francis Xavier Female Academy, 233 Ill. 26, 84 N. E. 55.

Missouri.— St. Vincent's College *v.* Schaefer, 104 Mo. 261, 16 S. W. 395.

New York.— *In re* Vassar, 127 N. Y. 1, 27 N. E. 394; Colored Orphans' Assoc. *v.* New York, 38 Hun 593.

Vermont.— Middlebury College *v.* Cheney, 1 Vt. 336.

See 45 Cent. Dig. tit. "Taxation," § 394.

32. See Omaha Medical College *v.* Rush, 22 Nebr. 449, 35 N. W. 222; and cases cited *infra*, this note.

Particular institutions.— The following kinds of schools or institutions have been held to come within one or other of the designations mentioned in the text: A commercial college. Blackman *v.* Houston, 39 La. Ann. 592, 2 So. 193; Rohrbough *v.* Douglas County, 76 Nebr. 679, 107 N. W. 1000. But see Lichtentag *v.* Tax Collector, 46 La. Ann. 572, 15 So. 176, holding that a school of stenography and typewriting conducted for private profit is not exempt. A medical college. Omaha Medical College *v.* Rush, 22 Nebr. 449, 35 N. W. 222. But see Kings County Medical Soc. *v.* Neff, 34 N. Y. App. Div. 83, 53 N. Y. Suppl. 1077. A college of pharmacy. Louisville College of Pharmacy *v.* Louisville, 82 S. W. 610, 26 Ky. L. Rep. 825. A theological college or seminary. Xenia United Presbyterian Theological Seminary *v.* Little, 25 Ohio Cir. Ct. 609. A school for teaching useful trades to children. Hebrew Benev., etc., Asylum *v.* New York, 11 Hun (N. Y.) 116. An institution for promotion of mechanical and engineering science. Inland Revenue Com'rs *v.* Forrest, 15 H. L. Cas. 334, 60 L. J. Q. B. 281. A society for study and preservation of history. *In re* Montgomery County Historical Society, 13 Montg. Co. Rep. (Pa.) 205. A gymnastic association. German Gymnastic Assoc. *v.* Louisville, 117 Ky. 958, 80 S. W. 201, 25 Ky. L. Rep. 2105, 111 Am. St. Rep. 287, 65 L. R. A. 120. An association such as the National Academy of Design incorporated for the purpose of the "cultivation of the arts of design." People *v.* Feitner, 31 Misc. (N. Y.) 565, 65 N. Y. Suppl. 587. A museum of arts including in the purposes of its incorporation the "encouraging and developing of the study of the fine arts, and the application of arts to manufacture and practical life, of advancing the

tions,[33] the exemption will extend to educational institutions carried on by private individuals as well as to incorporated institutions.[34] Nor is it essential to constitute an "educational" institution that it should be incorporated exclusively for such purpose or that there should be a regular corps of teachers with regular classes of students,[35] but its objects must have some educational value and it must perform some educational function;[36] and it is always essential to the exemption that the educational work of the institution should be carried on; when it ceases or is abandoned, the property becomes subject to taxation.[37]

b. Public or Charitable Character of Institution. If an exemption from taxation is granted generally to schools or educational institutions, without requiring that they shall be public or charitable institutions, it may be claimed by a private school maintained by an individual or corporation as a business enterprise.[38] In some states, however, it is considered that such an institution is not within the spirit of the exemption laws,[39] and this is clearly the case where the exemption is limited to school property "not used with a view to profit."[40]

general knowledge of kindred subjects, and to that end, of furnishing popular instruction and recreation." Matter of Mergentime, 129 N. Y. App. Div. 367, 113 N. Y. Suppl. 948 [*affirmed* in 195 N. Y. 572, 88 N. E. 1125]. *Compare* Academy of Fine Arts *v.* Philadelphia County, 22 Pa. St. 496, holding that an institution for the study and exhibition of works of art is not an "academy," within the meaning of the statute, although styled an "academy of fine arts." But a young men's christian association is not a "seminary of learning" within the application of an exemption statute. New York Y. M. C. A. *v.* New York, 113 N. Y. 187, 21 N. E. 86 [*reversing* 44 Hun 102].

Chautauqua assembly.— The property of a local "Chautauqua" is not exempt from taxation on the ground of its educational features, where its sessions last but a few days in the year, and its purposes are social as well as educational, and stock-holders in the corporation receive benefit from its earnings in the way of free tickets to its meetings. Bosworth *v.* Kentucky Chautauqua Assembly, 112 Ky. 115, 65 S. W. 602, 23 Ky. L. Rep. 1393.

"College" and "university."— These terms contrasted and explained see Yale University *v.* New Haven, 71 Conn. 316, 42 Atl. 87, 43 L. R. A. 490.

The word "school" in an exemption statute has been held to mean any institution of learning, and is not limited to the lower grades of schools to the exclusion of higher institutions like colleges. Omaha Medical College *v.* Rush, 22 Nebr. 449, 35 N. W. 222. But the term "school-house" as used in the New York statutes applies only to buildings provided for the public common schools. Colored Orphans' Assoc. *v.* New York, 104 N. Y. 581, 12 N. E. 279; Chegaray *v.* New York, 13 N. Y. 220 [*reversing* 2 Duer 521, and *overruling* Chegaray *v.* Jenkins, 5 N. Y. 376].

The term "institutions of learning" as used in the Illinois statute does not include private schools which teach only the rudimentary branches commonly taught in public schools, but if the course of instruction includes the higher branches it is not material that it also includes branches ordinarily taught in the public schools. People *v.* St. Francis Xavier Female Academy, 233 Ill. 26, 84 N. E. 55.

33. See Chegaray *v.* New York, 13 N. Y. 220 [*reversing* 2 Duer 521].

The term "society" in a statute exempting from taxation school-houses owned by religious societies applies only to incorporated societies. St. Monica Church *v.* New York, 119 N. Y. 91, 23 N. E. 294, 7 L. R. A. 70.

34. Jackson *v.* Preston, 93 Miss. 366, 47 So. 547, 21 L. R. A. N. S. 164; Montclair Military Academy *v.* Bowden, 64 N. J. L. 214, 47 Atl. 490.

35. Matter of Mergentime, 129 N. Y. App. Div. 367, 113 N. Y. Suppl. 948 [*affirmed* in 195 N. Y. 572, 88 N. E. 1125].

36. *In re* Vineland Historical, etc., Soc., 66 N. J. Eq. 291, 56 Atl. 1039.

37. Grubb *v.* Weaver, 19 Pa. Co. Ct. 609.

38. *Arkansas.*— Phillips County *v.* Sister Estelle, 42 Ark. 336.

Georgia.— Linton *v.* Lucy Cobb Inst., 117 Ga. 678, 45 S. E. 53.

Indiana.— Indianapolis *v.* Sturdevant, 24 Ind. 391.

Louisiana.— State *v.* Orleans Parish Bd. of Assessors, 52 La. Ann. 223, 26 So. 872.

Michigan.— Detroit Home, etc., School *v.* Detroit, 76 Mich. 521, 43 N. W. 593, 6 L. R. A. 97.

Minnesota.— Ramsey County *v.* Stryker, 52 Minn. 144, 53 N. W. 1133.

Missouri.— State *v.* Johnston, 214 Mo. 656, 113 S. W. 1083, 21 L. R. A. N. S. 171.

New Jersey.— Montclair Military Academy *v.* State Bd. of Assessors, 65 N. J. L. 516, 47 Atl. 558.

Canada.— Wylie *v.* Montreal, 12 Can. Sup. Ct. 384.

See 45 Cent. Dig. tit. "Taxation," § 400.

39. Indianapolis *v.* McLean, 8 Ind. 328; State *v.* Ross, 24 N. J. L. 497; People *v.* Mezger, 181 N. Y. 511, 73 N. E. 1130; Chegaray *v.* New York, 13 N. Y. 220; Chegaray *v.* Jenkins, 3 Sandf. (N. Y.) 409 [*affirmed* in 5 N. Y. 376].

40. Brenau Assoc. *v.* Harbison, 120 Ga. 929, 48 S. E. 363; Montgomery *v.* Wyman, 130 Ill. 17, 22 N. E. 845; *In re* Dille, 119 Iowa 575, 93 N. W. 571.

So also, if the exemption is granted only to "public" schools, colleges, etc., it cannot be extended to an institution conducted entirely for the pecuniary advantage of the proprietor.[41] Nor is such an institution one of "purely public charity" within the meaning of the statutes,[42] the distinction between charity and business, in this connection, being determined by the source from which the institution principally derives its support. If it is chiefly maintained by tuition fees it is not a charity, although it may also derive some revenue from donations or endowment funds,[43] particularly where its income produces a surplus over the cost of maintenance;[44] but if supported mainly by free gifts or income from charitable endowments it is exempt from taxation, although it may also receive tuition fees from those able to pay them.[45]

c. What Are Public Schools and Colleges. The term "public" school, as used in the tax laws, ordinarily means only such schools as are maintained and regulated under the laws of the state, or by the local municipal authorities, as part of the general system of popular education, and does not include such schools as are supported and controlled by private enterprise, although these may be "public" in the sense that they are open to the indefinite public free of charge;[46] but the application of the term "public" is not a question of definition but of legislative intention,[47] and it may apply to schools which are open to the public, although not owned by the public,[48] and notwithstanding some charge for tuition is made.[49] On the other hand, if the exemption is granted to "free" schools, it

But the fact that tuition fees are charged, where such fees are not used for the purposes of private or corporate profit but are appropriated to the maintenance of the institution, does not defeat the right to exemption under a statute exempting the property of educational institutions provided it is "not used for purposes of private or corporate profit or income." Linton *v.* Lucy Cobb Inst., 117 Ga. 678, 45 S. E. 53.

41. Mundy *v.* Van Hoose, 104 Ga. 292, 30 S. E. 783; Henderson *v.* McCullagh, 89 Ky. 448, 12 S. W. 932, 12 Ky. L. Rep. 77; Englewood School *v.* Chamberlain, 54 N. J. L. 549, 24 Atl. 479.

42. Harrisburg *v.* Harrisburg Academy, 26 Pa. Super. Ct. 252; Moravian Seminary *v.* Northampton County, 2 Lanc. L. Rev. (Pa.) 281; Beaver County *v.* Geneva College, 2 Pa. Dist. 70; Haverford College *v.* Davis, 2 Del. Co. (Pa.) 33; Southwell *v.* Royal Holloway College, [1895] 2 Q. B. 487, 59 J. P. 503, 64 L. J. Q. B. 791, 73 L. T. Rep. N. S. 183, 15 Reports 533, 44 Wkly. Rep. 315; Charterhouse School *v.* Lamarque, 25 Q. B. D. 121, 54 J. P. 790, 59 L. J. Q. B. 495, 62 L. T. Rep. N. S. 907, 38 Wkly. Rep. 776.

43. Philadelphia *v.* Public Schools Overseers, 170 Pa. St. 257, 32 Atl. 1033, 29 L. R. A. 600; Philadelphia's Appeal, (Pa. 1888) 15 Atl. 683; Hunter's Appeal, 1 Mona. (Pa.) 1; Kittanning Academy *v.* Kittanning Borough, 19 Pa. Co. Ct. 296; Harrisburg *v.* Harrisburg Academy, 6 Dauph. Co. Rep. (Pa.) 179; Haverford College *v.* Davis, 2 Del. Co. (Pa.) 33; Mercersburg College *v.* Poffenberger, 36 Pa. Super. Ct. 100.

44. Mercersburg College *v.* Poffenberger, 36 Pa. Super. Ct. 100.

45. Brewer *v.* American Missionary Assoc., 124 Ga. 490, 52 S. E. 804; Linton *v.* Lucy Cobb Inst., 117 Ga. 678, 45 S. E. 53; Kentucky Female Orphan School *v.* Bell, 100 Ky. 470, 36 S. W. 921, 19 Ky. L. Rep. 1916, 40 L. R. A. 119; Episcopal Academy *v.* Philadelphia, 150 Pa. St. 565, 25 Atl. 55; Northampton County *v.* Lafayette College, 128 Pa. St. 132, 18 Atl. 516; Dickinson College *v.* Cumberland County, 12 Pa. Co. Ct. 582; Protestant Episcopal Church Academy *v.* Hunter, 4 Pa. Co. Ct. 66. And see Gerke *v.* Purcell, 25 Ohio St. 229; Myers *v.* Akins, 8 Ohio Cir. Ct. 228, 4 Ohio Cir. Dec. 425.

46. *Illinois.*— People *v.* Ryan, 138 Ill. 263, 27 N. E. 1095; Chicago University *v.* People, 118 Ill. 565, 9 N. E. 189; Illinois Industrial University *v.* Champaign County, 76 Ill. 184; Pace *v.* Jefferson County, 20 Ill. 644.

Kentucky.— Henderson *v.* McCullagh, 89 Ky. 448, 12 S. W. 932.

Massachusetts.— Jenkins *v.* Andover, 103 Mass. 94; Merrick *v.* Amherst, 12 Allen 500.

Michigan.—Auditor-Gen. *v.* State Regents, 83 Mich. 467, 47 N. W. 440, 10 L. R. A. 376.

New York.— Colored Orphan Assoc. *v.* New York, 104 N. Y. 581, 12 N. E. 279; Chegaray *v.* New York, 13 N. Y. 220.

Ohio.— Gerke *v.* Purcell, 25 Ohio St. 229.

Pennsylvania.— See Philadelphia *v.* Pennsylvania University, 44 Pa. St. 360.

Rhode Island.— St. Joseph's Church *v.* Providence Tax Assessors, 12 R. I. 19, 34 Am. Rep. 597.

England.— Blake *v.* London Corp., 19 Q. B. D. 79, 56 L. J. Q. B. 424, 36 Wkly. Rep. 791.

See 45 Cent. Dig. tit. "Taxation," § 401.

47. Blake *v.* London, 18 Q. B. D. 437, 56 L. J. Q. B. 152 [*affirmed* in 19 Q. B. D. 79, 56 L. J. Q. B. 424, 36 Wkly. Rep. 791].

48. Myers *v.* Akins, 8 Ohio Cir. Ct. 228, 4 Ohio Cir. Dec. 425; Willard *v.* Pike, 59 Vt. 202, 9 Atl. 907.

49. Willard *v.* Pike, 59 Vt. 202, 9 Atl. 907; Blake *v.* London, 18 Q. B. D. 437, 56 L. J. Q. B. 152.

is not necessary, to meet this requirement, that the particular school should be controlled by the state, but only that it should be open and free to all children of suitable age.[50]

d. Sectarian Schools. If the statute exempts "property used for school purposes," or "educational institutions" generally, it may be considered broad enough to include parochial and other schools maintained by particular churches or sects exclusively for the benefit of their own people, provided they are not conducted for gain.[51] But such sectarian or denominational schools are not "free public schools" or "institutions of purely public charity," [52] although a religious denominational school which offers educational advantages to all who may apply, not limiting the admission of pupils to children of members of the denomination, although it may give a preference to such children, and which is supported by voluntary contributions and not conducted for profit, may be exempt as a purely public charity.[53]

e. What Property Exempt — (i) *In General.* The question as to what property of an educational institution is exempt depends largely upon the wording of the statute.[54] Under the statutes as generally framed all the property belonging to a school or college and used directly, immediately, and exclusively for its proper purposes is exempt from taxation,[55] including the school or college buildings,[56] the land on which they stand or which is used in connection with them,[57] and the personal property constituting the educational equipment, such as libraries, apparatus, and necessary furniture.[58]

(ii) *Nature of Ownership, Occupancy, or Use.* To be entitled to exemption it is ordinarily necessary that the property should be owned by the school or college; it is not enough that it is used for such purposes if owned by a third person.[59] Further, the exemption ordinarily extends only to such prop-

50. Phillips County *v.* Sister Estelle, 42 Ark. 536; Baltimore City Appeal Tax Ct. *v.* St. Peter's Academy, 50 Md. 321; Northampton County *v.* Lafayette College, 128 Pa. St. 132, 18 Atl. 516.

51. Rettew *v.* St. Patrick's Roman Catholic Church, 4 Pennew. (Del.) 593, 58 Atl. 828; Warde *v.* Manchester, 56 N. H. 508, 22 Am. Rep. 504; Hebrew Free School Assoc. *v.* New York, 4 Hun (N. Y.) 446; Church of St. Monica *v.* New York, 55 N. Y. Super. Ct. 160, 13 N. Y. St. 308; Gilmour *v.* Pelton, 5 Ohio Dec. (Reprint) 447, 6 Am. L. Rec. 26.

52. Thiel College *v.* Mercer County, 101 Pa. St. 530; Mullen *v.* Juenet, 6 Pa. Super. Ct. 1; St. Joseph's Church *v.* Providence Tax Assessors, 12 R. I. 19, 34 Am. Rep. 597.

53. Louisville *v.* Nazareth Literary, etc., Inst., 100 Ky. 518, 36 S. W. 994, 19 Ky. L. Rep. 1102; Baltimore City Appeal Tax Ct. *v.* Grand Lodge G. O. H., 50 Md. 421; Hennepin County *v.* Grace, 27 Minn. 503, 8 N. W. 761; White *v.* Smith, 189 Pa. St. 222, 42 Atl. 125, 43 L. R. A. 498 [*reversing* 8 Pa. Super. Ct. 205]; Episcopal Academy *v.* Philadelphia, 150 Pa. St. 565, 25 Atl. 55; Haverford College *v.* Rhoads, 6 Pa. Super. Ct. 71; Ursinus College *v.* Collegeville, 17 Montg. Co. Rep. (Pa.) 61; White *v.* Smith, 27 Pittsb. Leg. J. N. S. 330.

54. County Com'rs *v.* Colorado Seminary, 12 Colo. 497, 21 Pac. 490; Nobles County *v.* Hamline University, 46 Minn. 316, 48 N. W. 1119; Northwestern University *v.* People, 99 U. S. 309, 25 L. ed. 387.

55. *In re* Northwestern University Property Assessment, 206 Ill. 64, 69 N. E. 75; Tulane University *v.* Board of Assessors, 115 La. 1025, 40 So. 445; Harvard College *v.* Kettell, 16 Mass. 204; Academy of Sacred Heart *v.* Irey, 51 Nebr. 755, 71 N. W. 752.

56. Stevens Inst. *v.* Bowes, 78 N. J. L. 205, 73 Atl. 38; Willard *v.* Pike, 59 Vt. 202, 9 Atl. 907.

57. Stevens Inst. *v.* Bowes, 74 N. J. L. 80, 70 Atl. 730; Northampton County *v.* Lehigh University, 13 Pa. Co. Ct. 659; Cassiano *v.* Ursuline Academy, 64 Tex. 673. And see *infra*, IV, E, 2, e, (III).

Although the word "building" is the only one used in specifying the property exempt, this will include the land upon which the building stands and which is essential to its convenient enjoyment. Cassiano *v.* Ursuline Academy, 64 Tex. 673.

58. Baltimore County Appeal Tax Ct. *v.* St. Peter's Academy, 50 Md. 321. But see Kansas City *v.* Kansas City Medical College, 111 Mo. 141, 20 S. W. 35, holding that a statute exempting real property used for school purposes, "with the buildings thereon," does not include office furniture, nor the furniture of a chemical laboratory not fastened to the building.

59. *Indiana.*— Travelers' Ins. Co. *v.* Kent, 151 Ind. 349, 50 N. E. 562, 51 N. E. 723.

Kentucky.— Nazareth Literary, etc., Inst. *v.* Com., 14 B. Mon. 266.

Louisiana.—Armand *v.* Dumas, 28 La. Ann. 403.

Minnesota.— Hennepin County *v.* Bell, 43 Minn. 344, 45 N. W. 615.

New York.— People *v.* Brooklyn Bd. of

erty of the institution as is actually and exclusively used for its proper and legitimate educational purposes,[60] or definitely intended so to be used at a reasonably early date,[61] unless the statute is broad enough to include property owned by the institution whether actually used and occupied by it or not.[62] But even where the statute relates in terms to property "used exclusively" for such purposes this refers merely to the primary and inherent use and does not preclude such incidental uses as are directly connected with, essential to, and in furtherance of the primary use;[63] and property does not cease to be used or used "exclusively" for a school or college, within the meaning of the law, because the principal or president or some of the teachers, with their families, reside within the academic buildings.[64]

Assessors, 32 Hun 457 [*affirmed* in 97 N. Y. 648].

Pennsylvania.— Kittanning Academy *v.* Kittanning Borough School Dist., 8 Pa. Super. Ct. 27.

Tennessee.— Nashville *v.* Ward, 16 Lea 27. See 45 Cent. Dig. tit. "Taxation," § 395.

But see Anniston City Land Co. *v.* State, 160 Ala. 253, 48 So. 659, holding that where the constitution exempts lands "when the same are used" for educational purposes, the use determines the right to the exemption irrespective of the question of ownership, and that the legislature cannot add to this the requirement that the lands must be "owned and used" for such purposes.

Property is not "used and set apart" for educational purposes when it is owned by one person and used by another for school purposes. Travelers' Ins. Co. *v.* Kent, 151 Ind. 349, 50 N. E. 562, 51 N. E. 723.

60. *Colorado.*— County Com'rs *v.* Colorado Seminary, 12 Colo. 497, 21 Pac. 490.

Illinois.— Northwest Presby. Theological Seminary *v.* People, 101 Ill. 578

Iowa.— Foy *v.* Coe College, 95 Iowa 689, 64 N. W. 636.

Kansas.— St. Mary's College *v.* Crowl, 10 Kan. 442; Washburn College *v.* Shawnee County, 8 Kan. 344

Louisiana.—Ferrell *v.* Penrose, 52 La. Ann. 1481, 27 So. 945.

Massachusetts.— Phillips Academy *v.* Andover, 175 Mass. 118, 55 N. E. 841, 48 L. R. A. 550. And see Amherst College *v.* Amherst Assessors, 193 Mass. 168, 79 N. E. 248.

Michigan.— Detroit Home, etc., School *v.* Detroit, 76 Mich. 521, 43 N. W. 593, 6 L. R. A. 97.

Nebraska.— Watson *v.* Cowles, 61 Nebr. 216, 85 N. W. 35.

New Hampshire.— Phillips Exeter Academy *v.* Exeter, 58 N. H. 306, 42 Am. Rep. 589.

New York.— People *v.* Mezger, 181 N. Y. 511, 73 N. E. 1130.

Texas.— St. Edwards' College *v.* Morris, 82 Tex. 1, 17 S. W. 512; Red *v.* Morris, 72 Tex. 554, 10 S. W. 681.

Building partly used for other purposes.— A building which is used in part for a schoolhouse and in part for other purposes is not exempt; there can be no separate assessment for the part diverted to other uses. Wyman *v.* St. Louis, 17 Mo. 335. But see Ferrell *v.* Penrose, 52 La. Ann. 1481, 27 So. 945.

61. See Washburn College *v.* Shawnee County, 8 Kan. 344; Enaut *v.* McGuire, 36 La. Ann. 804, 51 Am. Rep. 14; Ramsey County *v.* Macalaster College, 51 Minn. 437, 53 N. W. 704, 18 L. R. A. 278.

62. Nobles County *v.* Hamline University, 46 Minn. 316, 48 N. W. 1119 (holding that an exemption of "all corporate property belonging" to an educational institution includes all the property which it may lawfully acquire and hold and is not limited to property actually used and occupied by it); University of the South *v.* Skidmore, 87 Tenn. 155, 9 S. W. 892 (holding that a charter provision exempting land "so long as said land belongs to" the college applies regardless of the use made of the property); Wey *v.* Salt Lake City, 35 Utah 504, 101 Pac. 381 (holding that a statute exempting all property "held" by a board of education means all property "owned" by the board and not merely such as is used for school purposes); Northwestern University *v.* People, 99 U. S. 309, 25 L. ed. 387 (charter provision exempting "all property, of whatever kind or description, belonging to or owned by the corporation").

63. State *v.* Johnston, 214 Mo. 656, 113 S. W. 1083, 21 L. R. A. N. S. 171. See also Cassiano *v.* Ursuline Academy, 64 Tex. 673; and cases cited *infra*, note 64.

64. *Colorado.*— Cathedral of St. John the Evangelist *v.* Arapahoe County, 29 Colo. 143, 68 Pac. 272.

Louisiana.— State *v.* Orleans Parish Bd. of Assessors, 52 La. Ann. 223, 26 So. 872; Blackman *v.* Houston, 39 La. Ann. 592, 2 So. 193. But see Ferrell *v.* Penrose, 52 La. Ann. 1481, 27 So. 945.

Massachusetts.— Phillips Academy *v.* Andover, 175 Mass. 118, 55 N. E. 841, 48 L. R. A. 550.

Missouri.— State *v.* Johnston, 214 Mo. 656, 113 S. W. 1083, 21 L. R. A. N. S. 171.

Nebraska.— Watson *v.* Cowles, 61 Nebr. 216, 85 N. W. 35.

New York.— People *v.* Mezger, 181 N. Y. 511, 73 N. E. 1130.

Texas.— Red *v.* Morris, 72 Tex. 554, 10 S. W. 681; Cassiano *v.* Ursuline Academy, 64 Tex. 673; Carter *v.* Patterson, (Civ. App. 1897) 39 S. W. 1110. But see Red *v.* Johnson, 53 Tex. 284; San Antonio *v.* Seeley, (Civ. App. 1900) 57 S. W. 688.

A building in which the owner's wife conducts a school, the owner being an attorney and occupying the building as a homestead, is

(III) *Contiguous or Adjoining Property.* The exemption of the property of an educational institution will also extend to a tract of land adjacent to its buildings, used as a place for the exercise and recreation of the teachers and pupils, provided it is not unnecessarily large for that purpose,[65] and to a farm which it owns and which is maintained to furnish practical instruction in agriculture, to afford the means of exercise to the pupils, and also to raise supplies for consumption within the establishment;[66] but not to property platted into lots and held for sale, and not used in connection with the institution's educational work.[67]

(IV) *Residences of Instructors.* Dwelling-houses erected by a college or academy on its lands for the residences of the president and professors are ordinarily held to be exempt from taxation,[68] notwithstanding such occupancy is a

not exempt as being "used exclusively" for school purposes. Edmonds *v.* San Antonio, 14 Tex. Civ. App. 155, 36 S. W. 495.

65. People *v.* St. Francis Xavier Female Academy, 233 Ill. 26, 84 N. E. 55; McCullough *v.* La Salle County Bd. of Review, 186 Ill. 15, 57 N. E. 837, 50 L. R. A. 517 (where, however, the land in question was held not exempt because the legal title was not in the institution, as required by the statute); Monticello Female Seminary *v.* People, 106 Ill. 398, 46 Am. Rep. 702; Emerson *v.* Milton Academy, 185 Mass. 414, 70 N. E. 442; Hennepin County *v.* Grace, 27 Minn. 503, 8 N. W. 761; People *v.* New York Tax, etc., Com'rs, 10 Hun (N. Y.) 246; People *v.* New York Tax, etc., Com'rs, 6 Hun (N. Y.) 109 [*affirmed* in 64 N. Y. 656].

Tract contiguous or separated.— In some states a tract of land thus used is not exempt unless it is within the common inclosure of the school or college grounds; if separated by a street or highway it is taxable. Northwest Presb. Theological Seminary *v.* People, 101 Ill. 578; Stewart *v.* Davis, 7 N. C. 244; Northampton County *v.* Lafayette College, 5 Pa. Co. Ct. 407. But in others such a separation or division is not considered as important, where all the property of the institution is used for the same general purpose. People *v.* New York Tax, etc., Com'rs, 10 Hun (N. Y.) 246; State *v.* Fisk University, 87 Tenn. 233, 10 S. W. 284.

In New Jersey land acquired by a college after the erection of its academic buildings, separated therefrom by a street, and used mainly for athletic purposes, is not land whereon its buildings "are situated, necessary to the fair use and enjoyment thereof," so as to be entitled to exemption under the act of 1903. Stevens Inst. *v.* Bowes, 78 N. J. L. 205, 73 Atl. 38.

66. *Illinois.*— Monticello Female Seminary *v.* People, 106 Ill. 398, 46 Am. Rep. 702.

Kansas.— St. Mary's College *v.* Crowl, 10 Kan. 442.

Massachusetts.— Mt. Hermon Boys' School *v.* Gill, 145 Mass. 139, 13 N. E. 354; Wesleyan Academy *v.* Wilbraham, 99 Mass. 599.

New York.— People *v.* Barber, 42 Hun 27 [*affirmed* in 106 N. Y. 669, 13 N. E. 936]; People *v.* New York Tax, etc., Com'rs, 10 Hun 246.

Tennessee.— State *v.* Fisk University, 87 Tenn. 233, 10 S. W. 284.

Texas.— Cassiano *v.* Ursuline Academy, 64 Tex. 673. But see St. Edwards' College *v.* Morris, 82 Tex. 1, 17 S. W. 512, where land owned by the proprietor of a private school and used to enable him conveniently and cheaply to supply the table of a boarding-house kept by him for pupils was held not exempt, although contiguous to and immediately connected with the land used exclusively for school purposes.

Farm used solely for purpose of supplies.— A charitable educational institution is subject to taxation on land owned by it and used solely for tillage and pasturage in order to provide food for the inmates of the institution, if it appears that the endowment of the corporation is such that the food supplied by the farm could be procured from other sources of income. *In re* Sisters of Blessed Sacrament, 38 Pa. Super. Ct. 640.

67. Ottawa Univ. *v.* Franklin County, 48 Kan. 460, 29 Pac. 599.

68. *Iowa.*— Griswold College *v.* State, 46 Iowa 275, 26 Am. Rep. 138.

Massachusetts.— Harvard College *v.* Cambridge Assessors, 175 Mass. 145, 55 N. E. 844, 48 L. R. A. 547; Williams College *v.* Williamstown Assessors, 167 Mass. 505, 46 N. E. 394.

Minnesota.— Ramsey County *v.* Macalaster College, 51 Minn. 437, 53 N. W. 704, 18 L. R. A. 278.

New Jersey.— State *v.* Ross, 24 N. J. L. 497.

New York.— People *v.* Mezger, 181 N. Y. 511, 73 N. E. 1130; St. Monica Church *v.* New York, 55 N. Y. Super. Ct. 160, 13 N. Y. St. 308.

Pennsylvania.— White *v.* Smith, 189 Pa. St. 222, 42 Atl. 125, 43 L. R. A. 498; Northampton County *v.* Lafayette College, 128 Pa. St. 132, 18 Atl. 516; Ursinus College *v.* Collegeville, 17 Montg. Co. Rep. 61.

Texas.— Red *v.* Morris, 72 Tex. 554, 10 S. W. 681.

Vermont.— Willard *v.* Pike, 59 Vt. 202, 9 Atl. 907.

See 45 Cent. Dig. tit. "Taxation," § 397.

But see Kendrick *v.* Farquhar, 8 Ohio 189 (holding that where the exemption statute excepts buildings "not occupied for literary purposes," a building occupied by a college professor as a residence is not exempt); *In re* Pawtucket, 24 R. I. 86, 52 Atl. 679 (holding that where the exemption is of buildings so

part consideration for the services performed for the institution,[69] although the rule is otherwise if the occupants of such dwellings pay rent for the same, as they would for any other houses.[70]

(v) *Dormitories.* Dormitories for the use of students resident at the institution are a proper and necessary part of the equipment of a college or academy and are within its general exemption from taxation.[71]

(vi) *Fraternity Chapter-Houses.* The chapter-houses of college fraternities being independent as regards their ownership, occupation, and control from the colleges at which they are located and used chiefly as homes or club houses for their members are not exempt from taxation.[72]

(vii) *Property Leased or Otherwise Used For Profit.* An educational institution cannot as a general rule claim exemption from taxation in respect to property which it rents out for purposes wholly unconnected with its educational work or which it otherwise manages as an investment and a source of profit,[73] even though the rent or other income from the property is devoted to the support of the institution.[74] But the exemption laws or charter provisions

far as "used exclusively" for educational purposes, a building used in part as a chapel and in part as a residence for teachers is not exempt).

Instructors residing in school or college buildings see *supra*, IV, E, 2, e, (II).

69. State *v.* Ross, 24 N. J. L. 497; Northampton County *v.* Lafayette College, 5 Pa. Co. Ct. 407 [*affirmed* in 128 Pa. St. 132, 18 Atl. 516]. But see Williams College *v.* Williamstown Assessors, 167 Mass. 505, 46 N. E. 394; and cases cited *infra*, note 70.

70. Yale Univ. *v.* New Haven, 71 Conn. 316, 42 Atl. 87, 43 L. R. A. 490; Amherst College *v.* Amherst Assessors, 173 Mass. 232, 53 N. E. 815; Williams College *v.* Williamstown Assessors, 167 Mass. 505, 46 N. E. 394; St. James Educational Inst. *v.* Salem, 153 Mass. 185, 26 N. E. 636, 10 L. R. A. 573; Pierce *v.* Cambridge, 2 Cush. (Mass.) 611.

71. *Connecticut.*— Yale Univ. *v.* New Haven, 71 Conn. 316, 42 Atl. 87, 43 L. R. A. 490, holding also that the fact that certain dormitories of a college are let at higher rates than other apartments, and are apportioned to wealthy students, does not reduce the character of the buildings to that of investments of the college in trade, so as to deprive them of the exemption.

Illinois.— People *v.* Baptist Theological Union, 171 Ill. 304, 49 N. E. 559.

Kentucky.— Morgan *v.* U. S. Presbyterian Church, 101 S. W. 338, 31 Ky. L. Rep. 38.

Massachusetts.— Harvard College *v.* Cambridge Assessors, 175 Mass. 145, 55 N. E. 844, 48 L. R. A. 547.

Pennsylvania.— Northampton County *v.* Lafayette College, 128 Pa. St. 132, 18 Atl. 516.

Vermont.— Willard *v.* Pike, 59 Vt. 202, 9 Atl. 907.

Compare Phillips Exeter Academy *v.* Exeter, 58 N. H. 306, 42 Am. Rep. 589.

72. Orono *v.* Sigma Alpha Epsilon Soc., 105 Me. 214, 74 Atl. 19; Phi Beta Epsilon Corp. *v.* Boston, 182 Mass. 457, 65 N. E. 824; People *v.* Lawler, 74 N. Y. App. Div. 553, 77 N. Y. Suppl. 840 [*reversing* 36 Misc. 594, 73 N. Y. Suppl. 1082, and *affirmed* in 179 N. Y. 535, 71 N. E. 1136].

73. *Connecticut.*— Hartford *v.* Hartford Theological Seminary, 66 Conn. 475, 34 Atl. 483.

Georgia.— Linton *v.* Lucy Cobb Inst., 117 Ga. 678, 45 S. E. 53.

Louisiana.— State *v.* Orleans Bd. of Assessors, 52 La. Ann. 223, 26 So. 872.

Maryland.— Frederick County Com'rs *v.* Sisters of Charity, 48 Md. 34.

Missouri.— State *v.* Macgurn, 187 Mo. 238, 86 S. W. 138; Wyman *v.* St. Louis, 17 Mo. 335.

New Hampshire.— New London *v.* Colby Academy, 69 N. H. 443, 46 Atl. 743; Phillips Exeter Academy *v.* Exeter, 58 N. H. 306, 42 Am. Rep. 589.

New Jersey.— Society for Promotion of Learning, etc. *v.* New Brunswick, 55 N. J. L. 65, 25 Atl. 853; State *v.* Ross, 24 N. J. L. 497.

New York.— Pratt Inst. *v.* New York, 183 N. Y. 151, 75 N. E. 1119; Temple Grove Seminary *v.* Cramer, 98 N. Y. 121; People *v.* Wells, 94 N. Y. App. Div. 271, 87 N. Y. Suppl. 1107; People *v.* Baden, 3 N. Y. St. 367.

Oregon.— Willamette Univ. *v.* Knight, 35 Oreg. 33, 56 Pac. 124.

Canada.— Commissaires D'Ecoles *v.* Sœurs de la Congrégation de Notre Dame, 12 Can. Sup. Ct. 45; *In re* De Limoilou Corp., 7 Quebec Q. B. 44.

See 45 Cent. Dig. tit. "Taxation," § 398.

Property leased during vacations.— The exemption of an institution of learning is not lost merely by reason of the fact that, during the summer months, its building is rented and used for the accommodation of boarders. Temple Grove Seminary *v.* Cramer, 98 N. Y. 121.

If the property is public property of the state and therefore exempt as "public property," it is not material whether it is used merely for income or not. Richmond County Academy *v.* Augusta, 90 Ga. 634, 17 S. E. 61, 20 L. R. A. 151.

74. *Illinois.*— Chicago Theological Seminary *v.* People, 193 Ill. 619, 61 N. E. 1022; People *v.* Chicago Theological Seminary, 174 Ill. 177, 51 N. E. 198.

in some cases are broad enough to include property yielding a revenue, where such revenue is applied directly and exclusively to the maintenance of the school or college.[75]

(VIII) *TRUST OR ENDOWMENT FUNDS.* In most of the states it is held that the exemption from taxation granted to an institution of learning includes not only its real estate and physical equipment, but also funds donated or bequeathed to it, by way of endowment or in trust for its uses, the income from which is entirely devoted to the maintenance of the institution.[76]

f. Literary and Scientific Societies. In some cases the exemption statutes expressly include the property of literary and scientific institutions or societies,[77]

Kansas.— Stahl *v.* Kansas Educational Assoc., 54 Kan. 542, 38 Pac. 796.

Louisiana.— State *v.* Board of Assessors, 35 La. Ann. 668.

New York.— Pratt Inst. *v.* New York, 99 N. Y. App. Div. 525, 91 N. Y. Suppl. 136 [*affirmed* in 183 N. Y. 151, 75 N. E. 1119].

Oregon.—Willamette Univ. *v.* Knight, 35 Oreg. 33, 56 Pac. 124.

Virginia.— Com. *v.* Hampton Normal, etc., Inst., 106 Va. 614, 56 S. E. 594.

75. *Colorado.*— Colorado Seminary *v.* Arapahoe County, 30 Colo. 507, 71 Pac. 410.

Connecticut.— New Haven *v.* Sheffield Scientific School, 59 Conn. 163, 22 Atl. 156.

Kentucky.— Com. *v.* Hamilton College, 125 Ky. 329, 101 S. W. 405, 30 Ky. L. Rep. 1338.

Massachusetts.— Hardy *v.* Waltham, 7 Pick. 108, charter provision.

Missouri.— North St. Louis Gymnastic Soc. *v.* Hudson, 85 Mo. 32.

New Jersey.— Englewood Boys School *v.* Chamberlain, 55 N. J. L. 292, 26 Atl. 913.

Pennsylvania.— Northampton County *v.* Lafayette College, 5 Pa. Co. Ct. 407.

Tennessee.—Vanderbilt Univ. *v.* Cheney, 116 Tenn. 259, 94 S. W. 90; University of the South *v.* Skidmore, 87 Tenn. 155, 9 S. W. 892, charter provision.

United States.—Whitman College *v.* Berryman, 156 Fed. 112, holding that a charter provision of a college providing that its "property, income and proceeds shall not be subject to taxation," includes within the exemption all property of the corporation, whether used directly for college purposes or as a source of income.

Sale of farm products by agricultural college.—A college of agriculture may sell its surplus agricultural products, such as milk, butter, and eggs, without losing its exemption; hence where an agricultural institute maintained a model dairy farm for the purpose of scientific instruction, a large part of the products thereof being consumed within the institute, and the revenue derived from marketing the surplus being devoted to the support of the school as a mere incident, and the state did not show what part of such property constituted a source of revenue as distinguished from that which was devoted solely to educational purposes, it was held that neither the farm nor its products were subject to taxation. Com. *v.* Hampton Normal, etc., Inst., 106 Va. 614, 56 S. E. 594.

76. *Connecticut.*— New Haven *v.* Sheffield Scientific School, 59 Conn. 163, 22 Atl. 156.

Kentucky.— Com. *v.* Gray, 114 Ky. 665, 74 S. W. 702, 25 Ky. L. Rep. 52; Com. *v.* Pollitt, 76 S. W. 412, 25 Ky. L. Rep. 790.

Massachusetts.—Williston Seminary *v.* Hampshire, 147 Mass. 427, 18 N. E. 210.

Missouri.— State *v.* Westminster College, 175 Mo. 52, 74 S. W. 990.

Ohio.— Little *v.* United Presb. Theological Seminary, 72 Ohio St. 417, 74 N. E. 193; Gerke *v.* Purcell, 25 Ohio St. 229. But see State *v.* Cappeller, 8 Ohio Dec. (Reprint) 219, 6 Cinc. L. Bul. 339.

Pennsylvania.— See Wagner Inst.'s Appeal, 116 Pa. St. 555, 11 Atl. 402, as to what constitutes an endowment.

Rhode Island.— Brown Univ. *v.* Granger, 19 R. I. 704, 36 Atl. 720, 36 L. R. A. 847.

See 45 Cent. Dig. tit. "Taxation," § 399.

But see County Com'rs *v.* Colorado Seminary, 12 Colo. 497, 21 Pac. 490 (holding under a particular statute that land donated to an educational institution to be sold and the proceeds devoted to the purposes of the institution is not while remaining unsold and unoccupied exempt from taxation); Nevin *v.* Krollman, 38 N. J. L. 574 (holding that an endowment consisting of land is not within the application of a statute exempting "the endowment or fund" of an educational institution).

77. See Orono *v.* Sigma Alpha Epsilon Soc., 105 Me. 214, 74 Atl. 19; Phi Beta Epsilon Corp. *v.* Boston, 182 Mass. 457, 65 N. E. 824; Wesleyan Academy *v.* Wilbraham, 99 Mass. 599; People *v.* Lawler, 74 N. Y. App. Div. 553, 77 N. Y. Suppl. 840 [*affirmed* in 179 N. Y. 535, 71 N. E. 1136]; People *v.* Feitner, 31 Misc. (N. Y.) 565, 65 N. Y. Suppl. 587; Cincinnati College *v.* State, 19 Ohio 110.

What institutions or societies included.— The exemption statutes relating to literary and scientific institutions do not include college fraternities. Orono *v.* Sigma Alpha Epsilon Soc., 105 Me. 214, 74 Atl. 19; Phi Beta Epsilon Corp. *v.* Boston, 182 Mass. 457, 65 N. E. 824; People *v.* Lawler, 74 N. Y. App. Div. 553, 77 N. Y. Suppl. 840 [*reversing* 36 Misc. 594, 73 N. Y. Suppl. 1082, and *affirmed* in 179 N. Y. 535, 71 N. E. 1136]. And a corporation having for its paramount object the dissemination of theosophical ideas and the procuring of converts thereto is neither a "scientific" nor a "literary" institution. New England Theosophical Corp. *v.* Boston Bd. of Assessors, 172 Mass. 60, 51 N. E. 456, 42 L. R. A. 281. So also a law society is not a charitable or a literary institution.

and while such societies have been held not to be within the application of certain terms ordinarily used with reference to educational institutions,[78] it has been held that such an association may be a "purely public charity," although it has no particular reference to the poor.[79] In any case where the terms of the law are broad enough to include such an institution, the exemption will apply only to such of its property as is used exclusively, or at least predominantly, for its own special purposes.[80]

g. Libraries and Museums. Free public libraries and museums are usually exempted from taxation, either under a designation specially appropriate to such institutions, or in the character of "institutions of learning" or of "purely public charity."[81] But if the privileges of the institution are restricted to members or stock-holders, it is not public and therefore not exempt.[82] Nor can it claim exemption on any part of its building or other property which is rented out to others and used as a source of profit, but only on so much as is devoted to its own special uses.[83]

3. Religious Societies and Institutions — a. In General. If the constitution provides generally for the taxation of all property without exception, church property is not exempt;[84] but there are in most jurisdictions constitutional or statutory provisions exempting religious societies and institutions from taxation either generally or with regard to certain property,[85] and except under a statute

Ex p. St. John Law Society, 30 N. Brunsw. 501

78. Academy of Fine Arts *v.* Philadelphia County, 22 Pa. St. 496, holding that the Pennsylvania academy of fine arts is not exempt under a statute exempting "all universities, colleges, academies and schoolhouses."

79. Gerke *v.* Purcell, 25 Ohio St. 229.

80. Salem Lyceum *v.* Salem, 154 Mass. 15, 27 N. E. 672; Cincinnati College *v.* State, 19 Ohio 110.

81. *Louisiana.*— State *v.* Orleans Bd. of Assessors, 52 La. Ann. 223, 26 So. 872.

New Jersey.— State *v.* Leester, 29 N. J. L. 541 [*reversing* 28 N. J. L. 103].

New York.— Matter of Mergentime, 129 N. Y. App. Div. 367, 113 N. Y. Suppl. 948 [*affirmed* in 195 N. Y. 572, 88 N. E. 1125] (metropolitan museum of art exempt as an educational institution); Matter of Howell, 34 Misc. 40, 69 N. Y. Suppl. 505; *In re* Lenox, 9 N. Y. Suppl. 895. *Compare* Matter of Francis' Estate, 121 N. Y. App. Div. 129, 105 N. Y. Suppl. 643.

Ohio.— Cleveland Library Assoc. *v.* Pelton, 36 Ohio St. 253.

Pennsylvania.— Donohugh's Appeal, 86 Pa. St. 306 [*affirming* 12 Phila. 284].

England.— Manchester *v.* McAdam, [1896] A. C. 500, 61 J. P. 100, 65 L. J. Q. B. 672, 75 L. T. Rep. N. S. 229. See also Andrews *v.* Bristol Corp., 56 J. P. 615, 61 L. J. Q. B. 715, 67 L. T. Rep. N. S. 618, 5 Reports 7.

See 45 Cent. Dig. tit. "Taxation," § 404.

82. Matter of Wolfe, 15 N. Y. Suppl. 539, 2 Connoly Surr. 600; Matter of Vanderbilt, 10 N. Y. Suppl. 239, 2 Connoly Surr. 319; Delaware County Inst. *v.* Delaware County, 94 Pa. St. 163; Providence Athenaeum *v.* Tripp, 9 R. I. 559. But see Mercantile Library Co. *v.* Philadelphia, 14 Pa. Co. Ct. 204, holding that a library association's property is exempt, although it charges a fee for the use of books taken out and annual dues for membership.

83. *Illinois.*— People *v.* Peoria Mercantile Library Assoc., 157 Ill. 369, 41 N. E. 557.

Louisiana.— New Orleans *v.* New Orleans Mechanics' Soc., 27 La. Ann. 436.

Michigan.— Auditor-Gen. *v.* Manistee Women's Temperance Assoc., 119 Mich. 430, 78 N. W. 466; Detroit Young Men's Soc. *v.* Detroit, 3 Mich. 172.

New York.—People *v.* Sayles, 32 App. Div. 197, 53 N. Y. Suppl. 67 [*reversing* 23 Misc. 1, 50 N. Y. Suppl. 505, and *affirmed* in 157 N. Y. 677, 51 N. E. 1093].

Ohio.— Cleveland Library Assoc. *v.* Pelton, 36 Ohio St. 253.

Pennsylvania.— Mercantile Library Co. *v.* Philadelphia, 161 Pa. St. 155, 28 Atl. 1068; Pittsburgh *v.* Mercantile Library Hall Co., 3 Pa. Co. Ct. 519.

See 45 Cent. Dig. tit. "Taxation," § 404.

But see State *v.* Leester, 29 N. J. L. 541 [*reversing* 28 N. J. L. 103], construing an exemption clause in the charter of a library association as exempting a building erected by the association only a part of which was used for the purposes of the association and the remainder leased for stores, a public hall, and other purposes.

84. Franklin St. Soc. *v.* Manchester, 60 N. H. 342. See also Catlin *v.* Trinity College, 113 N. Y. 133, 20 N. E. 864, 3 L. R. A. 206; Haynes *v.* Copeland, 18 U. C. C. P. 150.

85. See the statutes of the several states; and the following cases:

Arkansas.— Pulaski County *v.* First Baptist Church, 86 Ark. 205, 110 S. W. 1034.

Connecticut.— First Unitarian Soc. *v.* Hartford, 66 Conn. 368, 34 Atl. 89.

Illinois.— People *v.* Oak Park First Cong. Church, 232 Ill. 158, 83 N. E. 536.

Indiana.— Ft. Wayne First Presb. Church *v.* Ft. Wayne, 36 Ind. 338, 10 Am. Rep. 35.

relating only to incorporated institutions,[86] it is not necessary, in order to be entitled to the exemption, that the religious society should be incorporated.[87] Nor is it requisite that its sole purpose should be the maintenance of public worship in a church; the terms of the statutes are broad enough to include organizations of a benevolent, charitable, or missionary character, falling within the general sense of the term "religious" as distinguished from private and secular institutions.[88] There is some conflict of authority as to whether the property of a camp-meeting association is exempt from taxation.[89]

b. Ownership or Possession of Property. In some states the laws are so framed as to exempt from taxation property which is actually and exclusively used for religious purposes, although the congregation may not own it;[90] but in others the rule is otherwise, and title must be vested in the organized religious society, and it is not exempt if owned by a member of the society individually or by a stranger, although leased to and used by the society.[91]

Massachusetts. — Salem Marine Soc. *v.* Salem, 155 Mass. 329, 29 N. E. 584.

New York.— People *v.* Feitner, 168 N. Y. 494, 61 N. E. 762; People *v.* Barton, 63 N. Y. App. Div. 581, 71 N. Y. Suppl. 933.

North Carolina.— United Brethren *v.* Forsyth County, 115 N. C. 489, 20 S. E. 626.

Ohio.—Watterson *v.* Halliday, 77 Ohio St. 150, 82 N. E. 962.

Pennsylvania.— Moore *v.* Taylor, 147 Pa. St. 481, 23 Atl. 768.

Rhode Island.—St. Mary's Church *v.* Tripp, 14 R. I. 307.

Tennessee.— Methodist Episcopal Church South *v.* Hinton, 92 Tenn. 188, 21 S. W. 321.

United States.— Gibbons *v.* District of Columbia, 116 U. S. 404, 6 S. Ct. 427, 29 L. ed. 680, exemption of church buildings and grounds in District of Columbia.

86. St. Monica Church *v.* New York, 119 N. Y. 91, 23 N. E. 294, 7 L. R. A. 70.

87. People *v.* Barton, 63 N. Y. App. Div. 581, 71 N. Y. Suppl. 933.

88. Hebrew Free School Assoc. *v.* New York, 4 Hun (N. Y.) 446. See also Litz *v.* Johnston, 65 N. J. L. 169, 46 Atl. 776; State *v.* New York Yearly Meeting of Friends, 61 N. J. Eq. 620, 48 Atl. 227; People *v.* Reilly, 85 N. Y. App. Div. 71, 83 N. Y. Suppl. 39 [*affirmed* in 178 N. Y. 609, 70 N. E. 1107]; Matter of Prall, 78 N. Y. App. Div. 301, 79 N. Y. Suppl. 971. *Compare* Matter of White, 118 N. Y. App. Div. 869, 103 N. Y. Suppl. 688.

The society of friends, although not incorporated, is an association organized for religious purposes, within the meaning of the statute, so as to be entitled to the exemption. People *v.* Barton, 63 N. Y. App. Div. 581, 71 N. Y. Suppl. 933.

The salvation army under its act of incorporation is exempt from taxation on both its real and personal property "to the extent that, and so long as," it is used exclusively for certain specified purposes. People *v.* Feitner, 33 Misc. (N. Y.) 712, 68 N. Y. Suppl. 338 [*affirmed* in 68 N. Y. App. Div. 639, 74 N. Y. Suppl. 1142].

A publishing house, incorporated as an arm of the methodist church, for the manufacture and distribution of books, disseminating religious knowledge, and with the purpose that the produce of the house shall be appropriated to the benefit of superannuated preachers, is a religious and charitable institution. Methodist Episcopal Church South *v.* Hinton, 92 Tenn. 188, 21 S. W. 321.

89. See People *v.* Watseka Camp Meeting Assoc., 160 Ill. 576, 43 N. E. 716 (holding that the grounds of a camp-meeting association are not exempt under a statute exempting "all church property actually and exclusively used for public worship"); Davis *v.* Cincinnati Camp Meeting Assoc., 57 Ohio St. 257, 49 N. E. 401 (holding that a camp-meeting association whose lands are not leased or otherwise used for profit is exempt as an institution of "purely public charity").

Food supplies for sale.— A charter provision authorizing a camp-meeting association organized for "religious, moral, charitable, and benevolent purposes" to hold exempt from taxation "for the purposes of said corporation" real and personal property not exceeding a certain value, does not exempt from taxation a stock of groceries and food supplies owned by the association and currently sold on the grounds to all persons desiring to purchase. Alton Bay Campmeeting Assoc. *v.* Alton, 69 N. H. 311, 45 Atl. 95.

Where a dwelling is erected upon the land of a camp-meeting association under a parol license or lease for a money consideration, the land is subject to taxation because not occupied by the association for its own purposes within the meaning of the statute. Foxcroft *v.* Straw, 86 Me. 76, 29 Atl. 950.

90. Louisville *v.* Werne, 80 S. W. 224, 25 Ky. L. Rep. 2196; Scott *v.* Russian Israelites Soc., 59 Nebr. 571, 81 N. W. 624; Howell *v.* Philadelphia, 8 Phila. (Pa.) 280; Willard *v.* Pike, 59 Vt. 202, 9 Atl. 907.

Leasehold title.— In Ohio church property is exempt from taxation when held by the congregation which occupies it by an estate of perpetual leasehold. Church of Epiphany *v.* Raine, 10 Ohio Dec. (Reprint) 449, 21 Cinc. L. Bul. 180.

91. People *v.* Watseku Camp Meeting Assoc., 160 Ill. 576, 43 N. E. 716 (must be "owned by the congregation"); People *v.* Ryan, 138 Ill. 263, 27 N. E. 1095; People *v.*

c. Trust or Endowment Funds. Funds or property donated or bequeathed to a religious society, and held in trust for it or by way of endowment, the income being devoted exclusively to the religious uses of the society, is generally held entitled to share in the exemption from taxation of the other property of the society,[92] although the rule is otherwise under some statutes.[93]

d. What Property Exempt — (i) *In General.* An exemption from taxation granted to religious societies will ordinarily include the houses or buildings exclusively devoted to religious purposes, together with so much land as is appurtenant thereto and reasonably necessary to their use.[94] But land owned by such a society, separate and apart from the premises on which its church stands, and not necessary or incidental to the use of the church as such, and not used by the society for any of its strictly religious purposes, is not exempt.[95] This last rule has been applied so strictly in some cases as to exclude from the exemption land purchased by the society for the express purpose of building a church on it, and intended so to be used when it becomes necessary,[96] or even to exclude church buildings in process of erection and the land on which they are being built.[97]

Anderson, 117 Ill. 50, 7 N. E. 625; Salem Marine Soc. *v.* Salem, 155 Mass. 329, 29 N. E. 584; St Monica Church *v.* New York, 119 N. Y. 91, 23 N. E. 294, 7 L. R. A. 70; Hebrew Free School Assoc. *v.* New York, 99 N. Y. 488, 2 N. E 399; Katzer *v.* Milwaukee, (Wis. 1899) 79 N. W. 745.

92 Seymour *v.* Hartford, 21 Conn. 481; Landon *v.* Litchfield, 11 Conn. 251; Parker *v* Redfield, 10 Conn. 490; Atwater *v.* Woodbridge, 6 Conn. 223, 16 Am. Dec 46; State *v.* Silverthorn, 52 N. J. L. 73, 19 Atl. 124; Salem, etc., Cong. of United Brethren *v.* Forsyth County, 115 N C. 489, 20 S. E. 626; Mattern *v.* Canevin, 213 Pa. St. 588, 63 Atl. 131 But see Hartford First Unitarian Soc. *v.* Hartford, 66 Conn. 368, 34 Atl. 89; Presbyterian Church *v.* Montgomery County, 3 Grant (Pa.) 245

What constitutes endowment.— A parsonage purchased with money raised by the voluntary contributions of the congregation is not an endowment within the meaning of a statute exempting from taxation the "endowment or fund" of any religious society. State *v.* Lyon, 32 N. J. L. 360. Nor is land held for a church by trustees apart from the church edifice State *v.* Krollman, 38 N. J. L. 323 [*affirmed* in 38 N. J. L. 574].

93. Com *v.* Thomas, 119 Ky. 208, 83 S. W. 572, 26 Ky. L. Rep. 1128; *In re* Tax Cases, 12 Gill & J. (Md.) 117; Gloucester Fifth Parish Ministerial Fund *v.* Gloucester, 19 Pick (Mass.) 542.

94. Byington *v.* Wood, 12 Iowa 479; People *v.* Feitner, 168 N. Y. 494, 61 N. E. 762; Gerke *v.* Purcell, 25 Ohio St. 229.

95. *Arkansas.*— Pulaski County *v.* Little Rock First Baptist Church, 86 Ark. 205, 110 S. W. 1034.

Connecticut.— Manresa Inst. *v.* Norwalk, 61 Conn. 228, 23 Atl. 1088.

Illinois.— People *v.* Ryan, 138 Ill. 263, 27 N. E. 1095.

Iowa.— Kirk *v.* St. Thomas' Church, 70 Iowa 287, 30 N. W. 569.

Kentucky.— Louisville *v* Werne, 80 S. W. 224, 25 Ky. L Rep. 2196.

Massachusetts.— Boston Soc. of Redemptorist Fathers *v.* Boston, 129 Mass. 178.

Nebraska.—Beatrice First Christian Church *v* Beatrice, 39 Nebr. 432, 58 N. W. 166.

New York.—People *v.* Reilly, 85 N. Y. App. Div. 71, 83 N. Y. Suppl. 39 [*affirmed* in 178 N. Y. 609, 70 N. E. 1107].

North Carolina.— Salem United Brethren Cong. *v.* Forsyth County, 115 N. C. 489, 20 S. E. 626.

Ohio.— Hamilton County *v.* Mannix, 9 Ohio Dec. (Reprint) 189, 11 Cinc. L. Bul. 184.

Wisconsin.— Green Bay, etc., Canal Co. *v.* Outagamie County, 76 Wis. 587, 45 N. W. 526.

See 45 Cent. Dig. tit. "Taxation," § 407.

Property necessary or indispensable.— It is not necessary that land, in order to be exempt as church property, should be indispensable to the use of the church, but it is exempt if it is no more than is reasonably appropriate to the purpose and is used for no other. Mannix *v.* Hamilton County, 9 Ohio Dec. (Reprint) 18, 10 Cinc. L. Bul. 53.

A janitor's residence, built on the church lot but separated from the church building, is not exempt. Pittsburg *v.* Pittsburg Third Presb. Church, 10 Pa. Super. Ct. 302.

"Religious or educational purposes."— Under a statute exempting property "used exclusively for religious or educational purposes" one use need not be entirely exclusive of the other, and a building for religious purposes is exempt from taxation, although it is also used for educational purposes, so long as such use is merely incidental or occasional or if habitual is merely permissive and does not interfere with the use for religious purposes. St. Mary's Church *v.* Tripp, 14 R. I. 307.

96. Enaut *v.* McGuire, 36 La. Ann. 804, 51 Am. Rep. 14; All Saints Parish *v.* Brookline, 178 Mass. 404, 59 N. E. 1003, 52 L. R. A. 778; Trinity Church *v.* New York, 10 How. Pr. (N. Y.) 138; Matlack *v.* Jones, 2 Disn. (Ohio) 2. *Compare* Old South Soc. *v.* Boston, 127 Mass. 378; Trinity Church *v.* Boston, 118 Mass. 164.

97. Matlock *v.* Jones, 2 Disn. (Ohio) 2; Mullen *v.* Erie County, 85 Pa. St. 288, 27 Am. Rep. 650; Erie County *v.* Bishop, 13

When a church building is abandoned and dismantled, it is no longer exempt.[98] As to personal property, it is held that a statute exempting the "equipment" of religious or charitable institutions will include sacramental vessels used in a church.[99]

(II) *Place of Public Worship.* The phrase "place of public worship," in the statutes exempting church property, is construed as meaning a house or building which is actually and exclusively used for the holding of religious services,[1] or one which is principally so used, where any other uses to which it may be put are either related to the religious or charitable work of the congregation or else are only incidental and occasional and not a source of revenue.[2] A temporary interruption in the use of a church building as a place of public worship will not affect its exemption from taxation,[3] but the rule is otherwise if its use for religious purposes is entirely discontinued or abandoned.[4]

(III) *Rectory or Parsonage.* It is well settled that a rectory or parsonage, built and owned by a religious society, is not exempt from taxation as a "place of public worship," although such rectory or parsonage is used for no other purpose than as a residence for the priest or minister, who occupies it rent free,[5]

Phila. (Pa.) 509. But see Trinity Church *v.* Boston, 118 Mass. 164; Washington Heights M. E. Church *v.* New York, 20 Hun (N. Y.) 297.

98. Old South Soc. *v.* Boston, 127 Mass. 378; Gibbons *v.* District of Columbia, 116 U. S. 404, 6 S. Ct. 427, 29 L. ed. 680. And see Moore *v.* Taylor, 147 Pa. St. 481, 23 Atl. 768.

99. Baltimore County Appeal Tax Ct. *v.* St. Peter's Academy, 50 Md. 321.

1. Black *v.* Brooklyn, 51 Hun (N. Y.) 581, 4 N. Y. Suppl. 78; Colored Orphan Assoc. *v.* New York, 38 Hun (N. Y.) 593 [*affirmed* in 104 N. Y. 581, 12 N. E. 279].

Occasional religious services and ceremonies held in the parsonage of a church, situate on the same lot as the church edifice, do not make it a regular place of stated worship, so as to be exempt. Wood *v.* Moore, 1 Chest. Co. Rep. (Pa.) 265.

Private chapel.— A chapel in an orphan asylum is not exempt as a place of public worship, where the only religious services held therein are provided for the benefit of the inmates, and the public are expressly excluded, except under pressing and peculiar circumstances. Colored Orphan Ben. Assoc. *v.* New York, 104 N. Y. 581, 12 N. E. 279.

Exemption of church lot.— Whether the word "house" of public worship, as used in statutes exempting church property, will include the land on which the church edifice stands, is doubtful. It is affirmed in Massachusetts. Trinity Church *v.* Boston, 118 Mass. 164. But denied in Michigan. Lefevre *v.* Detroit, 2 Mich. 586.

2. *Connecticut.*— Connecticut Spiritualist Camp-Meeting Assoc. *v.* East Lyme, 54 Conn. 152, 5 Atl. 849, pavilion used by spiritualists on Sundays for religious exercises, but on week days for purely secular purposes, not exempt.

Illinois.— *In re* Walker, 200 Ill. 566, 66 N. E. 144.

Massachusetts.— Lowell South Cong. Meeting House *v.* Lowell, 1 Metc. 538, no exemption of tenements, although under the same roof with the church building, which are used for secular purposes.

New York.—Shaarai Berocho *v.* New York, 60 N. Y. Super. Ct. 479, 18 N. Y. Suppl. 792, Jewish synagogue exempt, although janitor lives with his family on the top floor, paying no rent. But see Congregation Kol Israel Anschi Poland *v.* New York, 52 Hun 507, 5 N. Y. Suppl. 608.

Rhode Island.— St. Mary's Church *v.* Tripp, 14 R. I. 307, holding that church property will not lose its exemption by reason of a merely incidental and occasional use for school purposes.

3. Old South Soc. *v.* Boston, 127 Mass. 378.

4. Moore *v.* Taylor, 147 Pa. St. 481, 23 Atl. 768. And see *supra*, IV, E, 3, d, (I).

5. *Georgia.*— St. Mark's Church *v.* Brunswick, 78 Ga. 541, 3 S. E. 561.

Indiana.—Wabash M. E. Church *v.* Ellis, 38 Ind. 3.

Louisiana.— State *v.* Orleans Parish Bd. of Assessors, 52 La. Ann. 223, 26 So. 872; First Presb. Church *v.* New Orleans, 30 La. Ann. 259, 31 Am. Rep. 224.

Massachusetts.— Springfield Third Cong. Soc. *v.* Springfield, 147 Mass. 396, 18 N. E. 68.

Minnesota.— St. Peter's Church *v.* Scott County, 12 Minn. 395.

New Jersey.— State *v.* Axtell, 41 N. J. L. 117; State *v.* Krollman, 38 N. J. L. 323; State *v.* Lyon, 32 N. J. L. 360.

New York.— People *v.* O'Brien, 53 Hun 580, 6 N. Y. Suppl. 862; People *v.* Collison, 6 N. Y. Suppl. 711, 22 Abb. N. Cas. 52.

Ohio.— Watterson *v.* Halliday, 77 Ohio St. 150, 82 N. E. 962; Gerke *v.* Purcell, 25 Ohio St. 229.

Pennsylvania.— *In re* Parsonage Taxes, 25 Pa. Co. Ct. 570; Northampton County *v.* St. Peter's Church, 5 Pa. Co. Ct. 416; *In re* Central M. E. Church Taxation, 11 Kulp 131; Dauphin County *v.* St. Stephen's Church, 3 Phila. 189; Church of our Saviour *v.* Montgomery County, 10 Wkly. Notes Cas. 170.

Rhode Island.— St. Joseph's Church *v.* Providence Tax Assessors, 12 R. I. 19, 34 Am. Rep. 597.

Canada.— Harris *v.* Whitby Tp., 34 Can. L. J. N. S. 240.

See 45 Cent. Dig. tit. "Taxation," § 410.

and although it is situated on the same lot as the church;[6] nor is it exempt by reason of the fact that occasional religious services are held there, or that a room or part of it is set apart as a chapel,[7] or that it is also used for meetings of the vestry and associations connected with the church,[8] or that other acts connected with the work of the church, such as the hearing of confessions, performing of marriage ceremonies, and distribution of gifts to the poor, are sometimes performed there.[9] And even though the statute exempts church property used "for religious purposes," this is held not to include the rectory or parsonage.[10] The same rule applies to a dwelling-house owned by a diocese and used exclusively as the residence of the bishop.[11] But in some states the statutes expressly exempt dwellings owned by religious societies and used as residences for ministers or other ecclesiastics.[12]

(iv) *Property Diverted to Secular Uses.* The customary exemption from taxation of the property of a religious society will not include any part of its property which, instead of being used for religious purposes, is diverted to secular uses for gain,[13] and if part of a building is exempt, as being exclusively used for

6. St. Peter's Church *v.* Scott County, 12 Minn. 395; Wood *v.* Moore, 1 Chest. Co. Rep. (Pa.) 265. See also cases cited, *supra*, note 5.

7. Ramsey County *v.* Church of Good Shepherd, 45 Minn. 229, 47 N. W. 783, 11 L. R. A. 175; Wood *v.* Moore, 1 Chest. Co. Rep. (Pa.) 265; St. Joseph's Church *v.* Providence Tax Assessors, 12 R. I. 19, 34 Am. Rep. 597.

8. State *v.* Orleans Parish Bd. of Assessors, 52 La. Ann. 223, 26 So. 872; Watterson *v.* Halliday, 77 Ohio St. 150, 82 N. E. 962. See also State *v.* Axtell, 41 N. J. L. 117.

9. Watterson *v.* Halliday, 77 Ohio St. 150, 82 N. E. 962.

10. People *v.* Oak Park First Cong. Church, 232 Ill. 158, 83 N. E. 536; Ramsey County *v.* Church of Good Shepherd, 45 Minn. 229, 47 N. W. 783, 11 L. R. A. 175; Hennepin County *v.* Grace, 27 Minn. 503, 8 N. W. 761; State *v.* Axtell, 41 N. J. L. 117. But see Cook *v.* Hutchins, 46 Iowa 706; Griswold College *v.* State, 46 Iowa 275, 26 Am. Rep. 138, holding that the residence of the rector of a church is exempt under a statute exempting the property of "religious institutions" which is "devoted solely to the appropriate objects of these institutions."

11. Vail *v.* Beach, 10 Kan. 214. But see Bishop's Residence Co. *v.* Hudson, 91 Mo. 671, 4 S. W. 435, exempt as being used for purely charitable purpose.

12. See the statutes of the different states. And see Broadway Christian Church *v.* Com., 112 Ky. 448, 66 S. W. 32, 23 Ky. L. Rep. 1695; People *v.* Feitner, 168 N. Y. 494, 61 N. E. 762; St. Philip's Parish Protestant Episcopal Church *v.* Prioleau, 63 S. C. 70, 40 S. E. 1026, 57 L. R. A. 606; Gray *v.* La Fayette County, 65 Wis. 567, 27 N. W. 311.

Necessity for occupancy by minister.— If the statute merely exempts all "parsonages," a parsonage does not lose its character as such because it is not occupied by the pastor but is rented and the rents applied to the payment of his salary and the rent of a different residence (St. Philip's Parish Protestant Episcopal Church *v.* Prioleau, 63 S. C. 70, 40 S. E. 1026, 57 L. R. A. 606); but the rule is otherwise where the exemption is in terms restricted to a parsonage "occupied as a home and for no other purpose" (Broadway Christian Church *v.* Com., 112 Ky. 448, 66 S. W. 32, 23 Ky. L. Rep. 1695).

In Illinois a statute exempting parsonages was held to be unconstitutional on the ground that it was not property "used exclusively" for "religious purposes" within the meaning of the constitutional provision authorizing exemptions. People *v.* Oak Park First Cong. Church, 232 Ill. 158, 83 N. E. 536.

13. *Connecticut.*— Parker *v.* Redfield, 10 Conn. 490.

Illinois.— Chicago First M. E. Church *v.* Chicago, 26 Ill. 482.

Indiana.— Orr *v.* Baker, 4 Ind. 86.

Iowa.— Nugent *v.* Dilworth, 95 Iowa 49, 63 N. W. 448.

Maine.— Foxcroft *v.* Piscataquis Valley Campmeeting Assoc., 86 Me. 78, 29 Atl. 951.

Massachusetts.—South Congregational Soc. *v.* Lowell, 1 Metc. 538.

New Jersey.— Sisters of Peace *v.* Westervelt, 64 N. J. L. 510, 45 Atl. 788.

New York.— People *v.* Barton, 63 N. Y. App. Div. 581, 71 N. Y. Suppl. 933. See also Congregation Kal Israel Anschi Poland *v.* New York, 52 Hun 507, 5 N. Y. Suppl. 608. But see People *v.* Dohling, 6 N. Y. App. Div. 86, 39 N. Y. Suppl. 765.

North Carolina.— United Brethren Cong. *v.* Forsyth County, 115 N. C. 489, 20 S. E. 626.

Pennsylvania.— Philadelphia *v.* Barber, 160 Pa. St. 123, 28 Atl. 644; Pocono Pines Assembly *v.* Monroe County, 29 Pa. Super. Ct. 36; Delaware County *v.* Sisters of St. Francis, 2 Del. Co. 149. But see Howard Assoc.'s Appeal, 70 Pa. St. 344.

United States.— Gibbons *v.* District of Columbia, 116 U. S. 404, 6 S. Ct. 427, 29 L. ed. 680.

See 45 Cent. Dig. tit. "Taxation," § 408.

Lodging-houses of a religious and charitable corporation, the rooms in which are let to tenants at the usual rates of rent, are not exempt from taxation. Chapel of Good Shepherd *v.* Boston, 120 Mass. 212.

religious purposes, another part of the same building, which is used as a source of revenue, may be taxed;[14] but a church building which is regularly and statedly occupied for purposes of religious worship does not become liable to taxation because it is occasionally rented for entertainments or political conventions.[15]

e. Property of Young Men's Christian Association. A young men's christian association has been held to be entitled to exemption both as a charitable institution and also on the ground that its building is a place used for religious worship;[16] but it is ordinarily held that whether it be classed as a religious or as a charitable institution,[17] it cannot claim exemption from taxation on its building as a "house" or "place" of public worship, merely because religious services are conducted in one room thereof, especially if other rooms are leased to tenants;[18] and generally that any part of a building or other property owned by this association which is leased for hire or otherwise used as a source of profit is liable to taxation.[19]

f. Cemeteries and Cemetery Associations. An exemption of cemeteries from taxation will apply to land acquired and set apart for burial purposes and either actually in use therefor or intended so to be used,[20] provided, in the latter case, that some active measures have been taken to prepare the ground for use as a cemetery;[21] and although a cemetery conducted as a mere source of private or corporate profit is not within the exemption laws,[22] the mere fact that the lots

A summer boarding-house conducted by a religious organization is not exempt from taxes, although all the profits are used for charity. Sisters of Peace *v.* Westervelt, 64 N. J. L. 510, 45 Atl. 788.

14. Chicago First M. E. Church *v.* Chicago, 26 Ill. 482; Orr *v.* Baker, 4 Ind. 86; Philadelphia *v.* Barber, 160 Pa. St. 123, 28 Atl. 644. But see Howard Assoc.'s Appeal, 70 Pa. St. 344.

15. Hartford First Unitarian Soc. *v.* Hartford, 66 Conn. 368, 34 Atl. 89.

16. Com. *v.* Young Men's Christian Assoc., 116 Ky. 711, 76 S. W. 522, 25 Ky. L. Rep. 940. But see Paterson Y. M. C. A. *v.* Patterson, 61 N. J. L. 420, 39 Atl. 655 [*affirmed* in 64 N. J. L. 361, 45 Atl. 1092], holding that buildings of a young men's christian association are not within the application of a statute exempting "all buildings used exclusively for charitable purposes."

17. See Auburn *v.* Young Men's Christian Assoc., 86 Me. 244, 29 Atl. 992; and cases cited *infra*, notes 18, 19.

18. People *v.* Young Men's Christian Assoc., 157 Ill. 403, 41 N. E. 557; *In re* Watson, 171 N. Y. 256, 63 N. E. 1109 [*reversing* 70 N. Y. App. Div. 623, 75 N. Y. Suppl. 1134]; Young Men's Christian Assoc. *v.* New York, 113 N. Y. 187, 21 N. E. 86; *In re* Fay, 37 Misc. (N. Y.) 532, 76 N. Y. Suppl. 62. But see Com. *v.* Young Men's Christian Assoc., 116 Ky. 711, 76 S. W. 522, 25 Ky. L. Rep. 940.

19. Auburn *v.* Young Men's Christian Assoc., 86 Me. 244, 29 Atl. 992; Young Men's Christian Assoc. *v.* Douglas County, 60 Nebr. 642, 83 N. W. 924, 52 L. R. A. 123; Young Men's Christian Assoc. *v.* Keene, 70 N. H. 223, 46 Atl. 186; Grove *v.* Exeter Hall Y. M. C. A., 67 J. P. 279, 88 L. T. 696, 19 T. L. R. 491. But see Com. *v.* Young Men's Christian Assoc., 116 Ky. 711, 76 S. W. 522, 25 Ky. L. Rep. 940.

Vacant lots purchased as a building site for such an association are not while vacant and unoccupied exempt from taxation, where the statute exempts only property "actually occupied by" such associations. Young Women's Christian Assoc. *v.* Spencer, 29 Ohio Cir. Ct. 249.

20. *Indiana.*— Oak Hill Cemetery Co. *v.* Wells, 38 Ind. App. 479, 78 N. E. 350.

Louisiana.— Metairie Cemetery Assoc. *v.* Board of Assessors, 37 La. Ann. 32, holding that Const. art. 207, exempting from taxation places of burial, was not restricted to the narrower import of tenanted graves, but included entire tracts of land set apart for a cemetery.

Maryland.—Appeal Tax Ct. *v.* St. Peter's Academy, 50 Md. 321.

Missouri.— State *v.* Wesleyan Cemetery Assoc., 11 Mo. App. 560.

New Jersey.— Hoboken *v.* North Bergen Tp., 43 N. J. L. 146.

New York.— People *v.* Pratt, 129 N. Y. 68, 29 N. E. 7, land within a city owned by a cemetery association, and which cannot be used by it for any other purpose, is exempt, although, by an ordinance of the city, no burials can be made there.

See 45 Cent. Dig. tit. "Taxation," § 415.

Assessment for local improvements.— Under the New York statutes land actually used and occupied for cemetery purposes is exempt from assessment for local improvements as well as from ordinary taxation, and since there can be no valid assessment there can be no set-off of benefits against damages, where the part of the cemetery land is taken for the improvement. *In re* New York, 192 N. Y. 459, 85 N. E. 755 [*modifying* 120 N. Y. App. Div. 201, 105 N. Y. Suppl. 315].

21. Woodlawn Cemetery *v.* Everett, 118 Mass. 354; Trinity Church *v.* New York, 10 How. Pr. (N. Y.) 138; German Evangelical Protestant Cemetery *v.* Brooks, 8 Ohio Cir. Ct. 439, 4 Ohio Cir. Dec. 478.

22. Negley *v.* Henderson, 55 S. W. 554, 21 Ky. L. Rep. 1394; Brown *v.* Pittsburgh, (Pa. 1888) 16 Atl. 43, holding that where a ceme-

in it are sold for purposes of interment does not give it this character.[23] Only so much of the land owned as is used or intended for burial purposes is exempt, and not other portions which are used for entirely different purposes, or rented out;[24] nor can the exemption be claimed in respect to land purchased by the owners of the cemetery with the intention of employing it for the same purpose at some indefinite future time;[25] but this does not mean that only such land is exempt as is actually occupied by burial plots and graves.[26] The exemption will also cover permanent improvements placed on the land and necessary to its use as a burying-ground;[27] but will not include personal property,[28] such as horses, hearses, carriages, tools, and other articles used for burial or about their cemeteries,[29] or funds, investments, or securities owned by the cemetery association.[30]

V. PLACE OF TAXATION.

A. General Principles — 1. Taxing Districts. A taxing district is the district throughout which a particular tax or assessment is ratably apportioned and levied upon the inhabitants.[31] The lines of such districts are usually, but not necessarily, coincident with those of the major municipal divisions of a state, such as counties, parishes, cities, or towns,[32] and in the case of an unorganized

tery has been bought as an investment for a church, and whatever revenues are derived from it are for the use of the church, and may be appropriated to any purpose which it may choose, the cemetery is not exempt.

23. State *v.* Board of Assessors, 52 La. Ann. 223, 26 So. 872; Metairie Cemetery Assoc. *v.* Board of Assessors, 37 La. Ann. 32.

24. *Illinois.*—Bloomington Cemetery Assoc. *v.* People, 170 Ill. 377, 48 N. E. 905; People *v.* Graceland Cemetery Co., 86 Ill. 336, 29 Am. Rep. 32.

Iowa.— Mulroy *v.* Churchman, 60 Iowa 717, 15 N. W. 583; Mulroy *v.* Churchman, 52 Iowa 238, 3 N. W. 72.

Massachusetts.— Proprietors Rural Cemetery *v.* Worcester Co., 152 Mass. 408, 25 N. E. 618, 10 L. R. A. 365.

Missouri.— State *v.* Lange, 16 Mo. App. 468.

New York.— See *In re* New York, 192 N. Y. 459, 85 N. E. 755 [*modifying* 120 N. Y. App. Div. 201, 105 N. Y. Suppl. 315]. *Compare* People *v.* Stilwell, 190 N. Y. 284, 83 N. E. 56 [*reversing* 119 N. Y. App. Div. 913, 104 N. Y. Suppl. 1137], holding that the mere fact that a cemetery association is in receipt of a small revenue for the temporary use of a portion of its property not occupied by graves is not necessarily sufficient to defeat the right to exemption.

Ohio.— German Evangelical Protestant Cemetery *v.* Brooks, 8 Ohio Cir. Ct. 439, 4 Ohio Cir. Dec. 478.

Uses incidental to cemetery.— Conducting a greenhouse on the cemetery property for the purpose of growing plants and flowers to beautify the grounds is not a use for other than cemetery purposes, notwithstanding a small surplus has been sold for the benefit of the association. State *v.* Lakewood Cemetery Assoc., 93 Minn. 191, 101 N. W. 161. But see Rosehill Cemetery Co. *v.* Kern, 147 Ill. 483, 35 N. E. 240.

25. Rosehill Cemetery Co. *v.* Kern, 147 Ill. 483, 35 N. E. 240; People *v.* Graceland Cemetery Co., 86 Ill. 336, 29 Am. Rep. 32. *Compare* State *v.* Lakewood Cemetery Assoc., 93 Minn. 191, 101 N. W. 161.

26. State *v.* Lakewood Cemetery Assoc., 93 Minn. 191, 101 N. W. 161; People *v.* Stilwell, 190 N. Y. 284, 83 N. E. 56 [*reversing* 119 N. Y. App. Div. 913, 104 N. Y. Suppl. 1137]. But see Rosehill Cemetery Co. *v.* Kern, 147 Ill. 483, 35 N. E. 240.

27. Appeal Tax Ct. *v.* Baltimore Cemetery Co., 50 Md. 432; State *v.* Lakewood Cemetery Assoc., 93 Minn. 191, 101 N. W. 161.

28. State *v.* Casey, 210 Mo. 235, 109 S. W. 1 (holding that an exemption of "cemeteries," without any reference to any particular kinds of property, applies only to the lands so used and not to the personal property of a cemetery association); Rosedale Cemetery Assoc. *v.* Linden Tp., 73 N. J. L. 421, 63 Atl. 904 (holding that, although the exemption is of "cemetery lands and property," the term "property" will not be construed as including personal property).

29. Rosedale Cemetery Assoc. *v.* Linden Tp., 73 N. J. L. 421, 63 Atl. 904.

30. Com. *v.* Lexington Cemetery Co., 114 Ky. 165, 70 S. W. 280, 24 Ky. L. Rep. 924; State *v.* Wilson, 52 Md. 638; *In re* Tax Cases, 12 Gill & J. (Md.) 117; Muhlenburg *v.* Charles Evans Cemetery Co., 1 Woodw. (Pa.) 323. *Compare* Metairie Cemetery Assoc. *v.* Board of Assessors, 37 La. Ann. 32.

31. Black L. Dict. (2d ed).

32. Felix *v.* Waggner, 39 La. Ann. 391, 1 So. 926; Smith *v.* Howell, 60 N. J. L. 384, 38 Atl. 180; Keely *v.* Sanders, 99 U. S. 441, 25 L. ed. 327.

An Indian reservation which is by an act of the territorial legislature attached to an organized county for taxing purposes becomes a part of the taxing district of such county. Pryor *v.* Bryan, 11 Okla. 357, 66 Pac. 348.

Where the termini and the direction of the line of a taxing district are unmistakable, the boundary line of such district is designated with sufficient certainty. Burnham *v.* Claiborne Parish Police Jury, 107 La. 513, 32 So. 87.

county, it is usually considered as within the taxing district represented by the county to which it is attached for judicial purposes.[33] The creation and determination of the taxing districts of the state is a matter within the discretion of the legislature, with which the courts will not interfere;[34] and when such a district is once lawfully established, it will retain its character and boundaries until divided or modified in some manner authorized by law.[35]

2. Legislative Power to Fix Situs of Property. The legislature has power to fix the *situs* of personal property for purposes of taxation, placing it either at the owner's domicile or where the property itself is situated,[36] and also to invest executive officers with authority to determine the place for the listing of personal property as between different counties or different places in the same county.[37]

B. Domicile or Residence of Owner — 1. In General. Except where, as just stated, the statute fixes the *situs* of personal property for the purpose of taxation at the place where the property is situated, it is to be assessed to the owner only at the place of his domicile, and cannot legally be assessed anywhere else.[38] And the owner's domicile is commonly fixed for this purpose by the place of his residence on a certain day in the year, prescribed by statute, usually the day on which the returns of personal property are required to be made or on which the assessment is begun.[39]

2. What Constitutes Domicile. Within the meaning of the tax laws the terms "residence," "inhabitancy," and "place of abode" are all ordinarily equivalent to the more exact term "domicile."[40] And a person's domicile is his fixed and

Tax districts in New York.— By statute in this state a tax district is defined as a political subdivision of the state having a board of assessors authorized to assess property therein. A county is not a tax district within the meaning of the statute. People *v.* Columbia County, 182 N. Y. 556, 75 N. E. 1133; Utica *v.* Oneida County, 109 N. Y. App. Div. 189, 95 N. Y. Suppl. 839; People *v.* Schoharie County, 39 Misc. (N. Y.) 162, 79 N. Y. Suppl. 145.

33. Meade County *v.* Hoehn, 12 S. D. 500, 81 N. W. 887; Dupree *v.* Stanley County, 8 S. D. 20, 65 N. W. 426; Llano Cattle Co. *v.* Faught, 69 Tex. 402, 5 S. W. 494. *Compare* Yellowstone County *v.* Northern Pac. R. Co., 10 Mont. 414, 25 Pac. 1058.

34. *Michigan.*— Pioneer Iron Co. *v.* Negaunee, 116 Mich. 430, 74 N. W. 700.

New Jersey.— Street-Lighting Dist. No. 1 *v.* Drummond, 63 N. J. L. 493, 43 Atl. 1061. But see Van Cleve *v.* Passaic Valley Sewerage Com'rs, 71 N. J. L. 574, 60 Atl. 214 (holding that a grant of power of local taxation, to be valid, must conform to the fundamental doctrine that the area over which such power extends shall be coincident with the political district of the state exercising some power of local government over the area selected for taxation); Carter *v.* Wade, 59 N. J. L. 119, 35 Atl. 649.

New York.— Litchfield *v.* Vernon, 41 N. Y. 123.

Ohio.— Hill *v.* Higdon, 5 Ohio St. 243, 67 Am. Dec. 289; Scovill *v.* Cleveland, 1 Ohio St. 126.

Utah.— Kimball *v.* Grantsville City, 19 Utah 368, 57 Pac. 1, 45 L. R. A. 628.

35. Whelan *v.* Cassidy, 64 Nebr. 503, 90 N. W. 229. And see Armstrong *v.* Russellville Dist. Turnpike Co., 29 S. W. 307, 16 Ky. L. Rep. 879; White Pine County *v.* Ash, 5 Nev. 279 (creation of new county); Cumru Tp. *v.* Berks County Poor Directors, 112 Pa. St. 264, 3 Atl. 578.

36. *Georgia.*—Walton County *v.* Morgan County, 120 Ga. 548, 48 S. E. 243.

Iowa.— Layman *v.* Iowa Tel. Co., 123 Iowa 591, 99 N. W. 205.

Massachusetts.— Scollard *v.* American Felt Co., 194 Mass. 127, 80 N. E. 233.

North Carolina.—Winston *v.* Salem, 131 N. C. 404, 42 S. E. 889; Hall *v.* Fayetteville, 115 N. C. 281, 20 S. E. 373.

Texas.— Missouri, etc., R. Co. *v.* Shannon, 100 Tex. 379, 100 S. W. 138, 10 L. R. A. N. S. 681.

Wisconsin.— Chicago, etc., R. Co. *v.* State, 128 Wis. 553, 108 N. W. 557.

And see *supra*, III, A, 4, d, (I); III, A, 5, b, (I).

Purpose of tax as affecting situs of property.— The legislature cannot arbitrarily give property a *situs* for taxation, but the tax burdens must be imposed on the state at large, the county at large, and the smaller taxing districts at large, according as the purpose thereof is purely general or purely local. Chicago, etc., R. Co. *v.* State, 128 Wis. 553, 108 N. W. 557.

37. State *v.* Hynes, 82 Minn. 34, 84 N. W. 636; Clarke *v.* Stearns County, 66 Minn. 304, 69 N. W. 25.

38. Hartland *v.* Church, 47 Me. 169; Preston *v.* Boston, 12 Pick. (Mass.) 7; Matter of Douglas, 48 Hun (N. Y.) 318, 1 N. Y. Suppl. 126; People *v.* O'Donnell, 96 N. Y. Suppl. 297; *In re* Cartright, 6 Can. L. J. 189.

39. See Hunt *v.* McFadgen, 20 Ark. 277; People *v.* Feitner, 40 Misc. (N. Y.) 368, 82 N. Y. Suppl. 258; Philadelphia Nat. Bank *v.* Pottstown Security Co., 14 Montg. Co. Rep. (Pa.) 106.

40. Borland *v.* Boston, 132 Mass. 89, 42

permanent home, to which he always has the intention of returning when absent from it, although he may take up a temporary or transient residence elsewhere.[41] The residence of an infant is at the residence of the parents or surviving parent,[42] and in the case of insane persons this rule applies after they have attained their majority.[43]

3. Persons Having Two Residences. If the taxpayer has two residences in different taxing districts or in different states, as, a summer and a winter home, or two homes kept open the year round, he is taxable at that place which was originally his domicile, provided the opening of the other home has not involved an abandonment of the original domicile and the acquisition of a new one,[44] or at that place which he regards and claims as his domicile, as shown by his keeping the main part of his establishment there, holding office, voting, causing his prop-

Am. Rep. 424; Arnold *v.* Davis, 8 R. I. 341. See also Schmoll *v.* Schenck, 40 Ind. App. 581, 82 N. E. 805; State *v.* Shepherd, 218 Mo. 656, 117 S. W. 1169, 131 Am. St. Rep. 568.

Domicile and residence synonymous in tax laws.—Where the statute provides for the taxation of property of persons "residing" within the state, the word has reference to fixed and permanent domicile, and not to temporary or transient residence. Culbertson *v.* Floyd County, 52 Ind. 361. But in New York it is held that a person "resides" for the purpose of taxation in a city where he has lived for nearly two years, having employment there part of the time, although he has a domicile in another state where he votes and pays taxes, and to which he intends to return. Austen *v.* Crilly, 13 N. Y. App. Div. 247, 42 N. Y. Suppl. 1097. In New Jersey the residence required to make one liable to a personal tax in a particular township or ward is precisely the same in kind as that which will entitle him to vote there. Sharp *v.* Casper, 36 N. J. L. 367. But the rule is otherwise in New York. See Bell *v.* Pierce, 51 N. Y. 12.

Domicile and residence distinguished.—There is a wide difference between domicile and mere residence. While they are usually at the same place, they may be at different places. Domicile is the established, fixed, permanent, ordinary dwelling-place of a party, as distinguished from his temporary or transient, although actual, place of residence. One is his legal residence as distinguished from his temporary place of abode; in other words, one is his home, as distinguished from the places to which business or pleasure may temporarily call him. Salem *v.* Lyme, 29 Conn. 74.

41. *Connecticut.*—Salem *v.* Lyme, 29 Conn. 74.

Georgia.—Daniel *v.* Sullivan, 46 Ga. 277.

Indiana.—Brookover *v.* Kase, 41 Ind. App. 102, 83 N. E. 524; Schmoll *v.* Schenck, 40 Ind. App. 581, 82 N. E. 805.

Iowa.—Nugent *v.* Bates, 51 Iowa 77, 50 N. W. 76, 33 Am. Rep. 117, holding that one remains taxable in the place where his home is and where he leaves his family permanently, although he engages in business in another state.

Massachusetts.—Borland *v.* Boston, 132 Mass. 89, 42 Am. Rep. 424 (holding that one remains taxable at the place of his domicile, although he has left there with no intention of returning, if he has not established a domicile elsewhere); Sears *v.* Boston, 1 Metc. 250 (domicile not lost by residence with one's family in a foreign country, if the intention to return is continuous); Thorndike *v.* Boston, 1 Metc. 242.

Michigan.—Detroit *v.* Lothrop Estate Co., 136 Mich. 265, 99 N. W. 9.

Nebraska.—White *v.* Lincoln, 79 Nebr. 153, 112 N. W. 369.

New Hampshire.—Moore *v.* Wilkins, 10 N. H. 452.

New York.—Crawford *v.* Wilson, 4 Barb. 504; Bartlett *v.* New York, 5 Sandf. 44; People *v.* Barker, 17 N. Y. Suppl. 788.

North Carolina.—Hannon *v.* Grizzard, 89 N. C. 115.

Virginia.—Lindsay *v.* Murphy, 76 Va. 428.

Wisconsin.—Kellogg *v.* Oshkosh, 14 Wis. 623.

United States.—Anderson *v.* Watts, 138 U. S. 694, 11 S. Ct. 449, 34 L. ed. 1078; Marks *v.* Marks, 75 Fed. 321; Danahy *v.* Denison Nat. Bank, 64 Fed. 148, 12 C. C. A. 75; Haskell *v.* Bailey, 63 Fed. 873, 11 C. C. A. 476.

An unmarried man who owns in one taxing district a farm on which is a house in which he keeps a room and which he considers his home and who votes in this district is taxable in this district, although he sleeps at night at the residence of his parents in a different taxing district, owing solely to their feebleness and need of assistance. State *v.* Shepherd, 218 Mo. 656, 147 S. W. 1169, 131 Am. St. Rep. 568.

42. Brookover *v.* Kase, 41 Ind. App. 102, 83 N. E. 524.

Property held by guardian see *infra*, V, D, 2.

43. Brookover *v.* Kase, 41 Ind. App. 102, 83 N. E. 524.

44. Harvard College *v.* Gore, 5 Pick (Mass.) 370; Tripp *v.* Brown, 9 R. I. 240; Arnold *v.* Davis, 8 R. I. 341.

Residence at time of assessment.—Under a statute providing that every person shall be assessed in the municipality in which he resides at the time of the assessment, the assessment is to be made at the place where the person actually resides at the time, although he has a residence at another place and votes

erty to be assessed for taxes there, and other such indications.[45] In the absence of any other sufficient test, it is considered that his domicile is at the place where he spends the greater part of the year,[46] or, according to the statute in New York, at the place where his principal business is transacted.[47]

4. Residence Situated Partly in Two Jurisdictions. Where a dwelling-house is divided by the boundary line between two taxing districts, the owner is taxable in that district in which stands the most necessary part of the house or the living rooms of the family.[48]

5. Change or Abandonment of Domicile — a. In General. A taxpayer may change his domicile by abandoning his present home and removing to another and settling himself there permanently with no intention of returning to the former abode, and so cease to be taxable at the place of his former residence;[49] but a merely simulated removal from one place to another, which is no more than a device to evade or escape taxation, will not have this effect;[50] and his liability for a tax will not be abated by his removal to another place after the day when he is notified to return his list of taxable property or after it is assessed to him.[51] Since, for the purpose of taxation, one must have a residence or domicile somewhere, he cannot abandon a domicile once acquired until he has actually acquired another;[52] and a domicile once established will be presumed to continue where it has been until a change is affirmatively shown.[53]

b. Intent. In determining the question of a change of domicile, the intention of the party with reference to the permanence of his residence in the new place is important. If he means it to be a merely temporary residence, followed by a return to his former home, there is no legal change of domicile; otherwise if he intends to establish himself permanently in the new place and not to return to the former.[54] But a change of domicile cannot legally be effected by intention

there. Milsaps *v.* Jackson, 88 Miss. 504, 42 So. 234.

45. Ellis *v.* People, 199 Ill. 548, 65 N. E. 428; Covington *v.* Wayne, 58 S. W. 776, 22 Ky. L. Rep. 826; Barron *v.* Boston, 187 Mass. 168, 72 N. E. 951; Thayer *v.* Boston, 124 Mass. 132, 26 Am. Rep. 650; People *v.* Crowley, 21 N. Y. App. Div. 304, 47 N. Y. Suppl. 457; People *v.* Barker, 70 Hun (N. Y.) 397, 24 N. Y. Suppl. 63 [*affirmed* in 139 N. Y. 658, 35 N. E. 208].

46. Cabot *v.* Boston, 12 Cush. (Mass.) 52; People *v.* Barker, 17 N. Y. Suppl. 788; Ailman *v.* Griswold, 12 R. I. 339; Greene *v.* Gardner, 6 R. I. 242.

47. See Paddock *v.* Lewis, 179 N. Y. 591, 72 N. E. 1146 [*affirming* 59 N. Y. App. Div. 430, 69 N. Y. Suppl. 1]; Bowe *v.* Jenkins, 69 Hun (N. Y.) 458, 23 N. Y. Suppl. 548; Douglas *v.* New York, 2 Duer (N. Y.) 110; Bartlett *v.* New York, 5 Sandf. (N. Y.) 44; People *v.* Barker, 17 N. Y. Suppl. 789; People *v* Tax, etc., Com'rs, 3 N. Y. Suppl. 674.

48. Judkins *v.* Reed, 48 Me. 386; Chenery *v.* Waltham, 8 Cush. (Mass.) 327.

49. Kirkland *v.* Whately, 4 Allen (Mass.) 462; People *v.* Moore, 52 Hun (N. Y.) 13, 4 N. Y. Suppl. 778; Wade *v.* Matheson, 4 Lans. (N. Y.) 158 [*affirmed* in 47 N. Y. 658]; Mason *v.* Thurber, 1 R. I. 481; Jones *v.* St. John, 30 Can. Sup. Ct. 122.

An insane person is not precluded from changing his residence on the ground that he is incapable of forming an intention to do so, as the guardian may form such intention and change the residence of his ward. Brookover *v.* Kase, 41 Ind. App. 102, 83 N. E. 524. But if the insane person is not in the custody of his committee but is confined in an asylum the removal of the asylum from one county to another will not change the residence of the insane person, in the absence of any such intention on the part of his committee. New York *v.* Brinckerhoff, 63 Misc. (N. Y.) 445, 118 N. Y. Suppl. 449.

50. Thayer *v.* Boston, 124 Mass. 132, 26 Am. Rep. 650; Draper *v.* Hatfield, 124 Mass. 53.

But one may lawfully and effectively change his domicile notwithstanding his purpose in so doing is to diminish the amount of his taxes. Draper *v.* Hatfield, 124 Mass. 53.

51. State *v.* Brown Tobacco Co., 140 Mo. 218, 41 S. W. 776; Warren *v.* Werner, 14 Wis. 366.

52. Schmoll *v.* Schenck, 40 Ind. App. 581, 82 N. E. 805; Porterfield *v.* Augusta, 67 Me. 556; Borland *v.* Boston, 132 Mass. 89, 42 Am. Rep. 424; Bulkley *v.* Williamstown, 3 Gray (Mass.) 493; Kellogg *v.* Winnebago County, 42 Wis. 97.

53. *In re* Nichols, 54 N. Y. 62; People *v.* O'Rourke, 32 N. Y. App. Div. 66, 52 N. Y. Suppl. 1057; New York *v.* Brinckerhoff, 63 Misc. (N. Y.) 445, 118 N. Y. Suppl. 449; Kirby *v.* Bradford County, 134 Pa. St. 109, 19 Atl. 494.

54. *Indiana.*— Schmoll *v.* Schenck, 40 Ind. App. 581, 82 N. E. 805.

Iowa.— Babcock *v.* Bd. of Equalization, 65 Iowa 110, 21 N. W. 207.

Kentucky.— Lebanon *v.* Biggers, 117 Ky. 430, 78 S. W. 213, 25 Ky. L. Rep. 1528.

Maine.— Stockton *v.* Staples, 66 Me. 197;

alone without actual removal;[55] and on the other hand, if there is an actual and permanent removal, a change of domicile is effected, notwithstanding the party's desire and intention to retain a legal residence at his former place of abode.[56]

c. Evidence. The burden of proving a taxpayer's legal residence is on the state or local authorities seeking to collect a tax from him,[57] except where met by the presumption that a domicile once established continues until its abandonment is affirmatively shown.[58] On this question evidence may be admissible of the party's declarations and statements as to where he considers his legal home to be,[59] particularly where he has given formal notice to the assessing officers of a change of domicile.[60] It may also be shown that he has returned property for assessment in a given place;[61] but the fact that his name is included in the lists of the assessors of a particular town is not conclusive evidence,[62] although the omission or removal of his name from such lists is competent evidence against his claim that he continues a resident of that place.[63] The location of one's domicile, in case of dispute, is a question of fact for the jury.[64]

C. Nature and Location of Property — 1. Real Property — a. In General. Real property and interests therein, including incorporeal hereditaments, should be taxed only in the city, county, or other taxing district where actually situated; and an assessment of it in another jurisdiction is absolutely void, and so are all proceedings founded thereon.[65]

Littlefield *v.* Brooks, 50 Me. 475; Church *v.* Rowell, 49 Me. 367.

Massachusetts.— Thayer *v.* Boston, 124 Mass. 132, 26 Am. Rep. 650; Bangs *v.* Brewster, 111 Mass. 382; Colton *v.* Longmeadow, 12 Allen 598; Briggs *v.* Rochester, 16 Gray 337; Carnoe *v.* Freetown, 9 Gray 357.

Vermont.—Woodard *v.* Isham, 43 Vt. 123; Mann. *v.* Clark, 33 Vt. 55.

See 45 Cent. Dig. tit. "Taxation," § 423.

Return to former domicile.— If one leaves his home and removes to another place, with the intention of residing there permanently, but abandons that intention and removes back to the place of his former residence, he continues taxable there Nugent *v.* Bates, 51 Iowa 77, 50 N. W. 76, 33 Am. Rep. 117; Church *v.* Rowell, 49 Me. 367.

55. Stoddert *v.* Ward, 31 Md. 562, 100 Am. Dec. 83; Otis *v.* Boston, 12 Cush. (Mass.) 44.

56. Dickinson *v.* Brookline, 181 Mass. 195, 63 N. E. 331, 92 Am St. Rep. 407.

57. Hurlburt *v.* Green, 41 Vt. 490; Alexandria *v.* Hunter, 2 Munf. (Va.) 228.

58. Kilburn *v.* Bennett, 3 Metc. (Mass.) 199 And see *supra*, V, B, 5, a.

59. Schmoll *v.* Schenck, 40 Ind. App. 581, 82 N. E. 805; Cole *v.* Cheshire, 1 Gray (Mass.) 441; Beecher *v.* Detroit, 114 Mich. 228, 72 N. W. 206. But see Pickering *v.* Cambridge, 144 Mass. 244, 10 N. E. 827, holding evidence to be inadmissible that the taxpayer, prior to the year in which the taxes were assessed, declined to accept a nomination for office in a city, because he "had no connection with, or interest in, the affairs of" that city.

60. Gardiner *v.* Brookline, 181 Mass. 162, 63 N. E. 397; Viles *v.* Waltham, 157 Mass. 542, 32 N. E. 901, 34 Am. St. Rep. 311; State *v.* Renshaw, 166 Mo 682, 66 S. W. 953.

61. Schmoll *v.* Schenck, 40 Ind. App. 581, 82 N. E. 805; King *v.* Parker, 73 Iowa 757, 34 N. W. 451. But see Lyman *v.* Fiske, 17 Pick. (Mass.) 231, 28 Am. Dec. 293, holding that a party's election to pay a personal property tax in one town rather than in another is only one circumstance bearing on the question of his actual habitancy, which must be considered in connection with the other circumstances of the case.

62. Mead *v.* Boxborough, 11 Cush. (Mass.) 362; Preston *v.* King, 61 Vt. 606, 17 Atl. 790; Gregory *v.* Bugbee, 42 Vt. 480.

63. Meserve *v.* Folsom, 62 Vt. 504, 20 Atl. 926.

64. Bailey *v.* Buell, 59 Barb. 158 [*reversed* on other grounds in 50 N. Y. 662].

65. *Arkansas.*— Toby *v.* Haggerty, 23 Ark. 370.

Georgia.—Walton County *v.* Morgan County, 120 Ga. 548, 48 S. E. 243.

Iowa.— Bailey *v.* Fisher, 38 Iowa 229.

Kansas.— Hoffman *v.* Woods, 40 Kan. 382, 19 Pac. 805.

Michigan.— Taylor *v.* Youngs, 48 Mich. 268, 12 N. W. 208.

New Jersey.— State *v.* Jones, 39 N. J. L. 246.

New York.— People *v.* Howell, 106 N. Y. App. Div. 140, 94 N. Y. Suppl. 488; Hudson River Bridge Co. *v.* Patterson, 11 Hun 525 [*affirmed* in 74 N. Y. 365].

Vermont.— Hubbard *v.* Newton, 52 Vt. 346.

See 45 Cent. Dig. tit. "Taxation," § 427; and, generally, *supra*, III, A, 2, b.

Incorporeal hereditaments and easements are taxable only where the land lies to which they pertain or out of which they grow. San Francisco *v.* Oakland Water Co., 148 Cal. 331, 83 Pac. 61; Stockton Gas, etc., Co. *v.* San Joaquin County, 148 Cal. 313, 83 Pac. 54, 5 L. R. A. N. S. 174; Matter of Hall, 116 N. Y. App. Div. 729, 102 N. Y. Suppl. 5 [*affirmed* in 189 N. Y. 552, 82 N. E. 1127].

A water right (see, generally, *supra*, III,

b. Land in More Than One Taxing District. In the absence of statutory directions to the contrary, where a single tract of land or farm lies partly within two or more taxing districts, each district is entitled to tax that portion within its own limits, on a proportional valuation;[66] but in order to prevent certain mischiefs incident to the assessment of an entire property in different parcels and by different sets of assessors, this rule has in some jurisdictions been changed by statute,[67] and in several states the statutes now meet this case by providing that the whole lot or farm shall be assessable in that district where the owner or occupant resides or where the dwelling-house or "mansion house" is situated.[68]

A, 2, b, (III)) should be taxed as a part of the land to which it appertains and to which it is incident and at the place where such land is situated (Matter of Hall, 116 N. Y. App. Div. 729, 102 N. Y. Suppl. 5 [*affirmed* in 189 N. Y. 552, 82 N. E. 1127]. But see Helena Water Works Co. *v.* Settles, 37 Mont. 237, 95 Pac. 838).

Mining rights in land.— In Kentucky, prior to the act of March 19, 1894, relating to the taxation of coal, oil, and gas privileges in the lands of another in the county where the lands are situated, such privileges were taxable only in the county where the person owning the privilege resided. Kirk *v.* Western Gas, etc., Co., 37 S. W. 849, 18 Ky. L. Rep. 692.

Standing timber.— Trees bought by a lumber company for the purpose of allowing them to stand for several years before cutting them are taxable in the county where they are situated, irrespective of the company's domicile. Coldiron *v.* Kentucky Lumber Co., 32 S. W. 224, 17 Ky. L. Rep. 598.

Lands rented to tenants.— For special rules in certain states as to taxation of real property leased to tenants see Robson *v.* Du Bose, 79 Ga. 721, 4 S. E. 329; Pease *v.* Whitney, 5 Mass. 380.

Taxation of bridges and notice for purposes of tax see *supra*, III, A, 2, b, (IV).

Lands below high-water mark.—A borough, the boundary of which is high-water mark of a bay, has no power to tax land and piers thereon outside high-water mark. Central R. Co. *v.* Atlantic Highlands, 75 N. J. L. 80, 66 Atl. 936.

66. Robson *v.* Du Bose, 79 Ga. 721, 4 S. E. 329; Barger *v.* Jackson, 9 Ohio 163; Patton *v.* Long, 68 Pa. St. 260.

67. See Bausman *v.* Lancaster County, 50 Pa. St. 208; and cases cited *infra*, note 68.

Construction of statutes.— Since as a general rule land is taxable in the tax district, actual or technical, in which it is situated, any statute creating an exception to the rule must be strictly construed. People *v.* Marens, 62 Misc. (N. Y.) 317, 116 N. Y. Suppl. 189 [*affirmed* in 134 N. Y. App. Div. 170, 118 N. Y. Suppl. 838].

68. See the statutes of the several states; and the following cases:

New Jersey.— Potter *v.* Orange, 62 N. J. L. 192, 40 Atl. 647; State *v.* Pohatcong Tp., (Sup. 1894) 28 Atl. 673; Warren Mfg. Co. *v.* Dalrymple, 56 N. J. L. 449, 28 Atl. 671; Stewart *v.* Flummerfelt, 53 N. J. L. 540, 22 Atl. 119; State *v.* Washer, 51 N. J. L. 122, 16 Atl. 49; Compton *v.* Dally, 47 N. J. L. 84; State *v.* Abbott, 42 N. J. L. 111; State *v.* Britton, 42 N. J. L. 103; State *v.* Warford, 37 N. J. L. 397; State *v.* Jewell, 34 N. J. L. 259; State *v.* Hay, 31 N. J. L. 275; State *v.* Reinhardt, 31 N. J. L. 218; State *v.* Hoffman, 30 N. J. L. 346.

New York.— People *v.* Gray, 185 N. Y. 196, 77 N. E. 1172; Tebo *v.* Brooklyn, 134 N. Y. 341, 31 N. E. 984; People *v.* Wilson, 125 N. Y. 367, 26 N. E. 454; Dorn *v.* Backer, 61 N. Y. 261; People *v.* Gray, 109 N. Y. App. Div. 116, 95 N. Y. Suppl. 825 [*affirmed* in 185 N. Y. 196, 77 N. E. 1172]; People *v.* Howell, 106 N. Y. App. Div. 140, 94 N. Y. Suppl. 488; Gordon *v.* Becker, 71 Hun 282, 24 N. Y. Suppl. 1018; People *v.* Gaylord, 52 Hun 335, 5 N. Y. Suppl. 348; Chamberlain *v.* Sherman, 53 Misc. 474, 103 N. Y. Suppl. 239; Saunders *v.* Springsteen, 4 Wend. 429. See also People *v.* Wilson, 113 N. Y. App. Div. 1, 98 N. Y. Suppl. 1080, holding that a tract of land containing more than thirty thousand acres, somewhat unevenly divided between two towns, the whole tract being mountainous and woody and covered with lakes, and containing a number of buildings, some of which were in each town, and used for residences, hunting lodges, servants' residences, and in the manufacture on a large scale of maple sugar and lumber, is not a "farm or lot" within the meaning of the statute.

North Carolina.— Hairston *v.* Stinson, 35 N. C. 479.

Ohio.— Hughey *v.* Horrel, 2 Ohio 231.

Pennsylvania.— York Haven Water, etc., Co.'s Appeal, 212 Pa. St. 622, 62 Atl. 97; Bausman *v.* Lancaster County, 50 Pa. St. 208; Follett *v.* Butler County, 31 Pa. Super. Ct. 571; Follett *v.* Butler County, 30 Pa. Super. Ct. 21 [*affirmed* in 219 Pa. St. 509, 69 Atl. 76]; Com. *v.* Wheelock, 13 Pa. Super. Ct. 282; *In re* Stahl, 1 Lanc. L. Rev. 329. See also Quigley *v.* Reiff, 39 Pa. Super. Ct. 425.

Division by township and borough lines.— Under the Pennsylvania statutes where lands are situated partly in a township and partly in a borough, the portion lying within the borough is properly assessable there, although the mansion house is in the township. Com. *v.* Wyoming County, 22 Pa. Co. Ct. 418. And conversely where a farm is divided by a township and borough line and the mansion house is in the borough, the land in the township is to be assessed in the township and the land in the borough assessed in the

2. Personal Property — a. In General. As a general rule, personal property, for the purpose of taxation, has its *situs* at the place of its owner's domicile, and cannot legally be assessed in any other place than where he resides, although the property itself may be elsewhere.[69] But it is competent for the legislature to assign to tangible personal property a *situs* of its own, independent of the place of the owner's domicile; and accordingly statutes in several states provide that such property shall be assessed for taxation at the place where it is physically present.[70]

b. Domestic Animals. According to the rule now generally prevailing, cattle, horses, and other domestic animals are assessable for taxation at the place where they are kept or herded during the greater portion of the year or usually, irrespective of the owner's residence;[71] but animals are not subject to taxation in a

borough, whether the land outside of the borough lies in one or several townships. Follett *v.* Butler County, 219 Pa. St. 509, 69 Atl. 76. Where the dividing line between the city and township passes through the house, and the owner has filed a notice that he chose the township as his residence, the city cannot tax the house and lot. Lancaster *v.* Bare, 8 Pa. Dist. 472.

Manufacturing plant.—A statute of Georgia declares that manufacturing plants divided by county lines shall be returned for taxation in the county where the main buildings containing machinery or most of such buildings are located. See High Shoals Mfg. Co. *v.* Penick, 127 Ga. 504, 56 S. E. 648; Walton County *v.* Morgan County, 120 Ga. 548, 48 S. E. 243.

69. *Georgia.*— Walton County *v.* Morgan County, 120 Ga. 548, 48 S. E. 243.

Illinois.— King *v.* McDrew, 31 Ill. 418.

Kentucky — Ayer, etc., Tie Co. *v.* Keown, 122 Ky. 580, 93 S. W. 588, 29 Ky. L. Rep. 110, 400.

Maine.— Norway *v.* Willis, 105 Me. 54, 72 Atl. 733.

Massachusetts.— Platt *v.* Grover, 136 Mass. 115.

Minnesota.— Clarke *v.* Stearns County, 47 Minn. 552, 50 N. W. 615.

Missouri.—State *v.* Shepherd, 218 Mo. 656, 117 S. W. 1169, 131 Am. St. Rep. 568; De Arman *v.* Williams, 93 Mo. 158, 5 S. W. 904; Corn *v.* Cameron, 19 Mo. App. 573.

New Jersey.— State *v.* Chambersburg, 37 N. J. L. 258; State *v.* Bishop, 34 N. J. L. 45.

New York.— Wilcox *v.* Rochester, 129 N. Y. 247, 29 N. E. 99; Mygatt *v.* Washburn, 15 N. Y. 316; Skeel *v.* Thompson, 9 How. Pr. 478.

North Carolina.— Green *v.* Allen, 44 N. C. 228.

Pennsylvania.—Com. *v.* Pennsylvania Coal Co., 9 Pa. Dist. 486; Bellefonte *v.* Spring Tp., 5 Pa. L. J. Rep. 14.

South Carolina.— State *v.* Charleston, 2 Speers 719.

Tennessee.— Brown *v.* Greer, 3 Head 695.

Vermont.— Blood *v.* Sayre, 17 Vt. 609.

Canada.— *In re* Cartwright, 6 Can. L. J. 189.

See 45 Cent. Dig. tit. "Taxation," § 433.

70. See the statutes of the several states; and the following cases:

Alabama.— Trammell *v.* Connor, 91 Ala. 398, 8 So. 495.

California.— People *v.* Niles, 35 Cal. 282.

Illinois.— Irvin *v.* New Orleans, etc., R. Co., 94 Ill. 105, 34 Am. Rep. 208; Mills *v.* Thornton, 26 Ill. 300, 79 Am. Dec. 377.

Indiana.— Powell *v.* Madison, 21 Ind. 335; New Albany *v.* Meekin, 3 Ind. 481, 56 Am. Dec. 522.

Iowa.— McGregor *v.* McGregor Branch State Bank, 12 Iowa 70; Lemp *v.* Hastings, 4 Greene 448.

Kentucky.— Ayer, etc., Tie Co. *v.* Keown, 122 Ky. 580, 93 S. W. 588, 29 Ky. L. Rep. 110, 400.

Michigan.— Grand Rapids Bark, etc., Co. *v.* Inland Tp., 136 Mich. 121, 98 N. W. 980.

Minnesota.— State *v.* Hynes, 82 Minn. 34, 84 N. W. 636.

Montana.— Flowerree Cattle Co. *v.* Lewis & Clark County, 33 Mont. 32, 81 Pac. 398.

New Jersey.— Shillingsburg *v.* Ridgway, 69 N. J. L. 113, 54 Atl. 531; Mayer *v.* Jersey City, 61 N. J. L. 473, 40 Atl. 281.

Oklahoma.— Godfrey *v.* Wright, 8 Okla. 151, 56 Pac. 1051; Boyd *v.* Wiggins, 7 Okla. 85, 54 Pac. 411.

Texas.—Galveston *v.* J. M. Guffey Petroleum Co., 51 Tex. Civ. App. 642, 113 S. W. 585, holding that under the Texas constitution where property is physical in character and of a nature that can acquire an actual *situs* it must be taxed in the county where actually situated or located.

Washington.— Northwestern Lumber Co. *v.* Chehalis County, 24 Wash. 626, 64 Pac. 787.

See 45 Cent. Dig. tit. "Taxation," § 433.

The net proceeds of a mine are taxable at the place where the ores are taken to the surface through the main workings. Eureka Hill Min. Co. *v.* Eureka, 22 Utah 447, 63 Pac. 654.

Of two assessments of taxes on personal property in two counties, in consequence of its removal from one into the other, that which is first made is alone valid. People *v.* Holladay, 25 Cal. 300.

71. *California.*— Rosasco *v.* Tuolumne County, 143 Cal. 430, 77 Pac. 148.

Colorado.— Pueblo County *v.* Wilson, 15 Colo. 90, 24 Pac. 563; Metcalf *v.* Fisher, 2 Colo. App. 375, 31 Pac. 175.

Illinois.— People *v.* Caldwell, 142 Ill. 434, 32 N. E. 691.

taxing district other than that of the owner's residence merely because they may happen to be there temporarily, although for grazing purposes, at the date of listing or assessment.[72]

c. Stock in Trade of Merchant or Manufacturer. Personal property constituting the stock in trade of a merchant or the raw or finished product of a manufacturer is not ordinarily taxable at the place of the owner's domicile, but, according to varying statutes in the different states, at the place where it is actually located or stored,[73] where the owner's business is carried on,[74] where the property is kept for sale,[75] or where it is employed in trade or manufacturing or the mechanic arts,[76] provided, in some states, that the owner of the property hires

Kansas.— Smith *v.* Mason, 48 Kan. 586, 30 Pac. 170; Graham *v.* Chautauqua County, 31 Kan. 473, 2 Pac. 549.

Massachusetts.— Pierce *v.* Eddy, 152 Mass. 594, 26 N. E. 99.

Nevada.— State *v.* Shaw, 21 Nev. 222, 29 Pac. 321.

New Jersey.— State *v.* Falkinburge, 15 N. J. L. 320.

Oklahoma.— Prairie Cattle Co. *v.* Williamson, 5 Okla. 488, 49 Pac. 937.

South Dakota.— Meade County *v.* Hoehn, 12 S. D. 500, 81 N. W. 887; Holcomb *v.* Kelliher, 5 S. D. 438, 59 N. W. 227.

Texas.— Cammack *v.* Matador Land, etc., Co., 30 Tex. Civ. App. 421, 70 S. W. 454; Clampitt *v.* Johnson, 17 Tex. Civ. App. 281, 42 S. W. 866. See Nolan *v.* San Antonio Ranch Co., 81 Tex. 315, 16 S. W. 1064.

See 45 Cent. Dig. tit. "Taxation," § 435.

The Kansas statute providing that animals shall be listed "where usually kept" contains a proviso that "if the owner of such animals lives outside of the limits of a city, such property shall be taxed in the township where the owner resides." McCandless *v.* Carlisle, 32 Kan. 365, 4 Pac. 623.

In Wyoming a statute (Rev. St. § 1801) provides that all live stock on the open range shall be taxed in the county wherein the home range is located. See Swan *v.* Dickinson, 11 Wyo. 188, 70 Pac. 1050.

72. Rhyno *v.* Madison County, 43 Iowa 632; Hill *v.* Caldwell, 134 Ky. 99, 119 S. W. 749; Whitmore *v.* McGregor, 20 Nev. 451, 23 Pac. 510; Ford *v.* McGregor, 20 Nev. 446, 23 Pac. 508; Barnes *v.* Woodbury, 17 Nev. 383, 30 Pac. 1068.

Property temporarily in taxing district generally see *infra*, V, E.

73. Hopkins *v.* Baker, 78 Md. 363, 28 Atl. 284, 22 L. R. A. 477; Valentine-Clark Co. *v.* Shawano County, 120 Wis. 310, 97 N. W. 915; London *v.* Watt, 22 Can. Sup. Ct. 300.

Ice as "stock in trade."— Ice belonging to a non-resident dealer and stored awaiting transportation to another state is stock in trade, within the meaning of a statute providing for the taxation thereof in the town where located. Winkley *v.* Newton, 67 N. H. 80, 36 Atl. 610, 35 L. R. A. 756.

Raw material for the manufacture of paper and paper in process of manufacture, as well as manufactured paper, are "visible personal estate," and so assessable in the township where found. Warren Mfg. Co. *v.* Dalrymple, 56 N. J. L. 449, 28 Atl. 671.

Property in storage.—Lumber on the premises of the manufacturer awaiting transportation to the purchaser, or piled at a railroad siding preparatory to shipment, is not taxable as property "in storage." Osterhout *v.* Jones, 54 Mich. 228, 19 N. W. 964; Monroe *v.* Greenhoe, 54 Mich. 9, 19 N. W. 569.

"Manufacturer."— One may be a manufacturer, within the meaning of a statute relating to taxation, although he neither owns nor operates a plant, but contracts with the owners of a plant to have his materials manufactured for him. State *v.* Clarke, 64 Minn. 556, 67 N. W. 1144.

74. *Connecticut.*— Jackson *v.* Union, 82 Conn. 266, 73 Atl. 773.

Massachusetts.— Cotton *v.* Boston, 161 Mass. 8, 36 N. E. 677.

Michigan.— Comstock *v.* Grand Rapids, 54 Mich. 641, 20 N. W. 623; McCoy *v.* Anderson, 47 Mich. 502, 11 N. W. 290.

Minnesota.— State *v.* Iverson, 108 Minn. 316, 122 N. W. 165; State *v.* Dunn, 86 Minn. 301, 90 N. W. 772; State *v.* Clarke, 64 Minn. 556, 67 N. W. 1144; Minneapolis, etc., Elevator Co. *v.* Clay County, 60 Minn. 522, 63 N. W. 101.

New Hampshire.—Connecticut Valley Lumber Co. *v.* Monroe, 71 N. H. 473, 52 Atl. 940.

New Jersey.— Mullins *v.* Jersey City, 61 N. J. L. 135, 38 Atl. 822.

Wisconsin.— State *v.* Fisher, 125 Wis. 271, 102 N. W. 566.

See 45 Cent. Dig. tit. "Taxation," § 437.

75. Valentine-Clark Co. *v.* Shawano County, 120 Wis. 310, 97 N. W. 915; Torrey *v.* Shawano County, 79 Wis. 152, 48 N. W. 246.

76. New Limerick *v.* Watson, 98 Me. 379, 57 Atl. 79; Ingram *v.* Cowles, 150 Mass. 155, 23 N. E. 48; Amesbury Woolen, etc., Mfg. Co. *v.* Amesbury, 17 Mass. 461; Gray *v.* Kettell, 12 Mass. 161; Little *v.* Greenleaf, 7 Mass. 236.

Place of manufacture and sale different.— Where a firm manufactured its boots and shoes at the Illinois state prison at Joliet, and sold them at its place of business in Chicago, it was held that the stock and machinery employed in the manufacture at Joliet were taxable there. Selz *v.* Cagwin, 104 Ill. 647.

Pulp wood made from logs taken from a boom in a town on one side of the river and there cut up into convenient lengths and awaiting transportation to the pulp mills situated in a town on the opposite side of the river, to be manufactured into pulp, is not

or occupies a store, shop, mill, factory, or wharf, for business purposes connected with such property, at a place other than that of his own residence.[77]

d. Logs and Timber. Logs and timber are generally assessable for taxation at the place where found, rather than at the owner's residence;[78] and sawed lumber, piled or stored and kept for sale, is taxable where found, under the designation of "merchants' goods."[79] But in some states logs which are destined for a particular mill, and intended to be sawed there, are taxable in the district where the mill is situated;[80] and in Michigan, by statute, all forest products are assessable in the township where they are on the second Monday of April, except that when they are in transit to some place within the state they shall be assessed at such place, it being assumed, in the absence of evidence to the contrary, that their destination is the sorting grounds of the booming company or driving agents nearest the mouth of the stream.[81]

e. Capital Invested in Business.[82] Capital invested in business constitutes another exception to the general rule of taxing personalty at the place of the owner's domicile, and if invested in a business carried on at another place is assessable there.[83]

taxable as "employed in the mechanical arts" in the town where temporarily situated. Bradley *v.* Penobscot Chemical Fibre Co., 104 Me. 276, 71 Atl. 887.

77. See Ament *v.* Humphrey, 3 Greene (Iowa) 255; Campbell *v.* Machias, 33 Me. 419; Barron *v.* Boston, 187 Mass. 168, 72 N. E. 951; Ingram *v.* Cowles, 150 Mass. 155, 23 N. E. 48; Hittinger *v.* Boston, 139 Mass. 17, 29 N. E. 214; Lee *v.* Templeton, 6 Gray (Mass.) 579; Field *v.* Boston, 10 Cush. (Mass.) 65; Hood *v.* Judkins, 61 Mich. 575, 28 N. W. 689; Manistique Lumbering Co. *v.* Witter, 58 Mich. 625, 634, 26 N. W. 1, 155; Ryerson *v.* Muskegon, 57 Mich. 383, 24 N. W. 114; Putnam *v.* Fife Lake Tp., 45 Mich. 125, 7 N. W. 699.

What constitutes a hiring or occupation of a store, shop, wharf, etc. see New Limerick *v.* Watson, 98 Me. 379, 57 Atl. 79; Creamer *v.* Bremen, 91 Me. 508, 40 Atl. 555; Gower *v.* Jonesboro, 83 Me. 142, 21 Atl. 846; Martin *v.* Portland, 81 Me. 293, 17 Atl. 72; Stockwell *v.* Brewer, 59 Me. 286; Farwell *v.* Hathaway, 151 Mass. 242, 23 N. E. 849; Loud *v.* Charleston, 103 Mass. 278; Lee *v.* Templeton, 6 Gray (Mass.) 579; Huckins *v.* Boston, 4 Cush. (Mass.) 543; Kalkaska Tp. *v.* Fletcher, 81 Mich. 446, 45 N. W. 1006.

What is a "store."— A storehouse of an ice dealer, in which he keeps the ice constituting his stock in trade, and from which it is delivered on contracts principally made elsewhere, is not a "store" within the meaning of these statutes. Hittinger *v.* Westford, 135 Mass. 258.

78. Ellsworth *v.* Brown, 53 Me. 519; Connecticut Valley Lumber Co. *v.* Monroe, 71 N. H. 473, 52 Atl. 940. *Contra*, Morgan *v.* Southern Lumber Co., 89 S. W. 120, 28 Ky. L. Rep. 190.

Property of railroad company.— Wood, timber, logs, and lumber owned by a railroad company and distributed along its line for present use in operating and repairing its road are to be deemed a part of the road, and are taxable as such. Fitchburg R. Co. *v.* Prescott, 47 N. H. 62.

79. Eagle River *v.* Brown, 85 Wis. 76, 55 N. W. 163; Sanford *v.* Spencer, 62 Wis. 230, 22 N. W. 465; Washburn *v.* Oshkosh, 60 Wis. 453, 19 N. W. 364; Mitchell *v.* Plover, 53 Wis. 548, 11 N. W. 27.

80. Farmingdale *v.* Berlin Mills Co., 93 Me. 333, 45 Atl. 39; Mitchell *v.* Lake Tp., 126 Mich. 367, 85 N. W. 865; Torrent *v.* Yager, 52 Mich. 506, 18 N. W. 239; Day *v.* Pelican, 94 Wis. 503, 69 N. W. 368; State *v.* Bellew, 86 Wis. 189, 56 N. W. 782; Hurley *v.* Texas, 20 Wis. 634. See also Winnipiseogee Paper Co. *v.* Northfield, 67 N. H. 365, 29 Atl. 453, holding that logs which, in the course of the year, the owner intends to float down the river for manufacture at his mills, but which meanwhile remain at his landing in another town, are not "on their way to market" within the meaning of the tax laws.

81. See Mitchell *v.* Lake Tp., 126 Mich. 367, 85 N. W. 865; Elk Rapids Iron Co. *v.* Helena Tp., 117 Mich. 211, 75 N. W. 455; Plainfield Tp. *v.* Sage, 107 Mich. 19, 64 N. W. 731; Maurer *v.* Cliff, 94 Mich. 194, 53 N. W. 1055; Corning *v.* Masonville Tp., 74 Mich. 177, 41 N. W. 831; Pardee *v.* Freesoil Tp., 74 Mich. 81, 41 N. W. 867; Hill *v.* Graham, 72 Mich. 659, 40 N. W. 779; Brooks *v.* Arenac Tp., 71 Mich. 231, 38 N. W. 907; Boyce *v.* Cutter, 70 Mich. 539, 38 N. W. 464.

82. Stock in trade of merchant or manufacturer see *supra*, V, C, 2, c.

83. *Georgia.*— High Shoals Mfg. Co. *v.* Penick, 127 Ga. 504, 56 S. E. 648; Greene County *v.* Wright, 126 Ga. 504, 54 S. E. 951.

Iowa.— Dean *v.* Solon, 97 Iowa 303, 66 N. W. 182.

Massachusetts.— See Bemis *v.* Boston, 14 Allen 366, holding, however, that a resident of the state is subject to taxation at his residence on his interest in a business carried on in another state.

Michigan.— Putnam *v.* Fife Lake Tp., 45 Mich. 125, 7 N. W. 699; Michigan, etc., R. Co. *v.* Auditor-Gen., 9 Mich. 448.

New York.— Hitt *v.* Crosby, 26 How. Pr. 413.

f. Credits and Securities. Property of an intangible nature, such as credits, bills receivable, bank deposits, bonds, promissory notes, mortgage loans, judgments, and corporate stock, has no *situs* of its own for the purpose of taxation, and is therefore assessable only at the place of its owner's domicile.[84] This rule is not affected by the fact that the note or other evidence of the debt may be deposited elsewhere,[85] or that the debt is secured by a mortgage on property situated in another county or taxing district,[86] or that the debt has been reduced to judgment at the domicile of the debtor.[87]

g. Shipping. The place of taxing vessels as between different taxing districts within the same state is in some cases governed by statutes relating expressly to this class of property,[88] and in the absence of such provision, by the general stat-

See 45 Cent. Dig. tit. "Taxation," § 438.

The capital of a banker or broker is taxable under the Massachusetts statute where the owner resides and not where he has his office. Prince *v.* Boston, 193 Mass. 545, 79 N. E. 741.

84 *Alabama.*— Boyd *v.* Selma, 96 Ala. 144, 11 So. 393. 16 L. R. A. 729.

California.— Mackay *v.* San Francisco, 128 Cal. 678, 61 Pac. 382; *In re* Fair, 128 Cal. 607, 61 Pac. 184; People *v.* Park, 23 Cal. 138.

Georgia.— Augusta *v.* Dunbar, 50 Ga. 387 [*overruling* Bridges *v.* Griffin, 33 Ga. 113].

Illinois.— Hayward *v.* Christian County Bd of Review, 189 Ill. 234, 59 N. E. 601; Scripps *v.* Fulton County Bd. of Review, 183 Ill. 278, 55 N. E. 700; Sivwright *v.* Pierce, 108 Ill. 133.

Indiana.— Froesman *v.* Byrns, 68 Ind. 247; Powell *v.* Madison, 21 Ind. 335.

Iowa.— Barber *v.* Farr, 54 Iowa 57, 6 N. W. 134.

Kansas.— Johnson County *v.* Hewitt, 76 Kan. 816, 93 Pac. 181, 14 L. R. A. N. S. 493.

Kentucky.— Com. *v.* Northwestern Mut. L. Ins. Co., 107 S. W. 233, 32 Ky. L. Rep. 796; Harting *v.* Lexington, 43 S. W. 415, 19 Ky. L. Rep. 1829.

Louisiana.— Liverpool, etc., Ins. Co. *v.* Bd. of Assessors, 51 La. Ann. 1028, 25 So. 970, 72 Am. St Rep. 483, 45 L. R. A. 524; Meyer *v.* Pleasant, 41 La. Ann. 645, 6 So. 258.

Massachusetts.—Lanesborough *v.* Berkshire County, 131 Mass. 424.

Minnesota.— State *v.* American Freehold Land Mortg. Co., 76 Minn. 155, 78 N. W. 962, 1117; St. Paul *v.* Merritt, 7 Minn. 258.

Mississippi.—Vicksburg *v.* Armour Packing Co., (1898) 24 So. 224.

New York.— Boardman *v.* Tompkins County, 85 N. Y. 359; People *v.* Tax Com'rs, 23 N. Y. 224; Redfield *v.* Genesee County, Clarke 42.

Oregon.— Johnson *v.* Oregon City Council, 3 Oreg. 13, 2 Oreg. 327.

Texas.— Ferris *v.* Kimble, 75 Tex. 476, 12 S. W. 689.

Virginia.—State Bank *v.* Richmond, 79 Va. 113.

United States.—Kirtland *v.* Hotchkiss, 100 U. S. 491, 25 L. ed. 558; State Tax on Foreign Held Bonds, 15 Wall. 300, 21 L. ed. 179.

See 45 Cent. Dig. tit. "Taxation," § 439.

Situs of intangible personal property for purpose of taxation in general see *supra*, III, A, 5, b.

85. *Alabama.*— Boyd *v.* Selma, 96 Ala. 144, 11 So. 393, 16 L. R. A. 729.

Illinois.— Ellis *v.* People, 199 Ill. 548, 65 N. E. 428.

Kansas.— Johnson County *v.* Hewitt, 76 Kan. 816, 93 Pac. 181, 14 L. R. A. N. S. 493.

New York.— Boardman *v.* Tompkins County, 85 N. Y. 359.

Texas.— Ferris *v.* Kimble, 75 Tex. 476, 12 S. W. 689.

86. *Alabama.*— Boyd *v.* Selma, 96 Ala. 144, 11 So. 393, 16 L. R. A. 729.

California.— People *v.* Whartenby, 38 Cal. 461.

Kansas.— Johnson County *v.* Hewitt, 76 Kan. 816, 93 Pac. 181, 14 L. R. A. N. S. 493.

Maryland.— Latrobe *v.* Baltimore, 19 Md. 13.

New Jersey.— Van Winkle *v.* Manchester Tp., 25 N. J. L. 531.

Ohio.— Grant *v.* Jones, 39 Ohio St. 506.

Wisconsin.— State *v.* Gaylord, 73 Wis. 316, 41 N. W. 521.

United States.—Kirtland *v.* Hotchkiss, 100 U. S. 491, 25 L. ed. 558.

See 45 Cent. Dig. tit. "Taxation," § 440; and, generally, *supra*, III, A, 2, c, (v), (c).

87. Meyer *v.* Pleasant, 41 La. Ann. 645, 6 So. 258.

A judgment foreclosing a mortgage is not taxable in the county where the mortgaged land lies, if the mortgagee lives in another. People *v.* Eastman, 25 Cal. 601.

88. Voght *v.* Ayer, 104 Ill. 583; Cook *v.* Port Fulton, 106 Ind. 170, 6 N. E. 321 [*distinguishing* Eversole *v.* Cook, 92 Ind. 222, decided under a prior statute]; Woodsum Steamboat Co. *v.* Sunapee, 74 N. H. 495, 69 Atl. 577, holding that under the New Hampshire statute providing for the taxation of boats, etc., at the owner's place of residence, the residence of a steamboat company operating boats on a lake between three towns is at the town where most of the business is done and from which the boats start in the morning and to which they return at night, and where they are kept when not in use.

Under the Illinois statute requiring vessels to be assessed where they "may belong, or be enrolled, registered or licensed, or kept when not enrolled, registered or licensed," it has been held that if a vessel is registered and its business transacted in one town it should be assessed there and not in a

utes relating to the taxation of other personal property,[89] and the general principles governing the *situs* of property of this character.[90] Ordinarily as between different taxing districts in the same state the particular place where the vessel may be registered or enrolled is not material,[91] the *situs* of the vessel, although registered elsewhere,[92] being at the domicile of the owner,[93] unless it has acquired an actual *situs* elsewhere.[94] So a vessel is not subject to municipal taxation because registered or enrolled in a particular city if the owner resides outside of the city,[95] or the vessel has acquired an actual *situs* elsewhere,[96] nor is a vessel which is owned and enrolled in a particular county or taxing district subject to taxation in a different taxing district where it may happen to be temporarily in the course of its business.[97]

D. Ownership or Possession of Property — 1. Property Held in Trust. Trust funds or other personal property held in trust are usually assessable to the trustee at his place of residence, as he is regarded as holding the legal title, and this fixes the *situs* of the property.[98] But in some states the laws provide

different town where the owner resides (Voght *v.* Ayer, 104 Ill. 583); and that a vessel which, when not engaged in navigation, is permanently located and kept in a particular town where the owner resides, is subject to taxation in such town although registered in a different town (Halstead *v.* Adams, 108 Ill. 609).

In Indiana the act of 1881 changes the rule prescribed by the act of 1872, and provides that vessels of persons, companies, or corporations shall be listed "where such owner, or one of the members of such company, resides, or where such corporation transacts business," and under this statute a vessel must be listed at the residence of the owner regardless of its actual situation. Cook *v.* Port Fulton, 106 Ind. 170, 6 N. E. 321.

89. Stinson *v.* Boston, 125 Mass. 348 (holding that under a statute requiring personal property to be "assessed to the owner in the city or town where he is an inhabitant," a vessel owned by several persons jointly cannot be assessed by a city for taxation to the owners jointly where only a part of them reside within the city); Wheaton *v.* Mickel, 63 N. J. L. 525, 42 Atl. 843 (holding that the statutory provision requiring visible personal estate to be assessed in the township, ward, or taxing district where it is found, applies only to property situated within the state, and that if a vessel is not within the state its assessment is governed by the provision requiring "other personal estate" to be assessed where the owner resides); Pelton *v.* Northern Transp. Co., 37 Ohio St. 450 (holding that the taxation of vessels is governed by the general statutory provisions as to taxation of personal property not otherwise especially provided for, and that under such provisions if the home port of a vessel and the residence of the owner are in the same county, the vessel is to be taxed in the township or town of the owner's domicile); Pomeroy Salt Co. *v.* Davis, 21 Ohio St. 555 (holding that under the Ohio statutes vessels belonging to an unincorporated company should be listed in the taxing district where the company's principal office is located and in which its managing agent resides).

90. Mobile *v.* Baldwin, 57 Ala. 61, 29 Am. Rep. 712; People *v.* Niles, 35 Cal. 282.

Situs generally see *supra*, III, A, 5, d.

91. Mobile *v.* Baldwin, 57 Ala. 61, 29 Am. Rep. 712; Hooper *v.* Baltimore, 12 Md. 464; Shrewsbury Tp. *v.* Merchants' Steamboat Co., 76 N. J. L. 407, 69 Atl. 958; American Mail Steamship Co. *v.* Crowell, 76 N. J. L. 54, 68 Atl. 752.

Vessels may acquire an actual situs and the place of enrolment and registration is not material if the actual *situs* is elsewhere. Galveston *v.* J. M. Guffey Petroleum Co., 51 Tex. Civ. App. 642, 113 S. W. 585.

92. American Mail Steamship Co. *v.* Crowell, 76 N. J. L. 54, 68 Atl. 752. See also cases cited *infra*, notes 93–97.

93. Mobile *v.* Baldwin, 57 Ala. 61, 29 Am. Rep. 712; Hooper *v.* Baltimore, 12 Md. 464; Shrewsbury Tp. *v.* Merchants' Steamboat Co., 76 N. J. L. 407, 69 Atl. 958; American Mail Steamship Co. *v.* Crowell, 76 N. J. L. 54, 68 Atl. 752.

If owned by a corporation the residence of the corporation is in the taxing district where its chief office is located. American Mail Steamship Co. *v.* Crowell, 76 N. J. L. 54, 68 Atl. 752. But in case the company merely maintains an office and holds stockholders' meetings at the place designated in the articles of incorporation as its place of business, its residence is at the place where its business is principally carried on. Woodsum Steamboat Co. *v.* Sunapee, 74 N. H. 495, 69 Atl. 577.

94. Mobile *v.* Baldwin, 57 Ala. 61, 29 Am. Rep. 712. See also State *v.* Higgins Oil, etc., Co., (Tex. Civ. App. 1908) 116 S. W. 617; Galveston *v.* J. M. Guffey Petroleum Co., 51 Tex. Civ. App. 642, 113 S. W. 585, in each of which cases the actual *situs* of the vessel was in the same county as the residence of the owner but in a different county from that where the vessels were enrolled.

95. Mobile *v.* Baldwin, 57 Ala. 61, 29 Am. Rep. 712; Hooper *v.* Baltimore, 12 Md. 464.

96. Galveston *v.* J. M. Guffey Petroleum Co., 51 Tex. Civ. App. 642, 113 S. W. 585.

97. People *v.* Niles, 35 Cal. 282.

98. *Georgia.*— Richmond County Academy

for the assessment of such property to the *cestui que trust* at his domicile,[99] especially where the income from the trust is payable directly to him.[1] If there are several trustees residing in different taxing districts, the assessment of the property should be apportioned among them according to their *pro rata* shares.[2]

2. Property Held by Guardian. Personal property of a minor in the custody or control of his guardian is taxable at the place of domicile of the guardian, not that of the ward.[3] But in some states it is held that it is taxable at the domicile of the ward,[4] unless the ward lives in another state,[5] or that it is taxable where the guardian was appointed, regardless of where he or the ward resides.[6] The rule also varies in different jurisdictions as to whether the property of an insane person for whom a guardian or committee has been appointed should be taxed at the domicile of the insane person,[7] or at that of the guardian or committee.[8]

v. Augusta, 90 Ga. 634, 17 S. E. 61, 20 L. R. A. 151.

Maryland.— Baltimore *v.* Stirling, 29 Md. 48; Latrobe *v.* Baltimore, 19 Md. 13.

Minnesota.— State *v.* Willard, 77 Minn. 190, 79 N. W. 829.

New Hampshire.— Rand *v.* Pittsfield, 70 N. H. 530, 49 Atl. 88.

New York.— People *v.* Ogdensburgh, 48 N. Y. 390; People *v.* Barker, 8 Misc. 32, 28 N. Y. Suppl. 651; Kellinger's Petition, 1 Ch. Sent. 26.

Ohio.— State *v.* Matthews, 10 Ohio St. 431.

Pennsylvania.—Carlisle *v.* Marshall, 36 Pa. St. 397.

Vermont.— Clark *v.* Powell, 62 Vt. 442, 20 Atl. 597; Catlin *v.* Hull, 21 Vt. 152.

Washington.— Walla Walla *v.* Moore, 16 Wash. 339, 47 Pac. 753, 58 Am. St. Rep. 31.

See 45 Cent. Dig. tit. "Taxation," §§ 443, 444.

99. Botto *v.* Louisville, 117 Ky. 798, 79 S. W. 241, 25 Ky. L. Rep. 1918; Lexington *v.* Fishback, 109 Ky. 770, 60 S. W. 727, 22 Ky. L. Rep. 1392; Baltimore *v.* Baltimore Safe Deposit, etc., Co., 97 Md. 659, 55 Atl. 316; Davis *v.* Macy, 124 Mass. 193; Hathaway *v.* Fish, 13 Allen (Mass.) 267.

But the trust estate of a non-resident in the hands of a resident trustee is taxable at the residence of the trustee (Com. *v.* Simpson, 104 S. W. 274, 31 Ky. L. Rep. 880, 103 S. W. 309, 31 Ky. L. Rep. 658; Higgins *v.* Com., 103 S. W. 306, 31 Ky. L. Rep. 653) and not in the county where the trust was created by the judgment of the circuit court (Com. *v.* Simpson, *supra*).

1. Hunt *v.* Perry, 165 Mass. 287, 43 N. E. 103; Dorr *v.* Boston, 6 Gray (Mass.) 131; Clarke *v.* Addeman, 26 R. I. 168, 58 Atl. 623; Greene *v.* Mumford, 4 R. I. 313.

2. *California.*— Mackay *v.* San Francisco, 128 Cal. 678, 61 Pac. 382.

Georgia.— Richmond County Academy *v.* Augusta, 90 Ga. 634, 17 S. E. 61, 20 L. R. A. 151.

Maryland.— Baltimore *v.* Stirling, 29 Md. 48.

Massachusetts.— Hardy *v.* Yarmouth, 6 Allen 277.

Ohio.— State *v.* Matthews, 10 Ohio St. 431.

See 45 Cent. Dig. tit. "Taxation," §§ 443, 444.

3. *Indiana.*— Tousey *v.* Bell, 23 Ind. 423.

Iowa.— Hinkhouse *v.* Wilton, 94 Iowa 254, 62 N. W. 782.

Massachusetts.— Baldwin *v.* Fitchburg, 8 Pick. 494; Payson *v.* Tufts, 13 Mass. 493.

Mississippi.— Clayton *v.* Tupelo, (1901) 29 So. 994.

Virginia.— Hurt *v.* Bristol, 104 Va. 213, 51 S. E. 223; Hughes *v.* Staunton, 97 Va. 518, 34 S. E. 450.

In Missouri the court in a recent case, while expressly avoiding a decision as to whether the property of a ward should be taxed at the residence of the ward or that of the guardian, held that where the guardian and ward resided in different school-districts, the fact that the ward had resided in a third district prior to the death of his parents did not make his property taxable in that district. State *v.* Hamilton, 202 Mo. 377, 100 S. W. 609. It is also held under a statute requiring personal property to be assessed "in the county in which such owner resides," that if a guardian is appointed in one county and later both he and the ward remove to another county, the property of the ward is taxable in the latter county, notwithstanding the probate court of the first county still retains jurisdiction over it until final settlement of the estate. State *v.* McCausland, 154 Mo. 185, 55 S. W. 218.

4. Louisville *v.* Sherley, 80 Ky. 71; West Chester School Dist. *v.* Darlington, 38 Pa. St. 157; West Chester School Directors *v.* James, 2 Watts & S. (Pa.) 568, 37 Am. Dec. 525.

5. West Chester School Dist. *v.* Darlington, 38 Pa. St. 157.

6. Baldwin *v.* Washington County, 85 Md. 145, 36 Atl. 764. See also Kinehart *v.* Howard, 90 Md. 1, 44 Atl. 1040.

7. Brookover *v.* Kase, 41 Ind. App. 102, 83 N. E. 524; People *v.* New York Tax Com'rs, 100 N. Y. 215, 3 N. E. 85 [*reversing* 36 Hun 359].

Change of residence.—Where the guardians of a lunatic change the residence of their ward for his benefit and in good faith and with the intent to make the new residence his permanent home, the ward becomes liable to be assessed for taxes in the town to which he removed and not in the town where he previously resided. Mason *v.* Thurber, 1 R. I. 481.

8. Hurt *v.* Bristol, 104 Va. 213, 51 S. E. 223, holding that the committee of a lunatic

3. Property of Decedent's Estate.[9] Personal property belonging to the estate of a decedent is assessable to the executor or administrator, and according to the general rule it is to be taxed at the place of domicile of such personal representative,[10] although in some states such property is taxable at the place where the decedent was domiciled at the time of his death.[11] But after particular property has been distributed or paid over to those entitled, it is taxable to them personally and at their respective places of residence.[12]

4. Property in Possession of Agent. Under the general rule that personal property is to be taxed to the owner at the place of his residence,[13] it is in the absence of statute to the contrary to be so taxed, although the property may be in a different taxing district in the custody of an agent;[14] but in some jurisdictions provision is made by statute for the taxation in certain cases of property in the hands of an agent at the place where the agent resides or his business is carried on.[15]

5. Partnership Property.[16] The domicile of a partnership is the place where

is taxable for property of the lunatic at the place of the committee's domicile and not at the place where the committee was appointed.

9. **Liability for taxation** see *supra*, III, A, 3, i.

10. *Illinois.*— McClellan *v.* Jo Daviess County Bd. of Review, 200 Ill. 116, 65 N. E. 711.

Iowa.— Burns *v.* McNally, 90 Iowa 432, 57 N. W. 908; Cameron *v.* Burlington, 56 Iowa 320, 9 N. W. 239 [*distinguishing* McGregor *v.* Vanpel, 24 Iowa 436].

Kentucky.— Boske *v.* Security Trust, etc., Co., 56 S. W. 524, 22 Ky. L. Rep. 181.

New Hampshire.—Kent *v.* Exeter, 68 N. H. 469, 44 Atl. 607.

New Jersey.— Endicott *v.* Corson, 50 N. J. L. 381, 13 Atl. 265; State *v.* Jones, 39 N. J. L. 650; State *v.* Holmdel Tp., 39 N. J. L. 79.

New York.— People *v.* O'Donnel, 183 N. Y. 9, 75 N. E. 540 [*reversing* 106 N. Y. App. Div. 526, 94 N. Y. Suppl. 884]; People *v.* New York Tax Com'rs, 99 N. Y. 154, 1 N. E. 401; Matter of Haight, 32 N. Y. App. Div. 496, 53 N. Y. Suppl. 226; Austen *v.* Varian, 16 N. Y. App. Div. 337, 44 N. Y. Suppl. 599; People *v.* Barker, 14 Misc. 586, 36 N. Y. Suppl. 725.

Ohio.— Sommers *v.* Boyd, 48 Ohio St. 648, 29 N. E. 497; Brown *v.* Noble, 42 Ohio St. 405; State *v.* Matthews, 10 Ohio St. 431.

Oregon.— Johnson *v.* Oregon City, 2 Oreg. 327.

Tennessee.— Gallatin *v.* Alexander, 10 Lea 475.

See 45 Cent. Dig. tit. "Taxation," § 445.

11. *California.*— San Francisco *v.* Lux, 64 Cal. 481, 2 Pac. 254.

Connecticut.— Cornwall *v.* Todd, 38 Conn. 443.

Massachusetts.— Hardy *v.* Yarmouth, 6 Allen 277.

Michigan.— Avery *v.* De Witt, 72 Mich. 25, 40 N. W. 39.

Mississippi.— Millsaps *v.* Jackson, 78 Miss. 537, 30 So. 756, holding, however, that stocks and bonds of a testator in the hands of executors, as trustees, after the termination of their duties as executors, should be assessed for municipal taxes at the domicile of the executors.

Missouri.— Stephens *v.* Booneville, 34 Mo. 523.

Virginia.— Staunton *v.* Stout, 86 Va. 321, 10 S. E. 5.

Wisconsin.— Hayden *v.* Roe, 66 Wis. 288, 28 N. W. 186.

See 45 Cent. Dig. tit. "Taxation," § 445.

The official residence of an executor, in so far as it pertains to the authority of the assessor to assess omitted property of the estate located in the county where the executor qualified, is in such county during the pendency of the trust, irrespective of the actual residence of the executor. Gallup *v.* Schmidt, (Ind. 1899) 54 N. E. 384.

12. Cornwall *v.* Todd, 38 Conn. 443; Hardy *v.* Yarmouth, 6 Allen (Mass.) 277.

13. See *supra*, V, B, 1; V, C, 2, a.

14. Ellis *v.* People, 199 Ill. 548, 65 N. E. 428; Snakenberg *v.* Stein, 126 Iowa 650, 102 N. W. 533; O'Callaghan *v.* Owenboro, 111 Ky. 765, 64 S. W. 619, 23 Ky. L. Rep. 1099; Boardman *v.* Tompkins County, 85 N. Y. 359.

15. Dalby *v.* People, 124 Ill. 66, 16 N. E. 224; Curtis *v.* Richland Tp., 56 Mich. 478, 23 N. W. 175, holding, however, that in the provision that personal property under the control of an agent "may" be assessed to the agent where he resides, the word "may" is not to be read as "shall."

Cattle being fed by a hired man on another farm of the owner in a different county from that where the owner resides, and subsequently returned to the home farm, are to be considered as under the control of the owner all the time and not in the hands of an agent within the application of the statute. People *v.* Caldwell, 142 Ill. 434, 32 N. E. 691.

The New York statutes requiring that every person shall be assessed where he resides for personal property owned by him or "in his possession or under his control as agent," applies as regards the latter provision only to cases where the owner is a nonresident of the state. Boardman *v.* Tompkins County, 85 N. Y. 359. But see People *v.* Bug, 13 Abb. N. Cas. (N. Y.) 169, 66 How. Pr. 242.

16. **Liability to taxation** see *supra*, III, A, 3, n.

its business is carried on, and personal property belonging to the firm and employed or invested in its business is to be assessed to the firm as such and at its place of business, irrespective of the residence of the individual partners.[17]

E. Property Temporarily in Taxing District or in Transit.[18] Property which is only temporarily within the limits of a given county or other taxing district, or which is in transit through it, does not constitute a part of its taxable wealth, and therefore cannot be assessed for taxation there.[19]

F. Corporations and Corporate Property — 1. Domicile of Corporation For Purposes of Taxation. A corporation has its domicile, for the purpose of taxation, at the place where its principal business office is located;[20] and if the

17. *Kentucky.*— Louisville *v.* Tatum, 111 Ky. 747, 64 S. W. 836, 23 Ky. L. Rep. 1014.

Massachusetts.— Spinney *v.* Lynn, 172 Mass. 464, 52 N. E. 523; Duxbury *v.* Plymouth County, 172 Mass. 383, 52 N. E. 535; Cloutman *v.* Concord, 163 Mass. 444, 40 N. E. 763; Ricker *v.* American L. & T. Co., 140 Mass. 346, 5 N. E. 284; Barker *v.* Watertown, 137 Mass. 227; Bemis *v.* Boston, 14 Allen 366; Peabody *v.* Essex County, 10 Gray 97.

Michigan.— Williams *v.* Saginaw, 51 Mich. 120, 16 N. W. 260.

Missouri.—Plattsburg School Dist. *v.* Bowman, 178 Mo. 654, 77 S. W. 880.

New Jersey.— Taylor *v.* Love, 43 N. J. L. 142.

Vermont.— Fairbanks *v.* Kittredge, 24 Vt. 9.

See 45 Cent. Dig. tit. "Taxation," § 447.

Different places of business.— Under the Massachusetts statute, partners having places of business in two or more towns shall be taxed in each of such places for the proportion of property employed therein. Duxbury *v.* Plymouth County, 172 Mass. 383, 52 N. E. 535. A place of business within the application of the statute means a place where the business is carried on by the partners under their own control and on their own account. Little *v.* Cambridge, 9 Cush. (Mass.) 298.

18. **Taxation of property temporarily in state** or in transit through it see *supra*, III, A, 5, e.

19. Walton *v.* Westwood, 73 Ill. 125; Hill *v.* Caldwell, 134 Ky. 99, 119 S. W. 749 (cattle temporarily in pasture in a county other than the residence of the owner); Flowerree Cattle Co. *v.* Lewis, etc., County, 33 Mont. 32, 81 Pac. 398; Conley *v.* Chedic, 7 Nev. 336.

Reason of rule.— Personal property which is passing through a county for the purpose of finding a market elsewhere, or is destined for some other county in the state, is not property in the county through which it is passing, for the purpose of taxation. To constitute it property for that purpose in any particular county, it must be in such a situation as to make it a part of the wealth of that county; it must belong in it, or be incorporated with the other property of the county. Conley *v.* Chedic, 7 Nev. 336.

What constitutes transit.— In order that property within a county may be regarded as in transit, so as to be exempt from taxation therein, there must be at least an intention and fixed purpose to remove it within a reasonable time; and an intention to remove it at some future time, depending upon certain contingencies, which may or may not happen, is insufficient. State Trust Co. *v.* Chehalis County, 79 Fed. 282, 24 C. C. A. 584. And see John Hancock Ice Co. *v.* Rose, 67 N. J. L. 86, 50 Atl. 364. Grain purchased by an agent and stored in his warehouse subject to the order of the owner is not in transit so as to exempt the agent from liability for taxes. Walton *v.* Westwood, 73 Ill. 125.

A portable sawmill temporarily in use in a town other than that in which the owner resides or has his place of business is not "situated or employed" in such town within the meaning of the statute for purposes of taxation. Ingraham *v.* Coles, 150 Mass. 155, 23 N. E. 48.

A steam derrick used in the erection of a mill by the owner in a place other than his residence is not subject to taxation in the latter place, the exceptions made by the statute to the rule that personal property shall be taxed at the residence of the owner not including steam derricks. Dresser *v.* Hopkinton, 75 N. H. 138, 71 Atl. 534.

Taxation of itinerant merchants or peddlers see Woodward *v.* Jacobs, 27 Ind. App. 188, 60 N. E. 1015.

Logs in process of manufacture at a mill see Wisconsin Sulphite Fibre Co. *v.* D. K. Jeffris Lumber Co., 132 Wis. 1, 111 N. W. 237.

20. *Arkansas.*— Harris Lumber Co. *v.* Grandstaff, 78 Ark. 187, 95 S. W. 772.

California.— San Joaquin, etc., Canal, etc., Co. *v.* Merced County, 2 Cal. App. 593, 84 Pac. 285.

Connecticut.— Field *v.* Guilford Water Co., 79 Conn. 70, 63 Atl. 723.

Georgia.— Greene County *v.* Wright, 126 Ga. 504, 54 S. E. 951.

Illinois.— Munson *v.* Crawford, 65 Ill. 185.

Maine.— Portland, etc., R. Co. *v.* Saco, 60 Me. 196.

Michigan.— Detroit Transp. Co. *v.* Detroit Bd. of Assessors, 91 Mich. 382, 51 N. W. 978.

Missouri.— Pacific R. Co. *v.* Cass County, 53 Mo. 17.

New Jersey.— Warren Mfg. Co. *v.* Warford, 37 N. J. L. 397; Warren R. Co. *v.* Person, 32 N. J. L. 134; Jersey City, etc., R. Co. *v.* Haight, 30 N. J. L. 443.

New York.— People *v.* Barker, 157 N. Y.

law requires the certificate of incorporation to state where such principal office shall be located, it is ordinarily conclusive on this point and fixes the place for taxing the company's property,[21] unless its residence has been changed pursuant to some statute,[22] although some decisions hold that if no business is transacted at the nominal principal office except the meetings of stock-holders and directors, while all the company's executive and financial business is done at another place, it is to be taxed at the latter place;[23] and it is to be noted that a manufacturing company is ordinarily taxable where its factory or works are situated, and not where its executive office is established.[24]

2. Situs of Property Generally. Following the rules just stated, the *situs* of all intangible personal property of a corporation, for purposes of taxation, is at its legal residence or principal place of business,[25] and the same applies to its franchises,[26] and according to the decisions in some states to its tangible and

159, 51 N. E. 1043; Union Steamboat Co. *v.* Buffalo, 82 N. Y. 351; People *v.* McLean, 80 N. Y. 254; People *v.* Barker, 91 Hun 590, 36 N. Y. Suppl. 842 [*affirmed* in 149 N. Y. 589, 44 N. E. 1127]; McLean *v.* Cuper Milling Co., 60 Hun 578, 14 N. Y. Suppl. 509; People *v.* Oswego, 6 Thomps. & C. 673; People *v.* Marenus, 62 Misc. 317, 116 N. Y. Suppl. 189 [*affirmed* in 134 N. Y. App. Div. 170, 118 N. Y. Suppl. 838].

Ohio.— Pelton *v.* Northern Transp. Co., 37 Ohio St. 450.

Tennessee.— Grundy County *v.* Tennessee Coal, etc., Co., 94 Tenn. 295, 29 S. W. 116.

Virginia.— Orange, etc., R. Co. *v.* Alexandria, 17 Gratt. 176.

Wisconsin.— Milwaukee Steamship Co. *v.* Milwaukee, 83 Wis. 590, 53 N. W. 839, 18 L. R. A. 353. See also Chicago, etc., R. Co. *v.* State, 128 Wis. 553, 108 N. W. 557.

United States.— National State Bank *v.* Pierce, 17 Fed. Cas. No. 10,052, 5 Reporter 682, 18 Alb. L. J. (N. Y.) 16, 5 Wkly Notes Cas. 344.

Canada.— Brantford *v.* Ontario Inv. Co., 15 Ont. App. 605; *Ex p.* St. John Suspension Bridge Co., 8 N. Brunsw. 190; *Ex p.* Byrne, 15 N. Brunsw. 125.

See 45 Cent. Dig. tit. "Taxation," § 450.

The principal place of business is held under the New Hampshire statutes to be the residence of a corporation and not a different town where it merely maintains an office and holds meetings of stock-holders. Woodsum Steamboat Co. *v.* Sunapee, 74 N. H. 495, 69 Atl. 577.

21. Union Steamboat Co. *v.* Buffalo, 82 N. Y. 351; Miner *v.* Fredonia, 27 N. Y. 155; Oswego Starch Factory *v.* Dolloway, 21 N. Y. 449; Western Transp. Co. *v.* Scheu, 19 N. Y. 408; People *v.* Barker, 91 Hun (N. Y.) 594, 36 N. Y. Suppl. 844; People *v.* Barker, 87 Hun (N. Y.) 341, 34 N. Y. Suppl. 269 [*affirmed* in 147 N. Y. 715, 42 N. E. 725]; Chesebrough Mfg. Co. *v.* Coleman, 44 Hun (N. Y.) 545; Metcalf *v.* Messenger, 46 Barb. (N. Y.) 325; Pelton *v.* Northern Transp. Co., 37 Ohio St. 450. But see Portsmouth Tp. *v.* Cranage Steamship Co., 148 Mich. 230, 111 N. W. 749; and cases cited *infra*, note 23.

Indefinite location.— If the statute requires the certificate of incorporation to state the place of the principal business office and the statement is that it shall be at N "or at such other place as the stockholders of the company might determine," the latter provision will be held to be surplusage and the residence of the corporation to be designated as N. People *v.* Barker, 91 Hun (N. Y.) 594, 36 N. Y. Suppl. 844.

A corporation may waive objection to an assessment in a county where it maintains an office, although its principal office and place of business is in another county. *In re* McLean, 138 N. Y. 158, 33 N. E. 821, 20 L. R. A. 389.

Where the statute does not require the articles of incorporation to state where the principal office shall be, the insertion in the articles of such a statement is not conclusive. Austen *v.* Hudson River Tel. Co., 73 Hun (N. Y.) 96, 25 N. Y. Suppl. 916.

22. People *v.* Barker, 91 Hun (N. Y.) 594, 36 N. Y. Suppl. 844.

23. Teagan Transp. Co. *v.* Detroit Bd. of Assessors, 139 Mich. 1, 102 N. W. 273, 111 Am. St. Rep. 391, 69 L. R. A. 431; Woodsum Steamboat Co. *v.* Sunapee, 74 N. H. 495, 69 Atl. 577; Milwaukee Steamship Co. *v.* Milwaukee, 83 Wis. 590, 53 N. W. 839, 18 L. R. A. 353. See also Portsmouth Tp. *v.* Cranage Steamship Co., 148 Mich. 230, 111 N. W. 749. *Compare* Grundy County *v.* Tennessee Coal, etc., Co., 94 Tenn. 295, 29 S. W. 116.

24. Penick *v.* High Shoals Mfg. Co., 116 Ga. 819, 43 S. E. 254; Oswego Starch Factory *v.* Dolloway, 21 N. Y. 449; Peter Cooper's Glue Factory *v.* McMahon, 15 Abb. N. Cas. (N. Y.) 314. See also Morgan County *v.* Walton County, 120 Ga. 1028, 48 S. E. 409.

25. Portland *v.* Union Mut. L. Ins. Co., 79 Me. 231, 9 Atl. 613; People *v.* Barker, 84 N. Y. App. Div. 469, 83 N. Y. Suppl. 33; Grundy County *v.* Tennessee Coal, etc., Co., 94 Tenn. 295, 29 S. W. 116; Franklin County *v.* Nashville, etc., R. Co., 12 Lea (Tenn.) 521.

26. San Francisco *v.* Oakland Water Co., 148 Cal. 331, 83 Pac. 61; Frankfort *v.* Stone, 58 S. W. 373, 22 Ky. L. Rep. 502; State *v.* Anderson, 90 Wis. 550, 63 N. W. 746. See also Evanston Electric Illuminating Co. *v.* Kochersberger, 175 Ill. 26, 51 N. E. 719.

visible personal property also,[27] although in others property of the latter description is regarded as having a *situs* of its own and is taxable where found.[28] The appointment of a receiver for a corporation does not change the *situs* of its property for taxation, no matter where the receiver may reside.[29]

3. Capital and Stock.[30] The capital stock of a corporation is assessable to the corporation itself at its principal place of business.[31] But shares of such stock, considered as the property of their individual holders, are taxable to such holders at their respective places of residence,[32] in the absence of a statute to the contrary; but the *situs* of shares of corporate stock for purposes of taxation may properly be fixed by statute at the place where the corporation is domiciled.[33]

4. Banking Institutions — a. In General. Real estate and other tangible property of a banking institution is taxable where situated.[34] But shares of stock in a bank are assessable only to the owner at his place of residence,[35] unless by statute they are made taxable where the bank is located.[36] As to money on deposit in a bank, there is a conflict of authority as to whether it should be taxed to the bank as a part of its assets or to the depositor as a debt due to him.[37] In the former case it will be assessable where the bank is located; in the latter, at the domicile of the depositor.[38]

b. National Bank Shares.[39] The federal statute provided that the shares of national banks should be assessed "at the place where said bank is located, and not elsewhere,"[40] and a conflict of authority having arisen as to whether

27. Harris Lumber Co. *v.* Grandstaff, 78 Ark. 187, 95 S. W. 772; Walton County *v.* Morgan County, 121 Ga. 659, 49 S. E. 776; Langdon-Creasy Co. *v.* Owenton Common School Dist., 116 Ky. 562, 76 S. W. 381, 25 Ky. L. Rep. 823; Com. *v.* Pennsylvania Coal Co., 197 Pa. St. 551, 47 Atl. 740.

28. Layman *v.* Iowa Tel. Co., 123 Iowa 591, 99 N. W. 205; O'Neal *v.* Virginia, etc., Bridge Co., 18 Md. 1, 79 Am. Dec. 669; Michigan Dairy Co. *v.* McKinlay, 70 Mich. 574, 38 N. W. 469; People *v.* Barker, 84 N. Y. App. Div. 469, 83 N. Y. Suppl. 33.

Real estate in two townships.—Where the real estate of a corporation is situated partly in one township and partly in another, and is occupied by the corporation, it will be subject to taxation in the township where the corporation resides. Warren Mfg. Co. *v.* Warford, 37 N. J. L. 397.

29. State *v.* Red River Valley El. Co., 69 Minn. 131, 72 N. W. 60.

30. In banking institutions see *infra*, V, F, 4.

31. People *v.* Ward, 105 Ill. 620; Quincy R. Bridge Co. *v.* Adams County, 88 Ill. 615; American Coal Co. *v.* Allegany County Com'rs, 59 Md. 185; Baltimore *v.* Baltimore City Pass. R. Co., 57 Md. 31. And see *supra*, III, B, 1, g.

32. *California.*—Stanford *v.* San Francisco, 131 Cal. 34, 63 Pac. 145.

Indiana.— Conwell *v.* Connersville, 15 Ind. 150; Evansville *v.* Hall, 14 Ind. 27.

Kansas.— Griffith *v.* Watson, 19 Kan. 23.

Maryland.— Baltimore *v.* Allegany County Com'rs, 99 Md. 1, 57 Atl. 632.

Massachusetts.—Amesbury Woollen, etc., Mfg. Co. *v.* Amesbury, 17 Mass. 461; Salem Iron Factory Co. *v.* Danvers, 10 Mass. 514.

Michigan.— Bacon *v.* State Tax Com'rs, 126 Mich. 22, 85 N. W. 307, 86 Am. St. Rep. 524.

Pennsylvania.— McKeen *v.* Northampton County, 49 Pa. St. 519, 88 Am. Dec. 515.

See 45 Cent. Dig. tit. "Taxation," § 455; and *supra*, III, B, 1, j.

33. Layman *v.* Iowa Tel. Co., 123 Iowa 591, 99 N. W. 205; South Nashville St. R. Co. *v.* Morrow, 87 Tenn. 406, 11 S. W. 348; Bedford *v.* Nashville, 7 Heisk. (Tenn.) 409; McLaughlin *v.* Chadwell, 7 Heisk. (Tenn.) 389; St. Albans *v.* National Car Co., 57 Vt. 68

34. Tremont Bank *v.* Boston, 1 Cush. (Mass.) 142; Nashua Sav. Bank *v.* Nashua, 46 N. H. 389; Orange Nat. Bank *v.* Williams, 58 N. J. L. 45, 32 Atl. 745. And see Farmers' L. & T. Co. *v.* Fonda, 114 Iowa 728, 87 N. W. 724.

35. *Connecticut.*— New London Sav. Bank *v.* New London, 20 Conn. 111. *Compare* Hartford F. Ins. Co. *v.* Hartford, 3 Conn. 15.

Indiana.— Madison *v.* Whitney, 21 Ind. 261.

Massachusetts.— Goldsbury *v.* Warwick, 112 Mass. 384.

Michigan.— Howell *v.* Cassopolis, 35 Mich. 471.

Pennsylvania.— Strong *v.* O'Donnell, 10 Phila. 575.

Tennessee.— Nashville *v.* Thomas, 5 Coldw. 600.

West Virginia.—Watson *v.* Fairmont, 38 W. Va. 183, 18 S. E. 467.

See 45 Cent. Dig. tit. "Taxation," § 458; and *supra*, III, B, 2, a, (IV).

36. London *v.* Hope, 80 S. W. 817, 26 Ky. L. Rep. 112; McLaughlin *v.* Chadwell, 7 Heisk. (Tenn.) 389.

37. See *supra*, III, B, 2, a, (VI).

38. See Grundy County *v.* Tennessee Coal, etc., Co., 94 Tenn. 295, 29 S. W. 116; Pyle *v.* Brenneman, 22 Fed. 787, 60 C. C. A. 409.

39. Liability of shares of stock-holders to taxation see *infra*, III, B, 2, b, (IV).

40. State *v.* Haight, 31 N. J. L. 399; Peo-

this provision applied so as to define and limit the place of taxation as between different counties or taxing districts of the same state,[41] or was merely intended to define the state authority which was allowed to impose the tax without affecting the place of assessment within the state,[42] an explanatory statute was enacted declaring the meaning of the "place where" a bank was located to be the "state in which" it was located.[43] Under this statute, except in the case of shares of non-resident owners which must be assessed in the city or town where the bank is located,[44] the legislature is free to determine the place of local taxation,[45] and may provide for the assessment of the shares of resident owners either at the place where the bank is located, regardless of the owner's residence,[46] or at the place where the owner resides.[47] In the absence of any provision to the contrary, however, such shares have their *situs* at the residence of the owner,[48] and are not subject to taxation where the bank is located if the owner resides in a different taxing district.[49]

5. Railroad Companies — a. In General. Real and personal property of a railroad may be assessed for local taxation, if the legislature so directs, by the several counties or other municipalities in which such property is actually located;[50] or the legislature may treat the railroad with all its property as an entirety and give it a general *situs* for purposes of taxation at its principal office,[51] or may cause the capital or property to be assessed as a whole by a state board, and distribute the total valuation among the several counties through which the road runs in proportion to the mileage of main line within each.[52]

ple *v.* New York Tax Com'rs, 35 N. Y. 423 [*affirmed* in 4 Wall. (U. S.) 244, 18 L. ed. 344]; Nashville *v.* Thomas, 5 Coldw. (Tenn.) 600.

41. Packard *v.* Lewiston, 55 Me. 456; State *v.* Haight, 31 N. J. L. 399; Nashville *v.* Thomas, 5 Coldw. (Tenn.) 600.

42. Austin *v.* Boston, 14 Allen (Mass.) 359 [*affirmed* in 7 Wall. (U. S.) 694, 19 L. ed. 224]; Clapp *v.* Burlington, 42 Vt. 579, 1 Am. Rep. 355.

43. Mendota First Nat. Bank *v.* Smith, 65 Ill. 44; Buie *v.* Fayetteville, 79 N. C. 267; Strong *v.* O'Donnell, 10 Phila. (Pa.) 575.

44. See Providence Sav. Inst. *v.* Boston, 101 Mass. 575, 3 Am. Rep. 407; Howell *v.* Cassopolis, 35 Mich. 471; Buie *v.* Fayetteville, 79 N. C. 267; Strong *v.* O'Donnell, 10 Phila. (Pa.) 575.

45. *Arizona.*— State Nat. Bank *v.* Long, 6 Ariz. 311, 57 Pac. 639.

Illinois.— Mendota First Nat. Bank *v.* Smith, 65 Ill. 44.

Massachusetts.— Providence Sav. Inst. *v.* Boston, 101 Mass. 575, 3 Am. Rep. 407.

Michigan.— Howell *v.* Cassopolis, 35 Mich. 471, holding that under the Michigan statute of 1875, such shares are to be assessed in the township where the bank is located unless the stock-holder resides in a different township of the same county, in which case he is taxable only in the township where he resides.

North Carolina.— Buie *v.* Fayetteville, 79 N. C. 267.

Pennsylvania.— Strong *v.* O'Donnell, 10 Phila. 575.

46. Mendota First Nat. Bank *v.* Smith, 65 Ill. 44.

47. Buie *v.* Fayetteville, 79 N. C. 267.

48. Strong *v.* O'Donnell, 10 Phila. (Pa.) 575.

49. State Nat. Bank *v.* Long, 6 Ariz. 311, 57 Pac. 639; Strong *v.* O'Donnell, 10 Phila. (Pa.) 575.

50. *Iowa.*— Dubuque, etc., R. Co. *v.* Webster County, 21 Iowa 235.

Michigan.— Mitchell *v.* Lake Tp., 126 Mich. 367, 85 N. W. 865.

Missouri.— State *v.* Dulle, 48 Mo. 282.

Nebraska.— Chicago, etc., R. Co. *v.* Hitchcock County, 40 Nebr. 781, 59 N. W. 358.

New Jersey.— Delaware, etc., R. Co. *v.* Newark, 60 N. J. L. 60, 37 Atl. 629.

New York.— Buffalo, etc., R. Co. *v.* Erie County, 48 N. Y. 93; Mohawk, etc., R. Co. *v.* Clute, 4 Paige 384.

Texas.— State *v.* Austin, etc., R. Co., 94 Tex. 530, 62 S. W. 1050.

United States.— Union Pac. R. Co. *v.* Peniston, 18 Wall. 5, 21 L. ed. 787.

See 45 Cent. Dig. tit. "Taxation," § 461; and *supra*, III, B, 2, d.

51. Detroit, etc., R. Co. *v.* Detroit, 141 Mich. 5, 104 N. W. 327; New Albany *v.* Kansas City, etc., R. Co., 76 Miss. 111, 23 So. 546; Heerwagen *v.* Crosstown St. R. Co., 90 N. Y. App. Div. 275, 86 N. Y. Suppl. 218 [*modified* on another point in 179 N. Y. 99, 71 N. E. 729]; Chicago, etc., R. Co. *v.* State, 128 Wis. 553, 108 N. W. 557. See also Applegate *v.* Ernst, 3 Bush (Ky.) 648, 96 Am. Dec. 272.

Choses in action of a railroad company, coming into existence in the corporation's different divisions of the territory through which it runs, and going into a general fund to be applied to dividends or general expenses, without regard to the division where such expenses are incurred, have their *situs* for the purpose of taxation at the corporate domicile. Grundy County *v.* Tennessee Coal, etc., Co., 94 Tenn. 295, 29 S. W. 116.

52. Huck *v.* Chicago, etc., R. Co., 86 Ill.

b. Right of Way, Tracks, and Other Realty. In the ordinary distribution of railroad taxation between the state and the municipalities, the former sometimes reserves the right to tax the real property of the road as a whole, or to have it assessed as a whole for state taxes by a state board; [53] but the more usual arrangement is for the state to tax capital stock and franchises, leaving to the local authorities the right to tax the physical property of the road within their respective limits, such as road-bed, tracks, bridges, shops, and other improvements.[54]

c. Rolling-Stock and Equipment Rolling-stock and other such equipment of a railroad is sometimes apportioned among the several counties through which the road passes, for the purpose of local taxation, in proportion to the mileage of the road in each county.[55] But in the absence of a statute authorizing such a distribution, property of this kind is taxable only at the domicile of the corporation, that is, its head office or principal place of business.[56]

6. Miscellaneous Corporations. Decisions relating to special statutory rules for the taxation of the property of certain particular kinds of corporations are collated in the note hereto.[57]

352; State *v.* Back, 72 Nebr. 402, 100 N. W. 952, 69 L. R. A. 561; Franklin County *v.* Nashville, etc., R. Co., 12 Lea (Tenn.) 521.

53. *Illinois.*—Chicago, etc., R. Co. *v.* Grant, 167 Ill. 489, 47 N. E. 750; Chicago, etc., R. Co. *v.* People, 4 Ill. App. 468.

Kentucky.— Louisville, etc., R. Co. *v.* Warren County Ct., 5 Bush 243.

Missouri.— State *v.* Hannibal, etc., R. Co., 135 Mo. 618, 37 S. W. 532.

Nebraska.— Chicago, etc., R. Co. *v.* Cass County, 72 Nebr. 489, 101 N. W. 11.

Pennsylvania.—Western New York, etc., R. Co. *v.* Venango County, 183 Pa. St. 618, 38 Atl. 1088.

See 45 Cent. Dig. tit. "Taxation," § 462.

54. See the statutes of the several states; and the cases cited *infra*, this note.

The following kinds of railroad property have been held taxable by local authorities: Tracks and railroad bed. Sparks *v.* Macon, 98 Ga. 301, 25 S. E. 459; Sangamon, etc., R. Co. *v.* Morgan County, 14 Ill. 163, 56 Am. Dec. 497; Morgan's L. & T., etc., Co. *v.* Bd. of Reviewers, 41 La. Ann. 1156, 3 So. 507; Camden, etc., R. Co. *v.* Atlantic City, 60 N. J. L. 242, 41 Atl. 1116. Fences along the right of way. Santa Clara County *v.* Southern Pac. R. Co., 118 U. S. 394, 6 S. Ct. 1132, 30 L. ed. 118. Track, road, and bridges. Detroit *v.* Wayne Cir. Judge, 127 Mich. 604, 86 N. W. 1032. Bridge not constructed as part of the road and used for general travel. St. Joseph, etc., R. Co. *v.* Devereux, 41 Fed. 14. Rails, sleepers, and bridges. Providence, etc., R. Co. *v.* Wright, 2 R. I. 459. Machine and repair shops. Oregon Short Line R. Co. *v.* Yeates, 2 Ida. (Hasb.) 397, 17 Pac. 457. Freight yards leased or used for private purposes. State *v.* Hannibal, etc., R. Co., 135 Mo. 618, 37 S. W. 532; Delaware, etc., R. Co. *v.* Newark, 60 N. J. L. 60, 37 Atl. 629. Franchise of a street railway company. Detroit *v.* Wayne Cir. Judge, 127 Mich. 604, 86 N. W. 1032.

55. Cook County *v.* Chicago, etc., R. Co., 35 Ill. 460; Evansville, etc., R. Co. *v.* West, 138 Ind. 697, 37 N. E. 1012; Pittsburgh, etc., R. Co. *v.* Backus, 133 Ind. 625, 33 N. E. 432; Baltimore, etc., R. Co. *v.* Wicomico County, 93 Md. 113, 48 Atl. 853; Richmond, etc., R. Co. *v.* Alamance, 84 N. C. 504.

56. *Iowa.*— Dubuque *v.* Illinois Cent. R. Co., 39 Iowa 56.

Maryland.— Baltimore City Appeal Tax Ct. *v.* Western Maryland R. Co., 50 Md. 274.

Minnesota.— State *v.* Iverson, 97 Minn. 286, 106 N. W. 309.

Missouri.— Pacific R. Co. *v.* Cass County, 53 Mo. 17.

Utah.— Union Refrigerator Transit Co. *v.* Lynch, 18 Utah 378, 55 Pac. 639, 48 L. R. A. 790.

Virginia.— Elizabeth City County *v.* Newport News, 106 Va. 764, 56 S. E. 801.

See 45 Cent. Dig. tit. "Taxation," § 463.

Compare Territory *v.* Yavapai County Delinquent Tax List, 3 Ariz. 117, 21 Pac. 768; Atlantic, etc., R. Co. *v.* Lesueur, 2 Ariz. 428, 19 Pac. 157, 1 L. R. A. 244, holding that for the purpose of taxation the *situs* of rolling-stock of a railway company is wherever such stock is habitually used in the business.

Steamboat owned by railroad.—A county assessor has no authority to assess a steamboat used by a railroad exclusively for the transfer of freight and passengers between terminals, even though it were not assessed by the railroad assessors. Little Rock, etc., R. Co. *v.* Williams, 101 Tenn. 146, 46 S. W. 448.

57. See the cases cited *infra*, this note.

Turnpike companies.— A statute of New Jersey directs that the personal estate of such a company shall be taxed where the treasurer resides, if tolls are collected in several townships or wards. Within the meaning of this statute a plank road company is a turnpike company. Haight *v.* State, 32 N. J. L. 449; Jersey City, etc., Plank Road Co. *v.* Haight, 30 N. J. L. 443.

Toll-bridge companies.— In New York the real property of such companies is to be assessed in the town or ward where it lies, the provision of the statute directing their assessment in the town or ward where the tolls are collected applying only to their

7. **Foreign Corporations.** Where a foreign corporation does business within the state, the place for the taxation of its property within the state is the place where its principal or head office within the state is located, if the statute so directs;[58] but otherwise, where the property is found.[59] But the fact that such a corporation maintains a business office in the state does not make it an "inhabitant" of the state, nor fix its legal residence there, in the sense of establishing a domicile which may draw to it the entire personal property of the corporation for the purpose of taxation.[60]

VI. Levy and Assessment.[1]

A. Levy and Apportionment[2] — **1. Nature of Levy.** While the word "levy" as applied to taxation has been given a variety of meanings,[3] in its proper sense, as applied to the determination of the amount or rate to be charged, it is the formal and official action of a legislative body invested with the power of taxation — whether national, state, or local — whereby it determines and declares that a tax of a certain amount, or of a certain percentage on value, shall be imposed

personal property. Hudson River Bridge Co. *v.* Patterson, 74 N. Y. 365.

Water companies.—Where a water company is chartered to supply a certain county and a city therein with water, the mere fact that the pipes of the company pass through the adjoining county does not make the company's franchise taxable there. Spring Valley Water Works *v.* Barber, 99 Cal. 36, 33 Pac. 735, 21 L. R. A. 416. And see Riverton, etc., Water Co. *v.* Haig, 58 N. J. L. 295, 33 Atl. 215. In Montana the statute provides that the personal property and franchises of water companies must be taxed "where the principal works are located." Helena Water Works Co. *v.* Settles, 37 Mont. 237, 95 Pac. 838.

The property of a manufacturing corporation is taxable to the corporation in the town where the property is situated. Smith *v.* Burley, 9 N. H. 423.

Telephone companies.— Under the New Hampshire statutes real estate owned by a telephone company and used in its ordinary business is taxable by the state board of equalization and not by the town in which it is situated. New England Tel., etc., Co. *v.* Manchester, 72 N. H. 166, 55 Atl. 188.

58. People *v.* McLean, 80 N. Y. 254; British Commercial L. Ins. Co. *v.* New York Tax, etc., Com'rs, 31 N. Y. 32; Sims *v.* Best, 25 Ohio Cir Ct 149.

59 Liverpool, etc., Ins. Co. *v.* Bd. of Assessors, 44 La. Ann 760, 11 So. 91, 16 L. R. A. 56; Scollard *v.* American Felt Co., 194 Mass 127, 80 N. E. 233.

In Massachusetts the act of 1903 expressly provides that a foreign corporation shall be subject to taxation on its machinery and merchandise by the municipality in which such property is situated. Hilliard *v.* Fells Ice Co., 200 Mass. 331, 86 N. E. 773.

60. Ayer, etc., Tie Co. *v.* Keown, 122 Ky. 580, 93 S. W. 588, 29 Ky. L. Rep. 110, 400; Boston Inv. Co. *v.* Boston, 158 Mass. 461, 33 N. E. 580.

Consolidation with domestic corporation.— A corporation formed by the consolidation of a domestic and a foreign corporation is to be deemed a domestic corporation for the purpose of the taxation of its property subject to taxation as of its domicile. Keokuk, etc., Bridge Co. *v.* People, 161 Ill. 132, 43 N. E. 691.

1. **Assessment and remission of equalizing tax on change of boundaries of school-district** see Schools and School-Districts, 35 Cyc. 855.

Assessment of legacy, inheritance, and transfer taxes see *infra*, XVI, E.

Assessment of school-taxes on change of boundaries or creation of new school-district see Schools and School-Districts, 35 Cyc. 1034.

2. **Apportionment of assessments and taxes for public inprovement** see Municipal Corporations, 28 Cyc. 1155 *et seq.*

3. Reno County School Dist. No. 127 *v.* Reno County School Dist. No. 45, 80 Kan. 641, 103 Pac. 126; Dickson *v.* Burckmyer, 67 S. C. 526, 46 S. E. 343.

Among the meanings given the word "levy" are: "To impose or assess;" "to impose, assess and collect under authority of law;" "to raise or collect by assessment;" "to charge a sum of money already ascertained against a person or property subject to the charge;" "to determine by vote the amount of tax to be raised;" "to fix the rate at which property is to be taxed." Gray *v.* Peoria Bd. of School Inspectors, 231 Ill. 63, 83 N. E. 95.

Distinctions.— The term "levy" is sometimes used for the purpose of conferring all the powers incident to the creation and collection of a tax; while again it is only intended to confer administrative powers in the collection of the tax without reference to its creation. Dickson *v.* Burckmyer, 67 S. C. 526, 46 S. E. 343. But the term "levy," in the sense of voting a tax, or determining in gross how much shall be raised by a particular class or general property, must not be confused with the term "levy" as it is used in the sense of merely performing the administrative duty of laying, on a legitimate basis, taxes previously levied, appropriated, or voted by the legislature. Chicago, etc., R. Co. *v.* State, 128 Wis. 553, 108 N. W. 557.

on persons and property subject thereto.[4] It is not a judicial power,[5] but is a legislative function to be exercised only by the state or some inferior political division to which the state has delegated the power;[6] and as a legislative function it cannot be delegated to administrative officers,[7] although the further proceedings, such as in extending, assessing, and collecting the taxes, are administrative.[8]

2. Power and Authority of Legislature — a. In General. The power of a state legislature to levy taxes is general and unlimited, in respect to amount and to the persons or property subject, except in so far as it is restrained by constitutional provisions,[9] or territorially limited by the boundaries of the state,[10] or by the vesting in local authorities of the exclusive right to levy taxes for their proper local purposes.[11] And although the constitutions sometimes limit the power of the legislature in this respect by requiring the levy of a tax to be based on previous estimates of the probable revenue and the estimated expenses of the state,[12] or by requiring tax levies to be periodically made,[13] yet as a general rule the legislature is left to its own judgment and discretion in regard to the manner in which this power shall be exercised.[14]

4. *Alabama.*— Maguire *v.* Mobile County, 71 Ala. 401; Perry County *v.* Selma, etc., R. Co., 58 Ala. 546.

Colorado.— People *v.* Ames, 24 Colo. 422, 51 Pac. 426.

Iowa.— Tallman *v.* Cooke, 43 Iowa 330.

Louisiana.— State *v.* Maginnis, 26 La. Ann. 558.

Wisconsin.— Chicago, etc., R. Co. *v.* State, 128 Wis. 553, 108 N. W. 557.

See 45 Cent. Dig. tit. "Taxation," § 486.

5. Yamhill County *v.* Foster, 53 Oreg. 124, 99 Pac. 286.

6. Reno County School Dist. No. 127 *v.* Reno County School Dist. No. 45, 80 Kan. 641, 103 Pac. 126; Yamhill County *v.* Foster, 53 Oreg. 124, 99 Pac. 286; Chicago, etc., R. Co. *v.* State, 128 Wis. 553, 108 N. W. 557.

7. Chicago, etc., R. Co. *v.* State, 128 Wis. 553, 108 N. W. 557.

8. Chicago, etc., R. Co. *v.* State, 128 Wis. 553, 108 N. W. 557.

9. *Arkansas.*— Van de Griff *v.* Haynie, 28 Ark. 270.

Florida.— Cheney *v.* Jones, 14 Fla. 587.

Illinois.— Bank of Republic *v.* Hamilton County, 21 Ill. 53.

New York.— People *v.* Bleckwenn, 55 Hun 169, 7 N. Y. Suppl. 914 [*affirmed* in 129 N. Y. 637, 29 N. E. 1031].

Vermont.— Wells *v.* Austin, 59 Vt. 157, 10 Atl. 405.

See 45 Cent. Dig. tit. "Taxation," § 470. See also *supra*, I, B, 3.

Constitutional requirements and restrictions see *supra*, II.

10. See *supra*, I, C, 1.

11. People *v.* Houston, 54 Cal. 536. *Compare* Dickson *v.* Burckmyer, 67 S. C. 526, 46 S. E. 343.

12. Stein *v.* Morrison, 9 Ida. 426, 75 Pac. 246; Choat *v.* Phelps, 63 Kan. 762, 66 Pac. 1002. See also Chicago, etc., R. Co. *v.* State, 128 Wis. 553, 108 N. W. 557.

13. State *v.* Bailey, 56 Kan. 81, 42 Pac. 373. *Compare* Davis *v.* Brace, 82 Ill. 542 (as to a standing levy); Chicago, etc., R. Co. *v.* State, 128 Wis. 553, 108 N. W. 557.

14. *Indiana.*—Washington Nat. Bank *v.* Daily, 166 Ind. 631, 77 N. E. 53.

Kansas.— State *v.* Bailey, 56 Kan. 81, 42 Pac. 373, holding that the legislature may levy taxes by requiring a gross sum to be collected from the taxable property of the state, as well as by fixing a rate per cent.

Maryland.—Faust *v.* Twenty-Third German-American Bldg. Assoc., 84 Md. 186, 35 Atl. 890, holding that the legislature may make the levy and assessment of a tax directly, without the intervention of any officer.

Massachusetts.— *In re* Opinion of Justices, 126 Mass. 547, holding that under the state constitution the senate has an equal right with the house of representatives to originate an inquiry into the returns made from the towns, for the purpose of settling a valuation and of concluding on the proportion of ratable property within each town.

New York.— *In re* Flower, 129 N. Y. 643, 29 N. E. 463 [*reversing* 55 Hun 158, 7 N. Y. Suppl. 866]; *In re* Union College, 129 N. Y. 308, 29 N. E. 460 [*reversing* 7 N. Y. Suppl. 866] (both of which hold that the legislature cannot provide for the apportionment of a tax among the persons assessed, without also providing for notice or a hearing on the part of the taxpayer); Gubner *v.* McClellan, 130 N. Y. App. Div. 716, 115 N. Y. Suppl. 755.

North Dakota.— Sykes *v.* Beck, 12 N. D. 242, 96 N. W. 844.

See 45 Cent. Dig. tit. "Taxation," § 471.

Levy of poll or capitation tax.— The assessment of half a poll tax on an individual is illegal. Southampton *v.* Easthampton, 8 Pick. (Mass.) 380. Under a statutory provision (Mass. Rev. St. c. 27), that there shall be assessed upon polls, as nearly as the same can be conveniently done, one-sixth part of the whole sum to be raised, provided the whole poll tax assessed in any one year shall not exceed one dollar and fifty cents upon any individual, one-sixth of the state tax must be assessed on the polls, although if added to the town and county tax it would bring the poll tax on each individual above one dollar and fifty cents. Goodrich *v.* Lunenburg, 9 Gray (Mass.) 38. In assessing taxes for county and township purposes and for city purposes, at the same time, in a city, a separate poll tax must be assessed

b. Apportionment to Municipalities. The apportionment of taxes among the taxable persons of the state, or of a particular section or territorial division thereof, is purely a legislative function,[15] and a general power to tax implies a power to apportion the tax in such manner as the legislature shall see fit,[16] except in so far as it is restrained by constitutional provisions.[17] The ordinary state taxes are generally apportioned among the several counties or other municipalities in proportion to the value of the taxable property therein as determined by the state board of equalization;[18] but this involves a proper adjustment of the burdens of taxation when a new county or municipality is formed out of an old one.[19] A state board, in assessing the entire value of the capital or franchises of a corporation, should apportion that value, for the purpose of taxation, among the various counties or taxing districts in which the business of the corporation is exercised.[20]

3. Powers of Counties and Other Local Authorities[21] — a. In General. The local authorities of counties and other municipalities are generally invested by law with power to levy such taxes as are necessary for their proper expenses,[22] and such a

in the city taxes, and it is an error to assess only one poll tax for all of such purposes which cannot be corrected by the court, but for which it must set aside the whole assessment. Fish *v.* Branin, 23 N. J. L. 484.

15. Youngblood *v.* Sexton, 32 Mich. 406, 20 Am. Rep. 654; Gordon *v.* Cornes, 47 N. Y. 608; People *v.* Haws, 34 Barb. (N. Y.) 69.

16. Gordon *v.* Cornes, 47 N. Y. 608; *In re* New York Protestant Episcopal Public School, 31 N. Y. 574; People *v.* Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266; People *v.* Haws, 34 Barb. (N. Y.) 69; Scovill *v.* Cleveland, 1 Ohio St. 126.

17. Gordon *v.* Cornes, 47 N. Y. 608 (holding that in the absence of any constitutional restraint the exercise by the legislature of this power cannot be reviewed by the courts); People *v.* Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266.

Taxation for local improvements.—Where revenues are to be raised for the construction of local improvements, such as are designed to benefit in a special and peculiar manner some one portion of the state or municipality, a new and special taxing district is created, confined to the limits within which property receives the peculiar benefit of the improvement, and the apportionment is made according to value or some other just standard within this district. Gordon *v.* Cornes, 47 N. Y. 608; *In re* New York Protestant Episcopal Public School, 31 N. Y. 574; Black Tax Titles (2d ed.), § 87. See also Municipal Corporations. 28 Cyc. 1155 *et seq.*

18. Auditor-Gen. *v.* Menominee County, 89 Mich. 552, 51 N. W. 483; State *v.* Linn County, 25 Oreg. 503, 36 Pac. 297.

19. Auditor-Gen. *v.* Menominee County, 89 Mich. 552, 51 N. W. 483 (holding that after the formation of a new county from parts taken from old counties the auditor-general should separate the equalized valuation of the property of such counties and apportion the taxes in any one of the old counties in proportion to the valuation of the property therein, after deducting therefrom the valuation of the property in the portion taken therefrom to form the new county); Ontonagon County *v.* Gogebic County, 74 Mich. 721, 42 N. W. 170 (holding that where a county is divided and a new one created from a portion of its territory, the auditor-general should apportion the state tax chargeable to the original county prior to such division between it and the new county upon the basis of the assessed value of the land in each for the year in which the last state equalization was made prior to such division).

The setting off of a part of one town by the legislature to another, with a proviso that the part so set off shall pay its proportion of certain debts and liabilities of the town from which it is separated, to be assessed and collected in the same manner and by the same persons as though the legislature had not made such separation, does not authorize the assessment and collection of a separate tax on that section for the payment of its proportion. Winslow *v.* Morrill, 47 Me. 411.

20. San Diego County *v.* Riverside County, 125 Cal. 495, 58 Pac. 81; Com. *v.* Chesapeake, etc., R., Co., 122 Ky. 283, 91 S. W. 1137, 28 Ky. L. Rep. 1201; Frankfort *v.* Stone, 58 S. W. 373, 22 Ky. L. Rep. 502. See also *supra*, V, F, 5, a.

21. **Delegation of taxing power to local authorities** see *supra*, I, E, 2.

22. See the statutes of the several states. And see the following cases:

California.— People *v.* Gerke, 37 Cal. 228.

Idaho.— Gooding *v.* Proffitt, 11 Ida. 380, 83 Pac. 230.

Kentucky.—Palmer *v.* Craddock, 2 Ky. Dec. 182, power in county courts.

Louisiana.— State *v.* McVea, 26 La. Ann. 151.

Michigan.— Zink *v.* Monroe County, 68 Mich. 283, 36 N. W. 73, holding that the board of county supervisors has the right to determine whether the taxes on the assessment rolls received by them from the township supervisors are authorized by law.

Minnesota.— Piper *v.* Branham, 14 Minn. 548.

Nevada.— State *v.* Manhattan Silver Min. Co., 4 Nev. 318.

North Carolina.—Wingate *v.* Sluder, 51

grant of authority is not unconstitutional.[23] But such power must be express and not merely implied,[24] and must be exercised in strict compliance with the statute, and any conditions or limitations imposed thereby,[25] and such grants, as to their nature and extent, are construed with strictness,[26] any doubts therein being given to the taxpayer.[27]

b. Purposes of Taxation — (i) *In General.* The requirement that all taxes, to be valid, must be levied for a public purpose,[28] applies to taxes which a county or other municipal corporation is authorized to levy.[29] The particular purpose for which such taxes may be levied depends upon the terms of the statute granting the power,[30] such as for the purpose of paying lawfully contracted debts and

N. C. 552, holding that Rev. Code, c. 111, did not take away or abridge the authority of the commissioners of Asheville to levy a tax.

Ohio.— Jones *v.* Franklin County, 25 Ohio Cir. Ct. 510.

See 45 Cent. Dig. tit. "Taxation," §§ 474, 475. See also Counties, 11 Cyc. 575 *et seq.*; Municipal Corporations, 28 Cyc. 1658 *et seq.*

Constitutionality of statutes: Giving the commissioners of a county power to tax for county purposes (Cotten *v.* Leon County Com'rs, 6 Fla. 610), or police purposes (Dexter *v.* Raine, 10 Ohio Dec. (Reprint) 25, 18 Cinc. L. Bul. 61 [*affirmed* in 18 Cinc. L. Bul. 301]).

Repeal of statutes see People *v.* Burt, 43 Cal. 560; Bartlett *v.* Atchison, etc., R. Co., 32 Kan. 134, 4 Pac. 178; Dunlop *v.* Minor, 26 La. Ann. 117.

Levy in newly organized county.— The acceptance by the controller of land rendered for taxation by a non-resident in an unorganized county, as provided under Tex. Const. art. 8, §§ 11, 12, does not prevent the county upon its subsequent organization from levying and collecting taxes, where the same have not been actually paid to the controller, and the organization is effected before June 1 of that year. Magnolia Cattle, etc., Co. *v.* Love, 2 Tex. Civ. App. 385, 21 S. W. 574.

23. State *v.* McVea, 26 La. Ann. 151, holding that the power delegated to police juries to levy tax is for parochial uses, and the special power to levy a uniform per centum on every species of property, trade, or profession on which the state assesses a tax, is not unconstitutional, although the constitution is silent on the subject. And see cases cited *supra*, note 22.

Levy without consent of taxpayers or their representatives.—A county levy imposed by the justices of the county courts, who are not elected but appointed, is not contrary to a constitutional declaration that men "cannot be taxed . . . without their own consent or that of their representatives." *In re* County Levy, 5 Call (Va.) 139.

24. State *v.* Shortridge, 56 Mo. 126, power of county court. See also Appeals from Taxation, 1 Phila. (Pa.) 418.

25. State *v.* St. Louis, etc., R. Co., 135 Mo. 77, 36 S. W. 211 (holding that unless a certificate of the assessments and rate of taxation of railroad property is made to the county court at the time and within the year required, the county court cannot levy the tax); State *v.* Union Trust Co., 92 Mo. 157, 6 S. W. 867; State *v.* Missouri Pac. R. Co., 92 Mo. 137, 6 S. W. 862 (as to the necessity of an order from the circuit court, made on proper application, authorizing the county court to levy taxes on railroad property to pay interest on railroad bonds); State *v.* Hannibal, etc., R. Co., 87 Mo. 236; Union Pac. R. Co. *v.* Howard County, 66 Nebr. 663, 92 N. W. 579, 97 N. W. 280.

26. *Alabama.*— Lott *v.* Ross, 38 Ala. 156.

Kansas.— Marion, etc., R. Co. *v.* Champlin, 37 Kan. 682, 16 Pac. 222.

Kentucky.— Campbell Turnpike Road Co. *v.* Highlands Dist., 130 Ky. 812, 114 S. W. 286, holding that the power of assessing a turnpike franchise is in the county board of supervisors to the exclusion of the assessing officers of the district.

Louisiana.— State *v.* Fournet, 30 La. Ann. 1103 (as to power of the police jury to levy taxes); Marigny *v.* Carradine, 19 La. Ann. 99.

Missouri.— State *v.* Wabash, etc., R. Co., 97 Mo. 296, 10 S. W. 434, holding that the circuit court cannot authorize the county court to levy a tax against a railroad company for prior years.

See 45 Cent. Dig. tit. "Taxation," §§ 474, 475.

Levy for past years.— Under a statute providing that the meeting to make the annual levy of taxes shall be held previous to July 1, in each year, the power of county commissioners to levy taxes in any one year is restricted to a levy for that year. Baltimore, etc., R. Co. *v.* Wicomico County, 93 Md. 113, 48 Atl. 853.

27. Lott *v.* Ross, 38 Ala. 156.

28. See *supra*, I, D, 1.

29. Rice *v.* Wadsworth, 27 N. H. 104 (holding that a tax cannot be legally assessed to raise a sum equal to the interest of surplus revenue after such revenue has been expended, for the purpose of being divided among the tax-paying polls); Chicago, etc., R. Co. *v.* State, 128 Wis. 553, 108 N. W. 557; Hayes *v.* Douglas County, 92 Wis. 429, 65 N. W. 482, 53 Am. St. Rep. 926, 31 L. R. A. 213 (holding that a county tax levied to pay for placing stones from the county in the state building at the world's fair was invalid).

30. Sullivan *v.* State, 66 Ill. 75 (to refund private subscriptions for bounties to volunteers); Warder *v.* Clark County, 38 Ohio St. 639 (to purchase toll-roads; and to refund

expenses.[31] But the authority of a county or other municipal corporation to levy taxes may be restricted by statute or a constitutional provision, except for certain specified purposes,[32] and when so restricted the taxes cannot be levied for any other purposes than those specified.[33]

(II) *AID TO RAILROADS.* Aiding in the construction of a railroad through a county or other municipal corporation is a public purpose with reference to that county or municipality, so as to justify local taxation to raise money to pay a county or municipal subscription to the stock or bonds of the railroad company.[34] As a general rule, however, the railroad itself cannot be taxed by the county or municipality for this purpose;[35] but where the franchises of a railroad company have been purchased by a new company the property and improvements of the new company in the county, except such as it acquires by its purchase from the old company, are subject to taxation for the payment of its part of a county subscription to aid in the construction of the old road.[36]

assessments); Com. *v.* McWilliams, 11 Pa. St. 61 (to enable a county to subscribe for shares of the capital stock of a turnpike company). See also COUNTIES, 11 Cyc. 578; MUNICIPAL CORPORATIONS, 28 Cyc. 1663.

31. *Alabama.*— Tallapoosa Com'rs Ct. *v.* Tarver, 21 Ala. 661, holding that authority to levy a county tax for the purpose of discharging the liability previously incurred by certain commissioners included counsel fees incurred by them in good faith in defense of a suit instituted against them.

Louisiana.— Sterling *v.* West Feliciana Parish, 26 La. Ann. 59, holding that, for all purposes for which police juries were authorized to create debts, they were authorized to levy and collect a tax for the payment of such debts. See also Benjamin *v.* East Baton Rouge Parish, 23 La. Ann. 329.

New York.— People *v.* Kingston, 101 N. Y. 82, 4 N. E. 348, costs incurred by the board of supervisors of a town in appealing from an assessment of county taxes.

South Carolina.—State *v.* Georgetown Dist., 2 Rich. 413, expense of transcribing records in the district offices.

Washington.— Holcomb *v.* Johnson, 43 Wash. 362, 86 Pac. 409.

West Virginia.—Armstrong *v.* Taylor County Ct., 41 W. Va. 602, 24 S. E. 993.

United States.— U. S. *v.* New Orleans, 103 U. S. 358, 26 L. ed. 395; U. S. *v.* New Orleans, 98 U. S. 381, 25 L. ed. 225; U. S. *v.* New Orleans, 17 Fed. 483 [*reversed* on other grounds in 131 U. S. 220, 9 S. Ct. 755, 33 L. ed. 110].

See 45 Cent. Dig. tit. "Taxation," §§ 476, 477. See also COUNTIES, 11 Cyc. 579; MUNICIPAL CORPORATIONS, 28 Cyc. 1672.

But *compare* Weston Lumber Co. *v.* Munising Tp., 123 Mich. 138, 82 N. W. 267; Union Pac. R. Co. *v.* York County, 10 Nebr. 612, 7 N. W. 270, holding that, where there is no law to authorize it, a sinking fund tax cannot be levied to pay the floating indebtedness of a county.

A tax levied to pay judgments against a county, although ordered by a court or judge, is not taxation by judicial authority or the exercise by the court of functions not properly judicial, and hence a statute authorizing such a tax is not in violation of a constitutional provision that no duty shall attach to the supreme and district courts but such as are judicial. Smith *v.* Huey, 34 La. Ann. 1011.

32. Warren County *v.* Klein, 51 Miss. 807; Sedberry *v.* Chatham County, 66 N. C. 486.

Repeal of statutes see Oregon Short Line etc., R. Co. *v.* Standing, 10 Utah 452, 37 Pac. 687.

33. Thompson *v.* Wiley, 46 N. J. L. 476; Hixon *v.* Eagle River, 91 Wis. 649, 65 N. W. 366 (holding that authority of a county to levy a tax to purchase land for the purpose of holding thereon agricultural fairs does not authorize it to levy a tax to be paid over to an agricultural society); Beaty *v.* Knowler, 4 Pet. (U. S.) 152, 7 L. ed. 813 [*affirming* 14 Fed. Cas. No. 7,896, 1 McLean 41].

Expenses of courts.— Insolvent criminal costs due the solicitor-general or the solicitor of a city court, after being allowed by the grand jury, are "expenses of court," within the meaning of a constitutional provision, which prohibits counties from exercising the taxing power except, *inter alia*, to raise funds for the payment of "expenses of court." Adam *v.* Cohen, 84 Ga. 725, 11 S. E. 895; Adam *v.* Wright, 84 Ga. 720, 11 S. E. 893 [*distinguishing* Adair *v.* Ellis, 83 Ga. 464, 10 S. E. 117].

34. Cotten *v.* Leon County Com'rs, 6 Fla. 610; Com. *v.* Allegheny County Com'rs, 40 Pa. St. 348. See also COUNTIES, 11 Cyc. 579; MUNICIPAL CORPORATIONS, 28 Cyc. 1671.

Repeal of statutes see Com. *v.* Allegheny County Com'rs, 40 Pa. St. 348.

35. Louisville, etc., R. Co. *v.* Com., 89 Ky. 531, 12 S. W. 1064, 11 Ky. L. Rep. 734 (holding that a railroad cannot be taxed by a county to pay the subscription of the county to aid in its construction, although the county issued bonds in payment of the subscription and the tax is to pay the bonds); Applegate *v.* Ernst, 3 Bush (Ky.) 648, 96 Am. Dec. 272. See also Elizabethtown, etc., R. Co. *v.* Carter County, 18 S. W. 370, 13 Ky. L. Rep. 744. But *compare* Shenandoah Valley R. Co. *v.* Clark County, 78 Va. 269, holding that railroad property may be taxed by a county, together with other property therein, to pay interest on county railroad aid bonds.

36. Louisville, etc., R. Co. *v.* Hopkins County, 87 Ky. 605, 9 S. W. 497, 10 Ky. L.

c. Rate or Amount. The state constitution or statutes usually limit the taxing power of counties or other municipalities for ordinary county or municipal purposes, to the raising, in any one year, of a specified sum or of a certain percentage of the value of the taxable property;[37] and where taxes are levied to the prescribed limit the power is exhausted, and any taxes levied in excess thereof are illegal and void.[38] But in addition to the levy of taxes for general county or municipal purposes, provision is usually made either by general or special laws, for extra levies, likewise limited, for school,[39] and poor taxes,[40] and for other special purposes not included in the ordinary county or municipal expenses,[41] such as the payment of the bonded or other debt of the county or municipality, or interest thereon,[42]

Rep. 806; Owensboro, etc., R. Co. *v.* Daviess County, (Ky. 1887) 3 S. W. 164.

37. See the statutes of the several states. And see the following cases:

Arkansas.— Scott *v.* Watkins, 22 Ark. 556.

Florida.— State *v.* Southern Land, etc., Co., 45 Fla. 374, 33 So. 999.

Louisiana.— State *v.* State Tax Collector, 39 La. Ann. 530, 2 So. 59; Witkowski *v.* Bradley. 35 La. Ann. 904; Lafitte *v.* Morgans, 29 La. Ann. 1.

Mississippi.— Warren County *v.* Klein, 51 Miss. 807.

Nebraska.— State *v.* Gosper County, 14 Nebr. 22, 14 N. W. 801; Burlington, etc., R. Co. *v.* Clay County, 13 Nebr. 367, 13 N. W. 628; Burlington, etc., R. Co. *v.* Lancaster County, 4 Nebr. 293.

Ohio.— Cummings *v.* Fitch, 40 Ohio St. 56; State *v.* Strader, 25 Ohio St. 527; State *v.* Humphreys, 25 Ohio St. 520; Kemper *v.* McClelland, 19 Ohio 308; Dexter *v.* Hamilton County, 10 Ohio Dec. (Reprint) 338, 20 Cinc. L. Bul. 364; State *v.* Brewster, 9 Ohio Dec. (Reprint) 227, 11 Cinc. L. Bul. 234.

Oklahoma.—Atchison, etc., R. Co. *v.* Wiggins, 5 Okla. 477, 49 Pac. 1019.

United States.— Ketchum *v.* Pacific R. Co., 14 Fed. Cas. No. 7,738, 4 Dill. 41 note.

See 45 Cent. Dig. tit. "Taxation," §§ 476, 479. See also COUNTIES, 11 Cyc. 576; MUNICIPAL CORPORATIONS, 28 Cyc. 1664.

Constitutional limitation of rate or amount in general see supra, II, E.

Legislative determination conclusive.— The determination by the legislature of the amount of taxes required for the year, and the rate necessary, is conclusive on the counties. State *v.* Multnomah County, 13 Oreg. 287, 10 Pac. 635.

38. *Arkansas.*— Cope *v.* Collins, 37 Ark. 649; Vance *v.* Little Rock, 30 Ark. 435. But see Worthen *v.* Badgett, 32 Ark. 496, holding that an excessive levy vitiates the whole tax.

Louisiana.—Witkowski *v.* Bradley, 35 La. Ann. 904; Gonzales *v.* Lindsay, 30 La. Ann. 1085.

Michigan.— Michigan Land, etc., Co. *v.* Republic Tp., 65 Mich. 628, 32 N. W. 882, excess collected should be repaid.

Ohio.—Cummings *v.* Fitch, 40 Ohio St. 56; Kemper *v.* McClelland, 19 Ohio 308.

Oklahoma.— Atchison, etc., R. Co. *v.* Wiggins, 5 Okla. 477, 49 Pac. 1019.

See 45 Cent. Dig. tit. "Taxation," §§ 476, 479. See also *infra*, VI, A, 8, b.

39. Lafitte *v.* Morgans, 29 La. Ann. 1; Powder River Cattle Co. *v.* Johnson County, 3 Wyo. 597, 29 Pac. 361, 31 Pac. 278, holding that taxes levied for the support of the common schools are not taxes for "county purposes." See also SCHOOLS AND SCHOOL-DISTRICTS, 35 Cyc. 998 *et seq.*

40. Waller *v.* Perkins, 52 Ga. 233; Allen *v.* Bernards Tp. Taxation Com'rs, 57 N. J. L. 303, 31 Atl. 219. But see Atchison, etc.. R. Co. *v.* Wilhelm, 33 Kan. 206, 6 Pac. 273, holding that taxes for the support of the poor are to be regarded as current expenses of the county, and within the statutory limitation.

41. *Florida.*— State *v.* Southern Land, etc., Co., 45 Fla. 374, 33 So. 999, for expenses of criminal prosecutions, and for pensions.

Georgia.— Spann *v.* Webster County, 64 Ga. 498, for purposes authorized by the constitution, or by special act.

Illinois.— Elrod *v.* Bernadotte, 53 Ill. 368, holding that a power to levy a tax, not to exceed three per cent in any one year, to pay the volunteers' substitutes and drafted men was not exhausted by a levy in one year, but there might be a further levy, provided it did not exceed in any one year the three per cent.

Michigan.— Crooks *v.* Whitford, 47 Mich. 283, 11 N. W. 159.

Minnesota.— McCormick *v.* Fitch, 14 Minn. 252.

Mississippi.— Warren County *v.* Klein, 51 Miss. 807, for the building and repairing of court-houses, jails, bridges, and other necessary conveniences.

New Jersey.— Little *v.* Oliver, 59 N. J. L. 89, 34 Atl. 943, deficiencies.

Ohio.— Dexter *v.* Hamilton County, 10 Ohio Dec. (Reprint) 338, 20 Cinc. L. Bul. 364.

See 45 Cent. Dig. tit. "Taxation," §§ 476, 479.

Repeal of statute see Little *v.* Oliver, 59 N. J. L. 89, 34 Atl. 943.

That the amount to be paid by each individual is governed by the last assessment of taxable property in the county does not render invalid a statute authorizing a specific tax. Shaw *v.* Dennis, 10 Ill. 405.

42. *Georgia.*— Couper *v.* Rowe, 42 Ga. 229.

Illinois.— Peoria, etc., R. Co. *v.* People, 183 Ill. 19, 55 N. E. 714, under a statute requiring that the question of such excess shall be submitted to the people.

Iowa.— Sioux City, etc., R. Co. *v.* Osceola County, 52 Iowa 26, 2 N. W. 593, county's bonded indebtedness.

or the satisfaction of judgments which have been recovered against it.[43] Where it is left to the citizens to vote the amount of the taxes to be levied, this also imposes a strict limitation on the power of the assessing and collecting officers, and they can add nothing whatever to the amount voted.[44] Where the amount to be raised is by law committed to the discretion of the local authorities and they have lawfully exercised such discretion, commissioners of taxation who have authority to act only in case the local authorities fail to do so, have no power to change the amount so ordered;[45] nor, in the absence of an abuse of such discretion, can a court of equity supervise the action of such authorities.[46]

4. Making of Levy by Local Authorities — a. Necessity, Duty, and Authority to Make Levy.[47] No county or other local tax is valid unless it is duly levied by the proper local authorities,[48] except where the levy is made directly by the legislature, in which case the concurrent action of the local authorities is not necessary.[49] The action of the local authorities in this particular is not generally discretionary, but is an imperative duty,[50] and, when performed by a board, must be performed by at least a majority of the board acting together as such,[51] or by the prescribed number or majority,[52] and must be concurred in by such boards or authorities as the statute directs.[53]

Louisiana.—Lafitte *v.* Morgans, 29 La. Ann. 1, holding, however, that such a tax must first be authorized by a vote of a majority of the voters of the parish.

Mississippi.— Cowart *v.* Foxworth, 67 Miss. 322, 7 So. 350, to pay teachers' warrants.

Nebraska.— Burlington, etc., R. Co. *v.* Saunders County, 17 Nebr. 318, 22 N. W. 560; State *v.* Gosper County, 14 Nebr. 22, 14 N. W. 801.

See 45 Cent. Dig. tit. "Taxation," §§ 476, 479. See also Counties, 11 Cyc. 576; Municipal Corporations, 28 Cyc. 1672.

43. Couper *v.* Rowe, 42 Ga. 229.

Mandamus.—A county or other municipality may be compelled by mandamus to levy an additional or greater tax than the prescribed limit, for the purpose of paying a judgment rendered against it. Shields *v.* Chase, 32 La. Ann. 409; Louisiana City *v.* U. S., 103 U. S., 289, 26 L. ed. 358. But see Stewart *v.* Jefferson Police Jury, 116 U. S. 135, 6 S. Ct. 332, 29 L. ed 588; U. S. *v.* Clark County Ct., 95 U. S. 769, 24 L. ed. 545. See also Mandamus, 26 Cyc. 325 *et seq.*

44. Joyner *v.* Egremont School Dist., 3 Cush. (Mass.) 567; Burlington, etc., R. Co. *v.* Clay County, 13 Nebr. 367, 13 N. W. 628; State *v.* Flavell, 24 N. J. L. 370; Coles *v.* Platt, 24 N. J. L. 108; Vail *v.* Bentley, 23 N. J. L. 532. But *compare* Wagner *v.* Jackson, 31 N. J. L. 189.

45. Allen *v.* Bernards Tp. Taxation Com'rs, 57 N. J. L. 303, 31 Atl. 219.

46. Clay *v.* Hawkins County Justices, 5 Lea (Tenn.) 137, holding that the amount of taxes to be levied is within the discretion of the county court, and that a court of equity has no jurisdiction to reduce the same or to supervise the action of the county court, unless it refuses altogether to perform its duties.

47. Duty or authority as dependent on certificate of rate or amount see *infra*, VI, A, 5, c.

48. Templeton *v.* Levee Com'rs, 16 La. Ann. 117; Loose *v.* Navarre, 95 Mich. 603, 55 N. W. 435 (not rated); St. Louis, etc., R. Co. *v.* Apperson, 97 Mo. 300, 10 S. W. 478 (holding that a railroad tax book extended by the clerk without any levy having been made by the county court is void).

Officers de facto.—Persons acting as a board of equalization and making a levy for taxes are at least *de facto* officers, whose acts are of the same validity as acts of officers *de jure*. Peirce *v.* Weare, 41 Iowa 378.

49. People *v.* Lothrop, 3 Colo. 428; Labadie *v.* Dean, 47 Tex. 90.

50. People *v.* Ames, 24 Colo. 422, 51 Pac. 426; State *v.* Yellowstone County, 12 Mont. 503, 31 Pac. 78; State *v.* Harris, 17 Ohio St. 608. *Compare* Young *v.* Lane, 43 Nebr. 812, 62 N. W. 202, holding that authority to levy an extra tax for a soldiers' relief fund was permissive only.

51. Gilbert *v.* Huston, Litt. Sel. Cas. (Ky.) 223 (holding that a levy laid by less than the majority of all the justices in office in the county, including all who have been commissioned and taken the oath of office, although they may never have taken their seats on the bench, is void); Schenck *v.* Peav, 21 Fed. Cas. No. 12,450, Woolw. 175 (holding that, where the authority is conferred on three tax commissioners, it cannot be exercised by two, if the third has no opportunity to take part therein).

52. Brunswick County *v.* Woodside, 31 N. C. 496 (any three or more justices); Steele *v.* Blanton, 1 Lea (Tenn.) 514 (majority of justices composing the county court).

Three fifths of the justices entitled to attend are necessary for the levying of a county tax under Milliken & V. Code (Tenn.), § 4974. Central Trust Co. *v.* Ashville Land Co., 72 Fed. 361, 18 C. C. A. 590.

It will be presumed, in the absence of evidence to the contrary, that the required majority was present at the assessment of a tax. State *v.* McIntoch, 29 N. C. 68.

53. State *v.* Hagerty, 5 Ohio Cir. Ct. 22, 3 Ohio Cir. Dec. 12, board of county commissioners and board of control of the county.

b. Apportionment. Where the statute requires certain county authorities to apportion the state and county taxes among the several townships or other minor municipal divisions, according to the value of taxable property therein, it is essential to the validity of the taxes that the apportionment should at least substantially comply with the requirements of the statute,[54] as that it must not unreasonably exceed the amount to be raised by taxation;[55] although the apportionment will not be invalidated by mere clerical errors,[56] unless they have the effect to increase the tax to be borne by certain parcels of land beyond their just proportion.[57] If the county authorities improperly refuse to apportion the taxes they may be compelled to do so by mandamus.[58]

5. Requisites and Validity of Levy — a. In General. Although it has been held that no tax can be sustained as valid unless it is levied in accordance with the letter of the statute,[59] as a general rule the forms, methods, and various steps which the statute requires to be performed before the owners of property are properly chargeable with the tax, such as the filing of a petition for a levy,[60] an order for the submission of the question to popular vote,[61] the making of a previous estimate of the necessary or probable expenses of the municipality,[62] and notice to taxpayers of the meeting of the board which is to levy the tax [63] are conditions precedent to the validity of the tax and must be at least substantially followed in all material particulars; [64] and a failure substantially to comply with the stat-

54. *Michigan.*— Hoffman *v.* Lynburn, 104 Mich. 494, 62 N. W. 728; Shelden *v.* Marion Tp., 101 Mich. 256, 59 N. W. 614; Boyce *v.* Auditor-Gen., 90 Mich. 314, 51 N. W. 457; Boyce *v.* Sebring, 66 Mich. 210, 33 N. W. 815, holding that the statute does not require any particular form to be adopted or the word "apportion" to be used in the record, and that the mathematical computation by which is ascertained the amount of state and county tax to be raised by each township need not appear of record, but simply the result reached by such computation.

New Jersey.— Eatontown Tp. *v.* Monmouth County, 51 N. J. L. 100, 15 Atl. 830; Sea Isle City *v.* Cape May County, 50 N. J. L. 50, 12 Atl. 771; Bayonne *v.* Hudson County, 46 N. J. L. 93; Skirm *v.* Cox, 38 N. J. L. 302.

Tennessee.— State *v.* Cincinnati, etc., R. Co., 13 Lea 500.

Washington.—Coolidge *v.* Pierce County, 28 Wash. 95, 68 Pac. 391.

Canada.— *In re* Scott, 13 U. C. Q. B. 346.

See 45 Cent. Dig. tit. "Taxation," § 485.

Signature.— The failure of the chairman of the county board to sign an apportionment and equalization of the county tax, as required by statute, renders such apportionment invalid. Weston *v.* Monroe, 84 Mich. 341, 47 N. W. 446 [*distinguishing* Lacey *v.* Davis, 4 Mich. 140, 66 Am. Dec. 524].

Deduction of debts.— In apportioning the state and school tax among the several townships in a county, the board of assessors must distribute it according to the value of the property after deducting debts, as shown by the duplicates of the assessors of the several townships of the then present year and not of the preceding year. Skirm *v.* Cox, 38 N. J. L. 302.

55. Chicago, etc., R. Co. *v.* Baldridge, 177 Ill. 229, 52 N. E. 263; Alvord *v.* Collin, 20 Pick. (Mass.) 418.

56. Case *v.* Dean, 16 Mich. 12.

57. Case *v.* Dean, 16 Mich. 12.

58. People *v.* Jackson County, 24 Mich. 237. See also Mandamus, 26 Cyc. 334.

59. Hough *v.* North Adams, 196 Mass. 290, 82 N. E. 46.

60. Williams *v.* Lawrence County, 121 Ind. 239, 23 N. E. 76.

61. Peoria, etc., R. Co. *v.* People, 183 Ill. 19, 55 N. E. 714.

62. Waggoner *v.* Maumus, 112 La. 229, 36 So. 332; Wilson *v.* Anderson, 28 La. Ann. 261; St. Louis County *v.* Nettleton, 22 Minn. 356; State *v.* Wise, 12 Nebr. 313, 11 N. W. 329; Oregon R. Co. *v.* Umatilla County, 47 Oreg. 198, 81 Pac. 352.

63. Lahman *v.* Hatch, 124 Cal. 1, 56 Pac. 621; State *v.* Manhattan Silver Min. Co., 4 Nev. 318.

64. *Alabama.*— State Auditor *v.* Jackson County, 65 Ala. 142.

California.— Hewes *v.* Reis, 40 Cal. 255.

Idaho.— Shoup *v.* Willis, 2 Ida. (Hasb.) 120, 6 Pac. 124.

Missouri.— State *v.* Hannibal, etc., R. Co., 101 Mo. 136, 13 S. W. 505.

Oklahoma.— Nelson *v.* Oklahoma City, etc., R. Co., 24 Okla. 617, 104 Pac. 42.

Texas.— Dawson *v.* Ward, 71 Tex. 72, 9 S. W. 106.

Virginia.— Gilkeson *v.* Frederick County Justices, 13 Gratt. 577.

See 45 Cent. Dig. tit. "Taxation," §§ 486–489.

Mode of ordering levy.— Where an order of the board of supervisors showed that the committee on county taxes reported that they had examined the accounts of the county and recommended that a tax of a certain amount for all purposes be levied for the year on all the taxable property of the county, and that upon motion the report was adopted by the board, it is in effect an order for the levy of such a tax. Mix *v.* People, 72 Ill. 241.

Disregard of express directions.— The positive requirements of the statute in regard to

utory requirements is a fatal omission invalidating the tax,[65] although a formal levy is not required, and mere irregularities or informalities will not invalidate the tax.[66] If the statutory provisions relating to a levy have for their object the protection of the taxpayer against spoliation or excessive taxation, they are mandatory and must be followed;[67] but if the requirements prescribed by the statute are designed for the information of assessors and other officers, and intended to promote despatch, method, system, and uniformity in the mode of proceeding, they are merely directory, and a failure to comply with such requirements does not invalidate the levy;[68] and this is also true of clerical and ministerial duties, the observance or non-observance of which do not injuriously affect the taxpayer.[69]

b. Statement of Purpose and Amount of Tax. The failure of a tax levy to state distinctly, as required by statute, the amount of the tax[70] and the purpose for which it is levied[71] invalidates the tax, except where the statute itself defines such purpose.[72] But a substantial compliance with such requirements is sufficient, and it is enough if reasonable certainty and particularity is used in setting forth the purpose of the tax,[73] or the amount thereof;[74] and it is lawful to levy a tax

the levy of taxes cannot be treated as obsolete merely because they have been disregarded in practice. Kitchen *v.* Smith, 101 Pa. St. 452.

Sufficiency of official action to constitute levy.— Where a committee appointed by the board of supervisors make a report recommending the levy of a specified tax, and the report is adopted by the board, it is a sufficient levy. West *v.* Whitaker, 37 Iowa 598. And it is not necessary, to make a legal levy, that there should be an appropriation of the money to be raised by the tax to the specific object for which it is levied. State *v.* Southern Land, etc., Co., 45 Fla. 374, 33 So. 999.

65. *Dakota.*— Bode *v.* New England Inv. Co., 6 Dak. 499, 42 N. W. 658, 45 N. W. 197.

Illinois.— Wabash R. Co. *v.* People, 213 Ill. 522, 72 N. E. 1127; Chicago, etc., R. Co. *v.* People, 213 Ill. 497, 72 N. E. 1118; Chicago, etc., R. Co. *v.* People, 213 Ill. 458, 72 N. E. 1105; People *v.* Lee, 112 Ill. 113, 1 N. E. 471.

Massachusetts.— Gerry *v.* Stoneham, 1 Allen 319.

Michigan.—Hogleskamp *v.* Weeks, 37 Mich. 422; Hall *v.* Kellogg. 16 Mich. 135.

United States.— Huntington *v.* Central Pac. R. Co., 12 Fed. Cas. No. 6,911, 2 Sawy. 503.

See 45 Cent. Dig. tit. "Taxation," §§ 486–489.

66. Wabash, etc., R. Co. *v.* McCleave, 108 Ill. 368; Jefferson County *v.* Johnson, 23 Kan. 717; Fish *v.* Genett, 56 S. W. 813, 22 Ky. L. Rep. 177; Burlington, etc., R. Co. *v.* Lancaster County, 12 Nebr. 324, 11 N. W. 332.

67. State Auditor *v.* Jackson County, 65 Ala. 142.

68. State Auditor *v.* Jackson County, 65 Ala. 142; Atlanta Nat. Bldg., etc., Assoc. *v.* Stewart, 109 Ga. 80, 35 S. E. 73; Com. *v.* New England Slate, etc., Co., 13 Allen (Mass.) 391; Robbins *v.* Barron, 33 Mich. 124.

69. State Auditor *v.* Jackson County, 65 Ala. 142; Auditor-Gen. *v.* Hill, 98 Mich. 326, 57 N. W. 168.

70. Dever *v.* Cornwell, 10 N. D. 123, 86 N. W. 227, holding that a tax levy by percentages, under a statute requiring the levy of taxes to be in specific amounts, is void.

71. Chesapeake, etc., R. Co. *v.* Com., 129 Ky. 318, 108 S. W. 248, 111 S. W. 334, 32 Ky. L. Rep. 1119, 33 Ky. L. Rep. 882; Com. *v.* U. S. Fidelity, etc., Co., 121 Ky. 409, 89 S. W. 251, 28 Ky. L. Rep. 362; Wathen *v.* Young, 103 Ky. 36, 44 S. W. 115, 19 Ky. L. Rep. 1678; Southern R. Co. *v.* Hamblen County, 115 Tenn. 526, 92 S. W. 238.

Curative statutes.— A statute curing tax levies which were originally defective in omitting to state the purpose for which the tax was levied is a valid enactment. Bowyer *v.* People, 220 Ill. 93, 77 N. E. 91.

72. Coulson *v.* Harris, 43 Miss. 728, holding that the levy need not specify the purpose for which it is made, where the statute authorizing a special tax itself defines the purpose.

73. *Georgia.*— Habersham County Road, etc., Com'rs *v.* Porter Mfg. Co., 103 Ga. 613, 30 S. E. 547, holding that a tax levy "to pay other lawful charges against the county" is not so indefinite that its collection should be enjoined.

Illinois.— Cincinnati, etc., R. Co. *v.* People, 213 Ill. 197, 72 N. E. 774 (levy merely "for current expenses" is invalid); Peoria, etc., R. Co. *v.* People, 183 Ill. 19, 55 N. E. 714.

Iowa.— Casady *v.* Lowry, 49 Iowa 523.

Kentucky.— Cahill *v.* Perrine, 105 Ky. 531, 49 S. W. 344, 50 S. W. 19, 20 Ky. L. Rep. 1454, 1656.

Michigan.— Harding *v.* Bader, 75 Mich. 316, 42 N. W. 942.

Nebraska.— Burlington, etc., R. Co. *v.* Cass County, 16 Nebr. 136, 19 N. W. 700.

Texas.— Cresswell Ranch, etc., Co. *v.* Roberts County, (Civ. App. 1894) 27 S. W. 737.

See 45 Cent. Dig. tit. "Taxation," § 497.

Informalities in the statement of the purpose of the levy does not invalidate the tax. Burlington, etc., R. Co. *v.* Lancaster County, 12 Nebr. 324, 11 N. W. 332.

74. Peoria, etc., R. Co. *v.* People, 183 Ill. 19, 55 N. E. 714; Shuttuck *v.* Smith, 6 N. D. 56, 69 N. W. 5; Henderson *v.* Hughes County,

of a certain per cent or amount in gross, if the specific purposes to which certain percentages are to be applied are defined in detail.[75]

c. Certificate as to Rate or Amount. Where the statute requires certain authorities of the towns or other municipal divisions to make and file with certain officers a certificate of the amount which they require to be raised by taxation, it is essential that there shall be a compliance with such requirement in every substantial particular before the tax can be lawfully levied.[76] But a substantial performance of such requirement is ordinarily sufficient, and the tax will not be invalidated by mere irregularities or informalities in the certificate,[77] particularly where there is a statutory provision curing merely formal defects and irregularities not affecting the substantial justice of the tax.[78] It has been held that a levy cannot be made unless the certificate is made and filed within the time required;[79] but ordinarily a requirement as to time is held to be merely directory and a substantial compliance therewith is sufficient.[80]

d. List or Assessment as Basis For Levy. In many states the tax levy is required to be based upon an assessment list of the taxable property, which must be before the levying officers at the time, so that they may determine the rate necessary to raise a given sum.[81] It is usually required, under a provision of this

13 S. D. 576, 83 N. W. 682; Sutherland *v.* Randolph County Ct., 62 W. Va. 1, 57 S. E. 274.

75. Brunswick *v.* Finney, 54 Ga. 317; Buck *v.* People, 78 Ill. 560. See also Weston Lumber Co. *v.* Munising Tp., 123 Mich. 138, 82 N. W. 267. But see Wabash R. Co. *v.* People, 213 Ill. 522, 72 N. E. 1127; Chicago, etc., R. Co. *v.* People, 213 Ill. 497, 72 N. E. 1118; Chicago, etc., R. Co. *v.* People, 213 Ill. 458, 72 N. E. 1105, all of which hold that under a statute providing that when the taxes are to be raised for several purposes the amount for each purpose shall be stated separately, the levy must be in separate items, and a levy in a gross amount for all county purposes is void.

76. St. Louis, etc., R. Co. *v.* People, 147 Ill. 9, 35 N. E. 228; Peoria, etc., R. Co. *v.* People, 141 Ill. 483, 31 N. E. 113 (statement held too indefinite); Shawneetown First Nat. Bank *v.* Cook, 77 Ill. 622; Minnesota, etc., R. Co. *v.* Hiams, 53 Iowa 501, 5 N. W. 703.

Claims to be embraced in the amount certified see State *v.* Goodwin, (S. C. 1907) 59 S. E. 35, 81 S. C. 419, 62 S. E. 1100.

Insufficient signature and authentication of certificate see Peoria, etc., R. Co. *v.* People, 141 Ill. 483, 31 N. E. 113; Hogleskamp *v.* Weeks, 37 Mich. 422.

Judgment as dispensing with certificate.— A judgment lawfully rendered against a town, on an obligation which shows on its face that the holder is entitled to have a tax assessed and collected for its payment, imposes on the county authorities the duty of levying such tax, although the town clerk does not make the certificate required by the statute. Hawley *v.* Fairbanks, 108 U. S. 543, 2 S. Ct. 846, 27 L. ed. 820.

Presumption.— One certificate, although not sufficient in amount, is a strong presumption against the existence of another certificate. Case *v.* Dean, 16 Mich. 12.

77. St. Louis, etc., R. Co. *v.* People, 147 Ill. 9, 35 N. E. 228; Gage *v.* Bailey, 102 Ill. 11; Shontz *v.* Evans, 40 Iowa 139; Boyce *v.* Auditor-Gen., 90 Mich. 314, 51 N. W. 457; Auditor-Gen. *v.* McArthur, 87 Mich. 457, 49 N. W. 592.

A certificate regular on its face is, in the absence of notice of illegality, sufficient authority for a levy of the amount certified. Wall *v.* Trumbull, 16 Mich. 228; Smith *v.* Crittenden, 16 Mich. 152; People *v.* Queens County, 1 Hill (N. Y.) 195. Thus a certificate of the amount of taxes voted, although on its face suggesting illegality, protects the county supervisor, unless the facts on which such illegality depends are shown on its face, or are such as to require inquiry by the supervisor as a ministerial officer. Wall *v.* Trumbull, 16 Mich. 228.

78. St. Louis, etc., R. Co. *v.* People, 147 Ill. 9, 35 N. E. 228; Buck *v.* People, 78 Ill. 560.

79. State *v.* St. Louis, etc., R. Co., 135 Mo. 77, 36 S. W. 211.

80. Smith *v.* Crittenden, 16 Mich. 152, holding that a requirement that the certificate be filed on or before the first Monday in October is directory merely, and is sufficiently complied with if it is filed after the first Monday and before the second.

Under Ill. Rev. St. (1874) § 191, curing formal defects and irregularities, the failure to file a certificate within the time required by law does not invalidate the tax. Thatcher *v.* People, 79 Ill. 597; Chiniquy *v.* People, 78 Ill. 570; Buck *v.* People, 78 Ill. 560. Prior to the enactment of this statute, however, if the certificate was not filed within the time required it was void. Gage *v.* Nichols, 135 Ill. 128, 25 N. E. 672; Shawneetown First Nat. Bank *v.* Cook, 77 Ill. 622; Mix *v.* People, 72 Ill. 241.

Presumption.— A certificate found in the county clerk's office with his file mark on it will be presumed to have been filed on the date named in the file mark, and will be presumed to have been the basis of the tax levy. Gage *v.* Nichols, 135 Ill. 128, 25 N. E. 672.

81. See the statutes of the several states. See also Perry County *v.* Selma, etc., R. Co.,

kind, that the tax shall be based upon the last completed assessment roll or list in force at the time,[82] and made up or prepared in due compliance with the statute.[83] A levy cannot be based upon a list or roll not made until after the levy, although in the same year,[84] unless by virtue of the statute the assessment, although made after the levy, takes effect as of a time prior thereto.[85] A levy for omitted taxes in a past year must be based upon the assessment for the year in which the tax was omitted.[86]

e. Determination of Rate and Amount. The amount to be raised by the tax, or the rate per cent of the tax, must be determined in due form by the proper officers,[87] and with such a degree of precision as to leave no uncertainty which cannot be removed by mere computation.[88] The rate per cent or amount

65 Ala. 391, holding that a failure to comply with a statute of this character does not invalidate the levy.

An assessment for taxes made by the authorities of one city cannot be used as a basis for the levy of the tax rate of another city where annexation has taken place. Covington *v.* Carroll, 108 S. W. 295, 32 Ky. L. Rep. 1255.

82. *Colorado.*— Parks *v.* Soldiers', etc., Home Com'rs, 22 Colo. 86, 43 Pac. 542.

Iowa.— Cantillon *v.* Dubuque, etc., R. Co., 78 Iowa 48, 42 N. W. 613, 5 L. R. A. 776; Peirce *v.* Weare, 41 Iowa 378, assessment for past year.

Louisiana.— State *v.* Knowles, 117 La. 129, 41 So. 439 (upon the assessment of each year); New Orleans *v.* Canal, etc., Co., 32 La. Ann. 157 (holding that there is no constitutional requirement that taxes shall be levied upon a roll made for the preceding year, although that has been the customary mode, and that the legislature may base the levy upon an assessment made in the same year); St. Mary's Parish Police Jury *v.* Harris, 10 La. Ann. 676.

Missouri.— State *v.* Kansas City, etc., R. Co., 116 Mo. 15, 22 S. W. 611; State *v.* Jefferson County Ct. Clerk, 41 Mo. 583.

New Hampshire.— Henry *v.* Sargeant, 13 N. H. 321, 40 Am. Dec. 146.

Vermont.— Sprague *v.* Abbott, 58 Vt. 331, 2 Atl. 123; Collamer *v.* Drury, 16 Vt. 574, at the time of the vote.

Virginia.— Norfolk, etc., R. Co. *v.* Smyth County, 87 Va. 521, 12 S. E. 1009; Prince George County *v.* Atlantic, etc., R. Co., 87 Va. 283, 12 S. E. 667.

See 45 Cent. Dig. tit. "Taxation," § 495.

83. Longyear *v.* Auditor-Gen., 72 Mich. 415, 40 N. W. 738; Fletcher *v.* Auditor-Gen., 70 Mich. 197, 38 N. W. 213; Davenport *v.* Auditor-Gen., 70 Mich. 192, 38 N. W. 211; Spear *v.* Braintree, 24 Vt. 414.

Invalid assessment.— After a law relating to the assessment of city taxes has been repealed, any tax levied upon an assessment made under such law, and not in accordance with the law in force when the assessment is made, is invalid and cannot be collected. Burbank *v.* People, 90 Ill. 554.

Valuation fixed by state board of equalization.— When the valuation of taxable property in any county is changed by the state board of equalization, the county commissioners may use the valuation so fixed by the state board as a basis for making their levies for all purposes, but are not bound to do so. Geary County *v.* Missouri, etc., R. Co., 52 Kan. 168, 61 Pac. 693.

84. Hebard *v.* Ashland County, 55 Wis. 145, 12 N. W. 437. *Compare* Gale *v.* Mead, 4 Hill (N. Y.) 109; Moss *v.* Hinds, 29 Vt. 188, holding that a tax voted on the day of the return of the new grand list of a town may be assessed according to that list, and that it does not affect the question that the vote was at an adjournment of a meeting held sometime before.

85. Parsons *v.* Child, 36 Iowa 108; Prince George County *v.* Atlantic, etc., R. Co., 87 Va. 283, 12 S. E. 667.

86. State *v.* Jefferson County Ct. Clerk, 41 Mo. 583. *Compare* Peirce *v.* Weare, 41 Iowa 378.

87. Chicago, etc., R. Co. *v.* Baldridge, 177 Ill. 229, 52 N. E. 263; Missouri, etc., R. Co. *v.* Miami County, 67 Kan. 434, 73 Pac. 103; Moore *v.* Foote, 32 Miss. 469; Dent *v.* Bryce, 16 S. C. 1; Morton *v.* Comptroller-Gen., 4 S. C. 430. See also Wills *v.* Austin, 53 Cal. 152.

Effect of curative statute see Scott, etc., Mercantile Co. *v.* Nelson County, 14 N. D. 407, 104 N. W. 528.

Notice of rate of taxation.— A statute requiring notices of the rate of taxation to be published in certain newspapers is mandatory. State *v.* Defiance County, 1 Ohio S. & C. Pl. Dec. 584, 32 Cinc. L. Bul. 88.

88. *California.*— Lake County *v.* Sulphur Bank Quicksilver Min. Co., 66 Cal. 17, 4 Pac. 876, use of figures and decimal points.

Illinois.— Chicago, etc., R. Co. *v.* People, 225 Ill. 463, 80 N. E. 295; St. Louis, etc., R. Co. *v.* People, 224 Ill. 155, 79 N. E. 664; Chicago, etc., R. Co. *v.* People, 214 Ill. 471, 73 N. E. 747.

Kentucky.— Pulaski County *v.* Watson, 106 Ky. 500, 50 S. W. 861, 21 Ky. L. Rep. 61.

New Hampshire.— Wyatt *v.* State Bd. of Equalization, 74 N. H. 552, 70 Atl. 387.

South Carolina.— Dickson *v.* Burckmyer, 67 S. C. 526, 46 S. E. 343, dropping fractions of less than half a mill.

See 45 Cent. Dig. tit. "Taxation," § 498.

Amount or per cent.— A levy of a certain per cent on the taxable property is a sufficient determination of the amount of the tax, where the amount which will result there-

must not be in excess of the constitutional or statutory limitations,[89] but an amount or rate which is originally excessive may be subsequently reduced by the proper authorities.[90]

f. Time and Place of Levy. A statutory provision that the tax levy shall be made at a certain time of the year, or between certain dates, is generally held to be mandatory, so that a levy made at any other time is invalid,[91] unless the delay is caused without any fault or neglect on the part of the levying officers.[92] In some states, however, a provision of this kind is held simply directory, so that a delay beyond the statutory time in making the levy will not avoid it.[93] A lawful tax levy can only be made within the state,[94] and at some place where the levying board or other authority is authorized by law to hold its meeting.[95]

6. Record of Levy. It is essential to the validity of a tax levy that a written record of it should be made and kept by some proper authority,[96] although mere

from is exactly determinable by mere calculation. State *v.* Southern Land, etc., Co., 45 Fla. 374, 33 So. 999; Mustard *v.* Hoppess, 69 Ind. 324; Hubbard *v.* Winsor, 15 Mich. 146.

89. People *v.* State Bd. of Equalization, 20 Colo. 220, 37 Pac. 964; Chicago, etc., R. Co. *v.* People, 225 Ill. 463, 80 N. E. 295; Edwards *v.* People, 88 Ill. 340; Crebbin *v.* Wever, 71 Kan. 445, 80 Pac. 977; State *v.* Nevada Cent. R. Co., 28 Nev. 186, 81 Pac. 99, 113 Am. St. Rep. 834.

90. People *v.* State Bd. of Equalization, 20 Colo. 220, 37 Pac. 964 (holding that a reduction of the tax levy for general revenue for city purposes is within the discretion of the board of equalization, and that where the total state tax levied exceeds the constitutional limit, reduction in different levies must be made *pro rata*, if no preference is given in the statute authorizing them); New Orleans *v.* Burthe, 26 La. Ann. 497; McCready *v.* Lansdale, 58 Miss. 877.

91. *Arkansas.*— St. Louis Refrigerator, etc., Co. *v.* Thornton, 74 Ark. 383, 86 S. W. 852; Berger *v.* Lutterloh, 69 Ark. 576, 68 S. W. 37.

Indiana.— Kratli *v.* Larrew, 104 Ind. 363, 3 N. E. 267; Peed *v.* Millikan, 79 Ind. 86; Clark *v.* Noblesville, 44 Ind. 83.

Maryland.— State *v.* Milburn, 9 Gill 97.

Mississippi.— Harris *v.* Stockett, 58 Miss. 825; Stovall *v.* Connor, 58 Miss. 138; Gamble *v.* Witty, 55 Miss. 26; Beard *v.* Lee County, 51 Miss. 542.

United States.— Berthold *v.* Hoskins, 38 Fed. 772.

See 45 Cent. Dig. tit. "Taxation," § 491.

Expiration of authority.— A levy made by officers after their legislative authority has expired is void. Boehm *v.* Porter, 54 Ark. 665, 17 S. W. 1; Parr *v.* Matthews, 50 Ark. 390, 8 S. W. 22.

Levy ordered by court.— A levy at any other time than that fixed by the statute is invalid, although the board convened and made the levy in obedience to a mandamus from the federal court. Martin *v.* McDiarmid, 55 Ark. 213, 17 S. W. 877.

No time fixed by law.— Where the charter of a city authorizes it to levy and collect taxes without any restriction as to time, the fact that the taxes of one year are levied somewhat later than usual will not invalidate the levy. Hallo *v.* Helmer, 12 Nebr. 87, 10 N. W. 568. See also State *v.* Manhattan Silver Min. Co., 4 Nev. 318.

Two levies may be made in one year, provided they are made for different years. Cincinnati, etc., R. Co. *v.* Com., 51 S. W. 568, 21 Ky. L. Rep. 418.

Special session of board.— Effect of statutes authorizing the calling of special meetings of the board see Pulaski County *v.* Watson, 106 Ky. 500, 50 S. W. 861, 21 Ky. L. Rep. 61; Beck *v.* Allen, 58 Miss. 143.

Adjourned meeting.— Where the levying authority or board holds its meeting at or within the limited time, and adjourns to a later time, a levy of taxes at the adjourned meeting is valid. Bowyer *v.* People, 220 Ill. 93, 77 N. E. 91; Hubbard *v.* Winsor, 15 Mich. 146; State *v.* Hannibal, etc., R. Co., 101 Mo. 136, 13 S. W. 505. *Contra*, State *v.* Merryman, 7 Harr. & J. (Md.) 79; Smith *v.* Nelson, 57 Miss. 138.

Prematurely levying a tax before the commencement of the next tax year does not affect its legality. Iberia Parish *v.* Iberia Parish Police Jury, 123 La. 416, 49 So. 5.

92. Torian *v.* Shayot, 47 La. Ann. 589, 17 So. 203; American Coal Co. *v.* Allegany County, 59 Md. 185, by appeal.

93. *Alabama.*— Perry County *v.* Selma, etc., R. Co., 65 Ala. 391.

Iowa.— Easton *v.* Savery, 44 Iowa 654.

Missouri.— St. Louis, etc., R. Co. *v* Gracy, 126 Mo. 472, 29 S. W. 579 (under curative statute); State *v.* Hannibal, etc., R. Co., 113 Mo. 297, 21 S. W. 14.

Ohio.— State *v.* Harris, 17 Ohio St. 608; Dexter *v.* Hamilton County, 10 Ohio Dec. (Reprint) 338, 20 Cinc. L. Bul. 364.

Tennessee.— Bright *v.* Halloman, 7 Lea 309.

Washington.— Wingate *v.* Ketner, 8 Wash. 94, 35 Pac. 591.

See 45 Cent. Dig. tit. "Taxation," § 491.

94. Marion County *v.* Barker, 25 Kan. 258.

95. Capital State Bank *v.* Lewis, 64 Miss. 727, 2 So. 243; Johnson *v.* Futch, 57 Miss. 73.

96. *Indiana.*— Doe *v.* McQuilkin, 8 Blackf. 335.

Iowa.— Hintrager *v.* Kiene, 62 Iowa 605, 15 N. W. 568, 17 N. W. 910; Moore *v.* Cooke, 40 Iowa 290.

Michigan.— Boyce *v.* Auditor-Gen., 90

informalities or defects in the record, such as its entry in a wrong book or the failure of the officers to sign it, will not avoid the levy.[97]

7. Presumptions and Evidence as to Levy. The record of a levy of taxes is the best evidence of it; its recitals are conclusive; and parol evidence cannot be received to prove such levy unless the previous existence of the record and its loss or destruction is established.[98] But when the record is in evidence, all reasonable presumptions will be indulged in favor of the validity and regularity of the proceedings.[99]

8. Defects and Objections — a. In General. A total want of authority to levy a particular tax, or other fatal jurisdictional defects in the levy, may be shown against it;[1] but it will not be void for mere irregularities or informalities,[2] nor can such objections be raised against the levy in a collateral proceeding.[3]

Mich. 324, 51 N. W. 457 (must show that amount to be raised was determined); Flint, etc., R. Co. *v.* Auditor-Gen., 41 Mich. 635, 2 N. W. 835; Yelverton *v.* Steele, 36 Mich. 62; Moser *v.* White, 29 Mich. 59 (must show every essential proceeding).

New Hampshire.— Paul *v.* Linscott, 56 N. H. 347 (authority for the levying must be proved by the record); Farrar *v.* Fessenden, 39 N. H. 268.

Wyoming.— Hecht *v.* Boughton, 2 Wyo. 385.

See 45 Cent. Dig. tit. "Taxation," § 501.

But *compare* Gage *v.* Bailey, 102 Ill. 11, holding that it will be presumed that a tax which has been actually levied was levied by proper authority, although no record thereof is made to appear.

97. *Indiana.*— Hill *v.* Probst, 120 Ind. 528, 22 N. E. 664.

Iowa.— Prouty *v.* Tallman, 65 Iowa 354, 21 N. W. 675; Martin *v.* Cole, 38 Iowa 141.

Kansas.— Kansas City, etc., R. Co. *v.* Tontz, 29 Kan. 460; Jefferson County *v.* Johnson, 23 Kan. 717.

Kentucky.— Fish *v.* Genett, 56 S. W. 813, 22 Ky. L. Rep. 177; Thompson *v.* Com., 10 Ky. L. Rep. 118.

Virginia.— Norfolk, etc., R. Co. *v.* Smyth County, 87 Va. 521, 12 S. E. 1009, entry in wrong book.

See 45 Cent. Dig. tit. "Taxation," § 501.

Failure of the officers to sign the record does not invalidate the levy. People *v.* Eureka Lake, etc., Canal Co., 48 Cal. 143; Martin *v.* Cole, 38 Iowa 141; Boyce *v.* Auditor-Gen., 90 Mich. 314, 51 N. W. 457; Lacey *v.* Davis, 4 Mich. 140, 66 Am. Dec. 524.

98. *Illinois.*— Fagan *v.* Rosier, 68 Ill. 84; Irwin *v.* Miller, 23 Ill. 401.

Iowa.— Moore *v.* Cooke, 40 Iowa 290.

Massachusetts.— Halleck *v.* Boylston, 117 Mass. 469; Taylor *v.* Henry, 2 Pick. 397.

Michigan.— Upton *v.* Kennedy, 36 Mich. 215; Moser *v.* White, 29 Mich. 59.

Minnesota.— Howes *v.* Gillett, 23 Minn. 231, tax duplicates not evidence of levy.

New Hampshire.— Paul *v.* Linscott, 56 N. H. 347 (warrant of county treasurer not sufficient evidence of levy); Farrar *v.* Fessenden, 39 N. H. 268; Cardigan *v.* Page, 6 N. H. 182.

New York.— Hilton *v.* Bender, 69 N. Y. 75.

Tennessee.— Quinby *v.* North American Coal, etc., Co., 2 Heisk. 596.

Vermont.— Eddy *v.* Wilson, 43 Vt. 362.

See 45 Cent. Dig. tit. "Taxation," § 504.

99. *Illinois.*— Cincinnati, etc., R. Co. *v.* People, 206 Ill. 565, 69 N. E. 628; Burbank *v.* People, 90 Ill. 554; Decker *v.* Hughes, 68 Ill. 33, that a majority of the taxpayers voted in favor of the subscriptions to pay which the taxes were levied.

Kansas.— Bergman *v.* Bullitt, 43 Kan. 709, 23 Pac. 938.

Louisiana.— St. Mary's Parish Police Jury *v.* Harris, 10 La. Ann. 676, that the levy was based on the last assessment roll.

Michigan.— Wright *v.* Dunham, 13 Mich. 414.

Minnesota.— St. Peters' Church *v.* Scott County, 12 Minn. 395.

Mississippi.— Brigins *v.* Chandler, 60 Miss. 862, that the special meeting at which the taxes were levied was legally held.

New Hampshire.— Fletcher *v.* Drew, 48 N. H. 180.

Virginia.— Norfolk, etc., R. Co. *v.* Smyth County, 87 Va. 521, 12 S. E. 1009.

See 45 Cent. Dig. tit. "Taxation," § 504.

Compare Bate *v.* Speed, 10 Bush (Ky.) 664, holding that where the action of the officers whose duty it is to impose a tax is called directly in question by a taxpayer, and their authority and jurisdiction denied, no presumption is indulged that the tax was legally imposed.

1. Nixon *v.* Ruple, 30 N. J. L. 58.

Estoppel to object.— A taxpayer cannot question the legality and constitutionality of a special tax levied by an ordinance, on which others have acted, for the passage of which he petitioned, for which he worked and voted when it was submitted to a vote of the taxpayers, and from which he has secured an advantage. Andrus *v.* Opelousas Bd. of Police, 41 La. Ann. 697, 6 So. 603, 17 Am. St. Rep. 411, 5 L. R. A. 681.

Jurisdiction of commissioners of appeal in cases of illegal taxation see Nixon *v.* Ruple, 30 N. J. L. 58.

2. Smith *v.* Leavenworth County, 9 Kan. 296.

3. Hilton *v.* Mason, 92 Ind. 157; Ballard *v.* Thomas, 19 Gratt. (Va.) 14. See also State *v.* Dowling, 50 Mo. 134. *Compare* Scott *v.* Union County, 63 Iowa 583, 19 N. W. 667.

b. Effect of Partial Illegality.[4] If a tax is levied for several purposes, one of which is illegal, or if the rate or amount exceeds the statutory limitation, to any extent whatever, many decisions hold that the entire levy is absolutely void,[5] although according to others the partial invalidity or excess will not affect so much of the levy as is lawful, if it is possible to separate the legal from the illegal.[6]

9. Relevy or Subsequent Levy. A levy of taxes which is illegal or invalid for irregularities may generally be cured by a relevy in proper form;[7] and so where provision should have been made, in a general levy, for special purposes or extra expenses, but this was omitted, the authority of the levying board is not exhausted, but may be exercised by a new levy for such purposes.[8]

10. Judicial Control of Levies.[9] If the boards or officers authorized to levy taxes refuse to perform their duty, a court of competent jurisdiction may compel them to do so.[10] And so an injunction lies to restrain the levy of a tax which is clearly illegal or in excess of their authority, on the application of a party who shows that direct injury will result to himself or his property.[11] But courts have

Conclusiveness of tax rolls in collateral proceedings see *infra*, VI, E, 12, d.

4. Effect of partial invalidity of tax roll see *infra*, VI, E, 10.

5. *Maine.*— Huse *v.* Merriam, 2 Me. 375.

Massachusetts.— Libby *v.* Burnham, 15 Mass. 144; Stetson *v.* Kempton, 13 Mass. 272, 7 Am. Dec. 145. But see Colman *v.* Anderson, 10 Mass. 105.

Michigan.— Hewitt *v.* White, 78 Mich. 117, 43 N. W. 1043; Boyce *v.* Sebring, 66 Mich. 210, 33 N. W. 815; Lacey *v.* Davis, 4 Mich. 140, 66 Am. Dec. 524. But see Michigan Land, etc., Co. *v.* Republic Tp., 65 Mich. 628, 32 N. W. 882; Lake Superior Ship Canal, etc., Co. *v.* Thompson Tp., 56 Mich. 493, 23 N. W. 183, both holding that if the tax is properly levied but excessive, it is void only as to the excess.

Texas.— Dean *v.* Lufkin, 54 Tex. 265; San Antonio *v.* Raley, (Civ. App. 1895) 32 S. W. 180.

Vermont.— Johnson *v.* Colburn, 36 Vt. 693.

United States.— Clarke *v.* Strickland, 5 Fed. Cas. No. 2,864, 2 Curt. 439.

See 45 Cent. Dig. tit. "Taxation," § 481. See also *supra*, VI, A, 3, c.

6. *Florida.*— Pensacola *v.* Louisville, etc., R. Co., 21 Fla. 492 [*overruling* Basnett *v.* Jacksonville, 19 Fla. 664].

Illinois.— Mix *v.* People, 72 Ill. 241.

Kansas.— Smith *v.* Leavenworth County, 9 Kan. 296.

Nebraska.— Burlington, etc., R. Co. *v.* Saunders County, 16 Nebr. 123, 19 N. W. 698.

New Hampshire.— Taft *v.* Barrett, 58 N. H. 447.

New Jersey.— Sherman *v.* McClurg, 27 N. J. L. 253.

North Carolina.— Clifton *v.* Wynne, 80 N. C. 145.

Ohio.— Cummings *v.* Fitch, 40 Ohio St. 56.

Tennessee.— Bright *v.* Halloman, 7 Lea 309.

See 45 Cent. Dig. tit. "Taxation," § 481. See also *supra*, VI, A, 3, c.

7. People *v.* Wemple, 53 Hun (N. Y.) 197, 6 N. Y. Suppl. 732 [*affirmed* in 117 N. Y. 77, 22 N. E. 761]; McLean *v.* State, 8 Heisk. (Tenn.) 22.

But an original assessment which is void cannot be cured by a relevy. People *v.* Wemple, 53 Hun (N. Y.) 197, 6 N. Y. Suppl. 732 [*affirmed* in 117 N. Y. 77, 22 N. E. 761].

8. State *v.* Maguire, 52 Mo. 420; People *v.* Schoharie County, 49 Hun (N. Y.) 308, 2 N. Y. Suppl. 142 [*reversed* on other grounds in 121 N. Y. 345, 24 N. E. 830].

9. Jurisdiction and powers of courts to review assessments in general see *infra*, VII, C, 1.

10. Wharton *v.* Cass Tp. School Directors, 42 Pa. St. 358; Clay *v.* Hawkins County, 5 Lea (Tenn.) 137; Reg. *v.* Land Tax Com'rs, 16 Q. B. 381, 15 Jur. 190, 20 L. J. Q. B. 211, 71 E. C. L. 381; *In re* Holborn Land Tax Assessment, 5 Exch. 548; *In re* Glatton Land-Tax, 9 L. J. Exch. 211, 6 M. & W. 689.

Mandamus to compel levy in general see Mandamus, 26 Cyc. 320 *et seq.*

Mandamus to compel levy of tax to pay judgment against municipal corporation see Benjamin *v.* East Baton Rouge Parish, 23 La. Ann. 329; State *v.* Ewing, 116 Mo. 129, 22 S. W. 476. See also Mandamus, 26 Cyc. 325 *et seq.*

11. *Georgia.*— Schwartz *v.* National Packing Co., 122 Ga. 533, 50 S. E. 494.

Kansas.— Andrews *v.* Love, 46 Kan. 264, 26 Pac. 746; Challiss *v.* Atchison, 39 Kan. 276, 18 Pac. 195; Wyandotte, etc., Bridge Co. *v.* Wyandotte County, 10 Kan. 326, all of which hold, however, that before an injunction can be granted some step must be taken by the taxing officers toward the levying or collection of the tax.

Maryland.— Webster *v.* Baltimore County, 51 Md. 395.

New York.—Magee *v.* Cutler, 43 Barb. 239.

North Dakota.— Torgrinson *v.* Norwich School Dist. No. 31, 14 N. D. 10, 103 N. W. 414.

Ohio.— Griffith *v.* Crawford County, 1 Ohio Dec. (Reprint) 457, 10 West. L. J. 97.

United States.— Gregg *v.* Sanford, 65 Fed. 151, 12 C. C. A. 525.

See 45 Cent. Dig. tit. "Taxation," § 507.

Compare Norton *v.* Milner, 89 Ind. 197.

Injunction to restrain assessment see *infra*, VII, C, 5.

no general control over this subject, and cannot increase or reduce the amount of a levy which is within the authority and discretion of the levying officers,[12] or enjoin the levy merely on grounds of expedience, policy, or municipal economy.[13]

11. Liability For Acts of Board or Officer.[14] The officers of a municipal corporation charged with the levy of taxes may be personally responsible to persons injured by their official action in cases where the levy was entirely void, for want of jurisdiction or other cause;[15] but they are not so liable for errors or improper allowances in the levy, where they acted within their jurisdiction.[16]

B. Assessors of Taxes — 1. Appointment and Qualification — a. Appointment, Status, and Tenure of Office. It is necessary to the validity of an assessment of taxes, and the acts of the various officers under it, that it shall have been made by assessors who were duly elected to their office, if that is required by law,[17] or duly appointed by competent authority, if the office is appointive,[18] or similarly appointed by the proper authority to fill a vacancy.[19] Tax assessors are

Parties cannot join in a suit to restrain the imposition of a tax which would be a lien only upon their respective lands and not upon any common property owned by them. Magee *v.* Cutler, 43 Barb. (N. Y.) 239.

12. Whedon *v.* Lancaster County, 76 Nebr. 761, 107 N. W. 1092; Young *v.* Lane, 43 Nebr. 812, 62 N. W. 202; Clay *v.* Hawkins County, 5 Lea (Tenn.) 137.

13. Williams *v.* Lunenburg School Dist. No. 1, 21 Pick. (Mass.) 75, 32 Am. Dec. 243; *In re* Powers, 52 Mo. 218; Wharton *v.* Cass Tp. School Directors, 42 Pa. St. 358.

14. Liabilities of assessor see *infra*, VI, B, 4, 5.

15. Thames Mfg. Co. *v.* Lathrop, 7 Conn. 550; Clark *v.* Axford, 5 Mich. 182; Marsh *v.* Bowen, 12 Abb. N. Cas. (N. Y.) 1.

A town is not responsible in an action for an error of the assessors of taxes. Lorillard *v.* Monroe, 12 Barb. (N. Y.) 161 [*affirmed* in 11 N. Y. 392, 62 Am. Dec. 120].

16. Parish *v.* Golden, 35 N. Y. 462. See also Wall *v.* Trumbull, 16 Mich. 228.

17. Rosborough *v.* Boardman, 67 Cal. 116, 1 Pac. 261; State *v.* Burke, 154 Ind. 645, 57 N. E. 509; Thayer *v.* Stearns, 1 Pick. (Mass.) 109.

Necessity of election.— In Nevada a county assessor is one of the "necessary officers" who, under the constitution, must be elected under provisions made by the legislature. State *v.* Arrington, 18 Nev. 412, 4 Pac. 735. But in Pennsylvania, where the constitution requires county officers to be elected at the general elections, assessors are not county officers, and therefore the legislature may provide for their appointment by the courts in certain counties. Com. *v.* Collier, 213 Pa. St. 138, 62 Atl. 567.

Impeaching election.— In an action by a town to recover taxes assessed by persons chosen, sworn, and acting as the town's assessors, defendant cannot impeach their election on the ground of an omission to use the check list in balloting. Sudbury *v.* Heard, 103 Mass. 543.

Construction of particular statutes providing for the election of assessors see People *v.* International Salt Co., 233 Ill. 223, 84 N. E. 278.

18. *Georgia.*— Dawson Compress, etc., Co. *v.* Dawson City Council, 107 Ga. 358, 33 S. E. 419.

Illinois.— People *v.* Lieb, 85 Ill. 484.

Kansas.— Ray *v.* Miller, 78 Kan. 843, 98 Pac. 239.

Minnesota.— State *v.* Johnstone, 61 Minn. 56, 63 N. W. 176.

Mississippi.— Wolfe *v.* Murphy, 60 Miss. 1; Ray *v.* Murdock, 36 Miss. 692.

New Jersey.— State *v.* Brown, 53 N. J. L. 162, 20 Atl. 772.

Tennessee.— Matthews *v.* Blount County, 3 Lea 120.

Virginia.— Whitlock *v.* Hawkins, 105 Va. 242, 53 S. E. 401.

Canada.— *In re* McPherson, 17 U. C. Q. B. 99.

See 45 Cent. Dig. tit. "Taxation," §§ 513, 515.

Power of the legislature to declare the manner of appointments to the office of commissioner of taxes and assessments see People *v.* Woodruff, 32 N. Y. 355 [*reversing* 42 Barb. 203].

Construction of particular statutes providing for the appointment of assessors see James *v.* Haynes, 79 Kan. 608, 100 Pac. 622; State *v.* Taylor, 119 Tenn. 229, 104 S. W. 242.

19. *Illinois.*— People *v.* Lieb, 85 Ill. 484.

Indiana.— State *v.* Burke, 154 Ind. 645, 57 N. E. 509.

Kentucky.— Long *v.* Bowen, 94 Ky. 540, 23 S. W. 343, 15 Ky. L. Rep. 276.

Louisiana.— State *v.* State Assessors, 24 La. Ann. 410.

Mississippi.— Morgan *v.* Harrell, 26 Miss. 408.

Pennsylvania.— Street *v.* Com., 6 Watts & S. 209.

Texas.— State *v.* Cocke, 54 Tex. 482.

See 45 Cent. Dig. tit. "Taxation," § 515.

An appointment of a successor upon a conditional resignation not addressed to the appointing power is void. State *v.* Huff, 172 Ind. 1, 87 N. E. 141.

A vacancy in the office of assessor is not created by an *ex parte* judgment of the county auditor that such a vacancy exists. State *v.* Huff, 172 Ind. 1, 87 N. E. 141.

Evidence held insufficient to show an abandonment of his office by an assessor see State *v.* Huff, 172 Ind. 1, 87 N. E. 141.

ministerial and not judicial officers,[20] but they are to be regarded as public officers rather than as agents of their municipality.[21] They may be removed at any time if they hold office merely at the pleasure of the appointing power,[22] or they may be removed by the act of the legislature in abolishing the office.[23]

b. Eligibility. Statutory requirements that an assessor of taxes shall be a freeholder, a resident of the town or district, etc., are mandatory.[24] But it is generally held that a person who acts as assessor under color of title to the office, although he is ineligible or legally disqualified, is an officer *de facto*, so that the assessment will not be wholly void.[25]

c. Qualification, Oath, and Bond. It is generally held that where an assessor of taxes fails to take the oath required of him by statute, or takes it in an informal or irregular manner, or before one not authorized to administer it, or fails to subscribe it or have it recorded or attached to the assessment roll, any such defect does not vitiate the assessment, for, if otherwise qualified, he is entitled to the character of an officer *de facto*, and as such his acts are binding.[26] But where a board of assessors must by law consist of a certain number of persons, and one of

20. Henry *v.* Sargeant, 13 N. H. 321, 40 Am. Dec. 146.

21. Rockland *v.* Farnsworth, 93 Me. 178, 44 Atl. 681. See also Booksh *v.* A. Wilbert Sons Lumber, etc., Co., 115 La. 351, 39 So. 9.

22. People *v.* Barker, 5 N. Y. App. Div. 227, 39 N. Y. Suppl. 140 [*affirmed* in 150 N. Y. 570, 44 N. E. 1127].

23. State *v.* Harris, 1 N. D. 190, 45 N. W. 1101.

24. *In re* Assessorship, 23 Pa. Co. Ct. 654. See also Du Page County *v.* Jenks, 65 Ill. 275.

25. Wolfe *v.* Murphy, 60 Miss. 1; Texas, etc., R. Co. *v.* Harrison County, 54 Tex. 119; *Ex p.* Calhoun, 10 N. Brunsw. 454. But see Hawkins *v.* Jonesboro, 63 Ga. 527 (holding that where the commissioners having jurisdiction to review assessments on appeal appointed one of their own number as assessor, the assessment was illegal); Springfield *v.* Butterfield, 98 Me. 155, 56 Atl. 581 (where the assessor was ineligible under the statute because he had been a collector of taxes and had not made a final settlement of his accounts).

26. *Arkansas.*— Sawyer *v.* Wilson, 81 Ark. 319, 99 S. W. 389; Barton *v.* Lattourette, 55 Ark. 81, 17 S. W. 588; Murphy *v.* Shepard, 52 Ark. 356, 12 S. W. 707; Equalization Bd. *v.* Land Owners, 51 Ark. 516, 11 S. W. 822; Moore *v.* Turner, 43 Ark. 243.

Illinois.— Guyer *v.* Andrews, 11 Ill. 494.

Indiana.— Fernsel *v.* Rector, 47 Ind. 114.

Maine.— Lord *v.* Parker, 83 Me. 530, 22 Atl. 392; Oldtown *v.* Blake, 74 Me. 280; Gould *v.* Monroe, 61 Me. 544; Patterson *v.* Creighton, 42 Me. 367. But see Orneville *v.* Palmer, 79 Me. 472, 10 Atl. 451 (holding that if two of three assessors take the oath of office before a person not authorized by law to administer it, the tax assessed by the board is illegal); Dresden *v.* Gould, 75 Me. 298.

Maryland.— Koontz *v.* Hancock, 64 Md. 134, 20 Atl. 1039.

Massachusetts.— Bucknam *v.* Ruggles, 15 Mass. 180, 8 Am. Dec. 98.

Michigan.— St. Joseph First Nat. Bank *v.* St. Joseph, 46 Mich. 526, 9 N. W. 838.

Nebraska.— McClure *v.* Warner, 16 Nebr. 447, 20 N. W. 387; Hallo *v.* Helmer, 12 Nebr. 87, 10 N. W. 568.

New Hampshire.— Odiorne *v.* Rand, 59 N. H. 504; Hayes *v.* Hanson, 12 N. H. 284. But *compare* Pike *v.* Hanson, 9 N. H. 491; Cardigan *v.* Page, 6 N. H. 182.

New York.— Dows *v.* Irvington, 66 How. Pr. 93.

South Dakota.— Avant *v.* Flynn, 2 S. D. 153, 49 N. W. 15.

Tennessee.— Nance *v.* Hopkins, 10 Lea 508.

Vermont.— Potter *v.* Lewis, 73 Vt. 367, 51 Atl. 5; Smith *v.* Hard, 61 Vt. 469, 17 Atl. 481; Brock *v.* Bruce, 58 Vt. 261, 2 Atl. 598; Rowell *v.* Horton, 58 Vt. 1, 3 Atl. 906; Day *v.* Peasley, 54 Vt. 310. *Compare* Lynde *v.* Dummerston, 61 Vt. 48, 17 Atl. 45 (holding the listers' oath void by reason of an improper addition therein, and the subsequent tax list vitiated thereby); Walker *v.* Burlington, 56 Vt. 131 (as to necessity for listers' oath); Ayers *v.* Moulton, 51 Vt. 115 (holding that the listers' oath is imperative).

See 45 Cent. Dig. tit. "Taxation," § 517.

But *compare* Martin *v.* Barbour, 34 Fed. 701 [*affirmed* in 140 U. S. 634, 11 S. Ct. 944, 35 L. ed. 546], holding that, under an Arkansas statute, the failure of the assessor to take the prescribed oath, *ipso facto* vacates his office, and where the clerk, in violation of law, delivers to him the assessment book, no assessment on that book can be made the foundation of a valid tax title.

Where no assessors are elected, the selectmen must, each of them, be sworn as an assessor before they can legally assess a tax, and an assessment made by them as officers *de facto* is invalid. Dresden *v.* Gould, 75 Me. 298.

Material alteration of oath.— Where the form of the oath to be taken by assessors is prescribed by statute, and is intended to secure a just valuation of the property to be assessed, and in the oath attached to the assessment roll of a certain year a change is made in the language so that the oath can truthfully be taken even if the assessment is entirely unequal and unjust, and cannot be laid as the foundation for an indictment

them fails to qualify, the others have no lawful authority to make the assessment.[27] The best evidence of the due qualification of an assessor is the written oath itself or the official record of it;[28] but if no such record is in existence, it may be proved by parol.[29] Neglect or failure properly to file the bond required of an assessor may invalidate his title to the office, but not necessarily the assessment which he makes.[30]

d. Deputies and Assistants. The duty of assessing property for taxation must be performed by the assessor in person and cannot be delegated to a clerk, deputy, or assistant,[31] unless under express statutory authority.[32] But the employment of tax inquisitors, to search out concealed or omitted property, is sanctioned by some of the recent decisions.[33]

2. Compensation of Assessors. The compensation of tax assessors, whether measured as a percentage on the amount of the total assessment,[34] or as a fixed sum for each taxable person on the list,[35] or a *per diem* compensation for the time actually

for perjury however grossly the assessors should violate their duty, the assessment is void. Shattuck *v.* Bascom, 105 N. Y. 39, 12 N. E. 283. See also Lynde *v.* Dummerston, 61 Vt. 48, 17 Atl. 45.

27. Machiasport *v.* Small, 77 Me. 109; Williamsburg *v.* Lord, 51 Me. 599; Schenck *v.* Peay, 21 Fed. Cas. No. 12,450, Woolw. 175. *Compare* George *v.* Mendon Second School Dist., 6 Metc. (Mass.) 497.

An assessment by two assessors legally chosen and sworn and another person chosen and sworn as a selectman only is void. Jordan *v.* Hopkins, 85 Me. 159, 27 Atl. 91.

28. Bowler *v.* Brown, 84 Me. 376, 24 Atl. 879; Bennett *v.* Treat, 41 Me. 226; Colburn *v.* Ellis, 5 Mass. 427; Ware *v.* Bradbury, 29 Fed. Cas. No. 17,168, 3 Sumn. 186. See also Scott *v.* Watkins, 22 Ark. 556.

The absence of any record in the town books showing that the tax assessors were sworn does not furnish *prima facie* evidence that they were not sworn. Sibley *v.* Smith, 2 Mich. 486.

29. Farnsworth Co. *v.* Rand, 65 Me. 19; Kellar *v.* Savage, 17 Me. 444.

30. See Washington County *v.* Miller, 14 Iowa 584; Stockle *v.* Silsbee, 41 Mich. 615, 2 N. W. 900; State *v.* Cocke, 54 Tex. 482.

Approval of official bonds of assessors see Davies *v.* State, 30 Ohio Cir. Ct. 527.

31. *Florida.*— Tampa *v.* Kaunitz, 39 Fla. 683, 23 So. 416, 63 Am. St. Rep. 202.

Iowa.— Snell *v.* Ft. Dodge, 45 Iowa 564.

Kentucky.— Bruce *v.* Vanceburg, etc., Road Co., 35 S. W. 112, 18 Ky. L. Rep. 35.

Louisiana.— Merchants' Mut. Ins. Co. *v.* Board of Assessors, 40 La. Ann. 371, 3 So. 891.

Michigan.— Woodman *v.* Auditor-Gen., 52 Mich. 28, 17 N. W. 227.

Mississippi.—Stokes *v.* State, 24 Miss. 621.

North Dakota.— Farrington *v.* New England Inv. Co., 1 N. D. 102, 45 N. W. 191.

See 45 Cent. Dig. tit. "Taxation," § 521.

But *compare* Philadelphia, etc., R. Co. *v.* Com., 104 Pa. St. 86.

Assessor directing and adopting work of assistant.— An assessment is not invalid because made in the first instance by a deputy or assistant, if he was under the direction and supervision of the assessor while doing it, and the latter adopts his work when finished. Tampa *v.* Mugge, 40 Fla. 326, 24 So. 489; Reed *v.* Cedar Rapids, 138 Iowa 360, 116 N. W. 140; Snell *v.* Ft. Dodge, 45 Iowa 564.

32. Meek *v.* McClure, 49 Cal. 623; New York *v.* Watts, 40 Misc. (N. Y.) 595, 83 N. Y. Suppl. 23; *In re* Assistant Assessors, 1 Pa. Dist. 142; Com. *v.* Cornelius, 15 Pa. Co. Ct. 73, 3 Pa. Dist. 680; McLennan County *v.* Frost, 32 Tex. Civ. App. 617, 75 S. W. 876. See also Farrington *v.* New England Inv. Co., 1 N. D. 102, 45 N. W. 191.

The appointment of an assistant assessor is not merely a ministerial act, but requires the exercise of judgment, and is not within the legal powers of a deputy county auditor. Davies *v.* State, 30 Ohio Cir. Ct. 527.

33. Richmond *v.* Dickinson, 155 Ind. 345, 58 N. E. 260; Fleener *v.* Litsey, 30 Ind. App. 399, 66 N. E. 82; Disbrow *v.* Cass County, 119 Iowa 538, 93 N. W. 585; State *v.* Lewis, 74 Ohio St. 403, 78 N. E. 523. But *compare* People *v.* Smith, 130 Ill. App. 407 (holding that a contract by which a county agrees to pay an attorney for services in searching out property which has not been made the subject of taxation is *ultra vires* and void); Gannaway *v.* McFall, 109 Ill. App. 23; State *v.* Goldthait, 172 Ind. 210, 87 N. E. 133.

34. See the statutes of the several states. And see the following cases:

Alabama.— East *v.* Eichelberger, 69 Ala. 187.

Louisiana.— Kathman *v.* New Orleans, 11 La. Ann. 457; Vienne *v.* Natchitoches Police Jury, 4 La. Ann. 499.

Mississippi.— Bogan *v.* Holder, 76 Miss. 597, 24 So. 695; Stone *v.* Casper, (1887) 2 So. 74.

New Mexico.— Sandoval *v.* Bernalillo County, 13 N. M. 537, 86 Pac. 427.

Tennessee.— Grundy County *v.* Tennessee Coal, etc., Co., 94 Tenn. 295, 29 S. W. 116.

Texas.— Dimmitt County *v.* Cavender, (Civ. App. 1901) 65 S. W. 881; Harrison County School Trustees *v.* Farmer, 23 Tex. Civ. App. 39, 56 S. W. 555.

See 45 Cent. Dig. tit. "Taxation," § 522.

35. See the statutes of the several states.

employed in making the assessment,[36] or a fixed annual or other salary,[37] is a matter of statutory regulation in the different states, as is also the proportion in which the pay of the assessors shall be divided between the state and the municipalities.[38] Whatever it be, this compensation is payable only to the board or assessor actually doing the work,[39] and will include everything pertaining to his duties as assessor for which no extra allowance is specially made,[40] and will cover the pay of deputies or assistants, except where their employment is authorized by statute or by the municipal authorities under whom the assessor works,[41] and an assessor cannot claim to be paid twice for his services merely because his successor in office uses the assessment roll which he made.[42] Special provision is sometimes made for fees for the discovery and listing of omitted or concealed property,[43] but an assessor cannot claim compensation for listing property which is legally exempt from taxation.[44]

3. Duties and Powers of Assessors — a. In General. An assessor of taxes, being a public officer, can act officially only in pursuance of authority conferred

And see Bell *v.* Arkansas County, 44 Ark. 493; Harrison *v.* Com., 83 Ky. 162; Williams *v.* Sharkey County, 74 Miss. 122, 20 So. 860; Hughston *v.* Carroll County, 68 Miss. 660, 10 So 51; Hill *v.* Warren County, (Miss. 1890) 8 So. 257.

36 See the statutes of the several states. And see Daily *v.* Daviess County, 165 Ind. 99, 74 N. E. 977; Whitley County *v.* Garty, 161 Ind 464, 68 N. E. 1012; Moody *v.* Newburyport, 3 Metc. (Mass.) 431; People *v.* Jones, 175 N. Y. 471, 67 N. E. 1088 [*affirming* 68 N. Y. App Div. 396, 74 N. Y. Suppl. 294]; Marquette *v.* Berks County, 3 Pa. Super. Ct. 36; Young *v.* Huntington County, 20 Pa. Co. Ct. 374.

Double compensation.— A statute which provides for a board of review composed of the assessor, auditor, and treasurer of the county, and two freeholders, who shall each receive a *per diem* compensation while acting as members of the board, does not authorize the county assessor, while acting as a member of the board, to draw an additional *per diem for* services performed as assessor. Daily *v.* Daviess County, 165 Ind. 99, 74 N. E. 977.

Mileage.— Assessors are not entitled to mileage in addition to their *per diem* compensation. Taylor *v.* Umatilla County, 6 Oreg. 401; Young *v.* Huntington County, 20 Pa. Co. Ct. 374.

Overpayments to an assessor may be recovered by the proper county authorities. Campbell *v.* Boone County, 41 Ind. App. 710, 83 N. E. 357; Caldwell *v.* Boone County, 41 Ind. App. 40, 83 N. E. 355.

37. Dodge *v.* San Francisco, 135 Cal. 512, 67 Pac. 973.

Power to change salaries.— Where the statute authorizes the county commissioners to "determine" the salaries of the township assessors within certain limits, they may change such a salary from time to time. Allen County *v.* Chapman, 22 Ind. App. 60, 53 N. E. 187.

Salary voted by town.— Under a statute providing that the auditors shall not allow any claim for personal services except where compensation is fixed by law or by vote of the town, a tax lister can recover only such compensation as the town votes him. Barnes *v.* Bakersfield, 57 Vt. 375.

38. State *v.* Holladay, 61 Mo. 524; Wilbarger County *v.* Perkins, 86 Tex. 348, 24 S. W. 794.

39. State *v.* Jumel, 30 La. Ann. 235.

Where it is the duty of the collector, and not the receiver, to make assessments for both state and county purposes, an agreement by an inferior court that the services should be performed by the receiver is void, and he cannot recover thereon. Adams *v.* Dougherty County, 21 Ga. 206.

40. Williams *v.* Chariton County, 85 Mo. 645.

Making militia rolls.— Where the making of a roll of persons liable to militia duty is part of the duty of an assessor of taxes, he cannot claim extra compensation for it. McClung *v.* St. Paul, 14 Minn. 420; State *v.* Ryland, 14 Nev. 46; Dilley *v.* Luzerne County, 8 Pa. Co. Ct. 162.

Reassessment.— Compensation of assessor for making a reassessment ordered by the county board see Crawford County *v.* Huls, 12 Ill. App. 406.

Compensation of assessor for making copies of assessment rolls for cities see Alameda County *v.* Dalton, 9 Cal. App. 26, 98 Pac. 85.

Compensation for each line of the tax roll actually extended by the assessor see Pearsall *v.* Brower, 120 N. Y. App. Div. 584, 105 N. Y. Suppl. 207.

41. Tulare County *v.* May, 118 Cal. 303, 50 Pac. 427; Lynch *v.* Butte County, 102 Cal. 446, 36 Pac. 806; Roberts *v.* People, 9 Colo. 458, 13 Pac. 630; Warner *v.* State Auditors, 128 Mich. 500, 87 N. W. 638; Beaumont *v.* Ramsey County, 32 Minn. 108, 19 N. W. 727.

42. State *v.* Graham, 23 La. Ann. 780.

43. Reed *v.* Cunningham, 121 Iowa 555, 96 N. W. 1119; Harrison *v.* Wilkerson, 80 S. W. 1190, 26 Ky. L. Rep. 260; Hoak *v.* Lancaster County, 29 Pa. Super. Ct. 585.

44. Powers *v.* Osbon, 118 Ky. 810, 82 S. W. 419, 26 Ky. L. Rep. 744; Berry *v.* Missoula County, 6 Mont. 121, 9 Pac. 899.

upon him by law and within the limits of such authority,[45] and can assess only such taxes as it is legally his duty to assess.[46] Further the authority of assessors is limited to the districts within and for which they are elected or appointed; and they have no power to assess property situated beyond those limits.[47]

b. Authority to Make Assessment.[48] The authority to assess the property of railroads and other corporations having property or interests throughout the state is usually committed by statute to a board of state officers,[49] and such a statute is valid and constitutional,[50] and the authority which it confers is exclusive of that of the local assessors.[51] Sometimes also the duty of assessing omitted property is confided by law to other officers than those charged with making the regular assessments,[52] and there may be cases in which the executive officers of a munic-

45. Jackson County *v.* Kaul, 77 Kan. 715, 717, 96 Pac. 45, 17 L. R. A. N. S. 552; State *v.* Board of Assessors, 111 La. 982, 36 So. 91.

Finishing uncompleted assessment.— Under the statutes of Florida, an imperfect assessment roll, commenced by one city tax assessor, and perfected by his successor, is valid. Pensacola *v.* Bell, 22 Fla. 469.

That the assessor is compensated by a commission on the amount of the taxes levied does not affect the validity of his assessment. Jackson Lumber Co. *v.* McCrimmon, 164 Fed. 759.

46. Case *v.* Dean, 16 Mich. 12.

47. *California.*—Williams *v.* Corcoran, 46 Cal. 553; People *v.* Placerville, etc., R. Co., 34 Cal. 656; People *v.* Hastings, 29 Cal. 449.

Maine.—Winslow *v.* Morrill, 47 Me. 411.

Maryland.—Williamsport *v.* Darby, (1894) 29 Atl. 605.

New York.— People *v.* Dederick, 40 N. Y. App. Div. 570, 57 N. Y. Suppl. 1131 [*affirmed* in 160 N. Y. 687, 55 N. E. 1099].

United States.— Union Pac. R. Co. *v.* Alexander, 113 Fed. 347.

See 45 Cent. Dig. tit. "Taxation," §§ 525, 527.

An Indian reservation attached to an organized county for taxing purposes, being a part of the county taxing district to which it is attached, the county assessor of such organized county is the proper officer to assess the property in such reservation. Pryor *v.* Bryan, 11 Okla. 357, 66 Pac. 348.

48. **Authority to extend tax** see *infra*, VI, E, 5.

49. *California.*— San Francisco, etc., R. Co. *v.* Stockton, 149 Cal. 83, 84 Pac. 771.

Colorado.—Ames *v.* People, 26 Colo. 83, 56 Pac. 656.

Illinois.— People *v.* Atchison, etc., R. Co., 225 Ill. 593, 80 N. E. 272; People *v.* Upham, 221 Ill. 555, 77 N. E. 931; People *v.* Illinois Cent. R. Co., 215 Ill. 177, 74 N. E. 116; Knopf *v.* Lake St. El. R. Co., 197 Ill. 212, 64 N. E. 340; Distilling, etc., Co. *v.* People, 161 Ill. 101, 43 N. E. 779.

Iowa.— Missouri Valley, etc., R., etc., Co. *v.* Harrison County, 74 Iowa 283, 37 N. W. 372.

Kentucky.— Louisville *v.* Louisville Public Warehouse Co., 107 Ky. 184, 53 S. W. 291, 21 Ky. L. Rep. 867.

Missouri.— State *v.* Wiggins Ferry Co., 208 Mo. 622, 106 S. W. 1005; State *v.* St. Louis, etc., R. Co., 82 Mo. 683.

Montana.— Missouri River Power Co. *v.* Steele, 32 Mont. 433, 80 Pac. 1093.

Nebraska.— State *v.* Drexel, 75 Nebr. 751, 107 N. W. 110.

New Jersey.— New York Bay R. Co. *v.* Newark, 76 N. J. L. 832, 71 Atl. 276 [*reversing* 75 N. J. L. 389, 67 Atl. 1049]; United New Jersey R., etc., Co. *v.* Newark, 76 N. J. L. 830, 71 Atl. 275 [*reversing* 75 N. J. L. 385, 67 Atl. 1075]; *In re* New Jersey Cent. R. Co., 72 N. J. L. 86, 59 Atl. 1062.

North Carolina.— Beaufort County *v.* Old Dominion Steamship Co., 128 N. C. 558, 39 S. E. 18.

Tennessee.— State *v.* Memphis, etc., R. Co., 14 Lea 56.

United States.—Western Union Tel. Co. *v.* Henderson, 68 Fed. 588; Central Trust Co. *v.* Wabash, etc., R. Co., 27 Fed. 14.

See 45 Cent. Dig. tit. "Taxation," § 525. See also *supra*, III, B, 3, d.

50. See *supra*, II, B, 1, g, (IV), (A); II, B, 4, b.

51. *Illinois.*— People *v.* Atchison, etc., R. Co., 225 Ill. 593, 80 N. E. 272; Anderson *v.* Chicago, etc., R. Co., 117 Ill. 26, 7 N. E. 129.

Kentucky.— Campbell County Bd. of Equalization *v* Louisville, etc., R. Co., 109 S. W. 303, 33 Ky. L. Rep. 78.

Michigan.— Detroit *v.* Detroit Manufacturers' R. Co., 149 Mich. 530, 113 N. W. 365.

Mississippi.— Yazoo, etc., R. Co. *v.* Vicksburg, (1909) 49 So. 185.

Missouri.— State *v.* St. Louis, etc., R. Co., 82 Mo. 683.

Nebraska.— Chicago, etc., R. Co. *v.* Richardson County, 61 Nebr. 519, 85 N. W. 532.

North Carolina.—Atlantic, etc., R. Co. *v.* New Bern, 147 N. C. 165, 60 S. E. 925.

See 45 Cent. Dig. tit. "Taxation," § 525. And see cases cited *supra*, note 49.

But *compare* Rio Grande Western R. Co. *v.* Salt Lake Inv. Co., 35 Utah 528, 101 Pac. 586, holding that the state board of equalization has no authority to assess a part of a lot claimed, but not owned by a railroad company, which is distinct from its right of way, as authority to assess it is in the local assessor.

52. Stevens *v.* Henry County, 218 Ill. 468, 75 N. E. 1024, 4 L. R. A. N. S. 339; Winona, etc., Land Co. *v.* Minnesota, 159 U. S. 526, 16 S. Ct. 83, 40 L. ed. 247.

ipality will be justified in making assessments in the absence of any assessor or without his intervention,[53] or in which the state may make the assessment directly by appropriate legislative action.[54] But as a rule this authority belongs alone to the regularly appointed or elected local assessor.[55] A board charged with the review and equalization of assessments has no power to take the place of the assessor and make an assessment in the first place,[56] nor is he, in matters resting in his judgment or discretion, subject to their direction or control.[57] Even the legislature cannot usurp the functions of the tax assessors created by the constitution.[58] Ordinarily the authority of the assessor to proceed with his work depends only on the directions of the statute under which he acts, and not on a warrant or authority given to him by any other officer.[59] An assessment of taxes made by any person other than the one authorized to make it is void.[60]

c. Action by Majority of Board. Where an assessment is required to be made by a board composed of several officers, the law intends that it shall be the joint act of all the members of the board, and an assessment made by one or more members, without the concurrence of the rest, is invalid,[61] unless it is adopted by the full

In Mississippi, the right of the state revenue agent to assess back taxes is not exclusive, as a municipality, acting through its clerk, is authorized, by Code (1906), § 3421, of its own motion to assess property that has escaped taxation. Adams *v.* Clarksdale, (Miss. 1909) 48 So. 242.

53. Scammon *v.* Scammon, 28 N. H. 419 (holding that if a town elects no assessors, the selectmen may assess the taxes); Homer *v.* Cilley, 14 N. H. 85 (holding that where an unincorporated settlement has too few inhabitants to elect town officers the treasurer may assess); Devinney *v.* Reynolds, 1 Watts & S. (Pa.) 328 (holding that unseated land may be assessed by the commissioners without the intervention of the assessors); Strange *v.* Oconto Land Co., 136 Wis. 516, 117 N. W. 1023 (holding that where a town neglects or refuses to elect officers other residents of the county holding offices in an adjoining town may be authorized to assess and collect state and county taxes). See also Hoke *v.* Com., 79 Ky. 567.

54. State *v.* Baltimore, 105 Md. 1, 65 Atl. 369.

55. *California.*— Smith *v.* Farrelly, 52 Cal. 77.

Illinois.— Chicago, etc., R. Co. *v.* Vollman, 213 Ill. 609, 73 N. E. 360.

Kentucky.— Louisville, etc., R. Co. *v.* Com., 85 Ky. 198, 3 S. W. 139, 8 Ky. L. Rep. 840.

Michigan.— State Tax Com'rs *v.* Grand Rapids Bd. of Assessors, 124 Mich. 491, 83 N. W. 209.

New Jersey.—State *v.* Simpkins, 53 N. J. L. 582, 22 Atl. 57; State *v.* Craig, 51 N. J. L. 462, 17 Atl. 955.

See 45 Cent. Dig. tit. "Taxation," § 525.

But a constitutional provision for the election of an assessor of taxes for each county does not deprive the legislature of the power to devolve on another officer the duty of assessing property in some special cases where the county assessors are unable to ascertain with any reasonable degree of approximation the value of the property to be assessed. Missouri, etc., R. Co. *v.* Shannon, 100 Tex. 379, 100 S. W. 138, 10 L. R. A. N. S. 681 [*affirming* (Civ. App. 1906) 97 S. W. 527].

56. Ferris *v.* Coover, 10 Cal. 589; Rexroth *v.* Ames, 55 N. J. L. 509, 26 Atl. 787; State *v.* Williams, 123 Wis. 61, 100 N. W. 1048. See also State *v.* Baltimore, 105 Md. 1, 65 Atl. 369.

57. State *v.* Drexel, 75 Nebr. 751, 107 N. W. 110; People *v.* St. Lawrence County, 101 N. Y. App. Div. 327, 91 N. Y. Suppl. 948; Phillips *v.* Thurston County, 35 Wash. 187, 76 Pac. 993.

58. *In re* Taxation of Mining Claims, 9 Colo. 635, 21 Pac. 476.

59. Rowe *v.* Friend, 90 Me. 241, 38 Atl. 95; Alvord *v.* Collin, 20 Pick. (Mass.) 418, both of which hold that the assessor's authority to proceed does not depend upon the state treasurer's warrant.

60. *California.*— People *v.* White, 47 Cal. 616; People *v.* Hastings, 29 Cal. 449.

Illinois.—Anderson *v.* Chicago, etc., R. Co., 117 Ill. 26, 7 N. E. 129.

Michigan.— Paldi *v.* Paldi, 84 Mich. 346, 47 N. W. 510.

Missouri.— State *v.* St. Louis, etc., R. Co., 82 Mo. 683.

Pennsylvania.— Mattis *v.* Ruth, 1 Lack. Leg. Rec. 311.

See 45 Cent. Dig. tit. "Taxation," § 525.

61. *California.*— People *v.* Coghill, 47 Cal. 361.

Connecticut.— Middletown *v.* Berlin, 18 Conn. 189.

Indiana.— Columbus, etc., R. Co. *v.* Grant County, 65 Ind. 427; Kinney *v.* Doe, 8 Blackf. 350.

Louisiana.— Oteri *v.* Parker, 42 La. Ann. 374, 7 So. 570.

New York.— People *v.* Chenango County, 11 N. Y. 563; Powell *v.* Tuttle, 3 N. Y. 396; Metcalf *v.* Messenger, 46 Barb. 325; Downing *v.* Rugar, 21 Wend. 178, 34 Am. Dec. 223; Lee *v.* Parry, 4 Den. 125.

Vermont.— Fuller *v.* Gould, 20 Vt. 643.

United States.— Schenck *v.* Peay, 21 Fed. Cas. No. 12,451, 1 Dill. 267.

See 45 Cent. Dig. tit. "Taxation," § 526.

But *compare* Smith *v.* Leavenworth County, 9 Kan. 296, holding that the failure of the board of assessors to meet and agree on a

board.[62] The exception to this rule is that the action of a majority of the board will be legally sufficient where joint or concurrent action has been attempted and has failed, either because some of the members refuse to act or because of an irreconcilable difference of opinion.[63]

d. Acts of De Facto Assessors. In some of the states it is considered that the principles which support the acts of *de facto* officers in general have no applicability to *de facto* tax assessors.[64] But the general rule is otherwise. Notwithstanding an informality or irregularity in the title of the person acting as assessor, if he is in actual possession and administration of the office under color of an election or appointment, so as to be entitled to the character of an officer *de facto*, the assessment which he makes must be held valid and legal.[65]

4. Civil Liabilities of Assessors — a. Negligence or Misconduct in General. A tax assessor may be held civilly liable in damages for injuries resulting from unauthorized or wrongful acts in the performance of his duties.[66]

basis of valuation is a mere irregularity, as each assessor is bound to assess the property in his township at its true value.

Where one of three duly qualified assessors dies, and the town votes not to fill the vacancy, the remaining two can make a valid assessment. Cooke *v.* Scituate, 201 Mass. 107, 87 N. E. 207.

62. Porter *v.* Rockford, etc., R. Co., 76 Ill. 561, holding that the validity of an assessment made by a committee of the state board of equalization will be sustained, where they report to the full board and their report is adopted.

63. *Florida.*— Billings *v.* Stark, 15 Fla. 297.

Massachusetts.—Williams *v.* Lunenburg School Dist. No. 1, 21 Pick. 75, 32 Am. Dec. 243.

New York.— Downing *v.* Rugar, 21 Wend. 178, 34 Am. Dec. 223.

Vermont.—Wells *v.* Austin, 59 Vt. 157, 10 Atl. 405.

United States.— Schenck *v.* Peay, 21 Fed. Cas. No. 12,451, 1 Dill. 267. See also Schenck *v.* Peay, 21 Fed. Cas. No. 12,450, Woolw. 175, as to a statute declaring that a majority of the board of tax commissioners shall have full authority to transact the business of the board.

See 45 Cent. Dig. tit. "Taxation," § 526.

64. People *v.* Hastings, 29 Cal. 449.

Usurper without color of title.—An assessment made by persons who had neither been elected nor sworn as assessors would be an assessment, not by officers *de facto*, but by mere intruders coming in without even color of authority. Birch *v.* Fisher, 13 Serg. & R. (Pa.) 208.

65. *Arkansas.*— Barton *v.* Lattourette, 55 Ark. 81, 17 S. W. 588; Murphy *v.* Shepard, 52 Ark. 356, 12 S. W. 707; Equalization Bd. *v.* Land Owners, 51 Ark. 516, 11 S. W. 822; Moore *v.* Turner, 43 Ark. 243; Twombly *v.* Kimbrough, 24 Ark. 459; Scott *v.* Watkins, 22 Ark. 556.

Connecticut.— State *v.* Carroll, 38 Conn. 449, 9 Am. Rep. 409.

Florida.— Tampa *v.* Kaunitz, 39 Fla. 683, 23 So. 416, 63 Am. St. Rep. 202; Kissimmee City *v.* Cannon, 26 Fla. 3, 7 So. 523; State *v.* Gleason, 12 Fla. 190.

Illinois.— People *v.* Lieb, 85 Ill. 484.

Iowa.—Allen *v.* Armstrong, 16 Iowa 508; Washington County *v.* Miller, 14 Iowa 584.

Kansas.—Watkins *v.* Inge, 24 Kan. 612.

Maine.— Greenville *v.* Blair, 104 Me. 444, 72 Atl. 177. See also Greene *v.* Walker, 63 Me. 311. But *compare* Springfield *v.* Butterfield, 98 Me. 155, 56 Atl. 581; Hale *v.* Cushing, 2 Me. 218.

Massachusetts.— Bucknam *v.* Ruggles, 15 Mass. 180, 8 Am. Dec. 98.

Mississippi.— Ray *v.* Murdock, 36 Miss. 692.

Nebraska.— South Omaha *v.* O'Rourke, 70 Nebr. 470, 97 N. W. 608.

Nevada.— Sawyer *v.* Dooley, 21 Nev. 390, 32 Pac. 437.

New Hampshire.— French *v.* Spalding, 61 N. H. 395; Smith *v.* Messer, 17 N. H. 420; Tucker *v.* Aiken, 7 N. H. 113.

New Jersey.— State *v.* Brown, 53 N. J. L. 162, 20 Atl. 772; Bloomfield Tp. *v.* Pierson, 47 N. J. L. 247; State *v.* Ocean Tp., 39 N. J. L. 75; State *v.* Tolan, 33 N. J. L. 195.

Ohio.— Sheldon *v.* Coates, 10 Ohio 278.

South Dakota.— Iowa, etc., Tel. Co. *v.* Schamber, 15 S. D. 588, 91 N. W. 78.

Tennessee.— Jones *v.* Scanland, 6 Humphr. 195, 44 Am. Dec. 300.

Texas.— Texas, etc., R. Co. *v.* Harrison County, 54 Tex. 119.

United States.— Ronkendorf *v.* Taylor, 4 Pet. 349, 7 L. ed. 882.

Effect of failure to take oath or give bond see *supra*, VI, B, 1, c.

The right of a de facto member of a state board of assessors and equalization to exercise the duties of his office cannot be collaterally questioned. Sawyer *v.* Dooley, 21 Nev. 390, 32 Pac. 437.

Irregularities in the election of an assessor does not affect the validity of an assessment made by him. Greenville *v.* Blair, 104 Me. 444, 72 Atl. 177.

66. *Alabama.*— Carter *v.* Mercer, 9 Ala. 556.

Maine.—Allen *v.* Archer, 49 Me. 346, acting without legal authority.

Massachusetts.— Bassett *v.* Porter, 4 Cush. 487.

New Hampshire.— Henry *v.* Sargeant, 13

b. Illegality, Mistake, Overvaluation. The duties of the tax assessors are quasi-judicial in character, and therefore if they keep within their authority and act honestly and in good faith and with a common degree of care and prudence, they are not answerable in damages for errors, mistakes, inaccuracies, or bad judgment in the assessment,[67] or for any illegality in the tax itself not brought to their notice and for which they are not responsible.[68] Nor, under the same conditions, are they civilly liable for an overvaluation or excessive assessment of the property of a taxpayer.[69] If, however, it can be shown that an assessor acted fraudulently or with actual malice in a particular case, his judicial character does not protect him, and he is answerable in damages.[70]

N. H. 321, 40 Am. Dec. 146, assessing on a list materially erroneous.

Vermont.— St. Johnsbury School Dist. No. 1 *v.* Kittridge, 27 Vt. 650 (wrongful designation of taxpayers); Kellogg *v.* Higgins, 11 Vt. 240.

See 45 Cent. Dig. tit. "Taxation," § 540.

Responsibility for collector.— The assessors of a town are not liable for the unlawful acts of the collector in arresting, for nonpayment of a tax, a taxpayer who offered to show him sufficient goods and chattels to pay the tax. Rowe *v.* Friend, 90 Me. 241, 38 Atl. 95. But persons undertaking to act as assessors, without having been legally elected, are personally liable for the acts of a collector to whom they have issued a warrant for the collection of taxes assessed by them. Allen *v.* Archer, 49 Me. 346.

Acting without jurisdiction.—A tax assessor acts without jurisdiction, and therefore makes himself responsible in damages, if he proceeds on an assessment roll which has not been verified by the proper officers, as required by law (Smith *v.* Mosher, 9 N. Y. Suppl. 786), or if he makes an alteration in an assessment list, to the prejudice of a particular taxpayer, after it has been perfected and lodged with the town clerk and the assessor's power over it has ceased (Bristol Mfg. Co. *v.* Gridley, 28 Conn. 201).

67. *Iowa.*— Stevens *v.* Carroll, 130 Iowa 463, 104 N. W. 433.

Maine.— Patterson *v.* Creighton, 42 Me. 367.

Massachusetts.— Lincoln *v.* Chapin, 132 Mass. 470; Ingraham *v.* Doggett, 5 Pick. 451.

Michigan.— See Wall *v.* Trumbull, 16 Mich. 228.

Minnesota.— Stewart *v.* Case, 53 Minn. 62, 54 N. W. 938, 29 Am. St. Rep. 575.

New Hampshire.— Locke *v.* Pittsfield, 63 N. H. 122; McDaniel *v.* Tebbetts, 60 N. H. 497; Edes *v.* Boardman, 58 N. H. 580; Hayes *v.* Hanson, 12 N. H. 284. *Compare* Henry *v.* Sargeant, 13 N. H. 321, 40 Am. Dec. 146.

New York.—Williams *v.* Weaver, 75 N. Y. 30; Clark *v.* Norton, 49 N. Y. 243; Parish *v.* Golden, 35 N. Y. 462; Foster *v.* Van Wyck, 2 Abb. Dec. 167, 3 Transcr. App. 196, 4 Abb. Pr. N. S. 469, 41 How. Pr. 493; Hopkins *v.* Leach, 125 N. Y. App. Div. 294, 109 N. Y. Suppl. 713; Robinson *v.* Rowland, 26 Hun 501; Youmans *v.* Simmons, 7 Hun 466; Palmer *v.* Lawrence, 6 Lans. 282; Bell *v.* Pierce, 48 Barb. 51 [*affirmed* in 51 N. Y. 12]; Vose *v.* Willard, 47 Barb. 320.

Utah.— Taylor *v.* Robertson, 16 Utah 330, 52 Pac. 1.

Vermont.—Wilson *v.* Marsh, 34 Vt. 352; Stearns *v.* Miller, 25 Vt. 20; Fairbanks *v.* Kittredge, 24 Vt. 9; Fuller *v.* Gould, 20 Vt. 643.

See 45 Cent. Dig. tit. "Taxation," § 540.

68. Boody *v.* Watson, 64 N. H. 162, 9 Atl. 794; Odiorne *v.* Rand, 59 N. H. 504; Edes *v.* Boardman, 58 N. H. 580. But *compare* Dickinson *v.* Billings, 4 Gray (Mass.) 42; Withington *v.* Eveleth, 7 Pick. (Mass.) 106; Inglee *v.* Bosworth, 5 Pick. (Mass.) 498, 16 Am. Dec. 419; Stetson *v.* Kempton, 13 Mass. 272, 7 Am. Dec. 145; Drew *v.* Davis, 10 Vt. 506, 33 Am. Dec. 213.

69. *California.*— San Jose Gas Co. *v.* January, 57 Cal. 614.

Indiana.—Walker *v.* Hallock, 32 Ind. 239.

Iowa.— Parkinson *v.* Parker, 48 Iowa 667; Muscatine Western R. Co. *v.* Horton, 38 Iowa 33; Macklot *v.* Davenport, 17 Iowa 379.

Kentucky.— Daugherty *v.* Bazell, 123 Ky. 424, 96 S. W. 576, 29 Ky. L. Rep. 884.

Louisiana.— Lilienthal *v.* Campbell, 22 La. Ann. 600.

Maine.— Rowe *v.* Friend, 90 Me. 241, 38 Atl. 95.

Massachusetts.— Little *v.* Greenleaf, 7 Mass. 236; Dillingham *v.* Snow, 5 Mass. 547.

Michigan.— Wall *v.* Trumbull, 16 Mich. 228.

Missouri.— State *v.* Reed, 159 Mo. 77, 60 S. W. 70.

New Hampshire.— Fawcett *v.* Dole, 67 N. H. 168, 29 Atl. 693; McDaniel *v.* Tebbetts, 60 N. H. 497.

New York.— Chemung Nat. Bank *v.* Elmira, 53 N. Y. 49; Western R. Co. *v.* Nolan, 48 N. Y. 513; Barhyte *v.* Shepherd, 35 N. Y. 238; Bell *v.* Pierce, 48 Barb. 51 [*affirmed* in 51 N. Y. 12]; Vose *v.* Willard, 47 Barb. 320; People *v.* Reddy, 43 Barb. 539; Brown *v.* Smith, 24 Barb. 419; Vail *v.* Owen, 19 Barb. 22; Weaver *v.* Devendorf, 3 Den. 117; Easton *v.* Calendar, 11 Wend. 90.

North Carolina.— Pentland *v.* Stewart, 20 N. C. 521.

Oregon.— Oregon Steam Nav. Co. *v.* Wasco County, 2 Oreg. 206.

See 45 Cent. Dig. tit. "Taxation," § 543.

70. *California.*— Ballerino *v.* Mason, 83 Cal. 447, 23 Pac. 530.

Connecticut.— Bristol Mfg. Co. *v.* Gridley, 27 Conn. 221, 71 Am. Dec. 56.

Iowa.— Parkinson *v.* Parker, 48 Iowa 667.

Missouri.— State *v.* Reed, 159 Mo. 77, 60 S. W. 70.

c. Assessment of Exempt Property. It has been held that if an assessor undertakes to assess property which is exempt by law, he acts outside of his authority and is therefore liable in damages.[71] But on the other hand it has been held that an assessor is not individually liable for errors in determining what property is, and what is not, exempt from taxation, and in assessing exempt property, since in so doing he acts in a judicial and not a ministerial capacity.[72]

d. Error as to Residence. Assessors have no jurisdiction to assess a poll tax upon a non-resident, or to assess him for personal property not within their district, and they are personally liable for so doing, although under a mistaken belief that he was a resident.[73] It is to be noted, however, that in some states the statutes relieve assessors from the consequences of a mistake of this kind, by providing that they shall not be answerable if they acted under an honest belief that they had jurisdiction or "with integrity and fidelity." [74]

e. Omission or Refusal to Assess.[75] No action lies against an assessor for an error of judgment in omitting to place on the assessment roll some property which should have been assessed, although the consequence is to increase the plaintiff's taxes,[76] as the proper remedy against an assessor, who neglects or refuses to assess taxable persons or property, is by mandamus to compel him to do so.[77]

f. Waiver and Estoppel. One having a right of action against assessors for a fraudulent or illegal assessment may waive the same, or be estopped to claim it, by acquiescence in the assessment or payment of the tax.[78]

g. Actions For Damages. Trespass is the proper form of action against an assessor for a fraudulent or illegal assessment.[79] Such an action will lie against

New York.—Williams *v.* Weaver, 75 N. Y. 30; Rockefeller *v.* Taylor, 69 N. Y. App. Div. 176, 74 N. Y. Suppl. 812. But see Weaver *v.* Devendorf, 3 Den. 117.

Vermont.— Stearns *v.* Miller, 25 Vt. 20; Fuller *v.* Gould, 20 Vt. 643.

United States.— Bailey *v.* Berkey, 81 Fed. 737.

See 45 Cent. Dig. tit. "Taxation," §§ 540–545.

Compare Steele *v.* Dunham, 26 Wis. 393.

71. Ford *v.* McGregor, 20 Nev. 446, 23 Pac. 508; Taylor *v.* Robertson, 16 Utah 330, 52 Pac. 1.

72. Barhyte *v.* Shepherd, 35 N. Y. 238 [*overruling* Prosser *v.* Secor, 5 Barb. 607]; Vail *v.* Owen, 19 Barb. (N. Y.) 22; Weaver *v.* Devendorf, 3 Den. (N. Y.) 117; Dubois *v.* Parcells, 118 N. Y. Suppl. 615. But *compare* Chemung Nat. Bank *v.* Elmira, 53 N. Y. 49; Lapolt *v.* Maltby, 10 Misc. (N. Y.) 330, 31 N. Y. Suppl. 686.

73. Ware *v.* Percival, 61 Me. 391, 14 Am. Rep. 565; Herriman *v.* Stowers, 43 Me. 497; New York Milk Produce Co. *v.* Damon, 172 N. Y. 661, 65 N. E. 1119 [*affirming* 57 N. Y. App. Div. 261, 68 N. Y. Suppl. 183]; Dorn *v.* Backer, 61 N. Y. 261 [*reversing* 61 Barb. 597]; Dorwin *v.* Strickland, 57 N. Y. 492; Bailey *v.* Buell, 50 N. Y. 662 [*reversing* 59 Barb. 158]; Westfall *v.* Preston, 49 N. Y. 349; Clark *v.* Norton, 49 N. Y. 243; Bennett *v.* Buffalo, 17 N. Y. 383; Mygatt *v.* Washburn, 15 N. Y. 316; Wade *v.* Matheson, 4 Lans. 158; Fairbanks *v.* Kittredge, 24 Vt. 9; Henry *v.* Edson, 2 Vt. 499. *Compare* Davis *v.* Strong, 31 Vt. 332.

74. Durant *v.* Eaton, 98 Mass. 469; Baker *v.* Allen, 21 Pick. (Mass.) 382; Smith *v.* Bradley, 20 N. H. 117. But prior to the Massachusetts statute the rule in that state was, that the assessor was liable in such a case. See Lyman *v.* Fiske, 17 Pick. (Mass.) 231, 28 Am. Dec. 293; Freeman *v.* Kenney, 15 Pick. (Mass.) 44; Inglee *v.* Bosworth, 5 Pick. (Mass.) 498, 16 Am. Dec. 419; Gage *v.* Currier, 4 Pick. (Mass.) 399; Sumner *v.* Dorchester First Parish, 4 Pick. (Mass.) 361; Agry *v.* Young, 11 Mass. 220.

75. **Omission of persons or property from tax rolls** see *infra*, VI, E, 9.

76. Dillingham *v.* Snow, 5 Mass. 547; Meade *v.* Haines, 81 Mich. 261, 45 N. W. 836; Boody *v.* Watson, 64 N. H. 162, 9 Atl. 794; Bellows Falls Canal Co. *v.* Rockingham, 37 Vt. 622.

77. People *v.* Ames, 24 Colo. 422, 51 Pac. 426; State *v.* Osborn, 60 Nebr. 415, 83 N. W. 357. See also MANDAMUS, 26 Cyc. 321 text and note 7.

78. Hilton *v.* Fonda, 86 N. Y. 339 [*affirming* 19 Hun 191]; Sexton *v.* Pepper, 28 Hun (N. Y.) 31; Cooley *v.* Aiken, 15 Vt. 322.

Malicious overassessment.— The failure of the taxpayer to appear before the board of equalization and apply for a reduction of his assessment, or the refusal of the board to reduce it, would not excuse the assessor for a malicious overassessment. Parkinson *v.* Parker, 48 Iowa 667.

79. Little *v.* Merrill, 10 Pick. (Mass.) 543; Thayer *v.* Stearns, 1 Pick. (Mass.) 109; Stetson *v.* Kempton, 13 Mass. 272, 7 Am. Dec. 145; Agry *v.* Young, 11 Mass. 220; Charleton *v.* Alway, 11 A. & E. 993, 9 L. J. Q. B. 237, 3 P. & D. 618, 39 E. C. L. 520.

Form of action under code system see Perkins *v.* Ralls, 71 Cal. 87, 11 Pac. 860.

Averments of complaint see Ballerino *v.* Mason, 83 Cal. 447, 23 Pac. 530; Curtis *v.*

two of a board of three assessors if the third did not act with them or concur in the assessment.[80] But when plaintiff has paid the taxes and recovered them back in an action against the municipality, he cannot afterward maintain trespass against the assessor.[81]

5. Criminal Responsibility of Assessors. In some states tax assessors who neglect or refuse to perform their official duties, or who act fraudulently or corruptly, are liable to indictment as for a misdemeanor.[82]

C. Assessment of Property in General[83] **— 1. General Principles — a. Definition and Nature of Assessment.** An assessment of a tax is a final listing of persons and property subject to the tax, with an official estimate of the value of the property of each for the purpose of the tax.[84] It is the final step in the process of "taxation," and the one which fixes a definite and enforceable liability upon persons and property for the amount of the tax.[85]

b. Necessity of Assessment.[86] The assessment is an indispensable prerequisite to the validity of a tax against any individual; for without a valid assessment there can be no lawful attempt to collect the tax or to enforce it against any specific property.[87] Mere irregularities in the assessment will not affect its validity, but

Barker, 24 N. Y. App. Div. 71, 48 N. Y. Suppl. 934; Stearns *v.* Miller, 25 Vt. 20.

Evidence see Alameda County *v.* Dalton, 9 Cal. App. 26, 98 Pac. 85; New Canaan *v.* Hoyt, 23 Conn. 148; Willard *v.* Wetherbee, 4 N. H. 118.

80. Fuller *v.* Gould, 20 Vt. 643.

81. Ware *v.* Percival, 61 Me. 391, 14 Am. Rep. 565.

82. See the statutes of the several states. And see Siebe *v.* San Francisco Super. Ct., 114 Cal. 551, 46 Pac. 456; State *v.* Hunter, 8 Blackf. (Ind.) 212; Wyckoff *v.* Creveling, 40 N. J. L. 150; State *v.* Northfield, 13 Vt. 565.

83. Assessment by municipal corporations see Municipal Corporations, 28 Cyc. 1695 *et seq.*

Mode of assessment or valuation as violating constitutional requirement of equality and uniformity see *supra*, II, B, 1, g, (iv).

Officers to make assessments for benefits from public improvement see Municipal Corporations, 28 Cyc. 1141 *et seq.*

Refunding taxes paid for defects in assessment see *infra*, IX, B, 2.

84. Hacker *v.* Howe, 72 Nebr. 385, 101 N. W. 255.

Other definitions: "Determining the value of a man's property or occupation for the purpose of levying a tax." 3 Cyc. 1111.

"An assessment, strictly speaking, is an official estimate of the sums which are to constitute the basis of an apportionment of a tax between the individual subjects of taxation within the district." Cooley Tax. 596 [*citing* Perry County *v.* Selma, etc., R. Co., 58 Ala. 546; Rood *v.* Mitchell County, 39 Iowa 444; Geren *v.* Gruber, 26 La. Ann. 694; Wells *v.* Smyth, 55 Pa. St. 159].

The word "assessment," as used in tax statutes, does not mean merely the valuation of the property for taxation, but includes the whole statutory mode of imposing the tax, embracing all of the proceedings for raising money by the exercise of the power of taxation from their inception to their conclusion. Hurford *v.* Omaha, 4 Nebr. 336; Jackson Lumber Co. *v.* McCrimmon, 164 Fed. 759.

"**The term commonly includes** two distinct processes: first, the preparation of a list by the proper officers, comprising a description of all the persons or property found within the jurisdiction and liable to contribute to the particular tax; and second, an estimate by the assessors of the value of the property, of whatever character it may be, which is to be called upon to contribute, thus forming the basis of an apportionment of the whole tax among the taxable persons within the district. The list, when thus completed, is usually denominated the 'tax list' or 'assessment roll.'" Black Tax Titles (2d ed.), § 89. See also *In re* Seaman, 135 Iowa 543, 113 N. W. 354.

"**Assessed**" means the amount to be imposed on the property and collected. Risley *v.* Utica, 168 Fed. 737.

85. Adams *v.* Snow, 65 Iowa 435, 21 N. W. 765; Heaton *v.* Knight, 65 Iowa 434, 21 N. W. 764; East Tennessee, etc., R. Co. *v.* Morristown, (Tenn. Ch. App. 1895) 35 S. W. 771.

Taxes not extended.—An assessment may be regarded as made, in the sense of fixing a liability upon the taxpayer, although the precise amount of the tax against his property has not yet been computed and extended on the roll. *In re* Babcock, 115 N. Y. 450, 22 N. E. 263.

86. Assessment as prerequisite to performance of work or letting of contract for public improvement see Municipal Corporations, 28 Cyc. 971.

87. *Alabama.*—Driggers *v.* Cassady, 71 Ala. 529; Perry County *v.* Selma, etc., R. Co., 58 Ala. 546.

Arizona.—Waller *v.* Hughes, 2 Ariz. 114, 11 Pac. 122.

California.—Lake County *v.* Sulphur Bank Quicksilver Min. Co., 66 Cal. 17, 4 Pac. 876; People *v.* Pearis, 37 Cal. 259; People *v.* Hastings, 29 Cal. 449.

Idaho.—Quivey *v.* Lawrence, 1 Ida. 313.

Illinois.—Graves *v.* Bruen, 11 Ill. 431.

only such omissions or defects as go to the jurisdiction of the assessors, or deprive the taxpayer of some substantial right.[88] And an illegality in the assessment, being a radical defect, cannot be regarded as a mere irregularity such as to be healed by the running of the statute of limitations;[89] and a statute which cures irregularities in tax proceedings will not cure a want of assessment.[90]

c. Statutory Provisions. An assessment of taxes must be made under authority of a statute and in accordance with its provisions.[91] Furthermore, the assess-

Iowa.—Appanoose County *v.* Vermilion, 70 Iowa 365, 30 N. W. 616; Worthington *v.* Whitman, 67 Iowa 190, 25 N. W. 124; Early *v.* Whittingham, 43 Iowa 162.

Kentucky.— Turner *v.* Pewee Valley, 100 Ky. 288, 38 S. W. 143, 688, 18 Ky. L. Rep. 755; Covington *v.* Carroll, 108 S. W. 295, 32 Ky. L. Rep. 1255; National Bank of Commerce *v.* Licking Valley Land, etc., Co., 22 S. W. 881, 15 Ky. L. Rep. 211.

Louisiana.—Augusti *v.* Lawless, 43 La. Ann. 1097, 10 So. 171; Woolfolk *v.* Fonbene, 15 La. Ann. 15.

Massachusetts.— Thayer *v.* Stearns, 1 Pick. 482; Thurston *v.* Little, 3 Mass. 429.

Michigan.— Newkirk *v.* Fisher, 72 Mich. 113, 40 N. W. 189.

Mississippi.— Shewalter *v.* Brown, 35 Miss. 423.

Missouri.— State *v.* Linney, 192 Mo. 49, 90 S. W. 844.

Nebraska.— Nebraska City *v.* Nebraska City Hydraulic Gas Light, etc., Co., 9 Nebr. 339, 2 N. W. 870; Morrill *v.* Taylor, 6 Nebr. 236.

New York.— Matter of Nichols, 54 N. Y. 62; Westfall *v.* Preston, 49 N. Y. 349.

North Carolina.— North Carolina R. Co. *v.* Alamance County, 77 N. C. 4.

Pennsylvania.— Miller *v.* Hale, 26 Pa. St. 432; Bratton *v.* Mitchell, 1 Watts & S. 310; McCall *v.* Lorimer, 4 Watts 351. See also Delaware Division Canal Co. *v.* Com., 50 Pa. St. 399.

Texas.— Yenda *v.* Wheeler, 9 Tex. 408; Sullivan *v.* Bitter, (Civ. App. 1908) 113 S. W. 193. See also State *v.* Maryland Fidelity, etc., Co., 35 Tex. Civ. App. 214, 80 S. W. 544.

Vermont.— Judevine *v.* Jackson, 18 Vt. 470.

See 45 Cent. Dig. tit. "Taxation," § 510.

No formal assessment is required where a special tax is levied on specific property, or where the statute levying the tax itself prescribes the amount to be paid, so that it could be recovered by suit. Wells *v.* Burbank, 17 N. H. 393; Wagner *v.* Jackson, 31 N. J. L. 189; Hall *v.* Houston, etc., R. Co., 39 Tex. 286; King *v.* U. S., 99 U. S. 229, 25 L. ed. 373; U. S. *v.* Halloran, 26 Fed. Cas. No. 15,286, 14 Blatchf. 1; U. S. *v.* Pacific R. Co., 27 Fed. Cas. No. 15,984, 4 Dill. 71.

88. Greenville *v.* Blair, 104 Me. 444, 72 Atl. 177.

89. Townsend *v.* Edwards, 25 Fla. 582, 6 So. 212; Davenport *v.* Knox, 34 La. Ann. 407; Person *v.* O'Neal, 32 La. Ann. 228; Woolfolk *v.* Fonbene, 15 La. Ann. 15. But *compare* Oconto County *v.* Jerrard, 46 Wis. 317, 50 N. W. 591.

90. People *v.* Holladay, 25 Cal. 300; McReynolds *v.* Longenberger, 57 Pa. St. 13.

91. See State *v.* New Lindell Hotel Co., 9 Mo. App. 450; Hough *v.* North Adams, 196 Mass. 290, 82 N. E. 46 (holding that the assessment of taxes is a purely statutory proceeding, and must ordinarily be pursued with technical strictness); Caldwell Land, etc., Co. *v.* Smith, 151 N. C. 70, 65 S. E. 641 (holding that, although regulations affecting the methods of taxation are many of them regarded as merely directory, this does not permit or sanction a procedure in direct contravention of a positive and essential legislative requirement); Com. *v.* Camp Mfg. Co., 109 Va. 84, 63 S. E. 978 (assessment of land and timber separately).

Constitutionality of particular statutes see Eastern Kentucky Coal Lands Corp *v.* Com., 127 Ky. 667, 106 S. W. 260, 108 S. W. 1138, 32 Ky. L. Rep. 129, 33 Ky. L. Rep. 49; Anderson *v.* Ritterbusch, 22 Okla. 761, 98 Pac. 1002; Com. *v.* Camp Mfg. Co., 109 Va. 84, 63 S. E. 978.

Statute invalid in part.— Although the provisions of a statute as to the collection of taxes may be invalid, yet if its provisions in regard to the assessment are separable and independent, they may stand and be enforced. Com. *v.* E. H. Taylor Jr. Co., 101 Ky. 325, 41 S. W. 11, 19 Ky. L. Rep. 552.

Authority of legislature as to frequency of assessments.— A constitutional provision that property shall be assessed every fifth year does not withdraw from the legislature the right to provide for an assessment oftener than that. *Ex p.* Lynch, 16 S. C. 32. See also Com. *v.* Camp Mfg. Co., 109 Va. 84, 63 S. E. 978.

Mandatory and directory provisions.— Those provisions of a statute relating to the assessment of taxes which are intended for the security of the citizen, or to insure equality of taxation, or for certainty as to the nature and amount of each person's taxes, are mandatory; but those designed merely for the information or direction of officers, or to secure methodical and systematic modes of proceeding, are merely directory. See the following cases:

Alabama.— State Auditor *v.* Jackson County, 65 Ala. 142.

California.— Knott *v.* Peden, 84 Cal. 299, 24 Pac. 160.

Illinois.— Vittum *v.* People, 183 Ill. 154, 55 N. E. 689.

Maryland.— O'Neal *v.* Virginia, etc., Bridge Co., 18 Md. 1, 79 Am. Dec. 669.

Massachusetts.— Torrey *v.* Millbury, 21 Pick. 64.

ment must be based on the statute in force at the time it is made.[92] A new revenue law will not be construed retrospectively unless such is its clear meaning;[93] and while the enactment of an entirely new tax law will render illegal any proceedings thereafter taken under the former and repealed statute,[94] yet the repeal of an act under which an assessment has been made will not vacate or invalidate the assessment.[95]

d. Time and Date of Assessment. The revenue laws commonly provide that the assessment shall be made, or shall be completed, on a certain day or within a certain time. Such a provision, however, is so far directory that the assessment will not be invalidated by a delay beyond the statutory time, unless it is shown that the delay prejudiced the particular taxpayer by depriving him of a right to be heard before the board of equalization or otherwise operated to his disadvantage.[96] But the assessment must always be made as of the statutory date, or with reference to conditions as then existing; and hence a delay beyond that

Minnesota.— Corbet *v.* Rocksbury, 94 Minn. 397, 103 N. W. 11.

New York.— Cromwell *v.* MacLean, 123 N. Y. 474, 25 N. E. 932.

North Dakota.— Wells County *v.* McHenry, 7 N. D. 246, 74 N. W. 241.

Irregularities disregarded.— Where there is substantial compliance with the statute, irregularities in the assessment which are of such a nature that their effect cannot be injurious to taxpayers will not be regarded. San Francisco, etc., R. Co. *v.* State Bd. of Equalization, 60 Cal. 12; South Platte Land Co. *v.* Crete, 11 Nebr. 344, 7 N. W. 859.

Assessment of municipal stock see State *v.* Baltimore, 105 Md. 1, 65 Atl. 369.

92. State *v.* Edwards, 136 Mo. 360, 38 S. W. 73.

Repeal of statutes see Monaghan *v.* Lewis, 4 Pennew. (Del.) 364, 55 Atl. 1; Owensboro Waterworks Co. *v.* Owensboro, 74 S. W. 685, 24 Ky. L. Rep. 2530; Salisbury *v.* Jackson, 89 Md. 518, 43 Atl. 928; Meagher County *v.* Gardner, 18 Mont. 110, 44 Pac. 407.

93. *Georgia.*— Southern Express Co. *v.* Atlanta, 126 Ga. 45, 54 S. E. 771.

Mississippi.— Butts *v.* Ricks, 82 Miss. 533, 34 So. 354; Selden *v.* Coffee, 55 Miss. 41.

Missouri.— Livingston County *v.* Hannibal, etc., R. Co., 60 Mo. 516.

South Dakota.— Danforth *v.* McCook County, 11 S. D. 258, 76 N. W. 940, 74 Am. St. Rep. 808.

Washington.— Heilig *v.* Puyallup, 7 Wash. 29, 34 Pac. 164.

See 45 Cent. Dig. tit. "Taxation," § 511.

94. Baker *v.* Scudder, 32 N. J. L. 203. See also Royal Highlanders *v.* State, 77 Nebr. 18, 108 N. W. 183, 7 L. R. A. N. S. 380; Flanders *v.* Multnomah County, 43 Oreg. 583, 73 Pac. 1042.

95. *Maine.*— State *v.* Waterville Sav. Bank, 68 Me. 515.

Maryland.— Baltimore City Appeal Tax Ct. *v.* Maryland Univ., 50 Md. 457; Baltimore City Appeal Tax Ct. *v.* Baltimore Academy, 50 Md. 437; Baltimore City Appeal Tax Ct. *v.* Patterson, 50 Md. 354; Baltimore City Appeal Tax Ct. *v.* Western Maryland R. Co., 50 Md. 274.

North Dakota.— State *v.* Moorhouse, 5 N. D. 406, 67 N. W. 140.

Pennsylvania.— Com. *v.* Philadelphia, etc., Tel. Co., 2 Dauph Co. Rep. 394.

Washington.— Woodward *v.* Taylor, 33 Wash. 1, 73 Pac. 785, 75 Pac. 646.

See 45 Cent. Dig. tit. "Taxation," § 511.

96. *California.*— People *v.* Latham, 52 Cal. 598; Hart *v.* Plum, 14 Cal. 148.

Florida.— Stieff *v.* Hartwell, 35 Fla. 606, 17 So. 899.

Kentucky.— Hager *v.* Citizens' Nat. Bank, 127 Ky. 192, 105 S. W. 403, 914, 32 Ky. L. Rep. 95; Anderson *v.* Mayfield, 93 Ky. 230, 19 S. W 598, 14 Ky. L. Rep. 370.

Massachusetts.— Hough *v.* North Adams, 196 Mass. 290, 82 N. E. 46, holding that a delay of two months was of no consequence, as the assessment, under the statute, took effect as of the date specified.

Nevada.— State *v.* Western Union Tel. Co., 4 Nev. 338.

New Hampshire.— Wells *v.* Burbank, 17 N. H. 393.

New York.— People *v.* Haupt, 104 N. Y. 377, 10 N. E. 871; People *v.* Keefe, 119 N. Y. App. Div. 713, 104 N. Y. Suppl. 154 [*affirmed* in 190 N. Y. 555, 83 N. E. 1130].

Ohio.— Stormer *v.* Lucas County, 11 Ohio S. & C. Pl. Dec. 49, 8 Ohio N. P. 110.

Pennsylvania.— Philadelphia Contributionship *v.* Yard, 17 Pa. St. 331. *Compare* Schmuck *v.* Hartman, 222 Pa. St. 190, 70 Atl. 1091, holding that there can be no assessment of a state tax on personal property after the expiration of the year in which it ought to have been assessed.

Utah.— Taylor *v.* Robertson, 16 Utah 330, 52 Pac. 1.

See 45 Cent. Dig. tit. "Taxation," § 530.

But *compare* Bohler *v.* Verdery, 92 Ga. 715, 19 S. E. 36; McCutchen *v.* Lyon County, 95 Iowa 20, 63 N. W. 455; Tierney *v.* Brown, 67 Miss. 109, 6 So. 737; Thomas *v.* Leland, 70 Vt. 223, 39 Alt. 1094.

Estoppel to object to delay in completing assessment see William Wilkens Co. *v.* Baltimore, 103 Md. 293, 63 Atl. 562; Baltimore, etc., R. Co. *v.* Wicomico County, 93 Md. 113, 48 Atl. 853; Iowa, etc., Tel. Co. *v.* Schamber, 15 S. D. 588, 91 N. W. 78.

time will not enable the assessor to include in his list persons or property not within the state, or not in existence or not subject to taxation, on that date.[97] Within the meaning of such a statute, the assessment is completed when the persons and property to be taxed have been listed and the amounts to be collected have been computed.[98] And after that date, until a new assessment, assessors are not bound to regard changes in the title to taxable property or in its value.[99] An assessment is not invalid because of a failure of the assessors to date the assessment, as required by statute, such provision being merely directory.[1]

e. Evidence of Assessment. The presumption is that the assessing officers have performed their duty, and that the assessment is valid, and the burden of proving its invalidity is on the party objecting thereto.[2] The best and primary evidence of the fact and amount of an assessment is the assessment book or list itself.[3] Unless a foundation for the introduction of secondary evidence is laid, these facts cannot be proved by the testimony of the assessors or other parol evidence,[4] or even by other documents or records made in the course of the levying or collecting of the tax.[5]

2. List or Statement by Taxpayer[6] — a. Constitutional and Statutory Provisions. In many states persons owning taxable property are required to make

97. *California.*— People *v.* Kohl, 40 Cal. 127.

Iowa.— Wangler *v.* Black Hawk County, 56 Iowa 384, 9 N. W. 314.

Louisiana.— Bunkie Brick Works *v.* Avoyelles Police Jury, 113 La. 1062, 37 So. 970; Palfrey *v.* Connely, 106 La. 699, 31 So. 148; Southern Ins. Co. *v.* Board of Assessors, 49 La. Ann. 401, 21 So. 913.

Massachusetts.— Rogers *v.* Gookin, 198 Mass. 434, 85 N. E. 405.

Mississippi.— Colbert *v.* Leake County, 60 Miss. 142.

Nevada.— State *v.* Eastabrook, 3 Nev. 173.

New York.— Clark *v.* Norton, 49 N. Y. 243 [*affirming* 58 Barb. 434]; People *v.* Chenango County, 11 N. Y. 563.

Virginia.— Pardee *v.* Com., 102 Va. 905, 47 S. E. 1010.

United States.— Dodge *v.* Nevada Nat. Bank, 109 Fed. 726, 48 C. C. A. 626.

98. State *v.* Johnson, 16 Mont. 570, 41 Pac. 706; Wells *v.* Smyth, 55 Pa. St. 159.

In Rhode Island an assessment is deemed to have been made on the day following the last date on which taxpayers were notified to bring in an account of their ratable estates. Warwick, etc., Water Co. *v.* Carr, 24 R. I. 226, 52 Atl. 1030; McAdam *v.* Honey, 20 R. I. 351, 39 Atl. 189.

99. State *v.* Jersey City, 44 N. J. L. 156; State *v.* Hardin, 34 N. J. L. 79; State *v.* Williamson, 33 N. J. L. 77; Overing *v.* Foote, 65 N. Y. 263; Clark *v.* Norton, 49 N. Y. 243 [*affirming* 58 Barb. 434]; Woodward *v.* French, 31 Vt. 337. See also White *v.* State, 51 Ga. 252; Johnson *v.* Lyon, 106 Ill. 64; Stockman *v.* Robbins, 80 Ind. 195; Covington *v.* Carroll, 108 S. W. 295, 32 Ky. L. Rep. 1255; Rothschild *v.* Begole, 105 Mich. 388, 63 N. W. 309.

1. Warwick, etc., Water Co. *v.* Carr, 24 R. I. 226, 52 Atl. 1030.

2. People *v.* Hulin, 237 Ill. 122, 86 N. E. 666.

Regularity presumed.—An assessment is presumed to be correct and to have been made in conformity with the law, although this presumption may be rebutted by evidence. Palmer *v.* Boling, 8 Cal. 384; People *v.* McComber, 7 N. Y. Suppl. 71.

3. *Louisiana.*— Lafayette *v.* Kohn, 19 La. 94.

Maine.— Norridgewock *v.* Walker, 71 Me. 181.

New Hampshire.— Forest *v.* Jackson, 56 N. H. 357; Farrar *v.* Fessenden, 39 N. H. 268; Pittsfield *v.* Barnstead, 38 N. H. 115.

Pennsylvania.— Stark *v.* Shupp, 112 Pa. St. 395, 3 Atl. 864; McReynolds *v.* Longenberger, 57 Pa. St. 13; Bratton *v.* Mitchell, 7 Watts & S. 259.

Washington.— Seattle *v.* Parker, 13 Wash. 450, 43 Pac. 369.

United States.— Ronkendorff *v.* Taylor, 1 Pet. 349, 7 L. ed. 882.

See 45 Cent. Dig. tit. "Taxation," § 514.

4. Averill *v.* Sanford, 36 Conn. 345; Marlborough *v.* Sisson, 23 Conn. 44; Bright *v.* Markle, 17 Ind. 308; Hickman *v.* Dawson, 35 La. Ann. 1086; State *v.* Edgar, 26 La. Ann. 726; Kelly *v.* Craig, 27 N. C. 129.

5. *California.*—Allison Ranch Min. Co. *v.* Nevada County, 104 Cal. 161, 37 Pac. 875, notice from county board of equalization.

Minnesota.— Fleckten *v.* Spicer, 63 Minn. 454, 65 N. W. 926 (town clerk's certificate of payment of the tax); Howes *v.* Gillett, 23 Minn. 231 (tax duplicates of county).

New Hampshire.—Wakefield *v.* Alton, 3 N. H. 378, selectmen's book.

New Jersey.— Hopper *v.* Malleson, 16 N. J. Eq. 382, recitals in tax warrant.

Pennsylvania.— Bratton *v.* Mitchell, 1 Watts & S. 310; Simon *v.* Brown, 3 Yeates 186, 2 Am. Dec. 368, tax deed.

See 45 Cent. Dig. tit. "Taxation," § 514.

Compare Burbank *v.* People, 90 Ill. 554; Norridgewock *v.* Walker, 71 Me. 181.

6. **Report or statement by corporation** see *infra*, VI, D, 2.

Report or statement by stock-holders see *infra*, VI, D, 3.

a list or schedule of the same and return it to the assessors as a basis for their assessment. Some of these statutes are held merely directory, no penalty attaching for a failure to comply.[7] But generally it is provided that some penalty or disadvantage shall be visited on the taxpayer who refuses or neglects to list his property; and the courts have affirmed the constitutionality of statutes providing that, in such case, the assessor shall estimate the value of such person's property according to the best information he can obtain, and that the taxpayer shall have no appeal from the valuation so fixed; [8] or that the assessor, after valuing the property according to his own judgment, shall add a certain percentage to the estimate so reached (even as much as fifty or one hundred per cent) and then proceed to assess the tax on the aggregate; [9] or imposing a specific penalty on the delinquent taxpayer,[10] or even rendering him liable to indictment and punishment.[11]

b. Notice or Demand. Statutes requiring the assessor to demand from the taxpayer a list of his taxable property, or to notify him of his duty to return it, have sometimes been held merely directory; [12] but generally this requirement is held to be mandatory, so that the assessor cannot make a valid assessment or impose any penalties on the delinquent, unless he has first given the proper notice or duly demanded the list.[13] Exceptions are necessarily made where the tax-

7. Merchants' Mut. Ins. Co. *v.* Board of Assessors, 40 La. Ann. 371, 3 So. 891; State *v.* Delevan, 1 Wis. 345.

8. *California.*— Orena *v.* Sherman, 61 Cal. 101.

Georgia.— Georgia, R., etc., Co. *v.* Wright, 124 Ga. 596, 53 S. E. 251.

Louisiana.— State *v.* Louisiana Mut. Ins. Co., 19 La. Ann. 474.

Massachusetts.— Charlestown *v.* Middlesex County, 101 Mass. 87; Otis Co. *v.* Ware, 8 Gray 509; Porter *v.* Norfolk County, 5 Gray 365. And see White *v.* New Bedford, 160 Mass. 217, 35 N. W. 678.

Nevada.— State *v.* Washoe County Bd. of Equalization, 7 Nev. 83.

New Jersey.— State *v.* State Comptroller, 54 N. J. L. 135, 23 Atl. 122; Sharp *v.* Apgar, 31 N. J. L. 358.

Oklahoma.— Pentecost *v.* Stiles, 5 Okla. 500, 49 Pac. 921.

See 45 Cent. Dig. tit. "Taxation," § 550.

Void assessment.—A law which provides that a party failing to list his property shall have no relief if "overtaxed" will not shut him out from his appropriate remedy against a void assessment. Mechanics' Sav. Bank *v.* Granger, 17 R. I. 77, 20 Atl. 202.

An owner who leaves the assessment of his land to the assessor, and fails to object thereto, is liable for the taxes assessed. Moores *v.* Thomas, (Miss. 1909) 48 So. 1025.

9. Boyer *v.* Jones, 14 Ind. 354; Fox's Appeal, 112 Pa. St. 337, 4 Atl. 149; Sanderson *v.* Lackawanna County, 1 Pa. Co. Ct. 342; *Ex p.* Lynch, 16 S. C. 32; Bartlett *v.* Wilson, 59 Vt. 23, 8 Atl. 321; Howes *v.* Bassett, 56 Vt. 141. See also State *v.* Allen, 2 McCord (S. C.) 55. *Contra,* McCormick *v.* Fitch, 14 Minn. 252.

A wilful undervaluation of property returned for taxation is of itself a "false return" within the meaning of a statute providing that in case of a false return the assessor shall find the true amount taxable and add to it a penalty. Ohio Farmers' Ins. Co. *v.* Hard, 59 Ohio St. 248, 52 N. E. 635.

10. See *infra,* VI, C, 3, c; XV, A, 3, b.

11. Caldwell *v.* State, 14 Tex. App. 171. See also *infra,* VI, C, 3, b.

12. Hudson *v.* Miller, 10 Kan. App. 532, 63 Pac. 21; Boothbay *v.* Race, 68 Me. 351; State *v.* Western Union Tel. Co., 4 Nev. 338; Hazzard *v.* O'Bannon, 36 Fed. 854. See also State *v.* Casey, 210 Mo. 235, 109 S. W. 1, holding that an assessor's failure to comply with Rev. St. (1899) § 5575, relative to giving notice, will not invalidate an assessment.

Visit to precinct.— The failure of an assessor or his assistant to make at least one visit to each precinct to receive tax returns will not alone vitiate the assessment. Reid *v.* Southern Dev. Co., 52 Fla. 595, 42 So. 206.

13. *California.*— People *v.* Shippee, 53 Cal. 675.

Kentucky.— Trigg *v.* Glasgow, 2 Bush 594; Jones *v.* Com., 14 B. Mon. 1. But *compare* Louisville, etc., Mail Co. *v.* Barbour, 88 Ky. 73, 9 S. W. 516, 10 Ky. L. Rep. 836.

Michigan.— Turner *v.* Muskegon County Cir. Judge, 95 Mich. 1, 54 N. W. 705.

Rhode Island.— Matteson *v.* Warwick, etc., Water Co., 28 R. I. 570, 68 Atl. 577.

Vermont.— Thomas *v.* Leland, 70 Vt. 223, 39 Atl. 1094.

United States.— Powder River Cattle Co. *v.* Custer County, 45 Fed. 323.

See 45 Cent. Dig. tit. "Taxation," § 551.

Sufficiency of notice or demand.—A personal application on the part of the assessor has been held sufficient. Melvin *v.* Weare, 56 N. H. 436. But on the other hand it has been held that where the statute requires a written or printed notice a mere verbal notice is insufficient (Cape Girardeau *v.* Buehrmann, 148 Mo. 198, 49 S. W. 985), although it is not material that the notice, if otherwise sufficient, is not dated (State *v.* Seahorn, 139 Mo. 582, 39 S. W. 809).

On whom served.— In the case of a partnership, the notice may be served on either partner. State *v.* Owsley, 17 Mont. 94, 42 Pac. 105.

payer has kept out of the way or otherwise evaded notice,[14] or where he cannot be found.[15] The burden of proving a want of notice or demand is on the taxpayer.[16]

c. Who Should List Property. Every person should list for taxation the property of which he is the actual and beneficial owner,[17] and also, under the statutes as generally framed, property which he holds for another in a fiduciary capacity, as agent, trustee, guardian, etc.[18] The statute may also apply to non-resident owners of taxable property.[19] But the act of a stranger in listing the property as his own can neither give him a title nor affect the rights of the true owner.[20]

d. Making and Requisites of List in General. Provided there is an intention and endeavor to comply with the law, considerable latitude is allowed to the taxpayer in regard to the form of his return.[21] Real property is not ordinarily required to be listed every year, but only when there is a change in the title or possession.[22] But it is otherwise as to personalty, and a return which does not specify or describe

The notices may be sent by mail, if the statute does not require the assessor to visit each taxpayer personally. Turner *v.* Muskegon County Cir. Judge, 95 Mich. 1, 54 N. W. 705.

Where demand to be made.— The statute in Virginia intends that application for a list of taxable property shall be made to the taxpayer at the place of his domicile, and not elsewhere. Hurt *v.* Bristol, 104 Va. 213, 51 S. E. 223. But in New Jersey a demand is sufficient, although not made at the person's dwelling-house, unless he objects to it on that account. Anonymous, 7 N. J. L. 160.

14. Griggsry Constr. Co. *v.* Freeman, 108 La. 435, 32 So. 399, 58 L. R. A. 349; Mussey *v.* White, 3 Me. 290; McMillan *v.* Carter, 6 Mont. 215, 9 Pac. 906.

15. State *v.* Cummings, 151 Mo. 49, 52 S. W. 29.

16. Winnisimmet Co. *v.* Chelsea, 6 Cush. (Mass.) 477; State *v.* Seahorn, 139 Mo. 582, 39 S. W. 809.

Where the record is silent, it will be assumed that the tax officers have complied with the statute requiring them to furnish taxpayers with a notice to furnish a list of taxable property. Masonic Education, etc., Trust *v.* Boston, 201 Mass. 320, 87 N. E. 602.

17. Brown *v.* State, 42 Ala. 540 (property of minor); Hennel *v.* Vanderburgh County, 132 Ind. 32, 31 N. E. 462 (insane person); Brooks *v.* West Springfield, 193 Mass. 190, 79 N. E. 337 (mortgaged land); Plattsburg School Dist. *v.* Bowman, 178 Mo. 654, 77 S. W. 880 (property of partnership).

The taxpayer need not make out the list if he furnishes the material or information for doing so to the assessor. People *v.* Quinn, 18 Cal. 122.

18. *California.*—Weyse *v.* Crawford, 85 Cal. 196, 24 Pac. 735, duty of warehouseman as to listing property stored with him.

Connecticut.—Brooks *v.* Hartford, 61 Conn. 112, 23 Atl. 697, holding that receivers of a corporation are not the "owners" of its property within the meaning of the statute.

Illinois.— Mason *v.* People, 51 Ill. App. 640.

Indiana.— Rieman *v.* Shepard, 27 Ind. 288, agent.

Missouri.— State *v.* Burr, 143 Mo. 209, 44 S. W. 1045, guardian of minor.

Nebraska.— Lincoln Transfer Co. *v.* Lancaster County Bd. of Equalization, 78 Nebr. 197, 110 N. W. 724.

New Hampshire.— Bell *v.* Sawyer, 59 N. H. 393, trustees.

South Carolina.— Pollitzer *v.* Beinkempen, 76 S. C. 517, 57 S. E. 475, administrator.

Texas.— State *v.* Fidelity, etc., Co., 35 Tex. Civ. App. 214, 80 S. W. 544, state treasurer as "agent or trustee" of foreign corporations depositing securities with him.

See 45 Cent. Dig. tit. "Taxation," § 554.

Where an agent refuses to disclose the name of his principal, the property may be assessed against the agent without giving the name of the owner. Security Sav. Bank *v.* Carroll, 131 Iowa 605, 109 N. W. 212; Lincoln Transfer Co. *v.* Lancaster County Bd. of Equalization, 78 Nebr. 197, 110 N. W. 724.

19. Wolfe County *v.* Beckett, 127 Ky. 252, 105 S. W. 447, 32 Ky. L. Rep. 167, 17 L. R. A. N. S. 688; Com. *v.* Hollidy, 98 Ky. 616, 33 S. W. 943, 17 Ky. L. Rep. 1159; Com. *v.* Engle, 52 S. W. 811, 21 Ky. L. Rep. 1019; Com. *v.* Ellis, 9 S. W. 221, 10 Ky. L. Rep. 341; Clinton *v.* Krull, 125 N. Y. App. Div. 157, 111 N. Y. Suppl. 105.

But in Massachusetts and New Hampshire the statutes do not apply to non-residents. Hopkins *v.* Reading, 170 Mass. 568, 49 N. E. 923; Carpenter *v.* Dalton, 58 N. H. 615.

20. Braxton *v.* Rich, 47 Fed. 178.

Ratification of unauthorized act of stranger in listing property see Warren *v.* Wentworth, 45 N. H. 564.

21. Los Angeles *v.* Los Angeles City Water Co., 137 Cal. 699, 70 Pac. 770; Royer Wheel Co. *v.* Taylor County, 104 Ky. 741, 47 S. W. 876, 20 Ky. L. Rep. 904; Com. *v.* Ellis, 9 S. W. 221, 10 Ky. L. Rep. 341; Russell *v.* Green, 10 Okla. 340, 62 Pac. 817.

Lists held insufficient see Allen *v.* McKay, (Cal. 1902) 70 Pac. 8; Winnisimmet Co. *v.* Chelsea, 6 Cush. (Mass.) 477; Peebles *v.* Taylor, 121 N. C. 38, 27 S. E. 999.

An assessment of land by the assessor is not invalid because the owner's agent did not comply with the statute in listing the land. Ward *v.* Wentz, 130 Ky. 705, 113 S. W. 892.

Evidence of return of list see State *v.* Hoyt, 123 Mo. 348, 27 S. W. 382.

22. Com. *v.* Lauth, 56 S. W. 519, 22 Ky. L. Rep. 4; King *v.* Hatfield, 130 Fed. 564.

the different kinds or classes of taxable personalty, but only gives the aggregate amount or valuation, is fatally defective.[23] If the forms or blanks sent out call for items of information not required by the statute, the taxpayer cannot be held delinquent for failing to furnish such items.[24] Directions as to the time when, or within which, the list must be returned, are generally applied with strictness.[25]

e. Property to Be Included and Valuation. The statutes commonly make the tax year begin on a certain date, so that the property which the taxpayer is required to list is that which he owned on that date;[26] and he must include all his taxable property according to its nature, and the directions of the statute,[27] including property out of the state but having its *situs* for the purpose of taxation at his own domicile,[28] and, if the law so requires, bonds or other securities of the United States.[29] The value of the property, or of each item or class, must also be stated if required by the statute,[30] merchants and manufacturers being ordinarily required to state the average value of their stock during the year.[31] But

23. New Canaan *v.* Hoyt, 23 Conn. 148; Bell *v.* Lexington, 120 Ky. 199, 85 S. W. 1081, 27 Ky. L. Rep. 591; Troy Cotton, etc., Manufactory *v.* Fall River, 167 Mass. 517, 46 N. E. 99; Clarke *v.* Tinkham, 20 R. I. 790, 38 Atl. 926. But *compare* State *v.* Emshwiller, 6 Blackf. (Ind.) 76; Lexington *v.* Lafayette County Bank, 165 Mo. 671, 65 S. W. 943.

Property in two counties.— An owner of cattle running in two counties must make return to the assessors of both counties, showing the number he owned running in each. Price *v.* Kramer, 4 Colo. 546. And a similar rule applies to land lying in two counties. Com. *v.* Toncray, 52 S. W. 797, 21 Ky. L. Rep. 572.

24. Stark County Bank *v.* McGregor, 6 Ohio St. 45.

Furnishing blanks, by the assessor to the owner, on which to return his property for taxation, and the assessor's reception from the owner of a verified return, are not conditions precedent to a valid assessment. Younger *v.* Meadows, 63 W. Va. 275, 59 S. E. 1087.

25. Com. *v.* Gatliff, 132 Ky. 95, 116 S. W. 263; Otis County *v.* Ware, 8 Gray (Mass.) 509; Porter *v.* Norfolk County, 5 Gray (Mass.) 365; Pauli *v.* Seward, 4 C. Pl. (Pa.) 137; Matteson *v.* Warwick, etc., Water Co., 28 R. I. 570, 68 Atl. 577. See also Georgia R., etc., Co. *v.* Wright, 125 Ga. 589, 54 S. E. 52, as to allowing time for making return after dissolution of an injunction whereby such return was forbidden.

To justify a failure to furnish a list at the time appointed, the taxpayer must show that he was unable to offer it at that time, and the fact that he in good faith supposed he was a non-resident, and had been so regarded by the assessors for a series of years, does not justify his omission to furnish the list, if in fact he was a resident and liable to taxation as such. Edwards Mfg. Co. *v.* Farrington, 102 Me. 140, 66 Atl. 309.

26. Swann *v.* State, 77 Ala. 545; Johnson *v.* Lyon, 106 Ill. 64.

27. Coventry County *v.* Coventry Assessors of Taxes, 16 R. I. 240, 14 Atl. 877 (holding that the taxpayer must return all his taxable property, not merely the value of its surplus over his debts); Webb *v.* Ritter, 60 W. Va. 193, 54 S. E. 484 (holding that an invalid sale of land for non-payment of taxes does not excuse the owner from listing it for taxation).

Particular applications of text: As to choses in action see Adams *v.* Clarke, 80 Miss. 134, 31 So. 216. As to standing trees see Callahan *v.* Dean Tie Co., 92 S. W. 582, 29 Ky. L. Rep. 142. The "year's income" means the income of the preceding year and not of the current year. State *v.* Elfe, 3 Strobh. (S. C.) 395. In the case of an annuity, its present worth according to the life tables, and not the annual payment, is the amount to be listed. Com. *v.* Nute, 115 Ky. 239, 72 S. W. 1090, 24 Ky. L. Rep. 2138. The owner of a bonded warehouse must report the removal of spirits therefrom. Peacock Distilling Co. *v.* Com., 110 Ky. 597, 62 S. W. 272, 22 Ky. L. Rep. 1948.

Sufficiency of description of property see Com. *v.* Gatliff, 132 Ky. 95, 116 S. W. 263; Eastern Kentucky Coal Lands Corp. *v.* Com., 127 Ky. 667, 106 S. W. 260, 108 S. W. 1138, 32 Ky. L. Rep. 129, 33 Ky. L. Rep. 49; Sullivan *v.* Boston, 198 Mass. 119, 84 N. E. 443; Norris *v.* Delaware, etc., R. Co., 218 Pa. St. 88, 66 Atl. 1122.

Property exempt from taxation need not be listed. Whitely *v.* Arbogast, 29 Ohio Cir. Ct. 595.

28. Com. *v.* Hays, 8 B. Mon. (Ky.) 1.

Situs of intangible personal property for purpose of taxation see *supra*, III, A, 5, b.

Evidence of situs.— The statement in an objection to an assessment or in court that the *situs* of money, notes, and credits is such that they are not subject to taxation in the state is not evidence thereof. Singer Mfg. Co. *v.* Denver, 46 Colo. 50, 103 Pac. 294.

29. Shotwell *v.* Moore, 45 Ohio St. 632, 16 N. E. 470 [*affirmed* in 129 U. S. 590, 9 S. Ct. 362, 32 L. ed. 827]; Sherard *v.* Lindsay, 13 Ohio Cir. Ct. 315, 7 Ohio Cir. Dec. 245. *Compare* Ogden *v.* Walker, 59 Ind. 460.

30. See the statutes of the several states.

In Maine the "true and perfect list" which the statute requires the taxpayer to bring in need not specify values. Orland *v.* County Com'rs, 76 Me. 460.

31. See the statutes of the several states. And see Dean *v.* Solon, 97 Iowa 303, 66

a return by the taxpayer that he has no ratable personal property and owns none of the property mentioned in the statute is sufficient, if such be the fact.[32]

f. Statement of Debts to Be Deducted. Where the taxpayer is allowed to deduct his debts from the value of his taxable property, he is required to state such debts in his tax return;[33] and if he fails to do so no deduction can be claimed or allowed, but he will be taxable on his entire property.[34]

g. Verification of List.[35] Where the law requires the taxpayers' lists to be verified by oath or affidavit, an unverified list is of no effect; it does not bind the assessors, and does not benefit the property-owner;[36] and this is also true if the affidavit is in a form which does not comply with the directions of the statute.[37] But the failure of the assessors to require taxpayers to verify their lists will not vitiate the entire levy or assessment.[38]

h. Conclusiveness and Effect. A taxpayer is bound and estopped by his own statements as to the nature, title, and value of his property, made in the list which he returns for taxation,[39] although of course he can prejudice no one else by listing property which he does not own,[40] nor can he make such a list a foundation for a title.[41] On the other hand, the list is not absolutely conclusive on the assessors;

N. W. 182; Sebastian *v.* Ohio Candle Co., 27 Ohio St. 459; Perry County *v.* Moeller, 11 Ohio 428.

32. *In re* Newport Reading Room, 21 R. I. 440, 44 Atl. 511.

33. *Illinois.*— Morris *v.* Jones, 150 Ill. 542, 37 N. E. 928.

Indiana.—Matter *v.* Campbell, 71 Ind. 512. See also Moore *v.* Hewitt, 147 Ind. 464, 46 N. E. 905.

Minnesota.— State *v.* Nelson, 107 Minn. 319, 119 N. W. 1058.

New Hampshire.— Wiggin *v.* Colebrook, 57 N. H. 107.

New Jersey.— State *v.* Warner, (Sup. 1891) 22 Atl. 341; Conover *v.* Honce, 46 N. J. L. 347; Appleby *v.* East Brunswick Tp., 44 N. J. L. 153; Shreve *v.* Crosley, 36 N. J. L. 425; Forst *v.* Parker, 34 N. J. L. 71; Tatum *v.* McChesney, 34 N. J. L. 63; Young *v.* Parker, 34 N. J. L. 49; Perkins *v.* Bishop, 34 N. J. L. 45; Mount *v.* Parker, 32 N. J. L. 341; Warne *v.* Johnson, 30 N. J. L. 452.

South Dakota.—*In re* Assessment of Taxes, 4 S. D. 6, 54 N. W. 818.

Vermont.— Sprague *v.* Fletcher, 69 Vt. 69, 37 Atl. 239, 37 L. R. A. 840.

See 45 Cent. Dig. tit. "Taxation," § 557.

34. Morris *v.* Jones, 150 Ill. 542, 37 N. E. 928; State *v.* Nelson, 107 Minn. 319, 119 N. W. 1058; Mount *v.* Parker, 32 N. J. L. 341; Warne *v.* Johnson, 30 N. J. L. 452. *Compare* Moore *v.* Hewitt, 147 Ind. 464, 46 N. E. 905, holding that a taxpayer does not lose his right to the benefit of the deduction by omitting credits from his schedule, at the direction of the assessor, to whom he stated the true amounts thereof, and who told him that it was not his practice to insert them in the schedule.

35. **Authentication of tax rolls** see *infra*, VI, E, 6.

36. Buckingham *v.* State, 17 Ind. 305; State *v.* Lenfesty, 10 Ind. 397; Burns *v.* State, 5 Ind. App. 385, 31 N. E. 547; Lee *v.* Com., 6 Dana (Ky.) 311; Port Colden Bldg., etc., Assoc. *v.* Nunn, 44 N. J. L. 354; Lawrence *v.* Janesville, 46 Wis. 364, 1 N. W. 338, 50 N. W. 1102.

Who may verify list.— The oath must be made by the person whose property is concerned, unless the statute authorizes him to act in this matter by an agent or attorney. Corporations may be represented by an agent, but his authorization must be in due form and sufficiently shown. Narragansett Pier Co. *v.* Narragansett Dist. Tax Assessors, 17 R. I. 452, 23 Atl. 11.

Who may administer oath.— A township assessor has authority to administer oaths to persons in verification of their tax lists. State *v.* Reynolds, 108 Ind. 353, 9 N. E. 287.

37. Newell *v.* Whitingham, 58 Vt. 341, 2 Atl. 172.

Sufficiency of affidavit see People *v.* Quinn, 18 Cal. 122 (affidavit need not be in writing); Arnold *v.* Middletown, 41 Conn. 206; Lanesborough *v.* Berkshire County, 131 Mass. 424.

38. Gratwick, etc., Lumber Co. *v.* Oscoda, 97 Mich. 221, 56 N. W. 600; Lynam *v.* Anderson, 9 Nebr. 367, 2 N. W. 732.

39. Waterbury *v.* O'Loughlin, 79 Conn. 630, 66 Atl. 173; Guilford Union School Dist. *v.* Bishop, 76 Conn. 695, 58 Atl. 13, 66 L. R. A. 989; Tampa *v.* Mugge, 40 Fla. 326, 24 So. 489; Tolman *v.* Raymond, 202 Ill. 197, 66 N. E. 1086; Dennison *v.* Williamson County, 153 Ill. 516, 39 N. E. 118; People *v.* Atkinson, 103 Ill. 45; State *v.* Cooper, 59 Wis. 666, 18 N. W. 438. But *compare* Milford Water Co. *v.* Hopkinton, 192 Mass. 491, 78 N. E. 451; Troy Cotton, etc., Manufactory *v.* Fall River, 167 Mass. 517, 46 N. E. 99; Chicago, etc., R. Co. *v.* Cass County, 51 Nebr. 369, 70 N. W. 955; Brown *v.* French, 80 Fed. 166, in which cases no estoppel was held to arise from the listing of property which in reality was not taxable, or in which an erroneous valuation was given.

40. Com. *v.* Hamilton, 72 S. W. 744, 24 Ky. L. Rep. 1944.

41. Urket *v.* Coryell, 5 Watts & S. (Pa.) 60.

they should accept it as true if they have no ground to doubt its correctness; but if they are not satisfied of its accuracy, they may conduct an investigation as to the extent and value of the person's property, and may increase his assessment on satisfactory proof that the list was not correct,[42] provided he has been given notice and opportunity to be heard.[43] But this cannot be done on mere surmise or where there is no ground in the evidence to fix a valuation different from that sworn to by the owner.[44]

i. Addition of Omitted Property.[45] Items of taxable property omitted from a taxpayer's sworn list may be added by the assessor on discovering their existence and taxability;[46] but this should only be done on notice to the taxpayer and giving him an opportunity to explain the omission or contest the liability of the property to taxation.[47]

3. Proceedings on Failure to Return List or Making False List[48] **— a. Right and Duty of Assessor to Ascertain and Value Property — (i) *In General.***[49] If the taxpayer neglects or refuses to return the sworn list of his taxable property required of him by statute, or makes a false or insufficient list, it usually is the right and duty of the assessor to proceed to ascertain the nature and extent of that person's taxable property from the best sources of information at his com-

42. *Georgia.*— Georgia R., etc., Co. *v.* Wright, 124 Ga. 596, 53 S. E. 251.

Illinois.— Felsenthal *v.* Johnson, 104 Ill. 21.

Kentucky.— Baldwin *v.* Shine, 84 Ky. 502, 2 S. W. 164, 8 Ky. L. Rep. 496.

Massachusetts.—Lanesborough *v.* Berkshire County, 131 Mass. 124; Hall *v.* Middlesex County, 10 Allen 100; Newburyport *v.* Essex County, 12 Metc. 211.

Michigan.— Bowman *v.* Montcalm Cir. Judge, 129 Mich. 608, 89 N. W. 334.

Missouri.— State *v.* Spencer, 114 Mo. 574, 21 S. W. 837.

Nevada.— State *v.* Central Pac. R. Co., 10 Nev. 47; State *v.* Kruttschnitt, 4 Nev. 178.

New Jersey.—Newton Trust Co. *v.* Atwood, 77 N. J. L. 141, 71 Atl. 110.

New York.—People *v.* Halsey, 37 N. Y. 344 [*affirming* 53 Barb. 547, 36 How. Pr. 487].

Oregon.— Oregon, etc., Mortg. Sav. Bank *v.* Jordan, 16 Oreg. 113, 17 Pac. 621.

Vermont.— Fulham *v.* Howe, 60 Vt. 351, 14 Atl. 652.

West Virginia.— Younger *v.* Meadows, 63 W. Va. 275, 59 S. E. 1087.

Wisconsin.—State *v.* Gaylord, 73 Wis. 306, 41 N. W. 518; Lawrence *v.* Janesville, 46 Wis. 364, 1 N. W. 338, 50 N. W. 1102; Matheson *v.* Mazomanie, 20 Wis. 191.

See 45 Cent. Dig. tit. "Taxation," § 562. And see *infra*, VI, C, 6, a, (IV).

43. State *v.* Spencer, 114 Mo. 574, 21 S. W. 837, even though the statute does not require such notice. And see cases cited *supra*, note 42.

44. Gibson *v.* Clark, 131 Iowa 325, 108 N. W. 527; People *v.* Reddy, 43 Barb. (N. Y.) 539.

Where a return of personalty shows valid indebtedness in excess of the value of the personalty, an assessment notwithstanding such return is erroneous. People *v.* Odell, 129 N. Y. App. Div. 475, 114 N. Y. Suppl. 199.

45. Omissions from tax rolls see *infra*, VI, E, 9.

46. *Arkansas.*— Kinsworthy *v.* Mitchell, 21 Ark. 145.

California.— Rosasco *v.* Tuolumne County, 143 Cal. 430, 77 Pac. 148; Henne *v.* Los Angeles County, 129 Cal. 297, 61 Pac. 1081.

Indiana.— Gallup *v.* Schmidt, (1899) 54 N. E. 384.

Kansas.— Johnson County *v.* Hewitt, 76 Kan. 816, 93 Pac. 181, 14 L. R. A. N. S. 493, holding that where omitted property is duly valued and the proper amount of taxes thereon charged against the owner, the failure of the county clerk to correct the assessor's return does not vitiate the tax.

Minnesota.— Thompson *v.* Tinkcom, 15 Minn. 295.

Nebraska.— Roe *v.* St. John, 7 Nebr. 139.

Ohio.— Cameron *v.* Cappeller, 41 Ohio St. 533.

Pennsylvania.— Baugh *v.* Elkin, 24 Pa. Co. Ct. 203.

United States.— Askamp *v.* Lewis, 103 Fed. 906.

See 45 Cent. Dig. tit. "Taxation," § 563.

But *compare* Tores *v.* Rowan County Justices, 6 N. C. 167.

Taxpayer's right of appeal from a judgment listing omitted property for taxation see Com. *v.* Adams Express Co., 124 Ky. 85, 98 S. W. 288, 30 Ky. L. Rep. 309.

47. Moors *v.* Boston Street Com'rs, 134 Mass. 431; Ware *v.* Bradbury, 29 Fed. Cas. No. 17,168, 3 Sumn. 186. See also Com. *v.* Adams Express Co., 124 Ky. 85, 98 S. W. 288, 30 Ky. L. Rep. 309. But *compare* Rosasco *v.* Tuolumne, 143 Cal. 430, 77 Pac. 148; Wabash, etc., R. Co. *v.* Johnson, 108 Ill. 11.

48. Effect of failure to make list or statement of property on right of review see *infra*, VII, B, 3, c.

Penalties for failure to make list or making false list see *infra*, XV, A, 3, b.

49. Notice or demand as condition precedent to assessment of property on failure to list see *supra*, VI, C, 2, b.

mand, and to place a valuation upon it according to his own best judgment and knowledge.[50]

(II) *Examination of Witnesses and Inspection of Books.* Under the statutes in some of the states the tax assessor has authority, when he disbelieves a sworn list of property returned to him by a taxpayer, or on default of such list, to summon before him the taxpayer or third persons and examine them under oath;[51] and also has the right to examine the books and papers of taxpayers, including corporations, for the same purpose,[52] and mandamus lies to compel their production.[53]

b. Criminal Prosecution. In some states, a taxpayer who refuses to return a list of his taxable property, or who makes a false and fraudulent return, is liable to indictment and punishment as for a misdemeanor, provided his action was intentional and sprang from a wilful design to escape or evade taxation.[54]

50. *Alabama.*— Lott *v.* Hubbard, 44 Ala. 593.

California.— Bode *v.* Holtz, 65 Cal. 106, 3 Pac. 495.

Illinois.—Cummins *v.* Webber, 218 Ill. 521, 75 N. E. 1041.

Kentucky.— Com. *v.* Southern Pac. Co., 127 Ky. 358, 105 S. W. 466, 468, 32 Ky. L. Rep. 259, 285, 239 (holding that a proceeding before the board of tax supervisors by the revenue agent for the state at large to obtain the listing of property for taxation is not the institution of a suit under St. (1903) § 4241, authorizing a suit to compel the listing of property for taxation); Clark *v.* Belknap, 13 S. W. 212, 11 Ky. L. Rep. 791 (holding that the assessor does not himself list the property on the taxpayer's refusal to do so, but reports the fact to the supervisors).

Louisiana.— State *v.* Louisiana Mut. Ins. Co., 19 La. Ann. 474.

Massachusetts.— Noyes *v.* Hale, 137 Mass. 266.

Missouri.— State *v.* Carr, 178 Mo. 229, 77 S. W. 543; State *v.* Seahorn, 139 Mo. 582, 39 S. W. 809.

Montana.— McMillan *v.* Carter, 6 Mont. 215, 9 Pac. 906.

Nebraska.— Lincoln Transfer Co. *v.* Lancaster County Bd. of Equalization, 78 Nebr. 197, 110 N. W. 724.

New Jersey.—Reese *v.* Sherrer, 49 N. J. L. 610, 10 Atl. 286, procedure in case of absentee having in his charge property belonging to others.

New Mexico.— Valencia County *v.* Atchison, etc., R. Co., 3 N. M. 380, 10 Pac. 294.

North Carolina.— North Carolina R. Co. *v.* Alamance, 77 N. C. 4.

Ohio.—Robinson *v.* Ward, 13 Ohio St. 293.

Texas.— Moody *v.* Galveston, 21 Tex. Civ. App. 16, 50 S. W. 481.

Vermont.—Smith *v.* Stannard, 81 Vt. 319, 70 Atl. 568; Buchanan *v.* Cook, 70 Vt. 168, 40 Atl. 102.

Wisconsin.— Wauwatosa *v.* Gunyon, 25 Wis. 271.

United States.— Custer County *v.* Anderson, 68 Fed. 341, 15 C. C. A. 471.

See 45 Cent. Dig. tit. "Taxation," § 565.

Where an assessor disbelieves sworn statements made to him in making an assessment, he must return the information inducing such disbelief, so that the court may understand on what he acted. People *v.* Dederick, 25 Misc. (N. Y.) 539, 55 N. Y. Suppl. 40 [*affirmed* in 41 N. Y. App. Div. 617, 58 N. Y. Suppl. 1146 (*modified* in 161 N. Y. 195, 55 N. E. 927)].

Assessment by clerk of court.— A statute of Kentucky authorizes the county court, in a proceeding against a taxpayer for failing to list his property, to direct its clerk to assess the property; and it is held that lapse of time is no bar to the proceeding. Louisville, etc., R. Co. *v.* Com., 85 Ky. 198, 3 S. W. 139, 8 Ky. L. Rep. 840.

51. See the statutes of the several states. And see the following cases: People *v.* Mills Nat. Bank, 123 Cal. 53, 55 Pac. 685, 69 Am. St. Rep. 32, 45 L. R. A. 747; Burns *v.* State, 5 Ind. App. 385, 31 N. E. 547; Trigg *v.* Glasgow, 2 Bush (Ky.) 594.

52. Washington Nat. Bank *v.* Daily, 166 Ind. 631, 77 N. E. 53; Co-operative Bldg., etc., Assoc. *v.* State, 156 Ind. 463, 60 N. E. 146; State *v.* Workingmen's Bldg., etc., Fund, etc., Assoc., 152 Ind. 278, 53 N. E. 168; Miller *v.* Cincinnati First Nat. Bank, 46 Ohio St. 424, 21 N. E. 860.

53. See MANDAMUS, 26 Cyc. 364 note 48.

54. See the statutes of the several states. And see the following cases: Smith *v.* State, 43 Ala. 344; Brown *v.* State, 42 Ala. 540; State *v.* Washoe County, 5 Nev. 317; Miller *v.* Cincinnati First Nat. Bank, 46 Ohio St. 424, 21 N. E. 860.

In Indiana a taxpayer may be prosecuted by indictment where there is a failure or refusal to return any list at all, but not where a list is returned, although it is a false and fraudulent one. Durham *v.* State, 116 Ind. 514, 19 N. E. 329.

Defense.— It is no defense to a prosecution against a person for failing to give in a list of his taxable property that the same property was given in by another. Olds *v.* Com., 3 A. K. Marsh. (Ky.) 465.

Time for indictment or information in such a case see Com. *v.* Hollidy, 98 Ky. 616, 33 S. W. 943, 17 Ky. L. Rep. 1159; Galbraith *v.* State, 33 Tex. Cr. 331, 26 S. W. 502; Mock *v.* State, 11 Tex. App. 56.

Sufficiency of indictment or information in such a prosecution see Durham *v.* State, (Ind. 1888) 17 N. E. 629; Lose *v.* State, 72

c. Penal Action to Impose Fine. It is provided under some of the statutes that a taxpayer who neglects or refuses to return a list of his taxable property shall be reported as delinquent, and may thereupon be brought before a proper court by summons and a fine imposed on him.[55]

4. Determination as to Taxable Persons and Property — a. In General. The selection of the subjects for taxation is a legislative power, and the assessing or valuing officers usually have no discretion in that regard;[56] but it is generally the duty of the assessor or other proper officer or board to investigate and determine questions as to the nature and classification of particular persons or property with reference to taxation, the liability of such person or property to taxation,[57] and the ownership of the property,[58] although his decision is not final or conclusive.[59]

b. Records or Paper Title. In determining who is the owner of particular property the assessor is justified in relying on what he finds on the public records, and is not required to investigate the validity of any conveyance or go behind the records to search out secret transfers.[60] Thus a tax title fair on its face and

Ind. 285; Peacock Distilling Co. *v.* Com., 110 Ky. 597, 62 S. W. 272, 22 Ky. L. Rep. 1948; Alexander *v.* Com., 1 Bibb (Ky.) 515 (holding that a prosecution against a person "for failing to give in a true list of his property subject to taxation" is bad for uncertainty); Com. *v.* Engle, 52 S. W. 811, 21 Ky. L. Rep. 1019 (holding that an indictment which charges the offense substantially in the language of the statute is sufficient); Com. *v.* Singer Mfg. Co., 21 S. W. 354, 14 Ky. L. Rep. 732; State *v.* Welch, 28 Mo. 600 (holding that an indictment for delivering to the assessor a fraudulent list of property should allege in what respect the list of taxable property delivered is false or fraudulent, and state in terms of general description, at least, the taxable property owned by defendant and fraudulently omitted in the list delivered); Caldwell *v.* State, 14 Tex. App. 171; Haugh *v.* State, 12 Tex. App. 343; Berry *v.* State, 10 Tex. App. 315.

Admissibility of evidence under such an indictment see Olds *v.* Com., 3 A. K. Marsh. (Ky.) 465.

Sufficiency of evidence to sustain such an indictment see Goodman *v.* People, 90 Ill. App. 533; State *v.* Ebbs, 89 Mo. App. 95.

55. See the statutes of the several states. And see State *v.* Halter, 149 Ind. 292, 47 N. E. 665, 49 N. E. 7; State *v.* Hilgendorf, 23 Ind. App. 207, 55 N. E. 102; Spalding *v.* Com., 88 Ky. 135, 10 S. W. 420, 10 Ky. L. Rep. 714; Louisville, etc., Mail Co. *v.* Barbour, 88 Ky. 73, 9 S. W. 516, 10 Ky. L. Rep. 836; Louisville, etc., R. Co. *v.* Com., 85 Ky. 198, 3 S. W. 139, 8 Ky. L. Rep. 840 (sufficiency of summons); Evans *v.* Com., 13 Bush (Ky.) 269 (summons held insufficient); Vance *v.* Com., 3 Bush (Ky.) 465 (summons held insufficient); Chiles *v.* Com., 4 J. J. Marsh. (Ky.) 577; Com. *v.* Morehead, 78 S. W. 1105, 25 Ky. L. Rep. 1927; Fleming *v.* Sinclair, 58 S. W. 370, 22 Ky. L. Rep. 499; Com. *v.* Toncray, 52 S. W. 797, 21 Ky. L. Rep. 572; Butler *v.* Watkins, 27 S. W. 995, 16 Ky. L. Rep. 302 (on the filing of a proper information).

56. Johnson County *v.* Johnson, (Ind. 1909) 89 N. E. 590.

57. State *v.* Hannibal, etc., R. Co., 97 Mo. 348, 10 S. W. 436; Bell *v.* Pierce, 51 N. Y. 12 (holding that assessors have jurisdiction to determine whether a person domiciled in a town for portions of each year and owning property situated therein is or is not an inhabitant of that town for the purposes of personal taxation); Buffalo, etc., R. Co. *v.* Erie County, 48 N. Y. 93 (holding that whether land is to be assessed as resident or non-resident land is to be decided by the assessors).

58. Desmond *v.* Babbitt, 117 Mass. 233; Campbell *v.* Wilson, 1 Watts (Pa.) 503.

A tax collector is not required to examine what title a party has to land which is assessed to him for taxation. Cooper *v.* Holmes, 71 Md. 20, 17 Atl. 711.

59. State *v.* Hannibal, etc., R. Co., 97 Mo. 348, 10 S. W. 436, holding that, although the state board is empowered to assess toll bridges, its determination that a bridge is a toll bridge is not conclusive. *Compare* Central Trust Co. *v.* Wabash, etc., R. Co., 27 Fed. 14.

In Kentucky the county court acts judicially in determining whether property is subject to assessment, and its determination that property is not so subject is conclusive on the commonwealth, unless reversed on appeal. Com. *v.* Churchill, 131 Ky. 251, 115 S. W. 189.

Exempt property.— A tax assessor has no authority to assess land which is exempt from taxation, and hence his action in determining that it is not so used as to bring it within the exemption is not conclusive. Portland University *v.* Multnomah County, 31 Oreg. 498, 50 Pac. 532.

60. *Connecticut.*— Jones *v.* Bridgeport, 36 Conn. 283.

Iowa.— Cranston *v.* McQuiston, 127 Iowa 104, 102 N. W. 785.

Kentucky.— Fish *v.* Genett, 56 S. W. 813, 22 Ky. L. Rep. 177.

Louisiana.— Williams *v.* Chaplain, 112 La. 1075, 36 So. 859; Geddes *v.* Cunningham, 104 La. 306, 29 So. 138; Palmer *v.* Board of Assessors, 42 La. Ann. 1122, 8 So. 487; Gee *v.* Clark, 42 La. Ann. 918, 8 So. 627; Mason *v.* Bemiss, 38 La. Ann. 935.

Massachusetts.—Butler *v.* Stark, 139 Mass.

suffered to remain unquestioned on the records of deeds is a sufficient basis for an assessment for taxation, whether the title is valid or not.[61] So the validity of a lease of property cannot be questioned by the assessor, but it must be treated as binding and the assessment made with reference thereto.[62]

c. Inspection of Property. An assessment is not invalidated by the fact that the assessors did not actually view and inspect the property in question, if they have otherwise sufficient knowledge or evidence of its existence and value.[63]

d. Determination as to Place of Taxation. It is also within the province of an assessor to determine, in the first instance at least, the *situs* of particular property for the purpose of taxation,[64] and although his decision may be erroneous the assessment is not for that reason void.[65] And these rules also apply in regard to the apportionment by the assessor or other proper officers of railroad or other similar property for the purpose of its assessment in the various counties which it traverses.[66]

5. Mode of Assessment as Dependent on Nature or Ownership of Property[67] — **a. In General.** The rules and principles for the assessment of property for taxation may vary according to whether it is real or personal estate, the statutes sometimes making a distinction between these two classes not quite identical with that recognized by the common law,[68] and, in the case of real estate, whether

19, 29 N. E. 213; Forster *v.* Forster, 129 Mass. 559.

Missouri.—Wilcox *v.* Phillips, 199 Mo. 288, 97 S. W. 886; Nolan *v.* Taylor, 131 Mo. 224, 32 S. W. 1144.

New Hampshire.—Benton *v.* Merrill, 68 N. H. 369, 39 Atl. 257.

Virginia.—Stevenson *v.* Henkle, 100 Va. 591, 42 S. E. 672.

Wisconsin.—Finney *v.* Boyd, 26 Wis. 366.

United States.—State Trust Co. *v.* Chehalis County, 79 Fed. 282, 24 C. C. A. 584; The North Cape, 18 Fed. Cas. No. 10,316, 6 Biss. 505.

See 45 Cent. Dig. tit. "Taxation," § 537.

61. Ashley Co. *v.* Bradford, 109 La. 641, 33 So. 634; Denegre *v.* Buchanan, 47 La. Ann. 1559, 18 So. 501; Augusti *v.* Citizens' Bank, 46 La. Ann. 529, 15 So. 74; Prescott *v.* Payne, 44 La. Ann. 650, 11 So. 140. But *compare* McWilliams *v.* Michel, 43 La. Ann. 984, 10 So. 11.

62. *In re* Long Beach Land Co., 106 N. Y. App. Div. 253, 94 N. Y. Suppl. 282 [*reversed* on other grounds in 182 N. Y. 489, 79 N. E. 533].

63. *Arkansas.*—Moore *v.* Turner, 43 Ark. 243.

Michigan.—Sawyer-Goodman Co. *v.* Crystal Falls, 56 Mich. 597, 23 N. W. 334.

New Hampshire.—Dewey *v.* Stratford, 42 N. H. 282.

New York.—McMahon *v.* Palmer, 102 N. Y. 176, 6 N. E. 400, 55 Am. Rep. 796 [*affirming* 12 Daly 362].

Vermont.—Weatherhead *v.* Guilford, 62 Vt. 327, 19 Atl. 717.

Wisconsin.—Boorman *v.* Juneau County, 76 Wis. 550, 45 N. W. 675. But see Hersey *v.* Barron County, 37 Wis. 75.

See 45 Cent. Dig. tit. "Taxation," § 532.

64. Keokuk, etc., Bridge Co. *v.* People, 161 Ill. 132, 43 N. E. 691; Van Wagenen *v.* Lyon County, 74 Iowa 716, 39 N. W. 105; *In re* Stahl, 1 Lanc. L. Rev. (Pa.) 329.

65. Van Wagenen *v.* Lyon County, 74 Iowa 716, 39 N. W. 105.

66. State Auditor *v.* Jackson County, 65 Ala. 142; Indiana, etc., R. Co. *v.* People, 154 Ill. 558, 39 N. E. 133; Ohio, etc., R. Co. *v.* People, 119 Ill. 207, 10 N. E. 545; Wilson *v.* Weber, 96 Ill. 454 [*affirming* 3 Ill. App. 125]; State *v.* Stone, 119 Mo. 668, 25 S. W. 211; Hannibal, etc., R. Co. *v.* State Bd. of Equalization, 64 Mo. 294; Wabash, etc., R. Co. *v.* Kelsey, 9 Ohio Dec. (Reprint) 227, 11 Cinc. L. Bul. 234.

67. **Liability of persons and property in general as dependent on ownership or possession** see *supra*, III, A, 3.

Nature of property as affecting place of taxation see *supra*, V, C.

Nature of property liable to taxation see *supra*, III, A, 2.

Ownership of property as affecting place of taxation see *supra*, V, D.

68. Richards *v.* Wapello County, 48 Iowa 507; Steere *v.* Walling, 7 R. I. 317.

Land and buildings separately owned see People *v.* Brooklyn Bd. of Assessors, 93 N. Y. 308; People *v.* New York Tax Com'rs, 82 N. Y. 459; People *v.* Tax, etc., Com'rs, 80 N. Y. 573. And see *supra*, III, A, 2, b, (v).

Machinery and fixtures in mills and factories see Sprague *v.* Lisbon, 30 Conn. 18. And see *supra*, III, A, 2, b, (VI).

Water power used by its owner in connection with his mill should be assessed as incident to the machinery, although the mill and machinery stand idle, and although it is his intention that they shall remain permanently so. Hazard Powder Co. *v.* Enfield, 80 Conn. 486, 69 Atl. 16.

A tax assessed jointly on real and personal property is void. Stark *v.* Shupp, 112 Pa. St. 395, 3 Atl. 864.

Separate pieces of personalty.—A statute providing that in assessing personal property the different classes of personalty enumerated therein shall be assessed at their

it is the title in fee which is to be assessed or a lesser interest, easement, appurtenance, or usufruct,[69] or the interest of a mortgagee.[70] So also there are different rules for the assessment of land according to whether it is occupied or unseated, improved or unimproved.[71] If property which is taxable and that which is not are mingled together in one assessment against the same person, the assessment as a whole is invalid.[72]

b. Unoccupied or Unseated Land. In several of the states the statutes make a distinction between "seated" or "occupied" lands and those which are "unseated" or "unoccupied," requiring those of the one class to be separately assessed from those of the other, or even to be placed on a different list, or directing that they shall be differently described, or requiring the assessment to be made in the name of the owner in the one case but not in the other. Whatever the distinction, it is regarded as imperative; so that an assessment of seated or occupied land as unseated or unoccupied, or *vice versa*, is invalid.[73] The principle of the classification varies under the statutes in the different states; but the general theory is that

value does not require that the separate value of each piece shall be given in the assessment. Wright *v.* San Antonio, (Tex. Civ. App. 1899) 50 S. W. 406.

69. **Possessory rights in land** see Reily *v.* Lancaster, 39 Cal. 354; State *v.* Moore, 12 Cal. 56.

Lands under water see Newaygo Portland Cement Co. *v.* Sheridan Tp., 137 Mich. 475, 100 N. W. 747; Jersey City *v.* State Bd. of Assessors, 73 N. J. L. 164, 63 Atl. 21.

Riparian and other water rights see *supra*, III, A, 2, b, (III).

Mines and minerals.— Minerals in the earth are real estate, and when the owner of them has not the fee to the surface of the land, they should be separately assessed and taxed. Cherokee, etc., Coal, etc., Co. *v.* Crawford County, 71 Kan. 276, 80 Pac. 601; Sanderson *v.* Scranton, 105 Pa. St. 469; Interstate Coal, etc., Co. *v.* Com., 103 Va. 586, 49 S. E. 974. And see, generally, *supra*, III, A, 2, b, (II).

Right to cut and remove timber see Ward *v.* Echo Tp., 145 Mich. 56, 108 N. W. 364; Clove Spring Iron Works *v.* Cone, 56 Vt. 603. And as to assessment and taxation of crops and timber generally see *supra*, III, A, 2, b, (VII).

Undivided interest in lands or minerals underlying land see Toothman *v.* Courtney, 62 W. Va. 167, 58 S. E. 915.

In Illinois under Hurd Rev. St. (1905) c. 120, § 60, when a leasehold estate in exempt property is taxable to the lessee, it must be taxed as real estate and not as personal property. People *v.* International Salt. Co., 233 Ill. 223, 84 N. E. 278.

70. Chicago, etc., R. Co. *v.* State, 128 Wis. 553, 108 N. W. 557. And as to taxation of mortgages generally see *supra*, III, A, 2, c, (V), (C).

71. Southern Banking, etc., Co. *v.* Wilcox Lumber Co., 119 Ga. 519, 46 S. E. 668. And see *infra*, VI, C, 5, b.

72. East Tennessee, etc., R. Co. *v.* Morristown, (Tenn. Ch. App. 1895) 35 S. W. 771. But *compare* Morris Canal, etc., Co. *v.* Haight, 35 N. J. L. 178.

In Illinois where lands of a sanitary district, parts of which are leased and subject to taxation, while other parts are exempt as being used solely for a public purpose, are assessed and taxed as a whole, the tax is not for that reason invalid, since it is the duty of the district to make known to the assessing officers what proportion is used for a public purpose. Chicago Sanitary Dist. *v.* Hanberg, 226 Ill. 480, 80 N. W. 1012.

73. *Georgia.*—Brown *v.* Powell, 85 Ga. 603, 11 S. E. 866.

Maine.— Barker *v.* Hesseltine, 27 Me. 354; Shimmin *v.* Inman, 26 Me. 228; Brown *v.* Veazie, 25 Me. 359; Lunt *v.* Wormell, 19 Me. 100.

Massachusetts.— Desmond *v.* Babbitt, 117 Mass. 233; Rising *v.* Granger, 1 Mass. 48.

Michigan.— Seymour *v.* Peters, 67 Mich. 415, 35 N. W. 62; Hanscom *v.* Hinman, 30 Mich. 419; Rayner *v.* Lee, 20 Mich. 384.

Nebraska.—Alexander *v.* Hunter, 29 Nebr. 259, 45 N. W. 461.

New Hampshire.— Thompson *v.* Ela, 60 N. H. 562; Perley *v.* Stanley, 59 N. H. 587; Bowles *v.* Clough, 55 N. H. 389.

New York.—Ritter *v.* Worth, 58 N. Y. 627; Newell *v.* Wheeler, 48 N. Y. 486; Whitney *v.* Thomas, 23 N. Y. 281; Dike *v.* Lewis, 2 Barb. 344.

Pennsylvania.— Miller *v.* McCullough, 104 Pa. St. 624; Jackson *v.* Stoetzel, 87 Pa. St. 302; Greenough *v.* Fulton Coal Co., 74 Pa. St. 486; Bechdle *v.* Lingle, 66 Pa. St. 38; Wells *v.* Smyth, 55 Pa. St. 159; Hathaway *v.* Elsbree, 54 Pa. St. 498; Miller *v.* Gorman, 38 Pa. St. 309; Milliken *v.* Benedict, 8 Pa. St. 169; Wilson *v.* Watterson, 4 Pa. St. 214; Bernhard *v.* Allen, 10 Pa. Cas. 274, 14 Atl. 42; Meyhart *v.* Forkston Tp., 5 Leg. Gaz. 407.

Canada.— Gemmel *v.* Sinclair, 1 Manitoba 85; Cotter *v.* Sutherland, 18 U. C. C. P. 357.

See 45 Cent. Dig. tit. "Taxation," § 572.

Mode of assessment in Pennsylvania.— It is a sufficient assessment of unseated land if it is so described as to warn the owner thereof that it is his land which is assessed. Putnam *v.* Tyler, 117 Pa. St. 570, 12 Atl. 43; Dunden *v.* Snodgrass, 18 Pa. St. 151; Thompson *v.* Fisher, 6 Watts & S. 520; Dunn *v.* Ralyea, 6 Watts & S. 475; Harper *v.* McKeehan, 3 Watts & S. 238.

the question of occupancy or non-occupancy is one of fact rather than of intention, and that entry upon the land, not merely transient, but of a more or less permanent character, and either for the purpose of residence or of cultivation, makes it "seated" land.[74] Once having this character, it is presumed to continue seated until a change is shown.[75] But an entire and permanent abandonment of the premises, suffering the land to return to its native wild state, will transform it again from seated to unseated property.[76]

c. Lands of Non-Residents. Where lands of a non-resident owner are required to be separately classed or assessed from those of resident owners, the observance of this direction is essential to the validity of the assessment.[77] As non-resident lands are not usually required to be assessed to the true owner, a mistake in the name is not material;[78] but they must be described with such certainty and particularity that they may readily be identified.[79]

d. Separate Parcels of Land. The statutory requirement, now practically universal, that each separate and distinct parcel of land shall be separately valued and assessed, is imperative; and an assessment of a joint tax on two parcels of land belonging to different owners is entirely invalid,[80] and the same rule applies

74. *Georgia.*— Southern Banking, etc., Co. *v.* Wilcox Lumber Co., 119 Ga. 519, 46 S. E. 668.

Michigan.— Burroughs *v.* Goff, 64 Mich. 464, 31 N. W. 273.

New York.— Joslyn *v.* Pulver, 59 Hun 129, 13 N. Y. Suppl. 311 [*affirmed* in 128 N. Y. 334, 28 N. E. 604].

Pennsylvania.— Stoetzel *v.* Jackson, 105 Pa. St. 562; Arthurs *v.* King, 95 Pa. St. 167; Jackson *v.* Stoetzel, 87 Pa. St. 302; Watson *v.* Davidson, 87 Pa. St. 270; George *v.* Messinger, 73 Pa. St. 418; Biddle *v.* Noble, 68 Pa. St. 279; Lackawanna Iron, etc., Co. *v.* Fales, 55 Pa. St. 90; Altemose *v.* Hufsmith, 45 Pa. St. 121; Green *v.* Watson, 34 Pa. St. 332; Jackson *v.* Sassaman, 29 Pa. St. 106; Ellis *v.* Hall, 19 Pa. St. 292; Wilson *v.* Watterson, 4 Pa. St. 214; Wallace *v.* Scott, 7 Watts & S. 248; Mitchell *v.* Bratton, 5 Watts & S. 451; Forster *v.* McDivit, 5 Watts & S. 359; McCall *v.* Yople, 4 Watts & S. 168; McCall *v.* Himebaugh, 4 Watts & S. 164; McCall *v.* Coover, 4 Watts & S. 151; Patterson *v.* Blackmore, 9 Watts 104; Kennedy *v.* Daily, 6 Watts 269; Fish *v.* Brown, 5 Watts 441; Sheaffer *v.* McKabe, 2 Watts 421; Campbell *v.* Wilson, 1 Watts 503; Winton Coal Co. *v.* Lackawanna County, 1 Lack. Leg. N. 195; Arthurs *v.* Bascom, 28 Leg. Int. 284.

Canada.— Toronto Bank *v.* Fanning, 17 Grant Ch. (U. C.) 514.

See 45 Cent. Dig. tit. "Taxation," § 181.

Cultivation of part of an undivided tract of land will render the whole seated. Campbell *v.* Wilson, 1 Watts (Pa.) 503; Arthurs *v.* Bascom, 28 Leg. Int. (Pa.) 284.

Temporary residence of a trespasser to take off timber will not fix upon a tract of land the character of seated land after he has left it, so as to authorize its assessment for taxes as such. Lackawanna Iron, etc., Co. *v.* Fales, 55 Pa. St. 90.

Where a tract of land is divided and a part thereof sold to a purchaser who occupies it, the residue assessed in the name of the original warrantee is subject to sale for taxes as unseated land. Campbell *v.* Wilson, 1 Watts (Pa.) 503.

75. Stewart *v.* Trevor, 56 Pa. St. 374; Arthurs *v.* Smathers, 38 Pa. St. 40; Negley *v.* Breading, 32 Pa. St. 325; McKibbin *v.* Charlton, 14 Pa. St. 128; Milliken *v.* Benedict, 8 Pa. St. 169; Harbeson *v.* Jack, 2 Watts (Pa.) 124.

76. Arthurs *v.* King, 84 Pa. St. 525; Stewart *v.* Trevor, 56 Pa. St. 374; Arthurs *v.* Smathers, 38 Pa. St. 40; Negley *v.* Breading, 32 Pa. St. 325; Harbeson *v.* Jack, 2 Watts (Pa.) 124; Arthurs *v.* Bascom, 28 Leg. Int. (Pa.) 284.

77. Randall *v.* Watson, 70 N. H. 236, 46 Atl. 688; Langley *v.* Batchelder, 69 N. H. 566, 46 Atl. 1085; Perley *v.* Stanley, 59 N. H. 587; Joslyn *v.* Rockwell, 128 N. Y. 334, 28 N. E. 604; Stewart *v.* Crysler, 100 N. Y. 378, 3 N. E. 471; Schreiber *v.* Long Island R. Co., 127 N. Y. App. Div. 286, 111 N. Y. Suppl. 123; Turner *v.* Boyce, 11 Misc. (N. Y.) 502, 33 N. Y. Suppl. 433.

"Occupancy" of timber land, within the meaning of a statute allowing land to be assessed as non-resident only where there is not an owner or "occupant" of it residing in the taxing district see Clark *v.* Kirkland, 133 N. Y. App. Div. 826, 118 N. Y. Suppl. 315.

Where there is a resident owner of an undivided interest in land to whom his interest at least should be assessed, the assessment of the land as non-resident land is void. Clark *v.* Kirkland, 133 N. Y. App. Div. 826, 118 N. Y. Suppl. 315.

78. Sewell *v.* Watson, 31 La. Ann. 589; Alvord *v.* Collin, 20 Pick. (Mass.) 418. But *compare* Thompson *v.* Ela, 60 N. H. 562.

79. Orono *v.* Veazie, 61 Me. 431; French *v.* Patterson, 61 Me. 203; Brown *v.* Dinsmoor, 3 N. H. 103; Thompson *v.* Burhans, 61 N. Y. 52; Tallman *v.* White, 2 N. Y. 66.

80. *California.*— Terrill *v.* Groves, 18 Cal. 149.

Illinois.— Howe *v.* People, 86 Ill. 288; Roby *v.* Chicago, 48 Ill. 130.

Kansas.— Challiss *v.* Hekelnkaemper, 14 Kan. 474.

Louisiana.— George *v.* Cole, 109 La. 816, 33 So. 784; Waggoner *v.* Maumus, 112 La.

where the two parcels are owned by the same person,[81] unless the assessment may be saved by the aid of a statute curing defects and irregularities,[82] or unless the

229, 36 So. 332; Howcott *v.* Fifth Louisiana Levee Dist., 46 La. Ann. 322, 14 So. 848. And see Head *v.* Howcott Land Co., 119 La. 331, 44 So. 117.

Maine.— Barker *v.* Blake, 36 Me. 433.

Maryland.— See Hill *v.* Williams, 104 Md. 595, 65 Atl. 413.

Massachusetts.— Lancy *v.* Boston, 186 Mass. 128, 71 N. E. 302; Jennings *v.* Collins, 99 Mass. 29, 96 Am. Dec. 687; Hayden *v.* Foster, 13 Pick. 492.

Michigan.— Auditor-Gen. *v.* Ayer, 122 Mich. 136, 80 N. W. 997; Cooley *v.* Waterman, 16 Mich. 366.

Minnesota.— Farnham *v.* Jones, 32 Minn. 7, 19 N. W. 83.

Mississippi.— Dunn *v.* Winston, 31 Miss. 135. But see Moores *v.* Thomas, (1909) 48 So. 1025, holding that the provision of the Code (1906), § 4283, that all subdivisions of a section shall be set down, if they belong to different persons, is merely directory, and that an assessment *in solido* of two tracts of land belonging to different individuals does not invalidate the assessment.

Nebraska.— Hart *v.* Murdock, 80 Nebr. 274, 114 N. W. 268; Spiech *v.* Tierney, 56 Nebr. 514, 76 N. W. 1090.

North Dakota.— State Finance Co. *v.* Browdle, 16 N. D. 193, 112 N. W. 76; State Finance Co. *v.* Beck, 15 N. D. 374, 109 N. W. 357; Roberts *v.* Fargo First Nat. Bank, 8 N. D. 504, 79 N. W. 1049.

Ohio.—Douglas *v.* Dangerfield, 10 Ohio 152.

Pennsylvania.— Fisk *v.* Corey, 141 Pa. St. 334, 21 Atl. 594; McLaughlin *v.* Kain, 45 Pa. St. 113.

Virginia.— Douglas Co. *v.* Com., 97 Va. 397, 34 S. E. 52.

Wisconsin.— Neu *v.* Voege, 96 Wis. 489, 71 N. W. 880; Towne *v.* Salentine, 92 Wis. 404, 66 N. W. 395; Siegel *v.* Outagamie County, 26 Wis. 70; Orton *v.* Noonan, 25 Wis. 672; Knox *v.* Huidekoper, 21 Wis. 527; State *v.* Williston, 20 Wis. 228.

See 45 Cent. Dig. tit. "Taxation," §§ 574, 575.

Joint owners.—Where two different persons own distinct parcels of the same lot of land, in severalty, it cannot properly be assessed to them as joint owners. Romig *v.* Lafayette, 33 Ind. 30; Knox *v.* Huidekoper, 21 Wis. 527.

Unknown owners.— The rule stated in the text applies also where the owners of realty are unknown; separate lots or parcels must be separately assessed and taxed. Shimmin *v.* Inman, 26 Me. 228.

Apportionment of taxes.— It is implied in the rule stated in the text that, the joint assessment being void, there can be no apportionment of the tax between the owners jointly assessed for it. But in Michigan this is otherwise by statute. See Kneeland *v.* Hull, 116 Mich. 55, 74 N. W. 300.

Building covering several lots.— Where a building covers several lots belonging to different owners, it is held proper, in New York, to include all the lots in one assessment, instead of assessing a certain amount against the owner of each lot. People *v.* Feitner, 169 N. Y. 604, 62 N. E. 1099 [*affirming* 65 N. Y. pp. Div. 318, 73 N. Y. Suppl. 97].

81. *Alabama.*— Walker *v.* Chapman, 22 Ala. 116.

California.— People *v.* Hollister, 47 Cal. 408.

Florida.— McKeown *v.* Collins, 38 Fla. 276, 21 So. 103.

Illinois.— Howe *v.* People, 86 Ill. 288.

Indiana.— Cockrum *v.* West, 122 Ind. 372, 23 N. E. 140. See Parker *v.* Wayne County, 56 Ind. 38.

Iowa.— Martin *v.* Cole, 38 Iowa 141.

Kansas.— See Spalding *v.* Watson, 35 Kan. 39, 10 Pac. 105.

Maine.— Nason *v.* Ricker, 63 Me. 381.

Maryland.— Allegany County *v.* Union Min. Co., 61 Md. 545.

Massachusetts.— Sandwich *v.* Fish, 2 Gray 298; Hayden *v.* Foster, 13 Pick. 492.

Michigan.— Wright *v.* Dunham, 13 Mich. 414.

Nebraska.— Dundy *v.* Richardson County, 8 Nebr. 508, 1 N. W. 565.

Nevada.— Peers *v.* Reed, 23 Nev. 404, 48 Pac. 897; Wright *v.* Cradlebaugh, 3 Nev. 341.

New York.— May *v.* Traphagen, 139 N. Y. 478, 34 N. E. 1064 [*reversing* 19 N. Y. Suppl. 679]; Bennett *v.* Kovarick, 23 Misc. 73, 51 N. Y. Suppl. 752; Litchfield *v.* Brooklyn, 13 Misc. 693, 34 N. Y. Suppl. 1090; French *v.* Whittlesey, 30 N. Y. Suppl. 363.

North Dakota.— Griffin *v.* Denison Land Co., (1908) 119 N. W. 1041.

Pennsylvania.— Fisk *v.* Corey, 141 Pa. St. 334, 21 Atl. 594; Insurance Co. *v.* Yard, 17 Pa. St. 338.

Rhode Island.—Mowry *v.* Slatersville Mills, 20 R. I. 94, 37 Atl. 538; Taylor *v.* Narragansett Pier Co., 19 R. I. 123, 33 Atl. 519; Evans *v.* Newell, 18 R. I. 38, 25 Atl. 347; Young *v.* Joslin, 13 R. I. 675.

Texas.— McCombs *v.* Rockport, 14 Tex. Civ. App. 560, 37 S. W. 988. *Compare* Guerguin *v.* San Antonio, (Civ. App. 1899) 50 S. W. 140.

Wisconsin.— Neu *v.* Voege, 96 Wis. 489, 71 N. W. 880.

United States.— French *v.* Edwards, 13 Wall. 506, 20 L. ed. 702.

Canada.— Reed *v.* Smith, 1 Manitoba 341; Wildman *v.* Tait, 32 Ont. 274; Aston *v.* Innis, 26 Grant Ch. (U. C.) 42.

See 45 Cent. Dig. tit. "Taxation," § 574.

Taxable and non-taxable property.— If two parcels of land are wrongfully assessed together, and one is not taxable, the tax on that, if paid under protest, may be recovered back. St. Mary's Church *v.* Tripp, 14 R. I. 307.

82. *Massachusetts.*— Sargent *v.* Bean, 7 Gray 125.

owner estops himself to allege its illegality, by listing and valuing the property himself in the manner adopted by the assessors,[83] or by acquiescing in it.[84] The rule means that two or more disconnected parcels or tracts shall not be assessed together; [85] and it applies in general to the lots into which city or town blocks or squares are divided,[86] although in some states a block belonging wholly to one person may be assessed as a single parcel,[87] and so may contiguous lots, tracts, or parcels of town or country land held by the same person under the same title, especially if occupied or used together as an entirety.[88]

e. Necessity of Assessment to Owner [89] — (i) *In General.* Statutes requiring real property to be listed and assessed in the name of the owner are mandatory, not merely directory; and an assessment made in the name of one who is not the owner of the property, when the true owner is known or, by the

Missouri.— Phelps *v.* Brumback, 107 Mo. App. 16, 80 S. W. 678.

Pennsylvania.— Russel *v.* Werntz, 24 Pa. St. 337.

West Virginia.— Duerr *v.* Snodgrass, 58 W. Va. 472, 52 S. E. 531; Boggess *v.* Scott, 48 W. Va. 316, 37 S. E. 661.

United States.— Davis *v.* McGee, 28 Fed. 867.

See 45 Cent. Dig. tit. "Taxation," § 574.

But *compare* Hamilton *v.* Fond du Lac, 25 Wis. 490.

83. Albany Brewing Co. *v.* Meriden, 48 Conn. 243; Kissimmee City *v.* Drought, 26 Fla. 1, 7 So. 525, 23 Am. St. Rep. 546; Warwick, etc., Water Co. *v.* Carr, 24 R. I. 226, 52 Atl. 1030; Harris *v.* Houston, 21 Tex. Civ. App. 432, 52 S. W. 653; Turner *v.* Houston, 21 Tex. Civ. App. 214, 51 S. W. 642; San Antonio *v.* Raley, (Tex. Civ. App. 1895) 32 S. W. 180; Dallas Title, etc., Co. *v.* Oak Cliff, 8 Tex. Civ. App. 217, 27 S. W. 1036.

84. Cobban *v.* Hinds, 23 Mont. 338, 59 Pac. 1.

85. Spellman *v.* Curtenius, 12 Ill. 409; Hayden *v.* Foster, 13 Pick. (Mass.) 492.

86. *Montana.*— North Real Estate L. & T. Co. *v.* Billings L & T. Co., 36 Mont. 356, 93 Pac. 40, disconnected town lots.

Nevada.— Wright *v.* Cradlebaugh, 3 Nev. 341.

New York.— Bennett *v.* Kovarick, 44 N. Y. App. Div. 629, 60 N. Y. Suppl. 1133.

Oklahoma.— Frazier *v.* Prince, 8 Okla. 253, 58 Pac. 751.

Texas.— State *v.* Baker, 49 Tex. 763; Houston *v.* Stewart, 40 Tex. Civ. App. 499, 90 S. W. 49, holding that unless the several lots of a taxpayer are used together for one purpose and as one piece of property, he is entitled to have each lot assessed separately.

Wisconsin.— Neu *v.* Voege, 96 Wis. 489, 71 N. W. 880.

Canada.— Black *v.* Harrington, 12 Grant Ch. (U. C.) 175.

See 45 Cent. Dig. tit. "Taxation," §§ 574, 575.

Owner's division to be followed.— In a municipality a large body of land under a single title must either be assessed as a whole or, if it has been subdivided by those who own it, the plan of subdivision must be respected; the assessor cannot divide it up as he thinks it might or ought to be. Appeal of Belin, 4 Lack. Leg. N. (Pa.) 295. See also Sullivan *v.* Boston, 198 Mass. 119, 84 N. E. 443.

87. Jacobs *v.* Buckalew, 4 Ariz. 351, 42 Pac. 619; People *v.* Culverwell, 44 Cal. 620; People *v.* Morse, 43 Cal. 534; Thatcher *v.* People, 79 Ill. 597; Sparks *v.* Clark, 57 Mo. 58.

88. *Idaho.*— Co-Operative Sav., etc., Assoc. *v.* Green, 5 Ida. 660, 51 Pac. 770.

Iowa.— Weaver *v.* Grant, 39 Iowa 294; Martin *v.* Cole, 38 Iowa 141.

Kansas.— Edwards *v.* Sims, 40 Kan. 235, 19 Pac. 710; Dodge *v.* Emmons, 34 Kan. 732, 9 Pac. 951.

Michigan.— John Duncan Land, etc., Co. *v.* Rusch, 145 Mich. 1, 108 N. W. 494.

Missouri.— Yeaman *v.* Lepp, 167 Mo. 61, 66 S. W. 957.

Nebraska.— Spiech *v.* Tierney, 56 Nebr. 514, 76 N. W. 1090.

Nevada.— Wright *v.* Cradlebaugh, 3 Nev. 341.

North Carolina.— Hairston *v.* Stinson, 35 N. C. 479.

North Dakota.— Griffin *v.* Denison Land Co., (1908) 119 N. W. 1041, holding that the word "contiguous," as used in a statutory provision allowing such assessment, means land which touches on the sides, and that two quarter sections of the same section which only touch at the corners, no parts of the sides being common, do not constitute, for the purpose of taxation, one tract of land, and their assessment as such is void.

Pennsylvania.— Russell *v.* Werntz, 24 Pa. St. 337; Harper *v.* McKeehan, 3 Watts & S. 238.

West Virginia.— Winning *v.* Eakin, 44 W. Va. 19, 28 S. E. 757.

United States.— New York Guaranty, etc., Co. *v.* Tacoma R., etc., Co., 93 Fed. 51, 35 C. C. A. 192.

See 45 Cent. Dig. tit. "Taxation," §§ 574, 575.

The assessment of a lot as a whole includes a parcel forming a part of it. Rio Grande Western R. Co. *v.* Salt Lake Inv. Co., 35 Utah 528, 101 Pac. 586.

89. Designation of owner by name in tax list or assessment roll see *infra*, VI, E, 3.

Determination of ownership by assessors see *supra*, VI, C, 4, a, b.

exercise of ordinary care, could be discovered, is generally invalid and will not support any proceedings for the enforcement of the tax,[90] unless such error is cured by

90. *Alabama.*— Crook *v.* Anniston City Land Co., 93 Ala. 4, 9 So. 425.

California.— Emeric *v.* Alvarado, 90 Cal. 444, 27 Pac. 356; Klumpke *v.* Baker, 68 Cal. 559, 10 Pac. 197; Bosworth *v.* Webster, 64 Cal. 1, 27 Pac. 786; Hearst *v.* Egglestone, 55 Cal. 365; People *v.* Castro, 39 Cal. 65; Kelsey *v.* Abbott, 13 Cal. 609. But see *infra*, VI, C, 5, e, (IV).

Connecticut.—Smith *v.* Read, 51 Conn. 10, holding that under the laws of New York requiring real estate to be assessed in the name of the "owner or occupant," an assessment is void which names the husband as the owner of real estate belonging to his wife, where he lives separately from her and is not an occupant of the property.

Florida.— Hughey *v.* Winborne, 44 Fla. 601, 33 So. 249; Stackpole *v.* Hancock, 40 Fla. 362, 24 So. 914, 45 L. R. A. 814; McKeown *v.* Collins, 38 Fla. 276, 21 So. 103; L'Engle *v.* Wilson, 21 Fla. 461; L'Engle *v.* Florida Cent., etc., R. Co., 21 Fla. 353.

Iowa.— See Clifton Heights Land Co. *v.* Randell, 82 Iowa 89, 47 N. W. 905.

Kentucky.— Johnson *v.* McIntire, 1 Bibb 295; Spaulding *v.* Thompson, 30 S. W. 20, 16 Ky. L. Rep. 836; Wheeler *v.* Bramel, 8 S. W. 199, 10 Ky. L. Rep. 301. *Compare* Com. *v.* Kinniconick, etc., R. Co., 104 S. W. 290, 31 Ky. L. Rep. 859.

Louisiana.— *In re* Sheehy, 119 La. 608, 44 So. 315; Slattery *v.* Heilperin, 110 La. 86, 34 So. 139; Lockhart *v.* Smith, 47 La. Ann. 121, 16 So. 660; Maspereau *v.* New Orleans, 38 La. Ann. 400; Le Blanc *v.* Blodgett, 34 La. Ann. 107; Lague *v.* Boagni, 32 La. Ann. 912; Workingmen's Bank *v.* Lannes, 30 La. Ann. 871; Thibodaux *v.* Keller, 29 La. Ann. 508; Sutton *v.* Calhoun, 14 La. Ann. 209.

Maine.— Barker *v.* Blake, 36 Me. 433.

Massachusetts.— Rogers *v.* Gookin, 198 Mass. 434, 85 N. E. 405 ("to the person who is either the owner or in possession"); Sargent *v.* Bean, 7 Gray 125 (holding that an assessment to one who is neither the owner nor in possession is erroneous).

Michigan.— Mann *v.* Carson, 120 Mich. 631, 79 N. W. 941; Pieotter *v.* Whaley, 80 Mich. 257, 45 N. W. 81.

Mississippi.— Redmond *v.* Banks, 60 Miss. 293; Green *v.* Craft, 28 Miss. 70; Baskins *v.* Doe, 24 Miss. 431.

Missouri.— St. Louis *v.* Wenneker, 145 Mo. 230, 47 S. W. 105, 68 Am. St. Rep. 561; Jefferson *v.* Mock, 74 Mo. 61; Hume *v.* Wainscott, 46 Mo. 145; Abbott *v.* Lindenbower, 42 Mo. 162.

New Hampshire.— Perham *v.* Haverhill Fibre Co., 64 N. H. 2, 3 Atl. 312; Thompson *v.* Ela, 60 N. H. 562; Thompson *v.* Gerrish, 57 N. H. 85.

New Jersey.— State *v.* Vanderbilt, 33 N. J. L. 38.

New York.— Ritter *v.* Worth, 58 N. Y. 627; Newell *v.* Wheeler, 48 N. Y. 486; Whitney *v.* Thomas, 23 N. Y. 281; Clark *v.* Kirkland, 133 N. Y. App. Div. 826, 118 N. Y. Suppl. 315 (to resident owner); Loomis *v.* Semper, 38 Misc. 567, 78 N. Y. Suppl. 74. *Compare* Haight *v.* New York, 99 N. Y. 280, 1 N. E. 883.

North Dakota.— The provisions of Comp. Laws (1887), § 1548, relating to this subject were held to be mandatory. Sweigle *v.* Gates, 9 N. D. 538, 84 N. W. 481; Roberts *v.* Fargo First Nat. Bank, 8 N. D. 504, 79 N. W. 1049. But it is now held that the provisions of Laws (1897), p. 256, c. 126, on this point, are merely directory. Sykes *v.* Beck, 12 N. D. 242, 96 N. W. 844; Hertzler *v.* Freeman, 12 N. D. 187, 96 N. W. 294.

Oregon.— Bradford *v.* Durham, 54 Oreg. 1, 101 Pac. 897 (holding that land should be assessed to the holder of the apparent legal title, and that an assessment otherwise is void); Martin *v.* White, 53 Oreg. 319, 100 Pac. 290 (should be assessed in the owner's name if known or ascertainable); Ferguson *v.* Kaboth, 43 Oreg. 414, 73 Pac. 200, 74 Pac. 466; Dowell *v.* Portland, 13 Oreg. 248, 10 Pac. 308.

Pennsylvania.— Safe Deposit, etc., Co. *v.* Fricke, 152 Pa. St. 231, 25 Atl. 530; Hamaker *v.* Whitecar, 1 Walk. 120.

Tennessee.— Anderson *v.* Post, (Ch. App. 1896) 38 S. W. 283.

Texas.— Yenda *v.* Wheeler, 9 Tex. 408.

Vermont.— Bemis *v.* Phelps, 41 Vt. 1; Moss *v.* Hinds, 29 Vt. 188.

Washington.— Vestal *v.* Morris, 11 Wash. 451, 39 Pac. 960; Bear *v.* Choir, 7 Wash. 631, 32 Pac. 776, 36 Pac. 286.

West Virginia.— Boggess *v.* Scott, 48 W. Va. 316, 37 S. E. 661; Cunningham *v.* Brown, 39 W. Va. 588, 20 S. E. 615.

Wisconsin.— Milwaukee Iron Co. *v.* Hubbard, 29 Wis. 51; State *v.* Williston, 20 Wis. 228.

Wyoming.— Hecht *v.* Boughton, 2 Wyo. 385.

United States.— Rich *v.* Braxton, 158 U. S. 375, 15 S. Ct. 1006, 35 L. ed. 1022 [*affirming* 47 Fed. 178]; Bird *v.* Benlisa, 142 U. S. 664, 12 S. Ct. 323, 35 L. ed. 1151; Washington *v.* Pratt, 8 Wheat. 681, 5 L. ed. 714; Flannagan *v.* Dunne, 105 Fed. 828, 45 C. C. A. 81; Northern Pac. R. Co. *v.* Galvin, 85 Fed. 811; Tracey *v.* Reed, 38 Fed. 69, 13 Sawy. 622, 2 L. R. A. 773; Greenwalt *v.* Tucker, 8 Fed. 792, 3 McCrary 166; Stansbury *v.* Taggart, 22 Fed. Cas. No. 13,292, 3 McLean 457.

Canada.— Reg. *v.* Germantown Lake Dist. Sewer Com'rs, 12 N. Brunsw. 341; Coleman *v.* Kerr, 27 U. C. Q. B. 5. See also South Norfolk *v.* Warren, 8 Manitoba 481.

See 45 Cent. Dig. tit. "Taxation," §§ 696, 701.

But *compare* Kinsworthy *v.* Mitchell, 21 Ark. 145; Union Trust Co. *v.* Weber, 96 Ill. 346; Stilz *v.* Indianapolis, 81 Ind. 582; Lynam *v.* Anderson, 9 Nebr. 367, 2 N. W. 732.

Assessment to agent instead of owner see Meyer *v.* Trubee, 59 Conn. 422, 22 Atl. 424;

statute.[91] Exceptions, however, are commonly made by statute in the case of unseated or non-resident lands;[92] and an assessment made to one not the owner may also be validated by acquiescence, so far that the principle of estoppel will apply.[93]

(II) *Unknown Owners.* If the ownership of particular parcels of realty cannot be discovered, the statutes commonly permit their assessment to "unknown owners," and the assessment will then be as valid as if made to individuals by name.[94] When an assessment is made in this form, it is presumed that the officers performed their duty in endeavoring to ascertain who was the owner and that he really was unknown to them.[95] But if the name of the owner was in fact known to the assessor, or could have been discovered by an examination of the public records, an assessment to "unknown owners" cannot be sustained;[96] and these statutes give no authority for an assessment to a named person "and all owners and claimants known and unknown;" and such an assessment is void.[97]

Welles *v.* Battelle, 11 Mass. 477; Fowler *v.* Springfield, 64 N. H. 108, 5 Atl. 770.

An assessment to a husband of lands owned by his wife is void. Smith *v.* Read, 51 Conn. 10; *In re* Riddell, 116 N. Y. Suppl. 261.

An assessment to one who owns only a portion of a tract of land, of the entire tract as a single tract is void. Lyman *v.* People, 2 Ill. App. 289; Bradford *v.* Durham, 54 Oreg. 1, 101 Pac. 897.

Property sold to the state for the taxes of a certain year cannot be again sold at a later year as property of the tax debtor and not of the state, but should be separately assessed as the property of the state. Lisso *v.* Giddens, 117 La. 507, 41 So. 1029.

91. See *infra*, VI, C, 5, e, (IV).

92. Cottle *v.* Cary, 61 N. Y. App. Div. 66, 70 N. Y. Suppl. 129; Van Rensselaer *v.* Cottrell, 7 Barb. (N. Y.) 127; Thompson *v.* Fisher, 6 Watts & S. (Pa.) 520; Harper *v.* McKeechan, 3 Watts & S. (Pa.) 238; Strauch *v.* Shoemaker, 1 Watts & S. (Pa.) 166. And see *supra*, VI, C, 5, b.

93. McWilliams *v.* Michel, 43 La. Ann. 984, 10 So. 11; Wilbert *v.* Michel, 42 La. Ann. 853, 8 So. 607; Gordon *v.* Chiles, (Miss. 1892) 12 So. 146; Benton *v.* Merrill, 68 N. H. 369, 39 Atl. 257. And see Reinach *v.* New Orleans Imp. Co., 50 La. Ann. 497, 23 So. 455.

94. See the statutes of the several states. And see Crawford *v.* McLaurin, 83 Miss. 265, 35 So. 209. 949 (holding that if a taxpayer fails to list his land for taxation, as the law requires him to do, he cannot complain of its assessment to "unknown owners"); Powell *v.* McKee, 81 Miss. 229, 32 So. 919; Collins *v.* Long Island City, 10 N. Y. Suppl. 167 (holding that an assessment of land of a non-resident is not vitiated by being made to unknown owners); Koth *v.* Pallachucola Club, 79 S. C. 514, 61 S. E. 77 (holding also that a sale of land for taxes under an execution describing the owner as unknown conveys a good *prima facie* title); Shipley *v.* Gaffner, 48 Wash. 169, 93 Pac. 211 (holding that if the true owner is unknown to the assessor he may so state, and his statement is conclusive on the question).

But where a single lot is occupied as such by the owner, an assessment of a part of it to the owner and of other parts of it to unknown owners is illegal. Bidleman *v.* Brooks, 28 Cal. 72. And see Lewis *v.* Withers, 44 Fed. 165 [*affirmed* in 151 U. S. 545, 14 S. Ct. 424, 38 L. ed. 265].

95. *California.*— Stockton *v.* Dunham, 59 Cal. 608; Chambers *v.* Satterlee, 40 Cal. 497.

Illinois.— Merritt *v.* Thompson, 13 Ill. 716.

Iowa.— Corning Town Co. *v.* Davis, 44 Iowa 622.

Maine.— Brown *v.* Veazie, 25 Me. 359.

New Hampshire.— Smith *v.* Messer, 17 N. H. 420; Cardigan *v.* Page, 6 N. H. 182.

See 45 Cent. Dig. tit. "Taxation," § 700.

96. *Alabama.*— Oliver *v.* Robinson, 58 Ala. 46.

Florida.— Daniel *v.* Taylor, 33 Fla. 636, 15 So. 213.

Louisiana.— Robinson *v.* Williams, 45 La. Ann. 485, 12 So. 499; Rapp *v.* Lowry, 30 La. Ann. 1272; Sutton *v.* Calhoun, 14 La Ann. 209.

Maine.— Barker *v.* Hesseltine, 27 Me. 354.

Oregon.— Lewis *v.* Blackburn, 42 Oreg. 114, 69 Pac. 1024.

Wisconsin.— Crane *v.* Janesville, 20 Wis. 305.

See 45 Cent. Dig. tit. "Taxation," § 700.

Contra.— Corning Town Co. *v.* Davis, 44 Iowa 622; State *v.* Hurt, 113 Mo. 90, 20 S. W. 879; Shipley *v.* Gaffner, 48 Wash. 169, 93 Pac. 211.

Conflicting claims to title.— The statute does not require the assessor to decide conflicting claims of ownership, or incur the risk of a mistake; in case of reasonable doubt, the land may be taxed to unknown owners. French *v.* Spalding, 61 N. H. 395.

97. Jatunn *v.* O'Brien, 89 Cal. 57, 26 Pac. 635; Greenwood *v.* Adams, 80 Cal. 74, 21 Pac. 1134; Daly *v.* Ah Goon, 64 Cal. 512, 2 Pac. 401; Grimm *v.* O'Connell, 54 Cal. 522; Grotefend *v.* Ultz, 53 Cal. 666; Nichols *v.* McGlathery, 43 Iowa 189. But *compare* Brunn *v.* Murphy, 29 Cal. 326; O'Grady *v.* Barnhisel, 23 Cal. 287.

Heading of assessment roll.— The words, "To all owners and claimants, known and

(III) *Effect of Mistake in Name of Owner.* If the property is intended to be assessed in the name of the right owner, and the attempt is made to designate him correctly, the assessment will not be vitiated by a mistake in his name or by the addition of an unnecessary description, if it is not of such a character as to deceive or mislead him.[98] But an assessment is invalid if it is made in a name which is calculated to mislead or deceive the true owner, without his knowledge or consent.[99]

(IV) *Statutes Validating Assessments in Wrong Name.* In many states statutes have been enacted declaring that an assessment of taxes shall not be invalid because of a mere mistake in the designation of the name of the owner of the property, or because of the fact that the assessment was made without the owner's name or in a name other than that of the rightful owner.[1]

unknown," in the heading of an assessment roll, are an idle recital and do not vitiate the assessment. Basworth *v.* Webster, 64 Cal. 1, 27 Pac. 786; San Francisco *v.* Phelan, 61 Cal. 617.

98. *California.*— Klumpke *v.* Baker, 131 Cal. 80, 63 Pac. 137, 676; Houser, etc., Mfg. Co. *v.* Hargrove, 129 Cal. 90, 61 Pac. 660; Landregan *v.* Peppin, 86 Cal. 122, 24 Pac. 859; Lake County *v.* Sulphur Bank Quicksilver Min. Co., 68 Cal. 14, 8 Pac. 593. But see Emeric *v.* Alvarado, 90 Cal. 444, 27 Pac. 356 (holding that an assessment of lands owned by "Castro" to "Castero," was invalid); Crawford *v.* Schmidt, 47 Cal. 617 (holding that an assessment to an owner by his surname, leaving a blank for his given name, is void); People *v.* Whipple, 47 Cal. 591.

Illinois.— Lyle *v.* Jacques, 101 Ill. 644; Union Trust Co. *v.* Weber, 96 Ill. 346.

Iowa.— Kendig *v.* Knight, 60 Iowa 29, 14 N. W. 78.

Kentucky.— Woolley *v.* Louisville, 114 Ky. 556, 71 S. W. 893, 24 Ky. L. Rep. 1357; Joyes *v.* Louisville, 82 S. W. 432, 26 Ky. L. Rep. 713.

Louisiana.— Lavergne *v.* New Orleans, 28 La. Ann. 677.

Maine.— Bath *v.* Reed, 78 Me. 276, 4 Atl. 688.

Maryland.—O'Neal *v.* Virginia, etc., Bridge Co., 18 Md. 1, 79 Am. Dec. 669.

Michigan.— Menominee *v.* S. K. Martin Lumber Co., 119 Mich. 201, 77 N. W. 704; Detroit *v.* Macier, 117 Mich. 76, 75 N. W. 285; Hill *v.* Graham, 72 Mich. 659, 40 N. W. 779.

Nevada.— State *v.* Diamond Valley Live Stock, etc., Co., 21 Nev. 86, 25 Pac. 448.

New Hampshire.— Pierce *v.* Richardson, 37 N. H. 306.

New Jersey.— State *v.* Matthews, 40 N. J. L. 268; State *v.* Vanderbilt, 33 N. J. L. 38.

New York.— People *v.* Barker, 137 N. Y. 631, 33 N. E. 745 [*affirming* 21 N. Y. Suppl. 704]; Sanders *v.* Carley, 83 N. Y. App. Div. 193, 83 N. Y. Suppl. 106 [*affirmed* in 178 N. Y. 622, 70 N. E. 1108]; Van Voorhis *v.* Budd, 39 Barb. 479; *In re* Hartshorn, 17 N. Y. Suppl. 567. See also *In re* Medina, 52 Misc. 621, 103 N. Y. Suppl. 1018 [*affirmed* in 121 N. Y. App. Div. 929, 106 N. Y. Suppl. 1148].

Vermont.— Adams *v.* Sleeper, 64 Vt. 544, 24 Atl. 990.

Virginia.— Yellow Poplar Lumber Co. *v.* Thompson, 108 Va. 612, 62 S. E. 358.

Wisconsin.— Boyington Co. *v.* Southwick, 120 Wis. 184, 97 N. W. 903; Enos *v.* Bemis, 61 Wis. 656, 21 N. W. 812.

See 45 Cent. Dig. tit. "Taxation," §§ 696–701.

99. *Alabama.*— State Land Co. *v.* Mitchell, 162 Ala. 469, 50 So. 117 (holding that an assessment of land owned by and in possession of "Jack Mitchell" to "Jacob Mitchell" is void); State *v.* Sloss, 87 Ala. 119, 6 So. 309 (holding that an assessment against the "American Mortgage Company" will not support a judgment for the taxes so assessed against the agent of the "American Mortgage Company of Scotland").

Montana.— Birney *v.* Warren, 28 Mont. 64, 72 Pac. 293, holding that under Pol. Code, §§ 3700, 3707, a misnomer of the owner of personal property assessed as the property of a particular person vitiates the assessment, and that section 3916, which provides that when land is sold for taxes correctly imposed as the property of a particular person, no misnomer of the owner or supposed owner shall affect the sale, does not apply to personal property.

Pennsylvania.— Philadelphia *v.* Miller, 49 Pa. St. 440, holding that an assessment without any description or means of identification in the name of a person unknown in connection with any title or possession of the land is invalid.

Texas.— Pfeuffer *v.* Bondies, 42 Tex. Civ. App. 52, 93 S. W. 221, holding that an assessment to Joseph M. Meador was invalid as against land owned by Judson M. Meador.

West Virginia.—Collins *v.* Reger, 62 W. Va. 195, 57 S. E. 743, holding that an assessment in the name of Martha Hedrick of land belonging to Martha Helmick is invalid.

See 45 Cent. Dig. tit. "Taxation," §§ 696–701.

1. See the statutes of the several states. And see the following cases:

Arkansas.— Garibaldi *v.* Jenkins, 27 Ark. 453; Kinsworthy *v.* Mitchell, 21 Ark. 145; Merrick *v.* Hutt, 15 Ark. 331.

California.— Landregan *v.* Peppin, 86 Cal. 122, 24 Pac. 859; Pearson *v.* Creed, 69 Cal. 538, 11 Pac. 56; Glowner *v.* De Alvarez, 10

These laws are constitutional.[2] But under such statutes, the assessment, advertisement, and sale of land for taxes must be in the same name, whether that of the owner or not.[3]

f. Property of Partners and Joint Owners. The property of a copartnership should be assessed to it in the firm-name.[4] Real property belonging to several persons as joint tenants or tenants in common should be assessed to them jointly, giving the names of all;[5] and an assessment to one of the joint owners by name, with or without the addition "*et al.*," is generally insufficient.[6]

g. Property of Decedents' Estates. Personal property of a decedent's estate is to be assessed in the name of his executor or administrator.[7] But real property as a general rule should be assessed to the decedent's heirs at law by name,[8] and

Cal. App. 194, 101 Pac. 432; Ogden Commercial Nat. Bank *v.* Schlitz, 6 Cal. App. 174, 91 Pac. 750.

Illinois.— Union Trust Co. *v.* Weber, 96 Ill. 346.

Indiana.— Helms *v.* Wagner, 102 Ind. 385, 1 N. E. 730; Schrodt *v.* Deputy, 88 Ind. 90; Stilz *v.* Indianapolis, 81 Ind. 582; Fell *v.* West, 35 Ind. App. 20, 73 N. E. 719.

Massachusetts.— Westhampton *v.* Searle, 127 Mass. 502; Tyler *v.* Hardwick, 6 Metc. 470.

Michigan.— Loud, etc., Lumber Co. *v.* Hagar, 118 Mich. 452, 76 N. W. 980; Iron Star Co. *v.* Wehse, 117 Mich. 487, 76 N. W. 66; Bradley *v.* Bouchard, 85 Mich. 18, 48 N. W. 208; Michigan Dairy Co. *v.* McKinley, 70 Mich. 574, 38 N. W. 469.

Montana.— Cobban *v.* Hinds, 23 Mont. 338, 59 Pac. 1.

Nebraska.— Lynam *v.* Anderson, 9 Nebr. 367, 2 N. W. 732.

New York.— Haight *v.* New York, 99 N. Y. 280, 1 N. E. 883; Collins *v.* Long Island City, 10 N. Y. Suppl. 167.

North Dakota.— Hertzler *v.* Freeman, 12 N. D. 187, 96 N. W. 294.

Pennsylvania.— Glass *v.* Gilbert, 58 Pa. St. 266; Strauch *v.* Shoemaker, 1 Watts & S. 166.

Texas.— Taber *v.* State, 38 Tex. Civ. App. 235, 85 S. W. 835.

Washington.— Woodward *v.* Taylor, 33 Wash. 1, 73 Pac. 785, 75 Pac. 646; Coolidge *v.* Pierce County, 28 Wash. 95, 68 Pac. 391.

2. Witherspoon *v.* Duncan, 4 Wall. (U. S.) 210, 18 L. ed. 339.

3. Bettison *v.* Budd, 21 Ark. 578.

4. *Illinois.*— Lyle *v.* Jacques, 101 Ill. 644.

Michigan.— Hubbard *v.* Winsor, 15 Mich. 146. And see Hill *v.* Graham, 72 Mich. 659, 40 N. W. 779.

Missouri.— Stanberry *v.* Jordan, 145 Mo. 371, 46 S. W. 1093.

New Hampshire.— Van Dyke *v.* Carleton, 61 N. H. 574.

New York.—People *v.* Wells, 177 N. Y. 586, 70 N. E. 1106 [*affirming* 85 N. Y. App. Div. 440, 82 N. Y. Suppl. 866, 83 N. Y. Suppl. 387].

Canada.— Matter of Hatt, 7 Can. L. J. 103.

See 45 Cent. Dig. tit. "Taxation," § 577.

5. *California.*— People *v.* Shimmins, 42 Cal. 121; People *v.* McEwen, 23 Cal. 54.

Iowa.— Meyer *v.* Dubuque County, 49 Iowa 193, holding that the assessor need not ascertain and assess to joint owners their respective interests in the property.

Kansas.— Corbin *v.* Inslee, 24 Kan. 154.

Louisiana.— Russell *v.* Lang, 50 La. Ann. 36, 23 So. 113; Hayes *v.* Viator, 33 La. Ann. 1162.

New York.— See May *v.* Traphagen, 139 N. Y. 478, 34 N. E. 1064 [*reversing* 19 N. Y. Suppl. 679].

Pennsylvania.— Fisk *v.* Corey, 141 Pa. St. 334, 21 Atl. 594.

See 45 Cent. Dig. tit. "Taxation," § 577.

Community property.—An assessment of community property in the name of the wife alone is void. Gwynn *v.* Dierssen, 101 Cal. 563, 36 Pac. 103.

Credits.—A credit consisting of part of the purchase-price of land formerly owned in common should not be listed as a whole against the vendors, but the interest of each should be listed against him. State *v.* Rand, 39 Minn. 502, 40 N. W. 835.

Assessment to owner and others.—An assessment of property in the name of two persons, to whom it had never jointly belonged, but which had always been owned by one of them alone, is void. Denegre *v.* Gerac, 35 La. Ann. 952.

6. McWilliams *v.* Gulf States Land, etc., Co., 111 La. 194, 35 So. 514; Norres *v.* Hays, 44 La. Ann. 907, 11 So. 462; Clark *v.* Bragdon, 37 N. H. 562; Toole *v.* Oneida County, 16 Misc. (N. Y.) 653, 37 N. Y. Suppl. 9 [*affirmed* in 13 N. Y. App. Div. 471, 37 N. Y. Suppl. 9, 43 N. Y. Suppl. 1160]; Asper *v.* Moon, 24 Utah 241, 67 Pac. 409. But *compare* Hood *v.* New Orleans, 49 La. Ann. 1461, 22 So. 401; Fleischauer *v.* West Hoboken Tp., 40 N. J. L. 109; Barnes *v.* Brown, 1 Tenn. Ch. App. 726.

Where one of three tenants in common is a resident of the tax district, the land, or at least his undivided interest, should be assessed to him as resident owner. Clark *v.* Kirkland, 133 N. Y. App. Div. 826, 118 N. Y. Suppl. 315.

7. Eliot *v.* Prime, 98 Me. 48, 56 Atl. 207; Batchelder *v.* Cambridge, 176 Mass. 384, 57 N. E. 664; People *v.* Gaus, 169 N. Y. 19, 61 N. E. 987; McLean *v.* Horn, 17 N. Y. Suppl. 119. And see *supra*, III, A, 3, i.

8. Payne *v.* Arthur, 29 S. W. 860, 16 Ky. L. Rep. 784; Fairfield *v.* Woodman, 76 Me. 549; Baines *v.* Alker, 207 Pa. St. 234, 56 Atl. 433.

it has been held that an assessment of real property is invalid if it is made in the name of the deceased owner,[9] or of the estate of the decedent,[10] or if it is assessed to "the heirs" of the deceased without naming them or without a more particular description of them.[11] But on the other hand it has been held that an assessment of real property is valid, where made in the name of the estate of the decedent,[12] before the heirs go into possession;[13] or in the name of the deceased owner,[14] if the heirs do not cause the land to be assessed in their names,[15] or if notice of the decedent's death has not been given to the assessor,[16] or the property is vacant and the owner does not reside in the tax district;[17] or if it is made to the heirs

9. *Alabama.*— Scott *v.* Brown, 106 Ala. 604, 17 So. 731; Jackson *v.* King, 82 Ala. 432, 3 So. 232.

District of Columbia.— Kann *v.* King, 25 App. Cas. 182 [*reversed* on other grounds in 204 U. S. 43, 27 S. Ct. 213, 51 L. ed. 360].

Louisiana.— Boagni *v.* Pacific Imp. Co., 111 La. 1063, 36 So. 129; George *v.* Cole, 109 La. 816, 33 So. 784; Millaudon *v.* Gallagher, 104 La. 713, 29 So. 307; Kohlman *v.* Glaudi, 52 La. Ann. 700, 27 So. 116; Cucullu *v.* Brakenridge Lumber Co., 49 La. Ann. 1445, 22 So. 409; Montgomery *v.* Marydale Land, etc., Co., 46 La. Ann. 403, 15 So. 63; Kearns *v.* Collins, 40 La. Ann. 453, 4 So. 498 (deceased person to whom the property did not belong at the time); Stafford *v.* Twitchell, 33 La. Ann. 520; Fix *v.* Dierker, 30 La. Ann. 175.

Maine.— Morrill *v.* Lovett, 95 Me. 165, 49 Atl. 666, 26 L. R. A. 634.

Massachusetts.— Kerslake *v.* Cummings, 180 Mass. 65, 61 N. E. 760.

New Hampshire.— Burpee *v.* Russell, 64 N. H. 62, 5 Atl. 837.

New Mexico.— Stewart *v.* Bernalillo County, 11 N. M. 517, 70 Pac. 574.

Rhode Island.— Taft *v.* Ballou, 23 R. I. 213, 49 Atl. 895.

See 45 Cent. Dig. tit. "Taxation," §§ 704–706.

Death during fiscal year.—An assessment of property for taxes made in the name of one who was living and the owner of the property at the beginning of the fiscal year will bind his heirs. *In re* Kauffman, 104 Iowa 639, 74 N. W. 8; Clifford *v.* Michiner, 49 La. Ann. 1511, 22 So. 811.

10. *Alabama.*— Jackson *v.* King, 82 Ala. 432, 3 So. 232.

Florida.— L'Engle *v.* Wilson. 21 Fla. 461.

Maine.— Fairfield *v.* Woodman, 76 Me. 549.

Michigan.— Fowler *v.* Campbell, 100 Mich. 398, 59 N. W. 185. But *compare* Dickison *v.* Reynolds, 48 Mich. 158, 12 N. W. 24.

Missouri.— State *v.* Kenrick, 159 Mo. 631, 60 S. W. 1063.

New Mexico.— Territory *v.* Perea, 10 N. M. 362, 62 Pac. 1094.

New York.— Trowbridge *v.* Horan, 78 N. Y. 439; Matter of Chadwick, 59 N. Y. App. Div. 334, 69 N. Y. Suppl. 853; Adams *v.* Monroe County, 18 N. Y. App. Div. 415, 46 N. Y. Suppl. 48 [*affirmed* in 154 N. Y. 619, 49 N. E. 144]; People *v.* Valentine, 5 N. Y. App. Div. 520, 38 N. Y. Suppl. 1087; Matter of Kenworthy, 63 Hun 165, 17 N. Y. Suppl. 655. But *compare* Sanders *v.* Carley, 83 N. Y. App. Div. 193, 83 N. Y. Suppl. 106 [*affirmed* in 178 N. Y. 622, 70 N. E. 1108], holding that an assessment of non-resident lands is not invalid because the owner of the premises is designated as "estate of ——," as such designation may be regarded as surplusage.

North Carolina.— Morrison *v.* McLauchlin, 88 N. C. 251.

Virginia.— Douglas Co. *v.* Com., 97 Va. 397, 34 S. E. 52.

See 45 Cent. Dig. tit. "Taxation," §§ 704–706.

11. *Michigan.*— Fowler *v.* Campbell, 100 Mich. 398, 59 N. W. 185. But *compare* Dickison *v.* Reynolds, 48 Mich. 158, 12 N. W. 24.

Missouri.— Berlien *v.* Bieler, 96 Mo. 491, 9 S. W. 916.

New York.— Sandy Hill *v.* Akin, 77 Hun 537, 28 N. Y. Suppl. 889; Matter of Reid, 52 N. Y. App. Div. 243, 65 N. Y. Suppl. 373. *Compare* Wheeler *v.* Anthony, 10 Wend. 346.

Pennsylvania.— County Com'rs *v.* Hazelhurst, 3 Pa. L. J. Rep. 297.

United States.— Bush *v.* Williams, 4 Fed. Cas. No. 2,225, Brunn. Col. Cas. 234, Cooke (Tenn.) 360.

See 45 Cent. Dig. tit. "Taxation," §§ 704–706.

12. Moale *v.* Baltimore, 61 Md. 224; Coles *v.* Platt, 24 N. J. L. 108, holding that an assessment of taxes to the estate of J. B. C., where the estate is well known and commonly so designated, is not void for uncertainty or lack of form in not naming the persons assessed. See also Endicott *v.* Corson, 50 N. J. L. 381, 13 Atl. 265.

13. Gonzales *v.* Saux, 119 La. 657, 44 So. 332; Surget *v.* Newman, 43 La. Ann. 873, 9 So. 561; Carter *v.* New Orleans, 33 La. Ann. 816. See also New Orleans *v.* Stemple, 175 U. S. 309, 20 S. Ct. 110, 44 L. ed. 174.

14. Grant *v.* Bartholomew, 57 Nebr. 673, 78 N. W. 314; Koth *v.* Pallachucola Club, 79 S. C. 514, 61 S. E. 77; Holroyd *v.* Pumphrey, 18 How. (U. S.) 69, 15 L. ed. 264.

15. Husbands *v.* Polivick, 128 Ky. 652, 96 S. W. 825, 29 Ky. L. Rep. 890.

16. Williams *v.* Chaplain, 112 La. 1075, 36 So. 859.

17. Sewell *v.* Watson, 31 La. Ann. 589, holding that vacant property, the owner of which does not reside in the parish where it is situated, may be validly assessed as the property of its immediately preceding but deceased owner, of whose succession it is a part and in whose name it stood on the public records.

without naming them, when it descends to them by operation of law.[18] If the land has been devised it must be assessed to the devisees and not to the heirs of the decedent.[19]

h. Property Held in Trust. Real estate held by a trustee should be assessed in his name, with the addition of such a description as will show that he holds it in a fiduciary character.[20]

i. Assessment of Separate Interests. The general rule is that real estate should be assessed as such to the present owner thereof without regard to the divided or conflicting interest in it which may be claimed by different parties,[21] although under some statutes separate interests in the property should be separately assessed.[22]

6. Valuation[23] — a. In General — (i) *Necessity of Valuation.* It is absolutely necessary, to support an assessment of taxes, that the assessor should put an actual cash valuation upon the property which is to be taxed.[24]

18. Elliot *v.* Spinney, 69 Me. 31; Koth *v.* Pollachucola Club, 79 S. C. 514, 61 S. E. 77. See also Noble *v.* Indianapolis, 16 Ind. 506.

19. Elliot *v.* Spinney, 69 Me. 31; Tobin *v.* Gillespie, 152 Mass. 219, 25 N. E. 88.

20. *California.*— See Title Guaranty, etc., Co. *v.* Los Angeles County, 3 Cal. App. 619, 86 Pac. 844, as to effect of failure to disclose name of principal or beneficiary.

Louisiana.— Dibble *v.* Leppert, 47 La. Ann. 792, 17 So. 309.

Massachusetts.— Hough *v.* North Adams, 196 Mass. 290, 82 N. E. 46; Hardy *v.* Yarmouth, 6 Allen 277.

Michigan.— Homer Tp. *v.* Smith, 141 Mich. 586, 105 N. W. 12.

New York.— Trowbridge *v.* Horan, 78 N. Y. 439. In this state under Laws (1896), c. 908, § 32, a person holding taxable property as a trustee shall be assessed as such but shall be designated as trustee, and such assessment carried out in a separate line from his individual assessment. And it is held that where there are three trustees of a single fund an assessment of the fund to only two of them is not invalid; and that where trustees hold a trust fund under three distinct trusts in favor of as many separate *cestuis que trustent*, an assessment of the fund is not invalid because it fails to assess each trust separately. People *v.* Feitner, 61 N. Y. App. Div. 115, 70 N. Y. Suppl. 556 [*affirmed* in 168 N. Y. 646, 61 N. E. 1132, and *affirming* 33 Misc. 656, 68 N. Y. Suppl. 226]; People *v.* Feitner, 59 N. Y. App. Div. 233, 69 N. Y. Suppl. 574 [*affirmed* in 167 N. Y. 621, 60 N. E. 1117]. See also People *v.* Feitner, 26 Misc. 40, 56 N. Y. Suppl. 407, holding that there must be an identification of the exact trust so that an assessment to one by the use only of the words "as trustee" following his name is void. But see People *v.* Barker, 11 Misc. 262, 32 N. Y. Suppl. 485 [*affirmed* in 86 Hun 283, 33 N. Y. Suppl. 1132], as to designating a trustee as "executor and trustee."

West Virginia.— Boggess *v.* Scott, 48 W. Va. 316, 37 S. E. 661.

Canada.— See Franchon *v.* St. Thomas, 7 Can. L. J. 245.

21. Oldhams *v.* Jones, 5 B. Mon. (Ky.) 458; Dunn *v.* Winston, 31 Miss. 135; Jackson *v.* Babcock, 16 N. Y. 246.

Assessment to holder of life-estate.— See Fenley *v.* Louisville, 119 Ky. 569, 84 S. W. 582, 27 Ky. L. Rep. 204; Garland *v.* Garland, 73 Me. 97; Willard *v.* Blount, 33 N. C. 624.

Where the title of a lessee of property is a base or determinable fee the property should be assessed to such lessee. Connecticut Spiritualistic Camp Meeting Assoc. *v.* East Lyme, 54 Conn. 152, 5 Atl. 849.

Private alley.— Where one conveys lots, describing them as bounded on one side by an alley of a certain width to be left open for use in common, the alley which is but a private way is properly assessed to the grantor in whom the fee simple title remains, as it is no part of the duty of the assessor to separately value the interest in the alley of the grantor and grantee. Hill *v.* Williams, 104 Md. 595, 65 Atl. 413.

22. Williams *v.* Brace, 5 Conn. 190; McLaughlin *v.* Kain, 45 Pa. St. 113; Logan *v.* Washington County, 29 Pa. St. 373.

The interests of two or more tenants in common may be assessed separately. Payne *v.* Danley, 18 Ark. 441, 68 Am. Dec. 187; Fleischauer *v.* West Hoboken Tp., 40 N. J. L. 109. See also *supra*, VI, C, 5, f.

Easements.— Where these are appurtenant to the realty, they are to be taxed as a part of the land to which they belong; but easements in gross must be valued and taxed separately from the land out of which they are granted. Winnipiseogee Lake Cotton, etc., Mfg. Co. *v.* Gilford, 64 N. H. 337, 10 Atl. 849. And see *supra*, III, A, 2, b, (VIII).

The purchaser at a tax-sale of a fraction of a lot is entitled to have such fraction listed and assessed separately in order that he may pay the taxes thereon. Roby *v.* Chicago, 48 Ill. 130.

23. Change of valuation or amount of tax by reviewing board or officer see *infra*, VII, B, 5, c.

Equality and uniformity see *supra*, II, B.

Extending amount of tax see *infra*, VI, E, 5.

Valuation and determination of amount of taxable property of corporation see *infra*, VI, D, 5.

Valuation of railroad property see *infra*, VI, D, 8, b.

24. Hurlbutt *v.* Butenop, 27 Cal. 50; *In re*

(II) *Determination of Value.* The legislature may decide the manner in which different forms of property may be valued for taxation.[25] To constitute a valid assessment of property for taxation, the valuation of the property must be made by the proper assessing officer himself,[26] and he cannot delegate this duty to another.[27] In making the estimate the assessor must apply his own knowledge and exercise his own judgment,[28] and he is neither bound nor permitted, unless the statute so directs, to adopt a valuation made by a different assessor or board of assessors or board of review.[29] Unless otherwise specified, his estimate should be based upon and correspond with the fair cash value of the property;[30] and the amount it would bring at a fair private sale is ordinarily a just criterion of this value;[31] but in forming his estimate the assessor should avail himself of all proper sources of information and take into consideration all facts and circumstances

House Bill No. 270, 7 Colo. 635, 21 Pac. 476; Lebanon *v.* Ohio, etc., R. Co., 77 Ill. 539; Hunt *v.* Union Tp., 27 N. J. L. 433.

All available property should be taxed according to its value for the purpose of establishing the proportional ability and duty of individual owners to bear their burdens as citizens. *In re* Opinion of Justices, 195 Mass. 607, 84 N. E. 499.

25. St. Louis Consol. Coal Co. *v.* Miller, 236 Ill. 149, 86 N. E. 205. See also Royal Mfg. Co. *v.* New Jersey Bd. of Equalization, 76 N. J. L. 402, 70 Atl. 978, holding that since Pub. Laws (1906), 210, creating the county board of taxation, there has been no warrant scaling down valuation of taxable property by adopting a uniform percentage of actual value, although such was the general practice for years.

Legislative authority.— The power of the legislature to assess state taxes and to compel their payment directly to the state treasurer, without other official assistance, implies power to determine the value of the property to be assessed, and consequently a power of discrimination in selecting and fixing the taxable values. State *v.* Sterling, 20 Md. 502. And there is no constitutional objection to the legislature making the gross output of producing mines the criterion to govern assessors in determining the valuation. *In re* House Bill No. 270, 7 Colo. 635, 21 Pac. 476.

Mineral lands "improved and under development" see Com. *v.* Pocahontas Coal, etc., Co., 107 Va. 666, 60 S. E. 84.

26. Hyatt *v.* Allen, 54 Cal. 353; Tampa *v.* Mugge, 40 Fla. 326, 24 So. 489; Hoefling *v.* San Antonio, 15 Tex. Civ. App. 257, 38 S. W. 1127. See also State *v.* Cudahy Packing Co., 103 Minn. 419, 115 N. W. 645, 1039, holding that the revenue system contemplates an original assessment by the assessor, its correction by the auditor, and its equalization by various boards.

27. Woodman *v.* Auditor-Gen., 52 Mich. 28, 17 N. W. 227.

28. *Florida.*— King *v.* Gwynn, 14 Fla. 32.

Illinois.— St. Louis, etc., R. Co. *v.* Surrell, 88 Ill. 535.

Iowa.— Burnham *v.* Barber, 70 Iowa 87, 30 N. W. 20.

Michigan.— Crooks *v.* Whitford, 47 Mich. 283, 11 N. W. 159.

Nevada.— State *v.* Central Pac. R. Co., 10 Nev. 47.

New York.— People *v.* McNamara, 18 N. Y. App. Div. 17, 45 N. Y. Suppl. 456.

See 45 Cent. Dig. tit. "Taxation," § 580.

29. Granger *v.* Parsons, 2 Pick. (Mass.) 392; Missouri, etc., R. Co. *v.* Shannon, (Tex. Civ. App. 1906) 97 S. W. 527 [*affirmed* in 100 Tex. 379, 100 S. W. 138, 10 L. R. A. N. S. 681].

Conclusiveness of judgments fixing valuation.— An assessor is not bound to estimate a property at a certain sum because that sum was fixed as its value in a previous year by the judgment either of a court or of a board of review. Legendre *v.* St. Charles Parish Assessor, 108 La. 515, 32 So. 523; People *v.* Zundel, 157 N. Y. 513, 52 N. E. 570.

Statutes requiring adoption of valuation made by other board or assessor see Pitcher *v.* Jackman, 15 Ind. 107; People *v.* Adams, 125 N. Y. 471, 26 N. E. 746 [*affirming* in part and *reversing* in part 10 N. Y. Suppl. 295]; Wilson *v.* Marsh, 34 Vt. 352.

Approval of valuations.— It is competent for an assessor to employ others to make the valuations in the first instance, if he himself examines, revises, and adopts their estimates. Snell *v.* Ft. Dodge, 45 Iowa 564; Jermyn *v.* Fowler, 186 Pa. St. 595, 40 Atl. 972; Dean *v.* Gleason, 16 Wis. 1.

Right of auditor to direct assessor as to valuation of real property see Hamilton County *v.* Albers, 28 Ohio Cir. Ct. 830.

30. Stein *v.* Mobile, 17 Ala. 234; State *v.* Illinois Cent. R. Co., 27 Ill. 64, 79 Am. Dec. 396; State *v.* Savage, 65 Nebr. 714, 91 N. W. 716; State *v.* Osborn, 60 Nebr. 415, 83 N. W. 357; Clark *v.* Middleton, 74 N. H. 188, 66 Atl. 115.

There is a marked distinction between "full and true value" and "full and true cash value," as used in statutes relating to taxation. Richardson *v.* Howard, 23 S. D. 86, 120 N. W. 768.

31. State *v.* Randolph Tp., 25 N. J. L. 427; Brown *v.* Greer, 3 Head (Tenn.) 695. And see Salscheider *v.* Ft. Howard, 45 Wis. 519. But *compare* People *v.* Feitner, 34 Misc. (N. Y.) 299, 69 N. Y. Suppl. 793 [*affirmed* in 63 N. Y. App. Div. 615, 72 N. Y. Suppl. 1124 (*affirmed* in 168 N. Y. 675, 61 N. E. 1132)].

bearing on the question which are within his knowledge or brought to his attention.[32]

(III) *Unequal, Excessive, and Inadequate Valuations.* An assessment will not be held void by reason of an excessive valuation placed on the property by the assessor, where it was the result of an error of judgment on his part and not of dishonesty or want of good faith;[33] but it is otherwise if the overvaluation was made fraudulently or maliciously,[34] although the mere fact of an excessive valuation is not sufficient to establish fraud.[35] In the absence of such circumstances, the taxpayer aggrieved by the assessor's action must seek a reduction of his assessment before the board of review or before the courts in an appropriate proceeding.[36] Similar rules apply to the case of an unequal valuation, that is, where the complainant's property is valued out of proportion to its real worth as compared with the valuations put on other similar property.[37] An intentional

32. *Alabama.*— State *v.* Sage Land, etc., Co., 118 Ala. 677, 23 So. 637.

Illinois.— Keokuk, etc., Bridge Co. *v.* People, 161 Ill. 514, 44 N. E. 206, holding that an assessor is not required to employ experts to assist him in valuing a bridge.

New Hampshire.— Dewey *v.* Stratford, 42 N. H. 282.

New Jersey.— Keeler *v.* Tindall, 36 N. J. L. 97.

New York.— People *v.* Neff, 15 N. Y. App. Div. 585, 44 N. Y. Suppl. 810.

Ohio.— State *v.* Halliday, 61 Ohio St. 352, 56 N. E. 118, 49 L. R. A. 427.

See 45 Cent. Dig. tit. "Taxation," §§ 580, 585.

"Taxable value" is the sum at which property is appraised for taxation. Amoskeag Mfg. Co. *v.* Manchester, 70 N. H. 200, 46 Atl. 470.

33. *Illinois.*— Keokuk, etc., Bridge Co. *v.* People, 161 Ill. 514, 44 N. E. 206; St. Louis, etc., R. Co. *v.* People, 127 Ill. 627, 21 N. E. 348; People *v.* Ashley, 122 Ill. 297, 13 N. E. 556.

Iowa.— Beeson *v.* Johns, 59 Iowa 166, 13 N. W. 97.

Maine.— Lord *v.* Parker, 83 Me. 530, 22 Atl. 392.

Massachusetts.— Harrington *v.* Glidden, 179 Mass. 486, 61 N. E. 54, 94 Am. St. Rep. 613.

Mississippi.— Union Inv. Co. *v.* Harrison County, 67 Miss. 614, 7 So. 509.

Nebraska.— Miller *v.* Hurford, 13 Nebr. 13, 12 N. W. 832.

New York.— People *v.* Adams, 125 N. Y. 471, 26 N. E. 746 [*modifying* 10 N. Y. Suppl. 295]; People *v.* Van Nostrand, 71 Hun 611, 24 N. Y. Suppl. 513.

Oregon.— West Portland Park Assoc. *v.* Kelly, 29 Oreg. 412, 45 Pac. 901.

Vermont.— Waterman *v.* Davis, 66 Vt. 83, 28 Atl. 664; Weatherhead *v.* Guilford, 62 Vt. 327, 19 Atl. 717; Fulham *v.* Howe, 60 Vt. 351, 14 Atl. 652; Bullock *v.* Guilford, 59 Vt. 516, 9 Atl. 360.

Wisconsin.— Hixon *v.* Oneida County, 82 Wis. 515, 52 N. W. 445.

See 45 Cent. Dig. tit. "Taxation," §§ 581, 589.

34. People *v.* Ohio, etc., R. Co., 96 Ill. 411; Pacific Hotel Co. *v.* Lieb, 83 Ill. 602; People *v.* Haight, 24 Misc. (N. Y.) 425, 53 N. Y. Suppl. 723; Landes Estate Co. *v.* Clallam County, 19 Wash. 569, 53 Pac. 670; Cincinnati Southern R. Co. *v.* Guenther, 19 Fed. 395.

35. People *v.* Odin Coal Co., 238 Ill. 279, 87 N. E. 410; Keokuk, etc., Bridge Co. *v.* People, 161 Ill. 514, 44 N. E. 206; Spring Valley Coal Co. *v.* People, 157 Ill. 543, 41 N. E. 874; Covington *v.* Shinkle, 74 S. W. 652, 25 Ky. L. Rep. 73; Hamilton *v.* Rosenblatt, 8 Mo. App. 237.

36. *New York.*— People *v.* Campbell, 145 N. Y. 587, 40 N. E. 239; People *v.* Kalbfleisch, 25 N. Y. App. Div. 432, 49 N. Y. Suppl. 546 [*affirmed* in 156 N. Y. 678, 50 N. E. 1121].

Pennsylvania.— Rockhill Iron, etc., Co. *v.* Fulton County, 204 Pa. St. 44, 53 Atl. 530.

Rhode Island.— Newport Illuminating Co. *v.* Newport Tax Assessors, 19 R. I. 632, 36 Atl. 426, 36 L. R. A. 266.

Tennessee.— Grundy County *v.* Tennessee Coal, etc., Co., 94 Tenn. 295, 29 S. W. 116.

Canada.— Great Western R. Co. *v.* Ferman, 8 U. C. C. P. 221.

See 45 Cent. Dig. tit. "Taxation," § 583.

Presumption of correctness.— In a proceeding to reduce an assessment, it will be presumed that the assessor's valuation is correct, and this presumption must be overcome by clear evidence Estell *v.* Hawkens, 50 N. J. L. 122, 11 Atl. 265; People *v.* Collison, 22 Abb. N. Cas. (N. Y.) 52; Vancouver Water Works Co. *v.* Clark County, 55 Wash. 112, 104 Pac. 180; Northern Pac. R. Co. *v.* Pierce County, 55 Wash. 108, 104 Pac. 178.

An overvaluation of personalty cannot be sustained because the realty was undervalued. People *v.* Barker, 81 Hun (N. Y.) 22, 30 N. Y. Suppl. 586 [*reversed* on other grounds in 144 N. Y. 94, 39 N. E. 13].

37. *Illinois.*— People *v.* Odin Coal Co., 238 Ill. 279, 87 N. E. 410; Keokuk, etc., Bridge Co. *v.* People, 161 Ill. 514, 44 N. E. 206.

Minnesota.— State *v.* Cudahy Packing Co., 103 Minn. 419, 115 N. W. 645, 1039.

Nebraska.— Lincoln Land Co. *v.* Phelps County, 59 Nebr. 249, 80 N. W. 818.

New Hampshire.— Winnipiseogee Lake Cotton, etc., Mfg. Co. *v.* Laconia, 73 N. H. 337, 61 Atl. 676.

New York.— People *v.* Badgley, 138 N. Y.

and wilful undervaluation of particular property will also invalidate the assessment of it,[38] although it will not necessarily avoid the whole assessment list;[39] and one taxpayer cannot resist the payment of the taxes properly assessed against him, on the ground that another's property was undervalued, unless he shows resulting increase in his own burdens, or perhaps an intentional and habitual disregard of the law by the assessors.[40]

(iv) *Increasing Valuation Made by Taxpayer.* The assessor is not bound by the valuation placed on his property by the taxpayer in his list or return, even though sworn to, but may increase it, if satisfied by proper evidence or even from his own knowledge that it is too low;[41] but the assessor cannot take this action arbitrarily and without sufficient reason.[42]

b. Valuation of Real Estate — (i) *General Rules.* Unless otherwise directed by statute, land is to be valued for purposes of assessment at its actual worth or fair market value,[43] which means not necessarily its cost to the present owner,[44] or its price at a sacrifice sale, but the price it would bring at a fair private sale between parties dealing on equal terms.[45] In fixing this value, the assessor should take into consideration all the different elements of value and all the facts directly affecting the value of the land, such as advantages or disadvantages of situation, the uses to which the land may be put, its nearness to tide water, water power, etc.,[46] but not merely conjectural or speculative elements of

314, 33 N. E. 1076 [*reversing* 67 Hun 65, 22 N. Y. Suppl. 26].

Washington.— Vancouver Water Works Co. *v.* Clark County, 55 Wash. 112, 104 Pac. 180.

Wisconsin.— Brauns *v.* Green Bay, 55 Wis. 113, 12 N. W. 463.

See 45 Cent. Dig. tit. "Taxation," § 581.

38. Auditor-Gen. *v.* Jenkinson, 90 Mich. 523, 51 N. W. 643; State *v.* Savage, 65 Nebr. 714, 91 N. W. 716; Schettler *v.* Fort Howard, 43 Wis. 48.

39. Auditor-Gen. *v.* Jenkinson, 90 Mich. 523, 51 N. W. 643; Kittle *v.* Shervin, 11 Nebr. 65, 7 N. W. 861; Marshall *v.* Benson, 48 Wis. 558, 4 N. W. 385, 762.

40. Georgia Midland, etc., R. Co. *v.* State, 89 Ga. 597, 15 S. E. 301; State *v.* Cudahy Packing Co., 103 Minn. 419, 115 N. W. 645, 1039; State *v.* Lakeside Land Co., 71 Minn. 283, 73 N. W. 970; State *v.* Thayer, 69 Minn. 170, 71 N. W. 931; Winnipiseogee Lake Cotton, etc., Mfg. Co. *v.* Laconia, 73 N. H. 337, 61 Atl. 676; Taylor *v.* Louisville, etc., R. Co., 88 Fed. 350, 31 C. C. A. 537.

41. *Florida.*— King *v.* Gwynn, 14 Fla. 32.

Illinois.— Tolman *v.* Salomon, 191 Ill. 202, 60 N. E. 809.

Indiana.— Willis *v.* Crowder, 134 Ind. 515, 34 N. E. 315.

Louisiana.—Tragar *v.* Clayton, McGloin 228.

Missouri.— State *v.* Reed, 159 Mo. 77, 60 S. W. 70.

See 45 Cent. Dig. tit. "Taxation," § 582. And see *supra*, VI, C, 2, h.

Waiver of right to object.— After assessment rolls have been legally exposed for correction and closed it is too late to object to the methods by which the assessors fixed the value of the property. New Orleans *v.* Canal, etc., Co., 32 La. Ann. 157. And see Jones *v.* Johnson, 60 Ga. 260.

42. Weyse *v.* Crawford, 85 Cal. 196, 24 Pac. 735; Shawneetown First Nat. Bank *v.* Cook, 77 Ill. 622; McConkey *v.* Smith, 73 Ill. 313.

43. Turnley *v.* Elizabeth, 76 N. J. L. 42, 68 Atl. 1094; People *v.* Barker, 146 N. Y. 304, 40 N. E. 996; Plumer *v.* Marathon County, 46 Wis. 163, 50 N. W. 416.

44. *In re* Municipal Clauses Act, 8 Brit. Col. 361.

The consideration stated in a deed is no evidence of the value for purposes of taxation of the property transferred. People *v.* McCarthy, 102 N. Y. 630, 8 N. E. 85. But *compare In re* Vancouver Incorporation Act, 9 Brit. Col. 373, holding that in estimating the value of an expensive residence, it is fair to assume that the owner will not permit his property to be sacrificed, and therefore a valuation approaching to nearly the actual cost is not excessive.

45. State *v.* Moore, 12 Cal. 56; Eureka Dist. Gold Min. Co. *v.* Ferry County, 28 Wash. 250, 68 Pac. 727; Webster-Glover Lumber, etc., Co. *v.* St. Croix County, 63 Wis. 647, 24 N. W. 417; *In re* Municipal Clauses Act, 8 Brit. Col. 361; *In re* Queenston Heights Bridge, 1 Ont. L. Rep. 114; Cassils *v.* Montreal, 14 Quebec Super. Ct. 269.

What the whole property would bring at a fair private sale is held to be a good criterion of its value for the purpose of taxation. Colwell *v* Abbott, 42 N. J. L. 111. But on the other hand it has been held that a sale of land at public auction is the criterion of its value. Dickerson Suckasunny Min. Co. *v.* Randolph Tp., 25 N. J. L. 427; Lehigh, etc., Coal Co. *v.* Luzerne County, 225 Pa. St. 267, 74 Atl. 67.

46. Winnipiseogee Lake Cotton, etc., Mfg. Co. *v.* Gilford, 64 N. H. 337, 10 Atl. 849; New York, etc., R. Co. *v.* Yard, 43 N. J. L. 632; Trask *v.* Carragan, 37 N. J. L. 264 (holding that adjacency of the land to tide water is a fact to be taken into account in estimating its value); State *v.* Flavell, 24 N. J. L. 370 (holding that the location of the land in the vicinity of an extensive water power is a pertinent fact); Chicago, etc., R.

value.[47] In case of business property, its income or earning capacity as an investment is a fair test of value.[48] If the title of the person assessed is a leasehold or other estate less than the fee, the valuation fixed should be that of his interest, not of the whole estate.[49]

(II) *Appurtenances, Easements, and Improvements.* Rights, easements, franchises, and appurtenances belonging to or connected with a particular parcel of land are to be considered as a part of it, for purposes of assessment, and its value should be estimated in connection with such advantages and as enhanced thereby.[50] So also all fixed and permanent buildings and other improvements on land are a part of it and must be included in its appraised value for taxation.[51]

Co. *v.* State, 128 Wis. 553, 108 N. W. 557; Hersey *v.* Barron County, 37 Wis. 75; Canadian Pac. R. Co. *v.* Verdun, 20 Quebec Super. Ct. 194.

Due regard must be had to the valuation of other land in the same district, in determining the valuation of a particular tract of land for taxation. Lehigh, etc., Coal Co. *v.* Luzerne County, 225 Pa. St. 267, 74 Atl. 67; Delaware, etc., R. Co.'s Tax Assessment, 224 Pa. St. 240, 248, 73 Atl. 429, 432; Vancouver Water Works Co. *v.* Clark County, 55 Wash. 112, 104 Pac. 180, valuation of farming land in the vicinity of lands containing springs used to supply a city with water, and of other lands containing springs not so used.

Valuation of coal lands as compared with the valuation of other realty within the district see Lehigh, etc., Coal Co. *v.* Luzerne County, 225 Pa. St. 267, 74 Atl. 67; Delaware, etc., R. Co.'s Tax Assessment, 224 Pa. St. 240, 248, 73 Atl. 429, 432. In ascertaining the valuation of coal lands the superficial and not the foot acre is the unit of value. *In re* Lehigh, etc., Coal Co.'s Assessment, 225 Pa. St. 272, 74 Atl. 65.

47. Union Inv. Co. *v.* Harrison County, 67 Miss. 614, 7 So. 509, holding that in assessing land for taxation, the probability that a projected railroad may not be built, in which event the land would be comparatively worthless, should not be considered.

48. People *v.* Kalbfleisch, 25 N. Y. App. Div. 432, 49 N. Y. Suppl. 546 [*affirmed* in 156 N. Y. 678, 50 N. E. 1121]; People *v.* Weaver, 34 Hun (N. Y.) 321 [*affirmed* in 99 N. Y. 659]; Smith *v.* Forest County, 23 Pa. Co. Ct. 643. But see Hurd *v.* Cook, 60 N. J. L. 70, 36 Atl. 892; Dickerson Suckasunny Min. Co. *v.* Randolph Tp., 25 N. J. L. 427.

In determining the value of property principally on its earnings, the average earnings and expenses for a series of years or for such time as is reasonably available must be considered. People *v.* State Tax Com'rs, 128 N. Y. App. Div. 13, 112 N. Y. Suppl. 392 [*modified* as to other matters in 196 N. Y. 39, 89 N. E. 581].

49. Philadelphia, etc., R. Co. *v.* Baltimore City Appeal Tax Ct., 50 Md. 397; Wright *v.* Cradlebaugh, 3 Nev. 341; Robinson *v.* Allegheny County, 7 Pa. St. 161; State *v.* Taylor, 72 Tex. 297, 12 S. W. 176; Daugherty *v.* Thompson, 71 Tex. 192, 9 S. W. 99.

In valuing the interest of a lessee in leased property for taxation, the value of the lease to the lessee is to be ascertained and not the value of the property leased. People *v.* Barker, 121 N. Y. App. Div. 661, 106 N. Y. Suppl. 336. And see cases cited *supra*, this note.

Valuation of mortgagee's interest see Sullivan *v.* Boston, 198 Mass. 119, 84 N. E. 443.

The fact that the lessor is not assessed for the actual value of the property leased does not justify an assessment against the lessee for the difference between the actual and the assessed value of the property. People *v.* Barker, 121 N. Y. App. Div. 661, 106 N. Y. Suppl. 336.

50. Stein *v.* Mobile, 17 Ala. 234; Winnipiseogee Lake Cotton, etc., Mfg. Co. *v.* Gilford, 64 N. H. 337, 10 Atl. 849. And see cases cited *infra*, this note.

Water-power see Saco Water Power Co. *v.* Buxton, 98 Me. 295, 56 Atl. 914; Lowell *v.* Middlesex County, 152 Mass. 372, 25 N. E. 469, 9 L. R. A. 356; Warwick, etc., Water Co. *v.* Carr, 24 R. I. 226, 52 Atl. 1030; Bellows Falls Canal Co. *v.* Rockingham, 37 Vt. 622.

Littoral owner's right to reclaim and preëmpt tide lands see New York, etc., R. Co. *v.* Hughes, 46 N. J. L. 67; New York, etc., R. Co. *v.* Yard, 43 N. J. L. 121; Trask *v.* Carragan, 37 N. J. L. 264.

Reservoir rights see Winnipiseogee Lake Cotton, etc., Mfg. Co. *v.* Gilford, 64 N. H. 337, 10 Atl. 849.

Franchise to take tolls upon waterworks see Mobile *v.* Stein, 54 Ala. 23.

Approach to a bridge see Keokuk, etc., Bridge Co. *v.* People, 176 Ill. 267, 52 N. E. 117.

Water-power appurtenant to real estate in Massachusetts, created by the fall of water in a river flowing through such real estate and used for power in a sister state, is taxable in Massachusetts on a valuation of the uses to which the power could be put in Massachusetts and the uses to which it is put in connection with an additional waterfall and structures in the sister state, and then estimating the value imputable to the real estate in Massachusetts. Blackstone Mfg. Co. *v.* Blackstone, 200 Mass. 82, 85 N. E. 880, 18 L. R. A. N. S. 755. See also Winnipiseogee Lake Cotton, etc., Mfg. Co. *v.* Gilford, 64 N. H. 337, 10 Atl. 849.

51. *Illinois.*— Fitch *v.* Pinckard, 5 Ill. 69.

Nebraska.— Freeman *v.* Lynch, 8 Nebr. 192.

New York.— People *v.* Wells, 54 Misc. 322, 105 N. Y. Suppl. 1006 [*affirmed* in 126 N. Y.

In some states it is required, and in all it is proper even if not necessary, that the improvements should be valued separately from the land, although the two valuations are added together to fix the total assessment.[52]

(III) *Platted and Unplatted City Property.* It is provided by law in some states that lands within the limits of a city, but which have not been platted or subdivided into lots, shall not be assessed at a higher rate than suburban or agricultural lands, although this does not require them to be valued with reference to their possible use for purposes of agriculture; but they must be appraised at their actual value.[53]

(IV) *Property Partly Exempt.* It is error to assess taxable and exempt property together, but if the whole tax is not greater than what is properly chargeable to the taxable property, the assessment will not be disturbed.[54] Where one portion of a parcel of improved property is subject to taxation and another portion exempt, as where part of a large building is used for charitable, educational, or religious purposes, and the rest for business purposes, and the portions are not physically separable, the proper method of valuation is to estimate the value of the property as a whole, and then deduct the value of the exempt portion.[55]

(V) *Increasing Valuation Between Periodical Assessments.* In some states the appraisement of real property for taxation is made only at intervals of several years, the valuation once fixed remaining until the next periodical assessment.[56] The assessors, however, are authorized and directed to increase

App. Div. 944, 111 N. Y. Suppl. 1135 (*affirmed* in 193 N. Y. 614, 86 N. E. 1129)].

Washington.— Eureka Dist. Gold Min. Co. *v.* Ferry County, 28 Wash. 250, 68 Pac. 727.

Canada.— *In re* Vancouver Incorporation Act, 9 Brit. Col. 495.

See 45 Cent. Dig. tit. "Taxation," § 587.

As to improvements erected by a tenant under a mining lease see Gorrell *v.* Murphy, 1 Leg. Gaz. Rep. (Pa.) 195.

The value of buildings that do not belong to the owner of the soil should for assessment be measured by what it would cost to replace them if they were destroyed; and the fact that the ground is favorably situated commercially does not add to their value separately from the soil on which they stand. Tulane Imp. Co. *v.* Board of Assessors, 121 La. 941, 46 So. 928.

52. *California.*— Miller *v.* Kern County, 137 Cal. 516, 70 Pac. 549; People *v.* Culverwell, 44 Cal. 620.

Idaho.— People *v.* Owyhee Lumber Co., 1 Ida. 420; People *v.* Owyhee Min. Co., 1 Ida. 409.

Iowa.— Robertson *v.* Anderson, 57 Iowa 165, 10 N. W. 341.

Maryland.—Allegany County *v.* Union Min. Co., 61 Md. 545.

Massachusetts.— Tremont, etc., Mills *v.* Lowell, 163 Mass. 283, 39 N. E. 1028.

Nebraska.— Dundy *v.* Richardson County, 8 Nebr. 508, 1 N. W. 565.

See 45 Cent. Dig. tit. "Taxation," § 587.

Mills and machinery.— In proceedings to abate an assessment of a manufacturing plant, the machinery is to be treated as a separate class from the land and the buildings thereon, and, although each should properly be valued in connection with the other, yet if the land or the buildings be overvalued, an abatement may be ordered, although the machinery is rightly valued. Hamilton Mfg. Co. *v.* Lowell, 185 Mass. 114, 69 N. E. 1080.

Buildings owned by tenant.— Buildings erected on leased land by a tenant under a lease for ninety-nine years, renewable forever, are to be separately assessed to him at their value. Philadelphia, etc., R. Co. *v.* Baltimore City Appeal Tax Ct., 50 Md. 397.

53. Eschenburg *v.* Lake County, 129 Ind. 398, 28 N. E. 865; South Bend *v.* Cushing, 123 Ind. 290, 24 N. E. 114; Benoist *v.* St. Louis, 15 Mo. 668; Ransom *v.* Potter, 22 Ohio Cir. Ct. 388, 12 Ohio Cir. Dec. 478.

In the absence of such a statute, it is the duty of the assessor of lands within the corporate limits of a city to assess them at their true value, whether they are used for farming purposes or divided into lots for building purposes. Janesville *v.* Markoe, 18 Wis. 350.

54. Morris Canal, etc., Co. *v.* Haight, 35 N. J. L. 178; Roberts *v.* Jersey City, 25 N. J. L. 525.

55. *Maine.*— Auburn *v.* Young Men's Christian Assoc., 86 Me. 244, 29 Atl. 992.

Maryland.—Frederick County *v.* St. Joseph Sisters of Charity, 48 Md. 34.

Massachusetts.— Cambridge *v.* Middlesex County, 114 Mass. 337.

Nebraska.— Lohrbough *v.* Douglas County, 76 Nebr. 679, 107 N. W. 1000.

New York.— Worden *v.* Oneida County, 35 N. Y. App. Div. 206, 54 N. Y. Suppl. 952.

Ohio.— Cleveland Library Assoc. *v.* Pelton, 36 Ohio St. 253.

See 45 Cent. Dig. tit. "Taxation," § 588.

56. State *v.* Atwood Lumber Co., 96 Minn. 392, 105 N. W. 276.

Omitted property.— Where taxable property has been omitted from a triennial assessment, such property may be included in an assessment made in the following year, although there may have been no erections, ad-

this valuation in any case where the value of a particular parcel has been increased since the last assessment by the addition of new structures or improvements to it.[57] But this will not authorize an increase of valuation on account of work which amounts to no more than a repair, alteration, or remodeling of an existing building,[58] or on account of an enhancement of the value of the property from causes other than those specified.[59]

c. Valuation of Personal Property — (i) *In General.* In appraising personal property for taxation, the assessor is not conclusively bound by the valuation made by the owner,[60] but must estimate it, according to his own best judgment, at its fair market value.[61] The stock in trade of a merchant or manufacturer is ordinarily assessed at its fair average value through the year.[62]

(ii) *Credits, Investments, and Securities.*[63] Bonds, mortgages, judgments, shares of stock, and similar securities are to be assessed for taxation at their actual value rather than their nominal or face value.[64] But United States bonds, treasury notes, and other securities of the national government are exempt from taxation and must be excluded from the assessment of the owner's personalty.[65] The holder of an annuity secured by mortgage or bond, or of a bond in lieu of dower, is to be assessed only for the sum actually due and unpaid thereon

ditions, or improvements made since the triennial assessment. Union Coal Co. *v.* Cooner, 27 Pa. Super. Ct. 95.

57. Lewis *v.* State, 69 Ohio St. 473, 69 N. E. 980.

58. Perrine *v.* Parker, 34 N. J. L. 352; Schindler *v.* Lewis, 16 Ohio Cir. Ct. 348, 9 Ohio Cir. Dec. 174. *Compare* Lewis *v.* State, 69 Ohio St. 473, 69 N. E. 980.

59. Crozer *v.* People, 206 Ill. 464, 69 N. E. 489; Hancock County *v.* Simmons, 85 Miss. 302, 38 So. 337 (holding that an increase of valuation is not permissible because the value of a village lot has been increased by the building of a railroad through the village); *In re* Beechwood Imp. Co., 12 Pa. Dist. 430 (holding that the dividing up of a tract of land into building lots, and the laying out, grading, curbing, and sewering of streets through it do not warrant an increase in its assessment between triennial periods).

Increase in valuation on platting of land under Ohio Rev. St. § 2797 see Hamilton County *v.* Albers, 28 Ohio Cir. Ct. 830; Davis *v.* Hamilton County, 28 Ohio Cir. Ct. 817.

60. Humphreys *v.* Nelson, 115 Ill. 45, 4 N. E. 637. But *compare* Wauwatosa *v.* Gunyon, 25 Wis. 271, holding, under an early statute of Wisconsin, that the valuation of the taxpayer's credits was to be fixed by himself.

Owner's valuation as evidence.— If merchandise is carried on the owner's books as of a certain value, and he also insures it for that sum, the assessors are justified in appraising it at that value, and are not obliged to reduce their assessment merely on his statement that it has depreciated in value. People *v.* Feitner, 34 Misc. (N. Y.) 305, 69 N. Y. Suppl. 798 [*affirmed* in 62 N. Y. App. Div. 618, 71 N. Y. Suppl. 1145 (*affirmed* in 168 N. Y. 674, 61 N. E. 1133)].

61. Willis *v.* Crowder, 134 Ind. 515, 34 N. E. 315; State *v.* Kruttschnitt, 4 Nev. 178; State *v.* Halliday, 61 Ohio St. 352, 56 N. E. 118, 49 L. R. A. 427.

62. *Indiana.*— Simoyan *v.* Rohan, 36 Ind. App. 495, 76 N. E. 176.

Iowa.— Jewell *v.* Sumner Tp., 113 Iowa 47, 84 N. W. 973.

Kentucky.— Barret *v.* Henderson, 4 Bush 255.

Louisiana.— Cudahy Packing Co. *v.* Board of Assessors, 115 La. 325, 38 So. 1008; Swift *v.* Board of Assessors, 115 La. 321, 38 So. 1006.

New Hampshire.— International Paper Co. *v* Walpole, 75 N. H. 320, 74 Atl. 180, holding that logs of a foreign wood pulp and paper manufacturer stored on its land for use in its manufacturing business are properly taxed as stock in trade.

See 45 Cent. Dig. tit. "Taxation," §§ 591–593.

Average capital of a grain dealer see Central Granaries Co. *v.* Lancaster County, 77 Nebr. 319, 327, 113 N. W. 199, 543.

63. **Deduction of indebtedness** see *infra*, VI, C, 7.

64. State *v.* Stamm, 165 Mo. 73, 65 S. W. 242; People *v.* Tax, etc., Com'rs, 4 Hun (N. Y.) 595; Com. *v.* Lehigh Valley R. Co., 104 Pa. St. 89. But *compare* Perry County *v.* Troutman, 8 Pa. Co. Ct. 427.

Insurance policy.—After the death of the insured and before proofs thereof are made, the value of a policy of insurance issued by a fraternal benefit society is a question of fact for the determination of the taxing officers. Cooper *v.* Montgomery County Bd. of Review, 207 Ill. 472, 69 N. E. 878, 64 L. R. A. 72.

Money deposited in a bank and evidenced by a certificate of deposit payable on demand is liable to assessment as money, and not as a credit. White *v.* Lincoln, 79 Nebr. 153, 112 N. W. 369.

Valuation of bank stock see Blue Hill First Nat. Bank *v.* Webster County, 77 Nebr. 815, 113 N. W. 190, 77 Nebr. 813, 110 N. W. 535.

65. See *supra*, III, D, 3, a.

Devices to evade taxation by conversion of money and investments into United States

at the time of the assessment;[66] but the interest of a remainder-man in a principal fund, which is to take effect in possession after the death of a life annuitant, is to be assessed for its present value, to be ascertained by the tables of mortality.[67]

7. Deduction of Indebtedness[68] — a. In General. In several states a taxpayer is allowed to deduct his *bona fide* indebtedness from the amount of his taxable personal property;[69] and an assessment is void if made without allowing such deduction when properly claimed by a person entitled to it.[70] But generally, where a person owns property in several places, the deduction is to be allowed only at the place of his own domicile, and hence cannot be claimed by non-residents.[71]

b. Deduction From Credits. In the absence of statute there can be no deductions from taxes on credits for debts owing by the taxpayer, and a statute authorizing such deduction should be strictly construed.[72] Within the meaning of such laws, money, whether in hand or in bank, is not a "credit" from which the deduction can be made,[73] neither is money loaned at interest, whether secured by note, bond, mortgage, or otherwise,[74] nor shares of stock in a national or state bank.[75] Where the law requires the taxpayer to file a list or schedule of the debts which

securities just before period for assessment see *supra*, III, A, 1, e.

66. State *v.* Melroy, (N. J. Sup. 1890) 19 Atl. 732; Richey *v.* Shurts, 41 N. J. L. 279; Gano *v.* Apgar, 41 N. J. L. 230; Hill *v.* Hansom, 36 N. J. L. 50; State *v.* Cornell, 31 N. J. L. 374.

Taxability of annuities in general see *supra*, III, A, 2, d.

67. State *v.* Melroy, (N. J. Sup. 1890) 19 Atl. 732; Wills *v.* Lippincott, 50 N. J. L. 349, 13 Atl. 6; Crispin *v.* Vansyckle, 49 N. J. L. 366, 8 Atl. 120; Wyckoff *v.* Jones, 39 N. J. L. 650.

68. Deductions of indebtedness: Of corporations generally see *infra*, VI, D, 5, e, (II). Of insurance companies see *infra*, VI, D, 7, b. Of railroad companies see *infra*, VI, D, 8, f.

Deduction of value of property of corporation not taxable see *infra*, VI, D, 5, e, (I).

69. See the statutes of the several states. And see Clark *v.* Belknap, 13 S. W. 212, 11 Ky. L. Rep. 791 (holding that a statutory provision allowing such a deduction is nugatory, where the law is so framed that no deduction can be made from the kinds of property enumerated in it, and it embraces all known kinds of property); Steere *v.* Walling, 7 R. I. 317 (holding that movable machinery is personal property, from the value of which the owner's actual indebtedness may be deducted); *In re* Assessment, etc., of Taxes, 4 S. D. 6, 54 N. W. 818.

Estate of devisee.— In order to determine how much of the estate of a devisee should be assessed for taxation, the amount which such devisee should contribute to the payment of decedent's debts should be ascertained and deducted from the devisee's estate. Schaeffer *v.* Ardery, 241 Ill. 27, 89 N. E. 294.

70. Howell *v.* Richards, 47 N. J. L. 434, 1 Atl. 495; Hughes *v.* Kelley, 69 Vt. 443, 38 Atl. 91.

An assignee for the benefit of creditors is a "trustee" within the meaning of the New Jersey tax law, and as such is taxable for the estate of the assignor in his hands, without deduction for the debts due from the assignor to his creditors. Clark *v.* Grover, 37 N. J. L. 174.

71. Perkins *v.* Bishop, 34 N. J. L. 45; People *v.* Barker, 159 N. Y. 569, 54 N. E. 1093 [*affirming* 35 N. Y. App. Div. 486, 54 N. Y. Suppl. 848]; People *v.* Barker, 145 N. Y. 239, 39 N. E. 1065; People *v.* Barker, 141 N. Y. 118, 35 N. E. 1073, 23 L. R. A. 95. But *compare In re* Assessment, etc., of Taxes, 4 S. D. 6, 54 N. W. 818.

72. Bailies *v.* Des Moines, 127 Iowa 124, 102 N. W. 813.

Deduction of indebtedness from unsecured credits see Willows Bank *v.* Glenn County, 155 Cal. 352, 101 Pac. 13.

73. Morris *v.* Jones, 150 Ill. 542, 37 N. E. 928; Stewart *v.* Duerr, 20 Ohio Cir. Ct. 505, 11 Ohio Cir. Dec. 310; Pullman State Bank *v.* Manring, 18 Wash. 250, 51 Pac. 464. But *compare* Com. *v.* Kentucky Distilleries, etc., Co., 132 Ky. 521, 116 S. W. 766; Clark *v.* Maher, 34 Mont. 391, 87 Pac. 272.

74. *Indiana.*— Clark *v.* Carter, 40 Ind. 190, under the statute of 1869. But under Rev. St. (1881) §§ 6332, 6333, and 6336. it is otherwise. Moore *v.* Hewitt, 147 Ind. 464, 46 N. E. 905.

Kansas.— Lappin *v.* Nemaha County, 6 Kan. 403.

Nebraska.— Lancaster County *v.* McDonald, 73 Nebr. 453, 103 N. W. 78.

Nevada.— Drexler *v.* Tyrrell, 15 Nev. 114; State *v.* State First Nat. Bank, 4 Nev. 348.

Ohio.— Payne *v.* Watterson, 37 Ohio St. 121.

See 45 Cent. Dig. tit. "Taxation," § 596.

But *compare* Taylor *v.* Caribou, 102 Me. 401, 67 Atl. 2.

A note and mortgage taken in exchange for property is not "money loaned and invested," but is a credit from which the holder may deduct the just debts by him owing at the time of making his tax return. Oleson *v.* Cuming County, 81 Nebr. 209, 115 N. W. 783.

75. Chapman *v.* Wellington First Nat. Bank, 56 Ohio St. 310, 47 N. E. 54; Burrows *v.* Smith, 95 Va. 694, 29 S. E. 674. But *compare* Bramel *v.* Manring, 18 Wash. 421, 51 Pac. 1050; Pullman State Bank *v.* Manring, 18 Wash. 250, 51 Pac. 464.

he wishes to deduct, he loses the privilege by a failure to comply with this requirement.[76] The right belongs, as the statutes are generally framed, to corporations as well as to natural persons.[77]

c. Debts Which May Be Deducted. The law allows the taxpayer to deduct only such debts as are just and legal, founded on actual consideration, and a present charge against him.[78] Either by restrictive provisions in the statutes,[79] or by the construction placed upon them by the courts, the taxpayer is not accorded this privilege in respect to obligations which are not properly described as "debts";[80] or in respect to contingent or collateral obligations or charges for which he expects to become liable, but which are not yet due;[81] or debts due to non-residents;[82] or for subscriptions to charitable institutions or to the capital stock of corporations;[83] or, in New York, for debts incurred in the purchase of property which is not taxable.[84]

d. Deduction of Encumbrances on Real Property. In the absence of a statute allowing the owner of land to deduct from its assessed value the encumbrances on it, real property is to be assessed at its full value without regard to mortgages or other encumbrances upon it.[85] In several states, however, there are now laws

76. Pierce *v.* Carlock, 224 Ill. 608, 79 N. E. 959; Siegfried *v.* Raymond, 190 Ill. 424, 60 N. E. 868. But see Schoonover *v.* Petcina, 126 Iowa 261, 100 N. W. 490; Sprague *v.* Fletcher, 69 Vt. 69, 37 Atl. 239, 37 L. R. A. 840.

77. State *v.* Northern Pac. R. Co., 95 Minn. 43, 103 N. W. 731; Daly Bank, etc., Co. *v.* Silver Bow County, 33 Mont. 101, 81 Pac. 950. And see *infra*, VI, D, 5, e, (II).

78. Hutchinson *v.* Oskaloosa Bd. of Equalization, 67 Iowa 182, 25 N. W. 121; Baldwin *v.* Hewitt, 88 Ky. 673, 11 S. W. 803, 11 Ky. L. Rep. 199; People *v.* Coleman, 133 N. Y. 625, 30 N. E. 1150 [*affirming* 16 N. Y. Suppl. 330]; People *v.* Tax Com'rs, 99 N. Y. 154, 1 N. E. 401 [*affirming* 34 Hun 506]; Stewart *v.* Duerr, 20 Ohio Cir. Ct. 505, 11 Ohio Cir. Dec. 310. But *compare* People *v.* Ryan, 88 N. Y. 142, 10 Abb. N. Cas. 37, 61 How. Pr. 452, 42 Am. Rep. 238, holding that deduction must be allowed for an actual and valid debt, although incurred in a transaction which was a mere device to escape taxation.

Application to particular debts see Tallcott *v.* Glastonbury, 64 Conn. 575, 30 Atl. 764 (note secured by mortgage); Bremer *v.* Cherokee, (Iowa 1898) 73 N. W. 861 (indebtedness of taxpayer to his adult children); Rogers *v.* Pettit, 39 N. J. L. 654 (apportionable annuity).

In Connecticut the statute impliedly prohibits any deduction for unsecured indebtedness which was not contracted to obtain and did not in fact obtain for the debtor taxable property, afterward set in his list and made the subject of assessment. Skilton *v.* Colebrook, 76 Conn. 666, 57 Atl. 850.

79. See People *v.* Barker, 155 N. Y. 330, 49 N. E. 940, holding that the right to have debts deducted from the value of taxable property is not an absolute one, but is in the nature of a favor, and no constitutional right is violated by a law which permits the deduction of some debts and not of others.

80. Title Guaranty, etc., Co. *v.* Los Angeles County, 3 Cal. App. 619, 86 Pac. 844 (holding that the obligation of one on account of money in his control as agent or trustee is not that of a debtor, in such sense that the amount thereof may be deducted from his assessment); Bailies *v.* Des Moines, 127 Iowa 124, 102 N. W. 813 (holding that unpaid taxes are not "debts" within the meaning of such a statute); Hoagland *v.* Merrick County, 81 Nebr. 83, 115 N. W. 537 (holding that an indebtedness existing merely as a convenience in bookkeeping cannot be deducted).

81. Schoonover *v.* Petcina, 126 Iowa 261, 100 N. W. 490; Beecher *v.* Detroit, 110 Mich. 456, 68 N. W. 237; People *v.* Wells, 94 N. Y. App. Div. 463, 87 N. Y. Suppl. 745, 88 N. Y. Suppl. 1113 [*affirmed* in 179 N. Y. 566, 71 N. E. 1136]; Albany Mut. Bldg. Assoc. *v.* Laramie, 10 Wyo. 54, 65 Pac. 1011.

82. Montgomery *v.* Trenton, 40 N. J. L. 89; Ankeny *v.* Multnomah County, 4 Oreg. 271, 3 Oreg. 388; Barnes *v.* Flummerfelt, 21 Wash. 498, 58 Pac. 575.

In New York an assessment for taxation on personal property of a non-resident located in New York is not subject to deduction for an indebtedness due from the owner, unless the indebtedness stands in some direct relation to the property. People *v.* O'Donnell, 46 Misc. 521, 92 N. Y. Suppl. 577.

83. Matter *v.* Campbell, 71 Ind. 512; King *v.* Carroll, 129 Iowa 364, 105 N. W. 705, holding, however, that a contract to contribute to the endowment fund of a college, payable at the death of the obligor, is a binding debt which may be deducted.

84. People *v.* Dederick, 161 N. Y. 195, 55 N. E. 927; People *v.* Barker, 155 N. Y. 330, 49 N. E. 940 (holding that this provision applies not only to cases where the debt was fraudulently incurred for the purpose of evading taxation, but to all cases of debts incurred for non-taxable property); People *v.* Barker, 22 N. Y. App. Div. 120, 47 N. Y. Suppl. 958. And see People *v.* Tax Com'rs, 53 Misc. (N. Y.) 336, 104 N. Y. Suppl. 756.

85. Territory *v.* Gila County Delinquent Tax List, 3 Ariz. 179, 24 Pac. 182; Fields *v.* Russell, 38 Kan. 720, 17 Pac. 476; Allen *v.* Harford County, 74 Md. 294, 22 Atl. 398;

in force which permit such deductions to be made;[86] and when the privilege is duly claimed by the landowner it must be allowed by the assessor.[87]

8. Omissions of Taxable Property — a. Effect in General. In some jurisdictions it is held that the intentional omission of property liable to taxation from the assessment roll invalidates all taxes levied thereon and gives a right of complaint against the entire assessment to any one whose own burdens are unduly increased by such omission;[88] but that if the omission is accidental and unintentional, resulting from the negligence of the assessor or from a want or mistake of judgment on his part, without fraud, it will not vitiate the whole proceeding.[89] But the rule more generally adopted is that the assessment is not invalidated, at least as to a person who is properly taxed, by any such omission, from whatever cause arising, and whether intentional or not.[90]

b. Addition of Omitted Property.[91] After the completion of his assessment

Paddell *v.* New York, 50 Misc. 422, 100 N. Y. Suppl. 581 [*affirmed* in 114 N. Y. App. Div. 911, 100 N. Y. Suppl. 1133]; Matter of Murphy, 9 Misc. (N. Y.) 647, 30 N. Y. Suppl. 511.

Under New Jersey Tax Act (1903), § 10, (Pamphl. Laws (1903), p. 400) no deduction from the assessed value of real property can be made by the assessor on account of any mortgage debt. Hartshorne *v.* Avon-by-the-Sea, 75 N. J. L. 407, 67 Atl. 935. Prior to the enactment of this statute, however, the rule in this state under earlier statutes was otherwise. See Myers *v.* Campbell, 64 N. J. L. 186, 44 Atl. 863; Rosell *v.* Buck, 62 N. J. L. 575, 41 Atl. 968; Myers *v.* Campbell, 59 N. J. L. 378, 35 Atl. 788; Appleby *v.* East Brunswick Tp., 44 N. J. L. 153; State *v.* Silvers, 41 N. J. L. 505; King *v.* Manning, 40 N. J. L. 461; State *v.* Williamson, 33 N. J. L. 77; Pershine *v.* Grey, 29 N. J. L. 380; Woodward *v.* Pearson, 24 N. J. L. 254.

86. See the statutes of the several states. And see Smith *v.* Keagle, (Cal. 1888) 20 Pac. 152; People *v.* San Francisco, 77 Cal. 136, 19 Pac. 257; Chicago, etc., R. Co. *v.* State, 128 Wis. 553, 108 N. W. 557.

In assessing oil and gas privileges under a lease there should be deducted from the value thereof the part represented by the amount of oil reserved to the lessor by the lease, the remainder being taxable against the lessee. Wolfe County *v.* Beckett, 127 Ky. 252, 105 S. W. 447, 32 Ky. L. Rep. 167, 17 L. R. A. N. S. 688.

87. Palomares Land Co. *v.* Los Angeles County, 146 Cal. 530, 80 Pac. 931; Henne *v.* Los Angeles County, 129 Cal. 297, 61 Pac. 1081; Abbott *v.* Frost, 185 Mass. 398, 70 N. E. 478.

88. Auditor-Gen. *v.* Prescott, 94 Mich. 190, 53 N. W. 1058; Coles *v.* Platt, 24 N. J. L. 108; Semple *v.* Langlade County, 75 Wis. 354, 44 N. W. 749; Johnston *v.* Oshkosh, 65 Wis. 473, 27 N. W. 320; Smith *v.* Smith, 19 Wis. 615, 88 Am. Dec. 107; Hershey *v.* Milwaukee County, 16 Wis. 185, 82 Am. Dec. 713; Weeks *v.* Milwaukee, 10 Wis. 242. But *compare* Bond *v.* Kenosha, 17 Wis. 284; Dean *v.* Gleason, 16 Wis. 1, both holding that the omission of railroad property does not affect the assessment.

89. *Massachusetts.* — Williams *v.* Lunenburg School Dist. No. 1, 21 Pick. 75, 32 Am. Dec. 243.

Michigan. — Perkins *v.* Nugent, 45 Mich. 156, 7 N. W. 757.

Minnesota. — Corbet *v.* Rocksbury, 94 Minn. 397, 103 N. W. 11.

Nebraska. — Burlington, etc., R. Co. *v.* Saline County, 12 Nebr. 396, 11 N. W. 854. See also Kittle *v.* Shervin, 11 Nebr. 65, 7 N. W. 861.

New Jersey. — Coles *v.* Platt, 24 N. J. L. 108.

Wisconsin. — Chicago, etc., R. Co. *v.* State, 128 Wis. 553, 108 N. W. 557; Smith *v.* Smith, 19 Wis. 615, 88 Am. Dec. 707; Dean *v.* Gleason, 16 Wis. 1; Weeks *v.* Milwaukee, 10 Wis. 242.

Canada. — Meisner *v.* Meisner, 32 Nova Scotia 320.

See 45 Cent. Dig. tit. "Taxation," § 766.

90. *California.* — People *v.* McCreery, 34 Cal. 432.

Connecticut. — Sanford *v.* Dick, 15 Conn. 447.

Illinois. — Dunham *v.* Chicago, 55 Ill. 357.

Iowa. — Sioux City, etc., R. Co. *v.* Osceola County, 45 Iowa 168.

Maine. — Greenville *v.* Blair, 104 Me. 444, 72 Atl. 177; Longfellow *v.* Quimby, 33 Me. 457.

New Hampshire. — Thompson *v.* Newtown, 21 N. H. 595; Smith *v.* Messer, 17 N. H. 420.

New York. — New York *v.* Tucker, 182 N. Y. 535, 75 N. E. 1128 [*affirming* 91 N. Y. App. Div. 214, 86 N. Y. Suppl. 509]; Van Denter *v.* Long Island City, 139 N. Y. 133, 34 N. E. 774.

Ohio. — Columbus Exch. Bank *v.* Hines, 3 Ohio St. 1.

Pennsylvania. — Philadelphia Contributionship *v.* Yard, 17 Pa. St. 331.

Rhode Island. — McTwiggan *v.* Hunter, 19 R. I. 265, 33 Atl. 5, 29 L. R. A. 526; Capwell *v.* Hopkins, 10 R. I. 378.

Vermont. — Blodgett *v.* Holbrook, 39 Vt. 336; Spear *v.* Braintree, 24 Vt. 414.

Washington. — Eureka Dist. Gold Min. Co. *v.* Ferry County, 28 Wash. 250, 68 Pac. 727; Puget Sound Agricultural Co. *v.* Pierce County, 1 Wash. Terr. 159.

United States. — Muscatine *v.* Mississippi, etc., R. Co., 17 Fed. Cas. No. 9,971, 1 Dill. 536.

See 45 Cent. Dig. tit. "Taxation," § 766.

91. Assessment of omitted property by reviewing board or officer see *infra*, VII, B, 5, b.

the assessor has no power to add to it property which he has omitted, unless under authority of a statute.[92] In most of the states, however, the statutes now provide for omitted property by allowing it to be assessed when discovered, and incorporated in the list or roll.[93] Such an enactment is constitutional.[94]

9. Amendment and Reassessment — a. Amendment or Alteration by Assessors.[95] Before completion and delivery of the assessment lists or rolls, the assessors have authority to correct mistakes in them,[96] except that they cannot increase the assessment of a taxpayer or the valuation of his property without giving him notice and an opportunity to be heard.[97] On the other hand, if the taxpayer

92. Parkinson *v.* Jasper County Tel. Co., 31 Ind. App. 135, 67 N. E. 471; Douglas County *v.* Lane, 76 Kan. 12, 90 Pac. 1092.

93. See the statutes of the several states. And see the following cases:

Idaho.—Inland Lumber, etc., Co. *v.* Thompson, 11 Ida. 508, 83 Pac. 933, 114 Am. St. Rep. 274.

Illinois.— Stevens *v.* Henry County, 218 Ill. 468, 75 N. E. 1024, 4 L. R. A. N. S. 339; Allwood *v.* Cowen, 111 Ill. 481. See also People *v.* International Salt Co., 233 Ill. 223, 84 N. E. 278, as to the power of an assessor to assess property omitted from the county clerk's lists of taxable real estate.

Indiana.— State *v.* Goldthait, 172 Ind. 210, 87 N. E. 133; McCrory *v.* O'Keefe, 162 Ind. 534, 70 N. E. 812; Chicago, etc., R. Co. *v.* John, 150 Ind. 113, 48 N. E. 640; Deniston *v.* Terry, 141 Ind. 677, 41 N. E. 143; Saint *v.* Welsh, 141 Ind. 382, 40 N. E. 903; Lang *v.* Clapp, 103 Ind. 17, 2 N. E. 197; Parkinson *v.* Jasper County Tel. Co., 31 Ind. App. 135, 67 N. E. 471; Woll *v.* Thomas, 1 Ind. App. 232, 27 N. E. 578.

Iowa.— *In re* Seaman, 135 Iowa 543, 113 N. W. 354; Security Sav. Bank *v.* Carroll, 131 Iowa 605, 109 N. W. 212; Snakenberg *v.* Stein, 126 Iowa 650, 102 N. W. 533; Morgan *v.* Messenger, 125 Iowa 247, 101 N. W. 127; Thornburg *v.* Cardell, 123 Iowa 313, 95 N. W. 239, 98 N. W. 791; Beresheim *v.* Arnd, 117 Iowa 83, 90 N. W. 506; Lambe *v.* McCormick, 116 Iowa 169, 89 N. W. 241.

Kansas.—Douglas County *v.* Lane, 76 Kan. 12, 90 Pac. 1092.

Kentucky.— Com. *v.* Chesapeake, etc., R. Co., 131 Ky. 661, 117 S. W. 287; Com. *v.* Lovell, 125 Ky. 491, 101 S. W. 970, 31 Ky. L. Rep. 105; Com. *v.* Chaudet, 125 Ky. 111, 100 S. W. 819, 30 Ky. L. Rep. 1157; Com. *v.* Reed, 121 Ky. 432, 89 S. W. 294, 28 Ky. L. Rep. 381; Bell *v.* Lexington, 120 Ky. 199, 85 S. W. 1081, 27 Ky. L. Rep. 591; Belknap *v.* Com., 120 Ky. 59, 85 S. W. 693, 27 Ky. L. Rep. 473; Com. *v.* Citizens' Nat. Bank, 117 Ky. 946, 80 S. W. 158, 25 Ky. L. Rep. 2100; Sebree *v.* Com., 115 Ky. 736, 74 S. W. 716, 25 Ky. L. Rep. 121; Com. *v.* Sweigart, 115 Ky. 293, 73 S. W. 758, 24 Ky. L. Rep. 2147; Chicago, etc., R. Co. *v.* Com., 115 Ky. 278, 72 S. W. 1119, 24 Ky. L. Rep. 2124; Com. *v.* American Tobacco Co., 96 S. W. 466, 29 Ky. L. Rep. 745; Bishop *v.* Gregory, 85 S. W. 1197, 27 Ky. L. Rep. 478; Com. *v.* Hamilton, 72 S. W. 744, 24 Ky. L. Rep. 1944.

Louisiana.— Parker *v.* New Orleans Gas Light Co., 44 La. Ann. 753, 11 So. 32; New Orleans *v.* Southern Bank, 15 La. Ann. 89.

Maine.— Sweetsir *v.* Chandler, 98 Me. 145, 56 Atl. 584; Eliot *v.* Prime, 98 Me. 48, 56 Atl. 207.

Maryland.— Skinner, etc., Ship Bldg., etc., Co. *v.* Baltimore, 96 Md. 32, 53 Atl. 416.

Massachusetts.— Harwood *v.* North Brokfield, 130 Mass. 561.

Minnesota.— State *v.* Eberhard, 90 Minn. 120, 95 N. W. 1115.

Mississippi.— Adams *v.* Clarke, 80 Miss. 134, 31 So. 216.

New York.— People *v.* Goff, 52 N. Y. 434; *In re* Chadwick, 59 N. Y. App. Div. 334, 69 N. Y. Suppl. 853.

Rhode Island.— Sullivan *v.* Peckham, 16 R. I. 525, 17 Atl. 997.

Tennessee.— Arbuckle *v.* McCutcheon, 111 Tenn. 514, 77 S. W. 772.

Vermont.— Potter *v.* Lewis, 73 Vt. 367, 51 Atl. 5.

West Virginia.—Webb *v.* Ritter, 60 W. Va. 193, 54 S. E. 484.

United States.— Chicago Union Tract. Co. *v.* State Bd. of Equalization, 112 Fed. 607.

See 45 Cent. Dig. tit. "Taxation," § 600.

94. Belknap *v.* Com., 120 Ky. 59, 85 S. W. 693, 27 Ky. L. Rep. 473; Powell *v.* McKee, 81 Miss. 229, 32 So. 919; South Nashville St. R. Co. *v.* Morrow, 87 Tenn. 406, 11 S. W. 548, 2 L. R. A. 853.

95. **Amendment by assessor after roll has been filed** see *infra*, VI, E, 9, c.

96. Savings, etc., Soc. *v.* San Francisco, 146 Cal. 673, 80 Pac. 1086; People *v.* Westchester County, 15 Barb. (N. Y.) 607; Livingston *v.* Hollenbeck, 4 Barb. (N. Y.) 9, 3 How. Pr. 343. But *compare* Sweetsir *v.* Chandler, 98 Me. 145, 56 Atl. 584; Eagle River *v.* Brown, 85 Wis. 76, 55 N. W. 163.

Apportionment of the tax among persons by whom the property was severally purchased after it had been assessed see Rogers *v.* Gookin, 198 Mass. 434, 85 N. E. 405, holding also that purchasers who recognized the apportionment as made at their request, and only complained that the tax was too high, could not thereafter object that the request was not in writing.

97. People *v.* Ward, 105 Ill. 620; *In re* Seaman, 135 Iowa 543, 113 N. W. 354; Garrett *v.* Creekmore, 121 Ky. 250, 89 S. W. 166, 28 Ky. L. Rep. 211; Stewart *v.* Trevor, 56 Pa. St. 374.

Estoppel to object to want of proper notice see Rogers *v.* Gookin, 198 Mass. 434, 85 N. E. 405.

Burden to show prejudice by failure to receive notice see Rogers *v.* Gookin, 198 Mass. 434, 85 N. E. 405.

makes application for a reduction of his assessment and furnishes satisfactory proof of a mistake, it is the duty of the assessor to correct it.[98]

b. Reassessment.[99] As a general rule, either by express authority or by implication from the statutes, a reassessment may be made where the original assessment, either as a whole or as to individuals, was void for illegality, error, or irregularity.[1]

10. Notice of Assessment.[2] By statute in some of the states, the taxpayer is entitled to personal notice of the fact and amount of his assessment;[3] but generally this is not required, the validity of the assessment not depending on the fact of notice being given,[4] except in the case of listing omitted property or of an increased assessment.[5] When notice is provided for, it is in general not

98. People *v.* Albany Bd. of Assessors, 40 N. Y. 154; People *v.* Howland, 61 Barb. (N. Y.) 273. But see Vose *v.* Willard, 47 Barb. (N. Y.) 320, where the taxpayer failed to comply with the statute.

99. Reassessment by reviewing board or officer see *infra*, VII, B, 5, h.

1. *Georgia.*— Central Georgia R. Co. *v.* Wright, 125 Ga. 617, 54 S. E. 64; Georgia R., etc., Co. *v.* Wright, 125 Ga. 589, 54 S. E. 52.

Illinois.— People *v.* Chicago, etc., R. Co., 228 Ill. 102, 81 N. E. 813.

Iowa.— *In re* Seaman, 135 Iowa 543, 113 N. W. 354.

Massachusetts.— Hunt *v.* Perry, 165 Mass. 287, 43 N. E. 103; Market Nat. Bank *v.* Belmont, 137 Mass. 407.

Michigan.— Auditor-Gen. *v.* Tuttle, 146 Mich. 106, 109 N. W. 48.

New Jersey.— *In re* Elizabeth, 49 N. J. L. 488, 10 Atl. 363.

New York.— Overing *v.* Foote, 43 N. Y. 290; Douglas *v.* Westchester County, 68 N. Y. App. Div. 296, 74 N. Y. Suppl. 144 [*reversed* on other grounds in 172 N. Y. 309, 65 N. E. 162]; People *v.* Nassau County, 54 Misc. 323, 104 N. Y. Suppl. 353.

Pennsylvania.—Jermyn *v.* Scranton, 3 Lack. Leg. N. 112.

Tennessee.— Boyd *v.* Hunt, 13 Lea 252; Barnes *v.* Brown, 1 Tenn. Ch. App. 726.

Vermont.— Fuller *v.* Gould, 20 Vt. 643.

See 45 Cent. Dig. tit. "Taxation," § 602.

But *compare* State *v.* April Fool Min. Co., 26 Nev. 87, 64 Pac. 3; Scheiber *v.* Kaehler, 49 Wis. 291, 5 N. W. 817, reassessment upon portion of tract held void.

A reassessed tax is not, speaking strictly, a new tax; but is a part of the tax of the year in which it is first assessed, and must be based upon the valuation of that year, and must be laid under the original votes of the town and the warrants of the state and county fixing the tax for that year. Market Nat. Bank *v.* Belmont, 137 Mass. 407.

In the absence of statutory authority, after city taxes have been assessed to one who is not the owner of the land, and under such assessment a sale has been made, the city has no power to refund, to reassess to the true owner, and to sell again. Dowell *v.* Portland, 13 Oreg. 248, 10 Pac. 308.

A retrospective law may be passed providing for the reassessment of grossly undervalued property. Anderson *v.* Ritterbusch, 22 Okla. 761, 98 Pac. 1002.

2. **Notice of assessment of corporate property** see *infra*, VI, D, 11.

Notice of assessment for benefits from public improvement see Municipal Corporations, 28 Cyc. 1145.

Notice of proceedings of reviewing board see *infra*, VII, B, 7, b.

3. *Maryland.*— Carstairs *v.* Cochran, 95 Md. 488, 52 Atl. 601, holding that a receipt of a tax bill of taxes is sufficient notice of the tax assessment.

Mississippi.— Adams *v.* Clarksdale, (1909) 48 So. 242 (as to time of service); Clarksdale *v.* Yazoo, etc., R. Co., (1901) 29 So. 93.

New York.— People *v.* Lewis, 127 N. Y. App. Div. 107, 111 N. Y. Suppl. 398.

Rhode Island.— Taft *v.* Ballou, 23 R. I. 213, 49 Atl. 895; Kettelle *v.* Warwick, etc., Water Co., 23 R. I. 114, 49 Atl. 492; McTwiggan *v.* Hunter, 18 R. I. 776, 30 Atl. 962.

Vermont.— Meserve *v.* Folsom, 62 Vt. 504, 20 Atl. 926; Brush *v.* Buker, 56 Vt. 143; Dean *v.* Aiken, 48 Vt. 541.

Wisconsin.—Kellogg *v.* Oshkosh, 14 Wis. 623.

Canada.— Bain *v.* Montreal, 8 Can. Sup. Ct. 252; Nicholls *v.* Cumming, 1 Can. Sup. Ct. 395.

See 45 Cent. Dig. tit. "Taxation," §§ 603–606.

Who entitled to notice.— One to whom the owner of a private alley has given an easement of passage thereover is not entitled to object that the owner thereof was not notified of its assessment for taxes. Hill *v.* Williams, 104 Md. 595, 65 Atl. 413.

Presumption as to notice of assessment see Saranac Land, etc., Co. *v.* Roberts, 125 N. Y. App. Div. 333, 109 N. Y. Suppl. 547 [*affirmed* in 195 N. Y. 303, 88 N. E. 753].

4. *Illinois.*— Grant Land Assoc. *v.* People, 213 Ill. 256, 72 N. E. 804; Gage *v.* Evans, 90 Ill. 569 [*affirming* 1 Ill. App. 202].

Iowa.— Foy *v.* Coe College, 95 Iowa 689, 64 N. W. 636.

Louisiana.—Legendre *v.* St. Charles Parish, 108 La. 515, 32 So. 523. But see Gay *v.* Hebert, 25 La. Ann. 196.

Nebraska.— Chicago, etc., R. Co. *v.* Richardson County, 72 Nebr. 482, 100 N. W. 950.

Pennsylvania.—Winton Coal Co. *v.* Lackawanna County, 1 Lack. Leg. N. 195.

See 45 Cent. Dig. tit. "Taxation," §§ 603–606.

5. Carney *v.* People, 210 Ill. 434, 71 N. E. 365; People *v.* Brooklyn Bd. of Assessors, 92 N. Y. 430. See also Beresheim *v.* Arnd, 117

vitiated by minor irregularities, and is sufficient if it brings home in any way to the actual knowledge of the person or corporation affected the facts of which it is supposed to inform him.[6]

D. Assessment of Corporate Stock and Property[7] — **1. In General — a. Duty and Authority of Assessors.** The assessment of corporations for taxation, particularly those whose business extends into several of the counties or other taxing districts of the state, is commonly intrusted to a state officer, board of commissioners, or state board of equalization, except as to property having a local *situs* exclusively; and the powers and duties of these officers, in making the assessment and valuation, are substantially the same as those of the local assessors in dealing with property locally taxable.[8]

b. Omitted Property. As in the case of property of individual taxpayers,[9] so also with regard to corporate stock and property, provision is commonly made by law for the assessment by the proper officers of any property which may have been omitted from the assessment as originally made or which has escaped taxation in previous years.[10]

2. Report or Statement by Corporation — a. Necessity in General. In most jurisdictions there are statutory provisions requiring corporations to make a return or statement, to the proper assessing board or officers, of their taxable property,[11] and if they disregard and fail to comply with such provisions the

Iowa 83, 90 N. W. 506; and *supra*, VI, C, 9, a. But *compare* People *v.* International Salt Co., 223 Ill. 223, 84 N. E. 278, as to original assessment of omitted property by the assessors.

Where an original assessment is made by the board of review, the property-owner is entitled to notice. People *v.* International Salt Co., 223 Ill. 223, 84 N. E. 278.

6. Missouri River, etc., R. Co. *v.* Morris, 8 Kan. 210; Union Coal Co. *v.* Cooner, 27 Pa. Super. Ct. 95; Edison Electric Illuminating Co. *v.* Spokane County, 22 Wash. 168, 60 Pac. 132; Albany Mut. Bldg. Assoc. *v.* Laramie, (Wyo.) 47 Pac. 1011. And see Miller *v.* Kern County, 150 Cal. 797, 90 Pac. 119.

Notice to executor of decedent's estate see People *v.* New York Tax Com'rs, 31 Hun (N. Y.) 235.

7. Description of corporate property and stock see *infra*, VI, E, 4, a, (III).

Designation in tax roll of corporation and stock-holders see *infra*, VI, E, 3, c.

Discrimination between corporations and individuals as to mode of assessment or valuation as violating constitutional requirement of equality and uniformity see *supra*, II, B, 4.

Exemptions see *supra*, IV, D, 3.

Liability of corporations and corporate property to taxation see *supra*, III, B.

Place of taxation of corporations and corporate property see *supra*, V, F.

8. See the statutes of the several states. And see the following cases:

Illinois.— Ottawa Gas Light, etc., Co. *v.* Downey, 127 Ill. 201, 20 N. E. 20; Porter *v.* Rockford, etc., R. Co., 76 Ill. 561.

Iowa.— Cedar Rapids, etc., R. Co. *v.* Cummins, 125 Iowa 430, 101 N. W. 176.

Kentucky.—Southern R. Co. *v.* Coulter, 113 Ky. 657, 68 S. W. 873, 24 Ky. L. Rep. 203; Com. *v.* Maysville, etc., R. Co., 91 S. W. 1139, 28 Ky. L. Rep. 1322; Stone *v.* Louisville, 57 S. W. 627, 22 Ky. L. Rep. 423.

Louisiana.— Louisiana, etc., R. Co. *v.* Bailey, 115 La. 929, 40 So. 358.

Maryland.— Baltimore *v.* Baltimore City Pass. R. Co., 57 Md. 31.

Missouri.— State *v.* Severance, 55 Mo. 378.

Nebraska.— State *v.* Savage, 65 Nebr. 714, 91 N. W. 716.

New Jersey.— Jersey City *v.* State Bd. of Equalization, 74 N. J. L. 382, 65 Atl. 903 [*reversed* on other grounds in 74 N. J. L. 753, 67 Atl. 38].

New York.— People *v.* Roberts, 90 Hun 533, 36 N. Y. Suppl. 73.

Utah.— State *v.* Eldredge, 27 Utah 477, 76 Pac. 337.

Wisconsin.— State *v.* Chicago, etc., R. Co., 128 Wis. 449, 108 N. W. 594.

United States.— Lake Shore, etc., R. Co. *v.* Powers, 138 Fed. 257 [*affirmed* in 201 U. S. 245, 26 S. Ct. 459, 50 L. ed. 744]; Railroad Tax Cases, 136 Fed. 233.

See 45 Cent. Dig. tit. "Taxation," § 607.

9. See *supra*, VI, C, 8, b.

10. *Connecticut.*— East Granby *v.* Hartford Electric Light Co., 76 Conn. 169, 56 Atl. 514.

Illinois.— Chicago, etc., R. Co. *v.* People, 195 Ill. 184, 62 N. E. 869.

Kentucky.— Com. *v.* Adams Express Co., 118 Ky. 312, 80 S. W. 1118, 26 Ky. L. Rep. 190; Louisville, etc., Ferry Co. *v.* Com., 108 Ky. 717, 57 S. W. 624, 626, 22 Ky. L. Rep. 446, 480; Com. *v.* Chesapeake, etc., R. Co., 91 S. W. 672, 28 Ky. L. Rep. 1110; Com. *v.* Citizens' Nat. Bank, 80 S. W. 158, 25 Ky. L. Rep. 2100; Louisville Water Co. *v.* Com., 34 S. W. 1064, 18 Ky. L. Rep. 2.

Louisiana.— New Orleans *v.* New Orleans, etc., R. Co., 35 La. Ann. 679.

Mississippi.— Yazoo, etc., R. Co. *v.* Adams, 73 Miss. 648, 19 So. 91; State *v.* Simmons, 70 Miss. 485, 12 So. 477.

See 45 Cent. Dig. tit. "Taxation," § 611.

11. See the statutes of the several states. And see the following cases:

assessing officers may make their lists and valuation from any sources of information open to them.[12] If, as is usually the case, the time for making this return is fixed by law, this direction must be obeyed; a return made after the limited time not being in any way binding on the asesssors.[13] And the same is true of a requirement that the list shall be verified; to entitle it to consideration it must be sworn to by an officer or duly authorized agent of the corporation.[14] But a failure to make a requisition or demand on the corporation for a tax return before proceeding to assess it, if that is required by law, will invalidate the assessment.[15]

b. Property to Be Listed. The statutory directions as to the kinds and items of property to be included in a corporation's tax return must be complied with, at least substantially and in all essential particulars, or the return will be insufficient and may be rejected.[16]

c. List of Stock-Holders. Where corporations are required periodically to report to the taxing officers lists of their shareholders, with their residences and the number of shares respectively held, to aid in the proper assessment of such shares, compliance with this duty may be enforced by appropriate proceedings against the corporation.[17] Statutory provisions requiring such a list have been

Arkansas.— Dallas County *v.* Banks, 87 Ark. 484, 113 S. W. 37, insurance company.

Illinois.— Quincy, etc., R. Co. *v.* People, 156 Ill. 437, 41 N. E. 162; Postal Tel.-Cable Co. *v.* Barnard, 37 Ill. App. 105. *Compare* Pacific Hotel Co. *v.* Lieb, 83 Ill. 602.

Indiana.— Louisville, etc., R. Co. *v.* State, 25 Ind. 177, 87 Am. Dec. 358.

Mississippi.— Panola County *v.* Carrier, 89 Miss. 277, 42 So. 347.

New Jersey.—Williamson *v.* New Jersey Southern R. Co., 28 N. J. Eq. 277.

Pennsylvania.— Pennsylvania Ins. Co. *v.* Loughlin, 139 Pa. St. 612, 21 Atl. 163; Com. *v.* Germania Life Ins. Co., 33 Leg. Int. 169.

West Virginia.— Bramwell Bank *v.* Mercer County Ct., 36 W. Va. 341, 15 S. E. 78.

See 45 Cent. Dig. tit. "Taxation," § 612.

National banks excepted see Eaton *v.* Union County Nat. Bank, 141 Ind. 159, 40 N. E. 693.

Investment company.—A corporation organized to purchase land, and whose capital is invested therein, is not an investment company, within a statute requiring such a company to make a statement of its capital stock. Bressler *v.* Wayne County, 84 Nebr. 774, 122 N. W. 23, 82 Nebr. 758, 118 N. W. 1054.

12. See *infra*, VI, D, 2, f.

13. *California.*— Hart *v.* Plum, 14 Cal. 148.

Indiana.— Louisville, etc., R. Co. *v.* State, 25 Ind. 177, 87 Am. Dec. 358; State *v.* Hamilton, 5 Ind. 310.

Kentucky.—Whitaker *v.* Brooks, 90 Ky. 68, 13 S. W. 355, 11 Ky. L. Rep. 871.

New York.— People *v.* New York Floating Dry Dock Co., 63 How. Pr. 451; People *v.* Ross, 15 How. Pr. 63.

Pennsylvania.— Com. *v.* Lehigh Valley R. Co., 129 Pa. St. 429, 18 Atl. 406, 410.

Newly organized corporation.—Where a statute requires annual reports to be made by corporations "hereafter in November," a corporation within the terms of the act is bound to make such a report in November, although it has not been in existence for a year. People *v.* Spring Valley Hydraulic Gold Co., 92 N. Y. 383.

14. Narragansett Pier Co. *v.* Narragansett Dist. Tax Assessors, 17 R. I. 452, 23 Atl. 11. See also State *v.* Northern Trust Co., 73 Minn. 70, 75 N. W. 754.

15. Northern Pac. R. Co. *v.* Carland, 5 Mont. 146, 3 Pac. 134.

16. Charlestown *v.* Middlesex County, 1 Allen (Mass.) 199 (list by treasurer of corporation held sufficient); State *v.* St. Paul Trust Co., 76 Minn. 423, 79 N. W. 543; Missoula First Nat. Bank *v.* Bailey, 15 Mont. 301, 39 Pac. 83; Oregon, etc., Sav. Bank *v.* Catlin, 15 Oreg. 342, 15 Pac. 462.

Applications of the rule as to the necessity and method of listing: Capital and stock. State *v.* Stonewall Ins. Co., 89 Ala. 335, 7 So. 753; Louisville, etc., Mail Co. *v.* Barbour, 88 Ky. 73, 9 S. W. 516, 10 Ky. L. Rep. 836; Pomeroy Salt Co. *v.* Davis, 21 Ohio St. 555. Land and improvements. Chicago, etc., R. Co. *v.* Miller, 72 Ill. 144; Chicago, etc., R. Co. *v.* Livingston County, 68 Ill. 458. Bridges. Cass County *v.* Chicago, etc., R. Co., 25 Nebr. 348, 41 N. W. 246, 2 L. R. A. 188. Itemized list of personal property. State *v.* Central Pac. R. Co., 17 Nev. 259, 30 Pac. 887. Gross earnings. State *v.* Chicago, etc., R. Co., 128 Wis. 449, 108 N. W. 594. Bonded and other indebtedness. Com. *v.* People's Pass. R. Co., 183 Pa. St. 353, 38 Atl. 1091; Com. *v.* Northern Cent. R. Co., 2 Dauph. Co. Rep. (Pa.) 67. Shares of stock-holders when the taxes are to be paid in the first instance by the corporation. Whitaker *v.* Brooks, 90 Ky. 68, 13 S. W. 355, 11 Ky. L. Rep. 871; New Orleans Cotton Exchange *v.* Board of Assessors, 35 La. Ann. 1154. Mortgages, bonds, or other credits as separate items of taxation. Caldwell Land, etc., Co. *v.* Smith, 151 N. C. 70, 65 S. E. 641.

17. State *v.* Royce, 68 Conn. 311, 36 Atl. 48; Baltimore *v.* Chester River Steamboat Co., 103 Md. 400, 63 Atl. 810; Firemen's Ins. Co. *v.* Baltimore, 23 Md. 296; Nebraska Cent. Bldg., etc., Assoc. *v.* Lancaster County Bd. of Equalization, 78 Nebr. 472, 478, 111 N. W.

applied to national banks, as by requiring the cashier or other officer of the bank to keep or transmit a list of the shareholders.[18]

d. Who May Make Return. The tax return for a corporation may be made by any of the officers designated in the statute for that purpose, or by an officer charged with the active conduct of its business;[19] but in either case, the return must show his competency to make it or it will be insufficient.[20]

e. Conclusiveness and Effect. A corporation is generally bound and estopped by the statements in its tax return as to its property and its value.[21] The return is also to be accepted by the assessors as *prima facie* correct and they are justified in relying on it and making their assessment accordingly.[22] In fact they are not at liberty arbitrarily to reject it as false or to proceed in disregard of its statements, when it is not disputed or contradicted by any competent evidence or information.[23] At the same time, the return is not absolutely conclusive on the assessors, and they may make the assessment without regard to its statements if its correctness is successfully impeached.[24] In the absence of a statute to the contrary, a corporation's tax report or list may be exhibited to a person having a legitimate interest in inspecting it.[25]

f. Failure or Refusal to Make Return.[26] Where a corporation neglects or refuses to make the tax return required of it by law, it becomes the duty of the

147, 112 N. W. 314; Memphis *v.* Home Ins. Co., 91 Tenn. 558, 19 S. W. 1042.

18. Hager *v.* Lebanon Citizens' Nat. Bank, 127 Ky. 192, 105 S. W. 403, 914, 32 Ky. L. Rep. 95; Paul *v.* McGraw, 3 Wash, 296, 28 Pac. 532; Waite *v.* Dowley, 94 U. S. 527, 24 L. ed. 181.

Sufficiency of list see Paul *v.* McGraw, 3 Wash. 296, 28 Pac. 532.

19. Lake County *v.* Sulphur Bank Quicksilver Min. Co., 68 Cal. 14, 8 Pac. 593 (superintendent); State *v.* Washoe County, 5 Nev. 317; Charlotte Bldg., etc., Assoc. *v.* Mecklenburg County, 115 N. C. 410, 20 S. E. 526 (must be listed by corporate officers and not by individual stock-holders); Boston Safe Deposit, etc., Co. *v.* Providence Tax Assessors, 25 R. I. 524, 57 Atl. 301 (president).

20. State *v.* Washoe County, 5 Nev. 317.

21. Iowa Cent. R. Co. *v.* People, 156 Ill. 373, 40 N. E. 954; State *v.* Northern Trust Co., 73 Minn. 70, 75 N. W. 754; Com. *v.* Haney Co., 1 Dauph. Co. Rep. (Pa.) 184; Galveston, etc., R. Co. *v.* Galveston, 33 Tex. Civ. App. 384, 77 S. W. 269. But *compare* Chicago, etc., R. Co. *v.* Auditor-Gen., 53 Mich. 79, 18 N. W. 586, holding that a railroad company, by making out its annual report in good faith to the auditor-general of its operations, receipts, and expenses, on which report its tax is to be estimated, is not estopped to show errors or omissions therein.

22. Hager *v.* American Surety Co., 121 Ky. 791, 90 S. W. 550, 28 Ky. L. Rep. 782; People *v.* New York Tax, etc., Com'rs, 76 N. Y. 64; People *v.* Miller, 90 N. Y. App. Div. 588, 86 N. Y. Suppl. 420; People *v.* Steele, Sheld. (N Y.) 345 [*affirmed* in 56 N. Y. 664].

Return not an assessment.—A tax return made by a corporation does not constitute an assessment on which collection of a tax can be based Com. *v.* Lehigh Coal, etc., Co., 104 Pa. St. 89.

23. State *v.* Boston, etc., Express Co., 100 Me. 278, 61 Atl. 697; People *v.* Wells, 179 N. Y. 524, 71 N. E. 1136 [*affirming* 93 N. Y. App. Div. 212, 87 N. Y. Suppl. 543]; People *v.* Barker, 144 N. Y. 638, 39 N. E. 17; Twenty-Third St. R. Co. *v.* Feitner, 92 N. Y. App. Div. 518, 87 N. Y. Suppl. 304; People *v.* Feitner, 78 N. Y. App. Div. 313, 79 N. Y. Suppl. 975; People *v.* Feitner, 41 N. Y. App. Div. 571, 58 N. Y. Suppl. 713; People *v.* Wells, 42 Misc. (N. Y.) 606, 87 N. Y. Suppl. 595; People *v.* Barker, 23 Misc. (N. Y.) 188, 51 N. Y. Suppl. 1105; People *v.* Barker, 16 Misc. (N. Y.) 252, 39 N. Y. Suppl. 88; People *v.* Barker, 37 N. Y. Suppl. 106; Central Petroleum Co. *v.* Com., 25 Leg. Int. (Pa.) 316.

24. Illinois, etc., Coal Co. *v.* Stookey, 122 Ill. 358, 13 N. E. 516; Chicago, etc., R. Co. *v.* Paddock, 75 Ill. 616; People *v.* Barker, 144 N. Y. 94, 39 N. E. 13; People *v.* New York Tax, etc., Com'rs, 76 N. Y. 64; People *v.* Kelsey, 101 N. Y. App. Div. 248, 91 N. Y. Suppl. 711; Com. *v.* Fall Brook R. Co., 188 Pa. St. 199, 41 Atl. 606; State *v.* State Bd. of Assessment, etc., 3 S. D. 338, 53 N. W. 192.

The value of property and securities contained in a sworn statement by the president of a trust company, showing its capital stock and surplus and the value of its securities exempt from taxation submitted to a tax assessor, is not binding on him in making an assessment against such company. Newton Trust Co. *v.* Atwood, 77 N. J. L. 141, 71 Atl. 110.

25. American Dist. Tel. Co. *v.* Woodbury, 127 N. Y. App. Div. 455, 112 N. Y. Suppl. 165, holding that where the statute neither authorizes nor prohibits the publishing of such reports, the state board of tax commissioners could exhibit them to any one having a legitimate interest in inspecting them, and should deny such inspection for improper purposes, whether or not such inspection could be had being within the discretion of the board.

Inspection of public records generally see RECORDS, 34 Cyc. 592.

26. **Proceedings for discovery of property** see *infra*, VI, D, 4.

assessors, or other proper officers, to assess its property upon the best information they can obtain,[27] and in some cases the company is debarred from obtaining any reduction of the tax so assessed.[28] In some jurisdictions a penalty is also imposed.[29]

3. Report or Statement by Stock-Holders. When a corporation makes a report or return of its capital stock and is assessed and pays taxes thereon, it is not generally required that the individual stock-holders should list or return their separate holdings of the stock.[30] But under some statutes it is required that the individual stock-holder shall list capital stock held by him.[31]

4. Proceedings For Discovery of Property. In case of the failure or refusal of a corporation to make a tax return, the assessors may obtain the necessary information from any proper and available sources, as in the case of individual taxpayers,[32] and may have compulsory process to force the corporation to disclose its list of stock-holders or to furnish other information peculiarly within its own knowledge,[33] and may, under the statutes generally in force, examine persons under oath and inspect the books of the corporation.[34]

5. Valuation and Determination of Taxable Property — a. Valuation of Corporate Property in General. Except for necessary differences growing out of the form and organization of corporate business, the property of corporations is to be appraised for taxation in the same way and on the same principles as that of individuals.[35] The entire assets of a corporation should be valued as a unit if

27. *Georgia.*— Georgia R., etc., Co. *v.* Wright, 124 Ga. 596, 53 S. E. 251.

Indiana.— Louisville, etc., R. Co. *v.* State, 25 Ind. 177, 87 Am. Dec. 358.

Missouri.— State *v.* Casey, 210 Mo. 235, 109 S. W. 1.

New Jersey.— Trenton Heat, etc., Co. *v.* State Bd. of Assessors, 73 N. J. L. 370, 63 Atl. 1005.

New York.— People *v.* Wemple, 138 N. Y. 582, 34 N. E. 386.

Return delayed by injunction.—Where an injunction from a federal court, restraining a person whose duty it was to return corporate stock for taxation from so doing, was issued at a time when the holder had twelve days yet remaining of the time in which to make a return for taxation, and the state officer did not make an assessment of the property until after the expiration of that time, the assessment was valid. Georgia R., etc., Co. *v.* Wright, 125 Ga. 589, 54 S. E. 52.

28. Otis Co. *v.* Ware, 8 Gray (Mass.) 509.

29. Chicago, etc., R. Co. *v.* People, 217 Ill. 164, 75 N. E. 368; Farmers' L. & T. Co. *v.* Fonda, 114 Iowa 728, 87 N. W. 724 (holding that the penalty cannot be avoided by making a return after the proper time and after the assessor's books are closed); Iowa, etc., Tel. Co. *v.* Schamber, 15 S. D. 588, 91 N. W. 78.

Where the statute requires the treasurer of a corporation to report the facts concerning its indebtedness, it is his duty to make diligent inquiry for the necessary facts, and the corporation is liable only in case of his default. Com. *v.* Northern Cent. R. Co., 2 Dauph. Co. Rep. (Pa.) 67.

Stock-holders are not liable to taxation on their shares of stock in consequence of the default of the corporation to report its property and pay the taxes thereon. Whitaker *v.* Brooks, 90 Ky. 68, 13 S. W. 355, 11 Ky. L. Rep. 871.

30. Lockwood *v.* Weston, 61 Conn. 211, 23 Atl. 9; Wiley *v.* Salisbury, 111 N. C. 397, 16 S. E. 542; Jones *v.* Davis, 35 Ohio St. 474; Sturges *v.* Carter, 114 U. S. 511, 5 S. Ct. 1014, 29 L. ed. 240.

31. Hasely *v.* Ensley, 40 Ind. App. 598, 82 N. E. 809 (all shares in foreign corporations other than banks); Bressler *v.* Wayne County, 84 Nebr. 774, 122 N. W. 23, 82 Nebr. 758, 118 N. W. 1054 (duty of owner of capital stock to list the same, when it is not assessed in the state).

32. See *supra*, VI, C, 3, a, (I).

33. Matter of Adler, 76 N. Y. App. Div. 571, 78 N. Y. Suppl. 690 [*affirmed* in 174 N. Y. 287, 66 N. E. 929]. See also Louisville, etc., R. Co. *v.* Com., 85 Ky. 198, 3 S. W. 139, 8 Ky. L. Rep. 840.

A national bank may be compelled to disclose the names of its depositors and the amount of their deposits, under compulsory process from a state court, in order to ascertain whether any money deposited therein, subject to taxation within the county, has not been duly returned for that purpose by the owners. Youngstown First Nat. Bank *v.* Hughes, 6 Fed. 737 [*reversing* 9 Fed. Cas. No. 4,811, and *affirmed* in 106 U. S. 523, 1 S. Ct. 489, 27 L. ed. 268].

34. New York, etc., Grain, etc., Exchange *v.* Gleason, 121 Ill. 502, 13 N. E. 204; Applegate *v.* State, 158 Ind. 119, 63 N. E. 16. And see *supra*, VI, C, 3, a, (II).

35. Chicago, etc., R. Co. *v.* State, 128 Wis. 553, 108 N. W. 557. And see Schley *v.* Lee, 106 Md. 390, 67 Atl. 252.

Corporation pursuing different kinds of business.—A corporation engaged in the business of transportation and mining and purchasing coal, occupations which are taxable at different rates, is entitled to an ap-

the law so requires.[36] But if the valuation is to be by separate elements, land should be estimated at its true value, having regard to its situation and all other considerations which affect its value,[37] and the value fixed by local assessors is not an invariable criterion;[38] and this is also true as to buildings, the cost price of which is not necessarily the present measure of value,[39] and in general as to the various kinds and items of personal property which the corporation may own,[40] and if the value of the personalty cannot otherwise be ascertained with exactness, it is proper to consider the earnings or dividends of the company.[41] Where the indebtedness of the corporation is also to be taxed, it is a question, in the absence of a statute, whether orders or bonds issued at a discount should be assessed at their par or market value,[42] although it is competent for the legislature to fix the face value as the value for taxing purposes.[43] In cases of doubt, insufficient information, or conflicting statements the judgment of the assessors will not be disturbed unless clearly shown to be erroneous or fraudulent.[44]

b. Valuation of Franchises and Privileges. The franchises of a corporation are property which may be valued and assessed separate and apart from its capital and other property;[45] but when so assessed they must be taxed, like all other prop-

portionment of its capital stock for taxing purposes. Com. *v.* Delaware, etc., Canal Co., 1 Dauph. Co. Rep. (Pa.) 257.

36. R. Co. *v.* State, 128 Wis. 553, 108 N. W. 557, public service corporation. And see Louisville, etc., Canal Co. *v.* Com., 7 B. Mon. (Ky.) 160; American Glue Co. *v.* Com., 195 Mass. 528, 81 N. E. 302, 122 Am. St. Rep. 268.

37. Com. *v.* Covington, etc., Bridge Co., 114 Ky. 343, 70 S. W. 849, 24 Ky. L. Rep. 1177; State *v.* Metz, 31 N. J. L. 378; People *v.* Morgan, 55 N. Y. App. Div. 265, 66 N. Y. Suppl. 823; People *v.* Barker, 16 Misc. (N. Y.) 252, 39 N. Y. Suppl. 88; Chicago, etc., R. Co. *v.* State, 128 Wis. 553, 108 N. W. 557.

38. People *v.* Wemple, 138 N. Y. 582, 34 N. E. 386 (holding that in assessing taxes on corporate real estate, the controller is not bound by the value placed thereon by the local assessors); People *v.* Morgan, 55 N. Y. App. Div. 265, 66 N. Y. Suppl. 823; People *v.* Barker, 16 Misc. (N. Y.) 252, 39 N. Y. Suppl. 88.

39. People *v.* Miller, 84 N. Y. App. Div. 168, 82 N. Y. Suppl. 621 [*modified* in 177 N. Y. 461, 69 N. E. 1103].

40. *Arkansas.*—*In re* Arkansas Cypress Shingle Co., 74 Ark. 28, 84 S. W. 1029.

Minnesota.—State *v.* Duluth Gas, etc., Co., 76 Minn. 96, 78 N. W. 1032.

Mississippi.—Granada Bank *v.* Adams, 87 Miss. 669, 40 So. 4.

New Jersey.—State *v.* Craig, 51 N. J. L. 437, 17 Atl. 941.

New York.—People *v.* Feitner, 171 N. Y. 641, 63 N. E. 786; People *v.* Kelsey, 108 N. Y. App. Div. 138, 96 N. Y. Suppl. 42; People *v.* Oswego, 6 Thomps. & C. 673.

See 45 Cent. Dig. tit. "Taxation," § 624.

41. People *v.* Barker, 146 N. Y. 304, 40 N. E. 996; People *v.* Barker, 81 Hun (N. Y.) 22, 30 N. Y. Suppl. 586 [*reversed* on other grounds in 144 N. Y. 94, 39 N. E. 13]; People *v.* Barker, 74 Hun (N. Y.) 418, 26 N. Y. Suppl. 519; People *v.* Barker, 28 Misc. (N. Y.) 13, 59 N. Y. Suppl. 926 [*affirmed* and *modified* in 165 N. Y. 305, 59 N. E. 137, 151 (*reversing* 48 N. Y. App. Div. 248, 63 N. Y. Suppl. 167)]. And see People *v.* Neff, 19 N. Y. App. Div. 596, 46 N. Y. Suppl. 239 [*affirmed* in 154 N. Y. 437, 48 N. E. 820], holding that where the value of the personal assets of a company cannot be otherwise definitely ascertained, and the company pays no dividends and has suffered business losses, the difference between the market value of its capital stock and the assessed value of its real estate may be taken as the value of its personalty.

42. Michigan, etc., R. Co. *v.* Auditor-Gen., 9 Mich. 448; People *v.* Barker, 146 N. Y. 304, 40 N. E. 996.

43. Com. *v.* Lehigh Coal, etc., Co., 206 Pa. St. 641, 56 Atl 81; Com. *v.* Delaware Div. Canal Co., 123 Pa. St. 594, 16 Atl. 584, 2 L. R. A. 798.

44. People *v.* Barker, 144 N. Y. 94, 39 N. E. 13; People *v.* Barker, 139 N. Y. 55, 34 N. E. 722; People *v.* Barker, 75 Hun (N. Y.) 6, 26 N. Y. Suppl. 971.

Where the assessment and valuation of bank stock for taxation is made before the bank becomes insolvent, such assessment is fixed and final, and the court, in the absence of fraud, cannot review the valuation, and the shareholders are liable for the amount so assessed. Hewitt *v.* Traders' Bank, 18 Wash. 326, 51 Pac. 468. And see Bramel *v.* Manring, 18 Wash. 421, 51 Pac. 1050.

45. State *v.* Duluth Gas, etc., Co., 76 Minn. 96, 78 N. W. 1032; People *v.* Feitner, 78 N. Y. App. Div. 313, 79 N. Y. Suppl. 975; People *v.* Wells, 42 Misc. (N. Y.) 606, 87 N. Y. Suppl. 595; Richmond, etc., R. Co. *v.* Brogden, 74 N. C. 707. But *compare* Lake City El. Light Co. *v.* McCrary, 132 Iowa 624, 110 N. W. 19; Fond du Lac Water Co. *v.* Fond du Lac, 82 Wis. 322, 52 N. W. 439, 16 L. R. A. 581, water company.

In New York the state board of tax commissioners must annually fix and determine the valuation of each special franchise subject to assessment in each city, town, or tax district, and village assessors must enter the

erty, according to their real value.[46] The legislature may direct the manner of arriving at the value of franchises for taxation by any method reasonably fair in its operation, although it has no power to establish an arbitrary rule having no relation to the ascertainment of the true value.[47] One method of appraising corporate franchises much in vogue is to take the market value of the whole capital stock of the company and deduct from it the value of all its real property and tangible personal property, the remainder being the value of the franchise.[48] But under some statutes the amount of capital stock outstanding,[49] or of that employed within the state, is made the basis for estimating the franchise tax, the latter being calculated as a percentage on such capital, and varying with the amount

valuation of such franchises as so fixed, and, where the board omits to do so, the assessors have no power to determine such value. People *v.* Keno, 61 Misc. 345, 114 N. Y. Suppl. 1094.

Each highway crossing of a railroad company in a town in which it has only one line of railroad is not a special franchise to be valued separately, but all its special privileges therein, constituting parts of and operated as one system, constitute its special franchise for taxation. People *v.* Gourley, 64 Misc. (N. Y.) 605, 118 N. Y. Suppl. 776 [*reversed* on other grounds in 135 N. Y. App. Div. 869, 120 N. Y. Suppl. 200].

But where some of the crossings are wholly in one town, and others wholly in another town, all of which are assessed at a gross valuation by the state board of tax commissioners, the town assessors cannot apportion between them the gross valuation of the franchises as fixed by the board. People *v.* Gourley, 135 N. Y. App. Div. 869, 120 N. Y. Suppl. 200 [*reversing* 64 Misc. 605, 118 N. Y. Suppl. 776].

46. Baltimore Consol. Gas Co. *v.* Baltimore, 101 Md. 541, 61 Atl. 532, 109 Am. St. Rep. 584, 1 L. R. A. N. S. 263; Western Union Tel. Co. *v.* Omaha, 73 Nebr. 527, 103 N. W. 84; Southern Gum Co. *v.* Laylin, 66 Ohio St. 578, 64 N. E. 564; Gulf, etc., R. Co. *v.* Hewes, 183 U. S. 66, 22 S. Ct. 26, 46 L. ed. 86. See also Illinois Cent. R. Co. *v.* Grayson County, 99 S. W. 625, 30 Ky. L. Rep. 780.

47. Western Union Tel. Co. *v.* Omaha, 73 Nebr. 527, 103 N. W. 84.

48. *California.*— Crocker *v.* Scott, 149 Cal. 575, 87 Pac. 102; State Bank *v.* San Francisco, 142 Cal. 276, 75 Pac. 832, 100 Am. St. Rep. 130, 64 L. R. A. 918; Spring Valley Water Works *v.* Schottler, 62 Cal. 69.

Kentucky.— Morrell Refrigerator Car Co. *v.* Com., 128 Ky. 447, 108 S. W. 926, 32 Ky. L. Rep. 1383, 1389 (proportionate part of capital stock of refrigerating car company); Com. *v.* Covington, etc., Bridge Co., 114 Ky. 343, 70 S. W. 849, 24 Ky. L. Rep. 1177; Southern R. Co. *v.* Coulter, 113 Ky. 657, 68 S. W. 873, 24 Ky. L. Rep. 203; Louisville Bridge Co. *v.* Louisville, 112 Ky. 347, 65 S. W. 814, 23 Ky. L. Rep. 1655; Louisville R. Co. *v.* Com., 105 Ky. 710, 49 S. W. 486, 20 Ky. L. Rep. 1509 (holding that the fact that the corporation is to exist only for a limited time may be taken into account in valuing the franchise); Paducah St. R. Co. *v.* McCracken County, 105 Ky. 472, 49 S. W. 178, 20 Ky. L. Rep. 1294 (holding that the indebtedness of the corporation and the cost of operating its business are not to be deducted); Henderson Bridge Co. *v.* Com., 99 Ky. 623, 31 S. W. 486, 17 Ky. L. Rep. 389, 29 L. R. A. 73; Com. *v.* Chesapeake, etc., R. Co., 91 S. W. 672, 28 Ky. L. Rep. 1110; Owensboro Waterworks Co. *v.* Owensboro, 74 S. W. 685, 24 Ky. L. Rep. 2530. But under the act of March 15, 1906, the assessing board may consider the two items of gross earnings and net income of a foreign corporation in the state in fixing the valuation of its franchise. James *v.* American Surety Co., 133 Ky. 313, 117 S. W. 411, holding further that such statute is prospective only.

Massachusetts.— Tremont, etc., Mills *v.* Lowell, 178 Mass. 469, 59 N. E. 1007; Firemen's Fire Ins. Co. *v.* Com., 137 Mass. 80; Boston, etc., R. Co. *v.* Com., 100 Mass. 399; Manufacturers' Ins. Co. *v.* Loud, 99 Mass. 146, 96 Am. Dec. 715. See also American Glue Co. *v.* Com., 195 Mass. 528, 81 N. E. 302, 122 Am. St. Rep. 268.

North Carolina.— Jackson *v.* North Carolina Corp. Commission, 130 N. C. 385, 42 S. E. 123.

United States.— Taylor *v.* Secor, 92 U. S. 575, 23 L. ed. 663; Coulter *v.* Weir, 127 Fed. 897, 62 C. C. A. 429 [*modified* in 128 Fed. 1019, 62 C. C. A. 681].

See 45 Cent. Dig. tit. "Taxation," § 625.

Money paid by a corporation for the purpose of effecting an organization or putting the company into legal shape to do business is not a taxable asset in the hands of the company, as the value of the corporation's franchise is not dependent on the amount expended in creating it. Com. *v.* Ledman, 127 Ky. 603, 106 S. W. 247, 32 Ky. L. Rep. 452.

Bonds, notes, accounts, cash, stock in other corporations, and other credits of a telephone corporation are intangible property, and not subject to assessment by the local assessor, but are to be considered by the board of valuation in fixing the franchise tax. Com. *v.* Cumberland Tel., etc., Co., 124 Ky. 535, 99 S. W. 604, 30 Ky. L. Rep. 723.

49. Knickerbocker Imp. Co. *v.* State Bd. of Assessors, 73 N. J. L. 94, 62 Atl. 266 (holding that stock owned by the corporation which issued it should not be considered in determining the amount of the franchise tax); People's Inv. Co. *v.* State Bd. of Assessors, 66 N. J. L. 175, 48 Atl. 579.

of dividends declared.[50] Under other statutes the franchise is valued on the basis of the earning capacity of the corporation.[51]

c. Valuation of Capital. In appraising the capital or capital stock of corporations for taxation, various rules and principles are followed in different jurisdictions, the following methods being those most generally adopted: (1) To take as the basis of assessment the aggregate par value of the capital stock issued and outstanding.[52] (2) To assess according to the actual or market value of the aggregate number of shares constituting the nominal capital.[53] (3) To appraise the capital according to its earning capacity, that is, to capitalize the net earnings of the corporation at a fair rate of interest, and take the result as the value of the capital.[54] (4) To take the property of the corporation as representing its capital, that is, to base the appraisement on the actual worth of all the assets, real and personal estate, franchises, and good-will in which the capital is invested.[55] But

50. People *v.* Morgan, 183 N. Y. 574, 76 N. E. 1105; People *v.* Glynn, 132 N. Y. App. Div. 546, 116 N. Y. Suppl. 1078 [*affirmed* in 198 N. Y. 501, 92 N. E. 1097]; People *v.* Glynn, 130 N. Y. App. Div. 332, 114 N. Y. Suppl. 460; People *v.* Miller, 85 N. Y. App. Div. 178, 83 N. Y. Suppl. 96; People *v.* Knight, 75 N. Y. App. Div. 169, 77 N. Y. Suppl. 401 [*modified* in 173 N. Y. 255, 62 N. E. 1102]; People *v.* Campbell, 66 Hun (N. Y.) 146, 21 N. Y. Suppl. 7. See also People *v.* Olean, 15 N. Y. St. 461.

Apportionment of franchise tax where corporation has not been in business for the full year see People *v.* Knight, 99 N. Y. App. Div. 62, 90 N. Y. Suppl. 537; People *v.* Miller, 98 N. Y. App. Div. 584, 90 N. Y. Suppl. 755.

51. Rocheblave Market Co. *v.* New Orleans, 110 La. 529, 34 So. 665 (holding also that twelve per cent is a fair basis on which to capitalize the franchise of a market company for the purpose of a tax assessment); Crescent City R. Co. *v.* New Orleans, 44 La. Ann. 1057, 11 So. 681; New Orleans, etc., R. Co. *v.* New Orleans, 44 La. Ann. 1055, 11 So. 820; New Orleans, etc., R. Co. *v.* New Orleans, 44 La. Ann. 1053, 11 So. 687; State *v.* Franklin County Sav. Bank, etc., Co., 74 Vt. 246, 52 Atl. 1069. See also Western Union Tel. Co. *v.* Omaha, 73 Nebr. 527, 103 N. W. 84, holding that gross receipts may properly be considered as an item in estimating the value of a franchise, but standing alone they are not a proper measure of its value.

In certiorari to review a valuation of a special franchise, in the absence of evidence of what would constitute a reasonable rate of return on the capital invested in the business, the court could adopt six per cent as a fair rate in determining the value of the franchise under the net earnings rule; and in valuing the tangible property under such rule the present value of the property and not its cost must be taken. People *v.* State Bd. of Tax Com'rs, 196 N. Y. 39, 89 N. E. 581 [*modifying* 128 N. Y. App. Div. 13, 112 N. Y. Suppl. 392], 197 N. Y. 33, 90 N. E. 112.

52. Rudderow *v.* West Jersey Ferry Co., 31 N. J. L. 512; Gloucester Mfg. Co. *v.* Hallam, 30 N. J. L. 405.

53. *Louisiana.*— Planters' Crescent Oil Co. *v.* Jefferson Parish Assessor, 41 La. Ann. 1137, 6 So. 809.

Massachusetts.—American Glue Co. *v.* Com., 195 Mass. 528, 81 N. E. 302, 122 Am. St. Rep. 268; Com. *v.* Cary Imp. Co., 98 Mass. 19.

Minnesota.— State *v.* Duluth Gas, etc., Co., 76 Minn. 96, 78 N. W. 1032, 57 L. R. A. 63.

Mississippi.— Panola County *v.* Carrier, 89 Miss. 277, 42 So. 347.

Nebraska.— State *v.* Karr, 64 Nebr. 514, 90 N. W. 308.

See 45 Cent. Dig. tit. "Taxation," § 626.

54. Hager *v.* American Surety Co., 121 Ky. 791, 90 S. W. 550, 28 Ky. L. Rep. 782; Henderson Bridge Co. *v.* Com., 99 Ky. 623, 31 S. W. 486, 17 Ky. L. Rep. 389, 29 L. R. A. 73 [*affirmed* in 166 U. S. 150, 17 S. Ct. 532, 41 L. ed. 953]; Henderson Bridge Co. *v.* Negley, 63 S. W. 989, 23 Ky. L. Rep. 746; Com. *v.* Brush Electric Light Co., 145 Pa. St. 147, 22 Atl. 844; Matson's Ford Bridge Co. *v.* Com., 117 Pa. St. 265, 11 Atl. 813; Com. *v.* Sharon Coal Co., 3 Pa. Dist. 19; Com. *v.* Edgerton Coal Co., 14 Pa. Co. Ct. 449, 33 Wkly. Notes Cas. 369; Com. *v.* Delaware, etc., R. Co., 14 Pa. Co. Ct. 440; Com. *v.* Edgerton Coal Co., 3 Dauph. Co. Rep. 236; Chicago Union Traction Co. *v.* State Bd. of Equalization, 114 Fed. 557 [*affirmed* in 207 U. S. 20, 28 S. Ct. 7, 52 L. ed. 78], holding that net earnings should be capitalized at six per cent.

55. *Illinois.*— Keokuk, etc., Bridge Co. *v.* People, 161 Ill. 132, 43 N. E. 691; Pacific Hotel Co. *v.* Lieb, 83 Ill. 602, holding also that the fact that the shares of stock in a corporation are worthless is not enough to impeach an assessment of its capital stock, for this may be in consequence of the debts of the corporation, but in that case the creditors would take the place of the stock-holders as to the corporate property assessed.

Kentucky.— Henderson Bridge Co. *v.* Com., 99 Ky. 623, 31 S. W. 486, 17 Ky. L. Rep. 389, 29 L. R. A. 73 [*affirmed* in 166 U. S. 150, 17 S. Ct. 532, 41 L. ed. 953].

Maryland.—American Coal Co. *v.* Allegany County, 59 Md. 185.

Michigan.— Detroit Bd. of Education *v.* State Bd. of Assessors, 133 Mich. 116, 94 N. W. 668.

in some of the states, no one of these methods is followed exclusively, although all may be employed in arriving at the final result, the theory being that the value of the corporation's capital is a question of fact to be decided on consideration of all relevant facts and circumstances, such as the actual value of assets, earning capacity, dividends, market price of shares, indebtedness, encumbrances, franchises, and privileges.[56] Where the assessment is to be based on the capital

New York.— People *v.* Miller, 179 N. Y. 49, 71 N. E. 463 [*affirming* 90 N. Y. App. Div. 588, 86 N. Y. Suppl. 420]; People *v.* Morgan, 178 N. Y. 433, 70 N. E. 967, 67 L. R. A. 960 [*reversing* 86 N. Y. App. Div. 577, 83 N. Y. Suppl. 998] (holding that stock in another corporation owned by a corporation is to be taxed as a part of its capital); People *v.* Roberts, 154 N. Y. 101, 47 N. E. 980 [*affirming* 19 N. Y. App. Div. 574, 46 N. Y. Suppl. 570] (holding that the actual value of the capital stock is to be ascertained by taking the value of the company's assets, deducting its liabilities and exemptions, and adding the value of the goodwill of its business including its right to conduct the same under its franchise); People *v.* Barker, 146 N. Y. 304, 40 N. E. 996 (holding that it is the actual value of the capital stock and not the market value of its share stock that is to be assessed); People *v.* Barker, 144 N. Y. 94, 39 N. E. 13; People *v.* Wemple, 138 N Y. 582, 34 N. E. 386 [*affirming* 63 Hun 453, 18 N. Y. Suppl. 504]; People *v.* Asten, 100 N. Y. 597, 3 N. E. 788; People *v.* Kelsey, 110 N. Y. App. Div. 797, 97 N. Y. Suppl. 197 [*affirmed* in 184 N. Y. 572, 77 N. E. 1194]; People *v.* Kelsey, 110 N. Y. App. Div. 617, 96 N. Y. Suppl. 745 [*affirmed* in 184 N. Y. 573, 77 N. E. 1194]; People *v.* Wells, 110 N. Y. App. Div. 194, 97 N. Y. Suppl. 47; People *v.* Kelsey, 108 N. Y. App. Div. 138, 96 N. Y. Suppl. 42; People *v.* Kelsey, 101 N. Y. App. Div. 48, 91 N. Y. Suppl. 711 (accumulated surplus to be included); People *v.* Morgan, 96 N. Y. App. Div. 110, 88 N. Y. Suppl. 1066 [*affirmed* in 183 N. Y. 573, 76 N. E. 1103] (holding that the good-will of a corporation is an asset to be considered in fixing the value of its capital); People *v.* Feitner, 92 N. Y. App. Div. 518, 87 N. Y. Suppl. 304 (holding that capital stock does not mean share stock, but means the actual money or property paid in and possessed by the corporation); People *v.* Miller, 90 N. Y. App. Div. 591, 86 N. Y. Suppl. 193; Brooklyn Rapid Transit Co. *v.* Miller, 85 N. Y. App. Div. 178, 83 N. Y. Suppl. 96 [*affirmed* in 181 N. Y. 582, 74 N. E. 1123]; People *v.* Feitner, 82 N. Y. App. Div. 368, 81 N. Y. Suppl. 898; People *v.* Feitner, 60 N. Y. App. Div. 282, 70 N. Y. Suppl. 120; People *v.* Morgan, 55 N. Y. App. Div. 265, 66 N. Y. Suppl. 823; People *v.* Barker, 31 N. Y. App. Div. 315, 51 N. Y. Suppl. 1102, 53 N. Y. Suppl. 1111, 23 Misc. 192, 51 N. Y. Suppl. 1102 [*affirmed* in 158 N. Y. 709, 53 N. E. 1130 (*affirmed* in 179 U. S. 279, 21 S. Ct. 121, 45 L. ed. 190)]; People *v.* Roberts, 4 N. Y. App. Div. 334, 38 N. Y. Suppl. 724; People *v.* Roberts, 91 Hun 146, 36 N. Y. Suppl. 277 [*affirmed* in 158 N. Y. 709, 53 N. E. 1130]; People *v.* Barker, 85 Hun 210, 32 N. Y. Suppl. 990; People *v.* O'Donnel, 54 Misc. 5, 115 N. Y. Suppl. 457; People *v.* Feitner, 39 Misc. 467, 80 N. Y. Suppl. 152; People *v.* Tax, etc., Com'rs, 4 N. Y. Suppl. 43 (value of franchise may be included).

North Carolina.— Durham County *v.* Blackwell Durham Tobacco Co., 116 N. C. 441, 21 S. E. 423; Raleigh, etc., R. Co. *v.* Wake County, 87 N. C. 414.

See 45 Cent Dig. tit. "Taxation," § 626.

New York Franchise Tax Law of 1896.— This statute provides for the payment by every corporation of an annual franchise tax of one fourth of a mill for each one per cent of dividends, in case it pays dividends at the annual rate of six per cent or more, but otherwise of one and one-half mills on each dollar of its capital stock, and in the latter case, the capital stock is to be appraised "at its actual value in cash, not less, however, than the average price which said stock sold for during the year." This contemplates an assessment on the property in which the capital is invested rather than on the shares of stock, but it is not limited by the nominal or par value of the share stock. On the contrary, with reference to this matter, the capital stock and share stock are considered as the same thing, and may be assessed for more than the par value of the shares. People *v.* Morgan, 47 N. Y. App. Div. 126, 62 N. Y. Suppl. 191 [*affirmed* in 162 N. Y. 654, 57 N. E. 1121]. And as to the construction and application of this statute in general see People *v.* Knight, 173 N. Y. 255, 65 N. E. 1102; People *v.* Coleman, 126 N. Y. 433, 27 N. E. 818, 12 L. R. A. 762 [*reversing* 13 N. Y. Suppl. 67]; People *v.* Miller, 94 N. Y. App. Div. 564, 88 N. Y. Suppl. 197 [*affirmed* in 180 N. Y. 16, 72 N. E. 525]; People *v.* Knight, 75 N. Y. App. Div. 164, 77 N. Y. Suppl. 398; People *v.* Roberts, 4 N. Y. App. Div. 334, 38 N. Y. Suppl. 724; People *v.* Roberts, 90 Hun 537, 36 N. Y. Suppl. 34; People *v.* Coleman, 44 Hun 410; People *v.* Dederick, 25 Misc. 539, 55 N. Y. Suppl. 40 [*affirmed* in 41 N. Y. App. Div. 617, 58 N. Y. Suppl. 1146 (*modified* in 161 N. Y. 195, 55 N. E. 927)]; People *v.* Tax, etc., Com'rs, 4 N. Y. Suppl. 45.

Bonds purchased as an investment with surplus earnings of a corporation engaged in the operation of floating grain elevators is not capital on which to compute the amount of the tax. People *v.* Roberts, 116 N. Y. App. Div. 30, 101 N. Y. Suppl. 184.

56. Crescent City R. Co. *v.* New Orleans Bd. of Assessors, 51 La. Ann. 335, 25 So. 311; People *v.* Wells, 42 Misc. (N. Y.) 606, 87 N. Y. Suppl. 595; People *v.* Feitner, 39

employed within the state, it is the average amount so employed during the year that is to be taken as the basis, and not the highest amount employed at any one period.[57] If the capital has been increased during the year, the tax on the increased amount may be apportioned.[58]

d. Nominal or Actual Value of Stock. The valuation to be placed on the stock of a corporation is sometimes held to correspond with its nominal or par value or the amount paid in on such stock;[59] but more usually the assessment is made on the actual value of the stock, which may be its book value or liquidating value or its market value,[60] which is to be determined, where possible, by market quotations or evidence of the price passing on actual sales of the shares.[61]

e. Deductions — (i) *Property Not Taxable.* In determining the value of the capital or assets of a corporation for the purpose of an assessment of taxes, it is proper to exclude or deduct so much as is invested in property not subject to local taxation, either because exempt by its nature or by statute or because it is outside the state.[62]

Misc. (N. Y.) 467, 80 N. Y. Suppl. 152; People *v.* Coleman, 13 N. Y. Suppl. 67; Com. *v.* Manor Gas Coal Co., 188 Pa. St. 195, 41 Atl. 605; Com. *v.* New York, etc., R. Co., 188 Pa. St. 169, 41 Atl. 594; Com. *v.* Manor Gas Coal Co., 8 Pa. Dist. 258, 2 Dauph. Co. Rep. (Pa.) 121; Com. *v.* Philadelphia Co., 3 Dauph. Co. Rep. (Pa.) 259; Com. *v.* Jamestown, etc., R. Co., 3 Dauph. Co. Rep. (Pa.) 255; Com. *v.* Delaware, etc., R. Co., 3 Dauph. Co. Rep. (Pa.) 249; Com. *v.* Lake Shore, etc., R. Co., 3 Dauph. Co. Rep. (Pa.) 172; Com. *v.* Allegheny Heating Co., 2 Dauph. Co. Rep. (Pa.) 91; Com. *v.* Darby First Nat. Bank, 2 Dauph. Co. Rep. (Pa.) 88; Com. *v.* J. W. Haney Co., 1 Dauph. Co. Rep. (Pa.) 184; Railroad, etc., Cos. *v.* Tennessee Bd. of Equalizers, 85 Fed. 302.

57. Central Granaries Co. *v.* Lancaster County, (Nebr. 1907) 113 N. W. 199, 543, 77 Nebr. 311, 109 N. W. 385; People *v.* Morgan, 168 N. Y. 672, 61 N. E. 1132 [*affirming* 57 N. Y. App. Div. 335, 68 N. Y. Suppl. 21]. And see People *v.* Roberts, 116 N. Y. App. Div. 30, 101 N. Y. Suppl. 184.

58. Com. *v.* American Mach. Co., 2 Chest. Co. Rep. (Pa.) 186. And see Com. *v.* People's Traction Co., 183 Pa. St. 405, 39 Atl. 42.

59. Wilson *v.* Augusta Factory, 44 Ga. 388; Utica Bank *v.* Utica, 4 Paige (N. Y.) 399, 27 Am. Dec. 72.

60. *Illinois.*— Ottawa Glass Co. *v.* McCaleb, 81 Ill. 556.

Louisiana.— New Orleans, etc., R. Co. *v.* Board of Assessors, 32 La. Ann. 19.

New Jersey.— Fidelity Trust Co. *v.* Vogt, 66 N. J. L. 86, 48 Atl. 580; Mechanics' Nat. Bank *v.* Baker, 65 N. J. L. 549, 48 Atl. 582.

New York.— People *v.* New York Tax Com'rs, 95 N. Y. 554; Oswego Starch Factory *v.* Dolloway, 21 N. Y. 449; People *v.* Delaware, etc., Canal Co., 54 Hun 598, 7 N. Y. Suppl. 890 [*affirmed* in 121 N. Y. 666, 24 N. E. 1093]; People *v.* New York Tax Com'rs, 31 Hun 32; People *v.* New York Tax Com'rs, 64 How. Pr. 405.

Pennsylvania.— Com. *v.* Pittsburg R. Co., 166 Pa. St. 453, 31 Atl. 202; Com. *v.* Delaware, etc., R. Co., 165 Pa. St. 44, 30 Atl. 522, 523; Com. *v.* Edgerton Coal Co., 164 Pa. St. 284, 30 Atl. 125, 129; Pennsylvania R. Co. *v.* Com., 94 Pa. St. 474; Com. *v.* Pottsville Union Sav. Fund Assoc., 2 Chest. Co. Rep. 189.

See 45 Cent. Dig. tit. "Taxation," §§ 627, 628.

61. Com. *v.* People's Traction Co., 183 Pa. St. 405, 39 Atl. 42; Com. *v.* Philadelphia, etc., R. Co., 145 Pa. St. 74, 22 Atl. 235. But *compare* People *v.* Coleman, 126 N. Y. 433, 27 N. E. 818, 12 L. R. A. 762 [*reversing* 13 N. Y. Suppl. 67]; People *v.* Coleman, 9 N. Y. St. 29.

Where there have been no sales of shares, and there is no evidence of their value, they should be appraised at the amount paid in on the same. Com. *v.* People's Traction Co., 183 Pa. St. 405, 39 Atl. 42.

Stock dividend.— Where a corporation during the year issues additional shares of stock which are of much greater value than par, and allots such shares to the existing stockholders *pro rata*, such shares should not enter into the computation in ascertaining the average selling price. Com. *v.* People's Traction Co., 183 Pa. St. 405, 39 Atl. 42.

62. *Iowa.*— Judy *v.* Pleasant Nat. State Bank, 133 Iowa 252, 110 N. W. 605.

Kentucky.— Com. *v.* Cumberland Tel., etc., Co., 124 Ky. 535, 99 S. W. 604, 30 Ky. L. Rep. 723; Com. *v.* Mt. Sterling Nat. Bank, 99 S. W. 958, 30 Ky. L. Rep. 954.

Massachusetts.— Com. *v.* Lowell Gas Light Co., 12 Allen 75. But see Com. *v.* New England Slate, etc., Co., 13 Allen 391.

New Jersey.— Fidelity Trust Co. *v.* State Bd. of Equalization, 77 N. J. L. 128, 71 Atl. 61.

New York.— People *v.* Miller, 179 N. Y. 564, 71 N. E. 1136; Guaranty Trust Co. *v.* New York, 108 N. Y. App. Div. 192, 95 N. Y. Suppl. 770; People *v.* Miller, 94 N. Y. App. Div. 564, 88 N. Y. Suppl. 197 [*affirmed* in 180 N. Y. 16, 72 N. E. 525]; People *v.* Coleman, 52 Hun 93, 5 N. Y. Suppl. 87 [*reversed* on other grounds in 115 N. Y. 178, 21 N. E. 1056]; People *v.* New York Tax, etc., Com'rs, 46 How. Pr. 315, 1 Thomps. & C. 611; Farmers' L. & T. Co. *v.* New York, 7 Hill 261.

Pennsylvania.— See Com. *v.* Delaware, etc., R. Co., 206 Pa. St. 645, 56 Atl. 69.

West Virginia.— State *v.* Graybeal, 60 W. Va. 357, 55 S. E. 398.

(II) *INDEBTEDNESS.* If the right of deducting debts from the assessed value of property is extended to taxpayers generally, or if the statutes make no exception in this particular as to corporations, these bodies as well as natural persons are entitled to the privilege.[63] But just as in the case of individuals, the debt, to be deducted, must be a direct obligation of the company, presently due, and one which it is bound and expects to discharge.[64]

(III) *REAL PROPERTY.* As land is separately assessed and taxed, it is commonly provided that the value of the real estate owned by a corporation shall be deducted from the assessed value of its capital or assets.[65] But if the land is

United States.— Coulter *v.* Weir, 127 Fed. 897, 62 C. C. A. 429.

See 45 Cent. Dig. tit. "Taxation," § 629.

But *compare* Schley *v.* Lee, 106 Md. 390, 67 Atl. 252; Emory *v.* State, 41 Md. 38.

Patent rights may be included in determining the franchise tax required of a corporation on its appraised capital. People *v.* Knight, 174 N. Y. 475, 67 N. E. 65, 63 L. R. A. 87 [*reversing* 67 N. Y. App. Div. 333, 73 N. Y. Suppl. 745]; People *v.* Kelsey, 101 N. Y. App. Div. 325, 91 N. Y. Suppl. 955 [*affirmed* in 181 N. Y. 512, 73 N. E. 1130].

63. State Bd. of Equalization *v.* People, 191 Ill. 528, 61 N. E. 339, 58 L. R. A. 513; Com. *v.* St. Bernard Coal Co., 9 S. W. 709, 10 Ky. L. Rep. 596; Standard L., etc., Ins. Co. *v.* Detroit Bd. of Assessors, 95 Mich. 466, 55 N. W. 112; Detroit Common Council *v.* Detroit Bd. of Assessors, 91 Mich. 78, 51 N. W. 787, 16 L. R. A. 59; People *v.* Barker, 141 N. Y. 196, 36 N. E. 184 [*affirming* 72 Hun 126, 25 N. Y. Suppl. 340]; People *v.* Asten, 100 N. Y. 597, 3 N. E. 788; People *v.* Feitner, 92 N. Y. App. Div. 518, 87 N. Y. Suppl. 304; Heerwagen *v.* Crosstown St. R. Co., 90 N. Y. App. Div. 275, 86 N. Y. Suppl. 218 [*modified* in 179 N. Y. 99, 71 N. E. 729]; People *v.* Pond, 37 N. Y. App. Div. 330, 57 N. Y. Suppl. 490; People *v.* Coleman, 1 N. Y. Suppl. 666. But *compare* State *v.* Sellers, 151 Ala. 557, 44 So. 548 (amount of recorded mortgages not to be deducted); Henderson Bridge Co. *v.* Com., 99 Ky. 623, 31 S. W. 486, 17 Ky. L. Rep. 389, 29 L. R. A. 73 [*affirmed* in 166 U. S. 150, 17 S. Ct. 532, 41 L. ed. 953]; State *v.* Duluth Gas, etc., Co., 76 Minn. 96, 78 N. W. 1032, 57 L. R. A. 63; State *v.* Karr, 64 Nebr. 514, 90 N. W. 298 (franchise tax); Farmers' L. & T. Co. *v.* New York, 7 Hill (N. Y.) 261.

Bonded indebtedness.— In assessing the value of easements in a street belonging to a gas company, the appeal tax court cannot treat the bonded indebtedness of a company as an asset for the purpose of taxation. Baltimore City Consol. Gas Co. *v.* Baltimore, 105 Md. 43, 65 Atl. 628, 121 Am. St. Rep. 553.

In the taxation of trust companies, the amount of the capital and accumulated surplus must be ascertained by deducting from the gross assets at their true value the liabilities and debts of the company. Fidelity Trust Co. *v.* State Bd. of Equalization, 77 N. J. L. 128, 71 Atl. 61.

64. Michigan, etc., R. Co. *v.* Auditor-Gen., 9 Mich. 448 (corporate bonds); Royal Highlanders *v.* State, 77 Nebr. 18, 108 N. W. 183 (outstanding beneficiary certificates of a fraternal benefit association); People *v.* Feitner, 167 N. Y. 622, 60 N. E. 1118 (debts not due); People *v.* Miller, 94 N. Y. App. Div. 564, 88 N. Y. Suppl. 197 [*affirmed* in 180 N. Y. 16, 72 N. E. 525] (preferred stock not a debt); People *v.* Feitner, 61 N. Y. App. Div. 129, 70 N. Y. Suppl. 500 [*affirmed* in 171 N. Y. 641, 63 N. E. 786] (indebtedness as indorser or surety); People *v.* Barker, 86 Hun (N. Y.) 131, 33 N. Y. Suppl. 388 (dividends declared but unpaid); People *v.* Barker, 28 Misc. (N. Y.) 13, 59 N. Y. Suppl. 926 [*affirmed* in 165 N. Y. 305, 59 N. E. 137, 151 (*reversing* 48 N. Y. App. Div. 248, 63 N. Y. Suppl. 167)] (bonds issued in lieu of dividends); People *v.* Barker, 37 N. Y. Suppl. 106 (debentures not actually issued).

65. See the statutes of the several states. And see the following cases:

Louisiana.— Merchants' Mut. Ins. Co. *v.* Board of Assessors, 40 La. Ann. 371, 3 So. 891; Louisiana Oil Co. *v.* Board of Assessors, 34 La. Ann. 618.

Maine.— Wheeler *v.* Waldo County, 88 Me. 174, 33 Atl. 983.

New Jersey.— Fidelity Trust Co. *v.* State Bd. of Equalization, 77 N. J. L. 128, 71 Atl. 61.

New York.— People *v.* Coleman, 115 N. Y. 178, 21 N. E. 1056; People *v.* New York Tax Com'r, 104 N. Y. 240, 10 N. E. 437; People *v.* Asten, 100 N. Y. 597, 3 N. E. 788; People *v.* Brooklyn Bd. of Assessors, 39 N. Y. 81; People *v.* Feitner, 58 N. Y. App. Div. 555, 69 N. Y. Suppl. 27; People *v.* Campbell, 70 Hun 507, 24 N. Y. Suppl. 208; People *v.* Coleman, 44 Hun 410; People *v.* Hilts, 27 Misc. 290, 58 N. Y. Suppl. 434 [*affirmed* in 47 N. Y. App. Div. 629, 62 N. Y. Suppl. 1145]; People *v.* Barker, 16 Misc. 258, 39 N. Y. Suppl. 106 [*affirmed* in 47 N. Y. App. Div. 27, 39 N. Y. Suppl. 776 (*affirmed* in 151 N. Y. 639, 45 N. E. 1133)]; People *v.* New York Tax, etc., Com'rs, 4 N. Y. Suppl. 47; People *v.* Olean, 15 N. Y. St. 461; People *v.* Coleman, 9 N. Y. St. 29.

West Virginia.— State *v.* Graybeal, 60 W. Va. 357, 55 S. E. 398.

See 45 Cent. Dig. tit. "Taxation," § 632.

In Pennsylvania, however, the real estate of quasi-public corporations, unless exempt from such taxation by statute, is taxed by including the value thereof in the assessment of the capital stock. Conoy Tp. *v.* York Haven Electric Power Plant Co., 222 Pa. St. 319, 71 Atl. 207; Com. *v.* Western Union Tel. Co., 2 Dauph. Co. Rep. 40.

mortgaged, or otherwise set apart or held for the discharge of particular liabilities, it is only the value of the equity or residuary interest in it which is to be deducted and not its entire value.[66]

f. Determination of Amount of Earnings or Receipts. When the tax is laid upon or measured by the gross earnings of a corporation, this term includes all income from its business,[67] but does not include cash received from the sale of property or raw material in which a portion of the capital was invested.[68] Where the tax is on net income or earnings, it contemplates the deduction of all expenses of conducting the business;[69] but not extraordinary outlays in the enlargement or improvement of the plant or the replacement of capital.[70]

g. Determination of Amount of Dividends. If the tax depends on, or is measured by, the dividends declared by the corporation, the fact and amount of such dividends will be determined by the returns made by the corporation or other

Real estate proper to be deducted does not include a reversionary interest in leasehold estates for ninety-nine years, renewable forever, where the lessees have covenanted to pay all taxes (Baltimore *v.* Canton Co., 63 Md. 218); or a franchise (People *v.* New York Tax Com'rs, 104 N. Y. 240, 10 N. E. 437), or vaults erected by a safe deposit company in a building owned by other parties (People *v.* Wells, 181 N. Y. 245, 73 N. E. 961).

Mortgages.— Under a statute declaring that a real estate mortgage shall be deemed an interest in land for the purpose of taxation, mortgages held by a corporation must be taxed to it and deducted from the assessment of its capital stock. Standard L., etc., Ins. Co. *v.* Detroit Bd. of Assessors, 95 Mich. 466, 55 N. W. 112; Standard L., etc., Ins. Co. *v.* Detroit Bd. of Assessors, 91 Mich. 517, 52 N. W. 17; Detroit River Sav. Bank *v.* Detroit Bd. of Assessors, 91 Mich. 514, 52 N. W. 17; Latham *v.* Detroit Bd. of Assessors, 91 Mich. 509, 52 N. W. 15; Detroit Common Council *v.* Detroit Bd. of Assessors, 91 Mich. 78, 51 N. W. 787, 16 L. R. A. 59.

The value to be deducted is the assessed value of the real estate and not the actual value at the time of the assessment. People *v.* Coleman, 115 N. Y. 178, 21 N. E. 1056; People *v.* Asten, 100 N. Y. 597, 3 N. E. 788; People *v.* Tax Com'rs, 4 N. Y. Suppl. 43; People *v.* Coleman, 9 N. Y. St. 29; State *v.* Graybeal, 60 W. Va. 357, 55 S. E. 398. But *compare* People *v.* Tax Com'rs, 104 N. Y. 240, 10 N. E. 437 (real estate out of the state); People *v.* Barker, 16 Misc. (N. Y.) 258, 39 N. Y. Suppl. 106 [*affirmed* in 7 N. Y. App. Div. 27, 39 N. Y. Suppl. 776 (*affirmed* in 151 N. Y. 639, 45 N. E. 1133)].

66. Barrett's Appeal, 75 Conn. 280, 53 Atl. 591; Cutler's Appeal, 74 Conn. 35, 49 Atl. 338; People *v.* Wells, 180 N. Y. 62, 72 N. E. 626 [*reversing* 95 N. Y. App. Div. 574, 88 N. Y. Suppl. 1030].

67. State *v.* Northwestern Tel. Exch. Co., 107 Minn. 390, 120 N. W. 534 (holding, however, that amounts which the regular rates of a telephone company would have produced, had the telephone service which was in fact rendered without charge been charged for at the regular rates, is not a part of the gross earnings); State *v.* St. Paul, etc., R. Co., 30 Minn. 311, 15 N. W. 307; New York *v.* Fulton St. R. Co., 130 N. Y. App. Div. 791, 115 N. Y. Suppl. 410 [*reversing* 59 Misc. 630, 112 N. Y. Suppl. 494] (holding that a street railroad company must pay on receipts derived from the operation, under trackage agreements, of tracks built and owned by other companies); Com. *v.* Brush Electric Light Co., 204 Pa. St. 249, 53 Atl. 1096.

68. People *v.* Morgan, 114 N. Y. App. Div. 266, 99 N. Y. Suppl. 711.

69. Montgomery County *v.* Montgomery Gaslight Co., 64 Ala. 269; Com. *v.* Ocean Oil Co., 59 Pa. St. 61; Com. *v.* Penn Gas Coal Co., 3 Brewst. (Pa.) 107; Lawless *v.* Sullivan, 6 App. Cas. 373, 50 L. J. P. C. 33, 44 L. T. Rep. N. S. 897, 29 Wkly. Rep. 917 [*reversing* 3 Can. Sup. Ct. 117].

The dividends paid by a corporation may not be looked to as a basis for the determination of its earnings for purposes of an assessment of taxes. People *v.* Feitner, 78 N. Y. App. Div. 313, 79 N. Y. Suppl. 975.

In determining the value of a corporate special franchise by the net earnings rule, the gross earnings are ascertained from which the operating expenses are deducted, and then after deducting a fair return on that portion of the capital invested in tangible property, the balance comprises the earnings attributable to the special franchise, which when capitalized at a fair rate give the value of the special franchise. People *v.* State Tax Com'rs, 196 N. Y. 39, 89 N. E. 581 [*modifying* 128 N. Y. App. Div. 13, 112 N. Y. Suppl. 392], 197 N. Y. 33, 90 N. E. 112. Within such rule an allowance on account of the general depreciation of the plant ultimately making replacement necessary should be deducted from the gross earnings; and the taxes of the corporation for a given year are a part of its operating expenses which should also be deducted, but such deduction does not include a special franchise tax. People *v.* State Tax Com'rs, 196 N. Y. 39, 89 N. E. 581 [*modifying* 128 N. Y. App. Div. 13, 112 N. Y. Suppl. 392], 197 N. Y. 33, 90 N. E. 112.

70. Philadelphia Contributionship *v.* Com., 98 Pa. St. 48 (amount expended several years before in the purchase of a security); Com. *v.* Ocean Oil Co., 59 Pa. St. 61; Com. *v.* Minersville Water Co., 2 Pa. Dist. 738.

proper sources of information.[71] It is to be observed that when the statutes speak of dividends on the "capital stock," as related to taxation, the stock meant is that paid in and not the nominal or authorized capital.[72]

h. Valuation of Shares of Stock. Stock of an incorporated company is to be assessed for taxation, in the hands of the stock-holders, at its fair market value, not its nominal or par value.[73] From this valuation is to be deducted, according to the law in some of the states, a proportional part of the value of real estate or other property of the corporation which is already fully covered by taxation,[74] provided it is a domestic corporation;[75] but no deduction is made for the value of United States bonds or other non-taxable securities owned by the company.[76]

6. Banks, Bank Stock, and Deposits[77] — a. Assessment in General. A statute directing the taxation of banks in a specific manner, to be in lieu of all other taxes, prohibits their assessment in any other mode, and if incorporated in their charters is an inviolable contract.[78] If the tax is to be assessed on the capital

71. State *v.* State Comptroller, 54 N. J. L. 135, 23 Atl. 122.

Taxation of dividends generally, and dividends as measure of franchise tax see *supra*, III, B, 1, k.

What are dividends.— Earnings or profits of a company fairly devoted to the betterment of its plant cannot be considered as "dividends earned or declared." State *v.* State Comptroller, 54 N. J. L. 135, 23 Atl. 122. Nor are moneys returned to stock-holders on consolidation with another company, being part of a sum which they had advanced to supply a working capital, dividends. People *v.* Knight, 96 N. Y. App. Div. 120, 89 N. Y. Suppl. 72. But the amount contributed by stock-holders to pay a loss incurred by the company cannot be deducted from the amount of a taxable dividend. Columbia Conduit Co. *v.* Com., 90 Pa. St. 307.

The declaration of a dividend by a corporation on part of its capital stock raises the presumption that the same dividend is declared on all, and is a sufficient basis for a settlement against the corporation of a tax as though the same dividend had been declared on all the stock. Atlantic, etc., Tel. Co. *v.* Com., 3 Brewst. (Pa.) 366.

72. Philadelphia *v.* Philadelphia, etc., Pass. R. Co., 52 Pa. St. 177; Second St., etc., Pass. R. Co. *v.* Philadelphia, 51 Pa. St. 465.

Computation of capital.— Where a foreign corporation has all of its original capital invested in a foreign state, and an additional amount out of its accumulated dividends in this state, dividends should be estimated upon the aggregate of these two amounts. People *v.* Wilson, 121 N. Y. App. Div. 376, 106 N. Y. Suppl. 1 [*affirmed* in 193 N. Y. 671, 87 N. E. 1125].

73. Consolidated Nat. Bank *v.* Pima County, 5 Ariz. 142, 48 Pac. 291; Bridgman *v.* Keokuk, 72 Iowa 42, 33 N. W. 355; Com. *v.* Steele, 126 Ky. 670, 104 S. W. 687, 31 Ky. L. Rep. 1033; Belvidere Bank *v.* Tunis, 23 N. J. L. 546.

Market value includes the face and premium values. Com. *v.* Steele, 126 Ky. 670, 104 S. W. 687, 31 Ky. L. Rep. 1033.

74. Bulkeley's Appeal, 77 Conn. 45, 58 Atl. 8; Batterson *v.* Hartford, 50 Conn. 558; Hall *v.* Bain, 18 R. I. 413, 28 Atl. 371; Willard *v.* Pike, 59 Vt. 202, 9 Atl. 907. See also People's Nat. Bank *v.* Marye, 107 Fed. 570 [*affirmed* in 191 U. S. 272, 24 S. Ct. 68, 48 L. ed. 180] holding that a statute imposing taxes on bank shares is not invalid because it requires the assessment of such shares at their market value, without making any deduction on account of the real estate owned by the bank, which is separately taxable, the shares being the property of the stock-holder, while the realty is the property of the corporation.

75. Dwight *v.* Boston, 12 Allen (Mass.) 316, 90 Am. Dec. 149. See also American Glue Co. *v.* Com., 195 Mass. 528, 81 N. E. 302, 122 Am. St. Rep. 268.

76. Security Sav. Bank *v.* Carroll, 128 Iowa 230, 103 N. W 379; People's Sav. Bank *v.* Des Moines, (Iowa 1904) 101 N. W. 867; Independence First Nat. Bank *v.* Independence, 123 Iowa 482, 99 N. W. 142; Parker *v.* Sun Ins. Co., 42 La. Ann. 1172, 8 So. 618; Home Ins. Co. *v.* Board of Assessors, 42 La. Ann. 1131, 8 So. 481; Shreveport First Nat. Bank *v.* Board of Reviewers, 41 La. Ann. 181, 5 So. 408; Cleveland Trust Co. *v.* Lander, 184 U. S. 111, 22 S. Ct. 394, 46 L. ed. 456; Charleston Nat. Bank *v.* Melton, 171 Fed. 743. But *compare* New Orleans *v.* New Orleans Canal, etc., Co., 29 La. Ann. 851 [*affirmed* in 99 U. S. 97, 25 L. ed. 409].

77. **Exemptions** see *supra*, IV, D, 3, d.
Liability to taxation see *supra*, III, B, 2, a.
Place of taxation see *supra*, V, F, 4.

78. *Alabama.*—National Commercial Bank *v.* Mobile, 62 Ala. 284, 34 Am. Rep. 15.

Indiana.—State *v.* State Bank, 7 Blackf. 393.

Iowa.— German Sav. Bank *v.* Trowbridge, 124 Iowa 514, 100 N. W. 333.

Kentucky.— Hager *v.* Lebanon Citizens' Nat. Bank, 127 Ky. 192, 105 S. W. 403, 914, 32 Ky. L. Rep. 95; Johnson *v.* Com., 7 Dana 338.

Mississippi.— Oxford Bank *v.* Oxford, 70 Miss. 504, 12 So. 203.

New York.— People *v.* Feitner, 191 N. Y. 88, 83 N. E. 592 [*reversing* 120 N. Y. App. Div. 838, 105 N. Y. Suppl. 993]; Binghamton First Nat. Bank *v.* Binghamton, 72 N. Y. App. Div. 354, 76 N. Y. Suppl. 526.

Ohio.— Commercial Bank *v.* Bowman, 1 Handy 246, 12 Ohio Dec. (Reprint) 125.

See 45 Cent. Dig. tit. "Taxation," §§ 637, 638.

of the bank, it means so much of the capital as may be issued and outstanding at the time.[79] If on the property or assets of the bank, it should be assessed like any other property and at its fair value;[80] and the assessment should include real and personal property, cash and credit items, and such other elements as may come within the terms of the particular statute.[81]

b. Deduction of Non-Taxable Property. From the assessment on its capital or total assets a banking corporation is entitled to have deducted the value of its real estate, where the same is otherwise taxed;[82] and if the assessment is made on the property in which the capital of the bank is invested, rather than on the capital *eo nomine*, there must also be deducted the value of United States bonds and other non-taxable securities constituting a part of such property.[83]

c. Deposits. Where money on deposit is considered as the property of the bank and therefore taxable to it,[84] or where a franchise tax on banks is measured by the amount of the deposits, the assessment will be made on the total of the general deposits, with any interest due depositors thereon, excluding some deposit accounts specially excepted by statute, and will be determined by the reports of the bank officers required by law to be made to the taxing officers.[85] It is generally held that deposits are not debts or liabilities which the bank is entitled to deduct from its gross assets.[86]

But *compare* Com. *v.* Easton Bank, 10 Pa. St. 442, holding that the bank is subject to a subsequent general law, which increases the rate of taxation, although its charter has not then expired.

Jurisdiction of taxing officers to settle taxes on banks see Citizens' Sav. Bank *v.* New York, 166 N. Y. 594, 59 N. E. 1120; Com. *v.* Easton Bank, 10 Pa. St. 442.

79. Gordon *v.* New Brunswick Bank, 6 N. J. L. 100; Metcalf *v.* Messenger, 46 Barb. (N. Y.) 325; People *v.* Olmstead, 45 Barb. (N. Y.) 644; State Bank *v.* Richmond, 79 Va. 113.

Where the statute intends that the capital stock of a bank shall be assessed to the individual shareholders as their property, an assessment of the whole to the bank is illegal. Farmers', etc., Bank *v.* Hoffman, 93 Iowa 119, 61 N. W. 418; Chemung Canal Nat. Bank *v.* Elmira, 53 N. Y. 609.

80. New Orleans *v.* Southern Bank, 11 La. Ann. 41; Missoula First Nat. Bank *v.* Bailey, 16 Mont. 135, 40 Pac. 175. But *compare* People *v.* Lockport Bd. of Education, 46 Barb. (N. Y.) 588.

81. Seward County *v.* Cattle, 14 Nebr. 144, 15 N. W. 337; Albuquerque First Nat. Bank *v.* Albright, 13 N. M. 514, 86 Pac. 548; People *v.* Miller, 177 N. Y. 461, 69 N. E. 1103 [*modifying* 84 N. Y. App. Div. 168, 82 N. Y. Suppl. 621]; Griffin *v.* Heard, 78 Tex. 607, 14 S. W. 892. See also Com. *v.* Mt. Sterling Nat. Bank, 99 S. W. 958, 30 Ky. L. Rep. 954; Clark *v.* Maher, 34 Mont. 391, 87 Pac. 272.

82. Albia First Nat. Bank *v.* Albia, 86 Iowa 28, 52 N. W. 334; Campbell *v.* Centerville, 69 Iowa 439, 29 N. W. 596; Lippincott *v.* Lippincott, 75 N. J. L. 795, 69 Atl. 502 [*affirming* 74 N. J. L. 439, 66 Atl. 113]; People *v.* Coleman, 135 N. Y. 231, 31 N. E. 1022; People *v.* Tax, etc., Com'rs, 69 N. Y. 91 [*reversing* 9 Hun 650]; People *v.* New York Tax, etc., Com'rs, 40 Barb. (N. Y.) 334.

83. Campbell *v.* Centerville, 69 Iowa 439, 29 N. W. 596; Lippincott *v.* Lippincott, 75 N. J. L. 795, 69 Atl. 502 [*affirming* 74 N. J. L. 439, 66 Atl. 113]. See also German American Sav. Bank *v.* Burlington, 118 Iowa 84, 91 N. W. 829.

Deduction of United States securities from assessments on corporate shares see *supra*, VI, D, 5, h.

Taxation of corporate capital invested in United States securities see *supra*, III, D, 3, b.

But a statute providing for the taxation of national bank stock is not invalid because it does not provide for any deduction from the valuation on account of any United States bonds held by the bank. Charleston Nat. Bank *v.* Melton, 171 Fed. 743.

84. See *supra*, III, B, 2, a, (VI).

85. See State *v.* Sterling, 20 Md. 502 (as to reports required from savings banks; also as to deducting non-taxable securities from amount of deposits, and as to deducting accounts of charitable institutions and individual deposits less than fifty dollars); *In re* Suffolk Sav. Bank, 151 Mass. 103, 23 N. E. 728 (including interest accruing and payable to depositors).

Deposit taxable to depositor without any deduction for debts due from him see Gray *v.* Boston Street Com'rs, 138 Mass. 414. But see Hogerty *v.* McNeill, 7 Ohio Cir. Ct. 388, 4 Ohio Cir. Dec. 647.

Checks and drafts deposited.— If these are accepted and handled by the bank as cash items, being credited to the depositor's account and subject to his check, they are included in the taxable deposits; but otherwise if they are only taken "for collection" and are not to be checked against until paid. Metropolis Bank *v.* Weber, 41 Fed. 413.

86. Security Sav. Bank, etc., Co. *v.* Hinton, 97 Cal. 214, 32 Pac. 3; Oxford Bank *v.* Oxford, 70 Miss. 504, 12 So. 203; Clark *v.* Maher, 34 Mont. 391, 87 Pac. 272; Ellis *v.* Linck, 3 Ohio St. 66. But *compare* People

d. Assessment of Shares of Stock — (I) *In General.* Shares of stock in a banking institution, as distinct from the capital stock, are to be assessed to the individual stock-holders, and this, although the law requires the bank to list and report the stock-holders and the number of their shares.[87] Such stock is ordinarily required to be assessed at its full and true market value, rather than its book value or its nominal price.[88] Whether or not it is of the class of credits or property from which the stock-holder's indebtedness may be deducted, for the purposes of the assessment, depends on the local statute.[89]

(II) *National Bank Stock.* Shares of stock in a national banking association are to be assessed for taxation at their actual market value, not necessarily their par value,[90] the only limitation imposed by congress being that they

v. Barker, 154 N. Y. 128, 47 N. E. 173 (savings bank deposits); *In re* Haight, 32 N. Y. App. Div. 496, 53 N. Y. Suppl. 226; Griffin *v.* Heard, 78 Tex. 607, 14 S. W. 892.

87. *Alabama.*— Sumter County *v.* Gainesville Nat. Bank, 62 Ala. 464, 34 Am. Rep. 30.

Arizona.— Western Inv. Banking Co. *v.* Murray, 6 Ariz. 215, 56 Pac. 728.

Missouri.— State *v.* Merchants' Bank, 160 Mo. 640, 61 S. W. 676; Stanberry *v.* Jordan, 145 Mo. 371, 46 S. W. 1093; State *v.* Catron, 118 Mo. 280, 24 S. W. 439; Springfield *v.* Springfield First Nat. Bank, 87 Mo. 441; Hannibal First Nat. Bank *v.* Meredith, 44 Mo. 500.

Virginia.— State Bank *v.* Richmond, 79 Va. 113.

United States.— Exchange Nat. Bank *v.* Miller, 19 Fed. 372.

See 45 Cent. Dig. tit. "Taxation," § 644. And see *supra*, III, B, 2, a, (IV).

National banks are agents of their stock-holders for the purpose of listing their stock for taxation and paying the tax thereon. Blue Hill First Nat. Bank *v.* Webster County, 77 Nebr. 815, 113 N. W. 190, 77 Nebr. 813, 110 N. W. 535.

Surplus fund.— Under a statute authorizing the taxation of the stock of a corporation in the hands of stock-holders, and exempting from taxation so much of the property of the corporation as is represented by the stock taxed in the hands of stock-holders, the surplus fund of a bank is exempt from taxation, as it belongs to the stock-holders and is represented by the stock. Belvidere Bank *v.* Tunis, 23 N. J. L. 546.

Assessment of national bank stock to stock-holder as omitted property see Judy *v.* Pleasant Nat. State Bank, 133 Iowa 252, 110 N. W. 605.

The refusal of the bank officers to furnish a list of shareholders to the assessor does not justify him in making the assessment for such stock against the bank property. Springfield *v.* Springfield First Nat. Bank, 87 Mo. 441.

88. *Indiana.*— State *v.* State Bank, 6 Blackf. 349.

Iowa.— National State Bank *v.* Burlington, 119 Iowa 696, 94 N. W. 234.

Maryland.— Schley *v.* Montgomery County, 106 Md. 407, 67 Atl. 250, holding also that only such deductions should be made therefrom as are reasonable on account of fluctuations and actual conditions.

Mississippi.—Alexander *v.* Thomas, 70 Miss. 517, 12 So. 708.

New Jersey.— Stratton *v.* Collins, 43 N. J. L. 562.

New York.— People *v.* Albany Bd. of Assessors, 2 Hun 583. But *compare* People *v.* Miller, 84 N. Y. App. Div. 168, 82 N. Y. Suppl. 621 [*modified* in 177 N. Y. 461, 69 N. E. 1103].

See 45 Cent. Dig. tit. "Taxation," § 644.

Market value or book value.— The book value of bank stock, that is, the amount which each share would be entitled to receive on a distribution among stock-holders of the entire capital and the surplus above all liabilities, is not necessarily the measure of its value for purposes of taxation; its market value may be higher, taking into consideration the bank's business, franchises, and prospects. Stratton *v.* Collins, 43 N. J. L. 562. And see National Bank of Commerce *v.* New Bedford, 155 Mass. 313, 29 N. E. 532; Ankeny *v.* Blakley, 44 Or. 78, 74 Pac. 485.

Under the present statute in New York, providing a method for the assessment and taxation of shares in banks, when the assessors ascertain the value of shares of bank stock from the total value of the corporate properties, they must include the value of the real estate and cannot deduct it in making the assessment. *In re* Ossining First Nat. Bank, 182 N. Y. 460, 75 N. E. 306. But see People *v.* Tax, etc., Com'rs, 80 N. Y. 573.

Valuation by assessor on owner's failure to state value see Dean *v.* Kopperl, 1 Tex. App. Civ. Cas. § 746.

89. See the statutes of the several states. And see Farmington *v.* Downing, 67 N. H. 141, 30 Atl. 345; Williams *v.* Weaver, 75 N. Y. 30; People *v.* Dolan, 36 N. Y. 59, 1 Transcr. App. 118; Stanley *v.* Albany County, 121 U. S. 535, 7 S. Ct. 1234, 30 L. ed. 1000.

90. *Illinois.*— Illinois Nat. Bank *v.* Kinsella, 201 Ill. 31, 66 N. E. 338.

Iowa.— Estherville First Nat. Bank *v.* Estherville, 136 Iowa 203, 112 N. W. 829.

Massachusetts.— Adams *v.* New Bedford, 155 Mass. 317, 29 N. E. 532; National Bank of Commerce *v.* New Bedford, 155 Mass. 313, 29 N. E. 532.

Nebraska.— Blue Hill First Nat. Bank *v.* Webster County, 77 Nebr. 815, 113 N. W. 190, 77 Nebr. 813, 110 N. W. 535, holding also that where a bank owns real estate of a greater value than that at which it is

shall not be taxed at a higher rate than is assessed on other moneyed capital in the hands of individual citizens of the state.[91] Where the local statutes allow the taxpayer to deduct his debts from his credits or from stock which he holds in other corporations, it is generally held that he must be allowed the same privilege of deduction from his holdings of stock in national banks.[92]

7. Insurance Companies[93] — a. Assessment in General. Whether these companies are taxed on their franchises, capital, premiums, earnings, surplus, or other assets, the method of assessment and valuation must be in accordance with the provisions of the local statutes applicable thereto.[94]

b. Deductions. An insurance company is ordinarily entitled, like other taxpayers, to deduct its actual and legal debts from the assessment of its assets or personal property for taxation,[95] including its contingent liability to policy-holders, at least to the extent of what would be required to reinsure its outstanding risks,[96]

carried on the bank books, the excess should be considered in fixing the value of the stock.

New Hampshire.— Strafford Nat. Bank *v.* Dover, 58 N. H. 316.

New Jersey.— Lippincott *v.* Lippincott, 75 N. J. L. 795, 69 Atl. 502 [*reversing* 74 N. J. L. 439, 66 Atl. 113]; Mechanics' Nat. Bank *v.* Baker, 65 N. J. L. 549, 48 Atl. 582.

New York.— People *v.* Tax, etc., Com'rs, 67 N. Y. 516 [*affirming* 8 Hun 536, and *affirmed* in 94 U. S. 415, 24 L. ed. 164].

Oregon.—Ankeny *v.* Blakley, 44 Or. 78, 74 Pac. 485.

Pennsylvania.— Everitt's Appeal, 71 Pa. St. 216

United States.— People *v.* Com'rs of Taxes, 94 U. S. 415, 24 L. ed. 164 [*affirming* 67 N. Y. 516 (*affirming* 8 Hun 536)]; Exchange Nat. Bank *v.* Miller, 19 Fed. 372; St. Louis Nat. Bank *v.* Papin. 21 Fed. Cas. No. 12,239, 4 Dill. 29. *Compare* Union Nat. Bank *v.* Chicago, 24 Fed. Cas. No. 14,374, 3 Biss. 82.

See 45 Cent. Dig. tit. "Taxation," § 646.

Taxation of national bank stock in general see *supra*, III, B, 2, b, (IV).

91 See *supra*, III, B, 2. b, (V).

92 *Iowa.*—Albia First Nat. Bank *v.* Albia, 86 Iowa 28, 52 N. W. 334.

New Hampshire.— Peavey *v.* Greenfield, 64 N. H. 284, 9 Atl. 722; Weston *v.* Manchester, 62 N. H. 574.

New Jersey.— Lippincott *v.* Lippincott, 75 N. J. L. 795, 69 Atl. 502 [*reversing* 74 N. J. L. 439, 66 Atl. 113].

North Carolina.— McAden *v.* Mecklenburg County, 97 N. C. 355, 2 S. E. 670.

Ohio.— State Nat. Bank *v.* Shields, 1 Ohio S. & C. Pl. Dec. 609, 31 Cinc. L. Bul. 321. But see Niles *v.* Shaw, 50 Ohio St. 370, 34 N. E. 162.

Wisconsin.— Ruggles *v.* Fond du Lac, 53 Wis. 436, 10 N. W. 565.

United States.—Whitbeck *v.* Mercantile Nat. Bank, 127 U. S. 193, 8 S. Ct. 1121, 32 L. ed. 118; Stanley *v.* Albany County, 121 U. S. 535, 7 S. Ct. 1234, 30 L. ed. 1000; Mercantile Nat. Bank *v.* Shields, 59 Fed. 952; Richards *v.* Rock Rapids, 31 Fed. 505; Albany *v.* Stanley, 12 Fed. 82.

See 45 Cent. Dig. tit. "Taxation," § 647. And see *supra*, III, B, 2, b, (V), (C).

But *compare* Richmond First Nat. Bank *v.* Turner, 154 Ind. 456, 57 N. E. 110 [*overruling* Wasson *v.* Indianapolis First Nat. Bank, 107 Ind. 206, 8 N. E. 97]; Dutton *v.* Citizens' Nat. Bank, 53 Kan. 440, 36 Pac. 719; People *v.* Coleman, 18 N. Y. Suppl. 675.

Deduction of indebtedness of corporation generally see *supra*, VI, D, 5, e, (II).

93. Exemptions see *supra*, IV, D, 3, f.

Liability to taxation see *supra*, III, B, 2, c.

Valuation of franchises and privileges generally see *supra*, VI, D, 5, b.

94. See the statutes of the several states. And see Ætna Life Ins. Co. *v.* Coulter, 115 Ky. 787, 74 S. W. 1050, 25 Ky. L. Rep. 193 (power to tax franchises); People *v.* State Treasurer, 31 Mich. 6 (tax on premiums); State *v.* Utter, 34 N. J. L. 489 (meaning of "accumulated surplus"); State *v.* Parker, 34 N. J. L. 479 ("accumulated surplus"); People *v.* Miller, 177 N. Y. 515, 70 N. E. 10 (meaning of "gross premiums"); People *v.* Coleman, 112 N. Y. 565, 20 N. E. 389, 2 L. R. A. 772 [*affirming* 49 Hun 607, 1 N. Y. Suppl. 666] (surplus); People *v.* Tax, etc., Com'rs, 76 N. Y. 64 (meaning of "surplus earnings").

95. Hawkeye Ins. Co. *v.* Des Moines Bd. of Equalization, 75 Iowa 770, 37 N. W. 966; Equitable L. Ins. Co. *v.* Des Moines Bd. of Equalization, 74 Iowa 178, 37 N. W. 141, (Iowa 1887) 32 N. W. 376; Tripp *v.* Merchants' Mut. F. Ins. Co., 12 R. I. 435. But *compare* Kansas Mut. L. Assoc. *v.* Hill, 51 Kan. 636, 33 Pac. 300, holding that debts owing in good faith by a mutual life insurance company organized on the coöperative plan, without capital stock, cannot be deducted from the amount of cash on hand, or loans secured by mortgages on real estate, in listing the company's property for taxation.

96. Chicago L. Ins. Co. *v.* Des Moines Bd. of Review, 131 Iowa 254, 108 N. W. 305; Hawkeye Ins. Co. *v.* Des Moines Bd. of Equalization, 75 Iowa 770, 37 N. W. 966; Equitable L. Ins. Co. *v.* Des Moines Bd. of Equalization, 74 Iowa 178, 37 N. W. 141; People *v.* Tax, etc., Com'rs, 76 N. Y. 64; People *v.* Ferguson, 38 N. Y. 89; People *v.* Reliance Mar. Ins. Co., 70 Hun (N. Y.) 554, 24 N. Y. Suppl. 190. But *compare* Kansas Mut. Life Assoc. *v.* Hill, 51 Kan. 636, 33 Pac. 300; Detroit F. & M. Ins. Co. *v.* Hartz, 132 Mich. 518, 94 N. W. 7; Amazon Ins. Co.

but not its contingent liability to refund unearned premiums.[97] An insurance company should also be allowed a deduction for exempt and non-taxable securities;[98] but when such a deduction has been made it should not be allowed a further deduction for the reinsurance reserve, if not taxable, since in the absence of evidence to the contrary it must be assumed that such reserve is invested in the securities deducted.[99]

8. Railroad Companies[1] — a. Assessment in General. If the charter of a railroad company prescribes the mode of assessing its property for purposes of taxation, it constitutes a contract and that method must be followed.[2] Otherwise the assessment is to be made according to the special rules laid down by the statutes as applicable to this class of property.[3] Provisions for the assessment and valuation of the property of a railroad, as a unit, by a railroad commission or state board of equalization, and its apportionment among the various municipal corporations through which the road passes, designed to secure uniformity and to do away with fragmentary assessments in the counties, are now common and

v. Cappellar, 38 Ohio St. 560 [*affirming* 8 Ohio Dec. (Reprint) 493, 8 Cinc. L. Bul. 247].

Premiums paid for reinsurance by a domestic insurance company cannot be deducted from the gross receipts in determining the gross amount of business done or received within the state. People *v.* Miller, 177 N. Y. 515, 70 N. E. 10. See also People *v.* Reliance Mar. Ins. Co., 70 Hun (N. Y.) 554, 24 N. Y. Suppl. 190.

Fraternal beneficial association.—Where, at the time of the assessment of the property of such an association for taxation, no part of the fund assessed had been paid out, the fact that orders had been issued against the fund for a large part thereof did not entitle the association to deduct the amount of such orders from its taxable property. State Council C. K. I. *v.* Effingham County Bd. of Review, 198 Ill. 441, 64 N. E. 1104.

A mutual insurance company, organized for the mutual benefit of its members, and not for profit, is entitled to set off, in determining its assessment of credits for purposes of taxation, the amount of its outstanding benefit certificates against securities in its reserve fund set apart and devoted exclusively to the payment of such certificates. Scandinavian Mut. Aid Assoc. *v.* Kearney County, 81 Nebr. 468, 116 N. W. 155, 81 Nebr. 473, 118 N. W. 333.

97. Kenton Ins. Co. *v.* Covington, 86 Ky. 213, 5 S. W. 461, 9 Ky. L. Rep. 513; People *v.* Davenport, 91 N. Y. 574.

98. Trenton *v.* New Jersey Standard F. Ins. Co., 76 N. J. L. 79, 68 Atl. 1111 [*affirmed* in 77 N. J. L. 757, 73 Atl. 606].

99. Trenton *v.* New Jersey Standard F. Ins. Co., 76 N. J. L. 79, 68 Atl. 1111 [*affirmed* in 77 N. J. L. 757, 73 Atl. 606].

1. **Exemptions** see *supra*, IV, D, 3, g.
Liability to taxation see *supra*, III, B, 2, d.
Place of taxation see *supra*, V, F, 5.

2. Goldsmith *v.* Rome R. Co., 62 Ga. 473; Philadelphia *v.* Philadelphia, etc., R. Co., 52 Pa. St. 177; Bailey *v.* Magwire, 22 Wall. (U. S.) 215, 22 L. ed. 850; Parmley *v.* St. Louis, etc., R. Co., 18 Fed. Cas. No. 10,768, 3 Dill. 251. But *compare* Goldsmith *v.* Central R. Co., 62 Ga. 509, holding that if the rate of taxation fixed in the charter of a railroad company exceeds the *ad valorem* rate, then only the general rate *ad valorem* should be levied.

3. Kentucky Cent. R. Co. *v.* Pendleton County, 2 S. W. 176, 8 Ky. L. Rep. 517; Great Northern R. Co. *v.* Snohomish County, 48 Wash. 478, 93 Pac. 924; Indianapolis, etc., R. Co. *v.* Vance, 96 U. S. 450, 24 L. ed. 752.

What constitutes a railroad.—A railroad company having nothing but a bare road-bed, with no rails and no equipment, is not "running and operating a railroad," so as to be assessable by the railroad assessor. Neely *v.* Buchanan, (Tenn. Ch. App.) 54 S. W. 995. But a company, the business of which was to build and own a bridge used exclusively for railroad purposes, and which reports to the railroad commissioner and pays taxes as a railroad company, is a "railroad" within the Michigan statute. Sault Ste. Marie Bridge Co. *v.* Powers, 138 Fed. 262 [*affirmed* in 201 U. S. 245, 26 S. Ct. 466, 50 L. ed. 765]. So a railroad composed of short tracks, and used in connection with a ferry for the purpose of hauling cars of other railroads to and from the ferry, and owned by the ferry company is subject to assessment by the state board of equalization, and not by the city assessor. State *v.* Wiggins Ferry Co., 208 Mo. 622, 106 S. W. 1005.

Private lines of railroad.—A short line of railroad, built and exclusively used by a manufacturing company for hauling its own material and products and lying wholly within one county, is not within the spirit or letter of a statute providing for the assessment of railroad property by a state board. Dayton *v.* Dayton Coal, etc., Co., 99 Tenn. 578, 42 S. W. 444. And see Monmouth Park Assoc. *v.* State Assessors, 60 N. J. L. 372, 37 Atl. 729.

Classification of railroads by the state tax commission for purposes of taxation see Great Northern R. Co. *v.* Snohomish County, 48 Wash. 478, 93 Pac. 924.

Assessment of second-class railroad property under the New Jersey Act of March 4, 1908, see Long Dock Co. *v.* State Bd. of Assessors, 78 N. J. L. 44, 73 Atl. 53.

are always sustained as a valid exercise of the legislative power.[4] Subject to special statutory directions, railroad property is to be assessed like other property, whether belonging to corporations or to individuals, and at the same rate,[5] and its existence, extent, and varieties are to be ascertained in the same way.[6]

Assessment of lots abutting on closed street and belonging to the railroad company see People *v.* O'Donnell, 130 N. Y. App. Div. 734, 115 N Y. Suppl. 509.

A privilege tax on railroads does not authorize the collection of a greater tax on a double than on a single track road. Adams *v.* Illinois Cent. R. Co., 92 Miss. 566, 46 So. 50.

4. See the statutes of the several states. And see the following cases:

Alabama.— Nashville, etc., R. Co. *v.* State, 129 Ala. 142, 30 So. 619.

Colorado.—Ames *v.* People, 26 Colo. 83, 56 Pac. 656; Hall *v.* American Refrigerator Transit Co., 24 Colo. 291, 51 Pac. 421, 65 Am. St. Rep. 223, 56 L. R. A. 89.

Idaho.— McConnell *v.* State Bd. of Equalization, 11 Ida. 652, 83 Pac. 494; Oregon Short-Line R. Co. *v.* Gooding, 6 Ida. 773, 59 Pac. 821.

Illinois.— Law *v.* People, 87 Ill. 385.

Indiana.— Clark *v.* Vandalia R. Co., 172 Ind. 409, 86 N. E. 851; Jeffersonville *v.* Louisville, etc., Bridge Co., 169 Ind. 645, 83 N. E. 337.

Iowa.— Chicago, etc., R. Co. *v.* Davenport, 51 Iowa 451, 1 N. W. 720; Dubuque *v.* Chicago, etc., R. Co., 47 Iowa 196.

Kansas.— Missouri River, etc., R. Co. *v.* Morris, 7 Kan. 210.

Kentucky.—Cincinnati, etc., R. Co. *v.* Com., 81 Ky. 492; Vanceburg, etc., Road Co. *v.* Maysville, etc., R. Co., (1901) 63 S. W. 749.

Maine.— State *v.* Canadian Pac. R. Co., 100 Me. 202, 60 Atl. 901.

Maryland.— Baltimore, etc., R. Co. *v.* Wicomico County, 93 Md. 113, 48 Atl. 853.

Missouri.— State *v.* Hannibal, etc.. R. Co., 101 Mo. 120, 13 S. W. 406; State *v.* Severance, 55 Mo. 378.

Nebraska.— State *v.* Back, 72 Nebr. 402, 100 N. W. 952, 69 L. R. A. 561.

New Jersey.— Jersey City *v.* State Bd. of Equalization, 74 N. J. L. 753, 67 Atl. 38 [*reversing* 74 N. J. L. 382, 65 Atl. 903].

North Carolina.— Richmond, etc., R. Co. *v.* Alamance County, 84 N. C. 504.

Oregon.— Oregon R. Co. *v.* Umatilla County, 47 Oreg. 198, 81 Pac. 352.

Tennessee.— Harris *v.* State, 96 Tenn. 496, 34 S. W. 1017; Franklin County *v.* Nashville, etc., R. Co., 12 Lea 521.

United States.— Union Pac. R. Co. *v.* Ryan, 113 U. S. 516, 5 S. Ct. 601, 28 L. ed. 1098; Taylor *v.* Secor, 92 U. S. 575, 23 L. ed. 663; Michigan Railroad Tax Cases, 138 Fed. 223 [*affirmed* in 201 U. S. 245, 26 S. Ct. 459, 50 L. ed. 744]; Smith *v.* Rackliffe, 83 Fed. 983. See also Chicago, etc., R. Co. *v.* Babcock, 204 U. S. 585, 27 S. Ct. 326, 51 L. ed. 636; Southern R Co. *v.* North Carolina Corp. Commission, 97 Fed. 513.

See 45 Cent. Dig. tit. "Taxation," § 652.

Powers and jurisdiction of state board of assessors see Manistee, etc., R. Co. *v.* Turner, 115 Mich. 291, 73 N. W. 240; Yazoo, etc., R. Co. *v.* Adams, 81 Miss. 90, 32 So. 937.

Degree of uniformity required.—Where the method of assessing the property of a particular railroad company adopted by a state board is within the powers conferred on it by statute, and does not result in an excessive valuation as compared with the property of other railroad companies, a court of equity will not enjoin the collection of taxes thereon because, owing to the peculiar nature of the property of such company within the state, the method so adopted was different from that applied to other roads. Kansas City, etc., R. Co. *v.* King, 120 Fed. 614. 57 C. C. A. 278.

Taxation in addition to franchise tax.—A tax can lawfully be levied on the franchise of a railroad and also a separate tax on the road-bed, rolling-stock, and fixtures at their cash value. *In re* R. Taxation, 102 Me. 527, 66 Atl. 726.

5. *Illinois.*— Chicago, etc., R. Co. *v.* Livingston County, 68 Ill. 458.

Indiana.— Clark *v.* Vandalia R. Co., 172 Ind. 409, 86 N. E. 851.

Maryland.— *In re* Tax Cases, 12 Gill & J. 117.

New Hampshire.— Boston, etc., R. Co. *v.* State, 62 N. H. 648.

New Jersey.— Williams *v.* Bettle, 51 N. J. L. 512, 18 Atl. 750, rate.

Wisconsin.— Chicago, etc., R. Co. *v.* State, 128 Wis. 553, 108 N. W. 557.

See 45 Cent. Dig. tit. "Taxation," § 652.

Railroad property as personalty.— Under the statute of Kentucky regulating the taxation of railroads, the tax levied by the board of railroad assessors on property held or used in the operation of a railroad is a tax on personal property. Missouri, etc., R. Co. *v.* Labette County, 9 Kan. App. 545, 59 Pac. 383.

That the board of valuation gives an improper credit, whereby the franchise tax is reduced, after the railroad commission has properly assessed the tangible property of a railroad company, in no way invalidates the assessment of the railroad commission. Com. *v.* Kinniconick, etc., R. Co., 104 S. W. 290, 31 Ky. L. Rep. 859.

Assessment of money belonging to a foreign railroad company in the hands of the receiver of another railroad company see Clark *v.* Vandalia R. Co., 172 Ind. 409, 86 N. E. 851.

6. Chicago, etc., R. Co. *v.* Cedar Rapids, 127 Iowa 678, 103 N. W. 997; People *v.* Michigan Cent. R. Co., 145 Mich. 140, 108 N. W. 772; People *v.* Shields, 6 Hun (N. Y.) 556.

b. Valuation of Property. The assessment of railroad property is to be based on its value for the purpose for which it is intended and devoted.[7] The cost of construction or of acquisition, or the cost of replacement, may be considered in fixing this valuation, but it is not in itself a fair measure of value;[8] and it is also proper to consider the aggregate amount of the company's capital stock and bonded debt, as representing its investment and therefore indicating the value of its property.[9] But productiveness rather than cost should be the standard, and hence the question should be, what would the property sell for, as a railroad, at a fair and free sale;[10] and on this question the earning capacity of the road, as evidenced by its net profits, is a very important consideration, although perhaps not absolutely controlling;[11] and so also is the rental value of the road.[12] In this connection also the market value of the company's stock and bonds may properly be taken into account;[13] and in general the assessors should base their valuation upon all the factors which enter into the market value of the property,[14] obtaining

7. State *v.* Illinois Cent. R. Co., 27 Ill. 64, 79 Am. Dec. 396; Louisville, etc., R. Co. *v.* State, 8 Heisk. (Tenn.) 663.

"Property used for railroad and canal purposes," upon the question of its valuation under N. J. Act March 27, 1888, § 3. subd. 2, see Long Dock Co. *v.* State Bd. of Assessors, (N. J. Sup. 1909) 73 Atl. 53.

In New Jersey under Pamphl. Laws (1884), p. 142, as amended by Pamphl. Laws (1888), p. 269, the board of assessors must ascertain the value of: (1) The main stem, (2) other real property, (3) tangible personal property, and (4) the franchise; it being presumed that the road-bed as laid is to be taxed as main stem, whether the railroad company conducts a passenger or freight business, or both. Jersey City *v.* State Bd. of Assessors, 74 N. J. L. 720, 68 Atl. 227 [*reversing* 73 N. J. L. 170, 63 Atl. 23].

Revaluation.—Where all the property of a railroad company has been valued for taxation for certain years, a revaluation for those years cannot be made. Com. *v.* Ledman, 127 Ky. 603, 106 S. W. 247, 32 Ky. L. Rep. 452.

8. *Kentucky.*— Owensboro, etc., R. Co. *v.* Logan County, 11 S. W. 76, 11 Ky. L. Rep. 99.

Louisiana.— Morgan's Louisiana, etc., R., etc., Co. *v.* Iberia Parish Bd. of Reviewers, 41 La. Ann. 1156, 3 So. 507.

New Jersey.— Central R. Co. *v.* State Bd. of Assessors, 49 N. J. L. 1, 7 Atl. 306.

New York.—People *v.* Keator, 36 Hun 592 [*affirming* 67 How. Pr. 277]; People *v.* Haren, 3 N. Y. Suppl. 86.

Oregon.— Oregon, etc., R. Co. *v.* Jackson County, 38 Oreg. 589, 64 Pac. 307, 65 Pac. 369.

Pennsylvania.— Com. *v.* Lake Shore, etc., R. Co., 3 Dauph. Co. Rep. 172.

United States.— Cincinnati Southern R. Co. *v.* Guenther, 19 Fed. 395.

See 45 Cent. Dig. tit. "Taxation," § 653.

9. Porter *v.* Rockford, etc., R. Co., 76 Ill. 561; Chicago, etc., R. Co. *v.* Cole, 75 Ill. 591; Oregon, etc., R. Co. *v.* Jackson County, 38 Oreg. 589, 64 Pac. 307, 65 Pac. 369.

10. State *v.* Illinois Cent. R. Co., 27 Ill. 64, 79 Am. Dec. 396; Morgan's Louisiana, etc., R., etc., Co. *v.* Iberia Parish, 41 La. Ann. 1156, 3 So. 507; Atlantic, etc., R. Co. *v.* State, 60 N. H. 133 (holding that the fact that the road is run at a net loss does not show it to be of no value); People *v.* Pond, 13 Abb. N. Cas. (N. Y.) 1.

11. *Illinois.*— State *v.* Illinois Cent. R. Co., 27 Ill. 64, 79 Am. Dec. 396.

Louisiana.— Morgan's Louisiana, etc., R., etc., Co. *v.* Iberia Parish, 41 La. Ann. 1156, 3 So. 507.

Nebraska.— State *v.* Savage, 65 Nebr. 714, 91 N. W. 716.

Nevada.— State *v.* Nevada Cent. R. Co., 28 Nev. 186, 81 Pac. 99, 113 Am. St. Rep. 834; State *v.* Nevada Cent. R. Co., 26 Nev. 357, 68 Pac. 294, 69 Pac. 1042; State *v.* Virginia, etc., R. Co., 24 Nev. 53, 49 Pac. 945, 50 Pac. 607.

New York.— People *v.* Hicks, 105 N. Y. 198, 11 N. E. 653; People *v.* Hicks, 40 Hun 598; People *v.* Keator, 36 Hun 592 [*affirming* 67 How. Pr. 277]; People *v.* Wilder, 3 N. Y. St. 159; People *v.* Haren, 3 N. Y. Suppl. 86; People *v.* Assessor, 2 N. Y. Suppl. 240.

Oregon.— Oregon, etc., R. Co. *v.* Jackson County, 38 Oreg. 589, 64 Pac. 307, 65 Pac. 369.

United States.— Louisville, etc., R. Co. *v.* Coulter, 131 Fed. 282 [*reversed* on other grounds in 196 U. S. 599, 25 S. Ct. 342, 49 L. ed. 615].

See 45 Cent. Dig. tit. "Taxation," § 653.

12. Clark *v.* Vandalia R. Co., 172 Ind. 409, 86 N. E. 851; Atlantic, etc., R. Co. *v.* State, 60 N. H. 133; People *v.* Feitner, 75 N. Y. App. Div. 527, 78 N. Y. Suppl. 308 [*affirmed* in 174 N. Y. 532, 66 N. E. 1114]; Oregon, etc., R. Co. *v.* Jackson County, 38 Oreg. 589, 64 Pac. 307, 65 Pac. 369.

13. State *v.* Savage, 65 Nebr. 714, 91 N. W. 716; Oregon, etc., R. Co. *v.* Jackson County, 38 Oreg. 589, 64 Pac. 307, 65 Pac. 369; Taylor *v.* Louisville, etc., R. Co., 88 Fed. 350, 31 C. C. A. 537.

14. *Indiana.*— Pittsburgh, etc., R. Co. *v.* Backus, 133 Ind. 625, 33 N. E. 432 (connections with trunk or interstate lines); Indianapolis, etc., R. Co. *v.* Backus, 133 Ind. 609, 33 N. E. 443; Terre Haute, etc., R. Co. *v.* Marion County, Wils. 380.

Mississippi.— Yazoo, etc., R. Co. *v.* Adams, 85 Miss. 772, 38 So. 348, right of the com-

all the information they can from all pertinent and reliable sources.[15] The value of a branch line should be considered in connection with its relation to the main line.[16] Where the road extends out of the state, its value as a whole may be determined and the assessment made on the basis of the mileage within the state, unless there are circumstances which give to the portions outside the state a relatively higher value than those within the state, in which case all such circumstances must be considered.[17] A railroad company may, in the same manner as an individual, obtain the aid of the courts in relieving it if the valuation of its property is fraudulent or excessive.[18]

c. Rolling-Stock and Equipment. The rolling-stock of a railroad company may be assessed as capital employed within the state, except as to any cars or engines shown to be used exclusively outside the state.[19] Whether such property is to be assessed by the state board or the local officers depends upon the particular statute;[20] but if by the former, its value should be apportioned among the several counties according to the average number of cars operated in each.[21]

pany to operate its railroad in the manner, on the conditions, and with the powers granted in its charter.

Nebraska.— State *v.* Savage, 65 Nebr. 714, 91 N. W. 716.

Oregon.— Oregon, etc., R. Co. *v.* Jackson County, 38 Oreg. 589, 64 Pac. 307, 65 Pac. 369, connections with other roads and advantages for commanding the carrying trade.

Tennessee.— Louisville, etc., R. Co. *v.* Bate, 12 Lea 573.

See 45 Cent. Dig. tit. "Taxation," § 653.

Savings bank deposits as a factor to be considered in valuing railroad property see Wyatt *v.* State Bd. of Equalization, 74 N. H. 552, 70 Atl. 387.

Valuation of second-class railroad property under the New Jersey act of March 27, 1888, see Long Dock Co. *v.* State Bd. of Assessors, (N. J. Sup. 1909) 73 Atl. 53.

15. State *v.* Southwestern R. Co., 70 Ga. 11; State *v.* Savage, 65 Nebr. 714, 91 N. W. 716.

Admissions by corporation as to the amount of its taxable property see People *v.* Barker, 6 N. Y. App. Div. 356, 39 N. Y. Suppl. 682 [*reversed* on other grounds in 152 N. Y. 417, 46 N. E. 875].

Report or return by corporation see Owensboro, etc., R. Co. *v.* Com., 73 S. W. 744, 24 Ky. L. Rep. 2178; Shelby County *v.* Mississippi, etc., R. Co., 16 Lea (Tenn.) 401, 1 S. W. 32; State *v.* Austin, etc., R. Co., 94 Tex. 530, 62 S. W. 1050.

Increasing valuation by local board after state board has valued railroad property see State *v.* Carson, etc., R. Co., 29 Nev. 487, 91 Pac. 932.

16. State *v.* Southwestern R. Co., 70 Ga. 11; Louisville, etc., R. Co. *v.* Bate, 12 Lea (Tenn.) 573.

17. *Indiana.*— Evansville, etc., R. Co. *v.* West, 138 Ind. 697, 37 N. E. 1012; Cleveland, etc., R. Co. *v.* Backus, 133 Ind. 513, 33 N. E. 421, 18 L. R. A. 729.

Maine.— State *v.* Canadian Pac. R. Co., 100 Me. 202, 60 Atl. 901.

Nebraska.— State *v.* Savage, 65 Nebr. 714, 91 N. W. 716.

Tennessee.— Chattanooga, etc., R. Co. *v.* Nashville, etc., R. Co., 7 Lea 561 [*overruling* Louisville, etc., R. Co. *v.* State, 8 Heisk 663].

United States.— Cleveland, etc., R. Co. *v.* Backus, 154 U. S. 439, 14 S. Ct. 1122, 38 L. ed. 1041 [*affirming* 133 Ind. 513, 33 N. E. 421, 18 L. R. A. 729]; Indianapolis, etc., R. Co. *v.* Backus, 154 U. S. 438, 14 S. Ct. 1114, 38 L. ed. 1040; Pittsburgh, etc., R. Co. *v.* Backus, 154 U. S. 421, 14 S. Ct. 1114, 38 L. ed. 1031 [*affirming* 133 Ind. 625, 33 N. E. 432]; Louisville, etc., R. Co. *v.* Coulter, 131 Fed. 282 [*reversed* on other grounds in 196 U. S. 599, 25 S. Ct. 342, 49 L. ed. 615].

See 45 Cent. Dig. tit. "Taxation," § 653.

18. *Illinois.*— La Salle, etc., R. Co. *v.* Donoghue, 127 Ill. 27, 18 N. E. 827, 11 Am. St. Rep. 90.

New Jersey.— Williams *v.* Bettle, 50 N. J. L. 132, 11 Atl. 17; Central R. Co. *v.* State Bd. of Assessors, 49 N. J. L. 1, 7 Atl. 306.

North Dakota.— Shuttuck *v.* Smith, 6 N. D. 56, 69 N. W. 5.

Oregon.— Oregon, etc., R. Co. *v.* Jackson County, 38 Oreg. 589, 64 Pac. 307, 65 Pac. 369.

United States.— Louisville, etc., R. Co. *v.* Coulter, 131 Fed. 282 [*reversed* on other grounds in 196 U. S. 599, 25 S. Ct. 342, 49 L. ed. 615]; Jessup *v.* Chicago, etc., R. Co., 13 Fed. Cas. No. 7,300.

See 45 Cent. Dig. tit. "Taxation," §§ 653, 654.

But *compare* State *v.* New York, etc., R. Co., 60 Conn. 326, 22 Atl. 765.

19. People *v.* Miller, 177 N. Y. 584, 69 N. E. 1129 [*affirming* 89 N. Y. App. Div. 127, 84 N. Y. Suppl. 1088].

20. San Francisco *v.* Central Pac. R. Co., 63 Cal. 467, 49 Am. Rep. 98; California *v.* Central Pac. R. Co., 127 U. S. 1, 8 S. Ct. 1073, 32 L. ed. 150; Santa Clara County *v.* Southern Pac. R. Co., 118 U. S. 394, 6 S. Ct. 1132, 30 L. ed. 118, holding that steamboats belonging to a railroad and engaged in transporting passengers and freight across waters which divide the railroad must be assessed by county officers and not by the state board in California.

21. Atlantic, etc., R. Co. *v.* Lesueur, 2 Ariz. 428, 19 Pac. 157, 1 L. R. A. 244; State

d. Valuation of Capital Stock. Where the capital of a railroad is to be appraised at its actual value, the valuation should correspond with the fair market value of all the stock issued and outstanding.[22] In the case of an interstate road, each state should assess such a portion of the appraised value of the entire capital stock as corresponds with the number of miles of road within the state in its relation to the entire mileage of the road.[23]

e. Earnings and Receipts. In some states railroad companies are taxed on their gross earnings,[24] which will include every form of revenue or profit which is in itself taxable by the state.[25] Where, however, the assessment is to be made on

v. Savage, 65 Nebr. 714, 91 N. W. 716; State *v.* Aldridge, 66 Ohio St. 598, 64 N. E. 562; Salt Lake County *v.* State Bd. of Equalization, 18 Utah 172, 55 Pac. 378.

22. Ohio, etc., R. Co. *v.* Weber, 96 Ill. 443; State *v.* Savage, 65 Nebr. 714, 91 N. W. 716.

Unissued stock.— There should not be included in the assessment proposed but unissued new shares of stock, although such shares are paid for and have a market value. Boston, etc., R. Co. *v.* Com., 157 Mass. 68, 31 N. E. 696.

In making such valuation every element of property, tangible or intangible, owned by the company, together with the company's franchise and earning capacity, must be considered; but not the property value of the company's shares. Com. *v.* Ledman, 127 Ky. 603, 106 S. W. 247, 32 Ky. L. Rep. 452.

23. Ohio, etc., R. Co. *v.* Weber, 96 Ill. 443; Southern Pac. Co. *v.* Com., 134 Ky. 410, 120 S. W. 309 (holding that such proportion is not conclusive but simply to be considered); Com. *v.* Delaware, etc., R. Co., 145 Pa. St. 96, 22 Atl. 157; Com. *v.* Pullman Palace Car Co., 2 Pa. Dist. 618, 13 Pa. Co. Ct. 54; Com. *v.* Lake Shore, etc., R. Co., 3 Dauph. Co. Rep. (Pa.) 172; Com. *v.* Western Union Tel. Co., 2 Dauph. Co. Rep. (Pa.) 30.

24. See the statutes of the several states. And see Goldsmith *v.* Augusta, etc., R. Co., 62 Ga. 468; Detroit, etc., R. Co. *v.* Railroad Com'r, 119 Mich. 132, 77 N. W. 631; State *v.* Minnesota, etc., R. Co., 102 Minn. 506, 112 N. W. 899; State *v.* Duluth, etc., R. Co., 102 Minn. 26, 112 N. W. 897; Minneapolis, etc., R. Co. *v.* Koerner, 85 Minn. 149, 88 N. W. 430; State *v.* Northern Pac. R. Co., 36 Minn. 207, 30 N. W. 663; Chicago, etc., R. Co. *v.* Pfaender, 23 Minn. 217; State *v.* Harshaw, 76 Wis. 230, 45 N. W. 308; State *v.* McFetridge, 64 Wis. 130, 24 N. W. 140; State *v.* McFetridge, 56 Wis. 256, 14 N. W. 185.

Part of road exempt.— Where a railroad company, whose charter exempts its original road from taxation, subsequently acquires another line, which is subject to taxation, but fails to keep a separate account of the gross receipts of the two roads, in estimating the gross receipts of the road so acquired, for the purpose of taxation, they should be made to bear the same proportion to the entire gross receipts as the mileage of the road so acquired bears to the entire mileage of the railroad company. State *v.* Baltimore, etc., R. Co., 48 Md. 49.

Gross earnings tax must be determined on the gross earnings during the fiscal year for which the tax is to be paid. State *v.* Rutland R. Co., 81 Vt. 508, 71 Atl. 197.

25. State *v.* Minnesota, etc., R. Co., 106 Minn. 176, 118 N. W. 679, 1007, holding that the gross earnings are not limited to earnings derived from the operation of trains, but include all earnings received by the railroad company while performing work incidental to or connected with the business of transportation and which may reasonably be considered within the scope of its corporate power.

"Gross income" or "gross earnings," within the meaning of the above rule, includes interest received by a railroad company on its loans and deposits (Detroit, etc., R. Co. *v.* Railroad Com'rs, 119 Mich. 132, 77 N. W. 631. But *compare* State *v.* Minnesota, etc., R. Co., 106 Minn. 176, 118 N. W. 679, 1007); rent of tracks and terminals (Detroit, etc., R. Co. *v.* Railroad Com'rs, 119 Mich. 132, 77 N. W. 631; Com. *v.* New York, etc., R. Co., 145 Pa. St. 38, 22 Atl. 212; New York, etc., R. Co. *v.* Pennsylvania, 158 U. S. 431, 15 S. Ct. 896, 39 L. ed. 1043. But *compare* State *v.* Minnesota, etc., R. Co., 106 Minn. 176, 118 N. W. 679, 1007; State *v.* St. Paul, etc., R. Co., 30 Minn. 311, 15 N. W. 307); amounts received for services rendered in moving, transferring, and switching cars at loading points (Detroit, etc., R. Co. *v.* Railroad Com'rs, 119 Mich. 132, 77 N. W. 631; State *v.* Minnesota, etc., R. Co., *supra*); amounts received for the use of equipment, such as steam shovels, hoisting machinery, work trains, cars, and engines, including crews (State *v.* Minnesota, etc., R. Co., *supra*); amounts received from other railroad companies for the use of work trains employed in construction work (State *v.* Minnesota, etc., R. Co., *supra*); and amounts received for the use of its cars in excess of the amount paid out by it for the use of cars of other companies (State *v.* Minnesota, etc., R. Co., *supra*; State *v.* McFetridge, 64 Wis. 130, 24 N. W. 140). But it does not include money received for carrying the United States mails (People *v.* Morgan, 57 N. Y. App. Div. 302, 68 N. Y. Suppl. 135 [*affirmed* in 168 N. Y. 1, 60 N. E. 1041]); or amounts received for the sale of old material, supplies, and equipment, or of the surplus of supplies and material not necessary for the company's own use (State *v.* Minnesota, etc., R. Co., *supra*); or amounts received from other railroad companies for the repair of cars based upon actual cost according to a reciprocal arrangement between

the basis of net earnings, the amount is to be arrived at by deducting all operating expenses from the gross receipts.[26] In the case of an interstate road, the earnings or receipts must be apportioned on the basis of mileage within and without the state.[27]

f. Deductions. Railroad companies are generally entitled to deduct from the assessment on their capital or assets property having a *situs* without the state or which is not taxable within the state.[28] The further right to deduct indebtedness or other item depends altogether on the local statutes,[29] as does also the right of the individual taxpaper to deduct his debts from the value of railroad stocks or bonds which he holds.[30]

g. Right of Way and Other Real Property — (i) *Valuation in General.* The portion of a railway lying within the limits of each taxing district is to be assessed as real estate,[31] and at its fair cash value.[32] But in arriving at this value it is not proper to consider it simply as so much land, and appraise it the same as adjoining lands of individual owners, but it must be treated as part of an entire system of railroad, and considered with reference to its value for railroad purposes and to its situation and any incidental advantages.[33] This rule, however,

them; or amounts which might have been received had the company charged itself at the usual rates for shipping its own supplies and material over its own lines; or the income derived from rentals on the right of way, garnishee fees, commissions from insurance companies, rental from telephone companies, bill-board privileges, sale of hay, stumpage, etc.; or gross receipts from labor and work train service, or materials furnished in maintaining, laying, surfacing, extending, and taking up spur tracks for private parties (State *v.* Minnesota, etc., R. Co., *supra*).

26 Clark *v.* Vandalia R. Co., 172 Ind. 409, 86 N. E. 851; State *v.* Board of Assessors, 48 La. Ann. 1156, 20 So. 670; State *v.* Nevada Cent. R. Co., 28 Nev 186, 81 Pac. 99, 113 Am. St. Rep. 834; State *v.* Virginia, etc, R. Co., 24 Nev. 53, 49 Pac. 945, 50 Pac. 607. And see New York *v.* Manhattan R. Co., 119 N Y. App Div. 240, 104 N. Y. Suppl. 609 [*affirmed* in 192 N. Y. 90, 84 N. E. 745].

What are operating expenses.— Compensation paid by a railroad company for the use of equipment, at a certain percentage of the value, is a part of its operating expenses. Com. *v.* Philadelphia, etc., R. Co., 164 Pa. St. 252, 30 Atl. 145. So are taxes actually paid. State *v.* Nevada Cent. R. Co., 28 Nev. 186, 81 Pac. 99, 113 Am. St. Rep. 834.

27. Chicago, etc., R. Co. *v.* Auditor-Gen., 53 Mich. 79, 18 N. W. 586.

28. Com *v.* Delaware, etc., R. Co., 145 Pa. St. 96, 22 Atl. 157. *Compare* Michigan Southern, etc., R. Co. *v.* Auditor-Gen., 9 Mich. 448

29. See the statutes of the several states. And see the following cases:

California.— Central Pac. R. Co. *v.* State Bd. of Equalization, 60 Cal. 35, without deductions for mortgages.

Connecticut.— State *v.* New York, etc., R. Co., 60 Conn. 326, 22 Atl. 765, cannot deduct loans to other railroad companies on long time, or stock of other companies not intended to be sold.

New Jersey.— Williams *v.* Bettle, 50 N. J. L. 132, 11 Atl. 17, deduction must be made from the local tax and not from the state tax.

New York.— People *v.* Feitner, 61 N. Y. App. Div. 129, 70 N. Y. Suppl. 500 [*affirmed* in 171 N. Y. 641, 63 N. E. 786]; People *v.* New York Tax Com'rs, 1 Thomps. & C. 635.

Tennessee.— Louisville, etc., R. Co. *v.* Bate, 12 Lea 573, holding that in assessing the property of a corporation owning different railroads, the statutory exemption of one thousand dollars can be deducted but once, not once for each road.

See 45 Cent. Dig. tit. "Taxation," § 658.

30. Hale *v.* Hampshire County, 137 Mass. 111; Raleigh. etc., R. Co. *v.* Wake County, 87 N. C. 414.

31. See *infra*, VI, D, 8, g, (v).

Assessment as non-resident lands.—A railroad company is a resident of the towns through which its road passes, and its real estate, occupied and used for railroad purposes, cannot properly be assessed as non-resident lands. People *v.* Barker, 48 N. Y. 70 [*affirming* 48 Barb. 173, 33 How. Pr. 150]; People *v.* Cassity, 46 N. Y. 46.

Interurban street railways see Waterloo, etc., Rapid Transit Co. *v.* Blackhawk County, 131 Iowa 237, 108 N. W. 316.

32. People *v.* New York Tax Com'rs, 104 N. Y. 240, 10 N. E. 437; Central Pac. R. Co. *v.* Evans, 111 Fed. 71; Huntington *v.* Central Pac. R. Co., 12 Fed. Cas. No. 6,911, 2 Sawy. 503.

Equal valuation in different counties.—A railroad track, as a whole, is a single property, and should not be assessed upon any higher valuation per mile in one county than in another. Law *v.* People, 87 Ill. 385.

33. *Illinois.*— St. Louis Bridge, etc., R. Co. *v.* People, 127 Ill. 627, 21 N. E. 348; Chicago, etc., R. Co. *v.* Lee County, 44 Ill. 248.

Kansas.— Kansas Pac. R. Co. *v.* Wyandotte County, 16 Kan. 587.

New York.— People *v.* Barker, 48 N. Y. 70 [*affirming* 48 Barb. 173, 33 How. Pr.

applies only to lands used in connection with the business of the railroad; other real property, owned by the road but not so used, is to be valued in the same manner as the real estate of private individuals.[34] The land and the buildings or improvements on it are to be separately assessed if the statute so directs.[35]

(II) *Railroad Bridges.* A railroad bridge is assessable as real estate,[36] and its value for purposes of taxation is not measured by its cost, but by its earnings or its value as a part of the railroad system.[37]

(III) *State or Local Assessment.* The distribution of the right to assess the right of way, road-bed, and other real property of railroad companies, as between the state board and the local authorities, varies greatly in the different states; but the general tendency is to assign to the state officers all that which constitutes a part of the continuous line of railway, and to the local taxing officers all property not used for railroad purposes and also such as is incidental or accessory to the operation of the road.[38]

150]; People *v.* Reid, 64 Hun 553, 19 N. Y. Suppl. 528. But see Albany, etc., R. Co. *v.* Canaan, 16 Barb. 244; Albany, etc., R. Co. *v.* Osborn, 12 Barb. 223.

Oregon.— Oregon, etc., R. Co. *v.* Jackson County, 38 Oreg. 589, 64 Pac. 307, 65 Pac. 369.

Texas.— State *v.* St. Louis Southwestern R. Co., 43 Tex. Civ. App. 533, 96 S. W. 69.

Virginia.— Baltimore, etc., R. Co. *v.* Koontz, 77 Va. 698.

See 45 Cent. Dig. tit. "Taxation," § 661.

But *compare* Huntington *v.* Central Pac. R. Co., 12 Fed. Cas. No. 6,911, 2 Sawy. 503.

Depreciation of adjoining property not considered.— In fixing the valuation of real estate of a railroad company within a town for purposes of taxation, the damages the company would be compelled to pay for depreciation of land adjoining that taken, if it were now constructing its road, cannot be included. People *v.* Hilts, 62 N. Y. Suppl. 1145 [*affirmed* in 163 N. Y. 594, 57 N. E. 1122].

Leased road.— Where all the property of a railroad company consists of real estate, and lies in one tax district, and is leased to another corporation, the assessors have no right arbitrarily to fix the value of the lessor's property by considering its rental value, and then tax the difference between the value so fixed and the assessed value of the real estate as "capital and surplus." People *v.* Feitner, 174 N. Y. 532, 66 N. E. 1114.

34. Toledo, etc., R. Co. *v.* Lafayette, 22 Ind. 262. See also Oregon, etc., R. Co. *v.* Jackson County, 38 Oreg. 589, 64 Pac. 307, 65 Pac. 369.

35. State *v.* Hannibal, etc., R. Co., 110 Mo. 265, 19 S. W. 816; New York, etc., R. Co. *v.* Yard, 43 N. J. L. 121; Huntington *v.* Central Pac. R. Co., 12 Fed. Cas. No. 6,911, 2 Sawy. 503.

Railroad built on another's land.— Where a railroad is constructed on land of another, under a parol arrangement with the owner, the works constructed for use for railroad purposes, such as embankments, bridges, culverts, and tracks, are assessable to the railroad company, although the land itself is assessable to the owner. Hoboken R. etc., Co. *v.* State Bd. of Assessors, 62 N. J. L. 561, 41 Atl. 728.

36. People *v.* Atchison, etc., R. Co., 206 Ill. 252, 68 N. E. 1059; Pittsburgh, etc., R. Co. *v.* West Virginia Bd. of Public Works, 172 U. S. 32, 19 S. Ct. 90, 43 L. ed. 354; Keithsburg Bridge Co. *v.* McKay, 42 Fed. 427. See also Cowen *v.* Aldridge, 114 Fed. 44, 51 C. C. A. 670; and *supra*, III, B, 2, d, (II).

Bridge taxable as part of road.— A bridge owned by a railroad company on its line of road is properly returned for taxation as so much mileage of railroad, and cannot be again taxed as a bridge. Schmidt *v.* Galveston, etc., R. Co., (Tex. Civ. App. 1893) 24 S. W. 547.

Toll-bridge.— A railroad bridge owned by a railroad company and constituting a part of its track is taxable only as a part of the road, and not as a separate structure, notwithstanding it is used in part as a toll-bridge for the passage of teams, wagons, and the like. State *v.* Hannibal, etc., R. Co., 97 Mo. 348, 10 S. W. 436. *Compare* State *v.* Hannibal, etc., R. Co., 89 Mo. 98, 14 S. W. 511.

37. Alexandria Canal R., etc., Co. *v.* District of Columbia, 1 Mackey (D. C.) 217; People *v.* Weaver, 67 How. Pr. (N. Y.) 477 [*affirmed* in 34 Hun 321], earnings. See also Chicago, etc., R. Co. *v.* Com., 115 Ky. 278, 72 S. W. 1119, 24 Ky. L. Rep. 2124.

Assessment of railroad bridge by the "mileage rule" as an integral part of the entire roadway see State *v.* Louisiana, etc., R. Co., 215 Mo. 479, 114 S. W. 956.

38. See the statutes of the several states. And see the following cases:

Alabama.— Nashville, etc., R. Co. *v.* State, 129 Ala. 142, 30 So. 619, holding that depots, platforms, stations, and water tanks, owned by a railroad company and situated on its right of way, are to be assessed by the local authorities.

Arkansas.— St. Louis, etc., R. Co. *v.* Miller County, 67 Ark. 498, 55 S. W. 926, holding that all real estate, including structures thereon, other than that denominated "railroad tracks," shall be listed by the local assessors.

Illinois.— Railroad track must be assessed

(iv) *Property Included in "Right of Way," "Railroad Track," and "Road-Bed."* Where these terms are used as descriptive of the kinds of railroad property which are to be assessed by the state board, they are generally taken in a very comprehensive sense. Thus, the "right of way" is not the mere easement of passage, but the land covered by the track,[39] and may also include side-tracks, depots, shops, and other structures along the line of the road,[40] although it cannot be extended to cover land acquired with the intention of using it for railroad purposes at some time in the future.[41] The same remarks apply to the general terms "roadway" or "road-bed." [42] And in states where the state officers are given jurisdiction over the assessment of "railroad track," this term is made to include not only the rails and their bed, but also the right of way and side or spur tracks, together with depots, round-houses, water tanks, reservoirs, and other such property.[43] A bridge forming a part of the line of a railroad, or connecting its

by the state board, but all other real estate of railroad companies, including stations and other buildings and structures thereon, must be assessed by the local assessors. People *v.* State Bd. of Equalization, 205 Ill. 296, 68 N. E. 943; Peoria, etc., R. Co. *v.* Goar, 118 Ill. 134, 8 N. E. 682; People *v.* Chicago, etc., R. Co., 116 Ill. 181, 4 N. E. 480; Chicago, etc., R. Co. *v.* People, 99 Ill. 464; Chicago, etc., R. Co. *v.* People, 98 Ill. 350; Chicago, etc., R. Co. *v.* Paddock, 75 Ill. 616.

Iowa.— Chicago, etc., R. Co. *v.* Davenport, 51 Iowa 451, 1 N. W. 720.

Kansas.— Shawnee County *v.* Topeka Equipment Co., 26 Kan. 363, holding that rolling-stock of a railroad company is to be assessed by the board of railroad assessors, not the local assessors.

Missouri.— State *v.* St. Louis, etc., R. Co., 117 Mo. 1, 22 S. W. 910.

Nebraska.—All real and personal property of a railroad company outside its right of way is to be assessed by the local officers, and all other property by the state board of equalization. Chicago, etc., R. Co. *v.* Richardson County, 72 Nebr. 482, 100 N. W. 950; Adams County *v.* Kansas City, etc., R. Co., 71 Nebr. 549, 99 N. W. 245; Chicago, etc., R. Co. *v.* Richardson County, 61 Nebr. 519, 85 N. W. 532; Republican Valley, etc., R. Co. *v.* Chase County, 33 Nebr. 759, 51 N. W. 132; Red Willow County *v.* Chicago, etc., R. Co., 26 Nebr. 660, 42 N. W. 879; Burlington, etc., R. Co. *v.* Lancaster County, 15 Nebr. 251, 18 N. W. 71; Burlington, etc., R. Co. *v.* Lancaster County, 7 Nebr. 33.

New Jersey.—All property not used for railroad purposes is assessed in the same manner as the taxable property of other owners in the same municipality, but such as is used for railroad purposes is assessed by the state board. *In re* Erie R. Co., 65 N. J. L. 608, 48 Atl. 601; *In re* Erie R. Co., 64 N. J. L. 123, 44 Atl. 976; United New Jersey R., etc., Co. *v.* Jersey City, 53 N. J. L. 547, 22 Atl. 59.

New York.—People *v.* New York Tax, etc., Com'rs, 23 Hun 687 [*reversed* on other grounds in 101 N. Y. 322, 4 N. E. 127].

Pennsylvania.— *In re* East Pennsylvania R. Co., 1 Walk. 428, holding that machine shops and blacksmith, carpenter, and paint shops are not necessary parts of the railroad, but merely useful, and are locally assessable.

Tennessee.— State *v.* Nashville, etc., R. Co., 96 Tenn. 385, 34 S. W. 1023.

Virginia.— Virginia, etc., R. Co. *v.* Washington County, 30 Gratt. 471.

Wisconsin.— State *v.* Chicago, etc., R. Co., 128 Wis. 449, 108 N. W. 594.

Wyoming.— Union Pac. R. Co. *v.* Ryan, 2 Wyo. 408.

United States.— Chicago, etc., R. Co. *v.* Sabula, 19 Fed. 177.

See 45 Cent. Dig. tit. "Taxation," § 664. See also *supra*, III, B, 2, d, (II).

Ferry slips located on a navigable river in connection with which a railroad company is operating a ferry are property used for railroad purposes to be assessed by the state board of assessors. *In re* Long Dock Co., 75 N. J. L. 325, 68 Atl. 126.

39. Keener *v.* Union Pac. R. Co., 31 Fed. 126. But *compare* Nashville, etc., R. Co. *v.* State, 129 Ala. 142, 30 So. 619.

40. St. Louis, etc., R. Co. *v.* Miller County, 67 Ark. 498, 55 S. W. 926. But *compare* Nashville, etc., R. Co. *v.* State, 129 Ala. 142, 30 So. 619; Chicago, etc., R. Co. *v.* Paddock, 75 Ill. 616.

41. Chicago, etc., R. Co. *v.* People, 136 Ill. 660, 27 N. E. 200; Red Willow County *v.* Chicago, etc., R. Co., 26 Nebr. 660, 42 N. W. 879.

42. Neary *v.* Philadelphia, etc., R. Co., 7 Houst. (Del.) 419, 9 Atl. 405; Chicago, etc., R. Co. *v.* Cass County, 8 N. D. 18, 76 N. W. 239.

Steamers used by a railroad company in transporting freight cars across water intervening between the termini of the tracks are not taxable as part of the "roadway" or "road-bed." San Francisco *v.* Central Pac. R. Co., 63 Cal. 467, 49 Am. Dec. 98.

43. Chicago, etc., R. Co. *v.* People, 218 Ill. 463, 75 N. E. 1021 (land adjoining the right of way, used as a reservoir); People *v.* State Bd. of Equalization, 205 Ill. 296, 68 N. E. 943; Chicago, etc., R. Co. *v.* People, 129 Ill. 571, 22 N. E. 864, 25 N. E. 5 (track to a quarry); People *v.* Chicago, etc., R. Co., 116 Ill. 181, 4 N. E. 480 (land acquired and held for right of way, otherwise occupied until needed for laying tracks); Chicago, etc., R. Co. *v.* Miller, 72 Ill. 144; Chicago, etc., R.

different parts so as to make one continuous line, may be classed as "railroad track." [44]

(v) *Property Included in "Real Estate."* It is entirely competent for the legislature, for the purposes of taxation, to make that realty which would be personal property at common law, and *vice versa*; [45] and therefore the question whether particular railroad property is assessable as real estate or as personalty depends largely on the provisions of the local statute.[46]

9. Miscellaneous Corporations. The general rules stated above,[47] except in so far as they are changed or modified by special statutory provisions, apply in regard to assessments of taxes against certain classes of corporations which differ from other corporations either in respect to the nature of their business, or in respect to the nature of the property which they hold,[48] such as express companies,[49] turnpike and toll road companies,[50] sleeping car companies,[51] street railroads,[52]

Co. *v.* People, 4 Ill. App. 468; Pfaff *v.* Terre Haute, etc., R. Co., 108 Ind. 144, 9 N. E. 93.

There is no distinction, within the New Jersey act of March 27, 1888, between the principal or main line of a railroad, and a lawfully authorized branch line of railroad, but the property of each must be assessed in part as "main stem," and in part as "other real estate used for railroad purposes," according to the circumstances of the property. Jersey City *v.* State Bd. of Assessors, 75 N. J. L. 571, 69 Atl. 200 [*modifying* 73 N. J. L. 164, 63 Atl. 21].

What constitutes "main stem."—What is the "main stem" of a railroad is a question of fact, depending on the actual use of the line at the time of assessment; but as between a line used mainly for passenger traffic and a line used mainly for freight traffic, the former is the main stem; and as between two lines of track used for freight traffic, the longer line, in the absence of other distinguishing features, is the main stem. Jersey City *v.* State Bd. of Assessors, 73 N. J. L. 164, 63 Atl. 21 [*modified* in 75 N. J. L. 571, 69 Atl. 200].

44. Anderson *v.* Chicago, etc., R. Co., 117 Ill. 26, 7 N. E. 129. And see Baltimore City Appeal Tax Ct. *v.* Western Maryland R. Co., 50 Md. 274. But *compare* Cass County *v.* Chicago, etc., R. Co., 25 Nebr. 348, 41 N. W. 246, 2 L. R. A. 188.

45. Johnson *v.* Roberts, 102 Ill. 655; Central Iowa R. Co. *v.* Wright County, 67 Iowa 199, 25 N. W. 128; Missouri, etc., R. Co. *v.* Labette County, 9 Kan. App. 545, 59 Pac. 383; Steere *v.* Walling, 7 R. I. 317. See also Bangor, etc., R. Co. *v.* Harris, 21 Me. 533; and *supra*, VI, C, 5, a.

46. See the statutes of the several states. And see the following cases:

Indiana.— Louisville, etc., R. Co. *v.* State, 25 Ind. 177, 87 Am. Dec. 358, holding that it is within the power of the legislature to treat rolling machinery of a railroad as real property for purpose of taxation.

Maine.— Portland, etc., R. Co. *v.* Saco, 60 Me. 196, holding that, under the statute, the track of the road and the land on which it is built are not "real estate."

Maryland.— Baltimore City Appeal Tax Ct. *v.* Western Maryland R. Co., 50 Md. 274, holding that where a railroad is built on the bed of a public street, or in a tunnel under the street, the easement may be assessed and taxed as real estate.

Minnesota.— Chicago, etc., R. Co. *v.* Houston County, 38 Minn. 531, 38 N. W. 619, grain elevator as real estate.

New Jersey.— *In re* New York Bay R. Co., 75 N. J. L. 115, 67 Atl. 513.

United States.— New Mexico *v.* United States Trust Co., 174 U. S. 545, 19 S. Ct. 784, 43 L. ed. 1079, improvements as real estate.

See 45 Cent. Dig. tit. "Taxation," § 666.

47. See *supra*, VI, D, 1-5.

48. See the statutes of the several states.

Valuation of property of ferry company incorporated in another state see State *v.* Wiggins Ferry Co., 208 Mo. 622, 106 S. W. 1005.

49. *Indiana.*— State *v.* Adams Express Co., 144 Ind. 549, 42 N. E. 483.

Maine.— State *v.* Boston, etc., Exp. Co., 100 Me. 278, 61 Atl. 697.

Pennsylvania.— Com. *v.* U. S. Exp. Co., 157 Pa. St. 579, 27 Atl. 396.

South Carolina.— Southern Exp. Co. *v.* Hood, 15 Rich. 66, 94 Am. Dec. 141.

United States.— Fargo *v.* Hart, 193 U. S. 490, 24 S. Ct. 498, 48 L. ed. 761; Coulter *v.* Weir, 127 Fed. 897, 62 C. C. A. 429 [*modified* in 128 Fed. 1019, 62 C. C. A. 681].

And see 45 Cent. Dig. tit. "Taxation," § 667.

Liability to taxation see *supra*, III, B, 2, e, (IV).

50. Campbell Turnpike Road Co. *v.* Highland Dist., 130 Ky. 812, 114 S. W. 286; People *v.* Selkirk, 180 N. Y. 401, 73 N. E. 248.

Liability to taxation see *supra*, III, B, 2, e, (VI).

51. Carlile *v.* Pullman Palace Car Co., 8 Colo. 320, 7 Pac. 164, 54 Am. Rep. 553; Com. *v.* Central Transp. Co., 145 Pa. St. 89, 22 Atl. 209; State *v.* Pullman's Palace Car Co., 64 Wis. 89, 23 N. W. 871; Pullman's Palace Car Co. *v.* Bd. of Assessors, 55 Fed. 206; Pullman Southern Car Co. *v.* Nolan, 22 Fed. 276 [*affirmed* in 117 U. S. 34, 51, 6 S. Ct. 635, 643, 29 L. ed. 785, 791].

52. *California.*— San Francisco, etc., R. Co. *v.* Scott, 142 Cal. 222, 75 Pac. 575.

telegraph and telephone companies,[53] and building and loan associations, and other similar corporations.[54]

Florida.— Bloxham *v.* Consumers' Electric Light, etc., R. Co., 36 Fla. 519, 18 So. 444, 51 Am. St. Rep. 44, 29 L. R. A. 507.

Iowa.— Cedar Rapids, etc., R. Co. *v.* Cummins, 125 Iowa 430, 101 N. W. 176; Marion *v.* Cedar Rapids, etc., R. Co., 120 Iowa 259, 94 N. W. 501.

Louisiana.— St. Charles St. R. Co. *v.* Bd. of Assessors, 51 La. Ann. 459, 25 So. 90.

Massachusetts.— Greenfield, etc., R. Co. *v.* Greenfield, 187 Mass. 352, 73 N. E. 477.

Michigan.— Detroit Citizens' St. R. Co. *v.* Detroit, 125 Mich. 673, 85 N. W. 96, 86 N. W. 809.

Missouri.— State *v.* Metropolitan St. R. Co., 161 Mo. 188, 61 S. W. 603.

New Jersey.— Hoboken R., etc., Co. *v.* State Bd. of Assessors, 64 N. J. L. 172, 44 Atl. 960.

New York.— People *v.* Barker, 165 N. Y. 305, 59 N. E. 137, 151 [*reversing* 48 N. Y. App. Div. 248, 63 N. Y. Suppl. 167 (*reversing* 28 Misc. 13, 59 N. Y. Suppl. 926)]; People *v.* Barker, 121 N. Y. App. Div. 661, 106 N. Y. Suppl. 336 (deductions); People *v.* Grout, 119 N. Y. App. Div. 130, 879, 103 N. Y. Suppl. 975, 976 [*affirmed* in 189 N. Y. 510, 81 N. E. 1173]; People *v.* Barker, 7 N. Y. App. Div. 27, 39 N. Y. Suppl. 776 [*reversing* 16 Misc. 258, 39 N. Y. Suppl. 106 (*affirmed* in 151 N. Y. 639, 45 N. E. 1133)]; Kings County El. R. Co. *v.* Brooklyn, 16 Misc. 419, 38 N. Y. Suppl. 154; Brooklyn El. R. Co. *v.* Brooklyn, 16 Misc. 416, 38 N. Y. Suppl. 154 [*affirmed* in 11 N. Y. App. Div. 127, 42 N. Y. Suppl. 683]; People *v.* New York Tax, etc., Com'rs, 19 Hun 460 [*affirmed* in 82 N. Y. 459].

Tennessee.— South Nashville St. R. Co. *v.* Morrow, 87 Tenn. 406, 11 S. W. 348, 2 L. R. A. 853.

See 45 Cent. Dig. tit. "Taxation," § 669.

Liability to taxation see *supra*, III, B, 2, e, (II).

A street railroad company leasing property from other companies, and paying taxes on the property of the lessor companies as part of the rent, cannot be compelled to again pay taxes based on the fee value of the leased property. People *v.* Barker, 121 N. Y. App. Div. 661, 106 N. Y. Suppl. 336.

Franchise tax of street railroad company and deductions therefrom see People *v.* Grout, 119 N. Y. App. Div. 130, 879, 103 N. Y. Suppl. 975, 976 [*affirmed* in 189 N. Y. 510, 81 N. E. 1173].

53. *Idaho.*— McConnell *v.* State Bd. of Equalization, 11 Ida. 652, 83 Pac. 494.

Indiana.— Western Union Tel. Co. *v.* Taggart, 141 Ind. 281, 40 N. E. 1051, 60 L. R. A. 671.

Iowa.— Chicago, etc., R. Co. *v.* Rhein, 135 Iowa 404, 112 N. W. 823; Iowa Union Tel. Co. *v.* Bd. of Equalization, 67 Iowa 250, 25 N. W. 155.

Minnesota.— State *v.* Northwestern Tel. Exch. Co., 107 Minn. 390, 120 N. W. 534; State *v.* Western Union Tel. Co., 96 Minn. 13, 104 N. W. 567.

Nebraska.— Western Union Tel. Co. *v.* Dodge County, 80 Nebr. 23, 117 N. W. 468, 80 Nebr. 18, 113 N. W. 805; Nebraska Tel. Co. *v.* Hall County, 75 Nebr. 405, 106 N. W. 471; Western Union Tel. Co. *v.* Omaha, 73 Nebr. 527, 103 N. W. 84.

New York.— People *v.* Dolan, 126 N. Y. 166, 27 N. E. 269, 12 L. R. A. 251; People *v.* Campbell, 70 Hun 507, 24 N. Y. Suppl. 208; People *v.* New York Tax Com'rs, 31 Hun 638.

Pennsylvania.— Com. *v.* Pennsylvania Tel. Co., 2 Dauph. Co. Rep. 57; Com. *v.* Western Union Tel. Co., 2 Dauph. Co. Rep. 30.

Texas.— Western Union Tel. Co. *v.* State, 62 Tex. 630.

United States.— Western Union Tel. Co. *v.* Taggart, 163 U. S. 1, 16 S. Ct. 1054, 41 L. ed. 49; Western Union Tel. Co. *v.* Massachusetts, 125 U. S. 530, 8 S. Ct. 961, 31 L. ed. 790.

Canada.— Bell Tel. Co. *v.* Ascot, 16 Quebec Super. Ct. 436.

See 45 Cent. Dig. tit. "Taxation," § 670.

Liability to taxation see *supra*, III, B, 2, e, (VII).

A telegraph line owned by a railroad company, used for the transaction of its business, and leased to a telegraph company for commercial business, is not taxable as railroad property but as the property of a telegraph company. Chicago, etc., R. Co. *v.* Rhein, 135 Iowa 404, 112 N. W. 823.

Gross earnings.— Money received from messengers employed specially to call non-subscribers to the telephone stations, and moneys collected from the company's patrons as messenger charges paid to persons in whose buildings the company's booths are located, are a part of the gross earnings of a telephone company, as is also a proportionate part of its property within the state resulting from its use in interstate commerce; but money collected from its patrons for other telephone companies with which it has traffic arrangements is not a part of such earnings. State *v.* Northwestern Tel. Exch. Co., 107 Minn. 390, 120 N. W. 534.

Valuation.— The net earnings of a telegraph company for a single year, standing alone, are not a proper criterion by which to determine the actual value of its system for taxation purposes; and in determining the value of the property of such company the income derived from messages sent from and received at stations in a given district, comprising only a part of the system, is not the proper measure of the gross earnings of that part of the system within the district, where the lines within such district are used for the transmission of messages having neither origin nor destination therein. Western Union Tel. Co. *v.* Dodge County, 80 Nebr. 23, 117 N. W. 468, 80 Nebr. 18, 113 N. W. 805.

54. State *v.* Redwood Falls Bldg., etc., As-

10. Foreign Corporations.[55] Except in so far as governed by special statutory provisions, the ordinary rules for the assessment of property are applicable where a foreign corporation is taxed for the franchise or privilege of doing business within the state,[56] or in proportion to its gross receipts or net earnings made within the state,[57] or on specific real or personal property having its *situs* within the state.[58] But where the tax is on capital or capital stock, the company can be charged with taxes only on a ratable proportion of its capital,[59] and where the tax is on "capital employed within the state," this means capital as represented by property, and not capital stock,[60] and its value is to be ascertained by taking into account all property within the state owned by the corporation, whether in money, goods, or assets.[61] In fixing this valuation the assessing officers should be guided by any reliable evidence which is before them, and cannot fix the figures arbitrarily;[62] but their decision will not be disturbed by the courts unless plainly shown to be fraudulent or unfair.[63] Whether or not a foreign corporation is entitled to deduct debts from the assessed value of its property depends on the local statute.[64]

11. Notice of Assessment.[65] Where the statute prescribes the duties of

soc., 45 Minn. 154, 47 N. W. 540, 10 L. R. A. 752; Washington Bldg., etc., Assoc. *v.* Creveling, 39 N. J. L. 465 [*affirmed* in 40 N. J. L. 192]; Nebraska Cent. Bldg., etc., Assoc. *v.* Bd. of Equalization, 78 Nebr. 472, 111 N. W. 147, 78 Nebr. 478, 112 N. W. 314.

Liability to taxation see *supra*, III, B, 2, e, (I).

55. Liability to taxation see *supra*, III, B, 3.

56 James *v.* American Surety Co., 133 Ky. 313, 117 S. W. 411; James *v.* U. S. Fidelity, etc., Co., 133 Ky. 299, 117 S. W. 406 (holding that in fixing the valuation of the franchise of a foreign corporation, the assessing board should consider the two items of gross earnings and net income of the corporation in the state); Com. *v.* Ledman, 127 Ky. 603, 106 S. W. 247, 32 Ky. L. Rep. 452; American Can Co. *v.* Com., 188 Mass. 1, 73 N. E. 856; People *v.* Equitable Trust Co., 96 N. Y. 387; People *v.* Roberts, 4 N. Y. App. Div. 288, 39 N. Y. Suppl. 448 [*affirmed* in 151 N. Y. 621, 45 N. E. 1134].

57. National F. Ins. Co. *v.* Hanberg, 215 Ill 378, 74 N. E. 377; Hager *v.* American Surety Co., 121 Ky. 791, 90 S. W. 550, 28 Ky. L. Rep. 782; State *v.* Northern Pac. R. Co., 95 Minn. 43, 103 N. W. 731. See also Clark *v.* Vandalia R. Co., 172 Ind. 409, 86 N. E. 851.

58. Graham *v.* St. Joseph Tp., 67 Mich. 652, 35 N. W. 808; *In re* Lehigh Valley R. Co., 71 N. J. L. 128, 58 Atl. 103; People *v.* Martin, 48 Hun (N. Y.) 193; Pennsylvania Coal Co. *v.* Porth, 63 Wis. 77, 23 N. W. 105.

59. Com. *v.* Western Union Tel. Co., 2 Dauph. Co. Rep. (Pa.) 30.

60. People *v.* Morgan, 178 N. Y. 433, 70 N. E. 967, 67 L. R. A. 960 [*reversing* 86 N. Y. App. Div. 577, 83 N. Y. Suppl. 998]; People *v.* Miller, 112 N. Y. App. Div. 880, 98 N. Y. Suppl. 751.

61. People *v.* Wemple, 133 N. Y. 323, 31 N. E. 238 [*reversing* 16 N. Y. Suppl. 602]; People *v.* Morgan, 86 N. Y. App. Div. 577, 83 N. Y. Suppl. 998 [*reversed* on other grounds in 178 N. Y. 433, 70 N. E. 967, 67 L. R. A. 960]; American Book Co. *v.* Shelton, 117 Tenn. 745, 100 S. W. 725.

Intangible assets.— It is proper to take into account the value of patents owned by the corporation. People *v.* Kelsey, 181 N. Y. 512, 73 N. E. 1130. Also the value of a trade-mark. People *v.* Kelsey, 185 N. Y. 546, 77 N. E. 1195 [*affirming* 105 N. Y. App. Div. 132, 93 N. Y. Suppl. 971]. And also the value of the good-will of a business. People *v.* Roberts, 159 N. Y. 70, 53 N. E. 685, 45 L. R. A. 126. But not copyrights. People *v.* Roberts, *supra*.

62. People *v.* Kelsey, 181 N. Y. 512, 73 N. E. 1130 [*affirming* 101 N. Y. App. Div. 325, 91 N. Y. Suppl. 955]; People *v.* Roberts, 37 N. Y. App. Div. 1, 55 N. Y. Suppl. 317.

63. People *v.* Barker, 147 N. Y. 31, 41 N. E. 435, 29 L. R. A. 393; People *v.* Roberts, 25 N. Y. App. Div. 89, 48 N. Y. Suppl. 881 [*reversed* on the facts in 156 N. Y. 585, 51 N. E. 293]; People *v.* Roberts, 82 Hun 352, 31 N. Y. Suppl. 243 [*affirmed* in 145 N. Y. 375, 40 N. E. 7]; People *v.* Barker, 25 N. Y. Suppl. 394 [*affirmed* in 141 N. Y. 118, 35 N. E. 1073, 23 L. R. A. 95].

64. See the statutes of the several states. And see People *v.* Roberts, 37 N. Y. App. Div. 1, 55 N. Y. Suppl. 317; People *v.* Barker, 86 Hun (N. Y.) 148, 33 N. Y. Suppl. 221 [*affirmed* in 147 N. Y. 31, 43 N. E. 435, 29 L. R. A. 393] (no deduction); People *v.* Barker, 33 N. Y. Suppl. 1019 (no deduction).

Debts bearing no relation to the assets of a foreign corporation in the state in which it is doing business cannot be applied to reduce an assessment for the purpose of taxation in the state. People *v.* Raymond, 54 Misc. (N. Y.) 330, 105 N. Y. Suppl. 1007.

65. Notice of assessment in general see *supra*, VI, C, 10.

Notice of completion and filing of assessment roll see *infra*, VI, E, 7, d.

Notice of increase in assessment see *supra*, VI, C, 2, h; VI, C, 6, a, (IV).

Notice of meeting of board of equalization see *infra*, VII, B, 7, b.

assessing officers, and both the manner and the date of the steps they are to take in the assessment of property, it is the duty of the taxpayer corporation to take notice of its terms, and unless there is a statutory provision to the contrary, no personal or individual notice is ordinarily required to be given to it of the fact, date, or amount of its assessment.[66]

E. Assessment Rolls or Books[67] **— 1. In General — a. Nature and Necessity of Roll or List.** The assessment or tax roll or list varies under the different statutes, but ordinarily it is a completed record for the year of all the taxable persons and property within the tax district, so arranged and itemized as to show to each taxpayer who may examine it exactly what property he is assessed upon and the amount of tax he is required to pay thereon,[68] and the making of this roll or list in accordance with the directions of the statute is ordinarily an essential prerequisite to the valid enforcement of the taxes entered on it.[69]

Notice to taxpayers to bring in lists see *supra*, VI, C, 2, b.

66. *Arkansas.*— St. Louis, etc., R. Co. *v.* Worthen, 52 Ark. 529, 13 S. W. 254, 7 L. R. A. 374, notice of meeting of board for valuation not required.

Indiana.— Chicago, etc., R. Co. *v.* John, 150 Ind. 113, 48 N. E. 640; Pittsburgh, etc., R. Co. *v.* Backus, 133 Ind. 625, 33 N. E. 432; Cleveland, etc., R. Co. *v.* Backus, 133 Ind. 513, 33 N. E. 421, 18 L. R. A. 729; Smith *v.* Rude Bros. Mfg. Co., 131 Ind. 150, 30 N. E. 947; Hyland *v.* Brazil Block Coal Co., 128 Ind. 335, 26 N. E. 672.

Kentucky.— Elizabethtown Dist. Public School *v.* Louisville, etc., R. Co., 30 S. W. 620, 17 Ky. L. Rep. 160, holding that where a railroad company made an incorrect report, it could not object to want of notice. See also Illinois Cent. R. Co. *v.* Com., 128 Ky. 268, 108 S. W. 245, 32 Ky. L. Rep. 1112, 110 S. W. 265, 33 Ky. L. Rep. 326; Chesapeake, etc., R. Co. *v.* Vanceburg, etc., Turnpike Co., 104 S. W. 951, 31 Ky. L. Rep. 1163.

Maryland.— Corry *v.* Baltimore, 96 Md. 310, 53 Atl. 942, 103 Am. St. Rep. 364.

New York.— People *v.* Smith, 50 Hun 39, 2 N. Y. Suppl. 460, on shares of resident stockholders of national bank.

Vermont.— Clement *v.* Hale, 47 Vt. 680.

Wisconsin.— Chicago, etc., R. Co. *v.* State, 128 Wis. 553, 108 N. W. 557.

United States.— Merchants', etc., Nat. Bank *v.* Pennsylvania, 167 U. S. 461, 17 S. Ct. 829, 42 L. ed. 236; Nevada Nat. Bank *v.* Dodge, 119 Fed. 57, 56 C. C. A. 145.

See 45 Cent. Dig. tit. "Taxation," § 674.

67. **Assessment reports and records in proceedings for assessment for benefits from public improvement** see MUNICIPAL CORPORATIONS, 28 Cyc. 1166.

Assessment rolls, rate bills, and lists of school taxes see SCHOOLS AND SCHOOL-DISTRICTS, 35 Cyc. 1022.

Certificate of assessment for benefit from public improvement or special tax bill against specific property see MUNICIPAL CORPORATIONS, 28 Cyc. 1168.

List or assessment on which tax is levied see *supra*, VI, A, 5, d.

Record of levy see *supra*, VI, A. 6.

68. See the statutes of the several states. And see Jewett *v.* Foot, 190 Iowa 359, 93 N. W. 364 (holding that a "tax list" under the Iowa statute relating to the duty of the county auditor to collect the assessment refers to the current list or book and to none other); Wells *v.* Burbank, 17 N. H. 393; Homer *v.* Cilley, 14 N. H. 85 (both holding that the term "tax list" includes a treasurer's warrant for the collection of a single sum assessed against only one place).

A "tax roll" means the roll in proper form to warrant the treasurer in enforcing the tax. Babcock *v.* Beaver Creek Tp., 64 Mich. 601, 31 N. W. 423. And "tax rolls" are the original extensions of the levies made by the proper authorities and include state, county, township, and school taxes. Smith *v.* Scully, 66 Kan. 139, 71 Pac. 249.

"Assessment rolls" to be laid before the local board of review for correction, under the Iowa statutes, are the lists originally made by the assessor and his assistant and sworn to by the assessor, and not the books or lists thereafter required to be made up for other purposes. Reed *v.* Cedar Rapids, 138 Iowa 366, 116 N. W. 140.

The terms "list" and "grand list," as used in the Vermont statutes relative to taxation, mean a schedule of the polls and ratable estate of the inhabitants upon which taxes are to be assessed. Wilson *v.* Wheeler, 55 Vt. 446. The personal list required to be lodged in the town clerk's office as a basis of taxation is the judicial determination of the listers of the amount of the taxpayer's personal estate that should enter into the annual grand list. Bartlett *v.* Wilson, 59 Vt. 23, 8 Atl. 321.

69. *Maine.*— Baker *v.* Webber, 102 Me. 414, 67 Atl. 144.

Massachusetts.— Thurston *v.* Little, 3 Mass. 429.

Mississippi.— Vicksburg Bank *v.* Adams, 74 Miss. 179, 21 So. 401.

New Hampshire.— Perkins *v.* Langmaid, 36 N. H. 501.

New York.— People *v.* Wells, 178 N. Y. 609, 70 N. E. 1107; People *v.* Feitner, 63 N. Y. App. Div. 615, 72 N. Y. Suppl. 1124 [*affirmed* in 168 N. Y. 674, 61 N. E. 1132].

Oregon.— Oregon, etc., Sav. Bank *v.* Jordan, 16 Oreg. 113, 17 Pac. 621.

b. Authority and Duty to Make. The making of the assessment list or roll is a duty which can be performed, with proper legal effect, only by the particular board or officer designated by the statute.[70] It is a duty which cannot be delegated, and the roll is invalid if prepared by any third person,[71] unless he be a mere clerk or agent acting under the direction and supervision of the proper officer.[72]

c. Requisites in General. The assessment list must be made in at least substantial conformity with the directions of the statute and contain all the essential particulars which the law requires;[73] and further it must show on its face that it purports to be an official list made by the proper officer acting in his official capacity,[74] and must be certain and specific in designating the persons and property taxable and the amount of taxes charged.[75]

Texas.— See Sullivan *v.* Bitter, 51 Tex. Civ. App. 604, 113 S. W. 193, holding that an assessment of property for taxation includes a list of the property to be taxed in some form and an estimate of the sums which are to guide in apportioning the tax. But *compare* Hernandez *v.* San Antonio, (Civ. App. 1897) 39 S. W. 1022.

Vermont.— Downing *v.* Roberts, 21 Vt. 441.

See 45 Cent. Dig. tit. "Taxation," § 675.

But *compare* Harris *v.* State, 96 Tenn. 496, 34 S. W. 1017.

After the completion of the tax list or assessment roll, the assessor is not required to keep a book containing the original list and assessment of each person's property. People *v.* Stockton, etc., R. Co., 49 Cal. 414.

Unless a legal levy has been made, the extension of an assessment upon a tax roll affords no authority for the collection of the tax. Reno County School Dist. No. 127 *v.* Reno County School Dist. No. 45, 80 Kan. 641, 103 Pac. 126.

70. Alameda County *v.* Dalton, 9 Cal. App. 26, 98 Pac. 85; Middletown *v.* Berlin, 18 Conn. 189, majority of assessors.

Successor in office.— Where a county assessor resigns his office after having duly listed and valued all the taxable property, leaving nothing to be done but to copy the assessment sheets into the list or roll required by statute, the work may lawfully be completed by his successor. Bode *v.* New England Inv. Co., 1 N. D. 121, 45 N. W. 197; Farrington *v.* New England Inv. Co., 1 N. D. 102, 45 N. W. 191.

Authority as to contents of roll.— Under a law requiring the town clerk to prepare the assessment roll, so far as possible, from the assessment of the preceding year, after its revision by the town assessors, he has power to place on the roll an assessment which had been stricken therefrom by the assessors. People *v.* Schoonover, 47 N. Y. App. Div. 278, 62 N. Y. Suppl. 180 [*reversing* 26 Misc. 576, 57 N. Y. Suppl. 498, and *affirmed* in 166 N. Y. 629, 60 N. E. 1118].

71. Paldi *v.* Paldi, 84 Mich. 346, 47 N. W. 510; People *v.* Hagadorn, 104 N. Y. 516, 10 N. E. 891; Ne-ha-sa-ne Park Assoc. *v.* Lloyd, 7 N. Y. App. Div. 359, 40 N. Y. Suppl. 58.

72. Covington *v.* Rockingham, 93 N. C. 134.

73. *Idaho.*— People *v.* Owyhee Min. Co., 1 Ida. 409, as to classification of property.

Illinois.— Dennis *v.* Maynard, 15 Ill. 477.

New York.— People *v.* Adams, 125 N. Y. 471, 26 N. E. 746.

Texas.— Lofton *v.* Miller, (Civ. App. 1909) 118 S. W. 911 (holding that the tax rolls are to be made out from lists made up from information furnished by property-owners); State *v.* Farmer, (Civ. App. 1900) 57 S. W. 84 [*affirmed* in 94 Tex. 232, 59 S. W. 541].

Vermont.— Willard *v.* Pike, 59 Vt. 202, 9 Atl. 907; Clove Spring Iron Works *v.* Cone, 56 Vt. 603; Stearns *v.* Miller, 25 Vt. 20; Doe *v.* Whitlock, 1 Tyler 305.

See 45 Cent. Dig. tit. "Taxation," § 677.

Copying former roll.—An assessment is void which is made by copying the roll of the preceding year. Davidson *v.* Sterrett, 13 Ky. L. Rep. 265; State *v.* Cook, 82 Mo. 185.

Time of making entries.— The failure of the assessor to enter the assessment as soon as made, on the book prescribed for that purpose, does not invalidate the assessment as against the owner of the property. Grundy County *v.* Tennessee Coal, etc., Co., 94 Tenn. 295, 29 S. W. 116.

Partly exempt property.— Property which is by law exempt from taxes except for school and highway purposes should not be stricken from the assessment roll, but should be marked "exempt" so that it may be made the basis of assessment for school and highway taxes. People *v.* Reilly, 41 N. Y. App. Div. 378, 58 N. Y. Suppl. 558.

Designation of year.— Where there has been but one assessment for a certain calendar year, a statement in the assessment book that it is the book of assessments for that year is a proper designation of the year, although the fiscal year includes the first half of the succeeding calendar year. Chapman *v.* Zoberlein, 152 Cal. 216, 92 Pac. 188.

74. House *v.* Stone, 64 Tex. 677; Bartlett *v.* Wilson, 59 Vt. 23, 8 Atl. 321; Smith *v.* Hard, 59 Vt. 13, 8 Atl. 317.

75. Green *v.* Craft, 28 Miss. 70; Stoddard *v.* Lyon, 18 S. D. 207, 99 N. W. 1116. See also Greenleaf *v.* Bartlett, 146 N. C. 495, 60 S. E. 419, 14 L. R. A. N. S. 660.

2. Form and Arrangement[76] — **a. In General.** The directions of the statutes as to the form and arrangement of the assessment list, in so far as they are designed to secure certainty and intelligibility and inform and protect the citizen, are mandatory and must be strictly observed; but otherwise they are to be considered as merely directions to the officers, and if they are disregarded it does not invalidate the assessment.[77] Thus a direction that the list must state the valuation placed on each separate piece of property must be at least substantially complied with.[78] On the other hand, the provisions of the statute as to the number, kind, or designation of the books or volumes in which the list shall be contained are generally directory only, provided no confusion or uncertainty results from the method adopted.[79] And so, where the roll or list contains all the matter essential to a good assessment, it is immaterial that the columns in the book are not arranged precisely as the law directs or that there are more columns than the statute intends.[80] Nor is the list invalidated by the use of characters and abbreviations, provided they are such as are commonly understood and plainly indicate what they stand for.[81]

b. Classification of Subjects. A direction of the statute that real and personal property shall be separately listed is generally imperative;[82] and so of a provision for the separate listing of property in different districts of the same city or county, where the rate of taxation varies.[83] Where taxes levied

76. **Errors and omissions** see *infra*, VI, E, 9.

77. Lockwood *v.* Roys, 11 Wash. 697, 40 Pac. 346; French *v.* Edwards, 13 Wall. (U. S.) 506, 20 L. ed. 702.

Unseated lands.— The forms of making, entering, and certifying assessments of unseated lands are matters entirely within the discretion of the several commissioners, provided they are intelligible. Laird *v.* Hiester, 24 Pa. St. 452.

Requirement of alphabetical arrangement see *In re* Interstate Land Co., 110 La. 286, 34 So. 446.

78. *Arizona.*— Territory *v.* Yavapai County Delinquent Tax List, 3 Ariz. 117, 21 Pac. 768.

California.— Knott *v.* Peden, 84 Cal. 299, 24 Pac. 160; People *v.* Hollister, 47 Cal. 408; Hurlbutt *v.* Butenop, 27 Cal. 50.

Massachusetts.— Westhampton *v.* Searle, 127 Mass. 502; Torrey *v.* Millbury, 21 Pick. 64.

Michigan.— St. Joseph First Nat. Bank *v.* St. Joseph Tp., 46 Mich. 526, 9 N. W. 838.

New York.— Utica *v.* Churchill, 43 Barb. 550.

Vermont.— Bellows Falls Canal Co. *v.* Rockingham, 37 Vt. 622.

Washington.— Lockwood *v.* Roys, 11 Wash. 697, 40 Pac. 346.

See 45 Cent. Dig. tit. "Taxation," § 685.

79. *Kansas.*— Morrill *v.* Douglass, 14 Kan. 293.

Maryland.— Frownfelter *v.* State, 66 Md. 80, 5 Atl. 410.

Massachusetts.— Noyes *v.* Hale, 137 Mass. 266.

Missouri.— State *v.* Chicago, etc., R. Co., 165 Mo. 597, 65 S. W. 989; State *v.* Bank of Neosho, 120 Mo. 161, 25 S. W. 372; Thomas *v.* Chapin, 116 Mo. 396, 22 S. W. 785. As to requirement of separate books for real and personal property see State *v.* Stamm, 165 Mo. 73, 65 S. W. 242.

West Virginia.— Charleston, etc., Bridge Co. *v.* Kanawha County Ct., 41 W. Va. 658, 24 S. E. 1002.

See 45 Cent. Dig. tit. "Taxation," § 683.

80. *California.*— San Luis Obispo County *v.* White, 91 Cal. 432, 24 Pac. 864, 27 Pac. 756.

Massachusetts.— Blackburn *v.* Walpole, 9 Pick. 97.

Michigan.—Auditor-Gen. *v.* Keweenan Assoc., 107 Mich. 405, 65 N. W. 288.

New York.— People *v.* Garmon, 63 N. Y. App. Div. 530, 71 N. Y. Suppl. 826; Bennett *v.* Robinson, 42 N. Y. App. Div. 412, 59 N. Y. Suppl. 197; Litchfield *v.* Brooklyn, 13 Misc. 693, 34 N. Y. Suppl. 1090.

Oregon.— Dayton *v.* Multnomah County, 34 Oreg. 239, 55 Pac. 23; Dayton *v.* State Bd. of Equalization, 33 Oreg. 131, 50 Pac. 1009.

Vermont.— Chandler *v.* Spear, 22 Vt. 388.

See 45 Cent. Dig. tit. "Taxation," § 684.

Listing property under an improper heading on the assessment book is merely an informality which does not invalidate the assessment. California Domestic Water Co. *v.* Los Angeles County, 10 Cal. App. 185, 101 Pac. 547, by statute.

81. Salisbury *v.* Shirley, 66 Cal. 223, 5 Pac. 104; Jackson *v.* Cummings, 15 Ill. 449; Hoyt *v.* Clark, 64 Minn. 139, 66 N. W. 262.

Abbreviations in description of real property see *infra*, VI, E, 4, b, (XI).

82. People *v.* Owyhee Min. Co., 1 Ida. 409; Northern Pac. R. Co. *v.* Carland, 5 Mont. 146, 3 Pac. 134; Stark *v.* Shupp, 112 Pa. St. 395, 3 Atl. 864. But see Roberts *v.* Welsh, 92 Mass. 278, 78 N. E. 408; Bellows Falls Canal Co. *v.* Rockingham, 37 Vt. 622.

Separate listing of unseated or non-resident lands see *infra*, VI, E, 4, b, (IX).

83. State *v.* Abrahams, 6 Wash. 372, 33 Pac. 964.

by different authorities or for different purposes are included in the same list, but required to be entered separately, the assessment is invalidated by failure to do so.[84]

3. Designation of Persons[85] — a. Necessity of Inserting Name. An assessment of particular property is not valid or enforceable unless the name of the owner, or the person chargeable with the tax, is inserted with a proper description thereof in the assessment roll in connection with the property,[86] except in cases where the owner is unknown,[87] and under some statutes except in the case of non-resident owners; [88] but under other statutes a non-resident owner should also be described in the assessment roll,[89] although his assessment on the roll should be separated from other assessments.[90] Further if the person chargeable with

84. People *v.* Moore, 1 Ida. 662. *Compare* Philadelphia Ins. Contributionship *v.* Yard, 17 Pa. St. 331.

85. **Effect of mistake in assessment in name of owner** see *supra*, VI, C, 5, e, (III).
Mode of assessment of property of decedents' estates see *supra*, VI, C, 5, g.
Mode of assessment of property of partnership or joint owners see *supra*, VI, C, 5, f.
Mode of assessment of trust property see *supra*, VI, C, 5, h.
Necessity of assessment to right owner see *supra*, VI, C, 5, e, (I).
Statutes validating assessments in wrong name see *supra*, VI, C, 5, e, (IV).

86. *California.*— Bosworth *v.* Webster, 64 Cal. 1, 27 Pac. 786; People *v.* Whipple, 47 Cal. 591.
Connecticut.— Hellman *v.* Burritt, 62 Conn. 438, 26 Atl. 473; Meyer *v.* Trubee, 59 Conn. 422, 22 Atl. 424.
Louisiana.— Dibble *v.* Leppert, 47 La. Ann. 792, 17 So. 309 (holding that property standing in the name of a tutor may be assessed in his name as such without mentioning the names of the minors); Howcott *v.* Fifth Louisiana Levee Dist., 46 La. Ann. 322, 14 So. 848 (holding that an assessment of a number of different parcels of land belonging to different persons to one of the owners is void).
Michigan.— Detroit *v.* Macier, 117 Mich. 76, 75 N. W. 285.
Minnesota.— Wray *v.* Litchfield, 64 Minn. 309, 67 N. W. 72.
Mississippi.— Green *v.* Craft, 28 Miss. 70.
Missouri.— State *v.* Mission Free School, 162 Mo. 332, 62 S. W. 998.
New Hampshire.— Clark *v.* Bragdon, 37 N. H. 562 (holding that an assessment of property owned by three persons to "W. C. *et al.*" is insufficient); Ainsworth *v.* Dean, 21 N. H. 400.
New York.— Cottle *v.* Cary, 173 N. Y. 624, 66 N. E. 1106 [*affirming* 73 N. Y. App. Div. 54, 76 N. Y. Suppl. 580]; Dubois *v.* Webster, 7 Hun 371; Matter of Medina, 52 Misc. 621, 103 N. Y. Suppl. 1018 (as to degree of certainty required); Wheeler *v.* Anthony, 10 Wend. 346.
Vermont.— See Wells *v.* Austin, 59 Vt. 157, 10 Atl. 405.
Wisconsin.— State *v.* Williston, 20 Wis. 228, holding that the entry of a whole tract, owned by several persons, in the name only of one of such persons, renders the assessment void.
Canada.— Flanagan *v.* Elliott, 12 Can. Sup. Ct. 435; Coquitlam *v.* Hoy, 6 Brit. Col. 458.
See 45 Cent. Dig. tit. "Taxation," § 690.
But *compare* Parker *v.* Cochran, 64 Iowa 757, 21 N. W. 13, holding that where taxes on land are duly assessed to the owner, the omission of the owner's name in transcribing the tax into the tax list does not invalidate the assessment.
Christian name blank.— An assessment of land for taxes made to the owner by his surname, leaving a blank for his christian name, is void. Crawford *v.* Schmidt, 47 Cal. 617.
Where a widow uses the initials of her deceased husband, and is known by his name, an assessment in which she is so described is sufficient. Tieman *v.* Johnston, 114 La. 112, 38 So. 75.
Name assumed for business purposes.— An individual banker doing business under the general banking laws of the state, who assumes a special name, by which his business is known, may be assessed by that name. Patchin *v.* Ritter, 27 Barb. (N. Y.) 34.
Repeating name in connection with different properties.— Where a taxpayer is assessed for several separate pieces of property, it is not necessary that his name should be entered in the roll opposite each description, but it is enough if it is entered at the top of the page or at the commencement of the assessment, followed by the list of the property under the proper heads, no other name intervening. Oregon R. Co. *v.* Umatilla County, 47 Oreg. 198, 81 Pac. 352.
The entry in the column "remarks" in an assessment roll of the names and addresses of persons does not constitute an assessment of the property to such individuals or affect the validity of the assessment, where the entry appears to be merely a memorandum to aid in the collection of the tax. Cone *v.* Lauer, 131 N. Y. App. Div. 193, 115 N. Y. Suppl. 644.

87. See *supra*, VI, C, 5, e, (II).

88. Berlin *v.* Grange, 5 U. C. C. P. 211, holding that a non-resident owner of lands can only be rated on the assessment roll by name at his own request.

89. De Blaquiere *v.* Becker, 8 U. C. C. P. 167, holding, however, that the entry of a person as a resident when he is in fact a non-resident does not render his assessment nugatory.

90. Sanders *v.* Downs, 141 N. Y. 422, 36

the taxes holds the property in a representative or fiduciary capacity, he should be described by adding some such term as "agent" or "trustee" to his name, although this rule is not very strictly enforced, provided the list shows clearly who it is that is charged with the tax.[91]

b. Entry in Alphabetical Order. A statutory requirement that the names of persons taxed shall be arranged in the assessment list in alphabetical order is sufficiently complied with, as to any particular person, if he is listed under the first letter of his surname, although a strict alphabetical order is not preserved among the names beginning with the same initial.[92]

c. Designation of Corporation and Stock-Holders. Strictly speaking a corporation should be described in the assessment list with the same particularity as an individual.[93] But the courts have been very lenient in this matter, sustaining assessments upon corporate property notwithstanding mistakes or errors in the name, where it could be shown that the essential words in the name were given, so that the misnomer was not calculated to mislead;[94] where the name given was that of a predecessor of the company intended to be charged;[95] where it was commonly and familiarly known by the name employed, although not its correct or full name;[96] where the officers of the company observed the mistake and failed to have it corrected;[97] or where the irregularity could be brought within the terms of a curative statute.[98] Where stock in a bank or other corporation is to be assessed to the individual holders, the assessment is invalid if made in the name of the corporation and not in the names of the shareholders.[99]

N. E. 391. *Compare* Collins *v.* Long Island City, 132 N. Y. 321, 594, 30 N. E. 835 [*affirming* 56 Hun 647, 9 N. Y. Suppl. 866].

91. *Illinois.*— Lockwood *v.* Johnson, 106 Ill. 334.

Massachusetts.— Welles *v.* Battelle, 11 Mass. 477.

Michigan.— Spanish River Lumber Co. *v.* Bay City, 113 Mich. 181, 71 N. W. 595.

New York.— Trowbridge *v.* Horan, 78 N. Y. 439, holding that lands owned by a person as trustee must be assessed to him, with the addition to his name of his representative character.

Rhode Island.— Clarke *v.* Addeman, 26 R. I. 168, 58 Atl. 623.

A description of trustees "as executors and trustees" of a fund of personal property in the assessment roll does not vitiate the assessment. People *v.* Barker, 11 Misc. (N. Y.) 262, 32 N. Y. Suppl. 485 [*affirmed* in 86 Hun 283, 33 N. Y. Suppl. 1132].

92. *In re* Interstate Land Co., 110 La. 286, 34 So. 446; People *v.* Barker, 21 N. Y. Suppl. 704 [*affirmed* in 137 N. Y. 631, 33 N. E. 745].

Where property is held by two trustees, the requirement of the statute as to alphabetical arrangement is sufficiently complied with if the assessment is entered under the first letter of the name of one of the trustees. People *v.* Barker, 11 Misc. (N. Y.) 262, 32 N. Y. Suppl. 485 [*affirmed* in 86 Hun 283, 33 N. Y. Suppl. 1132].

Alphabetical order not required see Watkins *v.* Couch, 142 Iowa 164, 120 N. W. 485.

93. State *v.* Sloss, 87 Ala. 119, 6 So. 309; Lake County *v.* Sulphur Bank Quicksilver Min. Co., 66 Cal. 17, 4 Pac. 876; Falls Branch Jellico Land, etc., Co. *v.* Com., 83 S. W. 108, 26 Ky. L. Rep. 1028; Walla Walla First Nat. Bank *v.* Hungate, 62 Fed. 548.

An unincorporated association, although not strictly a copartnership, is assessable for taxation in the company or association name. Pomeroy Salt Co. *v.* Davis, 21 Ohio St. 555.

94. *California.*— Lake County *v.* Sulphur Bank Q. M. Co., 68 Cal. 14, 8 Pac. 593.

Maine.— Farnsworth Co. *v.* Rand, 65 Me. 19.

Michigan.— Gratwick, etc., Lumber Co. *v.* Oscoda, 97 Mich. 221, 56 N. W. 600, holding that the designation of a corporation on the assessment roll by the initial letters of its corporate name does not render the assessment void.

New Hampshire.— Souhegan Nail, etc., Factory *v.* McConihe, 7 N. H. 309.

New Jersey.— Pennington *v.* Mendes, 38 N. J. Eq. 336.

New York.— People *v.* Garmon, 63 N. Y. App. Div. 530, 71 N. Y. Suppl. 826.

Virginia.— Stevenson *v.* Henkle, 100 Va. 591, 42 S. E. 672.

See 45 Cent. Dig. tit. "Taxation," § 708.

95. Hartford *v.* Hartford Theological Seminary, 66 Conn. 475, 34 Atl. 483; Booth *v.* Raymond, 191 Ill. 351, 61 N. E. 129. But *compare* Chippewa Hardware Co. *v.* Atwood, 127 Mich. 338, 86 N. W. 854.

96. Chicago, etc., R. Co. *v.* Kelley, 105 Iowa 106, 74 N. W. 935; Farnsworth Co. *v.* Rand, 65 Me. 19; Oregon R. Co. *v.* Umatilla County, 47 Oreg. 198, 81 Pac. 352.

97. O'Neal *v.* Virginia, etc., Bridge Co., 18 Md. 1, 79 Am. Dec. 669; State *v.* Diamond Valley Live Stock, etc., Co., 21 Nev. 86, 25 Pac. 448.

98. Michigan Dairy Co. *v.* McKinlay, 70 Mich. 574, 38 N. W. 469; Petrie Lumber Co. *v.* Collins, 66 Mich. 64, 32 N. W. 923. And see *supra*, VI, C, 5, e, (IV).

99. James Clark Distilling Co. *v.* Cumberland, 95 Md. 468, 52 Atl. 661; Albany City

4. Description of Property — a. In General — (i) *Necessity and Sufficiency of Description.* It is essential to the validity of the assessment list and of all proceedings founded on it that it should contain a description of all the property intended to be assessed; but minute particularity is not required, any description being sufficient which identifies the particular property so clearly that the owner cannot be misled.[1] And a detailed description will be more easily dispensed with where the assessor is unable to ascertain the exact nature of the property.[2] It is not necessary to enumerate every item of personal property, but it has been held that the different classes mentioned in the statute should be separately listed,[3] although by the force of some statutes, it is now held sufficient to list all such property under the general description of "personal property," [4] and an assessment even under such a heading as "miscellany" may be considered sufficient if the owner himself knows exactly what is meant.[5]

(ii) *Showing Taxability of Property.* Each article or item of property listed must appear on the face of the assessment to be included within the particular kinds or classes of property made taxable by law, or at least it must appear that it is not exempt.[6]

(iii) *Corporate Property and Stock.* An assessment upon the "cap-

Nat. Bank *v.* Maher, 6 Fed. 417, 19 Blatchf. 175. But *compare* Small *v.* Lawrenceburgh, 128 Ind. 231, 27 N. E. 500.

That the list of shareholders appears in a different part of the assessment book from where the amount is noted is no ground for annulling an assessment on the shares. Castles *v.* New Orleans, 46 La. Ann. 542, 15 So. 199. But see Albany City Nat. Bank *v.* Maher, 6 Fed. 417, 19 Blatchf. 175.

1. *Alabama.*— State *v.* Kidd, 125 Ala. 413, 28 So. 480; Smith *v.* Cox, 115 Ala. 503, 22 So. 78.

Illinois.— See King *v.* People, 193 Ill. 530, 61 N. E. 1035.

Kentucky.— Com. *v.* Riley, 115 Ky. 140, 72 S. W. 809, 24 Ky. L. Rep. 2005; Com. *v.* Collins, 72 S. W. 819, 24 Ky. L. Rep. 2042.

Louisiana.— Posey *v.* New Orleans, 113 La. 1059, 37 So. 969; Muller *v.* Mazerat, 109 La. 116, 33 So. 104; Scott *v.* Parry, 108 La. 11, 32 So. 188; Augusti *v.* Lawless, 43 La. Ann. 1097, 10 So. 171; Rougelot *v.* Quick, 34 La. Ann. 123.

Maine.— Greene *v.* Walker, 63 Me. 311.

Massachusetts.— Roberts *v.* Welsh, 192 Mass. 278, 78 N. E. 408.

Michigan.— Petit *v.* Flint, etc., R. Co., 114 Mich. 362, 72 N. W. 238.

New York.— Cone *v.* Lauer, 131 N. Y. App. Div. 193, 115 N. Y. Suppl. 644, 1116; People *v.* Banfield, 36 Misc. 13, 72 N. Y. Suppl. 35. And see Rochester *v.* Farrar, 44 Misc. 394, 89 N. Y. Suppl. 1035.

North Dakota.— Hodgson *v.* State Finance Co., (1909) 122 N. W. 336; State Finance Co. *v.* Mather, 15 N. D. 386, 109 N. W. 350.

See 45 Cent. Dig. tit. "Taxation," § 711.

Bridges.— Where the statute requires the assessment of bridges to be by "metes and bounds," the length of the bridge and approaches assessed should be stated unless such monuments are given as will control the distance. People *v.* Guthrie, 149 Ill. 360, 38 N. E. 549 [*reversing* 46 Ill. App. 124]; Keokuk, etc., Bridge Co. *v.* People, 145 Ill. 596, 34 N. E. 482.

Mortgages.— If held by an executor or trustee, the assessment is not void for a failure to designate him in his representative capacity. Vail *v.* Runyon, 41 N. J. L. 98.

Leases see Cruger *v.* Dougherty, 43 N. Y. 107 [*affirming* 1 Lans. 464].

Farm products.— The description, "eighteen tons of hay, $540," is sufficiently definite. Donnell *v.* Webster, 63 Me. 15.

The term "loans on stocks and bonds," used in describing an item of property assessed to a savings bank, sufficiently describes the property. Savings, etc., Soc. *v.* San Francisco, 131 Cal. 356, 63 Pac. 665.

Omitted property see Cape Girardeau *v.* Buehrmann, 148 Mo. 198, 49 S. W. 985.

2. Hartford *v.* Champion, 54 Conn. 436, 7 Atl. 721; Lewis *v.* Eastford, 44 Conn. 477; King *v.* People, 193 Ill. 530, 61 N. E. 1035; Sweetsir *v.* Chandler, 98 Me. 145, 56 Atl. 584.

3. Falkner *v.* Hunt, 16 Cal. 167 (this case, however, was rendered ineffective by Pol. Code, § 3650). See also *In re* Seaman, 135 Iowa 543, 113 N. W. 354 (holding, however, that an assessment of personal property is sufficient if rightfully assessed, although the property is erroneously classified generally as personal property, provided the owner is not prejudiced); Thompson *v.* Davidson, 15 Minn. 412 (holding that an assessment of a quantity of wheat as "household goods" is void).

4. Dear *v.* Weineke, 94 Cal. 322, 29 Pac. 646; San Francisco *v.* Pennie, 93 Cal. 465, 29 Pac. 66; Dear *v.* Varnum, 80 Cal. 86, 22 Pac. 76; People *v.* Sneath, 28 Cal. 612; Brunson *v.* Starbuck, 32 Ind. App. 457, 70 N. E. 163; Lamson Consol. Store Service Co. *v.* Boston, 170 Mass. 354, 49 N. E. 630. But *compare* Rumford Chemical Works *v.* Ray, 19 R. I. 302, 33 Atl. 443, and Dunnell Mfg. Co. *v.* Newell, 15 R. I. 233, 2 Atl. 766, under a particular statute relating to business corporations.

5. Ayer, etc., Tie Co. *v.* Keown, 89 S. W. 116, 28 Ky. L. Rep. 201.

6. Monroe *v.* New Canaan, 43 Conn. 309; Whittelsey *v.* Clinton, 14 Conn. 72; Adam *v.*

ital" of a designated corporation, by that name, and describing the capital generally, is ordinarily sufficient.[7] But where the property of the company is assessed, although its plant or works may be assessed as an entirety, the different parts or elements must be separately described with sufficient certainty to identify them.[8] Shares of stock in a corporation, when assessed to the holder thereof, may be described as so many shares of "bank stock," "insurance stock," or the like, without naming the company,[9] and if corporate stock is required to be assessed as a part of the holder's personalty, listing it as a separate item does not invalidate the assessment.[10]

(IV) *Railroad Property.* Property of this kind must be described with sufficient particularity to identify it, but at the same time with reference to its peculiar nature.[11] A statutory requirement that land and the improvements thereon shall be separately assessed applies to the right of way, tracks, and other property of a railroad.[12]

b. Real Property — (I) *Necessity and Sufficiency of Description.* To establish a lien for taxes on realty and sustain proceedings for the forfeiture or sale of the land for non-payment of the tax, it is necessary that the assessment shall contain such a description as will identify the particular parcel of land assessed with certainty and beyond any reasonable possibility of doubt or mistake.[13]

Litchfield, 10 Conn. 127; Newport Reading Room's Petition, 21 R. I. 440, 44 Atl. 511.

7. San Francisco *v.* Spring Valley Water Works, 54 Cal. 571; New Orleans *v.* New Orleans, etc., R. Co., 37 La. Ann. 45; New Orleans, etc., R. Co. *v.* Orleans Bd. of Assessors, 32 La. Ann. 19; State *v.* Lewis, 118 Wis. 432, 95 N. W. 388. And see Concord First Nat. Bank *v.* Concord, 59 N. H. 75.

8. State *v.* Wharton, 115 Wis. 457, 91 N. W. 976; Fond du Lac Water Co. *v.* Fond du Lac, 82 Wis. 322, 52 N. W. 439, 16 L. R. A. 581.

Separate assessment of corporate property see People *v.* Wells, 91 N. Y. App. Div. 44, 86 N. Y. Suppl. 456.

An assessment against a water company for "pipes in streets 60,000" is fatally defective for indefiniteness where there are other companies occupying the same streets of the town with pipes to a greater extent than the occupancy of the water company. Matteson *v.* Warwick, etc., Water Co., 28 R. I. 540, 68 Atl. 577.

The description of a corporate franchise on the assessment roll as "the . . . Company franchise" is insufficient. Southwestern Tel., etc., Co. *v.* San Antonio, 32 Tex. Civ. App. 101, 73 S. W. 859.

9. San Francisco *v.* Flood, 64 Cal. 504, 2 Pac. 264; Hartford *v.* Champion, 58 Conn. 268, 20 Atl. 471; Monroe *v.* New Canaan, 43 Conn. 309.

Misdescription of corporate stock.— Shares of stock in a corporation cannot properly be listed to the holder thereof under the description of "money at interest." Sweetsir *v.* Chandler, 98 Me. 145, 56 Atl. 584.

10. State *v.* Stamm, 165 Mo. 73, 65 S. W. 242; Farmers' Nat. Bank *v.* Cook, 32 N. J. L. 347; McMahon *v.* Palmer, 102 N. Y. 176, 6 N. E. 400, 55 Am. Rep. 796; Williams *v.* Weaver, 75 N. Y. 30.

11. San Francisco, etc., R. Co. *v.* State Bd. of Equalization, 60 Cal. 12 (description of roadway by giving termini, courses, and distances); Cairo, etc., R. Co. *v.* Matthews, 152 Ill. 153, 38 N. E. 623 (effect of misdescription when company is required to file schedule of its property); Wabash, etc., R. Co. *v.* People, 137 Ill. 181, 27 N. E. 456 (use of general terms, such as "railroad track," "main track," "rolling stock main line"); Kings County El. R. Co. *v.* Brooklyn, 16 Misc. 419, 38 N. Y. Suppl. 154; Brooklyn El. R. Co. *v.* Brooklyn, 16 Misc. (N. Y.) 416, 38 N. Y. Suppl. 154 (holding that a requirement that property shall be described in the assessment list by numbers of lot and block does not apply to railroad tracks in city streets).

12. California, etc., R. Co. *v.* Mecartney, 104 Cal. 616, 28 Pac. 448.

13. *Arkansas.*— Buckner *v.* Sugg, 79 Ark. 442, 96 S. W. 184.

California.— Palomares Land Co. *v.* Los Angeles County, 146 Cal. 530, 80 Pac. 931; People *v.* Flint, 39 Cal. 670; People *v.* Sierra Buttes Quartz Min. Co., 39 Cal. 511.

Florida.— Miller *v.* Lindstrom, 45 Fla. 473, 33 So. 521.

Georgia.— Brinson *v.* Lassiter, 81 Ga. 40, 6 S. E. 468.

Illinois.— Carne *v.* Peacock, 114 Ill. 347, 2 N. E. 165; People *v.* Purviance, 12 Ill. App. 216.

Kansas.—Wilkins *v.* Tourtellott, 28 Kan. 825; McWilliams *v.* Great Spirit Springs Co., 7 Kan. App. 210, 52 Pac. 905.

Louisiana.—Augusti *v.* Lawless, 43 La. Ann. 1097, 10 So. 171; Rougelot *v.* Quick, 34 La. Ann. 123; Thibodaux *v.* Keller, 29 La. Ann. 508; Woolfolk *v.* Fonbene, 15 La. Ann. 15.

Maine.— Burgess *v.* Robinson, 95 Me. 120, 49 Atl. 606; Oldtown *v.* Blake, 74 Me. 280; Griffin *v.* Creppin, 60 Me. 270; Greene *v.* Lunt, 58 Me. 518; Adams *v.* Larrabee, 46 Me. 516.

Massachusetts.— Farnum *v.* Buffum, 4 Cush. 260.

Michigan.— Jackson *v.* Sloman, 117 Mich. 126, 75 N. W. 282; Amberg *v.* Rogers, 9 Mich. 332.

Hence a description which merely gives the name of the owner and the number of acres, without anything to fix the exact location of the land, is insufficient;[14] but if such description is accompanied by other descriptive matter by which the particular land may be located and identified it is sufficient.[15] So also an assessment of a "lot" or "house and lot" on a designated street or street corner in a city is insufficient,[16] although the description may be sufficient if, in addition, the number of the house is stated.[17] It has been said that a description which would be sufficient in a conveyance of land between individuals will be sufficient in a tax assessment;[18] or, according to other cases, the description is sufficient if it contains such data as will enable a competent surveyor to identify the property with reasonable certainty.[19] Some decisions also maintain that parol evi-

Mississippi.— Cogburn *v.* Hunt, 54 Miss. 675

Missouri.— State *v.* Burrough, 174 Mo. 700, 74 S. W. 610.

New Hampshire.— See Drew *v.* Morrill, 62 N. H. 23, particular description of resident lands not required.

New Jersey.— Newcomb *v.* Franklin Tp., 46 N. J. L. 437.

New York.— *In re* New York Cent., etc., R. Co., 90 N. Y. 342; Tallman *v.* White, 2 N. Y. 66; Clinton *v.* Krull, 125 N. Y. App. Div. 157, 111 N. Y. Suppl. 105; Rochester *v.* Farrar, 44 Misc. 394, 89 N. Y. Suppl. 1035.

North Carolina.— Fulcher *v.* Fulcher, 122 N. C. 101, 29 S. E. 91.

North Dakota.—Griffin *v.* Denison Land Co., (1908) 119 N. W. 1041; State Finance Co. *v.* Mulberger, 16 N. D. 214, 112 N. W. 986, 125 Am. St. Rep. 650; Grand Forks County *v.* Frederick, 16 N. D. 118, 112 N. W. 839, 125 Am. St. Rep. 621 (holding that the description of land in an assessment roll must be so definite as to afford the owner the means of identification of the land as his land, and must also inform intending purchasers what lands are offered for sale; and if it does not answer these requirements, the mere fact that the owner is aware that it is his land that is intended to be assessed, and that he owns no other land in the block, is immaterial and does not validate the assessment); State Finance Co. *v.* Mather, 15 N. D. 386, 109 N. W. 350; Power *v.* Bowdle, 3 N. D. 107, 54 N. W. 404, 44 Am. St. Rep. 511, 21 L. R. A. 328.

Ohio.— Douglas *v.* Dangerfield, 10 Ohio 152; Lafferty *v.* Byers, 5 Ohio 458.

Oregon.— Title Trust Co. *v.* Aylsworth, 40 Oreg. 20, 66 Pac. 276.

Pennsylvania.— Everhart *v.* Nesbitt, 182 Pa. St. 500, 38 Atl. 525; Glass *v.* Gilbert, 58 Pa. St. 266; Lyman *v.* Philadelphia, 56 Pa. St. 488; Philadelphia *v.* Miller, 49 Pa. St. 440; Woodside *v.* Wilson, 32 Pa. St. 52; Dunden *v.* Snodgrass, 18 Pa. St. 151; Dunn *v.* Ralyea, 6 Watts & S. 475.

Rhode Island.— Kettelle *v.* Warwick, etc., Water Co., 23 R. I. 114, 49 Atl. 492; Evans *v.* Newell, 18 R. I. 38, 25 Atl. 347.

Tennessee.— Morristown *v.* King, 11 Lea 669; Peck *v.* East Tennessee Lumber, etc., Co., (Ch. App. 1899) 53 S. W. 1107.

Texas.— State *v.* Farmer, 94 Tex. 232, 59 S. W. 541; Yenda *v.* Wheeler, 9 Tex. 408.

Utah.— Jungk *v.* Snyder, 28 Utah 1, 78 Pac. 168.

West Virginia.— Maxwell *v.* Cunningham, 50 W. Va. 298, 40 S. E. 499.

Canada.— Schultz *v.* Alloway, 10 Manitoba 221; Nanton *v.* Villeneuve, 10 Manitoba 213.

See 45 Cent. Dig. tit. "Taxation," § 720.

The headings of the columns of an assessment roll are a part of the description of the land assessed. State *v.* Vaile, 122 Mo. 33, 26 S. W. 672.

Where a part of a lot becomes exempt from taxation, the remainder is taxable as a distinct parcel. St. Peter's Church *v.* Scott County, 12 Minn. 395.

Effect of curative statute see Com. *v.* Louisville, 47 S. W. 865, 20 Ky. L. Rep. 893.

Form of tract.—A description of land in an assessment as six acres will, in the absence of proof to the contrary, be regarded as six acres in the form of a square. Immegart *v.* Gorgas, 41 Iowa 439.

14. Driggers *v.* Cassady, 71 Ala. 529; Jones *v.* Blanchard, 62 N. H. 651; Ainsworth *v.* Dean, 21 N. H. 400; Holmes *v.* Union County School District No. 15, 11 Oreg. 332, 8 Pac. 287; Tilton *v.* Oregon Cent. Military Road Co., 23 Fed. Cas. No. 14,055, 3 Sawy. 22.

15. Greene *v.* Hunt, 58 Me. 518 (numbers and lots and ranges); Westhampton *v.* Searle, 127 Mass. 502; Clark *v.* Mulford, 43 N. J. L. 550; State *v.* Woodbridge Tp., 42 N. J. L. 401.

16. Jones *v.* Pelham, 84 Ala. 208, 4 So. 22; Kelsey *v.* Abbott, 13 Cal. 609; Whitmore *v.* Learned, 70 Me. 276; Bingham *v.* Smith, 64 Me. 450; Parker *v.* Elizabeth, 39 N. J. L. 689.

17. Roberts *v.* Welsh, 192 Mass. 278, 78 N. E. 408; State *v.* Newark, 36 N. J. L. 288.

18. Dike *v.* Lewis, 4 Den. (N. Y.) 237; Slaughter *v.* Dallas, 101 Tex. 315, 107 S. W. 48 [*modifying* (Tex. Civ. App. 1907) 103 S. W. 218]; Orton *v.* Noonan, 23 Wis. 102; Curtis *v.* Brown County, 22 Wis. 167. But *compare* Jones *v.* Pelham, 84 Ala. 208, 4 So. 22; Buckner *v.* Sugg, 79 Ark. 442, 96 S. W. 184 (where it is said that in taxation proceedings, the description of the land must be such as fully apprises the owner, without recourse to the superior knowledge peculiar to him as owner, that the particular tract of his land is sought to be charged with a tax lien); People *v.* Mahoney, 55 Cal. 286.

19. Otis *v.* People, 196 Ill. 542, 63 N. E.

dence is admissible in aid of the description in the assessment, provided there is enough to form a basis for the application of such evidence.[20] Furthermore, the owner cannot complain of the description in the assessment if it is merely a transcript of what he himself furnished to the assessor.[21] And although the description may be too imperfect to sustain a lien for the tax, it does not follow that it will not support an action at law or other proceeding to enforce the tax as a personal liability of the owner of the property.[22]

(II) *Location According to Government Survey.* Lands covered by the official survey of the United States government may properly be described, for purposes of assessment, by reference to the usual and proper subdivisions thereof.[23] And in so describing it the proper and accepted characters and abbreviations may be used; but if those employed are not familiar in usage or definite in themselves, the description may be void for uncertainty.[24] Furthermore, the

1053; Koelling *v.* People, 196 Ill. 353, 63 N. E. 735; People *v.* Stahl, 101 Ill. 346; Fowler *v.* People, 93 Ill. 116; Law *v.* People, 80 Ill. 268. And see Douglass *v.* Leavenworth County, 75 Kan. 6, 88 Pac. 557, holding that the assessment is sufficient if the description of the land is true and no other property in the county answers to the description, and it may easily be found by any one acquainted with the description and with the facts which exist and which may easily be ascertained on inquiry.

20. *Alabama.*— Driggers *v.* Cassady, 71 Ala. 529. *Compare* Jones *v.* Pelham, 84 Ala. 208, 4 So. 22.

Arkansas.— Buckner *v.* Sugg, 79 Ark. 442, 96 S. W. 184.

California.— Fox *v.* Townsend, 152 Cal. 51, 91 Pac. 1004, 1007.

Mississippi.— Crawford *v.* McLaurin, 83 Miss. 265, 35 So. 209, 949; Smith *v.* Hickman, (1899) 24 So. 973.

New Jersey.— State *v.* Woodbridge Tp., 42 N. J. L. 401.

Texas.— Slaughter *v.* Dallas, 101 Tex. 315, 107 S. W. 48 [*modifying* (Civ. App. 1907) 103 S. W. 218].

See 45 Cent. Dig. tit. "Taxation," § 720.

But *compare* Jackson *v.* Sloman, 117 Mich. 126, 75 N. W. 282.

21. Jeffries *v.* Clark, 23 Kan. 448; Lane *v.* March, 33 La. Ann. 554; Scollard *v.* Dallas, 16 Tex. Civ. App. 620, 42 S. W. 640; Eustis *v.* Henrietta, (Tex. Civ. App. 1896) 37 S. W. 632.

22. Shaw *v.* Orr, 30 Iowa 355; Cressey *v.* Parks, 76 Me. 532; Pfeiffer *v.* Miles, 48 N. J. L. 450, 4 Atl. 429; State *v.* Union Tp., 36 N. J. L. 309.

23. *Arkansas.*— Chestnut *v.* Harris, 64 Ark. 580, 43 S. W. 977, 62 Am. St. Rep. 213.

California.—Allen *v.* McKay, 139 Cal. 94, 72 Pac. 713.

Indiana.— Jordan Ditching, etc., Assoc. *v.* Wagoner, 33 Ind. 50.

Iowa.— Cahalan *v.* Van Sant, 87 Iowa 593, 54 N. W. 433; Judd *v.* Anderson, 51 Iowa 345, 1 N. W. 677.

Louisiana.—Webre *v.* Lutcher, 45 La. Ann. 574, 12 So. 834; Person *v.* O'Neal, 32 La. Ann. 228.

Maine.—Adams *v.* Larrabee, 46 Me. 516.

Minnesota.— Corbet *v.* Rocksbury, 94 Minn. 397, 103 N. W. 11.

Mississippi.— Moores *v.* Thomas, (1909) 48 So. 1025.

United States.— Jenkins *v.* McTigue, 22 Fed. 148.

See 45 Cent. Dig. tit. "Taxation," § 721.

Numbered lot in section.—A description of land as a certain numbered lot in a designated section of the government survey does not represent any ascertainable part of the survey, unless a plat has been made and recorded by competent authority dividing the survey into numbered lots. Sanford *v.* People, 102 Ill. 374; People *v.* Chicago, etc., R. Co., 96 Ill. 369.

Lands not covered by government survey. — In a case in Arkansas it appeared that land uncovered by the recession of the waters of a meandered lake would, if the lines of the public survey had been extended so as to embrace it, have been a part of a certain section, township, and range. The land was not officially surveyed and platted, but an extension of the lines of the public survey was run by the county surveyor, and the land was popularly known by the description which it would have had if the survey had been officially extended, and under this description it was assessed and sold for taxes. It was held that the description was sufficient, when aided by evidence that the land had been unofficially surveyed and was popularly known by the description used. Buckner *v.* Sugg, 79 Ark. 442, 96 S. W. 184. But *compare* State *v.* Central Pac. R. Co., 21 Nev. 94, 25 Pac. 442.

Number of survey and certificate.—A statutory requirement that the description of the land in the assessment list shall contain the number of the certificate under which it was located, or the number of the survey under which it was entered or patented, is mandatory, and the assessment will be invalid if this number is omitted when it could have been ascertained. Morgan *v.* Smith, 70 Tex. 637, 8 S. W. 528; Gulf, etc., R. Co. *v.* Poindexter, 70 Tex. 98, 7 S. W. 316; Henderson *v.* White, 69 Tex. 103, 5 S. W. 374; Hammon *v.* Nix, 104 Fed. 689, 44 C. C. A. 132. But *compare* Taber *v.* State, 38 Tex. Civ. App. 235, 85 S. W. 835.

24. Adams *v.* Larrabee, 46 Me. 516; Power *v.* Larabee, 2 N. D. 141, 49 N. W. 724;

description must be made complete by giving the name or number of the section, township, and range,[25] unless these particulars can be supplied or made definite from the headings of the columns in the assessment book,[26] or from the fact that the assessment district includes only one such section or township.[27]

(III) *Description by Metes and Bounds.* A description of land by metes and bounds is sufficient in a tax assessment if correct and comprehensible; but if the boundaries given are confused, erroneous, uncertain, or impossible of location on the ground the assessment will be void.[28]

(IV) *Description by Numbers on Recorded Map or Plat.* It is usual and sufficient to describe city or town lots in an assessment roll by the number of the lot and of the block or square, and the name of the quarter, subdivision, or addition, according to the recorded plats, with the name of the city or town.[29] But a description of this kind must be definite and certain in itself,[30]

Moran *v.* Thomas, 19 S. D. 469, 104 N. W. 212.

25 *Mississippi.*— Wing *v.* Minor, (1890) 7 So. 347.

North Dakota.— Sheets *v.* Paine, 10 N. D. 103, 86 N. W. 117.

Oregon.— Martin *v.* White, 53 Oreg. 319, 100 Pac. 290.

South Dakota.— Stokes *v.* Allen, 15 S. D. 421, 89 N. W. 1023.

United States.— Paine *v.* Willson, 146 Fed. 488, 77 C. C. A. 44; Paine *v.* Germantown Trust Co., 136 Fed. 527, 69 C. C. A. 303.

See 45 Cent. Dig. tit. "Taxation," § 721.

But *compare* Cone *v.* Lauer, 131 N. Y. App. Div. 193, 15 N. Y. Suppl. 644, 1116.

26. Griffin *v.* Tuttle, 74 Iowa 219, 37 N. W. 167; Burdick *v.* Connell, 69 Iowa 458, 29 N. W. 416; Auditor-Gen. *v.* Sparrow, 116 Mich. 574, 74 N. W. 881; Stoddard *v.* Lyon, 18 S. D. 207, 99 N. W. 1116.

27. Dumphey *v.* Auditor-Gen., 123 Mich. 354, 82 N. W. 55; Bird *v.* Perkins, 33 Mich. 28.

28. *California.*— Davis *v.* Pacific Imp. Co., 137 Cal. 245, 70 Pac. 15; Harvey *v.* Meyer, 117 Cal. 60, 48 Pac. 1014; People *v.* Mahoney, 55 Cal. 286; People *v.* Crockett, 33 Cal. 150; Lachman *v.* Clark, 14 Cal. 131.

Illinois.— People *v.* Reat, 107 Ill. 581.

Louisiana.— Gonzales *v.* Saux, 119 La. 657, 44 So. 332; Shelly *v.* Friedrichs, 117 La. 679, 42 So. 218; Sutton *v.* Calhoun, 14 La. Ann. 209.

Nebraska.—Hart *v.* Murdock, 80 Nebr. 274, 114 N. W. 268, holding that in the description of land by metes and bounds a point on the compass named in the survey may be construed to mean an opposite direction when it appears to have been written by clerical error, and is so inconsistent with the remaining part of the description as to show that the opposite direction was intended.

North Dakota.— Grand Forks County *v.* Frederick, 16 N. D. 118, 112 N. W. 839, 125 Am. St. Rep. 621.

Oregon.— Jory *v.* Palace Dry Goods Co., 30 Oreg. 196, 46 Pac. 786.

See 45 Cent. Dig. tit. "Taxation," § 724.

Measurements approximately stated.— Where the measurements along the directions given meet and close up, and inclose an area equal to that stated, the use of the word "about" before the figures giving the distances does not create any uncertainty in the description. Roberts *v.* Welsh, 192 Mass. 278, 78 N. E. 408.

Bounding by adjoining proprietors.— A description in an assessment for taxes which gives the name of the owner, the number of acres, and refers to the names of adjoining owners on either side for the north, south, east, and west boundaries, respectively, is sufficient. Barnes *v.* Brown, 1 Tenn. Ch. App. 726.

29. *Arkansas.*— Kelly *v.* Salinger, 53 Ark. 114, 13 S. W. 596.

California.—Baird *v.* Monroe, 150 Cal. 560, 89 Pac. 352; Davis *v.* Pacific Imp. Co., 137 Cal. 245, 70 Pac. 15; San Gabriel Valley Land, etc., Co. *v.* Witmer Bros. Co., 96 Cal. 623, 29 Pac. 500, 31 Pac. 588, 18 L. R. A. 465, 470.

Illinois.— Carrington *v.* People, 195 Ill. 484, 63 N. E. 163.

Kansas.— Bruce *v.* McBee, 23 Kan. 379.

Louisiana.— *In re* Martinez, 117 La. 719, 42 So. 246; *In re* Wenck, 52 La. Ann. 376, 26 So. 989; Hood *v.* New Orleans, 49 La. Ann. 1461, 22 So. 401; Poland *v.* Dreyfous, 48 La. Ann. 83, 18 So. 906.

Massachusetts.— Bemis *v.* Caldwell, 143 Mass. 299, 9 N. E. 623.

Minnesota.— Merchant's Realty Co. *v.* St. Paul, 77 Minn. 343, 79 N. W. 1040.

Mississippi.— Levenworth *v.* Greenville Wharf, etc., Co., 82 Miss. 578, 35 So. 138.

New Jersey.— State *v.* Galloway Tp., 42 N. J. L. 415; State *v.* Van Horn, 40 N. J. L. 143; State *v.* Van Horne, 39 N. J. L. 444.

New York.— Clinton *v.* Krull, 125 N. Y. App. Div. 157, 111 N. Y. Suppl. 105.

Texas.—Haynes *v.* State, 44 Tex. Civ. App. 492, 99 S. W. 405; Guerguin *v.* San Antonio, (Civ. App. 1899) 50 S. W. 140; Hernandez *v.* San Antonio, (Civ. App. 1897) 39 S. W. 1022.

Wisconsin.— Janesville *v.* Markoe, 18 Wis. 350.

Canada.— Aston *v.* Innis, 26 Grant Ch. U. C. 42.

See 45 Cent. Dig. tit. "Taxation," §§ 722, 729, 735.

30. *Indiana.*— Millikan *v.* Lafayette, 118 Ind. 323, 20 N. E. 847.

Louisiana.— Lewis *v.* Brock, 123 La. 1, 48 So. 563, holding that a tax-sale of urban lots so misdescribed in the assessment as not to

and state the numbers of the lots and squares correctly,[31] and refer to a map or plat actually made and existing,[32] which also must be correctly named,[33] and free from invalidating defects or ambiguities,[34] and which, according to some of the authorities, must be an authentic map or plat in the sense of having been made by a person authorized to make it and duly recorded,[35] although other decisions dispense with this requisite, provided the map or plat is one generally recognized and used and referred to by the citizens and the local officers.[36] It is also essential that the description shall show in what town or city the lot is located, either by naming it in the description or stating it in the headings of columns in the assessment book,[37] and if it is a subdivision or addition having a particular name or other designation, the latter must be correctly given.[38]

(v) *Name of Tract or Property.* It is sufficient to describe a tract of land, a farm, a country estate, a mining property, or the like, by a name by which it is commonly and popularly known, with particulars as to general location and acreage, provided such description identifies the property with certainty;[39] but

identify them with lots in the same square belonging to the tax debtor vests no title in the purchaser.

Michigan.— Mayot *v.* Auditor-Gen., 140 Mich. 593, 104 N. W. 19.

Missouri.— State *v.* Wabash R. Co., 114 Mo. 1, 21 S. W. 26.

New Hampshire.— Ainsworth *v.* Dean, 21 N. H. 400.

South Dakota.— Turner *v.* Hand County, 11 S. D. 348, 77 N. W. 589.

See 45 Cent. Dig. tit. "Taxation," §§ 722, 729, 735.

31. Augusti *v.* Lawless, 45 La. Ann. 1370, 14 So. 228; Slaughter *v.* Dallas, 101 Tex. 315, 107 S. W. 48 [*modifying* (Civ. App. 1907) 103 S. W. 218], holding, however, that where, although the lot number is not given, it can be definitely ascertained what particular lot is meant, the description is sufficient.

Admissibility of parol evidence in aid of a description which contains a mistake in the number of the lot or which is applicable to either of two lots see Marsh *v.* Nelson, 101 Pa. St. 51; Hess *v.* Harrington, 73 Pa. St. 438.

32. *California.*—Fox *v.* Townsend, 152 Cal. 51, 91 Pac. 1004, 1007; Wright *v.* Fox, 150 Cal. 680, 89 Pac. 832; Miller *v.* Williams, 135 Cal. 183, 67 Pac. 788. See also Santa Barbara *v.* Eldred, 108 Cal. 294, 41 Pac. 410.

Colorado.— Stough *v.* Reeves, 42 Colo. 432, 95 Pac. 958.

Illinois.— Sanford *v.* People, 102 Ill. 374; People *v.* Chicago, etc., R. Co., 96 Ill. 369.

Indiana.— Green *v.* McGrew, 35 Ind. App. 104, 72 N. E. 1049, 73 N. E. 832, 111 Am. St. Rep. 149.

Michigan.— Mayot *v.* Auditor-Gen., 140 Mich. 593, 104 N. W. 19.

New York.—White *v.* Wheeler, 51 Hun 573, 4 N. Y. Suppl. 405 [*affirmed* in 123 N. Y. 627, 25 N. E. 952]; Lalor *v.* New York, 12 Daly 235.

See 45 Cent. Dig. tit. "Taxation," §§ 722, 729, 735.

33. Miller *v.* Lindstrom, 45 Fla. 473, 33 So. 521; Auditor-Gen. *v.* Fleming, 142 Mich. 12, 105 N. W. 71.

34. People *v.* Reat, 107 Ill. 581; Minneapolis Railway Terminal Co. *v.* Minnesota Debenture Co., 81 Minn. 66, 83 N. W. 485; Williams *v.* Central Land Co., 32 Minn. 440, 21 N. W. 550.

35. Joliet Stove Works *v.* Kiep, 230 Ill. 550, 82 N. E. 875 [*affirming* 132 Ill. App. 457] (holding that an assessment on property described as a certain lot in a certain division when there is no plat of such division on file is void); People *v.* Reat, 107 Ill. 581; Gage *v.* Rumsey, 73 Ill. 473; Matteson *v.* Warwick, etc., Water Co., 28 R. I. 570, 68 Atl. 577; Merton *v.* Dolphin, 28 Wis. 456.

36. Kershaw *v.* Jansen, 49 Nebr. 467, 68 N. W. 616; Roads *v.* Estabrook, 35 Nebr. 297, 53 N. W. 64; Janesville *v.* Markoe, 18 Wis. 350. *Compare* Richter *v.* Beaumont, 67 Miss. 285, 7 So. 357.

37. Santa Barbara *v.* Eldred, 108 Cal. 294, 41 Pac. 410; Alexander *v.* Hunter, 29 Nebr. 259, 45 N. W. 461; O'Neil *v.* Tyler, 3 N. D. 47, 53 N. W. 434; Asper *v.* Moon, 24 Utah 241, 67 Pac. 409. *Compare* Baird *v.* Monroe, 150 Cal. 560, 89 Pac. 352.

38. Stough *v.* Reeves, 42 Colo. 432, 95 Pac. 958; Jackson *v.* Sloman, 117 Mich. 126, 75 N. W. 282; Lynam *v.* Anderson, 9 Nebr. 367, 2 N. W. 732; Waltz *v.* Hirtz, 11 Ohio Dec. (Reprint) 14, 24 Cinc. L. Bul. 110.

39. *Alabama.* — Driggers *v.* Cassady, 71 Ala. 529.

Arkansas.— Buckner *v.* Sugg, 79 Ark. 442, 96 S. W. 184.

California.—Baird *v.* Monroe, 150 Cal. 560, 89 Pac. 352; People *v.* Leet, 23 Cal. 161; High *v.* Shoemaker, 22 Cal. 363.

Connecticut.— East Granby *v.* Hartford Electric Light Co., 76 Conn. 169, 56 Atl. 514.

Maryland.— Cooper *v.* Holmes, 71 Md. 20, 17 Atl. 711.

Minnesota. — Godfrey *v.* Valentine, 45 Minn. 502, 48 N. W. 325; Gilfillan *v.* Hobart, 34 Minn. 67, 24 N. W. 342.

Mississippi.— Havard *v.* Day, 62 Miss. 748.

Nevada.— State *v.* Central Pac. R. Co., 10 Nev. 47.

New York.— Colman *v.* Shattuck, 62 N. Y. 348; People *v.* O'Brien, 53 Hun 580, 6 N. Y. Suppl. 862. See also Cone *v.* Lauer, 131 N. Y. App. Div. 193, 922, 115 N. Y. Suppl. 644, 1116. holding that an assessment is not invalid because of a failure to designate the

if the name is arbitrarily selected, or if it is ambiguous or misleading, or does not designate the property with such certainty as to avoid all chance of mistake, it is insufficient and the assessment void.[40]

(VI) *Description in Record Title.* A description of property in the assessment roll which follows that in the owner's recorded title will ordinarily be sufficient.[41] But it is not essential that the description in the recorded deeds or other title papers shall be followed, if the assessor's description is sufficient to identify the property with certainty.[42]

(VII) *Fractional Lots or Parts of Tracts.* A description of property in an assessment which is so indefinite as not to show whether the whole or a part of a tract, or if a part, what part, is intended to be assessed to the person named, is insufficient.[43] Thus a description which states that the property is part of a larger tract, but does not clearly identify the specific and determinate part intended, is so inadequate as to render the assessment void.[44] And this is also true of an assessment which merely describes the land as a certain number of acres in a specified tract, without locating or identifying the portion meant to be assessed.[45] But such a description may be good if it contains other matter

land by the name applied many years before to a much larger tract of which the land assessed was a part.

Pennsylvania.— Glass *v.* Gilbert, 58 Pa. St. 266; Miller *v.* Hale, 26 Pa. St. 432.

Rhode Island.— Hopkins *v.* Young, 15 R. I. 48, 22 Atl. 926.

Texas.— Barrett *v.* Spence, 28 Tex. Civ. App. 344, 67 S. W. 921.

Washington.— Eureka Dist. Gold Min. Co. *v.* Ferry County, 28 Wash. 250, 68 Pac. 727.

United States.— Kelly *v.* Herrall, 20 Fed. 364.

See 45 Cent. Dig. tit. "Taxation," § 731.

40. *California.*—Chapman *v.* Zoberlein, 152 Cal. 216, 92 Pac. 188; Lake County *v.* Sulphur Bank Quicksilver Min. Co., 66 Cal. 17, 4 Pac. 876; Lachman *v.* Clark, 14 Cal. 131.

Minnesota.—Williams *v.* Central Land Co., 32 Minn. 440, 21 N. W. 550.

New Jersey.— Newcomb *v.* Franklin Tp., 46 N. J. L. 437.

New York.— Tallman *v.* White, 2 N. Y. 66.

Pennsylvania.— Norris *v.* Delaware, etc., R. Co., 218 Pa. St. 88, 66 Atl. 1122; Lyman *v.* Philadelphia, 56 Pa. St. 488; Philadelphia *v.* Miller, 49 Pa. St. 440.

South Dakota.—Van Cise *v.* Carter, 9 S. D. 234, 68 N. W. 539.

United States.— Bird *v.* Benlisa, 142 U. S. 664, 12 S. Ct. 323, 35 L. ed. 1151.

See 45 Cent. Dig. tit. "Taxation," § 731.

41. Bristol *v.* Murff, 49 La. Ann. 357, 21 So. 519; Talle *v.* De Monasterio, 48 La. Ann. 1232, 20 So. 687; Gulf State Land, etc., Co. *v.* Fasnacht, 47 La. Ann. 1294, 17 So. 800; Roberts *v.* First Nat. Bank, 8 N. D. 504, 79 N. W. 1049; Philadelphia *v.* Thurlow, 6 Pa. Dist. 51.

42. Chopin *v.* Pollet, 48 La. Ann. 1186, 20 So. 721; Stewart *v.* Colter, 31 Minn. 385, 18 N. W. 98.

43. People *v.* Flint, 39 Cal. 670; People *v.* Sierra Buttes Quartz Min. Co., 39 Cal. 511; Auman *v.* Hough, 31 Pa. Super. Ct. 337.

44. *Alabama.*— Dane *v.* Glennon, 72 Ala. 160.

Arkansas.— Texarkana Water Co. *v.* State, 62 Ark. 188, 35 S. W. 788.

California.— Miller *v.* Williams, 135 Cal. 183, 67 Pac. 788; People *v.* Hancock, 48 Cal. 631; People *v.* Hyde, 48 Cal. 431; People *v.* Cone, 48 Cal. 427; People *v.* Mariposa Co., 31 Cal. 196; People *v.* Pico, 20 Cal. 595.

Florida.— Grissom *v.* Furman, 22 Fla. 581.

Illinois.— People *v.* Reat, 107 Ill. 581.

Iowa.— Armour *v.* Officer, 116 Iowa 675, 88 N. W. 1058.

Kansas.— Harding *v.* Greene, 59 Kan. 202, 52 Pac. 436.

Maine.— Greene *v.* Walker, 63 Me. 311; Greene *v.* Lunt, 58 Me. 518.

Michigan.— Atwell *v.* Zeluff, 26 Mich. 118.

Mississippi.—Hughes *v.* Thomas, (1900) 29 So. 74; Sims *v.* Warren, 67 Miss. 278, 7 So. 226.

Missouri.— Jefferson City *v.* Whipple, 71 Mo. 519.

Nebraska.— Spiech *v.* Tierney, 56 Nebr. 514, 76 N. W. 1090.

New Hampshire.— Ainsworth *v.* Dean, 21 N. H. 400.

North Dakota.— Power *v.* Bowdle, 3 N. D. 107, 54 N. W. 404, 44 Am. St. Rep. 511, 21 L. R. A. 328.

Ohio.— Massie *v.* Long, 2 Ohio 287, 15 Am. Dec. 547.

Oregon.— Jory *v.* Palace Dry Goods Co., 30 Oreg. 196, 46 Pac. 786.

Utah.—Moon *v.* Salt Lake County, 27 Utah 435, 76 Pac. 222.

Wisconsin.— Head *v.* James, 13 Wis. 641.

United States.— Hintrager *v.* Nightingale, 56 Fed. 847.

Canada.— *Re* Jenkins, 25 Ont. 399.

See 45 Cent. Dig. tit. "Taxation," §§ 723, 726.

45. *Indiana.*— Richardson *v.* State, 5 Blackf. 51.

Kansas.— Lyon County *v.* Goddard, 22 Kan. 389.

Mississippi.— Dingey *v.* Paxton, 60 Miss. 1038.

Missouri.—Ward *v.* Linney, 192 Mo. 49, 90 S. W. 844.

New York.— People *v.* Stilwell, 190 N. Y.

which shows positively that the land assessed must be some particular part of the lot or tract and can be no other part of it.[46]

(VIII) *STATEMENT OF QUANTITY OF LAND.* In the case of agricultural and other lands outside of the cities and towns the number of acres in the tract should be given in the assessment as nearly as possible.[47] But an omission to do this, or a misstatement of the number of acres, will not vitiate a description otherwise sufficient,[48] unless the statute requires the acreage to be given, in which case an assessment cannot validly be made without it.[49]

(IX) *SEPARATE LISTING OF UNSEATED OR NON-RESIDENT LANDS.* A statutory requirement that unseated, unoccupied, or non-resident lands shall be listed in a separate book, or in a separate part of the assessment roll, from seated or occupied lands, is imperative and the assessment of such property is invalidated by a failure to comply with it.[50]

(X) *IMPROVEMENTS.* Where the assessment is upon improved real estate, it is not generally necessary to describe the improvements with great particularity, the use of such terms as "dwelling-house," "barn," and the like being sufficient.[51]

284, 83 N. E. 56 [*reversing* 119 App. Div. 913, 104 N. Y. Suppl. 1137].

Ohio.— Stewart *v.* Aten, 5 Ohio St. 257; Turney *v.* Yeoman, 16 Ohio 24; Burchard *v.* Hubbard, 11 Ohio 316; Treon *v.* Emerick, 6 Ohio 391; Massie *v.* Long, 2 Ohio 287, 15 Am. Dec. 547.

Pennsylvania.— Everhart *v.* Nesbitt, 182 Pa. St. 500, 38 Atl. 525.

Utah.— Olsen *v.* Bagley, 10 Utah 492, 37 Pac. 739.

United States.—Raymond *v.* Longworth, 14 How. 76, 14 L. ed. 333.

See 45 Cent. Dig. tit. "Taxation," §§ 723, 726.

46. *California.* — People *v.* Crockett, 33 Cal. 150; Patten *v.* Green, 13 Cal. 325.

Georgia.— Boyd *v.* Wilson, 86 Ga. 379, 12 S. E. 744, 13 S. E. 428.

Illinois.— Greenwood *v.* La Salle, 137 Ill. 225, 26 N. E. 1089.

Michigan.— Harts *v.* Mackinac Island, 131 Mich. 680, 92 N. W. 351.

Minnesota.— St. Peter's Church *v.* Scott County, 12 Minn. 395.

Nebraska.— Spiech *v.* Tierney, 56 Nebr. 514, 76 N. W. 1090; Concordia L. & T. Co. *v.* Van Camp, 2 Nebr. (Unoff.) 633, 89 N. W. 744.

Washington.— Noyes *v.* King County, 18 Wash. 417, 51 Pac. 1052.

See 45 Cent. Dig. tit. "Taxation," §§ 723, 726.

47. Lachman *v.* Clark, 14 Cal. 131; Husbands *v.* Polivick, 96 S. W. 825, 29 Ky. L. Rep. 890; Matteson *v.* Warwick, etc., Water Co., 28 R. I. 570, 68 Atl. 577.

48. *Massachusetts.*—Welles *v.* Battelle, 11 Mass. 477.

Nevada.— State *v.* Central Pac. R. Co., 10 Nev. 47.

New York.— People *v.* Garmon, 63 N. Y. App. Div. 530, 71 N. Y. Suppl. 826; Matter of Wood, 35 N. Y. App. Div. 363, 54 N. Y. Suppl. 978 [*affirmed* in 163 N. Y. 605, 57 N. E. 1128].

Pennsylvania.— Putnam *v.* Tyler, 117 Pa. St. 570, 12 Atl. 43; Williston *v.* Colckett, 9 Pa. St. 38.

Texas.— Kenson *v.* Gage, 34 Tex. Civ. App. 547, 79 S. W. 605.

Vermont.— Bellows Falls Canal Co. *v.* Rockingham, 37 Vt. 622.

See 45 Cent. Dig. tit. "Taxation," § 727.

49. Weeks *v.* Waldron, 64 N. H. 149, 5 Atl. 660; Lawton *v.* New Rochelle, 114 N. Y. App. Div. 883, 100 N. Y. Suppl. 284; Perkins *v.* Dibble, 10 Ohio 433, 36 Am. Dec. 97. See also Husbands *v.* Polivick, 96 S. W. 825, 29 Ky. L. Rep. 890.

50. Seymour *v.* Peters, 67 Mich. 415, 35 N. W. 62; Hanscom *v.* Hinman, 30 Mich. 419; Rayner *v.* Lee, 20 Mich. 384; Mittendorf *v.* Dunscomb, 113 N. Y. App. Div. 909, 99 N. Y. Suppl. 306; Sanders *v.* Saxton, 36 Misc. (N. Y.) 574, 73 N. Y. Suppl. 1095 [*affirmed* in 89 N. Y. App. Div. 421, 85 N. Y. Suppl. 762 (*reversed* on other grounds in 182 N. Y. 477, 75 N. E. 529, 108 Am. St. Rep. 826, 1 L. R. A. N. S. 727)]; Blackburn *v.* Lewis, 45 Oreg. 422, 77 Pac. 746; Hutchinson *v.* Kline, 199 Pa. St. 564, 49 Atl. 312; Dietrick *v.* Mason, 57 Pa. St. 40; Jackson *v.* Gunton, 26 Pa. Super. Ct. 203 [*affirmed* in 218 Pa. St. 275, 67 Atl. 467]. See also *supra*, VI, C, 5, b, c. But see Adams *v.* Seymour, 30 Conn. 402; Sanders *v.* Carley, 178 N. Y. 622, 70 N. E. 1108, in reference to special statutory provisions applicable to towns within counties having a population of over three hundred thousand.

Recorded deed as notice to assessor.— The record of a deed creating a separate estate in the minerals in unseated lands, by a reservation thereof, is not notice requiring the assessment of the surface and the minerals separately. Hutchinson *v.* Kline, 199 Pa. St. 564, 49 Atl. 312.

Where land is assessed as that of non-residents and is an entire tract, which has not been subdivided, a failure to describe a part of the tract not liable to taxation and to designate unoccupied parts, where part of it is occupied, are jurisdictional defects. People *v.* Golding, 55 Misc. (N. Y.) 425, 106 N. Y. Suppl. 821.

51. People *v.* Rains, 23 Cal. 127; Westhampton *v.* Searle, 127 Mass. 502.

(xi) *Abbreviations and Figures.* The description in an assessment list is not invalidated by the use of figures and abbreviations if they are such as are in familiar use and easily understood, and not misleading, and full enough to point out the particular land with certainty,[52] except that the name of the town or district should not be abbreviated.[53]

5. Extending Amount of Tax. To complete a valid assessment it is necessary that the amount of the tax on each listed item or parcel of property shall be computed and extended on the proper tax book or roll in accordance with the statutory provisions relative thereto, and until this is done no legal liability attaches,[54] except where the omission of this step or defects therein can be brought

Buildings on different parts of tract.—Where a tract of land lies partly within and partly without the limits of a city, both parts being improved, and the improvements on the whole tract are included in the assessment of that part which lies within the city, and there is no means of determining how they should be apportioned, the tax on the improvements is void. Coolidge *v.* Pierce County, 28 Wash. 95, 68 Pac. 391.

Assessment of improvements as personalty.—Where, after the assessment of a tract of land, a valuable mill is erected on it, and it is reported as an additional assessment to the tax collector, an assessment thereon is not void because the collector gave in the mill as personal property. Tunica County *v.* Tate, 78 Miss. 294, 29 So. 74.

52. Baird *v.* Monroe, 150 Cal. 560, 89 Pac. 352; Buck *v.* People, 78 Ill. 560; Olcott *v.* State, 10 Ill. 481; Watkins *v.* Couch, 134 Iowa 1, 111 N. W. 315; Jenkins *v.* McTigue, 22 Fed. 148.

Applications of rule.—The ordinary ditto marks, or the abbreviation "do" for "ditto," are permissible. Bandow *v.* Wolven, 20 S. D. 445, 107 N. W. 204; Hodgdon *v.* Burleigh, 4 Fed. 111. The description may designate the points of the compass by their ordinary abbreviations and their combinations, as "N," "W," or "NW," "SE," and the like. Law *v.* People, 80 Ill. 268; Jefferson County *v.* Johnson, 23 Kan. 717; Sibley *v.* Smith, 2 Mich. 486; Beggs *v.* Paine, 15 N. D. 436, 109 N. W. 322. So also the abbreviation "ex" for except, "a" for acres, and "cor" for corner may be employed in the description. State *v.* Vaile, 122 Mo. 33, 26 S. W. 672. And the abbreviation "excp't rip'n r'g't" has been held sufficiently certain to be used for the words "excepting riparian rights." Newaygo Portland Cement Co. *v.* Sheridan Tp., 137 Mich. 475, 100 N. W. 747.

Fractions may be indicated by their ordinary arithmetical abbreviations; but "NW4" or "W2" is not a sufficient method of writing "the northwest quarter" or "the west half." State Finance Co. *v.* Mulberger, 16 N. D. 214, 112 N. W. 986, 125 Am. St. Rep. 650; State Finance Co. *v.* Trimble, 16 N. D. 199, 112 N. W. 984; Power *v.* Bowdle, 3 N. D. 107, 54 N. W. 404, 44 Am. St. Rep. 511, 21 L. R. A. 328; Power *v.* Larabee, 2 N. D. 141, 49 N. W. 724. But *compare* Riddle *v.* Messer, 84 Ala. 236, 4 So. 185.

The term "east middle" of a given town lot is unintelligible in a tax assessment. State Finance Co. *v.* Mather, 15 N. D. 386, 109 N. W. 350.

53. Wing *v.* Minor, (Miss. 1890) 7 So. 347, holding that an assessment of "lot 7, block 5, O. S." does not authorize a tax-sale of lot 7, block 5, in Ocean Springs.

54. *Alabama.*—State *v.* Sloss, 87 Ala. 119, 6 So. 309.

Arizona.—Territory *v.* Yavapai County, 9 Ariz. 405, 84 Pac. 519.

Colorado.—Boston, etc., Smelting Co. *v.* Elder, 20 Colo. App. 90, 77 Pac. 258.

Florida.—Levy *v.* Ladd, 35 Fla. 391, 17 So. 635.

Illinois.—Cleveland, etc., R. Co. *v.* People, 223 Ill. 17, 79 N. E. 17; Law *v.* People, 87 Ill. 385; Davis *v.* Brace, 82 Ill. 542.

Iowa.—*In re* Seaman, 135 Iowa 543, 113 N. W. 354.

Kansas.—Moon *v.* March, 40 Kan. 58, 19 Pac. 334. But *compare* Walker *v.* Douglass, 2 Kan. App. 706, 43 Pac. 1143.

Michigan.—Seymour *v.* Peters, 67 Mich. 415, 35 N. W. 62.

Minnesota.—McCormick *v.* Fitch, 14 Minn. 252.

Missouri.—State *v.* St. Louis, etc., R. Co., 135 Mo. 77, 36 S. W. 211; State *v.* St. Louis, etc., R. Co., 117 Mo. 1, 22 S. W. 910.

New Hampshire.—Derry Nat. Bank *v.* Griffin, 68 N. H. 183, 34 Atl. 740.

New Jersey.—State *v.* Perkins, 24 N. J. L. 409.

New York.—Wilcox *v.* City, etc., Contract Co., 128 N. Y. App. Div. 227, 112 N. Y. Suppl. 532 [*affirmed* in 198 N. Y. 588, 92 N. E. 1084] (as to proper book); People *v.* Carmichael, 64 Misc. 271, 118 N. Y. Suppl. 354; People *v.* Golding, 55 Misc. 425, 106 N. Y. Suppl. 821 (holding that the failure of the supervisors to extend the taxes after preparation of the assessment roll is a jurisdictional defect).

Oregon.—See Waterhouse *v.* Clatsop County, 50 Oreg. 176, 91 Pac. 1083, holding that the extension of taxes on the assessment roll is a part of the process of collection and not of the assessment, apportionment, or levy.

Pennsylvania.—Greenough *v.* Fulton Coal Co., 74 Pa. St. 486. See also McDermott *v.* Hoffman, 70 Pa. St. 31.

Washington.—Lockwood *v.* Roys, 11 Wash. 697, 40 Pac. 346.

See 45 Cent. Dig. tit. "Taxation," § 736.

A library tax is properly extended as a part of the general tax of the city with

within the terms of a curative statute as a mere irregularity.[55] The same rule applies where the law requires the several amounts of distinct taxes levied on the same assessment to be separately set forth.[56] An error in computing and extending the amount of the tax will vitiate the assessment unless the amount of the excess is so trifling as to be negligible.[57] The duty of making this computation and entry is ordinarily a judicial duty of the proper board or officer and cannot be delegated to a third person,[58] except that it may be made up by one acting under the direction and supervision of the proper board or officer;[59] but the time of performing it is not regarded as very material, provided it is done before any attempt to enforce the tax.[60]

6. Authentication — a. Signature of Assessors. The statutes ordinarily require the assessment roll to be signed by the assessors, and a compliance with this provision is essential to the validity of further proceedings,[61] although under some statutes the assessor's signature to the oath or certificate attached to the

respect to which it is assessed. Chicago *v.* Cook County, 136 Ill. App. 120.

On what valuation the taxes are to be extended see People *v.* Chicago, etc., R. Co., 223 Ill. 300, 79 N. E. 22 (equalized valuation); *In re* Seaman, 135 Iowa 543, 113 N. W. 354 (actual value).

Correction of errors in the extension see State *v.* Johnson, 135 Wis. 192, 115 N. W. 801; State *v.* Florin, 135 Wis. 192, 115 N. W. 800; State *v.* Krumenauer, 135 Wis. 185, 115 N. W. 798.

Extending back taxes see Mecartney *v.* Morse, 137 Ill. 481, 24 N. E. 576, 26 N. E. 376; Gage *v.* People, (Ill. 1886) 8 N. E. 197; Swinney *v.* Beard, 71 Ill. 27.

55. See the statutes of the several states. And see Cairo, etc., R. Co. *v.* Mathews, 152 Ill. 153, 38 N. E. 623; Cornoy *v.* Wetmore, 92 Iowa 100, 60 N. W. 245; Milwaukee, etc., R. Co. *v.* Kossuth County, 41 Iowa 57; Sully *v.* Kuehl, 30 Iowa 275; Eldridge *v.* Kuehl, 27 Iowa 160; State *v.* Lounsberry, 125 Mo. 157, 28 S. W. 448.

56. Thatcher *v.* People, 79 Ill. 597; Thayer *v.* Stearns, 1 Pick. (Mass.) 482; Case *v.* Dean, 16 Mich. 12. See also Wall *v.* Trumbull, 16 Mich. 228.

57. *Illinois.*— Hammond *v.* Carter, 155 Ill. 579, 40 N. E. 1019; Thatcher *v.* People, 79 Ill. 597.

Massachusetts.— Libby *v.* Burnham, 15 Mass. 144.

Michigan.— Grand Rapids *v.* Welleman, 85 Mich. 234, 48 N. W. 534; Case *v.* Dean, 16 Mich. 12.

New York.— Colman *v.* Shattuck, 2 Hun 497, 5 Thomps. & C. 34 [*affirmed* in 62 N. Y. 348].

Wisconsin.— Kelley *v.* Corson, 8 Wis. 132.

See 45 Cent. Dig. tit. "Taxation, §§ 736, 739.

Estoppel of state.—Where the auditor-general computes, on the basis of reports made to him by a railroad company, the taxes imposed by law on the company's capital and property, but does not pass judgment on the correctness of the reports, the state is not estopped from enforcing payment of the correct amount. Lake Shore, etc., R. Co. *v.* People, 46 Mich. 193, 9 N. W. 249.

58. People *v.* Hagadorn, 104 N. Y. 516, 10 N. E. 891 (board of supervisors); Bellinger *v.* Gray, 51 N. Y. 610. But *compare* Reno County School Dist. No. 127 *v.* Reno County School Dist. No. 45, 80 Kan. 641, 103 Pac. 126, ministerial duty only.

What officer is to extend tax see Chiniquy *v.* People, 78 Ill. 570 (county clerk); Milwaukee, etc., R. Co. *v.* Kossuth County, 41 Iowa 57 (clerk of board of supervisors).

59. People *v.* Wemple, 139 N. Y. 240, 34 N. E. 883 [*reversing* 67 Hun 495, 22 N. Y. Suppl. 497]; Covington *v.* Rockingham, 93 N. C. 134.

60. Harwood *v.* Brownell, 48 Iowa 657; Utica First Nat. Bank *v.* Waters, 7 Fed. 152, 19 Blatchf. 242.

61. *Maine.*— Foxcroft *v.* Nevens, 4 Me. 72.

Michigan.— Lowe *v.* Detroit, 138 Mich. 541, 101 N. W. 810; Darmstaetter *v.* Moloney, 45 Mich. 621, 8 N. W. 574; Sibley *v.* Smith, 2 Mich. 486.

Missouri.— Howard *v.* Heck, 88 Mo. 456, sign and seal the assessor's book.

New Hampshire.— Gordon *v.* Rundlett, 28 N. H. 435 (signature by selectmen); Chase *v.* Sparhawk, 22 N. H. 134. See also Bailey *v.* Ackerman, 54 N. H. 527.

North Carolina.— Kelly *v.* Craig, 27 N. C. 129.

Vermont.— Bartlett *v.* Wilson, 59 Vt. 23, 8 Atl. 321; Smith *v.* Hard, 59 Vt. 13, 8 Atl. 317.

See 45 Cent. Dig. tit. "Taxation," § 745.

But *compare* Boyle *v.* West, 107 La. 347, 31 So. 794; Townsen *v.* Wilson, 9 Pa. St. 270.

Sufficiency of signature.—A tax deed will not be held void because the official title of the assessor was omitted after his signature to the oath as to the correctness of the assessment roll. Shoup *v.* Central Branch Union Pac. R. Co., 24 Kan. 547.

Requirement of seal to assessment roll see Shoup *v.* Central Branch Union Pac. R. Co., 24 Kan. 547; Linton *v.* Wanke, 118 N. Y. Suppl. 965 [*affirmed* in 133 N. Y. App. Div. 922, 117 N. Y. Suppl. 1139].

In an action to collect the taxes, it is probable that the proceedings would not be defeated by the mere failure of the assessor to sign the roll, although this would defeat a tax-sale. See Bath *v.* Whitmore, 79 Me. 182, 9 Atl. 119.

assessment roll is a sufficient signature.[62] If there are several assessors jointly concerned in the making of the roll, they must all sign it; it is not sufficiently authenticated by the signature of less than the whole number.[63] But it is immaterial on what part of the roll the names of the assessors appear, if they sign in such a manner as to show their intention to give it official sanction.[64]

b. Certificate or Verification[65] — (i) *NECESSITY.* The assessment roll or list is usually required to be authenticated by an affidavit or verified certificate made and attached thereto by the assessor or other officer engaged in its preparation in final form, attesting its genuineness and setting forth that he has duly performed his duty according to law in the making of it; and the omission of this step is commonly held to be fatal to the validity of any further proceedings founded on the roll or list,[66] although in some states it is now held that the provision of

62. Dickison *v.* Reynolds, 48 Mich. 158, 12 N. W. 24 (holding that a failure to sign the certificate is a fatal defect); Darmstaetter *v.* Moloney, 45 Mich. 621, 8 N. W. 574; Lacey *v.* Davis, 4 Mich. 140, 66 Am. Dec. 524 [*distinguishing* Sibley *v.* Smith, 2 Mich. 486]. See also Auditor-Gen. *v.* Griffin, 140 Mich. 427, 103 N. W. 854, holding that the fact that a certificate of equalization attached to the roll is not signed by the clerk of the board but by the chairman alone does not affect the taxpayers' obligation to pay the tax.

Where the assessor's clerk at his request writes the assessor's signature to the oath required to be appended to the tax roll, it is the assessor's signature and is as effective as if written by himself. Reed *v.* Cedar Rapids, 138 Iowa 366, 116 N. W. 140.

63. Middletown *v.* Berlin, 18 Conn. 189; Belfast Sav. Bank *v.* Kennebec Land, etc., Co. 73 Me. 404. And see Wells *v.* Austin, 59 Vt. 157, 10 Atl. 405.

One authorized to sign for all.— In the absence of any statutory provision, a selectman may properly sign the names of the other members of the board to a certificate of assessment, where he is authorized by them to do so. Bellows *v.* Weeks, 41 Vt. 590.

64. Johnson *v.* Goodridge, 15 Me. 29; Kane *v.* Brooklyn, 1 N. Y. Suppl. 306 [*affirmed* in 114 N. Y. 586, 21 N. E. 1053].

65. **Verification by taxpayer of list or statement of property** see *supra*, VI, C, 2, g.

66. *Dakota.*— Bode *v.* New England Inv. Co., 6 Dak. 499, 42 N. W. 658, 45 N. W. 197.

Florida.— Orlando *v.* Equitable Bldg., etc., Assoc., 45 Fla. 507, 33 So. 986.

Iowa.—Warfield-Pratt-Howell Co. *v.* Averill Grocery Co., 119 Iowa 75, 93 N. W. 80.

Michigan.— Newkirk *v.* Fisher, 72 Mich. 113, 40 N. W. 189; Dickison *v.* Reynolds, 48 Mich. 158, 12 N. W. 24. *Compare* Darmstaetter *v.* Moloney, 45 Mich. 621, 8 N. W. 574.

Missouri.— Burke *v.* Brown, 148 Mo. 309, 49 S. W. 1023; State *v.* Farmers', etc., Nat. Bank, 144 Mo. 381, 46 S. W. 148; State *v.* Phillips, 102 Mo. 664, 15 S. W. 319; Pike *v.* Martindale, 91 Mo. 268, 1 S. W. 858; State *v.* Schooley, 84 Mo. 447; State *v.* Cook, 82 Mo. 185. But see Taft *v.* McCullock, 135 Mo. 588, 37 S. W. 499, construing a statute requiring the copy of the assessor's book, made by the clerk of the county court and furnished to the collector, to be authenticated by the seal of the court, and holding that the omission of such authentication does not affect the validity of the taxes.

New York.— People *v.* Suffern, 68 N. Y. 321; Bellinger *v.* Gray, 51 N. Y. 610; O'Donnell *v.* McIntyre, 37 Hun 615 [*affirmed* in 116 N. Y. 663, 22 N. E. 1134]; People *v.* Golding, 55 Misc. 425, 106 N. Y. Suppl. 821; Raquette Falls Land Co. *v.* International Paper Co., 41 Misc. 357, 84 N. Y. Suppl. 836 [*affirmed* in 94 N. Y. App. Div. 609, 87 N. Y. Suppl. 1146 (*affirmed* in 181 N. Y. 540, 73 N. E. 1131)]. See Colman *v.* Shattuck, 2 Hun 497, 5 Thomps. & C. 34 [*affirmed* in 62 N. Y. 348].

North Carolina.— Kelly *v.* Craig, 27 N. C. 129.

North Dakota.— Grand Forks County *v.* Frederick, 16 N. D. 118, 112 N. W. 839, 125 Am. St. Rep. 621; Beggs *v.* Paine, 15 N. D. 436, 109 N. W. 322; Eaton *v.* Bennett, 10 N. D. 346, 87 N. W. 188. But *compare* Douglas *v.* Fargo, 13 N. D. 467, 101 N. W. 919, holding that while the omission to attach the assessor's affidavit to an assessment roll is an illegal act and renders the assessment void in an action at law, yet it will not invalidate the assessment, where there is no allegation that it was unjust, in a suit in equity to cancel the taxes levied thereon or a sale for non-payment of such taxes. And see State Finance Co. *v.* Mather, 15 N. D. 386, 109 N. W. 350.

Texas.— Taber *v.* State, 38 Tex. Civ. App. 235, 85 S. W. 835.

Vermont.— Bundy *v.* Wolcott, 59 Vt. 665, 10 Atl. 756; Walker *v.* Burlington, 56 Vt. 131; Rowe *v.* Hulett, 50 Vt. 637; Tunbridge *v.* Smith, 48 Vt. 648; Houghton *v.* Hall, 47 Vt. 333; Reed *v.* Chandler, 32 Vt. 285; Spear *v.* Tilson, 24 Vt. 420.

Wisconsin.— Power *v.* Kindschi, 58 Wis. 539, 17 N. W. 689, 43 Am. Rep. 652; Scheiber *v.* Kaehler, 49 Wis. 291, 5 N. W. 817; Marshall *v.* Benson, 48 Wis. 558, 4 N. W. 385, 762; Tierney *v.* Union Lumbering Co., 47 Wis. 248, 2 N. W. 289; Plumer *v.* Marathon Co., 46 Wis. 177, 50 N. W. 416; Marsh *v.* Clark County, 42 Wis. 502. *Compare* Fifield *v.* Marinette County, 62 Wis. 532, 22 N. W. 705 (holding that the mere failure of the assessor to verify the assessment roll, as required by law, does not necessarily render the taxes apportioned upon such assessment un-

the statute in this behalf is merely directory and a failure to comply with it a mere irregularity.[67]

(II) *Requisites and Sufficiency* — (A) *In General.* The verification of the assessment roll should be in the form and method prescribed by the statute, but if it contains all that is essential, a substantial compliance with the statute will be sufficient, and minute particularity is not required.[68] The date of the

equal or unjust); Hart *v.* Smith, 44 Wis. 213; Mitchell *v.* Pillsbury, 5 Wis. 407.

United States.— Lamb *v.* Farrell, 21 Fed. 5; Griggs *v.* St. Croix County, 20 Fed. 341.

See 45 Cent Dig. tit. "Taxation," §§ 741, 747.

Effect in equity.— However the omission of the statutory verification may affect the right to proceed further against the land itself, it does not necessarily invalidate the assessment in equity. In such a case, in a court of chancery, the assessment and the tax levy thereon are voidable only on condition that the party complaining shows that the omissions and defects in the tax proceedings have resulted in injustice to him, and pays or offers to pay the amount which, under a just assessment, would be required of him. Farrington *v.* New England Inv. Co., 1 N. D. 102, 45 N. W. 191; Wisconsin Cent. R. Co. *v.* Lincoln County, 67 Wis. 478, 30 N. W. 619; Fifield *v.* Marionette County, 62 Wis. 532, 22 N. W. 705. And see Ashley County Equalization Bd. *v.* Land Owners, 51 Ark. 516, 11 S. W. 822.

67. *Arizona.*—Wallapaimin, etc., Co. *v.* Territory, 9 Ariz. 373, 84 Pac. 85.

Colorado.— Duggan *v.* McCullough, 27 Colo. 43, 59 Pac. 743.

Kansas.— Krutz *v.* Chandler, 32 Kan. 659, 5 Pac. 170; Jefferson County *v.* Johnson, 23 Kan. 717.

Mississippi.— Chestnut *v.* Elliott, 61 Miss. 569.

Nebraska.— Spiech *v.* Tierney, 56 Nebr. 514, 76 N. W. 1090; Twinting *v.* Finlay, 55 Nebr. 152, 75 N. W. 548; Merriam *v.* Dovey, 25 Nebr. 618, 41 N. W. 550; McClure *v.* Warner, 16 Nebr. 447, 20 N. W. 387. Earlier decisions in this state were to the contrary. See McNish *v.* Perrine, 14 Nebr. 582, 16 N. W. 837; Lynam *v.* Anderson, 9 Nebr. 367, 2 N. W. 732; Morrill *v.* Taylor, 6 Nebr. 236.

Oregon.— Oregon R., etc., Co. *v.* Umatilla County, 47 Oreg. 198, 81 Pac. 352.

South Dakota.— Bandow *v.* Wolven, 20 S. D. 445, 107 N. W. 204; Avant *v.* Flynn, 2 S. D. 153, 49 N. W. 15.

See 45 Cent. Dig. tit. "Taxation," §§ 741, 747.

68 *California.*— People *v.* Min. Co., 39 Cal. 511.

Dakota.— Bode *v.* New England Inv. Co., 6 Dak. 499, 42 N. W. 658, 45 N. W. 197.

Kentucky.— Louisville Bridge Co. *v.* Louisville, 65 S. W. 814, 23 Ky. L. Rep. 1655.

Maine.— Bangor *v.* Lancey, 21 Me. 472.

Massachusetts.— Bradford *v.* Randall, 5 Pick. 496.

Missouri.— State *v.* Seahorn, 139 Mo. 582, 39 S. W. 809; Taft *v.* McCullock, 135 Mo. 588, 37 S. W. 499.

Nebraska.— Hallo *v.* Helmer, 12 Nebr. 87, 10 N. W. 568.

Nevada.— State *v.* Western Union Tel. Co., 4 Nev. 338.

New York.—Ward *v.* Brooklyn, 164 N. Y. 591, 58 N. E. 1093; Colman *v.* Shattuck, 62 N. Y. 348; Buffalo, etc., R. Co. *v.* Erie County, 48 N. Y. 93; Parish *v.* Golden, 35 N. Y. 462; Van Rensselaer *v.* Whitbeck, 7 N. Y. 517, Seld. Notes 27 [*reversing* 7 Barb. 133, 4 How. Pr. 381]; Cone *v.* Lauer, 131 N. Y. App. Div. 193, 115 N. Y. Suppl. 644; *In re* Adler, 76 N. Y. App. Div. 571, 78 N. Y. Suppl. 690 [*affirmed* in 174 N. Y. 287, 66 N. E. 929]; Ward *v.* Brooklyn, 32 N. Y. App. Div. 430, 53 N. Y. Suppl. 41 [*affirmed* in 164 N. Y. 591, 58 N. E. 1093]; Rome, etc., R. Co. *v.* Smith, 39 Hun 332 [*affirmed* in 101 N. Y. 684]; Chemung Nat. Bank *v.* Elmira, 6 Lans. 116 [*reversed* on other grounds in 53 N. Y. 49]; People *v.* Adams, 10 N. Y. Suppl. 295.

North Dakota.— Lee *v.* Crawford, 10 N. D. 482, 88 N. W. 97.

South Dakota.— Richardson *v.* Howard, 23 S. D. 86, 120 N. W. 768 (form of oath); Bandow *v.* Wolven, 20 S. D. 445, 107 N. W. 204.

Tennessee.— Harris *v.* State, 96 Tenn. 496, 34 S. W. 1017.

Vermont.— Smith *v.* Hard, 61 Vt. 469, 17 Atl. 481; Blodgett *v.* Holbrook, 39 Vt. 336.

Wisconsin.— Marshall *v.* Benson, 48 Wis. 558, 4 N. W. 385, 762.

See 45 Cent. Dig. tit. "Taxation," §§ 742, 748.

The certification must be in writing. State *v.* Thomson, 18 S. C. 538.

Certificate as to examination of property.— If the verification of an assessment roll omits the statement required by statute, that the assessors "have together personally examined, within the year past" each item of assessable property, it is invalid. Brevoort *v.* Brooklyn, 89 N. Y. 128. See also Kane *v.* Brooklyn, 114 N. Y. 586, 21 N. E. 1053 [*affirming* 1 N. Y. Suppl. 306].

Who may administer oath.— If the statute expressly designates the officer before whom the verification of the assessment roll shall be made, it is invalid if made before any other officer. Orlando *v.* Equitable Bldg., etc., Assoc., 45 Fla. 507, 33 So. 986; Lee *v.* Crawford, 10 N. D. 482, 88 N. W. 97; Potter *v.* Lewis, 73 Vt. 367, 51 Atl. 5; Meacham *v.* Newport, 70 Vt. 264, 40 Atl. 729.

Where premises are assessed for taxation as non-resident lands by description, a certificate showing whether the lands were subdivided or whether the assessors were unable to obtain information as to such subdivisions is essential to the validity of the assessment. Linton *v.* Wanke, 118 N. Y. Suppl. 965

certificate or verification is not generally important, and an error or informality therein will not vitiate the assessment,[69] unless it shows that the verification was made before it could legally be done, as, for instance, without waiting to make the changes and corrections resulting from appeals and review.[70]

(B) *Certificate as to Valuation.* Where the assessors are directed to state in their certificate or verification that the property mentioned in the assessment roll has been estimated at its "true cash value," or its "true and full value," or where any similar phrase is positively prescribed, it is a fatal defect if these words are omitted, and subsequent proceedings founded on the assessment are invalid;[71] but if the statute is substantially complied with in this respect, an immaterial variance or error made in good faith in the use of the required term or phrase will not vitiate the verification or certificate.[72]

c. Presumptions and Evidence as to Authentication. The regularity and validity of the certificate or verification to an assessment roll will be presumed until a fatal defect in it is pointed out by positive evidence.[73]

d. Conclusiveness of Certificate.[74] Assessors are estopped to deny the statements in their certificate or verification of the assessment roll, and their admissions or declarations are not admissible in contradiction of such statements.[75]

7. Completion, Return, and Filing — a. Return and Filing in General. When the assessment roll or list is completed, it is commonly provided that it shall be returned by the assessors into the office of the town or county clerk, or of the board of supervisors, or some other public office, and there placed on file, in order that it may be open to the inspection of the interested public and also to furnish official evidence for the warrants or other process to the collectors of taxes. This requirement is imperative, and there can be no valid proceedings for the

[*affirmed* in 133 N. Y. App. Div. 922, 117 N. Y. Suppl. 1139].

69. Dickison *v.* Reynolds, 48 Mich. 158, 12 N. W. 24; Yelverton *v.* Steele, 36 Mich. 62; State *v.* Hurt, 113 Mo. 90, 20 S. W. 879; People *v.* Jones, 106 N. Y. 330, 12 N. E. 711; McMahon *v.* Palmer, 102 N. Y. 176, 6 N. E. 400, 55 Am. Rep. 796; Wilmot *v.* Lathrop, 67 Vt. 671, 32 Atl. 861; Chandler *v.* Spear, 22 Vt. 388. See also Miller *v.* Kern County, 150 Cal. 797, 90 Pac. 119, holding that delay in verifying the assessment roll is immaterial where no injury resulted to the taxpayer and the verification was made before any attempt to enforce the tax. But *compare* Bartlett *v.* Wilson, 59 Vt. 23, 8 Atl. 321; Walker *v.* Burlington, 56 Vt. 131.

70. Westfall *v.* Preston, 49 N. Y. 349; Smith *v.* Mosher, 9 N. Y. Suppl. 786; Lee *v.* Crawford, 10 N. D. 482, 88 N. W. 97.

71. Paldi *v.* Paldi, 84 Mich. 346, 47 N. W. 510; Westbrook *v.* Miller, 64 Mich. 129, 30 N. W. 916; Daniels *v.* Watertown Tp., 55 Mich. 376, 21 N. W. 350; Gilchrist *v.* Dean, 55 Mich. 244, 21 N. W. 330; Sinclair *v.* Learned, 51 Mich. 335, 16 N. W. 672; Hurd *v.* Raymond, 50 Mich. 369, 15 N. W. 514; Dickison *v.* Reynolds, 48 Mich. 158, 12 N. W. 24; Silsbee *v.* Stockle, 44 Mich. 561, 7 N. W. 160, 367; Hogleskamp *v.* Weeks, 37 Mich. 422; Clark *v.* Crane, 5 Mich. 151, 71 Am. Dec. 776; Shattuck *v.* Bascom, 105 N. Y. 39, 12 N. E. 283; People *v.* Fowler, 55 N. Y. 252; Inman *v.* Coleman, 37 Hun (N. Y.) 170; Hinckley *v.* Cooper, 22 Hun (N. Y.) 253; Beach *v.* Hayes, 58 How. Pr. (N. Y.) 17; Brock *v.* Bruce, 58 Vt. 261, 2 Atl. 598; Scheiber *v.* Kaehler, 49 Wis. 291, 5 N. W. 817; Marshall *v.* Benson, 48 Wis. 558, 4 N. W. 385, 762; Wauwatosa *v.* Gunyon, 25 Wis. 271. But *compare* Moore *v.* Turner, 43 Ark. 243.

72. Blue Iron Min. Co. *v.* Negaunee, 105 Mich. 317, 63 N. W. 202; Fay *v.* Wood, 65 Mich. 390, 32 N. W. 614; Dickison *v.* Reynolds, 48 Mich. 158, 12 N. W. 24; McCallum *v.* Bethany Tp., 42 Mich. 457, 4 N. W. 164; Merriam *v.* Coffee, 16 Nebr. 450, 20 N. W. 389; Sherrill *v.* Hewitt, 13 N. Y. Suppl. 498; Marshall *v.* Benson, 48 Wis. 558, 4 N. W. 385, 762; Wauwatosa *v.* Gunyon, 25 Wis. 271. And see cases cited *supra*, note 71.

73. *Louisiana.*— Montgomery *v.* Marydale Land, etc., Co., 46 La. Ann. 403, 15 So. 63.

Michigan.— Hecock *v.* Van Dusen, 80 Mich. 359, 45 N. W. 343; Bird *v.* Perkins, 33 Mich. 28.

Nebraska.— Merriam *v.* Coffee, 16 Nebr. 450, 20 N. W. 389, genuineness of signature.

New York.— Colman *v.* Shattuck, 62 N. Y. 348, that oath was properly administered.

Vermont.— Blodgett *v.* Holbrook, 39 Vt. 336.

See 45 Cent. Dig. tit. "Taxation," § 751.

74. Operation and conclusiveness of tax rolls see *infra*, VI, E, 12.

75. Gamble *v.* East Saginaw, 43 Mich. 367, 5 N. W. 416; Brooklyn El. R. Co. *v.* Brooklyn, 11 N. Y. App. Div. 127, 42 N. Y. Suppl. 683 [*affirming* 16 Misc. 416, 38 N. Y. Suppl. 154]; Kings County El. R. Co. *v.* Brooklyn, 16 Misc. (N. Y.) 419, 38 N. Y. Suppl. 154; Marshall *v.* Benson, 48 Wis. 558, 4 N. W. 385, 762; Plumer *v.* Marathon County, 46 Wis. 163, 50 N. W. 416.

enforcement of the tax until the law has been duly and fully complied with in this particular.[76] As to the filing of the list or roll, the important thing is its physical presence in the proper office, and such irregularities as an omission to mark it "filed" or to note the date of its filing are generally disregarded.[77]

b. Effect of Delay in Returning. Where the law requires the assessment roll to be completed and filed on or before a certain day in the year, it is held in some states that this provision is mandatory and that a delay in making the return beyond the time limited will invalidate the assessment;[78] but in others, this provision is considered as directory only and a delay in filing as a mere irregularity not affecting the validity of the tax.[79] The better rule, however, appears to be

76. *Georgia.*— Georgia R., etc., Co. *v.* Wright, 124 Ga. 596, 53 S. E. 251.

Massachusetts.— Westhampton *v.* Searle, 127 Mass. 502; Sprague *v.* Bailey, 19 Pick. 436; Thayer *v.* Stearns, 1 Pick. 482; Blossom *v.* Cannon, 14 Mass. 177. But see Com. *v.* New England Slate, etc., Co., 13 Allen 391.

Michigan.— Grand Rapids *v.* Blakely, 40 Mich. 367, 29 Am. Rep. 539.

Mississippi.—Wolfe *v.* Brown, (1892) 11 So. 879. See also Brigins *v.* Chandler, 60 Miss. 862.

Missouri.— State *v.* Lounsberry, 125 Mo. 157, 28 S. W. 448.

New York.— People *v.* Burhans, 25 Hun 186; People *v.* Wells, 40 Misc. 555, 82 N. Y. Suppl. 875 [*affirmed* in 91 N. Y. App. Div. 44, 86 N. Y. Suppl. 456 (*affirmed* in 178 N. Y. 609, 70 N. E. 1107)]; People *v.* Sheppard, 33 Misc. 453, 68 N. Y. Suppl. 426, sufficiency of filing.

Pennsylvania.— Russel *v.* Werntz, 24 Pa. St. 337; Stevenson *v.* Deal, 2 Pars. Eq. Cas. 212.

Vermont.— Godfrey *v.* Bennington Water Co., 75 Vt. 350, 55 Atl. 654; Taylor *v.* Moore, 63 Vt. 60, 21 Atl. 919; Ayers *v.* Moulton, 51 Vt. 115; Howard *v.* Shumway, 13 Vt. 358.

United States.— Irwin *v.* Ontario, 3 Fed. 49, 18 Blatchf. 259; Overman *v.* Parker, 18 Fed. Cas. No. 10,623, Hempst. 692.

See 45 Cent. Dig. tit. "Taxation," § 755.

But *compare* Pittsfield *v.* Barnstead, 40 N. H. 477; Smith *v.* Bradley, 20 N. H. 117.

A written notice to a taxpayer, stating the amount of his assessment and the time and place when his objections to it will be heard, does not cure a defective compliance with the law requiring the assessment list to be filed in the town clerk's office. Bartlett *v.* Wilson, 59 Vt. 23, 8 Atl. 321.

Waiver of objections.—Irregularities in returning municipal taxes, and even an omission to return, are waived by pointing out property to be levied on under a tax execution, the issuance of which presupposes a return duly made. Athens Nat. Bank *v.* Danforth, 80 Ga. 55, 7 S. E. 546.

77. Joyner *v.* Harrison, 56 Ark. 276, 19 S. W. 920 (holding that the fact that an assessment roll cannot be found in the office where the law requires it to be filed does not prove that it was not regularly filed there); Moore *v.* Turner, 43 Ark. 243 (holding that an assessment will not be quashed because the date of filing the list does not appear); Mills *v.* Scott, 62 Miss. 525 (holding that the clerk's failure to mark the list filed does not invalidate it); Brock *v.* Bruce, 58 Vt. 261, 2 Atl. 598 (holding that it is not necessary for the clerk to minute the date of filing in his office, as such date may be shown by parol). But *compare* Bundy *v.* Wolcott, 59 Vt. 665, 10 Atl. 756, as to the necessity of noting the date of filing.

Acceptance by board of commissioners see Rayburn *v.* Kuhl, 10 Iowa 92.

78. *Connecticut.*— Thames Mfg. Co. *v.* Lathrop, 7 Conn. 550.

Illinois.— Billings *v.* Detten, 15 Ill. 218; Marsh *v.* Chestnut, 14 Ill. 223.

Mississippi.— Farnsworth Lumber Co. *v.* Fairley, (1900) 27 So. 836; Preston *v.* Banks, 71 Miss. 601, 14 So. 258; Carlisle *v.* Goode, 71 Miss. 453, 15 So. 119; Pearce *v.* Perkins, 70 Miss. 276, 12 So. 205; Osburn *v.* Hide, 68 Miss. 45, 8 So. 514; Fletcher *v.* Trewalla, 60 Miss. 968; Mitchum *v.* McInnis, 60 Miss. 945; Stovall *v.* Connor, 58 Miss. 138. But *compare* McGuire *v.* Union Inv. Co., 76 Miss. 868, 25 So. 367, under curative statute.

Vermont.— Grout *v.* Johnson, 73 Vt. 268, 50 Atl. 1059; Meacham *v.* Newport, 70 Vt. 264, 40 Atl. 729. But see Smith *v.* Blair, 67 Vt. 658, 32 Atl. 504.

United States.— Parker *v.* Overman, 18 How. 137, 15 L. ed. 318; Taylor *v.* Louisville, etc., R. Co., 88 Fed. 350, 31 C. C. A. 537.

See 45 Cent. Dig. tit. "Taxation," § 756.

Authority of board of supervisors to grant an extension of time for filing assessment roll see Bennett *v.* Maxwell, 82 Miss. 70, 34 So. 226; Herndon *v.* Mayfield, 79 Miss. 533, 31 So. 103.

79. *Colorado.*—Waddingham *v.* Dickson, 17 Colo. 223, 29 Pac. 177.

Illinois.— St. Louis Bridge Co. *v.* People, 128 Ill. 422, 21 N. E. 428; Eurigh *v.* People, 79 Ill. 214; Purrington *v.* People, 79 Ill. 11.

Maryland.— Carstairs *v.* Cochran, 95 Md. 488, 52 Atl. 601.

Nebraska.— Burlington, etc., R. Co. *v.* Saline County, 12 Nebr. 396, 11 N. W. 854.

Nevada.— State *v.* Northern Belle Mill, etc., Co., 15 Nev. 385; State *v.* Western Union Tel. Co., 4 Nev. 338.

New Hampshire.— Scammon *v.* Scammon, 28 N. H. 419.

New York.— People *v.* Haupt, 104 N. Y. 377, 10 N. E. 871; People *v.* Jones, 43 Hun 131 [*affirmed* in 106 N. Y. 330, 12 N. E. 711]; New York *v.* Watts, 40 Misc. 595, 83 N. Y. Suppl. 23. *Compare* New York *v.*

that a delay in returning the roll is important only when it deprives the individual taxpayer of his opportunity to examine into his own assessment and to take proper steps to have it reduced or corrected, or unreasonably shortens the time allowed him for this purpose.[80]

c. Evidence of Return. An assessment roll filed in the proper office will be presumed to have been filed in due time, in the absence of evidence to the contrary;[81] and if the fact is in dispute, it may be shown by the testimony of any person acquainted with the facts.[82]

d. Notice of Completion and Filing. When the law requires public notice to be given of the completion and filing of the assessment roll, in order that taxpayers may be informed of their opportunity to scrutinize their own assessments and present objections to them, the requirement is jurisdictional, and the taxes cannot be enforced if the notice is neglected.[83]

8. Duplicate Lists or Rolls — a. In General. A duplicate tax list or roll is to be placed in the hands of the tax collector, and, with or without a warrant according to the local s atute, constitutes his authority to demand and collect the taxes.[84] That it should be duly made and delivered in the manner required by statute is therefore essential to the further proceedings,[85] although the omission of it will not invalidate the assessment already made.[86] It should of course be an exact copy of the original list, but clerical errors may be disregarded,[87] and in case of discrepancies between the two the original will govern.[88] The duplicate should include all changes made by the board of equalization or review in the original assessment,[89] but no additions can be made for the first time in the duplicate.[90] The duplicate should also show distinctly the names of the persons assessed,[91] and the amount charged to each,[92] but need not contain an exact description of the real estate.[93] Nor is it necessary that it shall include copies of the affidavits or certificates made by the assessors and other officers.[94] It must

Smith, 61 N. Y. App. Div. 407, 70 N. Y. Suppl. 702.

Canada.— Reg. *v.* Snider, 23 U. C. C. P. 330; Nickle *v.* Douglas, 35 U. C. Q. B. 126.

See 45 Cent. Dig. tit. "Taxation," § 756.

80. Watson *v.* Campbell, 56 Ark. 184, 19 S. W. 668; Burlington Gas Light Co. *v.* Burlington, 101 Iowa 458, 70 N. W. 628; O'Neil *v.* Tyler, 3 N. D. 47, 53 N. W. 434; Whitlock *v.* Hawkins, 105 Va. 242, 53 S. E. 401.

81. Bettison *v.* Budd, 21 Ark. 578; Morgan *v.* Blewitt, 72 Miss. 903, 17 So. 601; Pearce *v.* Perkins, 70 Miss. 276, 12 So. 205; Grayson *v.* Richardson, 65 Miss. 222, 3 So. 579.

82. Wilmot *v.* Lathrop, 67 Vt. 671, 32 Atl. 861; Blodgett *v.* Holbrook, 39 Vt. 336.

83. Brunswick *v.* Finney, 54 Ga. 317; Wheeler *v.* Mills, 40 Barb. (N. Y.) 644; Oswego County *v.* Betts, 6 N. Y. Suppl. 934; Rhodes *v.* Buie, 13 N. C. 524; Yenda *v.* Wheeler, 9 Tex. 408. But *compare* People *v.* Moyer, 104 N. Y. 377, 10 N. E. 871.

A posting by a person other than the assessor of such notice is sufficient. Oswego County *v.* Betts, 6 N. Y. Suppl. 934.

Publication in newspaper see State *v.* Defiance County, 1 Ohio S. & C. Pl. Dec. 584, 32 Cinc. L. Bul. 88.

84. See *infra*, X, A, 4, d, e.

85. Scarry *v.* Lewis, 133 Ind. 96, 30 N. E. 411; State *v.* Weston, 29 Mont. 125, 74 Pac. 415; Conklin *v.* Cullen, 29 Mont. 38, 74 Pac. 72; Smith *v.* Stannard, 81 Vt. 319, 70 Atl. 568, abstract of list of property of recusant taxpayer.

Duplicate and warrant.— A statute requiring selectmen to make a list of all taxes assessed by them, under their hands, with a warrant under their hands and seals, does not require two instruments; a warrant may be a warrant and a list within the meaning of the statute. Bailey *v.* Ackerman, 54 N. H. 527.

86. State *v.* Neosho Bank, 120 Mo. 161, 25 S. W. 372; Conklin *v.* Cullen, 29 Mont. 38, 74 Pac. 72.

87. Midland R. Co. *v.* State, 11 Ind. App. 433, 38 N. E. 57.

88. Geren *v.* Gruber, 26 La. Ann. 694.

89. People *v.* Ashbury, 44 Cal. 616 (holding, however, that the auditor in making a duplicate must disregard an order of the reviewing board canceling an assessment, or any order of the board by which it assumes an authority not conferred upon it by law); Dakota L. & T. Co. *v.* Codington, 9 S. D. 159, 68 N. W. 314.

90. Higgins *v.* Ausmuss, 77 Mo. 351. See Henry *v.* Bell, 75 Mo. 194. But *compare* Wade *v.* Kimberley, 5 Ohio Cir. Ct. 33, 3 Ohio Cir. Dec. 18, statutory provision.

91. Clark *v.* Bragdon, 37 N. H. 562. See also Hannah *v.* Collins, 94 Ind. 201.

92. State *v.* Perkins, 24 N. J. L. 409. But see Moore *v.* Foote, 32 Miss. 469.

93. Charleston *v.* Lawry, 89 Me. 582, 36 Atl. 1103.

94. Boyce *v.* Sebring, 66 Mich. 210, 33 N. W. 815; Fells *v.* Barbour, 58 Mich. 49, 24 N. W. 672; Tweed *v.* Metcalf, 4 Mich. 579; Wheeler, etc., Mfg. Co. *v.* Ligon, 62 Miss.

be authenticated by the assessors or other proper officers in the manner prescribed by the statute,[95] and should be delivered punctually at the time appointed by law, although a delay is not material if the delivery is made before the taxes become due.[96]

b. Supplying Lost or Destroyed Rolls. The fact that the assessment list or duplicate has been lost, destroyed, or mutilated does not prevent the collector from proceeding to collect the taxes, but the list should be replaced from the best evidence obtainable.[97]

9. Errors and Omissions[98] — a. In General. An assessment roll or list is not rendered null and void by errors, omissions, or irregularities which do not affect the substantial justice of the tax itself, or which do not prejudice the individual taxpayer in the way of charging him with a greater tax than he is legally liable to pay,[99] nor will the assessment be vitiated by an error of judgment on the part of the assessors, when made in good faith and in the honest exercise of their judgment and discretion.[1] Neither will the assessment be void when it is lacking only in those features which can readily and certainly be supplied by computation from the data given.[2]

560; Bradley *v.* Ward, 58 N. Y. 401; Boyd *v.* Gray, 34 How. Pr. (N. Y.) 323.

95. Colby *v.* Russell, 3 Me. 227 (signature of assessors); St. Louis, etc., R. Co. *v.* Apperson, 97 Mo. 300, 10 S. W. 478 (authenticated by county clerk and seal of his office); Gordon *v.* Clifford, 28 N. H. 402 (signature of selectmen).

Signing the warrant attached to the assessment list or roll is a sufficient compliance with the statute requiring the list to be signed. Bangor *v.* Lancey, 21 Me. 472; Thompson *v.* Currier, 24 N. H. 237; Kane *v.* Brooklyn, 114 N. Y. 586, 21 N. E. 1053. But see Foxcroft *v.* Nevens, 4 Me. 72.

Requirement of verification see State *v.* Weston, 29 Mont. 125, 74 Pac. 415; Howell *v.* Metz, 31 N. J. L. 365, holding, however, that an assessment is not rendered invalid by the omission of the assessor to annex to his duplicate an oath or affirmation that the assessments have been made according to the requirements of law.

A defective certificate to a copy of an assessment roll does not vitiate the assessment. Wheeler, etc., Mfg. Co. *v.* Ligon, 62 Miss. 560.

96. Henderson *v.* Hughes County, 13 S. D. 576, 83 N. W. 682.

97. Thomas *v.* Chicago, 152 Ill. 292, 38 N. E. 923; State *v.* Schooley, 84 Mo. 447.

98. **Assessment of omitted property by reviewing board or officer** see *infra*, VII, B, 5. b.

Liability of assessor for omission or refusal to assess see *supra*, VI, B, 4, e.

Omissions of taxable property see *supra*, VI, C, 8.

99. *California.*— O'Grady *v.* Barnhisel, 23 Cal. 287.

Illinois.— Beers *v.* People, 83 Ill. 488.

Indiana.— Reynolds *v.* Bowen, 138 Ind. 434, 36 N. E. 756, 37 N. E. 962.

Iowa.— Robbins *v.* Magoun, 101 Iowa 580, 70 N. W. 700.

Maine.— Foss *v.* Whitehouse, 94 Me. 491, 48 Atl. 109; Dover *v.* Maine Water Co., 90 Me. 180, 38 Atl. 101.

Massachusetts.— Sprague *v.* Bailey, 19 Pick. 436.

Missouri.— State *v.* Brown Tobacco Co., 140 Mo. 218, 41 S. W. 776.

Nebraska.— Chamberlain Banking House *v.* Woolsey, 60 Nebr. 516, 83 N. W. 729; Otoe County *v.* Brown, 16 Nebr. 394, 398, 20 N. W. 274, 641.

New Jersey.—Perkins *v.* Bishop, 34 N. J. L. 45.

New York.— People *v.* Sayles, 32 N. Y. App. Div. 203, 53 N. Y. Suppl. 65 [*affirmed* in 157 N. Y. 679, 51 N. E. 1092].

Texas.— Haynes *v.* State, 44 Tex. Civ. App. 492, 99 S. W. 405.

Vermont.— Spear *v.* Braintree, 24 Vt. 414; Chandler *v.* Spear, 22 Vt. 388.

See 45 Cent. Dig. tit. "Taxation," §§ 680, 681.

It is the duty of a taxpayer to see that his property is properly listed and assessed, and, if there are clerical errors, to have them corrected; and failing in this, he should not be allowed to remain quiet and then seek to escape payment of his share of the taxes by relying on some defect that has worked him no prejudice. Jenkins *v.* McTigue, 22 Fed. 148.

Erroneous and illegal assessments distinguished.— An assessment of taxes is "illegal" when the officers who make it have no jurisdiction in the premises, but "erroneous" when they have power to act but err in the exercise of that power. Covington *v.* Voskotter, 80 Ky. 219; Chemung Nat. Bank *v.* Elmira, 53 N. Y. 49 [*quoted* in Ford *v.* McGregor, 20 Nev. 446, 450, 23 Pac. 508]; People *v.* Molloy, 35 N. Y. App. Div. 136, 54 N. Y. Suppl. 1084 [*affirmed* in 161 N. Y. 621, 55 N. E. 1099]; Matter of Eckerson, 25 Misc. (N. Y.) 645, 56 N. Y. Suppl. 373 [*affirmed* in 41 N. Y. App. Div. 631, 59 N. Y. Suppl. 1116].

1. Tampa *v.* Kaunitz, 39 Fla. 683, 23 So. 416, 63 Am. St. Rep. 202; Coleman *v.* Anderson, 10 Mass. 105; Shuttuck *v.* Smith, 6 N. D. 56, 69 N. W. 5; Wilson *v.* Wheeler, 55 Vt. 446; Henry *v.* Chester, 15 Vt. 460.

2. Griffin *v.* Tuttle, 74 Iowa 219, 37 N. W. 167; Willard *v.* Pike, 59 Vt. 202, 9 Atl. 907.

b. Omission of Dollar Mark. Some of the decisions hold that if the amount of the tax on a specific item or piece of property is attempted to be expressed in figures only, without a dollar mark or any other sign explicitly indicating the denominations of money intended to be indicated by the numerals, it is insufficient and vitiates the assessment.[3] But the weight of authority is to the effect that this omission does not render the assessment void where the figures are arranged in the ruled columns familiar to bookkeepers, or where the dollar sign is placed at the head or bottom of the column, or generally where the entries are so made that a reasonably intelligent man, exercising his common sense, would not be deceived or misled by the mere omission of the dollar mark.[4]

c. Amendment by Assessors[5] — (i) *In General.* After the completion and return of an assessment roll, the assessor has no further control over it and has no authority to alter or amend it,[6] except as concerns the correction of mere informalities or clerical errors,[7] and except as to making the changes ordered by

3. Emeric *v.* Alvarado, 90 Cal. 444, 27 Pac. 356; People *v.* Hastings, 34 Cal. 571; People *v.* San Francisco Sav. Union, 31 Cal. 132; Braly *v.* Seaman, 30 Cal. 610; Thompson *v.* Evans, 2 Tenn. Ch. App. 61; Barnes *v.* Brown, 1 Tenn. Ch. App. 726; Anderson *v.* Post, (Tenn. Ch. App. 1896) 38 S. W. 283; Tilton *v.* Oregon Cent. Military Road Co., 23 Fed. Cas. No. 14,055, 3 Sawy. 22.

4. *California.*— Swamp Land Reclamation Dist. No. 407 *v.* Wilcox, 75 Cal. 443, 17 Pac. 241; People *v.* Empire Gold, etc., Min. Co., 33 Cal. 171. *Compare* cases cited *supra*, note 3.

Florida.— Reid *v.* Southern Dev. Co., 52 Fla. 595, 42 So. 206.

Idaho.— People *v.* Owyhee Lumber Co., 1 Ida. 420.

Illinois.— Elston *v.* Kennicott, 46 Ill. 187; Chickering *v.* Faile, 38 Ill. 342; Hill *v.* Figley, 25 Ill. 156.

Indiana.— Midland R. Co. *v.* State, 11 Ind. App. 433, 38 N. E. 57.

Louisiana.— New Orleans *v.* Day, 29 La. Ann. 416.

Michigan.— St. Joseph First Nat. Bank *v.* St. Joseph Tp., 46 Mich. 526, 9 N. W. 838; Bird *v.* Perkins, 33 Mich. 28.

Minnesota.— Salisbury *v.* Stenmoe, 96 Minn. 467, 105 N. W. 416.

Montana.— Ward *v.* Gallatin County, 12 Mont. 23, 29 Pac. 658.

Nebraska.— Lynam *v.* Anderson, 9 Nebr. 367, 2 N. W. 732.

Nevada.— State *v.* Sadler, 21 Nev. 13, 23 Pac. 799; State *v.* Eureka Consol. Min. Co., 8 Nev. 15.

New Hampshire.— Sawyer *v.* Gleason, 59 N. H. 140; Cahoon *v.* Coe, 52 N. H. 518.

New York.— Ensign *v.* Barse, 107 N. Y. 329, 14 N. E. 400, 15 N. E. 401; Chamberlain *v.* Taylor, 36 Hun 24. But see Matter of Church of Holy Sepulchre, 61 How. Pr. 315.

Rhode Island.— Hopkins *v.* Young, 15 R. I. 48, 22 Atl. 926.

Washington.— Spokane Falls *v.* Browne, 3 Wash. 84, 27 Pac. 1077.

United States.— Jenkins *v.* McTigue, 22 Fed. 148.

See 45 Cent. Dig. tit. "Taxation," § 767.

5. **Amendment or additional assessment while roll is in the hands of the assessor** see *supra*, VI, C, 9.

6. *California.*— Johnson *v.* Malloy, 74 Cal. 430, 16 Pac. 228.

Illinois.— Illinois Southern R. Co. *v.* People, 215 Ill. 123, 74 N. E. 97.

Indiana.— Cleveland, etc., R. Co. *v.* Ensley, 44 Ind. App. 538, 89 N. E. 607, after taxes have been paid.

Kansas.—Gibbins *v.* Adamson, 44 Kan. 203, 24 Pac. 51, without notice to owner.

Nevada.— State *v.* Manhattan Silver Min. Co., 4 Nev. 318

New York.— People *v.* Forrest, 96 N. Y. 544 (except upon complaint of the party aggrieved); Overing *v.* Foote, 65 N. Y. 263; Binghamton Trust Co. *v.* Binghamton, 72 N. Y. App. Div. 341, 76 N. Y. Suppl. 517; People *v.* Westchester County, 15 Barb. 607.

Tennessee.—Anderson *v.* Post, (Ch. App. 1896) 38 S. W. 283.

Vermont.— Downing *v.* Roberts, 21 Vt. 441.

Washington.— Lewis *v.* Bishop, 19 Wash. 312, 53 Pac. 165.

United States.—Brettaugh *v.* Locust Mountain Coal, etc., Co., 4 Fed. Cas. No. 1,846.

See 45 Cent. Dig. tit. "Taxation," § 768.

Changing name of deceased owner.—Where an owner of property dies after the completion of the assessment roll, assessors have authority to substitute for his name on the roll that of his succession. Lane *v.* March, 33 La. Ann. 554.

In Canada an indictment will not lie for forging or altering an assessment roll for a township deposited with the clerk. Reg. *v.* Preston, 21 U. C. Q. B. 86.

7. *California.*— San Luis Obispo County *v.* White, 91 Cal. 432, 24 Pac. 864, 27 Pac. 756.

Colorado.— Haley *v.* Elliott, 20 Colo. 379, 38 Pac. 771.

Illinois.— Illinois Southern R. Co. *v.* People, 215 Ill. 123, 74 N. E. 97.

Iowa.— Smith *v.* McQuiston, 108 Iowa 363, 79 N. W. 130.

Maine.— Eliot *v.* Prime, 98 Me. 48, 56 Atl. 207.

New York.— People *v.* Jones, 43 Hun 131 [*affirmed* in 106 N. Y. 330, 12 N. E. 711].

the board of equalization.[8] But unauthorized changes made by the assessors will not necessarily vitiate the whole assessment roll; it may stand good as made and returned by them originally.[9]

(II) *Adding Omitted Persons or Property.*[10] Unless specially authorized by statute, assessors have no power to add to their completed assessment roll any names not already included or any items of property omitted.[11]

d. Curative Statutes. Statutes have been enacted in many states legalizing and confirming particular levies of taxes, or providing that assessments of taxes in general shall not be held void on account of any errors, irregularities, informalities, or omissions not affecting the substantial justice of the tax itself.[12] But the legislature cannot cure jurisdictional defects. The entire want of any assessment, such imperfections in the assessment as prevent the taxpayer from discovering upon what property he is taxed and for how much, a failure to give him notice and an opportunity to object, and, generally, any defects or omissions which strip the assessors of their jurisdiction, or deprive their proceedings of the necessary character of "due process of law," are beyond the reach of a curative statute.[13]

Ohio.— Lewis *v.* State, 59 Ohio St. 37, 51 N. E. 440; Black *v.* Hagerty, 16 Ohio Cir. Ct. 255, 9 Ohio Cir. Dec. 93.

8. Henry *v.* Sargeant, 13 N. H. 321, 40 Am. Dec. 146.

9. Lahman *v.* Hatch, 124 Cal. 1, 56 Pac. 621; State *v.* Manhattan Silver Min. Co., 4 Nev. 318; Quimby *v.* Wood, 19 R. I. 571, 35 Atl. 149; Willard *v.* Pike, 59 Vt. 202, 9 Atl. 907; Bellows *v.* Weeks, 41 Vt. 590; Downing *v.* Roberts, 21 Vt. 441.

10. Additions by assessor to list of property by taxpayer see *supra*, VI, C, 2, i.

11. Three Rivers *v.* Smith, 99 Mich. 507, 58 N. W. 481; Overing *v.* Foote, 65 N. Y. 263; Clark *v.* Norton, 49 N. Y. 243; Burger *v.* Farrell, 50 Misc. (N. Y.) 497, 100 N. Y. Suppl. 638; Sullivan *v.* Peckham, 16 R. I. 525, 17 Atl. 997. But *compare* Farmers', etc., Bank *v.* Vandalia, 57 Ill. App. 681.

12. *California.*— Lahman *v.* Hatch, 124 Cal. 1, 56 Pac. 621.

Florida.— Orlando *v.* Giles, 51 Fla. 644, 40 So. 840.

Illinois.— Hill *v.* Figley, 25 Ill. 156, omission of words or signs to indicate dollars and cents.

Michigan.— Newaygo Portland Cement Co. *v.* Sheridan Tp., 137 Mich. 475, 100 N. W. 747; Ludington *v.* Escanaba, 115 Mich. 288, 73 N. W. 368.

Mississippi.— Cochran *v.* Baker, 60 Miss. 282.

Missouri.— State *v.* Phillips, 137 Mo. 259, 38 S. W. 931; State *v.* Neosho Bank, 120 Mo. 161, 25 S. W. 372, return of original assessor's book instead of copy thereof.

New Hampshire.— Mowry *v.* Blandin, 64 N. H. 3, 4 Atl. 382.

New Jersey.— Dodge *v.* Love, 49 N. J. L. 235, 9 Atl. 744 [*affirming* 47 N. J. L. 436, 2 Atl. 810]; Hetfield *v.* Plainfield, 46 N. J. L. 119.

New York.— Ensign *v.* Barse, 107 N. Y. 329, 14 N. E. 400, 15 N. E. 401; Matter of Lamb, 51 Hun 633, 4 N. Y. Suppl. 858 (omission of affidavit); Kent *v.* Warner, 47 Hun 474 (oath before wrong officer); Haight *v.* New York, 32 Hun 153 [*affirmed* in 99 N. Y. 280, 1 N. E. 883]; *In re* East Ave. Baptist Church, 11 N. Y. Suppl. 113.

Pennsylvania.— Lehigh, etc., Coal Co. *v.* Close, 2 Walk. 140.

Vermont.— Grout *v.* Johnson, 73 Vt. 268, 50 Atl. 1059; Smith *v.* Hard, 61 Vt. 469, 17 Atl. 481, 59 Vt. 13, 8 Atl. 317.

United States.— Williams *v.* Albany County, 122 U. S. 154, 7 S. Ct. 1244, 30 L. ed. 1088; Hartley *v.* Boynton, 17 Fed. 873, 5 McCrary 453.

See 45 Cent. Dig. tit. "Taxation," §§ 770, 771.

13. *California.*— People *v.* San Francisco Sav. Union, 31 Cal. 132 (want of valuation); People *v.* Sneath, 28 Cal. 612 (fictitious description).

Illinois.— Illinois Southern R. Co. *v.* People, 215 Ill. 123, 74 N. E. 97; Billings *v.* Detten, 15 Ill. 218, failure to make return in designated time.

Louisiana.— Augusti *v.* Lawless, 45 La. Ann. 1370, 14 So. 228, insufficient description.

Maine.— Emery *v.* Sanford, 92 Me. 525, 43 Atl. 116.

Mississippi.— Bowman *v.* Roe, 62 Miss. 513; Fanning *v.* Funches, 60 Miss. 541, both illegal meetings by board of supervisors.

Missouri.— State *v.* Keosho Bank, 120 Mo. 161, 25 S. W. 372.

New Hampshire.— Mowry *v.* Blandin, 64 N. H. 3, 4 Atl. 882, unauthorized assessment.

New Jersey.— Peckham *v.* Newark, 43 N. J. L. 576, proceedings under unconstitutional statute.

New York.— People *v.* Wemple, 117 N. Y. 77, 22 N. E. 761; Rowley *v.* Poughkeepsie, 106 N. Y. App. Div. 258, 94 N. Y. Suppl. 454; Sanders *v.* Saxton, 89 N. Y. App. Div. 421, 73 N. Y. Suppl. 1095, 85 N. Y. Suppl. 762; Cromwell *v.* Wilson, 52 Hun 614, 5 N. Y. Suppl. 474; Sanders *v.* Saxton, 36 Misc. 574, 73 N. Y. Suppl. 1095 [*affirmed* in 89 N. Y. App. Div. 421, 85 N. Y. Suppl. 762 (*reversed* on other grounds in 182 N. Y. 477, 75 N. E. 529, 108 Am. St. Rep. 826, 1 L. R. A. N. S. 727)].

North Dakota.— Grand Forks County *v.*

Furthermore, laws of this character will not be construed retrospectively unless their language plainly requires it.[14]

10. Effect of Invalidity. If an assessment of taxes is illegal and void, no action will lie for the recovery of the taxes,[15] and no valid sale of the property can be made for their non-payment,[16] although the tax need not be lost if a reassessment can be made.[17] If the assessment is valid in part and void in part, the whole assessment will not be invalidated if the legal and illegal portions can be separated clearly and certainly.[18]

11. Presumption of Validity and Correctness.[19] In support of an assessment of taxes it will be presumed that it is valid, regular, and correct, and that various officers charged with the making of the assessment all performed their duties in good faith and at the proper time and in conformity with the statutes, and that their various acts were legal and proper; and this presumption will stand until overcome by satisfactory evidence to the contrary.[20]

Frederick, 16 N. D. 118, 112 N. W. 839, 125 Am. St. Rep. 621; State Finance Co. *v.* Bowdle, 16 N. D. 193, 112 N. W. 76.

Oregon.— Martin *v.* White, 53 Oreg. 319, 100 Pac. 290, incorrect description of land to one not the owner.

Pennsylvania.— McReynolds *v.* Longenberger, 75 Pa. St. 13, want of any assessment.

Vermont.— Tunbridge *v.* Smith, 48 Vt. 648.

West Virginia.— Toothman *v.* Courtney, 62 W. Va. 167, 58 S. E. 945, entry in land book of undivided interest in land.

United States.— Virginia Nat. Bank *v.* Richmond, 42 Fed. 877, illegal and void assessment.

Canada.— Ryan *v.* Whelan, 6 Manitoba 565 [*affirmed* in 20 Can. Sup. Ct. 65].

See 45 Cent. Dig. tit. "Taxation," §§ 770, 771.

14. Gage *v.* Nichols, 135 Ill. 128, 25 N. E. 672; Daniells *v.* Watertown Tp., 61 Mich. 514, 28 N. W. 673; Carlisle *v.* Goode, 71 Miss. 453, 15 So. 119.

15. Wattles *v.* Lapeer, 40 Mich. 624; State *v.* Vicksburg Bank, 69 Miss. 99, 10 So. 102; State *v.* Adler, 68 Miss. 487, 9 So. 645. But see Shaw *v.* Orr, 30 Iowa 355; Pfeiffer *v.* Miles, 48 N. J. L. 450, 4 Atl. 429.

Effect of acquiescence.— Mere knowledge on the part of the owner of property that an alleged assessment thereof for taxes is void does not vitalize the assessment. Hughey *v.* Winborne, 44 Fla. 601, 33 So. 249. But if he acquiesces in the assessment and pays the taxes, he will not afterward be heard to complain. Wattles *v.* Lapeer, 40 Mich. 624.

16. Jackson *v.* Rowe, 106 N. Y. App. Div. 65, 94 N. Y. Suppl. 568 [*affirmed* in 191 N. Y. 512, 84 N. E. 1114]; Beggs *v.* Paine, 15 N. D. 436, 109 N. W. 322; Yenda *v.* Wheeler, 9 Tex. 408.

Trespass.—Where officers of a municipality make out tax bills on assessments which are illegal and void, and cause a warrant to be issued thereon, they are responsible in trespass to those whose property is taken thereunder. Thames Mfg. Co. *v.* Lathrop, 7 Conn. 550. And see *supra*, VI, B, 4.

17. Libby *v.* Burnham, 15 Mass. 144.

As to reassessments generally see *supra*, VI, C, 9, b.

18. *District of Columbia.*—Alexandria Canal, etc., Co. *v.* District of Columbia, 5 Mackey 376.

Florida.— Tampa *v.* Mugge, 40 Fla. 326, 24 So. 489.

Indiana.— Hart *v.* Smith, 159 Ind. 182, 64 N. E. 661, 95 Am. St. Rep. 280, 58 L. R. A. 949.

Michigan.—Auditor-Gen. *v.* Hughitt, 132 Mich. 311, 93 N. W. 621.

Nebraska.— Grant *v.* Bartholomew, 57 Nebr. 673, 78 N. W. 314.

New Jersey.— State *v.* Camden Tax Assessment Com'rs, (Sup. 1901) 48 Atl. 538.

New Mexico.— U. S. Trust Co. *v.* Territory, 10 N. M. 416, 62 Pac. 987.

New York.— Foster *v.* Van Wyck, 2 Abb. Dec. 167, 3 Transcr. App. 196, 4 Abb. Pr. N. S. 469, 41 How. Pr. 493.

Rhode Island.—Mowry *v.* Slatersville Mills, 20 R. I. 94, 37 Atl. 538.

Texas.— State *v.* Fulmore, (Civ. App. 1902) 71 S. W. 418.

Vermont.— Meacham *v.* Newport, 70 Vt. 264, 40 Atl. 729.

United States.— Santa Clara County *v.* Southern Pac. R. Co., 118 U. S. 394, 6 S. Ct. 1132, 30 L. ed. 118; Youngstown Bridge Co. *v.* Kentucky, etc., Bridge Co., 64 Fed. 441.

See 45 Cent. Dig. tit. "Taxation," § 773.

Effect of partial illegality of levy see *supra*, VI, A, 8, b.

19. Presumptions as to authentication see *supra*, VI, E, 6, c.

20. *Alabama.*—Walling *v.* Morgan County, 126 Ala. 326, 28 So. 433.

California.— Hewes *v.* McLellan, 80 Cal. 393, 22 Pac. 287 (as to ownership); Palmer *v.* Boling, 8 Cal. 384 (that assessment was made at proper time); California Domestic Water Co. *v.* Los Angeles County, 10 Cal. App. 185, 101 Pac. 547 (that assessor listed property under proper head in an assessment book with proper headings).

Illinois.— Cairo, etc., R. Co. *v.* Mathews, 152 Ill. 153, 38 N. E. 623; Jackson *v.* Cummings, 15 Ill. 449, that name of owner was unknown.

Indiana.—Adams *v.* Davis, 109 Ind. 10, 9 N. E. 162 (that county auditor made duplicate under statutory authority); Hazzard *v.* Heacock, 39 Ind. 172.

12. Operation and Conclusiveness[21]— **a. Operation and Effect.** An assessment roll or list is *prima facie* and sufficient evidence, in the absence of countervailing proof, of the due levy and assessment of the taxes charged upon it.[22] But it is not evidence of title to the property as between the person to whom it is assessed and a stranger,[23] and is not such a public record as imparts constructive notice;[24] and the tax book in the hands of the tax collector, prior to the time the tax becomes delinquent, does not have the force of a judgment and execution against the taxpayer, although it does have such effect after such delinquency.[25] The language employed in the descriptions of property and in other parts of the roll or list must be interpreted reasonably and with due regard to the con-

Iowa.— Burdick *v.* Connell, 69 Iowa 458, 29 N. W. 416; Silcott *v.* McCarty, 62 Iowa 161, 17 N. W. 460 (at proper time); Beeson *v.* Johns, 59 Iowa 166, 13 N. W. 97; Corning Town Co. *v.* Davis, 44 Iowa 622 (that name of owner was unknown).

Louisiana.—Corkran Oil, etc., Co. *v.* Arnaudet, 111 La. 563, 35 So. 747; Merchants' Mut. Ins. Co. *v.* Bd. of Assessors, 40 La. Ann. 371, 3 So. 891; State *v.* Louisiana Sav. Bank, etc., Co., 32 La. Ann. 1136 (valuation); Shields *v.* Pipes, 31 La. Ann. 765; New Orleans *v.* New Orleans Canal, etc., Co., 29 La. Ann. 851 (valuation).

Massachusetts.— Blossom *v.* Cannon, 14 Mass. 177.

Michigan.—Redding *v.* Lamb, 81 Mich. 318, 45 N. W. 997; Mills *v.* Richland Tp., 72 Mich. 100, 40 N. W. 183 (valuation); Hood *v.* Judkins, 61 Mich. 575, 28 N. W. 689; Perkins *v.* Nugent, 45 Mich. 156, 7 N. W. 757; Hunt *v.* Chapin, 42 Mich. 24, 3 N. W. 873; Wright *v.* Dunham, 13 Mich. 414.

Minnesota.— Thompson *v.* Tinkcom, 15 Minn. 295; St. Peter's Church *v.* Scott County, 12 Minn. 395.

Missouri.— State *v.* Neosho Bank, 120 Mo. 161, 25 S. W. 372, as to name in which business is conducted.

New Hampshire.— Smith *v.* Masser, 17 N. H. 420 (that names of owners were unknown); Perry *v.* Buss, 15 N. H. 222; Blake *v.* Sturtevant, 12 N. H. 567.

New Jersey.— State *v.* Pierson, 47 N. J. L. 247, that assessors acted according to the best of their information and belief.

New York.— Colman *v.* Shattuck, 62 N. Y. 348; Matter of Peek, 80 Hun 122, 30 N. Y. Suppl. 59; People *v.* Adams, 56 Hun 645, 10 N. Y. Suppl. 295; People *v.* Chapin, 38 Hun 272 (that there were no defects in a lost original assessment roll); Chamberlain *v.* Taylor, 36 Hun 24; Johnson *v.* Learn, 30 Barb. 616 (jurisdiction to make assessment); Matter of Farmers' Nat. Bank, 1 Thomps. & C. 383 (valuation); Matter of Murphy, 9 Misc. 647, 30 N. Y. Suppl. 511 (that assessed only such property as was not exempt); People *v.* McComber, 7 N. Y. Suppl. 71.

Oregon.— See Martin *v.* White, 53 Oreg. 319, 100 Pac. 290, holding that it cannot be presumed that property is situated in the county, so as to give the assessor jurisdiction, because it is on his assessment roll, as his description thereof should show his jurisdiction.

Pennsylvania.— Com. *v.* Runk, 26 Pa. St. 235; Von Storch *v.* Scranton City, 3 Pa. Co. Ct. 567.

Tennessee.—Louisville, etc., R. Co. *v.* State, 8 Heisk. 663.

Texas.— Clark *v.* Elmendorf, (Civ. App. 1904) 78 S. W. 538.

Vermont.—Adams *v.* Sleeper, 64 Vt. 544, 24 Atl. 990 (that taxpayer's inventory was placed on the list as it was returned); Brock *v.* Bruce, 58 Vt. 261, 2 Atl. 598 (that listers acted in good faith); Macomber *v.* Center, 44 Vt. 235.

Wisconsin.— Green Bay, etc., Canal Co. *v.* Outagamie County, 76 Wis. 587, 45 N. W. 566, that omitted property was exempt from taxation.

Canada.— McDonell *v.* McDonald, 24 U. C. Q. B. 74.

See 45 Cent. Dig. tit. "Taxation," § 774. See also *supra*, VI, E, 7, c.

21. **Conclusiveness and effect of:** Certificate or affidavit to tax roll see *supra*, VI, E, 6, d. List of property by taxpayer in general see *supra*, VI, C, 2, h. Report or statement by corporation see *supra*, VI, D, 2, e.

22. *California.*— San Gabriel Valley Land, etc., Co. *v.* Witmer Bros. Co., 96 Cal. 623, 29 Pac. 500, 31 Pac. 588, 18 L. R. A. 465, 470.

Michigan.—Wattles *v.* Lapeer, 40 Mich. 624.

Minnesota.— *In re* Jefferson, 35 Minn. 215, 28 N. W. 256.

Texas.— Homes *v.* Henrietta, (Civ. App. 1897) 41 S. W. 728; Earle *v.* Henrietta, (Civ. App. 1897) 41 S. W. 727.

United States.— Ronkendorff *v.* Taylor, 4 Pet. 349, 7 L. ed. 882.

See 45 Cent. Dig. tit. "Taxation," § 783.

Assessment rolls or lists as evidence of the facts which they contain see *supra*, VI, C, 1, e.

23. Chew *v.* Beall, 13 Md. 348; De Loach *v.* Sarratt. 55 S. C. 254, 33 S. E. 2, 35 S. E. 441.

24. Laird *v.* Hiester, 24 Pa. St. 452. *Compare* Slaughter *v.* Dallas, (Tex. Civ. App. 1907) 103 S. W. 218 [*reversed* on other grounds in 101 Tex. 315, 107 S. W. 48], holding that an assessment of real estate, which sufficiently describes the property as against the owner, is sufficient as against a subsequent purchaser.

25. Cincinnati, etc., R. Co. *v.* Hamilton County, 120 Tenn. 1, 113 S. W. 361.

text and subject-matter, and also, if possible, so as to make the assessment effective.[26]

b. Admissibility of Extrinsic Evidence. Parol extrinsic evidence cannot be received to vary or contradict the particulars set forth in an assessment list or roll;[27] and the testimony of the assessors is not admissible to impeach or controvert their own assessments.[28] Parol evidence, however, may be admitted for the purpose of explaining descriptive matter in the assessment list or applying it to its intended object, provided the list itself furnishes an unmistakable clue for the application of such testimony.[29] Where it becomes necessary in any kind of action to determine to whom property was assessed at a given time, or who paid the taxes on it, the assessment list is the best evidence on this issue, and extrinsic evidence cannot be received unless the failure to produce the list is excused by showing its loss or destruction or in some other satisfactory manner.[30]

c. Conclusiveness in General. In the assessment and valuation of property the assessors or other proper officers act judicially, and therefore their determinations as to values and other questions of fact are final and conclusive unless impeached for fraud or want of jurisdiction, and until reversed or set aside by some tribunal having authority to review their action.[31]

26. *Louisiana.*—Webre *v.* Lutcher, 45 La. Ann. 574, 12 So. 834.

Maine.— Saco Water Power Co. *v.* Buxton, 98 Me. 295, 56 Atl. 914.

Nevada.— State *v.* Real Del Monte Gold, etc., Min. Co., 1 Nev. 523.

Pennsylvania.— Laird *v.* Hiester, 24 Pa. St. 452.

Vermont.—Waterman *v.* Davis, 66 Vt. 33, 28 Atl. 664.

Washington.— Shipley *v.* Gaffner, 48 Wash. 169, 93 Pac. 211, holding that where the place for the name of the owner of property is left blank in the assessment roll, it amounts to a statement that the owner is unknown.

See 45 Cent. Dig. tit. "Taxation," § 783.

An assessment of a waterworks company for "capital invested in merchandise and manufacturing" includes its pipes, hydrants, etc.; but not its corporate franchise to construct waterworks in a city and use the streets therefor, or its "solvent credits," since these are separate kinds of property and should be listed separately. Adams *v.* Vicksburg Waterworks Co., 94 Miss. 601, 47 So. 530; Adams *v.* Bullock, 94 Miss. 27, 47 So. 527, 530.

27. *California.*—Allen *v.* McKay, 139 Cal. 94, 72 Pac. 713. And see People *v.* Stockton, etc., R. Co., 49 Cal. 414; People *v.* San Francisco Sav. Union, 31 Cal. 132.

Louisiana.— Gaither *v.* Green, 40 La. Ann. 362, 4 So. 210.

Maine.— Sweetsir *v.* Chandler, 98 Me. 145, 56 Atl. 584.

Michigan.— Case *v.* Dean, 16 Mich. 12.

Mississippi.— McQueen *v.* Bush, 76 Miss. 283, 24 So. 196; Vicksburg Bank *v.* Adams, 74 Miss. 179, 21 So. 401.

Oregon.—West Portland Park Assoc. *v.* Kelly, 29 Oreg. 412, 45 Pac. 901.

Washington.— Carlisle *v.* Chehalis County, 32 Wash. 284, 73 Pac. 349.

Where an assessment is not complete, and is undergoing direct adjudication in a suit, a misdescription therein may be shown by parol. Vicksburg Bank *v.* Adams, 74 Miss. 179, 21 So. 401.

28. Saco Water Power Co. *v.* Buxton, 98 Me. 295, 56 Atl. 914; Von Storch *v.* Scranton City, 3 Pa. Co. Ct. 567; Tierney *v.* Union Lumbering Co., 47 Wis. 248, 2 N. W. 289; Plumer *v.* Marathon County, 46 Wis. 163, 50 N. W. 416.

29. State *v.* Real Del Monte Gold, etc., Min. Co., 1 Nev. 523; Conklin *v.* El Paso, (Tex. Civ. App. 1897) 44 S. W. 879.

Identifying property assessed.— Parol evidence is not admissible to show what particular lot of land an assessor had in mind in making the assessment roll. Harvey *v.* Meyer, 117 Cal. 60, 48 Pac. 1014.

30. *Alabama.*— Doe *v.* Edmondson, 145 Ala. 557, 40 So. 505.

Connecticut.—Averill *v.* Sanford, 36 Conn. 345; Marlborough *v.* Sisson, 23 Conn. 44.

Georgia.— Livingston *v.* Hudson, 85 Ga. 835, 12 S. E. 17.

Illinois.—Andrews *v.* People, 75 Ill. 605.

Indiana.— Bright *v.* Markle, 17 Ind. 308.

Louisiana.— State *v.* Edgar, 26 La. Ann. 726.

New Hampshire.— Forest *v.* Jackson, 56 N. H. 357; Farrar *v.* Fessenden, 39 N. H. 268; Pittsfield *v.* Barnstead, 38 N. H. 115.

Pennsylvania.— Stark *v.* Shupp, 112 Pa. St. 395, 3 Atl. 864; McCall *v.* Lorimer, 4 Watts 351; Simon *v.* Brown, 3 Yeates 186, 2 Am. Dec. 368.

Vermont.— Sherwin *v.* Bugbee, 17 Vt. 337.

Washington.— Seattle *v.* Parker, 13 Wash. 450, 43 Pac. 369.

See also *supra*, VI, C, 1, e.

But *compare* Holmead *v.* Chesapeake, etc., Canal Co., 12 Fed. Cas. No. 6,626, 1 Hayw. & H. 77.

31. *Arkansas.*—Vance *v.* Austell, 45 Ark. 400.

California.— Modoc County *v.* Churchill, 75 Cal. 172, 16 Pac. 771, as to value.

Illinois.— St. Louis Bridge, etc., Co. *v.* People, 127 Ill. 627, 21 N. E. 348; Illinois, etc., R., etc., Co. *v.* Stookey, 122 Ill. 358, 13 N. E.

d. Conclusiveness in Collateral Proceedings. An assessment list or roll cannot be impeached in any collateral proceeding on account of any alleged errors or irregularities,[32] although it is otherwise if the list or roll appears on its face to be illegal or entirely invalid.[33]

13. Custody of Assessment Records. The assessment lists or rolls are permanent public records and must remain in the custody of the officers charged by law with the duty of keeping them,[34] although they may be produced in court, as evidence, when properly called for.[35] If an assessment roll cannot be found in the office where it is required by law to be kept, the presumption arises that it never existed.[36]

14. Access to Rolls or Books. Directions of the statute that the tax assessment shall be kept open for public inspection for a designated length of time, or until a specified date, are mandatory, and the assessment is invalid if this is not done.[37] Any taxpayer has the right to inspect his own assessment and to

516; East St. Louis Connecting R. Co. *v.* People, 119 Ill. 182, 10 N. E. 397.

Indiana.— Brunson *v.* Starbuck, 32 Ind. App. 457, 70 N. E. 163.

Iowa.— Judy *v.* National State Bank, 133 Iowa 252, 110 N. W. 605.

Kentucky.— Coulter *v.* Louisville Bridge Co., 114 Ky. 42, 70 S. W. 29, 24 Ky. L. Rep. 809; Odd Fellows' Hall Assoc. *v.* Dayton, 76 S. W. 181, 25 Ky. L. Rep. 665.

Louisiana.— Oteri *v.* Parker, 42 La. Ann. 374, 7 So. 570; New Orleans *v.* McArthur, 12 La. Ann. 47.

Maryland.— Consumers' Ice Co. *v.* State, 82 Md. 132, 33 Atl. 427, holding that where the state tax commissioner exceeds his authority in assessing unissued shares of stock of a corporation, the latter may resist collection of the tax thereon in the courts.

Michigan.— Flint Land Co. *v.* Godkin, 136 Mich 668, 99 N. W. 1058; Blanchard *v.* Powers, 42 Mich. 619, 4 N W. 542.

Mississippi.— Yazoo Delta Inv. Co. *v.* Suddoth, 70 Miss. 416, 12 So. 246.

Nebraska.— Holthaus *v.* Adams County, 74 Nebr. 861, 105 N. W. 632.

New York.— People *v.* Campbell, 148 N. Y. 759, 43 N. E. 177; People *v.* Halsey, 37 N. Y. 344; Albany, etc., R. Co. *v.* Canaan, 16 Barb. 244; People *v.* Adams, 10 N. Y. Suppl. 295 [*affirmed* in 125 N. Y. 471, 26 N E. 746].

Oregon.— Oregon, etc., Sav. Bank *v.* Jordan, 16 Oreg. 113, 17 Pac. 621.

Pennsylvania.— Respublica *v.* Deaves, 3 Yeates 465. *Compare* Diamond Coal Co. *v.* Fisher, 19 Pa. St. 267.

See 45 Cent. Dig. tit. "Taxation," § 784.

A court of equity, however, is not estopped to inquire into the facts on which an assessment roll is based, because of the certificates attached thereto. New Whatcom *v.* Bellingham Bay Imp. Co., 9 Wash. 639, 38 Pac. 163.

Jurisdiction of assessor.— The question of the validity of a tax assessed by a *de facto* assessor may be raised in a suit by the town to recover the tax. Springfield *v.* Butterfield, 98 Me. 155, 56 Atl. 581.

Decision as to domicile.—A determination by the assessors as to the residence of a property-owner is not conclusive. Dorn *v.* Backer, 61 N. Y. 261; Paddock *v.* Guyder, 8 N. Y. Suppl. 905. And see *supra*, VI, B, 4, d.

Conclusiveness as against county.— Assessments made by several assessors for several years, and the action of the county authorities approving the same, are not conclusive on the county as an adjudication that the taxpayer owned no other property subject to taxation, where there was fraud on the part of the taxpayer in making statements to the assessors. Judy *v.* National State Bank, 133 Iowa 252, 110 N. W. 605.

32. *Louisiana.*— Gaither *v.* Green, 40 La. Ann. 362, 4 So. 210.

Michigan.— Davis *v.* Kalamazoo Tp., 1 Mich. N. P. 16. *Compare* Wattles *v.* Lapeer, 40 Mich. 624.

Minnesota.— Obst *v.* Ramsey County, 95 Minn. 123, 103 N. W. 893.

New Hampshire.— Boody *v.* Watson, 64 N. H. 162, 9 Atl. 794.

New York.— Buffalo, etc., R. Co. *v.* Erie County, 48 N. Y. 93; Matter of Adler, 76 N. Y. App. Div. 571, 78 N. Y. Suppl. 690 [*affirmed* in 174 N. Y. 287, 66 N. E. 929]; People *v.* Halsey, 53 Barb. 547, 36 How. Pr. 487 [*affirmed* in 37 N. Y. 344, 4 Transcr. App. 261]; Van Rensselaer *v.* Witbeck, 7 Barb. 133, 4 How. Pr. 381 [*reversed* on the facts in 7 N. Y. 517, Seld. Notes 27]; Jamaica, etc., Road *v.* Brooklyn, 1 N. Y. Suppl. 830.

Oregon.— Ankeny *v.* Blakley, 44 Oreg. 78, 74 Pac. 485.

Vermont.— Taylor *v.* Moore, 63 Vt. 60, 21 Atl. 919.

See 45 Cent. Dig. tit. "Taxation," § 785.

33. Ross *v.* Cayuga County, 38 Hun (N. Y.) 20.

34. Graves *v.* Bruen, 11 Ill. 431 (auditor); Phenix *v.* Clark, 2 Mich. 327 (holding that the supervisors have the absolute and exclusive right to the possession of the assessment rolls, and are authorized to bring suits, in their official character, to recover possession of them); French *v.* Whittlesey, 30 N. Y. Suppl. 363 (county treasurer).

35. French *v.* Whittlesey, 30 N. Y. Suppl. 363. *Compare* Witters *v.* Sowles, 32 Fed. 130, 24 Blatchf. 550.

36. Scott *v.* Stearns, 2 Mich. N. P. 111.

37. Farnsworth Lumber Co. *v.* Fairley,

examine into the assessments of persons whom he represents in a fiduciary capacity or as attorney in fact or at law; but he may properly be restricted within these limits; there is no such thing as a general and unlimited right to inspect the tax records relating to other people.[38] And the sworn inventories returned by taxpayers are confidential and should not be disclosed to any third person for any purpose.[39]

VII. EQUALIZATION AND REVIEW OF ASSESSMENTS.

A. Equalization[40] — 1. In General — a. Meaning of Equalization. The function of equalization is the adjustment of aggregate valuations of property, as between the different counties of the state or between the different taxing districts of the same county, so that the share of the whole tax imposed upon each county or district shall be justly proportioned to the value of taxable property within its limits, in order that one county or district shall not pay a higher tax, in proportion to the value of its taxable property, than another.[41]

b. Power to Create Boards of Equalization. Statutes providing for the equalization of taxes, and for the creation of official boards for that purpose, whether state or local, are a legitimate exercise of the power of the legislature over the subject of taxation, and are free from constitutional objection.[42]

c. Equalization Among Classes or Kinds of Property.[43] While all the property in a district belonging to the same class must be increased or diminished in the same ratio, under some statutes, the valuation of one class of property may be raised or lowered, if necessary, by the local board of equalization, without disturbing the assessed valuation of another class.[44] But this can-

(Miss. 1900) 28 So. 569; Clarke *v.* New York, 111 N. Y. 621, 19 N. E. 436; New York *v.* Watts, 40 Misc. (N. Y.) 595, 83 N. Y. Suppl. 23; People *v.* Hornbeck, 30 Misc. (N. Y.) 212, 61 N. Y. Suppl. 978.

Notice of completion and filing of assessment roll for the purpose of giving taxpayers an opportunity to inspect the same see *supra*, VI, E, 7, d.

38. *In re* Lord, 167 N. Y. 398, 60 N. E. 748 [*affirming* 59 N. Y. App. Div. 591, 69 N. Y. Suppl. 678].

39. Witters *v.* Sowles, 32 Fed. 130, 24 Blatchf. 550, holding that in an action between a receiver and the stock-holders of an insolvent national bank, the town clerk having the custody of a sworn inventory returned by a taxpayer will not be permitted to produce it; but that a witness who assisted the taxpayer in making the inventory, and saw its contents before it was taken by the lister, may be examined as to its contents.

40. Equalization of assessments for school purposes see SCHOOLS AND SCHOOL-DISTRICTS, 35 Cyc. 1024.

41. *Iowa.*— Harney *v.* Mitchell County, 44 Iowa 203.

Michigan.— Auditor-Gen. *v.* Sparrow, 116 Mich. 574, 74 N. W. 881.

Nebraska.— State *v.* Karr, 64 Nebr. 514, 90 N. W. 298.

New Mexico.— Poe *v.* Howell, (1901) 67 Pac. 62.

Oklahoma.— Bardrick *v.* Dillon, 7 Okla. 535, 54 Pac. 785; Gray *v.* Stiles, 6 Okla. 455, 49 Pac. 1083.

42. *California.*— Savings, etc., Soc. *v.* Austin, 46 Cal. 416.

Illinois.— People *v.* Salomon, 46 Ill. 333.

Kentucky.— Spalding *v.* Hill, 86 Ky. 656, 7 S. W. 27, 9 Ky. L. Rep. 852.

Michigan.— Detroit United R. Co. *v.* State Tax Com'rs, 136 Mich. 96, 98 N. W. 997.

Nebraska.—Hacker *v.* Howe, 72 Nebr. 385, 101 N. W. 255.

Nevada.— Sawyer *v.* Dooley, 21 Nev. 390, 32 Pac. 437.

Wisconsin.—Foster *v.* Rowe, 128 Wis. 326, 107 N. W. 635; State *v.* Thorne, 112 Wis. 81, 87 N. W. 797, 55 L. R. A. 956; State *v.* Myers, 52 Wis. 628, 9 N. W. 777.

United States.— Chicago Union Traction Co. *v.* State Bd. of Equalization, 114 Fed. 557 [*affirmed* in 207 U. S. 20, 28 S. Ct. 7, 52 L. ed. 78]; Ketchum *v.* Pacific R. Co., 14 Fed. Cas. No. 7,738, 4 Dill. 41 note.

See 45 Cent. Dig. tit. "Taxation," §§ 787, 788.

Local self-government.— The assessment of property for purposes of taxation is not a matter of such local concern that the legislature cannot provide for a state board of tax commissioners to supervise and revise the assessments made by the local assessors. State Tax Com'rs *v.* Grand Rapids Bd. of Assessors, 124 Mich. 491, 83 N. W. 209.

Repeal of statutes see Johnson *v.* Com., 7 Dana (Ky.) 338.

43. Equalization among classes or kinds of property by state board of equalization see *infra*, VII, A, 3, b.

44. People *v.* Palmer, 113 Ill. 346, 1 N. E. 850; Cassett *v.* Sherwood, 42 Iowa 623; Case *v.* Dean, 16 Mich. 12; State *v.* Edwards, 31 Nebr. 369, 47 N. W. 1048. But *compare* Anderson *v.* Ingersoll, 62 Miss. 73; McCallum *v.* Camden County Bd. of Assessors, 68 N. J. L. 544, 34 Atl. 755; State *v.* Raine,

not be done arbitrarily, and the act of the board is void if it results in palpable inequality.[45]

2. Equalization by Municipal or Local Board or Officer — a. Necessity of Equalization. A statutory direction that taxes shall be equalized by an official board, as between the different municipal divisions of a county, is imperative, and a failure to comply with this requirement is a jurisdictional defect which will invalidate the entire tax levy.[46]

b. Powers and Proceedings of Board. In that part of its work which concerns the different towns or other municipalities as units, a board of equalization has no authority to change the assessment of any individual taxpayer.[47] Hence no notice of its meetings or proceedings, for the purpose of equalizing assessments between different towns or districts, need be given to individual property-owners.[48] Furthermore, its action is automatic in the sense that no complaint, demand, or petition is necessary to set it in motion,[49] neither is the board required to examine witnesses or hear evidence, but it acts on its own knowledge, judgment, and discretion.[50] Its authority extends over all municipal divisions within its territory, but it must recognize the divisions made by law for assessment purposes, and cannot divide a city or other assessment district into portions for the purpose of equalizing the taxes.[51] The adjustments made by the board ordinarily apply to all classes of taxes which may be levied on the same assessment,[52] and must embrace

47 Ohio St. 447, 25 N. E. 54; State *v.* Holmes, 20 Ohio St. 474.

45. Manson L. & T. Co. *v.* Heston, 83 Iowa 377, 49 N. W. 985.

46. Auditor-Gen. *v.* Reynolds, 83 Mich. 471, 47 N. W. 442; Atty.-Gen. *v.* Sanilac County, 42 Mich. 72, 3 N. W. 260; Yelverton *v.* Steele, 36 Mich. 62; Dakota County *v.* Parker, 7 Minn. 267. And see People *v.* Ontario County, 114 N. Y. App. Div. 915, 100 N. Y. Suppl. 1136. But *compare* Goudreau *v.* St. Ignace, 97 Mich. 413, 56 N. W. 772; Chamberlain *v.* St. Ignace, 92 Mich. 332, 52 N. W. 634 (both of which hold that the failure of the county board of supervisors to properly equalize the assessments, under Pub. Acts (1889), p. 238, as between the various townships, does not affect the legality of a levy of a school tax within a city); Scollard *v.* Dallas, 16 Tex. Civ. App. 620, 42 S. W. 640 (holding that a property-owner who does not in any way complain of the assessment of his property cannot resist payment of the tax levied according to such assessment on the ground that there is no proper board of appeals to pass upon objections to assessments).

In Idaho under Const. art. 7, § 12, the county commissioners for the several counties constitute boards of equalization for their counties, and it is the duty of such boards to equalize the valuation of the taxable property in their respective counties under such rules as may be prescribed by law. Weiser Nat. Bank *v.* Jeffreys, 14 Ida. 659, 95 Pac. 23.

47. Getchell *v.* Polk County, 51 Iowa 107, 50 N. W. 574; Atty.-Gen. *v.* Sanilac County, 42 Mich. 72, 3 N. W. 260.

48. Hubbard *v.* Goss, 157 Ind. 485, 62 N. E. 36; Lancaster County *v.* Whedon, 76 Nebr. 753, 108 N. W. 127; State *v.* Edwards, 31 Nebr. 369, 47 N. W. 1048; Suydam *v.* Merrick County, 19 Nebr. 155, 27 N. W. 142; Hallo *v.* Helmer, 12 Nebr. 87, 10 N. W. 568; Dundy *v.* Richardson County, 8 Nebr. 508, 1 N. W. 565.

49. State *v.* Edwards, 31 Nebr. 369, 47 N. W. 1048; State *v.* Edwards, 26 Nebr. 701, 42 N. W. 882; Suydam *v.* Merrick County, 19 Nebr. 155, 27 N. W. 142; Salt Lake City *v.* Armstrong, 15 Utah 472, 49 Pac. 641. See also People *v.* Kingston, 101 N. Y. 82, 4 N. E. 348.

50. *Kansas.*— Symns *v.* Graves, 65 Kan. 628, 70 Pac. 591; Challiss *v.* Rigg, 49 Kan. 119, 30 Pac. 190; Fields *v.* Russell, 38 Kan. 720, 17 Pac. 476.

Michigan.— Auditor-Gen. *v.* Griffin, 140 Mich. 427, 103 N. W. 854.

Nebraska.—Suydam *v.* Merrick County, 19 Nebr. 155, 27 N. W. 142.

New Jersey.— State *v.* Roe, 36 N. J. L. 86.

Wisconsin.—Foster *v.* Rowe, 128 Wis. 326, 107 N. W. 635; West *v.* Ballard, 32 Wis. 168.

See 45 Cent. Dig. tit. "Taxation," § 792.

Arbitrary action illegal.— Where the board is required to base its judgment upon a careful and thorough comparison of the assessments in the different townships, and an adjudication that one is relatively too low, an arbitrary addition to the valuation of a particular township, without such comparison and adjudication, will be set aside as unauthorized. State *v.* Hopper, 54 N. J. L. 544, 23 Atl. 948. See also Kimball *v.* Merchants' Sav., etc., Co., 89 Ill. 611; Suydam *v.* Merrick County, 19 Nebr. 155, 27 N. W. 142.

51. Montis *v.* McQuiston, 107 Iowa 651, 78 N. W. 704; Dickey *v.* Polk County, 58 Iowa 287, 12 N. W. 290; Getchell *v.* Polk County, 51 Iowa 107, 50 N. W. 574; Messenger *v.* Peter, 129 Mich. 93, 88 N. W. 209; State *v.* Lippels, 112 Wis. 203, 87 N. W. 1093.

52. Salt Lake City *v.* Armstrong, 15 Utah 472, 49 Pac. 641.

all the assessed property within the district affected.[53] The compensation of the officers constituting the board is generally fixed by law.[54]

c. Method of Equalization. In order to effect an equalization it is the duty of the board to ascertain whether the valuation of assessable property in each town or district bears a just relation to that in all the other towns or districts, and if it does not, the board is to increase or diminish the aggregate valuation in any town or district by adding or deducting such a percentage as will in its opinion be necessary to produce such relation.[55] For this purpose the board may take as a standard the particular township or district assessment roll which, in its judgment, most nearly represents a true and just valuation, and make the others conform to it.[56] The increase or diminution ordered should be specified as a percentage, and not as a gross or lump sum,[57] and should be made applicable to all the taxable property of the district affected, and not to a particular class or kind.[58] It is not "equalization," or within the functions of the board to transfer property from the assessment list of one district to that of another,[59] or to make an addition to the valuation in all the districts indiscriminately,[60] although it may lawfully reduce the total of the assessment list of any district below that made by the assessors.[61]

d. Records of Board. The board of equalization must keep a written record of its proceedings if required by statute as an essential to the validity of further proceedings.[62] And the record must contain enough to show clearly what action was taken by the board in regard to the equalization of taxes,[63] and must be signed by the members if the law so directs.[64] But presumptions will be indulged in

53. Black *v.* McGonigle, 103 Mo. 192, 15 S. W. 615; State *v.* Anderson, 38 N. J. L. 82; Kelley *v.* Corson, 11 Wis. 1.

Annual valuations see State *v.* Nichols, 29 Wash. 159, 69 Pac. 771.

Equalizing assessments on new buildings and structures see State *v.* Lewis, 20 Ohio Cir. Ct. 319, 11 Ohio Cir. Dec. 13.

54. See the statutes of the several states. And see Outagamie County *v.* Greenville, 77 Wis. 165, 45 N. W. 1090.

55. *Illinois.*—McKee *v.* Champaign County, 53 Ill. 477; People *v.* Nichols, 49 Ill. 517.

Iowa.— Harney *v.* Mitchell County, 44 Iowa 203.

Michigan.— Goudreau *v.* St. Ignace, 97 Mich. 413, 56 N. W. 772; Chamberlain *v.* St. Ignace, 92 Mich. 332, 52 N. W. 634; Boyce *v.* Sebring, 66 Mich. 210, 33 N. W. 815. See also Auditor-Gen. *v.* Griffin, 140 Mich. 427, 103 N. W. 854.

Nebraska.— Lancaster County *v.* Whedon, 76 Nebr. 753, 108 N. W. 127.

New Jersey.— Sea Isle City *v.* Cape May County, 50 N. J. L. 50, 12 Atl. 771.

New York.— People *v.* Wayne County, 49 Hun 476, 2 N. Y. Suppl. 555.

Utah.— Salt Lake City *v.* Armstrong, 15 Utah 472, 49 Pac. 641.

Wisconsin.— Kelley *v.* Corson, 8 Wis. 182.

Canada.— Simcoe *v.* Norfolk County, 5 Can. L. J. N. S. 181. And see *In re* Simcoe County, 5 Can. L. J. N. S. 294; *In re* Strachan, 41 U. C. Q. B. 175; *In re* Gibson, 20 U. C. Q. B. 111.

See 45 Cent. Dig. tit. "Taxation," § 793.

But under a provision authorizing the county board to increase or diminish individual assessments, the board has no power to raise or diminish the entire assessment roll. Wells *v.* State Bd. of Equalization, 56 Cal. 194.

56. Lee *v.* Mehew, 8 Okla. 136, 56 Pac. 1046; Bardrick *v.* Dillon, 7 Okla. 535, 54 Pac. 785; Webb *v.* Renfrew, 7 Okla. 198, 54 Pac. 448.

57. State *v.* Coe, (N. J. Sup. 1899) 44 Atl. 952. See also Tallmadge *v.* Rensselaer County, 21 Barb. (N. Y.) 611.

58. People *v.* Nichols, 49 Ill. 517 (must include unimproved as well as improved lands); Sinclair *v.* Learned, 51 Mich. 335, 16 N. W. 672 (both realty and personalty); New Jersey Zinc Co. *v.* Sussex County Bd. of Equalization, 70 N. J. L. 186, 56 Atl. 138; West Hoboken Tp. *v.* Anderson, 38 N. J. L. 173. See also Weiser Nat. Bank *v.* Jeffreys, 14 Ida. 659, 95 Pac. 23 (holding that the statutory method of equalization applies to the taxable property in the county, and not to the property over which the taxing power has no jurisdiction); Auditor-Gen. *v.* Longyear, 110 Mich. 223, 68 N. W. 130.

59. McCowen Independent School Dist. *v.* Local Bd. of Review, 131 Iowa 195, 108 N. W. 220.

60. Kimball *v.* Merchants' Sav., etc., Co., 89 Ill. 611. And see McCutchen *v.* Lyon County, 95 Iowa 20, 63 N. W. 455.

61. Tweed *v.* Metcalf, 4 Mich. 579.

62. Perry County *v.* Selma, etc., R. Co., 65 Ala. 391; State Auditor *v.* Jackson County, 65 Ala. 142; Fowler *v.* Russell, 45 Kan. 425, 25 Pac. 871; Auditor-Gen. *v.* Reynolds, 83 Mich. 471, 47 N. W. 442; Silsbee *v.* Stockle, 44 Mich. 561, 7 N. W. 160, 367. But see Tweed *v.* Metcalf, 4 Mich. 579.

63. Paldi *v.* Paldi, 84 Mich. 346, 47 N. W. 510.

64. State Auditor *v.* Jackson County, 65

favor of the regularity of the proceedings, and in aid of the recitals in the record;[65] and the record may be amended to make it conform to the truth.[66]

e. Decision of Board and Certificate. The decision of the board of equalization, acting within its jurisdiction, is in the nature of a judgment and cannot be impeached collaterally.[67] It is binding on the officer whose duty it becomes to make the changes in the assessment list ordered by the board,[68] and mandamus lies to compel him to perform this duty;[69] but it is not final or conclusive as against a reassessment or back assessment or omitted or undervalued property.[70] Where the law directs that a certificate of equalization shall be attached to the assessment roll, if this requirement is not complied with, no valid sale of property can be made for non-payment of the taxes appearing on such roll.[71]

f. Review of Proceedings. Provision is generally made by statute for an appeal or other proceeding to review the action of a board of equalization, at the instance of the town, city, or other municipal division aggrieved thereby;[72] but such an appeal cannot be taken at the instance of an individual taxpayer.[73]

3. Equalization by State Board — a. Powers and Proceedings of Board. A state board of equalization has only such power with reference to the equalizing of tax assessments as is conferred upon it by statute,[74] and generally this power

Ala. 142; Weston *v.* Monroe, 84 Mich. 341, 47 N. W. 446.

65. State Auditor *v.* Jackson County, 65 Ala. 142; Peterson *v.* First Nat. Bank, 8 Kan. App. 508, 56 Pac. 146; Auditor-Gen. *v.* Ayer, 109 Mich. 694, 67 N. W. 985; Hoffman *v.* Lynburn, 104 Mich. 494, 62 N. W. 728.

66. State *v.* Central Pac. R. Co., 17 Nev. 259, 30 Pac. 887.

67. Orr *v.* State Bd. of Equalization, 3 Ida. 190, 28 Pac. 416; Ocean County *v.* Vanarsdale, 42 N. J. L. 536; New York *v.* Davenport, 92 N. Y. 604; Foster *v.* Rowe, 128 Wis. 326, 107 N. W. 635.

68. Ridley *v.* Doughty, 77 Iowa 226, 42 N. W. 178; State *v.* Cornwall, 97 Wis. 565, 73 N. W. 63.

69. Ridley *v.* Doughty, 77 Iowa 226, 42 N. W. 178. See also, generally, Mandamus, 26 Cyc. 320.

70. State *v.* Taylor, 119 Tenn. 229, 104 S. W. 242.

71. Westbrook *v.* Miller, 64 Mich. 129, 30 N. W. 916; Maxwell *v.* Paine, 53 Mich. 30, 18 N. W. 546.

72. See the statutes of the several states. And see People *v.* Ulster County, 32 Hun (N. Y.) 607; Philadelphia *v.* Board of Revision, 33 Leg. Int. (Pa.) 366.

Appeal to the state assessors by a town on account of an unjust and excessive assessment see People *v.* Hadley, 76 N. Y. 337 [*reversing* 16 Hun 113] (holding that the state assessors are confined to the valuation of the real estate, and that in performing their duty they must consider the valuation of all the towns of the county separately, and remedy any injustice done to the appealing town as compared with other towns, by placing the excess complained of upon other towns, although other towns which have not appealed have suffered a like injustice); People *v.* State Assessors, 47 Hun (N. Y.) 450 (holding that where the board of equalization admits evidence irregularly, but there is other competent proof of the facts necessary to be shown, their action will not be reviewed); Schabacher *v.* State Assessors, 14 N. Y. St. 309 (holding that, although the state assessors are not bound by technical rules of evidence governing actions at law, they are not at liberty to reject or receive evidence entirely in their own discretion; and that they might receive in evidence deeds or conveyances showing the consideration therefor as evidence of the value of the land).

Time of certifying and filing the state assessors' decision with the board of supervisors of the town appealing see People *v.* Ontario County, 85 N. Y. 323 [*reversing* 17 Hun 501]; People *v.* Hadley, 76 N. Y. 337 [*reversing* 16 Hun 113], both holding that where a decision of the state assessors upon an appeal of a supervisor in behalf of his town is certified and forwarded by mail within ten days after it is made and signed, although not until after the beginning of the next annual session of the board of supervisors, it is sufficient and binding upon such board.

Certiorari to review the decision of state assessors see East Brunswick Tp. *v.* New Brunswick, 57 N. J. L. 77, 29 Atl. 422; People *v.* Williams, 17 Abb. N. Cas. (N. Y.) 366, holding that the court will not reverse the decision of the state assessors as against the weight of evidence, if there is evidence tending to support the determination as to all material facts. See also *infra*, VII, C, 3.

73. Kelley *v.* Corson, 11 Wis. 1. See also Lancaster County *v.* Whedon, 76 Nebr. 753, 108 N. W. 127.

74. Orr *v.* State Bd. of Equalization, 3 Ida. 190, 28 Pac. 416; Hamilton *v.* State, 3 Ind. 452; Bell *v.* Meeker, 39 Ind. App. 224, 78 N. E. 641; Spokane Falls, etc., R. Co. *v.* Stevens County, 48 Wash. 699, 93 Pac. 927; Great Northern R. Co. *v.* Snohomish County, 48 Wash. 478, 93 Pac. 924, holding that the state board of tax commissioners do not act merely in an advisory capacity, but have power to classify intercounty railroads and

is limited to the equalizing of state taxes and does not extend to taxes levied by local authorities.[75] Under some statutes the state board is an integral part of the machinery for the assessment of taxes, and this process cannot be considered complete until the state board has acted upon it.[76] A state board of equalization should convene at the time appointed by law, although statutory provisions as to the date of meeting are held to be merely directory.[77] Where the statute prescribes the time and place of meeting, no other notice need be given to the public or to the members of the board.[78] This board is not generally required to examine witnesses or to base its action on any particular kind or *quantum* of evidence, but may proceed in its own way and act on any information which is satisfactory to it.[79] Its record of proceedings should be signed by the members of the board if the law so directs.[80]

b. Method of Equalizing. The office of a state board of equalization is to equalize the tax among the several counties, or districts, if the statute so provides, so that the share of such tax imposed upon each county or district shall be justly proportioned to the value of the taxable property therein; [81] and for this purpose it may adopt as a standard that one of the several returns which most

fix the value thereof for purposes of taxation.

The state board of equalization has no power to adopt rules for the government of assessors which require the assessment of the property of an individual in excess of its value. Richards *v.* Harlan County, 79 Nebr. 665, 113 N. W. 194.

75. Oregon Short Line R. Co. *v.* Pioneer Irr. Dist., 16 Ida. 578, 102 Pac. 904 (holding that the power and jurisdiction of a state board of equalization as to the assessment of railroad property relates to assessments for general purposes and not to assessments for local improvements); Spear *v.* Braintree, 24 Vt. 414.

76. Hacker *v.* Howe, 72 Nebr. 385, 101 N. W. 255.

Premature return of roll.— Where the state board of equalization, after acting on the assessment roll of a county, returned the roll to the county clerk, leaving the assessment of the real estate untouched, but afterward recalled the roll and made changes in the real estate assessment, the board did not lose jurisdiction by prematurely returning the roll to the county clerk, but its jurisdiction continued until it had acted on all the assessments. Carroll *v.* Alsup, 107 Tenn. 257, 64 S. W. 193.

77. State Auditor *v.* Jackson County, 65 Ala. 142.

78. *Colorado.*— People *v.* Lothrop, 3 Colo. 428.

Kentucky.— Spalding *v.* Hill, 86 Ky. 656, 7 S. W. 27, 9 Ky. L. Rep. 852.

Nebraska.—Hacker *v.* Howe, 72 Nebr. 385, 101 N. W. 255.

New Mexico.— Territory *v.* Albuquerque First Nat. Bank, 10 N. M. 283, 65 Pac. 172.

Tennessee.— Carroll *v.* Alsup, 107 Tenn. 257, 64 S. W. 193.

See 45 Cent. Dig. tit. "Taxation," § 800.

79. State *v.* Hannibal, etc., R. Co., 101 Mo. 120, 13 S. W. 406; Hacker *v.* Howe, 72 Nebr. 385, 101 N. W. 255; New York *v.* Davenport, 92 N. Y. 604. See also Schabacher *v.* State Assessors, 14 N. Y. St. 309.

Assessment rolls.— The fact that the state board of equalization does not have before it the assessment rolls of the different counties, as intended by the statute, or any other particular written evidence provided for by law, is not a jurisdictional defect, but a mere irregularity. New York *v.* Davenport, 92 N. Y. 604; Dayton *v.* Multnomah County, 34 Oreg. 239, 55 Pac. 23; Dayton *v.* Bd. of Equalization, 33 Oreg. 131, 50 Pac. 1009. Thus the territorial board of equalization of Arizona may base any order it may make upon abstracts of the assessment rolls furnished by the clerks of the boards of supervisors of the various counties under its order without inspecting the assessment rolls from which the abstracts were taken. Old Dominion Cooper Min., etc., Co. *v.* Gila County, (Ariz. 1909) 100 Pac. 777; United Globe Mines *v.* Gila County, (Ariz. 1909) 100 Pac. 774.

80. State Auditor *v.* Jackson County, 65 Ala. 142. *Compare* Pentecost *v.* Stiles, 5 Okla. 500, 49 Pac. 921.

81. *California.*— Baldwin *v.* Ellis, 68 Cal. 495, 9 Pac. 652.

Colorado.— People *v.* Ames, 27 Colo. 126, 60 Pac. 346.

Indiana.— Hamilton *v.* State, 3 Ind. 452 (congressional districts, not counties); Bell *v.* Meeker, 39 Ind. App. 224, 78 N. E. 641.

Kansas.— Missouri, etc., R. Co. *v.* Miami County, 67 Kan. 434, 73 Pac. 103.

Kentucky.— Royer Wheel Co. *v.* Taylor County, 104 Ky. 741, 47 S. W. 876, 20 Ky. L. Rep. 904.

Nebraska.—Hacker *v.* Howe, 72 Nebr. 385, 101 N. W. 255.

New Jersey.— East Brunswick Tp. *v.* New Brunswick, 57 N. J. L. 145, 30 Atl. 684. See Central R. Co. *v.* State Bd. of Assessors, 74 N. J. L. 1, 65 Atl. 244, as to power to compel reassessment of entire property of a taxing district.

Oklahoma.— Gray *v.* Stiles, 6 Okla. 455, 49 Pac. 1083; Wallace *v.* Bullen, 6 Okla. 17, 52 Pac. 954.

Pennsylvania.— Com. *v.* Philadelphia, 1 Dauph. Co. Rep. 392.

nearly represents a true and just valuation of the property assessed, and add to or deduct from the returns of the other counties or districts, such a percentage as will make them conform to the standard selected.[82] But this board has generally no power to increase or reduce the assessment of any individual taxpayer;[83] and as it must, as a rule, act upon the aggregate valuations of the different counties, it cannot ordinarily increase or diminish the valuation of any particular class of property,[84] except where it is specially authorized by statute to do so,[85] as in regard to railroad and other similar property;[86] nor can it raise the returns of any county above the total actual value of all the taxable property therein,[87] or add to the valuation of all of the counties in such a manner as to raise the aggregate valuation of the whole state.[88]

c. Operation and Effect of Decision. The decision of the state board of equalization, acting within its jurisdiction, is judicial in character and therefore not open to collateral impeachment,[89] although it may be reviewed or enjoined

See 45 Cent. Dig. tit. "Taxation," § 801.

82. Territory *v.* Yavapai County, 9 Ariz. 405, 84 Pac. 519; Baldwin *v.* Ellis, 68 Cal. 495, 9 Pac. 652; Weber *v.* Dillon, 7 Okla. 568, 54 Pac. 894; Webb *v.* Renfrew, 7 Okla. 198, 54 Pac. 448; Wallace *v.* Bullen, 6 Okla. 757, 54 Pac. 974; Copper Queen Consol. Min. Co. *v.* Territorial Bd. of Equalization, 206 U. S. 474, 27 S. Ct. 695, 51 L. ed. 1143 [*affirming* 9 Ariz. 383, 84 Pac. 511]. See also Clark *v.* Lawrence County, 21 S. D. 254, 111 N. W. 558, as to the statutory requirement that the rate per cent of addition or deduction shall be even and not fractional.

83. *California.*— San Francisco, etc., R. Co. *v.* State Bd. of Equalization, 60 Cal. 12; Wells *v.* State Bd. of Equalization, 56 Cal. 194.

Nebraska.—Hacker *v.* Howe, 72 Nebr. 385, 101 N. W. 255.

New Jersey.— Cregar *v.* Lebanon Tp., 70 N. J. L. 598, 57 Atl. 129.

Pennsylvania.— Com. *v.* Philadelphia, 1 Dauph. Co. Rep. 392.

Utah.— State *v.* Thomas, 16 Utah 86, 50 Pac. 615.

See 45 Cent. Dig. tit. "Taxation," § 801.

But *compare* Carroll *v.* Alsup, 107 Tenn. 257, 64 S. W. 193, under statute.

84. *Colorado.*— People *v.* Ames, 27 Colo. 126, 60 Pac. 346. And see People *v.* Lothrop, 3 Colo. 428.

Idaho.— Orr *v.* State Bd. of Equalization, 3 Ida. 190, 28 Pac. 416.

Indiana.— Bell *v.* Meeker, 39 Ind. App. 224, 78 N. E. 641.

Minnesota.— State *v.* Empanger, 73 Minn. 337, 76 N. W. 53.

Missouri.— State *v.* Vaile, 122 Mo. 33, 26 S. W. 672.

New Jersey.— Tuckerton R. Co. *v.* State Bd. of Assessors, 75 N. J. L. 157, 67 Atl. 69. See also Jersey City *v.* Tax Bd. of Equalization, 74 N. J. L. 753, 67 Atl. 38 [*reversing* 74 N. J. L. 382, 65 Atl. 903].

South Dakota.— Coler *v.* Sterling, 11 S. D. 140, 76 N. W. 12 (bank stock); Campbell *v.* Minnehaha Nat. Bank, 11 S. D. 133, 76 N. W. 10.

See 45 Cent. Dig. tit. "Taxation," § 801.

85. *Arizona.*— Copper Queen Consol. Min. Co. *v.* Territorial Bd. of Equalization, 9 Ariz. 383, 84 Pac. 511 [*affirmed* in 206 U. S. 474, 27 S. Ct. 695, 51 L. ed. 1143].

Kentucky.—Russell *v.* Carlisle, 8 S. W. 14, 10 Ky. L. Rep. 25.

Louisiana.— Amos Kent Lumber, etc., Co. *v.* St. Helena Tax Assessor, 123 La. 178, 48 So. 880; Natalbany Lumber Co. *v.* St. Helena Tax Collector, 123 La. 174, 48 So. 879, holding, however, that an increase in an assessment in pursuance of an order of the state board of equalization by listing lands originally assessed in three different classes in a higher class indiscriminately, will be canceled and the assessment held to remain as originally returned.

New Mexico.— Territory *v.* Albuquerque First Nat. Bank, 10 N. M. 283, 65 Pac. 172.

Oregon.— Dayton *v.* Multnomah County, 34 Oreg. 239, 55 Pac. 23; Dayton *v.* State Bd. of Equalization, 33 Oreg. 131, 50 Pac. 1009.

Washington.— State *v.* Nichols, 29 Wash. 159, 69 Pac. 771.

United States.— Copper Queen Consol. Min. Co. *v.* Territorial Bd. of Equalization, 206 U. S. 474, 27 S. Ct. 695, 51 L. ed. 1143 [*affirming* 9 Ariz. 383, 84 Pac. 511].

See 45 Cent. Dig. tit. "Taxation," § 801.

86. Ames *v.* People, 26 Colo. 83, 56 Pac. 656; Smith *v.* Kelly, 24 Oreg. 464, 33 Pac. 642; Oregon, etc., R. Co. *v.* Croisan, 22 Oreg 393, 30 Pac. 219; Spokane Falls, etc., R. Co. *v.* Stevens County, 48 Wash. 699, 93 Pac. 927; Great Northern R. Co. *v.* Snohomish County, 48 Wash. 478, 93 Pac. 924; Michigan Cent. R. Co. *v.* Powers, 201 U. S. 245, 26 S. Ct. 459, 50 L. ed. 744. See also Jersey City *v.* Tax Bd. of Equalization, 74 N. J. L. 753, 67 Atl. 38 [*reversing* 74 N. J. L. 382, 65 Atl. 903].

87. Weber *v.* Dillon, 7 Okla. 568, 54 Pac. 894.

88. State *v.* Fortune, 24 Mont. 154, 60 Pac. 1086; State *v.* State Bd. of Equalization, 18 Mont. 473, 46 Pac. 266; Poe *v.* Howell, (N. M 1901) 67 Pac. 62. But *compare* Copper Queen Consol. Min. Co. *v.* Territorial Bd. of Equalization, 9 Ariz. 383, 84 Pac. 511 [*affirmed* in 206 U. S. 474, 27 S. Ct. 695, 51 L. ed. 1143]; Webb *v.* Renfrew, 7 Okla. 198, 54 Pac. 448; Wallace *v.* Bullen, 6 Okla. 757, 54 Pac. 974.

89. *Arizona.*— Old Dominion Copper Min.,

if fraudulent or illegal;[90] but such decision is not final or conclusive as against a reassessment or back assessment on omitted or undervalued property.[91] Its rulings, if at all ambiguous, will be aided by construction so as to keep them if possible within the jurisdiction of the board.[92] And if the board transcends its proper jurisdiction, in making an original assessment, it will not vitiate the whole tax.[93]

B. Review and Correction of Assessments by Official Boards or Officers — 1. In General — a. Nature and Scope of Remedy. An application to an officer or board of equalization or review to change an individual assessment is in the nature of an appeal from the decision of the assessor, and it has been held that in passing upon it the officer or board acts in a judicial capacity, at least to the extent that its determination has the force of an adjudication,[94] although its powers and method of procedure are strictly regulated by statute.[95] The effect of such an appeal is to suspend the power of the assessing and collecting officers to act upon the particular assessment until the board shall have decided the case.[96] If complaint is made of an excessive valuation of the property affected, the remedy of the complainant is to have the assessment reduced, and not to be released from the entire tax.[97]

b. Necessity of Pursuing Statutory Remedy. When the statutes provide a remedy against an excessive, erroneous, or improper assessment of the property of an individual, by proceedings before a board of equalization or review, the taxpayer must at his peril avail himself of this remedy, and cannot resort to the courts in the first instance; and if he neglects properly to bring his complaint before the board of review, he cannot assail the assessment in any collateral

etc., Co. *v.* Gila County, (1909) 100 Pac. 777; United Globe Mines *v.* Gila County, (1909) 100 Pac. 774.

Idaho.— Orr *v.* State Bd. of Equalization, 3 Ida. 190, 28 Pac. 416.

Illinois.— St. Louis Bridge, etc., R. Co. *v.* People, 127 Ill. 627, 21 N. E. 348; Illinois, etc., R., etc., Co. *v.* Stookey, 122 Ill. 358, 13 N. E. 516.

Nebraska.— Hacker *v.* Howe, 72 Nebr. 385, 101 N. W. 255.

New York.— New York *v.* Davenport, 92 N. Y. 604; People *v.* Williams, 20 N. Y. Suppl. 350.

Ohio. — State *v.* Lewis, 64 Ohio St. 216, 60 N. E. 198.

Oklahoma.— Wallace *v.* Bullen, 6 Okla. 17, 52 Pac. 954.

Tennessee.— Briscoe *v.* McMillan, 117 Tenn. 115, 100 S. W. 111.

United States.— McLeod *v.* Receveur, 71 Fed. 455, 18 C. C. A. 188.

Duty of local officer to assess or extend the taxes as ordered by the state board of equalization see Atchison, etc., R. Co. *v.* Sumner County, 76 Kan. 618, 92 Pac. 590; Spokane Falls, etc., R. Co. *v.* Stevens County, 48 Wash. 699, 93 Pac. 927; Great Northern R. Co. *v.* Snohomish County, 48 Wash. 478, 93 Pac. 924, holding that where the county assessor assesses railroads at a higher valuation than that placed upon them by the state board of equalization, it will not be presumed, to justify such excess assessment, that proportionally higher value was placed on all other property in the county.

90. Hacker *v.* Howe, 72 Nebr. 385, 101 N. W. 255; Weber *v.* Dillon, 7 Okla. 568, 54 Pac. 894; Dayton *v.* State Bd. of Equalization, 33 Oreg. 131, 50 Pac. 1009; Briscoe *v.* McMillan, 117 Tenn. 115, 100 S. W. 111. See also Atchison, etc., R. Co. *v.* Sumner County, 76 Kan. 618, 92 Pac. 590.

91. State *v.* Taylor, 119 Tenn. 229, 104 S. W. 242.

92. Old Dominion Copper Min., etc., Co. *v.* Gila County, (Ariz. 1909) 100 Pac. 777; United Globe Mines *v.* Gila County, (Ariz. 1909) 100 Pac. 774 (holding that in the absence of a showing to the contrary it will be assumed that the territorial board of equalization in equalizing assessments proceeded regularly, and not arbitrarily); Schroeder *v.* Grady, 66 Cal. 212, 5 Pac. 81; People *v.* Dunn, 59 Cal. 328.

93. Paul *v.* Pacific R. Co., 18 Fed. Cas. No. 10,845, 4 Dill. 35.

94. People *v.* Goldtree, 44 Cal. 323; State *v.* Ormsby County, 7 Nev. 392; Steele *v.* Dunham, 26 Wis. 393, holding that the members of the board act judicially and therefore are not liable in a suit at law for illegal or corrupt conduct. But *compare* Vandercook *v.* Williams, 106 Ind. 345, 1 N. E. 619, 8 N. E. 113; Kansas Pac. R. Co. *v.* Ellis County Com'rs, 19 Kan. 584 (legislative power); State *v.* Hannibal, etc., R. Co., 135 Mo. 618, 37 S. W. 532.

95. People *v.* Delaware County, 60 N. Y. 381 [*affirming* 2 Hun 102].

Effect of application to wrong board see Missouri Valley, etc., R., etc., Co. *v.* Harrison County, 74 Iowa 283, 37 N. W. 372.

96. Fuller *v.* Gould, 20 Vt. 643. And see Com. *v.* Pennsylvania Co., 145 Pa. St. 266, 23 Atl. 549.

97. Warwick, etc., Water Co. *v.* Carr, 24 R. I. 226, 52 Atl. 1030.

manner, nor invoke the common-law or equitable powers of the courts for the redress of his grievance.[98] Non-residence of the taxpayer is no excuse for a

98. *Alabama.*— Lehman *v.* Robinson, 59 Ala. 219, as to time complaint should be made.

Arkansas.— Clay County *v.* Brown Lumber Co., 90 Ark. 413, 119 S. W. 251; Pulaski County Bd. of Equalization Cases, 49 Ark. 518, 6 S. W. 1.

California.— San Jose Gas Co. *v.* January, 57 Cal. 614.

Connecticut.— Monroe *v.* New Canaan, 43 Conn. 309.

Illinois.— Cummins *v.* Webber, 218 Ill. 521, 75 N. E. 1041; Hulbert *v.* People, 189 Ill. 114, 59 N. E. 567; Clement *v.* People, 177 Ill. 144, 52 N. E. 382; Kochersperger *v.* Larned, 172 Ill. 86, 49 N. E. 988; Beidler *v.* Kochersperger, 171 Ill. 563, 49 N. E. 716; Keokuk, etc., Bridge Co. *v.* People, 145 Ill. 596, 34 N. E. 482; New York, etc., Grain, etc., Exch. *v.* Gleason, 121 Ill. 502, 13 N. E. 204; Phœnix Grain, etc., Exch. *v.* Gleason, 121 Ill. 524, 13 N. E. 209; Camp *v.* Simpson, 118 Ill. 224, 8 N. E. 308; Mix *v.* People, 116 Ill. 265, 4 N. E. 783; Humphreys *v.* Nelson, 115 Ill. 45, 4 N. E. 637; Madison County *v.* Smith, 95 Ill. 328; People *v.* Big Muddy Iron Co., 89 Ill. 116; Porter *v.* Rockford, etc., R. Co., 76 Ill. 561; Adsit *v.* Lieb, 76 Ill. 198.

Indiana.— Small *v.* Lawrenceburgh, 128 Ind. 231, 27 N. E. 500.

Iowa.— Collins *v.* Keokuk, 118 Iowa 30, 91 N. W. 791; *In re* Kauffman, 104 Iowa 639, 74 N. W. 8; Smith *v.* Marshalltown, 86 Iowa 516, 53 N. W. 286; Missouri Valley, etc., R., etc., Co. *v.* Harrison County, 74 Iowa 283, 37 N. W. 372; Harris *v.* Fremont County, 63 Iowa 639, 19 N. W. 826; Powers *v.* Bowman, 53 Iowa 359, 5 N. W. 566; Buell *v.* Schaale, 39 Iowa 293; Macklot *v.* Davenport, 17 Iowa 379.

Kentucky.— Ryan *v.* Louisville, 133 Ky. 714, 118 S. W. 992 (holding that where the assessed valuation of property is excessive, or there is an attempted assessment of omitted property, the remedy is by an application to the board of supervisors, and to appeal from their action, except on the question of valuation, and injunction does not lie); Mossett *v.* Newport, etc., Bridge Co., 106 Ky. 518, 50 S. W. 63, 20 Ky. L. Rep. 1969; Royer Wheel Co. *v.* Taylor County, 104 Ky. 741, 47 S. W. 876, 20 Ky. L. Rep. 904.

Louisiana.—Red River, etc., Line *v.* Parker, 41 La. Ann. 1046, 6 So. 896; Louisiana Brewing Co. *v.* Board of Assessors, 41 La. Ann. 565, 6 So. 823; State *v.* Louisiana Mut. Ins. Co., 19 La. Ann. 474; Daily *v.* Newman, 14 La. Ann. 580; State *v.* Southern Steamship Co., 13 La. Ann. 497.

Maine.— Bath *v.* Whitmore, 79 Me. 182, 9 Atl. 119; Gilpatrick *v.* Saco, 57 Me. 277.

Maryland.— James Clark Distilling Co. *v.* Cumberland, 95 Md. 468, 52 Atl. 661; Gittings *v.* Baltimore, 95 Md. 419, 52 Atl. 937, 54 Atl. 253; O'Neal *v.* Virginia, etc., Bridge Co., 18 Md. 1, 79 Am. Dec. 669.

Massachusetts.— Harrington *v.* Glidden, 179 Mass. 486, 61 N. E. 54, 94 Am. St. Rep. 613; Bates *v.* Sharon, 175 Mass. 293, 56 N. E. 586; Schwarz *v.* Boston, 151 Mass. 226, 24 N. E. 41; Norcross *v.* Milford, 150 Mass. 237, 22 N. E. 892; Richardson *v.* Boston, 148 Mass. 508, 20 N. E. 166; Howe *v.* Boston, 7 Cush. 273; Bates *v.* Boston, 5 Cush. 93; Osborn *v.* Danvers, 6 Pick. 98.

Michigan.— Traverse Beach Assoc. *v.* Elmwood Tp., 142 Mich. 297, 105 N. W. 768; Hinds *v.* Belvidere Tp., 107 Mich. 664, 65 N. W. 544; Meade *v.* Haines, 81 Mich. 261, 45 N. W. 836; Peninsula Iron, etc., Co. *v.* Crystal Falls Tp., 60 Mich. 510, 27 N. W. 666.

Minnesota.— State *v.* Willard, 77 Minn. 190, 79 N. W. 829.

Missouri.— State *v.* Neosho Bank, 120 Mo. 161, 25 S. W. 372.

Montana.—Ward *v.* Gallatin County, 12 Mont. 23, 29 Pac. 658; Northern Pac. R. Co. *v.* Patterson, 10 Mont. 90, 24 Pac. 704.

Nebraska.— Hall *v.* Moore, 75 Nebr. 693, 106 N. W. 785; Medland *v.* Connell, 57 Nebr. 10, 77 N. W. 437; Kittle *v.* Shervin, 11 Nebr. 65, 7 N. W. 861.

Nevada.— State *v.* Wright, 4 Nev. 251.

New Jersey.—Appelget *v.* Pownell, 49 N. J. L. 169, 6 Atl. 441; State *v.* Snedeker, 42 N. J. L. 76; State *v.* Matthews, 40 N. J. L. 268.

New York.— People *v.* Adams, 125 N. Y. 471, 26 N. E. 746; Jamaica, etc., Road Co. *v.* Brooklyn, 123 N. Y. 375, 25 N. E. 476; People *v.* Tax Com'rs, 99 N. Y. 254, 1 N. E. 773; Trumbull *v.* Palmer, 104 N. Y. App. Div. 51, 93 N. Y. Suppl. 349; Rochester *v.* Bloss, 77 N. Y. App. Div. 28, 79 N. Y. Suppl. 236 [*affirmed* in 173 N. Y. 646, 66 N. E. 1105]; Matter of Baumgarten, 39 N. Y. App. Div. 174, 57 N. Y. Suppl. 284; Worden *v.* Oneida County, 35 N. Y. App. Div. 206, 54 N. Y. Suppl. 952; *In re* McLean, 2 Silv. Sup. 314, 6 N. Y. Suppl. 230; Matter of Eckerson, 25 Misc. 645, 56 N. Y. Suppl. 373 [*affirmed* in 41 N. Y. App. Div. 631, 59 N. Y. Suppl. 1116]; Williams *v.* Holden, 4 Wend. 223; People *v.* Manhattan F. Ins. Co., 59 N. Y. Suppl. 1007.

Oklahoma.— Carroll *v.* Gerlach, 11 Okla. 151, 65 Pac. 844; Wilson *v.* Wiggins, 7 Okla. 517, 54 Pac. 716.

Oregon.—West Portland Park Assoc. *v.* Kelly, 29 Oreg. 412, 45 Pac. 901; Oregon, etc., Mortg. Sav. Bank *v.* Jordan, 16 Oreg. 113, 17 Pac. 621; Shumway *v.* Baker County, 3 Oreg. 246.

Pennsylvania.— Stewart *v.* Maple, 70 Pa. St. 221.

Texas.— Duck *v.* Peeler, 74 Tex. 268, 11 S. W. 1111; Moody *v.* Galveston, 21 Tex. Civ. App. 16, 50 S. W. 481.

Virginia.— Shenandoah Valley R. Co. *v.* Clarke County, 78 Va. 269.

Washington.— Chehalis Boom Co. *v.* Chehalis County, 24 Wash. 135, 63 Pac. 1123.

failure to appear before the board of review, since he voluntarily submits himself to the jurisdiction of the state, for purposes of taxation, by acquiring and holding property therein.[99] But the necessity for pursuing the statutory remedy does not exist where the assessment complained of is void and illegal,[1] as where the assessors acted entirely without jurisdiction,[2] or where the assessment was fraudulently made,[3] or is so incomplete or devoid of proper authentication that there is nothing legally sufficient to lay before the board as a basis for their action.[4]

2. Grounds of Review — a. Defects and Irregularities. Defects, errors, and irregularities, not fundamental in their nature, but occurring in the exercise of lawful jurisdiction, may be corrected by the board of equalization or review, and should not be brought before the courts in the first instance.[5] This rule applies, for instance, where property is assessed in the wrong name,[6] or in the name of a deceased person,[7] or where it is erroneously classified as real instead of personal property or *vice versa*.[8]

See Whatcom County *v.* Fairhaven Land Co., 7 Wash. 101, 34 Pac. 563.

Wisconsin.— Milwaukee *v.* Wakefield, 134 Wis. 462, 113 N. W. 34, 115 N. W. 137; Boorman *v.* Juneau County, 76 Wis. 550, 45 N. W. 675; Lawrence *v.* Janesville, 46 Wis. 364, 1 N. W. 338, 50 N. W. 1102.

Wyoming.— Kelley *v.* Rhoads, 7 Wyo. 237, 51 Pac. 593, 75 Am. St. Rep. 904, 39 L. R. A. 594.

United States.— Beeson *v.* Johns, 124 U. S. 56, 8 S. Ct. 352, 31 L. ed. 360; Stanley *v.* Albany County, 121 U. S. 535, 7 S. Ct. 1234, 30 L. ed. 1000; Ledoux *v.* La Bee, 83 Fed. 761; Dundee Mortg., etc., Co. *v.* Charlton, 32 Fed. 192, 13 Sawy. 25.

See 45 Cent. Dig. tit. "Taxation," §§ 808, 809.

No board of equalization elected.—A taxpayer who filed no complaint about his assessment cannot complain that no board of equalization was elected, where the statute provides that such a board may be chosen, when the taxpayer complains, if none has already been elected. Crecelius *v.* Louisville, 49 S. W. 547, 20 Ky. L. Rep. 1551.

Second application to board not required.— A taxpayer need not make more than one complaint to the board of review before resorting to the courts; that is, he need not go back to the board for the purposes of pointing out an alleged error in its former action, before bringing his appeal. Ingersoll *v.* Des Moines, 46 Iowa 553.

99. Crawford *v.* Polk County, 112 Iowa 118, 83 N. W. 825; Citizens' Sav. Bank *v.* New York, 37 N. Y. App. Div. 560, 56 N. Y. Suppl. 295 [*affirmed* in 166 N. Y. 594, 59 N. E. 1120].

1. *Arkansas.*— Clay County *v.* Brown Lumber Co., 90 Ark. 413, 119 S. W. 251, holding that where an assessment is invalid because of jurisdictional defects, the taxpayer may invoke judicial remedies, and is not confined to those prescribed by the assessment laws.

Iowa.— Dickey *v.* Polk County, 58 Iowa 287, 12 N. W. 290.

Kentucky.— Ryan *v.* Louisville, 133 Ky. 714, 118 S. W. 992, on exempt property.

Nebraska.— Hutchinson *v.* Omaha, 52 Nebr. 345, 72 N. W. 218.

New York.— People *v.* Feitner, 45 Misc. 12, 90 N. Y. Suppl. 826 [*affirmed* in 99 N. Y. App. Div. 274, 90 N. Y. Suppl. 904 (*affirmed* in 181 N. Y. 549, 74 N. E. 1124)].

South Dakota.— Dakota L. & T. Co. *v.* Codington County, 9 S. D. 159, 68 N. W. 314.

See 45 Cent. Dig. tit. "Taxation," §§ 808, 809.

2. Layman *v.* Iowa Tel. Co., 123 Iowa 591, 99 N. W. 205; St. Paul *v.* Merritt, 7 Minn. 258; McLean *v.* Jephson, 123 N. Y. 142, 25 N. E. 409, 9 L. R. A. 493.

3. Citizens' Nat. Bank *v.* Columbia County, 23 Wash. 441, 63 Pac. 209.

4. Vittum *v.* People, 183 Ill. 154, 55 N. E. 689; Smith *v.* McQuiston, 108 Iowa 363, 79 N. W. 130; Topsham *v.* Purinton, 94 Me. 354, 47 Atl. 919; May *v.* Traphagen, 139 N. Y. 478, 34 N. E. 1064.

5. Louisville, etc., R. Co. *v.* Bd. of Public Instruction, 50 Fla. 222, 39 So. 480; State *v.* Southern Land, etc., Co., 45 Fla. 374, 33 So. 999; Tragar *v.* Clayton, McGloin (La.) 228; Auditor-Gen. *v.* Ayer, 122 Mich. 136, 80 N. W. 997; Union Stock Yards Nat. Bank *v.* Thurston County, 65 Nebr. 408, 91 N. W. 286, 92 N. W. 1022. See also *supra*, VII, B, 1, b. But *compare* United New Jersey R., etc., Co. *v.* Parker, 75 N. J. L. 771, 69 Atl. 239 [*modifying* (Sup. 1907) 67 Atl. 686, 75 N. J. L. 120, 67 Atl. 672].

Property no longer in existence.— It is no objection to the assessment of property as of a given date that the property has since then ceased to exist. Shelby County *v.* Mississippi, etc., R. Co., 16 Lea (Tenn.) 401, 1 S. W. 32.

Errors held fundamental.— Where the assessor errs in determining as to the extent or number of new structures on a certain tract of land, the error is fundamental, and does not come within a statute authorizing the correction of clerical errors. Mitchell *v.* Hamilton County, 10 Ohio Dec. (Reprint) 628, 22 Cinc. L. Bul. 292. And this is also true where there was no authority to levy the particular tax. Kennedy *v.* Montgomery County, 98 Tenn. 165, 38 S. W. 1075.

6. Geddes *v.* Cunningham, 104 La. 306, 29 So. 138; Fowler *v.* Springfield, 64 N. H. 108, 5 Atl. 770; Carpenter *v.* Dalton, 58 N. H. 615.

7. Geddes *v.* Cunningham, 104 La. 306, 29 So. 138.

8. Connecticut Valley Lumber Co. *v.* Mon-

b. Error in Valuation or Amount. A taxpayer may obtain from the board of review a reduction of his assessment when it is excessive, whether in consequence of a relatively exorbitant valuation of his property or an error in estimating its extent or amount,[9] provided he can show that he is prejudiced by the mistake,[10] which is not the case where his assessment, however erroneous, requires him to pay no more than his just and fair proportion of the tax,[11] or where his property has been assessed uniformly with other like property in the same district and at no higher rate.[12]

3. Right of Review — a. In General. The constitutional requirement of "due process of law" applies to tax proceedings, and it is necessary that the tax-

roe, 71 N. H. 473, 52 Atl. 940; Newark, etc., Traction Co. *v.* North Arlington, 65 N. J. L. 150, 46 Atl. 568.

9. *Illinois.*— Barkley *v.* Dale, 213 Ill. 614, 73 N. E. 325.

Iowa.— Barz *v.* Klemme Bd. of Equalization, 133 Iowa 563, 111 N. W. 41; Burnham *v.* Barber, 70 Iowa 87, 30 N. W. 20, both holding that, although a taxpayer's property is assessed at its actual value, he has a cause of complaint which the board of equalization should rectify, if it is assessed higher than other like property.

Nebraska.— Sarpy County *v.* Clarke, 4 Nebr. (Unoff.) 87, 93 N. W. 416.

New Hampshire.— Amoskeag Mfg. Co. *v.* Manchester, 70 N. H. 200, 46 Atl. 470; *In re* Wolfeborough Sav. Bank, 69 N. H. 84, 39 Atl. 522.

New Jersey.— State *v.* Roat, (Sup. 1900) 45 Atl. 910.

New York.— People *v.* Barker, 14 N. Y. App. Div. 412, 43 N. Y. Suppl. 1015; People *v.* Ontario County, 50 Misc. 63, 100 N. Y. Suppl. 330 [*affirmed* in 114 N. Y. App. Div. 915, 100 N. Y. Suppl. 1136]; People *v.* Moore, 11 N. Y. St. 859.

Ohio.— Davis *v.* Hamilton County, 28 Ohio Cir. Ct. 817; State *v.* Wright, 28 Ohio Cir. Ct. 697 [*affirmed* in 76 Ohio St. 596, 81 N. E. 1199] (holding that an owner of a building which he himself has torn down is entitled to have the county auditor deduct from the tax duplicate the value of such building at any time between the second day of April and the first day of October, as provided in the statute); Harrison *v.* County Com'rs, 6 Cinc. L. Bul. 696, 8 Ohio Dec. (Reprint) 256.

Washington.— Dickson *v.* Kittitas County, 42 Wash. 429, 84 Pac. 855; Henderson *v.* Pierce County, 37 Wash. 201, 79 Pac. 617.

See 45 Cent. Dig. tit. "Taxation," § 815.

Discrimination against national banks see Mechanics' Nat. Bank *v.* Baker, 65 N. J. L. 113, 46 Atl. 586.

Fraud, capriciousness, or want of the exercise of an honest judgment by tax officers is ground for interfering with their action if the assessment made is grossly disproportionate to the property's value, or unequal when compared with the assessment of other like property; but mere overvaluation, unless the excess is so gross as to impute fraud to the assessor, is not ground for interference. Northern Pac. R. Co. *v.* Pierce County, 55 Wash. 108, 104 Pac. 178.

10. State *v.* Flavell, 24 N. J. L. 370; People *v.* Feitner, 34 Misc. (N. Y.) 299, 69 N. Y. Suppl. 793 [*affirmed* in 63 N. Y. App. Div. 615, 72 N. Y. Suppl. 1124 (*affirmed* in 168 N. Y. 674, 61 N. E. 1132)].

A party is prejudiced, in such sense as to have a legal right to complain, when the error of which he complains allows a large amount of taxable property of a particular corporation to escape assessment, thereby increasing the rate of taxation on all the property in the assessment roll, although the immediate effect of the correction will be to increase, rather than reduce, his own assessment on particular items of similar property. People *v.* Albany Bd. of Assessors, 2 Hun (N. Y.) 583, 5 Thomps. & C. 155.

One error neutralizing another.— When the same person is over-taxed for some of his property, and for other property on the same roll he is under-taxed to an equal or greater extent, he is not entitled to an abatement, although he is entitled to a correction of the erroneous form of assessment when it is injurious to him. Lowell *v.* Middlesex Co., 152 Mass. 372, 25 N. E. 469, 9 L. R. A. 356; Amoskeag Mfg. Co. *v.* Manchester, 70 N. H. 200, 46 Atl. 470; Edes *v.* Boardman, 58 N. H. 580 [*overruling* Dewey *v.* Stratford, 42 N. H. 282].

11. Lexington Mill, etc., Co. *v.* Dawson County, 1 Nebr. (Unoff.) 872, 96 N. W. 62; People *v.* New York Tax Com'rs, 5 N. Y. St. 311; Northern Pac. R. Co. *v.* Pierce County, 55 Wash. 108, 104 Pac. 178.

12. Sarpy County *v.* Clarke, 4 Nebr. (Unoff.) 87, 93 N. W. 416; People *v.* Feitner, 95 N. Y. App. Div. 481, 88 N. Y. Suppl. 774; People *v.* Nassau County, 54 Misc. (N. Y.) 323, 104 N. Y. Suppl. 353 (although in excess of its value); Martin *v.* Clay, 8 Okla. 46, 56 Pac. 715; Wallace *v.* Bullen, 6 Okla. 17, 52 Pac. 954.

Franchise tax.— A statutory provision which relates alone, so far as the equality of the assessment is concerned, to the assessment or valuation of different franchises, does not relate to inequality of assessment by special franchises as compared with other kinds of property; and the fact that real estate in a city is assessed at only eighty per cent of its full value does not entitle the owner of a special franchise in that city to a reduction of twenty per cent on its full valuation as fixed by the state board of tax commissioners. People *v.* Woodbury, 63 Misc. (N. Y.) 1, 116 N. Y. Suppl. 209.

payer shall have an opportunity to be heard in opposition to the assessment or valuation of his property before his liability is conclusively fixed.[13] But the denial of this opportunity, or the failure to constitute a board of equalization or review, or of such a board to meet, is a matter which can be complained of only by a party who can show that he himself is prejudiced thereby.[14]

b. Persons Entitled. The right of appeal to the officer or board of equalization or review is ordinarily given to any person "interested" or having property assessed on the roll.[15] If this right is not in terms restricted to taxpayers, the city in which property is located may complain that the assessment is too low.[16] But where shares of corporate stock are assessed directly to the individual shareholders, it has been held that the corporation itself is not a party in interest in such sense as to have a right of appeal.[17] Several taxpayers are not authorized to unite in a petition for review, unless they complain of an error or illegality which affects them all in the same manner.[18]

c. Failure to Return List or Inventory.[19] In some states a taxpayer who neglects or refuses to return a list or schedule of his taxable property, as required

13. Orr *v.* State Bd. of Equalization, 3 Ida. 190, 28 Pac. 416; Hough *v.* Hastings, 13 Ill. 312; State *v.* Baltimore, 105 Md. 1, 65 Atl. 369; Fowble *v.* Kemp, 92 Md. 630, 48 Atl. 379; Monticello Distilling Co. *v.* Baltimore, 90 Md. 416, 45 Atl. 210; Exchange Bank Tax Cases, 21 Fed. 99.

No implied repeal of law giving right of review.— A statute providing a remedy against illegal assessments should not be deemed embraced in a general repeal of all laws relating to assessments, in an act prescribing and regulating the method of assessing taxes. Shear *v.* Columbia County, 14 Fla. 146; Warner Iron Co. *v.* Pace, 89 Tenn. 707, 15 S. W. 1077.

14. Cowell *v.* Doub, 12 Cal. 273; Scott County *v.* Hinds, 50 Minn. 204, 52 N. W. 523.

15. People *v.* Centralia Gas, etc., Co., 238 Ill. 113, 87 N. E. 370 (holding that a company in possession of premises and claiming to be the owner thereof is *prima facie* entitled to object to a tax, although assessed in the name of another company); State *v.* State Tax Collector, 104 La. 468, 29 So. 39; Com. *v.* Delaware Division Canal Co., 123 Pa. St. 594, 16 Atl. 584, 2 L. R. A. 798; Dundee Mortgage, etc., Co. *v.* Charlton, 32 Fed. 192, 13 Sawy. 25.

"A person aggrieved" within the meaning of such a statute means one whose pecuniary interests are or may be adversely affected. Hough *v.* North Adams, 196 Mass. 290, 82 N. E. 46.

Vendor or purchaser of property see *In re* Southern Wood Mfg. Co., 49 La. Ann. 926, 22 So. 39; State *v.* Bd. of Assessors, McGloin (La.) 25; Hamilton *v.* Ames, 74 Mich. 298, 41 N. W. 930 (assignee); State *v.* Lawson, (N. J. Sup. 1900) 45 Atl. 911.

Mortgagor of realty entitled to complain see Detroit *v.* Detroit Bd. of Assessors, 91 Mich. 78, 51 N. W. 787, 16 L. R. A. 59.

One having color of title to land may apply for an abatement of the taxes assessed thereon. Carpenter *v.* Dalton, 58 N. H. 615.

Owner of exempt property.— Where the statute provides a proceeding to obtain relief when an "owner of assessable property" has been unjustly assessed thereon, it will not be construed as affording relief to an owner of property on which taxes could not legally be assessed, but which is nevertheless erroneously assessed. Arapahoe County *v.* Denver Union Water Co., 32 Colo. 382, 76 Pac. 1060.

Agent.— One who is assessed for money in his hands as agent may have the assessment corrected so as to show that the principal is ultimately liable for the tax. Title Guaranty, etc., Co. *v.* Los Angeles County, 3 Cal. App. 619, 86 Pac. 844.

Rule in Canada.— Any elector or ratepayer may complain of the wrongful omission from the assessment roll of the name of a person which should be inserted therein. Matter of Roman Catholic Separate Schools, 18 Ont. 606.

16. St. Louis Bridge Co. *v.* People, 128 Ill. 422, 21 N. E. 428; People *v.* Ontario County, 50 Misc. (N. Y.) 63, 100 N. Y. Suppl. 330 [*affirmed* in 114 N. Y. App. Div. 915, 100 N. Y. Suppl. 1136]. But *compare* Kenilworth *v.* Bd. of Tax Equalization, 78 N. J. L. 302, 72 Atl. 966 [*affirmed* in 78 N. J. L. 439, 74 Atl. 480], holding that where a borough consents to the confirmation of assessments of ratables as made by its assessor before the county board of taxation and such assessment is confirmed, the borough cannot be said to be aggrieved by the action of the county board so as to justify an appeal to the state board.

17. People *v.* Feitner, 71 N. Y. App. Div. 572, 76 N. Y. Suppl. 245; People *v.* Wall St. Bank, 39 Hun (N. Y.) 525; People *v.* Button, 17 N. Y. Suppl. 315. *Contra*, Independence First Nat. Bank *v.* Independence, 123 Iowa 482, 99 N. W. 142; Citizens' Nat. Bank *v.* Columbia County, 23 Wash. 441, 63 Pac. 209.

18. Barrett's Appeal, 73 Conn. 288, 47 Atl. 243; Tampa *v.* Mugge, 40 Fla. 326, 24 So. 489; State *v.* Grow, 74 Nebr. 850, 105 N. W. 898; People *v.* O'Donnel, 113 N. Y. App. Div. 713, 99 N. Y. Suppl. 436 [*affirmed* in 187 N. Y. 536, 80 N. E. 1117].

19. **Proceedings on failure of taxpayer to return list or making false list** see *supra*, VI, C, 3.

by law, is debarred from any relief against the assessment imposed on him, and the officer or board of equalization or review has no jurisdiction to hear his complaint or reduce his assessment.[20] But a taxpayer will not forfeit his right to a review by a mere inaccuracy or imperfection in a list or inventory, or the omission of property from it by mistake or under an honest belief that it is not taxable,[21] or by a delay in filing it beyond the time allowed by law, provided it is filed before the petition for review,[22] or, in fact, by an entire failure to return the list if there is a good and unimpeachable excuse for such failure.[23] In several states, on the other hand, the taxpayer's neglect to comply with this requirement, although it may entail other consequences, such as the imposition of a penalty or a fine, will not deprive him of the right to appeal to the board of review.[24]

20. *Louisiana.*— Travelers' Ins. Co. *v.* Board of Assessors, 122 La. 129, 47 So. 439, 24 L. R. A. N. S. 388. But see Merchants' Mut. Ins. Co. *v.* Board of Assessors, 40 La. Ann. 371, 3 So. 891.

Maine.— Freedom *v.* Waldo County, 66 Me. 172; Lambard *v.* Kennebec County Com'rs, 53 Me. 505; Winslow *v.* Kennebec County Com'rs, 37 Me. 561.

Massachusetts.— Amherst College *v.* Amherst Assessors, 193 Mass. 168, 79 N. E. 248; Ashley *v.* Bristol County, 166 Mass. 216, 44 N. E. 220. *Compare* Wright *v.* Lowell, 166 Mass. 298, 44 N. E. 249 (holding that a refusal of a taxpayer to answer on oath necessary inquiries as to the nature and amount of his estate will not deprive him of his right to an abatement of the tax if aggrieved thereby); Lowell *v.* Middlesex County, 146 Mass. 403, 16 N. E. 8 (holding that the jurisdiction of the county commissioners to hear an appeal is not defeated by the failure of a corporation to file with the assessors a sworn list of its property).

Nebraska.—Lincoln Transfer Co. *v.* County Bd. of Equalization, 78 Nebr. 197, 110 N. W. 724.

Nevada.— State *v.* Sadler, 21 Nev. 13, 23 Pac. 799; State *v.* Washoe County Bd. of Equalization, 7 Nev. 83; State *v.* Washoe County, 5 Nev. 317.

New Hampshire.— Parsons *v.* Durham, 70 N. H. 44, 47 Atl. 600.

New Jersey.— Young *v.* Parker, 33 N. J. L. 192. *Compare* Warne *v.* Johnson, 30 N. J. L. 452.

Rhode Island.— Tripp *v.* Torrey, 17 R. I. 359, 22 Atl. 278; Greene *v.* Mumford, 4 R. I. 313.

Wisconsin.— Milwaukee *v.* Wakefield, 134 Wis. 462, 113 N. W. 34, 115 N. W. 137; Cramer *v.* Milwaukee, 18 Wis. 257.

See 45 Cent. Dig. tit. "Taxation," § 818.

A return of "no property" where there is property does not save the taxpayer from the doom of the assessor. Travelers' Ins. Co. *v.* Board of Assessors, 122 La. 129, 47 So. 439, 24 L. R. A. N. S. 388.

21. U. S. Fidelity, etc., Co. *v.* Board of Assessors, 122 La. 139, 47 So. 442; Travelers' Ins. Co. *v.* Board of Assessors, 122 La. 129, 47 So. 439, 24 L. R. A. N. S. 388; Blackstone Mfg. Co. *v.* Blackstone, 200 Mass. 82, 85 N. E. 880, 18 L. R. A. N. S. 755 (innocent omission); Wright *v.* Lowell, 166 Mass. 298, 44 N. E. 249; Adams *v.* New Bedford, 155 Mass. 317, 29 N. E. 532; National Bank of Commerce *v.* New Bedford, 155 Mass. 313, 29 N. E. 532; Great Barrington *v.* Berkshire County, 112 Mass. 218; State *v.* Central Pac. R. Co., 17 Nev. 259, 30 Pac. 887; Matteson *v.* Warwick, etc., Water Co., 28 R. I. 570, 68 Atl. 577.

22. Lowell *v.* Middlesex County Com'rs, 3 Allen (Mass.) 546.

23. Vaughan *v.* Boston St. Com'rs, 154 Mass. 143, 28 N. E. 144 (illness in his family not a sufficient excuse); Winnisimmet Co. *v.* Chelsea Assessors, 6 Cush. (Mass.) 477; Parsons *v.* Durham, 70 N. H. 44, 47 Atl. 600 (holding that it is not a sufficient excuse that municipal officers advised him that it was not necessary to file the list); Robbins *v.* Horner, 38 N. J. L. 212; Matteson *v.* Warwick, etc., Water Co., 28 R. I. 570, 68 Atl. 577 (holding that where the assessors prescribe a time for the making of returns within which it is impossible for the taxpayer to make a return of ratable estate owned by it on the day of the assessment, the taxpayer is not deprived of his right to defend against a tax illegally assessed against him by reason of his failure to return an account of his taxable property). And see Edwards Mfg. Co. *v.* Farrington, 102 Me. 140, 66 Atl. 309, holding that, in order to justify a failure to furnish the assessor with a list of taxable property at the time appointed, as required by statute, the applicant for abatement must show that he was unable to offer it at the time appointed; and the fact that the applicant in good faith supposed himself to be a non-resident, and had been so regarded by the assessors for a series of years, does not justify his omission to furnish such list, if in fact he was a resident and liable to taxation as such.

Want of authority to assess.—A person whom the assessors have no authority to assess at all, if enrolled and assessed, may contest the tax at any time, and is not estopped therefrom by neglecting to return the list required by law. St. Paul *v.* Merritt, 7 Minn. 258.

24. People *v.* Meacham, 241 Ill. 415, 89 N. E. 691; Pacific Hotel Co. *v.* Lieb, 83 Ill. 602; People *v.* Cheetham, 45 Hun (N. Y.) 6; People *v.* Pitman, 9 N. Y. St. 469; Moody *v.* Galveston, 21 Tex. Civ. App. 16, 50 S. W. 481; Western Union Tel. Co. *v.* Lakin, 53 Wash. 326, 101 Pac. 1094, holding that a telegraph company operating under a federal

d. Estoppel or Waiver[25] — (i) *In General.* A taxpayer is estopped to object to the form or substance of his assessment where it has been made in compliance with his own request or directions or on the basis of his own list or inventory.[26] An appeal from an assessment, calling in question the amount justly due, is a waiver of any irregularities in the form or manner of the assessment.[27]

(ii) *By Payment or Tender of Taxes.* It has been held that payment of taxes without protest is a waiver of any invalidity or irregularity in the assessment.[28] But one is not estopped to object to an irregular or improper assessment on particular property by the mere fact that taxes similarly assessed upon it for several previous years have been paid without objection.[29]

(iii) *By Failure to Object.* A taxpayer who discovers errors, irregularities, or injustice in his assessment must take steps to have it corrected by the assessor or by the board of review, or otherwise according to the remedies which the law gives him, and if he neglects to do this, when he has an opportunity, he will not be allowed afterward to raise objections to the assessment,[30] except where

franchise may question the validity of a tax imposed by a state on its franchise, although it has failed to schedule for taxation certain tangible property subject to state taxation. But *compare* Johnson *v.* Roberts, 102 Ill. 655.

25. **Estoppel of corporation by report or statement** see *supra*, VI, D, 2, e.

26. *Connecticut.*— East Granby *v.* Hartford Electric Light Co., 76 Conn. 169, 56 Atl. 514.

Florida.— Kissimmee City *v.* Drought, 26 Fla. 1, 7 So. 525, 23 Am. St. Rep. 546.

Illinois.— Indianapolis, etc., R. Co. *v.* People, 130 Ill. 62, 22 N. E. 854.

Kansas.— Jeffries *v.* Clark, 23 Kan. 448.

Minnesota.— Faribault Water-Works Co. *v.* Rice County, 44 Minn. 12, 46 N. W. 143.

Missouri.— State *v.* Springer, 134 Mo. 212, 35 S. W. 589; Kansas City *v.* Holmes, 127 Mo. App. 620, 106 S. W. 559.

Nebraska.— Moore *v.* Furnas County Live Stock Co., 78 Nebr. 558, 111 N. W. 464.

New York.— People *v.* Button, 17 N. Y. Suppl. 315.

Rhode Island.— Providence Second Universalist Soc. *v.* Providence, 6 R. I. 235.

Wisconsin.— State *v.* Bellew, 86 Wis. 189, 56 N. W. 782.

See 45 Cent. Dig. tit. "Taxation," § 824.

Mutual mistake of law as to place of taxation as not effecting an estoppel see Portsmouth Tp. *v.* Cranage Steamship Co., 148 Mich. 230, 111 N. W. 749.

Where property is not subject to taxation there is no statutory estoppel, and no equitable estoppel when the acquiescence of the taxpayer is induced by the representations of the assessor. Bunkie Brick Works *v.* Avoyelles Police Jury, 113 La. 1062, 37 So. 970.

The action of the cashier of a national bank in giving in to the officers of the city for taxation against the bank a number of the shares of its stock, taxable under the laws of the state to the stock-holders, does not estop a receiver subsequently appointed for the bank, but before the tax is paid, from setting up the mistake. Wilmington *v.* Ricaud, 90 Fed. 214, 32 C. C. A. 580.

Objection to classification.— A corporation which, in former years, insisted that it was a savings bank and not assessable as a loan and trust company, is not thereby estopped to claim a right to be assessed under the statute governing loan and trust companies. Wahkonsa Inv. Co. *v.* Ft. Dodge, 125 Iowa 148, 100 N. W. 517. And see Farmers' L. & T. Co. *v.* Newton, 97 Iowa 502, 66 N. W. 784.

27. Hart *v.* Plum, 14 Cal. 148; Spring Valley Coal Co. *v.* People, 157 Ill. 543, 41 N. E. 874, holding that appealing from an assessment and obtaining a reduction waives an objection that the assessment was fraudulently made.

28. Busby *v.* Noland, 39 Ind. 234; Burton *v.* Hintrager, 18 Iowa 348; Scholfield *v.* West, 44 La. Ann. 277, 10 So. 806; Palmer *v.* Board of Assessors, 42 La. Ann. 1122, 8 So. 487. But *compare* State *v.* Hannibal, etc., R. Co., 110 Mo. 265, 19 S. W. 816; Manchester Mills *v.* Manchester, 57 N. H. 309; Jersey Co.'s Associates *v.* Jersey City, 50 N. J. L. 141, 11 Atl. 348.

An excessive tax may be complained of by a taxpayer even though he has paid the same if he had no knowledge of the excess at the time. Arimex Consol. Copper Co. *v.* State Bd. of Assessors, 69 N. J. L. 121, 54 Atl. 244.

29. Farmers', etc., Nat. Bank *v.* Hoffmann, 93 Iowa 119, 61 N. W. 418; Weeks *v.* Gilmanton, 60 N. H. 500; Cruger *v.* Dougherty, 43 N. Y. 107; Parsons *v.* Parker, 80 Hun (N. Y.) 281, 30 N. Y. Suppl. 134; Matter of Wood, 24 Misc. (N. Y.) 561, 54 N. Y. Suppl. 30. But *compare* Factors', etc., Ins. Co. *v.* Levi, 42 La. Ann. 432, 7 So. 625; Sawyer *v.* Gleason, 59 N. H. 140.

30. *California.*— California Domestic Water Co. *v.* Los Angeles County, 9 Cal. App. 185, 101 Pac. 547.

Illinois.— Buttenuth *v.* St. Louis Bridge Co., 123 Ill. 535, 17 N. E. 439, 5 Am. St. Rep. 545.

Indiana.— Telle *v.* Green, 28 Ind. 184; Conwell *v.* Connersville, 8 Ind. 358.

Kentucky.— Vanceburg, etc., Turnpike Road Co. *v.* Maysville, etc., R. Co., 117 Ky. 275, 77 S. W. 1118, 25 Ky. L. Rep. 1404; Chicago, etc., R. Co. *v.* Com., 115 Ky. 278, 72 S. W. 1119, 24 Ky. L. Rep. 2124.

he has been prevented from making such objection by a failure to give him notice, or by other omission of duty on the part of the assessor or board of review.[31] But this rule does not apply where the assessment is entirely void for want of authority to make it or on account of some fundamental error.[32]

4. Creation and Organization of Board — a. In General. The legislature has implied authority to create state and county boards of equalization and review,[33] or it may authorize their appointment by the executive[34] or judicial officers.[35] If such a board is illegally appointed, or never holds a meeting to effect an organization, taxpayers are under no obligation to file complaints or petitions before it,[36] but a person who appears before the board and seeks a correction of his assessment thereby waives any objection to the validity of the board's organization or the title of the members to their office.[37]

b. Qualification of Members. If the officer, or a majority of those acting as a board of equalization, do not possess the statutory qualifications or have no legal title to their office, the actions of the officer or board will be void;[38] but it is otherwise where this objection applies only to one member or to a minority, in which case no objection can be raised to the action of the board in any collateral proceeding.[39] Although the members of the board are required to be sworn, their official actions are not invalidated by the fact that the records fail to show that they took the oath of office.[40]

c. Power to Act by Majority or by Committees. The duties of an officer or board of equalization are judicial in their character and cannot be delegated to third persons, except as to merely clerical details, but must be performed by the officer or board as such.[41] The board, however, may act by a committee of its

Louisiana.— State *v.* Board of Assessors, 31 La. Ann. 806; New Orleans *v.* Lesseps, 11 La. Ann. 251.

Massachusetts.— Davis *v.* Macy, 124 Mass. 193.

Michigan.— Caledonia *v.* Rose, 94 Mich. 216, 53 N. W. 927; Sage *v.* Burlingame, 74 Mich. 120, 41 N. W. 878; St. Joseph First Nat. Bank *v.* St. Joseph Tp., 46 Mich. 526, 9 N. W. 838. See also Barstow *v.* Big Rapids, 56 Mich. 35, 22 N. W. 103.

New York.— People *v.* Dolan, 126 N. Y. 166, 27 N. E. 269, 12 L. R. A. 251 [*reversing* 57 Hun 357, 10 N. Y. Suppl. 940].

Washington.— Eureka Dist. Gold Min. Co. *v.* Ferry County, 28 Wash. 250, 68 Pac. 727.

See 45 Cent. Dig. tit. "Taxation," § 827.

31. Milwaukee *v.* Wakefield, 134 Wis. 462, 113 N. W. 34, 115 N. W. 137.

32. Lyman *v.* People, 2 Ill. App. 289; St. Paul *v.* Merritt, 7 Minn. 258; Carlisle Borough School Directors *v.* Carlisle Bank, 8 Watts (Pa.) 289. And see Portsmouth Tp. *v.* Cranage Steamship Co., 148 Mich. 230, 111 N. W. 749.

33. *Idaho.*— Feltham *v.* Washington County, 10 Ida. 182, 77 Pac. 332.

Illinois.— People *v.* Cook County, 176 Ill. 576, 52 N. E. 334.

Texas.— See Dwyer *v.* Hackworth, 57 Tex. 245, holding that an intermediate board cannot be created by ordinance.

Washington.— State *v.* Nichols, 29 Wash. 159, 69 Pac. 771.

Wisconsin.— State *v.* Gaylord, 73 Wis. 316, 41 N. W. 521.

See 45 Cent. Dig. tit. "Taxation," § 828.

34. Pulaski County Bd. of Equalization Cases, 49 Ark. 518, 6 S. W. 1, governor.

35. New Jersey Zinc Co. *v.* Sussex County Bd. of Equalization, 70 N. J. L. 186, 56 Atl. 138, by the judge of the court of common pleas.

Power of the court to appoint an expert accountant as a special commissioner to assist the clerk of the board of revision see Hodges *v.* Board of Review, 3 L. T. N. S. (Pa.) 77.

36. Slaughter *v.* Louisville, 89 Ky. 112, 8 S. W. 917.

37. People *v.* Garmon, 34 Misc. (N. Y.) 350, 69 N. Y. Suppl. 819 [*affirmed* in 63 N. Y. App. Div. 530, 71 N. Y. Suppl. 826]; Commercial Electric Light, etc., Co. *v.* Judson, 21 Wash. 49, 56 Pac. 829.

38. State *v.* McGinnis, 34 Ind. 452.

Disqualification by interest.— Proceedings had before the auditor for the correction of the returns of property for taxation being judicial in character, the fact that he is entitled to a percentage of the tax charged gives him such an interest as to render his decision void. Conklin *v.* Squire, 4 Ohio S. & C. Pl. Dec. 493, 29 Cinc. L. Bul. 157.

39. State Nat. Bank *v.* Memphis, 116 Tenn. 641, 94 S. W. 606, 7 L. R. A. N. S. 663; Texas, etc., R. Co. *v.* Harrison County, 54 Tex. 119; Bratton *v.* Johnson, 76 Wis. 430, 45 N. W. 412.

40. State *v.* Buchanan County Bd. of Equalization, 108 Mo. 235, 18 S. W. 782; Taber *v.* Wilson, 34 Mo. App. 89; Nova Ceasarea Harmony Lodge No. 2 *v.* Hagerty, 11 Ohio Dec. (Reprint) 595, 28 Cinc. L. Bul. 67; Manor Real Estate, etc., Co. *v.* Cooner, 209 Pa. St. 531, 58 Atl. 918; McIntyre *v.* White Creek, 43 Wis. 620.

41. Bellinger *v.* Gray, 51 N. Y. 610.

own members, provided their findings are reported to and approved by the board as a whole.[42] And unless the law creating the board provides otherwise, its duties may be performed by a majority of the members, being duly qualified, provided such action is taken at a duly convened meeting of which every member has had actual or constructive notice.[43]

5. Authority and Powers of Board or Officer[44] — a. In General. Officers or boards of this kind are generally vested with authority to equalize assessments and to review individual assessments, on the application of parties in interest, and correct any mistakes, defects, or erroneous valuations therein.[45] But their authority is entirely statutory and must be strictly confined to the limits marked out by the statute and exercised in conformity therewith.[46] Furthermore, their

42. Earl *v.* Raymond, 188 Ill. 15, 59 N. E. 19; Halsey *v.* People, 84 Ill. 89; Beers *v.* People, 83 Ill. 488; Porter *v.* Rockford, etc., R. Co., 76 Ill. 561; Burlington Gas Light Co. *v.* Burlington, 101 Iowa 458, 70 N. W. 628; Harts *v.* Mackinac Island, 131 Mich. 680, 92 N. W. 351; Boyce *v.* Sebring, 66 Mich. 210, 33 N. W. 815; Matter of Pearsall, 9 Abb. Pr. N. S. (N. Y.) 203.

43. *Colorado.*— People *v.* Lothrop, 3 Colo. 428.

Michigan.—Mills *v.* Richland Tp., 72 Mich. 100, 40 N. W. 183. And see Auditor-Gen. *v.* Sparrow, 116 Mich. 574, 74 N. W. 881.

New Jersey.— Oxford Tp. *v.* Delaware, etc., R. Co., 64 N. J. L. 195, 45 Atl. 775; Mount *v.* Parker, 32 N. J. L. 341.

Ohio— Britt *v.* Lewis, 16 Ohio Cir. Ct. 343, 9 Ohio Cir. Dec. 166; Hirschman *v.* Fratz, 6 Ohio Dec. (Reprint) 1109, 10 Am. L. Rec. 486; Hulbert *v.* Wise, 6 Ohio Dec. (Reprint) 1069, 10 Am. L. Rec. 183.

Tennessee.— Carroll *v.* Alsup, 107 Tenn. 257, 64 S. W. 193.

Texas.— Connor *v.* Waxahachie, (1889) 13 S. W. 30; Ferris *v.* Kimble, 75 Tex. 476, 12 S. W. 689; Texas, etc., R. Co. *v.* Harrison County, 54 Tex. 119.

Wisconsin.— State *v.* Lippels, 112 Wis. 203, 87 N. W. 1093; State *v.* Gaylord, 73 Wis. 316, 41 N. W. 521.

United States.— Cooley *v.* O'Connor, 12 Wall. 391, 20 L. ed. 446.

But *compare* Hamilton *v.* State, 3 Ind. 452.

Notice of special meeting see Pike County *v.* Rowland, 94 Pa. St. 238.

44. Amendment of roll by assessor by adding omitted persons or property see *supra*, VI, E, 9, c, (II).

Assessment of omitted property by court see *infra*, VII, C, 1, b.

45. *Kansas.*— Atchison, etc., R. Co. *v.* Wilson, 35 Kan. 175, 10 Pac. 459.

Louisiana.— State *v.* State Tax Collector, 39 La. Ann. 530, 2 So. 59.

Nebraska.— Lincoln Land Co. *v.* Phelps County, 59 Nebr. 249, 80 N. W. 818.

New York.— People *v.* Neff, 15 N. Y. App. Div. 8, 44 N. Y. Suppl. 46 [*affirmed* in 156 N. Y. 701, 51 N. E. 1093].

North Dakota.—Casselton First Nat. Bank *v.* Lewis, (1909) 121 N. W. 836, holding that under Laws (1897), c. 126, the local boards of review, where there are such boards, equalize the assessments as between individuals, the county board as between the several assessment districts, and the state board as between the several counties; and that the county board acts in a dual capacity: (1) To adjust assessments in districts having no board of reviewers; and (2) to equalize assessments between the various districts.

Utah.— State *v.* Thomas, 16 Utah 86, 50 Pac. 615.

Wisconsin.— Strange *v.* Oconto Land Co., 136 Wis. 516, 117 N. W. 1023 (including extraordinary assessments); Cramer *v.* Milwaukee, 18 Wis. 257.

United States.— *In re* Wyoming Valley Ice Co., 165 Fed. 789 (holding that under Penn. Act, March 30, 1811, § 16, the auditor-general and state treasurer may revise taxes which have been settled but not taken out of their hands, by appeal or otherwise; provided action is taken within the time specified and a final discharge has not been allowed); Taylor *v.* Louisville, etc., R. Co., 88 Fed. 350, 31 C. C. A. 537.

See 45 Cent. Dig. tit. "Taxation," § 829.

46. *Illinois.*— Sherlock *v.* Winnetka, 68 Ill. 530.

Indiana.— Jeffersonville, etc., R. Co. *v.* McQueen, 49 Ind. 64.

Kansas.— Stanfield *v.* Boyd, 10 Kan. App. 265, 62 Pac. 721.

Louisiana.— Union Oil Co. *v.* Campbell, 48 La. Ann. 1350, 20 So. 1007.

Nebraska.— Grant *v.* Bartholomew, 58 Nebr. 839, 80 N. W. 45.

Nevada.— State *v.* Central Pac. R. Co., 9 Nev. 79.

New York.— People *v.* New York Tax, etc., Com'rs, 91 N. Y. 593; People *v.* Delaware County, 60 N. Y. 381 [*reversing* 2 Hun 102]; Van Rensselaer *v.* Whitbeck, 7 Barb. 133, 4 How. Pr. 381 [*reversed* on other grounds in 7 N. Y. 517, Seld. Notes 27].

Pennsylvania.— Williamson's Estate, 153 Pa. St. 508, 26 Atl. 246.

Vermont.— Kellogg *v.* Higgins, 11 Vt. 240.

See 45 Cent. Dig. tit. "Taxation," § 829.

In Indiana the county auditor has no power to correct mistakes in the state board of tax commissioners' assessment for the mileage of railroad trackage; but such mistakes must be corrected by such board in a manner authorized by law. Baltimore, etc., R. Co.

jurisdiction may depend on the fact of an assessment having been made, on the *situs* of the particular property, the residence of the owner, or other such considerations, and such jurisdiction is not presumed, but the necessary facts must appear on the record.[47] This jurisdiction is also, in general, appellate only, and where it depends on some precedent action of the taxpayer, or on the denial of relief by some inferior officer or board, it will be strictly construed.[48] Where the statute directs the mode of assessing or valuing particular property, the board has no power to change an assessment made in accordance therewith.[49] And moreover, where the board is created for the purpose of reviewing assessments of particular classes of property, such as corporate property in general or the property of railroad companies, it will possess, as to that kind of property, the ordinary powers of a board of review, but will have no jurisdiction over assessments of any other property.[50]

b. Assessment of Omitted Property — (i) *In General.* In the absence of special statutory authority therefor, the officer or board of equalization or review cannot act as an original assessing body and make an assessment *de novo* or add omitted property.[51] But in many states power is now given to such officers or

v. Oregon Tp., 170 Ind. 300, 84 N. E. 529 [*affirming* (App. 1907) 81 N. E. 105].

Adjudging legality of tax.— Unless authorized by the statute a board of equalization has no jurisdiction to determine the right of a municipal corporation to assess a tax, nor any authority to vacate and set aside an assessment on the ground of want of power in the municipality levying it. Taylor Dist. Tp. *v.* Moore, 39 Iowa 605; *In re* Lange, 85 N. Y. 307.

Correction of errors.— If the board exceeds its authority in correcting an error by its own judgment, instead of directing it to be done, this is immaterial, where the error is such that its correction is a mere ministerial duty. Weaver *v.* State, 39 Ala. 535.

Effect of illegal action by board.— If the board acts illegally in changing assessments, it will not vitiate the legal acts of the assessors, since until legally changed or vacated, their assessments are binding on taxpayers. State *v.* Allen, 43 Ill. 456.

47. Ellis *v.* People, 199 Ill. 548, 65 N. E. 428; State *v.* Washoe County, 5 Nev. 317; Wright *v.* Pelton, 4 Ohio Dec. (Reprint) 499, 2 Clev. L. Rep. 266. See also State *v.* Minnesota Tax Commission, 103 Minn. 485, 115 N. W. 647 (holding that Rev. Laws (1905), § 801, in so far as it requires the favorable recommendation of the county board and the county auditor as a condition precedent to the correction of an assessment or the abatement of taxes, is not repealed by Gen. Laws (1907), p. 576, c. 408, imposing on the Minnesota tax commission the duty formerly imposed on the state auditor, to hear grievances relating to taxes on account of excessive valuation); Delaware, etc., Canal Co. *v.* Walsh, 11 Phila. (Pa.) 587.

Power of correction in case of non-resident taxpayer see People *v.* Delaware County, 60 N. Y. 381 [*reversing* 2 Hun 202].

48. *Colorado.*— Pilgrim Consol. Min. Co. *v.* Teller County, 32 Colo. 334, 76 Pac. 364.

Illinois.— Workingmen's Banking Co. *v.* Wolff, 150 Ill. 491, 37 N. E. 930, appeal by owner necessary.

Indiana.— Parkinson *v.* Jasper County Tel. Co., 31 Ind. App. 135, 67 N. E. 471.

Nebraska.— Lincoln Land Co. *v.* Phelps County, 59 Nebr. 249, 80 N. W. 818.

Nevada.— Virginia, etc., R. Co. *v.* Ormsby County, 5 Nev. 341.

New Jersey.— Bayonne *v.* Hudson County, 46 N. J. L. 93.

Ohio.— Adams *v.* Shields, 17 Ohio Cir. Ct. 129, 9 Ohio Cir. Dec. 558.

Texas.— Moody *v.* Galveston, 21 Tex. Civ. App. 16, 50 S. W. 481.

See 45 Cent. Dig. tit. "Taxation," § 829.

But *compare* People *v.* Feitner, 168 N. Y. 441, 61 N. E. 763 [*affirming* 61 N. Y. App. Div. 117, 70 N. Y. Suppl. 360].

49. Tibbetts *v.* Job, 11 Ill. 453; People *v.* Delaware County, 47 How. Pr. (N. Y.) 24 [*affirmed* in 60 N. Y. 381 (*reversing* 2 Hun 102, 4 Thomps. & C. 336)].

50. Cummings *v.* Stark, 138 Ind. 94, 34 N. E. 444; Jones *v.* Rushville Nat. Bank, 138 Ind. 87, 37 N. E. 338; Pittsburgh, etc., R. Co. *v.* Backus, 133 Ind. 625, 33 N. E. 432; Cleveland, etc., R. Co. *v.* Backus, 133 Ind. 513, 23 N. E. 421, 18 L. R. A. 729.

51. *Massachusetts.*— Lowell *v.* Middlesex County, 146 Mass. 403, 16 N. E. 8. But see Noyes *v.* Hale, 137 Mass. 266.

Minnesota.— State *v.* Crookston Lumber Co., 85 Minn. 405, 89 N. W. 173. But see State *v.* Cudahy Packing Co., 103 Minn. 419, 115 N. W. 645, 1039, under the charter of Minneapolis.

Missouri.— State *v.* Cunningham, 153 Mo. 642, 55 S. W. 249; Pacific R. Co. *v.* Cass County, 53 Mo. 17.

Nevada.— State *v.* Ernst, 26 Nev. 113, 65 Pac. 7.

Pennsylvania.— Com. *v.* Philadelphia, 1 Dauph. Co. Rep. 392. See also Com. *v.* Pennsylvania Co., 145 Pa. St. 266, 23 Atl. 549.

Texas.— Sullivan *v.* Bitter, 51 Tex. Civ. App. 604, 113 S. W. 193 (holding that in the absence of statutory authority a board of equalization cannot assess property not listed

boards not only to correct assessments but also to add to the assessment lists taxable persons and property omitted by the assessors.[52] Such a statute is constitutional and valid, as the legislature may select any agency it deems proper

and valued by the assessors; and construing Rev. St. (1895) tit. 104, c. 3, and art. 5124, as amended by Acts (1907), p. 459, c. 11, as not giving such authority to the board); Cook *v.* Galveston, etc., R. Co., 5 Tex. Civ. App. 644, 24 S. W. 544.

United States.— Powder River Cattle Co. *v.* Custer County, 45 Fed. 323; Paul *v.* Pacific R. Co., 18 Fed. Cas. No. 10,845, 4 Dill. 35.

See 45 Cent. Dig. tit. "Taxation," § 831.

52. *Alabama.*— *Ex p.* Howard-Harrison Iron Co., 119 Ala. 484, 24 So. 516, 72 Am. St. Rep. 928.

Arkansas.— Dallas County *v.* Banks, 87 Ark. 484, 113 S. W. 37, authority to add the value of stock in certain insurance companies.

Connecticut.— Sanford's Appeal, 75 Conn. 590, 54 Atl. 739; Hamersley *v.* Franey, 39 Conn. 176.

Idaho.— Murphy *v.* Lincoln County Bd. of Equalization, 6 Ida. 745, 59 Pac. 715.

Illinois.— People *v.* Upham, 221 Ill. 555, 77 N. E. 931; Gannaway *v.* Barricklow, 203 Ill. 410, 67 N. E. 825; People *v.* Sellars, 179 Ill. 170, 53 N. E. 545.

Indiana.— Gallup *v.* Schmidt, 154 Ind. 196, 56 N. E. 443; Crowder *v.* Riggs, 153 Ind. 158, 53 N. E. 1019; Hunter Stone Co. *v.* Woodard, 152 Ind. 474, 53 N. E. 947; Reynolds *v.* Bowen, 138 Ind. 434, 36 N. E. 756, 37 N. E. 962; Vandercook *v.* Williams, 106 Ind. 345, 1 N. E. 619, 8 N. E. 113; International Bldg., etc., Assoc. *v.* Marion County, 30 Ind. App. 12, 65 N. E. 297. But see Pavy *v.* Greensburgh, etc., Turnpike Co., 42 Ind. 400.

Iowa.— *In re* Seaman, 135 Iowa 543, 113 N. W. 354; Security Sav. Bank *v.* Carroll, 131 Iowa 605, 109 N. W. 212 (county treasurer); King *v.* Parker, 73 Iowa 757, 34 N. W. 451; Parker *v.* Van Steenburg, 68 Iowa 174, 26 N. W. 60; Robb *v.* Robinson, 66 Iowa 500, 24 N. W. 15; Ordway *v.* Smith, 53 Iowa 589, 5 N. W. 757. But see Royce *v.* Jenney, 50 Iowa 676.

Kansas.— Douglas County *v.* Lane, 76 Kan. 12, 90 Pac. 1092. But *compare* Pomeroy Coal Co. *v.* Emlen, 44 Kan. 117, 24 Pac. 340.

Kentucky.— Ward *v.* Wentz, 130 Ky. 705, 113 S. W. 892 (holding, however, that one's land cannot be assessed as omitted property, where there has been a valid assessment of all of it for the same year); Mt. Sterling Oil, etc., Co. *v.* Ratliff, 127 Ky. 1, 104 S. W. 993, 31 Ky. L. Rep. 1229.

Maryland.— Baltimore, etc., R. Co. *v.* Wicomico County, 93 Md. 113, 48 Atl. 853; Monticello Distilling Co. *v.* Baltimore, 90 Md. 416, 45 Atl. 210; Hopkins *v.* Van Wyck, 80 Md. 7, 30 Atl. 556.

Michigan.— State Tax Com'rs *v.* Grand Rapids Bd. of Assessors, 124 Mich. 491, 83 N. W. 209.

Mississippi.— Oxford Bank *v.* Lafayette County, 79 Miss. 152, 29 So. 825; Tunica County *v.* Tate, 78 Miss. 294, 29 So. 74. See also Adams *v.* Clarksdale, (1909) 48 So. 242.

Nebraska.—White *v.* Lincoln, 79 Nebr. 153, 112 N. W. 369; Elkhorn Land, etc., Co. *v.* Dixon County, 35 Nebr. 426, 53 N. W. 382.

New Mexico.— U. S. Trust Co. *v.* Territory, 10 N. M. 416, 62 Pac. 987.

New York.— People *v.* New York, 20 Barb. 81 [*affirmed* in 16 N. Y. 424]; People *v.* Port Jervis, 23 Misc. 317, 52 N. Y. Suppl. 59.

Ohio.— Probasco *v.* Raine, 50 Ohio St. 378, 34 N. E. 536 [*reversing* 21 Cinc. L. Bul. 88]; Yost *v.* Maumee Brewing Co., 20 Ohio Cir. Ct. 26, 10 Ohio Cir. Dec. 693; Rawson *v.* Schott, 14 Ohio Cir. Ct. 94, 7 Ohio Cir. Dec. 256; Gibson *v.* Zumstein, 10 Ohio Dec. (Reprint) 516, 21 Cinc. L. Bul. 318; Luken *v.* Staley, 8 Ohio Dec. (Reprint) 320, 7 Cinc. L. Bul. 96. See also State *v.* Akins, 63 Ohio St. 182, 57 N. E. 1094.

Oklahoma.— Gamble *v.* Patrick, 22 Okla. 915, 99 Pac. 640, holding that the right of the officers charged with subjecting omitted property to taxation is continuing, and is not terminated by the death of the taxpayer.

Oregon.— Oregon, etc., Mortg. Sav. Bank *v.* Jordan, 16 Oreg. 113, 17 Pac. 621; Poppleton *v.* Yamhill County, 8 Oreg. 337.

South Carolina.— Garrison *v.* Laurens, 55 S. C. 551, 33 S. E. 577.

South Dakota.— Grigsby *v.* Minnehaha County, 6 S. D. 492, 62 N. W. 105.

Tennessee.— State *v.* Nashville, etc., R. Co., 96 Tenn. 385, 34 S. W. 1023; Chesapeake, etc., R. Co. *v.* Lauderdale County, 16 Lea 688, 1 S. W. 48; Shelby County *v.* Mississippi, etc., R. Co., 16 Lea 401, 1 S. W. 32; Wilson *v.* Benton, 11 Lea 51; Louisville, etc., R. Co. *v.* State, 8 Heisk. 663.

See 45 Cent. Dig. tit. "Taxation," § 834.

What property may be added.— The board may add omitted property of railroads as well as of private individuals. Cincinnati Southern R. Co. *v.* Guenther, 19 Fed. 395. And it may also add property temporarily converted into non-taxable securities with intent to evade the law (Crowder *v.* Riggs, 153 Ind. 158, 53 N. E. 1019), but not property which was intentionally and deliberately omitted by the assessors because they believed it was not taxable (People *v.* Schoonover, 26 Misc. (N. Y.) 576, 57 N. Y. Suppl. 498 [*reversed* on other grounds in 47 N. Y. App. Div. 278, 62 N. Y. Suppl. 180 (*affirmed* in 166 N. Y. 629, 60 N. E. 1118)]; Marsh *v.* Bowen, 12 Abb. N. Cas. (N. Y.) 1; Weeks *v.* Milwaukee, 10 Wis. 242), nor property which actually bears its share of the tax, although accredited to the wrong item in the tax return (Woll *v.* Thomas, 1 Ind. App. 232, 27 N. E. 578). The board has power to add omitted property, although no property at all was assessed to the owner and his name does not appear on the assessment roll. Horton *v.* Driskell, 13 Wyo.

for taxing purposes.[53] Such an additional assessment made by the board should be made as of the time when it should have been made originally,[54] and before the time fixed by law for the adjournment of the board.[55] On this question of omitted property, the taxpayer's sworn list or inventory is not conclusive on the board.[56]

(II) *Assessment For Prior Years.* Where the statutes empower the officers or board of equalization to add omitted property to the assessment list, they are not generally restricted to the taxes of the current year but are authorized to assess back taxes on such property, within the limitations of the statute.[57] But a statute granting this authority will not be construed as retroactive;[58] and it gives the board no power to revise and increase an assessment of property for former years, on the theory that the assessment was too low and was therefore to be regarded as an omission.[59]

(III) *Directing Assessor to Assess.* In some jurisdictions, where the board of equalization lacks authority to make an original assessment of property which it discovers to have been omitted from the roll, it may still direct the assessor to assess such property, and the latter officer will be bound to act on the instruc-

66, 77 Pac. 354. And see Franklin County *v.* Nashville, etc., R. Co., 12 Lea (Tenn.) 521.

53. Kleinschmidt *v.* Cappeller, 8 Ohio Dec. (Reprint) 212, 6 Cinc. L. Bul. 325; Jones *v.* Wood, 2 Ohio S. & C. Pl. Dec. 75, 1 Ohio N. P. 155 [*reversed* on other grounds in 9 Ohio Cir. Ct. 560, 6 Ohio Cir. Dec. 538]. *Compare* Evansville, etc., R. Co. *v.* Hays, 118 Ind. 214, 20 N. E. 736.

54. Chesapeake, etc., R. Co. *v.* State, 13 Lea (Tenn.) 348. But see State *v.* Murphy, 31 N. J. L. 288.

55. Saline County *v.* Hughes, 84 Ark. 347, 105 S. W. 577; Barkley *v.* Dale, 213 Ill. 614, 73 N. E. 325.

56. Savings, etc., Soc. *v.* San Francisco, 131 Cal. 356, 63 Pac. 665.

57. See the statutes of the several states. And see the following cases:

Arkansas.— St. Louis, etc., R. Co. *v.* Miller County, 67 Ark. 498, 55 S. W. 926.

Illinois.— Warner *v.* Campbell, 238 Ill. 630, 87 N. E. 853 (holding that where a taxpayer has not been assessed on credits at all for former years, the board of review may assess them in subsequent years); Sellars *v.* Barrett, 185 Ill. 466, 57 N. E. 422.

Indiana.— Parkison *v.* Thompson, 164 Ind. 609, 73 N. E. 109; Crowder *v.* Riggs, 153 Ind. 158, 53 N. E. 1019. Under the earlier statutes in this state assessments of omitted property could be made only for the current year. McKeen *v.* Haskell, 108 Ind. 97, 8 N. E. 901; Lang *v.* Clapp, 103 Ind. 17, 2 N. E. 197; Hamilton *v.* Amsden, 88 Ind. 304; Scott *v.* Knightstown, 84 Ind. 108; State *v.* Howard, 80 Ind. 466; Stockman *v.* Robbins, 80 Ind. 195.

Louisiana.— State *v.* New Orleans, 105 La. 768, 30 So. 97.

New York.— People *v.* Roberts, 157 N. Y. 70, 51 N. E. 437.

Ohio.— Pittsburg, etc., R. Co. *v.* Clark County Treasurer, 78 Ohio St. 227, 85 N. E. 49; Rheinboldt *v.* Raine, 52 Ohio St. 160, 39 N. E. 145 [*affirming* 6 Ohio Cir. Ct. 544, 3 Ohio Cir. Dec. 577]; Neave Bldg. Co. *v.* Brooks, 9 Ohio Cir. Ct. 151, 6 Ohio Cir. Dec. 280; Scott *v.* Raine, 11 Ohio Dec. (Reprint) 171, 25 Cinc. L. Bul. 154; Ludlow *v.* Willich, 1 Cinc. Super. Ct. 315.

See 45 Cent. Dig. tit. "Taxation," § 835.

But *compare* Douglas County *v.* Lanne, 76 Kan. 12, 90 Pac. 1092 (holding that Gen. St. (1901) § 7599, does not afford means for collecting the amount of taxes that ought to have been, but were not, imposed in previous years, but merely authorizes the county clerk or board of commissioners to add to the tax roll of the current year personal property improperly omitted therefrom, and that if they improperly attempt to charge a person with the amount of a tax which ought to have been, but was not, assessed against him in a former year, on account of personal property then owned by him, such proceeding is wholly void); Sudderth *v.* Brittain, 76 N. C. 458; Schmuck *v.* Hartman, 222 Pa. St. 190, 70 Atl. 1091 (holding that the taxing authorities cannot assess a taxpayer who has neglected to make a return for a particular year, after the expiration of that year).

"Current year," as used in a statute authorizing the county auditor on discovery of any omitted real estate to add to the taxes of a "current year" the taxes which have been omitted for the preceding years, means the "current tax year," and not the "current calendar year." Pittsburg, etc., R. Co. *v.* Clark County Treasurer, 78 Ohio St. 227, 85 N. E. 49.

58. Hennel *v.* Vanderburgh County, 132 Ind. 32, 31 N. E. 462; Lang *v.* Clapp, 103 Ind. 17, 2 N. E. 197; Shelby County *v.* Mississippi, etc., R. Co., 16 Lea (Tenn.) 401, 1 S. W. 32.

59. Barkley *v.* Dale, 213 Ill. 614, 73 N. E. 325; Patton *v.* Commercial Bank, 10 Ohio S. & C. Pl. Dec. 321, 7 Ohio N. P. 401; Mercantile Nat. Bank *v.* Lander, 109 Fed. 21 [*affirmed* in 118 Fed. 785, 55 C. C. A. 523 (*reversed* on other grounds in 186 U. S. 458, 22 S. Ct. 908, 46 L. ed. 1247)]. And see Du Bois *v.* Lake County, 4 Ind. App. 138, 30 N. E. 206; Woll *v.* Thomas, 1 Ind. App. 232, 27 N. E. 578.

tions of the board, although exercising his own judgment and discretion as to details.[60]

c. Change of Valuation or Amount of Tax. In reviewing an individual assessment, the board of equalization is bound neither by the valuation placed on the property by its owner nor by that of the assessor, and does not act as an arbitrator between these two parties, but as an official body charged with the duty of ascertaining the true taxable value of the property, and therefore it may make such changes in the assessment as are necessary to carry its determination into effect.[61] But county boards have no authority to change valuations made by the state board on property committed to the exclusive jurisdiction of the latter;[62] and generally an appeal does not lie from one board of equalization to another, each possessing its own well-defined jurisdiction and authority.[63]

d. Increase of Valuation or Tax. Ordinarily the officer or board of equalization is restricted to correcting assessments alleged to be excessive, and has no authority to increase valuations previously made by the assessor or other proper

60. Hampson *v.* Dysart, 6 Ariz. 98, 53 Pac. 581; Security Sav. Bank, etc. *v.* Los Angeles County, (Cal. 1893) 34 Pac. 437; Farmers', etc., Bank *v.* Los Angeles Bd. of Equalization, 97 Cal. 318, 32 Pac. 312; Murphy *v.* Lincoln County Bd. of Equalization, 7 Ida. 745, 59 Pac. 715; Connor *v.* Waxahachie, (Tex. 1889) 13 S. W. 30; Ferris *v.* Kimble, 75 Tex. 476, 12 S. W. 689.

In case of conflicting instructions, the assessor is bound to follow the directions of the state controller rather than those of the board of equalization. Cook *v.* Galveston, etc., R. Co., 5 Tex. Civ. App. 644, 24 S. W. 544.

61. *Alabama.*— State *v.* Sloss-Sheffield Steel, etc., Co., 162 Ala. 234, 50 So. 366; *Ex p.* Howard-Harrison Iron Co., 130 Ala. 185, 30 So. 400.

Arizona.— Hampson *v.* Dysart, 6 Ariz. 98, 53 Pac. 581.

Connecticut.— Bradley *v.* New Haven, 73 Conn. 646, 48 Atl. 960.

Georgia.— Collier *v.* Morrow, 90 Ga. 148, 15 S. E. 768.

Illinois.— Chicago, etc., R. Co. *v.* Bureau County, 25 Ill. 580.

Michigan.— Ward *v.* Echo Tp., 145 Mich. 56, 108 N. W. 364.

Mississippi.— Tunica County *v.* Tate, 78 Miss. 294, 29 So. 74.

Nebraska.— State *v.* Karr, 64 Nebr. 514, 90 N. W. 298.

Nevada.— State *v.* Meyers, 23 Nev. 274, 46 Pac. 51.

New Jersey.— Woodstown *v.* Salem County Bd. of Assessors, (Sup. 1903) 56 Atl. 124.

New York.— People *v.* Roberts, 27 N. Y. App. Div. 400, 50 N. Y. Suppl. 302 [*affirmed* in 158 N. Y. 666, 52 N. E. 1125]; People *v.* Barker, 22 N. Y. App. Div. 161, 47 N. Y. Suppl. 1020. See also People *v.* Schoonover, 26 Misc. 576, 57 N. Y. Suppl. 498 [*reversed* on other grounds in 47 N. Y. App. Div. 278, 62 N. Y. Suppl. 180 (*affirmed* in 166 N. Y. 629, 60 N. E. 1118)].

Ohio.— Gazlay *v.* Humphreys, 7 Ohio Dec. (Reprint) 102, 1 Cinc. L. Bul. 114.

Oregon.— Shumway *v.* Baker County, 3 Oreg. 246.

Wisconsin.— State *v.* Lawler, 103 Wis. 460, 79 N. W. 777; State *v.* Gaylord, 73 Wis. 306, 41 N. W. 518; Wauwatosa *v.* Gunyon, 25 Wis. 271.

See 45 Cent. Dig. tit. "Taxation," § 837.

Contra.— Houghton *v.* Austin, 47 Cal. 646.

The state board of equalization has power to increase or reduce the valuation of railroad property as well as other property. Braden *v.* Union Trust Co., 25 Kan. 362.

Necessity of valuation by assessor.—A board of equalization cannot place a valuation on property for assessment which has been returned by the assessor without having any value placed on it. Lyman *v.* Howe, 64 Ark. 436, 42 S. W. 830.

Change of valuation between assessment periods.—Annual boards of equalization may change the appraisement in any one year of the decennial periods, but such revaluation must be based upon some change of value or condition. Black *v.* Hagerty, 16 Ohio Cir. Ct. 255, 9 Ohio Cir. Dec. 93. But in equalizing values and correcting errors made by the decennial appraisers a board of review must at all times be guided and controlled by values as they existed at the time of making the decennial appraisement, and not by values as at present existing. National Land, etc., Co. *v.* Davies, 29 Ohio Cir. Ct. 334 [*affirmed* in 76 Ohio St. 407, 81 N. E. 755]. As to apportionment of valuation between owner of surface and owner of coal, when coal is conveyed after the decennial appraisement see Johnson *v.* Lacey, 30 Ohio Cir. Ct. 619.

A resolution of a town meeting reducing an annual military tax is ineffectual. Atwater *v.* O'Reilly, 81 Conn. 367, 71 Atl. 505.

Death of taxpayer as limiting time to make corrections see Williamson's Estate, 153 Pa. St. 508, 26 Atl. 246 [*affirming* 1 Pa. Dist. 159, 11 Pa. Co. Ct. 235].

62. People *v.* Sacramento County, 59 Cal. 321; Pensacola *v.* Louisville, etc., R. Co., 21 Fla. 492; Baltimore, etc., R. Co. *v.* Oregon Tp., 170 Ind. 300, 84 N. E. 529 [*affirming* (Ind. App. 1907) 81 N. E. 105].

63. See McGee *v.* State, 32 Nebr. 149, 49 N. W. 220.

officer;[64] but under most statutes such officer or board has at least a limited authority to increase the valuation placed on any piece of property, if satisfied that it is too low.[65] But this action must be based on sound and sufficient reasons,

64. People *v.* Miller, 84 N. Y. App. Div. 166, 82 N. Y. Suppl. 607 (state controller); People *v.* Morgan, 59 N. Y. App. Div. 302, 69 N. Y. Suppl. 263; People *v.* Roberts, 51 N. Y. App. Div. 152, 64 N. Y. Suppl. 627; People *v.* Neff, 15 N. Y. App. Div. 8, 44 N. Y. Suppl. 46 [*affirmed* in 156 N. Y. 701, 51 N. E. 1093]; Oregon Steam Nav. Co. *v.* Wasco County, 2 Oreg. 206; Leach *v.* Blakely, 34 Vt. 134. But see People *v.* Wells, 91 N. Y. App. Div. 172, 86 N. Y. Suppl. 309.

Back taxes.—An understatement by a taxpayer of the extent or value of his taxable property, even if intentional, does not warrant the board of equalization in going back and levying taxes on the difference between the listed and the actual extent or value, under their authority to assess "omitted" property, at least after payment of the taxes originally assessed. Sudderth *v.* Brittain, 76 N. C. 458. And see Florer *v.* Sherwood, 128 Ind. 495, 28 N. E. 71; Williams *v.* Segur, 106 Ind. 368, 1 N. E. 707; Donch *v.* Lake County, 4 Ind. App. 374, 30 N. E. 204. But see National Storage Co. *v.* Jersey City, 50 N. J. L. 141, 11 Atl. 348.

Increase after reduction.— Where the board has reduced the valuation of property at the instance of the owner, it has no jurisdiction subsequently to increase the valuation, at least without notice. Manson L. & T. Co. *v.* Heston, 83 Iowa 377, 49 N. W. 985; Phillips *v.* New Buffalo Tp., 64 Mich. 683, 31 N. W. 581.

65. *Arkansas.*— Nashville Lumber Co. *v.* Howard County, 89 Ark. 53, 115 S. W. 936; Saline County *v.* Hughes, 84 Ark. 347, 105 S. W. 577.

California.— Mackay *v.* San Francisco, 113 Cal. 392, 45 Pac. 696; People *v.* Reynolds, 28 Cal. 107, limited authority. And see Los Angeles *v.* Los Angeles City Waterworks Co., 49 Cal. 638.

Connecticut.— Whittelsey *v.* Clinton, 14 Conn. 72, may not make a threefold addition.

Illinois.— Warner *v.* Campbell, 238 Ill. 630, 87 N. E. 853 (holding that the board of review cannot increase assessments in a subsequent year in the absence of fraud when the assessment was made); People *v.* St. Louis, etc., R. Co., 230 Ill. 61, 82 N. E. 305 (holding, however, that it was improper for the board of review in 1905 to increase an assessment of land made in 1903 on account of a supposed increase in value of underlying coal and mineral); Condit *v.* Widmayer, 196 Ill. 623, 63 N. E. 1078; Kimball *v.* Merchants' Sav., etc., Co., 89 Ill. 611; Coolbaugh *v.* Huck, 86 Ill. 600; McConkey *v.* Smith, 73 Ill. 313; State *v.* Allen, 43 Ill. 456.

Kansas.— Pomeroy Coal Co. *v.* Emlen, 44 Kan. 117, 24 Pac. 340.

Missouri.— State *v.* Baker, 170 Mo. 383, 70 S. W. 872.

Montana.— State *v.* Ellis, 15 Mont. 224, 38 Pac. 1079. See also Western Ranches *v.* Custer County, 28 Mont. 278, 72 Pac. 659.

Nebraska.— State *v.* Karr, 64 Nebr. 514, 90 N. W. 298; Grant *v.* Bartholomew, 57 Nebr. 673, 78 N. W. 314.

New Jersey.— Wayne Tp. *v.* Laflin, etc., Powder Co., 76 N. J. L. 175, 68 Atl. 909; National Storage Co. *v.* Jersey City, 50 N. J. L. 141, 11 Atl. 348; Vanderpool *v.* Bonnell, 49 N. J. L. 317, 8 Atl. 116; Mutual Ben. L. Ins. Co. *v.* Utter, 33 N. J. L. 183.

Ohio.— Humphreys *v.* Safe Deposit Co., 29 Ohio St. 608; Hayes *v.* Yost, 24 Ohio Cir. Ct. 18; Nova Ceasarea Harmony Lodge No. 2 *v.* Hagerty, 11 Ohio Dec. (Reprint) 595, 28 Cinc. L. Bul. 67; Gibson *v.* Zumstein, 10 Ohio Dec. (Reprint) 516, 21 Cinc. L. Bul. 318; Wagner *v.* Zumstein, 10 Ohio Dec. (Reprint) 515, 21 Cinc. L. Bul. 317; Humphreys *v.* Safe Deposit Co., 5 Ohio Dec. (Reprint) 464, 6 Cinc. L. Bul. 79. See also State *v.* Annual State Bd. of Equalization, 65 Ohio St. 544, 63 N. E. 68.

Rhode Island.—Anderton *v.* Pawtucket Tax Assessors, (1909) 71 Atl. 797, holding that an increase in valuation of farm land by the board of assessors is not rendered illegal by the fact that no improvements were made on the land and that its condition was unaltered.

South Carolina.— State *v.* Cromer, 35 S. C. 213, 14 S. E. 493, auditor.

Tennessee.— State Nat. Bank *v.* Memphis, 116 Tenn. 641, 94 S. W. 606, 7 L. R. A. N. S. 663.

Utah.— State *v.* Armstrong, 19 Utah 117, 56 Pac. 1076.

Wisconsin.— State *v.* Fisher, 129 Wis. 57, 108 N. W. 206. But *compare* Ketchum *v.* Mukwa, 24 Wis. 303, and White *v.* Appleton, 22 Wis. 639, both of which hold that the board of equalization has no power to increase the value of the items returned by a taxpayer under oath.

United States.— Mercantile Nat. Bank *v.* Hubbard, 105 Fed. 809, 45 C. C. A. 66.

See 45 Cent. Dig. tit. "Taxation," § 838.

Necessity of appeal.— The state board of tax commissioners has no jurisdiction, except on appeal, to raise the assessment on particular property. Eaton *v.* Union County Nat. Bank, 141 Ind. 136, 40 N. E. 668; Seymour First Nat. Bank *v.* Brodhecker, 137 Ind. 693, 37 N. E. 340.

Increasing all valuations.—A city council, sitting as a board of equalization, has no authority to raise the assessed value of all the property of the city by raising the aggregate value of each assessment a certain per cent. Kittle *v.* Shervin, 11 Nebr. 65, 7 N. W. 861. But where assessments are relatively equal, but at much less than the true value of the property, the board of review cannot increase the valuation of the property of one taxpayer without increasing in proportion the valuation of the property of the other taxpayers. Hixon *v.* Eagle River, 91 Wis. 649, 65 N. W. 366.

and cannot be taken arbitrarily; [66] nor is the board justified in any case in raising the valuation of property above its true cash value,[67] or in taking this action without notice to the individual affected.[68]

e. Reduction of Valuation or Tax. If fully satisfied that the assessment of an individual is too high, through error or injustice, the officer or board of equalization generally has power to correct it by reducing the valuation or abating the tax proportionally,[69] provided the owner duly and seasonably applies for relief.[70] In some states also this board is empowered to reduce the assessment where the property in question has been destroyed or materially injured, or its value exhausted or diminished, since the assessment was made.[71]

Gross increase.—A board of equalization may not make a gross increase in the aggregate valuation of property, where the list returned by the assessor has several different items therein; and such an increase cannot be upheld by evidence that in equalizing the assessment it added items to the list as returned by the assessor and increased the items listed. Nashville Lumber Co. *v.* Howard County, 89 Ark. 53, 115 S. W. 936; Saline County *v.* Hughes, 84 Ark. 347, 105 S. W. 577.

66. Cochise County *v.* Copper Queen Consol. Min. Co., 8 Ariz. 221, 71 Pac. 946; Philadelphia *v.* Board of Revision, 33 Leg. Int. (Pa.) 366; State *v.* Sackett, 117 Wis. 580, 94 N. W. 314. And see Sams *v.* Fisher, 106 Md. 155, 66 Atl. 711; Davies *v.* National Land, etc., Co., 76 Ohio St. 407, 81 N. E. 755 [*affirming* 29 Ohio Cir. Ct. 334].

67. Mackay *v.* San Francisco, 113 Cal. 392, 45 Pac. 696; Lee *v.* Mehew, 8 Okla. 136, 56 Pac. 1046; Bardrick *v.* Dillon, 7 Okla. 535, 54 Pac. 785.

68. See *infra*, VII, B, 7, b.

69. *Colorado.*— Denver First Nat. Bank *v.* Montrose County, 36 Colo. 265, 84 Pac. 1111.

Illinois.— Wabash R. Co. *v.* People, 214 Ill. 568, 73 N. E. 749; Morgan *v.* Smithson, 9 Ill. 368.

Kansas.— Pomeroy Coal Co. *v.* Emlen, 44 Kan. 117, 24 Pac. 340.

Maine.— Penobscot Chemical Fibre Co. *v.* Bradley, 99 Me. 263, 59 Atl. 83.

Massachusetts.— Lowell *v.* Middlesex County, 146 Mass. 403, 16 N. E. 8; Northampton *v.* Hampshire County, 145 Mass. 108, 13 N. E. 388; Carleton *v.* Ashburnham, 102 Mass. 348; Hubbard *v.* Garfield, 102 Mass. 72. But the tax assessors have no power to make an abatement of taxes in any way except that specified by statute. Rogers *v.* Gookin, 198 Mass. 434, 85 N. E. 405.

Minnesota.— State *v.* Minnesota Tax Commission, 103 Minn. 485, 115 N. W. 647.

New York.— People *v.* Shields, 6 Hun 556.

North Carolina.— Wade *v.* Craven County Com'rs, 74 N. C. 81.

Ohio.— In this state the board of equalization cannot reduce the valuation of any lot or tract of land appearing on the duplicate of the preceding year, unless at the same time they increase the valuation of other parcels of land then on the duplicate to an amount equal at least to such attempted reduction. State *v.* Raine, 47 Ohio St. 447, 25 N. E. 54. The state auditor cannot delegate to the county auditor his power to reduce a valuation. McCall *v.* Treasurer, 11 Ohio Dec (Reprint) 190, 25 Cinc. L. Bul. 165. And the power conferred on the state auditor to remit taxes does not authorize him to reduce a valuation of real estate made in pursuance of law by a local board of equalization merely because he believes the valuation to be excessive. Black *v.* Hagerty, 60 Ohio St. 551, 54 N. E. 527. As to the correction of clerical errors see State *v.* Lewis, 25 Ohio Cir. Ct. 227; Harte *v.* Hamilton County, 10 Ohio Dec. (Reprint) 514, 21 Cinc. L. Bul. 317.

Pennsylvania.— Cambridge Springs Co.'s Appeal, 8 Pa. Dist. 55.

See 45 Cent. Dig. tit. "Taxation," § 841.

Abatement of poll taxes.— Under a statute exempting from taxation "the polls . . . of persons who by reason of age, infirmity, and poverty are in the judgment of the assessors unable to contribute fully towards the public charges," if a poll tax is assessed on any such person, or on a person not an inhabitant of the town, the assessors may abate it on their own motion. Gordon *v.* Sanderson, 165 Mass. 375, 43 N. E. 128.

Conditions precedent to action by the board of review in abating an assessment or tax see State *v.* Minnesota Tax Commission, 103 Minn. 485, 115 N. W. 647.

Certificate of error.— Under Oklahoma Sess. Laws (1905), c. 31, art. 1, § 1, the county commissioners are authorized to issue certificates of error to taxpayers in certain cases; but they have no such authority when an assessment is made, and the board of equalization of the city in which it was located raises the valuation of certain property, on the ground that the action of the board was unwarranted. Bostick *v.* Noble County, 19 Okla. 92, 91 Pac. 1125.

70. Van Wagenen *v.* Lyon County, 74 Iowa 716, 39 N. W. 105.

Ground of application for relief.— If the complainant's property is not assessed above its fair cash value, no abatement can be allowed because other like property is assessed at less than its fair cash value. Lowell *v.* Middlesex County, 152 Mass. 372, 25 N. E. 469, 9 L. R. A. 356. Nor is a party entitled to an abatement because a single valuation has been put on different items which the statute requires to be valued separately. Lowell *v.* Middlesex County, *supra*.

71. State *v.* Atwood Lumber Co., 96 Minn. 392, 105 N. W. 276 (land stripped of its

f. Remission of Tax and Striking Off Names or Property.[72] In some states a limited authority is given to the board of equalization or review to remit or release taxes for particular reasons;[73] but as a general rule they have no power to strike out the name of any person from the assessment roll as prepared by the assessors, or to cancel the assessment on any item of property, for the reason that they believe it to be exempt or for any other cause.[74]

g. Correction of Errors and Defects. Statutes empowering the board of equalization or other reviewing officers to correct errors and defects in the assessment roll will authorize them to amend assessments made in the wrong name, mistaken or defective descriptions, errors of computation, and the like;[75] but this power of amendment is generally to be restricted to such errors as are apparent on an examination of the roll without extrinsic evidence, and does not extend to the correction of an error of the assessors in making the assessment, or to any substantial error of judgment or of law.[76]

timber); Forsdick *v.* Quitman County, (Miss. 1899) 25 So. 294 (floods as "casualties" causing deterioration of land); Wehmer *v.* Treasurer, 11 Ohio Dec. (Reprint) 190, 25 Cinc. L. Bul. 165 (deducting from the value of new buildings the value of buildings replaced); Scott *v.* Raine, 11 Ohio Dec. (Reprint) 171, 25 Cinc. L. Bul. 154 (destruction of property by fire, flood, storm, or cyclone); Ferguson *v.* Lycoming County, 8 Pa. Co. Ct. 667 (total destruction of whole or part of the property). See also Bostick *v.* Noble County, 19 Okla. 92, 91 Pac. 1125.

A sale of a portion of the property affords no ground for abatement. Rogers *v.* Gookin, 198 Mass. 434, 85 N. E. 405. Thus the sale and removal of timber from land does not entitle the owner of the land to any reduction. Johnson *v.* Lacey, 30 Ohio Cir. Ct. 619.

72. Setting aside assessment by court see *infra*, VII, C, 1, a.

73. State *v.* Ormsby County, 7 Nev. 392; People *v.* Barker, 140 N. Y. 437, 35 N. E. 657, 23 L. R. A. 785 [*reversing* 69 Hun 287, 23 N. Y. Suppl. 622]; Matter of Pullman, 52 Misc. (N. Y.) 1, 102 N. Y. Suppl. 356.

In New York the tax commissioners of New York city under their power to correct erroneous assessments may change an assessment by striking out the names of two nonresident executors and allowing it to stand against resident executors. People *v.* Coleman, 42 Hun 581. But such commissioners have no authority to exempt from taxation property which under the law is not exempt. People *v.* Campbell, 93 N. Y. 196.

74. *California.*— People *v.* San Francisco, 50 Cal. 282; People *v.* Ashbury, 44 Cal. 616; People *v.* San Francisco, 44 Cal. 613. Authority of board of supervisors to cancel taxes which cannot be collected see People *v.* Ashbury, 46 Cal. 523.

Delaware.— Biggs *v.* Buckingham, 6 Del. Ch. 267, 23 Atl. 858.

Iowa.— Royce *v.* Jenney, 50 Iowa 676.

Louisiana.— State *v.* Board of Assessors, 30 La. Ann. 261.

Oregon.— Portland Univ. *v.* Multnomah County, 31 Oreg. 498, 50 Pac. 532.

South Dakota.— Grigsby *v.* Minnehaha County, 6 S. D. 492, 62 N. W. 105.

See 45 Cent. Dig. tit. "Taxation," § 842.

75. *Alabama.*— Timberlake *v.* Brewer, 59 Ala. 108.

Iowa.— Ridley *v.* Doughty, 85 Iowa 418, 52 N. W. 350; Adams *v.* Snow, 65 Iowa 435, 21 N. W. 765.

Minnesota.— St. Peter's Church *v.* Scott County, 12 Minn. 395.

Montana.— Missoula First Nat. Bank *v.* Bailey, 15 Mont. 301, 39 Pac. 83.

Nebraska.— State *v.* Grow, 74 Nebr. 850, 105 N. W. 898.

New Jersey.— State *v.* Montclair, etc., R. Co., 43 N. J. L. 524.

New York.— People *v.* Barker, 11 Misc. 262, 32 N. Y. Suppl. 485 [*affirmed* in 86 Hun 283, 33 N. Y. Suppl. 1132]; People *v.* Flushing Bd. of Assessors, 6 N. Y. St. 3.

Ohio.— Fayette County Treasurer *v.* People's, etc., Bank, 47 Ohio St. 503, 25 N. E. 697, 10 L. R. A. 196; State *v.* Raine, 47 Ohio St. 447, 25 N. E. 54.

Vermont.— Henry *v.* Chester, 15 Vt. 460.

United States.— Altschul *v.* Gittings, 86 Fed. 200, holding that the board of equalization created under the laws of Oregon is empowered to correct all errors of assessment, as well those where the property is not the subject of taxation as those where the assessment is unequal or excessive.

See 45 Cent. Dig. tit. "Taxation," § 843.

But *compare* Saline County Bd. of Equalization *v.* Hughes, 84 Ark. 347, 105 S. W. 577 (holding that after a county board of equalization has finally adjourned it cannot meet and correct errors which it made in performing its functions); *Ex p.* Blackburn, 10 Ark. 416 (holding that the state auditor cannot correct a mistake of the sheriff in listing and assessing lands); People *v.* Hastings, 34 Cal. 571; Weston *v.* Monroe, 84 Mich. 341, 47 N. W. 446 (holding that a substantial alteration of the tax roll of a town, made by the supervisors after it has been completed by the county board and certified to by the chairman, invalidates the entire tax levy for the town).

76. Smith *v.* McQuiston, 108 Iowa 363, 79 N. W. 130 (holding that authority to cor-

h. Reassessment.[77] In some of the states authority is given to the board of equalization to order a reassessment of property in case it is found that the original assessment was invalid or fatally defective.[78] But this cannot be done simply on the ground of an undervaluation, where the assessment was made in good faith and was accepted without any steps taken to review it, and the taxes were paid.[79]

6. Meetings of Board — a. Time and Place of Meetings — (i) *In General.* Some cases maintain the rule that a statute requiring the board of equalization to meet on a designated day is mandatory and must be literally complied with;[80] but the doctrine generally accepted is that the failure of the board to convene and begin its sessions at the appointed time is a mere irregularity which does not vitiate the tax, provided no one is deprived of his opportunity to appear before them and be heard.[81] The board may continue its sessions by adjournments taken from time to time.[82] If it is required to sit from day to day, or to remain

rect any clerical or other error in the assessment or tax books does not include errors of judgment on the part of the assessors, but is meant to cover all cases where the record does not disclose the true facts, and in which the matter of judgment is not involved); Hermance *v.* Ulster County, 71 N. Y. 481; Bennett *v.* Buffalo, 17 N. Y. 383; Draude *v.* Staley, 8 Ohio Dec. (Reprint) 265, 6 Cinc. L. Bul. 773 (correction as to underpayment for preceding years); Commercial Bank *v.* Woodside, 14 Pa. St. 404 (changing land from seated to unseated list).

77. **Reassessment by assessor** see *supra*, VI, C, 9, b.

78. *Alabama.*— State *v.* Sloss-Sheffield Steel, etc., Co., 162 Ala. 234, 50 So. 366.

Iowa.— *In re* Seaman, 135 Iowa 543, 113 N. W. 354.

Michigan.— Auditor-Gen. *v.* Tuttle, 146 Mich. 106, 109 N. W. 48 (holding that no reassessment of rejected drain taxes can be made without authority from the board of supervisors); Auditor-Gen. *v.* Fleming, 142 Mich. 12, 105 N. W. 71.

New Jersey.— New Jersey Cent. R. Co. *v.* State Bd. of Assessors, 74 N. J. L. 1, 65 Atl. 244, holding that the state board of equalization may compel the reassessment of the whole property of a taxing district, when it is shown that it has been assessed at substantially less than its true value; but that it is not justified in doing this merely on a stipulation of facts to which the taxing district is not a party.

New York.— Douglas *v.* Westchester County, 172 N. Y. 309, 65 N. E. 162.

Tennessee.— State *v.* Taylor, 119 Tenn. 229, 104 S. W. 242.

Wisconsin.— Ashland County *v.* Knight, 129 Wis. 63, 108 N. W. 208; Bass *v.* Fond du Lac County, 60 Wis. 516, 19 N. W. 526.

See 45 Cent. Dig. tit. "Taxation," § 844.

That property had been regularly assessed in the first instance, the assessments passed on by the county board of equalization and by the state board, and by the latter certified back to the county, and taxes paid thereon, will not prevent a reassessment of the property in a proper case. Smoky Mountain Land, etc., Co. *v.* Lattimore, 119 Tenn. 620, 105 S. W. 1028.

Reassessment of delinquent taxes see Gehrhardt *v.* Schwartz, 102 N. Y. App. Div. 389, 92 N. Y. Suppl. 613 [*affirmed* in 186 N. Y. 574, 89 N. E. 1105], holding that a reassessment levied jointly on four lots owned severally is invalid.

Proceedings.— Under the Alabama statute, where a tax commissioner makes a reassessment, he is required to return it to the commissioners' court, which, if satisfied that there has been no undervaluation, dismisses the proceeding; but if not so satisfied notice must be given to the taxpayer, as required by statute, and the commissioners must then proceed as in other cases of undervaluation. State *v.* Sloss-Sheffield Steel, etc., Co., 162 Ala. 234, 50 So. 366. In such a case the question before the commissioners' court is not whether the reassessment by the commissioner is proper, but whether the assessment by the tax assessor is correct. State *v.* Sloss-Sheffield Steel, etc., Co., *supra*.

Statement to the board of supervisors held insufficient to authorize a reassessment see Auditor-Gen. *v.* Tuttle, 146 Mich. 106, 109 N. W. 48.

79. People's Sav. Bank *v.* Layman, 134 Fed. 635.

80. Hyland *v.* Brazil Block Coal Co., 128 Ind. 335, 26 N. E. 672; Slaughter *v.* Louisville, 89 Ky. 112, 8 S. W. 917, 12 Ky. L. Rep. 61; Sioux City, etc., R. Co. *v.* Washington County, 3 Nebr. 30; Powers *v.* Larabee, 2 N. D. 141, 49 N. W. 724.

81. *Alabama.*— Birmingham Bldg., etc., Assoc. *v.* State, 120 Ala. 403, 25 So. 52.

Colorado.— Duggan *v.* McCullough, 27 Colo. 43, 59 Pac. 743.

Iowa.— Hill *v.* Wolfe, 28 Iowa 577.

Michigan.— Wright *v.* Auditor-Gen., 118 Mich. 556, 77 N. W. 11 [*distinguishing* Auditor-Gen. *v.* Chandler, 108 Mich. 569, 66 N. W. 482; Caledonia Tp. *v.* Rose, 94 Mich. 216, 53 N. W. 927].

Mississippi.— Cato *v.* Gordon, 63 Miss. 320; Wolfe *v.* Murphy, 60 Miss. 1.

New York.— People *v.* Turner, 145 N. Y. 451, 40 N. E. 400; Matter of Young, 26 Misc. 186, 56 N. Y. Suppl. 861.

Wisconsin.— State *v.* Zillmann, 121 Wis. 472, 98 N. W. 543.

See 45 Cent. Dig. tit. "Taxation," § 845.

82. *Illinois.*— St. Louis Bridge Co. *v.* People, 128 Ill. 422, 21 N. E. 428; Halsey *v.* People, 84 Ill. 89.

in continuous session, an interruption of the session will not be a fatal defect if enough time is given for the hearing and determination of all objections;[83] and it may hold special meetings at times properly appointed and of which due notice is given.[84] If it is required to complete its work within a limited number of days, business days only are to be counted, Sundays being excluded.[85] But where the statute expressly limits the time during which the board may act, its power ceases with the expiration of that time, and any changes in the assessment roll made afterward are illegal.[86] So also are changes made prematurely, that is, before the board is legally organized or before the time appointed for it to begin its labors.[87] The board should also sit at the very place appointed for it by law; but a slight departure from the law in this respect, such as holding the meeting in another room in the same building, will not invalidate the proceedings, if no one was misled or deprived of his opportunity to appear.[88]

(II) *Waiver of Objections.* Any person who appears before the board of equalization or review and presents objections to his assessment waives any objections as to the time or place of meeting of the board.[89]

Kansas.— Challiss *v.* Rigg, 49 Kan. 119, 30 Pac. 190.

Michigan.—Auditor-Gen. *v.* Sparrow, 116 Mich. 574, 74 N. W. 881. See also Auditor-Gen. *v.* Chandler, 108 Mich. 569, 66 N. W. 482.

Missouri.— State *v.* Vaile, 122 Mo. 33, 26 S. W. 672; Black *v.* McGonigle, 103 Mo. 192, 15 S. W. 615.

New York.— *In re* Cathedral of Incarnation, 91 N. Y. App. Div. 543, 86 N. Y. Suppl. 900.

North Dakota.— O'Neil *v.* Tyler, 3 N. D. 47, 53 N. W. 434.

See 45 Cent. Dig. tit. "Taxation," §§ 797, 847.

But *compare* Smith *v.* Nelson, 57 Miss. 138.

83. Gates *v.* Johnson, 121 Mich. 603, 80 N. W. 709; Wolfe *v.* Murphy, 60 Miss. 1. *Compare* St. Louis County *v.* Nettleton, 22 Minn. 356, holding that an adjournment except from day to day is an irregularity that will let in the defense that the tax was "partially, unfairly, and unequally assessed" to the prejudice of the objecting party.

84. Tierney *v.* Brown, 65 Miss. 563, 5 So. 104, 7 Am. St. Rep. 679.

The legislature may constitutionally legalize special meetings of the state board of tax commissioners not authorized by the statute creating the board. Seymour First Nat. Bank *v.* Isaacs, 161 Ind. 278, 68 N. E. 288.

85. Yocum *v.* Brazil First Nat. Bank, 144 Ind. 272, 43 N. E. 231, (1894) 38 N. E. 599.

86. *Arkansas.*— Wiley *v.* Flournoy, 30 Ark. 609.

Connecticut.— Sanford's Appeal, 75 Conn. 590, 54 Atl. 739.

Michigan.— State Tax Com'rs *v.* Cady, 124 Mich. 683, 83 N. W. 783; Auditor-Gen. *v.* Sparrow, 116 Mich. 574, 74 N. W. 881; Stone *v.* Sessions, 100 Mich. 343, 58 N. W. 1014.

Mississippi.— Biloxi *v.* Biloxi Real Estate Co., (1909) 48 So. 729 (holding that the mayor and aldermen of a city or town have no power to equalize assessments after the expiration of the month of October, although the meetings held in the succeeding month are adjournments of a meeting begun on October 31); Brothers *v.* Beck, 75 Miss. 482, 22 So. 944.

Missouri.— St Joseph Lead Co. *v.* Simms, 108 Mo. 222, 18 S. W. 906.

Nebraska.— Sumner *v.* Colfax County, 14 Nebr. 524, 16 N. W. 756.

Nevada.— State *v.* Central Pac. R. Co., 21 Nev. 270, 30 Pac. 693.

New Jersey.— New Jersey Zinc Co. *v.* Sussex County, 70 N. J. L. 186, 56 Atl. 138.

See 45 Cent. Dig. tit. "Taxation," §§ 846, 847.

But *compare* Buswell *v.* Alameda County, 116 Cal. 351, 48 Pac. 226; Nova Ceasarea Harmony Lodge No. 2 *v.* Hagerty, 28 Cinc. L. Bul. (Ohio) 67; Godfrey *v.* Douglas County, 28 Oreg. 446, 43 Pac. 171; Graham *v.* Lasater, (Tex. Civ. App. 1894) 26 S. W. 472.

87. People *v.* Cook County Bd. of Review, 178 Ill. 348, 53 N. E. 221; Tobey *v.* Wilson, 43 U. C. Q. B. 230. But *compare Ex p.* Howard-Harrison Iron Co., 119 Ala. 484, 24 So. 516, 72 Am. St. Rep. 928.

88. Tampa *v.* Mugge, 40 Fla. 326, 24 So. 489; State *v.* Vaile, 122 Mo. 33, 26 S. W. 672. See also Yazoo Delta Inv. Co. *v.* Suddoth, 70 Miss. 416, 12 So. 246 (holding that a board of equalization having jurisdiction over a county which is divided into two districts, and required to hold its meetings in the two districts alternately, has no proper authority to act on the assessments in one district when sitting in the other, although its action in this respect may be subsequently ratified); Trumbull *v.* Palmer, 104 N. Y. App. Div. 51, 93 N. Y. Suppl. 349 (construing a statute requiring the board to appoint a time and place for hearings and to be present for that purpose, and holding that the occasional presence of members of the board in the building, but not in the room appointed for the hearing, is insufficient, although for the rest of the time they remain within telephonic communication). But *compare* Caledonia Tp. *v.* Rose, 94 Mich. 216, 53 N. W. 927, holding that a provision as to the place of meeting is mandatory.

89. Faribault Water-Works Co. *v.* Rice

b. Time and Place For Objections or Application For Review. A taxpayer aggrieved by his assessment must present his objections to the board of equalization, or file his application for a review, at the appointed time and place, or within the time limited by law, or he will lose his right to claim relief.[90] But on the other hand, no regulation or procedure of the board can deprive him of the full time allowed him by law for this purpose.[91]

7. Proceedings Before Officer or Board of Review — a. Procedure in General. The proceedings before an officer or board of equalization are not governed by the rules of practice prevailing in ordinary civil suits, and minor irregularities or informalities do not vitiate them, the only essential matters being that the officer or board shall keep within his or its jurisdiction and that taxpayers shall be given a full opportunity to appear and present their grievances.[92] Nor is this proceeding one in which a trial by jury can be claimed as of right.[93] If the statute makes no provision for a new trial or rehearing, the officer or board cannot grant one.[94]

County, 44 Minn. 12, 46 N. W. 143; State *v.* Thomas, 17 N. J. L. 160; State *v.* Cooper, 59 Wis. 666, 18 N. W. 438.

90. *Arizona.*—Atlantic, etc., R. Co. *v.* Yavapai County, (1889) 21 Pac. 768.

Arkansas.— Clay County *v.* Brown Lumber Co., 90 Ark. 413, 119 S. W. 251.

Colorado.— Barnett *v.* Jaynes, 26 Colo. 279, 57 Pac. 703.

Iowa.— Slocum *v.* Fayette County, 61 Iowa 169, 16 N. W. 61; Snell *v.* Ft. Dodge, 45 Iowa 564.

Kentucky.— Chesapeake, etc., R. Co. *v.* Com., 129 Ky. 318, 108 S. W. 248, 32 Ky. L. Rep. 1119, 111 S. W. 334, 33 Ky. L. Rep. 882; Illinois Cent. R. Co. *v.* Com., 128 Ky. 268, 108 S. W. 245, 32 Ky. L. Rep. 1112, 110 S. W. 265, 33 Ky. L. Rep. 326, holding that where the assessment of a franchise tax on a railroad has become final by the failure of the company to object and seek a reduction, a member of the board of valuations and assessment after his term is out cannot affect its finality by testimony that the board did not consider the assessment a valid act or final.

Louisiana.— City Item Co-Operative Printing Co. *v.* New Orleans, 51 La. Ann. 713, 25 So. 313; Oteri *v.* Parker, 42 La. Ann. 374, 7 So. 570; New Orleans *v.* Canal, etc., Co., 32 La. Ann. 157 (too late after the assessment rolls have been corrected and closed); State *v.* Louisiana Mut. Ins. Co., 19 La. Ann. 474; Daily *v.* Newman, 14 La. Ann. 580 (too late after judgment and sale); Lafayette *v.* Kohn, 19 La. 94.

Massachusetts.— Lowell *v.* Middlesex, 146 Mass. 403, 16 N. E. 8.

Minnesota.— State *v.* Willard, 77 Minn. 190, 79 N. W. 829.

New Jersey.— Jersey City *v.* State Bd. of Taxation, 70 N. J. L. 159, 56 Atl. 135.

New York.— People *v.* Ontario County, 17 Hun 501 [*reversed* on other grounds in 85 N. Y. 323]; Kal Israel, etc., Cong. *v.* New York, 1 N. Y. Suppl. 35 [*affirmed* in 52 Hun 507, 5 N. Y. Suppl. 608].

Wyoming.— Standard Cattle Co. *v.* Baird, 8 Wyo. 144, 56 Pac. 598.

United States.— *In re* Wyoming Valley Ice Co., 165 Fed. 789.

See 45 Cent. Dig. tit. "Taxation," § 852.

But *compare* Nashville Sav. Bank *v.* Nashville, 3 Tenn. Ch. 362.

Illegal assessment.—A statute requiring taxpayers to apply for the correction of errors in assessments within a certain time does not apply to illegal assessments. Orleans Bd. of Assessors *v.* Pullman's Palace-Car Co., 60 Fed. 37, 8 C. C. A. 490 [*affirming* 55 Fed. 206].

Time of entering default.— Where an order is made that objections to an assessment roll be filed by a certain day, they must be filed before that day commences, and if they are not so filed, a default may be entered on that day. Burhans *v.* Norwood Park, 138 Ill. 147, 27 N. E. 1088.

Illness and absence as excuses for failure to file objections see People *v.* Feitner, 35 N. Y. App. Div. 490, 54 N. Y. Suppl. 902; Clawson Lumber Co. *v.* Jones, 20 Tex. Civ. App. 208, 49 S. W. 909.

91. State *v.* Vaile, 122 Mo. 33, 26 S. W. 672.

92. Rockafellow *v.* Board of Equalization, 77 Iowa 493, 42 N. W. 380; Gager *v.* Prout, 48 Ohio St. 89, 26 N. E. 1013; National Land, etc., Co. *v.* Davies, 29 Ohio Cir. Ct. 334 [*affirmed* in 76 Ohio St. 407, 81 N. E. 755] (holding that the rules governing the present boards of revenue are those formerly governing the decennial boards of equalization as found in Rev. St. § 2814); Poppleton *v.* Yamhill County, 18 Oreg. 377, 23 Pac. 253, 7 L. R. A. 449; Smoky Mountain Land, etc., Co. *v.* Lattimore, 119 Tenn. 620, 105 S. W. 1028 (holding that where a complainant appears before a county trustee in response to a citation in back-tax proceedings, on appeal from the trustee's decision to the state board of equalization, the board has jurisdiction of the complainant's person).

Attendance of assessors.— The assessors of the several wards, districts, or townships are required by law to attend at the hearing of appeals by the board of review, to prevent imposition by parties appealing; but their neglect or refusal to attend will not defeat the rights of appellants; the board must nevertheless act and may be compelled to do so by mandamus. Delaware, etc., Canal Co. *v.* Walsh, 11 Phila. (Pa.) 587.

93. Ross *v.* Crawford County, 16 Kan. 411.

94. State *v.* Central Pac. R. Co., 21 Nev.

b. Notice to Taxpayers [95] — (i) *Necessity of Notice.* The proceedings for the assessment of taxes being judicial in character, and the decision of the officer or board of equalization or review being in the nature of a judgment, it is ordinarily essential that the taxpayer shall have adequate notice of any application or proposal to have the board change the amount of the assessment as fixed by the assessor, and of the time and place where he may complain of an erroneous assessment, particularly where the object of the board's action is to increase his assessment.[96] And the same rule applies to an assessment made originally by the board

172, 26 Pac. 225, 1109; People *v.* Schenectady County, 35 Barb. (N. Y.) 408. But *compare* People *v.* Barker, 22 N. Y. App. Div. 120, 47 N. Y. Suppl. 958 [*affirmed* in 155 N. Y. 661, 49 N. E. 1102].

95. Notice of assessment see *supra*, VI, C, 10.

96. *Arizona.*— Copper Queen Consol. Min. Co. *v.* Cochise County Bd. of Equalization, 7 Ariz. 364, 65 Pac. 149.

California.— Hagenmeyer *v.* Mendocino County Bd. of Equalization, 82 Cal. 214, 23 Pac. 14; Patten *v.* Green, 13 Cal. 325.

Connecticut.— Thames Mfg. Co. *v.* Lathrop, 7 Conn. 550.

Florida.— Kissimmee City *v.* Cannon, 26 Fla. 3, 7 So. 523.

Illinois.— Cox *v.* Hawkins, 199 Ill. 68, 64 N. E. 1093; People *v.* Ohio, etc., R. Co., 96 Ill. 411; Shawneetown First Nat. Bank *v.* Cook, 77 Ill. 622; Darling *v.* Gunn, 50 Ill. 424; Glassford *v.* Dorsey, 2 Ill. App. 521.

Iowa.— Jackson *v.* Chizum, 78 Iowa 209, 42 N. W. 650; Auer *v.* Dubuque, 65 Iowa 650, 22 N. W. 914.

Kansas.— Dykes *v.* Lockwood Mortg. Co., 57 Kan. 416, 46 Pac. 711; Kansas Pac. R. Co. *v.* Russell, 8 Kan. 558; Leavenworth County Com'rs *v.* Lang, 8 Kan. 284; Dykes *v.* Lockwood Mortg. Co., 2 Kan. App. 217, 43 Pac. 268.

Kentucky.— Ward *v.* Wentz, 130 Ky. 705, 113 S. W. 892; Mt. Sterling Oil, etc., Co. *v.* Ratliff, 127 Ky. 1, 104 S. W. 993, 31 Ky. L. Rep. 1229; Negley *v.* Henderson Bridge Co., 107 Ky. 414, 54 S. W. 171, 21 Ky. L. Rep. 1154.

Maryland.— Sams *v.* Fisher, 106 Md. 155, 66 Atl. 711; Monticello Distilling Co. *v.* Baltimore, 90 Md. 416, 45 Atl. 210; Allegany County *v.* New York Min. Co., 76 Md. 549, 25 Atl. 864; Allegany County Com'rs *v.* Union Min. Co., 61 Md. 545; Baltimore *v.* Grand Lodge A. F. & A. M., 60 Md. 280.

Massachusetts.— Lowell *v.* Wentworth, 6 Cush. 221.

Michigan.— Phillips *v.* New Buffalo Tp., 64 Mich. 683, 31 N. W. 581; Avery *v.* East Saginaw, 44 Mich. 587, 7 N. W. 177; Thomas *v.* Gain, 35 Mich. 155, 24 Am. Rep. 535. *Compare* Detroit Citizens' St. R. Co. *v.* Detroit, 125 Mich. 673, 85 N. W. 96, 86 N. W. 809, 84 Am. St. Rep. 589.

Mississippi.— Lum *v.* Vicksburg, 72 Miss. 950, 18 So. 476; Alabama, etc., R. Co. *v.* Brennan, 69 Miss. 103, 10 So. 451.

Missouri.— State *v.* Baker, 170 Mo. 194, 70 S. W. 470; Noll *v.* Morgan, 82 Mo. App. 112; Rich Hill Coal Min. Co. *v.* Neptune, 19 Mo. App. 438; Relfe *v.* Columbia L. Ins. Co., 11 Mo. App. 374; State *v.* New Lindell Hotel Co., 9 Mo. App. 450.

Montana.— Montana Ore Purchasing Co. *v.* Maher, 32 Mont. 480, 81 Pac. 13; Western Ranches *v.* Custer County, 28 Mont. 278, 72 Pac. 659.

Nebraska.— Grant *v.* Bartholomew, 58 Nebr. 839, 80 N. W. 45; Grant *v.* Bartholomew, 57 Nebr. 673, 78 N. W. 314; McGee *v.* State, 32 Nebr. 149, 49 N. W. 220; South Platte Land Co. *v.* Buffalo County, 7 Nebr. 253; Sioux City, etc., R. Co. *v.* Washington County, 3 Nebr. 30.

Nevada.— State *v.* Northern Belle Mill, etc., Co., 12 Nev. 89. But see State *v.* Carson, etc., R. Co., 29 Nev. 487, 91 Pac. 932, holding that Comp. Laws, § 1098, providing for the publication of notice of the increased valuation of taxes on property by a board of equalization is merely directory.

New Jersey.—Shrewsbury Tp. *v.* Merchants' Steamboat Co., 76 N. J. L. 407, 69 Atl. 958 (actual or constructive notice necessary); Eatontown Tp. *v.* Monmouth Electric Co., 75 N. J. L. 459, 68 Atl. 342 (holding that a county board of taxation has no jurisdiction to reduce the assessed valuation imposed on property of the township on the appeal of the owner, in the absence of both actual and constructive notice to the township or its representatives of the hearing of such appeal); Jersey City *v.* New Jersey Tax Bd. of Equalization, 74 N. J. L. 753, 67 Atl. 38 [*reversing* 74 N. J. L. 382, 65 Atl. 903]; New Jersey Zinc Co. *v.* Sussex County Tax Bd. of Equalization, 70 N. J. L. 186, 56 Atl. 138; Clark Thread Co. *v.* Kearny Tp., 55 N. J. L. 50, 25 Atl. 327; Dodge *v.* Love, 49 N. J. L. 235, 9 Atl. 744; Clark *v.* Mulford, 43 N. J. L. 550; State *v.* Carragan, 37 N. J. L. 264; State *v.* Parker, 34 N. J. L. 352; Nixon *v.* Ruple, 30 N. J. L. 58. See also West Hoboken *v.* Hudson County, 66 N. J. L. 162, 49 Atl. 9. *Compare* Vanderpool *v.* Bonnell, 49 N. J. L. 317, 8 Atl. 116.

New York.— People *v.* Feitner, 191 N. Y. 88, 83 N. E. 592 [*reversing* 120 N. Y. App. Div. 838, 105 N. Y. Suppl. 993]; Stuart *v.* Palmer, 74 N. Y. 133, 30 Am. Rep. 289; People *v.* Wells, 91 N. Y. App. Div. 172, 86 N. Y. Suppl. 309; People *v.* Barker, 86 Hun 240, 33 N. Y. Suppl. 190. See also Apgar *v.* Hayward, 110 N. Y. 225, 18 N. E. 85.

North Carolina.— Caldwell Land, etc., Co. *v.* Smith, 146 N. C. 199, 59 S. E. 653, holding that an owner is entitled to such notice, under Const. art. 1, § 17, prohibiting the taking of property without due process of law.

Ohio.— Davies *v.* National Land, etc., Co., 76 Ohio St. 407, 81 N. E. 755 [*affirming* 29

of review, to cover omitted property; this ordinarily will not be valid unless the taxpayer is given notice and an opportunity to apply for a review and correction.[97]

(II) *Requisites and Sufficiency.* It is generally held that personal notice to taxpayers is not necessary where a public statute, of which all persons are bound to take notice, specifies the day and place where the board of equalization shall meet, this being sufficient notice to give the board jurisdiction over any particular assessment.[98] And it has also been held that a published general

Ohio Cir. Ct. 334]; State *v.* Lewis, 25 Ohio Cir. Ct. 227; Euclid Ave. Sav., etc., Co. *v.* Hubbard, 22 Ohio Cir. Ct. 20, 12 Ohio Cir. Dec. 279; Phillips *v.* Hunter, 9 Ohio Cir. Ct. 698, 6 Ohio Cir. Dec. 746. But see Lewis *v.* State, 69 Ohio St. 473, 69 N. E. 980, as to increasing assessments on buildings improved during the year.

Oregon.— Ankeny *v.* Blakley, 44 Oreg. 78, 74 Pac. 485.

Pennsylvania.— Philadelphia Ins. Contributionship *v.* Yard, 17 Pa. St. 331; Larimer *v.* McCall, 4 Watts & S. 133.

South Carolina.— State *v.* Boyd, 35 S. C. 233, 14 S. E. 496.

South Dakota.— Avant *v.* Flynn, 2 S. D. 153, 49 N. W. 15.

Texas.— San Antonio *v.* Hoefling, 90 Tex. 511, 39 S. W. 918; Hoefling *v.* San Antonio, 15 Tex. Civ. App. 257, 38 S. W. 1127; Gage *v.* Nevill, 3 Tex. App. Civ. Cas. § 274.

Washington.— Lewis *v.* Bishop, 19 Wash. 312, 53 Pac. 165.

Wisconsin.— State *v.* Sackett, 117 Wis. 580, 94 N. W. 314. But see State *v.* Wharton, 117 Wis. 558, 94 N. W. 359.

United States.— French *v.* Edwards, 13 Wall. 506, 20 L. ed. 702; Santa Clara County *v.* Southern Pac. R. Co., 18 Fed. 385; Albany City Bank *v.* Maher, 6 Fed. 417, 19 Blatchf. 175; Jessup *v.* Chicago, etc., R. Co., 13 Fed. Cas. No. 7,300. But *compare* State R. Tax Cases, 92 U. S. 575, 23 L. ed. 663.

Canada.— Nicholls *v.* Cumming, 1 Can. Sup. Ct. 395; Tobey *v.* Wilson, 43 U. C. Q. B. 230.

See 45 Cent. Dig. tit. "Taxation," § 854.

But *compare* Bd. of Equalization *v.* Land Owners, 51 Ark. 516, 11 S. W. 822; Pulaski County Bd. of Equalization Cases, 49 Ark. 518, 6 S. W. 1; Satterwhite *v.* State, 142 Ind. 1, 40 N. E. 654, 1087; State *v.* Cudahy Packing Co., 103 Minn. 419, 115 N. W. 645, 1039, holding that the requirement that notice shall be given of the meetings of the city and state boards of equalization is directory, and that a failure to give such notice is no defense to a tax unless it is shown to have resulted prejudicially.

Exceptional cases.— Notice to individual taxpayers is not required before making a change in the entire assessment of a taxing district. Hallo *v.* Helmer, 12 Nebr. 87, 10 N. W. 568; Dundy *v.* Richardson County, 8 Nebr. 508, 1 N. W. 565. Nor is it necessary to give special notice of a transfer of a personal property assessment from one township to another, where the assessment is not increased. Ellis *v.* People, 199 Ill. 548, 65 N. E. 428. Nor is notice necessary where the board of review is to act entirely upon its own knowledge of the property and opinion as to its value, without hearing evidence. Collier *v.* Morrow, 90 Ga. 148, 15 S. E. 768. And so where a statute provides for the construction of a system of sewers in a city, and the levy of assessments therefor according to area, without regard to improvements, the levy of the assessment is a mere mathematical computation, and if full notice is provided for as to all prior proceedings, it is not necessary that the act should provide an opportunity for lot owners to be heard on the assessments after they are levied. Gillette *v.* Denver, 21 Fed. 822.

Failure to give notice.— Where a tax law provides an opportunity for the taxpayer to be heard but notice thereof is not given, and the assessing officer refuses to hear any complaint, the statute is not invalid on that account, but the tax is voidable and the assessment if attacked in due form and in due time will be set aside for the irregularity. People *v.* Feitner, 191 N. Y. 88, 83 N. E. 592 [*reversing* 120 N. Y. App. Div. 838, 105 N. Y. Suppl. 993].

97. *Illinois.*— Carney *v.* People, 210 Ill. 434, 71 N. E. 365.

Maryland.— Myers *v.* Baltimore County, 83 Md. 385, 35 Atl. 144, 55 Am. St. Rep. 349, 34 L. R. A. 309.

New York.— Bennett *v.* Buffalo, 17 N. Y. 383.

Ohio.— Champaign County Bank *v.* Smith, 7 Ohio St. 42.

United States.— Western Ranches *v.* Custer County, 89 Fed. 577.

See 45 Cent. Dig. tit. "Taxation," § 854.

But *compare* Oregon, etc., Mortg. Sav. Bank *v.* Jordan, 16 Oreg. 113, 17 Pac. 621.

98. *Arkansas.*— St. Louis, etc., R. Co. *v.* Worthen, 52 Ark. 529, 13 S. W. 254, 7 L. R. A. 374.

Colorado.— People *v.* Lothrop, 3 Colo. 428.

Idaho.— Inland Lumber, etc., Co. *v.* Thompson, 11 Ida. 508, 83 Pac. 933, 114 Am. St. Rep. 274.

Kansas.— Gillett *v.* Lyon County Treasurer, 30 Kan. 166, 1 Pac. 577.

Maryland.— O'Neal *v.* Virginia, etc., Bridge Co., 18 Md. 1, 79 Am. Dec. 669; Methodist Church *v.* Baltimore, 6 Gill 391, 48 Am. Dec. 540.

Minnesota.— State *v.* Hynes, 82 Minn. 34, 84 N. W. 636.

Missouri.— State *v.* Springer, 134 Mo. 212, 35 S. W. 589; State *v.* New Lindell Hotel Co., 9 Mo. App. 450.

Nebraska.— Hacker *v.* Howe, 72 Nebr. 385, 101 N. W. 255. In this state it was formerly held otherwise. See McGee *v.* State, 32 Nebr. 149, 49 N. W. 220; South Platte Land Co. *v.*

notice of the meeting of the board of equalization is sufficient to give it authority to act upon individuals.[99] But where the law requires personal notice to taxpayers, it must be carefully complied with in respect to its form and substance,[1] and must be given at least the prescribed number of days before the proposed action is taken,[2] and must fix a day certain for the appearance of the property-owner,[3] and inform him in regard to the property which is to be acted on and of

Buffalo County, 7 Nebr. 253; Sioux City, etc., R. Co. *v.* Washington County, 3 Nebr. 30.

New Jersey.— State *v.* Runyon, 41 N. J. L. 98; Nixon *v.* Ruple, 30 N. J. L. 58.

New Mexico.— Territory *v.* Albuquerque First Nat. Bank, 10 N. M. 283, 65 Pac. 172.

New York.— People *v.* Feitner, 191 N. Y. 88, 83 N. E. 592 [*reversing* 120 N. Y. App. Div. 838, 105 N. Y. Suppl. 993].

Ohio.— Hambleton *v.* Dempsey, 20 Ohio 168; Euclid Ave. Sav., etc., Co. *v.* Hubbard, 22 Ohio Cir. Ct. 20, 12 Ohio Cir. Dec. 279.

Oregon.— Oregon, etc., R. Co. *v.* Lane County, 23 Oreg. 386, 31 Pac. 964.

South Dakota.— Billinghurst *v.* Spink County, 5 S. D. 84, 58 N. W. 272.

Tennessee.— Carroll *v.* Alsup, 107 Tenn. 257, 64 S. W. 193.

Utah.— State *v.* Armstrong, 19 Utah 117, 56 Pac. 1076.

United States.—Lander *v.* Mercantile Bank, 186 U. S. 458, 22 S. Ct. 908, 46 L. ed. 1247; Santa Clara County *v.* Southern Pac. R. Co., 18 Fed. 385. And see State R. Tax Cases, 92 U. S. 575, 23 L. ed. 663.

See 45 Cent. Dig. tit. "Taxation," § 855.

99. *Illinois.*— Camp *v.* Simpson, 118 Ill. 224, 8 N. E. 308.

Michigan.— Bialy *v.* Bay City, 139 Mich. 495, 102 N. W. 1033.

Missouri.— Black *v.* McGonigle, 103 Mo. 192, 15 S. W. 615.

New York.— Fithian *v.* Wheeler, 125 N. Y. 696, 26 N. E. 141; Terrel *v.* Wheeler. 123 N. Y. 76, 25 N. E. 329; Lamb *v.* Connolly, 122 N. Y. 531, 25 N. E. 1042; Kane *v.* Brooklyn, 1 N. Y. Suppl. 306.

Oregon.— Oregon, etc., R. Co. *v.* Lane County, 23 Oreg. 386, 31 Pac. 964.

Canada.— Vivian *v.* McKim Tp., 23 Ont. 561.

See 45 Cent. Dig. tit. "Taxation," § 855.

But *compare* Patten *v.* Green, 13 Cal. 325; Britt *v.* Hagerty, 11 Ohio Cir. Ct. 115, 5 Ohio Cir. Dec. 64.

Strict compliance necessary.— Where the statute requires the names of persons whose assessments are to be acted on by the board to be inserted in the published notice, the board has no jurisdiction over one whose name is not so given. International Bldg., etc., Assoc. *v.* Marion County, 30 Ind. App. 12, 65 N. E. 297; Bialy *v.* Bay City, 139 Mich. 495, 102 N. W. 1033. So also where the law directs the notice to be published in a certain number of newspapers, or in all the newspapers of a certain class, it must be strictly complied with. Grant *v.* Bartholomew, 58 Nebr. 839, 80 N. W. 45; Loomis *v.* Semper, 38 Misc. (N. Y.) 567, 78 N. Y. Suppl. 74. And where notice by public advertisement is to be given by the board, a notice by the city assessor in his own name is insufficient, although he is *ex officio* a member of the board. Slaughter *v.* Louisville, 89 Ky. 112, 8 S. W. 917, 12 Ky. L. Rep. 61.

1. Hagenmeyer *v.* Mendocino County Bd. of Equalization, 82 Cal. 214, 23 Pac. 14; *In re* Seaman, 135 Iowa 543, 113 N. W. 354. And see Lum *v.* Vicksburg, 72 Miss. 950, 18 So. 476; People *v.* Feitner, 191 N. Y. 88, 83 N. E. 592 [*reversing* 120 N. Y. App. Div. 838, 105 N. Y. Suppl. 993].

Incorrect description of statute.— An assessment valid under the act in force at the time is not invalidated by the fact that the tax commissioners, in their notice to the property-owner, incorrectly describe the statute under which they assumed to act in making the assessment. People *v.* Barker, 35 N. Y. App. Div. 486, 54 N. Y. Suppl. 848 [*affirmed* in 159 N. Y. 569, 54 N. E. 1093].

2. Port Huron *v.* Wright, 150 Mich. 279, 114 N. W. 76; Matador Land, etc., Co. *v.* Custer County, 28 Mont. 286, 72 Pac. 662; New Jersey Zinc Co. *v.* Sussex County Bd. of Equalization, 70 N. J. L. 186, 56 Atl. 138; Everett Water Co. *v.* Fleming, 26 Wash. 364, 67 Pac. 82; Lewis *v.* Bishop, 19 Wash. 312, 53 Pac. 165. *Compare* Anderton *v.* Pawtucket Tax Assessors, (R. I. 1909) 71 Atl. 797, holding that an increase in the valuation of property is not illegal because a notice to persons to bring in statements of their taxable property, made the time therefor include, contrary to law, days prior to the assessment, where the objecting owner made no statement at any time and is not prejudiced by the notice.

If the statute does not prescribe a definite number of days' notice, the notice given must be sufficient to allow for a full and fair hearing. Spring Valley Water Works *v.* Schottler, 62 Cal. 69. And it is not sufficient if it requires the taxpayer to appear the next day. Wells *v.* Adair, 11 Ohio Dec. (Reprint) 783, 29 Cinc. L. Bul. 205.

Notice before decision.— The notice must be given before the board decides on the change to be made in the assessment; it is not sufficient to make the change and then give notice to show cause against it. Jersey City *v.* State Bd. of Equalization, 74 N. J. L. 753, 67 Atl. 38 [*reversing* 74 N. J. L. 382, 65 Atl. 903]; State *v.* Anderson, 38 N. J. L. 82. But *compare* Cleaveland County *v.* Atlanta, etc., Air Line R. Co., 86 N. C. 541.

3. Grant *v.* Bartholomew, 58 Nebr. 839, 80 N. W. 45; Everett Water Co. *v.* Fleming, 26 Wash. 364, 67 Pac. 82.

The notice need not specify the hour when the board will meet. Smith *v.* Hard, 61 Vt. 469, 17 Atl. 481.

the nature of the change proposed to be made in the assessment.[4] The provisions of the statute must also be followed in regard to the manner of serving or giving the notice.[5]

(III) *Persons Notified.* Where personal notice is required it ordinarily must be served on the owner of the property to be affected,[6] or his agent,[7] or executor or administrator.[8] In case of a corporation service may be had on any officer of the company authorized to accept notice,[9] and need not be made on the individual stock-holders.[10]

(IV) *Waiver of Notice.* A voluntary appearance of a taxpayer or his agent before the officer or board of equalization or review, for the purpose of obtaining relief against the assessment or contesting a proposed increase of it, is a waiver of notice or of any objections to the form or service of the notice.[11] But not so where the appearance by the taxpayer or his counsel is only for the

4. *California.*— Security Sav. Bank, etc., *v.* Los Angeles County, (1893) 34 Pac. 437; Farmers', etc., Bank *v.* Los Angeles Bd. of Equalization, 97 Cal. 318, 32 Pac. 312.

Indiana.— Reynolds *v.* Bowen, 138 Ind. 434, 36 N. E. 756, 37 N. E. 962; Florer *v.* Sheridan, 137 Ind. 28, 36 N. E. 365, 23 L. R. A. 278.

Maryland.— Alleghany County *v.* New York Min. Co., 76 Md. 549, 25 Atl. 864.

New Jersey.— State *v.* Warford, 32 N. J. L. 207.

New York.— People *v.* Feitner, 191 N. Y. 88, 83 N. E. 592 [*reversing* 120 N. Y. App. Div. 838, 105 N. Y. Suppl. 993], holding that the notice must be such that compliance therewith is possible, and that the taxpayer may object or protest even though he has no grounds for doing either.

Ohio.— Wells *v.* Adair, 11 Ohio Dec. (Reprint) 783, 29 Cinc. L. Bul. 205.

See 45 Cent. Dig. tit. "Taxation," § 855.

But *compare* Poppleton *v.* Yamhill County, 18 Oreg. 377, 23 Pac. 253, 7 L. R. A. 449, holding that the notice given by the board of equalization or county court sitting as such board, to a taxpayer of a proposed increase of his assessment, need not specify the property to be added thereto.

5. *Indiana.*— Eaton *v.* Union County Nat. Bank, 141 Ind. 159, 40 N. E. 693 (holding that verbal notice on the day of hearing is insufficient, under a statute requiring written notice); International Bldg., etc., Assoc. *v.* Marion County, 30 Ind. App. 12, 65 N. E. 297.

Kentucky.— Ward *v.* Wentz, 130 Ky. 705, 113 S. W. 892, by posting in a conspicuous place on the premises.

New Jersey.— State *v.* Drake, 33 N. J. L. 194, service on tenant of property-owner not sufficient.

New York.— Board of Supervisors *v.* Betts, 6 N. Y. Suppl. 934, holding that where the statute requires that the assessors "shall cause notices" of the assessment to be put up, a posting by a person other than the assessor is sufficient.

Ohio.— Hayes *v.* Yost, 24 Ohio Cir. Ct. 18, holding that posting a letter is not equivalent to personal service.

Texas.— Graham *v.* Lasater, (Civ. App. 1894) 26 S. W. 472, holding that a postal card containing the required notice is "written" notice.

United States.— Sturges *v.* Carter, 114 U. S. 511, 5 S. Ct. 1014, 29 L. ed. 240.

See 45 Cent. Dig. tit. "Taxation," § 855.

6. People *v.* Centralia Gas, etc., Co., 238 Ill. 113, 87 N. E. 370 (holding that under the statutory provision requiring notice to the person or corporation to be affected, the owner of the property is such person, and not necessarily the person in whose name it is assessed); State *v.* Drake, 33 N. J. L. 194 (holding that service on a tenant of the owner of the property is not sufficient).

Notice served on one owner of an undivided interest in property will not bind any of the others. Perkins *v.* Zumstein, 4 Ohio Cir. Ct. 371, 2 Ohio Cir. Dec. 601.

Lessee of premises.—A personal covenant in a lease that the lessee will pay the taxes does not, as between the taxing district and the lessee, make the latter the owner or taxpayer within the meaning of the statute entitling him to notice. New Auditorium Pier Co. *v.* Atlantic City Taxing Dist., 74 N. J. L. 303, 65 Atl. 855.

7. State *v.* DeBow, 46 N. J. L. 286.

8. Gallup *v.* Schmidt, 154 Ind. 196, 56 N. E. 443; Reynolds *v.* Bowen, 138 Ind. 434, 36 N. E. 756, 37 N. E. 962; Gamble *v.* Patrick, 22 Okla. 915, 99 Pac. 640.

9. Allison Ranch Min. Co. *v.* Nevada County, 104 Cal. 161, 37 Pac. 875.

10. James Clark Distilling Co. *v.* Cumberland, 95 Md. 468, 52 Atl. 661; Ladd *v.* Gilson, 26 Wash. 79, 66 Pac. 126.

11. *Alabama.*— Tillis *v.* Covington County, 91 Ala. 396, 8 So. 794; Calhoun County *v.* Woodstock Iron Co., 82 Ala. 151, 2 So. 132.

California.— Savings, etc., Soc. *v.* San Francisco, 146 Cal. 673, 80 Pac. 1086; Farmers', etc., Bank *v.* Los Angeles Bd. of Equalization, 97 Cal. 318, 32 Pac. 312; California Domestic Water Co. *v.* Los Angeles County, 10 Cal. App. 185, 101 Pac. 547.

Connecticut.— Sanford's Appeal, 75 Conn. 590, 54 Atl. 739; Quinebaug Reservoir Co. *v.* Union, 73 Conn. 294, 47 Atl. 328.

Illinois.— People *v.* Odin Coal Co., 238 Ill. 279, 87 N. E. 410; American Express Co. *v.* Raymond, 189 Ill. 232, 59 N. E. 528.

Indiana.— Deniston *v.* Terry, 141 Ind. 677, 41 N. E. 143; International Bldg., etc., Assoc.

purpose of objecting to the want of notice or to the legality of a notice given,[12] or for the purpose of seeking a reduction of his assessment which has been increased by the board without the giving of such notice.[13]

c. Complaint or Application For Review. The officer or board of review may act on a given assessment on its own motion without any special complaint;[14] but it is generally required that a complaint, petition, or affidavit shall be filed by the party aggrieved before the board may act, although under some statutes this complaint, petition, or affidavit is not required to be a formal one,[15] and if made need not be in writing unless so required by the board.[16] Under other statutes, however, the board has no jurisdiction or authority to act unless a written complaint, petition, or affidavit of some party who professes to be aggrieved by the assessment is made.[17] Although such a complaint when made or required

v. Marion County, 30 Ind. App. 12, 65 N. E. 297, appearance by secretary of corporation. *Compare* Eaton *v.* Union County Nat. Bank, 141 Ind. 159, 40 N. E. 693, as to appearance by cashier of a bank.

Iowa.— Henkle *v.* Keota, 68 Iowa 334, 27 N. W. 250; Hutchinson *v.* Oskaloosa Bd. of Equalization, 66 Iowa 35, 23 N. W. 249.

Kentucky.—Ward *v.* Wentz, 130 Ky. 705, 113 S. W. 892, holding that the knowledge of the landowner's agent that an assessment had been raised by the board of supervisors did not dispense with the notice required by statute; but only his actual appearance before them to secure the reduction would have done this.

Maryland.— Baltimore County *v.* Winand, 77 Md. 522, 26 Atl. 1110.

Minnesota.— Faribault Water-Works Co. *v.* Rice County, 44 Minn. 12, 46 N. W. 143.

Missouri.— State *v.* Baker, 170 Mo. 383, 70 S. W. 872; State *v.* Baker, 170 Mo. 194, 70 S. W. 470; State *v.* Buchanan County Bd. of Equalization, 108 Mo. 235, 18 S. W. 782; Taber *v.* Wilson, 34 Mo. App. 89.

Montana.— Cosier *v.* McMillan, 22 Mont. 484, 56 Pac. 965.

Nevada.— State *v.* Western Union Tel. Co., 4 Nev. 338.

New York.— Jewell *v.* Van Steenburgh, 58 N. Y. 85.

Oregon.— Godfrey *v.* Douglas County, 28 Oreg. 446, 43 Pac. 171.

South Dakota.—Avant *v.* Flynn, 2 S. D. 153, 49 N. W. 15.

Texas.— Clawson Lumber Co. *v.* Jones, 20 Tex. Civ. App. 208, 49 S. W. 909; Graham *v.* Lasater, (Civ. App. 1894) 26 S. W. 472.

Utah.— Central Pac. R. Co. *v.* Standing, 13 Utah 488, 45 Pac. 344.

Wisconsin.— State *v.* Gaylord, 73 Wis. 306, 41 N. W. 518; State *v.* Cooper, 59 Wis. 666, 18 N. W. 438.

See 45 Cent. Dig. tit. "Taxation," § 857.

12. State *v.* Drake, 33 N. J. L. 194; Reg. *v.* Cornwall Revision Ct., 25 U. C. Q. B. 286.

13. Montana Ore Purchasing Co. *v.* Maher, 32 Mont. 480, 81 Pac. 13; Western Ranches *v.* Custer County, 28 Mont. 278, 72 Pac. 659.

14. Pulaski County Bd. of Equalization Cases, 49 Ark. 518, 6 S. W. 1.

15. *Alabama.*— *Ex p.* Howard-Harrison Iron Co., 119 Ala. 484, 24 So. 516, 72 Am. St. Rep. 928.

Arkansas.— Pulaski County Bd. of Equalization Cases, 49 Ark. 518, 6 S. W. 1.

California.—Allison Ranch Min. Co. *v.* Nevada County, 104 Cal. 161, 37 Pac. 875, holding that it is not necessary to authorize a county board of equalization to increase an assessment that a complaint or affidavit that the assessment is too low should have been filed. But *compare* Garretson *v.* Santa Barbara County, 61 Cal. 54 (holding that a county board of equalization cannot act upon an unverified application to reduce an assessment or upon an application not in writing); People *v.* Goldtree, 44 Cal. 323; People *v.* Flint, 39 Cal. 670; People *v.* Reynolds, 28 Cal. 107.

Nebraska.— Grand Prairie Tp. *v.* Schure, 24 Nebr. 354, 38 N. W. 735. But see State *v.* Dodge County, 20 Nebr. 595, 31 N. W. 117, holding that the complaint if made orally must be reduced to writing and spread upon the records.

Nevada.— State *v.* Meyers, 23 Nev. 274, 46 Pac. 51. But see State *v.* Central Pac. R. Co., 17 Nev. 259, 30 Pac. 887; State *v.* Manhattan Silver Min. Co., 4 Nev. 318.

See 45 Cent. Dig. tit. "Taxation," §§ 858, 859.

16. Barz *v.* Klemme Bd. of Equalization, 133 Iowa 563, 111 N. W. 41; Levant *v.* Penobscot County Com'rs, 67 Me. 429; Page *v.* Melrose, 186 Mass. 361, 71 N. E. 787; State *v.* Washoe County Com'rs, 14 Nev. 140; State *v.* Northern Belle Mill, etc., Co., 12 Nev. 89; San Francisco Cent. Pac. R. Co. *v.* Standing, 13 Utah 488, 45 Pac. 344.

17. *Illinois.*— People *v.* Lots in Ashley, 122 Ill. 297, 13 N. E. 556.

Louisiana.— Concordia Parish *v.* Campbell, 117 La. 75, 41 So. 358; Union Oil Co. *v.* Campbell, 48 La. Ann. 1350, 20 So. 1007.

Michigan.— Detroit Citizens' St. R. Co. *v.* Detroit, 125 Mich. 673, 85 N. W. 96, 86 N. W. 809, 84 Am. St. Rep. 589.

New York.— People *v.* Feitner, 168 N. Y. 441, 61 N. E. 763; People *v.* Forest, 30 Hun 240; People *v.* Westchester County, 15 Barb. 607; Niagara County *v.* People, 7 Hill 504.

Ohio.— Davies *v.* National Land, etc., Co., 76 Ohio St. 407, 81 N. E. 755 [*affirming* 29 Ohio Cir. Ct. 334]. But see Britt *v.* Lewis, 16 Ohio Cir. Ct. 343, 9 Ohio Cir. Dec. 166.

See 45 Cent. Dig. tit. "Taxation," §§ 858, 859.

is not necessarily judged by the strict rules of pleading, it must clearly and definitely set forth the grounds on which the revisory power of the officer or board is invoked and show on its face that the petitioner is entitled to relief;[18] but if it is informal or irregular, it may be amended,[19] or any objections to its form or substance may be waived, by the reviewing officers' receiving and filing it.[20]

d. Answer and Reply. According to the practice in some states where a citation issues to a taxpayer requiring him to show cause why his land shall not be sold for delinquent taxes or his assessment shall not be increased, he is to file a written answer,[21] which has the evidential force of a pleading, that is, if its allegations are sufficient and are admitted no judgment of increase can be given.[22] But as the ordinary rules of pleading do not apply in proceedings of this kind, no reply to such an answer is considered necessary.[23]

Who may file complaint.—A complaint filed before the board of review by the clerk of the board, although filed under its order, is not such a complaint as the statute intends, for it must be filed by an owner of real estate interested in a new assessment. Davies *v.* National Land, etc., Co., 76 Ohio St. 407, 81 N. E. 755 [*affirming* 29 Ohio Cir. Ct. 334].

Joinder in complaint see *supra*, VII, B, 3, b.

18. *Colorado.*—Arapahoe County *v.* Denver Union Water Co., 32 Colo. 382, 76 Pac. 1060.

Connecticut.—Barrett's Appeal, 73 Conn. 288, 47 Atl. 243.

Illinois.— McCullough *v.* Peoria County Bd. of Review, 183 Ill. 373, 55 N. E. 685.

Indiana.— Clark *v.* Schindler, 43 Ind. App. 269, 87 N. E. 44, holding that in a proceeding by a county auditor to collect taxes on omitted property, a petition failing to allege that the property was subject to taxation was fatally defective, and that a failure to allege that the omitted property was of any value was also a defect.

Louisiana.— Standard Mar. Ins. Co. *v.* Board of Assessors, 123 La. 717, 49 So. 483 (holding that an application that an assessment should be "wiped out" and "reduced to nothing" is not an application to reduce an assessment); Behan *v.* Board of Assessors, 46 La. Ann. 870, 15 So. 397.

Nebraska.— Lexington Mill, etc., Co. *v.* Dawson County, (1901) 96 N. W. 62; Dixon County *v.* Halstead, 23 Nebr. 697, 37 N. W. 621. See also Sarpy County *v.* Clarke, 4 Nebr. (Unoff.) 87, 93 N. W. 416, holding that it is sufficient if the complaint before a board of equalization shows that the complainant considers himself aggrieved and that his property has been assessed too high.

New York.— People *v.* Feitner, 77 N. Y. App. Div. 428, 79 N. Y. Suppl. 309; People *v.* Webster, 49 N. Y. App. Div. 556, 63 N. Y. Suppl. 574; People *v.* Barker, 14 N. Y. App. Div. 412, 43 N. Y. Suppl. 1015; People *v.* Campbell, 88 Hun 544, 34 N. Y. Suppl. 801; People *v.* New York Tax, etc., Com'rs, 33 Barb. 116 [*reversed* on other grounds in 23 N. Y. 224]; People *v.* Feitner, 33 Misc. 293, 68 N. Y. Suppl. 581.

Ohio.— National Land, etc., Co. *v.* Davies, 29 Ohio Cir. Ct. 334 [*affirmed* in 76 Ohio St. 407, 81 N. E. 755].

See 45 Cent. Dig. tit. "Taxation," §§ 858, 859.

Verification by agent of corporation.— Where the complaint is made by a corporation it may be verified by its agent, if he has knowledge of the facts, and the verification may be on information and belief. People *v.* Webster, 49 N. Y. App. Div. 556, 63 N. Y. Suppl. 574; People *v.* Johnson, 29 N. Y. App. Div. 75, 51 N. Y. Suppl. 388.

An alternative demand for the reduction of an assessment may be cumulated with a demand for its cancellation. New England Mut. L. Ins. Co. *v.* Board of Assessors, 121 La. 1068, 47 So. 27, 26 L. R. A. N. S. 1120.

Issues.— Complainant cannot ask for a greater reduction of an assessment than that prayed for in his petition. New England Mut. L. Ins. Co. *v.* Board of Assessors, 121 La. 1068, 47 So. 27, 26 L. R. A. N. S. 1120. The objection that land is indefinitely described is not raised by a statement which, after specifying objections not covering the matter, recites "that said assessment is illegal, in that it is not made in accordance with the provisions of the statute regulating such assessments," and prays merely that the assessment be reduced to a certain amount. People *v.* Carmichael, 64 Misc. (N. Y.) 271, 118 N. Y. Suppl. 354.

19. Lowell *v.* Middlesex County, 146 Mass. 403, 16 N. E. 8; Sherman *v.* McClurg, 27 N. J. L. 253.

20. People *v.* Ouderkirk, 120 N. Y. App. Div. 650, 105 N. Y. Suppl. 134 (holding that an objection to the sufficiency of a complaint comes too late after it has been acted upon); People *v.* Webster, 49 N. Y. App. Div. 556, 63 N. Y. Suppl. 574; People *v.* Johnson, 29 N. Y. App. Div. 75, 51 N. Y. Suppl. 388; People *v.* Kilborn, 35 Misc. (N. Y.) 599, 72 N. Y. Suppl. 133.

21. Capital City Water Co. *v.* Board of Revenue, 92 Ala. 380, 9 So. 326; Whatcom County *v.* Fairhaven Land Co., 7 Wash. 101, 34 Pac. 563.

Written answer by board of assessors to notice given to it by the committee of review see New Orleans Gaslight Co. *v.* New Orleans, 46 La. Ann. 1146, 15 So. 456.

22. Capital City Water Co. *v.* Board of Revenue, 92 Ala. 380, 9 So. 326.

23. Poppleton *v.* Yamhill County, 18 Oreg. 377, 23 Pac. 253, 7 L. R. A. 449.

e. Evidence — (I) *Presumptions and Burden of Proof.*[24] On appeal to the board of equalization, the assessor's decision as to the *situs* of property, its taxability, and the valuation put upon it is presumed to be correct until the contrary appears,[25] and the party complaining must assume the burden of proving his grievance by satisfactory evidence.[26] It will also be presumed on appeal that any action taken by the board of equalization was based on proper and sufficient evidence.[27]

(II) *Admissibility.* If the statute prescribes the kind of evidence which the officer or board may hear, or on which his or its decision shall be based, it must be strictly obeyed;[28] but otherwise the officer or board is not bound by the ordinary rules of evidence, and may hear affidavits or unsworn testimony without giving an opportunity for cross-examination;[29] and, generally, it may admit and act upon any evidence which has a direct bearing on the question before the board or tends to prove the fact in issue.[30] But evidence as to the value of the

24. **Presumption as to regularity and legality of proceedings** see *infra*, VII, B, 7, f, (IV), (B).

25. *Illinois.*— *In re* Maplewood Coal Co., 213 Ill. 283, 72 N. E. 786.

Michigan.— Port Huron *v.* Wright, 150 Mich. 279, 114 N. W. 76.

Nebraska.— Woods *v.* Lincoln Gas, etc., Light Co., 74 Nebr. 526, 104 N. W. 931.

Oregon.— Oregon Coal, etc., Co. *v.* Coos County, 30 Oreg. 308, 47 Pac. 851.

Wisconsin.— State *v.* Fisher, 124 Wis. 271, 102 N. W. 566; State *v.* Williams, 123 Wis. 73, 100 N. W. 1052; State *v.* Lien, 108 Wis. 316, 84 N. W. 422; State *v.* Pors, 107 Wis. 420, 83 N. W. 706, 51 L. R. A. 917.

See 45 Cent. Dig. tit. "Taxation," § 861.

26. *Connecticut.*— Bulkeley's Appeal, 77 Conn. 45, 58 Atl. 8.

Indiana.— Gallup *v.* Schmidt, 154 Ind. 196, 56 N. E. 443.

Iowa.— Bednar *v.* Carroll, 138 Iowa 338, 116 N. W. 315, that the property sought to be assessed is exempt.

Maine.— Penobscot Chemical Fibre Co. *v.* Bradley, 99 Me. 263, 59 Atl. 83.

Mississippi.— Forsdick *v.* Quitman County, (1899) 25 So. 294.

Nebraska. — Woods *v.* Lincoln Gas, etc., Light Co., 74 Nebr. 526, 104 N. W. 931.

New Jersey.—Wharton *v.* Abbott, 42 N. J. L. 109.

New York.— People *v.* Barker, 141 N. Y. 251, 36 N. E. 196; People *v.* Davenport, 91 N. Y. 574; People *v.* Feitner, 58 N. Y. App. Div. 555, 69 N. Y. Suppl. 27; People *v.* O'Rourke, 31 N. Y. App. Div. 583, 52 N. Y. Suppl. 427; People *v.* Feitner, 27 Misc. 384, 58 N. Y. Suppl. 869 [*affirmed* in 45 N. Y. App. Div. 542, 61 N. Y. Suppl. 432].

Wisconsin.— State *v.* Williams, 123 Wis. 73, 100 N. W. 1052.

Assessment of back taxes.— In Alabama, on appeal to the circuit court from the additional assessment imposed by the back tax commissioner, under the revenue laws, the state has the burden of proof in sustaining the assessment. Hooper *v.* State, 141 Ala. 111, 37 So. 662.

27. State *v.* Hannibal, etc., R. Co., 101 Mo. 120, 13 S. W. 406; Hambleton *v.* Dempsey, 20 Ohio 168.

28. Cincinnati College *v.* La Rue, 22 Ohio St. 469.

In Wisconsin the statute intends that oral evidence is the only kind of testimony on which the board can act, and this is a provision which the board has no jurisdiction to waive; and affidavits cannot be received. State *v.* Hobe, 124 Wis. 8, 102 N. W. 350; State *v.* Wharton, 117 Wis. 558, 94 N. W. 359 (holding that letters and affidavits of the purchaser of property are not admissible as evidence before a board of review upon the question whether the title passed to him prior to May 1); State *v.* Lien, 112 Wis. 282, 87 N. W. 1113.

29. Earl *v.* Raymond, 188 Ill. 15, 59 N. E. 19; People *v.* Priest, 180 N. Y. 532, 72 N. E. 1149 [*affirming* 90 N. Y. App. Div. 520, 85 N. Y. Suppl. 481]; People *v.* Campbell, 139 N. Y. 68, 34 N. E. 753. See also White *v.* Lincoln, 79 Nebr. 153, 112 N. W. 369; People *v.* McComber, 7 N. Y. Suppl. 71.

30. *Connecticut.* — Cutler's Appeal, 74 Conn. 35, 49 Atl. 338.

Nebraska.—Western Union Tel. Co. *v.* Dodge County, 80 Nebr. 18, 113 N. W. 805, holding that the board may obtain information as to the value of the taxable property from the most reliable source at their command, and that the strict rules of evidence are inapplicable.

New York.— People *v.* Poultney Bd. of Assessors, 101 N. Y. Suppl. 176. See also People *v.* Moore, 11 N. Y. St. 859, evidence not entitled to consideration.

Ohio.— State *v.* Lewis, 20 Ohio Cir. Ct. 319, 11 Ohio Cir. Dec. 13.

Washington.— Edison Electric Illuminating Co. *v.* Spokane County, 22 Wash. 168, 60 Pac. 132.

Wisconsin.— State *v.* Williams, 123 Wis. 61, 100 N. W. 1048; State *v.* Wharton, 117 Wis. 558, 94 N. W. 359.

See 45 Cent. Dig. tit. "Taxation," § 862.

Applications.— The amount of insurance carried by a merchant on his stock in trade is evidence of its value which may be considered by the board. People *v.* Feitner, 34 Misc. (N. Y.) 305, 69 N. Y. Suppl. 798 [*affirmed* in 62 N. Y. App. Div. 618, 71 N. Y. Suppl. 1145]. An inventory of an estate sworn to and filed by the administra-

property should be confined to its value at the time of the assessment complained of, and evidence of its value at some former time is not admissible except as a starting point from which to estimate subsequent appreciation or depreciation.[31] Evidence of the assessed valuation of other property in the same town or district and similarly situated is not generally considered to be admissible,[32] except that it may be admitted for the purpose of showing a rule of the assessors to value all such property at a certain percentage of its actual value and to show whether or not such rule was observed in the case complained of.[33] The members of the board of review are not required to inspect the property in person, but they may send experts to examine it.[34]

(III) *Weight and Sufficiency.* The affidavit or sworn statement of the taxpayer is evidence to be considered by the board of review, and while it is not conclusive, still if it is not contradicted or impeached by evidence, it must be accepted as correct;[35] and the same is true of schedules or reports filed by corporations.[36] And on the other hand, the assessor's sworn statement is sufficient to sustain the action of the board, taken in accordance with it, if not overborne by testimony.[37] Aside from these considerations, any evidence which has a direct bearing on the question of value may serve as the basis of the board's determination, if uncontradicted.[38] But in case of a conflict in the testimony the ordinary rules of evidence apply, and the decision should be given in accordance with the clear preponderance of testimony.[39]

tor in the probate court is competent evidence of the value of the estate. Erie County *v.* Walker, 10 Ohio Dec. (Reprint) 558, 22 Cinc. L. Bul. 106. So also the inspectors' report made to assist the assessor in his valuation of land is admissible as to its value. T. B. Scott Lumber Co. *v.* Oneida County, 72 Wis. 158, 39 N. W. 343. But on the question of the valuation of property of a railroad company, evidence that it had advanced its freight rates is irrelevant and improper. Chicago, etc., R. Co. *v.* Boone County, 44 Ill. 240.

31. *Alabama.*— State *v.* Bienville Water-Supply Co., 89 Ala. 325, 8 So. 54.

Illinois.— Chicago, etc., R. Co. *v.* Boone County, 44 Ill. 240.

Maine.— Penobscot Chemical Fibre Co. *v.* Bradley, 99 Me. 263, 59 Atl. 83.

Massachusetts. — Lowell *v.* Middlesex County, 152 Mass. 372, 25 N. E. 469, 9 L. R. A. 356.

New Hampshire. — Winnipiseogee Lake Cotton, etc., Mfg. Co. *v.* Laconia, 68 N. H. 248, 35 Atl. 252; Winnipiseogee Lake Cotton, etc., Mfg. Co. *v.* Gilford, 67 N. H. 514, 35 Atl. 945.

See 45 Cent. Dig. tit. "Taxation," § 862.

32. Alabama Mineral Land Co. *v.* Perry County, 95 Ala. 105, 10 So. 550; Chicopee *v.* Hampden County, 16 Gray (Mass.) 38; People *v.* Feitner, 27 Misc. (N. Y.) 371, 58 N. Y. Suppl. 875.

Evidence as to the selling price of other tracts not similarly situated and some of which are in neighboring towns is not admissible. Haven *v.* Essex County, 155 Mass. 467, 29 N. E. 1083.

33. Greenwoods Co. *v.* New Hartford, 65 Conn. 461, 32 Atl. 933; Penobscot Chemical Fibre Co. *v.* Bradley, 99 Me. 263, 59 Atl. 83; Manchester Mills *v.* Manchester, 58 N. H. 38.

34. Nova Ceasarea Harmony Lodge No. 2 *v.* Hagerty, 11 Ohio Dec. (Reprint) 595, 28 Cinc. L. Bul. 67. See also White *v.* Lincoln, 79 Nebr. 153, 112 N. W. 369.

35. Sherman *v.* McClurg, 27 N. J. L. 253; People *v.* Barker, 48 N. Y. 70; People *v.* Feitner, 90 N. Y. App. Div. 9, 85 N. Y. Suppl. 587; People *v.* Holland, 61 Barb. (N. Y.) 273; People *v.* Reddy, 43 Barb. (N. Y.) 539; People *v.* Pulteney Bd. of Assessors, 101 N. Y. Suppl. 176; Adriance *v.* New York, 12 How. Pr. (N. Y.) 224.

Where the board receives a verified statement of the party complaining, and the truth thereof is not disputed, it cannot reject the statement or act otherwise than in accordance therewith, unless the evidence justifies it, since they are acting judicially and are bound by the evidence before them. People *v.* Failing, 130 N. Y. App. Div. 888, 114 N. Y. Suppl. 514; People *v.* Hall, 130 N. Y. App. Div. 360, 114 N. Y. Suppl. 511 [*modifying* 57 Misc. 308, 109 N. Y. Suppl. 402].

36. Kansas Pac. R. Co. *v.* Riley County, 20 Kan. 141; State *v.* Hannibal, etc., R. Co., 101 Mo. 120, 13 S. W. 406; People *v.* Hall, 130 N. Y. App. Div. 360, 114 N. Y. Suppl. 511 [*modifying* 57 Misc. 308, 109 N. Y. Suppl. 402]; People *v.* Feitner, 30 Misc. (N. Y.) 665, 64 N. Y. Suppl. 298.

37. State *v.* Northern Belle Mill, etc., Co., 12 Nev. 89.

38. Gager *v.* Prout, 48 Ohio St. 89, 26 N. E. 1013.

That a corporation declares a dividend is presumptive evidence that its capital is unimpaired; but this may be rebutted. People *v.* Barker, 165 N. Y. 305, 59 N. E. 137, 151.

39. Clement *v.* People, 177 Ill. 144, 52 N. E. 382; Penobscot Chemical Fibre Co. *v.* Bradley, 99 Me. 263, 59 Atl. 83; People *v.* Feitner, 61 N. Y. App. Div. 456, 70 N. Y.

(iv) *Decision Not Based on Evidence.* In some states the board of equalization may act upon the assessments within its jurisdiction without hearing any evidence, and merely upon the knowledge or opinions of its members as to the value of property.[40] But in other states the rule is otherwise; and the board is empowered to act only upon evidence adduced before it, and no assessment can be changed except upon evidence;[41] and furthermore, the action of the board will be illegal if taken arbitrarily without any evidence or contrary to all the evidence before it.[42]

(v) *Power to Call Witnesses and Compel Testimony.* The officer or board of equalization, under the statutes generally in force, has power to administer oaths and to summon witnesses and require them to testify,[43] including the complainant himself, the penalty of his refusal to answer being the denial of all relief.[44] Under some statutes the board also has power to require the production of books and papers for its inspection.[45]

Suppl. 545 [*affirmed* in 168 N. Y. 677, 61 N. E. 1133]; People *v.* Feitner, 58 N. Y. App. Div. 468, 69 N. Y. Suppl. 410; Matter of Nisbet, 40 N. Y. App. Div. 611, 57 N. Y. Suppl. 551 [*affirmed* in 165 N. Y. 605, 58 N. E. 1090]; People *v.* Feitner, 33 Misc. (N. Y.) 357, 68 N. Y. Suppl. 535; State *v.* Fisher, 124 Wis. 271, 102 N. W. 566; State *v.* Williams, 123 Wis. 73, 100 N. W. 1052; State *v.* Lien, 108 Wis. 316, 84 N. W. 422.

The testimony of an agent of an owner of property, appearing before a board of review to reduce an assessment, must be taken most strongly against the owner. State *v.* Williams, 123 Wis. 73, 100 N. W. 1052.

40. *Arkansas.* — Pulaski County Bd. of Equalization Cases, 49 Ark. 518, 6 S. W. 1.

Georgia.— Collier *v.* Morrow, 90 Ga. 148, 15 S. E. 768.

Illinois.— *In re* Maplewood Coal Co., 213 Ill. 283, 72 N. E. 786.

Michigan.— Griswold *v.* Bay City Union School Dist., 24 Mich. 262.

New Jersey.— State *v.* Roe, 36 N. J. L. 86, but this applies only to equalizations as between townships.

Washington.— Olympia Water Works *v.* Gelbach, 16 Wash. 482, 48 Pac. 251.

Wyoming.— Ricketts *v.* Crewdson, 13 Wyo. 284, 79 Pac. 1042, 81 Pac. 1.

See 45 Cent. Dig. tit. "Taxation," § 864.

41. *Alabama.*—State *v.* Sloss-Sheffield Steel, etc., Co., 162 Ala. 234, 50 So. 366.

Massachusetts.— Noyes *v.* Hale, 137 Mass. 266.

Nebraska.— State *v.* Dodge County, 20 Nebr. 595, 31 N. W. 117.

Ohio.—Wise *v.* Kromberg, 7 Ohio Dec. (Reprint) 541, 3 Cinc. L. Bul. 863; Gerke Brewing Co. *v.* Hagerty, 1 Ohio S. & C. Pl. Dec. 687, 1 Ohio N. P. 68.

Wisconsin.— Shove *v.* Manitowoc, 57 Wis. 5, 14 N. W. 829; Milwaukee Iron Co. *v.* Schubel, 29 Wis. 444, 9 Am. Rep. 591; Phillips *v.* Stevens' Point, 25 Wis. 594; State *v.* Delavan, 1 Wis. 345. A statute in force from 1871 to 1877 authorized the board to act without hearing witnesses. See McIntyre *v.* White Creek, 43 Wis. 620; Wilson *v.* Heller, 32 Wis. 457. But under the present law the board is not bound to accept as true either the evidence of the owner asking for a reduction or the evidence in support of the assessor's valuation, but may, in the exercise of its judgment, fix a value between the two extremes. State *v.* Williams, 123 Wis. 61, 100 N. W. 1048.

See 45 Cent. Dig. tit. "Taxation," § 864.

42. Leavenworth County *v.* Lang, 8 Kan. 284; People *v.* Tax, etc., Com'rs, 33 Misc. (N. Y.) 347, 68 N. Y. Suppl. 548; People *v.* Dykes, 19 N. Y. Suppl. 78; Fatz *v.* Mueller, 35 Ohio St. 397; Gerke Brewing Co. *v.* Hagerty, 1 Ohio S. & C. Pl. Dec. 687, 1 Ohio N. P. 68; Fond du Lac Water Co. *v.* Fond du Lac, 82 Wis. 322, 52 N. W. 439, 16 L. R. A. 581; Tainter *v.* Lucas, 29 Wis. 375.

43. State *v.* Wood, 110 Ind. 82, 10 N. E. 639; State *v.* State Tax Collector, 39 La. Ann. 530, 2 So. 59; People *v.* Campbell, 139 N. Y. 68, 34 N. E. 753; People *v.* McComber, 7 N. Y. Suppl. 71; State *v.* Hobe, 124 Wis. 8, 102 N. W. 350.

Matters triable by record.— A reviewing officer cannot take oral testimony to ascertain what action was taken by the board of equalization with reference to particular property, as this must appear of record. Barney, etc., Mfg. Co. *v.* Montgomery County, 11 Ohio Dec. (Reprint) 790, 29 Cinc. L. Bul. 366.

A referee to take testimony may be appointed by the county controller, where the supervisors of a town appeal from the decision of the supervisors of the county as to the equalization of assessments. People *v.* Hillhouse, 1 Lans. (N. Y.) 87.

44. People *v.* Hall, 83 Hun (N. Y.) 375, 31 N. Y. Suppl. 956; People *v.* Maynard, 7 Misc. (N. Y.) 295, 28 N. Y. Suppl. 141; Heffner *v.* Mahoney, 10 Ohio Dec. (Reprint) 260, 14 Cinc. L. Bul. 369. But *compare* McMorran *v.* Wright, 74 Mich. 356, 41 N. W. 1082.

Objections to questions.— The mere fact that the questions asked by the tax commissioners are inquisitorial is no ground for a refusal to answer, since the examination is of necessity inquisitorial, and the materiality of the questions is for the determination of the commissioners, and not for the complainant. People *v.* Feitner, 58 N. Y. App. Div. 468, 69 N. Y. Suppl. 410.

45. Satterwhite *v.* State, 142 Ind. 1, 40 N. E. 654, 1087.

f. Judgment or Decision and Record — (I) *Scope and Extent of Relief.* The board of equalization, in granting relief, is generally limited to the scope of the application made to it,[46] although in some jurisdictions it has power to increase an assessment instead of reducing it.[47] If the valuation is found to be merely excessive, it may be set aside as to the excess and affirmed as to the residue;[48] but if the assessment is arbitrary and fraudulent, it should be vacated entirely, and not merely as to the excess.[49] There is generally no authority to award costs to the successful applicant for relief,[50] or to allow him interest on so much of the tax as is adjudged excessive, where the whole has been paid under protest.[51]

(II) *Rendition and Form of Decision.* The decision of an officer or board of equalization is usually in the form of a resolution or order, and while it should specify the persons or property affected,[52] it is not to be judged by strict rules, and will not be invalidated by any informality, provided it shows clearly what action was taken by the board.[53] Although the courts will not interfere with the discretion of the board, it may be compelled by mandamus to take up and decide any particular complaint.[54] Formal notice to the taxpayer of the decision of the board is not generally required.[55]

(III) *Record of Proceedings* — (A) *In General.* If the statute requires the board of equalization to keep a record of its proceedings and enter thereon the action taken in particular cases, it is generally held mandatory, and a disregard of it fatal to the validity of its determinations.[56] The record when made must show affirmatively upon its face the jurisdiction of the officer or board and that he or they acted within the same;[57] but in other respects it will be aided by all reasonable presumptions,[58] and irregularities, informalities, or clerical errors in the record, or in the manner of preparing or keeping it, will not invalidate the

46. State *v.* Ormsby County, 6 Nev. 95.
A revision without making any change in the assessment will not invalidate it. Chicago, etc., R. Co. *v.* Bureau County, 25 Ill. 580.
Apportionment between resident and non-resident trustees see People *v.* Wells, 182 N. Y. 314, 74 N. E. 878.

47. See *supra*, VII, B, 5, d. But see Lowell *v.* Middlesex County, 3 Allen (Mass.) 546.
Addition of penalty see Patton *v.* Commercial Bank, 10 Ohio S. & C. Pl. Dec. 321, 7 Ohio N. P. 401.

48. State *v.* Dickerson, 25 N. J. L. 427.

49. Brennan *v.* Buffalo, 13 N. Y. App. Div. 453, 43 N. Y. Suppl. 597.

50. Penobscot Chemical Fibre Co. *v.* Bradley, 99 Me. 263, 59 Atl. 83; Lowell *v.* Middlesex County, 3 Allen (Mass.) 546.

51. Lowell *v.* Middlesex County, 3 Allen (Mass.) 550.

52. People *v.* Ashbury, 46 Cal. 523.

53. *California.*—La Grange Hydraulic Gold Min. Co. *v.* Carter, 142 Cal. 560, 76 Pac. 241.
Indiana.— Seymour First Nat. Bank *v.* Isaacs, 161 Ind. 278, 68 N. E. 288.
Michigan.— Case *v.* Dean, 16 Mich. 12.
Mississippi.— Mixon *v.* Clevenger, 74 Miss. 67, 20 So. 148; Grayson *v.* Richardson, 65 Miss. 222, 3 So. 579.
Missouri.— State *v.* Baker, 170 Mo. 383, 70 S. W. 872.
Nevada.— State *v.* Washoe County, 14 Nev. 140.
Pennsylvania.— Manor Real Estate, etc., Co. *v.* Cooner, 209 Pa. St. 531, 58 Atl. 918.
See 45 Cent. Dig. tit. "Taxation," § 869.

54. People *v.* Knight, 66 N. Y. App. Div. 150, 72 N. Y. Suppl. 929. And see *infra*, VII, C, 4, a, (I).

55. Com. *v.* New England Slate, etc., Co., 13 Allen (Mass.) 391. But *compare* People *v.* Knight, 66 N. Y. App. Div. 150, 72 N. Y. Suppl. 929.

56. Hillsborough County *v.* Londonderry, 46 N. H. 11; Hayes *v.* Yost, 24 Ohio Cir. Ct. 18; Ratterman *v.* Niehaus, 4 Ohio Cir. Ct. 502, 2 Ohio Cir. Dec. 673; Wise *v.* Kromberg, 7 Ohio Dec. (Reprint) 541, 3 Cinc. L. Bul. 541; Muller *v.* Fratz, 6 Ohio Dec. (Reprint) 811, 8 Am. L. Rec. 310; Hecht *v.* Boughton, 2 Wyo. 385. *Contra*, Hutchinson *v.* Board of Equalization, 66 Iowa 35, 23 N. W. 249; Auditor-Gen. *v.* Buckeye Iron Co., 132 Mich. 454, 93 N. W. 1080.

57. *Arizona.*— Copper Queen Consol. Min. Co. *v.* Cochise County Bd. of Equalization, 7 Ariz. 364, 65 Pac. 149.
Michigan.— Delray Land Co. *v.* Springwells Tp., 149 Mich. 397, 112 N. W. 1132 (record held insufficient for uncertainty); Bialy *v.* Bay City, 139 Mich. 495, 102 N. W. 1033.
Montana.— Montana Ore Purchasing Co. *v.* Maher, 32 Mont. 480, 81 Pac. 13.
New Jersey.—State *v.* Warford, 32 N. J. L. 207; Nixon *v.* Ruple, 30 N. J. L. 58.
Ohio.—Euclid Ave. Sav., etc., Bank *v.* Hubbard, 22 Ohio Cir. Ct. 20, 12 Ohio Cir. Dec. 279.
See 45 Cent. Dig. tit. "Taxation." § 870.

58. Lacey *v.* Davis, 4 Mich. 140, 66 Am. Dec. 524; Godfrey *v.* Douglas County, 28 Oreg. 446, 43 Pac. 171.

tax.[59] The record of the board is the best and only proper evidence of their proceedings, and no other evidence can be received if the record can be produced.[60]

(B) *Amendment and Correction.* The board of equalization has at all times authority to amend its record by supplying omissions or correcting mistakes.[61]

(IV) *Conclusiveness and Effect of Decision* — (A) *In General.* The decision of the officer or board of equalization upon a particular assessment submitted to it for adjudication is in the nature of a judgment and has the ordinary force and effect of a judgment; and in the absence of fraud or illegality it generally is final and conclusive as to all matters submitted by law to the decision of the officer or board,[62] and is not open to impeachment or contradiction in a collateral

59. *California.*— Allison Ranch Min. Co. *v.* Nevada County, 104 Cal. 161, 37 Pac. 875.

Indiana.— Fell *v.* West, 35 Ind. App. 20, 73 N. E. 719.

Iowa.— Easton *v.* Savery, 44 Iowa 654.

Kansas.— Fowler *v.* Russell, 45 Kan. 425, 25 Pac. 871.

Michigan. — Auditor-Gen. *v.* Ayer, 109 Mich. 694, 67 N. W. 985, 122 Mich. 136, 80 N. W. 997.

Minnesota.— State *v.* Crookston Lumber Co., 85 Minn. 405, 89 N. W. 173.

Missouri.— State *v.* Baker, 170 Mo. 194, 70 S. W. 470; State *v.* Hannibal, etc., R. Co., 101 Mo. 120, 13 S. W. 406; Pacific R. Co. *v.* Franklin County, 57 Mo. 223; Taber *v.* Wilson, 34 Mo. App. 89.

Montana.— Montana Ore Purchasing Co. *v.* Maher, 32 Mont. 480, 81 Pac. 13.

Oregon.— Becker *v.* Malheur County, 24 Oreg. 217, 33 Pac. 543.

See 45 Cent. Dig. tit. "Taxation," § 870.

Signing record.— Failure of the members of the board of equalization to sign the record, as directed by statute, does not invalidate their proceedings. State *v.* Wray, 55 Mo. App. 646.

60. Washington County *v.* St. Louis, etc., R. Co., 58 Mo. 372; State *v.* Central Pac. R. Co., 17 Nev. 259, 30 Pac. 887; Godfrey *v.* Douglas County, 28 Oreg. 446, 43 Pac. 171.

61. *Illinois.*— Chicago, etc., R. Co. *v.* People, 184 Ill. 240, 56 N. E. 367.

Indiana.— Seymour First Nat. Bank *v.* Isaacs, 161 Ind. 278, 68 N. E. 288.

Maine.— Orland *v.* County, 76 Me. 462.

Michigan.— Shelden *v.* Marion Tp., 101 Mich. 256, 59 N. W. 614.

Missouri.— State *v.* Wray, 55 Mo. App. 646.

62. *California.*—California Domestic Water Co. *v.* Los Angeles County, 10 Cal. App. 185, 101 Pac. 547. *Compare* Columbia Sav. Bank *v.* Los Angeles County, 137 Cal. 467, 70 Pac. 308, holding that the action of the board in refusing to grant the petition of a taxpayer to strike out an assessment for moneys invested in United States bonds is not final or conclusive against the taxpayer, in an action by him to recover back taxes paid by him thereon under protest.

Connecticut.— State *v.* Travelers' Ins. Co., 70 Conn. 590, 40 Atl. 465, 66 Am. St. Rep. 138.

Illinois.— Coal Run Coal Co. *v.* Finlen, 124 Ill. 666, 17 N. E. 11.

Indiana.— Johnson County *v.* Johnson, 173 Ind. 76, 89 N. E. 590; Cleveland, etc., R. Co. *v.* Ensley, 44 Ind. App. 538, 89 N. E. 607.

Kansas.— Finney County *v.* Bullard, 77 Kan. 349, 94 Pac. 129, 16 L. R. A. N. S. 807, holding that in the absence of grounds justifying a resort to a court of equity, the decision of the board on valuation is final.

Kentucky.— Vanceburg, etc., Road Co. *v.* Maysville, etc., R. Co., 117 Ky. 275, 77 S. W. 1118, 25 Ky. L. Rep. 1404; Paducah St. R. Co. *v.* McCracken County, 105 Ky. 472, 49 S. W. 178, 20 Ky. L. Rep. 1294; South Covington, etc., R. Co. *v.* Bellevue, 105 Ky. 283, 49 S. W. 23, 20 Ky. L. Rep. 1184, 57 L. R. A. 50.

Michigan.—Ward *v.* Echo Tp., 145 Mich. 56, 108 N. W. 364; Grand Rapids *v.* Welleman, 85 Mich. 234, 48 N. W. 534; Boyce *v.* Sebring, 66 Mich. 210, 33 N. W. 815; Williams *v.* Saginaw, 51 Mich. 120, 16 N. W. 260; Griswold *v.* Bay City Union School Dist., 24 Mich. 262; Case *v.* Dean, 16 Mich. 12.

Minnesota.— State *v.* London, etc., Mortg. Co., 80 Minn. 277, 83 N. W. 339.

Mississippi.— Adams *v.* Clarke, 80 Miss. 134, 31 So. 216; Horne *v.* Green, 52 Miss. 452, holding that the action of the board is conclusive only as to irregularities and matters of fact resting wholly *in pais*, such as misdescription, excessive valuation, listing of property to the wrong person, and the like.

Nebraska.— Chapel *v.* Franklin County, 58 Nebr. 544, 78 N. W. 1062.

New Jersey.— Morris, etc., R. Co. *v.* Newark, 67 N. J. L. 310, 43 Atl. 691; Potter *v.* Ross, 23 N. J. L. 517, as to amount of assessment or value of property.

New York.— People *v.* Wells, 179 N. Y. 257, 71 N. E. 1126; People *v.* McCarthy, 102 N. Y. 630, 8 N. E. 85; People *v.* Feitner, 60 N. Y. App. Div. 282, 70 N. Y. Suppl. 120; People *v.* Wemple, 63 Hun 444, 18 N. Y. Suppl. 511; Jamaica, etc., Road Co. *v.* Brooklyn, 1 N. Y. Suppl. 830.

North Carolina.— Pickens *v.* Henderson County, 112 N. C. 698, 17 S. E. 438.

North Dakota.—Casselton First Nat. Bank *v.* Lewis, (1909) 121 N. W. 836.

Ohio.— See Gager *v.* Prout, 48 Ohio St. 89, 26 N. E. 1013.

Oklahoma.—Wallace *v.* Bullen, 6 Okla. 17, 52 Pac. 954.

South Dakota.— Dakota L. & T. Co. *v.* Codington County, 9 S. D. 159, 68 N. W. 314.

Texas.— Texas, etc., R. Co. *v.* Harrison County, 54 Tex. 119; Clawson Lumber Co. *v.* Jones, 20 Tex. Civ. App. 208, 49 S. W. 909.

proceeding.[63] It must be accepted and obeyed by the officer whose duty it is to make the changes in the assessment roll which are ordered by the board, and he cannot question or review its decisions, but mandamus lies to compel him to perform the simple ministerial duty which the decision of the board imposes on him.[64] It is also binding on the collector of taxes, and conversely it will protect

Washington.— Ladd *v.* Gilson, 26 Wash. 79, 66 Pac. 126; Lewis *v.* Bishop, 19 Wash. 312, 53 Pac. 165; Noyes *v.* King County, 18 Wash. 417, 51 Pac. 1052; Baker *v.* King County, 17 Wash. 622, 50 Pac. 481.

Wisconsin.— See Plumer *v.* Marathon County, 46 Wis. 163, 50 N. W. 416.

United States.— Missouri *v.* Dockery, 191 U. S. 165, 24 S. Ct. 53, 48 L. ed. 133, 63 L. R. A. 571; Stanley *v.* Albany County, 121 U. S. 535, 7 S. Ct. 1234, 30 L. ed. 1000.

See 45 Cent. Dig. tit. "Taxation," § 872.

Liability of property to taxation.— On the question whether particular property is liable to taxation or is exempt by law the decision of the board of equalization is not conclusive. Johnson County *v.* Johnson, 173 Ind. 76, 89 N. E. 590; Horne *v.* Green, 52 Miss. 452; Potter *v.* Ross, 23 N. J. L. 517.

Application of doctrine of res judicata in general.— The rule of *res judicata* in reference to tax assessments rests upon the same basis as in the case of other judgments; and one who relies on the conclusiveness of an assessment must be able to show that all his property was before the board of review when his assessment was settled, for any of it which was not brought to the attention of the board was not in issue before it and of course not adjudicated. Adams *v.* Clarke, 80 Miss. 134, 31 So. 216. For the same reason orders of the board made in proceedings to which a city was not a party are not *res judicata* as to the city. People *v.* Priest, 41 Misc. (N. Y.) 545, 85 N. Y. Suppl. 235. So also the decision of the board as to the assessment of property for the taxes of a given year is not binding on the same board or its successors when the question is as to the assessment of the same property in succeeding years. Lowell *v.* Middlesex County, 152 Mass. 372, 25 N. E. 469, 9 L. R. A. 356; People *v.* Roberts, 155 N. Y. 408, 50 N. E. 53, 41 L R. A. 228.

63. *Illinois.*— Ellis *v.* People, 199 Ill. 548, 65 N. E. 428; Coal Run Coal Co. *v.* Finlen, 124 Ill. 666, 17 N. E. 11; Republic L. Ins. Co. *v.* Pollak, 75 Ill. 292; Spencer *v.* People, 68 Ill. 510.

Indiana.— State *v.* Clinton County, 162 Ind. 580, 68 N. E. 295, 70 N. E. 373, 984; Jones *v.* Rushville Natural Gas Co., 135 Ind. 595, 35 N. E. 390; Pittsburgh, etc., R. Co. *v.* Backus, 133 Ind. 625, 33 N. E. 432; Cleveland, etc., R. Co. *v.* Backus, 133 Ind. 513, 33 N. E. 421, 18 L. R. A. 729. But see Hart *v.* Smith, 159 Ind. 182, 64 N. E. 661, 95 Am. St. Rep. 280, 58 L. R. A. 949.

Kansas.— Torrington *v.* Rickershauser, 41 Kan. 486, 21 Pac. 648. *Compare* Lyon County *v.* Sergeant, 24 Kan. 572.

Kentucky.—Ward *v.* Beale, 91 Ky. 60, 14 S. W. 967, 12 Ky. L. Rep. 671.

Louisiana.— State *v.* Board of Assessors, 30 La. Ann. 261.

Michigan.— Grand Rapids *v.* Welleman, 85 Mich. 234, 48 N. W. 534; Atty.-Gen. *v.* Sanilac County, 42 Mich. 72, 3 N. W. 260; Case *v.* Dean, 16 Mich. 12.

Minnesota.— State *v.* Hynes, 82 Minn. 34, 84 N. W. 636.

Missouri.— State *v.* Western Union Tel. Co., 165 Mo. 502, 65 S. W. 775.

Nebraska.— State *v.* State Bd. of Equalization, 81 Nebr. 139, 115 N. W. 789; State *v.* Grow, 74 Nebr. 850, 105 N. W. 898.

Nevada.— State *v.* Central Pac. R. Co., 21 Nev. 172, 26 Pac. 225, 1109.

New Jersey.—Camden *v.* Mulford, 26 N. J. L. 49.

Oregon.—Rhea *v.* Umatilla County, 2 Oreg. 298.

Tennessee.— Smoky Mt. Land, etc., Co. *v.* Lattimore, 119 Tenn. 620, 105 S. W. 1028, judgment of reassessment.

United States.—Campbellsville Lumber Co. *v.* Hubbart, 112 Fed. 718, 50 C. C. A. 435; McLeod *v.* Receveur, 71 Fed. 455, 18 C. C. A. 188. See also Western Union Tel. Co. *v.* Wright, 166 Fed. 954.

See 45 Cent. Dig. tit. "Taxation," § 872. See also *infra*, VII, C, 1, a.

64. *Arizona.*—Territory *v.* Yavapai County, 9 Ariz. 405, 84 Pac. 519.

Illinois.— People *v.* Opel, 207 Ill. 469, 69 N. E. 838.

Indiana.— Seymour First Nat. Bank *v.* Isaacs, 161 Ind. 278, 68 N. E. 288.

Iowa.— Polk County *v.* Sherman, 99 Iowa 60, 68 N. W. 562; Ridley *v.* Doughty, 77 Iowa 226, 42 N. W. 178.

Michigan.— Bialy *v.* Bay City, 139 Mich. 495, 102 N. W. 1033; State Tax Com'rs *v.* Quinn, 125 Mich. 128, 84 N. W. 1.

Nevada.— State *v.* Fish, 4 Nev. 216.

New Jersey.— Englewood *v.* Bergen County Tax Bd. of Equalization, 71 N. J. L. 423, 59 Atl. 15.

Ohio.— State *v.* Lewis, 64 Ohio St. 216, 60 N. E. 198; Sherard *v.* Lindsay, 13 Ohio Cir. Ct. 315, 7 Ohio Cir. Dec. 245.

South Carolina.— State *v.* Covington, 35 S. C. 245, 14 S. E. 499.

Wisconsin.— State *v.* Cornwall, 97 Wis. 565, 73 N. W. 63.

See 45 Cent. Dig. tit. "Taxation," §§ 872, 912.

The opinion of the assessor that the acts of the board of equalization in changing the valuations in the assessment roll were irregular and void will not excuse him from assessing the taxes according to such changed valuations, since the opinion of an officer that the acts of his superior are void does not relieve him from the performance of a statutory duty based on such acts. State Tax Com'rs *v.* Quinn, 125 Mich. 128, 84 N. W.

him in the discharge of his duties, if he acts within it.[65] But it may be reviewed and reversed by the courts when shown to have been given without jurisdiction or otherwise to be wholly illegal,[66] and also where shown to have been fraudulent, malicious, or entirely arbitrary.[67] Such decision may also, by statute in some of the states, be reviewed by the courts on the ground of error, but in that case it will not be disturbed unless very clearly shown to have been erroneous.[68] And under some statutes the board of equalization itself has power, on notice to the complainant, to reopen its decision, which has been rendered without proper jurisdiction, and render a proper one.[69]

(B) *Presumption of Regularity.* In proceeding to review an order or decision of the board of equalization, there is a presumption that the board discharged its functions properly and that its proceedings were duly and regularly taken, which presumption must be overcome by the party complaining.[70]

1. *Compare* Union Oil Co. *v.* Campbell, 48 La. Ann. 1350, 20 So. 1007.

65. Eatontown School Dist. No. 4 *v.* Lewis, 35 N. J. L. 377; Roll *v.* Perrine, 34 N. J. L. 254, tax collector not bound to disregard action of commissioners.

66. *Colorado.*— Pueblo County *v.* Wilson, 15 Colo. 90, 24 Pac. 563.

Florida.— Tampa *v.* Mugge, 40 Fla. 326, 24 So. 489.

Illinois.— State *v.* Allen, 43 Ill. 456.

Nebraska.— State *v.* State Bd. of Equalization, 81 Nebr. 139, 115 N. W. 789; Spiech *v.* Tierney, 56 Nebr. 514, 76 N. W. 1090.

Ohio.— Hagerty *v.* Huddleston, 60 Ohio St. 149, 53 N. E. 960.

See 45 Cent. Dig. tit. "Taxation," § 872. See also *infra*, VII, C, 1, a.

A decision rendered where but one member of the board sat at the hearing with the private secretary of another member, without the complainant's knowledge that such secretary was not a member of the board, is void, and the fact that the complainant did not know that such private secretary was not a member of the board excuses him from interposing an objection to the jurisdiction of one member to hear his appeal, if such objection was necessary. Smoky Mountain Land, etc., Co. *v.* Lattimore, 119 Tenn. 620, 105 S. W. 1028.

67. *California.*—California Domestic Water Co. *v.* Los Angeles County, 9 Cal. App. 185, 101 Pac. 547.

Illinois.— State Bd. of Equalization *v.* People, 191 Ill. 528, 61 N. E. 339, 55 L. R. A. 513; Burton Stock Car Co. *v.* Traeger, 187 Ill. 9, 58 N. E. 418.

Indiana.— Pittsburgh, etc., R. Co. *v.* Backus, 133 Ind. 625, 33 N. E. 432; Cleveland, etc., R. Co. *v.* Backus, 133 Ind. 513, 33 N. E. 421, 18 L. R. A. 729.

Nebraska.— State *v.* State Bd. of Equalization, 81 Nebr. 139, 115 N. W. 789.

Nevada.— State *v.* Central Pac. R. Co., 21 Nev. 172, 26 Pac. 225, 1109.

Texas.— Johnson *v.* Holland, 17 Tex. Civ. App. 210, 43 S. W. 71.

Washington.— Edison Electric Illuminating Co. *v.* Spokane County, 22 Wash. 168, 60 Pac. 132; Baker *v.* King County, 17 Wash. 622, 50 Pac. 481.

Wisconsin.— Brown *v.* Oneida County, 103 Wis. 149, 79 N. W. 216; Green Bay, etc., Canal Co. *v.* Outagamie County, 76 Wis. 587, 45 N. W. 536.

United States.— Maish *v.* Arizona Terr., 164 U. S. 599, 17 S. Ct. 193, 41 L. ed. 567; Paul *v.* Pacific R. Co., 18 Fed. Cas. No. 10,845, 4 Dill. 35.

See 45 Cent. Dig. tit. "Taxation," § 872. See also *infra*, VII, C, 1, a.

68. Vicksburg, etc., R. Co. *v.* Lake, 38 La. Ann. 760; People *v.* Campbell, 145 N. Y. 587, 40 N. E. 239 [*affirming* 80 Hun 466, 30 N. Y. Suppl. 472]; People *v.* Wemple, 138 N. Y. 582, 34 N. E. 386 [*affirming* 63 Hun 452, 18 N. Y. Suppl. 504]; People *v.* Roberts, 90 Hun (N. Y.) 533, 36 N. Y. Suppl. 73; People *v.* Campbell, 70 Hun (N. Y.) 507, 24 N. Y. Suppl. 208.

Correcting mathematical errors.— A statutory provision that the valuation fixed by the board of equalization shall be final does not preclude the court, in a suit for the tax, from correcting any errors in the mathematical process by which such valuation was reached. State *v.* Travelers' Ins. Co., 70 Conn. 590, 40 Atl. 465, 66 Am. St. Rep. 138.

69. Smoky Mountain Land, etc., Co. *v.* Lattimore, 119 Tenn. 620, 105 S. W. 1028, holding that a judgment by the state board of equalization which is void for want of a quorum at the trial may be reopened by the board on notice to the appellant and a judgment or finding rendered by the full board. *Compare* Adams *v.* Clarsdale, (Miss. 1909) 48 So. 242.

70. *Alabama.*— State Auditor *v.* Jackson County, 65 Ala. 142.

California.— Hagenmeyer *v.* Mendocino County Bd. of Equalization, 82 Cal. 214, 23 Pac. 14; Guy *v.* Washburn, 23 Cal. 111.

Michigan.— Auditor-Gen. *v.* Hill, 97 Mich. 80, 56 N. W. 219.

New Jersey.—Wayne Tp. *v.* Laflin, etc., Powder Co., 76 N. J. L. 175, 68 Atl. 909.

Ohio.— Hambleton *v.* Dempsey, 20 Ohio 168; Hulbert *v.* Wise, 6 Ohio Dec. (Reprint) 1069, 10 Am. L. Rec. 183.

Oregon.— Godfrey *v.* Douglas County, 28 Oreg. 446, 43 Pac. 171.

Washington.— Great Northern R. Co. *v.* Snohomish County, 54 Wash. 23, 102 Pac. 881.

Wisconsin.— Marsh *v.* Richwood, 113 Wis. 111, 88 N. W. 916.

See 45 Cent. Dig. tit. "Taxation," § 873.

g. Mode of Correction of Assessment. The changes and corrections ordered by the board of equalization should be duly entered in the books or rolls containing the original assessment,[71] by a proper officer or clerk; [72] and, if the law so requires, a statement of the facts on which the change was ordered should be filed at the same time.[73] Omitted property, if ordered by the board to be assessed, may be entered *nunc pro tunc.*[74]

C. Judicial Remedies For Review and Correction of Assessments — 1. Jurisdiction and Powers of Courts — a. In General. The courts have no jurisdiction to revise and change assessments of property for taxation duly made by the proper officers, in any collateral proceeding or in any direct proceeding except where authorized by statute, on grounds of irregularity, error, or excessive valuation.[75] They may always inquire into the jurisdiction of the assessors and board of equalization, and set aside their decisions if found to have been made

71. Oliver *v.* Robinson, 58 Ala. 46; Hamersley *v.* Franey, 39 Conn. 176; Goddard *v.* Seymour, 30 Conn. 394; Jones *v.* Tiffin, 24 Iowa 190; Delaware, etc., Canal Co. *v.* Walsh, 33 Leg. Int. (Pa.) 349, 5 Luz. Leg. Reg. 69.

72. Goddard *v.* Seymour, 30 Conn. 394 (town clerk); Pacific R. Co. *v.* Franklin County, 57 Mo. 223 (deputy of county clerk); State *v.* Carson, etc., R. Co., 29 Nev. 487, 91 Pac. 932 (clerk of board of equalization); Hulbert *v.* Wise, 6 Ohio Dec. (Reprint) 1069, 10 Am. L. Rec. 183 (holding that the auditor may correct clerical errors).

73. Ross *v.* Crawford County Com'rs, 16 Kan. 411.

74. Pacific R. Co. *v.* Franklin County, 57 Mo. 223.

75. *Arkansas.*— Under the statutes in this state an owner of property may have his assessment adjusted by the county court for an obvious error therein. Clay County *v.* Brown Lumber Co., 90 Ark. 413, 119 S. W. 251 (holding also that since a specified term of the county court is fixed by statute, of which notice must be taken, no notice to a taxpayer whose assessment has been raised is necessary in order to confer jurisdiction on such tribunals to act); Saline County *v.* Hughes, 84 Ark. 347, 105 S. W. 577.

California.— California Bank *v.* San Francisco, 142 Cal. 276, 75 Pac. 832, 100 Am. St. Rep. 1305, 64 L. R. A. 918; People *v.* Mills Nat. Bank, 123 Cal. 53, 55 Pac. 685, 69 Am. St. Rep. 32, 45 L. R. A. 747; Johnson *v.* Malloy, 74 Cal. 430, 16 Pac. 228.

Colorado.— Arapahoe County *v.* Denver Union Water Co., 32 Colo. 382, 76 Pac. 1060.

Connecticut.— Morris *v.* New Haven, 77 Conn. 108, 58 Atl. 748, statutory right of appeal.

Florida.— Jackson County *v.* Thornton, 44 Fla. 610, 33 So. 291.

Illinois.—Weber *v.* Baird, 208 Ill. 209, 70 N. E. 231; Hulbert *v.* People, 189 Ill. 114, 59 N. E. 567; People *v.* Lots in Ashley, 122 Ill. 297, 13 N. E. 556; New York, etc., Grain, etc., Exch. *v.* Gleason, 121 Ill. 502, 13 N. E. 204; Republic L. Ins. Co. *v.* Pollak, 75 Ill. 292.

Indiana.— Baltimore, etc., R. Co. *v.* Oregon Tp., 170 Ind. 300, 84 N. E. 529 [*affirming* (App. 1907) 81 N. E. 105]; Jeffersonville *v.* Louisville, etc., Bridge Co., 169 Ind. 645, 83 N. E. 337; Hart *v.* Smith, 159 Ind. 182, 64 N. E. 661, 95 Am. St. Rep. 280, 58 L. R. A. 949; Rhoads *v.* Cushman, 45 Ind. 85; Pitcher *v.* Jackman, 15 Ind. 107; Biggs *v.* Lake County, 7 Ind. App. 142, 34 N. E. 500.

Iowa.— Judy *v.* Pleasant Nat. State Bank, 133 Iowa 252, 110 N. W. 605; Ferguson *v.* Rolfe, (1903) 94 N. W. 1129; Polk County *v.* Sherman, 99 Iowa 60, 68 N. W. 562.

Kentucky.— Hopkinsville First Nat. Bank *v.* Hopkinsville, 128 Ky. 383, 108 S. W. 311, 32 Ky. L. Rep. 1283, 16 L. R. A. N. S. 685; Citizens' Nat. Bank *v.* Com., 118 Ky. 51, 80 S. W. 479, 81 S. W. 686, 26 Ky. L. Rep. 62.

Louisiana.— District courts have original jurisdiction in cases of illegal assessment and taxation. Bunkie Brick Works *v.* Avoyelles Police Jury, 113 La. 1062, 37 So. 970; Otevi *v.* Parker, 42 La. Ann. 374, 7 So. 570. But it is a condition precedent to the exercise of the taxpayer's right of action in a court of justice that previous and timely effort shall have been made on his part to have the board of assessors correct an alleged error while the matter was yet in their hands and under their control. Leeds *v.* Hardy, 43 La. Ann. 810, 9 So. 488; State *v.* Graham, 23 La. Ann. 780. A rule to show cause is not a proper proceeding to reduce an assessment of taxes or revise a judgment for them. Schmidt *v.* New Orleans, 28 La. Ann. 429.

Maryland.— O'Neal *v.* Virginia, etc., Bridge Co., 18 Md. 1, 79 Am. Dec. 669.

Massachusetts.— Connecticut Mut. L. Ins. Co. *v.* Com., 133 Mass. 161; Com. *v.* Cary Imp. Co., 98 Mass. 19.

Minnesota.— State *v.* Duluth Gas, etc., Co., 76 Minn. 96, 78 N. W. 1032, 57 L. R. A. 63.

Montana.— Danforth *v.* Livingston, 23 Mont. 558, 59 Pac. 916.

New Hampshire.— Manchester *v.* Furnald, 71 N. H. 153, 51 Atl. 657; *In re* Briggs, 29 N. H. 547; Walker *v.* Cochran, 8 N. H. 166.

New Jersey.— Royal Mfg. Co. *v.* Rahway, 75 N. J. L. 416, 67 Atl. 940 (holding that under Acts (1903), § 38, it is the duty of the court to amend an assessment when satisfied that the value of the taxable property for which a person is assessed is too great, and reduce the same to a proper amount);

without any authority of law.[76] And the equitable powers of the courts may be invoked with success where the particular assessment complained of can be shown to have been made fraudulently or maliciously, or in such an arbitrary and capricious manner as amounts to constructive fraud;[77] and an overvaluation may

Newark *v.* North Jersey St. R. Co., 68 N. J. L. 486, 53 Atl. 219; Williams *v.* Bettle, 50 N. J. L. 132, 11 Atl. 17; Reynolds *v.* Paterson, 49 N. J. L. 380, 8 Atl. 113; Dodge *v.* Love, 49 N. J. L. 235, 9 Atl. 744; State *v.* Powers, 24 N. J. L. 406.

New York.— Swift *v.* Poughkeepsie, 37 N. Y. 511; Matter of Baumgarten, 39 N. Y. App. Div. 174, 57 N. Y. Suppl. 284; Livingston *v.* Hollenbeck, 4 Barb. 9, 3 How. Pr. 343 [*affirmed* in 15 N. Y. 454]; Kings County El. R. Co. *v.* Brooklyn, 16 Misc. 419, 38 N. Y. Suppl. 154; Brooklyn El. R. Co. *v.* Brooklyn, 16 Misc. 416, 38 N. Y. Suppl. 154 [*affirmed* in 11 N. Y. App. Div. 127, 42 N. Y. Suppl. 683]; People *v.* Asten, 15 N. Y. St. 170; People *v.* Christie, 14 N. Y. St. 525. Under Laws (1880), c. 269, an assessment is subject to review in the supreme court if found to be "illegal, erroneous, or unequal," but when an assessment violates no absolute rule of law, the court of appeals has no power to interfere. People *v.* Coleman, 107 N. Y. 541, 14 N. E. 431. And an excessive assessment is subject to review by the courts only on a writ of certiorari. Kings County El. R. Co. *v.* Brooklyn, 16 Misc. 419, 38 N. Y. Suppl. 154 [*affirmed* in 11 N. Y. App. Div. 127, 42 N. Y. Suppl. 683]; Brooklyn El. R. Co. *v.* Brooklyn, 16 Misc. 416, 38 N. Y. Suppl. 154.

Ohio.— Musser *v.* Adair, 55 Ohio St. 466, 45 N. E. 903; Sherard *v.* Lindsay, 13 Ohio Cir. Ct. 315, 7 Ohio Cir. Dec. 245; Nova Ceasarea Harmony Lodge No. 2 *v.* Hagerty, 11 Ohio Dec. (Reprint) 595, 28 Cinc. L. Bul. 67; Gerke Brewing Co. *v.* Hagerty, 1 Ohio S. & C. Pl. Dec. 687, 1 Ohio N. P. 68.

Pennsylvania.— Stewart *v.* Maple, 70 Pa. St. 221; Philadelphia *v.* Thurlow, 6 Pa. Dist. 51; Nichols *v.* Wilkes-Barre, 9 Kulp 371.

Texas.— Linz *v.* Sherman, (Civ. App. 1901) 62 S. W. 71.

Utah.— Home F. Ins. Co. *v.* Lynch, 19 Utah 189, 56 Pac. 681.

Virginia.— Richmond *v.* Crenshaw, 76 Va. 936.

Washington.— Great Northern R. Co. *v.* Snohomish County, 54 Wash. 23, 102 Pac. 881.

West Virginia.— Clark *v.* Mercer County Ct., 55 W. Va. 278, 47 S. E. 162.

Wisconsin.— State *v.* Wharton, 117 Wis. 558, 94 N. W. 359; Marsh *v.* Richwood, 113 Wis. 111, 88 N. W. 916; Plumer *v.* Marathon County, 46 Wis. 163, 50 N. W. 416.

See 45 Cent. Dig. tit. "Taxation," §§ 884–886. See also *supra*, VII, B, 7, f, (IV), (A).

Defense to action to recover taxes.—Where suit is brought against a delinquent taxpayer to recover the taxes, he may, if he can show the existence of errors in his assessment, have them corrected. State *v.* Deering, 56 Minn. 24, 57 N. W. 313.

76. Pilgrim Consol. Min. Co. *v.* Teller County, 32 Colo. 334, 76 Pac. 364; Weber *v.* Baird, 208 Ill. 209, 70 N. E. 231; East St. Louis Connecting R. Co. *v.* People, 119 Ill. 182, 10 N. E. 397; Heffner *v.* Mahoney, 10 Ohio Dec. (Reprint) 260, 19 Cinc. L. Bul. 369; Gerke Brewing Co. *v.* Hagerty, 1 Ohio S. & C. Pl. Dec. 687, 1 Ohio N. P. 68. See also *supra*, VII, B, 7, f, (IV), (A).

Exempt property.—Where assessors attempt to assess property which is legally exempt from taxation, they act beyond their jurisdiction and the courts may give relief. Salisbury Permanent Bldg., etc., Assoc. *v.* Wicomico County, 86 Md. 615, 39 Atl. 425; Detroit *v.* Wayne Cir. Judge, 127 Mich. 604, 86 N. W. 1032.

Situs of property.—Where property is not subject to the jurisdiction of the assessors, by reason of having its *situs* elsewhere, their action in assessing it is illegal and may be set aside by the courts. Maxwell *v.* People, 189 Ill. 546, 59 N. E. 1101; Nester *v.* Baraga Tp., 133 Mich. 640, 95 N. W. 722.

Under N. Y. Tax Laws (1908), c. 505, § 259*b*, relating to the cancellation of a personal property tax against a person which "is void for want of jurisdiction of such person," a tax on personalty against a nonresident is a tax on the property within the state, and cannot be canceled on proof that the tax is uncollectable for want of personal property. Matter of Adams, 60 Misc. 333, 113 N. Y. Suppl. 293.

77. *Arizona.*— Territory *v.* Yavapai County Delinquent Tax List, 3 Ariz. 117, 21 Pac. 768.

Illinois.— Coal Run Coal Co. *v.* Finlen, 124 Ill. 666, 17 N. E. 11; Buttenuth *v.* St. Louis Bridge Co., 123 Ill. 535, 17 N. E. 439, 5 Am. St. Rep. 545; East St. Louis Connecting R. Co. *v.* People, 119 Ill. 182, 10 N. E. 397.

Indiana.— Johnson County *v.* Johnson, 173 Ind. 76, 89 N. E. 590.

Kentucky.—Albin Co. *v.* Louisville, 117 Ky. 895, 79 S. W. 274, 25 Ky. L. Rep. 2055.

Michigan.— Detroit Citizens' St. R. Co. *v.* Detroit, 125 Mich. 673, 85 N. W. 96, 86 N. W. 809, 84 Am. St. Rep. 589; Muskegon *v.* Boyce, 123 Mich. 535, 82 N. W. 264; Pioneer Iron Co. *v.* Negaunee, 116 Mich. 430, 74 N. W. 700.

Minnesota.— State *v.* Western Union Tel. Co., 96 Minn. 13, 104 N. W. 567.

Missouri.— Hamilton *v.* Rosenblatt, 8 Mo. App. 237.

Oregon.— Oregon, etc., R. Co. *v.* Jackson County, 38 Oreg. 589, 64 Pac. 307, 65 Pac. 369; Dayton *v.* Multnomah County, 34 Oreg. 239, 55 Pac. 23.

Washington.— Olympia Water Works *v.* Gelbach, 16 Wash. 482, 48 Pac. 251; Olympia *v.* Stevens, 15 Wash. 601, 47 Pac. 11.

Wisconsin.— Semple *v.* Langlade County,

be so grossly excessive as to raise a presumption of fraud and thereby justify the interference of the court.[78]

b. Assessment of Omitted Property. Whatever revisory jurisdiction over the assessment of taxes may be lodged in the courts, it does not include the power to make an original assessment of omitted property,[79] unless such authority is clearly and expressly given by statute.[80]

2. Appeal From Assessment — a. Jurisdiction and Right of Appeal. Unless specially authorized by statute, no appeal lies from the decision of the assessors or the board of equalization on a particular assessment to the courts of law.[81] In many states, however, such an appeal is provided for by statute in certain cases, and in such cases constitutes the proper remedy of a person aggrieved by the

75 Wis. 354, 44 N. W. 749. *Compare* West *v.* Ballard, 32 Wis. 168.

See 45 Cent. Dig. tit. "Taxation," §§ 884–886. See also *supra*, VII, B, 7, f, (IV), (A).

78. State Bd. of Equalization *v.* People, 191 Ill. 528, 61 N. E. 339, 58 L. R. A. 513; Keokuk, etc., Bridge Co. *v.* People, 176 Ill. 267, 52 N. E. 117; State *v.* London, etc., Mortg. Co., 80 Minn. 277, 83 N. W. 339; Templeton *v.* Pierce County, 25 Wash. 377, 65 Pac. 553.

79. State *v.* Mobile County Revenue, etc., Com'rs, 73 Ala. 65; Judy *v.* Pleasant Nat. State Bank, 133 Iowa 252, 110 N. W. 605; Com. *v.* Pennsylvania Co., 145 Pa. St. 266, 23 Atl. 549. But *compare* Boody *v.* Watson, 64 N. H. 162, 9 Atl. 794.

80. Williamson *v.* Mimms, 49 Ark. 336, 5 S. W. 320; Hopkins *v.* Van Wyck, 80 Md. 7, 30 Atl. 556.

In Kentucky a supplemental means for assessing omitted property, by the county court, is provided for by statute. See Com. *v.* Glover, 132 Ky. 588, 116 S. W. 769; Com. *v.* Paducah, 126 Ky. 77, 102 S. W. 882, 31 Ky. L. Rep. 528; Com. *v.* Lovell, 125 Ky. 491, 101 S. W. 970, 31 Ky. L. Rep. 105; Com. *v.* Collins, 72 S. W. 819, 24 Ky. L. Rep. 2042. See also Louisville, etc., R. Co. *v.* Com., 1 Bush 250. But *compare* Pennington *v.* Woolfolk, 79 Ky. 13. This proceeding is a proceeding on behalf of the commonwealth, and it is the real party in interest, although the revenue agent if successful obtains compensation for his efforts; and it is instituted by the county revenue agent filing a statement, which he need not verify, containing a description and the value of the property proposed to be assessed. Com. *v.* Glover, *supra*; Com. *v.* Chaudet, 125 Ky. 111, 100 S. W. 819, 30 Ky. L. Rep. 1157. Such a proceeding against a trust company as a trustee for a designated beneficiary is against the trustee and no judgment can be rendered against the trust estate, but the judgment is against the trust company which is personally liable. Com. *v.* Churchill, 131 Ky. 251, 115 S. W. 189. And the question whether a *cestui que trust* whose estate is sought to be assessed in such a proceeding against a trustee is a resident of the county in which the proceeding is brought, as alleged in the petition, is not placed in issue by an averment in the answer of want of knowledge or information sufficient to constitute a belief on that subject in the mind of the trustee, since it is his duty to know the residence of the *cestui que trust*. Com. *v.* Lovell, *supra*.

81. *Arizona.*— Cochise County *v.* Copper Queen Consol. Min. Co., 8 Ariz. 221, 71 Pac. 946.

Arkansas.— Clay County *v.* Brown Lumber Co., 90 Ark. 413, 119 S. W. 251, no appeal from decision in matters as to value unless specially provided for.

Idaho.— Humbird Lumber Co. *v.* Morgan, 10 Ida. 327, 77 Pac. 433; Feltham *v.* Washington County, 10 Ida. 182, 77 Pac. 332.

Illinois.— Ohio, etc., R. Co. *v.* Lawrence County, 27 Ill. 50; Worthington *v.* Pike County, 23 Ill. 363.

Kansas.— State Auditor *v.* Atchison, etc., R. Co., 6 Kan. 500, 7 Am. Rep. 575.

Kentucky.— In this state there is no appeal from the decision of the state board of equalization. Paducah St. R. Co. *v.* McCracken County, 105 Ky. 472, 49 S. W. 178, 20 Ky. L. Rep. 1294; Ward *v.* Beale, 91 Ky. 60, 14 S. W. 967, 12 Ky. L. Rep. 671. But an appeal may be taken to the county court from the decision of a board of supervisors. Ward *v.* Beale, *supra*.

Louisiana.— See New Orleans Gas Light Co. *v.* Board of Assessors, 31 La. Ann. 270, holding that no appeal lies from the decision of referees to whom a real estate owner has submitted a complaint for over-assessment.

Michigan.— McDonald *v.* Escanaba, 62 Mich. 555, 29 N. W. 93.

North Carolina.— Murdock *v.* Iredell County, 138 N. C. 124, 50 S. E. 567; Wade *v.* Craven County, 74 N. C. 81.

Oregon.— French *v.* Harney County, 33 Oreg. 418, 54 Pac. 211. *Compare* Rhea *v.* Umatilla County, 2 Oreg. 298.

Washington.— Buchanan *v.* Adams County, 15 Wash. 699, 46 Pac. 643; Knapp *v.* King County, 15 Wash. 541, 46 Pac. 1047; Olympia Water Works *v.* Thurston County Bd. of Equalization, 14 Wash. 268, 44 Pac. 267.

Wisconsin.—West *v.* Ballard, 32 Wis. 168.

See 45 Cent. Dig. tit. "Taxation," §§ 877, 879, 889.

But *compare* Schmuck *v.* Hartman, 222 Pa. St. 190, 70 Atl. 1091, holding that, although no right of appeal from a judgment in favor of a taxpayer against a tax assessment is given by statute, the supreme court, by reason of its general jurisdiction to examine and correct all errors of the lower courts, will

assessment.[82] An appeal may even be given by implication from the statute, but only where the inference that the legislature intended to allow it is irresistible.[83] A statute granting this remedy will be construed with some strictness, and the courts will not entertain appeals in cases other than those specified in the statute, or on other grounds.[84] Nor will an appeal lie where another remedy

treat an appeal as a certiorari, and correct any error on the face of the record.

82. See the statutes of the several states. And see the following cases:

Alabama.— State *v.* Allen, 151 Ala. 556, 44 So. 564, to circuit court from determination of commissioners' court of county.

Arkansas.— Floyd *v.* Gilbreath, 27 Ark. 675 (in case of excessive assessment); Randle *v.* Williams, 18 Ark. 380.

Colorado.—Arapahoe County *v.* Denver Union Water Co., 32 Colo. 382, 76 Pac. 1060.

Dakota.— Pierre Water Works Co. *v.* Hughes County, 5 Dak. 145, 37 N. W. 733.

Iowa.— Peterson *v.* Clarence Bd. of Review, 138 Iowa 717, 116 N. W. 818; Bednar *v.* Carroll, 138 Iowa 338, 116 N. W. 315; Burns *v.* McNally, 90 Iowa 432, 57 N. W. 908; Ingersoll *v.* Des Moines, 46 Iowa 553, must first complain to city council before appealing to circuit court.

Louisiana.— City-Item Co-operative Printing Co. *v.* New Orleans, 51 La. Ann. 713, 25 So. 313; State *v.* State Tax Collector, 39 La. Ann. 530, 2 So. 59.

Maryland.— Graham *v.* Harford County, 87 Md. 321, 39 Atl. 804. See also Monticello Distilling Co. *v.* Baltimore, 90 Md. 416, 45 Atl. 210.

Massachusetts.— Brodbine *v.* Revere, 182 Mass. 598, 66 N. E. 607.

Mississippi.—Adams *v.* Stonewall Cotton Mills, 89 Miss. 865, 43 So. 65 (holding that the proper remedy of the revenue agent for a decision of the board of supervisors disallowing certain assessments for back taxes is an appeal from such order); Jennings *v.* Coahoma County, 79 Miss. 523, 31 So. 107; Simmons *v.* Scott County, 68 Miss. 37, 8 So. 259.

Nebraska.— State *v.* State Bd. of Equalization, 81 Nebr. 139, 115 N. W. 789. *Compare* Webster *v.* Lincoln, 50 Nebr. 1, 69 N. W. 394; Sioux City, etc., R. Co. *v.* Washington County, 3 Nebr. 30.

New Hampshire.— Bradley *v.* Laconia, 66 N. H. 269, 20 Atl. 331; Edes *v.* Boardman, 58 N. H. 580. See also Durham *v.* Thompson, 2 N. H. 166.

New Jersey.— Dickerson Suckasunny Min. Co. *v.* Randolph Tp. Collector, 25 N. J. L. 427.

New York.— Kinsella *v.* Auburn, 4 Silv. Sup. 101, 7 N. Y. Suppl. 317.

Ohio.— Corry *v.* Gaynor, 21 Ohio St. 277.

Pennsylvania.— Clark *v.* Burschell, 220 Pa. St. 435, 69 Atl. 900; Philadelphia Co.'s Petition, 210 Pa. St. 490, 60 Atl. 93; Moore *v.* Taylor, 147 Pa. St. 481, 23 Atl. 768; Everitt's Appeal, 71 Pa. St. 216; Silver *v.* Schuylkill County, 32 Pa. St. 356; Philadelphia *v.* State Bd. of Revision, 11 Phila. 284; Rhoads *v.* Philadelphia, 2 Phila. 149.

Tennessee.—Warner Iron Co. *v.* Pace, 89 Tenn. 707, 15 S. W. 1077. *Compare* Tomlinson *v.* Board of Equalization, 88 Tenn. 1, 12 S. W. 414, 6 L. R. A. 207.

United States.— Oskamp *v.* Lewis, 103 Fed. 906, construing Ohio Rev. St. § 5848.

Canada.— *In re* Crowe's Assessment, 15 Nova Scotia 301; Confederation Life Assoc. *v.* Toronto, 22 Ont. App. 166; Watt *v.* London, 19 Ont. App. 675; London Mut. Ins. Co. *v.* London, 15 Ont. App. 629; Brantford Corp. *v.* Ontario Inv. Co., 15 Ont. App. 605; Canadian Land, etc., Co. *v.* Dysart Municipality, 12 Ont. App. 80; Vivian *v.* McKim Tp., 23 Ont. 561; Shaw *v.* Shaw, 12 U. C. C. P. 456; *In re* Judge Perth County Ct., 12 U. C. C. P. 252; Niagara Falls Suspension Bridge Co. *v.* Gardner, 29 U. C. Q. B. 194; Scragg *v.* London Corp. 26 U. C. Q. B. 263; Toronto *v.* Great Western R. Co., 25 U. C. Q. B. 570.

See 45 Cent. Dig. tit. "Taxation," §§ 877, 879, 889.

That appellant is a non-resident and not liable to be taxed does not prevent the district court in Iowa from taking jurisdiction of the appeal, as jurisdictional objections may be raised on such appeal. Shirk *v.* Monmouth Tp. Bd. of Review, 137 Iowa 230, 114 N. W. 884.

An original action in equity will not lie to review or cancel a decision of the board of review, where the statute has provided for an appeal from an assessment as finally settled by such board, except where it has acted without jurisdiction. Peterson *v.* Clarence Bd. of Review, 138 Iowa 717, 116 N. W. 818.

Whether hearing should be before more than one judge in a county having more than one see *In re* Lehigh, etc., Coal Co.'s Assessment, 225 Pa. St. 272, 74 Atl. 65.

The collection of the tax is not prevented by such an appeal. Frick Coke Co. *v.* Mt. Pleasant Tp., 222 Pa. St. 451, 71 Atl. 930.

83. *Ex p.* Howard-Harrison Iron Co., 119 Ala. 484, 24 So. 516, 72 Am. St. Rep. 928; General Custer Min. Co. *v.* Van Camp, 2 Ida. (Hasb.) 40, 3 Pac. 22.

84. Grigsby *v.* Minnehaha County, 6 S. D. 492, 62 N. W. 105.

In Illinois, the Revenue Act of 1898, § 35, relating to the assessment of property and providing for an appeal from such assessment if the board of review shall decide that property claimed to be exempt is liable to be taxed, denies by implication the right to appeal from a decision of the board as to questions of excessive valuation, and limits the appeal to the single question of exemption. Havemeyer *v.* Cook County Bd. of Review, 202 Ill. 446, 66 N. E. 1044; Maxwell *v.* People, 189 Ill. 546, 59 N. E. 1101; Dutton *v.* Pike County Bd. of Review, 188 Ill. 386, 58 N. E.

such as certiorari, has been given by statute; [85] and on the other hand, where the statute provides a remedy by appeal a writ of review will not lie.[86] In order to sustain an appeal the record must show that jurisdiction as to the subject-matter appealed from exists,[87] and the party must take such steps as the law directs to obtain and preserve his right of appeal.[88] Where an appeal is thus given from the assessing or reviewing officers to a court of original jurisdiction, the decision of that court is generally final, so that no appeal will lie to a higher court,[89] although under some statutes this also is allowed.[90]

b. Time of Taking Appeal. The statutes granting a right of appeal from tax assessments restrict the time within which such a proceeding for review may be taken, usually prescribing a short period, in order that the collection of the public revenues may not be unduly delayed; [91] and it is generally held that the

953; Keokuk, etc., Bridge Co. *v.* People, 185 Ill. 276, 56 N. E. 1049.

85. Smoky Mountain Land, etc., Co. *v.* Lattimore, 119 Tenn. 620, 105 S. W. 1028; Low *v.* Lincoln County Ct., 27 W. Va. 785.

86. Rogers *v.* Hays, 3 Ida. 597, 32 Pac. 259.

87. Marion *v.* National Loan, etc., Co., 122 Iowa 629, 98 N. W. 488.

A proper record showing the essential facts of jurisdiction is essential, and neither the consent of the parties nor silence on the part of the appellee can take the place of such a record. Peterson *v.* Clarence Bd. of Review, 138 Iowa 717, 116 N. W. 818. But the fact that the records of the county commissioners are irregular does not affect the right of a taxpayer to appeal. *In re* Lehigh, etc., Coal Co.'s Assessment, 225 Pa. St. 272, 74 Atl. 65.

88. Burns *v.* McNally, 90 Iowa 432, 57 N. W. 908.

Necessity for bill of exceptions as provided by statute see State *v.* State Bd. of Equalization, etc., 81 Nebr. 139, 115 N. W. 789.

Presumption that all things required by the statute in order to appeal were done see Singer Mfg. Co. *v.* Denver, 46 Colo. 50, 103 Pac. 294.

Estoppel.—Where a taxpayer makes no return of his property an over-assessment thereof is not open to review by application to the courts. Travelers' Ins. Co. *v.* Bd. of Assessors, 122 La. 129, 47 So. 439, 24 L. R. A. N. S. 388. So in New Jersey the supreme court will not review the action of the state board of equalization in dismissing an appeal, where the action appealed from was consented to by the petitioner. Kenilworth *v.* Bd. of Equalization, 78 N. J. L. 302, 72 Atl. 966 [*affirmed* in 78 N. J. L. 439, 74 Atl. 480].

89. *Colorado.*— Teller County *v.* Pinnacle Gold Min. Co., 36 Colo. 492, 85 Pac. 1005; Pilgrim Consol. Min. Co. *v.* Teller County, 20 Colo. App. 311, 78 Pac. 617. *Compare* Gillett *v.* Logan County, 13 Colo. App. 380, 58 Pac. 335.

Kentucky.— Marion County *v.* Wilson, 105 Ky. 302, 49 S. W. 8, 799, 20 Ky. L. Rep. 1193, 1452.

Maryland.— Gadd *v.* Anne Arundel County, 82 Md. 646, 33 Atl. 433; Wells *v.* Thomas, 72 Md. 26, 19 Atl. 118; Meyer *v.* Steuart, 48 Md. 423.

Ohio.— Street *v.* Francis, 3 Ohio 277.

Pennsylvania.— Kimber *v.* Schuylkill County, 20 Pa. St. 366.

Texas.— Scottish-American Mortg. Co. *v.* Bd. of Equalization, (Civ. App. 1898) 45 S. W. 757.

West Virginia.— Ritchie County Bank *v.* Ritchie County Ct., 65 W. Va. 208, 63 S. E. 1098 (holding that no appeal lies from, or writ of error to, a judgment or order by a circuit court on an appeal from an order of a county court in respect to an erroneous assessment involving only a question of valuation); Bluefield Water Works, etc., Co. *v.* State, 63 W. Va. 480, 60 S. E. 403; McLean *v.* State, 61 W. Va. 537, 56 S. E. 884. But *compare* Charleston, etc., Bridge Co. *v.* Kanawha County Ct., 41 W. Va. 658, 24 S. E. 1002.

90. Com. *v.* Churchill, 131 Ky. 251, 115 S. W. 189; Com. *v.* Lexington Roller Mills Co., 104 S. W. 318, 31 Ky. L. Rep. 924 (appeal to circuit court from county court in a proceeding to assess omitted property); Morgan *v.* Warner, 45 N. Y. App. Div. 424, 60 N. Y. Suppl. 963 [*affirmed* in 162 N. Y. 612, 57 N. E. 1118]; State *v.* South Penn Oil Co., 42 W. Va. 80, 24 S. E. 688 (county court to circuit court). And see State *v.* Baltimore, 105 Md. 1, 65 Atl. 369. But *compare* People *v.* Barker, 152 N. Y. 417, 46 N. E. 875 [*reversing* 6 N. Y. App. Div. 356, 39 N. Y. Suppl. 682 (*affirming* 17 Misc. 497, 41 N. Y. Suppl. 236)].

91. See the statutes of the several states. And see the following cases:

Arkansas.— Clay County *v.* Brown Lumber Co., 90 Ark. 413, 119 S. W. 251, holding that, although complaints against an alleged excessive valuation or assessment of property must be made at the term of court beginning on the first Monday in October next following the session of the board of equalization, the hearing may be continued.

Massachusetts.— Brodbine *v.* Revere, 182 Mass. 598, 66 N. E. 607.

Mississippi.— Simmons *v.* Scott County, 68 Miss. 37, 8 So. 259.

New York.— People *v.* Hadley, 76 N. Y. 337; People *v.* Christie, 14 N. Y. St. 525.

Pennsylvania.— Com. *v.* Crum Lynne Iron, etc., Co., 27 Pa. Super. Ct. 508; *In re* Margwauth, 10 Kulp 336; Pierce *v.* Lackawanna County, 1 Lack. Leg. Rec. 469.

courts have no jurisdiction or authority to entertain an appeal after the time limited by law.[92]

c. Parties. A proceeding for the assessment and collection of a tax is between the taxpayer and the state or municipality levying the tax, so that an appeal may be taken either by the person whose property is affected by the assessment complained of [93] or by the state or municipality; [94] and in the former case the county or other municipal corporation is the proper party defendant, and not the board of equalization whose judgment is appealed from.[95]

d. Pleading and Practice. On appeals of this kind no special formality is required outside the particular directions of the statute.[96] It is commonly required that notice of the appeal shall be given to the officer or board from whose decision the appeal is taken or to some officer of the municipality concerned,[97] and the appellant may also be required to give an appeal-bond or security for costs, although this is not invariably the case.[98] Some form of complaint or petition to the reviewing court is generally necessary,[99] and also an answer

Tennessee.—Warner Iron Co. *v.* Pace, 89 Tenn. 707, 15 S. W. 1077.

Virginia.— Fulkerson *v.* Bristol Treasurer, 95 Va. 1, 27 S. E. 815.

But *compare* Ingersoll *v.* Des Moines, 46 Iowa 553.

After notice of tax.—Where the statute allows an appeal at any time within nine months after notice of the tax and provides for the giving of such notice to residents but not to persons who are not inhabitants of the state, a non-resident, taxed for personal property, may appeal at any time within nine months after actual notice of the tax. Downing *v.* Farmington, 68 N. H. 187, 38 Atl. 729.

After adjournment of board.—Where an appeal must be taken within twenty days after the adjournment of the board of equalization, the time begins to run from the final adjournment of the board, not from an adjournment in the nature of a recess taken in order to give time for the service of notice on interested parties. Barz *v.* Klemme Bd. of Equalization, 133 Iowa 563, 111 N. W. 41.

92. Rhoads *v.* Philadelphia, 2 Phila. (Pa.) 149; *In re* Nottawasaga Tp., 4 Ont. L. Rep. 1. And see *In re* Allan, 10 Ont. 110; Scott *v* Listowel, 12 Ont. Pr. 77; *In re* Ronald, 9 Ont. Pr. 232. But *compare* State *v.* Meehan, 92 Minn. 283, 100 N. W. 6.

93. White *v.* Portland, 67 Conn. 272, 34 Atl. 1022 (holding that where a tenant by the curtesy appeals from an alleged illegal assessment on the real estate the remainderman is not a proper party); *In re* British Mortg. Loan Co., 29 Ont. 641.

Appeals by "tax ferrets" and revenue agents see *In re* Woodbury County, 129 Iowa 588, 105 N. W. 1023; Adams *v.* Stonewall Cotton Mills, 89 Miss. 865, 43 So. 65.

Appeal by one taxpayer from action on another's assessment.—Where the board of review reduces the assessment of a certain corporation, on its application, and another taxpayer appeals from this decision to the district court and obtains a judgment raising the assessment, the corporation is entitled to appeal to the supreme court. Van Camp *v.* Custer County, 2 Ida. (Hasb.) 29, 33, 2 Pac. 721.

94. *Ex p.* Howard-Harrison Iron Co., 130 Ala. 185, 30 So. 400; Farmers' L. & T. Co. *v.* Newton, 97 Iowa 502, 66 N. W. 784; Com. *v.* Huffman, 55 S. W. 7, 21 Ky. L. Rep. 1343; Shelby County *v.* Mississippi, etc., R. Co., 16 Lea (Tenn.) 401, 1 S. W. 32.

95. Oregon, etc., Sav. Bank *v.* Catlin, 15 Oreg. 342, 15 Pac. 462; Mackin *v.* Taylor County Ct., 38 W. Va. 338, 18 S. E. 632.

96. Prairie County *v.* Matthews, 46 Ark. 383; Catron *v.* Archuleta County, 18 Colo. 553, 33 Pac. 513 (not affected by laws regulating appeals in general); Schoonover *v.* Petcina, 126 Iowa 261, 100 N. W. 490.

97. Peterson *v.* Clarence Bd. of Review, 138 Iowa 717, 116 N. W. 818; Marion *v.* National Loan, etc., Co., 122 Iowa 629, 98 N. W. 488; German American Sav. Bank *v.* Burlington, 118 Iowa 84, 91 N. W. 829; Richards *v.* Rock Rapids, 72 Iowa 77, 33 N. W. 372; *In re* Downey, 8 Can. L. J. 198; Reg. *v.* Lancashire Justices, 34 L. T. Rep. N. S. 124. But *compare* Delaware, etc., Canal Co. *v.* Walsh, 11 Phila. (Pa.) 587.

Any defects in the service of the notice are cured by the appearance of the person served. Richards *v.* Rock Rapids, 72 Iowa 77, 33 N. W. 372.

98. Tunica County *v.* Tate, 78 Miss. 294, 29 So. 74; Pain *v.* Brantford, 9 Can. L. J. N. S. 261.

No appeal-bond required see Marion *v.* Cedar Rapids, etc., R. Co., 120 Iowa 259, 94 N. W. 501; Ingersoll *v.* Des Moines, 46 Iowa 553; Com. *v.* Reed, 121 Ky. 432, 89 S. W. 294, 28 Ky. L. Rep. 381.

The state cannot be required to give an appeal-bond, and the state tax collector and board of assessors being state functionaries, their appeal is the appeal of the state and no bond is required to perfect it. Merchants' Mut. Ins. Co. *v.* Bd. of Assessors, 40 La. Ann. 371, 3 So. 891; Adams *v.* Kuhn, 72 Miss. 276, 16 So. 598.

99. State *v.* Sloss-Sheffield Steel, etc., Co., 162 Ala. 234, 50 So. 366; Peterson *v.* Clarence Bd. of Review, 138 Iowa 717, 116 N. W. 818; Wahkonsa Inv. Co. *v.* Ft. Dodge, 125 Iowa

thereto;[1] and the appellant should file a transcript of the record or proceedings before the board of equalization, or a bill of exceptions or such other papers as will show the action taken by the board and define the questions presented for review.[2] Costs may be allowed against an unsuccessful appellant.[3]

e. Scope of Inquiry on Appeal. An appeal gives the court no power of revision or equalization of the assessment roll generally, but it can consider only the assessment appealed from.[4] With this restriction, in some of the states, the court on appeal is to try the case *de novo*, taking cognizance of all objections or considerations which could have been presented to the assessors or board of equalization;[5] but in other states it is limited to the consideration of objections

148, 100 N. W. 517; Marion *v.* National Loan, etc., Co., 122 Iowa 629, 98 N. W. 488.

Discretion as to allowing pleadings.— It is within the discretion of the district court, on appeal from the board of equalization, to allow pleadings to be filed, although the statute makes no provision therefor. Farmers' L. & T. Co. *v.* Newton, 97 Iowa 502, 66 N. W. 784.

In Alabama on appeal from the commissioners' court to the circuit court in a tax assessment proceeding, the state may file a complaint claiming a valuation in excess of that suggested by the tax commissioner, or that returned by the taxpayer, or that found by the commissioners' court. State *v.* Sloss-Sheffield Steel, etc., Co., 162 Ala. 234, 50 So. 366.

1. Com. *v.* Churchill, 131 Ky. 251, 115 S. W. 189, holding also that the circuit court on appeal from the county court dismissing a proceeding to assess omitted property may, after the submission of the case, allow an amendment of the answer so as to plead a former judgment in bar.

2. *Alabama.*— State *v.* Atkins, 129 Ala. 138, 29 So. 931.

California.— Hagenmeyer *v.* Mendocino County Bd. of Equalization, 82 Cal. 214, 23 Pac. 14.

Iowa.— Kamrar *v.* Webster City, (1909) 120 N. W. 120 (holding that on appeal to the district court from the action of the board of equalization, where it appears that plaintiff has not procured or filed the record or transcript of the proceeding before the board, the court may in its discretion allow the defect to be remedied); Peterson *v.* Clarence Bd. of Review, 138 Iowa 717, 116 N. W. 818 (holding that where the record does not show that any notice of appeal was served or any transcript made or filed, questions raised as to the merits of the case may not be considered even though the other party raises no objection); Marion *v.* Cedar Rapids, etc., R. Co., 120 Iowa 259, 94 N. W. 501; Frost *v.* Oskaloosa Bd. of Review, 114 Iowa 103, 86 N. W. 213.

Maryland.— Baltimore City *v.* Austin, 95 Md. 90, 51 Atl. 824.

Nebraska.— Field *v.* Nebraska Tel. Co., 74 Nebr. 419, 104 N. W. 932.

Filing pleadings in the appellate court will not obviate the necessity of a formal appeal, to give jurisdiction and a final transcript to define, at least in general terms, the issues to be tried. Peterson *v.* Clarence Bd. of Review, 138 Iowa 717, 116 N. W. 818.

3. Stahmer *v.* State, 125 Ala. 72, 27 So. 311; People *v.* Haren, 3 N. Y. Suppl. 86; Bowers *v.* Harding, [1891] 1 Q. B. 560, 55 J. P. 376, 60 L. J. Q. B. 474, 64 L. T. Rep. N. S. 201, 39 Wkly. Rep. 558.

4. Pons *v.* Orleans Parish Bd. of Assessors, 118 La. 1101, 43 So. 891; Bell's Appeal, 11 Pa. Dist. 732.

5. *Alabama.*— State *v.* Sloss-Sheffield Steel, etc., Co., 162 Ala. 234, 50 So. 366; Birmingham Bldg., etc., Assoc. *v.* State, 120 Ala. 403, 25 So. 52; Sullivan *v.* State, 110 Ala. 95, 20 So. 452.

Iowa.— *In re* Seaman, 135 Iowa 543, 113 N. W. 354; Gibson *v.* Cooley, 129 Iowa 529, 105 N. W. 1011; Schoonover *v.* Petcina, 126 Iowa 261, 100 N. W. 490; Wahkonsa Inv. Co. *v.* Ft. Dodge, 125 Iowa 148, 100 N. W. 517; Lyons *v.* Ottumwa Bd. of Equalization, 102 Iowa 1, 70 N. W. 711; Grimes *v.* Burlington, 74 Iowa 123, 37 N. W. 106.

Kentucky.—Com. *v.* Mitchell, 124 Ky. 581, 99 S. W. 670, 30 Ky. L. Rep. 775; Com. *v.* Reed, 121 Ky. 432, 89 S. W. 294, 28 Ky. L. Rep. 381; Com. *v.* Haggin, 99 S. W. 906, 30 Ky. L. Rep. 788; Com. *v.* Brower, 99 S. W. 671, 30 Ky. L. Rep. 788. See also Campbell County Bd. of Equalization *v.* Louisville, etc., R. Co., 109 S. W. 303, 33 Ky. L. Rep. 78.

New Hampshire.— *In re* Briggs, 29 N. H. 547.

Pennsylvania.— *In re* Lehigh, etc., Coal Co.'s Assessment, 225 Pa. St. 272, 74 Atl. 65 (holding that on appeal to the common pleas from a tax assessment fixed by the board of revision, the proceeding as to the methods of procedure, proofs offered and admitted, findings of fact and conclusions of law is *de novo*; and it is the duty of the court to determine all questions raised as if it were litigation between private parties, and it sits as a court and not as a board of county commissioners or of revision, and is clothed with all the powers of a court to determine the issues involved, subject to the rules of practice and law applicable to any other hearing of analogous character); *In re* Delaware, etc., R. Co.'s Tax Assessment, 224 Pa. St. 240, 248, 73 Atl. 429, 432; Rockhill Iron, etc., Co. *v.* Fulton County, 204 Pa. St. 44, 53 Atl. 530; Pocono Pines Assembly *v.* Monroe County, 29 Pa. Super. Ct. 36; Com. *v.* Northern Cent. R. Co., 2 Dauph. Co. Rep. 64; Pringle's Appeal, 6

presented below or such as are specifically brought into issue before it;[6] and under some statutes the inquiry on appeal is further limited by law to the single question whether the property was liable to taxation or to other specific questions.[7] As a general rule the appellate court will not review the evidence on which the board of equalization or the lower court acted, or reverse its decisions on issues of fact if supported by any competent evidence;[8] nor will it disturb the findings or decisions of the court or board below unless they are manifestly wrong.[9]

f. Burden of Proof and Evidence. The assessment appealed from is presumed to be correct, and the burden is on the appellant to prove facts showing the error, injustice, want of jurisdiction, or other foundation of his appeal, and the appeal will be dismissed if he does not produce competent and satisfactory evidence to

Kulp 525. But *compare* Delaware, etc., R. Co. *v.* Com., 66 Pa. St. 64.

Duties and method of procedure of appellate court see State *v.* Sloss-Sheffield Steel, etc., Co., 162 Ala. 234, 50 So. 366; *In re* Lehigh, etc., Coal Co.'s Assessment, 225 Pa. St. 272, 74 Atl. 65.

6. *Colorado.*—Arapahoe County *v.* Denver Union Water Co., 32 Colo. 382, 76 Pac. 1060.

Michigan.— Hubbard *v.* Winsor, 15 Mich. 146.

Nebraska.— Blue Hill First Nat. Bank *v.* Webster County, 77 Nebr. 813, 110 N. W. 535; Nebraska Tel. Co. *v.* Hall County, 75 Nebr. 405, 106 N. W. 471. See also Jones *v.* Seward County, 5 Nebr. 561.

New Jersey.— Elizabeth *v.* New Jersey Jockey Club, 63 N. J. L. 515, 44 Atl 207; Van Riper *v.* North Plainfield Tp., 43 N. J. L. 349; State *v.* Lewis, 39 N. J. L. 501.

Oklahoma.— Bostick *v.* Noble County, 19 Okla 92, 91 Pac. 1125, holding that on such appeal the district court takes appellate jurisdiction only, and cannot convert such action into an action in equity and assume a jurisdiction of equity that the inferior tribunal did not have.

Canada.— Great Western R. Co. *v.* Rouse, 15 U. C. Q. B. 168.

7. *In re* Maplewood Coal Co., 213 Ill. 283, 72 N. E. 786; *In re* Wilmerton, 206 Ill. 15, 68 N. E. 1050; *In re* Major, 134 Ill. 19, 24 N. E. 973; Com. *v.* Lovell, 125 Ky. 491, 101 S. W. 970, 31 Ky. L. Rep. 105. See also Albert *v.* Board of Revision, 139 Pa. St. 467, 22 Atl. 644; Coulter *v.* Weir, 127 Fed. 897, 62 C. C. A. 429; Bagg *v.* St. Louis, 20 Quebec Super. Ct. 149.

In the province of Ontario the jurisdiction of the court of revision and the courts exercising the appellate jurisdiction therefrom is confined to the question of valuation, namely, whether or not the assessment is too high or too low; and whether the property is assessable or not is for the determination of the assessor alone, from which there is no appeal. International Bridge Co. *v.* Bridgeburg, 12 Ont. L. Rep. 314, 7 Ont. Wkly. Rep. 497; Toronto R. Co. *v.* Toronto, [1904] A. C. 809.

Whether any property of a lessor railroad company was omitted from assessment is the only question upon review of the action of a board of valuation and assessment in assessing the property and franchises of a leased railroad against the lessee company. Com. *v.* Chesapeake, etc., R. Co., 131 Ky. 661, 117 S. W. 287.

8. *Indiana.*— Pittsburgh, etc., R. Co. *v.* Backus, 133 Ind. 625, 33 N. E. 432; Cleveland, etc., R. Co. *v.* Backus, 133 Ind. 513, 33 N. E. 421, 18 L. R. A. 729.

Iowa.— Hutchinson *v.* Oskaloosa Bd. of Equalization, 67 Iowa 37, 24 N. W. 581. But see Davis *v.* Clinton, 55 Iowa 549, 8 N. W. 423.

Maryland.— Menshaw *v.* State, 109 Md. 84, 71 Atl. 457 (holding that the court should be cautious in declaring a tax laid by competent authority to be excessive and unreasonable); Baltimore City *v.* Austin, 95 Md. 90, 51 Atl. 824.

Pennsylvania.— York Haven Water, etc., Co.'s Appeal, 212 Pa. St. 622, 62 Atl. 97. *Compare* Com. *v.* Manor Gas Coal Co., 8 Pa. Dist. 258.

West Virginia.— Charleston, etc., Bridge Co. *v.* Kanawha County Ct., 41 W. Va. 658, 24 S. E. 1002.

Wisconsin.— State *v.* Fisher, 129 Wis. 57, 108 N. W. 206; State *v.* Gaylord, 73 Wis. 306, 41 N. W. 518.

But *compare* Schabacker *v.* State Assessors, 14 N. Y. St. 309.

9. *Kentucky.*— Thomas *v.* Jackson County, (1909) 119 S. W. 209, holding that the action of the board of supervisors as reviewers of assessments will not be disturbed by the court of appeals on a mere suspicion that they erred.

Massachusetts.— National Bank of Commerce *v.* New Bedford, 175 Mass. 257, 56 N. E. 288.

Nebraska.— Blue Hill First Nat. Bank *v.* Webster County, 77 Nebr. 815, 113 N W. 190, 77 Nebr. 813, 110 N. W. 535; Woods *v.* Lincoln Gas, etc., Co., 74 Nebr. 526, 104 N. W. 931; Field *v.* Lincoln Traction Co., 74 Nebr. 418, 104 N. W. 931.

New Jersey.— Blume *v.* Bowes, 65 N. J. L. 470, 47 Atl. 487.

Pennsylvania.— Com. *v.* West End Coal Co., 182 Pa. St. 353, 38 Atl. 14; Com. *v.* Delaware, etc., R. Co., 165 Pa. St. 44, 30 Atl. 522, 523; Pocono Pines Assembly *v.* Monroe County, 29 Pa Super. Ct. 36; Emery Lumber Co. *v.* Sullivan County, 28 Pa. Super. Ct. 451.

this effect.[10] On such an appeal the court may receive proof of any pertinent fact which tends to show whether or not the assessment was illegal or excessive.[11] Where the question is as to an alleged excessive valuation of appellant's property, evidence that the property of other taxpayers was assessed at a lower valuation than that of the appellant is incompetent and should be excluded,[12] unless in connection with evidence showing that the assessors had adopted a rule of assessing property at only a certain percentage of its real value.[13]

g. Relief Granted. The court should render such decision or judgment as it may deem right and equitable on the record presented and the evidence produced.[14] If an overvaluation is shown the court on appeal has power to reduce it to the proper amount,[15] or to equalize the appellant's assessments with other

10. *Alabama.*— Stahmer *v.* State, 125 Ala. 72, 27 So. 311. But *compare* Sullivan *v.* State, 110 Ala. 95, 20 So. 452.

Arkansas.— Hempstead County *v.* Hope Bank, 74 Ark. 37, 84 S. W. 1030.

Colorado.— Singer Mfg. Co. *v.* Denver, 46 Colo. 50, 103 Pac. 294.

Idaho.— Murphy *v.* Lincoln County Bd. of Equalization, 6 Ida. 745, 59 Pac. 715.

Iowa.— Estherville First Nat. Bank *v.* Estherville, 136 Iowa 203, 112 N. W. 829; Marion *v.* National Loan, etc., Co., 122 Iowa 629, 98 N. W. 488; Frost *v.* Oskaloosa Bd. of Review, 114 Iowa 103, 86 N. W. 213; King *v.* Parker, 73 Iowa 757, 34 N. W. 451.

Kentucky.— Marion County *v.* Wilson, 105 Ky. 302, 49 S. W. 8, 799, 20 Ky. L. Rep. 1193, 1452.

Louisiana.— Pons *v.* Orleans Parish Bd. of Assessors, 118 La. 1101, 43 So. 891; Frost *v.* New Orleans, 28 La. Ann. 417.

Maryland.—Consolidated Gas Co. *v.* Baltimore, 101 Md. 541, 61 Atl. 532, 109 Am. St. Rep. 584, 1 L. R. A. N. S. 263.

Nebraska.— Western Union Tel. Co. *v.* Dodge County, 80 Nebr. 23, 117 N. W. 468, 80 Nebr. 18, 113 N. W. 805; John *v.* Connell, 61 Nebr. 267, 85 N. W. 82.

Ohio.— Black *v.* Hagerty, 16 Ohio Cir. Ct. 255, 9 Ohio Cir. Dec. 93.

Pennsylvania.— *In re* Lehigh, etc., Coal Co.'s Assessment, 225 Pa. St. 272, 74 Atl. 65; Com. *v.* Ontario, etc., R. Co., 188 Pa. St. 205, 41 Atl. 607; Com. *v.* Beech Creek R. Co., 188 Pa. St. 203, 41 Atl. 605; Smith *v.* Forest County, 23 Pa. Co. Ct. 643.

United States.— Union Refrigerator Transit Co. *v.* Lynch, 177 U. S. 149, 20 S. Ct. 631, 44 L. ed. 708.

Canada.— *In re* Canadian Pac. R. Co., 5 Northwest. Terr. 187.

See also *supra*, VII, B, 7, f, (IV), (B).

11. Consolidated Gas Co. *v.* Baltimore, 105 Md. 43, 65 Atl. 628, 121 Am. St. Rep. 553 (holding that it was competent to inquire from the members of the appeal tax court as to what were their methods in reaching the assessment they made, for the purpose of showing that it was either illegal or excessive); Panola County *v.* Carrier, 92 Miss. 148, 45 So. 426; Western Union Tel. Co. *v.* Dodge County, 80 Nebr. 18, 113 N. W. 805, 80 Nebr. 23, 117 N. W. 468.

Where a taxpayer claims a deduction from his assessment for an alleged indebtedness to a brother in another state, a certificate of the county clerk in that state that the brother had not given in any credits for taxation is not evidence against the taxpayer, where it does not appear that the brother resided in that county or that the clerk was authorized to make the certificate. Stein *v.* Casey Local Bd. of Review, 135 Iowa 539, 113 N. W. 339.

12. Alabama Mineral Land Co. *v.* Perry County, 95 Ala. 105, 10 So. 550; Toof *v.* New Haven, 73 Conn. 543, 48 Atl. 208; White *v.* Portland, 63 Conn. 18, 26 Atl. 342; Lancaster County *v.* Brown, 76 Nebr. 286, 107 N. W. 576. *Compare* White *v.* Venango County, 10 Pa. Dist. 482; Smith *v.* Forest County, 23 Pa. Co. Ct. 643.

13. Randell *v.* Bridgeport, 63 Conn. 321, 28 Atl. 523.

14. *In re* Lehigh, etc., Coal Co.'s Assessment, 225 Pa. St. 272, 74 Atl. 65.

In Pennsylvania on reversal of an order of the common pleas on appeal to it from a tax assessment fixed by the board of revision, the judge, when the record is remitted, must determine whether the testimony already taken is sufficient to warrant such findings as may be necessary for a just valuation of the lands in question, in accordance with the opinion of the supreme court, and if sufficient his findings of fact and conclusions of law may be adopted, modified, or changed in accordance with the opinion, but if insufficient the case may be opened up and new testimony introduced. *In re* Lehigh, etc., Coal Co.'s Assessment, 225 Pa. St. 272, 74 Atl. 65.

On the question whether a taxpayer is indebted on notes for which he claims a deduction, evidence that he had given in as his indebtedness a less amount in former years, although proper on the issue of fraud, standing alone cannot sustain the issue against him. Stein *v.* Casey Local Bd. of Review, 135 Iowa 539, 113 N. W. 339.

15. *Arkansas.*— *Ex p.* Ft. Smith, etc., Bridge Co., 62 Ark. 461, 36 S. W. 1060.

Connecticut.— Greenwoods Co. *v.* New Hartford, 65 Conn. 461, 32 Atl. 933; Ives *v.* Goshen, 65 Conn. 456, 32 Atl. 932; Randell *v.* Bridgeport, 63 Conn. 321, 28 Atl. 523.

Iowa.—Kamrar *v.* Webster County, (1909) 120 N. W. 120; Burnham *v.* Barber, 70 Iowa 87, 30 N. W. 20.

valuations of similar property.[16] It also has power to relieve him by striking off property which he does not own, although it is erroneously assessed to him, or which is not taxable at all.[17] But generally the court has no jurisdiction to make an original assessment of omitted property,[18] to increase the assessment made against the appellant,[19] or to render a personal judgment against him for the taxes found to be due.[20] As to other errors or mistakes in the assessment, it is now generally held, by the aid of statutes, that they may be amended or corrected by the court on appeal,[21] although it is sometimes better practice to remand the case to the court below or the board of equalization, as the case may be, with directions to enter the proper judgment.[22]

3. Certiorari to Review Assessment — a. Nature and Scope of Remedy. Both at common law and by virtue of statute, in some states, a writ of certiorari is a proper mode by which to review the action of the assessors or board of equalization in fixing or adjusting an assessment of taxes,[23] except, in some jurisdictions, where another direct remedy is available or appropriate.[24] A writ of certiorari lies in tax proceedings, especially where the law does not grant an appeal or provide any other remedy,[25] to review the action of the assessing officers or board on the

Oklahoma.—Webb *v.* Renfrew, 6 Okla. 198, 54 Pac. 448.

Pennsylvania.— Plains Tp.'s Appeal, 21 Pa. Super. Ct. 68 [*affirmed* in 206 Pa. St. 556, 56 Atl. 60]; Heberton's Appeal, 2 Pa. Dist. 794, 13 Pa. Co. Ct. 372; Armstrong County Tax Assessments, 25 Pa. Co. Ct. 213; Berwind White Coal Min. Co. *v.* Clearfield County, 18 Pa. Co. Ct. 545; Richter's Appeal, 8 Pa. Co. Ct. 119; Hamilton's Appeal, 22 Lanc. L. Rev. 21; Harrison's Appeal, 20 Montg. Co. L. Rep. 167; Drake *v.* Northampton County, 9 North. Co. Rep. 324.

Canada.—Hickson *v.* Wilson, 2 Northwest. Terr. 426.

See 45 Cent. Dig. tit. "Taxation," § 883.

16. Doylestown Tax Assessments, 17 Pa. Co. Ct. 535; Weitzenkorn *v.* Luzerne County, 8 Kulp (Pa.) 165.

Relief is properly refused on the ground that the property of others was undervalued and plaintiff's assessment thereby increased, where it appears that his property was justly assessed at its true value and that such others were overvalued on some property. Ives *v.* Goshen, 65 Conn. 456, 32 Atl. 932; Ives *v.* Goshen, 63 Conn. 79, 26 Atl. 845.

17. Cedar Rapids, etc., R. Co. *v.* Cedar Rapids, 106 Iowa 476, 76 N. W. 728; Dunlieth, etc., Bridge Co. *v.* Dubuque County, 55 Iowa 558, 8 N. W. 443; Garrett *v.* Creekmore, 121 Ky. 250, 89 S. W. 166, 28 Ky. L. Rep. 211.

18. Cedar Rapids, etc., R. Co. *v.* Cedar Rapids, 106 Iowa 476, 76 N. W. 728; Com. *v.* Paducah, 126 Ky. 77, 102 S. W. 882, 31 Ky. L. Rep. 528. See also Lexington *v.* Walsh, 102 S. W. 891, 31 Ky. L. Rep. 446; and *supra*, VII, C, 1, b.

19. *Ex p.* Ft. Smith, etc., Bridge Co., 62 Ark. 461, 36 S. W. 1060; Estherville First Nat. Bank *v.* Estherville, 136 Iowa 203, 112 N. W. 829; Farmers' L. & T. Co. *v.* Fonda, 114 Iowa 728, 87 N. W. 724; Des Moines Water Co.'s Appeal, 48 Iowa 324. But see Tennessee Coal, etc., Co. *v.* State, 141 Ala. 103, 37 So. 433.

20. *Ex. p.* Howard-Harrison Iron Co., 130 Ala. 185, 30 So. 400; Morris Ice Co. *v.* Adams, 75 Miss. 410, 22 So. 944.

21. Weaver *v.* State, 39 Ala. 535; State *v.* Lantz, 53 N. J. L. 578, 22 Atl. 49; Endicott *v.* Corson, 50 N. J. L. 381, 13 Atl. 265; Sandford *v.* Kearny Tp., 48 N. J. L. 125, 4 Atl. 442; People *v.* Gaus, 169 N. Y. 19, 61 N. E. 987; Great Western R. Co. *v.* Rogers, 29 U. C. Q. B. 245. See also Rhoads *v.* Cushman, 45 Ind. 85. But *compare* Brown *v.* Grand Junction, 75 Iowa 488, 39 N. W. 718; French *v.* Harney County, 33 Oreg. 418, 54 Pac. 211; Oregon Steam Nav. Co. *v.* Wasco County, 2 Oreg. 206.

22. Com. *v.* Reed, 121 Ky. 432, 89 S. W. 294, 28 Ky. L. Rep. 381; Sarpy County *v.* Clarke, 4 Nebr. (Unoff.) 87, 93 N. W. 416.

23. *Missouri.*— State *v.* Dowling, 50 Mo. 134; State *v.* St. Louis County Ct., 47 Mo. 594.

New Jersey.— Royal Mfg. Co. *v.* Rahway, 75 N. J. L. 416, 67 Atl. 940 (reviewing the legislation and decisions in this state on this question, and holding that where the state board of equalization has rendered a judgment as to an assessment, the proper procedure is to remove that judgment by certiorari and require the board to certify the facts submitted to it and the grounds of its determination); Trenton Heat, etc., Co. *v.* State Bd. of Assessors, 73 N. J. L. 370, 63 Atl. 1005 (holding that under Pamphl. Laws (1903), p. 346, § 11, the court should determine disputed questions of fact as well as of law). See also State *v.* Manning, 42 N. J. L. 163.

New York.— See *In re* Mt. Morris Square, 2 Hill 14.

Tennessee.— Nashville *v.* Smith, 86 Tenn. 213, 6 S. W. 273 (not against state); Louisville, etc., R. Co. *v.* Bate, 12 Lea 573.

Canada.—*In re* Nova Scotia Bank's Assessment, 12 Nova Scotia 32.

See 45 Cent. Dig. tit. "Taxation," § 890.

24. See *infra*, VII, C, 3, b.

25. Floyd *v.* Gilbreath, 27 Ark. 675; People *v.* Betts, 55 N. Y. 600; Susquehanna Bank *v.* Broome County, 25 N. Y. 312; Mil-

ground that the tax is illegal, or that they have acted without jurisdiction, or in excess of their rightful jurisdiction,[26] or that they have erred in matters of law,[27] or acted on erroneous legal principles.[28] But ordinarily this writ does not lie to review an assessment on account of irregularities, mistakes, defects, or mere overvaluation.[29] In New York both at common law and by virtue of the stat-

waukee Iron Co. *v.* Schubel, 29 Wis. 444, 9 Am. Rep. 591.

26. *District of Columbia.*—Wood *v.* District of Columbia, 6 Mackey 142; Alexandria Canal, etc., Co. *v.* District of Columbia, 5 Mackey 376.

Iowa.— Remey *v.* Burlington Bd. of Equalization, 80 Iowa 470, 45 N. W. 899; Royce *v.* Jenney, 50 Iowa 676.

Maine.— Fairfield *v.* Somerset County, 66 Me. 385.

Missouri.— State *v.* Springer, 134 Mo. 212, 35 S. W. 589. But *compare* State *v.* Dowling, 50 Mo. 134.

New Jersey.— Sharp *v.* Apgar, 31 N. J. L. 358.

New York.— People *v.* Feitner, 41 N. Y. App. Div. 544, 58 N. Y. Suppl. 648; People *v.* Fredericks, 48 Barb. 173 [*affirmed* in 48 N. Y. 70]; Niagara El. Co. *v.* McNamara, Sheld. 360; People *v.* Feitner, 30 Misc. 641, 64 N. Y. Suppl. 321; Mercantile Nat. Bank *v.* New York, 27 Misc. 32, 57 N. Y. Suppl. 254 [*affirmed* in 50 N. Y. App. Div. 628, 63 N. Y. Suppl. 1111]; Patchin *v.* Brooklyn, 13 Wend. 664.

Tennessee.— Smoky Mountain Land, etc., Co. *v.* Lattimore, 119 Tenn. 620, 105 S. W. 1028; Tomlinson *v.* Board of Equalization, 88 Tenn. 1, 12 S. W. 414, 6 L. R. A. 207.

Wisconsin.— State *v.* Sackett, 117 Wis. 580, 94 N. W. 314.

See 45 Cent. Dig. tit. "Taxation," §§ 890, 894.

But *compare* State *v.* Thompson, 2 N. H. 236.

Discretion of court.— The question of granting or refusing this writ is one always addressed to the sound discretion of the court, and where it is sought to have an assessment declared illegal this discretion will be very cautionsly exercised, especially where the assessment involved is one for general taxes or where great mischief or public harm might result from setting it aside. Padgett *v.* District of Columbia, 17 App. Cas. (D. C.) 255; Owosso Fractional School Dist. No. 1 *v.* Owosso Joint Bd. of School Inspectors, 27 Mich. 3.

Misconduct of assessors.— An overvaluation of land by the assessors may be corrected on certiorari where it shows such partiality or misconduct as to render the whole assessment void. Coles *v.* Platt, 24 N. J. L. 108.

Inquiring into title or qualifications of assessors.— The writ of certiorari cannot be made a means of inquiring into the regularity or validity of the appointment of the assessors or their qualifications or title to their office, if it appears that those who made the assessment were at least *de facto* officers. State *v.* Brown, 53 N. J. L. 162, 20 Atl. 772; Hoey *v.* Ocean Tp. Collector, 39 N. J. L. 75; People *v.* Tierney, 57 Hun (N. Y.) 357, 10 N. Y. Suppl. 940 [*modified* on other grounds in 126 N. Y. 166, 27 N. E. 269, 12 L. R. A. 251]; People *v.* Parker, 45 Hun (N. Y.) 432.

27. Wheeler *v.* Waldo County, 88 Me. 174, 33 Atl. 983; Chicopee *v.* Hampden County, 16 Gray (Mass.) 38; Gibbs *v.* Hampden County, 19 Pick. (Mass.) 298; State *v.* Powers, 24 N. J. L. 406.

28. Newburyport *v.* Essex County, 12 Metc. (Mass.) 211; State *v.* Newark, 27 N. J. L. 185; State *v.* Quaife, 23 N. J. L. 89; Baldwin *v.* Calkins, 10 Wend. (N. Y.) 167; Bouton *v.* Brooklyn, 2 Wend. (N. Y.) 395; Le Roy *v.* New York, 20 Johns. (N. Y.) 430, 11 Am. Dec. 289; Milwaukee Iron Co. *v.* Schubel, 29 Wis. 444, 9 Am. Rep. 591, arbitrary or capricious valuation.

29. *Arkansas.*— Pulaski County Bd. of Equalization Cases, 49 Ark. 518, 6 S. W. 1; Randle *v.* Williams, 18 Ark. 380.

California.— Spring Valley Water Works *v.* Schottler, 62 Cal. 69; Central Pac. R. Co. *v.* Placer County Bd. of Equalization, 46 Cal. 667. But see California Northern R. Co. *v.* Butte County, 18 Cal. 671.

Idaho.— Murphy *v.* Lincoln County Bd. of Equalization, 6 Ida. 745, 59 Pac. 715.

Iowa.— Smith *v.* Jones County, 30 Iowa 531.

Massachusetts.— Jones *v.* Boston, 104 Mass. 461.

Michigan.— Whitbeck *v.* Hudson, 50 Mich. 86, 14 N. W. 708.

Minnesota.— State *v.* Twin Lakes, 84 Minn. 374, 87 N. W. 925.

Missouri.— Hannibal, etc., R. Co. *v.* State Bd. of Equalization, 64 Mo. 294.

Montana.— State *v.* Ellis, 15 Mont. 224, 38 Pac. 1079, abuse of discretion.

Nevada.— State *v.* Ormsby County, 7 Nev. 392.

New Jersey.— Benedictine Sisters *v.* Elizabeth, 50 N. J. L. 347, 13 Atl. 5 (irregularities); Conover *v.* Honce, 46 N. J. L. 347 (defects in form). See also State *v.* Newark, 32 N. J. L. 453. But see Dickerson Suckasunny Min. Co. *v.* Randolph Tp. Collector, 25 N. J. L. 427. Under N. J. Pamphl. Laws (1903), p. 418, and Pamphl. Laws (1852), § 2, an overvaluation or excessive assessment of taxable property may be reviewed by certiorari. Royal Mfg. Co. *v.* Rahway, 75 N. J. L. 416, 67 Atl. 940. It was otherwise, however, under earlier statutes. See Benedictine Sisters *v.* Elizabeth, 50 N. J. L. 347, 13 Atl. 5; State *v.* Manchester Tp. Collector, 25 N. J. L. 531; State *v.* Powers, 24 N. J. L. 406; State *v.* Danser, 23 N. J. L. 552; State *v.* Quaife, 23 N. J. L. 89. But the action of a board in increasing or decreasing the assessed value of property is not reviewable on certiorari unless the board violates some

utes,[30] a writ of certiorari lies to review an assessment of taxes in respect to illegality, overvaluation, and inequality of valuation.[31] There are also some cases in which the writ lies to secure the making of a correction in the assessment roll, where there is a plain duty to make it, involving no judgment or discretion.[32]

b. Other Remedies Available or Appropriate. Certiorari is not a writ which lies where the party complaining has another available and adequate remedy; and hence if the taxpayer neglects to avail himself of his opportunity to apply to the board of equalization or review for relief against his assessment, he cannot bring it before the court by certiorari,[33] except where such an application would

legal principle in adjusting the value of the taxable property. Hudson County Union *v.* Hudson County Bd. of Taxation, 77 N. J. L. 178, 71 Atl. 46; Colonial Trust Co. *v.* Cheeffey, 69 Atl. 455.

South Dakota.— State *v.* State Bd. of Assessment, etc., 3 S. D. 338, 53 N. W. 192.

Tennessee.— Tomlinson *v.* Board of Equalization, 88 Tenn. 1, 12 S. W. 414, 6 L. R. A. 207; Shelby County *v.* Mississippi, etc., R. Co., 16 Lea 401, 1 S. W. 32.

Wisconsin.— State *v.* Williams, 123 Wis. 61, 100 N. W. 1048; State *v.* Lewis, 118 Wis. 432, 95 N. W. 388.

See 45 Cent. Dig. tit. "Taxation," §§ 890, 894.

30. See N. Y. Consol. Laws (1909), c. 62, §§ 46, 291–293; and earlier statutes.

31. People *v.* State Tax Com'rs, 196 N. Y. 39, 89 N. E. 581 [*modifying* 128 N. Y. App. Div. 13, 112 N. Y. Suppl. 392], 197 N. Y. 33, 90 N. E. 112; Western R. Co. *v.* Nolan, 48 N. Y. 513; People *v.* Ogdensburgh, 48 N. Y. 390; People *v.* Albany Assessors, 40 N. Y. 154; Swift *v.* Poughkeepsie, 37 N. Y. 511; People *v.* Keefe, 119 N. Y. App. Div. 713, 104 N. Y. Suppl. 154 [*affirmed* in 190 N. Y. 555, 83 N. E. 1130]; New York *v.* Tucker, 91 N. Y. App. Div. 214, 86 N. Y. Suppl. 509 [*affirmed* in 182 N. Y. 535, 75 N. E. 1128]; People *v.* Feitner, 51 N. Y. App. Div. 178, 64 N. Y. Suppl. 539; People *v.* Campbell, 64 Hun (N. Y.) 417, 19 N. Y. Suppl. 652; People *v.* Wemple, 63 Hun N. Y. 444, 18 N. Y. Suppl. 511 [*reversed* on the facts in 148 N. Y. 690, 43 N. E. 176]; People *v.* Wemple, 61 Hun (N. Y.) 53, 15 N. Y. Suppl. 711, 718 [*reversed* on other grounds in 129 N. Y. 664, 29 N. E. 812]; People *v.* Hillhouse, 1 Lans. (N. Y.) 87; Prosser *v.* Secor, 5 Barb. (N. Y.) 607; People *v.* Hall, 57 Misc. (N. Y.) 308, 109 N. Y. Suppl. 402 [*reversed* on other grounds in 130 N. Y. App. Div. 360, 114 N. Y. Suppl. 511], holding that on certiorari to review an assessment the assessment can be reëxamined only where a prior examination involved a doubt as to its legality, and not where the examination was conclusive. See also People *v.* Pitman, 9 N. Y. St. 469.

Inequality, as a ground for relief under this statute, means that the relator's assessment is made at a higher proportionate valuation than the assessment of other property on the same roll by the same officers, and this must be something more than a valuation disproportionate to that placed upon a few other pieces of property in the same vicinity. *In re* Corwin, 135 N. Y. 245, 32 N. E. 16; People *v.* Carter, 109 N. Y. 576, 17 N. E. 222; People *v.* Feitner, 95 N. Y. App. Div. 217, 88 N. Y. Suppl. 694 [*affirmed* in 180 N. Y. 536, 72 N. E. 1148]. But where it appears that all the other property is assessed at only one fifth of its value, although this is in violation of the statutory direction that property shall be assessed at its full value, yet, as the law requires an unequal assessment to be made proportional with the others, the relator's assessment will be reduced accordingly. People *v.* Ganley, 131 N. Y. 566, 30 N. E. 64 [*affirmed* in 56 Hun 639, 8 N. Y. Suppl. 563].

The right of a taxpayer to review an assessment by certiorari is absolute and not a matter of discretion, and he may show that the assessment is invalid for any reason. People *v.* Davenport, 119 N. Y. App. Div. 790, 104 N. Y. Suppl. 332. But *compare* People *v.* Parker, 117 N. Y. 86, 22 N. E. 752; Swift *v.* Poughkeepsie, 37 N. Y. 511.

32. Keck *v.* Keokuk County, 37 Iowa 547. See also Reese *v.* Sherrer, 49 N. J. L. 610, 10 Atl. 286.

33. *Alabama.*— Lehman *v.* Robinson, 59 Ala. 219.

Colorado.— People *v.* Arapahoe County, 27 Colo. 86, 59 Pac. 733.

New Jersey.— Young *v.* Parker, 34 N. J. L. 49; Sharp *v.* Apgar, 31 N. J. L. 358; Van Winkle *v.* Manchester Tp. Collector, 25 N. J. L. 531. Later cases, however, hold that statutory authority to petition the state board of assessors for a review does not prevent a review of the action of such board by certiorari. People's Inv. Co. *v.* State Bd. of Assessors, 66 N. J. L. 175, 48 Atl. 579. But where a local assessment has been appealed to and passed upon successively by the county board and the state board, certiorari will not lie to the local authorities, as the proper procedure is to bring up the judgment of the state board and the proceedings before that board. People's Inv. Co. *v.* State Bd. of Assessors, *supra*.

New York.— *In re* Corwin, 135 N. Y. 245, 32 N. E. 16; People *v.* Adams, 125 N. Y. 471, 26 N. E. 746; People *v.* Carter, 119 N. Y. 654, 23 N. E. 927; People *v.* Tax Com'rs, 99 N. Y. 254, 1 N. E. 773; People *v.* Ferguson, 120 N. Y. App. Div. 563, 105 N. Y. Suppl. 388; People *v.* Wells, 99 N. Y. App. Div. 364, 91 N. Y. Suppl. 219 [*affirmed* in 181 N. Y. 252, 73 N. E. 1025]; People *v.* Feitner, 63 N. Y. App. Div. 615, 72 N. Y. Suppl. 1124 [*affirmed* in 168 N. Y. 675, 61 N. E. 1132]; People *v.* Feitner, 45 N. Y. App. Div. 542, 61 N. Y. Suppl. 432; People *v.* Neff, 26 N. Y.

be useless,[34] or where the assessment is complained of as entirely illegal or void.[35] For the same reason, if the law allows a direct remedy by appeal to the board or courts from an assessment, this remedy must be pursued and certiorari does not lie,[36] unless he has not made such appeal for want of notice.[37]

c. Defenses and Grounds of Opposition. Certiorari will not be granted, although an error appears, if it is not shown to be prejudicial to the relator,[38] or in any case where the court would be precluded by statute or by the facts of the particular case from granting any effective relief,[39] or where the relator is in fault, as by having refused to answer questions or make disclosure or otherwise aid in effecting a just appraisement of his property,[40] or where great mischief or public

App. Div. 542, 50 N. Y. Suppl. 680; People *v.* O'Donnell, 46 Misc. 521, 92 N. Y. Suppl. 577; People *v.* Feitner, 34 Misc. 299, 69 N. Y. Suppl. 793 [*affirmed* in 63 N. Y. App. Div. 615, 72 N. Y. Suppl. 1124]; People *v.* New York Tax Com'rs, 28 Misc. 591, 59 N. Y. Suppl. 1010; People *v.* Middletown Assessors, 19 N. Y. Suppl. 142; People *v.* Dolan, 11 N. Y. Suppl. 35; People *v.* New York Tax, etc., Com'rs, 4 N. Y. Suppl. 41. But see People *v.* Duguid, 68 Hun 243, 22 N. Y. Suppl. 988, holding that the appearance before the assessors on grievance day is not a jurisdictional fact in the proceeding by certiorari, but a failure so to appear merely raises a question of laches.

Wisconsin.— State *v.* Williams, 123 Wis. 73, 100 N. W. 1052.

See 45 Cent. Dig. tit. "Taxation," §§ 891–893.

Refusal of board to hear complaint.— Where a taxpayer failed to make application for a correction of his assessment while the books were open for inspection, and the board refused thereafter to consider an application, it was held that certiorari would not lie, but the taxpayer's remedy was by mandamus to compel the board to consider his application. People *v.* Wells, 110 N. Y. App. Div. 336, 97 N. Y. Suppl. 333.

34. Alexandria Canal, etc., Co. *v.* District of Columbia, 5 Mackey (D. C.) 376 (where the board has no power to grant the relief desired); People *v.* Lewis, 55 Hun (N. Y.) 521, 9 N. Y. Suppl. 333.

35. Earles *v.* Ramsey, 61 N. J. L. 194, 38 Atl. 812; Hatch *v.* Buffalo, 38 N. Y. 276; People *v.* Wells, 87 N. Y. App. Div. 284, 84 N. Y. Suppl. 277; People *v.* O'Donnel, 47 Misc. (N. Y.) 226, 95 N. Y. Suppl. 889; People *v.* Feitner, 39 Misc. (N. Y.) 474, 80 N. Y. Suppl. 138; People *v.* Feitner, 30 Misc. (N. Y.) 641, 64 N. Y. Suppl. 321; Taylor *v.* Louisville, etc., R. Co., 88 Fed. 350, 31 C. C. A. 537. But see State *v.* Washoe County, 14 Nev. 140; People *v.* Davenport, 119 N. Y. App. Div. 790, 104 N. Y. Suppl. 332.

A failure to file written objections on the day fixed by the assessors for hearing complaints, as required by statute does not affect the right to review by certiorari an assessment made without jurisdiction. People *v.* Keno, 61 Misc. (N. Y.) 345, 114 N. Y. Suppl. 1094.

36. *Alabama.*— State *v.* Southern Cotton-Oil Co., 124 Ala. 523, 27 So. 306.

Georgia.— Writkowski *v.* Skalowski, 46 Ga. 41.

Iowa.— Ferguson *v.* Rolfe, 119 Iowa 338, 93 N. W. 352; Macklot *v.* Davenport, 17 Iowa 379.

Nevada.— Peacock *v.* Leonard, 8 Nev. 84.

New Hampshire.— Boston, etc., R. Co. *v.* Folsom, 46 N. H. 64.

New Jersey.— Appelget *v.* Pownell, 49 N. J. L. 169, 6 Atl. 441; Bell *v.* Snedeker, 42 N. J. L. 76; Wyckoff *v.* Nunn, 39 N. J. L. 422; State *v.* Apgar, 31 N. J. L. 358; Pershine *v.* Grey, 29 N. J. L. 380; Van Winkle *v.* Manchester Tp., 25 N. J. L. 531; Coles *v.* Platt, 24 N. J. L. 108. See also Vail *v.* Bentley, 23 N. J. L. 532.

See 45 Cent. Dig. tit. "Taxation," § 891.

But *compare* People *v.* Wemple, 129 N. Y. 543, 29 N. E. 808, 14 L. R. A. 708, review of action of controller.

Discretion of court.— Where legal questions of importance arise in the assessment of taxes, the supreme court will exercise the discretion of looking into the case upon certiorari, as well before as after an appeal from the commissioners. Morris Canal, etc., Co. *v.* Betts, 24 N. J. L. 555; Vail *v.* Bentley, 23 N. J. L. 532.

37. Wyckoff *v.* Nunn, 39 N. J. L. 422.

38. Winslow *v.* Kennebec County, 37 Me. 561; People *v.* Barker, 74 Hun (N. Y.) 418, 26 N. Y. Suppl. 519.

39. Hoboken *v.* Jersey City, 68 N. J. L. 607, 53 Atl. 595; People *v.* Albany Bd. of Assessors, 2 Hun (N. Y.) 583 [*affirmed* in 67 N. Y. 521].

40. People *v.* Barker, 76 Hun (N. Y.) 454, 27 N. Y. Suppl. 1082; People *v.* Feitner, 32 Misc. (N. Y.) 61, 66 N. Y. Suppl. 154. And see People *v.* Campbell, 139 N. Y. 68, 34 N. E. 753.

Effect of mistaken claim by taxpayer.— A railroad company appeared by its attorney on grievance day, to obtain a review of its assessment, and filed an affidavit in which the attorney stated the rule of law by which he claimed the assessors should be governed in valuing the company's real estate, but the rule so stated was erroneous. Thereafter the company brought certiorari to review the assessment, and it was held not to be bound by the argument or rule set forth in such affidavit, so as to be precluded from obtaining relief on a different theory. People *v.* Garmon, 34 Misc. (N. Y.) 350, 69 N. Y. Suppl. 819.

harm might result from setting aside the assessment.[41] Payment of the taxes under protest does not generally bar the prosecution of proceedings by certiorari.[42]

d. Persons Entitled to Review. The writ may issue on the relation of any individual taxpayer who is injured or aggrieved by his particular assessment,[43] although it has been held that he must show that he has some peculiar interest in the controversy which is not common to all the taxpayers on the roll.[44] Two or more persons will commonly be permitted to join in the application if they complain of the same alleged error or inequality and are affected by it in the same way.[45] But stock-holders in a corporation cannot have certiorari to review an assessment of the property of the corporation;[46] nor can the corporation thus obtain a review of the assessment of its stock in the hands of the individual shareholders.[47]

e. Parties Defendant. The writ of certiorari should go to the officer or board having the custody of the record or papers sought to be reviewed, and hence ordinarily to the assessors or board of assessors,[48] even after they have parted with control of the assessment roll;[49] or it may go to the collector of taxes if the

41. Padgett *v.* District of Columbia, 17 App. Cas. (D. C.) 255; Fractional School Dist. No. 1 *v.* Owosso Joint School Inspectors, 27 Mich. 3.

Consequences to public officers.— The fact that an assessor had no jurisdiction and that his assessment was void will not prevent a review of his proceedings by certiorari, although it would render the collector personally liable. State *v.* Dowling, 50 Mo. 134.

42. People *v.* Carter, 119 N. Y. 557, 23 N. E. 926.

43. People *v.* State Tax Com'rs, 196 N. Y. 39, 89 N. E. 581 [*modifying* 128 N. Y. App. Div. 13, 112 N. Y. Suppl. 392], 197 N. Y. 33, 90 N. E. 112 (holding that a corporation taxed upon a special franchise is entitled to assail the assessment by certiorari on the ground of inequality); People *v.* Feitner, 92 N. Y. App. Div. 518, 87 N. Y. Suppl. 304; People *v.* Feitner, 60 N. Y. App. Div. 282, 70 N. Y. Suppl. 120; People *v.* Feitner, 54 N. Y. App. Div. 217, 66 N. Y. Suppl. 769 [*affirmed* in 165 N. Y. 645, 59 N. E. 1129]; People *v.* Barker, 87 Hun (N. Y.) 194, 33 N. Y. Suppl. 1042 [*affirmed* in 148 N. Y. 731, 42 N. E. 725]; People *v.* Westchester County, 57 Barb. (N. Y.) 377.

Representatives.— Certiorari to review a tax assessment may be brought by the executor of a deceased taxpayer. Ely *v.* Holmdel Tp., 39 N. J. L. 79. Or where the taxpayer is a lunatic, it may be brought by his guardian or committee. People *v.* Williams, 90 Hun (N. Y.) 501, 36 N. Y. Suppl. 65.

A person whose name appears on the assessment roll apparently made pursuant to statute is entitled to a writ of certiorari to review the assessment for any reason that may make it void, although the whole roll may have been invalid on account of matters not appearing on its face. People *v.* Davenport, 119 N. Y. App. Div. 790, 104 N. Y. Suppl. 332.

44. Benton *v.* Taylor, 46 Ala. 388; Libby *v.* West St. Paul, 14 Minn. 248. *Compare* Orr *v.* State Bd. of Equalization, 3 Ida. 190, 28 Pac. 416; People *v.* Westchester County, 57 Barb. (N. Y.) 377, 8 Abb. Pr. N. S. 277.

45. Woodworth *v.* Gibbs, 61 Iowa 398, 16 N. W. 287; People *v.* Feitner, 163 N. Y. 384, 57 N. E. 624; People *v.* Feitner, 74 N. Y. App. Div. 130, 77 N. Y. Suppl. 436 [*affirmed* in 172 N. Y. 618, 64 N. E. 1124]; People *v.* Feitner, 71 N. Y. App. Div. 572, 76 N. Y. Suppl. 245. But *compare* Carter *v.* Cullman County Com'rs' Ct., 80 Ala. 394.

Joint trustees.— Where property is held jointly by two trustees, one of whom is a non-resident, and an assessment is made against the latter, he is not compelled to await proceedings for the enforcement of the tax, but may bring certiorari to review the assessment. People *v.* Wells, 182 N. Y. 314, 74 N. E. 878.

46. State *v.* Flavell, 24 N. J. L. 370, holding also that the exception must be from the corporation.

47. State *v.* Cook, 32 N. J. L. 347; People *v.* Coleman, 41 Hun (N. Y.) 344. But *compare* Mercantile Nat. Bank *v.* New York, 27 Misc. (N. Y.) 32, 57 N. Y. Suppl. 254.

48. State *v.* Casey, 210 Mo. 235, 109 S. W. 1 (holding that, although certiorari only lies against judicial or quasi-judicial bodies, it will lie against an assessor to review an assessment); People *v.* Carter, 52 Hun (N. Y.) 458, 5 N. Y. Suppl. 507 [*affirmed* in 117 N. Y. 625, 22 N. E. 1128]; People *v.* Carter, 47 Hun (N. Y.) 446.

Writ directed to individual members of board.— It is a fatal error if the writ of certiorari to review assessment proceedings is addressed to certain members of the board of assessors instead of to all the members or to the board itself. People *v.* Roe, 25 N. Y. App. Div. 107, 49 N. Y. Suppl. 227.

49. *In re* Corwin, 135 N. Y. 245, 32 N. E. 16 [*reversing* 64 Hun 167, 19 N. Y. Suppl. 142, and *disapproving* People *v.* Tompkins, 40 Hun (N. Y.) 228] (after delivery to board of supervisors); People *v.* Adams, 125 N. Y. 471, 26 N. E. 746 [*modifying* 10 N. Y. Suppl. 295] (after delivery to tax collector); People *v.* Lewis, 55 Hun (N. Y.) 521, 9 N. Y. Suppl. 333; People *v.* Carter, 47 Hun (N. Y.) 446 (after delivery to city controller); People *v.* New York Tax, etc., Com'rs, 46 How. Pr. (N. Y.) 227; People *v.* Pitman, 9 N. Y. St. 469. But see People *r.* Queens County, 82

duplicate and warrant are in his hands; [50] or in some cases it may be directed to the municipal corporation levying the tax, in its corporate name.[51]

f. Time of Taking Proceedings. Where the statute prescribes a period within which application must be made for a writ of certiorari to review assessments, it is mandatory, and the writ must be refused if the application comes too late; [52] and independently of statute, the laches of the relator will be ground for denying him relief,[53] except in cases where he had no notice of the proceedings, for in that event the statutory limitation does not apply and he is not chargeable with laches if he acts with reasonable promptness after discovering the assessment.[54]

g. Petition. Statutory certiorari to review an action of tax assessors is substantially a new trial of the matters decided by them; the petition is the complaint, and the return the answer, and general rules of pleading are applicable.[55] The petition or application for certiorari to review a tax assessment may state conclusions of fact without supporting evidence; [56] but it must show clearly and directly the grounds of objection to the assessment on which the relator relies,[57] and that he is injured or prejudiced by the assessment as it stands.[58] If it is claimed that the assessment is illegal, the petition must set forth specifically,

N. Y. 275 [*modifying* 18 Hun 4]; People *v.* Board of Assessors, 16 Hun (N. Y.) 407; People *v.* Fredericks, 48 Barb. (N. Y.) 173; People *v.* Reddy, 43 Barb. (N. Y.) 539; People *v.* New York Tax, etc., Com'rs, 43 Barb. (N. Y.) 494.

But local assessors are not entitled to intervene in certiorari proceedings to review the action of the state board of assessors because of the fact that they are criticized in the petition. People *v.* Priest, 181 N. Y. 300, 73 N. E. 1100 [*reversing* 101 N. Y. App. Div. 223, 91 N. Y. Suppl. 772 (*reversing* 41 Misc. 545, 85 N. Y. Suppl. 235)]; People *v.* Priest, 101 N. Y. App. Div. 263, 91 N. Y. Suppl. 1001 [*reversing* 41 Misc. 548, 85 N. Y. Suppl. 237].

A town clerk is not a necessary party to certiorari proceedings to review an assessment by reason of the fact that the assessment roll after it is completed is required to be deposited with him. Matter of Winegard, 78 Hun (N. Y.) 58, 28 N. Y. Suppl. 1039 [*affirming* 5 Misc. 54, 25 N. Y. Suppl. 48].

A supervisor of a town is not a necessary party to such proceeding. People *v.* Smith, 24 Hun (N. Y.) 66 [*affirmed* in 85 N. Y. 628].

50. Reese *v.* Sherrer, 49 N. J. L. 610, 10 Atl. 286; Washington Tp. *v.* Howell, 24 N. J. L. 519.

51. Woodbridge Tp. *v.* State, 43 N. J. L. 262; *In re* Belmont, 40 Misc. (N. Y.) 133, 81 N. Y. Suppl. 280 [*affirmed* in 83 N. Y. App. Div. 643, 82 N. Y. Suppl. 1110]. But *compare* People *v.* Priest, 101 N. Y. App. Div. 263, 91 N. Y. Suppl. 1001 [*reversing* 41 Misc. 548, 85 N. Y. Suppl. 237]; People *v.* Priest, 95 N. Y. App. Div. 44, 88 N. Y. Suppl. 11.

52. Hunt *v.* Warshung, 48 N. J. L. 613, 9 Atl. 199; Warshung *v.* Hunt, 47 N. J. L. 256; People *v.* Feitner, 168 N. Y. 441, 61 N. E. 763; People *v.* Feitner, 71 N. Y. App. Div. 572, 76 N. Y. Suppl. 245; People *v.* Feitner, 41 N. Y. App. Div. 496, 58 N. Y. Suppl. 670; People *v.* Barker, 22 N. Y. App. Div. 161, 47 N. Y. Suppl. 1020; People *v.* Wemple, 60 Hun (N. Y.) 225, 14 N. Y. Suppl. 859; People *v.* Wells, 39 Misc. (N. Y.) 602, 80 N. Y. Suppl. 610; People *v.* Feitner, 30 Misc. (N. Y.) 646, 64 N. Y. Suppl. 269.

53. *District of Columbia.*— Padgett *v.* District of Columbia, 17 App. Cas. 255.

Michigan.— *In re* Lantis, 9 Mich. 324, 80 Am. Dec. 58.

New Jersey.— Union Waxed, etc., Paper Co. *v.* State Bd. of Assessors, 73 N. J. L. 374, 63 Atl. 1006; Pompton Steel, etc., Co. *v.* Wayne Tp., 65 N. J. L. 487, 47 Atl. 469; State *v.* Camden Bd. of Tax Assessors, 53 N. J. L. 319, 21 Atl. 938; State *v.* Binninger, 42 N. J. L. 528; Jersey City Land, etc., Co. *v.* Love, 42 N. J. L. 355.

New York.— *In re* Lord, 78 N. Y. 109.

Canada.— *Ex p.* Gerow, 9 N. Brunsw. 269.

See 45 Cent. Dig. tit. "Taxation," § 902.

Unconstitutional tax law.— Where objection to an assessment is based on the unconstitutionality of the statute under which it was made, the laches of the relator is no bar to certiorari brought to set it aside, nor cause for its dismissal. State *v.* Jersey City, 45 N. J. L. 256.

54. Wood *v.* District of Columbia, 6 Mackey (D. C.) 142; People *v.* Adams, 125 N. Y. 471, 26 N. E. 746; People *v.* Hicks, 105 N. Y. 198, 11 N. E. 653; People *v.* Port Jervis, 23 Misc. (N. Y.) 317, 52 N. Y. Suppl. 59.

55. People *v.* Stillwell, 190 N. Y. 284, 83 N. E. 56; People *v.* Hall, 57 Misc. (N. Y.) 308, 109 N. Y. Suppl. 402.

56. *In re* Cathedral of Incarnation, 91 N. Y. App. Div. 543, 86 N. Y. Suppl. 900.

57. Flaherty *v.* Atlantic City, 73 N. J. L. 458, 63 Atl. 992; Matter of New York, 117 N. Y. App. Div. 811, 103 N. Y. Suppl. 87; People *v.* Carmichael, 64 Misc. (N. Y.) 271, 118 N. Y. Suppl. 354.

58. People *v.* Wells, 101 N. Y. App. Div. 600, 92 N. Y. Suppl. 5 [*reversed* on the facts in 182 N. Y. 314, 78 N. E. 878]; People *v.* Harkness, 84 Hun (N. Y.) 445, 32 N. Y. Suppl. 344.

and not by way of inference or implication, in what the alleged illegality consists.[59] If it is claimed that relator's assessment is unequal because at a higher proportionate valuation than other property, instances of such inequality should be set forth in the petition.[60] And if relief is sought on the ground of overvaluation, it is not enough to state merely the relator's opinion as to the value of the property, but such facts in regard to its value must be set forth as will make out a *prima facie* case.[61] It is also proper, and probably necessary, to show that the relator is not chargeable with any negligence in failing to obtain a correction of his assessment by the assessors or the board of review.[62] But the court will not require the taxes to be paid as a condition to granting the writ.[63]

h. Writ and Return. The writ should require the officers to whom it is directed to return the record and proceedings before them, and is unauthorized if it demands anything more than the statute requires to be returned,[64] and it should call for only so much of the record as affects the particular property of the relator.[65] It should be served on the officer having the custody of the record,[66] and be made returnable at such time and in such court as the statute directs,[67] although a defect in this respect is cured by a full and voluntary appearance of the respondents at a time not named in the writ, a stipulation to refer, and a

59. People *v.* Barker, 84 N. Y. App. Div. 469, 83 N. Y. Suppl. 33 (property not within the state); People *v.* Feitner, 65 N. Y. App. Div. 318, 73 N. Y. Suppl. 97 [*affirmed* in 169 N. Y. 604, 62 N. E. 1099]; People *v.* Campbell, 88 Hun (N. Y.) 527, 34 N. Y. Suppl. 711 (error in taxing relator as a nonmanufacturing corporation); People *v.* Barker, 66 Hun (N. Y.) 21, 20 N. Y. Suppl. 797 [*affirmed* in 137 N. Y. 544, 33 N. E. 336]; People *v.* Feitner, 39 Misc. (N. Y.) 463, 80 N. Y. Suppl. 140 [*reversed* on other grounds in 86 N. Y. App. Div. 46, 83 N. Y. Suppl. 1114 (*affirmed* in 178 N. Y. 577, 70 N. E. 1106)]; People *v.* Coleman, 30 N. Y. Suppl. 379 (recital in petition held not a specification that exempt property was assessed); People *v.* New York Tax, etc., Com'rs, 26 N. Y. Suppl. 941.

60. People *v.* Feitner, 51 N. Y. App. Div. 178, 64 N. Y. Suppl. 539; People *v.* Webster, 49 N. Y. App. Div. 556, 63 N. Y. Suppl. 574; People *v.* Board of Assessors, 10 N. Y. App. Div. 393, 41 N. Y. Suppl. 769; People *v.* O'Donnell, 46 Misc. (N. Y.) 519, 92 N. Y. Suppl. 770; People *v.* Feitner, 33 Misc. (N. Y.) 293, 68 N. Y. Suppl. 581; People *v.* Feitner, 27 Misc. (N. Y.) 384, 58 N. Y. Suppl. 869 [*affirmed* in 45 N. Y. App. Div. 542, 61 N. Y. Suppl. 432]; People *v.* Wells, 92 N. Y. Suppl. 769. But see People *v.* Budlong, 25 N. Y. App. Div. 373, 49 N. Y. Suppl. 484 [*reversing* 21 Misc. 361, 47 N. Y. Suppl. 765]; Matter of Nisbet, 3 N. Y. App. Div. 171, 38 N. Y. Suppl. 392.

61. People *v.* Feitner, 61 N. Y. App. Div. 156, 70 N. Y. Suppl. 452 [*affirmed* in 168 N. Y. 661, 61 N. E. 1132]; People *v.* Feitner, 61 N. Y. App. Div. 117, 70 N. Y. Suppl. 360 [*affirmed* in 168 N. Y. 441, 61 N. E. 763]; People *v.* Feitner, 51 N. Y. App. Div. 178, 64 N. Y. Suppl. 539; People *v.* Feitner, 39 Misc. (N. Y.) 463, 80 N. Y. Suppl. 140 [*reversed* on other grounds in 86 N. Y. App. Div. 46, 83 N. Y. Suppl. 1114 (*affirmed* in 178 N. Y. 577, 70 N. E. 1106)]. But *compare* People *v.* Ouderkirk, 120 N. Y. App. Div. 650, 105 N. Y. Suppl. 134.

62. People *v.* Carter, 119 N. Y. 557, 23 N. E. 926; People *v.* State Tax Com'rs, 55 N. Y. App. Div. 218, 67 N. Y. Suppl. 69. See also People *v.* Gray, 45 Hun (N. Y.) 243.

An application cannot be made to the assessing officers to correct some errors, and on their refusal certiorari be maintained to review other errors. People *v.* Nassau County, 54 Misc. (N. Y.) 323, 104 N. Y. Suppl. 353.

63. Singer Sewing Mach. Co. *v.* State Assessors, 54 N. J. L. 90, 22 Atl. 1085.

64. People *v.* State Tax Com'rs, 55 N. Y. App. Div. 186, 67 N. Y. Suppl. 51; People *v.* Feitner, 40 N. Y. App. Div. 620, 57 N. Y. Suppl. 1062 (holding that the writ should not require defendants to specify by what authority or claim of authority they made the assessment); *In re* Winegard, 78 Hun (N. Y.) 58, 28 N. Y. Suppl. 1039 [*modifying* 5 Misc. 54, 25 N. Y. Suppl. 48] (holding that the writ is not invalid because it requires the return of the original assessment roll, although this is contrary to the statute, since it may be satisfied by returning a certified or sworn copy, as provided by the statute).

65. People *v.* New York Tax Com'rs, 10 Abb. N. Cas. (N. Y.) 35.

66. State *v.* Losby, 116 Wis. 57, 90 N. W. 188.

Notice of the granting of a writ of certiorari may be dispensed with by the court. People *v.* Smith, 24 Hun (N. Y.) 66 [*affirmed* in 85 N. Y. 628].

67. People *v.* Priest, 169 N. Y. 432, 62 N. E. 567 [*modifying* 63 N. Y. App. Div. 128, 71 N. Y. Suppl. 390]; Matter of Tilyou, 57 N. Y. App. Div. 101, 67 N. Y. Suppl. 1097; People *v.* Feitner, 53 N. Y. App. Div. 181, 65 N. Y. Suppl. 935; People *v.* Lewis, 55 Hun (N. Y.) 521, 9 N. Y. Suppl. 333; People *v.* Smith, 24 Hun (N. Y.) 66 [*affirmed* in 85 N. Y. 628]; People *v.* Greenburgh, 6 N. Y. St. 744.

failure to move to dismiss the complaint.[68] The return to the writ should traverse the material allegation of the petition so as to raise an issue for the determination of the court;[69] and if the assessors acted on evidence or information outside of that shown by the papers filed in the case, their return to the writ should embody such evidence.[70] But the return, if irregular in this or other respects, may be amended.[71] The general rule in proceedings by certiorari is that the return is conclusive as to the facts required by the writ to be returned; but this rule does not apply in statutory proceedings where the court is authorized to examine into the whole case and hear testimony if necessary.[72]

i. Hearing and Evidence. In view of the public interests affected by a review of tax proceedings the courts require diligence in the prosecution of such review in order that the case shall be brought promptly to a hearing,[73] at the time or term prescribed by statute.[74] The issues will be limited to the specific objections to the assessment made before the assessors or the board of review, and no others will be considered by the court.[75] The rule at common law is that certiorari

68. People *v.* Lewis, 55 Hun (N. Y.) 521, 9 N. Y. Suppl. 333.

69. People *v.* Stillwell, 190 N. Y. 284, 83 N. E. 56 (holding that a return not denying the material allegations of the petition for the writ, but containing merely affirmative allegations inconsistent with and contradictory in some respects of the material allegations in the petition, does not put in issue the allegation of the petition under the rule of pleading applicable to such proceedings that a material fact alleged is not controverted by a statement inconsistent therewith, but only by a general or specific denial); People *v.* Wells, 92 N. Y. App. Div. 622, 87 N. Y. Suppl. 1144 [*affirmed* in 179 N. Y. 524, 71 N. E. 1136]; People *v.* Feitner, 90 N. Y. App. Div. 9, 85 N. Y. Suppl. 587. But *compare* Lowell *v.* County Com'rs, 146 Mass. 403, 16 N. E. 8 (holding that the response to the writ should not be in the form of an answer to the petition, but merely a return of the record and proceedings on the decision); People *v.* New York Tax Com'rs, 28 Misc. (N. Y.) 591, 59 N. Y. Suppl. 1010.

The assessors should certify that they have followed the statute, not merely that they have fairly assessed the property. People *v.* Weaver, 67 How. Pr. (N. Y.) 477.

70. People *v.* State Tax Com'rs, 196 N. Y. 39, 89 N. E. 581 [*modifying* 128 N. Y. App. Div. 13, 112 N. Y. Suppl. 392], 197 N. Y. 33, 90 N. E. 112; People *v.* Barker, 139 N. Y. 55, 34 N. E. 722; People *v.* Miller, 92 N. Y. App. Div. 116, 87 N. Y. Suppl. 341; People *v.* Feitner, 38 Misc. (N. Y.) 178, 77 N. Y. Suppl. 745 [*modified* in 78 N. Y. App. Div. 313, 79 N. Y. Suppl. 975]; People *v.* Dederick, 25 Misc. (N. Y.) 539, 55 N. Y. Suppl. 40 [*modified* in 41 N. Y. App. Div. 617, 58 N. Y. Suppl. 1147 (*modified* in 161 N. Y. 195, 55 N. E. 927)]; People *v.* Roberts, 18 Misc. (N. Y.) 530, 42 N. Y. Suppl. 1089 [*reversed* on other grounds in 19 N. Y. App. Div. 574, 46 N. Y. Suppl. 570 (*affirmed* in 154 N. Y. 101, 47 N. E. 980)]; People *v.* Barker, 16 Misc. (N. Y.) 252, 39 N. Y. Suppl. 88.

71. People *v.* Barker, 159 N. Y. 569, 54 N. E. 1093 [*affirming* 35 N. Y. App. Div. 486, 54 N. Y. Suppl. 848].

72. State *v.* Warford, 30 N. J. L. 207; People *v.* Stillwell, 190 N. Y. 284, 83 N. E. 56; People *v.* Palmer, 86 Hun (N. Y.) 513, 33 N. Y. Suppl. 926 [*affirmed* in 148 N. Y. 732, 42 N. E. 725]; People *v.* New York Tax, etc., Com'rs, 4 N. Y. Suppl. 41; People *v.* Smith, 24 Hun (N. Y.) 66 [*affirmed* in 85 N. Y. 628]; People *v.* Pitman, 9 N. Y. St. 469.

73. State *v.* Robinson, 38 N. J. L. 267; People *v.* Smith, 24 Hun (N. Y.) 66 [*affirmed* in 85 N. Y. 628]. And see People *v.* Wemple, 61 Hun (N. Y.) 83, 15 N. Y. Suppl. 446 [*affirmed* in 131 N. Y. 64, 29 N. E. 1002, 27 Am. St. Rep. 542], holding that it is too late five months after the return and after hearing and argument for a petitioner to file affidavits contradicting the return.

74. People *v.* Smith, 24 Hun (N. Y.) 66 [*affirmed* in 85 N. Y. 628].

75. People *v.* Arapahoe County, 27 Colo. 86, 59 Pac. 733; People *v.* State Tax Com'rs, 196 N. Y. 39, 89 N. E. 581 [*modifying* 128 N. Y. App. Div. 13, 112 N. Y. Suppl. 392], 197 N. Y. 33, 90 N. E. 112 (holding that the duty of the courts on certiorari to review a determination of the state board of tax commissioners extends only to an inquiry whether the rule adopted by the board was reasonably adapted to that end, and if so whether it was correctly applied to the facts, and they cannot lay down an exclusive rule applicable to all cases); People *v.* Gray, 185 N. Y. 196, 77 N. E. 1172; *In re* Long Beach Land Co., 182 N. Y. 489, 75 N. E. 533; People *v.* Feitner, 63 N. Y. App. Div. 615, 72 N. Y. Suppl. 1124 [*affirmed* in 168 N. Y. 674, 61 N. E. 1132]; People *v.* Nassau County, 54 Misc. (N. Y.) 323, 104 N. Y. Suppl. 353; People *v.* Feitner, 39 Misc. (N. Y.) 463, 80 N. Y. Suppl. 140 [*reversed* on other grounds in 86 N. Y. App. Div. 46, 83 N. Y. Suppl. 1114 (*affirmed* in 178 N. Y. 577, 70 N. E. 1106)]; People *v.* Garmon, 34 Misc. (N. Y.) 350, 69 N. Y. Suppl. 819 [*affirmed* in 63 N. Y. App. Div. 530, 71 N. Y. Suppl. 826]; People *v.* Barker, 86 Hun (N. Y.) 148, 33 N. Y. Suppl. 221 [*affirmed* in 147 N. Y. 31, 41 N. E. 435, 29 L. R. A. 393]; Matter of Winegard, 78 Hun (N. Y.) 58, 28 N. Y. Suppl. 1039; Peo-

brings up the record alone and that extrinsic evidence cannot be received.[76] But in some states this proceeding by certiorari is in the nature of a new trial, and it is permissible and proper for the court to hear and consider original evidence on the issues presented.[77] Where this is the case, the decision of the assessors is presumed to be correct, and the burden is on the relator affirmatively to show the contrary;[78] and the assessors' decision will not be disturbed unless entirely unsupported by the evidence or clearly against the weight of the evidence.[79] Any evidence is admissible which has a bearing on the questions presented and which would be properly received under the ordinary rules of evidence,[80] and in case

ple *v.* New York Tax, etc., Com'rs, 26 N. Y. Suppl. 941.

Where overvaluation is the only complaint made in the statement filed with the assessors, and in the petition for a writ of certiorari to review an assessment, an issue that the relator, a non-resident, was assessed in the resident's list cannot be raised by motion to cancel the assessment on the petition, writ, and return. People *v.* Kaufman, 121 N. Y. App. Div. 599, 106 N. Y. Suppl. 305.

76. *Arkansas.*— Vance *v.* Little Rock, 30 Ark. 435; Floyd *v.* Gilbreath, 27 Ark. 675.

Colorado.— People *v.* Arapahoe County, 27 Colo. 86, 59 Pac. 733.

Massachusetts.— Charlestown *v.* Middlesex County, 109 Mass. 270.

Missouri.— Hannibal, etc., R. Co. *v.* State Bd. of Equalization, 64 Mo. 294.

New Jersey.— State *v.* Manning, 41 N. J. L. 275. And see Newark *v.* North Jersey St. R. Co., 68 N. J. L. 486, 53 Atl. 219.

New York.— Hatch *v.* Buffalo, 38 N. Y. 276.

Wisconsin.— State *v.* Losby, 115 Wis. 57, 90 N. W. 188; State *v.* Fuldner, 109 Wis. 56, 85 N. W. 118.

77. People *v.* State Tax Com'rs, 196 N. Y. 39, 89 N. E. 581 [*modifying* 128 N. Y. App. Div. 13, 112 N. Y. Suppl. 392], 197 N. Y. 33, 90 N. E. 112 (holding that the court may under the statute direct further proof as to the value of the assessed property in determining the correct valuation, as such proceeding is similar to a revaluation of the property); People *v.* Wells, 181 N. Y. 245, 73 N. E. 961; People *v.* Feitner, 168 N. Y. 441, 61 N. E. 763; People *v.* State Tax Com'rs, 132 N. Y. App. Div. 604, 117 N. Y. Suppl. 81; People *v.* Feitner, 116 N. Y. App. Div. 452, 101 N. Y. Suppl. 1021; People *v.* Feitner, 92 N. Y. App. Div. 518, 87 N. Y. Suppl. 304; People *v.* Wells, 84 N. Y. App. Div. 330, 82 N. Y. Suppl. 564; People *v.* Feitner, 81 N. Y. App. Div. 118, 81 N. Y. Suppl. 73; People *v.* Feitner, 27 Misc. (N. Y.) 384 58 N. Y. Suppl. 869 [*affirmed* in 45 N. Y. App. Div. 542, 61 N. Y. Suppl. 432].

78. Copper Queen Consol. Min. Co. *v.* Territorial Bd. of Equalization, 9 Ariz. 383, 84 Pac. 511; Newton Trust Co. *v.* Atwood, 77 N. J. L. 141, 71 Atl. 110; Dodge *v.* Love, 47 N. J. L. 436, 2 Atl. 810; People *v.* State Tax Com'rs, 196 N. Y. 39, 89 N. E. 581 [*modifying* 128 N. Y. App. Div. 13, 112 N. Y. Suppl. 392], 197 N. Y. 33, 90 N. E. 112; People *v.* New York Tax Com'rs, 104 N. Y. 240, 10 N. E. 437; People *v.* Wells, 101 N. Y. App. Div. 600, 92 N. Y. Suppl. 5 [*reversed* on other grounds in 182 N. Y. 314, 74 N. E. 878]; People *v.* Kalbfleisch, 25 N. Y. App. Div. 432, 49 N. Y. Suppl. 546; People *v.* O'Donnell, 54 Misc. (N. Y.) 5, 105 N. Y. Suppl. 457; People *v.* Campbell, 80 Hun (N. Y.) 466, 30 N. Y. Suppl. 472 [*affirmed* in 145 N. Y. 587, 40 N. E. 239]; People *v.* Barker, 68 Hun (N. Y.) 513, 22 N. Y. Suppl. 1043 [*reversed* on other grounds in 139 N. Y. 55, 34 N. E. 722]; People *v.* Barker, 66 Hun (N. Y.) 21, 20 N. Y. Suppl. 797 [*affirmed* in 137 N. Y. 544, 33 N. E. 336]; People *v.* Murphy, 57 Hun (N. Y.) 586, 10 N. Y. Suppl. 377; People *v.* O'Rourke, 52 N. Y. Suppl. 427; *Ex p.* Maher, 14 N. Brunsw. 251.

79. Royal Mfg. Co. *v.* Board of Equalization, 76 N. J. L. 402, 7 Atl. 978 (evidence held to justify the valuation complained of); People *v.* Glynn, 130 N. Y. App. Div. 332, 114 N. Y. Suppl. 460 [*affirmed* in 198 N. Y. 605, 92 N. E. 1097]; People *v.* Priest, 90 N. Y. App. Div. 520, 85 N. Y. Suppl. 481 [*affirmed* in 180 N. Y. 532, 72 N. E. 1149]; People *v.* Barker, 6 N. Y. App. Div. 356, 39 N. Y. Suppl. 682 [*reversed* on other grounds in 152 N. Y. 417, 46 N. E. 875]; People *v.* Wemple, 80 Hun (N. Y.) 504, 30 N. Y. Suppl. 503 [*affirmed* in 144 N. Y. 478, 39 N. E. 397]; People *v.* Feitner, 27 Misc. (N. Y.) 384, 58 N. Y. Suppl. 869 [*affirmed* in 45 N. Y. App. Div. 542, 61 N. Y. Suppl. 432].

In Wisconsin the rule is stated to be that the court cannot investigate the evidence on which the board of review acted and vacate the ruling of the board on the ground that it is contrary to such evidence, but can only determine whether there is a reasonable basis, from the standpoint of the board, for its decision, and if there is such basis the determination of the board must be sustained. State *v.* Fisher, 129 Wis. 57, 108 N. W. 206; State *v.* Fisher, 124 Wis. 271, 102 N. W. 566; State *v.* Williams, 123 Wis. 61, 100 N. W. 1048.

Dismissal of application without prejudice to right of relator to take other proceedings for review of the disputed taxes see *In re* Belvidiere-Delaware R. Co., 75 N. J. L. 381, 67 Atl. 1058.

80. Baltimore Consol. Gas. Co. *v.* Baltimore, 105 Md. 43, 65 Atl. 628; Lowell *v.* County, 146 Mass. 413, 16 N. E. 14; People *v.* Christie, 115 N. Y. 158, 21 N. E. 1024; *In re* Long Beach Land Co., 106 N. Y. App. Div. 253, 94 N. Y. Suppl. 282 [*reversed* on other grounds in 182 N. Y. 489, 75 N. E. 533]; People *v.* Wells, 101 N. Y. App. Div.

of conflict the decision of the court should be in accordance with the preponderance of the proof.[81] The court may order a reference where it finds that there is a question of fact requiring evidence for its determination.[82]

j. Determination and Disposition of Cause. In proceedings of this kind, the court will not generally set aside the entire assessment if, without doing so, it can give proper relief to the particular relator.[83] If it finds error or injustice in his assessment, it may correct and adjust the assessment, reducing it if necessary

600, 92 N. Y. Suppl. 5 [*reversed* on the facts in 182 N. Y. 314, 74 N. E. 878]; People *v.* Wells, 99 N. Y. App. Div. 455, 91 N. Y. Suppl. 283 [*affirmed* in 181 N. Y. 245, 73 N. Y. Suppl. 961]; People *v.* Barker, 48 N. Y. App. Div. 248, 63 N. Y. Suppl. 167 [*reversed* on other grounds in 165 N. Y. 305, 59 N. E. 137, 157]; People *v.* Williams, 90 Hun (N. Y.) 501, 36 N. Y. Suppl. 65; People *v.* Badgley, 67 Hun (N. Y.) 65, 22 N. Y. Suppl. 26 [*reversed* on other grounds in 138 N. Y. 314, 33 N. E. 1076]; People *v.* Mechanicville, 6 Lans. (N. Y.) 105; People *v.* Feitner, 39 Misc. (N. Y.) 467, 80 N. Y. Suppl. 152; People *v.* Haight, 24 Misc. (N. Y.) 425, 53 N. Y. Suppl. 723; People *v.* Zoeller, 15 N. Y. Suppl. 684.

The strict rules of evidence applicable to trials do not prevail in a proceeding to review a tax assessment. People *v.* Ouderkirk, 120 N. Y. App. Div. 650, 105 N. Y. Suppl. 134.

81. As sustaining the rule stated in the text and as determining questions upon the weight and sufficiency of the evidence in particular cases see People *v.* Glynn, 194 N. Y. 387, 87 N. E. 434 [*affirming* 127 N. Y. App. Div. 933, 111 N. Y. Suppl. 1139]; People *v.* Feitner, 107 N. Y. App. Div. 267, 95 N. Y. Suppl. 10; People *v.* Jacobs, 106 N. Y. App. Div. 614, 94 N. Y. Suppl. 483 [*affirmed* in 185 N. Y. 548, 77 N. E. 1195]; People *v.* Wells, 99 N. Y. App. Div. 455, 91 N. Y. Suppl. 283 [*affirmed* in 181 N. Y. 245, 73 N. E. 961]; People *v.* Feitner, 96 N. Y. App. Div. 615, 88 N. Y. Suppl. 779; People *v.* Feitner, 95 N. Y. App. Div. 481, 88 N. Y. Suppl. 774; People *v.* Miller, 84 N. Y. App. Div. 168, 82 N. Y. Suppl. 621 [*modified* on other grounds in 177 N. Y. 461, 69 N. E. 1103]; People *v.* Feitner, 61 N. Y. App. Div. 456, 70 N. Y. Suppl. 545 [*affirmed* in 168 N. Y. 677, 61 N. E. 1133]; People *v.* Feitner, 51 N. Y. App. Div. 178, 64 N. Y. Suppl. 539; People *v.* Feitner, 27 Misc. (N. Y.) 371, 58 N. Y. Suppl. 875 [*reversed* on other grounds in 43 N. Y. App. Div. 198, 59 N. Y. Suppl. 327]; People *v.* Haight, 24 Misc. (N. Y.) 425, 53 N. Y. Suppl. 723; People *v.* Zoeller, 15 N. Y. Suppl. 684; People *v.* Flushing Bd. of Assessors, 6 N. Y. St. 3.

Findings of fact and conclusions of law as in an equitable action are not required. State *v.* Patterson, 138 Wis. 475, 120 N. W. 227.

82. Childs *v.* Howland, 48 N. J. L. 425, 4 Atl. 430; People *v.* Kaufman, 121 N. Y. App. Div. 599, 106 N. Y. Suppl. 305; People *v.* Feitner, 43 N. Y. App. Div. 198, 59 N. Y. Suppl. 327; People *v.* Carmichael, 64 Misc. (N. Y.) 271, 118 N. Y. Suppl. 354; People *v.* Feitner, 39 Misc. (N. Y.) 474, 80 N. Y. Suppl. 138; People *v.* Feitner, 39 Misc. (N. Y.) 467, 80 N. Y. Suppl. 152; People *v.* Feitner, 39 Misc. (N. Y.) 463, 80 N. Y. Suppl. 140 [*reversed* on other grounds in 86 N. Y. App. Div. 46, 83 N. Y. Suppl. 1114 (*affirmed* in 178 N. Y. 577, 70 N. E. 1106)]; People *v.* Platt, 92 N. Y. 349, 36 N. Y. Suppl. 531; People *v.* Coleman, 48 Hun (N. Y.) 602, 1 N. Y. Suppl. 112, 551; People *v.* Zoeller, 15 N. Y. Suppl. 684.

Where a number of certiorari proceedings are brought by distinct sets of relators to review assessments of various parcels of property, and the testimony of experts is necessary, and it will be difficult to bring them together for the purposes of trial in court, the court in the exercise of its discretion may send the proceedings to various referees under orders containing provisions for expediting the proceedings. People *v.* Feitner, 53 Misc. (N. Y.) 334, 104 N. Y. Suppl. 794.

Findings of referee.— Under a statute providing that where the validity of a tax assessment is disputed, it may be submitted to a referee and his report shall constitute part of the proceedings on which the court may determine its validity, the findings of the referee are not conclusive on the court. People *v.* Barker, 28 Misc. (N. Y.) 13, 59 N. Y. Suppl. 926 [*reversed* on other grounds in 48 N. Y. App. Div. 248, 63 N. Y. Suppl. 107 (*reversed* in 165 N. Y. 305, 59 N. E. 137, 151)]. While the tax law (N. Y. Consol. Laws, c. 60, § 290) provides that the testimony in such cases may be taken by a referee and reported with his conclusions, the final determination as to the correctness of the assessing officer's valuation rests with the special term to which he reports and on appeal with the appellate division, and it is not merely the referee's report with the annexed proof which the court has to review but the decision of the special term with all matters upon which it is founded. People *v.* State Tax Com'rs, 196 N. Y. 39, 89 N. E. 581 [*modifying* 128 N. Y. App. Div. 13, 112 N. Y. Suppl. 392], 197 N. Y. 33, 90 N. E. 112.

83. Van Vorst *v.* Kingsland, 23 N. J. L. 85. *Compare* Vreeland *v.* Bergen, 34 N. J. L. 438.

Property partly exempt.—Where an assessment is made of a parcel of realty as a whole, and part of it is found to be exempt from taxation, as being devoted to religious uses, it is proper for the court to set aside so much of the assessment as relates to that portion. Sisters of Peace *v.* Westervelt, 64 N. J. L. 510, 45 Atl. 788.

to the proper amount;[84] or it may reverse the decision of the assessing officers and remit the case for a new assessment.[85] If the assessment is found to be entirely illegal, the proper course is to order it stricken from the roll.[86] On the other hand, if the decision is against the relator, the court may give judgment for the taxes found to be due.[87] But ordering the municipal officers to refund an excess of taxes already paid by the relator is generally a matter of statutory regulation and not within the jurisdiction of the court.[88] Bringing an assessment up for review on certiorari does not usually operate as a stay of proceedings for the collection of the tax.[89]

k. Appeal. Except in so far as regulated by special statute, an appeal from the decision of the court reviewing an assessment on certiorari is governed by the ordinary rules applicable to appeals in final orders.[90] The appellate court will not ordinarily interfere with the lower court's discretion,[91] and will not review the evidence, or at least will not reverse on this ground unless the want of evidence very clearly appears.[92]

l. Costs. If the proceedings result in favor of the respondents, they are entitled to their costs.[93] But the assessors whose action is under review are not to be made personally liable for costs unless it is shown that they acted with gross negligence or in bad faith;[94] and this is not to be imputed to them where they

84. Reese *v.* Sherrer, 49 N. J. L. 610, 10 Atl. 286; Childs *v.* Howland, 48 N. J. L. 425, 4 Atl. 430; People *v.* Ganley, 131 N. Y. 566, 30 N. E. 64 [*affirming* 8 N. Y. Suppl. 563]; People *v.* Carter, 47 Hun (N. Y.) 446; People *v.* Summerville, 56 Misc. (N. Y.) 300, 107 N. Y. Suppl. 575; People *v.* Feitner, 27 Misc. (N. Y.) 371, 58 N. Y. Suppl. 875 [*reversed* on other grounds in 43 N. Y. App. Div. 198, 59 N. Y. Suppl. 327]; People *v.* Haight, 24 Misc. (N. Y.) 425, 53 N. Y. Suppl. 723; People *v.* Tax Com'rs, 16 N. Y. Suppl. 834; People *v.* Zoeller, 15 N. Y. Suppl. 684. *Compare* Conover *v.* Davis, 48 N. J. L. 112, 2 Atl. 667, holding that the court, on certiorari, can only determine matters of fact for the purpose of affirming or reversing, in whole or in part, the tax imposed, and cannot revise the value of the ratables assessed for the purpose of readjusting the assessment.

85. People *v.* Barker, 165 N. Y. 305, 59 N. E. 137, 151; People *v.* Miller, 112 N. Y. App. Div. 880, 98 N. Y. Suppl. 751; People *v.* Wells, 87 N. Y. App. Div. 284, 84 N. Y. Suppl. 277; People *v.* Valentine, 5 N. Y. App. Div. 520, 38 N. Y. Suppl. 1087; People *v.* Fraser, 74 Hun (N. Y.) 282, 26 N. Y. Suppl. 814 [*affirmed* in 145 N. Y. 593, 40 N. E. 165].

86. People *v.* Feitner, 78 N. Y. App. Div. 313, 79 N. Y. Suppl. 975; People *v.* Feitner, 65 N. Y. App. Div. 318, 73 N. Y. Suppl. 97 [*affirmed* in 169 N. Y. 602, 62 N. E. 1099]; People *v.* Valentine, 5 N. Y. App. Div. 520, 38 N. Y. Suppl. 1087.

87. State *v.* Smith, 31 N. J. L. 216; Salmer *v.* Clay County, 20 S. D. 307, 105 N. W. 623.

88. People *v.* Coleman, 48 Hun (N. Y.) 602, 1 N. Y. Suppl. 112, 551; People *v.* Erie County, 51 Misc. (N. Y.) 200, 99 N. Y. Suppl. 1062.

89. Singer Sewing Mach. Co. *v.* State Bd. of Assessors, 54 N. J. L. 90, 22 Atl. 1085; People *v.* Coleman, 48 Hun (N. Y.) 602, 1 N. Y. Suppl. 112, 551.

Certiorari prohibiting increase of assessment.—Where a certiorari from a district court is issued to a board of equalization, commanding it to desist from further proceedings in relation to an increase of an assessment, any attempted action of the board thereafter, increasing the assessment sought to be reviewed, is void. Copper Queen Consol. Min. Co. *v.* Cochise County Bd. of Equalization, 7 Ariz. 364, 65 Pac. 149.

90. See People *v.* Parker, 155 N. Y. 322, 49 N. E. 884; People *v.* Brooklyn Bd. of Assessors, 154 N. Y. 437, 48 N. E. 820; People *v.* Barker, 152 N. Y. 417, 46 N. E. 875; People *v.* New York Tax, etc., Com'rs, 101 N. Y. 652, 4 N. E. 752; People *v.* Keator, 101 N. Y. 610, 3 N. E. 903 (must be taken within sixty days after service of a copy of the judgment); People *v.* Feitner, 61 N. Y. App. Div. 129, 70 N. Y. Suppl. 500 [*affirmed* in 171 N. Y. 641, 63 N. E. 786]; People *v.* Valentine, 5 N. Y. App. Div. 520, 38 N. Y. Suppl. 1087. And see, generally, APPEAL AND ERROR, 2 Cyc. 474.

91. People *v.* Garmon, 63 N. Y. App. Div. 530, 71 N. Y. Suppl. 826 [*affirming* 34 Misc. 350, 69 N. Y. Suppl. 819].

92. People *v.* Haupt, 104 N. Y. 377, 10 N. E. 871; State *v.* Williams, 123 Wis. 61, 100 N. W. 1048.

93. People *v.* Coleman, 18 Abb. N. Cas. (N. Y.) 246.

Costs on appeal from the determination of a special term on a return to a certiorari are in the discretion of the court. People *v.* New York Tax, etc., Com'rs, 101 N. Y. 652, 4 N. E. 752.

94. People *v.* Flagg, 33 N. Y. App. Div. 642, 54 N. Y. Suppl. 1112; People *v.* Russell, 57 Hun (N. Y.) 53, 10 N. Y. Suppl. 391; People *v.* Lawlor, 36 Misc. (N. Y.) 594, 73 N. Y. Suppl. 1082 [*reversed* on other grounds in 74 N. Y. App. Div. 553, 77 N. Y. Suppl. 840

honestly applied their judgment, in a case not free from doubt, although their decision was wrong.[95]

4. Mandamus to Correct Assessment[96] — a. Nature and Scope of Remedy — (i) *Compelling Official Action.* If assessors omit property from their lists which should have been assessed, mandamus lies on the relation either of the proper public officer or of an individual taxpayer to compel them to make an assessment of it, although their judgment as to the amount of the assessment will not be controlled by this writ.[97] Assessors may also be required in this manner to supply defects or correct informalities in the assessment roll,[98] to transfer property from the name of the original owner to the name of a purchaser thereof,[99] or to enter on the roll the changes ordered by the board of equalization.[1] In like manner the writ lies to compel the board of equalization to hear and determine complaints of taxpayers, although of course their judgment must be left free.[2] But even where this writ would otherwise be available, the right to it may be lost by the laches or unreasonable delay of the relator.[3] The writ will not go to the assessors or board after they have completed their work on the assessment roll and it has been placed in the hands of the collector.[4]

(ii) *Correcting Errors in Assessment.* Mandamus does not lie to control any administrative officer in the discharge of duties which require the exercise of judgment and discretion on his part, but only to enforce the performance of a plain ministerial duty. Hence the writ will not be granted to enable a taxpayer to obtain a reduction of an assessment which he alleges to be excessive.[5]

(*affirmed* in 179 N. Y. 535, 71 N. E. 1136)]; People *v.* Barker, 25 N. Y. Suppl. 393; People *v.* Zoeller, 15 N. Y. Suppl. 684; People *v.* McComber, 7 N. Y. Suppl. 71; People *v.* Keator, 67 How. Pr. (N. Y.) 277.

95. People *v.* Rushford, 81 N. Y. App. Div. 298, 80 N. Y. Suppl. 891; People *v.* Williams, 90 Hun (N. Y.) 501, 36 N. Y. Suppl. 65; People *v.* Christie, 14 N. Y. St. 525.

96. Mandamus to compel levy and assessment generally see Mandamus, 26 Cyc. 320 *et seq.*

97. *California.*— Hyatt *v.* Allen, 54 Cal. 353; People *v.* Shearer, 30 Cal. 645.

Illinois.— State Bd. of Equalization *v.* People, 191 Ill. 528, 61 N. E. 339, 58 L. R. A. 513.

Louisiana.— State *v.* Orleans Parish Bd. of Assessors, 52 La. Ann. 223, 26 So. 872.

Maine.— Knight *v.* Thomas, 93 Me. 494, 45 Atl. 499.

West Virginia.— State *v.* Herrald, 36 W. Va. 721, 15 S. E. 974.

See 45 Cent. Dig. tit. "Taxation," § 911.

Effect of delay.—An application for mandamus to compel the assessors to place omitted property on the roll will be denied when made so late as to deprive the owners of any right to review the assessment. Maurer *v.* Cliff, 94 Mich. 194, 53 N. W. 1055. And see Knight *v.* Thomas, 93 Me. 494, 45 Atl. 499.

98. People *v.* Ontario County, 114 N. Y. App. Div. 915, 100 N. Y. Suppl. 1136 [*affirming* 50 Misc. 63, 100 N. Y. Suppl. 330]; Harris *v.* State, 96 Tenn. 496, 34 S. W. 1017.

Supplying affidavit.—Where assessors omit to incorporate in their affidavit to the assessment roll a clause required by the statute, they will not be compelled by mandamus to add it, if it appears that, with the affidavit so amended, they could not truthfully make oath to it. People *v.* Fowler, 55 N. Y. 252.

99. Dye *v.* State, 73 Ohio St. 231, 76 N. E. 829.

1. People *v.* Strother, 67 Cal. 624, 8 Pac. 383; Union Oil Co. *v.* Campbell, 48 La. Ann. 1350, 20 So. 1007; State *v.* Bd. of Assessors, 30 La. Ann. 261. See also *supra*, VII, B, 7, f, (iv), (a).

2. Loewenthal *v.* People, 192 Ill. 222, 61 N. E. 462; Gunning *v.* People, 76 Ill. App. 574; People *v.* Wells, 110 N. Y. App. Div. 336, 97 N. Y. Suppl. 333; People *v.* Knight, 66 N. Y. App. Div. 150, 72 N. Y. Suppl. 929. See also People *v.* Delaware County, 60 N. Y. 336 [*reversing* 2 Hun 102, 4 Thomps. & C. 336 (*reversing* 47 How. Pr. 24)].

3. People *v.* Olsen, 215 Ill. 620, 74 N. E. 785. And see Knight *v.* Thomas, 93 Me. 494, 45 Atl. 499.

4. Gaither *v.* Green, 40 La. Ann. 362, 4 So. 210; Colonial L. Assur. Co. *v.* New York County, 24 Barb. (N. Y.) 166, 13 How. Pr. 305, 4 Abb. Pr. 84. And see Knight *v.* Thomas, 93 Me. 494, 45 Atl. 499.

5. *Iowa.*— Meyer *v.* Dubuque County, 43 Iowa 592.

Kentucky.— Southern Pac. R. Co. *v.* Com., 134 Ky. 410, 120 S. W. 309.

Maryland.— Baltimore County *v.* Winand, 77 Md. 522, 26 Atl. 1110.

Massachusetts.— Gordon *v.* Sanderson, 165 Mass. 375, 43 N. E. 128; Gibbs *v.* Hampden County, 19 Pick. 298; *In re* Morse, 18 Pick. 443.

Michigan.— Atty.-Gen. *v.* Sanilac County, 42 Mich. 72, 3 N. W. 260.

Nebraska.— State *v.* Savage, 65 Nebr. 714, 91 N. W. 716.

But where the assessors have acted illegally and without jurisdiction, in assessing property which is not taxable or not within their territory, they may be required by mandamus to strike the assessment from the roll.[6] And so they may be required to deduct an unwarranted increase in the assessment, or otherwise to correct it when they have violated their plain statutory duty either in fixing it originally or in changing it contrary to law.[7] The correction of merely clerical or mathematical errors may also be obtained by means of this writ.[8]

b. Existence of Other Remedy. Mandamus is an extraordinary remedy and is not granted where the petitioner has a full and adequate remedy in the ordinary course of law; hence this writ cannot be used as a means of correcting a tax assessment where there is an available and sufficient remedy by appeal or certiorari.[9]

5. Injunction to Restrain Assessment — a. In General. Although injunction may be an appropriate remedy to prevent the collection of an illegal tax already assessed,[10] the courts set their faces strongly against the use of this writ to restrain an expected or intended but uncompleted assessment, the functions of assessors being quasi-judicial and the illegality or impropriety of the assessment not being ordinarily a matter of anticipation but a matter for consideration after the assessment is made;[11] nor will an assessment be restrained for mere irregulari-

Nevada.—Hardin *v.* Guthrie, 26 Nev. 246, 66 Pac. 744.

Pennsylvania.— Bedford Borough *v.* Anderson, 45 Pa. St. 388.

Wisconsin.— Brown *v.* Oneida County, 103 Wis. 149, 79 N. W. 216.

Canada.— *In re* Dickson, 10 U. C. Q. B. 395.

See 45 Cent. Dig. tit. "Taxation," §§ 911, 912. See also Mandamus, 26 Cyc. 323.

Unconstitutionality of statute.— To correct an alleged error in a tax duplicate on the ground that the statute under which the assessment was made is unconstitutional is not a plain ministerial duty for which mandamus may be granted. *Ex p.* Lynch, 16 S. C. 32.

6. Anne Arundel County *v.* Baltimore Sugar Refining Co., 99 Md. 481, 58 Atl. 211; People *v.* Wilson, 119 N. Y. 515, 23 N. E. 1064; People *v.* New York Tax, etc., Com'rs, 41 Hun (N. Y.) 373; People *v.* Lockport, 46 Barb. (N. Y.) 588, 598; People *v.* Olmsted, 45 Barb. (N. Y.) 644; People *v.* Barton, 44 Barb. (N. Y.) 148; Utica Bank *v.* Utica, 4 Paige (N. Y.) 399, 27 Am. Dec. 72; Smith *v.* King, 14 Oreg. 10, 12 Pac. 8; State *v.* Lafayette County, 3 Wis. 816. See also Mandamus, 26 Cyc. 324. But *compare* Steel *v.* Fell, 29 Oreg. 272, 45 Pac. 794.

Where a county trustee erroneously refuses to take jurisdiction and hear a proceeding by a state revenue agent for the reassessment or back assessment of taxes on property, mandamus is the proper remedy to compel him to do so. State *v.* Taylor, 119 Tenn. 229, 104 S. W. 242.

7. State *v.* Dodge County, 20 Nebr. 595, 31 N. W. 117; People *v.* Priest, 180 N. Y. 532, 72 N. E. 1149 [*affirming* 90 N. Y. App. Div. 520, 85 N. Y. Suppl. 481]; People *v.* Olmsted, 45 Barb. (N. Y.) 644; Adriance *v.* New York, 12 How. Pr. (N. Y.) 224; State *v.* Covington, 35 S. C. 245, 14 S. E. 499; State *v.* Boyd, 35 S. C. 233, 14 S. E. 496; State *v.* Cromer, 35 S. C. 213, 14 S. E. 493. And see State *v.* Raine, 47 Ohio St. 447, 25 N. E. 54, holding that mandamus will issue to a county auditor to compel him to correct errors committed by him for several years in transferring to the tax duplicates deductions illegally made by the annual board of equalization, although these corrections present difficulties requiring the exercise of a sound judgment coupled with an extensive knowledge of the law.

8. People *v.* Schoharie County, 39 Misc. (N. Y.) 162, 79 N. Y. Suppl. 145; People *v.* Wilson, 7 N. Y. Suppl. 627 [*affirmed* in 119 N. Y. 515, 23 N. E. 1064].

9. Ridley *v.* Doughty, 77 Iowa 226, 42 N. W. 178; State *v.* Drexel, 75 Nebr. 751, 107 N. W. 110; McGee *v.* State, 32 Nebr. 149, 49 N. W. 220; People *v.* Keefe, 119 N. Y. App. Div. 713, 104 N. Y. Suppl. 154 [*affirmed* in 190 N. Y. 555, 83 N. E. 1130] (holding that certiorari and not mandamus is the proper remedy to review an assessment for taxation made by officers having jurisdiction to make the assessment); People *v.* Wells, 110 N. Y. App. Div. 336, 97 N. Y. Suppl. 333; People *v.* Feitner, 72 N. Y. App. Div. 45, 76 N. Y. Suppl. 219; People *v.* Board of Taxes, etc., 55 N. Y. App. Div. 544, 67 N. Y. Suppl. 241; People *v.* Feitner, 44 N. Y. App. Div. 239, 60 N. Y. Suppl. 614; James *v.* Bucks County, 13 Pa. St. 72.

A remedy by suit to recover taxes paid under protest is not such an adequate remedy as to prevent the issue of mandamus to reduce an assessment of personal property the valuation of which has been wrongfully increased by the county auditor. State *v.* Cromer, 35 S. C. 213, 14 S. E. 493.

10. See *infra*, X, D, 2.

11. *Indiana.*— McConnell *v.* Hampton, 164 Ind. 547, 73 N. E. 1092.

Michigan.—Hiller *v.* Grandy, 13 Mich. 540.

Missouri.— State *v.* Hager, 92 Mo. 511, 4 S. W. 925.

New Mexico.— Albuquerque First Nat. Bank *v.* Albright, 13 N. M. 514, 86 Pac. 548.

ties.[12] Still the writ is allowed in some cases, where any attempted action on the part of the assessors with reference to assessing the particular property would be clearly illegal or a mere usurpation of power,[13] or where the employment of this remedy is necessary to prevent a clouding of title,[14] or irreparable injury to complainant;[15] or where, as in other cases of equitable jurisdiction, a writ of injunc-

New York.— Western R. Co. *v.* Nolan, 48 N. Y. 513; Messeck *v.* Columbia County, 50 Barb. 190.

North Carolina.— North Carolina R. Co. *v.* Alamance County, 82 N. C. 259.

Ohio.— Wagner *v.* Zumstein, 10 Ohio Dec. (Reprint) 515, 21 Cinc. L. Bul. 317.

Texas.— Missouri, etc., R. Co. *v.* Shannon, 100 Tex. 379, 100 S. W. 138, 10 L. R. A. N. S. 681 [*affirming* (Civ. App. 1906) 97 S. W. 527]; Chisholm *v.* Adams, 71 Tex. 678, 10 S. W. 336.

West Virginia.— Armstrong *v.* Taylor County Ct., 41 W. Va. 602, 24 S. E. 993.

Wisconsin.—Chicago, etc., R. Co. *v.* State, 128 Wis. 553, 108 N. W. 557.

United States.— Albuquerque First Nat. Bank *v.* Albright, 208 U. S. 548, 28 S. Ct. 349, 52 L. ed. 614 [*affirming* 13 N. M. 514, 86 Pac. 548], holding that equity will not enjoin a reassessment of a tax on the stock and real property of a national bank because of the apprehension that the statute will be violated by the assessing officer in making the assessment.

See 45 Cent. Dig. tit. "Taxation," § 913.

Jurisdiction of federal courts.— The courts of the United States have no power to control or restrain the taxing power of a state exercised within its constitutional limits. New York Bank of Commerce *v.* New York, 2 Black (U. S.) 620, 17 L. ed. 451. But see Secor *v.* Singleton, 35 Fed. 376, holding that a suit against state and county officers to restrain the assessment of exempt property is not in name or effect a suit against the state, and a decree of a federal court enjoining them is not void.

Misapplication of funds.—A general assessment of taxes for county purposes cannot be enjoined on the ground that the board of county commissioners contemplate an unlawful use of the funds when collected. Madison County *v.* Brown, 28 Ind. 128.

12. Ashley County Equalization Bd. *v.* Land Owners, 51 Ark. 516, 11 S. W. 822; Covington *v.* Rockingham, 93 N. C. 134.

13. Schaeffer *v.* Ardery, 241 Ill. 27, 89 N. E. 294 (valuation unauthorized by law); Bates *v.* Parker, 227 Ill. 120, 81 N. E. 334 (equity will review an assessment levied on property that the taxpayer did not own at the time of the assessment, or on property which was exempt from taxation, or where the assessment was made from a wrongful or fraudulent motive on the part of the assessor, but not for excessive valuation unless so grossly out of proportion to actual value as to indicate dishonesty); Schley *v.* Montgomery County, 106 Md. 407, 67 Atl. 250; Schley *v.* Lee, 106 Md. 390, 67 Atl. 252; Briscoe *v.* McMillan, 117 Tenn. 115, 100 S. W. 111 (holding that the maintenance of a bill to enjoin an illegal assessment of taxes is not prevented by a statute prohibiting the use of injunction to forbid or hinder or delay the collection of taxes, nor by a provision that the action of the state board of equalization shall be final and conclusive). See also Morgan's Louisiana, etc., R., etc., Co. *v.* Pecot, 50 La. Ann. 737, 23 So. 948.

Want of jurisdiction see Hart *v.* Smith, 159 Ind. 182, 64 N. E. 661, 95 Am. St. Rep. 280, 58 L. R. A. 949; Poe *v.* Howell, (N. M. 1901) 67 Pac. 62; Central Pac. R. Co. *v.* Evans, 111 Fed. 71.

Lack of quorum.—Where a decision of the state board of equalization in back tax proceedings is void because there was no quorum present to hear complainant's appeal before such board, a bill is maintainable to enjoin enforcement of the judgment. Smoky Mountain Land, etc., Co. *v.* Lattimore, 119 Tenn. 620, 105 S. W. 1028.

Unconstitutional statute.— Injunction lies to restrain the assessment of property under a statute alleged to be unconstitutional. Green *v.* Hutchinson, 128 Ga. 379, 57 S. E. 353; Union Pac. R. Co. *v.* Alexander, 113 Fed. 347. And it is the proper remedy for an assessment made on unconstitutional principles. Fargo *v.* Hart, 193 U. S. 490, 24 S. Ct. 498, 48 L. ed. 761.

Partial illegality.— Where the void part of an assessment can be separated from the valid part an injunction will issue to restrain the extension of the tax as to the void portion. Robinson *v.* McKenney, 239 Ill. 343, 88 N. E. 264; Cox *v.* Hawkins, 199 Ill. 68, 64 N. E. 1093. But see Ottawa Glass Co. *v.* McCaleb, 81 Ill. 556.

Exempt property.— Injunction lies to restrain an assessment upon property which is exempt from taxation. Duckett *v.* Gerig, 223 Ill. 284, 79 N. E. 94; Baldwin *v.* Shine, 84 Ky. 502, 2 S. W. 164, 8 Ky. L. Rep. 496; Morris Canal, etc., Co. *v.* Jersey City, 12 N. J. Eq. 227; Jones *v.* Davis, 35 Ohio St. 474; Memphis, etc., R. Co. *v.* Gaines, 3 Tenn. Ch. 478. But where it appears that the owner purposely put his property into a form in which it would not be taxable, as a mere device to escape the payment of taxes, equity will not enjoin its assessment. Sisler *v.* Foster, 72 Ohio St. 437, 74 N. E. 639. And see *supra*, III, A, 1, e. See also Hale *v.* Jefferson County, 39 Mont. 137, 101 Pac. 973, as to the burden of proving property taxable being on the state.

14. Scribner *v.* Allen, 12 Minn. 148; Laughlin *v.* Santa Fe County, 3 N. M. 264, 5 Pac. 817; Von Beck *v.* Rondout, 15 Abb. Pr. (N. Y.) 48; Gregg *v.* Sanford, 65 Fed. 151, 12 C. C. A. 525; Sanford *v.* Gregg, 58 Fed. 620.

15. Scribner *v.* Allen, 12 Minn. 148; State

tion is necessary in order to prevent a multiplicity of suits, growing out of the assessment.[16]

b. Other Remedies Available. Injunction will not issue to restrain the assessment of taxes in any case where the complainant has a plain and adequate remedy at law by appeal, certiorari, or other appropriate proceedings.[17]

c. Parties. The bill for injunction may generally be maintained by any person having a direct and immediate interest in the result.[18] The proper defendant is the officer having charge of the assessment or who proposes to take the action intended to be averted, although not one who has retired from office.[19]

6. Action to Reduce Assessment or Abate Tax[20] — a. Nature and Scope of Remedy. In some states the laws provide a remedy against excessive or erroneous assessments by a suit or petition in a court of general jurisdiction, in the nature of a bill in equity,[21] which may be maintained by any person aggrieved by

v. Parkville, etc., R. Co., 32 Mo. 496; Von Beck *v.* Rondout, 15 Abb. Pr. (N. Y.) 48.

16. Scribner *v.* Allen, 12 Minn. 148; Morris Canal, etc., Co. *v.* Jersey City, 12 N. J. Eq. 227; Von Beck *v.* Rondout, 15 Abb. Pr. (N. Y.) 48; Singer Mfg. Co. *v.* Adams, 165 Fed. 877, 91 C. C. A. 461; Sanford *v.* Poe, 69 Fed. 546, 16 C. C. A. 305, 60 L. R. A. 641; Western Union Tel. Co. *v.* Poe, 61 Fed. 449.

17. *District of Columbia.*— Alexandria Canal, etc., Co. *v.* District of Columbia, 5 Mackey 376.

Illinois.— Schæffer *v.* Ardery, 241 Ill. 27, 89 N. E. 294.

Indiana.— Harrison County *v.* McCarty, 27 Ind. 475; Stephens *v.* Smith, 30 Ind. App. 120, 65 N. E. 546.

Iowa.— Security Sav. Bank *v.* Carroll, 128 Iowa 230, 103 N. W. 379; West Bend Dist. Tp. *v.* Brown, 47 Iowa 25.

Kentucky.— Ryan *v.* Louisville, 133 Ky. 714, 118 S. W. 992; Baldwin *v.* Shine, 84 Ky. 502, 2 S. W. 164, 8 Ky. L. Rep. 496.

New York.— Western R. Co. *v.* Nolan, 48 N. Y. 513.

Ohio.— Mills *v.* Cincinnati Bd. of Equalization, 1 Cinc. Super. Ct. 566.

Oregon.— Goodnough *v.* Powell, 23 Oreg. 525, 32 Pac. 396.

Pennsylvania.— Nichols *v.* Wilkes-Barre, 9 Kulp 371.

Tennessee.—Briscoe *v.* McMillan, 117 Tenn. 115, 100 S. W. 111; Louisville, etc., R. Co. *v.* Bate, 12 Lea 573.

Wisconsin.— Foster *v.* Lowe, 131 Wis. 54, 110 N. W. 829, 132 Wis. 268, 111 N. W. 688; West *v.* Ballard, 32 Wis. 168.

United States.— Louisville, etc., R. Co. *v.* Bate, 22 Fed. 480.

Canada.— Grier *v.* St. Vincent, 13 Grant Ch. (U. C.) 512.

See 45 Cent. Dig. tit. "Taxation," § 914.

18. Biggs *v.* Buckingham, 6 Del. Ch. 267, 23 Atl. 858 (who may sue to enjoin levy court from taking off names from the assessment list); Collins *v.* Davis, 57 Iowa 256, 10 N. W. 643 (holding that an action to restrain a city council from making an unlawful reduction of the assessment of a corporation may be maintained by a citizen and resident taxpayer, although he has no greater interest in the matter than any other taxpayer); Wicomico County *v.* Bancroft, 135 Fed. 977, 70 C. C. A. 287 [*reversed* on other grounds in 203 U. S. 112, 27 S. Ct. 21, 51 L. ed. 112] (holding that a holder of mortgage bonds of a railroad may sue to enjoin its illegal taxation, if the mortgage trustee refuses to sue). *Compare* Wyandotte, etc., Bridge Co. *v.* Wyandotte County, 10 Kan. 326, holding that a private citizen cannot sue to restrain the levy of a tax on any or all of the property in the county.

19. Chandler *v.* Dix, 194 U. S. 590, 24 S. Ct. 766, 48 L. ed. 1129.

20. Abatement of amount of tax see *infra*, IX, B.

Existence of remedy as barring right to recover back taxes paid see *infra*, IX, C, 2.

Right to trial by jury in proceedings to abate taxes see Juries, 24 Cyc. 136.

21. See the statutes of the several states. And see U. S. Envelope Co. *v.* Vernon, 72 Conn. 329, 44 Atl. 478; Sweetser *v.* Manning, 200 Mass. 378, 86 N. E. 897; Sullivan *v.* Boston, 198 Mass. 119, 84 N. E. 443; Rockingham Ten Cent Sav. Bank *v.* Portsmouth, 52 N. H. 17; Cocheco Mfg. Co. *v.* Strafford, 51 N. H. 455.

Limitation of action see New Orleans Warehouse Co. *v.* Marrero, 51 La. Ann. 343, 24 So. 800. In New Hampshire a petition for the abatement of a tax must be brought within nine months after notice of the tax. Larkin *v.* Portsmouth, 59 N. H. 26.

Retrospective effect of statute.— A statute giving a right to apply to a court for the abatement of an inequitable tax may be invoked in respect to a cause of action accruing before its passage, as it merely changes the mode of judicial procedure to enforce a right without affecting the right itself. *In re* Wolfeborough Sav. Bank, 69 N. H. 84, 39 Atl. 522.

In North Dakota the law gives the court power to review an assessment in a proceeding brought to obtain a tax judgment, and to reduce the tax if it appears that the land has been unfairly or unequally assessed. Wells County *v.* McHenry, 7 N. D. 246, 74 N. W. 241.

Attorney's fee.— In Louisiana the statute requires the unsuccessful complainant to pay the fee of the attorney appointed to assist the tax collector in the suit. See Methodist

his assessment, or by one having authority to represent him,[22] against the board of assessors or the municipal corporation,[23] and in which the complainant may obtain an abatement or reduction of his assessment if shown to be excessive or disproportionate;[24] or if he shows that some or all of the property assessed is exempt.[25]

b. Conditions Precedent. Before being entitled to maintain an action of this kind the complainant must have exhausted his remedy by appeal to the board of equalization or review,[26] unless the board has refused him an opportunity to be heard or unless he has been prevented from appearing before them by accident or mistake without fault on his own part.[27] Whether he is also obliged to pay or tender so much of the tax as he admits to be just depends on the local statute.[28]

c. Pleading and Evidence. The court will consider only such grounds of objection to the assessment as are set forth in the application or petition,[29] and the cases there made cannot be enlarged by amendments.[30] The burden is on complainant to prove the error, inequality, or injustice in the assessment,[31] by competent and satisfactory evidence.[32]

7. Action to Vacate Assessment or For Reassessment — a. In General. A suit in the nature of a bill in equity may be maintained to cancel or vacate a tax assess-

Episcopal Church South *v.* New Orleans, 107 La. 611, 32 So. 101; Bonner *v.* Board of Assessors, 52 La. Ann. 2062, 28 So. 369.

22. Planters' Crescent Oil Co. *v.* Jefferson Parish Assessor, 41 La. Ann. 1137, 6 So. 809 (holding that a corporation may maintain an action to reduce or annul an assessment on the shares of its capital stock without joining the shareholders as parties); Dewey *v.* Stratford, 40 N. H. 203 (holding that non-resident taxpayers are equally entitled to relief as residents).

One becoming the owner of land after it has been assessed cannot have the taxes abated. Dunham *v.* Lowell, 200 Mass. 468, 86 N. E. 951.

23. U. S. Envelope Co. *v.* Vernon, 72 Conn. 529, 44 Atl. 478; Gay *v.* New Orleans Bd. of Assessors, 34 La. Ann. 370.

24. Manchester Mills *v.* Manchester, 57 N. H. 309. *Compare* Holton *v.* Bangor, 23 Me. 264.

Disproportionate assessment.— Where the constitution requires that all property shall be assessed at its actual cash value, one whose property is assessed at less than its cash value cannot have his assessment reduced because the property of others is assessed at a lower proportionate rate of value; his only right to relief is to have the assessment of such other property raised. Carroll *v.* Alsup, 107 Tenn. 257, 64 S. W. 193.

25. Milford Water Co. *v.* Hopkinton, 192 Mass. 491, 78 N. E. 451; All Saints Parish *v.* Brookline, 178 Mass. 404, 59 N. E. 1003, 52 L. R. A. 778.

26. New Orleans Warehouse Co. *v.* Marrero, 106 La. 130, 30 So. 305; Louisiana Brewing Co. *v.* Bd. of Assessors, 41 La. Ann. 565, 6 So. 823; Shattuck *v.* New Orleans, 39 La. Ann. 206, 1 So. 411; Holton *v.* Bangor, 25 Me. 264; Templeton *v.* Pierce County, 25 Wash. 377, 65 Pac. 553.

27. Trust, etc., Co. *v.* Portsmouth, 59 N. H. 33; Melvin *v.* Weare, 56 N. H. 436.

28. Tampa *v.* Mugge, 40 Fla. 326, 23 So. 489; Bradley *v.* Lincoln County, 60 Wis. 71, 18 N. W. 732, both of which hold that the valid portion of the tax must be paid or tendered. But on the other hand, in South Dakota the complainant need not make such tender but the court must render judgment for such an amount of taxes as it finds to be due. Pettigrew *v.* Moody County, 17 S. D. 275, 96 N. W. 94.

29. White *v.* Portland, 63 Conn. 18, 26 Atl. 342; Reimers *v.* Merrick County, 82 Nebr. 639, 118 N. W. 113; People *v.* Feitner, 77 N. Y. App. Div. 428, 79 N. Y. Suppl. 309.

30. White *v.* Portland, 63 Conn. 18, 26 Atl. 342.

31. New Orleans Cotton Exch. *v.* Bd. of Assessors, 37 La. Ann. 423; Tragar *v.* Clayton, McGloin (La.) 228; Brooks *v.* West Springfield, 193 Mass. 190, 79 N. E. 337; Clark *v.* Middleton, 74 N. H. 188, 66 Atl. 115.

32. New Orleans Cotton Exch. *v.* Bd. of Assessors, 39 La. Ann. 95, 1 So. 272; Page *v.* Melrose, 186 Mass. 361, 71 N. E. 787; Clark *v.* Middleton, 74 N. H. 188, 66 Atl. 115; Dewey *v.* Stratford, 42 N. H. 282. See also Hager *v.* Citizens' Nat. Bank, 127 Ky. 192, 105 S. W. 403, 32 Ky. L. Rep. 95.

The appraisal complained of may be compared with the appraisal of other real estate in the same town, for the purpose of ascertaining whether the assessment was proportional and whether justice requires an abatement. Manchester Mills *v.* Manchester, 58 N. H. 38.

Proof of title is sufficiently made, for the purposes of such a suit, by showing that the complainant has paid the taxes on the lands in question for four successive years, claiming to own them. Dewey *v.* Stratford, 42 N. H. 282.

Estoppel of complainant.— A statement published by a corporation in regard to the amount of its assets, verified by its officers and finance committee, cannot be contradicted by the company in an action to reduce an assessment based on that statement.

ment,[33] provided the party complaining has no adequate remedy at law or in the ordinary course of the tax proceedings;[34] and herein the court may order the complainant's assessment to be stricken from the roll,[35] or may even vacate and annul the entire assessment roll,[36] provided adequate grounds for such action on its part are made to appear,[37] as where it casts a cloud on the owner's title,[38] or

Home Ins. Co. *v.* Bd. of Assessors, 48 La. Ann. 451, 19 So. 280.

33. Louisville Water Co. *v.* Clark, 94 Ky. 47, 21 S. W. 246, 14 Ky. L. Rep. 886. See also Kelley *v.* Barton, 174 Mass. 396, 54 N. E. 860.

Jurisdictional amount.— In contesting an assessment, jurisdiction is determined by the amount of taxes demandable on the sum in dispute between the taxpayer and the assessor. Tragar *v.* Clayton, McGloin (La.) 228.

Effect of setting aside.— A valid decree, obtained by proper proceedings in a court of competent jurisdiction, setting aside illegal town taxes, and not appealed from, will prevail against a subsequent decree obtained by the auditor-general for the sale of the land for non-payment of such taxes. Thomas *v.* Auditor-General, 120 Mich. 535, 79 N. W. 812.

34. Buchanan *v.* McFarland, 31 App. Cas. (D. C.) 6; Tragar *v.* Clayton, McGloin (La.) 228; State *v.* Segoine, 53 N. J. L. 339, 21 Atl. 852.

A statute providing a summary remedy by petition to declare an assessment not lawfully made embraces only those assessments in which there is error on the face of the assessment roll, and the remedy is not coextensive with that afforded in equity, and is not available after the property has been sold for taxes and the rights of third persons have intervened. Knight *v.* Matson, 53 Fla. 609, 43 So. 695.

35. Yale University *v.* New Haven, 71 Conn. 316, 42 Atl. 87, 43 L. R. A. 490; Matter of Douglas, 48 Hun (N. Y.) 318, 1 N. Y. Suppl. 126; *In re* Ulster County Sav. Bank, 20 Hun (N. Y.) 481. But *compare In re* Buffalo Mut. Gas-Light Co., 144 N. Y. 228, 39 N. E. 86 (as to authority of county judge); Portland University *v.* Multnomah County, 31 Oreg. 498, 50 Pac. 532 (as to authority of county court).

A reduction of assessment cannot be decreed in a suit brought exclusively for cancellation. Liverpool, etc., Ins. Co. *v.* Bd. of Assessors, 122 La. 98, 47 So. 415.

36. Auditor-General *v.* Pioneer Iron Co., 123 Mich. 521, 82 N. W. 260; *In re* Assessment School Rate, 3 Nova Scotia Dec. 122; Lincoln County *v.* Niagara, 25 U. C. Q. B. 578; *In re* Secord, 24 U. C. Q. B. 142; Truchon *v.* Chicoutimi, 25 Quebec Super. Ct. 55.

A judgment annulling a tax necessarily destroys any tax certificate issued by virtue of such tax and defeats a void deed issued on such certificate. German Nat. Bank *v.* Bayfield County, 139 Wis. 398, 121 N. W. 256; Lamoreux *v.* Bayfield County, 139 Wis. 394, 398, 121 N. W. 255, 256.

37. Buchanan *v.* McFarland, 31 App. Cas. (D. C.) 6; Dade County *v.* Hardee, 56 Fla. 243, 47 So. 350 (holding that the statutory remedy that, where payment of an assessment is refused because of illegality, the person assessed may apply to the circuit court, which, if it finds the assessment illegal, shall declare it not lawfully made, is limited to cases where payment is refused because of the illegality of the assessment and does not meet defects in the levy of the tax); U. S. Fidelity, etc., Co. *v.* Board of Assessors, 122 La. 139, 47 So. 442 (holding that where a taxpayer has been sued for money in possession when as a matter of fact he had no such money, and so stated in his return, the assessment will be canceled); Moffat *v.* Calvert County, 97 Md. 266, 54 Atl. 960 (holding that an error in naming a corporation assessed is not sufficient grounds for vacating the assessment).

Facts arising subsequent to the assessment cannot be made the basis of a proceeding to annul it. Tampa *v.* Kaunitz, 39 Fla. 683, 23 So. 416, 63 Am. St. Rep. 202. But *compare* Com. *v.* New York, etc., Coal Co., 1 Dauph. Co. Rep. (Pa.) 248.

Purpose to misapply funds raised by tax. — That county authorities have levied an unnecessarily large tax, with the purpose, as alleged in the complaint, of applying the excess to an unlawful use, does not justify a court of equity in setting aside the assessment, but it will wait until the authorities vote to expend the money in an unlawful manner, and then interfere by injunction. West *v.* Ballard, 32 Wis. 168.

38. Townsend *v.* New York, 77 N. Y. 542 (holding that to authorize an action to set aside a tax and cancel a lien on land as a cloud on title, the lien must be apparently valid and endanger the owner's title; and that the fact that the tax was unconstitutional is insufficient, as its invalidity will always appear); Trumbull *v.* Palmer, 104 N. Y. App. Div. 51, 93 N. Y. Suppl. 349 (holding that the invalidity of the assessment must be such as can only be shown by extrinsic evidence); Coxe *v.* Town, 10 N. Y. Suppl. 73.

Suit to remove cloud on title.— Notwithstanding a person, whose property has been encumbered by the levy of an illegal tax, has an opportunity to pay the same under duress or protest and thereby secure a remedy to recover back the money, he may at his election, while the tax roll is in the hands of the collector, sue to remove the cloud on the title and incidentally prevent the collection of the tax; and in such a suit an interim injunction should be granted restraining the enforcement of the tax, where it is reasonably probable that plaintiff will recover on

where an excessive valuation is fraudulently or wrongfully put upon the property.[39] But under the power now generally given by statute to the courts to correct irregularities and defects in assessments, such radical action will not be taken if it is possible to do equity by canceling the illegal part of an assessment and allowing the remainder to stand, reducing it to a just amount, apportioning the tax among different pieces of property or different owners when it has been erroneously assessed as a whole, or otherwise adjusting the assessment to the legal rights of the complainant.[40] Such an action must be brought within the time limited by the statute, if any.[41] The question of costs, except when regulated by statute, rests in the discretion of the court.[42]

b. Parties. An action to vacate an illegal assessment may be maintained by any one having a direct interest in the property and who may be affected by the taxes in question.[43] Generally the only necessary defendant is the municipal corporation levying the tax, and not administrative officers or any third persons.[44]

c. Pleading and Evidence. The presumption is in favor of the correctness and regularity of the assessment,[45] and the plaintiff must distinctly and specifically allege the errors or grounds of illegality on which he relies and assume the burden of proving them by competent and satisfactory evidence.[46]

defendant being protected by a bond. A. H. Stange Co. *v.* Merrill, 134 Wis. 514, 115 N. W. 115.

39. Wells, etc., Express *v.* Crawford County, 63 Ark. 576, 40 S. W. 710, 37 L. R. A. 371; Milwaukee Iron Co. *v.* Hubbard, 29 Wis. 51.

40. *Alabama.*— Tennessee Coal, etc., Co. *v.* State, 141 Ala. 103, 37 So. 433.

Nebraska.— Lynam *v.* Anderson, 9 Nebr. 367, 2 N. W. 732.

New Jersey.— Blume *v.* Bowes, 65 N. J. L. 470, 47 Atl. 487; Press Printing Co. *v.* Bd. of Assessors, 51 N. J. L. 75, 16 Atl. 173; State *v.* Montclair, etc., R. Co., 43 N. J. L. 524.

New York.— *In re* Auchmuty, 90 N. Y. 685; People *v.* Feitner, 75 N. Y. Suppl. 1086.

South Dakota.— Rochford *v.* Fleming, 10 S. D. 24, 71 N. W. 317.

See 45 Cent. Dig. tit. "Taxation," § 925.

41. Hurt *v.* Bristol, 104 Va. 213, 51 S. E. 223; Wells *v.* Lincoln Dist. Bd. of Education, 20 W. Va. 157; Gilkey *v.* Merrill, 67 Wis. 459, 30 N. W. 733, not before the taxes have been extended. See also *In re* Union College, 129 N. Y. 308, 29 N. E. 460, holding that the statutory requirement that any proceeding to test the validity of any "sale" of land for taxes shall be commenced within one year from the passage of the statute, does not apply to a proceeding to test the validity of an "assessment."

42. State *v.* New Orleans, 105 La. 768, 30 So. 97; Newark Brass Works *v.* State Bd. of Assessors, 63 N. J. L. 500, 43 Atl. 695; People *v.* Pratt, 19 N. Y. Suppl. 565, 22 N. Y. Civ. Proc. 294; Manor Real Estate, etc., Co. *v.* Cooner, 209 Pa. St. 531, 58 Atl. 918.

43. Thomas *v.* Auditor-General, 120 Mich. 535, 79 N. W. 812 (joinder of plaintiffs having a common interest in vacating the assessment); Kent *v.* Exeter, 68 N. H. 469, 44 Atl. 607 (administrator of deceased taxpayer); Spear *v.* Door County, 65 Wis. 298, 27 N. W. 60 (holding that a mortgagor who has covenanted to pay taxes may sue to set aside an illegal tax even after foreclosure and sale); Pier *v.* Fond du Lac County, 53 Wis. 421, 10 N. W. 686 (former owner of land who conveyed it by warranty deed with full covenants, under which a liability might arise if a hostile title were acquired under the tax assessment).

44. *Florida.*— Pensacola *v.* Louisville, etc., R. Co., 21 Fla. 492, holding that neither the city tax collector nor the county tax assessor is a necessary party to a petition to declare an assessment unlawful.

Michigan.— Thomas *v.* Auditor-General, 120 Mich. 535, 79 N. W. 812; Adams *v.* Auditor-General, 43 Mich. 453, 5 N. W. 457.

Missouri.— Newmeyer *v.* Missouri, etc., R. Co., 52 Mo. 81, 14 Am. Rep. 394, state not necessary party.

New York.— *In re* Jones, 18 Hun 327, holding that a purchaser of the property at a tax-sale is not a necessary party to a proceeding to vacate the assessment.

Wisconsin.— Gilman *v.* Sheboygan County, 79 Wis. 26, 48 N. W. 111, holding that it is not necessary to join parties in whose names plaintiff's land was erroneously assessed.

See 45 Cent. Dig. tit. "Taxation," § 927.

45. Wells, etc., Express *v.* Crawford County, 63 Ark. 576, 40 S. W. 710, 37 L. R. A. 371; Moffat *v.* Calvert County, 97 Md. 266, 54 Atl. 960; Henderson *v.* Hughes County, 13 S. D. 576, 83 N. W. 682. And see Johnson Home *v.* Seneca Falls, 37 N. Y. App. Div. 147, 55 N. Y. Suppl. 803.

46. *Florida.*— Tampa *v.* Kaunitz, 39 Fla. 683, 23 So. 416, 63 Am. St. Rep. 202; Pensacola *v.* Bell, 22 Fla. 466.

Illinois.— Buttenuth *v.* St. Louis Bridge Co., 123 Ill. 535, 17 N. E. 439, 5 Am. St. Rep. 545.

Indiana.— Theobald *v.* Clapp, 43 Ind. App. 191, 87 N. E. 100, judgment for plaintiff held not sustained by the findings.

Iowa.— King *v.* Parker, 73 Iowa 757, 34 N. W. 451.

d. Stay of Proceedings and Reassessment. In some states, by statute, if the court decides that the assessment should be vacated for reasons going to the ground-work of the tax and affecting all the property on the roll, it will stay all proceedings in the action until a general reassessment can be made.[47] If, however, the objections relied on and established affect only the particular assessment before the court, it may simply correct or adjust the complainant's assessment;[48] or if the action necessary to be taken in order to do justice to the complainant more properly belongs to the province of the assessors than to that of the court, those officers may be ordered to make a new assessment.[49]

VIII. LIEN AND PRIORITY.[1]

A. Nature and Creation of Lien — 1. Tax Lien Is Statutory. A tax levied and assessed upon specific property is not a lien on that or any other property of the owner unless expressly made so by statute,[2] and an intention to this

Louisiana.— New Orleans *v.* Walker, 23 La. Ann. 781.

Michigan.— Boyce *v.* Auditor-Gen., 90 Mich. 314, 51 N. W. 457.

New Jersey.— Cossitt *v.* Reimenschneider, 39 N. J. L. 625.

West Virginia.— Hannis Distilling Co. *v.* Berkeley County Ct., 62 W. Va. 442, 407, 59 S. E. 1051, 1054, want of title and ownership held not sufficiently shown by the evidence.

Wisconsin.— Brown *v.* Oneida County, 103 Wis. 149, 79 N. W. 216; Plumer *v.* Marathon County, 46 Wis. 163, 50 N. W. 416, holding that a nonsuit will be denied where the assessment rolls are impeached by *prima facie* evidence, and defendant fails to call the assessors, or to account for not calling them, or in any way to rebut plaintiff's evidence.

See 45 Cent. Dig. tit. "Taxation," § 928.

Showing prejudice to plaintiff.— Where the ground of complaint is that the tax is void for want of authority to levy it, plaintiff may maintain the suit without a showing that he is prejudiced or that the tax is unequally assessed. St. Louis County *v.* Nettleton, 22 Minn. 356.

47. Johnston *v.* Oshkosh, 65 Wis. 473, 27 N. W. 320; Spear *v.* Door County, 65 Wis. 298, 27 N. W. 60; Pratt *v.* Lincoln County, 61 Wis. 62, 20 N. W. 726; Monroe *v.* Ft. Howard, 50 Wis. 228, 6 N. W. 803; Kingsley *v.* Marathon County, 49 Wis. 649, 6 N. W. 317; Single *v.* Stettin, 49 Wis. 645, 6 N. W. 312, Griggs *v.* St. Croix County, 20 Fed. 341.

An action to try title to the land in question will not stay proceedings to set aside a tax assessment. Gilman *v.* Sheboygan County, 79 Wis. 26, 48 N. W. 111.

48. Hixon *v.* Eagle River, 91 Wis. 649, 65 N. W. 366. See also *supra*, VII, C, 7, a.

49. *Maine.*— Dresden *v.* Bridge, 90 Me. 489, 38 Atl. 545.

Michigan.— Auditor-Gen. *v.* Smith, 125 Mich. 576, 85 N. W. 8.

New Jersey.— Crossley *v.* East Orange Tp. Committee, 62 N. J. L. 583, 41 Atl. 712.

New York.— People *v.* Neff, 19 N. Y. App. Div. 590, 46 N. Y. Suppl. 385 [*affirmed* in 154 N. Y. 763, 49 N. E. 1103].

United States.— Maish *v.* Arizona, 164 U. S. 599, 17 S. Ct. 193, 41 L. ed. 567.

1. Of municipal taxes see MUNICIPAL CORPORATIONS, 28 Cyc. 704.

2. *Alabama.*— Daughdrill *v.* Crosby, 25 Ala. 345.

Colorado.— Wason *v.* Major, 10 Colo. App. 181, 50 Pac. 741.

Connecticut.— Albany Brewing Co. *v.* Meriden, 48 Conn. 243.

Delaware.— *In re* Lord, etc., Chemical Co., 7 Del. Ch. 248, 44 Atl. 775.

Idaho.— Palmer *v.* Pettingill, 6 Ida. 346, 55 Pac. 653.

Illinois.— Biggins *v.* People, 106 Ill. 270.

Iowa.— Jaffray *v.* Anderson, 66 Iowa 718, 24 N. W. 527; Garrettson *v.* Scofield, 44 Iowa 35.

Kentucky.— Kentucky Cent. R. Co. *v.* Com., 92 Ky. 64, 17 S. W. 196, 13 Ky. L. Rep. 484. And see Middlesboro *v.* Coal, etc., Bank, 108 Ky. 680, 57 S. W. 497, 22 Ky. L. Rep. 380.

Louisiana.— Stewart's Succession, 41 La. Ann. 127, 6 So. 587; Selby *v.* Levee Com'rs, 14 La. Ann. 434; Hagan *v.* Sompeyrac, 3 La. 154.

Massachusetts.— Dunham *v.* Lowell, 200 Mass. 468, 86 N. E. 951.

Michigan.— Auditor-Gen. *v.* Lake George, etc., R. Co., 82 Mich. 426, 46 N. W. 730.

Mississippi.— Bailey *v.* Fuqua, 24 Miss. 497; Anderson *v.* State, 23 Miss. 459.

Missouri.— Jefferson City *v.* Whipple, 71 Mo. 519.

Montana.— Walsh *v.* Croft, 27 Mont. 407, 71 Pac. 409.

Nebraska.— Spiech *v.* Tierney, 56 Nebr. 514, 76 N. W. 1090; McNish *v.* Perrine, 14 Nebr. 582, 16 N. W. 837.

New Jersey.— Linn *v.* O'Neil, 55 N. J. L. 58, 25 Atl. 273; Morrow *v.* Dows, 28 N. J. Eq. 459.

Ohio.— *In re* Citizens' Bank Assignment, 2 Ohio Dec. (Reprint) 230, 2 West. L. Month. 121.

Oregon.— Ross *v.* Portland, 42 Oreg. 134, 70 Pac. 373.

Pennsylvania.— Parker's Appeal, 5 Pa. St. 390; Burd *v.* Ramsey, 9 Serg. & R. 109; Brooke *v.* Kaufman, 6 Pa. Dist. 513; Lair *v.* Wack, 5 Pa. Dist. 606; Snyder *v.* Mogart, 5 Pa. Dist. 146, 17 Pa. Co. Ct. 1; Kenner *v.*

effect must be clearly manifested in the statute, as the lien will neither be created by implication nor enlarged by construction.[3] Nor will a statutory provision of this kind be given a retrospective operation unless plainly required by its terms.[4] Further, the repeal of the statute will divest the liens which it created, unless they are expressly or impliedly preserved.[5]

2. Prerequisites to Attaching of Lien — a. Validity and Sufficiency of Assessment. In order that a tax may attach as a lien upon particular property it is necessary that there shall have been a valid assessment of it, complete in all essentials, and certain and definite in respect to describing the property, the owner, and the amount of the tax.[6]

Kelly, 19 Pa. Co. Ct. 348; Rutt *v.* Burkey, 18 Pa. Co. Ct. 445; Taylor *v.* Bowling, 18 Pa. Co. Ct. 259; United Security L. Ins., etc., Co. *v.* Dougherty, 18 Pa. Co. Ct. 217; Wetzel *v.* Goodyear, 17 Pa. Co. Ct. 110; Ellis *v.* Kies, 1 Dauph. Co. Rep. 195; Chester *v.* Roan, 8 Del. Co. 66; Wolfe *v.* Reily, 8 Kulp 448; Scranton *v.* Scanlon, 7 Lack. Leg. N. 15; Gubert *v.* Aiello, 3 Lack. Leg. N. 294; Philadelphia *v.* Duffy, 4 Phila. 289.

Rhode Island.— Quimby *v.* Wood, 19 R. I. 571, 35 Atl. 149; People's Sav. Bank *v.* Tripp, 13 R. I. 621.

South Carolina.— Barker *v.* Smith, 10 Rich. 226.

South Dakota.— Miller *v.* Anderson, 1 S. D. 539, 47 N. W. 957, 11 L. R. A. 317.

Tennessee.— State *v.* Campbell, (1897) 41 S. W. 937.

Texas.— Jodon *v.* Brenham, 57 Tex. 655.

West Virginia.— Cabin Creek Dist. Bd. of Education *v.* Old Dominion Iron, etc., Mfg. Co., 18 W. Va. 441.

United States.—Haine *v.* Madison Parish, etc., Levee Com'rs, 19 Wall. 655, 22 L. ed. 223; Tompkins *v.* Little Rock, etc., R. Co., 18 Fed. 344, 5 McCrary 597 [*affirmed* in 125 U. S. 109, 8 S. Ct. 762, 31 L. ed. 615]; Georgetown *v.* Smith, 10 Fed. Cas. No. 5,347, 4 Cranch C. C. 91.

See 45 Cent. Dig. tit. "Taxation," §§ 931, 932.

Power of municipal corporations.— Municipal corporations have no authority to make the taxes levied by them liens on real or personal property, unless power to do so has been granted them by charter or statute. Philadelphia *v.* Greble, 38 Pa. St. 339. See Municipal Corporations, 28 Cyc. 1704.

3. Creighton *v.* Manson, 27 Cal. 613; Anderson *v.* State, 23 Miss. 459; Miller *v.* Anderson, 1 S. D. 539, 47 N. W. 957, 11 L. R. A. 317. *Compare* Snyder *v.* Mogart, 5 Pa. Dist. 146, 17 Pa. Co. Ct. 1, where a statute was held to create a tax lien by necessary implication.

Statute declaring liability of property.—A statute declaring that all personal property subject to taxation shall be liable to be seized and sold for taxes does not make the taxes a lien thereon. *In re* Citizens' Bank Assignment, 2 Ohio Dec. (Reprint) 230, 2 West. L. Month. 121.

Statute giving priority of payment.— No tax lien is created by a statute which merely gives to taxes a preference or prior right of payment as against all other debts or claims against the owner of the property. Anderson *v.* State, 23 Miss. 459.

Under a contract between the state and a corporation, providing for its incorporation, authorizing it to build a railroad, imposing taxes, and making them a lien on its property, the lien for taxes is similar to a mortgage lien. People *v.* Michigan Cent. R. Co., 145 Mich. 140, 108 N. W. 772.

4. Burnet *v.* Dean, 60 N. J. Eq. 9, 46 Atl. 532.

5. See *infra*, VIII, E, 1.

6. *California.*— People *v.* Pearis, 37 Cal. 259; Moss *v.* Shear, 25 Cal. 38, 85 Am. Dec. 94. But see Couts *v.* Cornell, 147 Cal. 560, 82 Pac. 194, 109 Am. St. Rep. 168.

Florida.— L'Engle *v.* Florida Cent., etc., R. Co., 21 Fla. 353.

Illinois.— Sanford *v.* People, 102 Ill. 374.

Louisiana.— Brusle *v.* Sauve, 20 La. Ann. 560.

New Jersey.— Pfeiffer *v.* Miles, 48 N. J. L. 450, 4 Atl. 429.

New York.— Barlow *v.* Saint Nicholas Bank, 63 N. Y. 399, 20 Am. Rep. 547; Burr *v.* Palmer, 53 N. Y. App. Div. 358, 65 N. Y. Suppl. 1056; Rose *v.* Northrup, 41 Misc. 238, 84 N. Y. Suppl. 52 [*affirmed* in 88 N. Y. App. Div. 621, 85 N. Y. Suppl. 1145]; *In re* Van Beuren, 66 N. Y. Suppl. 267.

Texas.— State *v.* Farmer, 94 Tex. 232, 59 S. W. 541.

Utah.— Gillmor *v.* Dale, 27 Utah 372, 75 Pac. 932.

See 45 Cent. Dig. tit. "Taxation," § 935.

Contra.— Peckham *v.* Milliken, 99 Ind. 352; Chester *v.* Roan, 8 Del. Co. (Pa.) 66, holding that a tax lien on land may be valid, although the tax was assessed to the wrong person.

Sufficiency of description of property to create lien see Watkins *v.* Couch, 134 Iowa 1, 111 N. W. 315.

Assessment against owner of land personally.— Under Tax Law, § 89, providing that unpaid taxes may be assessed against the land itself the next year after that for which they are delinquent, where unpaid taxes were assessed each year against the owner of land personally, they did not constitute a lien on the land, and hence a purchaser on foreclosure of a mortgage was not entitled to compel the referee to pay such taxes out of the proceeds of the sale. Greenfield *v.* Beaver, 30 Misc. 366, 62 N. Y. Suppl. 471.

b. Demand.[7] The lien of a tax exists independently of any demand made upon the taxpayer, and hence no such demand is necessary before suing to foreclose the lien.[8]

c. Recording or Registration. In some states, although a tax lien is good in favor of the state against the owner without recording or registry of it, this action is necessary to make it effective as against third persons.[9] But generally the only requirement is that the amount of the tax and the fact of its being delinquent shall be shown by the official tax books or records, or by some official certificate, so that persons interested in the property can ascertain by inspection the existence and amount of the lien.[10]

B. Property to Which Lien Attaches — 1. In General. Where a statutory provision makes taxes a lien on particular kinds of property it will not be extended by construction so as to affect other kinds of property.[11] As a general rule the tax is a lien only on the specific piece or article or aggregate collection of property upon which it is assessed,[12] and binds only such property as is owned by the taxpayer at the time the taxes become delinquent or the lien attaches,[13] and only such property as is situate within the county or other taxing district.[14]

7. See also *infra*, IX, A, 1, a.

8. Hart *v.* Tiernan, 59 Conn. 521, 21 Atl. 1007.

9. Factors', etc., Ins. Co. *v.* Levi, 42 La. Ann. 432, 7 So. 625; Davidson *v.* Lindop, 36 La. Ann. 765; Edwards' Succession, 32 La. Ann. 457; Jacob *v.* Preston, 31 La. Ann. 514; Cochran *v.* Ocean Dry-Dock Co., 30 La. Ann. 1365; New Orleans Sav. Inst. *v.* Leslie, 28 La. Ann. 496; Adams *v.* Wakefield, 26 La. Ann. 592; Parker's Appeal, 8 Watts & S. (Pa.) 449; Bryn Mawr College *v.* Anderson, 10 Pa. Co. Ct. 442; Gulf States Land Co. *v.* Parker, 60 Fed. 974.

Rights of United States.—A state statute requiring that all liens on real property must be recorded in order to affect third parties (La. Const. (1879) art. 176) does not apply to tax liens in favor of the United States. U. S. *v.* Snyder, 149 U. S. 210, 13 S. Ct. 846, 37 L. ed. 705.

Lien on personal property.— In Louisiana it is not necessary that a lien for taxes on personal property shall be registered. Mullan *v.* Creditors, 39 La. Ann. 397, 2 So. 45.

10. *Connecticut.*—New Britain *v.* Mariners' Sav. Bank, 67 Conn. 528, 35 Atl. 505.

Iowa.— Union Cent. L. Ins. Co. *v.* Chapin, 113 Iowa 411, 85 N. W. 791; Jiska *v.* Ringgold County, 57 Iowa 630, 11 N. W. 618. See Watkins *v.* Couch, 134 Iowa 1, 111 N. W. 315.

Louisiana.— Behan *v.* Board of Assessors, 46 La. Ann. 870, 15 So. 397.

Missouri.— See State *v.* Harper, 83 Mo. 670.

Nebraska.— State *v.* Missouri Pac. R. Co., 75 Nebr. 4, 105 N. W. 983.

Pennsylvania.— *In re* Goodwin Gas Stove, etc., Co., 2 Pa. Dist. 483. See Pittsburgh *v.* Hannon, 8 Pa. Dist. 188.

11. Creighton *v.* Manson, 27 Cal. 613; Howard *v.* Augusta, 74 Me. 79; Bailey *v.* Fuqua, 24 Miss. 497.

Tax on bank stock.— Where a statute imposes a tax on shares of stock in incorporated banks, and provides that the bank shall pay the tax, but it is intended that this shall be a mere method of collection and that the tax shall ultimately fall on the stock-holders, the tax does not attach as a lien on the property of the bank. Cleveland Trust Co. *v.* Lander, 19 Ohio Cir. Ct. 271, 10 Ohio Cir. Dec. 452. And see State *v.* Mayhew, 2 Gill (Md.) 487.

12. Philadelphia *v.* McGonigle, 4 Phila. (Pa.) 351; Edmonson *v.* Galveston, 53 Tex. 157; State *v.* Baker, 49 Tex. 763; Clegg *v.* State, 42 Tex. 605. *Compare* Cones *v.* Wilson, 14 Ind. 465.

Railroad property.— All the property of a railroad being assessed as a unit, and the tax being due as a unit, the tax is a lien on all the property assessed. Maricopa, etc., R. Co. *v.* Arizona, 156 U. S. 347, 15 S. Ct. 391, 39 L. ed. 447.

Stock in trade.— A tax assessed on a stock of goods, which is afterward sold as a whole, is not a lien on additional goods added by the vendee, and where the original stock bought by the vendee is all sold out by him, the only things in his hands to which the tax lien attaches are the store fixtures. Chicago Bazaar Co. *v.* McNichols, 13 Colo. App. 154, 56 Pac. 672.

13. Rodgers *v.* Gaines, 73 Ala. 218; U. S. *v.* Pacific R. Co., 27 Fed. Cas. No. 15,984, 4 Dill. 71.

14. Wabash, etc., R. Co. *v.* People, 137 Ill. 181, 27 N. E. 456.

Property of non-residents.— If the property is assessable within the particular county or other tax district, it is generally immaterial, with respect to the creation of a tax lien on it, whether the owner is a resident or non-resident. Edwards *v.* Beaird, 1 Ill. 70. See Harris *v.* Layport, 4 Nebr. (Unoff.) 636, 95 N. W. 851.

Change of county lines.—When, by a change of county boundaries made after land has been assessed for taxes, it falls into another county, the lien of the tax on the land still continues, and the tax collector of the old county may enforce the payment of the tax by sale. Moss *v.* Shear, 25 Cal. 38, 85 Am. Dec. 94.

And of course the tax does not attach, as a lien, to property which the statute exempts from taxation.[15]

2. Lien on Personal Property. Taxes on personal property do not constitute a lien upon it unless it is so declared by the statute.[16] But when such a lien is given it generally attaches to all the taxable personalty of the owner, and not separately to each item or piece of property for the tax assessed against that article.[17]

3. Lien on Real Estate. According to the rules generally in force, the taxes assessed upon a particular parcel or tract of land are a lien upon that alone, and not upon other real estate of the same owner;[18] and if land is assessed to a person having an interest in it less than the fee, the lien generally attaches only to that interest, not to the fee.[19] The lien on land for taxes does not follow fixtures severed therefrom.[20]

4. Taxes Against Personal Property as Lien on Realty. In some of the states taxes assessed upon personal property attach as liens upon any real estate owned by the taxpayer at the time of such assessment or at the time when the taxes become delinquent.[21]

15. See Jetton *v.* University of the South, 208 U. S. 489, 28 S. Ct. 375, 52 L. ed. 584, to the effect that a state statute (Tenn. Acts (1903), c. 258, § 32), assessing leaseholds and making the tax a lien upon the fee, is not to be construed as giving such a lien for a tax on the interest of a lessee where the fee itself is exempt from taxation.

16. Walsh *v.* Croft, 27 Mont. 407, 71 Pac. 409. And see *supra*, VIII, A, 1.

17. Hill *v.* Figley, 23 Ill. 418; Com. *v.* Walker, 80 S. W. 185, 25 Ky. L. Rep. 2122; Farmers' L. & T. Co. *v.* Memminger, 48 Nebr. 17, 66 N. W. 1014; Reynolds *v.* Fisher, 43 Nebr. 172, 61 N. W. 695; Hill *v.* Palmer, 32 Nebr. 632, 49 N. W. 718; Foster, etc., Lumber Co. *v.* Leisure, 3 Nebr. (Unoff.) 267, 91 N. W. 556. But *compare* Jodon *v.* Brenham, 57 Tex. 655. And see Hamilton *v.* His Creditors, 51 La. Ann. 1035, 25 So. 965, holding that an assessment on "merchandise and stock in trade" in New Orleans gives the city no lien on the proceeds of counters, fixtures, and wooden partitions in a bar-room.

Principal and interest of bonds.— Taxes on railroad bonds are a charge on the principal of the debt, although they are to be collected out of the interest. Clopton *v.* Philadelphia, etc., R. Co., 54 Pa. St. 356.

18. *Connecticut.*— Meriden *v.* Maloney, 74 Conn. 90, 49 Atl. 897.

Illinois.— Kepley *v.* Jansen, 107 Ill. 79.

New York.— Hutchinson *v.* Rochester, 92 Hun 393, 36 N. Y. Suppl. 766.

Pennsylvania.— Parker's Appeal, 5 Pa. St. 390. See Philadelphia *v.* Thurlow, 5 Pa. Super. Ct. 600.

Texas.— Edmonson *v.* Galveston, 53 Tex. 157; Marlin *v.* Green, 33 Tex. Civ. App. 421, 78 S. W. 704, 79 S. W. 40.

United States.— Washington *v.* Pratt, 8 Wheat. 681, 5 L. ed. 714.

See 45 Cent. Dig. tit. "Taxation," §§ 939, 940.

Unseated lands see Sinnemahoning Iron, etc., Co. *v.* Cameron County, 12 Pa. Co. Ct. 291. And see Stokely *v.* Boner, 10 Serg. & R. (Pa.) 254; Burd *v.* Ramsey, 9 Serg. & R. (Pa.) 109.

Lien depending on deficiency of personal property.— Under an early statute of Maryland, taxes levied on real estate were not liens on the land where there was a sufficiency of personal property on the premises taxed to pay the same. Dallam *v.* Oliver, 3 Gill (Md.) 445.

19. Buttrick *v.* Nashua Iron, etc., Co., 59 N. H. 392 (land held under contract of purchase not bound for a poll tax assessed against the vendee); Morrison *v.* Bruce, 1 Ohio S. & C. Pl. Dec. 190, 7 Ohio N. P. 200 (leasehold interest); Forbes *v.* Gracey, 94 U. S. 762, 24 L. ed. 313 (possessory title to mining claim on the public domain).

Life-tenant and remainder-man.— Where property is assessed to the tenant for life the lien binds only his interest, not that of the remainder-man. White *v.* Portland, 67 Conn. 272, 34 Atl. 1022; Tabb *v.* Com., 98 Va. 47, 34 S. E. 946, 51 L. R. A. 283. *Contra*, Hadley *v.* Hadley, 114 Tenn. 156, 87 S. W. 250.

20. State *v.* Goodnow, 80 Mo. 271.

21. *Illinois.*— Union Trust Co. *v.* Weber, 96 Ill. 346.

Indiana.— Peckham *v.* Millikan, 99 Ind. 352; Isaacs *v.* Decker, 41 Ind. 410.

Iowa.— Paulson *v.* Rule, 49 Iowa 576; Garrettson *v.* Scofield, 44 Iowa 35.

Kentucky.— Com. *v.* Walker, 80 S. W. 185, 25 Ky. L. Rep. 2122.

Pennsylvania.— Scott *v.* Kerlin, 1 Del. Co. 545.

South Dakota.— Iowa Land Co. *v.* Douglas County, 8 S. D. 491, 67 N. W. 52; Miller *v.* Anderson, 1 S. D. 539, 47 N. W. 957, 11 L. R. A. 317.

Wyoming.— Natrona County *v.* Shaffner, 12 Wyo. 177, 74 Pac. 88, 109 Am. St. Rep. 971.

See 45 Cent. Dig. tit. "Taxation," § 938.

Contra.— Saloy *v.* Woods, 40 La. Ann. 585, 4 So. 209; Mullan *v.* Creditors, 39 La. Ann. 397, 2 So. 45; Linn *v.* O'Neil, 55 N. J. L. 58, 25 Atl. 273.

Titles and interests affected.— Under a statute making taxes on personal property a lien on real estate "owned" by the taxpayer, the mortgagor of land is the "owner" of it,

C. Time When Lien Attaches and Priorities — 1. When Lien Attaches in General. In many states, the time when taxes shall attach as a lien upon property is fixed by statute as of a certain day in the year or other specific time.[22] Where this is not the case, the lien ordinarily attaches as soon as the amount of the tax is definitely fixed and liability for its payment commences, which may be as soon as the assessment of the property is completed and the tax extended on the books,[23] or more usually when the tax warrant or other process or the

even after sale on foreclosure if his right of redemption has not yet expired. Bodertha *v.* Spencer, 40 Ind. 353; New England L. & T. Co. *v.* Young, 81 Iowa 732, 39 N. W. 116, 46 N. W. 1103, 10 L. R. A. 478. So taxes on the personal property of a firm are a lien on the land of a partner. Bibbins *v.* Clark, 90 Iowa 230, 57 N. W. 884, 59 N. W. 290, 29 L. R A. 278. But a statute making personal taxes a lien on real estate of the "person" assessed does not apply to corporations. Com. *v.* Lehigh Valley R. Co., 5 Pa. Co. Ct. 474. And taxes on a husband's personal property are not a lien on land held by himself and his wife in entirety. Morrison *v.* Seybold, 92 Ind 298 Nor does the lien attach to property entered under the homestead laws of the United States prior to the issuance of a patent. Natrona County *v.* Shaffner, 12 Wyo. 177, 74 Pac. 88, 109 Am. St. Rep 971.

Property affected.— The lien of a tax on personalty does not attach to land in another town, in the hands of a purchaser after the assessment and before the delinquency of the tax. Schaeffer *v.* People, 60 Ill. 179. But personal taxes assessed against the owner of improvements on land attach as a lien on the improvements. People *v.* Smith, 123 Cal. 70, 55 Pac. 765.

22. See the statutes of the different states. And see the following cases:

California.— San Diego County *v.* Riverside County, 125 Cal. 495, 58 Pac. 81; Reeve *v.* Kennedy, 43 Cal. 643.

Connecticut.— Briggs *v.* Morse, 42 Conn. 258.

Georgia.— Doe *v.* Deavors, 8 Ga. 479.

Illinois.— Cooper *v.* Corbin, 105 Ill. 224; Fairfield *v.* People, 94 Ill. 244; Almy *v.* Hunt, 48 Ill 45.

Indiana.— Cones *v.* Wilson, 14 Ind. 465.

Iowa.— Plymouth County *v.* Moore, 114 Iowa 700, 87 N. W. 662; Cummings *v.* Easton, 46 Iowa 183; Baldwin *v.* Mayne, 42 Iowa 131.

Kansas.—Atchison, etc., R. Co. *v.* Jones, 20 Kan. 527.

Massachusetts.— Cochran *v.* Guild, 106 Mass. 29, 8 Am. Rep. 296.

Michigan.— Tousey *v.* Post, 91 Mich. 631, 52 N. W. 57; Harrington *v.* Hilliard, 27 Mich. 271.

Missouri.— McLaren *v.* Sheble, 45 Mo. 130; Blossom *v.* Van Court, 34 Mo. 390, 86 Am. Dec. 114.

Nebraska.— Miller *v.* Hurford, 13 Nebr. 13, 12 N. W. 832; Wilhelm *v.* Russell, 8 Nebr. 120; Pettit *v.* Black, 8 Nebr. 52.

New York.— Brown *v.* Goodwin, 75 N. Y. 409; Rundell *v.* Lakey, 40 N. Y. 513.

Pennsylvania.— Kuntz *v.* Schumacher, 120 Pa. St. 131, 13 Atl. 561; Dungan's Appeal, 88 Pa. St. 414; Titusville Second Nat. Bank's Appeal, 85 Pa. St. 528; Philadelphia *v.* Meager, 67 Pa. St. 345; Smith *v.* Simpson, 60 Pa. St. 168; Russell's Appeal, 59 Pa. St. 401; Densmore *v.* Haggerty, 59 Pa. St. 189.

Vermont.— Hutchins *v.* Moody, 34 Vt. 433.

Washington.— Phelan *v.* Smith, 22 Wash. 397, 61 Pac. 31.

See 45 Cent. Dig. tit. "Taxation," § 942.

Fractions of a day.—Where the statute declares that the tax lien shall attach on a certain day, it attaches on the earliest moment of that day, and is effective against a purchaser who takes possession of the premises on the afternoon of that day. Hill *v.* Bacon, 110 Mass. 387.

Not necessarily when payable.— The time when a tax becomes due and payable under a statute does not necessarily fix the time when it becomes a lien. Westhus *v.* Union Trust Co., 164 Fed. 795, 90 C. C. A. 441.

23. *California.*— Reeve *v.* Kennedy, 43 Cal. 643.

Iowa.— Shanafelt *v.* Chandler, (1905) 103 N. W. 976.

Louisiana.— Huckleby *v.* State, 57 Fla. 433, 48 So. 979.

Massachusetts.— Cochran *v.* Guild, 106 Mass. 29, 8 Am. Rep. 296.

Minnesota.— Webb *v.* Bidwell, 15 Minn. 479.

New Jersey.— Cadmus *v.* Fagan, 47 N. J. L. 549, 4 Atl. 323; Hallinger *v.* Zimmerman, 63 N. J. Eq. 100, 51 Atl. 936.

New York.— Dowdney *v.* New York, 54 N. Y. 186; Kern *v.* Towsley, 45 Barb. 150; Post *v.* Leet, 8 Paige 337.

Pennsylvania.— Woods *v.* Van Bonnhorst, 10 Pa. Dist. 640; Chester *v.* Roan, 8 Del. Co. 66.

Texas.— Cruger *v.* Ginnuth, 3 Tex. App. Civ. Cas. § 24.

Vermont.— Hutchins *v.* Moody, 30 Vt. 655.

Washington.— Puyallup *v.* Lakin, 45 Wash. 368, 88 Pac. 578; Klickitat Warehouse Co. *v.* Klickitat County, 42 Wash. 299, 84 Pac. 860

Canada.— Sandall *v.* Kinnear, 27 N. Brunsw. 342.

When "assessed."— When valued by the assessor, personal property is "assessed," within the meaning of Wash. Laws (1903), p. 74, c. 59, § 3, providing that personal property taxes shall be a lien upon all real estate and personal property from the day the assessment is made. Puyallup *v.* Lakin, 45 Wash. 368, 88 Pac. 578.

Relation back of lien.— If the assessment

tax book is delivered to the proper officers for the collection of the tax.[24] But under some statutes there is no lien on personal property until actual seizure or distraint thereof,[25] and taxes on personalty do not become a lien on real estate, in some jurisdictions, until the recovery of a judgment therefor, or at least until application for judgment is made.[26]

2. Priority of Tax Lien — a. In General. It is competent for the legislature to make taxes a paramount lien on the property of the taxpayer, and this has been done in many states, the consequence being that the lien for taxes takes precedence of every other lien or claim upon the property of whatsoever kind, however created, and whether attaching before or after the assessment of the taxes.[27]

is not made until after the date fixed by law, still the lien will relate back to the time designated. McLaren *v.* Sheble, 45 Mo. 130; Blossom *v.* Van Court, 34 Mo. 390, 86 Am. Dec. 114.

Reassessment.— Where an assessment is vacated and a reassessment made and confirmed, the lien attaches as of the date of the original assessment. Cadmus *v.* Fagan, 47 N. J. L. 549, 4 Atl. 323.

24. *Illinois.*— Saup *v.* Morgan, 108 Ill. 326; Cooper *v.* Corbin, 105 Ill. 224; Crescent Livery Co. *v.* Perkins, 44 Ill. App. 373.

Indiana.— Barker *v.* Morton, 19 Ind. 146. And see Cones *v.* Wilson, 14 Ind. 465.

Michigan.— Jacobs *v.* Union Trust Co., 155 Mich. 233, 118 N. W. 921 (holding that as between a vendor and vendee of land, in the absence of express statutory provision, a lien upon land for unpaid taxes does not exist until the amount thereof has been ascertained and has become a charge which may be discharged by payment, and this is at the time the tax roll comes to the hands of the receiver of taxes, and not when the property is listed for assessment); Auditor-Gen. *v.* Lake George, etc., R. Co., 82 Mich. 426, 46 N. W. 730; Eaton *v.* Chesebrough, 82 Mich. 214, 46 N. W. 365.

Minnesota.— Webb *v.* Bidwell, 15 Minn. 479.

Nebraska.— Chamberlain Banking House *v.* Woolsey, 60 Nebr. 516, 83 N. W. 729; Farmers' L. & T. Co. *v.* Memminger, 48 Nebr. 17, 66 N. W. 1014; Reynolds *v.* McMillan, 43 Nebr. 183, 61 N. W. 699; Reynolds *v.* Fisher, 43 Nebr. 172, 61 N. W. 695; Blanchard *v.* Logan County, 2 Nebr. (Unoff.) 516, 89 N. W. 376. Under Comp. St. (1881) c. 77, art. 1, § 139, providing that the tax assessed on personal property is a lien from the time the tax-books were received by the collector, the word "tax-books" meant the tax list with warrant attached, and the filing with the treasurer of a tax list without the warrant required by section 83 did not create a lien on the personal property of the person assessed. Platte Valley Milling Co. *v.* Malmsten, 79 Nebr. 730, 113 N. W. 229.

New York.— Brown *v.* Goodwin, 75 N. Y. 409; Coudert *v.* Huerstel, 60 N. Y. App. Div. 83. 69 N. Y. Suppl. 778; *In re* Board of Education, 59 N. Y. App. Div. 258, 69 N. Y. Suppl. 572 [*reversed* on other grounds in 169 N. Y. 456, 62 N. E. 566]; Burr *v.* Palmer, 53 N. Y. App. Div. 358, 65 N. Y. Suppl. 1056.

North Dakota.— Swenson *v.* Greenland, 4 N. D. 532, 62 N. W. 603.

Vermont.— Hutchins *v.* Moody, 34 Vt. 433. See 45 Cent. Dig. tit. "Taxation," § 942.

25. *California.*— People *v.* Lardner, 30 Cal. 242.

Colorado.— McKay *v.* Batchellor, 2 Colo. 591.

Idaho.— Palmer *v.* Pettingill, 6 Ida. 346, 55 Pac. 653.

Iowa.— Larson *v.* Hamilton County, 123 Iowa 485, 99 N. W. 133; Castle *v.* Anderson, 69 Iowa 428, 29 N. W. 400.

Ohio.— Spence *v.* Frye, 3 Ohio Dec. (Reprint) 11, 2 Wkly. L. Gaz. 103.

United States.—Maish *v.* Bird, 22 Fed. 180; Steubenville, etc.. R. Co. *v.* Tuscarawass County, 22 Fed. Cas. No. 13,388.

26. Parsons *v.* East St. Louis Gas Light, etc., Co., 108 Ill. 380; Saup *v.* Morgan, 108 Ill. 326; Ream *v.* Stone, 102 Ill. 359; Belleville Nail Co. *v.* People, 98 Ill. 399; Binkert *v.* Wabash R. Co., 98 Ill. 205; Metcalf *v.* Davies Screw Co., 17 Fed. Cas. No. 9,495.

27. *Arkansas.*— Biscoe *v.* Coulter, 18 Ark. 423.

Florida.— Spratt *v.* Price, 18 Fla. 289.

Illinois.— Cooper *v.* Corbin, 105 Ill. 224; Dennis *v.* Maynard, 15 Ill. 477; Dunlap *v.* Gallatin County, 15 Ill. 7. See Mix *v.* Ross, 57 Ill. 121.

Indiana.— Indianapolis First Nat. Bank *v.* Hendricks, 134 Ind. 361, 33 N. E. 110, 34 N. E. 218; Jenkins *v.* Newman, 122 Ind. 99, 23 N. E. 683; Isaacs *v.* Decker, 41 Ind. 410.

Iowa.— Paulson *v.* Rule, 49 Iowa 576.

Kansas.— Kerr *v.* Hoskinson, 8 Kan. App. 193, 47 Pac. 172.

Maryland.— American Casualty Ins. Co.'s Case, 82 Md. 535, 34 Atl. 778, 38 L. R. A. 97; State *v.* Mayhew, 2 Gill 487.

Massachusetts.— Parker *v.* Baxter, 2 Gray 185.

Missouri.— Rohrer *v.* Oder, 124 Mo. 24, 27 S. W. 606; Keating *v.* Craig, 73 Mo. 507.

Nebraska.— Medland *v.* Van Etten, 75 Nebr. 79, 106 N. W. 1022; Eddy *v.* Kimerer, 61 Nebr. 498, 85 N. W. 540; Campbell *v.* Gawlewicz, 3 Nebr. (Unoff.) 321, 91 N. W. 569; Mutual Ben. L. Ins. Co. *v.* Siefken, 1 Nebr. (Unoff.) 860, 96 N. W. 603.

New Hampshire.— Eastman *v.* Thayer, 60 N. H. 408.

New Jersey.— Smith *v.* Specht, 58 N. J. Eq. 47, 42 Atl. 599; Lydecker *v.* Palisade Land Co., 33 N. J. Eq. 415; Paterson *v.* O'Neill, 32

But this preference does not belong to the tax lien unless it is so declared by statute, and a law, for example, which merely enacts that taxes shall be a lien on real property does not make them a first lien.[28] A statute creating this extraordinary privilege will not be construed as retrospective unless its language plainly requires that interpretation.[29] There is generally no displacement of prior liens by the tax lien if the law under which the taxes are levied contemplates the separate assessment of various particular interests in land, rather than the holding of the land itself liable.[30]

b. As Affected by Registration. Where the law requires tax liens to be registered or otherwise made a matter of public record, they do not outrank liens or interests acquired previous to such recording.[31]

c. As Against Levy or Attachment. Where the lien of a tax on personal property attaches only from the time of its seizure or distraint, it does not displace a lien previously acquired by the levy of an execution or attachment.[32] But if the tax lien begins from the issuance of a warrant or the placing of the duplicate in the hands of the collector, it is superior to any lien acquired by judicial process after that time.[33]

N. J. Eq. 386; Hardenbergh *v.* Converse, 31 N. J. Eq. 500; Public School Trustees *v.* Trenton, 30 N. J. Eq. 667.

New York.— People *v.* Manhattan F. Ins. Co., 59 N. Y. Suppl. 1007; *In re* Blight, 59 N. Y. Suppl. 1006; Dale *v.* McEvers, 2 Cow. 118.

Ohio.— State *v.* Godfrey, 20 Ohio Cir. Ct. 649, 10 Ohio Cir. Dec. 316; Donohue *v.* Brotherton, 10 Ohio S. & C. Pl. Dec. 47, 7 Ohio N. P. 367.

Pennsylvania.— Eaton's Appeal, 83 Pa. St. 152; Dungan's Appeal, 68 Pa. St. 204, 8 Am. Rep. 169; *In re* Wallace, 59 Pa. St. 401; Snyder *v.* Mogart, 5 Pa. Dist. 146, 17 Pa. Co. Ct. 1; Strasburger *v.* Guinter, 23 Pa. Co. Ct. 481; Ancoma *v.* Becker, 14 Pa. Co. Ct. 73; McFarland's Estate, 28 Pittsb. Leg. J. 49.

South Carolina.— Shell *v.* Duncan, 31 S. C. 547, 10 S. E. 330, 5 L. R. A. 821; Butler *v.* Baily, 2 Bay 244.

Tennessee.— State *v.* Stanley, 3 Lea 524; Staunton *v.* Harris, 9 Heisk. 579.

Virginia.— Thomas *v.* Jones, 94 Va. 756, 27 S. E. 813.

Washington.— Mills *v.* Thurston County, 16 Wash. 378, 47 Pac. 759.

United States.— Osterberg *v.* Union Trust Co., 93 U. S. 424, 23 L. ed. 964; Minnesota *v.* Central Trust Co., 94 Fed. 244, 36 C. C. A. 214; *In re* Brand, 4 Fed. Cas. No. 1,809, 2 Hughes 334; Georgia *v.* Atlantic & G. R. Co., 10 Fed. Cas. No. 5,351, 3 Woods, 434; Steubenville, etc., R. Co. *v.* Tuscarawass County, 22 Fed. Cas. No. 13,388.

See 45 Cent. Dig. tit. "Taxation," § 943 *et seq.*

State and municipal taxes.— Municipal taxes are of equal lien with state and county taxes. Justice *v.* Logansport, 101 Ind. 326. And see Strasburger *v.* Guinter, 23 Pa. Co. Ct. 481.

Taxes and assessments.— A lien of general taxes is superior to the lien of assessments for local improvements. White *v.* Thomas, 91 Minn. 395, 98 N. W. 101; Ballard *v.* Ross, 38 Wash. 209, 80 Pac. 439.

Marshaling liens.— Where a tax is thus made by statute a privileged lien, it will not be marshaled by a court of equity with other liens. People's Sav. Bank *v.* Tripp, 13 R. I. 621.

28. *Colorado.*— Gifford *v.* Callaway, 8 Colo. App. 359, 46 Pac. 626.

Iowa.— Bibbins *v.* Polk County, 100 Iowa 493, 69 N. W. 1007.

Nebraska.— Platte Valley Milling Co. *v.* Malmsten, 79 Nebr. 730, 113 N. W. 229.

New Jersey.— Howell *v.* Essex County Road Bd., 32 N. J. Eq. 672; O'Neill *v.* Dringer, 31 N. J. Eq. 507.

Pennsylvania.— Rhein Bldg. Assoc. *v.* Lea, 100 Pa. St. 210; Gormley's Appeal, 27 Pa. St. 49; Briggs' Appeal, 1 Walk. 199.

South Dakota.— Miller *v.* Anderson, 1 S. D. 539, 47 N. W. 957, 11 L. R. A. 317.

Wyoming.— Lobban *v.* State, 9 Wyo. 377, 64 Pac. 82.

See 45 Cent. Dig. tit. "Taxation," § 943.

29. Finn *v.* Haynes, 37 Mich. 63; Hulin *v.* Butte County, 18 S. D. 339, 100 N. W. 739; *In re* Prince, 131 Fed. 546.

30. Cadmus *v.* Jackson, 52 Pa. St. 295; Allegheny City's Appeal, 41 Pa. St. 60; Pittsburgh's Appeal, 40 Pa. St. 455. And see Meyer *v.* Burritt, 60 Conn. 117, 22 Atl. 501.

31. Jacob *v.* Preston, 31 La. Ann. 514; New Orleans Sav. Inst. *v.* Leslie, 28 La. Ann. 496; Adams *v.* Wakefield, 26 La. Ann. 592; William Wilson, etc., Silversmith Co.'s Estate, 150 Pa. St. 285, 24 Atl. 636; Dowlin *v.* Harley, 2 Pa. Co. Ct. 194.

Exception as to United States.—State laws requiring the registration of tax liens do not apply to liens in favor of the United States and hence do not affect their priority. U. S. *v.* Snyder, 149 U. S. 210, 13 S. Ct. 846, 37 L. ed. 705.

32. Beatie *v.* Brown, 46 Ga. 458; Gaar *v.* Hurd, 92 Ill. 315; Wise *v.* L. & C. Wise Co., 153 N. Y. 507, 47 N. E. 788; Hartwell *v.* Bissell, 17 Johns. (N. Y.) 128; Helsel *v.* Walker, 7 Pa. Dist. 628.

33. McNiel *v.* Farneman, 37 Ind. 203; Evans *v.* Walsh, 41 N. J. L. 281, 32 Am. Rep.

d. As Against Mortgages and Other Encumbrances. Taxes levied subsequent to the execution or recording of a mortgage on realty do not have priority over it unless by express legislation.[34] But statutes so enacting are in force in many states, so that the lien of a tax assessment, as soon as it attaches, displaces the lien of a mortgage or a judgment already existing against the property.[35] It is even within the constitutional power of the legislature to enact that the tax lien shall take precedence over mortgages or other encumbrances made or given before the enactment of the law creating the tax lien and existing at the date of its passage.[36] But this retroactive construction will not be adopted unless expressed in terms too plain to be mistaken.[37] The lien of a personal property tax, when sought to be enforced against real estate of the owner, is generally inferior to the lien of an existing mortgage.[38] And as to personal property, to which the tax lien does not ordinarily attach until seizure or distraint, such lien is usually subordinate to that of an existing chattel mortgage.[39] It is also to be noted that the provisions of a statute giving priority to tax liens over mortgages and other encumbrances do not apply to mortgages made to the state or its officers.[40]

D. Transfer of Property — 1. In General. Where taxes are by statute a specific lien or charge upon the land on which they are assessed, whether or not the lien is made paramount to others, the general rule is that such lien will not be divested by any sale or other transfer of the land, but binds the premises in the hands of all successive holders,[41] although in some states an exception is made in

201; Matter of Columbian Ins. Co., 3 Abb. Dec. (N. Y.) 239.

34. Dows *v.* Drew, 27 N. J. Eq. 442. And see *supra*, VIII, C, 2, a.

35. *California.*— California L. & T. Co. *v.* Weis, 118 Cal. 489, 50 Pac. 697.

Connecticut.— Meyer *v.* Burritt, 60 Conn. 117, 22 Atl. 501.

Illinois.— People *v.* Weber, 164 Ill. 412, 45 N. E. 723; Cooper *v.* Corbin, 105 Ill. 224; Mix *v.* Ross, 57 Ill. 121; Dennis *v.* Maynard, 15 Ill. 477; Dunlap *v.* Gallatin County, 15 Ill. 7.

Indiana.— Ferris *v.* Berkshire L. Ins. Co., 139 Ind. 486, 38 N. E. 609; Peckham *v.* Millikan, 99 Ind. 352; Isaacs *v.* Decker, 41 Ind. 410.

New Jersey.—Doremus *v.* Cameron, 49 N. J. Eq. 1, 22 Atl. 802; Rankin *v.* Coar, 46 N. J. Eq. 566, 22 Atl. 177, 11 L. R. A. 661; Morrow *v.* Dows, 28 N. J. Eq. 459; Campbell *v.* Dewick, 20 N. J. Eq. 186.

New York.— Ellice *v.* Van Rensselaer, 6 How. Pr. 116.

North Carolina.— Woody *v.* Jones, 113 N. C. 253, 18 S. E. 205.

Ohio.— State *v.* Godfrey, 20 Ohio Cir. Ct. 649, 10 Ohio Cir. Dec. 316; Creech *v.* Pittsburgh, etc., R. Co., 3 Ohio S. & C. Pl. Dec. 265, 2 Ohio N. P. 164.

Pennsylvania.— Eaton's Appeal, 83 Pa. St. 152. See Parker's Appeal, 8 Watts & S. 449.

South Carolina.— Shell *v.* Duncan, 31 S. C. 547, 10 S. E. 330, 5 L. R. A. 821; Annely *v.* De Saussure, 12 S. C. 488. See State *v.* Guerry, 15 Rich. 353.

United States.— Provident Sav. Inst. *v.* Jersey City, 113 U. S. 506, 5 S. Ct. 612, 28 L. ed. 1102. And see Loring *v.* American Transp. Co., 138 Fed. 600.

See 45 Cent. Dig. tit. "Taxation." § 946.

But *compare* Ferguson *v.* Kaboth, 43 Oreg. 414, 73 Pac. 200, 74 Pac. 466.

36. Lydecker *v.* Palisade Land Co., 33 N. J. Eq. 415; Howell *v.* Essex County Road Bd., 32 N. J. Eq. 672; O'Brien *v.* Cogswell, 17 Can. Sup. Ct. 420.

37. Finn *v.* Haynes, 37 Mich. 63; Lukens *v.* Katz, 27 Pa. Co. Ct. 596.

38. Parsons *v.* East St. Louis Gas Light, etc., Co., 108 Ill. 380; State *v.* Newark, 42 N. J. L. 38. But *compare* California L. & T. Co. *v.* Weis, 118 Cal. 489, 50 Pac. 697; New England L. & T. Co. *v.* Young, 81 Iowa 732, 39 N. W. 116, 46 N. W. 1103, 10 L. R. A. 478.

39. *Colorado.*— Lee *v.* Stanard, 15 Colo. App. 101, 61 Pac. 234.

Illinois.— Cooper *v.* Corbin, 105 Ill. 224.

Michigan.— St. Johns Nat. Bank *v.* Bingham Tp., 113 Mich. 203, 71 N. W. 588.

Nebraska.— Woolsey *v.* Chamberlain Banking House, 70 Nebr. 194, 97 N. W. 241; Chamberlain Banking House *v.* Woolsey, 60 Nebr. 516, 83 N. W. 729; Blanchard *v.* Logan County, 2 Nebr. (Unoff.) 516, 89 N. W. 376.

New York.— Wise *v.* L. & C. Wise Co., 12 N. Y. App. Div. 319, 42 N. Y. Suppl. 54 [*affirmed* in 153 N. Y. 507, 47 N. E. 788].

United States.— Maish *v.* Bird, 22 Fed. 180.

40. Logansport *v.* McConnell, 121 Ind. 416, 23 N. E. 264; Hood *v.* Baker, (Ind. App. 1905) 75 N. E. 608; Jasper County *v.* Rogers, 17 Iowa 254; Chancellor *v.* Van Hovenberg, (N. J. Ch. 1899) 45 Atl. 439; Rahway *v.* State Sinking Fund Com'rs, 44 N. J. Eq. 296, 18 Atl. 56; Public School Trustees *v.* Trenton, 30 N. J. Eq. 667.

41. *Alabama.*— Rodgers *v.* Gaines, 73 Ala. 218; Driggers *v.* Cassady, 71 Ala. 529.

Arkansas.— Bridewell *v.* Morton, 46 Ark. 73.

Georgia.— Freeman *v.* Atlanta, 66 Ga. 617.

Indiana.— Pittsburgh, etc., R. Co. *v.* Harden, 137 Ind. 486, 37 N. E. 324; Ewing *v.* Robeson, 15 Ind. 26.

favor of purchasers or mortgagees in good faith without notice.[42] Nor will the tax lien be divested by an assignment for the benefit of creditors,[43] or by the transfer of the property to an assignee or trustee in bankruptcy.[44] Where a statute makes taxes on personal property a lien thereon, a purchaser of such property takes the same free from any lien for taxes, if the title passes before such a lien attaches by levy, distraint, or otherwise;[45] but it is otherwise where personal property is sold after the lien attaches, particularly where the statute provides

Kentucky.— Covington *v.* Boyle, 6 Bush 204; Oldhams *v.* Jones, 5 B. Mon. 458; Commonwealth Bank *v.* Com., 94 S. W. 620, 29 Ky. L. Rep. 643.

Massachusetts.— Market Nat. Bank *v.* Belmont, 137 Mass. 407.

Michigan.— Jacobs *v.* Union Trust Co., 155 Mich. 233, 118 N. W. 921.

Minnesota.— State *v.* Northwestern Tel. Exch. Co., 80 Minn. 17, 82 N. W. 1090 [*following* Martin County *v.* Drake, 40 Minn. 137, 41 N. W. 942 (*overruling* Hennepin County *v.* St. Paul, etc., R. Co., 33 Minn. 534, 24 N. W. 196)].

Missouri.— Kansas City *v.* Hannibal, etc., R. Co., 77 Mo. 180; Schmidt *v.* Smith, 57 Mo. 135; Scott *v.* Shy, 53 Mo. 478.

North Carolina.— Wooten *v.* Sugg, 114 N. C. 295, 19 S. E. 148.

Ohio.— Hoglen *v.* Cohan, 30 Ohio St. 436.

Pennsylvania.— Chadwick *v.* Phelps, 45 Pa. St. 105; Easton *v.* Drake, 9 Kulp 320; Chester *v.* Roan, 8 Del. Co. 66.

Tennessee.—Swan *v.* Knoxville, 11 Humphr. 130.

See 45 Cent. Dig. tit. "Taxation," § 947 *et seq.*

Exceptions to rule.— In Connecticut the law provides that land shall be subject to a lien for taxes for one year and afterward "until a transfer thereof"; and the foreclosure of a mortgage, and the vesting of the absolute title in the mortgagee by failure to redeem, is a transfer within the meaning of the statute. Waterbury Sav. Bank *v.* Lawler, 46 Conn. 243. In Louisiana unrecorded tax liens more than three years old do not affect purchasers of the property. State *v.* Recorder of Mortgages, 111 La. 236, 35 So. 534.

Purchaser from state.— One purchasing lands from the state takes them free from all tax liens. Bradford *v.* Lafargue, 30 La. Ann. 432.

Sale of land in parcels; order of liability for taxes.— Where the owner of land which is subject to a lien for taxes divides it into parcels and sells them separately to different purchasers at different times, the tax lien continues to bind each parcel for the whole amount of the tax, and the several purchasers are liable for the payment of the taxes in the inverse order of alienation; that is, the parcel last sold is the one first liable. Askew *v.* Scottish American Mortg. Co., 114 Ga. 300, 40 S. E. 256; Merchants' Nat. Bank *v.* McWilliams, 107 Ga. 532, 33 S. E. 860.

Transfer to one exempted from taxation.— Where, for the purposes of taxation, the statutory tax lien for the current year attaches to real property on a certain day, ownership of real property on that day determines its liability to taxation for that year, and if it is taxable at that time the lien then attaches, and it is not divested by a sale after that day to a corporation which has commuted to the state by a payment of a percentage on its gross earnings in lieu of other taxes. State *v.* Northwestern Tel. Exch. Co., 80 Minn. 17, 82 N. W. 1094 [*following* Martin County *v.* Drake, 40 Minn. 137, 41 N. W. 942 (*overruling* Hennepin County *v.* St. Paul, etc., R. Co., 33 Minn. 534, 24 N. W. 196)].

42. Robinson *v.* Hulick, 67 N. J. L. 496, 51 Atl. 493; Exum *v.* Baker, 115 N. C. 242, 20 S. E. 448, 44 Am. St. Rep. 449.

Who are innocent purchasers.—A transfer of property subject to taxation, by persons individually to themselves as constituting a corporation, does not constitute the corporation an innocent purchaser so as to defeat a claim for taxes thereon. And a new corporation created by the consolidation of other corporations is not an innocent purchaser of the property of such corporations, at least in the absence of a provision for the payment of their liabilities, so as to prevent the state from subjecting such property to the payment of taxes thereon. Bloxham *v.* Florida Cent., etc., R. Co., 35 Fla. 625, 17 So. 902. But on the other hand, where a mortgagee of land, foreclosing his mortgage and buying in the property, had no notice at the time the mortgage was made that taxes were in arrear, the land is not liable for such taxes, although he had notice prior to the sale. Moore *v.* Sugg, 114 N. C. 292, 19 S. E. 147. A purchaser of land subject to state taxes is not an innocent purchaser where the description of the property in the tax rolls was sufficient to identify it and the delinquent rolls showed that the taxes had not been paid. Haynes *v.* State, 44 Tex. Civ. App. 492, 99 S. W. 405.

43. State *v.* Rowse, 49 Mo. 586. But see Kansas City *v.* Hannibal, etc., R. Co., 77 Mo. 180.

44. Stokes *v.* State, 46 Ga. 412, 12 Am. Rep. 588; Mesker *v.* Koch, 76 Ind. 68; *In re* Brand, 4 Fed. Cas. No. 1,809, 2 Hughes 334.

45. Saup *v.* Morgan, 108 Ill. 326; Spence *v.* Frye, 3 Ohio Dec. (Reprint) 11, 2 Wkly. L. Gaz. 103. Although a tax list when placed in the hands of a sheriff for collection has the force of a docketed judgment and execution as to real estate, it creates no lien on personal property, until levied, as against *bona fide* purchasers for value from the taxpayer's assignee for benefit of creditors. Shelby *v.* Tiddy, 118 N. C. 792, 24 S. E. 521.

that the lien shall not be divested by alienation.[46] Where a tax on personal property does not become a lien upon the real estate of the owner until the collector, on failure to collect the same, charges it on such real estate in his application for judgment, and by notice, after such real estate is conveyed by the owner his personal tax cannot be charged against it in the hands of his grantee, even though the grantee had notice at the time of his purchase of the existence of an unpaid personal tax.[47]

2. Judicial Sale of Property. It is also a general rule that a tax lien which has attached to land is not divested by a sale of the land under judicial process, whether upon execution, decree of court, foreclosure of a mortgage, or in any other proceeding to which the state is not a party.[48]

E. Duration and Termination of Lien — 1. In General. Where the statute makes the lien of taxes perpetual, or declares that it shall continue until the taxes are paid, no statute of limitations or delay in enforcement can be invoked against proceedings to enforce the lien.[49] But in many states the lien is specif-

46. Larson *v.* Hamilton County, 123 Iowa 485, 99 N. W. 133 (holding that under a statute providing that "taxes upon stocks of goods or merchandise shall be a lien thereon and shall continue a lien thereon when sold in bulk, and may be collected from the owner, purchaser or vendee," although the lien for taxes on a stock of goods attaches at the time of the tax levy, a sale in bulk of the stock after assessment and before levy will not defeat the lien); Jenkins *v.* London, 31 Leg. Int. (Pa.) 260; Puyallup *v.* Lakin, 45 Wash 368, 88 Pac. 578 (holding that the purchase of a water plant by a municipality after a lien for personal property taxes had attached did not divest the lien); Spokane County *v.* Annis, 43 Wash. 655, 86 Pac. 1066.

47. Belleville Nail Co. *v.* People, 98 Ill. 399. And see Schaeffer *v.* People, 60 Ill. 179.

Ky. St. (1903) § 4021, providing that the commonwealth shall have a lien on property assessed for taxes, which shall not be defeated by alienation, does not give a lien on land for a whisky tax assessed against the owner of the whisky after the conveyance of the land by him. Com. *v.* Walker, 80 S. W. 185, 25 Ky. L. Rep. 2122.

48 *Florida.*— Huckleby *v.* State, 57 Fla. 433, 48 So. 979; Bloxham *v.* Consumers' Electric Light, etc., Co., 36 Fla. 519, 18 So. 444, 51 Am. St. Rep. 44, 29 L. R. A. 507.

Georgia.— Wilson *v.* Boyd, 84 Ga. 34, 10 S. E. 499; Atlanta, etc., R. Co. *v.* State, 63 Ga. 483; Doe *v.* Deavors, 8 Ga. 479.

Indiana.— Logansport *v.* McConnell, 121 Ind. 416, 23 N. E. 264; Rinard *v.* Nordyke, 76 Ind. 130; Isaacs *v.* Decker, 41 Ind. 410; Bodertha *v.* Spencer, 40 Ind. 353. See Groom *v.* State, 24 Ind. 255; State *v.* Marion County Auditor, Smith 40.

Louisiana.— Girardey's Succession, 42 La. Ann. 497, 7 So. 673; Morris *v.* Lalaurie, 39 La. Ann. 47, 1 So. 659; Dupuy's Succession, 33 La. Ann. 258.

Nebraska.— Iler *v.* Colson, 8 Nebr. 331, 1 N. W. 248; Vaughan *v.* Clark, 5 Nebr. 238.

South Carolina.— Annely *v.* De Saussure, 12 S. C. 488.

Tennessee.— State *v.* Hill, 87 Tenn. 638, 11 S. W. 610.

United States.— Osterberg *v.* Union Trust Co., 93 U. S. 424, 23 L. ed. 964.

See 45 Cent. Dig. tit. "Taxation," § 950.

Contra, in Pennsylvania. Shaw *v.* Allegheny, 115 Pa. St. 46, 7 Atl. 770; Mellon's Appeal, 114 Pa. St. 564, 8 Atl. 183; Anspach's Appeal, 112 Pa. St. 27, 3 Atl. 378; Smith *v.* Simpson, 60 Pa. St. 168; Allegheny City's Appeal, 41 Pa. St. 60; Snyder *v.* Mogart, 17 Pa. Co. Ct. 1; Fryer *v.* Metz, 12 Montg. Co. Rep. 108; Janney *v.* Harlan, 5 Pa. L. J. 116. See Steen's Estate, 175 Pa. St. 299, 34 Atl. 732 (private sale of decedent's lands); Hazlett *v.* McCutcheon, 158 Pa. St. 539, 27 Atl. 1086; Brotherlin's Estate, 15 Pa. Co. Ct. 251.

Tax lien on personal property in Iowa see Howard County *v.* Strother, 71 Iowa 683, 33 N. W. 238.

Intervention by state see *infra*, IX, A, 1, c.

49. *California.*— Lewis *v.* Rothchild, 92 Cal. 625, 28 Pac. 805.

Indiana.— Gorley *v.* Sewell, 77 Ind. 316; Mesker *v.* Koch, 76 Ind. 68.

Iowa.— Under Iowa Code Suppl. (1902) §§ 1389*a*–1389*c*, requiring the treasurer to enter each year in the delinquent personal tax list all delinquent personal taxes of any preceding year, and providing that personal taxes so entered shall be and remain a lien on any real estate owned or acquired by any delinquent taxpayer until paid or canceled, and repealing Code, § 1389, requiring the treasurer to place on the tax list each year all previous delinquent personal property taxes, provides a record of all delinquent personal taxes, which, when once entered on the delinquent personal tax list, remain a lien until paid or legally canceled, without being entered on the delinquent tax lists of subsequent years. Watkins *v.* Couch, 142 Iowa 164, 120 N. W. 485.

Massachusetts.— Hayden *v.* Foster, 13 Pick. 492.

Michigan.— Auditor-Gen. *v.* Carpenter, 138 Mich. 669, 101 N. W. 1025.

Nebraska.— Adams *v.* Osgood, 42 Nebr. 450, 60 N. W. 869; Cushman *v.* Taylor, 2 Nebr. (Unoff.) 793, 90 N. W. 207.

New Jersey.— Skinner *v.* Christie, 52 N. J. Eq. 720, 29 Atl. 772.

ically limited to one or more years from its inception,[50] and after the expiration of this period it is generally held that the taxes become a mere personal charge or claim against the taxpayer,[51] although in some jurisdictions the doctrine prevails that the statute does not restrain the collector from selling the land after the expiration of the tax lien, provided there has been no alienation of it in the mean time by the owner.[52] The repeal of the statute under which taxes were levied will also extinguish the lien, unless the repealing act contains a provision preserving the lien.[53] But it is in the power of the legislature to extend the life of a tax lien, to revive and restore a lien which has lapsed, or even to create a new lien for the same taxes, if no rights of third persons have intervened.[54]

2. As Affected by Payment, Judgment, or Proceedings to Collect. A tax lien is extinguished by payment or a sufficient tender of the taxes,[55] except in cases where the payment is made by a person who has the right to be subrogated to the lien of the state.[56] But when a judgment is recovered for back taxes the lien of the taxes will not be merged in the judgment so as to expire within the time fixed

North Dakota.—Walls County *v.* McHenry, 7 N. D. 246, 74 N. W. 241.

Pennsylvania.— Barclay *v.* Leas, 9 Pa. Co. Ct. 314.

See 45 Cent. Dig. tit. "Taxation," §§ 951, 952.

When action for taxes barred.—A lien for taxes is an incident to the tax, and when an action to recover the debt is barred the lien is also barred. San Francisco *v.* Jones, 20 Fed. 188.

Tax lien similar to mortgage lien.— Where a statute authorizes the incorporation of a railroad company and the construction of its road, and imposes an annual tax on its capital and makes the same a lien on its road, and this is accepted by the company, the lien for taxes is a contract lien in the nature of a mortgage lien and is not defeated by the lapse of any less time than would suffice to defeat a mortgage lien. People *v.* Michigan Cent. R. Co., 145 Mich. 150, 108 N. W. 772.

50. See the statutes of the different states. And see the following cases:

Louisiana.— State *v.* Recorder of Mortgages, 111 La. 236, 35 So. 534; Rousset *v.* New Orleans, 110 La. 1040, 35 So. 281; Gowland *v.* New Orleans, 52 La. Ann. 2042, 28 So. 358; Parham's Succession, 51 La. Ann. 980, 25 So. 947, 26 So. 700; Saloy *v.* Woods, 40 La. Ann. 585, 4 So. 209; Reed *v.* Creditors, 39 La. Ann. 115, 1 So. 784; Davidson *v.* Lindop, 36 La. Ann. 765; State *v.* Recorder of Mortgages, 34 La. Ann. 178; Buckner *v.* Masters, 22 La. Ann. 246; Erwin's Succession, 16 La. Ann. 132.

New Jersey.— Campion *v.* Raritan Tp., (Sup. 1903) 56 Atl. 704; Burnet *v.* Dean, 63 N. J. Eq. 253, 49 Atl. 503, 51 Atl. 1023 [*affirming* 60 N. J. Eq. 9, 46 Atl. 532]; Duryee *v.* U. S. Credit System Co., 55 N. J. Eq. 311, 37 Atl. 155.

Pennsylvania.— Philadelphia *v.* Hiester, 142 Pa. St. 39, 21 Atl. 766; Philadelphia *v.* Scott, 93 Pa. St. 25; Philadelphia *v.* Scott, 12 Phila. 450; Evans' Estate, 2 Woodw. 166.

Wisconsin.— Curtis *v.* Brown County, 22 Wis. 167.

Canada.— St. John *v.* McLeod, 17 N. Brunsw. 423.

See 45 Cent. Dig. tit. "Taxation," §§ 951, 952.

Time of commencing proceedings.— If a time is limited by statute for proceedings to enforce a tax lien, it is sufficient if they are begun within the time, and they may proceed to judgment afterward. Himmelman *v.* Carpenter, 47 Cal. 42; Dougherty *v.* Henarie, 47 Cal. 9; Randolph *v.* Bayue, 44 Cal. 366.

51. Peoples' Homestead Assoc. *v.* Garland, 107 La. 476, 31 So. 892; Scholfield *v.* West, 44 La. Ann. 277, 10 So. 806; Stewart's Succession, 41 La. Ann. 127, 6 So. 587.

52. Leeds *v.* Hardy, 43 La. Ann. 810, 9 So. 488; Stewart's Succession, 41 La. Ann. 127, 6 So. 587; Abbott *v.* Frost, 185 Mass. 398, 70 N. E. 478; Russell *v.* Deshon, 124 Mass. 342; Kelso *v.* Boston, 120 Mass. 297; Holden *v.* Eaton, 7 Pick. (Mass.) 15; Mason *v.* Bilbruck, 62 N. H. 440. *Contra, In re* Elizabeth, 49 N. J. L. 488, 10 Atl. 363; Doremus *v.* Cameron, 49 N. J. Eq. 1, 22 Atl. 802; Tax-Payers' Protective Assoc. *v.* Kirkpatrick, 41 N. J. Eq. 347, 7 Atl. 625; Kirkpatrick *v.* New Brunswick, 40 N. J. Eq. 46; Anspach's Appeal, 112 Pa. St. 27, 3 Atl. 378; Bull *v.* Griswold, 14 R. I. 22.

53. Gorley *v.* Sewell, 77 Ind. 316; Gull River Lumber Co. *v.* Lee, 7 N. D. 135, 73 N. W. 430. See also Gardenhire *v.* Mitchell, 21 Kan. 83; Barden *v.* Wells, 14 Mont. 462, 36 Pac. 1076; Alliance Trust Co. *v.* Multnomah County, 38 Oreg. 433, 63 Pac. 498; South Chester *v.* Harvey, 1 Del. Co. (Pa.) 62.

Implication.—An express saving clause in the repealing statute is not necessary to prevent the destruction of existing liens, but it is sufficient if the intention to preserve and continue them clearly appears from the provisions of the act. Gorley *v.* Sewell, 77 Ind. 316. See also Debolt *v.* Ohio L. Ins., etc., Co., 1 Ohio St. 563.

54. Dunlop *v.* Minor, 26 La. Ann. 117; *In re* Elizabeth, 49 N. J. L. 488, 10 Atl. 363.

55. See *infra*, IX, A, 6.

56. See *infra*, IX, A, 1, c, (II), (B).

by statute for the expiration of a judgment lien;[57] and generally the bringing of a personal action or the recovery of a personal judgment for the taxes against the owner of the land will neither divest nor extend the lien of the taxes.[58] Nor will a tax lien on personal property given by statute be divested or defeated by the recovery of a personal judgment for the amount of the taxes.[59] In some states, however, provision is made by law for instituting a suit or proceeding by scire facias upon a tax lien within a limited time after it has attached, the effect being to continue the lien in force for another period of years.[60] A specific lien for taxes, which the statute declares shall last for a certain time only, is not extended by the lodgment of an execution for the taxes, as allowed by the statute, within such time, but the execution has its own lien only, which is subject to prior encumbrances.[61] An action to enforce a lien subject to statutory bar, in order to arrest the running of the statute of limitations and keep the lien alive, must not only be brought in time, but must be prosecuted, after commencement, with such reasonable diligence as will save a *lis pendens* lien from loss by laches.[62]

3. Merger in Title. A tax lien is merged and extinguished when the state, by escheat or, it would seem, by forfeiture or purchase at a tax-sale, becomes the owner of the fee in the land affected,[63] or where the owner of land, after it has been sold for the taxes and bid in by the state, and before the sale becomes absolute, purchases the bids of the state;[64] but it has been held, under a statute declaring taxes on real property to be a perpetual lien thereon, that the lien of a county for taxes is not extinguished by the county's bidding in the land at a sale for such taxes, but continues until the taxes are in fact received.[65] A merger and extinguishment of the tax lien may also result where the owner conveys the land to one holding a tax certificate or tax deed for the premises, but it seems that an intent to produce the merger must appear.[66] But a merger does not result merely because a mortgagee, taxed in respect to his debt and security, becomes the owner by foreclosure.[67]

4. Loss or Discharge of Lien.[68] The lien of a tax may be lost by its intentional abandonment by the state or municipal corporation,[69] or by neglect to proceed with an action instituted for its enforcement.[70] But such lien is not ordinarily

57. Boyd *v.* Ellis, 107 Mo. 394, 18 S. W. 29. See State *v.* Recorder of Mortgages, McGloin (La.) 190.

58. People *v.* Stahl, 101 Ill. 346; Kentucky Cent. R. Co. *v.* Com., 92 Ky. 64, 17 S. W. 196, 13 Ky. L. Rep. 484; Eschbach *v.* Pitts, 6 Md. 71.

59. Boyce *v.* Stevens, 86 Mich. 549, 49 N. W. 577.

60. See Philadelphia *v.* Kates, 150 Pa. St. 30, 24 Atl. 673; Philadelphia *v.* Hiester, 142 Pa. St. 39, 21 Atl. 766; Anspach's Appeal, 112 Pa. St. 27, 3 Atl. 378; Philadelphia *v.* Browning, 13 Pa. Super. Ct. 164.

61. State *v.* Guerry, 15 Rich. (S. C.) 353.

62. Robinson *v.* Bierce, 102 Tenn. 428, 52 S. W. 992, 47 L. R. A. 275, holding that a suit to enforce the collection of taxes is subject to the same practice which controls other suits, and that failure to take action in such a suit for eight years amounted to such gross laches as to deprive the state of its lien on the property.

63. Reid *v.* State, 74 Ind. 252.

64. Gould *v.* Day, 94 U. S. 405, 24 L. ed. 232.

65. Rochford *v.* Fleming, 10 S. D. 24, 71 N. W. 317.

66. Gilman *v.* Stock Exch. Bank, 64 Kan. 87, 67 Pac. 551, holding that a mortgagee of land cannot defend against the lien of a tax certificate holder on the ground that a gift to the latter of a quitclaim deed from the owner of the land merged the tax lien in the land title, without evidence showing an intent to produce the merger.

Conveyance to grantee in void tax deed.— Where one was in possession and claimed to own real estate under a void tax deed, but later procured a quitclaim from the rightful owner the interest he had by virtue of tax deed was merged in the stronger and superior title he obtained by the quitclaim deed; and he then held subject to all tax liens that would have been valid if the rightful owner had never parted with his title. African M. E. Church *v.* Hewitt, 37 Kan. 107, 14 Pac. 540.

67. Alliance Trust Co. *v.* Multnomah County, 38 Oreg. 433, 63 Pac. 498; Dekum *v.* Multnomah County, 38 Oreg. 253, 63 Pac. 496; Smith *v.* Kelly, 24 Oreg. 464, 33 Pac. 642.

68. Transfer of property see *supra*, VIII, D.

69. Bradley *v.* Hintrager, 61 Iowa 337, 16 N. W. 204.

70. Robinson *v.* Bierce, 102 Tenn. 428, 52 S. W. 992, 47 L. R. A. 275. See *supra*, VIII, E, 2.

divested by the failure or neglect of officers to take steps prescribed by the statute with relation to the perfecting or enforcement of the lien,[71] and so far as it affects realty, the lien is not lost by failure to collect the tax out of personal property which was available for its satisfaction.[72] The fact that there was a time during the existence of a tax lien when no procedure was provided for its enforcement did not extinguish the lien.[73] County commissioners have no authority to release land from a lien for taxes, and an attempted release by them of a lien on land for personal taxes, made subsequent to the execution of a mortgage of the property, does not estop the county, as against the mortgagee, from enforcing the lien.[74] Under some statutes the lien of taxes on personal property expires on the return by the collector of the warrant for their collection.[75]

5. Omission From Certificate or Statement as to Tax Liens. Where a certificate or statement as to the amount of taxes chargeable against a particular property and which are delinquent is furnished by an officer whose statutory duty it is to furnish such certificates on demand, the state or municipality is estopped to assert the lien of any tax omitted from such certificate, as against an innocent purchaser dealing with the property in reliance thereon.[76]

6. Sale of Property For Taxes. A valid sale of land for taxes discharges the lien not only of the taxes for which the sale was made but of any others which were delinquent at the time.[77] But if the sale was illegal or so defective as to be entirely void, the lien is not divested, because in that case the owner loses nothing and the state or municipality takes nothing which it can legally retain.[78] And, as will be elsewhere shown, omissions and irregularities in the sale of property for taxes may render the sale invalid to convey title, but still valid to transfer the lien to the purchaser.[79]

F. Protection of Lien. If the chief value of realty is in the timber or other natural products thereon, the state may protect its tax lien by an injunction to prevent waste, or may constitutionally enact a law prohibiting, under penalties, the stripping of the land when taxes are delinquent.[80]

71. *Michigan.*— Auditor-Gen. *v.* Carpenter, 138 Mich. 669, 101 N. W. 1025; Auditor-Gen. *v.* Lake George, etc., R. Co., 82 Mich. 426, 46 N. W. 730.

Missouri.— State *v.* Hutchinson, 116 Mo. 399, 22 S. W. 785; State *v.* Hurt, 113 Mo. 90, 20 S. W. 879.

New Jersey.— Duryee *v.* U. S. Credit System Co., 55 N. J. Eq. 311, 37 Atl. 155.

Pennsylvania.— *In re* Goodwin Gas Stove, etc., Co.'s Estate, 166 Pa. St. 296, 31 Atl. 91 [*affirming* 35 Wkly. Notes Cas. 234].

South Dakota.— Iowa Land Co. *v.* Douglas County, 8 S. D. 491, 67 N. W. 52.

Tennessee.—Swan *v.* Knoxville, 11 Humphr. 130.

Texas.— San Antonio *v.* Raley, (Civ. App. 1895) 32 S. W. 180.

See 45 Cent. Dig. tit. "Taxation," § 957.

72. Spiech *v.* Tierney, 56 Nebr. 514, 76 N. W. 1090; Anspach's Appeal, 112 Pa. St. 27, 3 Atl. 378; Dowlin *v.* Harley, 2 Pa. Co. Ct. 194.

Relinquishment of distress or stay of proceedings see Parker's Appeal, 8 Watts & S. (Pa.) 449.

73. Auditor-Gen. *v.* Carpenter, 138 Mich. 669, 101 N. W. 1025.

74. Iowa Land Co. *v.* Douglas County, 8 S. D. 491, 67 N. W. 52.

75. See Saup *v.* Morgan, 108 Ill. 326.

76. Rosecrans *v.* District of Columbia, 5 Mackey (D. C.) 120; Jiska *v.* Ringgold County, 57 Iowa 630, 11 N. W. 618; Harness *v.* Cravens, 126 Mo. 233, 28 S. W. 971. *Contra,* Croswell *v.* Benton, 54 Minn. 264, 55 N. W. 1125.

77. Philadelphia *v.* Powers, 214 Pa. St. 247, 63 Atl. 602; Jarvis *v.* Peck, 19 Wis. 74; Jamieson *v.* Victoria, 6 Brit. Col. 109. But *compare* City Safe Deposit, etc., Co. *v.* Omaha, 76 Nebr. 446, 112 N. W. 598, 21 L. R. A. N. S. 72, holding that lien is not divested by sale, but only transferred to purchaser.

Sale of part of tract.— Although taxes are a lien on the entire property on which they are assessed, a sale of any portion of the land sufficient to discharge the taxes discharges the entire property from the lien. Philadelphia *v.* McGonigle, 4 Phila. (Pa.) 351.

Sale of different interests.— Although a sale for taxes of the estate of the remainderman realizes enough to pay the back taxes, the life-estate, being primarily liable, is not released from the lien. Philadelphia *v.* Hepburn, 13 Phila. (Pa.) 98.

78. Texarkana Water Co. *v.* State, 62 Ark. 188, 35 S. W. 788; Harris *v.* Drought, 24 Kan. 524; Auditor-Gen. *v.* Newman, 135 Mich. 288, 97 N. W. 703; New York *v.* Colgate, 12 N. Y. 140. *Compare* Phelan *v.* San Francisco, 120 Cal. 1, 52 Pac. 38.

79. See *infra,* XIV, C, 3.

80. Caldwell *v.* Ward, 83 Mich. 13, 46

IX. PAYMENT, RELEASE OR COMPROMISE, AND REFUNDING OR RECOVERY OF TAXES PAID.

A. Payment or Tender — 1. In General — a. Necessity of Notice or Demand.[81] A demand for payment of taxes or notice that they are due and payable is usually made a condition precedent to distraint, sale, or other compulsory proceedings for their collection,[82] and sometimes it is required in order to render taxes delinquent;[83] but unless the law expressly requires it, no notice or demand is required either to fix the duty of the citizen to pay his taxes,[84] or to authorize a suit or other compulsory proceeding to collect the same.[85] And even when a statute contains provision for notice, such provision may be merely directory, so that a failure on the part of the officer to give the notice will not prevent collection of the tax.[86] Where demand for payment of a tax is required, it need not be in any express words, but is sufficient if it plainly informs the taxpayer

N. W. 1024, 88 Mich. 378, 50 N. W. 303; Prentice *v.* Weston, 111 N. Y. 460, 18 N. E. 720.

81. Presentation of claim against estate for taxes and assessments see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 467.

82. *Connecticut.*— Goddard *v.* Seymour, 30 Conn. 394, demand required before levy.

Indiana.— Cones *v.* Wilson, 14 Ind. 465, demand before levy.

Iowa.— Lathrop *v.* Howley, 50 Iowa 39, tax deed void because demand of a city tax was not made, as required by the charter, before the sale of land on which the tax was a lien.

Kentucky.— Hoozer *v.* Buckner, 11 B. Mon. 183, statute requiring officer, before distraining for taxes due and unpaid, to demand the taxes and to deliver to the tax debtor a statement of the taxes due and to tender a receipt for the same, to be delivered if they are paid.

Maine.— See Miller *v.* Davis, 88 Me. 454, 34 Atl. 265, demand before arrest on warrant for taxes.

Vermont.— Notice to a resident taxpayer of the time and place at which the collector will receive payment of the tax, required by St. § 472, and a similar notice to a non-resident taxpayer, required by section 504, is essential before a valid sale for the tax can be made, unless excused by demand and refusal to pay. Brush *v.* Watson, 81 Vt. 43, 6 Atl. 141 (non-resident); Brock *v.* Bruce, 58 Vt. 261, 2 Atl. 598; Hurlbut *v.* Green, 42 Vt. 316; Wheelock *v.* Archer, 26 Vt. 380; Downer *v.* Woodbury, 19 Vt. 329.

Washington.— Vestal *v.* Morris, 11 Wash. 451, 39 Pac. 960, holding a tax deed void where there was no proof in the county records that the treasurer had given the notice required by statute that the duplicate assessment roll was in his hands, and of the date when the taxes must be paid.

United States.— Mayhew *v.* Davis, 16 Fed. Cas. No. 9,347, 4 McLean 213, holding that under the Illinois act of 1839, it was necessary that a collector of taxes should make a demand for taxes upon the owner of land, as provided by the statute, before a judgment could be properly rendered against the land.

See 45 Cent. Dig. tit. "Taxation," § 963.

83. St. Anthony Falls Water Power Co. *v.* Greely, 11 Minn. 321, holding that where a statute required notice by the collector to taxpayers of a city, by publication in the official paper of the city, of the receipt of the tax list by him, and requiring them to pay within a certain time, and made such publication equivalent to personal demand, and the failure to pay within such time equivalent to a refusal to pay, taxes were not delinquent until personal demand or publication.

84. Hart *v.* Tiernan, 59 Conn. 521, 51 Atl. 1007; Goddard *v.* Seymour, 30 Conn. 394; Ives *v.* Lynn, 7 Conn. 505; Perkins *v.* Perkins, 24 N. J. L. 409 (holding that an error by the collector in notifying a party of his tax did not invalidate a tax legally assessed, however it might have affected the tax warrant); Union Pac. R. Co. *v.* Dodge County, 98 U. S. 541, 25 L. ed. 196 (under a Nebraska statute).

Notice to parties reducing ores.— The written notice required by Nevada Mining Tax Law (1871), § 7, to be given by the assessor to parties engaged in reducing ores, was not a prerequisite to the liability of the producer for the tax, but was only intended to hold a party reducing ores extracted by others to the extent of the value of the ores in his possession when notified. State *v.* Eureka Consol. Min. Co., 8 Nev. 15.

85. Hart *v.* Tiernan, 59 Conn. 521, 21 Atl. 1007 (demand not necessary before suit to foreclose tax lien); Ives *v.* Lynn, 7 Conn. 505 (personal demand of the tax debtor for personal property to satisfy the tax not necessary before sale of real estate for that purpose); Noland *v.* Busby, 28 Ind. 154 (seizure of personal property to satisfy tax).

86. Noland *v.* Busby, 28 Ind. 154. *Compare,* however, Brush *v.* Watson, 81 Vt. 43, 69 Atl. 141 (holding, in view of the summary method of proceeding against property for taxes, and under a fair construction of the statute, that the provision in St. § 504, that a tax collector "may" notify a non-resident taxpayer of the time and place at which he will receive payment of the tax, and that the time shall not be less than twenty or more than forty days from the time when the notice is mailed, is mandatory, unless excused by demand and refusal to pay); Mayhew *v.* Davis, 16 Fed. Cas. No. 9,347, 4 McLean 213.

that the collector is present and officially desires payment of the tax.[87] Under some statutes notice by publication in a newspaper or by posting, or both, is sufficient.[88]

b. Person by Whom Payment May Be Made — (i) *In General.* Payment of taxes may be made by the owner of the property through an agent.[89] by any one of several joint owners or persons having separate interests or estates in the premises.[90] by a purchaser having an inchoate title under a foreclosure or other judicial sale.[91] or by a stock-holder of the corporation against which the tax is assessed.[92] Payment of taxes by a stranger, a mere volunteer or intermeddler, will divest the lien and inure to the benefit of the owner,[93] but it cannot be made the foundation of any right or claim on the part of such third person,[94] unless his act is adopted or ratified by the owner.[95] Where there are two assessments of the same land to different persons for the same year, the payment of taxes by one under his assessment discharges the lien for taxes, and no collection under the other assessment can be made, because the state is entitled to only one payment.[96]

(ii) *Payment by Claimants, Lienors, and Other Third Parties* — (a) *Effect in General.* A person who in good faith and under color of title claims to be the owner of real property may pay the taxes assessed thereon, and if his claim of title is subsequently defeated, he is entitled to reimbursement for the

87. Miller v. Davis, 88 Me. 454, 34 Atl. 265.

88. See Ives v. Lynn, 7 Conn. 505; St. Anthony Falls Water Power Co. v. Greely, 11 Minn. 321.

Sufficiency of publication.— Under a provision that the tax roll shall be delivered July 1, and that "forthwith" six days' notice by publication in the official daily paper shall be given, which shall be a demand for payment, the publication on the first seven days of the month, except July 4, is sufficient. Walker v. Detroit, 138 Mich. 598, 101 N. W. 809.

89. *Arkansas.*— Kinsworthy v. Austin, 23 Ark. 375.

Delaware.— Hawkins v. Dougherty, 9 Houst. 158, 18 Atl. 951.

Illinois.— Paris v. Lewis, 83 Ill. 397.

West Virginia.— Sters v. Wiseman, 68 W. Va. 340, 62 S. E. 460.

United States.— U. S. v. Lee, 106 U. S. 196, 1 S. Ct. 240, 27 L. ed. 171; Bennett v. Hunter, 9 Wall. 326, 19 L. ed. 672.

Right of agent or attorney to lien for taxes paid.— Under a statute giving to every attorney, agent, or guardian, etc., "seised or having the care of lands," a lien for money advanced in paying taxes thereon, one who pays taxes on land as the agent or attorney of the owner is not entitled to a lien, unless he shows that he was seised of the lands or had the care of them. Peay v. Field, 30 Ark. 600.

90. Emmons v. Moore, 85 Ill. 304; Brown v. Day, 18 Pa. St. 129; State v. Low, 46 W. Va. 451, 33 S. E. 271.

91. Beyer v. Pacific Mut. L. Ins. Co., 1 Cal. App. 54, 81 Pac. 671; McNary v. Wrightman, 32 Org. 573, 52 Pac. 310; Montgomery v. Charleston, 99 Fed. 925, 40 C. C. A. 106, 48 L. R. A. 509. But see Union Cent. L. Ins. Co. v. Chapin, 113 Iowa 411, 85 N. W. 791; State v. Harman, 57 W. Va. 447, 50 S. E. 828.

92. State v. Minneapolis Millers' Assoc., 30 Minn. 429, 16 N. W. 291.

93. *Illinois.*— Mann v. Chicago, 48 Ill. 420; Morrison v. Kelly, 22 Ill. 609, 74 Am. Dec. 169.

Iowa.— Iowa R. Land Co. v. Guthrie, 59 Iowa 383, 5 N. W. 318, holding that where taxes becoming due on land subsequent to a void sale for previous taxes were paid by the holder of the void certificate, to whom they were afterward refunded, such taxes could not again be treated as delinquent by the treasurer, and a sale of the land therefor was void.

Pennsylvania.— Reading v. Finney, 73 Pa. St. 467; Montgomery v. Meredith, 17 Pa. St. 42; Trexler v. Africa, 27 Pa. Super. Ct. 355.

Virginia.— Martin v. Snowden, 18 Gratt. 100.

West Virginia.— Sters v. Wiseman, 68 W. Va. 340, 62 S. E. 460. *Compare* Bailey v. McClaugherty, 48 W. Va. 346, 37 S. E. 701.

94. Broderick v. Allamakee County, 104 Iowa 750, 73 N. W. 884 (payment of taxes on land by one who has no title thereto gives him no right to enjoin the sale of the land for such taxes); Goodnow v. Stryker, 61 Iowa 261, 16 N. W. 486 (cannot recover from the owner the taxes so paid). *Compare infra*, IX, A, 1, b, (III), (A).

Husband and wife.— Assumpsit will not lie by a husband to recover taxes paid on his wife's land, in the absence of a request by her or a promise of repayment. Doughty v. Miller, 50 N. J. Eq. 509, 25 Atl. 153.

95. Goodnow v. Stryker, 61 Iowa 261, 16 N. W. 486, sufficient adoption or ratification by the owner where he pleaded the payment as a defense in an action against him by the county to recover the taxes.

96. Pickler v. State, 149 Ala. 493, 42 So. 1013; Trollien Cypress Lumber Co. v. Albert Hansen Lumber Co., 121 La. 700, 46 So. 698.

amount so paid from the true owner.[97] In some states this rule is declared by statute.[98] But payment of taxes by a mere stranger who knows he has no title to the land cannot create any liability on the part of the owner, unless adopted or ratified by him,[99] although it is otherwise where the payment is made under an honest but mistaken belief as to the state of the title, provided the mistake does not arise from the party's own carelessless or ignorance of the law.[1] On similar principles, reimbursement may be claimed by a judgment or mortgage creditor or other lienor who pays the taxes instead of the owner, when he is obliged to make the payment in order to save or protect his own interest;[2] and

97. *Arkansas.*— Kemp *v.* Cossart, 47 Ark. 62, 14 S. W. 465.

Indiana.— Hammon *v.* Sexton, 69 Ind. 37.

Iowa.— Govern *v.* Russ, 125 Iowa 188, 100 N. W. 325; Hays *v.* McCormick, 83 Iowa 89, 49 N. W. 69; Merrill *v.* Tobin, 82 Iowa 529, 48 N. W. 1044; Goodnow *v.* Burrows, 74 Iowa 758, 37 N. W. 326; Montgomery County *v.* Severson, 68 Iowa 451, 27 N. W. 377; Goodnow *v.* Wells, 67 Iowa 654, 25 N. W. 864; Goodnow *v.* Litchfield, 67 Iowa 691, 25 N. W. 882; Fogg *v.* Holcomb, 64 Iowa 621, 21 N. W. 111; Goodnow *v.* Stryker, 62 Iowa 221, 14 N. W. 345, 17 N. W. 506; American Emigrant Co. *v.* Iowa R. Land Co., 52 Iowa 323, 3 N. W. 88; Goodnow *v.* Moulton, 51 Iowa 555, 2 N. W. 395; Semple *v.* McCrary, 46 Iowa 37. *Compare* Garrigan *v.* Knight, 47 Iowa 525.

Kentucky.— Rhodes *v.* Negley, 84 S. W. 1144, 27 Ky. L. Rep. 291.

Michigan.— See Taylor *v.* Roniger, 147 Mich. 99, 110 N. W. 503.

Nebraska.— Flanagan *v.* Mathisen, 78 Nebr. 412, 110 N. W. 1012; Crawford *v.* Galloway, 29 Nebr. 261, 45 N. W. 628; Snowden *v.* Tyler, 21 Nebr. 199, 31 N. W. 661. The so-called "Occupying Claimant's Act" of 1883 (Laws (1883), p. 249, c. 59), affording protection to persons not in the possession of disputed lands who have paid taxes and made lasting improvements thereon in good faith, claiming title to the same, and having an apparent title thereto derived connectedly by the public records from the United States or this state, is valid, and is applicable to lands of which adverse claimants had actual title at the time of its enactment. Flanagan *v.* Mathisen, *supra.*

Ohio.— Desnoyers *v.* Dennison, 19 Ohio Cir. Ct. 320, 10 Ohio Cir. Dec. 430.

Pennsylvania.— Brown *v.* Day, 78 Pa. St. 129; Rawle *v.* Renshaw, 15 Pa. Super. Ct. 488; Landreth *v.* McCaffrey, 9 Pa. Dist. 343.

Tennessee.—Wicks *v.* Sears, 4 Lea 298; Childress *v.* Vance, 1 Baxt. 406.

Vermont.— See Bryant *v.* Clark, 45 Vt. 483.

United States.— Tacey *v.* Irwin, 18 Wall. 549, 21 L. ed. 786; Bennett *v.* Hunter, 9 Wall. 326, 19 L. ed. 672. *Compare* Iowa Homestead Co. *v.* Des Moines Nav., etc., Co., 17 Wall. 153, 21 L. ed. 622.

See 45 Cent. Dig. tit. "Taxation," § 986.

Use and occupation as compensation for taxes paid.—Where a party has for a term of years occupied and had the use and enjoyment of lands to which he had no title, although he believed in good faith that he was the owner, and has paid the taxes on the land, he does not thereby gain an equitable claim against the land for the amount so paid as taxes. But if he is sued for use and occupation, the taxes for the years which may be included in the suit are a proper item to be considered and credited. Taylor *v.* Roniger, 147 Mich. 99, 110 N. W. 503.

98. See the cases cited in the preceding note.

99. Scharffbillig *v.* Scharffbillig, 51 Minn. 349, 53 N. W. 713; Shillock *v.* Gilbert, 23 Minn. 386. *Compare supra,* IX, A, 1, b, (I).

Effect on rights of owner.—A mere payment of taxes or assessments on land by one claiming title thereto will not preclude the true owner, who was ignorant thereof, from asserting his title. Stevens *v.* New York, 46 N. Y. Super. Ct. 274 [*affirmed* in 84 N. Y. 296].

1. Govern *v.* Russ, 125 Iowa 188, 100 N. W. 325; Weinberger *v.* Fauerbach, 14 Abb. Pr. N. S. (N. Y.) 91. *Compare* Bryant *v.* Nelson-Frey Co., 94 Minn. 305, 102 N. W. 859.

2. *California.*— See Henry *v.* Garden City Bank, etc., Co., 145 Cal. 54, 78 Pac. 228.

Georgia.— Patton *v.* Camp, 120 Ga. 936, 48 S. E. 361.

Louisiana.— Dickson *v.* Hynes, 36 La. Ann. 684.

Massachusetts.— See Curtis *v.* Gay, 15 Gray 36.

New Jersey.— Farmer *v.* Ward, 75 N. J. Eq. 33, 71 Atl. 401.

New York.— Lageman *v.* Kloppenburg, 2 E. D. Smith 126.

Oregon.— McNary *v.* Wrightman, 32 Oreg. 573, 52 Pac. 510.

Pennsylvania.— Hogg *v.* Longstreth, 97 Pa. St. 255.

Texas.— Stone *v.* Tilley, (Civ. App. 1906) 95 S. W. 718.

Washington.— Childs *v.* Smith, 51 Wash. 457, 99 Pac. 304, 130 Am. St. Rep. 1107; Hemen *v.* Rinehart, 45 Wash. 1, 87 Pac. 953; Dunsmuir *v.* Port Angeles Gas, etc., Co., 30 Wash. 586, 71 Pac. 9.

See 45 Cent. Dig. tit. "Taxation," § 986.

Mortgagee's right of reimbursement for taxes paid by him see MORTGAGES, 27 Cyc. 1255.

A city paying delinquent general taxes to protect its lien on lots is entitled to an equitable lien on the lots for the amount paid, such a payment not being a voluntary one. Spokane *v.* Security Sav. Soc., 46 Wash. 150, 89 Pac. 466.

so as to a purchaser who is obliged to pay taxes which should be paid by his vendor,[3] or a lessee who is forced to pay the landlord's taxes and *vice versa*.[4] But in all these cases it must be observed that there is no right to claim reimbursement if the payment is voluntary, that is, if the person making it is under no kind of compulsion, or is not forced to do so for the protection of any interest of his own, or if he no longer has any interest to protect, or if the tax is invalid and uncollectable.[5] A grantee or mortgagee of land, who pays taxes assessed upon the interest of a prior party in the land, and which is a lien thereon, cannot recover the land so paid from the latter, where there is no contractual relation between them.[6]

(B) *Right to Lien.* When taxes are paid on another's land under such circumstances as to give a right of recovery for the taxes paid, as set forth in the preceding section, the person making the payment will have an equitable lien on the premises for the amount so paid, or, according to the doctrine prevailing in some jurisdictions, will be subrogated to the lien of the state or municipality.[7] But

3. *Kansas.*— Greer *v.* McCarter, 5 Kan. 17.

Michigan.— Curtis *v.* Flint, etc., R. Co., 32 Mich. 291.

New Hampshire.— Dana *v.* Colby, 63 N. H. 169.

New Jersey.— Hutchinson *v.* Hutchinson, (Ch. 1904) 58 Atl. 528.

Washington.— Litchfield *v.* Cowley, 34 Wash. 566, 76 Pac. 81.

See 45 Cent. Dig. tit. "Taxation," § 986.

4. Campbell *v.* Luck, 25 Ohio Cir. Ct. 356; Kitchen *v.* Smith, 101 Pa. St. 452. See Neill *v.* Lacy, 110 Pa. St. 294, 1 Atl. 325.

5. *Illinois.*— Kessler *v.* Kedzie, 106 Ill. App. 1.

Iowa.— Iowa Mercantile Co. *v.* Blair, 123 Iowa 290, 98 N. W. 789; Warfield-Pratt-Howell Co. *v.* Averill Grocery Co., 119 Iowa 75, 93 N. W. 80.

New York.— Janeway *v.* Burn, 180 N. Y. 560, 73 N. E. 1125; Fishkill Landing First Nat. Bank *v.* Shuster, 2 Alb. L. J. 459.

Ohio.— Creps *v.* Baird, 3 Ohio St. 277.

Pennsylvania.— Scott *v.* Whitely, 2 Pa. L. J. Rep. 118.

Texas.— Southern Home Bldg., etc., Assoc. *v.* Thomson, 24 Tex. Civ. App. 76, 58 S. W. 202.

Vermont.— Fulton *v.* Aldrich, 76 Vt. 310, 57 Atl. 108.

See 45 Cent. Dig. tit. "Taxation," § 986.

6. William Ede Co. *v.* Heywood, 153 Cal. 615, 96 Pac. 81, 22 L. R. A. N. S. 562 (holding that a grantee of real estate who paid the tax assessed against the interest of the mortgagee of his grantor, which interest, for purposes of taxation, was an interest in land (Const. art. 13, § 4; Pol. Code, § 3627) and which tax was a lien on the interest of the mortgagee (Pol. Code, § 3718), could not recover of the mortgagee the sum so paid to discharge the tax, as there was no contractual relation between them); Canadian, etc., Mortg., etc., Co. *v.* Boas, 136 Cal. 419, 69 Pac. 18 (holding that where a first mortgagee foreclosed his mortgage, making the assignee of a second mortgage a party defendant, bought in the property at the sale and received a deed of conveyance, and meanwhile, the assignee having failed to pay the taxes due on his second mortgage, his interest therein was sold for taxes, and bought in by the state, the first mortgagee could not, after receiving his deed, pay to the state the amount for which such assignee's interest had been sold for taxes, together with costs, etc., and then maintain an action against the assignee to recover the amount of such payment); McPike *v.* Heaton, 131 Cal. 109, 63 Pac. 179, 82 Am. St. Rep. 335 (holding that the covenant implied against the encumbrance of taxes is a personal covenant, as would be any covenant against encumbrances, express or implied, which does not run with the land or pass to an assignee or succeeding grantee, and that a succeeding grantee who has paid the taxes cannot maintain an action against the first grantor upon the covenant implied from his deed of grant). See also Henry *v.* Garden City Bank, etc., Co., 145 Cal. 54, 78 Pac. 228. In William Ede Co. *v.* Heywood, *supra*, it is said that the cases above cited practically overrule San Gabriel Valley Land, etc., Co. *v.* Witmer Co., 96 Cal. 623, 29 Pac. 500, 31 Pac. 588, 18 L. R. A. 465, 470, and Angus *v.* Plum, 121 Cal. 608, 54 Pac. 97.

7. *Arkansas.*— Kemp *v.* Cossart, 47 Ark. 62, 14 S. W. 465; Woodall *v.* Delatour, 43 Ark. 521; Peay *v.* Feild, 30 Ark. 600.

Illinois.— Sharp *v.* Thompson, 100 Ill. 447, 39 Am. Rep. 61.

Indiana.— Harlan *v.* Jones, 104 Ind. 167, 3 N. E. 826.

Iowa.— German Trust Co. *v.* Bd. of Equalization, 121 Iowa 325, 96 N. W. 878; Merrill *v.* Tobin, 82 Iowa 529, 48 N. W. 1044; Cassidy *v.* Woodward, 77 Iowa 354, 42 N. W. 319; Goodnow *v.* Oakley, 68 Iowa 25, 25 N. W. 912; Bradley *v.* Cole, 67 Iowa 650, 25 N. W. 849; Evans *v.* Burns, 67 Iowa 179, 25 N. W. 119; Goodnow *v.* Plumbe, 64 Iowa 672, 21 N. W. 133; Goodnow *v.* Stryker, 63 Iowa 569, 19 N. W. 681; Goodnow *v.* Litchfield, 63 Iowa 275, 19 N. W. 226.

Kentucky.— Allen *v.* Perrine, 103 Ky. 516, 45 S. W. 500, 20 Ky. L. Rep. 202, 41 L. R. A. 351.

Louisiana.— Will's Succession, 15 La. Ann. 381. But *compare* Chaffe *v.* Ludeling, 34 La. Ann. 962.

no such lien exists where the payment was voluntary, in the legal sense, or was made at the request of the owner and for his mere accommodation.[8] Nor can this lien be made effective against a subsequent purchaser from the real owner who had no notice of the circumstances under which the taxes were paid.[9] Although a tax lien may be kept alive for the benefit of a surety paying the taxes, a tax collector, who pays the taxes out of his own funds, cannot be considered a surety, and he has no lien therefor.[10]

(III) *Corporation Paying Tax on Stocks or Bonds* — (A) *In General.* The courts have sustained the validity of the statutes in force in several of the states requiring corporations to pay the taxes assessed upon the shares of their capital stock in the hands of individual stock-holders, or upon their outstanding bonded indebtedness, and directing, or intending, that the corporation shall then deduct and retain the amount of such taxes from dividends payable to its shareholders or from interest on its bonds, as the case may be.[11] It is generally held that such a provision makes the tax a debt due from the corporation, for which

Maryland.— Hebb *v.* Moore, 66 Md. 167, 7 Atl. 255.

Michigan.— Richards *v.* Lewis L. Arms Shingle, etc., Co., 74 Mich. 57, 41 N. W. 860.

Mississippi.— Ingersoll *v.* Jeffords, 55 Miss. 37.

New Jersey.— Farmer *v.* Ward, 75 N. J. Eq. 33, 71 Atl. 401; Manning *v.* Tuthill, 30 N. J. Eq. 29.

New York.— Oliphant *v.* Burns, 146 N. Y. 218, 40 N. E. 980.

Ohio.— Nowler *v.* Coit, 1 Ohio 519, 13 Am. Dec. 640.

Pennsylvania.— Jackson *v.* Pittsburgh, 8 Pa. Dist. 150.

Texas.— Hensel *v.* Kegans, 8 Tex. Civ. App. 583, 28 S. W. 705.

Washington.— Childs *v.* Smith, 51 Wash. 457, 99 Pac. 304, 130 Am. St. Rep. 1107; Spokane *v.* Security Sav. Soc., 46 Wash. 150, 89 Pac. 466; Hemen *v.* Rinehart, 45 Wash. 1, 87 Pac. 953; Ball *v.* Clothier, 34 Wash. 299, 75 Pac. 1099; Rothschild *v.* Rollinger, 32 Wash. 307, 73 Pac. 367; Dunsmuir *v.* Port Angeles Gas, etc., Co., 30 Wash. 586, 71 Pac. 9; Packwood *v.* Briggs, 25 Wash. 530, 65 Pac. 846.

West Virginia.— See Hinchman *v.* Morris, 29 W. Va. 673, 2 S. E. 863.

See 45 Cent. Dig. tit. "Taxation," § 987.

Compare, however, Wood *v.* Gruble, 31 Kan. 69, 1 Pac. 277; Preston *v.* Wright, 81 Me. 306, 17 Atl. 128, 10 Am. St. Rep. 257.

Extent of lien.—Where the land consists of separate lots, and no rights of third persons have intervened, it is error to declare a lien on each lot for the taxes paid on it by another, but the whole amount should be adjudged a lien on the lots collectively. Goodnow *v.* Litchfield, 63 Iowa 275, 19 N. W. 226.

Duration of lien.—Where one, believing that he holds a valid mortgage lien not barred by limitation, pays in good faith delinquent general taxes to protect the lien, so as to procure an equitable lien on the land therefor, he is subrogated to the rights and liens of the county and state, against which limitation does not run; Ballinger Annot. Code & St. § 1740; Pierce Code, § 8678, providing that taxes assessed upon realty shall after levy be a lien thereon until paid. Childs *v.* Smith, 51 Wash. 457, 99 Pac. 304, 130 Am. St. Rep. 1107.

Effect of purchase at tax-sale.—Where a mortgagee without authority purchases the property at a tax-sale, he occupies the same position as if he had paid the taxes before sale, and is therefore only entitled to subrogation to the tax lien. Farmer *v.* Ward, 75 N. J. Eq. 33, 71 Atl. 401. See *infra*, XIV, C, 3.

8. *Connecticut.*—Sperry *v.* Butler, 75 Conn. 369, 53 Atl. 899.

Indiana.— Snoddy *v.* Leavitt, 105 Ind. 357, 5 N. E. 13; Sohn *v.* Wood, 75 Ind. 17.

New Jersey.— Rankin *v.* Coar, 46 N. J. Eq. 566, 22 Atl. 177, 11 L. R. A. 661.

New York.— Koehler *v.* Hughes, 4 Misc. 236, 24 N. Y. Suppl. 760.

Tennessee.— Ferguson *v.* Quinn, 97 Tenn. 46, 36 S. W. 576, 33 L. R. A. 688.

Texas.—Furche *v.* Mayer, (Civ. App. 1895) 29 S. W. 1099.

See 45 Cent. Dig. tit. "Taxation," § 987.

Erroneous belief in lien of judgment or mortgage.— Where a judgment creditor or mortgagee pays taxes on land, believing in good faith, although erroneously, that the judgment or mortgage is still a lien on the land, the payment is not voluntary, and he acquires an equitable lien on the land for the taxes so paid with interest from the several dates of payment. Childs *v.* Smith, 51 Wash. 457, 99 Pac. 304, 130 Am. St. Rep. 1107; Hemen *v.* Rinehart, 45 Wash. 1, 87 Pac. 953; Dunsmuir *v.* Port Angeles Gas, etc., Co., 30 Wash. 586, 71 Pac. 9; Packwood *v.* Briggs, 25 Wash. 530, 65 Pac. 846.

9. Merrill *v.* Tobin, 82 Iowa 529, 48 N. W. 1044; Bowen *v.* Duffie, 66 Iowa 88, 23 N. W. 277.

10. *In re* Wallace, 59 Pa. St. 401.

11. New Orleans *v.* Louisiana Sav. Bank, etc., Co., 31 La. Ann. 826; Donovan *v.* Firemen's Ins. Co., 30 Md. 155; Com. *v.* Lehigh Valley R. Co, 129 Pa. St 429, 18 Atl. 406, 410; Com. *v.* Delaware Div. Canal Co., 123 Pa. St. 594, 16 Atl. 584, 2 L. R. A. 798; Catawissa R. Co.'s Appeal, 78 Pa. St. 59; Maltby *v.* Reading, etc., R. Co., 52 Pa. St. 140; Com. *v.* Wilkesbarre, etc., R. Co., 14 Pa. Co. Ct. 205; Com. *v.* New York, etc., R. Co., 9 Pa. Co. Ct. 305; South Nashville St. R. Co.

it is directly and primarily liable, and that its liability for the same is not affected by its becoming insolvent or going into the hands of a receiver.[12] Under a statute requiring a municipal corporation to pay the state tax on its stock loans for the holders thereof, and directing its collection from them by the corporation by deducting it from the interest due and payable thereon to them, the obligation of the corporation to pay such tax is a direct statutory obligation, for breach of which an action at law will lie.[13]

(B) *Bank Stock.* The rules stated in the preceding section apply to the taxation of shares of the capital stock of banking institutions;[14] and in particular, a state has power to require national banks to pay for their stock-holders the taxes legally assessed against their respective shares.[15] But the bank is not directly liable to pay such tax unless it has dividends or other property of the stockholders in its possession, and hence a suit for the tax cannot be maintained against the receiver of an insolvent national bank where the property represented by the shares has disappeared.[16]

(IV) *CONTRIBUTION AND APPORTIONMENT.* Where separate interests in the same parcel of realty are owned by different persons, or even where there are separate tenements in the same building, the taxes may be apportioned among those interested,[17] and so as between the owner of the original parcel and a purchaser of a portion of it;[18] and generally, in these circumstances, where one person pays the whole amount of the taxes, he may call upon the others for contribution.[19]

v. Morrow, 87 Tenn. 406, 11 S. W. 348, 2 L. R. A. 853.

12. State *v.* Baltimore, 105 Md. 1, 65 Atl. 369; American Casualty Ins. Co.'s Case, 82 Md. 535, 34 Atl. 778, 38 L. R. A. 97; Com. *v.* Philadelphia, etc., Coal, etc., Co., 137 Pa. St. 481, 20 Atl. 531, 580 (holding that, although a corporation is in the hands of a receiver appointed by the United States court, it is the duty of its treasurer to assess and pay the three mill tax on its bonded debt); Com. *v.* Lehigh Valley R. Co., 129 Pa. St. 429, 18 Atl. 406, 1410; Com. *v.* Wilkesbarre, etc., R. Co., 14 Pa. Co. Ct. 205; Buffalo, etc., R. Co. *v.* Com., 3 Brewst. (Pa.) 374. *Contra*, Relfe *v.* Columbia L. Ins. Co., 11 Mo. App. 374.

Payment by the bondholders themselves, or by any other parties, will discharge the corporation from liability for the tax. Com. *v.* Lehigh Valley R. Co., 104 Pa. St. 89.

Corporation defaulting on interest payment. — Where a corporation, for lack of funds, makes default in the payment of the interest for a certain year on its bonds, so that its treasurer cannot retain the state taxes from the amount going to bondholders, the company is not liable to the state for the taxes for that year. Com. *v.* Philadelphia, etc., R. Co., 13 Pa. Co. Ct. 65.

13. State *v.* Baltimore, 105 Md. 1, 65 Atl. 369.

14. Ætna Ins. Co. *v.* New York, 7 N. Y. App. Div. 145, 40 N. Y. Suppl. 120 [*affirmed* in 153 N. Y. 331, 47 N. E. 593]; Atty.-Gen. *v.* Cape Fear Bank, 40 N. C. 71; Atty.-Gen. *v.* Newbern Bank, 21 N. C. 216.

15. Sumter County *v.* Gainesville Nat. Bank, 62 Ala. 464, 34 Am. Rep. 30; National Commercial Bank *v.* Mobile, 62 Ala. 284, 34 Am. Rep. 15; Kennedy *v.* Citizens' Nat. Bank, 128 Iowa 561, 104 N. W. 1021; Com. *v.* Louisville First Nat. Bank, 4 Bush (Ky.) 98, 96 Am. Dec. 285; Omaha First Nat. Bank *v.* Douglas County, 9 Fed. Cas. No. 4,799, 3 Dill. 330. And see *supra*, III, B, 2, b, (IV), (A).

16. Redhead *v.* Iowa Nat. Bank, 127 Iowa 572, 103 N. W. 796; Farmers', etc., Nat. Bank *v.* Hoffman, 93 Iowa 119, 61 N. W. 418; Hershire *v.* Iowa City First Nat. Bank, 35 Iowa 272; Stapylton *v.* Thaggard, 91 Fed. 93, 33 C. C. A. 353; Boston *v.* Beal, 55 Fed. 26, 5 C. C. A. 26.

Bank's claim for reimbursement.—Where a bank pays taxes assessed on its stock, as required by statute, its claim for reimbursement against the holder of such stock is an asset of the bank which it is entitled to collect. Kennedy *v.* Citizens' Nat. Bank, 128 Iowa 561, 104 N. W. 1021.

17. Graham *v.* Dunigan, 2 Bosw. (N. Y.) 516; Cincinnati College *v.* Yeatman, 30 Ohio St. 276; Iron City Tool Works *v.* Long, 4 Pa. Cas. 57, 7 Atl. 82.

18. People *v.* Brooklyn Assessors, 137 N. Y. 201, 33 N. E. 145. *Compare* Shaw *v.* Quinn, 12 Serg. & R. (Pa.) 299; N. D. Laws (1897), c. 126, § 96, and Laws (1890), c. 132, § 92, providing for the division of valuations for taxation on transfer of part of a tract do not apply to division of valuations where no transfer has been made after assessment of taxes. State Finance Co. *v.* Bowdle, 16 N. D. 193, 112 N. W. 76.

Sale of separate parcels; liability for taxes in adverse order of alienation see *supra*, VIII, D, 1. As to right of last grantee who is compelled under this rule to pay taxes on the whole to compel contribution see Bull *v.* Griswold, 14 R. I. 22.

19. Dikeman *v.* Dikeman, 11 Paige (N. Y.) 484; Iron City Tool Works *v.* Long, 4 Pa. Cas. 57, 7 Atl. 82. See Taylor *v.* Planet Property, etc., Co., 78 Mo. App. 137 (mere volunteer paying tax cannot compel contribution); Homer *v.* Cilley, 14 N. H. 85 (payment before land is advertised for sale).

Statutes sometimes provide for the apportionment of taxes among the proper subdivisions or parcels of the real estate assessed.[20]

c. Payment From Property in Custody of Law. Where property subject to taxes has been sold under decree of foreclosure or other judicial process and the proceeds brought into court, even if the statute does not expressly direct the payment of the taxes out of the fund, it is entirely proper for the court to do so,[21] and the same is true in regard to property in the possession of a receiver appointed by the court.[22]

20. See Morris, etc., Dredging Co. *v.* Bayonne, 75 N. J. L. 59, 67 Atl. 20, holding that under Gen. Tax Act (1903) (Pub. Laws (1903), p. 414), § 61, the council of the city of Bayonne are required on proper application of any person interested to apportion taxes among the proper subdivisions or parcels of real estate assessed for taxes in said city.

21. Degner *v.* Baltimore, 74 Md. 144, 21 Atl. 697; Georgetown College *v.* Perkins, 74 Md. 72, 21 Atl. 551; Baltimore *v.* Chase, 2 Gill & J. (Md.) 376; Poughkeepsie Sav. Bank *v.* Winn, 56 How. Pr. (N. Y.) 368.

Intervention by state.— The state has a right to intervene in a suit to enforce its lien for taxes on property involved therein, and obtain an order for payment out of proceeds arising from the judicial sale of such property (Huckleby *v.* State, 57 Fla. 433, 48 So. 979); and where the state does intervene in such a case parties wishing to question the legality of the tax must do so by answer (Huckleby *v.* State, *supra*).

Lien not divested by judicial sale see *supra*, VIII, D, 2.

22. *Connecticut.*— Lamkin *v.* Baldwin, etc., Mfg. Co., 72 Conn. 57, 43 Atl. 593, 1042, 44 L. R. A. 786.

Georgia.— Dysart *v.* Brown, 100 Ga. 1, 26 S. E. 767, holding that where it appears that an insolvent corporation, whose assets are in the hands of a receiver, is already two years in default in the payment of its state and county taxes, and that the taxes for a third year will soon become due, it is the duty of the judge by whom the receiver was appointed, upon a proper application by the tax collector, to order the receiver, if no other means are available for the purpose, to sell a sufficiency of the property of the corporation to raise the money with which to pay the overdue taxes; and the fact that all of the income derived by a receiver from carrying on the business of a corporation whose assets are in his hands is requisite to the operation of that business is no legal excuse for such long delay in paying its taxes.

Idaho.— Palmer *v.* Pettingill, 7 Ida. 346, 55 Pac. 653.

Illinois.—Wiswall *v.* Kunz, 173 Ill. 110, 50 N. E. 184, holding that while property held by a receiver should be assessed to the receiver, the fact that it is assessed in the name of the party for whom the receiver holds possession does not affect the validity of the tax; and it is within the power of the court appointing the receiver to allow the amount of the tax, as a claim against the receiver, and order the same paid by the receiver to the tax collector; and that the taxes upon this property in the hands of the receiver, assessed after his appointment, may properly be regarded as part of the costs and expenses of the receivership, and may be ordered paid in full, as other costs and expenses.

Indiana.— See Stoner *v.* Bitters, 151 Ind. 575, 52 N. E. 149.

Kentucky.— Spalding *v.* Com., 88 Ky. 135, 10 S. W. 420, 10 Ky. L. Rep. 714, holding that the proper procedure is for the court appointing a receiver of property of a decedent's estate which is in litigation to direct him to list the property in the county court, and pay the taxes, but it is not improper for the former court to grant leave to institute a suit in the county court against the receiver, to compel him to list the property; and the county court having ordered the receiver to do so, and its order having been appealed to the court appointing him, and there affirmed, the latter court may be considered as having directed the listing.

New Jersey.— *In re* U. S. Car Co., 60 N. J. Eq. 514, 43 Atl. 673 [*reversing* 57 N. J. Eq. 357, 42 Atl. 272].

New York.— Central Trust Co. *v.* New York City, etc., R. Co., 110 N. Y. 250, 18 N. E. 92, 1 L. R. A. 260 [*reversing* 47 Hun 587] (holding that where a railroad corporation was insolvent and all its property was in the hands of a receiver appointed in an action to foreclose a mortgage thereon, the amount of which exceeded the value of all the property, and the receiver as such was operating the road under order of the court, and had in his hands moneys arising from the gross earnings sufficient to pay a tax imposed upon the corporation under and pursuant to the Corporation Act of 1881 (Laws (1881), c. 361), the state was not confined to the proceedings prescribed in said act to collect such tax, but the court, on petition and application of the attorney-general, made in the foreclosure suit, and on notice to the corporation and to the receiver might, in its discretion, make an order directing the receiver to pay the same out of said gross earnings); Matter of Columbian Ins. Co., 3 Abb. Dec. 239, 3 Keyes 123. And see Decker *v.* Gardiner, 124 N. Y. 334, 26 N. E. 814, 11 L. R. A. 480.

Pennsylvania.— Com. *v.* Buffalo, etc., R. Co., 2 Dauph. Co. Rep. 216. And see Philadelphia, etc., R. Co. *v.* Com., 104 Pa. St. 80.

United States.— See *Ex p.* Tyler, 149 U. S. 164, 13 S. Ct. 785, 37 L. ed. 689.

d. To Whom Payment Made.[23] A payment of taxes, in order to be effective in relieving the person and his property from liability, must be made to the officer primarily authorized to receive them,[24] or at least to someone legally delegated to act in his behalf in receiving and receipting for the taxes.[25]

e. Time and Place For Payment. The statutes ordinarily fix the time when taxes shall become due and payable and prescribe the length of time which may elapse before they shall be considered delinquent.[26] After that time, although the citizen still has the right to relieve his property by paying the taxes, they usually carry a penalty or interest, which must be included in the payment.[27] But when land has been sold for delinquent taxes, the owner's right to discharge the tax by payment is lost and he has instead a right of redemption which must be obtained by means of the appropriate procedure.[28] On the other hand, payment of taxes

Excuse for non-payment.— The facts that a receiver had sold the property, which was realty, by the court's order and approval, and the purchaser had taken it subject to taxes, were held a "good and sufficient cause" for non-payment within the meaning of Horner Rev. St. Ind. (1897) § 6436, providing that where a receiver neglects to pay taxes on property he may be cited to show cause why such taxes, with penalty, should not be paid. Stoner *v.* Bitters, 151 Ind. 575, 52 N. E. 149.

Certificates issued by a receiver given priority see Union Trust Co. *v.* Illinois Midland Co., 117 U. S. 434, 6 S. Ct. 809, 29 L. ed. 963.

License-fee assessed against insolvent corporation in hands of receiver entitled to priority see *In re* U. S. Car Co., 60 N. J. Eq. 514, 43 Atl. 673 [*reversing* 57 N. J. Eq. 357, 42 Atl. 272].

23. Authority to collect see *infra*, X, A, 4.

24. Sherrick *v.* State, 167 Ind. 345, 79 N. E. 193; Auditor Public Accounts *v.* Western Union Tel. Co., 46 S. W. 704, 20 Ky. L. Rep. 469; Young *v.* King, 3 R. I. 196; Texas, etc., R. Co. *v.* State, 43 Tex. Civ. App. 580, 97 S. W. 142. *Compare* Jones *v.* Dils, 18 W. Va. 759.

25. Randall *v.* Dailey, 66 Wis. 285, 28 N. W. 352, holding that where payment is made to a person authorized by the county treasurer to receive the taxes, the fact that the receipt is signed only by a stamp with a facsimile of the treasurer's signature will not affect the rights of the taxpayer as against a subsequent purchaser of the land at tax-sale. But see Marshall *v.* Baldwin, 11 Phila. (Pa.) 403, holding that proof of payment of taxes to a conveyancer is not proof of payment to a proper person.

26. See the statutes of the several states. And see the following cases:

Maryland.— State *v.* Safe-Deposit, etc., Co., 86 Md. 581, 39 Atl. 523; Condon *v.* Maynard, 71 Md. 601, 18 Atl. 957.

Massachusetts.— Com. *v.* Commonwealth Bank, 22 Pick. 176.

Mississippi.— Carlisle *v.* Yoder, 69 Miss. 384, 12 So. 255.

Nevada.— State *v.* Eureka Consol. Min. Co., 8 Nev. 15.

North Carolina.— State *v.* Bryant, 121 N. C. 569, 28 S. E. 551.

Ohio.— Hoglen *v.* Cohan, 30 Ohio St. 436; McMillan *v.* Robbins, 5 Ohio 28.

Oklahoma.— Norton *v.* Choctaw, etc., R. Co., 16 Okla. 482, 86 Pac. 287.

South Carolina.—Willis *v.* Heighway, 40 S. C. 476, 19 S. E. 135.

Tennessee.— Rucker *v.* Hyde, 118 Tenn. 358, 100 S. W. 739.

Texas.— Lufkin *v.* Galveston, 73 Tex. 340, 11 S. W. 340; Clark *v.* Elmendorf, (Civ. App. 1904) 78 S. W. 538.

United States.— McGunnegle *v.* Rutherford, 16 Fed. Cas. No. 8,815*a*, Hempst. 45, construing early statute of Arkansas.

See 45 Cent. Dig. tit. "Taxation," § 969.

Time for payment of license-tax.— Taxes and fees for business licenses are payable in advance, that is, they must be paid before the license is delivered. State *v.* Spencer, 49 Mo. 342.

Tax collector's business hours.—A collector or receiver of taxes has a right to appoint certain reasonable hours of the business day, during which alone his office will be open for the receipt of taxes. Lancaster *v.* Kray, 21 Lanc. L. Rev. (Pa.) 383.

The registry tax on mortgages, provided by Minn. Gen. Laws (1907), c. 328, must be paid on the filing for record of an agreement for an extension or renewal of the mortgage. Mutual Ben. L. Ins. Co. *v.* Martin County, 104 Minn. 179, 526, 116 N. W. 572, 575.

27. Bracey *v.* Ray, 26 La. Ann. 710 (if a delinquent tax is actually received by the collector without the penalty, a sale cannot afterward be made for the penalty); Connolly's Case, 5 Wkly. Notes Cas. (Pa.) 8 (collector should receive taxes at any time when offered, without regard to the question whether the payment is in time to entitle the taxpayer to vote at a coming election); State *v.* Folk, 45 S. C. 491, 23 S. E. 628 (the fact that the statute makes default in the payment of poll taxes a misdemeanor will not prevent the collector from accepting voluntary payment of delinquent poll taxes with penalties).

Interest and penalties see *infra*, IX, A, 2, e.

28. Coombs *v.* Steere, 8 Ill. App. 147; Squire *v.* McCarthy, 77 Nebr. 431, 112 N. W. 327, 77 Nebr. 429, 109 N. W. 768.

at a time when the collector is not authorized to receive them will not avoid a subsequent sale of the land for the same taxes.[29] Questions seldom arise as to the proper place for the payment of taxes, but it is held that where a new county or other political subdivision is formed by separation from an old one, taxes on property within the district set off to the new county must be paid to the proper officer of that county, rather than in the old one.[30]

f. Tender. A good and sufficient tender of taxes due has the same effect as actual payment, in preventing the lawful prosecution of any proceedings for the enforcement of the taxes.[31] But the tender must be unconditional,[32] and it must be made to an officer authorized to receive the tax,[33] and be for the full amount

29. Thornton *v.* Smith, 36 Ark. 508; Texas, etc., R. Co. *v.* State, 43 Tex. Civ. App. 580, 97 S. W. 142; Orange County *v.* Texas, etc., R. Co., 35 Tex. Civ. App. 361, 80 S. W. 670.

30. Morehouse Parish *v.* Richland Parish, 23 La. Ann. 648; Fremont, etc., R. Co. *v.* Brown County, 18 Nebr. 516, 26 N. W. 194. And see Southern R. Co. *v.* Mitchell, 139 Ala. 629, 37 So. 85.

Land assessed in two counties.—If land has been assessed in a doubtful or disputed territory by two counties, the tax may be paid in the county where the land is actually situated, and such payment will bar an action brought for the taxes in the other county. People *v.* Wilkerson, 1 Ida. 619.

31. *Arkansas.*— Kinsworthy *v.* Austin, 23 Ark. 375. And see Bender *v.* Bean, 52 Ark. 132, 12 S. W. 180, 241.

Maine.— Loomis *v.* Pingree, 43 Me. 299.

Maryland.— Duvall *v.* Perkins, 77 Md. 582, 26 Atl. 1085.

Mississippi.— Jones *v.* Burford, 26 Miss. 194. And see Miller *v.* McGehee, 60 Miss. 903.

Missouri.— Harness *v.* Cravens, 126 Mo. 233, 28 S. W. 971. *Compare*, however, McGuire *v.* Brockman, 58 Mo. App. 307.

New York.— People *v.* O'Keefe, 90 N. Y. 419.

Oregon.— Nickum *v.* Gaston, 28 Oreg. 322, 42 Pac. 130.

Washington.— Loving *v.* McPhail, 48 Wash. 113, 92 Pac. 944, holding that where the owner of property sends the treasurer of the county more than enough money to pay the taxes due on certain property, with a request to return the balance if more than necessary for that purpose, and the treasurer receipts for the taxes in full, the effort to pay taxes is the equivalent of payment, so far as to discharge the lien and bar a sale for non-payment.

Wisconsin.— Edwards *v.* Upham, 93 Wis. 455, 67 N. W. 728.

United States.— Poindexter *v.* Greenhow, 114 U. S. 270, 5 S. Ct. 903, 962, 29 L. ed. 185; U. S. *v.* Lee, 106 U. S. 196, 1 S. Ct. 240, 27 L. ed. 171; Atwood *v.* Weems, 99 U. S. 183, 25 L. ed. 471; Tracey *v.* Irwin, 18 Wall. 549, 21 L. ed. 786; Robinson *v.* Lee, 122 Fed. 1012; Parsons *v.* Slaughter, 63 Fed. 876; Lewis *v.* Withers, 44 Fed. 165; Willis *v.* Miller, 29 Fed. 238; Green *v.* Brooks, 28 Fed. 215; Schenck *v.* Peay, 21 Fed. Cas. No. 12,451, 1 Dill. 267.

See 45 Cent. Dig. tit. "Taxation," § 970.

Equivalent of payment in effect on certificate of sale see Poindexter *v.* Greenhow, 114 U. S. 270, 5 S. Ct. 903, 962, 29 L. ed. 185.

Valid tender as satisfaction of tax judgment see Woodruff *v.* Trapnall, 10 How. (U. S.) 190, 13 L. ed. 383.

Lands assessed to another.— A sale of land for taxes after a tender of payment by the owner or his agent does not divest the owner of his title, although the land was assessed in the name of another person. Kinsworthy *v.* Austin, 23 Ark. 375.

By whom made.—While actual payment by any person will discharge the lien of taxes and thus end the treasurer's power to sell for non-payment, an offer to pay, which fails through the fault of the treasurer, in order to have such effect, must be made by a person having an interest which would be lost to him by a sale. Such an interest may be shown by a contract of sale of the land executed prior to the payment of the taxes. Trexler *v.* Africa, 27 Pa. Super. Ct. 385.

Keeping tender good.— If, in an action of replevin against a tax collector, plaintiff relies upon a tender of all the taxes due as entitling him to a return of his goods, he must show a continuous tender up to and during the trial. Miller *v.* McGehee, 60 Miss. 903. If the taxpayer comes into equity to have a sale for taxes set aside and to cancel the certificate or redeem, basing the right upon a tender, he must keep the tender good. Lancaster *v.* De Hadway, 97 Ind. 565; People *v.* Edwards, 56 Hun (N. Y.) 377, 10 N. Y. Suppl. 335.

Tender unnecessary see U. S. *v.* Lee, 106 U. S. 196, 1 S. Ct. 240, 27 L. ed. 171.

A valid tender in redemption and its refusal terminates the estate of tax purchasers. Bender *v.* Bean, 52 Ark. 132, 12 S. W. 180, 241. And see *infra*, XII, C, 2, a.

32. State *v.* Central Pac. R. Co., 21 Nev. 247, 30 Pac. 686, holding, however, that a demand for a receipt does not invalidate the tender where the law makes it the duty of the tax receiver to give such receipts.

Sufficiency of tender.—Where coupons from state bonds are made by law a legal tender in payment of taxes, but the state has notified the tax collectors not to receive them, the slightest offer of such coupons to a collector is a tender. Green *v.* Brooks, 28 Fed. 215.

33. Edwards *v.* Upham, 93 Wis. 455, 67 N. W. 728.

of the tax due, with any accrued interest, penalties, or costs,[34] except in cases where the assessment is entirely void, when no tender at all is necessary,[35] and in cases where part of the tax is illegal, when the taxpayer may tender the amount legally due and resist payment of the rest.[36] But the taxpayer always has the right to tender the taxes due on a part of his assessed property, separable from the rest, or to offer payment of one only of several distinct taxes levied on the same property reserving the right to contest the others.[37]

g. Excuses For Non-Payment — (i) *In General.* The personal disability of the owner of property is not an excuse for his failure to pay the taxes thereon;[38] nor is his financial inability to pay them,[39] or an actual or intended diversion to an unlawful purpose of the public moneys raised by the tax.[40] But an unlawful rule adopted and published by the collecting officers that they will receive payment of the taxes from no one but the owner in person will excuse an agent having charge of the property from making a useless tender and prevent a valid tax-sale of the property.[41] Failure of the officer to present a check given in payment of taxes, so that, by reason of failure of the bank, it is not paid, is no excuse for non-payment of the taxes.[42]

(ii) *Mistake; Reliance on Official Statement or Certificate.* Where a property-owner in good faith applies to the proper officer to pay his taxes, and is furnished with a statement, certificate, or information as to the amount of the taxes due, on which he relies, but which is incomplete or erroneous by reason of the mistake or fraud of the officer, and he pays all that is demanded of him, this will be equivalent to full payment, so far as to invalidate any subsequent sale of the property for the omitted taxes.[43] But in some states this rule

34. Howell *v.* Hogins, 37 Ark. 110 (tender of a county warrant of greater face value than the amount of the taxes to be paid, with an offer by the taxpayer to remit the excess, is good); Hunt *v.* McFadgen, 20 Ark. 277; State *v.* Carson City Sav. Bank, 17 Nev. 146, 30 Pac. 703; Heft *v.* Gephart, 65 Pa. St. 510; Crum *v.* Burke, 25 Pa. St. 377; Joslyn *v.* Tracy, 19 Vt. 569 (tender must include traveling expenses incurred by collector in attempting to distrain property). *Compare* Converse *v.* Jennings, 13 Gray (Mass.) 77, holding that a tender of the amount due for taxes on land advertised for sale for non-payment of taxes, but not yet sold, need not include any fees of the collector for a levy upon the land, or for traveling expenses to make a return to the state and county treasurers, or for a commission on the tax.

35. Albany City Nat. Bank *v.* Maher, 9 Fed. 884, 20 Blatchf. 341.

36. Walker *v.* St. Louis, 15 Mo. 563; Clark *v.* Colfax County, 2 Nebr. (Unoff.) 133, 96 N. W. 607. But *compare* Julien *v.* Ainsworth, 27 Kan. 446.

37. Iowa R. Land Co. *v.* Carroll County, 39 Iowa 151; Olmsted County *v.* Barber, 31 Minn. 256, 17 N. W. 473, 944. And see *infra*, IX, A, 2, c.

38. See *supra*, III, A, 1, b, (II).

39. Silverthorne *v.* Warren R. Co., 33 N. J. L. 372.

40. State *v.* Fuller, 34 N. J. L. 227.

41. U. S. *v.* Lee, 106 U. S. 196, 1 S. Ct. 240, 27 L. ed. 171; Hills *v.* National Albany Exch. Bank, 105 U. S. 319, 26 L. ed. 1052; Atwood *v.* Weems, 99 U. S. 183, 25 L. ed. 471; Tracey *v.* Irwin, 18 Wall. (U. S.) 549, 21 L. ed. 786; Bennett *v.* Hunter, 9 Wall. (U. S.) 326, 19 L. ed. 672.

42. Manck *v.* Fratz, 7 Ohio Dec. (Reprint) 704, 4 Cinc. L. Bul. 1043.

43. *Arkansas.*— Scroggin *v.* Ridling, 92 Ark. 630, 121 S. W. 1053; Gunn *v.* Thompson, 70 Ark. 500, 69 S. W. 261; Hickman *v.* Kempner, 35 Ark. 505.

Iowa.— Hintrager *v.* Mahoney, 78 Iowa 537, 43 N. W. 522, 6 L. R. A. 50; Jiska *v.* Ringgold County, 57 Iowa 630, 11 N. W. 618; Corning Town Co. *v.* Davis, 44 Iowa 622. A taxpayer is not negligent in relying upon information given him by the county treasurer respecting the taxes he is required to pay; and, if he makes a timely and honest effort to pay or to redeem, and is misled by the treasurer's conduct or mistake, equity will grant him relief. Burchardt *v.* Scofield, 141 Iowa 336, 117 N. W. 1061.

Kansas.— Moon *v.* March, 40 Kan. 58, 19 Pac. 334.

Michigan.— Hayward *v.* O'Connor, 145 Mich. 52, 108 N. W. 366; Hoffman *v.* Auditor-Gen., 136 Mich. 689, 100 N. W. 180; Carpenter *v.* Jones, 117 Mich. 91, 75 N. W. 292; Hough *v.* Auditor-Gen., 116 Mich. 663, 74 N. W. 1045.

Mississippi.— Brannan *v.* Lyon, 86 Miss. 401, 38 So. 609.

Missouri.— Harness *v.* Cravens, 126 Mo. 233, 28 S. W. 971. *Compare*, however, Raley *v.* Guinn, 76 Mo. 263.

Nebraska.— Browne *v.* Finlay, 51 Nebr. 465, 71 N. W. 34.

New York.— People *v.* Brooklyn Registrar of Arrears, 114 N. Y. 19, 20 N. E. 611.

Pennsylvania.— Pottsville Lumber Co. *v.* Wells, 157 Pa. St. 5, 27 Atl. 408; Philadelphia

is restricted to cases where the officer is authorized or required by law to furnish official tax statements, and it is held that in the absence of any such authority or requirement the taxpayer who relies on what he is told does so at his own peril.[44] A landowner, it has been held, is not bound as a matter of law to take notice of a new map giving a new description of his lands, and if, relying on the old description and the old map, he attempts to pay his taxes, and supposes he has done so on all his lands, but fails to do so on some of them, which are subsequently sold for taxes without his knowledge, the deed made in pursuance of such sale is void.[45] Where the owner of land goes to the county treasurer's office, in good faith, for the purpose of paying the taxes thereon, and, although using reasonable diligence to ascertain and pay them, fails to do so by reason of being actually misled by the assessment, and the treasurer's advertised list of sales of unseated lands, the land being there designated by a wrong warrant number, a sale of the land for such taxes is void.[46]

2. Mode and Amount of Payment — a. Mode of Making Payment — (i) *In General.* As a general rule, the law requires taxes to be paid actually in cash, and all at once, unless where a statute allows their discharge in instalments;[47] but the same result may be accomplished by retention of funds belonging to the taxpayer, by transfer of credits, or anything else which is equivalent to actual payment.[48] But private arrangements between the taxpayer and the collector are not regarded with favor, and a tax cannot be discharged by the collector merely

v. Anderson, 142 Pa. St. 357, 21 Atl. 976, 21 L. R. A. 751; Freeman *v.* Cornwell, (1888) 15 Atl. 873; Breisch *v.* Coxe, 81 Pa. St. 336; Baird *v.* Cahoon, 5 Watts & S. 540; Trexler *v.* Africa, 27 Pa. Super. Ct. 385, 33 Pa. Super. Ct. 395; Philadelphia *v.* Glanding, 8 Pa. Co. Ct. 367.

Washington.— Taylor *v.* Debritz, 48 Wash. 373, 93 Pac. 528; Bullock *v.* Wallace, 47 Wash. 690, 92 Pac. 675.

Wisconsin.— Nelson *v.* Churchill, 117 Wis. 10, 93 N. W. 799; Edwards *v.* Upham, 93 Wis. 455, 67 N. W. 728; Bray, etc., Land Co. *v.* Newman, 92 Wis. 271, 65 N. W. 494; Gould *v.* Sullivan, 84 Wis. 659, 54 N. W. 1013, 36 Am. St. Rep. 955, 20 L. R. A. 487; Randall *v.* Dailey, 66 Wis. 285, 28 N. W. 352.

See 45 Cent. Dig. tit. "Taxation," §§ 990, 1267.

Unauthorized officer.— The rule has no application where the officer applied to is not the one authorized to receive the tax. Edwards *v.* Upham, 93 Wis. 455, 67 N. W. 728.

44. Elliot *v.* District of Columbia, 3 MacArthur (D. C.) 396; Kahl *v.* Love, 37 N. J. L. 5. But *compare* Rosecrans *v.* District of Columbia, 5 Mackey (D. C.) 120. In Raley *v.* Guinn, 76 Mo. 263, it was held that a tax deed could not be defeated by showing that before advertisement or sale of the land the owner went to the office of the collector to pay the taxes, and was told that there were none against the land, as the publication of the delinquent list, as required by law, gave him correct information on the subject.

45. Richter *v.* Beaumont, 67 Miss. 285, 7 So. 357; Lewis *v.* Monson, 151 U. S. 545, 14 S. Ct. 424, 38 L. ed. 265.

46. Freeman *v.* Cornwell, (Pa. 1888) 15 Atl. 873.

47. Litchfield *v.* Brooklyn, 10 Misc. (N. Y.) 74, 31 N. Y. Suppl. 151. And see Harrington *v.* Dickinson, 155 Mich. 161, 118 N. W. 931; and *infra*, IX, A, 2, d.

Contract for services in payment.—An agreement between a taxpayer of a county or city and such corporation that certain services were to be rendered by him in consideration that his taxes were to be canceled will not avail the taxpayer in an action between him, or his grantee, and the purchaser of real property at tax-sale, notwithstanding he may have performed his part of the contract, it not appearing that the county or city had complied with its contract and paid the taxes. Merriam *v.* Dovey, 25 Nebr. 618, 41 N. W. 550.

48. Thus a county treasurer may withhold so much of an officer's salary as is necessary to pay a tax lien on the latter's property. Beckett *v.* Wishon, 5 Ohio S. & C. Pl. Dec. 257, 5 Ohio N. P. 155. And see Ewing *v.* Robeson, 15 Ind. 26, as to state auditor retaining the interest accruing on state bonds, for the payment of taxes. So where a county treasurer deposits in a bank receipts for taxes due from the bank, receives credit for the amount of such taxes, and afterward draws the money out by check, the transaction amounts to a payment of the taxes. Wasson *v.* Lamb, 120 Ind. 514, 22 N. E. 729, 16 Am. St. Rep. 342, 6 L. R. A. 191. Where a county treasurer deposited the county funds in a bank, and used the bank as a medium for the collection of taxes, by placing tax receipts in its hands and permitting it to collect the amount and credit it to the deposit account, the delivery to the bank of a receipt for the amount of the taxes assessed against the bank, and a credit of the amount of such receipt to the deposit account, constituted, as between the county and the county treasurer, a collection of the tax due from the bank. Brown *v.* Sheldon State Bank, 139 Iowa 83, 117 N. W. 289.

marking it "paid" on his books,[49] although in some states it has been held that he may, if he chooses, account for the tax in his return, and then sue on the promise of the taxpayer to pay him.[50]

(II) *Set-Off or Counter-Claim.* As a tax is not a debt in the ordinary sense, nor the liability for it founded upon contract, it cannot be paid or discharged by setting off or counter-claiming against it a debt due from the municipality to the individual taxpayer,[51] and still less of course a debt due from the collector of taxes in his private capacity.[52]

b. Medium of Payment — (I) *In General.* The legislature has power to prescribe the kind of funds in which taxes shall be payable,[53] and may declare that only gold and silver coin shall be receivable for this purpose.[54] But in the absence of such a restriction, taxes may be paid in any lawful current money, although the collector has no authority to accept anything else, unless specially allowed by law.[55]

(II) *State and Municipal Bonds, Warrants, and Other Obligations.* State scrip, county warrants or orders, treasurers' certificates, school-district orders, state or municipal bonds or the coupons therefrom, and all other such evidences of indebtedness are not receivable in payment of taxes, unless specifically made so by some constitutional or statutory provision.[56] But where

49. Reutchler *v.* Hucke, 3 Ill. App. 144; Ambler *v.* Clayton, 23 Iowa 173. And see Maxwell *v.* Hunter, 65 Iowa 121, 21 N. W. 481.

Credit on account.— Inasmuch as a tax collector is only authorized to receive cash for taxes, the fact that he is given credit on his account for taxes by a taxpayer does not amount to a payment. Figures *v.* State, (Tex. Civ. App. 1907) 99 S. W. 412.

50. Jacks *v.* Dyer, 31 Ark. 334; Elson *v.* Spraker, 100 Ind. 374; Schaum *v.* Showers, 49 Ind. 285; Pontiac *v.* Axford, 49 Mich. 69, 12 N. W. 914; Shriver *v.* Cowell, 92 Pa. St. 262; McCracken *v.* Elder, 34 Pa. St. 239.

51. *Indiana.*— Scobey *v.* Decatur County, 72 Ind. 551.

Iowa.— Hedge *v.* Des Moines, 141 Iowa 4, 119 N. W. 276.

Kentucky.—Anderson *v.* Mayfield, 93 Ky. 230, 19 S. W. 598, 14 Ky. L. Rep. 370.

Louisiana.— New Orleans *v.* Davidson, 30 La. Ann. 541, 31 Am. Rep. 228.

North Carolina.— Gatling *v.* Carteret County, 92 N. C. 536, 53 Am. Rep. 432; Cobb *v.* Elizabeth City, 75 N. C. 1.

South Carolina.— Trenholm *v.* Charleston, 3 S. C. 347, 16 Am. Rep. 732.

Wisconsin.— Keep *v.* Frazier, 4 Wis. 224.

United States.—Apperson *v.* Memphis, 1 Fed. Cas. No. 497, 2 Flipp. 363.

See 45 Cent. Dig. tit. "Taxation," § 972. And see *supra*, I, A, 2, b.

52. Com. *v.* Mahon, 12 Pa. Super. Ct. 616; Shoemaker *v.* Swiler, 2 Leg. Op. (Pa.) 7; Miller *v.* Wisener, 45 W. Va. 59, 30 S. E. 237.

53. Coit *v.* Claw, 28 Ark. 516; English *v.* Oliver, 28 Ark. 317.

54. Prescott *v.* McNamara, 73 Cal. 236, 14 Pac. 877; State Treasurer *v.* Wright, 28 Ill. 509; Whiteaker *v.* Haley, 2 Oreg. 128.

United States legal tender notes.— The acts of congress making the notes of the United States a legal tender for the payment of debts do not apply to involuntary contributions in the nature of taxes or assessments exacted under state laws, but only to debts in the strict sense of the term; and if a state requires payment of its taxes in coin, these notes are not a legal tender therefor. Whiteaker *v.* Haley, 2 Oreg. 128; Hagar *v.* Reclamation Dist. No. 7, 111 U. S. 701, 4 S. Ct. 663, 28 L. ed. 569; Lane County *v.* Oregon, 7 Wall. (U. S.) 71, 19 L. ed. 101. See Crutcher *v.* Sterling, 1 Ida. 306.

55. *Arkansas.*— Coit *v.* Claw, 28 Ark. 516; Hunt *v.* McFadgen, 20 Ark. 277.

Indiana.— Richards *v.* Stogsdell, 21 Ind. 74.

Louisiana.— Shreveport *v.* Gregg, 28 La. Ann. 836.

Michigan.— Staley *v.* Columbus Tp., 36 Mich. 38.

New York.— McLanahan *v.* Syracuse, 18 Hun 259.

Pennsylvania.— Nutting *v.* Lynn, 18 Pa. Super. Ct. 59, agreement of collector to accept commodities in lieu of cash.

Texas.— Figures *v.* State, (Civ. App. 1907) 99 S. W. 412.

See 45 Cent. Dig. tit. "Taxation," § 973 *et seq.*

56. *Alabama.*— Burke *v.* Armstrong, 52 Ala. 48.

Arkansas.— Hughes *v.* Ross, 38 Ark. 275; Graham *v.* Parham, 32 Ark. 676; Loftin *v.* Watson, 32 Ark. 414; Askew *v.* Columbia County, 32 Ark. 270; Wallis *v.* Smith, 29 Ark. 354; English *v.* Oliver, 28 Ark. 317; Wells *v.* Cole, 27 Ark. 603; Gaines *v.* Rives, 8 Ark. 220.

Colorado.— Morgan *v.* Pueblo, etc., R. Co., 6 Colo. 478.

Florida.— Frier *v.* State, 11 Fla. 300.

Louisiana.— State *v.* Lemarie, 25 La. Ann. 412 (illegal state warrants); Roman *v.* Ory, 12 Rob. 517.

Missouri.— Kansas City, etc., R. Co. *v.* Thornton, 152 Mo. 570, 54 S. W. 445.

obligations of any of the kinds mentioned are expressly declared by law to be receivable in discharge of taxes, the collector is bound to accept them when tendered in proper amount, and if he refuses the tender his further acts in proceeding to collect the taxes are unlawful.[57] The fact that county or municipal obligations are already barred by the statute of limitations when offered to the collector does not justify him in refusing to accept them;[58] but he cannot be required to receive any which are void because illegally issued.[59]

South Carolina.— State *v.* Pinckney, 3 Strobh. 400.

Tennessee.— State *v.* Sneed, 9 Baxt. 472; Lea *v.* Memphis, 9 Baxt. 103.

Texas.— Davis *v.* Burney, 58 Tex. 364; Bryan *v.* Sundberg, 5 Tex. 418.

Vermont.— If the collector takes a town order in payment of taxes, it must be regarded as a personal matter only, not official, and cannot be regarded as a payment of the order. Sawyer *v.* Springfield, 40 Vt. 305.

Wisconsin.— Oneida County *v.* Tibbits, 125 Wis. 9, 102 N. W. 897; Marinette *v.* Oconto County, 47 Wis. 216, 2 N. W. 314.

See 45 Cent. Dig. tit. "Taxation," §§ 973, 974, 978.

57. *Arkansas.*— Howell *v.* Hogins, 37 Ark. 110; Vance *v.* State, 35 Ark. 176; Danley *v.* Pike, 15 Ark. 141.

California.— Prescott *v.* McNamara, 73 Cal. 236, 14 Pac. 877.

Georgia.— Fuller *v.* State, 73 Ga. 408.

Kansas.— Judd *v.* Driver, 1 Kan. 455.

Louisiana.— State *v.* Cassard, 21 La. Ann. 751.

Mississippi.— Jones *v.* Melchoir, 71 Miss. 115, 13 So. 857.

Missouri.— Reynolds *v.* Norman, 114 Mo. 509, 21 S. W. 845.

South Carolina.— Trenholm *v.* Gaillard, 12 S. C. 66.

Texas.—Ostrum *v.* San Antonio, 30 Tex. Civ. App. 462, 71 S. W. 304. And see Bammel *v.* Houston, 68 Tex. 10, 2 S. W. 740, holding that a statute authorizing such evidences of indebtedness to be received in payment of taxes applies only where the payment is made before the taxes have become delinquent; after that they must be paid in money.

West Virginia.— State *v.* Melton, 62 W. Va. 253, 57 S. E. 729.

United States.— Hagood *v.* Southern, 117 U. S. 52, 6 S. Ct. 608, 29 L. ed. 805; Poindexter *v.* Greenhow, 114 U. S. 270, 5 S. Ct. 903, 29 L. ed. 185; Keith *v.* Clark, 97 U. S. 454, 24 L. ed. 1071; Furman *v.* Nichol, 8 Wall. 44, 19 L. ed. 370; U. S. *v.* Macon County Ct., 45 Fed. 400.

See 45 Cent. Dig. tit. "Taxation," § 973 *et seq.*

Virginia coupon litigation.— In a long series of cases in the courts of Virginia and of the United States relating to the receivability of coupons from certain bonds of that state in payment of state taxes, it was finally decided that a declaration by a state, incorporated in its bonds, that they shall be receivable in payment of all taxes due the state creates a contract between the state and any holder of such bonds, which is protected by the federal constitution; that it would be violated by a subsequent act of the state legislature withdrawing the privilege of using such bonds, or their coupons, in payment of taxes, and that therefore, notwithstanding such subsequent act, a collector of taxes was legally bound to accept the coupons when tendered in proper amount; but that a statute which provided a course of proceedings for testing and determining the genuineness of such coupons, that question being sometimes in doubt on account of the existence in the market of spurious or stolen bonds, was not open to constitutional objection, where it did not absolutely prohibit the acceptance of such coupons in payment of taxes, although it required the payment of the tax in money pending the investigation of the validity of the coupons tendered, and the refund of the money so paid when their genuineness should be legally established. For a full account of the history of this litigation see Black Const. Prohib. § 87. And for decisions on the particular points above mentioned see Maury *v.* Com., 92 Va. 310, 23 S. E. 757; Com. *v.* Dunlop, 89 Va. 431, 16 S. E. 273; Com. *v.* Ford, 89 Va. 427, 16 S. E. 277; Mallan *v.* Bransford, 86 Va. 675, 10 S. E. 977; Com. *v.* Tunstall, 86 Va. 372, 10 S. E. 414; Com. *v.* Hurt, 85 Va. 918, 9 S. E. 148; Poindexter *v.* Greenhow, 84 Va. 441, 4 S. E. 742; Com. *v.* Guggenheimer, 78 Va. 71; Com. *v.* Smith, 76 Va. 477; Lee *v.* Harlow, 75 Va. 22; Williamson *v.* Massey, 33 Grant. (Va.) 237; Clarke *v.* Tyler, 30 Gratt. (Va.) 134; Wise *v.* Rogers, 24 Gratt. (Va.) 169; Antoni *v.* Wright, 22 Gratt. (Va.) 833; Royall *v.* Virginia, 121 U. S. 102, 7 S. Ct. 826, 30 L. ed. 883; Sands *v.* Edmunds, 116 U. S. 585, 6 S. Ct. 516, 29 L. ed. 739; Royall *v.* Virginia, 116 U. S. 572, 6 S. Ct. 510, 29 L. ed. 735; Marye *v.* Parsons, 114 U. S. 325, 5 S. Ct. 932, 962, 29 L. ed. 205, 207; Poindexter *v.* Greenhow, 114 U. S. 270, 5 S. Ct. 903, 29 L. ed. 185; Antoni *v.* Greenhow, 107 U. S. 769, 2 S. Ct. 91, 27 L. ed. 468; Hartman *v.* Greenhow, 102 U. S. 672, 26 L. ed. 271; Parsons *v.* Slaughter, 63 Fed. 876; Willis *v.* Miller, 29 Fed. 238; Virginia Coupon Cases, 25 Fed. 654; Baltimore, etc., R. Co. *v.* Allen, 17 Fed. 171.

58. Hill *v.* Logan County, 57 Ark. 400, 21 S. W. 1063; Whitthorne *v.* Jett, 39 Ark. 139; Howell *v.* Hogins, 37 Ark. 110; Daniel *v.* Askew, 36 Ark. 487; Pelton *v.* Crawford County, 10 Wis. 69.

59. People *v.* May, 9 Colo. 414, 15 Pac. 36; Fuller *v.* Chicago, 89 Ill. 282; City Nat. Bank *v.* Mahan, 21 La. Ann. 751; Whaley *v.* Gaillard, 21 S. C. 560.

(III) *Bank and Treasury Notes.* Where a state is the sole stock-holder in a bank, or establishes a bank as its fiscal agent, and provides by law that the notes of the bank shall be receivable in payment of taxes, it is the imperative duty of the collector to accept such notes when tendered in due amount.[60] United States treasury notes may also be made by the states a legal tender in payment of taxes, but they are not so if the state requires taxes to be paid in coined money.[61]

(IV) *Checks, Drafts, and Notes.* The acceptance of a check on a bank for the amount of the drawer's taxes is at most only a conditional payment; that is, the taxes are not paid until the check is paid, and if it is never presented or is dishonored the taxes remain a charge.[62] The same rule applies to drafts.[63] As to promissory notes of individuals, the collector has no right whatever to accept them; if he does so, it may give him a private right of action against the maker, but cannot prejudice the public in the collection of the revenue.[64]

c. Amount of Payment in General. One who has paid taxes is not prejudiced by the fact that he paid less than was due, relying on the statement made to him by the receiving officer.[65] A statute requiring a corporation to pay its tax to the state treasurer, although it has applied to the supreme court for an abatement of the same, and providing that a reduction, if obtained, shall be credited on its next tax, is mandatory as to allowing such credit.[66]

d. Partial Payment.[67] The law ordinarily intends that taxes shall be paid in full at one time, and unless it is otherwise provided by statute, a taxpayer cannot tender a portion of the tax due and demand a receipt therefor.[68] But the citizen always has the right to pay the amount of any one tax listed against him, while refusing or omitting to pay others,[69] or to pay the taxes for the current

60. Danley *v.* Pike, 15 Ark. 141; State *v.* Stoll, 2 S. C. 538; Graniteville Mfg. Co. *v.* Roper, 15 Rich. (S. C.) 138; Marr *v.* State, 10 Lea (Tenn.) 470; Clark *v.* Keith, 8 Lea (Tenn.) 703; Keith *v.* Clarke, 4 Lea (Tenn.) 718; Furman *v.* Nichol, 3 Coldw. (Tenn.) 432; Longinette *v.* Shelton (Tenn. Ch. App. 1898) 52 S. W. 1078; South Carolina *v.* Stoll, 17 Wall. (U. S.) 425, 21 L. ed. 650.

61. Crutcher *v.* Sterling, 1 Ida. 306; People *v.* Bear, 1 Ida. 217. *Compare* Perry *v.* Washburn, 20 Cal. 318. And see *supra*, IX, A, 2, b, (I).

62. *District of Columbia.*— Koones *v.* District of Columbia, 4 Mackey 339, 54 Am. Rep. 278.

Illinois.— Johns *v.* McKibben, 156 Ill. 71, 40 N. E. 449.

Massachusetts.— Houghton *v.* Boston, 159 Mass. 138, 34 N. E. 93.

Michigan.— Moore *v.* Auditor-Gen., 122 Mich. 599, 81 N. W. 561.

Nebraska.— Richards *v.* Hatfield, 40 Nebr. 879, 59 N. W. 777.

New Jersey.— Kahl *v.* Love, 37 N. J. L. 5.

New York.— McLanahan *v.* Syracuse, 18 Hun 259.

Ohio.— Manck *v.* Fratz, 7 Ohio Dec. (Reprint) 704, 4 Cinc. L. Bul. 1043.

See 45 Cent. Dig. tit. "Taxation," § 976.

63. Barnard *v.* Mercer, 54 Kan. 630, 39 Pac. 182; Elliott *v.* Miller, 8 Mich. 132.

64. *Florida.*— Dickson *v.* Gamble, 16 Fla. 687.

Maine— Embden *v.* Bunker, 86 Me. 313, 29 Atl. 1085; Thorndike *v.* Camden, 82 Me. 39, 19 Atl. 95, 7 L. R. A. 463; Willey *v.* Greenfield, 30 Me. 452.

Michigan.— Hatch *v.* Reid. 112 Mich. 430, 70 N. W. 889; Doran *v.* Phillips, 47 Mich. 228, 10 N. W. 350.

Mississippi.— McWilliams *v.* Phillips, 51 Miss. 196.

Missouri.— Craig *v.* Smith, 31 Mo. App. 286.

New York.— Mumford *v.* Armstrong, 4 Cow. 553; Orange County Bank *v.* Wakeman, 1 Cow. 46.

North Carolina.— Kerner *v.* Boston Cottage Co., 123 N. C. 294, 31 S. E. 718.

65. Trexler *v.* Africa, 27 Pa. Super. Ct. 385, 33 Pa. Super. Ct. 395; Randall *v.* Dailey, 66 Wis. 285, 28 N. W. 352. See *supra*, IX, A, 1, g, (II).

66. Boston, etc., R. Co. *v.* State, 64 N. H. 490, 13 Atl. 874, construing Laws (1881), c. 53, § 1. See also *infra*, IX, A, 6.

67. Application of payments see *infra*, IX, A, 4.

Interest in case of partial payments see *infra*, IX, A, 2, e, note 73.

68. Osburn *v.* Searles, 156 Ill. 88, 40 N. E. 452; Julien *v.* Ainsworth, 27 Kan. 446; New Orleans Warehouse Co. *v.* Marrero, 106 La. 130, 30 So. 305; Harrington *v.* Dickinson, 155 Mich. 161, 118 N. W. 931; Sayers *v.* O'Connor, 124 Mich. 256, 82 N. W. 1044. See also *supra*, IX, A, 2, a, (I).

69. *Arkansas.*— Coit *v.* Claw, 28 Ark. 516.

Iowa.— Iowa R. Land Co. *v.* Carroll County, 39 Iowa 151.

Michigan.— Chapin Min. Co. *v.* Uddenberg, 126 Mich. 375, 85 N. W. 872.

Ohio.— Ward *v.* Wheeling, etc., R. Co., 4 Ohio S. & C. Pl. Dec. 154, 3 Ohio N. P. 274.

Pennsylvania.— Com. *v.* Peltz, 3 Phila. 330.

See 45 Cent. Dig. tit. "Taxation," § 980.

year, and contest those assessed for previous years,[70] or to pay the tax on any one piece or item of his property which is separately assessed, without offering to pay the taxes on other parts.[71]

e. Interest and Penalties. Delinquent taxes do not bear interest unless it is expressly so provided by statute.[72] But it is competent for the legislature to prescribe the payment of interest as a penalty for delay in the payment of taxes and to regulate its rate.[73] This, however, can be effected only by an act plainly manifesting the legislative intention as to the right to recover interest, its amount, and the date from which it shall begin,[74] the latter being ordinarily the time when

70. Olmsted County *v.* Barber, 31 Minn. 256, 17 N. W. 473, 944.

71. State *v.* Central Pac. R. Co., 21 Nev. 94, 25 Pac. 442. But *compare* Ricketts *v.* Crewdson, 13 Wyo. 284, 79 Pac. 1042, 81 Pac. 1, holding that under a statute making personal taxes a lien on real estate, a tax collector is not obliged to receive the tax on the realty and receipt for the same so long as the taxes on the personal property remain unpaid. And so the owner of three quarter sections of land which have been assessed and taxed as entire and complete quarter sections cannot pay taxes on an undivided half of each. Auld *v.* McAllaster, 43 Kan. 162, 23 Pac. 165. And where two adjacent lots of different sizes and values, and belonging to different owners, are assessed together as one parcel, the owner of the larger and more valuable lot cannot, by paying one half of the joint tax, cast the remainder on the other lot. Chaliss *v.* Hekelnkaemper, 14 Kan. 474. See State Finance Co. *v.* Bowdle, 16 N. D. 193, 112 N. W. 76, as to payment of taxes on part of a tract of land where it has been divided and part sold after the assessment.

72. *Alabama.*—Perry County *v.* Selma, etc., R. Co., 65 Ala. 391.

Arizona.— Greer *v.* Richards, 3 Ariz. 227, 32 Pac. 266.

California.— Haskell *v.* Bartlett, 34 Cal. 281; Himmelman *v.* Oliver, 34 Cal. 246.

Connecticut.— Sargent *v.* Tuttle, 67 Conn. 162, 34 Atl. 1028, 32 L. R. A. 822.

Georgia.— Georgia R., etc., Co. *v.* Wright, 124 Ga. 596, 53 S. E. 251; State *v.* Southwestern R. Co., 70 Ga. 11.

Kentucky.— Louisville, etc., R. Co. *v.* Com., 89 Ky. 531, 12 S. W. 1064, 11 Ky. L. Rep. 734; Louisville, etc., R. Co. *v.* Hopkins County, 87 Ky. 605, 9 S. W. 497, 10 Ky. L. Rep. 806; Ormsby *v.* Louisville, 79 Ky. 197, 2 Ky. L. Rep. 66; Kentucky Cent. R. Co. *v.* Pendleton County, 2 S. W. 176, 8 Ky. L. Rep. 517.

Maine.— Rockland *v.* Ulmer, 87 Me. 357, 32 Atl. 972.

Massachusetts.— Danforth *v.* Williams, 9 Mass. 324.

Minnesota.— State *v.* New England Furniture, etc., Co., 107 Minn. 52, 119 N. W. 427; State *v.* Baldwin, 62 Minn. 518, 65 N. W. 80.

New Jersey.— Paterson Ave., etc., Com'rs *v.* Hudson County, 44 N. J. L. 570; Camden *v.* Allen, 26 N. J. L. 398.

New York.— Rochester *v.* Bloss, 185 N. Y. 42, 77 N. E. 794, 6 L. R. A. N. S. 694; Ellice *v.* Van Rensselaer, 6 How. Pr. 116.

Texas.— Cave *v.* Houston, 65 Tex. 619; Western Union Tel. Co. *v.* State, 55 Tex. 314; Edmonson *v.* Galveston, 53 Tex. 157.

Vermont.— Shaw *v.* Peckett, 26 Vt. 482.

Canada.— See Morden *v.* South Dufferin, 6 Manitoba 515; Schultz *v.* Winnepeg, 6 Manitoba 35.

See 45 Cent. Dig. tit. "Taxation," § 981.

73. *Arkansas.*— Scott *v.* Watkins, 22 Ark. 556.

California.— People *v.* Reis, 76 Cal. 269, 18 Pac. 309.

Kentucky.— Woolley *v.* Louisville, 114 Ky. 556, 71 S. W. 893, 24 Ky. L. Rep. 1357.

Michigan.— Lacey *v.* Davis, 4 Mich. 140, 66 Am. Dec. 524.

Missouri.— Eyermann *v.* Blakesly, 9 Mo. App. 231.

Tennessee.— Nance *v.* Hopkins, 10 Lea 508.

Washington.— Sound Inv. Co. *v.* Bellingham Bay Land Co., 45 Wash. 636, 88 Pac. 1117, 53 Wash. 470, 102 Pac. 234.

Wisconsin.— Potts *v.* Cooley, 56 Wis. 45, 13 N. W. 682.

Compare, however, Morden *v.* South Dufferin, 6 Manitoba 515; Schultz *v.* Winnepeg, 6 Manitoba 35.

The holder of an estate in remainder in real property is not liable for the penalties for non-payment of taxes assessed to the tenant for life. Hadley *v.* Hadley, 114 Tenn. 156, 87 S. W. 250.

Interest in case of partial payments — Where a taxpayer liable to a tax paid a part thereof and obtained an injunction restraining collection of the balance, and the injunction was afterward dissolved, and the taxpayer then paid the amount of taxes unpaid without interest, it was held that the second payment should have been credited as a partial payment on the balance, with interest from the time payment should have been made to the date of payment, so that the remainder would become a new principal bearing interest. Com. *v.* Louisville, etc., R. Co., 104 S. W. 267, 31 Ky. L. Rep. 819.

74. Greenwood *v.* La Salle, 137 Ill. 225, 26 N. E. 1089; Elliott *v.* East Pennsylvania R. Co., 99 U. S. 573, 25 L. ed. 292.

Interest and penalty. — Where a statute fixes a penalty of ten per cent for each year during which the tax remains unpaid, interest is not chargeable in addition. People *v.* Gold, etc., Tel. Co., 98 N. Y. 67 [*reversing* 32 Hun 491].

the assessment is complete and the taxes become payable, unless the statute grants a certain time within which to make the payment without penalties or fixes the day when interest shall commence to accrue.[75] There may be circumstances which will justify a delay in the payment and warrant the courts in refusing to enforce the statutory interest or penalties,[76] and a sufficient tender, kept good, will stop the running of interest; [77] but interest continues to run from the date of the assessment, although the delay in payment was caused by the taxpayer's appeal from the assessment, and even though he succeeds in obtaining a reduction in the amount of the tax.[78]

f. Rebates and Discounts. As an inducement to citizens to pay their taxes promptly, it has sometimes been thought proper to offer a rebate or discount on all taxes paid within a certain time after they become due, and such a statute is valid,[79] unless it permits the rebate or discount to be made in such a manner as

Statute fixing legal rate of interest.— A statute providing for the recovery of interest on debts, contracts, and judgments and fixing the legal rate does not apply to taxes if it does not specially name them; and another statute providing that every tax shall have the "effect" of a judgment against the person does not make taxes bear interest simply because judgments do so. People *v.* Central Pac. R. Co., 105 Cal. 576, 38 Pac. 905; Rochester *v.* Bloss, 185 N. Y. 42, 77 N. E. 794, 6 L R. A. N. S. 694.

No rate fixed.—Where the law plainly intends that delinquent taxes shall bear interest, but does not fix the rate, it will be the same as the legal rate of interest on ordinary debts and claims. Licking Valley Bldg. Assoc. *v.* Com., 89 S. W. 682, 28 Ky. L. Rep. 543; Baker *v.* Kelley, 11 Minn. 480.

75. See the statutes of the different states. And see the following cases:

Kentucky.— Henderson Bridge Co. *v.* Com., 120 Ky. 690, 87 S. W. 1088, 27 Ky. L. Rep. 1104; Com. *v.* Rosenfield, 117 Ky. 374, 80 S. W. 1178, 25 Ky. L. Rep. 2229, 82 S. W. 433, 26 Ky. L. Rep. 726.

Maine.— Snow *v.* Weeks, 77 Me. 429, 1 Atl. 243.

Maryland.— State *v.* Baltimore, 105 Md. 1, 65 Atl. 369.

Michigan.— Lake Shore, etc., R. Co. *v.* People, 46 Mich. 193, 9 N. W. 249.

Minnesota.— State *v.* Baldwin, 62 Minn. 518, 65 N. W. 80.

Pennsylvania.— Com. *v.* Easton Bank, 10 Pa. St. 442; Barclay *v.* Leas, 9 Pa. Co. Ct. 314.

Tennessee.— Myers *v.* Park, 8 Heisk. 550.

Wisconsin.— Arnold *v.* Juneau County, 43 Wis. 627.

See 45 Cent. Dig. tit. "Taxation," § 981.

76. Texarkana Water Co. *v.* State, 62 Ark. 188, 35 S. W. 788; Savannah, etc., R. Co. *v.* Morton, 71 Ga. 24; Litchfield *v.* Webster County, 101 U. S. 773, 25 L. ed. 925. In the case last cited the ownership of the real estate taxed was in dispute, the state itself claiming title.

77. Clark *v.* Colfax County, 2 Nebr. (Unoff.) 133, 96 N. W. 607; Second St., etc., Pass. R. Co. *v.* Philadelphia, 51 Pa. St. 465. See Joyes *v.* Louisville, 82 S. W. 432, 26 Ky. L. Rep. 713. And *compare* Com. *v.* Rosenfield, 118 Ky. 374, 80 S. W. 1178, 82 S. W. 433, 25 Ky. L. Rep. 2229, 26 Ky. L. Rep. 726. Where a taxpayer makes a sufficient tender of payment of his general taxes, and the treasurer refuses to receive the same because the taxpayer will not also pay an invalid special tax, interest should not be charged the taxpayer. State *v.* Several Parcels of Land, 80 Nebr. 424, 114 N. W. 283.

Tender in general see *supra*, IX, A, 1, f.

Insufficient tender.— The presentation of a certified copy of a decree in a suit to enjoin the collection of taxes on the ground that the valuation was grossly excessive, adjudging that the valuation was excessive and fixing a less amount as a fair valuation, to the county treasurer, with demand that he correct the taxes so as to conform to the decree in order that the taxpayer might know the amount of taxes to be paid, followed by the statement of the treasurer that he would consult the county attorney upon the subject, with no further inquiry or demand by the taxpayer, was not such a tender by the taxpayer as would arrest the running of interest. State *v.* Several Parcels of Land, 82 Nebr. 570, 118 N. W. 465.

78. *Kentucky.*— Louisville *v.* Louisville R. Co., 118 Ky. 534, 81 S. W. 701, 84 S. W. 535, 26 Ky. L. Rep. 378, 27 Ky. L. Rep. 141; Louisville, etc., R. Co. *v.* Com., 94 S. W. 655, 29 Ky. L. Rep. 666.

Nebraska— State *v.* Several Parcels of Land, 82 Nebr. 570, 118 N. W. 465.

New Hampshire.—Winnipiseogee Lake Cotton, etc., Mfg. Co. *v.* Gilford, 64 N. H. 514, 15 Atl. 137; Western Union Tel. Co. *v.* State, 64 N. H. 265, 9 Atl. 547.

New Jersey.—Singer Mfg. Co. *v.* Morrison, 70 N. J. L. 163, 56 Atl. 133.

New York.— Mayer *v.* New York, 101 N. Y. 284, 4 N. E. 336.

Pennsylvania.— Delaware Div. Canal Co. *v.* Com., 50 Pa. St. 399.

See 45 Cent. Dig. tit. "Taxation," § 981.

79. See State *v.* Francis, 23 Kan. 495; Morden *v.* South Dufferin, 6 Manitoba 515.

Construction of particular statutes see State *v.* Francis, 23 Kan. 495 (railroad company paying taxes under Tax Laws (1876), § 37, on property in unorganized counties, entitled to same rebate as taxpayers in organized counties under the general tax law);

to violate the constitutional requirement of a uniform and equal rate of assessment and taxation or some other particular constitutional provision.[80]

3. Evidence of Payment — a. Presumptions. The mere duty of the owner of property to pay the taxes thereon raises no presumption that he has paid them,[81] although the fact that he has paid the taxes on particular property for a series of years may warrant a presumption of payment as to the taxes of one particular year for which he cannot show a receipt,[82] and it may be presumed that the tax of a particular year was paid from the fact that it was not included in the tax bills of succeeding years.[83] It is also held that a presumption of payment may arise from mere lapse of time if sufficiently long continued.[84] It will be presumed that payments made on tax assessments were made by the party rendering the land for taxation.[85]

b. Admissibility. The fact of the payment of taxes may be shown by the receipt or certificate of the collector of taxes or other officer authorized to receive them,[86] or by the entries in the books and official records of the tax office,[87] or

Louisville, etc., R. Co. *v.* Louisville, 29 S. W. 865, 16 Ky. L. Rep. 796 (holding that an act providing that a discount in case taxes in the city of Louisville should be paid before a certain date applied only to the taxes of citizens, and not to those of railroad companies).

Statutes repealed see Ridgway *v.* O'Neill, 49 Pa. St. 174.

Failure of assessors to post up a copy of the section of the statute relating to abatement for prompt payment of taxes, as provided by the statute, does not affect the validity of assessments, the provision being merely directory. Sprague *v.* Bailey, 19 Pick. (Mass.) 436.

80. See *supra*, II.

Discrimination.—A statutory provision for the allowance of a discount to citizens, and not to railroad companies, for the prompt payment of taxes, is not such a discrimination as to render the act unconstitutional. Louisville, etc., R. Co. *v.* Louisville, 29 S. W. 865, 16 Ky. L. Rep. 796.

81. Ankney *v.* Albright, 20 Pa. St. 157; State *v.* Jackson, 56 W. Va. 558, 49 S. E. 465. But see Kirchner *v.* Wapsinonoc School Tp., 141 Iowa 43, 118 N. W. 51, holding that, in the absence of a contrary showing, it will be presumed that taxes were paid when due.

82. Hodgdon *v.* Wight, 36 Me. 326; Watkins *v.* Lang, 17 S. C. 13. And see Brown *v.* Day, 78 Pa. St. 129.

83. Attleborough *v.* Middleborough, 10 Pick. (Mass.) 378.

84. Andover *v.* Merrimack County, 37 N. H. 437; Colebrook *v.* Stewartstown, 28 N. H. 75; Dalton *v.* Bethlehem, 20 N. H. 505; Hopkinton *v.* Springfield, 12 N. H. 328; Woodburn *v.* Farmers', etc., Bank, 5 Watts & S. (Pa.) 447. *Contra*, Mills *v.* Henry Oil Co., 57 W. Va. 255, 50 S. E. 157; Smith *v.* Tharp, 17 W. Va. 221.

85. Ryle *v.* Davidson, (Tex. Civ. App. 1909) 116 S. W. 823.

86. *Illinois.*—Abbott *v.* Stone, 70 Ill. App. 671.

Iowa.—Vaughn *v.* Stone, 54 Iowa 376, 2 N. W. 973, 6 N. W. 596.

Louisiana.— McAveal *v.* Murrell, 108 La. 116, 32 So. 395; State *v.* Reid, 45 La. Ann. 162, 12 So. 189.

Michigan.— Johnstone *v.* Scott, 11 Mich. 232.

Minnesota.— Seigneuret *v.* Fahey, 27 Minn. 60, 6 N. W. 403.

Nebraska.— Keys *v.* Fink, 81 Nebr. 571, 116 N. W. 162.

Pennsylvania.— McReynolds *v.* Longenberger, 57 Pa. St. 13; Coxe *v.* Deringer, 7 Leg. Gaz. 36.

Texas.—Acklin *v.* Paschal, 48 Tex. 147; Deen *v.* Wills, 21 Tex. 642.

West Virginia.—Webb *v.* Ritter, 60 W. Va. 193, 54 S. E. 484.

Wyoming.— Lobban *v.* State, 9 Wyo. 377, 64 Pac. 82.

See 45 Cent. Dig. tit. "Taxation," § 983.

Evidence to apply receipt to subject-matter. — Extrinsic evidence is admissible to apply a tax collector's receipt to its proper subject-matter where there is a mistake or ambiguity. Perret *v.* Borries, 78 Miss. 934, 30 So. 59; Trager *v.* Jenkins, 75 Miss. 676, 23 So. 424; Wolf *v.* Philadelphia, 105 Pa. St. 25; Brymer *v.* Taylor, 5 Tex. Civ. App. 103, 23 S. W. 635.

Explanation or contradiction.— Like any other receipt, that given by a tax collector may be explained or even overborne by outside evidence. Rand *v.* Scofield, 43 Ill. 167; Ellen *v.* Ellen, 16 S. C. 132; State *v.* School, etc., Com'rs, 13 Wis. 409.

87. Taylor *v.* Lawrence, 148 Ill. 388, 36 N. E. 74; Job *v.* Tebbetts, 10 Ill. 376; State *v.* Krahmer, 92 Minn. 397, 100 N. W. 105; Webb *v.* Ritter, 60 W. Va. 193, 54 S. E. 484.

Entry of taxes "paid."—An entry of the word "paid" in the books of the assessor or tax collector, opposite a particular assessment or charge, is competent evidence of the payment of the tax. Joslyn *v.* Pulver, 59 Hun (N. Y.) 129, 13 N. Y. Suppl. 311 [*affirmed* in 128 N. Y. 334, 28 N. E. 604]; McIntosh *v.* Marathon Land Co., 110 Wis. 296, 85 N. W. 976. But *compare* Ambler *v.* Clayton, 23 Iowa 173; Ankeny *v.* Albright, 20 Pa. St. 157.

Stubs.— Stub duplicates of receipts for

by any other competent evidence sufficient to satisfy a jury,[88] including parol testimony, according to the doctrine prevailing in many states,[89] although in some such testimony is not admissible unless the failure to produce a receipt or record evidence is first satisfactorily accounted for.[90]

c. Weight and Sufficiency. A receipt from the proper officer is *prima facie* evidence of the payment of taxes, and is sufficient proof thereof unless successfully contradicted.[91] Where other evidence is introduced, it is governed by the ordinary rules, and in order to establish the fact it should be clear and positive and of a satisfactory character.[92] If no receipt is produced, and no witness testifies

taxes made and kept by the collector are competent evidence of the fact of payment. Harrison *v.* Sauerwein, 70 Iowa 291, 30 N. W. 571; State *v.* Ring, 29 Minn. 78, 11 N. W. 233; McIntosh *v.* Marathon Land Co., 110 Wis. 296, 85 N. W. 976. *Compare* Pier *v.* Prouty, 67 Wis. 218, 30 N. W. 232.

An abstracter's certificate is not admissible to prove payment of taxes on land by the occupant, thereby vesting in him a prescriptive title; such payments should be proved by the tax receipts or the treasurer's records. Brinker *v.* Union Pac., etc., R. Co., 11 Colo. App. 166, 55 Pac. 207.

88. *Illinois.*— Cook *v.* Norton, 61 Ill. 285; Rand *v.* Scofield, 43 Ill. 167.

Iowa.—Adams *v.* Beale, 19 Iowa 61.

Kansas.— Leitzbach *v.* Jackman, 28 Kan. 524; Mathews *v.* Buckingham, 22 Kan. 166.

Maine.— Dennett *v.* Crocker, 8 Me. 239.

Michigan.— Hammond *v.* Hannin, 21 Mich. 374, 4 Am. Rep. 490.

Minnesota.— Seigneuret *v.* Fahey, 27 Minn. 60, 6 N. W. 403.

Nebraska.— Keys *v.* Fink, 81 Nebr. 571, 116 N. W. 162.

Pennsylvania.— McReynolds *v.* Longenberger, 57 Pa. St. 13.

Texas.— Deen *v.* Wills, 21 Tex. 642.

89. *Arkansas.*— Davis *v.* Hare, 32 Ark. 386.

Connecticut.— Beers *v.* Botsford, 3 Day 159.

Florida.— Boykin *v.* State, 40 Fla. 484, 24 So. 141.

Illinois.— Irwin *v.* Miller, 23 Ill. 401; Hinchman *v.* Whetstone, 23 Ill. 185. But see Lane *v.* Sharpe, 4 Ill. 566, holding that redemption of land from a tax-sale should be proved by the records in the auditor's office, not by testimony of witnesses.

Iowa.—Adams *v.* Beale, 19 Iowa 61.

Maine.— Dennett *v.* Crocker, 8 Me. 239.

Mississippi.— Gordon *v.* Kitrell, (1897) 21 So. 922; McNutt *v.* Lancaster, 9 Sm. & M. 570.

Nebraska.— Keyes *v.* Fink, 81 Nebr. 571, 116 N. W. 162; Richards *v.* Hatfield, 40 Nebr. 879, 59 N. W. 777.

New Jersey.— Burlington County *v.* Fennimore, 1 N. J. L. 220.

Pennsylvania.— Trexler *v.* Africa, 27 Pa. Super. Ct. 385.

Texas.— McDonough *v.* Jefferson County, 79 Tex. 535, 15 S. W. 490; Ochoa *v.* Miller, 59 Tex. 460; Jordan *v.* Brown, (Civ. App. 1906) 94 S. W. 398.

90. *Kansas.*— Downing *v.* Haxton, 21 Kan. 178.

Louisiana.— Hickman *v.* Dawson, 35 La. Ann. 1086; Prevost *v.* Johnson, 9 Mart. 123.

Massachusetts.— Hall *v.* Hall, 1 Mass. 101. See Robbins *v.* Townsend, 20 Pick. 345.

Mississippi.— Edmondston *v.* Ingram, 68 Miss. 32, 8 So. 257.

Tennessee.— Shepherd *v.* Hamilton County, 8 Heisk. 380; Wood *v.* State, 8 Heisk. 329.

91. *Illinois.*— Perkins *v.* Bulkley, 166 Ill. 229, 46 N. E. 733; Cook *v.* Norton, 43 Ill. 391.

Minnesota.— Ripon College *v.* Brown, 66 Minn. 179, 68 N. W. 837; Knight *v.* Valentine, 34 Minn. 26, 24 N. W. 295.

Nebraska.— Mutual Ben. L. Ins. Co. *v.* Daniels, 67 Nebr. 91, 93 N. W. 134. But *compare* Adams *v.* Osgood, 55 Nebr. 766, 76 N. W. 446.

Oregon.— Nickum *v.* Gaston, 28 Oreg. 322, 42 Pac. 130.

South Dakota.— King *v.* Lane, 21 S. D. 101, 110 N. W. 37; Harris *v.* Stearns, 20 S. D. 622, 108 N. W. 247; Danforth *v.* McCook County, 11 S. D. 258, 76 N. W. 940, 74 Am. St. Rep. 808; Rochford *v.* Fleming, 10 S. D. 24, 71 N. W. 317. The statute in this state provides that the posession of a tax receipt shall be conclusive evidence of the payment of prior taxes; but this does not apply where the tax receipt was obtained by larceny, forgery, or fraud. Harris *v.* Stearns, *supra*.

See 45 Cent. Dig. tit. "Taxation," § 984.

Contra.— Clark *v.* Blair, 14 Fed. 812, 4 McCrary 311.

92. *Colorado.*— Brinker *v.* Union Pac., etc., R. Co., 11 Colo. App. 166, 55 Pac. 207.

Illinois.— Sholl *v.* People, 194 Ill. 24, 61 N. E. 1122; Perry *v.* Burton, 126 Ill. 599, 18 N. E. 653.

Indiana.— Keesling *v.* Winfield, 149 Ind. 709, 49 N. E. 163; Rieman *v.* Shepard, 27 Ind. 288.

Iowa.— Cornoy *v.* Wetmore, 92 Iowa 100, 60 N. W. 245; Bright *v.* Slocum, 77 Iowa 27, 41 N. W. 477; Buck *v.* Holt, 74 Iowa 294; 37 N. W. 377; Harber *v.* Sexton, 66 Iowa 211, 23 N. W. 635.

Louisiana.— Pietre *v.* Schleslinger, 110 La. 234, 34 So. 425.

Minnesota.— State *v.* Krahmer, 92 Minn. 397, 100 N. W. 105.

Mississippi.— Stevenson *v.* Reed, 90 Miss. 341, 43 So. 433.

Pennsylvania.— Knupp *v.* Brooks, 200 Pa. St. 494, 50 Atl. 196; Ankeny *v.* Albright, 20

as to paying the tax or having seen it paid, it will be concluded that no payment was made.[93]

4. Application of Payments.[94] In making a payment on account of taxes the owner has a right to direct its application to a particular tax or to a particular piece or item of property, and the receiving officer is bound by such direction, and the effect of the payment will not be defeated by its misapplication by the officer.[95] Where part of a tax which has been paid in full is afterward adjudged invalid, the taxpayer may have the excess applied on valid taxes thereafter accruing.[96]

5. Tax Receipts or Certificates.[97] A tax collector is not bound to give a receipt for taxes paid to him if the law does not require it,[98] but if it is made his duty to give such a receipt, it may be enforced by mandamus.[99] The taxpayer is not prejudiced by any defect or informality in his receipt, such as the lack of a proper signature.[1] If the receipt is indefinite or ambiguous it may be explained and interpreted.[2] While it is *prima facie* evidence of payment,[3] it does not estop the municipal corporation collecting the tax from showing that the tax was not in fact paid, or that it was not paid "in full" as recited in the receipt.[4]

6. Operation and Effect of Payment. Full payment of the taxes due on particular property discharges the tax lien, releases the owner from liability, and invalidates any subsequent proceedings taken for the enforcement of the lien or the tax through the mistake or fault of officers.[5] But if the payment is less than

Pa. St. 157. See Trexler *v.* Africa, 33 Pa. Super. Ct. 395.

Texas.— Gillespie *v.* Gulf, etc., R. Co., (1892) 18 S. W. 474; Lofton *v.* Miller, (Civ. App. 1909) 118 S. W. 911; Sharpe *v.* Kellogg, (Civ. App. 1909) 116 S. W. 401.

Virginia.— Brown *v.* Bradshaw, 100 Va. 124, 40 S. E. 617.

Washington.— Cavanaugh *v.* Roberts, 50 Wash. 265, 97 Pac. 55, where the evidence was held sufficient to support a finding that a delinquent tax had not been paid by a deposit with the county treasurer of sufficient funds for that purpose.

United States.— *In re* Porterfield, 138 Fed. 192.

See 45 Cent. Dig. tit. "Taxation," § 984.

93. Wallace *v.* International Paper Co., 70 N. Y. App. Div. 298, 75 N. Y. Suppl. 340.

94. See also *infra*, X, A, 10, b, (VI).

95. *Arkansas.*— Hickman *v.* Kempner, 35 Ark. 505.

Illinois.— Mason *v.* Chicago, 48 Ill. 420.

Iowa.— Henderson *v.* Robinson, 76 Iowa 603, 41 N. W. 371; Maxwell *v.* Hunter, 65 Iowa 121, 21 N. W. 481; Morris *v.* Sioux County, 42 Iowa 416.

Louisiana.—Lefebre *v.* Negrotto, 44 La. Ann. 792, 11 So. 91.

Michigan.— Fuller *v.* Grand Rapids, 40 Mich. 395.

New Jersey.— Morris, etc., Dredging Co. *v.* Bayonne, 75 N. J. L. 59, 67 Atl. 20.

Pennsylvania.— Laird *v.* Hiester, 24 Pa. St. 452; Dougherty *v.* Dickey, 4 Watts & S. 146. *Compare* Stephens *v.* Wells, 6 Watts 325.

Partial payments see *supra*, IX, A, 2, d.

96. Northern Pac. R. Co. *v.* Raymond, 5 Dak. 356, 40 N. W. 538, 1 L. R. A. 732.

97. Receipts as evidence see *supra*, IX, A, 3, b, c.

98. Stiles *v.* Hitchcock, 47 Vt. 419, 19 Am. Rep. 121.

99. Perry *v.* Washburn, 20 Cal. 318.

1. Randall *v.* Dailey, 66 Wis. 285, 28 N. W. 352.

2. Winslow *v.* Cooper, 104 Ill. 235. See *supra*, IX, A, 3, b, note 86.

3. See *supra*, IX, A, 3, b, c.

4. *Georgia.*— State *v.* Southwestern R. Co., 70 Ga. 11.

Maine.— State *v.* Waldo Bank, 20 Me. 470.

Minnesota.— Olmsted County *v.* Barber, 31 Minn. 256, 17 N. W. 473, 944.

Missouri.— State *v.* Union Trust Co., 92 Mo. 157, 6 S. W. 867.

Texas.— Graves *v.* Bullen, (Civ. App. 1909) 115 S. W. 1177.

Wisconsin.— Marco *v.* Fond du Lac, 63 Wis. 212, 23 N. W. 419.

See 45 Cent. Dig. tit. "Taxation," § 989.

5. *Alabama.*— Pickler *v.* State, 149 Ala. 669, 42 So. 1018.

Arizona.— See Gibson Abstract Co. *v.* Cochise County, (1909) 100 Pac. 453, holding that under Civ. Code (1901), par. 3851, providing that the county assessor, when he shall assess the property of any person or corporation not owning real estate within the county of sufficient value in the assessor's judgment to pay taxes on both real and personal property, shall proceed immediately to collect taxes on the personal property so assessed at the rate of the previous year, where an assessor collects taxes on personal property as authorized by such section, the county has no further claim against the owner, and cannot collect any additional amount in case the current rate is higher.

Arkansas.— Gunn *v.* Thompson, 70 Ark. 500, 69 S. W. 261; Davis *v.* Hare, 32 Ark. 386.

Florida.— Graham *v.* Florida Land, etc., Co., 33 Fla. 356, 14 So. 796; Conant *v.* Buesing, 23 Fla. 559, 2 So. 882.

Illinois.—Wabash R. Co. *v.* People, 196 Ill.

the full amount due, its receipt does not estop the state or municipality from collecting the balance.[6] Where the statute under which the tax is levied is unconstitutional, but only in respect to a matter of form, voluntary payment of the tax is a waiver of objections on this ground.[7] But if the tax is entirely illegal and void, and is nevertheless paid, the taxpayer is entitled to a credit for the sum so paid on a subsequent valid assessment.[8] If property is wrongly assessed in one county and the taxes there paid, this does not relieve the owner from liability to pay the tax assessed on the same property in another county, but he is entitled to a return of the money paid in the first.[9]

B. Release or Compromise, and Refunding of Taxes Paid — 1. Release or Compromise.[10] The state has general power to compromise or release its claims against debtors, and may therefore, by appropriate legislation,

606, 63 N. E. 1084; Russell *v.* Mandell, 73 Ill. 136; Morrison *v.* Kelly, 22 Ill. 609, 74 Am. Dec. 169.

Indiana.— Nyce *v.* Schmoll, 40 Ind. App. 555, 82 N. E. 539.

Iowa.—Adams County *v.* Burlington, etc., R. Co., 39 Iowa 507; Walton *v.* Gray, 29 Iowa 440.

Kentucky.— Blight *v.* Banks, 6 T. B. Mon. 192, 17 Am. Dec. 136.

Louisiana.— Trellieu Cypress Lumber Co. *v.* Albert Hansen Lumber Co., 121 La. 700, 46 So. 699; Kent *v.* McFatter, 111 La. 1037, 36 So. 112; Hake *v.* Lee, 106 La. 482, 31 So. 54; Lefebre *v.* Negrotto, 44 La. Ann. 792, 11 So. 91.

Massachusetts.— Hurd *v.* Melrose, 191 Mass. 576, 78 N. E. 302.

Michigan.— Mayot *v.* Auditor-Gen., 140 Mich. 593, 104 N. W. 19; Rayner *v.* Lee, 20 Mich. 384.

Minnesota.— Meller *v.* Hodsdon, 33 Minn. 366, 23 N. W. 543.

Mississippi.— Towry *v.* Wax, (1906) 42 So. 536; Burroughs *v.* Vance, 75 Miss. 696, 23 So. 548; Jones *v.* Burford, 26 Miss. 194; Griffing *v.* Pintard, 25 Miss. 173.

Missouri.— Huber *v.* Pickler, 94 Mo. 382, 7 S. W. 427. But *compare* Evarts *v.* Missouri Lumber, etc., Co., 193 Mo. 433, 92 S. W. 372.

New York.— Joslyn *v.* Rockwell, 128 N. Y. 334, 28 N. E. 604 [*affirming* 59 Hun 129, 13 N. Y. Suppl. 311]; Jackson *v.* Morse, 18 Johns. 441, 9 Am. Dec. 225.

Pennsylvania.— Reading *v.* Finney, 73 Pa. St. 467; Ankeny *v.* Albright, 20 Pa. St. 157; Montgomery *v.* Meredith, 17 Pa. St. 42. See Patton *v.* Long, 68 Pa. St. 260.

Texas.— Hollywood *v.* Wellhausen, 28 Tex. Civ. App. 541, 68 S. W. 329.

West Virginia.— Sturm *v.* Fleming, 26 W. Va. 54.

Wisconsin.— Sprague *v.* Cœnen, 30 Wis. 209.

United States.— Bennett *v.* Hunter, 9 Wall. 326, 19 L. ed. 672; *In re* Wyoming Valley Ice Co., 165 Fed. 789; Barnes *v.* Bee, 138 Fed. 476 [*affirmed* in 149 Fed. 727, 79 C. C. A. 433].

See 45 Cent. Dig. tit. "Taxation," § 985.

Payment before assessment.—A payment of money as taxes on property before the assessment thereof, and the collector's receipt therefor, are no legal discharge of taxes subsequently assessed against the property. Cossart *v.* Spence, 23 Ark. 374. And see *supra*, IX, A, 1, e.

As evidence of title.— The mere assessment of taxes on a particular property to a certain person, and his payment of them, are neither evidence of title in him, nor notice of its existence. Morey *v.* Herrick, 18 Pa. St. 123.

6. Marion *v.* National Loan, etc., Co., 130 Iowa 511, 107 N. W. 309; Schiffer *v.* Douglass, 74 Kan. 231, 86 Pac. 132; Johnson *v.* Finley, 54 Nebr. 733, 74 N. W. 1080; Neil *v.* Barron, 8 Ohio S. & C. Pl. 424, 7 Ohio N. P. 84. But where, after taxes had been settled against a corporation by the auditor-general and state treasurer, the corporation became bankrupt, and on petition the taxes were resettled and reduced, both on corporate loans and on capital stock, and such amounts were allowed by the referee and the tax on capital stock was paid by the trustee, but the tax on loans was reversed on appeal, the payment of the tax on the capital stock constituted a discharge as to it. *In re* Wyoming Valley Ice Co., 165 Fed. 789.

7. People *v.* Williams, 3 Thomps. & C. (N. Y.) 338.

8. *Illinois.*— Mix *v.* People, 116 Ill. 265, 4 N. E. 783.

Kentucky.— Citizens' Nat. Bank *v.* Com., 80 S. W. 479, 25 Ky. L. Rep. 2254.

Missouri.— State *v.* Missouri Pac. R. Co., 92 Mo. 137, 6 S. W. 862.

North Dakota.— Northern Pac. R. Co. *v.* McGinnis, 4 N. D. 494, 61 N. W. 1032.

United States.—Cincinnati Southern R. Co. *v.* Guenther, 19 Fed. 395.

See 45 Cent. Dig. tit. "Taxation," § 985.

Payment of an illegal tax for one year does not bar the right to contest that for another year. Carpenter *v.* Central Covington, 119 Ky. 785, 81 S. W. 919, 26 Ky. L. Rep. 430.

9. Stevens *v.* Carroll, 130 Iowa 463, 104 N. W. 433; Snakenberg *v.* Stein, 126 Iowa 650, 102 N. W. 533; Jandt *v.* Sioux County, 73 Nebr. 381, 102 N. W. 763. But see State *v.* Baker, 129 Mo. 482, 31 S. W. 924. And see Chicago, etc., R. Co. *v.* Rhein, 135 Iowa 404, 112 N. W. 823.

10. **Authority of collectors** see *infra*, X, A, 4, g.

release or remit particular taxes altogether or authorize their compromise or settlement on part payment,[11] unless prevented by a constitutional prohibition.[12] But a grant to a person to take the benefit of past due taxes to his own use, like a grant of exemption from future taxation, is to be strictly construed, and the right is not to be taken by implication.[13] It seems that counties, towns, and municipal corporations cannot compromise or release claims for taxes legally assessed, at least if the debtor is able to pay, unless they are authorized by the legislature to do so,[14] and certainly they cannot do so even then if there is a constitutional prohibition.[15] Where a tax has been regularly assessed under a statute and the liability therefor is fully fixed, the repeal of the statute does not have the effect of remitting such tax, unless such an intention on the part of the legislature appears.[16]

11. Demoville *v.* Davidson County, 87 Tenn. 214, 10 S. W. 353 (holding that the act of March 9, 1887, releasing druggists of a certain class from liability for taxes under certain revenue laws, was simply an exercise of the state's power to compromise or release its claims against debtors, and therefore it was no objection to the act that no provision was made for refunding the tax of such druggists of that class as had already paid); McHenry *v.* Alford, 168 U. S. 651, 18 S. Ct. 242, 42 L. ed. 614 (compromise). See also *In re* Kilby Bank, 23 Pick. (Mass.) 93; Auditor-Gen. *v.* O'Connor, 83 Mich. 464, 47 N. W. 443.

Counties.— The legislature has the right to release county as well as state taxes. Demoville *v.* Davidson County, 87 Tenn. 214, 10 S. W. 353.

Construction and application of particular statutes see Files *v.* Pocahontas, etc., R. Co., 48 Ark. 529, 3 S. W. 817; *In re* Kilby Bank, 23 Pick. (Mass.) 93; Auditor-Gen. *v.* O'Connor, 83 Mich. 464, 47 N. W. 443 (statute applicable to taxes reassessed); Demoville *v.* Davidson County, 87 Tenn. 214, 10 S. W. 353 (holding that the act of March 9, 1887, releasing druggists of a certain class from liability for taxes under certain revenue laws, being a release of all liability, extended to the liability incurred to counties as well as to the state).

Compliance with invalid statute. — Where an unconstitutional statute remitting certain taxes assessed against a railroad company was acquiesced in by the local authorities, who refrained from requiring the collector to collect the taxes or to account for them, this did not prevent the assertion of a claim for such taxes in the succeeding year. Perry County *v.* Selma, etc., R. Co., 58 Ala. 546.

12. Illinois Cent. R. Co. *v.* Com., 128 Ky. 268, 108 S. W. 245, 32 Ky. L. Rep. 1112, 110 S. W. 265, 33 Ky. L. Rep. 326 (holding that an agreement between the state board of valuation and assessment and a railroad company to release the latter for taxes for previous years on condition that it pay the taxes for the particular year was void, where the assessments for the previous years had become final, Ky. Const. § 52, providing that the general assembly shall have no power to release or authorize the release, in whole or in part, of indebtedness due to the commonwealth or to any county or municipality); Southern R. Co. *v.* Coulter, 113 Ky. 657, 68 S. W. 873, 24 Ky. L. Rep. 203. And see Citizens' Nat. Bank *v.* Com., 118 Ky. 51, 80 S. W. 479, 81 S. W. 686, 25 Ky. L. Rep. 2254, 26 Ky. L. Rep. 62; Louisville *v.* Louisville, etc., R. Co., 111 Ky. 1, 63 S. W. 14, 23 Ky. L. Rep. 390.

Unliquidated demand.— In Kentucky it is held that the constitutional prohibition against releasing or authorizing the release, in whole or in part, of indebtedness due to the commonwealth or to any county or municipality, does not forbid the compromise of an unliquidated demand for taxes, and that a judgment upon an agreed stipulation of facts will not be disturbed ordinarily, except for fraud or mistake. Com. *v.* Southern Pac. R. Co., 134 Ky. 421, 120 S. W. 313.

13. Files *v.* Pocahontas, etc., R. Co., 48 Ark. 529, 3 S. W. 817. See also Territory *v.* Gaines, 11 Ariz. 270, 93 Pac. 281.

14. State *v.* Fyler, 48 Conn. 145. But see San Antonio *v.* San Antonio St. R. Co., 22 Tex. Civ. App. 148, 54 S. W. 281, sustaining the compromise of a suit for taxes. *Compare* MUNICIPAL CORPORATIONS, 28 Cyc. 1711.

In Arizona, Rev. St. (1901) par. 973, conferring on boards of supervisors power to direct and control the prosecution and defense of all suits to which the county is a party, and to compromise the same and to do and perform all other acts and things which may be necessary to the full discharge of the chief legislative authority of the county government, did not confer on a county's board of supervisors authority to compromise an action for the collection of taxes. Territory *v.* Gaines, 11 Ariz. 270, 93 Pac. 281. A compromise of delinquent taxes, made subsequent to the passage of the act of March 19, 1903 (Laws (1903), p. 168, No. 92), amending Revenue Law, § 91 (Rev. St. (1901) par. 3922), and specifying the conditions under which a board of supervisors may compromise taxes, which compromise is not based on any of the conditions specified, is void. Territory *v.* Gaines, *supra*.

15. Citizens' Nat. Bank *v.* Com., 118 Ky. 51, 80 S. W. 479, 81 S. W. 686, 25 Ky. L. Rep. 2254, 26 Ky. L. Rep. 62; Louisville *v.* Louisville, etc., R. Co., 111 Ky. 1, 63 S. W. 14, 23 Ky. L. Rep. 390. And see MUNICIPAL CORPORATIONS, 28 Cyc. 1711. *Compare supra*, this section, note 14.

16. Debolt *v.* Ohio L. Ins., etc., Co., 1 Ohio St. 563. See *supra*, I, F.

2. Authority to Refund. The state may authorize the refund of taxes already paid, either out of its own treasury or those of the municipalities, but it must be by a valid and constitutional act of the legislature,[17] and the repeal of such an act takes away the right of the citizen to claim a refund and of the public officers to make it.[18] In the absence of such a statute, no power to refund taxes is lodged in the executive or administrative officers of the state or municipality;[19] and if the power is given to them by law it must be strictly followed.[20] The statute must be given a retrospective as well as a prospective operation if such appears to have been the intention of the legislature.[21] Where a statute providing for a refund of excessive or erroneous taxes paid is general in its terms, it applies to voluntary as well as to involuntary or compulsory payment.[22]

3. Grounds For Refunding — a. In General. To take advantage of a statute authorizing the refund of taxes illegally or wrongfully assessed, it must be shown

17. State *v.* Goldsmith, 162 Ala. 171, 50 So. 394; State *v.* Graham, 25 La. Ann. 625 (holding refunding act unconstitutional); *In re* L. E. Waterman Co., 33 Misc. (N. Y.) 569, 68 N. Y. Suppl. 892. See also Mills *v.* Hendricks County, 50 Ind. 436 (construing a statute which directed the charging back against a county of taxes illegally exacted, but made no express provision for repayment to the individual taxpayers, but which was nevertheless held to render the county liable to each person who had paid such taxes); People *v.* Erie County, 193 N. Y. 127, 86 N. E. 348 [*reversing* 126 N. Y. App. Div. 920, 110 N. Y. Suppl. 1140]; People *v.* Haverstraw Bd. of Education, 126 N. Y. App. Div. 414, 110 N. Y. Suppl. 769 [*affirmed* in 193 N. Y. 601, 86 N. E. 1130].

Statute constitutional.—N. Y. Laws (1907), c. 721, § 1, subd. 3, providing for the refund to taxpayers of excessive school taxes judicially determined excessive, and which prescribes limitations to the application which it authorizes, and which applies retrospectively as well as prospectively, and authorizes the refunding of taxes determined illegal on certiorari issued under Laws (1880), c. 269, which law was repealed in Laws (1896), c. 908, is not obnoxious to Const. art. 7, § 6, which section is aimed against the allowance of stale demands against the state. People *v.* Haverstraw Bd. of Education, 126 N. Y. App. Div. 414, 110 N. Y. Suppl. 769 [*affirmed* in 193 N. Y. 601, 86 N. E. 1130]. Nor is such statute unconstitutional as imposing upon one person the debt of another, since taxes are not to be regarded as debts within the constitutional prohibition relating thereto, and even if they were, the statute merely adjusts the debt, in that it returns to the "debtor" the excess paid by him over what was due from him, and merely provides for an abatement of the excessive portion of the tax and not for a donation or gift. People *v.* Haverstraw Bd. of Education, *supra*.

Provision for interest.— The fact that the application of a statute allowing refund of excessive taxes, together with interest from the date of payment, to taxes paid twenty years before, is in effect to give an interest paying investment for twenty years to the taxpayer, affords no justification for nullifying the statute by judicial legislation; such criticism of the statute not being one against the refund, but against the express provision of the statute affording interest thereon. People *v.* Haverstraw Bd. of Education, 126 N. Y. App. Div. 414, 110 N. Y. Suppl. 769 [*affirmed* in 193 N. Y. 601, 86 N. E. 1130].

Railroads and other corporations.— Acts (1907), p. 227, c. 142, providing that taxes illegally assessed, and paid through mistake of fact, shall be apportioned and refunded, being general in its terms, applies to the property of all taxpayers, natural or artificial, including railroads. Sahm *v.* State, 172 Ind. 237, 88 N. E. 257.

18. Henderson *v.* State, 58 Ind. 244; St. Joseph County *v.* Ruckman, 57 Ind. 96; Arimex Consol. Copper Co. *v.* State Bd. of Assessors, 69 N. J. L. 121, 54 Atl. 244.

19. Howell *v.* Ada County, 6 Ida. 154, 53 Pac. 542; People *v.* Roberts, 157 N. Y. 677, 51 N. E. 1093 [*affirming* 30 N. Y. App. Div. 78, 51 N. Y. Suppl. 747]; Carolina, etc., R. Co. *v.* Tribble, 25 S. C. 260.

Action for illegal refund.— A taxpayer of a county has sufficient interest in the subject-matter to maintain an action against the board of supervisors for illegal action in refunding certain money paid for taxes. Hospers *v.* Wyatt, 63 Iowa 264, 19 N. W. 204.

20. Van Antwerp *v.* Kelly, 50 Hun (N. Y.) 513, 3 N. Y. Suppl. 462 [*affirmed* in 130 N. Y. 699, 30 N. E. 68]; Moore *v.* McGuire, 142 Fed. 787 [*reversed* on other grounds in 205 U. S. 214, 27 S. Ct. 483, 51 L. ed. 776].

Construction of statutes see Sahm *v.* State, 172 Ind. 237, 88 N. E. 257; People *v.* Erie County, 193 N. Y. 127, 86 N. E. 348 [*reversing* 126 N. Y. App. Div. 920, 110 N. Y. Suppl. 1140]; People *v.* Haverstraw Bd. of Education, 126 N. Y. App. Div. 414, 110 N. Y. Suppl. 769 [*affirmed* in 193 N. Y. 601, 86 N. E. 1130]; and other cases cited under the sections following.

21. See People *v.* Haverstraw Bd. of Education, 126 N. Y. App. Div. 414, 110 N. Y. Suppl. 1069 [*affirmed* in 193 N. Y. 601, 86 N. E. 1130].

22. People *v.* Haverstraw Bd. of Education, 126 N. Y. App. Div. 414, 110 N. Y. Suppl. 769 [*affirmed* in 193 N. Y. 601, 86 N. E. 1130]. And see Slimmer *v.* Chickasaw County, 140 Iowa 448, 118 N. W. 779.

that the tax was illegal, that the assessors acted without jurisdiction, that the property should not have been assessed at all, or that the taxes claimed were not justly due; it is not sufficient to show mere irregularities or errors of judgment in the assessment or in the mode of making it,[23] or that the valuation of the property was excessive or was increased without authority.[24] But where an assessment is made on property which has no existence in fact, the error is one which may justify a refund of the taxes paid.[25] A statute providing for a refund, on petition in the court of county commissioners, to any person who, through mistake in the assessment or collection of taxes, has paid money that was not due from him for taxes, refers merely to cases where there has been a mistake in the assessment or collection of taxes, and does not clothe county commissioners or the board of review with the judicial function of passing on the constitutionality of a taxation law.[26]

b. Persons or Property Exempt or Not Liable. An assessment of taxes on persons or property which are exempt by law is illegal and not merely erroneous, and if the taxes have been paid a refund may properly be claimed in some jurisdictions.[27] The same is true where one has been illegally and improperly

23. *Arkansas.* — Clay County *v.* Brown Lumber Co., 90 Ark. 413, 119 S. W. 251, holding that the phrase "erroneously assessed" in Kirby Dig. § 7180, providing that in case any person has paid taxes on property, real or personal, erroneously assessed, the court, on satisfactory proof, etc., shall make an order refunding the amount of the county tax so erroneously assessed and paid, and make provision for refunding the state tax, refers to an assessment which is illegal because of a jurisdictional defect, such as an assessment levied on exempt property, or property not located within the county, and does not include a mere error of judgment on the part of the assessing officers in valuing the property.

California.— See Graciosa Oil Co. *v.* Santa Barbara County, 155 Cal. 140, 99 Pac. 483, 20 L. R. A. N. S. 211.

Indiana.— Indianapolis *v.* Vajen, 111 Ind. 240, 12 N. E. 311; Henry County *v.* Murphy, 100 Ind. 570; Carroll County *v.* Graham, 98 Ind. 279; Durham *v.* Montgomery County, 95 Ind. 182; Howard County *v.* Armstrong, 91 Ind. 528. As to right of railroad company to refund where it is erroneously assessed on property lying partly in one township and partly in another, or partly in a township and partly in a city or town, see Sahm *v.* State, 172 Ind. 237, 88 N. E. 257.

Iowa.— Dubuque, etc., R. Co. *v.* Webster County, 40 Iowa 16.

New York.— People *v.* Wemple, 133 N. Y. 617, 30 N. E. 1002; *In re* Reid, 52 N. Y. App. Div. 243, 65 N. Y. Suppl. 373; Harris *v.* Niagara County, 33 Hun 279.

Ohio.— Butler *v.* Hamilton County, 39 Ohio St. 168; Perrin *v.* County Com'rs, 6 Ohio Dec. (Reprint) 1085, 10 Am. L. Rec. 311; Davis *v.* Hamilton County, 28 Ohio Cir. Ct. 817; Hamilton County *v.* Eckstein, 6 Ohio Dec. (Reprint) 843, 8 Am. L. Rec. 421.

Pennsylvania.— Lick's Estate, 28 Pa. Co. Ct. 113.

Wyoming.— Carton *v.* Uinta County, 10 Wyo. 416, 69 Pac. 1013.

See 45 Cent. Dig. tit. "Taxation," § 992.

Statutory rule in Ohio; correction of "clerical" errors and refund of taxes paid see Hamilton County *v.* Albers, 28 Ohio Cir. Ct. 830; Davis *v.* Hamilton County, 28 Ohio Cir. Ct. 817; Mitchell *v.* Hamilton County, 10 Ohio Dec. (Reprint) 628, 22 Cinc. L. Bul. 292; Tatem *v.* Hamilton County, 10 Ohio Dec. (Reprint) 514, 21 Cinc. L. Bul. 317; Tenhundfeld *v.* Hamilton County, 10 Ohio Dec. (Reprint) 513, 21 Cinc. L. Bul. 316; Chatfield *v.* Hamilton County, 10 Ohio Dec. (Reprint) 511, 21 Cinc. L. Bul. 315; Perrin *v.* County Com'rs, 6 Ohio Dec. (Reprint) 1085, 10 Am. L. Rec. 311; Ives *v.* Hamilton County, 6 Ohio Dec. (Reprint) 1079, 10 Am. L. Rec. 306; State *v.* Cappeller, 6 Ohio Dec. (Reprint) 1015, 9 Am. L. Rec. 543.

24. Cerbat Min. Co. *v.* State, 29 Hun (N. Y.) 81; People *v.* Ulster County, 10 Hun (N. Y.) 545 [*affirmed* in 71 N. Y. 481]; Sandheger *v.* Hamilton County, 8 Ohio Dec. (Reprint) 569, 9 Cinc. L. Bul. 20; Ridderman *v.* Hamilton County, 6 Ohio Dec. (Reprint) 939, 8 Am. L. Rec. 749. *Contra*, Newsom *v.* Bartholomew County, 92 Ind. 229; Zeigler *v.* Blackford County, 33 Ind. App. 375, 71 N. E. 527; Donch *v.* Lake County, 4 Ind. App. 374, 30 N. E. 204.

25. Hamilton County *v.* Brashears, 6 Ohio Dec. (Reprint) 1027, 9 Am. L. Rec. 626.

26. State *v.* Goldsmith, 162 Ala. 171, 50 So. 394.

27. People *v.* Wemple, 141 N. Y. 471, 36 N. E. 506 [*reversing* 69 Hun 367, 23 N. Y. Suppl. 661]; Williams *v.* Wayne County, 78 N. Y. 561; *In re* New York Catholic Protectory, 8 Hun (N. Y.) 91 [*affirmed* in 77 N. Y. 342]; People *v.* Herkimer County, 56 Barb. (N. Y.) 452; People *v.* Otsego County, 53 Barb. (N. Y.) 564 [*affirmed* in 51 N. Y. 401]. And see Clay County *v.* Brown Lumber Co., 90 Ark. 413, 119 S. W. 251. *Contra*, State *v.* Montgomery County, 31 Ohio St. 271; Dickson *v.* County Com'rs, 6 Ohio Dec. (Reprint) 1141, 10 Am. L. Rec. 571; Ives *v.* Hamilton County, 6 Ohio Dec. (Reprint) 1079, 10 Am. L. Rec. 306; Carolina, etc., R. Co. *v.* Tribble, 25 S. C. 260.

assessed for property which he does not own or have any interests in, and he has paid the tax.[28]

4. Proceedings to Secure Refund. According to the usual course of proceedings, a claim for the refund of taxes must be filed within the time limited by law,[29] with the official body or board which is authorized to order the refund, generally the administrative board of a county or city,[30] and this board has a judicial function to perform in hearing and trying the application, so that mandamus will not lie to control its decision, but only to compel it to take up the case, or to require it to ascertain and determine the amount to be refunded where the right to a refund is clearly apparent as a matter of law or rests on undisputed facts.[31] The board should act on proper and competent evidence presented to it,[32] and if it refuses to grant the relief demanded the remedy is by appeal,[33] and not by mandamus.[34] In some jurisdictions, however, the proceeding is taken in a court of original jurisdiction,[35] on a petition which must clearly set forth a good and sufficient ground for ordering the refund of the taxes.[36] In either case, if the facts are found for the petitioner, he is entitled to an order for the restoration of the entire tax paid, if none of it was due, or so much of it as was in excess of the sum rightly chargeable, with interest,[37] and then it becomes the duty of the proper officer to draw his warrant upon the treasury which has received the tax and which is liable to refund it.[38]

C. Recovery of Taxes Paid — 1. Right of Recovery in General. Subject to the exceptions hereafter pointed out, an action at law may be maintained to

28. *In re* Coleman, 30 Hun (N. Y.) 544; Kirkwood *v.* Ford, 34 Oreg. 552, 56 Pac. 411. But *compare* Carroll County *v.* Graham, 98 Ind. 279.

29. Perrin *v.* Honeycutt, 144 Cal. 87, 77 Pac. 776; Hatwood *v.* Fayetteville, 121 N. C. 207, 28 S. E. 299.

30. Barber *v.* Jackson County, 40 Ill. App. 42; *In re* Buffalo Mut. Gas-Light Co., 144 N. Y. 228, 39 N. E. 86; People *v.* Matthias, 84 N. Y. App. Div. 122, 81 N. Y. Suppl. 1105; *In re* Gilloren, 16 Misc. (N. Y.) 130, 38 N. Y. Suppl. 954.

31. Beecher *v.* Clay County, 52 Iowa 140, 2 N. W. 1037; People *v.* Essex County, 85 N. Y. 612; *In re* New York Catholic Protectory, 77 N. Y. 342; People *v.* Essex County, 70 N. Y. 228; People *v.* Montgomery County, 67 N. Y. 109, 23 Am. Rep. 94; People *v.* Ulster County, 65 N. Y. 300; People *v.* Otsego County, 51 N. Y. 401; Van Hise *v.* Rensselaer County, 21 Misc. (N. Y.) 572, 48 N. Y. Suppl. 874; Carton *v.* Uinta County, 10 Wyo. 416, 69 Pac. 1013. *Compare* Butler *v.* Fayette County, 46 Iowa 326; State *v.* Brewster, 6 Ohio Dec. (Reprint) 1210, 12 Am. L. Rec. 544.

32. Pulaski County *v.* Senn, 117 Ind. 410, 20 N. E. 276.

33. State *v.* Miami County, 63 Ind. 497; Shultz *v.* Blackford County, 20 Ind. 178.

34. Younger *v.* Santa Cruz County, 68 Cal. 241, 9 Pac. 103; State *v.* Miami County, 63 Ind. 497.

35. Byles *v.* Golden Tp., 52 Mich. 612, 18 N. W. 383. See *In re* Douglas, 48 Hun (N. Y.) 318, 1 N. Y. Suppl. 126.

36. Pulaski County *v.* Senn, 117 Ind. 410, 20 N. E. 276; Boston Mfg. Co. *v.* Com., 144 Mass. 598, 12 N. E. 362.

37. Boott Cotton Mills *v.* Lowell, 159 Mass. 383, 34 N. E. 367; People *v.* Kelsey, 114 N. Y. App. Div. 319, 99 N. Y. Suppl. 852; People *v.* Matthias, 84 N. Y. App. Div. 122, 81 N. Y. Suppl. 1105.

Interest.— The obligation to refund excessive taxes levied and collected carries with it the right to interest as a matter of course. *In re* O'Berry, 179 N. Y. 285, 72 N. E. 109; People *v.* Haverstraw Bd. of Education, 126 N. Y. App. Div. 414, 110 N. Y. Suppl. 769 [*affirmed* in 193 N. Y. 601, 86 N. E. 1130].

Reaudit; estoppel by acquiescence.— Where, on presentation by a taxpayer to a county board of supervisors of his claim for a refund of the amount in excess of what should have been paid for all taxes, the board allowed a refund as to state, county, and town taxes, but denied it as to school and highway taxes, and paid the refund allowed, and the taxpayer accepted the same without objection and acquiesced in the determination for three years, he could not again open the matter and obtain a reaudit of his claim. People *v.* Erie County, 193 N. Y. 127, 86 N. E. 348 [*reversing* 126 N. Y. App. Div. 920, 110 N. Y. Suppl. 1140].

38. *Alabama.*—White *v.* Smith, 117 Ala. 232, 23 So. 525.

Iowa.— Iowa R. Land Co. *v.* Woodbury County, 64 Iowa 212, 19 N. W. 915, the refunding must be from the several funds to which the tax was apportioned when collected.

New York.— People *v.* Matthias, 84 N. Y. App. Div. 122, 81 N. Y. Suppl. 1105, the fact that after the payment of a tax on an illegal valuation the boundaries of the town were changed and a part thereof annexed to a city, did not relieve the town from its liability to refund its proportion of such tax.

North Carolina.— North Carolina R. Co. *v.*

recover taxes where they were wrongfully and illegally assessed and collected,[39] or where the municipality had no authority to levy or collect the particular tax or to assess the particular property,[40] or where the same property has been twice assessed and taxed,[41] and perhaps where the tax justly due has been swollen by

Alamance County, 77 N. C. 4, the county commissioners will refund the county tax and certify to the state auditor the amount of the state tax to be refunded.

Ohio.— Flack *v.* Humphreys, 24 Ohio St. 330.

Recovery back of taxes refunded.—Where taxes improperly collected by a county have been refunded, the county cannot thereafter recover the amount so refunded on the ground that it was paid back under a mistake of law, although the collection was illegal for a different reason from that supposed at the time the money was refunded. Graves County *v.* Mayfield First Nat. Bank, 108 Ky. 194, 56 S. W. 16, 21 Ky. L. Rep. 1656.

39. *California.*— Stewart Law, etc., Co. *v.* Alameda County, 142 Cal. 660, 76 Pac. 481.

Connecticut.— Jackson *v.* Union, 82 Conn. 266, 73 Atl. 773.

District of Columbia.— District of Columbia *v.* Glass, 27 App. Cas. 576; District of Columbia *v.* Chapman, 25 App. Cas. 98.

Illinois.— Cook County *v.* Fairbank, 222 Ill. 578, 78 N. E. 895.

Indiana.—Newsom *v.* Bartholomew County, 103 Ind. 526, 3 N. E. 163.

Iowa.— Slimmer *v.* Chickasaw County, 140 Iowa 448, 118 N. W. 779; Bibbins *v.* Polk County, 100 Iowa 493, 69 N. W. 1007.

Kansas.— Jackson County *v.* Kaul, 77 Kan. 715, 717, 96 Pac. 45, 17 L. R. A. N. S. 552; Atchison, etc., R. Co. *v.* Sumner County, 76 Kan. 618, 92 Pac. 590; Douglas County *v.* Lane, (1907) 90 Pac. 1092; Connelly *v.* Trego County, (1902) 67 Pac. 453.

Kentucky.— Com. *v.* Baske, 124 Ky. 463, 99 S. W. 316, 30 Ky. L. Rep. 400; First Nat. Bank *v.* Christian County, 106 S. W. 831, 32 Ky. L. Rep. 634.

Massachusetts.— Masonic Education, etc., Trust *v.* Boston, 201 Mass. 320, 87 N. E. 602; Joyner *v.* Egremont Third School Dist. No. 3, 3 Cush. 567; Inglee *v.* Bosworth, 5 Pick. 498, 16 Am. Dec. 419.

Michigan.— Rice *v.* Muskegon, 150 Mich. 679, 114 N. W. 661; Byles *v.* Golden Tp., 52 Mich. 612, 18 N. W. 383.

Minnesota.— Foster *v.* Blue Earth County, 7 Minn. 140.

Montana.—Western Ranches *v.* Custer County, 28 Mont. 278, 72 Pac. 659.

Nebraska.— Chase County *v.* Chicago, etc., R. Co., 58 Nebr. 274, 78 N. W. 502; Chicago, etc., R. Co. *v.* Nemaha County, 50 Nebr. 393, 69 N. W. 958.

New Jersey.— *In re* New Jersey Cent. R. Co., 72 N. J. L. 86, 59 Atl. 1062.

New York.— Peyser *v.* New York, 70 N. Y. 497, 26 Am. Rep. 624; Guaranty Trust Co. *v.* New York, 108 N. Y. App. Div. 192, 95 N. Y. Suppl. 770; Ætna Ins. Co. *v.* New York, 7 N. Y. App. Div. 145, 40 N. Y. Suppl. 120 [*affirmed* in 153 N. Y. 331, 47 N. E. 593]; Bailey *v.* Buell, 59 Barb. 158.

South Carolina.— De Soto Gold Min. Co. *v.* Smith, 49 S. C. 188, 27 S. E. 1.

South Dakota.— Chicago, etc., R. Co. *v.* Rolfson, 23 S. D. 405, 122 N. W. 343.

Texas.— Galveston County *v.* Galveston Gas Co., 72 Tex. 509, 10 S. W. 583.

Washington.— Puget Realty Co. *v.* King County, 50 Wash. 349, 97 Pac. 226.

Wisconsin.—A. H. Stange Co. *v.* Merrill, 134 Wis. 514, 115 N. W. 115.

Wyoming.— Kelley *v.* Rhoads, 7 Wyo. 237, 51 Pac. 593, 75 Am. St. Rep. 904, 39 L. R. A. 594.

United States.— Herold *v.* Kahn, 159 Fed. 608, 86 C. C. A. 598, 163 Fed. 947, 90 C. C. A. 307; U. S. Express Co. *v.* Allen, 39 Fed. 712 [*reversed* on other grounds in 139 U. S. 591, 11 S. Ct. 646, 35 L. ed. 273].

See 45 Cent. Dig. tit. "Taxation," § 996 *et seq.*

Exempt property.—Where a tax on exempt property is wholly void the tax may be recovered back. Masonic Education, etc., Trust *v.* Boston, 201 Mass. 320, 87 N. E. 602.

Suit against United States.— When the government uses and withholds one's money paid on an invalid or abated tax on a national bank, an action lies to his use for money had and received. Johnston *v.* U. S., 17 Ct. Cl. 157.

Refusal of good tender.— Where a tax collector refuses to accept a tender of coupons from state bonds, which are made by law receivable in payment of taxes, and the citizen pays in money, he may recover back the amount in an action of assumpsit. Brown *v* Greenhow, 80 Va. 118.

Vendee paying vendor's taxes.— A plaintiff who has been compelled, by levy and sale of his property, to pay the unpaid tax of a former occupant of the premises, has no cause of action against the municipality. Newman *v.* Livingston County, 1 Lans. (N. Y.) 476 [*affirmed* in 45 N. Y. 676].

40. *Iowa.*— Isbell *v.* Crawford County, 40 Iowa 102.

Massachusetts.— Dorr *v.* Boston, 6 Gray 131.

Nebraska.— Fremont, etc., R. Co. *v.* Holt County, 28 Nebr. 742, 45 N. W. 163.

New York.— Ernenwein *v.* Oneida County, 24 Misc. 216, 53 N. Y. Suppl. 529.

Wyoming.— Moore *v.* Sweetwater County, 2 Wyo. 8.

See 45 Cent. Dig. tit. "Taxation," § 996.

Property destroyed.—Where property is destroyed by fire after the taxes are spread on the assessment roll, the owner is not entitled to a rebate. Case *v.* Detroit, 129 Mich. 298, 88 N. W. 626.

41. Penobscot Chemical Fibre Co. *v.* Bradley, 99 Me. 263, 59 Atl. 83; Dunnell Mfg. Co.

an unauthorized increase or an excessive valuation.[42] But no such action can be based on mere irregularities or informalities in the assessment not affecting the substantial justice of the tax.[43] Nor can the action be maintained where plaintiff has waived his right or is estopped to deny the validity of the tax.[44]

v. Pawtucket, 7 Gray (Mass.) 277. But *compare* Baldwin *v.* Johnson, 2 U. C. Q. B. 475.

42. *Indiana.*— Indianapolis *v.* Morris, 25 Ind. App. 409, 58 N. E. 510; Cleveland, etc., R. Co. *v.* Marion County, 19 Ind. App. 58, 49 N. E. 51.

Louisiana.— James *v.* New Orleans, 19 La. Ann. 109.

New Hampshire.—Ford *v.* Holden, 39 N. H. 143.

New York.— Delano *v.* New York, 32 Hun 144.

Ohio.— State *v.* Lewis, 15 Ohio Cir. Ct. 279, 8 Ohio Cir. Dec. 276.

Contra.— Kehe *v.* Blackhawk County, 125 Iowa 549, 101 N. W. 281; Leonard *v.* Madison County, 64 Iowa 418, 20 N. W. 742; Chapel *v* Franklin County, 58 Nebr. 544, 78 N W. 1062; Texas Land, etc., Co. *v.* Hemphill County, (Tex. Civ. App. 1901) 61 S. W. 333.

43. *California.*— Graciosa Oil Co. *v.* Santa Barbara County, 155 Cal. 140, 99 Pac. 483, 20 L. R. A. N. S. 211 (holding that under Pol. Code, § 3804, providing that taxes erroneously or illegally collected shall be refunded, and giving a right of recovery only when the assessment is void, mere irregularities in procedure, not invalidating the assessment, do not absolve the taxpayer from the obligation to pay or give him any right to recover taxes paid); Steele *v.* Kelshaw, (1908) 93 Pac. 1021; Steele *v.* San Luis Obispo County, 152 Cal. 785, 93 Pac. 1020.

Connecticut.— Jackson *v.* Union, 82 Conn. 266, 73 Atl. 773.

Illinois.— Stephenson County *v.* Manny, 56 Ill. 160.

Kansas.— Douglas County *v.* Lane, 76 Kan. 12, 90 Pac. 1092.

Kentucky.— Hopkinsville First Nat. Bank *v.* Hopkinsville, 128 Ky. 383, 108 S. W. 311, 32 Ky. L. Rep. 1283, 16 L. R. A. N. S. 685; Grayson County Nat. Bank *v.* Leitchfield, (1908) 114 S. W. 289.

Louisiana.— New Orleans Bank *v.* New Orleans, 12 La. Ann. 421.

Massachusetts.— Tobey *v.* Wareham, 2 Allen 594; Lincoln *v.* Worcester, 8 Cush. 55.

Missouri.— Kansas City *v.* Holmes, 127 Mo. App. 620, 106 S. W. 559.

New Hampshire.— Hanson *v.* Haverhill, 60 N. H. 218.

New York.— U. S. Trust Co. *v.* New York, 144 N. Y. 488, 39 N. E. 383 [*affirming* 77 Hun 182, 28 N. Y. Suppl. 344].

Wisconsin.— Day *v.* Pelican, 94 Wis. 503, 69 N. W. 368; Wiesman *v.* Brighton, 83 Wis. 550, 53 N. W. 911.

Wyoming.— Carton *v.* Uinta County, 10 Wyo. 416, 69 Pac. 1013.

Canada.— Bain *v.* Montreal, 8 Can. Sup. Ct. 252.

See 45 Cent. Dig. tit. "Taxation," § 996.

Incomplete assessment roll.— See Henry *v.* Chester, 15 Vt. 460, as to recovery of taxes paid on an assessment roll which was incomplete because not containing the changes ordered by the board of equalization.

Excessive assessment.— An action by a bank against a city to recover taxes paid on the ground that United States bonds owned by the bank had been assessed will not be entertained, where no complaint was made by plaintiff to the proper officers within the time prescribed by law. Grayson County Nat. Bank *v.* Leitchfield, (Ky. 1908) 114 S. W. 289. See also Hopkinsville First Nat. Bank *v.* Hopkinsville, 128 Ky. 383, 108 S. W. 311, 32 Ky. L. Rep. 1283, 16 L. R. A. N. S. 685.

44. Slimmer *v.* Chickasaw County, 140 Iowa 448, 118 N. W. 779 (holding that one who, through his agent, voluntarily handed in to the assessor a list of property which he represented was liable to assessment, and who thereafter voluntarily paid the taxes expended by the county, was estopped from recovering the taxes, although the property was not subject to taxation in the county; and that he could not recover them under Code, § 1417, requiring the board of supervisors to direct the treasurer to refund any tax erroneously or illegally exacted or paid); Wood *v.* Norwood Tp., 52 Mich. 32, 17 N. W. 229.

No waiver of right.— Failure to resist the collection of an invalid or illegal tax does not constitute a waiver of the right of action to recover it back. Dickey *v.* Polk County, 58 Iowa 287, 12 N. W. 290. See Tatum *v.* Trenton, 85 Ga. 468, 11 S. E. 705.

No estoppel.— Notwithstanding the failure of the taxpayer to list his taxable property, he may recover taxes wrongfully charged against him under color of Kan. Gen. St. (1901) § 7599, authorizing the county clerk or board of county commissioners, upon notice to a taxpayer who has failed to list all his taxable property, or who has undervalued it, to correct the returns of the assessor and charge the person with the proper amount of taxes, and which he has paid under the compulsion of a tax warrant. One who, to avoid the seizure and sale of his property under a void tax warrant, pays the amount of the charge may recover it in a proper action, notwithstanding his fault in failing to make a statement of his taxable property in the previous year, and notwithstanding he has never discharged his moral obligation to contribute in proportion to his means to the public expenses of that year. Douglas County *v.* Lane, 76 Kan. 12, 90 Pac. 1092. Where a person has no property in a municipality liable to assessment, his failure to appear before a board of review does not

2. Other Remedies Available. An action for the recovery of taxes paid cannot be maintained, however, where plaintiff has another and more appropriate remedy provided in the ordinary course of the tax proceedings themselves,[45] as by an application to the board of equalization or other body for an abatement or reduction of taxes assessed illegally or excessively,[46] or by an appeal or certiorari to review the assessment complained of,[47] or by mandamus to obtain the correction of errors or irregularities in the assessment,[48] or to compel the refunding of taxes illegally exacted.[49] In some cases also an action for damages against the assessors is a more appropriate remedy than one for the recovery of the taxes paid.[50]

3. Effect of Paying Over or Distributing Money. It is generally held that an action may be maintained against a county, town, or other municipal corporation for the recovery of taxes illegally exacted only while the fund so raised remains in the possession of defendant.[51] Hence if a county has collected general taxes, part of which are for itself and part for the state or for townships, school or road districts, or the like, no recovery can be had after the funds have been divided up and paid over to the several treasurers or receiving officers.[52] Nor can a recov-

estop him from contesting the validity of an assessment in an action to recover taxes paid under protest. Rice *v.* Muskegon, 150 Mich. 679, 114 N. W. 661.

45. Ranney *v.* Bader, 67 Mo. 476; Rubey *v.* Shain, 54 Mo. 207 (statutory proceeding to arrest collection of tax); Cloud *v.* Norwich, 57 Vt. 448. But *compare* Chegaray *v.* New York, 2 Duer (N. Y.) 521 [*reversed* on other grounds in 13 N. Y. 220], holding that in an action to recover taxes illegally assessed and collected, if defendants admit the receipt of the taxes they cannot object that plaintiff should have sought other remedies.

46. *California.*— Henne *v.* Los Angeles County, 129 Cal. 297, 61 Pac. 1081.

Maine.— Waite *v.* Princeton, 66 Me. 225; Hemingway *v.* Machias, 33 Me. 445.

Massachusetts.— St. James Educational Inst. *v.* Salem, 153 Mass. 185, 26 N. E. 636, 10 L. R. A. 573; Norcross *v.* Milford, 150 Mass. 237, 22 N. E. 892; Richardson *v.* Boston, 148 Mass. 508, 20 N. E. 166; Salmond *v.* Hanover, 13 Allen 119; Bourne *v.* Boston, 2 Gray 494; Lincoln *v.* Worcester, 8 Cush. 55; Howe *v.* Boston, 7 Cush. 273; Bates *v.* Boston, 5 Cush. 93; Boston Water Power Co. *v.* Boston, 9 Metc. 199; Osborn *v.* Danvers, 6 Pick. 98. *Compare* McGee *v.* Salem, 149 Mass. 238, 21 N. E. 386.

Michigan.— Detroit River Sav. Bank *v.* Detroit, 114 Mich. 81, 72 N. W. 14.

Ohio.— Ætna Iron, etc., Co. *v.* Taylor, 4 Ohio S. & C. Pl. Dec. 180, 3 Ohio N. P. 152.

Oregon.—Ramp *v.* Marion County, 24 Oreg. 461, 33 Pac. 681.

Pennsylvania.— Wharton *v.* Birmingham, 37 Pa. St. 371.

Wisconsin.— Day *v.* Pelican, 94 Wis. 503, 69 N. W. 368.

Wyoming.— Johnson County *v.* Searight Cattle Co., 3 Wyo. 777, 31 Pac. 268.

See 45 Cent. Dig. tit. "Taxation," § 997.

But see Puget Realty Co. *v.* King County, 50 Wash. 349, 97 Pac. 226 (holding that suit may be brought against a county to recover taxes paid through mistake, and it is not necessary to appear before the board of equalization for such relief); Miller *v.* Pierce County, 28 Wash. 110, 68 Pac. 358; Powder River Cattle Co. *v.* Custer County, 45 Fed. 323. And *compare* Chicago, etc., R. Co. *v.* Nemaha County, 50 Nebr. 393, 69 N. W. 958; Union, etc., Bank *v.* Memphis, 107 Tenn. 66, 64 S. W. 13; Galveston County *v.* Galveston Gas Co., 72 Tex. 509, 10 S. W. 583; Wilmington *v.* Ricaud, 90 Fed. 214, 32 C. C. A. 580.

47. Simonson *v.* West Harrison, 5 Ind. App. 459, 32 N. E. 585; U. S. Trust Co. *v.* New York, 144 N. Y. 488, 39 N. E. 383 [*affirming* 77 Hun 182, 28 N. Y. Suppl. 344]; Hopkins *v.* Leach, 125 N. Y. App. Div. 294, 109 N. Y. Suppl. 713; Robinson *v.* Rowland, 26 Hun (N. Y.) 501; Genesee Valley Nat. Bank *v.* Livingston County, 53 Barb. (N. Y.) 223.

48. Winter *v.* Montgomery, 65 Ala. 403. And see *supra*, VII, C, 4.

49. Eyerly *v.* Jasper County, 72 Iowa 149, 33 N. W. 609. And see *supra*, IX, B, 2-4.

50. Hayford *v.* Belfast, 69 Me. 63; Ware *v.* Percival, 61 Me. 391, 14 Am. Rep. 565; Huggins *v.* Hinson, 61 N. C. 126.

Liability of assessors in actions for damages see, generally, *supra*, VI, B, 4.

51. Burlington, etc., R. Co. *v.* Buffalo County, 14 Nebr. 51, 14 N. W. 539; Meacham *v.* Newport, 70 Vt. 264, 40 Atl. 729.

52. *Indiana.*— Cleveland, etc., R. Co. *v.* Marion County, 19 Ind. App. 58, 49 N. E. 51.

Iowa.— Stone *v.* Woodbury County, 51 Iowa 522, 1 N. W. 745; Des Moines, etc., R. Co. *v.* Lowry, 51 Iowa 486, 1 N. W. 782. *Contra*, Lauman *v.* Des Moines County, 29 Iowa 310.

Kansas.— Saline County *v.* Geis, 22 Kan. 381; Pawnee County *v.* Atchison, etc., R. Co., 21 Kan. 748.

Nebraska.— Price *v.* Lancaster County, 18 Nebr. 199, 24 N. W. 705.

Vermont.— Meacham *v.* Newport, 70 Vt. 264, 40 Atl. 729; Slack *v.* Norwich, 32 Vt. 818; Vermont Cent. R. Co. *v.* Burlington, 28 Vt. 193; Spear *v.* Braintree, 24 Vt. 414.

Wisconsin.— Matheson *v.* Mazomanie, 20 Wis. 191. But see Matteson *v.* Rosendale, 37 Wis. 254.

Contra.— Byles *v.* Golden, 52 Mich. 612.

ery be had, even as to the taxes belonging to the particular municipality which is made defendant, after it has paid out the money so received to its own creditors.[53]

4. Voluntary Payment — a. In General. Whatever may be the ground upon which objection to a tax or to the assessment of it may be made, it is a well settled general rule that if the tax is paid by the person assessed voluntarily and without compulsion it cannot be recovered back in an action at law,[54] unless

18 N. W. 383; Montgomery *v.* Cowlitz County, 14 Wash. 230, 44 Pac. 259.

Payment after suit begun.— It is no defense to an action against a county for state, county, and town taxes erroneously collected by the county treasurer, that after the commencement of the action the part of the tax collected for the state and the town has been paid to them out of the county treasury, since the pendency of the action is sufficient notice of the taxpayer's right to the money. Du Bois *v.* Lake County, 10 Ind. App. 347, 37 N. E. 1056.

53. Hawkins *v.* Nicholas County, 89 S. W. 484, 28 Ky. L. Rep. 479. *But compare* Tallant *v.* Burlington, 39 Iowa 543; Louden *v.* East Saginaw, 41 Mich. 18, 2 N. W. 182.

54. *Arizona.*— Gibson Abstract Co. *v.* Cochise County, (1909) 100 Pac. 453, holding that where plaintiff paid taxes on personal property without protest at the rate of a previous year before the rate for the current year had been ascertained, instead of giving bond to save its property from seizure as authorized by statute, the payment was voluntary, and plaintiff could not recover the difference between the taxes paid and the amount chargeable to it at the current rate as subsequently fixed.

California.— Warren *v.* San Francisco, 150 Cal. 167, 88 Pac. 712; Grimley *v.* Santa Clara County, 68 Cal. 575, 9 Pac. 840; Younger *v.* Santa Cruz County, 68 Cal. 241, 9 Pac. 103.

Colorado.— El Paso County *v.* Colorado Springs Co., 15 Colo. App. 274, 62 Pac. 336.

Dakota.— Rushton *v.* Burke, 6 Dak. 478, 43 N. W. 815.

District of Columbia.— Georgetown College *v.* District of Columbia, MacArthur & M. 43.

Florida.— Johnson *v.* Atkins, 44 Fla. 185, 32 So. 879.

Georgia.— McGehee *v.* Columbus, 69 Ga. 581; Thomson *v.* Norris, 62 Ga. 538.

Illinois.— Gaar *v.* Hurd, 92 Ill. 315; Chicago *v.* Klinkert, 94 Ill. App. 524; Chicago *v.* Fidelity Sav. Bank, 11 Ill. App. 165; Lyons *v.* Cook, 9 Ill. App. 543.

Indiana.— St. Joseph County *v.* Ruckman, 57 Ind. 96; Mills *v.* Hendricks County, 50 Ind. 436; Ligonier *v.* Ackerman, 46 Ind. 552, 15 Am. Rep. 323; Lima Tp. *v.* Jenks, 20 Ind. 301; Martin *v.* Stanfield, 17 Ind. 336; Jenks *v.* Lima Tp., 17 Ind. 326; Nyce *v.* Schmoll, 40 Ind. App. 555, 82 N. E. 539; Baltimore, etc., R. Co. *v.* Oregon Tp., (App. 1907) 81 N. E. 105.

Iowa.— Slimmer *v.* Chickasaw County, 140 Iowa 448, 118 N. W. 779; Stevens *v.* Carroll, 130 Iowa 463, 104 N. W. 433; Kehe *v.* Blackhawk County, 125 Iowa 549, 101 N. W. 281; Odendahl *v.* Rich, 112 Iowa 182, 83 N. W. 886; Hawkeye Loan, etc., Co. *v.* Marion, 110 Iowa 468, 81 N. W. 718; Iowa R. Land Co. *v.* Davis, 102 Iowa 128, 71 N. W. 229; Lindsey *v.* Boone County, 92 Iowa 86, 60 N. W. 173.

Kansas.— Phillips *v.* Jefferson County, 5 Kan. 412.

Kentucky.— German Security Bank *v.* Coulter, 112 Ky. 577, 66 S. W. 425, 23 Ky. L. Rep. 1888; Louisville, etc., R. Co. *v.* Hopkins County, 87 Ky. 605, 9 S. W. 497, 10 Ky. L. Rep. 806; Louisville City Nat. Bank *v.* Coulter, 66 S. W. 427, 23 Ky. L. Rep. 1883.

Louisiana.— New Orleans Canal, etc., Co. *v.* New Orleans, 30 La. Ann. 1371.

Maine.— Smith *v.* Readfield, 27 Me. 145.

Maryland.— Monticello Distilling Co. *v.* Baltimore, 90 Md. 416, 45 Atl. 210; Baltimore *v.* Hussey, 67 Md. 112, 9 Atl. 19.

Massachusetts.— Adams *v.* New Bedford, 155 Mass. 317, 29 N. E. 532; National Bank of Commerce *v.* New Bedford, 155 Mass. 313, 29 N. E. 532; Barrett *v.* Cambridge, 10 Allen 48; Nelson *v.* Milford, 7 Pick. 18.

Michigan.— Williams *v.* Merritt, 152 Mich. 621, 116 N. W. 386; Gage *v.* Saginaw, (1901) 84 N. W. 1100; Loud, etc., Lumber Co. *v.* Vienna Tp., 120 Mich. 382, 79 N. W. 575; Manistee Lumber Co. *v.* Springfield Tp., 92 Mich. 277, 52 N. W. 468.

Minnesota.— Gould *v.* Hennepin County, 76 Minn. 379, 79 N. W. 303, 530; Smith *v.* Schroeder, 15 Minn. 35.

Missouri.— State *v.* Chicago, etc., R. Co., 165 Mo. 597, 65 S. W. 989; Maguire *v.* State Sav. Assoc., 62 Mo. 344; State *v.* Powell, 44 Mo. 436; Christy *v.* St. Louis, 20 Mo. 143, 61 Am. Dec. 598; Walker *v.* St. Louis, 15 Mo. 563; Kansas City *v.* Holmes, 127 Mo. App. 620, 106 S. W. 559.

Nebraska.— Martin *v.* Kearney County, 62 Nebr. 538, 87 N. W. 351; Welton *v.* Merrick County, 16 Nebr. 83, 20 N. W. 111; Foster *v.* Pierce County, 15 Nebr. 48, 17 N. W. 261; Turner *v.* Althaus, 6 Nebr. 54.

New York.— McCue *v.* Monroe County, 162 N. Y. 235, 56 N. E. 627; New York, etc., R. Co. *v.* Marsh, 12 N. Y. 308; Matter of Reid, 52 N. Y. App. Div. 243, 65 N. Y. Suppl. 373; McKibben *v.* Oneida County, 25 N. Y. App. Div. 361, 49 N. Y. Suppl. 553; Broderick *v.* Yonkers, 22 N. Y. App. Div. 448, 48 N. Y. Suppl. 265 [*affirmed* in 163 N. Y. 571, 57 N. E. 1105]; Ernenwein *v.* Oneida County, 24 Misc. 216, 53 N. Y. Suppl. 529; People *v.* Wemple, 69 Hun 367, 23 N. Y. Suppl. 661; Wilcox *v.* New York, 53 N. Y. Super. Ct. 436; Toal *v.* New York, 34 Misc. 18, 69 N. Y.

there is some constitutional or statutory provision expressly or impliedly giving him such right although the tax is paid without compulsion.[55]

b. What Constitutes Voluntary Payment.[56] A payment is voluntary, in the sense that no action lies to recover back the amount, not only where it is made willingly and without objection;[57] but in all cases where there is no compulsion or duress nor any necessity of making the payment as a means of freeing the person or property from legal restraint or the grasp of legal process.[58] Hence a payment made in pursuance of a bargain or compromise between the taxpayer and the state or municipality is voluntary,[59] and so is a payment of taxes levied under a void statute, since the citizen should know that its invalidity is a complete defense and that he could not be coerced into making payment.[60] So also where there

Suppl. 454 [*affirmed* in 67 N. Y. App. Div. 619, 73 N. Y. Suppl. 1149].

Ohio.— Mays *v.* Cincinnati, 1 Ohio St. 268; Wehmer *v.* Hamilton County Treasurer, 11 Ohio Dec. (Reprint) 190, 25 Cinc. L. Bul. 165; Adams Express Co. *v.* Cincinnati Gas Light Co., 10 Ohio Dec. (Reprint) 389, 21 Cinc. L. Bul. 18.

Oregon.— Johnson *v.* Crook County, 53 Oreg. 329, 100 Pac. 294; Eugene *v.* Lane County, 50 Oreg. 468, 93 Pac. 255.

Pennsylvania.— Taylor *v.* Philadelphia Bd. of Health, 31 Pa. St. 73, 72 Am. Dec. 724; Christ Church Hospital *v.* Philadelphia County, 24 Pa. St. 229; Meylert *v.* Sullivan County, 19 Pa. St. 181; Patterson *v.* Philadelphia, 5 Pa. Co. Ct. 626; Luzerne County *v.* Com., 15 Montg. Co. Rep. 153.

Rhode Island.— Matteson *v.* Warwick, etc., Water Co., 28 R. I. 570, 68 Atl. 577.

Tennessee.— Cincinnati, etc., R. Co. *v.* Hamilton County, 120 Tenn. 1, 113 S. W. 361; Nashville, etc., R. Co. *v.* Marion County, 120 Tenn. 347, 108 S. W. 1058; Union, etc., Bank *v.* Memphis, 107 Tenn. 66, 64 S. W. 13; Dickins *v.* Jones, 6 Yerg. 483, 27 Am. Dec. 488.

Texas.— Gaar *v.* Shannon, (Civ. App. 1909) 115 S. W. 361; Moller *v.* Galveston, 23 Tex. Civ. App. 693, 57 S. W. 1116.

Wyoming.— Moore *v.* Sweetwater County, 2 Wyo. 8.

United States.— Elliott *v.* Swartwout, 10 Pet. 137, 9 L. ed. 373; Kentucky Bank *v.* Stone, 88 Fed. 383 [*affirmed* without opinion in 174 U. S. 799, 19 S. Ct. 881, 43 L. ed. 1187]; Corkle *v.* Maxwell, 7 Fed. Cas. No. 3,231, 3 Blatchf. 413.

Canada.— Street *v.* Lambton County, 12 U. C. C. P. 294; Grantham *v.* Toronto, 3 U. C. Q. B. 212; Bogie *v.* Montreal, 16 Quebec Super. Ct. 593.

See 45 Cent. Dig. tit. "Taxation," § 999.

Compare Riker *v.* Jersey City, 38 N. J. L. 225, 20 Am. Rep. 386, holding that a voluntary payment of taxes may be recovered back where the assessment has been set aside by a judicial decision.

55. Indianapolis *v.* Morris, 25 Ind. App. 409, 58 N. E. 510; Bankers' Life Assoc. *v.* Douglas County, 61 Nebr. 202, 85 N. W. 54; People *v.* Madison County, 51 N. Y. 442. Under Iowa Code, § 1417, requiring the board of supervisors to direct the treasurer to refund to the taxpayer any tax erroneously or illegally exacted or paid, a taxpayer may recover in an action at law taxes erroneously or illegally exacted or paid, although paid voluntarily and without protest. Slimmer *v.* Chickasaw County, 140 Iowa 448, 118 N. W. 779.

56. Presumption that payment was voluntary see *infra*, IX, C, 6, g.

57. Falvey *v.* Hennepin County, 76 Minn. 257, 79 N. W. 302; Barney, etc., Mfg. Co. *v.* Montgomery County, 11 Ohio Dec. (Reprint) 790, 29 Cinc. L. Bul. 366.

58. Wills *v.* Austin, 53 Cal. 152; Santa Rosa Bank *v.* Chalfant, 52 Cal. 170; Brazil *v.* Kress, 55 Ind. 14; Edinburg *v.* Hackney, 54 Ind. 83; Lima Tp. *v.* Jenks, 20 Ind. 301; Jenks *v.* Lima Tp., 17 Ind. 326; Feist *v.* New York, 74 N. Y. App. Div. 627, 77 N. Y. Suppl. 517; Drake *v.* Shurtliff, 24 Hun (N. Y.) 422; Union Bank *v.* New York, 51 Barb. (N. Y.) 159 [*reversed* on other grounds in 51 N. Y. 638]. *Compare* Bellinger *v.* Gray, 51 N. Y. 610; Fishkill Landing First Nat. Bank *v.* Shuster, 2 Alb. L. J. 459. And see Williams *v.* Merritt, 152 Mich. 621, 116 N. W. 386; Johnson *v.* Crook County, 53 Oreg. 329, 100 Pac. 294; Nashville, etc., R. Co. *v.* Marion County, 120 Tenn. 347, 108 S. W. 1058; Cincinnati, etc., R. Co. *v.* Hamilton County, 120 Tenn. 1, 113 S. W. 361. A payment of taxes in order to be involuntary, so as to entitle the taxpayer to recover them for illegality, must be made on compulsion to prevent an immediate seizure of the taxpayer's goods or the arrest of his person; mere threats of litigation or apprehension of levy of distress warrants being insufficient. Cincinnati, etc., R. Co. *v.* Hamilton County, *supra*. To make a payment of taxes involuntary, it must appear that the officer authorized to collect the same had in his hands process authorizing the seizure of the person or property of the taxpayer, that such seizure was imminent, and that there were no other legal means of protecting the person or property than by payment; and under such circumstances payment under protest saves the rights of a taxpayer to recover if the taxes are illegal. Nashville, etc., R. Co. *v.* Marion County, *supra*.

59. Palomares Land Co. *v.* Los Angeles County, 146 Cal. 530, 80 Pac. 931; Lee *v.* Templeton, 13 Gray (Mass.) 476; Ostrum *v.* San Antonio, 30 Tex. Civ. App. 462, 71 N. W. 304.

60. Lange *v.* Soffell, 33 Ill. App. 624; Detroit *v.* Martin, 34 Mich. 170, 22 Am. Rep.

has been no demand for the taxes, no steps taken to enforce them, and no pressure exerted to compel their payment.[61] A payment made merely to save the property from being returned delinquent is voluntary,[62] and so is one made to prevent the sale of land for an illegal tax.[63] On the other hand, money illegally exacted as a condition of redeeming lands from tax-sale is not paid voluntarily,[64] and a payment by a bank of illegal taxes upon the shares of its stock, without consent of the owners, is not voluntary.[65]

c. Mistake of Law or Fact. Taxes voluntarily paid under a mistake of law cannot be recovered back, whether the mistake be as to the validity of the statute under which they are levied, the legality of the assessment, or the legal liability of the person or property.[66] But it is sometimes held that there may be a recovery

512; Dixon County *v.* Beardshear, 38 Nebr. 389, 56 N. W. 990; San Francisco, etc., R. Co. *v.* Dinwiddie, 13 Fed. 789, 8 Sawy. 312. But see U. S. *v.* Norton, 97 U. S. 164, 24 L. ed. 907.

61. Conklin *v.* Springfield, 19 Ill. App. 167 [*affirmed* in 132 Ill. 420, 24 N. E. 67]; Wilson *v.* Pelton, 40 Ohio St. 306; Dunnell Mfg. Co. *v.* Newell, 15 R. I. 233, 2 Atl. 766.

Payment to clear title for purchaser.—Where a sale of land has bee made for taxes illegally assessed, and the owner, in order to complete a contract for the sale of the land to a purchaser who refuses to take title unless the taxes are paid or set aside, pays the taxes, such payment is not voluntary and the amount may be recovered back. Adams *v.* Monroe County, 18 N. Y. App. Div. 415, 46 N. Y. Suppl. 48 [*affirmed* in 154 N. Y. 619, 49 N. E. 144].

Payment to procure letters testamentary.—Where the executors of an estate were compelled to pay a docket fee charged by the clerk of the probate court under an unconstitutional statute, before the clerk would issue their letters testamentary, and it was necessary to the preservation of the estate that they should have the letters, the payment was held not voluntary. Cook County *v.* Fairbank, 222 Ill. 578, 78 N. E. 895.

62. Younger *v.* Santa Cruz County, 68 Cal. 241, 9 Pac. 103; Jackson Tp. *v.* Thoman, 51 Ohio St. 285, 37 N. E. 523.

63. Wills *v.* Austin, 53 Cal. 152; De Baker *v.* Carillo, 52 Cal. 473; Walser *v.* School Dist. No. 1 Bd. of Education, 160 Ill. 272, 43 N. E. 346, 31 L. R. A. 329; Detroit *v.* Martin, 34 Mich. 170, 22 Am. Rep. 512; Shane *v.* St. Paul, 26 Minn. 543, 6 N. W. 349. *Contra*, Seeley *v.* Westport, 47 Conn. 294, 36 Am. Rep. 70.

64. Palomares Land Co. *v.* Los Angeles County, 146 Cal. 530, 80 Pac. 931; Raynsford *v.* Phelps, 43 Mich. 342, 5 N. W. 403, 38 Am. St. Rep. 189; Canadian Pac. R. Co. *v.* Cornwallis, 7 Manitoba 1 [*affirmed* in 19 Can. Sup. Ct. 702].

65. Ætna Ins. Co. *v.* New York, 153 N. Y. 331, 47 N. E. 593; Guaranty Trust Co. *v.* New York, 108 N. Y. App. Div. 192, 95 N. Y. Suppl. 770; Ætna Ins. Co. *v.* New York, 14 Misc. (N. Y.) 145, 35 N. Y. Suppl. 857 [*affirmed* in 7 N. Y. App. Div. 145, 40 N. Y. Suppl. 120].

66. *Georgia.*—Williams *v.* Stewart, 115 Ga. 864, 42 S. E. 256; Jackson *v.* Atlanta, 61 Ga. 228.

Illinois.— Gannaway *v.* Barricklow, 203 Ill. 410, 67 N. E. 825; Yates *v.* Royal Ins. Co., 200 Ill. 202, 65 N. E. 726.

Iowa.— Espy *v.* Ft. Madison, 14 Iowa 226; Kraft *v.* Keokuk, 14 Iowa 86.

Kentucky.— Louisville, etc., R. Co. *v.* Com., 89 Ky. 531, 12 S. W. 1064, 11 Ky. L. Rep. 734. *Compare* Covington *v.* Powell, 2 Metc. 226; Underwood *v.* Brockman, 4 Dana 309, 29 Am. Dec. 407.

Maryland.— Lester *v.* Baltimore, 29 Md. 415, 96 Am. Dec. 542.

Missouri.— Couch *v.* Kansas City, 127 Mo. 436, 30 S. W. 117.

New York.— Dewey *v.* Niagara County, 62 N. Y. 294.

North Carolina.—Bristol *v.* Morganton, 125 N. C. 365, 34 S. E. 512.

Ohio.— Newport, etc., Bridge Co. *v.* Hamilton County, 8 Ohio Dec. (Reprint) 564, 9 Cinc. L. Bul. 16; Dewald *v* Staley, 8 Ohio Dec. (Reprint) 376, 7 Cinc. L. Bul. 248.

Pennsylvania.— Millard *v.* Delaware, etc., R. Co., 224 Pa. St. 448, 73 Atl. 904, holding that where the owner of the surface, who had made a coal lease of the coal underneath the land, sued to recover from the owner of the coal the amount of several years of taxes on the coal which had been assessed against him, and had been paid by him in mistake, an affidavit of defense that the taxes were paid under a mistake of law and not under a mistake of fact was sufficient to prevent judgment.

Texas.— Galveston County *v.* Gorham, 49 Tex. 279.

Washington.— Peacock Mill Co. *v.* Honeycutt, 55 Wash. 18, 103 Pac. 1112. In this case plaintiff purchased certain wheat in February, 1907, but no title passed until delivery between March 7 and the following April. The wheat was listed for taxation as plaintiff's property on March 1, 1907, but plaintiff's manager first refused to pay taxes on it until the assessor informed him that the seller claimed that he had sold the wheat and would not pay the taxes, whereupon plaintiff's manager listed the wheat and paid the taxes, knowing that there had been no delivery prior to March 1. It was held that the taxes were paid under a mistake of law, without fraud or any attempt to take advantage of plaintiff, but with full knowl-

if the mistake is one of fact,[67] particularly if made by the revenue officers in the form of a statement to the taxpayer or in taking some official action on the correctness of which the latter has a right to rely,[68] although it is otherwise where the mistake is made by the taxpayer himself, and is the result of his neglect of some legal duty, or where the facts which would have shown the mistake were within his own possession or within his reach,[69]

d. Duress or Compulsion. Where payment of an illegal tax, or one for which the person is not liable, is enforced by duress or compulsion, the payment is not voluntary and the amount may be recovered back in a proper action.[70] There is duress in this sense when the taxpayer has been placed under arrest, or when there has been a distraint or seizure of his chattels, for the purpose of compelling him to pay the tax,[71] or when the officer, being armed with lawful process and having authority to enforce his demand, has made a distinct threat to seize and

edge of the facts, and were therefore not recoverable.

See 45 Cent. Dig. tit. "Taxation," § 1001.

But *compare* Catholic Soc. *v.* New Orleans, 10 La. Ann. 73. And see Weiser Nat. Bank *v.* Jeffreys, 14 Ida. 659, 95 Pac. 23, holding that the cashier of a national bank may act as the agent of the bank in listing its property for taxation, but he has no authority to list the capital stock for assessment against the bank, and the mistake of the cashier in listing the capital stock will not estop the bank from recovering the taxes paid under protest on such void assessment. Weiser Nat. Bank *v.* Jeffreys, 14 Ida. 659, 95 Pac. 23.

67. Indianapolis *v.* McAvoy, 86 Ind. 587; George's Creek Coal, etc., Co. *v.* Allegany County, 59 Md. 255; Dolman *v.* Pitt, 109 Mo. App. 133, 82 S. W. 1111; Betz *v.* New York, 119 N. Y. App. Div. 91, 103 N. Y. Suppl. 886 [*affirmed* in 193 N. Y. 625, 86 N. E. 1122]; *In re* Edison Electric Illuminating Co., 22 N. Y. App. Div. 371, 48 N. Y. Suppl. 99 [*affirmed* in 155 N. Y. 699, 50 N. E. 1116]. And see Puget Realty Co. *v.* King County, 50 Wash. 349, 97 Pac. 226. *Compare*, however, Baltimore, etc., R. Co. *v.* Oregon Tp., (Ind. App. 1907) 81 N. E. 105.

68. Pacific Coast Co. *v.* Wells, 134 Cal. 471, 66 Pac. 657; Wheeler *v.* Hennepin County, 87 Minn. 243, 91 N. W. 890; State *v.* Hagerty, 4 Ohio S. & C. Pl. Dec. 283, 3 Ohio N. P. 246; Upper Canada Law Soc. *v.* Toronto, 25 U. C. Q. B. 199. And see Puget Realty Co. *v.* King County, 50 Wash. 349, 97 Pac. 226. See *supra*, IX, A, 1, g, (II). *Compare*, however, Baltimore, etc., R. Co. *v.* Oregon Tp., (Ind. App. 1907) 81 N. E. 105.

69. *California.*— San Diego Land, etc., Co. *v.* La Presa School Dist., 122 Cal. 98, 54 Pac. 528.

Indiana.— Carr *v.* Stewart, 58 Ind. 581. And see Baltimore, etc., R. Co. *v.* Oregon Tp., (App. 1907) 81 N. E. 105.

Iowa.— Dubuque, etc., R. Co. *v.* Webster County, 40 Iowa 16.

Michigan.— Bateson *v.* Detroit, 143 Mich. 582, 106 N. W. 1104.

Missouri.— Mathews *v.* Kansas City, 80 Mo. 231.

Canada.— Ontario Trusts Corp. *v.* Toronto, 30 Ont. 209.

70. Magnolia *v.* Sharman, 46 Ark. 358; Chicago *v.* Klinkert, 94 Ill. App. 524; Johnson *v.* Crook County, 53 Oreg. 329, 100 Pac. 294; Luzerne County *v.* Com., 2 Dauph. Co. Rep. (Pa.) 253.

71. *Maine.*— Fellows *v.* Fayette School Dist. No. 8, 39 Me. 559; Tucker *v.* Wentworth, 35 Me. 393; Briggs *v.* Lewiston, 29 Me. 472.

Michigan.— Roedel *v.* White Cloud, 108 Mich. 506, 66 N. W. 386; Turnbull *v.* Alpena Tp., 74 Mich. 621, 42 N. W. 114; Babcock *v.* Beaver Creek Tp., 65 Mich. 479, 32 N. W. 653.

Oregon.— Johnson *v.* Crook County, 53 Oreg. 329, 100 Pac. 294.

Pennsylvania.— Shaw *v.* Allegheny, 115 Pa. St. 46, 7 Atl. 770.

Rhode Island.— Lindsay *v.* Allen, 19 R. I. 721, 36 Atl. 840.

Tennessee.— Cincinnati, etc., R. Co. *v.* Hamilton County, 120 Tenn. 1, 113 S. W. 361.

Wisconsin.— Hurley *v.* Texas, 20 Wis. 634. And see A. H. Strange Co. *v.* Merrill, 134 Wis. 514, 115 N. W. 115.

Canada.— Smith *v.* Shaw, 8 Can. L. J. 297.

See 45 Cent. Dig. tit. "Taxation," § 1002. And see the cases cited *infra*, this section.

But *compare* Dunbar *v.* Boston, 112 Mass. 75; Shaw *v.* Becket, 7 Cush. (Mass.) 442; Dow *v.* Sudbury, 5 Metc. (Mass.) 73. And see Meacham *v.* Newport, 70 Vt. 67, 39 Atl. 631, holding that an arrest of the person and payment of the tax to obtain release is not sufficient to warrant a recovery back of the tax, in the absence of evidence that the tax warrant was not due, or of the use of unlawful means to induce payment, or of arrest on process sued out maliciously and without probable cause, or of unlawful force or severity while under lawful arrest.

Levy on stranger's goods.—A stranger to the tax who pays money to prevent a seizure of his property to satisfy the tax cannot recover it back; and where a stranger's property is levied on and advertised for sale, but no actual possession is taken, his payment of the tax is voluntary, although under protest, there being an adequate remedy by replevin. Canfield Salt, etc., Co. *v.* Manistee Tp., 100 Mich. 466, 59 N. W. 164; Sowles *v.* Soule, 59 Vt. 131, 7 Atl. 715.

sell property or is searching for property on which to levy.[72] And according to the great preponderance of the authorities it is enough to constitute duress if the officer simply demands payment of the tax under color of a warrant or other process which gives him legal power to enforce his demand by compulsory proceedings against the person or property and which makes it his duty to do so, although he makes no threat and takes no steps to distrain or levy; for in this case the process has the force of an execution, and the taxpayer is justified in believing that if he refuses to pay the tax a levy on his property will follow as the only alternative, and therefore he is not obliged to wait for a distraint or even a threat.[73] But there is no duress or legal compulsion where the payment is

72. *Alabama.*— Raisler *v.* Athens, 66 Ala. 194.

California.— De Fremery *v.* Austin, 53 Cal. 380; Guy *v.* Washburn, 23 Cal. 111.

Colorado.— Denver *v.* Evans, 35 Colo. 490, 84 Pac. 65.

District of Columbia.— District of Columbia *v.* Glass, 27 App. Cas. 576; District of Columbia *v.* Chapman, 25 App. Cas. 95.

Maine.— Creamer *v.* Bremen, 91 Me. 508, 40 Atl. 555.

Mississippi.— Vicksburg *v.* Butler, 56 Miss. 72.

New Hampshire.— Benton *v.* Goodale, 66 N. H. 424, 20 Atl. 1121.

New York.— Dutchess County Mut. Ins. Co. *v.* Poughkeepsie, 51 Hun 595, 4 N. Y. Suppl. 93; Bruecher *v.* Port Chester, 31 Hun 550 [*affirmed* in 101 N. Y. 240, 4 N. E. 272].

North Dakota.— St. Anthony, etc., El. Co. *v.* Bottmeau County, 9 N. D. 346, 83 N. W. 212, 50 L. R. A. 262.

Oregon.— Johnson *v.* Crook County, 53 Oreg. 329, 100 Pac. 294.

Pennsylvania.—Grim *v.* Weissenberg School Dist., 57 Pa. St. 433, 98 Am. Dec. 237. *Compare* Taylor *v.* Philadelphia Bd. of Health, 31 Pa. St. 73, 72 Am. Dec. 724; Murry *v.* Besore, 16 Lanc. L. Rev. 374.

South Carolina.—Cade *v.* Perrin, 14 S. C. 1.

Wisconsin.—A. H. Stange Co. *v.* Merrill, 134 Wis. 514, 115 N. W. 115; Ruggles *v.* Fond du Lac, 53 Wis. 436, 10 N. W. 565.

Wyoming.— Kelley *v.* Rhoads, 7 Wyo. 237, 51 Pac. 593, 75 Am. St. Rep. 904, 39 L. R. A. 594.

United States.— Herold *v.* Kahn, 159 Fed. 608, 86 C. C. A. 598, 163 Fed. 947, 90 C. C. A. 307.

See 45 Cent. Dig. tit. "Taxation," § 1002.

Threat to shut off water.— Where a property-owner is forced to pay a water tax by a threat to shut off the supply, it is a payment under compulsion. Westlake *v.* St. Louis, 77 Mo. 47, 46 Am. Rep. 4.

73. *California.*— Smith *v.* Farrelly, 52 Cal. 77; Guy *v.* Washburn, 23 Cal. 111.

Connecticut.— Jackson *v.* Union, 82 Conn. 266, 73 Atl. 773; Hubbard *v.* Brainard, 35 Conn. 563; Adam *v.* Litchfield, 10 Conn. 127; Atwater *v.* Woodbridge, 6 Conn. 223, 16 Am. Dec. 46.

Illinois.—Kimball *v.* Corn Exch. Nat. Bank, 1 Ill. App. 209.

Indiana.— Lima Tp. *v.* Jenks, 20 Ind. 301.

Kansas.—Atchison, etc., R. Co. *v.* Sumner County Com'rs, 76 Kan. 618, 92 Pac. 590; Atchison, etc., R. Co. *v.* Atchison County, 47 Kan. 722, 28 Pac. 999; Kansas Pac. R. Co. *v.* Wyandotte County, 16 Kan. 587; Greenabaum *v.* King, 4 Kan. 332, 96 Am. Dec. 172.

Maine.— Howard *v.* Augusta, 74 Me. 79.

Massachusetts.—McGee *v.* Salem, 149 Mass. 238, 21 N. E. 386; Lincoln *v.* Worcester, 8 Cush. 55; Joyner *v.* Egremont School Dist. No. 3, 3 Cush. 567; George *v.* Mendon Second School Dist., 6 Metc. 497; Boston, etc., Glass Co. *v.* Boston, 4 Metc. 181; Perry *v.* Dover, 12 Pick. 206; Preston *v.* Boston, 12 Pick. 7; Sumner *v.* First Dorchester Parish, 4 Pick. 361; Amesbury Woollen, etc., Mfg. Co. *v.* Amesbury, 17 Mass. 461.

Michigan.— Thompson *v.* Detroit, 114 Mich. 502, 72 N. W. 320; Minor Lumber Co. *v.* Alpena, 97 Mich. 499, 56 N. W. 926; Babcock *v.* Beaver Creek Tp., 64 Mich. 601, 31 N. W. 423; Grand Rapids *v.* Blakely, 40 Mich. 367, 29 Am. Dec. 539; Atwell *v.* Zeluff, 26 Mich. 118.

Minnesota.— Dakota County *v.* Parker, 7 Minn. 267.

Mississippi.— Tuttle *v.* Everett, 51 Miss. 27, 24 Am. Rep. 622.

Nebraska.— Turner *v.* Althaus, 6 Nebr. 54.

New York.— Peyser *v.* New York, 70 N. Y. 497, 26 Am. Rep. 624; *In re* Edison Electric Illuminating Co., 22 N. Y. App. Div. 371, 48 N. Y. Suppl. 99 [*affirmed* in 155 N. Y. 699, 50 N. E. 1116].

Ohio.— Draude *v.* Staley, 8 Ohio Dec. (Reprint) 265, 6 Cinc. L. Bul. 773.

Pennsylvania.—Grim *v.* Weissenberg School Dist., 57 Pa. St. 433, 98 Am. Dec. 237; Luzerne County *v.* Com., 2 Dauph. Co. Rep. 253.

South Dakota.— Chicago, etc., R. Co. *v.* Rolfson, 23 S. D. 405, 122 N. W. 343.

Tennessee.— State Nat. Bank *v.* Memphis, 116 Tenn. 641, 94 S. W. 606, 7 L. R. A. N. S. 663; Bright *v.* Halloman, 7 Lea 309.

Vermont.— Babcock *v.* Granville, 44 Vt. 325.

Wisconsin.—A. H. Stange Co. *v.* Merrill, 134 Wis. 514, 115 N. W. 115; Ruggles *v.* Fond du Lac, 53 Wis. 436, 10 N. W. 565; Farcher *v.* Marathon County, 52 Wis. 388, 9 N. W. 23, 38 Am. Rep. 745.

United States.— Powder River Cattle Co. *v.* Custer County, 45 Fed. 323; Hendy *v.* Soule, 11 Fed. Cas. No. 6,359, Deady 400; Reynolds *v.* Williams, 20 Fed. Cas. No. 11,734 4 Biss. 108. But *compare* Union Pac. R. Co.

made before the tax is due or delinquent,[74] or where the officer has no warrant, or has a warrant which is entirely void, so that he could not carry out his threat.[75] Nor is it regarded as a case of legal compulsion where the payment is made to prevent a sale of land, but the circumstances are such that a tax deed, if executed, would be void for defects appearing on the face of the record, so that it could not cloud the title.[76] On the other hand, where a corporation pays a tax the validity of which it disputes, for the purpose of avoiding heavy penalties imposed by statute for non-payment, the payment is not voluntary.[77] And the same may be true of payments made not under threat of the seizure and sale of property, but to avoid the sacrifice of or serious injury to the taxpayer's rights in other directions.[78]

5. Protest — a. Payment Under Protest in General. By force of statute in some of the states, illegal taxes may be recovered back in an action at law when their payment was accompanied by a formal protest against the validity of the

v. Dodge County, 98 U. S. 541. 25 L. ed. 196; Balfour *v.* Portland. 28 Fed. 738.

Canada.— Street *v.* Simcoe Corp., 12 U. C. C. P. 284.

See 45 Cent. Dig. tit. "Taxation," § 1002.

But *compare* Lingle *v.* Elmwood Tp., 142 Mich. 194, 105 N. W. 604; Dunnell Mfg. Co. *v.* Newell, 15 R. I. 233, 2 Atl. 766; Laredo *v.* Loury, (Tex. App. 1892) 20 S. W. 89.

74. Merrill *v.* Austin, 53 Cal. 379; Santa Rosa Bank *v.* Chalfant, 52 Cal. 170; Van Hise *v.* Rensselaer County, 21 Misc. (N. Y.) 572, 48 N. Y. Suppl. 874. *Compare* Tozer *v.* Skagit County, 34 Wash. 147, 75 Pac. 638, as to payment of tax which is an immediate lien on the land, although not enforceable until after three years.

Payment to secure rebate.— Payment of a tax which is not immediately collectable, and made only for the purpose of securing the discount or rebate which the law allows for payment in advance, cannot be said to be made under duress or compulsion. Atchison, etc., R. Co. *v.* Atchison County, 47 Kan. 722, 28 Pac. 99. *Compare* Stowe *v.* Stowe, 70 Vt. 609, 41 Atl. 1024.

75. *California.*— Bakersfield, etc., Oil Co. *v.* Kern County, 144 Cal. 148, 77 Pac. 892.

Connecticut.— Morris *v.* New Haven, 78 Conn. 673, 63 Atl. 123.

Michigan.— Godkin *v.* Doyle Tp., 145 Mich. 236, 106 N. W. 882.

Wyoming.— Carton *v.* Uinta County, 10 Wyo. 416, 69 Pac. 1013.

United States.— Sonoma County Tax Case, 13 Fed. 789, 8 Sawy. 312.

But *compare* Wyandotte County *v.* Kansas City, etc., R. Co., 4 Kan. App. 772, 46 Pac. 1013; Allen *v.* Burlington, 45 Vt. 202.

76. Cooper *v.* Chamberlin, 78 Cal. 450, 21 Pac. 14; Wills *v.* Austin, 53 Cal. 152; Swanston *v.* Ijams, 63 Ill. 165; Davies *v.* Galveston, 16 Tex. Civ. App. 13, 41 S. W. 145. *Compare* Gage *v.* Saginaw, 128 Mich. 682, 84 N. W. 1100, 87 N. W. 1027; Ætna Ins. Co. *v.* New York, 153 N. Y. 331, 47 N. E. 593; Montgomery *v.* Cowlitz County, 14 Wash. 230, 44 Pac. 259.

77. Western Union Tel. Co. *v.* Mayer, 28 Ohio St. 521; Van Nest *v.* Brooks, 11 Ohio Dec. (Reprint) 228, 25 Cinc. L. Bul. 307; Adams Express Co. *v.* Battermann, 10 Ohio Dec. (Reprint) 469, 21 Cinc. L. Bul. 238. *Compare* Boston Manufacturer's Mut. F. Ins. Co. *v.* Hendricks, 41 Misc. (N. Y.) 479, 85 N. Y. Suppl. 44.

78. Thus, one who by force of the statute is unable to place on the record a deed of conveyance by which he has acquired title to real estate, by reason of illegal taxes being charged on the land, may pay the taxes in order to secure the recording of his deed; and such payment is not voluntary and may be recovered back. Oakland Cemetery Assoc. *v.* Ramsey County, 98 Minn. 404, 108 N. W. 857, 109 N. W. 237, 116 Am. St. Rep. 377; State *v.* Nelson, 41 Minn. 25, 42 N. W. 548, 4 L. R. A. 300. But *compare* Weston *v.* Luce County, 102 Mich. 528, 61 N. W. 15. So where the administrator of an estate is forced to pay taxes levied on it under an unconstitutional statute, because the court refuses to allow the administration of the estate to proceed until such taxes are paid, and immediate action is necessary to preserve the estate. Mearkle *v.* Hennepin County, 44 Minn. 546, 47 N. W. 165. And so where a liquor dealer pays an unconstitutional license-tax in order to be allowed to continue in business. Catoir *v.* Watterson, 38 Ohio St. 319. But *contra*, as to paying a state tax on foreign immigrants in order to obtain a health certificate for the vessel in which they arrive, without which certificate the vessel cannot enter the port. Taylor *v.* Philadelphia Bd. of Health, 31 Pa. St. 73, 72 Am. Dec. 724.

Payment to procure letters testamentary. — Where the executors of an estate were compelled to pay an alleged docket fee imposed by the clerk of the probate court, as required by Hurd Rev. St. (1905) p. 1075, c. 53, § 63, which was unconstitutional, before the clerk would issue letters testamentary to them, which were necessary to properly conserve the estate in their charge, whereupon they paid the tax under protest, they were entitled to maintain an action to recover the same. Cook County *v.* Fairbank, 222 Ill. 578, 78 N. E. 895.

taxes and against being compelled to pay them.[79] But as a general rule this privilege is given only in cases where the tax is entirely invalid or unauthorized, not where the ground of objection goes only to errors or overvaluations in the assessment.[80] And many decisions hold, in the absence of a statute, that a protest does not save the payment from being voluntary, in the sense which forbids its recovery back, if it was not made under any duress, compulsion, or threats, or under the pressure of process immediately available for the forcible collection of the tax.[81]

79. See the statutes of the different states. And see the following cases:

California.— Mendocino Bank *v.* Chalfant, 51 Cal. 471; Falkner *v.* Hunt, 16 Cal. 167.

Idaho.— Shoup *v.* Willis, 2 Ida. (Hasb.) 120, 6 Pac. 124.

Iowa.— Thomas *v.* Burlington, 69 Iowa 140, 28 N. W. 480; Winzer *v.* Burlington, 68 Iowa 279, 27 N. W. 241; Richards *v.* Wapello County, 48 Iowa 507.

Maine.— Hathaway *v.* Addison, 48 Me. 440.

Massachusetts.—Oliver *v.* Lynn, 130 Mass. 143.

Michigan.— Rice *v.* Muskegon, 150 Mich. 679, 114 N. W. 661; Lingle *v.* Elmwood Tp., 142 Mich. 194, 105 N. W. 604; Michigan Sanitarium, etc., Assoc. *v.* Battle Creek, 138 Mich. 676, 101 N. W. 855; Gage *v.* Saginaw, 128 Mich. 682, 84 N. W. 1100, 87 N. W. 1027; Monroe Water Co. *v.* Frenchtown Tp., 98 Mich. 431, 57 N. W. 268; McFarlan *v.* Cedar Creek Tp., 93 Mich. 558, 53 N. W. 782; Mills *v.* Richland Tp., 72 Mich. 100, 40 N. W. 183.

Nebraska.— Chicago, etc., R. Co. *v.* Lincoln County, 66 Nebr. 228, 92 N. W. 208; Dakota County *v.* Chicago, etc., R. Co., 63 Nebr. 405, 88 N. W. 663.

New York.—Dutchess County Mutual Ins. Co. *v.* Poughkeepsie, 51 Hun 595, 4 N. Y. Suppl. 93.

South Dakota.— Whittaker *v.* Deadwood, 12 S. D. 608, 82 N. W. 202.

Texas.— Galveston Gas Co. *v.* Galveston County, 54 Tex. 287.

Utah.— Centennial Eureka Min. Co. *v.* Juab County, 22 Utah 395, 62 Pac. 1024.

Wisconsin.— A. H. Stange Co. *v.* Merrill, 134 Wis. 514, 115 N. W. 115.

See 45 Cent. Dig. tit. "Taxation," § 1003.

80. *Idaho.*— Erwin *v.* Hubbard, 4 Ida. 170, 37 Pac. 274.

Kansas.—St. Louis, etc., R. Co. *v.* Labette County, (1901) 66 Pac. 1045.

Massachusetts.— Hicks *v.* Westport, 130 Mass. 478.

Michigan.— Weston *v.* Luce County, 102 Mich. 528, 61 N. W. 15; Shelden *v.* Marion Tp., 101 Mich. 256, 59 N. W. 614; Minor Lumber Co. *v.* Alpena, 97 Mich. 499, 56 N. W. 926; Peninsular Iron Co. *v.* Crystal Falls Tp., 60 Mich. 510, 27 N. W. 666; Grand Rapids *v.* Blakely, 40 Mich. 367, 29 Am. Rep. 539.

Rhode Island.— Mechanics' Sav. Bank *v.* Granger, 17 R. I. 77, 20 Atl. 202.

Texas.— Continental Land, etc., Co. *v.* Board, 80 Tex. 489, 16 S. W. 312.

See 45 Cent. Dig. tit. "Taxation," § 1003.

Estoppel to allege illegality.— A taxpayer who, as a member of the board of supervisors, votes for the levying of a certain tax, cannot be allowed to complain of his own act and recover the amount, by reason of having paid it under protest on the ground of its illegality. Wood *v.* Norwood Tp., 52 Mich. 32, 17 N. W. 229. See *supra*, IX, C, 1 text and note 44.

81. *Alabama.*— Raisler *v.* Athens, 66 Ala. 194; Gachet *v.* McCall, 50 Ala. 307.

California.— Dear *v.* Varnum, 80 Cal. 86, 22 Pac. 76; Merrill *v.* Austin, 53 Cal. 379; Woodland Bank *v.* Webber, 52 Cal. 73.

Delaware.—Monoghan *v.* Lewis, 5 Pennew. 218, 59 Atl. 948.

District of Columbia.—District of Columbia *v.* Glass, 27 App. Cas. 576; Georgetown College *v.* District of Columbia, MacArthur & M. 43.

Illinois.— Conkling *v.* Springfield, 132 Ill. 420, 24 N. E. 67; People *v.* Miner, 46 Ill. 374.

Indiana.—Durham *v.* Montgomery County, 95 Ind. 182; Patterson *v.* Cox, 25 Ind. 261; Jenks *v.* Lima Tp., 17 Ind. 326.

Iowa.— Muscatine *v.* Keokuk Northern Line Packet Co., 45 Iowa 185.

Kansas.— Wabaunsee County *v.* Walker, 8 Kan. 431.

Massachusetts.— Dexter *v.* Boston, 176 Mass. 247, 57 N. E. 379, 79 Am. St. Rep. 306; Lee *v.* Templeton, 13 Gray 476; Forbes *v.* Appleton, 5 Cush. 115.

Michigan.—Williams *v.* Merritt, 152 Mich. 621, 116 N. W. 386; White *v.* Millbrook Tp., 60 Mich. 532, 27 N. W. 674.

Minnesota.— Oakland Cemetery Assoc. *v.* Ramsey County, 98 Minn. 404, 108 N. W. 857, 109 N. W. 237, 116 Am. St. Rep. 377.

Missouri.—Robins *v.* Latham, 134 Mo. 466, 36 S. W. 33.

New York.— Flower *v.* Lance, 59 N. Y. 603.

Ohio.— Whitbeck *v.* Minch, 48 Ohio St. 210, 31 N. E. 743. See Hornberger *v.* Case, 9 Ohio Dec. (Reprint) 434, 13 Cinc. L. Bul. 511.

Oregon.— Johnson *v.* Crook County, 53 Oreg. 329, 100 Pac. 294.

Pennsylvania.— Peebles *v.* Pittsburgh, 101 Pa. St. 304, 47 Am. Rep. 714; Christ Church Hospital *v.* Philadelphia County, 24 Pa. St. 229.

Rhode Island.— See Rumford Chemical Works *v.* Ray, 19 R. I. 456, 34 Atl. 814.

Tennessee.— Cincinnati, etc., R. Co. *v.*

b. Requisites and Sufficiency of Protest. If the statute does not require a protest to be in writing, no particular formality in making it is necessary;[82] but if a written protest is required, the statute is not satisfied by an oral objection, even though accompanied by a memorandum written on the tax bill or on the margin of the assessment roll.[83] If in writing, the protest should not be couched in general terms, but should state distinctly and specifically the grounds on which the taxpayer objects to the legality of the tax,[84] except that it need not set forth facts of which the tax collector has notice, or which he is bound to know, officially.[85]

6. Actions or Proceedings For Recovery of Taxes — a. Nature and Form of Remedy. The proper remedy for the recovery of taxes paid is an action at law in the form of assumpsit as for money had and received,[86] unless some other remedy is provided by statute,[87] not a proceeding in equity.[88] Where a taxpayer brings an action under a statute to recover interest on taxes wrongfully exacted, it cannot recover independently thereof.[89]

b. Conditions Precedent. It may or may not be a condition precedent to the maintenance of an action to recover back taxes paid that plaintiff shall first have applied to the board of equalization or review for such relief as it could afford,[90] or that he shall have endeavored to have the assessment vacated or set aside,[91] these matters depending on the local statutes. But in the absence of a statute specifically requiring it, it is not necessary that plaintiff shall have made a formal demand for the restoration of the taxes or exhibited or submitted his claim to the local officers.[92]

Hamilton County, 120 Tenn. 1, 113 S. W. 361.

Texas.— Gaar *v.* Shannon, (Civ. App. 1909) 115 S. W. 361.

Washington.— Montgomery *v.* Cowlitz County, 14 Wash. 230, 44 Pac. 259.

United States.— Oceanic Steamship Co. *v.* Tappan, 18 Fed. Cas. No. 10,405, 16 Blatchf. 296. *Compare*, however, Herold *v.* Kahn, 159 Fed. 608, 86 C. C. A. 598, 163 Fed. 947, 90 C. C. A. 307.

Canada.—Benjamin *v.* Elgin County Corp., 26 U. C. Q. B. 660.

See 45 Cent. Dig. tit. "Taxation," § 1003.

82. Lyon *v.* Guthard, 52 Mich. 271, 17 N. W. 839; Custer County *v.* Chicago, etc., R. Co., 62 Nebr. 657, 87 N. W. 341.

83. Kehe *v.* Blackhawk County, 125 Iowa 549, 101 N. W. 281; Knowles *v.* Boston, 129 Mass. 551; Traverse Beach Assoc. *v.* Elmwood Tp., 142 Mich. 78, 105 N. W. 30; Phœbus *v.* Manhattan Social Club, 105 Va. 144, 52 S. E. 839. *Compare* Borland *v.* Boston, 132 Mass. 89, 42 Am. Rep. 424.

84. Mackay *v.* San Francisco, 128 Cal. 678, 61 Pac. 382; Meek *v.* McClure, 49 Cal. 623; Lingle *v.* Elmwood Tp., 142 Mich. 194, 105 N. W. 604; Whitney *v.* Port Huron, 88 Mich. 268, 50 N. W. 316, 26 Am. St. Rep. 291; Peninsula Iron Co. *v.* Crystal Falls Tp., 60 Mich. 79, 26 N. W. 840; Bankers' L. Assoc. *v.* Douglas County, 61 Nebr. 202, 85 N. W. 54; Davis *v.* Otoe County, 55 Nebr. 677, 76 N. W. 465. *Compare* Rumford Chemical Works *v.* Ray, 19 R. I. 456, 34 Atl. 814.

85. Smith *v.* Farrelly, 52 Cal. 77; Mason *v.* Johnson, 51 Cal. 612; Centennial Eureka Min. Co. *v.* Juab County, 22 Utah 395, 62 Pac. 1024.

86. *Alabama.*— Raisler *v.* Athens, 66 Ala. 194.

Illinois.— Chicago *v.* Klinkert, 94 Ill. App. 524.

Michigan.— Michigan Sanitarium, etc., Assoc. *v.* Battle Creek, 138 Mich. 676, 101 N. W. 855; Daniels *v.* Watertown Tp., 55 Mich. 376, 21 N. W. 350; Grand Rapids *v.* Blakely, 40 Mich. 367, 29 Am. Rep. 539.

Nebraska.—Turner *v.* Althaus, 6 Nebr. 54.

New York.— Guaranty Trust Co. *v.* New York, 108 N. Y. App. Div. 192, 95 N. Y. Suppl. 770; Dale *v.* New York, 71 N. Y. App. Div. 227, 75 N. Y. Suppl. 576, 1123.

See 45 Cent. Dig. tit. "Taxation," § 1006.

87. See *supra*, IX, C, 2.

Special remedy provided by statute see Adams *v.* Monroe County, 154 N. Y. 619, 49 N. E. 144.

Proceedings for refund see *supra*, IX, B, 4.

88. Crawford *v.* Bradford, 23 Fla. 404, 2 So. 782; Kimball *v.* Merchants' Sav., etc., Co., 89 Ill. 611.

89. Home Sav. Bank *v.* Morris, 141 Iowa 560, 120 N. W. 100.

90. See the statutes of the different states. And see the following cases:

Michigan.— Michigan Sav. Bank *v.* Detroit, 107 Mich. 246, 65 N. W. 101.

Montana.— Barrett *v.* Shannon, 19 Mont. 397, 48 Pac. 746.

New York.— Citizens' Sav. Bank *v.* New York, 166 N. Y. 594, 59 N. E. 1120 [*affirming* 37 N. Y. App. Div. 560, 56 N. Y. Suppl. 295].

Tennessee.— Ward *v.* Alsup, 100 Tenn. 619, 46 S. W. 573.

Texas.—Hardesty *v.* Fleming, 57 Tex. 395.

91. See Clarke *v.* Stearns County, 66 Minn. 304, 69 N. W. 25; Jex *v.* New York, 103 N. Y. 536, 9 N. E. 39; Bruecher *v.* Port Chester, 101 N. Y. 240, 4 N. E. 272.

92. *Arkansas.*— State *v.* Thompson, 10 Ark. 61.

c. Time to Sue and Limitations. An action of this kind must be brought within the time prescribed by the special statute of limitations, if any, applicable to such suits; [93] otherwise it is barred by the same lapse of time which would limit an action for money had and received between private parties.[94] As between the taxpayer and a municipal corporation from which a recovery is sought, the statute begins to run from the date of payment of the tax and it is not postponed until the illegality of the tax has been judicially decided; [95] but where the suit is to recover from the true owner of land taxes paid by another under a mistaken

Colorado.— Arapahoe County *v.* Cutter, 3 Colo. 349.

Maine.— Look *v.* Industry, 51 Me. 375.

New Hampshire.— Ford *v.* Holden, 39 N. H. 143.

New York.— Ætna Ins. Co. *v.* New York, 153 N. Y. 331, 47 N. E. 593; Bruecher *v.* Port Chester, 101 N. Y. 240, 4 N. E. 272.

Pennsylvania.— Robinson *v.* County, 1 Walk. 305.

Utah.— Centennial Eureka Min. Co. *v.* Juab County, 22 Utah 395, 62 Pac. 1024.

Vermont.— Babcock *v.* Granville, 44 Vt. 325.

United States.— Western Ranches *v.* Custer County, 89 Fed. 577.

See 45 Cent. Dig. tit. "Taxation," § 1008.

Compare Bibbins *v.* Clark, 90 Iowa 230, 57 N. W. 884, 59 N. W. 290, 29 L. R. A. 278; Lord *v.* Kennebunkport, 61 Me. 462; Burlington, etc., R. Co. *v.* Buffalo County, 14 Nebr. 51, 14 N. W. 539; Wright *v.* Merrimack, 52 Wis. 466, 9 N. W. 390.

93. See the statutes of the different states. And see the following cases:

Iowa.— Magnolia Dist. Tp. *v.* Boyer Independent Dist., 80 Iowa 495, 45 N. W. 907; Scott *v.* Chickasaw County, 53 Iowa 47, 3 N. W. 820; Callanan *v.* Madison County, 45 Iowa 561. The payment of taxes on land belonging to the government and not subject to taxation, under the belief that the government has parted with its rights to the land, does not prevent the running of the statute of limitations against the right to recover the taxes so paid, under Code (1873), § 2530, providing that in action for relief on the ground of "mistake," the cause of action shall not be deemed to have accrued until the mistake has been discovered. Lonsdale *v.* Carroll County, 105 Iowa 452, 75 N. W. 332. See also Sioux City, etc., R. Co. *v.* O'Brien County, 118 Iowa 582, 92 N. W. 857 [*distinguishing* Iowa City *v.* Johnson County, (1895) 61 N. W. 995]. But where a tax voted in aid of a resident bridge company was by it assigned to a foreign company, which could not legally receive such aid without the taxpayer's knowledge, who paid the tax believing the resident company was to receive it, an action for its recovery because of such mistake did not accrue until a discovery of the mistake. Baird *v.* Omaha R. Co., 111 Iowa 627, 82 N. W. 1020.

Kentucky.— Bank of Commerce *v.* Stone, 108 Ky. 427, 56 S. W. 683, 22 Ky. L. Rep. 70. Under a city charter providing that all actions to recover from such city the amount of any taxes or assessments which have been or may be illegally or erroneously collected shall be prosecuted within six months after the cause of action arose, and not afterward, the statute begins to run from the time the taxes are collected, and not from the time the taxpayer discovers that the assessment, levy, and collection were illegal. Covington *v.* Voskotter, 80 Ky. 219.

Massachusetts.— Rev. Laws (1902), c. 13, § 86, providing that no action for taxes paid shall be maintained unless commenced within three months, or unless they are paid under protest or compulsion, establishes conditions precedent to the action, and a compliance with such condition as to time is as essential as that the payment shall be under protest or compulsion. Wheatland *v.* Boston, 202 Mass. 258, 88 N. E. 769. Such statute applies to an action for a tax void because laid under an unconstitutional statute. Wheatland *v,* Boston, *supra.*

Michigan.— Lingle *v.* Elmwood Tp., 142 Mich. 194, 105 N. W. 604; Babcock *v.* Beaver Creek Tp., 65 Mich. 479, 32 N. W. 653. The statute limiting to thirty days the time of commencing actions to recover taxes paid under protest has no application to actions instituted to recover taxes paid involuntarily. Pere Marquette R. Co. *v.* Ludington, 133 Mich. 397, 95 N. W. 417.

New York.— *In re* Edison Electric Illuminating Co., 22 N. Y. App. Div. 371, 48 N. Y. Suppl. 99 [*affirmed* in 155 N. Y. 699, 50 N. E. 1116].

North Carolina.— Hatwood *v.* Fayetteville, 121 N. C. 207, 28 S. E. 299.

Ohio.— State *v.* Lewis, 20 Ohio Cir. Ct. 319, 11 Ohio Cir. Dec. 13.

Texas.— Dallas *v.* Kruegel, 95 Tex. 43, 64 S. W. 922.

Wisconsin.—Wright *v.* Merrimack, 52 Wis. 466, 9 N. W. 390; Eaton *v.* Manitowoc County, 40 Wis. 668.

Wyoming.— Marks *v.* Uinta County, 11 Wyo. 488, 72 Pac. 894.

See 45 Cent. Dig. tit. "Taxation," § 1009.

94. *In re* Hoople, 179 N. Y. 308, 72 N. E. 229.

95. Sioux City, etc., R. Co. *v.* O'Brien County, 118 Iowa 582, 92 N. W. 857; Pelton *v.* Bemis, 44 Ohio St. 51, 4 N. E. 714; Hamilton County *v.* Wood, 7 Ohio Dec. (Reprint) 533, 3 Cinc. L. Bul. 841; Centennial Eureka Min. Co. *v.* Juab County, 22 Utah 395, 62 Pac. 1024. But *compare* Eyerly *v.* Jasper County, 77 Iowa 470, 42 N. W. 374.

belief of ownership, the statute begins to run from the end of the litigation which settles the question of title.[96]

d. Parties Plaintiff. The proper plaintiff in an action of this kind is the person who is ultimately entitled to the money if it shall be recovered.[97] In some states one taxpayer is allowed to bring such a suit in behalf of himself and of all other persons similarly interested;[98] but in such case plaintiff must have a substantial interest in the controversy, and he cannot assume to represent others if his own pecuniary interest is a mere trifle.[99]

e. Defendants. An action for the recovery of illegal taxes paid to a collector or other receiving officer may be maintained against such officer personally if he still has the money in his possession.[1] But after he has paid it over to the proper officers of the county or other municipal corporation his own responsibility is at an end, and the suit should then be brought against the municipality.[2] In the

96. Goodnow *v.* Wells, 78 Iowa 760, 38 N. W. 172; Wood *v.* Curran, 76 Iowa 560, 41 N. W. 214; Goodnow *v.* Oakley, 68 Iowa 25, 25 N. W. 912; Bradley *v.* Cole, 67 Iowa 650, 25 N. W. 849; Goodnow *v.* Litchfield, 63 Iowa 275, 19 N. W. 226; Goodnow *v.* Stryker, 62 Iowa 221, 14 N. W. 345, 17 N. W. 506; Goodnow *v.* Moulton, 51 Iowa 555, 2 N. W. 395.

97. Shoemaker *v.* Grant County, 36 Ind. 175; Schultze *v.* New York, 103 N. Y. 307, 8 N. E. 528; Bristol *v.* Morganton, 125 N. C. 365, 34 S. E. 512; Norfolk, etc., R. Co. *v.* Smyth County, 87 Va. 521, 12 S. E. 1009.

Where a bank has paid taxes on shares of its stock, an action to recover the payment may be maintained in the name of the bank without joining the stock-holders. State Nat. Bank *v.* Memphis, 116 Tenn. 641, 94 S. W. 606, 7 L. R. A. N. S. 663.

Action by consignee.— Where an inhabitant of a town is taxed on his property and the assessors include therein property which he holds as consignee of another person, he cannot maintain an action against the town to recover back the amount of the tax on the property held by him as consignee. Stickney *v.* Bangor, 30 Me. 404.

98. Whaley *v.* Com., 110 Ky. 154, 61 S. W. 35, 23 Ky. L. Rep. 1292; Kilbourne *v.* Allyn, 7 Lans. (N. Y.) 352 [*affirmed* in 59 N. Y. 21, 17 Am. Rep. 291]. *Contra,* Jackson Tp. *v.* Thoman, 51 Ohio St. 285, 37 N. E. 523.

99. Sparks *v.* Robinson, 115 Ky. 453, 74 S. W. 176, 24 Ky. L. Rep. 2336; Hawkins *v.* Nicholas County, 89 S. W. 484, 28 Ky. L. Rep. 479.

1. *Dakota.*— Rushton *v.* Burke, 6 Dak. 478, 43 N. W. 815.

Kansas.— Pawnee County *v.* Atchison, etc., R. Co., 21 Kan. 748.

Kentucky.— Owen County Fiscal Ct. *v.* F. & A. Cox Co., 132 Ky. 738, 117 S. W. 296; Com. *v.* Baske, 124 Ky. 468, 99 S. W. 316, 30 Ky. L. Rep. 400; Com. *v.* Stone, 114 Ky. 511, 71 S. W. 428, 24 Ky. L. Rep. 1297; Whaley *v.* Com., 110 Ky. 154, 61 S. W. 35, 23 Ky. L. Rep. 1292; Blair *v.* Carlisle, etc., Turnpike Co., 4 Bush 157; First Nat. Bank *v.* Christian County, 106 S. W. 831, 32 Ky. L. Rep. 634.

Michigan.— Lyon *v.* Guthard, 52 Mich. 271, 17 N. W. 839.

Ohio.— Hornberger *v.* Case, 9 Ohio Dec. (Reprint) 434, 13 Cinc. L. Bul. 511; Herzberg *v.* Willey, 9 Ohio Dec. (Reprint) 426, 13 Cinc. L. Bul. 334.

Rhode Island.— Lindsay *v.* Allen, 19 R. I. 721, 36 Atl. 840.

Wyoming.— Powder River Cattle Co. *v.* Johnson County, 3 Wyo. 597, 29 Pac. 361, 31 Pac. 278.

See 45 Cent. Dig. tit. "Taxation," § 1011.

2. *California.*— Craig *v.* Boone, 146 Cal. 718, 81 Pac. 22.

Iowa.— Ottumwa Independent Dist. *v.* Taylor, 100 Iowa 617, 69 N. W. 1009.

Kansas.— St. Louis, etc., R. Co. *v.* Labette County, (1901) 66 Pac. 1045.

Kentucky.— Com. *v.* Donnelly, 85 S. W. 720, 27 Ky. L. Rep. 454. *Compare* Com. *v.* Baske, 124 Ky. 468, 99 S. W. 316, 30 Ky. L. Rep. 400.

Minnesota.— Dakota County *v.* Parker, 7 Minn. 267.

Mississippi.— Tuttle *v.* Everett, 51 Miss. 27, 24 Am. Rep. 622.

Missouri.— Loring *v.* St. Louis, 80 Mo. 461; Davis *v.* Bader, 54 Mo. 168; Lewis County *v.* Tate, 10 Mo. 650.

New York.— Chegaray *v.* New York, 2 Duer 521 [*reversed* on other grounds in 13 N. Y. 220]; Robinson *v.* Brooklyn, 9 N. Y. St. 716.

Rhode Island.—See Fish *v.* Higbee, 22 R. I. 223, 47 Atl. 212.

Texas.— Hardesty *v.* Fleming, 57 Tex. 395.

Wisconsin.— Kellogg *v.* Winnebago County, 42 Wis. 97.

Wyoming.— Kelley *v.* Rhoads, 7 Wyo. 237, 51 Pac. 593, 75 Am. St. Rep. 904, 39 L. R. A. 594. See Johnson County *v.* Searight Cattle Co., 3 Wyo. 777, 31 Pac. 268.

See 45 Cent. Dig. tit. "Taxation," § 1011.

Compare Olney *v.* Gaddis, 90 Ill. App. 622; Kimball *v.* Corn Exch. Nat. Bank, 1 Ill. App. 209; Foss *v.* Whitehouse, 94 Me. 491, 48 Atl. 109.

No action against county.— In some jurisdictions no action can be maintained by a taxpayer against a county for taxes wrongfully collected, whether the taxes have been paid out by the county or not, no right of action being given by statute. Owen County Fiscal Ct. *v.* F. & A. Cox Co., 132 Ky. 738, 117 S. W. 296; First Nat. Bank *v.* Christian County, 106 S. W. 831, 32 Ky. L. Rep. 634.

Money paid over to state.— In an action

case of taxes collected for and paid over to the state the matter is not so clear. There is authority for holding that a suit to recover money paid as taxes, when brought against the treasurer or other officer of a state, is not a suit against the state itself within the inhibition of the federal constitution.[3] But some states have obviated the difficulty by giving express permission for the maintenance of suits against their officers in cases of this kind,[4] and others have provided for the refunding of state taxes through the several counties in which they were collected.[5]

f. Pleading. The petition or complaint in an action to recover back money paid as taxes must allege distinctly the facts relied on as rendering the tax illegal or its exaction unlawful, and this not in general terms, but with such particularity that the court may judge of their sufficiency.[6] It must also allege the payment of the tax,[7] and that such payment was involuntary, when this is necessary to entitle him to recover, with facts showing duress or compulsion or some compelling necessity of making the payment,[8] and a proper demand for the return of the tax

against a city for the repayment of a tax on real estate paid by its former owner by mistake, and in ignorance of the fact that title to the property had passed to the city, the fact that the amount had been paid over to the state, so that the city could not get a credit or repayment thereof, was no defense, since if the city, as owner of the property, was not entitled to make the payment to the state, it should not, with knowledge of the facts, have done so. Lesster *v.* New York, 33 N. Y. App. Div. 350, 53 N. Y. Suppl. 934 [*affirmed* in 161 N. Y. 628, 55 N. E. 1092].

Right of appeal.— State and county officers concerned in the collection of a tax levied without authority, against whom no costs are awarded, have no interest in and cannot appeal from that part of a decree which directs the refunding of such tax. Rutz *v.* Calhoun, 100 Ill. 392.

United States customs officers.— The rules stated in the text apply to these officers. If they demand and collect illegal or excessive customs duties, they may be sued personally for the amount so long as the money remains in their hands, but not after they have paid it into the treasury. Cheatham *v.* Norvekl, 92 U. S. 85, 23 L. ed. 561; Maxwell *v.* Griswold, 10 How. (U. S.) 242, 13 L. ed. 405; Elliott *v.* Swartwout, 10 Pet. (U. S.) 137, 9 L. ed. 373; U. S. Rev. St. (1878) § 3011.

3. Scottish Union, etc., Ins. Co. *v.* Herriott, 109 Iowa 606, 80 N. W. 665, 77 Am. St. Rep. 548; *Ex p.* Tyler, 149 U. S. 164, 13 S. Ct. 785, 37 L. ed. 689; Pennoyer *v.* McConnaughy, 140 U. S. 1, 11 S. Ct. 699, 35 L. ed. 363. *Compare* Shoemaker *v.* Grant County, 36 Ind. 175, holding that the taxpayer's only remedy against the state is to petition the legislature to make an appropriation for his repayment.

4. See the statutes of the different states. And see Smith *v.* Rackliffe, 87 Fed. 964, 31 C. C. A. 328, holding that a statute giving permission to sue the state for taxes illegally collected does not imply a consent that such suits may be brought in the courts of the United States.

5. See Mills *v.* Hendricks County, 50 Ind. 436; People *v.* Monroe County, 36 Mich. 70.

6. *Alabama.*— Francis *v.* Southern R. Co., 124 Ala. 544, 27 So. 22.

California.— Bakersfield, etc., Oil Co. *v.* Kern County, 144 Cal. 148, 77 Pac. 892; Western Union Tel. Co. *v.* San Joaquin County, 141 Cal. 264, 74 Pac. 856; Kern Valley Water Co. *v.* Kern County, 137 Cal. 511, 70 Pac. 476.

Georgia.— Montgomery, etc., R. Co. *v.* Duer, 46 Ga. 272.

Indiana.— State *v.* Miami County, 63 Ind. 497; People's Gas, etc., Co. *v.* Harrell, 36 Ind. App. 588, 76 N. E. 318.

Iowa.— Chicago, etc., R. Co. *v.* Avoca Independent Dist., 99 Iowa 556, 68 N. W. 881.

Kentucky.— Sparks *v.* Robinson, 115 Ky. 453, 74 S. W. 176, 24 Ky. L. Rep. 2336; Hawkins *v.* Nicholas County, 89 S. W. 484, 28 Ky. L. Rep. 479.

Nebraska.— Price *v.* Lancaster County, 18 Nebr. 199, 24 N. W. 705.

Ohio.— Pelton *v.* Bemis, 44 Ohio St. 51, 4 N. E. 714.

See 45 Cent. Dig. tit. "Taxation," § 1012.

Joinder of counts.— Where the first count in a complaint stated facts entitling plaintiff to recover a part of the sum paid by him for taxes, and the second stated the same facts and also others alleged to invalidate the whole tax, and the prayer was for a money judgment for the amount of the whole tax, it was held that there was no misjoinder. Ruggles *v.* Fond du Lac, 53 Wis. 436, 10 N. W. 565.

Limitation of issues.— Where plaintiff complains that the tax was illegal because laid upon property largely in excess of what he owned, he is not precluded from relying for relief on any other ground. Babcock *v.* Beaver Creek Tp., 64 Mich. 601, 31 N. W. 423.

7. Goodnow *v.* Oakley, 68 Iowa 25, 25 N. W. 912; Centennial Eureka Min. Co. *v.* Juab County, 22 Utah 395, 62 Pac. 1024.

8. Clarksville *v.* Montgomery County, (Tenn. Ch. App. 1901) 62 S. W. 33; Wyckoff *v.* King County, 18 Wash. 256, 51 Pac. 379. A demurrer was properly sustained to a complaint to recover taxes claimed to have been paid under compulsion, which averred that

before suit brought, if that is required by the statute.[9] The plea or answer should meet specifically the allegations of the complaint and raise an issue.[10]

g. Evidence. The presumption is in favor of the validity of tax laws and of the regularity of official action taken under them; and the burden is on plaintiff to prove the illegality of the tax or other grounds on which he particularly relies to establish his right to recover back the amount he has paid in the form of taxes.[11] In particular, he must prove the fact of payment to the officer authorized by law to receive the taxes,[12] and that the payment was not voluntary, but was made

the sheriff, in obedience to a warrant attached to the roll, notified plaintiff of the tax specified, that the exaction was just and due, and unless it was paid, he would "in due time" collect it by sale of the property, but which nowhere alleged that the sheriff was either in the act of selling, or that he threatened immediately to do so, or that plaintiff, believing that the menace would be instantly executed, was by the abrupt urgency ensnared into meeting the payment, or that he had no other expedient of freeing his property. Johnson *v.* Crook County, 53 Oreg. 329, 100 Pac. 294.

9. Custer County *v.* Chicago, etc., R. Co., 62 Nebr. 657, 87 N. W. 341; Richmond, etc., R. Co. *v.* Reidsville, 109 N. C. 494, 13 S. E. 865; Chicago, etc., R. Co. *v.* Langlade, 55 Wis. 116, 12 N. W. 357.

Necessity of demand before suit see *supra*, IX, C, 6, b.

10. Savings, etc., Soc. *v.* San Francisco, 146 Cal. 673, 80 Pac. 1086; Clark *v.* Greene, 23 R. I. 118, 52 Atl. 889.

11. *California.*— Savings, etc., Soc. *v.* San Francisco, 146 Cal. 673, 80 Pac. 1086.

Connecticut.— Where it was not shown that a tax was larger than it would have been had the average amount of goods kept on hand for sale during the year been taken in making the assessment of a trading business, as required by Conn. Gen. St. (1902) § 2342, nor that goods on hand at the date of the assessment was not the average amount kept during the year, the court could not assume that any part of the tax was excessive. Jackson *v.* Union, 82 Conn. 266, 73 Atl. 773.

Georgia.— Douglasville *v.* Johns, 62 Ga. 423.

Maine.— Portland, etc., R. Co. *v.* Saco, 60 Me. 196.

Massachusetts.— All Saints Parish *v.* Brookline, 178 Mass. 404, 59 N. E. 1003, 52 L. R. A. 778. And see Masonic Education, etc., Trust *v.* Boston, 201 Mass. 320, 87 N. E. 602.

Michigan.— Turnbull *v.* Alpena Tp., 74 Mich. 621, 42 N. W. 114. See Ward *v.* Echo Tp., 145 Mich. 56, 108 N. W. 364.

Nebraska.— Davis *v.* Otoe County, 55 Nebr. 677, 76 N. W. 465.

New York.— See Matter of Medina, 52 Misc. 621, 103 N. Y. Suppl. 1018 [*affirmed* in 121 N. Y. App. Div. 929, 106 N. Y. Suppl. 1148].

Ohio.— Hamilton County *v.* Wood, 7 Ohio Dec. (Reprint) 533, 3 Cinc. L. Bul. 841; Perrin *v.* County Com'rs, 6 Ohio Dec. (Reprint) 1085, 10 Am. L. Rec. 311.

Rhode Island.— Warwick, etc., Water Co. *v.* Carr, 24 R. I. 226, 52 Atl. 1030.

Wyoming.— Marks *v.* Uinta County, 11 Wyo. 488, 72 Pac. 894.

See 45 Cent. Dig. tit. "Taxation," § 1013.

Illegality of tax.— A decree of a court adjudging the tax to be void and reciting the presence of both parties by counsel is sufficient proof of such invalidity. Gage *v.* Saginaw, 128 Mich. 682, 84 N. W. 1100, 87 N. W. 1027. But where the ground of objection is that the tax was levied in part for an illegal object, it is not necessary to show that the money was applied to that object. Gillette *v.* Hartford, 31 Conn. 351. And see Cresswell Ranch, etc., Co. *v.* Roberts County, (Tex. Civ. App. 1894) 27 S. W. 737.

Fraudulent or arbitrary overvaluation see Solomon *v.* Oscoda Tp., 77 Mich. 365, 43 N. W. 990; Galveston County *v.* Galveston Gas Co., 72 Tex. 509, 10 S. W. 583; Ostrum *v.* San Antonio, 30 Tex. Civ. App. 462, 71 S. W. 304; Home F. Ins. Co. *v.* Lynch, 19 Utah 189, 56 Pac. 681; Carlisle *v.* Chehalis County, 32 Wash. 284, 73 Pac. 349.

Exemption of property see Stony Wold Sanatorium *v.* Keese, 112 N. Y. App. Div. 738, 98 N. Y. Suppl. 1088.

Non-residence of plaintiff see Bailey *v.* Buell, 59 Barb. (N. Y.) 158 [*reversed* in 50 N. Y. 662].

Time of payment see Lingle *v.* Elmwood Tp., 142 Mich. 194, 105 N. W. 604.

Verified statement of taxpayer as ground of estoppel see Centennial Eureka Min. Co. *v.* Juab County, 22 Utah 395, 62 Pac. 1024.

Condition precedent to power to tax.— If a charitable corporation omits after notice from the assessors to bring in the list and statement of all real and personal estate held by it for charitable purposes required by Mass. Rev. Laws, c. 12, § 41, the corporation under section 5, clause 3, of the same chapter, still is exempt from taxation for that year unless such omission was wilful, and, in an action brought by it against a city to recover a tax paid under protest, the burden of proving that such an omission was wilful is on defendant. Masonic Education, etc., Trust *v.* Boston, 201 Mass. 320, 87 N. E. 602.

Evidence held sufficient see Rice *v.* Muskegon, 150 Mich. 679, 114 N. W. 661.

12. Smith *v.* Readfield, 27 Me. 145; Daniels *v.* Watertown Tp., 55 Mich. 376, 21 N. W. 350.

Election and qualification.— If payment was made to the proper officer plaintiff need not prove that he was legally elected and qualified. Hathaway *v.* Addison, 48 Me. 440.

under duress or compulsion, when this is necessary to a recovery,[13] and he must show clearly the exact amount he is entitled to recover;[14] and where the payment was made under a protest, plaintiff is generally restricted to the grounds of objection stated therein.[15]

h. Amount of Recovery. If the decision is in favor of plaintiff, he will be entitled to recover the whole amount of taxes paid by him, or so much thereof as defendant ought not in justice to retain.[16] But if part of the tax was legal and valid, only the invalid portion can be recovered, if they are separable;[17] and plaintiff is not entitled to a decree establishing the amount he is entitled to recover as a set-off against other taxes or taxes subsequently accruing.[18] He will in some states be entitled to recover interest from the date of demand,[19] but not the costs of a distress or other proceedings to collect the tax.[20]

X. COLLECTION AND ENFORCEMENT AGAINST PERSONS AND PERSONAL PROPERTY.

A. Collectors and Proceedings For Collection — 1. In General — a. Power to Enforce Collection. The sovereign power to lay and assess taxes necessarily implies authority to provide means for enforcing their collection,[21] and it belongs to the legislature of a state to prescribe the remedies by means of which

13. Raisler *v.* Athens, 66 Ala. 194; Phœbus *v.* Manhattan Social Club, 105 Va. 144, 52 S. E. 839; Northwestern Union Packet Co. *v.* St. Louis, 18 Fed. Cas. No. 10,345, 4 Dill. 10. But *compare* Stewart Law, etc., Co. *v.* Alameda County, 142 Cal. 660, 76 Pac. 481; Adams Express Co. *v.* Rattermann, 10 Ohio Dec. (Reprint) 469, 21 Cinc. L. Bul. 238.

14. Indianapolis *v.* Ritzinger, 24 Ind. App. 65, 56 N. E. 141. See Mills *v.* Hendricks County, 50 Ind. 436.

15. Aurora Iron Min. Co. *v.* Ironwood, 119 Mich. 325, 78 N. W. 126; Hinds *v.* Belvidere Tp., 107 Mich. 664, 65 N. W. 544. But see Woodmere Cemetery Assoc. *v.* Springwells Tp., 130 Mich. 466, 90 N. W. 277.

16. Farmers', etc., Bank *v.* Vandalia, 57 Ill. App. 681; Murphy *v.* Dobben, 137 Mich. 565, 100 N. W. 891; Spear *v.* Braintree, 24 Vt. 414. *Compare* Texas Land, etc., Co. *v.* Hemphill County, (Tex. Civ. App. 1901) 61 S. W. 333.

Collection by unauthorized officer.— Where one is duly assessed for taxes for which he is liable, which taxes are collected by a collector *de facto*, he cannot recover back the amount of the taxes, or the value of the property which may have been taken to pay them, merely because of a defect in the qualification of the collector, but he is entitled to nominal damages only. Cavis *v.* Robertson, 9 N. H. 524.

17. Gerry *v.* Stoneham, 1 Allen (Mass.) 319; Torrey *v.* Millbury, 21 Pick. (Mass.) 64.

Excessive tax.— Where personal property was taxable in the town where assessed, the owner, after paying the tax to avoid seizure and sale, can, in an action to recover the taxes paid, recover, if anything, only the excess over what would have been a regular assessment. Jackson *v.* Union, 82 Conn. 266, 73 Atl. 773.

18. McVeigh *v.* Lanier, 50 Ark. 384, 8 S. W. 141; Otis *v.* People, 196 Ill. 542, 63 N. E. 1053; New Orleans *v.* Davidson, 30 La. Ann. 554.

19. *Indiana.*— Lake County *v.* Donch, 6 Ind. App. 337, 33 N. E. 663.

Massachusetts.— Boston, etc., Glass Co. *v.* Boston, 4 Metc. 181.

New Hampshire.—Amoskeag Mfg. Co. *v.* Manchester, 70 N. H. 336, 47 Atl. 74; Boston, etc., R. Co. *v.* State, 63 N. H. 571, 4 Atl. 571.

New York.— Van Hise *v.* Rensselaer County, 21 Misc. 572, 48 N. Y. Suppl. 874.

Texas.— Galveston County *v.* Galveston Gas Co., 72 Tex. 509, 10 S. W. 583.

United States.— Erskine *v.* Van Arsdale, 15 Wall. 75 note, 21 L. ed. 63.

Contra.— Kern Valley Water Co. *v.* Kern County, 150 Cal. 801, 90 Pac. 121; Miller *v.* Kern County, 150 Cal. 797, 90 Pac. 119; Savings, etc., Soc. *v.* San Francisco, 131 Cal. 356, 63 Pac. 665 (holding that in an action to recover invalid taxes paid under protest, under Pol. Code, § 3819, interest could only be allowed against the county from the time of the judgment declaring the money due); Jackson County *v.* Kaul, 77 Kan. 715, 717, 96 Pac. 45, 17 L. R. A. N. S. 552 (holding that Gen. St. (1901) § 3590, allowing creditors interest at six per cent when no other interest is agreed upon, cannot be interpreted to impose a liability on a county, and, in an action against the county officers to recover taxes wrongfully exacted over the protest of the taxpayer and through compulsion of a tax warrant, interest on the money from the time it was paid, then being due, cannot be recovered).

20. Shaw *v.* Becket, 7 Cush. (Mass.) 442.

21. Biscoe *v.* Coulter, 18 Ark. 423; Lucas *v.* Purdy, 142 Iowa 359, 120 N. W. 1063; McCarrol *v.* Weeks, 5 Hayw. (N. C.) 246; Thompson *v.* Allen County, 13 Fed. 97 [*affirmed* in 115 U. S. 550, 6 S. Ct. 140, 29 L. ed. 472].

this shall be accomplished,[22] and from time to time to change the same, in its discretion, there being no such thing as a vested right in the continuance of a mere remedy,[23] subject only to the limitation that the taxpayer shall not be deprived of his property without due process of law,[24] and that, whatever methods of collecting the taxes are ordained, they shall apply uniformly to all persons or property of the same class or kind.[25] The regulation of administrative details in the collection of the taxes levied by counties and other municipal divisions may, to a limited extent, be left to the determination of the local authorities.[26]

b. Constitutional and Statutory Provisions. Constitutional directions as to the collection of taxes must of course be observed and obeyed by the legislature,[27] but otherwise, as above stated, its discretion is practically unlimited.[28] The repeal of a statute providing for the levy and collection of taxes will not operate retrospectively so as to affect unpaid taxes already due or pending proceedings for their collection.[29] And the repealing effect of a new tax law will be confined within narrow limits, so that it will not be held to abrogate laws applicable to particular localities nor the details of previous general laws which are not clearly in conflict with it.[30]

2. Appointment, Qualification, and Tenure of Collectors — a. Creation and Abolition of Office. If the constitution creates the office of tax collector, or names the officer who shall act in that capacity, its provisions cannot be varied in the least degree by the legislature.[31] But otherwise it belongs to the legislature to create this office and to abolish and change it at pleasure, although the effect may be that persons lawfully acting as tax collectors shall be legislated out of their office.[32] Authority may also be given to cities or other municipal corporations to create the office of tax collector, for their own purposes, and to prescribe his duties, but such authorization must be strictly pursued.[33]

b. Eligibility. Whatever may be prescribed by law as the qualifications of a

22. State *v.* Certain Lands, 40 Ark. 35; Lucas *v.* Purdy, 142 Iowa 359, 120 N. W. 1063; State *v.* Milburn, 9 Gill (Md.) 97; State *v.* Illinois, etc., Bridge Co., 73 Mo. 442.

23. *In re* Elizabeth, 49 N. J. L. 488, 10 Atl. 363.

24. Griswold College *v.* Davenport, 65 Iowa 633, 22 N. W. 904; Cincinnati, etc., R. Co. *v.* Kentucky, 115 U. S. 321, 6 S. Ct. 57, 29 L. ed. 414.

25. McComb *v.* Bell, 2 Minn. 295; Com. *v.* Swab, 8 Pa. Co. Ct. 111.

26. Southern R. Co. *v.* Kay, 62 S. C. 28, 39 S. E. 785. And see Pittsburgh, etc., R. Co. *v.* Harden, 137 Ind. 486, 37 N. E. 324, holding that an authority to county commissioners to suspend the collection of taxes against a railroad until the road is sufficiently advanced to justify them in collecting the taxes carries with it authority subsequently to order their collection on compliance by the road with the conditions required by law.

27. See *supra*, II, A.

28. See *supra*, X, A, 1, a.

29. *Arkansas.*— State *v.* Certain Lands, 40 Ark. 35.

California.— Oakland *v.* Whipple, 44 Cal. 303.

Louisiana.— Gaither *v.* Green, 40 La. Ann. 362, 4 So. 210.

Missouri.— State *v.* Rainey, 74 Mo. 229.

Pennsylvania.— Com. *v.* Honey Brook Coal Co., 2 Pearson 365.

Washington.— Washington Nat. Bank *v.* King County, 9 Wash. 607, 38 Pac. 219. See Spokane County *v.* Northern Pac. R. Co., 5 Wash. 89, 31 Pac. 420.

See 45 Cent. Dig. tit. "Taxation," § 1018.

Compare Gorley *v.* Sewell, 77 Ind. 316.

30. *Connecticut.*—Atwater *v.* O'Reilly, 81 Conn. 367, 71 Atl. 505.

Illinois.— Brown *v.* Hogle, 30 Ill. 119.

Pennsylvania.— Evans *v.* Phillipi, 117 Pa. St. 226, 11 Atl. 630, 2 Am. St. Rep. 655; Bitting *v.* Com., 7 Pa. Cas. 545, 12 Atl. 29; Com. *v.* Scheckler, 1 Pa. Co. Ct. 505; Cooper *v.* Newcomer, 6 Lanc. L. Rev. 9; *In re* Election in Upper Leacock Tp., 3 Lanc. L. Rev. 225. *Compare* Com. *v.* Topper, 219 Pa. 221, 68 Atl. 666.

Texas.— Harrington *v.* Galveston County, 1 Tex. App. Civ. Cas. § 792.

Washington.— State *v.* Purdy, 14 Wash. 343, 44 Pac. 857.

Compare State *v.* Milburn, 9 Gill (Md.) 97.

31. Mutual L. Ins. Co. *v.* Martien, 27 Mont. 437, 71 Pac. 470.

32. State *v.* Lavigne, 23 La. Ann. 111. And see People *v.* Crooks, 53 N. Y. 648; Com. *v.* Topper, 219 Pa. St. 221, 68 Atl. 666, holding that Pa. Act, June 25, 1885 (Pamphl. Laws 187), providing for the election of a collector of taxes, supersedes the office of collector of school taxes under the former system, and the new officer is the only person authorized to collect taxes of any kind.

33. People *v.* Bedell, 2 Hill (N. Y.) 196; Hamilton County *v.* Arnold, 65 Ohio St. 479, 63 N. E. 81; State *v.* Strong, (Tenn. Ch.

tax collector — as that he shall be a freeholder, a resident of the district for a certain length of time, not a defaulter nor in arrears in respect to accounting for public money in his hands, or the like — it is essential to his full and perfect title to the office that he shall be eligible in all respects.[34] But a lack of the proper qualifications will not bar an action on his bond, if he was at least an officer *de facto*.[35] Tenure of another office at the same time, if it is of an executive or ministerial character, is generally no obstacle to the election or appointment of the incumbent as a tax collector.[36]

c. Other Officers as Collectors Ex Officio. In some states, the sheriff, treasurer, or other officer of the county is charged with the collection of taxes and vested with the necessary authority for that purpose by virtue of his office, and without special appointment or election as tax collector;[37] in others, a ministerial officer of this kind is to fill the office of tax collector only in the absence of a special designation or appointment of some other person to that office.[38] But a deputy sheriff has no authority, by virtue of his appointment as such, to discharge the duties of tax collector, although his principal is collector of taxes as well as sheriff.[39]

d. Appointment or Election. In some jurisdictions collectors of taxes are elected by popular vote;[40] and in some cases, particularly where local authorities

App. 1897) 47 S. W. 1103. See Com. *v.* Wade, 126 Ky. 791, 104 S. W. 965, 31 Ky. L. Rep. 1185.

34. Sheehan *v.* Scott, 145 Cal. 684, 79 Pac. 350; Com. *v.* Browne, 1 Serg. & R. (Pa.) 382; Reg. *v.* Ryan, 6 U. C. Q. B. 296. And see Com. *v.* Topper, 219 Pa. St. 221, 68 Atl. 666.

35. Boreland *v.* Washington County, 20 Pa. St. 150. And see *infra*, X, A, 10, c, (III), (B), (2).

36. People *v.* Squires, 14 Cal. 12; Merrill *v.* Gorham, 6 Cal. 41 (both holding that a sheriff is not a judicial officer, and the offices of sheriff and of tax collector, although distinct under the constitution, may be united in the same hands); State *v.* Fowler, 66 Conn. 294, 32 Atl. 162, 33 Atl. 1005 (although the law provides that no selectman shall hold the office of tax collector in the same town during the same official year, yet one who has been elected a selectman and resigns may be tax collector before the expiration of the year for which he was elected); Howard *v.* Proctor, 7 Gray (Mass.) 128 (a selectman and assessor of taxes of a town may legally be chosen collector of taxes also).

37. See the statutes of the different states. And see the following cases:

Arkansas.— Remley *v.* Matthews, 84 Ark. 598, 106 S. W. 482.

California.— Trout *v.* Gardiner, 39 Cal. 386.

Idaho.— People *v.* Lytle, 1 Ida. 143.

Illinois.— Ryan *v.* People, 117 Ill. 486, 6 N. E. 37.

Kentucky.— Com. *v.* Louisville Water Co., 132 Ky. 305, 116 S. W. 712; Com. *v.* Wade, 126 Ky. 791, 104 S. W. 965, 31 Ky. L. Rep. 1185.

Mississippi.— French *v.* State, 52 Miss. 759.

Missouri.— State *v.* Watson, 71 Mo. 470; State *v.* Fulkerson, 10 Mo. 681.

Tennessee.— Bailey *v.* Lockhart, 4 Yerg. 567.

Washington.— Wright *v.* Stinson, 16 Wash. 368, 47 Pac. 761.

See 45 Cent. Dig. tit. "Taxation," § 1022.

Taxes on unlisted property.— The county commissioners have implied power, after making an assessment for taxes on unlisted property, to authorize collection by the sheriff. Caldwell Land, etc., Co. *v.* Smith, 146 N. C. 199, 59 S. E. 653.

Suspension of sheriff on indictment.— Although a sheriff is suspended, under Kirby Dig. § 7992, on indictment being filed against him, he is still sheriff, and entitled to qualify for the separate office of collector; and, on his failure to do so in the time limited, section 7042, providing that, if the sheriff fail to qualify as collector within a certain time, the governor shall, on being notified, appoint a person to perform the duties of collector, which appointee section 7044 provides shall hold the office till the next general election, applies. Remley *v.* Matthews, 84 Ark. 598, 106 S. W. 482.

38. Colman *v.* Anderson, 10 Mass. 105; State *v.* Weston, 29 Mont. 125, 74 Pac. 415; Waite *v.* Hyde Park Lumber Co., 65 Vt. 103, 25 Atl. 1089; Cameron *v.* Walden, 32 Vt. 323.

39. Crowell *v.* Barham, 57 Ark. 195, 21 S. W. 33. *Contra*, Wood *v.* Cook, 31 Ill. 271.

40. Town Council's Appeal, (Pa. 1888) 15 Atl. 730; Buckwalter *v.* Lancaster County, 12 Pa. Super. Ct. 272; Pottsville Borough Town Council's Appeal, 1 Mona. (Pa. 705.

Not a judicial function.— It is no part of the functions of a court to appoint a collector of taxes, nor can a tax, levied and assessed for a particular purpose, be treated as an equitable asset or chose in action; and hence where a court of the United States has rendered judgment against a municipal corporation, although it may by mandamus compel the proper local officers to levy and collect a tax to pay it, yet, if there are no state or local officers authorized to make the collection, the court cannot appoint a tax collector or a receiver. Rees *v.* Watertown,

fail to act, the governor of the state is authorized to make an appointment.[41] But generally, in the absence of contrary directions in the constitution or a general law, the power of appointing officers for this purpose is vested in the legislature in respect to state taxes,[42] and in the executive board or officers of counties, cities, and other municipalities, the action of such appointing power not being open to collateral impeachment nor to review by the courts, except where taken illegally or without jurisdiction.[43] Where the power of appointment is thus lodged in a county or other municipal board, they may appoint several collectors, unless their authority is specifically limited in this respect,[44] and may make an appointment *pro tempore* or to fill a vacancy.[45] But the practice of selling the office of tax collector at public auction to the lowest bidder, without regard to his suitability or qualifications, is severely condemned by the courts and generally held illegal.[46] Where the sheriff or some other officer is entitled to the office of tax collector, and another may be appointed only in case he declines to act or fails to qualify, these conditions must be fulfilled before a valid appointment can be made.[47]

19 Wall. (U. S.) 107, 22 L. ed. 72; O'Brien *v.* Wheelock, 78 Fed. 673; Devereaux *v.* Brownsville, 29 Fed. 742; Thompson *v.* Allen County, 13 Fed. 97 [*affirmed* in 115 U. S. 550, 6 S. Ct. 140, 29 L. ed. 472].

41. Remley *v.* Matthews, 84 Ark. 598, 106 S. W. 482; Vaughan *v.* Kendall, 79 Ark. 584, 96 S. W. 140; Falconer *v.* Shores, 37 Ark. 386; Milburn *v.* State, 1 Md. 1; Fulkerson *v.* State, 14 Mo. 49; State *v.* Fulkerson, 10 Mo. 681.

Appointment by military governor see State *v.* Cooper, 53 Miss. 615.

42. People *v.* Squires, 14 Cal. 12.

43. *California.*— Smith *v.* Farrelly, 52 Cal. 77.

Iowa.— Massie *v.* Harrison County, 129 Iowa 277, 105 N. W. 507.

Maryland.— State *v.* Dorsey, 3 Gill & J. 75.

New Hampshire.— Odiorne *v.* Rand, 59 N. H. 504. So the collector's appointment is good if made by a majority of the persons composing the board which has the power of appointment. Butler *v.* Washburn, 25 N. H. 251.

Pennsylvania.— Com. *v.* Jimison, 205 Pa. St. 367, 54 Atl. 1036; Erie County's Appeal, 10 Pa. Cas. 348, 14 Atl. 44.

See 45 Cent. Dig. tit. "Taxation," § 1023.

Qualifications of appointing power.— When a tax collector is duly elected or appointed by the board having authority for that purpose, a defect in their titles to their office will not invalidate his election or appointment, if they were at least officers *de facto*. Roberts *v.* Holmes, 54 N. H. 560; Farrier *v.* Dugan, 48 N. J. L. 613, 7 Atl. 881; Dugan *v.* Farrier, 47 N. J. L. 383, 1 Atl. 751.

Nominations made by assessor.— Where it is the statutory duty of the assessor to present to the board of county commissioners the names of two persons suitable for the office of collector, with the intention that one of them shall be appointed, still it is not obligatory on the commissioners to appoint either of them if neither is qualified or suitable; and if one of them dies or declines to act they are not bound to appoint the other; the assessor should not send in his own name as one of the nominees. Com. *v.* Perkins, 7 Pa. St. 42; Com. *v.* Browne, 1 Serg. & R. (Pa.) 382; Com. *v.* Hamilton, 9 Leg. Int. (Pa.) 2; Com. *v.* Hamilton, 11 Pa. L. J. 337.

Necessity of appointment in writing see Ainsworth *v.* Dean, 21 N. H. 400.

A town clerk must certify the date of record of the commission of a tax collector, whose authority to act depends upon the commission being recorded, both on the original commission and on the record. Pierce *v.* Richardson, 37 N. H. 306.

Sale of office.— A tax collector has no power to employ another person to perform the duties of the office for a commission on the amount collected; such a contract is against public policy and void. Cansler *v.* Penland, 125 N. C. 578, 34 S. E. 683, 48 L. R. A. 441.

44. Belgrade *v.* Sidney, 15 Mass. 523; Bradey *v.* French, 9 Ohio S. & C. Pl. Dec. 195, 6 Ohio N. P. 122. Under Ky. St. (1903) § 4131, authorizing the county court where there is no sheriff to appoint a collector for all taxes due the state, county, or taxing districts, or a separate collector for money due the state, county, etc., authorized to be collected by the sheriff, only one collector may be appointed to collect the taxes for any division, and, where one is appointed to collect county revenue, another cannot be appointed to collect some special assessments therein. Com. *v.* Wade, 126 Ky. 791, 104 S. W. 965, 31 Ky. L. Rep. 1185.

45. Phelon *v.* Granville, 140 Mass. 386, 5 N. E. 269; Blackstone *v.* Taft, 4 Gray (Mass.) 250; Pierce *v.* Richardson, 37 N. H. 306; Clement *v.* Hale, 47 Vt. 680. And see Com. *v.* Topper, 219 Pa. St. 221, 68 Atl. 666, appointment to fill vacancy caused by incumbent's ceasing to be a resident of the particular district. But see Combs *v.* Eversole, 120 Ky. 346, 86 S. W. 560, 27 Ky. L. Rep. 764; Hadley *v.* Chamberlin, 11 Vt. 618.

46. Howard *v.* Proctor, 7 Gray (Mass.) 128; Spencer *v.* Jones, 6 Gray (Mass.) 502; Alvord *v.* Collin, 20 Pick. (Mass.) 418; Tucker *v.* Aiken, 7 N. H. 113; Cardigan *v.* Page, 6 N. H. 182; Carleton *v.* Whitcher, 5 N. H. 196; Meredith *v.* Ladd, 2 N. H. 517.

47. *Arkansas.*— Bosely *v.* Woodruff County

But no person can be compelled to serve as tax collector against his will, although duly elected or appointed.[48]

e. Qualification. A collector of taxes must take the official oath required by statute or ordinance.[49] His failure to do so will not necessarily deprive him of the right to demand and receive payment of the taxes and give a good receipt therefor,[50] but if he has not been sworn his office will not protect him, nor will he be warranted in selling lands for the non-payment of the tax.[51] The same rules apply generally to other requirements of the statutes in regard to the qualification and commissioning of tax collectors.[52]

f. De Facto Collectors.[53] The acts of one who assumes to exercise the office of tax collector and who has color of title to the office will be sustained, so far as necessary for the protection of third persons and the public, as the acts of an officer *de facto*, although there may be a defect in his appointment or qualification.[54] But this does not apply where he owes his appointment to a board or officer having no authority whatever to make it,[55] nor where he acts after his office has been judicially declared to be vacant.[56]

Ct., 28 Ark. 306. See Remley *v.* Matthews, 84 Ark. 598, 106 S. W. 482.

Kentucky.— Patton *v.* Lair, 4 J. J. Marsh. 248.

Pennsylvania.— Ridgway Tp. *v.* Wheeler, 90 Pa. St. 450.

Tennessee.— Bailey *v.* Lockhart, 4 Yerg. 567.

Virginia.— Chapman *v.* Com., 25 Gratt. 721.

Appointment by fiscal court.— The term by "law," as used in Ky. St. (1903) § 4129, providing that the sheriff shall be collector of all taxes, unless the payment thereof is by law directed to be made to some officer, means a statute, and does not include an order of the fiscal court; and a nomination by the fiscal court of a collector of a special tax is void. Com. *v.* Wade, 126 Ky. 791, 104 S. W. 965, 31 Ky. L. Rep. 1185.

48. Morrell *v.* Sylvester, 1 Me. 248; Cardigan *v.* Page, 6 N. H. 182.

49. Morgan *v.* Vance, 4 Bush (Ky.) 323; Johnston *v.* Wilson, 2 N. H. 202, 9 Am. Dec. 50; Com. *v.* Stevens, 3 Lack. Jur. (Pa.) 113.

Time of taking oath.— The oath of a tax collector must be taken after his appointment is definitely made, not before. Phelon *v.* Granville, 140 Mass. 386, 5 N. E. 269. But see Gorman *v.* Boise County, 1 Ida. 553, where one was elected assessor and also collector and took the oath of both offices at the same time.

Form of oath.— The oath taken by the collector must conform substantially, if not exactly, to the directions of the statute. Gordon *v.* Clifford, 28 N. H. 402; Olney *v.* Pearce, 1 R. I. 292; Wing *v.* Hall, 47 Vt. 182.

Proof of oath.— The collector's oath need not be a matter of record, unless specially so required by law, but may be proved by parol. Howard *v.* Proctor, 7 Gray (Mass.) 128; Sprague *v.* Bailey, 19 Pick. (Mass.) 436.

50. Whiting *v.* Ellsworth, 85 Me. 301, 27 Atl. 177; Oldtown *v.* Blake, 74 Me. 280; Williams *v.* Lunenburg School Dist. No. 1, 21 Pick. (Mass.) 75, 32 Am. Dec. 243; Lewis *v.* Brady, 17 Ont. 377.

51. Payson *v.* Hall, 30 Me. 319; Cavis *v.* Robertson, 9 N. H. 524; Cardigan *v.* Page, 6 N. H. 182; Langdon *v.* Poor, 20 Vt. 13. But see Bellows *v.* Elliot, 12 Vt. 569. In Baker *v.* Webber, 102 Me. 414, 67 Atl. 144, it is said to be indispensable to the validity of a sale of real estate for non-payment of taxes, by a tax collector, that he should be shown to have been legally elected and qualified to act in that capacity.

52. Bassett *v.* Governor, 11 Ga. 207 (applying to governor for commission within limited time after election); Hays *v.* Drake, 6 Gray (Mass.) 387 (qualification of one chosen collector in the place of one who declines the office); Fletcher *v.* Drew, 48 N. H. 180 (failure to make a written agreement as to collector's compensation, as required by statute, does not invalidate his appointment).

53. **De facto officers** generally see OFFICERS, 29 Cyc. 1389.

54. *Alabama.*— Beebe *v.* Robinson, 52 Ala. 66.

Arkansas.— Ft. Smith School Dist. *v.* Sewer Dist. No. 1 Bd. of Imp., 65 Ark. 343, 46 S. W. 418.

Maine.— Whiting *v.* Ellsworth, 85 Me. 301, 27 Atl. 177; Oldtown *v.* Blake, 74 Me. 280. And see Greenville *v.* Blair, 104 Me. 444, 72 Atl. 177.

New Hampshire.— French *v.* Spalding, 61 N. H. 395; Pierce *v.* Richardson, 37 N. H. 306; Smith *v.* Messer, 17 N. H. 420.

Pennsylvania.— Kingsbury *v.* Ledyard, 2 Watts & S. 37.

Vermont.— See Adams *v.* Jackson, 2 Ark. 145.

Canada.— *Ex p.* Martin, 34 N. Brunsw. 142.

See 45 Cent. Dig. tit. "Taxation," § 1033.

Lack of eligibility.— When a collector of taxes is ineligible under the constitution, his claim to the office and discharge of its duties, however regular his installation, are no protection, and in a suit to hold him responsible he cannot justify under his office. Morgan *v.* Vance, 4 Bush (Ky.) 323.

55. Burgess *v.* Pue, 2 Gill (Md.) 11.

56. Peck *v.* Holcombe, 3 Port. (Ala.) 329.

g. Duration and Tenure of Office. A collector of taxes may generally enter upon the exercise of his office as soon as he has taken the oath and given the bond,[57] and he is entitled to retain his office for the full term for which he was elected or appointed,[58] and ordinarily until his successor is elected or appointed and qualified.[59] But he may resign and withdraw from the office,[60] and, subject to special statutory provisions in that behalf, he may be suspended or removed from office, either by the governor of the state or by the power to which he owes his appointment, if he is guilty of misconduct in office.[61] And the office of tax collector may become vacant where residence within a certain district is essential and the incumbent ceases to be a resident.[62]

h. Deputies and Assistants. Unless it be contrary to the statute, a collector of taxes may appoint deputies or assistants to aid him in discharging the duties of his office.[63] But he must be responsible for their collections,[64] and he may maintain a private action against a deputy for money collected by the latter and not paid over.[65]

3. Compensation of Collectors — a. Right to Compensation — (i) *In General.* A tax collector is entitled to fees or commissions only in the cases and to the extent prescribed by the statute; and if the law makes no provision for his compensation in respect to particular services rendered or the collection of particular taxes, he can claim none.[66] If the sheriff or treasurer of a county is *ex*

57. Falconer *v.* Shores, 37 Ark. 386.

58. Jimeson *v.* Cowperthwaite, 42 N. J. L. 159; People *v.* Hardy, 8 Utah 68, 29 Pac. 1118; Hadley *v.* Chamberlin, 11 Vt. 618.

Extending term of office see Beebe *v.* Robinson, 64 Ala. 171; People *v.* Crooks, 53 N. Y. 648.

Term of appointee by governor to fill vacancy see State *v.* Herring, 208 Mo. 708, 106 S. W. 984.

59. Haley *v.* Petty, 42 Ark. 392; People *v.* Woodruff, 32 N. Y. 355; Briggs *v.* Carr, 27 R. I. 477, 63 Atl. 487.

Delivery of tax books to successor in office see Price *v.* Adamson, 37 Mo. 145; Somers *v.* Burke County, 123 N. C. 582, 31 S. E. 873, 68 Am. St. Rep. 834; Ridgway Tp. *v.* Wheeler, 90 Pa. St. 450.

60. Spaulding *v.* Northumberland, 64 N. H. 153, 6 Atl. 642; Johnston *v.* Wilson, 2 N. H. 202, 9 Am. Dec. 50; Waters *v.* Edmondson, 8 Heisk. (Tenn.) 384.

61. *Alabama.*— Peck *v.* Holcombe, 3 Port. 329.

California.— Woods *v.* Varnum, 85 Cal. 639, 24 Pac. 843.

Florida.— State *v.* Johnson, 30 Fla. 499, 11 So. 855.

Georgia.— State *v.* Frazier, 48 Ga. 137.

Louisiana. — State *v.* Barrow, 29 La. Ann. 243; State *v.* Fisher, 26 La. Ann. 537; State *v.* Yoist, 25 La. Ann. 396.

Pennsylvania.— Com. *v.* Connor, 207 Pa. St. 263, 56 Atl. 443; Mattern *v.* Connor, 17 York Leg. Rec. 77.

See 45 Cent. Dig. tit. "Taxation," § 1038.

Compare Gorman *v.* Boise County, 1 Ida. 553; Hager *v.* Lucas, 120 Ky. 307, 86 S. W. 552, 27 Ky. L. Rep. 710.

62. Com. *v.* Topper, 219 Pa. St. 221, 68 Atl. 666.

63. Whitford *v.* Lynch, 10 Kan. 180; Prater *v.* Strother, 13 S. W. 252, 11 Ky. L. Rep. 831; Parker *v.* Southern Bank, 46 La. Ann. 563, 15 So. 200; Aldrich *v.* Aldrich, 8 Metc. (Mass.) 102. *Compare* Fremont County *v.* Brandon, 6 Ida. 482, 56 Pac. 264.

Bonds of deputy collectors see Post *v.* Sheppard, 4 Gill (Md.) 276; McCormick *v.* Fitch, 14 Minn. 252.

64. Evans *v.* State, 36 Tex. 323; Lee County Justices *v.* Fulkerson, 21 Gratt. (Va.) 182; Corbett *v.* Johnston, 11 U. C. C. P. 317.

65. Ratliff *v.* Ferguson, 86 Ky. 89, 5 S. W. 311, 9 Ky. L. Rep. 376; Box *v.* McKelvey, 8 Heisk. (Tenn.) 861.

66. *Alabama.*— Dunklin *v.* Gafford, 17 Ala. 814.

California.— Butte County *v.* Merrill, 141 Cal. 396, 74 Pac. 1036; People *v.* San Francisco, 28 Cal. 429.

Georgia.—Justices Fulton County Inferior Ct. *v.* Yoakum, 19 Ga. 611.

Idaho.— Gorman *v.* Boise County, 1 Ida. 647.

Illinois.— Mason County *v.* Mason, etc., Special Drain. Dist., 140 Ill. 539, 30 N. E. 676.

Indiana.— Paoli *v.* Charles, 164 Ind. 690, 74 N. E. 508.

Maryland.— Duvall *v.* Perkins, 77 Md. 582, 26 Atl. 1085.

Minnesota.— Chapel *v.* Ramsey County, 71 Minn. 18, 73 N. W. 520.

Nevada.— State *v.* Donnelly, 20 Nev. 214, 19 Pac. 680.

Pennsylvania.— Philadelphia *v.* Moore, 208 Pa. St. 327, 57 Atl. 710; Philadelphia *v.* McMichael, 208 Pa. St. 297, 57 Atl. 705; Kirkendall *v.* Luzerne County, 25 Pa. Super. Ct. 429.

South Dakota.— Centerville *v.* Turner County, 23 S. D. 424, 122 N. W. 350.

Washington.— State *v.* Mudgett, 21 Wash. 99, 57 Pac. 351.

West Virginia.— Hawkins *v.* Bare, 63 W. Va. 431, 60 S. E. 391.

See 45 Cent. Dig. tit. "Taxation," § 1043.

officio collector of taxes, he is not generally entitled to any compensation additional to his salary as sheriff or treasurer.[67] Further, according to the systems generally in force, the tax collector can claim commissions only on sums actually collected as taxes,[68] and may forfeit his right to the same by negligence or misconduct in his office.[69] If he continues to act after the expiration of his term of office he cannot claim pay for extra services on the theory that he is no longer collector, as he will not be permitted to deny his official character.[70]

(II) *Nature of Services.* When the collector's compensation is in the form of a commission on taxes collected, it can be claimed only in respect to taxes which he has actually collected and by his own efforts; [71] and where he is to receive graduated fees for special services rendered, such as serving a warrant, making a distress, selling property, and the like, the services must have been actually and necessarily rendered and his acts such as were authorized by law.[72] Hence a fee chargeable for taxes collected by distress or by levy and sale cannot be claimed where payment was made on mere demand or after a levy and without a sale.[73]

A tax collector is not entitled to commissions on the sums for which the state bids in land at a delinquent tax-sale. State *v.* Brewer, 64 Ala. 287. Nor is he entitled to commissions on taxes worked out on the roads Brennan's Appeal, 1 Walk. (Pa.) 522.

What are "county taxes" with reference to collector's right to commissions on their collection see Butt *v.* Montgomery County, 62 Miss. 213; State *v.* Ewing, 116 Mo. 129, 22 S. W. 476.

Commission for collection of liquor licenses see Socorro Bd. of Education *v.* Robinson, 7 N. M. 231, 34 Pac. 295.

Assumpsit will lie against a tax collector to recover excessive fees paid to him. Benton *v.* Goodale, 66 N. H. 424, 30 Atl. 1121.

67 Hughes *v.* People, 82 Ill. 78; Broadwell *v.* People, 76 Ill. 554; Backus *v.* Wayne County Treasurer, 99 Mich. 218, 58 N. W. 62; Lane *v.* Coos County, 10 Oreg. 123. See Combs *v.* Breathitt County, 46 S. W. 505, 20 Ky. L. Rep. 529.

68. Yazoo, etc., R. Co. *v.* Loye, 69 Miss. 109, 12 So. 266.

69. Young *v.* East Baton Rouge Parish, 116 La. 379, 40 So. 768. *Compare* State *v.* Bloxham, 33 Fla. 482, 15 So. 227.

70. Joliet *v.* Tuohey, 1 Ill. App. 483.

71. *California.*— Boggs *v.* Placer County, 65 Cal. 561, 4 Pac. 569.

Georgia.— Keen *v.* Rouse, 44 Ga. 601.

Kentucky.— Citizens' Nat. Bank *v.* Com., 118 Ky. 51, 80 S. W. 479, 25 Ky. L. Rep. 2254, 81 S. W. 686, 26 Ky. L. Rep. 62.

Missouri.— Gordon *v.* Lafayette County, 74 Mo. 426.

New Mexico.— Baca *v.* Bernalillo County, 10 N. M. 438, 62 Pac. 979.

New York.— Livingston County *v.* McCartney, 26 Barb. 90.

Ohio.— State *v.* Godfrey, 24 Ohio Cir. Ct. 455, holding that a county auditor who places omitted property on the tax duplicate and collects the tax on it is entitled to his commission, notwithstanding the fact that he was aided by a tax inquisitor.

Tennessee.—State *v.* Crutchfield, (Ch. App. 1899) 52 S. W. 335.

See 45 Cent. Dig. tit. "Taxation," § 1045.

72. *Alabama.*— Shields *v.* Sheffield, 79 Ala. 91; Gachet *v.* McCall, 50 Ala. 307.

California.—San Mateo County *v.* Maloney, 71 Cal. 205, 12 Pac. 53.

Idaho.— Fremont County *v.* Brandon, 6 Ida. 482, 56 Pac. 264.

Kentucky.— Riedel *v.* Com., 118 Ky. 926, 82 S. W. 635, 26 Ky. L. Rep. 898.

Minnesota.— Justus *v.* Ramsey County, 94 Minn. 72, 101 N. W. 943.

New York.— Manhattan R. Co. *v.* Merges, 167 N Y. 539, 60 N. E. 1115 [*affirming* 38 N. Y. App. Div. 120, 56 N. Y. Suppl. 563].

Ohio.— Stormer *v.* Lucas County, 11 Ohio S. & C. Pl. Dec. 49, 8 Ohio N. P. 110.

Tennessee.—Harriman Imp. Co. *v.* McNutt, (Ch. App. 1896) 37 S. W. 396.

Texas.— State *v.* Wolfe, (Civ. App. 1899) 51 S. W. 657.

Vermont.— Woodward *v.* Rutland, 61 Vt. 316, 17 Atl. 797.

See 45 Cent. Dig. tit. "Taxation," § 1045.

Unsuccessful proceedings on warrant.— In Schmid *v.* Brown County, 44 Minn. 67, 46 N. W. 145, it was held that the collector of taxes is entitled to the same compensation for services rendered in an attempt to collect a tax warrant which, by no fault of his, does not succeed, as the law allows to a constable on executions which he is unable to collect. But this case was subsequently overruled and the contrary held in Chapel *v.* Ramsey County, 71 Minn. 18, 73 N. W. 520.

73. *Mississippi.*—Anderson *v.* Hawks, 70 Miss. 639, 12 So. 697. But *compare* Miller *v.* Delta, etc., Land Co., 74 Misc. 110, 20 So. 875.

Nebraska.— Kane *v.* Union Pac. R. Co., 5 Nebr. 105.

New York.— Manhattan R. Co. *v.* Merges, 38 N. Y. App. Div. 120, 56 N. Y. Suppl. 563 [*affirmed* in 167 N. Y. 539, 60 N. E. 1115].

North Carolina.— State *v.* Bisaner, 97 N. C. 503, 2 S. E. 368.

South Carolina.— Cleveland *v.* McCravy, 46 S. C. 252, 24 S. E. 175.

Tennessee.— Hill *v.* Allen, (Ch. App. 1896) 39 S. W. 892.

See 45 Cent Dig. tit. "Taxation," § 1045.

The same rule applies to mileage or travel fees incurred in enforcing the payment of taxes.[74]

(III) *As Between Successive Collectors.* As a rule a collector of taxes, or a sheriff in his capacity as a collector, is not entitled to commissions on taxes collected by his successor in office.[75] But an outgoing sheriff is entitled to the commissions on the amount of taxes he pays to his successor in office, as required by statute.[76] And it has been held under certain circumstances that where the substantial and responsible duties of the collector of back taxes were performed by one collector, while actual payment was made to his successor, the former was entitled to the statutory fees.[77]

b. Amount of Salary or Commissions. The amount receivable by a tax collector as salary, commissions, or fees is ordinarily regulated by statute, and the provisions of the law in this particular will be strictly followed and will be superior to any local ordinance or any private contract between the local authorities and the collector.[78] A statute allowing the tax collector a commission on the "sum

74. Thralls *v.* Sumner County, 24 Kan. 594; Labette County *v.* Franklin, 16 Kan. 450; Joslyn *v.* Tracy, 19 Vt. 569; Henry *v.* Tilson, 17 Vt. 479.

75. Union County *v.* Cowser, 24 Ark. 51, holding that a sheriff is not entitled to commissions except where he collects the taxes, and if he fails to take the tax book, and it is delivered to his successor, he has no claim for commissions on the taxes collected by his successor. See also Graves *v.* Bullen, (Tex. Civ. App. 1909) 115 S. W. 1177, holding that where plaintiff was legally elected collector of a county, he became entitled to the office and the emoluments thereof as soon as he took the oath of office and qualified. In the case last cited defendant, before retiring from the office of tax collector, executed, as paid, the tax receipts of a large number of taxpayers in the county, listed on his official tax roll. The taxes had not been paid or tendered, defendant's purpose being to advance the money and pay the taxes, holding the receipts as a personal claim for the money so advanced against the taxpayers, and thus benefit by the commissions after his term. When plaintiff qualified as tax collector, these receipts had not been removed from the office nor delivered by defendant to the taxpayers, nor the taxes paid either by them or by defendant, who, after retiring from the office, paid the taxes in full. It was held that such transaction was without authority, and that plaintiff was entitled to recover commissions on the taxes so paid.

Collector employed by treasurer.— A person employed or appointed by a county treasurer under Ohio Rev. St. § 2858, as collector of delinquent personal taxes, in making his contract of employment assumed the risk of the death of the treasurer appointing him, and of the loss of income which a revocation of his appointment by the successor of the treasurer would entail, and he was not entitled to commissions on taxes after the termination of his employment by the death of the treasurer appointing him, and revocation of his appointment by the successor, the right to compensation being coexistent with the right to hold the position. Brady *v.* French, 9 Ohio S. & C. Pl. Dec. 202, 6 Ohio N. P. 127.

76. Randolph County *v.* Trogden, 75 N. C. 350.

77. Watson *v.* Schnecko, 13 Mo. App. 208, holding that a collector who performed all preliminary duties as to the collection of back taxes, began a suit to recover them, and conducted it to judgment, was entitled to the commissions provided by the statutes, although he was not in office when the judgment was rendered and when the taxes were collected thereon.

Penalty accruing to officer demanding taxes as fee.— Under a statute to enforce the collection of taxes against banks, etc. (Ohio Act March 14, 1853), providing that if the taxes should remain unpaid until a certain day, the treasurer of the county should "forthwith demand payment of the amount of such taxes, and five per centum penalty thereon, which penalty shall be for the use of the treasurer," it was held that the treasurer making the demand was entitled to such penalty as fees, and might retain it, and might recover it from his successor if collected by the latter. It was said, however, that he was not entitled to the one per cent commission for collection of the taxes, as that accrued, if at all, to the treasurer who actually collected the money. Thomas *v.* Hamilton County Auditor, 6 Ohio St. 113.

78. *Arkansas.*—Wilson *v.* State, 51 Ark. 212, 10 S. W. 491.

California.—Alameda County *v.* Dalton, 148 Cal. 246, 82 Pac. 1050; Yolo County *v.* Colgan, 132 Cal. 265, 64 Pac. 403, 84 Am. St. Rep. 41; Orange County *v.* Harris, 97 Cal. 600, 32 Pac. 594; Swinnerton *v.* Monterey County, 76 Cal. 113, 18 Pac. 135; Faughnan *v.* Tuolumne County, 35 Cal. 133.

Florida.— State *v.* Drew, 16 Fla. 303.

Idaho.—Fremont County *v.* Brandon, 6 Ida. 482, 56 Pac. 264; Wickersham *v.* Elmore County, 4 Ida. 137, 36 Pac. 700; Cunningham *v.* Moody, 3 Ida. 125, 28 Pac. 395; Gorman *v.* Boise County, 1 Ida. 647.

Illinois.— Ryan *v.* People, 117 Ill. 486, 6 N. E. 37; Waukegan *v.* Foote, 91 Ill. App. 588.

collected" means revenue collected, and he cannot charge a commission on sums collected as costs.[79] Nor can he do so on the discount allowed by law to the taxpayer for prompt payment.[80] Where the statute fixes the commission of a tax collector, the county supervisors cannot make a contract with him allowing him any other or greater compensation than that designated in the statute.[81] Where a contract with a tax collector is made, it must definitely fix his compensation, and it is not enough to prescribe that it shall not exceed a certain sum or a certain per cent.[82]

c. Allowance and Payment. Under the systems in force in some states, the tax collector is allowed to retain his fees or commissions out of the money which he collects, paying over the balance only.[83] But more usually he is to pay into

Indiana.— Warren *v.* Britton, 84 Ind. 14.

Kentucky.— Green County *v.* Howard, 127 Ky. 379, 105 S. W. 897, 32 Ky. L. Rep. 243; Riedel *v.* Com., 118 Ky. 926, 82 S. W. 635, 26 Ky. L. Rep. 898; Little *v.* Strow, 112 Ky. 527, 66 S. W. 282, 23 Ky. L. Rep. 1829; Reams *v.* McHargue, 111 Ky. 163, 63 S. W. 437, 23 Ky. L. Rep. 540; Pence *v.* Nelson County, 107 Ky. 66, 53 S. W. 25, 21 Ky. L. Rep. 724; Pendleton County *v.* McMillan, 104 Ky. 816, 48 S. W. 154, 20 Ky. L. Rep. 1017; Montgomery County Ct. *v.* Chenault, 47 S. W. 457, 20 Ky. L. Rep. 704.

Maine.— Gould *v.* New Portland, 15 Me. 28.

Michigan.— Texas Tp. *v.* Wager, 12 Mich. 39.

Mississippi.— Yazoo, etc., R. Co. *v.* Love, 69 Miss. 109, 12 So. 266.

Missouri.— State *v.* Hawkins, 169 Mo. 615, 70 S. W. 119; St. Louis Bd. of Education *v.* Ziegenhein, 156 Mo. 313, 56 S. W. 888; State *v.* Ewing, 116 Mo. 129, 22 S. W. 476.

Nebraska.— State *v.* Cornell, 54 Nebr. 647, 75 N. W. 25.

Nevada.— State *v.* Donnelly, 20 Nev. 214, 19 Pac. 680.

New Jersey.— Demarest *v.* New Barbadoes Tp., 40 N. J. L. 604.

New York.— Pearsall *v.* Brower, 120 N. Y. App. Div. 584, 105 N. Y. Suppl. 207; People *v.* Besson, 2 Silv. Sup. 576, 6 N. Y. Suppl. 135.

North Carolina.— New Hanover County *v.* Stedman, 141 N. C. 448, 54 S. E. 269.

Pennsylvania.— Berks County *v.* Levan, 86 Pa. St. 360; Sides *v.* Lancaster County, 9 Pa. Dist. 609; Com. *v.* Scott, 7 Pa. Co. Ct. 409; Ephrata Tp. School Bd. *v.* Lancaster County, 17 Lanc. L. Rev. 317; Buckwalter *v.* Lancaster County, 16 Lanc. L. Rev. 84.

South Carolina.— Treasurers *v.* Burger, 3 Rich. 357.

Tennessee.— State *v.* Murphy, 101 Tenn. 515, 47 S. W. 1098; Davidson County *v.* De Grove, 2 Coldw. 494.

Texas.— Eustis *v.* Henrietta, 91 Tex. 325, 43 S. W. 259; Ramsey *v.* State, 78 Tex. 602, 14 S. W. 793; Beavens *v.* Houston, 54 Tex. 277.

West Virginia.— Hawkins *v.* Bare, 63 W. Va. 431, 60 S. E. 391.

Canada.— Welland *v.* Brown, 4 Ont. 217.

See 45 Cent. Dig. tit. "Taxation," § 1047.

Unlawful increase of compensation.— A statute allowing a commission for the collection of license-taxes is not applicable to the case of a tax collector whose term began before the statute was passed, as otherwise the constitutional provision against an increase in compensation during the term of an incumbent would be violated. Butte County *v.* Merrill, 141 Cal. 396, 74 Pac. 1036.

Ordinance contravening statute.— A city cannot, by ordinance or otherwise, prevent the township collector from retaining his full commission from the city taxes collected by him as township collector. Bloomington *v.* Calhoun, 86 Ill. App. 491.

Judgment for fees and costs.— Where a sheriff who has levied a tax warrant obtains judgment in an action of replevin for the taxes and his costs and fees, the county has no power, on a compromise with the debtor, to satisfy the judgment so far as relates to the costs and fees. McKinnon *v.* Carlton County, 71 Minn. 481, 73 N. W. 1085.

79. State *v.* Smith, 13 Mo. App. 421.

80. Com. *v.* Scott, 7 Pa. Co. Ct. 409.

81. Massie *v.* Harrison County, 129 Iowa 277, 105 N. W. 507. But it seems that they may allow him a further compensation for services not within the scope of his duties as tax collector. State *v.* Georgetown Dist. Public Buildings Com'rs, 2 Rich. (S. C.) 413.

82. Hamilton County *v.* Arnold, 65 Ohio St. 479, 63 N. E. 81.

83. Sacramento County *v.* Colgan, 114 Cal. 246, 46 Pac. 175; Foresman *v.* Johnson, 65 Ind. 132; Hethcock *v.* Crawford County, 200 Mo. 170, 98 S. W. 582; State *v.* Alsup, 91 Mo. 172, 4 S. W. 31; Walker County *v.* Fidelity, etc., Co., 107 Fed. 851, 47 C. C. A. 15.

Recovery of commissions after payment to county.— In Missouri, where a collector of taxes is allowed by statute to retain five per cent of back taxes collected as commissions, together with a penalty of four per cent collected from the taxpayer, and it is provided (Rev. St. (1899) § 9255) that a collector shall file each month with the county clerk a statement of the taxes collected during the preceding month, and shall "pay the same, less his commissions, into the state and county treasuries," it was held that a collector who retains the penalty and pays the entire amount of the taxes collected to the county cannot thereafter claim payment of the five per cent commission from the county; his mistake in failing to deduct his commissions being one of law. Hethcock *v.* Crawford County, 200 Mo. 170, 98 S. W. 582.

the treasury the entire amount collected, and his compensation is then audited, allowed, and paid as other claims against the state or county.[84] And, although he has no lien on the money in his hands, he is a preferred creditor and entitled to prior payment out of the funds raised by his collections.[85]

4. AUTHORITY TO COLLECT[86] — a. In General. To constitute full authority for the collection of taxes, the person assuming that function must be the officer designated by statute or ordinance or commission,[87] and he must have been duly elected or appointed,[88] and have qualified for the office,[89] and must be provided with the necessary warrant or other process of authorization.[90] A tax collector

84. *Alabama.*— Shaver *v.* Robinson, 59 Ala. 195.

California.— Donahue *v.* El Dorado County, 49 Cal. 248.

Idaho.— Moscow *v.* Latah County, 5 Ida. 36, 46 Pac. 874; Wickersham *v.* Elmore County, 4 Ida. 137, 36 Pac. 700; Guheen *v.* Curtis, 3 Ida. 443, 31 Pac. 805; Cunningham *v.* Moody, 3 Ida. 125, 28 Pac. 395.

Louisiana.— Scarborough *v.* Stevens, 3 Rob. 147.

Maryland.— Allen *v.* State, 98 Md. 697, 57 Atl. 646; Seidenstricker *v.* State, 2 Gill 374.

Missouri.— State *v.* Smith, 13 Mo. App. 421.

Tennessee.— State *v.* Murphy, 101 Tenn. 515, 47 S. W. 1098; McLean *v.* State, 8 Heisk. 22; Winchester *v.* Slatter, 2 Heisk. 65.

Texas.— Dean *v.* State, 54 Tex. 313. See Bailey *v.* Aransas County, 46 Tex. Civ. App. 547, 102 S. W. 1159.

See 45 Cent. Dig. tit. "Taxation," § 1048.

Commissions on poll taxes.— The requirement of the Alabama constitution that the money derived from the poll tax shall be "exclusively" applied in aid of the school fund does not import that such tax shall not bear the expense of its own collection, but reference is intended to the net amount derived from such tax. Shaver *v.* Robinson, 59 Ala. 195.

Payment by county tax collector to contractor with county.— The fact that the tax collector of a county is not a party to a contract of the county with another person to pay him a certain per cent of all moneys collected by him on delinquen tax rolls does not affect the duty of the tax collector to obey an order of the commissioners' court to make payment to such other person according to such contract. Bailey *v.* Aransas County, 46 Tex. Civ. App. 547, 102 S. W. 1159.

85. Chapman *v.* Smith, 20 Ga. 572; Grimes *v.* Goodell, 3 Nev. 79.

86. As dependent on time of payment see *supra*, IX, A, 1, e.

De facto collectors see *supra*, X, 2, f.

87. *California.*— Mitchell *v.* Crosby, 46 Cal. 97.

Georgia.— Smith *v.* Goldsmith, 63 Ga. 736.

Indiana.— Burns Annot. St. (1901) § 7634, providing that the state auditor shall direct and superintend the collection of all moneys due the state, did not authorize such auditor to collect foreign insurance taxes, required to be paid into the "treasury of the state" by Burns Annot. St. (1901) § 7664. Sherrick *v.* State, 167 Ind. 345, 79 N. E. 193. See also Dailey *v.* State, 171 Ind. 646, 87 N. E. 4 [*transferred* from the appellate court, 42 Ind. App. 690, 86 N. E. 498].

Kentucky.— Com. *v.* Louisville Water Co., 132 Ky. 305, 116 S. W. 712; Com. *v.* Wade, 126 Ky. 791, 104 S. W. 965, 31 Ky. L. Rep. 1185.

Maryland.— Allegany County *v.* Union Min. Co., 61 Md. 545.

Nebraska.— Logan County *v.* Carnahan, 66 Nebr. 685, 92 N. W. 984, 95 N. W. 812.

Pennsylvania.— Com. *v.* Topper, 219 Pa. St. 221, 68 Atl. 666; Com. *v.* Connor, 207 Pa. St. 263, 56 Atl. 443.

See 45 Cent. Dig. tit. "Taxation," § 1051.

Authority by municipal ordinance.— A collector of taxes in a town under an ordinance must strictly follow its directions in his proceedings, and when acting under a special authority he must show affirmatively the warrant of his proceeding. Allen *v.* Scott, 13 Ill. 80.

Illegality of prior proceedings.— A collector is not excused from the performance of any duty as such by the illegality of the prior proceedings of the town, unless it prevents him from performing his duty safely. Kellar *v.* Savage, 17 Me. 444.

Organization of new county.— Where territory is detached from a county and organized into a new county, the treasurer of the old county cannot be required to collect from the taxpayers of the new county taxes levied prior to the division. State *v.* Clevenger, 27 Nebr. 422, 43 N. W. 243, 20 Am. St. Rep. 674.

88. Slade *v.* Governor, 14 N. C. 365; Dickey *v.* Alley, 12 N. C. 453; Lenoir *v.* Wellborn, 12 N. C. 451; Pottsville Borough Town Council's Appeal, 1 Mona. (Pa.) 705. And see *supra*, X, A, 2, d.

89. Baker *v.* Webber, 102 Me. 414, 67 Atl. 144. See *supra*, X, A, 2, e.

90. See *infra*, X, A, 4, e. And see Shaw *v.* Orr, 30 Iowa 355 (as to effect of temporary surrender of tax list to the county treasurer); Cadman *v.* Smith, 15 Okla. 633, 85 Pac. 346 (authority to proceed with the collection of taxes is derived from the warrant, not from the provisions of the statute); Texas, etc., R. Co. *v.* State, 43 Tex. Civ. App. 580, 97 S. W. 142.

Certification of levy.— It is the duty of the sheriff or collector of revenue to take notice of the levy of taxes by the fiscal court and to collect and distribute it as by law required, and a special certification of the levy is not

of one county has no authority to go into another county and in person execute his process for taxes there.[91]

b. Taxes Within Authority of Collector. Although taxes levied by various authorities or for various purposes may all be assessed on the same persons or property and all be due at the same time, it does not follow that they are to be collected by the same persons. Regard must be had to the statutes or ordinances, which often distribute the duty among collectors for various municipal divisions or for various funds; and generally, authority to collect one particular tax does not carry with it authority to collect another.[92] A collector generally has authority to demand and enforce the payment of all the taxes on the list committed to him, although assessed before he was appointed,[93] or although they become delinquent and the time expires when he should make his return;[94] and he may also be given authority to collect arrears of taxes or the delinquent taxes of preceding years.[95]

c. Death or Expiration of Term. A collector of taxes generally has authority to proceed with the collection of all the taxes on the list or roll committed to him, even after the expiration of the year or other term for which he was appointed, and although his successor has been chosen and qualified.[96] Upon the death of a collector, the completion of his work will ordinarily devolve upon his successor in office, although statutes have sometimes been enacted authorizing the sureties on the deceased collector's bond, or his administrator, to collect the balance of the taxes.[97]

d. Delivery of Assessment Roll, Tax List, or Duplicate. In some states, the

required. Com. *v.* Wade, 126 Ky. 791, 104 S. W. 965, 31 Ky. L. Rep. 1185.

91. Russell *v.* P binson, 153 Ala. 327, 44 So. 1040.

92. *California.*— Mitchell *v.* Crosby, 46 Cal. 97.

Indiana.— Paoli *v.* Charles, 164 Ind. 690, 74 N. E. 508. See also Sherrick *v.* State, 167 Ind. 345, 79 N. E. 193.

Iowa.— Lamb *v.* Anderson, 54 Iowa 190, 3 N. W. 416, 6 N. W. 268.

Kentucky.— Com. *v.* Louisville Water Co., 132 Ky. 305, 116 S. W. 712, authority to collect "back taxes," as between sheriff and revenue agents under the act of March 5, 1906 (Laws (1906), p. 152, c. 22). The collectors authorized to be appointed take the place of the sheriff and fill his office so far as the collection of revenue is concerned, and it is their duty to collect all taxes levied and collectable for that year, whether state or county, regular or special. Com. *v.* Wade, 126 Ky. 791, 104 S. W. 965, 31 Ky. L. Rep. 1185.

New Jersey.— State *v.* Craig, 51 N. J. L. 462, 17 Atl. 955.

New York.—Bennett *v.* Robinson, 42 N. Y. App. Div. 412, 59 N. Y. Suppl. 197.

Pennsylvania.— Cunningham *v.* Mitchell, 67 Pa. St. 78; Hilbish *v.* Hower, 58 Pa. St. 93; Chalker *v.* Ives, 55 Pa. St. 81; Com. *v.* Peltz, 6 Phila. 330.

Tennessee.— McLean *v.* State, 8 Heisk. 22.

See 45 Cent. Dig. tit. "Taxation," § 1052.

93. Colburn *v.* Ellis, 7 Mass. 89.

94. Shaw *v.* Orr, 30 Iowa 355; St. Joseph First Nat. Bank *v.* St. Joseph Tp., 46 Mich. 526, 9 N. W. 838; Smith *v.* Messer, 17 N. H. 420; Homer *v.* Cilley, 14 N. H. 85.

95. *Alabama.*— Lott *v.* Mobile County, 79 Ala. 69.

Kentucky.— Shawhan *v.* Harrison County, 116 Ky. 490, 76 S. W. 407, 25 Ky. L. Rep. 734.

Maryland.—McCauley *v.* State, 21 Md. 556.

Mississippi.— State *v.* Harris, 52 Miss. 686.

Missouri.— State *v.* Fullerton, 143 Mo. 682, 44 S. W. 741.

North Carolina.— Wilmington *v.* Cronly, 122 N. C. 383, 388, 30 S. E. 9; Jones *v.* Arrington, 94 N. C. 541.

Ohio.— Matter of Arnold, 11 Ohio S. & C. Pl. Dec. 1, 8 Ohio N. P. 112.

Pennsylvania.— Com. *v.* Western Union Tel. Co., 2 Dauph. Co. Rep. 40.

Tennessee— Otis *v.* Boyd, 8 Lea 679; Bailey *v.* Lockhart, 4 Yerg. 567.

See 45 Cent. Dig. tit. "Taxation," § 1053.

Penalties, interest, and fees see Danforth *v.* Williams, 9 Mass. 324; Toledo Bridge Co. *v.* Yost, 22 Ohio Cir. Ct. 376, 12 Ohio Cir. Dec. 448; Ireland *v.* Gordon, 39 Tex. 253.

96. *Connecticut.*— Picket *v.* Allen, 10 Conn. 146.

Delaware.— Smith *v.* Riding, 9 Houst. 235, 22 Atl. 97.

Kentucky.— Jones *v.* Gallatin County, 78 Ky. 491. But *compare* Blackwell *v.* Lewis, 122 Ky. 845, 93 S. W. 40, 29 Ky. L. Rep. 385; Com. *v.* Masonic Temple Co., 89 Ky. 658, 13 S. W. 121, 11 Ky. L. Rep. 982.

Louisiana.— Voisin *v.* Guillet, 4 Rob. 267.

North Carolina.— Jones *v.* Arrington, 91 N. C. 125.

Rhode Island.— Briggs *v.* Carr, 27 R. I. 477, 63 Atl. 487.

Tennessee.— Brown *v.* Porter, 7 Humphr. 373.

See 45 Cent. Dig. tit. "Taxation," § 1054.

But *compare* Matter of Long, 40 N. Y. App. Div. 152, 57 N. Y. Suppl. 929.

97. Morton *v.* Ashbee, 46 N. C. 312.

collector's authority to proceed with the collection of the taxes is based on the delivery to him of the original assessment roll or list or a duplicate thereof; having this he needs no other warrant, but without it he cannot lawfully proceed.[98] The list or duplicate must be properly certified or authenticated as the law directs,[99] and should be delivered to the collector at or within the time appointed, although a delay not shown to have been prejudicial to any one will not invalidate the further proceedings.[1]

e. Warrant For Collection — (i) *Nature and Necessity.* Where the collector's authority consists of a warrant or other formal precept, directing him to proceed with the collection of the taxes and to enforce their payment, he must be provided with this process before he can lawfully take any steps against delinquent taxpayers; without it he is a trespasser.[2] The warrant prescribes and limits his authority,[3] constitutes his justification and protection against liability in

98. *Maine.*— Lowe *v.* Weld, 52 Me. 588.
Montana.— State *v.* Weston, 29 Mont. 125, 74 Pac. 415.
New York.— Sheldon *v.* Van Buskirk, 2 N. Y. 473.
North Carolina.— Peebles *v.* Taylor, 121 N. C. 38, 27 S. E. 999.
Texas.— See Texas, etc., R. Co. *v.* State, 43 Tex. Civ. App. 580, 97 S. W. 142; Orange County *v.* Texas, etc., R. Co., 35 Tex. Civ. App. 361, 80 S. W. 670.
United States.— Branch *v.* Davis, 29 Fed. 888.
Canada.— Trenton *v.* Dyer, 24 Can. Sup. Ct. 474.
See 45 Cent. Dig. tit. "Taxation," § 1057.
But in Pennsylvania the authority of a collector of taxes to proceed with the collection is his warrant; the duplicate is but a memorandum of the amount he is to collect from the parties named therein. Hilbish *v.* Hower, 58 Pa. St. 93.
Duty of collector as to obtaining list or duplicate.— It is the duty of the tax collector to obtain the assessment list or duplicate, calling for it at the proper office if necessary, and demanding its delivery to him. Ross *v.* People, 78 Ill. 375; State *v.* Scharff, 3 Gill & J. (Md.) 95.
Sufficiency of delivery.— The delivery of the tax list to the collector before the execution of his bond is not regular, but may be a good conditional delivery and be consummated by the subsequent execution of the bond. McCauley *v.* State, 21 Md. 556; Pierce *v.* Richardson, 37 N. H. 306. But delivery of the tax list to a deputy will not bind the collector. Tucker *v.* Bingham, 12 Lea (Tenn.) 653.

99. Ridgefield *v.* Goodday, 65 N. J. L. 153, 46 Atl. 590; Vienna Corp. *v.* Marr, 9 Can. L. J. 301.

1. Breeze *v.* Haley, 10 Colo. 5, 13 Pac. 913; Oswego County *v.* Betts, 6 N. Y. Suppl. 934; Lewis *v.* Brady, 17 Ont. 377. See Clark *v.* Smith, 31 Misc. (N. Y.) 490, 65 N. Y. Suppl. 646.

2. *Florida.*— Donald *v.* McKinnon, 17 Fla. 746, Under Laws (1895), p. 25, c. 4322, § 36, it is not necessary for a tax collector to obtain a warrant from the county commissioner, unless there has been a total failure of the tax collector to obey the command of the warrant issued by the assessor. Hunt *v.* Turner, 54 Fla. 654, 45 So. 509.
Illinois.— Glos *v.* Randolph, 138 Ill. 268, 27 N. E. 941; Ogden *v.* Bemis, 125 Ill. 105, 17 N. E. 55; Eagan *v.* Connelly, 107 Ill. 458; Ream *v.* Stone, 102 Ill. 359.
Louisiana.— State *v.* Cannon, 44 La. Ann. 734, 11 So. 86.
Maine.— Pearson *v.* Canney, 64 Me. 188; Flint *v.* Sawyer, 30 Me. 226.
Nebraska.— The tax list in the hands of the county treasurer will authorize him to collect the taxes described therein; but, to invest him with jurisdiction to seize personal property in satisfaction of a tax lien thereon, the clerk's warrant provided for by statute must be attached to the list. Unless the clerk's warrant provided for by statute is attached to the tax list in the hands of the county treasurer, there exists no enforceable lien for the payment of taxes against the personal property of a tax debtor. Platte Valley Milling Co. *v.* Malmsten, 79 Nebr. 730, 113 N. W. 229, 79 Nebr. 735, 116 N. W. 962.
New Hampshire.— Taft *v.* Barrett, 58 N. H. 447.
New York.— Brase *v.* Miller, 195 N. Y. 204, 88 N. E. 369; Strong *v.* Walton, 47 N. Y. App. Div. 114, 62 N. Y. Suppl. 353.
Oklahoma— Morrow *v.* Smith, 8 Okla. 267, 61 Pac. 366; Frazier *v.* Prince, 8 Okla. 253, 58 Pac. 751.
Pennsylvania.— Hilbish *v.* Hower, 58 Pa. St. 93; Chalker *v.* Ives, 55 Pa. St. 81. *Compare* Creswell *v.* Montgomery, 13 Pa. Super. Ct. 87.
Utah.— Asper *v.* Moon, 24 Utah 241, 67 Pac. 409.
United States.—Lamb *v.* Farrell, 21 Fed. 5.
See 45 Cent. Dig. tit. "Taxation," § 1058.
But *compare* Jackson County *v.* Gullatt, 84 Ala. 243, 3 So. 906; Harwood *v.* Brownell, 48 Iowa 657; Shaw *v.* Orr, 30 Iowa 355; Parker *v.* Sexton, 29 Iowa 421.
Warrant unnecessary in addition to assessment roll, tax list, etc. see *supra*, X, A. 4, d.

3. Estell *v.* Hawkens, 50 N. J. L. 122, 11 Atl. 265, holding that if the warrant merely directs the collector to make the taxes by sale of the goods and chattels of the delinquent, he has no authority to advertise his lands for sale.

damages for his official acts done in obedience to it,[4] and is *prima facie* the measure of his accountability, all the taxes specified in the warrant or in the accompanying list being presumptively collectable.[5]

(II) *Authority to Make and Authentication.* The official who is to issue the tax warrant is designated in the statute, and no other can perform this duty;[6] but on the other hand, if he unjustifiably refuses to issue the warrant he may be compelled by mandamus.[7] The warrant is always required to be signed by the proper authority;[8] but if that authority is a board of officers, the signatures of a majority are sufficient.[9] It is sometimes required to be under seal, and the omission of the seal is a fatal defect.[10] In some of the states, by statutes, the warrant may be renewed or extended for a further period of time, by an appropriate indorsement by the proper authorities.[11]

(III) *Form and Requisites.* Statutory directions as to the form and contents of a tax warrant must be followed, at least substantially; but mere informalities or irregularities not going to the essence of the collector's authority will not vitiate it.[12] This warrant is not "process" in the ordinary sense of the

4. See *infra*, X, A, 8, b.

But if the tax warrant is void, any sale made or deed given by virtue thereof will be void also. Van Wagenen *v.* Brown, 26 N. J. L. 196.

5. Fake *v.* Whipple, 39 Barb. (N. Y.) 339 [*affirmed* in 39 N. Y. 394, 7 Transcr. App. 115]; Harrisburg *v.* Guiles, 192 Pa. St. 191, 44 Atl. 48.

6. See the statutes of the different states. And see Corbin *v.* Hill, 21 Iowa 70; Walls *v.* Burbank, 17 N. H. 393; Mullins *v.* Jersey City, 61 N. J. L. 135, 38 Atl. 822; Alger *v.* Curry, 40 Vt. 437.

7. People *v.* Halsey, 53 Barb. (N. Y.) 547 [*affirmed* in 37 N. Y. 344, 4 Transcr. App. 261].

8. Scammon *v.* Chicago, 42 Ill. 192.

Place of signature.— It is immaterial in what manner the warrant is signed, whether at the beginning or the end, provided it is signed by the proper authorities and in such a manner as to show that they intended to give it their official sanction. Belfast Sav. Bank *v.* Kennebec Land, etc., Co., 73 Me. 404; Bangor *v.* Lancey, 21 Me. 472; Johnson *v.* Goodridge, 15 Me. 29.

Signature without official designation.— A tax warrant issued by the supervisors of a county is valid, although the persons signing it are not described therein as supervisors, and although their names merely are signed to it without any official designation. Sheldon *v.* Van Buskirk, 2 N. Y. 473. But *compare* Short *v.* State, 79 Ga. 550, 4 S. E. 852.

Signing warrant without assessment.— Where the law requires both the assessment list and a warrant to be delivered to the collector and that both shall be signed by the proper officers, a signing of the warrant alone is not sufficient, although it is contained in the same book with the assessment. Belfast Sav. Bank *v.* Kennebec Land, etc., Co., 73 Me. 404; Bangor *v.* Lancey, 21 Me. 472; Foxcroft *v.* Nevens, 4 Me. 72; Colby *v.* Russell, 3 Me. 227; Chase *v.* Sparhawk, 22 N. H. 134.

9. *Illinois.*— Shaw *v.* Dennis, 10 Ill. 405.

Maine.— Belfast Sav. Bank *v.* Kennebec Land, etc., Co., 73 Me. 404. But see Sanfason *v.* Martin, 55 Me. 110.

Massachusetts.— Sprague *v.* Bailey, 19 Pick. 436.

New Hampshire.— Benton *v.* Merrill, 68 N. H. 369, 39 Atl. 257; Smith *v.* Messer, 17 N. H. 420.

New York.— Chenango Bank *v.* Brown, 26 N. Y. 467; Tallmadge *v.* Rensselaer County, 21 Barb. 611.

See 45 Cent. Dig. tit. "Taxation," § 1059.

But *compare* Townsend *v.* Gray, 1 D. Chipm. (Vt.) 127.

10. People *v.* Henckler, 137 Ill. 580, 27 N. E. 602; Smith *v.* Randall, 3 Hill (N. Y.) 495; Mattocks *v.* McLain Land, etc., Co., 11 Okla. 433, 68 Pac. 501. See Bradford *v.* Randall, 5 Pick. (Mass.) 496. N. Y. Tax Law (Laws (1896), p. 816, c. 908), § 56, providing that after a board of supervisors has levied the taxes for the county at its annual meeting, the board shall annex to the tax roll a warrant under the seal of the county, signed by the chairman and clerk of the board, commanding tax collectors to collect taxes, etc., is mandatory, and a warrant bearing the seal of a board of supervisors, but not the county seal, is fatally defective and a tax-sale based thereon is invalid. Brase *v.* Miller, 195 N. Y. 204, 88 N. E. 369. See also Rochester *v.* Bloss, 77 N. Y. App. Div. 28, 79 N. Y. Suppl. 236 [*affirmed* in 173 N. Y. 646, 66 N. E. 1105].

11. Gratwick, etc., Lumber Co. *v.* Oscoda, 97 Mich. 221, 56 N. W. 600; Phillips *v.* New Buffalo Tp., 68 Mich. 217, 35 N. W. 918; Chenango Bank *v.* Brown, 26 N. Y. 467; New Richmond Lumber Co. *v.* Rogers, 68 Wis. 608, 32 N. W. 700.

12. Scarry *v.* Lewis, 133 Ind. 96, 30 N. E. 411; Lord *v.* Parker, 83 Me. 530, 22 Atl. 392; Machiasport *v.* Small, 77 Me. 109; Bailey *v.* Ackerman, 54 N. H. 527; Wing *v.* Hall, 47 Vt. 182; Goodwin *v.* Perkins, 39 Vt. 598; Walker *v.* Miner, 32 Vt. 769; Spear *v.* Braintree, 24 Vt. 414; Chandler *v.* Spear, 22 Vt. 388; Brown *v.* Wright, 17 Vt. 97, 42 Am. Dec. 481.

term, and therefore need not run in the name of the people or the state,[13] and an error in its date, apparent on the face of the warrant, will not invalidate it.[14] It should of course be directed to the proper person to execute it, and an error in this respect is fatal; but it need not name the officer if it correctly describes him.[15] Unless the warrant itself contains a list of the persons and property assessed and the amounts severally due, it should be attached to or accompanied by an assessment list or rate bill giving these particulars.[16] It should command the collector to collect the several items,[17] and should give him all necessary authority and directions to enforce payment by such measures of distraint, sale of property, etc., as are authorized by the laws of the state.[18] Further, the warrant should direct the collector to pay over the money collected to the proper officer, but the omission of this clause, or an error as to the person to whom he is to account, does not necessarily vitiate it.[19]

Separate warrants for separate taxes unnecessary see Thayer *v.* Stearns, 1 Pick. (Mass.) 482; Brackett *v.* Whidden, 3 N. H. 17.

Alteration of warrant see Rowell *v.* Horton, 57 Vt. 31; Goodwin *v.* Perkins, 39 Vt. 598.

Time for payment.— A tax warrant is not invalidated by the fact that an unreasonably short time was granted for its payment, if the notice and proceedings by the collector were regular. Weeks *v.* Batchelder, 41 Vt. 317.

Showing validity of taxes.— It is not necessary, unless required by statute, that the tax warrant shall show on its face that the taxes were assessed by the proper authority or otherwise that they are lawful and valid. Rice *v.* Burns, 9 Pa. Super. Ct. 58; Buchanan *v.* Cook, 70 Vt. 168, 40 Atl. 102.

Time for return of warrant see Rice *v.* Burns, 9 Pa. Super. Ct. 58.

Delay in delivery of warrant.— A delay in delivering the warrant to the tax collector until after the day fixed by the statute will not invalidate the warrant, provided enough time remains for him to take all necessary steps in executing the warrant according to law. Bradley *v.* Ward, 58 N. Y. 401; Oswego County *v.* Betts, 6 N. Y. Suppl. 934; People *v.* Allen, 6 Wend. (N. Y.) 486.

13. *Colorado.*— Haley *v.* Elliott, 16 Colo. 159, 26 Pac. 559.

Illinois.— Scarritt *v.* Chapman, 11 Ill. 443; Curry *v.* Hinman, 11 Ill. 420.

Maine.— Mussey *v.* White, 3 Me. 290.

Michigan.— Wisner *v.* Davenport, 5 Mich. 501; Tweed *v.* Metcalf, 4 Mich. 579.

Wisconsin.— Sprague *v.* Birchard, 1 Wis. 457, 60 Am. Dec. 393.

See 45 Cent. Dig. tit. "Taxation," § 1060.

14. Drew *v.* Morrill, 62 N. H. 23; Bellows *v.* Weeks, 41 Vt. 590.

15. *Arkansas.*— Keith *v.* Freeman, 43 Ark. 296.

Georgia.— Byars *v.* Curry, 75 Ga. 515.

Michigan.—H. M. Loud, etc., Lumber Co. *v.* Hagar, 118 Mich. 452, 76 N. W. 980; St. Joseph First Nat. Bank *v.* St. Joseph Tp., 46 Mich. 526, 9 N. W. 838.

New Jersey.— Dinsmore *v.* Westcott, 25 N. J. Eq. 470.

Pennsylvania.—Cannell *v.* Crawford County, 59 Pa. St. 196; Stephens *v.* Wilkins, 6 Pa. St. 260.

Vermont.— Wilson *v.* Seavey, 38 Vt. 221; Chandler *v.* Spear, 22 Vt. 388.

See 45 Cent. Dig. tit. "Taxation," § 1060.

16. *Connecticut.*— Goddard *v.* Seymour, 30 Conn. 394; Picket *v.* Allen, 10 Conn. 146.

Massachusetts.— Barnard *v.* Graves, 13 Metc. 85.

Michigan.— West Michigan Lumber Co. *v.* Dean, 73 Mich. 459, 41 N. W. 504.

Missouri.— Dickson *v.* Rouse, 80 Mo. 224.

Nebraska.— Reynolds *v.* Fisher, 43 Nebr. 172, 61 N. W. 695.

New Hampshire.— Clark *v.* Bragdon, 37 N. H. 562; Wells *v.* Burbank, 17 N. H. 393.

New York.— Upper Nyack *v.* Jewett, 86 N. Y. App. Div. 254, 83 N. Y. Suppl. 838 [*affirmed* in 181 N. Y. 514, 73 N. E. 1133]; French *v.* Whittlesey, 30 N. Y. Suppl. 363.

See 45 Cent. Dig. tit. "Taxation," § 1061.

Description of persons and property in tax warrant, and conformity with assessment see Whitmore *v.* Learned, 70 Me. 276; Hunt *v.* Perry, 165 Mass. 287, 43 N. E. 103; Howard *v.* Proctor, 7 Gray (Mass.) 128; Van Dyke *v.* Carleton, 61 N. H. 574; Estell *v.* Hawkens, 50 N. J. L. 122, 11 Atl. 265; American Tool Co. *v.* Smith, 32 Hun (N. Y.) 121, 14 Abb. N. Cas. 378 [*affirmed* in 96 N. Y. 670].

17. Webster *v.* People, 98 Ill. 343; Cheshire *v.* Howland, 13 Gray (Mass.) 321; Perley *v.* Parker, 20 N. H. 263.

18. Frankfort *v.* White, 41 Me. 537; Westhampton *v.* Searle, 127 Mass. 502; King *v.* Whitcomb, 1 Metc. (Mass.) 328; Estell *v.* Hawkens, 50 N. J. L. 122, 11 Atl. 265; Cadman *v.* Smith, 15 Okla. 633, 85 Pac. 346.

Effect of unauthorized mandate.— Where the warrant contains a direction to the collector to take steps for enforcing payment which are not authorized by law, or in regard to the amount to be collected, this does not vitiate the warrant, if the unlawful portion is separable from the rest and no actual attempt to obey it is made; nor is the collector bound to act upon a precept or direction in his warrant which the law does not sanction or require. Bath *v.* Whitmore, 79 Me. 182, 9 Atl. 119; Snow *v.* Weeks, 77 Me. 429, 1 Atl. 243; Gordon *v.* Clifford, 28 N. H. 402.

19. Leominster *v.* Conant, 139 Mass. 384, 2 N. E. 690; Clemons *v.* Lewis, 36 Vt. 673.

f. Tax Bills. Where the statute requires tax collectors to render to known owners of property a bill of their taxes, this provision is mandatory, and it must be complied with before any further steps can lawfully be taken.[20] The bill should contain such a description of the property taxed and such further information as will make it perfectly intelligible to the owner of the property.[21] Tax bills are usually by statute made *prima facie* evidence of the validity of the assessment and that the amount stated as due is just and correct.[22]

g. Authority to Compromise. A tax collector has no authority to compromise with a delinquent taxpayer by accepting less than the full amount due.[23]

5. Accounting and Paying Over Taxes Collected — a. Accounting by Tax Collectors — (i) *In General.* A collector of taxes is bound and may be compelled to settle his accounts at the time fixed by law or extended by the proper authorities,[24] and no previous demand for an accounting is necessary.[25] The accounting should be before the proper officers and in conformity with all the directions of the statute, there being generally no power to waive positive requirements of the law in this regard.[26] In some states the practice is to charge the collector with the amount actually received by him as taxes and allow him proper credits against the same;[27] in others he is primarily charged with the entire amount of the tax list or duplicate, and must then, in addition to ordinary allowances and deductions, establish his right to exoneration for taxes uncollected.[28] But under either system neither the collector nor the county can

20. Benzinger *v.* Gies, 87 Md. 704, 40 Atl. 654; Amherst College *v.* Amherst Assessors, 193 Mass. 168, 79 N. E. 248; Benton *v.* Merrill, 68 N. H. 369, 39 Atl. 257; Davis *v.* Sawyer, 66 N. H. 34, 20 Atl. 100; Asper *v.* Moon, 24 Utah 241, 67 Pac. 409.

21. *Kentucky.*— Louisville Bridge Co. *v.* Louisville, 58 S. W. 598, 22 Ky. L. Rep. 703.

Louisiana.— Mullan *v.* Creditors, 39 La. Ann. 397, 2 So. 45, disparity between tax bills and assessor's certificate.

Massachusetts.— A postal card containing the necessary information may serve as a tax bill. Amherst College *v.* Amherst, 193 Mass. 168, 79 N. E. 248.

Missouri.— State *v.* Burrough, 174 Mo. 700, 74 S. W. 610; State *v.* Burr, 143 Mo. 209, 44 S. W. 1045 (effect of mistake in spelling name); Barnett *v.* St. Louis Public School Bd., 61 Mo. App. 539.

Vermont.— Buchanan *v.* Cook, 70 Vt. 168, 40 Atl. 102; Hughes *v.* Kelley, 69 Vt. 443, 38 Atl. 91; Wilmot *v.* Lathrop, 67 Vt. 671, 32 Atl. 861, tax bills not required to be verified.

See 45 Cent. Dig. tit. "Taxation," § 1065.

22. Louisville *v.* Johnson, 95 Ky. 254, 24 S. W. 875, 15 Ky. L. Rep. 615; Mullan *v.* Creditors, 39 La. Ann. 397, 2 So. 45; State *v.* Fullerton, 143 Mo. 682, 44 S. W. 741; State *v.* Maloney, 113 Mo. 367, 20 S. W. 1064; State *v.* Mastin, 103 Mo. 508, 15 S. W. 529; State *v.* Miller, 16 Mo. App. 539.

23. State *v.* Central Pac. R. Co., 9 Nev. 79, 10 Nev. 47; Cincinnati Southern R. Co. *v.* Guenther, 19 Fed. 395. And see Territory *v.* Gaines, 11 Ariz. 270, 93 Pac. 281. *Compare* Luzerne County *v.* Law, Wilcox (Pa.) 205. See also *supra*, IX, B, 1.

24. Sayer *v.* Brown, 119 Ga. 539, 46 S. E. 649.

Time for accounting see Moeng *v.* People, 138 Ill. 513, 28 N. E. 1073 (notice by county collector to town collectors to account); State *v.* Lanier, 31 La. Ann. 423 (auditor cannot extend time); Ray *v.* Horton, 77 N. C. 334 (sheriff); Com. *v.* Ferrell, 17 Pa. Co. Ct. 263 (time after expiration of term).

Mandamus not the proper remedy to compel a tax collector to settle his accounts see *In re* Quin, 23 U. C. Q. B. 308.

Payment without accounting.— A tax collector is not discharged by a payment made to the treasurer without complying with the requirements of the statute as to the passing of his accounts with the controller. Wood *v.* State, 8 Heisk. (Tenn.) 329.

25. Carnall *v.* Crawford County, 11 Ark. 604; State *v.* Woodside, 31 N. C. 496; State *v.* McIntosh, 31 N. C. 307.

26. *Alabama.*— State *v.* Lott, 69 Ala. 147.

Iowa.— Ford *v.* Jefferson County, 4 Greene 273.

Kentucky.— Fidelity, etc., Co. *v.* Logan County, 119 Ky. 428, 84 S. W. 341, 27 Ky. L. Rep. 66, necessity of recording settlement.

Maine.— Richmond *v.* Toothaker, 69 Me. 451.

New York.— Colman *v.* Shattuck, 62 N. Y. 348.

Texas.— Shaw *v.* State, 43 Tex. 355.

See 45 Cent. Dig. tit. "Taxation," § 1070.

27. Vance *v.* State, 35 Ark. 176; Adams *v.* Conner, 73 Miss. 425, 19 So. 198; Ysleta *v.* Lowenstein, (Tex. Civ. App. 1894) 25 S. W. 444.

28. *Alabama.*— State *v.* Brewer, 64 Ala. 287.

Louisiana.— State *v.* Guilbeau, 37 La. Ann. 718.

Pennsylvania.— Com. *v.* Carson, 28 Pa. Super. Ct. 477; *In re* Bryn Mawr Trust Co., 20 Montg. Co. Rep. 54.

Tennessee.— Dawson *v.* Griffin, 4 Sneed 381.

Utah.— Hamer *v.* Weber County, 11 Utah 1, 37 Pac. 741.

offset a claim or demand which is not directly connected with his acts or duties in the character of tax collector.[29] Penalties on delinquent county taxes belong to the county, and the sheriff collecting them must account for them on his official bond.[30]

(II) *Conclusiveness and Effect of Accounting.* A settlement of a tax collector's accounts, properly had, is *prima facie* evidence against all parties concerned, including the sureties on his bond, as to the amount due or chargeable, but is not conclusive in any direct proceeding,[31] although it is not impeachable collaterally.[32] But where the settlement is made with a court of law or a board acting judicially, its finding and adjudication as to the state of the accounts has the force of a judgment and is of course conclusive.[33]

b. Responsibility For Money Collected. A collector of taxes is not regarded as a bailee of the money collected by him and remaining in his hands, but he is an insurer of its safety against loss by any means whatever, including such losses as arise from the act of God or the public enemy.[34] He is therefore responsible for the taxes collected, although he is robbed of the money or it is stolen from him,[35]

Virginia.— See Nottoway County *v.* Powell, 106 Va. 751, 56 S. E. 812.

See 45 Cent. Dig. tit. "Taxation," § 1071.

29. Lawson *v.* Pulaski County, 3 Ark. 1.

30. Davis *v.* Com., 107 S. W. 306, 32 Ky. L. Rep. 811.

31. *Alabama.*— Kilpatrick *v.* Pickens County, 66 Ala. 422; State *v.* Brewer, 64 Ala. 287.

Arkansas.—Wilson *v.* State, 51 Ark. 212, 10 S. W. 491; Crawford *v.* Carson, 35 Ark. 565.

Louisiana.—Young *v.* East Baton Rouge Parish, 116 La. 379, 40 So. 768.

Maryland.— Billingsley *v.* State, 14 Md. 369; State *v.* McKee, 11 Gill & J. 378.

Mississippi.— Lowrey *v.* Biloxi, (1905) 38 So. 42.

Missouri.— State *v.* Smith, 65 Mo. 464; State *v.* Smith, 26 Mo. 226, 72 Am. Dec. 204.

New Jersey.— New Barbadoes Tp. *v.* Demarest, 1 N. J. L. J. 54.

Pennsylvania.— Scott *v.* Strawn, 85 Pa. St. 471. But see Com. *v.* Black, 15 Pa. Co. Ct. 664, holding that an auditor's tax settlement is conclusive unless appealed from.

Texas.— Shaw *v.* State, 43 Tex. 355.

Wisconsin.— Bullwinkel *v.* Guttenberg, 17 Wis. 583.

See 45 Cent. Dig. tit. "Taxation," § 1073.

Setting aside settlement.—A court has power to set aside or reopen a tax collector's settlement of his accounts on the ground of fraud; and it is said that this may be done at any time during the term, without notice to him, and that if the account is incorrect it is presumptively fraudulent. Price *v.* Johnson County, 15 Mo. 433; Greene County *v.* Taylor, 77 N. C. 404.

Action to surcharge a settlement of a sheriff's account of taxes collected for fraud or mistake, under Ky. St. (1903) § 4146, see Davis *v.* Com., 107 S. W. 306, 32 Ky. L. Rep. 811.

Bill in equity by county supervisors to surcharge county treasurer's accountings see Nottoway County *v.* Powell, 106 Va. 751, 56 S. E. 812.

Appeal by taxpayer from audit of tax collector's account see Devlin's Case, 39 Pa. Super. Ct. 311.

32. State *v.* McBride, 76 Ala. 51; Grant County Justices *v.* Bartlett, 5 B. Mon. (Ky.) 195; Montgomery County Ct. *v.* Chenault, 47 S. W. 457, 20 Ky. L. Rep. 704; State *v.* Reid, 45 La. Ann. 162, 12 So. 189; State *v.* Powell, 40 La. Ann. 234, 4 So. 46, 8 Am. St. Rep. 522. But *compare* State *v.* Smith, 65 Mo. 464.

33. Jones *v.* State, 14 Ark. 170; Fidelity, etc., Co. *v.* Logan County, 119 Ky. 428, 84 S. W. 341, 27 Ky. L. Rep. 66; Pulaski County *v.* Watson, 106 Ky. 500, 50 S. W. 861, 21 Ky. L. Rep. 61; Campbell County Ct. *v.* Coons, 6 B. Mon. (Ky.) 521; State *v.* Hawkins, 169 Mo. 615, 70 S. W. 119; McLean *v.* State, 8 Heisk. (Tenn.) 22. And see further, Com. *v.* Moren, 78 S. W. 432, 25 Ky. L. Rep. 1635; Bates *v.* Knott County Ct., 67 S. W. 1006, 24 Ky. L. Rep. 73.

34. Bladen County *v.* Clarke, 73 N. C. 255; State *v.* Harper, 6 Ohio St. 607, 67 Am. Dec. 363. *Compare* U. S. *v.* Thomas, 15 Wall. (U. S.) 337, 21 L. ed. 89; U. S. *v.* Huger, 26 Fed. Cas. No. 15,415, 1 Hughes 397.

35. *Indiana.*— Morbeck *v.* State, 28 Ind. 86.

Massachusetts.— Hancock *v.* Hazzard, 12 Cush. 112, 59 Am. Dec. 171.

New Jersey.— New Providence Tp. *v.* McEachron, 33 N. J. L. 339.

New York.— Muzzy *v.* Shattuck, 1 Den. 233 [*affirmed* in 7 Hill 584 note].

Ohio.— State *v.* Harper, 6 Ohio St. 607, 67 Am. Dec. 363.

Texas.— Boggs *v.* State, 46 Tex. 10.

United States.—U. S. *v.* Dashiel, 4 Wall. 182, 18 L. ed. 319; U. S. *v.* Morgan, 11 How. 154, 13 L. ed. 643; U. S. *v.* Prescott, 3 How. 578, 11 L. ed. 734.

See 45 Cent. Dig. tit. "Taxation," § 1074.

Contra, see Ross *v.* Hatch, 5 Iowa 149; State *v.* Lanier, 31 La. Ann. 423, holding that the collector is not liable for funds lost through robbery, unless it is shown that the loss could have been avoided by the exercise of ordinary care and diligence on his part. And see State *v.* Houston, 78 Ala. 576. 56 Am. Rep. 59, construing a statute requiring

or although it is lost by the failure of a bank in which he has deposited it.[36] It has been held that a collector of taxes is charged with the duty of delivering the same to the proper authorities, and is not a mere debtor to the state and county, but sustains the relation of trustee to them;[37] and therefore that the doctrine as to following trust funds applies where he pays out funds received as taxes in payment of his individual debt or otherwise misapplies them.[38]

c. Duty and Liability to Pay Over Funds. It is the duty of a tax collector to pay over the money actually received by him in the form of taxes, notwithstanding the tax may be illegal or there may be defects in the levy, assessment, or tax warrant.[39] And this he must do punctually at the time or times required by law.[40]

tax collectors to pay into the treasury the moneys collected in funds of the same character as received, and prohibiting their use or conversion of moneys collected, and holding that a collector is not liable for money of which he was robbed, unless such money was not the same money collected, or he had failed to pay it into the treasury as required by law.

36. Griffin *v.* Mississippi Levee Com'rs, 71 Miss. 767, 15 So. 107; Oneida *v.* Thompson, 92 Hun (N. Y.) 16, 37 N. Y. Suppl. 889.

37. Hill *v.* Fleming, 128 Ky. 201, 107 S. W. 764, 32 Ky. L. Rep. 1065. And see Com. *v.* Fisher, 113 Ky. 491, 68 S. W. 855, 24 Ky. L. Rep. 300. *Compare*, however, Steinback *v.* State, 38 Ind. 483; Perley *v.* Muskegon County, 32 Mich. 132, 20 Am. Rep. 637.

38. Hill *v.* Fleming, 128 Ky. 201, 107 S. W. 764, 32 Ky. L. Rep. 1065. See, generally, TRUSTS.

39. *Alabama.*— Boring *v.* Williams, 17 Ala. 510; Thompson *v.* Stickney, 6 Ala. 579.

California.— San Francisco *v.* Ford, 52 Cal. 198; Placer County *v.* Astin, 8 Cal. 303.

Georgia.— Walden *v.* Lee County, 60 Ga. 296; Wilkinson *v.* Bennett, 56 Ga. 290.

Illinois.— Reed *v.* Chatsworth, 109 Ill. App. 332; Kuntz *v.* Cedarville, 109 Ill. App. 330; People *v.* Gillespie, 47 Ill. App. 522; People *v.* Cooper, 10 Ill. App. 384.

Indiana.— State *v.* Cunningham, 8 Blackf. 339.

Kentucky.— Shawhan *v.* Harrison County, 116 Ky. 490, 76 S. W. 407, 25 Ky. L. Rep. 734; Palmer *v.* Craddock, Ky. Dec. 182.

Louisiana.— Iberville Police Jury *v.* Sherburne, 17 La. 342; McGuire *v.* Bry, 3 Rob. 196.

Maine.— Trescott *v.* Moan, 50 Me. 347; Johnson *v.* Goodridge, 15 Me. 29.

Maryland.— Frownfelter *v.* State, 66 Md. 80, 5 Atl. 410; O'Neal *v.* Washington County School Com'rs, 27 Md. 227; Waters *v.* State, 1 Gill 302.

Massachusetts.— Sandwich *v.* Fish, 2 Gray 298.

Mississippi.— State *v.* Harney, 57 Miss. 863.

Missouri.— Mississippi County *v.* Jackson, 51 Mo. 23; Lewis County *v.* Tate, 10 Mo. 650.

New York.— Olean *v.* King, 116 N. Y. 355, 22 N. E. 559; People *v.* Brown, 55 N. Y. 180.

North Carolina.— Clifton *v.* Wynne, 80 N. C. 145; Brunswick County *v.* Woodside, 30 N. C. 104.

Pennsylvania.— Com. *v.* Philadelphia, 27 Pa. St. 497; Com. *v.* Black, 15 Pa. Co. Ct. 664.

Tennessee.— Galbraith *v.* State, 10 Lea 568; Chandler *v.* State, 1 Lea 296; McLean *v.* State, 8 Heisk. 22; Governor *v.* Montgomery, 2 Swan 613.

Texas.— Mast *v.* Nacogdoches County, 71 Tex. 380, 9 S. W. 267; Webb County *v.* Gonzales, 69 Tex. 455, 6 S. W. 781; Swan *v.* State, 48 Tex. 120; Morris *v.* State, 47 Tex. 583.

Vermont.— Pawlet *v.* Kelley, 69 Vt. 398, 38 Atl. 92; Tunbridge *v.* Smith, 48 Vt. 648.

Virginia.— Cook *v.* Hays, 9 Gratt. 142.

West Virginia.— Wheeling *v.* Black, 25 W. Va. 266.

Wisconsin.— Battles *v.* Doll, 113 Wis. 357, 89 N. W. 187.

United States.— Bell *v.* Mobile, etc., R. Co., 4 Wall. 598, 18 L. ed. 338.

See 45 Cent. Dig. tit. "Taxation," § 1075.

Taxes paid under protest.—A tax collector should pay into the treasury money paid for taxes under protest, although the taxpayer notified him not to make such payment, and that he intended to sue him to recover the money back; and the collector is not liable to the taxpayer for making such payment. Phelan *v.* San Francisco, 120 Cal. 1, 52 Pac. 38.

Restraint by injunction.— Where a collector obtains an unauthorized extension of time to pay over the money collected, he is already in default, and it is no defense that at the end of the extended period, when he was ready to pay, there were two rival governments in existence and he was enjoined from paying over the money to one of the claimants of the office of auditor, and afterward, and before the injunction was dissolved, the money was stolen from him. State *v.* Lanier, 31 La. Ann. 423.

Credit for abatements.—A collector is accountable to the town for all tax abatements allowed by the state treasurer, but not allowed to him by the selectmen. Essex *v.* French, 50 Vt. 413. And see Chadwell *v.* State, 8 Heisk. (Tenn.) 340.

Auditors' reports.— Where a tax collector's liability is fixed at a sum stated for a particular year by the auditors, the fact that in subsequent years the auditors' reports make no further mention of such balance does not relieve the collector from its payment. Com. *v.* Maxwell, 34 Pa. Super. Ct. 631.

40. Lawson *v.* Pulaski County, 3 Ark. 1;

d. Mode and Effect of Payment and to Whom Made. A tax collector is discharged from all further liability or responsibility on paying over the whole amount of his collections.[41] But to have this effect the payment must be made to the officer duly authorized to receive it,[42] and in case of several taxes concurrently collected but payable to different officers, the correct amount of each tax must be turned over to the proper officer.[43] The payment must also be made in cash or its equivalent, and the collector cannot pay in state, county, or municipal scrip or warrants or certificates of indebtedness, unless these are by law a legal tender for this specific purpose.[44] Nor is it permitted the collector to pay judgments or other claims against the county or town out of the taxes in his hands, and receive credit as for so much cash, unless he does it in obedience to an order of court or a valid order drawn on him by the proper municipal authorities.[45]

e. Application of Payments. A tax collector who is indebted to the treasury for taxes collected in more than one year, and who makes a partial payment, may appropriate it as he pleases.[46] In the absence of any such appropriation, the law will apply the payment on the oldest debt,[47] except where the money is identified as coming from a particular taxpayer for the taxes of a particular year, in which case it will not be applied on the collector's debt for another year.[48]

f. Liability For Interest and Penalties. When a collector of taxes fails to pay over the money in his hands on the day appointed by law, he is generally chargeable with interest thereafter on the amount for which he should account,[49]

Lake County *v.* Neilon, 44 Oreg. 14, 74 Pac. 212.

41. Woodall *v.* Oden, 62 Ala. 125; People *v.* Smith, 12 Ill. 281.

Collections made without authority.— If a collector, before demand or notice, pays over to the treasurer taxes received by him under color of office but without authority of law, such payment will discharge him from all liability to the party by whom they were paid. Crutchfield *v.* Wood, 16 Ala. 702.

42. Van Dyke *v.* State, 24 Ala. 81; Walker *v.* Chapman, 22 Ala. 116; Gibson County *v.* Harrington, 1 Blackf. (Ind.) 260; Jenkins *v.* Briggs, 65 N. C. 159; Berks County *v.* Reed, 2 Woodw. (Pa.) 4.

Recovery of money paid to wrong officer.— If a tax collector by mistake pays over the taxes collected to the wrong officer, he may recover back the amount so long as it remains in that officer's hands. Law *v.* Nunn, 3 Ga. 90. And see School Directors *v.* Delahoussaye, 30 La. Ann. 1097.

43. Hardyston Tp. *v.* Harden, 68 N. J. L. 76, 52 Atl. 232; Clifton *v.* Wynne, 80 N. C. 145; Com. *v.* Miller, 20 Pa. Co. Ct. 183. See State *v.* Houston, 83 Ala. 361, 3 So. 859.

44. *Arkansas.*—Askew *v.* Columbia County, 32 Ark. 270.

Missouri.— State *v.* Alsup, 91 Mo. 172, 4 S. W. 31, receipts for taxes worked out in labor on the public roads.

Tennessee.— McLean *v.* State, 8 Heisk. 22.

Virginia.— Lipscomb *v.* Winston, 1 Hen. & M. 453.

United States.— Burgess *v.* Winston, 28 Fed. 559.

See 45 Cent. Dig. tit. "Taxation," § 1076.

Check as payment see Kempner *v.* Galveston County, 73 Tex. 216, 11 S. W. 188.

45. Todd *v.* Caines, 18 B. Mon. (Ky.) 620; Canterberry *v.* Kouns, 3 Litt. (Ky.) 449; Vermillion Parish Police Jury *v.* Bookshier, 31 La. Ann. 736; Fidelity, etc., Co. *v.* State, 98 Md. 162, 56 Atl. 361; Yancey County *v.* Piercy, 72 N. C. 181. See Lee *v.* Marion Nat. Bank, 94 Ky. 41, 21 S. W. 346, 15 Ky. L. Rep. 99.

46. *Maine.*— Richmond *v.* Brown, 66 Me. 373.

Missouri.— State *v.* Smith, 26 Mo. 226, 72 Am. Dec. 204.

New Jersey.— Bogert *v.* Mathe, 51 N. J. L. 216, 17 Atl. 305.

West Virginia.— Taylor *v.* La Follette, 49 W. Va. 478, 39 S. E. 276; State *v.* Wade, 15 W. Va. 524.

Canada.—McBride *v.* Gardham, 8 U. C. C. P. 296.

See 45 Cent. Dig. tit. "Taxation," § 1077.

47. Helm *v.* Com., 79 Ky. 67; Draffen *v.* Boonville, 8 Mo. 395; Frost *v.* Mixsell, 38 N. J. Eq. 586; Pawlet *v.* Kelley, 69 Vt. 398, 38 Atl. 92.

48. Taylor *v.* La Follette, 49 W. Va. 478, 39 S. E. 276. And see Tunbridge *v.* Smith, 48 Vt. 648.

49. *Alabama.*— State *v.* McBride, 76 Ala. 51; State *v.* Lott, 69 Ala. 147.

Kentucky.—Whaley *v.* Com., 110 Ky. 154, 61 S. W. 35, 23 Ky. L. Rep. 1292; Samuels *v.* Com., 10 Bush 491.

Mississippi.— Adams *v.* Saunders, 93 Miss. 520, 46 So. 960.

New Hampshire.— Pittsburg *v.* Tabor, 61 N. H. 100; Hudson *v.* Tenney, 6 N. H. 456.

New Jersey.— Ross *v.* Walton, 67 N. J. L. 688, 52 Atl. 1132; Somerset County Bd. of Chosen Freeholders *v.* Veghte, 7 N. J. L. 145.

Pennsylvania.— Glover *v.* Wilson, 6 Pa. St. 290.

South Carolina.— State *v.* Harrison, Harp. 88.

Tennessee.— Governor *v.* McEwen, 5 Humphr. 241.

or, in some states, he is subjected to a penalty, which may be either a fixed amount in the nature of a fine or a heavy percentage on the amount due, by way of liquidated damages;[50] but a statutory penalty of this kind cannot be enlarged by charging interest upon it, at least before judgment.[51] A statute imposing damages for failure of a tax collector to pay over taxes collected is penal and must be strictly construed, and the conduct of the officer must come strictly within the terms of the law.[52]

g. Lien or Security on Collector's Property. The state or municipality has no lien on the property of a tax collector, to secure his due accounting for the public money coming to his hands,[53] unless it be so ordained by statute; but laws of this kind are in force in several states,[54] and the lien so created will take precedence of mortgages or grants of the property.[55]

6. Return of Warrant and Delinquent List. The collector is required to return his warrant with an account of his doings thereon, or otherwise to furnish a report of his official acts which may serve as a basis for the settlement of his accounts;

Texas.— Cordray *v.* State, 55 Tex. 140; Dean *v.* State, 54 Tex. 313.

See 45 Cent. Dig. tit. "Taxation," § 1079.

Rate of interest.—The legislature may constitutionally impose on collectors of taxes who fail to pay over money collected by them at the prescribed time a higher rate of interest than that generally established. State *v.* Harrison, Harp. (S. C.) 88.

Excuses for non-payment.—Where the state remits a part of the indebtedness of a tax collector, authorizing the cancellation of his bond on payment of a fixed amount, it is a renunciation of the right to claim the interest allowed by statute as a penalty. State *v.* Leckie, 14 La. Ann. 636. So the penalty should not be claimed for a year in which there was no county treasurer and no demand upon the collector to pay over the balance in his hands to any particular person. Bates *v.* Knott County Ct., 67 S. W. 1006, 24 Ky. L. Rep. 73. So also where the collector had been requested by the officer to whom money collected as a special tax should be paid over to retain it in his hands for a time. Hardy *v.* Logan County Ct., 23 S. W. 661, 15 Ky. L. Rep. 405.

Waiver or release.— In the absence of statutory authority an auditor has no power, in settling with a tax collector, to waive or contract away the rights of the state by waiving payment of, or releasing the collector from liability for, interest due from him to the state. State *v.* Lott, 69 Ala. 147.

50. *Alabama.*—Walker *v.* Chapman, 22 Ala. 116; James *v.* Governor, 1 Ala. 605.

Arkansas.—Carnall *v.* Crawford County, 11 Ark. 604 (holding that a delinquent tax collector might be charged with the statutory penalty in the *ex parte* adjustment of his accounts); Lawson *v.* Pulaski County, 3 Ark. 1.

Kentucky.— Bates *v.* Knott County Ct., 67 S. W. 1006, 24 Ky. L. Rep. 73.

Louisiana.—State *v.* Hampton, 14 La. Ann. 679.

Mississippi.— Adams *v.* Saunders, 93 Miss. 520, 46 So. 960.

North Carolina.— State *v.* Candler, 118 N. C. 888, 24 S. E. 709.

Tennessee. — Newman *v.* Thompson, 6 Humphr. 24.

See 45 Cent. Dig. tit. "Taxation," § 1079.

Remission of damages.— In Mississippi the governor and attorney-general may, under the statute, at any time before rendition of the judgment or decree, make the proper certificate, resulting in the remitting of the damages for the failure of a county tax collector to pay the state and county taxes collected by him. Adams *v.* Saunders, 93 Miss. 520, 46 So. 960.

Repeal of statute see Adams *v.* Saunders, 93 Miss. 520, 46 So. 960.

51. Fidelity, etc., Co. *v.* Logan County, 119 Ky. 428, 84 S. W. 341, 27 Ky. L. Rep. 66; Davenport *v.* McKee, 98 N. C. 500, 4 S. E. 545; Gaskins *v.* Com., 1 Call (Va.) 194.

52. Adams *v.* Saunders, 93 Miss. 520, 46 So. 960. In this case a county tax collector promptly paid the taxes due the county as shown by the tax books, but withheld taxes collected. A part of the amount withheld was damages collected by him, a part was money paid to him for taxes due to separate school districts and a part was an overpayment of the true amount of taxes due from a number of taxpayers. It was held that, although the collector, having collected the funds in his official capacity, was obliged to pay the same into the county treasury, he was not liable to the penalty imposed for non-payment of taxes collected; the object of the statute imposing the penalty being to force a prompt payment into the treasury, after collection of all taxes due the county and state.

53 Bell *v.* Haw, 8 Mart. N. S. (La.) 243; Warner *v.* Emory, 3 Yeates (Pa.) 50.

Bond and mortgage as security for deficit in collector's account see Barton County *v.* Harrington, 71 Mo. 118.

54. See the statutes of the different states. And see Harlan *v.* Lumsden, 1 Duv. (Ky.) 86; Perdue *v.* Huff, 15 S. W. 250, 12 Ky. L. Rep. 782; Butler County *v.* Henry, 3 Penr. & W. (Pa.) 26.

Lien of collector's bond see *infra*, X, A, 10, c, (II).

55. Warner *v.* Emory, 3 Yeates (Pa.) 50.

and statutory requirements in this regard must be complied with at least substantially and in due season.[56] It is also a usual requirement that he shall return a list of delinquent taxpayers or property, both for the purpose of claiming credit or exoneration for the taxes which he has not been able to collect,[57] and as a basis for further compulsory proceedings against land or other property.[58]

7. Rights and Liabilities as to Taxes Uncollected — a. Liability of Collector in General. A tax collector is *prima facie* accountable for all the taxes on his list or warrant, and may be held liable not only for his actual collections but also for taxes which he might have collected by due diligence and by the employment of such legal remedies as are within his authority,[59] including the penalties charged against delinquent taxpayers for their delay,[60] and including interest on the amount chargeable to the collector from the time of a demand on him.[61] Where a sheriff seizes and sells property for taxes and fails to collect the price from the purchaser, he becomes responsible therefor to the state and county.[62]

b. Excuses For Failure to Collect. A collector is not bound to collect a tax

56. Adams *v.* Moulton, 7 Pick. (Mass.) 286; Claflin *v.* Cheney, 4 Pick. (Mass.) 118; Wright *v.* Dunham, 13 Mich. 414; Nance *v.* Hopkins, 10 Lea (Tenn.) 508. *Compare* Howard *v.* Proctor, 7 Gray (Mass.) 128.

57. *Arkansas.*— Lawson *v.* Pulaski County, 3 Ark. 1.

Kentucky.—See Com. *v.* Bush, 131 Ky. 384, 115 S. W. 249.

Minnesota.— Gutches *v.* Todd County, 44 Minn. 383, 46 N. W. 678.

New Jersey.— Hetfield *v.* Plainfield, 46 N. J. L. 119.

New York.—Olean *v.* King, 5 N. Y. St. 169.

South Carolina.— Treasurers *v.* Cleary, 3 Rich. 372.

Tennessee.— Chadwell *v.* State, 8 Heisk. 340.

Virginia.—Nottaway County *v.* Powell, 106 Va. 751, 56 S. E. 812.

See 45 Cent. Dig. tit. "Taxation," § 1082.

Penalty for failure to file delinquent list see State *v.* Floyd, 28 La. Ann. 553.

Amended and supplemental lists see Henrico County *v.* McGruder, 84 Va. 828, 6 S. E. 232.

58. Leigh *v.* Trippe, 91 Ark. 117, 120 S. W. 972; Hall *v.* Hall, 23 La. Ann. 135; Wilkinson *v.* Linkous, 64 W. Va. 205, 61 S. E. 152; Devine *v.* Wilson, 63 W. Va. 409, 60 S. E. 351; Hornage *v.* Imboden, 57 W. Va. 206, 49 S. E. 1036; Noble *v.* Amoretti, 11 Wyo. 230, 71 Pac. 879. And see *infra*, XI, E, 1.

Affidavit.— The return of a delinquent tax list is void where the affidavit required by W. Va. Code (1906), § 843, is wholly omitted therefrom, the statute requiring such affidavit being mandatory (Devine *v.* Wilson, 63 W. Va. 409, 60 S. E. 351); and the same is true where, although the oath is subscribed by the sheriff in the form prescribed by said section, it does not appear that the oath was subscribed by a person authorized by law to administer oaths, as required by section 844, and in such case the omission cannot be supplied (Wilkinson *v.* Linkous, 64 W. Va. 205, 61 S. E. 152).

59. *Alabama.*— Fidelity, etc., Co. *v.* Mobile County, 124 Ala. 144, 27 So. 386; State *v.* Lott, 69 Ala. 147; Timberlake *v.* Brewer, 59 Ala. 108.

Kentucky.—See Com. *v.* Bush, 131 Ky. 384, 115 S. W. 249.

Louisiana.— State *v.* Powell, 40 La. Ann. 234, 4 So. 46, 8 Am. St. Rep. 522; Vermillion Parish Police Jury *v.* Brookshier, 31 La. Ann. 736; Scarborough *v.* Stevens, 3 Rob. 147; St. Helena Police Jury *v.* Fluker, 1 Rob. 389; Natchitoches Police Jury *v.* Bullit, 8 Mart. N. S. 323. *Compare* State *v.* Floyd, 28 La. Ann. 553.

Maine.— Gorham *v.* Hall, 57 Me. 58.

Mississippi.— Adams *v.* Stonewall Mfg. Co., 80 Miss. 94, 31 So. 544, what constitutes "wilful default" of tax collector.

New Hampshire.— Pittsburg *v.* Tabor, 61 N. H. 100.

New Jersey.— Painter *v.* Blairstown Tp., 43 N. J. Eq. 317, 12 Atl. 187.

New York.— Olean *v.* King, 116 N. Y. 355, 22 N. E. 559; Fake *v.* Whipple, 39 Barb. 339.

See 45 Cent. Dig. tit. "Taxation," § 1084.

Receipt given without payment.— A tax collector is liable for taxes for which he has given receipts without in fact receiving payment. McLean *v.* State, 8 Heisk. (Tenn.) 22.

Want of authority to collect.— The collector cannot be held liable for failure to collect taxes for which he held no sufficient warrant or other authority. Montgomery County Court *v.* Chenault, 47 S. W. 457, 20 Ky. L. Rep. 704; Stanberry *v.* Jordan, 145 Mo. 371, 46 S. W. 1093; Tracey *v.* Titusville School Dist., 3 Walk. (Pa.) 263. And see Orneville *v.* Pearson, 61 Me. 553.

A town treasurer, under Vt. St. §§ 480–486, providing for the collection of taxes by the treasurer, having no authority to enforce collection except in case of absconding taxpayers, cannot be compelled to account for the amount of tax bills committed to him for collection, in excess of the money actually received by him, in the absence of a statute making him thus chargeable. Brookfield *v.* Pigelow, 80 Vt. 428, 68 Atl. 656.

60. Fidelity, etc., Co. *v.* Logan County, 119 Ky. 428, 84 S. W. 341, 27 Ky. L. Rep. 66; Culton *v.* Com., 9 Bush (Ky.) 701.

61. Cheshire *v.* Howland, 13 Gray (Mass.) 321. See *supra*, X, A, 5, f.

62. Bailey *v.* Napier, (Ky.) 117 S. W. 948.

levied under an unconstitutional statute, and cannot be held liable for his failure to do so.[63] And the same rule applies where the assessment or the warrant was so defective or insufficient that it gave him no legal authority to proceed and would have afforded him no protection against suits,[64] where he was enjoined from collecting the particular tax,[65] or where, by reason of delay in the delivery of the warrant to him or by his resignation or removal from office, it was impossible for him to make the collections within the time limited by law.[66]

c. Allowance of Credit For Taxes Returned Delinquent. In some states it is the practice, on a tax collector's accounting, to charge him with all the taxes on his list or warrant and then allow him credit for such as are properly returned delinquent or uncollectable; but to avail himself of this means of exoneration he must proceed in the manner and at the time and place prescribed by law.[67] Authority to audit his account and make such allowances is sometimes committed to a court,[68] and sometimes to the board of county or municipal officers.[69] But in either case it is a duty to examine the account and adjudicate upon the claims for exoneration and to allow credit only for such taxes as are determined to have been properly returned delinquent,[70] and it is sometimes required that the collector's application in this behalf shall be supported by his affidavit that he has exhausted all legal means of enforcing payment.[71]

d. Rights of Collector Against Taxpayer. Uncollected taxes with which the

63. Boring *v.* Williams, 17 Ala. 510; Vassalboro *v.* Nowell, 75 Me. 242; Adams *v.* Farnsworth, 15 Gray (Mass.) 423; Tunbridge *v.* Smith, 48 Vt. 648. *Compare* Olean *v.* King, 116 N. Y. 355, 22 N. E. 559.

64. *Florida.*— State *v.* Rushing, 17 Fla. 226.

Georgia.— Barlow *v.* Sumter County Ordinary, 47 Ga. 639; Reynolds *v.* Lofton, 18 Ga. 47.

Maine.— Harpswell *v.* Orr, 69 Me. 333; Pearson *v.* Canney, 64 Me. 188; Frankfort *v.* White, 41 Me. 537.

Massachusetts.— Lincoln *v.* Chapin, 132 Mass. 470; Cheshire *v.* Howland, 13 Gray 321.

Michigan.—Weimer *v.* Bunbury, 30 Mich. 201.

Mississippi.—Adams *v.* Brennan, 72 Miss. 894, 18 So. 482.

New Hampshire.— Pittsburg *v.* Danforth, 56 N. H. 272.

See 45 Cent. Dig. tit. "Taxation," § 1086.

But *compare* State *v.* Atkinson, 107 N. C. 317, 12 S. E. 202. And see Jackson County *v.* Gullatt, 84 Ala. 243, 3 So. 906.

Defects in assessment as excuse for failure to collect taxes see Scarborough *v.* Stevens, 3 Rob. (La.) 147; Thorndike *v.* Camden, 82 Me. 39, 19 Atl. 95, 7 L. R. A. 463.

Defects in the warrant, caused by non-observance of statutory provisions which are only directory, and which do not affect the authority which it purports to give, but are designed only for the protection of the collector, do not excuse him for failure to collect taxes, if he accepts the warrant without objection. Bradley *v.* Ward, 58 N. Y. 401; Prince *v.* Britt, 8 Heisk. (Tenn.) 290.

65. Com. *v.* Masonic Temple Co., 89 Ky. 658, 13 S. W. 121, 11 Ky. L. Rep. 982.

66. State *v.* Daspit, 30 La. Ann. 1112; West Baton Rouge Parish *v.* Morris, 27 La. Ann. 459. But *compare* Howard *v.* State, 8 Mo. 361; Com. *v.* Ferrell, 17 Pa. Co. Ct. 263.

Mere difficulty of performing the duty of collecting taxes within the time prescribed by law forms no excuse for the non-performance. Chadwell *v.* State, 8 Heisk. (Tenn.) 340.

Statute extending time.— Nor is delay in the delivery of the warrant to the collector a sufficient excuse where a special statute was passed extending the time for making the collection. Bradley *v.* Ward, 58 N. Y. 401.

67. State *v.* McBride, 76 Ala. 51; Mobile *v.* Huggins, 8 Ala. 440; Lawson *v.* Pulaski County, 3 Ark. 1; Scarborough *v.* Stevens, 3 Rob. (La.) 147.

In Virginia, until and unless the original tax tickets for delinquent taxes are filed with the clerk as required by Code (1887), § 608 (Code (1904), p. 301), a county treasurer is not entitled to receive credit on account of any delinquent taxes. Nottoway County *v.* Powell, 106 Va. 751, 56 S. E. 812.

Rights of taxpayer.—A statute authorizing county officers to strike off from the delinquent tax list such taxes as cannot be collected is intended to affect only the auditing and settlement of official accounts; the delinquent taxpayer cannot claim any advantage from it. State *v.* Central Pac. R. Co., 10 Nev. 47.

68. Montgomery County Ct. *v.* Chenault, 47 S. W. 457, 20 Ky. L. Rep. 704; Pettit *v.* State, 8 Heisk. (Tenn.) 320.

69. Eatherly *v.* State, 14 Nebr. 287, 15 N. W. 714; Stokes County *v.* Wall, 117 N. C. 377, 23 S. E. 358; Pettit *v.* State, 8 Heisk. (Tenn.) 320.

70. Lawson *v.* Pulaski County, 3 Ark. 1; Hardy *v.* Logan County Ct., 23 S. W. 661, 15 Ky. L. Rep. 405; State *v.* Vaile, 122 Mo. 33, 26 S. W. 672; State *v.* Hurt, 113 Mo. 90, 20 S. W. 879.

71. State *v.* Viator, 37 La. Ann. 734; Grundysen *v.* Polk County, 57 Minn. 212, 58 N. W. 864.

collector has charged himself and for which he has accounted to the proper officers, or for which he has not been exonerated, belong to him, and he may enforce their payment against the delinquent taxpayer for the purpose of reimbursing himself.[72] But a collector who voluntarily pays the tax of a particular person with his own money cannot maintain an action against that person without showing either that it was done at his request or that he afterward promised to repay it.[73]

8. Liability For Official Acts — a. Liability For Negligence or Misconduct. A tax collector who proceeds unlawfully in the execution of his writ, or makes an illegal levy or seizure, or practises extortion, oppression, fraud, or other misconduct in dealing with the taxpayer or his property, is liable in trespass to the party injured.[74] But if he makes a lawful levy or distress, his subsequent omission or neglect of duty will not make him a trespasser *ab initio*.[75]

b. Protection by Warrant or Other Process. By the weight of authority a collector of taxes who acts under the authority of a warrant or other process which is duly issued and regular and sufficient on its face is protected thereby against everything except his own fault or illegal conduct; and neither an illegality in the tax itself nor defects in the levy or assessment nor a want of jurisdiction over the particular person or property will expose him to liability as a trespasser.[76] In

72. *Connecticut.* — Meyer *v.* Burritt, 60 Conn. 117, 22 Atl. 501.

Georgia.— Dorsett *v.* Brown, 83 Ga. 581, 10 S. E. 274; White *v.* State, 51 Ga. 252.

Indiana.— State *v.* Taggart, 148 Ind. 431, 47 N. E. 831; Schaum *v.* Showers, 49 Ind. 285; Richards *v.* Stogsdell, 21 Ind. 74.

Maryland.— Hammond *v.* O'Hara, 2 Harr. & G. 111.

Massachusetts.— Needham *v.* Morton, 146 Mass. 476, 16 N. E. 407.

Missouri.— State *v.* Rollins, 29 Mo. 267.

North Carolina.— Davie *v.* Blackburn, 117 N. C. 383, 23 S. E. 321.

Pennsylvania.—West Caln Tp. *v.* Gibbs, 4 Pa. Dist. 149.

See 45 Cent. Dig. tit. "Taxation," § 1090.

Employment of attorney by tax collector to prosecute actions to recover delinquent taxes and contract for compensation of attorney see McGowan *v.* Gaines, 11 Ariz. 105, 89 Pac. 538.

73. Smith *v.* Crocker, 2 Root (Conn.) 84; Dickson *v.* Gamble, 16 Fla. 687; Wallkill *v.* Mamakating, 14 Johns. (N. Y.) 87; Beach *v.* Vandenburgh, 10 Johns. (N. Y.) 361. But *compare* Ott *v.* Chapline, 3 Harr. & M. (Md.) 323. And see Cone *v.* Donaldson, 47 Pa. St. 363.

74. *California.*—Hays *v.* Hogan, 5 Cal. 241.

Connecticut.— Prince *v.* Thomas, 11 Conn. 472.

Delaware.— Hawkins *v.* Dougherty, 9 Houst. 156, 18 Atl. 951.

Kentucky.— Scoville *v.* Baugh, 84 S. W. 1146, 27 Ky. L. Rep. 319.

Maine.— Foss *v.* Whitehouse, 94 Me. 491, 48 Atl. 109; Buswell *v.* Fuller, 89 Me. 600, 36 Atl. 1059; Carter *v.* Allen, 59 Me. 296, 8 Am. Rep. 420; Blanchard *v.* Dow, 32 Me. 557.

Massachusetts.— Pierce *v.* Benjamin, 14 Pick. 356, 25 Am. Dec. 396.

Michigan.— Mogg *v.* Hall, 83 Mich. 576, 47 N. W. 553; Raynsford *v.* Phelps, 43 Mich. 342, 5 N. W. 403, 38 Am. Rep. 189; Sturgis First Nat. Bank *v.* Watkins, 21 Mich. 483. See Raynsford *v.* Phelps, 49 Mich. 315, 13 N. W. 606.

Mississippi.— Tuttle *v.* Everett, 51 Miss. 27, 24 Am. Rep. 622.

Missouri.— Maguire *v.* State Sav. Assoc., 62 Mo. 344; Chouteau *v.* Rowse, 56 Mo. 65; State *v.* Powell, 44 Mo. 436.

New York.—Wetmore *v.* Campbell, 2 Sandf. 341. See Van Rensselaer *v.* Kidd, 6 N. Y. 331.

North Carolina.— Ray *v.* Horton, 77 N. C. 334.

Pennsylvania.— McGregor *v.* Montgomery, 4 Pa. St. 237; Dowlin *v.* Harey, 2 Pa. Co. Ct. 194.

Vermont.— Sprague *v.* Fletcher, 69 Vt. 69, 37 Atl. 239, 37 L. R. A. 840; Buzzell *v.* Johnson, 54 Vt. 90.

See 45 Cent. Dig. tit. "Taxation," § 1091.

Excessive distress or sale.—A collector of taxes is liable in trespass if he sells upon his warrant a greater amount of chattels than would be sufficient to pay the tax with fees and costs. Williamson *v.* Dow, 32 Me. 559; Cone *v.* Forest, 126 Mass. 97; Libby *v.* Burnham, 15 Mass. 144; Denton *v.* Carroll, 4 N. Y. App. Div. 532, 40 N. Y. Suppl. 19.

False imprisonment see Thurston *v.* Martin, 23 Fed. Cas. No. 14,018, 5 Mason 497; McSorley *v.* St. John, 6 Can. Sup. Ct. 531 [*reversing* 20 N. Brunsw. 479]; Mellon *v.* Kings County, 35 N. Brunsw. 153.

Exaction of illegal fees see Foss *v.* Whitehouse, 94 Me. 491, 48 Atl. 109; Robbins *v.* Swift, 86 Me. 197, 29 Atl. 981.

75. Waterbury *v.* Lockwood, 4 Day (Conn.) 257, 4 Am. Dec. 215; Bird *v.* Perkins, 33 Mich. 28; Souhegan Nail, etc., Factory *v.* McConihe, 7 N. H. 309; Ordway *v.* Ferrin, 3 N. H. 69; Wheelock *v.* Archer, 26 Vt. 380; Spear *v.* Tilson, 24 Vt. 420.

76. *Alabama.*— Lott *v.* Hubbard, 44 Ala. 593.

Georgia.— Gilbert *v.* Dougherty County, 53 Ga. 191.

Indiana.— Noland *v.* Busby, 28 Ind. 154; Ewing *v.* Robeson, 15 Ind. 26.

some of the cases, however, the tax collector's warrant is held to afford him no protection if there was a want of jurisdiction, or if the tax itself was illegal or invalid.[77]

c. Defects in Assessment Roll or Warrant. If a tax warrant or other process is void on its face, or contains patent defects of such a nature that it confers no authority on the collector, he is not protected by it for acts done under it;[78] and so if the assessment roll or list attached to the warrant is fatally defective, or if either the roll or the warrant shows illegality on its face.[79] But mere clerical errors or verbal inaccuracies do not deprive the warrant of its force as a protection to the officer.[80]

d. Indemnity to Collector. In some states municipal corporations are bound by statute, and in others it is held that they may bind themselves by contract, to indemnify their tax collectors against suits for damages growing out of the illegality of the tax or assessment or anything but the collector's own negligence or misconduct.[81]

9. Proceedings Against Defaulting Officers — a. Summary Proceedings in General. In view of the public functions performed by tax collectors and the necessity of despatch and certainty in the collection of the public revenue, it is

Iowa.— Games *v.* Robb, 8 Iowa 193; Hershey *v.* Fry, 1 Iowa 593.

Maine.— Carville *v.* Addition, 62 Me. 459; Nowell *v.* Tripp, 61 Me. 426, 14 Am. Rep. 572; Seekins *v.* Goodale, 61 Me. 400, 14 Am. Rep. 568; Caldwell *v.* Hawkins, 40 Me. 526.

Massachusetts.— Cone *v.* Forest, 126 Mass. 97; Rawson *v.* Spencer, 113 Mass. 40; Howard *v.* Proctor, 7 Gray 128; Hays *v.* Drake, 6 Gray 387; Upton *v.* Holden, 5 Metc. 360.

Michigan.— Godkin *v.* Corliss, 146 Mich. 507, 109 N. W. 855; Curtiss *v.* Witt, 110 Mich. 131, 67 N. W. 1106; Muskegon *v.* S. K. Martin Lumber Co., 86 Mich. 625, 49 N. W. 489; Byles *v.* Genung, 52 Mich. 504, 18 N. W. 238; Bird *v.* Perkins, 33 Mich. 28; Clark *v.* Axford, 5 Mich. 182.

Minnesota.— *In re* C. N. Nelson Lumber Co., 61 Minn. 238, 63 N. W. 630.

Mississippi.— Newman *v.* Elam, 30 Miss. 507.

Missouri.—Walden *v.* Dudley, 49 Mo. 419; Jefferson City *v.* Opel, 49 Mo. 190; St. Louis Mut. L. Ins. Co. *v.* Charles, 47 Mo. 462; St. Louis Bldg., etc., Assoc. *v.* Lightner, 47 Mo. 393; Glasgow *v.* Rowse, 43 Mo. 479; Turner *v.* Franklin, 29 Mo. 285.

New Hampshire.— Odiorne *v.* Rand, 59 N. H. 504; Kelley *v.* Noyes, 43 N. H. 209; Woods *v.* Davis, 34 N. H. 328; Gordon *v.* Clifford, 28 N. H. 402; Kinsley *v.* Hall, 9 N. H. 190.

New York.—Woolsey *v.* Morris, 96 N. Y. 311; Chegaray *v.* Jenkins, 5 N. Y. 376; Sheldon *v.* Van Buskirk, 2 N. Y. 473; Doolittle *v.* Doolittle, 31 Barb. 312; Patchin *v.* Ritter, 27 Barb. 34; Thomas *v.* Clapp, 20 Barb. 165; Baley *v.* Wortsman, 2 N. Y. St. 246; Abbot *v.* Yost, 2 Den. 86.

North Carolina.— Clifton *v.* Wynne, 80 N. C. 145; Mulford *v.* Sutton, 79 N. C. 276; Gore *v.* Mastin, 66 N. C. 371; State *v.* Lutz, 65 N. C. 503.

Ohio.— Champaign County Bank *v.* Smith, 7 Ohio St. 42; Thompson *v.* Kelly, 2 Ohio St. 647; Loomis *v.* Spencer, 1 Ohio St. 153.

Pennsylvania.— Buck *v.* Com., 90 Pa. St. 110; Cunningham *v.* Mitchell, 67 Pa. St. 78.

Rhode Island.— Peckham *v.* Bicknell, 11 R. I. 596.

Texas.— Texas Land, etc., Co., *v.* Hemphill County, (Civ. App.) 61 S. W. 333.

Vermont.— Goodwin *v.* Perkins, 39 Vt. 598.

Wisconsin.— Power *v.* Kindschi, 58 Wis. 539, 17 N. W. 689, 46 Am. Rep. 652; Sprague *v.* Birchard, 1 Wis. 457, 60 Am. Dec. 393.

United States.— Utica First Nat. Bank *v.* Waters, 7 Fed. 152, 19 Blatchf. 242.

See 45 Cent. Dig. tit. "Taxation," § 1092.

77. *Indiana.*— State Bank *v.* Brackenridge, 7 Blackf. 395, exempt real estate.

Maine.— Snow *v.* Weeks, 77 Me. 429, 1 Atl. 243, interest wrongfully included.

New Hampshire.— Cavis *v.* Robertson, 9 N. H. 524; Cloutman *v.* Pike, 7 N. H. 209; Johnson *v.* Dole, 4 N. H. 478; Adams *v.* Mack, 3 N. H. 493.

New York.— Bellinger *v.* Gray, 51 N. Y. 610, void assessment rate.

Ohio.— Loomis *v.* Spencer, 1 Ohio St. 153.

Texas.—Wright *v.* Jones, 14 Tex. Civ. App. 423, 38 S. W. 249.

Vermont.— Shaw *v.* Peckett, 25 Vt. 423; Downing *v.* Roberts, 21 Vt. 441; Collamer *v.* Drury, 16 Vt. 574.

United States.— Hays *v.* Pacific Mail Steamship Co., 17 How. 596, 15 L. ed. 254.

See 45 Cent. Dig. tit. "Taxation," § 1092.

78. Atwell *v.* Zeluff, 26 Mich. 118; Warrensburg *v.* Miller, 77 Mo. 56; Henry *v.* Bell, 75 Mo. 194; Clark *v.* Bragdon, 37 N. H. 562; Chalker *v.* Ives, 55 Pa. St. 81.

79. Van Rensselaer *v.* Witbeck, 7 N. Y. 517; Utica Bank *v.* Utica, 4 Paige (N. Y.) 399, 27 Am. Dec. 71; Blood *v.* Sayre, 17 Vt. 609. *Compare* Brown *v.* Hutchinson, 11 Vt. 569.

80. Hays *v.* Drake, 6 Gray (Mass.) 387; King *v.* Whitcomb, 1 Metc. (Mass.) 328; Bird *v.* Perkins, 33 Mich. 28.

81. See the statutes of the different states. And see Pike *v.* Middleton, 12 N. H. 278;

held lawful to proceed against defaulting tax collectors in a summary manner, as by a motion for judgment or a rule to show cause why judgment should not be entered.[82] But it is of course essential that there should be due notice and an opportunity to defend,[83] and the judgment must show on its face everything necessary to sustain the jurisdiction of the court.[84] The statement or certificate of the auditor or other public officer charged with the duty of settling the collector's accounts may be presumptive evidence against him of the amount due, if made so by statute.[85]

b. Execution, Distress, or Extent. In many states the laws authorize summary process against a delinquent tax collector in the form of an execution, distress warrant, or extent, which is to be issued by the county board or other officers to whom payment of the taxes should be made, and under which the collector's property, real or personal, or both, is seized and may be sold unless he establishes his non-liability.[86] Proceedings of this kind being in derogation of the common

Ladd *v.* Waterbury, 34 Vt. 426; Willis *v.* Miller, 29 Fed. 238.

82. *Alabama.*—Walker *v.* Chapman, 22 Ala. 116; Boring *v.* Williams, 17 Ala. 510; Nabors *v.* Governor, 3 Stew. & P. 15.

Kentucky.—Walker *v.* Parker, 4 B. Mon. 97; Grayham *v.* Washington County Ct., 9 Dana 182; Gaither *v.* Slaughter, 1 Dana 369; Meadows *v.* Com., 4 J. J. Marsh. 14; Whitnell *v.* Caldwell County Justices, 4 Litt. 147; Palmer *v.* Craddock, Ky. Dec. 182.

Missouri.— Owens *v.* Andrew County Ct., 49 Mo. 372.

North Carolina.— See McKenzie *v.* Buchanan, 51 N. C. 31.

Tennessee.— McGowan *v.* Tally, 9 Lea 302; Waters *v.* Edmondson, 8 Heisk. 384; Shepherd *v.* Hamilton County, 8 Heisk. 380; Petitt *v.* State, 8 Heisk. 320; McLean *v.* State, 8 Heisk. 22; Carlton *v.* State, 8 Heisk. 16; Dulaney *v.* Dunlap, 3 Coldw. 306; Dawson *v.* Clark, 3 Sneed 438; Hardaway *v.* Shelby County Ct. Chairman, 5 Humphr. 557; Miller *v.* Moore, 3 Humphr. 189; Banks *v.* Bingham, 3 Yerg. 312.

Vermont.— Mt. Holly *v.* French, 75 Vt. 1, 52 Atl. 1038.

Virginia.— Cook *v.* Hays, 9 Gratt. 142; Brunswick Overseers of Poor *v.* Tucker, 2 Leigh 580.

See 45 Cent. Dig tit. "Taxation," § 1095.

83. Walker *v.* Chapman, 22 Ala. 116; Ford *v.* Com., Litt. Sel. Cas. (Ky.) 3; Whitnell *v.* Caldwell County Justices, 4 Litt. (Ky.) 147.

84. Crockett *v.* Parkison, 3 Coldw. (Tenn.) 219.

85. Timberlake *v.* Brewer, 59 Ala. 108; Com. *v.* Rodes, 5 T. B. Mon. (Ky.) 318; Johnson *v.* Thompson, 4 Bibb (Ky.) 294; Duquesne School Dist. *v.* Pitts, 184 Pa. St. 156, 39 Atl. 64. *Contra*, Allbright *v.* Governor, 25 Tex. 687.

86. See the statutes of the different states. And see the following cases:

Georgia.— Bridges *v.* Dooly County, 83 Ga. 275, 9 S. E. 1085; Pulaski County *v.* Thompson, 83 Ga. 270, 9 S. E. 1065; Wilson *v.* Wright, 83 Ga. 38, 9 S. E. 834.

Louisiana.— Scarborough *v.* Stevens, 3 Rob. 147.

Maine.— Snow *v.* Winchell, 74 Me. 408.

Missouri.— Phillips *v.* Robbins, 59 Mo. 107.

New Hampshire.—Ayer *v.* Goss, 71 N. H. 66, 51 Atl. 253; Nason *v.* Fowler, 70 N. H. 291, 47 Atl. 263.

New York.— Under Tax Law, § 260 (Laws (1896), p. 886, c. 908), providing that, if any collector shall fail to pay over or account for moneys collected, the county court on application of the treasurer shall order the sheriff to levy any sum remaining unpaid out of the collector's property, and section 262, providing that, if any part of the moneys due are not thus collected, proceedings shall be had on the undertaking of the collector, such order must issue irrespective of any equities existing as between the collector and his sureties, or between the sureties themselves, or between the collector and the estate of the bankrupt sureties, and it was no defense that the collector had deposited the funds in the bank of his sureties, and that they had become bankrupt. *In re* Masterman, 118 N. Y. Suppl. 322. Nor was it any defense that the supervisors had levied taxes to cover the sum not accounted for, and that the same had been collected prior to argument of the motion. *In re* Masterman, *supra.*

Pennsylvania.— Schuylkill, etc., Imp., etc., Co. *v.* McCreary, 58 Pa. St. 304; Stauffer *v.* Lancaster County, 1 Watts 300, 26 Am. Dec. 69; Com. *v.* Gregory, 2 Pars. Eq. Cas. 241; Stauffer *v.* Lancaster, 9 Lanc. Bar 145.

Vermont.— Hackett *v.* Amsden, 57 Vt. 432; Clark *v.* Lathrop, 33 Vt. 140.

United States.— Murray *v.* Hoboken Land, etc., Co., 18 How. 272, 15 L. ed. 372.

Canada.— Charlesworth *v.* Ward, 31 U. C. Q. B. 94.

See 45 Cent. Dig. tit. "Taxation," § 1096.

Person acting as collector without authority.—Where a person exercising the duties of tax collector has, in proper legal proceedings, been adjudged a usurper, and to be exercising the office without authority, and ordered to pay over the money in his hands to the clerk of the court, an execution cannot be issued against him as collector for the amount of the taxes collected by him. Hartley *v.* State, 3 Ga. 233.

law, the statute authorizing them must be very strictly followed in every essential particular.[87]

c. Attachment of Person. It is within the authority of the legislature, although no longer usual, to provide that a defaulting tax collector shall be forced to discharge his liability to the public by an attachment or warrant for his arrest and commitment to prison.[88]

d. Actions — (i) *Form of Remedy.* As a rule, a suit by the state or a municipal corporation against a tax collector, to recover taxes collected by him and not paid over, is properly brought in the form of an action of assumpsit, as for money had and received.[89] Under some circumstances, however, a bill in equity may be maintained.[90]

(ii) *Right of Action and Defenses.* At common law and without special statutory authority, either the state or a municipal corporation may maintain an action at law against a delinquent tax collector for the money received by him.[91] In such a suit defendant can plead nothing but payment or its equivalent,[92] or that the money in question never came into his hands.[93] In particular, a plea of set-off is not allowed.[94]

87. Haley *v.* Petty, 42 Ark. 392; Weimer *v.* Bunbury, 30 Mich. 201.

88. Daggett *v.* Everett, 19 Me. 373; Com. *v.* Ruff, 3 Rawle (Pa.) 95.

89. Coons *v.* People, 76 Ill. 383; Gibson County *v.* Harrington, 1 Blackf. (Ind.) 260; Richmond *v.* Brown, 66 Me. 373; Com. *v.* Perrego, 218 Pa. St. 314, 67 Atl. 621.

90. Nottoway County *v.* Powell, 106 Va. 751, 56 S. E. 812, holding that the board of supervisors of a county was entitled to maintain a bill in equity to recover all moneys received by the county treasurer on tax tickets contained in the delinquent lists, and to have a reference to a commissioner in chancery with regard to such tickets and collections; the statutes providing for the collection of delinquent taxes applying only to cases in which the lists have been returned by the treasurer in good faith in conformity to law, and affording no remedy against a treasurer who has *ex maleficio* collected tax tickets.

Sufficiency of bill see Nottoway County *v.* Powell, 106 Va. 751, 56 S. E. 812.

A bill in equity will not lie to enjoin a delinquent collector of taxes from misappropriating or disposing of the public money in his hands, but the remedy is by suit at law either on his bond or against him personally. Hindman *v.* Aledo, 6 Ill. App. 436. But *compare* Pride *v.* State, 52 Ark. 502, 13 S. W. 135.

The statutory lien on the property of a tax collector for the payment of any judgment which may be rendered against him in his official capacity is not a right of property, and is enforceable only in equity. Turner *v.* Teague, 73 Ala. 554.

91. *Alabama.*—Walling *v.* Morgan County, 126 Ala. 326, 28 So. 433.

Indiana.— Helvey *v.* Huntington County, 6 Blackf. 317.

Massachusetts.—Adams *v.* Farnsworth, 15 Gray 423.

Michigan.— Spencer *v.* Perry, 18 Mich. 394.

New Hampshire.— Gilford *v.* Munsey, 68 N. H. 609, 44 Atl. 536; Wentworth *v.* Gove, 45 N. H. 160.

New York.—Warren *v.* Philips, 30 Barb. 646.

Pennsylvania.— Com. *v.* Perrego, 218 Pa. St. 314, 67 Atl. 621.

Virginia.— Nottoway County *v.* Powell, 106 Va. 751, 56 S. E. 812.

See 45 Cent. Dig. tit. "Taxation," § 1100.

A sheriff's cause of action on a parol undertaking by his deputy to account for taxes collected accrues when the deputy quits the sheriff's service, and is barred in five years. Housman *v.* Long, 66 S. W. 821, 23 Ky. L. Rep. 1994.

Tax collected to pay particular creditor.— An action cannot be maintained in the name of the state to recover from a collector money assessed by the levy court to be collected and paid to a particular person by the collector, who neglects to give bond. State *v.* Stewart, 4 Harr. & M. (Md.) 422.

92. *Alabama.*—Walling *v.* Morgan County, 126 Ala. 326, 28 So. 433, holding that a plea of payment imposes on defendant the burden of proving payment to the reasonable satisfaction of the jury, and that a receipt is only *prima facie* evidence.

Idaho.— Sponberg *v.* Oneida County, 8 Ida. 722, 59 Pac. 532, holding that a mistake of law is no defense.

Kentucky.— Com. *v.* Rodes, 5 T. B. Mon. 318, tender and set-off cannot be pleaded.

Maryland.— O'Neal *v.* Washington County School Com'rs, 27 Md. 227, existence of remedy on bond no bar.

New Jersey.— Street Lighting Dist. No. 1 *v.* Drummond, 63 N. J. L. 493, 43 Atl. 1061, unconstitutionality of statute under which taxes were levied cannot be pleaded.

See 45 Cent. Dig. tit. "Taxation," § 1100.

93. Clary *v.* Grayson, 7 La. 371; State *v.* Stong, (Tenn. Ch. App. 1897) 47 S. W. 1103.

94. Waterbury *v.* Lawlor, 51 Conn. 171; Frier *v.* State, 11 Fla. 300; Com. *v.* Rodes, 5 T. B. Mon. (Ky.) 318; State *v.* Bradley, 37 La. Ann. 623. But *compare* State *v.* Floyd, 28 La. Ann. 553.

(iii) *Jurisdiction and Proceedings.* A suit against a delinquent tax collector should be brought after demand and refusal of payment if that is required by statute, although otherwise it is not necessary;[95] and it should be brought within the time limited by law for such actions,[96] in a court of competent jurisdiction,[97] and in the name of the proper state or municipal authorities.[98] It should be founded on a declaration containing all the essentials of a good cause of action,[99] and supported by competent and satisfactory evidence.[1] The recovery may include interest and penalties if the statute so provides.[2]

10. Bonds of Tax Collectors — a. In General — (i) *Requirements as to Execution and Amount.* It is commonly required by law that a collector of taxes shall give a bond with sureties conditioned for the faithful performance of his duties or to secure his due accounting for the money collected.[3] And in some states it is considered that the execution of this bond is a condition precedent to the right of the collector to demand the taxes or to enforce their payment.[4] The amount of the bond is prescribed by statute, and is commonly not less than double the amount of the taxes to be collected.[5] But a bond for a greater amount is not invalid;[6] and on the other hand, the fact that it is for less than the statutory penalty does not protect the collector against a judgment.[7] Even where such bond is not prescribed by law, it is held that the local municipal authorities may require the collector to give it,[8] and that they may at any time call upon him for a new bond or for additional sureties.[9]

95. Wentworth *v.* Gove, 45 N. H. 160; Brunswick County *v.* Woodside, 31 N. C. 496; Moore County *v.* McIntosh, 31 N. C. 307. *Compare* Com. *v.* Bartlett, 7 J. J. Marsh. (Ky.) 161.

96. Pride *v.* State, 52 Ark. 502, 13 S. W. 135; Keokuk County *v.* Howard, 41 Iowa 11; State *v.* Dyer, 17 Iowa 223; State *v.* Finn, 102 Mo. 222, 14 S. W. 984.

97. Patilla *v.* Governor, 5 Port. (Ala.) 232.

Venue see Armstrong *v.* State, Minor (Ala.) 160.

98. State *v.* Cooper, 53 Miss. 615; Wilson *v.* Lewistown, 1 Watts & S. (Pa.) 428. See State *v.* Harris, 52 Miss. 686, as to right of private taxpayer to bring suit if proper officers refuse to do so.

99. Posey County *v.* Saunders, 17 Ind. 437; Gibson County *v.* Harrington, 1 Blackf. (Ind.) 260; State *v.* Seibert, 148 Mo. 408, 50 S. W. 109; Burnett *v.* Henderson, 21 Tex. 588; Nottoway County *v.* Powell, 106 Va. 751, 56 S. E. 812.

1. *Louisiana.*— State *v.* Lake, 45 La. Ann. 1207, 14 So. 126 (certified statement from auditor of public accounts as *prima facie* evidence); Vermillion *v.* Comeau, 10 La. Ann. 695 (burden is not on plaintiff to prove that defendant actually collected the taxes); West Baton Rouge *v.* Hebert, 2 La. Ann. 149.

Mississippi.—Adams *v.* Carter, (1899) 25 So. 669.

Missouri.— State *v.* Seibert, 148 Mo. 408, 50 S. W. 109.

South Carolina.— State *v.* Teague, 9 S. C. 149.

Texas.—Mast *v.* Nacogdoches County, 71 Tex. 380, 9 S. W. 267.

Washington.— Dillon *v.* Spokane County, 3 Wash. Terr. 498, 17 Pac. 889, a settlement made with the board of county commissioners cannot be pleaded by defendant in estoppel, but is matter of evidence on the trial.

See 45 Cent. Dig. tit. "Taxation," § 1101.

2. Fidelity, etc., Co. *v.* Logan County, 119 Ky. 428, 84 S. W. 341, 27 Ky. L. Rep. 66; Pence *v.* Nelson County, 107 Ky. 66, 53 S. W. 25, 21 Ky. L. Rep. 724; Ross *v.* Walton, 63 N. J. L. 435, 44 Atl. 430; Williamson *v.* Jones, 127 N. C. 178, 37 S. E. 202.

3. See the statutes of the different states. And see the following cases:

California.— People *v.* Love, 25 Cal. 520.

Georgia.— Reynolds *v.* Lofton, 18 Ga. 47.

Kentucky.—Anderson *v.* Thompson, 10 Bush 132.

Pennsylvania.— Com. *v.* Evans, 8 Pa. Co. Ct. 665.

Virginia.— Com. *v.* Jackson, 1 Leigh 485.

See 45 Cent. Dig. tit. "Taxation," § 1026.

4. State *v.* Blagge, 61 N. C. 11; Oatman *v.* Barney, 46 Vt. 594; Isaacs *v.* Wiley, 12 Vt. 674; Coit *v.* Wells, 2 Vt. 318. *Contra*, Scarborough *v.* Parker, 53 Me. 252; Duntley *v.* Davis, 42 Hun (N. Y.) 229; Sheldon *v.* Coates, 10 Ohio 278.

5. Hodgkin *v.* Holland, 34 Ark. 200; Kane *v.* Garfield, 60 Vt. 79, 13 Atl. 800; Spear *v.* Ditty, 8 Vt. 419.

Where the statute fixes the amount of the tax collector's bond, but also provides that the county board may require a bond in a greater amount when the case requires it, a bond in a greater amount cannot be required unless the record of the board shows a determination of the necessity for such bond. Gorman *v.* Boise County, 1 Ida. 553.

6. Matthews *v.* Lee, 25 Miss. 417.

7. Mabry *v.* Tarver, 1 Humphr. (Tenn.) 94.

8. Montville *v.* Haughton, 7 Conn. 543; Morrell *v.* Sylvester, 1 Me. 248. But see Smith *v.* Randlette, 98 Me. 86, 56 Atl. 199.

9. Com. *v.* Adams, 3 Bush (Ky.) 41; State

(II) *Time For Making.* Where the statute fixes the time within which a person elected or appointed tax collector must file his official bond,[10] failure to comply with its provisions will be tantamount to a refusal to serve and will justify another election or appointment;[11] and a bond filed after the time limited is *prima facie* invalid if not void,[12] although it is held to be within the power of the proper authorities to approve and accept it,[13] in which case it will be a good common-law bond, even if not valid as a statutory bond.[14] Where the law requires the bond to be given annually, a bond given for the collector's term of office, extending over more than a year, is not good.[15]

(III) *Requisites and Validity.* A tax collector's bond should be executed in due form of law,[16] and run to the proper obligee,[17] and be conditioned substantially, if not exactly, in accordance with the statute.[18] But minor irregularities, defects, variances, or misrecitals will not be allowed to invalidate it or release the collector or his sureties from liability under it.[19] And it is to be noted

v. Lafayette County Court, 41 Mo. 545; Poe *v.* State, 72 Tex. 625, 10 S. W. 737; Rains *v.* Simpson, 50 Tex. 495, 32 Am. Rep. 609.

10. See the statutes of the different states. And see State *v.* Falconer, 44 Ala. 696 (statute extending time for filing bond); Ross *v.* People, 78 Ill. 375 (excuses for failure to file).

Filing and acceptance.—Where a tax collector files his bond within the statutory period, its acceptance after that period is valid and relates back to the time of filing. Drew *v.* Morrill, 62 N. H. 23.

Term of court.— Under a statute providing that the tax collector's bond shall be filed "at the term of court when the county levy is imposed," a bond is valid when executed at the same term at which the levy is imposed, although prior to the actual making of the levy. Lyons *v.* Breckinridge County Ct., 101 Ky. 715, 42 S. W. 748, 19 Ky. L. Rep. 951; Wilson *v.* Linville, 93 Ky. 254, 19 S. W. 739, 14 Ky. L. Rep. 150. But not when made before that term of court begins. Maynard *v.* Com., 80 Ky. 587.

11. Falconer *v.* Shores, 37 Ark. 386; Ross *v.* People, 78 Ill. 375; People *v.* McKinney, 52 N. Y. 374; State *v.* Briggs, 15 R. I. 425, 7 Atl. 404. But *compare* Com. *v.* Stambaugh, 164 Pa. St. 437, 30 Atl. 293.

12. Com. *v.* Magoffin, 25 S. W. 599, 15 Ky. L. Rep. 775; De Soto County *v.* Dickson, 34 Miss. 150.

But neither the collector nor his sureties can set up as a defense to an action on the bond that it was not executed within the time prescribed by statute. Goree *v.* State, 22 Ark. 236.

13. Johnson *v.* Logan County, 111 Ky. 698, 64 S. W. 634, 23 Ky. L. Rep. 988; Basham *v.* Com., 13 Bush (Ky.) 36; State *v.* Dorsey, 3 Gill & J. (Md.) 75.

Validating statute.—A statute providing that official bonds not approved and filed as prescribed by law shall stand in the place of a bond properly given applies to a bond given by a tax collector several months after he should have given it. Fulton County *v.* Clarke, 73 Ga. 665.

14. Scarborough *v.* Parker, 53 Me. 252.

15. Boughton *v.* State, 7 Humphr. (Tenn.) 193; Nevill *v.* Day, 3 Humphr. (Tenn.) 37; Maddox *v.* Shacklett, (Tenn. Ch. App. 1895) 36 S. W. 731.

16. Boothbay *v.* Giles, 68 Me. 160.

Effect of omission of seal see Dedge *v.* Branch, 94 Ga. 37, 20 S. E. 657; Richardson *v.* Rogers, 50 How. Pr. (N. Y.) 403; Wilder *v.* Butterfield, 50 How. Pr. (N. Y.) 385.

Signature.— It is the signatures of the obligors, and not the insertion of their names in the body of the bond, that gives validity to it. Baker County *v.* Huntington, 48 Oreg. 593, 87 Pac. 1036, 89 Pac. 144.

17. *Alabama.*—Calhoun *v.* Lunsford, 4 Port. 345.

Maine.— Lord *v.* Lancey, 21 Me. 468.

New Hampshire.— Horn *v.* Whittier, 6 N. H. 88.

New York.—Warren *v.* Philips, 30 Barb. 646.

Canada.— Judd *v.* Read, 6 U. C. C. P. 362.

See 45 Cent. Dig. tit. "Taxation," § 1028.

18. McEachron *v.* New Providence Tp., 35 N. J. L. 528; Kincannon *v.* Carlisle, 9 Yerg. (Tenn.) 11, 30 Am. Dec. 391.

19. *Alabama.*— Bromberg *v.* Fidelity, etc., Co., 139 Ala. 338, 36 So. 622; State *v.* Flinn, 77 Ala. 100; Armstrong *v.* State, Minor 160.

Arkansas.— Hodgkin *v.* Holland, 34 Ark. 200.

Kentucky.— Grant County *v.* Bartlett, 5 B. Mon. 195, misrecital of amount to be collected.

Louisiana.— Bradley *v.* Rapp, 10 La. Ann. 589.

Maine.— Trescott *v.* Moan, 50 Me. 347.

Maryland.— Frownfelter *v.* State, 66 Md. 80, 5 Atl. 410.

Mississippi.— De Soto County *v.* Dickson, 34 Miss. 150.

Missouri.— Wimpey *v.* Evans, 84 Mo. 144.

New Hampshire.— A collector's bond will be held good, although it has no witness, or is dated on Sunday, if it appears to have been delivered on Saturday, or the collector is recited in it to have been chosen, instead of appointed, or its acceptance was not in writing and can only be shown by parol. Pierce *v.* Richardson, 37 N. H. 306.

New York.— Wilder *v.* Butterfield, 50 How. Pr. 385.

Tennessee.—McLean *v.* State, 8 Heisk. 22; Miller *v.* Moore, 2 Humphr. 421.

See 45 Cent. Dig. tit. "Taxation," § 1028.

that such a bond, although wholly ineffective as a statutory obligation, may still be a good common-law bond, so that it may be sued on as at common law, although statutory remedies are not available.[20]

(iv) *Acceptance or Approval.* It is a common and an important provision of the statutes that the collector's bond shall be approved by some court or some officer designated for that purpose;[21] although it is held that the bond may be binding on the collector and his sureties, if he acts under it, in the absence of such approval.[22] A part of the duty of the court or officer is an inquiry into the financial responsibility of the sureties offered.[23] But if the bond presented is correct in form and amount, and the sureties are satisfactory, the court or board which is to pass upon it must accept it, and may be compelled by mandamus to do so.[24]

(v) *Bonds of Other Officers as Collectors.* Where the collection of taxes is committed to one holding another county or municipal office, as, for example, a sheriff, it is common to require a separate bond for the collection of the taxes,[25] and in an action thereon no question can be raised as to the validity of his title to the office of sheriff, provided he was at least sheriff *de facto*, nor as to the execution or sufficiency of his bond as sheriff.[26] In other respects bonds so given are governed by the same principles which apply to the ordinary bonds of tax collectors.[27]

b. Liability on Bonds — (i) *Scope and Extent in General.*[28] The extent of liability on a tax collector's bond is measured in the first instance by the condition of the bond, which is construed with strictness.[29] It includes of course the due payment or accounting for all the taxes collected,[30] and may also extend,

20. *Alabama.*— Walker *v.* Chapman, 22 Ala. 116.

Maine.— Lord *v.* Lancey, 21 Me. 468.

Massachusetts.— Sweetser *v.* Hay, 2 Gray 49; Burroughs *v.* Lowder, 8 Mass. 373; Freeman *v.* Davis, 7 Mass. 200.

New Hampshire.— Horn *v.* Whittier, 6 N. H. 88.

Pennsylvania.— Claasen *v.* Shaw, 5 Watts 468, 30 Am. Dec. 338.

South Carolina.—State Treasurer *v.* Bates, 2 Bailey 362.

Tennessee.—Governor *v.* Allen, 8 Humphr. 176; Goodrum *v.* Carroll, 2 Humphr. 490, 37 Am. Dec. 564.

21. See the statutes of the different states. And see Bromberg *v.* Fidelity, etc., Co., 139 Ala. 338, 36 So. 622; *Ex p.* McCabe, 33 Ark. 396; Hudson *v.* Miles, 185 Mass. 582, 71 N. E. 63, 102 Am. St. Rep. 370; McLean *v.* State, 8 Heisk. (Tenn.) 22.

Approval of a bond will be sufficient, although coupled with an objection to the collector's eligibility which the controller had no jurisdiction to raise. Oglesby *v.* State, 73 Tex. 658, 11 S. W. 873.

Action of majority of board.— Where a collector's bond is to be approved by a board of officers, the action of the majority is sufficient. Butler *v.* Washburn, 25 N. H. 251.

22. McCauley *v.* State, 21 Md. 556; Wendell *v.* Fleming, 8 Gray (Mass.) 613; Moore *v.* State, 9 Mo. 334.

23. Oliver *v.* Martin, 36 Ark. 134; Gorman *v.* Boise County, 1 Ida. 553.

24. Smith *v.* Randlette, 98 Me. 86, 56 Atl. 199; Mattern *v.* Allegheny County, 12 Pa. Dist. 244.

25. McGuire *v.* Bry, 3 Rob. (La.) 196; McCauley *v.* State, 21 Md. 556; State *v.* Harney, 57 Miss. 863.

Liability on sheriffs' bonds see Sheriffs and Constables, 35 Cyc. 1939, 1940.

26. Com. *v.* Howard, 99 Ky. 542, 36 S. W. 556, 18 Ky. L. Rep. 412; Police Jury *v.* Haw, 2 La. 41, 20 Am. Dec. 294; State *v.* Lafayette County Ct., 41 Mo. 545. *Compare* Patton *v.* Lair, 4 J. J. Marsh. (Ky.) 248.

27. See, generally, *supra*, X, A, 10, a, (i)–(iv). And see particularly as to bonds of sheriffs as tax collectors. Calloway *v.* Com., 4 Bush (Ky.) 383; Thompson *v.* Com., 10 Ky. L. Rep. 118; Sweetzer *v.* Hay, 2 Gray (Mass.) 49; Lay *v.* State, 5 Sneed (Tenn.) 604; Governor *v.* Porter, 5 Humphr. (Tenn.) 165; Mabry *v.* Tarver, 1 Humphr. (Tenn.) 94; Winslow *v.* Com., 2 Hen. & M. (Va.) 459.

28. Liability on official bond of sheriff and effect of special bond as collector of taxes, see Sheriffs and Constables, 35 Cyc. 1939.

29. Osenton *v.* Burnett, 41 S. W. 270, 19 Ky. L. Rep. 610; New York *v.* Goldman, 125 N. Y. 395, 26 N. E. 456; Cannell *v.* Crawford County, 59 Pa. St. 196; Leggett *v.* Humphreys, 21 How. (U. S.) 66, 16 L. ed. 50; U. S. *v.* Boyd, 15 Pet. (U. S.) 187, 10 L. ed. 706; Miller *v.* Stewart, 9 Wheat. (U. S.) 680, 6 L. ed. 189.

30. Johnson *v.* Goodridge, 15 Me. 29; State *v.* Woodside, 30 N. C. 104.

Costs not included.— Where the bond obliges the collector to collect and pay over "taxes," there is no liability on it for costs and fees incurred in advertising land for tax-sale. State *v.* Montague, 34 Fla. 32, 15 So.

either by force of a statute or the terms of the bond itself, to the protection of individuals against the tortious or illegal acts of the collector;[31] and it is said that the law controlling the assessment and collection of the public revenue becomes a part of the contract entered into by the collector and his sureties, and is as binding as any express condition of the bond.[32]

(II) *NATURE OF TAX.* If the bond is conditioned only for the collection and payment of a particular tax by name, or a particular class of taxes, it cannot be extended to cover any tax not clearly within the description.[33] But if it is conditioned for the faithful performance of the collector's duty, or for the payment of all money collected by him, it will cover every class and variety of taxes lawfully committed to him for collection,[34] and hence may include arrears of taxes remaining uncollected by his predecessor,[35] or a special tax which he is charged to collect, although he may be required to give, or may actually give, a separate bond to cover it,[36] and even new taxes provided for by statutes enacted after the execution of the bond.[37]

(III) *AMOUNT OF LIABILITY.* Within the limitation of the penal sum of the collector's bond, and subject to any arrangement specified in it for a division of liability among the several sureties,[38] the measure of their responsibility is the

589; Brown *v.* Phipps, 6 Sm. & M. (Miss.) 51.

Effect of illegality.—Where money illegally borrowed by county officers for county purposes was received by the collector, his sureties are not liable for his failure to disburse such money. Frost *v.* Mixsell, 38 N. J. Eq. 586.

Advance of state taxes.—Where the collector receives state taxes as well as local taxes, and fails to account for the same, and the local authorities advance the amount of the state taxes and pay them to the state treasurer, the collector and his sureties are liable therefor. Richmond *v.* Toothaker, 69 Me. 451; Jansen *v.* Ostrander, 1 Cow. (N. Y.) 670. *Compare* Norridgewock *v.* Hale, 80 Me. 362, 14 Atl. 943.

Want of authority to collect see *infra*, X, A, 10, b, (V), (B).

31. Palmer *v.* Pettingill, 6 Ida. 346, 55 Pac. 653; State *v.* Schacklett, 37 Mo. 280; Chamberlain Banking House *v.* Woolsey, 60 Nebr. 516, 83 N. W. 729. See Clark *v.* U. S., 60 Ga. 156; State *v.* Harris, 89 Ind. 363, 46 Am. Rep. 169.

32. State *v.* Hathorn, 36 Miss. 491; Worth *v.* Cox, 89 N. C. 44.

Effect of new legislation.—It is the statute existing at the time the contract of the sureties is made that enters into and becomes a part of it. If a new statute imposes on the collector duties not in any way germane to those previously required of him, the sureties on his bond, executed before the passage of the act, are not responsible for any delinquencies of the collector in the performance of the new duties imposed. White *v.* East Saginaw, 43 Mich. 567, 6 N. W. 86; Spokane County *v.* Allen, 9 Wash. 229, 37 Pac. 428, 43 Am. St. Rep. 830.

33. Lindsay *v.* Dozier, 44 N. C. 275, holding that a school tax levied by the county court is a "county tax."

34. People *v.* Hoover, 92 Ill. 575; Adair *v.* Hancock Deposit Bank, 107 Ky. 212, 53 S. W. 295, 21 Ky. L. Rep. 934; Pulaski County *v.* Watson, 106 Ky. 500, 50 S. W. 861, 21 Ky. L. Rep. 61; Howard *v.* Com., 105 Ky. 604, 49 S. W. 466, 20 Ky. L. Rep. 1411; Lyons *v.* Breckenridge County Ct., 101 Ky. 715, 42 S. W. 748, 19 Ky. L. Rep. 951; Taylor *v.* Nunn, 2 Metc. (Ky.) 199; Catron *v.* Com., 52 S. W. 929, 21 Ky. L. Rep. 650; State *v.* Hampton, 14 La. Ann. 679; Duncan *v.* State, 7 La. Ann. 377; Buffington *v.* Dinkgrave, 4 La. Ann. 548; McGuire *v.* Bry, 3 Rob. (La.) 196; Ashby *v.* Wellington, 8 Pick. (Mass.) 524.

35. Greene County *v.* Taylor, 77 N. C. 404; Washington *v.* Walker, 29 Fed. Cas. No. 17,235, 2 Cranch C. C. 293. But *compare* Edwards *v.* Taylor, 4 Bibb (Ky.) 353; State *v.* Rollins, 29 Mo. 267.

36. *Arkansas.*— Christian *v.* Ashley County, 24 Ark. 142.

Kentucky.— Whaley *v.* Com., 110 Ky. 154, 61 S. W. 35, 23 Ky. L. Rep. 1292; Schuff *v.* Pflanz, 99 Ky. 97, 35 S. W. 132, 18 Ky. L. Rep. 25. *Compare*, however, Cook *v.* Clark, 16 S. W. 269, 13 Ky. L. Rep. 100.

Mississippi.— State *v.* Hathorn, 36 Miss. 491.

North Carolina.— Cherry *v.* Wilson, 78 N. C. 164.

West Virginia.—State *v.* Poling, 44 W. Va. 312, 28 S. E. 930. *Compare*, however, Glade Dist. Bd. of Education *v.* Rader, 42 W. Va. 178, 24 S. E. 680.

United States.— Indiana Bridge Co. *v.* Carr, 95 Fed. 594, 37 C. C. A. 187.

See 45 Cent. Dig. tit. "Taxation," § 1104.

Compare, however, Waters *v.* State, 1 Gill (Md.) 302; State *v.* Starnes, 5 Lea (Tenn.) 545.

37. Walker *v.* Chapman, 22 Ala. 116; State *v.* Hathorn, 36 Miss. 491; McLean *v.* State, 8 Heisk. (Tenn.) 22. See Com. *v.* Moren, 78 S. W. 432, 25 Ky. L. Rep. 1635.

38. When a tax collector's bond recites that the principal and sureties bind themselves in a certain sum, and then specifies the amounts for which each surety binds himself, the principal is bound in said cer-

amount actually due from the collector to the public authorities and remaining unpaid.[39] But if the law imposes a penalty upon the collector for his delinquency, either in the form of liquidated damages or in the form of interest at an extraordinary rate, this also is included in the liability of the sureties.[40]

(iv) *Term or Period Covered.* Where a tax collector is elected or appointed for a limited term, the sureties on his bond are responsible only for his official acts within that term, and hence not for collections made after its expiration.[41] But it makes no difference that some of the money was collected before the bond was executed,[42] or that part of the taxes were imposed by a levy made after the giving of the bond, if within the collector's term.[43] Where the collector is continued in office for more than one term, but gives separate bonds with different sureties, the liability of the sureties is to be estimated the same as if a different

tain sum, although there is no specification as to him in the bond. People *v.* Love, 25 Cal. 520. Where the bond stipulates, in regard to the sureties, that "we or either of us will pay" the sum of ten thousand dollars, the fact that a sum of one or two thousand dollars is prefixed to the signatures of the sureties will not alter their joint and several liability as fixed by the terms of the instrument. Baker County *v.* Huntington, 48 Oreg 593, 87 Pac. 1036, 89 Pac. 144.

39. State *v.* Daspit, 30 La. Ann. 1112; Brunswick *v.* Snow, 73 Me. 177, holding that where a collector fails to pay over taxes collected, the measure of the liability of the sureties is the amount actually collected as taxes and interest, and interest thereon from the date of demand, less payments made by the collector, and also deducting the compensation of the collector for collections actually made and paid over.

Interest see Hartford *v.* Franey, 47 Conn. 76; Com. *v.* Carson, 26 Pa. Super. Ct. 437. Under Ballinger & C. Comp. Oreg. § 4595, allowing interest on moneys after the same become due, interest cannot be allowed on a disputed claim until judgment is rendered, whether the dispute is as to the fact of liability or only as to the amount, and therefore, when the sureties on the bond of a sheriff as tax collector controverted their liability for his default, although acknowledging the extent of his defalcation, it was held that interest was not allowable on the demand against them until its liquidation by judgment Baker County *v.* Huntington, 48 Oreg. 593, 87 Pac. 1036, 89 Pac. 144.

Commissions of collector see State *v.* Perkins, 114 La. 301, 38 So. 196.

Credits.—Where, in an action against the sureties of a sheriff on his bond as tax collector for a devastavit in the collection of taxes, it was conceded that he had not previously received credit for certain claims payable out of the levies of prior years, which he in fact paid out of the taxes of 1905 collected by him, his sureties were entitled to credit for such claims as against the amount of the sheriff's liability for that year. Ætna Indem. Co. *v.* Lawrence County, 107 S. W. 339, 32 Ky. L. Rep. 894.

40. *Arkansas.*—Christian *v.* Ashley County, 24 Ark 142.

Illinois.— Tappan *v.* People, 67 Ill. 339.

Louisiana.— State *v.* Breed, 10 La. Ann. 491.

South Carolina.— State *v.* Harrison, Harp. 88. But *compare* State Treasurers *v.* Hilliard, 8 Rich. 412.

Tennessee.— McLean *v.* State, 8 Heisk. 22.

See 45 Cent. Dig. tit. "Taxation," § 1106.

41. *Alabama.*— Brewer *v.* King, 63 Ala. 511.

Illinois.—Walker *v.* People, 95 Ill. App. 637.

Maine.— Trescott *v.* Moan, 50 Me. 347.

Maryland.— Johnson *v.* State, 3 Harr. & M. 223.

Mississi pi.— Montgomery *v.* Governor, 7 How. 68.

Missouri.— Moss *v.* State, 10 Mo. 338, 47 Am. Dec. 116.

New Jersey.— Freehold Tp. *v.* Patterson, 38 N. J. L. 255.

North Carolina.— Prince *v.* McNeill, 77 N. C. 398; Coffield *v.* McNeill, 74 N. C. 535.

Tennessee.— Maddox *v.* Shacklett, (Ch. App. 1895) 36 S. W. 731; State *v.* Orr, 12 Lea 725; Chandler *v.* State, 1 Lea 296; Allison *v.* State, 8 Heisk. 312; McLean *v.* State, 8 Heisk. 22.

See 45 Cent. Dig. tit. "Taxation," § 1107.

Contra.— Com. *v.* Stambaugh, 164 Pa. St. 437, 30 Atl. 293. But *compare* Sullivan County *v.* Middendorf, 7 Pa. Super. Ct. 71.

Collector reëlected but not qualified.— Where a collector gave a bond conditioned that "during his continuance in said office" he would well and truly pay over all money collected, etc., and was reëlected in the following year but failed to qualify, although he continued to perform the duties of the office, it was held that his sureties were liable for the money collected by him in such following year. Lynn *v.* Cumberland, 77 Md. 449, 26 Atl. 1001.

42. Fidelity, etc., Co. *v.* Com., 104 Ky. 579, 47 S. W. 579, 49 S. W. 467; Combs *v.* Breathitt County, 38 S. W. 138, 39 S. W. 33, 18 Ky. L. Rep. 809; Hudson *v.* Miles, 185 Mass. 582, 71 N. E. 63, 102 Am. St. Rep. 370; Harris *v.* State, 55 Miss. 50; Conover *v.* Middletown Tp., 42 N. J. L. 382.

43. Grayham *v.* Washington County Ct., 9 Dana (Ky.) 182; State *v.* Kelley, 43 Tex. 667.

person had been appointed to fill the second term,[44] although some of the decisions hold that if the collector has in his hands, at the beginning of the second term, public money which he has not accounted for, the sureties on the bond for the second term are liable for it.[45]

(v) *Breach of Condition* — (a) *Payment Without Authority.* If the tax collector pays over the money in his hands to any person other than the officer authorized by law to receive it, it is a breach of the condition of his bond; and even if the municipality entitled to the taxes eventually receives the whole of the money, he is still liable in nominal damages.[46]

(b) *Failure to Pay Over Collections.* The collector and his sureties are liable for taxes received by him and which he has failed to pay over at the appointed time;[47] and it is immaterial, so far as respects the liability of the sureties, whether he had a warrant or other lawful authority to make the collection; if the taxes have been voluntarily paid to him, it is his duty to account for them, and failure to do so is a breach of the condition of the bond.[48]

44. Crawford *v.* Carson, 35 Ark. 565; U. S. *v.* Eckford, 1 How. (U. S.) 250, 11 L. ed. 120.

Apportionment of liability among different sets of sureties.— In suits on the bonds of a collector of taxes to recover a deficiency in his accounts, extending over three years, there being no evidence as to precisely when the deficit commenced or in which of the three years it occurred, it was held proper to divide the total deficit among the three bonds in the proportion of the sums collected by the collector on each yearly commitment of taxes into his hands. Phipsburg *v.* Dickinson, 78 Me. 457, 7 Atl. 9.

45. *Arkansas.*— Haley *v.* Petty, 42 Ark. 392.

Connecticut.—Hartford *v.* Franey, 47 Conn. 76.

North Carolina.— Fitts *v.* Hawkins, 9 N. C. 394.

Oregon.— Lake County *v.* Neilon, 44 Oreg. 14, 74 Pac. 212.

Pennsylvania.—Castor's Appeal, 2 Pennyp. 337.

Tennessee.— Miller *v.* Moore, 3 Humphr. 189.

Texas.— Tinsley *v.* Rusk County, 42 Tex. 40.

West Virginia.—Spencer Dist. Bd. of Education *v.* Cain, 28 W. Va. 758.

United States.— Walker County *v.* Fidelity, etc., Co., 107 Fed. 851, 47 C. C. A. 15.

See 45 Cent. Dig. tit. "Taxation," §§ 1107, 1108.

Contra.— Coons *v.* People, 76 Ill. 383; Newman *v.* Metcalfe County Ct., 4 Bush (Ky.) 67; Voisin *v.* Guillet, 4 Rob. (La.) 267; Lewenthall *v.* State, 51 Miss. 645; Frost *v.* Mixsell, 38 N. J. Eq. 586.

46. *Illinois.*— People *v.* Yeazel, 84 Ill. 539.

Louisiana.— School Directors *v.* Delahoussaye, 30 La. Ann. 1097.

Michigan.— People *v.* Bender, 36 Mich. 195.

North Carolina.— Clifton *v.* Wynne, 80 N. C. 145.

West Virginia.—Spencer Dist. Bd. of Education *v.* Cain, 28 W. Va. 758.

47. *California.*— Lawrence *v.* Doolan, 68 Cal. 309, 5 Pac. 484, 9 Pac. 159.

Kentucky.— Pulaski County *v.* Elrod, 66 S. W. 1017, 23 Ky. L. Rep. 2231; Combs *v.* Breathitt County, 46 S. W. 505, 20 Ky. L. Rep. 529.

Mississippi.— Boykin *v.* State, 50 Miss. 375.

New York.— Looney *v.* Hughes, 30 Barb. 605.

North Carolina.— Perry *v.* Campbell, 63 N. C. 257.

Tennessee.— McLean *v.* State, 8 Heisk. 22.

West Virginia.— Bennett *v.* McWhorter, 2 W. Va. 441.

Canada.—Baby *v.* Drew, 5 U. C. Q. B. 556.

See 45 Cent. Dig. tit. "Taxation," § 1111.

Taxes not included in bond.—Where the official duty of the collector is limited to the collection of certain particular taxes, money paid to him in liquidation of other taxes is not within the undertaking of his sureties, and they are not liable for his failure to pay it over. Ward *v.* Stahl, 81 N. Y. 406; Com. *v.* Reinhart, 15 Pa. Co. Ct. 487.

Failure, after redemption, to repay amount of overbid to purchaser.—Under Miss. Annot. Code (1892), §§ 3819, 3820, 3824, providing that on a purchaser paying at a tax-sale a sum in excess of the amount of taxes, when the excess at the time of redemption is in the hands of the tax collector, it shall be refunded to the purchaser, and the collector's bond shall be liable therefor, etc., the liability of a tax collector to repay an overbid at a tax-sale arises when redemption has been effected, and a failure to then pay it a breach of his bond. Indianola Bank *v.* Dodds, 90 Miss. 767, 44 So. 767. Under section 3820, providing that, where the owner of land sold for taxes shall accept the overbid of the purchaser, he shall pay interest, and section 3824, providing that the tax collector, on redemption being effected, shall refund the overbid to the purchaser, a tax collector is not liable for interest on overbids on lands being redeemed; the overbids being on deposit with him to await the contingency of redemption. Indianola Bank *v.* Dodds, *supra.*

48. *Florida.*— State *v.* Rushing, 17 Fla. 226.

(c) *Failure to Collect.* Failure of a tax collector to collect the legal taxes within the time required by law is a breach of the condition of his bond for which his sureties are liable,[49] at least to the extent of such taxes as were lost through his remissness or neglect,[50] although the sureties may show in mitigation of damages, if not in bar of the action, any circumstances which made it impossible for their principal to effect collections or which would be a sufficient legal excuse for his failure to do so.[51] The sureties are also liable for taxes for which the collector has given receipts without making the collection.[52]

(VI) *Application of Payments.*[53] If a tax collector serves for two successive terms and is in default, and makes payments on account of his liability to the municipality which he serves, it is his right to appropriate them to the deficit of either term, and if he does not so appropriate them the municipality may do so, and if neither makes an appropriation, the law will apply the payments to the oldest debt.[54] And if a payment is thus appropriated or applied on the deficit of the first term, and is sufficient to discharge it, the liability of the sureties on the bond given for that term is extinguished; but on the other hand, the sureties on the bond for the second term are liable for the resulting deficiency in the collector's accounts for that term.[55]

Maine.— Johnson *v.* Goodridge, 15 Me. 29.

Maryland.— Lynn *v.* Cumberland, 77 Md. 449, 26 Atl. 1001.

Michigan.— Berrien County Treasurer *v.* Bunbury, 45 Mich. 79, 7 N. W. 704.

Mississippi.—Adams *v.* Saunders, 89 Miss. 784, 42 So. 602.

Pennsylvania.— Com. *v.* Stambaugh, 164 Pa. St. 437, 30 Atl. 293.

Stipulation for sufficient warrant.— If the condition of the bond is that the collector shall collect and pay over all taxes for which he shall have a "sufficient warrant under the hands" of the proper officers, his sureties are not liable for money collected by him without such a warrant or outside of its terms. Foxcroft *v.* Nevens, 4 Me. 72.

Liability on sheriff's bond see Sheriffs and Constables, 35 Cyc. 1940.

49. *Alabama.*— State *v.* Lott, 69 Ala. 147.

California.— People *v.* Smith, 123 Cal. 70, 55 Pac. 765.

Maryland.— State *v.* Dorsey, 3 Gill & J. 75.

Mississippi.— Boykin *v.* State, 50 Miss. 375.

New York.—Fake *v.* Whipple, 39 Barb. 339 [*affirmed* in 39 N. Y. 394, 7 Transcr. App. 115].

Vermont.— Montpelier *v.* Clarke, 67 Vt. 479, 32 Atl. 252.

Virginia.— Ballard *v.* Thomas, 19 Gratt. 14.

See 45 Cent. Dig. tit. "Taxation," § 1112.

50. People *v.* Smith, 123 Cal. 70, 55 Pac. 765; Colerain *v.* Bell, 9 Metc. (Mass.) 499; State *v.* Irby, 1 McMull. (S. C.) 485. Under Ky. St. (1903) § 4147, providing that if the sheriff or collector of revenue without reasonable excuse fails to pay to any person entitled thereto the amount due upon any claim allowed by the fiscal court and payable out of the taxes levied by it, if collected or collectable by him, he and his sureties shall be liable therefor, where a special levy was made by the fiscal court to pay a judgment against a county, and a collector of state and county taxes was appointed and gave bond, and his attention was called to the special tax, but he refused to collect it, but did not pretend that it was not collectable, he and his sureties were liable on his official bond. Com. *v.* Wade, 126 Ky. 791, 104 S. W. 965, 31 Ky. L. Rep. 1185.

51. *Kentucky.*— Lyons *v.* Breckinridge County Ct., 101 Ky. 715, 42 S. W. 748, 19 Ky. L. Rep. 951, complaints of illegality of tax and threats to enjoin collection not sufficient to release sureties.

Maine.— Harpswell *v.* Orr, 69 Me. 393, collector deprived of one of the regular remedies for enforcing collection.

Massachusetts.— Colerain *v.* Bell, 9 Metc. 499, inability of particular persons to pay their taxes.

Mississippi.— Montgomery *v.* Governor, 7 How. 68, death of collector during term.

New York.— Fake *v.* Whipple, 39 N. Y. 394, too short time allowed for collection of taxes.

Pennsylvania.— Com. *v.* Titman, 148 Pa. St. 168, 23 Atl. 1120, no warrant issued to collector.

See 45 Cent. Dig. tit. "Taxation," § 1111.

52. McLean *v.* State, 8 Heisk. (Tenn.) 22. *Compare* Ward *v.* Marion County, 26 Tex. Civ. App. 361, 62 S. W. 557, 63 S. W. 155. It is otherwise if the sureties do not contract for the collection of the taxes, but only for the payment over of taxes collected; for an arrangement between the collector and a taxpayer by which the taxes are credited to the latter without actual payment, or by which his private claim against the collector is offset against the taxes, is not a payment of the taxes. Hartford *v.* Franey, 47 Conn. 76.

53. See also *supra*, IX, A, 4.

54. Readfield *v.* Shaver, 50 Me. 36, 79 Am. Dec. 592. But *compare* Elliott *v.* Allen, 30 S. W. 986, 17 Ky. L. Rep. 318.

55. *Kentucky.*— Helm *v.* Com., 79 Ky. 67.

Louisiana.— State *v.* Powell, 40 La. Ann.

c. Remedies and Actions on Bonds — (i) *Summary Remedies* — (a) *In General.* In many states the laws provide summary remedies for enforcing the liability of the sureties on a tax collector's bond, as well as against the collector himself, by motion, rule to show cause, tax execution, or distress.[56] But to make these remedies available, the bond must comply fully with the statutory requisites; if defective or irregular it may be good as a common-law obligation, but in that case only common-law remedies upon it may be pursued.[57]

(b) *Parties and Proceedings.* A summary proceeding of this character should be brought in the name of the obligee in the bond,[58] and may be against the collector and his sureties jointly,[59] or, according to the practice in some states, against the sureties alone or any of them individually.[60] Notice of a motion or rule to show cause must generally be given,[61] and while it need not contain every matter essential to a declaration at common law,[62] it should describe the bond and set forth enough other facts to show a cause of action.[63] The bond should be proved in the ordinary way at the hearing,[64] and if its execution is denied, an issue may be framed and sent to a jury.[65] On default, or failure of the defense, judgment may be entered at once for the amount found to be due,[66] and such judgment is

234, 4 So. 46, 8 Am. St. Rep. 522; State *v.* Hayes, 7 La. Ann. 118.

Maryland.— Frownfelter *v.* State, 66 Md. 80, 5 Atl. 410.

Massachusetts.— Hudson *v.* Miles, 185 Mass. 582, 71 N. E. 63, 102 Am. St. Rep. 370; Sandwich *v.* Fish, 2 Gray 298; Colerain *v.* Bell, 9 Metc. 499.

Missouri.— State *v.* Smith, 26 Mo. 226, 72 Am. Dec. 204.

North Carolina.—McGuire *v.* Williams, 123 N. C. 349, 31 S. E. 627.

Pennsylvania.— Com. *v.* Knettle, 182 Pa. St. 176, 38 Atl. 13.

Texas.— Arbuckle *v.* State, 81 Tex. 191, 16 S. W. 876; Polk *v.* State, 77 Tex. 289, 13 S. W. 1041; Newcomer *v.* State, 77 Tex. 286, 13 S. W. 1040. But *compare* State *v.* Middleton, 57 Tex. 185.

Vermont.— Montpelier *v.* Clarke, 67 Vt. 479, 32 Atl. 252; Carpenter *v.* Corinth, 62 Vt. 111, 22 Atl. 417; Lyndon *v.* Miller, 36 Vt. 329.

Virginia.— Chapman *v.* Com., 25 Gratt. 721.

See 45 Cent. Dig. tit. "Taxation," § 1113.

Contra.— Boring *v.* Williams, 17 Ala. 510; Porter *v.* Stanley, 47 Me. 515, 74 Am. Dec. 501; Metts *v.* State, 68 Miss. 126, 8 So. 390; Cox *v.* Hill, 5 Lea (Tenn.) 146.

56. See the statutes of the different states. And see the following cases:

Alabama.— Stamphill *v.* Franklin County, 86 Ala. 392, 5 So. 487; Carmichael *v.* Hays, 66 Ala. 543; Boring *v.* Williams, 17 Ala. 510.

Arkansas.— Pettigrew *v.* Washington County, 43 Ark. 33; Crawford *v.* Carson, 35 Ark. 565; Christian *v.* Ashley County, 24 Ark. 142.

Georgia.— Cahn *v.* Wright, 66 Ga. 119; Walden *v.* Lee County, 60 Ga. 296; Bassett *v.* Governor, 11 Ga. 207.

Kentucky.—Napier *v.* Casey, 6 J. J. Marsh. 601; Martin *v.* Hardin Justices, 6 J. J. Marsh. 7.

Louisiana.— State *v.* McDonnell, 13 La. Ann. 231; State *v.* Winfree, 12 La. Ann. 643.

Michigan.— James *v.* Howard, 4 Mich. 446.

Missouri.— Wimpey *v.* Evans, 84 Mo. 144.

Pennsylvania.— Com. *v.* Evans, 8 Pa. Co. Ct. 665.

See 45 Cent. Dig. tit. "Taxation," § 1119.

57. Miller *v.* Montgomery County, 1 Ohio 271. And see *supra*, X, A, 10, a, (III).

58. Wheat *v.* State, Minor (Ala.) 199; Grant County Justices *v.* Bartlett, 5 B. Mon. (Ky.) 195; Quarles *v.* Governor, 10 Humphr. (Tenn.) 122.

59. Ware *v.* Greene, 37 Ala. 494; Collier *v.* Powell, 23 Ala. 579; Clarke *v.* Redman, 5 J. J. Marsh. (Ky.) 31; Brown *v.* State, 8 Heisk. (Tenn.) 871. But *compare* Meadows *v.* Com., 4 J. J. Marsh. (Ky.) 14.

Where collections have been made during several years, for each of which the collector gave a bond with different sureties, a joint summons may be issued to all the sureties, and it need not recite the conditions of the several bonds, or the amount demanded from each set of sureties. Boyd *v.* Randolph, 91 Ky. 472, 16 S. W. 133, 13 Ky. L. Rep. 53.

60. *Ex p.* Wilson, 54 Ala. 296; Marion County *v.* Brown, 43 Ala. 112; Grant County Justices *v.* Bartlett, 5 B. Mon. (Ky.) 195; Boggs *v.* State, 46 Tex. 10.

61. Armstrong *v.* State, Minor (Ala.) 160; Grundy *v.* Com., 12 Bush (Ky.) 350. But *compare* Walden *v.* Lee County, 60 Ga. 296; Prairie *v.* Jenkins, 75 N. C. 545.

62. Walker *v.* Chapman, 22 Ala. 116.

63. Nabors *v.* Governor, 3 Stew. & P. (Ala.) 15; Armstrong *v.* State, Minor (Ala.) 160; Wilson *v.* Lilly, 1 Blackf. (Ind.) 358; Lemon *v.* Hay, 1 Blackf. (Ind.) 227; Mississippi County *v.* Jackson, 51 Mo. 23; Brown *v.* State, 8 Heisk. (Tenn.) 871.

64. Phillips *v.* Robbins, 59 Mo. 107; McLean *v.* State, 8 Heisk. (Tenn.) 22; Miller *v.* Moore, 2 Humphr. (Tenn.) 421.

65. Duncan *v.* Richardson, 1 Marv. (Del.) 372, 41 Atl. 75.

66. State *v.* McDonnell, 13 La. Ann. 231. *Compare* State *v.* Montegut, 7 Mart. (La.) 447. And see Shepherd *v.* Hamilton County, 8 Heisk. (Tenn.) 380.

conclusive of all claims and matters of defense which might have been litigated in such proceeding.[67]

(II) *Lien of Bond on Property of Collector and Sureties.* The statutory lien of a collector's bond on his property, and in some states on that of his sureties also, is not merely a remedy to enforce his duty of accounting, but is a part of the contract constituted by the giving of the bond, and has much the same effect as a mortgage.[68] It attaches ordinarily at the time of executing the bond, but in some states only from the rendition of a judgment against the collector.[69] The lien binds property acquired after the execution of the bond,[70] and follows the property into the hands of any purchaser, with or without notice.[71] It is entitled to such priority over other liens as the statute may give it,[72] and is not released by an extension of the time for paying over the taxes collected, at least if the sureties consent thereto.[73] This lien can be foreclosed only in equity.[74] In a decree for the sale of land under the lien of such a bond, it is error to allow defendant to redeem within the time fixed for redemption from sale under execution.[75]

(III) *Action or Suit* — (A) *Right of Action and Conditions Precedent.* A formal demand of payment is not generally a condition precedent to the institution of a suit on a tax collector's bond,[76] although in some states it is necessary that his accounts shall have been audited or adjusted, so that the precise sum may be ascertained for which judgment shall be demanded.[77] Ordinarily the sureties may be joined in the action as defendants; [78] but in some jurisdictions, apparently on the theory that their undertaking is in the nature of a guaranty, they cannot be sued until after the recovery of a judgment against their principal,[79] or even, in some states, until after the exhaustion of remedies against the principal and his property.[80] At common law the proper form of action on a tax collector's

67. State *v.* McBride, 76 Ala. 51; Boyd *v.* Randolph, 91 Ky. 472, 16 S. W. 133, 13 Ky. L. Rep. 53.

68. Knighton *v.* Curry, 62 Ala. 404.

69. See the statutes of the different states. And see Dallas County *v.* Timberlake, 54 Ala. 403; State *v.* Emerson, 3 Houst. (Del.) 85; Lippincott *v.* Barker, 2 Binn. (Pa.) 174, 4 Am. Dec. 433.

70. Baker *v.* Schuessler, 85 Ala. 541, 5 So. 328; Crawford *v.* Richardson, 101 Ill. 351; Pearce *v.* State, 49 La. Ann. 643, 21 So. 737.

71. Irby *v.* Livingston, 81 Ga. 281, 6 S. E. 591; Hook *v.* Richeson, 115 Ill. 431, 5 N. E. 98; Pearce *v.* State, 49 La. Ann. 643, 21 So. 737.

72. Crisfield *v.* Murdock, 127 N. Y. 315, 27 N. E. 1046 [*affirming* 55 Hun 143, 8 N. Y. Suppl. 593] (no priority over unrecorded prior mortgage executed by one of the sureties); Chatfield *v.* Rodger, 75 N. Y. App. Div. 631, 78 N. Y. Suppl. 1113.

73. Crawford *v.* Richeson, 101 Ill. 351.

74. Knighton *v.* Curry, 62 Ala. 404; Chatfield *v.* Rodger, 75 N. Y. App. Div. 631, 78 N. Y. Suppl. 1113.

75. Crisfield *v.* Murdock, 127 N. Y. 315, 27 N. E. 1046.

76. *Louisiana.*— Iberville *v.* Sherburne, 17 La. 342.

Maine.— Scarborough *v.* Parker, 53 Me. 252.

Massachusetts.— Sweetser *v.* Hay, 2 Gray 49.

North Carolina.—McGuire *v.* Williams, 123 N. C. 349, 31 S. E. 627; State *v.* Woodside, 31 N. C. 496; State *v.* McIntosh, 31 N. C. 307.

Vermont.— Houston *v.* Russell, 52 Vt. 110; Middlebury *v.* Nixon, 1 Vt. 232.

See 45 Cent. Dig. tit. "Taxation," § 1123.

Contra.— Com. *v.* McClure, 49 S. W. 789, 20 Ky. L. Rep. 1568; Com. *v.* Williams, 14 Bush (Ky.) 297; Cook *v.* Hays, 9 Gratt. (Va.) 142. *Compare*, however, Lancaster *v.* Arnold, 45 S. W. 82, 20 Ky. L. Rep. 34.

77. Foote *v.* Lake County, 109 Ill. App. 312 [*affirmed* in 206 Ill. 185, 69 N. E. 47]; Com. *v.* McClure, 49 S. W. 789, 20 Ky. L. Rep. 1568; Branch Tp. *v.* Youndt, 23 Pa. St. 182; Com. *v.* Geesey, 1 Pa. Super. Ct. 502. But *compare* Knighton *v.* Curry, 62 Ala. 404; Tappen *v.* People, 67 Ill. 339. And see Maryland Fidelity, etc., Co. *v.* Logan County, 119 Ky. 428, 84 S. W. 341, 27 Ky. L. Rep. 66, holding that a previous settlement of the collector's accounts is not necessary to the maintenance of an action on his bond where he has absconded.

78. See *supra*, X, A, 10, c, (I), (B); *infra*, X, A, 10, c, (III), (C).

79. Goree *v.* State, 22 Ark. 236. But *compare* State *v.* Winfree, 12 La. Ann. 643. And see Post *v.* Sheppard, 4 Gill (Md.) 276.

80. Marks *v.* Butler, 24 Ill. 567; Blanchard *v.* State, 6 La. 290. But *compare* Richmond *v.* Toothaker, 69 Me. 451; Looney *v.* Hughes, 30 Barb. (N. Y.) 605 [*affirmed* in 26 N. Y. 514]. And see Hartland *v.* Hackett, 57 Vt. 92, holding that the two remedies

bond is debt or covenant, usually the former, and not assumpsit;[81] but in some states, by statute, assumpsit will lie, notwithstanding the instrument is under seal.[82] Under some circumstances a suit in equity will lie.[83]

(B) *Defenses* — (1) IN GENERAL. Neither the collector nor his sureties can allege the illegality of the tax as a defense to a suit on his bond, when the ground of action is his failure to pay over money actually collected.[84] Nor can they, in the same circumstances, allege illegality, irregularity, or defects in the levy or assessment of the taxes,[85] or in the tax list or warrant or other process under which the collector acted.[86] Nor is a set-off allowed in this action.[87] But they may plead the statute of limitations, if any is applicable to the case,[88] or a waiver of a breach of condition of the bond,[89] or a former recovery;[90] or they may impeach for mistake a settlement of the collector's accounts with the auditing officers.[91]

against a delinquent tax collector, by imprisonment on an extent and by suit on his official bond, are elective and not concurrent.

Application for execution and return against collector see *In re* Masterman, 118 N. Y. Suppl. 322.

Reimbursement of sureties; right of action against taxpayer.— The owner of seated lands who has failed to pay taxes duly assessed and levied thereon during the ownership is liable, by a common-law action, to reimburse the sureties of the tax collector, who have been compelled to pay them, with interest from the date of such enforced payment. Com. *v.* Mahon, 12 Pa. Super. Ct. 616.

81. See ASSUMPSIT, ACTION OF, 4 Cyc. 323; BONDS, 5 Cyc. 812; COVENANT, ACTION OF, 11 Cyc. 1026; DEBT, ACTION OF, 13 Cyc. 403. And see Tappen *v.* People, 67 Ill. 339; Scarborough *v.* Parker, 53 Me. 252; Lathrop *v.* Allen, 19 Johns. (N. Y.) 229; Middlebury *v.* Nixon, 1 Vt. 232.

82. Com. *v.* Stambaugh, 164 Pa. St. 437, 30 Atl. 293; Com. *v.* Gruver, 13 Pa. Super. Ct. 553. And see ASSUMPSIT, ACTION OF, 4 Cyc. 323.

83. See Lott *v.* Mobile County, 79 Ala. 69 (holding that a county may maintain a bill in equity against a defaulting tax collector and his sureties to enforce a statutory lien against their property); Knighton *v.* Curry, 62 Ala. 404.

84. *Connecticut.*— Hartford *v.* Franey, 47 Conn. 76.

Georgia.— Perkins *v.* State, 101 Ga. 291, 28 S. E. 840.

Illinois.— People *v.* Gillespie, 47 Ill. App. 522.

Indiana.— State *v.* Cunningham, 8 Blackf. 339.

Louisiana.— Homer *v.* Merritt, 27 La. Ann. 568; McGuire *v.* Bry, 3 Rob. 196; Iberville Police Jury *v.* Sherburne, 17 La. 342.

Maryland.— Lynn *v.* Cumberland, 77 Md. 449, 26 Atl. 1001. But see State *v.* Merryman, 7 Harr. & J. 79.

North Carolina.— McGuire *v.* Williams, 123 N. C. 349, 31 S. E. 627; Clifton *v.* Wynne, 80 N. C. 145.

Pennsylvania.— Moore *v.* Allegheny City, 18 Pa. St. 55.

Tennessee.— Chandler *v.* State, 1 Lea 296; McLean *v.* State, 8 Heisk. 22.

Texas.— Webb County *v.* Gonzales, 69 Tex. 455, 6 S. W. 781.

Vermont.— Montpelier *v.* Clarke, 67 Vt. 479, 32 Atl. 252; Tunbridge *v.* Smith, 48 Vt. 648.

Contra.— Com. *v.* U. S. Fidelity, etc., Co., 121 Ky. 409, 89 S. W. 251, 28 Ky. L. Rep. 362; Whaley *v.* Com., 110 Ky. 154, 61 S. W. 35, 23 Ky. L. Rep. 1292.

Failure to collect.— The collector is not bound to expose himself to the risk of damages by enforcing the collection of an illegal tax; and hence where the suit on his bond is based on the failure to collect the taxes, as distinguished from failure to pay over money actually collected, the sureties may plead the illegality of the tax. Quynn *v.* State, 1 Harr. & J. (Md.) 26; Tunbridge *v.* Smith, 48 Vt. 648.

85. Fidelity, etc., Co. *v.* Mobile County, 124 Ala. 144, 27 So. 386; State *v.* Ewing, 116 Mo. 129, 22 S. W. 476.

86. *Kentucky.*— Combs *v.* Breathitt County, 46 S. W. 505, 20 Ky. L. Rep. 529.

Maine.— Orono *v.* Wedgewood, 44 Me. 49, 69 Am. Dec. 81. But *compare* Foxcroft *v.* Nevens, 4 Me. 72.

Massachusetts.— Sandwich *v.* Fish, 2 Gray 298.

North Carolina.— McGuire *v.* Williams, 123 N. C. 349, 31 S. E. 627.

Oregon.— Lake County *v.* Neilon, 44 Oreg. 14, 54 Pac. 212.

South Carolina.— State *v.* Odom, 1 Speers 263.

But *compare* Governor *v.* Montgomery, 2 Swan (Tenn.) 613.

87. State *v.* Leckie, 14 La. Ann. 636; Byers *v.* State, 2 Ohio 106.

88. People *v.* Burkhart, 76 Cal. 606, 18 Pac. 776; San Francisco *v.* Heynemann, 71 Cal. 153, 11 Pac. 870; Lawrence *v.* Doolan, 68 Cal. 309, 5 Pac. 484, 9 Pac. 159; Com. *v.* Pate, 85 S. W. 1096, 27 Ky. L. Rep. 623; State *v.* Ranson, 26 La. Ann. 125; State *v.* Winfree, 12 La. Ann. 643.

89. Northumberland *v.* Cobleigh, 59 N. H. 250.

90. Lyons *v.* Breckinridge County Ct., 101 Ky. 715, 42 S. W. 748, 19 Ky. L. Rep. 951; Combs *v.* Breathitt County, 46 S. W. 505, 20 Ky. L. Rep. 529.

91. Lyons *v.* Breckinridge County Ct., 101 Ky. 715, 42 S. W. 748, 19 Ky. L. Rep. 951.

(2) Estoppel to Deny Validity of Bond or Appointment. In a suit on the bond of a tax collector, both he and his sureties are estopped to deny the validity or regularity of the collector's election or appointment to his office or his qualification thereunder;[92] nor can they dispute the regularity or validity of the bond or its due approval or acceptance.[93]

(3) Release or Discharge of Sureties. The sureties on a tax collector's bond are released from their liability by any alteration in the condition of the bond made after its execution and without their consent,[94] and wholly or *pro tanto* by any liquidation of the collector's indebtedness, as where a portion of his debt is obtained on execution against him.[95] But they are not released or discharged by the granting of an extension of time to the principal within which to make his collections,[96] nor by the repeal of the law under which the bond was executed or any change in the law which does not operate to their prejudice, although it may vary the duties of the collector,[97] nor by the failure or neglect of the proper authorities to require the collector to make periodical settlements as required by law,[98] nor by the giving of a new bond, at least until it is fully approved and accepted in lieu of the old bond,[99] nor by the fact that the municipal authorities did not disclose to the sureties, prior to making the bond, facts within their knowl-

92. *Louisiana.*— Homer *v.* Merritt, 27 La. Ann. 568; State *v.* Dunn, 11 La. Ann. 549.
Maine.— Bethel *v.* Mason, 55 Me. 501; Kellar *v.* Savage, 20 Me. 199.
Maryland.— Laurenson *v.* State, 7 Harr. & J. 339.
Mississippi.— Taylor *v.* State, 51 Miss. 79.
New Hampshire.— Seabrook *v.* Brown, 71 N. H. 618, 51 Atl. 175.
Pennsylvania.— Com. *v.* Stambaugh, 164 Pa. St. 437, 30 Atl. 993.
See 45 Cent. Dig. tit. "Taxation," § 1109.

93. State *v.* Hampton, 14 La. Ann. 725; Waters *v.* Edmondson, 8 Heisk. (Tenn.) 384; McLean *v.* State, 8 Heisk. (Tenn.) 22; Chapman *v.* Com., 25 Gratt. (Va.) 721.

94. Dover *v.* Robinson, 64 Me. 183; Doane *v.* Eldridge, 16 Gray (Mass.) 254; Smith *v.* U. S., 2 Wall. (U. S.) 219, 17 L. ed. 788; Gass *v.* Stinson, 10 Fed. Cas. No. 5,260, 2 Sumn. 453. And see Pawlet *v.* Kelley, 69 Vt. 398, 38 Atl. 92, as to effect of corrections in the tax bills and the addition of some omitted property to the assessment list.

95. Templeton *v.* Comm., 3 Pa. Cas. 550, 8 Atl. 167. See Copley *v.* Dinkgrave, 7 La. Ann. 595.

96. *Illinois.*— Smith *v.* Peoria County, 59 Ill. 412; People *v.* Blackford, 16 Ill. 166; People *v.* McHatton, 7 Ill. 731. *Compare* Davis *v.* People, 6 Ill. 409.
Indiana.— Coman *v.* State, 4 Blackf. 241.
Louisiana.— Natchitoches *v.* Redmond, 28 La. Ann. 274.
Maryland.— State *v.* Carleton, 1 Gill 249.
Mississippi.— State *v.* Swinney, 60 Miss. 39, 45 Am. Rep. 405.
New York.— Olean *v.* King, 116 N. Y. 355, 22 N. E. 559.
North Carolina.— Worth *v.* Cox, 89 N. C. 44; Prairie *v.* Worth, 78 N. C. 169.
Tennessee.— Nashville *v.* Knight, 12 Lea 700; Lane *v.* Howell, 1 Lea 275; Allison *v.* State, 8 Heisk. 312; McLean *v.* State, 8 Heisk. 22. *Compare* Johnson *v.* Hacker, 8 Heisk. 388.
Virginia.— Smith *v.* Com., 25 Gratt. 780; Com. *v.* Holmes, 25 Gratt. 771.
West Virginia.— Bennett *v.* McWhorter, 2 W. Va. 441.
Canada.— Whitby Tp. Corp. *v.* Harrison, 18 U. C. Q. B. 606.
See 45 Cent. Dig. tit. "Taxation," § 1115.
Contra.— State *v.* Roberts, 68 Mo. 234, 30 Am. Rep. 788.

97. Compher *v.* People, 12 Ill. 290; Tucker *v.* Stokes, 3 Sm. & M. (Miss.) 124. And see Prairie *v.* Worth, 78 N. C. 169, where it is said that the power which imposes the burden of taxation can legally indulge, mitigate, or suspend the assessment and collection of its revenues; and every collecting officer accepts office and gives bond affected with notice and subject to the exercise of this right of sovereignty, which enters into and becomes a part of the contract with the state, and is as binding on the bondsmen as any express condition of the bond.

98. *Arkansas.*—Christian *v.* Ashley County, 24 Ark. 142; *Ex p.* Christian, 23 Ark. 641.
Maine.— Readfield *v.* Shaver, 50 Me. 36, 79 Am. Dec. 592.
Michigan.— Detroit *v.* Weber, 26 Mich. 284.
Mississippi.— Marlar *v.* State, 62 Miss. 677.
Missouri.— State *v.* Atherton, 40 Mo. 209.
Vermont.— State *v.* Bates, 36 Vt. 387.
United States.— Osborne *v.* U. S., 19 Wall. 577, 22 L. ed. 208; Ryan *v.* U. S., 19 Wall. 514, 22 L. ed. 172.
See 45 Cent. Dig. tit. "Taxation," § 1115.

99. Taylor *v.* Nunn, 2 Metc. (Ky.) 199; Finch *v.* State, 71 Tex. 52, 9 S. W. 85; State *v.* Wells, 61 Tex. 562.
Appointment of new collector.— A failure of municipal authorities to obey a statute which requires them, on application of the sureties on a defaulting tax collector's bond, to take from such collector the power to collect the taxes remaining uncollected, and to appoint another collector, will not release the

edge affecting the solvency or honesty of the collector, unless it amounts to a wilful and fraudulent concealment.[1]

(c) *Parties.* Suit on a tax collector's bond is properly brought in the name of the state or municipality to whose use or for whose protection it was given,[2] and where the bond runs to the state, and the breach alleged is the failure to pay over county taxes, the proper plaintiff is the state and not the county, although the suit may be to the use of the county or the judgment recovered will be in trust for the county.[3] According to the form of the bond, there may also be cases in which it should be sued on by the particular officer to whom, in his official capacity, it was given.[4] Both the collector and his sureties may and ordinarily will be

sureties. Stoeckle *v.* Armstrong, 8 Del. Ch. 150, 38 Atl. 1059.

1. Com. *v.* Jimison, 205 Pa. St. 367, 54 Atl. 1036; Harrisburg *v.* Guiles, 192 Pa. St. 191, 44 Atl. 48; Meaford Corp. *v.* Lang, 20 Ont. 42. And see Pickering *v.* Day, 2 Del. Ch. 333; Winthrop *v.* Soule, 175 Mass. 400, 56 N. E. 575.

2. *Alabama.*— Lott *v.* Mobile County, 79 Ala. 69.

California.— People *v.* Stacy, 74 Cal. 373, 16 Pac. 192.

Connecticut.— Montville *v.* Haughton, 7 Conn. 543.

Kentucky.— Bates *v.* Knott County Ct., 67 S. W. 1006, 24 Ky. L. Rep. 73.

Mississippi.— State *v.* Bias, 65 Miss. 510, 4 So. 785.

Canada.— Whitby Tp. Corp. *v.* Harrison, 18 U. C. Q. B. 603.

See 45 Cent. Dig. tit. "Taxation," §§ 1122, 1126.

Suit by creditor of municipality.— A person for whom a sum of money is levied by the commissioners of a county has a remedy on the collector's bond for its payment. Sheppard *v.* State, 3 Gill (Md.) 289.

Release of action.— An action on a collector's bond cannot be released by one of the selectmen without the consent of the town. Horn *v.* Whittier, 6 N. H. 88.

Venue of action where collector is sued for damages for an alleged trespass committed by him in his official character see Howard *v.* Herrington, 20 Ont. App. 175.

Amendment as to party plaintiff.— Where a tax collector's bond is taken in the name of the commissioners of the county and not in the name of the commonwealth as required by statute, and a suit is brought in the name of the commonwealth as legal plaintiff, the sureties cannot, after a trial upon the merits and a judgment against them, complain of the variance between the obligee named in the bond and the legal plaintiff in the suit. Such a defect may be cured by amendment, and such amendment will be allowed even in the appellate court. Com. *v.* Singer, 31 Pa. Super. Ct. 597.

3. *Alabama.*— Dudley *v.* Chilton County, 66 Ala. 593.

California.— People *v.* Love, 25 Cal. 520.

Georgia.— Barlow *v.* Sumter County, 47 Ga. 639.

Illinois.— Tappan *v.* People. 67 Ill. 339.

Kentucky.— Com. *v.* Brashears, 4 Dana 471; Com. *v.* McClure, 49 S. W. 789, 20 Ky. L. Rep. 1568. *Compare* McJilton *v.* Com., 5 J. J. Marsh. 592; Com. *v.* Fugate, 1 T. B. Mon. 1.

Mississippi.— State *v.* Hathorn, 36 Miss. 491.

Pennsylvania.— Com. *v.* Singer, 31 Pa. Super. Ct. 597.

Texas.— State *v.* Kelley, 43 Tex. 667. See King *v.* Ireland, 68 Tex. 682, 5 S. W. 499.

See 45 Cent. Dig. tit. "Taxation," § 1126.

But *compare* Hume *v.* Kelly, 28 Oreg. 398, 43 Pac. 380.

Intervention by scire facias on judgment.— In Pennsylvania, where an official bond given by a tax collector to the commonwealth has been entered up by the county, a borough, and a school-district acting together, and judgment entered thereon, a poor district which has placed its duplicate for poor taxes in the hands of the collector may subsequently intervene as a party plaintiff by a scire facias on the judgment; and it is immaterial that the judgment was entered on a warrant of attorney, and was not the result of an adverse action on the bond. Com. *v.* Maxwell, 34 Pa. Super. Ct. 631.

4. *Arkansas.*— Haynes *v.* Butler, 30 Ark. 69.

Indiana.— Heagy *v.* State, 85 Ind. 260; Taggart *v.* State, 49 Ind. 49.

Kentucky.— Hardy *v.* Logan County Ct., 23 S. W. 661, 15 Ky. L. Rep. 405. *Contra*, Com. *v.* McFarland, 7 J. J. Marsh. 208.

Mississippi.— Whitfield *v.* Wooldridge, 23 Miss. 183.

North Carolina.— State *v.* Staton, 104 N. C. 44, 10 S. E. 86.

See 45 Cent. Dig. tit. "Taxation," § 1126.

Contra.— Lord *v.* Lancey, 21 Me. 468; Moodey *v.* Shaw, Tapp. (Ohio) 280.

Suit by successor in office.—A tax collector's bond, given to a municipal officer by name, may be sued on by his successor in office, although not mentioned in the bond. Jansen *v.* Ostrander, 1 Cow. (N. Y.) 670.

Treasurer's suit for commissions.—Where it is the duty of the tax collector to turn over to the county treasurer the taxes collected by him, and the treasurer is entitled to retain his commissions out of such funds, and the collector fails to pay over the money, the treasurer can sue the collector and his sureties for the amount of such commissions, although the statute requiring the bond makes no provision for such a suit. Carothers *v.* Presidio County, 4 Tex. Civ. App. 529, 23 S. W. 491.

joined as defendants, but if the bond is joint and several it is not necessary that all should be included in the suit.[5]

(D) *Pleading.* The declaration, petition, or complaint should show the right of plaintiff to maintain the action, which may be predicated on the refusal of the proper officer to institute the proceeding.[6] It should also allege the levy and assessment of the taxes,[7] and the official duty of defendant to collect them, which will include his election or appointment and the delivery to him of the warrant or other process which authorized him to act,[8] and it should aver distinctly the collection by defendant of a certain and definite sum of money,[9] in his capacity as collector of taxes and while he continued in office,[10] and his refusal or failure to pay it over to the proper officer at the proper time.[11] The plea or answer should be responsive to the declaration and should negative its essential allegations.[12] A material variance between the conditions relied on in the declaration and those in the bond may be fatal.[13]

(E) *Evidence.* It is incumbent on plaintiff to prove the execution, approval,

Bond with indefinite obligee.—Where a collector's bond is made payable to "whomsoever it may concern," and he fails to obey the law requiring him to settle annually with the school trustees for school taxes collected by him, and to pay over the amount in his hands, the trustees are the proper parties to sue on the bond, the statute requiring actions to be prosecuted in the name of the "real party in interest." Walton *v.* Jones, 7 Utah 462, 27 Pac. 580.

5. Lott *v.* Mobile County, 79 Ala. 69; Sprigg *v.* State, 54 Md. 469; Adams *v.* Conner, 73 Miss. 425, 19 So. 198; Moore *v.* Foote, 32 Miss. 469; Butler *v.* State, 2 Tex. Unrep. Cas. 535.

6. See Stokes County *v.* Wall, 117 N. C. 377, 23 S. E. 358; Pender County *v.* McPherson, 79 N. C. 524.

School-district as beneficial plaintiff in suit by state.—Where a suit is brought on a tax collector's bond in the name of the state, although for the use of a school-district, the statement should set forth the manner in which the judgment should be entered in order to secure the proper amount to the school-district, but the omission of this particular may be cured by amendment, and if there is no demurrer, the amendment will be considered as having been made, after trial on the merits and judgment. Com. *v.* Gruver, 13 Pa. Super. Ct. 553.

In some of the early decisions it was ruled that a declaration in a suit of this kind was not objectionable for not setting out the condition of the bond and the breaches to be relied on. State *v.* Kizer, 6 Blackf. (Ind.) 44; Wilson *v.* Ridgely, 46 Md. 235.

7. State *v.* Johnson, 6 Blackf. (Ind.) 217; State *v.* Leonard, 6 Blackf. (Ind.) 173; Evans *v.* State, 2 Blackf. (Ind.) 387; Middlebury *v.* Nixon, 1 Vt. 232. *Compare* People *v.* Love, 25 Cal. 520.

8. State *v.* Leonard, 6 Blackf. (Ind.) 173; Evans *v.* State, 2 Blackf. (Ind.) 387; Brown *v.* Com., 6 J. J. Marsh. (Ky.) 635; Whitfield *v.* Wooldridge, 23 Miss. 183.

9. *California.*— People *v.* Love, 25 Cal. 520.

Indiana.— State *v.* Johnson, 6 Blackf. 217; State *v.* Evans, 3 Blackf. 379.

Kentucky.— Com. *v.* Moren, 78 S. W. 432, 25 Ky. L. Rep. 1635.

Mississippi.—Whitfield *v.* Wooldridge, 23 Miss. 183.

New York.— Jansen *v.* Ostrander, 1 Cow. 670; Lathrop *v.* Allen, 19 Johns. 229.

Oregon.— Fargo *v.* Benton County, 1 Oreg. 262.

Pennsylvania.— Com. *v.* Gruver, 13 Pa. Super. Ct. 553.

See 45 Cent. Dig. tit. "Taxation," § 1127.

Penalties and damages.—Where the statute affixes certain penalties to defaults by collectors, the declaration in an action on the collector's bond to recover those penalties must aver as a breach of the bond a neglect to comply with the statutory requirements. Lee *v.* State, 22 Ark. 231. But see State *v.* Lewenthall, 55 Miss. 589.

10. Rany *v.* Governor, 4 Blackf. (Ind.) 2; Morgan County *v.* Lutman, 63 Mo. 210; State *v.* Grimsley, 19 Mo. 171; Rochester *v.* Symonds, 7 Wend. (N. Y.) 392.

11. *Arkansas.*— Goree *v.* State, 22 Ark. 236; Jones *v.* State, 14 Ark. 170.

Missouri.— State *v.* Patton, 42 Mo. 530.

New Jersey.— Newark *v.* Davis, 18 N. J. L. 21.

Texas.— Shaw *v.* State, 43 Tex. 355.

Virginia.—An allegation that the collector had failed to pay the taxes on demand, instead of at the time appointed by law, is not good, but will be cured by verdict. Winslow *v.* Com., 2 Hen. & M. 459.

See 45 Cent. Dig. tit. "Taxation," § 1127.

12. *Kentucky.*— Com. *v.* McClure, 49 S. W. 789, 20 Ky. L. Rep. 1568.

Mississippi.— McNutt *v.* Lancaster, 9 Sm. & M. 570, as to plea that bond is not binding because never approved.

New York.—Williams *v.* Holden, 4 Wend. 223 (regularity of assessment cannot be put in issue by plea); Jansen *v.* Ostrander, 1 Cow. 670 (*nil debet* not a good plea).

Ohio.— Short *v.* Lancaster, 17 Ohio 96.

Wyoming.— Sweetwater County *v.* Young, 3 Wyo. 684, 29 Pac. 1002.

See 45 Cent. Dig. tit. "Taxation," § 1127.

13. State *v.* Wilson, 107 Md. 129, 68 Atl. 609.

and acceptance of the bond,[14] the levy and assessment of the taxes to be collected,[15] and the official character of defendant and his authority to proceed with the collection of the taxes.[16] Where the breach of condition alleged is the failure to pay over money collected, its actual receipt and the amount must also be shown by the evidence for plaintiff,[17] as well as the fact that it has not been paid over to the proper officers or legally accounted for;[18] and if defendant claims credit for partial payments, or payments made in pursuance of orders drawn on him, he has the burden of establishing this fact.[19] On the other hand, where the breach relied on is the failure to collect taxes which defendant should and could have collected, the case for plaintiff is sufficiently made out by showing defendant's *prima facie* liability for the entire list committed to him, and it is then for him to prove any circumstances justifying or excusing his failure to make the collections.[20]

(F) *Verdict and Judgment.*[21] The verdict, if for plaintiff, should be for a certain and definite amount,[22] and the judgment should correspond.[23] If the amount

14. Com. *v.* Williams, 14 Bush (Ky.) 297; Iberville *v.* Sherburne, 17 La. 342; McCauley *v.* State, 21 Md. 556; U. S. Fidelity, etc., Co. *v.* Fossati, (Tex. Civ. App. 1904) 81 S. W. 1038.

15. Anderson *v.* Bradford, 7 J. J. Marsh. (Ky.) 623; Northumberland *v.* Cobleigh, 59 N. H. 250, the latter case holding that it is sufficient to show that the officers assessing the taxes were *de facto* officers.

16. Machiasport *v.* Small, 77 Me. 109; Kellar *v.* Savage, 20 Me. 199; Laurenson *r.* State, 7 Harr. & J. (Md.) 339; Great Barrington *v.* Austin, 8 Gray (Mass.) 444; Houston County *v.* Dwyer, 59 Tex. 113.

17. State *v.* Daspit, 30 La. Ann. 1112; Boothby *v.* Giles, 64 Me. 403; Baden *v.* State, 1 Gill (Md.) 165; Gibson *v.* State, 59 Miss. 341; Montgomery *v.* Governor, 7 How. (Miss.) 68.

Collector's receipts and entries as evidence. — Receipts given by the collector to taxpayers are evidence against him to show the fact and amount of his collections. Hardy *v.* Logan County Ct., 23 S. W. 661, 15 Ky. L. Rep. 405; Charlotte *v.* Webb, 7 Vt. 38. So also are entries made by him in his official books; these are evidence not only against the collector but also against his sureties. Lynn *v.* Cumberland, 77 Md. 449, 26 Atl. 1001; Welland *v.* Brown, 4 Ont. 217. But it is otherwise as to a "county ledger" kept by the county clerk in pursuance of law. King *v.* Ireland, 68 Tex. 682, 5 S. W. 499.

Admissions of the collector that there was a certain amount of public money in his hands will support an action against him on his bond. Brighton *v.* Walker, 35 Me. 132.

Statement or settlement of account by auditor or controller as evidence in action on collector's bond see Com. *v.* Carson, 26 Pa. Super. Ct. 437; Com. *v.* Piroth, 31 Pittsb. Leg. J. N. S. (Pa.) 225; Allbright *v.* Governor, 25 Tex. 687. A report of county auditors showing that a county treasurer was not charged with any balance outstanding in the hands of a borough collector is not conclusive in favor of the borough collector, in a proceeding against him, instituted by a poor district which had placed in the collector's hands its duplicate for poor taxes. Com. *v.* Maxwell, 34 Pa. Super. Ct. 631.

Showing rights of sureties inter sese. — Where a collector holds office for two successive terms, giving separate bonds with different sureties, the burden of proof, in a suit on the bonds, is on the defendants to show what part of the deficit belonged to each year. Readfield *v.* Shaver, 50 Me. 36, 79 Am. Dec. 592; St. Joseph *v.* Merlatt, 26 Mo. 233, 72 Am. Dec. 207; Spencer Dist. Bd. of Education *v.* Cain, 28 W. Va. 758.

18. New York *v.* Goldman, 125 N. Y. 395, 26 N. E. 456; Lake County *v.* Neilon, 44 Oreg. 14, 74 Pac. 212; Wheeling *v.* Black, 25 W. Va. 266.

Proof of delinquency. — In an action against the sureties of a tax collector, proof that at the end of his term he was in default makes a *prima facie* case, and the burden of showing payment is on defendants. Mendocino County *v.* Johnson, 125 Cal. 337, 58 Pac. 5.

19. *California.* — Mendocino County *v.* Johnson, 125 Cal. 337, 58 Pac. 5.

Louisiana. — State *v.* Ranson, 26 La. Ann. 125.

Massachusetts. — Cheshire *v.* Howland, 13 Gray 321.

New Jersey. — Peck *v.* Essex County, 20 N. J. L. 457.

Tennessee. — Nashville *v.* Edwards, 16 Lea 203.

See 45 Cent. Dig. tit. "Taxation," § 1128.

20. Scarborough *v.* Stevens, 3 Rob. (La.) 147; Iberville *v.* Sherburne, 17 La. 342; Police Jury *v.* Bullit, 8 Mart. N. S. (La.) 323; Fake *v.* Whipple, 39 Barb. (N. Y.) 339 [*affirmed* in 39 N. Y. 394]; Allbright *v.* Governor, 25 Tex. 687.

21. **Amount of liability** see *supra*, X, A, 10, b, (III).

Interest see *supra*, X, A, 10, b, (III) note 39.

22. Lynn *v.* Cumberland, 77 Md. 449, 26 Atl. 1001; State *v.* Carleton, 1 Gill (Md.) 249; Baker County *v.* Huntington, 48 Oreg. 593, 87 Pac. 1036, 89 Pac. 144.

23. In entering judgment on a tax collector's bond, it is not proper to liquidate *ex parte* the amount due; defendants should be warned by scire facias or otherwise and given an opportunity to be heard. Lancaster County *v.* Brenner, 17 Lanc. L. Rev. (Pa.) 256.

recovered belongs to several different municipalities, the judgment should apportion it among them, although failure to do so furnishes no ground of objection to defendant.[24] A judgment against the collector and his sureties may be enforced by proceedings in equity.[25]

11. Criminal Responsibility of Collectors. By force of statutes in the different states, a tax collector may be liable to criminal prosecution when he embezzles the public money in his hands or unlawfully refuses to pay it over,[26] or if he unlawfully collects taxes when none are due, or wilfully and unlawfully exacts or demands more than is due.[27] But if he acts under a good and sufficient warrant in proceeding to collect a tax duly levied, he is not criminally liable for his act in exacting payment from a person who was improperly assessed.[28]

B. Property Subject to Process For Collection[29] — 1. In General. The personal property of the taxpayer is the primary fund out of which all his taxes are to be made,[30] and for this purpose almost every variety of personal property is subject to compulsory process, provided it is found within the district in which the collector's authority runs,[31] and he is not restricted to those particular articles on which the particular assessment was laid or on which a particular tax lien rests.[32] As a general rule there is no exemption of any class or kind of personalty from distress or seizure for taxes;[33] it is immaterial that the property in question may be by law exempt from levy and sale on ordinary executions,[34] or even that

24. Tappan *v.* People, 67 Ill. 339.

25. Com. *v.* Ford, 29 Gratt. (Va.) 683.

26. See the statutes of the different states. And see Woods *v.* Varnum, 85 Cal. 639, 24 Pac. 843; People *v.* Otto, 70 Cal. 523, 11 Pac 675; State *v.* Dudenhefer, 122 La. 288, 47 So. 614; State *v.* Walton, 62 Me. 106; State *v.* Nicholson, 67 Md. 1, 8 Atl. 817; State *v.* Neilon, 43 Oreg. 168, 73 Pac. 321; Com. *v.* McCullough, 19 Pa. Super. Ct. 412. But *compare* Hellings *v.* Com., 5 Rawle (Pa.) 64, holding that under the early act of 1799 in Pennsylvania, since it pointed out a specific remedy against a collector who embezzled taxes, an indictment would not lie. See, generally, Embezzlement, 15 Cyc. 486.

Defalcation of deputies.— In a prosecution against a sheriff for embezzling money collected as taxes, money collected by his deputies, which was mingled with the money of the sheriff's office and as such presumptively came into his possession, is properly included in the amount alleged to have been converted by the sheriff. State *v.* Neilon, 43 Oreg. 168, 73 Pac. 321.

27. State *v.* Green, 87 Mo. 583; State *v.* Green, 24 Mo. App. 227.

28. Buck *v.* Com., 90 Pa. St. 110.

29. **Property subject to distraint** see *infra*, X, C, 4, c.

30. Cones *v.* Wilson, 14 Ind. 465.

Exhaustion of personalty before selling land for taxes see *infra*, XI, B, 2.

31. Patchin *v.* Ritter, 27 Barb. (N. Y.) 34; Ward *v.* Aylesworth, 9 Wend. (N. Y.) 281; State *v.* Graham, 2 Hill (S. C.) 457; Ross *v.* Holtzman, 20 Fed. Cas. No. 12,075, 3 Cranch C. C. 391.

Promissory notes and mortgages are "goods and chattels" subject to levy under a tax warrant, if the officer can get possession of them without trespass. Blain *v.* Irby, 25 Kan. 499.

Railroad property.— The track or road-bed of a railway cannot be levied on for taxes, but its rolling-stock and other personal property may be, and also its franchise of earning tolls. Hackley *v.* Mack, 60 Mich. 591, 27 N. W. 871; Chicago, etc., R. Co. *v.* Custer County, 69 Nebr. 429, 95 N. W. 859; Randall *v.* Elwell, 52 N. Y. 521, 11 Am. Rep. 747.

Municipal waterworks cannot be sold for taxes, being essential to the public health and comfort, but they may be placed in the hands of a receiver for the collection of the taxes due. Covington *v.* Campbell County, 113 Ky. 612, 68 S. W. 669, 24 Ky. L. Rep. 433.

Stock of a private corporation not subject to levy under a tax warrant except by statute see Barnes *v.* Hall, 55 Vt. 420.

A judgment in favor of a taxpayer not subject to process in absence of a statute see Acme Harvesting Mach Co. *v.* Hinckley, 23 S. D. 509, 122 N. W. 482.

Dispensary.— The property of a dispensary, part of a system of state and local institutions for the sale of liquors, is subject to sale on execution for delinquent taxes due the state. Sheffield *v.* Blakely Dispensary, 111 Ga. 1, 36 S E. 302.

Debts due taxpayer.— Under a statute which authorizes the sale of debts due to a delinquent taxpayer, the collector may sell debts due for daily wages, such debts being taxable. White *v.* Martin, 75 Miss. 646, 23 So. 289, 65 Am. St. Rep. 616.

32. Berwin *v.* Legras, 28 La. Ann. 352. See Oteri *v.* Parker, 42 La. Ann. 374, 7 So. 570.

33. Solomon *v.* Willis, 89 Ala. 596, 7 So. 160; Scales *v.* Alvis, 12 Ala. 617, 46 Am. Dec. 269; Dennis *v.* Maynard, 15 Ill. 477; Reams *v.* McHargue, 111 Ky. 163, 63 S. W. 437, 23 Ky. L. Rep. 540; Com. *v.* Lay, 12 Bush (Ky.) 283, 23 Am. Rep. 718.

34. Gentry *v.* Purcell, 84 Ind. 83; Wilmington *v.* Sprunt, 114 N. C. 310, 19 S. E. 348; McKee *v.* Christman, 103 Pa. St. 431; Oliver

it was exempted by statute from taxation, or otherwise was not subject to taxation at the time of the assessment.[35]

2. Ownership and Possession. It is a general rule that the property of one person cannot be seized and sold for taxes due from another person.[36] Hence, although property may be assessed to one who holds it in the character of an agent, consignee, or assignee for creditors, this does not make his individual property liable for the tax.[37] So the property of a corporation is not liable to be taken for the satisfaction of taxes assessed upon its shareholders in respect to their ownership of the stock.[38] Exceptions are made by statute in some of the states, in view of the importance of collecting the public revenue without delay or litigation, so far as to authorize the seizure of property which is in the possession of the person who owes the tax, although he does not own it,[39] or to make taxes assessed upon the owner of real property in respect to such property collectable by seizure of the goods of a tenant in possession,[40] but these statutes are oppressive and are strictly construed.[41]

3. Liability of Personal Property For Satisfaction of Tax on Land. In some states taxes assessed upon land cannot be collected by sale of personal property but only by proceedings against the land itself.[42] But more commonly the

v. White, 18 S. C. 235. *Contra*, Doe *v.* Deavors, 11 Ga. 79.

35. Solomon *v.* Willis, 89 Ala. 596, 7 So. 160; Doe *v.* Minge, 56 Ala. 121; Ring *v.* Williams, 13 Tex. Civ. App. 609, 35 S. W. 733; Scottish Union, etc., Ins. Co. *v.* Bowland, 196 U. S. 611, 25 S. Ct. 345, 49 L. ed. 619. *Contra*, Jackson *v.* Savage, 79 Conn. 294, 64 Atl. 737; Ratliff *v.* Beale, 74 Miss. 247, 20 So. 865, 34 L. R. A. 472.

36. Archer *v.* Terre-Haute, etc., R. Co., 102 Ill. 493; Spence *v.* Frye, 33 Ohio Dec. (Reprint) 11, 2 Wkly. L. Gaz. 103; Daniels *v.* Nelson, 41 Vt. 161, 98 Am. Dec. 577.

Liability for taxes as between vendor and vendee see *supra*, III, A, 3, f.

Applications of rule.—The property of one joint owner of a mining claim cannot be taken on execution to satisfy a tax due from an employee of the other. Meyer *v.* Larkin, 3 Cal. 403. The property of a guardian cannot be taken to pay a tax assessed against him on the property of the ward. Tousey *v.* Bell, 23 Ind. 423. Nor can the property of a husband be made liable for a tax assessed against his wife before their marriage. Sumner *v.* Pinney, 31 Vt. 717. Taxes against a man not being a lien on his wife's property, sale of such property for such taxes is void. Brocking *v.* O'Bryan, 129 Ky. 543, 112 S. W. 631. But on the other hand the individual goods of a partner may be taken by distraint for the payment of a tax against the firm. Van Dyke *v.* Carleton, 61 N. H. 574. And an assessment and judgment for taxes against a succession, as such, are legal when the heirs have not obtained and recorded a decree putting them in possession. Carter *v.* New Orleans, 33 La. Ann. 816.

Pretended sale to evade distress.—Where a person against whom a tax is assessed makes a pretended sale of personal property for the express purpose of preventing a levy for the tax, retains possession of the property, and receives no consideration for the sale, and the vendee takes the bill of sale in order to assist in defeating the collection of the tax, a levy may be made on such property notwithstanding the sale. Gray *v.* Finn, 96 Mich. 62, 55 N. W. 615.

37. Deming *v.* James, 72 Ill. 78; Pioneer Fuel Co. *v.* Molloy, 131 Mich. 465, 91 N. W. 750; Dawson *v.* Croisan, 18 Oreg. 431, 23 Pac. 257.

38. Iowa City First Nat. Bank *v.* Hershire, 31 Iowa 18; Seneca First Nat. Bank *v.* Lyman, 59 Kan. 410, 53 Pac. 125; Hannibal First Nat. Bank *v.* Meredith, 44 Mo. 500; Sandy Hill First Nat. Bank *v.* Fancher, 48 N. Y. 524. *Compare* Omaha First Nat. Bank *v.* Douglas County, 9 Fed. Cas. No. 4,799, 3 Dill. 330. And see Lyman *v.* Seneca First Nat. Bank, 6 Kan. App. 74, 49 Pac. 639.

39. Sears *v.* Cottrell, 5 Mich. 251; Hersee *v.* Porter, 100 N. Y. 403, 3 N. E. 338 (statute embraces goods in possession of a mortgagor after default); Sheldon *v.* Van Buskirk, 2 N. Y. 473; Denton *v.* Carroll, 4 N. Y. App. Div. 532, 40 N. Y. Suppl. 19 (a boarder in a house is not in possession of the furniture in the room which he occupies); Cole *v.* Carl, 82 Hun (N. Y.) 360, 31 N. Y. Suppl. 565; Stockwell *v.* Vietch, 38 Barb. (N. Y.) 650, 15 Abb. Pr. 412 (statute does not apply to goods held by the person taxed for sale on commission and deposited in a warehouse, or to goods in the possession of a firm of which the person taxed is a member).

40. Morrow *v.* Dows, 28 N. J. Eq. 459; McGregor *v.* Montgomery, 4 Pa. St. 237; Hartman *v.* Hazen, 28 Pa. Co. Ct. 311; Winton Coal Co. *v.* Lackawanna County, 1 Lack. Leg. N. (Pa.) 195; Biddle *v.* Blackburn, 3 Pa. L. J. Rep. 396. But see Blakeslee *v.* Stebbins, 3 Pa. Dist. 269; Lewis *v.* Havard, 1 Chest. Co. Rep. (Pa.) 189; Baer *v.* Livingood, 2 Woodw. (Pa.) 336; Mace *v.* Ruttan, 7 Can. L. J. 299.

41. Stockwell *v.* Veitch, 38 Barb. (N. Y.) 650, 15 Abb. Pr. 412.

42. Littler *v.* McCord, 38 Ill. App. 147;

officer is not required to sell the land if he can find personal property sufficient to satisfy the tax,[43] at least if it is on the premises;[44] and indeed it is a statutory requirement in many states that personal property of the delinquent taxpayer shall be exhausted before proceeding to sell his land.[45] But the personal property of a purchaser of land is not liable, unless by statute, for the satisfaction of a tax assessed on the land while it belonged to his vendor.[46]

4. Property in Hands of Receiver. A tax collector cannot seize and sell property in the hands of a receiver, even for the purpose of collecting taxes.[47] The remedy is by application to the court to direct payment by the receiver, or for a sale of property for the purpose, where there are no available funds.[48]

C. Actions and Proceedings For Enforcement and Collection

1. Summary Remedies — a. In General. Summary proceedings are commonly authorized by law and resorted to for the collection of taxes; and they are not governed by the rules applicable to ordinary judicial proceedings, but only by such as the statute prescribes.[49] But a law of this kind is strictly construed and will not be extended by implication, and strict compliance with its provisions is essential to the validity of the proceedings.[50] In addition to the proceedings by distress, attachment, and tax executions, discussed in the succeeding sections, we may here mention, as examples of more or less summary methods of collecting taxes, the authority of a court which has an estate under its control, as in the case of a probate administration or a receivership, to order payment of taxes on a

Spiech *v.* Tierney, 56 Nebr. 574, 76 N. W. 1090; State *v.* Cain, 18 Nebr. 631, 26 N. W. 371. *Compare* Maus *v.* Logansport, etc., R. Co., 27 Ill. 77.

43. *Indiana.*— Ring *v.* Ewing, 47 Ind. 246; Midland R. Co. *v.* State, 11 Ind. App. 433, 38 N. E. 57.

Iowa.— Emerick *v.* Sloan, 18 Iowa 139.

New York.—Van Rensselaer *v.* Cottrell, 7 Barb. 127, 4 How. Pr. 376.

Pennsylvania.— McGregor *v.* Montgomery, 4 Pa. St. 237.

Vermont.— Shaw *v.* Peckett, 25 Vt. 423.

United States.— Semmes *v.* McKnight, 21 Fed. Cas. No. 12,653, 5 Cranch C. C. 539.

See 45 Cent. Dig. tit. "Taxation," § 1156.

Exceptions to rule.—Where lands are assessed as property of a non-resident, although the owner is in fact a resident, the collector cannot seize his personal property but must levy on the land. Lunt *v.* Wormell, 19 Me. 100. So where a farm belonging to a wife was improperly assessed to her husband. Hallock *v.* Rumsey, 22 Hun (N. Y.) 89. And the personal estate of a decedent is not liable for taxes accruing on his real estate after his death. Ross *v.* Holtzman, 20 Fed. Cas. No. 12,075, 3 Cranch C. C. 391.

44. Maus *v.* Logansport, etc., R. Co., 27 Ill. 77; Lake Shore, etc., R. Co. *v.* Roach, 80 N. Y. 339; Hayman *v.* Rothwell, 11 Fed. Cas. No. 6,267, 1 Hayw. & H. 156.

Crops and timber on land are liable to be seized and sold to satisfy a tax assessed on the land. Blodgett *v.* German Sav. Bank, 69 Ind. 153; Morrow *v.* Dows, 28 N. J. Eq. 459.

45. See *infra*, XI, B, 2.

46. Biggins *v.* People, 96 Ill. 381; Everson *v.* Syracuse, 39 Hun (N. Y.) 485; Atlantic, etc., R. Co. *v.* Cleino, 2 Fed. Cas. No. 631, 2 Dill. 175. *Compare* Henry *v.* Horstick, 9 Watts (Pa.) 412; Niver *v.* Perigo, 1 Leg. Gaz. (Pa.) 462.

47. *Georgia.*— Dysart *v.* Brown, 100 Ga. 1, 26 S. E. 767.

Idaho.— Palmer *v.* Pettingill, 6 Ida. 346, 55 Pac. 653.

South Carolina.— Cleveland *v.* McCrary, 46 S. C. 252, 24 S. E. 175.

Tennessee.—Weaver *v.* Duncan, (Ch. App. 1899) 56 S. W. 39.

United States.— *Ex p.* Tyler, 149 U. S. 164, 13 S. Ct. 785, 37 L. ed. 689; Clark *v.* McGhee, 87 Fed. 789, 31 C. C. A. 321. But see Central Trust Co. *v.* Wabash, etc., R. Co., 26 Fed. 11.

And see Receivers, 34 Cyc. 231 *et seq.*

Injunction against enforcement of tax.— A court whose receiver is in charge of a railroad may properly issue an injunction *pendente lite* forbidding the state taxing officers to collect disputed taxes levied against a part of the railroad property. Clark *v.* McGhee, 87 Fed. 789, 31 C. C. A. 321. And on a bill by a receiver to enjoin the enforcement of a tax alleged to be invalid, the power of the federal court to issue a temporary injunction is not affected by the fact that the state law denies any relief against an illegal tax except payment under protest and suit to recover the amount. *Ex p.* Tyler, 149 U. S. 164, 13 S. Ct. 785, 37 L. ed. 689, 149 U. S. 191, 13 S. Ct. 793, 37 L. ed. 698. And see *Ex p.* Chamberlain, 55 Fed. 704.

48. See *supra*, IX, A, 1, c.

Sale of real property see *infra*, XI, D, 1.

49. Oteri *v.* Parker, 42 La. Ann. 374, 7 So. 570 (the seizure of a vessel for taxes is not a proceeding *in rem*, to be governed by the rules of admiralty); Lavergne *v.* New Orleans, 28 La. Ann. 677 (as to notice).

50. *Alabama.*—Rivers *v.* Thompson, 43 Ala. 633.

Georgia.— D'Antignac *v.* Augusta City Council, 31 Ga. 700.

Louisiana.— Police Jury *v.* Bullit, 8 Mart.

simple rule to show cause,[51] the authority of the state to retain the taxes assessed on its bonds out of the interest due the holders,[52] and the right of the tax collector to use the process of garnishment,[53] and of proceedings supplementary to execution, in enforcing payment.[54]

b. Remedies Against Corporations. Corporations as well as individuals are amenable to the laws giving summary remedies for the collection of taxes, and may be proceeded against in the same way.[55] In addition, the laws of some states provide a drastic method of enforcing the payment of state taxes by corporations, by authorizing the courts to enjoin a delinquent corporation from the transaction of any business, or from any exercise of its corporate franchises, until the taxes are paid, and even by forfeiture of its charter.[56] When a corporation is in the hands of a receiver, taxes may be collected by a proceeding in the court having charge, directing the receiver to pay the taxes out of the funds in his hands.[57]

c. Personal Liability For Taxes. In some states it is held that the owner of property is personally liable for the taxes assessed upon it, irrespective of the existence of a lien for the taxes or of other remedies for their collection.[58] But this is denied in other states,[59] particularly where the person in question did not become the owner of the property until after the levy and assessment of the tax,[60] and it is a generally accepted rule that an action will not lie at common law for the recovery of a tax.[61]

N. S. 323, a summary process to enforce the payment of taxes under one act does not extend to new taxes on other objects levied by subsequent acts.

Ohio.— Covington, etc., Bridge Co. *v.* Mayer, 31 Ohio St. 317, the construction should not be so strict as to defeat the purpose of the statute.

United States.— McMillen *v.* Anderson, 95 U. S. 37, 24 L. ed. 335.

51. Cullop *v.* Vincennes, 34 Ind. App. 667, 72 N. E. 166; Brunson *v.* Starbuck, 32 Ind. App. 457, 70 N. E. 163; Dupuy's Succession, 33 La. Ann. 258; Wolfe *v.* Geffroy, 16 Ohio St. 219. And see *supra*, III, A, 3, k.

52. Ewing *v.* Robeson, 15 Ind. 26.

53. Broadway Christian Church *v.* Com., 112 Ky. 448, 66 S. W. 32, 23 Ky. L. Rep. 1695; Wilmington *v.* Sprunt, 114 N. C. 310, 19 S. E. 348.

54. *In re* Veith, 165 N. Y. 204, 58 N. E. 886.

55. New Orleans *v.* Home Ins. Co., 46 La. Ann. 555, 15 So. 377; Parker *v.* Sun Ins. Co., 42 La. Ann. 1172, 8 So. 618; Emory *v.* State, 41 Md. 38; Smyth *v.* International L. Assur. Co., 35 How. Pr. (N. Y.) 126; Debolt *v.* Ohio L. Ins., etc., Co., 1 Ohio St. 563. See State *v.* Baltimore, etc., R. Co., 41 W. Va. 81, 23 S. E. 677.

In a proceeding to recover taxes from a corporation the regularity of its corporate existence cannot be attacked, but the immunities claimed under its charter may be questioned. State *v.* Planters' F. & M. Ins. Co., 95 Tenn. 203, 31 S. W. 992.

56. See the statutes of the different states.

In New Jersey, under the act of 1884, imposing taxes on certain corporations, and providing that in case of non-payment such corporations may be enjoined from exercising any franchise or transacting any business, the court of equity has no discretion but must grant an injunction upon the presentation of a proper case. Electro-Pneumatic Transit Co.'s Case, 51 N. J. Eq. 71, 26 Atl. 463 [*overruling* New York File, etc., Co.'s Case, 43 N. J. Eq. 413, 5 Atl. 897; Faure Electric Light Co.'s Case, 43 N. J. Eq. 411, 5 Atl. 817]; Standard Underground Cable Co. *v.* Atty.-Gen., 46 N. J. Eq. 270, 19 Atl. 733, 19 Am. St. Rep. 394. The court cannot question the constitutionality of the statute. American Glucose Co. *v.* State, 43 N. J. Eq. 280, 5 Atl. 803.

Interstate telegraph company.— The remedy by injunction provided by statutes of this kind cannot be applied to a telegraph company whose lines within the state are mostly constructed and operated as United States postal roads under the act of congress granting the right to build and operate lines on such roads. Western Union Tel. Co. *v.* Massachusetts, 125 U. S. 530, 8 S. Ct. 961, 31 L. ed. 790.

57. Central Trust Co. *v.* New York, etc., R. Co., 110 N. Y. 250, 18 N. E. 92, 1 L. R. A. 260.

58. Oakland *v.* Whipple, 39 Cal. 112; Mercier's Succession, 42 La. Ann. 1135, 8 So. 732, 11 L. R. A. 817; New Orleans *v.* Day, 29 La. Ann. 416; Richardson *v.* Boston, 148 Mass. 508, 20 N. E. 166; Cummings *v.* Fitch, 7 Ohio Dec. (Reprint) 36, 1 Cinc. L. Bul. 77. *Compare* Rising *v.* Granger, 1 Mass. 47, holding that taxes on the lands of a non-resident proprietor are a lien on the land only and not a personal charge against such proprietor.

It is within the power of the legislature to make a tax on real estate a personal charge on the owner. Snipe *v.* Shriner, 44 N. J. L. 206.

59. Edwards *v.* Beaird, 1 Ill. 70; Jefferson *v.* Mock, 74 Mo. 61.

60. Biggins *v.* People, 96 Ill. 381; Blodgett *v.* German Sav. Bank, 69 Ind. 153.

61. See *infra*, X, C, 6, a, (I).

d. Constitutionality of Statutes. Laws providing summary remedies for the collection of delinquent taxes are not open to constitutional objection because they dispense with some of the formalities of ordinary judicial procedure, or cut off technical defenses, or authorize the seizure of property first and a hearing afterward, provided only that the taxpayer is given an opportunity, at some stage of the proceedings and before his rights are finally cut off, to contest the validity of the tax or his liability in respect to it.[62]

e. Defenses and Objections. No lapse of time bars the right of the state or of its municipalities to collect delinquent taxes,[63] unless the statute of limitations is expressly made applicable to such proceedings.[64] Nor can a set-off or counterclaim be interposed in proceedings for the recovery of taxes.[65] But the taxpayer may always contest the legality of the tax or the assessment or the question of his liability to it.[66]

2. Whether Statutory Remedies Exclusive. It is generally held that where a statute provides a remedy for the collection of taxes in given circumstances, that remedy must be pursued to the exclusion of all others based on general principles of law,[67] except in cases where the statutory remedy is inadequate in the particular

62. *California.*— People *v.* Central Pac. R. Co., 43 Cal. 398.

Iowa.— Parker *v.* Davenport, 65 Iowa 633, 22 N. W. 904.

Kentucky.— Cincinnati, etc., R. Co. *v.* Com., 81 Ky. 492.

Louisiana.— Parker *v.* Southern Bank, 46 La. Ann. 563, 15 So. 200; Parker *v.* Sun Ins. Co., 42 La. Ann. 1172, 8 So. 618; State *v.* Meyer, 41 La. Ann. 436, 6 So. 590; New Orleans *v.* Day, 29 La. Ann. 416. But see Rivers *v.* New Orleans, 42 La. Ann. 1196, 8 So. 484; Meyer *v.* Parker, 41 La. Ann. 440, 6 So. 679.

Michigan.— Auditor-Gen. *v.* Reynolds, 83 Mich. 471, 47 N. W. 442.

Minnesota.— *In re* Nelson Lumber Co., 61 Minn. 238, 63 N. W. 630.

Nevada.— State *v.* Central Pac. R. Co., 21 Nev. 260, 30 Pac. 689.

New York.— McMahon *v.* Palmer, 102 N. Y. 176, 6 N. E. 400, 55 Am. Rep. 796; Litchfield *v.* McComber, 42 Barb. 288.

Ohio.— Cummings *v.* Fitch, 7 Ohio Dec. (Reprint) 36, 1 Cinc. L. Bul. 77.

Tennessee.— Grundy County *v.* Tennessee Coal, etc., Co., 94 Tenn. 295, 29 S. W. 116.

United States.— Cincinnati, etc., R. Co. *v.* Kentucky, 115 U. S. 321, 6 S. Ct. 57, 29 L. ed. 414; McMillen *v.* Anderson, 95 U. S. 37, 24 L. ed. 335.

See 45 Cent. Dig. tit. "Taxation," § 1141 *et seq.*

63. *Illinois.*— Greenwood *v.* La Salle, 137 Ill. 225, 26 N. E. 1089.

Louisiana.— Leeds *v.* Treasurer, 43 La. Ann. 810, 9 So. 488; Oteri *v.* Parker, 42 La. Ann. 374, 7 So. 570; Smith *v.* Huey, 34 La. Ann. 1011; New Orleans *v.* Locke, 14 La. Ann. 854.

Missouri.— State *v.* Piland, 81 Mo. 519.

Nebraska.— Price *v.* Lancaster County, 18 Nebr. 199, 24 N. W. 705.

United States.— Hogan *v.* Ingle, 12 Fed. Cas. No. 6,583, 2 Cranch C. C. 352.

See 45 Cent. Dig. tit. "Taxation," §§ 1137, 1174.

Proceedings against receiver.—Where receivers have not made a return for taxation of property held by them, the claim for taxes is not barred by an order limiting the time for presenting claims. Walters *v.* Western, etc., R. Co., 68 Fed. 1002.

Limitation of time for enforcing claim for taxes against decedent's estate see Henderson *v.* Whitinger, 56 Ind. 131; Rich *v.* Tuckerman, 121 Mass. 222.

Proceeding against dissolved corporation.— A statute providing that the court may limit the time for the presentation of claims against dissolved insurance companies does not bar the claim of the state for taxes, although not presented within the time limited. *In re* Life Assoc. of America, 12 Mo. App. 40.

64. See the statutes of the different states. And see the following cases:

Alabama.— Perry County *v.* Selma, etc., R. Co., 58 Ala. 546.

Maryland.— Perkins *v.* Dyer, 71 Md. 421, 18 Atl. 889, 6 L. R. A. 198.

Nevada.— State *v.* Yellow Jacket Silver Min. Co., 14 Nev. 220.

New York.— Kelly's Application, 10 Abb. Pr. 208.

Pennsylvania.— Wickersham *v.* Russell, 51 Pa. St. 71; Philadelphia *v.* Rebank, 12 Pa. Co. Ct. 526.

United States.— San Francisco *v.* Jones, 20 Fed. 188.

65. Morgan *v.* Pueblo, etc., R. Co., 6 Colo. 478; Hawkins *v.* Sumter County, 57 Ga. 166; Wayne *v.* Savannah, 56 Ga. 448. And see *supra*, I, A, 2, b; *infra*, X, C, 6, d, (IV).

66. Georgia Midland, etc., R. Co. *v.* State, 89 Ga. 597, 15 S. E. 301; Macon, etc., R. Co. *v.* Goldsmith, 62 Ga. 463; Spence *v.* Frye, 3 Ohio Dec. (Reprint) 11, 2 Wkly. L. Gaz. 103. And see *infra*, X, C, 6, d, (I), (II).

67. *Florida.*— Bloxham *v.* Consumers' Electric Light, etc., Co., 36 Fla. 519, 18 So. 444, 51 Am. St. Rep. 44, 29 L. R. A. 507.

Louisiana.— Buckner *v.* Masters, 22 La. Ann. 246.

Maine.— York *v.* Goodwin, 67 Me. 260.

case or has been exhausted without satisfaction.[68] But if a law imposing taxes provides no means for enforcing their payment, recourse may be had to the ordinary processes of law.[69] A statute providing a different remedy for the collection of taxes from that previously in force may be retroactive, so as to be available for the collection of taxes levied before its passage.[70] But even though it repeals former laws, it will not affect the collection of taxes which have been duly assessed under previously existing laws.[71]

3. Tax Execution or Warrant — a. Issuance and Requisites. A tax execution is a writ authorizing the seizure and sale of property for delinquent taxes, and differs from an ordinary execution in that it is not based on a judgment but merely on a list of delinquent taxes returned and filed according to law,[72] and that authority to issue it is intrusted to the tax collector himself or, in some states, to a magistrate.[73] To be valid process it must be signed and sealed as the law directs,[74] and recite the necessary jurisdictional facts to authorize its issuance,[75] including a specification of the taxes for which it is issued,[76] and be directed to an officer authorized by law to execute it.[77]

b. Levy and Return. The proceedings of an officer executing a tax execution are to be governed by the same rules which are applicable to ordinary executions on judgments, except in so far as the same may be modified by statute.[78] If the

Nebraska.— Chamberlain *v.* Woolsey, 66 Nebr. 141, 92 N. W. 181, 95 N. W. 38; Dawes County *v.* Furay, 5 Nebr. (Unoff.) 507, 99 N. W. 271.

New Jersey.— Atlantic County *v.* Weymouth Tp., 68 N. J. L. 652, 54 Atl. 458.

North Dakota.— McHenry *v.* Kidder County, 8 N. D. 413, 79 N. W. 875.

Oregon.— Smith *v.* Kelly, 24 Oreg. 464, 33 Pac. 642.

West Virginia.— Cabin Creek Dist. Bd. of Education *v.* Old Dominion Iron, etc., Co., 18 W. Va. 441.

Contra.— Oakland *v.* Whipple, 39 Cal. 112; Boston *v.* Turner, 201 Mass. 190, 87 N. E. 634 (holding that the remedies which the statutes provide for the collection of a tax are cumulative, and a tax collector, proving a claim for unpaid taxes in bankruptcy proceedings against the bankrupt, does not waive any right created for his benefit under the bankrupt's common-law assignment for the benefit of creditors in trust to pay preferred claims, including taxes); State *v.* Georgia Co., 112 N. C. 34, 17 S. E. 10, 19 L. R. A. 485.

68. Mercier's Succession, 42 La. Ann. 1135, 8 So. 732, 11 L. R. A. 817; Coles *v.* Platt, 24 N. J. L. 108; Greene County *v.* Murphy, 107 N. C. 36, 12 S. E. 122.

69. State *v.* Severance, 55 Mo. 378.

70. Hosmer *v.* People, 96 Ill. 58; Holthaus *v.* Adams County, 74 Nebr. 861, 105 N. W. 632.

71. Weld *v.* Bangor, 59 Me. 416.

72. Boyce *v.* Stevens, 86 Mich. 549, 49 N. W. 577; Morrison *v.* St. Louis, etc., R. Co., 96 Mo. 602, 9 S. W. 626, 10 S. W. 148; Houston, etc., R. Co. *v.* State, 39 Tex. 148.

73. Sibley *v.* Carmichael, 120 Ga. 904, 48 S. E. 389; Barnes *v.* Carter, 120 Ga. 895, 48 S. E. 387; Doe *v.* Deavors, 11 Ga. 79; Com. *v.* Gearing, 1 Allen (Mass.) 595; Plainfield *v.* Runyon, 42 N. J. L. 568; Midland Terminal Ferry Co. *v.* Dobbs, 42 N. J. L. 136; McLean *v.* New York, etc., Ferry, etc., Transp. Co., 60 Hun (N. Y.) 80, 14 N. Y. Suppl. 74.

Tax collector out of office.— A tax execution issued by a tax collector after he goes out of office is not a legal process, and any sale of property thereunder is a mere nullity; but if the collector's official term had expired, but his successor had not qualified, he would still be in office so long as he acted officially. Skinner *v.* Roberts, 92 Ga. 366, 17 S. E. 353.

74. Short *v.* State, 79 Ga. 550, 4 S. E. 852; Harper *v.* Elberton, 23 Ga. 566; *In re* Nelson Lumber Co., 61 Minn. 238, 63 N. W. 630.

75. Equitable Bldg., etc., Assoc. *v.* State, 115 Ga. 746, 42 S. E. 87; Hilton *v.* Singletary, 107 Ga. 821, 33 S. E. 715 (where, however, it was held that the tax execution need not state the name of any particular person as the owner of the land in question); Wilson *v.* Herrington, 86 Ga. 777, 13 S. E. 129 (the omission of the tax collector to attach an unsigned receipt to the tax execution, as required by law, does not make the execution void but only irregular).

Warrant issued on removal of taxpayer.— Where the tax warrant is issued on the statutory ground that the person in question has removed out of the collector's precinct without paying his tax, the writ must state this fact. Williamston *v.* Willis, 15 Gray (Mass.) 427. But see Cheever *v.* Merritt, 5 Allen (Mass.) 563.

76. State *v.* Hodges, 14 Rich. (S. C.) 256; State *v.* Graham, 2 Hill (S. C.) 457. But see State *v.* Charleston City Council, 4 Rich. (S. C.) 286.

77. Winn *v.* Butts, 127 Ga. 385, 56 S. E. 406. But see Dickson *v.* Rouse, 80 Mo. 224.

Amendment.— A tax execution which omits the direction to any particular officer, but commands a levy on property of defendant, is irregular, not void, and may be amended by adding a direction as provided by law. Winn *v.* Butts, 127 Ga. 385, 56 S. E. 406.

78. Woods *v.* Davis, 34 N. H. 328; Georgia

law requires a demand to be made upon the taxpayer before proceeding with the execution, a levy without such demand is illegal,[79] and in any case the citizen must be allowed the full time which the statute grants him in which to pay his taxes voluntarily.[80] Whether the officer's authority is restricted to the town, borough, or other minor municipal division, or extends throughout the county or the state, depends on the local statute.[81] He is required to make return of his doings on the execution to the proper court or officer, but not to the taxpayer.[82]

c. Release or Delivery of Property on Bond. In some states provision is made by law for the release or surrender of personal property levied on under a tax execution, on the giving of a forthcoming bond or a bond for the payment of the taxes, by the owner or by a third person claiming the property.[83] But in the absence of a statute, no such bond can lawfully be taken by the collector or officer serving the writ.[84] If a claim to the property is interposed by a stranger, it should be referred to the court for trial.[85]

d. Supplementary Proceedings. A statutory "proceeding supplementary to execution" is an examination of a judgment debtor under oath, touching all his property and effects, with a view to the discovery of property subject to levy, which may be resorted to when an execution is returned unsatisfied; and in some states this proceeding is authorized to be taken as an aid in the collection of taxes.[86] It is founded upon a return by the tax collector that the tax remains unpaid and that he is unable to find property on which to levy,[87] and on an appli-

v. Atlantic, etc., R. Co., 10 Fed. Cas. No. 5,351, 3 Woods 434.

Leaving copy of writ see Olney *v.* Pearce, 1 R. I. 292.

Possession of warrant.— It does not invalidate a levy on chattels for taxes that the officer making it does not have the tax roll and warrant with him at the time, where they are both near by in his possession and control. Bonnin *v.* Zuehlke. 122 Wis. 128, 99 N. W. 445.

Registering the tax does not divest the right of the tax collector to levy for the same, but his remedy is cumulative. Biddle *v.* Blackburn, 5 Pa. L. J. 419.

Money in custody of law.— The levy of a tax on money gives the county a lien, but if the money has come into the custody of the law, the lien can be availed of only by direct application to the court having the fund in possession. Yuba County *v.* Adams, 7 Cal. 35.

79. King *v.* Whitcomb, 1 Metc. (Mass.) 328; Missouri *v.* Spiva, 42 Fed. 435. *Compare* Midland R. Co. *v.* State, 11 Ind. App. 433, 38 N. E. 57. See *infra*, X, C, 4, b.

Tender of receipt see Smith *v.* Ryan, 88 Ky. 636, 11 S. W. 647, 11 Ky. L. Rep. 128; Hoozer *v.* Buckner, 11 B. Mon. (Ky.) 183.

80. Veit *v.* Graff, 37 Ind. 253.

Refusal to pay.— Where a particular taxpayer, informed as to the taxes assessed against him, declares his intention not to pay them, it is not necessary for the collector to appoint a time and place for receiving the taxes, but he may at once make a levy. Hurlbut *v.* Green, 42 Vt. 316; Wheelock *v.* Archer, 26 Vt. 380; Downer *v.* Woodbury, 19 Vt. 329.

81. See the statutes of the different states. And see McKay *v.* Batchellor, 2 Colo. 591; Andrews *v.* Sellers, 11 Ind. App. 301, 38 N. E. 1101; Beard *v.* Seavey, 191 Mass. 503, 78 N. E. 123; Gage *v.* Dudley, 64 N. H. 437, 13 Atl. 865.

82. Spear *v.* Tilson, 24 Vt. 420.

Amendment of return see Morrison *v.* St. Louis, etc., R. Co., 96 Mo. 602, 9 S. W. 626, 10 S. W. 148.

83. Curry *v.* Gila County, 6 Ariz. 48, 53 Pac. 4; Pay *v.* Shanks, 56 Ind. 554; Midland R. Co. *v.* State, 11 Ind. App. 433, 38 N. E. 57; Miller *v.* Wisener, 45 W. Va. 59, 30 S. E. 237.

84. Hardesty *v.* Price, 3 Colo. 556; Brule County *v.* King, 11 S. D. 294, 77 N. W. 107.

85. Winn *v.* Butts, 127 Ga. 385, 56 S. E. 406.

86. See the statutes of the different states. For judicial decisions on the availability of this remedy in states where it is allowed by law see the cases cited *infra*, this section. For states where supplementary proceedings cannot be resorted to in aid of the collection of taxes see West *v.* State, 168 Ind. 77, 79 N. E. 361; Kirkwood *v.* Washington County, 32 Oreg. 568, 52 Pac. 568.

87. *In re* Veith, 165 N. Y. 204, 58 N. E. 886. The collection of a tax returned by a county treasurer as delinquent in the manner provided by Burns Annot St. (1901) § 8571, providing that the county treasurer shall make a list of the delinquent taxpayers, with the amount due from each, which list, when certified as correct by the county auditor, shall have the effect of an execution, and, on the treasurer being unable to find property on which to levy, he may make known the facts to the prosecuting attorney, who shall cause such proceedings to be brought as will secure the payment of the taxes, cannot be enforced by proceedings supplementary to execution provided by section 827, there being no judgment or returned execution. West *v.* State, 168 Ind. 77, 79 N. E. 361.

cation to a proper court for an order requiring the taxpayer to submit to examination,[88] and is generally governed by the same rules as are applicable to proceedings on an ordinary judgment.[89]

e. Assignment of Tax Execution. In Georgia the statute provides that if any third person will pay the amount of a tax execution it may be assigned and transferred to him, and he shall have the same rights of enforcing payment and of priority which the execution carried in the hands of the officer holding it.[90] Without the permission of such a statute a tax execution is not assignable.[91]

4. Distress — a. Nature and Scope of Remedy. A distress warrant is process in the nature of an execution;[92] but it must be authorized by statute; as applied to the collection of taxes, it has no justification in the common law.[93] Being a severe remedy, it is restricted in its operation to the person against whom the tax is assessed,[94] and the officer executing it is very strictly limited in respect to the taxes which he may enforce in this manner,[95] the territorial extent of his authority,[96] and all other matters affecting the rights of the delinquent.[97] But if property taken on distress is replevied or is released on the claim of a third person, or on

88. Matter of Wright, 73 N. Y. App. Div. 75, 76 N. Y. Suppl. 775.

89. Matter of Gould, 75 N. Y. App. Div. 576, 78 N. Y. Suppl. 381; *In re* Conklin, 36 Hun (N. Y.) 588.

Refusal to answer questions on supplementary proceedings is *prima facie* evidence that the person has property sufficient to pay the tax and which is not exempt. Wauwatosa *v.* Gunyon, 25 Wis. 271.

Defenses and motion to vacate see *In re* Adler, 174 N. Y. 287, 66 N. E. 929 (as to objections to sufficiency of warrant and as to showing that the assessment was excessive); *In re* Hartshorn, 17 N. Y. Suppl. 567 (the fact that defendant had enough property to satisfy the tax and which the collector could have found cannot be proved on the examination, but should be made the basis of a motion to vacate the order).

Costs see *In re* Pryor, 67 N. Y. App. Div. 316, 73 N. Y. Suppl. 961.

90. Ga. Code, § 891*a*. And see Hill *v.* Georgia State B. & L. Assoc., 120 Ga. 472, 47 S. E. 897; Livingston *v.* Hudson, 85 Ga. 835, 12 S. E. 17; Freeman *v.* Holcombe, 67 Ga. 337.

Effect of payment by debtor.— Where the tax execution is satisfied by retaining a sufficient amount out of the proceeds of a judicial sale of the taxpayer's lands on another writ, it is extinguished and cannot afterward be transferred under the statute. Blalock *v.* Buchanan, 114 Ga. 564, 40 S. E. 717.

Amount to be paid by assignee.— No legal transfer of a tax execution can be made except upon payment of the full amount due on it, including costs. Wilson *v.* Herrington, 86 Ga. 777, 13 S. E. 129.

Necessity of recording to preserve lien.— A third person buying a tax execution is required by the statute to have it entered on the execution docket of the superior court within thirty days after the transfer. If he fails to do this, the execution no longer has any force except as against defendant only. As to purchasers of the property or any third persons, it is extinguished. Funkhouser *v.* Male, 110 Ga. 766, 36 S. E. 57; Wilson *v.* Herrington, 86 Ga. 777, 13 S. E. 129; Clarke *v.* Douglass, 86 Ga. 125, 12 S. E. 209; Athens Nat. Bank *v.* Danforth, 80 Ga. 55, 7 S. E. 546.

91. State *v.* Wingfield, 59 Ga. 202; Smith *v.* Mason, 48 Ga. 177.

92. Virden *v.* Bowers, 55 Miss. 1. *Compare* Ross *v.* Holtzman, 20 Fed. Cas. No. 12,075, 3 Cranch C. C. 391, holding that a distress is not a judicial process, but is the private remedy of the party entitled to the rent, toll, service, tax, or other duty for which the tenant or debtor is liable.

93. Hull *v.* Southern Development Co., 89 Md. 8, 42 Atl. 943; Caldwell *v.* Eaton, 5 Mass. 399; Bergen *v.* Clarkson, 6 N. J. L. 352.

94. Daniels *v.* Nelson, 41 Vt. 161, 98 Am. Dec. 577.

Owner of property acquiring title after assessment of tax see Michigan Lake Superior Power Co. *v.* Atwood, 126 Mich. 651, 86 N. W. 139; Sawers *v.* Toronto, 2 Ont. L. Rep. 717.

Death of taxpayer.— A distress for the non-payment of a tax cannot be made after the death of the person against whom the tax was assessed. Wilson *v.* Shearer, 9 Metc. (Mass.) 504.

95. See Michigan Lake Superior Power Co. *v.* Atwood, 126 Mich. 651, 86 N. W. 139; Howard *v.* Proctor, 7 Gray (Mass.) 128.

Taxes on omitted property see Bell *v.* Lexington, 120 Ky. 199, 85 S. W. 1081, 27 Ky. L. Rep. 591.

Authority to distrain in one year for taxes of preceding year see Caston *v.* Toronto, 26 Ont. App. 459 [*affirming* 30 Ont. 16]; Coleman *v.* Kerr, 27 U. C. Q. B. 5.

96. Saunders *v.* Russell, 10 Lea (Tenn.) 293, as to case where taxpayer has removed to another county.

97. Butler *v.* Washburn, 25 N. H. 251 (election of remedies as between capias and distress); Brice *v.* McCarrell, 21 Pa. Co. Ct. 512 (tax warrant is not a lien on personalty until seizure); Shoemaker *v.* Swiler, 2 Leg. Op. (Pa.) 7 (personal performance of duty in connection with distraint).

the owner's giving a note for the amount of the taxes, the taxes are not paid, and it is no bar to a subsequent distress.[98]

b. Conditions Precedent. It is generally required that a distress for taxes shall be preceded by a demand on the taxpayer for their payment and his refusal or neglect to comply; and without this the distress is illegal.[99] It may also be provided that the collector shall have the delinquent tax list in his possession, or that he shall exhibit it to the debtor; and such a requirement is mandatory.[1]

c. Property Subject to Distraint. As a rule, subject to statutory exceptions, any property which is in the nature of personalty as distinguished from realty is subject to distraint for taxes,[2] provided it is found within the jurisdiction,[3] and the officer is not restricted to seizing the particular property on which the tax was assessed.[4] Primarily, no property can be taken but such as belongs to the tax debtor and which is in his possession at the time;[5] but to expedite the collection of taxes, leaving contests as to the ultimate liability to pay them to be settled later, the laws sometimes provide that property in the possession of the tax debtor as agent, bailee, or custodian may be taken on distress,[6] and so as to property

98. Farnsworth Co. *v.* Rand, 65 Me. 19; McGregor *v.* Montgomery, 4 Pa. St. 237; Spry *v.* McKenzie, 18 U. C. Q. B. 161.

99. *California.*— Himmelman *v.* Booth, 53 Cal. 50; Himmelmann *v.* Townsend, 49 Cal. 150.

Illinois.— Shaw *v.* Dennis, 10 Ill. 405.

Indiana.— Cones *v.* Wilson, 14 Ind. 465.

Kentucky.— Hoozer *v.* Buckner, 11 B. Mon. 183.

Massachusetts.— Howard *v.* Proctor, 7 Gray 128.

Minnesota.— C. N. Nelson Lumber Co. *v.* McKinnon, 61 Minn. 219, 63 N. W. 630.

United States.— U. S. *v.* Pacific R. Co., 27 Fed. Cas. No. 15,984, 4 Dill. 71.

Canada.— Goldie *v.* Johns, 16 Ont. App. 129; McDermott *v.* Trachsel, 26 Ont. 218; Lewis *v.* Brady, 17 Ont. 377; Chamberlain *v.* Turner, 31 U. C. C. P. 460; Campbell *v.* Elma, 13 U. C. C. P. 296.

Contra.— Ives *v.* Lynn, 7 Conn. 505; State *v.* Helmes, 3 N. J. L. 1050. Under the express provisions of Ky. St. (1909) § 4149 (Russell St. § 6008), no demand is required of a non-resident before the sheriff may distrain for taxes. James *v.* Blanton, 134 Ky. 803, 121 S. W. 951, 123 S. W. 328; James *v.* Luscher, (Ky. 1909) 121 S. W. 954.

Sufficiency of demand; overcharge.— A written demand for the payment of taxes which calls for a greater amount than is legally due is not sufficient as a demand, to precede a distress, even as to one of the items which is legally due and is separately stated. Foote *v.* Blanchard, 4 Manitoba 460. And see McRae *v.* Corbett, 6 Manitoba 426.

Refusal to pay.— When a taxpayer is aware of the taxes charged against him, and their amount, and declares that he will not pay them, it is a waiver of any more formal demand. Marshall *v.* Hunt, 89 Ill. App. 634; Clark *v.* Smith, 31 Misc. (N. Y.) 490, 65 N. Y. Suppl. 646. So also his refusal to pay the tax unless a receipt is given to him therefor is equivalent to an absolute refusal to pay, and waives his right to a statutory notice of six days before distress. Stiles *v.* Hitchcock, 47 Vt. 419, 19 Am. Rep. 121.

1. State *v.* Lutz, 65 N. C. 503; Noble *v.* Amoretti, 11 Wyo. 230, 71 Pac. 879.

2. Blain *v.* Irby, 25 Kan. 499 (notes and mortgages); Chicago, etc., R. Co. *v.* Ellson, 113 Mich. 30, 71 N. W. 324 (personal property of a railroad company, particularly coal stored for future use); Chicago, etc., R. Co. *v.* Forest County, 95 Wis. 80, 70 N. W. 77 (tools and fuel used by a railroad company not liable); Hope *v.* Cumming, 10 U. C. C. P. 118 (fixtures).

Intangible property — Judgment.— Distress for the collection of taxes is not a judicial process, and hence, in the absence of a statute, only such property can be distrained as is tangible and capable of seizure and sale. Acme Harvesting Mach. Co. *v.* Hinkley, 23 S. D. 509, 122 N. W. 482, holding that a judgment in favor of a taxpayer, although personal property, is intangible and cannot be taken or levied on in distress proceedings to recover taxes owing by the judgment creditor.

Part interest in vessel.— Where one owns a one-sixteenth interest in a vessel, and has failed to pay his taxes on such interest, the collector cannot take possession of such vessel and sell it for such arrears of taxes under the statute authorizing distraint. Cuyahoga County *v.* Benham, 18 Ohio Cir. Ct. 862, 9 Ohio Cir. Dec. 847.

3. Perry *v.* Hogan, 5 Kan. App. 463, 46 Pac. 996. See Harper *v.* Lindskog, 13 S. D. 524, 83 N. W. 581.

4. Houser, etc., Mfg. Co. *v.* Hargrove, (Cal. 1900) 59 Pac. 947, 129 Cal. 90, 61 Pac. 660; Mullins *v.* Jersey City, 61 N. J. L. 135, 38 Atl. 822; Russell *v.* Green, 10 Okla. 340, 62 Pac. 817. And see *supra*, X, B, 1.

5. Daniels *v.* Nelson, 41 Vt. 161, 98 Am. Dec. 577; Donahue *v.* Campbell, 2 Ont. L. Rep. 124; Great Western R. Co. *v.* Rogers, 29 U. C. Q. B. 245.

6. See the statutes of the different states. And see Dawson *v.* Dawson, 106 Ga. 45, 32 S. E. 29; Fowble *v.* Kemp, 92 Md. 630, 48 Atl. 379; Hubbell *v.* Abbott, 21 Misc. (N. Y.) 780, 47 N. Y. Suppl. 1129; Norris *v.* Toronto, 24 Ont. 297; Dennison *v.* Henry, 17 U. C. Q. B. 276.

purchased by him after the attaching of a lien for taxes against the former owner,[7] and so also in some states as to the goods of a tenant or occupant of the premises.[8] But property which is in the custody of the law cannot thus be taken.[9]

d. Proceedings on Distress. In regard to the quantity and value of property to be seized on a distress warrant, the collector must exercise a sound discretion, so as to secure satisfaction of the demand with the least loss and inconvenience to the debtor; but if he takes such an amount of property as to be excessive and oppressive, his action is illegal.[10] He must take actual possession of the property where that is physically possible, a constructive or symbolic seizure being permitted only in cases where the property is not susceptible of manual seizure.[11] The costs and fees of such a proceeding are regulated by statute.[12] Property illegally seized may be recovered in replevin, the burden of proof being on the claimant,[13] or the distress may be withdrawn on payment of the taxes and costs.[14] The officer's return on a distress warrant is *prima facie* evidence in his favor.[15]

5. Sale of Personal Property — a. Conditions Essential to Legal Sale — (i) *In General.* To justify an officer in selling personal property for taxes he must have a legal and sufficient warrant,[16] for taxes which remain due and unpaid,[17] and which are chargeable to the person whose property is to be sold,[18] and the property to be sold must be in his possession or subject to a lien for the taxes.[19] If the law requires him to keep the property distrained for a certain number of days before selling, in order to give the owner an opportunity to redeem, the provision is mandatory,[20] although he may begin his advertisement of the sale within that time, provided the sale is not prematurely made.[21]

7. Mills *v.* Thurston County, 16 Wash. 378, 47 Pac. 759. See Horsman *v.* Toronto, 27 Ont. App. 475 [*affirming* 31 Ont. 301].

8. Morrow *v.* Dows, 28 N. J. Eq. 459; Sheldon *v.* Van Buskirk, 2 N. Y. 473; McGregor *v.* Montgomery, 4 Pa. St. 237; Sitler *v.* Singer Mfg. Co., 30 Pa. Co. Ct. 1; Brice *v.* McCarrell, 21 Pa. Co. Ct. 512; Christie *v.* Toronto, 25 Ont. 425; Anglin *v.* Minis, 18 U. C. C. P. 170. And see *supra*, X, B, 2.

9. *California.*— Yuba County *v.* Adams, 7 Cal. 35.

Idaho.— Palmer *v.* Pettingill, 6 Ida. 346, 55 Pac. 653.

Maryland.— Prince George's County *v.* Clarke, 36 Md. 206.

United States.— McRae *v.* Bowers Dredging Co., 90 Fed. 360; Georgia *v.* Atlantic, etc., R. Co., 10 Fed. Cas. No. 5,351, 3 Woods 434.

Canada.— Kingston *v.* Rogers, 31 Ont. 119.

See *supra*, X, B, 4.

Effect of assignment for creditors.—As to effect of assignment for the benefit of creditors on right to distrain for taxes due from the assignor see Huiscamp *v.* Albert, 60 Iowa 421, 15 N. W. 264; Brooks *v.* Eighmey, 53 Iowa 276, 5 N. W. 174; Lyon *v.* Tuthard, 52 Mich. 271, 17 N. W. 839; Brice *v.* McCarrell, 21 Pa. Co. Ct. 512.

10. Roser *v.* Georgia L. & T. Co., 118 Ga. 181, 44 S. W. 994; Chamberlain *v.* Woolsey, 66 Nebr. 141, 92 N. W. 181, 95 N. W. 38; Jewell *v.* Swain, 57 N. H. 506; Corbett *v.* Johnston, 11 U. C. C. P. 317.

11. Bristol *v.* Murff, 49 La. Ann. 357, 21 So. 519; St. Anthony, etc., El. Co. *v.* Bottmeau County, 9 N. D. 346, 83 N. W. 212, 50 L. R. A. 262; Dodge *v.* Way, 18 Vt. 457; New Richmond Lumber Co. *v.* Rogers, 68 Wis. 608, 32 N. W. 700. And see Greer *v* Fergerson, 104 Ga. 552, 30 S. E. 943.

12. See the statutes of the different states. And see Manhattan R. Co. *v.* Merges, 167 N. Y. 539, 60 N. E. 1115; Murray *v.* McNair, 2 Loc. Cts. Gaz. 14.

13. Lewis *v.* Brady, 17 Ont. 377. And see, generally, Replevin, 34 Cyc. 1381 *et seq.*

14. Hill *v.* Allen, (Tenn. Ch. App. 1896) 39 S. W. 892.

15. Barnard *v.* Graves, 13 Metc. (Mass.) 85.

16. Wilson *v.* Seavey, 38 Vt. 221; Emerson *v.* Thompson, 59 Wis. 619, 18 N. W. 503.

Requisites of warrant or execution see *supra*, X, C, 3, a; X, C, 4, a.

Expiration of warrant.— In Wisconsin a town treasurer who has levied on personal property, under a tax warrant valid on its face, for a tax appearing on the tax roll against the owner of such property, may proceed to complete the proceedings, although his distress warrant expires before the sale, his powers in respect to the sale being the same as those given to sheriffs under executions. Keystone Lumber Co. *v.* Pederson, 93 Wis. 466, 67 N. W. 696.

17. Harris *v.* Deblieux, 115 La. 147, 38 So. 946.

18. Houser, etc., Mfg. Co. *v.* Hargrove, 129 Cal. 90, 61 Pac. 660; McAfee *v.* Bumm, 10 Phila. (Pa.) 157. See *supra*, X, B, 2.

19. People *v.* Smith, 123 Cal. 70, 55 Pac. 765; Forth *v.* Pursley, 82 Ill. 152.

20. Lefavour *v.* Bartlett, 42 N. H. 555; Souhegan Nail, etc., Factory *v.* McConihe, 7 N. H. 309. See Clemons *v.* Lewis, 36 Vt. 673.

21. Barnard *v.* Graves, 13 Metc. (Mass.)

(II) *NOTICE OF SALE.* Whatever notice the statute requires as preliminary to a sale of chattels for taxes must be given, in at least substantial compliance with the law's directions; without this the sale is void.[22] But defects or irregularities in the notice not calculated to mislead or in any way to prejudice the rights of the owner do not vitiate the proceedings.[23]

b. Time, Place, and Conduct of Sale. The sale must take place at the time appointed by law or specified in the notice; if held either earlier or later, it will be irregular if not absolutely void,[24] although it may be adjourned from time to time for sufficient cause.[25] It must also be held at the place where the property was seized or where the delinquent owner resides, if so directed in the statute.[26] The officer must stop when he has sold enough property to satisfy the taxes and costs; if he continues, he becomes a trespasser as to the excess and the sale is void.[27] So also if he sells property in lots which should have been offered as separate articles.[28] But inadequacy of price, without fraud, is not sufficient to vitiate the sale.[29] In other particulars, not specially covered by the statute, the sale is to be governed by the same rules which apply to sales under executions on judgments.[30]

c. Return of Sale. The officer making the sale should make such return of his doings under the warrant or execution as the law requires;[31] and the return is presumed to be true and correct in all particulars until it is successfully contradicted by evidence.[32]

d. Rights and Liabilities of Purchasers. Any person may become the purchaser at such a sale who is under no legal or contractual duty to pay the taxes for which the sale is made.[33] He is not bound to see to the strict regularity of all the proceedings, but is protected by the warrant, if fair and regular on its face,

85; Harriman *v.* Orange School Dist. No. 12, 35 Vt. 311.

22. Rodgers *v.* Gaines, 73 Ala. 218; Smith *v.* State, 43 Ala. 344; Harris *v.* Deblieux, 115 La. 147, 38 So. 946; Parker *v.* Citizens' Bank, 49 La. Ann. 105, 21 So. 232; Emerson *v.* Thompson, 59 Wis. 619, 18 N. W. 503; Gibson *v.* Lovell, 19 Grant Ch. (U. C.) 197.

23. *Alabama.*— Rodgers *v.* Gaines, 73 Ala. 218.

Arkansas.— Scott *v.* Watkins, 22 Ark. 556.

Illinois.— Lyle *v.* Jacques, 101 Ill. 644.

Massachusetts.— Rawson *v.* Spencer, 113 Mass. 40; Barnard *v.* Graves, 13 Metc. 85.

New Hampshire.— Johnson *v.* Dole, 3 N. H. 328.

Canada.— Gibson *v.* Lovell, 19 Grant Ch. (U. C.) 197.

See 45 Cent. Dig. tit. "Taxation," § 1178.

24. *Indiana.*—Adams *v.* Davis, 109 Ind. 10, 9 N. E. 162.

Maine.— Brackett *v.* Vining, 49 Me. 356.

Massachusetts.— Noyes *v.* Haverhill, 11 Cush. 338; Pierce *v.* Benjamin, 14 Pick. 356, 25 Am. Dec. 396.

Michigan.— Bird *v.* Perkins, 33 Mich. 28.

New Hampshire.—Lefavour *v.* Bartlett, 42 N. H. 555.

New York.— Sheldon *v.* Van Buskirk, 2 N. Y. 473.

Vermont.— Buzzell *v.* Johnson, 54 Vt. 90. See Clemons *v.* Lewis, 36 Vt. 673.

Washington.—Percival *v.* Thurston County, 14 Wash. 586, 45 Pac. 159.

See 45 Cent. Dig. tit. "Taxation," § 1179.

25. Cavis *v.* Robertson, 9 N. H. 524; Woodcock *v.* Bolster, 35 Vt. 632; Wheelock *v.* Archer, 26 Vt. 380; Spear *v.* Tilson, 24 Vt. 420.

26. Rodgers *v.* Gaines, 73 Ala. 218. But see Carville *v.* Additon, 62 Me. 459.

27. Seekins *v.* Goodale, 61 Me. 400, 14 Am. Rep. 568; Thompson *v.* Currier, 24 N. H. 237; Taylor *v.* Robertson, 16 Utah 330, 52 Pac. 1.

28. Leaton *v.* Murphy, 78 Mich. 77, 43 N. W. 1033; Shimer *v.* Mosher, 39 Hun (N. Y.) 153.

29. Irby *v.* Blain, 31 Kan. 716, 3 Pac. 499.

30. McNeil *v.* Cramer, 27 La. Ann. 678. See Kennedy *v.* Mary Lee Coal, etc., Co., 93 Ala. 494, 9 So. 608.

Sale under two warrants.—A collector of taxes, holding two tax warrants, may make one sale of personal property for non-payment of the whole amount of taxes due under both. Howard *v.* Proctor, 7 Gray (Mass.) 128.

Costs of sale see Howard *v.* Proctor, 7 Gray (Mass.) 128.

Costs of keeping live stock.— Where a sheriff seizes and sells live stock for delinquent taxes, he is entitled to reimburse himself for the actual cost of keeping and caring for the same between the seizure and the sale. Bailey *v.* Napier, (Ky. 1909) 117 S. W. 948.

31. Picket *v.* Allen, 10 Conn. 146. *Compare* Hoitt *v.* Burnham, 61 N. H. 620.

32. Deane *v.* Washburn, 17 Me. 100; Barnard *v.* Graves, 13 Metc. (Mass.) 85; Johnson *v.* Allen, 48 N. H. 235.

33. Hadley *v.* Musselman, 104 Ind. 459, 3 N. E. 122; Crook *v.* Williams, 20 Pa. St. 342.

to the same extent as a purchaser under an ordinary writ of fieri facias.[34] But the sale is void and the purchaser takes no title if the taxes had already been paid,[35] or if the property sold was not of a kind subject to distress under the laws of the state.[36]

6. Actions For Unpaid Taxes — a. Nature, Form, and Right of Action — (i) *Right of Action in General.* As a tax is not a debt in the ordinary meaning of that word,[37] it is generally held that no action will lie for its recovery, that is, that a suit at law cannot be maintained against the taxpayer unless a statute authorizes such an action.[38] Such a provision, however, is now quite

34. Tilghman *v.* Cruson, 4 Harr. (Del.) 341; Hill *v.* Figley, 25 Ill. 156; Gibson *v.* Lovell, 19 Grant Ch. (U. C.) 197. But see Flanders *v.* Cross, 10 Cush. (Mass.) 514. And *compare* Birney *v.* Warren, 28 Mont. 64, 72 Pac. 293, holding that the rule of *caveat emptor* applies to sales of property for delinquent taxes.

35. Brown *v.* Pontchartrain Land Co., 48 La. Ann. 1188, 20 So. 711.

36. Witters *v.* Sowles, 32 Fed. 130, 24 Blatchf. 550.

37. See *supra*, I, A, 2, b.

38. *California.*— Perry *v.* Washburn, 20 Cal. 318.

Indiana.— Richards *v.* Stogsdell, 21 Ind. 74.

Iowa.— Judy *v.* Pleasant Nat. State Bank, 133 Iowa 252, 110 N. W. 605; Shearer *v.* Citizens' Bank, 129 Iowa 564, 105 N. W. 1025. And see Lucas *v.* Purdy, 142 Iowa 359, 120 N. W. 1063, 24 L. R. A. N. S. 1294.

Kansas.—Stafford County *v.* Stafford First Nat. Bank, 48 Kan. 561, 30 Pac. 22.

Kentucky.— Louisville Water Co. *v.* Com., 89 Ky. 244, 12 S. W. 300, 11 Ky. L. Rep. 414, 6 L. R. A. 69; Baldwin *v.* Hewitt, 88 Ky. 673, 11 S. W. 803, 11 Ky. L. Rep. 199; Jones *v.* Gibson, 82 Ky. 561; Newport, etc., Bridge Co. *v.* Douglass, 12 Bush 673; Johnston *v.* Louisville, 11 Bush 527; Turnpike Com'rs *v.* Louisville, etc., R. Co., (1886) 1 S. W. 671.

Maine.— Packard *v.* Tisdale, 50 Me. 376.

Massachusetts.— Boston *v.* Turner, 201 Mass. 190, 87 N. E. 634; Home Sav. Bank *v.* Boston, 131 Mass. 277; Appleton *v.* Hopkins, 5 Gray 530; Crapo *v.* Stetson, 8 Metc. 393; Peirce *v.* Boston, 3 Metc. 520; Andover, etc., Turnpike Corp. *v.* Gould, 6 Mass. 40, 4 Am. Dec. 80; Ruddock *v.* Gordon, Quincy 58.

Michigan.— Detroit *v.* Jepp, 52 Mich. 458, 18 N. W. 217; Staley *v.* Columbus Tp., 36 Mich. 38.

Minnesota.— Faribault *v.* Misener, 20 Minn. 396, *quære.*

Mississippi.— Hinds County *v.* Johnston, (1890) 7 So. 390; State *v.* Piazza, 66 Miss. 426, 6 So. 316.

Missouri.—Carondelet *v.* Picot, 38 Mo. 125.

New Hampshire.— Hibbard *v.* Clark, 56 N. H. 155, 22 Am. Rep. 442.

New Jersey.— Camden *v.* Allen, 26 N. J. L. 398.

North Carolina.— Gatling *v.* Carteret County, 92 N. C. 536, 53 Am. Rep. 432.

Pennsylvania.— Miller *v.* Hale, 26 Pa. St. 432; McCall *v.* Lorimer, 4 Watts 351.

South Dakota.— Brule County *v.* King, 11 S. D. 294, 77 N. W. 107. An action will not lie to recover personal taxes except under Laws (1909), p. 308, c. 209, providing for actions to collect delinquent taxes against non-residents having no property within the state; such personal taxes being otherwise collectable only by distress and sale, as provided by Rev. Pol. Code, § 2162. Acme Harvesting Mach. Co. *v.* Hinkley, 23 S. D. 509, 122 N. W. 482.

Vermont.— Shaw *v.* Peckett, 26 Vt. 482; Webster *v.* Seymour, 8 Vt. 135.

West Virginia.— Hinchman *v.* Morris, 29 W. Va. 673, 2 S. E. 863; Cabin Creek Dist. Bd. of Education *v.* Old Dominion Iron Co., 18 W. Va. 441.

Wisconsin.— State *v.* Chicago, etc., R. Co., 128 Wis. 449, 108 N. W. 594.

United States.— Lane County *v.* Oregon, 7 Wall. 71, 19 L. ed. 101; U. S. *v.* Chamberlain, 156 Fed. 881, 84 C. C. A. 461.

See 45 Cent. Dig. tit. "Taxation," § 1185.

Contra.— New Orleans *v.* Day, 29 La. Ann. 416; American Coal Co. *v.* Allegany County, 59 Md. 185; State *v.* Memphis, etc., R. Co., 14 Lea (Tenn.) 56; Henrietta *v.* Eustis, 87 Tex. 14, 26 S. W. 619; Cave *v.* Houston, 65 Tex. 619; Stone *v.* Tilley, (Tex. Civ. App. 1906) 95 S. W. 718.

Personal claim and foreclosure of lien.— In Texas a personal claim for taxes and foreclosure of the lien on the land is maintainable. Henrietta *v.* Eustis, 87 Tex. 14, 26 S. W. 619; Central Hotel Co. *v.* State, (Tex. Civ. App. 1909) 117 S. W. 880.

Where no statutory remedy provided.— It is the doctrine of some of the cases that where a statute imposes taxes but makes no provision whatever for their collection, it must be presumed that the legislature intended that they should be collected by suit, and consequently an action will lie as at common law. See Perry County *v.* Selma, etc., R. Co., 58 Ala. 546; State *v.* New York, etc., R. Co., 60 Conn. 326, 22 Atl. 765; Territory *v.* Reyburn, McCahon (Kan.) 134; Irwin's Succession, 33 La. Ann. 63; Slack *v.* Ray, 26 La. Ann. 674; Baltimore *v.* Howard, 6 Harr. & J. (Md.) 383; State *v.* Severance, 55 Mo. 378; Gatling *v.* Carteret County, 92 N. C. 536, 53 Am. Rep. 432; Memphis *v.* Looney, 9 Baxt. (Tenn.) 130; Rutledge *v.* Fogg, 3 Coldw. (Tenn.) 554, 91 Am. Dec. 299; Jonesboro *v.* McKee, 2 Yerg. (Tenn.) 167; State *v.* Williams, 8 Tex. 384.

Where statutory remedy not declared exclusive.— Some of the decisions go much further than this, and hold that an action

common in the revenue laws of the states,[39] and such statutory authorization of suit may be made retroactive,[40] and may apply to taxes on omitted property or to taxes of previous years.[41] As to the form of action, if the suit is brought as at common law, it should be in assumpsit, but if on the statute, either debt or case.[42]

(II) *Exclusiveness of Statutory Remedies.* It is held in some states that where the statute creates and prescribes a particular remedy for the collection of delinquent taxes, it is exclusive, and therefore prohibits the maintenance of an action at law.[43] But exceptions to this rule are sometimes made where

at law may be maintained for the recovery of taxes, although the statute provides a special remedy for their collection, provided this statutory remedy is not in terms made exclusive. Perry County *v.* Selma, etc., R. Co., 58 Ala. 546; Burlington *v.* Burlington, etc., R. Co., 41 Iowa 134; Dubuque *v.* Illinois Cent. R. Co., 39 Iowa 56; State *v.* Southern Steamship Co., 13 La. Ann. 497; Dugan *v.* Baltimore, 1 Gill & J. (Md.) 499; State *v.* Memphis, etc., R. Co., 14 Lea (Tenn.) 56; Cave *v.* Houston, 65 Tex 619; Clegg *v.* Galveston County, 1 Tex. App. Civ. Cas. § 58.

Promise of taxpayer.—Where the taxpayer promises the collector, on a good consideration, to pay the amount of the tax, it seems that an action may be maintained on this promise Burr *v.* Wilcox, 13 Allen (Mass.) 269 But *compare* Brule County *v.* King, 11 S. D. 294, 77 N. W. 107.

39. See the statutes of the different states. And see Territory *v.* Gaines, 11 Ariz. 270, 93 Pac. 281; People *v.* Reis, 76 Cal. 269, 18 Pac. 309; McCrary *v.* Lake City Electric Light Co., 139 Iowa 548, 117 N. W. 964; Boston *v.* Turner, 201 Mass. 190, 87 N. E. 634; Menominee *v.* S. K. Martin Lumber Co., 119 Mich. 201, 77 N. W. 704; Delta, etc., Land Co. *v.* Adams, 93 Miss. 340, 48 So. 190; State *v.* Tittmann, 103 Mo. 553, 15 S. W. 936. A judgment and order for sale of land for taxes, and a forfeiture to the state at the sale, is sufficient to support an action of debt against the owner for the delinquent taxes. People *v.* International Salt Co., 233 Ill. 223, 84 N. E. 278; Sanderson *v.* La Salle, 117 Ill. 171, 7 N. E. 114; Biggins *v.* People, 106 Ill. 270.

Construction of statutes.— Proceedings at law for the collection of taxes, where forfeitures are not involved, should be construed liberally. Mason *v.* Belfast Hotel Co., 89 Me. 384, 36 Atl. 624.

Discretion of officer.— Under Ariz. Rev. L. § 86 (Rev. St. (1901) par. 3917), as amended by the act of March 19, 1903 (Laws (1903), p. 165, No. 92), requiring the county tax collector to sue for the collection of delinquent taxes, it is the duty of such officer to bring such suit, in the exercise of which he has no discretion. Territory *v.* Gaines, 11 Ariz. 270, 93 Pac. 281.

Tax laws of another state.— The courts of Illinois will not enforce the revenue laws of another state, where the demands of that state have been satisfied. Kessler *v.* Kedzie, 106 Ill. App. 1.

40 York *v.* Goodwin, 67 Me. 260; Rochester *v* Rochester R. Co., 109 N. Y. App. Div. 638, 96 N. Y. Suppl. 152 [*modified* on other grounds in 187 N. Y. 216, 79 N. E. 1010]. And see Biggins *v.* People, 106 Ill. 270. *Compare*, however, Delta, etc., Land Co. *v.* Adams, 93 Miss. 340, 48 So. 190, holding that Code (1906), § 4256, making every lawful tax a debt, and providing a new method of collecting it by action, while under the prior law back taxes were not debts, and were collectable, when on realty, by sale of the land, created a new obligation to pay, as well as a new remedy, and could have no retroactive effect, and hence a personal decree could not be rendered for back taxes due before the enactment of the section, although assessed thereafter, as they were not debts.

41. Galusha *v.* Wendt, 114 Iowa 597, 87 N. W. 512; Delta, etc., Land Co. *v.* Adams, 93 Miss. 340, 48 So. 190; Hull *v.* Alexander, 69 Ohio St. 75, 68 N. E. 642; Toledo Bridge Co. *v.* Yost, 22 Ohio Cir. Ct. 376, 12 Ohio Cir. Dec. 448. But an action for taxes on property omitted from taxation for preceding years is statutory, and cannot be maintained unless the statute has been substantially complied with. Judy *v.* Pleasant Nat. State Bank, 133 Iowa 252, 110 N. W. 605.

42. Baltimore *v.* Howard, 6 Harr. & J. (Md.) 383; Gillespie *v.* Sefrin, 1 Chest. Co. Rep. (Pa.) 61; Franklin *v.* Warwick, etc., Water Co., 24 R. I. 224, 52 Atl. 988; Meredith *v.* U. S., 13 Pet. (U. S.) 486, 10 L. ed. 258.

43. *Iowa.*— Plymouth County *v.* Moore, 114 Iowa 700, 87 N. W. 662; Cedar Rapids, etc., R. Co. *v.* Carroll County, 41 Iowa 153.

Kansas.— Stafford County *v.* Stafford First Nat. Bank, 48 Kan. 561, 30 Pac. 22.

Kentucky.—Johnston *v.* Louisville, 11 Bush 527.

Louisiana.—Alexandria *v.* Heyman, 35 La. Ann. 301.

Michigan.— Detroit *v.* Jepp, 52 Mich. 458, 18 N. W. 217.

Missouri.— State *v.* Snyder, 139 Mo. 549, 41 S. W. 216. But *compare* State *v.* Cummings, 151 Mo. 49, 52 S. W. 29.

Ohio.— Mayer *v.* Cincinnati German Bldg. Assoc., 2 Cinc. Super. Ct. 336.

Pennsylvania.—Bouck *v.* Kittanning, 1 Am. L. Reg. 125.

South Dakota.— Hanson County *v.* Gray, 12 S. D. 124, 80 N. W. 175, 76 Am. St. Rep. 591.

Utah.— Crismon *v.* Reich, 2 Utah 111.

Virginia.— Marye *v.* Diggs, 98 Va. 749, 37 S. E. 315, 51 L. R. A. 902.

Canada.— Carson *v.* Veitch, 9 Ont. 706.

See 45 Cent. Dig. tit. "Taxation," § 1189.

the statutory remedy is not adequate,[44] where it is such as cannot be enforced in the particular case,[45] and where it has been exhausted without satisfaction of the taxes.[46]

(III) *Suits in Equity.* The return of a tax warrant unsatisfied has sometimes been held sufficient ground for a proceeding in equity to enforce payment of the tax;[47] but as a general rule, the powers of the court of chancery cannot be invoked in matters of this kind except upon grounds of fraud, trust, or some other well-recognized head of equity jurisdiction.[48]

(IV) *Actions to Enforce Lien.* A court of equity has inherent jurisdiction of proceedings to enforce a tax lien independently of any statute.[49] If personal property subject to such a lien is in the possession of a third person, the proper officer may maintain replevin to recover it,[50] and if it has been sold, he may proceed in equity to charge the proceeds of sale with the tax lien.[51]

But *compare* Anniston *v.* Southern R. Co., 112 Ala. 557, 20 So. 915; Howard *v.* Houston, 59 Tex. 76. And see cases cited *supra*, note 38. In Massachusetts the remedies which the statutes provide for the collection of a tax are cumulative, and a tax collector, proving a claim for unpaid taxes in bankruptcy proceedings against the bankrupt, does not waive any right created for his benefit under the bankrupt's common-law assignment for the benefit of creditors in trust to pay preferred claims, including taxes. Boston *v.* Turner, 201 Mass. 190, 87 N. E. 634.

Back taxes.— In Mississippi, construing Code (1906), § 4256, providing that every lawful tax is a debt due by the person owning the property and may be recovered, and section 4740, providing that if, after the fiscal year in which taxes become due, the revenue agent discovers that property has not been assessed, he shall notify the tax collector, who shall assess it, and if the assessment is approved, and no appeal is taken, and the taxes are not paid within thirty days, the property, if realty, shall be ordered sold, as provided by section 4367, it was held that section 4256 provides a more effective remedy by which the essential nature of the obligation as for taxes is changed to that of debts and applies to back taxes and the method provided by section 4740 for collecting back taxes is not exclusive. Delta, etc., Land Co. *v.* Adams, 93 Miss. 340, 48 So. 190.

Right to forfeit corporate charter.—Although a state has the right to have the charter of a domestic corporation declared forfeited on its failure to pay taxes, this fact is no bar to the right of the state to bring a creditor's suit for the taxes, the forfeiture being a penalty which the state may insist on or waive at its election. State *v.* Georgia Co., 112 N. C. 34, 17 S. E. 10, 19 L. R. A. 485.

44. McLean *v.* Myers, 134 N. Y. 480, 32 N. E. 63 [*reversing* 58 N. Y. Super. Ct. 337, 11 N. Y. Suppl. 635].

45. Com. *v.* Louisville, 47 S. W. 865, 20 Ky. L. Rep. 893 (where the property belonged to a municipal corporation and therefore could not be seized and sold by the collector); State *v.* Southern Steamship Co., 13 La. Ann. 497 (where it was evident that if the property were seized, its sale would be stopped by an injunction); Hoover *v.* Engles, 63 Nebr. 688, 88 N. W. 869 (no personal property to be found).

46. Dunlap *v.* Gallatin County, 15 Ill. 7; Ryan *v.* Gallatin County, 14 Ill. 78; Com. *v.* Commonwealth Bank, 22 Pick. (Mass.) 176; Ruddock *v.* Gordon, Quincy (Mass.) 58; Shriver *v.* Cowell, 92 Pa. St. 262.

47. Auditor-Gen. *v.* Lake George, etc., R. Co., 82 Mich. 426, 46 N. W. 730.

48. Durant *v.* Albany County, 26 Wend. (N. Y.) 66; State *v.* Georgia Co., 112 N. C. 34, 17 S. E. 10, 19 L. R. A. 485 (creditor's bill); State *v.* Hirsch, 16 Lea (Tenn.) 40 (failure to collect taxes by ordinary method due to defendant's fraudulent representations). And see Adams *v.* Stonewall Mfg. Co., 80 Miss. 94, 31 So. 544. Under Mass. Rev. Laws (1902), c. 13, § 32, a tax collector may sue in equity to enforce a trust for unpaid taxes created by a common-law assignment for benefit of creditors in trust for the payment of preferred claims, including taxes; the word "action" as used in said section meaning the pursuit of a right in a court of justice, without regard to the form of legal proceedings. Boston *v.* Turner, 201 Mass. 190, 87 N. E. 634. The fact that Miss. Code (1906), § 4256, provides for a recovery of taxes by "action," does not confine the remedy to courts of law, in view of sections 4738, 4742, and 4743, giving the revenue agent authority to sue in either a court of law or equity. Delta, etc., Land Co. *v.* Adams, 93 Miss. 340, 48 So. 190.

Suit to enjoin sale of land and for personal decree.— In Mississippi a bill in equity will lie to restrain the sale of land until taxes thereon are paid and for a personal decree for the taxes. Delta, etc., Land Co. *v.* Adams, 93 Miss. 340, 48 So. 190. In such a suit, where an injunction is granted, and on the hearing on the merits a decree for the taxes is rendered, the injunction should be dissolved, as the decree, when properly enrolled, establishes a lien for the taxes. Delta, etc., Land Co. *v.* Adams, *supra*.

49. McInerny *v.* Reed, 23 Iowa 410; Merrill *v.* Ijams, 58 Nebr. 706, 79 N. W. 734; State *v.* Duncan, 3 Lea (Tenn.) 679. *Contra*, People *v.* Biggins, 96 Ill. 481.

50. Reynolds *v.* Fisher, 43 Nebr. 172, 61 N. W. 695.

51. Worthen *v.* Quinn, 52 Ark. 82, 12 S. W.

(v) *Authority of Particular Officers.* The statutes usually designate the particular state or municipal officer who shall have authority to institute and prosecute suits for the recovery of delinquent taxes; and where this is the case such an action will not lie in the name of any other officer.[52]

(vi) *Joinder and Consolidation.* Taxes levied for different years or other fiscal periods are distinct causes of action, and can be united in one suit only under circumstances which would justify such joinder in the case of other liabilities, or when it is so directed by the statute.[53] The same rule applies to taxes due to different treasuries, as to the state and a county, to a county and a school-district, or to a county and town.[54] So also the taxes due from the same owner on separate parcels of land should be sued for in as many separate suits, but these may be consolidated on motion, and it is generally proper to do so.[55]

(vii) *Persons Liable to Suit.* The suit should be brought against the person who is directly and primarily liable for the payment of the tax,[56] and this is ordinarily the one to whom the property was assessed, although he may have parted with the title in the mean time, no personal liability attaching to the purchaser unless by force of a statute.[57] If death or insolvency intervenes, the action may be against the personal representatives or assignee of the taxpayer.[58]

156; Reed *v.* Creditors, 39 La. Ann. 115, 1 So. 784.

52. See the statutes of the several states. And see the following cases:

Kentucky.— Lucas *v.* Com., 121 Ky. 423, 89 S. W. 292, 28 Ky. L. Rep. 372; Campbell County *v.* Newport, etc., Bridge Co., 112 Ky. 659, 66 S. W. 526, 23 Ky. L. Rep. 2056.

Louisiana.— New Orleans *v.* Jeter, 13 La. Ann. 509.

Maine.— Lord *v.* Parker, 83 Me. 530, 22 Atl. 392.

Michigan.— Auditor-Gen. *v.* Lake George, etc., R. Co., 82 Mich. 426, 46 N. W. 730.

Mississippi.— Yazoo, etc., R. Co. *v.* West, 78 Miss. 789, 29 So. 475; State *v.* Hill, 70 Miss. 106, 11 So. 789.

Nebraska.— Moore *v.* Furnas County Live Stock Co., 78 Nebr. 558, 111 N. W. 464.

Nevada.— State *v.* Central Pac. R. Co., 10 Nev. 87.

New Mexico.— U. S. Trust Co. *v.* Territory, 10 N. M. 416, 62 Pac. 987.

North Carolina.— Worth *v.* Wright, 122 N. C. 335, 29 S. E. 361.

Pennsylvania.— Casey *v.* Wade, 3 Walk. 282; Hayes *v.* Grier, 4 Binn. 80.

Tennessee.— State *v.* Baldwin University, 97 Tenn. 358, 37 S. W. 1; Grundy County *v.* Tennessee Coal, etc., Co., 94 Tenn. 295, 29 S. W. 116.

See 45 Cent. Dig. tit. "Taxation," § 1186.

Authority to compromise.— County officers having authority to sue for taxes due to the county may compromise such a suit and accept payment of less than the entire amount of taxes due. St. Louis, etc., R. Co. *v.* Anthony, 73 Mo. 431. But they cannot compromise a suit instituted by the state. State *v.* Central Pac. R. Co., 9 Nev. 79. See *supra*, X, A, 4, g.

Want of authority of county board.— A statutory requirement that an action by a county treasurer to recover personal taxes shall only be brought by the direction of the county board is waived by filing an answer and proceeding to trial without objection. Moore *v.* Furnas County Live Stock Co., 78 Nebr. 558, 111 N. W. 464.

Presumptions.— It may be presumed, in the absence of evidence to the contrary, that selectmen added the word "selectmen," if necessary, after their signatures to a written authority to the collector of taxes to bring an action for taxes, where such written authority has been destroyed. Greenville *v.* Blair, 104 Me. 444, 72 Atl. 177.

53. State *v.* Yellow Jacket Silver Min. Co., 14 Nev. 220.

54. *Alabama.*— State *v.* Adler, 123 Ala. 87, 26 So. 502.

California.— Los Angeles County *v.* Ballerino, 99 Cal. 593, 32 Pac. 581, 34 Pac. 329.

Illinois.— Dalby *v.* People, 124 Ill. 66, 16 N. E. 224.

Kentucky.— Pfirrman *v.* Clifton Dist., 96 S. W. 810, 29 Ky. L. Rep. 1003.

Maine.— Mason *v.* Belfast Hotel Co., 89 Me. 381, 36 Atl. 622.

55. Whitney *v.* Morton County, 73 Kan. 502, 85 Pac. 530; *In re* Stutsman County, 38 Fed. 337.

56. Dalby *v.* People, 124 Ill. 66, 16 N. E. 224.

57. *Illinois.*— Biggins *v.* People, 96 Ill. 381.

Indiana.— Volger *v.* Sidener, 86 Ind. 545; Blodgett *v.* German Sav. Bank, 69 Ind. 153.

Massachusetts.— Webber Lumber Co. *v.* Shaw, 189 Mass. 366, 75 N. E. 640.

Michigan.— Laketon Tp. *v.* Akeley, 74 Mich. 695, 42 N. W. 165.

New York.— Everson *v.* Syracuse, 29 Hun 485 [*reversed* on other grounds in 100 N. Y. 577].

United States.— Atlantic, etc., R. Co. *v.* Cleino, 2 Fed. Cas. No. 631, 2 Dill. 175.

Effect of foreclosure of mortgage see Webber Lumber Co. *v.* Shaw, 189 Mass. 366, 75 N. E. 640; Sherwin *v.* Boston Five Cents Sav. Bank, 137 Mass. 444; Andrews *v.* Worcester County Mut. F. Ins. Co., 5 Allen (Mass.) 65.

58. Galusha *v.* Wendt, 114 Iowa 597, 87 N. W. 512 (executor or administrator); Scollard *v.* Edwards, 194 Mass. 77, 80 N. E. 4

In case of a private corporation, the suit should be against the corporation as such, and not against the directors or any officer.[59] Proceedings may be taken against a non-resident owner, but only so far as to make the property assessed liable to the satisfaction of the tax, not to impose on him a personal liability.[60]

b. Conditions Precedent — (I) *In General.* It is always essential to the maintenance of the action that there shall have been a proper assessment of the property and such a failure on the part of the owner to pay the tax as constitutes a legal default; [61] and also, in some states, a proper return, certification, and filing of the delinquent list,[62] an authorization of the suit to be given by some superior officer, which may include his audit and settlement of the claim,[63] and sometimes the issue and return unsatisfied of a tax execution or distress warrant.[64] Any other conditions precedent imposed by the local statute must of course be observed or the suit will fail.[65]

(II) *Demand.* If the statute requires a demand upon the taxpayer and his refusal to pay to precede the institution of an action against him, it is mandatory; and this rule is sometimes applied in the absence of a statute requiring it,[66] although not invariably.[67]

c. Jurisdiction and Venue. A suit for the recovery of taxes must be brought in the court, if any, specially invested by statute with jurisdiction for that purpose; [68] and where there is such a grant of special jurisdiction, the ordinary limita-

(assignee in insolvency); Freetown *v.* Fish, 123 Mass. 355 (trustees).

59. Com. *v.* Commonwealth Bank, 22 Pick. (Mass.) 176; Muskegon *v.* Lange, 104 Mich. 19, 62 N. W. 158.

60. New York *v.* McLean, 170 N. Y. 374, 63 N. E. 380; McLean *v.* Myers, 134 N. Y. 480, 32 N. E. 63; Berlin *v.* Grange, 5 U. C. C. P. 211.

Removal from precinct.— Where a statute gave a right of action to the tax collector in his own name against any citizen who should remove out of his precinct without paying his taxes this was held to warrant a suit against a person who left the precinct in the circumstances mentioned, although he intended to return at some future time (Houghton *v.* Davenport, 23 Pick. (Mass.) 235), but not against one who had removed from the precinct before the tax was assessed, although after it was voted (Ware *v.* Sherburne First Parish, 8 Cush. (Mass.) 267).

61. *Illinois.*— People *v.* Davis, 112 Ill. 272.

Iowa.— Judy *v.* Pleasant Nat. State Bank, 133 Iowa 252, 110 N. W. 605; Thornburg *v.* Cardell, 123 Iowa 313, 95 N. W. 239, 98 N. W. 791.

Minnesota.—St. Anthony Falls Water Power Co. *v.* Greely, 11 Minn. 321.

New York.— Thompson *v.* Gardner, 10 Johns. 404.

South Carolina.— State *v.* Cheraw, etc., R. Co., 54 S. C. 564, 32 S. E. 691.

Texas.— Lockhart *v.* Houston, 45 Tex. 317; Clegg *v.* State, 42 Tex. 605.

See 45 Cent. Dig. tit. "Taxation," § 1192 *et seq.*

62. San Diego County *v.* California, etc., R. Co., 65 Cal. 282, 3 Pac. 892; Northwestern Cooperage, etc., Co. *v.* Scott, 123 Mich. 357, 82 N. W. 76; State *v.* Scott, 96 Mo. 72, 9 S. W. 21. But *compare* People *v.* Seymour, 16 Cal. 332, 76 Am. Dec. 521; State *v.* Renshaw, 166 Mo. 682, 66 S. W. 953; State *v.* Edwards, 162 Mo. 660, 63 S. W. 388; State *v.* Northern Belle Mill, etc., Co., 15 Nev. 385.

63. Orono *v.* Emery, 86 Me. 362, 29 Atl. 1095; Cape Elizabeth *v.* Boyd, 86 Me. 317, 29 Atl. 1062; Lehigh Crane Iron Co. *v.* Com., 55 Pa. St. 448.

64. Bergeman *v.* Beerbohm, 34 Colo. 118, 81 Pac. 701; Port Huron Tp. *v.* Potts, 78 Mich. 435, 44 N. W. 289; McCallum *v.* Bethany Tp., 42 Mich. 457, 4 N. W. 164. *Compare* McLean *v.* Myers, 134 N. Y. 480, 32 N. E. 63.

65. Perry County *v.* Selma, etc., R. Co., 65 Ala. 391 (certification of the number of miles of defendant's railroad track within the county); Lincoln Parish *v.* Huey, 30 La. Ann. 1244 (making and publication of estimate of county expenses for current year); Richards *v.* Clay County, 40 Nebr. 45, 58 N. W. 594, 42 Am. St. Rep. 650 (sending tax bill into another county to which delinquent has removed).

66. *Iowa.*— Thornburg *v.* Cardell, 123 Iowa 313, 95 N. W. 239, 98 N. W. 791; Bell *v.* Stevens, 116 Iowa 451, 90 N. W. 87.

Maine.— Rockland *v.* Ulmer, 87 Me. 357, 32 Atl. 972; Parks *v.* Cressey, 77 Me. 54.

New York.— Thompson *v.* Gardner, 10 Johns. 404; McLean *v.* Manhattan Medicine Co., 54 N. Y. Super. Ct. 371. But *compare* McLean *v.* Manhattan Medicine Co., 3 N. Y. St. 550.

Vermont.— Brock *v.* Bruce, 58 Vt. 261, 2 Atl. 598.

Canada.— Applegarth *v.* Graham, 7 U. C. C. P. 171.

See 45 Cent. Dig. tit. "Taxation," § 1195.

67. See Kentucky Cent. R. Co. *v.* Pendleton County, (Ky. 1886) 2 S. W. 176; Dugan *v.* Baltimore, 1 Gill & J. (Md.) 499; New York *v.* Watts, 40 Misc. (N. Y.) 595, 83 N. Y. Suppl. 23; Austen *v.* Westchester Tel. Co., 8 Misc. (N. Y.) 11, 28 N. Y. Suppl. 77.

68. See the statutes of the different states. And see the following cases:

tion of the jurisdiction of the particular court to suits involving a certain minimum sum does not apply.[69] Where the taxes to be recovered are assessed on real estate the action should ordinarily be brought in the county where the land lies;[70] but personal taxes should be sued for where defendant resides,[71] and there may a change of venue if the suit is begun in the wrong place.[72]

d. Defenses — (i) *In General.* The statutory rule in some states, and the general tendency of the courts in others, is to exclude such defenses as do not affect the substantial justice of the tax itself.[73] But defendant may always plead want of authority in the officer bringing the suit,[74] or payment of the tax or anything equivalent thereto,[75] or a former recovery.[76] Where an owner of property seeks to enjoin the collection of a tax he must pay the amount legally due before he can have affirmative relief against that which is illegal;[77] but when it is sought to enforce the payment of a tax against him he may defend, and judgment will be rendered only for the amount shown to be legally due.[78]

(ii) *Invalidity or Irregularity of Prior Proceedings.* A suit for taxes may be resisted on the ground that the tax in question is unconstitutional or otherwise illegal,[79] or that the action of the assessors was without jurisdiction because either the particular person or the particular property was exempt or beyond their territorial authority.[80] But no defense can be founded on mere irregularities, errors, defects, or omissions of statutory duty, either in the assess-

Indiana.— Gallup *v.* Schmidt, 154 Ind. 196, 56 N. E. 443.

Kentucky.— Central R., etc., Co. *v.* Com., 106 Ky. 329, 49 S. W. 456, 20 Ky. L. Rep. 1890.

Louisiana.— Gordon *v.* Goule, 30 La. Ann. 138.

Missouri.— State *v.* Edwards, 162 Mo. 660, 63 S. W. 388, jurisdiction of suit against executor of delinquent taxpayer.

Rhode Island.— Tripp *v.* Torrey, 17 R. I. 359, 22 Atl. 278.

Virginia.— Smith *v.* Clark, (1889) 10 S. E. 4.

Washington.— Pierce County *v.* Merrill, 19 Wash. 175, 52 Pac. 854.

Wisconsin.— Hancock *v.* Merriman, 46 Wis. 159, 49 N. W. 976.

See 45 Cent. Dig. tit. "Taxation," § 1201.

Justice of the peace.— A tax deed to land sold pursuant to a judgment rendered by a justice of the peace is absolutely void because of the want of jurisdiction to render such a judgment. Adams *v.* Carpenter, 187 Mo. 613, 86 S. W. 445.

69. Tripp *v.* Torrey, 17 R. I. 359, 22 Atl. 278.

70. State *v.* Shaw, 21 Nev. 222, 29 Pac. 321.

71. Wason *v.* Bigelow, 11 Colo. App. 120, 52 Pac. 636; Mason *v.* Belfast Hotel Co., 89 Me. 384, 36 Atl. 624; Harrold *v.* State, 30 Tex. Civ. App. 524, 71 S. W. 407.

72. Wason *v.* Bigelow, 11 Colo. App. 120, 52 Pac. 636.

73. Chiniquy *v.* People, 78 Ill. 570; Gillespie *v.* Sefrin, 1 Chest. Co. Rep. (Pa.) 61.

74. Ruddock *v.* Gordon, Quincy (Mass.) 58.

Effect of injunction restraining county officers from collecting taxes from defendant corporation see Western Union Tel. Co. *v.* State, 146 Ind. 54, 44 N. E. 793.

75. See *supra*, IX, A, 6. But the fact that the collector of taxes paid defendant's tax with his own money is no defense to the action unless it is shown that defendant authorized or adopted the payment. Lord *v.* Parker, 83 Me. 530, 22 Atl. 392. And although real estate is offered for sale for taxes for an amount in excess of what is legally due, the owner cannot defend the suit on that ground unless he first tenders the sum actually due. Nalle *v.* Austin, (Tex. Civ. App. 1897) 42 S. W. 780. And even a prior sale of the land for the taxes is no defense to the suit when such sale was void because held under an unconstitutional statute. McIntosh *v.* People, 93 Ill. 540. And the payment of a franchise tax illegally assessed is no defense to a tax legally assessed by the proper authorities. North Carolina R. Co. *v.* Alamance County, 82 N. C. 259.

Defendant's inability to pay.— Authority of the courts in New York to dismiss a tax proceeding when satisfied of defendant's inability, for want of property, to pay the tax see New York *v.* McCaldin Bros. Co., 176 N. Y. 585, 68 N. E. 1115.

76. State *v.* Central Pac. R. Co., 21 Nev. 260, 30 Pac. 689, where, however, it is held that the legislature has power to provide that a former recovery shall not constitute a defense to an action to recover taxes.

77. See *infra*, X, D, 2, c, (II).

78. People *v.* Centralia Gas, etc., Co., 238 Ill. 113, 115, 87 N. E. 370.

79. Detroit *v.* Mackinaw Transp. Co., 140 Mich. 174, 103 N. W. 557; State *v.* Chicago, etc., R. Co., 165 Mo. 597, 65 S. W. 989; State *v.* St. Louis, etc., R. Co., 74 Mo. 163. *Contra*, *In re* McClean, 3 Silv. Sup. (N. Y.) 314, 6 N. Y. Suppl. 230.

80. *Illinois.*— Keokuk, etc., Bridge Co. *v.* People, 161 Ill. 132, 43 N. E. 691.

Maine.— McCrillis *v.* Mansfield, 64 Me. 198.

Michigan.— Detroit *v.* Mackinaw Transp. Co., 140 Mich. 174, 103 N. W. 557.

ment or in the proceedings which followed it, up to the commencement of the suit, which do not affect the substantial liability of the defendant to pay the tax,[81] unless they amount to a deprivation of his right to be heard in opposition to the assessment, its legality, or its amount.[82]

(III) *UNEQUAL OR EXCESSIVE VALUATION.* It is no proper defense to a suit for the recovery of taxes that there were inequalities in the assessment of property,[83] or that the assessment of defendant's property was excessive or based on an overvaluation,[84] unless it can be shown that it was fraudulent;[85] for his remedy against a mistake or injustice of this kind is by appeal to the board of equalization or other reviewing body,[86] and his failure to avail himself of such remedy estops him from interposing the same objections in a suit for the taxes,[87]

Missouri.— State *v.* Cunningham, 153 Mo. 642, 55 S. W. 249.

Nevada.— State *v.* Central Pac. R. Co., 21 Nev. 247, 30 Pac. 686.

New York.— McLean *v.* Jephson, 123 N. Y. 142, 25 N. E. 409, 9 L. R. A. 493; Metcalf *v.* Messenger, 46 Barb. 325.

United States.— Planters' F. & M. Ins. Co. *v.* Tennessee, 161 U. S. 193, 16 S. Ct. 466, 40 L. ed. 667.

See 45 Cent. Dig. tit. "Taxation," § 1198.

Contra.— Canaan *v.* Enfield Village Fire Dist., 74 N. H. 8, 64 Atl. 725; Farmington *v.* Downing, 67 N. H. 441, 30 Atl. 345; Westville *v.* Munro, 32 Nova Scotia 511.

81. *California.*— Santa Barbara *v.* Eldred, 108 Cal. 294, 41 Pac. 410.

Illinois.— Harding *v.* People, 202 Ill. 122, 66 N. E. 962; Carrington *v.* People, 195 Ill. 484, 63 N. E. 163; Sanderson *v.* La Salle, 117 Ill. 171, 7 N. E. 114.

Iowa.— Galusha *v.* Wendt, 114 Iowa 597, 87 N. W. 512.

Kentucky.— Covington, etc., Bridge Co. *v.* Covington, 100 S. W. 269, 30 Ky. L. Rep. 1115.

Louisiana.— State *v.* Edgar, 26 La. Ann. 726; New Orleans *v.* Klein, 26 La. Ann. 493.

Maine.— Verona *v.* Bridges, 98 Me. 491, 57 Atl. 797; Rockland *v.* Ulmer, 87 Me. 357, 32 Atl. 972; Rockland *v.* Farnsworth, 86 Me. 533, 30 Atl. 68; Bath *v.* Whitmore, 79 Me. 182, 9 Atl. 119; Bath *v.* Reed, 78 Me. 276, 4 Atl. 688.

Massachusetts.— Burr *v.* Wilcox, 13 Allen 269.

Michigan.— Deerfield Tp. *v.* Harper, 115 Mich. 678, 74 N. W. 207.

Minnesota.— State *v.* Houston-Chamberlin Hardware Co., 96 Minn. 174, 104 N. W. 835; Houston County *v.* Jessup, 22 Minn. 552. And see State *v.* Backus-Brooks Co., 102 Minn. 50, 112 N. W. 863.

Missouri.— State *v.* Cummings, 151 Mo. 49, 52 S. W. 29.

Nevada.— State *v.* Sadler, 21 Nev. 13, 23 Pac. 799; State *v.* Northern Belle Mill, etc., Co., 15 Nev. 385.

New York.—Austen *v.* Westchester Tel. Co., 8 Misc. 11, 28 N. Y. Suppl. 77.

See 45 Cent. Dig. tit. "Taxation," § 1197.

But *compare* London Tp. *v.* Great Western R. Co., 16 U. C. Q. B. 500.

82. Caledonia Tp. *v.* Rose, 94 Mich. 216, 53 N. W. 927.

83. Cincinnati, etc., R. Co. *v.* People, 212 Ill. 546, 72 N. E. 763; Potosi *v.* Casey, 27 Mo. 372; Rochester *v.* Bloss, 173 N. Y. 646, 66 N. E. 1105; McCurdy *v.* Prugh, 59 Ohio St. 465, 55 N. E. 154. And see State *v.* Cudahy Packing Co., 103 Minn. 419, 115 N. W. 645, 1039.

84. *Illinois.*— Carney *v.* People, 210 Ill. 434, 71 N. E. 365.

Kentucky.—Albin Co. *v.* Louisville, 117 Ky. 895, 79 S. W. 274, 25 Ky. L. Rep. 2055.

Louisiana.— New Orleans *v.* New Orleans, etc., R. Co., 37 La. Ann. 45.

Maine.— Rockland *v.* Rockland Water Co., 82 Me. 188, 19 Atl. 163.

Michigan.— Port Huron *v.* Wright, 150 Mich. 279, 114 N. W. 76; Detroit *v.* Jacobs, 145 Mich. 395, 108 N. W. 671.

Minnesota.— State *v.* West Duluth Land Co., 75 Minn. 456, 78 N. W. 115.

Missouri.— State *v.* Western Union Tel. Co., 165 Mo. 502, 65 S. W. 775.

Nevada.— State *v.* Diamond Valley Live Stock, etc., Co., 21 Nev. 86, 25 Pac. 448.

Wisconsin.— See Milwaukee *v.* Wakefield, 134 Wis. 462, 113 N. W. 34, 115 N. W. 137.

United States.— Western Union Tel. Co. *v.* Missouri, 190 U. S. 412, 23 S. Ct. 730, 47 L. ed. 1116 [*affirming* 165 Mo. 502, 65 S. W. 775]; Ketchum *v.* Pacific R. Co., 14 Fed. Cas. No. 7,738, 4 Dill. 41.

Canada.— London Tp. *v.* Great Western R. Co., 17 U. C. Q. B. 267.

See 45 Cent. Dig. tit. "Taxation," § 1199.

85. *Illinois.*— East St. Louis Connecting R. Co. *v.* People, 119 Ill. 182, 10 N. E. 397.

Kansas.— Whitney *v.* Morton County, 73 Kan. 502, 85 Pac. 530.

Maine.— Bath *v.* Whitmore, 79 Me. 182, 9 Atl. 119.

Michigan.— Deerfield Tp. *v.* Harper, 115 Mich. 678, 74 N. W. 207.

Missouri.— State *v.* Cunningham, 153 Mo. 642, 55 S. W. 249.

Nevada.— State *v.* Central Pac. R. Co., 7 Nev. 99.

New York.— Western R. Co. *v.* Nolan, 48 N. Y. 513.

Texas.— Mann *v.* State, 18 Tex. Civ. App. 701, 46 S. W. 652.

86. See *supra*, VII, B, 1, b.

87. Los Angeles *v.* Glassell, 4 Cal. App. 43, 87 Pac. 241; Bath *v.* Whitmore, 79 Me. 182, 9 Atl. 119; State *v.* Atwood Lumber Co., 96 Minn. 392, 105 N. W. 276; State *v.* Sadler, 21 Nev. 13, 23 Pac. 799.

unless he can show that he was deprived of the hearing to which he was entitled or that he had a perfectly valid excuse for failing to claim it.[88] To make a defense of double taxation available, defendant must show that he has paid one of the taxes.[89]

(iv) *Set-Off or Counter-Claim.* The general rule is that a set-off or counter-claim cannot be interposed in an action for the recovery of delinquent taxes.[90]

(v) *Limitation of Actions.* No statute of limitations runs against the right of the state to collect its taxes, unless expressly made applicable;[91] but in respect to municipalities, and also the state when included within the statute, the ordinary period of limitations applicable to "liabilities founded on statute" or to claims not specially enumerated may be pleaded in defense to a suit for the recovery of taxes,[92] unless there is a statute specifically prescribing the period of limitations for suits of this class, which, in that case, would alone be applicable.[93] The statute begins to run from the date of the assessment of the taxes,[94] or from the time of delinquency, that is, the expiration of the time allowed the property-

88. State *v.* Mechanics', etc., Bank, 23 La. Ann 307; New York *v.* Tucker, 182 N. Y. 535, 75 N. E. 1128.

89. Heath *v.* McCrea, 20 Wash. 342, 55 Pac. 432.

90. Newport, etc., Bridge Co. *v.* Douglass, 12 Bush (Ky.) 673; New Orleans *v.* Davidson, 30 La. Ann. 541, 31 Am. Rep. 228; Camden *v.* Allen, 26 N. J. L. 398. And see *supra*, I, A, 2, b; X, C, 1, e. *Compare*, however, Louisville, etc., R. Co. *v.* Com., 30 S. W. 624, 17 Ky. L. Rep. 136; New Orleans *v.* New Orleans Waterworks Co., 36 La. Ann. 432.

91. Hood *v.* New Orleans, 49 La. Ann. 1461, 22 So. 401; Reed *v.* Creditors, 39 La. Ann. 115, 1 So. 784; Wasteney *v.* Schott, 58 Ohio St. 410, 51 N. E. 34 [*affirming* 13 Ohio Cir. Ct. 339, 7 Ohio Cir. Dec. 222].

92. *California.*— San Francisco *v.* Luning, 73 Cal. 610, 15 Pac. 311.

Iowa.— Brown *v.* Painter, 44 Iowa 368.

Kentucky.— Chesapeake, etc., R. Co. *v.* Com., 129 Ky. 318, 108 S. W. 248, 32 Ky. L. Rep 1119, 111 S. W. 334, 33 Ky. L. Rep. 882; Illinois Cent. R. Co. *v.* Com., 128 Ky. 268, 108 S. W. 245, 32 Ky. L. Rep. 1112, 110 S. W 265, 33 Ky. L. Rep. 326; Com. *v.* Rosenfield, 118 Ky. 374, 80 S. W. 1178, 25 Ky. L. Rep. 2229, 82 S. W. 433, 26 Ky. L. Rep. 726; Citizens' Nat. Bank *v.* Com., 118 Ky. 51, 80 S. W. 479, 25 Ky. L. Rep. 2254, 81 S. W. 686, 26 Ky. L. Rep. 62; Louisville, etc., Ferry Co. *v.* Com., 108 Ky. 717, 57 S. W. 624, 626, 22 Ky. L. Rep. 446, 480.

Louisiana.— Saloy *v.* Woods, 40 La. Ann. 585, 4 So. 209. *Contra*, Miramon *v.* New Orleans, 52 La. Ann. 1623, 28 So. 107.

Missouri.— State *v.* Vogelsang, 183 Mo. 17, 81 S. W. 1087.

Montana.— Custer County *v.* Story, 26 Mont. 517, 69 Pac. 56.

Nevada.— State *v.* Yellow Jacket Silver Min. Co., 14 Nev. 220.

United States.— Bristol *v.* Washington County, 177 U. S. 133, 20 S. Ct. 585, 44 L. ed. 701; San Francisco *v.* Jones, 20 Fed. 188.

See 45 Cent. Dig. tit. "Taxation," § 1202.

Contra.— Perry County *v.* Selma, etc., R. Co., 58 Ala. 546; Hoover *v.* Engles. 63 Nebr. 688, 88 N. W. 869; Hagerman *v.* Territory, 11 N. M. 156, 66 Pac. 526; Wilmington *v.* Cronly, 122 N. C. 383. 388, 30 S. E. 9; Greenlaw *v.* Dallas, 33 Tex. Civ. App. 100, 75 S. W. 812; Abney *v.* State, 20 Tex. Civ. App. 101, 47 S. W. 1043.

93. See the statutes of the different states. And see the following cases:

California.— Los Angeles County *v.* Ballerino, 99 Cal. 593, 32 Pac. 581, 34 Pac. 329; San Francisco *v.* Luning, 73 Cal. 610, 15 Pac. 311.

Georgia.— Georgia R., etc., Co. *v.* Wright, 124 Ga. 596, 53 S. E. 251.

Iowa.— Shearer *v.* Citizens' Bank, 129 Iowa 564, 105 N. W. 1025; Bell *v.* Stevens, 116 Iowa 451, 90 N. W. 87.

Kentucky.— Chesapeake, etc., R. Co. *v.* Com., 129 Ky. 318, 108 S. W. 248, 32 Ky. L. Rep. 1119, 111 S. W. 334, 33 Ky. L. Rep. 882; Illinois Cent. R. Co. *v.* Com., 128 Ky. 268, 108 S. W. 245, 32 Ky. L. Rep. 1112, 110 S. W. 265, 33 Ky. L. Rep. 326; Lucas *v.* Com., 121 Ky. 423, 89 S. W. 292, 28 Ky. L. Rep. 372. And see Morgan *v.* Frankfort, 135 Ky. 178, 121 S. W. 1033.

Maryland.— Baldwin *v.* State, 89 Md. 587, 43 Atl. 857.

Michigan.— Sturgis *v.* Flanders, 97 Mich. 546, 56 N. W. 934.

Missouri.— State *v.* Edwards, 162 Mo. 660, 63 S. W. 388.

Tennessee.— Union, etc., Bank *v.* Memphis, 101 Tenn. 154, 46 S. W. 557.

Texas.— Ollivier *v.* Houston, 22 Tex. Civ. App. 55, 54 S. W. 940; Clegg *v.* Galveston County, 1 Tex. App. Civ. Cas. 58. See Hernandez *v.* San Antonio, (Civ. App. 1897) 39 S. W. 1022.

See 45 Cent. Dig. tit. "Taxation," § 1202.

94. Thornburg *v.* Cardell, 123 Iowa 313, 95 N. W. 239, 98 N. W. 791; Citizens' Nat. Bank *v.* Com., 118 Ky. 51, 80 S. W. 479, 25 Ky. L. Rep. 2254, 81 S. W. 686, 26 Ky. L. Rep. 62; Louisville, etc., R. Co. *v.* Com., 1 Bush (Ky.) 250; Louisville *v.* Louisville Courier-Journal Co., 84 S. W. 773, 27 Ky. L.

owner to make a voluntary payment,[95] or from such other point or period as is fixed by law,[96] and is interrupted by the time consumed in litigation to test the validity of the tax or for its collection.[97]

e. Parties and Process — (i) *PARTIES.* Suits for the collection of delinquent taxes are usually authorized or directed to be brought in the name of the tax collector,[98] although sometimes they must be prosecuted in the name of the state,[99] or of the county or other municipality.[1] The proper defendant is the person to whom the tax was assessed,[2] and if the object is to enforce payment out of real estate, all owners of record should be joined.[3] If the delinquent corporation is in the hands of a receiver, he should be made a party in his representative capacity, although he cannot be held personally liable.[4] In Mississippi provision is made for joining the assessor and tax collector as parties in an action by the revenue agent against a delinquent taxpayer, and rendition of a judgment

Rep. 263; Louisville *v.* Com., 63 S. W. 580, 23 Ky. L. Rep. 598; Detroit *v.* Patten, 143 Mich. 243, 106 N. W. 884.

95. *Maryland.*— Baltimore *v.* Chester River Steamboat Co., 103 Md. 400, 63 Atl. 810.

Massachusetts.— Harrington *v.* Glidden, 179 Mass. 486, 61 N. E. 54, 94 Am. St. Rep. 613.

Minnesota.— State *v.* Sage, 75 Minn. 448, 72 N. W. 14.

Missouri.— State *v.* Fullerton, 143 Mo. 682, 44 S. W. 741; State *v.* Edwards, 136 Mo. 360, 38 S. W. 73; State *v.* Robyn, 93 Mo. 395, 6 S. W. 243.

Ohio.— Bridge Co. *v.* Yost, 22 Ohio Cir. Ct. 376, 12 Ohio Cir. Dec. 448. See Schott *v.* Burckhardt, 3 Ohio S. & C. Pl. Dec. 279, 2 Ohio N. P. 90.

Washington.— Pierce County *v.* Merrill, 19 Wash. 175, 52 Pac. 854.

96. See the statutes of the different states. And see Louisville *v.* Johnson, 95 Ky. 254, 24 S. W. 875, 15 Ky. L. Rep. 615; Com. *v.* Mahon, 12 Pa. Super. Ct. 616.

97. Masonic Temple Co. *v.* Pflantz, 52 S. W. 821, 21 Ky. L. Rep. 583; *In re* Southern Wood Mfg. Co., 49 La. Ann. 926, 22 So. 39.

98. *Connecticut.*— Eno *v.* Roberts, Kirby 393.

Louisiana.— Gonzales *v.* Lindsay, 30 La. Ann. 1085.

Michigan.— Ovid Tp. *v.* Haire, 133 Mich. 353, 94 N. W. 1060.

Mississippi.—Adams *v.* Stonewall Mfg. Co., 80 Miss. 94, 31 So. 544.

Nebraska.— Chamberlain *v.* Woolsey, 66 Nebr. 141, 92 N. W. 181, 95 N. W. 38.

Utah.— Crismon *v.* Reich, 2 Utah 111.

See 45 Cent. Dig. tit. "Taxation," § 1203.

Successor in office.— The complaint in an action begun by a tax collector for delinquent taxes may be amended by the substitution of his successor in office as plaintiff. Carstairs *v.* Cochran, 95 Md. 488, 52 Atl. 601.

Administrator of deceased collector.— Under the statutes of Vermont, where a tax collector dies pending a trustee suit commenced by him to enforce the payment of taxes, his administrator may be substituted as plaintiff and prosecute the suit to judgment. Smith *v.* Blair, 67 Vt. 658, 32 Atl. 504.

99. *Illinois.*— Ellis *v.* People, 199 Ill. 548, 65 N. E. 428.

Kentucky.— Campbell County *v.* Newport, etc., Bridge Co., 112 Ky. 659, 66 S. W. 526, 23 Ky. L. Rep. 659.

Massachusetts.— Oliver *v.* Colonial Gold Co., 11 Allen 283.

Missouri.— State *v.* Sanford, 127 Mo. 368, 30 S. W. 112.

Nebraska.— Holt County *v.* Golden, 5 Nebr. (Unoff.) 308, 98 N. W. 422.

Texas.— Texas, etc., R. Co. *v.* State, 43 Tex. Civ. App. 580, 97 S. W. 142.

1. People *v.* Ballerino, 99 Cal. 598, 34 Pac. 330; Albany County *v.* Durant, 9 Paige (N. Y.) 182. See San Bernardino County *v* Southern Pac. R. Co., 137 Cal. 659, 70 Pac. 782; San Diego County *v.* Southern Pac. R. Co., 108 Cal. 46, 40 Pac. 1052.

2. Topsham *v.* Blondell, 82 Me. 152, 19 Atl. 93; Orion Tp. *v.* Axford, 112 Mich. 179, 70 N. W. 417.

In case of assignment for benefit of creditors.— Under Mass. Rev. Laws (1902), c. 13, § 32, a tax collector, suing in equity to enforce a trust for unpaid taxes created by a common-law assignment for the benefit of creditors, properly makes the assignor a party defendant as the one primarily liable for the tax. Boston *v.* Turner, 201 Mass. 190, 87 N. E. 634.

Persons liable to suit see *supra*, X, C, 6, a, (VII).

3. People *v.* Weber, 164 Ill. 412, 45 N. E. 723 (but mortgagees are not necessary parties to an action to foreclose a lien for taxes against the homestead, nor is the wife of defendant); Louisville *v.* Kohnhorst, 76 S. W. 43, 25 Ky. L. Rep. 532 (effect on heirs of suit for taxes assessed against deceased tenant for life); Kansas City, etc., R. Co. *v.* Smith, 156 Mo. 608, 57 S. W. 555; League *v.* State, 93 Tex. 553, 57 S. W. 34 (disclaimer by party having no title to be affected by proceedings to foreclose tax lien). See Stevenson *v.* Black, 168 Mo. 549, 68 S. W. 909, as to the effect of a judgment and sale for taxes where only a part of the defendants were properly served with process in the suit.

4. Cincinnati, etc., R. Co. *v.* Com., 51 S. W. 568, 21 Ky. L. Rep. 418. And see Lucking *v.* Ballantyne, 132 Mich. 584, 94 N. W. 8;

against them for such agent's compensation, if it appears that the failure to pay was caused by their wilful default or negligence.[5]

(II) *Process and Service.* The summons or other process in an action of this kind should conform to any directions of the statute.[6] In the case of unknown or non-resident owners of property, it may be served by publication if the law so provides.[7]

f. Pleading — (I) *Declaration, Complaint, Petition, or Bill* — (A) *Form and Requisites in General.* It is competent for the legislature to prescribe a special form of declaration, complaint, petition, or bill to be used in tax suits, and when this is followed it need contain no more than the statute requires.[8] Otherwise the pleading must conform to the ordinary rules,[9] and if the suit is against a person other than the one to whom the tax was assessed, it must show statutory authority for bringing it and the facts on which it is based.[10]

(B) *Allegations.*[11] The declaration, complaint, petition, or bill should contain allegations showing plaintiff's authority to sue, if he is a public officer empowered to sue in his own name on certain conditions,[12] and facts showing that the matter is within the jurisdiction of the court, as to amount and venue,[13] and it should allege the levy and assessment of the tax,[14] defendant's liability thereto,[15] and compliance with any statutory directions as to proceedings preliminary to the

State *v.* Red River Valley El. Co., 69 Minn. 131, 72 N. W. 60.

5. Miss. Annot. Code (1892), § 4200. This provision does not apply to suits for back taxes which the taxpayer declined to pay, and which could not be otherwise collected because of appeals and contests. Delta, etc., R. Co. *v.* Adams, 93 Miss. 340, 48 So. 190.

6. See the statutes of the different states. And see Lucas *v.* Com., 121 Ky. 423, 89 S. W. 292, 28 Ky. L. Rep. 372 (summons is not void, although not issued within the prescribed number of days after filing of a statement by a revenue officer); Wilson *v.* Benton, 11 Lea (Tenn.) 51 (law does not require that the warrant should show by what authority suit is brought).

7. Com. *v.* Vanderbilt, 118 Ky. 787, 82 S. W. 426, 26 Ky. L. Rep. 716; Wall *v.* Holladay-Klotz Land, etc., Co., 176 Mo. 406, 75 S. W. 385; Turner *v.* Gregory, 151 Mo. 100, 52 S. W. 234; Stoneman *v.* Bilby, 43 Tex. Civ. App. 293, 96 S. W. 50; Williams *v.* Young, 41 Tex. Civ. App. 212, 90 S. W. 940; Peterson *v.* Lara, 46 Wash. 448, 90 Pac. 596.

8. People *v.* Central Pac. R. Co., 83 Cal. 393, 23 Pac. 303; Stockton *v.* Western F. & M. Ins. Co., 73 Cal. 621, 15 Pac. 314; State *v.* Hannibal, etc., R. Co., 101 Mo. 136, 13 S. W. 505; Wade *v.* Kimberley, 5 Ohio Cir. Ct. 33, 3 Ohio Cir. Dec. 18; Cummings *v.* Fitch, 7 Ohio Dec. (Reprint) 36, 1 Cinc. L. Bul. 77.

Surplusage see Gibson *v.* Miller, 28 Ohio Cir. Ct. 421.

9. See People *v.* Central Pac. R. Co., 83 Cal. 393, 23 Pac. 303; Zacharie's Succession, 30 La. Ann. 1260.

10. State *v.* Sloss, 87 Ala. 119, 6 So. 309; *In re* Johnson, 104 Ill. 50.

11. Bill to enjoin disposal of property and for a personal decree.—A suit to enjoin a corporation from disposing of the balance of its property until taxes due have been paid, and for a personal decree for the amount of the taxes, is not an attachment in chancery, and the bill need not contain the averments required in such case. Delta, etc., Land Co. *v.* Adams, 93 Miss. 340, 48 So. 190.

12. Charleston *v.* Lawry, 89 Me. 582, 36 Atl. 1103; Orono *v.* Emery, 86 Me. 362, 29 Atl. 1095; Ricker *v.* Brooks, 155 Mass. 400, 29 N. E. 534; Oliver *v.* Colonial Gold Co., 11 Allen (Mass.) 283; Mortenson *v.* West Point Mfg. Co., 12 Nebr. 197, 10 N. W. 714.

13. People *v.* Central Pac. R. Co., 83 Cal. 393, 23 Pac. 303; Ottawa Gas Light, etc., Co. *v.* People, 138 Ill. 336, 27 N. E. 924; Miller *v.* Crawford Independent School Dist., 26 Tex. Civ. App. 495, 63 S. W. 894.

14. *California.*— People *v.* Central Pac. R. Co., 83 Cal. 393, 23 Pac. 303.

Illinois.— Ottawa Gas Light, etc., Co. *v.* People, 138 Ill. 336, 27 N. E. 924.

Indiana.— Vogel *v.* Vogler, 78 Ind. 353; Conwell *v.* Connersville, 8 Ind. 358.

Kentucky.— Louisville *v.* Commonwealth, 3 Metc. 148; Louisville *v.* Louisville Gas Co., 22 S. W. 550, 17 Ky. L. Rep. 177; Kentucky Cent. R. Co. *v.* Com., 17 S. W. 196, 13 Ky. L. Rep. 484; Kentucky Cent. R. Co. *v.* Pendleton County, 2 S. W. 176, 8 Ky. L. Rep. 517.

Massachusetts.— Houghton *v.* Davenport, 23 Pick. 235.

North Dakota.— Swenson *v.* Greenland, 4 N. D. 532, 62 N. W. 603.

Rhode Island.— Franklin *v.* Warwick, etc., Water Co., 24 R. I. 224, 52 Atl. 988.

South Carolina.— State *v.* Cheraw, etc., R. Co., 54 S. C. 564, 32 S. E. 691.

Texas.— Miller *v.* Crawford Independent School Dist., 26 Tex. Civ. App. 495, 62 S. W. 894; Moody *v.* Galveston, 21 Tex. Civ. App. 16, 50 S. W. 481; Maddox *v.* Rockport, (Civ. App. 1898) 38 S. W. 397.

See 45 Cent. Dig. tit. "Taxation," § 1205 *et seq.*

15. Vassalboro *v.* Smart, 70 Me. 303; State *v.* Renshaw, 166 Mo. 682, 66 S. W. 953.

institution of the suit,[16] together with a description of the property taxed and proper allegations as to defendant's ownership of it or interest in it,[17] allegations as to demand and refusal of payment,[18] and a statement of the amount claimed and that it remains due and unpaid.[19]

(II) *PLEA OR ANSWER.* The plea or answer may set up any of the defenses which are available in an action of this kind;[20] but they must be pleaded distinctly and specifically and in a manner to raise an issue;[21] or defendant may deny and

16. *California.*— People *v.* Holladay, 25 Cal. 300; People *v.* Rains, 23 Cal. 131.

Iowa.— Lambe *v.* McCormick, 116 Iowa 169, 89 N. W. 241.

Kansas.— Doniphan County *v.* Allen, 5 Kan. App. 122, 48 Pac. 887.

Kentucky.— Kentucky Cent. R. Co. *v.* Pendleton County, (1886) 2 S. W. 176.

Missouri.— State *v.* Cummings, 151 Mo. 49, 52 S. W. 29.

17. *California.*— San Francisco *v.* Flood, 64 Cal. 504, 2 Pac. 264; People *v.* Cone, 48 Cal. 427; People *v.* Pearis, 37 Cal. 259; People *v.* De Carrillo, 35 Cal. 37; People *v.* Rains, 23 Cal. 131; People *v.* Pico, 20 Cal. 595.

Illinois.— Coombs *v.* People, 198 Ill. 586, 64 N. E. 1056; Carrington *v.* People, 195 Ill. 484, 63 N. E. 163; Bowman *v.* People, 114 Ill. 474, 2 N. E. 484; Biggins *v.* People, 96 Ill. 381; People *v.* Winkelman, 95 Ill. 412; Bell *v.* Barnard, 37 Ill. App. 275.

Iowa.— Under Acts 32d Gen. Assembly, p. 70, c. 62, authorizing an action at law for the collection of delinquent personal property taxes, a petition in an action for delinquent taxes, which alleges that during years stated the amount of taxes due from defendant, including interest, etc., is as shown by the tax record in the treasurer's office, a copy of which is attached marked as an exhibit, and made a part of the petition, which record shows the name of defendant and the value of personalty, shows that the taxes are due on personal property. McCrary *v.* Lake City Electric Light Co., 139 Iowa 548, 117 N. W. 964.

Kansas.— Doniphan County *v.* Allen, 5 Kan. App. 122, 48 Pac. 887.

Kentucky.— Kentucky Cent. R. Co. *v.* Pendleton County, (1886) 2 S. W. 176.

Louisiana.— New Orleans *v.* New Orleans, etc., R. Co., 35 La. Ann. 650.

Maine.— Rockland *v.* Farnsworth, 83 Me. 228, 22 Atl. 103.

Missouri.— State *v.* Thompson, 149 Mo. 441, 51 S. W. 98; State *v.* Hannibal, etc., R. Co., 101 Mo. 136, 13 S. W. 505.

Ohio.— Schott *v.* Burckhardt, 3 Ohio S. & C. Pl. Dec. 279, 2 Ohio N. P. 90.

Rhode Island.— Franklin *v.* Warwick, etc., Water Co., 24 R. I. 224, 52 Atl. 988.

Texas.— State *v.* Trilling, (Civ. App. 1901) 62 S. W. 788; State *v.* Mantooth, 20 Tex. Civ. App. 396, 49 S. W. 683; Maddox *v.* Rockport, (Civ. App. 1896) 38 S. W. 397.

United States.— McKnight *v.* Dudley, 103 Fed. 918.

See 45 Cent. Dig. tit. "Taxation," § 1209.

Tax bill as exhibit.— It is not necessary that the tax bill filed as an exhibit with the petition as a basis of the cause of action shall be the identical bill made out by the tax collector, or that his name shall appear on it, but a similar bill certified is sufficient. Frankfort *v.* Morgan, 110 S. W. 286, 33 Ky. L. Rep. 297.

18. People *v.* Seymour, 16 Cal. 332, 76 Am. Dec. 521; Thornburg *v.* Cordell, 123 Iowa 313, 95 N. W. 239, 98 N. W. 791; McLean *v.* Manhattan Medicine Co., 6 N. Y. St. 805.

19. *Illinois.*— Ottawa Gas Light, etc., Co. *v.* People, 138 Ill. 336, 27 N. E. 924; People *v.* Davis, 112 Ill. 272.

Indiana.— Brunson *v.* Starbuck, 32 Ind. App. 457, 70 N. E. 163.

Iowa.— Robinson *v.* Ferguson, 119 Iowa 325, 93 N. W. 350.

Mississippi.— Mississippi Levee Com'rs *v.* Yazoo, etc., R. Co., (Miss. 1899), 25 So. 664.

New York.— Ithaca *v.* Cornell, 75 Hun 425, 27 N. Y. Suppl. 682.

See 45 Cent. Dig. tit. "Taxation," § 1205.

20. See *supra*, X, C, 6, d.

Exemption—Answer or rejoinder.— In an action against a bank to collect taxes, a claim that United States bonds held by the bank were exempt should be set up in the answer, instead of the rejoinder, since it is a defense *pro tanto* to the cause of action set up in the petition. Citizens' Nat. Bank *v.* Com., 108 S. W. 231, 32 Ky. L. Rep. 1116.

21. *California.*— People *v.* Nelson, 36 Cal. 375, pleading fraud in the assessment.

Kentucky.— Com. *v.* Vanderbilt, 118 Ky. 787, 82 S. W. 426, 26 Ky. L. Rep. 716.

Maryland.— James Clark Distilling Co. *v.* Cumberland, 95 Md. 468, 52 Atl. 661.

Nevada.— State *v.* Sadler, 21 Nev. 13, 23 Pac. 799; State *v.* Central Pac. R. Co., 7 Nev. 99, both excessive valuation. If, in a suit to recover disputed taxes, defendant desires to raise an issue of excessive valuation, he should prepare his answer under Comp. Laws, § 1124, providing what defenses may be set up in tax suits. State *v.* Carson, etc., R. Co., 29 Nev. 487, 91 Pac. 932.

New York.— Austen *v.* Westchester Tel. Co., 8 Misc. 11, 28 N. Y. Suppl. 77 (liability of defendant to taxation within the district); McLean *v.* Julien Electric Co., 28 Abb. N. Cas. 249, 19 N. Y. Suppl. 906 (question of taxable income).

See 45 Cent. Dig. tit. "Taxation," § 1210.

Verification of answer see Rowley *v.* Howard, 23 Cal. 401.

Demurrer see Robinson *v.* Grant, 119 Iowa 573, 93 N. W. 586.

Allegations as to preliminary proceedings. — The denial of knowledge or information as to the allegations of the complaint rela-

disclaim all interest in the property upon which he was assessed for the taxes sought to be collected.[22]

(III) *Issues, Proof, and Variance.* The proof will be confined to the matters distinctly put in issue by the pleadings,[23] rejecting immaterial allegations and surplusage.[24] But as to any facts essential to the validity of the tax, the liability of defendant thereto, or the amount due, a variance between the pleadings and the proof will be fatal to the case.[25]

g. Evidence — (I) *Presumptions and Burden of Proof.* Plaintiff, whether it be the state, a municipality, or the tax collector, must first prove a levy and assessment of the tax in question,[26] and defendant's liability by reason of his ownership of the property assessed or otherwise,[27] both of which facts may ordinarily be proved, *prima facie* at least, by the production of the assessment roll or the delinquent list, aided by the presumption of the correctness of acts performed by public officers in the line of their duty.[28] But when these matters are established, defendant must assume the burden of proving any illegality, defect, or ground of non-liability on which he relies to defeat the action.[29]

tive to the various steps in the tax proceedings raises no issue, such matters being of record and open to public inspection. McLean *v.* Julien Electric Co., 19 N. Y. Suppl. 906, 28 Abb. N. Cas. 249.

The fact that several different methods of valuation or assessment are stated in an action to recover a tax does not make a case for an election, the proper practice being a motion to strike out the allegations as to the improper methods alleged. Vanceburg, etc., Road Co. *v.* Maysville, etc., R. Co., (Ky. 1901) 63 S. W. 749.

Action against receiver.—A rule may issue against the receiver of a railroad for the payment of taxes due, where the answer of the receiver only shows that it is not convenient to pay the taxes and also operate the road. Athens County *v.* Dale, 60 Ohio St. 180, 53 N. E. 958.

22. State *v.* Central Pac. R. Co., 20 Nev. 372, 22 Pac. 237. Since Nev. Comp. Laws, § 1124, in defining what defenses may be made in tax suits, when title to the property is denied, provides that defendant must deny all interest at the time of assessment, a defense that the property belonged to another when the county board of equalization increased the valuation was not available where defendant failed to allege that at the time of assessment the property was not its property. State *v.* Carson, etc., R. Co., 29 Nev. 487, 91 Pac. 932.

23. Brunson *v.* Starbuck, 32 Ind. App. 457, 70 N. E. 163; Louisville Tank Line Co. *v.* Com., 123 Ky. 81, 93 S. W. 635, 29 Ky. L. Rep. 257; New Orleans *v.* Lacroix, 11 La. Ann. 193.

24. Vanceburg, etc., Road Co. *v.* Maysville, etc., R. Co., 117 Ky. 275, 77 S. W. 1118, 25 Ky. L. Rep. 1404; Elizabethtown Dist. Public School *v.* Louisville, etc., R. Co., 30 S. W. 620, 17 Ky. L. Rep. 160.

25. Santa Barbara *v.* Eldred, 95 Cal. 378, 30 Pac. 562; Carney *v.* People, 210 Ill. 434, 71 N. E. 365.

26. Ohio, etc., R. Co. *v.* Highway Com'rs, 117 Ill. 279, 7 N. E. 663; Louisville *v.* Kimbel, 66 S. W. 608, 23 Ky. L. Rep. 1824.

27. Lamkin *v.* Baldwin, etc., Mfg. Co., 72 Conn. 57, 43 Atl. 593, 1042, 44 L. R. A. 786; Ohio, etc., R. Co. *v.* Highway Com'rs, 117 Ill. 279, 7 N. E. 663; Butler *v.* Watkins, 27 S. W. 995, 16 Ky. L. Rep. 302; Central Hotel Co. *v.* State, (Tex. Civ. App. 1909) 117 S. W. 880.

28. Wallapai Min., etc., Co. *v.* Territory, 9 Ariz. 373, 84 Pac. 85; People *v.* Waterman, 31 Cal. 412; Louisville Tank Line *v.* Com., 123 Ky. 81, 93 S. W. 635, 29 Ky. L. Rep. 257; New Orleans *v.* Gottschalk, 11 La. Ann. 69.

Proof of actual value.— In an action to recover omitted taxes, where it appears that notes and bonds held by a taxpayer had been returned for taxation for several years at less than their face value, the burden is on the state to show that their actual value was greater than the valuation as returned, since the presumption is that the assessor did his duty. Com. *v.* Higgins, 82 S. W. 601, 26 Ky. L. Rep. 910.

29. *Alabama.*—Alabama Mineral Land Co. *v.* State, 126 Ala. 90, 28 So. 668.

Illinois.— Ellis *v.* People, 199 Ill. 548, 65 N. E. 428.

Kentucky.— Louisville Tank Line *v.* Com., 123 Ky. 81, 93 S. W. 635, 29 Ky. L. Rep. 257; Frankfort *v.* Morgan, 110 S. W. 286, 33 Ky. L. Rep. 297.

Minnesota.— State *v.* Backus-Brooks Co., 102 Minn. 50, 112 N. W. 863, holding that in an action to enforce a delinquent personal property tax, the burden is on defendant, not only to show error in the proceedings, but that such error resulted to his prejudice, and that such taxes were unfairly and unequally assessed under Rev. Laws (1905), § 896.

Missouri.— State *v.* Vogelsang, 183 Mo. 17, 81 S. W. 1087.

New York.— Sherrill *v.* Hewitt, 13 N. Y. Suppl. 498.

Ohio.— Hunter *v.* Austin, 9 Ohio Cir. Ct. 583, 6 Ohio Cir. Dec. 480.

Pennsylvania.— Shafer *v.* Marsh, 22 Pa. Co. Ct. 33.

Tennessee.— Grundy County *v.* Tennessee Coal, etc., Co., 94 Tenn. 295, 29 S. W. 116.

(II) *ADMISSIBILITY.* The assessment roll or duplicate, the delinquent list, and tax bills properly made out are admissible in evidence to prove the facts appearing on the face of them,[30] as also the records of the board of equalization or review or the testimony of past members of such board,[31] and the taxpayer's schedule or inventory returned for the purpose of taxation may be evidence for or against him.[32] The ordinary rules for the admissibility of evidence are applicable to the proof of such facts as the value of property, the residence of defendant, or his liability to the particular tax,[33] as also to questions concerning the payment of the tax in question,[34] or plaintiff's authority to sue for it.[35]

(III) *WEIGHT AND SUFFICIENCY.* The assessment list or roll, when properly identified,[36] is *prima facie* evidence, and sufficient, until successfully impeached,

Texas.— Winston *v.* Ft. Worth, (Civ. App. 1898) 47 S. W. 740.

United States.— Neubauer *v.* American Smelting Co., 171 Fed. 273; Ketchum *v.* Pacific R. Co., 14 Fed. Cas. No. 7,738, 4 Dill. 41.

See 45 Cent. Dig. tit. "Taxation," § 1215.

30. *Connecticut.*— East Granby *v.* Hartford Electric Light Co., 76 Conn. 169, 56 Atl. 514.

Louisiana.— Rapides Police Jury *v.* Huie, 2 La. Ann. 887.

Maine.— Howe *v.* Moulton, 87 Me. 120, 32 Atl. 781.

Michigan.— Muskegon *v.* S. K. Martin Lumber Co., 86 Mich. 625, 49 N. W. 489.

Missouri.— State *v.* Merchants' Bank, 160 Mo. 640, 61 S. W. 676; State *v.* Hannibal, etc., R. Co., 113 Mo. 297, 21 S. W. 14.

Nevada.— State *v.* Manhattan Silver Min. Co., 4 Nev. 318.

Ohio.— Wade *v.* Kimberley, 5 Ohio Cir. Ct. 33, 3 Ohio Cir. Dec. 18.

Texas.— Figures *v.* State, (Civ. App. 1907) 99 S. W. 412; Clegg *v.* Galveston County, 1 Tex. App. Civ. Cas. § 58.

See 45 Cent. Dig. tit. "Taxation," § 1214.

Parol evidence.— Neither the abstract of the individual list of a taxpayer directed by Vt. Pub. St. (1906) § 565, to be lodged with the town clerk by the listers, nor the completed grand list provided for by section 571, being required to show the different steps taken by the listers in making up the list of a recusant taxpayer pursuant to section 561, parol evidence was properly received, in an action for taxes for that purpose. Smith *v.* Stannard, 81 Vt. 319, 70 Atl. 568.

Irregularities as to notice of hearings by listers.— Vt. Pub. St. (1906) § 566, requiring notice of the place of hearing by listers of persons aggrieved by their appraisal to be posted in the town clerk's office and two other public places, on or before a designated date, is mandatory, and compliance therewith is essential to the validity of a grand list, and hence, there being no evidence, as to two of the notices, tending to show that they had been posted in time, or tending to show that any of the notices posted stated the place of hearing, it was error to receive the grand list in evidence in an action for taxes. Smith *v.* Stannard, 81 Vt. 319, 70 Atl. 568.

Treasurer's warrant inadmissible for want of evidence as to statutory notice, etc. see Smith *v.* Stannard, 81 Vt. 319, 70 Atl. 568.

31. State *v.* New York, etc., R. Co., 60 Conn. 326, 22 Atl. 765; State *v.* Central Pac. R. Co., 17 Nev. 259, 30 Pac. 887. *Compare* People *v.* Central Pac. R. Co., 105 Cal. 576, 38 Pac. 905.

32. Bartlett *v.* Wilson, 60 Vt. 644, 15 Atl. 317. See Hathaway *v.* Choury, 14 Colo. App. 478, 60 Pac. 574; Butler *v.* Watkins, 27 S. W. 995, 16 Ky. L. Rep. 302.

Tax on gross earnings.— In an action to recover the annual tax imposed by Md. Code, Pub. Gen. Laws (1904), art. 81, § 164, imposing an annual tax of two per cent on the gross receipts of every domestic safe deposit, trust, guaranty, and fidelity company, a statement of the sources of the income of the corporation, including returns from investment of portions of its capital, profits on dealings in real estate, and earnings from loans, etc., was inadmissible; the company being liable to a two per cent tax on its gross earnings. State *v.* Central Trust Co., 106 Md. 268, 67 Atl. 267.

33. *Connecticut.*— Lamkin *v.* Baldwin, etc., Mfg. Co., 72 Conn. 57, 43 Atl. 593, 1042, 44 L. R. A. 786.

Illinois.— Ellis *v.* People, 199 Ill. 548, 65 N. E. 428.

Maryland.— State *v.* Central Trust Co., 106 Md. 268, 67 Atl. 267.

Michigan.— Muskegon *v.* S. K. Martin Lumber Co., 86 Mich. 625, 49 N. W. 489.

Missouri.— State *v.* Merchants' Bank, 160 Mo. 640, 61 S. W. 676. In an action by the state to collect taxes assessed by the state board of equalization against a ferry company, it was error to exclude evidence offered by the state that the company owned all the stock of two railroad companies, and that all three were working in unison as one transportation company, although those facts were established by evidence subsequently admitted. State *v.* Wiggins Ferry Co., 208 Mo. 622, 106 S. W. 1005.

Nevada.— State *v.* Nevada Cent. R. Co., 28 Nev. 186, 81 Pac. 99, 113 Am. St. Rep. 834; State *v.* Virginia, etc., R. Co., 24 Nev. 53, 49 Pac. 945, 50 Pac. 607; Bowman *v.* Boyd, 21 Nev. 281, 30 Pac. 823.

34. State *v.* Merchants' Bank, 160 Mo. 640, 61 S. W. 676; Georgetown *v.* Jones, 31 Tex. Civ. App. 623, 73 S. W. 22.

35. Ovid Tp. *v.* Haire, 133 Mich. 353, 94 N. W. 1060.

36. Deerfield Tp. *v.* Harper, 115 Mich. 678, 74 N. W. 207, holding that testimony by a

to show the fact and amount of the assessment and defendant's liability thereto,[37] unless it shows on its face that the assessment was erroneously made,[38] and the official delinquent list is presumptive evidence that the tax remains due and unpaid.[39] Other matters in issue must be proved by such evidence as is considered sufficient in ordinary suits at law.[40]

h. Trial, Judgment, and Review — (I) *TRIAL.* With respect to the time of trial and the facts and findings necessary to support a judgment, the directions of the statutes must be carefully observed.[41] Where defendant denies the right to tax his property, all questions bearing upon that right may be inquired into.[42] Questions of fact, such as the place of defendant's residence, or an alleged device to escape taxation, must go to the jury.[43]

(II) *JUDGMENT* — (A) *In General.* The judgment in an action for taxes must be based on a valid assessment,[44] and on pleadings sufficient in law to sustain it,[45] otherwise it may be set aside; but these requirements being fulfilled, it possesses all the ordinary attributes of a judgment,[46] is final and conclusive as to all

supervisor that he made the tax roll, that he delivered it to the county treasurer, and that he obtained it from the latter's office for use upon the trial is sufficient identification to justify its introduction in evidence. And see State *v.* Chicago R. Co., 165 Mo. 597, 65 S. W. 989.

37. *California.*— Modoc County *v.* Churchill, 75 Cal. 172, 16 Pac. 771.

Illinois.— Harding *v.* People, 202 Ill. 122, 66 N. E. 962; Carrington *v.* People, 195 Ill. 484, 63 N. E. 163.

Michigan.— Muskegon *v.* S. K. Martin Lumber Co., 86 Mich. 625, 49 N. W. 489.

Missouri.— State *v.* Vogelsang, 183 Mo. 17, 81 S. W. 1087; State *v.* Phillips, 137 Mo. 259, 38 S. W. 931.

Nevada.— State *v.* Nevada Cent. R. Co., 26 Nev. 357, 68 Pac. 294, 69 Pac. 1042.

Vermont.— Bowman *v.* Downer, 28 Vt. 532.

38. State *v.* Merchants' Bank, 160 Mo. 640, 61 S. W. 676. And see Loeber *v.* Leininger, 175 Ill. 484, 51 N. E. 703.

39. Carney *v.* People, 210 Ill. 434, 71 N. E. 365.

40. *Illinois.*— Twin City Gas Works *v.* People, 156 Ill. 387, 40 N. E. 950.

Kentucky.— Louisville Tank Line *v.* Com., 123 Ky. 81, 93 S. W. 635, 29 Ky. L. Rep. 257; McMakin *v.* Com., 80 S. W. 188, 25 Ky. L. Rep. 2195.

Maryland.— Westminster *v.* Westminster Sav. Bank, 92 Md. 62, 48 Atl. 34.

Mississippi.— Warren County *v.* Craig, (1901) 29 So. 821.

Nevada.— State *v.* Meyers, 23 Nev. 274, 46 Pac. 51.

Wisconsin.— Washburn *v.* Washburn Waterworks Co., 120 Wis. 575, 98 N. W. 539.

41. See the statutes of the different states. And see Brunson *v.* Starbuck, 32 Ind. App. 457, 70 N. E. 163; James Clark Distilling Co. *v.* Cumberland, 95 Md. 468, 52 Atl. 661; State *v.* Evans, 53 Mo. App. 663; Hancock *v.* Merriman, 46 Wis. 159, 49 N. W. 970.

42. Grundy County *v.* Tennessee Coal, etc., Co., 94 Tenn. 295, 29 S. W. 116.

43. Ovid Tp. *v.* Haire, 133 Mich. 353, 94 N. W. 1060; Com. *v.* Erie, etc., R. Co., 74 Pa. St. 94. In assumpsit for taxes, whether defendant's domicile was in the town in which he was taxed, at a certain time, or in a town of another state, was held to be a question for the jury. Smith *v.* Stannard, 81 Vt. 319, 70 Atl. 568.

44. *Alabama.*— State *v.* Sloss, 87 Ala. 119, 6 So. 309.

Maine.— Bucksport *v.* Buck, 89 Me. 320, 36 Atl. 456.

Minnesota.— State *v.* Nelson, 107 Minn. 319, 119 N. W. 1058 (holding that where defendant was the owner of stock in a foreign corporation, but it had never been listed or assessed in any manner for taxation, the court, in a suit to collect personal taxes, could not treat such stock as if it had been listed and a tax assessed thereon); Thompson *v.* Davidson, 15 Minn. 412.

Tennessee.— East Tennessee, etc., R. Co. *v.* Morristown, (Ch. App. 1895) 35 S. W. 771.

United States.— San Bernardino County *v.* Southern Pac. R. Co., 118 U. S. 417, 6 S. Ct. 1144, 30 L. ed. 125.

Mere irregularities not shown to be prejudicial and not rendering an assessment void will not prevent judgment for the full amount of the assessment. Covington, etc., Bridge Co. *v.* Covington, 100 S. W. 269, 30 Ky. L. Rep. 1115; State *v.* Duluth Gas, etc., Co., 76 Minn. 96, 78 N. W. 1032, 57 L. R. A. 63. And see *supra*, X, C, 6, d, (II).

45. People *v.* Hager, 19 Cal. 462; Falls Branch Jellico Land, etc., Co. *v.* Com., 83 S. W. 108, 26 Ky. L. Rep. 1028; Hays *v.* New Orleans, 32 La. Ann. 1307; Bland *v.* Windsor, 187 Mo. 108, 86 S. W. 162.

46. Sebree *v.* Nutter, 87 S. W. 1072, 27 Ky. L. Rep. 1080; First Presb. Church *v.* New Orleans, 30 La. Ann. 259, 31 Am. Rep. 224. *Compare* Mercier's Succession, 42 La. Ann. 1135, 8 So. 732, 11 L. R. A. 817.

Judgment as debt.— A judgment for taxes which is both *in personam* against the taxpayer and *in rem* against his real estate is a "debt" within the meaning of the legal tender act of congress. Rhodes *v.* Farrell, 2 Nev. 60.

Personal liability see Louisville *v.* Robinson, 119 Ky. 908, 85 S. W. 172, 27 Ky. L. Rep. 375; Beatrice *v.* Wright, 72 Nebr. 689, 101 N. W. 1039.

the matters in issue and decided,[47] and cannot be impeached in any collateral proceeding.[48] If the action is against several defendants, some of whom were improperly joined in the assessment, or who are otherwise not liable to the tax, they will be omitted from the judgment.[49] The judgment should be for the whole amount due, and may contain such provisions for its enforcement as the statutes may authorize.[50] If part of the tax claimed is shown to be illegal, but is readily separable from the rest, judgment may be given for the remainder.[51] Statutes sometimes authorize the court, in proceedings to enforce payment of personal property taxes, to dismiss the proceedings in its discretion, on such terms as shall be just, where it is satisfied that the person taxed is unable to pay the taxes.[52]

(B) *Recovery of Interest.* Delinquent taxes do not bear interest unless it is expressly so provided by statute.[53] But where interest is allowed by law, it is recoverable in the same proceedings which are brought for the collection of the taxes and as a part of the same;[54] and the judgment in a tax suit will bear interest from the date of its rendition the same as other judgments.[55]

Lien on property see Hagler *v.* Kelly, 14 N. D. 218, 103 N. W. 629.

47. Conclusiveness and effect of judgments in tax proceedings see JUDGMENTS, 23 Cyc. 1346. And see Kerr *v.* Woolley, 3 Utah 456, 24 Pac. 831.

48. See JUDGMENTS, 23 Cyc. p. 1058. And see Neff *v.* Smyth, 111 Ill. 100; Brown *v.* Walker, 11 Mo. App. 226 [*affirmed* in 85 Mo. 262]; Kizer *v.* Caufield, 17 Wash. 417, 49 Pac. 1064.

49. People *v.* Frisbie, 18 Cal. 402; Brown *v.* Walker, 85 Mo. 262. But see State *v.* Rand, 39 Minn. 502, 40 N. W. 835.

50. Lake County *v.* Sulphur Bank Quicksilver Min. Co., 66 Cal. 17, 4 Pac. 876; Sacramento County *v.* Central Pac. R. Co., 61 Cal. 250; Carrington *v.* People, 195 Ill. 484, 63 N. E. 163; Ohio, etc., R. Co. *v.* People, 119 Ill. 207, 10 N. E. 545; Rochester *v.* Rochester R. Co., 109 N. Y. App. Div. 638, 96 N. Y. Suppl. 152 [*modified* in 187 N. Y. 216, 79 N. E. 1010]; State *v.* St. Louis, etc., R. Co., 43 Tex. Civ. App. 533, 96 S. W. 69; Guerguin *v.* San Antonio, 19 Tex. Civ. App. 98, 50 S. W. 140.

Deficiency judgment.— A tax on land not being the personal obligation of the owner, and the land alone being liable for its payment, no deficiency judgment can be entered against the owner in a suit to foreclose the lien of the tax. Kelley *v.* Wehn, 63 Nebr. 410, 88 N. W. 682.

Adjudging lien on land.— That a judgment for taxes did not declare a lien on land specially described, as provided by the statute, is not an objection which the taxpayer is entitled to urge. Southern R. Co. *v.* State, 150 Ala 527, 43 So. 718.

51. Allen *v.* Peoria, etc., R. Co., 44 Ill. 85; Nalle *v.* Austin, 91 Tex. 424, 44 S. W. 66.

52. Greater New York Charter, Laws (1901), p. 395, c. 466, § 934. Under this provision it was held that where there was nothing in the record to show that defendants were unable to pay taxes duly assessed on property held by them as administrators, the discretion of the court was improperly exercised in relieving the estate from taxation. New York *v.* Goss, 124 N. Y. App. Div. 680, 109 N. Y. Suppl. 151. N. Y. Tax Law (Laws (1905), p. 624, c. 348), § 259*a*, authorizing dismissal of an action to collect a tax on payment of such part of the tax as may be just, or on payment of costs, where it appears that the person or corporation is unable for want of property to pay the tax, or where for other reasons upon the facts it seems just to the court that the tax should not be paid, does not afford an additional remedy to review the legality of an assessment depending upon no new facts, and hence a motion to dismiss such an action cannot be based upon that section, where defendant failed to prosecute certiorari to review the assessment, although up to the time of the assessment the question of law involved had not been judicially passed upon, and afterward, in another case, was decided in favor of the taxpayer. New York *v.* Assurance Co. of America, 129 N. Y. App. Div. 904, 113 N. Y. Suppl. 419.

53. Danforth *v.* Williams, 9 Mass. 324; Illinois Cent. R. Co. *v.* Adams, 78 Miss. 895, 29 So. 996; Edmonson *v.* Galveston, 53 Tex. 157. And see *supra.* I, A. 2, b; IX, A, 2, e.

54. Hartford *v.* Hills, 72 Conn. 599, 45 Atl. 433; State *v.* Stewart, 11 Iowa 251; Baker *v.* Kelley, 11 Minn. 480; Wilmington *v.* McDonald, 133 N. C. 548, 45 S. E. 864.

Rate of interest.— If the statute authorizes the collection of interest on delinquent taxes, but does not specify the rate, the recovery is limited to the legal rate of interest. Wilmington *v.* Cronly, 122 N. C. 383, 388, 30 S. E. 9.

When interest begins.— Interest begins to run from the day when the taxes become delinquent, that is, from the first day when a tax execution could be issued. Georgia R., etc., Co. *v.* Wright, 125 Ga. 589, 54 S. E. 52.

Injunction.— Effect of injunction restraining collection of the tax, afterward dissolved, on running of interest see Georgia R., etc., Co. *v.* Wright, 125 Ga. 589, 54 S. E. 52.

Construction of statute.— A statute which allows interest on delinquent taxes will not be construed retrospectively so as to increase the amount of taxes which became due before its passage. Conklin *v.* El Paso, (Tex. Civ. App. 1897) 44 S. W. 879.

55. People *v.* Central Pac. R. Co., 105 Cal.

(c) *Costs and Fees.* An unsuccessful defendant in a tax suit is ordinarily chargeable with the fees and expenses of officers in the proceedings to enforce the tax,[56] and generally with the costs of the action, provided a demand for payment of the tax was first made,[57] and in some states provision is also made by law for the payment of attorney's fees.[58] Whether or not the costs can be charged against the state or county, in a case where defendant prevails, depends entirely upon the local statute.[59]

(III) *APPEAL AND ERROR.* Where the law prescribes a particular procedure for reviewing a tax judgment, it is exclusive of other methods of review, such as certiorari, which would ordinarily be available.[60] On appeal, if it appears that the judgment is for a greater amount of taxes than could lawfully be levied, or includes an illegal item, it will be reversed or the illegal charge will be stricken out;[61] and on the other hand, if it omits items which it was the duty of the court to include, an appeal lies on behalf of the state.[62] The judgment will not be reversed for harmless or immaterial error, nor for errors cured by the subsequent course of proceedings.[63] An appeal-bond takes the place of the property assessed and releases the lien of the tax upon it.[64]

7. ATTACHMENT OR ARREST — a. Nature of Remedy and When Available. Payment of taxes cannot be enforced by arrest of the person unless by the authority of an explicit statute;[65] and even when this proceeding is authorized by law, it is

576, 38 Pac. 905; U. S. Trust Co. *v.* Territory, 10 N. M. 416, 62 Pac. 987; Wheeling, etc., R. Co. *v.* Wolfe, 13 Ohio Cir. Ct. 374, 7 Ohio Cir. Dec. 201; McCombs *v.* Rockport, 14 Tex. Civ. App. 560, 37 S. W. 988.

56. Webster *v.* Auditor-Gen., 121 Mich. 668, 80 N. W. 705; Rogers *v.* Marlboro County, 32 S. C. 555, 11 S. E. 383; State *v.* Baldwin University, 97 Tenn. 358, 37 S. W. 1. See State *v.* Eclipse Towboat Co., 26 La. Ann. 716.

57. Eliot *v.* Prime, 98 Me. 48, 56 Atl. 207; Dover *v.* Maine Water Co., 90 Me. 180, 38 Atl. 101; York *v.* Goodwin, 67 Me. 260.

58. *Arkansas.*— Kelley *v.* Laconia Levee Dist., 74 Ark. 202, 85 S. W. 249, 87 S. W. 638.

California.— People *v.* Central Pac. R. Co., 105 Cal. 576, 38 Pac. 905.

Missouri.— State *v.* Edwards, 144 Mo. 467, 46 S. W. 160.

Tennessee.— State *v.* Baldwin University, 97 Tenn. 358, 37 S. W. 1.

United States.— Ketchum *v.* Pacific R. Co., 14 Fed. Cas. No. 7,738, 4 Dill. 41.

59. See the statutes of the different states. And see the following cases:

Idaho.— People *v.* Moore, 1 Ida. 662.

Illinois.— People *v.* Emigh, 100 Ill. 517.

Kansas.— Whitney *v.* Morton County, 73 Kan. 502, 85 Pac. 530.

Louisiana.— Mahan *v.* Sundry Defendants, 22 La. Ann. 583.

Michigan.— Auditor-Gen. *v.* Bolt, 124 Mich. 185, 82 N. W. 845; Auditor-Gen. *v.* Baker, 84 Mich. 113, 47 N. W. 515.

See 45 Cent. Dig. tit. "Taxation," § 1220.

60. State *v.* Ames, 93 Minn. 187, 100 N. W. 889; State *v.* Faribault Waterworks, 65 Minn. 345, 68 N. W. 35; Washington County *v.* German-American Bank, 28 Minn. 360, 10 N. W. 21; State *v.* Jones, 24 Minn. 86. And see State *v.* Merchants' Bank, 160 Mo. 640, 61 S. W. 676.

Parties on appeal see *Ex p.* Washington Nat. Bank, 163 Ind. 476, 72 N. E. 260 (assessor as party to judgment); Thornburg *v.* Cardell, 123 Iowa 313, 95 N. W. 239, 98 N. W. 791 (three counties as joint plaintiffs); Adams *v.* Kuhn, 72 Miss. 276, 16 So. 598.

61. People *v.* Hastings, 26 Cal. 668; Wilmington *v.* McDonald, 133 N. C. 548, 45 S. E. 864.

62. State *v.* California Min. Co., 15 Nev. 234, 259.

63. People *v.* O'Gara Coal Co., 231 Ill. 172, 83 N. E. 140; Carney *v.* People, 210 Ill. 434, 71 N. E. 365; Keokuk, etc., Bridge Co. *v.* People, 176 Ill. 267, 52 N. E. 117; Gallup *v.* Schmidt, 154 Ind. 196, 56 N. E. 443; State *v.* Sadler, 21 Nev. 13, 23 Pac. 799; Buchanan *v.* Cook, 70 Vt. 168, 40 Atl. 102.

64. People *v.* Preston, 1 Ida. 374.

65. Marshall *v.* Wadsworth, 64 N. H. 386, 10 Atl. 685.

Collection of military taxes by imprisonment under Conn. Gen. St. (1902) § 2395, as amended by Pub. Acts (1907), c. 50, see Atwater *v.* O'Reilly, 81 Conn. 367, 71 Atl. 505.

Contempt proceedings.— In New York, a person against whom a tax is assessed on his personal property may be committed as for a contempt on account of his neglect to pay the tax. Matter of McLean, 62 Hun (N. Y.) 1, 16 N. Y. Suppl. 417; McLean *v.* Jephson, 26 Abb. N. Cas. (N. Y.) 40, 13 N. Y. Suppl. 834; McMahon *v.* Redfield, 12 Daly (N. Y.) 1; Matter of Kahn, 19 How. Pr. (N. Y.) 475. And see State *v.* Smith, 31 N. J. L. 216, holding that when a tax brought before the court by certiorari is affirmed, the court may in its discretion enforce the payment thereof by attachment.

Prosecution for obstructing collector.— Statute in California making it a misdemeanor to obstruct or hinder any public officer in the collection of taxes in which the state is interested see *Ex p.* Sam Wah, 91 Cal. 510, 27 Pac. 766.

not ordinarily a primary remedy, but one which may be resorted to only in case the collector is unable to find property of the delinquent on which to levy an execution or distress.[66] Nor can a person be arrested who is not liable to taxation in the town in which the tax is assessed.[67] But a taxpayer lawfully assessed for taxes in the town in which he resided at the time may be followed by the collector of that town into another town, to which he afterward removed, and there arrested for non-payment of the tax.[68]

b. Warrant and Proceedings Thereon. A warrant for the arrest of a delinquent taxpayer must be issued by lawful authority,[69] and must conform at least substantially to the directions of the statute and contain what is essential to make it a lawful process.[70] It cannot be executed before the taxes become delinquent, that is, before the expiration of the full time allowed to the taxpayer to make voluntary payment;[71] but although the time for completing the collection of the taxes is specified in the warrant, it may be served later.[72] The officer must have the warrant with him at the time he effects the arrest, and it is immaterial that the delinquent does not demand its production.[73] Under the statutes as generally framed, this warrant is not a returnable process;[74] but the officer is required to leave a copy of it with the jailer and to certify thereon his doings with respect to the delinquent, and this certificate should contain the facts necessary to justify him in making the arrest and commitment.[75]

c. Liability of Officers. If the officer proceeds under an insufficient warrant, exacts illegal charges, or fails to comply strictly with the statute, he becomes

Abolition of imprisonment for debt.— Statutes abolishing imprisonment for debt do not apply to proceedings for the collection of delinquent taxes. Appleton *v.* Hopkins, 5 Gray (Mass.) 530; Charleston *v.* Oliver, 16 S. C. 47.

66. Kerr *v.* Atwood, 188 Mass. 506, 74 N. E. 917; Hunt *v.* Holston, 185 Mass. 137, 70 N. E. 96; Hall *v.* Hall, 3 Allen (Mass.) 5; Lothrop *v.* Ide, 13 Gray (Mass.) 93; Snow *v.* Clark, 9 Gray (Mass.) 190; Com. *v.* Deuel, 8 Pa. Dist. 431.

In New Hampshire, however, the collector is not bound to search for property on which to levy, but may arrest the body of the delinquent unless the latter produces or exhibits sufficient property. Gordon *v.* Clifford, 28 N. H. 402; Osgood *v.* Welch, 19 N. H. 105; Kinsley *v.* Hall, 9 N. H. 190.

67. Bowker *v.* Lowell, 49 Me. 429.

68. Kinsley *v.* Hall, 9 N. H. 190. And see to same effect Hartland *v.* Church, 47 Me. 169.

69. Smith *v.* Keniston, 100 Mass. 172.

Sufficiency of complaint.— A proceeding under Conn. Gen. St. (1902) § 2395, as amended by Pub. Acts (1907), p. 619, c. 50, authorizing the commitment of persons failing to pay military taxes, etc., is a special statutory proceeding, and is not an action governed by ordinary rules of pleading in civil or criminal cases, and its purpose is not to enable the tax collector to obtain a judgment for the amount of the taxes, nor to require him to establish before a court the validity of the same; and a complaint under said statute, which describes complainant as the tax collector of a town, duly appointed and qualified, and that defendant has failed to pay the military commutation taxes assessed against him for the annual town taxes of designated years, which taxes became due on designated dates, that payment thereof has been legally demanded, and that defendant has failed to pay the same, is sufficient to give the court jurisdiction to order the commitment of defendant for non-payment of such taxes. Atwater *v.* O'Reilly, 81 Conn. 367, 71 Atl. 505.

70. *Connecticut.*— Wilcox *v.* Gladwin, 50 Conn. 77, not imperative that statutory form should be exactly followed.

Massachusetts.— Barnard *v.* Graves, 13 Metc. 85.

Pennsylvania.— *In re* Sommer, 28 Pa. Co. Ct. 93, the warrant should set out the facts justifying the imprisonment, and where two separate taxes are named it is not sufficient to give the aggregate amount, but the amount of each tax must be stated.

Rhode Island.— *In re* Collection of Poll Tax, 21 R. I. 582, 44 Atl. 805.

South Carolina.—Rogers *v.* Marlboro County, 32 S. C. 555, 11 S. E. 383.

Vermont.— Flint *v.* Whitney, 28 Vt. 680, a tax warrant commanding the officer on nonpayment to "proceed as the law directs" is not sufficient to authorize an arrest.

See 45 Cent. Dig. tit. "Taxation," § 1222.

71. Jacques *v.* Parks, 96 Me. 268, 52 Atl. 763; State *v.* Jones, 121 N. C. 616, 28 S. E. 347; Shaw *v.* Peckett, 26 Vt. 482.

72. Hartland *v.* Church, 47 Me. 169; Hubbard *v.* Garfield, 102 Mass. 72; Bassett *v.* Porter, 4 Cush. (Mass.) 487.

73. Smith *v.* Clark, 53 N. J. L. 197, 21 Atl. 491.

Breaking outer door see Gordon *v.* Clifford, 28 N. H. 402.

74. Kelley *v.* Noyes, 43 N. H. 209; Flint *v.* Whitney, 28 Vt. 680.

75. Wilcox *v.* Gladwin, 50 Conn. 77; Boardman *v.* Goldsmith, 48 Vt. 403; Flint *v.* Whitney, 28 Vt. 680; Henry *v.* Tilson, 19 Vt. 447.

liable as a trespasser.[76] This is the case where he fails to levy on personal property which is available for the purpose,[77] or where he does not comply with the law requiring him to deposit a certified copy of his warrant with the jailer.[78]

d. Release or Discharge. One imprisoned for non-payment of taxes may obtain his release on giving bond,[79] or on the poor debtor's oath; [80] but he is not entitled as of right to the writ of personal replevin and to be discharged thereon,[81] or to be released simply on his production of sufficient property to pay the tax; [82] nor can he take advantage of an order releasing the collector from his personal liability to the town for the taxes in question.[83]

e. Defenses, Objections, and Review. On appeal from an order committing defendant for failure to pay his tax, or other review of the proceedings, he may show that the collector made no sufficient effort to levy on personal property,[84] or that defendant was not liable to be charged with the tax in question; [85] but he cannot object that the levy or assessment was excessive, at least if he made no effort to have it corrected at the proper time.[86]

8. Criminal Prosecution or Recovery of Fine. It is sometimes, by statute, made a misdemeanor, punishable by fine, for a corporation or association to fail to pay its taxes after they become delinquent.[87]

D. Remedies For Wrongful Enforcement — 1. Limitations of Judicial Authority. For cogent reasons of public policy the courts are slow to interfere with the orderly and speedy collection of the public revenues, and will not interfere with proceedings to enforce the payment of taxes except in the clearest cases and for the most imperative reasons.[88] In some states they are forbidden by statute to issue the writ of injunction to restrain or interfere with the collection

76. Wilcox *v.* Gladwin, 50 Conn. 77; Townsend *v.* Walcutt, 3 Metc. (Mass.) 152; Boardman *v.* Goldsmith, 48 Vt. 403.

77. Snow *v.* Clark, 9 Gray (Mass.) 190; Flint *v.* Whitney, 28 Vt. 680.

78. Gordon *v.* Clifford, 28 N. H. 402; Henry *v.* Tilson, 19 Vt. 447.

79. Athens *v.* Ware, 39 Me. 345; Hoxie *v.* Weston, 19 Me. 322.

80. Skinner *v.* Lyford, 73 Me. 282.

81. Aldrich *v.* Aldrich, 8 Metc. (Mass.) 102.

82. Osgood *v.* Welch, 19 N. H. 105.

83. Hoxie *v.* Weston, 19 Me. 322.

84. Kerr *v.* Atwood, 188 Mass. 506, 74 N. E. 917.

Return as evidence.— Where the return on a tax warrant states that the collector has made diligent search for goods of the taxpayer, without finding any, it is *prima facie* evidence in favor of the collector to show a diligent search. Kerr *v.* Atwood, 188 Mass. 506, 74 N. E. 917. In New York it is conclusive. Matter of McLean, 62 Hun (N. Y.) 1, 16 N. Y. Suppl. 417.

85. Draves *v.* People, 97 Ill. App. 151; McLean *v.* Jephson, 123 N. Y. 142, 25 N. E. 409, 9 L. R. A. 493 [*reversing* 41 Hun 479]; *In re* Nichols, 54 N. Y. 62.

Enlistment in the United States army does not exempt one from a preëxisting liability to taxation on account of his property, or from liability to arrest on warrant for non-payment. Webster *v.* Seymour, 8 Vt. 135.

86. *In re* McLean, 3 N. Y. Suppl. 45.

87. Ky. St. (1903) § 4091, providing that any corporation, company, or association failing to pay its taxes, penalty, and interest, after they become delinquent, "shall be deemed guilty of a misdemeanor, and, on conviction, shall be fined fifty dollars for each day the same remains unpaid, to be recovered by indictment or civil action," etc. The penalty imposed by this section cannot be recovered in a suit issued by the revenue agent under Ky. St. (1903) § 4263, making it the duty of the revenue agent, when directed by the auditor, to institute suits, motions, or proceedings in the name of the commonwealth against any delinquent officer or other person, to recover any money which may be due the commonwealth, as a person charged with having committed a misdemeanor does not owe the commonwealth any money until he has been convicted of such misdemeanor. Louisville Water Co. *v.* Com., 132 Ky. 311, 116 S. W. 711.

88. *Connecticut.*— Dodd *v.* Hartford, 25 Conn. 232.

Georgia.— Scofield *v.* Perkerson, 46 Ga. 350; Cody *v.* Lennard, 45 Ga. 85; Eve *v.* State, 21 Ga. 50.

Illinois.— Felsenthal *v.* Johnson, 104 Ill. 21.

Kansas.— Kansas Pac. R. Co. *v.* Russell, 8 Kan. 558.

New York.— Brass *v.* Rathbone, 8 N. Y. App. Div. 78, 40 N. Y. Suppl. 466 [*affirmed* in 153 N. Y. 435, 47 N. E. 905]; Messeck *v.* Columbia County, 50 Barb. 190; New York L. Ins. Co. *v.* New York, 1 Abb. Pr. 250.

Pennsylvania.— Black *v.* Boyd, 155 Pa. St 163, 26 Atl. 5.

United States.— Nye *v.* Washburn, 125 Fed. 817; Steubenville, etc., R. Co. *v.* Tuscarawass County, 22 Fed. Cas. No. 13,388.

See 45 Cent. Dig. tit. "Taxation," § 1230 *et seq.*

of taxes,[89] and in others the legislature has restricted the scope of judicial authority in these matters by various other provisions.[90] But independently of these statutes, the courts are always disposed to remit the complaining taxpayer to such remedies as are provided for him by the common law or by the acts governing the proceedings in tax cases,[91] and they refuse to stop the process of collection on allegations of mere irregularity or of unfairness not involving a violation of the fundamental law.[92] The courts of the United States are not without power to enjoin the collection of taxes levied by the authority of the states, but they will proceed with great caution, and will grant such relief only when it appears that the tax is illegal, that the taxpayer has no remedy by the ordinary processes of law, and that there are special circumstances bringing the case under some recognized head of equity jurisdiction.[93]

2. Injunction — a. Illegality of Tax and Irregularity in Proceedings — (i) *General Rules.* A court of equity may, in the absence of statutory prohibition, enjoin the collection of a tax which is entirely illegal or levied without any authority, and which therefore, in justice and good conscience, the citizen ought not to be compelled to pay,[94] provided there are circumstances which bring the particular case under some recognized head of equity jurisdiction,[95] and provided there is no adequate remedy at law for the redress of the injury which would be inflicted by enforcing payment of the tax.[96] But this relief will not be granted

89. *California.*— San Jose Gas Co. *v.* January, 57 Cal. 614.

District of Columbia.— Alexandria Canal R., etc., Co. *v.* District of Columbia, 1 Mackey 217.

Georgia.— Yancey *v.* New Manchester Mfg. Co., 33 Ga. 622; Vanover *v.* Davis, 27 Ga. 354.

Illinois.— Swinney *v.* Beard, 71 Ill. 27; Wilson *v.* Weber, 3 Ill. App. 125.

Indiana.— Rinard *v.* Nordyke, 76 Ind. 130; Mesker *v.* Koch, 76 Ind. 68; Mullikin *v.* Reeves, 71 Ind. 281; Faris *v.* Reynolds, 70 Ind. 359.

Iowa.— Grimmell *v.* Des Moines, 57 Iowa 144, 10 N. W. 330.

Louisiana.— Gilmer *v.* Hill, 22 La. Ann. 465.

Michigan.— Eddy *v.* Lee Tp., 73 Mich. 123, 40 N. W. 792.

New York.— Astor *v.* New York, 39 N. Y. Super. Ct. 120 [*affirmed* in 62 N. Y. 580].

South Carolina.— Chamblee *v.* Tribble, 23 S. C. 70.

United States.— Snyder *v.* Marks, 109 U. S. 189, 3 S. Ct. 157, 27 L. ed. 901.

90. See the statutes of the different states. And see Schwarz *v.* Boston, 151 Mass. 226, 24 N. E. 41; Grand Rapids, etc., R. Co. *v.* Auditor-Gen., 144 Mich. 77, 107 N. W. 1075; Boorman *v.* Juneau County, 76 Wis. 550, 45 N. W. 675; Flanders *v.* Merrimack, 48 Wis. 567, 4 N. W. 741.

91. Philadelphia Mortg., etc., Co. *v.* Omaha, 65 Nebr. 93, 90 N. W. 1005, 57 L. R. A. 150.

Certiorari to test legality of tax or warrant see People *v.* Queens County, 1 Hill (N. Y.) 195; Saunders *v.* Russell, 10 Lea (Tenn.) 293; Spears *v.* Loague, 6 Coldw. (Tenn.) 420.

Affidavit of illegality see Georgia Trading Co. *v.* Marion County, 114 Ga. 397, 40 S. E. 250.

Action to quiet title and remove cloud see Philadelphia Mortg., etc., Co. *v.* Omaha, 65 Nebr. 93, 90 N. W. 1005, 57 L. R. A. 150.

Statute conferring jurisdiction on equity courts to enjoin collection of illegal taxes and assessments operates on suits pending when the act was passed. Vaughan *v.* Bowie, 30 Ark. 278.

92. Linton *v.* Athens, 53 Ga. 588; Whittaker *v.* Janesville, 33 Wis. 76.

93. Pittsburgh, etc., R. Co. *v.* West Virginia Bd. of Public Works, 172 U. S. 32, 19 S. Ct. 90, 43 L. ed. 354; *Ex p.* Tyler, 149 U. S. 164, 13 S. Ct. 785, 37 L. ed. 689; Brinkerhoff *v.* Brumfield, 94 Fed. 422; Evansville Nat. Bank *v.* Britton, 8 Fed. 867, 10 Biss. 503; Parmley *v.* St. Louis, etc., R. Co., 18 Fed. Cas. No. 10,768, 3 Dill. 25; Stevens *v.* New York, etc., R. Co., 23 Fed. Cas. No. 13,405, 13 Blatchf. 104; Union Pac. R. Co. *v.* Lincoln County, 24 Fed. Cas. No. 14,379, 2 Dill. 279.

On a bill by a receiver in the federal court to enjoin the enforcement of a tax alleged to be invalid, the power of court to issue a temporary injunction is not affected by the fact that the state law denies any relief against an illegal tax, except payment under protest and suit to recover the amount. *Ex p.* Tyler, 149 U. S. 164, 13 S. Ct. 785, 37 L. ed. 689, 149 U. S. 791, 13 S. Ct. 793, 37 L. ed. 698; *Ex p.* Chamberlain, 55 Fed. 704.

94. Fremont *v.* Boling, 11 Cal. 380; Morse *v.* Hitchcock County, 19 Nebr. 566, 27 N. W. 637; Delaware, etc., R. Co. *v.* Scranton City, 5 Pa. Co. Ct. 437; Allen *v.* Baltimore, etc., R. Co., 114 U. S. 311, 5 S. Ct. 925, 962, 29 L. ed. 200. And see *infra*, X, D, 2, a, (II), (III).

95. Ensley *v.* McWilliams, (Ala. 1906) 41 So. 296; Gray *v.* Peoria Bd. of School Inspectors, 231 Ill. 63, 83 N. E. 95. And see *infra*, X, D, 2, b.

96. Alabama Gold L. Ins. Co. *v.* Lott, 54 Ala. 499; Minneapolis, etc., R. Co. *v.* Dickey

on account of mere errors or irregularities in the proceedings not affecting the substantial justice of the tax,[97] nor on account of technical objections or circumstances of hardship in the particular case which do not undermine the foundations of the complainant's obligation to pay his tax.[98]

(II) *Illegality of Tax.* Where a tax is illegal, because levied under an unconstitutional statute, or for an unlawful purpose, or by persons having no authority whatever to make the levy, or assessed on persons or property not subject to taxation, it is the doctrine of many cases that this is sufficient ground to justify a court of equity in enjoining proceedings for its collection,[99] unless pro-

County, 11 N. D. 107, 90 N. W. 260; Fleming *v.* Power, 77 S. C. 528, 58 S. E. 430; Taylor *v.* Secor, 92 U. S. 575, 23 L. ed. 663; Heine *v.* Madison Parish, etc., Levee Com'rs, 19 Wall. (U. S.) 655, 22 L. ed. 223; Dows *v.* Chicago, 11 Wall. (U. S.) 108, 20 L. ed. 65; Parmley *v.* St. Louis, etc., R. Co., 18 Fed. Cas. No. 10,767, 3 Dill. 13. And see *infra*, X, D, 2, b, (II).

97. *Illinois.*— Munson *v.* Minor, 22 Ill. 594.

Indiana.— Ricketts *v.* Spraker, 77 Ind. 371; Jones *v.* Summer, 27 Ind. 510.

Iowa.— Security Sav. Bank *v.* Carroll, 131 Iowa 605, 109 N. W. 212.

Kansas.— Chicago, etc., R. Co. *v.* Grant, 55 Kan. 386, 40 Pac. 654; Dutton *v.* Citizens' Nat. Bank, 53 Kan. 440, 36 Pac. 719; Smith *v.* Leavenworth County, 9 Kan. 296; Seward *v.* Rheiner, 2 Kan. App. 95, 43 Pac. 423.

Missouri.— Dickhaus *v.* Olderheide, 22 Mo. App. 76.

Ohio.— Wagner *v.* Zumstein, 10 Ohio Dec. (Reprint) 515, 21 Cinc. L. Bul. 317.

Oregon.— Yamhill County *v.* Foster, 53 Oreg. 124, 99 Pac. 286.

Wisconsin.— Hixon *v.* Oneida County, 82 Wis. 515, 52 N. W. 445.

United States.— Taylor *v.* Secor, 92 U. S. 575, 23 L. ed. 663; Jackson Lumber Co. *v.* McCrimmon, 164 Fed. 759; Woodman *v.* Latimer, 2 Fed. 842; Woodman *v.* Ely, 2 Fed. 839; Parmley *v.* St. Louis, etc., R. Co., 18 Fed. Cas. No. 10,767, 3 Dill. 13.

See 45 Cent. Dig. tit. "Taxation," § 1230 *et seq.*

98. Wilson *v.* Hamilton County, 68 Ind. 507; Graham *v.* Chautauqua County, 31 Kan. 473, 2 Pac. 549; Burlington, etc., R. Co. *v.* Saunders County, 16 Nebr. 123, 19 N. W. 698.

Taxpayer as creditor of municipality.— Where a person whose property has been assessed for taxation by a city or county is a creditor of the municipality, he cannot have an injunction to restrain the collection of the tax until his debt shall have been paid. Fremont *v.* Mariposa County, 11 Cal. 361; Finnegan *v.* Fernandina, 15 Fla. 379, 21 Am. Rep. 292; Scobey *v.* Decatur County, 72 Ind. 551.

99. *Alabama.*— Montgomery *v.* Sayre, 65 Ala. 564; Mobile *v.* Baldwin, 57 Ala. 61, 29 Am. Rep. 712.

Arkansas.— Little Rock *v.* Barton, 33 Ark. 436; Oliver *v.* Memphis, etc., R. Co., 30 Ark. 128.

Dakota.— Frost *v.* Flick, 1 Dak. 131, 46 N. W. 508.

District of Columbia.— Alexander *v.* Dennison, 2 MacArthur 562.

Florida.— Finnegan *v.* Fernandina, 15 Fla. 379, 21 Am. Rep. 292.

Georgia.— Southwestern R. Co. *v.* Wright, 68 Ga. 311; Georgia Mut. Loan Assoc. *v.* McGowan, 59 Ga. 811; Vanover *v.* Davis, 27 Ga. 354.

Illinois.— Carr *v.* Arnold, 239 Ill. 37, 87 N. E. 870; Hanberg *v.* Western Cold Storage Co., 231 Ill. 32, 82 N. E. 842; Allwood *v.* Cowen, 111 Ill. 481; Lemont *v.* Singer, etc., Stone Co., 98 Ill. 94; Kimball *v.* Merchants', etc., Trust Co., 89 Ill. 611; Swinney *v.* Beard, 71 Ill. 27; Vieley *v.* Thompson, 44 Ill. 9; Ottawa *v.* Walker, 21 Ill. 605, 71 Am. Dec. 121.

Indiana.— State *v.* Clinton County, 162 Ind. 580, 68 N. E. 295, 70 N. E. 373, 984; Yocum *v.* Brazil First Nat. Bank, 144 Ind. 272, 43 N. E. 231; Scott *v.* Knightstown, 84 Ind. 108; Indianapolis, etc., R. Co. *v.* Tipton County, 70 Ind. 385; Riley *v.* Western Union Tel. Co., 47 Ind. 511; Jeffersonville *v.* Paterson, 32 Ind. 140; Toledo, etc., R. Co. *v.* Lafayette, 22 Ind. 262; Cleveland, etc., R. Co. *v.* Ensley, (App. 1909) 89 N. E. 607; Nyce *v.* Schmoll, 40 Ind. App. 555, 82 N. E. 539.

Iowa.— Bednar *v.* Carroll, 138 Iowa 338, 116 N. W. 315; Security Sav. Bank *v.* Carroll, 131 Iowa 605, 109 N. W. 212; Smith *v.* Peterson, 123 Iowa 672, 99 N. W. 552; Williams *v.* Penny, 25 Iowa 436; Olmstead *v.* *v.* Henry County, 24 Iowa 33.

Kansas.— Burnes *v.* Atchison, 2 Kan. 454.

Kentucky.— Gates *v.* Barrett, 79 Ky. 295; Owen County Fiscal Court *v.* F. & A. Cox Co., 132 Ky. 738, 117 S. W. 296; Mt. Sterling Oil, etc., Co. *v.* Ratliff, 127 Ky. 1, 104 S. W. 993, 31 Ky. L. Rep. 1229.

Maryland.— Baltimore *v.* Gail, 106 Md. 684, 68 Atl. 282; Joesting *v.* Baltimore, 97 Md. 589, 55 Atl. 456.

Massachusetts.— Freeland *v.* Hastings, 10 Allen 570.

Mississippi.— Meridian *v.* Bagsdale, 67 Miss. 86, 6 So. 619.

Missouri.— St. Louis, etc., R. Co. *v.* Epperson, 97 Mo. 300, 10 S. W. 478.

Nebraska.— Philadelphia Mortg., etc., Co. *v.* Omaha, 63 Nebr. 280, 88 N. W. 523, 90 N. W. 1005, 93 Am. St. Rep. 442; Union Pac. R. Co. *v.* Cheyenne County, 64 Nebr. 777, 90 N. W. 917; Grand Island, etc., R. Co. *v.* Dawes County, 62 Nebr. 44, 86 N. W. 934; Morris *v.* Merrel, 44 Nebr. 423, 62 N. W. 865.

North Carolina.— Purnell *v.* Page, 133

hibited by statute.[1] But a stricter rule is often applied, many decisions holding that the illegality of the tax is not enough to warrant the interference of the court, but that, in addition to this, it must appear that there are circumstances in the particular case which bring the application under some recognized head of equity jurisdiction,[2] and that there is no legal remedy for the injury inflicted

N. C. 125, 45 S. E. 534; Riggsbee *v.* Durham, 94 N. C. 800.

Ohio.— Gerke *v.* Purcell, 25 Ohio St. 229; Kirkley *v.* Parker, 27 Ohio Cir. Ct. 334.

Oklahoma.— Wallace *v.* Bullen, 6 Okla. 17, 52 Pac. 954.

Oregon.— Yamhill County *v.* Foster, 53 Oreg. 124, 99 Pac. 286.

Rhode Island.— Sherman *v.* Benford, 10 R. I. 559.

Texas.— Morris *v.* Cummings, 91 Tex. 618, 45 S. W. 383; Davis *v.* Burnett, 77 Tex. 3, 13 S. W. 613.

Virginia.— Tiller *v.* Excelsior Coal, etc., Corp., 110 Va. 151, 65 S. E. 507; Wytheville *v.* Johnson, 108 Va. 589, 62 S. E. 328, 18 L. R. A. N. S. 960; Richmond *v.* Crenshaw, 76 Va. 936.

Washington.— Phillips *v.* Thurston County, 35 Wash. 187, 76 Pac. 993; Northwestern Lumber Co. *v.* Chehalis County, 24 Wash. 626, 64 Pac. 787.

West Virginia.— Christie *v.* Malden, 23 W. Va. 667; Corrothers *v.* Clinton Dist. Bd. of Education, 16 W. Va. 527; Douglass *v.* Harrisville, 9 W. Va. 162, 27 Am. Rep. 548; McClung *v.* Livesay, 7 W. Va. 329.

Wisconsin.— Warden *v.* Fond du Lac County, 14 Wis. 618.

Wyoming.— Ivinson *v.* Hance, 1 Wyo. 270.

United States.— Clearwater Timber Co. *v.* Nez Perce County, 155 Fed. 633; McKnight *v.* Dudley, 148 Fed. 204, 78 C. C. A. 162; Wright *v.* Louisville, etc., R. Co., 116 Fed. 669 [*affirmed* in 117 Fed. 1007, 54 C. C. A. 672 (*reversed* on other grounds in 195 U. S. 219, 25 S. Ct. 16, 49 L. ed. 167)]; Gillette *v.* Denver, 21 Fed. 822; Albany City Bank *v.* Maher, 6 Fed. 417, 19 Blatchf. 175; City Nat. Bank *v.* Paducah, 5 Fed. Cas. No. 2,743, 2 Flipp. 61; Foote *v.* Linck, 9 Fed. Cas. No. 4,913, 5 McLean 616; Georgia *v.* Atkins, 10 Fed. Cas. No. 5,350, 1 Abb. 22, 35 Ga. 315.

See 45 Cent. Dig. tit. "Taxation," § 1231.

Enjoining sale of land for illegal tax see *infra*, XI, E, 5, a.

1. See *supra*, X, D, 1.

2. *Alabama.*— Elyton Land Co. *v.* Ayres, 62 Ala. 413; Selma Bldg., etc., Assoc. *v.* Morgan, 57 Ala. 33; Weaver *v.* State, 39 Ala. 535.

Arkansas.— Floyd *v.* Gilbreath, 27 Ark. 675.

California.— Savings, etc., Soc. *v.* Austin, 46 Cal. 416.

Colorado.— Highlands *v.* Johnson, 24 Colo. 371, 51 Pac. 1004; Insurance Co. of North America *v.* Bonner, 24 Colo. 220, 49 Pac. 366; Wason *v.* Major, 10 Colo. App. 181, 50 Pac. 741.

District of Columbia.— Burgdorf *v.* District of Columbia, 7 App. Cas. 405.

Illinois.— La Salle, etc., R. Co. *v.* Donoghue, 127 Ill. 27, 18 N. E. 827, 11 Am. St. Rep. 90; New York, etc., Grain, etc., Exch. *v.* Gleason, 121 Ill. 502, 13 N. E. 204; Nunda *v.* Crystal Lake, 79 Ill. 311; Swinney *v.* Beard, 71 Ill. 27; Cook County *v.* Chicago, etc., R. Co., 35 Ill. 460.

Kansas.— Kansas Pac. R. Co. *v.* Russell, 8 Kan. 558.

Massachusetts.— Brewer *v.* Springfield, 97 Mass. 152.

Minnesota.— Laird, etc., Co. *v.* Pine County, 72 Minn. 409, 75 N. W. 723; Bradish *v.* Lucken, 38 Minn. 186, 36 N. W. 454.

Mississippi.— McDonald *v.* Murphree, 45 Miss. 705.

Missouri.— McPike *v.* Pew, 48 Mo. 525; Barrow *v.* Davis, 46 Mo. 394; First Nat. Bank *v.* Meredith, 44 Mo. 500; Sayre *v.* Tompkins, 23 Mo. 443.

Nevada.— Wells *v.* Dayton, 11 Nev. 161.

New Jersey.— Baldwin *v.* Elizabeth, 42 N. J. Eq. 11, 6 Atl. 275; Bogert *v.* Elizabeth, 25 N. J. Eq. 426.

New York.— Susquehanna Bank *v.* Broome County, 25 N. Y. 312; Heywood *v.* Buffalo, 14 N. Y. 534; Hanlon *v.* Westchester County, 57 Barb. 383; Messeck *v.* Columbia County, 50 Barb. 190; Mutual Ben. L. Ins. Co. *v.* New York, 33 Barb. 322, 20 How. Pr. 416 [*affirmed* in 3 Abb. Dec. 344, 3 Keyes 182, 2 Abb. Pr. N. S. 233, 32 How. Pr. 359]; United Lines Tel. Co. *v.* Grant, 18 N. Y. Suppl. 534 [*affirmed* in 137 N. Y. 7, 32 N. E. 1005]; Pacific Mail Steamship Co. *v.* New York, 57 How. Pr. 511; Mann *v.* Union Free School Dist. No. 2 Bd. of Education, 53 How. Pr. 289; Mooers *v.* Smedley, 6 Johns. Ch. 27.

North Dakota.— Farrington *v.* New England Inv. Co., 1 N. D. 102, 45 N. W. 191.

Ohio.— McCoy *v.* Chillicothe Corp., 3 Ohio 370, 17 Am. Dec. 607.

Pennsylvania.—Van Nort's Appeal, 121 Pa. St. 118, 15 Atl. 473.

Texas.— Carlile *v.* Eldridge, 1 Tex. App. Civ. Cas. § 986.

West Virginia.— Blue Jacket Consol. Copper Co. *v.* Scherr, 50 W. Va. 533, 40 S. E. 514; Williams *v.* Grant County Ct., 26 W. Va. 488, 53 Am. Rep. 94.

United States.— Stone *v.* Commonwealth Bank, 174 U. S. 408, 19 S. Ct. 881, 43 L. ed. 1187; Pacific Express Co. *v.* Seibert, 142 U. S. 339, 12 S. Ct. 250, 35 L. ed. 1035; Allen *v.* Pullman's Palace Car Co., 139 U. S. 658, 11 S. Ct. 682, 35 L. ed. 303; Taylor *v.* Secor, 92 U. S. 575, 23 L. ed. 663; Hannewinkle *v.* Georgetown, 15 Wall. 547, 21 L. ed. 231; Dows *v.* Chicago, 11 Wall. 108, 20 L. ed. 65; People's Nat. Bank *v.* Marye, 107 Fed. 570 [*affirmed* in 191 U. S. 272, 24 S. Ct. 68, 48 L. ed. 180]; Commonwealth Bank *v.* Stone, 88 Fed. 383; Taylor *v.* Louisville, etc., R. Co., 88 Fed. 350, 31 C. C. A. 537; Balfour *v.* Portland, 28 Fed. 738; Union Nat. Bank *v.* Chi-

by forcing payment of the tax or that the party would not be adequately protected by the remedies which the law affords him, such as a review of the assessment on appeal or certiorari, action of trespass, suit to recover back the taxes paid, or the like.[3] And in any case injunction will not issue unless the illegality of the tax is shown very clearly,[4] nor will it be granted if it is admitted or

cago, 24 Fed. Cas. No. 14,374, 3 Biss. 82; Union Pac. R. Co. *v.* Lincoln County, 24 Fed. Cas. No. 14,379, 2 Dill. 279. And see Illinois L. Ins. Co. *v.* Newman, 141 Fed. 449, holding that a federal court of equity is without power to enjoin the collection of a tax levied under the authority of a state on the ground of its illegality alone, although such power is conferred by statute on the courts of the state.

See 45 Cent. Dig. tit. "Taxation," § 1231. And see *infra*, X, D, 2, b.

3. *Alabama.*— Mobile *v.* Baldwin, 57 Ala. 61, 29 Am. Rep. 712; Alabama Gold L. Ins. Co. *v.* Lott, 54 Ala. 499.

California.— Crocker *v.* Scott, 149 Cal. 575, 87 Pac. 102; Robinson *v.* Gaar, 6 Cal. 273; De Witt *v.* Hays, 2 Cal. 463, 56 Am. Dec. 352.

Colorado.— Hallett *v.* Arapahoe County, 40 Colo. 308, 90 Pac. 678; Woodward *v.* Ellsworth, 4 Colo. 580; Price *v.* Kramer, 4 Colo. 546.

Connecticut.— Rowland *v.* Weston First School Dist., 42 Conn. 30; Arnold *v.* Middletown, 39 Conn. 401.

District of Columbia.— Buchanan *v.* MacFarland, 31 App. Cas. 6; Burgdorf *v.* District of Columbia, 7 App. Cas. 405; Washington Market Co. *v.* District of Columbia, 4 Mackey 416; Harkness *v.* District of Columbia, 1 MacArthur 121.

Florida.— H. W. Metcalf Co. *v.* Martin, 54 Fla. 531, 45 So. 463, 127 Am. St. Rep. 149; Baldwin *v.* Tucker, 16 Fla. 258.

Idaho.— Wilkerson *v.* Walters, 1 Ida. 564.

Indiana.— Hendricks *v.* Gilchrist, 76 Ind. 369; Brown *v.* Herron, 59 Ind. 61.

Kansas.— Burnes *v.* Atchison, 2 Kan. 454.

Maryland.— O'Neal *v.* Virginia, etc., Bridge Co., 18 Md. 1, 79 Am. Dec. 669.

Massachusetts.— Loud *v.* Charlestown, 99 Mass. 208; Brewer *v.* Springfield, 97 Mass. 152.

Michigan.— Hagenbuch *v.* Howard, 34 Mich. 1.

Minnesota.— Bradish *v.* Lucken, 38 Minn. 186, 36 N. W. 454; Scribner *v.* Allen, 12 Minn. 148.

Mississippi.— Beck *v.* Allen, 58 Miss. 143.

Missouri.— McPike *v.* Pew, 48 Mo. 525; Steines *v.* Franklin County, 48 Mo. 167, 8 Am. Rep. 87.

Nevada.— Wells *v.* Dayton, 11 Nev. 161.

New Hampshire.— Perley *v.* Dolloff, 60 N. H. 504; Brown *v.* Concord, 56 N. H. 375; Rockingham Ten Cent Sav. Bank *v.* Portsmouth, 52 N. H. 17.

New Jersey.— Lewis *v.* Elizabeth, 25 N. J. Eq. 298; Hoagland *v.* Delaware, 17 N. J. Eq. 106.

New York.— United Lines Tel. Co. *v.* Grant, 137 N. Y. 7, 32 N. E. 1005; Mutual Ben. L. Assur. Co. *v.* New York, 3 Abb. Dec. 344, 3 Keyes 182, 2 Abb. Pr. N. S. 233, 32 How. Pr. 359 [*affirming* 8 Bosw. 683]; Hasbrook *v.* Kingston Bd. of Education, 3 Abb. Dec. 340, 3 Keyes 480, 3 Transcr. App. 106, 5 Abb. Pr. N. S. 399; Sage *v.* Gloversville, 43 N. Y. App. Div. 245, 60 N. Y. Suppl. 791; Rome, etc., R. Co. *v.* Smith, 39 Hun 332 [*affirmed* in 101 N. Y. 684]; Mutual Ben. L. Ins. Co. *v.* New York, 33 Barb. 322, 20 How. Pr. 416 [*affirmed* in 3 Abb. Dec. 344, 3 Keyes 182, 2 Abb. Pr. N. S. 233, 32 How. Pr. 359]; Wilson *v.* New York, 4 E. D. Smith 675, 1 Abb. Pr. 4; Postal Tel. Cable Co. *v.* Grant, 11 N. Y. Suppl. 323; Pacific Mail Steamship Co. *v.* New York, 57 How. Pr. 511.

North Carolina.— Hall *v.* Fayetteville, 115 N. C. 281, 20 S. E. 373.

Pennsylvania.— Manor Real Estate, etc., Co. *v.* Cooner, 209 Pa. St. 531, 58 Atl. 918.

South Carolina.— See Ware Shoals Mfg. Co. *v.* Jones, 78 S. C. 211, 58 S. E. 811.

South Dakota.— Chicago, etc., R. Co. *v.* Rolfson, 23 S. D. 405, 122 N. W. 343.

Texas.— Stephens *v.* Texas, etc., R. Co., 100 Tex. 177, 97 S. W. 309 [*reversing* (Civ. App. 1906) 93 S. W. 436].

Virginia.— Norfolk *v.* Perry Co., 108 Va. 28, 61 S. E. 866, 128 Am. St. Rep. 940.

Wisconsin.— Whittaker *v.* Janesville, 33 Wis. 76; Van Cott *v.* Milwaukee County, 18 Wis. 247. And see Duluth Log Co. *v.* Hawthorne, 139 Wis. 170, 120 N. W. 864.

United States.—Arkansas Bldg., etc., Assoc. *v.* Madden, 175 U. S. 269, 20 S. Ct. 119, 44 L. ed. 159; Taylor *v.* Secor, 92 U. S. 575, 23 L. ed. 663; Dows *v.* Chicago, 11 Wall. 108, 20 L. ed. 65; Linehan R. Transfer Co. *v.* Pendergrass, 70 Fed. 1, 16 C. C. A. 585; Schulenberg-Boeckeler Lumber Co. *v.* Hayward, 20 Fed. 422; Trask *v.* Maguire, 24 Fed. Cas. No. 14,145, 2 Dill. 183 note; Union Pac. R. Co. *v.* Lincoln County, 24 Fed. Cas. No. 14,379, 2 Dill. 279.

See 45 Cent. Dig. tit. "Taxation," §§ 1230, 1238. And see *infra*, X, D, 2, b, (II).

Compare McTwiggan *v.* Hunter, 18 R. I. 776, 30 Atl. 962, holding that when a taxpayer, suing in his own behalf, attacks an assessment for an illegality extending to the whole tax and its assessment on every person taxed, equity will take jurisdiction, although such complaining taxpayer would have an adequate remedy at law.

4. *Illinois.*— Peirce *v.* Carlock, 224 Ill. 608, 79 N. E. 959.

Nebraska.— Rittenhouse *v.* Bigelow, 38 Nebr. 547, 58 N. W. 534.

North Carolina.— Mitchell *v.* Craven County, 74 N. C. 487; Brodnax *v.* Groom, 64 N. C. 244.

Pennsylvania.— Truesdell's Appeal, 58 Pa. St. 148.

shown that part of the tax in question is legal and valid, unless perhaps as to the excess.[5]

(III) *Invalid Levy.* A court of equity will not issue its writ of injunction simply because some formality or legal requirement in levying a tax is wanting, if it is levied for an authorized purpose and by the persons designated by law;[6] but if officers or individuals assume, without authority, the right to levy a tax, or, having the right to levy a tax for a specified purpose, assume to levy a tax for an unauthorized purpose or in excess of the legal limit, equity may interpose by injunction.[7] And so, where an exaction is demanded under the guise of taxation, but without any levy and assessment.[8]

(IV) *Defects in Assessment.* The collection of a tax will not be enjoined on account of defects, mistakes, irregularities, or omissions of statutory requirements in the process of assessing, listing, and valuing the property, which are not of such a nature as to affect the substantial justice of the tax itself or work irreparable injury to the rights of the complainant.[9] Nor can a taxpayer have

Texas.— Blanc *v.* Meyer, 59 Tex. 89.

See 45 Cent. Dig. tit. "Taxation," §§ 1230, 1231.

5. Shepardson *v.* Gillette, 133 Ind. 125, 31 N. E. 788; Parkinson *v.* Jasper County Tel. Co., 31 Ind. App. 135, 67 N. E. 471; Burlington, etc., R. Co. *v.* York County, 7 Nebr. 487.

6. *Illinois.*— Drake *v.* Phillips, 40 Ill. 388.

Indiana.— Hunter Stone Co. *v.* Woodard, 152 Ind. 474, 53 N. E. 947.

Missouri.— St. Louis, etc., R. Co. *v.* Gracy, 126 Mo. 472, 29 S. W. 579.

Nebraska.— Hull *v.* Kearney County, 13 Nebr. 539, 14 N. W. 529; South Platte Land Co. *v.* Crete, 11 Nebr. 344, 7 N. W. 859.

North Dakota.— Minneapolis, etc., R. Co. *v.* Dickey County, 11 N. D. 107, 90 N. W. 260.

Ohio.— Columbus Exch. Bank *v.* Hines, 3 Ohio St. 1.

Oklahoma.— Sharpe *v.* Maney, 3 Okla. 105, 41 Pac. 88; Sharpe *v.* Engle, 2 Okla. 624, 39 Pac. 384.

Pennsylvania.— Lehigh Coal, etc., Co. *v.* Rahn Tp. School Bd., 9 Pa. Dist. 692.

Wisconsin.— Chicago, etc., R. Co. *v.* Forest County, 95 Wis. 80, 70 N. W. 77; Hixon *v.* Oneida County, 82 Wis. 515, 52 N. W. 445.

See 45 Cent. Dig. tit. "Taxation," § 1232.

Questioning title of officers.— A complaint to enjoin the collection of taxes on land, on the ground that the county in which the land is situated was not legally created, is bad in that it attacks the title to the offices of the new county commissioners and treasurer, which title can be inquired into only by proceedings by quo warranto. Wason *v.* Major, 10 Colo. App. 181, 50 Pac. 741.

7. *Colorado.*—Wason *v.* Major, 10 Colo. App. 181, 50 Pac. 741.

Illinois.— Drake *v.* Phillips, 40 Ill. 388.

Indiana.— Gavin *v.* Wells County, 104 Ind. 201, 3 N. E. 846.

Iowa.— Goold *v.* Lyon County, 74 Iowa 95, 36 N. W. 906; Cattell *v.* Lowry, 45 Iowa 478; Rood *v.* Mitchell County, 39 Iowa 444.

Kansas.—Topeka Water Supply Co. *v.* Roberts, 45 Kan. 363, 25 Pac. 855; Topeka City R. Co. *v.* Roberts, 45 Kan. 360, 25 Pac. 854.

Mississippi.— Lewis *v.* Boguechitto, 76 Miss. 356, 24 So. 875.

Oklahoma.— Durham *v.* Linderman, 10 Okla. 570, 64 Pac. 15; Wiggins *v.* Atchison, etc., R. Co., 9 Okla. 118, 59 Pac. 248; Mayfield *v.* Bradley, 6 Okla. 547, 50 Pac. 991; Gray *v.* Stiles, 6 Okla. 455, 49 Pac. 1083.

Tennessee.— Alexander *v.* Henderson, 105 Tenn. 481, 58 S. W. 648.

Utah.— Mercur Gold Min., etc., Co. *v.* Spry, 16 Utah 222, 52 Pac. 382.

Canada.—Cote *v.* Morgan, 7 Can. Sup. Ct. 1.

See 45 Cent. Dig. tit. "Taxation," § 1232.

Compare Mace *v.* Carteret County, 99 N. C. 65, 5 S. E. 740; Shafer *v.* Marsh, 22 Pa. Co. Ct. 33.

Levy of excessive amount.— The fact that in addition to a general county tax of five mills, to which county taxation is limited, a further tax of one-half mill to pay certain county indebtedness was levied, does not render the entire tax void, and a bill to enjoin collection of the tax must show a tender of the five mills legally levied. Wells, etc., Express *v.* Crawford County, 63 Ark. 576, 40 S. W. 710, 37 L. R. A. 371.

8. Brandirff *v.* Harrison County, 50 Iowa 164.

9. *Florida.*— King *v.* Gwynn, 14 Fla. 32.

Georgia.— Decker *v.* McGowan, 59 Ga. 805.

Illinois.— American Express Co. *v.* Raymond, 189 Ill. 232, 59 N. E. 528; Pratt *v.* Raymond, 188 Ill. 469, 59 N. E. 16; Sellars *v.* Barrett, 185 Ill. 466, 57 N. E. 422; Wabash, etc., R. Co. *v.* Johnson, 108 Ill. 11; Union Trust Co. *v.* Weber, 96 Ill. 346; Chicago, etc., R. Co. *v.* Siders, 88 Ill. 320; Du Page County *v.* Jenks, 65 Ill. 275; McBride *v.* Chicago, 22 Ill. 574; Chicago, etc., R. Co. *v.* Frary, 22 Ill. 34; Evans *v.* Gage, 1 Ill. App. 202.

Indiana.— McCrory *v.* O'Keefe, 162 Ind. 534, 70 N. E. 812; Crowder *v.* Riggs, 153 Ind. 158, 53 N. E. 1019; Miller *v.* Vollmer, 153 Ind. 26, 53 N. E. 949; Delphi *v.* Bowen, 61 Ind. 29.

Iowa.— Collins *v.* Keokuk, 118 Iowa 30, 91 N. W. 791; Cedar Rapids, etc., R. Co. *v.* Carroll County, 41 Iowa 153; Iowa R. Land Co. *v.* Carroll County, 39 Iowa 151; Conway *v.* Younkin, 28 Iowa 295.

Kansas.— Kansas Mut. Life Assoc. *v.* Hill, 51 Kan. 636, 33 Pac. 300; Ryan *v.* Leaven-

relief in this form where the errors in the assessment, however material, were attributable to his own mistake or want of care, or to false or misleading information furnished by himself.[10] Omissions of taxable property from the list, which result in increasing the amount demanded from the party complaining, may be ground for an injunction if fraudulently and illegally made;[11] but not where they were accidental or made in the mistaken belief that the omitted property was not taxable.[12] On the other hand, where the assessment was entirely void, as made without jurisdiction or by persons not authorized to make it, there is no legal foundation for the tax and its collection may be enjoined.[13] And so where the taxpayer was not given required notice or was deprived of his opportunity to apply for a revision of the assessment by the proper board or officer.[14]

(v) *Excessive or Unequal Assessment.* Injunction will not lie to restrain the collection of a tax merely on an allegation that the valuation of the property assessed is excessive;[15] but this remedy is properly granted where the

worth County, 30 Kan. 185, 2 Pac. 156; Challiss *v.* Atchison County, 15 Kan. 49. See Stebbins *v.* Challiss, 15 Kan. 55.

Louisiana.— Flower *v.* Legras, 24 La. Ann. 204.

Maryland.—Allegany County *v.* Union Min. Co., 61 Md. 545; Stoddert *v.* Ward, 31 Md. 562, 100 Am. Dec. 83.

Michigan.—Albany, etc., Min. Co. *v.* Auditor-Gen., 37 Mich. 391.

Missouri.—Unionville Nat. Bank *v.* Staats, 155 Mo. 55, 55 S. W. 626.

Nebraska.— Rothwell *v.* Knox County, 62 Nebr. 50, 86 N. W. 903; Bellevue Imp. Co. *v.* Bellevue, 39 Nebr. 876, 58 N. W. 446; Spargur *v.* Romine, 38 Nebr. 736, 57 N. W. 523; South Platte Land Co. *v.* Crete, 11 Nebr. 344, 7 N. W. 859; Wood *v.* Helmer, 10 Nebr. 65, 4 N. W. 968.

New York.—Trumbull *v.* Palmer, 104 N. Y. App. Div. 51, 93 N. Y. Suppl. 349; Jackson *v.* New York, 62 N. Y. App. Div. 46, 70 N. Y. Suppl. 877.

Ohio.—Wagoner *v.* Loomis, 37 Ohio St. 571.

Oklahoma.— Boyd *v.* Wiggins, 7 Okla. 85, 54 Pac. 411; Sweet *v.* Boyd, 6 Okla. 699, 52 Pac. 939.

Oregon.— Hibernian Benev. Soc. *v.* Kelly, 28 Oreg. 173, 42 Pac. 3, 52 Am. St. Rep. 769, 30 L. R. A. 167; Oregon, etc., Mortg. Sav. Bank *v.* Jordan, 16 Oreg. 113, 17 Pac. 621.

Pennsylvania.— Van Nort's Appeal, 121 Pa. St. 118, 15 Atl. 473.

Texas.— George *v.* Dean, 47 Tex. 73; Harrison *v.* Vines, 46 Tex. 15; Graham *v.* Lasater, (Civ. App. 1894) 26 S. W. 472.

Wisconsin.— Hixon *v.* Oneida County, 82 Wis. 515, 52 N. W. 445; Dean *v.* Gleason, 16 Wis. 1; Miltimore *v.* Rock County, 15 Wis. 9; Mills *v.* Gleason, 11 Wis. 470, 78 Am. Dec. 721.

Wyoming.— Ricketts *v.* Crewdson, 13 Wyo. 284, 79 Pac. 1042, 81 Pac. 1; Horton *v.* Driskell, 13 Wyo. 66, 77 Pac. 354.

United States.— Mercantile Nat. Bank *v.* Hubbard, 98 Fed. 465 [*reversed* in 105 Fed. 809, 45 C. C. A. 66 (*reversed* in 186 U. S. 458, 22 S. Ct. 908, 46 L. ed. 1247)]; Albany City Nat. Bank *v.* Maher, 6 Fed. 417, 19 Blatchf. 175; St. Louis Nat. Bank *v.* Papin, 21 Fed. Cas. No. 12,239, 4 Dill. 29; Union Pac. R. Co. *v.* Lincoln County, 24 Fed. Cas. No. 14,379, 2 Dill. 279.

See 45 Cent. Dig. tit. "Taxation," § 1233.

10. People *v.* Atkinson, 103 Ill. 45; Santa Fe Bank *v.* Buster, 50 Kan. 356, 31 Pac. 1094; Winfield Bank *v.* Nipp, 47 Kan. 744, 28 Pac. 1015; McGillin *v.* Chase County, 39 Nebr. 422, 58 N. W. 138; Mohawk, etc., R. Co. *v.* Clute, 4 Paige (N. Y.) 384.

11. Illinois Cent. R. Co. *v.* McLean County, 17 Ill. 291; Hamblin Real Estate Co. *v.* Astoria, 26 Oreg. 599, 40 Pac. 230; Mott *v.* Pennsylvania R. Co., 30 Pa. St. 9, 72 Am. Dec. 664.

12. Goddard *v.* Stockman, 74 Ind. 400; Burlington, etc., R. Co. *v.* Saline County, 12 Nebr. 396, 11 N. W. 854; Burlington, etc., R. Co. *v.* Seward County, 10 Nebr. 211, 4 N. W. 1016; Clark *v.* Lawrence County, 21 S. D. 254, 111 N. W. 558.

13. *Illinois* — Chicago, etc., R. Co. *v.* Vollman, 213 Ill. 609, 73 N. E. 360.

Kentucky.— Negley *v.* Henderson Bridge Co., 107 Ky. 414, 54 S. W. 171, 21 Ky. L. Rep. 1154.

Louisiana.— Oteri *v.* Parker, 42 La. Ann. 374, 7 So. 570.

Nebraska.— Rothwell *v.* Knox County, 62 Nebr. 50, 86 N. W. 903.

Wyoming.— Union Pac. R. Co. *v.* Donnellan, 2 Wyo. 478.

De facto assessors.— As to enjoining tax because assessed by persons not duly elected or appointed but having the character of *de facto* officers see Delaware, etc., Canal Co. *v.* Atkins, 48 Hun (N. Y.) 456, 1 N. Y. Suppl. 80. And see *supra*, VI, B, 3, d.

Fraudulent assessment see Hallett *v.* Arapahoe County, 40 Colo. 308, 90 Pac. 678.

14. Dawson *v.* Croisan, 18 Oreg. 431, 23 Pac. 257. And see Mt. Sterling Oil, etc., Co. *v.* Ratliff, 127 Ky. 1, 104 S. W. 993, 31 Ky. L. Rep. 1229; Caldwell Land, etc., Co. *v.* Smith, 146 N. C. 199, 59 S. E. 653.

15. *Arizona.*— Cochise County *v.* Copper Queen Consol. Min. Co., 8 Ariz. 221, 71 Pac. 946.

District of Columbia.— Washington Market Co. *v.* District of Columbia, 4 Mackey 416.

Florida.— King *v.* Gwynn, 14 Fla. 32.

Illinois.— Coxe *v.* Salomon, 188 Ill. 571, 59

overvaluation was fraudulently and intentionally made or is so grossly in excess of the real taxable value of the property as to be constructively fraudulent,[16] or where the excess results from an illegal increase in the valuation of the property ordered after the original assessment was made.[17] So also injunction may issue where it is shown that there was an illegal discrimination against particular classes of property, in making the valuation, resulting from the intentional and system-

N. E. 422; Martin *v.* Barnett, 188 Ill. 288, 58 N. E. 977; Burton Stock Car Co. *v.* Traeger, 187 Ill. 9, 58 N. E. 418; Kinley Mfg. Co. *v.* Kochersperger, 174 Ill. 379, 51 N. E. 648; La Salle, etc., R. Co. *v.* Donoghue, 127 Ill. 27, 18 N. E. 827, 11 Am. St. Rep. 90; Traders' Ins. Co. *v.* Farwell, 102 Ill. 413; Union Trust Co. *v.* Weber, 96 Ill. 346; Gage *v.* Evans, 90 Ill. 569; Munson *v.* Miller, 66 Ill. 380.

Indiana.— Fell *v.* West, 35 Ind. App. 20, 73 N. E. 719.

Kansas.— Finney County *v.* Bullard, 77 Kan. 349, 94 Pac. 129; Challiss *v.* Rigg, 49 Kan. 119, 30 Pac. 190; Lincoln County *v.* Bryant, 7 Kan. App. 252, 53 Pac. 775.

Kentucky.— Johnson *v.* Bradley-Watkins Tie Co., 120 Ky. 136, 85 S. W. 726, 27 Ky. L. Rep. 540; Royer Wheel Co. *v.* Taylor County, 104 Ky. 741, 47 S. W. 876, 20 Ky. L. Rep. 904.

Nebraska.— Western Union Tel. Co. *v.* Douglas County, 76 Nebr. 666, 107 N. W. 985.

New Mexico.— Albuquerque Nat. Bank *v.* Perea, 5 N. M. 664, 25 Pac. 776.

New York.— Mercantile Nat. Bank *v.* New York, 172 N. Y. 35, 64 N. E. 756 [*affirming* 27 Misc. 32, 57 N. Y. Suppl. 254].

North Carolina.— Wilson *v.* Green, 135 N. C. 343, 47 S. E. 469.

Ohio.— Lackman *v.* Zumstein, 10 Ohio Dec. (Reprint) 518, 21 Cinc. L. Bul. 319.

Pennsylvania.— Hutchinson *v.* Pittsburgh, 72 Pa. St. 320; Everitt's Appeal, 71 Pa. St. 216; Hughes *v.* Kline, 30 Pa. St. 227; Kimber *v.* Schuylkill County, 20 Pa. St. 366.

Texas.— Rosenberg *v.* Weekes, 67 Tex. 578, 4 S. W. 899; International, etc., R. Co. *v.* Smith County, 54 Tex. 1.

Vermont.— Phillips *v.* Bancroft, 75 Vt. 357, 56 Atl. 9.

Virginia.— Johnson *v.* Hampton, etc., Inst., 105 Va. 319, 54 S. E. 31.

West Virginia.— White Sulphur Springs Co. *v.* Robinson, 3 W. Va. 542.

Wisconsin.— Duluth Log Co. *v.* Hawthorne, 139 Wis. 170, 120 N. W. 864; Hixon *v.* Oneida County, 82 Wis. 515, 52 N. W. 445.

Wyoming.— Crewdson *v.* Nefsy Co., 14 Wyo. 61, 82 Pac. 1.

United States.—Chicago, etc., R. Co. *v.* Babcock, 204 U. S. 585, 27 S. Ct. 326, 51 L. ed. 636; Albuquerque Nat. Bank *v.* Perea, 147 U. S. 87, 13 S. Ct. 194, 37 L. ed. 91; Taylor *v.* Secor, 92 U. S. 575, 23 L. ed. 663; Jackson Lumber Co. *v.* McCrimmon, 164 Fed. 759; Western Union Tel. Co. *v.* Wight, 158 Fed. 1004; Hazard *v.* O'Bannon, 38 Fed. 220; Woodman *v.* Ely, 2 Fed. 839.

See 45 Cent. Dig. tit. "Taxation," § 1234.

16. *Arizona.*— Cochise County *v.* Copper Queen Consol. Min. Co., 8 Ariz. 221, 71 Pac. 946.

California.— Pacific Postal Tel.-Cable Co. *v.* Dalton, 119 Cal. 604, 51 Pac. 1072.

Illinois.— Siegfried *v.* Raymond, 190 Ill. 424, 60 N. E. 868; New Haven Clock Co. *v.* Kochersperger, 175 Ill. 383, 51 N. E. 629; Union Trust Co. *v.* Weber, 96 Ill. 346; Pacific Hotel Co. *v.* Lieb, 83 Ill. 602; Chicago, etc., R. Co. *v.* Cole, 75 Ill. 591.

Kentucky.— Covington *v.* Shinkle, 74 S. W. 652, 25 Ky. L. Rep. 73.

Maryland.— To entitle property-owners to relief in equity against excessive taxation, they must present a strong case, assigning something more than legal error, and appealing to the conscience of the court. O'Neal *v.* Virginia, etc., Bridge Co., 18 Md. 1, 79 Am. Dec. 669.

Michigan.— Walsh *v.* King, 74 Mich. 350, 41 N. W. 1080; Albany, etc., Min. Co. *v.* Auditor-Gen., 37 Mich. 391; Merrill *v.* Humphrey, 24 Mich. 170.

New York.— Mercantile Nat. Bank *v.* New York, 172 N. Y. 35, 64 N. E. 756.

Oregon.— Oregon, etc., R. Co. *v.* Jackson County, 38 Oreg. 589, 64 Pac. 307, 65 Pac. 369.

Texas.— Clawson Lumber Co. *v.* Jones, 29 Tex. Civ. App. 208, 49 S. W. 909; Johnson *v.* Holland, 17 Tex. Civ. App. 210, 43 S. W. 71.

United States.— Chicago Union Traction Co. *v.* State Bd. of Equalization, 207 U. S. 20, 28 S. Ct. 7, 52 L. ed. 78 [*affirming* 114 Fed. 557]; Hazard *v.* O'Bannon, 38 Fed. 220.

See 45 Cent. Dig. tit. "Taxation," § 1234.

Necessity of exhausting legal remedy.— Even where an overvaluation of property was fraudulently made, equity will not grant relief if there remains an adequate remedy at law. Nye *v.* Washburn, 125 Fed. 817. Thus the taxpayer must first apply to the board of equalization for a reduction of his assessment, and if they refuse to hear him he must sue out mandamus to compel them. Standard Oil Co. *v.* Magee, 191 Ill. 84, 60 N. E. 802; New Haven Clock Co. *v.* Kochersperger, 175 Ill. 383, 51 N. E. 629.

Alleging fraud.—A bill is demurrable which merely charges fraud in general terms, and alleges that the board of equalization assessed the property at a higher valuation than that stated in the taxpayer's return, without any further knowledge or information than that furnished by said return. Sterling Gas Co. *v.* Higby, 134 Ill. 557, 25 N. E. 660; La Salle, etc., R. Co. *v.* Donoghue, 127 Ill. 27, 18 N. E. 827, 11 Am. St. Rep. 90.

17. *Illinois.*— Condit *v.* Widmayer, 196 Ill. 623, 63 N. E. 1078; Workingmen's Banking

atic adoption of a rule or principle of valuation contrary to the constitutional or statutory requirement of equality and uniformity,[18] or where plaintiff's assessment, once legally fixed, was illegally increased without giving him notice or an opportunity to contest it.[19]

(VI) *Assessment of Persons or Property Not Liable.* Equity will enjoin the collection of taxes assessed upon exempt or non-taxable property,[20] and this remedy also is proper where the assessment is made, or the tax sought to be enforced, against one who is not the owner of the property or not liable for the payment of the tax,[21] and where the assessment was illegal because the

Co. *v.* Wolff, 150 Ill. 491, 37 N. E. 930; Kimball *v.* Merchants' Sav., etc., Co., 89 Ill. 611.

Iowa.— Montis *v.* McQuiston, 107 Iowa 651, 78 N. W. 704.

Montana.— Montana Ore Purchasing Co. *v.* Maher, 32 Mont. 480, 81 Pac. 13.

Ohio.— Euclid Ave. Sav., etc., Co. *v.* Hubbard, 22 Ohio Cir. Ct. 20, 12 Ohio Cir. Dec. 279; Cozad *v.* Hubbard, 18 Ohio Cir. Ct. 294, 10 Ohio Cir. Dec. 162.

Oklahoma.—Cranmer *v.* Williamson, 8 Okla. 683, 59 Pac. 249; Caffrey *v.* Overholser, 8 Okla. 202, 57 Pac. 206; Martin *v.* Clay, 8 Okla. 46, 56 Pac. 715; Weber *v.* Dillon, 7 Okla. 568, 54 Pac. 894.

18. *Kansas.*— Chicago, etc., R. Co. *v.* Atchison County, 54 Kan. 781, 39 Pac. 1039; Missouri, etc., R. Co. *v.* Geary County, 9 Kan. App. 350, 58 Pac. 121.

Oregon.— Smith *v.* Kelly, 24 Oreg. 464, 33 Pac. 642.

Pennsylvania.— Kemble *v.* Titusville, 135 Pa. St. 141, 19 Atl. 946.

Washington.—Andrews *v.* King County, 1 Wash. 46, 23 Pac. 409, 22 Am. St. Rep. 136.

Wisconsin.— Spear *v.* Door County, 65 Wis. 298, 27 N. W. 60; Lefferts *v.* Calumet County, 21 Wis. 688.

United States.— Raymond *v.* Chicago Union Traction Co., 207 U. S. 20, 28 S. Ct. 7, 52 L. ed. 78 [*affirming* 114 Fed. 557]; Chicago, etc., R. Co. *v.* Babcock, 204 U. S. 585, 27 S. Ct. 326, 51 L. ed. 636; Stanley *v.* Albany County, 121 U. S. 535, 7 S. Ct. 1234, 30 L. ed. 1000; Cummings *v.* Merchants' Nat. Bank, 101 U. S. 153, 25 L. ed. 903; Pelton *v.* Commercial Nat. Bank, 101 U. S. 143, 25 L. ed. 901; Chicago, etc., R. Co. *v.* Republic County, 67 Fed. 411, 14 C. C. A. 456; Michigan R. Tax Cases, 138 Fed. 223 [*affirmed* in 201 U. S. 245, 26 S. Ct. 459, 50 L. ed. 744]; Louisville, etc., R. Co. *v.* Coulter, 131 Fed. 282; Railroad, etc., Co.'s *v.* Tennessee, 85 Fed. 302; Toledo First Nat. Bank *v.* Lucas County Treasurer, 25 Fed. 749; Dundee Mortg. Trust Inv. Co. *v.* Parrish, 24 Fed. 197; Exchange Nat. Bank *v.* Miller, 19 Fed. 372.

See 45 Cent. Dig. tit. "Taxation," § 1234.

19. *California.*— Lahman *v.* Hatch, 124 Cal. 1, 56 Pac. 621.

Illinois.— Huling *v.* Ehrich, 183 Ill. 315, 55 N. E. 636; McConkey *v.* Smith, 73 Ill. 313; Darling *v.* Gunn, 50 Ill. 424; Cleghorn *v.* Postlewaite, 43 Ill. 428; Glassford *v.* Dorsey, 2 Ill. App. 521.

Indiana.— Seymour First Nat. Bank *v.* Brodhecker, 137 Ind. 693, 37 N. E. 340.

Kansas.— Topeka City R. Co. *v.* Roberts, 45 Kan. 360, 25 Pac. 854; Leavenworth County *v.* Lang, 8 Kan. 284.

Mississippi.—Alabama, etc., R. Co. *v.* Brennan, 69 Miss. 103, 10 So. 451.

United States.— Hills *v.* National Albany Exch. Bank, 12 Fed. 93.

20. *California.*— Robinson *v.* Gaar, 6 Cal. 273.

Colorado.— Colorado Farm, etc., Co. *v.* Beerbohm, 43 Colo. 464, 96 Pac. 443.

Illinois.— Siegfried *v.* Raymond, 190 Ill. 424, 60 N. E. 868; Illinois Cent. R. Co. *v.* Hodges, 113 Ill. 323; Kimball *v.* Merchants' Sav., etc., Co., 89 Ill. 611; Munson *v.* Miller, 66 Ill. 380.

Indiana.— Buck *v.* Miller, 147 Ind. 586, 45 N. E. 647, 47 N. E. 8, 62 Am. St. Rep. 436, 37 L. R. A. 384. *Compare* Telle *v.* Green, 28 Ind. 184.

Iowa.— Bednar *v.* Carroll, 138 Iowa 338, 116 N. W. 315.

Michigan.— Lenawee County Sav. Bank *v.* Adrian, 66 Mich. 273, 33 N. W. 304.

Missouri.— Valle *v.* Ziegler, 84 Mo. 214.

New Jersey.— Morris Canal, etc., Co. *v.* Jersey City, 12 N. J. Eq. 227.

Ohio.— Jones *v.* Davis, 35 Ohio St. 474.

Pennsylvania.— St. Mary's Gas Co. *v.* Elk County, 191 Pa. St. 458, 43 Atl. 321; Arthur *v.* Polk Borough School Dist., 164 Pa. St. 410, 30 Atl. 299.

Virginia.— Staunton *v.* Mary Baldwin Seminary, 99 Va. 653, 39 S. E. 596.

West Virginia.— Crim *v.* Phillipi, 38 W. Va. 122, 18 S. E. 466; Christie *v.* Malden, 23 W. Va. 667.

United States.— U. S. *v.* Rickert, 188 U. S. 432, 23 S. Ct. 478, 47 L. ed. 532; Osborn *v.* U. S. Bank, 9 Wheat. 738, 6 L. ed. 204; McKnight *v.* Dudley, 148 Fed. 204, 78 C. C. A. 162.

Canada.— Canadian Pac. R. Co. *v.* Calgary, 1 Northwest. Terr. 67.

See 45 Cent. Dig. tit. "Taxation," § 1235.

Compare Raleigh, etc., R. Co. *v.* Lewis, 99 N. C. 62, 5 S. E. 82.

21. Searing *v.* Heavysides, 106 Ill. 85; Ream *v.* Stone, 102 Ill. 359; Wangler *v.* Black Hawk County, 56 Iowa 384, 9 N. W. 314; Nicodemus *v.* Hull, 93 Md. 364, 48 Atl. 1049; Texas, etc., R. Co. *v.* Harrison County, 54 Tex. 119. But see Bloxham *v.* Consumers' Electric Light, etc., Co., 36 Fla. 519, 18 So. 444, 51 Am. St. Rep. 44, 29 L. R. A. 507; Broderick *v.* Allamakee County, 104 Iowa 750, 73 N. W. 884.

property was not within the jurisdiction of the taxing power, either as having a *situs* of its own or as belonging at the domicile of its owner, a non-resident.[22]

(VII) *Defects or Errors in Proceedings For Collection.* An injunction will not be granted on account of defects in the process under which the collecting officers act, or in their official authority, or on account of errors or irregularities in their proceedings in respect to levying on or distraining property,[23] except where the property of one person is levied on to pay the taxes of another,[24] or where the taxes had been fully paid and discharged before the levy.[25]

b. Special Grounds of Equity Jurisdiction — (I) *In General.* A court of chancery will not ordinarily take jurisdiction of a suit to enjoin the enforcement of a tax unless the complaint shows, in addition to the illegality or injustice of the tax demanded, some special ground of equity jurisdiction,[26] such as the avoidance of a multiplicity of suits,[27] or the prevention or removal of a cloud on the title to realty,[28] or fraud, accident, or mistake,[29] or irreparable injury to the complainant which would result from the threatened proceedings for the collection of the tax. But such injury cannot be said to result from a sale of personal property where ample compensation could be obtained in a suit for damages,[30] although there

22. *Arizona.*— State Nat. Bank *v.* Long, 6 Ariz. 311, 57 Pac. 639.

District of Columbia.—Alexandria Canal R., etc., Co. *v.* District of Columbia, 1 Mackey 217.

Georgia.— Penick *v.* High Shoals Mfg. Co., 113 Ga. 592, 38 S. E. 973.

Indiana.— Luke *v.* Sheridan, 26 Ind. App. 529, 60 N. E. 359.

Nebraska.— Thatcher *v.* Adams County, 19 Nebr. 485, 27 N. W. 729.

New York.— Jackson *v.* New York, 62 N. Y. App. Div. 46, 70 N. Y. Suppl. 877.

North Dakota.— Schaffner *v.* Young, 10 N. D. 245, 86 N. W. 733.

Oregon.—Allison *v.* Hatton, 46 Oreg. 370, 80 Pac. 101.

Texas.— Court *v.* O'Connor, 65 Tex. 334.

United States.— McKnight *v.* Dudley, 148 Fed. 204, 78 C. C. A. 162. But *compare* Milwaukee *v.* Koeffler, 116 U. S. 219, 6 S. Ct. 372, 29 L. ed. 612, non-residence of complainant not alone sufficient ground for injunction.

See 45 Cent. Dig. tit. "Taxation," § 1235.

But *compare* Williams *v.* Dutton, 184 Ill. 608, 56 N. E. 868, erroneous decision of assessor as to complainant's residence, in a doubtful case.

23. *Colorado.*— Breeze *v.* Haley, 10 Colo. 5, 13 Pac. 913.

Connecticut.—Waterbury Sav. Bank *v.* Lawler, 46 Conn. 243.

Indiana.— Center, etc., Gravel Road Co. *v.* Black, 32 Ind. 468.

Kansas.— Garnett Bank *v.* Ferris, 55 Kan. 120, 39 Pac. 1042.

New York.—Van Rensselaer *v.* Kidd, 4 Barb. 17; Livingston *v.* Hollenbeck, 4 Barb. 9.

North Carolina.— McDonald *v.* Teague, 119 N. C. 604, 26 S. E. 158.

Oregon.— Oregon Real Estate Co. *v.* Multnomah County, 35 Oreg. 1, 58 Pac. 106.

Wisconsin.— Whittaker *v.* Janesville, 33 Wis. 76.

United States.— *Ex p.* Chamberlain, 55 Fed. 704.

See 45 Cent. Dig. tit. "Taxation," § 1236.

But *compare* Clinton, etc., R. Co. *v.* Tax Collector, 30 La. Ann. 626.

24. Seeley *v.* Westport, 47 Conn. 294, 36 Am. Rep. 70; Deming *v.* James, 72 Ill. 78.

25. Com. *v.* Colley Tp., 29 Pa. St. 121; Lewis *v.* Spencer, 7 W. Va. 689, 23 Am. Rep. 619.

26. *Alabama.*— Ensley *v.* McWilliams, 145 Ala. 159, 41 So. 296, 117 Am. St. Rep. 26.

Illinois.— Gray *v.* Peoria School Inspectors, 231 Ill. 63, 83 N. E. 95.

Kansas.— Stewart *v.* Wyandotte County, 45 Kan. 708, 26 Pac. 683, 23 Am. St. Rep. 746.

Michigan.— Clee *v.* Sanders, 74 Mich. 692, 42 N. W. 154.

Nebraska.— South Platte Land Co. *v.* Buffalo County, 7 Nebr. 253.

Nevada.—Wells *v.* Dayton, 11 Nev. 161.

New Jersey.—American Dock, etc., Co. *v.* Public School Trustees, 35 N. J. Eq. 181; Hoagland *v.* Delaware Tp., 17 N. J. Eq. 106.

United States.— Louisville, etc., R. Co. *v.* Gaines, 3 Fed. 266, 2 Flipp. 621.

See 45 Cent. Dig. tit. "Taxation," § 1237. And see *supra*, X, D, 2, a, (I), (II).

Distinction between law and equity abolished.—Where the distinctions between actions at law and suits in equity and the forms of actions have been abolished, it is said that the remedy by injunction to restrain the collection of an illegal and void tax may be invoked, although the case does not present any peculiar ground of equity jurisdiction. Delphi *v.* Bowen, 61 Ind. 29.

27. See *infra*, X, D, 2, b, (III).

28. See *infra*, X, D, 2, b, (IV).

29. Phœnix Grain, etc., Exch. *v.* Gleason, 121 Ill. 524, 13 N. E. 209; Felsenthal *v.* Johnson, 104 Ill. 21; Leitch *v.* Wentworth, 71 Ill. 146.

30. Ritter *v.* Patch, 12 Cal. 298; Hannibal First Nat. Bank *v.* Meredith, 44 Mo. 500; White Sulphur Springs Co. *v.* Holly, 4 W. Va. 597; Indiana Mfg. Co. *v.* Koehne, 188 U. S. 681, 23 S. Ct. 452, 47 L. ed. 651.

are some cases in which such an action would not be an adequate remedy, as where the property in question possesses a peculiar intrinsic value not to be estimated in money,[31] or where the sale of the property on execution or distress would interfere with the business of the complainant or interrupt the exercise of a valuable franchise or damage his credit beyond repair.[32]

(II) *Inadequacy of Remedy at Law* — (A) *In General.* Equity will not take jurisdiction of a suit of this character if there is a plain and sufficient remedy at law for the injuries complained of or threatened.[33] But if the law affords no remedy, or if the only remedy available would not be adequate, it is ground for the interference of equity.[34] Where the taxpayer can pay the amount demanded

31. Odlin *v.* Woodruff, 31 Fla. 160, 12 So. 227, 22 L. R. A. 699; Henry *v.* Gregory, 29 Mich. 68; White *v.* Stender, 24 W. Va. 615, 49 Am. Rep. 283.

32. Johnson *v.* De Bary-Baya Merchants' Line, 37 Fla. 499, 19 So. 640, 37 L. R. A. 518 (injunction to prevent tax-sale of a ship peculiarly adapted to the business in which it was used and necessary to fill engagements, and which could not be replaced without great delay and injury); Frankfort *v.* Fidelity Trust, etc., Co., 111 Ky. 667, 64 S. W. 470, 23 Ky. L. Rep. 908 (injunction granted where threatened sale would materially damage the credit of the mortgagor company and might precipitate a foreclosure); Detroit *v.* Wayne County Cir. Judge, 127 Mich. 604, 86 N. W. 1032 (injunction to restrain collection of tax against street railway company by seizure of its cars, on the ground of interference with the exercise of a valuable franchise); Stone *v.* Commonwealth Bank, 174 U. S. 408, 19 S. Ct. 881, 43 L. ed. 1187 [*affirming* 88 Fed. 383] (restraining distress on personal property of a bank); Osborn *v.* U. S. Bank, 9 Wheat. 738, 6 L. ed. 204.

Sale of rolling-stock of railway.— The mortgagees and trustees of a railroad company cannot enjoin the state officers from seizing its rolling-stock to enforce collection of taxes, even though the company cannot pay the interest on its mortgage bonds, and would be unable to replace the rolling-stock if the same should be sold. Steubenville, etc., R. Co. *v.* Tuscarawass County, 22 Fed. Cas. No. 13,388. And see to same effect Chicago, etc., R. Co. *v.* Ft. Howard, 21 Wis. 44, 91 Am. Dec. 458.

33. *Arkansas.*—Witherspoon *v.* Nickels, 27 Ark. 332.

District of Columbia.— Buchanan *v.* MacFarland, 31 App. Cas. 6.

Florida.— H. W. Metcalf Co. *v.* Martin, 54 Fla. 531, 45 So. 463, 127 Am. St. Rep. 149.

Georgia.— Goodwin *v.* Savannah, 53 Ga. 410.

Illinois.— New Haven Clock Co. *v.* Kochersperger, 175 Ill. 383, 51 N. E. 629; Archer *v.* Terre-Haute, etc., R. Co., 102 Ill. 493.

Pennsylvania.— Mudey's Appeal, 1 Leg. Rec. 26.

South Dakota.— Chicago, etc., R. Co. *v.* Rolfson, 23 S. D. 405, 122 N. W. 343.

Texas.— Stephens *v.* Texas, etc., R. Co., 100 Tex. 177, 97 S. W. 309 [*reversing* (Civ. App.) 93 S. W. 436].

See 45 Cent. Dig. tit. "Taxation," § 1238. And see *supra*, X, D, 2, a, (I), (II).

Jurisdiction depending on absence of remedy at law.— In a proceeding in equity, the objection that there is a plain and adequate remedy at law is jurisdictional, and a bill for injunction to restrain the collection of a tax must be dismissed where such a remedy exists, notwithstanding the objection is not in any way raised by the defendant. Hoey *v.* Coleman, 46 Fed. 221.

Effect of prior adjudication.— The existence of an adequate remedy at law cannot successfully be urged to defeat ancillary relief by way of injunction in aid of a decree enjoining the collection of state taxes, since that question was foreclosed by the original decree. Gunter *v.* Atlantic Coast Line R. Co., 200 U. S. 273, 26 S. Ct. 252, 50 L. ed. 477.

34. Hunt *v.* Lambertville, 6 N. J. L. J. 343; Ware Shoals Mfg. Co. *v.* Jones, 78 S. C. 211, 58 S. E. 811; Kerr *v.* Woolley, 3 Utah 456, 24 Pac. 831; Wytheville *v.* Johnson, 108 Va. 589, 62 S. E. 328; Indiana Mfg. Co. *v.* Koehne, 188 U. S. 681, 23 S. Ct. 452, 47 L. ed. 651; Stone *v.* Kentucky Bank, 174 U. S. 799, 19 S. Ct. 881, 43 L. ed. 1187 [*affirming* 88 Fed. 383]; Pyle *v.* Brenneman, 122 Fed. 787, 60 C. C. A. 409; Woolsey *v.* Dodge, 30 Fed. Cas. No. 18,032, 6 McLean 142. And see Raymond *v.* Chicago Union Traction Co., 207 U. S. 20, 28 S. Ct. 7, 52 L. ed. 78 [*affirming* 114 Fed. 557].

Replevin.—Where proceedings are pending for the sale of personalty to collect an invalid tax, injunction will lie to restrain the sale and the enforcement of the tax, although the complainant could recover the property in replevin, since he is also entitled to a remedy to prevent any further attempt to collect the tax, which could not be obtained in replevin. Spencer *v.* Wheaton, 14 Iowa 38.

A national bank may sue to enjoin the collection of a tax wrongfully assessed against the shares of its stock-holders and demanded of the bank, since, owing to the complications that would arise between the bank and the stock-holders, the remedy at law is not adequate. Cummings *v.* Merchants' Nat. Bank, 101 U. S. 153, 25 L. ed. 903; Pelton *v.* Commercial Nat. Bank, 101 U. S. 143, 25 L. ed. 901; Covington City Nat. Bank *v.* Covington, 21 Fed. 484.

A national bank or stock-holder therein has the right to go into a federal court of equity to test the validity, under Rev. St. § 5219 (U. S. Comp. St. (1901) p. 3502), of

of him, under a protest, and then maintain an action at law to recover back the whole amount paid, or so much of it as was illegally exacted, this is ordinarily regarded as an adequate remedy.[35] And so is an action of trespass against the officer seizing and selling property to pay the tax,[36] unless it is shown that a judgment against him could not be collected by reason of his insolvency or otherwise.[37]

(B) *Remedy in Assessment Proceedings.* Where the statutes provide a board of equalization or review or other revisory body, with power to revise, correct, and equalize assessments, a taxpayer who feels himself aggrieved by any error, inequality, or overcharge in his assessment which that board has power to correct must seek his remedy by proper proceedings before the board, and if he fails to do so he cannot have relief by an injunction to restrain the collection of the tax.[38]

a tax levied by state authority on the stock of the bank, where there is no adequate remedy at law in such court, notwithstanding a remedy provided by the state statute. Charleston Nat. Bank *v.* Melton, 171 Fed. 743.

35. *Colorado.*— Price *v.* Kramer, 4 Colo. 546.

District of Columbia.—Washington Market Co. *v.* District of Columbia, 4 Mackey 416; Harkness *v.* District of Columbia Bd. of Public Works, 1 MacArthur 121.

Massachusetts.— Brewer *v.* Springfield, 97 Mass. 152.

New York.— Chemical Bank *v.* New York, 12 How. Pr. 476.

Pennsylvania.— Kershaw *v.* Philadelphia Water Dept., 15 Wkly. Notes Cas. 415.

South Carolina.— Fleming *v.* Power, 77 S. C. 528, 58 S. E. 430. But see Mfg. Co. *v.* Jones, 78 S. C. 211, 58 S. E. 811, holding that Civ. Code (1902), § 413, giving a taxpayer the right to pay taxes under protest and sue a county treasurer for taxes supposed to have been illegally paid, does not provide an adequate remedy against alleged illegal license-taxes imposed on a corporation by the license tax act of 1904 (24 St. at L. p. 462), as amended by the act of 1905 (24 St. at L. p. 827), which taxes are not under the control of any county treasurer, but are assessed on the books of the state controller-general and are payable directly into the state treasury.

South Dakota.— Chicago, etc., R. Co. *v.* Rolson, 23 S. D. 405, 122 N. W. 343.

Wisconsin.— Duluth Log Co. *v.* Hawthorne, 139 Wis. 170, 120 N. W. 864.

See 45 Cent. Dig. tit. "Taxation," § 1238.

But where no action lies to recover back the tax if once paid, equity has jurisdiction to determine its legality and to enjoin its collection if illegal. Pacific Express Co. *v.* Seibert, 44 Fed. 310 [*affirmed* in 142 U. S. 339, 12 S. Ct. 250, 35 L. ed. 1035]. So in a state where an action to recover taxes paid will lie only when they have been paid under duress of a distraint, such remedy is not an adequate one where the taxing officers, instead of distraining, may bring an action at law to collect the tax; for a remedy at law cannot be adequate if its adequacy depends on the will of the opposing party. Stone *v.* Kentucky Bank, 174 U. S. 799, 19 S. Ct. 881, 43 L. ed. 1187. See also Raymond *v.* Chicago Union Traction Co., 207 U. S. 20, 28 S. Ct. 7, 52 L. ed. 78 [*affirming* 114 Fed. 557].

36. Jacksonville *v.* Massey Business College, 47 Fla. 339, 36 So. 432; Delaware, etc., Canal Co. *v.* Atkins, 121 N. Y. 246, 24 N. E. 319; Mechanics', etc., Bank *v.* Debolt, 1 Ohio St. 591. And see H. W. Metcalf Co. *v.* Martin, 54 Fla. 531, 45 So. 463, 127 Am. St. Rep. 149; Chicago, etc., R. Co. *v.* Rolfson, 23 S. D. 405, 122 N. W. 343.

37. Richardson *v.* Scott, 47 Miss. 236; Conley *v.* Chedic, 6 Nev. 222. But *compare* Wells *v.* Dayton, 11 Nev. 161.

38. *Arizona.*— Campbell *v.* Bashford, 2 Ariz. 344, 16 Pac. 269.

California.— Fall *v.* Marysville, 19 Cal. 391.

Colorado.— Breeze *v.* Haley, 10 Colo. 5, 13 Pac. 913; Price *v.* Kramer, 4 Colo. 546.

District of Columbia.—Alexandria Canal R., etc., Co. *v.* District of Columbia, 7 Mackey 217.

Illinois.— New York, etc., Grain, etc., Exch. *v.* Gleason, 121 Ill. 502, 13 N. E. 204; Camp *v.* Simpson, 118 Ill. 224, 8 N. E. 308; Illinois Cent. R. Co. *v.* Hodges, 113 Ill. 323; Johnson *v.* Roberts, 102 Ill. 65.

Indiana.— Jones *v.* Cullen, 142 Ind. 335, 40 N. E. 124; Senour *v.* Matchett, 140 Ind. 636, 40 N. E. 122; Jones *v.* Rushville Natural Gas Co., 135 Ind. 595, 35 N. E. 390; Small *v.* Lawrenceburgh, 128 Ind. 231, 27 N. E. 500; Hilton *v.* Mason, 92 Ind. 157.

Iowa.— Reed *v.* Cedar Rapids, 138 Iowa 366, 116 N. W. 140; Bednar *v.* Carroll, 138 Iowa 338, 116 N. W. 315; Powers *v.* Bowman, 53 Iowa 359, 5 N. W. 566.

Kentucky.— Bell County Coke, etc., Co. *v.* Board of Trustees, 42 S. W. 92, 19 Ky. L. Rep. 789. *Compare* Mt. Sterling Oil, etc., Co. *v.* Ratliff, 127 Ky. 1, 104 S. W. 993, 31 Ky. L. Rep. 1229.

Mississippi.— Noxubee County *v.* Ames, (1887) 3 So. 37; Brooks *v.* Shelton, 47 Miss. 243.

Missouri.— Deane *v.* Todd, 22 Mo. 90.

Montana.— Missoula First Nat. Bank *v.* Bailey, 15 Mont. 301, 39 Pac. 83.

Nebraska.— South Platte Land Co. *v.* Crete, 11 Nebr. 344, 7 N. W. 859; Burlington, etc., R. Co. *v.* Seward County, 10 Nebr. 211, 4 N. W. 1016.

New Hampshire.— Rockingham Ten Cent Sav. Bank *v.* Portsmouth, 52 N. H. 17.

But this principle does not apply where the assessment was made without jurisdiction, as where the complainant was not the owner of the property assessed to him or had no taxable property within the county;[39] nor does it apply where his objections to the tax are of a character which the reviewing board would have no jurisdiction to consider,[40] or where it is certain, from the publicly known and fixed attitude of the board with respect to applications of the kind, that complainant's representations would have been disregarded and his application refused.[41] On the same principle, where the law provides a remedy for the review of assessments by appeal, certiorari, or motion, injunction cannot be granted to stop the enforcement of the tax.[42]

(III) *AVOIDING MULTIPLICITY OF SUITS.* A court of equity may enjoin the collection of an illegal tax when such action will prevent a multiplicity of suits which otherwise would be brought.[43] This may be the case where the property of the complainant, all equally affected by the same tax, is distributed through various taxing districts, or where the tax, if paid, would be divided up among various counties or cities, necessitating an action against each for its recovery.[44]

New Mexico.—Albuquerque Nat. Bank *v.* Perea, 5 N. M. 664, 25 Pac. 776.

Pennsylvania.— Moore *v.* Taylor, 147 Pa. St. 481, 23 Atl. 768; Hughes *v.* Kline, 30 Pa. St. 227; Crist *v.* Morris, 11 Phila. 357; Crist *v.* Morris, 2 Wkly. Notes Cas. 620.

Texas.— Duck *v.* Peeler, 74 Tex. 268, 11 S. W. 1111. *Compare* Sullivan *v.* Bitter, 51 Tex. Civ. App. 604, 113 S. W. 193.

Virginia.— Norfolk *v.* J. W. Perry Co., 108 Va. 28, 61 S. E. 866, 128 Am. St. Rep. 940.

Wisconsin.—Wisconsin Cent. R. Co. *v.* Ashland County, 81 Wis. 1, 50 N. W. 937; Bratton *v.* Johnson, 76 Wis. 430, 45 N. W. 412.

United States.— Douglas County *v.* Stone, 191 U. S. 557, 24 S. Ct. 843, 48 L. ed. 301 [*affirming* 110 Fed. 812]; Altschul *v.* Gittings, 86 Fed. 200; Robinson *v.* Wilmington, 65 Fed. 856, 13 C. C. A. 177; California, etc., Land Co. *v.* Gowen, 48 Fed. 771; Dundee Mortg., etc., Co. *v.* Charlton, 32 Fed. 192, 13 Sawy. 25.

See 45 Cent. Dig. tit. "Taxation," § 1239.

Compare Knapp *v.* Charles Mix County, 7 S. D. 399, 64 N. W. 187; Benn *v.* Chehalis County, 11 Wash. 134, 39 Pac. 365.

Suit by national bank.— Failure to exhaust the remedy afforded by the laws of the state for equalization of assessments does not preclude a national bank from obtaining relief in a federal court against the collection from it of taxes on its stock, on the ground of unjust discrimination in the valuation of such stock. Walla Walla First Nat. Bank *v.* Hungate, 62 Fed. 548.

39. Hubbard *v.* Johnson County, 23 Iowa 130; Crane *v.* Janesville, 20 Wis. 305; Horton *v.* Driskell, 13 Wyo. 66, 77 Pac. 354.

40. Davis *v.* Burnett, 77 Tex. 3, 13 S. W. 613; Pullman Palace-Car Co. *v.* Orleans Parish Bd. of Assessors, 55 Fed. 206 [*affirmed* in 60 Fed. 37, 8 C. C. A. 490]. And see Lively *v.* Missouri, etc., R. Co., 102 Tex. 545, 120 S. W. 852; Sullivan *v.* Biter, 51 Tex. Civ. App. 604, 113 S. W. 193.

41. Hills *v.* National Albany Exch. Bank, 105 U. S. 319, 26 L. ed. 1052.

42. Bednar *v.* Carroll, 138 Iowa 338, 116 N. W. 315; Security Sav. Bank *v.* Carroll, 131 Iowa 605, 109 N. W. 212; Scribner *v.* Allen, 12 Minn. 148; Norfolk *v.* J. W. Perry Co., 108 Va. 28, 61 S. E. 866, 128 Am. St. Rep. 940; Pittsburgh, etc., R. Co. *v.* West Virginia Public Works, 172 U. S. 32, 19 S. Ct. 90, 43 L. ed. 354. But see California, etc., Land Co. *v.* Gowen, 48 Fed. 771; Hazzard *v.* O'Bannon, 36 Fed. 854.

43. *Arkansas.*— Little Rock *v.* Prather, 46 Ark. 471.

Delaware.— Philadelphia, etc., R. Co. *v.* Neary, 5 Del. Ch. 600, 8 Atl. 363.

Michigan.— Clee *v.* Sanders, 74 Mich. 692, 42 N. W. 154.

Nebraska.— South Platte Land Co. *v.* Buffalo County, 7 Nebr. 253. But *compare* Bellevue Imp. Co. *v.* Bellevue, 39 Nebr. 876, 58 N. W. 446.

Pennsylvania.— Strong *v.* O'Donnell, 10 Phila. 575.

Texas.— George *v.* Dean, 47 Tex. 73; Blessing *v.* Galveston, 42 Tex. 641.

Utah.— Kerr *v.* Woolley, 3 Utah 456, 24 Pac. 831.

West Virginia.— Chesapeake, etc., R. Co. *v.* Miller, 19 W. Va. 408.

United States.— Stone *v.* Kentucky Bank, 174 U. S. 799, 19 S. Ct. 881, 43 L. ed. 1187 [*affirming* 88 Fed. 383]; Union, etc., Bank *v.* Memphis, 111 Fed. 561, 49 C. C. A. 455; Dundee Mortg., etc., Co. *v.* Multnomah County School-Dist. No. 1, 19 Fed. 359; Louisville, etc., R. Co. *v.* Gaines, 3 Fed. 266, 2 Flipp. 621; City Nat. Bank *v.* Paducah, 5 Fed. Cas. No. 2,743, 2 Flipp. 61.

See 45 Cent. Dig. tit. "Taxation," § 1240.

Other remedy available.— The argument that a multiplicity of suits may be prevented will not induce a court of equity to take jurisdiction of a suit to enjoin a tax where the complainant has failed to pursue the remedy afforded him by the statutes, by appealing to a board of review and ultimately to the courts. Indiana Mfg. Co. *v.* Koehne, 188 U. S. 681, 23 S. Ct. 452, 47 L. ed. 651.

44. Union Pac. R. Co. *v.* McShane, 22 Wall. (U. S.) 444, 22 L. ed. 747; Coulter *v.* Weir, 127 Fed. 897, 62 C. C. A. 429; Railroad, etc., Co.'s *v.* Tennessee Bd. of Equalizers, 85 Fed.

Also it is generally held that where the ground of objection or illegality is one which equally affects a large number of taxpayers, so that many individual actions at law would be brought if payment of the tax were enforced, this is ground for equity to interpose and determine the fundamental question in one action for injunction.[45] Some of the decisions, however, hold that this should not be permitted where the persons affected by the tax have no joint or common interest in any piece of property assessed, as they would not be allowed to join in a suit for injunction but would have to file as many separate bills.[46]

(IV) *Preventing Cloud on Title.* Injunction will lie to restrain the collection of an illegal tax which is a lien on real estate and creates a cloud on the title.[47] But this is only where the illegality or defect is not apparent but could only be shown by extrinsic evidence; if the tax is on its face unconstitutional or otherwise invalid it constitutes no cloud on the title and there is no ground for the interference of equity.[48] So where, by the law of the particular state, a tax deed is no evidence of title, there is no reason for equity to interpose and prevent a sale;[49] nor can such interposition be justified where a levy has already been made on personal property for the satisfaction of the tax, as in that case the cloud, if any, is presumptively removed.[50]

c. Proceedings and Relief — (I) *Jurisdiction and Right of Action.* A suit to enjoin the collection of taxes should be brought in a court having jurisdiction under the laws of the state.[51] To enable the court to take jurisdiction

302. But *compare* Weibeler *v.* Sullivan, 34 Minn. 317, 25 N. W. 638.

45. *Arkansas.*—Greedup *v.* Franklin County, 30 Ark. 101.

Kansas.— Gilmore *v.* Norton, 10 Kan. 491.

Michigan.— Clee *v.* Sanders, 74 Mich. 692, 42 N. W. 154.

Ohio.— Matheny *v.* Golden, 5 Ohio St. 361.

Utah.— Pettit *v.* Duke, 10 Utah 311, 37 Pac. 568.

Virginia.— Bull *v.* Read, 13 Gratt. 78.

West Virginia.— Williams *v.* Grant County Ct., 26 W. Va. 488, 53 Am. Rep. 94; Corrothers *v.* Clinton Dist. Bd. of Education, 16 W. Va. 527; Doonan *v.* Grafton Bd. of Education, 9 W. Va. 246.

Canada.— Central Vermont R. Co. *v.* St. Johns, 14 Can. Sup. Ct. 288.

See 45 Cent. Dig. tit. "Taxation," § 1240.

National bank and stock-holders.—Where an illegal assessment has been laid upon the shares of stock of a national bank, the bank may maintain a suit in equity to enjoin its collection, on the ground of preventing a multiplicity of suits on behalf of the individual shareholders. Albany City Nat. Bank *v.* Maher, 6 Fed. 417, 19 Blatchf. 175; National Albany Exch. Bank *v.* Hills, 5 Fed. 248, 18 Blatchf. 478 [*reversed* on other grounds in 12 Fed. 93, 105 U. S. 319, 26 L. ed. 1052].

46. Dodd *v.* Hartford, 25 Conn. 232; Sheldon *v.* Centre School Dist., 25 Conn. 224; Howell *v.* Buffalo, 2 Abb. Dec. (N. Y.) 412. And see Cutting *v.* Gilbert, 6 Fed. Cas. No. 3,519, 5 Blatchf. 259, where it is said that an injunction will not be granted to restrain a tax when, from the great number of persons affected by the tax, the remedy in equity would involve a litigation almost as onerous and vexatious as suits at law, as each taxpayer would be obliged to file a bill to obtain relief, and especially when the inconvenience to the government would be much more serious if equity should thus interpose than if the complainants were left to their legal remedy, an action against the assessor.

47. *Idaho.*— Bramwell *v.* Guheen, 3 Ida. 347, 29 Pac. 110.

Michigan.— Frost *v.* Leatherman, 55 Mich. 33, 20 N. W. 705; Scofield *v.* Lansing, 17 Mich. 437.

Missouri.— McPike *v.* Pen, 51 Mo. 63.

Montana.— Northern Pac. R. Co. *v.* Carland, 5 Mont. 146, 3 Pac. 134.

Nebraska.— Burlington, etc., R. Co. *v.* Clay County, 13 Nebr. 367, 13 N. W. 628.

New York.— Beach *v.* Hayes, 58 How. Pr. 17.

Wisconsin.— Milwaukee Iron Co. *v.* Hubbard, 29 Wis. 51.

United States.— Southern R. Co. *v.* Asheville, 69 Fed. 359; Tilton *v.* Oregon Cent. Military Road Co., 23 Fed. Cas. No. 14,055, 3 Sawy. 22.

And see 45 Cent. Dig. tit. "Taxation," § 1241.

Other remedy available.—Where property is illegally sold for taxes the owner has full and complete protection against the creation of any cloud on his title by a suit to enjoin the execution of the deed. Crocker *v.* Scott, 149 Cal. 575, 87 Pac. 102.

48. Ensley *v.* McWilliams, 145 Ala. 159, 41 So. 296, 117 Am. St. Rep. 26; Crocker *v.* Scott, 149 Cal. 575, 87 Pac. 102; Bucknall *v.* Story, 36 Cal. 67; Curtis *v.* East Saginaw, 35 Mich. 508; Wells *v.* Buffalo, 80 N. Y. 253; Townsend *v.* New York, 77 N. Y. 542; Guest *v.* Brooklyn, 69 N. Y. 506.

49. Minturn *v.* Smith, 17 Fed. Cas. No. 9,647, 3 Sawy. 142.

50. Henry *v.* Gregory, 29 Mich. 68; Oregon Short Line, etc., R. Co. *v.* Standing, 10 Utah 452, 37 Pac. 687.

51. See the statutes of the different states.

it is essential that there shall have been an assessment of the tax in question,[52] and that the tax shall be due and its forcible collection threatened, otherwise the action is premature.[53] On the other hand, such a proceeding is not within the statute of limitations, although the right of action may be lost by unreasonable delay amounting to laches.[54] The mere fact that a complainant accepted and recorded a deed purporting to convey to it lands, the legal and equitable title to which were both in fact in the United States, does not estop it to maintain a suit in equity to enjoin the collection of taxes levied on said lands by the taxing officers of the county who had actual knowledge of the condition of the title and of the claim of complainant that the land was not taxable and were not misled by such deed or record.[55] And the fact that a complainant was not the owner of lands at the time of an illegal levy of taxes thereon does not deprive him of the right to maintain a suit in equity to enjoin the enforcement of such taxes by a sale of the lands after he has become the owner.[56]

(II) *Payment or Tender of Taxes Due.* Equity will not enjoin the collection of taxes, any portion of which is legal and valid or admitted to be due, except upon the payment or tender of that portion.[57] But of course this does

And see Gerke *v.* Purcell, 25 Ohio St. 229; Wheeler *v.* Lynn, 8 Ohio St. 393.

Jurisdiction of federal courts.— The remedy given by a state statute, expressly authorizing suits to enjoin the illegal levy of taxes or the collection thereof, may be enforced on the equity side of the federal courts. Lander *v.* Mercantile Nat. Bank, 118 Fed. 785, 55 C. C. A. 523.

52. Yazoo, etc., R. Co. *v.* Adams, 73 Miss. 648, 19 So. 91.

53. Insurance Co. of North America *v.* Bonner, 24 Colo. 220, 49 Pac. 366; Smith *v.* Smith, 159 Ind. 388, 65 N. E. 183.

54. *Iowa.*— Smith *v.* Peterson, 123 Iowa 672, 99 N. W. 552.

Louisiana.— Morgan's Louisiana, etc., R. etc., Co. *v.* Pecot, 50 La. Ann. 737, 23 So. 948.

Massachusetts.— Holmes *v.* Baker, 16 Gray 259.

Michigan.— Stuart *v.* Kalamazoo School Dist. No. 1, 30 Mich. 69.

Nebraska.— Richards *v.* Hatfield, 40 Nebr. 879, 59 N. W. 777.

South Dakota.— Chicago, etc., R. Co. *v.* Faulk County, 15 S. D. 501, 90 N. W. 149.

Tennessee.— Kennedey *v.* Montgomery County, 98 Tenn. 165, 38 S. W. 1075.

55. Clearwater Timber Co. *v.* Nez Perce County, 155 Fed. 633.

56. Clearwater Timber Co. *v.* Shoshone County, 155 Fed. 612.

57. *Alabama.*— Montgomery *v.* Sayre, 65 Ala. 564; Alabama Gold L. Ins. Co. *v.* Lott, 54 Ala. 499; Tallassee Mfg. Co. *v.* Spigener, 49 Ala. 262.

Arizona.— Pima County Tax List *v.* Territory, 4 Ariz. 186, 37 Pac. 370, 39 Pac. 328.

Arkansas.— Bridwell *v.* Morton, 46 Ark. 73; Worthen *v.* Badgett, 32 Ark. 496; Twombly *v.* Kimbrough, 24 Ark. 459.

California.— Quint *v.* Hoffman, 103 Cal. 506, 37 Pac. 514, 777; Savings, etc., Soc. *v.* Austin, 46 Cal. 416.

Colorado.— Denver *v.* Hallett, 45 Colo. 132, 100 Pac. 408; American Refrigerator Transit Co. *v.* Adams, 28 Colo. 119, 63 Pac. 410; Insurance Co. of North America *v.* Bonner, 24 Colo. 220, 46 Pac. 366; Breeze *v.* Haley, 11 Colo. 351, 18 Pac. 551; Wason *v.* Major, 10 Colo. App. 181, 50 Pac. 741.

Connecticut.— Adams *v.* Castle, 30 Conn. 404.

District of Columbia.— Alexander *v.* Denison, 2 MacArthur 562.

Florida.— Pickett *v.* Russell, 42 Fla. 116, 634, 28 So. 764; Kissimmee City *v.* Cannon, 26 Fla. 3, 7 So. 523; Cheney *v.* Jones, 14 Fla. 587.

Illinois.— People *v.* Centralia Gas, etc., Co., 238 Ill. 113, 87 N. E. 370; Huling *v.* Ehrich, 183 Ill. 315, 55 N. E. 636; Moore *v.* Wayman, 107 Ill. 192; Johnson *v.* Roberts, 102 Ill. 655; Swinney *v.* Beard, 71 Ill. 27; Barnett *v.* Cline, 60 Ill. 205; Reed *v.* Tyler, 56 Ill. 288; Briscoe *v.* Allison, 43 Ill. 291; Taylor *v.* Thompson, 42 Ill. 9; O'Kane *v.* Treat, 25 Ill. 557; Wilson *v.* Weber, 3 Ill. App. 125.

Indiana.— Jeffersonville *v.* Louisville, etc., Bridge Co., 169 Ind. 645, 83 N. E. 337; Buck *v.* Miller, 147 Ind. 586, 45 N. E. 647, 47 N. E. 8, 62 Am. St. Rep. 436, 37 L. R. A. 384; Smith *v.* Union County Nat. Bank, 131 Ind. 201, 30 N. E. 948; Smith *v.* Rude Bros. Mfg. Co., 131 Ind. 150, 30 N. E. 947; Hyland *v.* Central Iron, etc., Co., 129 Ind. 68, 28 N. E. 308, 13 L. R. A. 515; Logansport *v.* McConnell, 121 Ind. 416, 23 N. E. 264; Wells County *v.* Dailey, 115 Ind. 360, 17 N. E. 619; Cauldwell *v.* Curry, 93 Ind. 363; Stilz *v.* Indianapolis, 81 Ind. 582; Ricketts *v.* Spraker, 77 Ind. 371; South Bend *v.* Notre Dame Du Lac University, 69 Ind. 344; Foresman *v.* Chase, 68 Ind. 500; Brown *v.* Herron, 59 Ind. 61; Montgomery County *v.* Elston, 32 Ind. 27, 2 Am. Rep. 327; Roseberry *v.* Huff, 27 Ind. 12; Harrison *v.* Haas, 25 Ind. 281; Ewing *v.* Batzner, 24 Ind. 409; Clay *v.* Wrought Iron Range Co., 42 Ind. App. 145, 85 N. E. 119.

Iowa.— Reed *v.* Cedar Rapids, 138 Iowa 366, 116 N. W. 140; Corey *v.* Ft. Dodge, 133 Iowa 666, 111 N. W. 6; Casady *v.* Lowry, 49 Iowa 523; Corbin *v.* Woodbine, 33 Iowa 297; Morrison *v.* Hershire, 32 Iowa 271.

Kansas.— Parsons Natural Gas Co. *v.*

not apply where the assessment is wholly and entirely void,[58] nor will it be made a condition of relief that taxes should be paid on property of the complainant which is taxable but which has not been assessed.[59] And it has been held that where suit is brought to enjoin that part of certain taxes only that are claimed to be invalid, complainants are not required to pay the taxes not sought to be enjoined as a condition precedent to their right to sue.[60] This condition is complied with by a tender in good faith of the amount believed to be justly due; the fact that the court finds a greater amount to be due is no cause for dismissing the bill, but only affects the question of costs.[61]

Rockhold, 79 Kan. 661, 100 Pac. 639; Garnett Bank *v.* Ferris, 55 Kan. 120, 39 Pac. 1042; Wilson *v.* Longendyke, 32 Kan. 267, 4 Pac. 361; Pritchard *v.* Madren, 24 Kan. 486; Gandy *v.* Chase County, 23 Kan. 738; Knox *v.* Dunn, 22 Kan. 683; Hagaman *v.* Cloud County, 19 Kan. 394; Challiss *v.* Hekelnkaemper, 14 Kan. 474; Lawrence *v.* Killam, 11 Kan. 499; Shelton *v.* Dunn, 6 Kan. 128; McIntyre *v.* Williamson, 8 Kan. App. 711, 54 Pac. 928.

Kentucky.— Covington *v.* Pullman Co., 121 Ky. 218, 89 S. W. 116, 28 Ky. L. Rep. 199; Thompson *v.* Lexington, 104 Ky. 165, 46 S. W. 481, 20 Ky. L. Rep. 457.

Maryland.— Allegany County *v.* Union Min. Co., 61 Md. 545.

Michigan.— Connors *v.* Detroit, 41 Mich. 128, 1 N. W. 902; Merrill *v.* Humphrey, 24 Mich. 170; Palmer *v.* Napoleon Tp., 16 Mich. 176; Conway *v.* Waverly Tp. Bd., 15 Mich. 257.

Mississippi.— Ball *v.* Meridian, 67 Miss. 91, 6 So. 645; Mobile, etc., R. Co. *v.* Moseley, 52 Miss. 127.

Missouri.— Porter *v.* R. J. Boyd Pav., etc., Co., 214 Mo. 1, 112 S. W. 235; St. Louis, etc., R. Co. *v.* Gracy, (1894) 28 S. W. 736; Overall *v.* Ruenzi, 67 Mo. 203.

Montana.— Montana Ore Purchasing Co. *v.* Maher, 32 Mont. 480, 81 Pac. 13.

Nebraska.— Hacker *v.* Howe, 72 Nebr. 385, 101 N. W. 255.

North Carolina.— Covington *v.* Rockingham, 93 N. C. 134.

North Dakota.— Douglas *v.* Fargo, 13 N. D. 467, 101 N. W. 919; Farrington *v.* New England Inv. Co., 1 N. D. 102, 45 N. W. 191.

Ohio.— Frazer *v.* Siebern, 16 Ohio St. 614; Adams Express Co. *v.* Rattermann, 10 Ohio Dec. (Reprint) 469, 21 Cinc. L. Bul. 238.

Oklahoma.— Russell *v.* Green, 10 Okla. 340, 62 Pac. 817; Halff *v.* Green, 10 Okla. 338, 62 Pac. 816; Lasater *v.* Green, 10 Okla. 335, 62 Pac. 816; Collins *v.* Green, 10 Okla. 244, 62 Pac. 813; Bardrick *v.* Dillon, 7 Okla. 535, 54 Pac. 785; State Nat. Bank *v.* Carson, (1897) 50 Pac. 990.

Oregon.— Dayton *v.* Multnomah County, 34 Oreg. 239, 55 Pac. 23; Welch *v.* Astoria, 26 Oreg. 89, 37 Pac. 66; Welch *v.* Clatsop County, 24 Oreg. 452, 33 Pac. 934; Brown *v.* School Dist. No. 1, 12 Oreg. 345, 7 Pac. 357.

Texas.— Rosenberg *v.* Weekes, 67 Tex. 578, 4 S. W. 899; Blanc *v.* Meyer, 59 Tex. 89; George *v.* Dean, 47 Tex. 73.

Washington.— Phillips *v.* Thurston County, 35 Wash. 187, 76 Pac. 993.

West Virginia.— Blue Jacket Consol. Copper Co. *v.* Scherr, 50 W. Va. 533, 40 S. E. 514.

Wisconsin.— Fifield *v.* Marinette County, 62 Wis. 532, 22 N. W. 705; Kaehler *v.* Dobberpuhl, 56 Wis. 480, 14 N. W. 644; Arnold *v.* Juneau County, 43 Wis. 627; Dean *v.* Borchsenius, 30 Wis. 236; Mills *v.* Charleton, 29 Wis. 400, 9 Am. Rep. 578; Mills *v.* Johnson, 17 Wis. 598; Myrick *v.* La Crosse, 17 Wis. 442; Bond *v.* Kenosha, 17 Wis. 284; Hersey *v.* Milwaukee County, 16 Wis. 185, 82 Am. Dec. 713.

Wyoming.— Union Pac. R. Co. *v.* Ryan, 2 Wyo. 408.

United States.— People's Nat. Bank *v.* Marye, 191 U. S. 272, 24 S. Ct. 68, 48 L. ed. 180; Northern Pac. R. Co. *v.* Clark, 153 U. S. 252, 14 S. Ct. 809, 38 L. ed. 706; Albuquerque Nat. Bank *v.* Perea, 147 U. S. 87, 13 S. Ct. 194, 37 L. ed. 91; German Nat. Bank *v.* Kimball, 103 U. S. 732, 26 L. ed. 469; Taylor *v.* Secor, 92 U. S. 575, 23 L. ed. 663; Chicago Union Traction Co. *v.* State Bd. of Equalization, 114 Fed. 557 [*affirmed* in 207 U. S. 20, 28 S. Ct. 7, 52 L. ed. 78]; Chicago, etc., R. Co. *v.* Norton County, 67 Fed. 413, 14 C. C. A. 458; Richmond, etc., R. Co. *v.* Blake, 49 Fed. 904; Dundee Mortg. Trust Inv. Co. *v.* Parrish, 24 Fed. 197; Albany City Bank *v.* Maher, 9 Fed. 884, 20 Blatchf. 341; Huntington *v.* Palmer, 8 Fed. 449, 7 Sawy. 355. See Gunter *v.* Atlantic Coast Line R. Co., 200 U. S. 273, 26 S. Ct. 252, 50 L. ed. 477.

See 45 Cent. Dig. tit. "Taxation," § 1244.

Sufficiency of tender.— The positive refusal of the treasurer, when that part of a tax which is admitted to be due is tendered, to accept anything less than the whole tax, is a waiver of further tender; and it is sufficient for the taxpayer, seeking an injunction to restrain the collection of that part of the tax alleged to be illegal, to deposit the money in court when ordered by the court. Gray *v.* Stiles, 6 Okla. 455, 49 Pac. 1083.

58. Yocum *v.* Brazil First Nat. Bank, (Ind. 1894) 38 N. E. 599; Hyland *v.* Brazil Block Coal Co., 128 Ind. 335, 26 N. E. 672; Valencia County *v.* Atchison, etc., R. Co., 3 N. M. 380, 10 Pac. 294; Sioux City Bridge Co. *v.* Dakota County, 61 Nebr. 75, 84 N. W. 607; Lewiston Water, etc., Co. *v.* Asotin County, 24 Wash. 371, 64 Pac. 544.

59. Clark *v.* Maher, 34 Mont. 391, 87 Pac. 272.

60. Bell *v.* Meeker, 39 Ind. App. 224, 78 N. E. 641.

61. Landes Estate Co. *v.* Clallam County, 19 Wash. 569, 53 Pac. 670; Chicago, etc., R.

(iii) *Preliminary Injunction.* A preliminary injunction to restrain the collection of the tax may issue where a strong case against its legality is made out by the complaint and affidavits and where the danger of forcible proceedings against complainant's property is imminent and grave injury is likely to result.[62] But this step will not be taken where the legality of the tax is plausibly defended and there is no special urgency to relieve the complainant and the public revenues would be tied up in such a way as to cause serious public inconvenience.[63]

(iv) *Parties* — (a) *In General.* As a general rule a bill for an injunction can be brought only by a taxpayer,[64] and only by one whose own property is affected by the tax in question, no one being permitted to enjoin the collection of taxes assessed against another.[65] Neither is it proper for several persons to join in the bill who have no community of interest nor any common ground of objection to the tax in question;[66] although if the objection urged is one going to the legality of the tax in general, or to the validity of the entire assessment, and which affects all the taxpayers equally and in common, and which can be determined on a single issue with the like effect as to all concerned, it is proper for any number of taxpayers to unite in the suit,[67] in which case the bill must

Co. *v.* Norton County, 67 Fed. 413, 14 C. C. A. 458.

62. Magruder *v.* Augusta, 86 Ga. 220, 12 S. E. 587; Savannah, etc., R. Co. *v.* Morton, 71 Ga. 24; Wright *v.* Southwestern R. Co., 64 Ga. 783; Armstrong *v.* Stedman, 130 N. C. 217, 41 S. E. 278; Moore *v.* Sugg, 112 N. C. 233, 17 S. E. 72; St. Mary's Gas Co. *v.* Elk County, 168 Pa. St. 401, 31 Atl. 1077; Lehigh Coal, etc., Co. *v.* Miller, 155 Pa. St. 542, 26 Atl. 660.

Form of order.— Case where the court, instead of granting a restraining order, ordered that those paying the tax should be held to have done so under protest and without prejudice to their rights see Brewer *v.* Stahl, (Kan. App. 1899) 55 Pac. 669.

63. Hawkins *v.* Jonesboro, 63 Ga. 527; Cincinnati Gas Light, etc., Co. *v.* Bowman, 12 Ohio Dec. (Reprint) 147, 1 Handy 289; Barton *v.* Pittsburgh, 3 Pitts. Leg. J. (Pa.) 242; Stone Cattle Co. *v.* Davis, 3 Tex. App. Civ. Cas. § 149.

64. Center Tp. *v.* Hunt, 16 Kan. 430; State *v.* McLaughlin, 15 Kan. 228, 2 Am. Rep. 264; Hopewell Tp. Bd. of Education *v.* Guy, 64 Ohio St. 434, 60 N. E. 573.

65. Du Page County *v.* Jenks, 65 Ill. 275; Missouri River, etc., R. Co. *v.* Wheaton, 7 Kan. 232; Baldwin *v.* Washington County, 85 Md. 145, 36 Atl. 764; Stiles *v.* Guthrie, 3 Okla. 26, 41 Pac. 383. *Compare,* however, Knopf *v.* Chicago First Nat. Bank, 173 Ill. 331, 50 N. E. 660, holding that a single taxpayer may restrain the extension of an illegal tax, as an entirety, on all the taxable property in the district.

A holder of bonds of a corporation secured by mortgage has no standing to enjoin the collection of taxes on the mortgaged property, unless where he alleges that the mortgagee refuses to bring the suit and joins him as a defendant. Bayles *v.* Dunn, 116 Fed. 185, 54 C. C. A. 549.

A partnership cannot enjoin the sale of the individual personal property of one partner for taxes due from the firm. Lyle *v.* Jacques, 101 Ill. 644.

But a mortgage of land does not change the title so as to debar the owner of the equity of redemption from suing to enjoin illegal taxes. Flint, etc., R. Co. *v.* Auditor-Gen., 41 Mich. 635, 2 N. W. 835. *Compare,* however, Sholes *v.* Omaha, 78 Nebr. 576, 111 N. W. 364, holding that after the purchase of mortgaged premises at foreclosure by the mortgagee the mortgagor cannot sue to restrain the collection of taxes levied after the execution of the mortgage, unless bound by a special covenant to pay such future assessments.

As between lessor and lessee of a railroad, the former may sue to enjoin the collection of taxes on it, when ultimately liable for such taxes under the terms of the lease. Columbus, etc., R. Co. *v.* Grant County, 65 Ind. 427.

66. Jones *v.* Rushville Nat. Bank, 138 Ind. 87, 37 N. E. 338; McGrath *v.* Newton, 29 Kan. 364; Hudson *v.* Atchison County, 12 Kan. 140; Youngblood *v.* Sexton, 32 Mich. 406, 20 Am. Rep. 654; Kerr *v.* Lansing, 17 Mich. 34.

67. *Arkansas.*— Floyd *v.* Gilbreath, 27 Ark. 675.

Connecticut.— Terret *v.* Sharon, 34 Conn. 105; Webster *v.* Harwinton, 32 Conn. 131.

Georgia.— Hewin *v.* Atlanta, 121 Ga. 723, 49 S. E. 765, 67 L. R. A. 795; Vanover *v.* Davis, 27 Ga. 354.

Illinois.— Harward *v.* St. Clair, etc., Levee, etc., Co., 51 Ill. 130.

Indiana.— Oliver *v.* Keightley, 24 Ind. 514; Nill *v.* Jenkinson, 15 Ind. 425; Lafayette *v.* Cox, 5 Ind. 38.

Iowa.— McMillan *v.* Lee County, 3 Iowa 311.

Kansas.— Gilmore *v.* Norton, 19 Kan. 491.

Maryland.— Baltimore *v.* Gill, 31 Md. 375; Baltimore *v.* Porter, 18 Md. 284, 79 Am. Dec. 686.

Massachusetts.— Holmes *v.* Baker, 16 Gray 259.

Michigan.— Motz *v.* Detroit, 18 Mich. 495; Scofield *v.* Lansing, 17 Mich. 437.

be filed in behalf of plaintiffs and all others similarly situated, this averment being essential.[68] All the officers who have any duty to perform in regard to the collection of the taxes should be made parties,[69] as also the municipal corporation which is to receive them; [70] and in addition it is proper to bring in any persons who are directly interested in the proceeds of the tax or for whose special benefit it was levied, as judgment or bond creditors of a municipality or a railroad aided by the tax.[71]

(B) *Corporation and Stock-Holders.* A corporation cannot maintain a suit to enjoin the collection of taxes assessed on the shares of stock held by its individual shareholders,[72] except where, by statute, it is primarily liable for the payment of such taxes, having the right to reimburse itself out of dividends or otherwise.[73] But it seems that in the reverse case a stock-holder may sue to enjoin taxes assessed on the stock of the corporation.[74]

(V) *PLEADING* — (A) *In General.* Whatever may be the complainant's ground of objection to the tax which he seeks to enjoin, he must allege it clearly and distinctly in his pleading, and not by way of inference or legal conclusions, but with a detailed statement of the facts on which he means to rely.[75] Thus,

Missouri.— Steines *v.* Franklin County, 48 Mo. 167, 8 Am. Rep. 87; Hooper *v.* Ely, 46 Mo. 505.

New Hampshire.— Barr *v.* Deniston, 19 N. H. 170.

North Carolina.— Galloway *v.* Jenkins, 63 N. C. 147.

Ohio.— Upington *v.* Oviatt, 24 Ohio St. 232; Loomis *v.* Lake County, etc., Plank Road Co., 1 Ohio Dec. (Reprint) 312, 7 West. L. J. 218.

Pennsylvania.— Page *v.* Allen, 58 Pa. St. 338, 98 Am. Dec. 272; Mott *v.* Pennsylvania R. Co., 30 Pa. St. 9, 72 Am. Dec. 664.

Rhode Island.— Sherman *v.* Carr, 8 R. I. 431.

Texas.— Carlile *v.* Eldridge, 1 Tex. App. Civ. Cas. § 986.

Vermont.— Stevens *v.* Rutland, etc., R. Co., 29 Vt. 545.

Virginia.— Johnson *v.* Drummond, 20 Gratt. 419; Bull *v.* Read, 13 Gratt. 78.

United States.—Mandeville *v.* Riggs, 2 Pet. 482, 7 L. ed. 493; Coulson *v.* Portland, 6 Fed. Cas. No. 3,275, Deady 481; King *v.* Wilson, 14 Fed. Cas. No. 7,810, 1 Dill. 555.

See 45 Cent. Dig. tit. "Taxation," § 1249.

68. Williams *v.* Grant County Ct., 26 W. Va. 488, 53 Am. Rep. 94; Doonan *v.* Grafton Bd. of Education, 9 W. Va. 246.

69. *Georgia.*— Jones *v.* Sligh, 75 Ga. 7.

Illinois.— Binkert *v.* Wabash R. Co., 98 Ill. 205.

Indiana.— See Bittinger *v.* Bell, 65 Ind. 445.

Iowa.— Hubbard *v.* Johnson County, 23 Iowa 130.

Louisiana.— Gaither *v.* Green, 40 La. Ann. 362, 4 So. 210.

Missouri.— St. Louis, etc., R. Co. *v.* Anthony, 73 Mo. 431.

See 45 Cent. Dig tit. "Taxation," § 1249.

Sheriff.— In an action to enjoin collection of taxes on unlisted property, where an assessment is made and the list given to the sheriff for collection, the sheriff is the proper party defendant. Caldwell Land, etc., Co. *v.* Smith, 146 N. C. 199, 59 S. E. 653.

County commissioners.— In an action against the sheriff to enjoin collection of taxes assessed on unlisted property, the county commissioners may be joined as parties at their request. Caldwell Land, etc., Co. *v.* Smith, 146 N. C. 199, 59 S. E. 653.

70. State *v.* Clinton County, 162 Ind. 580, 68 N. E. 295, 70 N. E. 373, 984; Bittinger *v.* Bell, 65 Ind. 445.

71. Thiebaud *v.* Tait, (Ind. 1892) 31 N. E. 1052; Carpenter *v.* Hindman, 32 Kan. 601, 5 Pac. 165; Shields *v.* Pipes, 31 La. Ann. 765; State *v.* Sanderson, 54 Mo. 203.

Compare Jager *v.* Doherty, 61 Ind. 528.

72. *Minnesota.*—Waseca County Bank *v.* McKenna, 32 Minn. 468, 21 N. W. 556.

Missouri.— Hannibal First Nat. Bank *v.* Meredith, 44 Mo. 500.

Ohio.— Cleveland Trust Co. *v.* Lander, 19 Ohio Cir. Ct. 271, 10 Ohio Cir. Dec. 452.

South Dakota.— Northwestern Loan, etc., Co. *v.* Muggli, 8 S. D. 160, 65 N. W. 442.

United States.— People's Nat. Bank *v.* Marye, 107 Fed. 570 [*affirmed* in 191 U. S. 272, 24 S. Ct. 68, 48 L. ed. 180].

73. Knopf *v.* Chicago First Nat. Bank, 173 Ill. 331, 50 N. E. 660; Jones *v.* Rushville Nat. Bank, 138 Ind. 87, 37 N. E. 338; People's Nat. Bank *v.* Marye, 107 Fed. 570 [*affirmed* in 191 U. S. 272, 24 S. Ct. 68, 48 L. ed. 180]; Mercantile Nat. Bank *v.* Hubbard, 105 Fed. 809, 45 C. C. A. 66 [*reversed* on other grounds in 186 U. S. 458, 22 S. Ct. 908, 46 L. ed. 1247]; Covington First Nat. Bank *v.* Covington, 103 Fed. 523 [*affirmed* in 198 U. S. 100, 25 S. Ct. 562, 49 L. ed. 963]; Whitney Nat. Bank *v.* Parker, 41 Fed. 402; Evansville Nat. Bank *v.* Britton, 8 Fed. 867, 10 Biss. 503.

74. Hills *v.* National Albany Exch. Bank, 12 Fed. 93.

75. *Indiana.*— Yocum *v.* Brazil First Nat. Bank, (1894) 38 N. E. 599; Mullikin *v.* Bloomington, 72 Ind. 161.

Iowa.— McConn *v.* Roberts, 25 Iowa 152.

Kentucky.— Carpenter *v.* Lambert, 92 S. W. 607, 29 Ky. L. Rep. 183.

Maryland.— Garrett County *v.* Franklin Coal Co., 45 Md. 470.

it is not sufficient to allege that the tax is "illegal" or "invalid," but the facts which show it to be so must be set forth.[76] The complaint must also show the amount of the tax assessed against plaintiff or demanded of him,[77] and if any part of it is admitted to be legal the amount thereof must be specifically stated.[78] Complainant must also show that the necessary authority to collect the tax is in the hands of the proper officer and that proceedings against him or his property are imminent,[79] and that they will cause him an irreparable injury, and as to this, he must state the facts showing what the injury will be and how and why it will result.[80] The same general rules, in respect to particularity and specific averments, apply also to the answer of defendant.[81] A complainant is not debarred from maintaining a suit to enjoin the enforcement of taxes illegally levied upon

Nebraska.— Dundy *v.* Richardson County, 8 Nebr. 508, 1 N. W. 565.

Wisconsin.— Duluth Log Co. *v.* Hawthorne, 139 Wis. 170, 120 N. W. 864.

See 45 Cent. Dig. tit. "Taxation," § 1250.

Applications of text.— For cases applying the rule stated in the text to averments of various grounds of objection to the legality of the tax or assessment see the following citations:

Levy in excess of legal limit.— Burlington, etc., R. Co. *v.* Kearney County, 17 Nebr. 511, 518, 23 N. W. 559, 562.

No levy by proper authority.— Sharpe *v.* Engle, 2 Okla. 624, 39 Pac. 384. See Kansas City, etc., R. C. *v.* Davis, 50 La. Ann. 1054, 23 So. 946.

No assessment made.— South Platte Land Co. *v.* Crete, 11 Nebr. 344, 7 N. W. 859.

No notice of assessment.— Gittings *v.* Baltimore, 95 Md. 419, 52 Atl. 937, 54 Atl. 253.

Fraud in assessment.— Hallett *v.* Arapahoe County, 40 Colo. 308, 90 Pac. 678; Sterling Gas Co. *v.* Higby, 134 Ill. 557, 25 N. E. 660; Pacific Hotel Co. *v.* Lieb, 83 Ill. 602; Cleveland, etc., R. Co. *v.* Backus, 133 Ind. 513, 33 N. E. 421, 18 L. R. A. 729; Delphi *v.* Bowen, 61 Ind. 29; Southern Oregon Co. *v.* Coos County, 39 Oreg. 185, 64 Pac. 646; Oregon, etc., R. Co. *v.* Jackson County, 38 Oreg. 589, 64 Pac. 307, 65 Pac. 369; Andrews *v.* King County, 1 Wash. 46, 23 Pac. 409, 22 Am. St. Rep. 136; Duluth Log Co. *v.* Hawthorne, 139 Wis. 170, 120 N. W. 864; Nye *v.* Washburn, 125 Fed. 817.

Excessive valuation.— Cochise County *v.* Copper Queen Consol. Min. Co., 8 Ariz. 221, 71 Pac. 946; Pacific Postal Tel. Cable Co. *v.* Dalton, 119 Cal. 604, 51 Pac. 1072; Humbird Lumber Co. *v.* Thompson, 11 Ida. 614, 83 Pac. 941; Musselman *v.* Logansport, 29 Ind. 533; Meyer *v.* Rosenblatt, 78 Mo. 495; Iowa, etc., Tel. Co. *v.* Schamber, 15 S. D. 588, 91 N. W. 78; Phillips *v.* Thurston County, 35 Wash. 187, 76 Pac. 993; Duluth Log Co. *v.* Hawthorne, 139 Wis. 170, 120 N. W. 864; Tainter *v.* Lucas, 29 Wis. 375.

Arbitrary and unreasonable valuation.— Cochise County *v.* Copper Queen Consol. Min. Co., 8 Ariz. 221, 71 Pac. 946; Firemen's Ins. Co. *v.* Hogan, 68 Ill. App. 514.

Unlawful increase in assessment.— Saint *v.* Welsh, 141 Ind. 382, 40 N. E. 903; King *v.* Parker, 73 Iowa 757, 34 N. W. 451; Minneapolis, etc., R. Co. *v.* Koerner, 85 Minn. 149, 88 N. W. 430; Rose *v.* Durham, 10 Okla. 373, 61 Pac. 1100; Alva State Bank *v.* Renfrew, 10 Okla. 25, 62 Pac. 285.

Alteration in assessment.— Gittings *v.* Baltimore, 95 Md. 419, 52 Atl. 937, 54 Atl. 253.

Omission of property from assessment roll. — Duluth Log Co. *v.* Hawthorne, 139 Wis. 170, 120 N. W. 864.

Taxation of exempt property.— Ayer, etc., Tie Co. *v.* Keown, 122 Ky. 580, 93 S. W. 588, 29 Ky. L. Rep. 110, 400.

Discrimination against plaintiff, and other non-residents. — Duluth Log Co. *v.* Hawthorne, 139 Wis. 170, 120 N. W. 864.

Discrimination against national banks.— Wagoner *v.* Loomis, 37 Ohio St. 571; German Nat. Bank *v.* Kimball, 103 U. S. 732, 26 L. ed. 469.

Cloud on title.— Conway *v.* Waverly Tp. Bd., 15 Mich. 257.

Title of plaintiff.— Montgomery *v.* Peach River Lumber Co., (Tex. Civ. App. 1909) 117 S. W. 1061.

76. New Decatur *v.* Nelson, 102 Ala. 556, 15 So. 275; Insurance Co. of North America *v.* Bonner, 7 Colo. App. 97, 42 Pac. 681; Mustard *v.* Hoppess, 69 Ind. 324; Mace *v.* Carteret County, 99 N. C. 65, 5 S. E. 740.

77. Chambers *v.* Adair, 110 Ky. 942, 62 S. W. 1128, 23 Ky. L. Rep. 373; Iowa, etc., Tel. Co. *v.* Schamber, 15 S. D. 588, 91 N. W. 78; Ricketts *v.* Crewdson, 13 Wyo. 284, 79 Pac. 1042, 81 Pac. 1.

78. Cheney *v.* Jones, 14 Fla. 587; Taylor *v.* Thompson, 42 Ill. 8; Wilson *v.* Weber, 3 Ill. App. 125; Altgelt *v.* San Antonio, 81 Tex. 436, 17 S. W. 75, 13 L. R. A. 383.

79. Worley *v.* Harris, 82 Ind. 493; Mullikin *v.* Bloomington, 72 Ind. 161; Brown *v.* Herron, 59 Ind. 61; Pugh *v.* Irish, 43 Ind. 415; Leavenworth County *v.* Lang, 8 Kan. 284.

80. Insurance Co. of North America *v.* Bonner, 24 Colo. 220, 49 Pac. 366; Anderson *v.* Mayfield, 93 Ky. 230, 19 S. W. 598, 14 Ky. L. Rep. 370; Marquette, etc., R. Co. *v.* Marquette, 35 Mich. 504; Laird, etc., Co. *v.* Pine County, 72 Minn. 409, 75 N. W. 723; Clarke *v.* Ganz, 21 Minn. 387.

81. Hampson *v.* Adams, 6 Ariz. 335, 57 Pac. 621; Beard *v.* Allen, 141 Ind. 243, 39 N. E. 665, 40 N. E. 654; Lake Shore, etc., R. Co. *v.* Smith, (Ind. 1892) 29 N. E. 1075; Florer *v.* Sherwood, 128 Ind. 495, 28 N. E. 71; King *v.* Parker, 73 Iowa 757, 34 N. W. 451.

lands because its bill does not allege it to be the owner of such lands where no objection is taken to the pleading, and the proofs, taken by stipulation, establish its ownership.[82]

(B) *Alleging Performance of Conditions Precedent.* Where the bill admits or shows that any part of the tax in question is legal and valid, it is demurrable if it fails to aver the payment or tender of such portion.[83] Also, where the party's primary remedy would be by appeal to the board of equalization or review, the bill must allege the steps taken to avail himself of this remedy or his excuse for not doing so.[84]

(VI) *EVIDENCE.* All presumptions are indulged in favor of the legality of the tax and the regularity and correctness of the assessment, and the complainant has the burden of proving, by clear and satisfactory evidence, the particular circumstances or grounds of objection on which he relies for relief,[85] unless the essential facts are admitted by the answer, in which case such evidence may be

82. Clearwater Timber Co. *v.* Shoshone County, 155 Fed. 612.

83. *Alabama.*— Tallassee Mfg. Co. *v.* Spigener, 49 Ala. 262.

Indiana.— Bundy *v.* Summerland, 142 Ind. 92, 41 N. E. 322; Hewett *v.* Fenstamaker, 128 Ind. 315, 27 N. E. 621. *Compare* Yocum *v.* Brazil First Nat. Bank, 144 Ind. 272, 43 N. E. 231.

Mississippi.— Meridian *v.* Ragsdale, 67 Miss. 86, 6 So. 619.

Texas.— Rio Grande R. Co. *v.* Scanlan, 44 Tex. 649.

Wisconsin.— Wisconsin Cent. R. Co., *v.* Ashland County, 81 Wis. 1, 50 N. W. 937; Fifield *v.* Marinette County, 62 Wis. 532, 22 N. W. 705.

See 45 Cent. Dig. tit. "Taxation," § 1251.

Compare Clement *v.* Everest, 29 Mich. 19.

Sufficiency of allegation.— It is not sufficient to allege that complainant is ready and willing to pay the portion of the tax admitted to be legal, or that he has paid it into court; for the state or municipality is not to be deprived of the use of that portion of its revenue which is admitted to be due and payable, pending litigation over the remainder. Huntington *v.* Palmer, 8 Fed. 449, 7 Sawy. 355; Parmley *v.* St. Louis, etc., R. Co., 18 Fed. Cas. No. 10,768, 3 Dill. 25.

84. Swenson *v.* McLaren, 2 Tex. Civ. App. 331, 21 S. W. 300.

85. *Arkansas.*— Blake *v.* Jordan, 45 Ark. 265.

Illinois.— Correll *v.* Smith, 221 Ill. 149, 77 N. E. 440; Weber *v.* Baird, 208 Ill. 209, 70 N. E. 231; Tolman *v.* Raymond, 202 Ill. 197, 66 N. E. 1086; Siegfried *v.* Raymond, 190 Ill. 424, 60 N. E. 868; Chicago, etc., R. Co. *v.* Paddock, 75 Ill. 616; O'Kane *v.* Treat, 25 Ill. 557.

Indiana.— Parkison *v.* Thompson, 164 Ind. 609, 73 N. E. 109; McCrory *v.* O'Keefe, 162 Ind. 534, 70 N. E. 812; Fell *v.* West, 35 Ind. App. 20, 73 N. E. 719; Stephens *v.* Smith, 30 Ind. App. 120, 65 N. E. 546.

Kentucky.— Bell *v.* Lexington, 120 Ky. 199, 85 S. W. 1081, 27 Ky. L. Rep. 591; Frankfort *v.* Mason, etc., Co., 100 Ky. 48, 37 S. W. 290, 18 Ky. L. Rep. 543.

Louisiana.— Stoner *v.* Flournoy, 28 La. Ann. 850.

Nebraska.—Chicago, etc., R. Co. *v.* Merrick County, 36 Nebr. 176, 54 N. W. 309.

Oklahoma.— Streight *v.* Durham, 10 Okla. 361, 61 Pac. 1096.

Oregon.— Ankeny *v.* Blakley, 44 Oreg. 78, 74 Pac. 485.

Pennsylvania.— Von Storch *v.* Scranton, 3 Pa. Co. Ct. 567.

Texas.— Engelke *v.* Schlenker, 75 Tex. 559, 12 S. W. 999; International, etc., R. Co. *v.* Smith County, 54 Tex. 1.

Wisconsin.— Canfield *v.* Bayfield County, 74 Wis. 60, 41 N. W. 437, 42 N. W. 100.

United States.— Louisville Trust Co. *v.* Stone, 107 Fed. 305, 46 C. C. A. 299.

See 45 Cent. Dig. tit. "Taxation," § 1252.

Showing liability for taxes.—An injunction should not issue when it does not appear from the agreed statement of facts that the taxes complained of stand charged on the duplicate to plaintiff or to any one else. Lamb *v.* Hetfield, 29 Ind. 280.

Showing illegal discrimination.— In a suit to enjoin a discriminating assessment of railroad property by a state commission, on the ground that there was an established rule by which all other property in the state was assessed at less than its actual value, where it is impossible to prove directly the adoption of such a rule by the assessing officers, it is competent for the complainant to establish its existence by inference from a uniform course of conduct, and for that purpose to introduce evidence of particular assessments and the value of the property assessed. Southern R. Co. *v.* North Carolina Corp Commission, 104 Fed. 700.

Showing fraudulent overvaluation.— In a suit to enjoin collection of taxes, the presumption of fraud that might arise from the fact that plaintiff's property is assessed at a higher valuation than a similar tract owned by another is not conclusive of overvaluation, in the light of evidence indicating rather that the latter property is under-assessed than that the former is over-assessed. Northern Pac. R. Co. *v.* Pierce County, 55 Wash. 108, 104 Pac. 178.

Notice of raise of assessment.—Where the owner of land, in a suit to enjoin collection of taxes based on a raise of the assessment by the board of supervisors without proper

dispensed with.[86] On the issues arising in a suit of this kind it is commonly proper to receive in evidence the original or duplicate assessment lists,[87] the records and minutes of official boards,[88] and, where necessary, the testimony of the assessors who made the assessment which is the subject of complaint.[89]

(VII) *Scope of Inquiry.* Any question bearing on the liability of the complainant to taxation or the amount of the taxes with which he is justly chargeable is a proper subject of inquiry;[90] but not the motives or reasons for levying the tax in question, unless it is charged to have been levied for an unlawful purpose,[91] nor the title of the assessing or collecting officers to their offices.[92] And it has been held that the court, in a suit by a railroad to enjoin the collection of taxes levied by local officers on money, cannot inquire into the evidence on which the state tax commissioners acted in assessing the property of the railroad, but must presume that the board discharged its duty and considered the money of the company in determining the valuation of the property.[93]

(VIII) *Decree and Relief Granted.* When a court of equity acquires jurisdiction of a suit to enjoin the collection of an illegal tax, it may settle fully the rights of the parties as to the entire subject-matter of the litigation.[94] If any separable portion of the tax is just and legal, only the remainder should be enjoined, not the whole; and the same rule applies where the tax as a whole is found to be excessive in amount.[95] But, subject to this rule, the court may so frame its decree as to give the successful complainant complete protection against any

notice, exhibits the notice actually served, which does not comply with Ky. St. (1903) § 4122, he overcomes the presumption that proper notice was given, and defendant must overcome the presumption that this was the only notice given by showing that one was given by posting on the land, as required by statute. Ward *v.* Wentz, 130 Ky. 705, 113 S. W. 892.

86. Union Pac. R. Co. *v.* York County, 10 Nebr. 612, 7 N. W. 270.

87. Hill *v.* Probst, 120 Ind. 528, 22 N. E. 664. See Jones *v.* Rushville Natural Gas Co., 135 Ind. 595, 35 N. E. 390.

88. Yocum *v.* Brazil First Nat. Bank, (Ind. 1894) 38 N. E. 599.

89. Von Storch *v.* Scranton, 3 Pa. Co. Ct. 567; Duck *v.* Peeler, 74 Tex. 268, 11 S. W. 1111; Eureka Dist. Gold Min. Co. *v.* Ferry County, 28 Wash. 250, 68 Pac. 727. But see Chicago, etc., R. Co. *v.* Babcock, 204 U. S. 585, 27 S. Ct. 326, 51 L. ed. 636, holding that the members of a state board of equalization and assessment should not be subjected to a cross-examination, in a proceeding for equitable relief against the taxation of railroad property, with regard to the operation of their minds in arriving at the valuation of such property for tax purposes.

90. Hills *v.* National Albany Exch. Bank, 12 Fed. 93, 105 U. S. 319, 26 L. ed. 1052. And see Lake Shore, etc., R. Co. *v.* Smith, (Ind. 1892) 29 N. E. 1075 (the lawful levy of a tax after a complaint filed to restrain its collection under an alleged unlawful levy will not defeat the action); Brandirff *v.* Harrison County, 50 Iowa 164 (a county having charged property as belonging to plaintiff and listed it as his is estopped to deny his ownership in a suit to enjoin the collection of the tax).

91. Logansport *v.* Seybold, 59 **Ind. 225.**

92. Lambeth *v.* De Bellevue, 24 La. Ann. 394.

93. Clark *v.* Vandalia R. Co., 172 Ind. 409, 86 N. E. 851.

94. Tiller *v.* Excelsior Coal, etc., Corp., 110 Va. 151, 65 S. E. 507.

Subsequent wrongful sale of property by defendant for taxes.— The court having acquired jurisdiction of an action to restrain enforcement of taxes against property exempt by law from taxation, the subsequent wrongful act of defendant in selling the property for the taxes will not deprive it of the power to grant such ultimate relief as plaintiff may be entitled to on such facts occurring during pendency of the suit and fully presented by the supplemental complaint. Colorado Farm, etc., Co. *v.* Beerbohm, 43 Colo. 464, 96 Pac. 443.

95. *Arizona.*— Cochise County *v.* Copper Queen Consol. Min. Co., 8 Ariz. 221, 71 Pac. 946.

Illinois.— Briscoe *v.* Allison, 43 Ill. 291.

Michigan.— Pillsbury *v.* Humphrey, 26 Mich. 245; Merrill *v.* Humphrey, 24 Mich. 170; Palmer *v.* Napoleon Tp., 16 Mich. 176.

Nebraska.— Wead *v.* Omaha, 73 Nebr. 321, 102 N. W. 675.

North Carolina.— While injunction is the appropriate remedy for avoiding the enforcement of an illegal or unconstitutional tax, it is the practice, enforced usually by statute, for the court not to enjoin the collection of the entire levy, if the portion conceded to be valid can be separated from the portion in controversy. Southern R. Co. *v.* Mecklenburg County, 148 N. C. 220, 61 S. E. 690.

Washington.— Coolidge *v.* Pierce County, 28 Wash. 95, 68 Pac. 391.

United States.— Whitney Nat. Bank *v.* Parker, 41 Fed. 402.

See 45 Cent. Dig. tit. "Taxation," § 1253.

attempt to enforce the tax or against any semblance of liability for it.[96] On the other hand, if the issues are found for the defendant municipality, it is entitled to a judgment for the sale of the property to pay the tax; [97] or if nothing is found but a defect in the tax proceedings, the case may be continued to enable the defendant to amend or cure it.[98] The matter of costs and attorney's fees is regulated by the local statute; [99] and in some states the law also provides for the imposition of a penalty, generally in the form of a heavy percentage, as damages for an unsuccessful attempt to enjoin the collection of taxes.[1]

3. Actions For Wrongful Enforcement — a. Right of Action and Form of Remedy. A person aggrieved by the wrongful enforcement against his person or property of a tax illegally levied or for which he is not liable may have an action of assumpsit against the county or municipality,[2] or he may maintain an action for damages against the tax collector, or a purchaser from him, which may be, according to the local practice and the circumstances of the particular case, in the form of trover and conversion,[3] or trespass,[4] or, where he was placed under arrest, assault and false imprisonment; [5] or, under proper conditions, and in

96. Drummer *v.* Cox, 165 Ill. 648, 46 N. E. 716; Florer *v.* Sherwood, 128 Ind. 495, 28 N. E. 71; Folkerts *v.* Power, 42 Mich. 283, 3 N. W. 857; Gray *v.* Stiles, 6 Okla. 455, 49 Pac. 1083.

Injunction as to future years.— Injunction to restrain a county treasurer and his successors from collecting a certain tax for any and all future years cannot be granted on a bill in which the county treasurer is the only defendant, and which only complains of the tax for a single year, although the bill contains a prayer for other and further relief. Beach *v.* Shoenmaker, 18 Kan. 147.

Joint plaintiffs.— A separate decree cannot be rendered in favor of one of the joint plaintiffs, in an action to enjoin the collection of taxes for failure to give notice. Cicero *v.* Williamson, 91 Ind. 541.

97. Central Covington *v.* Park, 56 S. W. 650, 21 Ky. L. Rep. 1847.

98. Kelly *v.* Belcher, 1 Tex. App. Civ. Cas. § 1126.

99. See the statutes of the different states. And see Drake *v.* Phillips, 40 Ill. 388; Wilson *v.* Weber, 3 Ill. App. 125; Emporia *v.* Whittlesey, 20 Kan. 17; Gates *v.* Barrett, 79 Ky. 295; Globe Lumber Co. *v.* Clement, 110 La. 438, 34 So. 595; New Orleans Warehouse Co. *v.* Marrero, 106 La. 130, 30 So. 305.

1. Rogers *v.* Kansas City, etc., R. Co., 48 Kan. 471, 29 Pac. 761; Tulane University *v.* Bd. of Assessors, 115 La. 1025, 40 So. 445; Wilson *v.* Anderson, 28 La. Ann. 261; Geren *v.* Gruber, 26 La. Ann. 694; Rio Grande R. Co. *v.* Scanlan, 44 Tex. 649.

2. *Connecticut.* — Bailey *v.* Goshen, 32 Conn. 546, 87 Am. Dec. 191.

Indiana.— Hennel *v.* Vanderburgh County, 132 Ind. 32, 31 N. E. 462.

Maine.—Ware *v.* Percival, 61 Me. 391, 14 Am. Rep. 565.

Massachusetts. — Dow *v.* Sudbury First Parish, 5 Metc. 73; Torrey *v.* Millbury, 21 Pick. 64.

New York.— Colton *v.* Beardsley, 38 Barb. 29.

Rhode Island. — St. Mary's Church *v.* Tripp, 14 R. I. 307; American Bank *v.* Mumford, 4 R. I. 478. See Crandall *v.* James, 6 R. I. 144.

See 45 Cent. Dig. tit. "Taxation," § 1260.

Compare Wright *v.* Jones, 14 Tex. Civ. App. 423, 38 S. W. 249.

Action against collector.—Where a tax collector, without authority, by seizure and threatened sale of property, forcibly and against the protest of a party, collects from him a sum for taxes which such party is under no legal obligation to pay, and which such officer had no legal authority to demand, such party can recover from the officer the sum so collected, with interest. Florida Packing, etc., Co. *v.* Carney, 51 Fla. 190, 41 So. 190.

Removal of cloud on title.—Where a tax is a valid claim, and is legally assessed, but there are defects arising in the course of the enforcement of its collection rendering the levy illegal, the taxpayer is entitled to have the levy removed, as a cloud on his title, but only on condition of paying the tax. Hamilton, etc., Co. *v.* L'Anse Tp., 107 Mich. 419, 65 N. W. 282.

3. Brocking *v.* O'Bryan, 129 Ky. 543, 112 S. W. 631; Pierce *v.* Benjamin, 14 Pick. (Mass.) 356, 25 Am. Dec. 396. The purchaser of property at a void tax-sale, who takes it and converts it to his own use, is liable to the owner for conversion, although the owner may, at his election, sue for the property. Brocking *v.* O'Bryan, *supra.*

4. Perry *v.* Buss, 15 N. H. 222; Henry *v.* Sargeant, 13 N. H. 321, 40 Am. Dec. 146; Pickering *v.* Coleman, 12 N. H. 148; Walker *v.* Cochran, 8 N. H. 166; Clark *v.* Smith, 31 Misc. (N. Y.) 490, 65 N. Y. Suppl. 646; Hughes *v.* Kelley, 69 Vt. 443, 38 Atl. 91. See Com. *v.* Ratcliff, 119 Ky. 853, 84 S. W. 1147, 27 Ky. L. Rep. 297.

The person who assists a tax collector in making a legal levy will not become a trespasser by a subsequent abuse by the officer of his authority. Wheelock *v.* Archer, 26 Vt. 380.

5. Kerr *v.* Atwood, 188 Mass. 506, 74 N. E. 917. And see Henry *v.* Sergeant, 13 N. H. 321, 40 Am. Dec. 146.

the absence of a statutory provision to the contrary, he may replevy the goods under seizure.[6]

b. Measure of Damages. Where property is unlawfully sold for taxes, or under circumstances rendering the officer a trespasser, the measure of damages in an action against him is the actual value of the property at the time of the sale, less the amount properly applied in payment of the tax,[7] or, according to some of the authorities, the amount of the bid, with a similar deduction.[8] Exemplary damages are not allowed.[9]

c. Parties and Proceedings. The declaration or complaint must contain the allegations essential to show plaintiff's right of action and the liability of the officer as a trespasser,[10] and plaintiff must assume the burden of proving the invalidity of the tax or of defendant's proceedings in its collection.[11] The officer's plea of justification need not allege compliance with each requirement of the statutes, but should show the liability of plaintiff or his property to the payment of the tax and defendant's authority to collect it.[12] The tax lists and other official documents are admissible in evidence and may be supplemented by testimony as to the essential facts.[13]

d. Justification of Officer Under Warrant. A tax warrant or execution, valid and regular on its face, protects the tax collector or other officer acting under it.[14] But when sued in trespass he must sustain the burden of showing his lawful authority.[15] And to this end he may plead his warrant or other process in justification of his official acts,[16] and to support such pleading, may introduce

6. Michigan Lake Superior Power Co. *v.* Atwood, 126 Mich. 651, 86 N. W. 139; Miller *v.* McGehee, 60 Miss. 903; Hallock *v.* Rumsey, 22 Hun (N. Y.) 89; Bonnin *v.* Zuehlke, 122 Wis. 128, 99 N. W. 445. See Niagara El. Co. *v.* McNamara, Sheld. (N. Y.) 360.

Claim and delivery under Ballinger & C. Comp. Oreg. § 285, subd. 4, see O'Sullivan *v.* Blakely, 54 Oreg. 551, 104 Pac. 297.

7. Cressey *v.* Parks, 76 Me. 532; Pierce *v.* Benjamin, 14 Pick. (Mass.) 356, 25 Am. Dec. 396; Clements *v.* Eiseley, 63 Nebr. 651, 88 N. W. 871; Hurlburt *v.* Green, 41 Vt. 490.

Effect of tender by officer.—Where goods were sold for taxes by the county treasurer under an unconstitutional act, and the owners' representative bid them in, and the difference between the selling price and taxes and cost was tendered the owners and refused, and the tender was kept good, the owners could not recover from the treasurer the value of the goods, but only the amount bid at the sale, less the amount of the tender. Spaulding *v.* Patterson, 46 Colo. 317, 104 Pac. 413.

8. Alexander *v.* Helber, 35 Mo. 334; Baker *v.* Freeman, 9 Wend. (N. Y.) 36, 24 Am. Dec. 117.

9. Wright *v.* Jones, 14 Tex. Civ. App. 423, 38 S. W. 249. And see Seneca First Nat. Bank *v.* Lyman, 59 Kan. 410, 53 Pac. 125.

10. Sprague *v.* Fletcher, 67 Vt. 46, 30 Atl. 693.

11. Bonnin *v.* Zuehlke, 122 Wis. 128, 99 N. W. 445; Enos *v.* Bemis, 61 Wis. 656, 21 N. W. 812. And see Lumpkin *v.* Cureton, 119 Ga. 64, 45 S. E. 729; Pickering *v.* Coleman, 12 N. H. 148.

12. Noland *v.* Busby, 28 Ind. 154; Hoozer *v.* Buckner, 11 B. Mon. (Ky.) 183; Joslyn *v.* Tracy, 19 Vt. 569; Downer *v.* Woodbury, 19 Vt. 329.

13. Higgins *v.* Reed, 8 Iowa 294, 74 Am. Dec. 305; Wilson *v.* Seavey, 38 Vt. 221.

Payment of taxes after commencement of suit to replevy personal property that has been seized for such taxes cannot be given in evidence to sustain the action. Busby *v.* Noland, 39 Ind. 234.

Evidence as to ownership.— In a suit involving the assessability of personal property for taxation, it is proper to show by witnesses that the taxes for previous years had been paid by the owners without protest, as showing in what light the owners regarded their occupancy and use of premises upon which the lumber sought to be taxed had been piled. Hood *v.* Judkins, 61 Mich. 575, 28 N. W. 689.

Estoppel.—Where a tax collector is fully informed, before making a levy, that the tax is void and will not be paid, he cannot rely on previous statements of the owner's attorney, who was unaware of the illegality of the tax and was only authorized to pay the legal taxes, in relation thereto as an estoppel. St. Louis, etc., R. Co. *v.* Apperson, 97 Mo. 300, 10 S. W. 478.

14. See *supra*, X, A, 8, b. And see Marshall *v.* Hunt, 89 Ill. App. 634; American Tool Co. *v.* Smith, 14 Abb. N. Cas. (N. Y.) 387 [*affirmed* in 96 N. Y. 670]; Champaign County Bank *v.* Smith, 7 Ohio St. 42; Rice *v.* Burns, 9 Pa. Super. Ct. 58.

15. Brackett *v.* Hayden, 15 Me. 347; Bosworth *v.* Bancroft, 74 Vt. 451, 52 Atl. 1050.

16. Games *v.* Robb, 8 Iowa 193; Beekman *v.* Traver, 20 Wend. (N. Y.) 67; Curry *v.* Hoffman, 5 Pa. L. J. Rep. 274; Clemons *v.* Lewis, 36 Vt. 673; Downer *v.* Woodbury, 19 Vt. 329 (pleading collector's bond); Briggs *v.* Whipple, 7 Vt. 15; Hathaway *v.* Goodrich, 5 Vt. 65; Wilcox *v.* Sherwin, 1 D. Chipm. (Vt.) 72.

it in evidence,[17] with the return, if one is required, or if not, with testimony as to his doings under it.[18]

XI. SALE OF LAND FOR DELINQUENT TAXES.[19]

A. Right or Power to Sell — 1. In General. If lands are subject to taxation they may be made subject to sale for taxes, the power to tax involving the power to enforce payment in this manner.[20] But authority to sell real estate for delinquent taxes must be expressly conferred by statute and can be exercised only in the precise cases specified in the law,[21] and an act granting this authority will not apply to taxes already delinquent unless it is expressly made retroactive;[22]

17. Hood *v.* Judkins, 61 Mich. 575, 28 N. W. 689; Smith *v.* Mosher, 9 N. Y. Suppl. 786; Eldred *v.* Sexton, 5 Ohio 215; Goodwin *v.* Perkins, 39 Vt. 598.

18. Hoitt *v.* Burnham, 61 N. H. 620.

19. **Tax-sale defined.**— A sale on an execution, although issued on a judgment recovered for taxes, is not a sale for the non-payment of taxes, in the ordinary acceptation of that term. "A 'tax sale,' or, what is the same thing, a 'sale for the non-payment of taxes,' has a distinct and well-defined meaning. It means a sale made in a proceeding '*in rem*,' and was so generally understood when the Homestead Law was enacted. It will be considered the phrase, a 'sale for the non-payment of taxes,' was employed in the statute in the sense it was commonly understood at the time, and that was, as has been seen, a sale made in a proceeding *in rem*, and not a sale on an execution issued on a judgment *in personam*." Douthett *v.* Winter, 108 Ill. 330, 334. A "tax-sale" is a sale made of property proceeded against by the state as belonging to someone other than itself, in enforcement of taxes due by that property and its owners. Gulf States Land, etc., Co. *v.* Wade, 51 La. Ann. 251, 260, 25 So. 105.

20. Biscoe *v.* Coulter, 18 Ark. 423; Larimer County *v.* National State Bank, 11 Colo. 564, 19 Pac. 537; Rhinehart *v.* Schuyler, 7 Ill. 473; Chadwell *v.* Jones, 1 Tenn. Ch. 493. And see Pritchard *v.* Madren, 24 Kan. 486, 491.

Proceedings are administrative not judicial.— The state or a municipality, in seizing and selling lands for the non-payment of taxes, acts administratively and not judicially, and hence it is within the constitutional power of the legislature to authorize and direct such sales to be made without a previous judgment or decree ordering it. Lucas *v.* Purdy, 142 Iowa 359, 120 N. W. 1063, 24 L. R. A. N. S. 1294; *In re* New York Protestant Episcopal Public School, 31 N. Y. 574: Nind *v.* Myers, 15 N. D. 400, 109 N. W. 335, 8 L. R. A. N. S. 157; League *v.* State, 93 Tex. 553, 57 S. W. 34. But *compare* State *v.* Sargent, 12 Mo. App. 228 [*affirmed* in 76 Mo. 557], holding that a sale under a judgment in a proceeding to collect back taxes was a judicial sale, the sale being made and tax deed executed by the sheriff under direction of the court. And see Wellshear *v.* Kelley, 69 Mo. 343. The overdue tax suit for the foreclosure of a tax lien, authorized by Ark. Acts (1881), p. 63, is a judicial proceeding, and the sale pursuant thereto is a judicial sale. Indiana, etc., Lumber, etc., Co. *v.* Milburn, 161 Fed. 531, 88 C. C. A. 473.

Concurrent remedies.— Proceedings for the sale of land for delinquent taxes are not precluded by the fact that the state or municipality may have another remedy or method of collection. Akers *v.* Burch, 12 Heisk. (Tenn.) 606; Masterson *v.* State, 17 Tex. Civ. App. 91, 42 S. W. 1003. But see Logan County *v.* Carnahan, 66 Nebr. 685, 92 N. W. 984, 95 N. W. 812.

Estoppel to enforce collection by sale.— In a case where the collector of taxes of the District of Columbia was applied to for a statement of the unpaid taxes on certain real estate, by one who did not disclose the object of the inquiry or state that he was about to purchase the land, it was held that the district was not estopped from making a sale of the property for unpaid taxes thereon, which had been omitted from the statement furnished on such request, although the applicant relied on the collector's statement in afterward purchasing the property. Elliot *v.* District of Columbia, 3 MacArthur (D. C.) 396. And see Diamond Coal Co. *v.* Fisher, 19 Pa. St. 267. But see *supra*, IX, A, 1, g, (II).

21. *Arkansas.*— Doyle *v.* Martin, 55 Ark. 37, 17 S. W. 346.

Florida.— Hull *v.* Greeley, 31 Fla. 471, 12 So. 469.

Iowa.— McInerny *v.* Reed, 23 Iowa 410.

Louisiana.—Prescott *v.* Payne, 44 La. Ann. 650, 11 So. 140; Bossier *v.* Maskell, 10 La. Ann. 671.

Maine.— Brown *v.* Veazie, 25 Me. 359.

Michigan.— Sibley *v.* Smith, 2 Mich. 486.

Mississippi.— Caruthers *v.* McLaran, 56 Miss. 371.

Missouri.— McPike *v.* Pen, 51 Mo. 63.

Nebraska.— Logan County *v.* Carnahan, 66 Nebr. 685, 92 N. W. 984, 95 N. W. 812.

New Hampshire.— Bellows *v.* Parsons, 13 N. H. 256.

New York.— Bennett *v.* Peck, 112 N. Y. 649, 20 N. E. 571; Bennett *v.* Peck, 28 Hun 447; Sharpe *v.* Speir, 4 Hill 76. And see Matter of McIntyre, 124 N. Y. App. Div. 66, 108 N. Y. Suppl. 242.

North Dakota.— Shuttuck *v.* Smith, 6 N. D. 56, 69 N. W. 5.

West Virginia.— Old Dominion Bldg., etc., Assoc. *v.* Sohn, 54 W. Va. 101, 46 S. E. 222.

See 45 Cent. Dig. tit. "Taxation," § 1263.

22. Nowlen *v.* Hall, 128 Mich. 274, 87

nor can the power be exercised after the end of the period of time limited by law for that purpose.[23] As to the authority vested in the officer making the sale, it is a naked power not coupled with an interest, and must be exercised in exact conformity with the law; a tax title is *stricti juris*, and its holder must be prepared to show full compliance with the directions of the statute.[24]

2. Authority of Municipal Corporations. A municipal corporation has no power or authority to sell land for non-payment of taxes unless this power be granted to it in express terms by statute and unless the power be deducible from a strict construction of the law; a general grant of authority, for example, to "assess and collect taxes" not being sufficient warrant for the sale and conveyance of lands for their non-payment.[25]

3. Effect of Change of Boundaries. Where land is assessed for taxes in a county, a subsequent change in the county boundaries, having the effect of transferring the land to another county, will not defeat the lien of the assessment or prevent the tax collector of the former county from enforcing the collection by sale of the land.[26]

4. Strict Compliance With Statutes Required. So far as regards provisions of law designed for the protection and security of the citizen, it is essential to the validity of a tax-sale of lands that there shall be a strict compliance with all the directions of the statute, both in relation to the observance of any conditions or prerequisites to the exercise of the power of sale, and to the conduct of the sale itself, as well as to the performance of conditions subsequent to the sale.[27]

N. W. 222; Norris *v.* Hall, 124 Mich. 170, 82 N. W. 832; McNaughton *v.* Martin, 72 Mich. 276, 40 N. W. 326; Hall *v.* Perry, 72 Mich. 202, 40 N. W. 324; Folsom *v.* Whitney, 95 Minn. 322, 104 N. W. 140.

23. White *v.* Portland, 68 Conn. 293, 36 Atl. 46; State *v.* Bellin, 79 Minn. 131, 81 N. W. 763.

24. *California.*— Preston *v.* Hirsch, 5 Cal. App. 485, 90 Pac. 965.

Indiana.— Millikan *v.* Patterson, 91 Ind. 515.

Maryland.— McMahon *v.* Crean, 109 Md. 652, 71 Atl. 995.

New Hampshire.— Cahoon *v.* Coe, 57 N. H. 556.

New York.— Cruger *v.* Dougherty, 43 N. Y. 107; Hubbell *v.* Weldon, Lalor 139.

Tax titles see *infra*, XIV.

25. *Iowa.*— McInerny *v.* Reed, 23 Iowa 410; Ham *v.* Miller, 20 Iowa 450.

Louisiana.— State *v.* New Orleans, 112 La. 408, 36 So. 475.

New York.— Wilcox *v.* Rochester, 54 Hun 72, 7 N. Y. Suppl. 187 [*affirmed* in 129 N. Y. 247, 29 N. E. 99]; Sharp *v.* Johnson, 4 Hill 92, 40 Am. Dec. 259.

Pennsylvania.— Philadelphia *v.* Greble, 38 Pa. St. 339.

Wisconsin.— Knox *v.* Peterson, 21 Wis. 247.

United States.— Beaty *v.* Knowler, 4 Pet. 152, 7 L. ed. 813.

See Municipal Corporations, 28 Cyc. 1717.

26. *California.*— Moss *v.* Shear, 25 Cal. 38, 85 Am. Dec. 94.

Indiana.— Alvis *v.* Whitney, 43 Ind. 83; Morgan County *v.* Hendricks County, 32 Ind. 234.

Iowa.— Ellsworth *v.* Nelson, 81 Iowa 57, 46 N. W. 740; Pitts *v.* Lewis, 81 Iowa 51, 46 N. W. 739; Collins *v.* Storm, 75 Iowa 36, 39 N. W. 161; Hilliard *v.* Griffin, 72 Iowa 331, 33 N. W. 156; Milwaukee, etc., R. Co. *v.* Kossuth County, 41 Iowa 57.

Kansas.— Kansas State Agricultural College *v.* Linscott, 30 Kan. 240, 1 Pac. 81.

Massachusetts.— Harman *v.* New Marlborough, 9 Cush. 525; Waldron *v.* Lee, 5 Pick. 323.

Michigan.—Comins *v.* Harrisville, 45 Mich. 442, 8 N. W. 44.

Mississippi.— Eskridge *v.* McGruder, 45 Miss. 294. And see Deason *v.* Dixon, 54 Miss. 585.

Pennsylvania.— Devor *v.* McClintock, 9 Watts & S. 80; Robinson *v.* Williams, 6 Watts 281.

Wisconsin.— Austin *v.* Holt, 32 Wis. 478. See 45 Cent. Dig. tit. "Taxation," § 1265.

But *compare* Cotter *v.* Sutherland, 18 U. C. C. P. 357; Doe *v.* Grover, 4 U. C. Q. B. 23. And see Harvey *v.* Douglass, 73 Ark. 221, 83 S. W. 946.

27. *Alabama.*— Oliver *v.* Robinson, 58 Ala. 46; Rivers *v.* Thompson, 43 Ala. 633.

California.— Kelsey *v.* Abbott, 13 Cal. 609; Ferris *v.* Coover, 10 Cal. 589.

District of Columbia.— Kann *v.* King, 25 App. Cas. 182 [*reversed* on other grounds in 204 U. S. 43, 27 S. Ct. 213, 51 L. ed. 360].

Florida.— Starks *v.* Sawyer, 56 Fla. 596, 47 So. 513; Orlando *v.* Equitable Bldg., etc., Assoc., 45 Fla. 507, 33 So. 986; Donald *v.* McKinnon, 17 Fla. 746.

Georgia.— Brooks *v.* Rooney, 11 Ga. 423, 56 Am. Dec. 430.

Illinois.— Williams *v.* Underhill, 58 Ill. 137; Conway *v.* Cable, 37 Ill. 82, 87 Am. Dec. 240.

Indiana.— Millikan *v.* Patterson, 91 Ind. 515.

Iowa.— Abell *v.* Cross, 17 Iowa 171.

But a more liberal rule is applied to those statutory provisions which are intended only for the convenience of officers or to promote system and despatch in the conduct of public business; as to these, a substantial compliance with the statute is sufficient.[28]

5. What Law Governs. So far as concerns the essential elements of the power to sell land for taxes and the conservation of vested rights, such a sale is governed by the law in force at the time of the assessment;[29] but as regards the proceedings relating to the sale itself it is governed by the statute in force when the sale is made,[30] unless there is a saving clause as to pending proceedings.[31] Hence if the existing statute is repealed, the proceedings must be conducted under the new and not the old law;[32] and this is the case where the new statute makes a complete change in the method of collecting taxes or introduces a wholly new system,[33] although the various laws will be so construed, if possible, as to avoid repugnancy or repeal.[34]

Louisiana.— Coucy *v.* Cummings, 12 La. Ann. 748.

Maine.— French *v.* Patterson, 61 Me. 203; Payson *v.* Hall, 30 Me. 319; Flint *v.* Sawyer, 30 Me. 226; Brown *v.* Veazie, 25 Me. 359.

Massachusetts.— Harrington *v.* Worcester, 6 Allen 576; Alvord *v.* Collin, 20 Pick. 418.

Mississippi.— Minor *v.* Natchez, 4 Sm. & M. 602, 43 Am. Dec. 488.

Missouri.— Large *v.* Fisher, 49 Mo. 307; Abbott *v.* Doling, 49 Mo. 302; Reeds *v.* Morton, 9 Mo. 878.

New Hampshire.— Cahoon *v.* Coe, 57 N. H. 556.

New York.— Tallman *v.* White, 2 N. Y. 66; Bunner *v.* Eastman, 50 Barb. 639; Hubbell *v.* Weldon, Lalor 139; Sharpe *v.* Speir, 4 Hill 76; Jackson *v.* Shepard, 7 Cow. 88, 17 Am. Dec. 502.

Pennsylvania.— Wister *v.* Kammerer, 2 Yeates 100.

Tennessee.— Sheafer *v.* Mitchell, 109 Tenn. 181, 71 S. W. 86; Sampson *v.* Marr, 7 Baxt. 486; Hamilton *v.* Burum, 3 Yerg. 355; Michie *v.* Mullin, 5 Hayw. 90; Bloomstein *v.* Brien, 3 Tenn. Ch. 55. *Compare* Randolph *v.* Metcalf, 6 Coldw. 400, holding that the law relating to tax-sales should be liberally construed, and that sales of land for taxes should be held good if there has been a reasonable compliance with the law.

Vermont.— Chandler *v.* Spear, 22 Vt. 388.

Virginia.— Martin *v.* Snowden, 18 Gratt. 100; Wilson *v.* Bell, 7 Leigh 22.

Washington.— Albring *v.* Petronio, 44 Wash. 132, 87 Pac. 49.

West Virginia.— Webb *v.* Ritter, 60 W. Va. 193, 54 S. E. 484.

United States.— Ronkendorff *v.* Taylor, 4 Pet. 349, 7 L. ed. 882; Thatcher *v.* Powell, 6 Wheat. 119, 5 L. ed. 221; Williams *v.* Peyton, 4 Wheat. 77, 4 L. ed. 518; Hodgdon *v.* Burleigh, 4 Fed. 111; Miner *v.* McLean, 17 Fed. Cas. No. 9,630, 4 McLean 138.

Canada.— Colquhoun *v.* Driscoll, 10 Manitoba 254; Ryan *v.* Whelan, 6 Manitoba 565; Cotter *v.* Sutherland, 18 U. C. C. P. 357.

See 45 Cent. Dig. tit. "Taxation," § 1263 *et seq.*

28. Starks *v.* Sawyer, 56 Fla. 596, 47 So. 513; Tweed *v.* Metcalf, 4 Mich. 579; Pierce *v.* Hall, 41 Barb. (N. Y.) 142; Kane *v.* Garfield, 60 Vt. 79, 13 Atl. 800; Chandler *v.* Spear, 22 Vt. 388. And see McMahon *v.* Crean, 109 Md. 652, 71 Atl. 995; Miller *v.* Henderson, 50 Wash. 200, 96 Pac. 1052.

Collateral attack see *infra*, XI, N, 3.

29. *Florida.*— Smith *v.* Philips, 51 Fla. 327, 41 So. 527.

Louisiana.— Schwartz *v.* Huer, McGloin 81.

Maine.— Brown *v.* Veazie, 25 Me. 359.

New Hampshire.— Cambridge Proprietors *v.* Chandler, 6 N. H. 271.

Pennsylvania.— Lambertson *v.* Hogan, 2 Pa. St. 22.

Sale under execution.— The provisions of the constitution of Illinois concerning the sale of land for taxes have no application to sales on executions obtained after personal suit against delinquent taxpayers; but such suits, and proceedings on executions obtained therein, are governed by the rules and provisions of law applicable to suits generally. Douthett *v.* Kettle, 104 Ill. 356.

30. *Indiana.*— Stalcup *v.* Dixon, 136 Ind. 9, 35 N. E. 987.

Louisiana.— Del Castillo *v.* McConnico, 47 La. Ann. 1473, 17 So. 868; Smith *v.* New Orleans, 43 La. Ann. 726, 9 So. 773.

Minnesota.— Hage *v.* St. Paul Land, etc., Co., 107 Minn. 350, 120 N. W. 298; Lawton *v.* Barker, 105 Minn. 102, 117 N. W. 249.

New York.—Matter of McIntyre, 124 N. Y. App. Div. 66, 108 N. Y. Suppl. 242.

Texas.— Bente *v.* Sullivan, (Civ. App. 1908) 115 S. W. 350.

And see the cases cited in the following notes.

31. Levy *v.* Acklen, 2 Tenn. Ch. App. 201.

32. Thomas *v.* Collins, 58 Mich. 64, 24 N. W. 553; Hage *v.* St. Paul Land, etc., Co., 107 Minn. 350, 120 N. W. 298; Lawton *v.* Barker, 105 Minn. 102, 117 N. W. 249; Matter of McIntyre, 124 N. Y. App. Div. 66, 108 N. Y. Suppl. 242.

33. Cromwell *v.* MacLean, 123 N. Y. 474, 25 N. E. 932; McRee *v.* McLemore, 8 Heisk. (Tenn.) 440; State *v.* Whittlesey, 17 Wash. 447, 50 Pac. 119; Treece *v.* American Assoc., 122 Fed. 598, 58 C. C. A. 266; Bugher *v.* Prescott, 23 Fed. 20.

34. State *v.* Leich, 166 Ind. 680, 78 N. E.

B. Conditions Precedent — 1. Demand and Default — a. Necessity in General. Where the statute requires a demand to be made upon the taxpayer for the payment of the taxes on his land, or a bill or statement to be rendered to him, there can be no valid sale of the land until this requirement has been fulfilled and the owner put in default by his failure to meet the demand,[35] nor until the delinquency shall have continued for the length of time prescribed by the statute before the sale is made.[36]

b. Effect of Payment. When the taxes upon a particular parcel of real estate have once been paid,[37] whether by the owner himself or by any other person entitled to make such payment,[38] to an officer authorized to receive them,[39] the

189; Safe Deposit, etc., Co. *v.* Fricke, 152 Pa. St. 231, 25 Atl. 530.

35. *Arkansas.*— Hare *v.* Carnall, 39 Ark. 196; Bonnell *v.* Roane, 20 Ark. 114. *Compare* Kinsworthy *v.* Mitchell, 21 Ark. 145.

Connecticut.— Ives *v.* Lynn, 7 Conn. 505.

Iowa.— Bradley *v.* Hintrager, 61 Iowa 337, 16 N. W. 204; Lathrop *v.* Howley, 50 Iowa 39.

Kentucky.— Julian *v.* Stephens, 11 S. W. 6, 10 Ky. L. Rep. 862.

Louisiana.—Webre *v.* Lutcher, 45 La. Ann. 574, 12 So. 834.

Maine.— Brown *v.* Veazie, 25 Me. 359.

Massachusetts.— Lancy *v.* Snow, 180 Mass. 411, 62 N. E. 735.

Minnesota.— St. Anthony Falls Water Power Co. *v.* Greely, 11 Minn. 321.

Mississippi.— Green *v.* Craft, 28 Miss. 70; Jones *v.* Burford, 26 Miss. 194. But *compare* Virden *v.* Bowers, 55 Miss. 1. And see Grayson *v.* Richardson, 65 Miss. 222, 3 So. 579.

New Hampshire.— Davis *v.* Sawyer, 66 N. H. 34, 20 Atl. 100.

New York.— People *v.* Brooklyn Registrar of Arrears, 114 N. Y. 19, 20 N. E. 611.

Pennsylvania.— Norris *v.* Delaware, etc., R. Co., 218 Pa. St. 88, 66 Atl. 1122; Baird *v.* Cahoon, 5 Watts & S. 540.

Texas.— Yenda *v.* Wheeler, 9 Tex. 408.

Utah.— Olsen *v.* Bagley, 10 Utah 492, 37 Pac. 739.

United States.— Mayhew *v.* Davis, 16 Fed. Cas. No. 9,347, 4 McLean 213.

See 45 Cent. Dig. tit. "Taxation," § 1266.

It will be presumed, if necessary to sustain a tax-sale of land in pursuance of a township treasurer's return of delinquent taxes, that personal demand for the taxes was made on resident owners. Dickison *v.* Reynolds, 48 Mich. 158, 12 N. W. 24.

Ground of refusal to pay immaterial.— The effect of a tax-sale on the title of the owner of the land is not changed by the fact that his refusal to pay the taxes assessed on it as part of a certain warrant was based on an honest, although erroneous, belief that it was within another warrant on which he paid the taxes. Wilson *v.* Marvin, 172 Pa. St. 30, 33 Atl. 275.

Effect of pendency of suit.—Where a state officer is suing a railroad company to recover the taxes assessed against it, for the purpose of obtaining an adjudication as to the validity of an exemption claimed by the company, the sheriff cannot, pending the suit, interfere by selling the property of the company for the taxes. Yazoo, etc., R. Co. *v.* West, 78 Miss. 789, 29 So. 475.

36. *Indiana.*— Jack *v.* White, 28 Ind. App. 398, 61 N. E. 603.

Iowa.— Orr *v.* Travacier, 21 Iowa 68; Scott *v.* Babcock, 3 Greene 133; Noble *v.* State, 1 Greene 325.

Minnesota.— Minnesota Debenture Co. *v.* United Real Estate Corp., 99 Minn. 287, 109 N. W. 251.

Mississippi.— Gamble *v.* Witty, 55 Miss. 26.

Pennsylvania.— Preswick *v.* McGrew, 107 Pa. St. 43; Miller *v.* Hale, 26 Pa. St. 432.

Canada.— McKay *v.* Crysler, 3 Can. Sup. Ct. 436.

37. **Payment of taxes in general** see *supra*, IX, A.

Presumption of payment from lapse of time.—After the lapse of more than thirty years, the taxes on land are presumed to have been paid, and if paid, a sale founded on them is invalid. McLaughlin *v.* Kain, 45 Pa. St. 113.

Satisfaction by levy on personalty.—Where personal property levied on and sufficient in value to pay the taxes on the land was lost solely through the negligence of the officer, the taxes will be held to have been paid and the land cannot be sold therefor. Campbell *v.* Wyant, 26 W. Va. 702.

38. **Persons by whom payment of taxes may be made** see *supra*, IX, A, 1, b.

Joint owners.— If land is owned by two persons as joint tenants or tenants in common, payment of the whole amount of the tax by either of them will destroy the power to sell the land, and this whether the land is assessed to that owner as an entirety or whether their several interests are separately assessed. Snodgrass *v.* Joliff, 59 W. Va. 292, 53 S. E. 151.

Payment by stranger.— If a stranger without title pays taxes on part of a tract of unseated land, without defining its location or boundaries, this will not defeat the title of a purchaser of such tract at tax-sale. Crum *v.* Burke, 25 Pa. St. 377.

39. **To whom payment of taxes to be made** see *supra*, IX, A, 1. d.

Authority of collector.— To prove payment of taxes it is not necessary to show that the collector was duly appointed; it is sufficient to show that he acted and was acknowledged as such. Smith *v.* Redford, 12 Grant Ch. (U. C.) 316.

lien of the tax is discharged, and all authority to sell the land is at an end, and a subsequent sale of the land for those taxes is void and passes no title.[40] This rule is applied, for example, where the receiving officer makes a mistake and credits the payment to a different tract of land,[41] or where the taxes are paid on a piece of property appearing on the tax roll by its legal and correct description but it is afterward sold under a different and incorrect description.[42] It is also held that the sale is void if made for the taxes of several years when the amount due for one or more of those years has been paid.[43] But the payment must be made before the sale; if made afterward it does not affect the purchaser's title, although it reduces the amount required to redeem.[44] It should also be observed that the general rule here stated is not admitted in some of the states, where the proceeding is by suit against the owner of the property and payment of the taxes is required to be set up as a defense before judgment, the doctrine being that actual payment of the taxes does not affect the jurisdiction of the court, and hence cannot invalidate the judgment or sale.[45]

c. Effect of Tender or Offer to Pay. A lawful tender of the tax on lands to the officer authorized to receive payment is equivalent to an actual payment, in so far that it divests the officer of authority to sell the land for such tax;[46] and the same rule applies where the owner, acting in good faith and with due diligence, offers or attempts to pay the taxes on his land, or pays all that he can ascertain to be due, and the offer or payment fails of its intended effect solely through the

40. *Alabama.*— State Land Co. *v.* Mitchell, 162 Ala. 469, 50 So. 117.

Arkansas.— Davis *v.* Hare, 32 Ark. 386.

Florida.— Conant *v.* Buesing, 23 Fla. 559, 2 So. 882.

Georgia.— Rish *v.* Ivey, 76 Ga. 738.

Iowa.— Iowa R. Land Co. *v.* Guthrie, 53 Iowa 383, 5 N. W. 519; Morris *v.* Sioux County, 42 Iowa 416.

Louisiana.— Page *v.* Kidd, 121 La. 1, 46 So. 35; Honor *v.* Fellman, 119 La. 1061, 44 So. 887; Bernstine *v.* Leeper, 118 La. 1098, 43 So. 889; Lisso *v.* Giddens, 117 La. 507, 41 So. 1029; Huber *v.* Jennings-Heywood Oil Syndicate, 111 La. 747, 35 So. 889.

Mississippi.— Dodds *v.* Marx, 63 Miss. 443; Griffing *v.* Pintard, 25 Miss. 173.

New York.— Jackson *v.* Morse, 18 Johns. 441, 9 Am. Dec. 225. Sale for double assessment as jurisdictional defect see People *v.* Golding, 55 Misc. 425, 106 N. Y. Suppl. 821.

Oregon.— Nickum *v.* Gaston, 28 Oreg. 322, 42 Pac. 130.

Pennsylvania.— Kramer *v.* Goodlander, 98 Pa. St. 353; Breisch *v.* Coxe, 81 Pa. St. 336; Brown *v.* Hays, 66 Pa. St. 229; Montgomery *v.* Meredith, 17 Pa. St. 42.

United States.— Bee *v.* Barnes, 149 Fed. 727, 79 C. C. A. 433 [*affirming* 138 Fed. 476].

Canada.— Charlton *v.* Watson, 4 Ont. 489; Proudfoot *v.* Austin, 21 Grant Ch. (U. C.) 566; Hamilton *v.* Eggleton, 22 U. C. C. P. 536; Myers *v.* Brown, 17 U. C. C. P. 307; Doe *v.* Mattheson, 9 U. C. Q. B. 321; Doe *v.* Edwards, 5 U. C. Q. B. 594.

See 45 Cent. Dig. tit. "Taxation," § 1267. And see *supra*, IX, A, 6.

41. Lefebre *v.* Negrotto, 44 La. Ann. 792, 11 So. 91; Laird *v.* Hiester, 24 Pa. St. 452; Dougherty *v.* Dickey, 4 Watts & S. (Pa.) 146; Peck *v.* Munro, 4 U. C. C. P. 363.

42. Rath *v.* Martin, 93 Iowa 499, 61 N. W. 941; Sullivan *v.* Davis, 29 Kan. 28; Lewis *v.* Withers, 44 Fed. 165.

43. Kinsworthy *v.* Mitchell, 21 Ark. 145; Loomis *v.* Semper, 38 Misc. (N. Y.) 567, 78 N. Y. Suppl. 74; Irwin *v.* Harrington, 12 Grant Ch. (U. C.) 179. But see *contra*, Hurley *v.* Powell, 31 Iowa 64; Knight *v.* Valentine, 34 Minn. 26, 24 N. W. 295.

44. Jones *v.* Welsing, 52 Iowa 220, 2 N. W. 1106; Collins *v.* Barclay, 7 Pa. St. 67.

45. See *infra*, XI, E, 3, c, (II).

46. *Arkansas.*— Kinsworthy *v.* Austin, 23 Ark. 375.

Illinois.— Lawrence *v.* Miller, 86 Ill. 502.

Maine.— Loomis *v.* Pingree, 43 Me. 299.

Massachusetts.— Converse *v.* Jennings, 13 Gray 77.

Mississippi.— Jones *v.* Burford, 26 Miss. 194.

United States.— Tracey *v.* Irwin, 18 Wall. 549, 21 L. ed. 786; Schenck *v.* Peay, 21 Fed. Cas. No. 12,451, 1 Dill. 267.

See 45 Cent. Dig. tit. "Taxation," § 1267. And see *supra*, IX, A, 1, f.

Offer refused in advance.—Where the owner of land is ready and willing to pay the tax on it and offers to do so, but is told by the receiving officer that the payment will not be accepted, a sale thereafter made is void. Atwood *v.* Weems, 99 U. S. 183, 25 L. ed. 471.

Amount to be tendered.— The whole amount due as taxes must be tendered; nothing less will stop the sale. State *v.* Carson City Sav. Bank, 17 Nev. 146, 30 Pac. 703. And where the lands have been advertised for sale, a tender, to make it effectual to stop the sale, must be for the whole amount of the taxes with penalties and costs. Hunt *v.* McFadgen, 20 Ark. 277.

mistake or fault of the officer or in consequence of misleading information given by him.[47]

d. Estoppel to Deny Payment. The state is not estopped to enforce the collection of taxes by sale of the land by the fact that, when defendants purchased the land on which they were assessed, there was an erroneous entry on the list in the auditor's office to the effect that the taxes had been paid, nor by the fact that the auditor indorsed on their deed a statement that the taxes were paid.[48]

2. Exhaustion of Personalty — a. Necessity in General. A statute requiring the tax collector to exhaust the personal property of the owner, as a means of collecting the tax, before having recourse to his real estate, is mandatory, and a sale of the land, made without observing this direction, is invalid.[49] But in

47. *Iowa.*— Capital City Gas-Light Co. *v.* Charter Oak Ins. Co., 51 Iowa 31, 50 N. W. 579; Corning Town Co. *v.* Davis, 44 Iowa 622.

Kansas.— Moon *v.* March, 40 Kan. 58, 19 Pac. 334.

Mississippi.— Richter *v.* Beaumont, 67 Miss. 285, 7 So. 357.

Ohio.— Harrison *v.* Owen, 3 Ohio Dec. (Reprint) 55, 2 Wkly. L. Gaz. 315.

Pennsylvania.—Freeman *v.* Cornwell, (1888) 15 Atl. 873.

Washington.— Gleason *v.* Owens, 53 Wash. 483, 102 Pac. 425, 132 Am. St. Rep. 1087.

Wisconsin.— Edwards *v.* Upham, 93 Wis. 455, 67 N. W. 728; Bray, etc., Land Co. *v.* Newman, 92 Wis. 271, 65 N. W. 494.

United States.— Lewis *v.* Monson, 151 U. S. 545, 14 S. Ct. 424, 38 L. ed. 265.

See 45 Cent. Dig. tit. "Taxation," § 1267.

Compare Raley *v.* Guinn, 76 Mo. 263.

Excuses for non-payment of taxes; reliance on official statement or certificate see *supra*, IX, A, 1, g, (II).

48. State *v.* Foster, 104 Minn. 408, 116 N. W. 826; Olmsted County *v.* Barber, 31 Minn. 256, 17 N. W. 473, 944.

49. *Alabama.*— Stoudenmire *v.* Brown, 57 Ala. 481; Doe *v.* Minge, 56 Ala. 121; Scales *v.* Alvis, 12 Ala. 617, 46 Am. Dec. 269.

Indiana.— Michigan Mut. L. Ins. Co. *v.* Kroh, 102 Ind. 515, 2 N. E. 733; Helms *v.* Wagner, 102 Ind. 385, 1 N. E. 730; Volger *v.* Sidener, 86 Ind. 545; Barton *v.* McWhinney, 85 Ind. 481; Morrison *v.* Bank of Commerce, 81 Ind. 335; Sharpe *v.* Dillman, 77 Ind. 280; McWhinney *v.* Brinker, 64 Ind. 360; Abbott *v.* Edgerton, 53 Ind. 196; Ring *v.* Ewing, 47 Ind. 246; Bowen *v.* Donovan, 32 Ind. 379; Catterlin *v.* Douglass, 17 Ind. 213; Cones *v.* Wilson, 14 Ind. 465.

Kentucky.— Leszinsky *v.* Le Grand, 119 Ky. 313, 83 S. W. 1038, 26 Ky. L. Rep. 1235; Julian *v.* Stephens, 11 S. W. 6, 10 Ky. L. Rep. 862; Wheeler *v.* Bramel, 8 S. W. 199, 10 Ky. L. Rep. 301. But see as to effect of present statutes in this state Alexander *v.* Aud, 121 Ky. 105, 88 S. W. 1103, 28 Ky. L. Rep. 69.

Maryland.— Polk *v.* Rose, 25 Md. 153, 89 Am. Dec. 773; Baltimore *v.* Chase, 2 Gill & J. 276.

Nebraska.—Wilhelm *v.* Russell, 8 Nebr. 120; Richardson County *v.* Miles, 7 Nebr. 118; Johnson *v.* Hahn, 4 Nebr. 139.

New York.— Rathbun *v.* Acker, 18 Barb. 393.

Pennsylvania.—Simpson *v.* Meyers, 197 Pa. St. 522, 47 Atl. 868; Kean *v.* Kinnear, 171 Pa. St. 639, 33 Atl. 325; Smith *v.* McGrew, 4 Watts & S. 338; Cox *v.* Grant, 1 Yeates 164; Ulrich *v.* Matika, 30 Pa. Super. Ct. 110; Philadelphia Nat. Bank *v.* Pottstown Security Co., 14 Montg. Co. Rep. 106.

South Carolina.— Johnson *v.* Jones, 72 S. C. 270, 51 S. E. 805. But see Interstate Bldg., etc., Assoc. *v.* Waters, 50 S. C. 459, 27 S. E. 948; Wilson *v.* Cantrell, 40 S. C. 114, 18 S. E. 517.

Tennessee.— Michie *v.* Mullins, 5 Hayw. 90.

Wisconsin.—Allen *v.* Allen, 114 Wis. 615, 91 N. W. 218.

United States.— Hellrigle *v.* Ould, 11 Fed. Cas. No. 6,344, 4 Cranch C. C. 72; Rodbird *v.* Rodbird, 20 Fed. Cas. No. 11,988, 5 Cranch C. C. 125. But see Thompson *v.* Carroll, 22 How. 422, 16 L. ed. 387.

Canada.— Boland *v.* Toronto, 32 Ont. 358; Dobbie *v.* Tully, 10 U. C. C. P. 432; Hamilton *v.* McDonald, 22 U. C. Q. B. 136; Foley *v.* Moodie, 16 U. C. Q. B. 254; Stafford *v.* Williams, 4 U. C. Q. B. 488. But see Stewart *v.* Taggart, 22 U. C. C. P. 284.

See 45 Cent. Dig. tit. "Taxation," § 1268.

Where a tax deed fails to show that the personal property of the delinquent had been exhausted before the sale of his real estate, or that he had no such property, such deed, unless accompanied by proper evidence of that fact, is not admissible as evidence of title. Smith *v.* Kyler, 74 Ind. 575; Ward *v.* Montgomery, 57 Ind. 276.

Sale voidable but not void.— Some of the cases hold that where land is sold without first exhausting the personalty, although the sale is ineffectual to convey title, yet it will transfer to the purchaser the lien of the state and therefore is not absolutely void. St. Clair *v.* McClure, 111 Ind. 467, 12 N. E. 134; State *v.* Casteel, 110 Ind. 174, 11 N. E. 219.

Tax and penalties not released.— The failure of the collector to make the taxes out of available personal property will not save the delinquent owner from the penalty or release him from the tax. Foresman *v.* Chase, 68 Ind. 500.

Who may complain.—Only the taxpayer himself can complain of a sale of his real estate made without first having recourse

several of the states, no such statute being in force, it is held that a tax-sale of land may be made for the taxes due on it, without reference to the question whether or not there is personalty which could have been seized and sold.[50]

b. Collector's Search For Personalty and Return. Whether the statute merely requires the tax collector to make a demand for personal property, or requires him to make a "reasonable" or "diligent" search for such property, he must obey its directions, and if he fails to do so a subsequent sale of the land is not valid.[51] Also the collector is generally required to make a return, certificate, or affidavit of his doings in this regard and of his failure to find personal property, and this likewise is essential to the validity of a sale of the land.[52] The return or certificate should be in the form, if any, prescribed by statute, or otherwise should show all that is essential to the right to have recourse to the land.[53]

to his personal property contrary to the statute. Frost *v.* Flick, 1 Dak. 131, 46 N. W. 508.

50. *Arkansas.*— Kinsworthy *v.* Mitchell, 21 Ark. 145.

Georgia.— Plant *v.* Eichberg, 65 Ga. 64; Smith *v.* Jones, 40 Ga. 39.

Maryland.— Dyer *v.* Boswell, 39 Md. 465.

Montana.—Ward *v.* Gallatin County, 12 Mont. 23, 29 Pac. 658.

Nebraska.— Lancaster County *v.* Rush, 35 Nebr. 119, 52 N. W. 837; Kittle *v.* Shervin, 11 Nebr. 65, 7 N. W. 861.

New Jersey.— State *v.* Newark, 42 N. J. L. 38; Martin *v.* Carron, 26 N. J. L. 228.

North Carolina.— Stanley *v.* Baird, 118 N. C. 75, 24 S. E. 12.

Texas.— Nalle *v.* Austin, (Civ. App. 1897) 42 S. W. 780.

United States.—West *v.* Duncan, 42 Fed. 430. See Stead *v.* Course, 4 Cranch 403, 2 L. ed. 660.

See 45 Cent. Dig. tit. "Taxation," § 1268.

51. *Alabama.*— Stoudenmire *v.* Brown, 57 Ala. 481.

Illinois.— Mt. Carmel Light, etc., Co. *v.* People, 166 Ill. 199, 46 N. E. 722.

Indiana.— McWhinney *v.* Brinker, 64 Ind. 360; Richcreek *v.* Russell, 34 Ind. App. 217, 72 N. E. 617.

Kentucky.—Allen *v.* Perrine, 103 Ky. 516, 45 S. W. 500, 20 Ky. L. Rep. 202, 41 L. R. A. 351; Julian *v.* Stephens, 11 S. W. 6, 10 Ky. L. Rep. 862; Wheeler *v.* Bramel, 8 S. W. 199, 10 Ky. L. Rep. 301.

Pennsylvania.— Davis *v.* Beers, 204 Pa. St. 288, 54 Atl. 35; Ulrich *v.* Matika, 30 Pa. Super. Ct. 110; Philadelphia Nat. Bank *v.* Pottstown Security Co., 14 Montg. Co. Rep. 106.

See 45 Cent. Dig. tit. "Taxation," § 1269.

Compare Ives *v.* Lynn, 7 Conn. 505; Allan *v.* Fisher, 13 U. C. C. P. 63; Fraser *v.* Mattice, 19 U. C. Q. B. 150.

Extent of search required.—A collector of taxes on coal mining land is not bound to take cognizance of personal property which he cannot find or see by going on the surface of the land, or that contained in the mine, before proceeding against the land. Winton Coal Co. *v.* Lackawanna County, 1 Lack. Leg. N. (Pa.) 195.

52. *Alabama.*— Scales *v.* Alvis, 12 Ala. 617, 46 Am. Dec. 269.

Arkansas.— Jones *v.* McLain, 23 Ark. 429.

Illinois.— Shelbyville Water Co. *v.* People, 140 Ill. 545, 30 N. E. 678, 16 L. R. A. 505; Schaeffer *v.* People, 60 Ill. 179.

Kentucky.— Leszinsky *v.* Le Grand, 119 Ky. 313, 83 S. W. 1038, 26 Ky. L. Rep. 1235.

Maryland.— Polk *v.* Rose, 25 Md. 153, 89 Am. Dec. 773.

Massachusetts.— Harrington *v.* Worcester, 6 Allen 576.

Minnesota.— St. Anthony Falls Water Power Co. *v.* Greely, 11 Minn. 321.

Mississippi.— Huntington *v.* Brantley, 33 Miss. 451.

South Carolina.— Curtis *v.* Renneker, 34 S. C. 468, 13 S. E. 664; Ebaugh *v.* Mullinax, 34 S. C. 364, 13 S. E. 613.

Texas.— Belden *v.* State, 46 Tex. 103.

United States.— Thatcher *v.* Powell, 6 Wheat. 119, 5 L. ed. 221.

See 45 Cent. Dig. tit. "Taxation," §§ 1268, 1269.

Contra.— Watson *v.* Swann, 83 Ga. 198, 9 S. E. 612; Danforth *v.* McCook County, 11 S. D. 258, 76 N. W. 940, 74 Am. St. Rep. 808; Iowa Land Co. *v.* Douglas County, 8 S. D. 491, 67 N. W. 52.

Practice in Alabama; affidavit of collector. — In this state the tax collector is required by statute to make, subscribe, and enter in the book containing the list of delinquents, an affidavit that he has been unable to find a sufficiency of personal property from which to collect the taxes; and it is held that this is a jurisdictional fact, which must affirmatively appear, and without which the court has no authority to make an order of condemnation and sale, and where sale is made without such affidavit, the purchaser takes no title. Cary *v.* Holmes, 109 Ala. 217, 19 So. 723; Feagin *v.* Jones, 94 Ala. 597, 10 So. 537; Riddle *v.* Messer, 84 Ala. 236, 4 So. 185; Simms *v.* Greer, 83 Ala. 263, 3 So. 423; Fleming *v.* McGee, 81 Ala. 409, 1 So. 106; Wartensleben *v.* Haithcock, 80 Ala. 565, 1 So. 68.

53. *Arkansas.*— Jones *v.* McLain, 23 Ark. 429.

Illinois.— Halsey *v.* People, 84 Ill. 89; Andrews *v.* People, 75 Ill. 605; Job *v.* Tebetts, 10 Ill. 376; Taylor *v.* People, 7 Ill. 349.

Michigan.—Dickison *v.* Reynolds, 48 Mich. 158, 12 N. W. 24.

Nebraska.— Johnson *v.* Hahn, 4 Nebr. 139.

It is generally held that the return or certificate is at least *prima facie* evidence of the facts which it recites.[54]

C. Taxes For Which Land May Be Sold — 1. Liability of Land in General. The decisions generally recognize the following fundamental rules: That a tax-sale is invalid for every purpose unless the property was at the time liable for all the taxes for which it was sold;[55] that where land is sold to pay the taxes due upon it, together with the taxes due upon other lands, whether belonging to the same or a different owner, the sale is void;[56] and that each parcel of a person's land, separately assessed, is only liable to sale for its own specific tax.[57]

2. Validity of Tax and of Levy and Assessment. It is essential to the validity of a tax-sale of land that the tax for which it is sold shall be a lawful and enforceable demand;[58] that it shall have been duly levied according to law and by the properly constituted authority;[59] and that it shall have been assessed upon the

New York.— Thompson *v.* Buhans, 61 N. Y. 52.

Ohio.— Stambaugh *v.* Carlin, 35 Ohio St. 209.

Texas.— Belden *v.* State, 46 Tex. 103.

Wisconsin.— Scheiber *v.* Kaehler, 49 Wis. 291, 5 N. W. 817.

Verification.—Where the law requires the return to be verified, and the verification is omitted altogether or is legally defective, the return is void. Hogleskamp *v.* Weeks, 37 Mich. 422; Harmon *v.* Stockwell, 9 Ohio 93; Miner *v.* McLean, 17 Fed. Cas. No. 9,630, 4 McLean 138.

54. *Alabama.*— Scales *v.* Alvis, 12 Ala. 617, 46 Am. Dec. 269.

Arkansas.— Davis *v.* Hare, 32 Ark. 386.

Illinois.— Burbank *v.* People, 90 Ill. 554; Pike *v.* People, 84 Ill. 80; Mix *v.* People, 81 Ill. 118; Chiniquy *v.* People, 78 Ill. 570; Andrews *v.* People, 75 Ill. 605. And see Cairo, etc., R. Co. *v.* Mathews, 152 Ill. 153, 38 N. E. 623.

Indiana.— Bowen *v.* Donovan, 32 Ind. 379. See Earle *v.* Simons, 94 Ind. 573; Ellis *v.* Kenyon, 25 Ind. 134.

Mississippi.— Virden *v.* Bowers, 55 Miss. 1; Bell *v.* Coats, 54 Miss. 538.

New York.— Jackson *v.* Shepard, 7 Cow. 88, 17 Am. Dec. 502.

Pennsylvania.— Stark *v.* Shupp, 112 Pa. St. 395, 3 Atl. 864.

Wisconsin.— Allen *v.* Allen, 114 Wis. 615, 91 N. W. 218.

55. *Arkansas.*— Scott *v.* Watkins, 22 Ark. 556.

California.— Bucknall *v.* Story, 36 Cal. 67.

Indiana.—McQuilkin *v.* Stoddard, 8 Blackf. 581.

Iowa.— Gaylord *v.* Scarff, 6 Iowa 179; Bleidorn *v.* Abel, 6 Iowa 5.

Mississippi.— Prophet *v.* Lundy, 63 Miss. 603; French *v.* McAndrew, 61 Miss. 187.

Rhode Island.— Quimby *v.* Wood, 19 R. I. 571, 35 Atl. 149.

South Carolina.— Smith *v.* Cox, 83 S. C. 1, 65 S. E. 222.

West Virginia.— Whitham *v.* Sayers, 9 W. Va. 671.

See 45 Cent. Dig. tit. "Taxation," § 1273.

County as owner.— A tax deed based on a sale for taxes which the county was bound to pay as owner of the land will not prevail against the title of one purchasing from the county. Gibson *v.* Howe, 37 Iowa 168.

Bounty taxes.— Right and power to sell land for non-payment of taxes assessed to pay bounties see Jones *v.* Chamberlain, 109 N. Y. 100, 16 N. E. 72.

56. *California.*— Knox *v.* Higby, 76 Cal. 264, 18 Pac. 381.

Colorado.— Cramer *v.* Armstrong, 28 Colo. 496, 66 Pac. 889.

Florida.— Brown *v.* Snell, 6 Fla. 741.

Illinois.— Kepley *v.* Jansen, 107 Ill. 79.

Maine.— Barker *v.* Blake, 36 Me. 433.

Michigan.— Wyman *v.* Baer, 46 Mich. 418, 9 N. W. 455.

New York.—Turner *v.* Boyce, 11 Misc. 502, 33 N. Y. Suppl. 433.

Tennessee.— Morristown *v.* King, 11 Lea 669.

See 45 Cent. Dig. tit. "Taxation," § 1273.

57. Barkley *v.* Hand, 41 N. J. L. 517. But *compare* Brymer *v.* Taylor, 5 Tex. Civ. App. 103, 23 S. W. 635. And see Powers *v.* Barr, 24 Barb. (N. Y.) 142.

58. Gage *v.* Goudy, 141 Ill. 215, 30 N. E. 320; Eastland *v.* Yazoo Delta Lumber Co., 90 Miss. 330, 43 So. 956 (tax levied under unconstitutional statute); Day *v.* Smith, 87 Miss. 395, 39 So. 526; Bookout *v.* Andrews, (Miss. 1899) 25 So. 865 (tax levied in aid of rebellion); Cotter *v.* Sutherland, 18 U. C. C. P. 357; Cameron *v.* Lee, 27 Quebec Super. Ct. 535. And see Smith *v.* Cox, 83 S. C. 1, 65 S. E. 222.

59. *California.*— Norris *v.* Russell, 5 Cal. 249.

Illinois.— People *v.* Welsh, 225 Ill. 364, 80 N. E. 313; Leitch *v.* People, 183 Ill. 569, 56 N. E. 127.

Iowa.— Smithberg *v.* Archer, 108 Iowa 215, 78 N. W. 847.

Massachusetts.— Westhampton *v.* Searle, 127 Mass. 502.

Michigan.— Auditor-Gen. *v.* Griffin, 140 Mich. 427, 103 N. W. 854.

New Hampshire.— Wells *v.* Burbank, 17 N. H. 393.

New York.— Calkins *v.* Chamberlain, 15 N. Y. St. 576.

Texas.— Greer *v.* Howell, 64 Tex. 688.

Canada.— Williams *v.* Taylor, 13 U. C. C. P. 219; McGill *v.* Langton, 9 U. C. Q. B. 91.

See 45 Cent. Dig. tit. "Taxation," § 1274.

property in such a manner and with such observance of the forms prescribed by law as to make it a lawful charge, due regard being had to all the directions intended for the security and protection of the owner,[60] although the sale may not be invalidated by errors or irregularities in the assessment or other proceedings which do not affect the substantial justice of the tax or the owner's liability to pay it.[61]

3. Partial Illegality of Tax — a. In General. If any portion of the tax, or aggregate of taxes, for which land is sold is unauthorized or illegal, the sale, in the absence of a statutory provision, is entirely void,[62] unless possibly in cases

Levy partly illegal.— In Rogers *v.* White, 68 Mich. 10, 35 N. W. 799, it is said that when any part of a levy does not appear to have been duly authorized, a sale of land for its proportionate share of such levy is invalid. But see *per contra*, Madson *v.* Sexton, 37 Iowa 562.

60. *Arkansas.*— Carraway *v.* Moore, 75 Ark. 146, 86 S. W. 993.

Louisiana.— Bartley *v.* Sallier, 118 La. 93, 42 So. 657; Augusti *v.* Lawless, 43 La. Ann. 1097, 10 So. 171; Woolfolk *v.* Fonbene, 15 La. Ann. 15.

Maine.— Freeman *v.* Thayer, 33 Me. 76.

Michigan.— Norris *v.* Hall, 124 Mich. 170, 82 N. W. 832.

Mississippi.— Mullins *v.* Shaw, 77 Miss. 900, 27 So. 602, 28 So. 958; Brothers *v.* Beck, 75 Miss. 482, 22 So. 944.

New Hampshire.— Perley *v.* Dolloff, 60 N. H. 504.

New Jersey.— Hopper *v.* Malleson, 16 N. J. Eq. 382.

New York.— Whitney *v.* Thomas, 23 N. Y. 281; People *v.* Lewis, 127 N. Y. App. Div. 107, 111 N. Y. Suppl. 398.

North Dakota.— Sweigle *v.* Gates, 9 N. D. 538, 84 N. W. 481.

Ohio.— Clark *v.* Southard, 2 Ohio Dec. (Reprint) 612, 4 West L. Month. 197.

Pennsylvania.— Albright *v.* Byers-Allen Lumber Co., 204 Pa. St. 71, 53 Atl. 648; Trexler *v.* Africa, 27 Pa. Super. Ct. 385; McClements *v.* Downey, 2 Pa. Super. Ct. 443; Rooney *v.* Perry, 20 Pa. Co. Ct. 645.

Tennessee.— Anderson *v.* Post, (Ch. App. 1896) 38 S. W. 283.

West Virginia.— State *v.* Tavenner, 49 W. Va. 696, 39 S. E. 649; Boggess *v.* Scott, 48 W. Va. 316, 37 S. E. 661.

Canada.— McKay *v.* Crysler, 3 Can. Sup. Ct. 436; Wildman *v.* Tait, 2 Ont. L. Rep. 307; Hall *v.* Farquharson, 15 Ont. App. 457; Fleming *v.* McNabb, 8 Ont. App. 656; Wildman *v.* Tait, 32 Ont. 274; Nelles *v.* White, 29 Grant. Ch. (U. C.) 338; Yokham *v.* Hall, 15 Grant Ch. (U. C.) 335; Lount *v.* Walkington, 15 Grant Ch. (U. C.) 332; Christie *v.* Johnston, 12 Grant Ch. (U. C.) 534; Black *v.* Harrington, 12 Grant Ch. (U. C.) 175; Ley *v.* Wright, 27 U. C. C. P. 522; Thompson *v.* Colcock, 23 U. C. C. P. 505; Townsend *v.* Elliot, 12 U. C. C. P. 217; Cameron *v.* Lee, 27 Quebec Super. Ct. 535.

See 45 Cent. Dig. tit. "Taxation," § 1274.

Assessment to unknown owner.— A tax-sale of land assessed to an unknown owner is not invalidated by the fact that the purchaser knew who the owner was. Lassitter *v.* Lee, 68 Ala. 287; Lime Rock Nat. Bank *v.* Henry, 69 N. H. 298, 46 Atl. 29; Shipley *v.* Gaffner, 48 Wash. 169, 93 Pac. 211. But a tax-sale of property of an unknown owner, without any notice being given to such owner in any of the modes pointed out by law, is absolutely void. Wellman *v.* Willis, 52 La. Ann. 1445, 27 So. 732. See *infra*, XI, F, 3. Proceedings for tax foreclosure are *in rem*, and not against the person of the owner; hence owners are bound to take notice of the property they own, pay taxes thereon, and defend against foreclosure for delinquent taxes, even though the property is assessed to unknown owners, or to other persons. Shipley *v.* Gaffner, *supra*.

Assessment to mortgagor.— Where real estate is lawfully assessed to the mortgagor alone, a sale for delinquent taxes is valid as against the mortgagee. Abbott *v.* Frost, 185 Mass. 398, 70 N. E. 478.

61. Sully *v.* Kuehl, 30 Iowa 275; Turner *v.* Hutchinson, 113 Mich. 245, 71 N. W. 514; Perley *v.* Dolloff, 60 N. H. 504; McDonell *v.* McDonald, 24 U. C. Q. B. 74. And see Gamble *v.* Central Pennsylvania Lumber Co., 225 Pa. St. 288, 74 Atl. 69.

62. *California.*— Wills *v.* Austin, 53 Cal 152; Hardenburgh *v.* Kidd, 10 Cal. 402.

Florida.— Graham *v.* Florida Land, etc, Co., 33 Fla. 356, 14 So. 796.

Illinois.— Riverside Co. *v.* Howell, 113 Ill. 256; McLaughlin *v.* Thompson, 55 Ill. 249; Campbell *v.* State, 41 Ill. 454.

Indiana.— Noble *v.* Indianapolis, 16 Ind. 506; Doe *v.* McQuilkin, 8 Blackf. 335.

Kentucky.— Fish *v.* Genett, 56 S. W. 813, 22 Ky. L. Rep. 177.

Louisiana.— Rougelot *v.* Quick, 34 La. Ann. 123.

Maine.— Elwell *v.* Shaw, 1 Me. 339.

Massachusetts.—White *v.* Gove, 183 Mass. 333, 67 N. E. 359; Alvord *v.* Collin, 20 Pick. 418; Torrey *v.* Millbury, 21 Pick. 64; Hayden *v.* Foster, 13 Pick. 492; Libby *v.* Burnham, 15 Mass. 144; Stetson *v.* Kempton, 13 Mass. 272, 7 Am. Dec. 145; Dillingham *v.* Snow, 5 Mass. 547; Thurston *v.* Littel, 3 Mass. 429; Bangs *v.* Snow, 1 Mass. 188.

Michigan.— Wagar *v.* Bowley, 104 Mich. 38, 62 N. W. 293; Tillotson *v.* Webber, 96 Mich. 144, 55 N. W. 837; Burroughs *v.* Goff, 64 Mich. 464, 31 N. W. 273; Silsbee *v.* Stockle, 44 Mich. 561, 7 N. W. 160, 367; Hammontree *v.* Lott, 40 Mich. 190; Lacey *v.* Davis, 4 Mich. 140, 66 Am. Dec. 524.

Minnesota.— St. Anthony Falls Water Power Co. *v.* Greely, 11 Minn. 321.

Mississippi.— Peterson *v.* Kittridge, 65

where the legal portion of the tax can be clearly and definitely separated from the rest.[63]

b. Statutes Validating Sales For Taxes Partly Illegal. In several of the states laws have been enacted providing that a sale of land for illegal or erroneous taxes shall nevertheless be effectual to pass the title if any portion of the taxes for which the land was sold was legal. The validity of these statutes is sustained, and their effect is that a tax-sale and deed, if otherwise regular, will not be rendered invalid by an error or illegality in the tax, if any part of the taxes for which the land was sold constituted a legal and valid charge upon it.[64]

4. Sale For All Taxes Due. Where the statute provides that sales of land for delinquent taxes shall be made for the total amount of the taxes due, including those in arrear for previous years or those assessed under different authorities or for different purposes, a sale for only a portion of the taxes due will not pass title to the purchaser, although he may be entitled to a lien for the taxes paid.[65]

Miss. 33, 3 So. 65, 5 So. 824; Gamble *v.* Witty, 55 Miss. 26; Shattuck *v.* Daniel, 52 Miss. 834; Beard *v.* Green, 51 Miss. 856; Dogan *v.* Griffin, 51 Miss. 782.

Nebraska.— McCann *v.* Merriam, 11 Nebr. 241, 9 N. W. 96. But see the cases cited *infra*, this note.

New Hampshire.— Buttrick *v.* Nashua Iron, etc., Co., 59 N. H. 392.

New York.— People *v.* Wemple, 117 N. Y. 77, 22 N. E. 761; People *v.* Hagadorn, 104 N. Y. 516, 10 N. E. 891; People *v.* Hagadorn, 36 Hun 610 [*affirmed* in 104 N. Y. 516, 10 N. E. 891]. But see New York Protestant Episcopal Public School *v.* Davis, 31 N. Y. 574.

Ohio.— Younglove *v.* Hackman, 43 Ohio St. 69, 1 N. E. 230; Kemper *v.* McClelland, 19 Ohio 308.

Rhode Island.— Young *v.* Joslin, 13 R. I. 675.

Vermont.— Drew *v.* Davis, 10 Vt. 506, 33 Am. Dec. 213.

United States.— Gage *v.* Pumpelly, 115 U. S. 454, 6 S. Ct. 136, 29 L. ed. 449; Hodgdon *v.* Burleigh, 4 Fed. 111; Gresham *v.* Montgomery, 10 Fed. Cas. No. 5,805, 2 Ky. L. Rep. 397.

Canada.—Ridout *v.* Ketchum, 5 U. C. C. P. 50.

See 45 Cent. Dig. tit. "Taxation," § 1277.

Contra.— Bird *v.* Sellers, 113 Mo. 580, 21 S. W. 91; Carman *v.* Harris, 61 Nebr. 635, 85 N. W. 848; Hall *v.* Moore, 3 Nebr. (Unoff.) 574, 92 N. W. 294; Trexler *v.* Africa, 27 Pa. Super. Ct. 385; Cornelius *v.* Dunn, 17 Pa. Co. Ct. 566.

Amount of illegal tax immaterial.— It is immaterial how small may be the illegal element or portion which enters into the aggregate amount of taxes for which the land is sold. Drake *v.* Ogden, 128 Ill. 603, 21 N. E. 511; McLaughlin *v.* Thompson, 55 Ill. 249.

63. Holcomb *v.* Johnson, 43 Wash. 362, 86 Pac. 409.

64. See the statutes of the different states. And see Parker *v.* Cochran, 64 Iowa 757, 21 N. W. 13; Corning Town Co. *v.* Davis, 44 Iowa 622; Genther *v.* Fuller, 36 Iowa 604; Rhodes *v.* Sexton, 33 Iowa 540; Hurley *v.* Powell, 31 Iowa 64; Sully *v.* Kuehl, 30 Iowa 275; Parker *v.* Sexton, 29 Iowa 421; Eldridge *v.* Kuehl, 27 Iowa 160; Southworth *v.* Edmands, 152 Mass. 203, 25 N. E. 106, 9 L. R. A. 118; Hunt *v.* Chapin, 42 Mich. 24, 3 N. W. 873; Upton *v.* Kennedy, 36 Mich. 215.

But a statute providing as to sales of land for taxes that "the courts shall apply the same liberal principles in favor of such titles as in sales by execution" is intended to prevent the mere irregularities which do not avoid execution sales from being held to avoid sales for taxes, and not to cure illegality in the levy or assessment, and does not change the rule that a sale of land for taxes a part of which are levied or assessed illegally is void. Gamble *v.* Witty, 55 Miss. 26.

65. *Iowa.*— Parker *v.* Cochran, 64 Iowa 757, 21 N. W. 13; Crowell *v.* Merrill, 60 Iowa 53, 14 N. W. 81.

Louisiana.— Waddill *v.* Walton, 42 La. Ann. 763, 7 So. 737; Renshaw *v.* Imboden, 31 La. Ann. 661.

Michigan.— Rumsey *v.* Griffin, 138 Mich. 413, 101 N. W. 571; Bending *v.* Auditor-General, 137 Mich. 500, 100 N. W. 777.

Nebraska.— Grant *v.* Bartholomew, 57 Nebr. 673, 78 N. W. 314; McGavock *v.* Pollack, 13 Nebr. 535, 14 N. W. 659; O'Donohue *v.* Hendrix, 13 Nebr. 257, 13 N. W. 281; Tillotson *v.* Small, 13 Nebr. 202, 13 N. W. 201.

North Dakota.— Scott, etc., Mercantile Co. *v.* Nelson County, 14 N. D. 407, 104 N. W. 528.

United States.— Coleman *v.* Peshtigo Lumber Co., 30 Fed. 317.

Statute held directory.— Some of the decisions hold that a statutory provision such as that mentioned in the text is only directory, and not mandatory, and that a failure to obey it is a mere irregularity which does not vitiate the sale. Kessey *v.* Connell, 68 Iowa 430, 27 N. W. 365; Allen *v.* Ramsey County, 98 Minn. 341, 108 N. W. 301.

What taxes included see Crowell *v.* Merrill, 60 Iowa 53, 14 N. W. 81, holding that the statutory provision refers only to state and county taxes, and that a separate sale for delinquent taxes voted in aid of a railroad is properly had.

Under a provision of this kind land should not be sold successively for the taxes of different years, but only once for the whole amount.[66]

5. Penalties, Costs, and Fees. It is proper to include in the charges for which the land is sold interest on the taxes, if allowed by law, penalties imposed by statute for default in payment, and the costs and fees of the collector and other officers concerned with the sale.[67] But if any item thus included is unwarranted by law, or is in excess of the legal limit, it will vitiate the sale.[68]

6. Personal Taxes. Where by law the taxes assessed on personal property become a lien on the owner's realty,[69] the lien may be enforced by sale of the land for the delinquent personal taxes,[70] after complying with any conditions prescribed by the statute.[71] But in some states land cannot be sold to satisfy the taxes on personal property.[72]

D. Real Property Subject to Sale — 1. In General. As a general rule only the land which is specifically charged with a tax can be sold for its non-payment,[73] and only such land as falls within one or another of the classes described

Taxes due only in part.— Where an officer sells land for the taxes of two years, when he had a right to collect only those due for the last year, the sale is void. Douglass *v.* Short, 14 N. C. 432.

Effect of trifling deficiency.— Where a tax-sale is made for one cent less than the taxes, penalties, and costs allowed by law, the defect is not sufficient to defeat the sale, if otherwise regular. Ireland *v.* George, 41 Kan. 751, 21 Pac. 776.

66. Worthen *v.* Badgett, 32 Ark. 496; Wilson *v.* Boyd, 84 Ga. 34, 10 S. E. 499; Shoemaker *v.* Lacy, 45 Iowa 422; Preston *v.* Van Gorder, 31 Iowa 250. But see Keen *v.* Sheehan, 154 Mass. 208, 28 N. E. 150.

67. *Arkansas.*— Sibley *v.* Cason, 86 Ark. 32, 109 S. W. 1007; Brasch *v.* Western Tie, etc., Co., 80 Ark. 425, 97 S. W. 445.

California.— Harper *v.* Rowe, 55 Cal. 132.

Kansas.— Kregelo *v.* Flint, 25 Kan. 695.

Massachusetts.— Howard *v.* Proctor, 7 Gray 128.

Michigan.— Fuller *v.* Grand Rapids, 40 Mich. 395.

Nebraska.— Barker *v.* Hume, 84 Nebr. 235, 120 N. W. 1131; Adams *v.* Osgood, 42 Nebr. 450, 60 N. W. 869.

Tennessee.— Nance *v.* Hopkins, 10 Lea 508.

United States.— Flynn *v.* Edwards, 36 Fed. 873.

See 45 Cent. Dig. tit. "Taxation," § 1276.

68. *Arkansas.*— Goodrum *v.* Ayers, 56 Ark. 93, 19 S. W. 97.

California.— Hewes *v.* McLellan, 80 Cal. 393, 22 Pac. 287.

Illinois.— Gage *v.* Williams, 119 Ill. 563, 9 N. E. 193.

Kansas.— Jackson *v.* Challiss, 41 Kan. 247, 21 Pac. 87; Blanchard *v.* Hatcher, 40 Kan. 350, 20 Pac. 15; Fox *v.* Cross, 39 Kan. 350, 18 Pac. 300; Harris *v.* Curran, 32 Kan. 580, 4 Pac. 1044; Hapgood *v.* Morten, 28 Kan. 764; Genthner *v.* Lewis, 24 Kan. 309.

Texas.— Lufkin *v.* Galveston, 73 Tex. 340, 11 S. W. 340.

Wisconsin.— Cole *v.* Van Ostrand, 131 Wis. 454, 110 N. W. 884; Milledge *v.* Coleman, 47 Wis. 184, 2 N. W. 77; Barden *v.* Columbia County, 33 Wis. 445, 14 Am. Rep. 762.

69. See *supra*, VIII, B, 4.

70. Cramer *v.* Armstrong, 28 Colo. 496, 66 Pac. 889; Larimer County *v.* National State Bank, 11 Colo. 564, 19 Pac. 537; Com. *v.* Walker, 80 S. W. 185, 25 Ky. L. Rep. 2122; Wilson *v.* Cantrell, 40 S. C. 114, 18 S. E. 517; Iowa Land Co. *v.* Douglas County, 8 S. D. 491, 67 N. W. 52.

71. Matzenbaugh *v.* People, 194 Ill. 108, 62 N. E. 546, 88 Am. St. Rep. 134; King *v.* People, 193 Ill. 530, 61 N. E. 1035; Cairo, etc., R. Co. *v.* Mathews, 152 Ill. 153, 38 N. E. 623; Larson *v.* Hamilton County, 123 Iowa 485, 99 N. W. 133; Dows *v.* Dale, 74 Iowa 108, 37 N. W. 1.

72. Union School Dist. *v.* Bishop, 76 Conn. 695, 58 Atl. 13, 66 L. R. A. 989; Kirkwood *v.* Magill, 6 Kan. 540; Wilcox *v.* Rochester, 54 Hun (N. Y.) 72, 7 N. Y. Suppl. 187 [*affirmed* in 129 N. Y. 247, 29 N. E. 99].

73. Toy *v.* McHugh, 62 Nebr. 820, 87 N. W. 1059. And see Fishel *v.* Stark, 49 La. Ann. 855, 21 So. 595.

Mortgaged property.— A mortgage is not an alienation of the property within the meaning of a statute providing that no land aliened shall be sold for taxes if the owner has other property from which the taxes may be collected. People's Sav. Bank *v.* Tripp, 13 R. I. 621.

Order of liability.— Right of purchaser of part of property at tax-sale to compel the sale of the remainder for taxes delinquent for previous years before resort to his portion see Thorington *v.* Montgomery, 82 Ala. 591, 2 So. 513.

Land previously sold on execution.— It is not a fraud for a sheriff to sell for taxes, on due levy and return to him by a constable, the same land which he had previously sold under a general execution against the same defendant. Wilson *v.* Boyd, 84 Ga. 34, 10 S. E. 499.

Tenant's interest in crops.— Where, by an agreement in the form of a lease between the owner of land and another, the owner lets certain fields for the term of a year which the other agrees to plant in a specified manner and to pay or deliver to the lessor a certain portion of each crop, the tenant's interest in the undivided crop may be seized

by the statute as liable to sale for taxes.[74] A tax collector has no power to sell land beyond the limits of his own county;[75] nor can he make a valid sale of any land which is exempt by law or otherwise not liable to taxation,[76] or land belonging to the state or held by a municipality in its governmental capacity,[77] or such as has been forfeited to the state for previous taxes or bid in for the state at tax-sale,[78] or, as a rule, property which is under the jurisdiction and control of a court of equity through a receiver or otherwise.[79] A homestead estate is ordinarily

and sold for a tax against him. Dinehart *v.* Wilson, 15 Barb. (N. Y.) 595.

Confiscated property — Heirs.— Under La. Const. (1879) art. 57; Const. (1898) art. 59, releasing heirs of confiscated property from all taxes due thereon, etc., and Acts (1882), No. 67, p. 86; (1886), No. 10, p. 20, remitting unpaid taxes on property while held as confiscated, etc. see *In re* Quaker Realty Co., 122 La. 229, 47 So. 536.

74. Dingey *v.* Paxton, 60 Miss. 1038.

"Real estate" — Ice-house on leased land. — Under N. H. Pub. St. (1901) c. 61, § 21, providing that any separate interest in land and buildings standing on the land shall be taken to be real estate, an ice-house erected on leased land is taxable as "real estate" within chapter 60, section 13, providing for the foreclosure of the tax lien on real estate by sale. O'Donnell *v.* Meredith, 75 N. H. 272, 73 Atl. 32.

Right of oil lessee to extract oil is a claim to the possession of land within Cal. Pol. Code, § 3820, and may be seized and sold for taxes, where no personal property can be found, under section 3821. Graciosa Oil Co. *v.* Santa Barbara County, 155 Cal. 140, 99 Pac. 483, 20 L. R. A. N. S. 211.

Lands of railways see Smith *v.* Midland R. Co., 4 Ont. 494.

75. Morrison *v.* Casey, 82 Miss. 522, 34 So. 145; Barger *v.* Jackson, 9 Ohio 163; Williams *v.* Harris, 4 Sneed (Tenn.) 332; Conrad *v.* Darden, 4 Yerg. (Tenn.) 307.

76. Maxwell *v.* People, 189 Ill. 591, 59 N. E. 1105; Gee *v.* Clark, 42 La. Ann. 918, 8 So. 627 (overflowed lands); Howell *v.* Miller, 88 Miss. 655, 42 So. 129 (swamp and overflowed lands); Lewis *v.* Vicksburg, etc., R. Co., 67 Miss. 82, 6 So. 773; Jennings *v.* McDowell, 25 Pa. St. 387 (donation land); Superior First Nat. Bank *v.* Douglas County, 124 Wis. 15, 102 N. W. 315.

77. *Iowa.*— Oakland Independent School Dist. *v.* Hewitt, 105 Iowa 663, 75 N. W. 497, school site.

Kentucky.— Owensboro Waterworks Co. *v.* Owensboro, 74 S. W. 685, 24 Ky. L. Rep. 2530, property of waterworks company.

Louisiana.— Richard *v.* Perrodin, 116 La. 440, 40 So. 789.

Minnesota.— Smith *v.* St. Paul, 72 Minn. 472, 75 N. W. 708, land laid out as a public street.

Mississippi.— Wilkinson *v.* Jenkins, (1903) 33 So. 838.

Wisconsin.— Reynolds *v.* Weiss, 27 Wis. 450, land mortgaged to the state.

Canada.— When land described for patent becomes subject to sale for taxes see Ryckman *v.* Van Voltenburg, 6 U. C. C. P. 385; Charles *v.* Dulmage, 14 U. C. Q. B. 585.

See 45 Cent. Dig. tit. "Taxation," § 1286.

78. Crawford *v.* McLaurin, 83 Miss. 265, 35 So. 209, 949; Patton *v.* Cass County, 13 N. D. 351, 102 N. W. 174; State *v.* Harman, 57 W. Va. 447, 50 S. E. 828; State *v.* McEldowney, 54 W. Va. 695, 47 S. E. 650. Mich. Gen. Tax Law (1893), § 61 (Act No. 206, p. 381, Pub. Acts (1893), providing that lands "hereafter" bid off in the name of the state and thus held shall not be included in a petition for sale for taxes, had no application to a petition made in 1894 by the auditor-general for a sale on account of the tax of 1892, where, when such petition was made, the land had not then been "hereafter" bid off in the name of the state. Owens *v.* Auditor-Gen., 147 Mich. 683, 111 N. W. 354.

Waiver of forfeiture.— Where property has been forfeited or adjudicated to the state for the non-payment of taxes, but the state continues to assess the same property to the owner and to collect taxes thereon for a number of years, equity will treat the transaction as a waiver of the forfeiture. Booksh *v.* Wilbert Sons Lumber, etc., Co., 115 La. 351, 39 So. 9; Clarke *v.* Strickland, 5 Fed. Cas. No. 2,864, 2 Curt. 439. See Hodgdon *v.* Wright, 36 Me. 326; Crane *v.* Reeder, 25 Mich. 303.

79. Prince George County *v.* Clarke, 36 Md. 206; Weaver *v.* Duncan, (Tenn. Ch. App. 1899) 56 S. W. 39 (holding that where a proceeding was pending to foreclose a trust deed, and a receiver had been appointed and taken possession of the property, it was *in custodia legis*; and hence a county trustee could not maintain a suit to subject it to payment of delinquent taxes, except in the court appointing the receiver, or with such court's consent); Virginia, etc., Steel, etc., Co. *v.* Bristol Land Co., 88 Fed. 134 (receiver); Burleigh *v.* Chehalis County, 75 Fed. 873 (sale enjoined). See also *supra*, IX, A, 1, c; X, B, 4. But the mere fact that a court of equity has ordered a receiver to take possession of property in litigation does not prevent its sale, before the receiver takes possession, for taxes due the state; and the tax purchaser, having obtained his deed, may take possession, if he finds no one in possession, without applying to the court for leave. Metcalfe *v.* Commonwealth Land, etc., Co., 113 Ky. 751, 68 S. W. 1100, 24 Ky. L. Rep. 527. And the fact that property is in possession of a sheriff under a seizure is no obstacle to its sale for taxes. Flower *v.* Beasley, 52 La. Ann. 2054, 28 So. 322. Nor

subject to taxation and to sale for the taxes assessed against it, but not subject to sale for taxes charged upon other property.[80]

2. Seated and Unseated Lands. In those states where a distinction is taken, in reference to the assessment and collection of taxes, between "seated," "resident," or "improved" lands on the one hand, and "unseated," "non-resident," or "wild" lands on the other hand, jurisdiction depends on the character of the land, and land belonging in fact to the one class cannot be sold as land of the other class; a sale so made is void and conveys no title.[81]

3. Validity of Sale Depending on Ownership[82]— a. In General. To justify a tax-sale of land, the person assessed must have at least a beneficial ownership of it,[83] and if real property is assessed to a person who is not the owner of it and sold for non-payment of the tax so assessed, the sale is invalid.[84] Taxes assessed

the fact that it is under administration in a probate court. Soniat *v.* Donovan, 118 La. 847, 43 So. 462. See *infra*, XI, D, 3, a.

80. *Georgia.*— Lamar *v.* Sheppard, 80 Ga. 25, 5 S. E. 247.

Illinois.— Douthett *v.* Winter, 108 Ill. 330.

Iowa.— Bitzer *v.* Becke, 120 Iowa 66, 94 N. W. 287; Stewart *v.* Corbin, 25 Iowa 144; Penn *v.* Clemans, 19 Iowa 372.

South Carolina.— Shell *v.* Duncan, 31 S. C. 547, 10 S. E. 330, 5 L. R. A. 821.

Texas.— Wright *v.* Straub, 64 Tex. 64; Lufkin *v.* Galveston, 58 Tex. 545; Bordages *v.* Higgins, 1 Tex. Civ. App. 43, 19 S. W. 446, 20 S. W. 184, 726.

81. Southern Banking, etc., Co. *v.* Wilcox, Lumber Co., 119 Ga. 519, 46 S. E. 668; Brown *v.* Powell, 85 Ga. 603, 11 S. E. 866; Hutchins *v.* Tenant, 73 Ga. 95; Holloway *v.* Jones, 143 Pa. St. 564, 22 Atl. 710; Preswick *v.* McGrew, 107 Pa. St. 43; Kramer *v.* Goodlander, 98 Pa. St. 353; McArthur *v* Kitchen, 77 Pa. St. 62; George *v.* Messinger, 73 Pa. St. 418; Hathaway *v.* Elsbree, 54 Pa. St. 498; Altemose *v.* Hufsmith, 45 Pa. St. 121; Jennings *v.* McDowell, 25 Pa. St. 387; Dikeman *v.* Parrish, 6 Pa. St. 210, 47 Am. Dec. 455; Hamaker *v.* Whitecar, 1 Walk. (Pa.) 120; Thompson *v.* Chase, 2 Grant (Pa.) 367; Jackson *v.* Flesher, 1 Grant (Pa.) 459; Cranmer *v.* Hall, 4 Watts & S. (Pa.) 36; Fish *v.* Brown, 5 Watts (Pa.) 441; Keating *v.* Williams, 5 Watts (Pa.) 382; Gibson *v.* Robbins, 9 Watts (Pa.) 156; Owens *v.* Vanhook, 3 Watts (Pa.) 260; Campbell *v.* Wilson, 1 Watts (Pa.) 503; Erwin *v.* Helm, 13 Serg. & R. (Pa.) 151; Skinner *v.* McAllister, 3 Pa. Cas. 306, 6 Atl. 120; McClements *v.* Downey, 2 Pa. Super. Ct. 443; Street *v.* Fogul, 32 U. C. Q. B. 119; Allan *v.* Fisher, 13 U. C. C. P. 63. *Compare* Winton Coal Co. *v.* Lackawanna County, 1 Lack. Leg. N. (Pa.) 195. See also Bush *v.* Davison, 16 Wend. (N. Y.) 550; Jackson *v.* Esty, 7 Wend. (N. Y.) 148. But see Silverthorne *v.* Campbell, 24 Grant Ch. (U. S.) 17. And see 45 Cent. Dig. tit. "Taxation," § 1288.

As to separate assessment and taxation of seated and unseated lands see *supra*, VI, C, 5, b.

Division of tract.— If part of a tract of land is seated and part unseated, the parts being separated by lines marked on the ground and held under independent titles, the unseated portion may be separately sold for taxes. Harper *v.* McKeehan, 3 Watts & S. (Pa.) 238. And where the whole of such a tract is assessed together and sold for taxes, it seems that, notwithstanding the irregularity of the assessment, the sale will pass a title to the part unseated and none to the part that is seated. Dietrick *v.* Mason, 57 Pa. St. 40.

Change in character of land.— Land that has once been seated may become unseated and liable to be sold as such for taxes. Robinson *v.* Williams, 6 Watts (Pa.) 281. And if land be unseated at the time the assessment is made, a subsequent seating, although in the same year, will not defeat a tax-sale. Murray *v.* Guilford, 8 Watts (Pa.) 548.

Timber on unseated land can be assessed only as a part of the land on which it stands, and cannot be sold for taxes except by sale of the land on which it stands. *In re* Treasurers' Deeds, 7 Pa. Dist. 427.

82. **Estoppel to deny payment as against grantee** see *supra*, XI, B, 1, d.

83. Coombs *v.* Warren, 34 Me. 89 (title for purposes of taxation as between mortgagor and mortgagee); Carroll *v.* Safford, 3 How. (U. S.) 441, 11 L. ed. 671 (land held by purchase from government before issuance of patent).

84. *Alabama.*— Milner *v.* Clarke, 61 Ala. 258.

California.— People *v.* Castro, 39 Cal. 65; Himmelmann *v.* Steiner, 38 Cal. 175.

Louisiana.— Bartley *v.* Sallier, 118 La. 93, 42 So. 657; Guidry *v.* Broussard, 32 La. Ann. 924; Lague *v.* Boagni, 32 La. Ann. 912; Workingmen's Bank *v.* Lannes, 30 La. Ann. 871; Fix *v.* Dierker, 30 La. Ann. 175.

Mississippi.— Dunn *v.* Winston, 31 Miss. 135; Baskins *v.* Doe, 24 Miss. 431. But *compare* Smith *v.* Cassidy, 75 Miss. 916, 23 So. 427.

Missouri.— Crane *v.* Dameron, 98 Mo. 567, 12 S. W. 251; Allen *v.* Ray, 96 Mo. 542, 10 S. W. 153; Payne *v.* Lott, 90 Mo. 676, 3 S. W. 402; Hume *v.* Wainscott, 46 Mo. 145; Abbott *v.* Lindenbower, 42 Mo. 162; Missouri Lumber, etc., Co. *v.* Zeitinger, 45 Mo. App. 114.

New Hampshire.— Burpee *v.* Russell, 64 N. H. 62, 5 Atl. 837; Thompson *v.* Ela, 60

against a decedent's estate may, however, be collected in the same manner as those due from a living person.[85]

b. Persons Under Disabilities. The fact that land belongs to a person who is under legal disabilities, as an infant or *feme covert*, does not prevent its sale for the non-payment of taxes assessed against it, nor will it prevent the title from passing by a tax deed, although favor is usually shown to such persons in regard to the time or terms of redemption.[86]

c. Non-Resident and Unknown Owners.[87] A sale of land for taxes as of an unknown owner is void unless the assessment was in this form and unless there has been due observance of all steps made necessary by statute as a condition of the right to proceed against the land after this method.[88] The land of a non-resident may be sold for non-payment of the taxes assessed upon it, but only in the mode and on the conditions pointed out by the statute,[89] and if it was erroneously assessed as the property of a non-resident, the sale is not valid.[90]

E. Proceedings Preliminary to Sale — 1. Delinquent List — a. Nature, Necessity, and Effect. A statutory requirement that the tax collector or other officer shall make and return a list of the lands on which the taxes have not been

N. H. 562; Thompson *v.* Gerrish, 57 N. H. 85.

Tennessee.— Gardner *v.* Brown, 1 Humphr. 354.

Texas.— Yenda *v.* Wheeler, 9 Tex. 408.

West Virginia.— Totten *v.* Nighbert, 41 W. Va. 800, 24 S. E. 627; Bradley *v.* Ewart, 18 W. Va. 598; Dequasie *v.* Harris, 16 W. Va. 345.

Wyoming.— Hecht *v.* Boughton, 2 Wyo. 385.

Canada.— O'Grady *v.* McCaffray, 2 Ont. 309; Humphreys *v.* Desjardins, 24 Quebec Super. Ct. 250.

See 45 Cent. Dig. tit. "Taxation," § 1287.

But *compare* McCoy *v.* Michew, 7 Watts & S. (Pa.) 386; Moyer *v.* Foss, 41 Wash. 130, 83 Pac. 12.

85. White *v.* Portland, 68 Conn. 293, 36 Atl. 46; Soniat *v.* Donovan, 118 La. 847, 43 So. 462; Sherman *v.* Schomber, 43 Wash. 330, 86 Pac. 569. But *compare* Jackson *v.* Wren, 36 La. Ann. 315. And see Kingman *v.* Glover, 3 Rich. (S. C.) 27, 45 Am. Dec. 756.

86. Bedgood *v.* McLain, 89 Ga. 793, 15 S. E. 670; Douglass *v.* Dickson, 31 Kan. 310, 1 Pac. 541; Keller *v.* Wilson, 90 Ky. 350, 14 S. W. 332, 12 Ky. L. Rep. 471; Elliot *v.* Garrard, 1 A. K. Marsh. (Ky.) 472; McQuain *v.* Meline, 16 Fed. Cas. No. 8,923.

Effect of early statute in Kentucky see Oldhams *v.* Jones, 5 B. Mon. 458; Harris *v.* Smith, 2 Dana 10; Hood *v.* Mathers, 2 A. K. Marsh. 553.

Right of redemption see *infra*, XII, A, 3, g, 4, e.

87. Assessment to unknown owner when owner known see *supra*, XI, C, 2, note 60.

88. Person *v.* O'Neal, 32 La. Ann. 228; Rapp *v.* Lowry, 30 La. Ann. 1272; Leigh *v.* Green, 62 Nebr. 344, 86 N. W. 1093, 89 Am. St. Rep. 751, 64 Nebr. 533, 90 N. W. 255, 101 Am. St. Rep. 592 [*affirmed* in 193 U. S. 79, 24 S. Ct. 390, 48 L. ed. 623]; Lynam *v.* Anderson, 9 Nebr. 367, 2 N. W. 732; Green *v.* Robertson, 30 Tex. Civ. App. 236, 70 S. W. 345.

Process see *infra*, XI, E, 2, c, 3, d.

Publication of notice of sale see *infra*, XI, F, 3.

89. *California.*— Hewes *v.* McLellan, 80 Cal. 393, 22 Pac. 287.

Connecticut.—Adams *v.* Seymour, 30 Conn. 402.

Louisiana.— Pursell *v.* Porter, 20 La. Ann. 323; Gernon *v.* Handlin, 19 La. Ann. 25; Hodge *v.* Cleary, 18 La. 514.

Maine.—Wallingford *v.* Fiske, 24 Me. 386.

Mississippi.— Huntington *v.* Brantley, 33 Miss. 451.

New Hampshire.— French *v.* Spalding, 61 N. H. 395; Bowles *v.* Clough, 55 N. H. 389; Jaquith *v.* Putney, 48 N. H. 138; Haverhill, etc., Iron Manufactory *v.* Barron, 3 N. H. 36.

New York.—Newman *v.* Livingston County, 45 N. Y. 676; Joslyn *v.* Pulver, 59 Hun 129, 13 N. Y. Suppl. 311 [*affirmed* in 128 N. Y. 334, 28 N. E. 604]; Butler *v.* Oswego, 56 Hun 358, 10 N. Y. Suppl. 768; People *v.* Wemple, 6 N. Y. Suppl. 732 [*affirmed* in 117 N. Y. 77, 22 N. E. 761].

Canada.— McKay *v.* Bamberger, 30 U. C. Q. B. 95; Jarvis *v.* Brooke, 11 U. C. Q. B. 299.

See 45 Cent. Dig. tit. "Taxation," § 1290.

Change of residence.— If a resident owner of lands should become a non-resident after the delivery of the tax book to the collector, the latter is bound to pursue the mode prescribed by the statute for the sale of the lands of resident taxpayers. Gossett *v.* Kent, 19 Ark. 602. And see Hutchins *v.* Moody, 34 Vt. 433.

Meaning of "non-resident."— In the laws of Louisiana relating to the sale of land for taxes, the term "non-resident" includes those who reside in the state, but out of the parish in which the land is situated and the tax assessed. Thompson *v.* Rogers, 4 La. 9.

Personalty not liable.—A tax on land is not a personal charge on the non-resident owner and cannot be collected by a levy on personal property. Tweed *v.* Metcalf, 4 Mich. 579; Dewey *v.* Stratford, 42 N. H. 282; New York, etc., R. Co. *v.* Lyon, 16 Barb. (N. Y.) 651.

90. Perley *v.* Stanley, 59 N. H. 587.

collected is imperative. This list is one of the foundations on which the power to sell the particular tract of land rests, and hence is essential to the validity of the sale,[91] and it is also, in any judicial proceedings preliminary to the sale, *prima facie* evidence of the validity of the levy and assessment and of the fact of delinquency.[92]

b. Making and Requisites — (i) *In General.* The delinquent list must be made and filed by the proper officer,[93] under his hand and seal if that is required by law,[94] and at or within the time prescribed by the statute.[95] If filed prematurely it will not support a tax-sale,[96] and if filed after the proper time it will invalidate the further proceedings, at least if rights of third persons have intervened or if any resultant injury to the owner is shown.[97] If the statute prescribes a form for this list, it is sufficient to follow the form substantially, but the

91. *Arkansas.*— Townsend *v.* Penrose, 84 Ark. 316, 105 S. W. 588; Magness *v.* Harris, 80 Ark. 583, 98 S. W. 362; Pennell *v.* Monroe, 30 Ark. 661.

Iowa.— Hintrager *v.* McElhinny, 112 Iowa 325, 82 N. W. 1008, 83 N. W. 1063; Hoben *v.* Snell, 94 Iowa 205, 62 N. W. 739; Paxton *v.* Ross, 89 Iowa 661, 57 N. W. 428; Snell *v.* Dubuque, etc., R. Co., 88 Iowa 442, 55 N. W. 310; Babcock *v.* Bonebrake, 77 Iowa 710, 42 N. W. 559; Hunter *v.* Early, 75 Iowa 769, 37 N. W. 776; Hooper *v.* Sac County Bank, 72 Iowa 280, 33 N. W. 681; Barke *v.* Early, 72 Iowa 273, 33 N. W. 677; Cummings *v.* Easton, 46 Iowa 183. *Compare* Hunt *v.* Gray, 76 Iowa 268, 41 N. W. 14.

Maine.— Hill *v.* Mason, 38 Me. 461.

Michigan.—Alcona County Sup'rs *v.* Auditor-Gen., 138 Mich. 491, 101 N. W. 657.

Minnesota.—Kipp *v.* Dawson, 31 Minn. 373, 17 N. W. 961, 18 N. W. 96; Knudson *v.* Curley, 30 Minn. 433, 15 N. W. 873. See Beumer *v.* Woll, 86 Minn. 294, 90 N. W. 530.

Mississippi.— Huntington *v.* Brantley, 33 Miss. 451.

New Hampshire.— Homer *v.* Cilley, 14 N. H. 85.

New Jersey.— Campion *v.* Raritan Tp., (Sup. 1903) 56 Atl. 704.

New York.— Wallace *v.* McEchron, 176 N. Y. 424, 68 N. E. 663; Tallman *v.* White, 2 N. Y. 66.

North Carolina.— Kelly *v.* Craig, 27 N. C. 129.

Pennsylvania.— Bigger *v.* Scouton, 30 Pa. Super. Ct. 503.

Tennessee.— Harriman Imp. Co. *v.* McNutt, (Ch. App. 1896) 37 S. W. 396.

Vermont.— Isaacs *v.* Wiley, 12 Vt. 674.

West Virginia.— Metz *v.* Starcher, 60 W. Va. 657, 56 S. E. 196, 116 Am. St. Rep. 925; McGhee *v.* Sampselle, 47 W. Va. 352, 34 S. E. 815.

United States.— Ontario Land Co. *v.* Wilfong, 162 Fed. 999 [*reversed* on other grounds in 171 Fed. 51, 96 C. C. A. 293], Washington statutes.

Canada.— Ruttan *v.* Burk, 7 Ont. L. Rep. 56; McKay *v.* Ferguson, 26 Grant Ch. (U. C.) 236. See Church *v.* Fenton, 28 U. C. C. P. 384.

See 45 Cent. Dig. tit. "Taxation," § 1279. See also *supra*, X, A, 6.

Contra.— Moore *v.* Patch, 12 Cal. 265; State *v.* Central Pac. R. Co., 10 Nev. 47.

Loss of records.—Where a statute requires the collector, in case of the loss of the records, to make his return of delinquent taxes "from the best information he can obtain," the collector is made the sole judge of the sources and sufficiency of the information; and on an application for judgment against real property his report cannot be impeached by showing that he did not in fact make his report from the best information he could have obtained. Andrews *v.* People, 75 Ill. 605.

92. Fisher *v.* People, 84 Ill. 491; Pike *v.* People, 84 Ill. 80; Olmsted County *v.* Barber, 31 Minn. 256, 17 N. W. 473, 944; State *v.* Hurt, 113 Mo. 90, 20 S. W. 879; Metz *v.* Starcher, 60 W. Va. 657, 56 S. E. 196, 116 Am. St. Rep. 925.

93. Quertermous *v.* Walls, 70 Ark. 326, 67 S. W. 1014.

94. Upton *v.* Kennedy, 36 Mich. 215; Hannel *v.* Smith, 15 Ohio 134. *Compare* Cole *v.* Van Ostrand, 131 Wis. 454, 110 N. W. 884.

95. Grayson *v.* Richardson, 65 Miss. 222, 3 So. 579, presumption as to filing of list in due time.

Filing in vacation.—A return or report of the delinquent list of lands by the collector of taxes to the court to which it is by law directed to be made is good, although made in vacation. Jackson *v.* Cummings, 15 Ill. 449.

96. Hickman *v.* Kempner, 35 Ark. 505; Bailey *v.* Haywood, 70 Mich. 188, 38 N. W. 209. And see Boles *v.* McNeil, 66 Ark. 422, 51 S. W. 71; Armstrong *v.* Donnelly, 56 Ark. 163, 19 S. W. 574; Flint *v.* Sawyer, 30 Me. 226; Conley *v.* McMillan, 120 Mich. 694, 79 N. W. 909; Ronkendorff *v.* Taylor, 4 Pet. (U. S.) 349, 7 L. ed. 882.

An extension of time for making return of the delinquent list is for the benefit of the tax collector, and if he makes return before the expiration of the extension, no legal wrong is done to taxpayers. Drennan *v.* Beierlein, 49 Mich. 272, 13 N. W. 587.

97. Birch *v.* Walworth, 79 Ark. 580, 96 S. W. 140; Le Seigneur *v.* Bessan, 52 La. Ann. 187, 26 So. 865; Weir *v.* Kitchens, 52 Miss. 74; Hopkins *v.* Sandidge, 31 Miss. 668; Vandermark *v.* Phillips, 116 Pa. St. 199, 9 Atl. 257. *Compare* Leindecker *v.* People, 98 Ill. 21; Jackson *v.* Cummings, 15 Ill. 449.

list must contain all the essential facts mentioned in the statute.[98] If no such form is given, the list must embody such data and recitals that it can serve its intended purpose, that is, it must show the liability of a particular piece of property to the payment of a particular sum assessed as a tax upon it and the fact that the tax remains delinquent.[99]

(II) *DESCRIPTION OF PROPERTY.* The delinquent list must contain such a description of the several parcels of land that they may be identified with reasonable ease and certainty, both in order that the owner may know that it is his land which is returned as delinquent and that intending purchasers may know what properties are to be offered for sale.[1]

98. *Alabama.*— Riddle *v.* Messer, 84 Ala. 236, 4 So. 185.

California.— Davis *v.* Pacific Imp. Co., 137 Cal. 245, 70 Pac. 15.

Illinois.— Beers *v.* People, 83 Ill. 488; Karnes *v.* People, 73 Ill. 274; Fox *v.* Turtle, 55 Ill. 377; Morrill *v.* Swartz, 39 Ill. 109; Morgan *v.* Camp, 16 Ill. 175; Pickett *v.* Hartsock, 15 Ill. 279.

Michigan.— Dickison *v.* Reynolds, 48 Mich. 158, 12 N. W. 24.

Minnesota.— O'Connor *v.* Finnegan, 60 Minn. 455, 62 N. W. 618; St. Anthony Falls Water Power Co. *v.* Greely, 11 Minn. 321.

See 45 Cent. Dig. tit. "Taxation," § 1280.

99. *Illinois.*— Law *v.* People, 84 Ill. 142.

New York.—Wood *v.* Knapp, 100 N. Y. 109, 2 N. E. 632.

Ohio.— Matthews *v.* Lewis, 18 Ohio Cir. Ct. 134, 9 Ohio Cir. Dec. 873.

Pennsylvania.—Vandermark *v.* Phillips, 116 Pa. St. 199, 9 Atl. 257.

West Virginia.— Metz *v.* Starcher, 60 W. Va. 657, 56 S. E. 196, 116 Am. St. Rep. 925.

United States.— Ontario Land Co. *v.* Wilfong, 162 Fed. 999 [*reversed* on other grounds in 171 Fed. 51, 96 C. C. A. 293], Washington statutes.

See 45 Cent. Dig. tit. "Taxation," § 1280.

Conditions precedent.— The delinquent list or return should show full compliance with all statutory conditions precedent to a tax sale. Johnson *v.* Hahn, 4 Nebr. 139; Thompson *v.* Burhans, 61 N. Y. 52; Belden *v.* State, 46 Tex. 103.

Reasons for failure to collect.—Where a return of delinquent lands contains no memorandum of the reasons assigned by the county treasurer why the taxes on such lands could not be collected, the return is invalid. Stambaugh *v.* Carlin, 35 Ohio St. 209.

Return of nulla bona.—Where the law requires the collector's return to certify that he has not been able to make the taxes due out of the personal property of the several delinquent owners, or that, after reasonable or diligent search, he has not been able to find personalty sufficient to satisfy such taxes, this fact is jurisdictional, and a return which does not so state will not support a tax-sale of the lands. Scheiber *v.* Kaehler, 49 Wis. 291, 5 N. W. 817. And see Job *v.* Tebbetts, 10 Ill. 376; Taylor *v.* People, 7 Ill. 349.

Amendment of return.— On application for judgment for delinquent taxes on lands, the court may allow the delinquent list to be amended so as to make it correspond with the collector's books. People *v.* Green, 158 Ill. 594, 42 N. E. 163.

1. *Alabama.*— Lowe *v.* Martin, 79 Ala. 336.

California.— Davis *v.* Pacific Imp. Co., 137 Cal. 245, 70 Pac. 15; Rollins *v.* Woodman, 117 Cal. 516, 49 Pac. 455.

Illinois.— Sholl *v.* People, 194 Ill. 24, 61 N. E. 1122; People *v.* Dragstran, 100 Ill. 286.

Kansas.— McWilliams *v.* Great Spirit Springs Co., 7 Kan. App. 210, 52 Pac. 905.

Kentucky.—Allen *v.* Robinson, 3 Bibb 326.

Louisiana.— St. Paul *v.* Louisiana Cypress Lumber Co., 116 La. 585, 40 So. 906.

Minnesota.— Mahlum *v.* Thayer, 93 Minn. 471, 101 N. W. 653; National Bond, etc., Co. *v.* Hennepin County, 91 Minn. 63, 97 N. W. 413; Davis *v.* How, 52 Minn. 157, 53 N. W. 1139; Smith *v.* Kipp, 49 Minn. 119, 51 N. W. 656; McQuade *v.* Jaffray, 47 Minn. 326, 50 N. W. 233; Olivier *v.* Gurney, 43 Minn. 69, 44 N. W. 887; Knight *v.* Alexander, 38 Minn. 384, 37 N. W. 796, 8 Am. St. Rep. 675; Kipp *v.* Fernhold, 37 Minn. 132, 33 N. W. 697.

New York.— Kane *v.* Brooklyn, 114 N. Y. 586, 21 N. E. 1053.

Oregon.— Burness *v.* Multnomah County, 37 Oreg. 460, 60 Pac. 1005.

Pennsylvania.—Van Loon *v.* Engle, 171 Pa. St. 157, 33 Atl. 77.

Texas.— McCormick *v.* Edwards, 69 Tex. 106, 6 S. W. 32.

West Virginia.— Mosser *v.* Moore, 56 W. Va. 478, 49 S. E. 537.

Wisconsin.—Van Ostrand *v.* Cole, 131 Wis. 446, 110 N. W. 891; Noyington Co. *v.* Southwick, 120 Wis. 184, 97 N. W. 903.

United States.— Under the statutes of Washington, until property shall have been listed as delinquent for non-payment of taxes by a description thereof sufficiently accurate to identify it, so that an intelligent owner, acquainted with his property, on having the delinquent list brought to his attention, will be able to recognize the description as being applicable to his property, it does not become delinquent, nor subject to foreclosure and sale for non-payment of taxes. Ontario Land Co. *v.* Wilfong, 162 Fed. 999 [*reversed* on other grounds in 171 Fed. 51, 96 C. C. A. 293].

See 45 Cent. Dig. tit. "Taxation," § 1280.

Sufficient to enable surveyor to locate lands.—A description in a delinquent tax list which is sufficient to enable a competent surveyor to locate the land is sufficient. People *v.* International Salt Co., 233 Ill. 223, 84 N. E.

(III) *NAME OF OWNER.* It is also necessary as a further means of identification, where the statute so requires, that the delinquent list shall contain the names of the respective owners of the several parcels of land included; and a defect in this particular will be fatal to the further proceedings.[2]

(IV) *TAXES, ETC., DUE.* It is further essential to the validity of the tax-sale that the delinquent list shall contain a statement of the amount of taxes due on each parcel of land, if this is required by the statute, an omission or error being fatal,[3] and that it show for what years the taxes are delinquent,[4] and show separately the taxes due to the state and those due to the county or other municipality.[5] The sums due may be shown in figures, but these must either be accompanied by the usual abbreviations for dollars and cents or so arranged in columns separated by the customary ledger lines as to indicate clearly the denominations of money.[6]

278; Sholl *v.* People, 194 Ill. 24, 61 N. E. 1122.

Use of abbreviations.—Where well-understood abbreviations are used in a delinquent tax list, and a competent surveyor can locate the land from such descriptions, they are sufficient. Sholl *v.* People, 194 Ill. 24, 61 N. E. 1122. But figures placed in perpendicular columns, without any heading to show what they refer to, do not constitute a sufficient description of the land. Knudson *v.* Curley, 30 Minn. 433, 15 N. W. 873. See Washington Timber, etc., Co. *v.* Smith, 34 Wash. 625, 76 Pac. 267.

Failure to repeat or use ditto marks.—Under Wis. Rev. St. (1898) § 1047, providing that in all tax proceedings any description of land which shall indicate the land intended with ordinary and reasonable certainty shall be sufficient, the descriptions of parcels of land in the delinquent return are not insufficient because the section, township, or range descriptions are not repeated or indicated by ditto marks for each parcel. Van Ostrand *v.* Cole, 131 Wis. 446, 110 N. W. 891.

Payment on part of tract.—Where a tract of land containing more than one subdivision is assessed to the owner of one parcel thereof, who pays the proportion of taxes chargeable against his land, the residue of the tract should be returned as delinquent. Pennell *v.* Monroe, 30 Ark. 661.

2. Ropes *v.* Minshew, 51 Fla. 299, 41 So. 538; Halsey *v.* People, 84 Ill. 89; Le Seigneur *v.* Bessan, 52 La. Ann. 187, 26 So. 865; *Ex p.* Thacker, 3 Sneed (Tenn.) 344. But in Minnesota proceedings to enforce the collection of real estate taxes are purely *in rem*; and hence a statute requiring the owner's name to be given in the list of delinquent taxes is merely directory, and an erroneous statement of the owner's name in such list will not avoid the tax judgment, where the land itself has been correctly described. McQuade *v.* Jaffray, 47 Minn. 326, 50 N. W. 233.

Joint owners.—Where land is owned by and assessed to two persons jointly, a description of it in the delinquent list which states it to be the property of one of them. by name, "*et al.*" is insufficient. Asper *v.* Moon, 24 Utah 241, 67 Pac. 409.

3. California L. & T. Co. *v.* Weis, 118 Cal. 489, 50 Pac. 697; Mann *v.* People, 102 Ill. 346; Cole *v.* Van Ostrand, 131 Wis. 454, 110 N. W. 884.

Where error not jurisdictional.— Where the delinquent list is not used as direct authority for the sale of the land, but only as notice to the owner and as a foundation for judicial proceedings which are to culminate in a judgment ordering the sale, as is the practice in some states, an omission or error in stating the amount of the taxes due is not a jurisdictional defect, but is merely a matter of defense which the owner waives if he does not plead it. State *v.* Baldwin, 62 Minn. 518, 65 N. W. 80; Collins *v.* Welch, 38 Minn. 62, 35 N. W. 566; Coffin *v.* Estes, 32 Minn. 367, 20 N. W. 357; Kipp *v.* Dawson, 31 Minn. 373, 17 N. W. 961, 18 N. W. 96; Darling *v.* Purcell, 13 N. D. 288, 100 N. W. 726.

Trifling error.—The fact that the delinquent list overstated the amount of taxes due, in one case by three cents and in another by four cents, will not invalidate the sale, the maxim "*de minimis non curat lex*" applying. Colman *v.* Shattuck, 62 N. Y. 348.

Taxes, penalties, interest, and costs.— These need not be separately stated or itemized, it being sufficient to state the total in a lump sum. Chapman *v.* Zoberlein, 152 Cal. 216, 92 Pac. 188; Cass County *v.* Security Imp. Co., 7 N. D. 528, 75 N. W. 775.

4. Gardner *v.* Early, 69 Iowa 42, 28 N. W. 427; Brown County *v.* Winona, etc., Land Co., 38 Minn. 397, 37 N. W. 949. But see Chambers *v.* People, 113 Ill. 509; Whitney *v.* Wegler, 54 Minn. 235, 55 N. W. 927; Doe *v.* Smith, 9 U. C. Q. B. 658.

5. Fox *v.* Turtle, 55 Ill. 377; Morrill *v.* Swartz, 39 Ill. 109. But *compare* Sawyer *v.* Wilson, 81 Ark. 319, 99 S. W. 389.

6. Sawyer *v.* Wilson, 81 Ark. 319, 99 S. W. 389; Carter *v.* Osborn, 150 Cal. 620, 89 Pac. 608; Muirhead *v.* Sands, 111 Mich. 487, 69 N. W. 826; Stein *v.* Hanson, 99 Minn. 387, 109 N. W. 821; Chouteau *v.* Hunt, 44 Minn. 173, 46 N. W. 341; Bonham *v.* Weymouth, 39 Minn. 92, 38 N. W. 805; Collins *v.* Welch, 38 Minn. 62, 35 N. W. 566; Raley *v.* Guinn, 76 Mo. 263. A tax-sale was not invalid because there was nothing, in connection with figures, in the delinquent tax list under the head of fees and valuation of the land, to indicate specifically that they were intended to

c. Verification and Certification. Some of the statutes require that the collector's return of delinquent lands shall be attested by him under oath, and under such a statute a tax-sale cannot lawfully be made without an attestation of the list substantially in the form prescribed by the law.[7] And it is also and equally essential that the affidavit shall be sworn to before an officer duly authorized to administer the oath.[8] The same imperative character is to be attributed to a statutory requirement that the delinquent list shall be certified by the clerk of the court or some other officer designated for the purpose; [9] and the certificate must be made at the time required by the statute.[10]

d. Filing and Recording. A statute requiring the delinquent list to be filed or recorded in the office of the county clerk or some other public office is mandatory, and compliance with its provisions is essential to a valid tax-sale of the lands affected, if the record is intended as official evidence of the facts recited in the list, or as notice, or as the foundation for process against the land; [11] but other-

denominate sums of money, since, lands being assessed in dollars and cents, taxes being payable in money, and it being common knowledge that dollars are expressed in the whole numbers and cents and mills decimally, the significance of the figures was clear. Sawyer *v.* Wilson, *supra.* A tax-sale is not void because in the delinquent list the amount due was indicated only by the word "amount," and immediately under it the figures "4 00," without any dollar sign, but with a space between the figure 4 and the two ciphers, as they usually appear when intended to mean dollars. Carter *v.* Osborn, *supra.* See also Chapman *v.* Zoberlein, 152 Cal. 216, 92 Pac. 188; Fox *v.* Wright, 152 Cal. 59, 91 Pac. 1005.

7. *Illinois.*— Weston *v.* People, 84 Ill. 284 (substantial compliance with statute); People *v.* Otis, 74 Ill. 384. *Compare* Chicago, etc., R. Co. *v.* People, 174 Ill. 80, 50 N. E. 1057; Wabash R. Co. *v.* People, 138 Ill. 316, 28 N. E. 57.

Michigan.— Seymour *v.* Peters, 67 Mich. 415, 35 N. W. 62; Upton *v.* Kennedy, 36 Mich. 215.

Ohio.— Stambaugh *v.* Carlin, 35 Ohio St. 209; Skinner *v.* Brown, 17 Ohio St. 33; Ward *v.* Barrows, 2 Ohio St. 241; Hollister *v.* Bennett, 9 Ohio 83; Winder *v.* Sterling, 7 Ohio Pt. II, 190.

Oregon.— Hughes *v.* Linn County, 37 Oreg. 111, 60 Pac. 843.

West Virginia.— Wilkinson *v.* Linkous, 64 W. Va. 205, 61 S. E. 152; Devine *v.* Wilson, 63 W. Va. 409, 60 S. E. 351.

Wisconsin.— Cotzhausen *v.* Kaehler, 42 Wis. 332.

See 45 Cent. Dig. tit. "Taxation," § 1281.

Compare, however, Cook *v.* John Schroeder Lumber Co., 85 Minn. 374, 88 N. W. 971; Bennett *v.* Blatz, 44 Minn. 56, 46 N. W. 319; Mille Lacs County *v.* Morrison, 22 Minn. 178; State *v.* Schooley, 84 Mo. 447.

Not necessary unless required by the statute see Bivens *v.* Henderson, 42 Ind. App. 562, 86 N. E. 426; Hollister *v.* Bennett, 9 Ohio 83.

8. Tabor *v.* People, 84 Ill. 202; Hough *v.* Hastings, 18 Ill. 312; Malony *v.* Mahar, 2 Dougl. (Mich.) 432; Harmon *v.* Stockwell, 9 Ohio 93; Wilkinson *v.* Linkous, 64 W. Va. 205, 61 S. E. 152.

9. *Arkansas.*— Johnson *v.* Elder, 92 Ark. 30, 121 S. W. 1066; Frank Kendall Lumber Co. *v.* Smith, 87 Ark. 360, 112 S. W. 888; Boyd *v.* Gardner, 84 Ark. 567, 106 S. W. 942; Hunt *v.* Gardner, 74 Ark. 583, 86 S. W. 426.

Illinois.— Glos *v.* Cass, 230 Ill. 641, 82 N. E. 827; McCraney *v.* Glos, 222 Ill. 628, 78 N. E. 921; Glos *v.* Dyche, 214 Ill. 417, 73 N. E. 757; Glos *v.* McKerlie, 212 Ill. 632, 72 N. E. 700; Glos *v.* Randolph, 138 Ill. 268, 27 N. E. 941.

Michigan.—Auditor-Gen. *v.* Keweenan Assoc., 107 Mich. 405, 65 N. W. 288.

Nebraska.— Whelen *v.* Stilwell, 4 Nebr. (Unoff.) 24, 93 N. W. 189.

New York.— Kane *v.* Brooklyn, 1 N. Y. Suppl. 306 [*affirmed* in 114 N. Y. 586, 21 N. E. 1053].

United States.— Ontario Land Co. *v.* Wilfong, 162 Fed. 999 [*reversed* on other grounds in 171 Fed. 51, 96 C. C. A. 293].

10. Thus failure to make and record the delinquent list before the day of sale as required by statute invalidates the sale. American Ins. Co. *v.* Dannehower, 89 Ark. 111, 115 S. W. 950; Townsend *v.* Penrose, 84 Ark. 316, 105 S. W. 588; Hunt *v.* Gardner, 74 Ark. 583, 86 S. W. 426. Under Hurd Rev. St. Ill. (1905) c. 120, § 194, providing that the county clerk shall carefully examine the delinquent list on which judgment for taxes has been rendered "on the day advertised for sale," and shall make a certificate "which shall be process on which all real property shall be sold for taxes," a certificate made on any other day than the day advertised for sale is void, and a sale and tax deed based thereon is void; and when the certificate is dated, the date is evidence of the time when the certificate was made. Glos *v.* Cass, 230 Ill. 641, 82 N. E. 827; McCraney *v.* Glos, 222 Ill. 628, 78 N. E. 921; Glos *v.* Dyche, 214 Ill. 417, 73 N. E. 757; Glos *v.* Hanford, 212 Ill. 261, 72 N. E. 439; Glos *v.* Gleason, 209 Ill. 517, 70 N. E. 1045; Kepley *v.* Fouke, 187 Ill. 162, 58 N. E. 303; Kepley *v.* Scully, 185 Ill. 52, 57 N. E. 187.

11. *Arkansas.*— Johnson *v.* Elder, 92 Ark. 30, 121 S. W. 1066; Frank Kendall Lumber

wise if the record is only intended for the purpose of preserving the list.[12] A filing of this list before the end of the time allowed for the voluntary payment of the taxes is premature and avoids the sale.[13]

e. Publication and Proof Thereof — (i) *In General.* Publication of the delinquent list, when required by statute, is generally an essential step in the collection of the taxes, being designed to give notice of the fact of delinquency and the amount due, particularly to non-resident and absentee owners.[14] And a substantial variance between the original list and the list as published will be fatal to the further proceedings.[15] As to the number of times the list shall be published or the length and continuity of publication, or the completion of publication before a prescribed date, the provisions of the statute must be carefully followed, as a defect in this particular may avoid the subsequent sale.[16] Proof of the publication, whether required to be made by the certificate of the officer having charge of the list or by the affidavit of the printer or publisher of the newspaper, is also an essential step, and exact compliance with the directions of the statute is held to be necessary.[17]

Co. *v.* Smith, 87 Ark. 360, 112 S. W. 888; Boyd *v.* Gardner, 84 Ark. 567, 106 S. W. 942; Earle Imp. Co. *v.* Chatfield, 81 Ark. 296, 99 S. W. 84; Magness *v.* Harris, 80 Ark. 583, 98 S. W. 362.

Louisiana.— Finney *v.* Gulf States Land, etc., Co., 112 La. 949, 36 So. 814; George *v.* Cole, 109 La. 816, 33 So. 784.

New Hampshire.— Homer *v.* Cilley, 14 N. H. 85.

Ohio.— Kellogg *v.* McLaughlin, 8 Ohio 114.

Washington.— Washington Timber, etc., Co. *v.* Smith, 34 Wash. 625, 76 Pac. 267.

United States.— Martin *v.* Barbour, 140 U. S. 634, 11 S. Ct. 944, 35 L. ed. 546.

See 45 Cent. Dig. tit. "Taxation," § 1282.

Sufficiency of filing and recording see McChesney *v.* People, 174 Ill. 46, 50 N. E. 1110; Alcona County *v.* Auditor-Gen., 138 Mich. 491, 101 N. W. 657.

12. *Illinois.*— Leindecker *v.* People, 98 Ill. 21.

Michigan.— Auditor-Gen. *v.* Keweenan Assoc., 107 Mich. 405, 65 N. W. 288.

Missouri.— State *v.* Hutchinson, 116 Mo. 399, 22 S. W. 785.

United States.— Harmon *v.* Steed, 49 Fed. 779.

Canada.— Allan *v.* Fisher, 13 U. C. C. P. 63.

13. Hickman *v.* Kempner, 35 Ark. 505.

Premature filing see *supra*, XI, E, 1, b, (I).

Delay in filing see *supra*, XI, E, 1, b, (I).

14. Frank Kendall Lumber Co. *v.* Smith, 87 Ark. 360, 112 S. W. 888; Moore *v.* Patch, 12 Cal. 265; Parker *v.* Rule, 9 Cranch (U. S.) 64, 3 L. ed. 658. But see Crocker *v.* Scott, 149 Cal. 575, 87 Pac. 102, where it is held that the only purpose of the statutory provision requiring publication of the delinquent list is to preserve the rights of the state and to start running the period of five years within which redemption can be effected.

Including illegal tax.— An advertisement of a delinquent tax list of lands including an illegal county tax as part of the amount due is a fatal defect. Clarke *v.* Strickland, 5 Fed. Cas. No. 2,864, 2 Curt. 439.

15. Darling *v.* Purcell, 13 N. D. 288, 100 N. W. 726, where, however, it is also held that variations in matters of mere phraseology or arrangement, which do not affect the substance and are not misleading as to the facts which the statute requires to be stated in the list, are not fatal to its validity.

The affidavit of the auditor returned with the list of delinquent taxes is no part of the list and need not be published with it. Chouteau *v.* Hunt, 44 Minn. 173, 46 N. W. 341.

16. *Arkansas.*— Sawyer *v.* Wilson, 81 Ark. 319, 99 S. W. 389; Pennell *v.* Monroe, 30 Ark. 661.

California.— California L. & T. Co. *v.* Weis, 118 Cal. 489, 50 Pac. 697.

Georgia.— Bentley *v.* Shingler, 111 Ga. 780, 36 S. E. 935; Rish *v.* Ivey, 76 Ga. 738.

Indiana.— Doe *v.* Flagler, Smith 404.

Maine.— United Copper Min., etc., Co. *v.* Franks, 85 Me. 321, 27 Atl. 185.

Montana.—Conklin *v.* Cullen, 29 Mont. 38, 74 Pac. 72.

Ohio.— Magruder *v.* Esmay, 35 Ohio St. 221.

See 45 Cent. Dig. tit. "Taxation," § 1283.

Provisions as to time of publication of delinquent list held directory only see Kipp *v.* Dawson, 31 Minn. 373, 17 N. W. 961, 18 N. W. 96.

Where a change is made in a delinquent tax notice during the publication, but such notice is published for the required time, and either form of notice taken alone would be sufficient to uphold a sale made thereunder, such change is not material or misleading. Ireland *v.* George, 41 Kan. 751, 21 Pac. 776.

17. *Arkansas.*— Frank Kendall Lumber Co. *v.* Smith, 87 Ark. 360, 112 S. W. 888 (holding that a tax-sale is void, where the clerk failed to record the list of delinquent lands and notice of sale, and certify at the foot of the record in what newspaper the list was published, the date of publication, and for what time the same was published before the day of sale, as required by Kirby Dig. § 7086); Cook *v.* Ziff Colored Masonic Lodge No. 119, 80 Ark. 31, 96 S. W. 618 (certificate held sufficient). Kirby Dig. § 7086, requiring the clerk of the county court to certify

(II) *Requirements as to Newspaper and Designation of Same.* The newspaper in which the delinquent list is to be published must be selected or designated in the manner prescribed by the statute and by the officers to whom authority for that purpose is committed by law,[18] and within the time limited;[19] and if there is no official action of this kind, or if an attempted designation is

at the foot of the record of the delinquent tax list when and in what newspaper the list was published, and for how long, does not require the certificate to state that the newspaper had a *bona fide* circulation in the county for thirty days before the publication. Leigh *v.* Trippe, 91 Ark. 117, 120 S. W. 972. The certificate of a county clerk that a list of lands delinquent for taxes was published in one newspaper for two weeks, weekly, the "first publication being on May 25, the next June 1, and the last, June 8, 1895," and in another paper, "the first publication being May 23, the second May 30, and the last June 6, 1895," shows the length of time notice of the sale was published "before the second Monday in June," within the requirements of the statute. Sawyer *v.* Wilson, 81 Ark. 319, 99 S. W. 389.

California.— Haaren *v.* High, 97 Cal. 445, 32 Pac. 518; Warden *v.* Broome, 9 Cal. App. 172, 98 Pac. 252. Under Cal. Pol. Code, § 3764, requiring the publication of a delinquent list containing the names of the persons and a description of the property and the amount of taxes, penalties, and costs, and section 3765 requiring the collector to publish with the delinquent list a notice that the property will be sold, etc., it was held that where a delinquent list otherwise correct stated that the taxes, penalties, and costs against the property in controversy were nineteen dollars and ninety cents, when the correct amount was nineteen dollars and forty cents, for which the property was in fact sold to the state, the sale was void. Warden *v.* Broome, *supra.*

Illinois.— McCraney *v.* Glos, 222 Ill. 628, 78 N. E. 921; Glos *v.* Hanford, 212 Ill. 261, 72 N. E. 439; McChesney *v.* People, 178 Ill. 542, 53 N. E. 356; Buck *v.* People, 78 Ill. 560; Senichka *v.* Lowe, 74 Ill. 274.

Kansas.— Stout *v.* Coates, 35 Kan. 382, 11 Pac. 151; Douglass *v.* Craig, 4 Kan. App. 99, 46 Pac. 197; Mims *v.* Finney County, 3 Kan. App. 622, 44 Pac. 38.

Minnesota.— Irwin *v.* Pierro, 44 Minn. 490, 47 N. W. 154.

See 45 Cent. Dig. tit. "Taxation," § 1283.

Proof of publication as essential to jurisdiction.— Where the publication of the delinquent list is not direct authority for the sale of the lands, but only the foundation for judicial proceedings *in rem,* culminating in a judgment ordering such sale, it is held that proof of the publication, to be made as the statute directs, is not essential to the jurisdiction of the court, provided the publication was in fact made as the law requires, but the omission of such proof is at most an amendable defect. Mille Lacs County *v.* Morrison, 22 Minn. 178; Raley *v.* Guinn, 76 Mo. 263. But *compare* Holmes *v.* Loughren, 97 Minn. 83, 105 N. W. 558, holding that where the printer's affidavit of publication of a delinquent list was sworn to before a notary public, but no notarial seal was affixed thereto, there was no publication of the delinquent list, and the court had no jurisdiction to enter judgment against a lot contained in it.

Parol proof of publication.— Where the delinquent list and proof of its publication are required to be perpetuated by record, and to be certified by the clerk before the sale, parol evidence is not admissible to supply its omission in a suit to confirm a tax title. Martin *v.* Barbour, 34 Fed. 701.

Presumption as to date.—Although the certificate of the county clerk as to the publication of the delinquent tax, required by Kirby Dig. Ark. § 7086, is not dated, it will be presumed, in the absence of proof to the contrary, that it was entered of record before the date of sale, as is necessary. Cook *v.* Ziff Colored Masonic Lodge, No. 119, 80 Ark. 31, 96 S. W. 618.

Filing and recording certificate.— Under Ill. Revenue Law, § 186 (Hurd Rev. St. (1905) c. 120), requiring the certificate of the publication of a delinquent tax list to be filed as part of the record of the county court, a filing thereof by the county clerk is not a sufficient compliance with the law, although the offices of county clerk and clerk of the county court are filled by the same person, and, notwithstanding Hurd Rev. St. (1905) p. 1946, c. 131, § 1, providing that the words "county clerk" shall be held to include "clerk of the county court," and the words "clerk of the county court" to include "county clerk," unless such construction would be inconsistent with the manifest intent of the legislature or repugnant to the context of the same statute. McCraney *v.* Glos, 222 Ill. 628, 78 N. E. 921.

18. Wren *v.* Nemaha County, 24 Kan. 301; Hall *v.* Ramsey County, 30 Minn. 68, 14 N. W. 263; Troy Press Co. *v.* Mann, 115 N. Y. App. Div. 25, 100 N. Y. Suppl. 516 [*affirmed* in 187 N. Y. 279, 79 N. E. 1006]; State *v.* Purdy, 14 Wash. 343, 44 Pac. 857.

At adjourned meeting.— Under Minn. Gen. St. (1894) § 1581, providing that a newspaper for publication of the delinquent list shall be designated by the county commissioners at their annual meeting in January, the designation is valid if made at an adjourned meeting. Minnesota Debenture Co. *v.* Scott, 106 Minn. 32, 119 N. W. 391.

19. Finnegan *v.* Gronerud, 63 Minn. 53, 65 N. W. 128, 348; Banning *v.* McManus, 51 Minn. 289, 53 N. W. 635; Reimer *v.* Newel, 47 Minn. 237, 49 N. W. 865; Emmons County *v.* Bismarck First Nat. Bank Lands, 9 N. D. 583, 84 N. W. 379.

too indefinite or informal to meet the requirements of the statute, it invalidates the further proceedings founded on such publication.[20] It is also commonly required that a certified copy of the resolution designating the newspaper shall be filed or deposited with the clerk of the court.[21] The medium of publication selected must answer the description of a "newspaper" and be printed in the English language;[22] and if the tax list is printed in a supplement or on extra sheets, the circulation of the same must be equal to that of the paper itself.[23]

f. Posting of List. Where the statute directs that a copy of the delinquent list shall be posted, its provisions must be obeyed in respect to the fact of posting and the time and place of so doing; if not, a subsequent sale of the lands is void.[24]

2. Proceedings to Enforce Lien — a. Nature and Form of Proceeding and Jurisdiction. A suit in equity may be maintained for the foreclosure of a tax lien on land when such a proceeding is directly authorized by statute,[25] or when the statute has omitted to make any provision for enforcing the payment of the tax or the remedy provided is lost for any reason,[26] but not when the statutory

20. Reimer *v.* Newel, 47 Minn. 237, 49 N. W. 865; Godfrey *v.* Valentine, 45 Minn. 502, 48 N. W. 325; Merriman *v.* Knight, 43 Minn. 493, 45 N. W. 1098; Brown *v.* Corbin, 40 Minn. 508, 42 N. W. 481; Knight *v.* Alexander, 38 Minn. 384, 37 N. W. 796, 8 Am. St. Rep. 675; Russell *v.* Gilson, 36 Minn. 366, 31 N. W. 692; Eastman *v.* Linn, 26 Minn. 215, 2 N. W. 693; Conklin *v.* Cullen, 29 Mont. 38, 74 Pac. 72; State *v.* Cronin, 75 Nebr. 738, 106 N. W. 986; Cass County *v.* Security Imp. Co., 7 N. D. 528, 75 N. W. 775.

21. Glos *v.* Hanford, 212 Ill. 261, 72 N. E. 439; Chadbourne *v.* Hart, 93 Minn. 233, 101 N. W. 68; Kipp *v.* Dawson, 59 Minn. 82, 60 N. W. 845; Reimer *v.* Newel, 47 Minn. 237, 49 N. W. 865; Darling *v.* Purcell, 13 N. D. 288, 100 N. W. 726; Emmons County *v.* Bismarck First Nat. Bank Lands, 9 N. D. 583, 84 N. W. 379; Cass County *v.* Security Imp. Co., 7 N. D. 528, 75 N. W. 775.

Sufficiency of resolution.— Where a certified copy of a resolution recommended the acceptance of the bids of the Minneapolis Tribune for the publication of the delinquent list, and that the contract be awarded to "them" on the filing of a proper bond, and the resolution was adopted, it was not insufficient, as any person of ordinary intelligence would have understood that the Minneapolis Tribune had been designated. Minnesota Debenture Co. *v.* Scott, 106 Minn. 32, 119 N. W. 391.

22. Jackson *v.* Cummings, 15 Ill. 449; Graham *v.* King, 50 Mo. 22, 11 Am. Rep. 401; State *v.* Chamberlain, 99 Wis. 503, 75 N. W. 62, 40 L. R. A. 843. But see as to newspaper printed in German Donahue *v.* O'Conor, 45 N. Y. Super. Ct. 278.

Change of name of paper.— The mere fact that a newspaper, officially designated as the medium of publication of the delinquent list, changes its name between the time of the designation and the time of the publication of the list does not destroy the identity of the paper or render the publication invalid. Reimer *v.* Newel, 47 Minn. 237, 49 N. W. 865.

Selection among bidders.— Where the law requires the proper officers to designate the newspaper making the lowest bid, they may designate one of several papers, whose bids are the same and lower than any other made. Godfrey *v.* Valentine, 45 Minn. 502, 48 N. W. 325.

Injunction may issue to restrain the publication of the delinquent tax list in an unauthorized newspaper. Sinclair *v.* Winona County, 23 Minn. 404, 23 Am. Rep. 694.

23. Tully *v.* Bauer, 52 Cal. 487; Davis *v.* Simms, 4 Bibb (Ky.) 465; Zahradnicek *v.* Selby, 15 Nebr. 579, 19 N. W. 645.

24. Doe *v.* Sweetser, 2 Ind. 649; Pitts *v.* Booth, 15 Tex. 453; Sommers *v.* Ward, 41 W. Va. 76, 23 S. E. 520; Iverslie *v.* Spaulding, 32 Wis. 394.

25. St. Louis, etc., R. Co. *v.* State, 47 Ark. 323, 1 S. W. 556; Biggins *v.* People, 106 Ill. 270; Pritchard *v.* Madren, 24 Kan. 486; Lancaster County *v.* Rush, 35 Nebr. 119, 52 N. W. 837; Lancaster County *v.* Trimble, 34 Nebr. 752, 52 N. W. 711. And see Logan County *v.* Carnahan, 66 Nebr. 685, 92 N. W. 984, 95 N. W. 812; Holt County *v.* Golden, 5 Nebr. (Unoff.) 308, 98 N. W. 422; Chase County *v.* Meeker, 5 Nebr. (Unoff.) 244, 97 N. W. 1021.

What law governs.— In a tax foreclosure suit, the statute in force when the action is instituted governs in all matters of procedure, and it is not affected by requirements subsequently enacted. Taylor *v.* Huntington, 34 Wash. 455, 75 Pac. 1104.

Right of action.— Since taxes are levied by and are due to a county, either for itself or as trustee for various corporations, such as the state, cities, villages, and school-districts, it is not necessary for the county to pay delinquent taxes before suing to foreclose the lien therefor. Lancaster County *v.* Trimble, 34 Nebr. 752, 52 N. W. 711. And see Meyer *v.* Burritt, 60 Conn. 117, 22 Atl. 501.

26. Winter *v.* Montgomery, 79 Ala. 481; Douthett *v.* Winter, 108 Ill. 330; McInerny *v.* Reed, 23 Iowa 410; State *v.* Duncan, 3 Lea (Tenn.) 679. *Compare* Louisville Trust Co. *v.* Muhlenberg County, 23 S. W. 674, 15 Ky. L. Rep. 397.

Lien on railroad property.— Where the law provides for the levy and assessment of

remedy by advertisement and sale of the property is intended to be exclusive or is at any rate available and adequate.[27] An action to foreclose such a lien must be brought in the county where the land lies,[28] and, although several taxes all equally attaching to the property as liens may be included in one suit,[29] it is not permissible to unite several parcels of land which were or should have been individually assessed.[30]

b. Demand, Time to Sue, and Limitations. In the absence of a statute no demand is necessary before suing to foreclose a tax lien.[31] If the statute provides that a suit to enforce a lien for taxes shall not be brought until they have been delinquent for a certain length of time, an action begun before the expiration of that time will be dismissed as premature.[32] On the other hand, no such action can be maintained after the end of the time limited for its institution, or after the end of the period to which the continuance of the lien is specifically limited by law.[33] But aside from such statutory restrictions, mere delay in bringing the suit will not prevent the enforcement of the lien.[34]

c. Parties and Process or Notice. Whether a suit of this kind should be brought in the name of the tax collector, the municipal corporation, or the people of the state, depends on the provisions of the local statute.[35] It is always proper, and sometimes it is required by law, that the suit shall be against the "owner" of the land, which means the owner of record at the time the action is begun;[36]

taxes against railroads, and makes them a lien on the section of the road lying within each county, but, for reasons of public policy, will not permit the sale of such part of the road, or of any personal property used in its operation, to compel payment of the tax, and the whole of the road cannot be sold for taxes in one county, it is evident that no provision is made for the enforcement of the tax; and therefore the law must be held to contemplate its enforcement by ordinary remedies, one of which is a proceeding in equity to establish and enforce the lien for the tax against its property. Dobbins *v.* Colorado, etc., R. Co., 19 Colo. App. 257, 75 Pac. 156.

Sale on execution.— Taxes on land are a specific charge upon it, and their payment cannot be enforced by a sale of it under execution of a judgment *in personam*. Clegg *v.* State, 42 Tex. 605.

27. Montezuma Valley Water Supply Co. *v.* Bell, 20 Colo. 175, 36 Pac. 1102; People *v.* Biggins, 96 Ill. 481; Greene County *v.* Murphy, 107 N. C. 36, 12 S. E. 122. *Compare* Henrietta *v.* Eustis, 87 Tex. 14, 26 S. W. 619.

28. State *v.* Baker, 129 Mo. 482, 31 S. W. 924.

29. Hart *v.* Tiernan, 59 Conn. 521, 21 Atl. 1007. But if taxes are due for which no lien is given by the statute, they cannot be united in one action with other taxes as to which a lien exists. Howard *v.* Augusta, 74 Me. 79.

30. Hellman *v.* Burritt, 62 Conn. 438, 26 Atl. 473; State *v.* Baker, 49 Tex. 763.

31. Hart *v.* Tiernan, 59 Conn. 521, 21 Atl. 1007.

32. State *v.* Robyn, 93 Mo. 395, 6 S. W. 243; Kelly *v.* Dawes County, 4 Nebr. (Unoff.) 49, 93 N. W. 405.

33. *Missouri.*— State *v.* Heman, 70 Mo. 441.

Nebraska.— Gallentine *v.* Fullerton, 67 Nebr. 553, 93 N. W. 932; Western Land Co. *v.* Buskley, 3 Nebr. (Unoff.) 776, 92 N. W. 1052.

New Jersey.— Hunt *v.* Lambertville, 6 N. J. L. J. 343.

Ohio.— Brenchweh *v.* Drake, 31 Ohio St. 652.

South Dakota.— Iowa Land Co. *v.* Douglas County, 8 S. D. 491, 67 N. W. 52.

See 45 Cent. Dig. tit. "Taxation," § 1293.

It is sufficient if the suit is begun within the time limited by law; it is not material that the further proceedings are had and judgment rendered after the expiration of that time. Himmelman *v.* Carpenter, 47 Cal. 42; Randolph *v.* Bayne, 44 Cal. 366.

34. Holden *v.* Eaton, 7 Pick. (Mass.) 15; Swan *v.* Knoxville, 11 Humphr. (Tenn.) 130. But see San Francisco *v.* Jones, 20 Fed. 188, as to extinguishment of tax lien after an action to recover the tax as a debt would be barred.

35. See the statutes of the different states. And see Hart *v.* Tiernan, 59 Conn. 521, 21 Atl. 1007; Ward *v.* Alton, 23 Ill. App. 475.

36. *Connecticut.*— Union School Dist. *v.* Bishop, 76 Conn. 695, 58 Atl. 13, 66 L. R. A. 989.

Kansas.— Pritchard *v.* Greenwood County, 26 Kan. 584.

Missouri.— Hilton *v.* Smith, 134 Mo. 499, 33 S. W. 464, 35 S. W. 1137; State *v.* Sack, 79 Mo. 661.

Nebraska.— Edmunson *v.* Alexander, 32 Nebr. 562, 49 N. W. 461.

Washington.— Port Townsend *v.* Trumbull, 40 Wash. 386, 82 Pac. 715.

Where the land affected is encumbered by a deed of trust in the nature of a mortgage, the trustee is regarded as the "owner" for the purpose of a tax suit, but the beneficiary named in the deed, or the holder of the note secured, will not be bound by the judgment

but provision is usually made by law for bringing in non-resident or unknown owners on process served by published advertisement,[37] and in some jurisdictions a general citation may be issued to all persons having or claiming any interest in the land or lien upon it, which notice is also served by publication,[38] although ordinarily the process should be served as in ordinary cases involving real estate.[39] A statute sometimes provides for the entry of a warning order on the records of the court in which the suit is brought, and compliance with the statute is necessary to confer jurisdiction.[40] If the theory of the statute is that the action is a personal one, the decree will bind only those who were made parties to the suit;[41] but on

if he is not made a party to the suit. Williams *v.* Hudson, 93 Mo. 524, 6 S. W. 261; Allen *v.* McCabe, 93 Mo. 138, 6 S. W. 62; Cowell *v.* Gray, 85 Mo. 169; Boatmen's Sav. Bank *v.* Grewe, 84 Mo. 477; Gitchell *v.* Kreidler, 84 Mo. 472.

Life-tenant and remainder-man.—A judgment in a tax suit brought against the life-tenant without joining the remainder-man cannot be collaterally attacked by the life-tenant in an action by him against the purchaser at the tax-sale to recover the land. Hogan *v.* Smith, 11 Mo. App. 314.

37. See the statutes of the different states. And see Cole *v.* Shelp, 98 Mich. 56, 56 N. W. 1052; Gillingham *v.* Brown, 187 Mo. 181, 85 S. W. 1113; Harness *v.* Cravens, 126 Mo. 233, 28 S. W. 971; Rohrer *v.* Oder, 124 Mo. 24, 27 S. W. 606; Allen *v.* Ray, 96 Mo. 542, 10 S. W. 153; Chamberlain *v.* Blodgett, 96 Mo. 482, 10 S. W. 44; Troyer *v.* Wood, 96 Mo. 478, 10 S. W. 42, 9 Am. St. Rep. 367; Elting *v.* Gould, 96 Mo. 535, 9 S. W. 922; Williams *v.* Hudson, 93 Mo. 524, 6 S. W. 261; Payne *v.* Lott, 90 Mo. 676, 3 S. W. 402; Goldsworthy *v.* Thompson, 87 Mo. 233; Armstrong *v.* Middlestadt, 22 Nebr. 711, 36 N. W. 151; Taylor *v.* Huntington, 34 Wash. 455, 75 Pac. 1104; Smith *v.* Newell, 32 Wash. 369, 73 Pac. 369; Thompson *v.* Robbins, 32 Wash. 149, 72 Pac. 1043. See also *infra*, XI, E, 3, d, (II).

Affidavit of non-residence.— Where an affidavit of non-residence for an order for the publication of process in a suit to foreclose a tax lien was made before a notary public, and alleged defendant's non-residence, the fact that it was mistakenly first filed with a justice of the peace, who had no jurisdiction of the action, and was then withdrawn and filed in the circuit court, did not render it ineffective to sustain the order. Himmelberger-Harrison Lumber Co. *v.* Keener, 217 Mo. 522, 117 S. W. 42.

Insufficient summons by publication.— Under Wash. Laws (1897), p. 182, c. 71, § 97, providing that the summons in a tax foreclosure proceeding shall be served in the same manner as summons in a civil action in the superior court, and Ballinger Annot. Codes & St. § 4878, providing that the summons in a civil action in the superior court shall contain the date of the first publication and shall require the defendant to appear and answer within sixty days from the date of the first publication thereof, a summons by publication in a tax foreclosure proceeding, which directs defendant to appear within sixty days after the service of the summons upon him, exclusive of the day of service, and defend the action, confers no jurisdiction on the court to render judgment; and Laws (1899), p. 285, c. 141, relating to revenue and taxation, did not attempt to change the statutes controlling the service of summons in such proceedings. Bartels *v.* Christensen, 46 Wash. 478, 90 Pac. 658; Dolan *v.* Jones, 37 Wash. 176, 79 Pac. 640; Thompson *v.* Robbins, 32 Wash. 149, 72 Pac. 1043.

38. Doyle *v.* Martin, 55 Ark. 37, 17 S. W. 346; Gregory *v.* Bartlett, 55 Ark. 30, 17 S. W. 344; Branson *v.* Caruthers, 49 Cal. 374; Washington Timber, etc., Co. *v.* Smith, 34 Wash. 625, 76 Pac. 267.

It is the duty of parties made defendants to a suit to foreclose a tax lien, on the ground that they have or claim some interest in the property, to set forth by answer any interest they may have. Port Townsend *v.* Trumbull, 40 Wash. 386, 82 Pac. 715.

39. Cruzen *v.* Stephens, 123 Mo. 337, 27 S. W. 557, 45 Am. St. Rep. 549. A court cannot enter a valid decree foreclosing a tax lien on property, unless it has acquired jurisdiction over the person of the owner by the service of process or notice in some mode prescribed by law, or by his appearance, or over the property *in rem* by its seizure under process. Ontario Land Co. *v.* Wilfong, 162 Fed. 999 [*reversed* on other grounds in 171 Fed. 51, 96 C. C. A. 293], Washington statute.

In Washington, a tax foreclosure by a county being a proceeding *in rem*, it is immaterial what name is used in the summons as the owner of the property, or whether any be used. It is enough, in the absence of fraud, that the summons properly described the property. Noble *v.* Aune, 50 Wash. 73, 96 Pac. 688.

40. Foohs *v.* Bilby, 83 Ark. 234, 103 S. W. 386 (holding that the entry upon the records of a court of the warning order describing lands proceeded against in an overdue tax proceeding was a jurisdictional matter, and the failure to embrace in the entry a description of a particular tract rendered the subsequent proceedings against that tract and the sale thereof void); Pope *v.* Campbell, 70 Ark. 207, 66 S. W. 916 (entry of the warning order upon the record of proceedings at law, instead of the chancery record, fatal); Gregory *v.* Bartlett, 55 Ark. 30, 17 S. W. 344.

41. Mix *v.* People, 116 Ill. 265, 4 N. E. 783; Williams *v.* Hudson, 93 Mo. 524, 6 S. W. 261. And see Jenkins *v.* Newman, 122

the other hand, if it is regarded as *in rem*, and especially after the publication of a general citation as above mentioned, the judgment is conclusive upon all persons having any interest.[42]

d. Proceedings and Judgment. The bill, petition, or complaint should describe the land sought to be charged,[43] and set forth the levy and assessment of the tax and the amount due and unpaid.[44] The answer may set up the invalidity of the levy or assessment,[45] or deny the legality of the tax.[46] The assessment list or collector's book is *prima facie* evidence of the liability of the land to the payment of the particular sum shown thereby.[47] The judgment or decree, if for plaintiff or complainant, should describe the land, state the amount of taxes due on each tract, and decree the foreclosure of the lien;[48] and such other or further relief may be granted as the pleadings and evidence will warrant.[49] It is conclusive of the facts essential to the maintenance of the action and of such matters of defense as were or should have been pleaded, including the legality of the tax and levy and the fact of delinquency.[50] The matter of costs and fees in actions of this kind is regulated by the local statute.[51]

3. Proceedings For Judgment — a. Nature and Form of Action. In some states, by constitutional provisions or by statute, real estate cannot be sold for the non-payment of taxes except under the judgment or decree of a court.[52]

Ind. 99, 23 N. E. 683; State *v.* Clymer, 81 Mo. 122.

42. Pritchard *v.* Madren, 24 Kan. 486; Newby *v.* Brownlee, 23 Fed. 320.

43. State *v.* Linney, 192 Mo. 49, 90 S. W. 844; State *v.* Cowgill, 81 Mo. 381.

44. Mix *v.* People, 122 Ill. 641, 14 N. E. 209; Christie *v.* Hartzell, 4 Nebr. (Unoff.) 627, 95 N. W. 637. A bill to enforce a lien on real estate for taxes is defective in failing to allege when the taxes were assessed and the levy made. Miami *v.* Miami Realty, etc., Co., 57 Fla. 366, 49 So. 55. In a tax suit facts must be alleged showing, not only a statutory liability, but complainant's right to recover. Miami *v.* Miami Realty, etc., Co., *supra*. It is the bill of complaint in a tax suit, and not the notice of lien, which must set out the cause of action. Miami *v.* Miami Realty, etc., Co., *supra*.

Lands listed to heirs of deceased owner see Waterbury *v.* O'Loughlin, 79 Conn. 630, 66 Atl. 173.

Amendment.— In a suit to enforce a lien for taxes, a claim of lien for additional taxes for a subsequent year on the same land was properly set up by amended petition, as authorized by Civ. Code Pr. § 694, subs. 3. Frankfort *v.* Herndon, 133 Ky. 583, 118 S. W. 347.

45. Medland *v.* Croft, 1 Nebr. (Unoff.) 419, 95 N. W. 665.

46. Union School Dist. *v.* Bishop, 76 Conn. 695, 58 Atl. 13, 66 L. R. A. 989.

47. Mix *v.* People, 122 Ill. 641, 14 N. E. 209; Mix *v.* People, 116 Ill. 265, 4 N. E. 783; State *v.* Birch, 186 Mo. 205, 85 S. W. 361; Pettibone *v.* Yeiser, 2 Nebr. (Unoff.) 65, 96 N. W. 193.

In Nebraska, in an action to enforce collection of delinquent taxes and assessments on real estate under Comp. St. (1905) c. 77, art. 9, commonly known as the "Scavenger Act," the petition, by express provision of the statute, must be taken as *prima facie* evidence of the legality of the tax and assessment set forth therein and of the several amounts levied on behalf of the state, county, or city, in which the lands are located, and that such taxes are unpaid and delinquent. State *v.* Several Parcels of Land, 78 Nebr. 581, 111 N. W. 367.

48. St. Louis, etc., R. Co. *v.* State, 47 Ark. 323, 1 S. W. 556; Auditor-Gen. *v.* Gurney, 109 Mich. 472, 67 N. W. 525, 1113; State *v.* Kerr, 8 Mo. App. 125.

Separate tracts of land included in same judgment see Mix *v.* People, 116 Ill. 265, 4 N. E. 783; Cave *v.* Houston, 65 Tex. 619; Edmonson *v.* Galveston, 53 Tex. 157; Whatcom County *v.* Fairhaven Land Co., 7 Wash. 101, 34 Pac. 563.

Signature of presiding judge see Raley *v.* Guinn, 76 Mo. 263.

49. Union School Dist. *v.* Bishop, 76 Conn. 695, 58 Atl. 13, 66 L. R. A. 989 (affirmative relief to defendant); Langlois *v.* People, 212 Ill. 75, 72 N. E. 28; Chicago Real Estate L. & T. Co. *v.* People, 104 Ill. App. 290 (appointment of receiver).

50. Doyle *v.* Martin, 55 Ark. 37, 17 S. W. 346; Mix *v.* People, 116 Ill. 265, 4 N. E. 783.

The lien for taxes is not merged in the judgment rendered in a proceeding under the statutes of Indiana, so as to prevent the enforcement of such lien in the ordinary manner for any balance of the taxes unpaid by the proceeds of the tax-sale against the same land when subsequently acquired by the tax debtor from the purchaser at the tax-sale. Beard *v.* Allen, 141 Ind. 243, 39 N. E. 665, 40 N. E. 654.

51. See the statutes of the different states. And see Ward *v.* Alton, 23 Ill. App. 475; Hall *v.* Moore, 3 Nebr. (Unoff.) 574, 92 N. W. 294; Whatcom County *v.* Fairhaven Land Co., 7 Wash. 101, 34 Pac. 563.

52. See the statutes of the different states. And see Webster *v.* Chicago, 62 Ill. 302; Hills *v.* Chicago, 60 Ill. 86; Hinman *v.* Pope, 6 Ill. 131; Bleirdorn *v.* Abel, 6 Iowa 5; Carlin *v.* Cavender, 56 Mo. 286; Strassheim *v.* Jer-

Where this is the case the right of suit rests solely upon the statute, and the provisions of the statute must be closely followed, as the proceedings cannot be aided by analogies drawn from common-law actions.[53] But an action for taxes may assume two forms. In the first place it may be a personal proceeding against the delinquent taxpayer, in which event it is strictly an action *in personam*, and the judgment is not directed against any specific tract of land, but may be enforced by execution like any other judgment.[54] In the second place, it may have for its objective the condemnation and sale of the particular parcel of land on which the taxes are assessed, in which case it is, according to some of the decisions, not strictly a judicial proceeding but rather administrative in character;[55] but it is at any rate a proceeding *in rem*, directed against the land itself, based on jurisdiction of the property rather than of the owner, and not involving the latter in any personal liability nor subjecting him to a general or personal judgment.[56]

b. Time to Sue and Limitations. A proceeding *in rem* for the collection of delinquent taxes on land being an action for the enforcement of a public right, rather than for the recovery of a debt, is not barred by any statute of limitations,[57] unless it is expressly so provided by law.[58] But if the statute prescribes that

man, 56 Mo. 104; Alexander *v.* Helber, 35 Mo. 334.

Strict foreclosure of lien.— In Kansas there is no authority for a strict foreclosure of a lien for taxes or betterments. Park *v.* Hetherington, 62 Kan. 868, 64 Pac. 1115.

53. People *v.* Otis, 74 Ill. 384; York *v.* Goodwin, 67 Me. 260; McCallum *v.* Bethany, 42 Mich. 457, 4 N. W. 164; Wattles *v.* Lapeer, 40 Mich. 624; Hughes *v.* Linn County, 37 Oreg. 111, 60 Pac 843. *Compare* State *v.* Central Pac. R. Co., 10 Nev. 47.

54. Byrne *v.* La Salle, 123 Ill. 581, 14 N. E. 679; Reed *v.* Louisville, 61 S. W. 11, 22 Ky. L. Rep. 1636; Mercier's Succession, 42 La. Ann. 1135, 8 So. 732, 11 L. R. A. 817. See, in general, as to suits *in personam* for the recovery of delinquent taxes *supra*, X, C, 6.

Tax lien not affected by judgment.— Where a personal judgment of this kind has been obtained, the state cannot, in an action against the alienee of defendant's property, enforce the judgment as a lien on the property without averring and proving all the steps necessary to the creation of a valid tax lien, as the lien exists by virtue of the statute and is not affected by the judgment. Kentucky Cent. R. Co. *v.* Com., 92 Ky. 64, 17 S. W. 196, 13 Ky. L. Rep. 484.

Judgment as bar to proceeding in rem.— Where the remedy *in personam* against the taxpayer has been pursued first, and a sale of the property made, and the proceeds applied to the payment of the taxes, such proceedings bar any subsequent proceeding *in rem* against the property for the same taxes. People *v.* Winter, 116 Ill. 211, 5 N. E. 536. But the mere recovery of a judgment without satisfaction wholly or in part does not have this effect. People *v.* Stahl, 101 Ill. 346.

55. Mix *v.* People, 86 Ill. 312; *In re* New York Protestant Episcopal Public School, 31 N. Y. 574.

56. *Arizona.*— Territory *v.* Yavapai County Delinquent Tax List, 3 Ariz. 117, 21 Pac. 768.

Illinois.— People *v.* Dragstran, 100 Ill. 286; Schaeffer *v.* People, 60 Ill. 179; Parks *v.* Miller, 48 Ill. 360; Pidgeon *v.* State, 36 Ill. 249; Chesnut *v.* March, 12 Ill. 173; Olcott *v.* State, 10 Ill. 481.

Minnesota.— Kipp *v.* Collins, 33 Minn. 394, 23 N. W. 554.

Missouri.— Neenan *v.* St. Joseph, 126 Mo. 89, 28 S. W. 963.

Pennsylvania.— Steen's Estate, 175 Pa. St. 299, 34 Atl. 732; Scranton *v.* Miller, 2 L. T. Rep. N. S. 111.

Texas.— Clegg *v.* State, 42 Tex. 605.

United States.— Newby *v.* Brownlee, 23 Fed. 320.

But in California, if sufficient service has been made upon the owner of the property to give the court full jurisdiction of his person, a personal judgment against him is regarded as valid. People *v.* Fox, 39 Cal. 621; Gillis *v.* Barnett, 38 Cal. 393. And see Reeve *v.* Kennedy, 43 Cal. 643.

57. *Illinois.*— Greenwood *v.* La Salle, 137 Ill. 225, 26 N. E. 1089.

Louisiana.— Leeds *v.* Treasurer, 43 La. Ann. 810, 9 So. 488.

Minnesota.— Brown County *v.* Winona, etc., Land Co., 38 Minn. 397, 37 N. W. 949.

Ohio.— Hartman *v.* Hunter, 8 Ohio Cir. Ct. 623, 4 Ohio Cir. Dec. 200.

Pennsylvania.— Philadelphia *v.* Browning, 13 Pa. Super. Ct. 164.

West Virginia.— Tebbetts *v.* Charleston, 33 W. Va. 705, 11 S. E. 23.

See 45 Cent. Dig. tit. "Taxation," § 1303.

Right of action depending on lien.— Unless otherwise provided the power to sell land for taxes must be exercised within the period during which such taxes remain a lien on the land to be sold. Harned *v.* Camden, 66 N. J. L. 520, 49 Atl. 1082.

58. Louisville *v.* Johnson, 95 Ky. 254, 24 S. W. 875, 15 Ky. L. Rep. 615; State *v.* Ward, 79 Minn. 362, 82 N. W. 686; Stevens *v.* Paulsen, 64 Nebr. 488, 90 N. W. 211; Darr *v.* Wisner, 63 Nebr. 305, 88 N. W. 518; Barnes *v.* Brown, 1 Tenn. Ch. App. 726.

judgments of this kind shall be rendered at a specified term of the court, it is to be taken as mandatory, and a judgment rendered at a different term will be void.[59]

c. Jurisdiction — (i) *In General.* Jurisdiction of proceedings of this kind can be entertained only by those courts to which it has been specially committed by law; [60] and as their proceedings are special and statutory and of a more or less summary character, it is necessary that every fact essential to the jurisdiction of the court shall appear on the record.[61]

(ii) *Jurisdiction Depending on Delinquency.* It is held in numerous cases that where the proceeding is by suit to enforce the collection of taxes against real estate, culminating in a judgment, the jurisdiction of the court, as to a particular tract, is not affected by the fact that the taxes upon such tract have previously been paid, this being a matter of defense merely; or at any rate that the judgment, if regular and otherwise valid, and showing jurisdiction on its face cannot be impeached in any collateral proceeding by proof of such prior payment[62]

Repeal of statute.— Minn. Laws (1902), p. 40, c. 2, § 82, repealing the statute of limitations as to the enforcement of taxes, applies to taxes delinquent at the time of its passage, as to which the limitation had not then run. State *v.* Foster, 104 Minn. 408, 116 N. W. 826.

59. Brown *v.* Hogle, 30 Ill. 119; Spurlock *v.* Dougherty, 81 Mo. 171. And see Stilwell *v.* People, 49 Ill. 45; Kinney *v.* Forsythe, 96 Mo. 414, 9 S. W. 918. But *compare* Akers *v.* Burch, 12 Heisk. (Tenn.) 606. And see Douglass *v.* Leavenworth County, 75 Kan. 6, 88 Pac. 557.

Effect of delay in proceedings.— A statute in Minnesota providing that in proceedings to enforce delinquent taxes the answer shall stand for trial at the same or next general or special term of court is held to be merely directory, and hence a delay on the part of the state to bring such a proceeding to trial for over six years does not operate as a discontinuance or entitle defendant to a dismissal. State *v.* Baldwin, 62 Minn. 518, 65 N. W. 80.

60. Covington *v.* Highlands Dist., 113 Ky. 612, 68 S. W. 669, 24 Ky. L. Rep. 433; Wellshear *v.* Kelley, 69 Mo. 343.

61. Territory *v.* Apache County Delinquent Tax List, 3 Ariz. 69, 21 Pac. 888; Chadbourne *v.* Hartz, 93 Minn. 233, 101 N. W. 68; Cordray *v.* Neuhaus, 25 Tex. Civ. App. 247, 61 S. W. 415; M'Clung *v.* Ross, 5 Wheat. (U. S.) 116, 5 L. ed. 46.

In Tennessee, it is stated that the grounds of fact on which the jurisdiction rests are that the land lies in the county, that the sum due for the taxes remains unpaid, and that there was no personal property which could be distrained for the payment. Anderson *v.* Patton, 1 Humphr. 369; Anderson *v.* Williams, 10 Yerg. 234; Hamilton *v.* Burum, 3 Yerg. 355.

In Alabama it is considered that the affidavit which the collector is required to make, as to his inability to find personal property after diligent search, is a jurisdictional fact without which the order of sale is void. Fleming *v.* McGee, 81 Ala. 409, 1 So. 106.

Demand and notice of delinquency.— It has been held essential to the jurisdiction of the court that a proper demand should have been made by the collector on the taxpayer for the amount of the taxes unpaid, and that this must appear on the face of the proceedings. Mayhew *v.* Davis, 16 Fed. Cas. No. 9,347, 4 McLean 213. And in Louisiana it is said that the notice of delinquency required to be given or mailed to the tax debtor is "sacramental," and the failure to give it vitiates all subsequent proceedings. Tensas Delta Land Co. *v.* Sholars, 105 La. 357, 29 So. 908. But see State *v.* St. Paul Trust Co., 76 Minn. 423, 79 N. W. 543.

Exemption of property.— In a proceeding to sell land for non-payment of taxes, the fact that the land is exempt from taxation does not deprive the court of jurisdiction, as that is one of the questions to be decided. Chisago County *v.* St. Paul, etc., R. Co., 27 Minn. 109, 6 N. W. 454.

Illegality of levy as affecting jurisdiction see Emmons County *v.* Bismarck First Nat. Bank's Lands, 9 N. D. 583, 84 N. W. 379.

Appearance for purpose of objecting to jurisdiction see Stearns County *v.* Smith, 25 Minn. 131.

62. *Arkansas.*— Doyle *v.* Martin, 55 Ark. 37, 17 S. W. 346; McCarter *v.* Neil, 50 Ark. 188, 6 S. W. 731; Williamson *v.* Mimms, 49 Ark. 336, 5 S. W. 320; Worthen *v.* Ratcliffe, 42 Ark. 330; Wallace *v.* Brown, 22 Ark. 118, 76 Am. Dec. 421.

California.— Mayo *v.* Foley, 40 Cal. 281.

Iowa.— McGahen *v.* Carr, 6 Iowa 331, 71 Am. Dec. 421; Gaylord *v.* Scarff, 6 Iowa 179.

Minnesota.— Chauncey *v.* Wass, 35 Minn. 1, 25 N. W. 457, 30 N. W. 826; Stewart *v.* Colter, 31 Minn. 385, 18 N. W. 98; Chisago County *v.* St. Paul, etc., R. Co., 27 Minn. 109, 6 N. W. 454.

Missouri.— Hill *v.* Sherwood, 96 Mo. 125, 8 S. W. 781; Jones *v.* Driskill, 94 Mo. 190, 7 S. W. 111; Knoll *v.* Woelken, 13 Mo. App. 275; State *v.* Sargent, 12 Mo. App. 228. But *compare* Huber *v.* Pickler, 94 Mo. 382, 7 S. W. 427.

North Dakota.— Purcell *v.* Farm Land Co., 13 N. D. 327, 100 N. W. 700.

Pennsylvania.— Cadmus *v.* Jackson, 52 Pa. St. 295.

United States.— Thomas *v.* Lawson, 21 How. 331, 16 L. ed. 82; Parker *v.* Overman,

d. Process or Notice — (i) *In General.* Notice in some form to the delinquent owner is essential to the jurisdiction of the court, and no valid judgment can be rendered except it be founded on a citation, notice, or summons such as the law provides for,[63] conforming to the statute in respect to its terms and recitals,[64] naming the parties correctly if their names are known,[65] served in such a manner as the statute directs and upon the proper persons,[66] and with such proof of its service and such filing or recording of the notice as the statute may call for.[67] In some states this initiatory process is a notice of the collector's intention to apply for a judgment and order of sale against the lands therein described as delinquent. This must state that such an order of sale will be asked for,[68] and must state the year or years for which the taxes are due,[69] and their amount,[70] with such other particulars as the law directs to be included.[71] And especially the notice must contain such a description of the land sought to be charged as will suffice to identify it with reasonable ease and certainty.[72] But an owner

18 How. 137, 15 L. ed. 318; Chicago Theological Seminary *v.* Gage, 12 Fed. 398, 11 Biss. 289.

Contra.— Watson *v.* Kent, 78 Ala. 602.

63. *Alabama.*— Riddle *v.* Messer, 84 Ala. 236, 4 So. 185.

Arkansas.— Gregory *v.* Bartlett, 55 Ark. 30, 17 S. W. 344.

Illinois.— Fortman *v.* Ruggles, 58 Ill. 207; McKee *v.* Champaign Co., 53 Ill. 477.

Louisiana.—Kohlman *v.* Glaudi, 52 La. Ann. 700, 27 So. 116.

Michigan.— Nowlen *v.* Hall, 128 Mich. 274, 87 N. W. 222. But see Tromble *v.* Hoffman, 130 Mich. 676, 90 N. W. 694.

Minnesota.— Russell *v.* Gilson, 36 Minn. 366, 31 N. W. 692.

Missouri.— Abbott *v.* Lindenbower, 42 Mo. 162.

Washington.— Rust *v.* Kennedy, 52 Wash. 472, 100 Pac. 998; Pyatt *v.* Hegquist, 45 Wash. 504, 88 Pac. 933; McManus *v.* Morgan, 38 Wash. 528, 80 Pac. 786.

United States.— Ontario Land Co. *v.* Wilfong, 162 Fed. 999 [*reversed* on other grounds in 171 Fed. 51, 96 C. C. A. 293], Washington statute.

See 45 Cent. Dig. tit. "Taxation," § 1305.

64. Smith *v.* Cox, 115 Ala. 503, 22 So. 78; Kipp *v.* Fitch, 73 Minn. 65, 75 N. W. 752; West *v.* St. Paul, etc., R. Co., 40 Minn. 189, 41 N. W. 1031.

Description of land.— The summons in tax foreclosure proceedings being required by Ballinger Annot. Codes & St. Wash. § 1751 (Pierce Code, § 8692), to name lands against which judgment will be rendered, the court is without jurisdiction as to land not so mentioned. Wick *v.* Rea, 54 Wash. 424, 103 Pac. 462.

65. Schnitger *v.* Rankin, 192 Mo. 35, 91 S. W. 122; Troyer *v.* Wood, 96 Mo. 478, 10 S. W. 42, 9 Am. St. Rep. 367; Fryer *v.* Magill, 163 Pa. St. 340, 30 Atl. 191; Peck *v.* East Tennessee Lumber, etc., Co., (Tenn. Ch. App. 1899) 53 S. W. 1107; Anderson *v.* Turati, 39 Wash. 155, 81 Pac. 557.

66. *California.*— People *v.* Fox, 39 Cal. 621, service on "person in possession"; and see this case as to posting copy of the summons on the land.

Louisiana.— Harvey *v.* Gulf States Land, etc., Co., 108 La. 550, 32 So. 475.

Michigan.— Coyle *v.* O'Connor, 121 Mich. 596, 80 N. W. 571; Taylor *v.* Deveaux, 100 Mich. 581, 59 N. W. 250 (service on owner's husband insufficient); Fowler *v.* Campbell, 100 Mich. 398, 59 N. W. 185; *In re* Wiley, 89 Mich. 58, 50 N. W. 742. One who demurs to a petition filed in proceedings to enforce a sale of land for taxes cannot object that the act under which the proceedings are instituted is unconstitutional because it makes no provision for personal service on resident owners of lands, as, by filing the demurrer, he waives any right to service which he might otherwise have been entitled to. State *v.* Iron Cliffs Co., 54 Mich. 350, 20 N. W. 493.

Nebraska.— Leigh *v.* Green, 62 Nebr. 344, 86 N. W. 1093, 89 Am. St. Rep. 751, an attaching creditor is not an "owner."

Texas.— State *v.* Unknown Owner, 47 Tex. Civ. App. 188, 103 S. W. 1116.

See 45 Cent. Dig. tit. "Taxation," § 1305.

Representatives of deceased owner see McGee *v.* Fleming, 82 Ala. 276, 3 So. 1; Jackson *v.* Wren, 36 La. Ann. 315.

67. *Arkansas.*— Pope *v.* Campbell, 70 Ark. 207, 66 S. W. 916.

Illinois.— People *v.* Land Owners, 82 Ill. 408; Dunham *v.* Chicago, 55 Ill. 357.

Louisiana.— Boyle *v.* West, 107 La. 347, 31 So. 794.

Michigan.— Mann *v.* Carson, 120 Mich. 631, 79 N. W. 941.

Missouri.— Duff *v.* Neilson, 90 Mo. 93, 2 S. W. 222.

68. Charles *v.* Waugh, 35 Ill. 315.

69. Fisher *v.* People, 84 Ill. 491; Durham *v.* People, 67 Ill. 414.

70. Bonham *v.* Weymouth, 39 Minn. 92, 38 N. W. 805.

71. Parks *v.* Miller, 48 Ill. 360.

72. *Arkansas.*— Foohs *v.* Bilby, 83 Ark. 234, 103 S. W. 386.

Illinois.— Hook *v.* People, 177 Ill. 632, 52 N. E. 1036; Pickering *v.* Lomax, 120 Ill. 289, 11 N. E. 175.

Kansas.— Doty *v.* Bassett, 44 Kan. 754, 26 Pac. 51; Pritchard *v.* Madren, 24 Kan. 486.

Michigan.— Wilkin *v.* Keith, 121 Mich. 66, 79 N. W. 887.

Minnesota.— Smith *v.* Kipp, 49 Minn. 119, 51 N. W. 656.

Missouri.— Vaughan *v.* Daniels, 98 Mo. 230,

who enters a general appearance and contests the application on the merits thereby waives any defects in the notice.[73]

(II) *Notice by Publication.* In cases where personal service of process in a suit of this kind cannot be had, the jurisdiction of the court may be founded on a proper service by publication.[74] But this must be based on a proper allegation in the petition or an affidavit or return that defendant is a non-resident or unknown owner,[75] and the citation must be directed to the right person,[76] and by

11 S. W. 573; Milner *v.* Shipley, 94 Mo. 106, 7 S. W. 175.

Tennessee.— *Ex p.* Thacker, 3 Sneed 344.

73. McChesney *v.* People, 178 Ill. 542, 53 N. E. 356; Illinois Cent. R. Co. *v.* People, 170 Ill. 224, 48 N. E. 215; Cairo, etc., R. Co. *v.* Mathews, 152 Ill. 153, 38 N. E. 623; Warren *v.* Cook, 116 Ill. 199, 5 N. E. 538; Mix *v.* People, 106 Ill. 425; People *v.* Dragstran, 100 Ill. 286; English *v.* People, 96 Ill. 566; Hale *v.* People, 87 Ill. 72; People *v.* Sherman, 83 Ill. 165; Tromble *v.* Hoffman, 130 Mich. 676, 90 N. W. 694.

74. *Illinois.*— Glos *v.* Woodard, 202 Ill. 480, 67 N. E. 3; McCauley *v.* People, 87 Ill. 123; Falch *v.* People, 8 Ill. App. 351.

Louisiana.— Bond *v.* Hiestand, 20 La. Ann. 139.

Michigan.— *In re* Wiley, 89 Mich. 58, 50 N. W. 742.

Missouri.— Blodgett *v.* Schaffer, 94 Mo. 562, 7 S. W. 436; Evans *v.* Robberson, 92 Mo. 192, 4 S. W. 941, 1 Am. St. Rep. 701; State *v.* Clarkson, 88 Mo. App. 553.

North Dakota.— Emmons County *v.* Thompson, 9 N. D. 598, 84 N. W. 385.

Texas.— Sellers *v.* Simpson, (Civ. App. 1909) 115 S. W. 888.

The sufficiency of the citation in a suit for taxes against non-resident or unknown owners cannot be inquired into collaterally in trespass to try title against the purchaser at tax-sale. Kenson *v.* Gage, 34 Tex. Civ. App. 547, 79 S. W. 605.

Unknown heirs see Young *v.* Jackson, 50 Tex. Civ. App. 351, 110 S. W. 74. Where a suit to foreclose a tax lien was brought against unknown heirs of a person named and the unknown owners of the land, and the judgment recited that "defendants" were served, and that an attorney appointed filed answer for "defendants," and the foreclosure was in general terms without any mention of any defendants, but "defendants" were given the right to have the property divided and sold in tracts less than the whole survey, the sale to be subject to the right of "defendants" to redeem, the judgment foreclosed the lien as against all the unknown owners made defendants. Sellers *v.* Simpson, (Tex. Civ. App. 1909) 115 S. W. 888.

75. English *v.* Woodman, 40 Kan. 412, 20 Pac. 262; Evarts *v.* Missouri Lumber, etc., Co., 193 Mo. 433, 92 S. W. 372; Warren *v.* Manwarring, 173 Mo. 21, 73 S. W. 447; Coombs *v.* Crabtree, 105 Mo. 292, 16 S. W. 830; State *v.* Clarkson, 88 Mo. App. 553; Brickell *v.* Farrell, 82 Fed. 220. And see Blanton *v.* Nunley, (Tex. Civ. App. 1909) 119 S. W. 881; Wren *v.* Scales, (Tex. Civ. App. 1909) 119 S. W. 879. A judgment foreclosing a tax lien against unknown owners of land rendered upon a citation served by publication is not binding upon persons in actual possession of the land at the time of the filing of the suit and the rendition of the judgment, but not served with citation. Sellers *v.* Simpson, (Tex. Civ. App. 1909) 115 S. W. 888.

Not authorized against resident.— Where the owner of land is an actual resident thereon, service by publication is unauthorized, and a tax judgment and deed obtained therein are properly vacated. Rust *v.* Kennedy, 52 Wash. 472, 100 Pac. 998; Pyatt *v.* Hegquist, 45 Wash. 504, 88 Pac. 933; McManus *v.* Morgan, 38 Wash. 528, 80 Pac. 786.

Sufficiency of affidavit.— Under Sayles Annot. Civ. St. Tex. (1897) art. 5232*o*, providing that, upon affidavit setting out that the owner of land reported sold or returned delinquent for taxes is unknown to the attorney of the state, notice of tax foreclosure suit may be given by publication, an affidavit by the county attorney that the statements are true to the best of his knowledge and belief is sufficient. Young *v.* Jackson, 50 Tex. Civ. App. 351, 110 S. W. 74.

Effect of false return.— The jurisdiction of the court is based on the order of publication and its due publication and proof thereof; and the judgment will be valid, although the order was based on a false return of the officer that the party was a non-resident, when in fact he was a resident; and a sale under the judgment will be good, as against the apparent owner and his grantees, if the purchaser had no notice that he was a resident. Schmidt *v.* Niemeyer, 100 Mo. 207, 13 S. W. 405; Payne *v.* Lott, 90 Mo. 676, 3 S. W. 402. See Martin *v.* Parsons, 49 Cal. 94.

76. Irwin *v.* New Orleans, 28 La. Ann. 670; Earnest *v.* Glaser, 32 Tex. Civ. App. 378, 74 S. W. 605; Bush *v.* Williams, 4 Fed. Cas. No. 2,225, Cooke (Tenn.) 360. The citation served by publication in an action for delinquent state and county taxes may be addressed directly to defendants, and it need not be addessed to any officer or require any officer to make return thereof. Gibbs *v.* Scales, (Tex. Civ. App. 1909) 118 S. W. 188.

Order embracing several properties.— There is no objection to one affidavit and one general order of service of summons by publication being made for several cases in which several lots of land have been assessed to unknown owners by fictitious names. Moss *v.* Mayo, 23 Cal. 421.

his correct name if it is known,[77] and the citation must also be in the form prescribed by the statute, if any, or contain all the particulars essential to a full and valid notice,[78] and in particular it must describe or identify the lands proceeded against,[79] and correctly inform the owner of the time when he must appear and answer,[80] and it must be published for the requisite length of

Effect of assessment to wrong person.— Where land is erroneously taxed to another than the owner, a judgment foreclosing the tax lien against the person to whom the land was taxed, in an action to which the owner was not a party and of which he had no knowledge, is not binding upon him. Grigsby *v.* Akin, 128 Ind. 591, 28 N. E. 180; Allen *v.* Ray, 96 Mo. 542, 10 S. W. 153.

77. See, generally, cases cited *infra*, this note. A judgment, in a tax suit against non-residents, notified by publication, who are described in the proceedings as "Mollie H. Lemen" and "Birdie E. Stone," instead of "Mary A. Lemen" and "Hattie E. Stone," is void as to them. Keaton *v.* Jorndt, 220 Mo. 117, 119 S. W. 629. But the judgment is not void because a defendant is described in the proceedings as "Kate A. Viger," instead of "Katie Antoinette Viger." Keaton *v.* Jorndt, *supra*.

The principle of idem sonans does not apply, as the notice is intended for the eye, not the ear. Chamberlain *v.* Blodgett, 96 Mo. 482, 10 S. W. 44; Troyer *v.* Wood, 96 Mo. 478, 10 S. W. 42, 6 S. W. 690, 9 Am. St. Rep. 367; Whelen *v.* Weaver, 93 Mo. 430, 6 S. W. 220. See Eels *v.* Blair, (Tex. Civ. App. 1901) 60 S. W. 462.

Use of initials.— Where notice by publication is addressed to defendant by the initials of his christian name only, while the record title to the land is in his full name, the court does not acquire jurisdiction, and judgment by default on such notice is void. Burkham *v.* Manewal, 195 Mo. 500, 94 S. W. 520; Evarts *v.* Missouri Lumber, etc., Co., 193 Mo. 433, 92 S. W. 372; Spore *v.* Ozark Land Co., 186 Mo. 656, 85 S. W. 556; Mosely *v.* Reily, 126 Mo. 124, 28 S. W. 895, 26 L. R. A. 721.

Surplusage.— Under Sayles Annot. Civ. St. Tex. (1897) art. 5232*o*, requiring notice of suits to collect delinquent taxes to be "directed to all parties owning or having or claiming any interest" in the land in question, etc., a notice "to unknown owners, and to all persons owning or having, or claiming any interest," etc., is sufficient, at least on collateral attack, even though immediately preceding that paragraph are recitals not required by the statute, for they may be treated as surplusage. Young *v.* Jackson, 50 Tex. Civ. App. 351, 110 S. W. 74.

78. Chiniquy *v.* People, 78 Ill. 570; Kenson *v.* Gage, 34 Tex. Civ. App. 547, 79 S. W. 605; Netzorg *v.* Green, 26 Tex. Civ. App. 119, 62 S. W. 789. A proceeding against the unknown owner of land to foreclose a delinquent tax assessment as authorized by Tex. Laws (1897), p. 138, c. 103, § 15, is a special proceeding in which the citation need not state the file number of the proceeding, as required by Rev. St. (1895) art. 1214, regulating citations in general. Unknown Owner *v.* State, (Tex. Civ. App. 1909) 118 S. W. 803.

Immaterial departure from statute.— Under Sayles Civ. St. Tex. (1897) art. 5232*o*, prescribing the requisites of citations in suits to recover delinquent taxes against unknown owners of land, where a citation departed from the express terms of the statute by having the notice to the unknown owner preceded by a direction to the sheriff or constable to serve it by publication, and by following the notice with a command for a return showing how the writ was served, notice or citation to the owner was not invalidated; the commands to the officer by separate paragraphs, made entirely distinct from the notice to the owner, being not as a matter of law misleading to the owner. State *v.* Unknown Owner, 47 Tex. Civ. App. 188, 103 S. W. 1116.

Statement of taxes due see Young *v.* Jackson, 50 Tex. Civ. App. 351, 110 S. W. 74.

79. Randall *v.* Snyder, 214 Mo. 23, 112 S. W. 529, 127 Am. St. Rep. 653; Stewart *v.* Allison, 150 Mo. 343, 51 S. W. 712; Winningham *v.* Trueblood, 149 Mo. 572, 51 S. W. 399; Milner *v.* Shipley, 94 Mo. 106, 7 S. W. 175; Ozark Land, etc., Co. *v.* Lasley, 88 Mo. App. 370; Campbell *v.* McIrwin, 4 Hayw. (Tenn.) 60; Borden *v.* Houston, 26 Tex. Civ. App. 29, 62 S. W. 426. But *compare* Goldsworthy *v.* Thompson, 87 Mo. 233. Under Sayles Annot. Civ. St. Tex. (1897) art. 5232*o*, providing that the notice in tax suits shall be directed to all persons claiming any interest in the land so described as to identify it, a notice in a tax suit for taxes due on the "A. Netherly" survey issued to the unknown owners of the "A. Wetherby" survey, and published as directed to the unknown owners of the "A. Weatheraby" survey, is fatally defective. Harris *v.* Hill, (Tex. Civ. App. 1909) 117 S. W. 907.

80. Wait *v.* McMillan, 121 Mich. 95, 79 N. W. 917; Peninsular Sav. Bank *v.* Ward, 118 Mich. 87, 76 N. W. 161, 79 N. W. 911; Stearns County *v.* Smith, 25 Minn. 131; Bartels *v.* Christensen, 46 Wash. 478, 90 Pac. 658; Young *v.* Droz, 38 Wash. 648, 80 Pac. 810. Under Wash. Laws (1897), p. 182, c. 71, § 96, subd. 3, authorizing service of summons in proceedings under the revenue act by publication, and providing that a summons so served shall direct the owner of the property to appear within sixty days after the date of the first publication exclusive of said day, a published summons citing defendant to appear "within sixty days after service of this notice and summons, exclusive of the day of service," is insufficient to confer jurisdiction. Gould *v.*

time,[81] in a newspaper officially designated for that purpose or answering the requirements of the statute in respect to the character of its circulation, the place of its publication, or otherwise.[82] Proof of publication must be made in the form and manner directed by the statute, and is generally considered essential to the jurisdiction.[83]

e. Parties. Whether a suit of this kind should be brought in the name of the state or county or of some public officer designated for the purpose depends on the local statute.[84] The proper defendant is the actual owner of the land, if known, or the person appearing of record to be vested with the title.[85] Sometimes the law directs or requires the joinder of all persons having or claiming any

Knox, 53 Wash. 248, 101 Pac. 886; Dolan *v.* Jones, 37 Wash. 176, 79 Pac. 640; Woodham *v.* Anderson, 32 Wash. 500, 73 Pac. 536; Smith *v.* White, 32 Wash. 414, 73 Pac. 480; Thompson *v.* Robbins, 32 Wash. 149, 72 Pac. 1043.

Length of time allowed.— It is not ground for setting aside a decree for the sale of land for delinquent taxes that there was not sufficient time, between the final publication of the order and petition and the time fixed for the hearing, to permit a non-resident owner to reach the place of trial from the place of his residence. Waldron *v.* Auditor-Gen., 109 Mich. 231, 67 N. W. 136.

81. Burns *v.* Ford, 124 Mich. 274, 82 N. W. 885; McFadden *v.* Brady, 120 Mich. 699, 79 N. W. 886; Eldridge *v.* Richmond, 120 Mich. 586, 79 N. W. 807; Eels *v.* Blair, (Tex. Civ. App. 1901) 60 S. W. 462; Pinkerton *v.* J. L. Gates Land Co., 118 Wis. 514, 95 N. W. 1089; Johnson *v.* Hunter, 127 Fed. 219 [*reversed* in 147 Fed. 133, 77 C. C. A. 359 (*reversed* in 209 U. S. 541, 28 S. Ct. 759, 52 L. ed. 918)].

82. Waldron *v.* Auditor-Gen., 109 Mich. 231, 67 N. W. 136; Combs *v.* Crabtree, 105 Mo. 292, 16 S. W. 830; Dick *v.* Foraker, 155 U. S. 404, 15 S. Ct. 124, 39 L. ed. 201.

83. *Arkansas.*— Gallagher *v.* Johnson, 65 Ark. 90, 44 S. W. 1041.

Illinois.— McChesney *v.* People, 178 Ill. 542, 53 N. E. 356; Bass *v.* People, 159 Ill. 207, 42 N. E. 880; Fisher *v.* People, 84 Ill. 491; Buck *v.* People, 78 Ill. 560; Fox *v.* Turtle, 55 Ill. 377.

Michigan.— Nester *v.* Church, 121 Mich. 81, 79 N. W. 893; McFadden *v.* Brady, 120 Mich. 699, 79 N. W. 886; Benedict *v.* Auditor-Gen., 104 Mich. 269, 62 N. W. 364.

Minnesota.— See Bennett *v.* Blatz, 44 Minn. 56, 46 N. W. 319.

North Dakota.— Cruser *v.* Williams, 13 N. D. 284, 100 N. W. 721.

Texas.— Young *v.* Jackson, 51 Tex. Civ. App. 351, 110 S. W. 74, publisher's affidavit of publication held sufficient.

84. See the statutes of the different states. And see Beers *v.* People, 83 Ill. 488; People *v.* Brislin, 80 Ill. 423; Hills *v.* Chicago, 60 Ill. 86; Grant *v.* Bartholomew, 57 Nebr. 673, 78 N. W. 314.

Right of assignee of tax, or of warrants to pay which the tax was levied, to sue to enforce collection of the tax see State *v.* Wabash R. Co., 169 Mo. 563, 70 S. W. 132.

85. People *v.* Rains, 23 Cal. 131 (it is not error to make the real estate a party, as in proceedings *in rem*, in an action to collect taxes); Desormeaux *v.* Moylan, 26 La. Ann. 730; Schnitger *v.* Rankin, 192 Mo. 35, 91 S. W. 122; Evans *v.* Robberson, 92 Mo. 192, 4 S. W. 941, 1 Am. St. Rep. 701; Watkins *v.* State, (Civ. App. 1901) 61 S. W. 532; League *v.* State, (Civ. App. 1900) 56 S. W. 262 [*affirmed* in 93 Tex. 553, 57 S. W. 34]; Mo. Rev. St. (1899) § 9303 (Annot. St. (1906) p. 4274), providing that suits to enforce taxes shall be brought against the owner, means the record owner, unless it is known or the purchaser have notice that the record owner is not the true owner. Ohlmann *v.* Clarkson Saw Mill Co., 222 Mo. 62, 120 S. W. 1155, 133 A. S. R. 506, 28 L. R. A. N. S. 432.

Name of married woman defendant.— Proceedings for the recovery of a tax judgment against land owned by a woman, and assessed in her name while a widow, may be conducted in that name, although prior to the institution of the proceedings she has married a second time. Lavergne *v.* New Orleans, 28 La. Ann. 677.

Guardian for infant defendant.— The fact that an infant defendant is not represented by a guardian, in an action to enforce a tax lien on his land, does not render the judgment void, but merely erroneous. Keller *v.* Wilson, 90 Ky. 350, 14 S. W. 332, 12 Ky. L. Rep. 471.

Husband and wife.— Neither is a necessary party to a suit to enforce a tax lien against the lands of the other. Roberts *v.* Zansler, 34 La. Ann. 205; Lavergne *v.* New Orleans, 28 La. Ann. 677; Berry *v.* San Antonio, (Tex. Civ. App. 1898) 46 S. W. 273; Bean *v.* Brownwood, (Tex. Civ. App. 1898) 43 S. W. 1036. In a suit for back taxes on land owned by a married woman, she is the only necessary party defendant. Sanzenbacher *v.* Santhuff, 220 Mo. 274, 119 S. W. 395.

Deceased owner.— The suit cannot be brought or continued against an owner who is dead, but should be against his heirs and devisees. Howcott *v.* New Orleans, 107 La. 305, 31 So. 668; State *v.* Edwards, 136 Mo. 360, 38 S. W. 73; Crosley *v.* Hutton, 98 Mo. 196, 11 S. W. 613; Brickell *v.* Farrell, 82 Fed. 220. There can be no citation to an estate, as an estate, to appear to defend an action to foreclose a lien for taxes. Perry *v.* Whiting, (Tex. Civ. App. 1909) 121 S. W. 903.

Life-tenant and remainder-man see Fanley *v.* Louisville, 119 Ky. 569, 84 S. W. 582, 27

interest in the land in question;[86] but persons having no title to the property or interest in it are not permitted to interpose and present objections to the rendition of judgment, unless they appear as agents or attorneys of the parties in interest.[87]

f. Defenses. The owner of the property may in general set up any defense which repels the claim of the state or municipality to enforce the particular charge against the particular property.[88] Thus he may object to the legality or validity of the tax itself,[89] or of the assessment of the same on his property,[90] although mere irregularities or informalities in the assessment are not generally sufficient to defeat the action.[91] Also he may deny the delinquency of the tax or the liability of himself or his property to its payment.[92] But mere excessive valuation of the property for the purpose of assessment is not available as a defense,[93] unless it is shown to have resulted from an intentional or fraudulent disregard of the statutory requirement of equality and uniformity.[94]

g. Pleading. To sustain an action of this kind, the petition or complaint must be properly entitled,[95] and must describe sufficiently the particular property to be proceeded against,[96] and contain allegations as to defendant's ownership

Ky. L. Rep. 204; Woolley *v.* Louisville, 114 Ky. 556, 71 S. W. 893, 24 Ky. L. Rep. 1257.

86. Leigh *v.* Green, 64 Nebr. 533, 90 N. W. 255, 101 Am. St. Rep. 512, 62 Nebr. 344, 86 N. W. 1093, 89 Am. St. Rep. 751; Ball *v.* Carroll, 42 Tex. Civ. App. 323, 92 S. W. 1023.

87. Hosmer *v.* People, 96 Ill. 58; People *v.* Quick, 87 Ill. 435. See Chicago, etc., R. Co. *v.* People, 218 Ill. 463, 75 N. E. 1021.

88. Availability of defenses in general see Maxwell *v.* People, 189 Ill. 546, 59 N. E. 1101; People *v.* Chicago, etc., R. Co., 172 Ill. 71, 49 N. E. 982; People *v.* Smith, 94 Ill. 226; Hess *v.* People, 84 Ill. 247; State *v.* Ward, 79 Minn. 362, 82 N. W. 686.

Defenses personal to owner.— A party objecting to judgment against his lands for delinquent taxes cannot urge objections as to other taxpayers not complaining, but is confined to such as apply to his own property. Buck *v.* People, 78 Ill. 560.

Effect of replevin.— A delinquent landowner who has replevied personal property distrained by the collector for taxes will not be heard to object to a judgment against the lands. Durham *v.* People, 67 Ill. 414.

Conflicting titles to land may be adjudicated in a suit by the state to sell forfeited lands. State *v.* Harman, 57 W. Va. 447, 50 S. E. 828.

Statute of limitations see Jefferson City *v.* Whipple, 71 Mo. 519. And see *supra*, X, C, 6, d, (v); XI, E, 3, b.

89. Hammond *v.* People, 169 Ill. 545, 48 N. E. 573; St. Louis County *v.* Nettleton, 22 Minn. 356; State *v.* Several Parcels of Land, 75 Nebr. 538, 106 N. W. 663.

Technical opposition to objections.— In a suit by a taxing power for judgment for delinquent taxes, technical opposition by the taxing power to the objections interposed by the taxpayer as to the validity of the taxes should not receive consideration. People *v.* Kankakee, etc., R. Co., 237 Ill. 362, 86 N. E. 742.

90. Law *v.* People, 87 Ill. 385; People *v.* Nichols, 49 Ill. 517. Where the record of an assessment of property showed on its face that an increase in assessment was made by the supervisor of assessments, and not by the county board of review, the assessment could not be impeached, in an action for delinquent taxes, by allegations of fraud on the part of the board of review in making the assessment. People *v.* Odin Coal Co., 238 Ill. 279, 87 N. E. 410.

91. McChesney *v.* People, 178 Ill. 542, 53 N. E. 356; Chiniquy *v.* People, 78 Ill. 570; Sullivan *v.* State, 66 Ill. 75. See Boyd *v.* Ellis, 107 Mo. 394, 18 S. W. 29.

92. Burcham *v.* Terry, 55 Ark. 398, 18 S. W. 458, 29 Am. St. Rep. 42 (land exempt from taxation); Dunning *v.* West, 66 Ill. 366 (denying delinquency); Chambers *v.* People, 113 Ill. 509 (paying the taxes for the current year will not defeat an action for back taxes); Chauncey *v.* Wass, 35 Minn. 1, 25 N. W. 457, 30 N. W. 826 (previous payment of tax); Knight *v.* Valentine, 34 Minn. 26, 24 N. W. 295 (payment of tax for one of several years).

93. Loewenthal *v.* People, 192 Ill. 222, 61 N. E. 462; Keokuk, etc., Bridge Co. *v.* People, 145 Ill. 596, 34 N. E. 482; People *v.* Lots in Ashley, 122 Ill. 297, 13 N. E. 556; English *v.* People, 96 Ill. 566; People *v.* Big Muddy Iron Co., 89 Ill. 116; Buck *v.* People, 78 Ill. 560; Adsit *v.* Lieb, 76 Ill. 198; Spencer *v.* People, 68 Ill. 510; Pacific County *v.* Ellis, 12 Wash. 108, 40 Pac. 632.

94. Otter Tail County *v.* Batchelder, 47 Minn. 512, 50 N. W. 536. Where assessing officers are actuated by wrongful or malicious motives, resulting in an overvaluation, the court will grant the taxpayer relief in proceedings for judgment against real property, but not so if the overvaluation results from a mere error of judgment not amounting to fraud. People *v.* Bourne, 242 Ill. 61, 89 N. E. 690.

95. Goodell *v.* Auditor-Gen., 143 Mich. 240, 106 N. W. 890, 114 Am. St. Rep. 646; Gibbs *v.* Southern, 116 Mo. 204, 22 S. W. 713.

96. *California.*— People *v.* Mariposa Co., 31 Cal. 196; People *v.* Leet, 23 Cal. 161.

Kansas.— Spicer *v.* Wheeler, 53 Kan. 424, 36 Pac. 736; Doty *v.* Bassett, (1890) 24 Pac. 944.

of it or his connection with the title.[97] It must also set forth the taxes claimed to be due and for what years,[98] and allege their delinquency or non-payment,[99] as well as the assessment and the observance of any conditions precedent to the right to maintain the action,[1] and contain a prayer or demand for appropriate relief.[2] Similarly the answer of defendant must be in writing and signed,[3] and set forth clearly the nature and grounds of his defense to the suit.[4] The pleadings must be verified if so required by statute.[5] Amendments may be allowed in suitable cases and in the discretion of the court.[6]

h. Evidence. The collector's report or return of delinquent land taxes is *prima facie* proof of the regularity and validity of the levy and assessment and of the fact that the taxes remain unpaid,[7] and upon the introduction of this evidence the burden is cast on defendant to establish any vitiating defects or irregularities.[8]

Michigan. — Hayward *v.* O'Connor, 145 Mich. 52, 108 N. W. 366; Jackson *v.* Mason, 143 Mich. 355, 106 N. W. 1112.

Missouri.— Randall *v.* Snyder, 214 Mo. 23, 112 S. W. 529, 127 Am. St. Rep. 653; O'Day *v.* McDaniel, 181 Mo. 529, 80 S. W. 895; Vaughan *v.* Daniels, 98 Mo. 230, 11 S. W. 573; Milner *v.* Shipley, 94 Mo. 106, 7 S. W. 175; State *v.* Rau, 93 Mo. 126, 5 S. W. 697.

Tennessee.— Colligan *v.* Cooney, 107 Tenn. 214, 64 S. W. 31; Polk *v.* Mitchell, 85 Tenn. 634, 4 S. W. 221.

Texas.—Haynes *v.* State, 44 Tex. Civ. App. 492, 99 S. W. 405.

See 45 Cent. Dig. tit. "Taxation," § 1308.

97. Waterbury *v.* O'Loughlin, 79 Conn. 630, 66 Atl. 173; Whatcom County *v.* Fairhaven Land Co., 7 Wash. 101, 34 Pac. 563.

98. People *v.* Todd, 23 Cal. 181; People *v.* Reat, 107 Ill. 581; Church *v.* Nester, 126 Mich. 547, 85 N. W. 1078; Cooper *v.* Gunter, 215 Mo. 558, 114 S. W. 943; State *v.* Rau, 93 Mo. 126, 5 S. W. 697.

99. People *v.* Central Pac. R. Co., 83 Cal. 393, 23 Pac. 303; Foran *v.* Foran, 15 N. Y. Suppl. 51, 26 Abb. N. Cas. 433.

1. People *v.* Ballerino, 99 Cal. 598, 34 Pac. 330; People *v.* Leet, 23 Cal. 161; People *v.* Rains, 23 Cal. 131; People *v.* Pico, 20 Cal. 595; Auditor-Gen. *v.* Sloman, 84 Mich. 118, 47 N. W. 565. *Compare* Unknown Owner *v.* State, (Tex. Civ. App. 1909) 118 S. W. 803.

2. Foran *v.* Foran, 15 N. Y. Suppl. 51, 26 Abb. N. Cas. 433.

3. Hess *v.* People, 84 Ill. 247; Buck *v.* People, 78 Ill. 560; Auditor-Gen. *v.* Sloman, 84 Mich. 118, 47 N. W. 565.

4. Los Angeles County *v.* Ballerino, 99 Cal. 593, 32 Pac. 581, 34 Pac. 329; Chicago, etc., R. Co. *v.* People, 207 Ill. 312, 69 N. E. 854; Houston County *v.* Jessup, 22 Minn. 552.

5. State *v.* Ward, 79 Minn. 362, 82 N. W. 686; Myers *v.* McRay, 114 Mo. 377, 21 S. W. 730; Cockrell *v.* State, 22 Tex. Civ. App. 568, 55 S. W. 579.

Verification of petition by county attorney held sufficient see Young *v.* Jackson, 50 Tex. Civ. App. 351, 110 S. W. 74.

6. Chicago, etc., R. Co. *v.* People, 214 Ill. 471, 73 N. E. 747; Chicago, etc., R. Co. *v.* People, 207 Ill. 312, 69 N. E. 854; Law *v.* People, 87 Ill. 385; Walsh *v.* People, 79 Ill. 521; Auditor-Gen. *v.* Chandler, 108 Mich. 569, 66 N. W. 482; Auditor-Gen. *v.* Jenkinson, 90 Mich. 523, 51 N. W. 643; State *v.* Phillips, 102 Mo. 664, 15 S. W. 319.

7. *Illinois.*— People *v.* St. Louis, etc., R. Co., 230 Ill. 61, 82 N. E. 305; Sholl *v.* People, 194 Ill. 24, 61 N. E. 1122; Chicago, etc., R. Co. *v.* People, 193 Ill. 539, 61 N. E. 1068; King *v.* People, 193 Ill. 530, 61 N. E. 1035; Chicago, etc., R. Co. *v.* People, 183 Ill. 196, 55 N. E. 643; Scott *v.* People, 142 Ill. 291, 32 N. E. 180; People *v.* Chicago, etc., R. Co., 140 Ill. 210, 29 N. E. 730; People *v.* Givens, 123 Ill. 352, 15 N. E. 23; Burbank *v.* People, 90 Ill. 554; Mix *v.* People, 81 Ill. 118; Chiniquy *v.* People, 78 Ill. 570; Buck *v.* People, 78 Ill. 560; Durham *v.* People, 67 Ill. 414. An objection that a road and bridge tax exceeded the rate allowed by law was properly overruled, where it was impossible to tell from the record what rate was extended; the *prima facie* case made by the collector's delinquent list not being overcome. People *v.* St. Louis, etc., R. Co., *supra.*

Kentucky.— Woolley *v.* Louisville, 114 Ky. 556, 71 S. W. 893, 24 Ky. L. Rep. 1357. See Reccius *v.* Louisville, 66 S. W. 410, 23 Ky. L. Rep. 1832.

Missouri.— State *v.* Birch, 186 Mo. 205, 85 S. W. 361; State *v.* Davis, 131 Mo. 457, 33 S. W. 22.

Nebraska.— Darr *v.* Wisner, 63 Nebr. 305, 88 N. W. 518.

Tennessee.— Peck *v.* East Tennessee Lumber, etc., Co., (Ch. App. 1899) 53 S. W. 1107.

Texas.— Watkins *v.* State, (Civ. App. 1901) 61 S. W. 532; Rouse *v.* State, (Civ. App. 1899) 54 S. W. 32.

United States.— Maish *v.* Arizona, 164 U. S. 599, 17 S. Ct. 193, 41 L. ed. 567.

See 45 Cent. Dig. tit. "Taxation," § 1309.

Effect of alterations in delinquent tax list see Walker *v.* Chicago, 56 Ill. 277.

Assessment presumed.— An assessment for taxes will be presumed to have been made, in aid of a judgment for the sale of land therefor, when collaterally called in question. Kenson *v.* Gage, 34 Tex. Civ. App. 547, 79 S. W. 605.

8. Moore *v.* People, 123 Ill. 645, 15 N. E. 25; Mix *v.* People, 86 Ill. 312.

Notice before increase of assessment.— In an action for delinquent taxes, a defense being that the assessment was increased with-

The legality of the tax is also presumed,[9] and the fact that it was lawfully voted or levied.[10] Other questions, such as the residence of defendant, the presence of property within the jurisdiction, or the title to the land in suit, are governed by the ordinary rules of evidence.[11]

i. Trial or Hearing.[12] Where there is but one application by a taxing power for judgment for delinquent taxes and all objections are made by the same property-owner, the objections may properly be joined and heard in the same proceeding, although several taxes are involved, the statute providing that the objections shall be heard and determined in a summary manner without pleadings.[13]

j. Judgment or Decree — (i) *In General.* A judgment in a tax case is void if rendered prematurely or before the expiration of the time allowed by law for the filing of objections,[14] or if it is delayed beyond the term of court at which the statute requires it to be rendered.[15] But a judgment by default may be entered in proper cases,[16] and the court has power to make such orders as are necessary to facilitate the proceedings,[17] although not to pronounce two final judgments in the same case,[18] and its authority generally extends to the grant of such relief as the justice and equity of the case may require.[19] Statutory provisions as to the enrolment or recording of the judgment are to be strictly followed; the validity of the further proceedings may depend on their due observance.[20]

out notice, where the clerk of the board of review testified that notice was mailed to the owner, which was shown by the entry on his record, the conclusion was warranted that the notice was mailed and received by some other officer of the owner, although its president and vice-president testified that they received no notice. People *v.* Odin Coal Co., 238 Ill. 279, 87 N. E. 410.

Overvaluation.— In a suit for unpaid taxes, the defense being that the assessment was fraudulent, evidence held to justify an honest belief by the board of review that the property was valued for taxation at its fair cash value see People *v.* Odin Coal Co., 238 Ill. 279, 87 N. E. 410. Evidence that the full value of certain real estate and improvements did not exceed seventy-five thousand dollars, but that the assessing officers had valued it for taxation at one hundred and eight thousand five hundred and fifty dollars, without more, was insufficient to show a fraudulent overvaluation justifying judicial interference in proceedings for judgment and sale. People *v.* Bourne, 242 Ill. 61, 89 N. E. 690.

9. *In re* Tax Sale, 54 Mich. 417, 23 N. W. 189; State *v.* Iron Cliffs Co., 54 Mich. 350, 20 N. W. 493. *Compare* English *v.* People, 96 Ill. 566.

10. Baltimore, etc., R. Co. *v.* People, 156 Ill. 189, 40 N. E. 834.

11. Matzenbaugh *v.* People, 194 Ill. 108, 62 N. E. 546, 88 Am. St. Rep. 134; King *v.* People, 193 Ill. 530, 61 N. E. 1035; State *v.* Lowe, 59 W. Va. 262, 53 S. E. 116.

12. **An order fixing the term for a hearing** on a petition of the auditor-general against land for delinquent taxes is sufficient where it follows the form provided by the statute. Waldron *v.* Auditor-Gen., 109 Mich. 231, 67 N. W. 136.

13. People *v.* Kankakee, etc., R. Co., 237 Ill. 362, 86 N. E. 742.

14. Pickett *v.* Hartsock, 15 Ill. 279; Williams *v.* Gleason, 5 Iowa 284; Wolverine Land Co. *v.* Davis, 141 Mich. 187, 104 N. W. 648; Bending *v.* Auditor-Gen., 137 Mich. 500, 100 N. W. 777; Aztec Copper Co. *v.* Auditor-Gen., 128 Mich. 615, 87 N. W. 895; Allen *v.* Cowley, 128 Mich. 530, 87 N. W. 620; Brown *v.* Napper, 125 Mich. 117, 83 N. W. 999; Brown *v.* Houghton Mineral Land, etc., Co., 123 Mich. 117, 81 N. W. 969; Miller *v.* Brown, 122 Mich. 147, 80 N. W. 999; McGinley *v.* Calumet, etc., Min. Co., 121 Mich. 88, 79 N. W. 928; Ledyard *v.* Auditor-Gen., 121 Mich. 56, 79 N. W. 918; Youngs *v.* Clark, 120 Mich. 528, 79 N. W. 803. *Compare* Chouteau *v.* Hunt, 44 Minn. 173, 46 N. W. 341.

15. Brown *v.* Hogle, 30 Ill. 119; Muirhead *v.* Bergland, 111 Mich. 655, 70 N. W. 143; Spurlock *v.* Dougherty, 81 Mo. 171. *Compare* Maish *v.* Arizona, 164 U. S. 599, 17 S. Ct. 193, 41 L. ed. 567.

16. McChesney *v.* People, 178 Ill. 542, 53 N. E. 356; Ogden *v.* Chicago, 22 Ill. 592.

17. Haven *v.* Owen, 121 Mich. 51, 79 N. W. 938, 80 Am. St. Rep. 477.

18. Warren *v.* Manwarring, 173 Mo. 21, 73 S. W. 447.

19. Walsh *v.* People, 79 Ill. 521; Pittsburg *v.* Pittsburg Third Presb. Church, 20 Pa. Super. Ct. 362. See Wabash R. Co. *v.* People, 196 Ill. 606, 63 N. E. 1084 (as to power of court to apportion taxes); Keokuk, etc., Bridge Co. *v.* People, 161 Ill. 514, 44 N. E. 206; Spring Valley Coal Co. *v.* People, 157 Ill. 543, 41 N. E. 874 (as to authority of court to reduce excessive levy or assessment).

20. Ames *v.* Sankey, 128 Ill. 523, 21 N. E. 579; Ogden *v.* Bemis, 125 Ill. 105, 17 N. E. 55. *Compare* Burns *v.* Ford, 124 Mich. 274, 82 N. W. 885; Hoffman *v.* Pack, 123 Mich. 74, 81 N. W. 934; Barnum *v.* Barnes, 118 Mich. 264, 76 N. W. 406.

Sufficiency of record.— A statute providing that a tax judgment shall be entered wholly on the left-hand page of the judgment book is merely directory. Countryman *v.* Wasson, 78 Minn. 244, 80 N. W. 973, 81 N. W. 213. As to entry of tax judgments in continuous order

(II) *Form and Contents.* The tax judgment should be substantially in the form prescribed by statute, if any,[21] and should show on its face all the facts essential to sustain the jurisdiction of the court.[22] In particular it must contain such a description of the land affected as will suffice to identify it with reasonable certainty,[23] and the description must correspond with that in the petition or complaint and in the notice or published advertisement, at least so far as to show that the same tract or parcel of land is intended,[24] and if several parcels of land are included in the one proceeding, the judgment should be rendered against each tract separately for the amount due on each.[25] Further, where the name of

in one book, with the signature of the clerk and the seal of the court on the last page only see Somerville *v.* Thrift, 69 Minn. 474, 72 N. W. 706.

Supplying lost record see Quinby *v.* North American Coal, etc., Co., 2 Heisk. (Tenn.) 596.

The record must show when the judgment was rendered, at what term or in what year; otherwise it cannot support a tax title. Young *v.* Thompson, 14 Ill. 380.

21. McChesney *v.* People, 178 Ill. 542, 53 N. E. 356; Chestnut *v.* Marsh, 12 Ill. 173; Muirhead *v.* Sands, 111 Mich. 487, 69 N. W. 826; Gilfillan *v.* Hobart, 34 Minn. 67, 24 N. W. 342; Kipp *v.* Collins, 33 Minn. 394, 23 N. W. 554.

What law governs.— The repeal of a former statute has no effect on an order for the sale of land for taxes made before the date of the repeal, but the sale will be valid and binding if made in pursuance of the law in force at the time the order was entered. McRee *v.* McLemore, 8 Heisk. (Tenn.) 440.

The copy of the judgment which is certified to the collector, on which lands are to be sold for taxes, is not "process" within the meaning of the constitution of Illinois, and therefore need not run in the name of the people. Scarritt *v.* Chapman, 11 Ill. 443; Curry *v.* Hinman, 11 Ill. 420.

22. Smith *v.* Cox, 115 Ala. 503, 22 So. 78; Wartensleben *v.* Haithcock, 80 Ala. 565, 1 So. 38; Allen *v.* McCabe, 93 Mo. 138, 6 S. W. 62; Hamilton *v.* Burum, 3 Yerg. (Tenn.) 355.

23. *Illinois.*— Chiniquy *v.* People, 78 Ill. 570; Spellman *v.* Curtenius, 12 Ill. 409; Olcott *v.* State, 10 Ill. 481.

Minnesota.— Ames *v.* Dever, 100 Minn. 125, 110 N. W. 370; Cook *v.* John Schroeder Lumber Co., 85 Minn. 374, 88 N. W. 971; Connecticut Mut. L. Ins. Co. *v.* Jacobson, 75 Minn. 429, 78 N. W. 10; Gribble *v.* Livermore, 72 Minn. 517, 75 N. W. 710; Kern *v.* Clarke, 59 Minn. 70, 60 N. W. 809; Chouteau *v.* Hunt, 44 Minn. 173, 46 N. W. 341; Feller *v.* Clark, 36 Minn. 338, 31 N. W. 175; Bower *v.* O'Donnall, 29 Minn. 135, 12 N. W. 352; Keith *v.* Hayden, 26 Minn. 212, 2 N. W. 495.

Missouri.— O'Day *v.* McDaniel, 181 Mo. 529, 80 S. W. 895; Kinney *v.* Forsythe, 96 Mo. 414, 9 S. W. 918.

Tennessee.— Anderson *v.* Patton, 1 Humphr. 369.

Texas.— Peareson *v.* Branch, (Civ. App. 1905) 87 S. W. 222.

Washington.— Stevens *v.* Doohen, 50 Wash. 145, 96 Pac. 1032.

See 45 Cent. Dig. tit. "Taxation," § 1312.

Compare Barnum *v.* Barnes, 118 Mich. 264, 76 N. W. 406.

Evidence to identify.— A description in a tax judgment which distinctly points out the land in such a way as to leave no room for mistake as to the property intended is sufficient, and evidence of extrinsic facts is admissible to apply the description and identify the land. National Bond, etc., Co. *v.* Hennepin County, 91 Minn. 63, 97 N. W. 413. A judgment is not void because of a misdescription of the survey in the petition, citation, and judgment, where the description was accurate as to the number of acres, the abstract, and certificate numbers, and as to the original grantee, but gave a wrong name as the name of the patentee, where it was shown that there was no such survey in the county as the one named, and the abstract and certificate numbers and the grantee as stated in the petition, citation, and judgment, could apply to no other survey, and it also appeared that in an exhibit attached to the petition the description was accurate. Wren *v.* Scales, (Tex. Civ. App. 1909) 119 S. W. 879.

24. O'Day *v.* McDaniel, 181 Mo. 529, 80 S. W. 895; Milner *v.* Shipley, 94 Mo. 106, 7 S. W. 175; Schaffer *v.* Davidson, 44 Tex. Civ. App. 100, 97 S. W. 858. Where tax bills against land on which an action by a city was based did not describe it, but merely mentioned it in one bill as fifty-seven acres, and in the others as sixty and twenty-nine one-hundredths acres northwest, and eighty-one and fifty-one one-hundredths acres southwest, and the judgment under which the land was sold described it as being in three tracts, giving the metes and bounds and courses and distances of each, the first tract containing eleven and twenty-six one-hundredths acres, more or less; the second containing seventeen and thirty-five one-hundredths acres, more or less; and the third containing forty-four and fifty-two one-hundredths acres, more or less, it was held that as there was no similarity between the description of the land in the petition referring to the tax bills as a part thereof, and the description in the judgment, and as it could not be told by an inspection of these two papers whether or not the land, or any part of it on which the city asserted its lien, was sold, the judgment should be vacated and set aside. Turner *v.* Middlesboro, (Ky. 1909) 117 S. W. 422.

25. *Arizona.*— Territory *v.* Yavapai County Delinquent Tax List, 3 Ariz. 117, 21 Pac. 768.

the owner or defendant is required to be stated, it must be given correctly and not approximately.[26] The judgment should also contain an order for the sale of the land and give proper directions as to the time and conditions of such sale.[27] It should be dated and signed as the law directs,[28] and blanks occurring in the judgment in places necessary to be filled will be fatal to its validity.[29] But subject to these conditions, mere irregularities or informalities, or mere surplusage, will not vitiate the judgment to such an extent that it cannot support a tax-sale.[30]

(III) *Amount of Judgment.* The judgment must state the amount of taxes found to be chargeable on the land and for which it is to be sold;[31] and this amount must either be written out or expressed in some other unmistakable manner; the use of numerals simply, without any words, marks, or signs to indicate that they stand for money, and for what denominations of money, is not sufficient.[32] Further the judgment should be for a definite amount against each tract or parcel

Illinois.— Olcott *v.* State, 10 Ill. 481.

Indiana.— Richcreek *v.* Russell, 34 Ind. App. 217, 72 N. E. 617.

Michigan.— Kneeland *v.* Hull, 116 Mich. 55, 74 N. W. 300.

Missouri.— State *v.* Hunter, 98 Mo. 386, 11 S. W. 756; Jones *v.* Driskill, 94 Mo. 190, 7 S. W. 111.

Texas.— Borden *v.* Houston, 26 Tex. Civ. App. 29, 62 S. W. 426; Bean *v.* Brownwood, (Civ. App. 1898) 43 S. W. 1036.

Washington.— Swanson *v.* Hoyle, 32 Wash. 169, 72 Pac. 1011.

See 45 Cent. Dig. tit. "Taxation," § 1312.

26. Nolan *v.* Taylor, 131 Mo. 224, 32 S. W. 1144; Simonson *v.* Dolan, 114 Mo. 176, 21 S. W. 510; Morrison *v.* Loftin, 44 Tex. 16. See Chicago Sanitary Dist. *v.* Hanberg, 226 Ill. 480, 80 N. E. 1012, holding that a judgment for unpaid taxes on lands owned by a sanitary district should be against the lands and not against the district.

Against estate.—In a suit to foreclose a lien for taxes, there can be no judgment against an estate as an estate. Perry *v.* Whiting, (Tex. Civ. App. 1909) 121 S. W. 903.

27. McChesney *v.* People, 174 Ill. 46, 50 N. E. 1110; People *v.* Weber, 164 Ill. 412, 45 N. E. 723; Woolley *v.* Louisville, 114 Ky. 556, 71 S. W. 893, 24 Ky. L. Rep. 1357; Higgins *v.* Bordages, (Tex. Civ. App. 1894) 28 S. W. 350; Warner *v.* Miner, 41 Wash. 98, 82 Pac. 1033.

Fixing time of sale.—Where the statute provides for the entry of a judgment condemning the lands to sale on a certain day not less than thirty days from the judgment, a judgment fixing the day of sale in less than thirty days is void, and a sale thereunder passes no title. Caston *v.* Caston, 60 Miss. 475.

28. English *v.* People, 96 Ill. 566; Mersereau *v.* Miller, 112 Mich. 103, 70 N. W. 341; Security Inv. Co. *v.* Buckler, 72 Minn. 251, 75 N. W. 107.

29. German-American Bank *v.* White, 38 Minn. 471, 38 N. W. 361.

30. *Illinois.*— Neff *v.* Smyth. 111 Ill. 100.

Michigan.— Burns *v.* Ford, 124 Mich. 274, 82 N. W. 885; Jenkinson *v.* Auditor-Gen., 104 Mich. 34, 62 N. W. 163.

Missouri.— State *v.* Hunter, 98 Mo. 386, 11 S. W. 756.

Ohio.—Wilkins *v.* Huse, 9 Ohio 154.

Texas.— Bean *v.* Brownwood, (Civ. App. 1898) 43 S. W. 1036. A judgment for delinquent state and county taxes is not wholly invalid because it improperly decrees that the order of sale to be issued thereon shall have the force of a writ of possession, and that the officer making the sale by virtue thereof shall place the purchaser in possession, as this may be treated as surplusage. Gibbs *v.* Scales, (Tex. Civ. App. 1909) 118 S. W. 188.

Washington.— Stevens *v.* Doohen, 50 Wash. 145, 96 Pac. 1032, holding that an irregularity in a tax foreclosure judgment foreclosing a lien against lot 23, in giving the number of the lot in a tabulated statement as lot 22, following the proper description, is a clerical error to be treated as surplusage, and does not avoid the judgment.

See 45 Cent. Dig. tit. "Taxation," § 1312.

31. Mix *v.* People, 81 Ill. 118; Lane *v.* Bommelmann, 21 Ill. 143; Merritt *v.* Thompson, 13 Ill. 716; Haven *v.* Owen, 121 Mich. 51, 79 N. W. 938, 80 Am. St. Rep. 477; Morgan *v.* Tweddle, 119 Mich. 350, 78 N. W. 121. See Newton *v.* Auditor-Gen., 131 Mich. 547, 91 N. W. 1030.

Error not jurisdictional.—Where proceedings for the sale of land for taxes are authorized by the fact that the taxes thereon are delinquent, error in the amount of the tax included in the judgment against the land is not jurisdictional and does not affect the validity of the judgment. Coffin *v.* Estes, 32 Minn. 367, 20 N. W. 357; Kipp *v.* Dawson, 31 Minn. 373, 17 N. W. 961, 18 N. W. 96.

32. *California.*— People *v.* San Francisco Sav. Union, 31 Cal. 132.

Illinois.— Pittsburgh, etc., R. Co. *v.* Chicago, 53 Ill. 80; Elston *v.* Kennicott, 46 Ill. 187; Potwin *v.* Oades, 45 Ill. 366; Baily *v.* Doolittle, 24 Ill. 577; Dukes *v.* Rowley, 24 Ill. 210; Eppinger *v.* Kirby, 23 Ill. 521, 76 Am. Dec. 709; Gibson *v.* Chicago, 22 Ill. 566; Lané *v.* Bommelmann, 21 Ill. 143; Lawrence *v.* Fast, 20 Ill. 338, 71 Am. Dec. 274.

Michigan.— Nowlen *v.* Hall, 128 Mich. 274, 87 N. W. 222; Russell *v.* Chittenden, 123 Mich. 546, 82 N. W. 204.

Minnesota.— Fagan *v.* Huntress, etc., Lumber Co., 80 Minn. 441, 83 N. W. 382; Collins *v.* Welch, 38 Minn. 62, 35 N. W. 566; Gutz-

of land included, and not in gross against them all.[33] It is error to include taxes not claimed in the petition or complaint,[34] or costs or fees not due or earned at the time of the rendition of the judgment.[35]

(iv) *Amendment and Opening or Vacating.* A tax judgment may be amended in matters of form or for the correction of clerical errors,[36] although not, it seems, where the defect proposed to be amended is such as renders the judgment entirely void.[37] It may be opened or set aside for sufficient cause,[38] on the application of a party in interest,[39] who is not chargeable with laches or unreasonable neglect of his own interests.[40]

(v) *Conclusiveness and Effect.* A judgment ordering the sale of land for delinquent taxes, when rendered by a court of competent jurisdiction, is binding and conclusive like any other judgment,[41] on the owner of the property and those in privity with him and on other persons joined as defendants,[42] even

willer *v.* Crowe, 32 Minn. 70, 19 N. W. 344; Tidd *v.* Rines, 26 Minn. 201, 2 N. W. 497.

Missouri.— Coombs *v.* Crabtree, 105 Mo. 292, 16 S. W. 830.

Tennessee.— Randolph *v.* Metcalf, 6 Coldw. 400.

United States.—Woods *v.* Freeman, 1 Wall. 398, 17 L. ed. 543.

See 45 Cent. Dig. tit. "Taxation," § 1312.

33. State *v.* Hunter, 98 Mo. 386, 11 S. W. 756; State *v.* Kerr, 8 Mo. App. 125; Borden *v.* Houston, 26 Tex. Civ. App. 29, 62 S. W. 426. But *compare* Jones *v.* Driskill, 94 Mo. 190, 7 S. W. 111. And see Turner *v.* Houston, 21 Tex. Civ. App. 214, 51 S. W. 642.

34. Elsey *v.* Falconer, 56 Ark. 419, 20 S. W. 5.

35. Gage *v.* Goudy, (Ill. 1892) 29 N. E. 896; Gage *v.* Lyons, 138 Ill. 590, 28 N. E. 832; Combs *v.* Goff, 127 Ill. 431, 20 N. E. 9; Gage *v.* Williams, 19 Ill. 563, 9 N. E. 193.

36. Atkins *v.* Hinman, 7 Ill. 437.

37. Kern *v.* Clarke, 59 Minn. 70, 60 N. W. 809.

38. Richcreek *v.* Russell, 34 Ind. App. 217, 72 N. E. 617 (inadvertence, surprise, and excusable neglect); Williams *v.* Kiowa County, 74 Kan. 693, 88 Pac. 70 (tax unlawfully levied); Aitkin County *v.* Morrison, 25 Minn. 295 (land exempt); State *v.* Several Parcels of Land, 75 Nebr. 538, 106 N. W. 663 (motion to open the judgment not grantable as of course after the end of the term).

In Nebraska, where the amount or existence of a tax involved in a scavenger suit for the collection of taxes is not put in issue or determined as a controverted question prior to the entry of a decree, the court retains jurisdiction of the subject-matter for the purpose of correcting mistakes until the confirmation of the sale, under Comp. St. (1903) c. 77, art. 9, §§ 38, 39. State *v.* Several Parcels of Land, 79 Nebr. 668, 113 N. W. 196.

Payment of taxes as condition precedent.— The landowner must pay the taxes, interest, and charges as a condition to the vacation of a defective decree for the sale of the land for taxes. Morgan *v.* Tweddle, 119 Mich. 350, 78 N. W. 121.

39. Swan *v.* Knoxville, 11 Humphr. (Tenn.) 130.

40. Washington County *v.* German-American Bank, 28 Minn. 360, 10 N. W. 21.

41. Mayo *v.* Foley, 40 Cal. 281; Warren *v.* Cook, 116 Ill. 199, 5 N. E. 538; Graceland Cemetery Co. *v.* People, 92 Ill. 619; Job *v.* Tebbetts, 10 Ill. 376; Evarts *v.* Missouri Lumber, etc., Co., 193 Mo. 433, 92 S. W. 372; Wellshear *v.* Kelley, 69 Mo. 343; Chicago Theological Seminary *v.* Gage, 12 Fed. 398, 11 Biss. 289.

In Illinois it was at one time the settled doctrine that a judgment by default in a tax suit was not conclusive on the taxpayer and might be collaterally impeached. Gage *v.* Busse, 114 Ill. 589, 3 N. E. 441; Riverside Co. *v.* Howell, 113 Ill. 256; Gage *v.* Bailey, 102 Ill. 11; Belleville Nail Co. *v.* People, 98 Ill. 399; McLaughlin *v.* Thompson, 55 Ill. 249; Gage *v.* Pumpelly, 115 U. S. 454, 6 S. Ct. 136, 29 L. ed. 449. But this rule was very much narrowed by a statute (1879) which enacted that such a judgment should be conclusive evidence of its regularity and validity in all collateral proceedings, and should estop all parties from raising any objections which existed at or before the rendition of the judgment and could have been presented as a defense thereto, except in cases where the tax had been paid or the land was not liable for the tax. Revenue Laws, § 224. But cases in which the tax is claimed to be illegal or unauthorized fall within the exception. Hammond *v.* People, 169 Ill. 545, 48 N. E. 573; Gage *v.* Goudy, 141 Ill. 215, 30 N. E. 320; Drake *v.* Ogden, 128 Ill. 603, 21 N. E. 511.

Judgment as bar.—A judgment rendered in favor of a delinquent taxpayer on account of informality in the assessment is no bar to an application for judgment against realty for the same taxes the following year. People *v.* Chicago, etc., R. Co., 140 Ill. 210, 29 N. E. 730.

42. Boatmen's Sav. Bank *v.* Grewe, 13 Mo. App. 335.

Parties not joined as defendants.—A judgment in a statutory suit for taxes is strictly against the property, and does not bind the parties further than it may affect their interest in the property itself, yet, unless one having an interest in the land is made a party to the suit, his interest is not affected by the judgment. Walker *v.* Mills, 210 Mo. 684, 109 S. W. 44. Where defendant claims under a tax deed, plaintiff can show that, although he was the owner of the land, he was

where the land was erroneously assessed and proceeded against in the name of one who was not the true owner,[43] and precludes inquiry in subsequent proceedings as to all matters of objection or defense which were or might have been raised in opposition to the rendition of the judgment,[44] including the regularity and validity of the assessment,[45] and the fact of the delinquency of the taxes.[46]

(VI) *PRESUMPTION OF VALIDITY AND COLLATERAL ATTACK.* Where a proceeding of this character is considered as summary, statutory, or in the exercise of a limited jurisdiction, the facts essential to the jurisdiction of the court must appear on the face of the proceedings and cannot be made out by the aid of presumptions.[47] But in other states a judgment of this kind is regarded as rendered in the exercise of a general jurisdiction and is supported by the same presumptions as obtain in the case of any other judgment of a court of general jurisdiction.[48]

not a party to the judgment on which the deed was based; the tax being levied against "unknown owner," and such evidence not being in contradiction of the record, but only questioning the identity of the parties. Wren *v.* Scales, (Tex. Civ. App. 1909) 119 S. W. 879. Where the proceeding is against property encumbered by a deed of trust, the beneficiary named in the deed, or the holder of the note secured, must be made a party; if not, he will not be bound by the judgment. Giraldin *v.* Howard, 103 Mo. 40, 15 S. W. 383; Williams *v.* Hudson, 93 Mo. 524, 6 S. W. 261. So where the decree bars only the equity of redemption, the right to redeem may be raised by an objection to a motion to confirm the sale. Logan County *v.* McKinley-Lanning L. & T. Co., 70 Nebr. 406, 101 N. W. 991. Again, if remainder-men are not made parties to the proceeding, they are not bound by the judgment. McCune *v.* Goodwillie, 204 Mo. 306, 102 S. W. 997. And although a tax judgment against land may be conclusive as against private persons, the public easement in a highway cannot be affected thereby. Sanborn *v.* Minneapolis, 35 Minn. 314, 29 N. W. 126. Where a suit to foreclose a lien for taxes was brought solely against the estate of a certain person, which was not an entity in law, and citation was addressed to such estate, and judgment rendered against it, the owner of the property was not bound. Perry *v.* Whiting, (Tex. Civ. App. 1909) 121 S. W. 403.

Non-service on one of several defendants.— A judgment in a statutory suit for taxes, brought against several defendants, may be vacated as to one and stand good as to the rest, and where two defendants in such a suit are served with process but the third defendant is not, the former cannot complain of the non-service on the latter. Walker *v.* Mills, 210 Mo. 684, 109 S. W. 44.

43. Daily *v.* Newman, 14 La. Ann. 580. But *compare* Desormeaux *v.* Moylan, 26 La. Ann. 730; Peareson *v.* Branch, (Tex. Civ. App. 1905) 87 S. W. 222.

Record owner.— If the judgment is against the owner of record, a sale thereunder will pass the title as against the grantee in an unrecorded deed from him, unless the purchaser had notice of such deed. Payne *v.* Lott, 90 Mo. 676, 3 S. W. 402; Vance *v.* Corrigan, 78 Mo. 94. But this rule does not protect the purchaser against the true owner, whose deed was recorded, although the book containing the record was destroyed by fire. Crane *v.* Dameron, 98 Mo. 567, 12 S. W. 251.

44. Mix *v.* People, 116 Ill. 265, 4 N. E. 783; Warren *v.* Cook, 116 Ill. 199, 5 N. E. 538.

Exhaustion of personalty see Riddle *v.* Messer, 84 Ala. 236, 4 So. 185; Job *v.* Tebbetts, 10 Ill. 376.

Jurisdiction of the court see Eitel *v.* Foote, 39 Cal. 439; Northern Pac. R. Co. *v.* Galvin, 85 Fed. 811.

45. Streett *v.* Reynolds, 63 Ark. 1, 38 S. W. 150; Ball *v.* Ridge Copper Co., 118 Mich. 7, 76 N. W. 130; Boyd *v.* Ellis, 107 Mo. 394, 18 S. W. 29; State *v.* Hunter, 98 Mo. 386, 11 S. W. 756; Allen *v.* Ray, 96 Mo. 542, 10 S. W. 153; Reeves *v.* Alter, 9 Pa. Cas. 412, 12 Atl. 551.

46. Streett *v.* Reynolds, 63 Ark. 1, 38 S. W. 150; Williamson *v.* Mimms, 49 Ark. 336, 5 S. W. 320; Muirhead *v.* Sands, 111 Mich. 487, 69 N. W. 826; Hill *v.* Sherwood, 96 Mo. 125, 8 S. W. 781. *Compare* Sampson *v.* Marr, 7 Baxt. (Tenn.) 486; Douglass *v.* Mumford, 7 Baxt. (Tenn.) 415. And see Watson *v.* Kent, 78 Ala. 602.

47. Driggers *v.* Cassady, 71 Ala. 529. And see *supra*, XI, E, 3, j, (II).

48. English *v.* Woodman, 40 Kan. 412, 20 Pac. 262; Hoyt *v.* Clark, 64 Minn. 139, 66 N. W. 262; Allen *v.* McCabe, 93 Mo. 138, 6 S. W. 662. Where a default judgment for delinquent taxes did not state the years for which the taxes were due, as required by Rev. St. (1899) § 9304 (Annot. St. (1906) p. 4277), and the petition in the action was lost, and the contents thereof were not shown, the court could not presume, on collateral attack, that the petition alleged the years, as required by section 9303 (Annot. St. (1906) p. 4274), for the purpose of supplying the omission in the judgment. Cooper *v.* Gunter, (Mo. 1908) 114 S. W. 943. A suit to foreclose a lien for delinquent taxes on property of an unknown owner is a proceeding *in rem*, not strictly judicial, but only a step in administration proceedings, and the judicial department is resorted to only on account of the dereliction of the owner. Hence, the jurisdiction so invoked being special and limited by the act of the legislative department, noth-

In the latter case, and also in the former case provided the necessary facts do appear of record, the judgment is not open to collateral impeachment or attack on account of any errors, irregularities, informalities, or objections which might have been presented in defense to the action,[49] although its invalidity may be shown collaterally where the court was in fact entirely without jurisdiction.[50]

k. Appeal and Review. The statutes generally provide for an appeal from a judgment against land for taxes,[51] by a party to the action having an interest in

ing is taken by intendment in favor of the court's action, but it must appear from the record itself that the facts existed which authorized the court to act, and that it kept within the limits of its lawful authority in so doing. Young *v.* Jackson, 50 Tex. Civ. App. 351, 110 S. W. 74.

49. *Alabama.*— Driggers *v.* Cassady, 71 Ala. 529; Carlisle *v.* Watts, 78 Ala. 486; Gunn *v.* Howell, 27 Ala. 663, 62 Am. Dec. 785.

Arkansas.— Beasley *v.* Equitable Securities Co., 72 Ark. 601, 84 S. W. 224; Burcham *v.* Terry, 55 Ark. 398, 18 S. W. 458, 29 Am. St. Rep. 42; McCarter *v.* Neil, 50 Ark. 188, 6 S. W. 731.

California.— Truman *v.* Robinson, 44 Cal. 623; Reily *v.* Lancaster, 39 Cal. 354; Eitel *v.* Foote, 39 Cal. 439.

Illinois.— Prout *v.* People, 83 Ill. 154; Turner *v.* Jenkins, 79 Ill. 228; Chestnut *v.* Marsh, 12 Ill. 173; Young *v.* Lorain, 11 Ill. 624, 52 Am. Dec. 463. See Brown *v.* Hogle, 30 Ill. 119.

Indiana.— McCann *v.* Jean, 134 Ind. 518, 34 N. E. 316.

Kansas.— McGregor *v.* Morrow, 40 Kan. 730, 21 Pac. 157; English *v.* Woodman, 40 Kan. 412, 20 Pac. 262.

Michigan.— Owens *v.* Auditor-Gen., 147 Mich. 683, 111 N. W. 354; Warren *v.* Auditor-Gen., 131 Mich. 263, 90 N. W. 1063; Wilkin *v.* Keith, 121 Mich. 66, 79 N. W. 887.

Minnesota.— Cook *v.* John Schroeder Lumber Co., 85 Minn. 374, 88 N. W. 971; Minneapolis R. Terminal Co. *v.* Minnesota Debenture Co., 81 Minn. 66, 83 N. W. 485; McNamara *v.* Fink, 71 Minn. 66, 73 N. W. 649; Gribble *v.* Livermore, 64 Minn. 396, 67 N. W. 213; Gilfillan *v.* Hobart, 34 Minn. 67, 24 N. W. 342; Kipp *v.* Collins, 33 Minn. 394, 23 N. W. 554.

Missouri.—Warren *v.* Manwarring, 173 Mo. 21, 73 S. W. 447; Cruzen *v.* Stephens, 123 Mo. 337, 27 S. W. 557, 45 Am. St. Rep. 549; Gibbs *v.* Southern, 116 Mo. 204, 22 S. W. 713; Coombs *v.* Crabtree, 105 Mo. 292, 16 S. W. 830; Schmidt *v.* Niemeyer, 100 Mo. 207, 13 S. W. 405; Allen *v.* Ray, 96 Mo. 542, 10 S. W. 153; Jones *v.* Driskill, 94 Mo. 190, 7 S. W. 111; Allen *v.* McCabe, 93 Mo. 138, 6 S. W. 62; Brown *v.* Walker, 85 Mo. 262; Wellshear *v.* Kelley, 69 Mo. 343; Hogan *v.* Smith, 11 Mo. App. 314. A judgment in a tax suit cannot be set aside in a collateral attack by proof that the taxes for the year specified in the judgment had been paid before the suit was begun. Cooper *v.* Gunter, (Mo. 1908) 114 S. W. 943.

Tennessee.— Neely *v.* Buchanan, (Ch. App. 1899) 54 S. W. 995.

Texas.— Crosby *v.* Bonnowsky, 29 Tex. Civ. App. 455, 69 S. W. 212; Bean *v.* Brownwood, (Civ. App. 1898) 43 S. W. 1036. A judgment on service by publication regular in all respects, and decreeing a lien with foreclosure in favor of the state against all persons claiming any interest in the land, and directing the sale of the land, cannot be collaterally attacked by one failing to show that he was in possession of the land when the suit was filed and citation issued. Gibbs *v.* Scales, (Civ. App. 1909) 118 S. W. 188.

Washington.— Tax-sales being made only after foreclosure, in a proceeding in which the owner is given notice and an opportunity to defend against overcharges, etc., the owner is estopped by the judgment to raise collaterally non-jurisdictional defects, so that the rendition of judgment through mistake for a larger amount of interest than was due would not avoid the sale. Timmerman *v.* McCullagh, 55 Wash. 204, 104 Pac. 212. All presumptions are in favor of the regularity of tax foreclosure proceedings upon a collateral attack upon the sale, and want of jurisdiction must affirmatively appear to invalidate the sale. Timmerman *v.* McCullagh, *supra.*

United States.— Chicago Theological Seminary *v.* Gage, 12 Fed. 398, 11 Biss. 289. See Wilfong *v.* Ontario Land Co., 171 Fed. 51, 96 C. C. A. 293 [*reversing* 162 Fed. 999].

See 45 Cent. Dig. tit. "Taxation," § 1316.

Defendant waiving service of process. — Where, in a statutory suit for taxes, one of the defendants is not served with process, but waives the service, in writing, on the petition instead of the summons attached thereto, the method of waiver is an irregularity only, and does not subject the judgment to collateral attack either by defendants who were served with process or by defendant making waiver. Walker *v.* Mills, 210 Mo. 684, 109 S. W. 44.

50. Mayot *v.* Auditor-Gen., 140 Mich. 593, 104 N. W. 19; Vaughan *v.* Daniels, 98 Mo. 230, 11 S. W. 573. Where the judgment in a tax suit does not show that the court determined that service of proper process had been made on the owners of the land, and the record therein shows a fatally defective notice, the judgment may be collaterally attacked for invalidity of notice. Harris *v.* Hill, (Tex. Civ. App. 1909) 117 S. W. 907.

51. See the statutes of the different states. And see English *v.* People, 96 Ill. 566; Fowler *v.* Pirkins, 77 Ill. 271; State *v.* Lockhart, 89 Minn. 121, 94 N. W. 168; Aurora *v.* Lindsay, 146 Mo. 509, 48 S. W. 642.

the property.[52] In some cases a trial *de novo* is to be had in the reviewing court;[53] but more generally that court will confine its inquiries to the particular questions or objections raised at the trial and embodied in a bill of exceptions,[54] or certified up for its consideration by the trial judge,[55] and which are duly urged and insisted upon on the appeal,[56] and will not consider defenses which should have been interposed in the court below but were not then insisted on,[57] nor any matters outside the scope of the particular case presented by the appeal.[58] Nor will the judgment be reversed for a mere conflict of evidence or on any showing not entirely satisfactory to the mind of the reviewing court,[59] nor where it appears that, whatever errors may have intervened, the appellant is not substantially injured by the judgment as it stands.[60]

l. Costs and Fees. If the statute so provides, as is commonly the case, the judgment may include the costs of the action and costs and fees of officers incurred or earned up to the time of the rendition of judgment,[61] although not any costs or expenses to be incurred in the proceedings subsequent to the judgment.[62] It

Order confirming or setting aside sale.— The authority conferred on a circuit court to confirm or reject a tax collector's sale is a special and limited jurisdiction, and no appeal lies from its order if none is provided for by statute. Hull *v.* Southern Development Co., 89 Md. 8, 42 Atl. 943.

Deposit of amount of judgment and costs as condition precedent to appeal see Bryant *v.* People, 71 Ill. 32; Schultz *v.* Harris, 31 Wash. 302, 71 Pac. 1009; Lockwood *v.* Allyn, 11 Wash. 704, 40 Pac. 348, 616.

52. People *v.* Quick, 87 Ill. 435; Olcott *v.* State, 10 Ill. 481 (several persons interested in the lands ordered to be sold may unite in a writ of error); Watkins *v.* State, (Tex. Civ. App. 1901) 61 S. W. 532 (where the suit was against "unknown owners," defendants who appeared and answered may appeal).

53. Pidgeon *v.* People, 36 Ill. 249.

54. People *v.* Chicago, etc., R. Co., 214 Ill. 190, 73 N. E. 315; Cincinnati, etc., R. Co. *v.* People, 205 Ill. 538, 69 N. E. 40; King *v.* People, 193 Ill. 530, 61 N. E. 1035; Bass *v.* People, 159 Ill. 207, 42 N. E. 880; Wiggins Ferry Co. *v.* People, 101 Ill. 446; Speight *v.* People, 87 Ill. 595; People *v.* Land Owners, 82 Ill. 408; Karnes *v.* People, 73 Ill. 274; Mann *v.* Carson, 120 Mich. 631, 79 N. W. 941; Egg Harbor Homestead, etc., Co. *v.* Galloway Tp., 42 N. J. L. 415; Maish *v.* Arizona, 164 U. S. 599, 17 S. Ct. 193, 41 L. ed. 567.

55. State *v.* Robert P. Lewis Co., 70 Minn. 202, 72 N. W. 962; State *v.* St. Croix Boom Corp., 49 Minn. 450, 52 N. W. 44; Morrison County *v.* St. Paul, etc., R. Co., 42 Minn. 451, 44 N. W. 982; Ramsey County *v.* Chicago, etc., R. Co., 33 Minn. 537, 24 N. W. 313.

56. People *v.* Chicago, etc., R. Co., 214 Ill. 190, 73 N. E. 315.

57. Colvin *v.* People, 166 Ill. 82, 46 N. E. 737; Cook *v.* Auditor-Gen., 124 Mich. 430, 83 N. W. 96; Davis *v.* Grant County, 75 Minn. 59, 77 N. W. 548; State *v.* Richardson, 77 Mo. 589.

58. People *v.* Chicago, etc., R. Co., 214 Ill. 190, 73 N. E. 315; Thatcher *v.* People, 79 Ill. 597; Olcott *v.* State, 10 Ill. 481.

59. People *v.* Frisbie, 26 Cal. 135; Mahany *v.* People, 138 Ill. 311, 27 N. E. 918; Rumsey *v.* Auditor-Gen., 138 Mich. 456, 101 N. W. 623; Shefferly *v.* Auditor-Gen., 120 Mich. 455, 79 N. W. 693; Newark, etc., Traction Co. *v.* North Arlington, 65 N. J. L. 150, 46 Atl. 568.

60. Chambers *v.* People, 113 Ill. 509; Law *v.* People, 84 Ill. 142. But a judgment against land for delinquent taxes, erroneous as to part, will be reversed *in toto* where it is difficult to make a proper distribution of it as against the lands liable to its payment. Thatcher *v.* People, 93 Ill. 240.

61. *California.*— People *v.* Latham, 53 Cal. 386.

Illinois.— Thatcher *v.* People, 79 Ill. 597; Merritt *v.* Thompson, 13 Ill. 716.

Kansas.—Douglass *v.* Leavenworth County, 75 Kan. 6, 88 Pac. 557.

Michigan.— Auditor-Gen. *v.* Baker, 84 Mich. 113, 47 N. W. 515.

Minnesota.— Olmsted County *v.* Barber, 31 Minn. 256, 17 N. W. 473, 944.

Missouri.— State *v.* Wilson, 174 Mo. 505, 74 S. W. 636.

Ohio.—Wilkins *v.* Huse, 9 Ohio 154.

Tennessee.— State *v.* Alexander, 115 Tenn. 156, 90 S. W. 20.

Texas.— Berry *v.* San Antonio, (Civ. App. 1898) 46 S. W. 273. Under Acts (1897), p. 136, c. 103, § 9, providing that, where two or more unimproved town lots belonging to the same person are included in the same suit for taxes, the costs shall be taxed against the lots collectively as if they were one tract, the costs in a suit for taxes against unimproved town lots, owned by one person, but separately assessed in the name of an unknown owner, must be taxed on the basis of the lots being one tract. Raht *v.* State, 48 Tex. Civ. App. 106, 106 S. W. 900.

Virginia.— Stone *v.* Caldwell, 99 Va. 492, 39 S. E. 121.

Washington.—A personal judgment should not be entered for costs, but they should be decreed a lien on the premises. Sound Inv. Co. *v.* Bellingham Bay Land Co., 53 Wash. 470, 102 Pac. 234.

See 45 Cent. Dig. tit. "Taxation," § 1318.

62. Gage *v.* Goudy, (Ill. 1892) 29 N. E. 896; Gage *v.* Lyons, 138 Ill. 590, 28 N. E. 832; Combs *v.* Goff, 127 Ill. 431, 20 N. E. 9;

may also, under statutory authority, include attorney's fees in the action or proceeding in which it is rendered.[63]

4. Warrant or Execution — a. Nature and Necessity. Where the statute itself contains explicit directions as to the sale of real property for the satisfaction of delinquent taxes, it may constitute a sufficient basis for the collector's proceedings in making such sale, without the necessity of providing him with a warrant or other process.[64] But on the other hand, if the law directs the issuance of a warrant, execution, or other writ, it is indispensable and no valid sale can be made without a valid process,[65] of the specific kind described, the law being construed with strictness in this regard.[66]

b. Form and Contents. The tax execution, precept, or warrant must be issued by the officer having authority for that purpose,[67] and be under seal, if so required by law,[68] and bear his proper written or printed signature,[69] and be addressed

Gage *v.* Williams, 119 Ill. 563, 9 N. E. 193; Auditor-Gen. *v.* McLaulin, 83 Mich. 352, 47 N. W. 233.

63. Files *v.* Fuller, 44 Ark. 273.

64. *Alabama.*— Jackson County *v.* Gullatt, 84 Ala. 243, 3 So. 906.

Iowa.— Cedar Rapids, etc., R. Co. *v.* Carroll County, 41 Iowa 153; Parker *v.* Sexton, 29 Iowa 421.

Michigan.— Auditor-Gen. *v.* Sparrow, 116 Mich. 574, 74 N. W. 881.

Minnesota.—Kipp *v.* Collins, 33 Minn. 394, 23 N. W. 554.

Nebraska.— Grant *v.* Bartholomew, 57 Nebr. 673, 78 N. W. 314.

New York.— Flower *v.* Bleckwen, 1 N. Y. Suppl. 564.

South Carolina.—Woody *v.* Dean, 24 S. C. 499.

See 45 Cent. Dig. tit. "Taxation," § 1319.

65. Norris *v.* Coley, 100 Ga. 547, 28 S. E. 222; Glos *v.* Mulcahy, 210 Ill. 639, 71 N. E. 629; Frew *v.* Taylor, 106 Ill. 159; Marin *v.* Sheriff, 30 La. Ann. 293; Gemmel *v.* Sinclair, 1 Manitoba 85.

66. Vickers *v.* Hawkins, 128 Ga. 794, 58 S. E. 44.

In Illinois the statute provides that the county clerk and the collector shall make a certificate, to be entered on the record following the order of court, that such record is correct and that the judgment was rendered on the property therein mentioned, etc., which certificate shall be the process on which real property or interests therein shall be sold for taxes. It is held that the omission of such a certificate, or the fact that it is made or dated on a day other than that fixed by law for the purpose, will invalidate the sale. Glos *v.* Hanford, 212 Ill. 261, 72 N. E. 439; Kepley *v.* Scully, 185 Ill. 52, 57 N. E. 187; Sankey *v.* Seipp, 27 Ill. App. 299.

An order by the county court that the sheriff proceed to levy on and sell all property delinquent for taxes for a certain year on and after a certain day is not a compliance with a statutory provision that all unpaid or delinquent taxes may be collected from the land taxed or the persons liable on a warrant issued under the order of the county court. Hughes *v.* Linn County, 37 Oreg. 111, 60 Pac. 843.

Assignability.— The controller-general cannot transfer a tax execution issued by him against wild lands, on receiving the amount due thereon from a stranger. Scott *v.* Stewart, 84 Ga. 772, 11 S. E. 897; Johnson *v.* Christie, 64 Ga. 117. Assignability of tax executions against personal property see *supra*, X, C, 3, e.

67. Hetfield *v.* Plainfield, 46 N. J. L. 119; Van Wagenen *v.* Brown, 26 N. J. L. 196; Sheldon *v.* Van Buskirk, 2 N. Y. 473. Under the express provisions of Ga. Act, Dec. 13, 1882 (Acts (1882), p. 47), a tax execution against unreturned wild land is properly issued by the tax collector. Vickers *v.* Hawkins, 128 Ga. 794, 58 S. E. 44.

68. People *v.* Henckler, 137 Ill. 580, 27 N. E. 602; Bradford *v.* Randall, 5 Pick. (Mass.) 496; Caboon *v.* Coe, 52 N. H. 518; Morgan *v.* Quesnel, 26 U. C. Q. B. 539.

69. Vickers *v.* Hawkins, 128 Ga. 794, 58 S. E. 44 (officer authorizing a third person to sign his name and adopting the signature so made); Belfast Sav. Bank *v.* Kennebec Land, etc., Co., 73 Me. 404.

Signature by majority of board.—Where the duty of issuing the warrant resides in a board of officers, as the board of assessors, it will be sufficient if a majority of them sign it; but the signature of any less number than a majority will not make the warrant valid. Belfast Sav. Bank *v.* Kennebec Land, etc., Co., 73 Me. 404; Sanfason *v.* Martin, 55 Me. 110; Sprague *v.* Bailey, 19 Pick. (Mass.) 436.

A printed signature is sufficient; it will be presumed that the officer authorized it to be affixed in that form. Hitchcock *v.* Latham, 97 Ga. 253, 22 S. E. 997; Textor *v.* Shipley, 86 Md. 424, 38 Atl. 932.

The misspelling of the officer's name does not invalidate the warrant, where it appears that he authorized another to sign it in his presence or actually adopted the signature and acted upon it. Vickers *v.* Hawkins, 128 Ga. 794, 58 S. E. 44.

Official description.— If the warrant is issued and signed by the officers having authority for that purpose, it is not a material omission that their official description is not added. Sheldon *v.* Van Buskirk, 2 N. Y. 473. But *compare* Short *v.* State, 79 Ga. 550, 4 S. E. 852. The addition of the letters "T. C." to the signature to a tax execution sufficiently indicates that the official who

to the person who is the proper officer to execute it, either by name or by a sufficient general description.[70] It should contain all the necessary jurisdictional facts or all the facts required by statute to be stated in it,[71] and if it issues upon a judgment, it should so state, and must correspond with the judgment, any material variance being fatal.[72] In particular, the process must name or describe the person against whose property it is issued, if a known owner,[73] and contain a description of the land sufficient to identify it and prevent mistakes,[74] and state the amount of taxes for which the sale is to be made and also, if the law so provides, the year or years for which they are due.[75] Mere informalities or irregularities, not going to the essence of the officer's authority to make the sale, will not be regarded as vitiating the process; [76] but if it was absolutely void in the beginning, a sale made under it cannot be validated by a subsequent amendment of the process.[77]

c. Levy and Return. The levy of a tax execution on land must be made by the proper officer,[78] on property subject to seizure and sufficient to satisfy the writ.[79] Unless required by statute the levy may be made constructively and without going upon the premises by making a suitable indorsement upon the

issued it did so in his capacity as tax collector. Vickers *v.* Hawkins, 128 Ga. 794, 58 S. E. 44.

70. *Arkansas.*— Keith *v.* Freeman, 43 Ark. 296.

Georgia.— Bedgood *v.* McLain, 89 Ga. 793, 15 S. E. 670; Byars *v.* Curry, 75 Ga. 515.

Michigan.— St. Joseph First Nat. Bank *v.* St. Joseph Tp., 46 Mich. 526, 9 N. W. 838.

New Jersey.— Dinsmore *v.* Westcott, 25 N. J. Eq. 470.

Pennsylvania.—Cannell *v.* Crawford County, 59 Pa. St. 196; Stephens *v.* Wilkins, 6 Pa. St. 260.

Vermont.—Wilson *v.* Seavey, 38 Vt. 221; Chandler *v.* Spear, 22 Vt. 388.

Canada.— Fitzgerald *v.* Wilson, 8 Ont. 559.

See 45 Cent. Dig. tit. "Taxation," § 1319.

71. Southern Pine Co. *v.* Kirkland, 112 Ga. 216, 37 S. E. 362; Leonard *v.* Pilkinton, 99 Ga. 738, 27 S. E. 753; Neff *v.* Smyth, 111 Ill. 100; Eagan *v.* Connelly, 107 Ill. 458; Hinman *v.* Pope, 6 Ill. 131; Hopper *v.* Malleson, 16 N. J. Eq. 382; Nanton *v.* Villeneuve, 10 Manitoba 213. A tax fieri facias, directed to the sheriff of a county named, and commanding that on certain unreturned wild land described he cause to be made a sum specified, being the amount of the state and county taxes for a year named and to make due return thereof, recited the necessary jurisdictional facts required by statute. Vickers *v.* Hawkins, 128 Ga. 794, 58 S. E. 44.

72. Pitkin *v.* Yaw, 13 Ill. 251.

73. Norris *v.* Coley, 100 Ga. 547, 28 S. E. 222; Leonard *v.* Pilkinton, 99 Ga. 738, 27 S. E. 753; Williams *v.* Young, 51 Ga. 453; Kingman *v.* Glover, 3 Rich. (S. C.) 27, 45 Am. Dec. 756.

74. *Georgia.*— Clewis *v.* Hartman, 71 Ga. 810.

Louisiana.— Marin *v.* Sheriff, 30 La. Ann. 293.

New Hampshire.— Cahoon *v.* Coe, 52 N. H. 518.

Pennsylvania.— Erwin *v.* Helm, 13 Serg. & R. 151; Stewart *v.* Graffies, 8 Serg. & R. 344.

Canada.—Schaefer *v.* Lundy, 20 U. C. C. P. 487.

See 45 Cent. Dig. tit. "Taxation," § 1319.

Contra.— Job *v.* Tebbetts, 10 Ill. 376.

Description of property in annexed list or schedule held sufficient see Church *v.* Fenton, 4 Ont. App. 159; Hall *v.* Hill, 22 U. C. Q. B. 578.

Description as wild or improved see Huxford *v.* Southern Pine Co., 124 Ga. 181, 52 S. E. 439; Bentley *v.* Shingler, 111 Ga. 780, 36 S. E. 935; Gardner *v.* Donalson, 80 Ga. 7, 7 S. E. 163.

Patented and unpatented lands.—A statute requiring the warrant for the sale of lands for taxes to distinguish those that have been patented from those held under lease or license of occupation is mandatory, and sales effected under a warrant omitting these particulars are void. Hall *v.* Hill, 22 U. C. Q. B. 578.

75. Neff *v.* Smyth, 111 Ill. 100; Hurd *v.* Melrose, 191 Mass. 576, 78 N. E. 302; Hopper *v.* Malleson, 16 N. J. Eq. 382; Dickson *v.* Burckmyer, 67 S. C. 526, 46 S. E. 343; Interstate Bldg., etc., Assoc. *v.* Waters, 50 S. C. 459, 27 S. E. 948.

76. Scarry *v.* Lewis, 133 Ind. 96, 30 N. E. 411; Bellows *v.* Weeks, 41 Vt. 590; Walker *v.* Miner, 32 Vt. 769; Fitzgerald *v.* Wilson, 8 Ont. 559.

77. Eagan *v.* Connelly, 107 Ill. 458; Pitkin *v.* Yaw, 13 Ill. 251.

78. Butler *v.* Davis, 68 Ga. 173; Morris *v.* Tinker, 60 Ga. 466; Webster *v.* Smith, 78 Mo. 163.

79. Dickson *v.* Burckmyer, 67 S. C. 526, 46 S. E. 343.

Owner pointing out property to be levied on see Boyd *v.* Wilson, 86 Ga. 379, 12 S. E. 744. 13 S. E. 428.

Objection to levy as excessive see Vickers *v.* Hawkins, 111 Ga. 119, 36 S. E. 463; Jones *v.* Johnson, 60 Ga. 260.

Return of no personal property as condition precedent to levy see Watson *v.* Swann, 83 Ga. 198, 9 S. E. 612; Plant *v.* Eichberg, 65 Ga. 64.

Setting aside levy; payment of taxes as condition precedent see State *v.* Hancock, 79 Ga. 799, 5 S. E. 248.

warrant or execution,[80] containing a sufficient description of the property seized,[81] and followed by notice to the party entitled to receive it.[82]

5. Restraining Sale — a. Grounds For Injunction — (i) *In General.* A court of equity has inherent jurisdiction, in the absence of statutory prohibition, to enjoin a threatened tax-sale of lands.[83] But this jurisdiction will not be exercised merely on a complaint that the proceeding would be oppressive or unfair, nor unless the application is brought under some recognized head of equity jurisdiction.[84] The principal ground for restraining such a sale is that it would be illegal, although not patently so, and therefore would cast a cloud on the owner's title;[85] but this does not apply where the proceedings are void on their face.[86] An injunction may also be granted where the party against whose property the proceeding is taken is not the tax debtor and the property is not that on which the tax was laid;[87] also where the taxes in question have already been paid or compromised,[88] and in some states where the owner has leviable personal property within the jurisdiction on which the collector has neglected to levy.[89]

(ii) *Illegal or Fraudulent Levy or Assessment.* If the levy of taxes was unauthorized, contrary to law, or in excess of legal limits, or if the assessment on complainant's property was illegal and void, and not merely irregular, equity may interfere by injunction to prevent a sale of the land assessed.[90] And

80. Miller *v.* Brooks, 120 Ga. 232, 47 S. E. 646; Mays *v.* Witkowski, 46 La. Ann. 1475, 16 So. 478; Elder *v.* New Orleans, 31 La. Ann. 500; U. S. *v.* Hess, 26 Fed. Cas. No. 15,358, 5 Sawy. 533. But *compare* Duvall *v.* Perkins, 77 Md. 582, 26 Atl. 1085. And see Dickson *v.* Burckmyer, 67 S. C. 526, 46 S. E. 343.

Alterations in entry.—Where it appears that changes or alterations have been made in the entry of levy on a tax execution, it will be presumed that such changes were made at the time of the original entry and before the sale, and the burden is upon the objecting party to show the contrary. Vickers *v.* Hawkins, 111 Ga. 119, 36 S. E. 463.

81. Collins *v.* Boring, 96 Ga. 360, 23 S. E. 401; Morgan *v.* Burks, 90 Ga. 287, 15 S. E. 821; Textor *v.* Shipley, 86 Md. 424, 38 Atl. 932; Duvall *v.* Perkins, 77 Md. 582, 26 Atl. 1085.

82. Le Blanc *v.* Blodgett, 34 La. Ann. 107; Textor *v.* Shipley, 86 Md. 424, 38 Atl. 932; Kuntz *v.* Schumacher, 4 Pa. Co. Ct. 515. And see Claypoole *v.* Dorsey, 5 Pa. L. J. Rep. 192.

Notice to wrong person.—A tax-sale of land made under a seizure recorded against a person who is not the owner is illegal. Workingmen's Bank *v.* Lannes, 30 La. Ann. 871.

83. Chicago, etc., R. Co. *v.* Cass County, 51 Nebr. 369, 70 N. W. 955; Canadian Pac. R. Co. *v.* Galgary, 5 Manitoba 37.

Statute forbidding injunction agianst tax-sale see Auditor-Gen. *v.* Iosco Cir. Judge, 58 Mich. 345, 25 N. W. 310.

84. Walker Tp. *v.* Thomas, 123 Mich. 290, 82 N. W. 48; Humphrey *v.* Stevens, 70 Mich. 292, 38 N. W. 214; People's Sav. Bank *v.* Tripp, 13 R. I. 621; T. B. Scott Lumber Co. *v.* Oneida County, 72 Wis. 158, 39 N. W. 343; Northern Pac. R. Co. *v.* Kurtzman, 82 Fed. 241.

85. *District of Columbia.*— McCormick *v.* District of Columbia, 4 Mackey 396.

Missouri.— McPike *v.* Pen, 51 Mo. 63.

New York.—Beach *v.* Hayes, 58 How. Pr. 17.

Ohio.— Neil *v.* Barron, 8 Ohio S. & C. Pl. Dec. 424, 7 Ohio N. P. 84.

Oregon.— Hughes *v.* Linn County, 37 Oreg. 111, 60 Pac. 843.

Wisconsin.— Milwaukee Iron Co. *v.* Hubbard, 29 Wis. 51.

Wyoming.— Ivinson *v.* Hance, 1 Wyo. 270. See 45 Cent. Dig. tit. "Taxation," § 1326.

Contra.— Red *v.* Johnson, 53 Tex. 284.

86. Hollister *v.* Sherman, 63 Cal. 38; Bucknall *v.* Story, 36 Cal. 67; Guest *v.* Brooklyn, 69 N. Y. 506.

87. Seeley *v.* Westport, 47 Conn. 294, 36 Am. Rep. 70.

88. *Alabama.*— Tallassee Mfg. Co. *v.* Glenn, 50 Ala. 489.

Indiana.— Logansport *v.* Carroll, 95 Ind. 156.

Louisiana.— Kock *v.* Triche, 52 La. Ann. 825, 27 So. 354.

Ohio.— Manck *v.* Fratz, 7 Ohio Dec. (Reprint) 704, 4 Cinc. L. Bul. 1043, giving a check, which is not paid because of the failure of the bank, is not such payment as to justify an injunction.

Pennsylvania.— Com. *v.* Colley Tp., 29 Pa. St. 121.

See 45 Cent. Dig. tit. "Taxation," § 1326.

89. Logansport *v.* Carroll, 95 Ind. 156; Abbott *v.* Edgerton, 53 Ind. 196; Turner *v.* Pewee Valley, 100 Ky. 288, 38 S. W. 143, 688, 18 Ky. L. Rep. 755; Johnson *v.* Hahn, 4 Nebr. 139. *Contra*, Frost *v.* Flick, 1 Dak. 131, 46 N. W. 508; Rinard *v.* Nordyke, 76 Ind. 120.

90. *California.*— Burr *v.* Hunt, 18 Cal. 303.

Florida.— Pickett *v.* Russell, 42 Fla. 116, 28 So. 764.

Illinois.— Illinois Cent. R. Co. *v.* Hodges, 113 Ill. 323. See Ayers *v.* Widmayer, 188 Ill. 121, 58 N. E. 956.

Kentucky.— Lexington, etc., R. Co. *v.* School Dist. No. 12, 54 S. W. 712, 21 Ky. L. Rep. 1205.

so also where the assessment was made fraudulently or in arbitrary disregard of the law and of complainant's rights.[91]

(III) *Excessive Valuation.* An excessive valuation placed on complainant's property for the purpose of taxation is not ground for an injunction, unless so grossly excessive as to furnish evidence of fraud or of an intentional disregard of the principle of equality and uniformity.[92]

(IV) *Errors and Irregularities.* Equity will not enjoin a tax-sale of lands on account of errors or irregularities in the assessment or other proceedings which could have been corrected on a proper application and which do not affect the substantial justice of the tax or the liability of the land for its satisfaction.[93]

Michigan.— Lake Superior Ship Canal, etc., Co. *v.* Auditor-Gen., 79 Mich. 351, 44 N. W. 616; Albany, etc., Min. Co. *v.* Auditor-Gen., 37 Mich. 391; Kinyon *v.* Duchene, 21 Mich. 498.

Missouri.— North St. Louis Gymnastic Soc. *v.* Hudson, 85 Mo. 32 [*affirming* 12 Mo. App. 342]; Mechanics' Bank *v.* Kansas City, 73 Mo. 555; McPike *v.* Pen, 51 Mo. 63; Lockwood *v.* St. Louis, 24 Mo. 20.

Nebraska.— Burlington, etc., R. Co. *v.* York County, 7 Nebr. 487.

New York.— Coxe *v.* Town, 56 Hun 648, 10 N. Y. Suppl. 73; Litchfield *v.* Brooklyn, 13 Misc. 693, 34 N. Y. Suppl. 1090.

South Dakota.— Dakota L., etc., Co. *v.* Codington County, 9 S. D. 159, 68 N. W. 314.

Texas.— Cassiano *v.* Ursuline Academy, 64 Tex. 673; Cotulla *v.* Burswell, 22 Tex. Civ. App. 329, 54 S. W. 614; Cook *v.* Galveston, etc., R. Co., 5 Tex. Civ. App. 644, 24 S. W. 544.

West Virginia.—Winifrede Coal Co. *v.* Cabin Creek Dist. Bd. of Education, 47 W. Va. 132, 34 S. E. 776.

Wisconsin.— Roe *v.* Lincoln County, 56 Wis. 66, 13 N. W. 887; Mitchell *v.* Milwaukee, 18 Wis. 92.

United States.— Huntington *v.* Central Pac. R. Co., 12 Fed. Cas. No. 6,911, 2 Sawy. 503. But see Gillette *v.* Denver, 21 Fed. 822.

See 45 Cent. Dig. tit. "Taxation," § 1326.

Contra.—And see Clayton *v.* Lafargue, 23 Ark. 137; Hunnewell *v.* Charlestown, 106 Mass. 350.

Exempt property.— If property is by statute exempt from taxation, the assessment of it is an illegality which will justify an injunction to restrain its sale for the taxes. Gonzales *v.* Sullivan, 16 Fla. 791; Illinois Cent. R. Co. *v.* Hodges, 113 Ill. 323; Jones *v.* Davis, 35 Ohio St. 474. See Oliver *v.* Memphis, etc., R. Co., 30 Ark. 128.

Land taxed in wrong district.—An injunction may issue where lands are unlawfully included within taxing districts to which they do not belong. Simpkins *v.* Ward, 45 Mich. 559, 8 ... W. 507.

Taxes partly illegal.—As a general rule an injunction cannot be granted if any portion of the taxes for which the sale is to be made are legal and regularly assessed and remain unpaid. Mesker *v.* Koch, 76 Ind. 68; Pillsbury *v.* Humphrey, 26 Mich. 245. And see Smith *v.* Humphrey, 20 Mich. 398, refusing to enjoin a tax-sale merely because of a demand for illegal interest.

91. *Alabama.*— Tallassee Mfg. Co. *v.* Glenn, 50 Ala. 489.

Michigan.—Auditor-Gen. *v.* Pioneer Iron Co., 123 Mich. 521, 82 N. W. 260; Merrill *v.* Humphrey, 24 Mich. 170.

Missouri.— St. Louis, etc., R. Co. *v.* Anthony, 73 Mo. 431.

Ohio.— Burnet *v.* Cincinnati, 3 Ohio 73, 17 Am. Dec. 582.

Wisconsin.— Goff *v.* Outagamie County, 43 Wis. 55; Schettler *v.* Ft. Howard, 43 Wis. 48; Tainter *v.* Lucas, 29 Wis. 375.

United States.— California, etc., Land Co. *v.* Gowen, 48 Fed. 771.

See 45 Cent. Dig. tit. "Taxation," § 1326.

92. *District of Columbia.*— Alexandria Canal R., etc., Co. *v.* District of Columbia, 1 Mackey 217.

Illinois.—Ayers *v.* Widmayer, 188 Ill. 121, 58 N. E. 956; Pacific Hotel Co. *v.* Lieb, 83 Ill. 602.

Missouri.— Hamilton *v.* Rosenblatt, 8 Mo. App. 237.

Montana.— Northern Pac. R. Co. *v.* Patterson, 10 Mont. 90, 24 Pac. 704.

South Dakota.— Macomb *v.* Lake County, 9 S. D. 466, 70 N. W. 652.

Texas.— Houston, etc., R. Co. *v.* Presidio County, 53 Tex. 518.

Washington.— Knapp *v.* King County, 17 Wash. 567, 50 Pac. 480.

Wisconsin.— Boorman *v.* Juneau County, 76 Wis. 550, 45 N. W. 675.

See 45 Cent. Dig. tit. "Taxation," § 1326.

93. *Dakota.*— Frost *v.* Flick, 1 Dak. 131, 46 N. W. 508.

Florida.— Finnegan *v.* Fernandina, 15 Fla. 379, 21 Am. Rep. 292.

Indiana.— Cleveland, etc., R. Co. *v.* Waynetown, 153 Ind. 550, 55 N. E. 451.

Iowa.— Burlington, etc., R. Co. *v.* Spearman, 12 Iowa 112.

Kentucky.— Ryan *v.* Central City, 54 S. W. 2, 21 Ky. L. Rep. 1070.

Michigan.— Burt *v.* Wadsworth, 39 Mich. 126; Albany, etc., Min. Co. *v.* Auditor-Gen., 37 Mich. 391.

Mississippi.— Deason *v.* Dixon, 54 Miss. 585.

Montana.— Cobban *v.* Hinds, 23 Mont. 338, 59 Pac. 1; Deloughrey *v.* Hinds, 23 Mont. 260, 58 Pac. 709; Ward *v.* Gallatin County, 12 Mont. 23, 29 Pac. 658; Northern Pac. R. Co. *v.* Patterson, 10 Mont. 90, 24 Pac. 704.

(v) *Adequate Remedy at Law.* Equity will not enjoin a tax-sale of real estate where complainant has an adequate remedy at law for the injustice or injury alleged,[94] as, by an appeal or certiorari,[95] mandamus to compel the board of equalization or review to hear and consider his application for a reduction,[96] action at law to recover back taxes illegally exacted,[97] or action for damages against the collector or officer making the sale.[98]

b. Conditions Precedent. One applying for an injunction to restrain a tax-sale of land must tender the taxes or so much thereof as he admits to be legal,[99] and must also show a sufficient excuse for his failure to appeal to the board of review for such relief as they could have granted him.[1]

c. Parties and Proceedings. Any person having a beneficial interest in the land in question, but no other, may sue to enjoin its sale for taxes,[2] and several complainants may join in the suit if they are all equally affected by the tax in question and allege against it grounds of objection common to them all.[3] The officers charged with the duty of making the threatened sale are the proper defendants,[4] and an adverse claimant of title may be brought in where the adjudication of his title is necessary to the determination of the issues.[5] The taxpayer should move without unnecessary delay,[6] and his complaint must set forth fully and distinctly, and not by way of inference or legal conclusion, the facts on which he

Wisconsin.— Kaehler *v.* Dobberpuhl, 56 Wis. 480, 14 N. W. 644; Dean *v.* Gleason, 16 Wis. 1. In the case last cited it appeared that, in making the assessment roll of a city, large amounts of personal property were omitted which very little diligence would have enabled the assessors to reach, and there were many errors and inequalities in the valuation of real estate which it seemed hardly possible for men of ordinary intelligence, acting under oath, to have committed; yet, as it could not be said, upon the whole evidence, that these errors resulted from anything but want of judgment and lack of diligence and business habits, it was held, in a suit to enjoin the sale of real estate for the taxes levied upon such assessments, that such errors did not invalidate the whole tax, and that the only remedy for such grievances was in the election of more diligent and competent officers.

See 45 Cent. Dig. tit. "Taxation," § 1326.

Compare Temple Grove Seminary *v.* Cramer, 98 N. Y. 121; Beach *v.* Hayes, 58 How. Pr. (N. Y.) 17.

94. Boyd *v.* Selma, 96 Ala. 144, 11 So. 393, 16 L. R. A. 729; Brown *v.* Abbott, (N. J. Ch. 1885) 2 Atl. 24; Lacoe, etc., Coal Co. *v.* Schadt, 3 Lack. Leg. N. (Pa.) 178; Sherman *v.* Leonard, 10 R. I. 469; Greene *v.* Mumford, 5 R. I. 472, 73 Am. Dec. 79.

95. Andrews *v.* Rumsey, 75 Ill. 598. *Compare* Alexander *v.* Henderson, 105 Tenn. 431, 58 S. W. 648.

96. White *v.* Raymond, 188 Ill. 298, 58 N. E. 976.

97. See *supra*, IX, C, 1. But see Brown *v.* French, 80 Fed. 166, holding that a federal court will enjoin a sale of the real estate of a national bank to enforce payment of taxes illegally assessed against its capital stock, under a law which would make the sale a cloud on its title, although the state statute gives an action at law to recover back taxes illegally exacted.

98. Anthony *v.* Sturgis, 86 Ind. 479; Harris *v.* Davis, 24 Pa. Co. Ct. 373. *Compare* Noll *v.* Morgan, 82 Mo. App. 112.

99. *Kentucky.*—Alexander *v.* Aud, 121 Ky. 10, 88 S. W. 1103, 28 Ky. L. Rep. 69.

Nebraska.— Burlington, etc., R. Co. *v.* York County, 7 Nebr. 487.

Oregon.—Alliance Trust Co. *v.* Multnomah County, 38 Or. 433, 63 Pac. 498.

Texas.— Dean *v.* Kopperl, 1 Tex. App. Civ. Cas. § 746.

Wyoming.— Ricketts *v.* Crewdson, 13 Wyo. 284, 79 Pac. 1042, 81 Pac. 1.

1. Houston, etc., R. Co. *v.* Presidio County, 53 Tex. 518. *Compare* Court *v.* O'Connor, 65 Tex. 334.

2. Steffins *v.* Stewart, 53 Kan. 92, 6 Pac. 55 (wife has no such interest in her husband's lands); Missouri River, etc., R. Co. *v.* Wheaton, 7 Kan. 232 (stranger to title cannot sue); Morrison *v.* Larkin, 26 La. Ann. 699; Temple Grove Seminary *v.* Cramer, 26 Hun (N. Y.) 309 [*affirmed* in 98 N. Y. 121]; Lefferts *v.* Calumet County, 21 Wis. 688.

A partnership cannot enjoin the collector from selling the individual property of one of its members for the taxes due from the firm, as that is a matter for the individual partner himself to complain of and does not affect the firm. Lyle *v.* Jacques, 101 Ill. 644.

3. Alexander *v.* Aud, 121 Ky. 10, 88 S. W. 1103, 28 Ky. L. Rep. 69.

4. Cook *v.* Condon, 6 Kan. App. 574, 51 Pac. 587; Lake Superior Ship Canal R., etc., Co. *v.* Auditor-Gen., 79 Mich. 351, 44 N. W. 616; Caldwell Land, etc., Co. *v.* Smith, 146 N. C. 199, 59 S. E. 653.

The county commissioners may be joined as parties at their request in an action against the sheriff to enjoin the collection of taxes. Caldwell Land, etc., Co. *v.* Smith, 146 N. C. 199, 59 S. E. 653.

5. Litchfield *v.* Polk County, 18 Iowa 70.

6. See *supra*, X, D, 2, c, (I). See Casey *v.* Burt County, 59 Nebr. 624, 81 N. W. 851.

relies for the grant of an injunction,[7] and he must prove his case,[8] encountering and overcoming, where necessary, the presumption of law that public officers have duly and regularly performed their duties.[9] A preliminary injunction will not be granted except in a very clear case and where it is apparent that it is necessary to protect the complainant's rights;[10] and in any case the court will so frame its decree as to require the complainant to pay so much of the tax as it finds to be legal and just.[11]

d. Operation and Effect of Decree. A decree enjoining the sale of land for taxes is not a ministerial act but a judicial decision against the validity of the tax, and therefore it is binding and conclusive until reversed, and any sale made contrary to the terms of the decree is illegal and void.[12]

F. Notice of Sale — 1. Requirement of Notice or Advertisement. It is essential to a valid tax-sale of land that the statutory directions as to notice thereof shall have been complied with substantially if not literally; and whether this notice is required to be individual or general, and whether by personal service, published advertisement, or posting, the omission of it is not a mere irregularity but a defect which invalidates all subsequent proceedings.[13]

7. *Colorado.*— Boston, etc., Smelting Co. *v.* Elder, 20 Colo. App. 96, 77 Pac. 258.

Indiana.—Volger *v.* Sidener, 86 Ind. 545; Rinard *v.* Nordyke, 76 Ind. 130.

Kentucky.—Alexander *v.* Aud, 121 Ky. 105, 88 S. W. 1103, 28 Ky. L. Rep. 69. Where the fee-simple title to land sold to the state for taxes and not redeemed had vested in it, a petition to restrain the state's officers from selling the land, which failed to aver either that the taxes had been paid or that the land had been redeemed, was fatally defective. James *v.* Blanton, 134 Ky. 803, 121 S. W. 951, 123 S. W. 328.

Montana.— Northern Pac. R. Co. *v.* Patterson, 10 Mont. 90, 24 Pac. 704.

Nebraska.—Webster *v.* Lincoln, 50 Nebr. 1, 69 N. W. 394.

Wisconsin.— Boorman *v.* Juneau County, 76 Wis. 550, 45 N. W. 675; Whittaker *v.* Janesville, 33 Wis. 76.

United States.— Chicago, etc., R. Co. *v.* Hartshorn, 30 Fed. 541.

See 45 Cent. Dig. tit. "Taxation," § 1329.

8. Thorington *v.* Montgomery, 88 Ala. 548, 7 So. 363.

9. Boston, etc., Smelting Co. *v.* Elder, 20 Colo. App. 96, 77 Pac. 258; Alexander *v.* Aud, 121 Ky. 105, 88 S. W. 1103, 28 Ky. L. Rep. 69; Tainter *v.* Lucas, 29 Wis. 375.

10. T. B. Scott Lumber Co. *v.* Oneida County, 72 Wis. 158, 39 N. W. 343. And see Chicago, etc., R. Co. *v.* Langlade County, 104 Wis. 373, 80 N. W. 598. Where the county commissioners placed on the tax list notes executed to plaintiff February 13, 1902, valued at four hundred and seventeen thousand dollars, and assessed them for taxation at that sum as a solvent credit for the years 1902 and 1903, and added the penalty twenty-five per cent, no notice being given to plaintiff of the proceedings, and the commissioners placed the list in the hands of the sheriff, who advertised plaintiff's real estate for sale, it was held that plaintiff was entitled to an injunction against the sale pending a final hearing. Caldwell Land, etc., Co. *v.* Smith, 146 N. C. 199, 59 S. E. 653.

11. Tisdale *v.* Auditor-Gen., 85 Mich. 261, 48 N. W. 568; Smith *v.* Humphrey, 20 Mich. 398.

12. Smith *v.* Longe, 20 Fla. 697; Louisville Water Co. *v.* Clark, 94 Ky. 47, 21 S. W. 246, 14 Ky. L. Rep. 886; Williams *v.* Cammack, 27 Miss. 209, 61 Am. Dec. 508.

13. *Alabama.*— Crebs *v.* Fowler, 148 Ala. 366, 42 So. 553; McKinnon *v.* Mixon, 128 Ala. 612, 29 So. 690; Carlisle *v.* Watts. 78 Ala. 486; Clarke *v.* Rowan, 53 Ala. 400; Elliot *v.* Doe, 24 Ala. 508.

Arkansas.— Thweatt *v.* Howard, 68 Ark. 426, 59 S. W. 764; Logan *v.* Eastern Arkansas Land Co., 68 Ark. 248, 57 S. W. 798.

Colorado.— Morris *v.* St. Louis Nat. Bank, 17 Colo. 231, 29 Pac. 802.

Iowa.— Dubuque *v.* Wooton, 28 Iowa 571; Abell *v.* Cross, 17 Iowa 171.

Kentucky.—Washington *v.* McCombs, 32 S. W. 398, 17 Ky. L. Rep. 740.

Louisiana.— Eames *v.* Woodson, 120 La. 1031, 46 So. 13; *In re* Sheehy, 119 La. 608, 44 So. 315; Bartley *v.* Sallier, 118 La. 93, 42 So. 657; Williams *v.* Chaplain, 112 La. 1075, 36 So. 859; Foreman *v.* Hinchcliffe, 106 La. 225, 30 So. 762; Geddes *v.* Cunningham, 104 La. 306, 29 So. 138; Johnson *v.* Martinez, 48 La. Ann. 52, 18 So. 909; McWilliams *v.* Michel, 43 La. Ann. 984, 10 So. 11; Breaux *v.* Negrotto, 43 La. Ann. 426, 9 So. 502; Villey *v.* Jarreau, 33 La. Ann. 291; Fix *v.* Dierker, 30 La. Ann. 175.

Maine.— Hobbs *v.* Clements, 32 Me. 67; Flint *v.* Sawyer, 30 Me. 226; Moulton *v.* Blaisdell, 24 Me. 283.

Maryland.— Steuart *v.* Meyer, 54 Md. 454; Guisebert *v.* Etchison, 51 Md. 478. Notice held sufficient see McMahon *v.* Crean, 109 Md. 652, 71 Atl. 995.

Massachusetts.—Williams *v.* Bowers, 197 Mass. 565, 84 N. E. 317; Forster *v.* Forster, 129 Mass. 559.

Minnesota.— McCord *v.* Sullivan, 85 Minn. 344, 88 N. W. 989, 89 Am. St. Rep. 561; Prindle *v.* Campbell, 9 Minn. 212.

Mississippi.— Blalock *v.* Gaddis, 33 Miss. 452; Styles *v.* Weir, 26 Miss. 187.

2. Personal Notice to Residents. Where the law requires personal notice to be given to the owner of the property, if he is known and a resident, it is mandatory and no valid sale can be made without such notice.[14] Within the meaning of such a provision, the "owner" includes all persons who are interested in the property, as coheirs or joint tenants or tenants in common,[15] and it means the person who owns the property at the time the notice is given, and not a former owner in whose name the land was assessed.[16] The law also intends that reasonably diligent action shall be taken to discover the true owner and make the notice effectual;[17] and thus if the owner is dead, an endeavor must be made to ascertain who are his heirs or representatives, and serve the notice on them, and if they are known or may be discovered, a notice addressed to the "estate" is insufficient.[18] Similar principles apply where the notice is directed to be given to the "occupant" of the premises,[19] or to the person "in actual possession" of the land.[20] Where the statute authorizes this notice to be given by mail, it is sufficient if a proper notice

Missouri.— Nelson *v.* Goebel, 17 Mo. 161; Reeds *v.* Morton, 9 Mo. 878.

New Jersey.— Landis *v.* Sea Isle City, 66 N. J. L. 558, 49 Atl. 685.

New York.— Leland *v.* Bennett, 5 Hill 286; Sharp *v.* Johnson, 4 Hill 92, 40 Am. Dec. 259; Bush *v.* Davison, 16 Wend. 550.

North Carolina.— Hill *v.* Nicholson, 92 N. C. 24; *In re* Macay, 84 N. C. 63. But *compare* Geer *v.* Brown, 126 N. C. 238, 35 S. E. 470.

Ohio.— Hughey *v.* Horel, 2 Ohio 231.

Oregon.— Rafferty *v.* Davis, 54 Oreg. 77, 102 Pac. 305.

Pennsylvania.— Jenks *v.* Wright, 61 Pa. St. 410; Arthurs *v.* Smathers, 38 Pa. St. 40; Thompson *v.* Brackenridge, 14 Serg. & R. 346; Blair *v.* Waggoner, 2 Serg. & R. 472.

Texas.— Bean *v.* Brownwood, 91 Tex. 684, 45 S. W. 897; Edwards *v.* Harnberger, (Civ. App. 1900) 55 S. W. 42. But *compare* Rogers *v.* Moore, 100 Tex. 220, 97 S. W. 685.

Utah.— Olsen *v.* Bagley, 10 Utah 492, 37 Pac. 739.

United States.— Early *v.* Doe, 16 How. 610, 14 L. ed. 1079; Washington *v.* Pratt, 8 Wheat. 681, 5 L. ed. 714; Martin *v.* Barbour, 34 Fed. 701 [*affirmed* in 140 U. S. 634, 11 S. Ct. 944, 35 L. ed. 546]; Marx *v.* Hanthorn, 30 Fed. 579; Moore *v.* Brown, 17 Fed. Cas. No. 9,753, 4 McLean 211.

Canada.— O'Brien *v.* Cogswell, 17 Can. Sup. Ct. 420; Haisley *v.* Somers, 13 Ont. 600; Deverill *v.* Coe, 11 Ont. 222.

See 45 Cent. Dig. tit. "Taxation," § 1334.

Contra.— Noland *v.* Busby, 28 Ind. 154.

Subsequent private sale of lands.—Where the treasurer, as authorized by law, makes a private sale of those lands which have remained unsold for want of bidders at the public sale, the same having been duly advertised, such private sale need not be on notice. Kittle *v.* Shervin, 11 Nebr. 65, 7 N. W. 861.

14. Villey *v.* Jarreau, 33 La. Ann. 291; Crosby *v.* Terry, 41 Tex. Civ. App. 594, 91 S. W. 652; Hollywood *v.* Wellhausen, 28 Tex. Civ. App. 541, 68 S. W. 329. *Compare* Sanders *v.* Earp, 118 N. C. 275, 24 S. E. 8.

Notice held sufficient see McMahon *v.* Crean, 109 Md. 652, 71 Atl. 995.

15. Howze *v.* Dew, 90 Ala. 178, 7 So. 239, 24 Am. St. Rep. 783; *In re* Interstate Land Co., 118 La. 587, 43 So. 173; Thurston *v.* Miller, 10 R. I. 358.

Mortgagee.— In North Carolina it is held that the mortgagee, being the legal owner of the land mortgaged, is the person to whom notice must be given of an intended tax-sale of the property. Hill *v.* Nicholson, 92 N. C. 24; Whitehurst *v.* Gaskill, 69 N. C. 449, 12 Am. Rep. 655.

Owner of timber.—Where the notice served on the record owner was fatally defective, the service of a sufficient notice on one claiming an interest in the timber growing on the land will not make the sale valid. Tucker *v.* Van Winkle, 142 Mich. 210, 105 N. W. 607.

16. Quinlan *v.* Callahan, 81 Ky. 618; *In re* Lafferranderie, 114 La. 6, 37 So. 990; Adolph *v.* Richardson, 52 La. Ann. 1156, 27 So. 665; Lague *v.* Boagni, 32 La. Ann. 912; Hume *v.* Wainscott, 46 Mo. 145; Abbott *v.* Lindenbower, 42 Mo. 162. But *compare* Jones *v.* Landis Tp., 50 N. J. L. 374, 13 Atl. 251. And see Barnard *v.* Hoyt, 63 Ill. 341, holding that where the property is vacant and unoccupied, the notice must be served on the person in whose name the land was assessed, even though he never had or claimed any interest in the premises.

17. Genella *v.* Vincent, 50 La. Ann. 956, 24 So. 690; Hoyle *v.* Southern Athletic Club, 48 La. Ann. 879, 19 So. 937.

18. McGee *v.* Fleming, 82 Ala. 276, 3 So. 1; Carlisle *v.* Watts, 78 Ala. 486; Fennimore *v.* Boatner, 112 La. 1080, 36 So. 860; Genella *v.* Vincent, 50 La. Ann. 956, 24 So. 690; Hoyle *v.* Southern Athletic Club, 48 La. Ann. 879, 19 So. 937.

19. Gage *v.* Bailey, 102 Ill. 11; People *v.* Kelsey, 180 N. Y. 24, 72 N. E. 524 [*reversing* 96 N. Y. App. Div. 148, 89 N. Y. Suppl. 416] (the commission of the forest preserve is an "occupant" within the meaning of such a statute); Leland *v.* Bennett, 5 Hill (N. Y.) 286.

Notice to redeem see *infra*, XII, B, 5, c.

20. Gage *v.* Waterman, 121 Ill. 115, 13 N. E. 543; Foy *v.* Houstman, 128 Iowa 220, 103 N. W. 369.

properly addressed has been deposited in the mail, and it is immaterial that the owner did not receive it.[21]

3. Publication of Notice. The laws of several states require, in the case of unknown and non-resident owners,[22] and sometimes in the case of all owners, whether resident or not,[23] that notice of tax-sales shall be given by advertisement published in one or more newspapers, and the sale will not be valid unless the provisions of such a statute are fully complied with.[24] A direction that the notice shall be published in a newspaper "published in the county" where the land lies is imperative and must be obeyed if there is such a paper.[25] It is commonly provided that the paper shall be selected or "designated" by the proper authorities of the city or county; and this is also a mandatory requirement;[26] and so where the paper is particularly named or described in the statute.[27] It is always under-

21. Rogers *v.* Moore, 100 Tex. 220, 97 S. W. 685. But the owner may show that the notice was not correctly addressed to his residence. Montgomery *v.* Marydale Land, etc., Co., 46 La. Ann. 403, 15 So. 63.

22. Bandow *v.* Wolven, 20 S. D. 445, 107 N. W. 204; Borden *v.* Patterson, 51 Tex. Civ. App. 173, 111 S. W. 182; Parker *v.* Rule, 9 Cranch (U. S.) 64, 3 L. ed. 658.

23. Henderson *v.* Ellerman, 47 La. Ann. 306, 16 So. 821.

24. *Alabama.*—Johnson *v.* Harper, 107 Ala. 706, 18 So. 198; Clarke *v.* Rowan, 53 Ala. 400

Arkansas.— Bettison *v.* Budd, 21 Ark. 578.

Colorado.— Morris *v.* St. Louis Nat. Bank, 17 Colo. 231, 29 Pac. 802.

Florida.— Daniel *v.* Taylor, 33 Fla. 636, 15 So. 313.

Illinois.— Langlois *v.* Stewart, 156 Ill. 609, 41 N. E. 177.

Mississippi.— Styles *v.* Weir, 26 Miss. 187.

New York.— See People *v.* Coler, 46 N. Y. App. Div. 237, 61 N. Y. Suppl. 665.

North Carolina.—Stanley *v.* Smith, 4 N. C. 124.

Oregon.— Rafferty *v.* Davis, 54 Oreg. 77, 102 Pac. 305.

Texas.— Borden *v.* Patterson, 51 Tex. Civ. App. 173, 111 S. W. 182.

United States.— Hodgdon *v.* Burleigh, 4 Fed. 111.

See 45 Cent. Dig. tit. "Taxation," § 1338.

Notice attached to delinquent list.— Under a statute requiring notice to be "attached" to the list of delinquent taxes, it is not material whether it precedes or follows the list, if it is attached to it when published. Chouteau *v.* Hunt, 44 Minn. 173, 46 N. W. 341.

Authority of officer to bind municipality for expense of publishing notices of a tax-sale see Canadian Bank of Commerce *v.* Toronto Junction, 3 Ont. L. Rep. 309.

25 West *v.* State, (Ark. 1901) 61 S. W. 918; Wynkoop *v.* Grand Traverse Cir. Judge, 113 Mich. 381, 71 N. W. 640; Hughey *v.* Horrel, 2 Ohio 231; Jarvis *v.* Brooke, 11 U. C. Q. B. 299.

Where no paper is published in the county where the lands lie publication may be made in a paper in the next adjacent county. Winder *v.* Sterling, 7 Ohio, Pt. II, 190.

Paper partly printed elsewhere.— A newspaper is printed within a county, within the meaning of such a statute, although half of each issue, not including matters of local interest, is printed elsewhere. Hart *v.* Smith, 44 Wis. 213.

It is not necessary for the town clerk to certify that the town of Windsor in which the advertisement was published was within the state. Bellows *v.* Elliot, 12 Vt. 569.

26. *Kansas.*—Wren *v.* Nemaha County, 24 Kan. 301.

Michigan.—Wilkin *v.* Keith, 121 Mich. 66, 79 N. W. 887; Powers' Appeal, 29 Mich. 504.

Minnesota.— Reimer *v.* Newell, 47 Minn. 237, 49 N. W. 865; Godfrey *v.* Valentine, 45 Minn. 502, 48 N. W. 325; Merriman *v.* Knight, 43 Minn. 493, 45 N. W. 1098; Knight *v.* Alexander, 38 Minn. 384, 37 N. W. 796, 8 Am. St. Rep. 675; Hall *v.* Ramsey County, 30 Minn. 68, 14 N. W. 263; Eastman *v.* Linn, 26 Minn. 215, 2 N. W. 693; Sinclair *v.* Winona County, 23 Minn. 404, 23 Am. Rep. 694.

Nebraska.— State *v.* Fink, 73 Nebr. 360, 102 N. W. 771; State *v.* Dixon County, 24 Nebr. 106, 37 N. W. 936.

New York.— Troy Press Co. *v.* Mann, 115 N. Y. App. Div. 25, 100 N. Y. Suppl. 516 [*affirmed* in 187 N. Y. 279, 79 N. E. 1006]; Kernitz *v.* Long Island City, 50 Hun 428, 3 N. Y. Suppl. 144.

North Dakota.— Blackmore *v.* Cooper, 15 N. D. 5, 106 N. W. 566, 125 Am. St. Rep. 574, 4 L. R. A. N. S. 1074.

South Dakota.— Dewell *v.* Hughes County, 8 S. D. 452, 66 N. W. 1079.

Wyoming.—Albany County *v.* Chaplin, 5 Wyo. 74, 37 Pac. 370.

27. Isaacs *v.* Shattuck, 12 Vt. 668.

Paper of state printer.—Where the notice was required to be published for a certain length of time in the paper of the state printer, and the publication was duly begun, but before completion the paper ceased to be that of the state printer, it was held insufficient. Bussey *v.* Leavitt, 12 Me. 378.

Publication in two papers.— The official publication of notice of city tax-sales in two newspapers, when the law requires it to be published officially in one newspaper, renders the sale invalid. Orlando *v.* Equitable Bldg., etc., Assoc., 45 Fla. 507, 33 So. 986.

A change in the name of the paper in which the notice is required to be published

stood, if not expressly required, that the advertisement shall be in the English language and published in a paper which is printed in the same tongue.[28] But it is a good publication if the notice is published in a supplement to the paper, or on an extra sheet, provided the circulation thereof is exactly the same as that of the paper itself.[29]

4. Form, Requisites, and Validity of Notice. Although some of the decisions maintain that mere informalities or irregularities in the notice of tax-sale will not invalidate it,[30] yet the tendency is to require a very strict and precise compliance with all the directions of the statute.[31] If the statute itself prescribes a form of notice, it cannot be safely departed from in any particular.[32] In any case the notice must show that it is official and proceeds from proper authority,[33] and must be in writing or printed and show clearly what it is intended to be.[34] In particular, it must state what tax it is that is delinquent,[35] and for what year levied or assessed,[36] and the amount of the tax for which the property is to be

will not affect the notice. Reimer *v.* Newel, 47 Minn. 237, 49 N. W. 865; Isaacs *v.* Shattuck, 12 Vt. 668.

28. Visscher *v.* Ottawa Cir. Judge, 116 Mich. 666, 74 N. W. 1013; Graham *v.* King, 50 Mo. 22, 11 Am. Rep. 401. But see Donahue *v.* O'Conor, 45 N. Y. Super. Ct. 278. where the statute required that notice of sale should be published in ten different papers of New York city, and it was held that a publication of the same in a paper printed in the German language, as one of the above number, did not invalidate the notice.

29. *California.*— Tully *v.* Bauer, 52 Cal. 487.

Kentucky.— Davis *v.* Simms, 4 Bibb 465.

Michigan.—Mann *v.* Carson, 120 Mich. 631, 79 N. W. 941.

Minnesota.— Whitney *v.* Bailey, 89 Minn. 247, 92 N. W. 974.

Nebraska.— Zahradnicek *v.* Selby, 15 Nebr. 579, 19 N. W. 645.

New York.— Morton *v.* Horton, 189 N. Y. 398, 82 N. E. 429 [*reversing* 101 N. Y. App. Div. 322, 91 N. Y. Suppl. 950].

Tennessee.— Buck *v.* Williams, 10 Heisk. 264.

Sunday edition.— Where the paper selected is a daily, and its proprietors also publish a Sunday paper of the same name, but which is not regarded as belonging to the regular daily issue, and instead of being delivered to subscribers is sold only to newsdealers and newsboys, such paper is a different and distinct one, and publication wholly in such Sunday issue, or partly therein and partly in the regular daily issue, would not be sufficient. Scammon *v.* Chicago, 40 Ill. 146. And see Ormsby *v.* Louisville, 79 Ky. 197, 2 Ky. L. Rep. 66.

30. *Arkansas.*— Thweatt *v.* Black, 30 Ark. 732; Scott *v.* Watkins, 22 Ark. 556.

Iowa.— Davis *v.* Magoun, 109 Iowa 308, 80 N. W. 423.

Mississippi.—Virden *v.* Bowers, 55 Miss. 1.

New Jersey.— Citizens' Gaslight Co. *v.* Alden, 44 N. J. L. 648.

United States.— Hodgdon *v.* Burleigh, 4 Fed. 111; Ogden *v.* Harrington, 18 Fed. Cas. No. 10,457, 6 McLean 418.

31. Wall *v.* Wall, 124 Mass. 65; Cahoon *v.* Coe, 57 N. H. 556; Jones *v.* Landis Tp., 50 N. J. L. 374, 13 Atl. 251.

What law governs see Martin *v.* Langenstein, 43 La. Ann. 789, 9 So. 507; Babcock *v.* Wolffarth, 35 Tex. Civ. App. 512, 80 S. W. 642.

Two insufficient advertisements of a tax-sale cannot be coupled together so as to make one complete legal advertisement, even though a verbal assent is given thereto by the delinquent taxpayer. Scales *v.* Alvis, 12 Ala. 617, 46 Am. Dec. 269. But where a change is made in a tax notice during the publication, and such notice is published for the required time, and either form of such notice, taken alone, would be sufficient to uphold a sale made thereunder, the change is immaterial. Ireland *v.* George, 41 Kan. 751, 21 Pac. 776.

32. *In re* New Orleans, 51 La. Ann. 972, 25 So. 686; Clark *v.* Mowyer, 5 Mich. 462; Garvey *v.* State, (Tex. Civ. App. 1905) 88 S. W. 873. See Carter *v.* Osborn, 150 Cal. 620, 89 Pac. 608; Sterling *v.* Urquhart, 88 Minn. 495, 93 N. W. 898.

33. Towle *v.* St. Paul Permanent Loan Co., 84 Minn. 105, 86 N. W. 781; Spear *v.* Ditty, 9 Vt. 282.

Notice by unqualified officer.— The making of the advertisement of his sale by a tax collector is an official act, and, if made before he is qualified by being sworn, the sale is void. Langdon *v.* Poor, 20 Vt. 13.

34. Genella *v.* Vincent, 50 La. Ann. 956, 24 So. 690 (notice of an assessment is not notice of an intention to sell in case of non-payment); Knowles *v.* Boston, 129 Mass. 551 (notice that it is the officer's duty to enforce the payment of the tax unless it is paid forthwith is not a notice of sale).

Printed or written notice.— Where the law requires "printed" notices of a tax-sale, a sale made under a written notice is void. Lagroue *v.* Rains, 48 Mo. 536. If the statute omits to specify the character of the notice, one in writing must be intended. Pearson *v.* Lovejoy, 53 Barb. (N. Y.) 407, 35 How. Pr. 193.

35. Langdon *v.* Poor, 20 Vt. 13; Isaac *v.* Wiley, 12 Vt. 674.

36. Knowlton *v.* Moore, 136 Mass. 32; Towle *v.* St. Paul Permanent Loan Co., 84

sold.[37] It is also necessary that it shall give the name of the owner of the property or the person against whom the taxes are assessed,[38] and describe the premises which are to be sold,[39] and it must particularly and exactly state the time when the sale will be held,[40] and the place,[41] and show that it will be made by the proper

Minn. 105, 86 N. W. 781; Cahoon *v.* Coe, 52 N. H. 518. See Thweatt *v.* Black, 30 Ark. 732.

37. *Arkansas.*— Scott *v.* Watkins, 22 Ark. 556.

Illinois.— Morgan *v.* Camp, 16 Ill. 175.

Massachusetts.— Lancy *v.* Snow, 180 Mass. 411, 62 N. E. 735; Alexander *v.* Pitts, 7 Cush. 503.

Michigan.— Jackson *v.* Mason, 143 Mich. 355, 106 N. W. 1112.

Minnesota.— Chouteau *v.* Hunt, 44 Minn. 173, 46 N. W. 341.

New Hampshire.— Derry Nat. Bank *v.* Griffin, 68 N. H. 183, 34 Atl. 740; Pierce *v.* Richardson, 37 N. H. 306; Eastman *v.* Little, 5 N. H. 290.

North Dakota.— Beggs *v.* Paine, 15 N. D. 436, 109 N. W. 322.

South Dakota.— Mather *v.* Darst, 13 S. D. 75, 82 N. W. 407.

United States.— Washington *v.* Pratt, 8 Wheat. 681, 5 L. ed. 714.

See 45 Cent. Dig. tit. "Taxation," § 1338.

Omission of dollar mark.— The notice is fatally defective if it states the amount of the taxes in figures only without any marks or signs to indicate that the figures represent money and the recognized denominations of money. Coombs *v.* O'Neal, 1 MacArthur (D. C.) 405; Cahoon *v.* Coe, 52 N. H. 518.

Statement of interest due.— If the statute prescribes that the notice shall state "the amount of taxes due" on the lands in question, this does not require it to include the amount of the interest due on the taxes up to the day of sale. Stevens *v.* Paulsen, 64 Nebr. 488, 90 N. W. 211.

38. *Alabama.*— Milner *v.* Clarke, 61 Ala. 258.

Arkansas.— Bettison *v.* Budd, 21 Ark. 578.

Louisiana.— Williams *v.* Chaplain, 112 La. 1075, 36 So. 859; George *v.* Cole, 109 La. 816, 33 So. 784; Workingmen's Bank *v.* Lannes, 30 La. Ann. 871.

Maine.— Shimmin *v.* Inman, 26 Me. 228.

Massachusetts.— Howard *v.* Proctor, 7 Gray 128; Sargent *v.* Bean, 7 Gray 125. See Alvord *v.* Collin, 20 Pick. 418.

Missouri.— Harness *v.* Cravens, 126 Mo. 233, 28 S. W. 971.

New Hampshire.— Langley *v.* Batchelder, 69 N. H. 566, 46 Atl. 1085, but the advertisement need not contain the name of the occupant where the lands are unimproved and contain no buildings.

New York.— People *v.* Cady, 105 N. Y. 299, 11 N. E. 810. On a tax-sale made under section 1027 of the charter of the city of New York (Laws (1897), c. 378), the pamphlet giving "a particular and detailed statement of the property to be sold" need not state the name of the owner in order to give validity to the sale. Although said section states that the notice of sale shall state that the "ownership" of the property is published or printed, the name of the real owner need not be published, but only the names of the persons to whom the property is assessed. People *v.* Moynahan, 130 N. Y. App. Div. 46, 114 N. Y. Suppl. 417.

United States.— Del Castillo *v.* McConnico, 168 U. S. 674, 18 S. Ct. 229, 42 L. ed. 622; Marx *v.* Hanthorn, 148 U. S. 172, 13 S. Ct. 508, 37 L. ed. 410 [*affirming* 30 Fed. 579]; Holroyd *v.* Pumphrey, 18 How. 69, 15 L. ed. 264.

See 45 Cent. Dig. tit. "Taxation," §§ 1335, 1338.

Contra.— Ireland *v.* George, 41 Kan. 751, 21 Pac. 776; Shoup *v.* Central Branch Union Pac. R. Co., 24 Kan. 547; McQuade *v.* Jaffray, 47 Minn. 326, 50 N. W. 233. And see Moore *v.* Rogers, 100 Tex. 361, 99 S. W. 1023, as to mistake in name of owner.

The particular estate or interest of the owner in the premises is not ordinarily required to be stated in the notice. State *v.* Sponaugle, 45 W. Va. 415, 32 S. E. 283, 43 L. R. A. 727. But see Eminence Land, etc., Co. *v.* Current River Land, etc., Co., 187 Mo. 420, 86 S. W. 145.

39. See *infra*, XI, F, 5.

40. *Illinois.*— Karnes *v.* People, 73 Ill. 274.

Kansas.— Ireland *v.* George, 41 Kan. 751, 21 Pac. 776; Russell *v.* Hudson, 24 Kan. 571; Corbin *v.* Young, 24 Kan. 198.

Louisiana.— Workingmen's Bank *v.* Lannes, 30 La. Ann. 871.

Mississippi.— Blalock *v.* Gaddis, 33 Miss. 452.

New Hampshire.— Taft *v.* Barrett, 58 N. H. 447.

Texas.— Henderson *v.* White, 69 Tex. 103, 5 S. W. 374.

See 45 Cent. Dig. tit. "Taxation," § 1333 *et seq.*

41. *Illinois.*— Lyle *v.* Jacques, 101 Ill. 644.

Kansas.— Ireland *v.* George, 41 Kan. 751, 21 Pac. 776; Russell *v.* Hudson, 24 Kan. 571; Corbin *v.* Young, 24 Kan. 198.

Louisiana.— Workingmen's Bank *v.* Lannes, 30 La. Ann. 871.

Maine.— Porter *v.* Whitney, 1 Me. 306.

Maryland.— *In re* Tax Sale of Lot No. 172, 42 Md. 196.

Michigan.— Clark *v.* Mowyer, 5 Mich. 462; Miles *v.* Walker, 4 Mich. 641.

Minnesota.— Whitney *v.* Bailey, 88 Minn. 247, 92 N. W. 974; Prindle *v.* Campbell, 9 Minn. 212.

Mississippi.— Blalock *v.* Gaddis, 33 Miss. 452.

New Hampshire.— Langley *v.* Batchelder, 69 N. H. 566, 46 Atl. 1085.

Texas.— Henderson *v.* White, 69 Tex. 103, 5 S. W. 374.

Wisconsin.— Midlothian Iron Min. Co. *v.* Dahlby, 108 Wis. 195, 84 N. W. 152.

See 45 Cent. Dig. tit. "Taxation," §§ 1335, 1338.

officer,[42] and that it will be a public sale or sale at public auction.[43] The time within which the owner may redeem from the sale is not usually required to be stated in this notice; but if so, it cannot be omitted.[44]

5. Designation or Description of Property. The notice of tax-sale must describe the lands to be sold with such certainty and particularity that they can be clearly identified, without any reasonable chance of mistake, so that the owner may know that it is his property which is advertised and an intending purchaser may know what lands are to be sold; if the description is insufficient for this purpose, the notice is fatally defective,[45] as is also the case where the description,

42. Salter *v.* Corbett, 80 Kan. 327, 102 Pac. 452; Casner *v.* Gahlman, 60 Kan. 857, 56 Pac. 1131 [*affirming* 6 Kan. App. 295, 51 Pac. 56].

43. Hoffman *v.* Groll, 35 Kan. 652, 12 Pac. 34; Hafey *v.* Bronson, 33 Kan. 598, 7 Pac. 239; Belz *v.* Bird, 31 Kan. 139, 1 Pac. 246.

44. *In re* Tax Sale of Lot No. 172, 42 Md. 196; Becker *v.* Holdridge, 47 How. Pr. (N. Y.) 429; State Finance Co. *v.* Trimble, 16 N. D. 199, 112 N. W. 984.

To whom payment to be made.— The omission to name the person to whom payment of the tax may be made does not affect the validity of the notice or sale. Sanders *v.* Leavey, 38 Barb. (N. Y.) 70.

45. *Alabama.*— Lyon *v.* Hunt, 11 Ala. 295, 46 Am. Dec. 216.

Arkansas.— Boles *v.* McNeil, 66 Ark. 422, 51 S. W. 71; Cooper *v.* Lee, 59 Ark. 460, 27 S. W. 970.

California.— Best *v.* Wohlford, 153 Cal. 17, 94 Pac. 98, description sufficient.

Colorado.— Stough *v.* Reeves, 42 Colo. 432, 95 Pac. 958, holding that the description in a notice of sale for taxes of the property as lots "1 to 24," does not exclude lot 24 by reason of the use of the word "to," as such word is not necessarily a term of exclusion, but one whose meaning is to be ascertained by the reason and sense in which it is used.

Georgia.— Boyd *v.* Wilson, 86 Ga. 379, 12 S. E. 744, 13 S. E. 428, description sufficient.

Indiana.— Brown *v.* Reeves, 31 Ind. App. 517, 68 N. E. 604.

Iowa.— Vaughan *v.* Stone, 55 Iowa 213, 7 N. W. 521; Shawler *v.* Johnson, 52 Iowa 473, 3 N. W. 604. But see Henderson *v.* Oliver, 32 Iowa 512; Burlington, etc., R. Co. *v.* Spearman, 12 Iowa 112.

Kansas.— Knote *v.* Caldwell, 43 Kan. 464, 23 Pac. 625.

Louisiana.— Marin *v.* Sheriff, 30 La. Ann. 293; Thibodaux *v.* Keller, 29 La. Ann. 508; Carmichael *v.* Aikin, 13 La. 205.

Maine.— Millett *v.* Mullen, 95 Me. 400, 49 Atl. 871; Whitmore *v.* Learned, 70 Me. 276; Bingham *v.* Smith, 64 Me. 450; Nason *v.* Ricker, 63 Me. 381; French *v.* Patterson, 61 Me. 203; Griffin *v.* Creppin, 60 Me. 270.

Maryland.— Hill *v.* Williams, 104 Md. 595, 65 Atl. 413; Richardson *v.* Simpson, 82 Md. 155, 33 Atl. 457; Cooper *v.* Holmes, 71 Md. 20, 17 Atl. 711; Guisebert *v.* Etchison, 51 Md. 478. An advertisement of tax-sale is sufficient, although the property be a private alleyway and be termed a lot in the advertisement, its boundaries being properly given, and no one being misled. Hill *v.* Williams, *supra.*

Massachusetts.— Williams *v.* Bowers, 197 Mass. 565, 84 N. E. 317; Farnum *v.* Buffum, 4 Cush. 260.

Michigan.— Tucker *v.* Van Winkle, 142 Mich. 210, 105 N. W. 607; Smith *v.* Auditor-Gen., 138 Mich. 582, 101 N. W. 807; Mann *v.* Carson, 120 Mich. 631, 79 N. W. 941.

Minnesota.— Doherty *v.* Real Estate Title Ins., etc., Co., 85 Minn. 518, 89 N. W. 853; Bidwell *v.* Webb, 10 Minn. 59, 88 Am. Dec. 56.

Missouri.—Stewart *v.* Allison, 150 Mo. 343, 51 S. W. 712; Comfort *v.* Ballingal, 134 Mo. 281, 35 S. W. 609.

Nebraska.— A description of land in a notice of tax-sale is sufficient where the context of the notice shows clearly that land in this state is referred to, and there is but one tract in the state answering the description, although the description would fit another tract situated in another state. Leigh *v.* Green, 64 Nebr. 533, 90 N. W. 255, 101 Am. St. Rep. 592.

New Hampshire.— Langley *v.* Batchelder, 69 N. H. 566, 46 Atl. 1085; Smith *v.* Messer, 17 N. H. 420. And see Drew *v.* Morrill, 62 N. H. 23.

New Jersey.— Hunt *v.* Warshung, 48 N. J. L. 613, 9 Atl. 199.

New York— People *v.* McGuire, 126 N. Y. 419, 27 N. E. 967; Smith *v.* Buhler, 121 N. Y. 213, 24 N. E. 11 [*affirming* 56 N. Y. Super. Ct. 391, 4 N. Y. Suppl. 632]; Kane *v.* Brooklyn, 114 N. Y. 586, 21 N. E. 1053; White *v.* Wheeler, 51 Hun 573, 4 N. Y. Suppl. 405 [*affirmed* in 123 N. Y. 627, 25 N. E. 952]; People *v.* Golding, 55 Misc. 425, 106 N. Y. Suppl. 821.

North Dakota.— State Finance Co. *v.* Mulberger, 16 N. D. 214, 112 N. W. 986, 125 Am. St. Rep. 650; State Finance Co. *v.* Trimble, 16 N. D. 199, 112 N. W. 984; Blakemore *v.* Cooper, 15 N. D. 5, 106 N. W. 566, 125 Am. St. Rep. 574, 4 L. R. A. N. S. 1074; Lee *v.* Crawford, 10 N. D. 482, 88 N. W. 97; Sweigle *v.* Gates, 9 N. D. 538, 84 N. W. 481.

Ohio.— Lafferty *v.* Byers, 5 Ohio 458. See McGinnis *v.* Willey, Wright 152.

South Dakota.— Bandow *v.* Wolven, 20 S. D. 445, 107 N. W. 204.

Tennessee.— Finley *v.* Gaut, 8 Baxt. 148.

West Virginia.— Barton *v.* Gilchrist, 19 W. Va. 223.

Wisconsin.— Sprague *v.* Coenen, 30 Wis. 209.

United States.— Raymond *v.* Longworth,

although clear and intelligible in itself, does not apply to the particular premises intended,[46] or where the notice describes the lands as belonging to a person other than the true owner.[47] If the statute requires the description in the notice of sale to follow that in the assessment, it is imperative that this shall be done, although this does not affect the question of the sufficiency of the description.[48] A faulty description in the notice cannot be cured by verbal communications made to bidders at the sale or by a correct description in the report of sale.[49]

6. Time and Number of Publications. The time prescribed by statute for the notice of sale is essential to its validity, and if the notice is given for anything less than the statutory time, the proceedings are as fatally defective as if no notice at all had been given.[50] Neither must the notice be prematurely begun, for it is

14 How. 76, 14 L. ed. 333; Ronkendorff *v.* Taylor, 4 Pet. 349, 7 L. ed. 882.

Canada.— McKay *v.* Crysler, 3 Can. Sup. Ct. 436; Farmers, etc., Loan Co. *v.* Conklin, 1 Manitoba 181; Scott *v.* Stuart, 18 Ont. 211; Aston *v.* Innis, 26 Grant Ch. (U. C.) 42; Greenstreet *v.* Paris, 21 Grant Ch. (U. C.) 229; Brooke *v.* Campbell, 12 Grant Ch. (U. C.) 526; Grant *v.* Gilmore, 21 U. C. C. P. 18; Townsend *v.* Elliot, 12 U. C. C. P. 217; McAdie *v.* Corby, 30 U. C. Q. B. 349. See Stewart *v.* Taggart, 22 U. C. C. P. 284.

See 45 Cent. Dig. tit. "Taxation," § 1339.

Description indefinite as to quantity.—A description in a notice of tax-sale is bad for uncertainty which states that the officer will sell a certain tract of land "or such undivided portion as may be necessary," or "two-thirds thereof," or so many acres "more or less." Sanford *v.* Sanford, 135 Mass. 314; Wall *v.* Wall, 124 Mass. 65; Bidwell *v.* Coleman, 11 Minn. 78; McKay *v.* Crysler, 3 Can. Sup. Ct. 436. But *compare* Schmoele *v.* Galloway Tp. Committee, 44 N. J. L. 145.

Effect of including lands not delinquent.— Where the notice of sale embraces all the lands on which taxes are assessed, and is not restricted to the lands upon which taxes are unpaid, it is irregular and defective. Morehouse *v.* Bowen, 9 Minn. 314; Prindle *v.* Campbell, 9 Minn. 212.

What portion to be sold.— The notice must also follow the statute in stating whether the whole tract will be sold, or an undivided interest in it, or a designated portion of it, or so much of it as may be found necessary. Wall *v.* Wall, 124 Mass. 65. And see Schmoele *v.* Galloway Tp. Committee, 44 N. J. L. 145.

46. *Arkansas.*— Patrick *v.* Davis, 15 Ark. 363.

Michigan.— Jackson *v.* Mason, 143 Mich. 355, 106 N. W. 1112.

New York.— Dever *v.* Hagerty, 43 N. Y. App. Div. 354, 60 N. Y. Suppl. 181 [*reversed* in 169 N. Y. 481, 62 N. E. 586].

North Carolina.— Edwards *v.* Lyman, 122 N. C. 741, 30 S. E. 328.

Ohio.—Waltz *v.* Hirtz, 11 Ohio Dec. (Reprint) 14, 24 Cinc. L. Bul. 110.

Tennessee.— Finley *v.* Gaut, 8 Baxt. 148; Williams *v.* Harris, 4 Sneed 332; Michie *v.* Mullins, 5 Hayw. 90.

Texas.— Yenda *v.* Wheeler, 9 Tex. 408.

See 45 Cent. Dig. tit. "Taxation," § 1339.

47. Milner *v.* Clarke, 61 Ala. 258; Workingmen's Bank *v.* Lannes, 30 La. Ann. 871; Farnum *v.* Buffum, 4 Cush. (Mass.) 260.

48. *Alabama.*— Oliver *v.* Robinson, 58 Ala. 46; Gachet *v.* McCall, 50 Ala. 307.

Indiana.— Brown *v.* Reeves, 31 Ind. App. 517, 68 N. E. 604.

Louisiana.—*In re* New Orleans, 51 La. Ann. 972, 25 So. 686; Rougelot *v.* Quick, 34 La. Ann. 123.

New Hampshire.— Langley *v.* Batchelder, 69 N. H. 566, 46 Atl. 1085. But *compare* Drew *v.* Morrill, 62 N. H. 23.

North Dakota.— Lee *v.* Crawford, 10 N. D. 482, 88 N. W. 97.

Contra.— See Henderson *v.* Oliver, 32 Iowa 512.

Description furnished by owner.— If the owner of the property himself furnishes a description to the assessors and it is is copied into the notice of tax-sale, neither he nor any one claiming title under him can complain that such description is defective. Lane *v.* March, 33 La. Ann. 554.

49. Morristown *v.* King, 11 Lea (Tenn.) 669; Ronkendorff *v.* Taylor, 4 Pet. (U. S.) 349, 7 L. ed. 882.

50. *Alabama.*— Lyon *v.* Hunt, 11 Ala. 295, 46 Am. Dec. 216; Pope *v.* Headen, 5 Ala. 433.

Arkansas.— Martin *v.* McDiarmid, 55 Ark. 213, 17 S. W. 877; Townsend *v.* Martin, 55 Ark. 192, 17 S. W. 875.

Indiana.— Doe *v.* Flagler, 1 Ind. 542.

Minnesota.— Morehouse *v.* Bowen, 9 Minn. 314; Prindle *v.* Campbell, 9 Minn. 212.

Mississippi.— Caston *v.* Caston, 60 Miss. 475.

Missouri.— Lynch *v.* Donnell, 104 Mo. 519, 15 S. W. 927.

New Jersey.— State *v.* Newark, 36 N. J. L. 288.

New Mexico.— Blackwell *v.* Albuquerque First Nat. Bank, 10 N. M. 555, 63 Pac. 43.

New York.— Kane *v.* Brooklyn, 114 N. Y. 586, 21 N. E. 1053.

Tennessee.— Finley *v.* Gaut, 8 Baxt. 148.

See 45 Cent. Dig. tit. "Taxation," § 1340.

But *compare* Bentley *v.* Shingler, 111 Ga. 780, 36 S. E. 935.

Actual date of publication governs, not nominal date.— In a case in Manitoba it appeared that lands were advertised for sale for taxes in two numbers of the "Gazette," as required, but that those numbers, although bearing certain dates, did not in fact issue

equally defective in that case.[51] Where the statute requires a publication of the notice for so many weeks "successively," or once a week for a certain number of weeks, or a certain number of times within a limited number of days or weeks, it must be literally and exactly complied with, at the risk of invalidating the sale.[52] Whether the publication, under a statute of this kind, is required to be continuous up to the date of the sale depends on the wording of the local statute;[53] but if the last publication is made on the day of the sale, it is clear that it must actually be made before the hour fixed for the sale, otherwise it cannot be counted.[54] Two attempts at advertisement, both irregular on account of the time, cannot be coupled together so as to authorize a sale.[55]

7. Posting of Notices. A statute requiring the notices of tax-sales to be posted at certain places, or at public and conspicuous places in the county, is mandatory and failure to obey its directions will invalidate the sale.[56] It is also

until later dates, dates too late to comply with the statute. On motion for an injunction to stay the sale, it was held that the statute was not sufficiently complied with, but that insufficient advertising would not, under the present laws, render the sale void, for which reason the injunction was refused. Wood *v.* Birtle, 4 Manitoba 415.

Publication on Sunday.— The publication is not sufficient if made on Sunday only. Ormsby *v.* Louisville, 79 Ky. 197, 2 Ky. L. Rep. 66. And if the last of the number of days prescribed should be Sunday, the notice should be published on Monday. Alameda Macadamizing Co. *v.* Huff, 57 Cal. 331.

Publication for ten days, Sundays excepted. —Where notice is required to be published for ten days, Sundays excepted, and it is omitted for two days, not Sundays, it is void. Haskell *v.* Bartlett, 34 Cal. 281. It is also defective if it be omitted one week day and published one Sunday. People *v.* McCain, 50 Cal. 210.

51. Person *v.* O'Neal, 32 La. Ann. 228. See Everett *v.* Boyington, 29 Minn. 264, 13 N. W. 45.

52. *Arkansas.*— Pennell *v.* Monroe, 30 Ark. 661.

California.— Carpenter *v.* Shinners, 108 Cal. 359, 41 Pac. 473.

Dakota.—Wambole *v.* Foote, 2 Dak. 1, 2 N. W. 239.

Illinois.— Ricketts *v.* Hyde Park, 85 Ill. 110; Andrews *v.* People, 83 Ill. 529.

Indiana.— Loughridge *v.* Huntington, 56 Ind. 253.

Iowa.— Davis *v.* Magoun, 109 Iowa 308, 80 N. W. 423.

Kansas.— Tidd *v.* Grimes, 66 Kan. 401, 71 Pac. 844.

Louisiana.— Hansen *v.* Mauberret, 52 La. Ann. 1565, 28 So. 167; *In re* New Orleans, 52 La. Ann. 1073, 27 So. 592; Worman *v.* Miller, McGloin 158.

Maine.— Bussey *v.* Leavitt, 12 Me. 378.

Maryland.— Textor *v.* Shipley, 86 Md. 424, 38 Atl. 932.

Minnesota.— Kipp *v.* Collins, 33 Minn. 394, 23 N. W. 554.

Mississippi.— Miller *v.* Delta, etc., Land Co., 74 Miss. 110, 20 So. 875.

New Hampshire.— Mowry *v.* Blandin, 64 N. H. 3, 4 Atl. 882; French *v.* Spalding, 61 N. H. 395; Schoff *v.* Gould, 52 N. H. 512; Cass *v.* Bellows, 31 N. H. 501, 64 Am. Dec. 347.

New York.— Wood *v.* Knapp, 100 N. Y. 109, 2 N. E. 632.

North Carolina.— Matthews *v.* Fry, 141 N. C. 582, 54 S. E. 379.

North Dakota.—Dever *v.* Cornwell, 10 N. D. 123, 86 N. W. 227.

Ohio.— Magruder *v.* Esmay, 35 Ohio St. 221.

Oklahoma.— Cadman *v.* Smith, 15 Okla. 633, 85 Pac. 346.

Oregon.— O'Hara *v.* Parker, 27 Oreg. 156, 39 Pac. 1004.

South Carolina.— Ebaugh *v.* Mullinax, 40 S. C. 244, 18 S. E. 802; Alexander *v.* Messervey, 35 S. C. 409, 14 S. E. 854.

South Dakota.— Bandow *v.* Wolven, 20 S. D. 445, 107 N. W. 204.

Wisconsin.— Chippewa River Land Co. *v.* J. L. Gates Land Co., 118 Wis. 345, 94 N. W. 37, 95 N. W. 954.

United States.— Early *v.* Homans, 16 How. 610, 14 L. ed. 1079; Martin *v.* Barbour, 34 Fed. 701.

Canada.— Gemmel *v.* Sinclair, 1 Manitoba 85; Connor *v.* Douglas, 15 Grant Ch. (U. C.) 456; Kempt *v.* Parkyn, 28 U. C. C. P. 123; McLaughlin *v.* Pyper, 29 U. C. Q. B. 526.

See 45 Cent. Dig. tit. "Taxation," § 1340.

53. See the statutes of the different states. And *compare* Watkins *v.* Inge, 24 Kan. 612, with Delogny *v.* Smith, 3 La. 418.

54. Buckingham *v.* Negrotto, 116 La. 737, 41 So. 54; *In re* Lindner, 113 La. 772, 37 So. 720.

55. Scales *v.* Alvis, 12 Ala. 617, 46 Am. Dec. 269.

56. Baumgardner *v.* Fowler, 82 Md. 631, 34 Atl. 537; Keene *v.* Barnes, 29 Mo. 377; Yenda *v.* Wheeler, 9 Tex. 408; Ramsey *v.* Hommel, 68 Wis. 12, 31 N. W. 271; Iverslie *v.* Spaulding, 32 Wis. 394.

Uninhabited places.— It is not necessary to post a notice of a sale of land for taxes within the limits of the place, if it is uninhabited. Wells *v.* Jackson Iron Mfg. Co., 47 N. H. 235; Wells *v.* Burbank, 17 N. H. 393. So if there is no public place in the locality. Cahoon *v.* Coe, 52 N. H. 518.

Contents of notice.— If the statute requires the posted notice to give the name of the oc-

essential that the notices shall be posted at the time prescribed by the statute or at the required interval before the day of sale.[57] If the statute itself designates the particular places where the notices are to be posted, it must be shown that the requirement was exactly followed.[58] If the direction is that the posting shall be at "public" places, it is a question of fact whether or not a given house or place was "public" in this sense, the answer depending not alone on the character of the building or place, but also on the popular habit of resorting thereto or the reverse, and on its comparative publicity with reference to the other houses or buildings in the place.[59]

8. Proof of Notice or Advertisement. Whatever proof the statute may require as to the publication or posting of tax-sale notices, it must be strictly complied with or the sale will be invalid.[60] And ordinarily, if the statute appoints the evidence by which the fact of giving notices shall be proved, and directs how it shall be made and how recorded or preserved, such preappointed evidence is

cupant of the building, it is necessary, in the case of the sale of a tenement-house, to give the names of the occupants; otherwise the sale is void. Amoskeag Sav. Bank *v.* Alger, 66 N. H. 414, 29 Atl. 407.

Officer may act by deputy.—The tax collector is not required personally to post the notices of sale of land for taxes, but may do so by deputy. Lynch *v.* Donnell, 104 Mo. 519, 15 S. W. 927.

57. Miles *v.* Walker, 4 Mich. 641; Prindle *v.* Campbell, 9 Minn. 212; Ward *v.* Walters, 63 Wis. 39, 22 N. W. 844.

What is reasonable notice.—A notice by the county treasurer of the sale of land for taxes posted at the court-house, county treasurer's office, and other public places at the county-seat, one week before the day of sale, was held to be a reasonable and sufficient notice. Clark *v.* Mowyer, 5 Mich. 462.

58. Hoskins *v.* Iowa Land Co., 121 Iowa 299, 96 N. W. 977; Olson *v.* Phillips, 80 Minn. 339, 83 N. W. 189; Keene *v.* Barnes, 29 Mo. 377; Allen *v.* Allen, 114 Wis. 615, 91 N. W. 218; Morrow *v.* Lander, 77 Wis. 77, 45 N. W. 956; Hilgers *v.* Quinney, 51 Wis. 62, 8 N. W. 17; Iverslie *v.* Spaulding, 32 Wis. 394; Jarvis *v.* Silliman, 21 Wis. 599.

59. Lynch *v.* Donnell, 104 Mo. 519, 15 S. W. 927 (places designated by a municipal ordinance as the places for posting notices and customarily used for that purpose); Hoitt *v.* Burnham, 61 N. H. 620 (post-office and hotels are public places); Cahoon *v.* Coe, 57 N. H. 556 (a private dwelling-house may be a public place if the settlement consists wholly of dwellings); Russell *v.* Dyer, 40 N. H. 173 (full discussion of subject); Tidd *v.* Smith, 3 N. H. 178 (a shoemaker's shop is not a public place); Hart *v.* Smith, 44 Wis. 213 (a store in a village and a post-office are public places).

60. *Arkansas.*—Osceola Land Co. *v.* Chicago Mill, etc., Co., 84 Ark. 1, 103 S. W. 609.

Colorado.—Sternberger *v.* Moffat, 44 Colo. 520, 99 Pac. 560, 130 Am. St. Rep. 140; Mitchell *v.* Knott, 43 Colo. 135, 95 Pac. 335; Charlton *v.* Kelly, 24 Colo. 273, 50 Pac. 1042. See Bertha Gold Min., etc., Co. *v.* Burr, 31 Colo. 264, 73 Pac. 36.

Illinois.—Glos *v.* Woodard, 202 Ill. 480, 67 N. E. 3.

Kansas.—Grinstead *v.* Cooper, 77 Kan. 778, 95 Pac. 401; Stout *v.* Coates, 35 Kan. 382, 11 Pac. 151.

Michigan.—Brooks *v.* Dix, 119 Mich. 329, 78 N. W. 125. See Church *v.* Nester, 126 Mich. 547, 85 N. W. 1078.

New Hampshire.—Drew *v.* Morrill, 62 N. H. 23.

New York.—Under Laws (1883), p. 104, c. 114, § 5, requiring that an affidavit of a person making service of notice of sale of lands for taxes should state deponent's knowledge as to the identity of the person served, an affidavit of service, stating that deponent knew the persons served to be the widow, children, and executor and widow of a deceased son of the deceased owner, to whom notice was addressed, was sufficient, although the facts on which the knowledge was based were not stated. Hobbs *v.* Scott, 122 N. Y. App. Div. 399, 106 N. Y. Suppl. 836.

Oregon.—Where the affidavit of publication of notice is required to be made by the printer, his foreman, or principal clerk, an affidavit by one styling himself "Foreman of the Eastern Oregon Republican" is insufficient, where there is nothing to show that he was the foreman of the printer, or of what department he was foreman. Rafferty *v.* Davis, 54 Oreg. 77, 102 Pac. 305. An affidavit of publication of notice of sale sworn to before a notary who fails to attach his official seal is worthless. Rafferty *v.* Davis, *supra.*

Wisconsin.—Myrick *v.* Kahle, 120 Wis. 57, 97 N. W. 506; Chippewa River Land Co. *v.* J. L. Gates Land Co., 118 Wis. 345, 94 N. W. 37, 95 N. W. 954; Allen *v.* Allen, 114 Wis. 615, 91 N. W. 218; Hiles *v.* Cate, 75 Wis. 91, 43 N. W. 802; Ramsey *v.* Hommel, 68 Wis. 12, 31 N. W. 271.

United States.—Dick *v.* Foraker, 155 U. S. 404, 15 S. Ct. 124, 39 L. ed. 201; Martin *v.* Barbour, 140 U. S. 634, 11 S. Ct. 944, 35 L. ed. 546.

See 45 Cent. Dig. tit. "Taxation," § 1342.

Time of filing proof of publication of notice see Church *v.* Nester, 126 Mich. 547, 85 N. W. 1078; Drew *v.* Morrill, 62 N. H. 23; Chippewa River Land Co. *v.* J. L. Gates Land Co., 118 Wis. 345, 94 N. W. 37, 95 N. W. 954; Allen *v.* Allen, 114 Wis. 615, 91 N. W. 218;

exclusive, and the lack of it cannot be supplied by parol or other evidence.[61] And where this proof is furnished by a return or affidavit of the officer or by an affidavit of the printer of the newspaper, it must not only show complete compliance with the statutory directions, but it must do this affirmatively and certainly, by setting out each particular fact, general statements that the notice was "duly" given, or that it was published "according to law" or "in accordance with the statute" being insufficient.[62] Where the publication was made in the public press, a copy of the newspaper or a clipping from it, together with the affidavit of the printer or publisher, constitutes proof, but neither alone is sufficient.[63] But where the proceedings are by way of judicial condemnation of the land, it is the fact and not the proof of publication that gives jurisdiction, and if publication was actually made, it is in the power of the court to adjudge its sufficiency, or to allow the lack of an affidavit to be supplied.[64] If proper proofs of the publication were duly made and filed, their subsequent loss cannot invalidate the tax-sale.[65]

Martin *v.* Barbour, 34 Fed. 701 [*affirmed* in 140 U. S. 634, 11 S. Ct. 944, 35 L. ed. 546].

Presumptions from record in support of sale see McMahon *v.* Crean, 109 Md. 652, 71 Atl. 995.

61. *Arkansas.*— Martin *v.* Allard, 55 Ark. 218, 17 S. W. 878. But *compare* Porter *v.* Dooley, 66 Ark. 1, 49 S. W. 1083.

Colorado.— Herr *v.* Graden, 33 Colo. 527, 81 Pac. 242; Rustin *v.* Merchants', etc., Tunnel Co., 23 Colo. 351, 47 Pac. 300. The publisher's affidavit of publication of a delinquent tax list and the treasurer's affidavit of posting are the exclusive proof of publication and posting, so that evidence thereof is incompetent, unless the affidavit has been filed and subsequently lost or mislaid. Sternberger *v.* Moffat, 44 Colo. 520, 99 Pac. 560, 130 Am. St. Rep. 140. Where a treasurer's affidavit of posting of notice of a delinquent tax-sale complied with 2 Mills Annot. St. §§ 3883, 3884, its conclusiveness was not impaired by his testimony that he had no personal recollection of the facts stated at the time he verified the affidavit. Sternberger *v.* Moffat, *supra.*

Missouri.— Comfort *v.* Ballingal, 134 Mo. 281, 35 S. W. 609.

New Jersey.— Jones *v.* Landis Tp., 50 N. J. L. 374, 13 Atl. 251.

Wisconsin.— Hilgers *v.* Quinney, 51 Wis. 62, 8 N. W. 17; Iverslie *v.* Spaulding, 32 Wis. 394.

United States.— Martin *v.* Barbour, 140 U. S. 634, 11 S. Ct. 944, 35 L. ed. 546 [*affirming* 34 Fed. 701].

See 45 Cent. Dig. tit. "Taxation," § 1342.

Contra.— *In re* New Orleans, 52 La. Ann. 1073, 27 So. 592; Southworth *v.* Edmands, 152 Mass. 203, 25 N. E. 106, 9 L. R. A. 118; Alvord *v.* Collin, 20 Pick. (Mass.) 418; Chandler *v.* Spear, 22 Vt. 388.

Although the statutory form of affidavit for proving the publication of notice of a tax-sale need not be literally followed, yet if the substantial requisites of such affidavit be disregarded, the proof of notice cannot be held sufficient. Morris *v.* St. Louis Nat. Bank, 17 Colo. 231, 29 Pac. 802.

Amendment of proof.—An affidavit in proof of posting notices of tax-sale, which is insufficient to validate a tax deed made on such sale, cannot be amended for the purpose of complying with the statute after the record is made up and filed with the clerk. Myrick *v.* Kahle, 120 Wis. 57, 97 N. W. 506.

62. *Colorado.*— Lambert *v.* Shumway, 36 Colo. 350, 85 Pac. 89; Rustin *v.* Merchants', etc., Tunnel Co., 23 Colo. 351, 47 Pac. 300; Morris *v.* St. Louis Nat. Bank, 17 Colo. 231, 29 Pac. 802; Paine *v.* Palmborg, 20 Colo. App. 432, 79 Pac. 330.

Georgia.— King *v.* Sears, 91 Ga. 577, 18 S. E. 830.

Illinois.— Davis *v.* Gossnell, 113 Ill. 121.

Louisiana.— Delogny *v.* Smith, 3 La. 418.

Maine.— Bowler *v.* Brown, 84 Me. 376, 24 Atl. 879; Tolman *v.* Hobbs, 68 Me. 316.

Maryland.— Prince George's County *v.* Clarke, 36 Md. 206.

Massachusetts.— Farnum *v.* Buffum, 4 Cush. 260.

Missouri.—Lynch *v.* Donnell, 104 Mo. 519, 15 S. W. 927.

New Hampshire.— Wells *v.* Burbank, 17 N. H. 393; Nelson *v.* Pierce, 6 N. H. 194.

New York.— See Colman *v.* Shattuck, 62 N. Y. 348.

Wisconsin.—Myrick *v.* Kahle, 120 Wis. 57, 97 N. W. 506; Chippewa River Land Co. *v.* J. L. Gates Land Co., 118 Wis. 345, 94 N. W. 37, 95 N. W. 954; Allen *v.* Allen, 114 Wis. 615, 91 N. W. 218; Wisconsin Cent. R. Co. *v.* Wisconsin River Land Co., 71 Wis. 94, 36 N. W. 837; Morris *v.* Carmichael, 68 Wis. 133, 31 N. W. 483; Ramsay *v.* Hommel, 68 Wis. 12, 31 N. W. 271.

See 45 Cent. Dig. tit. "Taxation," § 1342.

63. Durham *v.* People, 67 Ill. 414; Mann *v.* Carson, 120 Mich. 631, 79 N. W. 941; Spaulding *v.* O'Connor, 119 Mich. 45, 77 N. W. 323; Thevenin *v.* Slocum, 16 Ohio 519; Luffborough *v.* Parker, 16 Serg. & R. (Pa.) 351.

64. *Alabama.*— McGee *v.* Fleming, 82 Ala. 276, 3 So. 1.

Illinois.— Dukes *v.* Rowley, 24 Ill. 210.

Kansas.— Ireland *v.* George, 41 Kan. 751, 21 Pac. 776.

Minnesota.— Mille Lacs County *v.* Morrison, 22 Minn. 178.

Missouri.— Raley *v.* Guinn, 76 Mo. 263.

65. Davis *v.* Harrington, 35 Kan. 196, 10

G. Mode and Conduct of Sale — 1. Officers Authorized to Sell. It is essential to the validity of a tax-sale that it shall be made by the officer designated by law for that purpose.[66] It is also the general rule that after a collector's or treasurer's term of office has expired, and after his successor has been elected and qualified, he cannot make a valid sale of land for taxes, although the taxes were assessed and became delinquent before he went out of office.[67] But on the other hand the officers of a county have authority to sell lands for taxes which, after the assessment of the taxes, were included within the bounds of a new county.[68]

2. Conduct of Sale in General. A sale of land for taxes will be governed by the law in force at the time, and, as to any matters not specifically covered by the statute, by the laws applicable to judicial sales in general.[69] The officer's power to sell, being a naked power not coupled with any estate or interest of his own, is strictly construed, and in its execution he must conform to the statute which creates and confers it.[70] It is also his duty to see that the sale is conducted

Pac. 532; Hoffman *v.* Pack, 123 Mich. 74, 81 N. W. 934.

66. *Illinois.*— Garrick *v.* Chamberlain, 97 Ill. 620.

Louisiana.— Thompson *v.* Rogers, 4 La. 9.

Michigan.— People *v.* St. Clair County, 30 Mich. 388.

New York.— Ensign *v.* Barse, 107 N. Y. 329, 14 N. E. 400, 15 N. E. 401.

Ohio.— Garretson *v.* Hart, 1 Ohio Dec. (Reprint) 265, 6 West. L. J. 315.

Pennsylvania.— McCoy *v.* Turk, 1 Penr. & W. 499.

See 45 Cent. Dig. tit. "Taxation," § 1344.

Compare, however, Gable *v.* Seiben, 137 Ind. 155, 36 N. E. 844.

An order of the county court cannot confer the power to sell land for the non-payment of taxes on any officer not authorized by law to make such sales. Twombly *v.* Kimbrough, 24 Ark. 459.

Officer de facto.— It has been held that a person filling the office of county treasurer, to which office the duty of making tax-sales belongs, may make a valid sale of land for taxes, although his appointment to office was wrongful. Watkins *v.* Inge, 24 Kan. 612. *Compare,* however, Baker *v.* Webber, 102 Me. 414, 67 Atl. 144 (holding that it is indispensable to the sale of real estate by a tax collector for non-payment of taxes that the collector be shown to have been legally elected and qualified to act in that capacity); Gould *v.* Monroe, 61 Me. 544; Payson *v.* Hall, 30 Me. 319.

Qualification of officer see X, A, 2, e.

Acting by deputy.—As to validity of tax-sales made by a deputy or a clerk of the county treasurer see Hall *v.* Collins, 117 Mich. 617, 76 N. W. 72.

Action of part of board.— Commissioners of forfeited lands may each convey alone the lands which he has declared forfeited, and all need not join in the conveyance; but where one commissioner has sold and received the price, his successor cannot make the conveyance without an order of court. Miller *v.* Williams, 15 Gratt. (Va.) 213.

A sheriff who is also collector of taxes may sue as collector and then, as sheriff, sell the lands on execution and make the deed. Webster *v.* Smith, 78 Mo. 163.

67. *Arkansas.*— Hogins *v.* Brashears, 13 Ark. 242. But *compare* Twombly *v.* Kimbrough, 24 Ark. 459.

California.— Fremont *v.* Boling, 11 Cal. 380.

Kentucky.— Com. *v.* Masonic Temple Co., 89 Ky. 658, 13 S. W. 121, 11 Ky. L. Rep. 982.

Maryland.—See Duvall *v.* Perkins, 77 Md. 582, 26 Atl. 1085.

New Jersey.— Voorhees *v.* Anglesea, 74 N. J. L. 377, 65 Atl. 838.

Pennsylvania.— Cuttle *v.* Brockway, 32 Pa. St. 45.

Texas.— Bryan *v.* Harvey, 11 Tex. 311.

Virginia.— McCullough *v.* Hunter, 90 Va. 699, 19 S. E. 776.

Canada.— McMillan *v.* McDonald, 26 U. C. Q. B. 454.

See 45 Cent. Dig. tit. "Taxation," § 1344.

68. Austin *v.* Holt, 32 Wis. 478. And see Collins *v.* Storm, 75 Iowa 36, 39 N. W. 161.

69. Bedgood *v.* McLain, 89 Ga. 793, 15 S. E. 670; Templeton *v.* Morgan, 16 La. Ann. 438; Livingston *v.* Waldon, 4 Mart. N. S. (La.) 456.

Sale must be valid or void as a whole. Where the statute prescribes different methods or regulations for the sale of different classes of land, as, improved and unimproved lands, or for sales for the taxes of different years, a sale which includes the different classes of lands or the taxes for different years must be valid as a whole or the title under it will fail entirely. Wallingford *v.* Fiske, 24 Me. 386; Moulton *v.* Blaisdell, 24 Me. 283.

A bidder at a tax-sale which is not conducted in the manner prescribed by law cannot be regarded as a purchaser and is not entitled to a deed of the land. Garlington *v.* Copeland, 32 S. C. 57, 10 S. E. 616.

70. Nelson *v.* Abernathy, 74 Miss. 164, 21 So. 150; People *v.* Golding, 55 Misc. (N. Y.) 425, 106 N. Y. Suppl. 821; Hays *v.* Hunt, 85 N. C. 303; Tetrault *v.* Vaughan, 12 Manitoba 457. And see McDaniel *v.* Berger, 89 Ark. 139, 116 S. W. 194; Keenan *v.*

in a fair and proper manner, with abundant opportunity for free competition among bidders, and any conduct on his part tending to stifle competition, favor certain purchasers at the expense of others, or sacrifice the property, is fraudulent and will invalidate the sale.[71] In particular the sale must be made for cash,[72] and at auction,[73] and it must be free, public, and open to all competitors,[74] except that, in some jurisdictions, the treasurer is permitted to make a private sale of lands which have already been offered at public sale and remain unsold for lack of bidders, when he has duly reported the facts.[75] Aside from such a statutory exception as this, it is a fraud for the officer to enter into a private arrangement by which he allows individuals to select the lands they wish to purchase, and

Slaughter, 49 Tex. Civ. App. 180, 108 S. W. 703.

But minor informalities or irregularities, not of a nature to injure the rights of any one concerned or to deprive the sale of the character of a free and open competition, do not necessarily invalidate it. Drake *v.* Ogden, 128 Ill. 603, 21 N. E. 511; Youngs *v.* Povey, 127 Mich. 297, 86 N. W. 809; Cook *v.* John Schroeder Lumber Co., 85 Minn. 274, 88 N. W. 971; State Finance Co. *v.* Trimble, 16 N. D. 199, 112 N. W. 984; State Finance Co. *v.* Beck, 15 N. D. 374, 109 N. W. 357; Bean *v.* Brownwood, (Tex. Civ. App. 1898) 43 S. W. 1036.

The absence of the county treasurer at the time a bid was made at a tax-sale, although the statute requires his presence, is, at most, an irregularity not involving the sale. Minnesota Debenture Co. *v.* Scott, 106 Minn. 32, 119 N. W. 391.

Previous offer to rent.— The statute in Georgia requiring that when property which is not returned for taxation is sold there shall be an offer to rent or hire the property before the same is offered for sale does not apply to sales of wild lands. Barnes *v.* Carter, 114 Ga. 886, 40 S. E. 993.

Sale by wrong description.— In New York a sale of lands by the controller by descriptions other than those returned to him by the county treasurer is a jurisdictional defect rendering the sale void. People *v.* Golding, 55 Misc. (N. Y.) 425, 106 N. Y. Suppl. 821.

71. *Arkansas.*— Twombly *v.* Kimbrough, 24 Ark. 459.

Connecticut.—Townsend Sav. Bank *v.* Todd, 47 Conn. 190.

Illinois.— Gage *v.* Graham, 57 Ill. 144; Conway *v.* Cable, 37 Ill. 82, 87 Am. Dec. 240; Brown *v.* Hogle, 30 Ill. 119.

Iowa.— McCready *v.* Sexton, 29 Iowa 356, 4 Am. Rep. 214.

Michigan.— Christian *v.* Soderberg, 118 Mich. 47, 76 N. W. 126.

Rhode Island.— Howland *v.* Pettey, 15 R. I. 603, 10 Atl. 650.

West Virginia.— Younger *v.* Meadows, 63 W. Va. 275, 59 S. E. 1087.

Canada.— McRae *v.* Corbett, 4 Manitoba 460.

Effect on purchaser.—A purchaser at such sale is not affected by a fraud contemplated by the selling officer, of which the purchaser had no notice. Boyd *v.* Wilson, 86 Ga. 379, 12 S. E. 744, 13 S. E. 428.

Statements depressing bids.—Any conduct on the officer's part which tends to prevent the attendance of bidders or a fair competition among those present will ordinarily avoid the sale. Townsend Sav. Bank *v.* Todd, 47 Conn. 190; Younger *v.* Meadows, 63 W. Va. 275, 59 S. E. 1087. But the fact that the officer stated at the sale that he hoped no one would bid more than the amount of the taxes and charges, on account of the inconvenience of disposing of the surplus, will not render the sale void. Southworth *v.* Edmands, 152 Mass. 203, 25 N. E. 106, 9 L. R. A. 118.

72. Cushing *v.* Longfellow, 26 Me. 306; Dickson *v.* Burckmyer, 67 S. C. 526, 46 S. E. 343.

73. Cardigan *v.* Page, 6 N. H. 182; Saranac Land, etc., Co. *v.* Roberts, 195 N. Y. 303, 88 N. E. 753 [*affirming* 125 N. Y. App. Div. 333, 109 N. Y. Suppl. 547].

74. *Indiana.*— Stevens *v.* Williams, 70 Ind. 536.

Iowa.— Chandler *v.* Keeler, 46 Iowa 596; Thompson *v.* Ware, 43 Iowa 455; Butler *v.* Delano, 42 Iowa 350.

Minnesota.—Burdick *v.* Bingham, 38 Minn. 482, 38 N. W. 489.

Missouri.— Bender *v.* Dugan, 99 Mo. 126, 12 S. W. 795.

New York.— Meigs *v.* Roberts, 42 N. Y. App. Div. 290, 59 N. Y. Suppl. 215 [*reversed* on other grounds in 162 N. Y. 371, 56 N. E. 838, 76 Am. St. Rep. 322]; Andrus *v.* Wheeler, 29 Misc. 412, 61 N. Y. Suppl. 983. And see Saranac Land, etc., Co. *v.* Roberts, 195 N. Y. 303, 88 N. E. 753 [*affirming* 125 N. Y. App. Div. 333, 109 N. Y. Suppl. 547].

Pennsylvania.— Jenks *v.* Wright, 61 Pa. St. 410; Cuttle *v.* Brockway, 32 Pa. St. 45.

See 45 Cent. Dig. tit. "Taxation," § 1345.

But *compare* Dodge *v.* Emmons, 34 Kan. 732, 9 Pac. 951, where it appeared that a county treasurer, conducting a sale of land for taxes, in good faith struck it off to one not present and bidding; and it was held that the sale was not void but that this was merely an irregularity.

75. Gallentine *v.* Fullerton, 67 Nebr. 553, 93 N. W. 932; Medland *v.* Linton, 60 Nebr. 249, 82 N. W. 866; Medland *v.* Connell, 57 Nebr. 10, 77 N. W. 437; Johnson *v.* Finley, 54 Nebr. 733, 74 N. W. 1080; Ludden *v.* Hansen, 17 Nebr. 354, 22 N. W. 766; Kittle *v.* Shervin, 11 Nebr. 65, 7 N. W. 861; State *v.* Helmer, 10 Nebr. 25, 4 N. W. 367.

records such lands as having been regularly sold, on receiving from such persons the amounts due on them.[76]

3. PLACE OF SALE. The tax-sale must be held at the exact place designated by law or named in the advertisement, otherwise it will be void.[77] And this rule is applied with so much strictness that several cases hold that where the statute directs the sale to be held before the court-house door of the county, a sale made inside the court-house is void and passes no title.[78] The sale must also be made within the county in which the lands lie,[79] but not necessarily on the premises.[80]

4. TIME OF SALE — a. In General. It is absolutely essential that the tax-sale shall take place on a day duly appointed by law for that purpose, and if otherwise held it is void and of no effect,[81] except in cases where the law leaves it to

76. Truesdell *v.* Green, 57 Iowa 215, 10 N. W. 630; Bullis *v.* March, 56 Iowa 747, 2 N. W. 578, 6 N. W. 177; Chandler *v.* Keeler, 46 Iowa 596; Miller *v.* Corbin, 46 Iowa 150; Besore *v.* Dosh, 43 Iowa 211; Butler *v.* Delano, 42 Iowa 350; Young *v.* Rheinecher, 25 Kan. 366; Burdick *v.* Bingham, 38 Minn. 482, 38 N. W. 489. But *compare*, holding that a sale so made is irregular but not void, Lamb *v.* Davis, 74 Iowa 719, 39 N. W. 114; Slocum *v.* Slocum, 70 Iowa 259, 30 N. W. 562; Leavitt *v.* Watson, 37 Iowa 93.

77. *Connecticut.*— Beacher *v.* Bray, 1 Root 459.

Kansas.— Richards *v.* Cole, 31 Kan. 205, 1 Pac. 647.

Minnesota.— Whitney *v.* Bailey, 88 Minn. 247, 92 N. W. 974.

Texas.—Keenan *v.* Slaughter, 49 Tex. Civ. App. 180, 108 S. W. 703.

Canada.— Scott *v.* Imperial Loan Co., 11 Manitoba 190.

No place designated.— Md. Acts (1878), p. 362, c. 227, relating to tax-sales in Baltimore city, but containing no provision as to the place thereof, was in irreconcilable conflict with Code (1878), art. 11, § 49, requiring tax-sales to be on the premises or at the court-house door, and hence sales in Baltimore could be legally held at such place in the city as the collector in his discretion might select. McMahon *v.* Crean, 109 Md. 652, 71 Atl. 995.

78. Smith *v.* Cox, 115 Ala. 503, 22 So. 78; Thayer *v.* Hartman, 78 Miss. 590, 29 So. 396; Vasser *v.* George, 47 Miss. 713; McNair *v.* Jenson, 33 Mo. 312; Rubey *v.* Huntsman, 32 Mo. 501, 82 Am. Dec. 143; Keene *v.* Barnes, 29 Mo. 377; Sommers *v.* Ward, 41 W. Va. 76, 23 S. E. 520. And see Scarry *v.* Lewis, 133 Ind. 96, 30 N. E. 411.

79. Rice *v.* Johnson, 20 Ga. 639; People *v.* Hopkins, 2 Thomps. & C. (N. Y.) 586; White *v.* Wilkinson, 51 W. Va. 196, 41 S. E. 136.

Sale in precinct of delinquent's residence.— A statutory provision that sales for delinquent taxes shall be made "in the precinct in which such delinquent resides" refers to the time the assessment was made, at least in the absence of actual residence in another precinct in the county. Rodgers *v.* Gaines, 73 Ala. 218.

80. Howland *v.* Pettey, 15 R. I. 603, 10 Atl. 650; Chandler *v.* Spear, 22 Vt. 388.

81. *Arkansas.*— McDaniel *v.* Berger, 89 Ark. 139, 116 S. W. 194; Ross *v.* Royal, 77 Ark. 324, 91 S. W. 178; Penrose *v.* Doherty, 70 Ark. 256, 67 S. W. 398; Allen *v.* Ozark Land Co., 55 Ark. 549, 18 S. W. 1042; Boehm *v.* Porter, 54 Ark. 665, 17 S. W. 1; Vernon *v.* Nelson, 33 Ark. 748; Spain *v.* Johnson, 31 Ark. 314; Chaplin *v.* Holmes, 27 Ark. 414; McDermott *v.* Scully, 27 Ark. 226; Bonnell *v.* Roane, 20 Ark. 114; Merrick *v.* Hutt, 15 Ark. 331; Hogins *v.* Brashears, 13 Ark. 242.

Colorado.— Gomer *v.* Chaffee, 6 Colo. 314.

Illinois.— Essington *v.* Neill, 21 Ill. 139; Polk *v.* Hill, 15 Ill. 130; Hope *v.* Sawyer, 14 Ill. 254; Bestor *v.* Powell, 7 Ill. 119.

Iowa.— Plympton *v.* Sapp, 55 Iowa 195, 7 N. W. 498; Chandler *v.* Keeler, 46 Iowa 596.

Kansas.— Richards *v.* Cole, 31 Kan. 205, 1 Pac. 647; Entrekin *v.* Chambers, 11 Kan. 368; Park *v.* Tinkham, 9 Kan. 615.

Michigan.— Houghton County *v.* Auditor-Gen., 41 Mich. 28, 1 N. W. 890.

Minnesota.— Prindle *v.* Campbell, 9 Minn. 212.

Mississippi.— McLemore *v.* Anderson, 92 Miss. 42, 43 So. 878, 47 So. 801; Kennedy *v.* Sanders, 90 Miss. 524, 43 So. 913; Brougher *v.* Conley, 62 Miss. 358; Mayer *v.* Peebles, 58 Miss. 628; Mead *v.* Day, 54 Miss. 58; McGehee *v.* Martin, 53 Miss. 519.

Nebraska.—State *v.* Farney, 36 Nebr. 537, 54 N. W. 862.

Ohio.— Wilkins *v.* Huse, 10 Ohio 139; Mathers *v.* Bull, 19 Ohio Cir. Ct. 657, 10 Ohio Cir. Dec. 515; Matthews *v.* Lewis, 18 Ohio Cir. Ct. 134, 9 Ohio Cir. Dec. 873.

South Carolina.— Dougherty *v.* Crawford, 14 S. C. 628.

Tennessee.— Rucker *v.* Hyde, 118 Tenn. 358, 100 S. W. 739; Conrad *v.* Darden, 4 Yerg. 307; Levy *v.* Acklen, 2 Tenn. Ch. App. 201.

United States.— Callanan *v.* Hurley, 93 U. S. 387, 23 L. ed. 931.

Canada.— McKay *v.* Crysler, 3 Can. Sup. Ct. 436.

See 45 Cent. Dig. tit. "Taxation," § 1347.

Hours of sale.— A law which requires the sale to be kept open from nine o'clock in the morning until four o'clock in the afternoon

the discretion of the officer to fix the time of sale,[82] or where the proceedings have been delayed by appeal, injunction, or other process,[83] or where the time for holding tax-sales has been duly extended by competent authority.[84] On similar principles, where the law is such that the sale is to take place after a prescribed publication of notice, it must be held on the very day appointed in the notice or advertisement.[85] Whatever the requirement of the law may be, the day of sale can neither be anticipated nor delayed. If it is held prematurely, that is, on a day earlier than that authorized by law or appointed in the notice, it is invalid,[86] and so if it is held after the expiration of the tax lien or of the warrant or other process of the officer.[87] Nor, as a rule, can a valid tax-sale be made on Sunday or other non-juridical days.[88]

is mandatory and must be strictly complied with. State *v.* Farney, 36 Nebr. 537, 54 N. W. 862. See also Keenan *v.* Slaughter, 49 Tex. Civ. App. 180, 108 S. W. 703.

Presumptions and proof as to time of sale see Taylor *v.* Van Meter, 53 Ark. 204, 13 S. W. 699; Radcliffe *v.* Scruggs, 46 Ark. 96; Chandler *v.* Keeler, 46 Iowa 596; Spear *v.* Ditty, 8 Vt. 419.

The officer is protected in selling property for taxes on the day when, according to his interpretation of the statute, it should be done, process for such sale apparently in due form of law having been given. Mathers *v.* Bull, 9 Ohio S. & C. Pl. Dec. 408, 6 Ohio N. P. 45.

82. Stilwell *v.* People, 49 Ill. 45; Coleman *v.* Shattuck, 62 N. Y. 348.

83. Carne *v.* Peacock, 114 Ill. 347, 2 N. E. 165; Patterson *v.* Carruth, 13 Kan. 494; Jordan *v.* Kyle, 27 Kan. 190.

84. McConnell *v.* Day, 61 Ark. 464, 33 S. W. 731; Vernon *v.* Nelson, 33 Ark. 748; Shell *v.* Duncan, 31 S. C. 547, 10 S. E. 330, 5 L. R. A. 821; Roddy *v.* Purdy, 10 S. C. 137; Todd *v.* Werry, 15 U. C. Q. B. 614. In Taylor *v.* Allen, 67 N. C. 346, it was held that the sheriff's power to sell land for taxes being given on the condition that it shall be exercised within a certain time, the legislature cannot by a private act give him power to sell after the expiration of the time allowed by law. But *compare* Ford *v.* Delta, etc., Land Co., 43 Fed. 181 [*affirmed* in 164 U. S. 662, 17 S. Ct. 230, 41 L. ed. 590].

85. *California.*— Tully *v.* Bauer, 52 Cal. 487.

Connecticut.— Beacher *v.* Bray, 1 Root 459.

Minnesota.— Sheehy *v.* Hinds, 27 Minn. 259, 6 N. W. 781; Prindle *v.* Campbell, 9 Minn. 212.

Missouri.— Sullivan *v.* Donnell, 90 Mo. 278, 2 S. W. 264.

Ohio.— Wilkins *v.* Huse, 10 Ohio 139.

See 45 Cent. Dig. tit. "Taxation," § 1345.

86. *Colorado.*— Seymour *v.* Deisher, 33 Colo. 349, 80 Pac. 1038; Gomer *v.* Chaffee, 6 Colo. 314.

Louisiana.— Person *v.* O'Neal, 32 La. Ann. 228.

Maine.— Hobbs *v.* Clements, 32 Me. 67.

Michigan.—See Hooker *v.* Bond, 118 Mich. 255, 76 N. W. 404.

Minnesota.— See Everett *v.* Boyington, 29 Minn. 264, 13 N. W. 45.

Mississippi.— Davis *v.* Schmidt, 68 Miss. 736, 10 So. 64; Caston *v.* Caston, 60 Miss. 475; Harkreader *v.* Clayton, 56 Miss. 383, 31 Am. Rep. 369; McGehee *v.* Martin, 53 Miss. 519.

South Carolina.— Cooke *v.* Pennington, 15 S. C. 185.

Vermont.— Buzzell *v.* Johnson, 54 Vt. 90.

United States.— Moore *v.* Brown, 11 How. 414, 13 L. ed. 751.

Canada.— Connor *v.* McPherson, 18 Grant Ch. (U. C.) 607; Kelly *v.* Macklem, 14 Grant Ch. (U. C.) 29; Ford *v.* Proudfoot, 9 Grant Ch. (U. C.) 478; Bell *v.* McLean, 18 U. C. C. P. 416.

See 45 Cent. Dig. tit. "Taxation," § 1347.

Curing defect by statute.— Where the law requires that all tax-sales shall be made between the hours of twelve and five in the afternoon, and a sale is advertised and held at ten in the morning, the defect may be cured by a subsequent retroactive curative statute. Jones *v.* Landis Tp., 50 N. J. L. 374, 13 Atl. 251.

87. *Arkansas.*— Boehm *v.* Porter, 54 Ark. 665, 17 S. W. 1.

Maine.— Usher *v.* Taft, 33 Me. 199.

Massachusetts.— Noyes *v.* Haverhill, 11 Cush. 338; Pierce *v.* Benjamin, 14 Pick. 356, 25 Am. Dec. 396.

New Hampshire.— Mason *v.* Bilbruck, 62 N. H. 440. But *compare* Cahoon *v.* Coe, 52 N. H. 518.

New Jersey.— Johnson *v.* Van Horn, 45 N. J. L. 136; Field *v.* West Orange, 7 N. J. L. 348.

New York.— Dubois *v.* Poughkeepsie, 22 Hun 117.

North Carolina.— Taylor *v.* Allen, 67 N. C. 346.

United States.— Kelly *v.* Herrall, 20 Fed. 364.

Canada.— Hamilton *v.* McDonald, 22 U. C. Q. B. 136. See Cotter *v.* Sutherland, 18 U. C. C. P. 357.

See 45 Cent. Dig. tit. "Taxation," § 1347.

But *compare* Paden *v.* Akin, 7 Watts & S. (Pa.) 456; Little *v.* Gibbs, 8 Utah 261, 30 Pac. 986.

88. Picket *v.* Allen, 10 Conn. 146; Hadley *v.* Musselman, 104 Ind. 459, 3 N. E. 122 (tax-sale made on Christmas day is not invalid); Lynch *v.* Donnell, 104 Mo. 519, 15 S. W. 927 (no sale can lawfully be made on Thanksgiving day); Wood *v.* Meyer, 36 Wis. 308.

b. Postponement or Adjournment. An officer making a tax-sale has no power to adjourn or postpone it unless such authority can be derived from the statute;[89] and an adjournment, when authorized, must be in the manner and for the causes prescribed by law, and a sale made at a time to which there has been no legal adjournment is not valid.[90] Where an adjournment from day to day is authorized, the sale cannot be postponed for more than one day at a time,[91] except that the officer may adjourn it over a legal holiday.[92] The sale with its adjournments constitutes but one transaction and may well be dated as of the day when it commenced.[93]

5. Amount For Which Land May Be Sold — a. In General. It is always the intention that land offered at tax-sale shall bring not less than the whole amount of taxes due on it with the lawful costs and charges, and in some states this is positively required by law, so that a sale made for a less amount is void.[94] But this condition being fulfilled, the mere inadequacy of the price paid, considered with reference to the true or market value of the land, is no valid objection to the sale,[95] although in some jurisdictions we find laws forbidding the sale of prop-

89. Spain *v.* Johnson, 31 Ark. 314; Houghton County *v.* Auditor-Gen., 41 Mich. 28, 1 N. W. 890; Brougher *v.* Conley, 62 Miss. 358; Shell *v.* Duncan, 31 S. C. 547, 10 S. E. 330, 5 L. R. A. 821; Roddy *v.* Purdy, 10 S. C. 137.

But in Vermont it is held that the collector is bound to conduct the sale for the best interest of all concerned, and if he deems it necessary he may adjourn the sale. Wells *v.* Austin, 59 Vt. 157, 10 Atl. 405.

90. Chandler *v.* Keeler, 46 Iowa 596; Thompson *v.* Ware, 43 Iowa 455.

A tax deed showing that the land was sold at an adjourned sale, without reciting the causes justifying it, is at least *prima facie* evidence that the sale was properly held and that a proper cause for adjournment existed. Bullis *v.* Marsh, 56 Iowa 747, 2 N. W. 578, 6 N. W. 177; Clark *v.* Thompson, 37 Iowa 536; Lorain *v.* Smith, 37 Iowa 67; Hurley *v.* Street, 29 Iowa 429.

91. Collins *v.* Sherwood, 50 W. Va. 133, 40 S. E. 603; Wood *v.* Meyer, 36 Wis. 308. *Compare* Burns *v.* Lyon, 4 Watts (Pa.) 363; Coxe *v.* Deringer, 7 Leg. Gaz. (Pa.) 36 [*reversed* on other grounds in 78 Pa. St. 271].

92. Lynch *v.* Donnell, 104 Mo. 519, 15 S. W. 927.

93. Phelps *v.* Meade, 41 Iowa 470.

94. *Alabama.*— Crebs *v.* Fowler, 148 Ala. 366, 42 So. 553; State *v.* Brewer, 64 Ala. 287.

Iowa.— Griffin *v.* Tuttle, 74 Iowa 219, 37 N. W. 167; Crowell *v.* Merrill, 60 Iowa 53, 14 N. W. 81.

Louisiana.— Waddill *v.* Walton, 42 La. Ann. 763, 7 So. 737; Renshaw *v.* Imboden, 31 La. Ann. 661; Copley *v.* Hasson, 7 La. Ann. 593.

Michigan.— Moore *v.* Auditor-Gen., 122 Mich. 599, 81 N. W. 561; Hall *v.* Mann, 122 Mich. 13, 80 N. W. 789; Berkey *v.* Burchard, 119 Mich. 101, 77 N. W. 635, 79 N. W. 908.

Minnesota.— Chadbourne *v.* Hartz, 93 Minn. 233, 101 N. W. 68.

Mississippi.— See Hewes *v.* Seal, 80 Miss. 437, 32 So. 55.

Nebraska.— Medland *v.* Connell, 57 Nebr. 10, 77 N. W. 437; O'Donahue *v.* Hendrix, 13 Nebr. 257, 13 N. W. 281; Tillotson *v.* Small, 13 Nebr. 202, 13 N. W. 201. But *compare* Woodrough *v.* Douglas County, 71 Nebr. 354, 98 N. W. 1092. A sale for delinquent taxes for less than the amount of the taxes, interest, and costs due thereon is only a sale of the taxes and not of the land, and its only effect is to transfer the lien of the county to the purchaser, who may enforce his lien by proper proceedings. Barker *v.* Hume, 84 Nebr. 235, 120 N. W. 1131.

New York.— Jamaica, etc., Road *v.* Brooklyn, 1 N. Y. Suppl. 830.

Utah.— Heywood *v.* Weber County, 18 Utah 57, 55 Pac. 79.

See 45 Cent. Dig. tit. "Taxation," § 1349.

But *compare* Holbrook *v.* Kunz, 41 Ind. App. 260, 83 N. E. 730, holding that one whose land is sold at tax-sale for less than the amount due for taxes cannot complain of such irregularity in the sale, since he can have the land restored to him by paying off the lien for the amount for which the land was sold.

Taxes partly paid.— A tax-sale of land for the whole of the taxes assessed, when part of the taxes thereon have been paid, is void. Dickinson *v.* Arkansas City Imp. Co., 77 Ark. 570, 92 S. W. 21, 113 Am. St. Rep. 170.

Sale for taxes of one year only.— A sale of land for taxes due for one year does not discharge those levied and delinquent for previous years. Medland *v.* Connell, 57 Nebr. 10, 77 N. W. 437.

Accepting less than statutory amount of interest.— Where the auditor-general in the sale of state tax land accepted six per cent interest on the state's claim instead of one per cent a month, as required by Pub. Acts (1893), p. 16, No. 16, § 74, the sale was held void. Horton *v.* Salling, 155 Mich. 502, 119 N. W. 912; Horton *v.* Helmholtz, 149 Mich. 227, 112 N. W. 930.

95. *Georgia.*— Shackleford *v.* Hooper, 65 Ga. 366.

Illinois.— Frew *v.* Taylor, 106 Ill. 159.

Missouri.— State *v.* Sargent, 12 Mo. App. 228.

Texas.— Rogers *v.* Moore, 100 Tex. 220, 97

erty under these conditions for less than two thirds of its assessed or appraised value.[96]

b. Sale For Excessive Amount. If real property is offered at tax-sale for an amount exceeding the aggregate of taxes, costs, penalties, and charges for which the land is legally and actually liable, the sale, as a rule, is entirely void and passes no title.[97] But it will not be lightly assumed that the sale was made for an excessive amount; on the contrary, this must be clearly shown.[98] And in some states, in such a case, the owner of the property can have relief only on condition of paying or tendering what was justly due.[99]

c. Including Unauthorized Fees or Charges. The amount for which the land is offered may include costs and fees which are due and legally chargeable on the property up to the time of sale;[1] but the sale is invalid if such amount is made to include any fees, costs, commissions, or other charges which are illegal, excessive, unauthorized, or not yet accrued or due.[2]

S. W. 685; Blanton *v.* Nunley, (Civ. App. 1909) 119 S. W. 881.

United States.— Slater *v.* Maxwell, 6 Wall. (U. S.) 268, 18 L. ed. 796.

But gross inadequacy of price may justify the courts in laying stress on other matters, constituting in themselves only irregularities, which otherwise would not be sufficient to invalidate the sale, and so finding ground upon the whole case to set the sale aside. Davis *v.* McGee, 28 Fed. 867. And see Walters *v.* Herman, 99 Mo. 529, 12 S. W. 890; Younger *v.* Meadows, 63 W. Va. 275, 59 S. E. 1087.

96. See the statutes of the different states. And see Wooley *v.* Louisville, 114 Ky. 556, 71 S. W. 893, 24 Ky. L. Rep. 1357; Turner *v.* Smith, 18 Gratt. (Va.) 830.

97. *Arkansas.*— Sibley *v.* Thomas, 86 Ark. 578, 112 S. W. 210; Dickinson *v.* Arkansas City Imp. Co., 77 Ark. 570, 92 S. W. 21, 113 Am. St. Rep. 170; Cowling *v.* Muldrow, 71 Ark. 488, 76 S. W. 424; Cooper *v.* Freeman Lumber Co., 61 Ark. 36, 31 S. W. 981, 32 S. W. 494; Pack *v.* Crawford, 29 Ark. 489.

California.— Knox *v.* Higby, 76 Cal. 264, 18 Pac. 381; Boston Tunnel Co. *v.* McKenzie, 67 Cal. 485, 8 Pac. 22; Axtell *v.* Gerlach, 67 Cal. 483, 8 Pac. 34; Harper *v.* Rowe, 53 Cal. 233; Treadwell *v.* Patterson, 51 Cal. 637; Bucknall *v.* Story, 36 Cal. 67.

Georgia.—See Barnes *v.* Lewis, 98 Ga. 558, 25 S. E. 589.

Illinois.— Harland *v.* Eastman, 119 Ill. 22, 8 N. E. 810.

Kansas.— Glenn *v.* Stewart, 78 Kan. 608, 97 Pac. 863; Kansas State Agricultural College *v.* Linscott, 30 Kan. 240, 1 Pac. 81; Wilder *v.* Cockshutt, 25 Kan. 504; Genthner *v.* Lewis, 24 Kan. 309; Herzog *v.* Gregg, 23 Kan. 726; McQuesten *v.* Swope, 12 Kan. 32.

Kentucky.— Smith *v.* Ryan, 88 Ky. 636, 11 S. W. 647, 11 Ky. L. Rep. 128; Carlisle *v.* Cassady, 46 S. W. 490, 20 Ky. L. Rep. 562.

Louisiana.— The sale is not invalid if the taxes of any one of the years for which the sale was made are shown to have been legal and valid. Clifford *v.* Michiner, 49 La. Ann. 1511, 22 So. 811.

Massachusetts.— Loud *v.* Penniman, 19 Pick. 539.

Michigan.— Case *v.* Dean, 16 Mich. 12. But *compare* Smith *v.* Auditor-Gen., 138 Mich. 582, 101 N. W. 807.

Minnesota.— Prindle *v.* Campbell, 9 Minn. 212.

New Hampshire.— Wells *v.* Burbank, 17 N. H. 393.

New Jersey.— Landis *v.* Vineland, (Sup. 1899) 43 Atl. 569.

Texas.— Eustis *v.* Henrietta, 91 Tex. 325, 43 S. W. 259.

Utah.— Asper *v.* Moon, 24 Utah 241, 67 Pac. 409.

Wisconsin.—Pinkerton *v.* J. L. Gates Land Co., 118 Wis. 514, 95 N. W. 1089; Pierce *v.* Schutt, 20 Wis. 423; Warner *v.* Outagamie County, 19 Wis. 611; Kimball *v.* Ballard, 19 Wis. 601, 88 Am. Dec. 705.

Canada.— Cotter *v.* Sutherland, 18 U. C. C. P. 357; Allan *v.* Fisher, 13 U. C. C. P. 63; Doe *v.* Langton, 9 U. C. Q. B. 91.

See 45 Cent. Dig. tit. "Taxation," § 1350.

Contra.— Darling *v.* Purcell, 13 N. D. 288, 100 N. W. 726; Shuttuck *v.* Smith, 6 N. D. 56, 69 N. W. 5; Winder *v.* Sterling, 7 Ohio, Pt. II, 190; Peters *v.* Heasley, 10 Watts (Pa.) 208. But *compare* Lee *v.* Crawford, 10 N. D. 482, 88 N. W. 97.

98. Drennan *v.* Beierlein, 49 Mich. 272, 13 N. W. 587. And see Doland *v.* Mooney, 79 Cal. 137, 21 Pac. 436, holding that it will not be adjudged that a tax-sale was made for a sum exceeding the amount of the tax and legal costs, and is therefore void, merely because the recitals of the amount in the certificate and the deed differ.

99. Hansen *v.* Mauberret, 52 La. Ann. 1565, 28 So. 167; Pierce *v.* Schutt, 20 Wis. 423; Mills *v.* Johnson, 17 Wis. 598.

1. Trimble *v.* Allen-West Commission Co., 72 Ark. 72, 77 S. W. 898; Fish *v.* Genett, 56 S. W. 813, 22 Ky. L. Rep. 177; Nichols *v.* Roberts, 12 N. D. 193, 96 N. W. 298.

2. *Arkansas.*— Sibly *v.* Thomas, 86 Ark. 578, 112 S. W. 210; Kirker *v.* Daniels, 73 Ark. 263, 83 S. W. 912; Muskegon Lumber Co. *v.* Brown, 66 Ark. 539, 51 S. W. 1056; Darter *v.* Houser, 63 Ark. 475, 39 S. W. 358; Salinger *v.* Gunn, 61 Ark. 414, 33 S. W. 959; Goodrum *v.* Ayers, 56 Ark. 93, 19 S. W. 97.

California.—Axtell *v.* Gerlich, 67 Cal. 483, 8 Pac. 34.

Illinois.— Fuller *v.* Shedd, 161 Ill. 462, 44

d. Application of the Maxim De Minimis. The maxim "*de minimis non curat lex*" has a very limited application to the case where land has been sold at tax-sale for a sum exceeding the amount legally due upon it, and the cases show that very small sums, illegally included in the aggregate, will invalidate the sale.[3] Some of the decisions indeed maintain that this maxim cannot be invoked at all in the case supposed, and that any excess in the charges, however trifling, will vitiate the whole proceeding,[4] while others refuse to sustain the sale if the excess was greater than the smallest fractional coin authorized by law.[5]

6. Estates or Interests Sold. The statutes sometimes permit the owner of a specified and determinate fraction of a tract of land, or even of an undivided interest in it, to discharge the tax lien as respects that portion by paying a proportionate share of the gross tax; and where this is the case, a sale of the entire tract for the taxes assessed upon it as a whole, after payment of the tax on such a portion or interest, is void.[6] It is also the rule in some states to make separate

N. E. 286, 52 Am. St. Rep. 380, 33 L. R. A. 146; Gage *v.* Goudy, 141 Ill. 215, 30 N. E. 320; Gage *v.* Lyons, 138 Ill. 590, 28 N. E. 832.

Indiana.— Green *v.* McGrew, 35 Ind. App. 104, 72 N. E. 1049, 73 N. E. 832, 111 Am. St. Rep. 149; Richcreek *v.* Russell, 34 Ind. App. 217, 72 N. E. 617.

Kansas.— Douglass *v.* Walker, 57 Kan. 328, 46 Pac. 318; Jackson *v.* Challiss, 41 Kan. 247, 21 Pac. 87; Blanchard *v.* Hatcher, 40 Kan. 350, 20 Pac. 15; Fox *v.* Cross, 39 Kan. 350, 18 Pac. 300; Harris *v.* Curran, 32 Kan. 580, 4 Pac. 1044; Genthner *v.* Lewis, 24 Kan. 309; Truesdell *v.* Peck, 2 Kan. App. 533, 43 Pac. 990.

Michigan.— Sayers *v.* O'Connor, 124 Mich. 256, 82 N. W. 1044.

New Jersey.— Rellstab *v.* Belmar, 58 N. J. L. 489, 34 Atl. 885.

Utah.— Olsen *v.* Bagley, 10 Utah 492, 37 Pac. 739.

Wisconsin.— Baker *v.* Columbia County, 39 Wis. 444; Barden *v.* Columbia County, 33 Wis. 445, 14 Am. Rep. 762.

See 45 Cent. Dig. tit. "Taxation," § 1351.

Contra.—Wells *v.* Burbank, 17 N. H. 393.

3. See generally cases cited *infra*, this note. The following cases show what sums, in excess of the legal charges, have been held sufficient to invalidate the sale:

Arkansas.— Harvey *v.* Douglass, 73 Ark. 221, 83 S. W. 946 (one dollar and eighty-five cents); Salinger *v.* Gunn, 61 Ark. 414, 33 S. W. 959 (twenty-five cents).

California.— Miller *v.* Williams, 135 Cal. 183, 67 Pac. 788, eight cents.

Indiana.— Green *v.* McGrew, 35 Ind. App. 104, 72 N. E. 1049, 73 N. E. 832, 111 Am. St. Rep. 149, six cents.

Kansas.— Glenn *v.* Stewart, 78 Kan. 605, 97 Pac. 863; Genthner *v.* Lewis, 24 Kan. 309, nine cents.

Michigan.— Boyce *v.* Sebring, 66 Mich. 210, 33 N. W. 815 (three dollars); Burroughs *v.* Goff, 64 Mich. 464, 31 N. W. 273 (six cents).

Texas.— Lufkin *v.* Galveston, 73 Tex. 340, 11 S. W. 340, seventy cents.

Wisconsin.— Chippewa River Land Co. *v.* J. L. Gates Land Co., 118 Wis. 345, 94 N. W. 37, 95 N. W. 954 (twenty-five cents); Kimball *v.* Ballard, 19 Wis. 601, 88 Am. Dec. 705 (five per cent too much). And see Milledge *v.* Coleman, 47 Wis. 184, 2 N. W. 77; Baker *v.* Columbia County, 39 Wis. 444; Barden *v.* Columbia County, 33 Wis. 445, 14 Am. Rep. 762, the last three cases holding that the unlawful addition of the sum of five cents for a United States revenue stamp would invalidate the sale.

United States.— Baker *v.* Kaiser, 126 Fed. 317, 61 C. C. A. 303, sixty cents.

On the other hand, the following cases held that the sums respectively mentioned, and which were charged in excess of the amount legally due, were too inconsiderable to affect the validity of the sale:

California.— O'Grady *v.* Barnhisel, 23 Cal. 287, a sum "slightly in excess" of the proper amount.

Kansas.— Ireland *v.* George, 41 Kan. 751, 21 Pac. 776 (one cent); Salls *v.* Barons, 40 Kan. 697, 20 Pac. 485 (five cents).

Mississippi.— Havard *v.* Day, 62 Miss. 748, one cent and six mills.

New York.— Colman *v.* Shattuck, 62 N. Y. 348, four cents.

South Carolina.— Dickson *v.* Burckmyer, 67 S. C. 526, 46 S. E. 343, one dollar.

South Dakota.— Bandow *v.* Wolven, 20 S. D. 445, 107 N. W. 204, twenty-three cents.

Mere erroneous calculation.— But where, in computing the penalty to be added to the tax against land, the county clerk treated a fraction of between five and ten mills as an entire cent, instead of rejecting it, as required by Kan. Gen. St. (1901) § 7614, it was held that a tax deed based therein was not rendered invalid; the excess being due to an erroneous calculation rather than an intentional overcharge. Glenn *v.* Stewart, 78 Kan. 605, 97 Pac. 863. And see Ireland *v.* George, 41 Kan. 751, 21 Pac. 776.

4. *Illinois.*— McLaughlin *v.* Thompson, 55 Ill. 249.

Maine.— Huse *v.* Merriam, 2 Me. 375.

Michigan.— Case *v.* Dean, 16 Mich. 12.

New Hampshire.—Wells *v.* Burbank, 17 N. H. 393.

Texas.— Lufkin *v.* Galveston, 73 Tex. 340, 11 S. W. 340.

5. Cowling *v.* Muldrow, 71 Ark. 488, 76 S. W. 424; Treadwell *v.* Patterson, 51 Cal. 637; O'Grady *v.* Barnhisel, 23 Cal. 287.

6. Peirce *v.* Weare, 41 Iowa 378; Jones *v.*

assessments on the separate interests of tenants in common or other persons jointly interested, and where this is done the interest of one, although undivided, may be sold for his own default, without disturbing the title of the other.[7] But aside from these exceptions, it is the general rule that the tax collector has no authority to sell an undivided interest in land, but if the tract is to be divided the part sold must be a designated portion by metes and bounds.[8] It is also a general rule that the interest sold must be an estate in fee, not for years or any lesser estate.[9]

7. Quantity of Land Which May Be Sold — a. In General. According to the rule obtaining in most of the states, each particular tract of land is liable only for the taxes which have been assessed against itself, and consequently cannot be sold for the delinquency of taxes due on other lands of the same owner.[10] Under this rule, where a tract of land is assessed as an entirety, the sale of a portion of it for a part of the tax is voidable;[11] and conversely, the whole tract cannot be sold for the tax assessed on only a part of it or where the taxes on a part have

Gibson, 4 N. C. 480, 7 Am. Dec. 690. And see Pennell *v.* Monroe, 30 Ark. 661; Lawrence *v.* Miller, 86 Ill. 502; Fellows *v.* Denniston, 23 N. Y. 420.

7. Dyer *v.* Mobile Branch Bank, 14 Ala. 622; Payne *v.* Danley, 18 Ark. 441, 68 Am. Dec. 187; Townsend Sav. Bank *v.* Todd, 47 Conn. 190; Peirce *v.* Weare, 41 Iowa 378.

Applications of text.—As between life-estate and estate of remainder-man see Fenley *v.* Louisville, 119 Ky. 569, 84 S. W. 582, 27 Ky. L. Rep. 204; Woolley *v.* Louisville, 118 Ky. 897, 82 S. W. 608, 26 Ky. L. Rep. 872; Hellrigle *v.* Ould, 11 Fed. Cas. No. 6,344, 4 Cranch C. C. 72. As between two tenants in common see Payne *v.* Danley, 18 Ark. 441, 68 Am. Dec. 187; Ronkendorff *v.* Taylor, 4 Pet. (U. S.) 349, 7 L. ed. 882. As between two reversioners see Weaver *v.* Arnold, 15 R. I. 53, 23 Atl. 41. Mortgagor and mortgagee see Detroit *v.* Detroit Bd. of Assessors, 91 Mich. 78, 51 N. W. 787, 16 L. R. A. 59. Under N. H. Pub. St. (1901) c. 60, § 13, the tax collector has a prior lien on the land of a mortgagor for all taxes assessed against him, which may be foreclosed by sale if the mortgagor does not pay or expose personal property within fourteen days after notice. O'Donnell *v.* Meredith, 75 N. H. 272, 73 Atl. 32. Heir owning a half interest see Marti *v.* Wall, 51 La. Ann. 946, 26 So. 44.

Property of one person cannot be sold confusedly with that of another for taxes where there is no privity of estate between the parties. George *v.* Cole, 109 La. 816, 33 So. 784.

Effect on outstanding easement.—A private alley may be sold for non-payment of taxes thereon, although the easement of passage over it given to an adjoining owner may be thereby destroyed. Hill *v.* Williams, 104 Md. 595, 65 Atl. 413.

8. *California.*— Roberts *v.* Chan Tin Pen, 23 Cal. 259.

Connecticut.—Townsend Sav. Bank *v.* Todd, 47 Conn. 190.

Iowa.— Cragin *v.* Henry, 40 Iowa 158. *Compare* Jenswold *v.* Doran, 77 Iowa 692, 42 N. W. 465.

Kansas.—Auld *v.* McAllaster, 43 Kan. 162, 23 Pac. 165; Corbin *v.* Inslee, 24 Kan. 154.

Louisiana.— McDonough *v.* Elam, 1 La. 489, 20 Am. Dec. 284.

Massachusetts.— Sanford *v.* Sanford, 135 Mass. 314; Wall *v.* Wall, 124 Mass. 65; Loud *v.* Penniman, 19 Pick. 539.

Mississippi.— Stevenson *v.* Reed, 90 Miss. 341, 43 So. 433.

Rhode Island.—Weaver *v.* Arnold, 15 R. I. 53, 23 Atl. 41.

West Virginia.— Toothman *v.* Courtney, 62 W. Va. 167, 58 S. E. 915.

United States.— Clarke *v.* Strickland, 5 Fed. Cas. No. 2,864, 2 Curt. 439.

See 45 Cent. Dig. tit. "Taxation," § 1352.

City lots.—Under the laws of West Virginia, a separate part of a city, village, or town lot cannot be sold for taxes, but the sale must be of the whole lot or of an undivided interest therein. Old Dominion Bldg., etc., Assoc. *v.* Sohn, 54 W. Va. 101, 46 S. E. 222.

9. *In re* New York Protestant Episcopal Public School, 31 N. Y. 574. *Compare* Schatt *v.* Grosch, 31 N. J. Eq. 199.

10. Jodon *v.* Brenham, 57 Tex. 655; Edmonson *v.* Galveston, 53 Tex. 157; State *v.* Baker, 49 Tex. 763. And see State *v.* Sargeant, 76 Mo. 557.

11. *Kansas.*— Heil *v.* Redden, 38 Kan. 255, 16 Pac. 743; Kregelo *v.* Flint, 25 Kan. 695; Shaw *v.* Kirkwood, 24 Kan. 476.

Maine.—Allen *v.* Morse, 72 Me. 502.

Mississippi.— House *v.* Gumble, 78 Miss. 259, 29 So. 71.

North Dakota.— Roberts *v.* Fargo First Nat. Bank, 8 N. D. 504, 79 N. W. 1049.

United States.— Ballance *v.* Forsyth, 13 How. 18, 14 L. ed. 32.

See 45 Cent. Dig. tit. "Taxation," § 1353.

Exceptions to rule.—A part of a lot may be sold to pay taxes when they have accrued on that part. Ronkendorff *v.* Taylor, 4 Pet. (U. S.) 349, 7 L. ed. 882. And half of a piece of land can legally be sold under an advertisement of the whole, if there is legal cause for staying the sale as to the other half, as where the whole tract was advertised as belonging to unknown owners, but the owner of one half subsequently appears and pays his tax. Clay *v.* O'Brien, 24 La. Ann. 232.

been paid.[12] But in other states, where all the property of the owner is liable for the taxes on any part, the collector is not bound to sell the particular parcel assessed, but may levy on other land.[13] Where this rule obtains, it is sometimes the privilege of the owner to designate the property to be levied on and sold,[14] or it may be left to the discretion of the collector whether to sell the whole or a part of the tract selected,[15] unless the local statute requires him to offer first a fractional part of the tract and not to sell the whole unless that is necessary to secure a bid.[16] Aside from such statutory requirements, there is no absolute limit on the quantity of land which may be put up for sale;[17] but it is held that the levy of a tax execution for a very small sum on a tract of land of large value is an abuse of discretion amounting to a fraud on the law, and is ground for avoiding the sale.[18]

b. Sale of "As Much as May Be Necessary." A statute providing that the collector shall sell each tract of land separately, "or so much thereof as may be necessary" to satisfy the taxes and costs, imposes an imperative limitation upon him, and the sale will be voidable, if not absolutely void, where he sells an entire tract when a portion of it would have been enough, or sells a larger portion than was necessary, or continues selling after enough has been disposed of to raise the required amount; and the fact that it was necessary to sell the quantity actually sold must appear of record.[19] But of course this rule does not apply where

12. Peirce *v.* Weare, 41 Iowa 378; Reems *v.* Recorder of Mortgages, 47 La. Ann. 1138, 17 So. 697; Fellows *v.* Denniston, 23 N. Y. 420; Marsh *v.* Ne-ha-sa-ne Park Assoc., 18 Misc. (N. Y.) 314, 42 N. Y. Suppl. 996 [*reversed* on other grounds in 25 N. Y. App. Div. 34, 49 N. Y. Suppl. 384]; Jones *v.* Gibson, 4 N. C. 480, 7 Am. Dec. 690. The sale of more lands than are covered by the assessment is a jurisdictional defect. People *v.* Golding, 55 Misc. (N. Y.) 425, 106 N. Y. Suppl. 821.

13. Berwin *v.* Legras, 28 La. Ann. 352; Powers *v.* Barr, 24 Barb. (N. Y.) 142; Masterson *v.* State, 17 Tex. Civ. App. 91, 42 S. W. 1003.

14. See Bean *v.* Brownwood, (Tex. Civ. App. 1898) 43 S. W. 1036; Masterson *v.* State, 17 Tex. Civ. App. 91, 42 S. W. 1003; Rothchild *v.* Rollinger, 32 Wash. 307, 73 Pac. 367.

15. Hewes *v.* McLellan, 80 Cal. 393, 22 Pac. 287; Southworth *v.* Edmands, 152 Mass. 203, 25 N. E. 106, 9 L. R. A. 118.

16. French *v.* Patterson, 61 Me. 203; Dyer *v.* Boswell, 39 Md. 465; Tucker *v.* Tucker, 110 N. C. 333, 14 S. E. 860; Saunders *v.* McLin, 23 N. C. 572. And see *infra*, XI, G, 7, b, c.

Rule in Mississippi.—It is the duty of the tax collector, in making sales, to offer some one particular eighth of a section of land for sale, designating the particular eighth so offered, and if it will not bring the amount of the taxes due, he is then to designate some other particular eighth and offer that and the first together, and if the two thus offered will not sell for the amount of the taxes due he is to offer a third designated eighth, and so on until he has offered a sufficient quantity to bring the amount of the taxes due. Herron *v.* Jennings, (1902) 31 So. 965; Gregory *v.* Brogan, 74 Miss. 694, 21 So. 521; Caruther *v.* McLaren, 56 Miss. 371; Ray *v.* Murdock, 36 Miss. 692; Boisgerard *v.* Doe, 23 Miss. 122; Hodge *v.* Wilson, 12 Sm. & M. (Miss.) 498.

17. Tweed *v.* Metcalf, 4 Mich. 579; Sibley *v.* Smith, 2 Mich. 486.

Error as to quantity.—A sale of land for delinquent taxes will not be invalidated by an error as to quantity, where it is a mere irregularity, unless it is so great, in proportion to the actual quantity in the whole tract, as to mislead the owner in regard to its identity. Powel *v.* Barrington, 1 Pa. L. J. Rep. 239.

18. *Connecticut.*— Townsend Sav. Bank *v.* Todd, 47 Conn. 190.

Georgia.— Stark *v.* Cummings, 127 Ga. 107, 56 S. E. 130; Roser *v.* Georgia L. & T. Co., 118 Ga. 181, 44 S. E. 994; Williamson *v.* White, 101 Ga. 276, 28 S. E. 846, 65 Am. St. Rep. 302; Mixon *v.* Stanley, 100 Ga. 372, 28 S. E. 440; Brinson *v.* Lassiter, 81 Ga. 40, 6 S. E. 468; Morris *v.* Davis, 75 Ga. 169; Doane *v.* Chittenden, 25 Ga. 103.

Indiana.—O'Brien *v.* Coulter, 2 Blackf. 421; Richcreek *v.* Russell, 34 Ind. App. 217, 72 N. E. 617.

Maryland.— Margraff *v.* Cunningham, 57 Md. 585; Guisebert *v.* Etchison, 51 Md. 478; Dyer *v.* Boswell, 39 Md. 465; Polk *v.* Rose, 25 Md. 153, 89 Am. Dec. 773.

Michigan.— Starr *v.* Shepard, 145 Mich. 302, 108 N. W. 709.

Vermont.— Brush *v.* Watson, 81 Vt. 43, 69 Atl. 141.

Virginia.— Downey *v.* Nutt, 19 Gratt. 59; Martin *v.* Snowden, 18 Gratt. 100.

West Virginia.— Younger *v.* Meadows, 63 W. Va. 275, 59 S. E. 1087.

Canada.— Massingberd *v.* Montague, 9 Grant Ch. (U. C.) 92.

See 45 Cent. Dig. tit. "Taxation," § 1353.

But *compare* State *v.* Sargent, 12 Mo. App. 228; Lawton *v.* U. S., 21 Ct. Cl. 44.

19. *Georgia.*— Stark *v.* Cummings, 119 Ga. 35, 45 S. E. 722; Hobbs *v.* Hamlet, 106 Ga. 403, 32 S. E. 351.

a division of the land into smaller portions and the sale of one cannot be effected without material injury to the remaining portions or to the whole;[20] nor does it apply where the officer making the sale acts under a judgment and writ which commands him to sell the entire parcel.[21]

c. Sale of "Least Quantity" Necessary. In other states the law directs the officer to sell the least quantity of the tract that any purchaser will take and pay the taxes and costs. Here the purchase-money is invariably the amount of the charges for which the sale is made, and the best bidder is the one who will take the smallest fraction of the land at that price. A provision of this kind is mandatory, and if the sale is made in any other manner it is void.[22] But the whole of a tract of land may be sold to one bidder if no one will offer to pay the taxes and costs for less than the whole tract.[23]

d. Sale of Undetermined Portion. If the officer sells a portion of an entire tract, and it is described as to quantity but not as to location, the decisions generally hold the sale to be void for uncertainty.[24] But some of the cases hold it

Iowa.—Ware *v.* Thompson, 29 Iowa 65; Corbin *v.* De Wolf, 25 Iowa 124.

Kentucky.— Woolley *v.* Louisville, 114 Ky. 556, 71 S. W. 893, 24 Ky. L. Rep. 1357; Husbands *v.* Polivick, 96 S. W. 825, 29 Ky. L. Rep. 890.

Maine.— Brookings *v.* Woodin, 74 Me. 222; Straw *v.* Poor, 74 Me. 53; Wiggin *v.* Temple, 73 Me. 380; Allen *v.* Morse, 72 Me. 502; Whitmore *v.* Learned, 70 Me. 276; French *v.* Patterson, 61 Me. 203; Lovejoy *v.* Lunt, 48 Me. 377; Loomis *v.* Pingree, 43 Me. 299.

Massachusetts.— Crowell *v.* Goodwin, 3 Allen 535.

Missouri.— State *v.* Elliott, 114 Mo. App. 562, 90 S. W. 122.

New Hampshire.— Jaquith *v.* Putney, 48 N. H. 138; Lyford *v.* Dunn, 32 N. H. 81; Ainsworth *v.* Dean, 21 N. H. 400.

New York.— Powers *v.* Barr, 24 Barb. 142.

South Carolina.— See Wilson *v.* Cantrell, 40 S. C. 114, 18 S. E. 517.

Tennessee.— Nance *v.* Hopkins, 10 Lea 503.

Texas.— See Masterson *v.* State, 17 Tex. Civ. App. 91, 42 S. W. 1003.

Vermont.— Brush *v.* Watson, 81 Vt. 43, 69 Atl. 141; Woodcock *v.* Bolster, 35 Vt. 632.

United States.— French *v.* Edwards, 13 Wall. 506, 20 L. ed. 702; Mason *v.* Fearson, 9 How. 248, 13 L. ed. 125; Washington *v.* Pratt, 8 Wheat. 681, 5 L. ed. 714; Stead *v.* Course, 4 Cranch 403, 2 L. ed. 660; Commercial Bank *v.* Sandford, 103 Fed. 98, 99 Fed. 154.

Canada.— Hall *v.* Farquharson, 15 Ont. App. 457; Haisley *v.* Somers, 15 Ont. 275; Cotter *v.* Sutherland, 18 U. C. C. P. 357; Scholfield *v.* Dickenson, 10 Grant Ch. (U. C.) 226; Logie *v.* Stayner, 10 Grant Ch. (U. C.) 222; Henry *v.* Burness, 8 Grant Ch. (U. C.) 345.

See 45 Cent. Dig. tit. "Taxation," § 1353.

Sale to highest bidder.— In Maine the law authorizes the collector to sell to the highest bidder "so much of the real estate as may be necessary to pay the tax." But here the term "highest bidder" means the one who will pay the tax for the least quantity of the land. Lovejov *v.* Lunt, 48 Me. 377.

20. Howland *v.* Pettey, 15 R. I. 603, 10 Atl. 650; Bean *v.* Brownwood, (Tex. Civ. App. 1898) 43 S. W. 1036.

21. Bordages *v.* Higgins, 1 Tex. Civ. App. 43, 19 S. W. 446, 20 S. W. 184, 726. And see Wellshear *v.* Kelley, 69 Mo. 343; Flynn *v.* Edwards, 36 Fed. 873.

22. *Arizona.*— Jacobs *v.* Buckalew, 4 Ariz. 351, 42 Pac. 619.

California.— Reynolds *v.* Lincoln, 71 Cal. 183, 9 Pac. 176, 12 Pac. 449; Frink *v.* Roe, 70 Cal. 296, 11 Pac. 820; Hewell *v.* Lane, 53 Cal. 213; Carpenter *v.* Gann, 51 Cal. 193; Gillis *v.* Barnett, 38 Cal. 393. See Hewes *v.* McLellan, 80 Cal. 393, 22 Pac. 287.

Louisiana.— Tieman *v.* Johnston, 114 La. 112, 38 So. 75; Bristol *v.* Murff, 49 La. Ann. 357, 21 So. 519; Gulf States Land, etc., Co. *v.* Fasnacht, 47 La. Ann. 1294, 17 So. 800.

Missouri.—Roth *v.* Gabbert, 123 Mo. 21, 27 S. W. 528.

New Hampshire.— French *v.* Spalding, 61 N. H. 395, a sale made in this manner is not invalid, although the statute directs the sale of "as much as may be necessary" to pay the taxes and costs.

United States.— French *v.* Edwards, 13 Wall. 506, 20 L. ed. 702; Mora *v.* Nunez, 10 Fed. 634, 7 Sawy. 455.

See 45 Cent. Dig. tit. "Taxation," § 1353.

23. Doland *v.* Mooney, 79 Cal. 137, 21 Pac. 436; Schmoele *v.* Galloway Tp., 44 N. J. L. 145; Chandler *v.* Spear, 22 Vt. 388.

Under a statute requiring land sold for taxes to be sold as a whole to the highest bidder, provided the amount bid equals the amount of the taxes and costs, a sale to one who was asked to take the least quantity which he would accept for paying the taxes and costs is void, although he refused to accept less than the whole. Richards *v.* Howell, 60 Ark. 215, 29 S. W. 461.

24. *California.*— Roberts *v.* Chan Tin Pen, 23 Cal. 259.

Mississippi.— Nelson *v.* Abernathy, 74 Miss. 164, 21 So. 150.

Pennsylvania.— Erwin *v.* Helm, 13 Serg. & R. 151.

Tennessee.— Wands *v.* Brien, 13 Lea 732.

United States.— Ballance *v.* Forsyth, 13 How. 18, 14 L. ed. 32.

to be sufficient if the location can be determined by a survey or by reference to other documents,[25] and lay down rules for fixing the location in such cases.[26]

8. Sale in Parcels. Where so required by law, a tax collector must divide the tract into parcels and offer them for sale separately; and if this direction is not obeyed the sale is not valid.[27] So also, where the taxes are assessed to different persons, or upon different and distinct interests, or on separate lots or parcels, the officer cannot legally sell the whole of a tract, including the several interests or lots separately taxed, but each interest or lot must be separately sold for the payment of that tax only for which it is liable; otherwise the sale is void.[28] But exceptions to this last rule are made where several contiguous

Canada.— Knaggs *v.* Ledyard, 12 Grant Ch. (U. C.) 320.

See 45 Cent. Dig. tit. "Taxation," § 1353.

Compare Wells *v.* Burbank, 17 N. H. 393.

25. Taylor *v.* Wright, 121 Ill. 455, 13 N. E. 529; McClements *v.* Downey, 2 Pa. Super. Ct. 443.

26. *Alabama.*— Doe *v.* Clayton, 81 Ala. 391, 2 So. 24, holding that the sale of a certain number of acres in the northeast corner passes a square, containing so many acres, which may be located by a surveyor in the northeast corner.

Illinois.— Spellman *v.* Curtenius, 12 Ill. 409, holding that the intention of the law is that the quantity sold shall be taken from the eastern portion of the tract by a line drawn due north and south.

Iowa.— Jenswold *v.* Doran, 77 Iowa 692, 42 N. W. 465, holding that it need not appear in what portion of the tract a fractional part sold lies where only an undivided interest is sold.

Pennsylvania.— Coxe *v.* Blanden, 1 Watts 533, 26 Am. Dec. 83, holding that the purchaser has an unrestricted choice as to where he will locate his fraction.

Vermont.— Sheafe *v.* Wait, 30 Vt. 735, holding that a tax collector's deed which describes the land simply as so many acres of a certain lot passes an undivided interest in such lot, to the extent of the proportion between the number of acres sold and the whole number of acres in the lot.

27. *Alabama.*— Clarke *v.* Rowan, 53 Ala. 400.

Colorado.—Where a tax deed showed that the land covered consisted of distinct and non-contiguous tracts, and that they were not sold separately, as the statute requires, and that the tax was on the entire property, but the amount of the tax on each separate and distinct tract did not appear, it was held that the sale was void. Whitehead *v.* Callahan, 44 Colo. 396, 99 Pac. 57.

Louisiana.— Boyle *v.* West, 107 La. 347, 31 So. 794.

Massachusetts.— Roberts *v.* Welsh, 192 Mass. 278, 78 N. E. 408.

Minnesota.— Gilfillan *v.* Chatterton, 38 Minn. 335, 37 N. W. 583.

Mississippi.— Herring *v.* Moses, 71 Miss. 620, 14 So. 437.

Missouri.— Yeaman *v.* Lepp, 167 Mo. 61, 66 S. W. 957.

Oklahoma.— Keller *v.* Hawk, 19 Okla. 407, 91 Pac. 778; Eldridge *v.* Robertson, 19 Okla. 165, 92 Pac. 156.

Vermont.— Doe *v.* Strong, 1 Tyler 191.

West Virginia.— A sheriff in distraining for taxes must make no unreasonable distress, and must sell the property, where susceptible of division, in separate parcels, so as to cause the least sacrifice thereof possible, and a sale thereof otherwise at a grossly inadequate price is a violation of his official duty. Younger *v.* Meadows, 63 W. Va. 275, 59 S. E. 1087.

See 45 Cent. Dig. tit. "Taxation," § 1354.

Invalidity of tax deed see *infra,* XIII, D, 2, e.

28. *Alabama.*—Augusta Nat. Bank *v.* Baker Hill Iron Co., 108 Ala. 635, 19 So. 47.

Arkansas.— Chatfield *v.* Iowa, etc., Loan Co., 88 Ark. 395, 114 S. W. 473; Harris *v.* Brady, 87 Ark. 428, 112 S. W. 974; La Cotts *v.* Quertermous, 83 Ark. 174, 103 S. W. 182; Salinger *v.* Gunn, 61 Ark. 414, 33 S. W. 959; Cocks *v.* Simmons, 55 Ark. 104, 17 S. W. 594, 29 Am. St. Rep. 28; Montgomery *v.* Birge, 31 Ark. 491; Spain *v.* Johnson, 31 Ark. 314; Crane *v.* Randolph, 30 Ark. 579; Pack *v.* Crawford, 29 Ark. 489; Pettus *v.* Wallace, 29 Ark. 476.

California.— Terrill *v.* Groves, 18 Cal. 149.

Georgia.— Doane *v.* Chittenden, 25 Ga. 103.

Iowa.— Rankin *v.* Miller, 43 Iowa 11; Ware *v.* Thompson, 29 Iowa 65; Ackley *v.* Sexton, 24 Iowa 320; Harper *v.* Sexton, 22 Iowa 442; Ferguson *v.* Heath, 21 Iowa 438; Byam *v.* Cook, 21 Iowa 392; Boardman *v.* Bourne, 20 Iowa 134; Penn *v.* Clemans, 19 Iowa 372.

Kansas.— Cartwright *v.* McFadden, 24 Kan. 662; Hall *v.* Dodge, 18 Kan. 277. See McQuesten *v.* Swope, 12 Kan. 32.

Louisiana.— Norres *v.* Hays, 44 La. Ann. 907, 11 So. 462.

Maine.— Andrews *v.* Senter, 32 Me. 394; Wallingford *v.* Fiske, 24 Me. 386.

Massachusetts.— Barnes *v.* Boardman, 149 Mass. 106, 21 N. E. 308, 5 L. R. A. 785; Hayden *v.* Foster, 13 Pick. 492.

Michigan.— Kennedy *v.* Auditor-Gen., 134 Mich. 534, 96 N. W. 928.

Minnesota.— Chadbourne *v.* Hartz, 93 Minn. 233, 101 N. W. 68; Brown *v.* Setzer, 39 Minn. 317, 40 N. W. 70; Farnham *v.* Jones, 32 Minn. 7, 19 N. W. 83; Moulton *v.* Doran, 10 Minn. 67.

Mississippi.— Morris *v.* Myer, 87 Miss. 701, 40 So. 231; Speed *v.* McKnight, 76 Miss. 723, 25 So. 872; Higdon *v.* Salter, 76 Miss. 766, 25 So. 864; Griffin *v.* Ellis, 63 Miss. 348; Ray *v.* Murdock, 36 Miss. 692.

Missouri.— Yeaman *v.* Lepp, 167 Mo. 61, 66 S. W. 957; Corrigan *v.* Schmidt, 126 Mo. 304,

tracts owned by one person are assessed as one whole,[29] where two or more lots, owned by the same person, are used and occupied as a whole or for one purpose,[30] where two distinct lots belonging to the same owner are offered separately and no bids are received,[31] and where the officer, in making the sale, obeys the directions of a judgment.[32] Conversely, where a tax of a single gross sum is assessed on several lots or parcels of land, grouped as an entirety, all the lots must be sold together for the payment of the tax, and the tax cannot be arbitrarily apportioned and the lots sold separately, each for the payment of its proportionate share.[33]

H. Persons Who May Purchase — 1. General Rule. Any person who owes a positive duty to the state or municipality to pay the taxes on a particular tract of land cannot become a purchaser at a sale of the property for such taxes, or if he does so purchase it is deemed merely a mode of paying the taxes and does not found a new title or affect the existing title in any way.[34]

28 S. W. 874; Keene *v.* Barnes, 29 Mo. 377; Smith *v.* H. D. Williams Cooperage Co., 100 Mo. App. 153, 73 S. W. 315.

Montana.— Casey *v.* Wright, 14 Mont. 315, 36 Pac. 191.

Nebraska.— Rohrer *v.* Fassler, 2 Nebr. (Unoff.) 262, 96 N. W. 523.

Nevada.— Wright *v.* Cradlebaugh, 3 Nev. 341.

New Jersey.— Hasbrouck Heights Co. *v.* Lodi Tp. Committee, 66 N. J. L. 102, 48 Atl. 517.

New York.— People *v.* Golding, 55 Misc. 425, 106 N. Y. Suppl. 821; National F. Ins. Co. *v.* McKay, 1 Sheld. 138, 5 Abb. Pr. N. C. 445.

North Dakota.— State Finance Co. *v.* Beck, 15 N. D. 374, 109 N. W. 357.

Oregon.— Brentano *v.* Brentano, 41 Oreg. 15, 67 Pac. 922.

Pennsylvania.— Woodburn *v.* Wireman, 27 Pa. St. 18; Morton *v.* Harris, 9 Watts 319; Cunningham *v.* White, 2 Pa. Dist. 531.

Tennessee.— Sheafer *v.* Mitchell, 109 Tenn. 181, 71 S. W. 86.

Texas.— Allen *v.* Courtney, 24 Tex. Civ. App. 86, 58 S. W. 200; Fant *v.* Brannin, 2 Tex. Unrep. Cas. 323.

Wisconsin.— Jenkins *v.* Rock County, 15 Wis. 11.

United States.— Walker *v.* Moore, 29 Fed. Cas. No. 17,080, 2 Dill. 256. *Compare* Springer *v.* U. S., 102 U. S. 586, 26 L. ed. 253.

Canada.— Christie *v.* Johnston, 12 Grant Ch. (U. C.) 534; Laughtenborough *v.* McLean, 14 U. C. C. P. 175; McDonald *v.* Robillard, 23 U. C. Q. B. 105; Munro *v.* Grey, 12 U. C. Q. B. 647.

See 45 Cent. Dig. tit. "Taxation," § 1354.

The grantee in good faith from the purchaser of lands sold in mass at tax-sale acquires a good title, if without notice of the irregularity. Martin *v.* Ragsdale, 49 Iowa 589.

Invalidity of tax deed see *infra*, XIII, D, 2, e.

29. *Iowa.*— Smith *v.* Easton, 37 Iowa 584; Bulkley *v.* Callanan, 32 Iowa 461; Ware *v.* Thompson, 29 Iowa 65; Corbin *v.* De Wolf, 25 Iowa 124.

Kansas.— Cross *v.* Herman, 74 Kan. 554, 87 Pac. 686; Dodge *v.* Emmons, 34 Kan. 732, 9 Pac. 951; McQuesten *v.* Swope, 12 Kan. 32.

Minnesota.— National Bond, etc., Co. *v.* Hennepin County, 91 Minn. 63, 97 N. W. 413; Moulton *v.* Doran, 10 Minn. 67.

Nebraska.— Pettibone *v.* Fitzgerald, 62 Nebr. 869, 88 N. W. 143.

Pennsylvania.— Woodburn *v.* Wireman, 27 Pa. St. 18.

Tennessee.— Brien *v.* O'Shaughnesy, 3 Lea 724.

See 45 Cent. Dig. tit. "Taxation," § 1354.

30. *Iowa.*— Greer *v.* Wheeler, 41 Iowa 85; Weaver *v.* Grant, 39 Iowa 294.

Kansas.— Cross *v.* Herman, 74 Kan. 554, 87 Pac. 686.

Missouri.— Roth *v.* Gabbert, 123 Mo. 21, 27 S. W. 528.

New Jersey.— Jones *v.* Landis Tp., 50 N. J. L. 374, 13 Atl. 251.

Rhode Island.— Howland *v.* Pettey, 15 R. I. 603, 10 Atl. 650.

Washington.— Swanson *v.* Hoyle, 32 Wash. 169, 72 Pac. 1011.

United States.— Land, etc., Imp. Co. *v.* Bardon, 45 Fed. 706.

See 45 Cent. Dig. tit. "Taxation," § 1354.

31. Biscoe *v.* Coulter, 18 Ark. 423; Douthett *v.* Kettle, 104 Ill. 356; Slater *v.* Maxwell, 6 Wall. (U. S.) 268, 18 L. ed. 796.

32. Knight *v.* Valentine, 34 Minn. 26, 24 N. W. 295; Wellshear *v.* Kelley, 69 Mo. 343; Howard *v.* Stevenson, 11 Mo. App. 410.

33. *Arkansas.*—Bonner *v.* St. Francis Levee Dist. Bd. of Directors, 77 Ark. 519, 92 S. W. 1124.

Iowa.— Cedar Rapids, etc., R. Co. *v.* Carroll County, 41 Iowa 153; Iowa R. Land Co. *v.* Sac County, 39 Iowa 124.

Kansas.— Kregelo *v.* Flint, 25 Kan. 695.

Michigan.— Wyman *v.* Baer, 46 Mich. 418, 9 N. W. 455.

North Dakota.— O'Neil *v.* Tyler, 3 N. D. 47, 53 N. W. 434.

Ohio.— Willey *v.* Scoville, 9 Ohio 43.

Tennessee.— Morristown *v.* King, 11 Lea 669.

Canada.— Reed *v.* Smith, 1 Manitoba 341.

But *compare* Fellows *v.* Denniston, 23 N. Y. 420.

34. *Alabama.*— Johnston *v.* Smith, 70 Ala. 108.

Arkansas.— Guynn *v.* McCauley, 32 Ark. 97; Jacks *v.* Dyer, 31 Ark. 334.

California.— Christy *v.* Fisher, 58 Cal. 256; Garwood *v.* Hastings, 38 Cal. 216; Cop-

2. Owners and Others Liable. In most jurisdictions the owner of land can neither add to nor strengthen his title by omitting to pay taxes on it for which he is liable and then buying at the tax-sale; such a transaction amounts to no more than a payment of the taxes.[35] And the same rule applies to any person

pinger *v.* Rice, 33 Cal. 408; McMinn *v.* Whelan, 27 Cal. 300; Kelsey *v.* Abbott, 13 Cal. 609.

Georgia.— Bourquin *v.* Bourquin, 120 Ga. 115, 47 S. E. 639.

Illinois.— Lewis *v.* Ward, 99 Ill. 525; Busch *v.* Huston, 75 Ill. 343; Higgins *v.* Crosby, 40 Ill. 260; Blakeley *v.* Bestor, 13 Ill. 708; Frye *v.* Illinois Bank, 11 Ill. 367.

Indiana.— Buckley *v.* Taggart, 62 Ind. 236.

Iowa.— Fallon *v.* Chidester, 46 Iowa 588, 26 Am. Rep. 164; Weare *v.* Van Meter, 42 Iowa 128, 20 Am. Rep. 616.

Kansas.— Morrill *v.* Douglass, 17 Kan. 291; Carithers *v.* Weaver, 7 Kan. 110; Bowman *v.* Cockrill, 6 Kan. 311.

Kentucky.— Oldhams *v.* Jones, 5 B. Mon. 458.

Maine.— Dunn *v.* Snell, 74 Me. 22; Haskell *v.* Putnam, 42 Me. 244; Matthews *v.* Light, 32 Me. 305; Varney *v.* Stevens, 22 Me. 331.

Michigan.— Sands *v.* Davis, 40 Mich. 14; Bertram *v.* Cook, 32 Mich. 518; Dubois *v.* Campau, 24 Mich. 360; Lacey *v.* Davis, 4 Mich. 140, 66 Am. Dec. 524.

Mississippi.—Allen *v.* Poole, 54 Miss. 323; McLaughlin *v.* Green, 48 Miss. 175.

Missouri.— McCune *v.* Goodwillie, 204 Mo. 306, 102 S. W. 997; Smith *v.* Phelps, 63 Mo. 585.

Nebraska.— Tolliver *v.* Stephenson, 83 Nebr. 747, 120 N. W. 450; Gibson *v.* Sexson, 82 Nebr. 475, 118 N. W. 77.

New Hampshire.— Brown *v.* Simons, 44 N. H. 475.

New York.— Williams *v.* Townsend, 31 N. Y. 411; Nellis *v.* Lathrop, 22 Wend. 121, 34 Am. Dec. 285; Sharpe *v.* Kelley, 5 Den. 431.

Ohio.— Douglas *v.* Dangerfield, 10 Ohio 152; Piatt *v.* St. Clair, 6 Ohio 227.

Oklahoma.— Brooks *v.* Garner, 20 Okla. 236, 94 Pac. 694, 97 Pac. 995.

Pennsylvania.— Reinboth *v.* Zerbe Run Imp. Co., 29 Pa. St. 139; Coxe *v.* Wolcott, 27 Pa. St. 154.

Vermont.— Downer *v.* Smith, 38 Vt. 464; Willard *v.* Strong, 14 Vt. 532, 39 Am. Dec. 240.

Virginia.— Miller *v.* Williams, 15 Gratt. 213.

West Virginia.— Williamson *v.* Russell, 18 W. Va. 612.

Wisconsin.— Frentz *v.* Klotsch, 28 Wis. 312; Edgerton *v.* Schneider, 26 Wis. 385; Smith *v.* Lewis, 20 Wis. 350.

See 45 Cent. Dig. tit. "Taxation," § 1358.

The mere fact that taxes on land are assessed against a particular person does not impose on him the duty of paying the taxes if in fact the land does not belong to him and he stands in no trust relation to the owner; such person may permit the lands to be sold for the taxes and acquire a valid title to them by purchase at the tax-sale. Fink *v.* Miller, 19 Pa. Super. Ct. 556. *Compare*, however, *infra*, note 36.

Stock-holders of corporation.— The fact that purchasers of property at a tax-sale were stock-holders in a corporation which then owned the legal title to the property is not sufficient to constitute such purchase a payment of the taxes, in favor of a subsequent purchaser of the property at a foreclosure sale. Jenks *v.* Brewster, 96 Fed. 625.

35. *Arkansas.*— Pleasants *v.* Scott, 21 Ark. 370, 76 Am. Dec. 403.

California.— Gates *v.* Lindley, 104 Cal. 451, 38 Pac. 311.

Connecticut.— Middletown Sav. Bank *v.* Bacharach, 46 Conn. 513.

Dakota.— Wambole *v.* Foote, 2 Dak. 1, 2 N. W. 239.

Florida.— Petty *v.* Mays, 19 Fla. 652.

Iowa.— Griffin *v.* Turner, 75 Iowa 250, 39 N. W. 294; Emmet County *v.* Griffin, 73 Iowa 163, 34 N. W. 792.

Kansas.— Pomeroy *v.* Graham County, 6 Kan. App. 401, 50 Pac. 1094.

Maine.— Burgess *v.* Robinson, 95 Me. 120, 49 Atl. 606.

Michigan.— Cooley *v.* Waterman, 16 Mich. 366.

Mississippi.— Gaskins *v.* Blake, 27 Miss. 675.

Nebraska.— Tolliver *v.* Stephenson, 83 Nebr. 747, 120 N. W. 450; Wygant *v.* Dahl, 26 Nebr. 562, 42 N. W. 735. But the owner of a definite portion of a city lot may purchase the lot at a sale for delinquent taxes assessed against the whole lot, and enforce his lien for taxes on the portion not owned by him. Towle *v.* Shelly, 19 Nebr. 632, 28 N. W. 292.

West Virginia.— State *v.* Eddy, 41 W. Va. 95, 23 S. E. 529.

See 45 Cent. Dig. tit. "Taxation," § 1358; and cases cited in the preceding note.

Contra.— In a few states it is held that the owner of land has the same right as a stranger to buy it at tax-sale, and he may thereafter rely on his original title or the tax title or both. Branham *v.* Bezanson, 33 Minn. 49, 21 N. W. 861; Neill *v.* Lacy, 110 Pa. St. 294, 1 Atl. 325; Coxe *v.* Gibson, 27 Pa. St. 160, 67 Am. Dec. 454; Stewart *v.* Taggart, 22 U. C. C. P. 284.

Land of purchaser sold jointly with land of another.— Where a party purchases at a tax-sale his own land, together with land of another, which he had listed in one tract as belonging to himself, he simply pays his own taxes and the sheriff's deed conveys no title. Griffith *v.* Silver, 125 N. C. 368, 34 S. E. 544. And see Lewis *v.* Ward, 99 Ill. 525; Cooley *v.* Waterman, 16 Mich. 366; State *v.* Williston, 20 Wis. 228. *Compare* Bennet *v.* North Colorado Springs Land, etc., Co., 23

who is bound to keep down the taxes on the land either by contract with the owner of it or because of his fiduciary relation to the latter,[36] as in the case of a trustee, who cannot defeat the interests of the *cestui que trust* by a purchase at tax-sale,[37] or the beneficiary under a trust deed,[38] or a guardian in respect to the lands of his ward.[39] But the rule does not apply to one who claims the land under a voidable or radically defective title, for he may abandon it and rely on his tax title;[40] or to one who purchased the land subsequent to the levy of the tax and did not become responsible for its payment, for he may strengthen his title by discharging the tax lien in this manner;[41] or to a person who is not the owner of the land, although it is assessed in his name illegally and without his consent.[42]

3. Mortgagor and Mortgagee. Where land is encumbered by a mortgage, neither the mortgagor nor a purchaser from him, who has assumed the mortgage, can defeat the lien of the mortgage by buying the property at a sale for taxes.[43] It is also quite generally held that the mortgagee, in similar circumstances, cannot oust the title of the mortgagor by a purchase at tax-sale.[44] And neither of two

Colo. 470, 48 Pac. 812, 58 Am. St. Rep. 281.

36. *Alabama.*— Thorington *v.* Montgomery, 88 Ala. 548, 7 So. 363.

Arkansas.— Hunt *v.* Gaines, 33 Ark. 267; Ferguson *v.* Etter, 21 Ark. 160, 76 Am. Dec. 361; Bettison *v.* Budd, 17 Ark. 546, 65 Am. Dec. 442.

California.— Christy *v.* Fisher, 58 Cal. 256; Moss *v.* Shear, 25 Cal. 38, 85 Am. Dec. 94.

Illinois.— Burgett *v.* Taliaferro, 118 Ill. 503, 9 N. E. 334.

Kansas.— Waterson *v.* Devoe, 18 Kan. 223.

Michigan.— Blackwood *v.* Van Vleit, 30 Mich. 118.

New Hampshire.— Langley *v.* Batchelder, 69 N. H. 566, 46 Atl. 1085; Laton *v.* Balcom, 64 N. H. 92, 6 Atl. 37, 10 Am. St. Rep. 381; Saunders *v.* Farmer, 62 N. H. 572.

New Jersey.— Foley *v.* Kirk, 33 N. J. Eq. 170.

New York.— Williams *v.* Townsend, 31 N. Y. 411.

United States.— Kirlicks *v.* Interstate Bldg., etc., Assoc., 113 Fed. 290, 51 C. C. A. 318.

One who, having no interest in land, has it listed for taxes in his name, makes default in the payment of the taxes, bids in the property at the tax-sale, and receives the sheriff's deeds therefor, acquires no title to the land. Pope *v.* Wilder, 41 S. C. 540, 19 S. E. 996. And see Hudson *v.* Schumpert, 80 S. C. 22, 23, 61 S. E. 104, 105.

37. O'Halloran *v.* Fitzgerald, 71 Ill. 53; Sorenson *v.* Davis, 83 Iowa 405, 49 N. W. 1004.

38. Frierson *v.* Branch, 30 Ark. 453; Harrison *v.* Winston, 2 Tenn. Ch. 544.

39. *Iowa.*— Dohms *v.* Mann, 76 Iowa 723, 39 N. W. 823.

Louisiana.— Ingram *v.* Heintz, 112 La. 496, 36 So. 507.

Mississippi.— Wise *v.* Hyatt, 68 Miss. 714, 10 So. 37.

New Hampshire.— Thornton *v.* Gilman, 67 N. H. 392, 39 Atl. 900, guardian *de son tort.*

Tennessee.— McKee *v.* Dail, 1 Tenn. Ch. App. 689.

40. Seymour *v.* Harrison, 85 Iowa 130, 52 N. W. 114 (title defective because made in fraud of creditors and afterward set aside); Miltenberger *v.* Weems, 31 La. Ann. 259 (title of presumptive heir not shown to have accepted the succession, and who afterward renounced it); Atkinson *v.* Dixon, 89 Mo. 464, 1 S. W. 13 (person claiming title under a quitclaim deed but not in possession); Bannon *v.* Brandon, 34 Pa. St. 263, 75 Am. Dec. 655 (inchoate title by adverse possession).

41. Oswald *v.* Wolf, 129 Ill. 200, 21 N. E. 839; Griffin *v.* Turner, 75 Iowa 250, 39 N. W. 294; Lybrand *v.* Haney, 31 Wis. 230. *Compare* Chambers *v.* Wilson, 2 Watts (Pa.) 495.

Real and ostensible owner.— The real owner of property may buy it at a tax-sale made to satisfy taxes assessed against the ostensible owner, and the property will pass to him free from mortgages created upon it by the ostensible owner as a fraud upon him. Hillard *v.* Taylor, 114 La. 883, 38 So. 594.

42. Pleasants *v.* Scott, 21 Ark. 370, 76 Am. Dec. 403. *Compare* Ragsdale *v.* Alabama, etc., R. Co., 67 Miss. 106, 6 So. 630.

43. *Indiana.*— Cooper *v.* Jackson, 99 Ind. 566.

Kansas.— Howard Inv. Co. *v.* Benton Land Co., 5 Kan. App. 716, 46 Pac. 989.

Michigan.— Fells *v.* Barbour, 58 Mich. 49, 24 N. W. 672.

Minnesota.—American Baptist Missionary Union *v.* Hastings, 67 Minn. 303, 69 N. W. 1078. See Ross *v.* Cale, 94 Minn. 513, 103 N. W. 561.

Nebraska.— Toliver *v.* Stephenson, 83 Nebr. 747, 120 N. W. 450; Gibson *v.* Sexson, 82 Nebr. 475, 118 N. W. 77; Pitman *v.* Boner, 81 Nebr. 736, 116 N. W. 778.

New Jersey.—Ayers *v.* Casey, 72 N. J. L. 223, 61 Atl. 452.

Canada.— Lawlor *v.* Day, 29 Can. Sup. Ct. 441.

And see Mortgages, 27 Cyc. 1253.

44. *Arkansas.*— Ross *v.* Frick Co., 73 Ark. 45, 83 S. W. 343.

successive mortgagees of the same land can divest the lien of the other by such a purchase.[45]

4. Lien-Holders. The holder of a lien on land, by judgment or otherwise, is not debarred from buying it at a tax-sale and thereby cutting off other liens or divesting the title of the owner,[46] provided he has not placed himself, by contract or by taking possession and claiming title, in a position where it becomes his duty to pay the taxes.[47]

5. Dowress and Life-Tenants. A tenant for life cannot purchase at a tax-sale or acquire an interest adverse to the reversioner or remainder-man by obtaining an assignment of the tax title.[48] But a widow in possession of land after her husband's death, and before the assignment of dower to her, has been held entitled to purchase the property at a tax-sale.[49]

6. Joint Tenants, Tenants in Common, Etc. Where land is owned by joint tenants, coparceners, or tenants in common, and taxes are assessed upon it as a whole and it is sold for non-payment of the same, neither of the cotenants can purchase a title at the sale which shall be paramount to that of his companions or operate to dissolve the relationship; he has a claim upon the others for reimbursement, but his payment inures to the benefit of all.[50] But where the undivided

Colorado.— Barlow *v.* Hitzler, 40 Colo. 109, 90 Pac. 90.

Iowa.— Cone *v.* Wood, 108 Iowa 260, 79 N. W. 86, 75 Am. St. Rep. 223.

Kansas.— Manley *v.* Debentures B. Liquidation Co., 64 Kan. 573, 68 Pac. 31; Miller *v.* Ziegler, 31 Kan. 417, 2 Pac. 601.

New Jersey.— Farmer *v.* Ward, 75 N. J. Eq. 33, 71 Atl. 401.

South Dakota.— Rapid City First Nat. Bank *v.* McCarthy, 18 S. D. 218, 100 N. W. 14.

Washington.— Shepard *v.* Vincent, 38 Wash. 493, 80 Pac. 777.

And see Mortgages, 27 Cyc. 1253.

But *compare* the following cases, in which, under particular circumstances, purchases at tax-sales by mortgagees have been sustained: Spratt *v.* Price, 18 Fla. 289; Moore *v.* Boagni, 111 La. 490, 35 So. 716; Smith *v.* Reber, 1 Grant (Pa.) 217; Allen *v.* Dayton Hotel Co., 95 Tenn. 480, 32 S. W. 962; Kelly *v.* Macklem, 14 Grant Ch. (U. C.) 29; Schofield *v.* Dickenson, 10 Grant Ch. (U. C.) 226; Smart *v.* Cottle, 10 Grant Ch. (U. C.) 59.

Where several parties hold notes secured by the same mortgage, one of such lienholders cannot obtain the fee from the mortgagor in extinguishment of his claim, and then perfect his title as against his fellow lienholders, by subsequently acquiring a tax title under a lien on the land for taxes which existed at the time he acquired the fee therein. Gilman *v.* Heitman, 137 Iowa 336, 113 N. W. 932.

45. Frank *v.* Arnold, 73 Iowa 370, 35 N. W. 453; Garrettson *v.* Scofield, 44 Iowa 35; Gibson *v.* Gilman, 71 Kan. 320, 80 Pac. 587. *Compare* Connecticut Mut. L. Ins. Co. *v.* Bulte, 45 Mich. 113, 7 N. W. 707. See Mortgages, 27 Cyc. 1259.

46. Morrison *v.* Bank of Commerce, 81 Ind. 335; Wilson *v.* Jamison, 36 Minn. 59, 29 N. W. 887, 1 Am. St. Rep. 635. *Compare* Fair *v.* Brown, 40 Iowa 209.

47. Miller *v.* Ziegler, 31 Kan. 417, 2 Pac. 601; Faison *v.* Johnson, 70 Miss. 214, 12 So. 152.

48. *Arkansas.*— Swan *v.* Rainey, 59 Ark. 364, 27 S. W. 240.

Illinois.— Blair *v.* Johnson, 215 Ill. 552, 74 N. E. 747; Hanna *v.* Palmer, 194 Ill. 41, 61 N. E. 1051, 56 L. R. A. 93; Prettyman *v.* Walston, 34 Ill. 175.

Iowa.— Olleman *v.* Kelgore, 52 Iowa 38, 2 N. W. 612.

Kentucky.—Arnold *v.* Smith, 3 Bush 163.

Maine.— Varney *v.* Stevens, 22 Me. 331.

Mississippi.— Jones *v.* Merrill, 69 Miss. 747, 11 So. 23; Stewart *v.* Matheny, 66 Miss. 21, 5 So. 387, 14 Am. St. Rep. 538.

Tennessee.— Stovall *v.* Austin, 16 Lea 700.

Wisconsin.— Phelan *v.* Boylan, 25 Wis. 679.

United States.— Patrick *v.* Sherwood, 18 Fed. Cas. No. 10,804, 4 Blatchf. 112.

Purchaser from life-tenant.— Where the owner of an estate for life procures the issuance of a tax deed to himself, and then conveys the land by warranty deed, possession taken thereunder is adverse to the remainder-man, since the warranty deed is color of title in fee. Lewis *v.* Pleasants, 143 Ill. 271, 30 N. E. 323, 32 N. E. 384. And see Monro *v.* Rudd, 20 Grant Ch. (U. C.) 55.

49. Branson *v.* Yancy, 16 N. C. 77.

50. *Alabama.*— Johns *v.* Johns, 93 Ala. 239, 9 So. 419.

Arkansas.— Cocks *v.* Simmons, 55 Ark. 104, 17 S. W. 594, 29 Am. St. Rep. 28.

California.— Emeric *v.* Alvarado, 90 Cal. 444, 27 Pac. 356.

Illinois.— McChesney *v.* White, 140 Ill. 330, 29 N. E. 709; Burgett *v.* Taliaferro, 118 Ill. 503, 9 N. E. 334; Bracken *v.* Cooper, 80 Ill. 221; Busch *v.* Huston, 75 Ill. 343; Chickering *v.* Faile, 38 Ill. 342; Brown *v.* Hogle, 30 Ill. 119; Choteau *v.* Jones, 11 Ill. 300, 50 Am. Dec. 460.

Indiana.— Elston *v.* Piggott, 94 Ind. 14; Bender *v.* Stewart, 75 Ind. 88.

Iowa.— Clark *v.* Brown, 70 Iowa 139, 30 N. W. 46; Smith *v.* Smith, 68 Iowa 608, 27

interests of the tenants in common are separately assessed, or where the statute provides that either may relieve his undivided share from the lien of the assessment by paying a proportionate amount of the tax, it is considered that a cotenant who has paid his share may buy the other's interest when it is sold for taxes.[51] A partition effected before the assessment of the particular tax leaves either party free to purchase, but not so where the division is made after the assessment, although before the sale.[52] One who has parted with his interest and ceased to be connected with the title as a tenant in common may buy an outstanding tax title;[53] and if the purchase at the tax-sale is made by an entire stranger, and the title is held by him until it has become fixed and mature, either of the former cotenants may then buy from him without restoring the relation of cotenancy or

N. W. 780; Dickinson *v.* White, 64 Iowa 708, 21 N. W. 153; Conn *v.* Conn, 58 Iowa 747, 13 N. W. 51; Shell *v.* Walker, 54 Iowa 386, 6 N. W. 581; Sheean *v.* Shaw, 47 Iowa 411; Fallon *v.* Chidester, 46 Iowa 588, 26 Am. Rep. 164; Weare *v.* Van Meter, 42 Iowa 128, 20 Am. Rep. 616.

Kansas.— Delashmutt *v.* Parrent, 39 Kan. 548, 18 Pac. 712; Muthersbaugh *v.* Burke, 33 Kan. 260, 6 Pac. 252.

Kentucky.— Venable *v.* Beauchamp, 3 Dana 321, 28 Am. Dec. 74.

Michigan.— Richards *v.* Richards, 75 Mich. 408, 42 N. W. 954; Dubois *v.* Campau, 24 Mich. 360; Cooley *v.* Waterman, 16 Mich. 366; Butler *v.* Porter, 13 Mich. 292.

Minnesota.— Holterhoff *v.* Mead, 36 Minn. 42, 29 N. W. 675.

Mississippi.— Howell *v.* Shannon, 80 Miss. 598, 31 So. 965, 92 Am. St. Rep. 609; Ragsdale *v.* Alabama, etc., R. Co., 67 Miss. 106, 6 So. 630; Fox *v.* Coon, 64 Miss. 465, 1 So. 629; Harrison *v.* Harrison, 56 Miss. 174; Allen *v.* Poole, 54 Miss. 323.

New Hampshire.— Barker *v.* Jones, 62 N. H. 497, 13 Am. St. Rep. 413.

Ohio.— Piatt *v.* St. Clair, 6 Ohio 227.

Pennsylvania.— Davis *v.* King, 87 Pa. St. 261; Maul *v.* Rider, 51 Pa. St. 377; Lloyd *v.* Lynch, 28 Pa. St. 419, 70 Am. Dec. 137.

Vermont.— Downer *v.* Smith, 38 Vt. 464; Willard *v.* Strong, 14 Vt. 532, 39 Am. Dec. 240.

Wisconsin.— Perkins *v.* Wilkinson, 86 Wis. 538, 57 N. W. 371; Phelan *v.* Boylan, 25 Wis. 679; State *v.* Williston, 20 Wis. 228.

United States.— Bissell *v.* Foss, 114 U. S. 252, 5 S. Ct. 851, 29 L. ed. 126; Baker *v.* Whiting, 2 Fed. Cas. No. 787, 3 Sumn. 475.

See 29 Cent. Dig. tit. "Joint Tenancy," § 11; 45 Cent. Dig. tit. "Tenancy in Common," §§ 60, 61. And see JOINT TENANCY, 23 Cyc. 492; TENANCY IN COMMON.

Applications of rule.—The rule stated in the text applies to the husband of a tenant in common or coheiress; he cannot obtain title as against her cotenant by purchase at a tax-sale. Busch *v.* Huston, 75 Ill. 343; Burns *v.* Byrne, 45 Iowa 285; Austin *v.* Barrett, 44 Iowa 488; Robinson *v.* Lewis, 68 Miss. 69, 8 So. 258, 24 Am. St. Rep. 254, 10 L. R. A. 101; Chace *v.* Durfee, 16 R. I. 248, 14 Atl. 919. But see Broquet *v.* Warner, 43 Kan. 48, 22 Pac. 1004, 19 Am. St. Rep. 124. So a trustee holding the legal title to an undivided interest in the land cannot acquire a tax title adverse to the cotenants of his *cestui que trust.* Sorenson *v.* Davis, 83 Iowa 405, 49 N. W. 1004. And the grantee of a tenant in common cannot divest the interests of the cotenants of his grantor by buying at tax-sale. Tice *v.* Derby, 59 Iowa 312, 13 N. W. 301; Austin *v.* Barrett, 44 Iowa 488; Flinn *v.* McKinley, 44 Iowa 68. But *compare* Sands *v.* Davis, 40 Mich. 14. And see St. Mary's Power Co. *v.* Chandler-Dunbar Water Power Co., 133 Mich. 470, 95 N. W. 554. But on the other hand, the owner of mineral rights under a reservation in a deed of the surface of the lands may purchase the estate of the other at tax-sale, since they are not cotenants. Hutchinson *v.* Kline, 199 Pa. St. 564, 49 Atl. 312. And a purchaser at mortgage foreclosure sale, acquiring title to an undivided interest in the land, although he occupies in law the position of a tenant in common with the mortgagor, may take title to the remainder of the property by purchase of an outstanding tax title of the whole. Wright *v.* Sperry, 21 Wis. 331.

Title good against strangers.— A title thus acquired under a tax-sale by one of the cotenants will be good as against strangers. Burgett *v.* Williford, 56 Ark. 187, 19 S. W. 750, 35 Am. St. Rep. 96.

As foundation of claim of adverse possession.— Although a cotenant wrongfully purchases the property at tax-sale, yet if he takes out a tax deed and holds possession of the property for twenty years, claiming to be the exclusive owner, he may acquire a complete title by adverse possession. English *v.* Powell, 119 Ind. 93, 21 N. E. 458. But see Davis *v.* Chapman, 24 Fed. 674.

Remedy of cotenants.— Where the statute makes a tax deed *prima facie* evidence of title, the only remedy of the cotenants against one wrongfully taking a tax title to the whole estate is in equity; they have no title to support an action at law. Johns *v.* Johns, 93 Ala. 239, 9 So. 419.

51. Bennet *v.* North Colorado Springs Land, etc., Co., 23 Colo. 470, 48 Pac. 812, 58 Am. St. Rep. 281; Butler *v.* Porter, 13 Mich. 292; Willard *v.* Strong, 14 Vt. 532, 39 Am. Dec. 240.

52. Maul *v.* Rider, 51 Pa. St. 377.

53. Jonas *v.* Flanniken, 69 Miss. 577, 11 So. 319.

being required to hold in trust for the others,[54] provided this is not done in pursuance of an arrangement or scheme to use the stranger as a cover and oust the cotenants.[55]

7. Husband and Wife. It is a general rule that neither husband nor wife can purchase the other's land at a tax-sale,[56] although there are some authorities to the effect that the wife may thus purchase her husband's lands, where she is not under any obligation to pay the taxes, provided she acts in good faith and uses her own money.[57]

8. Agents and Attorneys.[58] It is a breach of trust for an agent or attorney having the management and control of real estate to purchase it at a tax-sale; and such a purchase vests no title in him, but inures to the benefit of the owner.[59]

54. Coleman *v.* Coleman, 3 Dana (Ky.) 398, 28 Am. Dec. 86; Reinboth *v.* Zerbe Run Imp. Co., 29 Pa. St. 139; Kirkpatrick *v.* Mathiot, 4 Watts & S. (Pa.) 251; Lewis *v.* Robinson, 10 Watts (Pa.) 354; Keele *v.* Cunningham, 2 Heisk. (Tenn.) 288; Clark *v.* Cantwell, 3 Head (Tenn.) 202. And see Alexander *v.* Sully, 50 Iowa 192; Frentz *v.* Klotsch, 28 Wis. 312. *Contra*, Sorenson *v.* Davis, 83 Iowa 405, 49 N. W. 1004; Dubois *v.* Campau, 24 Mich. 360; Battin *v.* Woods, 27 W. Va. 58.

55. Lomax *v.* Gindele, 117 Ill. 527, 7 N. E. 483; Hurley *v.* Hurley, 148 Mass. 444, 19 N. E. 545, 2 L. R. A. 172; Minter *v.* Durham, 13 Oreg. 470, 11 Pac. 231.

56. Thorington *v.* Montgomery, 94 Ala. 266, 10 So. 634; Herrin *v.* Henry, 75 Ark. 273, 87 S. W. 430; Warner *v.* Broquet, 54 Kan. 649, 39 Pac. 228 [*overruling* Broquet *v.* Warner, 43 Kan. 48, 22 Pac. 1004, 19 Am. St. Rep. 124]; Laton *v.* Balcom, 64 N. H. 92, 6 Atl. 37, 10 Am. St. Rep. 381. Where a husband and wife reside upon a tract of land in which the wife has a life-estate, the husband enjoying the rents and profits thereof, he acquires no interest in the land by omitting to pay the taxes, and thereafter purchasing from the tax title holder; but the transaction results only in a redemption from the tax-sale. Peck *v.* Ayres, 79 Kan. 457, 100 Pac. 283.

57. Willard *v.* Ames, 130 Ind. 351, 30 N. E. 210; Nagle *v.* Tieperman, 74 Kan. 32, 85 Pac. 941, 88 Pac. 969; Day *v.* Rutledge, 12 Manitoba 290 [*affirmed* in 29 Can. Sup. Ct. 441]. But *compare* Swift *v.* Agnes, 33 Wis. 228.

58. Attorney for tax collector see *infra*, XI, H, 12.

59. *Arkansas.*— Grober *v.* Clements, 71 Ark. 565, 76 S. W. 555, 100 Am. St. Rep. 91; Sanders *v.* Ellis, 42 Ark. 215; Wright *v.* Walker, 30 Ark. 44.

California.— Bernal *v.* Lynch, 36 Cal. 135 [*affirmed* in 9 Wall. (U. S.) 315, 19 L. ed. 714].

Illinois.— Gonzalia *v.* Bartelsman, 143 Ill. 634, 32 N. E. 532; Houston *v.* Buer, 117 Ill. 324, 7 N. E. 646; Barton *v.* Moss, 32 Ill. 50.

Iowa.— Bowman *v.* Officer, 53 Iowa 640, 6 N. W. 28.

Kansas.— Cunningham *v.* Jones, 37 Kan. 477, 15 Pac. 572, 1 Am. St. Rep. 257; Woodman *v.* Davis, 32 Kan. 344, 4 Pac. 262; Fisher *v.* Krutz, 9 Kan. 501.

Kentucky.— Oldhams *v.* Jones, 5 B. Mon. 458.

Maine.— Matthews *v.* Light, 32 Me. 305.

Michigan.— Linsley *v.* Sinclair, 24 Mich. 380.

Missouri.— Murdoch *v.* Milner, 84 Mo. 96.

Pennsylvania.— Bartholomew *v.* Leech, 7 Watts 472; Elliott *v.* Tyler, 3 Pa. Cas. 584, 6 Atl. 917.

Tennessee.— State *v.* Goldberg, 113 Tenn. 298, 86 S. W. 717.

West Virginia.— Siers *v.* Wiseman, 58 W. Va. 340, 52 S. E. 460; Curtis *v.* Borland, 35 W. Va. 124, 12 S. E. 1113; Franks *v.* Morris, 9 W. Va. 664; Morris *v.* Joseph, 1 W. Va. 256, 91 Am. Dec. 386.

Wisconsin.— Superior First Nat. Bank *v.* Douglas County, 124 Wis. 15, 102 N. W. 315; Fox *v.* Zimmermann, 77 Wis. 414, 46 N. W. 533; McMahon *v.* McGraw, 26 Wis. 614.

United States.— Persons *v.* Beling, 116 Fed. 877 [*affirmed* in 126 Fed. 449, 62 C. C. A. 63]; Schedda *v.* Sawyer, 21 Fed. Cas. No. 12,443, 4 McLean 181.

See Attorney and Client, 4 Cyc. 958; Principal and Agent, 31 Cyc. 1446.

Volunteer agent.— If land belonging to minors is selling for taxes, and a friend of the family buys it with his own money, and takes a deed to himself in trust for the minors, and gives his own bond for the surplus purchase-money, the title thereby made is as good and effectual in him as if no such trust had been expressed in the deed. Until the minors come of age it is unknown whether they will accept the purchase and repay his money, or refuse to pay and leave the land his. If he had bought with money furnished by the family, the case might fall within the rule forbidding a man to buy, directly or indirectly, his own land at a tax-sale. Harper *v.* McKeehan, 3 Watts & S. (Pa.) 238.

Where property is returned for taxes in the name of "Unknown," but represented by a third person, who bids in the land at a tax-sale and obtains a sheriff's deed, the third person acquires no title. Hudson *v.* Schumpert, 80 S. C. 22, 23, 61 S. E. 104, 105. And see Pope *v.* Wilder, 41 S. C. 540, 19 S. E. 996.

Attorneys at law.— The mere fact that the tax purchaser had been, during the life of the deceased owner, his attorney in certain suits would not cast upon him any

But the existence of a previous agency of this kind will not disqualify the person from purchasing if it has been finally terminated or explicitly renounced.[60] Some decisions, however, hold a purchase made in violation of such a trust to be only voidable at the option of the principal, who, if he wishes to set it aside, must refund the money paid;[61] and it appears that if the agent, after making such a purchase, conveys the premises to an innocent grantee for value, the latter will be protected against the equities of the former owner.[62]

9. Landlord and Tenant. A tenant in possession of land who has stipulated or is required by statute to pay the taxes cannot acquire any rights as against his landlord by a purchase at tax-sale.[63] But if the tenant is not bound, either by contract or by statute, to keep down the taxes, there are some decisions to the effect that he may lawfully buy the premises at a tax-sale,[64] although the doctrine generally accepted is that the relation between the parties will not permit the tenant to take advantage of the omission of his landlord to pay the taxes and obtain an independent title to the land through a tax-sale.[65]

10. Claimants of Title. If a person in the occupation of land is a mere intruder, holding the bare possession without any claim or color of title, there is nothing in his relation to the land or to the real owner to disqualify him from buying at a tax-sale;[66] but if he is in possession under claim and color of title, it

duty to pay the taxes or affect his right to purchase. Pack *v.* Crawford, 29 Ark. 489. But it is otherwise if he is counsel for the owner in any matter relating to the title. Wright *v.* Walker, 30 Ark. 44; Lynn *v.* Morse, 76 Iowa 665, 39 N. W. 203; Paul *v.* Hill, 3 Tenn. Ch. 443.

60. Williamson *v.* Mimms, 49 Ark. 336, 5 S. W. 320; Pack *v.* Crawford, 29 Ark. 489; Bartholemew *v.* Leech, 7 Watts (Pa.) 472; McLeod *v.* Waterman, 10 Brit. Col. 42.

61. Ellsworth *v.* Cordrey, 63 Iowa 675, 16 N. W. 211; Connecticut Mut. L. Ins. Co. *v.* Bulte, 45 Mich. 113, 7 N. W. 707. See Adams *v.* Sayre, 70 Ala. 318.

62. Lamb *v.* Davis, 74 Iowa 719, 39 N. W. 114.

63. *Arkansas.*— Hunt *v.* Gaines, 33 Ark. 267.

Illinois.— Burgett *v.* Taliaferro, 118 Ill. 503, 9 N. E. 334; Busch *v.* Huston, 75 Ill. 343.

Kansas.— St. Clair *v.* Craig, 77 Kan. 394, 94 Pac. 790; Duffitt *v.* Tuhan, 28 Kan. 292.

Maine.— Dunn *v.* Snell, 74 Me. 22; Haskell *v.* Putnam, 42 Me. 244.

Maryland.— Lansburgh *v.* Donaldson, 108 Md. 689, 71 Atl. 88.

Michigan.— Bertram *v.* Cook, 32 Mich. 518.

New Jersey.— Smith *v.* Specht, 58 N. J. Eq. 47, 42 Atl. 599, liability imposed by statute.

Vermont.— Blake *v.* Howe, 1 Aik. 306, 15 Am. Dec. 681.

West Virginia.— Williamson *v.* Russell, 18 W. Va. 612.

Wisconsin.— Shepardson *v.* Elmore, 19 Wis. 424.

See Landlord and Tenant, 24 Cyc. 954.

Tenant occupying rent-free.— One who occupies land free of rent, with the consent of the owner, but without any agreement as to the payment of taxes, cannot divest the owner's title by a purchase at tax-sale. Duffitt *v.* Tuhan, 28 Kan. 292. But see Uhl *v.* Small, 54 Kan. 651, 39 Pac. 178, holding that such an occupant may buy in a tax title founded on a tax-sale made prior to his possession.

Licensee.— The licensee of real estate cannot acquire a tax title thereto as against his licensor. Keokuk, etc., R. Co. *v.* Lindley, 48 Iowa 11. But *compare* Munroe *v.* Winegar, 128 Mich. 309, 87 N. W. 396.

64. Waggener *v.* McLaughlin, 33 Ark. 195; Ferguson *v.* Etter, 21 Ark. 160, 76 Am. Dec. 361; Bettison *v.* Budd, 17 Ark. 546, 65 Am. Dec. 442; Weichselbaum *v.* Curlett, 20 Kan. 709, 27 Am. Rep. 204.

65. *Alabama.*— Jackson *v.* King, 82 Ala. 432, 3 So. 232.

Florida.— Petty *v.* Mays, 19 Fla. 652.

Georgia.— Brinson *v.* Lassiter, 81 Ga. 40, 6 S. E. 468.

Iowa.— Curtis *v.* Smith, 42 Iowa 665.

Mississippi.— Gaskins *v.* Blake, 27 Miss. 675.

Wisconsin.— Lacy *v.* Johnson, 58 Wis. 414, 17 N. W. 246.

United States.— Horner *v.* Dellinger, 18 Fed. 495.

See Landlord and Tenant, 24 Cyc. 954.

66. *Arkansas.*— Palmer *v.* Ozark Land Co., 74 Ark. 253, 85 S. W. 408. But see Rodman *v.* Sanders, 44 Ark. 504; Sanders *v.* Ellis, 42 Ark. 215.

California.— Barrett *v.* Amerein, 36 Cal. 322; Moss *v.* Shear, 25 Cal. 38, 85 Am. Dec. 94.

Illinois.— Pickering *v.* Lomax, 120 Ill. 289, 11 N. E. 175; Seaver *v.* Cobb, 98 Ill. 200; Blakeley *v.* Bestor, 13 Ill. 708.

Iowa.— Curtis *v.* Smith, 42 Iowa 665.

Kansas.—Ard *v.* Pratt, 53 Kan. 632, 36 Pac. 995.

Michigan.— Blackwood *v.* Van Vleit, 30 Mich. 118.

Wisconsin.— Link *v.* Doerfer, 42 Wis. 391, 24 Am. Rep. 417.

See 45 Cent. Dig. tit. "Taxation," §§ 1357, 1358.

is his duty to pay the taxes, and therefore he cannot purchase;[67] and irrespective of the question of possession, the rule is sometimes broadly laid down that any person who buys at a tax-sale land to which he claims title does not thereby strengthen his title, but only removes the encumbrance created by the tax lien.[68] As to the holder of a tax title, it is held that if he is in possession under his deed, his title is not strengthened by successive purchases at subsequent sales of the same land for taxes;[69] but that one who holds a tax deed, whether valid or void, under which he has not gone into possession, may abandon all claim of title under it and buy at a subsequent tax-sale.[70]

11. Vendors and Purchasers. A grantor of land on which taxes are delinquent cannot destroy the estate of his vendee by buying at the tax-sale, but his purchase is regarded as no more than a payment of the taxes.[71] Similarly a vendee who is in possession of land under an executory contract for its purchase, particularly if he has stipulated to keep down the taxes, cannot buy the land at a tax-sale and set up the title so acquired against his vendor.[72] But when an oral contract for the sale of land has been broken, or when, in the case of a formal contract, the vendor has accepted a surrender of it and released the vendee, the latter may thereafter purchase the land at a sale for taxes, although they were

But *compare* Wilkes *v.* Elliot, 29 Fed. Cas. No. 17,660, 5 Cranch C. C. 611. And see Gaskins *v.* Blake, 27 Miss. 675.

67. *California.*— Reily *v.* Lancaster, 39 Cal. 354; Barrett *v.* Amerein, 36 Cal. 322; Bernal *v.* Lynch, 36 Cal. 135; Coppinger *v.* Rice, 33 Cal. 408; McMinn *v.* Whelan, 27 Cal. 300; Kelsey *v.* Abbott, 13 Cal. 609.

Georgia.— Burns *v.* Lewis, 86 Ga. 591, 13 S. E. 123.

Kansas.— Menger *v.* Carruthers, 3 Kan. App. 75, 44 Pac. 1096.

Michigan.— Lacey *v.* Davis, 4 Mich. 140, 66 Am. Dec. 524.

Ohio.— Douglas *v.* Dangerfield, 10 Ohio 152.

Wisconsin.— Whitney *v.* Gunderson, 31 Wis. 359; Jones *v.* Davis, 24 Wis. 229; Bassett *v.* Welch, 22 Wis. 175.

United States.— Le Roy *v.* Reeves, 15 Fed. Cas. No. 8,272, 5 Sawy. 102.

See 45 Cent. Dig. tit. "Taxation," §§ 1357. 1358.

68. Jacks *v.* Dyer, 31 Ark. 334; Choteau *v.* Jones, 11 Ill. 300, 50 Am. Dec. 460; Smith *v.* Cassidy, 75 Miss. 916, 23 So. 427; Pope *v.* Wilder, 41 S. C. 540, 19 S. E. 996. But *compare* Curtis *v.* Smith, 42 Iowa 665; Blackwood *v.* Van Vleit, 30 Mich. 118; Coxe *v.* Gibson, 27 Pa. St. 160, 67 Am. Dec. 454; Lybrand *v.* Haney, 31 Wis. 230.

Claim of title under void deed.— One who holds a quitclaim deed which conveys no title for lack of title in the grantor is not precluded from buying the same land at tax-sale, if he has not gone into possession under his deed (Atkison *v.* Dixon, 89 Mo. 464, 1 S. W. 13), or even where he has taken possession (Curtis *v.* Smith, 42 Iowa 665). And see Pickering *v.* Lomax, 120 Ill. 289, 11 N. E. 175.

Controversy as to title.— Where there is a *bona fide* controversy as to the title, and one of the claimants is in possession, he owes no duty to the other to keep the taxes paid, and he may therefore strengthen his claim by procuring a tax title. Jeffery *v.* Hursh, 45 Mich. 59, 7 N. W. 221. But *compare* Butterfield *v.* Walsh, 36 Iowa 534.

69. Tweed *v.* Metcalf, 4 Mich. 579; Lacey *v.* Davis, 4 Mich. 140, 66 Am. Dec. 524. And see Paul *v.* Fries, 18 Fla. 573; Stubblefield *v.* Borders 92 Ill. 279. But see McDonald *v.* Kelson, 79 Kan. 105, 98 Pac. 772, 28 L. R. A. N. S. 1080, holding that the holder of a tax deed, which has been set aside in an action of ejectment, and who has been given a lien for taxes, may rightfully purchase the premises at a subsequent tax-sale, for he is under no obligation to pay taxes, since he remains in possession to secure the satisfaction of his judgment lien for taxes.

70. Staley *v.* Leomans, 53 Ark. 428, 14 S. W. 646, 22 Am. St. Rep. 231; Neal *v.* Frazier, 63 Iowa 451, 19 N. W. 309; Mallory *v.* French, 44 Iowa 133; Coxe *v.* Gibson, 27 Pa. St. 160, 67 Am. Dec. 454; Eaton *v.* North, 29 Wis. 75.

71. Osceola Land Co. *v.* Henderson, 81 Ark. 432, 100 S. W. 896; Frank *v.* Caruthers, 108 Mo. 569, 18 S. W. 927. See Powell *v.* Lantzy, 173 Pa. St. 543, 34 Atl. 450; Cox *v.* Gibson, 27 Pa. St. 160, 67 Am. Dec. 454.

Quitclaim deed.— But where the grantor in a quitclaim deed, not containing any covenants of seizin or warranty, subsequently takes a tax deed of the land, the title under it will not inure to the benefit of the grantee. Sydnor *v.* Palmer, 29 Wis. 226.

72. *Arkansas.*—Fitzgerald *v.* Spain, 30 Ark. 95.

Georgia.— University Bank *v.* Athens Sav. Bank, 107 Ga. 246, 33 S. E. 34.

Illinois.— Oliver *v.* Croswell, 42 Ill. 41; Baily *v.* Doolittle, 24 Ill. 577; Voris *v.* Thomas, 12 Ill. 442.

Iowa.— Stinson *v.* Richardson, 48 Iowa 541; Hunt *v.* Rowland, 22 Iowa 53.

Maine.— Haskell *v.* Putnam, 42 Me. 244; Gardiner *v.* Gerrish, 23 Me. 46.

Michigan.— Ball *v.* Harpham, 140 Mich. 661, 104 N. W. 353; Simons *v.* Rood, 129 Mich. 345, 88 N. W. 879; Bertram *v.* Cook, 32 Mich. 518.

assessed on it during his tenancy.[73] A purchaser of land at judicial sale is generally bound to pay the accruing taxes during the period allowed for redemption or before confirmation by the court, and therefore cannot acquire a new title by buying it at tax-sale.[74] But after such a sale is vacated or set aside, he is under no such disability.[75]

12. Public Officers. A tax collector, treasurer, or other officer cannot personally or by an agent purchase real estate at an official sale thereof, made by himself, for delinquent taxes thereon, and he acquires no title by such a purchase.[76] Neither can he act in such a purchase as the agent of a third person.[77] And the same rule is generally applied to all public officers who have any duties to perform in connection with advertising or selling the lands or recording the sales or issuing tax deeds.[78] But clerks or deputies are not generally within the pro-

Tennessee.— Brien *v.* Paul, 3 Tenn. Ch. 357.

73. Shoup *v.* Central Branch Union Pac. R. Co., 24 Kan. 547; Ball *v.* Harpham, 140 Mich. 661, 104 N. W. 353.

74. Kelsey *v.* Abbott, 13 Cal. 609; Pool *v.* Ellis, 64 Miss. 555, 1 So. 725. See Vaughn *v.* Stone, 54 Iowa 376, 2 N. W. 973, 6 N. W. 596.

Right of original owner.— Where property sold at execution sale is afterward sold at tax-sale, on an assessment against the purchaser at execution sale, the original owner can purchase the property from the latter and possess it for himself. Gauthier *v.* Cason, 107 La. 52, 31 So. 386.

75. Thayer *v.* Hartman, 78 Miss. 590, 29 So. 396.

76. *Illinois.*— Maher *v.* Brown, 183 Ill. 575, 56 N. E. 181.

Iowa.— Kirk *v.* St. Thomas' Church, 70 Iowa 287, 30 N. W. 569.

Kansas.— Sponable *v.* Woodhouse, 48 Kan. 173, 29 Pac. 394; Spicer *v.* Rowland, 39 Kan. 740, 18 Pac. 908; Galbraith *v.* Drought, 24 Kan. 590; Haxton *v.* Harris, 19 Kan. 511.

Maine.— Payson *v.* Hall, 30 Me. 319.

Massachusetts.— Pierce *v.* Benjamin, 14 Pick. 356, 25 Am. Dec. 396.

Michigan.— Wait *v.* Gardiner, 123 Mich. 236, 81 N. W. 1098; Clute *v.* Barron, 2 Mich. 192.

Mississippi.— McLeod *v.* Burkhalter, 57 Miss. 65.

Pennsylvania.— Schuylkill County *v.* Petery, 129 Pa. St. 121, 18 Atl. 740; Fox *v.* Cash, 11 Pa. St. 207; Powel *v.* Barrington, 1 Pa. L. J. 158.

Vermont.— Crahan *v.* Chittenden, 82 Vt. 210, 74 Atl. 86; Chandler *v.* Moulton, 33 Vt. 245.

Virginia.— Taylor *v.* Stringer, 1 Gratt. 158.

Washington.—Coughlin *v.* Holmes, 53 Wash. 692, 102 Pac. 772.

Wisconsin.— Gilbert *v.* Dutruit, 91 Wis. 661, 65 N. W. 511; Coleman *v.* Hart, 37 Wis. 180.

Canada.— Mooney *v.* Smith, 17 Ont. 644; *In re* Cameron, 14 Grant Ch. (U. C.) 612.

See 45 Cent. Dig. tit. "Taxation," § 1359.

Contra.— Turner *v.* Gregory, 151 Mo. 100, 52 S. W. 234; Walcott *v.* Hand, 122 Mo. 621, 27 S. W. 331.

Purchase by wife of collector.— But a sale for taxes is not invalidated by the fact that the purchaser was the wife of the collector conducting the sale, in the absence of any fraud or irregularity. Means *v.* Haley, 84 Miss. 550, 36 So. 257, 86 Miss. 557, 38 So. 506.

Sale voidable or void.— In Iowa it is held that a sale thus made to a public officer is not void but voidable only, and the fraud of the officer will not defeat the title based thereon, when held by a subsequent purchaser for value without notice, save upon proper proceedings instituted therefor; and the right to have such a sale set aside may become barred by the statute of limitations. Lawrence *v.* Hornick, 81 Iowa 193, 46 N. W. 987; Ellis *v.* Peck, 45 Iowa 112.

77. Everett *v.* Beebe, 37 Iowa 452; Corbin *v.* Beebe, 36 Iowa 336; Payson *v.* Hall, 30 Me. 319; Crahan *v.* Chittenden, 82 Vt. 410, 74 Atl. 86.

78. *Arkansas.*— Cole *v.* Moore, 34 Ark. 582.

California.— Martin *v.* Parsons, 50 Cal. 498.

Georgia.— Wilkins *v.* Benning, 51 Ga. 9.

Michigan.— Youngs *v.* Povey, 127 Mich. 297, 86 N. W. 809.

Mississippi.— Barker *v.* Jackson, 90 Miss. 621, 44 So. 34, chancery clerk.

Canada.— Greenstreet *v.* Paris, 21 Grant Ch. (U. C.) 229; Beckett *v.* Johnston, 22 U. C. C. P. 301. See Totten *v.* Truax, 16 Ont. 490.

See 45 Cent. Dig. tit. "Taxation," § 1359.

But *compare* Cuttle *v.* Brockway, 32 Pa. St. 45; Gilbert *v.* Dutruit, 91 Wis. 661, 65 N. W. 511; O'Reilly *v.* Holt, 18 Fed. Cas. No. 10,563, 4 Woods 645. And see Wolcott *v.* Hand, 122 Mo. 621, 27 S. W. 331, sustaining a purchase by a tax collector under a tax-sale by the sheriff.

County attorney.— Sayles Annot. Civ. St. Tex. (1897) art. 5232*g*, providing that, where there is no bidder for land offered for sale for taxes, the county attorney shall bid the same off to the state, etc., does not render a purchase by the county attorney for his own use void as contrary to public policy; the state being a purchaser only when there are no bidders. Gibbs *v.* Scales, (Civ. App. 1909) 118 S. W. 188.

An attorney for a tax collector at the time tax proceedings are begun but not really attorney for the tax collector in office at the time of a tax-sale may become purchaser of the

hibition unless positively forbidden by statute,[79] except in cases where they take the place of their principals and conduct the sale.[80]

13. Indirect Purchase by Disqualified Person. A person who is disqualified from purchasing land at a tax-sale, either by reason of his relation to the title, his duty to the owner, or his character as a public officer, will not be allowed to acquire a valid title to such land indirectly, by procuring another person to figure as the ostensible purchaser at the sale and then taking an assignment of the certificate or a deed from such person on refunding him the money expended.[81]

14. Purchase by State or Municipality and Resale — a. Conditions Under Which Purchase May Be Made. A city, county, or other municipal corporation cannot buy lands at tax-sale unless expressly authorized to do so by statute, and then only to the extent and in the cases prescribed by the statute.[82] Generally speaking, the statutes authorize or direct a purchase by the state or municipality only in case the land remains unsold for want of bidders, or after it has been twice offered for sale to private bidders without success.[83] Under some statutes the

property at the tax-sale. Walker *v.* Mills, 210 Mo. 684, 109 S. W. 44.

79. *Arkansas.*— Hare *v.* Carnall, 39 Ark. 196.

Iowa.— Kirk *v.* St. Thomas' Church, 70 Iowa 287, 30 N. W. 569; Ellis *v.* Peck, 45 Iowa 112 (effect of statutory prohibition); Lorain *v.* Smith, 37 Iowa 67.

Kentucky.— Morton *v.* Waring, 18 B. Mon. 72.

Mississippi.— Mixon *v.* Clevenger, 74 Miss. 67, 20 So. 148; Browne *v.* Carlisle, 62 Miss. 595.

New Hampshire.— Wells *v.* Jackson Iron Mfg. Co., 47 N. H. 235, 90 Am. Dec. 575.

Pennsylvania.— Fox *v.* Cash, 111 Pa. St. 207.

Wisconsin.— Coleman *v.* Hart, 37 Wis. 180.

United States.— O'Reilly *v.* Holt, 18 Fed. Cas. No. 10,563, 4 Woods 645.

See 45 Cent. Dig. tit. "Taxation," § 1359.

Compare, however, Coughlin *v.* Holmes, 53 Wash. 692, 102 Pac. 772, holding that a sale of land for taxes by the county treasurer either to himself or to his deputy is against public policy.

80. Straus *v.* Head, 21 S. W. 537, 14 Ky. L. Rep. 740; Hall *v.* Collins, 117 Mich. 617, 76 N. W. 72.

81. *Alabama.*— Thorington *v.* Montgomery, 88 Ala. 548, 7 So. 363.

Arkansas.— Rowland *v.* Wadly, 71 Ark. 273, 72 S. W. 994; Guynn *v.* McCauley, 32 Ark. 97.

California.— Shay *v.* McNamara, 54 Cal. 169; Bernal *v.* Lynch, 36 Cal. 135.

Illinois.— McAlpine *v.* Zitzer, 119 Ill. 273, 10 N. E. 901.

Iowa.— Lindley *v.* Snell, 80 Iowa 103, 45 N. W. 726; Frank *v.* Arnold, 73 Iowa 370, 35 N. W. 453; Hain *v.* Robinson, 72 Iowa 735, 32 N. W. 417. See Busch *v.* Hall, 119 Iowa 279, 93 N. W. 356.

Kansas.— Stewart *v.* Elliott, 63 Kan. 851, 66 Pac. 986.

Louisiana.— Montgomery *v.* Whitfield, 41 La. Ann. 649, 6 So. 224.

Oklahoma.— Brooks *v.* Garner, 20 Okla. 236, 94 Pac. 694, 97 Pac. 995.

Wisconsin.— Swift *v.* Agnes, 33 Wis. 228.

See 45 Cent. Dig. tit. "Taxation," § 1358.

But the mere fact that an agent purchasing a tax title for another stands in such a relation to the property that he would not be permitted to acquire a tax title thereon for himself will not affect a purchase by him at tax-sale for his principal. Jury *v.* Day, 54 Iowa 573, 6 N. W. 893.

82. *Illinois.*— Champaign *v.* Harmon, 93 Ill. 491.

Indiana.— Logansport *v.* Humphrey, 84 Ind. 467.

Iowa.— Bruck *v.* Broesigks, 18 Iowa 393.

Montana.— Rush *v.* Lewis, etc., County, 36 Mont. 566, 93 Pac. 943, 37 Mont. 240, 95 Pac. 836.

Oklahoma.— Keller *v.* Hawk, 19 Okla. 407, 91 Pac. 778.

Wisconsin.— Jackson *v.* Jacksonport, 56 Wis. 310, 14 N. W. 296.

See 45 Cent. Dig. tit. "Taxation," § 1361. And see Municipal Corporations, 28 Cyc. 1721.

Compare Keller *v.* Wilson, 90 Ky. 350, 14 S. W. 332, 12 Ky. L. Rep. 471.

83. See the statutes of the different states. And see the following cases:

Arkansas.—Neal *v.* Wideman, 59 Ark. 5, 26 S. W. 16, sale to the state must be confirmed.

California.— See Young *v.* Patterson, 9 Cal. App. 469, 99 Pac. 552, tax deed to state.

Colorado.— Charlton *v.* Kelly, 24 Colo. 273, 50 Pac. 1042 [*reversing* 7 Colo. App. 301, 43 Pac. 455]; Charlton *v.* Toomey, 7 Colo. App. 304, 43 Pac. 454.

Florida.— Orlando *v.* Equitable Bldg., etc., Assoc., 45 Fla. 507, 33 So. 986.

Illinois.— Biggins *v.* People, 106 Ill. 270; Douthett *v.* Kettle, 104 Ill. 356, statute authorizing suit to be brought for delinquent taxes in the name of the proper county is broad enough to authorize such county to purchase land at a sale under the judgment.

Kansas.— The county is not a voluntary bidder at tax-sales, but in case there are no private bidders the land is struck off to the county without a formal bid. Doty *v.* Bassett, 44 Kan. 754, 26 Pac. 51; Larkin *v.* Wilson, 28 Kan. 513; Babbitt *v.* Johnson, 15 Kan. 252; Magill *v.* Martin, 14 Kan. 67; Norton *v.* Friend, 13 Kan. 532; Judd *v.* Driver, 1 Kan. 455.

state can withdraw from sale and refuse bids for lands which already belong to the state, but as to other lands it can acquire title only as a competitive bidder, the land being required to be sold to the highest bidder.[84]

b. Amount of the Bid. As a rule, where land is struck off to the state or municipality, the amount of the bid is expressed or understood to be the sum of the taxes and charges for which the sale is made; it cannot exceed this amount because the state or municipality cannot be a competitive bidder.[85] Under some statutes, however, the rule is otherwise.[86]

c. Nature of Title Acquired. The title acquired by the state or a municipality at a tax-sale is not quite the same as that vesting in a private purchaser, since

Kentucky.— Robinson *v.* Huff, 3 Litt. 37, necessity of inquest of office on sale to state.

Louisiana.— Breaux *v.* Negrotto, 43 La. Ann. 426, 9 So. 502; Martinez *v.* State Tax Collectors, 42 La. Ann. 677, 7 So. 796, holding that there is no law prohibiting the state from having property adjudicated to it at a tax-sale.

Michigan.— Burns *v.* Ford, 124 Mich. 274, 82 N. W. 885; Barnum *v.* Barnes, 118 Mich. 264, 76 N. W. 406.

Minnesota.— Pine County *v.* Lambert, 57 Minn. 203, 58 N. W. 990; Mulvey *v.* Tozer, 40 Minn. 384, 42 N. W. 387. And see Hage *v.* St. Paul Land, etc., Co., 107 Minn. 350, 120 N. W. 298; Minnesota Debenture Co. *v.* Scott, 106 Minn. 32, 119 N. W. 391; State *v.* Scott, 105 Minn. 69, 117 N. W. 417.

Montana.— Rush *v.* Lewis, etc., County, 36 Mont. 566, 93 Pac. 943, 37 Mont. 240, 95 Pac. 836.

Nebraska.— Logan County *v.* Carnahan, 66 Nebr. 685, 92 N. W. 984, 95 N. W. 812; State *v.* Cain, 18 Nebr. 635, 26 N. W. 373; Otoe County *v.* Mathews, 18 Nebr. 466, 25 N. W. 618; Otoe County *v.* Brown, 16 Nebr. 394, 398, 20 N. W. 274, 641.

North Carolina.— Love *v.* Wilbourn, 27 N. C. 344; Register *v.* Bryan, 9 N. C. 17.

Oklahoma.— Kramer *v.* Smith, 23 Okla. 381, 100 Pac. 532; Keller *v.* Hawk, 19 Okla. 407, 91 Pac. 778.

Oregon.— Burness *v.* Multnomah County, 37 Oreg. 460, 60 Pac. 1005.

Wisconsin.— Iron River *v.* Bayfield County, 106 Wis. 587, 82 N. W. 559; Sprague *v.* Coenen, 30 Wis. 209; Parish *v.* Eager, 15 Wis. 532.

United States.— Turner *v.* Smith, 14 Wall. 553, 20 L. ed. 724.

See 45 Cent. Dig. tit. "Taxation," § 1361. And see MUNICIPAL CORPORATIONS, 28 Cyc. 1721.

Invalidity of deed see *infra*, XIII, D, 2, d, (I).

Neglect of county officers to purchase.—Although the statute makes it the duty of the county commissioners, when a tract of unseated land is offered at tax-sale, and no one will bid a sum equal to the amount of the taxes due thereon and the costs, to bid off the same for the county and take the deed, yet the neglect of the commissioners to make such bid will not invalidate the title of a *bona fide* purchaser for a less sum. Devinney *v.* Reynolds, 1 Watts & S. (Pa.) 328.

84. See Saranac Land, etc., Co. *v.* Roberts, 195 N. Y. 303, 88 N. E. 753 [*affirming* 125 N. Y. App. Div. 333, 109 N. Y. Suppl. 547] (holding that where a sale for taxes to the state in 1877 was invalid, sales by the state controller in 1881 and 1885 for taxes of other years, pursuant to Laws (1881), p. 547, c. 402, § 5, which required him to bid in all lands belonging to the state and reject all other bids therefor, could not vest title in the state, for the lands were not sold at public auction to the highest bidder, as was required by Laws (1855), pp. 789, 790, c. 427, §§ 41, 44); Andrus *v.* Wheeler, 22 N. Y. App. Div. 596, 48 N. Y. Suppl. 118 [*reversing* 18 Misc. 646, 42 N. Y. Suppl. 525]; Turner *v.* Boyce, 11 Misc. (N. Y.) 502, 33 N. Y. Suppl. 433. Under Mont. Pol. Code, § 3882, providing that property sold for taxes may be struck off to the county as purchaser where there was no other purchaser, where land belonging to plaintiff's grantor was sold for taxes, and defendant county became the purchaser thereof, the tax deed reciting that at the sale the county was the bidder willing to take the lowest quantity sufficient to pay the taxes, etc., it was held that the statute prohibited the county from becoming a competitive bidder at a tax-sale, and the deed, showing that defendant county was a competitive bidder, was void on its face. Rush *v.* Lewis, etc., County, 36 Mont. 566, 93 Pac. 943, 37 Mont. 240, 95 Pac. 836. See also Kramer *v.* Smith, 23 Okla. 381, 100 Pac. 532.

85. Lovelace *v.* Tabor Mines, etc., Co., 29 Colo. 62, 66 Pac. 892; Smith *v.* New Orleans, 43 La. Ann. 726, 9 So. 773; Hilton *v.* Dumphey, 113 Mich. 241, 71 N. W. 527. But *compare* Russel *v.* Reed, 27 Pa. St. 166, holding that a treasurer's sale of land to the commissioners of the county for a sum more than sufficient to cover the taxes in arrear and the costs of the sale effectually divests the owner's title, although the county might refuse to ratify the purchase.

When the state becomes the purchaser, the statutes sometimes require that the bid shall include the county tax with interest and penalties, but the state is not liable to the county for this part of the amount bid. State *v.* Brewer, 64 Ala. 287. And see Nashville *v.* Lee, 12 Lea (Tenn.) 452.

Payment of bid.— Where a county purchases lands for delinquent taxes, it is not necessary for it to pay the amount to the treasurer. Lancaster County *v.* Trimble, 34 Nebr. 752, 52 N. W. 711.

86. See *supra*, XI, H, 14, a.

the object of the purchase is not the acquisition of property but rather the collection of the taxes; hence it is not, at least in its inception, an absolute legal title, carrying with it the right of possession and of disposition, but in the nature of an equitable title existing for the purpose of compelling satisfaction of the taxes and charges due;[87] or, according to some of the decisions, it is in the nature of a lien, which may be foreclosed by proper proceedings,[88] although it is generally held that the lien of the taxes for which the sale was made is extinguished by the sale and purchase.[89] The property continues subject to redemption for the same time and on the same conditions as if it had been bought by a private purchaser,[90] and a third person taking a conveyance from the state or municipality acquires whatever title his vendor had and holds it subject to the same equities and defenses.[91]

d. Certificate or Deed. In some states the law intends that a tax deed shall be issued to the state or a municipality buying at tax-sale, the same as to a private person.[92] But a more usual provision is for a list of the lands struck off to the state or municipality, to be made and certified by a designated officer,[93] and in some jurisdictions no deed or other similar document is required as evidence of the purchase.[94]

87. Morrill *v.* Douglass, 14 Kan. 293; Morse *v.* Auditor-Gen., 143 Mich. 610, 107 N. W. 317; Rochester *v.* Rochester R. Co., 109 N. Y. App. Div. 638, 96 N. Y. Suppl. 152 [*modified* in 187 N. Y. 216, 79 N. E. 1010]; Raquette Falls Land Co. *v.* International Paper Co., 94 N. Y. App. Div. 609, 87 N. Y. Suppl. 1146 [*affirmed* in 181 N. Y. 540, 73 N. E. 1131]; De Forest *v.* Thompson, 40 Fed. 375. *Compare* Guidry *v.* Broussard, 32 La. Ann. 924.

In California, under Pol. Code, § 3788, providing that a tax deed to the state conveys absolute title as of the date of five years from date of sale, the sale vests the equitable and the deed the legal title in the state, and as against the state the owner at the end of five years forfeits all rights excepting the privilege under section 3817 to redeem at any time before the state actually enters, sells, or disposes of the land. Young *v.* Patterson, 9 Cal. App. 469, 99 Pac. 552. And see Baird *v.* Monroe, 150 Cal. 560, 89 Pac. 352; Santa Barbara County *v.* Savings, etc., Soc., 137 Cal. 463, 70 Pac. 457.

Not a title by escheat or forfeiture.—Lands purchased by a county on a sale for delinquent taxes are held in trust for the state for itself and for other political subdivisions entitled to any portion of the fund, and are not obtained by escheat or forfeiture so as to belong under the constitution to the school fund. Woodrough *v.* Douglas County, 71 Nebr. 354, 98 N. W. 1092.

Abandonment of title by subsequent collection of taxes.— Where there was nothing to show that county commissioners in assessing and collecting taxes upon unseated land returned by a township assessor knew that the same was a part of a warrant sold for taxes situated in another township, they discharged their duty in regularly assessing it and collecting taxes thereon, and were not called upon to satisfy themselves as to the accuracy of the return; and there was no basis for the claim that the commissioners had abandoned their title acquired by purchase by them at the tax-sale, because, after such purchase, they continued to assess and collect taxes upon the same. Gamble *v.* Central Pennsylvania Lumber Co., 225 Pa. St. 288, 74 Atl. 69.

88. *Michigan.*— Dawson *v.* Peter, 119 Mich. 274, 77 N. W. 997.

Nebraska.— Logan County *v.* Carnahan, 66 Nebr. 685, 92 N. W. 984, 95 N. W. 812.

New Jersey.— Maginnis *v.* Rutherford, 73 N. J. L. 287, 63 Atl. 16.

Texas.— Masterson *v.* State, 17 Tex. Civ. App. 91, 42 S. W. 1003.

Virginia.— Com. *v.* Ashlin, 95 Va. 145, 28 S. E. 177.

United States.— Felch *v.* Travis, 92 Fed. 210.

89. Santa Barbara County *v.* Savings, etc., Soc., 137 Cal. 463, 70 Pac. 457; Bradford *v.* Lafargue, 30 La. Ann. 432; Maginnis *v.* Rutherford, 73 N. J. L. 284, 63 Atl. 166; Sayers *v.* Burkhardt, 85 Fed. 246, 29 C. C. A. 137. See West *v.* Negrotto, 52 La. Ann. 381, 27 So. 75.

90. St. Louis Refrigerator, etc., Co. *v.* Langley, 66 Ark. 48, 51 S. W. 68; Multnomah County *v.* Ttitle Guarantee Co., 46 Oreg. 523, 80 Pac. 409.

91. McCulloch *v.* Stone, 64 Miss. 378, 8 So. 236; Martin *v.* Barbour, 140 U. S. 634, 11 S. Ct. 944, 35 L. ed. 546.

92. Dyke *v.* Whyte, 17 Colo. 296, 29 Pac. 128; Lombard *v.* McMillan, 95 Wis. 627, 70 N. W. 673.

93. Alcona County Sup'rs *v.* Auditor-Gen., 138 Mich. 491, 101 N. W. 657; Garner *v.* Wallace, 118 Mich. 387, 76 N. W. 758; Mayson *v.* Banks, 59 Miss. 447; Weeks *v.* Merkle, 6 Okla. 714, 52 Pac. 929; Condon *v.* Galbraith, 106 Tenn. 14, 58 S. W. 916; State *v.* Dugan, 105 Tenn. 245, 58 S. W. 259.

94. Kelley *v.* Laconia Levee Dist., 74 Ark. 202, 85 S. W. 249, 87 S. W. 638; Doyle *v.* Martin, 55 Ark. 37, 17 S. W. 346; Neal *v.* Andrews, 53 Ark. 445, 14 S. W. 646; Guittard Tp. *v.* Marshall County Com'rs, 4 Kan. 388.

e. Resale. The statutes commonly provide authority for the resale of lands bid in by the state or municipalities at a tax-sale.[95] Under one system of making such resales, an application to purchase may be made by any person who will pay the necessary amount and a certificate may thereupon be issued or assigned to him.[96] But elsewhere the sale must be made at public auction and usually at the time of the annual tax-sales.[97] In either case it is customary to require service or publication of notice to the former owners or those entitled to redeem.[98] The officers charged with the conduct of such sales are sometimes authorized to fix the terms of sale, which, however, must include payment in cash;[99]

95. See the statutes of the different states. And see the following cases:

Alabama.— Purifoy *v.* Lamar, 112 Ala. 123, 20 So. 975.

California.— Whether the state had acquired the right to sell land which it claimed to hold for non-payment of taxes must be determined by the proceedings prior to the delivery of the deed of the tax collector to the state pursuant to the original tax-sale. Chapman *v.* Zoberlein, 152 Cal. 216, 92 Pac. 188. Under Pol. Code, § 3897, authorizing a sale of lands sold to the state for taxes whenever directed by the controller and noticed by the tax collector, the original owner cannot require a sale to be made or not made on a particular day. Young *v.* Patterson, 9 Cal. App. 469, 99 Pac. 552. The constitutional provision that all grants, etc., shall be in the name of the people of the state, and signed by the governor, etc., does not apply to the statute empowering tax collectors to grant to purchasers at public auction land bought by the state at sales for delinquent taxes. Phillips *v.* Cox, 7 Cal. App. 308, 94 Pac. 377.

Michigan.— Mann *v.* Carson, 120 Mich. 631, 79 N. W. 941.

Minnesota.— Hage *v.* St. Paul Land, etc., Co., 107 Minn. 350, 120 N. W. 298; Minnesota Debenture Co. *v.* Scott, 106 Minn. 32, 119 N. W. 391; State *v.* Scott, 105 Minn. 69, 117 N. W. 417; State *v.* Halden, 75 Minn. 512, 78 N. W. 16.

Pennsylvania.— Walker *v.* Bergbigler, 207 Pa. St. 427, 56 Atl. 963.

Tennessee.— Memphis *v.* Looney, 9 Baxt. 130; Webb *v.* Miller, 8 Heisk. 448; Cason *v.* Newsom, 8 Heisk. 446.

Virginia.— Bowe *v.* Richmond, 109 Va. 254, 64 S. E. 51.

When tax-sale complete.— A sale on proper notice by the state of land sold to it was complete when the purchase-money was paid and deposited in the county treasury; delivery of the deed not being essential. Young *v.* Patterson, 9 Cal. App. 469, 99 Pac. 552.

Bill in equity by state and municipalities to procure sale of lands bid in for taxes of several successive years see State *v.* Duncan, 3 Lea (Tenn.) 679.

Bill in equity to enjoin resale of land bid in by state or county at tax-sales see Baker *v.* Buckner, 99 Va. 368, 38 S. E. 280; Baker *v.* Briggs, 99 Va. 360, 38 S. E. 277.

Right of officer to withhold conveyance on discovering tax-sale to have been void see Hand *v.* Auditor-Gen., 112 Mich. 597, 71 N. W. 160.

96. Lovelace *v.* Tabor Mines, etc., Co., 29 Colo. 62, 66 Pac. 892; Alcona County *v.* Auditor-Gen., 138 Mich. 491, 101 N. W. 657; Brown *v.* Christian, 96 Va. 254, 31 S. E. 21.

Requisites of application see Lewis *v.* Coons, 96 Va. 506, 31 S. E. 904.

Assigning state tax lands to homesteaders see Morse *v.* Auditor-Gen., 143 Mich. 610, 107 N. W. 317; Semer *v.* Auditor-Gen., 133 Mich. 569, 95 N. W. 732.

Limitation of time for assigning tax-sale certificates issued to county see Carnahan *v.* Sieber Cattle Co., 34 Colo. 257, 82 Pac. 592.

97. Muirhead *v.* Sands, 111 Mich. 487, 69 N. W. 826; Lyon County *v.* Ross, 24 Nev. 102, 50 Pac. 1.

98. *California.*— Pol. Code, § 3897 (St. (1897) p. 436, c. 267), prescribing the notice of sale of lands sold to the state for taxes to be given by the tax collector pursuant to the order of the state controller, does not require that the notice contain the name of the person owing the delinquent tax against the property or a statement of the taxes, costs, penalties, and expenses accrued to date. Chapman *v.* Zoberlein, 152 Cal. 216, 92 Pac. 188. See also Fox *v.* Wright, 152 Cal. 59, 91 Pac. 1005.

Louisiana.— State *v.* Cannon, 44 La. Ann. 734, 11 So. 86.

Michigan.— Munroe *v.* Winegar, 128 Mich. 309, 87 N. W. 396; Garner *v.* Wallace, 118 Mich. 387, 76 N. W. 758.

Mississippi.—Weiner *v.* Dickerson, 82 Miss. 63, 33 So. 971.

Pennsylvania.— Jenks *v.* Wright, 61 Pa. St. 410.

Virginia.—Virginia Bldg., etc., Assoc. *v.* Glenn, 99 Va. 460, 39 S. E. 136; Thomas *v.* Jones, 94 Va. 756, 27 S. E. 813.

United States.— Morse *v.* South, 80 Fed. 206.

Canada.— *Re* Allan, 7 Manitoba 28.

Publication of notice.—Where a statute provided that the notice of sale of tax lands should be published at least three successive weeks in some newspaper published in the county, a publication for one day in each of the four successive weeks in a daily paper, the days being exactly a week apart, was sufficient. Chapman *v.* Zoberlein, 152 Cal. 216, 92 Pac. 188. And see Fox *v.* Wright, 152 Cal. 59, 91 Pac. 1005.

99. Wynn *v.* Stone, 69 Miss. 80, 13 So. 669; Brooke *v.* Turner, 95 Va. 696, 30 S. E. 55; Phillips *v.* Welts, 40 Wash. 501, 82 Pac. 737; State *v.* Phillips, 36 Wash. 651, 79 Pac. 313. See Darling *v.* Purcell, 13 N. D. 288, 100 N. W. 726, as to effect of delay in making payments.

but generally they are forbidden to sell for less than the amount of taxes and costs due, including the taxes accrued for years subsequent to the original tax-sale.[1] The title of the purchaser at such a resale is so far founded on the original tax-sale that he acquires only such title as was vested in the state or municipality, not a new and independent title.[2]

f. Second Sale For Other Taxes. Where the law is such that the state or municipality acquires a complete and absolute title by purchase at a tax-sale, or by the expiration of the time allowed for redemption from such sale, the land is not thereafter assessable for taxes of subsequent years; and if it is so assessed and is sold, the second sale is invalid and passes no title,[3] or, according to the doc-

1. *Kansas.*— Douglass *v.* Lowell, 60 Kan. 239, 56 Pac. 13.

Louisiana.— Carey *v.* Cagney, 109 La. 77, 33 So. 89.

Michigan.— Clippinger *v.* Auditor-Gen., 135 Mich. 1, 97 N. W. 53; Wilkin *v.* Keith, 121 Mich. 66, 79 N. W. 887; Detroit F. & M. Ins. Co. *v.* Wood, 118 Mich. 31, 76 N. W. 136; Hughes *v.* Jordan, 118 Mich. 27, 76 N. W. 134; Auditor-Gen. *v.* Bay County, 106 Mich. 662, 64 N. W. 570.

Minnesota.— Hoyt *v.* Chapin, 85 Minn. 524, 89 N. W. 850. See National Bond, etc., Co. *v.* Hennepin County, 91 Minn. 63, 97 N. W. 413.

Nebraska.— State *v.* Fink, 74 Nebr. 641, 104 N. W. 1059; State *v.* Graham, 17 Nebr. 43, 22 N. W. 114.

New Jersey.— Maginnis *v.* Rutherford, 73 N. J. L. 287, 63 Atl. 16.

Virginia.— Baker *v.* Briggs, 99 Va. 360, 38 S. E. 277; Lewis *v.* Coons, 96 Va. 506, 31 S. E. 904. See Bowe *v.* Richmond, 109 Va. 254, 64 S. E. 51, both state and city taxes.

Wisconsin.— Olson *v.* Tanner, 117 Wis. 544, 94 N. W. 305.

Sale to highest bidder.— The state has power to provide that the sale of its title to land for non-payment of taxes after the expiration of the redemption period shall be made for the highest price offered, regardless of the amount of taxes, interest, etc., accrued against the property, etc. Chapman *v.* Zoberlein, 152 Cal. 216, 92 Pac. 188; Fox *v.* Wright, 152 Cal. 59, 91 Pac. 1005. Under Pol. Code, § 3897, providing that, when the state shall become the owner of property sold for taxes, in reselling it, the tax collector shall sell the property to the highest bidder for cash, etc., the term "highest bidder" means the one who will make the highest cash bid for all the property, and not the person who will pay all the tax for the least amount of the land. Fox *v.* Wright, *supra.* In Nevada property bid in by a county at a tax-sale must be sold for its full value, and not merely for the taxes and costs due, as the treasurer is required by law to pay into the general fund of the county any balance remaining after the payment of the taxes and costs. Lyon County *v.* Ross, 24 Nev. 102, 50 Pac. 1.

2. George *v.* Cole, 109 La. 816, 33 So. 784; Leathem, etc., Lumber Co. *v.* Nalty, 109 La. 325, 33 So. 354; Textor *v.* Shipley, 86 Md. 424, 38 Atl. 932; McCulloch *v.* Stone, 64 Miss. 378, 8 So. 236; Felch *v.* Travis, 92 Fed. 210. But *compare* Semer *v.* Auditor-Gen., 133 Mich. 569, 95 N. W. 732; Cato *v.* Gordon, 62 Miss. 373. And see Thomas *v.* Jones, 94 Va. 756, 27 S. E. 813.

Sufficiency of deed by tax collector see Chapman *v.* Zoberlein, 152 Cal. 216, 92 Pac. 188.

Governor's deed conveying title notwithstanding irregularities see Hage *v.* St. Paul Land, etc., Co., 107 Minn. 350, 120 N. W. 298.

Effect of subsequent assessment and collection of taxes.—Where, after property was sold to the state for taxes, the state continued to assess the property in the name of the former owner, and the tax thus assessed was paid by the purchaser from the state, the continuing thus to assess did not operate as a waiver of the first sale, having the effect of reinstating the title in the former owner. Lavedan *v.* Choppin, 119 La. 1056, 44 So. 886.

Estoppel of state to impair title granted.— Where lands have been sold for taxes and bid in for the state, and the state subsequently assigns all rights and interests acquired by it under such sale to an individual in no way interested in such lands prior thereto, who thereafter perfects the title thereunder, the state cannot impeach or impair such title by a resale of the lands for taxes due and unpaid for prior years. State *v.* Camp, 79 Minn. 343, 82 N. W. 645. And see Minnesota Debenture Co. *v.* Scott, 106 Minn. 32, 119 N. W. 391; Gates *v.* Keigher, 99 Minn. 138, 108 N. W. 860.

Purchase by original owner.—Where an owner of lands paid the delinquent taxes thereon by purchasing the interest the state acquired in the land by reason of the non-payment of the taxes, the tax title, whether valid or not, became merged in the original title, and a stranger thereto could not question the validity of the tax title. Clippinger *v.* Auditor-Gen., 135 Mich. 1, 97 N. W. 53.

3. *Arkansas.*— Muskegon Lumber Co. *v.* Brown, 66 Ark. 539, 51 S. W. 1056; Neal *v.* Wideman, 59 Ark. 5, 26 S. W. 16.

Kansas.— Morrill *v.* Douglass, 17 Kan. 291, but this rule does not apply if the first sale was void for any reason.

Kentucky.— Bradford *v.* Walker, 5 S. W. 555, 9 Ky. L. Rep. 586.

Michigan.— Connecticut Mut. L. Ins. Co. *v.* Wood, 115 Mich. 444, 74 N. W. 656.

Virginia.— Glenn *v.* Brown, 99 Va. 322, 38 S. E. 189.

See 45 Cent. Dig. tit. "Taxation," § 1361.

trine prevailing in some states, the second sale amounts to a waiver and relinquishment of all rights or titles acquired by the state or municipality under the first.[4] But on the other hand, where the original purchase is regarded as vesting in the state or municipality no more than a lien, or a right to hold the lands for redemption, it is not in any way affected by a second assessment and sale.[5] When property has passed absolutely to the state for taxes, the original owner is not concerned in the legality of tax-sales subsequently made.[6]

I. Bids and Terms of Sale — 1. Bids and Bidders. Any person competent to purchase the land may attend the tax-sale and bid,[7] and the sale, when required by law to be made to the highest bidder, must appear of record to have been so made.[8] But where the bid is for a certain quantity of land, instead of a sum in cash, it must be definite and precise or it may be rejected;[9] and under some statutes the property must be struck off to the bidder who will agree to accept the lowest rate of interest from the date of the sale on the amount of the tax.[10] There is no objection to requiring a deposit of a reasonable portion of the price as an evidence of good faith.[11] The successful bid at a tax-sale may be assigned by the bidder making it.[12]

2. Stifling Competition and Combinations Among Bidders. A tax-sale will be invalidated by any fraudulent conduct on the part of the successful bidder which tends to prevent competition or procure an undue advantage for himself,[13] as

4. *Florida.*— Orlando *v.* Giles, 51 Fla. 422, 40 So. 834.

Mississippi.— Sigman *v.* Lundy, 66 Miss. 522, 6 So. 245.

New Jersey.— Smith *v.* Specht, 58 N. J. Eq. 47, 42 Atl. 599. See Maginnis *v.* Rutherford, 73 N. J. L. 287, 63 Atl. 16.

North Dakota.— McHenry *v.* Kidder County, 8 N. D. 413, 79 N. W. 875.

Pennsylvania.— Schreiber *v.* Moynihan, 197 Pa. St. 578, 47 Atl. 851.

Texas.— League *v.* State, 93 Tex. 553, 57 S. W. 34.

United States.— Murphy *v.* Packer, 152 U. S. 398, 14 S. Ct. 636, 38 L. ed. 489; Clarke *v.* Strickland, 5 Fed. Cas. No. 2,864, 2 Curt. 439.

See 45 Cent. Dig. tit. "Taxation," § 1361.

5. *Louisiana.*— Reinach *v.* Duplantier, 46 La. Ann. 151, 15 So. 13.

Maine.— Hodgdon *v.* Wight, 36 Me. 326.

Minnesota.— Countryman *v.* Wasson, 78 Minn. 244, 80 N. W. 973, 81 N. W. 213; Berglund *v.* Graves, 72 Minn. 148, 75 N. W. 118.

New York.— Raquette Falls Land Co. *v.* International Paper Co., 94 N. Y. App. Div. 609, 87 N. Y. Suppl. 1146 [*affirmed* in 181 N. Y. 540, 73 N. E. 1131]; People *v.* Buffalo, 33 Misc. 170, 68 N. Y. Suppl. 409 [*affirmed* in 63 N. Y. App. Div. 563, 68 N. Y. Suppl. 409, 71 N. Y. Suppl. 1145].

Texas.— Traylor *v.* State, 19 Tex. Civ. App. 86, 46 S. W. 81.

6. Gounaux *v.* Beaullieu, 123 La. 684, 49 So. 285.

7. See *supra*, XI, H, 1. And see Shedd *v.* Disney, 139 Ind. 240, 38 N. E. 594 (statute forbidding acceptance of bid by non-resident except on certain conditions); Jury *v.* Day, 54 Iowa 573, 6 N. W. 893 (principal and agent both present and bidding); New Orleans Pac. R. Co. *v.* Kelly, 52 La. Ann. 1741, 28 So. 212 (holding that a sale to a firm was not invalid because the assessor of the taxes was a member).

8. Bean *v.* Thompson, 19 N. H. 290, 49 Am. Dec. 154; Cardigan *v.* Page, 6 N. H. 182. But if the record shows the terms of sale, viz., that the land would be sold to the highest bidder, and then shows that A was the purchaser, this is evidence that A was also the highest bidder. Smith *v.* Messer, 17 N. H. 420.

9. Poindexter *v.* Doolittle, 54 Iowa 52, 6 N. W. 136. As to bids in the form of an offer to take a certain part or quantity of the land for the amount of the taxes and charges see *supra*, XI, G, 7, b, c.

10. Youker *v.* Hobart, 17 N. D. 296, 115 N. W. 839, holding void on its face a tax deed showing that the sale was made under a repealed statute (Laws (1897), c. 126, § 76) for the smallest quantity of land that would sell for the amount of the tax, and not, as required by Laws (1901), c. 154, then in force, to the person offering to accept the lowest rate of interest from the date of the sale on the amount of the tax. See also King *v.* Lane, 21 S. D. 101, 110 N. W. 37.

11. Whelen *v.* Stilwell, 4 Nebr. (Unoff.) 24, 93 N. W. 189.

12. Dickson *v.* Burckmyer, 67 S. C. 526, 46 S. E. 343. But *compare* Keene *v.* Houghton, 19 Me. 368, holding that where the statute only authorizes the officer to make a deed to the highest bidder, he cannot legally substitute the name of another for that of the highest bidder, and an agreement with the officer to pay the amount bid by another and receive a deed by way of substitution is void for want of consideration.

13. *Alabama.*— Thorington *v.* Montgomery, 94 Ala. 266, 10 So. 634.

Iowa.— McCready *v.* Sexton, 29 Iowa 356, 4 Am. Rep. 214; Eldridge *v.* Kuehl, 27 Iowa 160.

for instance where he makes statements at the sale to the assembled bidders disparaging the title to be sold or otherwise tending to chill their bidding or warns or requests them not to bid against him.[14] So also any agreement among the bidders at the sale, express or tacit, that they will take turns in bidding and not compete against each other, is a fraud on the law and on the owner of the land and will render the sale voidable at his instance, if not absolutely void.[15] But two or more persons may agree to bid jointly at a tax-sale, or form a partnership for that purpose, if it does not appear that this tended to keep down competition or to prevent a fair sale.[16] And fraud and collusion among the other bidders, to which the actual buyer is not privy and of which he is ignorant, will not vitiate the sale.[17] The existence of an unlawful pool or combination among the bidders must be proved by a clear preponderance of the evidence,[18] and cannot be inferred from the mere fact that there were several persons present at the sale and that they did not bid against each other.[19] There are also decisions to the effect that fraud committed by the purchaser, by a combination with other bidders or otherwise, will not defeat the title of his subsequent vendee without notice of the fraud and for value.[20]

Louisiana.— Delee *v.* Watkins, 2 La. 306. A tax-sale of the community real estate will be annulled as a fraud on the heirs of the wife where the purchaser, an employee in the office of the tax collector, colluded with the surviving husband to have the property sold for taxes under an agreement to pay the surviving husband the full value of the property after the acquisition of the tax title. Babin *v.* Daspit, 120 La. 755, 45 So. 597.

Mississippi.— Chiles *v.* Gallagher, 67 Miss. 413, 7 So. 208.

Missouri.— Hoge *v.* Hubb, 94 Mo. 489, 7 S. W. 443.

See 45 Cent. Dig. tit. "Taxation," § 1356.

14. *Iowa.*— McCready *v.* Sexton, 29 Iowa 356, 4 Am. Rep. 214; Eldridge *v.* Kuehl, 27 Iowa 160.

Missouri.— Merrett *v.* Poulter, 96 Mo. 237, 9 S. W. 586.

New Hampshire.— Bickford *v.* Poor, 68 N. H. 443, 44 Atl. 600.

South Carolina.— Coney *v.* Timmons, 16 S. C. 378.

United States.— Slater *v.* Maxwell, 6 Wall. 268, 18 L. ed. 796.

Canada.— Foy *v.* Merrick, 8 Grant Ch. (U. C.) 323; Raynes *v.* Crowder, 14 U. C. C. P. 111; McAdie *v.* Corby, 30 U. C. Q. B. 349; Todd *v.* Werry, 15 U. C. Q. B. 614.

See 45 Cent. Dig. tit. "Taxation," § 1356.

Statement by officer.— The fact that the officer making a tax-sale stated that he hoped no one would bid more than the amount of the taxes and charges, on account of the inconvenience of disposing of the surplus, will not render the sale void. Southworth *v.* Edmands, 152 Mass. 203, 25 N. E. 106, 9 L. R. A. 118.

15. *Illinois.*— Brown *v.* Hogle, 30 Ill. 119.

Iowa.— Johns *v.* Thomas, 47 Iowa 441; Springer *v.* Bartle, 46 Iowa 688; Pearson *v.* Robinson, 44 Iowa 413; Easton *v.* Mawkinney, 37 Iowa 601; Kerwer *v.* Allen, 31 Iowa 578.

North Dakota.— Youker *v.* Hobart, 17 N. D. 296, 115 N. W. 839.

Rhode Island.— Howland *v.* Pettey, 15 R. I. 603, 10 Atl. 650.

West Virginia.— Lohr *v.* George, 65 W. Va. 241, 64 S. E. 609, and may be shown by parol.

United States.— Slater *v.* Maxwell, 6 Wall. 268, 18 L. ed. 796; Singer Mfg. Co. *v.* Yarger, 12 Fed. 487, 2 McCrary 583.

Canada.— Keefer *v.* Roaf, 8 Ont. 69; Schofield *v.* Dickenson, 10 Grant Ch. (U. C.) 226; Logie *v.* Young, 10 Grant Ch. (U. C.) 217; Templeton *v.* Lovell, 10 Grant Ch. (U. C.) 214; Massingberd *v.* Montague, 9 Grant Ch. (U. C.) 92; Henry *v.* Burness, 8 Grant Ch. (U. C.) 345.

See 45 Cent. Dig. tit. "Taxation," § 1356.

16. Williams *v.* Moore, 68 Ga. 585; Morrison *v.* Bank of Commerce, 81 Ind. 335; Kerr *v.* Kipp, 37 Minn. 25, 33 N. W. 116; Dawson *v.* Ward, 71 Tex. 72, 9 S. W. 106. *Contra*, Dudley *v.* Little, 2 Ohio 504, 15 Am. Dec. 575.

17. Pearson *v.* Robinson, 44 Iowa 413; Case *v.* Dean, 16 Mich. 12. *Compare* Davis *v.* Clark, 8 Grant Ch. (U. C.) 358, where it was not shown that the purchaser was a party to an illegal combination among the bidders, but yet, as he had so acted as to keep down competition, the sale was set aside and he was ordered to pay the costs of the suit brought for that purpose.

18. Kruger *v.* Walker, 94 Iowa 506, 63 N. W. 320; Frank *v.* Arnold, 73 Iowa 370, 35 N. W. 453.

19. Gallaher *v.* Head, 108 Iowa 588, 79 N. W. 387; Beeson *v.* Johns, 59 Iowa 166, 13 N. W. 97; Davis *v.* Harrington, 35 Kan. 196, 10 Pac. 532; Swartz *v.* Funk, 23 Fed. Cas. No. 13,678. A *prima facie* case of a combination among bidders at a tax-sale to eliminate competition in bidding, made out by facts and circumstances giving rise to a strong inference thereof, is aided by the failure of the purchasers to deny the inculpating facts and calls for relief. Lohr *v.* George, 65 W. Va. 241, 64 S. E. 609.

20. Lamb *v.* Davis, 74 Iowa 719, 39 N. W. 114; Martin *v.* Ragsdale, 49 Iowa 589; Hus-

3. Terms of Sale. A tax-sale must be made on the basis of a payment in cash, and the officer can neither give credit to the purchaser nor accept his note or due-bill in payment.[21]

J. Payment of Price and Disposition of Proceeds — 1. Payment and Recovery of Price. To acquire title under a tax-sale the purchaser must pay the amount of his bid[22] to the officer authorized to receive it[23] within the time limited by statute for that purpose,[24] or, if the law requires payment to be made "forthwith" or "immediately," then with proper promptness, a short or inconsiderable delay not being held to invalidate the sale,[25] especially when caused by the congestion of business in the treasurer's office.[26] The purchaser cannot be required to pay costs or charges or anything beyond the amount of his bid,[27] except where the statute requires him to pay interest also.[28] Payment of the bid may be enforced by suit,[29] or, if payment is refused, the land may be reoffered for sale.[30]

2. Surplus Bond. In some states the surplus of the purchase-money, to which the owner of the land is entitled, is secured to him by a bond of the purchaser to account for the excess over the taxes and charges, which bond is made a lien upon the land.[31] The giving of this surplus bond is a condition precedent to the passing of title to the purchaser,[32] provided there is any surplus to be covered

ton *v.* Markley, 49 Iowa 162; Watson *v.* Phelps, 40 Iowa 482; Sibley *v.* Bullis, 40 Iowa 429; Van Shaack *v.* Robbins, 36 Iowa 201. *Contra*, Merrett *v.* Poulter, 96 Mo. 237, 9 S. W. 586.

21. Hunt *v.* McFadgen, 20 Ark. 277; Baldwin *v.* Shill, 3 Ind. App. 291, 29 N. E. 619; Cushing *v.* Longfellow, 26 Me. 306; Donnel *v.* Bellas, 34 Pa. St. 157. See Trexler *v.* Africa, 27 Pa. Super. Ct. 385.

What constitutes sale on credit.— The fact that the treasurer, in conducting a tax-sale, instead of stopping to take the money when the property is struck off, postpones payment of the amounts to a time immediately following the sale, does not constitute a sale on credit. Farmers' L. & T. Co. *v.* Wall, 129 Iowa 651, 106 N. W. 160.

Giving credit after sale.— It is no objection to the validity of a tax-sale that, in a case where the treasurer had made no agreement to give any credit to the purchaser, he took his note for a part of the price, as the treasurer is bound to account for the whole sum, and the taking of the note is a matter between the purchaser and himself in his private character. Longfellow *v.* Quimby, 29 Me. 196, 48 Am. Dec. 525. And see Anderson *v.* Rider, 46 Cal. 134.

22. Hays *v.* Hunt, 85 N. C. 303.

Purchase by county.—Where land is struck off to the county, it is unnecessary that the amount of the bid shall be paid, as the officer receiving it would be obliged at once to turn it back into the treasury in payment of the taxes. McCauslin *v.* McGuire, 14 Kan. 234; Lancaster County *v.* Trimble, 34 Nebr. 752, 52 N. W. 711.

23. Turk *v.* McCoy, 14 Serg. & R. (Pa.) 349.

Treasurer out of office.— The amount of the bid must be paid by the purchaser during the term of office of the person to whom he is directed to make payment, for after the expiration of his official term that officer has no authority to receive the payment. Donnel *v.* Bellas, 34 Pa. St. 157.

24. Holt *v.* Weld, 140 Mass. 578, 5 N. E. 506.

25. Anderson *v.* Rider, 46 Cal. 134; Hays *v.* Hunt, 85 N. C. 303; Donnel *v.* Bellas, 10 Pa. St. 341 (delay of five years too great); Haisley *v.* Somers, 13 Ont. 600 (payment good if made within a week or two). Where bids at a tax-sale were made just before the close of the day, and the full consideration was paid on the next day, there was a compliance with Minn. Rev. Laws (1905), § 937, that the payment be made "immediately" and "forthwith." Minnesota Debenture Co. *v.* Scott, 106 Minn. 32, 119 N. W. 391.

26. Judah *v.* Brothers, 72 Miss. 616, 17 So. 752, 33 L. R. A. 481; Leavitt *v.* S. D. Mercer Co., 64 Nebr. 31, 89 N. W. 426; Ure *v.* Bunn, 3 Nebr. (Unoff.) 61, 90 N. W. 904.

27. Ritz *v.* Bowers, 9 Watts (Pa.) 297.

28. See Hoffman *v.* Silverthorn, 137 Mich. 60, 100 N. W. 183; Clarke *v.* New York, 55 N. Y. Super. Ct. 259, 13 N. Y. St. 290, both holding that a mistake in the computation of the interest does not excuse the purchaser from completing his purchase or invalidate the sale.

29. Sheldon *v.* Steele, 114 Iowa 616, 87 N. W. 683; Armstrong County *v.* Smith, 10 Watts (Pa.) 391 (it is a good defense to such an action that the purchaser acquired no title because of a wrongful assessment of the land); Jarvis *v.* Cayley, 11 U. C. Q. B. 282.

30. Hunt *v.* McFadgen, 20 Ark. 277.

31. Thudium *v.* Deardorf, 3 Pa. St. 90; Peters *v.* Heasley, 10 Watts (Pa.) 208. And see Loud *v.* Penniman, 19 Pick. (Mass.) 539; People *v.* Hammond, 1 Dougl. (Mich.) 276.

32. Lackawanna Iron, etc., Co. *v.* Fales, 55 Pa. St. 90; Cuttle *v.* Brockway, 24 Pa. St. 145; Donnel *v.* Bellas, 10 Pa. St. 341; McDonald *v.* Maus, 8 Watts (Pa.) 364; Sutton *v.* Nelson, 10 Serg. & R. (Pa.) 238; Trexler *v.* Africa, 27 Pa. Super. Ct. 385; Rupert *v.* Delp, 7 Pa. Super. Ct. 209.

Bond given by third person.—Where the treasurer sold the land to one person, and

by it,[33] and payment of the whole amount of the purchase-money to the treasurer cannot be taken as a substitute for it.[34] It should be executed promptly after the sale, but a delay in respect to this requirement is not a fatal defect, provided the bond is given before the expiration of the time allowed for redemption.[35] The bond should describe the land affected[36] and state the amount of the surplus correctly.[37] If its execution and delivery are brought into issue, these facts must be proved affirmatively,[38] although they may sometimes be presumed, under proper circumstances, and especially after the lapse of many years.[39] The right of action on such a bond is in the treasurer named therein as the obligee.[40]

3. Disposition of Proceeds. The proceeds of a tax-sale must be paid into the proper treasury and applied in discharge of the various taxes and costs against the land, being distributed among the different municipalities interested in proper proportions;[41] but the tax purchaser is not responsible for the application of his money, and his title is not affected by a misappropriation of it.[42] The surplus, if any, belongs to the owner of the land at the time of the sale,[43] and will be paid

the deed was made to another, and the latter gave his bond for the surplus money, it was an irregularity, but a stranger could not take advantage of it. Morton *v.* Harris, 9 Watts (Pa.) 319.

Omission to file bond.— The omission of the treasurer to file the surplus bond will not vitiate the purchaser's title. Burns *v.* Lyon, 4 Watts (Pa.) 363; White *v.* Willard, 1 Watts (Pa.) 42.

33. Devinney *v.* Reynolds, 1 Watts & S. (Pa.) 328 (surplus bond not required where the cost of giving it would exceed the amount of the surplus); Gibson *v.* Robbins, 9 Watts (Pa.) 156 (failure to give bond is excusable where a mistake of the treasurer, in charging up too much costs, made it appear that there was no surplus); Turk *v.* McCoy, 14 Serg. & R. (Pa.) 349 (fee of one dollar required to be paid to the prothonotary for taking acknowledgment of the deed is not "surplus"); Trexler *v.* Africa, 27 Pa. Super. Ct. 385.

34. Connelly *v.* Nedrow, 6 Watts (Pa.) 451. But see Rogers *v.* Johnson, 67 Pa. St. 43, holding that payment of the entire purchase-money, instead of giving a surplus bond, is a mere irregularity, not fatal to the sale, and cured in five years.

35. Burd *v.* Patterson, 22 Pa. St. 219; Bayard *v.* Inglis, 5 Watts & S. (Pa.) 465. *Compare* Sutton *v.* Nelson, 10 Serg. & R. (Pa.) 238.

36. Devor *v.* McClintock, 9 Watts & S. (Pa.) 80; Bartholomew *v.* Leech, 7 Watts (Pa.) 472.

37. Bayard *v.* Inglis, 5 Watts & S. (Pa.) 465. And see Turner *v.* Waterson, 4 Watts & S. (Pa.) 171. But an error of a few cents will be regarded as a clerical mistake and will not vitiate the sale. Frick *v.* Sterrett, 4 Watts & S. (Pa.) 269.

38. McDonald *v.* Mans, 8 Watts (Pa.) 364.

Proof of bond.— The treasurer's receipt is *prima facie* evidence that the bond was given, and is conclusive in the absence of other evidence. Robinson *v.* Williams, 6 Watts (Pa.) 281; Fager *v.* Campbell, 5 Watts (Pa.) 287; White *v.* Willard, 1 Watts (Pa.) 42. But the oath of the treasurer is not admissible without preliminary evidence of a search for the bond and its loss. Dreisbach *v.* Berger, 6 Watts & S. (Pa.) 564. The bond itself, when produced from proper custody, may be given in evidence, without common-law proof of its execution. Burns *v.* Lyon, 4 Watts (Pa.) 363.

39. Lackawanna Iron, etc., Co. *v.* Fales, 55 Pa. St. 90; Huzzard *v.* Trego, 35 Pa. St. 9; Cuttle *v.* Brockway, 24 Pa. St. 145. *Compare* Alexander *v.* Bush, 46 Pa. St. 62.

40. Crawford *v.* Stewart, 38 Pa. St. 34; Irish *v.* Johnston, 11 Pa. St. 483; Church *v.* Riddle, 6 Watts & S. (Pa.) 509.

41. Cockburn *v.* Auditor-Gen., 120 Mich. 643, 79 N. W. 931; Moss *v.* State, 10 Mo. 338, 47 Am. Dec. 116; Rush Tp. *v.* Schuylkill County, 100 Pa. St. 356; San Antonio *v.* Campbell, (Tex. Civ. App. 1900) 56 S. W. 130.

The state has no priority over a county or city where land sold for taxes does not bring enough to pay all. Nashville *v.* Lee, 12 Lea (Tenn.) 452.

The tax collector cannot be compelled to retain in his hands the purchase-price of a tax-sale, the validity of which is in dispute, after the time limited by law for him to make his final settlement. Brown *v.* Pontchartrain Land Co., 49 La. Ann. 1779, 23 So. 292.

Mandamus to auditor to show warrant for fees due officers, to exclusion of county and school taxes, denied see Brandon *v.* Williams, 157 Ala. 386, 47 So. 199.

42. Moore *v.* Rogers, 100 Tex. 361, 99 S. W. 1023; Bean *v.* Brownwood, (Tex. Civ. App. 1898) 43 S. W. 1036; Ogden *v.* Harrington, 18 Fed. Cas. No. 10,457, 6 McLean 418.

43. Worcester *v.* Boston, 179 Mass. 41, 60 N. E. 410; People *v.* Hammond, 1 Dougl. (Mich.) 276; Mason *v.* Gitchell, 97 Mo. 134, 10 S. W. 608; People *v.* Palmer, 10 N. Y. App. Div. 395, 41 N. Y. Suppl. 760. See People *v.* Chapin, 104 N. Y. 96, 10 N. E. 141.

Mandamus to compel payment.— The owner, whose title has been cut off by a tax-sale, may have mandamus to compel the payment to him of any surplus money received on the

over to him provided he applies for it within the proper time.[44] But if there are liens or encumbrances on the property, by mortgage, judgment, or otherwise, and these are divested by the tax-sale, then it is generally held that the surplus should be applied to the various liens in their order,[45] and under this rule it may go to a subsequent purchaser at execution sale.[46]

4. Fees and Expenses of Sale. The costs and expenses of a tax-sale are payable out of the proceeds of the sale,[47] and the county or city is not to be held liable for them;[48] on the contrary, the officer whose duty it is to advertise and sell is personally liable for expenses incurred outside his own office, such as the charges of the printer for publishing the advertisements.[49] In regard to the various items

sale. People *v.* Hammond, 1 Dougl. (Mich.) 276.

Liability on bond.— A tax collector and sureties on his bond are liable for any surplus in his hands from the proceeds of sales of real property sold for taxes under a condition in the bond for his faithfully executing his office and the several duties required of him by law. State *v.* Wilson, 107 Md. 129, 68 Atl. 609.

Authority of court and remedy of collector.— Under Md. Code Pub. Gen. Laws (1904), art. 81, §§ 51, 53, directing the tax collector to sell property levied on for taxes for cash to the highest bidder, retaining the amount of the taxes with interest and costs, and "paying the surplus . . . to the owner thereof," and requiring him to report the sale to the circuit court for its ratification, where no sufficient cause to the contrary is shown, etc., the circuit court has no authority to distribute the proceeds of a sale by the collector, and where the collector cannot determine to whom the surplus is due he may institute a proceeding to which all persons interested may be made parties. State *v.* Wilson, 107 Md. 129, 68 Atl. 609.

Claims against United States.— If land is sold by the United States for a federal tax and bid in for more than is due, the government is liable to the landowner for the surplus. U. S. *v.* Lawton, 110 U. S. 146, 3 S. Ct. 545, 28 L. ed. 100. But he cannot sue until after demand made on the secretary of the treasury; and the statute of limitations runs from the date of his application. U. S. *v.* Taylor, 104 U. S. 216, 26 L. ed. 721.

Void sale.— If the tax-sale was entirely void, no part of the money paid by the purchaser can be claimed or recovered by the owner; as in that case he may disregard the pretended sale or may have it set aside, but the purchaser is entitled to have his money refunded. Goddard *v.* Seymour, 30 Conn. 394; Sponable *v.* Woodhouse, 48 Kan. 173, 29 Pac. 394; Haxton *v.* Harris, 19 Kan. 511. The two cases last cited hold that if the county treasurer becomes the purchaser at tax-sale, contrary to his official duty, the money paid by him into the treasury does not belong to the owner, nor can it be returned to the treasurer, but is forfeited to the public.

Acceptance of surplus as ratification of sale.— If the owner of the property, with knowledge of all the facts, accepts payment of the surplus money, he will be held to have ratified the sale and cannot afterward impeach its validity. Clyburn *v.* McLaughlin, 106 Mo. 521, 17 S. W. 692, 27 Am. St. Rep. 369.

44. Thompson *v.* Cox, 42 W. Va. 566, 26 S. E. 189.

45. Roeder *v.* Keller, 135 Ind. 692, 35 N. E. 1014; *In re* New York Protestant Episcopal Public School, 31 N. Y. 574. But *compare* People *v.* Hammond, 1 Dougl. (Mich.) 276.

Mortgagee.— A mortgagee who was under no duty or obligation to pay the taxes on the land, and whose title is divested by the tax-sale, has an equitable lien on the surplus proceeds of the sale, as against the mortgagor and those claiming under him. McDuffee *v.* Collins, 117 Ala. 487, 23 So. 45; Worcester *v.* Boston, 179 Mass. 41, 60 N. E. 410; Brockway *v.* Humphrey, 4 Nebr. (Unoff.) 403, 94 N. W. 625; Sutherland *v.* Brooklyn, 156 N. Y. 605, 51 N. E. 433 [*reversing* 87 Hun 82, 33 N. Y. Suppl. 959]. After sale of land for taxes, and before redemption, a mortgagee's interest is practically transferred to the fund, and he is entitled to any excess paid by the purchaser over the tax lien to be applied on the mortgage debt. Farmer *v.* Ward, 75 N. J. Eq. 33, 71 Atl. 401.

46. Summers *v.* Christian, 72 Ga. 193; Lacroix *v.* Camors, 34 La. Ann. 639; Bouton *v.* Lord, 10 Ohio St. 453.

47. Burke *v.* Blan, 79 Ala. 97; O'Grady *v.* Barnhisel, 23 Cal. 287; Kregelo *v.* Flint, 25 Kan. 695.

Void sale.— But the costs of sale cannot be charged against the land where the sale was invalid. Texarkana Water Co. *v.* State, 62 Ark. 188, 35 S. W. 788; Covell *v.* Young, 11 Nebr. 510, 9 N. W. 694; Hamer *v.* Weber County, 11 Utah 1, 37 Pac. 741.

Amount chargeable.— A county cannot collect a larger sum for advertising a tract of land in a delinquent tax list than it pays to the publisher. Genthner *v.* Lewis, 24 Kan. 309.

48. Payne *v.* Washington County, 25 Fla. 798, 6 So. 881; Ward *v.* Appling County, 80 Ga. 662, 6 S. E. 914; People *v.* Long, 13 Ill. 629; Abbett *v.* Switzerland County, 124 Ind. 467, 24 N. E. 1090.

49. Moore *v.* Magee, 48 Miss. 567; Enloe *v.* Hall, 1 Humphr. (Tenn.) 303.

Suit by treasurer.—Where a county treasurer sells land for delinquent taxes, but fails to collect from the purchaser the sum bid, he cannot maintain the statutory action

of fees and costs allowed and the circumstances under which they may be charged, the matter is entirely regulated by statute;[50] and sometimes special provisions are made for the case where the state or municipality becomes the purchaser.[51] But it is a general rule that no officer is allowed to make unnecessary costs; and thus where the land is sold at one sale for the delinquent taxes of two different years, only one set of costs can be made;[52] and so, where the same person buys several parcels of land and a single deed is desired and can be made to answer for all, the officer is not allowed to charge for as many separate deeds.[53] And if the lands of many persons are included in one advertisement, the entire cost cannot be charged against one of them, but it must be justly apportioned.[54]

K. Report and Confirmation of Sale — 1. Report or Return and Record — a. In General. The report or return of the officer who has made a tax-sale, setting forth his doings and the particulars of the sale, is an essential element of the sale, serving several very important purposes, and it must affirmatively appear that such report was duly made or the tax title will in most states be voidable if not absolutely void.[55] Furthermore, if the statute requires the report

against the purchaser for the fee allowed the treasurer in cases of "actual" sales; an actual sale involves the collection of the price. Miles *v.* Miller, 5 Nebr. 269.

50. See the statutes of the different states. And see the following cases:

Arkansas.— Lewis *v.* Cherry, 72 Ark. 254, 79 S. W. 793; Bagley *v.* Shoppach, 47 Ark. 72, 14 S. W. 467. It is the duty of a purchaser of land at a tax-sale to pay as a part of the purchase-money the statutory fees to the clerk for transferring the land on the tax books to the name of the purchaser. Sibly *v.* Cason, 86 Ark. 32, 109 S. W. 1007.

California.— Harper *v.* Rowe, 55 Cal. 132.

Illinois.— Morgan Park *v.* Knopf, 111 Ill. App. 571 [*affirmed* in 210 Ill. 453, 71 N. E. 340].

Iowa.— McClintock *v.* Sutherland, 35 Iowa 487.

Kansas.—Hapgood *v.* Morten, 28 Kan. 764; Wooden *v.* Allen County Com'rs, 22 Kan. 532.

Kentucky.— Minix *v.* Magoffin County, 32 S. W. 165, 749, 17 Ky. L. Rep. 628.

Louisiana.— State *v.* Houston, 39 La. Ann. 33, 1 So. 284.

Michigan.—Oppenborn *v.* Auditor-Gen., 140 Mich. 92, 103 N. W. 515.

Mississippi.— Baker *v.* Cox, 79 Miss. 306, 30 So. 641.

Missouri.— Heard *v.* Baber, 8 Mo. 142.

Nebraska.— Swan *v.* Huse, 15 Nebr. 465, 19 N. W. 605.

New York.— Crouch *v.* Hayes, 98 N. Y. 183; Clarke *v.* New York, 55 N. Y. Super. Ct. 259, 13 N. Y. St. 290.

North Dakota.— Nichols *v.* Roberts, 12 N. D. 193, 96 N. W. 298.

Tennessee.— Aldrich *v.* Pickard, 14 Lea 456; McGowan *v.* Memphis Taxing Dist., 11 Lea 162; State *v.* Nolan, 8 Lea 399; Akers *v.* Burch, 12 Heisk. 606; Enloe *v.* Hall, 1 Humphr. 303.

Utah.—Moon *v.* Salt Lake County, 27 Utah 435, 76 Pac. 222; Ogden City *v.* Hamer, 12 Utah 337, 42 Pac. 1113; Hamer *v.* Weber County, 11 Utah 1, 37 Pac. 741.

See 45 Cent. Dig. tit. "Taxation," § 1368.

51. See the statutes of the different states. And see the following cases:

Alabama.— Burke *v.* Blan, 79 Ala. 97; State *v.* Brewer, 64 Ala. 287.

Arizona.— Maricopa County *v.* Rosson, 4 Ariz. 335, 40 Pac. 314.

Missouri.— *Ex p.* Tate, 9 Mo. 668.

New York.— Armstrong *v.* Nassau County, 101 N. Y. App. Div. 116, 91 N. Y. Suppl. 867.

Tennessee.—Akers *v.* Burch, 12 Heisk. 606.

Virginia.— Couch *v.* Marye, (1888) 8 S. E. 582.

See 45 Cent. Dig. tit. "Taxation," § 1368.

52. Lewis *v.* Cherry, 72 Ark. 254, 79 S. W. 793.

53. Bagley *v.* Shoppach, 43 Ark. 375; Silliman *v.* Frye, 6 Ill. 664; State *v.* Clinton, 27 La. Ann. 362.

54. Findley *v.* Adams, 2 Day (Conn.) 369; Benton *v.* Goodale, 66 N. H. 424, 30 Atl. 1121.

55. Fay *v.* Crozer, 156 Fed. 486; Lasher *v.* McCreery, 66 Fed. 834. *Compare* Barton *v.* Gilchrist, 19 W. Va. 223, holding that a tax deed is not invalidated by the fact that the records do not show when the sheriff's list of delinquent tax-sales was copied into the record books or transmitted to the auditor. See also cases cited in the following notes.

Sale to state.—A sale of land by the trustee of a county to the treasurer of the state at a tax-sale is void in Tennessee, where the said trustee fails to file in the office of the clerk of the circuit court a certified list of the land so sold by him, as required by Acts (1897), p. 34, c. 1, § 63. Harris *v.* Mason, 120 Tenn. 668, 115 S. W. 1146, 25 L. R. A. N. S. 1011; Tax Title Cases, 105 Tenn. 243, 58 S. W. 259.

Purposes of report.— The report of tax-sales is said to be conducive to the protection of the persons interested in the land, and hence the statute must be strictly complied with. Landis *v.* Vineland, 60 N. J. L. 271, 37 Atl. 1099, 61 N. J. L. 424, 39 Atl. 685. Again, it may be important to furnish record evidence of the fact and the particulars of the sale, and serve as the basis for making out the tax deed at the proper time. Morton *v.*

to be made within a limited time after the sale, it must be strictly complied with, and it is a fatal defect if the report is made too late.[56]

b. Effect of Omission of Report or Return. It is generally held that the omission of the proper officer to make his report or return of the tax-sale is a fatal defect and one which invalidates the title founded on such sale,[57] although in some states this is considered only an irregularity, not fatal to the title, especially in view of constitutional or statutory provisions dispensing with the extreme strictness of the rule regarding tax titles.[58] And it should be noted that the loss of such a report or return once duly made, or the fact that it cannot be found in the proper office, will not necessarily affect the tax title, since here the presumption may be invoked that public officers have duly and regularly performed the duties with which they were charged.[59]

Reeds, 6 Mo. 64. See Wescott *v.* McDonald, 22 Me. 402. And it furnishes the proper official evidence of the amount for which each tract of land was sold, and hence is important as determining the amount required for redemption. Salinger *v.* Gunn, 61 Ark. 414, 33 S. W. 959; Cooper *v.* Freeman Lumber Co., 61 Ark. 36, 31 S. W. 981, 32 S. W. 494. And under the laws of some of the states, the treasurer has no power to sell land for taxes at a private sale, until after his report of the public tax-sale is made and filed. State *v.* Helmer, 10 Nebr. 25, 4 N. W. 367.

56. *Florida.*— Stieff *v.* Hartwell, 35 Fla. 606, 17 So. 899.

Maine.— Pinkham *v.* Morang, 40 Me. 587; Andrews *v.* Senter, 32 Me. 394; Shimmin *v.* Inman, 26 Me. 228.

Michigan.—Youngs *v.* Peters, 118 Mich. 45, 76 N. W. 138. Under a statute requiring the report of sale to be made "as soon as" the tax-sales are confirmed, ten or twelve days is not an unreasonable length of time to take in making such report. Youngs *v.* Peters, *supra*; Detroit F. & M. Ins. Co. *v.* Wood, 118 Mich. 31, 76 N. W. 136.

North Carolina.— Taylor *v.* Allen, 67 N. C. 346.

Vermont.— Lane *v.* James, 25 Vt. 481; Chandler *v.* Spear, 22 Vt. 388; Taylor *v.* French, 19 Vt. 49; Richardson *v.* Dorr, 5 Vt. 9; Mead *v.* Mallet, 1 D. Chipm. 239.

Virginia.— Bond *v.* Pettit, 89 Va. 474, 16 S. E. 666.

West Virginia.— State *v.* Harman, 57 W. Va. 447, 50 S. E. 828; McCallister *v.* Cottrille, 24 W. Va. 173; Barton *v.* Gilchrist, 19 W. Va. 223. But see State *v.* McEldowney, 54 W. Va. 695, 47 S. E. 650, as to effect of curative statute.

United States.— De Forest *v.* Thompson, 40 Fed. 375.

See 45 Cent. Dig. tit. "Taxation," § 1370.

Contra.— Langley *v.* Batchelder, 69 N. H. 566, 46 Atl. 1085; Hoitt *v.* Burnham, 61 N. H. 620; Brien *v.* O'Shaughnesy, 3 Lea (Tenn.) 724.

Sale of lands to state.—Where a sale of land by the county trustee to the treasurer of the state is void because of failure of the trustee to file in the office of the clerk of the circuit court a certified list of the land so sold by him, as required by Tenn. Acts (1897), p. 34, c. 1, § 63, the defect cannot be cured by the filing of such list after the property has been sold to an individual purchaser. Harris *v.* Mason, 120 Tenn. 668, 115 S. W. 1146, 25 L. R. A. N. S. 1011; Condon *v.* Galbraith, 106 Tenn. 14, 58 S. W. 916.

57. *District of Columbia.*— King *v.* District of Columbia, 4 MacArthur 36.

Florida.— Ellis *v.* Clark, 39 Fla. 714, 23 So. 410. But the failure of a city tax collector to forward a copy of his report of city tax-sales to the controller does not invalidate the sales. Orlando *v.* Equitable Bldg., etc., Assoc., 45 Fla. 507, 33 So. 986.

Maine.— Pinkham *v.* Morang, 40 Me. 587; Andrews *v.* Senter, 32 Me. 394; Shimmin *v.* Inman, 26 Me. 228.

Michigan.— Jenkinson *v.* Auditor-Gen., 104 Mich. 34, 62 N. W. 163; Millard *v.* Truax, 99 Mich. 157, 58 N. W. 70.

Mississippi.— Zingerling *v.* Henderson, (1895) 18 So. 432; National Bank of Republic *v.* Louisville, etc., R. Co., 72 Miss. 447, 17 So. 7; Ferrill *v.* Dickerson, 63 Miss. 210; Hopkins *v.* Sandidge, 31 Miss. 668. *Compare* Wolfe *v.* Murphy, 60 Miss. 1.

North Carolina.— Taylor *v.* Allen, 67 N. C. 346.

Oregon.—Ayers *v.* Lund, 49 Oreg. 303, 89 Pac. 806, 124 Am. St. Rep. 1046.

Tennessee.— Harris *v.* Mason, 120 Tenn. 668, 115 S. W. 1146, 25 L. R. A. N. S. 1011; Condon *v.* Galbraith, 106 Tenn. 14, 58 S. W. 916; *In re* Tax Title Cases, 105 Tenn. 243, 58 S. W. 259; Bloomstein *v.* Brien, 3 Tenn. Ch. 55. But *compare* Brien *v.* O'Shaughnesy, 3 Lea 724.

Vermont.— Lane *v.* James, 25 Vt. 481; Sumner *v.* Sherman, 13 Vt. 609.

West Virginia.— McCallister *v.* Cottrille, 24 W. Va. 173; Barton *v.* Gilchrist, 19 W. Va. 223; Orr *v.* Wiley, 19 W. Va. 150; Dequasie *v.* Harris, 16 W. Va. 345.

United States.— Martin *v.* Barbour, 140 U. S. 634, 11 S. Ct. 944, 35 L. ed. 546; Fay *v.* Crozer, 156 Fed. 486; Cook *v.* Lasher, 73 Fed. 701, 19 C. C. A. 654; De Forest *v.* Thompson, 40 Fed. 375.

See 45 Cent. Dig. tit. "Taxation," § 1372.

58. Vance *v.* Schuyler, 6 Ill. 160; Playter *v.* Cochran, 37 Iowa 258; Negus *v.* Yancey, 23 Iowa 417; Cahoon *v.* Coe, 52 N. H. 518; Smith *v.* Messer, 17 N. H. 420; Allen *v.* Allen, 114 Wis. 615, 91 N. W. 218

59. Scott *v.* Watkins, 22 Ark. 556; Church

c. Filing and Recording Return. The collector's report of tax-sales is usually required to be placed on file or recorded; and this provision also is generally imperative, so that the failure to obey it will invalidate a tax deed subsequently issued.[60]

d. Form and Contents of Report. Whatever directions the statute may give as to the form and contents of the report or return must be carefully observed, and there must be at least a substantial compliance with its provisions or else

v. Nester, 126 Mich. 547, 85 N. W. 1078; Upton *v.* Kennedy, 36 Mich. 215; Henderson *v.* Hughes County, 13 S. D. 576, 83 N. W. 682. But see McFadden *v.* Brady, 120 Mich. 699, 79 N. W. 886.

60. *Arkansas.*— Townsend *v.* Penrose, 84 Ark. 316, 105 S. W. 588; Quertermous *v.* Walls, 70 Ark. 326, 67 S. W. 1014. But *compare* Wagner *v.* Arnold, 72 Ark. 371, 80 S. W. 577.

District of Columbia.— Beale *v.* Brown, 6 Mackey 574 [*affirmed* in 149 U. S. 766, 13 S. Ct. 1043, 37 L. ed. 960].

Mississippi.— Coltrane *v.* Cox, 60 Miss. 537.

Missouri.— Reeds *v.* Morton, 9 Mo. 878.

New Hampshire.— Cardigan *v.* Page, 6 N. H. 182.

New Jersey.— Lippincott *v.* Pensauken Tp., 62 N. J. L. 177, 40 Atl. 625.

Tennessee.— Harris *v.* Mason, 120 Tenn. 668, 115 S. W. 1146, 25 L. R. A. N. S. 1011.

Vermont.— Chandler *v.* Spear, 22 Vt. 388; Taylor *v.* French, 19 Vt. 49; Judevine *v.* Jackson, 18 Vt. 470; Carpenter *v.* Sawyer, 17 Vt. 121; Clark *v.* Tucker, 6 Vt. 181.

West Virginia.— Simpson *v.* Edmiston, 23 W. Va. 675.

United States.— De Forest *v.* Thompson, 40 Fed. 375.

See 45 Cent. Dig. tit. "Taxation," § 1370.

But *compare* Alderson *v.* Sparrow, 16 La. Ann. 227; Chippewa River Land Co. *v.* J. L. Gates Land Co., 118 Wis. 345, 94 N. W. 37, 95 N. W. 954.

Duty of recorder.— It is the duty of the clerk or recorder to admit the report of tax-sales to record, if it conforms to the statute, without inquiring into the validity of the sale. Randolph Justices *v.* Stalnaker, 13 Gratt. (Va.) 523.

Manner and sufficiency of filing or recording.—Where the tax collector presented his certificates of the tax-sales to the county recorder for filing, and the latter received them, but did not mark them "filed" because no fees were paid him, it was held that the certificates must be deemed to have been filed, because the recorder was not entitled to fees. Rollins *v.* Wright, 93 Cal. 395, 29 Pac. 58. But on the other hand, a report attached to the tax record which must remain in the treasurer's office cannot be regarded as having been filed in the clerk's office. Jenkinson *v.* Auditor-Gen., 104 Mich. 34, 62 N. W. 163. In New Hampshire, if the collector's return is put on file in the clerk's office, it is not necessary that it shall be copied into the records. Gibson *v.* Bailey, 9 N. H. 168.

Separate records of sales to state and to individuals.— Kirby Dig. Ark. § 7092, requiring the clerk of the county court to make a record of all tax-sales in a substantial book, to "record in a separate book" each tract sold for taxes to the state, and to certify to the auditor of state a copy of each of said sale lists "as recorded in said book," contemplates separate records of sales to individuals and sales to the state, but not that the first record shall contain a list of sales to the state, nor that the record of sales to the state must be kept in a separate book. Leigh *v.* Trippe, 91 Ark. 117, 120 S. W. 972. Such statute is directory and does not invalidate a sale to the state where the records are not kept separately, technical irregularities not prejudicial to the owner not being regarded, and section 7114 requiring proceedings to set aside sales on account of such irregularities to be instituted within the period allowed for redemption. Leigh *v.* Tripp, *supra*.

Time of filing see *supra*, XI, K, 1, a.

Noting time of filing.—Under some statutes it is imperative that the recorder shall note on the list or otherwise the time of filing the same. McCallister *v.* Cottrille, 24 W. Va. 173; Simpson *v.* Edmiston, 23 W. Va. 675; Barton *v.* Gilchrist, 19 W. Va. 223; Fay *v.* Crozer, 156 Fed. 486, West Virginia statute.

Authentication of record.— Records of tax-sales may be entered in a separate book kept for that purpose, but they must be authenticated by the official signature of the recording officer. Isaacs *v.* Shattuck, 12 Vt. 668. See Mersereau *v.* Miller, 112 Mich. 103, 70 N. W. 341, as to effect of county clerk signing himself as "register" instead of "clerk."

Record as evidence.—When the county treasurer's record of a tax-sale and the certificate based thereon conflict, the former must be treated as the original entry. Kneeland *v.* Hull, 116 Mich. 55, 74 N. W. 300. Where the report of sale of taxes made by the county treasurer was received in evidence, and was indorsed, "Received and filed" on a certain date, and signed by the county clerk, the proceedings were not open to the objection that there was no report of the county treasurer's sale, which the law provides must be made by the county treasurer and filed with the county clerk. Temple *v.* Preston, 150 Mich. 486, 114 N. W. 336.

In Mississippi a sale of land to the state in 1868 for taxes cannot be held void merely because it appears only in the obsolete records and was not brought forward under the abatement act of 1875 (Acts (1875), p. 11, c. 2) or the acts of 1880 (Acts (1880), p. 88, c. 9) or 1890 (Acts (1890), p. 16, c. 5), requiring compilation of lands claimed to be held by the state; those acts not canceling tax-sales which were not listed in compliance therewith, unless the lands were omitted by and with the advice of the attorney-general, as re-

a tax deed based thereon may not be valid.[61] In particular, the report must show the essentials of a valid sale,[62] setting forth specifically the time and manner of giving notice thereof,[63] the time of the sale,[64] and the place where it was held,[65] and it must contain such a description of the land sold as will suffice to identify it clearly,[66] and say what estate in the land was sold,[67] and that it was necessary to sell the whole of a given tract in order to make the taxes and charges, if such was the case,[68] and it must also name or designate the purchaser,[69] and state the

quired by Acts (1880), p. 88, c. 9, § 2. Winton *v.* Day, (1909) 49 So. 264.

61. *Alabama.*— Riddle *v.* Messer, 84 Ala. 236, 4 So. 185.

Michigan.— Jenison *v.* Conklin, 114 Mich. 9, 71 N. W. 1114.

Missouri.— Donohoe *v.* Hartless, 33 Mo. 335.

New Jersey.— Landis *v.* Vineland, 60 N. J. L. 271, 37 Atl. 1099.

Oregon.—Ayers *v.* Lund, 49 Oreg. 303, 89 Pac. 806, 124 Am. St. Rep. 1046.

United States.— Collier *v.* Goessling, 160 Fed. 604, 87 C. C. A. 506, holding that under Tenn. Act (1899), p. 1084, c. 435, requiring the county trustee to make public sale of land subject to delinquent taxes, and requiring that he strike off to the treasurer all lands in lots so sold, when the full amount of taxes, penalties, and costs are not bid at the sale by some private person, and that he shall then file with the clerk a certified list of the lands so struck off, specifying the days of sale, the amounts of the respective taxes for which the sale was made, and each item of cost thereof, where a list contained figures, between perpendicular lines, with nothing to indicate that the figures stood for dollars and cents, and there was no separation of the tax due the state from that due the county, or the amount of any special tax, the list was void, and did not operate to pass any title to the state.

See 45 Cent. Dig. tit. "Taxation," § 1371.

But *compare,* for decisions slightly relaxing the severity of the rule stated in the text, Textor *v.* Shipley, 83 Md. 424, 38 Atl. 932; State *v.* McEldowney, 55 W. Va. 1, 47 S. E. 653; Kendall *v.* Scott, 48 W. Va. 251, 37 S. E. 531; Barton *v.* Gilchrist, 19 W. Va. 223.

Particularity required.— The various facts required in the report must be stated specifically; it is not enough to certify that the sale was duly made or made in conformity to law. Morton *v.* Reeds, 6 Mo. 64; Games *v.* Dunn, 14 Pet. (U. S.) 322, 10 L. ed. 476.

Omission of date.— The fact that the collector's report is not dated does not vitiate the sales listed in the report. Corburn *v.* Crittenden, 62 Miss. 125.

Effect of erasure.—Where an erasure appears in the record of tax-sales, it will be presumed to have been made in the correction of a mistake. Henderson *v.* Oliver, 32 Iowa 512.

Vacating defective report.—Although no certificate of sale has yet been issued on a defective return, the owner of the land may have the return examined on certiorari and vacated. Landis *v.* Vineland, 60 N. J. L. 271, 37 Atl. 1099.

62. Nason *v.* Ricker, 63 Me. 381 (report must show that the sale was made at auction); Bean *v.* Thompson, 19 N. H. 290, 49 Am. Dec. 154 (sale must appear to have been made to the highest bidder); Nance *v.* Hopkins, 10 Lea (Tenn.) 508 (not necessary to recite the election or qualification of the assessors); Burlew *v.* Quarrier, 16 W. Va. 108 (report must show the year for which the delinquent taxes were due).

63. *Maine.*— Lovejoy *v.* Lunt, 48 Me. 377.

New Hampshire.— Jones *v.* Blanchard, 62 N. H. 651.

New Jersey.— Jones *v.* Landis Tp., 50 N. J. L. 374, 13 Atl. 251.

Vermont.— Isaacs *v.* Shattuck, 12 Vt. 668.

United States.— Games *v.* Dunn, 14 Pet. 322, 10 L. ed. 476.

See 45 Cent. Dig. tit. "Taxation," § 1371.

Contra.— Thurston *v.* Miller, 10 R. I. 358.

64. Sully *v.* Kuehl, 30 Iowa 275; Bloomstein *v.* Brien, 3 Tenn. Ch. 55; Bellows *v.* Elliot, 12 Vt. 569 (a clerical error in stating the year of the sale does not vitiate, when the mistake is apparent and it is also apparent when the sale was really made); Spear *v.* Ditty, 8 Vt. 419; Callanan *v.* Hurley, 93 U. S. 387, 23 L. ed. 931. *Compare* Jones *v.* Landis Tp., 50 N. J. L. 374, 13 Atl. 251; Hornage *v.* Imboden, 57 W. Va. 206, 49 S. E. 1036.

65. Bellows *v.* Elliot, 12 Vt. 569; Spear *v.* Ditty, 8 Vt. 419; Winning *v.* Eakin, 44 W. Va. 19, 28 S. E. 757.

66. *Kansas.*— Douglass *v.* Leavenworth County, 75 Kan. 6, 88 Pac. 557.

Kentucky.— Husbands *v.* Polivick, 96 S. W. 825, 29 Ky. L. Rep. 890; Pryor *v.* Hardwick, 22 S. W. 545, 15 Ky. L. Rep. 166.

Maine.— Burgess *v.* Robinson, 95 Me. 120, 49 Atl. 606; Ladd *v.* Dickey, 84 Me. 190, 24 Atl. 813; Whitmore *v.* Learned, 70 Me. 276; Andrews *v.* Senter, 32 Me. 394; Shimmin *v.* Inman, 26 Me. 228.

New York.— Clark *v.* Holdridge, 12 N. Y. App. Div. 613, 43 N. Y. Suppl. 115.

Ohio.— Humphries *v.* Huffman, 33 Ohio St. 395.

Tennessee.— Morrison *v.* King, 11 Lea 669.

Vermont.— Bellows *v.* Elliot, 12 Vt. 569.

West Virginia.— Duerr *v.* Snodgrass, 58 W. Va. 472, 52 S. E. 531; Winning *v.* Eakin, 44 W. Va. 19, 28 S. E. 757; Barton *v.* Gilchrist, 19 W. Va. 223.

See 45 Cent. Dig. tit. "Taxation," § 1371.

67. Braxton *v.* Rich, 47 Fed. 178.

68. Milliken *v.* Houghton, 97 Me. 447, 54 Atl. 1075; Lovejoy *v.* Lunt, 48 Me. 377; Chandler *v.* Spear, 22 Vt. 388. *Compare* Duerr *v.* Snodgrass, 58 W. Va. 472, 52 S. E. 531.

69. Dumphey *v.* Auditor-Gen., 123 Mich. 354, 82 N. W. 55; Powers *v.* Penny, 59 Miss.

amount for which the land was sold.[70] It is generally necessary that the report shall be officially signed, and if the law requires it also to be certified, attested, or verified by affidavit, this too is indispensable.[71] Finally if the collector neglects to comply with a direction of the statute requiring him to state that he "is not now, nor has he at any time been, directly or indirectly interested in the purchase of any such lands," this will be ground for setting aside the sale and restraining the execution of a deed.[72]

e. Amendment. Where the report or return, or record thereof, shows a fatal defect in the proceedings on the face of it, it cannot be amended in such a manner as to make the sale appear valid, at least after the right of redemption has expired,[73] or where the effect of the amendment will be to divest the title of a *bona fide* purchaser from the original owner.[74]

2. Confirmation of Sale by Court. Proceedings for the confirmation of a tax-sale are prescribed or authorized by law in several of the states,[75] and in these jurisdictions, as a rule, a sale of land for taxes pursuant to a decree in an overdue tax suit vests no title in the purchaser until confirmation.[76] Such proceedings

5; Donohoe *v.* Hartless, 33 Mo. 335; Duerr *v.* Snodgrass, 58 W. Va. 472, 52 S. E. 531. *Compare* Hollister *v.* Bennett, 9 Ohio 83.

70. Wagner *v.* Arnold, 72 Ark. 371, 80 S. W. 577; McGrath *v.* Wallace, 116 Cal. 548, 48 Pac. 719; Kann *v.* King, 25 App. Cas. (D. C.) 182 [*reversed* on other grounds in 204 U. S. 43, 27 S. Ct. 213, 51 L. ed. 360]; Millard *v.* Truax, 99 Mich. 157, 58 N. W. 70.

71. *Louisiana.*— Tensas Delta Land Co. *v.* Sholars, 105 La. 357, 29 So. 908.

Maine.— Flint *v.* Sawyer, 30 Me. 226.

Mississippi.— Cole *v.* Coon, 70 Miss. 634, 12 So. 849; Mayson *v.* Banks, 59 Miss. 447.

New Hampshire.— Benton *v.* Merrill, 68 N. H. 369, 39 Atl. 257.

Ohio.— Hollister *v.* Bennett, 9 Ohio 83.

Tennessee.— *In re* Tax Title Cases, 105 Tenn. 243, 58 S. W. 259, holding that failure of the county trustee to file with the clerk of the circuit court the list, duly certified, of lands struck off to the state treasurer at tax sales, as required by statute, is fatal; it being essential that the list be duly certified, and not enough that it be substantially correct.

Vermont.— Taylor *v.* French, 19 Vt. 49.

United States.— Fay *v.* Crozer, 156 Fed. 486, affidavit of sheriff to list of sales not dated, and his certificate not signed by him; defects fatal under West Virginia statute.

See 45 Cent. Dig. tit. "Taxation," § 1371.

72. McClain *v.* Batton, 50 W. Va. 121, 40 S. E. 509; Boggess *v.* Scott, 48 W. Va. 316, 37 S. E. 661; Winning *v.* Eakin, 44 W. Va. 19, 28 S. E. 757; Phillips *v.* Minear, 40 W. Va. 58, 20 S. E. 924; Baxter *v.* Wade, 39 W. Va. 281, 19 S. E. 404; Hays *v.* Heatherly, 36 W. Va. 613, 15 S. E. 223; Jackson *v.* Kittle, 34 W. Va. 207, 12 S. E. 484.

73. McGrath *v.* Wallace, 116 Cal. 548, 48 Pac. 719; Hall *v.* O'Connell, 51 Oreg. 225, 94 Pac. 564; Langdon *v.* Poor, 20 Vt. 13; Judevine *v.* Jackson, 18 Vt. 470; French *v.* Edwards, 9 Fed. Cas. No. 5,098, 5 Sawy. 266. *Contra,* Langley *v.* Batchelder, 69 N. H. 566, 46 Atl. 1085.

74. Hall *v.* O'Connell, 51 Oreg. 225, 94 Pac. 564, no amendment to correct description of land sold.

75. See the statutes of the different states.

Time of proceedings.— Confirmation of a tax-sale may be made before the expiration of two years from the date of the sale. Doyle *v.* Martin, 55 Ark. 37, 17 S. W. 346.

Objections after default decree in "scavenger" suit.— In Nebraska the validity of taxes involved in a default decree rendered in a scavenger suit under Comp. St. (1907) c. 77, art. 9, may be contested on an application to confirm the sale; and when it appears on objections to such application that the decree includes taxes which are illegal and void, the motion to confirm the sale should be denied and the error in the decree corrected. State *v.* Several Parcels of Land, 81 Nebr. 770, 116 S. W. 682; Prudential Real Estate Co. *v.* Hall, 79 Nebr. 805, 808, 113 N. W. 243, 116 N. W. 40; State *v.* Several Parcels of Land, 75 Nebr. 538, 106 N. W. 663. A proceeding which deprives a person of his property by means of a void tax is gross injustice within the meaning of Comp. St. (1907) § 5235, providing that a confirmation of a tax-sale shall be denied where the taxes and assessments or a part thereof were based on proceedings wherein there had been gross injustice. State *v.* Several Parcels of Land, *supra.*

76. Neal *v.* Andrews, 53 Ark. 445, 14 S. W. 646; Smith *v.* Carnahan, 83 Nebr. 667, 120 N. W. 212; Indiana, etc., Lumber, etc., Co. *v.* Milburn, 161 Fed. 531, 88 C. C. A. 473. Where a purchaser at a void sale for taxes sues to foreclose the tax lien and the land is sold, it is a judicial sale, and does not become final until confirmation. Barker *v.* Hume, 84 Nebr. 235, 120 N. W. 1131.

Sale to state.— Confirmation of a tax-sale is necessary where the land was struck off to the state, as well as in the case of an individual purchaser; and until the sale is confirmed, the state is only a preferred bidder. Neal *v.* Andrews, 53 Ark. 445, 14 S. W. 646. After various decrees and orders, and vacations thereof, in proceedings for the sale of land for the non-payment of taxes, it appeared that the money paid by the purchasers had been distributed and was beyond their reach; and, the purchasers having neither money nor deeds of the land, a chan-

must be brought before a court of competent jurisdiction,[77] and upon the giving of the prescribed notice to the owner of the land and other parties in interest.[78] They are founded on the report or return of the officer making the sale, supplemented by testimony if necessary,[79] and the purchaser must show full compliance with the law regulating such sales.[80] The order or decree of the court confirming the sale [81] may be vacated by the court while the proceeding remains within its jurisdiction,[82] or, if it is void for want of jurisdiction or erroneous on its face, it may be set aside or reversed on appeal; [83] but otherwise it has the force and effect of a judgment, and in some states is held so far conclusive as to cut off all inquiry into the validity of the tax-sale,[84] although in some others it only establishes a *prima facie* case for the purchaser at the tax-sale, so as to cast the burden of proving its invalidity on the party objecting to it.[85] In any case, however, the order or decree is limited to determining the validity of the sale; the proceeding is not

cery court directed the commissioner to make a statement showing his disposition of the proceeds, and, this being done, confirmed the report of sales and ordered the commissioner to execute deeds to purchasers, conveying only such title as the decree or decrees were competent to pass. It was held that such order only confirmed sales of lands made to individuals, and did not apply to lands struck off to the state. Indiana, etc., Lumber, etc., Co. *v.* Milburn, 161 Fed. 531, 88 C. C. A. 473.

77. Miller *v.* Reynolds, (Ark. 1890) 13 S. W. 597 (case of confirmation of sale by court not legally constituted, but defect cured by subsequent execution of deed under order of the proper court); Boon *v.* Simmons, 88 Va. 259, 13 S. E. 439 (if decree of confirmation is made after the court has lost jurisdiction of the case by lapse of time, the tax title is worthless).

78. St. Louis, etc., R. Co. *v.* Holton-Warren Lumber Co., 61 Ark. 50, 32 S. W. 117; Armstrong *v.* Middlestadt, 22 Nebr. 711, 36 N. W. 151; *Re* South Vancouver Tax Sale, 9 Brit. Col. 572. But *compare In re* Tax Sale of Lot 172, 42 Md. 196, holding that the judge may set aside the tax-sale without the prescribed statutory notice having been given, if he finds upon a preliminary examination that the proceedings are not regular and in conformity with the law.

79. Taylor *v.* Forrest, 96 Md. 529, 54 Atl. 111; Stevenson *v.* Reed, 90 Miss. 341, 43 So. 433, holding that in an action to confirm a tax-sale, testimony of the sheriff that he "sold an undivided half interest in 80 acres, which would be 40 acres," instead of selling in 40-acre tracts, as required by Annot. Code (1892), § 3813, was competent, as explanatory of how the sale was conducted, and did not fall within the rule that an officer may not impeach his official acts.

80. Overman *v.* Parker, 18 Fed. Cas. No. 10,623, Hempst. 692.

81. The confirmation of a decree for the sale of land for taxes need not be shown by a formal order if the confirmation can be gathered from the entire report. Ousler *v.* Robinson, 72 Ark. 339, 80 S. W. 227. In Michigan the sale stands confirmed, subject to the right of redemption, without the entry of an order or further notice, unless objections are filed within eight days after the time for filing the report; and the mere fact that no formal order of confirmation has been entered is no ground for setting aside the sale. Conley *v.* McMillan, 120 Mich. 694, 79 N. W. 909.

Contents of order.— The order or decree of confirmation should so clearly identify the sale acted on as to leave no doubt that the particular sale under which title is claimed was before the court and was intended to be confirmed. Northrop *v.* Devore, 11 Ohio 359.

82. Indiana, etc., Lumber, etc., Co. *v.* Milburn, 161 Fed. 531, 88 C. C. A. 473, Arkansas statute. In Nebraska the court is the vendor in a judicial sale and may reject any bid appearing inadequate, and, while the proceeding remains within its jurisdiction, may vacate any erroneous order of confirmation made during its progress, and this power is not affected by the statute providing the procedure for the collection of taxes and commonly called the "Scavenger Act" (Cobbey Annot. St. (1903) §§ 10,644–10,691). Prudential Real Estate Co. *v.* Hall, 79 Nebr. 805, 808, 113 N. W. 243, 116 N. W. 40.

83. Adair *v.* Scott, 53 Ark. 480, 14 S. W. 671; *In re* Bond, 15 La. Ann. 129; Condon *v.* Galbraith, 106 Tenn. 14, 58 S. W. 916.

84. Boynton *v.* Ashabranner, 75 Ark. 415, 88 S. W. 566, 1011, 91 S. W. 20; Caldwell *v.* Martin, 55 Ark. 470, 18 S. W. 633; Boehm *v.* Botsford, 52 Ark. 400, 12 S. W. 786; Wallace *v.* Brown, 22 Ark. 118, 76 Am. Dec. 421.

Strangers not bound by decree.—A decree in a suit to confirm a tax-sale and the title based thereon is without effect upon the title of one who was not a party thereto. Osceola Land Co. *v.* Chicago Mill, etc., Co., 84 Ark, 1, 103 S. W. 609.

Effect of confirmation of sale on right of redemption see *infra*, XII, A, 1, note 78.

85. Kent *v.* Brown, 38 La. Ann. 802; Dodeman *v.* Barrow, 10 La. Ann. 193; McMahon *v.* Crean, 109 Md. 652, 71 Atl. 995; Young *v.* Ward, 88 Md. 413, 41 Atl. 925; Baumgardner *v.* Fowler, 82 Md. 631, 34 Atl. 537; Cooper *v.* Holmes, 71 Md. 20, 17 Atl. 711; Steuart *v.* Meyer, 54 Md. 454; Guisebert *v.* Etchison, 51 Md. 478.

a suit to quiet title, and it can neither establish nor confirm in the purchaser a title which he would not acquire under the sale.[86]

L. Certificate of Sale — 1. Nature and Purpose.[87] A tax-sale certificate is intended to identify the purchaser, and to be the official evidence of his right to receive the redemption money if tendered in time or a tax deed if there is no redemption, and of his rights *ad interim*. It does not create or pass a title to the land, but it is the proper evidence and assurance of the purchaser's inchoate or inceptive title.[88] It may be recorded if the law of the state so provides,[89] and it imparts constructive notice to a subsequent purchaser of the property.[90] On the death of the holder, it descends to the heir, and is not assets in the hands of the executor.[91]

2. Time of Executing. The tax-sale certificate is intended to be made on the day of the sale; if made before the sale actually takes place it is void; [92] and although a brief and not unreasonable delay in making it would probably not invalidate the title, yet there is no authority to make and deliver such a certificate after the lapse of several years from the sale.[93] The certificate should be dated as of the day of the sale, to which time it relates back.[94] If its delivery is refused or unreasonably delayed, the person entitled to it may have mandamus to compel its issuance.[95]

3. Form and Contents. A tax-sale certificate should follow the statutory form, if any, and at any rate contain all the particulars essential to a complete instrument.[96] It must be signed by the proper officer and must be under seal if

86. Updegraff *v.* Marked Tree Lumber Co., 83 Ark. 154, 103 S. W. 606; Beardsley *v.* Hill, 71 Ark. 211, 72 S. W. 372; Logan County *v.* McKinley-Lanning L. & T. Co., 70 Nebr. 406, 101 N. W. 991.

87. Assignment of certificate see *infra*, XIV, A, 7, a.

88. *Alabama.*— Hibbard *v.* Brown, 51 Ala. 469.

Georgia.— Flemister *v.* Flemister, 83 Ga. 79, 9 S. E. 724.

Minnesota.— Stewart *v.* Colter, 31 Minn. 385, 18 N. W. 98. Where land sold for taxes is bid in by the state, there must be a certificate of sale issued to the state, the same as to a private purchaser. Philbrook *v.* Smith, 40 Minn. 100, 41 N. W. 545.

Missouri.— Kohle *v.* Hobson, 215 Mo. 213, 114 S. W. 952.

North Dakota.— Cruser *v.* Williams, 13 N. D. 284, 100 N. W. 721.

Ohio.— State *v.* Godfrey, 62 Ohio St. 18, 56 N. E. 482.

Oklahoma.— Keller *v.* Hawk, 19 Okla. 407, 91 Pac. 778.

Wisconsin.— Curtis Land, etc., Co. *v.* Interior Land Co., 137 Wis. 341, 118 N. W. 853, 129 Am. St. Rep. 1068; Dalrymple *v.* Milwaukee, 53 Wis. 178, 10 N. W. 141. And see Eaton *v.* Manitowoc County, 44 Wis. 489.

See 45 Cent. Dig. tit. "Taxation," § 1377.

Equitable title.— A holder of tax certificates subject to tax deeds has an equitable title to the land, if they are held adversely to the owner. Curtis Land, etc., Co. *v.* Interior Land Co., 137 Wis. 341, 118 N. W. 853, 129 Am. St. Rep. 1068.

Effect of failure to make certificate.— The tax-sale certificate is intended for the benefit and protection of the purchaser; and the failure of the county treasurer to make and execute this certificate in no way affects the validity of the sale, which may be proven by other evidence if the certificate is not issued. Pentecost *v.* Stiles, 5 Okla. 500, 49 Pac. 921.

89. Meyer *v.* Fountain, 34 La. Ann. 987. See *infra*, XI, L, 5.

90. Grant *v.* Cornell, 147 Cal. 565, 82 Pac. 193, 109 Am. St. Rep. 173.

Encumbrance and cloud on title.— Outstanding tax certificates import an absolute and paramount right to the land, subject only to the right of redemption, and constitute an incumbrance upon the land and a cloud upon the title. Curtis Land, etc., Co. *v.* Interior Land Co., 137 Wis. 341, 118 N. W. 853, 129 Am. St. Rep. 1068.

91. Rice *v.* White, 8 Ohio 216; Eaton *v.* Manitowoc, 44 Wis. 489.

92. Glos *v.* Gleason, 249 Ill. 517, 70 N. E. 1045; Kepley *v.* Fouke, 187 Ill. 162, 58 N. E. 303.

93. Smith *v.* Lambert, 68 Minn. 313, 71 N. W. 381; Kipp *v.* Hill, 40 Minn. 188, 41 N. W. 970; Gilfillan *v.* Chatterton, 37 Minn. 11, 33 N. W. 35, 5 Am. St. Rep. 810; Stewart *v.* Minneapolis, etc., R. Co., 36 Minn. 355, 31 N. W. 351. But see *In re* Prince Albert Tax Sales, 4 Northwest Terr. 198. A tax-sale held at the legally authorized time will not be invalidated by the fact that the certificate was not made until three months afterward. Otoe County *v.* Brown, 16 Nebr. 394, 20 N. W. 274.

94. People *v.* Cady, 105 N. Y. 299, 11 N. E. 810.

95. State *v.* Magill, 4 Kan. 415; State *v.* Humphreys, 7 Ohio Dec. (Reprint) 131, 1 Cinc. L. Bul. 140.

96. *Arkansas.*— Keith *v.* Freeman, 43 Ark. 296.

California.— Carter *v.* Osborn, 150 Cal. 620, 89 Pac. 608.

so required, although not otherwise.[97] It must in particular give the date of the sale,[98] and describe the manner in which it was conducted, with reference especially to the reception of bids and the order and manner of offering separate tracts or parcels of land,[99] and it must contain a description of the property sold sufficient to identify it with certainty,[1] name the owner and person to whom it was assessed,[2] and state the amount of the taxes for which the land was sold and for what year they were delinquent.[3] This certificate also contains a statement

Iowa.— Davis *v.* Magoun, 109 Iowa 308, 80 N. W. 423.

Minnesota.— Gilfillan *v.* Hobart, 35 Minn. 185, 28 N. W. 222.

North Dakota.— State Finance Co. *v.* Trimble, 16 N. D. 199, 112 N. W. 984; Nind *v.* Myers, 15 N. D. 400, 109 N. W. 335, 8 L. R. A. N. S. 157.

Wisconsin.— Manseau *v.* Edwards, 53 Wis. 457, 10 N. W. 554.

See 45 Cent. Dig. tit. "Taxation," § 1378.

Omission of date.—A tax-sale is not invalid because the certificate is not dated. Corburn *v.* Crittenden, 62 Miss. 125.

97. *Mississippi.*— Gibbs *v.* Dortch, 62 Miss. 671.

Nevada.—Ward *v.* Carson River Wood Co., 13 Nev. 44.

New York.— Lockwood *v.* Gehlert, 127 N. Y. 241, 27 N. E. 812 [*affirming* 53 Hun 15, 6 N. Y. Suppl. 20].

North Dakota.— Beggs *v.* Paine, 15 N. D. 436, 109 N. W. 322, seal not necessary.

Ohio.— Sheldon *v.* Coates, 10 Ohio 278.

United States.— Cooley *v.* O'Connor, 12 Wall. 391, 20 L. ed. 446.

98. Sanborn *v.* Mueller, 38 Minn. 27, 35 N. W. 666; Gilfillan *v.* Hobart, 35 Minn. 185, 28 N. W. 222.

99. Whitney *v.* Bailey, 88 Minn. 247, 92 N. W. 974; Davis *v.* Carlin, 77 Minn. 472, 80 N. W. 366; Vanderlinde *v.* Canfield, 40 Minn. 541, 42 N. W. 538; Brown *v.* Setzer, 39 Minn. 317, 40 N. W. 70; Sanborn *v.* Mueller, 38 Minn. 27, 35 N. W. 666; Kipp *v.* Collins, 33 Minn. 394, 23 N. W. 554; Farnham *v.* Jones, 32 Minn. 7, 19 N. W. 83; Kipp *v.* Dawson, 31 Minn. 373, 17 N. W. 961, 18 N. W. 96. A tax certificate is void where it fails to state whether each tract of land therein described was in fact sold for the highest sum bid therefor. Babcock *v.* Johnson, 108 Minn, 217, 121 N. W. 909 [*distinguishing* Kipp *v.* Dawson, *supra*]; Davis *v.* Carlin, *supra.*

1. *California.*— Lemoore Bank *v.* Fulgham, 151 Cal. 234, 90 Pac. 936.

Nebraska.— Merrill *v.* Van Camp, 1 Nebr. (Unoff.) 462, 96 N. W. 344.

North Dakota.— Beggs *v.* Paine, 15 N. D. 436, 109 N. W. 322.

Tennessee.— Buck *v.* Williams, 10 Heisk. 264; Quinby *v.* North American Coal, etc., Co., 2 Heisk. 596.

Utah.— Olsen *v.* Bagley, 10 Utah 492, 37 Pac. 739.

West Virginia.— Old Dominion Bldg., etc., Assoc. *v.* Sohn, 54 W. Va. 101, 46 S. E. 222.

Wisconsin.— Chippewa River Land Co. *v.* J. L. Gates Land Co., 118 Wis. 345, 94 N. W. 37, 95 N. W. 954; Cate *v.* Werder, 114 Wis. 122, 89 N. W. 822; Reinhart *v.* Oconto County, 69 Wis. 352, 34 N. W. 135; Murphy *v.* Hall, 68 Wis. 202, 31 N. W. 754.

United States.— Metcalf *v.* Davies Screw Co., 17 Fed. Cas. No. 9,495.

Clerical errors.—Where, in a suit to foreclose a tax-sale certificate, a clerical mistake appears in the description, the error will not defeat the action if sufficient remains in the description to identify the land on the tax list. Hart *v.* Murdock, 80 Nebr. 274, 114 N. W. 268.

2. Greenwood *v.* Adams, 80 Cal. 74, 21 Pac. 1134.

3. *California.*— Lemoore Bank *v.* Fulgham, 150 Cal. 234, 90 Pac. 936; Preston *v.* Hirsch, 5 Cal. App. 485, 90 Pac. 965. An omission to recite the year for which land in controversy was assessed in the certificate of the sale of the land for taxes was not a mere clerical misprision, which could be avoided under Pol. Code, § 3885, authorizing disregard of irregularities. Preston *v.* Hirsch, *supra.* Under the express terms of Pol. Code, § 3776, the only amount required to be stated in a tax-sale certificate is the amount of the assessment, and a certificate is not invalidated by failure to separately set forth the amount of the penalties, costs, and charges. Bank of Lemoore *v.* Fulgham, *supra.*

Minnesota.— Cool *v.* Kelly, 78 Minn. 102, 80 N. W. 861.

Nebraska.— Cushman *v,* Taylor, (1902) 90 N. W. 207.

Tennessee.— Hamilton *v.* Brownsville Gaslight Co., 115 Tenn. 150, 90 S. W. 159.

United States.— Coleman *v.* Peshtigo Lumber Co., 30 Fed. 317.

The caption of a certificate for the sale of land for taxes, being no part of the certificate, is ineffective to aid the certificate so as to supply an omission therefrom of the year for which the property was assessed. Preston *v.* Hirsch, 5 Cal. App. 485, 90 Pac. 965.

Surplusage.—A certificate of sale of land for taxes was not invalid because it recited that the amount for which the land was sold, being the same as the amount charged, was for taxes of every kind charged against the property and penalties and costs and "charges"; the word "charges" being mere surplusage. Chapman *v.* Zoberlein, 152 Cal. 216, 92 Pac. 188.

Substantial compliance with requirement that the certificate shall recite that the property "was sold for delinquent taxes" see Phillips *v.* Cox, 7 Cal. App. 308, 94 Pac. 277.

of the time when the purchaser will be entitled to a deed, if no redemption is effected.[4]

4. Tax Certificate as Evidence. A certificate of purchase at tax-sale is *prima facie* evidence of the facts which it recites.[5] But as to the regularity and validity of the prior proceedings, from the assessment up to and including the sale, the authorities are divided, some holding the rule that the certificate is presumptive evidence of all such matters, casting on the party claiming adversely to it the burden of proving any particular defect alleged,[6] while others require the party claiming under the certificate to show a strict compliance with the statutes in all the steps necessary to be taken prior to the issue of the certificate.[7] As the certificate, however, is not an instrument of title, but only certifies to the right of the holder to obtain a deed, at a certain time and on certain conditions, it is not admissible, in an action such as ejectment, as evidence of title, even when accompanied by an offer to prove a demand and refusal of a tax deed.[8]

5. Recording or Filing. A statute requiring the tax certificate to be recorded or a duplicate of it to be filed officially, as a condition to the issuance of a tax deed or to its reception in evidence, is imperative and not merely directory.[9]

6. Delinquency Certificates. A statute sometimes authorizes the proper county officers, after the taxes on given land have been delinquent for a prescribed length of time,[10] to issue a certificate of delinquency to any person paying the entire amount of the taxes and charges due,[11] or, under certain conditions, to the

4. Stout *v.* Coates, 35 Kan. 382, 11 Pac. 151.

5. Tifft *v.* Greene, 211 Ill. 389, 71 N. E. 1030; Cook *v.* John Schroeder Lumber Co., 85 Minn. 274, 88 N. W. 971; Leavitt *v.* S. D. Mercer Co., 64 Nebr. 31, 89 N. W. 426; Woodbridge Tp. *v.* State, 43 N. J. L. 262; Keller *v.* Hawk, 19 Okla. 407, 91 Pac. 778.

Evidence as to manner of sale.— The fact that the certificate given to a purchaser of land at a tax-sale comprises several lots is no evidence that the lots were sold *en masse.* Gage *v.* Bailey, 102 Ill. 11.

Evidence as to amount of taxes due.—A tax certificate is admissible to show the amount of taxes due upon the land covered thereby for the year for which the sale was made. Lee *v.* Breezly, 54 Iowa 660, 7 N. W. 117.

6. *Minnesota.*— Mitchell *v.* McFarland, 47 Minn. 535, 50 N. W. 610; McQuade *v.* Jaffray, 47 Minn. 326, 50 N. W. 233; Bennett *v.* Blatz, 44 Minn. 56, 46 N. W. 319; Sanborn *v.* Cooper, 31 Minn. 307, 17 N. W. 856.

Missouri.— State *v.* Van Every, 75 Mo. 530.

Nebraska.— Gallentine *v.* Fullerton, 67 Nebr. 553, 93 N. W. 932; Ure *v.* Reichenberg, 63 Nebr. 899, 89 N. W. 414; Ryan *v.* West, 63 Nebr. 894, 89 N. W. 416; Bryant *v.* Estabrook, 16 Nebr. 217, 20 N. W. 245; Alling *v.* Woodard, 2 Nebr. (Unoff.) 235, 96 N. W. 127.

North Carolina.— Basnight *v.* Smith, 112 N. C. 229, 16 S. E. 902.

North Dakota.— State Finance Co. *v.* Beck, 15 N. D. 374, 109 N. W. 357. A tax certificate which is void for irregularity in the description of the land cannot be admitted as evidence of the levy and assessment of the tax. State Finance Co. *v.* Mulberger, 16 N. D. 214, 112 N. W. 986, 125 Am. St. Rep. 650.

United States.— Kelly *v.* Sanders, 99 U. S. 441, 25 L. ed. 327; De Treville *v.* Smalls, 98 U. S. 517, 25 L. ed. 174.

See 45 Cent. Dig. tit. "Taxation," § 1377 *et seq.*

7. *California.*— Crocker *v.* Scott, 149 Cal. 575, 87 Pac. 102; Hall *v.* Theisen, 61 Cal. 524.

Iowa.— Hogdon *v.* Green, 56 Iowa 733, 10 N. W. 267; Byam *v.* Cook, 21 Iowa 392. While a tax certificate is evidence of the sale, yet a record of the sale is better evidence. Clark *v.* Thompson, 37 Iowa 536; Henderson *v.* Oliver, 32 Iowa 512; McCready *v.* Saxton, 29 Iowa 356, 4 Am. Rep. 214.

New York.— Overing *v.* Foote, 43 N. Y. 290.

Ohio.— Cottage Loan, etc., Assoc. *v.* Bacon, 1 Ohio S. & C. Pl. Dec. 197, 2 Ohio N. P. 295.

Oregon.— Dolph *v.* Barney, 5 Oreg. 191.

Tennessee.— Quimby *v.* North American Coal, etc., Co., 2 Heisk. 596.

See 45 Cent. Dig. tit. "Taxation," § 1377.

8. Flemister *v.* Flemister, 83 Ga. 79, 9 S. E. 724; Ludden *v.* Hansen, 17 Nebr. 354, 22 N. W. 766.

9. Meyer *v.* Fountain, 34 La. Ann. 987; Donohoe *v.* Rooker, 10 Mo. 166; Tilden *v.* Duden, 48 Hun (N. Y.) 618, 1 N. Y. Suppl. 292. *Contra,* Bryant *v.* Estabrook, 16 Nebr. 217, 20 N. W. 245.

10. Cavanaugh *v.* Roberts, 50 Wash. 265, 97 Pac. 55; Jefferson County *v.* Trumbull, 34 Wash. 276, 75 Pac. 876; State *v.* Whittlesey, 17 Wash. 447, 50 Pac. 119.

Statute constitutional see State *v.* Whittlesey, 17 Wash. 447, 50 Pac. 119.

A county treasurer has authority to certify to tax delinquency certificates, although they were issued at a date prior to the commencement of his term of office. Jefferson County *v.* Trumbull, 34 Wash. 276, 75 Pac. 876.

11. Holcomb *v.* Johnson, 43 Wash. 362, 86 Pac. 409; State *v.* McConnaughey, 31 Wash.

county.[12] The holder of such certificates must then foreclose the right of redemption still remaining in the owner of the property by an action brought for that purpose.[13] To sustain such action the certificates must be substantially in the form prescribed by the statute,[14] and otherwise comply with mandatory requirements of the statute.[15]

M. Setting Aside or Canceling Sale or Certificate — 1. Jurisdiction and Authority of Courts and Officers. Where a tax-sale or the certificate issued thereon was entirely void, the owner is not obliged to redeem the land, but may have relief even before the expiration of the time limited for redemption. If the defect is not apparent on the face of the proceedings, a court of equity will set aside the sale and certificate as constituting a cloud on title, or to prevent a multiplicity of suits, or to prevent an injurious act by a public officer for which the law gives no adequate redress.[16] Where the tax-sale was founded on a judgment, the owner may move to vacate the judgment and the sale.[17] Where the purchaser applies for a writ of assistance or otherwise seeks to gain possession, the owner may file a petition in such proceeding to vacate the sale.[18] But where the rights of the purchaser at a tax-sale or holder of the certificate have passed to a third person for value and without notice, he cannot be affected by collateral proceedings, but a direct action against him must be brought.[19] In some states authority to cancel tax-sales or certificates is given by law to certain public officers.[20] But in the absence of such a statute the officers of a county, having bid in lands for it at a tax-sale, cannot cancel or rescind the sale except on the same conditions as would apply in the case of a private purchaser.[21]

207, 71 Pac. 770; Keene *v.* Seattle, 31 Wash. 202, 71 Pac. 769; Million *v.* Welts, 29 Wash. 106, 69 Pac. 633.

12. Miller *v.* Henderson, 50 Wash. 200, 96 Pac. 1052; Holcomb *v.* Johnson, 43 Wash. 362, 86 Pac. 409; Jefferson County *v.* Trumbull, 34 Wash. 276, 75 Pac. 876; State *v.* Whittlesey, 17 Wash. 447, 50 Pac. 119.

Issue of certificates to county in book form not unauthorized see Jefferson County *v.* Trumbull, 34 Wash. 276, 75 Pac. 876.

13. State *v.* Whittlesey, 17 Wash. 447, 50 Pac. 119. See *infra*, XII, A, 5.

Summons see Jefferson County *v.* Trumbull, 34 Wash. 276, 75 Pac. 876.

Trial and evidence see Jefferson County *v.* Trumbull, 34 Wash. 276, 75 Pac. 876.

14. Ballinger Annot. Codes & St. § 1749, providing for issue by the treasurer of a certificate of delinquency, and requiring a stub which shall be a summary of the certificate and shall contain among other facts the name of the owner or reputed owner if known, refers to the name of the owner as stated on the assessment roll, and does not require the treasurer to draw upon his own knowledge or investigate to determine the actual or reputed ownership, and he is not negligent if he follows the record as it appears in his office. Shipley *v.* Gaffner, 48 Wash. 169, 93 Pac. 211. The treasurer might under the statute state in a certificate either the name on the roll for the year when the taxes were delinquent, or that on the roll at the time of the certificate. Shipley *v.* Gaffner, *supra*.

15. Holcomb *v.* Johnson, 43 Wash. 362, 86 Pac. 409. *Compare* Miller *v.* Henderson, 50 Wash. 200, 96 Pac. 1052.

16. Ames *v.* Shankey, 128 Ill. 523, 21 N. E. 579; Newell *v.* Wheeler, 48 N. Y. 486; Shaarai Tephila Cong. *v.* New York, 53 How. Pr. (N. Y.) 213; Carroll *v.* Safford, 3 How. (U. S.) 441, 11 L. ed. 671; Archibald *v.* Youville, 7 Manitoba 473.

17. Crosby *v.* Terry, 41 Tex. Civ. App. 594, 91 S. W. 652.

18. Hickman *v.* Dawson, 33 La. Ann. 438; Jenkinson *v.* Auditor-Gen., 104 Mich. 34, 62 N. W. 163. And see McFarlane *v.* Simpson, 153 Mich. 193, 116 N. W. 982. But see Bamberger *v.* McKay, 15 Grant Ch. (U. C.) 328. This was an action of ejectment by the purchaser of lands at a tax-sale which was alleged to have been illegal, and the court declined to interfere by injunction to restrain the suit, saying that the proper course in such a case, in the event of the sale being found invalid, was for the owner to tender a deed to the purchaser for execution, and, on his refusal to execute such deed, to apply to the court for relief.

19. Bending *v.* Auditor-Gen., 137 Mich. 500, 100 N. W. 777; Schiffman *v.* Schmidt, 154 Mo. 204, 55 S. W. 451.

20. In Michigan, such authority is given to the auditor-general, in New York to the controller. For decisions concerning the power of these officers to vacate tax-sales and the manner of its exercise see Rumsey *v.* Griffin, 138 Mich. 413, 101 N. W. 571; Auditor-Gen. *v.* Sherman, 136 Mich. 157, 98 N. W. 995; Flint Land Co. *v.* Auditor-Gen., 133 Mich. 542, 95 N. W. 543; Schulte *v.* Auditor-Gen., 131 Mich. 676, 92 N. W. 417; People *v.* Campbell, 156 N. Y. 64, 50 N. E. 417; Weed *v.* Roberts, 22 Misc. (N. Y.) 46, 49 N. Y. Suppl. 366. *Compare* People *v.* Wemple, 139 N. Y. 240, 34 N. E. 883 [*reversing* 67 Hun 495, 22 N. Y. Suppl. 497].

21. Kelly *v.* Dawes County, 4 Nebr. (Unoff.) 49, 93 N. W. 405.

2. Grounds For Vacating. In some states the courts hold that a tax-sale should be set aside unless all the legal conditions precedent have been performed.[22] But the general rule is that relief of this kind should not be granted on account of mere errors or irregularities where no fraud or substantial injustice is shown.[23] It is, however, not a mere irregularity, but good ground for vacating the sale, where there was fraud and collusion between the officer making the sale and the purchaser,[24] where the owner of the property had no notice of the proceedings against it,[25] where the taxes were paid before the sale,[26] where the land was exempt from taxation,[27] or where there was a fatal defect in the assessment, as where the land was wrongly listed in the name of a stranger or was not sufficiently described for identification.[28] But a tax-sale will not be set aside for mere inadequacy of price,[29] or on account of any defects or injurious acts which resulted from the owner's own conduct or from his neglect to avail himself of his proper remedies in due season.[30] In some states the only matters which invalidate a tax-sale are prescribed by statute and no other grounds can be relied on.[31] A

22. State *v.* West Hoboken Tp., 40 N. J. L. 109; People *v.* Chapin, 105 N. Y. 309, 11 N. E. 510.

23. *Arkansas.*—Palmer *v.* Ozark Land Co., 74 Ark. 253, 85 S. W. 408.

California.— Reeve *v.* Kennedy, 43 Cal. 643.

Indiana.— St. Clair *v.* McClure, 111 Ind. 467, 12 N. E. 134.

Iowa.— Farmers' L. & T. Co. *v.* Wall, 129 Iowa 651, 106 N. W. 160.

Michigan.— Blondin *v.* Griffin, 133 Mich. 647, 95 N. W. 739; Gates *v.* Johnson, 121 Mich. 603, 80 N. W. 709; Hooker *v.* Bond, 118 Mich. 255, 76 N. W. 404.

Minnesota.— Munger *v.* Halden, 83 Minn. 490, 86 N. W. 617; London, etc., Mortg. Co. *v.* Gibson, 78 Minn. 53, 80 N. W. 205.

Nebraska.— Wood *v.* Helmer, 10 Nebr. 65, 4 N. W. 968.

North Dakota.— Scott, etc., Mercantile Co. *v.* Nelson County, 14 N. D. 407, 104 N. W. 528.

Texas.— Crosby *v.* Bannowsky, 95 Tex. 449, 68 S. W. 47.

United States.— Craig *v.* Pollock, 6 Fed. Cas. No. 3,335, 5 Dill. 449.

See 45 Cent. Dig. tit. "Taxation," § 1380 *et seq.*

But *compare* State *v.* Elliott, 114 Mo. App. 562, 90 S. W. 122.

24. Schenck *v.* Peay, 21 Fed. Cas. No. 12,451, 1 Dill. 267. See Superior First Nat. Bank *v.* Douglas County, 124 Wis. 15, 102 N. W. 315.

25. Jakobowski *v.* Auditor-Gen., 144 Mich. 46, 107 N. W. 722; Armstrong *v.* Exum, (Tenn. Ch. App. 1899) 52 S. W. 1024; Scanlan *v.* Campbell, 22 Tex. Civ. App. 505, 55 S. W. 501; West *v.* Duncan, 42 Fed. 430.

26. Boynton *v.* Ashabranner, 75 Ark. 415, 88 S. W. 566, 1011, 91 S. W. 20; Smith *v.* Auditor-Gen., 138 Mich. 582, 101 N. W. 807. But see State *v.* Boyd, 128 Mo. 130, 30 S. W. 513.

Failure to pay taxes, or payment of part only, in reliance on official statement as to amount due, as ground for vacating tax-sale see Welever *v.* Auditor-Gen., 143 Mich. 311, 106 N. W. 736; Bullock *v.* Auditor-Gen., 142 Mich. 122, 105 N. W. 542; Wallace *v.* International Paper Co., 70 N. Y. App. Div. 298, 75 N. Y. Suppl. 340; Wooten *v.* White, 125 N. C. 403, 34 S. E. 508.

27. Smith *v.* Auditor-Gen., 140 Mich. 582, 101 N. W. 807; Rumsey *v.* Griffin, 138 Mich. 413, 101 N. W. 571.

28. Shelly *v.* Friedrichs, 117 La. 679, 42 So. 218; McLoud *v.* Mackie, 175 Mass. 355, 56 N. E. 714; Griffith *v.* Silver, 125 N. C. 368, 34 S. E. 544; Bonnett *v.* Murdoch, 193 Pa. St. 527, 45 Atl. 317. But see Farrington *v.* New England Inv. Co., 1 N. D. 102, 45 N. W. 191, as to defects in assessment which are not ground for vacating sale.

29. State *v.* Innes, 137 Mo. App. 420, 118 S. W. 1168; State *v.* Sargent, 12 Mo. App. 228; Rogers *v.* Moore, 100 Tex. 220, 97 S. W. 685; Ross *v.* Drouilhet, 34 Tex. Civ. App. 327, 80 S. W. 241; Crosby *v.* Bonnowsky, 29 Tex. Civ. App. 455, 69 S. W. 212; Rothchild *v.* Rollinger, 32 Wash. 307, 73 Pac. 367. But *compare* State *v.* Elliott, 114 Mo. App. 562, 90 S. W. 122.

Gross inadequacy of price is a circumstance to be considered, and where an attorney fully believed that he was to be notified by the sheriff of a sale on execution for taxes of his client's lot, and was thereby led to make no further inquiry, or watch for advertisement of the sale made for an inadequate price, it should be set aside. State *v.* Innes, 137 Mo. App. 420, 118 S. W. 1168.

30. Morgan Park *v.* Knopf, 199 Ill. 444, 65 N. E. 322; Franz *v.* Krebs, 41 Kan. 223, 21 Pac. 99; Blondin *v.* Griffin, 133 Mich. 647, 95 N. W. 739; MacKinnon *v.* Auditor-Gen., 130 Mich. 552, 90 N. W. 329; Walker *v.* Mills, 210 Mo. 684, 109 S. W. 44.

31. See Moores *v.* Thomas, (Miss. 1909) 48 So. 1025.

In Michigan, by statute, decrees and sales in tax foreclosure proceedings can be set aside after confirmation only on the ground that the taxes have been paid, or that the land is exempt. Harrington *v.* Dickinson, 155 Mich. 161, 118 N. W. 931; Smith *v.* Auditor-Gen., 138 Mich. 582, 101 N. W. 807; Rumsey *v.* Griffin, 138 Mich. 413, 101 N. W. 571; Hall *v.* Mann, 118 Mich. 201, 36 N. W. 314.

sale of land for taxes after service of an injunction on the commissioners who levied the tax, enjoining them from "collecting or proceeding to collect" the tax on such land, is irregular and will be set aside.[32]

3. Payment or Tender. It will be made a condition to granting relief on an application to vacate a tax-sale that the owner of the property shall pay or tender to the holder of the tax certificate whatever sum he paid for his purchase with interest, or at least so much thereof as was for taxes justly and legally due.[33] And where plaintiff seeks to cancel a void sale of state tax lands and to purchase the land himself, he should be required to repay the amount paid on such void sale and subsequent taxes.[34]

4. Time For Proceedings. A proceeding to set aside a tax-sale and certificate must be brought within the time limited by law if there is a statute applicable to such actions,[35] and at any rate may be barred by complainant's laches if he delays for several years to seek relief.[36] But where a sale of state tax land is void, laches cannot be imputed to a stranger to the title in his delay of twelve years before seeking to cancel such sale and to purchase the land.[37]

5. Parties to Proceeding. The complainant in such a proceeding must show that he is the owner of the property, or at least that he has some title to it or interest in it,[38] and although several persons jointly interested in the premises

32. Williams *v.* Cammack, 27 Miss. 209, 61 Am. Dec. 508.

33. *Illinois.*— Gage *v.* Nichols, 112 Ill. 269; Peacock *v.* Carnes, 110 Ill. 99; Sankey *v.* Seipp, 27 Ill. App. 299; Durfee *v.* Murray, 7 Ill. App. 213.

Indiana.— McWhinney *v.* Brinker, 64 Ind. 360.

Iowa.— Corbin *v.* Woodbine, 33 Iowa 297.

Kansas.— Miller *v.* Ziegler, 31 Kan. 417, 2 Pac. 601.

New Jersey.— Under the maxim that he who seeks equity must do equity, a purchaser of land on mortgage foreclosure, charged with a tax lien, held by the mortgagee as a prior encumbrance, could not maintain a suit to vacate the tax lien without paying the amount represented by the tax certificate, with interest. Farmer *v.* Ward, 75 N. J. Eq. 33, 71 A. 401.

North Dakota.— Douglas *v.* Fargo, 13 N. D. 467, 101 N. W. 919.

Texas.— Crosby *v.* Terry, 41 Tex. Civ. App. 594, 91 S. W. 652.

West Virginia.— Lohr *v.* George, 65 W. Va. 241, 64 S. E. 609.

Wisconsin.— Hayes *v.* Douglas County, 92 Wis. 429, 65 N. W. 482, 53 Am. St. Rep. 926, 31 L. R. A. 213.

Canada.— Schultz *v.* Alloway, 10 Manitoba 221; Paul *v.* Ferguson, 14 Grant Ch. (U. C.) 230.

See 45 Cent. Dig. tit. "Taxation," § 1381 *et seq.*

Amount of legal taxes uncertain.— Where, in an action to set aside tax-sales and certificates for the illegality of a part of the taxes, the record discloses no means of determining what amount of the taxes levied upon plaintiff was valid, the court will not require payment of any amount as a condition of relief. Hebard *v.* Ashland County, 55 Wis. 145, 12 N. W. 437.

Action to impeach or vacate tax title see *infra*, XIV, B, 3, d.

34. Horton *v.* Salling, 155 Mich. 502, 119 N. W. 912.

35. Hall *v.* Miller, 150 Mich. 300, 113 N. W. 1104; Hayward *v.* O'Connor, 145 Mich. 52, 108 N. W. 366; Wisconsin Cent. R. Co. *v.* Lincoln County, 67 Wis. 478, 30 N. W. 619; Oberreich *v.* Fond du Lac County, 63 Wis. 216, 23 N. W. 421; Ruggles *v.* Fond du Lac County, 63 Wis. 205, 23 N. W. 416; Wisconsin Cent. R. Co. *v.* Lincoln County, 57 Wis. 137, 15 N. W. 121; Dalrymple *v.* Milwaukee, 53 Wis. 178, 10 N. W. 141; Farmers', etc., Loan Co. *v.* Conklin, 1 Manitoba 181. And see Shaaf *v.* O'Connor, 146 Mich. 504, 109 N. W. 1061, 117 Am. St. Rep. 652. See also *infra*, XIV, B, 4, d, (III).

Void judgment or certificate.— Some of the statutes of limitations have been construed as not applying where the tax judgment or certificate is void on its face. Babcock *v.* Johnson, 108 Minn. 217, 121 N. W. 909; Holmes *v.* Longhren, 97 Minn. 83, 105 N. W. 558; Williams *v.* St. Paul, 82 Minn. 273, 84 N. W. 1009; Burdick *v.* Bingham, 38 Minn. 482, 38 N. W. 489; Sanborn *v.* Cooper, 31 Minn. 307, 17 N. W. 856; Sheehy *v.* Hinds, 27 Minn. 259, 6 N. W. 781. See also *infra*, XIV, B, 4, a.

36. McFarlane *v.* Simpson, 153 Mich. 193, 116 N. W. 982; Scholfield *v.* Dickenson, 10 Grant Ch. (U. C.) 226.

37. Horton *v.* Salling, 155 Mich. 502, 119 N. W. 912.

38. Picquet *v.* Augusta, 64 Ga. 254.

Owner not in possession.—A suit to set aside a tax-sale on the ground of fraud may be maintained by the owner, although he is not in possession of the land, as it is not a suit to quiet title. Herr *v.* Martin, 90 Ky. 377, 14 S. W. 356, 12 Ky. L. Rep. 359.

Heirs and persons claiming through them. — That land was distributed by the probate court to the tax record owner's heirs, from whom plaintiffs derive title, shows sufficient title in plaintiffs to enable them to sue to set aside, for want of jurisdictional process,

may unite in the application or proceeding,[39] it is otherwise as to the joinder of independent landowners, whatever ground of illegality they may allege as being common to them all.[40] The holder of the tax-sale certificate is the proper defendant, and it is not necessary to join the municipal corporation.[41]

6. Process or Notice. The holder of a tax certificate is entitled to notice of any proceeding having for its object the vacating of the sale and the consequent destruction of whatever rights he may have acquired under it.[42]

7. Proceedings and Relief. A tax-sale or certificate may be set aside in a proper case on petition or complaint,[43] or on a supplemental answer after a reversal and remand in the suit to subject the land to the payment of taxes.[44] The court will consider only those objections to the tax-sale or other proceedings which are alleged and relied on in the petition or complaint,[45] and supported by competent evidence,[46] the burden being on complainant to prove the grounds averred.[47] The tax purchaser, on the other hand, has the right to show any and all titles under which he holds or claims the property.[48] If the assessment is determined to have been invalid, the court may stay all further proceedings until a reassessment shall be made.[49] But if the sale was void, the court will order it vacated and set aside, with such further provisions as will effect equity between the parties.[50]

tax foreclosure decrees based on assessments made while such tax record owner owned the land. Preston *v.* Cox, 50 Wash. 451, 97 Pac. 493.

Statute in New York.— The statute of this state (N. Y. Laws (1893), c. 711, § 20), giving the controller authority to cancel a tax-sale which is found to be defective or invalid and to refund the money paid by the purchaser, is intended for the benefit of the latter only, and does not authorize an application by the owner of the land for the cancellation of the sale, or allow the controller to entertain an application so made by the owner. People *v.* Roberts, 151 N. Y. 540, 45 N. E. 941; People *v.* Roberts, 144 N. Y. 234, 39 N. E. 85; People *v.* Wemple, 139 N. Y. 240, 34 N. E. 883; People *v.* Chapin, 104 N. Y. 369, 5 N. E. 64, 11 N. E. 383; People *v.* Roberts, 8 N. Y. App. Div. 219, 40 N. Y. Suppl. 457 [*affirmed* in 151 N. Y. 540, 45 N. E. 941 (*affirmed* in 171 U. S. 658, 19 S. Ct. 70, 43 L. ed. 323)]; Matter of Olmstead, 11 Misc. 700, 32 N. Y. Suppl. 1124.

39. Corrigan *v.* Schmidt, 126 Mo. 304, 28 S. W. 874.

40. Brunner *v.* Bay City, 46 Mich. 236, 9 N. W. 263.

41. Mills *v.* McKay, 15 Grant Ch. (U. C.) 192; Smith *v.* Redford, 12 Grant Ch. (U. C.) 316. But see Crites *v.* Fond du Lac County, 67 Wis. 236, 30 N. W. 214.

42. Ostrander *v.* Darling, 127 N. Y. 70, 27 N. E. 353. If the purchaser of land sold under a tax judgment was not a party to the proceeding in which the judgment was rendered, the judgment should not be vacated without notice to him. Pierce County *v.* Bunch, 49 Wash. 599, 96 Pac. 164. But *compare In re* Tax Sale of Lot No. 172, 42 Md. 196, holding that where the law requires tax-sales to be reported to the court for ratification, the judge may set aside a sale, without notice, if he finds on the preliminary examination that the proceedings were not in conformity with the law.

43. See the cases cited in notes following.

44. Clifton *v.* Pfirman, 110 S. W. 406, 33 Ky. L. Rep. 529, holding that where defendants in a suit to subject land to the payment of taxes procured the reversal of a judgment for plaintiff, after a sale of the land and a remand of the cause, the court properly allowed them to file a supplemental answer averring that specified infants owning an interest in the land were omitted as parties defendant, and properly vacated the judgment and order of sale.

45. *Illinois.*— Gage *v.* Bailey, 102 Ill. 11.

Iowa.— Wallace *v.* Berger, 25 Iowa 456.

Minnesota.— Moulton *v.* Doran, 10 Minn. 67.

Montana.—Ward *v.* Gallatin County, 12 Mont. 23, 29 Pac. 658.

New York.— Jamaica, etc., Road Co. *v.* Brooklyn, 123 N. Y. 375, 25 N. E. 476.

See 45 Cent. Dig. tit. "Taxation," § 1385.

46. Chicago, etc., R. Co. *v.* Holdsworth, 47 Iowa 20; Kerwer *v.* Allen, 31 Iowa 578; Spaulding *v.* Thompson, 30 S. W. 20, 16 Ky. L. Rep. 836; People *v.* Chapin, 105 N. Y. 309, 11 N. E. 510; People *v.* Wemple, 67 Hun (N. Y.) 495, 22 N. Y. Suppl. 497 [*reversed* on other grounds in 139 N. Y. 240, 34 N. E. 883]; Bray, etc., Land Co. *v.* Newman, 92 Wis. 271, 65 N. W. 494.

47. Gage *v.* Goudy, (Ill. 1892) 29 N. E. 896; Gage *v.* Busse, 102 Ill. 592.

Findings of court.—Although on the hearing of a motion to set aside a sale of a lot for taxes because the sheriff failed to notify an attorney of the date of the sale as agreed, the court's direction to the sheriff to give no promise to notify attorneys in the future seems inconsistent with a finding that none had been given, it was not equivalent to a direct finding that the sheriff promised to notify the attorney as was claimed. State *v.* Innes, 137 Mo. App. 420, 118 S. W. 1168.

48. Villey *v.* Jarreau, 33 La. Ann. 291.

49. Potter *v.* Brown County, 56 Wis. 272, 14 N. W. 375; Clarke *v.* Lincoln County, 54 Wis. 580, 12 N. W. 20.

50. Gage *v.* Busse, 102 Ill. 592 (requiring

8. Review. A proceeding to vacate a tax-sale may be reviewed either on certiorari or appeal, according to the local statute.[51] As in other cases, the reviewing tribunal will consider only objections properly brought before it and will not allow the parties to shift their ground.[52]

N. Presumptions of Validity and Collateral Attack — 1. Right to Impeach Sale. The right to impeach a tax-sale and have it set aside appertains in general to the owner of the property at the time of the sale and his personal representatives,[53] to a creditor holding a mortgage on the land or any part of it,[54] and to a subsequent purchaser from the owner who is in possession.[55]

2. Presumptions as to Validity. In most jurisdictions the general presumption of law that public officers charged with particular duties affecting the rights of individuals have performed them regularly and properly and in conformity with statutory directions applies to tax-sales; and one impeaching such a sale must show affirmatively any irregularity, omission, or dereliction of duty on the part of the officers concerned in it, on which he may rely.[56]

plaintiff to pay taxes legally due); Auditor-Gen. *v.* Newman, 135 Mich. 288, 97 N. W. 703 (refunding taxes paid by purchaser).

Charging purchaser with costs.—Where the purchaser at the tax-sale was not a party to any irregularity or impropriety, he should not be charged with the costs of a proceeding to set it aside, unless he was afforded an opportunity of investigating the matter and elected to stand a suit rather than abandon his claim. Blanchard *v.* Scanlan, 3 Manitoba 13.

Effect of decree.—A decree vacating a tax-sale does not discharge the land from the payment of the taxes, but it should be again placed on the delinquent list. McWhinney *v.* Brinker, 54 Ind. 360. But where the land was mortgaged to secure notes held by several different parties, a decree annulling the tax-sale inures to the benefit of all of such holders, and not solely to the holder at whose suit the decree was made. Weaver *v.* Alter, 29 Fed. Cas. No. 17,308, 3 Woods 152.

51. See the statutes of the different states. And see People *v.* Wemple, 139 N. Y. 240, 34 N. E. 883; Morrow *v.* Green Bay, 55 Wis. 112, 12 N. W. 437.

52. Wilcox *v.* Rochester, 129 N. Y. 247, 29 N. E. 99.

53. Glos *v.* Woodard, 202 Ill. 480, 67 N. E. 3.

Estoppel of owner.— The mere presence of the owner at the tax-sale does not estop him from complaining of irregularities in the sale. Claxton *v.* Shibley, 9 Ont. 451. Otherwise if he points out the land to be levied on, directs the sheriff to advertise and sell it, and is present in the character of a bidder at the sale. Byars *v.* Curry, 75 Ga. 515.

Administrator ad litem has no standing to maintain an action to set aside a tax-sale of land belonging to his decedent. Rodger *v.* Moran, 28 Ont. 275.

54. Miller *v.* Cook, 135 Ill. 190, 25 N. E. 756, 10 L. R. A. 292; Gerac *v.* Guilbeau, 36 La. Ann. 843; Ludeling *v.* McGuire, 35 La. Ann. 893.

55. Lacroix *v.* Camors, 34 La. Ann. 639; Steele *v.* Fish, 2 Minn. 153. See Hyatt *v.* Mills, 19 Ont. App. 329, as to purchaser having a mere right of entry.

56. *Arkansas.*— Doniphan Lumber Co. *v.* Reid, 82 Ark. 31, 100 S. W. 69; Cracraft *v.* Meyer, 76 Ark. 450, 88 S. W. 1027.

Georgia.— Bedgood *v.* McLain, 94 Ga. 283, 21 S. E. 529; Livingston *v.* Hudson, 85 Ga. 835, 12 S. E. 17; Shackleford *v.* Hooper, 65 Ga. 366.

Illinois.— Messinger *v.* Germain, 6 Ill. 631. But *compare* Williams *v.* Underhill, 58 Ill. 137.

Kansas.— See Gibson *v.* Larabee, 77 Kan. 243, 94 Pac. 216.

Kentucky.— Smith *v.* Ryan, 88 Ky. 636, 11 S. W. 647, 11 Ky. L. Rep. 128; Oldhams *v.* Jones, 5 B. Mon. 458; Currie *v.* Fowler, 5 J. J. Marsh. 145; Graves *v.* Hayden, 2 Litt. 61.

Louisiana.— Gouaux *v.* Beaullieu, 123 La. 684, 49 So. 285; Corkran Oil, etc., Co. *v.* Arnaudet, 111 La. 563, 35 So. 747; O'Hern *v.* Hibernia Ins. Co., 30 La. Ann. 959.

Massachusetts.— Pejepscut Proprietors *v.* Ransom, 14 Mass. 145, presumption aided by thirty years' possession under tax deed.

Michigan.— Stockle *v.* Silsbee, 41 Mich. 615, 2 N. W. 900.

Mississippi.— Allen *v.* Poole, 54 Miss. 323.

Missouri.—Wood *v.* Smith, 193 Mo. 484, 91 S. W. 85.

Nebraska.— Cowles *v.* Adams, 78 Nebr. 130, 110 N. W. 697; Darr *v.* Berquist, 63 Nebr. 713, 89 N. W. 256.

New York.— Lamb *v.* Connolly, 122 N. Y. 531, 25 N. E. 1042; Wood *v.* Knapp, 100 N. Y. 109, 2 N. E. 632.

North Carolina.— Tucker *v.* Tucker, 110 N. C. 333, 14 S. E. 860, holding that the presumption of regularity of official acts in connection with a tax-sale arises only after the execution of a deed to the purchaser.

Wisconsin.— Mills *v.* Johnson, 17 Wis. 598.

See 45 Cent. Dig. tit. "Taxation," § 1388. And see *infra*, XIII, G, 1; XIV, B, 7, b.

Contra.— Keane *v.* Cannovan, 21 Cal. 291, 82 Am. Dec. 738; McLaughlin *v.* Kain, 45 Pa. St. 113; Brush *v.* Watson, 81 Vt. 43, 69 Atl. 141; Townsend *v.* Downer, 32 Vt. 183; Cameron *v.* Lee, 27 Quebec Super. Ct. 535.

3. Collateral Attack. As a general rule the regularity and validity of a tax-sale of land cannot be impeached in any collateral proceeding,[57] unless by statute,[58] or unless the nullity of the sale is apparent on the face of the proceedings.[59] And within the meaning of this rule the following are held to be collateral and not direct proceedings: Trespass to try title, ejectment, or suit to quiet his title brought by the purchaser at the tax-sale,[60] partition,[61] suit to foreclose a mortgage on the land,[62] and summary proceedings to recover the land by the purchaser at a foreclosure sale against the purchaser at the tax-sale.[63]

O. Curative Statutes — 1. In General. Proceedings in the assessment and collection of taxes which the legislature might have dispensed with or made immaterial in the statute under which the proceedings are taken may be dispensed with or made immaterial by a statute passed after the proceedings have been taken and acting retrospectively, and thus defects or omissions in those proceedings may be cured; but if the defect is jurisdictional, that is to say, if it goes to the root of the authority to act, if it involves the omission of a step which the legislature could not have dispensed with, or if it consists in an irregularity which the legislature had no power to declare immaterial, it is beyond the reach of a curative statute.[64] Further it is to be observed that a curative statute may or

But *compare* Spear *v.* Ditty, 8 Vt. 419. See also *infra*, XIV, B, 7, b.

57. *Arkansas.*— St. Louis, etc., R. Co. *v.* Greeson, (1906) 98 S. W. 728; Ballard *v.* Hunter, 74 Ark. 174, 85 S. W. 252; Clay *v.* Bilby, 72 Ark. 101, 78 S. W. 749.

Kansas.— Belz *v.* Bird, 31 Kan. 139, 1 Pac. 246.

Louisiana.—Whitaker *v.* Ashbey, 43 La. Ann. 117, 8 So. 394; Gerac *v.* Guilbeau, 36 La. Ann. 843; Ludeling *v.* McGuire, 35 La. Ann. 893; Lannes *v.* Workingmen's Bank, 29 La. Ann. 112. See Dupre *v.* Thompson, 25 La. Ann. 503.

Michigan.— Gates *v.* Johnson, 121 Mich. 663, 80 N. W. 709.

Missouri.— Stevenson *v.* Black, 168 Mo. 549, 68 S. W. 909; Howard *v.* Stevenson, 11 Mo. App. 410; Brown *v.* Walker, 11 Mo. App. 226 [*affirmed* in 85 Mo. 262].

Nebraska.— Cass *v.* Nitsch, 81 Nebr. 228, 115 N. W. 753; Russell *v.* McCarthy, 70 Nebr. 514, 97 N. W. 644; Logan County *v.* McKinley-Lanning L. & T. Co., 70 Nebr. 399, 97 N. W. 642; Logan County *v.* Carnahan, 66 Nebr. 693, 95 N. W. 812.

Texas.— Ryon *v.* Davis, 32 Tex. Civ. App. 500, 75 S. W. 59.

Washington.— See Miller *v.* Henderson, 50 Wash. 200, 96 Pac. 1052. Although the record in tax foreclosure proceedings does not show directly that a certified copy of the order of sale was delivered to the officer making the sale, the recital in his return that the order was "directed and delivered" to him was sufficient evidence, on a collateral attack on the sale, that the order was delivered to him, if that be necessary. Timmerman *v.* McCullagh, 55 Wash. 204, 104 Pac. 212.

United States.— Flynn *v.* Edwards, 36 Fed. 873.

See 45 Cent. Dig. tit. "Taxation," § 1389.

58. If Ballinger Annot. Codes & St. Wash. § 5679, requiring the complaint in an action to recover property sold for taxes to set forth that the taxes have been paid or tendered, can be said to have been intended to authorize an attack on tax proceedings by direct attack only, its effect has been nullified by the later statute of 1897 (Laws (1897), p. 190, c. 71, § 114), which expressly permits collateral attacks where the taxes have been paid. Bullock *v.* Wallace, 47 Wash. 690, 92 Pac. 675. Under the latter act, making tax judgments conclusive evidence of their regularity in all collateral proceedings except in cases where the taxes have been paid, an owner who has paid his taxes may defeat a tax judgment in a collateral proceeding where the tax judgment was taken by default on constructive service. Bullock *v.* Wallace, *supra*.

59. Jurey *v.* Allison, 30 La. Ann. 1234; Worman *v.* Miller, McGloin (La.) 158; Cushing *v.* Longfellow, 26 Me. 306.

60. Flint Land Co. *v.* Godkin, 136 Mich. 668, 99 N. W. 1058; Munroe *v.* Winegar, 128 Mich. 309, 87 N. W. 396; Ryon *v.* Davis, 32 Tex. Civ. App. 500, 75 S. W. 59; Simpson *v.* Huff, (Tex. Civ. App. 1903) 74 S. W. 49. *Contra*, Hickman *v.* Dawson, 33 La. Ann. 438.

61. Wallace *v.* International Paper Co., 70 N. Y. App. Div. 298, 75 N. Y. Suppl. 340. But *compare* Collins *v.* Sherwood, 50 W. Va. 133, 40 S. E. 603.

62. McAlpine *v.* Zitzer, 119 Ill. 273, 10 N. E. 901; Bozarth *v.* Landers, 113 Ill. 181; Gage *v.* Perry, 93 Ill. 176; Carbine *v.* Sebastian, 6 Ill. App. 564; Roberts *v.* Wood, 38 Wis. 60.

63. Brown *v.* Martin, 49 Mich. 565, 14 N. W. 497. And see Ostrander *v.* Darling, 53 Hun (N. Y.) 190, 6 N. Y. Suppl. 718 [*affirmed* in 127 N. Y. 70, 27 N. E. 353].

64. *California.*— Lemoore Bank *v.* Fulgham, 151 Cal. 234, 90 Pac. 936.

Connecticut.— Lewis *v.* Eastford, 44 Conn. 477.

Iowa.— Richman *v.* Muscatine County, 77 Iowa 513, 42 N. W. 422, 14 Am. St. Rep. 308, 4 L. R. A. 445; Boardman *v.* Beckwith, 18 Iowa 292.

may not be retrospective, and if not intended to be so, it will have no effect on prior proceedings.[65]

2. Defects Curable. A retrospective statute may cure any informality or want of authority in the persons levying a tax,[66] but cannot validate a levy which was entirely illegal, made without any authority at all, or in excess of legal limits.[67] So where there was any informality or irregularity in the assessment of the property, it may be cured by statute,[68] but not a total lack of any assessment or an assessment so fatally defective as to be entirely void.[69] Failure to give the owner

Kansas.— Stout *v.* Coates, 35 Kan. 382, 11 Pac. 151; Emporia *v.* Norton, 13 Kan. 569; Cleveland Nat. Bank *v.* Iola, 9 Kan. 689.

Louisiana.— Breaux *v.* Negrotto, 43 La. Ann. 426, 9 So. 502.

Massachusetts.— Forster *v.* Forster, 129 Mass. 559.

Michigan.— People *v.* Saginaw County, 26 Mich. 22; People *v.* Ingham County, 20 Mich. 95.

Mississippi.—Vaughan *v.* Swayzie, 56 Miss. 704.

Missouri.—Adams *v.* Lindell, 5 Mo. App. 197.

New Jersey.— Jones *v.* Landis Tp., 50 N. J. L. 374, 13 Atl. 251; Hetfield *v.* Plainfield, 46 N. J. L. 119.

New York.— Ensign *v.* Barse, 107 N. Y. 329, 14 N. E. 400, 15 N. E. 401; Oswego County *v.* Betts, 6 N. Y. Suppl. 934.

Oregon.— Rafferty *v.* Davis, 54 Oreg. 77, 102 Pac. 305; Ayers *v.* Lund, 49 Oreg. 303, 89 Pac. 806, 124 Am. St. Rep. 1046.

Pennsylvania.— Coxe *v.* Deringer, 78 Pa. St. 271; Grim *v.* Weissenberk School Dist., 57 Pa. St. 433, 98 Am. Dec. 237; Schenley *v.* Com., 36 Pa. St. 29, 78 Am. Dec. 359; Russel *v.* Reed, 27 Pa. St. 166; Frick *v.* Sterrett, 4 Watts & S. 269.

West Virginia.—Wilkinson *v.* Linkous, 64 W. Va. 205, 61 S. E. 152; Collins *v.* Reger, 62 W. Va. 195, 57 S. E. 743; State *v.* McEldowney, 55 W. Va. 1, 47 S. E. 653.

United States.— Mattingly *v.* District of Columbia, 97 U. S. 687, 24 L. ed. 1098; Johnston *v.* Sutton, 45 Fed. 296; Ford *v.* Delta, etc., Land Co., 43 Fed. 181; Exchange Bank Tax Cases, 21 Fed. 99; Williams *v.* Albany County, 21 Fed. 99, 22 Blatchf. 302.

Canada.—Whelan *v.* Ryan, 20 Can. Sup. Ct. 65 [*affirming* 6 Manitoba 565]; Church *v.* Fenton, 5 Can. Sup. Ct. 239; McKay *v.* Crysler, 3 Can. Sup. Ct. 436; Claxton *v.* Shibley, 10 Ont. 295; Fenton *v.* McWain, 41 U. C. Q. B. 239. See Yokham *v.* Hall, 15 Grant Ch. (U. C.) 335.

See 45 Cent. Dig. tit. "Taxation," § 1390.

A special act to cure defects in the assessment and collection of taxes of a town is invalid where, under the constitution, the legislature has no authority to pass any special law for the assessment and collection of taxes. Kimball *v.* Rosendale, 42 Wis. 407, 24 Am. Rep. 421.

65. Gage *v.* Nichols, 33 Ill. App. 365 [*affirmed* in 135 Ill. 128, 25 N. E. 672].

66. Louisville, etc., R. Co. *v.* Bullitt County, 92 Ky. 280, 17 S. W. 632, 13 Ky. L. Rep. 568; State *v.* Demarest, 32 N. J. L. 528; Hewitt's Appeal, 88 Pa. St. 55.

67. *Kansas.*—Atchison, etc., R. Co. *v.* Woodcock, 18 Kan. 20.

Maine.— Barbour *v.* Camden, 51 Me. 608.

New York.— People *v.* Brooklyn, 71 N. Y. 495.

Oregon.— Rafferty *v.* Davis, 54 Oreg. 77, 102 Pac. 305.

United States.— Berthold *v.* Hoskins, 38 Fed. 772.

Canada.—Whelan *v.* Ryan, 20 Can. Sup. Ct. 65; Yokham *v.* Hall, 15 Grant Ch. (U. C.) 335.

68. *Massachusetts.*— Tyler *v.* Hardwick, 6 Metc. 470.

Michigan.— Petrie Lumber Co. *v.* Collins, 66 Mich. 64, 32 N. W. 923.

New York.— People *v.* McDonald, 69 N. Y. 362; *In re* East Ave. Baptist Church, 11 N. Y. Suppl. 113.

Pennsylvania.— Stewart *v.* Shoenfelt, 13 Serg. & R. 360.

Vermont.— Smith *v.* Hard, 59 Vt. 13, 8 Atl. 317.

United States.—Williams *v.* Albany County, 122 U. S. 154, 7 S. Ct. 1244, 30 L. ed. 1088; Witherspoon *v.* Duncan, 4 Wall. 210, 18 L. ed. 339.

69. *California.*— Schumacker *v.* Toberman, 56 Cal. 508; Brady *v.* King, 53 Cal. 44; Reis *v.* Graff, 51 Cal. 86; People *v.* Lynch, 51 Cal. 15, 21 Am. Rep. 677; People *v.* Goldtree, 44 Cal. 323; People *v.* Holladay, 25 Cal. 300.

Florida.— Orlando *v.* Giles, 51 Fla. 422, 40 So. 834. See Jacksonville *v.* Basnett, 20 Fla. 525.

Louisiana.— Edwards *v.* Fairex, 47 La. Ann. 170, 16 So. 736.

Michigan.— Hart *v.* Henderson, 17 Mich. 218.

Minnesota.— Prindle *v.* Campbell, 9 Minn. 212.

New York.— Cromwell *v.* MacLean, 123 N. Y. 474, 25 N. E. 932; People *v.* Wemple, 117 N. Y. 77, 22 N. E. 761; *In re* Hearn, 96 N. Y. 378; Clementi *v.* Jackson, 92 N. Y. 591; Doughty *v.* Hope, 1 N. Y. 79.

Ohio.— Stephan *v.* Daniels, 27 Ohio St. 527; Welker *v.* Potter, 18 Ohio St. 85.

Oregon.— Rafferty *v.* Davis, 54 Oreg. 77, 102 Pac. 305.

Pennsylvania.— Stewart *v.* Trevor, 56 Pa. St. 374; Commercial Bank *v.* Woodside, 14 Pa. St. 404; Milliken *v.* Benedict, 8 Pa. St. 169.

Wisconsin.— Dean *v.* Borchsenius, 30 Wis. 236; Hamilton *v.* Fond du Lac, 25 Wis. 490.

Canada.— Beckett *v.* Johnston, 32 U. C. C. P. 301.

Valuation is jurisdictional. People *v.* McCreery, 34 Cal. 432.

of the property the requisite notice of the assessment or subsequent proceedings or of the sale, whether by advertisement or otherwise, is a jurisdictional defect and not one which can be cured.[70] And the same is true of a sale of land notwithstanding the fact that the taxes had actually been paid.[71]

3. CONSTRUCTION OF CURATIVE STATUTES. A curative statute should be so construed as to carry into effect the legislative intention, and neither so strictly as to defeat the purpose of the enactment, nor so loosely as to inflict unintended injury on individuals.[72] Such statutes are generally retrospective, but cannot be so construed unless it is plainly intended.[73] And a prospective curative statute will not be interpreted as nullifying the effects of fundamental and jurisdictional errors.[74]

P. Wrongful Sales. Where land of a taxpayer is unlawfully sold for delinquent taxes, the officer is a trespasser and is liable to the owner in an action for damages,[75] the measure of his recovery being the value of the property lost to him in case the sale passed a good title to the purchaser, or otherwise the amount he has been obliged to pay to clear his property from the encumbrance of the tax-sale.[76] But as to the purchaser at such a sale the rule is different. At common law he comes strictly within the rule of *caveat emptor*, and unless aided by express statutory authority he is not entitled to recover back his money in a suit against the officer or the municipality.[77]

Sufficient description in notice and tax list is jurisdictional. Lee *v.* Crawford, 10 N. D. 482, 88 N. W. 97.

70. *Illinois.*— Billings *v.* Detten, 15 Ill. 218.

Kentucky.— Slaughter *v.* Louisville, 89 Ky. 112, 8 S. W. 917, 12 Ky. L. Rep. 61.

Louisiana.— Breaux *v.* Negrotto, 43 La. Ann. 426, 9 So. 502.

Minnesota.— McCord *v.* Sullivan, 85 Minn. 344, 88 N. W. 989, 89 Am. St. Rep. 561; Prindle *v.* Campbell, 9 Minn. 212; Weller *v.* St. Paul, 5 Minn. 95.

New Jersey.— Jones *v.* Landis Tp., 50 N. J. L. 374, 13 Atl. 251.

United States.— Albany City Bank *v.* Maher, 9 Fed. 884, 20 Blatchf. 341.

Canada.— O'Brien *v.* Cogswell, 17 Can. Sup. Ct. 420; Scott *v.* Stuart, 18 Ont. 211; Dalziel *v.* Mallory, 17 Ont. 80; Williams *v.* Taylor, 13 U. C. C. P. 219. See Cotter *v.* Sutherland, 18 U. C. C. P. 357.

71. Wallace *v.* Curtis, 29 Misc. (N. Y.) 415, 61 N. Y. Suppl. 994 [*reversed* on other grounds in 53 N. Y. App. Div. 41, 65 N. Y. Suppl. 543].

72. *Illinois.*— Peers *v.* People, 83 Ill. 488.

Michigan.— Clark *v.* Hall, 19 Mich. 356.

Mississippi.— Paxton *v.* Valley Land Co., 67 Miss. 96, 6 So. 628; Belcher *v.* Mhoon, 47 Miss. 613. Laws (1888), p. 40, c. 23, quieting title to lands in the Yazoo delta sold by the commissioners of the chancery court of a county, does not validate a sale for taxes of swamp and overflowed lands made before the state parted with the title acquired from the general government, since such lands were not subject to taxation. Creegan *v.* Hyman, 93 Miss. 481, 46 So. 952. And see Edwards *v.* Butler, 89 Miss. 179, 42 So. 381; Howell *v.* Miller, 88 Miss. 655, 42 So. 129.

New Hampshire.— Mowry *v.* Blandin, 64 N. H. 3, 4 Atl. 882.

New York.— Clementi *v.* Jackson, 92 N. Y. 591.

Pennsylvania.— Peters *v.* Heasley, 10 Watts 208.

West Virginia.— State *v.* McEldowney, 54 W. Va. 695, 47 S. E. 650; McGhee *v.* Sampselle, 47 W. Va. 352, 34 S. E. 815; McCallister *v.* Cottrille, 24 W. Va. 173.

See 45 Cent. Dig. tit. 'Taxation," § 1390.

73. *Connecticut.*— Thames Mfg. Co. *v.* Lathrop, 7 Conn. 550.

Michigan.— Clark *v.* Hall, 19 Mich. 356.

Pennsylvania.— Marsh *v.* Nelson, 101 Pa. St. 51.

West Virginia.— Collins *v.* Sherwood, 50 W. Va. 133, 40 S. E. 603.

Canada.— Ferguson *v.* Freeman, 27 Grant Ch. (U. C.) 211; Doe *v.* Grover, 4 U. C. Q. B. 23.

74. Morehouse *v.* Boden, 9 Minn. 314; Prindle *v.* Campbell, 9 Minn. 212; West *v.* Duncan, 42 Fed. 430.

75. *Indiana.*— Bunnell *v.* Farris, 82 Ind. 393.

New York.— See People *v.* Cady, 51 N. Y. Super. Ct. 316.

Pennsylvania.— Kean *v.* Kinnear, 171 Pa. St. 639, 33 Atl. 325.

Texas.— Houston *v.* Walsh, 27 Tex. Civ. App. 121, 66 S. W. 106.

Vermont.— Hutchins *v.* Moody, 37 Vt. 313.

See 45 Cent. Dig. tit. "Taxation," § 1391.

76. Cockrum *v.* West, 122 Ind. 372, 23 N. E. 140; Traer *v.* Filkins, 10 Iowa 563; Houston *v.* Welsh, 27 Tex. Civ. App. 121, 66 S. W. 106.

77. State *v.* Casteel, 110 Ind. 174, 11 N. E. 219; Indianapolis *v.* Langsdale, 29 Ind. 486; Sullivan *v.* Davis, 29 Kan. 28; Hamilton *v.* Valiant, 30 Md. 139; Ross *v.* Mabry, 1 Lea (Tenn.) 226. And see *infra*, XIV, C, 1, a.

Statutes authorizing suit by purchaser see Traer *v.* Filkins, 10 Iowa 563; Kelley *v.*

XII. REDEMPTION FROM TAX-SALES.

A. Right to Redeem — 1. Right and Necessity in General. A statutory right to redeem from tax-sales differs essentially from an equity of redemption proper; the former is self-executing and requires no judicial proceedings to make it effective; it is claimable as a matter of mere right by the owner of the property and is not founded on any special equities, and it is available not only where the sale was irregular or defective, but also, and especially, where the sale was perfectly regular and valid.[78] Indeed if the sale was void the owner is under no necessity of redeeming, but may have it vacated or set aside without redemption.[79] Such a statutory right of redemption is given by law in almost all the states, and is intended to afford the owner a last opportunity to save his property.[80] But it

Gage County, 67 Nebr. 6, 93 N. W. 194, 99 N. W. 524.

78. Lincoln *v.* Lincoln St. R. Co., 75 Nebr. 523, 106 N. W. 317; Carly *v.* Boner, 70 Nebr. 674, 102 N. W. 761; Logan County *v.* McKinley-Lanning L. & T. Co., 70 Nebr. 406, 101 N. W. 991.

Foreclosure of equity of redemption.— In some states the statutes provide for an action by the holder of a tax-sale certificate to foreclose the owner's equity of redemption. Such laws are valid and constitutional. Partridge *v.* Corkey, 4 Greene (Iowa) 383; Durbin *v.* Platto, 47 Wis. 484, 3 N. W. 30. As to action and proceedings under such statutes in general see *infra*, XII, A, 5.

Effect of confirming tax-sale.—A judicial decree confirming a tax-sale, although it precludes all further objection to the sale on account of informality or illegality, does not cut off the statutory right of redemption. Smith *v.* Thornton, 74 Ark. 572, 86 S. W. 1008. The right of redemption from sales of real estate for non-payment of taxes given by Nebr. Const. art. 9, § 3, applies to judicial as well as administrative sales, and the confirmation of such sales in no way adjudicates the right of redemption. Butler *v.* Libe, 81 Nebr. 740, 744, 116 N. W. 663, 117 N. W. 700. Even assuming that the court has jurisdiction, in confirming a judicial sale for taxes, to cut off the right of redemption, an order of confirmation which does not in terms deny to the owner such right will not be construed as having such effect. Smith *v.* Carnahan, 83 Nebr. 667, 120 N. W. 212.

In case of sale of lands to state.— The laws of Michigan do not prevent the sale or disposition of lands sold to the state at tax-sales, but give the owners the right of redemption after such lands have been sold to private purchasers from the state. Griffin *v.* Kennedy, 148 Mich. 583, 112 N. W. 756. *Compare* State *v.* Jackson, 56 W. Va. 558, 49 S. E. 465. Under Minn. Rev. Laws (1905), §§ 936–940, lands bid in to the state and not assigned to purchasers within three years are subject to redemption by the owner or other persons entitled to redeem. Minnesota Debenture Co. *v.* Scott, 106 Minn. 32, 119 N. W. 391.

Estoppel of purchaser to deny right of redemption.— In a suit by the person assessed with taxes against the purchaser at the tax-sale, to set aside a tax deed, the defendant, having bought plaintiff's title, is estopped to deny his right to redeem. Townshend *v.* Shaffer, 30 W. Va. 176, 3 S. E. 586.

The owner's failure to pay taxes on unimproved and unoccupied land does not necessarily defeat his right to redeem from the holder of an invalid tax title. Nicodemus *v.* Young, 90 Iowa 423, 57 N. W. 906.

79. Shoemaker *v.* Lacy, 45 Iowa 422; Stewart *v.* Crysler, 100 N. Y. 378, 3 N. E. 471; Simpson *v.* Meyers, 197 Pa. St. 522, 47 Atl. 868; French *v.* Edwards, 9 Fed. Cas. No. 5,098, 5 Sawy. 266.

Voluntary redemption from void sale.— If the owner of land, instead of resorting to litigation, seeks to redeem the same from an invalid tax-sale, he is required to pay the purchaser only the amount of his bid with common interest thereon, not the statutory rate of interest required on redemption from a valid sale. Roberts *v.* Merrill, 60 Iowa 166, 14 N. W. 235; Lynam *v.* Anderson, 9 Nebr. 367, 2 N. W. 732. *Compare* Jones *v.* Duras, 14 Nebr. 40, 14 N. W. 537. But if the owner, with full knowledge of the character of the sale and all the facts affecting its validity, pays the money required of him as the cost of redemption, the payment is voluntary and he cannot recover back the money from the county; the mere fact that a tax deed will be issued to the purchaser if he does not redeem does not put him under duress. Morris *v.* Sioux County, 42 Iowa 416; Shane *v.* St. Paul, 26 Minn. 543, 6 N. W. 349. But *compare* Brownlee *v.* Marion County, 53 Iowa 487, 5 N. W. 610; Marsh *v.* St. Croix County, 42 Wis. 355.

80. See the statutes of the different states. And see the following cases:

Iowa.— Henderson *v.* Robinson, 76 Iowa 603, 41 N. W. 371.

Kansas.— Where the holder of an invalid tax deed in possession sues to quiet title, and the tax deed is held void, but the lien of the taxes is preserved, and the land is sold to satisfy the same, Laws (1893), p. 188, c. 109 (Gen. St. (1901) §§ 4927 *et seq.*), providing for redemption on foreclosure of mortgage trust deeds, mechanics' liens, or other liens, has no application, and neither the defendant owner nor the holder of the mortgage lien has any right to redeem therefrom. Davidson *v.* Plummer, 76 Kan. 462, 92 Pac. 705.

Michigan.— G. F. Sanborn & Co. *v.* Alston,

is not ordinarily intended that separate parcels of the same tract, or separate undivided interests, shall be separately redeemed, the privilege extending only to the redemption of the whole tract or the whole title as sold.[81] Neither the sole owner of land nor a tenant in common is under any duty to redeem from a tax-sale;[82] and a purchase by him from the tax-sale purchaser after the time for redemption has expired does not amount merely to a redemption unless such is the intention.[83]

2. Statutory Provisions and Their Construction. The right of redemption from a tax-sale must be governed by the law in force at the time of the sale, not that in force at the time of the redemption; the relative rights of the parties, having become fixed and vested by the sale, cannot be affected by subsequent legislation.[84] Hence a statute abolishing, abridging, or enlarging the right of

153 Mich. 456, 463, 116 N. W. 1099, 117 N. W. 625; Bullock *v.* Auditor-Gen., 142 Mich. 122, 105 N. W. 542.

Mississippi.— Bonds *v.* Greer, 56 Miss. 710.

Nebraska.— Beatrice *v.* Wright, 72 Nebr. 689, 101 N. W. 1039.

New York.— Williams *v.* Townsend, 31 N. Y. 411; People *v.* Kelly, 10 Hun 283.

Texas.— Bente *v.* Sullivan, (Civ. App. 1909) 115 S. W. 350.

Washington.— Albring *v.* Petronio, 44 Wash. 132, 87 Pac. 49.

See 45 Cent. Dig. tit. "Taxation," § 1392.

Contra, in Indiana.— Under present statutes in this state a tax-sale may be made without the benefit of any right of redemption. Hall *v.* Craig, 125 Ind. 523, 25 N. E. 538; State *v.* McGill, 15 Ind. App. 289, 40 N. E. 1115, 43 N. E. 1016.

81. State *v.* Schaack, 28 Minn. 358, 10 N. W. 22; Rich *v.* Palmer, 6 Oreg. 339. See Boyd *v.* Holt, 62 Ala. 296; O'Reilly *v.* Holt, 18 Fed. Cas. No. 10,563, 4 Woods 645. But there are exceptions to this rule, by statute, in some states (see Garbanati *v.* Patterson, 37 Colo. 230, 85 Pac. 845), and in cases where the sale was irregular for including several distinct parcels or subdivisions of land in one tract (Penn *v.* Clemans, 19 Iowa 372; Byington *v.* Woods, 13 Iowa 17), and where the two lots were separately assessed and sold for taxes, although they afterward come into the hands of the same owner (Boatmen's Sav. Bank *v.* Grewe, 101 Mo. 625, 14 S. W. 708).

82. Duson *v.* Roos, 123 La. 835, 49 So. 590, 131 Am. St. Rep. 375.

83. Duson *v.* Roos, 123 La. 835, 49 So. 590, 131 Am. St. Rep. 375, holding that where a purchaser at a tax-sale conveyed the land to a tenant in common after the expiration of the period of redemption, and the price required to redeem was a little over twenty-six dollars, while the amount paid for the conveyance was two hundred and fifty dollars, this did not show that the sale by the tax-sale purchaser was a mere redemption by the tenant in common.

Purchase from state.— A purchase by a person from the state of land, title to which has become absolute by failure to redeem from the sale to the state, cannot be deemed a redemption, of which the prior owner or his grantee should have the benefit, although such purchaser obtained his deed on false affidavits that he was the owner. Embury *v.* Goodenough, 157 Mich. 140, 121 N. W. 744.

84. *Arkansas.*— Hodges *v.* Harkleroad, 74 Ark. 343, 85 S. W. 779; Wolfe *v.* Henderson, 28 Ark. 304.

Florida.— State *v.* Bradshaw, 39 Fla. 137, 22 So. 296.

Illinois.—People *v.* Riggs, 56 Ill. 483; Conway *v.* Cable, 37 Ill. 82, 87 Am. Dec. 240; Holloway *v.* Clark, 27 Ill. 483.

Iowa.— Negus *v.* Yancey, 22 Iowa 57.

Kansas.— Crawford *v.* Shaft, 35 Kan. 478, 11 Pac. 334.

Michigan.—Cuny *v.* Backus, 156 Mich. 342, 120 N. W. 796; McFarlane *v.* Simpson, 153 Mich. 193, 116 N. W. 982.

Minnesota.— State *v.* Krahmer, 106 Minn. 442, 117 N. W. 780, 21 L. R. A. N. S. 157; Stein *v.* Hanson, 99 Minn. 387, 109 N. W. 821; Phelps *v.* Powers, 90 Minn. 440, 97 N. W. 136; Kipp *v.* Johnson, 73 Minn. 34, 75 N. W. 736; Wade *v.* Drexel, 60 Minn. 164, 62 N. W. 261; Merrill *v.* Dearing, 32 Minn. 479, 21 N. W. 721.

South Dakota.— State *v.* Eylpaa, 3 S. D. 586, 54 N. W. 599.

Texas.— See League *v.* State, 93 Tex. 553, 57 S. W. 34; Collins *v.* Ferguson, 22 Tex. Civ. App. 552, 56 S. W. 225.

Virginia.— Harrison *v.* Thomas, 103 Va. 333, 49 S. E. 485.

Washington.— See Allen *v.* Peterson, 38 Wash. 599, 80 Pac. 849, holding that a statute is valid which merely shortens the time for redemption from previous tax-sales but does not arbitrarily cut off the right to redeem.

Wisconsin.— Robinson *v.* Howe, 13 Wis. 341.

See 45 Cent. Dig. tit. "Taxation," § 1393. See also Constitutional Law, 8 Cyc. 940 note 56.

Special provision for redemption by married woman.— The repeal of an act extending the period of redemption in the case of a married woman will not cut off her right to redeem within that period when the sale was made before the passage of the repealing act. Myers *v.* Copeland, 20 Iowa 22; Adams *v.* Beale, 19 Iowa 61. See Thompson *v.* Sherrill, 51 Ark. 453, 11 S. W. 689.

redemption or otherwise changing it will be construed, if possible, as prospective only or as saving existing rights,[85] or as merely amendatory or supplementary to existing statutes.[86] But the rule that the rights of parties in tax proceedings are to be determined by the law in force at the time of the tax-sale and the issuance of the certificate does not prevent the legislature from making changes in the manner of enforcing the lien which do not substantially impair any of the obligations of the contract.[87] And of course it is within the power of the legislature to repeal a law granting or regulating the right of redemption, as applied to future sales, and its intention to do so is evidenced by the enactment of a new statute providing a complete system of regulation and inconsistent with the former law.[88] Statutes allowing redemption from tax-sales are to be construed liberally and generously in favor of the redemptioner, and not to be applied with any greater severity or narrowness than the terms of the law absolutely require.[89]

3. Persons Entitled to Redeem — a. In General. As a general rule any person may redeem land from a tax-sale who has an interest in the property which would be affected by the maturing of the tax title in the purchaser.[90] This includes a lessee of the premises,[91] the wife or minor child of the owner, where the

85. Judah *v.* Brothers, 71 Miss. 414, 14 So. 455; Caruthers *v.* McLaran, 56 Miss. 371; Blakemore *v.* Cooper, 15 N. D. 5, 106 N. W. 566, 125 Am. St. Rep. 574, 4 L. R. A. N. S. 1074; McCulloch *v.* Dodge, 6 R. I. 346; *In re* Kerr, 5 Northwest. Terr. 297.

86. Rogers *v.* Nichols, 186 Mass. 440, 71 N. E. 950; Allen *v.* Peterson, 38 Wash. 599, 80 Pac. 849.

87. *California.*— Oullahan *v.* Sweeney, 79 Cal. 537, 21 Pac. 960, 12 Am. St. Rep. 172.

Illinois.— Gage *v.* Stewart, 127 Ill. 207, 19 N. E. 702, 11 Am. St. Rep. 116.

Michigan.— Weller *v.* Wheelock, 155 Mich. 698, 118 N. W. 609.

Minnesota.— State *v.* Krahmer, 105 Minn. 422, 117 N. W. 780, 21 L. R. A. N. S. 157.

United States.— Wheeler *v.* Jackson, 137 U. S. 245, 11 S. Ct. 76, 34 L. ed. 659; Curtis *v.* Whitney, 13 Wall. 68, 20 L. ed. 513.

And see Constitutional Law, 8 Cyc. 940.

88. Hadley *v.* Musselman, 104 Ind. 459, 3 N. E. 122; Byington *v.* Rider, 9 Iowa 566; Stewart *v.* Brooks, 28 Mo. 62; Chard *v.* Holt, 136 N. Y. 30, 32 N. E. 740; Levy *v.* Newman, 130 N. Y. 11, 28 N. E. 660.

89. *Alabama.*— Boyd *v.* Holt, 62 Ala. 296.

Iowa.— Ashenfelter *v.* Seiling, 141 Iowa 512, 119 N. W. 984; Corning Town Co. *v.* Davis, 44 Iowa 622; Burton *v.* Hintrager, 18 Iowa 348.

Louisiana.— Alter *v.* Shepherd, 27 La. Ann. 207; Winchester *v.* Cain, 1 Rob. 421.

Michigan.— Pike *v.* Richardson, 136 Mich. 414, 99 N. W. 398; Monaghan *v.* Auditor-Gen., 136 Mich. 247, 98 N. W. 1021.

Minnesota.— Nelson *v.* Central Land Co., 35 Minn. 408, 29 N. W. 121; Gaston *v.* Merriam, 33 Minn. 271, 22 N. W. 614; Merrill *v.* Dearing, 32 Minn. 479, 21 N. W. 721.

Mississippi.—Bonds *v.* Greer, 56 Miss. 710.

New York.— Gabel *v.* Williams, 39 Misc. 489, 80 N. Y. Suppl. 489.

Ohio.— Masterson *v.* Beasley, 3 Ohio 301.

Pennsylvania.— Gault's Appeal, 33 Pa. St. 94; Patterson *v.* Brindle, 9 Watts 98.

Texas.— Jackson *v.* Maddox, (Civ. App. 1909) 117 S. W. 185.

Virginia.— Hale *v.* Penn, 25 Gratt. 261; Corbett *v.* Nutt, 18 Gratt. 624.

West Virginia.— Poling *v.* Parsons, 38 W. Va. 80, 18 S. E. 379; Danser *v.* Johnsons, 25 W. Va. 380.

Wisconsin.— Karr *v.* Washburn, 56 Wis. 303, 14 N. W. 189; Jones *v.* Collins, 16 Wis. 594.

United States.— Corbett *v.* Nutt, 10 Wall. 464, 19 L. ed. 976; Dubois *v.* Hepburn, 10 Pet. 1, 9 L. ed. 325; Schenck *v.* Peay, 21 Fed. Cas. No. 12,451, 1 Dill. 267.

See 45 Cent. Dig. tit. "Taxation," § 1393.

90. *Iowa.*— Griffith *v.* Utley, 76 Iowa 292, 41 N. W. 21; Curl *v.* Watson, 25 Iowa 35, 95 Am. Dec. 763; Byington *v.* Bookwalter, 7 Iowa 512, 74 Am. Dec. 279.

Massachusetts.—Stone *v.* Stone, 163 Mass. 474, 40 N. E. 897.

Nebraska.— Douglass *v.* Hayes County, 82 Nebr. 577, 118 N. W. 114.

Pennsylvania.— McBride *v.* Hoey, 2 Watts 436. But see Brown *v.* Day, 78 Pa. St. 129, holding that after a valid sale for taxes it requires a clearer right to redeem than to pay in self-protection before sale.

Texas.— Jackson *v.* Maddox, (Civ. App. 1909) 117 S. W. 185.

Washington.— Meagher *v.* Sprague, 31 Wash. 549, 72 Pac. 108.

Wisconsin.—Campbell *v.* Packard, 61 Wis. 88, 20 N. W. 672.

United States.— Dubois *v.* Hepburn, 10 Pet. 1, 9 L. ed. 325; Schenck *v.* Peay, 21 Fed. Cas. No. 12,451, 1 Dill. 267.

See 45 Cent. Dig. tit. "Taxation," § 1394.

Determination of right to redeem.— Under a statute providing that land sold for taxes may be redeemed by any person who has a claim in it, when an application to redeem is made to the treasurer, he must determine whether the applicant has a right to redeem, and his decision of that question will be presumed to be correct until the presumption is overcome by evidence to the contrary. Hartman *v.* Reid, 17 Colo. App. 407, 68 Pac. 787.

91. Byington *v.* Rider, 9 Iowa 566.

property is a homestead,[92] and creditors holding liens on the property by judgment or otherwise.[93] Even in those states in which the statutory provision is simply that the "owner" may redeem,[94] this term will be stretched by construction so as to include the heirs of a deceased former owner,[95] or his executor or administrator,[96] or either the trustee or beneficiary, where the title to the land is held under a trust,[97] or another tax-sale purchaser;[98] and in fact so as to include the holder of almost any substantial estate or interest in the land, although it may be merely contingent or expectant.[99] But there is no right of redemption in an owner who has entirely divested himself of all title to the property sold,[1] nor in

92. Burel *v.* Baker, 89 Ark. 168, 116 S. W. 181; Seger *v.* Spurlock, 59 Ark. 147, 26 S. W. 819; Lammar *v.* Sheppard, 80 Ga. 25, 5 S. E. 247; Pfiffner *v.* Krapfel, 28 Iowa 27.

93. *Connecticut.*—Bacon *v.* Curtiss, 2 Root 39.

Iowa.— Swan *v.* Harvey, 117 Iowa 58, 90 N. W. 489.

Louisiana.— Basso *v.* Benker, 33 La. Ann. 432.

Tennessee.—Russell *v.* Dodson, 6 Baxt. 16.

Virginia.— Van Landingham *v.* Buena Vista Imp. Co., 99 Va. 37, 37 S. E. 274.

United States.— Schenck *v.* Peay, 21 Fed. Cas. No. 12,451, 1 Dill. 267.

94. See the statutes of the different states. And see the following cases:

Massachusetts.— Hillis *v.* O'Keefe, 189 Mass. 139, 75 N. E. 147.

Pennsylvania.— Orr *v.* Cunningham, 4 Watts & S. 294; McBride *v.* Hoey, 2 Watts 436.

Texas.— Jackson *v.* Maddox, (Civ. App. 1909) 117 S. W. 185.

Virginia.— Dooley *v.* Christian, 96 Va. 534, 32 S. E. 54.

West Virginia.— State *v.* King, 47 W. Va. 437, 35 S. E. 30; Townshend *v.* Shaffer, 30 W. Va. 176, 3 S. E. 586.

United States.— Dubois *v.* Hepburn, 10 Pet. 1, 9 L. ed. 325; Lancaster *v.* County Auditor, 14 Fed. Cas. No. 8,038, 2 Dill. 478.

See 45 Cent. Dig. tit. "Taxation," § 1397.

Relative of owner.— The mere fact that one is son-in-law to the owner of land will not entitle him to redeem it. Dixon *v.* Hockady, 36 S. C. 60, 15 S. E. 342.

Assessment to unknown owner.— The fact that land was assessed as "unknown," when in reality it was improved and occupied, and no effort was made to ascertain the name of the owner, will not deprive the true owner of the right to redeem. Lynam *v.* Anderson, 9 Nebr. 367, 2 N. W. 732.

Possessor in Louisiana.— One who has possessed land as owner for a number of years is considered in law as a provisional owner and is entitled to redemption from a tax-sale. Bentley *v.* Cavallier, 121 La. 60, 46 So. 101.

95. Rich *v.* Braxton, 158 U. S. 375, 15 S. Ct. 1006, 39 L. ed. 1022 [*affirming* 47 Fed. 178]. And see Jackson *v.* Maddox, (Tex. Civ. App. 1909) 117 S. W. 185.

96. White *v.* Smith, 68 Iowa 313, 25 N. W. 115, 27 N. W. 250; Bowers *v.* Williams, 34 Miss. 324.

97. Bourquin *v.* Bourquin, 120 Ga. 115, 47 S. E. 639; Plumb *v.* Robinson, 13 Ohio St. 298; Phillips *v.* Zerbe Run, etc., Imp. Co., 25 Pa. St. 56; Corbett *v.* Nutt, 10 Wall. (U. S.) 464, 19 L. ed. 976. See Karr *v.* Washburn, 56 Wis. 303, 14 N. W. 189. A trustee in a trust deed is a purchaser for value. Being a purchaser for value, and holding the legal title, he is an owner having a right to redeem from a tax-sale, as permitted to owners under W. Va. Code (1899), c. 31, §§ 15, 24. Clark *v.* McClaugherty, 53 W. Va. 376, 44 S. E. 269.

98. Where a statute limits the right of redemption from a sale for taxes to the owner, the word "owner" is not limited to the person who owned the land when the tax from which redemption is sought was assessed, but includes a purchaser at tax-sale, who thereupon becomes entitled as owner to redeem from prior sales. Rogers *v.* Lynn, 200 Mass. 354, 86 N. E. 889. A city which has bought in lands at a tax-sale may redeem them from a purchaser at a subsequent sale. Meagher *v.* Sprague, 31 Wash. 549, 72 Pac. 108. See also *infra*, XII, A, 3, c.

99. Ragor *v.* Lomax, 22 Ill. App. 628. And see Douglas *v.* Hayes County, 82 Nebr. 577, 118 N. W. 114.

Estates in reversion or remainder see Hodges *v.* Harkleroad, 74 Ark. 343, 85 S. W. 779; Tucker *v.* Tucker, 108 N. C. 235, 13 S. E. 5; Plumb *v.* Robinson, 13 Ohio St. 298; McMillan *v.* Robbins, 5 Ohio 28. And see Minnesota Debenture Co. *v.* Dean, 85 Minn. 473, 89 N. W. 848.

But an inchoate right of dower is not such an "estate" as will give the wife, under the laws of New York, the right to redeem the land from a tax-sale. Rosenblum *v.* Eisenberg, 123 N. Y. App. Div. 896, 108 N. Y. Suppl. 350; People *v.* Palmer, 10 N. Y. App. Div. 395, 41 N. Y. Suppl. 760.

1. *Iowa.*— Cummings *v.* Wilson, 59 Iowa 14, 12 N. W. 747.

Louisiana.— Wheeler *v.* McBain, 43 La. Ann. 859, 9 So. 495.

Massachusetts.— Da Silva *v.* Turner, 166 Mass. 407, 44 N. E. 532.

Pennsylvania.— Chadwick *v.* Phelps, 45 Pa. St. 105.

Canada.— Gilchrist *v.* Tobin, 7 U. C. C. P. 141.

See 45 Cent. Dig. tit. "Taxation," §§ 1394, 1397.

A mortgagor, after foreclosure, ceases to be the "owner" of the land and cannot redeem from a tax-sale. Da Silva *v.* Turner, 166 Mass. 407, 44 N. E. 532.

one whose only claim of title to the property is founded on a conveyance which is entirely invalid.[2]

b. Mortgagees, Etc. A mortgagee of real estate who is obliged to redeem the same from a tax-sale for the protection of his own interest therein has clearly such an interest in the property as entitles him to do so; and he is entitled to add the amount which he pays to effect the redemption to his mortgage debt and receive it back on redemption from the mortgage or on foreclosure of the same.[3] This rule applies also to the beneficiary in a deed of trust in the nature of a mortgage or the holder of the note secured thereby;[4] and it applies to an assignee of the

Grantor by warranty deed.— But under Nebr. Const. art. 9, § 3, giving not only the owner, but any person interested in real estate, the right to redeem from a tax-sale, the owner, who conveys the land by warranty deed after a sale for taxes, has such an interest in the land as entitles him to redeem. Douglas *v.* Hayes County, 82 Nebr. 577, 118 N. W. 114.

Bankrupt owner.— The fact that the owner of land has been adjudicated a bankrupt does not deprive him of the right to redeem it from a tax-sale, if no assignee has yet been appointed or if no conveyance to the assignee has yet been made. Hampton *v.* Rouse, 22 Wall. (U. S.) 263, 22 L. ed. 755.

2. Ricks *v.* Baskett, 68 Miss. 250, 8 So. 514; Levick *v.* Brotherline, 74 Pa. St. 149; Viele *v.* Van Steenberg, 31 Fed. 249.

Ownership acquired by fraud.— And it has been held that one acquiring the ownership of premises by fraud, although having apparently a valid title of record, is not entitled to a reconveyance by the purchaser of the state's tax title on the payment of the sums required for the redemption of property sold for taxes. Chandler *v.* Clark, 151 Mich. 159, 115 N. W. 65.

3. *Alabama.*— Red Mountain Min. Co. *v.* Jefferson County Sav. Bank, 113 Ala. 629, 21 So. 74, 59 Am. St. Rep. 151.

Connecticut.— Mix *v.* Hotchkiss, 14 Conn. 32.

Illinois.— Stinson *v.* Connecticut Mut. L. Ins. Co., 174 Ill. 125, 51 N. E. 193, 66 Am. St. Rep. 262; Clark *v.* Laughlin, 62 Ill. 278; Wright *v.* Langley, 36 Ill. 381. But a mortgagee in possession who allows the land to be sold for taxes will be allowed only the amount of the tax, with interest, not the amount paid by him to redeem. Moshier *v.* Norton, 100 Ill. 63.

Iowa.— Griffith *v.* Utley, 76 Iowa 292, 41 N. W. 21; Dickinson *v.* White, 64 Iowa 708, 21 N. W. 153; Ellsworth *v.* Low, 62 Iowa 178, 17 N. W. 450; Strong *v.* Burdick, 52 Iowa 630, 3 N. W. 707; Lloyd *v.* Bunce, 41 Iowa 660.

Kansas.— Galbreath *v.* Drought, 29 Kan. 711; Leitzbach *v.* Jackman, 28 Kan. 524; Merchants Sav. Bank *v.* Moore, 5 Kan. App. 362, 48 Pac. 455.

Louisiana.— Rondez *v.* Buras, 34 La. Ann. 1245; Shannon *v.* Lane, 33 La. Ann. 489; Montgomery *v.* Burton, 31 La. Ann. 330; Alter *v.* Shepherd, 27 La. Ann. 207.

Massachusetts.—Barry *v.* Lancy, 179 Mass. 112, 60 N. E. 395; McGauley *v.* Sullivan, 174 Mass. 303, 54 N. E. 842; Stone *v.* Stone, 163 Mass. 474, 40 N. E. 897; Keith *v.* Wheeler, 159 Mass. 161, 34 N. E. 174; Hawes *v.* Howland, 136 Mass. 267; Coughlin *v.* Gray, 131 Mass. 56; Walsh *v.* Wilson, 130 Mass. 124; Faxon *v.* Wallace, 101 Mass. 444.

Michigan.— Baker *v.* Clark, 52 Mich. 22, 17 N. W. 225.

Minnesota.— American Baptist Missionary Union *v.* Hastings, 67 Minn. 303, 69 N. W. 1078.

New Jersey.— Farmer *v.* Ward, 75 N. J. Eq. 33, 71 Atl. 401.

New York.— Chard *v.* Holt, 136 N. Y. 30, 32 N. E. 740; Sidenberg *v.* Ely, 90 N. Y. 257, 43 Am. Rep. 163; Cornell *v.* Woodruff, 77 N. Y. 203; Barker *v.* Miller, 32 N. Y. App. Div. 364, 53 N. Y. Suppl. 283; People *v.* Edwards, 56 Hun 377, 10 N. Y. Suppl. 335; Kortright *v.* Cady, 23 Barb. 490 [*reversed* on other grounds in 21 N. Y. 343, 78 Am. Dec. 145]; Brevoort *v.* Randolph, 7 How. Pr. 398; Rapelye *v.* Prince, 4 Hill 119, 40 Am. Dec. 267; Burr *v.* Veeder, 3 Wend. 412; Eagle F. Ins. Co. *v.* Pell, 2 Edw. 631.

Ohio.—Plumb *v.* Robinson, 13 Ohio St. 298.

South Dakota.— Rapid City First Nat. Bank *v.* McCarthy, 18 S. D. 218, 100 N. W. 14.

West Virginia.— Elliott *v.* Shaffer, 30 W. Va. 347, 4 S. E. 292.

United States.— Windett *v.* Union Mut. L. Ins. Co., 144 U. S. 581, 12 S. Ct. 751, 36 L. ed. 551.

Canada.— See Graham *v.* British Canadian Loan, etc., Co., 12 Manitoba 244.

See 45 Cent. Dig. tit. "Taxation," § 1399. And see MORTGAGES, 27 Cyc. 1258.

Contra.— Mixon *v.* Stanley, 100 Ga. 372, 28 S. E. 440.

Mortgage securing several obligations.— If the mortgage secures several notes or bonds which are held by different parties, and one of such parties redeems the land from a tax-sale or procures the sale to be judicially annulled, the consequent liberation of the land from the tax lien will inure to the benefit of all the holders of the notes or bonds, but all must contribute to the expense borne by one who freed the land. Weaver *v.* Alter, 29 Fed. Cas. No. 17,308, 3 Woods 152.

4. McKee *v.* Spiro, 107 Mo. 452, 17 S. W. 1013; Giraldin *v.* Howard, 103 Mo. 40, 15 S. W. 383; Cockerill *v.* Stafford, 102 Mo. 57, 14 S. W. 813; Boatmen's Sav. Bank *v.* Grewe, 101 Mo. 625, 14 S. W. 708; Cowell *v.* Gray, 85 Mo. 169; Myers *v.* Bassett, 84 Mo. 479; Corrigan *v.* Bell, 73 Mo. 53; Rowse *v.* John-

mortgage,[5] to the heir at law of the mortgagee or his devisee,[6] and to the purchaser at a sale on foreclosure of the mortgage or his assignee.[7]

c. Holder of Inchoate, Equitable, or Adverse Title.[8] In many states the laws permit a redemption from a tax-sale to be made by one whose claim of interest in the land is based on an imperfect, incomplete, or equitable title,[9] including a purchaser from the original owner under an executory contract of sale,[10] one who has bought the land at a sale on execution, foreclosure, or other judicial process,[11] a purchaser at a sale for later or different taxes,[12] or even one who is in possession under claim and color of title or without any paper title.[13]

d. Agent or Attorney of Owner. An agent or attorney, acting under instructions from the owner of the land, may redeem it from a tax-sale,[14] and if he is clothed with a general authority to take care of the property and protect the interests of the owner, no special direction or authority to redeem is required.[15]

son, 66 Mo. App. 57; Clark *v.* McClaugherty, 53 W. Va. 376, 44 S. E. 269; Gormley *v.* Bunyan, 138 U. S. 623, 11 S. Ct. 453, 34 L. ed. 1086.

5. Hawks *v.* Davis, 185 Mass. 119, 69 N. E. 1072; Faxon *v.* Wallace, 98 Mass. 44.

6. Witt *v.* Mewhirter, 57 Iowa 545, 10 N. W. 890; Burton *v.* Hintrager, 18 Iowa 348; McGauley *v.* Sullivan, 174 Mass. 303, 54 N. E. 842.

7. Barry *v.* Lancy, 179 Mass. 112, 60 N. E. 395; Downey *v.* Lancy, 178 Mass. 465, 59 N. E. 1015; Lancy *v.* Abington Sav. Bank, 177 Mass. 431, 59 N. E. 115; McGauley *v.* Sullivan, 174 Mass. 303, 54 N. E. 842; People *v.* Morgan, 85 N. Y. App. Div. 292, 83 N. Y. Suppl. 86.

8. **Inchoate right of dower** see *supra*, XII. A, 3, a, note 99.

9. Cowdry *v.* Cuthbert, 71 Iowa 733, 29 N. W. 798; Cummings *v.* Wilson, 59 Iowa 14, 12 N. W. 747; People *v.* Campbell, 143 N. Y. 335, 38 N. E. 300.

Purchaser of dower right.— One holding a deed for an unassigned right of dower has such an interest in the estate as will entitle him to redeem the property from a tax-sale. Rice *v.* Nelson, 27 Iowa 148.

Parol trust.— Where the law requires a trust in lands to be created or declared in writing, this does not render void a trust created by a parol agreement that land conveyed by a deed absolute shall be held for the benefit of another, but only voidable at the election of the grantee, and consequently the *cestui que trust* has an equitable interest which gives him the legal right to redeem from a tax-sale. Begole *v.* Hazzard, 81 Wis. 274, 51 N. W. 325.

10. Waterman *v.* Irby, 76 Ark. 551, 89 S. W. 844; Snider *v.* Smith, 75 Ark. 306, 87 S. W. 624; Neil *v.* Rozier, 49 Ark. 551, 6 S. W. 157; Woodward *v.* Campbell, 39 Ark. 580; Rogers *v.* Rutter, 11 Gray (Mass.) 410; Rich *v.* Palmer, 7 Oreg. 133. If the vendee has not paid any part of the purchase-money, he has no interest of his own which would entitle him to redeem, and must rely on the right of his vendor to redeem. Chadwick *v.* Phelps, 45 Pa. St. 105.

The grantee in a void donation deed, who has neither paid taxes nor been in possession, has no interest in the land entitling him to redeem. Smith *v.* Thornton, 74 Ark. 572, 86 S. W. 1008.

11. Gable *v.* Seiben, 137 Ind. 155, 36 N. E. 844; Whitaker *v.* Ashbey, 43 La. Ann. 117, 8 So. 394; Shearer *v.* Woodburn, 10 Pa. St. 511.

Sale of property of dissolved corporation. — The right to redeem land sold for taxes, vested in a dissolved corporation, is an interest in realty which may be sold by a trustee appointed by the court under the act of April 13, 1891, to sell the property of such corporation, and the purchaser at such sale may exercise the right to redeem. Philadelphia *v.* Unknown, 30 Pa. Super. Ct. 516.

Purchaser at foreclosure sale see *supra*, XII, A, 3, b.

12. *Georgia.*— Richardson *v.* Comer, 112 Ga. 103, 37 S. E. 116.

Louisiana.— McDougall *v.* Monlezun, 39 La. Ann. 1005, 3 So. 273.

Massachusetts.—Rogers *v.* Lynn, 200 Mass. 354, 86 N. E. 889.

Michigan.— Miller *v.* Meilstrup, 144 Mich. 643, 108 N. W. 427.

Pennsylvania.— McCord *v.* Bergautz, 7 Watts, 487; McBride *v.* Hoey, 1 Penr. & W. 54.

Washington.— Meagher *v.* Sprague, 31 Wash. 549, 72 Pac. 108.

West Virginia.— See State *v.* Belcher, 53 W. Va. 359, 44 S. E. 216.

13. Roach *v.* State, 148 Ala. 419, 39 So. 685; Foster *v.* Bowman, 55 Iowa 237, 7 N. W. 513; Campbell *v.* Packard, 61 Wis. 88, 20 N. W. 672. But *compare* Frazier *v.* Johnson, 65 N. J. L. 673, 48 Atl. 573.

Contesting claimants.— Where title to property is a matter of contest between two parties, it may be redeemed by either from a person claiming under a tax title adversely to both, leaving the effect of the redemption to be determined subsequently as between the contesting claimants. Benton *v.* Benton, 106 La. 99, 30 So. 137.

14. Gracie *v.* White, 18 Ark. 17; Elliott *v.* Shaffer, 30 W. Va. 347, 4 S. E. 292.

15. Huzzard *v.* Trego, 35 Pa. St. 9; Trego *v.* Huzzard, 19 Pa. St. 441; Patterson *v.* Brindle, 9 Watts (Pa.) 98; McCord *v.* Bergautz, 7 Watts (Pa.) 487; Townshend *v.* Shaffer, 30 W. Va. 176, 3 S. E. 586. And

If a person assumes without any authority to act as the owner's agent and pays the redemption money, the owner may accept and ratify his act, and the self-styled agent will not be permitted to deny the character in which he acted or to set up a claim of title in himself or assert any other claim to the land than as security for his reimbursement.[16]

e. Attempted Redemption by Stranger. A party having no interest in land, and not representing the owner, has no right to redeem it from a tax-sale, and if he tenders the redemption money to the holder of the tax-sale certificate the latter may refuse to receive it, or if the money is paid to the proper officer, the tax purchaser may repudiate it, and in either case the title of the latter is not divested, nor will the attempted redemption inure to the benefit of the real owner.[17] If, however, the tax purchaser consents to the redemption and accepts and retains the money, it is clear that he will be estopped to deny the effect of the transaction as a redemption,[18] and it seems that in such case the act of the stranger will inure to the benefit of the true owner of the land, at least if he chooses to ratify it and claim the advantage of it.[19]

f. Tenants in Common. As between joint tenants or tenants in common holding undivided interests in a tract of land sold *in solido* for taxes, either may redeem, but as a rule he must redeem the entire estate, not merely his undivided interest, and on so doing he will have a claim against his cotenant for reimbursement to the extent of his proportionate share.[20]

g. Persons Under Disabilities. An infant whose lands have been sold for non-payment of taxes has the same right as an adult to redeem them,[21] and indeed

see State *v.* Harper, 26 Nebr. 761, 42 N. W. 764.

16. Houston *v.* Buer, 117 Ill. 324, 7 N. E. 646; Schedda *v.* Sawyer, 21 Fed. Cas. No. 12,443, 4 McLean 181. And see State *v.* Register of Conveyances, 113 La. 93, 36 So. 900, holding that any one may, for the advantage of the owner of property sold for taxes, act as his agent and make payment of the redemption money, even without his knowledge.

17. *Iowa.*— Penn *v.* Clemens, 19 Iowa 372; Byington *v.* Bookwalter, 7 Iowa 512, 74 Am. Dec. 279.

Kentucky.— Bradford *v.* Walker, 5 S. W. 555, 8 Ky. L. Rep. 586.

Louisiana.— Staples *v.* Mayer, 44 La. Ann. 628, 11 So. 29.

Pennsylvania.— Laird *v.* Hiester, 24 Pa. St. 452; McBride *v.* Hoey, 2 Watts 436.

Wisconsin.— Rutledge *v.* Price County, 66 Wis. 35, 27 N. W. 819; Cousins *v.* Allen, 28 Wis. 232; Eaton *v.* North, 25 Wis. 514.

United States.— Halsted *v.* Buster, 140 U. S. 273, 11 S. Ct. 782, 35 L. ed. 484; Wood *v.* Welpton, 29 Fed. 405.

See 45 Cent. Dig. tit. "Taxation," § 1394.

But *compare* Jamison *v.* Thompson, 65 Miss. 516, 5 So. 107; Greene *v.* Williams, 58 Miss. 752.

18. Hunt *v.* Seymour, 76 Iowa 751, 39 N. W. 909; Orr *v.* Cunningham, 4 Watts & S. (Pa.) 294.

19. Sloan *v.* Cobb, 74 Ark. 393, 85 S. W. 1126; Alexander *v.* Ellis, 123 Pa. St. 81, 16 Atl. 770; Coxe *v.* Sartwell, 21 Pa. St. 480; Orr *v.* Cunningham, 4 Watts & S. (Pa.) 294. And see Harman *v.* Stearns, 95 Va. 58, 27 S. E. 601; Boulton *v.* Ruttan, 2 U. C. Q. B. (O. S.) 396.

20. *California.*— Quinn *v.* Kenney, 47 Cal. 147; Mayo *v.* Marshall, 23 Cal. 594; People *v.* McEwen, 23 Cal. 54.

Iowa.— Curl *v.* Watson, 25 Iowa 35, 95 Am. Dec. 763.

Maine.— Loomis *v.* Pingree, 43 Me. 299; Watkins *v.* Eaton, 30 Me. 529, 50 Am. Dec. 637.

Massachusetts.— Hurley *v.* Hurley, 148 Mass. 444, 19 N. E. 545, 2 L. R. A. 172.

Oregon.— Rich *v.* Palmer, 6 Oreg. 339.

Pennsylvania.— Halsey *v.* Blood, 29 Pa. St. 319.

Rhode Island.— Chace *v.* Durfee, 16 R. I. 248, 14 Atl. 919.

West Virginia.— Cain *v.* Brown, 54 W. Va. 656, 46 S. E. 579.

United States.— O'Reilly *v.* Holt, 18 Fed. Cas. No. 10,563, 4 Woods 645.

But *compare* People *v.* Detroit Treasurer, 8 Mich. 14, 77 Am. Dec. 433.

Minors see *infra*, XII, A, 4, e.

21. *Arkansas.*— Cowley *v.* Spradlin, 77 Ark. 190, 91 S. W. 550; Carroll *v.* Johnson, 41 Ark. 59.

Illinois.— Holloway *v.* Clark, 27 Ill. 483; Chapin *v.* Curtenius, 15 Ill. 427.

Kansas.— Douglass *v.* Lowell, 55 Kan. 574, 40 Pac. 917.

Michigan.— Foegan *v.* Carpenter, 117 Mich. 89, 75 N. W. 290.

Wisconsin.— Tucker *v.* Whittlesey, 74 Wis. 74, 41 N. W. 535, 42 N. W. 101; Karr *v.* Washburn, 56 Wis. 303, 14 N. W. 189.

See 45 Cent. Dig. tit. "Taxation," § 1396.

Estate of minor entitling him to redeem.— A minor may redeem who has either a vested or contingent remainder in the lands. Minnesota Debenture Co. *v.* Dean, 85 Minn. 473, 89 N. W. 848. He may redeem after execut-

is usually accorded a longer period for this purpose.[22] This right of redemption vested in a minor is a transferable interest and passes to his vendee.[23] So also a married woman may redeem her property from a tax-sale,[24] and so may the guardian or committee of an insane person.[25]

4. Time For Redemption — a. In General. Unless there are some special equities in the case giving the owner a right to maintain a suit for redemption from a tax-sale,[26] he must exercise his privilege of redeeming within the specific time limited by the constitution or statute for that purpose, or lose it finally. This time varies in the different states, but is usually one, two or three years from the time of the sale or execution of a tax deed, or a certain length of time after receiving notice from the purchaser.[27] Under some statutes the owner

ing and delivering a warranty deed. Hoffman *v.* Peterson, 123 Wis. 632, 102 N. W. 47.

Minor "heir."—Wash. Laws (1899), p. 298, c. 141, § 17 (Pierce Code, § 8696), providing for the redemption of real property of any "minor heir" from a sale for taxes, applies only to minors inheriting the property. Burdick *v.* Kimball, 53 Wash. 198, 101 Pac. 845.

22. See *infra*, XII, A, 4, e.

23. McConnell *v.* Swepston, 66 Ark. 141, 49 S. W. 566; Stout *v.* Merrill, 35 Iowa 47.

24. Anderson *v.* Batson, 37 S. W. 84, 18 Ky. L. Rep. 493; Plumb *v.* Robinson, 13 Ohio St. 298; Corbett *v.* Nutt, 18 Gratt. (Va.) 624.

25. Powell *v.* Smallwood, 48 W. Va. 298, 37 S. E. 551.

26. See *infra*, XII, A, 4, f; XII, D, 1.

27. See the statutes of the different states. And see the following cases:

Alabama.— Boyd *v.* Holt, 62 Ala. 296.

Arkansas.— Sibly *v.* Cason, 86 Ark. 32, 109 S. W. 1007; Thornton *v.* Smith, 36 Ark. 508.

Georgia.— Millen *v.* Howell, 81 Ga. 653, 8 S. E. 316.

Illinois.— Netterstrom *v.* Kemeys, 187 Ill. 617, 58 N. E. 609; Gage *v.* Parker, 103 Ill. 528; Eggleston *v.* Gage, 33 Ill. App. 184.

Iowa.— Cummings *v.* Wilson, 59 Iowa 14, 12 N. W. 747; Pearson *v.* Robinson, 44 Iowa 413.

Kansas.— Pierce *v.* Adams, 77 Kan. 46, 93 Pac. 594; Cable *v.* Coates, 36 Kan. 191, 12 Pac. 931.

Louisiana.—Winchester *v.* Cain, 1 Rob. 421.

Massachusetts.—Hawks *v.* Davis, 185 Mass. 119, 69 N. E. 1072; Perry *v.* Lancy, 179 Mass. 183, 60 N. E. 472.

Michigan.— Pike *v.* Richardson, 136 Mich. 414, 99 N. W. 398.

Minnesota.— State *v.* Halden, 75 Minn. 512, 78 N. W. 16; State *v.* McDonald, 26 Minn. 145, 1 N. W. 832.

Mississippi.— Le Blanc *v.* Illinois Cent. R. Co., 72 Miss. 669, 18 So. 381.

Nebraska.— Douglas *v.* Hayes County, 82 Nebr. 577, 118 N. W. 114; Wood *v.* Speck, 78 Nebr. 435, 110 N. W. 1001; Selby *v.* Pueppka, 73 Nebr. 179, 102 N. W. 263; Logan County *v.* Carnahan, 67 Nebr. 685, 92 N. W. 984, 95 N. W. 812. And see *infra*, this note.

New York.— Turner *v.* Boyce, 11 Misc. 502, 33 N. Y. Suppl. 433.

North Carolina.— Tiddy *v.* Graves, 126 N. C. 620, 36 S. E. 127.

Pennsylvania.— Russel *v.* Reed, 27 Pa. St. 166.

Texas.— Berry *v.* San Antonio, (Civ. App. 1898) 46 S. W. 273.

West Virginia.— Forqueran *v.* Donnally, 7 W. Va. 114.

See 45 Cent. Dig. tit. "Taxation," § 1402.

Judicial sale on foreclosure of tax lien.— In Nebraska, where there has been no valid administrative tax-sale, the owner has two years from and after the confirmation of the judicial sale in the action to foreclose the tax lien in which to redeem his land from such sale. Barker *v.* Hume, 84 Nebr. 235, 120 N. W. 1131; Smith *v.* Carnahan, 83 Nebr. 667, 120 N. W. 212; Douglas *v.* Hayes County, 82 Nebr. 577, 118 N. W. 114; Butler *v.* Libe, 81 Nebr. 740, 116 N. W. 663; Wood *v.* Speck, 78 Nebr. 435, 110 N. W. 1001; Logan County *v.* McKinley-Lanning L. & T. Co., 70 Nebr. 406, 101 N. W. 991; Logan County *v.* Carnahan, 66 Nebr. 685, 92 N. W. 984, 95 N. W. 812. Where a county before any administrative sale of real estate for taxes sues to foreclose a tax lien and obtains a decree, a sale thereunder is a judicial sale and does not become complete until confirmation; the time for redemption dating from such confirmation. Smith *v.* Carnahan, *supra*.

Sale under void decree.— But the limitation of two years within which a party may redeem from sale for taxes does not apply to a sale made under a void decree foreclosing a tax lien. Payne *v.* Anderson, 80 Nebr. 216, 114 N. W. 148.

Redemption by county.— The statute allowing two years for redemption from a tax-sale is not a statute of limitations within Miss. Const. § 104, providing that limitations shall not run against the state or any county, etc., and a county has not the right after the expiration of the two-year period to redeem land, which after the tax-sale it bought at a trustee's sale, to protect a loan made by it on the land prior to the tax-sale. Tallahatchie County *v.* Little, 94 Miss. 88, 46 So. 257.

Redemption of land sold to state.— Under Ky. St. (1909) § 4152, providing that, in the redemption of land sold to the state for taxes, the county clerk, at any time within two years after the sale, or until the revenue agent under the auditor's direction assumes charge of a collection by sale or otherwise, is vested with authority to collect the delinquent taxes, interest, and penalties, and

may redeem from taxes and tax-sales at any time before execution and delivery of a valid tax deed.[28]

b. Computation of Time. Where the statute provides that the owner shall have a certain length of time after the sale in which to redeem, this period begins to run from the day of the sale, and not from the time the purchaser takes a deed.[29] Under some statutes, however, the tax deed is to be issued directly after the sale, and not at the end of the redemption period, and where this is the case the time for redemption begins to run from the date of filing or recording the deed.[30] Under other statutes, again, the right of redemption is limited to a certain length of time after giving of notice of the sale or notice to redeem; and this is computed in the ordinary way, the requirements as to the fact and sufficiency of notice being applied with some strictness.[31]

c. When Time Expires. When the time for redemption is limited to a certain number of days after service of notice, or to one or more years from the sale, the day of giving the notice or the day of the sale is to be excluded, and the owner will be allowed the whole of the last day in which to redeem,[32] so that a tax deed

section 4154 allowing the revenue agent fifteen per cent for the collection and payment of delinquent taxes, interest, etc., it is held that, notwithstanding the fee-simple title to land sold to the state for taxes vests in the state on the expiration of the two-year redemption period, such title is subject to be divested by the payment of the taxes by the delinquent prior to the sale of the land by the revenue agent. James *v.* Blanton, 134 Ky. 803, 121 S. W. 951, 123 S. W. 328.

28. Stockand *v.* Hall, 54 Wash. 106, 102 Pac. 1037; Kahn *v.* Thorpe, 43 Wash. 463, 86 Pac. 855; State *v.* Cranney, 30 Wash. 594, 71 Pac. 50.

Void deed.— Limitations do not run in favor of a tax deed, void on its face, and under Rev. Pol. Code, § 2205, providing that the owner of land sold for taxes may redeem any time before the tax deed was issued, such a deed will not bar a redemption by the owner after the period of limitations. Battelle *v.* Wolven, 22 S. D. 39, 115 N. W. 99.

29. *Georgia.*—Wood *v.* Henry, 107 Ga. 389, 33 S. E. 410 (holding that a tax-sale, relative to the right of the owner to redeem, is not complete until payment of the purchase-money by the bidder); Boyd *v.* Wilson, 86 Ga. 379, 12 S. E. 744, 13 S. E. 428.

Kansas.— Doudna *v.* Harlan, 45 Kan. 484, 25 Pac. 883, rule applied where the land was bought in by the county for want of other bidders.

Louisiana.— Gonzales *v.* Saux, 119 La. 657, 44 So. 332; Geddes *v.* Cunningham, 104 La. 306, 29 So. 138.

Maine.— Millett *v.* Mullen, 95 Me. 400, 49 Atl. 871.

Oregon.— Hendershott *v.* Sagsvold, 49 Oreg. 592, 90 Pac. 1104.

Pennsylvania.— Rockland, etc., Coal, etc., Co. *v.* McCalmont, 72 Pa. St. 221.

See 45 Cent. Dig. tit. "Taxation," § 1404.

30. *Alabama.*— Pugh *v.* Youngblood, 69 Ala. 296.

Kansas.— Pierce *v.* Adams, 77 Kan. 46, 93 Pac. 594; Taylor *v.* Moise, 52 La. Ann. 2016, 28 So. 237, requisites of deed.

Washington.— State *v.* Maple, 16 Wash. 430, 47 Pac. 966.

Wisconsin.— Hiles *v.* Atlee, 90 Wis. 72, 62 N. W. 940 (defects in record of deed); Lander *v.* Bromley, 79 Wis. 372, 48 N. W. 594 (deed void on its face).

United States.—West *v.* Duncan, 42 Fed. 430; Berthold *v.* Hoskins, 38 Fed. 772.

31. *Iowa.*—Ashenfelter *v.* Seiling, 141 Iowa 512, 119 N. W. 984; Swope *v.* Prior, 58 Iowa 412, 10 N. W. 788.

Massachusetts.—Hawks *v.* Davis, 185 Mass. 119, 69 N. E. 1072; Barry *v.* Lancy, 179 Mass. 112, 60 N. E. 395; McGauley *v.* Sullivan, 174 Mass. 303, 54 N. E. 842; Keith *v.* Wheeler, 159 Mass. 161, 34 N. E. 174.

Michigan.— Escanaba Timber Land Co. *v.* Rusch, 147 Mich. 619, 111 N. W. 345.

Minnesota.— Patterson *v.* Grettum, 83 Minn. 69, 85 N. W. 907.

New York.— See Halsted *v.* Silberstein, 196 N. Y. 1, 89 N. E. 443.

Pennsylvania.—Arthurs *v.* Smathers, 38 Pa. St. 40.

See 45 Cent. Dig. tit. "Taxation," § 1404.

Report of return of service of notice.— Under Code (1897), § 1341, until written report of the return of service of notice of expiration of the time of redemption from a tax-sale is made by the treasurer to the auditor, as required by the statute, the auditor is justified in assuming that the right of redemption has not expired, and in accepting redemption at the hands of the owner or lien-holder, or at least from such as have not been served with notice in due time. Ashenfelter *v.* Seiling, 141 Iowa 512, 119 N. W. 984.

32. *Alabama.*— Pugh *v.* Youngblood, 69 Ala. 296.

Arkansas.— Hare *v.* Carnall, 39 Ark. 196.

Kansas.— Hicks *v.* Nelson, 45 Kan. 47, 25 Pac. 218, 23 Am. St. Rep. 709; Richards *v.* Thompson, 43 Kan. 209, 23 Pac. 106; Ireland *v.* George, 41 Kan. 751, 21 Pac. 776.

Massachusetts.— Clark *v.* Lancy, 178 Mass. 460, 59 N. E. 1034.

Minnesota.— Cole *v.* Lamm, 81 Minn. 463, 84 N. W. 329.

made on that last day, although it be in the afternoon, is premature;[33] and if the last day is Sunday, the owner will have the whole of the following day, Monday, in which to redeem.[34]

d. Statutes Extending or Abridging Time. In view of the contractual elements involved in a purchase at tax-sale, it is held that the legislature cannot constitutionally extend the period for redemption, as respects sales already made,[35] or curtail it in such a manner that, as applied to a particular previous sale, the right of redemption would be entirely cut off,[36] although this period may be abridged by a retroactive statute, provided that in each case affected a reasonable length of time is still left to the owner in which to redeem.[37]

e. Time Allowed Persons Under Disabilities. Unless specially favored by the statute, infants, married women, and persons under other disabilities have no longer time than other persons in which to redeem their lands from tax-sales.[38] But in many states laws are now in force according to such persons a period of

New Hampshire.—Annan *v.* Baker, 49 N. H. 161.

North Carolina.— Thomas *v.* Nichols, 127 N. C. 319, 37 S. E. 327.

Pennsylvania.— Cromelien *v.* Brink, 29 Pa. St. 522.

Wisconsin.—Whittlesey *v.* Hoppenyan, 72 Wis. 140, 39 N. W. 355.

Canada.— McDougall *v.* McMillan, 25 U. C. C. P. 75; Boulton *v.* Ruttan, 2 U. C. Q. B. O. S. 362.

Running of time for redemption from service or filing of notice see Ellsworth *v.* Green, 59 Iowa 622, 13 N. W. 723; Hand *v.* Ballou, 12 N. Y. 541.

Effect of issuance of deed.— Neither the premature issuance of a tax deed nor the failure to issue it as soon as the purchaser becomes entitled to it will extend the statutory period allowed for redemption. Wood *v.* Coad, 120 Iowa 111, 94 N. W. 264; Ellsworth *v.* Low, 62 Iowa 178, 17 N. W. 450. And an offer to redeem comes too late after the holder of the tax certificate becomes entitled to a deed, which he is prevented from obtaining only by an injunction wrongfully obtained by the owner. Long *v.* Smith, 62 Iowa 329, 17 N. W. 579.

Redemption too late.—An offer to redeem after the expiration of the statutory period, although only by one day, is too late. McIntosh *v.* Marathon Land Co., 110 Wis. 296, 85 N. W. 976; Proudfoot *v.* Bush, 12 U. C. C. P. 52.

33. Cable *v.* Coates, 36 Kan. 191, 12 Pac. 931; English *v.* Williamson, 34 Kan. 212, 8 Pac. 214. Where the statute allows a landowner three years from the day of sale and any additional time that may elapse until the tax deed is executed in which to redeem from a sale for taxes, and a tax deed is executed on the last day of the three-year period, the landowner has no additional time after that day in which to redeem. Pierce *v.* Adams, 77 Kan. 46, 93 Pac. 594.

34. Brophy *v.* Harding, 137 Ill. 621, 27 N. E. 523, 34 N. E. 253; Gage *v.* Davis, 129 Ill. 236, 21 N. E. 788, 16 Am. St. Rep. 260; Hicks *v.* Nelson, 45 Kan. 47, 25 Pac. 218, 23 Am. St. Rep. 709; Hill *v.* Timmermeyer, 36 Kan. 252, 13 Pac. 211; English *v.* Williamson, 34 Kan. 212, 8 Pac. 214.

35. *Arkansas.*—Wolfe *v.* Henderson, 28 Ark. 304.

Florida.— Hull *v.* State, 29 Fla. 79, 11 So. 97, 30 Am. St. Rep. 95, 16 L. R. A. 308.

Minnesota.— Merrill *v.* Dearing, 32 Minn. 479, 21 N. W. 721; Goenen *v.* Schroeder, 8 Minn. 387.

New York.— Dikeman *v.* Dikeman, 11 Paige 484.

Wisconsin.— Robinson *v.* Howe, 13 Wis. 341.

Compare Gault's Appeal, 33 Pa. St. 94.

Exception where state is purchaser.— The rule stated in the text is held not to apply where the state itself is the purchaser at the tax-sale, as the extension of the time for redemption is in this case not a violation of contract rights but an act of grace. Adkin *v.* Pillen, 136 Mich. 682, 100 N. W. 176; State *v.* Smith, 36 Minn. 456, 32 N. W. 174.

Failure to record deed.—A statute which authorizes the redemption of land sold for taxes at any time before the deed executed upon such sale is recorded is not void on the ground that it impairs the obligation of contracts or divests a title previously acquired. International L. Ins. Co. *v.* Scales, 27 Wis. 640.

36. Moody *v.* Hoskins, 64 Miss. 468, 1 So. 622.

37. Baldwin *v.* Ely, 66 Wis. 171, 28 N. W. 392. And see Conway *v.* Cable, 37 Ill. 82, 87 Am. Dec. 240. *Compare* Cargill *v.* Power, 1 Mich. 369.

38. *Arkansas.*— Sibly *v.* Cason, 86 Ark. 32, 109 S. W. 1007; Hall *v.* Potter, 81 Ark. 476, 99 S. W. 687; Little Rock Junction R. Co. *v.* Burke, 53 Ark. 430, 14 S. W. 622; Smith *v.* Macon, 20 Ark. 17.

Georgia.— Dawson *v.* Dawson, 106 Ga. 45, 32 S. E. 29.

Kansas.— Cartwright *v.* Korman, 45 Kan. 515, 26 Pac. 48.

Massachusetts.— O'Day *v.* Bowker, 143 Mass. 59, 9 N. E. 16.

Michigan.— Dumphey *v.* Hilton, 121 Mich. 315, 80 N. W. 1.

Mississippi.— Heard *v.* Walton, 39 Miss. 388. See Patterson *v.* Durfey, 68 Miss. 779, 9 So. 354.

New York.— Levy *v.* Newman, 130 N. Y. 11, 28 N. E. 660.

one or more years after removal of the disability in which to redeem.[39] A statute of this kind does not suspend the right of redemption during the infancy or coverture of the owner, but it may be exercised as well before as after the removal of the disability;[40] and a minor's right to redeem cannot be extinguished by any alienation or transfer during his minority.[41] But to claim the right of redemption after attaining his majority the minor must have been the owner of the property at the time of the sale;[42] if the owner of the property at that time was an adult, his infant heir will have no longer time to redeem than his ancestor would have had.[43] A purchaser from the infant owner will have the same time allowed to his vendor;[44] but the heir of the infant owner, even though himself a minor, must redeem within the statutory period after the infant's death, which in law terminates his disability, and cannot wait until after the time when the infant owner, had he survived, would have attained his majority.[45] As a general rule the right of a minor to

Pennsylvania.— Metz *v.* Hipps, 96 Pa. St. 15; McCormack *v.* Russell, 25 Pa. St. 185. See 45 Cent. Dig. tit. "Taxation," § 1403.

39. See the statutes of the different states. And see Cowley *v.* Spradlin, 77 Ark. 190, 91 S. W. 550; Smith *v.* Thornton, 74 Ark. 572, 86 S. W. 1008; Moore *v.* Irby, 69 Ark. 102, 61 S. W. 371; Bemis *v.* Plato, 119 Iowa 127, 93 N. W. 83; Metz *v.* Hipps, 96 Pa. St. 15; Cooper *v.* Brockway, 8 Watts (Pa.) 162; Sidle *v.* Walters, 5 Watts (Pa.) 389; Hoffman *v.* Peterson, 123 Wis. 632, 102 N. W. 47. See also State *v.* Krahmer, 105 Minn. 422, 117 N. W. 780, 21 L. R. A. N. S. 157.

Construction of statutes.—A statute entitling the purchaser at a tax-sale to a deed at the end of three years and one permitting persons under disabilities to redeem within five years, being *in pari materia*, must be construed so as to give effect to both. Dayton *v.* Relf, 34 Wis. 86.

Meaning of "orphans."—A statute granting a special time for redemption to "orphans" does not apply to minors who are not orphans. Downing *v.* Shoenberger, 9 Watts (Pa.) 298.

Application to married women.—Where lands of a married woman have been sold for taxes, she may, in conjunction with her husband, institute proceedings to redeem at any time during the coverture, although the ordinary period for redemption has expired. Plumb *v.* Robinson, 13 Ohio St. 298. The interest of the wife in the homestead is such an estate as entitles her to redeem after the coverture ceases. Adams *v.* Beale, 19 Iowa 61. But it seems that a married woman having a separate estate in lands sold for taxes is not under such a disability as respects such lands as will extend the time for redemption. Williamson *v.* Russell, 18 W. Va. 612. See Ethel *v.* Batchelder, 90 Ind. 520. And the widow of a person whose lands have been sold for taxes has no extended time for redemption, on the ground of having been a *feme covert*, her only interest at the time of the sale having been a contingent right of dower. Finch *v.* Brown, 8 Ill. 488.

Application to insane persons.—What constitutes lunacy, insanity, or mental derangement within the meaning of such statutes see Hawley *v.* Griffin, (Iowa 1900) 82 N. W. 905.

40. Carroll *v.* Johnson, 41 Ark. 59; Witt *v.* Mewhirter, 57 Iowa 545, 10 N. W. 890; Goodrich *v.* Florer, 27 Minn. 97, 6 N. W. 452; White *v.* Straus, 47 W. Va. 794, 35 S. E. 843.

The minor's guardian may act for him and make the redemption in his behalf. Witt *v.* Mewhirter, 57 Iowa 545, 10 N. W. 890.

41. Carroll *v.* Johnson, 41 Ark. 59; Strang *v.* Burris, 61 Iowa 375, 16 N. W. 285; Price *v.* Ferguson, 66 Miss. 404, 6 So. 210.

42. Pearsons *v.* American Inv. Co., 83 Iowa 358, 49 N. W. 853; Stevens *v.* Cassady, 59 Iowa 113, 12 N. W. 803; Burton *v.* Hintrager, 18 Iowa 348; Kulp *v.* Kulp, 51 Kan. 341, 32 Pac. 1118, 21 L. R. A. 550; Doudna *v.* Harlan, 45 Kan. 484, 25 Pac. 883; Harding *v.* Vaughn, 36 Fed. 742.

What constitutes ownership.—A minor owner of land is entitled to the statutory time for its redemption, although his deed was not recorded until after the sale (Tallman *v.* Cooke, 39 Iowa 402), or although his interest in the land had been sold under a void judgment (Tucker *v.* Whittlesey, 74 Wis. 74, 41 N. W. 535, 42 N. W. 101). So if the redemptioner is the heir of a mortgagee of land, or if his guardian holds a mortgage in trust for him, in either case he is entitled to redeem within the special time provided for minors. Witt *v.* Mewhirter, 57 Iowa 545, 10 N. W. 890; Burton *v.* Hintrager, 18 Iowa 348. But the production from the custody of the minor's guardian of an unacknowledged conveyance does not entitle the minor to the benefit of the special statute. Walker *v.* Sargent, 47 Iowa 448.

43. Stevens *v.* Cassady, 59 Iowa 113, 12 N. W. 803; Doudna *v.* Harlan, 45 Kan. 484, 25 Pac. 883; McMillan *v.* Hogan, 129 N. C. 314, 40 S. E. 63; McCormack *v.* Russell, 25 Pa. St. 185; Cooper *v.* Brockway, 8 Watts (Pa.) 162. *Contra*, Jones *v.* Collins, 16 Wis. 594. And see Reynolds *v.* Lieper, 7 Ohio, Pt. II, 17, holding that, although a forfeiture of lands for non-payment of taxes may have been incurred during the owner's lifetime, yet if he dies before the sale his infant heirs may redeem within the period allowed to owners who are minors.

44. Neil *v.* Rozier, 49 Ark. 551, 6 S. W. 157; Stout *v.* Merrill, 35 Iowa 47.

45. McGee *v.* Bailey, 86 Iowa 513, 53 N. W.

redeem after reaching full age is limited to his own interest in the premises and does not extend to that of other owners or tenants in common with him.[46]

f. Redemption After Time Expires. Although the statutory time for redemption may have expired, yet the holder of the tax certificate may consent to a redemption by the owner, and if he receives the money on that understanding, it is a redemption and not a purchase.[47] So the right of redemption is not barred by the lapse of the statutory time when the owner was prevented from exercising it within that period by the fraud of the purchaser,[48] or the fraud, fault, or mistake of a public officer,[49] or where the purchaser has failed to comply with some statutory requisite to the vesting of his title,[50] or redemption has been prevented or postponed by the pendency of proceedings either to recover the land or to enjoin the execution of a deed,[51] or perhaps on other equitable grounds.[52]

5. Actions to Foreclose Right of Redemption[53] — a. In General. In several of the states a process has been provided by statute by which the tax purchaser, at the expiration of the proper time, is to bring his suit, in the nature of a bill in equity and substantially as if it were founded on a mortgage, to foreclose the right of redemption subsisting in the former owner.[54] This action must not be instituted until the owner has had the full time allowed him by law for a voluntary

309; Gibbs *v.* Sawyer, 48 Iowa 443. But *compare* McNamara *v.* Baird, 72 Miss. 89, 16 So. 384.

46. Miller *v.* Porter, 35 Iowa 166; Stout *v.* Merrill, 35 Iowa 47; Jacobs *v.* Porter, 34 Iowa 341; Goodrich *v.* Florer, 27 Minn. 97, 6 N. W. 452; Wilson *v.* Sykes, 67 Miss. 617, 7 So. 492.

47. Shoemaker *v.* Porter, 41 Iowa 197; Philadelphia *v.* Miller, 49 Pa. St. 440; Coxe *v.* Wolcott, 27 Pa. St. 154; McCulloch *v.* Dodge, 6 R. I. 346, owner must comply with any conditions imposed by tax purchaser. *Compare* Lightner *v.* Mooney, 10 Watts (Pa.) 407.

Extension of time by agreement.—Where the tax debtor, whose property has been sold for taxes, offers to redeem within the statutory time, but does not know the amount to be tendered, and the purchaser consents to the redemption and promises to furnish a statement of account, the time for redemption will continue until the statement is furnished, or notice given that it will not be furnished. Sportono *v.* Howcott, 119 La. 1032, 44 So. 855.

Land bid in by county.—Where the county becomes the purchaser at the tax-sale, it is thought to be within the authority of the proper county officers to permit a redemption after the statutory time, and accept the redemption money, as it would be in the power of a private purchaser. Philadelphia *v.* Miller, 49 Pa. St. 440; Steiner *v.* Coxe, 4 Pa. St. 13. And see Kunes *v.* McCloskey, 115 Pa. St. 461, 9 Atl. 83; Jenks *v.* Wright, 61 Pa. St. 410; Hoffman *v.* Auditor-Gen., 136 Mich. 689, 100 N. W. 180. But *compare* Langley *v.* Chapin, 134 Mass. 82; People *v.* Hegeman, 14 N. Y. Suppl. 567; Diamond Coal Co. *v.* Fisher, 19 Pa. St. 267; Deringer *v.* Coxe, 6 Pa. Cas. 283, 10 Atl. 412.

48. See *infra*, XII, C, 8, a.

49. See *infra*, XII, C, 8, b.

50. Pollen *v.* Magna Charta Min., etc., Co., 40 Colo. 89, 90 Pac. 639 (failure of tax purchaser to take out deed); Blood *v.* Negrotto, 47 La. Ann. 1132, 17 So. 596 (failure of tax purchaser to pay accruing taxes on property); People *v.* Wemple, 80 Hun (N. Y.) 504, 30 N. Y. Suppl. 503 [*affirmed* in 144 N. Y. 478, 39 N. E. 397] (failure to serve notice on occupant of premises). But see Scofield *v.* McDowell, 47 Iowa 129, holding that after the expiration of the time limited by law, redemption cannot be claimed as a right, although the purchaser may not have taken out a deed.

51. Bitzer *v.* Becke, 120 Iowa 66, 94 N. W. 287; Collins *v.* Bryan, 124 N. C. 738, 32 S. E. 975.

52. See *infra*, XII, C, 8, a. But *compare* Montford *v.* Allen, 111 Ga. 13, 36 S. E. 305, holding that the laws of Georgia do not recognize the existence of equitable grounds as a basis for extending the time for redemption. And see McCormack *v.* Russell, 25 Pa. St. 185, holding that the death of the owner of lands, after the sale, does not extend the time.

53. Enforcement of tax lien see *supra*, XI, E, 2.

54. See the statutes of the several states. And see Byington *v.* Woods, 13 Iowa 17 (as to uniting several causes of action against properties belonging to the same joint owners and sold for taxes at the same time to the same purchaser); Potts *v.* Cooley, 56 Wis. 45, 13 N. W. 682 (purchaser may foreclose by suit, although he has already received a deed, if it is invalid).

Merger of tax title in fee.—When the purchaser at a tax-sale takes from the former owner a conveyance of the patent title, his tax lien is merged in the legal title, and he cannot assert it in hostility to a third person holding another tax lien against the same premises. Mead *v.* Brewer, 77 Nebr. 400, 109 N. W. 399.

Tax deed without foreclosure of certificate a nullity see Smith *v.* Smith, 150 N. C. 81, 63 S. E. 177; Wilcox *v.* Leach, 123 N. C. 74, 31 S. E. 374. And see *infra*, XIII, B, 2.

redemption,[55] and on the other hand it cannot be maintained after the time limited by law for such proceedings.[56] Jurisdiction depends on the fact of non-redemption, and if a redemption is actually accomplished pending the suit, it is error to retain the cause and a judgment for costs is void.[57]

b. Parties. The suit is to be brought by the purchaser at the tax-sale or his assignee.[58] The owner of the property is of course the principal and primary defendant; but a proceeding of this character is held to be *in rem* against the land, and therefore if it was assessed and taxed to "unknown owners" the suit may be entitled in the same way,[59] or, according to statutes in some of the states, the suit may properly be brought against the person appearing on the tax list or assessment roll as the owner, whether or not he has title.[60] But if the actual owner of the land is known to complainant, or could have been discovered by reasonable diligence, it is generally held that he is entitled to notice and will not be bound by the judgment if not served.[61] It is proper, if not necessary, to join as defendants other parties holding liens on the property or executory or equitable interests in it such as will be divested by a decree of foreclosure.[62]

c. Process or Notice. A proper summons or notice and service thereof is essential;[63] and the summons or notice must strictly follow the requirements of the statute, in respect as well to its form and contents as to the manner of its service.[64] If the owner is a non-resident or unknown, service may be made by

55. Iodence *v.* Peters, 64 Nebr. 425, 89 N. W. 1041; Chapin *v.* Stahlbrodt, 78 Hun (N. Y.) 563, 29 N. Y. Suppl. 609.

56. Vaughn *v.* Stone, 54 Iowa 376, 2 N. W. 973, 6 N. W. 596; Atkins *v.* Paige, 50 Iowa 666; Mead *v.* Brewer, 77 Nebr. 400, 109 N. W. 399; Valley County *v.* Milford, 70 Nebr. 313, 97 N. W. 310; Butler *v.* Copp, 5 Nebr. (Unoff.) 161, 97 N. W. 634; Keith County *v.* Big Springs, etc., Co., 5 Nebr. (Unoff.) 145, 97 N. W. 626; Chehalis County *v.* France, 44 Wash. 282, 87 Pac. 353.

57. Two Rivers Mfg. Co. *v.* Beyer, 74 Wis. 210, 42 N. W. 232, 17 Am. St. Rep. 131. See *infra*, XII, A, 5, d.

58. Matter of Anderson, 79 Hun (N. Y.) 170, 29 N. Y. Suppl. 476, holding that one who has merely contracted to buy from the tax purchaser the latter's right, title, and interest in the premises is not entitled to maintain the suit.

Suit to foreclose by city or county as tax purchaser see Russell *v.* McCarthy, 70 Nebr. 514, 97 N. W. 644; Keith County *v.* Big Springs Land, etc., Co., 5 Nebr. (Unoff.) 145, 97 N. W. 626; Rochester *v.* Rochester R. Co., 109 N. Y. App. Div. 638, 96 N. Y. Suppl. 152 [*modified* in 187 N. Y. 216, 79 N. E. 1010]; State *v.* Duncan, 3 Lea (Tenn.) 679; Swanson *v.* Hoyle, 32 Wash. 169, 72 Pac. 1011.

59. Fuller *v.* Unknown Owners Certain Lands, 9 Iowa 430; Butler *v.* Copp, 5 Nebr. (Unoff.) 161, 97 N. W. 634; Morrison *v.* Shipman, 37 Wash. 171, 79 Pac. 632; Williams *v.* Pittock, 35 Wash. 271, 77 Pac. 385.

Judgment against decedent.—A judgment in tax foreclosure proceedings is not rendered void as to living defendants who are properly before the court because it includes a defendant who was dead at the time the suit was brought. Allen *v.* Peterson, 38 Wash. 599, 80 Pac. 849.

60. Darnell Min., etc., Co. *v.* Ruckles, 45 Wash. 180, 88 Pac. 101; Rowland *v.* Eskeland, 40 Wash. 253, 82 Pac. 599; Allen *v.* Peterson, 38 Wash. 599, 80 Pac. 849; Carson *v.* Titlow, 38 Wash. 196, 80 Pac. 299; Spokane Falls, etc., R. Co. *v.* Abitz, 38 Wash. 8, 80 Pac. 192; Jefferson County *v.* Trumbull, 34 Wash. 276, 75 Pac. 876. And see Carney *v.* Bigham, 51 Wash. 452, 99 Pac. 21, 19 L. R. A. N. S. 905.

61. Little *v.* Chambers, 27 Iowa 522; Bingham *v.* Matthews, 39 Tex. Civ. App. 41, 86 S. W. 781; Pyatt *v.* Hegquist, 45 Wash. 504, 88 Pac. 933; Coe *v.* Manseau, 62 Wis. 81, 22 N. W. 155.

62. Clark *v.* Connor, 28 Iowa 311 (holder of unrecorded deed not a necessary party); Byington *v.* Walsh, 11 Iowa 27 (purchaser at execution sale); Byington *v.* Bookwalter, 7 Iowa 512, 74 Am. Dec. 279 (admission of a defendant on his own request does not determine validity of his claim); Brobst *v.* Thompson, 4 Greene (Iowa) 135 (holder of sheriff's certificate of purchase); Boatmen's Sav. Bank *v.* Grewe, 101 Mo. 625, 14 S. W. 708 (assignee of note secured by deed of trust); Hall *v.* Moore, 75 Nebr. 693, 106 N. W. 785 (mortgagee not a necessary party); Plumb *v.* Dyas, 38 Wash. 240, 80 Pac. 432 (vendee under executory contract of purchase from original owner).

63. Gibson *v.* Sexson, 82 Nebr. 475, 118 N. W. 77 (holding that where the record of a tax foreclosure shows on its face that the only service on a defendant corporation was upon a stranger to such corporation as receiver, when no receiver had in fact been appointed for such corporation, the judgment against such corporation is void, and may be collaterally attacked by such corporation or its assignee); Preston *v.* Cox, 50 Wash. 451, 97 Pac. 493 (notice must be directed to the tax record owner or the real owner). And see the cases in the notes following.

64. Abell *v.* Cross, 17 Iowa 171; Gaylord *v.* Scarff, 6 Iowa 179; Williams *v.* Pittock, 35 Wash. 271, 77 Pac. 385; Goffe *v.* Bond,

publication of the summons, as in other cases, the same careful compliance with the statute being required.[65]

d. Pleadings and Procedure. If the tax certificate is made *prima facie* evidence of title in the holder, it is not necessary for his complaint in foreclosure to set out the antecedent proceedings;[66] otherwise it should show his right to sue and contain the essential elements of a good declaration or complaint.[67] Defendant may plead payment or a redemption already effected,[68] or irregularity or excess in the assessment,[69] and, in some states, he may set up defenses in no way connected with the tax proceedings.[70] Unless his defense goes to the groundwork of the tax, he should tender the amount justly due.[71] The ordinary rules of evidence apply in a proceeding of this kind.[72] The judgment or decree [73] will grant such relief as may be appropriate in the premises,[74] and if it directs foreclosure, it will cut off all preëxisting liens or interests.[75] It is conclusive as to the matters in issue and cannot be assailed collaterally on account of any irregularity in the prior proceedings,[76] although in a proper case it may be reviewed on

69 Wis. 366, 34 N. W. 236. *Compare* Keith County *v.* Big Springs, etc., Co., 5 Nebr. (Unoff.) 145, 97 S. W. 626.

Surplusage in description of land in the summons does not affect the validity of the proceedings. Stanchfield *v.* Blessing, 55 Wash. 620, 104 Pac. 800.

65. Genther *v.* Fuller, 36 Iowa 604; Abell *v.* Cross, 17 Iowa 171; Chehalis County *v.* France, 44 Wash. 282, 87 Pac. 353; Callison *v.* Smith, 44 Wash. 202, 87 Pac. 120; Owen *v.* Owen, 41 Wash. 642, 84 Pac. 606; Allen *v.* Peterson, 38 Wash. 599, 80 Pac. 849; McManus *v.* Morgan, 38 Wash. 528, 80 Pac. 786; Whitney *v.* Knowlton, 33 Wash. 319, 74 Pac. 469; Woodham *v.* Anderson, 32 Wash. 500, 73 Pac. 536; Smith *v.* White, 32 Wash. 414, 73 Pac. 480.

Insufficient publication see Silverstone *v.* Totten, 50 Wash. 447, 97 Pac. 491.

Misnomer of owner.— Where the proceedings are *in rem* against the land and not against the person of the owner, a summons designating the latter by his initials is sufficient to give jurisdiction. Kahn *v.* Thorpe, 43 Wash. 463, 86 Pac. 855.

Presumption where decree recites regular service and there was time for publication of a valid summons between the close of an invalid publication and the entry of the decree see Silverstone *v.* Totten, 50 Wash. 447, 704, 97 Pac. 491, 1135.

66. Manseau *v.* Edwards, 53 Wis. 457, 1 N. W. 554; Durbin *v.* Platto, 47 Wis. 484, 3 N. W. 30.

67. Medland *v.* Van Etten, 79 Nebr. 49, 112 N. W. 362.

68. Vaughn *v.* Stone, 54 Iowa 376, 2 N. W. 973, 6 N. W. 596; Solberg *v.* Baldwin, 46 Wash. 196, 89 Pac. 561; Two Rivers Mfg. Co. *v.* Beyer, 74 Wis. 210, 42 N. W. 232, 17 Am. St. Rep. 131.

What amounts to payment see *supra*, IX. Where B, while wrongfully in possession of certain premises and collecting the rents, paid the taxes thereon, and, to defraud the creditors of the real owner, took receipts and certificates of delinquency in the names of others, such acts constituted a payment of the tax and precluded the holders of such certificates from foreclosing the same. Solberg *v.* Baldwin, 46 Wash. 196, 89 Pac. 561.

69. Kahn *v.* Thorpe, 43 Wash. 463, 86 Pac. 855, holding, however, that the defense, in an action to foreclose delinquent tax certificates against land, that, lands being taxed at their full value while personal property was taxed at only fifty per cent of its value, the land tax was excessive, was not available to one who had slept on his rights for six years without objection on that account.

70. Solberg *v.* Baldwin, 46 Wash. 196, 89 Pac. 561.

71. Sound Inv. Co. *v.* Bellingham Bay Land Co., 45 Wash. 636, 88 Pac. 1117; Kahn *v.* Thorpe, 43 Wash. 463, 86 Pac. 855; Woodham *v.* Anderson, 32 Wash. 500, 73 Pac. 536; Pier *v.* Prouty, 67 Wis. 218, 30 N. W. 232.

72. See EVIDENCE, 16 Cyc. 821. And see Byington *v.* Robertson, 17 Iowa 562 (execution and delivery of tax deed); Byington *v.* Bookwalter, 7 Iowa 512, 74 Am. Dec. 279 (certificate of redemption as evidence).

73. See Sound Inv. Co. *v.* Bellingham Bay Land Co., 45 Wash. 636, 88 Pac. 1117, as to necessity of separate findings and judgment.

Description of property.— Where a petition in foreclosure of a tax certificate of sale describes the property by lot number, as contained in the certificate, and by a particular description in metes and bounds, and the answer alleges a different boundary, the court has jurisdiction to ascertain what is in fact the true boundary, and enter a decree accordingly. Medland *v.* Van Etten, 79 Nebr. 49, 112 N. W. 362.

Surplusage in description of land in the judgment does not render it invalid. Stanchfield *v.* Blessing, 55 Wash. 620, 104 Pac. 800.

74. Logan County *v.* McKinley-Lanning L. & T. Co., 70 Nebr. 399, 97 N. W. 642 (granting statutory time to redeem after judgment); Rochester *v.* Rochester R. Co., 187 N. Y. 216, 79 N. E. 1010 (judgment for deficiency of uncollected taxes).

75. Butler *v.* Copp, 5 Nebr. (Unoff.) 161, 97 N. W. 634. But *compare* Gibson *v.* Sexson, 82 Nebr. 475, 118 N. W. 77.

76. McGahen *v.* Carr, 6 Iowa 331, 71 Am. Dec. 421; Gaylord *v.* Scarff, 6 Iowa 179;

appeal,[77] and may be opened within the time limited by statute, when rendered on default, or set aside for cause.[78]

B. Notice to Redeem — 1. Nature and Necessity. It is required in several states that the purchaser at a tax-sale shall give notice to the owner of the property, within a designated reasonable time, of the expiration of the period allowed for redemption and of his intention thereupon to claim a deed. A law of this kind is to be construed liberally and beneficially in the interest of the owner,[79] and in some jurisdictions it may be made retroactive, so as to apply to sales made before its passage, provided the purchaser is accorded in each case a reasonable time to give the notice,[80] although on the other hand, the right of the owner to receive such a notice, vested at the time of the sale, cannot be taken away by a subsequent statute.[81] The tax purchaser must comply with such a statute so far as it is in his power to do so, although a notice may be dispensed with in cases where there is no person legally entitled to it, as where the land is unoccupied and was assessed to unknown owners; [82] and the notice must be such as the law requires and given as it directs, in order to preserve the purchaser's rights.[83]

Logan County *v.* McKinley-Lanning L. & T. Co., 70 Nebr. 399, 97 N. W. 642.

77. Brown *v.* Davis, 36 Wash. 135, 78 Pac. 779; Nolan *v.* Arnot, 36 Wash. 101, 78 Pac. 463.

78. McGahen *v.* Carr, 6 Iowa 331, 71 Am. Dec. 421; Williams *v.* Pittock, 35 Wash. 271, 77 Pac. 385; Whitney *v.* Knowlton, 33 Wash. 319, 74 Pac. 469.

79. Nelson *v.* Central Land Co., 35 Minn. 408, 29 N. W. 121; Merrill *v.* Dearing, 32 Minn. 479, 21 N. W. 721.

80. *California.*— Oullahan *v.* Sweeney, 79 Cal. 537, 21 Pac. 960, 12 Am. St. Rep. 172. But *compare* Rollins *v.* Wright, 93 Cal. 395, 29 Pac. 58; King *v.* Samuel, 7 Cal. App. 55, 93 Pac. 391.

Illinois.— Gage *v.* Stewart, 127 Ill. 207, 19 N. E. 702, 11 Am. St. Rep. 116.

Washington.— Herrick *v.* Niesz, 16 Wash. 74, 47 Pac. 414.

Wisconsin.—Curtis *v.* Morrow, 24 Wis. 664; State *v.* Hundhausen, 24 Wis. 196. *Compare* Kearns *v.* McCarville, 24 Wis. 457; State *v.* Hundhausen, 23 Wis. 508.

United States.— Curtis *v.* Whitney, 13 Wall. 68, 20 L. ed. 513.

See 45 Cent. Dig. tit. "Taxation," § 1410.

Contra.— Robinson *v.* Cedar Rapids First Nat. Bank, 48 Iowa 354; Curry *v.* Backus, 156 Mich. 342, 120 N. W. 796; Stein *v.* Hanson, 99 Minn. 387, 109 N. W. 821 (holding that a notice of expiration of the period for redemption of property sold for taxes in 1901, prepared and served in accordance with Gen. St. (1894) c. 11, § 1564, was sufficient); Kipp *v.* Johnson, 73 Minn. 34, 75 N. W. 736; Gaston *v.* Merriam, 33 Minn. 271, 22 N. W. 614; State *v.* McDonald, 26 Minn. 145, 1 N. W. 832. But *compare* Pigott *v.* O'Halloran, 37 Minn. 415, 35 N. W. 4. But a statute may change the time within which the redemption notice shall be given, as to sales made before its passage, provided a reasonable time is allowed. State *v.* Krahmer, 105 Minn. 422, 117 N. W. 780, 21 L. R. A. N. S. 157.

81. Cole *v.* Lamm, 81 Minn. 463, 84 N. W. 329. See People *v.* Hegeman, 4 N. Y. Suppl. 352 [*affirmed* in 115 N. Y. 653, 21 N. E. 1118].

82. Lawrence *v.* Hornick, 81 Iowa 193, 46 N. W. 987; Burdick *v.* Connell, 69 Iowa 458, 29 N. W. 416; Walker *v.* Sioux City, etc., Land Co., 65 Iowa 563, 22 N. W. 676; Garmoe *v.* Sturgeon, 65 Iowa 147, 21 N. W. 493; Meredith *v.* Phelps, 65 Iowa 118, 21 N. W. 156; Parker *v.* Cochran, 64 Iowa 757, 21 N. W. 13; Chambers *v.* Haddock, 64 Iowa 556, 21 N. W. 32; Tuttle *v.* Griffin, 64 Iowa 455, 20 N. W. 757; Fuller *v.* Armstrong, 53 Iowa 683, 6 N. W. 61. But *compare* Barnard *v.* Hoyt, 63 Ill. 341; Hoyt *v.* Clark, 64 Minn. 139, 66 N. W. 262.

Death of owner.— The fact that the owner of the lands is dead does not dispense with the necessity of notice, as in the case of an unknown owner. Kessey *v.* Connell, 68 Iowa 430, 27 N. W. 365.

83. G. F. Sanborn Co. *v.* Alston, 153 Mich. 456, 463, 116 N. W. 1099, 117 N. W. 625; Lawton *v.* Barker, 105 Minn. 102, 117 N. W. 249; Levy *v.* Newman, 50 Hun (N. Y.) 438, 3 N. Y. Suppl. 324 [*affirmed* in 130 N. Y. 11, 28 N. E. 660] (notice to an infant who has no guardian is invalid); Jackson *v.* Esty, 7 Wend. (N. Y.) 148 (not sufficient for purchaser to show a waiver of notice by an occupant having no interest in the property); Broughton *v.* Journeay, 51 Pa. St. 31 (discovery by the owner that his property has been sold for taxes is not equivalent to notice).

Issuance of notice.— A notice of expiration of time of redemption is not invalidated because it does not appear that the holder of the tax certificate presented it to the county auditor under Gen. St. (1894) § 1654, in order that the notice might issue. Slocum *v.* McLaren, 106 Minn. 386, 119 N. W. 406; Lawton *v.* Barker, 105 Minn. 102, 117 N. W. 249. Nor is such notice invalid because it does not appear that the auditor delivered the notice to the person applying therefor as required by statute. Slocum *v.* McLaren, *supra*.

Form and requisites of notice see *infra*. XII, B, 6.

Service and proof thereof see *infra*, XII, B, 7.

2. Effect of Want or Invalidity of Notice. Failure to give th required statutory notice for redemption, or the existence of fatal defects in the notice given, will render a tax deed subsequently issued voidable, if not absolutely void, and entirely ineffective either as a grant or as an evidence of title,[84] and will leave the owner's right of redemption open and unlimited as to time; [85] and although it will not destroy the purchaser's lien for the taxes, he may be put to an action to foreclose it.[86]

3. Time For Giving Notice. Where the law directs the notice to be given after the purchaser shall have received his deed, or after the lapse of a certain time from the sale, a notice prematurely given is of no effect.[87] Where the provision is that the notice shall be given within a certain period before the end of the time for redemption, it is invalid unless the service is effected or the publication completed within the time prescribed.[88] In other cases the owner is allowed

84. *California.*— Johnson *v.* Taylor, 150 Cal. 201, 88 Pac. 903, 10 L. R. A. N. S. 818; Emeric *v.* Alvarado, 90 Cal. 444, 27 Pac. 356; King *v.* Samuel, 7 Cal. App. 55, 93 Pac. 391.

Illinois.— Palmer *v.* Riddle, 180 Ill. 461, 54 N. E. 227; Miller *v.* Pence, 132 Ill. 149, 23 N. E. 1030; Gage *v.* Bailey, 115 Ill. 646, 4 N. E. 777; Price *v.* England, 109 Ill. 394; Barnard *v.* Hoyt, 63 Ill. 341; Dalton *v.* Lucas, 63 Ill. 337; Holbrook *v.* Fellows, 38 Ill. 440.

Iowa.— Lindsey *v.* Booge, (1909) 122 N. W. 819; Ashenfelter *v.* Seiling, 141 Iowa 512, 119 N. W. 984; Foy *v.* Houstman, 128 Iowa 220, 103 N. W. 369; Shelley *v.* Smith, 97 Iowa 259, 66 N. W. 172; Snell *v.* Dubuque, etc., R. Co., 88 Iowa 442, 55 N. W. 310; Long *v.* Smith, 62 Iowa 329, 17 N. W. 579; Swope *v.* Prior, 58 Iowa 412, 10 N. W. 788.

Kansas.— Stout *v.* Coates, 35 Kan. 382, 11 Pac. 151; Blackistone *v.* Sherwood, 31 Kan. 25, 2 Pac. 874; Janes *v.* Wilkinson, 2 Kan. App. 361, 42 Pac. 735.

Michigan.— Fitschen *v.* Olson, 155 Mich. 320, 119 N. W. 3; G. F. Sanborn Co. *v.* Alston, 153 Mich. 456, 463, 116 N. W. 1099, 117 N. W. 625; Curry *v.* Larke, 153 Mich. 348, 116 N. W. 1075; McFarlane *v.* Simpson, 153 Mich. 193, 116 N. W. 982; Haden *v.* Closser, 153 Mich. 182, 116 N. W. 1001; Huron Land Co. *v.* Robarge, 128 Mich. 686, 87 N. W. 1032.

Minnesota.— Wallace *v.* Sache, 106 Minn. 123, 118 N. W. 360; Lawton *v.* Barker, 105 Minn. 102, 117 N. W. 249; Minnesota Debenture Co. *v.* Harrington, 104 Minn. 16, 115 N. W. 746; State *v.* Nord, 73 Minn. 1, 75 N. W. 760, 72 Am. St. Rep. 594; State *v.* Halden, 62 Minn. 246, 64 N. W. 568; Sanborn *v.* Mueller, 38 Minn. 27, 35 N. W. 666.

Nebraska.— Hendrix *v.* Boggs, 15 Nebr. 469, 20 N. W. 28.

New York.— People *v.* Ladew, 189 N. Y. 355, 82 N. E. 431, 190 N. Y. 543, 82 N. E. 1092 [*reversing* 108 N. Y. App. Div. 356, 95 N. Y. Suppl. 1151]; Thompson *v.* Burhans, 61 N. Y. 52; Westbrook *v.* Willey, 47 N. Y. 457; Meigs *v.* Roberts, 42 N. Y. App. Div. 290, 59 N. Y. Suppl. 215 [*reversed* on other grounds in 162 N. Y. 371, 56 N. E. 838, 76 Am. St. Rep. 322]; Lucas *v.* McEnerna, 19 Hun 14; Matter of Rourke, 63 Misc. 354, 118 N. Y. Supp. 415; Gabel *v.* Williams, 39 Misc. 489, 80 N. Y. Suppl. 489; Neber *v.* Hatch, 10 Abb. N. Cas. 431; Doughty *v.* Hope, 3 Den. 594; Bush *v.* Davison, 16 Wend. 550; Comstock *v.* Beardsley, 15 Wend. 348; Jackson *v.* Esty, 7 Wend. 148; Utica Bank *v.* Mersereau, 3 Barb. Ch. 528, 49 Am. Dec. 189.

North Dakota.— Blakemore *v.* Cooper, 15 N. D. 5, 106 N. W. 566, 125 Am. St. Rep. 574, 4 L. R. A. N. S. 1074.

South Dakota.— Flickinger *v.* Cornwell, 22 S. D. 382, 117 N. W. 1039.

See 45 Cent. Dig. tit. "Taxation," § 1409.

Contra.— Wright *v.* Sperry, 21 Wis. 331.

Effect on sale.— The fact that a notice to redeem from a tax-sale is invalid does not render the sale void. People *v.* Cady, 56 N. Y. Super. Ct. 180, 6 N. Y. Suppl. 546.

Laches.— Purchasers at tax-sale relying on an insufficient notice of redemption not barred by laches see G. F. Sanborn Co. *v.* Alston, 153 Mich. 456, 463, 116 N. W. 1099, 117 N. W. 625.

85. Iowa L. & T. Co. *v.* Pond, 128 Iowa 600, 105 N. W. 119; Swan *v.* Harvey, 117 Iowa 58, 90 N. W. 489; Wilson *v.* Russell, 73 Iowa 395, 35 N. W. 492; Bowers *v.* Hallock, 71 Iowa 218, 32 N. W. 268; Minnesota Debenture Co. *v.* Harrington, 104 Minn. 16, 115 N. W. 746; Merrill *v.* Dearing, 32 Minn. 479, 21 N. W. 721; Becker *v.* Howard, 66 N. Y. 5; People *v.* Cady, 56 N. Y. Super. Ct. 180, 6 N. Y. Suppl. 546; Utica Bank *v.* Mersereau, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189 note; Darling *v.* Purcell, 13 N. D. 288, 100 N. W. 726; Cruser *v.* Williams, 13 N. D. 284, 100 N. W. 721.

86. Van Etten *v.* Medland, 53 Nebr. 569, 74 N. W. 33; Lammers *v.* Comstock, 20 Nebr. 341, 30 N. W. 251.

87. Fitschen *v.* Olson, 155 Mich. 320, 119 N. W. 3 (tax deed premature or void on its face); Kipp *v.* Fitch, 73 Minn. 65, 75 N. W. 752; Lockwood *v.* Gehlert, 53 Hun (N. Y.) 15, 6 N. Y. Suppl. 20 [*affirmed* in 127 N. Y. 241, 27 N. E. 812]; Smith *v.* Walker, 56 N. Y. Super. Ct. 391, 4 N. Y. Suppl. 632 [*affirmed* in 121 N. Y. 213, 24 N. E. 11]; Donahue *v.* O'Conor, 45 N. Y. Super. Ct. 273.

88. Stoddard *v.* Sloan, 65 Iowa 680, 22 N. W. 924; Washington *v.* Hosp, 43 Kan. 324, 23 Pac. 564, 19 Am. St. Rep. 141; State *v.*

a certain number of days, after the notice, in which to redeem; and here he may rely on his right to the notice and wait until he receives it before taking any proceedings to redeem.[89] Where it is the duty of the tax purchaser to give this notice, he cannot validate a tardy notice by extending the time for redemption.[90]

4. Persons Who May Give Notice. In order that the redemption notice may be legal and sufficient it must emanate from some person who is legally qualified to give it.[91] Ordinarily the proper person is the purchaser at the tax-sale, but it may be given by an assignee of the certificate, even under an informal or irregular assignment,[92] but not by the original purchaser after he has sold and assigned the certificate.[93]

5. Persons Entitled to Notice — a. In General. The person to be served with the notice to redeem is generally the record owner of the land,[94] although for convenience the notice is sometimes permitted by law to be served on the person to whom the property is assessed or on the person found in possession or occupation of it.[95] Cases may occur in which the purchaser at the tax-sale is himself the person whom the law points out as entitled to be served with the notice; and here it may be dispensed with altogether,[96] unless personal service of such notice, and a return thereof, are made by statute necessary preliminaries to some further proceeding, such as a publication of the notice.[97]

b. Persons to Whom Land Is Taxed. In some states the redemption notice is

Gayhart, 34 Nebr. 192, 51 N. W. 746; Zahradnicek *v.* Selby, 15 Nebr. 579, 19 N. W. 645; Lucas *v.* McEnerna, 19 Hun (N. Y.) 14; Bennett *v.* New York, 1 Sandf. (N. Y.) 485.

Computation of time.— Where the notice is to be given a certain number of days before the expiration of the time for redemption, the day of giving the notice must be excluded from the computation. Landregan *v.* Peppin, 86 Cal. 122, 24 Pac. 859.

Time of publication in discretion of clerk.— Where the statute required the county clerk to publish lists of unredeemed lands sold for taxes "at least six months" before the end of the time for redemption, it was held that a publication made sixteen months before was within the discretion of the clerk. Hoffman *v.* Clark County, 61 Wis. 5, 20 N. W. 376.

89. Dentler *v.* State, 4 Blackf. (Ind.) 258; Doughty *v.* Hope, 3 Den. (N. Y.) 594; Utica Bank *v.* Mersereau, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189; Arthurs *v.* Smathers, 38 Pa. St. 40.

Application to purchase by county at tax-sale see Kansas State Agricultural College *v.* Linscott, 30 Kan. 240, 1 Pac. 81.

Application to case of infant owners see Wright *v.* Wing, 18 Wis. 45.

90. Thomas *v.* Nichols, 127 N. C. 319, 37 S. E. 327. But see Long *v.* Smith, 62 Iowa 329, 17 N. W. 579, where it is ruled that the holder of a tax deed, which is invalid because of a defective notice to redeem, may give a new notice and so lay the foundation for a new and valid deed.

91. Lockwood *v.* Gehlert, 53 Hun (N. Y.) 15, 6 N. Y. Suppl. 20 [*affirmed* in 127 N. Y. 241, 27 N. E. 812].

State as purchaser.— In Minnesota notice of the expiration of the time for redemption is not required to be served on behalf of the state. State *v.* Smith, 36 Minn. 456, 32 N. W. 174.

92. Nugent *v.* Cook, 129 Iowa 381, 105 N. W. 421; Swan *v.* Whaley, 75 Iowa 623, 35 N. W. 440; State *v.* Smith, 36 Minn. 456, 32 N. W. 174.

93. Sickles *v.* Union Inv. Co., 109 Iowa 450, 80 N. W. 534.

94. See the statutes of the different states. And see, generally, the cases cited *infra*, this note.

Applications of text.— Where the land is owned by a married woman, it is not sufficient to serve the notice on her husband. Cotes *v.* Rohrbeck, 139 Ill. 532, 28 N. E. 1110. As to grantee of husband and wife see Cahalan *v.* Van Sant, 87 Iowa 593, 54 N. W. 433. Where, after the sale, a railroad company condemns and takes possession of a right of way over the land, it is entitled to notice to redeem. Garmoe *v.* Sturgeon, 65 Iowa 147, 21 N. W. 493. But notice need not be served on the administrator of a deceased owner. Nugent *v.* Cook, 129 Iowa 381, 105 N. W. 421. And the sheriff is not required to investigate the records to ascertain the name of the true owner. Berg *v.* Van Nest, 97 Minn. 187, 106 N. W. 255. Nor, in case of an assignment by the owner for the benefit of his creditors, is it necessary to give notice to the assignee or the court. Wyman *v.* Baker, 83 Minn. 427, 86 N. W. 432. Nor to an owner who is a non-resident. People *v.* Hegeman, 4 N. Y. Suppl. 352 [*affirmed* in 115 N. Y. 653, 21 N. E. 1118].

Notice to two only of three tenants in common insufficient see White *v.* Shaw, 150 Mich. 270, 114 N. W. 210.

95. See *infra*, XII, B, 5, b, c.

96. Brown *v.* Pool, 81 Iowa 455, 46 N. W. 1069, 9 L. R. A. 767; Irwin *v.* Burdick, 79 Iowa 69, 44 N. W. 375; Knight *v.* Campbell, 76 Iowa 730, 39 N. W. 829.

97. Mitchell *v.* McFarland, 47 Minn. 535, 50 N. W. 610; Reimer *v.* Newel, 47 Minn. 237, 49 N. W. 865; Sperry *v.* Goodwin, 44 Minn. 207, 46 N. W. 328; Wakefield *v.* Day, 41 Minn. 344, 43 N. W. 71.

required to be served on the person to whom the land is "assessed" or "taxed." [98] This means the person in whose name the land is assessed or taxed at the time of giving the notice, not at the date of the sale,[99] and the notice must be served on him, although the assessment to him is a mistake, another being the true owner,[1] or although his only title to the property is based on an unrecorded deed.[2] The validity of the tax deed will depend upon a literal compliance with this provision of the statute,[3] it being the duty of the tax purchaser to examine the records and ascertain in whose name the land is taxed,[4] and he will be required, if necessary, to prove the correspondence between the assessment and the notice.[5] But where, at the time of giving the notice, the land is not taxed to any one, or is taxed to unknown owners, a statute of this kind dispenses with the notice.[6]

c. Persons in Possession or Occupancy. Under statutes directing the redemption notice to be served on the person in possession or occupation of the land,[7] an

98. See the statutes of the different states.

What constitutes "assessment" or "taxation" within the meaning of such statutes see Fuller *v.* Butler, 72 Iowa 729, 32 N. W. 283; Adams *v.* Snow, 65 Iowa 435, 21 N. W. 765; Walker *v.* Martin, 87 Minn. 489, 92 N. W. 336; Eide *v.* Clarke, 57 Minn. 397, 59 N. W. 484.

99. Smith *v.* Callanan, 103 Iowa 218, 72 N. W. 513, 42 L. R. A. 482; Rice *v.* Bates, 68 Iowa 393, 27 N. W. 286; Hall *v.* Guthridge, 52 Iowa 408, 3 N. W. 475; Thomson *v.* Dickey, 42 Nebr. 314, 60 N. W. 558; People *v.* Cady, 105 N. Y. 299, 11 N. E. 810; Denike *v.* Rourke, 7 Fed. Cas. No. 3,787, 3 Biss. 39.

1. Hawkeye Loan, etc., Co. *v.* Gordon, 115 Iowa 561, 88 N. W. 1081; Clifton Heights Land Co. *v.* Randell, 82 Iowa 89, 47 N. W. 905; Hillyer *v.* Farneman, 65 Iowa 227, 21 N. W. 578; Western Land Assoc. *v.* McComber, 41 Minn. 20, 42 N. W. 543. But see Cummings *v.* Browne, 61 Iowa 385, 16 N. W. 280.

2. Heaton *v.* Knight, 63 Iowa 686, 16 N. W. 532.

3. Hughes *v.* Carne, 135 Ill. 519, 26 N. E. 517 (notice to one partner not sufficient where the land is assessed to the firm); Crawford *v.* Liddle, 101 Iowa 148, 70 N. W. 97 (where the land is taxed to an "estate," the executors are entitled to notice); Lynn *v.* Morse, 76 Iowa 665, 39 N. W. 203 (effect of misnomer); Snyder *v.* Ingalls, 70 Minn. 16, 72 N. W. 807 (use of initial instead of full christian name); Sperry *v.* Goodwin, 44 Minn. 207, 46 N. W. 328 (a notice properly addressed to the person in whose name the land is then assessed is not invalidated by being also directed to the person to whom the property was assessed when the tax was levied); Hartley *v.* Boynton, 17 Fed. 873, 5 McCrary 453 (notice addressed to "unknown owners" is insufficient where the land was assessed to a person by name).

4. Heaton *v.* Knight, 65 Iowa 434, 21 N. W. 764.

5. Sterling *v.* Urquhart, 88 Minn. 495, 93 N. W. 898. But see Ellsworth *v.* Cordrey, 65 Iowa 303, 21 N. W. 648, holding that where land was assessed and taxed to a certain person, and the record title was in him when it was sold for taxes, it will be presumed that he retained the title, and that it was taxed to him at the time of giving the redemption notice, in the absence of evidence to the contrary.

6. Lawrence *v.* Hornick, 81 Iowa 193, 46 N. W. 987; Irwin *v.* Burdick, 79 Iowa 69, 44 N. W. 375; Griffin *v.* Tuttle, 74 Iowa 219, 37 N. W. 167. See Gage *v.* Webb, 141 Ill. 533, 31 N. E. 130.

7. See the statutes of the several states.

Owner and occupant.— Statutes of this kind are designed to secure the notification of the person in actual occupation of the land, and if the notice is served as the law directs, it is not material that notice is not given to the actual owner of the property (Woodward *v.* Taylor, 33 Wash. 1, 73 Pac. 785, 75 Pac. 646), or that the occupant has no title of record to the premises (Cahalan *v.* Van Sant, 87 Iowa 593, 54 N. W. 433). Similarly, the fact that the land was assessed to "unknown owners" does not excuse the tax purchaser from notifying the person whom he finds in possession. Cahalan *v.* Van Sant, 87 Iowa 593, 54 N. W. 433. It is his business to ascertain who is in possession, and he cannot excuse his failure to give the required notice on the ground that the property was in the possession of some person unknown to him. Combs *v.* Goff, 127 Ill. 431, 20 N. E. 9.

Sufficiency of compliance with statute.— Service of notice to redeem on one who is in possession as the agent of the tax purchaser himself is not a compliance with the statute. Burton *v.* Perry, 146 Ill. 71, 34 N. E. 60. So of service on one in whose wife's name the property stands. Medland *v.* Walker, 96 Iowa 175, 64 N. W. 797.

Mere squatters and the like.— Under the New York statute (Laws (1855), p. 794, c. 427, § 68), requiring service of the redemption notice "on the person actually occupying" the land, the notice must be served upon the actual occupant, although he does not occupy under any claim or color of title, as in the case of a mere squatter. People *v.* Ladew, 189 N. Y. 355, 82 N. E. 431, 190 N. Y. 543, 82 N. E. 1092 [*reversing* 108 N. Y. App. Div. 356, 95 N. Y. Suppl. 1151]; Matter of Rourke, 63 Misc. (N. Y.) 354, 118 N. Y. Suppl. 415. The occupant to whom the notice of tax-sale must be given is one in actual possession, independently of title,

actual and not merely constructive possession is intended.[8] But this does not mean that the possession must be that of one who is living on the premises,[9] for it is sufficient if he manifests an intention to use and enjoy the property, in the character of one entitled to its possession, by building on it, fencing or otherwise improving it, or cultivating it systematically,[10] although no possession or occupancy, within the meaning of the law, can be predicated on an occasional or temporary use of the premises by one who does not claim an interest in them,[11] nor on such accidental intrusion upon the property as may result from a mistake as to the boundaries.[12] A tenant occupying under a lease is in possession of the premises and should be served with the notice,[13] but not so of mere laborers,

and even though the occupancy is not such as to constitute adverse possession. Smith *v.* Sanger, 3 Barb. (N. Y.) 360 [*reversed* on other grounds in 4 N. Y. 577]; Comstock *v.* Beardsley, 15 Wend. (N. Y.) 348.

The forest preserve commission in New York, which is by statute given the care, control, and supervision of the forest preserve, and which, through its wardens, foresters, and protectors actually occupies the preserve, is an "occupant" within the meaning of the statute relating to redemption notice. People *v.* Kelsey, 180 N. Y. 24, 72 N. E. 524 [*reversing* 96 N. Y. App. Div. 148, 89 N. Y. Suppl. 416].

Occupant under master's deed.— Under Ill. Revenue Law (Hurd Rev. St. (1908) c. 120) § 216, providing that a purchaser of land for taxes, before he is entitled to a deed, shall cause a notice to be served on the occupant of such land, and on the owners thereof, of the time of redemption, one claiming the land in good faith as owner thereof, under a master's deed purporting to convey to him the title, is entitled to notice as being the actual occupant, whether or not he is the actual owner. Kenealy *v.* Glos, 241 Ill. 15, 89 N. E. 289.

8. Taylor *v.* Wright, 121 Ill. 455, 13 N. E. 529.

Question for jury.— Whether given acts amount to an occupation or possession of property is a question of fact for the jury. Jones *v.* Chamberlain, 109 N. Y. 100, 16 N. E. 72.

9. Whities *v.* Farsons, 73 Iowa 137, 34 N. W. 782; People *v.* Gaus, 134 N. Y. App. Div. 80, 118 N. Y. Suppl. 756; and other cases in the note following.

10. Shelley *v.* Smith, 97 Iowa 259, 66 N. W. 172; Cahalan *v.* Van Sant, 87 Iowa 593, 54 N. W. 433; Callanan *v.* Raymond, 75 Iowa 307, 39 N. W. 511; Sapp *v.* Walker, 66 Iowa 497, 24 N. W. 13; People *v.* Wemple, 144 N. Y. 478, 39 N. E. 397; People *v.* Gaus, 134 N. Y. App. Div. 80, 118 N. Y. Suppl. 756.

Illustrations.— Such occupancy has been held to exist where the occupant had built a log house, cleared and fenced an acre of the land about it, and lived in the house and occupied the land as his home, keeping parts of it under cultivation, for a considerable number of years. People *v.* Wemple, 144 N. Y. 478, 39 N. E. 397. Additional land purchased to straighten boundary of preserve and used and controlled in connection with the same see People *v.* Gaus, 134 N. Y. App. Div. 80, 118 N. Y. Suppl. 756.

"Actual possession" by cultivation or improvement.— The failure of the holder of a tax title to serve notice of the expiration of redemption on one who, through another, had cultivated and cropped the land, and was therefore in actual possession, avoided the notice. Wallace *v.* Sache, 106 Minn. 123, 118 N. W. 360. An improvement of property was notice of possession, making it incumbent on the holder of a tax certificate to serve notice on such person of the expiration of redemption. Wallace *v.* Sache, *supra.*

Cutting timber.— Where the land was not fit for cultivation and was unoccupied, but was used by the owner, who lived in the same county, to cut timber therefrom, it was held that he was "in possession" so as to be entitled to personal notice to redeem. Ellsworth *v.* Low, 62 Iowa 178, 17 N. W. 450.

11. Hammond *v.* Carter, 155 Ill. 579, 40 N. E. 1019; Drake *v.* Ogden, 128 Ill. 603, 21 N. E. 511; Brown *v.* Pool, 81 Iowa 455, 46 N. W. 1069, 9 L. R. A. 767; Stoddard *v.* Sloan, 65 Iowa 680, 22 N. W. 924; People *v.* Turner, 145 N. Y. 451, 40 N. E. 400; People *v.* Campbell, 143 N. Y. 335, 38 N. E. 300.

Illustrations.— Building a stack or two of hay on a tract of land actually occupied by another and inclosing the stack with boards to protect it from the rain is not occupancy within a statute requiring the "occupant" to be notified of a tax-sale. Drake *v.* Ogden, 128 Ill. 603, 21 N. E. 511. Occupying, at irregular intervals, as a hunting camp, a log house located on an island within or near the property in question, without any use of the main land except to roam over it in pursuit of game, does not constitute "actual occupancy" under the statute (People *v.* Campbell, 143 N. Y. 335, 338, 38 N. E. 300); nor does the mowing of a portion of land erroneously included in a fence. It seems there must be a substantial occupancy with intention to enjoy the property either by right or by wrong (Smith *v.* Sanger, 4 N. Y. 577).

12. Hammond *v.* Carter, 155 Ill. 579, 40 N. E. 1019; Smith *v.* Sanger, 4 N. Y. 577.

13. Gage *v.* Lyons, 138 Ill. 590, 28 N. E. 832; Callanan *v.* Raymond, 75 Iowa 307, 39 N. W. 511; Bradley *v.* Brown, 75 Iowa 180, 39 N. W. 258; Bank of Utica *v.* Mersereau, 3 Barb. Ch. (N. Y.) 528; Gage *v.* Bani, 141 U. S. 344, 12 S. Ct. 22, 35 L. ed. 776. See Simmons *v.* McCarthy, 118 Cal. 622, 50 Pac.

servants, or care-takers.[14] If there are several tenants, all must be served,[15] and so of one who is in the occupation of a part of the lot.[16] But the person to be notified is the one who is in possession at the time the notice is given, not at the time of the sale,[17] and consequently one who comes into possession after the notice, although before the end of the time for redemption, is not entitled to a new notice.[18] If the person designated by law is the "occupant" of the premises, and the land is actually vacant and unoccupied, notice need not ordinarily be given to the owner.[19]

d. Mortgagees. Where the statute explicitly requires that notice to redeem shall be given to the mortgagee as well as to the owner, the lien of the mortgage is not divested or in any way impaired by the execution of a tax deed without such notice to the mortgagee.[20] But there is nothing in the nature of the mortgagee's relation to the title which gives him the right to notice unless the statute contains provisions which clearly bring him within its terms.[21]

6. Form and Requisites of Notice — a. In General. If the statute prescribes a form for the redemption notice, such form must be substantially followed and every requirement observed, whether deemed material or not, or the notice will be insufficient.[22] If no form is prescribed, at any rate the notice must contain all that is essential for the precise and full information of the owner of the prop-

761. A tenant in actual possession of a portion of the land is an occupant entitled to notice. National F. Ins. Co. *v.* McKay, 5 Abb. Pr. N. S. (N. Y.) 445.

14. Hammond *v.* Carter, 155 Ill. 579, 40 N. E. 1019; Gage *v.* Schmidt, 104 Ill. 106; Rowland *v.* Brown, 75 Iowa 679, 37 N. W. 403; People *v.* Miller, 90 N. Y. App. Div. 596, 86 N. Y. Suppl. 189; National F. Ins. Co. *v.* McKay, Sheld. 138, 5 Abb. Pr. N. S. (N. Y.) 445.

15. Hintrager *v.* McElhinny, 112 Iowa 325, 82 N. W. 1008, 83 N. W. 1063.

16. Chicago, etc., R. Co. *v.* Kelley, 105 Iowa 106, 74 N. W. 935; Leland *v.* Bennett, 5 Hill (N. Y.) 286.

17. Gonzalia *v.* Bartelsman, 143 Ill. 634, 32 N. E. 532; Hand *v.* Ballou, 12 N. Y. 541; Harison *v.* Caswell, 17 N. Y. App. Div. 252, 45 N. Y. Suppl. 560.

18. Hammond *v.* Carter, 155 Ill. 579, 40 N. E. 1019; Taylor *v.* Wright, 121 Ill. 455, 13 N. E. 529.

19. Taylor *v.* Wright, 121 Ill. 455, 13 N. E. 529; Sickles *v.* Union Inv. Co., 109 Iowa 450, 80 N. W. 534; Funson *v.* Bradt, 105 Iowa 471, 75 N. W. 337; Parker *v.* Cochran, 64 Iowa 757, 21 N. W. 13; Clinton *v.* Krull, 125 N. Y. App. Div. 157, 111 N. Y. Suppl. 105.

But the fact that the premises were unoccupied five months before the expiration of the time for redemption does not lay a foundation for notice by publication. Gage *v.* Bailey, 100 Ill. 530.

20. Martin *v.* Stoddard, 127 N. Y. 61, 27 N. E. 285; Ruyter *v.* Reid, 121 N. Y. 498, 24 N. E. 791 [*affirming* 4 N. Y. Suppl. 743]; Chard *v.* Holt, 63 Hun 595, 18 N. Y. Suppl. 405 [*reversed* on other grounds in 136 N. Y. 30, 32 N. E. 740].

Payment by mortgagee before expiration of time for redemption.— Under N. H. Pub. St. (1901) c. 61, § 8, declaring that the purchaser at a tax-sale within thirty days from the sale shall notify all mortgagees of the date of the sale, the amount for which the land was sold, and the amount of his costs of notifying mortgagees, and that the sale shall be void as against any mortgagee to whom such notice shall not be given, a mortgagee who has paid the taxes before expiration of the time to notify him of the sale of the mortgaged property cannot complain that the sale was void because of want of notice. O'Donnell *v.* Meredith, 75 N. H. 272, 73 Atl. 32.

Ancient mortgage.— The mere fact of the existence of a mortgage recorded forty-eight years before the tax-sale is not sufficient to require proof of the service of notice upon the mortgagee. Martin *v.* Stoddard, 127 N. Y. 61, 27 N. E. 285.

Mortgagee's right to redeem see *supra*, XII, A, 3, b.

21. Glos *v.* Evanston, etc., County Bldg., etc., Assoc., 186 Ill. 586, 58 N. E. 374; Smyth *v.* Neff, 123 Ill. 310, 17 N. E. 702 (both holding that a mortgagee is not within the terms of a statute requiring the redemption notice to be served on the owner and "parties interested"); Hall *v.* Guthridge, 52 Iowa 408, 3 N. W. 475 (holding that a statute providing for service of the notice on the "person in possession" and on the person in whose name the property is taxed does not require notice to the mortgagee unless he is in possession); Becker *v.* Howard, 66 N. Y. 5.

22. G. F. Sanborn Co. *v.* Alston, 153 Mich. 456, 463, 116 N. W. 1099, 117 N. W. 625; Haden *v.* Closser, 153 Mich. 182, 116 N. W. 1001; Slocum *v.* McLaren, 106 Minn. 386, 119 N. W. 406; Lawton *v.* Barker, 105 Minn. 102, 117 N. W. 249; Stein *v.* Hanson, 99 Minn. 387, 109 N. W. 821; Simonton *v.* Hays, 32 Hun (N. Y.) 286.

Notice prepared by public officer see Hinkel *v.* Krueger, 47 Minn. 497, 50 N. W. 689; Broughton *v.* Journeay, 51 Pa. St. 31.

erty, and without any false or misleading statements.[23] If these conditions are fulfilled, it is permissible in some states to include several distinct tracts of land in one notice, even though owned by different persons.[24]

b. Identification of Sale. The notice must clearly identify the sale from which the owner is required to redeem; and in particular it must state the day and year of the sale,[25] the amount of the taxes for which the property was sold,[26] and the year for which they were levied or assessed;[27] and also, if the statute so requires, it must state clearly whether the sale was made for non-payment of a general tax or of a special assessment.[28]

c. Designation of Person to Be Notified. As a general rule the redemption notice must be addressed to the person upon whom it is to be served;[29] and if that person is designated in the statute as the owner, or the person to whom the land is taxed, or who is in possession, a notice addressed to any other person is fatally defective.[30] Any substantial mistake in the name, of such a character as to be misleading and not cured by the principle of *idem sonans*, will also invalidate the notice.[31]

23. Knight *v.* Knoblauch, 77 Minn. 8, 79 N. W. 582.

Effect of misstatements.— Where the notice sets forth the matters required by the statute, but misstates the date of the sale or any other material fact, and the misstatements are so interwoven into the notice as to contradict its statutory requirements, and the notice is thereby rendered misleading, the defect is fatal to the validity of the tax deed. Long *v.* Wolf, 25 Kan. 522.

Notice misdated.— If a notice containing all that is required by law is served more than thirty days before the day specified as the time when the purchaser will apply for a deed, as directed by the statute, it is sufficient, although dated within that time. Clarke *v.* Mead, 102 Cal. 516, 36 Pac. 862.

Stating effect of failure to redeem.— The notice must state that unless the land is redeemed by a certain day it will be conveyed to the tax purchaser; and if it fails in this it is insufficient. Simonton *v.* Hays, 32 Hun (N. Y.) 286.

24. Hammond *v.* Carter, 155 Ill. 579, 40 N. E. 1019; Drake *v.* Ogden, 128 Ill. 603, 21 N. E. 511; Jenswold *v.* Doran, 77 Iowa 692, 42 N. W. 465; Snyder *v.* Ingalls, 70 Minn. 16, 72 N. W. 807. *Contra*, Adams *v.* Burdick, 68 Iowa 666, 27 N. W. 911; White *v.* Smith, 68 Iowa 313, 25 N. W. 115, 27 N. W. 250; Ambler *v.* Patterson, 80 Nebr. 570, 114 N. W. 781.

25. Hughes *v.* Cannedy, 92 Cal. 382, 28 Pac. 573; Jackson *v.* Challiss, 41 Kan. 247, 21 Pac. 87; Blackistone *v.* Sherwood, 31 Kan. 25, 2 Pac. 874; Long *v.* Wolf, 25 Kan. 522. Where a controller's sale of land for taxes commenced on Nov. 10, 1881, and closed on November 23 following, a notice fixing the last day on which the sale was made as the time from which the two years given by the statute to redeem should run was not defective because the land was in fact sold November 19. Halsted *v.* Silberstein, 196 N. Y. 1, 89 N. E. 443.

26. Landregan *v.* Peppin, 86 Cal. 122, 24 Pac. 859; Sperry *v.* Goodwin, 44 Minn. 207, 46 N. W. 328.

27. Harrell *v.* Enterprise Sav. Bank, 183 Ill. 538, 56 N. E. 63; Hammond *v.* Carter, 155 Ill. 579, 40 N. E. 1019; Brophy *v.* Harding, 137 Ill. 621, 27 N. E. 523, 34 N. E. 253; Taylor *v.* Wright, 121 Ill. 455, 13 N. E. 529; Lawton *v.* Barker, 105 Minn. 102, 117 N. W. 249; Sperry *v.* Goodwin, 44 Minn. 207, 46 N. W. 328; Smith *v.* Buhler, 121 N. Y. 213, 24 N. E. 11.

Statement sufficient.— Where a notice to redeem contained two descriptions of lands and in the last column, opposite both descriptions, under the heading "Tax for Years," contained the figures 1898, 1899, 1900, 1901, and 1902, it was not defective for failure to indicate to which description such years applied, but they referred to all that appeared in the preceding columns, and meant that the amount was paid as to each description for the taxes named in the years enumerated. Gogebic Lumber Co. *v.* Moore, 157 Mich. 499, 122 N. W. 128.

28. Harrell *v.* Enterprise Sav. Bank, 183 Ill. 538, 56 N. E. 63; Bailey *v.* Smith, 178 Ill. 72, 52 N. E. 948; Gage *v.* Du Puy, 137 Ill. 652, 24 N. E. 541, 26 N. W. 386; Gage *v.* Davis, 129 Ill. 236, 21 N. E. 788, 16 Am. St. Rep. 260; Stillwell *v.* Brammell, 124 Ill. 338, 16 N. E. 226; Gage *v.* Waterman, 121 Ill. 115, 13 N. E. 543; Gage *v.* Bani, 141 U. S. 344, 12 S. Ct. 22, 35 L. ed. 776.

29. Steele *v.* Murry, 80 Iowa 336, 45 N. W. 1030; White *v.* Smith, 68 Iowa 313, 25 N. W. 115, 27 N. W. 250. *Compare* Shoup *v.* Central Branch Union Pac. R. Co., 24 Kan. 547.

30. Young *v.* Charnquist, 114 Iowa 116, 86 N. W. 205; Slyfield *v.* Barnum, 71 Iowa 245, 32 N. W. 270; Williams *v.* Olson, 141 Mich. 580, 104 N. W. 1101; Bradley *v.* Williams, 139 Mich. 230, 102 N. W. 625 (holding that a notice properly given to the owner of the fee is sufficient, although it was addressed to him as "mortgagee"); Sperry *v.* Goodwin, 44 Minn. 207, 46 N. W. 328.

31. Gage *v.* Mayer, 117 Ill. 632, 7 N. E. 97; American Exch. Nat. Bank *v.* Crooks, 97 Iowa 244, 66 N. W. 168; Cornoy *v.* Wetmore, 92 Iowa 100, 60 N. W. 245; Lynn *v.*

d. Description of Property. The redemption notice should describe the property with sufficient clearness and precision to inform the owner, with reasonable certainty, what particular lot or tract of land is intended; and a misleading description or substantial defect in the description will invalidate the notice and consequently also the tax deed.[32]

e. Amount Necessary to Redeem. The redemption notice is required to inform the owner of the amount which he will be required to pay in order to effect the redemption, and this statement should be clear and explicit and should disclose the exact and correct amount, otherwise the notice is invalid.[33] It has been

Morse, 76 Iowa 665, 39 N. W. 203; Nycum *v.* Raymond, 73 Iowa 224, 34 N. W. 819; Stoddard *v.* Sloan, 65 Iowa 680, 22 N. W. 924; Berglund *v.* Graves, 72 Minn. 148, 75 N. W. 118. That an original notice of expiration of redemption of land sold for taxes was directed to "Hans E. Hanson" and the notice as published was directed to "Hans E. Hansen" was a mere irregularity. Stein *v.* Hanson, 99 Minn. 387, 109 N. W. 821.

32. *Illinois.*— Esker *v.* Heffernan, 159 Ill. 38, 41 N. E. 1113.

Iowa.— Sickles *v.* Union Inv. Co., 109 Iowa 450, 80 N. W. 534; Funson *v.* Bradt, 105 Iowa 471, 75 N. W. 337; Stoddard *v.* Sloan, 65 Iowa 680, 22 N. W. 924.

Michigan.— G. F. Sanborn Co. *v.* Alston, 153 Mich. 456, 463, 116 N. W. 1099, 117 N. W. 625; Flint Land Co. *v.* Godkin, 136 Mich. 668, 99 N. W. 1058.

Minnesota.— Reimer *v.* Newel, 47 Minn. 237, 49 N. W. 865; Sperry *v.* Goodwin, 44 Minn. 207, 46 N. W. 328.

New York.— Clason *v.* Baldwin, 152 N. Y. 204, 46 N. E. 322.

North Dakota.— State Finance Co. *v.* Mulberger, 16 N. D. 214, 112 N. W. 986, 125 Am. St. Rep. 650; State Finance Co. *v.* Trimble, 16 N. D. 199, 112 N. W. 984.

South Dakota.— Stokes *v.* Allen, 15 S. D. 421, 89 N. W. 1023.

See 45 Cent. Dig. tit. "Taxation," § 1421.

Designation of state and county see Sickles *v.* Union Inv. Co., 109 Iowa 450, 80 N. W. 534; Sperry *v.* Goodwin, 44 Minn. 207, 46 N. W. 328. Notices served by a tax purchaser, which omit the name of the state and county in the description of the land in the body of the notices, are insufficient. Curry *v.* Larke, 153 Mich. 348, 116 N. W. 1075; Tucker *v.* Van Winkle, 142 Mich. 210, 105 N. W. 607. And the omission is not cured by the fact that the state and county are indorsed on the back, for the indorsements are no part of the statutory notice. Curry *v.* Larke, *supra*.

Misstatement of quantity.— If the notice erroneously states the quantity of the land, but otherwise correctly describes the property, the statement of the quantity will be treated as mere surplusage. Rowland *v.* Brown, 75 Iowa 679, 37 N. W. 403.

33. Salter *v.* Corbett, 80 Kan. 327, 102 Pac. 452; Shinkle *v.* Meek, 69 Kan. 368, 76 Pac. 837; Casner *v.* Gahlman, 60 Kan. 857, 56 Pac. 1131 [*affirming* 6 Kan. App. 295, 51 Pac. 56]; Duncan Land, etc., Co. *v.* Rusch, 145 Mich. 1, 108 N. W. 494; Jenswold *v.* Minnesota Canal Co., 93 Minn. 382, 101 N. W. 603; Roessler *v.* Romer, 92 Minn. 218, 99 N. W. 800; State *v.* Scott, 92 Minn. 210, 99 N. W. 799; Midland Co. *v.* Eby, 89 Minn. 27, 93 N. W. 707; Doherty *v.* Real Estate Title Ins., etc., Co., 85 Minn. 518, 89 N. W. 853; McNamara *v.* Fink, 71 Minn. 66, 73 N. W. 649; Robert *v.* Western Land Assoc., 43 Minn. 3, 44 N. W. 668. *Compare* Leggett *v.* Rogers, 9 Barb. (N. Y.) 406.

Amount necessary to redeem see *infra*, XII, C, 1.

Land bid in by state.— Land bid in by the state for taxes having been assigned by a purchaser, the sum paid by him is the "amount sold for" to be inserted in the redemption notice. Sperry *v.* Goodwin, 44 Minn. 207, 46 N. W. 328.

Prior void tax-sale.— In stating the amount required to redeem it, it is not necessary to include the amount of the state's lien arising from a prior void tax-sale. Minnesota Debenture Co. *v.* United Real Estate Corp., 99 Minn. 287, 109 N. W. 251.

Adding delinquent taxes.— If the correct amount required to redeem is stated, the addition of the words "and delinquent taxes" may be regarded as surplusage where there is no claim that there were any delinquent taxes on the land. Phelps *v.* Powers, 90 Minn. 440, 97 N. W. 136. But where a notice to eliminate the right of redemption stated the amount: "$36.08 together with $94.11 unpaid on delinquent taxes, interest, costs and penalties accruing subsequent to said sale," and in fact, there were no unpaid delinquent taxes at the time the notice was given, it was held that the notice was void and the landowner had not lost his right to redeem. Minnesota Debenture Co. *v.* Harrington, 104 Minn. 16, 115 N. W. 746.

Interest.— The notice is void if it fails to state the rate of interest to be paid on the amount required to redeem. Lawton *v.* Barker, 105 Minn. 102, 117 N. W. 249. Substantial compliance with the statute as to statement of interest see Slocum *v.* McLaren, 106 Minn. 386, 119 N. W. 406.

Penalty.—A tax-sale redemption notice, describing the property and giving the amount of taxes and costs accrued up to that time, being the consideration paid by the state at the sale, and reciting that unless such amount, with thirty-seven and one-half per cent additional and ten cents for the comptroller's deed, should be paid into the treasury, etc., the right of the occupant or other persons would be forever barred, was not

held, however, that a very trifling inaccuracy in the statement of the amount will not vitiate the notice.[34] But if the error is substantial it cannot be disregarded, even though it consists in stating a smaller sum than is legally due, and so is apparently advantageous to the redemptioner.[35] If the notice includes several distinct parcels of land, it must state the amount required for the redemption of each, and not the aggregate sum.[36]

f. Time For Redemption. The time when the right of redemption will expire by law must be stated in the redemption notice and correctly given, and if the time is there stated earlier or later than the time fixed by law, although it be by a single day, the notice is void.[37] Where the last day of the statutory time for redemption falls upon a Sunday, and the notice appoints the same day as the last for redemption, the notice is void, because in that case the owner will have the whole of the succeeding day in which to redeem.[38] The notice must also state the time precisely and specifically; if there is any indefiniteness, ambiguity, or uncertainty in this respect, it will not be effective to foreclose the right of redemption.[39]

objectionable for failure to set out in figures the amount of the thirty-seven and one-half per cent penalty. Halsted *v.* Silberstein, 196 N. Y. 1, 89 N. E. 443 [*reversing* 122 N. Y. App. Div. 909, 107 N. Y. Suppl. 1129].

Amount paid for controller's deed.— Where a tax-sale redemption notice requires payment of ten cents for a controller's deed, it is not defective for failure to state in terms that that amount has been paid to the controller, for executing and delivering the deed. Halsted *v.* Silberstein, 196 N. Y. 1, 89 N. E. 443 [*reversing* 122 N. Y. App. Div. 909, 107 N. Y. Suppl. 1129].

Successive sales.—A notice of expiration of the time to redeem from a tax-sale need not include the amount necessary to redeem from a later tax-sale to the same purchaser, as payment of such amount is not necessary in order to redeem from the first sale. Brodie *v.* State, 102 Minn. 202, 113 N. W. 2.

34. Robert *v.* Western Land Assoc., 43 Minn. 3, 44 N. W. 668; Western Land Assoc. *v.* McComber, 41 Minn. 20, 42 N. W. 543. *Contra*, Reed *v.* Lyon, 96 Cal. 501, 31 Pac. 619. And see Salter *v.* Corbett, 80 Kan. 327, 102 Pac. 452.

35. State *v.* Scott, 92 Minn. 210, 99 N. W. 799. But *compare* Watkins *v.* Inge, 24 Kan. 612.

36. Haden *v.* Closser, 153 Mich. 182, 116 N. W. 1001; G. F. Sanborn Co. *v.* Johnson, 148 Mich. 405, 111 N. W. 1091.

37. *California.*— Landregan *v.* Peppin, 86 Cal. 122, 24 Pac. 859.

Illinois.— Benefield *v.* Albert, 132 Ill. 665, 24 N. E. 634; Gage *v.* Davis, (1887) 14 N. E. 36; Wisner *v.* Chamberlin, 117 Ill. 568, 7 N. E. 68; Gage *v.* Bailey, 100 Ill. 530.

Kansas.— Ireland *v.* George, 41 Kan. 751, 21 Pac. 776; Torrington *v.* Rickershauser, 41 Kan. 486, 21 Pac. 648; Hollenback *v.* Ess, 31 Kan. 87, 1 Pac. 275.

Minnesota.— Kipp *v.* Robinson, 75 Minn. 1, 77 N. W. 414; State *v.* Nord, 73 Minn. 1, 75 N. W. 760, 72 Am. St. Rep. 594.

New York.— Clason *v.* Baldwin, 152 N. Y. 204, 46 N. E. 322; Hennessey *v.* Volkening, 22 N. Y. Suppl. 528, 30 Abb. N. Cas. 100.

North Dakota.— State Finance Co. *v.* Beck, 15 N. D. 374, 109 N. W. 357.

See 45 Cent. Dig. tit. "Taxation," § 1423.

Notice sufficient.— Where a delinquent tax-sale is held Sept. 4, 1900, and the final redemption notice states that lands sold at that sale must be redeemed on or before Sept. 4, 1903, or they will be deeded to the purchasers, such notice gives full three years after the sale for redemption and is not void. Michner *v.* Ford, 78 Kan. 837, 98 Pac. 273; Ireland *v.* George, 41 Kan. 751, 21 Pac. 776.

38. Brophy *v.* Harding, 137 Ill. 621, 27 N. E. 523, 34 N. E. 253; Gage *v.* Davis, 129 Ill. 236, 21 N. E. 788, 16 Am. St. Rep. 260; Gage *v.* Davis, (Ill. 1887) 14 N. E. 36; Hill *v.* Timmermeyer, 36 Kan. 252, 13 Pac. 211. But when the notice gives the full statutory time for redemption and one day more, and the last day named in the notice is Sunday, the owner will not be permitted to set aside a tax deed following such notice without showing that he was misled by the notice and that he offered to redeem on the day after the last day named. Hicks *v.* Nelson, 45 Kan. 47, 25 Pac. 218, 23 Am. St. Rep. 709.

39. *California.*— California, etc., R. Co. *v.* Mecartney, 104 Cal. 616, 38 Pac. 448.

Illinois.— Wilson *v.* McKenna, 52 Ill. 43, notice fixing the day on which the right of redemption will expire as of the day of the sale is void.

Kansas.— Jackson *v.* Challis, 41 Kan. 247, 21 Pac. 87 (not sufficient to say that the land must be redeemed "before the day limited therefor"); Blackistone *v.* Sherwood, 31 Kan. 35, 2 Pac. 874 (statement that the land will be deeded, if not redeemed, "on and after September 5, 1879, or within three years from the day of sale" is insufficient).

Minnesota.— Gahre *v.* Berry, 82 Minn. 200, 84 N. W. 733; Clary *v.* O'Shea, 72 Minn. 105, 75 N. W. 115, 71 Am. St. Rep. 465 (notice stating two different dates is void for uncertainty); State *v.* Halden, 62 Minn. 246, 64 N. W. 568; Peterson *v.* Mast, 61 Minn. 118, 63 N. W. 168 (stating the time in the alternative is insufficient).

7. Service of Notice — a. Personal Service. The statutes ordinarily require personal service of the redemption notice to be made on the owner of the property if he can be found, or on the person in possession or occupation of the premises.[40] The notice must be served in the same manner as a judicial writ, or at any rate in such a manner as to bring it effectively to the notice of the person to be served.[41] This service is sometimes required by the statute to be made by the holder of the tax certificate, and in that case it cannot be served by a public officer; [42] but if

New York.— Donahue *v.* O'Conor, 45 N. Y. Super. Ct. 278.

"Sixty days after service of this notice."— Sufficiency of this phrase see Mather *v.* Curley, 75 Minn. 248, 77 N. W. 957, 74 Am. St. Rep. 462; Kipp *v.* Fitch, 73 Minn. 65, 75 N. W. 752; Kipp *v.* Johnson, 73 Minn. 34, 75 N. W. 736; Kenaston *v.* Great Northern R. Co., 59 Minn. 35, 60 N. W. 813; Parker *v.* Branch, 42 Minn. 155, 43 N. W. 907.

40. See the statutes of the different states. And see Smith *v.* Gage, 12 Fed. 32, 11 Biss. 217.

Service on owner.— Service of the redemption notice on the grantee named in a recorded tax deed, which is void on its face, is not a service on the "owner" such as the law requires. Hodgson *v.* State Finance Co., (N. D. 1909) 122 N. W. 336; State Finance Co. *v.* Mulberger, 16 N. D. 214, 112 N. W. 986, 125 Am. St. Rep. 650; State Finance Co. *v.* Beck, 15 N. D. 374, 109 N. W. 357. Nor is the law complied with by service of the notice on a laborer employed by the owner but who is not in any sense the owner's agent for any such purpose. Gage *v.* Schmidt, 104 Ill. 106. But if the owner cannot be found in the county, the tax purchaser is not required to hunt up other parties claiming to have some interest in the premises. Frew *v.* Taylor, 106 Ill. 159. In Iowa a tax deed was invalid where the holder of the tax certificate failed to serve on the person in possession of the land, and on the person in whose name the land was taxed, notice of the expiration of the right of redemption, as required by Code, § 1441. Ashenfelter *v.* Seiling, 141 Iowa 512, 119 N. W. 984. In North Dakota such service must be on the owner of the land personally, if known to be a resident of the state; but, if a non-resident, service must be made by registered letter, addressed to the owner's last known post-office address, and must also be served personally on the person in possession. Hodgson *v.* State Finance Co., *supra.* Under Nebr. Scavenger Tax Act (Comp. St. (1903) c. 77, art. 9), §§ 33, 34, separate notice to redeem from a tax-sale should, when published, be given to the owner of the land sold. Ambler *v.* Patterson, 80 Nebr. 570, 114 N. W. 781. Evidence held to sustain a finding that the landowner was personally served with notice to redeem the land from tax-sale see Curry *v.* Backus, 156 Mich. 342, 120 N. W. 796.

Showing as to delivery of notice to sheriff. —A notice of expiration of time of redemption is not invalid because it does not appear that the person holding the tax certificate ever delivered the notice to the sheriff for service. Slocum *v.* McLaren, 106 Minn. 386, 119 N. W. 406.

41. See, generally, cases cited *infra,* this note.

Husband and wife.— Where the land is owned by a married woman, due service of the notice is not effected by leaving a copy with her husband. Cotes *v.* Rohrbeck, 139 Ill. 532, 28 N. E. 1110. And if the notice is to be served upon a husband and wife, it is not sufficient to hand a copy to the wife in the absence of the husband. Gage *v.* Bani, 141 U. S. 344, 12 S. Ct. 22, 35 L. ed. 776.

Service on a partner of the owner or person in possession is not sufficient. Gage *v.* Reid, 118 Ill. 35, 7 N. E. 127.

Service of notice on two of three tenants in common insufficient see White *v.* Shaw, 150 Mich. 270, 114 N. W. 210.

Public corporation.— Service of the notice on each of the three commissioners of a drainage district is sufficient service on the district. Hammond *v.* Carter, 155 Ill. 579, 40 N. E. 1019.

Service of a copy of the notice is sufficient. Duncan Land, etc., Co. *v.* Rusch, 145 Mich. 1, 108 N. W. 494.

Exhibiting evidence of title.— The law does not require that the tax purchaser, in serving the redemption notice on the owner, shall exhibit the deed and evidence of the sale or confirmation as in foreclosure cases. Bradley *v.* Williams, 139 Mich. 230, 102 N. W. 625.

Mailing notice.— Under the laws of North Dakota, the notice for redemption may be mailed at the residence of the holder of the certificate, although a non-resident. Nind *v.* Myers, 15 N. D. 400, 109 N. W. 335, 8 L. R. A. N. S. 157.

Place of service.— If the notice is properly served on the person in possession of the premises it is not necessary that the service should take place on the premises. Gage *v.* Bailey, 102 Ill. 11.

Effect of accepting service.—Where the law requires the notice to be served at least three months before the expiration of the time for redemption, a notice dated less than a month before that time is not sufficient, although service of it is accepted on the last day for redemption. Matthews *v.* Nefsy, 13 Wyo. 458, 81 Pac. 305, 110 Am. St. Rep. 1020.

42. Ellsworth *v.* Van Ort, 67 Iowa 222, 25 N. W. 142; Hall *v.* Guthridge, 52 Iowa 408, 3 N. W. 475. And see Scheftels *v.* Tabert, 46 Wis. 439, 1 N. W. 156. But *compare* Hale *v.* Hughes, 6 Ariz. 255, 56 Pac. 732.

Service by assignee.— Where the statute directs service of the notice to be made by the purchaser at the tax-sale or his assignee,

the notice is directed to be served by the sheriff, his deputy may properly act for him in serving it.[43]

b. Service by Publication or Posting. Where the land is vacant and unoccupied, or the owner is a non-resident, service of the notice for redemption is generally directed to be made by publication.[44] A proper foundation for this mode of service must be laid in accordance with the statute, whether by a return of *non est inventus* by the sheriff,[45] or by proof of a diligent and unsuccessful search for the owner.[46] The published notice must correspond in all essential particulars with the original,[47] and must be addressed exactly as the statute prescribes;[48] and there must be strict compliance with the statute in respect to the location or character of the newspaper in which it is published,[49] and the time of publication and number of insertions.[50] Similar rules apply where the notice, instead of being published, is to be posted in certain public places.[51]

c. Return, Proof, and Record of Service — (i) *In General.* To the lawful issuance and valid effect of a tax deed it is essential not only that the redemption notice shall have been served, but also that return or proof of service, complete and sufficient and such as the statute requires, shall have been made and filed, and that it shall be recorded with the conveyance when this is required by the statute,[52]

service by one who answered neither description is insufficient, although he afterward became assignee. Chappell *v.* Spire, 106 Ill. 472.

43. Williams *v.* Olson, 141 Mich. 580, 104 N. W. 1101.

44. See the statutes of the different states. And see Gage *v.* Bailey, 100 Ill. 530; McCash *v.* Penrod, 131 Iowa 631, 109 N. W. 180; State *v.* Halden, 62 Minn. 246, 64 N. W. 568.

When owner is "in possession" see Ellsworth *v.* Low, 62 Iowa 178, 17 N. W. 450. And see *supra*, XII, B, 5, c.

Personal service on non-resident.—Although the owner is a non-resident, publication of the notice is not necessary where it has been served on him personally while within the county (Baker *v.* Crabb, 73 Iowa 412, 35 N. W. 484), or even if it is served on him outside the state, provided the statute is broad enough to cover that case (Seymour *v.* Harrison, 85 Iowa 130, 52 N. W. 114).

Owner in fact a resident.— A service by publication where the owner was in fact a resident of the state, although defective, will not render the tax deed void. McQuity *v.* Doudna, 101 Iowa 144, 70 N. W. 99.

Death of owner.— Where the owner of the property dies before any attempt to serve the redemption notice, the case should be treated as though the assessment had been made to an "unknown" owner, and no publication of the notice is necessary. Nugent *v.* Cook, 129 Iowa 381, 105 N. W. 421.

45. Reimer *v.* Newel, 47 Minn. 237, 49 N. W. 865; Mueller *v.* Jackson, 39 Minn. 431, 40 N. W. 565. *Compare* Stoddard *v.* Sloan, 65 Iowa 680, 22 N. W. 924.

46. Sullivan *v.* Eddy, 164 Ill. 391, 45 N. E. 837; Burton *v.* Perry, 146 Ill. 71, 34 N. E. 60; Harding *v.* Brophy, 133 Ill. 39, 24 N. E. 558; Winters *v.* Cook, 140 Mich. 483, 103 N. W. 869; Albring *v.* Petronio, 44 Wash. 132, 87 Pac. 49.

47. Sperry *v.* Goodwin, 44 Minn. 207, 46 N. W. 328.

48. Hillyer *v.* Farneman, 65 Iowa 227, 21 N. W. 578. And see Lindsey *v.* Booge, (Iowa 1909) 122 N. W. 819.

49. Weer *v.* Hahn, 15 Ill. 298; Sperry *v.* Goodwin, 44 Minn. 207, 46 N. W. 328; Donahue *v.* O'Conor, 45 N. Y. Super. Ct. 278.

50. Cook *v.* John Schroeder Lumber Co., 85 Minn. 374, 88 N. W. 971; State *v.* Gayhart, 34 Nebr. 192, 51 N. W. 746; Flickinger *v.* Cornwell, 22 S. D. 382, 117 N. W. 1039.

51. Choat *v.* Phelps, 63 Kan. 762, 66 Pac. 1002; Washington *v.* Hosp, 43 Kan. 324, 23 Pac. 564, 19 Am. St. Rep. 141.

52. Smith *v.* Prall, 133 Ill. 308, 24 N. E. 521; Harland *v.* Eastman, 119 Ill. 22, 8 N. E. 810; Gage *v.* Mayer, 117 Ill. 632, 7 N. E. 97; Lindsey *v.* Booge, (Iowa 1909) 122 N. W. 819; Peterson *v.* Wallace, 140 Iowa 22, 118 N. W. 37; Ellsworth *v.* Van Ort, 67 Iowa 222, 25 N. W. 142; Halstead *v.* Silberstein, 196 N. Y. 1, 89 N. E. 443 [*reversing* 122 N. Y. App. Div. 909, 107 N. Y. Suppl. 1129]; People *v.* Ladew, 189 N. Y. 355, 190 N. Y. 543, 82 N. E. 431, 1092 [*reversing* 108 N. Y. App. Div. 356, 95 N. Y. Suppl. 1150]; Lockwood *v.* Gehlert, 127 N. Y. 241, 27 N. E. 812; Matter of Rourke, 63 Misc. (N. Y.) 354, 118 N. Y. Suppl. 415; Powell *v.* Jenkins, 14 Misc. (N. Y.) 83, 35 N. Y. Suppl. 265.

Failure to record service of notice with the conveyance, as required by N. Y. Laws (1855), p. 794, c. 427, § 68 *et seq.*, is fatal. People *v.* Ladew, 189 N. Y. 355, 190 N. Y. 543, 82 N. E. 431, 1092 [*reversing* 108 N. Y. App. Div. 356, 95 N. Y. Suppl. 1151]. Under section 68 of said statute, providing for the serving of a notice of the expiration of the time to redeem and declaring that no conveyance made pursuant to such section shall be recorded until the expiration of such notice, and that the evidence of service shall be recorded with such conveyance; section 72 declaring that the grantee or person claiming under him within one month after the service of the notice shall file with the controller a copy of the notice served, together with the affidavit of some person who shall

and the burden of showing due service and proof thereof rests on the party asserting title thereunder.[53] This proof is commonly required to be made by an affidavit of service by the holder of the tax certificate or his assignee or agent,[54] which is *prima facie* but not conclusive evidence, and may be contradicted or impeached by evidence;[55] but which, if it is defective in failing to show compliance with the statute, cannot be supplemented by extrinsic evidence.[56] The affidavit or the officer's return, as the case may be, must be signed and verified as the law directs,[57] and it must set forth all the facts necessary to show a due and legal

be credited as credible by the officer before whom the affidavit shall be taken, that such notice as is required was duly served specifying the mode of service; and section 73 providing that if the controller shall be satisfied that the proper notice has been served, and if the moneys required to be paid for the redemption of the land shall not have been paid he shall certify the facts, and the conveyance before made shall thereupon become absolute, the essential fact establishing a bar of the owner's rights is the controller's certificate that the notice complied with the statute, that it had been duly served, that the time within which a redemption might have been made had expired, and that the land had not been redeemed; and hence, this certificate being the evidence of notice and service which is required to be recorded in connection with the deed, it is not necessary that the notice or copy thereof with the affidavit of service shall be recorded. Halstead *v.* Silberstein, 196 N. Y. 1, 89 N. E. 443 [*reversing* 122 N. Y. App. Div. 909, 107 N. Y. Suppl. 1129].

Where land was taxed to unknown owners, proof of service of notice to redeem may be dispensed with. Chambers *v.* Haddock, 64 Iowa 556, 21 N. W. 32.

Return of service by mail.—A sheriff's return that he served the notice by depositing in the post-office for transmission one registered letter, containing a true copy of the notice, addressed to the secretary of the owner, "Mil., Wis.," sufficiently indicated that the abbreviations quoted stood for Milwaukee, Wis. Gogebic Lumber Co. *v.* Moore, 157 Mich. 499, 122 N. W. 128.

53. Mueller *v.* Jackson, 39 Minn. 431, 40 N. W. 565; Nelson *v.* Central Land Co., 35 Minn. 408, 29 N. W. 121; Seaman *v.* Thompson, 16 Nebr. 546, 20 N. W. 857; Cruser *v.* Williams, 13 N. D. 284, 100 N. W. 721.

Effect of tax deed as presumptive evidence. — If the statute makes the tax deed *prima facie* evidence of the regularity of all proceedings prior to its execution, it will be presumed, in the absence of a showing to the contrary, that the redemption notice was duly served upon the proper person. Soukup *v.* Union Inv. Co., 84 Iowa 448, 51 N. W. 167, 35 Am. St. Rep. 317.

Loss of affidavit.—The presumption of regularity, when supplemented by testimony showing that the required affidavit of service was actually made, cannot, in the absence of contradictory evidence, be overthrown by the mere fact that the affidavit cannot be found in the proper custody and that there is no record of it. Baker *v.* Crabb, 73 Iowa 412, 35 N. W. 484. But see Dalton *v.* Lucas, 63 Ill. 337.

54. Perry *v.* Bowman, 151 Ill. 25, 37 N. E. 680 (an affidavit made by one who is neither the holder of the tax certificate nor his assignee and which does not describe him as the agent of either of them is void); Hintrager *v.* McElhinny, 112 Iowa 325, 82 N. W. 1008, 83 N. W. 1063 (certificate of service by a constable is insufficient); Stevens *v.* Murphy, 91 Iowa 356, 59 N. W. 203, 51 Am. St. Rep. 348 (affidavit of service by one not described as the holder of the certificate or his agent is void); Babcock *v.* Bonebrake, 77 Iowa 710, 42 N. W. 559 (tax purchaser may make proof of service after conveying his interest by quitclaim deed but without assigning the certificate); Rowland *v.* Brown, 75 Iowa 679, 37 N. W. 403 (proof by agent); Baker *v.* Crabb, 73 Iowa 412, 35 N. W. 484 (proof of agency).

55. Waller *v.* Hintrager, 100 Iowa 148, 69 N. W. 431; Duncan Land, etc., Co. *v.* Rusch, 145 Mich. 1, 108 N. W. 494; Williams *v.* Olson, 141 Mich. 580, 104 N. W. 1101; Winters *v.* Cook, 140 Mich. 483, 103 N. W. 869; Nind *v.* Meyers, 15 N. D. 400, 109 N. W. 335, 8 L. R. A. N. S. 157; Gage *v.* Bani, 141 U. S. 344, 12 S. Ct. 22, 35 L. ed. 776. And see Slocum *v.* McLaren, 106 Minn. 386, 119 N. W. 406. Under Iowa Code (1897), § 1341, if there be a material omission in any of the required steps by which the period of redemption from a tax-sale may be cut off, the presumption arising from the treasurer's record of service of notice of expiration of time for redemption is overcome. Ashenfelter *v.* Seiling, 141 Iowa 512, 119 N. W. 984.

A sheriff's return of service of a notice to redeem land from tax-sale is evidence of the fact of service, although it may be defeated by proof that service was not made as alleged. Gogebic Lumber Co. *v.* Moore, 157 Mich. 499, 122 N. W. 128.

In proceedings to recover land bought at tax-sale, service of the notice required to be given to the owner must be proved by competent common-law evidence, not merely by the affidavit of service required to be filed. People *v.* Walsh, 87 N. Y. 481 [*affirming* 22 Hun 139]. And see Jewell *v.* Truhn, 38 Minn. 433, 38 N. W. 106.

56. Esker *v.* Heffernan, 159 Ill. 38, 41 N. E. 1113; Hughes *v.* Carne, 135 Ill. 519, 26 N. E. 517.

57. Lynn *v.* Morse, 76 Iowa 665, 39 N. W. 203; Stein *v.* Hanson, 99 Minn. 387, 109 N. W. 821 (return of service of notice not vitiated

service of the notice, including the time, place, and manner of service, the person on whom service was made, and the fact that he was the proper person to be served, and this with certainty and accuracy.[58]

(II) *Publication Service.* Where service of the redemption notice is made by published advertisement, proof and record thereof as required by the statute is equally essential as in the case of personal service,[59] and the burden of proving it is on the party asserting title under the tax-sale, the affidavit of publication being *prima facie* evidence in that behalf.[60] But in the absence of statutory provision the proof is not invalidated by a failure to record the affidavit or by its loss, a copy being admissible in the latter case.[61] If the law requires proof of publication to be made by the holder of the tax certificate or his agent or attorney, an affidavit of the publisher of the newspaper in which it was printed

by incorrect date); Clason *v.* Baldwin, 152 N. Y. 204, 46 N. E. 322 (controller's certificate of service of redemption notice must be under seal); Lockwood *v.* Gehlert, 53 Hun (N. Y.) 15, 6 N. Y. Suppl. 20 [*affirmed* in 127 N. Y. 241, 27 N. E. 812] (certificate signed by one controller and sealed by his successor in office is not good); Broughton *v.* Journeay, 51 Pa. St. 31 (proof of service should be preserved in the archives of the treasurer's office).

58. Brickley *v.* English, 129 Ill. 646, 22 N. E. 854; Wallahan *v.* Ingersoll, 117 Ill. 123, 7 N. E. 519; Davis *v.* Gossnell, 113 Ill. 121; Rice *v.* Bates, 68 Iowa 393, 27 N. W. 286 (if service is made on the proper person it is immaterial that the land is assessed to another at the time proof of service is made); Trulock *v.* Bentley, 67 Iowa 602, 25 N. W. 824 (proof defective in failing to state some of the facts required by statute); Caulkins *v.* Chamberlain, 37 Hun 163; Nind *v.* Myers, 15 N. D. 400, 109 N. W. 335, 8 L. R. A. N. S. 157.

Inability to find owner in county.— A return of service of a notice of expiration of time of redemption, that after diligent search the sheriff had been unable to find the within-named person within his county, instead of that the person named in such notice could not be found in the county, was nevertheless valid. Slocum *v.* McLaren, 106 Minn. 386, 119 N. W. 406.

Time and place of service see Barcroft *v.* Mann, 125 Iowa 530, 101 N. W. 276; Wilkin *v.* Wilkin, 91 Iowa 652, 60 N. W. 194; Rowland *v.* Brown, 75 Iowa 679, 37 N. W. 403; People *v.* Cady, 105 N. Y. 299, 11 N. E. 810.

Service by leaving copy at residence.— Under N. Y. Laws (1855), pp. 794, 795, c. 427, §§ 68, 69, providing for the service of a redemption notice on the occupant personally, or by leaving the same at his dwelling-house with any person of suitable age and discretion belonging to his family, a return of service by leaving a copy of the notice at the occupant's place of residence with his wife is sufficient, as it will be presumed that she was a person of suitable age and discretion and that, as she was occupying the occupant's dwelling-house, she belonged to his family. Halsted *v.* Silberstein, 196 N. Y. 1, 89 N. E. 443 [*reversing* 122 N. Y. App. Div. 909, 107 N. Y. Suppl. 1129].

Naming and describing person served.—As to particularity required in naming the person served, and effect of misnomer, and as to statements showing him to have been the "owner" or the "person in possession" at the time the service was made see Lauer *v.* Weber, 177 Ill. 115, 52 N. E. 489; Hughes *v.* Carne, 135 Ill. 519, 26 N. E. 517; Stillwell *v.* Brammell, 124 Ill. 338, 16 N. E. 226; Wisner *v.* Chamberlin, 117 Ill. 568, 7 N. E. 68; Gage *v.* Hervey, 111 Ill. 305; Rice *v.* Haddock, 70 Iowa 318, 30 N. W. 579. Where an affidavit showed that Harry R. Edwards was the same person to whom land was conveyed by deed to "Harry P. Edwards," a tax redemption notice, served by registered letter, addressed to Harry P. Edwards, shown by the receipt to have been received by H. P. Edwards, per H. R. Edwards, was shown to have been addressed to the proper party, whose name appeared as the record owner, and was received by the person whose real name was misnamed of record. Gogebic Lumber Co. *v.* Moore, 157 Mich. 499, 122 N. W. 128. Although a return of service of redemption notice would be in better form if it described the persons on whom served as in actual possession, the absence of the term "actual" is not material. Slocum *v.* McLaren, 106 Minn. 386, 119 N. W. 406.

Residence of person served.— A statement in a sheriff's return that he served a notice on M. "of the city of Marquette, Marquette county, Mich." justified an inference that M resided in Marquette county. Gogebic Lumber Co. *v.* Moore, 157 Mich. 499, 122 N. W. 128.

Description of premises in return of service see Slocum *v.* McLaren, 106 Minn. 386, 119 N. W. 406.

Attaching copy of the notice.— It is not necessary that a copy of the notice to redeem from a tax-sale shall be attached to the affidavit of service or filed with the county treasurer. Knudson *v.* Litchfield, 87 Iowa 111, 54 N. W. 199.

59. Lindsey *v.* Dodge, (Iowa 1909) 122 N. W. 819; Peterson *v.* Wallace, 140 Iowa 22, 118 N. W. 37; Nicol *v.* Sherman, 21 S. D. 189, 110 N. W. 777.

60. Walsh *v.* Burke, 134 Cal. 594, 66 Pac. 866.

61. Baker *v.* Crabb, 73 Iowa 412, 35 N. W. 484.

is not sufficient,[62] although the affidavit of the holder of the certificate may incorporate and refer to an affidavit of the publisher, and the two may be read together and may jointly make up the requisite proof.[63] The affidavit must set forth the particulars of the publication, as the name and description of the newspaper, the time of the publication, and the number of insertions,[64] and it must also set forth the facts laying a foundation for this mode of service, as by reciting that the owner was a non-resident or could not be found on diligent inquiry, or that the land was unoccupied or was taxed to unknown owners.[65]

8. Fees. The matter of fees for serving notice to redeem and making proof thereof is regulated by the local statutes.[66]

C. Proceedings and Effect — 1. Amount Required to Redeem — a. In General. Redemption from a tax-sale can be effected only by payment of the full amount prescribed by the statute as the price thereof.[67] Where the land

62. Sweeley *v.* Van Steenburg, 69 Iowa 696, 26 N. W. 78; Rice *v.* Bates, 68 Iowa 393, 27 N. W. 286; Chambers *v.* Haddock, 64 Iowa 556, 21 N. W. 32; Ellsworth *v.* Cordrey, 63 Iowa 675, 16 N. W. 211; American Missionary Assoc. *v.* Smith, 59 Iowa 704, 13 N. W. 849; Viele *v.* Van Steenberg, 31 Fed. 249. And see Hoskins *v.* Iowa Land Co., 121 Iowa 299, 96 N. W. 977.

Showing by whose direction service was made.— Under Iowa Code, § 1441, providing that the service of a redemption expiration notice shall be complete only after affidavit has been filed showing the service, and under whose direction it was made, etc., an affidavit reciting that affiant was agent of W, and that he served a notice on P by causing it to be published three times, etc., was fatally defective for failure to show under whose direction the service was made. Peterson *v.* Wallace, 140 Iowa 22, 118 N. W. 37. Under said section, where the purchaser of the certificate signed the notice as the lawful holder thereof, and it appeared from his affidavit that he was then the lawful holder of the certificate, and that he served the same on the owner of the property by causing the notice to be published, giving the dates and the places where published, this sufficiently showed that the service was under his direction, although the affidavit did not so specifically state. Lindsey *v.* Booge, (Iowa 1909) 122 N. W. 819.

Identifying holder of certificate see Stoddard *v.* Sloan, 65 Iowa 680, 22 N. W. 924.

Who is holder of certificate.— One who has exchanged his certificate of purchase for a void tax deed is still in law the holder of the certificate, and the proper person to make proof of publication of notice. Rice *v.* Bates, 68 Iowa 393, 27 N. W. 286.

63. Funson *v.* Bradt, 105 Iowa 471, 75 N. W. 337; Smith *v.* Heath, 80 Iowa 231, 45 N. W. 768; Johnson *v.* Brown, 71 Iowa 609, 33 N. W. 127; Rice *v.* Haddock, 70 Iowa 318, 30 N. W. 579; Stull *v.* Moore, 70 Iowa 149, 30 N. W. 387.

64. Walsh *v.* Burke, 134 Cal. 594, 66 Pac. 866; Nycum *v.* Raymond, 73 Iowa 224, 34 N. W. 819; Kessey *v.* Connell, 68 Iowa 430, 27 N. W. 365; Ellsworth *v.* Cordrey, 63 Iowa 675, 16 N. W. 211; Washington *v.* Hosp, 43 Kan. 324, 23 Pac. 564, 19 Am. St. Rep. 141; Mathews *v.* Fry, 141 N. C. 582, 54 S. E. 379.

65. Miller *v.* Williams, 135 Cal. 183, 67 Pac. 788; Hall *v.* Capps, 107 Cal. 513, 40 Pac. 809; Hammond *v.* Carter, 155 Ill. 579, 40 N. E. 1019; Glos *v.* Sankey, 148 Ill. 536, 36 N. E. 628, 39 Am. St. Rep. 196, 23 L. R. A. 665; Taylor *v.* Wright, 121 Ill. 455, 13 N. E. 529; Mueller *v.* Jackson, 39 Minn. 431, 40 N. W. 565.

66. See the statutes of the different states. And see San Francisco, etc., Land Co. *v.* Banbury, 106 Cal. 129, 39 Pac. 439; Reed *v.* Lyon, 96 Cal. 501, 31 Pac. 619.

67. People *v.* Ryan, 116 Ill. 73, 4 N. E. 478; Connecticut Mut. L. Ins. Co. *v.* Stinson, 62 Ill. App. 319; Richards *v.* Fuller, 122 La. 847, 48 So. 285; Coleman *v.* Baker, 24 La. Ann. 524; Smith *v.* Carnahan, 83 Nebr. 667, 120 N. W. 212; Butler *v.* Libe, 81 Nebr. 740, 116 N. W. 663, 81 Nebr. 744, 117 N. W. 700; Masterson *v.* Beasley, 3 Ohio 301; Blair *v.* Guaranty Sav., etc., Co., (Tex. Civ. App. 1909) 118 S. W. 608; Conklin *v.* El Paso, (Tex. Civ. App. 1897) 44 S. W. 879.

A "premium sale" under the Nebraska statute (Comp. St. (1907) § 5223), declaring that no redemption from a premium sale shall be allowed for less than the amount of the decree, interest, and costs and subsequent taxes paid, is a sale made for less than the amount of the decree, whether there were several bids or only one bid; and where the owner of land that has been sold at public sale under a tax decree under the statute for less than the amount of the decree fails to redeem by paying the full amount of the decree, interest, and costs, the purchaser is entitled to a confirmation, whether there has been one bid or more. State *v.* Several Parcels of Land, 84 Nebr. 719, 121 N. W. 977.

Void tax foreclosure.— Redemption from a void tax foreclosure should be allowed upon payment of the tax lien, the taxes subsequently paid, together with interest, and the value of permanent improvements made by the purchaser. Humphrey *v.* Hays, 85 Nebr. 239, 122 N. W. 987.

Where two tracts of land belonging to different owners are assessed together, one of the owners would not have to pay on both tracts, or redeem both, if sold for taxes; but he could pay on or redeem any subdivision, under Miss. Annot. Code (1892), § 3824, providing that if the purchaser at a tax-sale bid

was struck off to the state or county, this is usually the amount of all taxes delinquent and unpaid;[68] but in the case of a private purchaser, it is ordinarily the amount paid by him at the tax-sale,[69] together with such interest and penalties as the law prescribes,[70] and the costs and expenses of advertising and selling the land,[71] to which may be added the value of improvements put upon the land by the tax purchaser after the sale,[72] but deducting the sum of rents and profits or the fair rental value of the land if the purchaser has been in possession.[73] Where a tract of land was divided into parcels for the purpose of assessment and sale, the owner of any one parcel may redeem it by paying the price which it brought;[74] but in the absence of a statute the owner of an undivided interest in a tract, or of a separate portion of a tract which was assessed and sold as an entirety, cannot redeem his part or interest by payment of a proportionate part of the entire amount, but must redeem the whole.[75] Where land is sold to a private purchaser

and pay a larger sum than the amount of taxes, damages, and costs, and the excess at redemption be in the collector's hands, it shall be refunded to the purchaser, and if only a part of the land be redeemed the excess shall be apportioned ratably to the amount of taxes due at the time of sale on the respective parts, and section 3853, providing that the owner of land sold for taxes may redeem any part of it, where it is separable by legal subdivisions of not less than forty acres. Moores *v.* Thomas, (Miss. 1909) 48 So. 1025.

68. Couts *v.* Cornell, 147 Cal. 560, 82 Pac. 194, 109 Am. St. Rep. 168; Statton *v.* People, 18 Colo. App. 85, 70 Pac. 157; Everson *v.* Woodbury County, 118 Iowa 99, 91 N. W. 900; Soper *v.* Espeset, 63 Iowa 326, 19 N. W. 232; Judd *v.* Driver, 1 Kan. 455.

69. *Colorado.*— Elder *v.* Chaffee County, 33 Colo. 475, 81 Pac. 244.

Louisiana.— Richards *v.* Fuller, 122 La. 847, 48 So. 285.

Michigan.— Haney *v.* Miller, 154 Mich. 337, 117 N. W. 71, 745.

Minnesota.— State *v.* Johnson, 83 Minn. 496, 86 N. W. 610.

Missouri.— State *v.* Tufts, (1891) 15 S. W. 954.

Nebraska.— Douglas *v.* Hayes County, 82 Nebr. 577, 118 N. W. 114; Butler *v.* Libe, 81 Nebr. 740, 116 N. W. 663, 81 Nebr. 744, 117 N. W. 700.

A very trifling difference between the amount paid or tendered in redemption from a sale for taxes and the correct amount, if it is such only as might result from different modes of calculation, will not invalidate the redemption. Wyatt *v.* Simpson, 8 W. Va. 394.

Addition of judgment lien.— Where the holder of a judgment procures a tax deed to lands of the judgment debtor, which he agrees shall be subject to redemption by payment of the judgment, other claimants of the land can redeem only on complying with the terms of the agreement. Jordan *v.* Brown, 56 Iowa 281, 9 N. W. 200. And see Clower *v.* Fleming, 81 Ga. 247, 7 S. E. 278.

Lands bid in to state and sold to purchasers.— Under Minn. Rev. Laws (1905), §§ 936–940, where lands are bid in to the state and not assigned to purchasers within three years from the sale at which they were offered to purchasers at the highest price are expressly subject to redemption by the owner or other person duly and properly entitled to redeem. Upon redemption the full consideration of the sale must be paid to the tax purchaser, but the person redeeming is entitled to a return from the state of the surplus above the amount due the state. Minnesota Debenture Co. *v.* Scott, 106 Minn. 32, 119 N. W. 391.

Deduction for illegal taxes not allowed on redemption from purchaser of state tax lands see Haney *v.* Miller, 154 Mich. 337, 117 N. W. 71, 745.

70. See *infra*, XII, C, 1, b.

71. State *v.* Bowker, 4 Kan. 114; State *v.* Harper, 26 Nebr. 761, 42 N. W. 764; Permanent Sav., etc., Co. *v.* Sennt, 7 Ohio S. & C. Pl. Dec. 224, 4 Ohio N. P. 346. See Ramsey *v.* State, 78 Tex. 602, 14 S. W. 793; Dooley *v.* Christian, 96 Va. 534, 32 S. E. 54.

72. Cowley *v.* Spradlin, 77 Ark. 190, 91 S. W. 550; Waterman *v.* Irby, 76 Ark. 551, 89 S. W. 844; Humphreys *v.* Hays, 85 Nebr. 239, 122 N. W. 987; Towle *v.* Holt, 14 Nebr. 221, 15 N. W. 203; Lynch *v.* Brudie, 63 Pa. St. 206.

73. Cornoy *v.* Wetmore, 92 Iowa 100, 60 N. W. 245; Elliott *v.* Parker, 72 Iowa 746, 32 N. W. 494; Strang *v.* Burris, 61 Iowa 375, 16 N. W. 285; Gaskins *v.* Blake, 27 Miss. 675; Van Landingham *v.* Buena Vista Imp. Co., 99 Va. 37, 37 S. E. 274. *Compare* Bender *v.* Bean, 52 Ark. 132, 12 S. W. 180, 241.

No rent on purchaser's improvements.— The owner is not in any case entitled to the rent of buildings and improvements put upon the land by the occupying claimant. Elliott *v.* Parker, 72 Iowa 746, 32 N. W. 494; Boatmen's Sav. Bank *v.* Grewe, 101 Mo. 625, 14 S. W. 708.

Redemption after the time.— If the owner has allowed the whole statutory period for redemption to elapse, and a tax deed has been issued and recorded, he cannot thereafter indirectly effect a redemption by charging the purchaser for rents and profits received before the recording of the deed. Spengin *v.* Forry, 37 Iowa 242.

74. People *v.* McEwen, 23 Cal. 54; Penn *v.* Clemans, 19 Iowa 372; Hewes *v.* Seal, 80 Miss. 437, 32 So. 55.

75. *California.*— Quinn *v.* Kenney, 47 Cal. 147; Mayo *v.* Marshall, 23 Cal. 594; People *v.* McEwen, 23 Cal. 54.

at a tax-sale and he again purchases it at a subsequent tax-sale, the owner on redeeming from the first sale is not bound to pay the amount necessary to redeem from the later sale.[76]

b. Interest and Penalties. The statutes commonly provide that the purchaser at tax-sale shall be entitled to receive from one redeeming the land interest at a specified rate, which is generally to be computed on the amount of the purchase-money paid by him,[77] although sometimes only on the amount of taxes which he has paid,[78] and where redemption is effected through the aid of a court of equity, interest at the legal rate will be allowed.[79] In addition, the statute frequently provides for the payment to the purchaser of a heavy premium, in the nature of a penalty, usually calculated as interest at an extraordinary rate.[80] The constitutionality of such an enactment is no longer denied,[81] but the repeal of a statute imposing such a penalty works a remission of the penalty and it cannot be collected after the repeal.[82] Neither the statutory interest nor the penalty is to be calculated on the costs and expenses of the sale.[83]

c. Subsequent Taxes. The tax purchaser is also entitled to be reimbursed for the amount of all taxes paid by him upon the property after his purchase and before the redemption, with interest thereon,[84] provided he complies with the direc-

Minnesota.— State *v.* Schaack, 28 Minn. 358, 10 N. W. 22; Moulton *v.* Doran, 10 Minn. 67.

Oregon.— Rich *v.* Palmer, 6 Oreg. 339.

Rhode Island.— Chace *v.* Durfee, 16 R. I. 248, 14 Atl. 919.

West Virginia.— State *v.* King, 47 W. Va. 437, 35 S. E. 30.

United States.— O'Reilly *v.* Holt, 18 Fed. Cas. No. 10,563, 4 Woods 645.

See 45 Cent. Dig. tit. "Taxation," § 1433.

Contra.— Payne *v.* Goodyear, 26 U. C. Q. B. 448. And see Dietrick *v.* Mason, 57 Pa. St. 40.

76. Brodie *v.* State, 102 Minn. 202, 113 N. W. 2.

77. *Georgia.*— Holcombe *v.* Beauchamp, 101 Ga. 711, 28 S. E. 973.

Iowa.— Mulligan *v.* Hintrager, 18 Iowa 171.

Louisiana.— Coleman *v.* Baker, 24 La. Ann. 524.

Minnesota.— Midland Co. *v.* Eby, 89 Minn. 27, 93 N. W. 707.

Nebraska.— Smith *v.* Carnahan, 83 Nebr. 667, 120 N. W. 212; Douglas *v.* Hayes County, 82 Nebr. 577, 118 N. W. 114; Hannold *v.* Valley County, 82 Nebr. 221, 117 N. W. 350; Butler *v.* Libe, 81 Nebr. 740, 116 N. W. 663, 81 Nebr. 744, 117 N. W. 700.

Texas.— Blair *v.* Guaranty Savings, etc., Co., (Civ. App. 1909) 118 S. W. 608.

Redemption by minors.— On redemption of land belonging to a minor, after reaching his majority, it is error to compute the interest on the several payments made by the purchaser up to the date of the deed and to take the amount thereof as a new principal. Douglass *v.* Lowell, 55 Kan. 574, 40 Pac. 917.

On voluntary redemption from void sale see *supra*, XII, A, 1, note 79.

78. Comstock *v.* Cover, 35 Ill. 470; Ristine *v.* Johnson, 143 Ind. 44, 41 N. E. 538, 42 N. E. 310.

79. Gage *v.* Busse, 114 Ill. 589, 3 N. E. 441; Roberts *v.* Merrill, 60 Iowa 166, 14 N. W. 235. But *compare* Fish *v.* Genett, 56 S. W. 813, 22 Ky. L. Rep. 177.

80. See the statutes of the different states. And see, as to the construction and application of such statutes, and particularly the amount of the penalty and the mode of its computation, the following cases:

California.— Palomares Land Co. *v.* Los Angeles County, 146 Cal. 530, 80 Pac. 931; San Diego Inv. Co. *v.* Shaffer, 137 Cal. 323, 70 Pac. 179; Collier *v.* Shaffer, 137 Cal. 319, 70 Pac. 177.

Illinois.— Gage *v.* Parker, 103 Ill. 528.

Iowa.— Long *v.* Smith, 67 Iowa 22, 24 N. W. 574; Harber *v.* Sexton, 66 Iowa, 211, 23 N. W. 635; Curl *v.* Watson, 25 Iowa 35, 95 Am. Dec. 763.

Kansas.— Miller *v.* Madden, 35 Kan. 455, 11 Pac. 449; Briscoe *v.* Ellsworth County, 23 Kan. 334; State *v.* Bowker, 4 Kan. 114.

Kentucky.— Tug River Coal Co. *v.* Brewer, 91 Ky. 402, 15 S. W. 1117, 137 Ky. L. Rep. 1.

Louisiana.— Richards *v.* Fuller, 122 La. 847, 48 So. 285.

Missouri.— Stewart *v.* Brooks, 28 Mo. 62.

New York.— People *v.* Cady, 105 N. Y. 299, 11 N. E. 810.

South Dakota.— Nicol *v.* Sherman, 21 S. D. 189, 110 N. W. 777.

See 45 Cent. Dig. tit. "Taxation," § 1434.

81. Augustine *v.* Jennings, 42 Iowa 198; Mulligan *v.* Hintrager, 18 Iowa 171; Estes *v.* Stebbins, 25 Kan. 315; Kittle *v.* Shervin, 11 Nebr. 65, 7 N. W. 861.

82. Snell *v.* Campbell, 24 Fed. 880. And see Collier *v.* Shaffer, 137 Cal. 319, 70 Pac. 177.

83. Collier *v.* Shaffer, 137 Cal. 319, 70 Pac. 177; Cummings *v.* Cone, 4 Ida. 259, 38 Pac. 650; Hawks *v.* Davis, 185 Mass. 119, 69 N. E. 1072.

84. *Arkansas.*— Cole *v.* Moore, 34 Ark. 582. But *compare* Stephens *v.* Holmes, 26 Ark. 48.

California.— Collier *v.* Shaffer, 137 Cal. 319, 70 Pac. 177.

Illinois.— People *v.* Ryan, 116 Ill. 73, 4 N. E. 478.

Iowa.— Kessey *v.* Connell, 68 Iowa 430, 27

tions of the statute as to the establishment of his lien or the evidence of it.[85] But he cannot exact repayment of any taxes assessed against the land for years previous to the sale,[86] or of any taxes paid by him after the redemption.[87]

2. Payment or Tender — a. In General. When the person entitled to redeem from a sale for taxes duly offers the proper amount to the proper person, it is immaterial that the money is not accepted; for a sufficient tender will *ipso facto* work a redemption.[88] But to have this effect the tender must be of the full amount which the purchaser is entitled to receive,[89] and must be made in due time and

N. W. 365; Curl *v.* Watson, 25 Iowa 35, 95 Am. Dec. 763.

Kentucky.— Bleight *v.* Auditor, 2 T. B. Mon. 25.

Michigan.— G. F. Sanborn Co. *v.* Alston, 153 Mich. 456, 116 N. W. 1099, 153 Mich. 463, 117 N. W. 625; Cheever *v.* Flint Land Co., 134 Mich. 604, 96 N. W. 933.

Minnesota.— Jenswold *v.* Minnesota Canal Co., 93 Minn. 382, 101 N. W. 603; State *v.* Butler, 89 Minn. 220, 94 N. W. 688; State *v.* Peltier, 86 Minn. 181, 90 N. W. 375; McLachlan *v.* Carpenter, 75 Minn. 17, 77 N. W. 436; Berglund *v.* Graves, 72 Minn. 148, 75 N. W. 118. See Sprague *v.* Roverud, 34 Minn. 475, 26 N. W. 603.

Nebraska.— Hannold *v.* Valley County, 82 Nebr. 221, 117 N. W. 350; Butler *v.* Libe, 81 Nebr. 740, 116 N. W. 663, 81 Nebr. 744, 117 N. W. 700.

Pennsylvania.— Bannan's Appeal, 1 Walk. 461.

Tennessee.—Ayres *v.* Dozier, (Ch. App. 1899) 52 S. W. 662.

Virginia.— Parsons *v.* Newman, 99 Va. 298, 38 S. E. 186; Hale *v.* Penn, 25 Gratt. 261.

United States.— Harmon *v.* Steed, 49 Fed. 779; O'Reilly *v.* Holt, 18 Fed. Cas. No. 10,563, 4 Woods 645.

See 45 Cent. Dig. tit. "Taxation," § 1435.

Including municipal taxes.—A statute requiring the redemptioner to refund to the purchaser the amount of any taxes paid by him since the sale includes not only state and county taxes but also all municipal taxes paid by the purchaser. Cobb. *v.* Vary, 120 Ala. 263, 24 So. 442; Turner *v.* White, 97 Ala. 545, 12 So. 601. *Contra*, Byington *v.* Hampton, 13 Iowa 23; Byington *v.* Rider, 9 Iowa 566.

Not including personal taxes see San Diego, etc., R. Co. *v.* Shaffer, 137 Cal. 103, 69 Pac. 855; Buell *v.* Boylan, 10 S. D. 180, 72 N. W. 406.

Defective redemption notice.—Although a tax-sale purchaser's notice to the original owners of the sale and of their right to redeem is technically defective, the owners cannot redeem without reimbursing him for taxes paid subsequent to service of the notice, with interest on the sums paid. G. F. Sanborn Co. *v.* Alston, 153 Mich. 456, 116 N. W. 1099, 153 Mich. 463, 117 N. W. 625.

85. Kennedy *v.* Bigelow, 43 Iowa 74. But see Elliott *v.* Parker, 72 Iowa 746, 32 N. W. 494 (as to redemption in equity).

86. Sheppard *v.* Clark, 58 Iowa 371, 12 N. W. 316.

87. Byington *v.* Allen, 11 Iowa 3.

Effect of statute of limitations.— In a suit by the owner of land to redeem it from one claiming under a tax deed and under a decree quieting his title, it appeared that defendant's right of possession under the deed was barred by adverse possession before he actually gained the possession and before the date of the decree, and that the decree itself was void for want of jurisdiction. It was held that plaintiff could redeem on reimbursing defendant only for the taxes paid by him within five years before the commencement of the suit to redeem. Thode *v.* Spofford, 65 Iowa 294, 17 N. W. 561, 21 N. W. 647.

88. *Arkansas.*— Bender *v.* Bean, 52 Ark. 132, 12 S. W. 180, 241.

Georgia.— Bourquin *v.* Bourquin, 120 Ga. 115, 47 S. E. 639.

Kansas.—Wilson *v.* Reasoner, 37 Kan. 663, 16 Pac. 100.

Louisiana.— Bentley *v.* Cavallier, 121 La. 60, 46 So. 101; Spanier *v.* De Voe, 52 La. Ann. 581, 27 So. 174; Basso *v.* Benker, 33 La. Ann. 432; Brooks *v.* Hardwick, 5 La. Ann. 675.

Missouri.— Olmstead *v.* Tarsney, 69 Mo. 396.

Nebraska.— See Douglas *v.* Hayes County, 82 Nebr. 574, 118 N. W. 114.

Pennsylvania.— Deringer *v.* Coxe, 6 Pa. Cas. 283, 10 Atl. 412.

Texas.— Burns *v.* Ledbetter, 54 Tex. 374; Logan *v.* Logan, 31 Tex. Civ. App. 295, 72 S. W. 416.

West Virginia.— Koon *v.* Snodgrass, 18 W. Va. 320; Sperry *v.* Gibson, 3 W. Va. 522.

Canada.— Cunningham *v.* Markland, 5 U. C. Q. B. O. S. 645.

See 45 Cent. Dig. tit. "Taxation," § 1346.

Effect of tender.— The owner of land, having tendered the amount paid by the purchaser at the tax-sale, will be required to pay the same in order to redeem, although the tax deed is set aside as void. Chicago, etc., R. Co. *v.* Kelley, 105 Iowa 106, 74 N. W. 935.

Where tender unnecessary.—Where the tax deed was made without any authority of law, no tender or payment of the amount required to redeem need be proven. Adams *v.* Snow, 65 Iowa 435, 21 N. W. 765.

What effects redemption a question of law. —Whether the act of a person paying to the clerk of the county court the sum of money specified in his official receipt has operated as a redemption or not is a question of law for the court. Elliott *v.* Shaffer, 30 W. Va. 347, 4 S. E. 292.

89. Cowley *v.* Spradlin, 77 Ark. 190, 91 S. W. 550; Fitts *v.* Huff, 63 Miss. 594; Richards *v.* Fuller, 122 La. 847, 48 So. 285; Sanford *v.* Moore, 58 Nebr. 654, 79 N. W. 548.

manner,[90] and must be specific, that is, directed to a specific tax-sale and offering a particular amount,[91] and unconditional.[92] A tender must also be made by a person entitled to make it.[93] Further the money must be produced and tendered; that is, an offer to pay the amount necessary to redeem does not amount to a tender without the production of the money,[94] unless such production is waived or rendered unnecessary by the purchaser's refusal to receive the money, either in consequence of his denial of the right to redeem or of his claiming a larger sum.[95] Payment of the redemption money must be made in cash and in coin or legal tender notes, unless this is waived or unless the medium tendered is equivalent by law to current money.[96]

b. To Whom Made. The redemption money should generally be paid to the holder of the tax title at the time of the redemption, and hence not to the original purchaser if he has meanwhile conveyed his interest; [97] but to his vendee or the

A small deficiency in the amount tendered for redemption from a tax-sale, attributable to mistake, will not vitiate the tender. Mosser *v.* Moore, 56 W. Va. 478, 49 S. E. 537.

Where offer is refused.— If a tax purchaser refuses to permit a redemption, not on account of the amount of money tendered, but claiming the validity of his purchase and refusing a tender generally, the amount of the tender, although too small, is immaterial. Mosser *v.* Moore. 56 W. Va. 478, 49 S. E. 537.

90. Thweatt *v.* Black, 30 Ark. 732; Clower *v.* Fleming, 81 Ga. 247, 7 S. E. 278; People *v.* Edwards, 56 Hun (N. Y.) 377, 10 N. Y. Suppl. 335.

Place of tender see Alter *v.* Shepherd, 27 La. Ann. 207.

91. Bolinger *v.* Henderson, 23 Iowa 165.

92. *Colorado.*— Mitchell *v.* Pearson, 34 Colo. 281, 82 Pac. 447.

Mississippi.— Bacon *v.* Conn, Sm. & M. Ch. 348.

New York.— People *v.* Edwards, 56 Hun 377, 10 N. Y. Suppl. 335.

Pennsylvania.— Halsey *v.* Blood, 29 Pa. St. 319.

West Virginia.—Barton *v.* Gilchrist, 19 W. Va. 223.

Wisconsin.— Woodbury *v.* Shackleford, 19 Wis. 55.

See 45 Cent. Dig. tit. "Taxation," § 1436.

93. Evans *v.* Armstrong, 146 N. C. 1, 59 S. E. 165, 125 Am. St. Rep. 436, holding that where a wife's land was listed for taxation by her husband and sold, and no tender to redeem was made by her or by any one for her or claiming under her, a tender by the husband was ineffectual, as he had no estate or interest in the land.

94. Shoemaker *v.* Porter, 41 Iowa 197.

95. *Arkansas.*— Hodges *v.* Harkleroad, 74 Ark. 343, 85 S. W. 779.

Georgia.— Lamar *v.* Sheppard, 84 Ga. 561, 10 S. E. 1084.

Massachusetts.— Hillis *v.* O'Keefe, 189 Mass. 139, 75 N. E. 147; Perry *v.* Lancy, 179 Mass. 183, 60 N. E. 472.

Nebraska.— Douglas *v.* Hayes County, 82 Nebr. 577, 118 N. W. 114.

West Virginia.— Cain *v.* Brown, 54 W. Va. 656, 46 S. E. 579.

United States.— Dubois *v.* Hepburn, 10 Pet. 1, 9 L. ed. 325.

Necessity for tender and waiver.—Where a purchaser at tax-sale refuses to allow redemption to be made, the party wishing to redeem should tender the necessary amount, unless the purchaser waives a formal tender. Douglas *v.* Hayes County, 82 Nebr. 577, 118 N. W. 114. But the refusal of the purchaser to receive anything less than an amount which is larger than that to which he is entitled is a waiver of a formal tender. Douglas *v.* Hayes County, *supra.* Where the owner of part of a tract of land sold for taxes wrote to the person holding title under the judgment, stating that he desired to redeem his interest in the land, and the holder replied that he would be unwilling that a portion only of the land should be redeemed, and no tender of the amount due was made, nor any offer by the owner in his action for the land, there was no wrongful refusal of permission to redeem the land. Blanton *v.* Nunley, (Tex. Civ. App. 1909) 119 S. W. 881.

On bill to redeem.—A bill in equity filed by minors to redeem land from a tax-sale, as provided by law, implies an offer to pay such amount as the law allows to the purchaser, and such tender, not being met by any objection to its terms, or to the fact that no money is actually produced, terminates the estate of the tax purchaser. Bender *v.* Bean, 52 Ark. 132, 12 S. W. 180, 241.

96. Murphy *v.* Smith, 49 Ark. 37, 3 S. W. 891; Boyd *v.* Olvey, 82 Ind. 294; Reeves *v.* Bremer County, 73 Iowa 165, 34 N. W. 794; People *v.* Bleckwenn, 126 N. Y. 310, 27 N. E. 376.

Effect of receiving check in payment see Beck *v.* Meroney, 135 N. C. 532, 47 S. E. 613; Townshend *v.* Shaffer, 30 W. Va. 176, 3 S. E. 586.

Application of rents and profits of lands to redemption money see Lamar *v.* Shepard, 84 Ga. 761, 10 S. E. 1084; Babcock *v.* Bonebrake, 77 Iowa 710, 42 N. W. 559. And see *supra*, XII, C, 1, a.

A judgment creditor cannot redeem from a tax-sale by advancing the amount of his judgment upon the purchaser's bid. Russell *v.* Dodson, 6 Baxt. (Tenn.) 16.

97. Bright *v.* Boyd, 4 Fed. Cas. No. 1,875, 1 Story 478. But *compare* Faxon *v.* Wallace, 101 Mass. 444; Wheelwright *v.* Lamore,

assignee of the tax certificate,[98] unless there is some statutory provision to the contrary.[99] Payment may also be made to any duly authorized agent of the person entitled to receive it.[1] Even where the statute specifically designates a public officer as the person to receive the money, yet a tender or payment to the purchaser himself will be a sufficient compliance with the law, at least in equity;[2] and especially is it proper to deposit the money with the proper public officer when the purchaser cannot be found within the county.[3]

3. Proceedings on Redemption. The law does not generally require any formal application to redeem or any notice of an intention to do so,[4] but upon payment or tender of a sufficient amount to the proper party the redemption is effected without further formality.[5] In some states the holder of the tax title is required to execute a quitclaim deed to the redemptioner, and this right may be enforced judicially.[6] Where the payment is to be made to a public officer, the mere payment and receipt of the money are generally sufficient to effect the redemption, statutes prescribing the reports, entries, or other acts to be done by the officer being merely directory as respects the rights of the redemptioner.[7] When a

56 Fed. 163. And see Faxon *v.* Wallace, 98 Mass. 44 (payment to person in possession and claiming title adversely to the tax purchaser); Miller *v.* Steele, 146 Mich. 123, 109 N. W. 37 (payment to holder of second tax deed erroneously issued on same sale).

98. Thweatt *v.* Black, 30 Ark. 732.

But a tender to the original purchaser is good where the owner has no notice of his having assigned the certificate. Douglass *v.* McKeever, 54 Kan. 767, 39 Pac. 703.

99. See Turner *v.* Smith, (Tex. Civ. App. 1909) 119 S. W. 922, holding that under Rev. St. (1895) art. 5187, providing that the owner may within two years after the sale redeem "by paying or tendering to the purchaser, his heirs or legal representatives, double the amount paid for the land," payment may be made to the purchaser, although he has transferred his interest, and the owners have notice of such transfer, as the word "purchaser," as used in the statute, applies only to one who purchases at the tax-sale, such statutes being liberally construed in favor of the owner, and such right is not affected by a judgment in an action by the owners against the original purchasers in which the right to redeem was conferred on the owners by payment or tender of the amount due the purchasers or those holding under them.

1. Leas *v.* Garverich, 77 Iowa 275, 42 N. W. 194.

Husband as wife's agent for receipt of redemption money see Danser *v.* Johnson, 25 W. Va. 380.

2. Ruddy *v.* Woodbridge Tp., 47 N. J. L. 142; Broughton *v.* Journeay, 51 Pa. St 31; Cameron *v.* Barnhart, 14 Grant Ch. (U. C.) 661. But see *contra*, Poindexter *v.* Doolittle, 54 Iowa 52, 6 N. W. 136; Rich *v.* Palmer, 7 Oreg. 133. And *compare* Banks *v.* Bingham, 3 Yerg. (Tenn.) 312.

Ratification by acceptance of redemption money.— If the holder of the tax certificate accepts and retains the redemption money, he cannot afterward object to any irregularity in respect to the person to whom the payment was made. Hunt *v.* Seymour, 76 Iowa 751, 39 N. W. 909; Byington *v.* Hampton, 13 Iowa 23.

If the money is paid to the treasurer, he holds it subject to the order of the purchaser. State *v.* Snyder, 34 Nebr. 345, 51 N. W. 827.

Payment to deputy.—Where the law directs the money to be paid to the clerk of the board of supervisors, payment to one who was acting as deputy clerk, although not legally appointed such, will effect a valid redemption. Taylor *v.* Rountree, 28 Wis. 391.

3. Prater *v.* Craighead, 118 La. 627, 43 So. 258; Hale *v.* Penn, 25 Gratt. (Va.) 261.

4. Roach *v.* State, 148 Ala. 419, 39 So. 685; Rich *v.* Palmer, 7 Oreg. 133; Coxe *v.* Sartwell, 21 Pa. St. 480.

Redemption by insolvent corporation.—A corporation which is insolvent and in the hands of a receiver must redeem its lands from tax-sale in the same way as an individual owner, namely, by payment to the holder of the tax certificate; and the latter is not required to file his claim with the receiver as a creditor. Rice *v.* Jerome, 97 Fed. 719, 38 C. C. A. 388.

5. Doud *v.* Blood, 89 Iowa 237, 56 N. W. 452; Mathews *v.* Buckingham, 22 Kan. 166; State *v.* Conveyance Register, 113 La. 93, 36 So. 900; Loudon *v.* Spellman, 80 Fed. 592, 26 C. C. A. 13.

6. Elrod *v.* Owensboro Wagon Co., 128 Ga. 361, 57 S. E. 712; Escanaba Timber Land Co. *v.* Rusch, 147 Mich. 619, 111 N. W. 345.

7. Benton *v.* Merrill, 68 N. H. 369, 39 Atl. 257 (filing list of redemptions with the town clerk); Merrimon *v.* Lyman, 124 N. C. 434, 32 S. E. 732; Wyatt *v.* Simpson, 8 W. Va. 394 (filing duplicate of receipt for redemption money). But *compare* Cook *v.* Jones, 80 Ark. 43, 96 S. W. 620, holding that failure to file the receipt of the treasurer with the county clerk, as required by the statute, defeats a redemption otherwise valid.

The treasurer's sales book is evidence to prove the redemption of unseated land sold for taxes. Huzzard *v.* Trego, 35 Pa. St. 9.

redemption has thus been made it can neither be revoked by the party's withdrawing his money,[8] nor canceled or vacated by the receiving officer.[9] But if the right to redeem is disputed or denied, it may generally be determined in proceedings of a summary character before a court or judge on the application of the party offering to redeem,[10] or of the holder of the tax certificate.[11]

4. Certificate of Redemption or Receipt. In those states where the redemption money, instead of being paid directly to the tax purchaser, is deposited with a public officer, it is made by law the duty of that officer,[12] on being satisfied of the right of the party offering to redeem and on receipt of the proper amount,[13] to issue a certificate of redemption setting forth the material facts of the transaction.[14] As a rule, it does not invalidate the redemption if the officer neglects to issue this certificate or withholds it until the time for redemption has expired,[15] but if his duty in the matter is clear he may be compelled by mandamus to perform it.[16] The certificate is competent and even conclusive evidence of the fact of payment of the amount of money receipted for,[17] but is not evidence of title or of the right of the redemptioner or any fact essential thereto.[18] The certificate or a duplicate of it is commonly required to be filed or recorded, but the neglect to do so does not usually defeat the redemption.[19] Under some statutes, however, the receipt of the treasurer for the redemption money is required to be filed with a particular officer, and compliance is necessary to effect a valid redemption.[20]

5. Redemption Money — a. Disposition in General. Money paid to the proper officer of a county or city for the redemption of land does not belong to the munic-

Fees for search see Lantry *v.* Sage, 69 N. J. L. 560, 55 Atl. 34.

8. Levick *v.* Brotherline, 74 Pa. St. 149.

9. Ellsworth *v.* Low, 62 Iowa 178, 17 N. W. 450; People *v.* Wemple, 144 N. Y. 478, 39 N. E. 397.

10. Wade *v.* Drexel, 60 Minn. 164, 62 N. W. 261; People *v.* Wemple, 144 N. Y. 478, 39 N. E. 397; Plumb *v.* Robinson, 13 Ohio St. 298; Masterson *v.* Beasley, 3 Ohio 301; Street *v.* Francis, 3 Ohio 277; State *v.* Jackson, 56 W. Va. 558, 49 S. E. 465.

Actions to redeem in general see *infra*, XII, D.

11. Elliott *v.* Shaffer, 30 W. Va. 347, 4 S. E. 292.

12. See Burke *v.* Cutler, 78 Iowa 299, 43 N. W. 204, holding that a certificate of redemption is good if issued by a person who was *de facto* the deputy of the officer authorized to make it.

13. See State *v.* Cranney, 30 Wash. 594, 71 Pac. 50, as to proof of ownership sufficient to justify officer in issuing certificate of redemption.

14. Rice *v.* Nelson, 27 Iowa 148 (description of property redeemed); Alexander *v.* Ellis, 123 Pa. St. 81, 16 Atl. 770 (variance between treasurer's receipt and assessment as to quantity of land).

15. Roach *v.* State, 148 Ala. 419, 39 So. 685; Corbin *v.* Stewart, 44 Iowa 543. But *compare* Peavy *v.* Wood, 71 Miss. 981, 15 So. 929.

16. Byington *v.* Hamilton, 37 Kan. 758, 16 Pac. 54; People *v.* Edwards, 56 Hun (N. Y.) 377, 10 N. Y. Suppl. 335.

Liability for wrongfully issuing certificate of redemption see Boulton *v.* Ruttan, 2 U. C. Q. B. O. S. 362.

Cancellation of fraudulent certificate at suit of tax purchaser see Brown *v.* Cohn, 88 Wis. 627, 60 N. W. 826.

17. McConnell *v.* Greene, 8 Ill. 590; Burke *v.* Culture, 78 Iowa 299, 43 N. W. 204; Byington *v.* Rider, 9 Iowa 566; Taylor *v.* Steele, 1 A. K. Marsh. (Ky.) 315; Meagher *v.* Sprague, 31 Wash. 549, 72 Pac. 108.

Certificate as evidence of payment of taxes for other years see Knight *v.* Valentine, 34 Minn. 26, 24 N. W. 295; Danforth *v.* McCook County, 11 S. D. 258, 76 N. W. 940, 74 Am. St. Rep. 808; Harmon *v.* Steed, 49 Fed. 779.

18. Henrichsen *v.* Hodgen, 67 Ill. 179; Hardy *v.* Brown, (Tex. Civ. App. 1898) 46 S. W. 385.

Certificate as lien.—A redemption certificate given by the county treasurer does not operate as a lien on the land, where it was issued on a voluntary payment made by one who had then no title to the land or interest in it. Sheets *v.* Paine, 10 N. D. 103, 86 N. W. 117.

19. Cooper *v.* Shepardson, 51 Cal. 298; Wyatt *v.* Simpson, 8 W. Va. 394. *Contra*, Shelton *v.* Dunn, 6 Kan. 12.

20. Seebook *v.* Jones, 80 Ark. 43, 96 S. W. 620, holding that there is no valid redemption, although the provisions of the statutes for redemption from tax-sale are complied with, except that no receipt of the treasurer is filed with the county clerk, as required by Kirby Dig. § 7099, which provides that when so filed it shall operate as an extinguishment of all rights conferred by the sale, and without which receipt the clerk cannot note such redemption or deposit, the date thereof, and by whom made on his record of tax-sales, and sign his name officially thereto, as required by sections 7100, 7102.

ipality or the officer, even temporarily, but to the holder of the tax certificate;[21] and the officer holding it may be compelled by mandamus,[22] or by an action against him personally or on his official bond,[23] to pay over to the person entitled the entire amount in cash,[24] without deduction for fees or other charges,[25] and notwithstanding any conditions attempted to be imposed by the redemptioner.[26]

b. Estoppel by Receipt of Money. Where the holder of the tax certificate accepts and retains the money paid in for redemption, he is estopped from denying the validity of the redemption, in respect to the right of the party redeeming or the sufficiency of the amount, or claiming title to the property under the sale redeemed from,[27] but not from claiming title under a previous or different tax-sale.[28]

c. Recovery Back of Redemption Money Paid. Where taxes are illegally levied or assessed on property and the land is nevertheless sold for their non-payment and the owner pays the amount necessary to redeem, it is generally held that such payment is voluntary and cannot be recovered back in an action against the municipality or the tax purchaser, even though made under protest.[29] There are, however, some decisions to the contrary,[30] and some which hold that an action may lie against the officer receiving the payment, although not against the city or county.[31]

d. Indemnity and Contribution. Where a creditor by mortgage or other lien,

21. Smith *v.* Frankfort, 2 Kan. App. 411, 42 Pac. 1003; Wilson *v.* United Counties, 8 Can. L. J. 135, redemption money cannot be attached by creditors of the county.

Grantee of purchaser.—Where the purchaser at the tax-sale conveys the land before the end of the time for redemption, but retains the certificate and subsequently receives the redemption money, his grantee may maintain assumpsit against him therefor. Scovil *v.* Kelsey, 46 Ill. 344, 95 Am. Dec 415.

22. Murphy *v.* Smith, 49 Ark. 37, 3 S. W. 891; State *v.* Brasie, 96 Minn. 209, 104 N. W. 962.

23. State *v.* McGill, 15 Ind. App. 289, 40 N. E. 1115, 43 N. E. 1016; State *v.* Snyder, 34 Nebr. 345, 51 N. W. 827; Elliott *v.* Shaffer, 30 W. Va. 347, 4 S. E. 292.

Refund of overbid to tax purchaser on redemption.— Liability on collector's bond for failure to refund see Indianola Bank *v.* Dodds, 90 Miss. 767, 44 So. 767.

Limitation of actions as to suits against public officer to recover money paid for redemption see Robinson *v.* Cameron County, 1 Walk. (Pa.) 305; Knudston *v.* Leary, 108 Wis. 203, 84 N. W. 166.

The city or county is not liable to the holder of the tax certificate for the money paid for redemption unless it appears that it was paid into the treasury by the treasurer at the expiration of his term of office. Eaton *v.* Cass County, 11 Nebr. 229, 9 N. W. 60. See Anderson *v.* Cameron, 122 Iowa 183, 97 N. W. 1085.

24. Murphy *v.* Smith, 49 Ark. 37, 3 S. W. 891.

25. Stuart *v.* Walker, 10 Minn. 296. See Emmet County *v.* Griffin, 73 Iowa 163, 34 N. W. 792.

26. Halsey *v.* Blood, 29 Pa. St. 319.

27. Henry *v.* Florida Land, etc., Co., 38 Fla. 269, 21 So. 19; Darrow *v.* Union County, 87 Iowa 164, 54 N. W. 149; Hunt *v.* Seymour, 76 Iowa 751, 39 N. W. 909; Byington *v.* Hampton, 13 Iowa 23; Yanow *v.* Snelling, 34 Nebr. 280, 51 N. W. 820; Cecil *v.* Clark, 44 W. Va. 659, 30 S. E. 216. But see Terrell *v.* Gimmell, 20 Iowa 393.

28. Chard *v.* Holt, 136 N. Y. 30, 32 N. E. 740; Cooper *v.* Bushley, 72 Pa. St. 252. But *compare* Hardin *v.* McGreevy, 69 Ark. 211, 63 S. W. 51.

29. *Dakota.*— Rushton *v.* Burke, 6 Dak. 478, 43 N. W. 815.

Iowa.— Anderson *v.* Cameron, 122 Iowa 183, 97 N. W. 1085; Sears *v.* Marshall County, 59 Iowa 603, 13 N. W. 755.

Kansas.— Phillips *v.* Jefferson County, 5 Kan. 412.

Maine.— Rogers *v.* Greenbush, 58 Me. 395.

Minnesota.— Smith *v.* Schroeder, 15 Minn. 35.

Nebraska.— Foster *v.* Pierce County, 15 Nebr. 48, 17 N. W. 261; Jones *v.* Duras, 14 Nebr. 40, 14 N. W. 537.

Texas.— Galveston City Co. *v.* Galveston, 56 Tex. 486.

Wisconsin.— Rutledge *v.* Price County, 66 Wis. 35, 27 N. W. 819; Powell *v.* St. Croix County, 46 Wis. 210, 50 N. W. 1013.

United States.— Lamborn *v.* Dickinson County, 97 U. S. 181, 24 L. ed. 926.

See 45 Cent. Dig. tit. "Taxation," § 1445.

Voluntary redemption from void sale see *supra*, XII, A, 1, note 79.

30. *Iowa.*— Brownlee *v.* Marion County, 53 Iowa 487, 5 N. W. 610.

Maine.— Joy *v.* Oxford County, 3 Me. 131.

New York.— Remsen *v.* Wheeler, 105 N. Y. 573, 12 N. E. 564.

Ohio.—Woolley *v.* Staley, 39 Ohio St. 354.

Pennsylvania.— Clapp *v.* Pinegrove Tp., 138 Pa. St. 35, 20 Atl. 836, 12 L. R. A. 618.

Wisconsin.— Marsh *v.* St. Croix County, 42 Wis. 355.

See 45 Cent. Dig. tit. "Taxation," § 1445.

31. State *v.* Richardson County, 11 Nebr. 403, 9 N. W. 550; Richardson County *v.* Meyer, 11 Nebr. 357, 9 N. W. 549.

or a third person acting for the owner, redeems land from tax-sale, he is entitled to reimbursement, and may if necessary be subrogated to the rights of the holder of the tax certificate.[32] But this does not apply to one who pays the redemption money in the character of a mere volunteer, not acting on the owner's request or instructions nor having any interest in the land.[33] Where one joint tenant or tenant in common redeems the entire estate, the others must contribute ratably to his reimbursement.[34]

6. Redemption by Agreement of Parties. The statutory method of effecting redemption is not so far exclusive but that the parties in interest, by their mutual agreement, can vary the mode, place, or terms of redemption, as by fixing the price at less than the law would allow in consideration of its earlier payment, or extending the time for redemption beyond the statutory limit.[35] So also, instead of pursuing the usual method, the owner of the property may effect a redemption by taking an assignment of the certificate of purchase,[36] or even a formal conveyance from the tax purchaser or one claiming under him.[37] But it may become

32. *Connecticut.*—Bacon *v.* Curtiss, 2 Root 39.

Indiana.— Gable *v.* Seiben, 137 Ind. 155, 36 N. E. 844. See Cockrum *v.* West, 122 Ind. 372, 23 N. E. 140.

Iowa.— Barr *v.* Patrick, 59 Iowa 134, 12 N. W. 805, the rule does not apply to the owner of land subject to a vendor's lien, where he bought subject to such lien.

Louisiana.— Cambon *v.* Lapene, 40 La. Ann. 557, 4 So. 165; Shannon *v.* Lane, 33 La. Ann. 489.

Mississippi.— See Greene *v.* Williams, 58 Miss. 752.

Nebraska.— Carly *v.* Boner, 70 Nebr. 671, 97 N. W. 1014.

New Jersey.— Fiacre *v.* Chapman, 32 N. J. Eq. 463.

South Carolina.— Garlington *v.* Copeland, 32 S. C. 57, 10 S. E. 616.

See 45 Cent. Dig. tit. "Taxation," § 1446.

33. McKenzie *v.* Beaumont, 70 Nebr. 179, 97 N. W. 225; Koehler *v.* Hughes, 148 N. Y. 507, 42 N. E. 1051.

34. Watkins *v.* Eaton, 30 Me. 529, 50 Am. Dec. 637; Hurley *v.* Hurley, 148 Mass. 444, 19 N. E. 545, 2 L. R. A. 172; Fonseca *v.* Schultz, 7 Manitoba 458. And see *supra*, XII, A, 3, f.

Lien and enforcement.— Where a redemption is made under Burns Annot. St. Ind. (1908) § 812, providing that where one owning an interest redeems the property, he shall have a lien on the several shares of the other owners for their respective shares of redemption money, the redemptioner holds his lien in the nature of an assignee of the original lien-holder, the lien not being removed, but continued, and it can be enforced at any time after expiration of the time for redemption without further demand for repayment. Ellison *v.* Branstrattor, (Ind. App. 1909) 88 N. E. 963, 89 N. E. 513.

35. Henry *v.* Florida Land, etc., Co., 38 Fla. 269, 21 So. 19; Moore *v.* Boagni, 111 La. 490, 35 So. 716; Briggs *v.* Boardman, 135 Mich. 329, 97 N. W. 767; Taylor *v.* Courtnay, 15 Nebr. 190, 16 N. W. 842. And see Holmes *v.* Loud, 149 Mich. 410, 112 N. W. 1109.

Application of rents.—Where one was in possession of the land when it was sold for taxes, and became the purchaser, and the yearly rental of the land was worth considerably more than the taxes due on it at the time it was sold, it was held that the indebtedness of the occupant to the owner of the land for rent operated as an immediate redemption of the land. Gaskins *v.* Blake, 27 Miss. 675. And see *supra*, XII, C, 1, a. But *compare* Spengin *v.* Forry, 37 Iowa 242.

36. *Illinois.*— Houston *v.* Buer, 117 Ill. 324, 7 N. E. 646; Busch *v.* Huston, 75 Ill. 343. See Stubblefield *v.* Borders, 92 Ill. 279.

Iowa.— Manning *v.* Bonard, 87 Iowa 648, 54 N. W. 459; Swan *v.* Whaley, 75 Iowa 623, 35 N. W. 440; Bowman *v.* Eckstein, 46 Iowa 583.

Kansas.— Jones *v.* Miami County, 30 Kan. 278, 1 Pac. 76; Prizer *v.* Taylor, 3 Kan. App. 690, 44 Pac. 902.

Pennsylvania.— Lloyd *v.* Lynch, 28 Pa. St. 419, 70 Am. Dec. 137; Coxe *v.* Sartwell, 21 Pa. St. 480. But see Arthurs *v.* King, 95 Pa. St. 167.

Wisconsin.— Bennett *v.* Keehn, 57 Wis. 582, 15 N. W. 776; Bassett *v.* Welch, 22 Wis. 175. See Little *v.* Edwards, 84 Wis. 649, 55 N. W. 43.

See 45 Cent. Dig. tit. "Taxation," § 1442.

37. Montgomery *v.* Whitfield, 41 La. Ann. 649, 6 So. 224; Faler *v.* McRae, 56 Miss. 227; Steiner *v.* Coxe, 4 Pa. St. 13; Bente *v.* Sullivan, (Tex. Civ. App. 1908) 115 S. W. 350. Where the purchasers of land sold for taxes accepted the amount of the tax with one hundred per cent additional and costs from the holder of the original title, and deeded the land to him on the succeeding day, the purchasers waived all right to question the regularity of the redemption on the ground that the grantee was not the person entitled to redeem. Holmes *v.* Loud, 149 Mich. 410, 112 N. W. 1109.

Claiming benefit of sale to third person.— One whose land has been validly sold for taxes and who has not redeemed or offered to redeem within the time allowed by law, cannot claim the benefit of a sale made to a third person by the tax purchaser, as effecting a redemption, merely because such person falsely represented that he was a cred-

a question whether a given transaction was intended as a redemption or as a purchase of the outstanding title, and this is generally a question of fact for the determination of a jury,[38] except that equity will construe it as a redemption if the person making the payment stood in such a fiduciary relation to the owner or to other persons interested in the property as to make it inequitable for him to acquire a title for his own benefit.[39]

7. Operation and Effect of Redemption. A valid and effective redemption will divest the lien of the tax for which the land was sold and leave it as free as before,[40] although it will not have this effect as to prior delinquent taxes or as to rights growing out of a prior tax-sale.[41] Redemption will also put an end to the inceptive or inchoate title or interest acquired by the purchaser at the sale,[42] and render invalid a tax deed afterward issued to him.[43] It will restore the owner to his title as it stood before the sale;[44] but he will take that title exactly as it was, not acquiring a new title, but restoring at the same time any liens, encumbrances, or conflicting claims which were previously operative against him.[45] Neither will the redemption transfer to the owner any title or interest which the tax purchaser

itor of the tax debtor, and as such entitled and ready to redeem, and thus induced the purchaser to sell. Staples *v.* Mayer, 44 La. Ann. 628, 11 So. 29.

38. Coxe *v.* Wolcott, 27 Pa. St. 154. And see Wilson *v.* Carrico, 155 Ind. 570, 58 N. E. 847 (effect of quitclaim deed from tax purchaser); Arthurs *v.* King, 95 Pa. St. 167 (holding that if the price paid is more than would have been required for a redemption, it will be presumed to be a purchase and not a redemption, and this whether it was paid by a stranger or by the owner of the land). Where, after the sale of a designated homestead for taxes, the owners filed suit to set aside the sale and conveyance, and the suit was compromised within the two years from the date of the sale allowed for redemption, it being agreed that a judgment should be entered for the purchaser, he at the time executing a conveyance to the owners for a consideration small in comparison to the then value of the property, and the owners remained in possession from the date of the designation of the homestead until the husband's death, some four years subsequent to the time of the compromise, the transaction was a redemption. Bente *v.* Sullivan, (Tex. Civ. App. 1908) 115 S. W. 350.

39. Lane *v.* Wright, 121 Iowa 376, 96 N. W. 902, 100 Am. St. Rep. 362; Wheeler *v.* Knupp, 206 Pa. St. 306, 55 Atl. 979; Knupp *v.* Syms, 200 Pa. St. 489, 50 Atl. 210; Phillips *v.* Zerbe Run, etc., Imp. Co., 25 Pa. St. 56; Fisk *v.* Brunette, 30 Wis. 102.

40. Cole *v.* Rice, 74 Conn. 680, 51 Atl. 1083; Lake *v.* Gray, 35 Iowa 44. But *compare* McDougall *v.* Monlezun, 39 La. Ann. 1005, 3 So. 273.

41. Winter *v.* Montgomery, 101 Ala. 649, 14 So. 659; Gray *v.* Coan, 40 Iowa 327; Gray *v.* Coan, 30 Iowa 536. But see Hough *v.* Easley, 47 Iowa 330.

42. Davenport *v.* Sadler, 48 Kan. 311, 29 Pac. 168; Moore *v.* Boagni, 111 La. 490, 35 So. 716; Jamison *v.* Thompson, 65 Miss. 516, 5 So. 107; Goodman *v.* Sanger, 85 Pa. St. 37.

43. Hunt *v.* Seymour, 76 Iowa 751, 39 N. W. 909; Hartman *v.* Anderson, 48 Iowa 309; Corning Town Co. *v.* Davis, 44 Iowa 622; Fenton *v.* Way, 40 Iowa 196; Mitchell *v.* Bond, 84 Miss. 72, 36 So. 148; Stokes *v.* Allen, 15 S. D. 421, 89 N. W. 1023; Allan *v.* Hamilton, 23 U. C. Q. B. 109.

44. Jackson *v.* Neal, 136 Ind. 173, 35 N. E. 1021; Taylor *v.* Steele, 1 A. K. Marsh. (Ky.) 315; Laird *v.* Hiester, 24 Pa. St. 452. And see Millett *v.* Mullen, 95 Me. 400, 49 Atl. 871.

Redemption by pretended owner.— The redemption of land from a tax-sale by one who claimed the right to redeem under a deed from the delinquent owner, but which was forged, will not be effective to convey title either to such redemptioner or those claiming under him. Wood *v.* Welpton, 29 Fed. 405.

Recovery of possession.— Where vacant lands are redeemed from a tax-sale after the issuance of a tax deed, no action is necessary to entitle the legal owner to take possession. Hoffman *v.* Peterson, 123 Wis. 632, 102 N. W. 47.

45. *Georgia.*— Elrod *v.* Owensboro Wagon Co., 128 Ga. 361, 57 S. E. 712; Ivey *v.* Griffin, 94 Ga. 689, 21 S. E. 709.

Kansas.— Shrigley *v.* Black, 66 Kan. 213, 71 Pac. 301.

Louisiana.— Wheeler *v.* McBain, 43 La. Ann. 859, 9 So. 495.

New York.—Willey *v.* Greenfield, 64 N. Y. App. Div. 220, 71 N. Y. Suppl. 1046.

Pennsylvania.—Singer's Appeal, 4 Pa. Cas. 430, 7 Atl. 800.

Texas.— Redemption gives no new title. It simply relieves the land from the sale which has been made, whether the redemption is made before the statutory time has expired or by the consent of the purchaser. Bente *v.* Sullivan, (Civ. App. 1909) 115 S. W. 350.

The action of the commissioner of state lands in allowing a person to redeem land from a tax-sale and in executing a deed to him establishes merely his right to redeem, and is not an adjudication of his ownership of the land in litigation with another person. Meyer *v.* Snell, 89 Ark. 298, 116 S. W. 208.

held independently of the tax-sale.[46] There are cases in which a redemption effected by a third person will inure to the benefit of the owner, as where it is accomplished by a mortgagee or by one of several tenants in common.[47]

8. FAILURE TO REDEEM — a. Effect in General. Failure to redeem from a tax-sale divests the title of the owner under ordinary circumstances;[48] but not where it is brought about by the fraud, deceit, or breach of promise of the tax purchaser.[49] Mere excuses or mistakes, however, are not generally sufficient to relieve the owner from the consequences of failing to exercise his statutory right within the limited time.[50]

b. Fault or Mistake of Officer. It is the duty of the proper officers to impart correct information to those seeking to redeem from tax-sales, and an owner does not lose his right to redeem by permitting the appointed time to elapse, or paying less than the proper amount, or otherwise failing to comply with the directions of the statute, when this was caused by the fraud of a public officer,[51] or by the latter's mistake, negligence, or miscalculation, or by misleading advice given by him.[52] Similarly, a redemption is not defeated by the failure or neglect of the

46. Elrod *v.* Owensboro Wagon Co., 128 Ga. 361, 57 S. E. 712; Terrell *v.* Grimmell, 20 Iowa 393; Cooper *v.* Bushley, 72 Pa. St. 252. But see State *v.* Jackson, 56 W. Va. 558, 49 S. E. 465.

47. **Redemption by tenant in common** see Scott *v.* Brown, 106 Ala. 604, 17 So. 731; Quinn *v.* Kenney, 47 Cal. 147; Jones *v.* Miami County, 30 Kan. 278, 1 Pac. 76; Hurley *v.* Hurley, 148 Mass. 444, 19 N. E. 545, 2 L. R. A. 172. And see *supra*, XII, A, 3, f.

Redemption by mortgagee see Duncan *v.* Smith, 31 N. J. L. 325. And see *supra*, XII, A, 3, b.

Redemption by owner's wife see Reed *v.* Simms, 16 S. W. 268, 13 Ky. L. Rep. 66.

Redemption by stranger as inuring to benefit of true owner see *supra*, XII, A, 3, e.

Purchase by third person from state as redemption for owner's benefit.— Payment of taxes to the auditor and procuring a deed from the state for land sold for taxes before expiration of the two years allowed the owner for redemption operates as a redemption of the land for the owner's benefit, leaving no claim in the state which can mature into a title by failure of the owner to redeem at the expiration of the two years, and creating no title which can be confirmed by any proceeding. Magee *v.* Turner, 92 Miss. 438, 46 So. 544; Shattuck *v.* Daniel, 52 Miss. 834.

48. O'Day *v.* Bowker, 143 Mass. 59, 9 N. E. 16; Lightner *v.* Mooney, 10 Watts (Pa.) 407.

49. *Illinois.*— Converse *v.* Rankin, 115 Ill. 398, 4 N. E. 504.

Iowa.— Leas *v.* Garverich, 77 Iowa 275, 42 N. W. 194; Judd *v.* Mosely, 30 Iowa 423.

Michigan.— Laing *v.* McKee, 13 Mich. 124, 87 Am. Dec. 738.

Pennsylvania.— Rogers *v.* Johnson, 70 Pa. St. 224.

Tennessee.— Ayres *v.* Dozier, (Ch. App. 1899) 52 S. W. 662.

West Virginia.— Koon *v.* Snodgrass, 18 W. Va. 320.

Wisconsin. — Mather *v.* Hutchinson, 25 Wis. 27.

United States.—Wood *v.* Welpton, 29 Fed. 405.

See 45 Cent. Dig. tit. "Taxation," § 1448.

50. Harrison *v.* Owens, 57 Iowa 314, 10 N. W. 674; Finley *v.* Brown, 22 Iowa 538.

Mistake.— See, however, as to excusable mistake saving the right of redemption after the expiration of the limited time. O'Callaghan *v.* Lancy, 187 Mass. 474, 73 N. E. 551; Harney *v.* Charles, 45 Mo. 157.

51. Mather *v.* Hutchinson, 25 Wis. 27.

52. *Illinois.*— Converse *v.* Rankin, 115 Ill. 398, 4 N. E. 504; Gage *v.* Scales, 100 Ill. 218.

Iowa.— Hintrager *v.* Mahoney, 78 Iowa 537, 43 N. W. 522, 6 L. R. A. 50; Iowa Falls, etc., R. Co. *v.* Storm Lake Bank, 55 Iowa 696, 8 N. W. 649; Corning Town Co. *v.* Davis, 44 Iowa 622; Shoemaker *v.* Lacey, 38 Iowa 277; Noble *v.* Bullis, 23 Iowa 559, 92 Am. Dec. 442. But *compare* McGahen *v.* Carr, 6 Iowa 331, 71 Am. Dec. 421, holding that only fraudulent collusion between the treasurer and the purchaser at the tax-sale will avail the owner who has neglected to redeem. And see Ellsworth *v.* Cordrey, 63 Iowa 675, 16 N. W. 211; Gow *v.* Tidrick, 48 Iowa 284; Bolinger *v.* Henderson, 23 Iowa 165.

Kansas.— State *v.* Haughey, 5 Kan. 625.

Kentucky.— Tug River Coal Co. *v.* Brewer, 91 Ky. 402, 15 S. W. 1117, 13 Ky. L. Rep. 1.

Michigan.— O'Connor *v.* Gottschalk, 148 Mich. 450, 111 N. W. 1048; Muirhead *v.* Sands, 111 Mich. 487, 69 N. W. 826.

Minnesota.— Forrest *v.* Henry, 33 Minn. 434, 23 N. W. 848.

New York.— Van Benthuysen *v.* Sawyer, 36 N. Y. 150.

North Carolina.— Beck *v.* Meroney, 135 N. C. 532, 47 S. E. 613.

Pennsylvania.— Dietrick *v.* Mason, 57 Pa. St. 40; Price *v.* Mott, 52 Pa. St. 315; Bubb *v.* Tompkins, 47 Pa. St. 359.

Wisconsin.— Nelson *v.* Churchill, 117 Wis. 10, 93 N. W. 799.

United States.— Martin *v.* Barbour, 140 U. S. 634, 11 S. Ct. 944, 35 L. ed. 546 [*affirming* 34 Fed. 701]. But see Harman *v.* Stead, 59 Fed. 962, 8 C. C. A. 414.

See 45 Cent. Dig. tit. "Taxation," § 1432.

Remedy of purchaser.— If, as a result of the officer's error or miscalculation, the pur-

officer to make the entries or reports, or to do the other acts required of him by law after the payment of the redemption money.[53] But to enable an owner to claim the right to redeem on this ground it must appear that the fault or mistake was exclusively that of the officer, unmixed with any mistake or negligence on the part of the owner himself,[54] and he cannot by his own neglect make it the duty of the officer to furnish him with the required information a second time.[55]

D. Actions to Redeem — 1. Jurisdiction and Right of Action. Where a purchaser at a tax-sale refuses to allow redemption to be made on legal terms, an action to redeem will lie in favor of the owner or party interested.[56] But if the owner of land has failed to exercise his statutory right of redemption from a tax-sale, a bill in equity will not generally lie to effect a redemption unless expressly authorized by statute,[57] or unless there are in the case such circumstances of fraud, accident, or mistake as to bring it under a recognized head of equity jurisdiction,[58] or unless redemption in due season was prevented by failure to give the proper notice,[59] or by the minority or other legal disability of the owner, in which case he may sue in equity for redemption after the removal of the disability.[60] But the complainant must show himself to be free from any laches or negligence,[61] and the suit cannot be maintained unless brought within the time allowed by the statute of limitations,[62] which, however, in the case of persons

chaser does not receive all that he is entitled to, his remedy is against the officer. Dietrick *v.* Mason, 57 Pa. St. 40; Bubb *v.* Tompkins, 47 Pa. St. 359.

53. Burke *v.* Cutler, 78 Iowa 299, 43 N. W. 204; Corbin *v.* Stewart 44 Iowa 543; Fenton *v.* Way, 40 Iowa 196; Byington *v.* Bookwalter, 7 Iowa 512, 74 Am. Dec. 279. But see Harman *v.* Stead, 59 Fed. 962, 8 C. C. A. 414.

54. *Iowa.*— Easton *v.* Doolittle, 100 Iowa 374, 69 N. W. 672; Harrison *v.* Owens, 57 Iowa 314, 10 N. W. 674; Moore *v.* Hamlin, 38 Iowa 482.

Michigan.— Paine *v.* Boynton, 124 Mich. 194, 82 N. W. 816.

Montana.— Conklin *v.* Cullen, 29 Mont. 38, 74 Pac. 72.

Pennsylvania.— Hollinger *v.* Devling, 105 Pa. St. 417; Lamb *v.* Irwin, 69 Pa. St. 436.

Wisconsin.— Menasha Wooden Ware Co. *v.* Harmon, 128 Wis. 177, 107 N. W. 299.

55. Van Benthuysen *v.* Sawyer, 36 N. Y. 150.

56. Douglas *v.* Hayes County, 82 Nebr. 577, 118 N. W. 114.

57. *Arkansas.*—Craig *v.* Flanagin, 21 Ark. 319.

Colorado.—Statton *v.* People, 18 Colo. App. 85, 70 Pac. 157.

Louisiana.— Smeltzer *v.* Routh, 5 Mart. 698.

Massachusetts.— Barker *v.* Mackey, 168 Mass. 76, 46 N. E. 412; Gladwin *v.* French, 112 Mass. 186; Faxon *v.* Wallace, 98 Mass. 44; Mitchell *v.* Green, 10 Metc. 101.

New Jersey.— Culver *v.* Watson, 28 N. J. Eq. 548.

Washington.— Kahn *v.* Thorpe, 43 Wash. 463, 86 Pac. 855.

See 45 Cent. Dig. tit. "Taxation," §§ 1449, 1450.

Cumulative remedies.— The remedy provided by Mass. Pub. St. c. 12, § 66, giving the supreme judicial court equity powers in all cases of sale of real estate for taxes, is cumulative to that by writ of entry. Barker *v.* Mackey, 175 Mass. 485, 56 N. E. 614.

An application for mandamus to compel respondent to receive certain money in payment for taxes and to furnish receipted bills therefor cannot be construed to be an application to redeem from a tax-sale. People *v.* Cady, 56 N. Y. Super. Ct. 180, 6 N. Y. Suppl. 546.

58. *Illinois.*— Converse *v.* Brown, 200 Ill. 166, 65 N. E. 644.

Louisiana.— Taylor *v.* Moise, 52 La. Ann. 2016, 28 So. 237.

Massachusetts.— Clark *v.* Lancy, 178 Mass. 460, 59 N. E. 1034; Widersum *v.* Bender, 172 Mass. 436, 52 N. E. 717.

South Dakota.— Manhattan Trust Co. *v.* Richards Trust Co., 13 S. D. 377, 83 N. W. 425.

Tennessee.— Ayres *v.* Dozier, (Ch. App. 1899) 52 S. W. 662.

59. Hintrager *v.* McElhinny, 112 Iowa 325, 82 N. W. 1008, 83 N. W. 1063.

60. Hodges *v.* Harkleroad, 74 Ark. 343, 85 S. W. 779; Burgett *v.* McCrary, 61 Ark. 456, 33 S. W. 639; Bender *v.* Bean, 52 Ark. 132, 12 S. W. 180, 241; Carroll *v.* Johnson, 41 Ark. 59; Harney *v.* Charles, 45 Mo. 157.

61. Jackson *v.* Boyd, 75 Ark. 194, 87 S. W. 126; Converse *v.* Brown, 200 Ill. 166, 65 N. E. 644; Glos *v.* Evanston, etc., Bldg., etc., Assoc., 186 Ill. 586, 58 N. E. 374; Clark *v.* Lancy, 178 Mass. 460, 59 N. E. 1034.

62. See the statutes of the different states. And see the following cases:

Iowa.— Hintrager *v.* McElhinny, 112 Iowa 325, 82 N. W. 1008, 83 N. W. 1063; Smith *v.* Callanan, 103 Iowa 218, 72 N. W. 513, 42 L. R. A. 482; Rice *v.* Haddock, 70 Iowa 318, 30 N. W. 579.

Louisiana.— Richards *v.* Fuller, 122 La. 847, 48 So. 285.

Massachusetts.— Clark *v.* Lancy, 178 Mass. 460, 59 N. E. 1034; Widersum *v.* Bender, 172

under disabilities, may begin to run only from the removal of the disability.[63] Possession of the property is not necessary to enable one to maintain a bill to redeem from a tax-sale and enjoin the execution of a tax deed.[64]

2. Parties. In some states it is considered that a suit to redeem is essentially *in rem*, so that it is not necessary that any particular person shall be named as a defendant or served with process.[65] But generally it is considered that the purchaser at the tax-sale or his successor in interest is an indispensable party,[66] and that others should be joined who have or claim interests in the premises which may be affected by the decree.[67]

3. Pleading and Evidence. An action to redeem land from a tax-sale is governed, of course, by the general rules of pleading [68] and evidence.[69] The complainant must allege and prove that he was the owner of the property at the time of the tax-sale or had such an interest as would entitle him to redeem,[70] and must allege such facts as to show that his right is not barred by limitations.[71] If the validity of the taxes or the sale is not denied, or if redemption is sought on the ground of the refusal of a sufficient tender, the tender must be kept good, or at least the bill must aver an offer or willingness to pay the required amount.[72] But

Mass. 436, 52 N. E. 717; Gladwin *v.* French, 112 Mass. 186.

Missouri.— Cockerill *v.* Stafford, 102 Mo. 57, 14 S. W. 813.

Nebraska.— Douglas *v.* Hayes County, 82 Nebr. 577, 118 N. W. 114; Clifford *v.* Thun, 74 Nebr. 831, 104 N. W. 1052; Taylor *v.* Courtnay, 15 Nebr. 190, 16 N. W. 842.

South Carolina.—See Smith *v.* Cox, 83 S. C. 1, 65 S. E. 222.

Wisconsin.— Pulford *v.* Whicher, 76 Wis. 555, 45 N. W. 418.

See 45 Cent. Dig. tit. "Taxation," § 1450.

63. Hodges *v.* Harkleroad, 74 Ark. 343, 85 S. W. 779; O'Day *v.* Bowker, 143 Mass. 59, 9 N. E. 16; Goodrich *v.* Florer, 27 Minn. 97, 6 N. W. 452.

64. Glos *v.* Evanston, etc., Bldg., etc., Assoc., 186 Ill. 586, 58 N. E. 374.

65. Plumb *v.* Robinson, 13 Ohio St. 298. See Rawson *v.* Boughton, 5 Ohio 328.

66. Memphis Land, etc., Co. *v.* Clark, (Ark. 1889) 11 S. W. 765; O'Day *v.* Bowker, 143 Mass. 59, 9 N. E. 16.

67. Van Gorder *v.* Hanna, 72 Iowa 572, 34 N. W. 332 (holder of unrecorded assignment of a mortgage not a necessary party); Clark *v.* Lancy, 178 Mass. 460, 59 N. E. 1034 (vendee of owner holding warranty deed); Wood *v.* Speck, 78 Nebr. 435, 110 N. W. 1001 (mortgagor not necessary party to mortgagee's suit to redeem); Clifford *v.* Thun, 74 Nebr. 831, 104 N. W. 1052 (receiver appointed by court of another state).

68. See, generally, Equity, 16 Cyc. 216 *et seq.*; Pleading, 31 Cyc. 1.

Amendment of petition.—Under Nebr. Code Civ. Proc. § 144, providing that the court may, before or after judgment in furtherance of justice, amend any pleading by correcting a mistake therein, it was error to deny a motion, after decree, for leave to amend a petition to redeem from a tax-sale, so as to correctly describe the land, where no injustice would have been done defendant, while a great injustice was done plaintiff by denying it. Banchor *v.* Lowe, 83 Nebr. 801, 120 N. W. 452.

69. See Evidence, 16 Cyc. 821; 17 Cyc. 1.

70. *Arkansas.*—Waterman *v.* Irby, 76 Ark. 551, 89 S. W. 844; McGowan *v.* Smith, 68 Ark. 215, 57 S. W. 256.

Iowa.— Pearsons *v.* American Inv. Co., 83 Iowa 358, 49 N. W. 853; Bowers *v.* Hallock, 71 Iowa 218, 32 N. W. 268.

Kentucky.— Trosper *v.* Collins, 74 S. W. 710, 25 Ky. L. Rep. 113.

Massachusetts.— Hillis *v.* O'Keefe, 189 Mass. 139, 75 N. E. 147.

United States.— Harding *v.* Vaughn, 36 Fed. 742.

See 45 Cent. Dig. tit. "Taxation," § 1451.

Degree of proof required.— It is sufficient to show a *prima facie* title or interest entitling complainant to redeem, and the court will not inquire into its validity. Commings *v.* Wilson, 59 Iowa 14, 12 N. W. 747. And where both parties claim from a common grantor, plaintiff need only show a perfect chain of title from such grantor, without showing title in him. Westerfield *v.* Merchant, 93 Miss. 791, 47 So. 434; McKee *v.* Spiro, 107 Mo. 452, 17 S. W. 1013. It is enough to show such an interest as entitles plaintiff to redeem, although it be less than the absolute ownership of the land. White *v.* Smith, 68 Iowa 313, 25 N. W. 115, 27 N. W. 250.

A bill by a part-owner of land to redeem the whole tract from a sale for taxes need not particularly describe his interest or part ownership. Colver *v.* Watson, 28 N. J. Eq. 548.

Questioning sufficiency of description under which the lands were assessed and sold see Paxton *v.* Ross, 89 Iowa 661, 57 N. W. 428.

71. Langley *v.* Jones, 43 N. J. Eq. 404, 4 Atl. 308.

72. *Arkansas.*— Hodges *v.* Harkleroad, 74 Ark. 343, 85 S. W. 779.

Illinois.— Glos *v.* Evanston, etc., Bldg., etc., Assoc., 186 Ill. 586, 58 N. E. 374; Brophy *v.* Taylor, 30 Ill. App. 261.

New York.— Dikeman *v.* Dikeman, 11 Paige 484.

in that case the complainant cannot have relief on the ground of illegality of the taxes or defects in the proceedings prior to the sale.[73] It is held, however, that on bill to redeem and demurrer thereto the record and exhibits will be considered most favorably for the complainant.[74]

4. Judgment or Decree. The judgment or decree, if for plaintiff,[75] will grant him a proper and reasonable time in which to redeem,[76] charge the purchaser with rents and profits received by him while in possession of the premises,[77] allow him credit for money expended in necessary repairs and improvements,[78] and for all subsequent taxes paid by him,[79] and, if necessary to clear the title, require him to execute a quitclaim deed to plaintiff.[80] But plaintiff cannot generally recover costs unless he has paid or tendered the amount admitted to be due.[81] The judgment or decree in an action of this kind is conclusive on the merits and cannot be impeached collaterally.[82]

5. Action to Redeem After Execution of Deed. After the execution of a tax deed no action to redeem can be maintained unless it is authorized by the statute.[83] Such statutes are in force, however, in some states, and are applicable particularly in the case of infant owners,[84] and in cases where there was no sufficient compliance with the statute requiring notice to redeem.[85] The complainant in such an action must allege and show title in himself or such an interest as gives him the right to redeem,[86] and must allege payment of all taxes due on the premises at the commencement of the suit.[87] The inquiry on the hearing will be confined to the right of redemption and the equities between the parties,[88] and the costs must generally be borne by plaintiff.[89]

Tennessee.— Ayres *v.* Dozier, (Ch. App. 1899) 52 S. W. 662.

United States.— Loudon *v.* Spellman, 80 Fed. 592, 26 C. C. A. 13.

73. McCulloch *v.* Dodge, 6 R. I. 346. See Downey *v.* Laney, 178 Mass. 465, 59 N. W. 1015.

74. Gage *v.* Bailey, 115 Ill. 646, 4 N. E. 777.

75. Where plaintiff tendered and brought into court the amount which he in good faith believed to be due, a judgment in his favor will not be reversed, although the court found a larger sum to be due. Kraus *v.* Montgomery, 114 Ind. 103, 16 N. E. 153. And see Polk *v.* Mitchell, 85 Tenn. 634, 4 S. W. 221. As to dismissal of bill see Foster *v.* Ellsworth, 71 Iowa 262, 32 N. W. 314.

76. Swan *v.* Harvey, 123 Iowa 192, 98 N. W. 641; Giraldin *v.* Howard, 103 Mo. 40, 15 S. W. 383; Dikeman *v.* Dikeman, 11 Paige (N. Y.) 484. But *compare* Waterman *v.* Irby, 76 Ark. 551, 89 S. W. 844, holding that the court cannot fix the time within which the redemption shall be made as that is regulated by statute.

77. Hintrager *v.* McElhinny, 112 Iowa 325, 82 N. W. 1008, 83 N. W. 1063; Smith *v.* Specht, 58 N. J. Eq. 47, 42 Atl. 599.

78. Hintrager *v.* McElhinny, 112 Iowa 325, 82 N. W. 1008, 83 N. W. 1063; Hall *v.* Cardell, 111 Iowa 206, 82 N. W. 503.

79. Smith *v.* Specht, 58 N. J. Eq. 47, 42 Atl. 599.

80. Simonds *v.* Towne, 4 Gray (Mass.) 603.

81. Muskegon Lumber Co. *v.* Myers, 56 Ark. 199, 19 S. W. 602; Elliott *v.* Parker, 72 Iowa 746, 32 N. W. 494.

Costs of foreclosure suit and sale.—Where a decree foreclosing a tax lien was entered against the owner of real estate, a resident of the state, on service by publication so that the foreclosure and sale thereunder were void, it was error, in an action to redeem from a sale under such decree, to require plaintiff to pay the costs of the foreclosure suit and of the sale thereunder. Wagner *v.* Lincoln County, 80 Nebr. 473, 114 N. W. 574.

82. Quinn *v.* Kenney, 47 Cal. 147; Van Gorder *v.* Hanna, 72 Iowa 572, 34 N. W. 332; Harvey *v.* Tyler, 2 Wall. (U. S.) 328, 17 L. ed. 871.

83. Kahn *v.* Thorpe, 43 Wash. 463, 80 Pac. 855. But see Bennett *v.* Southern Pine Co., 123 Ga. 618, 51 S. E. 654, holding that where the officer making the sale executes a deed before the time for redemption has elapsed, the title acquired is a defeasible title subject to the right of the owner to redeem within the statutory time.

84. Callanan *v.* Lewis, 79 Iowa 452, 44 N. W. 892; Witt *v.* Mewhirter, 57 Iowa 545, 10 N. W. 890.

85. Callanan *v.* Lewis, 79 Iowa 452, 44 N. W. 892; Whities *v.* Farsons, 73 Iowa 137, 34 N. W. 782.

86. Busch *v.* Hall, 119 Iowa 279, 93 N. W. 356; Paxton *v.* Boss, 89 Iowa 661, 57 N. W. 428; Lynn *v.* Morse, 76 Iowa 665, 39 N. W. 203.

87. Snider *v.* Smith, 75 Ark. 306, 87 S. W. 624; Medland *v.* Walker, 96 Iowa 175, 64 N. W. 797; Lynn *v.* Morse, 76 Iowa 665, 39 N. W. 203.

88. Serrin *v.* Brush, 74 Iowa 489, 38 N. W. 375; Chace *v.* Durfee, 16 R. I. 248, 14 Atl. 919.

89. Serrin *v.* Brush, 74 Iowa 489, 38 N. W. 375.

XIII. TAX DEEDS.

A. Nature and Necessity — 1. In General. In most states neither a legal nor an equitable title to land sold for taxes will vest in the purchaser until the execution and delivery of the tax deed; until that time he has but a chattel interest or a statutory lien on the land.[90] Where the sale is founded on the judgment or decree of a court, the deed may stand on the same plane with sheriff's deeds in other cases;[91] but generally it is of no validity or effect unless supported by a valid sale.[92]

2. State or County as Purchaser. Where property at a tax-sale is bid in by the state or municipality for want of other bidders, it is not intended to be held permanently but only for the purpose of a resale; and hence it is generally held that no deed to the state or municipality is necessary or proper, unless required or authorized by statute,[93] although in a few states the rule prevails that a deed must be issued, just as in the case of a private purchaser, and without it the title of the former owner is not cut off.[94]

B. Right to Deed and Application Therefor — 1. Right to Deed in General. The purchaser at the tax-sale will generally be entitled to receive a deed for the land at the proper time,[95] provided the issuance of a deed is author-

90. *Arkansas.*— Stephens *v.* Holmes, 26 Ark. 48.

Delaware.— Betts *v.* Dick, 1 Pennew. 268, 40 Atl. 185.

Iowa.— Rice *v.* Bates, 68 Iowa 393, 27 N. W. 286; Williams *v.* Heath, 22 Iowa 519; Crosthwait *v.* Byington, 11 Iowa 532.

Kansas.— Douglass *v.* Dickson, 31 Kan. 310, 1 Pac. 541.

Minnesota.— Brackett *v.* Gilmore, 15 Minn. 245.

Missouri.— Hilton *v.* Smith, 134 Mo. 499, 33 S. W. 464; Donohoe *v.* Veal, 19 Mo. 331.

New Jersey.— Burgin *v.* Rutherford, 56 N. J. Eq. 666, 38 Atl. 854.

Pennsylvania.— Shalemiller *v.* McCarthy, 55 Pa. St. 186.

Vermont.— Wing *v.* Hall, 47 Vt. 182.

West Virginia.— Curtis *v.* Borland, 35 W. Va. 124, 12 S. E. 1113.

See 45 Cent. Dig. tit. "Taxation," § 1489.

Contra.— In some states it is held that the purchaser at tax-sale becomes invested with the title as soon as the time for redemption expires and on performance by him of all that is necessary to entitle him to a deed, although the deed is not yet issued to him. Youngs *v.* Povey, 127 Mich. 297, 86 N. W. 809; Beggs *v.* Paine, 15 N. D. 436, 109 N. W. 322.

91. Bedgood *v.* McLain, 89 Ga. 793, 15 S. E. 670; Pritchard *v.* Madren, 31 Kan. 38, 2 Pac. 691.

92. Citizens' Sav. Bank *v.* Auditor-Gen., 123 Mich. 511, 82 N. W. 214.

Tax deed as constituting claim and color of title see State *v.* Harman, 57 W. Va. 447, 50 S. E. 828. And see Adverse Possession, 1 Cyc. 1095.

93. *Arkansas.*— Doyle *v.* Martin, 55 Ark. 37, 17 S. W. 346; Neal *v.* Andrews, 53 Ark. 445, 14 S. W. 646.

Colorado.— Dimpfel *v.* Beam, 41 Colo. 25, 91 Pac. 1107.

Kansas.— Guittard Tp. *v.* Marshall County, 4 Kan. 388.

Minnesota.— See Stein *v.* Hanson, 99 Minn. 387, 109 N. W. 821.

Mississippi.— Mayson *v.* Banks, 59 Miss. 447.

Wisconsin.— Lombard *v.* White, 76 Wis. 445, 45 N. W. 420; Baldwin *v.* Ely, 66 Wis. 171, 28 N. W. 392.

See 45 Cent. Dig. tit. "Taxation," § 1490.

Repeal of statute authorizing.— 2 Mills' Annot. St. Colo. § 3900, authorizing the issuance of a tax deed to a county upon demand of the county clerk, was superseded by Laws (1893), p. 428, § 1, whereby the right of a county to take a tax deed was taken away, and providing that tax-sale certificates be assigned upon conditions specified, and hence, a tax deed, showing on its face that it was made to a county several months after the law of 1893 went into effect, was a nullity. Dimpfel *v.* Beam, 41 Colo. 25, 91 Pac. 1107.

94. Dyke *v.* Whyte, 17 Colo. 296, 29 Pac. 128; Canole *v.* Allen, 28 Pa. Super. Ct. 244.

95. See, generally, cases cited *infra*, this section.

No statutory provision for tax deeds.— If the statute which authorizes and regulates the sale of land for non-payment of taxes makes no provision whatever for the execution of deeds, none can lawfully be made; and if the collector making the sale gives a deed it conveys no title. Doe *v.* Chunn, 1 Blackf. (Ind.) 336.

Defective tax-sale.—A bidder at a tax-sale which is not conducted in the manner prescribed by law, and at which the land bid for by him is not laid off as directed by statute, cannot be regarded as a purchaser and is not entitled to a deed. Garlington *v.* Copeland, 32 S. C. 57, 10 S. E. 616.

Property in possession of receiver.— It has been held that the fact that lands are in the possession of a receiver of a federal court, as part of the assets of an insolvent corporation,

ized by statute,[96] and provided he is still the holder of a valid and uncanceled certificate of purchase,[97] and has done all that is necessary on his part to entitle him to a conveyance,[98] and provided that the property has not been redeemed.[99] But if the purchaser was disqualified from bidding at the sale, as, where he was under a legal or moral obligation to pay the taxes or stood in such a relation to the owner of the property that it would be a fraud for him to acquire a tax title, he is not entitled to a deed and will not be assisted in procuring it.[1] If the original purchaser has assigned his certificate of purchase, the assignee succeeds to his rights and will be entitled to a deed if his assignor was;[2] and the executor of a deceased purchaser may be considered the "assign" of his decedent within this rule.[3]

2. Conditions and Prerequisites. A tax deed cannot be issued unless there has been a sale of the land.[4] Any provisions of the statute imposing on the tax purchaser the duty of complying with prescribed conditions or obligations before taking out his deed are to be considered mandatory and essential to the validity of the deed.[5] This is particularly the case where the purchaser is required to produce his certificate or give evidence of his right to a deed, to cause the land to be surveyed, to file an affidavit concerning the occupancy or possession of it, or to serve notice to redeem on the owner or others.[6]

does not affect the right of a purchaser of such lands at a tax-sale to demand and receive a deed therefor when entitled thereto under the state laws. Whitehead *v.* Farmers' L. & T. Co., 98 Fed. 10, 39 C. C. A. 34; Rice *v.* Jerome, 97 Fed. 719, 38 C. C. A. 388. *Compare,* however, Johnson *v.* Southern Bldg., etc., Assoc., 132 Fed. 540, holding that a tax deed executed after the property has passed into the custody of a court, by its appointment of a receiver in foreclosure proceedings, is void and does not cut off the receiver's right to redeem.

96. Doe *v* Chunn, 1 Blackf. (Ind.) 336; Sibley *v.* Smith, 2 Mich. 486; Byrd *v.* Phillips, 120 Tenn. 14, 111 S. W. 1109; Smith *v.* Todd, 55 Wis. 459, 13 N. W. 488; Knox *v.* Peterson, 21 Wis. 247. And see Powell *v.* Jenkins, 14 Misc. (N. Y.) 83, 35 N. Y. Suppl. 265. See also *infra,* XIII, C, 1.

Implication.— The power to issue a tax deed is not implied from the power to sell for taxes. The principle that every grant of power carries with it the usual and necessary means for the exercise of that power, and that the power to convey is implied in the power to sell, does not apply in the construction of statutes which are in derogation of the common law, and the effect of which is to divest a citizen of his real estate. Doe *v.* Chunn, 1 Blackf. (Ind.) 336; Sibley *v.* Smith, 2 Mich. 486. *Compare,* however, Bruce *v.* Schuyler, 9 Ill. 221, 46 Am. Dec. 447, where it was said that an auditor, being authorized by statute to sell lands for taxes, and having executed that power, would have been authorized to execute deeds to the purchaser without any express provision on the subject.

97. Ogden *v.* Bemis, 125 Ill. 105, 17 N. E. 55, holding that a mere showing that a tax certificate was canceled as to a part of the property does not deprive the holder of the right to a deed for the balance.

98. Hoffman *v.* Silverthorn, 137 Mich. 60, 100 N. W. 183.

99. State *v.* Evans, 53 Mo. App. 663; People *v.* Hegeman, 14 N. Y. Suppl. 567.

1. *California.*— Mills *v.* Tukey, 22 Cal. 373, 83 Am. Dec. 74.

Florida.— Gamble *v.* Hamilton, 31 Fla. 401, 12 So. 229.

Kansas.— Bowman *v.* Cockrill, 6 Kan. 311.

Wisconsin.— Bennett *v.* Keehn, 57 Wis. 582, 15 N. W. 776; Lybrand *v.* Haney, 31 Wis. 230; Smith *v.* Lewis, 20 Wis. 350; State *v.* Williston, 20 Wis. 228.

United States.— Horner *v.* Dellinger, 18 Fed. 495.

See 45 Cent. Dig. tit. "Taxation," § 1493. And see *supra,* XI, H, 1, 2.

2. Smith *v.* Stephenson, 45 Iowa 645; McCauslin *v.* McGuire, 14 Kan. 234; Kerner *v.* Boston Cottage Co., 126 N. C. 356, 35 S. E. 590; Bell *v.* Orr, 5 U. C. Q. B. O. S. 433.

3. Blakemore *v.* Cooper, 15 N. D. 5, 106 N. W. 566, 125 Am. St. Rep. 574, 4 L. R. A. N. S. 1074. But *compare* Alexander *v.* Savage, 90 Ala. 383, 8 So. 93, holding that no tax deed can be issued to the administrator of a deceased purchaser where the statute only authorizes a deed to the original purchaser or to "the assignee, by written indorsement, of the certificate of purchase."

4. People *v.* Golding, 55 Misc. (N. Y.) 425, 106 N. Y. Suppl. 821, holding that where lands were withdrawn by the controller from sale in a statement that they belonged to the state, a conveyance given without any actual sale was a nullity.

5. Davis *v.* Jackson, 14 W. Va. 227.

Tax leases which show on their face that the statute authorizing their execution has not been complied with are void. Obermeyer *v.* Behn, 123 N. Y. App. Div. 440, 108 N. Y. Suppl. 289.

Foreclosure of certificate where land sold to county.—A deed from the county commissioners for land sold to the county for delinquent taxes without foreclosure of the certificate is a nullity. Smith *v.* Smith, 160 N. C. 81, 63 S. E. 177; Wilcox *v.* Leach, 123 N. C. 74, 31 S. E. 374.

6. Production or exhibition of tax certificate see Duggan *v.* McCullough, 27 Colo. 43,

3. Time of Issuing Deed. In some states a tax deed may issue directly after the sale and without waiting for the owner to redeem;[7] but the usual provision is that the purchaser may apply for and obtain his deed after the expiration of a certain time or when the period allowed for redemption shall have expired.[8] If issued before the expiration of such time it is premature and invalid,[9] and the invalidity is not cured by the fact that the owner allows the remainder of the time to run out without effecting a redemption;[10] and since the owner has the whole of the last day in which to redeem, a tax deed issued on that day is void.[11] It is also a customary provision that the purchaser must claim his deed within a certain number of years after the sale or after the end of the redemption period; and if he neglects to do this, his rights under the sale are lost and he cannot procure a deed;[12] and there is also authority for holding that the purchaser's rights may

59 Pac. 743; Thompson *v.* Merriam, 15 Nebr. 498, 20 N. W. 24; Reed *v.* Merriam, 15 Nebr. 323, 18 N. W. 137.

Filing certificate see Rollins *v.* Wright, 93 Cal. 395, 29 Pac. 58.

Indorsement of assignment of certificate see Morris *v.* Bird, 71 Kan. 619, 81 Pac. 185.

Payment of fees and accrued taxes see Olson *v.* Cash, 98 Minn. 4, 107 N. W. 557; State *v.* Strahl, 17 Wis. 146.

Survey of land see Nowlin *v.* Burwell, 28 Gratt. (Va.) 883; Old Dominion Bldg., etc., Assoc. *v.* Sohn, 54 W. Va. 101, 46 S. E. 222; Orr *v.* Wiley, 19 W. Va. 150.

Affidavit of non-occupancy see Harrell *v.* Enterprise Sav. Bank, 183 Ill. 538, 56 N. E. 63; Lauer *v.* Weber, 177 Ill. 115, 52 N. E. 489; Howe *v.* Genin, 57 Wis. 268, 15 N. W. 161.

Service of notice to redeem see Glos *v.* Gould, 182 Ill. 512, 55 N. E. 369; Smith *v.* Prall, 133 Ill. 308, 24 N. E. 521; Grimes *v.* Ellyson, 130 Iowa 286, 105 N. W. 418; King *v.* Lane, 21 S. D. 101, 110 N. W. 37. See *supra*, XII, B.

Allowing subsequent sale for taxes.— Under a statute providing that where a purchaser of land at a tax-sale allows it to be sold within two years, whether for the same class or for other taxes, his right to a deed shall be postponed, a deed obtained within this limitation is void. Denike *v.* Rourke, 7 Fed. Cas. No. 3,787, 3 Biss. 39.

7. Ives *v.* Lynn, 7 Conn. 505; Baker *v.* Kelley, 77 Minn. 480.

8. See the statutes of the different states.

Persons under disabilities.— The purchaser at the tax-sale will be entitled to his deed at the end of the period allowed for redemption, no redemption having been effected, although the owner, being an infant or a married woman, may have a right to redeem, by statute, after the removal of the disability and hence after the execution of the deed. Wright *v.* Wing, 18 Wis. 45.

9. *Florida.*— Neal *v.* Spooner, 20 Fla. 38.

Illinois.— Maher *v.* Brown, 183 Ill. 575, 56 N. E. 181; Bowman *v.* Wettig, 39 Ill. 416.

Iowa.— Swope *v.* Prior, 58 Iowa 412, 10 N. W. 788.

Kansas.— James *v.* Manning, 79 Kan. 830, 101 Pac. 628; Cable *v.* Coates, 36 Kan. 191, 12 Pac. 931; Gardenhire *v.* Mitchell, 21 Kan. 83.

Michigan.— Fitschen *v.* Olson, 155 Mich. 320, 119 N. W. 3; Griffin *v.* Jackson, 145 Mich. 23, 108 N. W. 438.

Nebraska.— McGavock *v.* Pollack, 13 Nebr. 535, 14 N. W. 659.

Virginia.— Bowe *v.* Richmond, 109 Va. 254, 64 S. E. 51; Yellow Poplar Lumber Co. *v.* Thompson, 108 Va. 612, 62 S. E. 358.

Wisconsin.— Little *v.* Edwards, 84 Wis. 649, 55 N. W. 43.

See 45 Cent. Dig. tit. "Taxation," § 1496.

Deed prematurely dated but delivery postponed.—Although a tax deed is dated before the end of the time for redemption, yet it is valid if it appears from extrinsic evidence that it was not delivered until after the expiration of the period for redemption. David *v.* Whitehead, 13 Wyo. 189, 79 Pac. 19, 923.

10. Griffin *v.* Jackson, 145 Mich. 23, 108 N. W. 438.

11. Brinker *v.* Union Pac., etc., R. Co., (Colo. App. 1898) 55 Pac. 207; Annan *v.* Baker, 49 N. H. 161; Whittlesey *v.* Hoppenyan, 72 Wis. 140, 39 N. W. 355. And see *supra*, XII, A, 4, c.

12. *California.*— Russ *v.* Crichton, 117 Cal. 695, 49 Pac. 1043.

Illinois.— Gage *v.* Reid, 118 Ill. 35, 7 N. E. 127.

Iowa.— Doud *v.* Blood, 89 Iowa 237, 56 N. W. 452; Innes *v.* Drexel, 78 Iowa 253, 43 N. W. 201; Johns *v.* Griffin, 76 Iowa 419, 41 N. W. 59; La Rue *v.* King, 74 Iowa 288, 37 N. W. 374; Ockendon *v.* Barnes, 43 Iowa 615.

Nebraska.— Fuller *v.* Colfax County, 33 Nebr. 716, 50 N. W. 1044; Alexander *v.* Wilcox, 30 Nebr. 793, 47 N. W. 81, 9 L. R. A. 735; D'Gette *v.* Sheldon, 27 Nebr. 829, 44 N. W. 30.

North Carolina.— Southern Immigration Imp., etc., Co. *v.* Rosey, 144 N. C. 370, 57 S. E. 2.

Wisconsin.— Goffe *v.* Bond, 69 Wis. 366, 34 N. W. 236.

See 45 Cent. Dig. tit. "Taxation," § 1496.

Suspension by injunction.— In Illinois this statute of limitations is suspended during any time when the purchaser may be prevented by an injunction or order of court from applying for his deed; but the time begins to run from the dissolution of the injunction or decree reversing it. Gage *v.* Parker, 178 Ill. 455, 53 N. E. 317; Gage *v.* Reid, 118 Ill. 35, 7 N. E. 127.

be waived or lost by laches, so that his long-continued neglect to take out a deed will raise a presumption that he has abandoned his claims and estop him from afterward asserting them.[13]

4. Application For Deed — a. Notice of Application. Where the statute requires the holder of the tax certificate to give to the owner or occupant of the premises written notice of his intention to apply for a deed, this is essential to the validity of the deed, and the notice must be in the form prescribed by the law and served as therein directed.[14] A statutory requirement of this kind may constitutionally apply to the holders of tax certificates made before its enactment, provided they are given a reasonable time in which to comply with the new law,[15] but not in cases where the right to a deed had become fixed and fully vested before the passage of the statute.[16]

b. Proceedings on Application. The procedure on applying for a tax deed and on executing the same is governed by the law in force at the time of the sale rather than at the time of making the deed.[17] In ordinary cases nothing more is

Application to assignees of counties.— In Wisconsin, in the case of one taking an assignment of a tax certificate from a county, the time begins to run from the date of the assignment; this does not mean the time when the county accepts his bid, but the time when the assignment is entered on the records of the county. Hotson *v.* Wetherby, 88 Wis. 324, 60 N. W. 423; Hiles *v.* Cate, 75 Wis. 91, 43 N. W. 802.

Retroactive statute of limitations.— If a later statute restricts the time allowed to the tax purchaser to make application for his deed within narrower limits than those prescribed by the statute in force at the time of the sale, or when the right to a deed accrued, it is not unconstitutional in such retroactive application, provided it grants to persons holding tax certificates at the date of its passage a reasonable length of time thereafter in which to procure deeds. Wheeler *v.* Jackson, 137 U. S. 245, 11 S. Ct. 76, 54 L. ed. 659.

13. Ives *v.* Lynn, 7 Conn. 505; Ockendon *v.* Barnes, 43 Iowa 615; John *v.* Rush, 14 Pa. St. 339; Randolph *v.* Metcalf, 6 Coldw. (Tenn.) 400. But see White *v.* Brooklyn, 122 N. Y. 53, 25 N. E. 243; Hotson *v.* Wetherby, 88 Wis. 324, 60 N. W. 423.

14. *California.*—Wetherbee *v.* Johnston, 10 Cal. App. 264, 101 Pac. 802.

Florida.— Starks *v.* Sawyer, 56 Fla. 596, 47 So. 513.

Illinois.— Mickey *v.* Barton, 194 Ill. 446, 62 N. E. 802; Glos *v.* Boettcher, 193 Ill. 534, 61 N. E. 1017; Hughes *v.* Carne, 135 Ill. 519, 26 N. E. 517; Miller *v.* Pence, 132 Ill. 149, 23 N. E. 1030; Price *v.* England, 109 Ill. 394; Barnard *v.* Hoft, 63 Ill. 341; Harrigan *v.* Peoria County, 106 Ill. App. 218.

North Carolina.—Warren *v.* Williford, 148 N. C. 474. 62 S. E. 697.

South Dakota.— Rector, etc., Co. *v.* Maloney, 15 S. D. 271, 88 N. W. 575.

Virginia.— Kelly *v.* Gwatkin, 108 Va. 6, 60 S. E. 749.

Wisconsin.— Towne *v.* Salentine, 92 Wis. 404, 66 N. W. 395; Howe *v.* Genin, 57 Wis. 268, 15 N. W. 161; Dreutzer *v.* Smith, 56 Wis. 292, 14 N. W. 465; Mead *v.* Nelson, 52 Wis. 402, 8 N. W. 895; Potts *v.* Cooley, 51 Wis. 353, 8 N. W. 153; Scheftels *v.* Tabert, 46 Wis. 439, 1 N. W. 156; State *v.* Hundhausen, 23 Wis. 508.

Sales to state.— Cal. Pol. Code, § 3785, requiring thirty days' notice to be given of the expiration of the time for redemption from a tax-sale or intention to apply for a deed, applies to a sale to the state as well as to a sale to an individual. Wetherbee *v.* Johnston, 10 Cal. App. 264, 101 Pac. 802.

Definiteness of statute.— The provision of Va. Act, April 2, 1902 (Acts (1901–1902), p. 779, c. 658), declaring that no deed shall be made to any purchaser of delinquent lands until after he has given to the person in whose name the land stood at the time of the sale four months' notice of his purchase, must, so far as it relates to notice, be read in connection with Code (1904), § 3207, prescribing the mode of serving notice, and the provision, when so read, is not bad for indefiniteness. Kelly *v.* Gwatkin, 108 Va. 6, 60 S. E. 749.

Effect of assignment for benefit of creditors.—Where a company in whose name land was returned delinquent is in existence, although it has made a general assignment, the purchaser can comply with Va. Act April 2, 1902 (Acts (1901–1902), p. 779, c. 658), providing that a purchaser of delinquent lands shall give notice of his purchase to the person in whose name the real estate stood at the time of the sale. Kelly *v.* Gwatkin, 108 Va. 6, 60 S. E. 749.

15. Oulahan *v.* Sweeney, 79 Cal. 537, 21 Pac. 960, 12 Am. St. Rep. 172; Kelly *v.* Gwatkin, 108 Va. 6, 60 S. E. 749; State *v.* Hundhausen, 24 Wis. 196; Curtis *v.* Whitney, 13 Wall. (U. S.) 68, 20 L. ed. 513; Coulter *v.* Stafford, 56 Fed. 564, 6 C. C. A. 18. And see Robinson *v.* Cedar Rapids First Nat. Bank, 48 Iowa 354; Ford *v.* Durie, 8 Wash. 87, 35 Pac. 595, 1082.

16. Rollins *v.* Wright, 93 Cal. 395, 29 Pac. 58; Kearns *v.* McCarville, 24 Wis. 457; State *v.* Hundhausen, 23 Wis. 508.

17. Ford *v.* Durie, 8 Wash. 87, 35 Pac. 595, 1082. And see Stein *v.* Hanson, 99 Minn. 387, 109 N. W. 821; and *infra*, XIII, F, 5.

required of the purchaser than that he shall satisfy the officer of his right to receive the deed, but this he must do in the mode pointed out by the statute.[18]

5. Restraining Issuance of Deed — a. In General. Any person who shows a sufficient title to or interest in the property in question [19] may apply to a court of competent jurisdiction [20] for an injunction to restrain the execution or delivery of a tax deed, on the ground that it would create a cloud on his title,[21] provided the vice or defect relied on does not appear on the face of the proceedings.[22] Relief of this kind may be granted where the tax was illegal or the assessment entirely invalid,[23] although not on the ground of an excessive valuation or of mere errors or irregularities in the prior proceedings.[24] So also an injunction may be granted

18. Hartman *v.* Reid, 17 Colo. App. 407, 68 Pac. 787; Thompson *v.* Merriam, 15 Nebr. 498, 20 N. W. 24; Reed *v.* Merriam, 15 Nebr. 323, 18 N. W. 137.

Authority of court to appoint commissioner to execute tax deed see Davis *v.* Jackson, 14 W. Va. 227.

Examination and approval by court.— Under Ark. Acts (1881), p. 70, § 15, prescribing the form of the deed to be executed by the commissioner in proceedings to enforce the payment of overdue taxes, and providing that, after confirmation of the sale and the expiration of the period for redemption, the commissioners shall execute a deed to the purchaser in the manner provided by law in cases of sales in other chancery proceedings. and Kirby Dig. § 6323, providing that a conveyance by a commissioner shall not pass any right until it has been examined and approved by the court, which approval shall be indorsed on the conveyance and recorded with it, where an order duly entered of record confirmed the sale and directed the commissioner to execute a deed, a conveyance by the commissioner without the examination and approval of the court gave the purchaser an equitable title, and the former owners were not entitled to have the sale and conveyance canceled on account of the defect. St. Louis, etc., Lumber, etc., Co. *v.* Godwin, 85 Ark. 372, 108 S. W. 516.

19. Johnson *v.* Brett, 64 Iowa 162, 19 N. W. 895; Harlow *v.* Gow, 44 Iowa 533; Jackson *v.* Kittle, 34 W. Va. 207, 12 S. E. 484.

Mortgagee.— That a mortgagee, although not in possession, has such an interest as entitles him to maintain a bill to enjoin the execution of a tax deed of the premises see Horn *v.* Garry, 49 Wis. 464, 5 N. W. 897. But *compare* Cook *v.* Miller, 26 Ill. App. 421, where it appeared that the mortgagee had ample security on other property and an injunction was refused.

20. Carroll *v.* Perry, 5 Fed. Cas. No. 2,456, 4 McLean 25, as to jurisdiction of federal courts. And see Bitzer *v.* Becke, (Iowa 1902) 89 N. W. 193, holding that if the court finds that complainant is entitled to no relief, it has no jurisdiction to continue a temporary restraining order.

21. *Arkansas.*— Hare *v.* Carnall, 39 Ark. 196.

California.— San Diego Realty Co. *v.* Cornell, 150 Cal. 637, 89 Pac. 603.

New Jersey.— Morris Canal, etc., Co. *v.* Jersey City, 12 N. J. Eq. 227.

New York.— Sanders *v.* Yonkers, 63 N. Y. 489, it must be made to appear that there is a determination to create a cloud on the title; it is not sufficient to show a merely speculative or potential danger.

West Virginia.— Koon *v.* Snodgrass, 18 W. Va. 320.

Canada.—Schultz *v.* Alloway, 10 Manitoba 221.

See 45 Cent. Dig. tit. "Taxation," § 1500.

Inadequacy of remedy at law see Schultz *v.* Alloway, 10 Manitoba 221.

22. Burr *v.* Hunt, 18 Cal. 303; Howell *v.* Buffalo, 2 Abb. Dec. (N. Y.) 412. *Compare* Schultz *v.* Alloway, 10 Manitoba 221.

23. *Arkansas.*—Worthen *v.* Badgett, 32 Ark. 496.

Illinois.— Gage *v.* Parker, 103 Ill. 528.

New Hampshire.— Brooks *v.* Howland, 58 N. H. 98.

Wisconsin.— Schettler *v.* Ft. Howard, 43 Wis. 48; Marsh *v.* Clark County, 42 Wis. 502; Siegel *v.* Outagamie County, 26 Wis. 70; Foote *v.* Milwaukee, 18 Wis. 270; Mitchell *v.* Milwaukee, 18 Wis. 92; Mills *v.* Johnson, 17 Wis. 598.

Canada.— Schultz *v.* Alloway, 10 Manitoba 221.

See 45 Cent. Dig. tit. "Taxation," § 1500.

Assessment fairly proportioned.— If it appears that the assessment upon plaintiff was no more than his proportionate share, and the objection does not go to the ground-work of the tax itself, the bill will be dismissed for want of equity. Perley *v.* Dolloff, 60 N. H. 504.

Neglect of legal remedies.— Failure to appear before board of equalization to complain of unjust assessment as ground for refusing injunction see Kittle *v.* Shervin, 11 Nebr. 65, 7 N. W. 861. Although plaintiff ought to have applied to the city council to cancel the sale before the filing of the bill, to give the city an opportunity of considering whether or not it would do so, this objection should not prevail after the city has put in an answer setting up the validity of the sale. Schultz *v.* Alloway, 10 Manitoba 221.

24. Moore *v.* Wayman, 107 Ill. 192; Stebbins *v.* Challiss, 15 Kan. 55; Challiss *v.* Atchison County, 15 Kan. 49; Lawrence *v.* Killam, 11 Kan. 499; Hallo *v.* Helmer, 12 Nebr. 87, 10 N. W. 568; Mills *v.* Johnson, 17 Wis. 598; Bond *v.* Kenosha, 17 Wis. 284; Kellogg *v.* Oshkosh, 14 Wis. 623; Warden *v.* Fond Du Lac County, 14 Wis. 618.

where the tax-sale was invalidated by disobedience to the directions of the law as to its conduct, by selling for an excessive amount, or by fraudulent combinations preventing competition,[25] or where the conduct of the purchaser has been fraudulent, in deceiving or misleading the owner as to the fact or time of redemption.[26] Both the tax purchaser, or holder of the certificate, and the officer whose duty it is to execute the deed should be made parties to the injunction suit.[27]

b. Payment or Tender. On the principle of doing equity, the complainant in an action of this kind should as a rule offer to reimburse the *bona fide* purchaser to the extent of the taxes lawfully chargeable upon the land and all legal costs;[28] and the court may order such payment as a condition to granting the relief asked.[29]

6. Mandamus to Compel Execution of Deed. If the property has not been redeemed,[30] and the purchaser or holder of the tax certificate has done all that is required of him in the way of giving notice,[31] and otherwise has a clear right to receive a deed, mandamus may issue to compel the proper officer to execute such a deed,[32] or to issue a second and perfect deed where the one originally given was

Curative statute.— Under a statute providing that no "sale" of land for taxes shall be impeached because of the addition of interest to the taxes, a bill will not lie to prevent the execution of a tax deed in pursuance of a sale on the ground that such an addition had been made, as the statute is not confined in its operation to a sale completed by conveyance, but makes valid the sale itself. Schultz *v.* Winnipeg, 6 Manitoba 269.

25. Axtell *v.* Gerlach, 67 Cal. 483, 8 Pac. 34; Glos *v.* Swigart, 156 Ill. 229, 41 N. E. 42; Gage *v.* Graham, 57 Ill. 144. See Dudley *v.* Gilmore, 35 Kan. 555, 11 Pac. 398.

Failure to exhaust personalty.—An injunction to restrain the execution of a tax deed will not be granted merely because the owner of the premises had personal property at the time, out of which the tax could have been collected. St. Clair *v.* McClure, 111 Ind. 467, 12 N. E. 134; Harrison *v.* Haas, 25 Ind. 281.

26. Allen *v.* Evans, 7 Ariz. 359, 64 Pac. 412; Holt *v.* King, 54 W. Va. 441, 47 S. E. 362; Koon *v.* Snodgrass, 18 W. Va. 320.

27. Siegel *v.* Outagamie County, 26 Wis. 70.

Failure to join tax purchaser.—As a judgment binds only parties and privies, a tax purchaser who is not made a party to an action to enjoin the treasurer from issuing a tax deed, and does not appear in the action, is not bound by the decree. Helphrey *v.* Redick, 21 Nebr. 80, 31 N. W. 256.

28. *Arkansas.*— Hare *v.* Carnall, 39 Ark. 196.

California.— San Diego Realty Co. *v.* Cornell, 150 Cal. 637, 89 Pac. 603; Grant *v.* Cornell, 147 Cal. 565, 82 Pac. 193, 109 Am. St. Rep. 173.

Illinois.— Moore *v.* Wayman, 107 Ill. 192.

Indiana.— Logansport *v.* Case, 124 Ind. 254, 24 N. E. 88; Morrison *v.* Jacoby, 114 Ind. 84, 14 N. E. 546, 15 N. E. 806; Rowe *v.* Peabody, 102 Ind. 198, 1 N. E. 353.

Nebraska.— Iler *v.* Colson, 8 Nebr. 331, 1 N. W. 248.

Wisconsin.— Hart *v.* Smith, 44 Wis. 213; Mills *v.* Johnson, 17 Wis. 598; Bond *v.* Kenosha, 17 Wis. 284; Hersey *v.* Milwaukee County, 16 Wis. 185, 82 Am. Dec. 713.

See 45 Cent. Dig. tit. "Taxation," § 1502.

No taxes due.— It is not necessary that the bill shall contain an offer to pay the purchaser the amount paid by him at the sale, and subsequently for taxes and otherwise, where the bill shows that there are no legal arrears of taxes. Schultz *v.* Alloway, 10 Manitoba 221.

29. San Diego Realty Co. *v.* Cornell, 150 Cal. 637, 89 Pac. 603; Alexander *v.* Merrick, 121 Ill. 606, 13 N. E. 190; Harrigan *v.* Peoria County, 106 Ill. App. 218; Iler *v.* Colson, 8 Nebr. 331, 1 N. W. 248; Hart *v.* Smith, 44 Wis. 213.

30. State *v.* Harper, 26 Nebr. 761, 42 N. W. 764; State *v.* Cranney, 30 Wash. 594, 71 Pac. 50.

31. Hintrager *v.* Traut, 69 Iowa 746, 27 N. W. 807; State *v.* Gayhart, 34 Nebr. 192, 51 N. W. 746; People *v.* New York, 10 Wend. (N. Y.) 393.

32. *Florida.*— State *v.* Bradshaw, 35 Fla. 313, 17 So. 642.

Illinois.— Maxcy *v.* Clabaugh, 6 Ill. 26.

Iowa.— Jones *v.* Welsing, 52 Iowa 220, 2 N. W. 1106.

Kansas.— Ide *v.* Finneran, 29 Kan. 569; Clippinger *v.* Tuller, 10 Kan. 377.

South Carolina.— State *v.* Lancaster, 46 S. C. 282, 24 S. E. 198.

Washington.— State *v.* Cranney, 30 Wash. 594, 71 Pac. 50.

Wisconsin.— State *v.* Winn, 19 Wis. 304, 88 Am. Dec. 689.

See 45 Cent. Dig. tit. "Taxation," § 1503.

Purchaser rescinding sale.—A tax purchaser cannot have mandamus to compel the issuance of a deed to him where it is shown that the money paid by him was tendered back to him on the same day and was accepted, and that the lands were afterward conveyed to other persons before he again tendered the money. Aitcheson *v.* Huebner, 90 Mich. 643, 51 N. W. 634.

Purchaser's assignee.—An assignee of the certificate of purchase may be entitled to compel the execution of a deed by mandamus, but not where he neglected to file or record the assignment and meanwhile a tax deed

so defective as to convey no title.[33] On an application of this kind it is not necessary for the petitioner to show the regularity of all the previous proceedings;[34] but the writ will not be granted if the record shows fatal defects or irregularities,[35] or if an action is pending in another court to have the tax proceedings declared void.[36]

C. Making and Issuance of Deed and Recording — 1. Authority and Duty to Make [37] — a. Officer Executing Deed. The officer who shall execute tax deeds is designated in the statutes, and no other can perform this office.[38] But if the deed is made by the proper officer, a trifling misdescription in the style of his office is not material.[39] An officer *de facto* may make the deed, but not one who has not taken the oath of office;[40] and if the same person fills two offices it must appear that both lawfully devolved upon him and that he is qualified in both.[41] Where land duly assessed and delinquent is thrown into a new county by a change of boundaries, both the sale and the deed should be made by the proper officers of the old county.[42]

b. Deputies. A deputy to a public officer, authorized by law to perform the duties of the office, may sign and execute a tax deed in cases where that duty would devolve upon his principal;[43] and in case he is authorized to act for his

was issued to the heirs of the original purchaser. Territory *v.* Perea, 6 N. M. 531, 30 Pac. 928.

Limitation of actions.— The statute of limitations begins to run against an application for mandamus to compel the execution of a tax deed from the date when the purchaser becomes entitled to demand it. Hintrager *v.* Traut, 69 Iowa 746, 27 N. W. 807.

33. McCready *v.* Sexton, 29 Iowa 356, 4 Am. Rep. 214; State *v.* Winn, 19 Wis. 304, 88 Am. Dec. 689. See Klokke *v.* Stanley, 109 Ill. 192. See *infra*, XIII, C, 1, d.

Form of deed.—Where the statute does not require the officer to give the purchaser any particular form of deed or to embody in it any particular recitals, mandamus will not lie to secure a deed in a particular form or with particular recitals. State *v.* Mantz, 62 Mo. 258. Nor will this writ issue to compel the officer to make a deed containing recitals which are contradicted by the return of the tax-sale. Hewell *v.* Lane, 53 Cal. 213.

34. Kidder *v.* Morse, 26 Vt. 74. See Bosworth *v.* Webster, 64 Cal. 1, 27 Pac. 786.

35. Bryson *v.* Spaulding, 20 Kan. 427.

36. State *v.* Patterson, 11 Nebr. 266, 9 N. W. 82.

37. **Ministerial act.**— The officers' act in issuing a tax deed is ministerial. Fitschen *v.* Olson, 155 Mich. 320, 119 N. W. 3; Griffin *v.* Jackson, 145 Mich. 23, 108 N. W. 438.

38. See the statutes of the different states. And see the following cases:

Alabama.— Roach *v.* State, 148 Ala. 419, 39 So. 685.

Arkansas.— Jacks *v.* Dyer, 31 Ark. 334.

California.— Lemoore Bank *v.* Fulgham, 151 Cal. 234, 90 Pac. 936.

Illinois.— Bruce *v.* Schuyler, 9 Ill. 221, 46 Am. Dec. 447.

Louisiana.— Pickett *v.* Southern Athletic Club, 47 La. Ann. 1605, 18 So. 634; Barrow *v.* Wilson, 39 La. Ann. 403, 2 So. 809.

Michigan.— Sibley *v.* Smith, 2 Mich. 486.

North Dakota.— Fisher *v.* Betts, 12 N. D. 197, 96 N. W. 132.

Pennsylvania.— Ross *v.* Marcey, 1 Pa. L. J. Rep. 205.

South Carolina.— Sullivan *v.* Ware, 11 S. C. 330.

Texas.— Bryan *v.* Harvey, 11 Tex. 311.

Vermont.— Biddlecom *v.* Farwell, 1 Tyler 5.

Washington.— Ward *v.* Huggins, 7 Wash. 617, 32 Pac. 740, 1015, 36 Pac. 285. Tax deed for city taxes to be executed by the city treasurer see Silverstone *v.* Norton, 50 Wash. 531, 97 Pac. 663.

West Virginia.— Baxter *v.* Wade, 39 W. Va. 281, 19 S. E. 404.

Wisconsin.— Bemis *v.* Weege, 67 Wis. 435, 30 N. W. 938; Mead *v.* Nelson, 52 Wis. 402, 8 N. W. 895; Swain *v.* Comstock, 18 Wis. 463.

United States.— Felch *v.* Travis, 92 Fed. 210; Marx *v.* Hanthorn, 30 Fed. 579.

Canada.— Nanton *v.* Villeneuve, 10 Manitoba 213; McLellan *v.* Assiniboia Municipality, 5 Manitoba 127; McDonald *v.* McDonnell, 24 U. C. Q. B. 424; Bryant *v.* Hill, 23 U. C. Q. B. 96.

See 45 Cent. Dig. tit. "Taxation," § 1491.

No officer designated by statute.— If the statute relating to tax-sales makes no provision for the execution of the deed by any officer, none can have implied authority to make it and hence no valid deed can be made. Doe *v.* Chunn, 1 Blackf. (Ind.) 336. See Fisher *v.* Betts, 12 N. D. 197, 96 N. W. 132; Byrd *v.* Phillips, 120 Tenn. 14, 111 S. W. 1109.

39. Bulger *v.* Moore, 67 Wis. 430, 30 N. W. 713.

40. Payson *v.* Hall, 30 Me. 319.

41. Payson *v.* Hall, 30 Me. 319; Chrisman *v.* Hough, 146 Mo. 102, 47 S. W. 941; Spurlock *v.* Dougherty, 81 Mo. 171.

42. Haseltine *v.* Simpson, 58 Wis. 579, 17 N. W. 332; Austin *v.* Holt, 32 Wis. 478.

43. *California.*— Mills *v.* Tukey, 22 Cal. 373, 83 Am. Dec. 74.

Michigan.— Fells *v.* Barbour, 58 Mich. 49, 24 N. W. 672; Westbrook *v.* Miller, 56 Mich. 148, 22 N. W. 256.

principal only in the event of the latter's death, absence, or disability, it will be presumed in support of the deed that the contingency existed which empowered him to make it.[44] It is generally held that a deed so made should be executed in the name of the principal "by" the deputy,[45] although in some states the deputy may execute it in his own name.[46]

c. Expiration of Term of Office. In some states it is considered that the power to sell and convey land for the non-payment of taxes is entire, and that the officer who made the sale is the one who must execute the deed, although meanwhile he has gone out of office, and that his successor cannot execute it.[47] In other states, however, it is held that the deed is to be made by the person who is the incumbent of the office at the time of its execution, whether the sale was made by him or by another.[48]

d. Second Deed on Same Sale. A treasurer or collector who has made a tax deed so irregular or imperfect as not to pass title may, where the law has been substantially complied with, execute a second or other deed correct in fact and regular in form so as to invest the purchaser with the legal title, and if he refuses, he may be compelled by mandamus.[49] But this authority cannot be used to cure defects in the anterior proceedings or misstate the prior proceedings;[50]

Mississippi.— McRee *v.* Swalm, 81 Miss. 679, 33 So. 503.

Virginia.— Hobbs *v.* Shumates, 11 Gratt. 516; Rockbold *v.* Barnes, 3 Rand. 473.

West Virginia.— Davis *v.* Living, 32 W. Va. 174, 9 S. E. 84.

Wisconsin.— Gilkey *v.* Cook, 60 Wis. 133, 18 N. W. 639.

United States.—Marx *v.* Hanthorn, 30 Fed. 579.

See 45 Cent. Dig. tit. "Taxation," § 1492.

No authority for deputy.— If a sheriff, acting as tax collector, has no statutory authority to appoint a deputy tax collector, a deed executed by a sheriff as tax collector by his under-sheriff conveys no title. Lathrop *v.* Brittain, 30 Cal. 680.

44. Westbrook *v.* Miller, 56 Mich. 148, 22 N. W. 256; Huey *v.* Van Wie, 23 Wis. 613.

45. Whitford *v.* Lynch, 10 Kan. 180; Ward *v.* Waters, 63 Wis. 39, 22 N. W. 844; Huey *v.* Van Wie, 23 Wis. 613; Marx *v.* Hanthorn, 30 Fed. 579.

46. Drennan *v.* Herzog, 56 Mich. 467, 23 N. W. 170; Westbrook *v.* Miller, 56 Mich. 148, 22 N. W. 256; McRee *v.* Swalm, 81 Miss. 679, 33 So. 503.

47. *Arkansas.*— Gavin *v.* Ashworth, 77 Ark. 242, 91 S. W. 303.

Illinois.— Bestor *v.* Powell, 7 Ill. 119.

Kentucky.— Graves *v.* Hayden, 2 Litt. 61.

Maryland.— McMahon *v.* Crean, 109 Md. 652, 71 Atl. 995; Taylor *v.* Forrest, 96 Md. 529, 54 Atl. 111.

North Carolina.— Southern Immigration Imp., etc., Co. *v.* Rosey, 144 N. C. 370, 57 S. E. 2. This is by force of the statute. Before its enactment, it was held that a sheriff or tax collector could not make the deed after the expiration of his term of office. Taylor *v.* Allen, 67 N. C. 346.

United States.— Cummings *v.* Cummings, 91 Fed. 602.

Canada.— Farmers', etc., Loan Co. *v.* Conklin, 1 Manitoba 181.

See 45 Cent. Dig. tit. "Taxation," § 1492.

48. Hoffman *v.* Bell, 61 Pa. St. 444; Hightower *v.* Freedle, 5 Sneed (Tenn.) 312; Marx *v.* Hanthorn, 30 Fed. 579; McMillan *v.* McDonald, 26 U. C. Q. B. 454; Bell *v.* McLean, 18 U. C. C. P. 416; Ferguson *v.* Freeman, 27 Grant Ch. (U. C.) 211. But *compare* Sheafer *v.* Mitchell, 109 Tenn. 181, 71 S. W. 86.

49. Duggan *v.* McCullough, 27 Colo. 43, 59 Pac. 743; Gould *v.* Thompson, 45 Iowa 450; McCready *v.* Sexton, 29 Iowa 356, 4 Am. Rep. 214; Douglass *v.* Nuzum, 16 Kan. 515; Clippinger *v.* Tuller, 10 Kan. 377; Lain *v.* Shepardson, 23 Wis. 224; Woodman *v.* Clapp, 21 Wis. 350; State *v.* Winn, 19 Wis. 304, 88 Am. Dec. 689. See Klokke *v.* Stanley, 109 Ill. 192. *Contra*, Baldwin *v.* Merriam, 16 Nebr. 199, 20 N. W. 250. See *supra*, XIII, B, 6.

Where first deed valid.—Where the treasurer has executed to the purchaser a valid deed, he cannot divest the title thus conveyed by the execution of a second deed, as his authority to make a second deed extends only to the case of the insufficient execution of the first. Bulkley *v.* Callanan, 32 Iowa 461.

Loss or destruction of first deed.—Where the statutory provision relating to the issuance of a second deed requires it to recite the loss or destruction of the first deed, this fact must not only be recited but must actually exist before a second deed can lawfully be made or have any effect as a conveyance. Burroughs *v.* Goff, 64 Mich. 464, 31 N. W. 273.

Limitation of time for applying.— A statute providing that no new deed shall be issued after three years from the recording of the insufficient or defective one cannot apply retroactively to persons whose deeds had been recorded more than three years before its enactment. Eaton *v.* North, 32 Wis. 303.

50. Gould *v.* Thompson, 45 Iowa 450; Hewitt *v.* Storch, 31 Kan. 488, 2 Pac. 556. While the county treasurer has the right to issue a second tax deed to cure defects in the

nor can a second or other deed so operate as to divest rights which have accrued prior to its execution.[51]

2. Property to Be Included — a. In General. The tax deed must show that the property conveyed is the same as that assessed, sold, and described in the certificate of sale; if it purports to convey more or other land, it is not valid.[52]

b. Conveyance of Several Tracts in One Deed. Where separate parcels of land are separately sold at the same tax-sale to the same purchaser, there is no legal objection to their being united in one conveyance;[53] and this may be done, although they belong to different owners,[54] and even where they are sold to different purchasers, provided the grantee in the deed has lawfully acquired all the different certificates of purchase.[55] Also it is held that where the same person buys a large number of lots at the same sale, he may require that they shall all be included in one deed, or he may take a separate deed for each lot at his option.[56]

3. Execution, Acknowledgment, and Delivery — a. Execution — (i) *In General.* The manner and form of the execution of a tax deed must conform at least substantially to the directions of the statute; and failing in this it is not valid.[57] This rule is applied to the requirement of its being signed by a particular

first, such authority cannot be exercised to overcome, by false recitations in such second deed, the record on which it is based. Keller *v.* Hawk, 19 Okla. 407, 91 Pac. 778. Under Kirby Dig. Ark. § 7116, providing that the clerk of the county court of the county in which tracts of land were sold for taxes, upon being satisfied from the records in his office that the tracts were sold separately instead of together as recited in the deed, shall cancel it and issue another reciting that each tract was sold separately, where the records in the clerk's office do not show how several tracts of land were sold, a corrected deed reciting that certain tracts were sold separately is void. Chatfield *v.* Iowa, etc., Land Co., 88 Ark. 395, 114 S. W. 473.

51. Vestal *v.* Morris, 11 Wash. 451, 39 Pac. 960.

52. *Iowa.*— Fitch *v.* Casey, 2 Greene 300.

Maine.—Where the tax deed purports to convey the whole of a tract of land and does not state that it was necessary to sell the whole, or where the recitals show that such a course was not necessary, the deed is void and passes no title to the grantee. Ladd *v.* Dickey, 84 Me. 190, 24 Atl. 813; Brookings *v.* Woodin, 74 Me. 222; Allen *v.* Morse, 72 Me. 502; Briggs *v.* Johnson, 71 Me. 235.

Minnesota.— Flint *v.* Webb, 25 Minn. 93.

Virginia.— Hale *v.* Penn, 25 Gratt. 261.

West Virginia.— If the report of the sheriff shows that an entire tract of land was sold at the tax-sale, a deed of a part of the tract is void. Jones *v.* Dils, 18 W. Va. 759.

See 45 Cent. Dig. tit. "Taxation," § 1517.

53. *Colorado.*— Barnett *v.* Jaynes, 26 Colo. 279, 57 Pac. 703; Crisman *v.* Johnson, 23 Colo. 264, 47 Pac. 296, 58 Am. St. Rep. 224; Waddingham *v.* Dickson, 17 Colo. 223, 29 Pac. 177. *Compare* Emerson *v.* Shannon, 23 Colo. 274, 47 Pac. 302, 58 Am. St. Rep. 232.

Florida.— State *v.* Jordan, 36 Fla. 1, 17 So. 742.

Kansas.— Gibson *v.* Shiner, 74 Kan. 728, 88 Pac. 259; Dodge *v.* Emmons, 34 Kan. 732, 9 Pac. 951; Watkins *v.* Inge, 24 Kan. 612. But *compare* Cartwright *v.* McFadden, 24 Kan. 662, holding that a tax deed purporting to convey several lots of land, which are in two bodies separated by a street, is void.

Massachusetts.— Pejepscut Proprietors *v.* Ransom, 14 Mass. 145.

Michigan.— Jackson *v.* Mason, 143 Mich. 355, 106 N. W. 1112.

Mississippi.— Ray *v.* Murdock, 36 Miss. 692.

Missouri.— Allen *v.* White, 98 Mo. 55, 10 S. W. 881.

Nebraska.— Towle *v.* Holt, 14 Nebr. 221, 15 N. W. 203.

South Dakota.— Bennett *v.* Darling, 15 S. D. 1, 86 N. W. 751.

See 45 Cent. Dig. tit. "Taxation," § 1518.

54. Stieff *v.* Hartwell, 35 Fla. 606, 17 So. 899.

55. Hunt *v.* Stinson, 101 Wis. 556, 77 N. W. 901.

56. Silliman *v.* Frye, 6 Ill. 664.

57. *Florida.*— Smith *v.* Philips, 51 Fla. 327, 41 So. 527.

Indiana.—Wine *v.* Woods, 158 Ind. 388, 63 N. E. 759; Gabe *v.* Root, 93 Ind. 256.

Massachusetts.— Tilson *v.* Thompson, 10 Pick. 359.

Missouri.— Dunlap *v.* Henry, 76 Mo. 106; Dalton *v.* Fenn, 40 Mo. 109; Stierlin *v.* Daley, 37 Mo. 483.

Nebraska.— Sutton *v.* Stone, 4 Nebr. 319.

Wisconsin.—Haseltine *v.* Donahue, 42 Wis. 576.

See 45 Cent. Dig. tit. "Taxation," § 1523.

Date.— A date is not essential to the validity of a tax deed, as it takes effect from its delivery. McMichael *v.* Carlyle, 53 Wis. 504, 10 N. W. 556.

Deed made on Sunday.— A tax deed is not void because dated on a Sunday, if otherwise issued at the proper time. Schiffer *v.* Douglass, 74 Kan. 231, 86 Pac. 132.

Effect of death of owner.—Where the land was sold for taxes in the lifetime of the owner, a deed afterward executed is not void because of his death in the mean time. Curry *v.* Fowler, 3 A. K. Marsh. (Ky.) 504.

officer,[58] to the correct description of the official character in which he executes it,[59] and to its attestation by witnesses if that is required by law.[60]

(II) *SEAL.* A tax deed not under seal or not sealed as the law requires is void; and whether the statute directs it to be under the seal of the county or municipality or the official seal of the treasurer or other officer or under his private seal, there can be no substitution, but the law must be strictly obeyed or the deed will be invalid.[61] It has sometimes been ruled that a scroll may take the place of a seal under a requirement of this kind; [62] but the tendency is to require a literal compliance with a statute directing the deed to bear the official seal of the municipality or the officer,[63] in so much that where a statute required tax deeds

Revenue stamps on tax deeds see Delorme *v.* Ferk, 24 Wis. 201; Sayles *v.* Davis, 22 Wis. 225; Hampton *v.* Rouse, 22 Wall. (U. S.) 263, 22 L. ed. 755.

Order or approval by court.— Approval by judge equivalent to approval by court; and deed not affected by failure to enter order of approval on record see Jacks *v.* Kelley Trust Co., 90 Ark. 548, 120 S. W. 142.

Execution in duplicate.— Validity of tax-sale not affected by failure to execute tax deed in duplicate as required by statute see Nanton *v.* Villeneuve, 10 Manitoba 213.

58. Reddick *v.* Long, 124 Ala. 260, 27 So. 402; Daniel *v.* Taylor, 33 Fla. 636, 15 So. 313; Denegre *v.* Buchanan, 47 La. Ann. 1559, 18 So. 501; Rainey *v.* Lamb Hardwood Lumber Co., 91 Miss. 690, 45 So. 367. And see *supra*, XIII, C, 1, a.

A statement, at the beginning of a tax deed, that "I, Lent I. Rice, the tax collector of the county of Tallahatchie, did" sell the land, is not a signature of the deed. Rainey *v.* Lamb Hardwood Lumber Co., 91 Miss. 690, 45 So. 367.

59. Callahan *v.* Davis, 125 Mo. 27, 28 S. W. 162; Bulger *v.* Moore, 67 Wis. 430, 30 N. W. 713; Scheiber *v.* Kaehler, 49 Wis. 291, 5 N. W. 817; Knox *v.* Huidekoper, 21 Wis. 527.

60. Keech *v.* Enriquez, 28 Fla. 597, 10 So. 91; Stewart *v.* Mathews, 19 Fla. 752; Bowen *v.* Striker, 100 Ind. 45; Wood *v.* Meyer, 36 Wis. 308. But *compare* Lowe *v.* Martin, 79 Ala. 366; Dillingham *v.* Brown, 38 Ala. 311; McCauslin *v.* McGuire, 14 Kan. 234; Stebbins *v.* Guthrie, 4 Kan. 353.

61. *Illinois.*— Gage *v.* Starkweather, 103 Ill. 559.

Kansas.— Reed *v.* Morse, 51 Kan. 141, 32 Pac. 900. See Clarke *v.* Tilden, 72 Kan. 574, 84 Pac. 139.

Kentucky.— Shortridge *v.* Catlett, 1 A. K. Marsh. 587; Doty *v.* Beasley, 2 Bibb 14.

Mississippi.— Day *v.* Day, 59 Miss. 318. See Bowers *v.* Chambers, 53 Miss. 259.

Nebraska.—Reed *v.* Merriam, 15 Nebr. 323, 18 N. W. 137; Sutton *v.* Stone, 4 Nebr. 319.

North Carolina.— Patterson *v.* Galliher, 122 N. C. 511, 29 S. E. 773.

Pennsylvania.— Watson *v.* Jones, 85 Pa. St. 117; Watt *v.* Gilmore, 2 Yeates 330. But *compare* Huston *v.* Foster, 1 Watts 477; Herron *v.* Murphy, 10 Pa. Cas. 280, 13 Atl. 958.

Wisconsin.— Laughlin *v.* Kieper, 125 Wis. 161, 103 N. W. 264; Dreutzer *v.* Smith, 56 Wis. 292, 14 N. W. 465; Dolan *v.* Trelevan, 31 Wis. 147; Knox *v.* Huidekoper, 21 Wis. 527; Woodman *v.* Clapp, 21 Wis. 350; Sturdevant *v.* Mather, 20 Wis. 576; Eaton *v.* North, 20 Wis. 449.

See 45 Cent. Dig. tit. "Taxation," § 1524.

Contra.— Stockand *v.* Hall, 45 Wash. 197, 88 Pac. 123. Under S. D. Rev. Pol. Code, § 2213, requiring a tax deed to be executed by the county treasurer under his hand, etc., but not expressly requiring a seal, and Rev. Civ. Code, § 1243, abolishing all distinctions between sealed and unsealed instruments, and section 939, providing that the absence of the grantor's seal shall not impair the grant, it was held that, as the statute abolished distinctions between sealed and unsealed instruments, except as to the statute of limitations, the absence of a seal from a tax deed did not affect its validity, although the form prescribed by statute contained the word "seal" after the treasurer's name, the deed not being affected in any way by any statute of limitations. Northwestern Mortg. Trust Co. *v.* Levtzow, 23 S. D. 562, 122 N. W. 600.

Seal of county clerk used as seal of county.— A tax deed bearing the county clerk's certificate that he affixed the official seal of the county, and having affixed a seal reading, "County Clerk Seal Logan County, Kansas," is not void because not attested by the official seal of the county; the clerk's seal having been, with one exception, used by him and his predecessors for years to attest their official acts. Jackson *v.* McCarron, 77 Kan. 776, 95 Pac. 402.

Use of old seal after change of name.— Where the old seal of a municipality had been used for a tax deed, while the name of the municipality had been changed by the statutory addition of the word "Rural," but the municipality had adopted and used the old seal, this objection was held not fatal to the deed. Nanton *v.* Villeneuve, 10 Manitoba 213; McRae *v.* Corbett, 6 Manitoba 426.

62. Brown *v.* Cohn, 85 Wis. 1, 54 N. W. 1101, 20 L. R. A. 182; Putney *v.* Cutler, 54 Wis. 66, 11 N. W. 437.

63. Gue *v.* Jones, 25 Nebr. 634, 41 N. W. 555; Bendexen *v.* Fenton, 21 Nebr. 184, 31 N. W. 685; Seaman *v.* Thompson, 16 Nebr. 546, 20 N. W. 857; Shelley *v.* Towle, 16 Nebr. 194, 20 N. W. 251; Sullivan *v.* Merriam, 16 Nebr. 157, 20 N. W. 118; Hendrix *v.* Boggs, 15 Nebr. 469, 20 N. W. 28; Deputron *v.* Young, 134 U. S. 241, 10 S. Ct. 539, 33 L. ed. 923.

to be executed under the official seal of the county treasurer, but made no provision for a seal for that officer, it was held that no valid tax deeds could be issued until the defect should be remedied.[64]

b. Acknowledgment. Even without a statutory direction to that effect it is probable that tax deeds, to be valid, must be acknowledged like other conveyances,[65] and where the law expressly requires their acknowledgment they are entirely ineffectual without it.[66] The acknowledgment must be made by the officer executing the deed,[67] and must be taken by the particular officer designated by law for that purpose,[68] and must be made at the time appointed by law or in due season.[69] It is also necessary that the form or certificate of acknowledgment shall follow the statutory direction, if any, or otherwise contain a correct recital of such facts as are essential to a good acknowledgment.[70]

c. Delivery. The delivery of a tax deed to the person entitled is essential to the vesting of title in him or the exercise of rights in the character of an owner.[71]

64 Frank *v.* Scoville, 48 Nebr. 169, 66 N. W. 1113; Dickey *v.* Paterson, 45 Nebr. 848, 64 N. W. 244; McCauley *v.* Ohenstein, 44 Nebr. 89, 62 N. W. 232; Thomsen *v.* Dickey, 42 Nebr. 314, 60 N. W. 558; Larson *v.* Dickey, 39 Nebr. 463, 58 N. W. 167, 42 Am. St Rep 595. *Contra*, State *v.* Olson, 45 Wash. 689, 89 Pac. 151; Spokane Terminal Co. *v.* Stanford, 44 Wash. 45, 87 Pac. 37.

65. Tilson *v.* Thompson, 10 Pick. (Mass.) 359; Dalton *v.* Fenn, 40 Mo. 109; Stierlin *v.* Daley, 37 Mo. 483; State *v.* Harman, 57 W. Va. 447, 50 S. E. 828. *Contra*, Morgan Park *v.* Knopf, 210 Ill. 453, 71 N. E. 340; Thompson *v.* Schuyler, 7 Ill. 271; Langley *v.* Batchelder, 69 N. H. 566, 46 Atl. 1085; Halsted *v.* Silberstein, 196 N. Y. 1, 89 N. E. 443 [*reversing* 122 N. Y. App. Div. 909, 107 N. Y. Suppl. 1129].

A properly acknowledged tax deed is admissible in evidence without further proof. Wetherbee *v.* Dunn, 32 Cal. 106; Foust *v.* Ross, 1 Watts & S. (Pa.) 501.

66. *Alabama.*— Stubbs *v.* Kohn, 64 Ala. 186

Missouri.— Graton *v.* Holliday-Klotz Land, etc., Lumber Co., 189 Mo. 322, 87 S. W. 37.

Pennsylvania.— Oswer *v.* Sheasley, 219 Pa. St. 390, 68 Atl. 965.

Virginia.— Leftwich *v.* Richmond, 100 Va. 164, 40 S. E. 651.

Wyoming.— Matthews *v.* Blake, 16 Wyo. 116, 92 Pac. 242, 27 L. R. A. N. S. 339.

Manner of acknowledgment.— A deed for land of a non-resident sold for taxes may be acknowledged and recorded as other conveyances of land, but it need not be acknowledged in the same manner as deeds for land sold under execution. Hogins *v.* Brashears, 13 Ark. 242.

67. Ward *v.* Walters, 63 Wis. 39, 22 N. W. 844; Scheiber *v.* Kachler, 49 Wis. 291, 5 N. W. 817; Huey *v.* Van Wie, 23 Wis. 613.

68. Waddingham *v.* Dickson, 17 Colo. 223, 29 Pac. 177; Douglass *v.* Carmean, 49 Kan. 674, 31 Pac. 371; Douglass *v.* Bishop, 45 Kan. 200, 25 Pac. 628, 10 L. R. A. 857; Graton *v.* Holliday-Klotz Land, etc., Lumber Co., 189 Mo. 322, 87 S. W. 37; Dunlap *v.* Henry, 76 Mo. 106; Bird *v.* McClelland, etc., Mfg. Co., 45 Fed. 458. Under Wyo. Rev. St. (1887) § 3832 (Rev. St. (1899) § 1897), declaring that tax deeds shall be acknowledged by the county treasurer before the clerk of a district court, a tax deed acknowledged before a notary public is void on its face. Matthews *v.* Blake, 16 Wyo. 116, 92 Pac. 242, 27 L. R. A. N. S. 339.

Acknowledgment in open court in Pennsylvania see Osmer *v.* Sheasley, 219 Pa. St. 390, 68 Atl. 965; Lee *v.* Newland, 164 Pa. St. 360, 30 Atl. 258.

Fees of officer taking acknowledgment see Heney *v.* Pima County, 2 Ariz. 257, 14 Pac. 299, 2 Ariz. 443, 17 Pac. 263; Morgan Park *v.* Knopf, 111 Ill. App. 571 [*affirmed* in 210 Ill. 453, 71 N. E. 340].

69. Edmondson *v.* Granberry, 73 Miss. 723, 19 So. 676 (deed not void because acknowledgment not taken for more than two years after sale); Avery *v.* Rose, 15 N. C. 549 (acknowledgment at later term of court than that appointed by law); Herron *v.* Murphy, 10 Pa. Cas. 280, 13 Atl. 958 (acknowledgment not void because taken after treasurer's term of office had expired).

70. Smith *v.* Watson, 124 Ala. 339, 27 So. 254; Parker *v.* Boutwell, 119 Ala. 297, 24 So. 860; Jackson *v.* Kirksey, 110 Ala. 547, 18 So. 304; East Tennessee, etc., R. Co. *v.* Davis, 91 Ala. 615, 8 So. 349; Kelley *v.* McBlain, 42 Kan. 764, 22 Pac. 994; Schleicher *v.* Gatlin, 85 Tex. 270, 20 S. W. 120; Laughlin *v.* Kieper, 125 Wis. 161, 103 N. W. 264; Milledge *v.* Coleman, 47 Wis. 184, 2 N. W. 77; Wilson *v.* Henry, 40 Wis. 594.

A mistake in the date of the acknowledgment of a tax deed will neither invalidate it nor preclude it from being recorded. Yorty *v.* Paine, 62 Wis. 154, 22 N. W. 137.

71. Hulick *v.* Scovil, 9 Ill. 159; McVey *v.* Carr, 159 Mo. 648, 60 S. W. 1034; Lockwood *v.* Gehlert, 53 Hun (N. Y.) 15, 6 N. Y. Suppl. 20 [*affirmed* in 127 N. Y. 241, 27 N. E. 812]. But *compare* Powell *v.* Jenkins, 14 Misc. (N. Y.) 83, 35 N. Y. Suppl. 265.

Delivery to "legal representatives."— Under N. Y. Laws (1885), p. 698, c. 405, § 6, providing for the delivery of a tax deed to the purchaser, his "legal representatives" or assigns, a deed is properly delivered to the sole devisee of the purchaser's estate, the quoted term not being necessarily confined

As in the case of other deeds, both the fact and the time of delivery of a tax deed may be shown by parol evidence.[72]

4. Recording or Registration — a. Necessity in General. In some states a tax deed becomes null and void if not recorded within a limited time.[73] And although in some states deeds of this kind are not considered to be within the recording acts relating to conveyances in general,[74] yet it is more usually held that such deeds must be recorded, even though the law does not expressly require it, in order to be available as evidence,[75] to support ejectment or other actions by the grantee,[76] or to protect him against the rights and claims of third persons.[77] If the deed is recorded prematurely, that is, before the end of the time allowed for redemption, it is of no avail; but if the time expires without any redemption being made, such recording then becomes good and need not be repeated.[78]

b. Sufficiency and Effect. A tax deed duly and properly recorded imparts constructive notice of what it contains to all parties concerned.[79] But this is not the case where the deed, although actually spread upon the record, was not entitled to be recorded for lack of compliance with the directions of the statute as to its execution or acknowledgment.[80] Nor does the recording of a tax deed cure jurisdictional defects in the prior proceedings,[81] or validate a deed which is void on its face.[82] The index is an essential part of the record, and the deed cannot be deemed recorded until properly indexed.[83] In some states the

to executors, administrators, etc. Rosenblum *v.* Eisenberg, 123 N. Y. App. Div. 896, 108 N. Y. Suppl. 350.

72. Ellis *v.* Clark, 39 Fla. 714, 23 So. 410; Pigott *v.* O'Halloran, 37 Minn. 415, 35 N. W. 4.

73. See the statutes of the different states. And see Humphrey *v.* Yost, 10 Kan. App. 324, 62 Pac. 550; St. Paul *v.* Louisiana Cypress Lumber Co., 116 La. 585, 40 So. 906. See also Halsted *v.* Silberstein, 196 N. Y. 1, 89 N. E. 443 [*reversing* 122 N. Y. App. Div. 909, 107 N. Y. Suppl. 1129].

74. Patterson *v.* Langston, 69 Miss. 400, 11 So. 932; Goodman *v.* Sanger, 91 Pa. St. 71.

75. Tilson *v.* Thompson, 10 Pick. (Mass.) 359; Dalton *v.* Fenn, 40 Mo. 109; Hewitt *v.* Week, 59 Wis. 444, 18 N. W. 417; Hewitt, Jr. *v.* Butterfield, 52 Wis. 384, 9 N. W. 15. But *compare* Fells *v.* Barbour, 58 Mich. 49, 24 N. W. 672.

76. Meyer *v.* Fountain, 34 La. Ann. 987; Hewitt *v.* Week, 59 Wis. 444, 18 N. W. 417; Lombard *v.* Culbertson, 59 Wis. 433, 18 N. W. 399. But *compare* Kansas State Agricultural College *v.* Linscott, 30 Kan. 240, 1 Pac. 81.

77. Maddox *v.* Arthur, 122 Ga. 671, 50 S. E. 668; Sintes *v.* Barber, 78 Miss. 585, 29 So. 403. But see Baker *v.* Towles, 11 La. 432.

78. Davis *v.* Hurst, (Tex. 1890) 14 S. W. 610.

79. Smith *v.* Jones, 37 Kan. 292, 15 Pac. 185.

Place of record.— A copy of a treasurer's deed from the registry in the treasurer's office is not evidence; it should be recorded in the recorder's office. Townsen *v.* Wilson, 9 Pa. St. 270.

Sufficiency of record.— See Laughlin *v.* Kieper, 125 Wis. 161, 103 N. W. 264 (variance between deed and record); Washburn Land Co. *v.* Chicago, etc., R. Co., 124 Wis. 305, 102 N. W. 546 (erasures in printed forms of records); St. Croix Land, etc., Co. *v.* Ritchie, 73 Wis. 409, 41 N. W. 345, 1064 (omissions in certificate of record).

Correcting imperfect record see Hotson *v.* Wetherby, 88 Wis. 324, 60 N. W. 423.

Marking deed "Filed."— Under Miss. Code (1906), § 4338, requiring the tax collector to file all conveyances of land to individuals in the chancery clerk's office, to remain there for two years from the sale unless the land be sooner redeemed, it is not essential that the clerk shall mark a deed "Filed" in order that it may remain a memorial by which it may be ascertained whether the time for redemption has expired, since the time for redemption is two years from the day of sale, and not from the day of filing; the purpose of the statutory requirement being merely to lodge the deed in proper custody. Brannon *v.* Pringle, 94 Miss. 215, 47 So. 674.

80. Keech *v.* Enriquez, 28 Fla. 597, 10 So. 91; Townsend *v.* Edwards, 25 Fla. 582, 6 So. 212; Whittlesey *v.* Hoppenyan, 72 Wis. 140, 39 N. W. 355; Hill *v.* Gordon, 45 Fed. 276.

81. Jackson *v.* Bailey, 19 S. D. 594, 104 N. W. 268.

82. Glos *v.* Bain, 223 Ill. 343, 79 N. E. 111; Lander *v.* Bromley, 79 Wis. 372, 48 N. W. 594.

83. Chippewa River Land Co. *v.* J. L. Gates Land Co., 118 Wis. 345, 94 N. W. 37, 95 N. W. 954; Hiles *v.* Atlee, 80 Wis. 219, 49 N. W. 816, 27 Am. St. Rep. 32; Hall *v.* Baker, 74 Wis. 118, 42 N. W. 104; St. Croix Land, etc., Co. *v.* Ritchie, 73 Wis. 409, 41 N. W. 345, 1064; Lombard *v.* Culbertson, 59 Wis. 433, 18 N. W. 399; Oconto County *v.* Jerrard, 46 Wis. 317, 50 N. W. 591; International L. Ins. Co. *v.* Scales, 27 Wis. 640; Bardon *v.* Land, etc., Imp. Co., 157 U. S. 327, 15 S. Ct. 650, 39 L. ed. 719 [*reversing*

statute requires that the notice of expiration of the time for redemption and proof of service thereof shall be recorded with the tax deed.[84]

5. Cancellation by Public Officers. In some states authority is given by law to certain public officers to cancel a tax deed upon the discovery of fatal defects in the prior proceedings,[85] or where, the deed having been made directly after the sale and remaining in official custody, the owner effects a redemption within the time allowed by law.[86] If such officer unwarrantably refuses to cancel the deed in a case where his duty is plain, he may be constrained by mandamus.[87]

D. Form and Contents — 1. In General — a. Sufficiency in General.[88] If no form for tax deeds is prescribed by statute, such a deed must be tested by the rules of the common law and must be sufficient to constitute a valid and operative conveyance under those rules.[89] Having regard to its peculiar nature, it must in particular disclose the power and authority under which it is made,[90] and recite the prior proceedings far enough to evidence and support that authority,[91] and in this respect its recitals must correspond at least substantially with the record of the proceedings.[92]

b. Following Statutory Form.[93] Where the statute prescribes the particular form of a tax deed, it is sometimes held that the form becomes substance and must be strictly pursued or the deed will be void;[94] but in most states it is held, and in some states expressly provided, that a substantial compliance with the statutory form will be sufficient, so that the deed need not be in the exact words of the statute.[95] It must, however, contain all the recitals directed by the statute to

45 Fed. 706]; Coleman *v.* Peshtigo Lumber Co., 30 Fed. 317.

84. See Halsted *v.* Silberstein, 196 N. Y. 1, 89 N. E. 443 [*reversing* 122 N. Y. App. Div. 909, 107 N. Y. Suppl. 1129]; People *v.* Ladew, 189 N. Y. 355, 190 N. Y. 543, 82 N. E. 431, 1092 [*reversing* 108 N. Y. App. Div. 356, 95 N. Y. Suppl. 1150]. And see *supra*, XII, B, 7, c, (I) text and note 52.

85. See the statutes of the different states. And see Hayward *v.* Auditor-Gen., 147 Mich. 591, 111 N. W. 190; Hoffman *v.* Auditor-Gen., 136 Mich. 689, 100 N. W. 180; Cole *v.* Auditor-Gen., 132 Mich. 262, 93 N. W. 890; State Land Office Com'r *v.* Auditor-Gen., 131 Mich. 147, 91 N. W. 153; Youngs *v.* Auditor-Gen., 118 Mich. 550, 77 N. W. 5.

86. Adams *v.* Mills, 71 Miss. 150, 14 So. 462.

87. Hoffman *v.* Auditor-Gen., 136 Mich. 689, 100 N. W. 180.

88. Particular recitals see *infra*, XIII, D, 2.

89. Guffey *v.* O'Reiley, 88 Mo. 418, 57 Am. Rep. 424; State *v.* Mantz, 62 Mo. 258. And see Cowan *v.* Skinner, 52 Fla. 486, 42 So. 730, holding that a tax deed is not void on its face when it gives the name of the grantee, the numbers of the tax certificates, the dates of the tax-sales, and the name in which the property was assessed, the amount paid for the certificates, a description of the land, beside other recitals prescribed by statute, and the execution is in the prescribed form.

Quitclaim deed. — Where the statute requires no greater formality in a deed from the state than in one from a private individual, a quitclaim deed conveys a good title to land sold for taxes. Mann *v.* Carson, 120 Mich. 631, 79 N. W. 941.

Deed conveying "right, title, and interest." — A tax deed purporting to convey to the purchaser "all the right, title, and interest" of the state in and to the premises, and not purporting to convey anything more, passes no title. Ketchem *v.* Mullinix, 92 Mo. 118, 4 S. W. 447; Einstein *v.* Gay, 45 Mo. 62. But see Cruzen *v.* Stephens, 123 Mo. 337, 27 S. W. 557, 45 Am. St. Rep. 549.

Attaching tax execution. — Where the sheriff is directed, on making a tax deed, to attach to it a duplicate of the tax execution, the deed is not invalidated by his attaching the original instead of a duplicate. Dickson *v.* Burckmyer, 67 S. C. 526, 46 S. E. 343.

Effect of defective deed. — Although a tax deed may be too defective to carry the title, still it may be sufficient evidence of the assignment to enable the grantee to recover taxes paid. Pitkin *v.* Reibel, 104 Mo. 505, 16 S. W. 244.

90. Madland *v.* Benland, 24 Minn. 372; Cogel *v.* Raph, 24 Minn. 194.

91. Loring *v.* Groomer, 142 Mo. 1, 43 S. W. 647.

92. Cragin *v.* Henry, 40 Iowa 158; Hewitt *v.* Storch, 31 Kan. 488, 2 Pac. 556; Sheafer *v.* Mitchell, 109 Tenn. 181, 71 S. W. 86.

93. Particular recitals see *infra*, XIII, D, 2.

94. Hubbell *v.* Campbell, 56 Cal. 527; Grimm *v.* O'Connell, 54 Cal. 522; Hill *v.* Leonard, 5 Ill. 140; Boardman *v.* Bourne, 20 Iowa 134.

95. *Arkansas.* — Bonnell *v.* Roane, 20 Ark. 114.

California. — Phillips *v.* Cox, 7 Cal. App. 308, 94 Pac. 377.

Kansas. — Dye *v.* Midland Valley R. Co., 77 Kan. 488, 94 Pac. 785; Baughman *v.* Harvey, 76 Kan. 767, 93 Pac. 146; Lincoln Mortg., etc., Co. *v.* Davis, 76 Kan. 639, 92

be incorporated, substantially, if not literally, in the form prescribed, and the omission of any such recital will be fatal to the validity of the deed,[96] and cannot be supplied by inference or implication however reasonable or necessary.[97] On the other hand, if the deed follows the statutory form, it must be held sufficient no matter what objections may be taken to the recitals or want of them.[98] But where the conditions of the sale were such that to follow the form would be to recite an untruth and show an illegal sale, the form must be modified to suit the facts.[99]

c. Omissions and Misrecitals. Although, as we have just seen,[1] a tax deed is fatally defective if it omits any recital which is required by the statute to be inserted in it, yet aside from such statutory requirements it is held that the deed will not be rendered invalid by omissions which are not to be regarded as essential or which can be supplied from other parts of the instrument,[2] or by misrecitals therein which are the result of mere clerical error and are not calculated to mislead or to affect the substantial rights of the parties.[3] Nor is

Pac. 707; Havel *v.* Decatur County Abstract Co., 76 Kan. 336, 91 Pac. 790; Ham *v.* Booth, 72 Kan. 429, 83 Pac. 24; Martin *v.* Garrett, 49 Kan. 131, 30 Pac. 168; Mack *v.* Price, 35 Kan. 134, 10 Pac. 521; McCauslin *v.* McGuire, 14 Kan. 234; Haynes *v.* Heller, 12 Kan. 381; Bowman *v.* Cockrill, 6 Kan. 311.

Mississippi.— Pattison *v.* Harvey, 81 Miss. 348, 33 So. 941.

Missouri.— Allen *v.* McCabe, 93 Mo. 138, 6 S. W. 62; Pearce *v.* Titsworth, 87 Mo. 635; Hopkins *v.* Scott, 86 Mo. 140; Williams *v.* McLanahan, 67 Mo. 499.

South Dakota.— Rector, etc., Co. *v.* Maloney, 15 S. D. 271, 88 N. W. 575.

Wisconsin.— Lybrand *v.* Haney, 31 Wis. 230.

United States.—Geekie *v.* Kirby Carpenter Co., 106 U. S. 379, 1 S. Ct. 315, 27 L. ed. 157.

See 45 Cent. Dig. tit. "Taxation," § 1504.

96. *Florida.*—Ropes *v.* Kemps, 38 Fla. 233, 20 So. 992.

Kansas.— Dye *v.* Midland Valley R. Co., 77 Kan. 488, 94 Pac. 785, tax deed not recorded five years.

Massachusetts.— Knowlton *v.* Moore, 136 Mass. 32; Reed *v.* Crapo, 127 Mass. 39; Lunenburg *v.* Walter Heywood Chair Co., 118 Mass. 540.

Missouri.—Bingham *v.* Delougherty, (1890) 13 S. W. 208; Bender *v.* Dugan, 99 Mo. 126, 12 S. W. 795; Sullivan *v.* Donnell, 90 Mo. 278, 2 S. W. 264; Rice *v.* Shipman, (1886) 1 S. W. 830; Hopkins *v.* Scott, 86 Mo. 140.

Nebraska.— Thompson *v.* Merriam, 15 Nebr. 498, 20 N. W. 24; Haller *v.* Blaco, 10 Nebr. 36, 4 N. W. 362.

North Dakota.— Beggs *v.* Paine, 15 N. D. 436, 109 N. W. 322.

Oregon.—Bradford *v.* Durham, 54 Oreg. 1, 101 Pac. 897.

Tennessee.— Marley *v.* Foster, 102 Tenn. 241, 52 S. W. 166.

Wisconsin.— Cutler *v.* Hurlbut, 29 Wis. 152; Lain *v.* Shepardson, 18 Wis. 59; Lain *v.* Cook, 15 Wis. 446. See Austin *v.* Holt, 32 Wis. 478.

United States.— Daniels *v.* Case, 45 Fed. 843.

See 45 Cent. Dig. tit. "Taxation," § 1504 *et seq.*

Compare Pleasants *v.* Scott, 21 Ark. 370, 76 Am. Dec. 403.

97. Grinstead *v.* Cooper, 77 Kan. 778, 95 Pac. 401; Dye *v.* Midland Valley R. Co., 77 Kan. 488, 94 Pac. 785 (tax deed not recorded five years); Bender *v.* Dungan, 99 Mo. 126, 12 S. W. 795; Hopkins *v.* Scott, 86 Mo. 140. See Skinner *v.* Williams, 85 Mo. 489. *Compare* Penrose *v.* Cooper, 71 Kan. 720, 81 Pac. 489, 84 Pac. 115; Sanger *v.* Rice, 43 Kan. 580, 23 Pac. 633, holding that after a tax deed has been recorded for five years it will not be held void because of the omission of express recitals required by statute, if the substance thereof can be supplied by inferences fairly drawn from statements in the deed by giving a liberal construction to it and to the language of the statute. And see Dye *v.* Midland Valley R. Co., *supra*; Rynearson *v.* Conn, 77 Kan. 160, 94 Pac. 205.

98. Bell *v.* Gordon, 55 Miss. 45; Bowers *v.* Chambers, 53 Miss. 259; Falkner *v.* Dorman, 7 Wis. 388.

Deed void on its face.— The rule stated in the text does not of course apply where the deed recites an impossibility or shows on its face that the law was not complied with. Fuller *v.* Shedd, 161 Ill. 462, 44 N. E. 286, 52 Am. St. Rep. 380, 33 L. R. A. 146; King *v.* Lane, 21 S. D. 101, 110 N. W. 37.

99. Dyke *v.* Whyte, 17 Colo. 296, 29 Pac. 128; Mack *v.* Price, 35 Kan. 134, 10 Pac. 521; McCauslin *v.* McGuire, 14 Kan. 234; Magill *v.* Martin, 14 Kan. 67; Sullivan *v.* Donnell, 90 Mo. 278, 2 S. W. 264; Skinner *v.* Williams, 85 Mo. 489.

1. See *supra*, text and note 96.

2. Ham *v.* Booth, 72 Kan. 429, 83 Pac. 24; Heil *v.* Redden, 38 Kan. 255, 16 Pac. 743; Coombs *v.* Crabtree, 105 Mo. 292, 16 S. W. 830.

3. Hickman *v.* Kempner, 35 Ark. 505 (error in reciting that land was assessed to an unknown owner); Bosworth *v.* Danzien, 25 Cal. 296 (partially false description of land); Schroeder *v.* Griggs, 80 Kan. 357, 102 Pac. 469 (omission of "not" after "could"); Maxon *v.* Gates, 136 Wis. 270, 116 N. W. 758; Austin *v.* Holt, 32 Wis. 478 (error in reciting

a tax deed invalidated by the incorporation therein of incorrect matter which may be rejected as mere surplusage.[4]

d. Covenants. Where the statute prescribing the form of tax deeds requires that they shall contain certain covenants these are considered as official and not personal, and therefore, where the title fails, the officer making the deed is not liable for a breach of the covenant of general warranty.[5]

e. Parties.[6] If the statute requires the tax deed to be executed in the name of the state, this is indispensable, and the deed is invalid if made in different form,[7] although this is not technically necessary unless made so by law.[8] Where the sale was made for city or county taxes, the deed should run in the name of the municipality.[9] Several collectors cannot join in a deed of land sold by them severally for taxes.[10] If made to the original purchaser at the tax-sale, the deed should name him and show that he was such purchaser,[11] and a misnomer will be fatal unless the identity of the person is established.[12] If the deed is made to an assignee of the tax certificate, it should show his right to the deed and his connection with the title;[13] but successive assignments of the certificate, intermediate between the purchaser at the tax-sale and the final assignee who procures the deed, need not be recited therein.[14]

2. Recitals — a. In General. A tax deed is void if it omits any of the recitals expressly required by statute to be incorporated in it;[15] and aside from such requirements, it must contain sufficient recitals of fact to show a compliance with the law under which the land became liable to sale and was sold,[16] and these must not be in the form of conclusions of law, as that proceedings were taken "according

that grantee was purchaser at tax-sale instead of assignee); Huey *v.* Van Wie, 23 Wis. 613 (misnaming county). But *compare* Brady *v.* Dowden, 59 Cal. 51 (error in regard to assessment); Ritter *v.* Worth, 58 N. Y. 627 (false recital that land was assessed to a non-resident); Battelle *v.* Knight, 23 S. D. 161, 120 N. W. 1102; Burlew *v.* Quarrier, 16 W. Va. 108 (misstatement of year for which taxes were delinquent).

That a date named in a tax deed is out of harmony with other recitals does not justify the assumption that it is a clerical error, at least unless the date is an impossible one, or is in direct and irreconcilable conflict with some other recital referring to the same matter. Price *v.* Barnhill, 79 Kan. 93, 98 Pac. 774.

4. Harper *v.* Rowe, 55 Cal. 132; Bell *v.* Gordon, 55 Miss. 45.

5. Stephenson *v.* Weeks, 22 N. H. 257; Wilson *v.* Cochran, 14 N. H. 397; Gibson *v.* Mussey, 11 Vt. 212.

6. Address or residence of grantee see *infra*, XIII, D, 2, a.

7. State Finance Co. *v.* Mulberger, 16 N. D. 214, 112 N. W. 986, 125 Am. St. Rep. 650; Woodman *v.* Clapp, 21 Wis. 350.

8. Leggett *v.* Rogers, 9 Barb. (N. Y.) 406; Utica Bank *v.* Mersereau, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189.

9. Stieff *v.* Hartwell, 35 Fla. 606, 17 So. 899; Florida Sav. Bank *v.* Brittain, 20 Fla. 507; Sams *v.* King, 18 Fla. 557; McNamara *v.* Estes, 22 Iowa 246; Treat *v.* Smith, 68 Me. 394.

10. Humphrey *v.* Boge, 2 Root (Conn.) 437.

11. Walton *v.* Hale, 9 Gratt. (Va.) 194; North *v.* Wendell, 22 Wis. 431; Krueger *v.* Knab, 22 Wis. 429.

Deed to partners.— A tax deed issued to partners in the firm-name is not for that reason invalid. Sherry *v.* Gilmore, 58 Wis. 324, 17 N. W. 252.

Deed to county.— Unless the statute provides otherwise, a tax deed issued to a county must be in the same form as one issued to an individual. Woodman *v.* Clapp, 21 Wis. 350.

County clerk making deed to himself.— A tax deed made by a county clerk in his official capacity to himself as the owner of the tax certificate is not void, and will not be voidable after the statute of limitations has run in its favor. Barr *v.* Randall, 35 Kan. 126, 10 Pac. 515.

Death of tax purchaser.—A tax deed made out in the name of the purchaser at the tax-sale, since deceased, is a nullity, as running to a grantee not in existence. Paine *v.* Boynton, 124 Mich. 194, 82 N. W. 816. In such a case the deed is properly made to his heirs at law. Gannon *v.* Moore, 83 Ark. 196, 104 S. W. 139. But see Alexander *v.* Savage, 90 Ala. 383, 8 So. 93, holding that a tax deed cannot lawfully be made to the administrator of the deceased purchaser.

12. McMinn *v.* Whelan, 27 Cal. 300; Ogden *v.* Bemis, 125 Ill. 105, 17 N. E. 55; McCash *v.* Penrod, 131 Iowa 631, 109 N. W. 180.

13. Florida Sav. Bank *v.* Brittain, 20 Fla. 507; Doe *v.* Bean, 6 Ill. 302; Morton *v.* Harris, 9 Watts (Pa.) 319. See Keene *v.* Houghton, 19 Me. 368, holding that the officer making the deed cannot legally substitute the name of another for that of the purchaser.

14. Cousins *v.* Allen, 28 Wis. 232. See Smith *v.* Todd, 55 Wis. 459, 13 N. W. 488.

15. See *supra*, XIII, D, 1, b.

16. *California.*— Kelsey *v.* Abbott, 13 Cal. 609; Ferris *v.* Coover, 10 Cal. 589.

to law," or "in manner and form as directed by law," but the particular facts must be recited.[17] Especially it is necessary to recite enough of the previous proceedings to show authority to sell the land and authority in the officer making the sale,[18] and authority for the execution of the deed and the manner of its execution;[19] and the recitals in a tax deed of lands sold to a county must show affirmatively the right of the county to take the lands.[20] But these conditions being met, and the law being silent as to the incorporation of particular recitals, it is generally held that only so much of the previous history need be set out as is essential to the meaning and validity of the tax deed, standing by itself as an independent instrument of conveyance.[21] But of course, if it shows that it was made without any legal authority, or shows disobedience to any essential requirement of the law, it is void and inoperative for every purpose.[22] A tax deed need not state the address or residence of the grantee unless the statute so requires.[23]

b. Assessment and Delinquency of Tax. It is generally held essential to the validity of a tax deed that it shall recite the levy of the tax and its legal assessment on the land in question,[24] and it is void if it shows on its face an assessment

Dakota.—Wambole *v.* Foote, 2 Dak. 1, 2 N. W. 239.

Maine.— Skowhegan Sav. Bank *v.* Parsons, 86 Me. 514, 30 Atl. 110.

Missouri.—Atkison *v.* Butler Imp. Co., 125 Mo. 565, 28 S. W. 861; Burden *v.* Taylor, 124 Mo. 12, 27 S. W. 349; Western *v.* Flanagan, 120 Mo. 61, 25 S. W. 531.

Texas.— Henderson *v.* White, 69 Tex. 103, 5 S. W. 374.

West Virginia.— Buchanan *v.* Reynolds, 4 W. Va. 681.

See 45 Cent. Dig. tit. "Taxation," § 1507.

17. Duncan *v.* Gillette, 37 Kan. 156, 14 Pac. 479; Moore *v.* Harris, 91 Mo. 616, 4 S. W. 439; Yankee *v.* Thompson, 51 Mo. 234; Large *v.* Fisher, 49 Mo. 307; Spurlock *v.* Allen, 49 Mo. 178; Rush *v.* Lewis & Clark County, 36 Mont. 566, 93 Pac. 943, 37 Mont. 240, 95 Pac. 836. *Contra,* O'Grady *v.* Barnhisel, 23 Cal. 287.

18. *Louisiana.*— Reeves *v.* Towles, 10 La. 276. But *compare* Boyle *v.* West, 107 La. 347, 31 So. 794; Sims *v.* Walshe, 49 La. Ann. 781, 21 So. 861.

Michigan.— Upton *v.* Kennedy, 36 Mich. 215.

Minnesota.— Madland *v.* Benland, 24 Minn. 372.

Missouri.— State *v.* Mantz, 62 Mo. 258.

Ohio.—Woodward *v.* Sloan, 27 Ohio St. 592.

19. Hereford *v.* O'Connor, 5 Ariz. 253, 52 Pac. 471; Garner *v.* Wallace, 118 Mich. 387, 76 N. W. 758; Hunt *v.* Miller, 101 Wis. 583, 77 N. W. 874.

20. Rush *v.* Lewis & Clark County, 36 Mont. 566, 93 Pac. 943, 37 Mont. 240, 95 Pac. 836.

That county was not a competitive bidder see *infra,* XIII, D, 2, d, (I).

21. *Arkansas.*— Pleasants *v.* Scott, 21 Ark. 370, 76 Am. Dec. 403.

California.—Wetherbee *v.* Dunn, 32 Cal. 106; Moss *v.* Shear, 25 Cal. 38, 85 Am. Dec. 94.

Indiana.— Scarry *v.* Lewis, 133 Ind. 96, 30 N. E. 411.

Louisiana.— Jopling *v.* Chachere, 107 La. 522, 32 So. 243.

Missouri.— State *v.* Richardson, 21 Mo. 420.

Virginia.— Flanagan *v.* Grimmet, 10 Gratt. 421.

See 45 Cent. Dig. tit. "Taxation," § 1507 *et seq.*

22. Spain *v.* Johnson, 31 Ark. 314; Twombly *v.* Kimbrough, 24 Ark. 459; Hall *v.* Dowling, 18 Cal. 619; Cogel *v.* Raph, 24 Minn. 194. A statement in a tax deed of a fact showing that it was improperly issued is fatal to its validity, although occurring in the course of a recital not required by the statute. Price *v.* Barnhill, 79 Kan. 93, 98 Pac. 774.

23. And such requirement is not implied from the fact that in the statutory form blanks are left after the names of the purchaser and his assignee in which to insert the counties of their residence. Havel *v.* Decatur County Abstract Co., 76 Kan. 336, 91 Pac. 790. And see Nichols *v.* Trueman, 80 Kan. 89, 101 Pac. 633; Stevenson *v.* Carson, 77 Kan. 444, 94 Pac. 796; Lincoln Mortg., etc., Co. *v.* Davis, 76 Kan. 639, 92 Pac. 707, rule applies to a tax deed based on proceedings under the compromise act.

24. *Arizona.*— Seaverns *v.* Costello, 8 Ariz. 308, 71 Pac. 930.

Arkansas.— Lawrence *v.* Zimpleman, 37 Ark. 643; Jacks *v.* Dyer, 31 Ark. 334.

California.— Davis *v.* Pacific Imp. Co., 127 Cal. 245, 70 Pac. 15; Simmons *v.* McCarthy, 118 Cal. 622, 50 Pac. 761.

Colorado.— See Waddingham *v.* Dickson, 17 Colo. 223, 29 Pac. 177.

Kansas.—Where at a tax-sale land for want of bidders was taken by the county, and after five years the certificate was assigned, and a deed made pursuant to Gen. St. (1901) § 7672, the fact that the recitals showed that the taxes which accrued while the land was held by the county were charged on the tax roll in the month of September of each year, instead of November, did not render the deed void. Taylor *v.* Adams, 79 Kan. 360, 99 Pac. 597.

South Dakota.— Horswill *v.* Farnham, 16 S. D. 414, 92 N. W. 1082.

Tennessee.— Conrad *v.* Darden, 4 Yerg. 307.

that was illegal or erroneous because made to a wrong person.[25] The deed must also contain proper recitals to show that the taxes remained delinquent and unpaid at the time of the sale,[26] or, if the statute so requires, that they were not paid within a specified time after demand,[27] and for what year's taxes the sale was made.[28]

c. Proceedings Preliminary to Sale. The tax deed must recite the proceedings preliminary to the sale at least so far as to show the authority under which the officer acted.[29] A tax deed showing that certain essential preliminary steps have not been taken is void on its face.[30] In particular, it must recite a demand for payment, if that is required by law, and failure to comply therewith,[31] and the

See 45 Cent. Dig. tit. "Taxation," § 1508.

Contra.— McQuain *v.* Meline, 16 Fed. Cas. No. 8,923.

Sufficiency of recital.— See Madland *v.* Benland, 24 Minn. 372, holding that a recital in a tax deed that lands have been duly forfeited for non-payment of taxes is a sufficient recital of the levy, assessment, and delinquency of the tax.

Misrecital of person to whom assessed.—A tax deed based on an assessment to "Priscilla Durham," which recites that the land was assessed to "Petruella Durham," is not a substantial statement of the assessment within the requirements of Ballinger & C. Comp. St. Oreg. § 3127, defining the effect of tax deeds as evidence. Bradford *v.* Durham, 54 Oreg. 1, 101 Pac. 897.

25. Russ *v.* Crichton, 117 Cal. 695, 49 Pac. 1043; Jatunn *v.* O'Brien, 89 Cal. 57, 26 Pac. 635; Greenwood *v.* Adams, 80 Cal. 74, 21 Pac. 1134; Pearson *v.* Creed, 78 Cal. 144, 20 Pac. 302; Brady *v.* Dowden, 59 Cal. 51; Grimm *v.* O'Connell, 54 Cal. 522; Brown *v.* Hartford, 173 Mo. 183, 73 S. W. 140. But *compare* Hickman *v.* Kempner, 35 Ark. 505, holding that a false recital in a tax deed that the land was assessed in the name of an unknown owner does not vitiate the sale.

26. Hubbard *v.* Johnson, 9 Kan. 632; Smith *v.* Bodfish, 27 Me. 289; Gilfillan *v.* Chatterton, 38 Minn. 335, 37 N. W. 583; Sherburne *v.* Rippe, 35 Minn. 540, 29 N. W. 322; O'Mulcahy *v.* Florer, 27 Minn. 449, 8 N. W. 166; Sheehy *v.* Hinds, 27 Minn. 259, 6 N. W. 781.

Sufficiency of recital.—A tax deed is not void on its face merely because of the omission of the word "remaining," where it should be stated that the land was sold for the payment of the "taxes, interest and costs then due and remaining unpaid." Heil *v.* Redden, 38 Kan. 255, 16 Pac. 743. A certificate of sale under which defendant claimed reciting that the taxes due were not paid and at the time of sale remained wholly unpaid, and that at the time of sale all the property assessed and delinquent as aforesaid was sold to the state, and a deed reciting that all the said property assessed and delinquent was by the sale vested in the state, substantially complied with Kan. Pol. Code, §§ 3776, 3785, providing that the certificate of sale of property for taxes and the deed thereof shall recite that the property was "sold for delinquent taxes." Phillips *v.* Cox, 7 Cal. App. 308, 94 Pac. 377.

Showing amount of delinquent taxes.—A tax deed from which it is impossible to determine the amount of the delinquent taxes is void. Finn *v.* Jones, 80 Kan. 431, 102 Pac. 479. A tax deed should show upon its face the amount of taxes, interest, and costs due upon each tract. Guffey *v.* O'Reiley, 88 Mo. 418, 57 Am. Rep. 424.

27. Harrington *v.* Worcester, 6 Allen (Mass.) 576. But see Cahoon *v.* Coe, 52 N. H. 518. And *compare* Gossett *v.* Kent, 19 Ark. 602.

28. *Arkansas.*— Spain *v.* Johnson, 31 Ark. 314.

California.— Simmons *v.* McCarthy, 118 Cal. 622, 50 Pac. 761.

Illinois.— Maxcy *v.* Clabaugh, 6 Ill. 26.

Louisiana.—Waddill *v.* Walton, 42 La. Ann. 763, 7 So. 737. And see Boyle *v.* West, 107 La. 347, 31 So. 794, holding that where the records show the year for which the property was sold, the deed is not invalidated by failure to recite such year.

Mississippi.— Bower *v.* Chess, etc., Co., 83 Miss. 218, 35 So. 444.

West Virginia.— Buchanan *v.* Reynolds, 4 W. Va. 681.

See 45 Cent. Dig. tit. "Taxation," §§ 1507, 1508.

But *compare* Utica Bank *v.* Mersereau, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189; Marshall *v.* Benson, 48 Wis. 558, 4 N. W. 385, 762. A tax deed executed under Kan. Laws (1893), p. 195, c. 110, § 4, in substantial compliance with the requirements of that provision, and attacked more than five years after it was recorded, was not void on its face because the granting clause of such deed did not specify the particular years for the taxes of which the land was conveyed. Gibson *v.* Freeland, 77 Kan. 450, 94 Pac. 782. Omission of a tax deed which was not assailed for more than five years after being recorded to state in terms in what year the taxes accrued for the land which was sold, the sale having been made in 1895, was supplied by a recital that the total consideration of the deed was made up of the taxes of 1894 and subsequent years; it being inferable therefrom that the sale was made for the taxes of 1894. Gow *v.* Blackman, 78 Kan. 489, 96 Pac. 799.

29. See, generally, cases cited *infra*, this section. *Compare* Sibley *v.* Smith, 2 Mich. 486.

30. Whitehead *v.* Callahan, 44 Colo. 396, 99 Pac. 57.

31. Pixley *v.* Pixley, 164 Mass. 335, 41

judgment or order of court, if any, under which the sale was made;[32] and a material variance between the judgment as in fact entered and that recited in the deed will be fatal to the deed.[33] It must also recite the writ or tax execution under which the officer acted, where it is the practice to proceed under process of that kind.[34] Further if the statute requires that the owner's available personalty shall be exhausted before having recourse to his land, the tax deed must show that this was done.[35] Finally it is essential that the notice or advertisement of sale should be recited, and in such a manner as to show that it fully complied with the statute.[36]

d. Sale[37] — (i) *In General.* The tax deed is required to show by distinct recitals that the land was in fact sold for the non-payment of taxes,[38] by what officer the sale was made,[39] to whom it was made,[40] and the manner of the sale, as that it was at public auction, to the highest bidder, or to the bidder who would take the least quantity of the land for the taxes on it, etc., at least so far as to show that no provision of the statute was violated in the conduct of the sale.[41]

N. E. 648; Langdon *v.* Stewart, 142 Mass. 576, 8 N. E. 605; Reed *v.* Crapo, 127 Mass. 39; Adams *v.* Mills, 126 Mass. 278; Harrington *v.* Worcester, 6 Allen (Mass.) 576. *Compare* Gossett *v.* Kent, 19 Ark. 602.

32. *Alabama.*— Southern R. Co. *v.* Hall, 145 Ala. 224, 41 So. 135.

Arkansas.— McDermott *v.* Scully, 27 Ark. 226.

California.—Wetherbee *v.* Dunn, 32 Cal. 106.

Illinois.— Eagan *v.* Connelly, 107 Ill. 458; Gage *v.* Lightburn, 93 Ill. 248; Cottingham *v.* Springer, 88 Ill. 90; Brown *v.* Hogle, 30 Ill. 119.

Missouri.— Dameron *v.* Jamison, 143 Mo. 483, 45 S. W. 258; Kinney *v.* Forsythe, 96 Mo. 414, 9 S. W. 918; Jones *v.* Driskill, 94 Mo. 190, 7 S. W. 111; Williams *v.* McLanahan, 67 Mo. 499. Where the recitals of a tax deed show affirmatively that no judgment was rendered against the land, the deed is void. Guffey *v.* O'Reiley, 88 Mo. 418, 57 Am. Rep. 424.

Tennessee.— Hightower *v.* Freedle, 5 Sneed 312.

Wisconsin.— Call *v.* Dearborn, 21 Wis. 503.

See 45 Cent. Dig. tit. "Taxation," § 1509.

33. Pitkin *v.* Yaw, 13 Ill. 251.

34. Lawrence *v.* Zimpleman, 37 Ark. 643; Bedgood *v.* McLain, 89 Ga. 793, 15 S. E. 670; Duff *v.* Neilson, 90 Mo. 93, 2 S. W. 222.

35. Jones *v.* McLain, 23 Ark. 429; Woolen *v.* Rockafeller, 81 Ind. 208; Ward *v.* Montgomery, 57 Ind. 276.

36. *Kentucky.*— Jones *v.* Miracle, 93 Ky. 639, 21 S. W. 241, 14 Ky. L. Rep. 639. *Compare* Hickman *v.* Skinner, 3 T. B. Mon. 210.

Louisiana.— *In re* Lafferranderie, 114 La. 6, 37 So. 990; Lambert *v.* Craig, 45 La. Ann. 1109, 13 So. 701. See Slattery *v.* Heilperin, 110 La. 86, 34 So. 139.

Maine.— Ladd *v.* Dickey, 84 Me. 190, 24 Atl. 813; Wiggin *v.* Temple, 73 Me. 380.

Massachusetts.— Downey *v.* Lancy, 178 Mass. 465, 59 N. E. 1015; Lunenburg *v.* Walter Heywood Chair Co., 118 Mass. 540.

Missouri.— Dow *v.* Chandler, 85 Mo. 245; Smith *v.* Funk, 57 Mo. 239; Yankee *v.* Thompson, 51 Mo. 234; Large *v.* Fisher, 49 Mo. 307; Abbott *v.* Doling, 49 Mo. 302; Spurlock *v.* Allen, 49 Mo. 178; Lagroue *v.* Rains, 48 Mo. 536.

Tennessee.— Blankenship *v.* French, (Ch. App. 1900) 60 S. W. 512.

United States.— Moore *v.* Brown, 11 How. 414, 13 L. ed. 751.

See 45 Cent. Dig. tit. "Taxation," § 1509.

Contra.— Hayes *v.* Ducasse, 119 Cal. 682, 52 Pac. 121; Flanagan *v.* Grimmet, 10 Gratt. (Va.) 421. And see Smith *v.* Philips, 51 Fla. 327, 41 So. 527.

37. Amount of land offered and sold see *infra*, XIII, D, 2, e.

Sale of several parcels together see *infra*, XIII, D, 2, e.

38. Doland *v.* Mooney, 72 Cal. 34, 13 Pac. 71; Hubbard *v.* Johnson, 9 Kan. 632.

39. Buchanan *v.* Reynolds, 4 W. Va. 681.

40. See *supra*, XIII, D, 1, e.

Sale to state or county see *infra*, this section.

41. *California.*— Hayes *v.* Ducasse, 119 Cal. 682, 52 Pac. 121.

Kansas.—Davis *v.* Harrington, 25 Kan. 196. 10 Pac. 532. And see Baughman *v.* Harvey, 76 Kan. 767, 93 Pac. 146, holding that where a tax deed has been of record more than five years before any suit attacking it, it is not void on its face because it omits the word "publicly" from the clause in the statutory form reading, "at the sale begun and publicly held."

Maine.— Green *v.* Alden, 92 Me. 177, 42 Atl. 358.

Minnesota.—West *v.* St. Paul, etc., R. Co., 40 Minn. 189, 41 N. W. 1031; Bonham *v.* Weymouth, 39 Minn. 92, 38 N. W. 805.

Missouri.— Mason *v.* Crowder, 85 Mo. 526.

South Carolina.— Cooke *v.* Pennington, 15 S. C. 185.

South Dakota.— Battelle *v.* Knight, 23 S. D. 161, 120 N. W. 1102; King *v.* Lane, 21 S. D. 101, 110 N. W. 37.

United States.— French *v.* Edwards, 13 Wall. 506, 20 L. ed. 702.

See 45 Cent. Dig. tit. "Taxation," § 1510.

Compare McCoy *v.* Michew, 7 Watts & S. (Pa.) 386, holding that it is not a good objection to a tax deed that it does not show whether the land was sold at public or private sale, as it will be presumed, until the con-

Where the sale was made to the state or county, the deed must show for whom the land was bid in,[42] and must also show the existence of the conditions under which the state or county could become a purchaser and not make it appear as a competitive bidder.[43] It is also a common requirement that the deed shall state correctly the amount for which the property was sold or bid in by the state or county.[44]

trary is shown, that it was made according to law.

Recital of wrong statute.—A statement that a tax-sale was pursuant to a particular statute, which had in fact been repealed by the general tax law, will not vitiate the deed so long as the sale complied with the general tax law. Kelly *v.* Austin, 132 N. Y. App. Div. 522, 116 N. Y. Suppl. 728.

42. Grinstead *v.* Cooper, 77 Kan. 778, 95 Pac. 401 (deed on record less than five years); Jackson *v.* McCarron, 77 Kan. 776, 95 Pac. 402 (holding that a tax deed which has been on record less than five years, and which recites that the land was bid off by the county treasurer, but not showing for whom he bid it off, is invalid).

Clerical errors.—A tax deed, reciting that lands were sold for the non-payment of taxes at public auction "in the county of A. and J. L. Gates to the said A. county," shows that the lands were sold to A county, and the words "J. L. Gates," inserted after the words "county of A.," describing the place of sale, cannot be transposed and inserted after "A. county," where named as the purchaser, so as to make it appear that there was a joint sale to the county and Gates, and thereby render the same void. Maxon *v.* Gates, 136 Wis. 270, 116 N. W. 758.

43. *California.*— San Luis Obispo County Bank *v.* Jack, 148 Cal. 437, 83 Pac. 705, 113 Am. St. Rep. 285.

Kansas.— Schroeder *v.* Griggs, 80 Kan. 357, 102 Pac. 469; Penrose *v.* Cooper, 71 Kan. 720, 81 Pac. 489, 84 Pac. 115; Larkin *v.* Wilson, 28 Kan. 513; Babbitt *v.* Johnson, 15 Kan. 252.

Montana.— Rush *v.* Lewis, etc., County, 36 Mont. 566, 93 Pac. 943, 37 Mont. 240, 95 Pac. 836.

Oklahoma.—Kramer *v.* Smith, 23 Okla. 381, 100 Pac. 532; Jones *v.* Carnes, 17 Okla. 470, 87 Pac. 652; Wade *v.* Crouch, 14 Okla. 593, 78 Pac. 91; Hanenkratt *v.* Hamil, 10 Okla. 219, 61 Pac. 1050.

South Dakota.— Thompson *v.* Roberts, 16 S. D. 403, 92 N. W. 1079; Reckitt *v.* Knight, 16 S. D. 395, 92 N. W. 1077.

Deed showing county a competitive bidder void on its face see Rush *v.* Lewis, etc., County, 36 Mont. 566, 93 Pac. 943, 37 Mont. 240, 95 Pac. 836; Kramer *v.* Smith, 23 Okla. 381, 100 Pac. 532; and other cases cited *supra*, this note.

Statement of conclusion contradicted by recitals.—Where a statute prohibits a county from becoming a competitive bidder at a tax-sale, a statement in a deed conveying land sold for taxes to a county that the land was offered for sale "in accordance with law," being merely the statement of a conclusion of law, can impart no validity to a deed, in the face of plain recitals therein to the effect that the property was sold at public auction, at which the county was a bidder. Rush *v.* Lewis, etc., County, 37 Mont. 240, 95 Pac. 836, 36 Mont. 566, 93 Pac. 943.

Defects not fatal.—Where the printed form of a tax deed with blanks to be filled prepared for use where several tracts have been assessed and sold separately, but are to be conveyed together, was so changed by striking out words and interlining others as to leave a recital that whereas the premises "could be sold for the amount of tax and charges thereon and was therefore bid off by the county treasurer for said county," the omission of the word "not," after the word "could," after striking out the negative "neither," was manifestly contrary to the intention and a mere clerical omission not avoiding the deed. Schroeder *v.* Griggs, 80 Kan. 357, 102 Pac. 469. And a tax deed of record more than five years before suit attacking it is not void because it substitutes the words "no person bid" for the words "said property could not be sold" in stating the necessity for a sale to the county. Baughman *v.* Harvey, 76 Kan. 767, 93 Pac. 146.

44. Baird *v.* Monroe, 150 Cal. 560, 89 Pac. 352; Simmons *v.* McCarthy, 118 Cal. 622, 50 Pac. 761; Preston *v.* Hirsch, 5 Cal. App. 485, 90 Pac. 965; Griffin *v.* Tuttle, 74 Iowa 219, 37 N. W. 167; Finn *v.* Jones, 80 Kan. 431, 102 Pac. 479; Webster *v.* Stevenson, 80 Kan. 92, 101 Pac. 634; Grinstead *v.* Cooper, 77 Kan. 778, 95 Pac. 401; Dye *v.* Midland Valley R. Co., 77 Kan. 488, 94 Pac. 785; Gibson *v.* Ast, 77 Kan. 458, 94 Pac. 801; Robidoux *v.* Munson, 75 Kan. 207, 88 Pac. 1085; Manker *v.* Peck, 71 Kan. 865, 81 Pac. 171; Penrose *v.* Cooper, 71 Kan. 720, 81 Pac. 489, 84 Pac. 115; Kramer *v.* Smith, 23 Okla. 381, 100 Pac. 532; Eldridge *v.* Robertson, 19 Okla. 165, 92 Pac. 156; Lowenstein *v.* Sexton, 18 Okla. 322, 90 Pac. 410.

Statement of consideration for deed see *infra*, XIII, D, 2, f.

Amount for which bid in by county.— A tax deed, which fails to state the amount for which the land was bid in by the county, is void on its face; and the omission is not cured by recitals stating the amount for which the certificate was assigned, when it is impossible to ascertain how much was paid for the taxes for the year for which the land was sold, and how much was for the subsequent taxes. Webster *v.* Stevenson, 80 Kan. 92, 101 Pac. 634. See also Grinstead *v.* Cooper, 77 Kan. 778, 95 Pac. 401, deed recorded less than five years. But a tax deed which has been recorded for more than five years is not void on its face because it does not recite the amount for which the county

(II) *Time and Place of Sale.* Where the statute requires a tax deed to contain a recital of the place where the sale was held, the omission of such recital, or a recital showing it to have been held at an unlawful place, will invalidate the deed.[45] So also it is generally considered necessary for the deed to state the time of the sale and show that it was held on the day appointed by law,[46] or at least on a day when the sale could lawfully take place, either as falling within the limits allowed by the statute or in consequence of an impossibility of making the sale on the appointed day,[47] the courts of some states being willing, in aid of the deed, to presume an adjournment.[48] It appears, however, that if the land was really sold on the legally appointed day, the purchaser's title will not be avoided by the fact that the deed recites a sale on a different day,[49] or by a clerical error in the recital, such as a lack of correspondence between the stated day of the week and the day of the month.[50]

e. Amount of Land Offered and Sold. If a tax deed shows that several lots or parcels of land were sold together, and that they were separate and distinct lots which could not lawfully be sold *en masse*,[51] it is void on its face.[52] But the

treasurer bid in the land for the county at the tax-sale, when the deed does recite that the treasurer did, nearly three years thereafter, assign a tax certificate thereon for a sum named, "being equal to the cost of redemption at that time," the 16th day of August, 1897, and the deed further recites the amount of the delinquent taxes for each year, the amount for which the treasurer bid off the land being then a matter simply of computation. Gibson *v.* Ast, 77 Kan. 458, 94 Pac. 801.

Immaterial variations.— Where all the minutiæ of a tax-sale are rightly described, with the judgment, so that the reference in the deed cannot be mistaken, the difference of a quarter of a cent in the amount will not vitiate. Jackson *v.* Cummings, 15 Ill. 449.

Several tracts in same deed.— A tax deed of several lots or tracts of land which fails to recite the separate amount for which each tract is conveyed, as required by statute, is void. Dye *v.* Midland Valley R. Co., 77 Kan. 488, 94 Pac. 785; Manker *v.* Peck, 71 Kan. 865, 81 Pac. 171; Kramer *v.* Smith, 23 Okla. 381, 100 Pac. 532; Eldridge *v.* Robertson, 19 Okla. 165, 92 Pac. 156.

45. *Colorado.*— Crisman *v.* Johnson, 23 Colo. 264, 47 Pac. 296, 58 Am. St. Rep. 224.

Missouri.— Skinner *v.* Williams, 85 Mo. 489.

Nebraska.— Baldwin *v.* Merriam, 16 Nebr. 199, 20 N. W. 250; Shelley *v.* Towle, 16 Nebr. 194, 20 N. W. 251; Thompson *v.* Merriam, 15 Nebr. 498, 20 N. W. 24; Towle *v.* Holt, 14 Nebr. 221, 15 N. W. 203; McGavock *v.* Pollack, 13 Nebr. 535, 14 N. W. 659; Howard *v.* Lamaster, 11 Nebr. 582, 10 N. W. 497; Haller *v.* Blaco, 10 Nebr. 36, 4 N. W. 362.

South Dakota.— Salmer *v.* Lathrop, 10 S. D. 216, 72 N. W. 570.

Tennessee.— Thompson *v.* Lawrence, 2 Baxt. 415.

Wisconsin.— Washburn Land Co. *v.* Chicago, etc., R. Co., 124 Wis. 305, 102 N. W. 546; Hunt *v.* Stinson, 101 Wis. 556, 77 N. W. 901; Huey *v.* Van Wie, 23 Wis. 613, omission to name county.

United States.— Hoge *v.* Magnes, 85 Fed. 355, 29 C. C. A. 564.

See 45 Cent. Dig. tit. "Taxation," § 1511.

46. Hogins *v.* Brashears, 13 Ark. 242; Robbins *v.* Frazier, 74 Kan. 697, 87 Pac. 1136; Haynes *v.* Heller, 12 Kan. 381; Mason *v.* Crowder, 85 Mo. 526. *Compare* Caruthers *v.* McLaren, 56 Miss. 371.

Hour of sale.— Where the notice for a tax-sale gave the time as a certain day of the month at a certain hour, a recital in the tax deed that the sale was made on that day of the month, without mentioning the hour of the day, is insufficient. Ladd *v.* Dickey, 84 Me. 190, 24 Atl. 813.

47. *Arkansas.*— Pleasants *v.* Scott, 21 Ark. 370, 76 Am. Dec. 403.

Iowa.— Easton *v.* Savery, 44 Iowa 654.

Kansas.— Stafford *v.* Lauver, 49 Kan. 690, 31 Pac. 302; Jordan *v.* Kyle, 27 Kan. 190. If, under the provisions of any statute, the sale on which a tax deed is based may have been legally made on the day named in the deed, the deed will not be held void on its face if otherwise regular. Clarke *v.* Tilden, 72 Kan. 574, 84 Pac. 139.

Michigan.— Lacey *v.* Davis, 4 Mich. 140, 66 Am. Dec. 524.

Missouri.— Roth *v.* Gabbert, 123 Mo. 21, 27 S. W. 528.

See 45 Cent. Dig. tit. "Taxation," § 1510.

48. Shawler *v.* Johnson, 52 Iowa 473, 3 N. W. 604; Lorain *v.* Smith, 37 Iowa 67; Love *v.* Welch, 33 Iowa 192; Hill *v.* Atterbury, 88 Mo. 114. And see Clark *v.* Thompson, 37 Iowa 536, holding that a memorandum of a county treasurer, showing an adjournment of a tax-sale, is not admissible to invalidate the tax deed. But *compare* Spain *v.* Johnson, 31 Ark. 314; McDermott *v.* Scully, 27 Ark. 226. And see Gregg *v.* Jesberg, 113 Mo. 34, 20 S. W. 652.

49. Hurlburt *v.* Dyer, 36 Iowa 474; McLemore *v.* Anderson, 92 Miss. 42, 43 So. 878, 47 So. 801; Brigins *v.* Chandler, 60 Miss. 862.

50. Harris *v.* Curran, 32 Kan. 580, 4 Pac. 1044; Shell *v.* Duncan, 31 S. C. 547, 10 S. E. 330, 5 L. R. A. 821.

51. See *supra*, XI, G, 8.

52. *Arkansas.*— Chatfield *v.* Iowa, etc., Land Co., 88 Ark. 395, 114 S. W. 473; Har-

mere fact that the deed comprises several distinct lots or parcels of land raises no presumption that they were sold in this manner,[53] and it will not be held void if it can be made out from the recitals of the deed either that the lots were in fact sold separately or that the circumstances of the particular case rendered it lawful to mass them together for the purpose of the sale.[54] Still, if several parcels were in fact sold separately according to law, the purchaser is entitled to a deed reciting the real facts of the sale, that all may appear to have been done legally.[55] In respect to other statutory directions as to the manner of offering and selling the land, the deed will be invalid if it does not show a compliance with the law, or at least if it shows the law to have been violated. This applies to the requirement that the officer shall sell the least quantity which any bidder will take for the amount of the taxes,[56] and to the rule which forbids the sale of the whole tract unless that course is necessary to raise the required amount.[57]

ris *v.* Brady, 87 Ark. 428, 112 S. W. 974; Montgomery *v.* Birge, 31 Ark. 491; Spain *v.* Johnson, 31 Ark. 314; Pack *v.* Crawford, 29 Ark. 489; Pettus *v.* Wallace, 29 Ark. 476.

Colorado.— Whitehead *v.* Callahan, 44 Colo. 396, 99 Pac. 57.

Iowa.— Hintrager *v.* McElhinny, 112 Iowa 325, 82 N. W. 1008, 83 N. W. 1063; Hurlburt *v.* Dyer, 36 Iowa 474; Ware *v.* Thompson, 29 Iowa 65; Ackley *v.* Sexton, 24 Iowa 320; Harper *v.* Sexton, 22 Iowa 442; Ferguson *v.* Heath, 21 Iowa 438; Byam *v.* Cook, 21 Iowa 392.

Kansas.— Worden *v.* Cole, 74 Kan. 226, 86 Pac. 464; Wyer *v.* La Rocque, 51 Kan. 710, 33 Pac. 547; Cartwright *v.* McFadden, 24 Kan. 662; Hall *v.* Dodge, 18 Kan. 277.

Massachusetts.— Barnes *v.* Boardman, 149 Mass. 106, 21 N. E. 308, 3 L. R. A. 785.

Missouri.— Allen *v.* Buckley, 94 Mo. 158, 7 S. W. 10.

Oklahoma.— Eldridge *v.* Robertson, 19 Okla. 165, 92 Pac. 156.

Wisconsin.— Tucker *v.* Whittlesey, 74 Wis. 74, 41 N. W. 535, 42 N. W. 101.

See 45 Cent. Dig. tit. "Taxation," § 1513.

Compare Sheafer *v.* Mitchell, 109 Tenn. 181, 71 S. W. 86.

Effect of statute of limitations.— In some states the fact that a tax deed shows upon its face that several tracts of land were sold for a gross sum will not render the tax title invalid after the lapse of five years from the date of the sale or from the recording of the deed. Monk *v.* Corbin, 58 Iowa 503, 12 N. W. 571; Bullis *v.* Marsh, 56 Iowa 747, 2 N. W. 578, 6 N. W. 177; Douglass *v.* Tullock, 34 Iowa 262; Thomas *v.* Stickle, 32 Iowa 71; Nagle *v.* Tieperman, 74 Kan. 32, 85 Pac. 941, 88 Pac. 969. And see York *v.* Barnes, 58 Kan. 478, 49 Pac. 596.

53. *Illinois.*— Gage *v.* Bailey, 102 Ill. 11.

Iowa.— Greer *v.* Wheeler, 41 Iowa 85.

Kansas.— Walker *v.* Boh, 32 Kan. 354, 4 Pac. 272; Watkins *v.* Inge, 24 Kan. 612.

Minnesota.— Sanborn *v.* Mueller, 38 Minn. 27, 35 N. W. 666.

Missouri.— Allen *v.* Buckley, 94 Mo. 158, 7 S. W. 10.

Nebraska.— Towle *v.* Holt, 14 Nebr. 221, 15 N. W. 203.

54. Barnett *v.* Jaynes, 26 Colo. 279, 57 Pac. 703; Waddingham *v.* Dickson, 17 Colo. 223, 29 Pac. 177; Penrose *v.* Cooper, 71 Kan. 720, 81 Pac. 489, 84 Pac. 115; Dodge *v.* Emmons, 34 Kan. 732, 9 Pac. 951; Walker *v.* Boh, 32 Kan. 354, 4 Pac. 272; Hotson *v.* Wetherby, 88 Wis. 324, 60 N. W. 423.

55. Montgomery *v.* Birge, 31 Ark. 491; Pack *v.* Crawford, 29 Ark. 489; Pettus *v.* Wallace, 29 Ark. 476; State *v.* Richardson, 21 Mo. 420.

Description in granting clause.— A deed which contains several distinct descriptions of real estate, and the granting clause of which provides that the property "last hereinbefore described" is conveyed, these words being copied from the statutory form for tax deeds, is upon its face invalid as a conveyance of any tracts other than those included in the last description. Spicer *v.* Howe, 38 Kan. 465, 16 Pac. 825.

56. *California.*— Best *v.* Wohlford, 153 Cal. 17, 94 Pac. 98; Rollins *v.* Woodman, 117 Cal. 516, 49 Pac. 455.

Colorado.— Lines *v.* Digges, 43 Colo. 166, 95 Pac. 341.

Iowa.— Smith *v.* Easton, 37 Iowa 584; Gray *v.* Coan, 30 Iowa 536.

Kansas.— Howell *v.* Gruver, 78 Kan. 378, 97 Pac. 467.

United States.— Le Roy *v.* Reeves, 15 Fed. Cas. No. 8,272, 5 Sawy. 102.

And see, generally, *supra*, XI, G, 7, c.

Compare Cane *v.* Herndon, 107 La. 591, 32 So. 33.

Description of property sold see *infra*, XIII, D, 3, a, note 75.

Showing sale not authorized.— A tax deed reciting that the land sold was the least quantity which would sell for the amount due for taxes, costs, and charges, is void on its face, where the statute authorizing such a sale had been repealed, and it was not authorized by the later statute, although such statement had been left in the printed form of deed by mistake. Batelle *v.* Knight, 23 S. D. 161, 120 N. W. 1102; Battelle *v.* Wolven, 22 S. D. 39, 115 N. W. 99; King *v.* Lane, 21 S. D. 101, 110 N. W. 37.

57. Howard *v.* Hulbert, 10 Kan. App. 314, 62 Pac. 545; Ladd *v.* Dickey, 84 Me. 190, 24 Atl. 813; Brookings *v.* Woodin, 74 Me. 222. And see, generally, *supra*, XI, G, 7, b. *Compare* Brien *v.* O'Shaughnesy, 3 Lea (Tenn.) 724.

f. Consideration [58] and Proceedings Subsequent to Sale. The tax deed is required to contain a statement of the consideration or price of the sale, substantially as directed by the statute, and must show that it did not include any illegal or excessive charges for taxes or costs; [59] and it will be invalidated by any material variance in this particular between the recital in the deed and that in the redemption notice or other proceedings.[60] If the statute also requires the deed to recite the time when the right of redemption expired, that proper notice thereof and of the amount necessary to redeem had been given, or that no redemption had been effected, these statements cannot safely be omitted.[61]

g. Tax Certificate and Assignment Thereof.[62] Where the statute provides that the matters recited in the certificate of sale shall also be recited in the tax deed, a deed which omits any material recital of the certificate, or varies from it in any material particular, is void.[63] Where the grantee in the deed is an assignee

58. Deed based on certificate and assignment thereof see *infra*, XIII, D, 2, g.

59. *California.*— Hewes *v.* McLellan, 80 Cal. 393, 22 Pac. 287; Doland *v.* Mooney, 79 Cal. 137, 21 Pac. 436.

Colorado.—Barnett *v.* Jaynes, 26 Colo. 279, 57 Pac. 703.

Kansas.— Finn *v.* Jones, 80 Kan. 431, 102 Pac. 479; Hahn *v.* Hill Inv. Co., 79 Kan. 693, 100 Pac. 484; Lanning *v.* Brown, 79 Kan. 103, 98 Pac. 771; Glenn *v.* Stewart, 78 Kan. 605, 608, 97 Pac. 863; Dye *v.* Midland Valley R. Co., 77 Kan. 488, 94 Pac. 785; Gibson *v.* Ast, 77 Kan. 458, 94 Pac. 801; Phares *v.* Cortright, 76 Kan. 63, 90 Pac. 784; Vogler *v.* Stark, 75 Kan. 831, 89 Pac. 653; Martin *v.* Garrett, 49 Kan. 131, 30 Pac. 168; Davis *v.* Harrington, 35 Kan. 196, 10 Pac. 532; Douglass *v.* Wilson, 31 Kan. 565, 3 Pac. 330; Case *v.* Frazier, 30 Kan. 343, 2 Pac. 519; Morrill *v.* Douglass, 14 Kan. 293. See Bowman *v.* Cockrill, 6 Kan. 311, holding that the filling of the blank, designated in the statutory form as the place for the statement of the consideration of the tax deed, with a less amount than it should be, does not render the deed void.

Minnesota.— Pfefferle *v.* Wieland, 55 Minn. 202, 56 N. W. 824.

Missouri.— Atkison *v.* Butler Imp. Co., 125 Mo. 565, 28 S. W. 861.

Wisconsin.— Milledge *v.* Coleman, 47 Wis. 184, 2 N. W. 77.

United States.— Geekie *v.* Kirby Carpenter Co., 106 U. S. 379, 1 S. Ct. 315, 27 L. ed. 157.

See 45 Cent. Dig. tit. "Taxation," § 1514.

Several tracts.— A tax deed which has not been recorded five years, and contains several separate tracts of land, is void on its face when its recitals do not show the amount for which each tract was conveyed, as required by the statute. Dye *v.* Midland Valley R. Co., 77 Kan. 488, 94 Pac. 785; Kramer *v.* Smith, 23 Okla. 381, 100 Pac. 532. And see *supra*, XIII, D, 2, d, (I), note 44.

Payment.— A tax deed, reciting that the county treasurer was conducting a tax-sale at the time and place the bid for the land was made, and that the sum bid was paid to the treasurer before the property was stricken off, is not open to the objection that it does not recite that the payment of the sum bid was made to the county treasurer. Howell *v.* Gruver, 78 Kan. 378, 97 Pac. 467.

Presumptions.— In the case of a tax deed less than five years old, in the absence of any showing as to the facts, the payment of subsequent taxes by the holder of the certificate must be presumed made at any date consistent with the recitals of the deed that would support its validity, and, if necessary for that purpose, it must also be presumed that the publications of the notice of sale and redemption notice were made for less than statutory maximum rates. Glenn *v.* Stewart, 78 Kan. 605, 608, 97 Pac. 863.

Statement of amount for which land sold see *supra*, XIII, D, 2, d, (I).

Consideration for assignment of certificate see *infra*, XIII, D, 2, g.

60. Landregan *v.* Peppin, 86 Cal. 122, 24 Pac. 859; Burlew *v.* Quarrier, 16 W. Va. 108. See Eustis *v.* Henrietta, (Tex. Civ. App. 1897) 41 S. W. 720.

61. Baird *v.* Monroe, 150 Cal. 560, 89 Pac. 352. But see Seaman *v.* Thompson, 16 Nebr. 546, 20 N. W. 857, holding that if the tax deed does not recite the giving of the notice for redemption, the holder of the tax title may prove that fact by extrinsic evidence.

Amount necessary to redeem.— Where a tax deed recites the amount the grantee paid for the certificate, giving the date and the amount of taxes subsequently paid, without giving the date of payment, and the final redemption notice gives as the amount necessary to redeem a sum claimed to be in excess of the proper amount, the deed will not be deemed invalid for that reason, if the amount of these payments, with interest from the date at which it could have been legally paid, equals or exceeds the sum stated in such notice. Michner *v.* Ford, 78 Kan. 837, 98 Pac. 273.

62. Amount for which bid in by county see *supra*, XIII, D, 2, d, (I).

63. De Frieze *v.* Quint, 94 Cal. 653, 30 Pac. 1, 28 Am. St. Rep. 151; Hughes *v.* Cannedy, 92 Cal. 382, 28 Pac. 573; Hewes *v.* McLellan, 80 Cal. 393, 22 Pac. 287; Doland *v.* Mooney, 79 Cal. 137, 21 Pac. 436; Anderson *v.* Hancock, 64 Cal. 455, 2 Pac. 31; Ludden *v.* Hansen, 17 Nebr. 354, 22 N. W. 766. *Compare* Best *v.* Wohlford, 153 Cal. 17,

of the certificate, the deed must recite the assignment, so as to show his title,[64] the name of the original purchaser,[65] and the manner of the assignment, if that is made material by the statute;[66] and in case of an assignment by a county, the deed must also show that it was made by the proper county officer,[67] and must generally show the consideration paid for the assignment and the consideration for the deed.[68]

94 Pac. 98; Cowan *v.* Skinner, 52 Fla. 486, 42 So. 730.

Where the law does not require a certificate of sale for taxes, the provision that the recitals in the certificate shall be embodied in the tax deed is inoperative, and a compliance therewith is unnecessary. Schamblin *v.* Means, 6 Cal. App. 261, 91 Pac. 1020.

64. Copeland *v.* Bond, 155 Ala. 571, 46 So. 853; Sanders *v.* Ransom, 37 Fla. 457, 20 So. 530; Florida Sav. Bank *v.* Brittain, 20 Fla. 507; Neenan *v.* White, 50 Kan. 639, 32 Pac. 381; Hall *v.* Baker, 74 Wis. 118, 42 N. W. 104; Krueger *v.* Knab, 22 Wis. 429. But see Doe *v.* Bean, 6 Ill. 302; Morton *v.* Harris, 9 Watts (Pa.) 319, as to presuming an assignment from the fact of the deed being made to another than the purchaser.

Sufficiency of recital of assignment see Knox *v.* Huidekoper, 21 Wis. 527.

Successive assignments.— Successive assignments of the certificate, intermediate between the purchaser at the tax-sale and the final assignee who procures the deed, need not be recited therein. Cousins *v.* Allen, 28 Wis. 232.

Clerical errors and surplusage.—A tax deed, reciting that, "whereas, James L. Gates and assignee of A. county has deposited in the office of the county clerk of the county of A. 75 certificates of the county treasurer," shows that James L. Gates presented himself as assignee of A county, and, the singular verb being used, that the application was made by one person only, and cannot be construed to mean that there was an assignee of A county in addition to Gates, and the word "and" before "assignee" should be rejected as surplusage, or as written by the clerk through mistake for "an." Maxon *v.* Gates, 136 Wis. 270, 116 N. W. 758.

65. Doolittle *v.* J. L. Gates Land Co., 131 Wis. 24, 110 N. W. 890; Washburn Land Co. *v.* Chicago, etc., R. Co., 124 Wis. 305, 102 N. W. 546; Dunbar *v.* Lindsay, 119 Wis. 239, 96 N. W. 557.

"Purchaser" to be named in deed.— The word "purchaser" in Wis. St. (1898) § 1178, requiring that the purchaser at a tax-sale be named in the tax deed, means one who has made a completed purchase, and not a mere bidder, who has forfeited his bid by failing to pay for the tax certificate, and who never obtained a delivery of the certificate. Herbst *v.* Land, etc., Co., 134 Wis. 502, 115 N. W. 119.

66. Atkison *v.* Butler Imp. Co., 125 Mo. 565, 28 S. W. 861; Pitkin *v.* Reibel, 104 Mo. 505, 16 S. W. 244. *Compare* Cousins *v.* Allen, 28 Wis. 232.

Sufficiency of recitals.— A tax deed is not void where it has been of record for more than five years, because, instead of using the statutory language as to the assignment of the tax-sale certificate and all the right, title, and interest of the county in the property, it merely states that the county clerk duly assigned all the right, title, and interest of the county in the property. Baughman *v.* Harvey, 76 Kan. 767, 93 Pac. 146.

Deed to heirs of purchaser.— A tax deed recorded for five years reciting a sale and issue of a certificate to R, and then reciting a conveyance, on presentation of the certificate, etc., "unto the said heirs of R, deceased, their heirs, and assigns," etc., is not void on its face for failure to state all the facts in detail as to the death of R and the legal proceedings by which the heirs became the owners of the certificate, as the recitals are to be liberally construed. Rynearson *v.* Conn, 77 Kan. 160, 94 Pac. 205.

67. Sanger *v.* Rice, 43 Kan. 580, 23 Pac. 633; Waterson *v.* Devoe, 18 Kan. 223; Entreken *v.* Howard, 16 Kan. 551; Sapp *v.* Morrill, 8 Kan. 677; Shoat *v.* Walker, 6 Kan. 65.

68. Hahn *v.* Hill Inv. Co., 79 Kan. 693, 100 Pac. 484; Colline *v.* Jolley, 79 Kan. 695, 100 Pac. 477; Sanger *v.* Rice, 43 Kan. 580, 23 Pac. 633; Morrill *v.* Douglass, 14 Kan. 293. But *compare* McCauslin *v.* McGuire, 14 Kan. 234.

Reciting insufficient consideration.— A tax deed is void if it recites a less consideration than necessary to redeem. Colline *v.* Jolley, 79 Kan. 695, 100 Pac. 477 (thirty-nine cents less); Wilks *v.* De Hart, 78 Kan. 217, 95 Pac. 836 (thirty-seven cents).

Sufficiency of statement see Burton *v.* Carver, 80 Kan. 696, 103 Pac. 84; Hahn *v.* Hill Inv. Co., 79 Kan. 693, 100 Pac. 484; Sanger *v.* Rice, 43 Kan. 580, 23 Pac. 633; Morrill *v.* Douglass, 14 Kan. 293. Taxes due and chargeable before the assignment of a certificate of tax-sale issued to a county should be included in the consideration for the assignment. Colline *v.* Jolley, 79 Kan. 695, 100 Pac. 477.

Error as to year.— A tax deed reciting that it is based on a certificate issued for the payment of the taxes of the year prior to that in which the taxes accrued is invalid upon its face, although it has been on record for more than five years. Price *v.* Barnhill, 79 Kan. 93, 98 Pac. 774.

Taxes due for each year.— A tax deed need not recite the taxes due for each year, but only the gross sum necessary to redeem at the time it was executed, as in the statutory form. Hahn *v.* Hill Inv. Co., 79 Kan. 693, 100 Pac. 484; Pierce *v.* Adams, 77 Kan. 46, 93 Pac. 594.

Subsequent taxes.— The clause in the

h. Evidence to Explain, Supply, or Contradict Recitals.[69] Unless the statute makes the recitals of a tax deed conclusive evidence,[70] extrinsic evidence is admissible to explain these recitals for the purpose of supporting the validity of the deed,[71] as also to contradict or control them,[72] to supply defects and omissions in the deed,[73] and to correct misrecitals and clerical or other errors.[74]

3. Description of Property — a. Certainty and Sufficiency in General. The description in the tax deed must be accurate enough to convey to the purchaser the precise land which he has bought and no other, and must be sufficiently clear and certain for all purposes of identification, both in support of the tax title and in order that it may not injuriously mislead parties interested in the land; if it fails in this it is void and passes no title.[75] Subject to this rule, and according

statutory form for a tax deed relating to the payment of subsequent taxes by the purchaser should be inserted in a deed, based on a sale to the county and an assignment of the certificate, only when the purchaser has paid taxes after the assignment of the certificate. Pierce *v.* Adams, 77 Kan. 46, 93 Pac. 594.

69. Tax deeds as evidence see *infra*, XIII, G.

Evidence to impeach deed or title see *infra*, XIII, G, 5.

70. Reckitt *v.* Knight, 16 S. D. 395, 92 N. W. 1077. And see Donohoe *v.* Veal, 19 Mo. 331. See *infra*, XIII, G, 2.

71. Greer *v.* Wheeler, 41 Iowa 85; John *v.* Young, 74 Kan. 865, 86 Pac. 295; Robbins *v.* Phillips, 74 Kan. 113, 85 Pac. 815. *Contra*, Greenwood *v.* Adams, 80 Cal. 74, 21 Pac. 1134; Preston *v.* Hirsch, 5 Cal. App. 485, 90 Pac. 965.

72. *Arkansas.*— Hickman *v.* Kempner, 35 Ark. 505.

California.— Landregan *v.* Peppin, 86 Cal. 122, 24 Pac. 859.

Illinois.— Billings *v.* Kankakee Coal Co., 67 Ill. 489.

Missouri.—Abbott *v.* Doling, 49 Mo. 302.

Pennsylvania.— Turner *v.* Waterson, 4 Watts & S. 171.

See 45 Cent. Dig. tit. "Taxation," § 1540 *et seq.*

73. Budd *v.* Bettison, 21 Ark. 582; Bonnell *v.* Roane, 20 Ark. 114; Moss *v.* Shear, 25 Cal. 38, 85 Am. Dec. 94; Clark *v.* Holton, 94 Ga. 542, 20 S. E. 429; John *v.* Young, 74 Kan. 865, 86 Pac. 295.

74. Klumpke *v.* Baker, 131 Cal. 80, 63 Pac. 137, 676; Knowles *v.* Martin, 20 Colo. 393, 38 Pac. 467; Kneeland *v.* Hull, 116 Mich. 55, 74 N. W. 300; Hardie *v.* Chrisman, 60 Miss. 671.

75. *Alabama.*—Francis *v.* Sandlin, 150 Ala. 583, 43 So. 829.

California.— Commercial Nat. Bank *v.* Schlitz, 6 Cal. App. 174, 91 Pac. 750. See Bosworth *v.* Danzien, 25 Cal. 296.

Colorado.— Lives *v.* Digges, 43 Colo. 166, 95 Pac. 341. See Halbouer *v.* Cuenin, 45 Colo. 507, 101 Pac. 763. Although Mills Annot. St. § 1901, prescribing the form of tax deeds, requires two descriptions of the property, one of the property assessed, and the other of the property sold, the second description need not be of the same particularity as the first, but any apt words which clearly indicate the property bid for and sold are sufficient, and hence, where the entire property assessed is sold the use of the words "said property," "the property above described," or "the whole of said property," is a sufficient compliance with the statute, being a description of the property bid for and sold by reference to the property described as taxed. Lines *v.* Digges, *supra*.

Indiana.— Sloan *v.* Sewell, 81 Ind. 180; Sharpe *v.* Dillman, 77 Ind. 280.

Iowa.— Martin *v.* Cole, 38 Iowa 141.

Kansas.— Robertson *v.* Lombard Liquidation Co., 73 Kan. 779, 85 Pac. 528; Kruse *v.* Fairchild, 73 Kan. 308, 85 Pac. 303; Ham *v.* Booth, 72 Kan. 429, 83 Pac. 24; Gibson *v.* Hammerburg, 72 Kan. 363, 83 Pac. 23; McDonough *v.* Merten, 53 Kan. 120, 35 Pac. 1117; Wood *v.* Nicholson, 43 Kan. 461, 23 Pac. 587; Wilkins *v.* Tourtellott, 28 Kan. 825; Hale *v.* Sweet, 7 Kan. App. 409, 53 Pac. 279.

Louisiana.— Levy *v.* Gause, 112 La. 789, 36 So. 684; Boyle *v.* West, 107 La. 347, 31 So. 794; Thibodaux *v.* Keller, 29 La. Ann. 508; Wills *v.* Auch, 8 La. Ann. 19.

Minnesota.— Kampfer *v.* East Side Syndicate, 95 Minn. 309, 104 N. W. 290; Bell *v.* McLaren, 89 Minn. 24, 93 N. W. 515.

Mississippi.— Cassidy *v.* Hartman, 93 Miss. 94, 46 So. 536; Boone *v.* Wells, 91 Miss. 799, 45 So. 571.

Missouri.—Where the proceedings for the sale of land for taxes and the deed pursuant thereto designated the landowner as "R. L. Hall," the deed was insufficient to convey the title of record of "Robert Lee Hall." Proctor *v.* Nance, 220 Mo. 104, 119 S. W. 409, 132 Am. St. Rep. 555.

New Hampshire.— Greely *v.* Steele, 2 N. H. 284, holding that a mistake as to the christian name of a former owner of the land will not avoid a tax deed.

New York.— People *v.* Golding, 55 Misc. 425, 106 N. Y. Suppl. 821; Utica Bank *v.* Mersereau, 3 Barb. Ch. 528, 49 Am. Dec. 189.

Ohio.— Marmet-Helm Coal, etc., Co. *v.* Cincinnati, etc., St. Ry., 28 Ohio Cir. Ct. 618.

Pennsylvania.— Norris *v.* Delaware, etc., R. Co., 218 Pa. St. 88, 56 Atl. 1122.

Texas.— Ozee *v.* Henrietta, 90 Tex. 334, 38 S. W. 768; Crumbley *v.* Busse, 11 Tex. Civ. App. 319, 32 S. W. 438.

Washington.— Miller *v.* Daniels, 47 Wash. 411, 92 Pac. 268.

Wisconsin.—Austin *v.* Holt, 32 Wis. 478.

to local usage, the description in the deed may be by metes and bounds,[76] or by giving the number of the lot and block,[77] or by giving the streets bounding the

United States.— Ontario Land Co. *v.* Wilfong, 162 Fed. 999 [*reversed* on other grounds in 171 Fed. 51, 96 C. C. A. 293.

Canada.—White *v.* Nelles, 11 Can. Sup. Ct. 587; Booth *v.* Girdwood, 32 U. C. Q. B. 23.

See 45 Cent. Dig. tit. "Taxation," §§ 1519, 1520.

Technical accuracy not required.—A tax deed is not void because the description is not technically accurate, where definite and certain enough to enable those familiar with it to readily recognize the land intended. Goodrow *v.* Stober, 80 Kan. 597, 102 Pac. 1089.

Exceptions and reservations see Abbott *v.* Coates, 62 Nebr. 247, 86 N. W. 1058; Day *v.* Needham, 2 Tex. Civ. App. 680, 22 S. W. 103; Pearson *v.* Mulholland, 17 Ont. 502.

Error as to one of several tracts.—An error in the description of one tract of land in a tax deed will not invalidate the deed as to other tracts included in it and properly described. Watkins *v.* Inge, 24 Kan. 612.

Application of recitals to several tracts.—In the case of a tax deed covering several tracts which has been of record for five years, failure to add to the statutory form, which includes but one description, words showing that the recitals apply to the tracts severally and not collectively, is not a fatal omission, but results at most in an ambiguity. Lincoln Mortg., etc., Co. *v.* Davis, 76 Kan. 639, 92 Pac. 707.

"Last hereinbefore described."—A tax deed which contains several distinct descriptions of real estate, and the granting clause of which provides that the real property "last hereinbefore described" is conveyed, is upon its face invalid as a conveyance of any tracts other than those included in the last description. Spicer *v.* Howe, 38 Kan. 465, 16 Pac. 825. A deed from a tax collector to the territory, which recites the assessment and levy of taxes for the year on property described as "Cabin and Lot 6 of Block 60 and Cabin and Lot 7 of Block 60" of a city and on personal property, and which states that the taxes were delinquent, and that the property was sold to the territory, and which conveys to the territory "all that lot . . . of land . . . above and last described in this deed," conveys only lot 7. Abell *v.* Swain, (Ariz. 1909) 100 Pac. 831.

Sale of least quantity bidder would take.—Where, under the statute, the sale was of the least quantity of the land which the bidder would take for the taxes, costs, etc., the deed, in addition to setting out this fact (see *supra*, XIII, D, 2, e), shows that the entire property assessed was sold, the use of the words "said property," "the property above described," or "the whole of said property," to indicate the property bid for and sold, describes with sufficient certainty the particular property sold, being a description of the property bid for and sold by reference to the property previously described as taxed. Lines *v.* Diggs, 43 Colo. 166, 95 Pac. 341. In Best *v.* Wohlford, 153 Cal. 17, 94 Pac. 98, a tax deed, having theretofore given a description of a parcel of land, and stated that the collector offered for sale the least quantity thereof to pay the assessment, etc., and that the grantee was the bidder who was willing to take the least quantity thereof, and pay the assessments etc., stated that the said least quantity or smallest portion of the land described was struck off to the grantee, and that the land was sold for assessments and subject to redemption. The granting clause stated that the collector thereby granted "all that lot, piece, or parcel of land so sold and hereinbefore and lastly described in this deed." It was held that the deed showed that the whole of the lot was the least quantity which any bidder was willing to take, and that such whole was in fact sold and conveyed by the deed, and that the deed was not open to the objection that it purported to convey the "least quantity or smallest portion," without designating what it was. *Compare*, however, Lines *v.* Digges, *supra*. A tax deed, reciting that a person named having offered to pay a certain sum, "being the whole amount of taxes, interest and costs then due and remaining unpaid on said property for 1889, to wit, NE¼ sec. 35-2-36, which was the least quantity bid for," is not open to the objection that the property is not described with sufficient certainty, in that the word "for" should have been used between the words "remaining unpaid" and "said property," instead of "on," as there immediately followed a description of the property, and the words "which was the least quantity bid for" removed any possible uncertainty. Howell *v.* Gruver, 78 Kan. 378, 97 Pac. 467.

76. *California.*— Brunn *v.* Murphy, 29 Cal. 326.

Kansas.— Dodge *v.* Emmons, 34 Kan. 732, 9 Pac. 951.

Louisiana.— Cooper *v.* Falk, 109 La. 474, 33 So. 567, holding insufficient the following description: "A certain tract of land assessed in the name of Robins and Cooper, containing six hundred and forty acres; boundaries unknown."

Massachusetts.—Hill *v.* Mowry, 6 Gray 551.

New York.— Zink *v.* McManus, 121 N. Y. 259, 24 N. E. 467; Oakley *v.* Healey, 38 Hun 244.

Wisconsin.— Scheiber *v.* Kaehler, 49 Wis. 291, 5 N. W. 817.

Canada.— McIntyre *v.* Great Western R. Co., 17 U. C. Q. B. 118.

See 45 Cent. Dig. tit. "Taxation," § 1520.

77. Gibson *v.* Shiner, 74 Kan. 728, 88 Pac. 259; Syer *v.* Bundy, 9 La. Ann. 540; Hubbard *v.* Arnold, 2 Tex. Unrep. Cas. 327; Wolf *v.* Gibbons, (Tex. Civ. App. 1902) 69 S. W. 238; Homes *v.* Henriette, (Tex. Civ. App.

land;[78] but a description of the property as "a house and lot" on a certain street, without the number, is void for uncertainty, although the dimensions or the name of the owner may be added.[79] In suitable cases the land may be described by the numbers of the subdivisions of the government survey,[80] and the usual abbreviations for these subdivisions and for the points of the compass may be used.[81] If the description is otherwise correct and sufficient, it is not necessarily invalidated by omitting to name the state and county;[82] but it is otherwise if the name of the city or town is omitted.[83] No sufficient description can be given by merely stating the quantity or acreage of the land,[84] but if the description is otherwise perfect and correct, a mistake in this particular will not avoid it.[85]

b. Undivided Interest or Part of Tract. Where a tax deed attempts to convey a portion of a tract or lot, it must be so particularly described that it can be definitely and certainly located within the boundaries of the larger tract; it will not do to describe it as a "part" of the tract or the "balance" of it, or as a given fractional part of it, or as so many acres out of the tract, or as a certain tract "less" or "excepting" a given number of acres; all these forms of description being void for uncertainty.[86] There are, however, some decisions to the effect that

1897) 41 S. W. 728; Ontario Land Co. *v.* Yordy, 44 Wash. 239, 87 Pac. 257.

Where there are several lots in the same square or other division bearing the same number, a description of the property by the number of the lot and square is insufficient. Miller *v.* Williams, 135 Cal. 183, 67 Pac. 788; Sleight *v.* Roe, 125 Mich. 585, 85 N. W. 10; Lount *v.* Walkington, 15 Grant Ch. (U. C.) 332.

78. A description of land sold for taxes as bounded by four well-known streets open and in use is sufficient. New Orleans Land Co. *v.* National Realty Co., 121 La. 196, 46 So. 208.

79. *Alabama.*— Jones *v.* Pelham, 84 Ala. 208, 4 So. 22.

California.— Keane *v.* Cannovan, 21 Cal. 291, 82 Am. Dec. 738.

Florida.—Walls *v.* Endel, 20 Fla. 86.

Louisiana.— Marin *v.* Sheriff, 30 La. Ann. 293.

Maine.—Whitmore *v.* Learned, 70 Me. 276.

Mississippi.— Smith *v.* Brothers, 86 Miss. 241, 38 So. 353; Bowers *v.* Andrews, 52 Miss. 596. See Strauss *v.* McAllister, (1889) 5 So. 625.

Rhode Island.— Tripp *v.* Ide, 3 R. I. 51.

See 45 Cent. Dig. tit. "Taxation," § 1520.

80. Rhodes *v.* Covington, 69 Ark. 357, 63 S. W. 799; Wendell *v.* Whitaker, 28 Kan. 690; Stanberry *v.* Nelson, Wright (Ohio) 766.

81. *Illinois.*— Taylor *v.* Wright, 121 Ill. 455, 13 N. E. 529.

Iowa.— Ellsworth *v.* Nelson, 81 Iowa 57, 46 N. W. 740.

Maine.— Moulton *v.* Egery, 75 Me. 485.

Michigan.—Amberg *v.* Rogers, 9 Mich. 332; Sibley *v.* Smith, 2 Mich. 486.

Mississippi.— Morgan *v.* Schwartz, 66 Miss. 613, 6 So. 326.

Missouri.— Lowe *v.* Ekey, 82 Mo. 286.

See 45 Cent. Dig. tit. "Taxation," §§ 1519, 1520.

82. Billings *v.* Kankakee Coal Co., 67 Ill. 489; Haynes *v.* Heller, 12 Kan. 381; Lewis *v.* Seibles, 65 Miss. 251, 3 So. 652, 7 Am. St. Rep. 649. See Austin *v.* Holt, 32 Wis. 478.

83. Campbell *v.* Packard, 61 Wis. 88, 20 N. W. 672. But a tax deed of lots on a certain avenue "city of Topeka" is not void because they are not described as "in" the city. Harris *v.* Curran, 32 Kan. 580, 4 Pac. 1044. Nor is a deed invalidated by describing the property as a certain block "to" a named village instead of "in" the village. Delorme *v.* Ferk, 24 Wis. 201.

84. Gooch *v.* Benge, 90 Ky. 393, 14 S. W. 375, 12 Ky. L. Rep. 368; Cooper *v.* Falk, 109 La. 474, 33 So. 567; Libby *v.* Mayberry, 80 Me. 137, 13 Atl. 577; Todd *v.* Lunt, 148 Mass. 322, 19 N. E. 522.

85. Towell *v.* Etter, 69 Ark. 34, 59 S. W. 1096, 63 S. W. 53; Graves *v.* Hayden, 2 Litt. (Ky.) 61; Smith *v.* New Orleans, 43 La. Ann. 726, 9 So. 773. But see *In re* Martinez, 117 La. 719, 42 So. 246, holding that where the dimensions of a lot of which the tax purchaser has been put in possession are less than those which are called for by the tax deed, and the lot is otherwise sufficiently described to identify the same, the title is in such case perfected to the extent of the possession, but not beyond it.

86. *Alabama.*— Dane *v.* Glennon, 72 Ala. 160.

Arkansas.— Dickinson *v.* Arkansas City Imp. Co., 77 Ark. 570, 92 S. W. 21, 113 Am. St. Rep. 170; Covington *v.* Berry, 76 Ark. 460, 88 S. W. 1005; Schattler *v.* Cassinelli, 56 Ark. 172, 19 S. W. 746; Hershey *v.* Thompson, 50 Ark. 484, 8 S. W. 689; Jacks *v.* Chaffin, 34 Ark. 534.

California.— Roberts *v.* Chan Tin Pen, 23 Cal. 259.

Illinois.—Alleman *v.* Hammond, 209 Ill. 70, 70 N. E. 661; Brickey *v.* English, 129 Ill. 646, 22 N. E. 854.

Indiana.— Armstrong *v.* Hufty, 156 Ind. 606, 55 N. E. 443, 60 N. E. 1080; Cooper *v.* Jackson, 71 Ind. 244.

Iowa.— Tucker *v.* Carlson, 113 Iowa 449, 85 N. W. 901; Smith *v.* Blackiston, 82 Iowa 240, 47 N. W. 1075; Ellsworth *v.* Nelson, 81 Iowa 57, 46 N. W. 740; Griffith *v.* Utley, 76 Iowa 292, 41 N. W. 21.

when the quantity of the land intended to be conveyed is stated and also its general location with reference to the larger tract, nothing being left uncertain but the shape of the portion to be conveyed, the description may be sustained, the presumption being that the land was intended to lie in the form of a square.[87]

c. Intendments and Inferences. It is a general rule that no intendments can be made in support of tax deeds, but they must be sufficiently certain on their face; and hence words necessary to identify the land will not be supplied by inference or presumption;[88] nor is it permissible to reject any part of the description as surplusage, although, if this were done, a good and sufficient description would remain.[89] The rule is different, however, where the statute makes the ordinary

Kansas.— Wilkins *v.* Tourtellott, 28 Kan. 825.

Maine.— Green *v.* Alden, 92 Me. 177, 42 Atl. 358; Larrabee *v.* Hodgkins, 58 Me. 412.

Michigan.— See Vetterly *v.* McNeal, 129 Mich. 507, 89 N. W. 441.

Mississippi.— Hughes *v.* Thomas, (1900) 29 So. 74; Nelson *v.* Abernathy, 74 Miss. 164, 21 So. 150; Pearce *v.* Perkins, 70 Miss. 276, 12 So. 205; Selden *v.* Coffee, 55 Miss. 41; Cogburn *v.* Hunt, 54 Miss. 275; Yandell *v.* Pugh, 53 Miss. 295.

Missouri.— Roth *v.* Gabbert, 123 Mo. 21, 27 S. W. 528; Western *v.* Flanagan, 120 Mo. 61, 25 S. W. 531.

New Hampshire.— Harvey *v.* Mitchell, 31 N. H. 575.

New York.— Underhill *v.* Keirns, 170 N. Y. 587, 63 N. E. 1122 [*affirming* 54 N. Y. App. Div. 214, 66 N. Y. Suppl. 573]; Marsh *v.* Ne-ha-sa-ne Park Assoc., 25 N. Y. App. Div. 34, 49 N. Y. Suppl. 384; People *v.* Golding, 55 Misc. 425, 106 N. Y. Suppl. 821; Wallace *v.* Curtis, 29 Misc. 415, 61 N. Y. Suppl. 994 [*reversed* on other grounds in 53 N. Y. App. Div. 41, 65 N. Y. Suppl. 543].

Ohio.—Winkler *v.* Higgins, 9 Ohio St. 599; Burchard *v.* Hubbard, 11 Ohio 316.

Texas.— Tram Lumber Co. *v.* Hancock, 70 Tex. 312, 7 S. W. 724.

Washington.— Miller *v.* Daniels, 47 Wash. 411, 92 Pac. 268.

Wisconsin.— Johnson *v.* Ashland Lumber Co., 52 Wis. 458, 9 N. W. 464.

United States.— Hintrager *v.* Nightingale, 36 Fed. 847.

Canada.— Davidson *v.* Kiely, 18 Grant Ch. (U. C.) 494; Knaggs *v.* Ledyard, 12 Grant Ch. (U. C.) 320; Austin *v.* Armstrong, 28 U. C. C. P. 47; Williams *v.* McColl, 23 U. C. C. P. 189; Cayley *v.* Foster, 25 U. C. Q. B. 405; McDonell *v.* McDonald, 24 U. C. Q. B. 74; Fraser *v.* Mattice, 19 U. C. Q. B. 150.

See 45 Cent. Dig. tit. "Taxation," §§ 1519, 1520.

Decisions contra or distinguishable.— See the following cases in which descriptions substantially similar to those mentioned in the text have been held sufficient, generally, however, with the addition of some more or less significant circumstance laid hold of to aid the description: Taylor *v.* Wright, 121 Ill. 455, 13 N. E. 529; Powers *v.* Sawyer, 100 Me. 536, 62 Atl. 349; Gilman *v.* Riopelle, 18 Mich. 145; Wheeler *v.* Lynch, 89 Miss. 157, 42 So. 538; Herring *v.* Moses, 71 Miss. 620, 14 So. 437; McCready *v.* Lansdale, 58 Miss. 877; Bowers *v.* Chambers, 53 Miss. 259; Scheiber *v.* Kaehler, 49 Wis. 291, 5 N. W. 817; Fraser *v.* West, 21 U. C. C. P. 161. See 45 Cent. Dig. tit. "Taxation," §§ 1519, 1520.

Deed conveying undivided interest in proportion to acreage see Sheafe *v.* Wait, 30 Vt. 735, holding that a tax deed which describes the land simply as so many acres of a certain lot passes an undivided interest in such lot equal to the proportion which the number of acres sold bears to the whole number of acres in the lot.

Rule in Pennsylvania.—A treasurer's tax-sale of part of a tract of land and a conveyance of that part, designating the quantity but not the locality, is good, and the purchaser has an unrestricted choice in the tract. Coxe *v.* Blanden, 1 Watts 533, 26 Am. Dec. 83. But *compare* Erwin *v.* Helm, 13 Serg. & R. 151.

Undivided portion.—Where the statute provides that the person who offers to pay the amount of taxes due on any parcel of land for the smallest portion of the same is to be considered the purchaser, and the portion thus designated shall be considered "an undivided portion," it is held that a tax deed describing the land conveyed as the "undivided seven-fortieths" of the entire parcel is valid. Brundige *v.* Maloney, 52 Iowa 218, 2 N. W. 1110. A tax deed, showing that an undivided three fourths of a certain tract was taxable and assessed for taxation and that the same tract was sold and conveyed by the deed, sufficiently identified the tract assessed with that sold. Halbouer *v.* Cuenin, 45 Colo. 507, 101 Pac. 763.

87. Doe *v.* Clayton, 81 Ala. 391, 2 So. 24. And see Kennedy *v.* Scott, 72 Kan. 359, 83 Pac. 971; Flanagan *v.* Boggess, 46 Tex. 330; Dolan *v.* Trelevan, 31 Wis. 147; Newby *v.* Brownlee, 23 Fed. 320. But this does not apply where the shape of the whole tract is such that it would not be possible to lay off the required number of acres in the form of a square. Ammons *v.* Dwyer, 78 Tex. 639, 15 S. W. 1049.

88. Blair Town Lot, etc., Co. *v.* Scott, 44 Iowa 143; Wendell *v.* Whitaker, 28 Kan. 690; Dodeman *v.* Barrow, 11 La. Ann. 87; Wilson *v.* Marshall, 10 La. Ann. 327; Orton *v.* Noonan, 23 Wis. 102. *Compare* Smith *v.* Philips, 51 Fla. 327, 41 So. 527, as to supplying by presumption words necessary to show that the land in question is within the state.

89. Collins *v.* Storm, 75 Iowa 36, 39 N. W. 161; Tallman *v.* White, 2 N. Y. 66; Dike *v.*

rules of evidence and of interpretation applicable to tax deeds, for in this case surplusage can be rejected and the maxim applies that that may be regarded as certain which can be rendered so.[90]

d. Extrinsic Evidence to Identify. It has been held in some cases that if the description in a tax deed is not certain and complete in itself, the deed is void and cannot be aided by extrinsic evidence.[91] But the rule more generally adopted is that such evidence is not admissible to supply defects or uncertainties apparent on the face of the deed or to explain a patent ambiguity;[92] while on the other hand if the defect or ambiguity is latent, that is, if the description is apparently certain and sufficient on its face, but needs evidence to apply it to the particular land intended, on account of a non-apparent error or mistake, extrinsic testimony should be received for this purpose.[93]

e. Variance Between Deed and Assessment. The description of the property in the tax deed should correspond with that in the assessment roll and other prior proceedings, and in case of a material variance the purchaser will not acquire title.[94] And this rule applies, although the description in the assessment list was

Lewis, 4 Den. (N. Y.) 237; Orton *v.* Noonan, 23 Wis. 102. *Compare* Nelles *v.* White, 29 Grant Ch. (U. C.) 338, holding that the words "be the same more or less" following the statement of the quantity of land, improperly inserted in a tax deed, may be rejected as surplusage.

90. Reinhart *v.* Oconto County, 69 Wis. 352, 34 N. W. 135; Meade *v.* Gilfoyle, 64 Wis. 18, 24 N. W. 413; Delorme *v.* Ferk, 24 Wis. 201.

91. Kilpatrick *v.* Sisneros, 23 Tex. 113; Wofford *v.* McKinna, 23 Tex. 36, 76 Am. Dec. 53.

92. *Arkansas.*—Woodall *v.* Edwards, 83 Ark. 334, 104 S. W. 128.

California.— Maps of the subdivisions and surveys of lots and tracts referred to in tax deeds are admissible to supplement the description in the assessments and tax deeds. Davis *v.* Le Mesnager, 152 Cal. 97, 92 Pac. 76.

Iowa.— Roberts *v.* Deeds, 57 Iowa 320, 10 N. W. 740.

Mississippi.— Gibbs *v.* Hall, (1905) 38 So. 369; Smith *v.* Brothers, 86 Miss. 241, 38 So. 353.

Texas.— Claiborne *v.* Elkins, 79 Tex. 380, 15 S. W. 395.

Virginia.— Miller *v.* Williams, 15 Gratt. 213.

Wisconsin.—Mendota Club *v.* Anderson, 101 Wis. 479, 78 N. W. 185.

See 45 Cent. Dig. tit. "Taxation," §§ 1519, 1520.

Plat in auditor's office.— Where the description in a tax deed is so indefinite as to make it impossible to locate the land, the holder of the deed cannot bring to his aid a plat in the auditor's office to which no reference is made in the deed or on the duplicate, and such deed is void for uncertainty. Marmet-Halm Coal, etc., Co. *v.* Cincinnati, etc., R. Co., 28 Ohio Cir. Ct. 618.

93. *Iowa.*— Judd *v.* Anderson, 51 Iowa 345, 1 N. W. 677.

Kansas.— Knote *v.* Caldwell, 43 Kan. 464, 23 Pac. 625.

Minnesota.— Stewart *v.* Colter, 31 Minn. 385, 18 N. W. 98.

Mississippi.— Hughes *v.* Thomas, (1900) 29 So. 74; Illinois Cent. R. Co. *v.* Le Blanc, 74 Miss. 650, 21 So. 760; Hanna *v.* Renfro, 32 Miss. 125.

Missouri.— Brown *v.* Walker, 85 Mo. 262; Nelson *v.* Brodhack, 44 Mo. 596, 100 Am. Dec. 328.

New Hampshire.— Greely *v.* Steele, 2 N. H. 284.

New York.— Ne-ha-sa-ne Park Assoc. *v.* Lloyd, 25 Misc. 207, 55 N. Y. Suppl. 108 [*affirmed* in 45 N. Y. App. Div. 631, 61 N. Y. Suppl. 1143 (*affirmed* in 167 N. Y. 431, 60 N. E. 741)].

Oregon.— Minter *v.* Durham, 13 Oreg. 470, 11 Pac. 231.

Pennsylvania.— Marsh *v.* Nelson, 101 Pa. St. 51; Hamaker *v.* Whitecar, 1 Walk. 120; Cornelius *v.* Dunn, 17 Pa. Co. Ct. 566.

Texas.— Murphy *v.* Williams, (Civ. App. 1900) 56 S. W. 695; Homes *v.* Henrietta, (Civ. App. 1897) 41 S. W. 728; Earle *v.* Henrietta, (Civ. App. 1897) 41 S. W. 727.

Wisconsin.— Jenkins *v.* Sharpf, 27 Wis. 472; Mecklem *v.* Blake, 19 Wis. 397. But see Curtis *v.* Brown County, 22 Wis. 167.

See 45 Cent. Dig. tit. "Taxation," §§ 1519, 1520.

Contra.— Roberts *v.* Fargo First Nat. Bank, 8 N. D. 504, 79 N. W. 1049.

94. *Florida.*— Levy *v.* Ladd, 35 Fla. 391, 17 So. 635; Carncross *v.* Lykes, 22 Fla. 587; Grissom *v.* Furman, 22 Fla. 581.

Iowa.— Blair Town Lot, etc., Co. *v.* Scott, 44 Iowa 143.

Kansas.— Bruce *v.* McBee, 23 Kan. 379.

Kentucky.— Carlisle *v.* Cassady, 46 S. W. 490, 20 Ky. L. Rep. 562.

Minnesota.— Flint *v.* Webb, 25 Minn. 93.

Mississippi.— Gibbs *v.* Hall, (1905) 38 So. 369.

Missouri.—O'Day *v.* McDaniel, 181 Mo. 529, 80 S. W. 895.

Pennsylvania.— Watts *v.* Gilmore, 2 Yeates 330.

Wyoming.— Matthews *v.* Nefsy, 13 Wyo. 458, 81 Pac. 305, 110 Am. St. Rep. 1020.

See 45 Cent. Dig. tit. "Taxation," § 1522.

What variance material.—A difference between the assessment and the deed, in respect

defective or insufficient while that in the deed is perfect and complete, as the defect in the former cannot be cured by inserting a good description in the latter.[95]

E. Amendment and Curative Statutes — 1. Amendment and Correction — a. In General. A mere clerical error in a tax deed may be corrected by the proper officer; [96] but not so a defect of substance.[97] In the latter case the proper remedy is to procure the issuance of a new deed; [98] but it must be observed that this remedy cannot be employed to cure a fatal defect in the anterior proceedings.[99]

b. Reformation in Equity. A tax title being a purely technical title, as distinguished from a meritorious title, and depending for its validity on a strict compliance with the requirements of the statutes in respect to all the prior proceedings, which are wholly *in invitum* as respects the owner of the property, a court of equity will not interfere to reform a tax deed or order the correction of errors in it.[1]

2. Curative Statutes. It is competent for the legislature, by a curative statute, to obviate the effect of errors, irregularities, or defects in tax deeds, where they are of such a character that it could have rendered them immaterial in advance,[2] but not to cure a want of jurisdiction or other defects affecting the substantial rights of the parties or going to the ground-work of the proceedings.[3]

to the description of the property, is not material if it is apparent that the same land is described in each. Mitchell *v.* Pillsbury, 5 Wis. 407. And it is no objection to a tax deed that it contains a fuller description than that contained in the assessment, provided that both fit the land intended. Castlemen *v.* Phillipsburg Land Co., 1 Tenn. Ch. App. 9.

Admissibility of extrinsic evidence.—Where the only variance is a difference in the number of the district, the holder of the tax deed may show that it resulted from a clerical error made by the clerk in transcribing the record. Hilton *v.* Singletary, 107 Ga. 821, 33 S. E. 715. And in Blair Town Lot, etc., Co. *v.* Scott, 44 Iowa 143, it was held that the tax purchaser may show by extrinsic evidence that the land described in the deed is the same as that assessed, although under a different description.

95. Hewitt *v.* Storch, 31 Kan. 488, 2 Pac. 556; Wilkins *v.* Tourtelott, 28 Kan. 825; Gibbs *v.* Hall, (Miss. 1905) 38 So. 369; Turney *v.* Yeoman, 16 Ohio 24; Stout *v.* Mastin, 139 U. S. 151, 11 S. Ct. 519, 35 L. ed. 121. *Compare* Maxson *v.* Huston, 22 Kan. 643.

96. Smith *v.* Griffin, 14 Colo. 429, 23 Pac. 905; Harvey *v.* Gulf States Land, etc., Co., 108 La. 550, 32 So. 475; Harding *v.* Auditor-Gen., 140 Mich. 646, 104 N. W. 39.

Effect of alteration.—A tax deed which appears on its face to have been altered in a material respect after its execution is not admissible in evidence. Miller *v.* Luco, 80 Cal. 257, 22 Pac. 195. See Lee *v.* Newland, 164 Pa. St. 360, 30 Atl. 258, as to what alterations require explanation before admitting the deed in evidence.

97. Duff *v.* Neilson, 90 Mo. 93, 2 S. W. 222.

98. See *supra*, XIII, C, 1, d.

99. *Iowa.*— Vaughan *v.* Stone, 55 Iowa 213, 7 N. W. 521.

Kansas.— Hewitt *v.* Storch, 31 Kan. 488, 2 Pac. 556.

Missouri.— Talley *v.* Schlatitz, 180 Mo. 231, 79 S. W. 162.

North Carolina.— Harrison *v.* Hahn, 95 N. C. 28.

South Dakota.— Rector, etc., Co. *v.* Maloney, 15 S. D. 271, 88 N. W. 575.

1. Altes *v.* Hinckler, 36 Ill. 265, 85 Am. Dec. 406; Keepfer *v.* Force, 86 Ind. 81; Byam *v.* Cook, 21 Iowa 392; Boone *v.* Dulion, 80 Miss. 584, 32 So. 1; Cogburn *v.* Hunt, 56 Miss. 718; Bowers *v.* Anderson, 52 Miss. 596; Morgan *v.* Smith, 70 Tex. 637, 8 S. W. 523. *Contra*, Hickman *v.* Kempner, 35 Ark. 505.

2. *California.*— Peck *v.* Fox, 154 Cal. 744, 99 Pac. 189 (failure to recite correct date of expiration of time to redeem); Schamblin *v.* Means, 6 Cal. App. 261, 91 Pac. 1020.

Maryland.— McMahon *v.* Crean, 109 Md. 652, 71 Atl. 995, deed executed without authority by successor of officer who made the tax-sale.

North Dakota.— State Finance Co. *v.* Mather, 15 N. D. 386, 109 N. W. 350.

West Virginia.— Hogan *v.* Piggott, 60 W. Va. 541, 56 S. E. 189.

Wisconsin.— Lombard *v.* White, 76 Wis. 445, 45 N. W. 420.

3. *Indiana.*— Wine *v.* Woods, 158 Ind. 383, 63 N. W. 759.

Kansas.— Worden *v.* Cole, 74 Kan. 226, 86 Pac. 464.

Louisiana.— Richard *v.* Perrodin, 116 La. 440, 40 So. 789.

Minnesota.— Olson *v.* Cash, 98 Minn. 4, 107 N. W. 557.

New York.— Sanders *v.* Saxton, 36 Misc. 574, 73 N. Y. Suppl. 1095 [*affirmed* in 89 N. Y. App. Div. 421, 85 N. Y. Suppl. 762 (*reversed* on other grounds in 182 N. Y. 477, 75 N. E. 529, 108 Am. St. Rep. 826, 1 L. R. A. N. S. 727)]. Laws (1896), p. 841, c. 908, § 132, providing that a conveyance executed by the controller which has been recorded in the office of the clerk of the county in which the lands conveyed are located for two years shall be conclusive evidence that the sale and proceedings prior thereto and all notices required to be given of the expiration of the time allowed to redeem, were

Such a statute may be construed as retroactive in its operation if plainly so intended, but not otherwise.[4]

F. Construction and Operation[5] — **1. In General.** The general rule, in the absence of a statute, is that a tax deed must be strictly construed in favor of the taxpayer; [6] but either by the aid of statutes making tax deeds *prima facie* evidence of title in the holder,[7] or after a great lapse of time,[8] they will be supported by all reasonable presumptions,[9] and in construing doubtful or ambiguous clauses that interpretation will be adopted, if possible, which would give validity to the deed rather than one which would destroy it.[10] A tax deed from the state conveying delinquent state tax land can receive no other construction than a deed between private persons, and the grantee therein is entitled to the performance of the conditions therein according to their exact terms.[11]

2. Property Conveyed. In respect to the property conveyed by a tax deed, it will be construed according to the ordinary rules applicable to private conveyances,[12] except that it cannot be made to include any greater interest or other property than that described in the assessment and other prior proceedings.[13] The acreage or area given will not control the general description, but *vice versa*.[14] Where the deed conveys several tracts of land, an error in the description of one will not invalidate the deed as to the others.[15]

3. Relation Back to Time of Sale. A tax deed, although delayed in its issuance, may relate back to the time when the purchaser became fully entitled to receive it,[16] or even to the time of the sale, when this is necessary to effect justice to all parties; [17] but it does not relate back to the time of the sale so as to clothe the

regular and regularly given, published, and served, did not cure the record of a conveyance to the state for non-payment of taxes which was wholly void. People *v.* Ladew, 189 N. Y. 355, 82 N. E. 431, 190 N. Y. 543, 82 N. E. 1092 [*reversing* 108 N. Y. App. Div. 356, 95 N. Y. Suppl. 1151]. Assessing land as non-resident, when there was a resident owner or occupant, to whom by Laws (1896), p. 801, c. 908, § 9, it should have been assessed, was a defect affecting the jurisdiction on constitutional grounds, within sections 131 and 132, making a tax deed after two years conclusive of regularity of proceedings except "any defect in the proceedings affecting the jurisdiction on constitutional grounds." Clark *v.* Kirkland, 133 N. Y. App. 826, 118 N. Y. Suppl. 315.

Wisconsin.— Hazeltine *v.* Hewitt, 61 Wis. 121, 20 N. W. 676; Easley *v.* Whipple, 57 Wis. 485, 14 N. W. 904.

United States.— Hodgdon *v.* Burleigh, 4 Fed. 111.

4. Peck *v.* Fox, 154 Cal. 744, 99 Pac. 189; Baird *v.* Monroe, 150 Cal. 560, 89 Pac. 352; Schamblin *v.* Means, 6 Cal. App. 261, 91 Pac. 1020; McMahon *v.* Crean, 109 Md. 652, 71 Atl. 995; McCann *v.* Merriam, 11 Nebr. 241, 9 N. W. 96; State *v.* Harman, 57 W. Va. 447, 50 S. E. 828.

5. Title or interest conveyed by tax deed and effect on existing liens and encumbrances see *infra*, XIV, A.

6. Rainey *v.* Lamb Hardwood Lumber Co., 91 Miss. 690, 45 So. 367. See *infra*, XIII, G, 1.

7. See *infra*, XIII, G, 3.

8. Colman *v.* Anderson, 10 Mass. 105; Sheafer *v.* Mitchell, 109 Tenn. 181, 71 S. W. 86.

9. Chicago, etc., R. Co. *v.* Kelley, 105 Iowa 106, 74 N. W. 935; Peninsular Sav. Bank *v.* Ward, 118 Mich. 87, 76 N. W. 161, 79 N. W. 911; Cornelius *v.* Ferguson, 17 S. D. 481, 97 N. W. 388.

10. Gibson *v.* Trisler, 73 Kan. 397, 85 Pac. 413; Kennedy *v.* Scott, 72 Kan. 359, 83 Pac. 971; Cane *v.* Herndon, 107 La. 591, 32 So. 33.

11. Haney *v.* Miller, 154 Mich. 337, 117 N. W. 71, 745.

12. Blakeley *v.* Bestor, 13 Ill. 708. And see, generally, Perry *v.* Burton, 111 Ill. 138; Wray *v.* Clarke, 64 Minn. 309, 67 N. W. 72; Eastman *v.* St. Anthony Falls Water-Power Co., 43 Minn. 60, 44 N. W. 882; Herron *v.* Murphy, 10 Pa. Cas. 280, 13 Atl. 958.

Property "last hereinbefore described."— A tax deed containing several distinct descriptions of real estate, whose granting clause conveys the real property "last hereinbefore described," is on its face invalid as to any other tracts than those included in the last description. Spicer *v.* Howe, 38 Kan. 465, 16 Pac. 825. And see Gibson *v.* Kueffer, 69 Kan. 534, 77 Pac. 282; Cartwright *v.* Korman, 45 Kan. 515, 26 Pac. 48.

13. Lemoore Bank *v.* Fulgham, 151 Cal. 234, 90 Pac. 936; Judd *v.* Anderson, 51 Iowa 345, 1 N. W. 677.

14. Crill *v.* Hudson, 71 Ark. 390, 74 S. W. 299; Webre *v.* Lutcher, 45 La. Ann. 574, 12 So. 834.

15. Watkins *v.* Inge, 24 Kan. 612.

16. Palmer *v.* Frank, 169 Ill. 90, 48 N. E. 426; Ferguson *v.* Miles, 8 Ill. 358, 44 Am. Dec. 702.

17. Hemmingway *v.* Drew, 47 Mich. 554, 11 N. W. 382; Connecticut Mut. L. Ins. Co. *v.* Bulte, 45 Mich. 113, 7 N. W. 707. And see

purchaser retrospectively with the rights of an owner during the interval;[18] nor for the purpose of making parties trespassers by reason of acts done on the land before the deed was executed.[19]

4. Priorities Between Successive Deeds. As between two tax deeds conveying the same land, the one which is later in date will outrank the other and divest any title acquired under it,[20] unless the latter, although earlier in date of execution, was founded on a later tax-sale;[21] or, according to some of the decisions, the priority is to be given to the sale and deed for the taxes of the later year.[22]

5. What Law Governs. The validity and effect of a tax deed duly executed are to be determined by the statutes in force when the sale was made or certificate acquired, and not by any statute enacted after the sale or issue of the certificate and before the making of the deed.[23]

G. Tax Deeds as Evidence[24] — 1. At Common Law — a. Presumptions and Burden of Proof. At common law the validity of a tax-sale will not be presumed from the mere deed of the collector unaccompanied by proof of the prior proceedings and their validity.[25] On the contrary, in the absence of an enabling statute, the burden is upon any person who claims title to land derived from a sale thereof for taxes to prove, affirmatively and by proper evidence, that every mandatory provision of the law under which the sale was effected was strictly complied with, that each step in the proceedings, from the assessment of the taxes to the execution of the deed, was formally and regularly taken by the officers or persons legally authorized, and that he or his grantor was the purchaser at the sale.[26]

Eldridge *v.* Richmond, 120 Mich. 586, 79 N. W. 807.

18. Taylor *v.* Frederick, McGloin (La.) 380; Donohoe *v.* Veal, 19 Mo. 331; Woodland Oil Co. *v.* Shoup, 107 Pa. St. 293; Lacy *v.* Johnson, 58 Wis. 414, 17 N. W. 246.

19. Hess *v.* Griggs, 43 Mich. 397, 5 N. W. 427.

20. Campbell *v.* Stagg, 37 Kan. 419, 15 Pac. 531; Charter Oak Land, etc., Co. *v.* Bippus, 200 Mo. 688, 98 S. W. 546; Raquette Falls Land Co. *v.* International Paper Co., 94 N. Y. App. Div. 609, 87 N. Y. Suppl. 1146 [*affirming* 41 Misc. 357, 84 N. Y. Suppl. 836, and *affirmed* in 181 N. Y. 540, 73 N. E. 1131]; Meldahl *v.* Dobbin, 8 N. D. 115, 77 N. W. 280. But *compare* Wells *v.* Johnston, 55 N. Y. App. Div. 484, 67 N. Y. Suppl. 112 [*affirmed* in 171 N. Y. 324, 63 N. E. 1095]; Patterson *v.* Cappon, 129 Wis. 439, 109 N. W. 103.

21. Doolittle *v.* J. L. Gates Land Co., 131 Wis. 24, 110 N. W. 890.

22. Anderson *v.* Rider, 46 Cal. 134; Kansas State Agricultural College *v.* Linscott, 30 Kan. 240, 1 Pac. 81; Keen *v.* Sheehan, 154 Mass. 208, 28 N. E. 150.

23. *Florida.*— Starks *v.* Sawyer, 56 Fla. 596, 47 So. 513.

Iowa.— Fitzgerald *v.* Sioux City, 125 Iowa 396, 101 N. W. 268.

Kansas.— See Pritchard *v.* Madren, 31 Kan. 38, 2 Pac. 691.

Nebraska.— McCann *v.* Merriam, 11 Nebr. 241, 9 N. W. 96.

Tennessee.— Sheafer *v.* Mitchell, 109 Tenn. 181, 71 S. W. 86.

Wisconsin.— Woodman *v.* Clapp, 21 Wis. 350.

Compare Snider *v.* Smith, 75 Ark. 306, 87 S. W. 624.

24. Evidence to explain, supply, or contradict recitals in deed see *supra*, XIII, D, 2, h.

25. Townsend *v.* Downer, 32 Vt. 183. And see, generally, cases cited *infra*, note 26. *Compare* O'Hern *v.* Hibernia Ins. Co., 30 La. Ann. 959; Stockle *v.* Silsbee, 41 Mich. 615, 2 N. W. 900. And see Shackleford *v.* Hooper, 65 Ga. 366; Wright *v.* Dunham, 13 Mich. 414.

26. *Alabama.*— Vadeboncœur *v.* Hannan, 159 Ala. 617, 49 So. 292; Copeland *v.* Bond, 155 Ala. 571, 46 So. 853; Reddick *v.* Long, 124 Ala. 260, 27 So. 402; Johnson *v.* Harper, 107 Ala. 706, 18 So. 198; Parker *v.* Doe, 20 Ala. 251; Lyon *v.* Hunt, 11 Ala. 295, 46 Am. Dec. 216; Pope *v.* Headen, 5 Ala. 433.

Arkansas.— Budd *v.* Bettison, 21 Ark. 582; Hogins *v.* Brashears, 13 Ark. 242; Blakeney *v.* Ferguson, 8 Ark. 272.

California.— Bucknall *v.* Story, 36 Cal. 67; Russell *v.* Mann, 22 Cal. 131; Lachman *v.* Clark, 14 Cal. 131.

Colorado.— Charlton *v.* Kelly, 24 Colo. 273, 50 Pac. 1042.

Florida.—Ayer *v.* Dillard, 45 Fla. 179, 33 So. 714.

Illinois.— Glanz *v.* Ziabek, 233 Ill. 22, 84 N. E. 36; Glos *v.* Kelly, 212 Ill. 314, 72 N. E. 378; Gage *v.* Parker, 178 Ill. 455, 53 N. E. 317; Gage *v.* Nichols, 135 Ill. 128, 25 N. E. 672; Anderson *v.* McCormick, 129 Ill. 308, 21 N. E. 803; Scammon *v.* Chicago, 46 Ill. 146; Chicago *v.* Wright, 32 Ill. 192; Lane *v.* Bommelmann, 21 Ill. 143; Fitch *v.* Pinckard, 5 Ill. 69; Garrett *v.* Doe, 2 Ill. 335, 30 Am. Dec. 653; Chamberlain *v.* Sutherland, 4 Ill. App. 494.

Indiana.— Skelton *v.* Sharp, 161 Ind. 383, 67 N. E. 535; Bowen *v.* Swander, 121 Ind. 164, 22 N. E. 725; Millikan *v.* Patterson,

b. Presumptions From Possession and Lapse of Time. As a general rule, and in the absence of a statute changing the common law in this respect, mere lapse of time will not of itself afford presumptive evidence of the regularity and validity of a tax-sale, if the purchaser and those claiming under him have not had pos-

91 Ind. 515; Farrar *v.* Clark, 85 Ind. 449; Smith *v.* Kyler, 74 Ind. 575; McEntire *v.* Brown, 28 Ind. 347; Ellis *v.* Kenyon, 25 Ind. 134; Gavin *v.* Shuman, 23 Ind. 32; Barnes *v.* Doe, 4 Ind. 132; Doe *v.* McQuilkin, 8 Blackf. 335; Mason *v.* Roe, 5 Blackf. 98; O'Brien *v.* Coulter, 2 Blackf. 421.

Iowa.— Blair Town Lot, etc., Co. *v.* Scott, 44 Iowa 143; McGahen *v.* Carr, 6 Iowa 331, 71 Am. Dec. 421; Gaylord *v.* Scarff, 6 Iowa 179; Laraby *v.* Reid, 3 Greene 419; Scott *v.* Babcock, 3 Greene 133; Fitch *v.* Casey, 2 Greene 300.

Kansas.— Ordway *v.* Cowles, 45 Kan. 447, 25 Pac. 862.

Kentucky.— Jones *v.* Miracle, 93 Ky. 639, 21 S. W. 241, 14 Ky. L. Rep. 639; Whipple *v.* Earick, 93 Ky. 121, 19 S. W. 237, 14 Ky. L. Rep. 85; Smith *v.* Ryan, 88 Ky. 636, 11 S. W. 647, 11 Ky. L. Rep. 128; Bishop *v.* Lovan, 4 B. Mon. 116; Craig *v.* Johnson, 3 T. B. Mon. 323; Terry *v.* Bleight, 3 T. B. Mon. 270, 16 Am. Dec. 101; Carlisle *v.* Cassady, 46 S. W. 490, 20 Ky. L. Rep. 562; Rice *v.* West, 42 S. W. 116, 19 Ky. L. Rep. 832; Pryor *v.* Hardwick, 22 S. W. 545, 15 Ky. L. Rep. 166. And see Griffin *v.* Sparks, 70 S. W. 30, 24 Ky. L. Rep. 849. *Compare* T. J. Moss Tie Co. *v.* Myers, (1909) 116 S. W. 255.

Louisiana.— Brady *v.* Offutt, 19 La. Ann. 184; Sutton *v.* Calhoun, 14 La. Ann. 209; Reeves *v.* Towles, 10 La. 276; Smith *v.* Corcoran, 7 La. 46; Nancarrow *v.* Weathersbee, 6 Mart. N. S. 347. And see Welsch *v.* Augusti, 52 La. Ann. 1949, 28 So. 363.

Maine.— McAllister *v.* Shaw, 69 Me. 348; French *v.* Patterson, 61 Me. 203; Worthing *v.* Webster, 45 Me. 270, 71 Am. Dec. 543; Matthews *v.* Light, 32 Me. 305; Brown *v.* Veazie, 25 Me. 359.

Maryland.— Dyer *v.* Boswell, 39 Md. 465; Beatty *v.* Mason, 30 Md. 409; Polk *v.* Rose, 25 Md. 153, 89 Am. Dec. 773; Alexander *v.* Walter, 8 Gill 239, 50 Am. Dec. 688.

Massachusetts.— Burke *v.* Burke, 170 Mass. 499, 49 N. E. 753; Blossom *v.* Cannon, 14 Mass. 177.

Michigan.— Norris *v.* Hall, 124 Mich. 170, 82 N. W. 832; Upton *v.* Kennedy, 36 Mich. 215.

Mississippi.— Sunflower Land, etc., Co. *v.* Watts, 77 Miss. 56, 25 So. 863; Chamberlain *v.* Lawrence County, 71 Miss. 949, 15 So. 40; Griffin *v.* Dogan, 48 Miss. 11; Natchez *v.* Minor, 10 Sm. & M. 246.

Missouri.— Nelson *v.* Goebel, 17 Mo. 161; Reeds *v.* Morton, 9 Mo. 878; Morton *v.* Reeds, 6 Mo. 64.

New Hampshire.— Cahoon *v.* Coe, 57 N. H. 556; Harvey *v.* Mitchell, 31 N. H. 575; Waldron *v.* Tuttle, 3 N. H. 340.

New Jersey.— Woodbridge Tp. *v.* State, 43 N. J. L. 262. And see Brooks *v.* Union Tp., 68 N. J. L. 133, 52 Atl. 238.

New York.— Westfall *v.* Preston, 49 N. Y. 349; Tallman *v.* White, 2 N. Y. 66; White *v.* Hill, 100 N. Y. App. Div. 207, 91 N. Y. Suppl. 623; Dever *v.* Haggerty, 43 N. Y. App. Div. 354, 60 N. Y. Suppl. 181 [*reversed* on other grounds in 169 N. Y. 481, 62 N. E. 586]; Hoyt *v.* Dillon, 19 Barb. 644; Varick *v.* Tallman, 2 Barb. 113; Stevens *v.* Palmer, 10 Bosw. 60; Sharp *v.* Speir, 4 Hill 76; Jackson *v.* Esty, 7 Wend. 148.

North Carolina.— Worth *v.* Simmons, 121 N. C. 357, 28 S. E. 528; Jordan *v.* Rouse, 46 N. C. 119; Pentland *v.* Stewart, 20 N. C. 521; Love *v.* Gates, 20 N. C. 498; Martin *v.* Lucey, 5 N. C. 311.

Ohio.— Rhodes *v.* Gunn, 35 Ohio St. 387; Thompson *v.* Gotham, 9 Ohio 170; Holt *v.* Hemphill, 3 Ohio 232; Clark *v.* Southard, 2 Ohio Dec. (Reprint) 612, 4 West. L. Month. 197.

Oregon.— Rafferty *v.* Davis, 54 Oreg. 77, 102 Pac. 305; Ayers *v.* Lund, 49 Oreg. 303, 89 Pac. 806, 124 Am. St. Rep. 1046.

Pennsylvania.— Stark *v.* Shupp, 112 Pa. St. 395, 3 Atl. 864; McReynolds *v.* Longenberger, 57 Pa. St. 13; Shearer *v.* Woodburn, 10 Pa. St. 511; Huston *v.* Foster, 1 Watts 477; Birch *v.* Fisher, 13 Serg. & R. 208; Blair *v.* Waggoner, 2 Serg. & R. 472; Blair *v.* Caldwell, 3 Yeates 284; Bernhard *v.* Allen, 10 Pa. Cas. 274, 14 Atl. 42; Canole *v.* Allen, 28 Pa. Super. Ct. 244.

Texas.— Dawson *v.* Ward, 71 Tex. 72, 9 S. W. 106; Clayton *v.* Rehm, 67 Tex. 52, 2 S. W. 45; Devine *v.* McCulloch, 15 Tex. 488; Robson *v.* Osborn, 13 Tex. 298; Yenda *v.* Wheeler, 9 Tex. 408; Hubbard *v.* Arnold, 2 Tex. Unrep. Cas. 327; Fant *v.* Brannin, 2 Tex. Unrep. Cas. 323; Lewright *v.* Walls, (Civ. App. 1909) 119 S. W. 721; Keenan *v.* Slaughter, 49 Tex. Civ. App. 180, 108 S. W. 703; Woody *v.* Strong, 45 Tex. Civ. App. 256, 100 S. W. 801; Lamberida *v.* Barnum, (Civ. App. 1905) 90 S. W. 698.

Utah.— Asper *v.* Moon, 24 Utah 241, 67 Pac. 409.

Vermont.— Brush *v.* Watson, 81 Vt. 43, 69 Atl. 141; Downer *v.* Tarbell, 61 Vt. 530, 17 Atl. 482; Cummings *v.* Holt, 56 Vt. 384; Wing *v.* Hall, 47 Vt. 182; Townsend *v.* Downer, 32 Vt. 183; Chandler *v.* Spear, 22 Vt. 388; Langdon *v.* Poor, 20 Vt. 13; Judevine *v.* Jackson, 18 Vt. 470; Carpenter *v.* Sawyer, 17 Vt. 121; May *v.* Wright, 17 Vt. 97, 42 Am. Dec. 481; Sumner *v.* Sherman, 13 Vt. 609; Bellows *v.* Elliot, 12 Vt. 569; Spear *v.* Ditty, 9 Vt. 282; Richardson *v.* Dorr, 5 Vt. 9; Hall *v.* Collins, 4 Vt. 316; Mix *v.* Whitlock, 1 Tyler 30.

Virginia.— Hobbs *v.* Shumates, 11 Gratt. 516; Chapman *v.* Doe, 2 Leigh 329; Nalle *v.* Fenwick, 4 Rand. 585.

West Virginia.— Columbia Finance, etc., Co. *v.* Fierbaugh, 59 W. Va. 334, 53 S. E. 468.

session under the deed; that is, the antiquity of a tax deed, if no possession has been taken under it, affords no presumption in its favor, but on the contrary operates the more strongly against the holder.[27] But on the other hand, an ancient tax deed and its recitals, together with long-continued and uninterrupted possession, are evidence from which compliance with the statute regulating tax-sales may be presumed.[28] In regard to the length of time during which possession must have continued in order to raise this presumption, no certain rule can be gathered from the authorities, but it is doubtful whether any time less than the full period prescribed by the statute of limitations will suffice.[29]

c. Effect of Tax Deed as Evidence. At common law, neither the tax deed nor its recitals can be accepted as evidence of the existence, legality, or validity of the prior proceedings, but these must be proved step by step as a necessary preliminary to the introduction of the deed as evidence of title.[30] Exceptions to this

Wisconsin.— Bridge *v.* Bracken, 3 Pinn. 73, 3 Chandl. 75.

United States.— Little *v.* Herndon, 10 Wall. 26, 19 L. ed. 878; Parker *v.* Overman, 18 How. 137, 15 L. ed. 318 [*affirming* 18 Fed. Cas. No. 10,623, Hempst. 692]; Pillow *v.* Roberts, 13 How. 472, 14 L. ed. 228; Games *v.* Dunn, 14 Pet. 322, 10 L. ed. 476 [*affirming* 8 Fed. Cas. No. 4,176, 1 McLean 321]; Boardman *v.* Reed, 6 Pet. 328, 8 L. ed. 415; Thatcher *v.* Powell, 6 Wheat. 119, 5 L. ed. 221; Williams *v.* Peyton, 4 Wheat. 77, 4 L. ed. 518; Parker *v.* Rule, 9 Cranch 64, 3 L. ed. 658 [*affirming* 20 Fed. Cas. No. 12,125, Brunn. Col. Cas. 239, Cooke (Tenn.) 365]; Stead *v.* Course, 4 Cranch 403, 2 L. ed. 660; Lamb *v.* Gillett, 14 Fed. Cas. No. 8,016, 6 McLean 365; Miner *v.* McLean, 17 Fed. Cas. No. 9,630, 4 McLean 138. *Compare* Ronkendorff *v.* Taylor, 4 Pet. 349, 7 L. ed. 882.

Canada.—Alloway *v.* Campbell, 7 Manitoba 506; Cameron *v.* Lee, 27 Quebec Super. Ct. 535.

See 45 Cent. Dig. tit. "Taxation," § 1559. And see the cases cited *infra*, XIII, G, 1, c, d.

Purchase by state.—A presumption can no more be indulged in favor of the validity of a tax-sale, where the state is the purchaser, than where an individual purchases. Lewright *v.* Walls, (Tex. Civ. App. 1909) 119 S. W. 721.

27. *Arkansas.*— Parr *v.* Matthews, 50 Ark. 390, 8 S. W. 22.

District of Columbia.—Keefe *v.* Bramhall, 3 Mackey 551.

Maine.— McAllister *v.* Shaw, 69 Me. 348; Worthing *v.* Webster, 45 Me. 270, 71 Am. Dec. 543. *Compare* Freeman *v.* Thayer, 33 Me. 76.

New Hampshire.— Waldron *v.* Tuttle, 3 N. H. 340.

New York.— Westbrook *v.* Willey, 47 N. Y. 457; Turner *v.* Boyce, 11 Misc. 502, 33 N. Y. Suppl. 433.

North Carolina.— Eastern Land, etc., Co. *v.* State Bd. of Education, 101 N. C. 35, 7 S. E. 573.

Pennsylvania.— Coxe *v.* Deringer, 78 Pa. St. 271; Alexander *v.* Bush, 46 Pa. St. 62; Shearer *v.* Woodburn, 10 Pa. St. 511; Deringer *v.* Coxe, 6 Pa. Cas. 283, 10 Atl. 412. But see Foust *v.* Ross, 1 Watts & S. 501. And *compare* Lackawanna Iron, etc., Co. *v.* Fales, 55 Pa. St. 90; Read *v.* Goodyear, 17 Serg. & R. 350.

Texas.— Telfener *v.* Dillard, 70 Tex. 139, 7 S. W. 847.

Vermont.— Downer *v.* Tarbell, 61 Vt. 530, 17 Atl. 482; Brown *v.* Wright, 17 Vt. 97, 42 Am. Dec. 481; Reed *v.* Field, 15 Vt. 672.

See 45 Cent. Dig. tit. "Taxation," § 1564.

Compare Keane *v.* Cannovan, 21 Cal. 291, 82 Am. Dec. 738; Colman *v.* Anderson, 10 Mass. 105.

28. *Arkansas.*— Pleasants *v.* Scott, 21 Ark. 370, 76 Am. Dec. 403.

Louisiana.— Gouaux *v.* Beaullieu, 123 La. 684, 49 So. 285; Corkran Oil, etc., Co. *v.* Arnaudet, 111 La. 563, 35 So. 747.

Maine.— Worthing *v.* Webster, 45 Me. 270, 71 Am. Dec. 543.

New Hampshire.— Waldron *v.* Tuttle, 3 N. H. 340.

Ohio.— Fitzpatrick *v.* Forsythe, 6 Ohio Dec. (Reprint) 682, 7 Am. L. Rec. 411.

Virginia.— Lennig *v.* White, (1894) 20 S. E. 831; Flanagan *v.* Grimmet, 10 Gratt. 421.

Wisconsin.— Sprecker *v.* Wakeley, 11 Wis. 432.

United States.— Williams *v.* William J. Athens Lumber Co., 62 Fed. 558.

See 45 Cent. Dig. tit. "Taxation," § 1564.

29. Phillips *v.* Sherman, 61 Me. 548; Townsend *v.* Downer, 32 Vt. 183; Richardson *v.* Dorr, 5 Vt. 9; Allen *v.* Smith, 1 Leigh (Va.) 231; Sprecker *v.* Wakeley, 11 Wis. 432. *Compare* Fitzpatrick *v.* Forsythe, 6 Ohio Dec. (Reprint) 682, 7 Am. L. Rec. 411.

30. *Alabama.*— Collins *v.* Robinson, 33 Ala. 91.

California.— Emeric *v.* Alvarado, 90 Cal. 444, 27 Pac. 356.

District of Columbia.—Keefe *v.* Bramhall, 3 Mackey 551.

Georgia.— Johnson *v.* Phillips, 89 Ga. 286, 15 S. E. 368; Butler *v.* Davis, 68 Ga. 173.

Illinois.— Glanz *v.* Ziabek, 233 Ill. 22, 84 N. E. 36; Glos *v.* Mulcahy, 210 Ill. 639, 71 N. E. 629; Anderson *v.* McCormick, 129 Ill. 308, 21 N. E. 803; Skinner *v.* Fulton, 39 Ill. 484; Goewey *v.* Urig, 18 Ill. 238; Doe *v.* Bean, 6 Ill. 302; Doe *v.* Leonard, 5 Ill. 140.

rule, however, are made where the deed is offered as against a mere intruder on the lands who enters without right and as a trespasser,[31] and also in the case where the deed is not offered as evidence of title, but to prove some collateral fact.[32]

d. Proof to Be by Records. Where the burden of proof is cast upon the tax title claimant to show compliance with the provisions of the statutes regulating tax-sales, he must make out his case step by step by record evidence; the proceedings on which the sale depends are to be proved by the records or by the originals from which the records should be made up;[33] and if the record is not

Indiana.— Bowen *v.* Swander, 121 Ind. 164, 22 N. E. 725; Parker *v.* Smith, 4 Blackf. 70.

Iowa.— Rayburn *v.* Kuhl, 10 Iowa 92.

Louisiana.— Bonvous *v.* Brown, 11 La. Ann. 214; Smith *v.* Corcoran, 7 La. 46.

Maine.— Rackliff *v.* Look, 69 Me. 516; Phillips *v.* Sherman, 61 Me. 548; Worthing *v.* Webster, 45 Me. 270, 71 Am. Dec. 543; Phillips *v.* Phillips, 40 Me. 160.

Maryland.— Polk *v.* Rose, 25 Md. 153, 89 Am. Dec. 773.

Michigan.— Morse *v.* Auditor-Gen., 143 Mich. 610, 107 N. W. 317; Farmers', etc., Bank *v.* Bronson, 14 Mich. 361; Ives *v.* Kimball, 1 Mich. 308; Scott *v.* Detroit Young Men's Soc., 1 Dougl. 119.

Mississippi.— Kennedy *v.* Sanders, 90 Miss. 524, 43 So. 913; Bennett *v.* Chaffe, 69 Miss. 279, 13 So. 731; Weathersby *v.* Thoma, 57 Miss. 296; Vaughan *v.* Swayzie, 56 Miss. 704; Clymer *v.* Cameron, 55 Miss. 593; Allen *v.* Poole, 54 Miss. 323.

Missouri.—Moreau *v.* Detchemendy, 41 Mo. 431; Bosworth *v.* Bryan, 14 Mo. 575.

Nebraska.— Hillers *v.* Yeiser, 3 Nebr. (Unoff.) 396, 96 N. W. 683.

New York.— Beekman *v.* Bigham, 5 N. Y. 366; Hoyt *v.* Dillon, 19 Barb. 644; Leggett *v.* Rogers, 9 Barb. 406; Varick *v.* Tallman, 2 Barb. 113; Sharp *v.* Speir, 4 Hill 76; Jackson *v.* Roberts, 11 Wend. 422; Jackson *v.* Shepard, 7 Cow. 88, 17 Am. Dec. 502.

North Carolina.— Garrett *v.* White, 38 N. C. 131; Pentland *v.* Stewart, 20 N. C. 521; Love *v.* Gates, 20 N. C. 498. *Compare* Martin *v.* Lucey, 5 N. C. 311.

Ohio.— Rhodes *v.* Gunn, 35 Ohio St. 387; Carlisle *v.* Longworth, 5 Ohio 368; Holt *v.* Hemphill, 3 Ohio 232.

South Carolina.— State *v.* Thompson, 18 S. C. 538.

Texas.— Dawson *v.* Ward, 71 Tex. 72, 9 S. W. 106; Bartley *v.* Harris, 70 Tex. 181, 7 S. W. 797; Henderson *v.* White, 69 Tex. 103, 5 S. W. 374; Calder *v.* Ramsey, 66 Tex. 218, 18 S. W. 502; Meredith *v.* Coker, 65 Tex. 29; Pratt *v.* Jones, 64 Tex. 694; Boyd *v.* Miller, 22 Tex. Civ. App. 165, 54 S. W. 411.

Vermont.— Brown *v.* Wright, 17 Vt. 97, 42 Am. Dec. 481; Reed *v.* Field, 15 Vt. 672.

Virginia.— Jesse *v.* Preston, 5 Gratt. 120.

Wisconsin.— Bridge *v.* Bracken, 3 Chandl. 75.

United States.—Pillow *v.* Roberts, 13 How. 472, 14 L. ed. 228; Games *v.* Dunn, 14 Pet. 322, 10 L. ed. 476; Williams *v.* Peyton, 4 Wheat. 77, 4 L. ed. 518; Bradford *v.* Hall, 36 Fed. 801; Arrowsmith *v.* Burlingim, 1 Fed. Cas. No. 563, 4 McLean 489; Minturn *v.* Smith, 17 Fed. Cas. No. 9,647, 3 Sawy. 142.

See 45 Cent. Dig. tit. "Taxation," § 1558. And see the cases cited *supra*, XIII, G, 1, a.

Decisions contra.— In some of the early cases, particularly in Kentucky and Vermont, a rule contrary to that stated in the text was held; but these decisions have either been overruled or else they stand opposed to the weight of authority. See Morton *v.* Waring, 18 B. Mon. (Ky.) 72; Currie *v.* Fowler, 5 J. J. Marsh. (Ky.) 145; Bodley *v.* Hord, 2 A. K. Marsh. (Ky.) 244; Allen *v.* Robinson, 3 Bibb (Ky.) 326; Garretson *v.* Hart, 1 Ohio Dec. (Reprint) 265, 6 West. L. J. 315; Hall *v.* Collins, 4 Vt. 316; Parker *v.* Bixby, 2 Tyler (Vt.) 466; Powell *v.* Brown, 1 Tyler (Vt.) 285.

Tax-sales under federal laws.— The rule stated in the text has been applied in the state courts to tax-sales under the direct tax laws of the United States. Taylor *v.* Whiting, 2 B. Mon. (Ky.) 268; Fox *v.* Stafford, 90 N. C. 296; Emery *v.* Harrison, 13 Pa. St. 317; Jesse *v.* Preston, 5 Gratt. (Va.) 120. But these decisions are apparently contrary to the view held by the supreme court of the United States. See Sherry *v.* McKinley, 99 U. S. 496, 25 L. ed. 330; Keely *v.* Sanders, 99 U. S. 441, 25 L. ed. 327.

31. McLeod *v.* Brooks Lumber Co., 98 Ga. 253, 26 S. E. 745; Kries *v.* Holladay-Klotz Land, etc., Co., 121 Mo. App. 184, 98 S. W. 1086; Troutman *v.* May, 33 Pa. St. 455; Jennings *v.* McDowell, 25 Pa. St. 387; Crum *v.* Burke, 25 Pa. St. 377; Shearer *v.* Woodburn, 10 Pa. St. 511; Dikeman *v.* Parrish, 6 Pa. St. 210, 47 Am. Dec. 455; Foust *v.* Ross, 1 Watts & S. (Pa.) 501; Foster *v.* McDivit, 9 Watts (Pa.) 341; State *v.* Jackson, 56 W. Va. 558, 49 S. E. 465.

But one who is in possession of land under claim and color of title is not a mere intruder, and as against him the holder of the tax title is bound to the same rule in regard to proving the anterior proceedings as against the original owner. Miller *v.* McCullough, 14 Pittsb. Leg. J. (Pa.) 223; Downer *v.* Tarbell, 61 Vt. 530, 17 Atl. 482.

32. McDermott *v.* Hoffman, 70 Pa. St. 31.

33. *Arkansas.*— Thweatt *v.* Black, 30 Ark. 732.

California.— Greenwood *v.* Adams, 80 Cal. 74, 21 Pac. 1134.

Georgia.— McCrory *v.* Manes, 47 Ga. 90.

Illinois.— Gage *v.* Davis, (1887) 14 N. E. 36; Schuyler *v.* Hull, 11 Ill. 462; Graves *v.* Bruen, 11 Ill. 431; Job *v.* Tebbetts, 10 Ill. 376.

proved or its loss accounted for, its existence cannot be presumed from lapse of time.[34]

2. Statutes Making Tax Deeds Conclusive Evidence.[35] A tax deed cannot be made by statute conclusive evidence of title in the grantee,[36] except as against the state[37] or against strangers.[38] Nor is it competent for the legislature to make such a deed conclusive evidence as to jurisdictional facts or facts vital to the exercise of the power of taxation or sale, as distinguished from such facts as are merely formal or of routine or pertaining to the regularity or the manner of the exercise of such power.[39] Hence a statute is unconstitutional if it attempts to preclude all inquiry into the validity or legality of the tax itself,[40] or the fact of a proper assessment,[41] or the giving of due notice of the time for redemp-

Iowa.— Monk *v.* Corbin, 58 Iowa 503, 12 N. W. 571.

Maine.— Bucksport *v.* Spofford, 12 Me. 487.

Massachusetts.— Boston *v.* Weymouth, 4 Cush. 538.

Nebraska.—Abbott *v.* Coates, 62 Nebr. 247, 86 N. W. 1058.

New Hampshire.— Pittsfield *v.* Barnstead, 40 N. H. 477; Blake *v.* Sturtevant, 12 N. H. 567; Adams *v.* Mack, 3 N. H. 493.

New York.— Stevens *v.* Palmer, 10 Bosw. 60.

Ohio.— Thevenin *v.* Slocum, 16 Ohio 519; Sheldon *v.* Coates, 10 Ohio 278; Kellogg *v.* McLaughlin, 8 Ohio 114.

Pennsylvania.— Diamond Coal Co. *v.* Fisher, 19 Pa. St. 267; Gearhart *v.* Dixon, 1 Pa. St. 224.

Vermont.— Blodgett *v.* Holbrook, 39 Vt. 336.

Wisconsin.— Iverslie *v.* Spaulding, 32 Wis. 394.

United States.— Games *v.* Stiles, 14 Pet. 322, 10 L. ed. 476; Miner *v.* McLean, 17 Fed. Cas. No. 9,630, 4 McLean 138.

34. Hilton *v.* Bender, 69 N. Y. 75. But see Redding *v.* Lamb, 81 Mich. 318, 45 N. W. 997, as to effect of a statute providing that tax-sales shall not be invalidated by the fact that any record or document is not found in the office in which it ought to be filed or found.

35. Effect of statute as concluding and estopping state see *infra*, XIV, A, 5, a, note 88.

36. Dawson *v.* Peter, 119 Mich. 274, 77 N. W. 997; Ayers *v.* Lund, 49 Oreg. 303, 89 Pac. 806, 124 Am. St. Rep. 1046.

37. State *v.* West Branch Lumber Co., 64 W. Va. 673, 63 S. E. 372; State *v.* Snyder, 64 W. Va. 659, 63 S. E. 385, as to which cases see *infra*, XIV, A, 5, a, note 88.

38. State *v.* Jackson, 56 W. Va. 558, 49 S. E. 465.

39. *Alabama.*— Doe *v.* Minge, 56 Ala. 121.

California.— Lemoore Bank *v.* Fulgham, 151 Cal. 234, 90 Pac. 936; Warden *v.* Broome, 9 Cal. App. 172, 98 Pac. 252; Phillips *v.* Cox, 7 Cal. App. 308, 94 Pac. 377.

Iowa.— Farmers' L. & T. Co. *v.* Wall, 129 Iowa 651, 106 N. W. 160; Gould *v.* Thompson, 45 Iowa 450; Martin *v.* Cole, 38 Iowa 141; Rima *v.* Cowan, 31 Iowa 125; Hurley *v.* Woodruff, 30 Iowa 260.

Kansas.— Morrill *v.* Douglass, 17 Kan. 291.

Louisiana.— *In re* Douglas, 41 La. Ann. 765, 6 So. 675; *In re* Lake, 40 La. Ann. 142, 3 So. 479.

Maine.— Longfellow *v.* Quimby, 33 Me. 457.

Michigan.— Quinlon *v.* Rogers, 12 Mich. 168.

Missouri.— Raley *v.* Guinn, 76 Mo. 263; Cook *v.* Hacklemann, 45 Mo. 317; Abbott *v.* Lindenbower, 42 Mo. 162.

New York.— People *v.* Turner, 145 N. Y. 451, 40 N. E. 400; Joslyn *v.* Rockwell, 123 N. Y. 334, 28 N. E. 604; Ensign *v.* Barse, 107 N. Y. 329, 14 N. E. 400, 15 N. E. 401; Bryan *v.* McGurk, 134 N. Y. App. Div. 93, 118 N. Y. Suppl. 912; Hagner *v.* Hall, 10 N. Y. App. Div. 581, 42 N. Y. Suppl. 63 [*affirmed* in 159 N. Y. 552, 54 N. E. 1092]; People *v.* Golding, 55 Misc. 425, 106 N. Y. Suppl. 821. And see Adirondack League Club *v.* Keyes, 122 N. Y. App. Div. 178, 106 N. Y. Suppl. 963; Brown *v.* Allen, 57 Hun 219, 10 N. Y. Suppl. 714. But *compare* Meigs *v.* Roberts, 162 N. Y. 371, 56 N. E. 838, 76 Am. St. Rep. 322 [*reversing* 42 N. Y. App. Div. 290, 59 N. Y. Suppl. 215].

North Dakota.— Roberts *v.* Fargo First Nat. Bank, 8 N. D. 504, 79 N. W. 1049.

United States.— Turner *v.* New York, 168 U. S. 90, 18 S. Ct. 38, 42 L. ed. 392; Callanan *v.* Hurley, 93 U. S. 387, 23 L. ed. 931; Bannon *v.* Burnes, 39 Fed. 892; Marx *v.* Hanthorn, 30 Fed. 579 [*affirmed* in 148 U. S. 172, 13 S. Ct. 508, 37 L. ed. 410]; Lamb *v.* Farrell, 21 Fed. 5; Kelly *v.* Herrall, 20 Fed. 384; Lord *v.* Milwaukee, etc., R. Co., 15 Fed. Cas. No. 8,507, 17 Wis. 588 note.

See 45 Cent. Dig. tit. "Taxation," § 1557.

40. Lufkin *v.* Galveston, 73 Tex. 340, 11 S. W. 340.

41. *California.*— Lemoore Bank *v.* Fulgham, 151 Cal. 234, 90 Pac. 936.

Iowa.— Robinson *v.* Cedar Rapids First Nat. Bank, 48 Iowa 354; Easton *v.* Savery, 44 Iowa 654; Nichols *v.* McGlathery, 43 Iowa 189; Phelps *v.* Meade, 41 Iowa 470; Immegart *v.* Gorgas, 41 Iowa 439; Bulkley *v.* Callanan, 32 Iowa 461; Powers *v.* Fuller, 30 Iowa 476.

Louisiana.— *In re* Lake, 40 La. Ann. 142, 3 So. 479.

Missouri.—Abbott *v.* Lindenbower, 42 Mo. 162.

New York.— Sanders *v.* Saxton, 89 N. Y. App. Div. 421, 85 N. Y. Suppl. 762 [*reversed* on other grounds in 182 N. Y. 477,

tion.[42] But on the other hand the deed may be made conclusive of the proper notice or advertisement of sale,[43] the warrant or other process under which the officer acted,[44] the regularity of the sale,[45] and other non-essential matters prior to the execution of the deed,[46] and the due execution of the deed itself.[47] A statute of this kind, however, is somewhat strictly construed, and it is held that the recitals of the deed will be conclusive only as to facts which the law requires to be recited therein and not of any facts beyond the scope of the authority of the officer making the recitals.[48] A statute making tax deeds conclusive evidence of the regularity of prior proceedings cannot apply to deeds recorded before its passage, where it does not give the owner a reasonable time within which to assert his rights.[49] But it has been held that the repeal of a statute giving this conclusive effect to tax deeds does not impair the obligation of contracts, in regard to sales made or deeds executed before the repeal, but merely changes the rule of evidence.[50]

3. Statutes Making Tax Deeds Presumptive Evidence. In many states laws have been enacted modifying the common-law rules and making tax deeds *prima facie* evidence of title in the purchaser or of the regularity and legality of the preliminary proceedings as well as of the sale. These statutes are undoubtedly constitutional,[51] and must be given their due and proper effect by the courts,

75 N. E. 529, 108 Am. St. Rep. 826, 1 L. R. A. 727].

42. Miller *v.* Miller, 96 Cal. 376, 31 Pac. 247, 31 Am. St. Rep. 229.

43. Scofield *v.* McDowell, 47 Iowa 129; Madson *v.* Sexton, 37 Iowa 562; Hurley *v.* Powell, 31 Iowa 64; Allen *v.* Armstrong, 16 Iowa 508. But *compare* Marx *v.* Hanthorn, 30 Fed. 579 [*affirmed* in 148 U. S. 172, 13 S. Ct. 508, 37 L. ed. 410].

44. Hurley *v.* Powell, 31 Iowa 64.

45. Farmers' L. & T. Co. *v.* Wall, 129 Iowa 651, 106 N. W. 160; Rima *v.* Cowan, 31 Iowa 125; Bennett *v.* Kovarick, 44 N. Y. App. Div. 629, 60 N. Y. Suppl. 1133; Marsh *v.* Ne-ha-sa-ne Park Assoc., 25 N. Y. App. Div. 34, 49 N. Y. Suppl. 384; Bennett *v.* Kovarick, 23 Misc. (N. Y.) 73, 51 N. Y. Suppl. 752 [*affirmed* in 44 N. Y. App. Div. 629, 60 N. Y. Suppl. 1133]; Oswego County *v.* Betts, 6 N. Y. Suppl. 934; Eustis *v.* Henrietta, 91 Tex. 325, 43 S. W. 259.

46. Phillips *v.* Cox, 7 Cal. App. 308, 94 Pac. 377.

47. Huey *v.* Van Wie, 23 Wis. 613. See Immegart *v.* Gorgas, 41 Iowa 439, as to statute making deed conclusive of the correctness of the description of the property.

48. Millikan *v.* Patterson, 91 Ind. 515; White *v.* Flynn, 23 Ind. 46.

49. People *v.* Golding, 55 Misc. (N. Y.) 425, 106 N. Y. Suppl. 821, holding that Laws (1896), p. 841, c. 908, § 132, making conveyances by the controller conclusive after two years, is repugnant to the constitution, as giving no time within which an owner's rights against the state may be asserted, except as to the specific grounds for which it provides for canceling taxes and sales, which remedy is not given to the owner, but only to the purchaser.

50. Howard *v.* Moot, 64 N. Y. 262; Hickox *v.* Tallman, 38 Barb. (N. Y.) 608; Strode *v.* Washer, 17 Oreg. 50, 16 Pac. 926; Marx *v.* Hanthorn, 148 U. S. 172, 13 S. Ct. 508, 37 L. ed. 410. *Compare* Smith *v.* Cleveland, 17 Wis. 573; Tracy *v.* Reed, 38 Fed. 69, 13 Sawy. 622, 2 L. R. A. 773.

51. *Arkansas.*— Biscoe *v.* Coulter, 18 Ark. 423.

Colorado.— Carnahan *v.* Sieber Cattle Co., 34 Colo. 257, 82 Pac. 592.

Connecticut.— Butts *v.* Francis, 4 Conn. 424.

Florida.— Saunders *v.* Collins, 56 Fla. 534, 47 So. 958; Sams *v.* King, 18 Fla. 557.

Indiana.— Bivens *v.* Henderson, 42 Ind. App. 562, 86 N. E. 426; Holbrook *v.* Kunz, 41 Ind. App. 260, 83 N. E. 730.

Iowa.— Genther *v.* Fuller, 36 Iowa 604; Allen *v.* Armstrong, 16 Iowa 508.

Kansas.— Ide *v.* Finneran, 29 Kan. 569.

Kentucky.— Wildharber *v.* Lunkenheimer, 128 Ky. 344, 108 S. W. 327, 32 Ky. L. Rep. 1221.

Maine.— Freeman *v.* Thayer, 33 Me. 76.

Michigan.— Groesbeck *v.* Seeley, 13 Mich. 329; Lacey *v.* Davis, 4 Mich. 140, 66 Am. Dec. 524; Sibley *v.* Smith, 2 Mich. 486.

Mississippi.— Virden *v.* Bowers, 55 Miss. 1; Ray *v.* Murdock, 36 Miss. 692.

Missouri.—Abbott *v.* Lindenbower, 42 Mo. 162.

New York.— Hand *v.* Ballou, 12 N. Y. 541; White *v.* Wheeler, 51 Hun 573, 4 N. Y. Suppl. 405 [*affirmed* in 123 N. Y. 627, 25 N. E. 952].

North Carolina.— Moore *v.* Byrd, 118 N. C. 688, 23 S. E. 968; Peebles *v.* Taylor, 118 N. C. 165, 24 S. E. 797.

Ohio.— Stanbery *v.* Sillon, 13 Ohio St. 571; Turney *v.* Yeoman, 14 Ohio 207.

Pennsylvania.— Hoffman *v.* Bell, 61 Pa. St. 444.

South Carolina.— Heyward *v.* Christensen, 80 S. C. 146, 61 S. E. 399.

Virginia.— Smith *v.* Chapman, 10 Gratt. 445.

Washington.— State *v.* Whittlesey, 17 Wash. 447, 50 Pac. 119.

West Virginia.— Dequasie *v.* Harris, 16 W. Va. 345.

provided the legislative intention is plainly expressed.[52] But being in derogation of the common law, their scope will not be extended by implication,[53] and in particular they will not be given a retroactive operation unless plainly so intended.[54] It seems, however, that the legislature may, by a subsequent statute, make a

Wisconsin.— Delaplaine *v.* Cook, 7 Wis. 44. See Strange *v.* Oconto Land Co., 136 Wis. 516, 117 N. W. 1023.

United States.— Keely *v.* Sanders, 99 U. S. 441, 25 L. ed. 327; De Treville *v.* Smalls, 98 U. S. 517, 25 L. ed. 174; Pillow *v.* Roberts, 13 How. 472, 14 L. ed. 228.

See 45 Cent. Dig. tit. "Taxation," § 1557.

52. See the statutes of the different states. And see the following cases:

Alabama.— Doe *v.* Moog, 150 Ala. 460, 43 So. 710.

Arkansas.— Jacks *v.* Kelley Trust Co., 90 Ark. 548, 120 S. W. 142; Morris *v.* Breedlove, 89 Ark. 296, 116 S. W. 223; Doniphan Lumber Co. *v.* Reid, 82 Ark. 31, 100 S. W. 69; Cracraft *v.* Meyer, 76 Ark. 450, 88 S. W. 1027; Thornton *v.* St. Louis Refrigerator, etc., Co., 69 Ark. 424, 65 S. W. 113; Scott *v.* Mills, 49 Ark. 266, 4 S. W. 908.

California.— Best *v.* Wohlford, 153 Cal. 17, 94 Pac. 98; Pearson *v.* Creed, 69 Cal. 538, 11 Pac. 56; Davis *v.* Pacific Imp. Co., 7 Cal. App. 452, 94 Pac. 595; Commercial Nat. Bank *v.* Schlitz, 6 Cal. App. 174, 91 Pac. 750.

Indiana.— Bivens *v.* Henderson, 42 Ind. App. 562, 86 N. E. 426; Holbrook *v.* Kunz, 41 Ind. App. 260, 83 N. E. 730.

Iowa.— McCash *v.* Penrod, 131 Iowa 631, 109 N. W. 180.

Kansas.— Hahn *v.* Hill Inv. Co., 79 Kan. 693, 100 Pac. 484; Gibson *v.* Larabee, 77 Kan. 243, 94 Pac. 216.

Michigan.— Hoffman *v.* H. M. Loud, etc., Lumber Co., 138 Mich. 5, 100 N. W. 1010, 104 N. W. 424.

Minnesota.— Baker *v.* Kelley, 11 Minn. 480.

Mississippi.— Chrisman *v.* Currie, 60 Miss. 858.

South Dakota.— St. Paul, etc., R. Co. *v.* Howard, 23 S. D. 34, 119 N. W. 1032.

West Virginia.— Hogan *v.* Piggott, 60 W. Va. 541, 56 S. E. 189.

And see the cases cited in the preceding note, and in the notes and sections following.

Construction and application of statutory language.— Where a statute makes the tax deed "sufficient" evidence of the authority of the collector, or of other primary requisites, this term is held equivalent to "*prima facie.*" Parker *v.* Overman, 18 How. (U. S.) 137, 15 L. ed. 318. So where a statute provides that a tax-sale shall not be impeached except for certain specified causes, it is held that this makes the deed presumptive evidence of good title in the grantee. Hardie *v.* Chrisman, 60 Miss. 671. But on the other hand, a statutory declaration that a tax deed shall be "good and effectual both in law and equity" gives no special sanction to the conveyance beyond that derived from the general principles of law and does not impart to it any further evidential force. Lyon *v.* Hunt, 11 Ala. 295, 46 Am. Dec. 216; Hadley *v.* Tankersley, 8 Tex. 12.

Conflict between recitals of deed and certificate.— Where the recitations in a tax certificate are in conflict with the recitations of the tax deed based thereon, the recitations of the tax deed will prevail. Keller *v.* Hawk, 19 Okla. 407, 91 Pac. 778.

To what deed statute applies.—Under N. Y. Tax Law, Laws (1896), p. 850, c. 908, § 157, declaring that the provisions as to sales by the state controller, for unpaid taxes and redemption, shall govern and control the county treasurer, and that the same rights and remedies shall be deemed to exist, the presumption authorized by section 131 (page 841), providing that a controller's deed shall be presumptive evidence that the sale and all proceedings prior thereto, from and including the assessment, and all notices required to be given previous to the expiration of the time allowed for redemption, were regular and in accordance with law, is applicable to a tax deed executed and delivered by a county treasurer pursuant to section 153 (page 849), and a deed of a county treasurer carries with it the same right to assume that all proceedings prior thereto were regular. Clinton *v.* Krull, 125 N. Y. App. Div. 157, 111 N. Y. Suppl. 105.

53. *Illinois.*— Pardridge *v.* Hyde Park, 131 Ill. 537, 23 N. E. 345.

Minnesota.— Flint *v.* Webb, 25 Minn. 93.

Texas.— Kelly *v.* Medlin, 26 Tex. 48.

West Virginia.— Dequasie *v.* Harris, 16 W. Va. 345.

United States.— Daniels *v.* Case, 45 Fed. 843.

Application to municipal tax-sales see Johnson *v.* Phillips, 89 Ga. 286, 15 S. E. 368.

Application to purchase by city or county see Orlando *v.* Equitable B. & L. Assoc., 45 Fla. 507, 33 So. 986; Ayers *v.* Lund, 49 Oreg. 303, 89 Pac. 806, 124 Am. St. Rep. 1046.

Notice for redemption not dispensed with see Kepley *v.* Fouke, 187 Ill. 162, 58 N. E. 303; Herrick *v.* Niesz, 16 Wash. 74, 47 Pac. 414.

Necessity of showing non-redemption see Broughton *v.* Sherman, 21 Minn. 431; Greve *v.* Coffin, 14 Minn. 345, 100 Am. Dec. 229.

54. *California.*— Keane *v.* Cannovan, 21 Cal. 291, 82 Am. Dec. 738; Morris *v.* Russell, 5 Cal. 249.

Illinois.— Garrett *v.* Doe, 2 Ill. 335, 30 Am. Dec. 653.

Maine.— Freeman *v.* Thayer, 33 Me. 76; Bussey *v.* Leavitt, 12 Me. 378.

North Carolina.— Eastern Land, etc., Co. *v.* State Bd. of Education, 101 N. C. 35, 7 S. E. 573.

Oregon.— Blackburn *v.* Lewis, 45 Oreg. 422, 77 Pac. 746.

Texas.— McPhail *v.* Burris, 42 Tex. 142.

See 45 Cent. Dig. tit. "Taxation," § 1557.

Compare, however, Wildharber *v.* Lunkenheimer, 128 Ky. 344, 108 S. W. 327, 32 Ky.

deed presumptive evidence of title which would not have been so at the time of the sale.[55] On the other hand it is competent to repeal a law of this kind, and it cannot be said that contractual rights are impaired, although the repeal affects deeds in existence at the time.[56]

4. Effect of Statutes Making Tax Deeds Evidence — a. In General. The effect of the statutes under consideration is to dispense with the necessity of proving the various steps in the tax proceedings, one by one, and to permit the introduction of the tax deed in evidence without preliminary proof.[57] If the statute enumerates the particular matters as to which it shall be presumptive evidence, all other essential steps must of course be proved;[58] but where, as is more usually the case, it makes the deed evidence of the facts recited in it, these need not be separately proved, in the first instance, but the deed will *prima facie* establish their existence and regularity;[59] and where the tax deed is made pre-

L. Rep. 1221; Heyward *v.* Christensen, 80 S. C. 146, 61 S. E. 399.

55. Wildharber *v.* Lunkenheimer, 128 Ky. 344, 108 S. W. 327, 32 Ky. L. Rep. 1221; Freeman *v.* Thayer, 33 Me. 76; Heyward *v.* Christensen, 80 S. C. 146, 61 S. E. 399. But see Keane *v.* Cannovan, 21 Cal. 291, 82 Am. Dec. 738; Norris *v.* Russell, 5 Cal. 249; Garrett *v.* Doe, 2 Ill. 335.

56. Emeric *v.* Alvarado, 90 Cal. 444, 27 Pac. 356; Gage *v.* Caraher, 125 Ill. 447, 17 N. E. 777. And see Madland *v.* Benland, 24 Minn. 372. But *compare* Fisher *v.* Betts, 12 N. D. 197, 96 N. W. 132.

57. *Alabama.*— Doe *v.* Moog, 150 Ala. 460, 43 So. 710.

Arkansas.— Jacks *v.* Kelley Trust Co., 90 Ark. 548, 120 S. W. 142; Morris *v.* Breedlove, 89 Ark. 296, 116 S. W. 223; Doniphan Lumber Co. *v.* Reid, 82 Ark. 31, 100 S. W. 69; Cracraft *v.* Meyer, 76 Ark. 450, 88 S. W. 1027; Thornton *v.* St. Louis Refrigerator, etc., Co., 69 Ark. 424, 65 S. W. 113; Alexander *v.* Bridgford, 59 Ark. 195, 27 S. W. 69; Scott *v.* Mills, 49 Ark. 266, 4 S. W. 908.

California.— Best *v.* Wohlford, 153 Cal. 17, 94 Pac. 98; Davis *v.* Pacific Imp. Co., 7 Cal. App. 452, 94 Pac. 595; Commercial Nat. Bank *v.* Schlitz, 6 Cal. App. 174, 91 Pac. 750. But *compare* Norris *v.* Russell, 5 Cal. 249.

Florida.— Saunders *v.* Collins, 56 Fla. 534, 47 So. 958; Stieff *v.* Hartwell, 35 Fla. 606, 17 So. 899.

Illinois.— Graves *v.* Bruen, 11 Ill. 431; Vance *v.* Schuyler, 6 Ill. 160.

Indiana.— May *v.* Dobbins, 166 Ind. 331, 77 N. E. 353; Bivens *v.* Henderson, 42 Ind. App. 562, 86 N. E. 426; Holbrook *v.* Kunz, 41 Ind. App. 260, 83 N. E. 730.

Iowa.— McCash *v.* Penrod, 131 Iowa 631, 109 N. W. 180; Allen *v.* Armstrong, 16 Iowa 508.

Kansas.— Bowman *v.* Cockrill, 6 Kan. 311.

Kentucky.— Wildharber *v.* Lunkenheimer, 128 Ky. 344, 108 S. W. 327, 32 Ky. L. Rep. 1221; Alexander *v.* Aud, 121 Ky. 10, 88 S. W. 1103, 28 Ky. L. Rep. 69.

Michigan.— Sibley *v.* Smith, 2 Mich. 486.

Minnesota.— Madland *v.* Benland, 24 Minn. 372; Broughton *v.* Sherman, 21 Minn. 431.

New York.— Baer *v.* McCullough, 176 N. Y. 97, 68 N. E. 129; Finlay *v.* Cook, 54 Barb. 9.

North Carolina.— Matthews *v.* Fry, 141 N. C. 582, 54 S. E. 379.

Ohio.— Stanbery *v.* Sillon, 13 Ohio St. 571; Turney *v.* Yeoman, 14 Ohio 207.

Pennsylvania.— Hubley *v.* Keyser, 2 Penr. & W. 496.

South Carolina.— Heyward *v.* Christensen, 80 S. C. 146, 61 S. E. 399.

South Dakota.— St. Paul, etc., R. Co. *v.* Howard, 23 S. D. 34, 119 N. W. 1032.

Virginia.— Smith *v.* Chapman, 10 Gratt. 445.

Washington.— Ward *v.* Huggins, 7 Wash. 617, 32 Pac. 740, 1015, 36 Pac. 285. See Tacoma Gas, etc., Co. *v.* Pauley, 49 Wash. 562, 95 Pac. 1103.

West Virginia.— Hogan *v.* Piggott, 60 W. Va. 541, 56 S. E. 189.

Wisconsin.— Whitney *v.* Marshall, 17 Wis. 174.

United States.— Lamb *v.* Gillett, 14 Fed. Cas. No. 8,016, 6 McLean 365; McQuain *v.* Meline, 16 Fed. Cas. No. 8,923.

See 45 Cent. Dig. tit. "Taxation," § 1557.

58. Parker *v.* Smith, 4 Blackf. (Ind.) 70; Cucullu *v.* Brakenridge Lumber Co., 49 La. Ann. 1445, 22 So. 409; Latimer *v.* Lovett, 2 Dougl. (Mich.) 204; King *v.* Cooper, 128 N. C. 347, 38 S. E. 924.

Proof that owner had no available personal property see Richard *v.* Carrie, 145 Ind. 49, 43 N. E. 949; Pitcher *v.* Dove, 99 Ind. 175; Earle *v.* Simons, 94 Ind. 573; Ellis *v.* Kenyon, 25 Ind. 134; Stewart *v.* Corbin, 25 Iowa 144; Doremus *v.* Cameron, 49 N. J. Eq. 1, 22 Atl. 802.

59. *Alabama.*— Riddle *v.* Messer, 84 Ala. 236, 4 So. 185.

Arkansas.— Bonnell *v.* Roane, 20 Ark. 114.

Illinois.— Ransom *v.* Henderson, 114 Ill. 528, 4 N. E. 141.

Kentucky.— Morton *v.* Waring, 18 B. Mon. 72.

Louisiana.—Welsch *v.* Augusti, 52 La. Ann. 1949, 28 So. 363.

Michigan.— Hoffman *v.* Silverthorn, 137 Mich. 60, 100 N. W. 183.

Mississippi.— Chamberlain *v.* Lawrence County, 71 Miss. 949, 15 So. 40.

Missouri.— Wall *v.* Holladay-Klotz Land, etc., Co., 175 Mo. 406, 75 S. W. 385.

New York.— See Jackson *v.* Esty, 7 Wend. 148.

sumptive evidence of title in the grantee, it is evidence of the existence and legality of all the antecedent steps required by law and of the authority of the several officers who acted in the matter, and is sufficient, unless rebutted by evidence, to enable the grantee to recover possession of the land.[60] In either case the deed will also be supported by all reasonable presumptions.[61] On the other hand, it

North Dakota.— Fisher *v.* Betts, 12 N. D. 197, 96 N. W. 132.

Pennsylvania.— Coxe *v.* Deringer, 82 Pa. St. 236.

South Dakota.— St. Paul, etc., R. Co. *v.* Howard, 23 S. D. 34, 119 N. W. 1032.

Vermont.— Parker *v.* Bixby, 2 Tyler 466. See Hall *v.* Collins, 4 Vt. 316.

See 45 Cent. Dig. tit. "Taxation," § 1556 *et seq.*

60. *Arkansas.*— Thornton *v.* St. Louis Refrigerator, etc., Co., 69 Ark. 424, 65 S. W. 113; Boehm *v.* Porter, 54 Ark. 665, 17 S. W. 1; Hunt *v.* McFadgen, 20 Ark. 277; Bonnell *v.* Roane, 20 Ark. 114; Biscoe *v.* Coulter, 18 Ark. 423.

California.— Rollins *v.* Wright, 93 Cal. 395, 29 Pac. 58.

Colorado.—U. S. Security, etc., Co. *v.* Wolfe, 27 Colo. 218, 60 Pac. 637.

Florida.— Cowan *v.* Skinner, 52 Fla. 486, 42 So. 730.

Georgia.— Livingston *v.* Hudson, 85 Ga. 835, 12 S. E. 17.

Illinois.— Manly *v.* Gibson, 14 Ill. 136; Ballance *v.* Curtenius, 12 Ill. 416; Spellman *v.* Curtenius, 12 Ill. 409; Graves *v.* Bruen, 11 Ill. 431; Lusk *v.* Harber, 8 Ill. 158.

Indiana.— Wilson *v.* Carrico, 155 Ind. 570, 58 N. E. 847; Wines *v.* Woods, 109 Ind. 291, 10 N. E. 399.

Iowa.— McCash *v.* Penrod, 131 Iowa 631, 109 N. W. 180; Chicago, etc., R. Co. *v.* Hemenway, 117 Iowa 598, 91 N. W. 910; Reed *v.* Thompson, 56 Iowa 450, 9 N. W. 331; Wilson *v.* Crafts, 56 Iowa 450, 9 N. W. 333; Fuller *v.* Armstrong, 53 Iowa 683, 6 N. W. 61; Shawler *v.* Johnson, 52 Iowa 473, 3 N. W. 604; Gould *v.* Thompson, 45 Iowa 450; Phelps *v.* Meade, 41 Iowa 470; Jeffrey *v.* Brokaw, 35 Iowa 505; Ware *v.* Little, 35 Iowa 234; Stewart *v.* Corbin, 25 Iowa 144.

Kansas.— Smith *v.* Hobbs, 49 Kan. 800, 31 Pac. 687; Gardenhire *v.* Mitchell, 21 Kan. 83; Hobson *v.* Dutton, 9 Kan. 477; Bowman *v.* Cockrill, 6 Kan. 311.

Kentucky.— Bodley *v.* Hord, 2 A. K. Marsh. 244.

Louisiana.— Iberia Cypress Co. *v.* Thorgeson, 116 La. 218, 40 So. 682; Muller *v.* Mazerat, 109 La. 116, 33 So. 104; Prescott *v.* Payne, 44 La. Ann. 650, 11 So. 140.

Maryland.— Young *v.* Ward, 88 Md. 413, 41 Atl. 925.

Mississippi.— Lochte *v.* Austin, 69 Miss. 271, 13 So. 838.

Missouri.— Abbott *v.* Lindenbower, 46 Mo. 291. See Moreau *v.* Detchemendy, 41 Mo. 431.

New York.— Erie County Sav. Bank *v.* Schuster, 107 N. Y. App. Div. 46, 94 N. Y. Suppl. 737 [*affirmed* in 187 N. Y. 111, 79 N. E. 843]; Curtiss *v.* Follett, 15 Barb. 337.

North Dakota.— Lee *v.* Crawford, 10 N. D. 482, 88 N. W. 97.

Oklahoma.— O'Keefe *v.* Dillenbeck, 15 Okla. 437, 83 Pac. 540.

Pennsylvania.— Lee *v.* Jeddo Coal Co., 84 Pa. St. 74.

South Carolina.— Heyward *v.* Christensen, 80 S. C. 146, 61 S. E. 399.

Washington.— Bracka *v.* Fish, 23 Wash. 646, 63 Pac. 561.

West Virginia.— Hogan *v.* Piggott, 60 W. Va. 541, 56 S. E. 189.

Wisconsin.— Emerson *v.* McDonnell, 129 Wis. 67, 107 N. W. 1037; Hart *v.* Smith, 44 Wis. 213; Nelson *v.* Rountree, 23 Wis. 367; Stewart *v.* McSweeney, 14 Wis. 468.

United States.— Martin *v.* Barbour, 34 Fed. 701 [*affirmed* in 140 U. S. 634, 11 S. Ct. 944, 35 L. ed. 546]; Huntington *v.* Central Pac. R. Co., 12 Fed. Cas. No. 6,911, 2 Sawy. 503.

See 45 Cent. Dig. tit. "Taxation," § 1556 *et seq.*

Evidence as to assignment of certificate of purchase see Doe *v.* Bean, 6 Ill. 302; American Exch. Nat. Bank *v.* Crooks, 97 Iowa 244, 66 N. W. 168; Gardenhire *v.* Mitchell, 21 Kan. 83; Bassett *v.* Welch, 22 Wis. 175.

Superior record title in another.— Mo. Rev. St. (1899) § 3150 (Annot. St. (1906) p. 1788), making a tax deed *prima facie* evidence that the person named as defendant was the absolute owner at the time of the sale, does not presume a title so conclusive that a superior record title will not overcome it, and where plaintiff's record title to land was superior to defendant's, in that defendant's grantor, against whom the tax action was brought, was not shown to have had any interest in the land, the *prima facie* title implied by the statute would not prevail against plaintiff's record title. Einstein *v.* Holladay-Klotz Land, etc., Co., 132 Mo. App. 82, 111 S. W. 859.

61. *Arkansas.*— Sawyer *v.* Wilson, 81 Ark. 319, 99 S. W. 389.

Iowa.— Bulkley *v.* Callanan, 32 Iowa 461.

Kansas.— Tucker *v.* Shorb, 80 Kan. 511, 103 Pac. 79; Schroeder *v.* Griggs, 80 Kan. 357, 102 Pac. 469; Morris *v.* Morris, 80 Kan. 134, 101 Pac. 1020; Hahn *v.* Hill Inv. Co., 79 Kan. 693, 100 Pac. 484; Robert *v.* Gibson, 79 Kan. 344, 99 Pac. 595; Gibson *v.* Larabee, 77 Kan. 243, 94 Pac. 216; Carson *v.* Platt, 76 Kan. 636, 92 Pac. 705. Where the recitals of a tax deed which has been of record less than five years do not of themselves impeach its validity, evidence is necessary to overthrow it, and an assumption will not be indulged in to defeat it. Pierce *v.* Adams, 77 Kan. 46, 93 Pac. 594.

Kentucky.— Hickman *v.* Skinner, 3 T. B. Mon. 210; Hughes *v.* Owens, 92 S. W. 595, 29 Ky. L. Rep. 140.

Louisiana.— Stroebel *v.* Seeger, 49 La. Ann. 36, 21 So. 126; O'Hern *v.* Hibernia Ins. Co., 30 La. Ann. 959.

Mississippi.— Virden *v.* Bowers, 55 Miss. 1.

will estop the party putting it in evidence from contradicting its recitals,[62] although he may if he chooses waive the benefit of the statutory presumption and prove the proceedings in detail.[63]

b. Burden of Proof. Where a statute makes the tax deed presumptive evidence of title or of the regularity of the anterior proceedings, without preliminary proof, its effect is to change the burden of proof, which before rested upon the purchaser to sustain the deed, and cast it upon the party who would contest its validity.[64] It is then incumbent upon the latter to point out the particular illegality or defect relied on and to prove it affirmatively; it is not sufficient to show facts from which illegality might be inferred or to cast a general doubt over the title, but some specific fault or defect must be established by sufficient and satisfactory legal evidence.[65] When this is done, however, the presumptive force of the deed is

Recitals conflicting with presumption of regularity.— Where a tax deed for land purchased by a county showed affirmatively that the county was a competitive bidder at the sale in violation of the statute, the purchaser thereof will not be protected by a presumption of regularity in the proceeding, or by Mont. Pol. Code, § 3897, making tax deeds *prima facie* evidence of certain matters, since a tax deed is construed most strongly against the grantee thereunder, and, where two presumptions are admissible from a deed, that must be indulged most favorable to the owner. Rush *v.* Lewis, etc., County, 36 Mont. 566, 93 Pac. 943, 37 Mont. 240, 95 Pac. 836.

62. Brady *v.* Dowden, 59 Cal. 51; Grimm *v.* O'Connell, 54 Cal. 522; Hanenkratt *v.* Hamil, 10 Okla. 219, 61 Pac. 1050.

63. Curtiss *v.* Follett, 15 Barb. (N. Y.) 337.

64. *Arkansas.*— Jacks *v.* Kelley Trust Co., 90 Ark. 548, 120 S. W. 142; Cracraft *v.* Meyer, 76 Ark. 450, 88 S. W. 1027; Morris *v.* Breedlove, 89 Ark. 296, 116 S. W. 223; Doniphan Lumber Co. *v.* Reid, 82 Ark. 31, 100 S. W. 69; Hunt *v.* McFadgen, 20 Ark. 277; Bonnell *v.* Roane, 20 Ark. 114.

California.— Davis *v.* Pacific Imp. Co., 7 Cal. App. 452, 94 Pac. 595; Commercial Nat. Bank *v.* Schlitz, 6 Cal. App. 174, 91 Pac. 750.

Colorado.— Waddingham *v.* Dickson, 17 Colo. 223, 29 Pac. 177.

Illinois.— Taylor *v.* Wright, 121 Ill. 455, 13 N. E. 529; Manly *v.* Gibson, 14 Ill. 136; Graves *v.* Bruen, 11 Ill. 431; Job *v.* Tebbetts, 10 Ill. 376.

Indiana.— May *v.* Dobbins, 166 Ind. 331, 77 N. E. 353; Bivens *v.* Henderson, 42 Ind. App. 562, 86 N. E. 426.

Iowa.— McCash *v.* Penrod, 131 Iowa 631, 109 N. W. 180; Kramer *v.* Ricke, 70 Iowa 535, 25 N. E. 278; Ellsworth *v.* Low, 62 Iowa 178, 17 N. W. 450; Wilson *v.* Crafts, 56 Iowa 450, 9 N. W. 333.

Kansas.— Jones *v.* Sadler, 75 Kan. 380, 89 Pac. 1019; Nagle *v.* Tieperman, 74 Kan. 32, 85 Pac. 941, 88 Pac. 969; Gibson *v.* Trisler, 73 Kan. 397, 85 Pac. 413.

Kentucky.— Wildharber *v.* Lunkenheimer, 128 Ky. 344, 108 S. W. 327, 32 Ky. L. Rep. 1221; Husbands *v.* Polivick, 96 S. W. 825, 29 Ky. L. Rep. 890.

Louisiana.— Iberia Cypress Co. *v.* Thorgeson, 116 La. 218, 40 So. 682; *In re* Interstate Land Co., 110 La. 286, 34 So. 446; Slattery *v.* Heilperin, 110 La. 86, 34 So. 139; Person *v.* O'Neal, 32 La. Ann. 228.

Michigan.—Beard *v.* Sharrick, 67 Mich. 321, 34 N. W. 585; Boyce *v.* Sebring, 66 Mich. 210, 33 N. W. 815; Wright *v.* Dunham, 13 Mich. 414.

Mississippi.—Herndon *v.* Mayfield, 79 Miss. 533, 31 So. 103; Meeks *v.* Whatley, 48 Miss. 337. See National Bank of the Republic *v.* Louisville, etc., R. Co., 72 Miss. 447, 17 So. 7.

Missouri.— Abbott *v.* Lindenbower, 46 Mo. 291.

New Jersey.— Woodbridge Tp. *v.* State, 43 N. J. L. 262.

New York.— Wood *v.* Knapp, 100 N. Y. 109, 2 N. E. 632; Colman *v.* Shattuck, 62 N. Y. 348; Culnane *v.* Dixon, 107 N. Y. App. Div. 163, 94 N. Y. Suppl. 1093 [*affirmed* in 187 N. Y. 111, 79 N. E. 843]; Wells *v.* Johnston, 55 N. Y. App. Div. 484, 67 N. Y. Suppl. 112; Lott *v.* De Graw, 30 Hun 417.

North Dakota.— Nind *v.* Myers, 15 N. D. 400, 109 N. W. 335, 8 L. R. A. N. S. 157; Sykes *v.* Beck, 12 N. D. 242, 96 N. W. 844.

Ohio.— Woodward *v.* Sloan, 27 Ohio St. 592; Turney *v.* Yeoman, 14 Ohio 207.

Oregon.— Brentano *v.* Brentano, 41 Oreg. 15, 67 Pac. 922.

South Carolina.— Heyward *v.* Christensen, 80 S. C. 146, 61 S. E. 399; Wilson *v.* Cantrell, 40 S. C. 114, 18 S. E. 517.

South Dakota.— Bandow *v.* Wolven, 20 S. D. 445, 107 N. W. 204, 23 S. D. 124, 120 N. W. 881.

Tennessee.— Allen *v.* Dayton Hotel Co., 95 Tenn. 480, 32 S. W. 962.

Texas.— Ozee *v.* Henrietta, 90 Tex. 334, 38 S. W. 768; Houssels *v.* Taylor, 24 Tex. Civ. App. 72, 58 S. W. 190.

Washington.— Tacoma Gas, etc., Co. *v.* Pauley, 49 Wash. 562, 95 Pac. 1103.

West Virginia.— Hogan *v.* Piggott, 60 W. Va. 541, 56 S. E. 189.

Wisconsin.— Hart *v.* Smith, 44 Wis. 213; Delaplaine *v.* Cook, 7 Wis. 44.

United States.— Williams *v.* Kirtland, 13 Wall. 306, 20 L. ed. 683; Thomas *v.* Lawson, 21 How. 331, 16 L. ed. 82; Robinson *v.* Bailey, 26 Fed. 219; Jenkins *v.* McTigue, 22 Fed. 148; Lamb *v.* Gillett, 14 Fed. Cas. No. 8,016, 6 McLean 365.

See 45 Cent. Dig. tit. "Taxation," §§ 1557, 1565.

65. *Alabama.*— State Auditor *v.* Jackson County, 65 Ala. 142.

repelled, and the burden of proof is shifted back to the tax purchaser, who must then establish his title as at common law.[66]

c. Evidence of Facts Not Recited. Where the statute merely makes the tax deed presumptive evidence of the truth of its own recitals, if the deed fails to recite any of the facts material to the sale or transfer of title, the party relying on it must aid the omission by extrinsic evidence.[67] But if the deed is made *prima facie* evidence of title, or of the regularity of all prior proceedings, facts not specially recited will be presumed.[68]

d. Levy and Assessment. Under a statute making a tax deed presumptive evidence of title, or of the regularity of all prior proceedings, it will be presumed, without preliminary proof, that all things were rightly done in regard to the levy and assessment of the tax,[69] although it is open to the party contesting the tax title to point out any jurisdictional defect in these proceedings.[70] But if the law

Arkansas.— Biscoe *v.* Coulter, 18 Ark. 423.
Florida.— Sams *v.* King, 18 Fla. 557.
Georgia.— Shackleford *v.* Hooper, 65 Ga. 366.
Idaho.— Co-Operative Sav., etc., Assoc. *v.* Green, 5 Ida. 660, 51 Pac. 770.
Illinois.— Daniels *v.* Burso, 40 Ill. 307.
Iowa.— Fuller *v.* Armstrong, 53 Iowa 683, 6 N. W. 61.
Michigan.— Case *v.* Dean, 16 Mich. 12; Lacey *v.* Davis, 4 Mich. 140, 66 Am. Dec. 524.
Mississippi.— Meeks *v.* Whatley, 48 Miss. 337.
New Jersey.— Woodbridge Tp. *v.* State, 43 N. J. L. 262.
New York.— Colman *v.* Shattuck, 62 N. Y. 348.
South Carolina.— Shell *v.* Duncan, 31 S. C. 547, 10 S. E. 330, 5 L. R. A. 821.
See 45 Cent. Dig. tit. "Taxation," §§ 1557, 1565.

66. *California.*— Bidleman *v.* Brooks, 28 Cal. 72.
Colorado.— Duggan *v.* McCullough, 27 Colo. 43, 59 Pac. 743.
Florida.— Starks *v.* Sawyer, 56 Fla. 596, 47 So. 513.
Georgia.— Livingston *v.* Hudson, 85 Ga. 835, 12 S. E. 17.
Illinois.— Tibbetts *v.* Job, 11 Ill. 453; Graves *v.* Bruen, 11 Ill. 431.
Iowa.— Long *v.* Burnett, 13 Iowa 28, 81 Am. Dec. 420.
Michigan.— Case *v.* Dean, 16 Mich. 12.
Washington.— Hurd *v.* Brisner, 3 Wash. 1, 28 Pac. 371, 28 Am. St. Rep. 17.
Wisconsin.— Eaton *v.* North, 20 Wis. 449.
See also *infra*, XIII, G, 5.

67. *Arkansas.*— Bonnell *v.* Roane, 20 Ark. 114.
Indiana.— Steeple *v.* Downing, 60 Ind. 478; Ellis *v.* Kenyon, 25 Ind. 134; Gavin *v.* Shuman, 23 Ind. 32.
Iowa.— Long *v.* Burnett, 13 Iowa 28, 81 Am. Dec. 420.
Kentucky.— Morton *v.* Waring, 18 B. Mon. 72.
New York.— Brown *v.* Goodwin, 56 How. Pr. 301.
See 45 Cent. Dig. tit. "Taxation," § 1557.
Effect of omission of recitals required by statute as invalidating deed see *supra*, XIII, D, 1, b, c.

Parol evidence to supply omitted recitals see *supra*, XIII, D, 2, h.

68. *Arkansas.*— Steadman *v.* Planters' Bank, 7 Ark. 424.
California.— Best *v.* Wohlford, 153 Cal. 17, 94 Pac. 98; O'Grady *v.* Barnhisel, 23 Cal. 287.
Kansas.— Hahn *v.* Hill Inv. Co., 79 Kan. 693, 100 Pac. 484.
Louisiana.— *In re* Lafferranderie, 114 La. 6, 37 So. 990; Simoneaux *v.* White Castle Lumber, etc., Co., 112 La. 221, 36 So. 328.
South Carolina.— Shell *v.* Duncan, 31 S. C. 547, 10 S. E. 330, 5 L. R. A. 821.

69. *California.*— Rollins *v.* Wright, 93 Cal. 395, 29 Pac. 58; Davis *v.* Pacific Imp. Co., 7 Cal. App. 452, 94 Pac. 595; Commercial Nat. Bank *v.* Schlitz, 6 Cal. App. 174, 91 Pac. 750.
Colorado.— Duggan *v.* McCullough, 27 Colo. 43, 59 Pac. 743.
Florida.— Saunders *v.* Collins, 56 Fla. 534, 47 So. 958; Mundee *v.* Freeman, 23 Fla. 529, 3 So. 153.
Kansas.— Gibson *v.* Larabee, 77 Kan. 243, 94 Pac. 216.
Louisiana.— Winter *v.* Thibodeaux, 8 La. 193.
Mississippi.— Wallace *v.* Lyle, (1904) 37 So. 460.
New Jersey.— Campbell *v.* Dewick, 20 N. J. Eq. 186.
North Carolina.— Peebles *v.* Taylor, 118 N. C. 165, 24 S. E. 797, 121 N. C. 38, 27 S. E. 999.
Oregon.— Harris *v.* Harsch, 29 Oreg. 562, 46 Pac. 141.
Pennsylvania.— Lehigh, etc., Coal Co. *v.* Close, 2 Walk. 140.
South Dakota.— St. Paul, etc., R. Co. *v.* Howard, 23 S. D. 34, 119 N. W. 1032.
Texas.— Earle *v.* Henrietta, (Civ. App. 1897) 41 S. W. 727.
Washington.— See Tacoma Gas, etc., Co. *v.* Pauley, 49 Wash. 562, 95 Pac. 1103.
Wisconsin.— Smith *v.* Cleveland, 17 Wis. 556; Stewart *v.* McSweeney, 14 Wis. 468.
United States.— Tracy *v.* Reed, 38 Fed. 69, 13 Sawy. 622, 2 L. R. A. 773; Jenkins *v.* McTigue, 22 Fed. 148.
See 45 Cent. Dig. tit. "Taxation," § 1560.

70. Turner *v.* Boyce, 11 Misc. (N. Y.) 502, 33 N. Y. Suppl. 433.

merely makes the deed evidence of the regularity of the sale, the levy and assessment must be proved independently.[71]

e. Fact, Regularity, and Validity of Sale. Where the statute makes the tax deed either *prima facie* or conclusive evidence of the "regularity of the sale," it may be relied on, without preliminary evidence and until successfully impeached, as proving that a sale was made in fact, that it was held at the proper time and place and in the proper manner, and that all things else connected with it were done regularly and legally.[72] But a statute going no further than this does not dispense with the necessity of proof of the levy and assessment of the tax and other preliminary steps, nor does it make the recitals of the deed evidence of these matters.[73]

f. Redemption. If the statute makes the tax deed *prima facie* evidence of title or of the regularity of all proceedings prior to its execution, it will be presumed, in the absence of positive evidence to the contrary, that the necessary notice for redemption was given and that the land was not redeemed; [74] but it is

71. Rathbone *v.* Hooney, 58 N. Y. 463; Earle *v.* Henrietta, 91 Tex. 301, 43 S. W. 15; Houston *v.* Washington, 16 Tex. Civ. App. 504, 41 S. W. 135.

72. *Arkansas.*— Cracraft *v.* Meyer, 76 Ark. 450, 88 S. W. 1027; Hill *v.* Denton, 74 Ark. 463, 86 S. W. 402; Pillow *v.* Roberts, 12 Ark. 822.

California.— Doland *v.* Mooney, 79 Cal. 137, 21 Pac. 436.

Florida.— Saunders *v.* Collins, 56 Fla. 534, 47 So. 958.

Illinois.— Rhinehart *v.* Schuyler, 7 Ill. 473.

Iowa.— Farmers' L. & T. Co. *v.* Wall, 129 Iowa 651, 106 N. W. 160; Slocum *v.* Slocum, 70 Iowa 259, 30 N. W. 562; Bullis *v.* Marsh, 56 Iowa 747, 2 N. W. 578, 6 N. W. 177; Shawler *v.* Johnson, 52 Iowa 473, 3 N. W. 604; Gould *v.* Thompson, 45 Iowa 450; Phelps *v.* Meade, 41 Iowa 470; Leavitt *v.* Watson, 37 Iowa 93; Ware *v.* Little, 35 Iowa 234; Bulkley *v.* Callanan, 32 Iowa 461; Rima *v.* Cowan, 31 Iowa 125.

Kansas.— Hobson *v.* Dutton, 9 Kan. 477.

Kentucky.— Wildharber *v.* Lunkenheimer, 128 Ky. 344, 108 S. W. 327, 32 Ky. L. Rep. 1221; Allen *v.* Robinson, 3 Bibb 326.

Louisiana.— Little River Lumber Co. *v.* Thompson, 118 La. 284, 42 So. 938.

Michigan.— Rowland *v.* Doty, Harr. 3.

Mississippi.— Burroughs *v.* Vance, 75 Miss. 696, 23 So. 548.

New Hampshire.— French *v.* Spalding, 61 N. H. 395.

New York.— People *v.* Francisco, 76 N. Y. App. Div. 262, 78 N. Y. Suppl. 423.

Pennsylvania.— Lee *v.* Jeddo Coal Co., 84 Pa. St. 74.

Tennessee.— Thompson *v.* Lawrence, 2 Baxt. 415.

Texas.— See Henderson *v.* White, 69 Tex. 103, 5 S. W. 374.

Wisconsin.— Hotson *v.* Wetherby, 88 Wis. 324, 60 N. W. 423; Cramer *v.* Stone, 38 Wis. 259; Lindsay *v.* Fay, 28 Wis. 177.

United States.— Callanan *v.* Hurley, 93 U. S. 387, 23 L. ed. 931.

See 45 Cent. Dig. tit. "Taxation," § 1561.

Assignment of certificate by state.— Where a deed shows that the state purchased at a tax-sale, and sold for the amount paid for the tax certificate, and further shows that the certificate was produced and surrendered to the clerk of the circuit court who executed the deed, it is unnecessary to prove that such certificate was assigned by the state, for it sufficiently appears that the grantees were holders of the certificate, paid for and surrendered the same to the state, and were entitled to and received the deed for the land embraced in the certificate. Saunders *v.* Collins, 56 Fla. 534, 47 So. 958.

73. *Georgia.*— Shackleford *v.* Hooper, 65 Ga. 366.

Illinois.— Doe *v.* Leonard, 5 Ill. 140.

Indiana.— Ward *v.* Montgomery, 57 Ind. 276; Wilson *v.* Lemon, 23 Ind. 433, 85 Am. Dec. 471; Parker *v.* Smith, 4 Blackf. 70.

Michigan.— Ives *v.* Kimball, 1 Mich. 308; Latimer *v.* Lovett, 2 Dougl. 204; Scott *v.* Detroit Young Men's Soc., 1 Dougl. 119; Rowland *v.* Doty, Harr. 3.

New York.— Westbrook *v.* Willey, 47 N. Y. 457; Beekman *v.* Bigham, 5 N. Y. 366; Tallman *v.* White, 2 N. Y. 66; Doughty *v.* Hope, 3 Den. 594; Striker *v.* Kelly, 2 Den. 323.

Texas.— Terrell *v.* Martin, 64 Tex. 121; Yenda *v.* Wheeler, 9 Tex. 408.

Wisconsin.— Bridge *v.* Bracken, 3 Pinn. 73, 3 Chandl. 75.

United States.— Overman *v.* Parker, 18 Fed. Cas. No. 10,623, Hempst. 692. But *compare* De Treville *v.* Smalls, 98 U. S. 517, 25 L. ed. 174.

Canada.—Archibald *v.* Youville, 7 Manitoba 473.

74. Young *v.* Iowa Toilers' Protective Assoc., 106 Iowa 447, 76 N. W. 822; Soukup *v.* Union Inv. Co., 84 Iowa 448, 51 N. W. 167, 35 Am. St. Rep. 317; Garmoe *v.* Sturgeon, 65 Iowa 147, 21 N. W. 493; Reed *v.* Thompson, 56 Iowa 455, 9 N. W. 331; Wilson *v.* Crafts, 56 Iowa 450, 9 N. W. 333; Fisher *v.* Betts, 12 N. D. 197, 96 N. W. 132; Lord *v.* Milwaukee, etc., R. Co., 15 Fed. Cas. No. 8,507, 17 Wis. 570 note. *Contra*, Reed *v.* Lyon, 96 Cal. 501, 31 Pac. 619; Miller *v.* Miller, 96 Cal. 376, 31 Pac. 247, 31 Am. St. Rep. 229; Mueller *v.* Jackson, 39 Minn. 431, 40 N. W. 565; Greve *v.* Coffin, 14 Minn. 345, 100 Am. Dec. 229.

otherwise if the statute makes the deed evidence only of the regularity of the sale.[75]

g. Notice of Application For Deed. Under a statute making a tax deed regular on its face *prima facie* evidence of the truth of the facts recited therein and of the regularity of all proceedings from the valuation of the land up to the execution of the deed, a tax deed regular on its face is *prima facie* evidence that a proper notice of intention to take out the tax deed was given and properly served, and the burden is on one attacking the deed to show a defective notice or service.[76]

h. Preliminaries to Introduction of Deed in Evidence — (I) *In General.* To secure the reception of a tax deed in evidence a proper foundation for it must be laid. Without the aid of a statute such as those under consideration, this must be done by proving all the preliminary proceedings;[77] but if the statute dispenses with this preliminary evidence, it is only necessary that the deed shall be fair and valid on its face.[78] In some states, however, the party offering the deed must first show due authority in the officer making it,[79] and that it was executed with due observance of the statutory requirements as to signature, sealing, attestation, and acknowledgment,[80] and even that it has been duly recorded and a proper index of the record made.[81]

(II) *Objections to Form or Validity of Deed.* To entitle a tax deed to be admitted as presumptive evidence, under the statute, it must be substantially in the form prescribed by law [82] and apparently fair and regular, for if it is void on its face, or if it discloses the illegality of the tax or a fatal defect in the prior proceedings, it proves nothing and must be rejected.[83]

75. Westbrook *v.* Willey, 47 N. Y. 457; Hennessey *v.* Volkening, 22 N. Y. Suppl. 528, 30 Abb. N. Cas. 100; Gage *v.* Bani, 141 U. S. 344, 12 S. Ct. 22, 35 L. ed. 776. But *compare* Ostrander *v.* Darling, 127 N. Y. 70, 27 N. E. 353.

76. Bandow *v.* Wolven, 20 S. D. 445, 107 N. W. 204, 23 S. D. 124, 120 N. W. 881.

77. Richards *v.* Beggs, 31 Colo. 186, 72 Pac. 1077; Johnson *v.* Briscoe, 92 Ind. 367; Greve *v.* Coffin, 14 Minn. 345, 100 Am. Dec. 229; Stambaugh *v.* Carlin, 35 Ohio St. 209; Thompson *v.* Gotham, 9 Ohio 170; Wolcott *v.* Holland, 27 Ohio Cir. Ct. 71. And see *supra*, XIII, G, 1, a–d.

Records destroyed.— The provision of the "burnt records act" in Illinois, that one relying on a tax deed shall prove the validity of the proceedings precedent to the tax-sale, does not apply to one who is defending a suit brought under that act. Garrick *v.* Chamberlain, 97 Ill. 620.

Copy of deed as evidence.— In Pennsylvania it is held that a copy of a treasurer's deed, from the registry in the treasurer's office, is not evidence and cannot be made to take the place of the original. Townsen *v.* Wilson, 9 Pa. St. 270.

78. Verdery *v.* Dotterer, 69 Ga. 194; Clark *v.* Ellithorp, 9 Kan. App. 503, 59 Pac. 286; Wright *v.* U. S. Mortgage Co., (Tex. Civ. App. 1899) 54 S. W. 368.

Successive deeds on same sale.— Where one claims under two deeds for taxes of the same property, it is competent on the first deed or sale being shown to be void, to introduce the second deed to prove his title. Mallory *v.* French, 44 Iowa 133. And see Brien *v.* O'Shaughnesy, 3 Lea (Tenn.) 724.

79. Bonham *v.* Weymouth, 39 Minn. 92, 38 N. W. 805; Jones *v.* Devore, 8 Ohio St. 430; Carlisle *v.* Longworth, 5 Ohio 368; Reusens *v.* Lawson, 91 Va. 226, 21 S. E. 347; Walton *v.* Hale, 9 Gratt. (Va.) 194; Shearer *v.* Corbin, 3 Fed. 705, 1 McCrary 306.

80. *Alabama.*— Bolling *v.* Smith, 79 Ala. 535.

California.— Wetherbee *v.* Dunn, 32 Cal. 106.

Indiana.—Armstrong *v.* Hufty, 156 Ind. 606, 55 N. E. 443, 60 N. E. 1080; Gabe *v.* Root, 93 Ind. 256; Green *v.* McGrew, 35 Ind. App. 104, 72 N. E. 1049, 73 N. E. 832, 111 Am. St. Rep. 149; Essex *v.* Meyers, 27 Ind. App. 639, 62 N. E. 96.

Missouri.— Dalton *v.* Fenn, 40 Mo. 109.

United States.— Sprague *v.* Pitt, 22 Fed. Cas. No. 13,254, McCahon (Kan.) 212.

Contra.— Ellis *v.* Clark, 39 Fla. 714, 23 So. 410; Irving *v.* Brownell, 11 Ill. 402; Grave *v.* Bruen, 6 Ill. 167.

81. Bolling *v.* Smith, 79 Ala. 535; Beale *v.* Brown, 6 Mackey (D. C.) 574 [*affirmed* in 149 U. S. 766, 13 S. Ct. 1043, 37 L. ed. 960]; Hiles *v.* Atlee, 80 Wis. 219, 49 N. W. 816, 27 Am. St. Rep. 32. *Compare* Ellis *v.* Clark, 39 Fla. 714, 23 So. 410.

82. Gibson *v.* Hammerburg, 72 Kan. 363, 83 Pac. 23; Dawson *v.* Peter, 119 Mich. 274, 77 N. W. 997; Beggs *v.* Paine, 15 N. D. 436, 109 N. W. 322.

83. *Arizona.*— Seaverns *v.* Costello, 8 Ariz. 308, 71 Pac. 930.

Arkansas.— Pack *v.* Crawford, 29 Ark. 489; Twombly *v.* Kimbrough, 24 Ark. 459.

Louisiana.— Renshaw *v.* Imboden, 31 La. Ann. 661.

Maine.—Allen *v.* Morse, 72 Me. 502.

Michigan.— Ball *v.* Busch, 64 Mich. 336, 31 N. W. 565.

Minnesota.— Taylor *v.* Winona, etc., R.

(iii) *Judgment and Precept or Order of Sale.* In some states where a tax-sale of land is founded on the judgment or decree of a court, it is necessary, before receiving the tax deed as evidence of title, that the party relying on it shall first show the judgment and the precept or order of sale thereon, these facts not being proved by the recitals of the deed.[84]

i. Effect of Such Statutes in Other States. A tax deed properly executed, and which is made presumptive evidence of title or of the regularity of the prior proceedings by a statute of the state where such proceedings were had, is admissible for the same purpose and has the same effect in the courts of any other state.[85]

5. Evidence to Impeach Deed or Title[86] — a. In General. Although a tax deed is by law made *prima facie* evidence of compliance with the provisions of the statute regulating tax-sales, yet it may be impeached by showing any substantial failure of such compliance; and when this is done its presumptive weight is overcome and the case thrown open.[87] Also it may be shown against the deed that

Co., 45 Minn. 66, 47 N. W. 453; Cogel *v.* Raph, 24 Minn. 194.

Nebraska.— Merriam *v.* Dovey, 25 Nebr. 618, 41 N. W. 550.

North Dakota.— State Finance Co. *v.* Trimble, 16 N. D. 199, 112 N. W. 984; State Finance Co. *v.* Beck, 15 N. D. 374, 109 N. W. 357.

Oregon.— Minter *v.* Durham, 13 Oreg. 470, 11 Pac. 231.

United States.— Daniels *v.* Case, 45 Fed. 843; Sonoma County Tax Case, 13 Fed. 789, 8 Sawy. 312; Roberts *v.* Pillow, 20 Fed. Cas. No. 11,909, 1 Hempst. 624.

Acknowledgment.—A tax deed void on its face because it was not acknowledged before the proper officer is inadmissible for the purpose of proving title in the purchaser, or his right to possession. Matthews *v.* Blake, 16 Wyo. 116, 92 Pac. 242, 27 L. R. A. N. S. 339.

Canceled deed.— Where a public officer, by statutory authority, issues a certificate canceling an existing tax deed, it is no longer evidence of title in the purchaser. Nowlen *v.* Hall, 128 Mich. 274, 87 N. W. 222.

84. *California.*— People *v.* Doe, 31 Cal. 220.

Georgia.— Sabattie *v.* Baggs, 55 Ga. 572.

Illinois.— Glanz *v.* Ziabek, 233 Ill. 22, 84 N. E. 36; Metropolitan West Side El. R. Co. *v.* Eschner, 232 Ill. 210, 83 N. E. 809; Blair *v.* Johnson, 215 Ill. 552, 74 N. E. 747; Gage *v.* Thompson, 161 Ill. 403, 43 N. E. 1062; Gilbreath *v.* Dilday, 152 Ill. 207, 38 N. E. 572; Perry *v.* Burton, 126 Ill. 599, 18 N. E. 653; Gage *v.* Caraher, 125 Ill. 447, 17 N. E. 777; Bell *v.* Johnson, 111 Ill. 374; Smith *v.* Hutchinson, 108 Ill. 662; Gage *v.* Lightburn, 93 Ill. 248; Cottingham *v.* Springer, 88 Ill. 90; Wilding *v.* Horner, 50 Ill. 50; Elston *v.* Kennicott, 46 Ill. 187; Charles *v.* Waugh, 35 Ill. 315; Baily *v.* Doolittle, 24 Ill. 577; Dukes *v.* Rowley, 24 Ill. 210; Marsh *v.* Chestnut, 14 Ill. 223; Spellman *v.* Curtenius, 12 Ill. 409; Lusk *v.* Harber, 8 Ill. 158; Atkins *v.* Hinman, 7 Ill. 437; Hinman *v.* Pope, 6 Ill. 131.

Indiana.— Burt *v.* Hasselman, 139 Ind. 196, 38 N. E. 598; Doe *v.* Himelick, 4 Blackf. 494.

Michigan.— McKinnon *v.* Meston, 104 Mich. 642, 62 N. W. 1014; Taylor *v.* Deveaux, 100 Mich. 581, 59 N. W. 250.

Nevada.— Bolan *v.* Bolan, 4 Nev. 150.

Tennessee.— Johnson *v.* Mills, 3 Hayw. 38; Castleman *v.* Phillipsburg Land Co., 1 Tenn. Ch. App. 9.

United States.—Little *v.* Herndon, 10 Wall. 26, 19 L. ed. 878, construing Illinois statute.

See 45 Cent. Dig. tit. "Taxation," § 1558.

Deed as evidence of collateral fact.— Although a tax deed is not evidence of title without proof of a valid judgment and precept, it may be offered in evidence to prove the *bona fides* of the purchaser. Sawyer *v.* Campbell, (Ill. 1885) 2 N. E. 660.

85. Watson *v.* Atwood, 25 Conn. 313; Bronson *v.* St. Croix Lumber Co., 44 Minn. 348, 46 N. W. 570. *Compare* Bisbee *v.* Torinus, 22 Minn. 555.

86. Evidence to explain, supply, or contradict recitals in deed see *supra*, XIII, D, 2, h.

87. *Arkansas.*— Morris *v.* Breedlove, 89 Ark. 296, 116 S. W. 223; Townsend *v.* Martin, 55 Ark. 192, 17 S. W. 875; Williamson *v.* Mimms, 49 Ark. 336, 5 S. W. 320; Hickman *v.* Kempner, 35 Ark. 505.

Florida.— Starks *v.* Sawyer, 56 Fla. 596, 47 So. 513.

Idaho.— McMasters *v.* Torsen, 7 Ida. 536, 51 Pac. 100.

Illinois.— Job *v.* Tebbetts, 10 Ill. 376.

Indiana.— Skelton *v.* Sharp, 161 Ind. 383, 67 N. E. 535; Wilson *v.* Lemon, 23 Ind. 433, 85 Am. Dec. 471; Brown *v.* Reeves, 31 Ind. App. 517, 68 N. E. 604.

Iowa.— Farmers' L. & T. Co. *v.* Wall, 129 Iowa 651, 106 N. W. 160; Long *v.* Burnett, 13 Iowa 28, 81 Am. Dec. 420; Rayburn *v.* Kuhl, 10 Iowa 92; Laraby *v.* Reid, 3 Greene 419.

Kansas.— City R. Co. *v.* Chesney, 30 Kan. 199, 1 Pac. 520.

Kentucky.— The statute requiring the original owner of land, in order to defeat a tax title, to show that the assessment, the levy, and sale were defective, shifted the burden to the owner, but did not change the rule that, before one can obtain a complete tax title, each legal step required by law to

the land in question was not subject to taxation at the time it was assessed,[88] or that the purchaser at the tax-sale was disqualified from acquiring the title by reason of a duty resting on him to pay the taxes.[89]

b. Levy and Assessment. Under the rule just stated, it is competent for the party seeking to impeach or invalidate a tax title, notwithstanding the recitals in the deed, to show that there was no levy of the tax in question,[90] that the levy was illegal or for an unlawful purpose,[91] that the land was never assessed for taxation,[92] or that the assessment was so erroneous, irregular, or defective as not to sustain the subsequent tax-sale founded thereon.[93]

c. Sale. Notwithstanding the effect given by statute to tax deeds as presumptive evidence, it is competent to show, in opposition to the title founded

subject land to sale must be complied with. Hamilton *v.* Steele, (1909) 117 S. W. 378.

Louisiana.— Tensas Delta Land Co. *v.* Sholars, 105 La. 357, 29 So. 908; Waddill *v.* Walton, 42 La. Ann. 763, 7 So. 737; State *v.* Herron, 29 La. Ann. 848; Winter *v.* Atkinson, 28 La. Ann. 650.

Michigan.—See Watts *v.* Bublitz, 99 Mich. 586, 58 N. W. 465.

Mississippi.— National Bank of the Republic *v.* Louisville, etc., R. Co., 72 Miss. 447, 17 So. 7; Hardie *v.* Chrisman, 60 Miss. 671; Caston *v.* Caston, 60 Miss. 475; Ray *v.* Murdock, 36 Miss. 692.

Missouri.— Kinney *v.* Forsythe, 96 Mo. 414, 9 S. W. 918; Ewart *v.* Davis, 76 Mo. 129.

New York.— Curtiss *v.* Follett, 15 Barb. 337.

North Dakota.— Cruser *v.* Williams, 13 N. D. 284, 100 N. W. 721.

Ohio.— Turney *v.* Yeoman, 16 Ohio 24. See Gwynne *v.* Neiswanger, 18 Ohio 400.

Pennsylvania.— Simpson *v.* Meyers, 197 Pa. St. 522, 47 Atl. 868.

South Carolina.— Bull *v.* Kirk, 37 S. C. 395, 16 S. E. 151.

Tennessee.—Randolph *v.* Metcalf, 6 Coldw. 400; Henderson *v.* Staritt, 4 Sneed 470.

West Virginia.— Dequasie *v.* Harris, 16 W. Va. 345.

Wisconsin.—Burrows *v.* Bashford, 22 Wis. 103; Delaplaine *v.* Cook, 7 Wis. 44.

United States.— Martin *v.* Barbour, 140 U. S. 634, 11 S. Ct. 944, 35 L. ed. 546; Gage *v.* Kaufman, 133 U. S. 471, 10 S. Ct. 406, 33 L. ed. 725; Kelly *v.* Herrall, 20 Fed. 364.

See 45 Cent. Dig. tit. "Taxation," § 1566 *et seq.*

Statute restricting defenses see Gibbs *v.* Dortch, 62 Miss. 671; Davis *v.* Vanarsdale, 59 Miss. 367; Greene *v.* Williams, 58 Miss. 752.

88. Treat *v.* Lawrence, 42 Wis. 330.

89. Blakeley *v.* Bestor, 13 Ill. 708.

90. Florida Sav. Bank *v.* Brittain, 20 Fla. 507; Hintrager *v.* Kiene, 62 Iowa 605, 15 N. W. 568, 17 N. W. 910.

91. Parr *v.* Matthews, 50 Ark. 390, 8 S. W. 22; Lufkin *v.* Galveston, 73 Tex. 340, 11 S. W. 340; Culbertson *v.* H. Whitbeck Co., 127 U. S. 326, 8 S. Ct. 1136, 32 L. ed. 134.

92. *Illinois.*— Schuyler *v.* Hull, 11 Ill. 462; Tibbetts *v.* Job, 11 Ill. 453; Graves *v.* Bruen, 11 Ill. 431.

Iowa.— Barrett *v.* Kevane, 100 Iowa 653, 69 N. W. 1036; Lathrop *v.* Irwin, 96 Iowa 713, 65 N. W. 972; Slocum *v.* Slocum, 70 Iowa 259, 30 N. W. 562; Easton *v.* Savery, 44 Iowa 654.

Louisiana.— *In re* Lake, 40 La. Ann. 142, 3 So. 479.

Washington.— Hurd *v.* Brisner, 3 Wash. 1, 28 Pac. 371, 28 Am. St. Rep. 17.

United States.— Parker *v.* Overman, 18 How. 137, 15 L. ed. 318.

See 45 Cent. Dig. tit. "Taxation," § 1567.

93. *California.*— Daly *v.* Ah Goon, 64 Cal. 512, 2 Pac. 401.

Florida.— Daniel *v.* Taylor, 33 Fla. 636, 15 So. 313; Brown *v.* Castellaw, 33 Fla. 204, 14 So. 822; Mundee *v.* Freeman, 23 Fla. 529, 3 So. 153; Donald *v.* McKinnon, 17 Fla. 746.

Illinois.— Hough *v.* Hastings, 18 Ill. 312; Grave *v.* Bruen, 6 Ill. 167.

Iowa.— Cassady *v.* Sapp, 64 Iowa 203, 19 N. W. 909; Sully *v.* Kuehl, 30 Iowa 275. But see Robinson *v.* Cedar Rapids First Nat. Bank, 48 Iowa 354.

Michigan.— Williams *v.* Mears, 61 Mich. 86, 27 N. W. 863.

Mississippi.— Gibbs *v.* Dortch, 62 Miss. 671; Davis *v.* Vanarsdale, 59 Miss. 367.

New York.— People *v.* Turner, 117 N. Y. 227, 22 N. E. 1022, 15 Am. St. Rep. 498; Colman *v.* Shattuck, 62 N. Y. 348; Ne-ha-sa-ne Park Assoc. *v.* Lloyd, 7 N. Y. App. Div. 359, 40 N. Y. Suppl. 58; Turner *v.* Boyce, 11 Misc. 502, 33 N. Y. Suppl. 433.

Oregon.— Strode *v.* Washer, 17 Oreg. 50, 16 Pac. 926.

Pennsylvania.— Miller *v.* McCullough, 104 Pa. St. 624.

Texas.— Meredith *v.* Coker, 65 Tex. 29.

Washington.— Baer *v.* Choir, 7 Wash. 631, 32 Pac. 776, 36 Pac. 286.

West Virginia.— Dequasie *v.* Harris, 16 W. Va. 345.

Wisconsin.— Marshall *v.* Benson, 48 Wis. 558, 4 N. W. 385, 762; Treat *v.* Lawrence, 42 Wis. 330; Orton *v.* Noonan, 25 Wis. 672; Eaton *v.* North, 20 Wis. 449.

United States.— Mathews *v.* Burdick, 48 Fed. 894.

See 45 Cent. Dig. tit. "Taxation," § 1567. And see *supra*, XI, C, 2.

Contra.— Burgett *v.* Williford, 56 Ark. 187, 19 S. W. 750, 35 Am. St. Rep. 96. And see Scott *v.* Mills, 49 Ark. 266, 4 S. W. 908;

thereon, that the necessary demand for the taxes was not made before the sale,[94] that there was a failure to exhaust the owner's personalty before resorting to the land,[95] that the requirements of the statute in regard to the notice or advertisement of the sale were not complied with,[96] that no sale in fact ever took place,[97] that it was not held at the proper time or place,[98] that it was not conducted in the manner prescribed by law,[99] or that there was fraud or collusion on the part of the officer making the sale and the tax purchaser.[1] But if the statute makes the deed conclusive evidence of the regularity of the sale it cannot be impeached on account of matters not going to the jurisdiction or authority to sell.[2]

d. Payment of Tax or Redemption. Although a tax deed may be made presumptive evidence of title, it is still permissible for a party claiming in opposition to it to impeach and defeat it by proof that the taxes on the land in question were in fact paid before the sale,[3] or that the property was duly and effectually redeemed after the sale.[4]

Ashley Co. *v.* Bradford, 109 La. 641, 33 So. 634.

94. Lathrop *v.* Howley, 50 Iowa 39.

Necessity of demand for taxes before sale see *supra*, XI, B, 1, a.

95. Jones *v.* McLain, 23 Ark. 429; Parker *v.* Smith, 4 Blackf. (Ind.) 70; Laraby *v.* Reid, 3 Greene (Iowa) 419. And see *supra*, XI, B, 2, a.

96. *Alabama.*— Johnson *v.* Harper, 107 Ala. 706, 18 So. 198.

Florida.— Daniel *v.* Taylor, 33 Fla. 636, 15 So. 313.

Kansas.— City R. Co. *v.* Chesney, 30 Kan. 199, 1 Pac. 520.

Louisiana.— Pickett *v.* Southern Athletic Club, 47 La. Ann. 1605, 18 So. 634.

Tennessee.—Douglass *v.* Mumford, 7 Baxt. 415.

Wisconsin.— Hiles *v.* Cate, 75 Wis. 91, 43 N. W. 802.

United States.— Ryan *v.* Staples, 76 Fed. 721, 23 C. C. A. 541; Marx *v.* Hanthorn, 30 Fed. 579 [*affirmed* in 148 U. S. 172, 13 S. Ct. 508, 37 L. ed. 410].

See 45 Cent. Dig. tit. "Taxation," § 1568.

Notice or advertisement of tax-sales in general see *supra*, XI, F.

97. Gardner *v.* Early, 69 Iowa 42, 28 N. W. 427; Hogdon *v.* Green, 56 Iowa 733, 10 N. W. 267; Coxe *v.* Deringer, 82 Pa. St. 236; Kelly *v.* Herrall, 20 Fed. 364.

98. Taylor *v.* Van Meter, 53 Ark. 204, 13 S. W. 699; Bullis *v.* Marsh, 56 Iowa 747, 2 N. W. 578, 6 N. W. 177; Thompson *v.* Ware, 43 Iowa 455; McNamara *v.* Estes, 22 Iowa 246; Lee *v.* Newland, 164 Pa. St. 360, 30 Atl. 258; Thompson *v.* Lawrence, 2 Baxt. (Tenn.) 415.

Time and place of tax-sales in general see *supra*, XI, G, 3, 4.

99. *Iowa.*— Chandler *v.* Keiler, 44 Iowa 371.

Louisiana.— Wyko *v.* Miller, 48 La. Ann. 475, 19 So. 478.

Maine.— Smith *v.* Bodfish, 27 Me. 289.

Mississippi.—Mixon *v.* Clevenger, 74 Miss. 67, 20 So. 148.

Washington.— Stoll *v.* Griffith, 41 Wash. 37, 82 Pac. 1025.

See 45 Cent. Dig. tit. "Taxation," § 1568.

But *compare* Biscoe *v.* Coulter, 18 Ark. 423, holding that the testimony of a tax collector, if competent for such a purpose, is not sufficient to overturn and defeat a tax title to land acquired by purchase from the auditor, by impeaching the truth of his own official return, attested by the county clerk, as to the mode of offering the lands for sale.

Mode and conduct of tax-sales of land in general see *supra*, XI, G.

1. Butler *v.* Delano, 42 Iowa 350.

2. Slocum *v.* Slocum, 70 Iowa 259, 30 N. W. 562; Flanagan *v.* Grimmet, 10 Gratt. (Va.) 421. *Compare* Stewart *v.* Crysler, 100 N. Y. 378, 3 N. E. 471 [*reversing* 21 Hun 285].

3. *Arkansas.*— Hickman *v.* Kempner, 35 Ark. 505.

Colorado.— Carnaham *v.* Sieber Cattle Co., 34 Colo. 257, 82 Pac. 592.

Illinois.— Daniels *v.* Burso, 40 Ill. 307; Spellman *v.* Curtenius, 12 Ill. 409.

Iowa.— Harrison *v.* Sauerwein, 70 Iowa 291, 30 N. W. 571; Slocum *v.* Slocum, 70 Iowa 259, 30 N. W. 562; Fenton *v.* Way, 40 Iowa 196; Walton *v.* Gray, 29 Iowa 440.

Kansas.— Walker *v.* Douglas, 39 Kan. 441, 18 Pac. 503.

Kentucky.— Blight *v.* Banks, 6 T. B. Mon. 192, 17 Am. Dec. 136.

Michigan.— Rowland *v.* Doty, Harr. 3.

Mississippi.— Virden *v.* Bowers, 55 Miss. 1; Weir *v.* Kitchens, 52 Miss. 74.

New York.—Joslyn *v.* Rockwell, 128 N. Y. 334, 28 N. E. 604; Parsons *v.* Parker, 80 Hun 281, 30 N. Y. Suppl. 134; Utica Bank *v.* Mersereau, 3 Barb. Ch. 528, 49 Am. Dec. 189.

North Carolina.— Moore *v.* Byrd, 118 N. C. 688, 23 S. E. 968.

Oregon.— Nickum *v.* Gaston, 28 Oreg. 322, 42 Pac. 130.

Washington.— Smith *v.* Jansen, 43 Wash. 6, 85 Pac. 672.

West Virginia.— Jones *v.* Dils, 18 W. Va. 759; Bradley *v.* Ewart, 18 W. Va. 598.

Wisconsin.— Randall *v.* Dailey, 66 Wis. 285, 28 N. W. 352; Merton *v.* Dolphin, 28 Wis. 456; Lewis *v.* Disher, 25 Wis. 441.

See 45 Cent. Dig. tit. "Taxation," § 1569.

4. Cooper *v.* Shepardson, 51 Cal. 298; Daniels *v.* Burso, 40 Ill. 307; Fenton *v.* Way, 40 Iowa 196.

XIV. TAX TITLES.[5]

A. Title and Rights of Tax Purchaser[6] — 1. Nature and Effect of Sale as Transfer of Title — a. In General. Tax-sales being in derogation of private rights of property, the laws authorizing and regulating them must be strictly construed, in so far as they are intended for the benefit or protection of the citizen, and their requirements must be strictly followed in order to pass any title to the purchaser.[7] Nor does such a title pass merely by the sale; but during the period thereafter allowed for redemption the interest of the purchaser is in the nature of a lien or mortgage, and he does not become invested with the incidents of true ownership until that time has expired and he has received a deed.[8]

b. What Law Governs. Questions concerning the effect of a tax-sale as a transfer of title, or the rights of the purchaser and the validity of his title, are to

5. As breach of covenant against encumbrances see COVENANTS, 11 Cyc. 1115.

Definition and nature.— "Tax title" is the title by which one holds lands purchased at a tax-sale. Willcuts *v.* Rollins, 85 Iowa 247, 52 N. W. 199; Beirne *v.* Burdett, 52 Miss. 795. It is not a derivative title (Willcuts *v.* Rollins, 85 Iowa 247, 52 N. W. 199); but is a purely technical, as distinguished from a meritorious title (Kern *v.* Clarke, 59 Minn. 70, 60 N. W. 809 [*quoting* Black Tax Title, § 409]).

6. Acquisition of tax title by: Agent to principal's property see PRINCIPAL AND AGENT, 31 Cyc. 1446; TRUSTS. Mortgagor or mortgagee see MORTGAGES, 27 Cyc. 1151 *et seq.* Tenant in common see TENANCY IN COMMON.

Lis pendens as affecting purchasers at tax-sale see LIS PENDENS, 25 Cyc. 1483.

Title of purchaser at sale for special assessments see MUNICIPAL CORPORATIONS, 28 Cyc. 1247.

Title under sale for levee taxes see LEVEES, 25 Cyc. 205.

7. *Alabama.*— McKinnon *v.* Mixon, 128 Ala. 612, 29 So. 690.

Illinois.— Bailey *v.* Smith, 178 Ill. 72, 52 N. E. 948.

Indiana.— Barnes *v.* Doe, 4 Ind. 132.

Louisiana.— Page *v.* Kidd, 121 La. 1, 46 So. 35; Coucy *v.* Cummings, 12 La. Ann. 748; Wills *v.* Auch, 8 La. Ann. 19.

Minnesota.— Kern *v.* Clarke, 59 Minn. 70, 60 N. W. 809.

New York.— Saranac Land, etc., Co. *v.* Roberts, 195 N. Y. 303, 88 N. E. 753 [*affirming* 125 N. Y. App. Div. 333, 109 N. Y. Suppl. 547], holding that the title of an owner of land sold for taxes, some of which were valid and some invalid, is not thereby divested.

North Carolina.— Hays *v.* Hunt, 85 N. C. 303.

Ohio.— Cook *v.* Prosser, 14 Ohio Cir. Ct. 137, 7 Ohio Cir. Dec. 619.

Tennessee.— State *v.* Woodruff, 11 Lea 300; Sampson *v.* Marr, 7 Baxt. 486; Hamilton *v.* Burum, 3 Yerg. 355; Michie *v.* Mullins, 5 Hayw. 90.

Texas.— Houston *v.* Washington, 16 Tex. Civ. App. 504, 41 S. W. 135.

United States.— Thatcher *v.* Powell, 6 Wheat. 119, 5 L. ed. 221; Denike *v.* Rourke, 7 Fed. Cas. No. 3,787, 3 Biss. 39.

See 45 Cent. Dig. tit. "Taxation," § 1455.

8. *Florida.*— Spaulding *v.* Ellsworth, 39 Fla. 76, 21 So. 812.

Iowa.— Crosthwait *v.* Byington, 11 Iowa 532.

Kansas.—Douglass *v.* Dickson, 31 Kan. 310, 1 Pac. 541. An early decision in this state held that a purchaser at a tax-sale became the owner at the time of the sale, his title being defeasible only by redemption. Stebbins *v.* Guthrie, 4 Kan. 353.

Kentucky.— James *v.* Blanton, 134 Ky. 803, 121 S. W. 951, 123 S. W. 328; James *v.* Luscher, (1909) 121 S. W. 954.

Louisiana.— State *v.* New Orleans Register of Conveyances, 113 La. 93, 36 So. 900.

Maine.— Watkins *v.* Eaton, 30 Me. 529, 50 Am. Dec. 637, holding that the interest of the purchaser, pending the time allowed for redemption, is an encumbrance upon the estate, in substance and principle equivalent to a mortgage.

Minnesota.— Brackett *v.* Gilmore, 15 Minn. 245.

New Jersey.— Kaighn *v.* Burgin, 56 N. J. Eq. 852, 42 Atl. 1117; Burgin *v.* Rutherford, 56 N. J. Eq. 666, 38 Atl. 854.

New York.— See Hubbell *v.* Weldon, Lalor 139, holding that, after the sale, the owner is to be regarded as holding in subordination to the title of the purchaser.

North Dakota.—Darling *v.* Purcell, 13 N. D. 288, 100 N. W. 726.

Oklahoma.— Keller *v.* Hawk, 19 Okla. 407, 91 Pac. 778.

Pennsylvania.— Shalemiller *v.* McCarty, 55 Pa. St. 186.

Texas.— Turner *v.* Smith, (Civ. App. 1909) 119 S. W. 922; Bente *v.* Sullivan, (Civ. App. 1909) 115 S. W. 350.

Wisconsin.— Curtis Land, etc., Co. *v.* Interior Land Co., 137 Wis. 341, 118 N. W. 853, 129 Am. St. Rep. 1068.

Necessity of taking out tax deed and nature of purchaser's title before issuance of deed see *supra*, XIII, A, 1.

Effect of redemption.— When the owner of the property actually effects a redemption before the county authorities direct the execution of a deed to the purchaser, a deed afterward issued is ineffectual. Merrimon *v.* Lyman, 124 N. C. 434, 32 S. E. 732.

be determined by the law in force at the time the sale was made,[9] which law, indeed, constitutes a contract between the state and the purchaser, the terms of which cannot be impaired by subsequent legislation.[10]

2. Property and Rights Passing by Sale and Deed[11] — a. In General. A tax-sale and deed cannot be effectual to pass title to any other land than that assessed,[12] or to convey any more land than the taxpayer owned at the time of the sale,[13] and the purchaser must take subject to any easements, such as right of way, which the owner had previously granted to third persons.[14]

b. Public and Exempt Lands. Since property belonging to the United States or to a state is not subject to taxation,[15] an assessment of taxes on such property is null and void and a sale thereunder passes no title whatever to the purchaser.[16] The same rule applies to the sale of land which is exempted from taxation by contract or legislative grant.[17] But a private person may have an inchoate or equitable title to land, the fee of which remains in the public, and this interest may be taxable and may pass to the purchaser at a tax-sale.[18]

9. *Alabama.*— Driggers *v.* Cassady, 71 Ala. 529; Oliver *v.* Robinson, 58 Ala. 46.

Maine.— Brown *v.* Veazie, 25 Me. 359.

Minnesota.— Slocum *v.* McLaren, 109 Minn. 49, 122 N. W. 871 (holding that a statutory requirement that the record of tax titles be made within six years from the date of the sale does not apply to titles which have been fully perfected before the passage of such act); State *v.* Krahmer, 105 Minn. 422, 117 N. W. 780, 21 L. R. A. N. S. 157; Stein *v.* Hanson, 99 Minn. 387, 109 N. W. 821.

Mississippi.— Capital State Bank *v.* Lewis, 64 Miss. 727, 2 So. 243; Hardie *v.* Chrisman, 60 Miss. 671.

Missouri.— State *v.* Mantz, 62 Mo. 258.

Nebraska.— Whiffin *v.* Higginbotham, 80 Nebr. 468, 114 N. W. 599; McCann *v.* Merriam, 11 Nebr. 241, 9 N. W. 96.

North Dakota.— Fisher *v.* Betts, 12 N. D. 197, 96 N. W. 132.

Wisconsin.— Nelson *v.* Rountree, 23 Wis. 367; Woodman *v.* Clapp, 21 Wis. 350.

See 45 Cent. Dig. tit. "Taxation," § 1456.

10. Fisher *v.* Betts, 12 N. D. 197, 96 N. W. 132.

11. Property conveyed by tax deed see *supra*, XIII, F, 2.

12. Carncross *v.* Lykes, 22 Fla. 587; Grissom *v.* Furman, 22 Fla. 581.

Tax-sale of land other than that assessed see *supra*, XI, D, 1.

Variance between tax deed and assessment in respect to description of property see *supra*, XIII, D, 3, e.

Portion of tract.— Where taxes are paid upon but a portion of a tract of unseated land, and the balance is sold for the non-payment of taxes, a purchaser, if there has been no prior location, may locate his purchase on such part of the whole tract as he may choose. Gamble *v.* Central Pennsylvania Lumber Co., 225 Pa. St. 288, 74 Atl. 69.

13. Miller *v.* Reynolds, (Ark. 1890) 13 S. W. 597; Bryant *v.* Kendall, 79 S. W. 186, 25 Ky. L. Rep. 1859. See also Reading *v.* Finney, 73 Pa. St. 467, as to understatement of number of acres in tract.

Interfering and overlapping surveys.—If interfering or overlapping tracts of unseated land are severally assessed with taxes and sold, the respective titles of the purchasers will be governed by the superiority of the original title. McCloskey *v.* Kunes, 142 Pa. St. 241, 21 Atl. 823; Kunes *v.* McCloskey, 115 Pa. St. 461, 9 Atl. 83; Hunter *v.* Cochran, 3 Pa. St. 105; Hunter *v.* Albright, 5 Watts & S. (Pa.) 423.

Severance of surface rights and minerals.— Where the surface of land is owned by one person and the oil in place by another, a sale for taxes in the name of the owner of the surface will pass also the oil owned by the other person, where his estate has not been charged on the tax books. Peterson *v.* Hall, 57 W. Va. 535, 50 S. E. 603.

Seizin.— Where one purchases a tract of marsh and unoccupied land at a valid tax-sale, he thereby acquires seizin, and until disseized a writ of entry will lie against him at the suit of a mortgagee of a former owner of the land, who has purchased the land on foreclosure of the mortgage. Perry *v.* Lancy, 179 Mass. 183, 60 N. E. 472.

14. Hall *v.* McCaughey, 51 Pa. St. 43.

15. Exemption from taxation of property of United States see *supra*, III, C, 2.

Property of state not taxable see *supra*, III, C, 3.

16. *California.*— Dorn *v.* Baker, 96 Cal. 206, 31 Pac. 37; Hall *v.* Dowling, 18 Cal. 619.

Iowa.— Campbell *v.* Spears, 120 Iowa 670, 94 N. W. 1126; Young *v.* Charnquist, 114 Iowa 116, 86 N. W. 205.

Louisiana.— Slattery *v.* Heilperin, 110 La. 86, 34 So. 139.

Missouri.— Moore *v.* Woodruff, 146 Mo. 597, 48 S. W. 489.

Ohio.— Ohio State University *v.* Satterfield, 2 Ohio Cir. Ct. 86, 1 Ohio Cir. Dec. 377.

West Virginia.— State *v.* Tavenner, 49 W. Va. 696, 39 S. E. 649.

United States.— Braxton *v.* Rich, 47 Fed. 178.

See 45 Cent. Dig. tit. "Taxation," § 1461.

17. Taylor *v.* Miles, 5 Kan. 498, 7 Am. Rep. 558; Hoskins *v.* Illinois Cent. R. Co., 78 Miss. 768, 29 So. 518, 84 Am. St. Rep. 644; Dixon *v.* Doe, 23 Miss. 84; Braxton *v.* Rich, 47 Fed. 178. And see *supra*, IV.

18. Gwynne *v.* Neiswanger, 18 Ohio 400;

c. Trees and Timber. During the period allowed for redemption, the purchaser at a tax-sale has no such title to the land as will justify him in entering and cutting timber, and if he does so, he is liable in trespass to the owner,[19] except where both the land and the timber are assessed and sold;[20] and conversely, as the owner has the right to cut timber during this period, the purchaser cannot maintain replevin for what he cuts and removes,[21] although a court of equity will perhaps restrain the owner from stripping the land if injury to the purchaser's lien is shown.[22] When the time for redemption expires and the purchaser obtains his deed, he will take title to the timber remaining on the land, and also to what has been cut by the owner in the interval and not removed;[23] but the purchaser has no right of action for timber cut and removed before the tax-sale, by the owner or a trespasser.[24]

d. Right of Possession — (i) *In General.* As a rule, until the expiration of the time allowed for redemption, the owner of the land, and not the tax purchaser, is entitled to the possession and enjoyment of the estate,[25] and if the latter enters

Harlan *v.* Thatcher, 18 Ohio 48; Gwynne *v.* Niswanger, 15 Ohio 367; Clark *v.* Southard, 2 Ohio Dec. (Reprint) 612, 4 West. L. Month. 197; Taylor *v.* Lyon Lumber Co., 13 Pa. Co. Ct. 235.

Taxation of equitable title held by entry under United States laws before issuance of patent see *supra*, III, C, 2, b, (III), (B).

Timber on public lands.— Where the title to the soil in land sold for taxes in the name of the inhabitants of a town was in the United States, and the sale was therefore void, the sale could not include, as property bought, the timber right of the town in such lands under a Spanish grant. Richard *v.* Perrodin, 116 La. 440, 40 So. 789.

19. *Kansas.*— Sullivan *v.* Davis, 29 Kan. 28.

New Jersey.— Brewer *v.* Ireland, 67 N. J. L. 31, 50 Atl. 437.

New York.— Millard *v.* Breckwoldt, 100 N. Y. App. Div. 44, 90 N. Y. Suppl. 890.

Pennsylvania.— Shalemiller *v.* McCarty, 55 Pa. St. 186. But *compare* Cromelin *v.* Brink, 29 Pa. St. 522, as to timber cut by the purchaser at a tax-sale in actual and hostile possession.

Vermont.— Wing *v.* Hall, 47 Vt. 182.

Wisconsin.— Paine *v.* Libby, 21 Wis. 425. But see Wright *v.* Wing, 18 Wis. 45, as to the necessity of the owner's redeeming or offering to do so, before obtaining an injunction to restrain the tax purchaser from cutting timber.

See 45 Cent. Dig. tit. "Taxation," § 1462.

But *compare* Busch *v.* Nester, 62 Mich. 381, 28 N. W. 911.

20. Eureka Lumber Co. *v.* Terrell, (Miss. 1909) 48 So. 628, holding that where it is manifest from the assessment roll that both land and timber are assessed to an unknown owner, although there is no separate assessment of the land and timber, the purchaser at a tax-sale takes the title to both.

21. Woodland Oil Co. *v.* Shoup, 107 Pa. St. 293; Shalemiller *v.* McCarty, 55 Pa. St. 186; Gault's Appeal, 33 Pa. St. 94; Woodland Oil Co. *v.* Lawrence, 1 Pennyp. (Pa.) 480; Lightner *v.* Mooney, 10 Watts (Pa.) 407; Lacy *v.* Johnson, 58 Wis. 414, 17 N. W. 246; Smith *v.* Sherry, 54 Wis. 114, 11 N. W. 465. But *compare* Gallaher *v.* Head, 108 Iowa 588, 79 N. W. 387.

22. Millard *v.* Breckwoldt, 100 N. Y. App. Div. 44, 90 N. Y. Suppl. 890.

23. Nicklase *v.* Morrison, 56 Ark. 553, 20 S. W. 414. And see Gates *v.* Lindley, 104 Cal. 451, 38 Pac. 311.

24. Taylor *v.* Frederick, McGloin (La.) 380; Hickey *v.* Rutledge, 136 Mich. 128, 98 N. W. 974.

25. *Alabama.*— Costley *v.* Allen, 56 Ala. 198; Hibbard *v.* Brown, 51 Ala. 469.

California.— Teich *v.* Arms, 5 Cal. App. 475, 90 Pac. 962.

Georgia.— Elrod *v.* Owensboro Wagon Co., 128 Ga. 361, 57 S. E. 712; Elrod *v.* Groves, 116 Ga. 468, 42 S. E. 731; Crine *v.* Johns, 96 Ga. 220, 22 S. E. 913.

Indiana.— Wagner *v.* Stewart, 143 Ind. 78, 42 N. E. 469. But it was otherwise in this state under earlier statutes. See Barton *v.* McWhinney, 85 Ind. 481; Davis *v.* Chapman, 24 Fed. 674.

Iowa.— Crosthwait *v.* Byington, 11 Iowa 532.

Louisiana.— See Handlin *v.* H. Weston Lumber Co., 47 La. Ann. 401, 16 So. 955.

Michigan.— Holmes *v.* Loud, 149 Mich. 410, 112 N. W. 1109, holding that under Comp. Laws (1897), §§ 3959–3961, a purchaser of land at a tax-sale is not entitled to possession until six months after the filing of the return of the sheriff of the notice to redeem, and not after six months from "service" of such notice.

Minnesota.—Taylor *v.* Slingerland, 39 Minn. 470, 40 N. W. 575.

New Hampshire.—Paul *v.* Linscott, 56 N. H. 347.

New York.— Millard *v.* Breckwoldt, 100 N. Y. App. Div. 44, 90 N. Y. Suppl. 890.

Pennsylvania.— Woodland Oil Co. *v.* Shoup, 107 Pa. St. 293; Shalemiller *v.* McCarty, 55 Pa. St. 186. *Compare* Hunter *v.* Cochran, 3 Pa. St. 105, holding that where one enters under a sale for taxes which had been paid previously to the sale, he enters without right.

Texas.— League *v.* State, 93 Tex. 553, 57 S. W. 34; Turner *v.* Smith, (Civ. App. 1909) 119 S. W. 922; Marlin *v.* Green, 34 Tex. Civ.

without the consent of the former, it is a trespass,[26] although under some statutes the holder of the tax title is entitled to possession until the property is redeemed.[27] But when the purchaser has obtained his deed he is entitled to the possession, and to hold it against a mortgagee or *cestui que trust*.[28] He must, however, obtain the possession in fact, either peaceably or by the aid of judicial process,[29] the tax deed itself not being sufficient to give him a constructive possession.[30] But a purchaser of a tax title is not entitled to possession of the property where his purchase is only of an inchoate interest in the property.[31] Under some statutes the holder of a tax title is not entitled to possession as against subsequent tax titles, until he has acquired all of such subsequent titles.[32]

(II) *Loss of Title by Failure of Possession or by Adverse Possession*. In the absence of a statute to that effect, the purchaser at a tax-sale does not forfeit his rights by a failure to take possession of the premises.[33] But it is now provided by law in several states that this result shall follow if he fails to acquire the possession within a special limited time;[34] and either under these statutes or under the general rules of adverse possession and the limitation of actions, continued possession on the part of the owner, protracted for a sufficient length of time, will bar all claims of the tax purchaser under his deed.[35]

App. 421, 78 S. W. 704, 79 S. W. 40; Ryon *v.* Davis, 32 Tex. Civ. App. 500, 75 S. W. 59; Masterson *v.* State, 17 Tex. Civ. App. 91, 42 S. W. 1003.

Vermont.— Wing *v.* Hall, 47 Vt. 182.

Wisconsin.— Lacy *v.* Johnson, 58 Wis. 414, 17 N. W. 246.

See 45 Cent. Dig. tit. "Taxation," § 1474.

26. Ives *v.* Beeler, (Kan. App. 1900) 59 Pac. 726.

But possession under a tax or assessment lease for a term of years is not adverse to the title of the owner in fee, but is in subordination thereto. Miller *v.* Warren, 94 N. Y. App. Div. 192, 87 N. Y. Suppl. 1011 [*affirmed* in 182 N. Y. 539, 75 N. E. 1131].

27. Donohoe *v.* Veal, 19 Mo. 331; Hack *v.* Heffern, 19 Ohio Cir. Ct. 233, 10 Ohio Cir. Dec. 461, possession under deed. See also Pratt *v.* Roseland R. Co., 50 N. J. Eq. 150, 24 Atl. 1027. But see Thevenin *v.* Slocum, 16 Ohio 519.

28. Allen *v.* McCabe, 93 Mo. 138, 6 S. W. 62.

29. Mitchell *v.* Titus, 33 Colo. 385, 80 Pac. 1042; Welsch *v.* Augusti, 52 La. Ann. 1949, 28 So. 363; Martin *v.* Langenstein, 43 La. Ann. 789, 9 So. 507.

Recovery of possession by tax purchaser see *infra*, XIV, B, 1, a.

Where the holder of a tax title finds the premises unoccupied he may enter, and in doing so is not liable to the original owner. Steltz *v.* Morgan, 16 Ida. 368, 101 Pac. 1057, 28 L. R. A. N. S. 398.

30. Mitchell *v.* Titus, 33 Colo. 385, 80 Pac. 1042; Weir *v.* Cordz-Fisher Lumber Co., 186 Mo. 388, 85 S. W. 341. And see *supra*, XIII, F, 1.

31. Gitchell *v.* Messmer, 14 Mo. App. 83 [*affirmed* in 87 Mo. 131], holding that where land belonging to a wife is assessed to the husband and for non-payment of taxes on judgment against him sold on execution, the purchaser's right is only that of a tenant by the curtesy initiate, and he cannot disturb the wife's possession.

32. Sinclair *v.* Learned, 51 Mich. 335, 16 N. W. 672, holding also that the subsequent title which will preclude possession need not necessarily be a legal tax title, although the tax on which it is based must be one that is not merely arbitrary.

33. Koen *v.* Martin, 110 La. 242, 34 So. 429.

Possession taken of wrong tract.— If the tax purchaser takes possession of a wrong tract by a mistake as to its identity, he is not precluded, on discovering his mistake, from asserting his right to that which he purchased. Hiester *v.* Laird, 1 Watts & S. (Pa.) 245.

Forfeiture of title by county.— Title acquired by a county by purchase at a tax-sale is lost, if it thereafter taxes the same property and sells it for taxes, so that one to whom it thereafter conveys the land takes no title. Feltz *v.* Nathalie Anthracite Coal Co., 203 Pa. St. 166, 52 Atl. 82.

34. See the statutes of the several states. And see the following cases:

Colorado.— Halbouer *v.* Cuenin, 45 Colo. 507, 101 Pac. 763.

Iowa.— Hintrager *v.* Hennessy, 46 Iowa 600; Wallace *v.* Sexton, 44 Iowa 257; Laverty *v.* Sexton, 41 Iowa 435; Peck *v.* Sexton, 41 Iowa 566; Brown *v.* Painter, 38 Iowa 456.

North Dakota.— Beggs *v.* Paine, 15 N. D. 436, 109 N. W. 322.

Wisconsin.— Smith *v.* Ford, 48 Wis. 115, 2 N. W. 134, 4 N. W. 462.

United States.— Barrett *v.* Holmes, 102 U. S. 651, 26 L. ed. 291.

See 45 Cent. Dig. tit. "Taxation," § 1475.

35. *Illinois.*— Mickey *v.* Barton, 194 Ill. 446, 62 N. E. 802.

Iowa.— Clark *v.* Sexton, 122 Iowa 310, 98 N. W. 127.

Kansas.— Hollenback *v.* Ess, 31 Kan. 87, 1 Pac. 275.

Kentucky.— James *v.* Luscher, (1909) 121 S. W. 954; James *v.* Blanton, 134 Ky. 803, 121 S. W. 951, 123 S. W. 328.

e. Rents and Profits and Waste. Before the execution of the tax deed the purchaser at tax-sale has no such title as will protect him in committing waste upon the premises;[36] but on the other hand, he may have appropriate remedies to restrain the commission of waste endangering his security.[37] During the period allowed for redemption he has no right to receive the rents and profits of the estate, unless such a right is given by statute,[38] and if he has been in possession during this period, the owner, on redeeming, is entitled to an accounting for the rental value of the premises exclusive of improvements made by the tax purchaser.[39] But a tax purchaser is not accountable for rents and profits where he does not take possession,[40] or where the premises had no rental value until improved by him;[41] nor can he be held liable for the rents and profits at the instance of a mortgagee of the premises, in a suit for foreclosure, at least in the absence of a demand therefor in the complaint;[42] nor is he accountable to a junior lien-holder unless he had actual possession or actually received rents.[43]

3. Title or Estate Acquired by Purchaser — a. In General. The *quantum* of the estate to be acquired by a purchase at tax-sale — whether it shall be an estate in fee, for life, or for a term of years, and whether subject to or free from existing liens and encumbrances — rests wholly in the legislative discretion.[44] Usually, however, nothing less than a title in fee simple is created,[45] although it has been

Louisiana.— Gauthreaux *v.* Theriot, 121 La. 871, 46 So. 892, 126 Am. St. Rep. 328 (holding that the acts of state taxing officers in placing property adjudicated to the state for unpaid taxes on the rolls for succeeding years and receiving taxes thereon from the tax debtor, who continues in undisputed possession, will be considered in equity as a waiver of the prior adjudication binding on the state and its assigns); *In re* Seim, 111 La. 554, 35 So. 744; Waddill *v.* Walton, 42 La. Ann. 763, 7 So. 737; Sully *v.* Spearing, 40 La. Ann. 558, 4 So. 489.

North Carolina.— Everett *v.* Smith, 44 N. C. 303.

Texas.—Patton *v.* Minor, (Civ. App. 1909) 117 S. W. 920.

Wisconsin.— Midlothian Iron Min. Co. *v.* Belknap, 108 Wis. 198, 84 N. W. 169; Smith *v.* Ford, 48 Wis. 115, 2 N. W. 134, 4 N. W. 462; Coleman *v.* Eldred, 44 Wis. 210; Wilson *v.* Henry, 35 Wis. 241; Swift *v.* Agnes, 33 Wis. 228; Lewis *v.* Disher, 32 Wis. 504; Whitney *v.* Marshall, 17 Wis. 174; Jones *v.* Collins, 16 Wis. 594; Parish *v.* Eager, 15 Wis. 532; Knox *v.* Cleveland, 13 Wis. 245; Sprecker *v.* Wakeley, 11 Wis. 432; Falkner *v.* Dorman, 7 Wis. 388; Edgerton *v.* Bird, 6 Wis. 527, 70 Am. Dec. 473.

See 45 Cent. Dig. tit. "Taxation," § 1475.

But *compare* Hubbell *v.* Weldon, Lalor (N. Y.) 139.

What constitutes adverse possession.— Cutting and using wood from unfenced land. Clark *v.* Sexton, 122 Iowa 310, 98 N. W. 127. Mining ore from the land. Stephenson *v.* Wilson, 37 Wis. 482. Cutting timber. Haseltine *v.* Mosher, 51 Wis. 443, 8 N. W. 273.

The possession of a tenant of leased premises conveyed by a tax deed is adverse to the purchaser at the tax-sale. Chase *v.* Dearborn, 21 Wis. 57.

Adverse possession of a third person at the time of the delivery of the tax deed does not render the deed void. Fortmann *v.* Wheeler, 84 Hun (N. Y.) 278, 32 N. Y. Suppl. 384.

36. Douglas *v.* Dickson, 31 Kan. 310, 1 Pac. 541; Wing *v.* Hall, 47 Vt. 182.

37. Millard *v.* Breckwoldt, 100 N. Y. App. Div. 44, 90 N. Y. Suppl. 890; Lander *v.* Hall, 69 Wis. 326, 34 N. W. 80.

38. Mayo *v.* Woods, 31 Cal. 269.

But if the statute gives the right of possession to the holder of a tax certificate, this carries with it the right to the rents and profits. Ethel *v.* Batchelder, 90 Ind. 520.

39. Elliott *v.* Parker, 72 Iowa 746, 32 N. W. 494; Hodgson *v.* State Finance Co., (N. D. 1909) 122 N. W. 336. But *compare* Anson *v.* Elwood, 76 N. J. L. 56, 68 Atl. 784, holding that a purchaser at a tax-sale who records a certificate as a mortgage is entitled to the rents and profits of the land and need not account to the owner therefor on redemption of the property.

40. Columbia Bank *v.* Jones, (N. J. Ch. 1889) 17 Atl. 808.

41. Boatmen's Sav. Bank *v.* Grewe, 101 Mo. 625, 14 S. W. 708.

42. Cooke *v.* Pennington, 15 S. C. 185.

43. Barton *v.* McWhinney, 85 Ind. 481.

44. Terrel *v.* Wheeler, 123 N. Y. 76, 25 N. E. 329 [*affirming* 49 Hun 262, 2 N. Y. Suppl. 86]; Black Tax Titles (2d ed), § 419.

Purchase by county.— A tax deed issued to a county for lands bid in by its treasurer, when in proper form and properly executed and recorded, conveys to the county as good a title as is conveyed by a similar deed to a cash purchaser. Dyke *v.* White, 17 Colo. 296, 29 Pac. 128.

45. Jones *v.* Randle, 68 Ala. 258; Flower *v.* Beasley, 52 La. Ann. 2054, 28 So. 322; Toolan *v.* Longyear, 144 Mich. 55, 107 N. W. 699, 121 Am. St. Rep. 603; Smith *v.* Messer, 17 N. H. 420. See also Indianapolis *v.* City Bond Co., 42 Ind. App. 470, 84 N. E. 20.

Where a state bids in land at a tax-sale, it acquires a valid absolute title in fee thereto. James *v.* Luscher, (Ky. 1909) 121 S. W. 954; James *v.* Blanton, 134 Ky. 803, 121

the policy in some states to grant leasehold interests only or estates for a term of years.[46]

b. Purchase From State. Where land is forfeited to the state for non-payment of taxes, or bid in by the state at a tax-sale, its subsequent conveyance to a purchaser from the state will ordinarily invest him with any and all titles which the state holds to the particular property,[47] although he may take subject to conditions subsequent, such as a requirement of notice to the former owner, the non-observance of which may divest his title,[48] or subject to the right of the original owner, his grantees, or mortgagees to obtain a reconveyance.[49] The usual rule is that the state thus acquires, and likewise transfers to its vendee, the exact title held by the delinquent taxpayer at the time of the sale,[50] although, if the statute so declares, the transfer to a private purchaser may invest him with a new title, independent of that of the former owner, and equivalent to a grant or patent.[51]

c. Tax-Sale Creating New Title. Under most statutes the rule prevails that a tax title has nothing to do with the previous chain of title and is not in any way connected with it, but that it is a breaking up of all previous titles and extinguishes and destroys all other titles and liens, and consequently the issuance of a valid tax deed creates in the purchaser a new and original title, entirely disconnected from that of the former owner, going back no further than the tax-sale, and not encumbered with any previous liens or collateral interests.[52]

d. Contingent and Expectant Interests Divested. Where the rule just stated

S. W. 951, 123 S. W. 328; Haney *v.* Miller, 154 Mich. 337, 117 N. W. 71, 745.

46. See the statutes of the several states. And see Pratt *v.* Roseland R. Co., 50 N. J. Eq. 150, 24 Atl. 1027.

47. Lavedan *v.* Choppin, 119 La. 1056, 44 So. 886; Lisso *v.* Giddens, 117 La. 507, 41 So. 1029; Iberia Cypress Co. *v.* Thorgeson, 116 La. 218, 40 So. 682; Gowland *v.* New Orleans, 52 La. Ann. 2042, 28 So. 358; Horton *v.* Helmholtz, 149 Mich. 227, 112 N. W. 930; Hickey *v.* Rutledge, 136 Mich. 128, 98 N. W. 974; Burns *v.* Ford, 124 Mich. 274, 82 N. W. 885; Means *v.* Haley, 84 Miss. 550, 36 So. 257; Caruthers *v.* McLaran, 56 Miss. 371; Clymer *v.* Cameron, 55 Miss. 593; Collins *v.* Reger, 62 W. Va. 195, 57 S. E. 743; State *v.* Jackson, 56 W. Va. 558, 49 S. E. 465, holding that one purchasing land sold as forfeited, in a proceeding under W. Va. Code (1899), c. 105, holds a grant from the state, within the meaning of the constitution, so as to take the benefit of another title previously forfeited to the state.

As against others than the original owner, his grantee, or mortgagees, the title of a purchaser of the state's tax title is absolute. Chandler *v.* Clark, 151 Mich. 159, 115 N. W. 65.

48. Duncan Land, etc., Co. *v.* Rusch, 145 Mich. 1, 108 N. W. 494; Boucher *v.* Trembley, 140 Mich. 352, 103 N. W. 819.

49. Haney *v.* Miller, 154 Mich. 337, 117 N. W. 71, 745; Chandler *v.* Clark, 151 Mich. 159, 115 N. W. 65.

50. Russell County *v.* Mahoney, 69 Kan. 661, 77 Pac. 692; State *v.* Collins, 48 W. Va. 64, 35 S. E. 840. And see Husbands *v.* Polivick, 96 S. W. 825, 29 Ky. L. Rep. 890.

51. Cochran *v.* Baker, 60 Miss. 282. See also *infra*, XIV, A, 3, c.

52. *Arkansas.*— Osceola Land Co. *v.* Chicago Mill, etc., Co., 84 Ark. 1, 103 S. W. 609; Biscoe *v.* Coulter, 18 Ark. 423.

Colorado.— Smith *v.* Griffin, 14 Colo. 429, 23 Pac. 905.

Florida.— Billings *v.* Stark, 15 Fla. 297.

Illinois.— Atkins *v.* Hinman, 7 Ill. 437.

Iowa.— Lucas *v.* Purdy, 142 Iowa 359, 120 N. W. 1063, 24 L. R. A. N. S. 1294; Willcuts *v.* Rollins, 85 Iowa 247, 52 N. W. 199; Crum *v.* Cotting, 22 Iowa 411. See also Byington *v.* Stone, 51 Iowa 317, 1 N. W. 647.

Kansas.— McFadden *v.* Goff, 32 Kan. 415, 4 Pac. 841; Kansas State Agricultural College *v.* Linscott, 30 Kan. 240, 1 Pac. 81.

Louisiana.— Frederick *v.* Goodbee, 120 La. 783, 45 So. 606 (holding that a tax-sale of the property itself without reservation is a sale of the whole title and cuts off all prior claims and encumbrances not specially excepted by statute, and there is a new and complete title emanating from the sovereign); West *v.* Negrotto, 52 La. Ann. 381, 27 So. 75.

Maryland.— McMahon *v.* Crean, 109 Md. 652, 71 Atl. 995, holding that a valid tax title clothes the owner with a new and complete title under an independent sovereign grant, which bars and extinguishes all prior titles and encumbrances, and equities of private persons.

Massachusetts.— Langley *v.* Chapin, 134 Mass. 82.

Michigan.— Lacey *v.* Davis, 4 Mich. 140, 66 Am. Dec. 524.

Nebraska.— Merriam *v.* Goodlett, 36 Nebr. 384, 54 N. W. 686.

New Hampshire.— Smith *v.* Messer, 17 N. H. 420.

New Jersey.— Wood *v.* Buena Vista Tp., 76 N. J. L. 159, 69 Atl. 205, holding that the title lodged in a township by virtue of a tax deed is in fee simple, absolute, free, and dis-

is in force, a tax title cuts off all inchoate and contingent rights and titles, including interests which might vest in persons not in being;[53] and this may include an estate in remainder, where the property is assessed to the life-tenant,[54] although ordinarily, in such a case, the estate of the remainder-man is not affected by the tax-sale, either because the separate interests are separately assessed or because the state does not undertake to sell more than the interest of the tenant for life.[55]

e. Rights of Dower and Homestead Divested. If the statutes are so framed, as above explained, as to invest the purchaser at a valid tax-sale with the title to the land in fee simple, without regard to the previous condition of the title, even the claims of homestead,[56] and inchoate rights of dower,[57] will be divested by such a sale, and the holder of the tax deed will take an estate unencumbered with any such rights or claims.

f. Transfer of Title of Person Assessed. If the laws contemplate only the sale and transfer of the title or interest of the person in whose name the property was assessed, the purchaser at a tax-sale will become invested with precisely the same title which was held by the delinquent taxpayer, no more and no less, and will take it subject to any infirmities, limitations, or liens which attached to it in the hands of the former owner.[58] But if the land is duly assessed to the owner of record, the title of the tax purchaser will prevail against the holder of an unre-

charged from any estate in or lien upon the same in favor of any person made a party to the proceedings.

Ohio.— Kahle *v.* Nisley, 74 Ohio St. 328, 78 N. E. 526; Security Trust Co. *v.* Root, 72 Ohio St. 535, 74 N. E. 1077; Gwynne *v.* Niswanger, 20 Ohio 556; Rennick *v.* Wallace, 8 Ohio 539.

Pennsylvania.— Kunes *v.* McCloskey, 115 Pa. St. 461, 9 Atl. 83.

Texas.— Ball *v.* Carroll, 42 Tex. Civ. App. 323, 92 S. W. 1023.

Vermont.— Brown *v.* Austin, 41 Vt. 262.

Wisconsin.— Cole *v.* Van Ostrand, 131 Wis. 454, 110 N. W. 884.

United States.— Hussman *v.* Durham, 165 U. S. 144, 17 S. Ct. 253, 41 L. ed. 664; De Roux *v.* Girard, 112 Fed. 89, 50 C. C. A. 136.

See 45 Cent. Dig. tit. "Taxation," § 1463. See also *infra*, XIV, A, 4, a.

Unless the tax proceedings are sufficient to divest the patent title it will prevail over the tax title. Ontario Land Co. *v.* Wilfong, 162 Fed. 999 [*reversed* on the facts in 171 Fed. 51].

53. Lucas *v.* Prudy, 142 Iowa 359, 120 N. W. 1063, 24 L. R. A. N. S. 1294; Willcuts *v.* Rollins, 85 Iowa 247, 52 N. W. 199; Hazlip *v.* Nunnery, (Miss. 1901) 29 So. 821; *In re* New York Protestant Episcopal Public School, 31 N. Y. 574; Jackson *v.* Babcock, 16 N. Y. 246; De Roux *v.* Girard, 105 Fed. 798.

54. Cummings *v.* Cummings, 91 Fed. 602.

If the estate in remainder is liable to be divested by the maturing of a tax title, the remainder-man has the right of redemption and must protect himself in that way. See *supra*, XII, A, 3, c.

55. *Kentucky.*— Rissberger *v.* Brown, 120 Ky. 142, 85 S. W. 731, 27 Ky. L. Rep. 538.

North Carolina.— Smith *v.* Proctor, 139 N. C. 314, 51 S. E. 889, 2 L. R. A. N. S. 172.

Ohio.— Plant *v.* Murphy, 5 Ohio Dec. (Reprint) 544.

Tennessee.— Ferguson *v.* Quinn, 97 Tenn. 46, 36 S. W. 576, 33 L. R. A. 688; Bleidorn *v.* Oakdale Iron, etc., Co., (Ch. App. 1896) 43 S. W. 360.

Virginia.— Glenn *v.* West, 106 Va. 356, 56 S. E. 143.

See 45 Cent. Dig. tit. "Taxation," § 1463.

Separate assessment of separate interests or estates see *supra*, VI, C, 5, i; *infra*, XIV, A, 3, g.

56. Shell *v.* Duncan, 31 S. C. 547, 10 S. E. 330, 5 L. R. A. 821.

57. *Arkansas.*— McWhirter *v.* Roberts, 40 Ark. 283.

Michigan.—Robbins *v.* Barron, 32 Mich. 36.

Minnesota.— Morrison *v.* Rice, 35 Minn. 436, 29 N. W. 168.

Ohio.— Jones *v.* Devore, 8 Ohio St. 430; Tullis *v.* Pierano, 9 Ohio Cir. Ct. 647, 9 Ohio Cir. Dec. 103.

Canada.— Tomlinson *v.* Hill, 5 Grant Ch. (U. C.) 231.

But *compare* Blevins *v.* Smith, 104 Mo. 583, 16 S. W. 213, 13 L. R. A. 441, holding that a tax-sale under a judgment for delinquent taxes does not bar a widow's right of dower where she was not made a party to the suit, although her right is only inchoate.

Separate assessment of separate interests. —Where the statute provides for the sale only of the interest of the person in whose name the land was assessed, a lien for taxes will not take priority over an inchoate right of dower attaching before the lien arose. Shell *v.* Duncan, 31 S. C. 547, 10 S. E. 330, 5 L. R. A. 821.

As between dowress and heirs.—A tax-sale of land in proceedings against the heirs will not divest a life-estate of the widow under the will. Berlien *v.* Bieler, 96 Mo. 491, 9 S. W. 916. And conversely, where the land of a decedent is listed for taxation in the name of his widow, although he left heirs to whom the land descended, a tax-sale of the land conveys only the widow's dower. Payne *v.* Arthur, 29 S. W. 860, 16 Ky. L. Rep. 784.

58. *Alabama.*— Dyer *v.* Mobile Branch Bank, 14 Ala. 622.

corded deed from such former owner, provided the tax purchaser had no notice or knowledge of such deed or of facts which should have put him on inquiry.[59]

g. Separate Interests Separately Assessed. If the statute deals with particular interests in land, rather than the land itself, and directs their separate assessment to their respective owners,[60] the purchase of a particular estate or interest so assessed, and sold for the non-payment of the taxes on it, will not in general disturb or affect any other estates or interests in the land or liens upon it.[61]

4. Liens and Encumbrances — a. In General. It is competent for the legislature to make the lien of taxes on real estate paramount to all other existing liens and encumbrances;[62] and when this is done, and when the tax-sale is considered as creating a new and independent title, it destroys and extinguishes all existing liens, charges, and encumbrances of every kind, and gives the purchaser a clear and unencumbered title.[63] But on the other hand, if the tax lien is not made

Georgia.— Gross *v.* Taylor, 81 Ga. 86, 6 S. E. 179; Kile *v.* Fleming, 78 Ga. 1.

Illinois.— Hill *v.* Figley, 25 Ill. 156; Hulick *v.* Scovil, 9 Ill. 159.

Indiana.— Indianapolis *v.* City Bond Co., 42 Ind. App. 470, 84 N. E. 20.

Kentucky.— Oldhams *v.* Jones, 5 B. Mon. 458; Husbands *v.* Polivick, 96 S. W. 825, 29 Ky. L. Rep. 890; Furguson *v.* Clark, 52 S. W. 964, 21 Ky. L. Rep. 697.

Louisiana.— Coucy *v.* Cummings, 12 La. Ann. 748.

Mississippi.— Dunn *v.* Winston, 31 Miss. 135.

Missouri. — Harrison Mach. Works *v.* Bowers, 200 Mo. 219, 98 S. W. 770; Powell *v.* Greenstreet, 95 Mo. 13, 8 S. W. 176; Jasper County *v.* Wadlow, 82 Mo. 172; Watt *v.* Donnell, 80 Mo. 195.

North Carolina.—*In re* Macay, 84 N. C. 63.

Tennessee.— Anderson *v.* Post, (Ch. App. 1896) 38 S. W. 283; Cardwell *v.* Crumley, (Ch. App. 1895) 35 S. W. 767.

Texas.—Wheeler *v.* Yenda, 11 Tex. 562, 9 Tex. 408.

Virginia.— Gates *v.* Lawson, 32 Gratt. 12.

West Virginia.— Cain *v.* Fisher, 57 W. Va. 492, 50 S. E. 752, 1015; McGhee *v.* Sampselle, 47 W. Va. 352, 34 S. E. 815; Kanawha Valley Bank *v.* Wilson, 29 W. Va. 645, 2 S. E. 768; Summers *v.* Kanawha County, 26 W. Va. 159; Smith *v.* Lewis, 2 W. Va. 39. *Compare* State *v.* Harman, 57 W. Va. 447, 50 S. E. 828.

Wisconsin.— Chase *v.* Dearborn, 21 Wis. 57.

United States.— McDonald *v.* Hannah, 59 Fed. 977, 8 C. C. A. 426 [*affirming* 51 Fed. 73]; Blodget *v.* Brent, 3 Fed. Cas. No. 1,553, 3 Cranch C. C. 394.

See 45 Cent. Dig. tit. "Taxation," § 1549.

59. Harrison Mach. Works *v.* Bowers, 200 Mo. 219, 98 S. W. 770; Wilcox *v.* Phillips, 199 Mo. 288, 97 S. W. 886; Stuart *v.* Ramsey, 196 Mo. 404, 95 S. W. 382; Evarts *v.* Missouri Lumber, etc., Co., 193 Mo. 433, 92 S. W. 372; Lucas *v.* Current River Land, etc., Co., 186 Mo. 448, 85 S. W. 359; Vance *v.* Corrigan, 78 Mo. 94. *Compare* Wood *v.* Smith, 193 Mo. 484, 91 S. W. 85.

But the above rule is inapplicable to a purchaser under a judgment in a back tax suit brought against the apparent owner of the land, where the deed from such apparent owner has been recorded and the book containing the record is destroyed by fire before suit brought for the taxes. Manwaring *v.* Missouri Lumber, etc., Co., 200 Mo. 718, 98 S. W. 762; Weir *v.* Cordz-Fisher Lumber Co., 186 Mo. 388, 85 S. W. 341.

60. See *supra*, VI, C, 5, i.

61. Windmiller *v.* Leach, 194 Ill. 631, 62 N. E. 789; Brundige *v.* Maloney, 52 Iowa 218, 2 N. W. 1110; Cadmus *v.* Jackson, 52 Pa. St. 295; Allegheny City's Appeal, 41 Pa. St. 60; Pittsburgh's Appeal, 40 Pa. St. 455; Irwin *v.* U. S. Bank, 1 Pa. St. 349; Frum *v.* Fox, 58 W. Va. 334, 52 S. E. 178.

62. See *supra*, VIII, C, 2.

63. *Georgia.*— Verdery *v.* Dotterer, 69 Ga. 194.

Indiana.— Ellison *v.* Branstrattor, (App. 1909) 88 N. E. 963, 89 N. E. 513, except claim or lien of state. See also Indianapolis *v.* City Bond Co., 42 Ind. App. 470, 84 N. E. 20.

Kansas.— Douglass *v.* Lowell, 64 Kan. 533, 67 Pac. 1106.

Louisiana.— Fitzpatrick *v.* Leake, 49 La. Ann. 794, 21 So. 597. *Compare* Font *v.* Gulf State Land, etc., Co., 47 La. Ann. 272, 16 So. 828.

Massachusetts.—Hunt *v.* Boston, 183 Mass. 305, 67 N. E. 244.

Michigan.—Robbins *v.* Barron, 32 Mich. 36.

Nebraska.—Topliff *v.* Richardson, 76 Nebr. 114, 107 N. W. 114; Leigh *v.* Green, 64 Nebr. 533, 90 N. W. 255, 101 Am. St. Rep. 592.

Ohio.— Kahle *v.* Nisley, 74 Ohio St. 328, 78 N. E. 526. *Compare* Bouton *v.* Lord, 10 Ohio St. 453.

Virginia.— Stevenson *v.* Henkle, 100 Va. 591, 42 S. E. 672.

West Virginia. — Kendall *v.* Scott, 48 W. Va. 251, 37 S. E. 531. *Compare* Smith *v.* Lewis, 2 W. Va. 39.

See 45 Cent. Dig. tit. "Taxation," § 1465. See also *supra*, XIV, A, 3, c.

Merger of tax title in fee.—Where the purchaser of a tax title acquires the interest of the record owner by conveyance subsequent to the acquisition of the tax title and within the period allowed by statute for redemption, the tax title is merged in the title acquired from the owner of record, and the purchaser holds subject to existing liens and equities.

paramount by law, or if the tax-sale is considered as passing only the title of the person assessed, it does not divest valid liens previously attaching.[64]

b. Judgment and Execution Liens. If the tax lien is made paramount to all others, as just stated, the lien of a judgment or execution against the owner of the land will be divested by a tax-sale and the maturing of the title in the purchaser, and the only right of the creditor will be to come upon the surplus, if any, of the purchase-money or to redeem from the tax-sale.[65]

c. Mortgage Liens — (i) *In General.* As a general rule, where the tax is laid upon the land as such, irrespective of separate estates, liens, or interests, and is collected by a valid tax-sale, the purchaser will take a clear title, freed from the lien of a prior mortgage.[66] But the mortgagee will have a right to redeem the

Boucher *v.* Trembley, 140 Mich. 352, 103 N. W. 819. *Compare* Carson *v.* Fulbright, 80 Kan. 624, 103 Pac. 139.

64. Battelle *v.* McIntosh, 62 Nebr. 647, 87 N. W. 361 (subject to liens deducted from the appraisement); Bouton *v.* Lord, 10 Ohio St. 453; Smith *v.* Lewis, 2 W. Va. 39.

65. Merrick *v.* Hutt, 15 Ark. 331; Morgan *v.* Burks, 90 Ga. 287, 15 S. E. 821; Indianapolis First Nat. Bank *v.* Hendricks, 134 Ind. 361, 33 N. E. 110, 34 N. E. 218; Jenkins *v.* Newman, 122 Ind. 99, 23 N. E. 683.

Effect of redemption by owner.— The purchaser at a tax-sale acquires but an inchoate title, which does not divest liens against the land until the expiration of the time allowed for redemption; hence if, within that time, the owner redeems, the property remains subject to a previously attaching judgment lien. Singer's Appeal, 4 Pa. Cas. 430, 7 Atl. 800.

Purchase equivalent to redemption.— Where the purchaser at a tax-sale stands in such a relation to the land or the owner that his purchase is legally equivalent merely to a payment of the taxes or a redemption, existing judgment liens are not divested. Beacham *v.* Gurney, 91 Iowa 621, 60 N. W. 187.

Tax deed not acknowledged or not recorded.—Where a tax deed was executed but was not acknowledged or proved for record as required by law, and afterward the original owner still remaining in possession, a judgment was rendered against him, it was held that the lien of the judgment was superior to the tax deed, as such deed, although spread on the records, was not constructive notice to subsequent creditors. Hill *v.* Gordon, 45 Fed. 276.

66. *Georgia.*— Verdery *v.* Dotterer, 69 Ga. 194.

Indiana.— Peckham *v.* Millikan, 99 Ind. 352.

Kansas.— Carson *v.* Fulbright, 80 Kan. 624, 103 Pac. 139, holding that one not obliged to pay taxes, nor in privity with one so liable, may obtain a tax title and when in possession thereunder may accept a conveyance from the former owner without incurring the risk of losing his land for failure to pay a mortgage given by such former owner, outstanding when the tax became delinquent. See also Cones *v.* Gibson, 77 Kan. 425, 94 Pac. 998, 16 L. R. A. N. S. 121, holding that a guarantor of payment of a note secured by mortgage may take a tax title to the mortgaged premises good against all the world except the mortgagee, and that the mortgagee may impeach such title only so far as may be necessary to protect his lien.

Louisiana.— *In re* Douglas, 41 La. Ann. 765, 6 So. 675; Maumus *v.* Beynet, 31 La. Ann. 462. See also Fitzpatrick *v.* Leake, 47 La. Ann. 1643, 18 So. 649.

Maine.—Williams *v.* Hilton, 35 Me. 547, 58 Am. Dec. 729.

Massachusetts.—Abbott *v.* Frost, 185 Mass. 398, 70 N. E. 478; Coughlin *v.* Gray, 131 Mass. 56; Parker *v.* Baxter, 2 Gray 185.

Missouri.— Allen *v.* McCabe, 93 Mo. 138, 6 S. W. 62; Cowell *v.* Gray, 85 Mo. 169; Gitchell *v.* Kreidler, 84 Mo. 472; Stafford *v.* Fizer, 82 Mo. 393.

New Jersey.— Blackwell *v.* Pidcock, 43 N. J. L. 165; Doremus *v.* Cameron, 49 N. J. Eq. 1, 22 Atl. 802; Paterson *v.* O'Neill, 32 N. J. Eq. 386; Campbell *v.* Dewick, 20 N. J. Eq. 186. But *compare* Morrow *v.* Dows, 28 N. J. Eq. 459. And see Hopper *v.* Malleson, 16 N. J. Eq. 382.

New York.— Erie County Sav. Bank *v.* Schuster, 187 N. Y. 111, 79 N. E. 843 [*affirming* 107 N. Y. App. Div. 46, 94 N. Y. Suppl. 737]; Oliphant *v.* Burns, 146 N. Y. 218, 40 N. E. 980. See Ruyter *v.* Reid, 121 N. Y. 498, 24 N. E. 791. But a mortgagee's rights are not divested by a tax-sale of the mortgaged property where the assessment of the tax was invalid. Bennett *v.* Kovarick, 44 N. Y. App. Div. 629, 60 N. Y. Suppl. 1133 [*affirming* 23 Misc. 73, 51 N. Y. Suppl. 752].

North Carolina.— Lyman *v.* Hunter, 123 N. C. 508, 31 S. E. 827; Powell *v.* Sikes, 119 N. C. 231, 26 S. E. 38. See also Virginia L. Ins. Co. *v.* Day, 127 N. C. 133, 37 S. E. 158.

Pennsylvania.— Cadmus *v.* Jackson, 52 Pa. St. 295; Fager *v.* Campbell, 5 Watts 287.

South Carolina. — Interstate Bldg., etc., Assoc. *v.* Waters, 50 S. C. 459, 27 S. E. 948.

United States.— Greenwalt *v.* Tucker, 8 Fed. 792, 3 McCrary 166.

See 45 Cent. Dig. tit. "Taxation," §§ 1466, 1552.

But *compare* Kepley *v.* Jansen, 107 Ill. 79; Middleton *v.* Moore, 43 Oreg. 357, 73 Pac. 16; Smith *v.* Lewis, 2 W. Va. 39.

Priority of tax lien as against mortgages and other encumbrances in general see *supra*, VIII, C, 2, d.

County as purchaser.— The authorities of a county cannot buy in a tax title, for the use of the school fund, for the purpose of

property within the time limited by law, unless his rights in that behalf have been cut off by a judgment foreclosing the tax lien in proceedings to which he was a party.[67]

(II) *Mortgage to State.* As an exception to the general rule just stated, and by force of statute in several states, it is held that a tax-sale does not divest the lien of a mortgage given to the state,[68] or of one given to secure a loan of school funds,[69] or of the state sinking fund.[70]

d. Lien of Prior or Coördinate Taxes — (I) *In General.* In some states it is held that the sale of land for non-payment of taxes does not divest the lien of any taxes previously assessed and chargeable on the same premises;[71] and this rule is undoubtedly correct where the law directs that the tax purchaser shall assume and pay all previous delinquent taxes,[72] or where the statute or the judgment under which the sale is made orders that he shall take title subject to the liens of existing taxes.[73] But ordinarily the doctrine prevails that a valid tax-sale will cut off the liens of all taxes assessed for any years previous to that for which the sale was made.[74] Hence a title acquired by a sheriff's or treasurer's

defeating and cutting off the lien of a mortgage held by a third person and which is prior to another mortgage in favor of the fund. Miller *v.* Gregg, 26 Iowa 75.

Foreclosure of mortgage.— A tax-sale is not subject to the rule that one who purchases during the pendency of a suit is held bound by the decree that may be made. Wright *v.* Walker, 30 Ark. 44. Hence a purchaser at a tax-sale is not bound by the foreclosure of a mortgage given by the former owner of the land, and the purchaser at the foreclosure sale cannot maintain ejectment against the holder of the tax title in possession. Becker *v.* Howard, 4 Hun (N. Y.) 359 [*affirmed* in 66 N. Y. 5].

67. Verdery *v.* Dotterer, 69 Ga. 194; Myers *v.* Bassett, 84 Mo. 479; Gitchell *v.* Kreidler, 84 Mo. 472; Becker *v.* Howard, 66 N. Y. 5 [*affirming* 4 Hun 359]. See Jordan *v.* Brown, 56 Iowa 281, 9 N. W. 200. And see *supra*, XII, A, 3, b.

68. Harrison *v.* Williams, 39 Ark. 315.

69. Stockwell *v.* State, 101 Ind. 1; State *v.* Jones, 95 Ind. 175; La Rue *v.* King, 74 Iowa 288, 37 N. W. 374; Ritchie *v.* McDuffie, 62 Iowa 46, 17 N. W. 167; Lovelace *v.* Berryhill, 36 Iowa 379; State *v.* Shaw, 28 Iowa 67; Crum *v.* Cotting, 22 Iowa 411; Helphrey *v.* Ross, 19 Iowa 40.

70. Pugh *v.* Sinking Fund Com'rs, 53 N. J. L. 629, 23 Atl. 270; Rahway *v.* New Jersey Sinking Fund Com'rs, 44 N. J. Eq. 296, 18 Atl. 56.

71. Adams *v.* Osgood, 42 Nebr. 450, 60 N. W. 869; People *v.* Buffalo, 63 N. Y. App. Div. 563, 68 N. Y. Suppl. 409, 71 N. Y. Suppl. 1145; Berger *v.* Multnomah County, 45 Oreg. 402, 78 Pac. 224; State *v.* Ewing, 11 Lea (Tenn.) 172; Nashville *v.* Cowan, 10 Lea (Tenn.) 209. See also Armstrong *v.* Nassau County, 101 N. Y. App. Div. 116, 91 N. Y. Suppl. 867.

72. Remick *v.* Lang, 47 La. Ann. 914, 17 So. 461; Leeds *v.* Hardy, 44 La. Ann. 556, 11 So. 1; Martinez *v.* State Tax Collectors, 42 La. Ann. 677, 7 So. 796; Gulf States Land, etc., Co. *v.* Parker, 72 Fed. 399, 60 Fed. 974.

Purchaser from delinquent taxpayer.— The provision of a city charter that any person who shall purchase property encumbered with taxes shall be deemed, as to such taxes, a delinquent taxpayer, and shall take the property charged with a lien, applies only to purchasers from a delinquent taxpayer, and not to a purchaser of property sold under a tax judgment. Houston *v.* Bartlett, 29 Tex. Civ. App. 27, 68 S. W. 730.

73. Burton *v.* Louisville, 85 S. W. 727, 27 Ky. L. Rep. 514; Auditor-Gen. *v.* Sherman, 136 Mich. 157, 98 N. W. 995; Rochester *v.* Kapell, 177 N. Y. 533, 69 N. E. 1121.

74. *Alabama.*—Thorington *v.* Montgomery, 88 Ala. 548, 7 So. 363.

California.— Chandler *v.* Dunn, 50 Cal. 15; Dougherty *v.* Henarie, 47 Cal. 9; Anderson *v.* Rider, 46 Cal. 134, all of which hold that a later tax title must prevail over that acquired by a sale for taxes of a previous year. But see Cowell *v.* Washburn, 22 Cal. 519.

District of Columbia.— District of Columbia *v.* Hufty, 13 App. Cas. 175; Wall *v.* District of Columbia, 6 Mackey 194; Brewer *v.* District of Columbia, 5 Mackey 274. *Compare* U. S. *v.* Macfarland, 18 App. Cas. 120.

Illinois.— Law *v.* People, 116 Ill. 244, 4 N. E. 845.

Indiana.— Justice *v.* Logansport, 101 Ind. 326.

Iowa.— Phillips *v.* Wilmarth, 98 Iowa 32, 66 N. W. 1053; Hough *v.* Easley, 47 Iowa 330; Shoemaker *v.* Lacy, 45 Iowa 422; Bowman *v.* Thompson, 36 Iowa 505; Preston *v.* Van Gorder, 31 Iowa 250; Gray *v.* Coan, 30 Iowa 536.

Louisiana.— Gulf States Land, etc., Co. *v.* Wade, 51 La. Ann. 251, 25 So. 105; Bradford *v.* Lafargue, 30 La. Ann. 432.

Michigan.— Robbins *v.* Barron, 32 Mich. 36. But see Harding *v.* Auditor-Gen., 140 Mich. 646, 104 N. W. 39.

Minnesota.— Minnesota Debenture Co. *v.* Scott, 106 Minn. 32, 119 N. W. 391; Brodie *v.* State, 102 Minn. 202, 113 N. W. 2; Gates *v.* Keigher, 99 Minn. 138, 108 N. W. 860; State *v.* Camp, 79 Minn. 343, 82 N. W. 645; Wass *v.* Smith, 34 Minn. 304, 25 N. W. 605. *Com-*

deed, in pursuance of a sale for a delinquent tax, will prevail over a tax title acquired by a similar deed for the tax of a previous year, even though the sale for the older tax was made after the sale for the later tax.[75] And it has been held that this rule operates as well in favor of the owner who redeems from the tax-sale as the purchaser.[76]

(II) *Subsequent Taxes.* A sale for the taxes of a given year does not discharge the land from the lien of taxes assessed for a subsequent year, whether they were assessed before the sale or in the interval before the purchaser completes his title,[77] except perhaps in cases where all the taxes were equally chargeable on the property at the time of the sale and might all have been included in it.[78]

(III) *Municipal Taxes and Assessments.* Where the statute makes the state taxes a superior lien to municipal taxes and local assessments, or where both classes of taxes are to be collected in the same manner and by the same proceedings, those of the latter class will be cut off and their lien extinguished by a sale for state taxes in which the local taxes or assessments might have been included.[79] But otherwise the purchaser will take subject to existing taxes of the inferior class.[80]

pare Oakland Cemetery Assoc. *v.* Ramsey County, 98 Minn. 404, 108 N. W. 857, 109 N. W. 237, 116 Am. St. Rep. 377; State *v.* Kipp, 80 Minn. 119, 82 N. W. 1114.

Missouri.— Smith *v.* Laumier, 84 Mo. 672. But *compare* State *v.* Werner, 10 Mo. App. 41.

North Dakota.— Emmons County *v.* Bennett, 9 N. D. 131, 81 N. W. 22.

Ohio.— Buckley *v.* Osburn, 8 Ohio 180.

Pennsylvania.— Brundred *v.* Egbert, 158 Pa. St. 552, 28 Atl. 142; Huzzard *v.* Trego, 35 Pa. St. 9; Irwin *v.* Trego, 22 Pa. St. 368. But see Townsend *v.* Prowattain, 81* Pa. St. 139.

Washington.— See Denman *v.* Steinbach, 29 Wash. 179, 69 Pac. 751.

West Virginia.— State *v.* Jackson, 56 W. Va. 558, 49 S. E. 465.

Wisconsin.— Knox *v.* Leidgen, 23 Wis. 292; Sayles *v.* Davis, 22 Wis. 225; Jarvis *v.* Peck, 19 Wis. 74.

United States.—Alexandria *v.* Preston, 8 Cranch 53, 3 L. ed. 485; Western Land, etc., Co. *v.* Guinault, 38 Fed. 287.

See 45 Cent. Dig. tit. "Taxation," § 1469.

75. *Alabama.*— Thorington *v.* Montgomery, 88 Ala. 548, 7 So. 363.

California.—Anderson *v.* Rider, 46 Cal. 134.

Massachusetts.— Keen *v.* Sheehan, 154 Mass. 208, 28 N. E. 150.

North Dakota.— Emmons County *v.* Bennett, 9 N. D. 131, 81 N. W. 22.

Texas.— Houston *v.* Bartlett, 29 Tex. Civ. App. 27, 68 S. W. 730.

West Virginia.— Cain *v.* Brown, 54 W. Va. 656, 46 S. E. 579.

See 45 Cent. Dig. tit. "Taxation," § 1469.

76. Hough *v.* Easley, 47 Iowa 330 [*distinguishing* Bowman *v.* Eckstien, 46 Iowa 583]; Huzzard *v.* Trego, 35 Pa. St. 9. But see Winter *v.* Montgomery, 101 Ala. 649, 14 So. 659; Shelley *v.* St. Charles County, 28 Fed. 875

77. *Georgia.*—Wilson *v.* Boyd, 84 Ga. 34, 10 S. E. 499.

Kansas.— See Tucker *v.* Shorb, 80 Kan. 511, 103 Pac. 79. But *compare* Gibson *v.* Trisler, 73 Kan. 397, 85 Pac. 413.

Kentucky.— Burton *v.* Louisville, 85 S. W. 727, 27 Ky. L. Rep. 514.

Louisiana.— Fluker *v.* De Grange, 117 La. 331, 41 So. 591; Muller *v.* Mazerat, 109 La. 116, 33 So. 104; Kohlman *v.* Glaudi, 52 La. Ann. 700, 27 So. 116; McAlster *v.* Anderson, 27 La. Ann. 425.

Massachusetts.— Keen *v.* Sheehan, 154 Mass. 208, 28 N. E. 150.

Michigan.—Auditor-Gen. *v.* Clifford, 143 Mich. 626, 107 N. W. 287; Cheever *v.* Flint Land Co., 134 Mich. 604, 96 N. W. 933; Cockburn *v.* Auditor-Gen., 120 Mich. 643, 79 N. W. 931; Hubbard *v.* Auditor-Gen., 120 Mich. 505, 79 N. W. 979. And see Munroe *v.* Winegar, 128 Mich. 309, 87 N. W. 396.

Missouri.—Excelsior Springs *v.* Henry, 99 Mo. App. 450, 73 S. W. 944.

Pennsylvania.— Irwin *v.* Trego, 22 Pa. St. 368; Liggett *v.* Long, 19 Pa. St. 499; Diamond Coal Co. *v.* Fisher, 19 Pa. St. 267.

West Virginia.— State *v.* Jackson, 56 W. Va. 558, 49 S. E. 465.

Wisconsin.— Sayles *v.* Davis, 22 Wis. 225.

United States.— Newby *v.* Brownlee, 23 Fed. 320.

See 45 Cent. Dig. tit. "Taxation," § 1469.

78. State *v.* Cole, 1 N. C. 224.

79. *Iowa.*— Fitzgerald *v.* Sioux City, 125 Iowa 396, 101 N. W. 268; Harrington *v.* Valley Sav. Bank, 119 Iowa 312, 93 N. W. 347.

Louisiana.— See *In re* Lindner, 114 La. 895, 38 So. 610.

South Carolina.— Holmes *v.* Weinheimer, 66 S. C. 18, 44 S. E. 82.

Tennessee.— Nashville *v.* Lee, 12 Lea 452.

Washington.— Ballard *v.* Mitchell, 38 Wash. 239, 80 Pac. 440; Ballard *v.* Ross, 38 Wash. 209, 80 Pac. 439; Pennsylvania Co. *v.* Tacoma, 36 Wash. 656, 79 Pac. 306. See Ballard *v.* Way, 34 Wash. 116, 74 Pac. 1067.

Wisconsin.— Knox *v.* Leidgen, 23 Wis. 292; Smith *v.* Ludington, 17 Wis. 334; Smith *v.* Vandyke, 17 Wis. 208.

See 45 Cent. Dig. tit. "Taxation," § 1469.

80. *Delaware.*— Knowles *v.* Morris, 6 Penn. 76, 65 Atl. 782.

5. Effect of Defects and Irregularities in Prior Proceedings[81] — **a. In General.** The power to sell land for the non-payment of taxes is a naked power not coupled with an interest,[82] and it is essential to its valid exercise that there shall be a strict compliance with the directions of the statute authorizing and regulating such sales.[83] The proceedings, being all hostile to the owner, are *stricti juris*, and the purchaser is bound to see to their regularity, and he comes strictly within the rule of *caveat emptor*.[84] To a certain extent flaws or omissions in the prior proceedings may be rendered innocuous by curative statutes,[85] or by statutes making tax deeds presumptive evidence or even conclusive evidence of regularity,[86] or by the application of the statute of limitations to actions to impeach tax titles.[87] But subject to these considerations the general rule prevails that, although defects or irregularities in the prior proceedings which are not material or not of a nature to affect the substantial rights of the taxpayer, or consist merely in the disregard of directory provisions, may not invalidate a tax title otherwise good, yet any illegality, jurisdictional defect, or disobedience to mandates of the law which are designed for the protection or security of the owner of the property will render the tax title wholly void and nugatory.[88] But

Georgia.— Hargrove *v.* Lilly, 69 Ga. 326.

Indiana.— McCollum *v.* Uhl, 128 Ind. 304, 27 N. E. 162, 725; Justice *v.* Logansport, 101 Ind. 326; Indianapolis *v.* City Bond Co., 42 Ind. App. 470, 84 N. E. 20.

Iowa.— Dennison *v.* Keokuk, 45 Iowa 266.

Louisiana.— State *v.* Recorder of Mortgages, 45 La. Ann. 566, 12 So. 880; Bellocq *v.* New Orleans, 31 La. Ann. 471.

See 45 Cent. Dig. tit. "Taxation," § 1469.

81. **Defect cured by limitations** see *infra*, XIV, B, 4, d, (IV).

Estoppel and ratification see *infra*, XIV, B, 3, a, (II).

Regularity of: Levy and assessment see *supra*, VI; VII. Redemption see *supra*, XII, B. Sale see *supra*, XI.

82. See *supra*, XI, A, 1.

83. See *supra*, XI, A, 4.

84. See *infra*, XIV, C, 1, a.

85. See *supra*, XI, O, 1, 2.

86. See *supra*, XIII, G, 2–4.

87. See *infra*, XIV, B, 4.

88. *Alabama.*— Fleming *v.* McGee, 81 Ala. 409, 1 So. 106; Elliot *v.* Doe, 24 Ala. 508.

Arkansas.— Sibly *v.* Cason, 86 Ark. 32, 109 S. W. 1007, holding that the failure of the clerk on a sale of land for taxes to transfer the land on the tax books to the name of the purchaser does not injure the owner or affect the validity of the sale.

California.— Wright *v.* Fox, 150 Cal. 680, 89 Pac. 832.

Florida.— Starks *v.* Sawyer, 56 Fla. 596, 47 So. 513.

Georgia.— Roser *v.* Georgia L. & T. Co., 118 Ga. 181, 44 S. E. 994.

Illinois.— Coombs *v.* People, 198 Ill. 586, 64 N. E. 1056.

Indiana.— Holbrook *v.* Kunz, 41 Ind. App. 260, 83 N. E. 730, holding that the omissions and irregularities in a sale may render the sale invalid to convey title, but still valid to transfer the lien to the purchaser.

Iowa.— Cassady *v.* Sapp, 64 Iowa 203, 19 N. W. 909.

Kansas.— Griffith *v.* Richards, 64 Kan. 257, 67 Pac. 846; Choat *v.* Phelps, 63 Kan. 762, 66 Pac. 1002; Park *v.* Tinkham, 9 Kan. 615; Taylor *v.* Miles, 5 Kan. 498, 7 Am. Rep. 558, holding that a tax deed made in pursuance of a sale of land for taxes levied upon it at a time when the land was not subject to taxation is void.

Kentucky.— James *v.* Luscher, (1909) 121 S. W. 954; James *v.* Blanton, 134 Ky. 803, 121 S. W. 951, 123 S. W. 328 (state's title not affected); Bailey *v.* Napier, (1909) 117 S. W. 948 (holding that the fact that a sheriff sold more property than was necessary to pay the taxes, or that he failed to collect the money from the purchaser, did not affect the purchaser's title).

Louisiana.— Lisso *v.* Giddens, 117 La. 507, 41 So. 1029; Booksh *v.* Wilbert Sons Lumber, etc., Co., 115 La. 351, 39 So. 9; *In re* Lindner, 114 La. 895, 38 So. 610; Tieman *v.* Johnston, 114 La. 112, 38 So. 75; *In re* Lafferranderie, 114 La. 6, 37 So. 990; State *v.* New Orleans, 112 La. 408, 36 So. 475; Boagni *v.* Pacific Imp. Co., 111 La. 1063, 36 So. 129; *In re* Seim, 111 La. 554, 35 So. 744; Ashley Co. *v.* Bradford, 109 La. 641, 33 So. 634; Tiblier *v.* Indianapolis Land Trust, 49 La. Ann. 1471, 22 So. 411; Prescott *v.* Payne, 44 La. Ann. 650, 11 So. 140; Livingston *v.* Waldon, 4 Mart. N. S. 456.

Maine.— Baker *v.* Webber, 102 Me. 414, 67 Atl. 144.

Michigan.— Platz *v.* Englehardt, 138 Mich. 485, 101 N. W. 849; Loose *v.* Navarre, 95 Mich. 603, 55 N. W. 435; Seymour *v.* Peters, 67 Mich. 415, 35 N. W. 62; Perkins *v.* Nugent, 45 Mich. 156, 7 N. W. 757; Stockle *v.* Silsbee, 41 Mich. 615, 2 N. W. 900; Hammontree *v.* Lott, 40 Mich. 190; Hogleskamp *v.* Weeks, 37 Mich. 422; Edwards *v.* Taliafero, 34 Mich. 13.

Mississippi.— Towry *v.* Wax, (1906) 42 So. 536; Chambers *v.* Myrick, 61 Miss. 459.

Missouri.— Walker *v.* Mills, 210 Mo. 684, 109 S. W. 44 (title of purchaser not affected by error in judgment); Burkham *v.* Manewal, 195 Mo. 500, 94 S. W. 520; Morrison *v.* Turnbaugh, 192 Mo. 427, 91 S. W. 152; Stevenson *v.* Black, 168 Mo. 549, 68 S. W.

it has been held that fraud in the conduct of a tax-sale of land, while it will render

909; Morgan *v.* Pott, 124 Mo. App. 371, 101 S. W. 717.

Nebraska.— Cowles *v.* Adams, 78 Nebr. 130, 110 N. W. 697; John *v.* Connell, 61 Nebr. 267, 85 N. W. 82.

New York.— Cromwell *v.* MacLean, 123 N. Y. 474, 25 N. E. 932; Matter of McIntyre, 124 N. Y. App. Div. 66, 108 N. Y. Suppl. 242; Raquette Falls Land Co. *v.* Hoyt, 109 N. Y. App. Div. 119, 95 N. Y. Suppl. 1029 [*affirmed* in 187 N. Y. 550, 80 N. E. 1119]; Morgan *v.* Turner, 35 Misc. 399, 71 N. Y. Suppl. 996 [*affirmed* in 81 N. Y. App. Div. 645, 81 N. Y. Suppl. 1136]; Ne-ha-sa-ne Park Assoc. *v.* Lloyd, 25 Misc. 207, 55 N. Y. Suppl. 108 [*affirmed* in 45 N. Y. App. Div. 631, 61 N. Y. Suppl. 1143 (*affirmed* in 167 N. Y. 431, 60 N. E. 741)]. But *compare* May *v.* Traphagen, 139 N. Y. 478, 34 N. E. 1064 [*reversing* 19 N. Y. Suppl. 679]; Ritter *v.* Wach, 58 N. Y. 628 [*reversing* 1 Thomps. & C. 406].

North Carolina.—Wooten *v.* White, 125 N. C. 403, 34 S. E. 508.

North Dakota.— State Finance Co. *v.* Beck, 15 N. D. 374, 109 N. W. 357; Beggs *v.* Paine, 15 N. D. 436, 109 N. W. 322; Fisher *v.* Betts, 12 N. D. 197, 96 N. W. 132; Dever *v.* Cornwell, 10 N. D. 123, 86 N. W. 227.

Oregon.— Bradford *v.* Durham, 54 Oreg. 1, 101 Pac. 897.

Pennsylvania.— Reading *v.* Finney, 73 Pa. St. 467; Thompson *v.* Fisher, 6 Watts & S. 520; Cobb *v.* Barclay, 9 Pa. Super. Ct. 573.

South Carolina.— Barrineau *v.* Stevens, 75 S. C. 252, 55 S. E. 309; Interstate Bldg., etc., Assoc. *v.* Waters, 50 S. C. 459, 27 S. E. 948.

Tennessee.— Harris *v.* Mason, 100 Tenn. 668, 115 S. W. 1146, 25 L. R. A. N. S. 1011, holding that where a tax-sale is void because of a county trustee's failure to file a certified list of the lands sold, a purchaser from the state does not acquire an equitable title.

Texas.— Davis *v.* Farnes, 26 Tex. 296; Keenan *v.* Slaughter, 49 Tex. Civ. App. 180, 108 S. W. 703; Bradley *v.* Janssen, (Civ. App. 1906) 93 S. W. 506.

Utah.— Jungk *v.* Snyder, 28 Utah 1, 78 Pac. 168; Moon *v.* Salt Lake County, 27 Utah 435, 76 Pac. 222; Eastman *v.* Gurrey, 15 Utah 410, 49 Pac. 310 [*overruling* Ogden City *v.* Hamer, 12 Utah 337, 42 Pac. 1113; Hamer *v.* Weber County, 11 Utah 1, 37 Pac. 741].

Washington.— Elrey *v.* Christie, 55 Wash. 699, 104 Pac. 214; Timmerman *v.* McCullagh, 55 Wash. 204, 104 Pac. 212.

West Virginia.— Devine *v.* Wilson, 63 W. Va. 409, 60 S. E. 351; Collins *v.* Reger, 62 W. Va. 195, 57 S. E. 743; Webb *v.* Ritter, 60 W. Va. 193, 54 S. E. 484; Day *v.* Fay, 59 W. Va. 65, 52 S. E. 1013; State *v.* Jackson, 56 W. Va. 558, 49 S. E. 465; Carrell *v.* Mitchell, 37 W. Va. 130, 16 S. E. 453.

United States.—Indiana, etc., Lumber, etc., Co. *v.* Milburn, 161 Fed. 531, 88 C. C. A. 473 (holding that misdescriptions of land which would be fatally defective to an ordinary tax proceeding do not render a sale pursuant to a judgment in an overdue tax suit invalid after confirmation); Paine *v.* Germantown Trust Co., 136 Fed. 527, 69 C. C. A. 303; Morse *v.* South, 80 Fed. 206; Ogden *v.* Harrington, 18 Fed. Cas. No. 10457, 6 McLean 418.

See 45 Cent. Dig. tit. "Taxation," § 1470.

Sale for taxes partly valid.—A tax deed based upon distinct taxes of different years is valid if any one of the sales was valid, whether the others were or not. Hunt *v.* Chapin, 42 Mich. 24, 3 N. W. 873. But *compare* Nehasane Park Assoc. *v.* Lloyd, 167 N. Y. 431, 60 N. E. 741 [*affirming* 45 N. Y. App. Div. 631, 61 N. Y. Suppl. 1148].

Estoppel of state as against prior tax purchaser — Deed made conclusive evidence.— Under W. Va. Code (1899), c. 31, § 29 (Code (1906), § 888), making a tax deed conclusive evidence that the state has passed to the grantee the title of the former owner, against all persons except the former owner, his heirs and assigns and those who might have redeemed, etc., the state is estopped from proceeding to sell, as forfeited for non-entry in the name of the former owner, land conveyed by the sheriff to a purchaser pursuant to a sale thereof for non-payment of taxes thereon, although the deed, because of defects in the sale proceeding, is void as to the former owner and fails to vest his title in the grantee therein. By making such deed conclusive evidence the statute works, by estoppel, a release, grant, or transfer of the title of the former owner to the grantee therein, upon the forfeiture of such title for failure of the former owner to keep the land taxed in his name and the taxes thereon paid for five years. State *v.* West Branch Lumber Co., 64 W. Va. 673, 63 S. E. 372; State *v.* Snyder, 64 W. Va. 659, 63 S. E. 385. Although the statute does not mention the state as one of the persons concluded, it must be construed as including the state so as to make it harmonize with the principles and public policy made manifest by the organic, statutory, and judicial system of the law of the state relating to taxation and the settlement of land titles. State *v.* Snyder, *supra*. The provision in said statute that it shall not be construed as precluding the state, or any county court, board of education or municipality, from instituting and maintaining any suit which might be instituted or maintained by any person claiming the land sold or any lien thereon, for the purpose of setting aside, for any reason, any tax-sale or deed for land sold for taxes, etc., does not confer on the state power to set aside a tax deed to avail itself of a forfeiture of the former owner's title, but only to proceed, notwithstanding the defective deed, to enforce any lien it may have on the land for prior taxes, treating it, not as the state's land, but as the land of the tax-deed grantee, or former owner, for such purpose and to such extent. State *v.* Snyder, *supra*.

the sale voidable at the instance of the injured owner, does not, like a jurisdictional defect, make the sale entirely null and void.[89]

b. Application of Doctrine of Bona Fide Purchasers. A purchaser of real property at a tax-sale is not entitled to protection as an innocent purchaser where he purchases for a grossly inadequate consideration;[90] or where he fraudulently causes the land to be assessed to himself and suffers it to be sold for taxes and buys it in through the agency of a third person;[91] but such a purchaser is not affected by fraud contemplated by the officer making the sale of which he had no notice.[92] Ordinarily such persons come strictly within the rule *caveat emptor*,[93] and as the proceedings for the collection of taxes are matters of public record, to which intending purchasers have access, they are chargeable with knowledge of defects which the records disclose.[94] Where the proceedings are based on the judgment or decree of a court, such a purchaser may generally rely on it to protect himself;[95] but his title is liable to be divested by the cancellation or setting aside of the tax-sale for cause, provided he has notice of the proceedings.[96]

c. Amendment of Records. The purchaser of a tax title takes it subject to the right to have the record amended or corrected to correspond with the actual facts;[97] but on the other hand, it is generally held that tax deeds or the proceedings in tax cases cannot be reformed or amended for the purpose of supporting or validating the tax title.[98]

6. Liability of Purchaser.[99] Beyond his liability to pay the amount of his bid and his responsibility on the surplus bond, if any was given,[1] and in respect to existing liens or encumbrances on the property not discharged by the tax-sale,[2] the purchaser at such sale is not ordinarily subject to any special liabilities growing out of the peculiar nature of his title or the mode of its acquisition. Thus he is not responsible in damages for taking the proper steps to acquire possession of the premises, if his own conduct was entirely correct, although the tax title may prove to be invalid.[3] But where the former owner of land pays overdue

89. Ellis *v.* Peck, 45 Iowa 112; Slater *v.* Maxwell, 6 Wall. (U. S.) 268, 18 L. ed. 796.

90. Green *v.* Robertson, 30 Tex. Civ. App. 236, 70 S. W. 345; Huff *v.* Maroney, 23 Tex. Civ. App. 465, 56 S. W. 754.

91. Turner *v.* Ladd, 42 Wash. 274, 84 Pac. 866.

92. Boyd *v.* Wilson, 86 Ga. 379, 12 S. E. 744, 13 S. E. 428.

93. See *infra*, XIV, C, 1, a.

94. St. Paul *v.* Louisiana Cypress Lumber Co., 116 La. 585, 40 So. 906; Martin *v.* Kearney County, 62 Nebr. 538, 87 N. W. 351.

A patent from the government, like a deed, must be filed and recorded, and if by failure to so file and record the patent the rights of an innocent purchaser accrue, such rights must prevail. Wilcox *v.* Phillips, 199 Mo. 288, 97 S. W. 886.

A purchaser with knowledge that someone besides the owner of record paid taxes on the land is placed on inquiry as to the claim of such party; and if the purchaser had actual or constructive notice that the suit for taxes was not against the real owner, although against the record owner, the tax deed would be unavailing as between him and the latter. Zweigart *v.* Reed, 221 Mo. 33, 119 S. W. 960.

95. Evarts *v.* Missouri Lumber, etc., Co., 193 Mo. 433, 92 S. W. 372; Bagley *v.* Sligo Furnace Co., 120 Mo. 248, 25 S. W. 207; Schmidt *v.* Niemeyer, 100 Mo. 207, 13 S. W. 405; Jones *v.* Driskill, 94 Mo. 190, 7 S. W. 111; Williams *v.* Young, 41 Tex. Civ. App. 212, 90 S. W. 940.

96. People *v.* Wemple, 67 Hun (N. Y.) 495, 22 N. Y. Suppl. 497 [*reversed* on other grounds in 139 N. Y. 240, 34 N. E. 883]; Ostrander *v.* Darling, 53 Hun (N. Y.) 190, 6 N. Y. Suppl. 718 [*affirmed* in 127 N. Y. 70, 27 N. E. 353].

97. Cass *v.* Bellows, 31 N. H. 501, 64 Am. Dec. 347; Gibson *v.* Bailey, 9 N. H. 168.

98. Altes *v.* Hinckler, 36 Ill. 265, 85 Am. Dec. 406; Keepfer *v.* Force, 86 Ind. 81; Ramos Lumber, etc., Co. *v.* Labarre, 116 La. 559, 40 So. 898; Bowers *v.* Andrews, 52 Miss. 596. But *compare* Hickman *v.* Kempner, 35 Ark. 505; Davis *v.* Sawyer, 66 N. H. 34, 20 Atl. 100.

An entry upon the tax record by the treasurer, designating the sale as erroneous, cannot thereafter be rightfully erased by him and a deed issued to the tax-sale purchaser without notice or opportunity to the owner to protect his rights. Burckhardt *v.* Scofield, 141 Iowa 336, 117 N. W. 1061, 133 Am. St. Rep. 173.

99. **Liability of purchaser for:** Rents and profits see *supra*, XIV, A, 2, e. Taxes see *supra*, XIV, A, 4, d.

1. See *supra*, XI, J, 1, 2.

2. See *supra*, XIV, A, 4.

Ground-rent.— The purchaser takes the land subject to payment of reserved ground-rent. Irwin *v.* U. S. Bank, 1 Pa. St. 349.

3. Fernandez *v.* Smith, 43 La. Ann. 708, 9

taxes in ignorance of a tax-sale, he is entitled to recover them from the tax purchaser.[4]

7. Assignees and Grantees of Purchasers — a. Assignment of Certificate of Purchase — (i) *In General.* A tax-sale certificate is not a negotiable instrument, and is probably not assignable without statutory authority or permission,[5] and it is clear that county officers have no authority, in the absence of statute, to assign tax certificates held by their county.[6] Such assignments are now, however, generally authorized by law, and a transfer of the rights evidenced by a tax certificate will not be enjoined in equity, on account of errors or defects in the proceedings, without a payment or tender of the taxes justly due.[7] But if the purchaser at the tax-sale was incompetent to buy and hold a tax title, he cannot make a valid assignment.[8]

(ii) *Mode and Sufficiency.* If the statute prescribes no formalities for the assignment of tax certificates, almost any form of transfer will be sufficient which shows the assignor's intention to transfer his entire right and interest.[9] These certificates, however, are not negotiable and therefore do not pass by mere delivery,[10] nor, unless permitted by statute, by indorsement and delivery.[11] In some states it is provided by law that such certificates shall be "assignable by indorsement," and this is held to make them transferable by a mere indorsement in blank with delivery to the assignee.[12] If the statute so requires, as is some-

So. 482, holding that a purchaser of property at a tax-sale, who notifies the occupant of his purchase and, on being informed that the tax has been paid and that the owner has the receipt, repeatedly requests the latter to produce the receipt and makes all efforts to secure such production without avail, cannot be held in damages for taking the proceedings authorized by the statute to be put in possession, as he is protected by the principles of *damnum absque injuria* and *volenti non fit injuria*; but when, after the occupant is ejected, full evidence is exhibited to the purchaser of the payment of the tax for which the sale was made, with a demand for dismissal of the proceedings, the refusal of the purchaser, compelling the owner to resort to an injunction suit in order to protect the property, and keeping him out of possession, places the purchaser in the wrong and makes him liable for all damages subsequently accruing.

4. Bowns *v.* May, 120 N. Y. 357, 24 N. E. 947; Rothchild *v.* Rollinger, 32 Wash. 307, 73 Pac. 367.

5. Billings *v.* McDermott, 15 Fla. 60; Sapp *v.* Morrill, 8 Kan. 677. See also Kruger *v.* Wood County, 44 Wis. 605.

A tax-sale certificate is assignable under a statute providing for the payment of redemption money to the purchaser or holder of the certificate "or assigns." Lincoln Mortg., etc., Co. *v.* Davis, 76 Kan. 639, 92 Pac. 707.

6. Shoat *v.* Walker, 6 Kan. 65; Swope *v.* Saine, 23 Fed. Cas. No. 13,705, 1 Dill. 416.

7. Hagaman *v.* Cloud County, 19 Kan. 394.

8. Jackson *v.* Jacksonport, 56 Wis. 310, 14 N. W. 296. And see Wilson *v.* Wood, 10 Okla. 279, 61 Pac. 1045.

9. Sanders *v.* Ransom, 37 Fla. 457, 20 So. 530; McFadden *v.* Goff, 32 Kan. 415, 4 Pac. 841; Leavitt *v.* Bell, 55 Nebr. 57, 75 N. W. 524.

But a mere memorandum, unsigned and indefinite, is not sufficient evidence of an assignment to support a tax deed in the name of another than the purchaser. Florida Sav. Bank *v.* Brittain, 20 Fla. 507.

Assignment by separate writing see Capehart *v.* McGahey, 132 Ala. 334, 31 So. 503.

Formal assignment without attaching certificate see Root *v.* Beymer, 146 Mich. 692, 110 N. W. 57.

Quitclaim deed as assignment see Flowers *v.* Jernigan, 116 Ala. 516, 22 So. 853; Boardman *v.* Boozewinkel, 121 Mich. 320, 80 N. W. 37; Leavitt *v.* Bell, 55 Nebr. 57, 75 N. W. 524; State *v.* Winn, 19 Wis. 304, 88 Am. Dec. 689.

Defects in the assignment cannot be alleged after the statutory period of limitations has run. Haseltine *v.* Simpson, 58 Wis. 579, 17 N. W. 332.

10. Horn *v.* Garry, 49 Wis. 464, 5 N. W. 897; Eaton *v.* Manitowoc County, 44 Wis. 489; Capron *v.* Adams County, 43 Wis. 613.

11. White *v.* Brooklyn, 122 N. Y. 53, 25 N. E. 243.

12. *Colorado.*— Rio Grande County *v.* Whelen, 28 Colo. 435, 65 Pac. 38.

Illinois.— Jones *v.* Glos, 236 Ill. 178, 86 N. E. 282; Larson *v.* Glos, 235 Ill. 584, 85 N. E. 926 [*reversing* 138 Ill. App. 412], holding that under Hurd Rev. St. (1905) c. 120, § 207, the writing of the name of the holder on the back of a tax certificate, with delivery of the certificate to the transferee, constitutes an effective transfer of the right and title of the original purchaser, and authorizes the transferee to write a formal assignment above the signature, if necessary.

Iowa.— American Exch. Nat. Bank *v.* Crooks, 97 Iowa 244, 66 N. W. 168; Swan *v.* Whaley, 75 Iowa 623, 35 N. W. 440.

Missouri.— Chrisman *v.* Hough, 146 Mo. 102, 47 S. W. 941; Pitkin *v.* Shacklett, 106

times the case, it is essential to an assignment that it shall be acknowledged,[13] and recorded.[14]

(III) *Who May Take Assignment.* Any person who is disqualified from purchasing at a tax-sale, either by reason of his title to the property or his fiduciary relation to the owner,[15] is equally disqualified from taking an assignment of the certificate of purchase, and if he does so, it merely amounts to a redemption.[16] Where municipal corporations are prohibited by law from taking assignments of tax certificates, an assignment to a town or other municipality is absolutely void, and if it in turn assigns the certificate to a stranger, he acquires no title as against the owner of the land.[17]

(IV) *Rights of Assignees.* The assignee of a tax certificate becomes invested with all the rights and interests of his assignor; he becomes entitled to the redemption money, if the same is paid, or to a deed if it is not.[18] But he can acquire no greater interest than his assignor had at the time, and hence takes nothing as against a prior assignee of the certificate in good faith or against one claiming an interest in the land previously granted by the assignor.[19] More-

Mo. 571, 17 S. W. 641; Pitkin *v.* Reibel, 104 Mo. 505, 16 S. W. 244.

Wisconsin.— Smith *v.* Todd, 55 Wis. 459, 13 N. W. 488; Hyde *v.* Kenosha County, 43 Wis. 129.

See 45 Cent. Dig. tit. "Taxation," § 1481.

The word "indorsement" means the writing of the name of the holder on the back of the certificate, under a statute authorizing the assignment of tax certificates by indorsement. Jones *v.* Glos, 236 Ill. 178, 86 N. E. 282; Larson *v.* Glos, 235 Ill. 584, 85 N. E. 926 [*reversing* 138 Ill. App. 412]. But see Territory *v.* Perea, 6 N. M. 531, 30 Pac. 928.

Place of indorsement immaterial.—Although the statute authorizes the assignment of a tax certificate by an indorsement "on the back thereof," it is equally valid when written across the face. Potts *v.* Cooley, 56 Wis. 45, 13 N. W. 682.

13. Williamson *v.* Hitner, 79 Ind. 233; Mattocks *v.* McLain Land, etc., Co., 11 Okla. 433, 68 Pac. 501; Wilson *v.* Wood, 10 Okla. 279, 61 Pac. 1045.

14. Smith *v.* Stephenson, 45 Iowa 645; Territory *v.* Perea, 6 N. M. 531, 30 Pac. 928; White *v.* Brooklyn, 122 N. Y. 53, 25 N. E. 243. *Compare* Swan *v.* Whaley, 75 Iowa 623, 35 N. W. 440.

15. See *supra*, XI, H, 1, 2.

16. *Illinois.*— Busch *v.* Huston, 75 Ill. 343.

Iowa.— Bowman *v.* Eckstien, 46 Iowa 583.

Kansas.— Wiswell *v.* Simmons, 77 Kan. 622, 95 Pac. 407.

Missouri.— Kohle *v.* Hobson, 215 Mo. 213, 114 S. W. 952.

Wisconsin.— Bennett *v.* Keehn, 57 Wis. 582, 15 N. W. 776; Bassett *v.* Welch, 22 Wis. 175.

See 45 Cent. Dig. tit. "Taxation," § 1481. See also *supra*, XII, C, 6.

But *compare* Arthurs *v.* King, 95 Pa. St. 167.

A tenant in common cannot acquire an independent title against his cotenants, where the land held in common is sold for taxes, by taking an assignment of the purchaser's certificate before the time for redemption has expired. Lloyd *v.* Lynch, 28 Pa. St. 419, 70 Am. Dec. 137.

Merger of tax title in fee.—An assignment of a tax certificate to one who, subsequently to the sale, has become the owner of the patent title, will not discharge the land from the lien of prior delinquent taxes. Bowman *v.* Eckstien, 46 Iowa 583.

Purchase by county officer. — Although county officers are strictly prohibited from buying at tax-sales, this does not necessarily prevent them from taking assignments of the tax certificates from the original purchasers, if done in good faith. Coleman *v.* Hart, 37 Wis. 180. And see Guthrie *v.* Harker, 27 Fed. 586.

17. Irvin *v.* Smith, 60 Wis. 175, 18 N. W. 724; Wright *v.* Zettel, 60 Wis. 168, 18 N. W. 760; Jackson *v.* Jacksonport, 56 Wis. 310, 14 N. W. 296; Dreutzer *v.* Smith, 56 Wis. 292, 14 N. W. 465; Eaton *v.* Manitowoc County, 44 Wis. 489.

18. *Arkansas.*—Bird *v.* Jones, 37 Ark. 195.

Colorado.— Rio Grande County *v.* Whelen, 28 Colo. 435, 65 Pac. 38.

Iowa.— Smith *v.* Stephenson, 45 Iowa 645; Lloyd *v.* Bunce, 41 Iowa 660.

Kansas.— McCauslin *v.* McGuire, 14 Kan. 234; City Trust Co. *v.* Tilton, 6 Kan. App. 442, 49 Pac. 796.

Nebraska.— Green *v.* Hellman, 61 Nebr. 875, 86 N. W. 912.

See 45 Cent. Dig. tit. "Taxation," § 1481.

19. Smith *v.* Todd, 55 Wis. 459, 13 N. W. 488; Horn *v.* Garry, 49 Wis. 464, 5 N. W. 897.

Agreement not to take deed.—A purchaser of a tax-sale certificate containing an indorsement by a prior purchaser not to procure a treasurer's deed of the premises, which such person had sold by warranty deed to another, will be enjoined from taking a deed under it. Soukup *v.* Union Inv. Co., 84 Iowa 448, 51 N. W. 167, 35 Am. St. Rep. 317.

Assignment of original and of duplicate.— A purchaser of a duplicate certificate of tax-sale cannot acquire a title under it as against, or superior to, that of a subsequent assignee of the original certificate, who purchased it and obtained a deed thereon with-

over the assignee takes the certificate subject to any infirmities or imperfections which would have availed against it in the hands of the original purchaser.[20]

(v) *Tax Certificates Held by County.* Where land is bid in by a county at tax-sale and certificates issued to the county, these can be transferred only by due authority of law;[21] and the statutes relating to such transfers are construed with some strictness in regard to the particular officer who shall make or execute the transfer,[22] the grant of necessary authority to him to do so,[23] the terms of the assignment and price to be paid by the purchaser,[24] and the mode and manner of the assignment.[25] As in other cases, the assignee succeeds to just the rights held by his assignor, the county, no more and no less.[26]

b. Grantees of Tax Purchasers — (i) *In General.* Even before the expiration of the time allowed for redemption, the tax purchaser may convey his interest otherwise than by an assignment of the certificate of sale.[27] After that time, he may dispose of it like any other title to any grantee;[28] but the nature of the title

out notice of the issue of the duplicate or of the rights of the holder thereof. Griswold *v.* Wilson, 36 Iowa 156.

20. *Indiana.* — Baldwin *v.* Shill, 3 Ind. App 291, 29 N. E. 619.

Iowa.—Besore *v.* Dosh, 43 Iowa 211; Light *v* West, 42 Iowa 138.

Kansas.— Prizer *v.* Taylor, 3 Kan. App. 690, 44 Pac. 902.

Tennessee.—Hubbard *v.* Godfrey, 100 Tenn. 150, 47 S. W. 81.

United States.— Singer Mfg. Co. *v.* Yarger, 12 Fed 487, 2 McCrary 583.

See 45 Cent Dig tit. "Taxation," § 1481.

Fraud in tax-sale. — Where fraud in the tax-sale has been established, and the assignment of the certificate is also alleged to have been fraudulent, the assignee must show affirmatively that he is a *bona fide* purchaser for value Light *v.* West, 42 Iowa 138. See also Curtis *v.* Smith, 42 Iowa 665.

21. Swope *v.* Saine, 23 Fed. Cas. No. 13,705, 1 Dill. 416.

22. Stafford *v.* Lauver, 49 Kan. 690, 31 Pac. 302; Morrill *v.* Douglass, 14 Kan. 293; State *v.* Winn, 19 Wis. 304, 88 Am. Dec. 689.

23. Woodman *v.* Clapp, 21 Wis. 350.

Executory contracts for sale.— As a general rule, county authorities have power only to sell tax certificates outright and for cash, not to make executory contracts of sale. Morrill *v.* Douglass, 14 Kan. 293; Smith *v.* Barron County, 44 Wis. 686. But see Douglass *v.* Wilson, 31 Kan. 565, 3 Pac. 330.

24. Noble *v.* Cain, 22 Kan. 493; Morrill *v.* Douglass, 14 Kan. 293; Smith *v.* Barron County, 44 Wis. 686, no authority to sell on credit or for anything else than money.

Consideration.— Taxes due before the assignment of a certificate of tax-sale to a county should be included in the consideration for the assignment. Colline *v.* Jolley, 79 Kan. 695, 100 Pac. 477. But a tax deed is not void because a certificate was assigned by the county for slightly less than the amount necessary to redeem, where the discrepancy is caused by an error in computation, and if it is traceable to the amount charged as interest the presumption is that it resulted from such an error; and such a discrepancy will not be regarded as substantial, if the interest charged is less than would result from computation in which the fractions of a cent are carried out, and greater than would result from a similar computation in which such fractions are rejected. Troyer *v.* Beedy, 79 Kan. 502, 100 Pac. 476.

25. McLeod *v.* Matteson, 99 Minn. 46, 108 N. W. 290 (assignment of several pieces of land in one instrument); Potts *v.* Cooley, 56 Wis. 45, 13 N. W. 682 (holding that an assignment written on the face of the certificate is not invalid because the statute directs an assignment to be indorsed on the back); Eaton *v.* Manitowoc County, 44 Wis. 489 (written assignment is necessary).

Stamp instead of signature. — It is not necessary that an assessment shall be in the proper handwriting of the officer authorized to make it; his name and official title may be stamped on the paper. Dreutzer *v.* Smith, 56 Wis. 292, 14 N. W. 465; State *v.* Nelson, 56 Wis. 290, 14 N. W. 442.

26. Rio Grande County *v.* Whelen, 28 Colo. 435, 65 Pac. 38; Shelley *v.* Towle, 16 Nebr. 194, 20 N. W. 251; Hall *v.* Baker, 74 Wis. 118, 42 N. W. 104; Kruger *v.* Wood County, 44 Wis. 605.

Right to foreclose lien.—Where the law is such that a county, on purchasing land at a tax-sale, does not become entitled to a deed but only to foreclose the lien of the certificate, as in the case of a mortgage, the county's assignee only acquires the same right. Huss *v.* Craig, 124 N. C. 743, 32 S. E. 974; Collins *v.* Bryan, 124 N. C. 738, 32 S. E. 975.

27. Scovil *v.* Kelsey, 46 Ill. 344, 95 Am. Dec. 415; Lloyd *v.* Bunce, 41 Iowa 660, both of which also hold that if the redemption money is paid to the tax purchaser, his grantee may maintain assumpsit against him for the amount. And see Jernigan *v.* Flowers, 94 Ala 508, 10 So. 437; Scott *v.* Watkins, 22 Ark. 556, holding that such a grantee, although not in possession, may bring a bill for confirmation of title under the statute.

Quitclaim deed as assignment of certificate of purchase see *supra*, XIV, A, 7, a, (II), note 9.

28. Shelley *v.* Smith, 97 Iowa 259, 66 N. W. 172 (sale of tax title to county officer who

is not changed by such a transfer, and the grantee must generally be prepared to maintain its validity, the same as the original purchaser.[29]

(II) *Bona Fides and Notice of Defects.* One who takes a conveyance of a tax title can claim no benefit from it if he had actual knowledge of facts which render it invalid,[30] or if the records show on their face fatal defects or irregularities.[31] But a purchaser in good faith and for value is protected against latent equities,[32] and against the consequences of fraud in the conduct of the tax-sale in which he did not participate and of which he had no knowledge,[33] and also against errors or irregularities in the proceedings of which he had no notice and of which the records give no hint.[34]

(III) *Purchase From State or County.* Where the title to land under a tax-sale has become fully vested in the state or a municipality, one who thereafter purchases from the state or municipality must see to it that his deed is properly executed by the officers having authority for that purpose,[35] in the manner and with the formalities prescribed by law.[36] It is competent for the legislature

could not have purchased at the tax-sale); Wygant *v.* Dahl, 26 Nebr. 562, 42 N. W. 735 (merger of tax title on conveyance of it to owner of fee).

Purchase by tenant in common from purchaser at tax-sale as not amounting to a mere renunciation in favor of the estate of an undivided half interest see Duson *v.* Roos, 123 La. 835, 49 So. 590, 131 Am. St. Rep. 375.

29. *Illinois.*—Warden *v.* Glos, 236 Ill. 511, 86 N. E. 116, holding that a grantor claiming under a void tax deed can convey nothing as against the true owner.

Kansas.— Harris *v.* Curran, 32 Kan. 580, 4 Pac. 1044.

New Hampshire.—Wells *v.* Jackson Iron Mfg. Co., 47 N. H. 235, 90 Am. Dec. 575, holding that a quitclaim deed executed by a tax collector's grantee is color of title, although the collector's deed conveyed no title.

Pennsylvania.—Goettel *v.* Sage, 117 Pa. St. 298, 10 Atl. 889, rescission of contract of sale on failure of tax title.

Virginia.—Taylor *v.* Stringer, 1 Gratt. 158.

United States.—Curts *v.* Cisna, 6 Fed. Cas. No. 3,507, 7 Biss. 260.

See 45 Cent. Dig. tit. "Taxation," § 1485.

A grantee of one who has conspired to eliminate competition in bidding at a tax-sale must deny notice of the misconduct of his grantor, whether alleged or not, and the burden of proof thereof is on the party seeking relief against him, but he must establish payment of consideration. Lohr *v.* George, 65 W. Va. 241, 64 S. E. 609.

30. Cooper *v.* Falk, 109 La. 474, 33 So. 567; Coney *v.* Timmons, 16 S. C. 378; Yancey *v.* Hopkins, 1 Munf. (Va.) 419.

Adverse possession as notice.— See Leas *v.* Garverich, 77 Iowa 275, 42 N. W. 194. But during the period allowed for redemption the continued possession of the owner is not inconsistent with the right of the tax purchaser, and hence is no notice, to one who purchases the tax title during that time, of any infirmity in the tax-sale. Jefferson Land Co. *v.* Grace, 57 Ark. 423, 21 S. W. 877; Major *v.* Brush, 7 Ind. 232.

Purchaser under quitclaim deed.— Where one by quitclaim deed purchases a defective tax title, he buys at his own risk and will be deemed to have notice of the defects in the title. Leland *v.* Isenbeck, 1 Ida. 469.

Neglect of tax title purchaser to record his deed see Billings *v.* Stark, 15 Fla. 297.

31. Sorenson *v.* Davis, 83 Iowa 405, 49 N. W. 1004; Simpson *v.* Edmiston, 23 W. Va. 675.

32. Jefferson Land Co. *v.* Grace, 57 Ark. 423, 21 S. W. 877; Morris *v.* Gregory, 80 Kan. 626, 103 Pac. 137.

33. St. Louis, etc., Lumber, etc., Co. *v.* Godwin, 85 Ark. 372, 108 S. W. 516; Jefferson Land Co. *v.* Grace, 57 Ark. 423, 21 S. W. 877; Lamb *v.* Davis, 74 Iowa 719, 39 N. W. 114; Martin *v.* Ragsdale, 49 Iowa 589; Huston *v.* Markley, 49 Iowa 162; Ellis *v.* Peck, 45 Iowa 112; Watson *v.* Phelps, 40 Iowa 482; Sibley *v.* Bullis, 40 Iowa 429; Van Shaack *v.* Robbins, 36 Iowa 201. But *compare* Merrett *v.* Poulter, 96 Mo. 237, 9 S. W. 586.

A deed acquired by a conspirator to prevent competition in bidding at a tax-sale will not be set aside as to his grantee, where the latter is a *bona fide* purchaser for a valuable consideration. Lohr *v.* George, 65 W. Va. 241, 64 S. E. 609.

34. *Arkansas.* — Jefferson Land Co. *v.* Grace, 57 Ark. 423, 21 S. W. 877.

Iowa.— Martin *v.* Ragsdale, 49 Iowa 589.

Pennsylvania.— Gamble *v.* Central Pennsylvania Lumber Co., 225 Pa. St. 288, 74 Atl. 69.

West Virginia. — Wingfield *v.* Neall, 60 W. Va. 106, 54 S. E. 47, 116 Am. St. Rep. 882.

United States.— Atlanta Nat. Bldg., etc., Assoc. *v.* Gilmer, 128 Fed. 293 [*reversed* on the facts in 136 Fed. 539, 69 C. C. A. 315].

See 45 Cent. Dig. tit. "Taxation," § 1487.

But *compare* Gonzalia *v.* Bartelsman, 143 Ill. 634, 32 N. E. 532.

35. Everett *v.* Boyington, 29 Minn. 264, 13 N. W. 45; Powell *v.* Jenkins, 14 Misc. (N. Y.) 83, 35 N. Y. Suppl. 265; Rice *v.* Ashland Real Estate, etc., Co., 72 Wis. 103, 38 N. W. 183; Haseltine *v.* Donahue, 42 Wis. 576.

36. Hier *v.* Rullman, 22 Kan. 606.

to enact that a title so acquired from the state shall be indefeasible and unimpeachable;[37] but in the absence of such a statute, the purchaser will take the title in the same condition in which the state held it and subject to the same equities and defenses.[38]

B. Actions Concerning Tax Titles[39] — **1. Suits For Possession — a. Recovery of Possession by Tax Purchaser** — (i) *In General.* When the time for redemption has expired and the tax purchaser has received his deed, he becomes entitled to the possession of the premises,[40] and he may take possession without suit if he can do so peaceably.[41] But if surrender of possession is refused, he may maintain a suit therefor, in the form of ejectment or other appropriate proceeding,[42] in a court of competent jurisdiction at law,[43] provided he has received his deed,[44] and on his complying with such conditions precedent as the statute may prescribe.[45] In such a suit he recovers on the strength of his tax title, and need not go behind the title of the person to whom the land was assessed, or, in the first instance, support the regularity of the prior proceedings.[46]

(ii) *Summary Proceedings.* At common law the holder of a tax title cannot resort to summary proceedings or a rule to recover the possession, but must institute a regular and formal suit;[47] nor is it thought competent for the legislature to provide for putting him in possession forcibly and without some kind of judicial hearing.[48] But in some states the laws now provide for the recovery of possession

37. Marble *v.* Fife, 69 Miss. 596, 13 So. 842.

38. Smith *v.* Auditor-Gen., 138 Mich. 582, 101 N. W. 807; Lyman *v.* Philadelphia, 56 Pa. St. 488; Pinkerton *v.* Fenelon, 131 Wis. 440, 111 N. W. 220; Martin *v.* Barbour, 140 U. S. 634, 11 S. Ct. 944, 35 L. ed. 546. See also *supra*, XIV, A, 3, b.

A grantee in a void commissioner's deed of land forfeited for taxes, who subdivides and plats the land and pays taxes assessed thereon as platted, does not thereby cut off the rights of the true owners in whom the title remained and who paid taxes under the correct assessment. Morris *v.* Breedlove, 89 Ark. 296, 116 S. W. 223.

39. Actions to foreclose right of redemption see *supra*, XII, A, 5.

Collateral attack on tax-sale see *supra*, XI, N, 3.

40. See *supra*, XIV, A, 2, d, (i).

41. Martin *v.* Langenstein, 43 La. Ann. 789, 9 So. 507.

42. Kansas State Agricultural College *v.* Linscott, 30 Kan. 240, 1 Pac. 81; Oswego County *v.* Betts, 6 N. Y. Suppl. 934; Wisconsin River Land Co. *v.* Paine Lumber Co., 130 Wis. 393, 110 N. W. 220.

43. State *v.* Judge Orleans Parish Fourth Dist. Ct., 27 La. Ann. 704.

Jurisdiction of equity.— In the absence of a statute establishing a different rule, a tax title is a strictly legal title, and the holder cannot invoke the aid of equity either to reform his deed, perfect an infirm title, or enforce a valid one. Altes *v.* Hinckler, 36 Ill. 265, 85 Am. Dec. 406; Gwynne *v.* Niswanger, 20 Ohio 556. See also Pitre *v.* Haas, 110 La. 163, 34 So. 361, as to refusal of relief to tax title claimant who does not come into court with clean hands.

44. Costley *v.* Allen, 56 Ala. 198; Hibbard *v.* Brown, 51 Ala. 469 (holding that a certificate of purchase at a tax-sale does not vest such title in the purchaser as will entitle him to maintain ejectment against the former owner, but for this purpose it is necessary that he shall have received his deed); Grimm *v.* O'Connell, 54 Cal. 522 (holding that the purchaser must recover, if at all, on his tax deed, supported by evidence of the regularity of the prior proceedings, if the same are attacked).

45. Meyer *v.* Fountain, 34 La. Ann. 987; Hewitt *v.* Week, 59 Wis. 444, 18 N. W. 417, holding that until a tax deed is properly recorded the grantee cannot maintain ejectment.

Payment of subsequent taxes see Beard *v.* Sharrick, 67 Mich. 321, 34 N. W. 585; Sinclair *v.* Learned, 51 Mich. 335, 16 N. W. 672.

Notice to former owner see Griffin *v.* Jackson, 145 Mich. 23, 108 N. W. 438; Briggs *v.* Gulich, 143 Mich. 457, 107 N. W. 269.

46. McCoy *v.* Michew, 7 Watts & S. (Pa.) 386; Bigler *v.* Karns, 4 Watts & S. (Pa.) 137.

Showing plaintiff's right to sue as assignee of tax purchaser see Wilcox *v.* Leach, 123 N. C. 74, 31 S. E. 374.

Payment as defense to purchaser's suit see Alspaugh *v.* Reynolds, 7 Lack. Leg. N. (Pa.) 301.

Proving prior proceedings.— Evidence that defendant had personal property out of which the tax might have been collected is not admissible. Geer *v.* Brown, 126 N. C. 238, 35 S. E. 470. But in Pennsylvania, where ejectment is brought on a tax title more than five years after the sale, the purchaser must show an assessment of the taxes by competent authority and that they were due and unpaid over a year before the sale took place. Rupert *v.* Delp, 7 Pa. Super. Ct. 209.

47. Steltz *v.* Morgan, 16 Ida. 368, 101 Pac. 1057, 28 L. R. A. N. S. 398; Schoembs *v.* Krieger, 33 La. Ann. 420; Mayenno *v.* Millaudon, 32 La. Ann. 1123; Fischel *v.* Mercier, 32 La. Ann. 704.

48. Calhoun *v.* Fletcher, 63 Ala. 574; May-

in these cases by summary proceedings,[49] as by means of an order requiring the sheriff to put the purchaser in possession,[50] or a writ of assistance similar to that used in mortgage foreclosure cases,[51] or a writ of possession,[52] or an action of forcible entry and unlawful detainer.[53]

b. Ejectment Against Tax Purchaser. Ordinarily an action of ejectment cannot be employed to destroy a tax title until the purchaser is in possession.[54] But in the case of vacant and unoccupied lands it is held in several states that the tax deed draws after it a constructive possession, and that the recording of such a deed is a sufficient assertion of hostile title to warrant ejectment by the former owner.[55] In any case, however, the owner's suit must be brought within the time limited by law,[56] and he must tender or offer to pay the taxes due, if the statute so directs.[57]

2. Actions to Confirm or Quiet Tax Titles — a. Right of Action in General. Unless by the aid of a statute, a bill in equity does not lie to confirm or quiet a tax title, the only remedy being at law.[58] But in many states the statutes now give to the purchaser at a tax-sale, if the deed is in his name,[59] or to his assignee

enno *v.* Millaudon, 32 La. Ann. 1123; Fischel *v.* Mercier, 32 La. Ann. 704. See also South Louisiana Land Co. *v.* Norgress, 120 La. 168, 45 So. 49, holding that where an owner and tax debtor remain in possession after sale for a number of years, the remedy of the tax title owner to oust the former owner is provided by statute, and trespass is not a proper remedy.

49. People *v.* Andrews, 52 N. Y. 445; Matter of Cary, 37 N. Y. App. Div. 631, 56 N. Y. Suppl. 6.

50. State *v.* Morrison, 44 S. C. 470, 22 S. E. 605.

51. San Jose *v.* Fulton, 45 Cal. 316; People *v.* Grant, 45 Cal. 97; People *v.* Doe, 31 Cal. 220; Moss *v.* Mayo, 23 Cal. 421; G. F. Sanborn Co. *v.* Johnson, 148 Mich. 405, 111 N. W. 1091; Beck *v.* Finn, 122 Mich. 21, 80 N. W. 785; Roberts *v.* Loxley, 121 Mich. 63, 79 N. W. 978; Mann *v.* Carson, 120 Mich. 631, 79 N. W. 941; Belmar *v.* Kennedy, 53 N. J. Eq. 466, 32 Atl. 1058. *Compare* Steltz *v.* Morgan, 16 Ida. 368, 101 Pac. 1057, 28 L. R. A. N. S. 398, holding that a tax deed has no more force as a writ of assistance to procure the possession of real estate than any other deed.

Where the question of title is involved, a writ of assistance is not the appropriate proceeding in favor of a purchaser at a tax-sale to recover possession of the property from a purchaser at a previous sale. Flint Land Co. *v.* Grand Rapids Terminal R. Co., 147 Mich. 627, 111 N. W. 192.

After change of possession.—Where it appears that plaintiff in ejectment had taken possession of lands under a void tax deed, and put in a tenant, who surrendered possession to defendant, and defendant showed an equitable interest in the land not connected with plaintiff's claim of title, plaintiff's only remedy is to recover possession by summary proceedings. Shaw *v.* Hill, 83 Mich. 322, 47 N. W. 247, 21 Am. St. Rep. 607.

52. Bloomstein *v.* Brien, 3 Tenn. Ch. 55.

53. Wilkerson *v.* Hudson, 71 Miss. 130, 13 So. 866; McLemore *v.* Scales, 68 Miss. 47, 8 So. 844; Leavenworth *v.* Crittenden, 62 Miss. 573; Crittenden *v.* Leavenworth, 62 Miss. 32. But see Kelley *v.* Hunter, 12 Ohio 216.

54. Kreamer *v.* Voneida, 213 Pa. St. 74, 62 Atl. 518; Rothchild *v.* Rollinger, 32 Wash. 307, 73 Pac. 367; Lombard *v.* Culbertson, 59 Wis. 433, 18 N. W. 399. And see Vail *v.* Richards, 62 Fed. 720, 10 C. C. A. 614.

55. Tilotson *v.* Webber, 96 Mich. 144, 55 N. W. 837; Heinmiller *v.* Hatheway, 60 Mich. 391, 27 N. W. 558; Anderson *v.* Courtright, 47 Mich. 161, 10 N. W. 183; Vastine *v.* Laclede Land, etc., Co., 135 Mo. 145, 36 S. W. 374; Callahan *v.* Davis, 103 Mo. 444, 15 S. W. 433; Wisconsin River Land Co. *v.* Paine Lumber Co., 130 Wis. 393, 110 N. W. 220; Cornell University *v.* Mead, 80 Wis. 387, 49 N. W. 815; Lombard *v.* Culbertson, 59 Wis. 433, 18 N. W. 399; Hewitt, Jr. *v.* Butterfield, 52 Wis. 384, 9 N. W. 15; Parish *v.* Eager, 15 Wis. 532; Knox *v.* Cleveland, 13 Wis. 245; Hill *v.* Kricke, 11 Wis. 442. See also Callahan *v.* Davis, 103 Mo. 444, 15 S. W. 433.

56. Loomis *v.* Semper, 38 Misc. (N. Y.) 567, 78 N. Y. Suppl. 74; Dickson *v.* Burckmyer, 67 S. C. 526, 46 S. E. 343.

57. Harvey *v.* Douglass, 73 Ark. 221, 83 S. W. 946.

58. Bell *v.* Johnson, 111 Ill. 374; Gwynne *v.* Niswanger, 20 Ohio 556; Douglas *v.* Dangerfield, 10 Ohio 152. But *compare* Powers *v.* Bottineau First Nat. Bank, 15 N. D. 466, 109 N. W. 361, holding that the mere fact that the rule of *caveat emptor* applies to purchasers at tax-sales is no ground for refusing to exercise in their behalf the usual principles in equitable actions.

59. Ingram *v.* Sherwood, 75 Ark. 176, 87 S. W. 435, holding that a purchaser of a tax title who borrows money to pay for the land from another, and directs that the land be conveyed to the latter as security for the loan, has such an equitable title as will support an action by him to confirm the tax title so acquired; and that the fact that he has agreed to sell the land as soon as he should procure the decree of confirmation does not deprive the court of jurisdiction. See also St. Louis Refrigerator, etc., Co. *v.* Thornton, 74 Ark. 383, 86 S. W. 852.

or grantee,[60] the right to maintain a bill to confirm and quiet his title,[61] or a bill of peace or bill *quia timet*,[62] or a bill to bar and foreclose the interests of the original owner and other claimants.[63] It is generally not necessary to such a bill that the complainant shall be in actual possession;[64] but he cannot institute and maintain the action until he has obtained his deed,[65] or at least until the time allowed for redemption has fully expired.[66] The ordinary rules, unless specially varied by statute, apply to such actions in respect to the joinder of parties and the right to defend,[67] and in respect to the service or publication of summons or notice.[68] A judgment for plaintiff concludes all persons bound thereby from afterward questioning the validity of the tax deed.[69]

b. Defenses to Purchaser's Suit. Where a tax purchaser sues for possession or to confirm or quiet his title he of course puts that title in issue, and the original owner may avail himself, by way of defense, of any matters sufficient to overthrow the tax title, such as the non-liability of the land to taxation, the previous payment of the taxes, jurisdictional defects in the prior proceedings, or fatal irregularities in the tax-sale.[70]

60. Long *v.* Boast, 153 Ala. 428, 44 So. 955 (grantee by quitclaim deed, after expiration of period of redemption); Finney *v.* Ford, 22 Wis. 173 (holding that the grantee of the grantee in a tax deed is his "assign" within the meaning of the statute relating to the confirmation of tax titles).

61. Long *v.* Boast, 153 Ala. 428, 44 So. 955; Peterson *v.* Kittredge, 65 Miss. 33, 3 So. 65, 5 So. 824; Love *v.* Shields, 3 Yerg. (Tenn.) 405; Bardon *v.* Land, etc., Imp. Co., 157 U. S. 327, 15 S. Ct. 650, 39 L. ed. 719. And see Goodman *v.* Nester, 64 Mich. 662, 21 N. W. 575.

Bill to remove cloud on tax title.—Where the proper officers of a municipal corporation refuse to cancel upon the tax records assessments for previous years, the grantee in a tax deed may maintain a bill in equity against the municipality to remove the cloud upon his title created by such assessments. District of Columbia *v.* Hufty, 13 App. Cas. (D. C.) 175. But a record title cut off in tax proceedings is not a cloud upon the title acquired through such proceedings, and hence a bill will not lie to remove it at the instance of the tax purchaser. Triangle Land Co. *v.* Nessen, 155 Mich. 463, 119 N. W. 586.

62. Belcher *v.* Mhoon, 47 Miss. 623; Langdon *v.* Templeton, 61 Vt. 119, 17 Atl. 839.

63. Finney *v.* Ford, 22 Wis. 173; Finney *v.* Ackerman, 21 Wis. 268; Grimmer *v.* Sumner, 21 Wis. 179.

64. Scott *v.* Watkins, 22 Ark. 556; Bonnell *v.* Roane, 20 Ark. 114. But *compare* Wals *v.* Grosvenner, 31 Wis. 681 [*overruling* Taylor *v.* Rountree, 28 Wis. 391 (*overruling* Grimmer *v.* Sumner, 21 Wis. 179)].

65. McDaniel *v.* Berger, 89 Ark. 139, 116 S. W. 194; McDonald *v.* Geisendorff, 128 Ind. 153, 27 N. E. 333; Sharpe *v.* Dillman, 77 Ind. 280; Boardman *v.* Boozewinkel, 121 Mich. 320, 80 N. W. 37.

66. Metcalfe *v.* Perry, 66 Miss. 68, 5 So. 232; Langdon *v.* Templeton, 61 Vt. 119, 17 Atl. 839.

67. *Arkansas.* — Thweatt *v.* Howard, 68 Ark. 426, 59 S. W. 764; Black *v.* Percifield, 1 Ark. 472.

Florida.— Bevill *v.* Smith, 25 Fla. 209, 6 So. 62, administrator of original owner as necessary party defendant.

Iowa.— Chandler *v.* Keeler, 46 Iowa 596; Clark *v.* Connor, 28 Iowa 311.

Louisiana.— Slattery *v.* Kellum, 114 La. 282, 38 So. 170.

United States.— Hintrager *v.* Nightingale, 36 Fed. 847, defendants in action where tax purchaser claims undivided interest.

Parties generally see PARTIES, 30 Cyc. 1.

Property in possession of receiver.— One who has bought at a tax-sale land in the charge of a receiver in an equity suit must ask for possession or for leave to bring suit, by petition *pro interesse suo*, filed in the pending cause, and he cannot maintain an original bill without leave. Young *v.* Vanhooser, 6 Lea (Tenn.) 136.

68. Porter *v.* Tallman, 68 Ark. 211, 56 S. W. 1071; Genther *v.* Fuller, 36 Iowa 604; Little *v.* Chambers, 27 Iowa 522; Abell *v.* Cross, 17 Iowa 171.

Process generally see PROCESS, 32 Cyc. 412.

69. Warner *v.* Trow, 36 Wis. 195.

70. *Arkansas.* — Thweatt *v.* Howard, 68 Ark. 426, 59 S. W. 764; Cooper *v.* Freeman Lumber Co., 61 Ark. 36, 31 S. W. 981, 32 S. W. 494; Townsend *v.* Martin, 55 Ark. 192, 17 S. W. 875, failure to publish notice of tax-sale for required length of time.

California.— Tully *v.* Bauer, 52 Cal. 487, defect in notice.

Indiana.— Skelton *v.* Sharp, 161 Ind. 383, 67 N. E. 535; Sohn *v.* Wood, 75 Ind. 17, tax-sale annulled and set aside.

Iowa.— Hawley *v.* Griffin, 121 Iowa 667, 92 N. W. 113, 97 N. W. 86 (as to right to plead right of redemption); Plympton *v.* Sapp, 55 Iowa 195, 7 N. W. 498 (tax-sale held on day not authorized by law); Gaylord *v.* Scarff, 6 Iowa 179 (payment of tax before sale).

Kansas.— Will *v.* Ritchie, 61 Kan. 715, 60 Pac. 734 (counter-claim for rents); Barker *v.* Mecartney, 10 Kan. App. 130, 62 Pac. 439 (defective description in tax deed).

Louisiana.— Harris *v.* Natalbany Lumber Co., 119 La. 978, 44 So. 806 (dual assessment or payment of taxes prior to sale);

c. Payment or Tender as Condition to Right to Defend. In some of the states the laws are so framed as to require a tender or deposit of an amount sufficient to cover the taxes and costs, as a condition to the right to contest a tax title, and confirmation of title cannot be prevented unless such tender or deposit is made.[71] Statutes of this kind will not be construed retrospectively;[72] nor can they constitutionally apply to cases where the defense calls in question the validity of the tax or goes to the groundwork of the tax proceedings.[73] But as applied to merely technical defenses or such as are based only on irregularities in the proceedings, they are valid.[74] It has been held, however, that a law of this character does not apply to the defense of fraud in the conduct of the tax-sale;[75] or where the action is brought before the expiration of the time for redemption;[76] or where, from the confusion of different parcels of land in the sale, defendant cannot ascertain how much to tender.[77]

3. Actions to Impeach or Vacate Tax Titles — a. Right to Attack Tax Title — (i) *In General.* The owner of land sold for taxes, or those who have succeeded to his rights, may impeach and overturn the tax title[78] by an action to set aside

Doullut *v.* Smith, 117 La. 491, 41 So. 913 (previous payment of taxes); Lisso *v.* Unknown Owner, 114 La. 392, 38 So. 282; Boagni *v.* Pacific Imp. Co., 111 La. 1063, 36 So. 129; Fernandez *v.* Smith, 43 La. Ann. 708, 9 So. 482.

Mississippi.— Foote *v.* Dismukes, 71 Miss. 110, 13 So. 879; Osburn *v.* Hyde, 68 Miss. 45, 8 So. 514 (assessment roll not filed according to law); Chrisman *v.* Currie, 60 Miss. 858 (land not taxable); Bell *v.* Coates, 54 Miss. 538 (want of notice).

Missouri.— Brown *v.* Walker, 11 Mo. App. 226, sale of lots *en masse*.

New York.— People *v.* Ladew, 189 N. Y. 355, 82 N. E. 431 [*reversing* 108 N. Y. App. Div. 356, 95 N. Y. Suppl. 1151], 190 N. Y. 543, 82 N. E. 1092 (no notice to redeem); Andrus *v.* Wheeler, 29 Misc. 412, 61 N. Y. Suppl. 983 (wrong conduct of sale); Terrell *v.* Wheeler, 13 N. Y. Civ. Proc. 178 (inadequacy of price no defense).

North Dakota.— Beggs *v.* Paine, 15 N. D. 436, 109 N. W. 322.

Pennsylvania.— Iddings *v.* Carns, 2 Grant 88.

Texas.— Collins *v.* Fergurson, 22 Tex. Civ. App. 552, 56 S. W. 225, inadequacy of price.

Wisconsin.— Lain *v.* Shepardson, 23 Wis. 224; Wilson *v.* Jarvis, 19 Wis. 597, purchaser disqualified from buying at tax-sale.

See 45 Cent. Dig. tit. "Taxation," § 1576.

Waiver of objections.— A waiver by all persons interested in land sold by a collector of taxes of an informality in the sale, after the bringing of a writ of entry by the purchaser at the sale against a person claiming title as a disseisor, will operate, by estoppel, to make good defendant's title as against such persons, but it will not have that effect as against the tenant. Reed *v.* Crapo, 133 Mass. 201.

71. See the statutes of the several states. And see Carter *v.* Hadley, 59 Miss. 130; McMillan *v.* Hogan, 129 N. C. 314, 40 S. E. 63; McKinney *v.* Minnehaha County, 17 S. D. 407, 97 N. W. 15; Paine *v.* Germantown Trust Co., 136 Fed. 527, 69 C. C. A. 303. *Compare* Manwaring *v.* Missouri Lumber, etc., Co., 200 Mo. 718, 98 S. W. 762.

Sufficiency of tender see Cone *v.* Wood, 109 Iowa 260, 79 N. W. 86, 75 Am. St. Rep. 223; Nicodemus *v.* Young, 90 Iowa 423, 57 N. W. 966.

When tender necessary.— See Orono *v.* Veazie, 57 Me. 517, holding that defendant may contest the sufficiency of plaintiff's evidence to establish compliance with the law, without being required to pay or tender the taxes, but must do this if he wishes to introduce evidence on his own behalf.

72. Conway *v.* Cable, 37 Ill. 82, 87 Am. Dec. 240.

73. Immegart *v.* Gorgas, 41 Iowa 439; Eustis *v.* Henrietta, 91 Tex. 325, 43 S. W. 259; Tierney *v.* Union Lumbering Co., 47 Wis. 248, 2 N. W. 289; Philleo *v.* Hiles, 42 Wis 527; Call *v.* Chase, 21 Wis. 511.

Unnecessary tender and deposit regarded as voluntary payment.—Although the tax on which plaintiff's deed was based was void, and it was therefore unnecessary for defendant to tender the amount, yet if he deposits it with the clerk of the court, it is a voluntary payment which cannot be recovered back. Powell *v.* St. Croix County, 46 Wis. 210, 50 N. W. 1013.

74. Knight *v.* Barnes, 25 Wis. 352; Smith *v.* Smith, 19 Wis. 615, 88 Am. Dec. 707; Wakeley *v.* Nicholas, 16 Wis. 588.

75. Corbin *v.* Beebee, 36 Iowa 336.

76. Dayton *v.* Relf, 34 Wis. 86.

77. Phillips *v.* Sherman, 61 Me. 548.

78. Cramer *v.* Armstrong, 28 Colo. 496, 66 Pac. 889; Iowa L. & T. Co. *v.* Pond, 128 Iowa 660, 105 N. W. 119; Burgson *v.* Jacobson, 124 Wis. 295, 102 N. W. 563.

Title necessary to maintain suit see *infra*, XIV, B, 3, a, (III).

The right of parties who have purchased timber cut from lands sold for taxes cannot be litigated in a proceeding by the original owner to set aside the tax-sale and deed issued thereon. Cook *v.* Hall, 123 Mich. 378, 82 N. W. 59.

Action by receiver.—Where property involved in a receivership is sold for taxes, the receiver, if he wishes to attack the sale for irregularities, must institute in the county where the property is situated such appro-

the sale and deed,[79] a bill to quiet title or to remove the cloud from his title,[80] a statutory action to determine adverse claims,[81] or a suit to recover possession of the land, according as one or the other of these remedies may be appropriate to the particular case,[82] brought in a court of competent jurisdiction.[83] But it is a general rule that a tax title cannot be assailed collaterally, but must be attacked, if at all, in a direct action;[84] and hence, for example, the validity of such a title cannot be litigated in a suit to foreclose a mortgage on the land.[85] If, however, defendant, in an action to recover real property, sets up a tax title as that on which he relies, plaintiff may attack and impeach it without the necessity of resorting to a direct action for that purpose.[86]

(II) *Estoppel and Ratification.* One may be estopped to impeach or deny the validity of a tax title by a judgment ordering the sale of the land for nonpayment of taxes, to which he was a party,[87] by a statute making tax deeds conclusive evidence or vesting an unimpeachable title in the purchaser,[88] by his own acts or admissions signifying his recognition of the tax title or ratification of the tax proceedings,[89] as by his accepting and retaining the surplus proceeds of the sale;[90]

priate action as the parties to the litigation may care to institute and the court may approve. Metcalfe *v.* Com. Land, etc., Co., 113 Ky. 751, 68 S. W. 1100, 24 Ky. L. Rep. 527.

79. See *infra*, XIV, B, 3, b.

80. See *infra*, XIV, B, 3, c.

A bill to enjoin the issuing of a tax deed, and to obtain a surrender of the tax certificate, is not to be treated as a bill to quiet a title or to remove a cloud from the title. Glos *v.* Dawson, 83 Ill. App. 197.

81. Hendershott *v.* Sagsvold, 49 Oreg. 592, 90 Pac. 1104; Moores *v.* Clackamas County, 40 Oreg. 536, 67 Pac. 662.

82. See Hendershott *v.* Sagsvold, 49 Oreg. 592, 90 Pac. 1104.

Ejectment to recover land purchased by the state at a void tax-sale see Saranac Land, etc., Co. *v.* Roberts, 125 N. Y. App. Div. 333, 109 N. Y. Suppl. 547 [*affirmed* in 195 N. Y. 303, 88 N. E. 753].

83. De Forest *v.* Thompson, 40 Fed. 375, holding that the federal courts have jurisdiction of a suit between citizens of different states to set aside tax-sales and deeds, for illegality and irregularity, although such sales and deeds were made pursuant to an order of a state court of the county containing the lands in question.

84. West *v.* Negrotto, 52 La. Ann. 381, 27 So. 75; Gerac *v.* Guilbeau, 36 La. Ann. 843; Jurey *v.* Allison, 30 La. Ann. 1234 (holding that a tax title may be attacked collaterally only where it is a mere simulation); Lannes *v.* Workingmen's Bank, 29 La. Ann. 112; Hoffman *v.* Flin Land Co., 144 Mich. 564, 108 N. W. 356; Hoffman *v.* Pack, 123 Mich. 74, 81 N. W. 934; Hilton *v.* Dumphey, 113 Mich. 241, 71 N. W. 527; Emmons County *v.* Thompson, 9 N. D. 598, 84 N. W. 385; Cole *v.* Van Ostrand, 131 Wis. 454, 110 N. W. 884.

85. McAlpine *v.* Zitzer, 119 Ill. 273, 10 N. E. 901; Bozarth *v.* Landers, 113 Ill. 181; Gage *v.* Perry, 93 Ill. 176; Carbine *v.* Sebastian, 6 Ill. App. 564; Roberts *v.* Wood, 38 Wis. 60.

86. Bivens *v.* Henderson, 42 Ind. App. 562, 86 N. E. 426 (in ejectment); Corbin *v.* Beebee, 36 Iowa 336; Johnson *v.* Martinez, 48 La. Ann. 52, 18 So. 909; Hickman *v.* Dawson, 33 La. Ann. 438.

87. Wagner *v.* Arnold, 91 Ark. 95, 120 S. W. 830 (holding that a chancery action to enforce the payment of taxes is *in rem*, and the holder of a tax title prior to the action, who does not set up his title, is barred from attacking the title of a purchaser under a decree of the chancery court); Carson *v.* Titlow, 38 Wash. 196, 80 Pac. 299. And see *supra*, XI, E, 3, j, (v).

88. State *v.* Dugan, 105 Tenn. 245, 58 S. W. 259; Hendricks *v.* Newbern, 105 Tenn. 244, 58 S. W. 259; Fowler *v.* Taylor, 105 Tenn. 243, 58 S. W. 259. And see *supra*, XIII, G, 2. *Compare* Van Ostrand *v.* Cole, 131 Wis. 446, 110 N. W. 891.

89. *Iowa.*— Pitts *v.* Seavey, 88 Iowa 336, 55 N. W. 480.

Kansas.— Marysville Inv. Co. *v.* Holle, 58 Kan. 773, 51 Pac. 281.

Louisiana.— New Orleans Ins. Assoc. *v.* Labranche, 31 La. Ann. 839.

Ohio.— Nye *v.* Denny, 18 Ohio St. 246, 98 Am. Dec. 118.

South Carolina.— Gardner *v.* Reedy, 62 S. C. 503, 40 S. E. 947.

Wisconsin.— Woodman *v.* Clapp, 21 Wis. 350.

See 45 Cent. Dig. tit. "Taxation," § 1579.

Town as purchaser at tax-sale.— A town which becomes the purchaser of land sold for taxes is not estopped to set up its title by the fact that for two years after the sale, and before a deed had been given by the collector, the land was taxed to the former owner and the taxes paid by him. Berry *v.* Bickford, 63 N. H. 328.

90. Proctor *v.* Nance, 220 Mo. 104, 119 S. W. 409, 132 Am. St. Rep. 555; Clyburn *v.* McLaughlin, 106 Mo. 521, 17 S. W. 692, 27 Am. St. Rep. 369. And see *supra*, XI, J, 3.

The effect of such ratification cannot be avoided by a subsequent grantee under a quitclaim deed, in an action to quiet title, by tendering such surplus into court to be repaid to the county. Proctor *v.* Nance, 220 Mo. 104, 119 S. W. 409, 132 Am. St. Rep. 555.

or by his unreasonable delay in the assertion of his rights.[91] But on the other hand the state is not estopped from selling and conveying land for the non-payment of taxes by a previous attempted tax-sale to another person which was null and void;[92] nor is the state or a county estopped from asserting title to its own non-taxable lands by the unauthorized acts of its officers in assessing and selling them.[93] In accordance with general principles, any party to an action of this kind is estopped from denying a title under which he claims or through which he must derive his rights,[94] but not by the acts or admissions of a party with whom he is not in privity.[95]

(III) *Title Necessary to Maintain Suit* — (A) *In General.* In some states the statutes debar any claimant of land from disputing a tax title thereon unless he shows title acquired from the state or the United States.[96] And as a general rule no one will be permitted to contest a tax title without first showing title in himself or in those under whom he claims at the time of the tax-sale,[97]

91. Weir *v.* Cordez-Fisher Lumber Co., 186 Mo. 388, 85 S. W. 341. And see *infra*, XIV, B, 4, e.

That a deed is five years old is no ground for applying the doctrine of estoppel against a claim of its being void for not showing the amount of taxes or the amount for which the land is sold. Finn *v.* Jones, 80 Kan. 431, 102 Pac. 479.

Where notice to redeem is void because of the premature issue of the tax deed, the owners of the property are not barred from questioning the validity of the tax title, by reason of their neglecting to redeem under such notice. Fitschen *v.* Olson, 155 Mich. 320, 119 N. W. 3.

92. Dick *v.* Foraker, 155 U. S. 404, 15 S. Ct. 124, 39 L. ed. 201.

93. Howard County *v.* Bullis, 49 Iowa 519; Bixby *v.* Adams County, 49 Iowa 507; Buena Vista County *v.* Iowa Falls, etc., R. Co., 46 Iowa 226; Slattery *v.* Heilperin, 110 La. 86, 34 So. 139; Wells *v.* Johnston, 171 N. Y. 324, 63 N. E. 1095. *Compare* Austin *v.* Bremer County, 44 Iowa 155, holding that where a county has sold land for taxes it has assessed and levied thereon, it cannot subsequently set up title in itself upon the ground that such land was not subject to taxation.

94. Norwich *v.* Congden, 1 Root (Conn.) 222; Carlisle *v.* Cassady, 46 S. W. 490, 20 Ky. L. Rep. 562.

But a grantee of land under a deed subject to "all unpaid taxes and sales for the same" is not estopped thereby to deny the validity of a tax-sale, where the assessment on which the sale was based was wholly void. Blackburn *v.* Lewis, 45 Oreg. 422, 77 Pac. 746.

95. Miller *v.* Cook, 135 Ill. 190, 25 N. E. 756, 10 L. R. A. 292; Flanagan *v.* Dunne, 105 Fed. 828, 45 C. C. A. 81.

96. See the statutes of the several states. And see Rhea *v.* McWilliams, 73 Ark. 557, 84 S. W. 726; Hintrager *v.* Kiene, 62 Iowa 605, 15 N. W. 568, 17 N. W. 910; Chandler *v.* Keeler, 46 Iowa 596; Hoffman *v.* H. M. Loud, etc., Lumber Co., 138 Mich. 5, 100 N. W. 1010, 104 N. W. 424; Ruggles *v.* Sands, 40 Mich. 559; Hewitt, Jr. *v.* Butterfield, 52 Wis. 384, 9 N. W. 15.

Such a provision does not apply to one who shows a title *prima facie* sufficient under common-law rules. Gamble *v.* Horr, 40 Mich. 561.

97. *Arkansas.*— Meyer *v.* Snell, 89 Ark. 298, 116 S. W. 208; Osceola Land Co. *v.* Chicago Mill, etc., Co., 84 Ark. 1, 103 S. W. 609; St. Louis Refrigerator, etc., Co. *v.* Thornton, 74 Ark. 383, 86 S. W. 852; Rhodes *v.* Covington, 69 Ark. 357, 63 S. W. 799.

Illinois.— Lusk *v.* Harber, 8 Ill. 158; Bestor *v.* Powell, 7 Ill. 119.

Iowa.— Swan *v.* Harvey, 117 Iowa 58, 90 N. W. 489; State *v.* Havrah, 101 Iowa 486, 70 N. W. 618; Callanan *v.* Wayne County, 73 Iowa 709, 36 N. W. 654; Foster *v.* Ellsworth, 71 Iowa 262, 32 N. W. 314; Pitt's Sons Mfg. Co. *v.* Beed, 69 Iowa 546, 29 N. W. 458.

Michigan.— Seymour *v.* Peters, 67 Mich. 415, 35 N. W. 62.

Mississippi.— Wilkinson *v.* Hiller, 71 Miss. 678, 14 So. 442.

Missouri.— Cobb *v.* Griffith, etc., Sand, etc., Co., 12 Mo. App. 130.

New York.— People *v.* Bain, 60 Misc. 253, 113 N. Y. Suppl. 27; Andrus *v.* Wheeler, 18 Misc. 646, 42 N. Y. Suppl. 525.

North Carolina.— Eames *v.* Armstrong, 146 N. C. 1, 59 S. E. 165, 125 Am. St. Rep. 426.

West Virginia.— Despard *v.* Pearcy, 65 W. Va. 140, 63 S. E. 871.

United States.— Robinson *v.* Bailey, 26 Fed. 219.

See 45 Cent. Dig. tit. "Taxation." § 1580.

Mere failure to redeem land or neglect to pay taxes will not *per se* divest the title, so as to prevent the owner from maintaining an action against the claimant under a tax-sale. St. Anthony Falls Water Power Co. *v.* Greely, 11 Minn. 321.

Two tenants in common may sue jointly to set aside the sale of their land for taxes; and it is no defense that the contract between the two complainants, whereby one of them acquired his title, was champertous. Gage *v.* Du Puy, 134 Ill. 132, 24 N. E. 866, 137 Ill. 652, 24 N. E. 541, 26 N. E. 386.

Where both parties to a suit to quiet title claim under tax-sales which are shown to have been void, neither party is precluded from showing the invalidity of the other's title, and in such a case the position of defendant is the stronger. Meyer *v.* Snell, 89 Ark. 298, 116 S. W. 208.

for if a person is devoid of all interest in the land or cannot show that he was injured by the tax-sale, it would be against the policy of the law to permit him to impugn the validity of the sale.[98] But it is not necessary for one who shows a good title to show also possession of the premises; [99] nor is it necessary that the title shown as a foundation for maintaining the suit shall be a perfect title in fee simple, for generally any one who has such an interest as would give him the right to redeem from the tax-sale may contest its validity,[1] and his interest may therefore be in the nature of a lien,[2] or an inchoate title under an executory contract of sale.[3] Nor will he be debarred from his suit because his record title is not perfect, it being sufficient to show an adverse possession under a claim of title in good faith based on any instrument which constitutes color of title.[4] He will not be required, in the first instance, to prove his title completely, a *prima facie* showing of title being enough; [5] and the holder of the tax title cannot impeach the deed under which the record owner claims as having been made in fraud of creditors.[6]

(B) *Mortgagees.* A mortgagee of real property has such a title to the land, or at least such an interest in it, as will entitle him to maintain an action to set aside a tax-sale and deed thereof; [7] and the same is true of the purchaser at a sale on foreclosure of the mortgage.[8]

b. Suit to Set Aside Tax-Sale and Deed. A court of equity has jurisdiction of a suit to set aside, on proper grounds, a tax-sale and cancel the deed issued

98. McArthur *v.* Peacock, 93 Ga. 715, 20 S. E. 215; McCash *v.* Penrod, 131 Iowa 631, 109 N. W. 180; Citizens' Bank *v.* Marr, 120 La. 236, 45 So. 115; West *v.* Negrotto, 48 La. Ann. 922, 19 So. 819; Reinach *v.* Duplantier, 46 La. Ann. 151, 15 So. 13; Lacroix *v.* Camors, 34 La. Ann. 639; New Orleans Ins. Assoc. *v.* Labranche, 31 La. Ann. 839; Murphy *v.* Burke, 47 Minn. 99, 49 N. W. 387.

99. Herr *v.* Martin, 90 Ky. 377, 14 S. W. 356, 12 Ky. L. Rep. 359. But *compare* Steele *v.* Fish, 2 Minn. 153. And see Smith *v.* Newman, 62 Kan. 318, 62 Pac. 1011, 53 L. R. A. 934.

1. South Chicago Brewing Co. *v.* Taylor, 205 Ill. 132, 68 N. E. 732; Gerac *v.* Guilbeau, 36 La. Ann. 843; Ludeling *v.* McGuire, 35 La. Ann. 893; Despard *v.* Pearcy, 65 W. Va. 140, 63 S. E. 871; Hawkinberry *v.* Snodgrass, 39 W. Va. 332, 19 S. E. 417.

2. See *infra*, XIV, B, 3, a, (III), (B), as to right of mortgagee to impeach tax title. But see University Bank *v.* Athens Sav. Bank, 107 Ga. 246, 33 S. E. 34 (holding that one who has no interest in the land except for holding a judgment lien on it cannot attack the tax-sale); Robbins *v.* Barron, 34 Mich. 517 (laying down a similar rule as to one who only has a claim for taxes paid on the land).

3. Langlois *v.* Stewart, 156 Ill. 609, 41 N. E. 177; Jones *v.* Hollister, 51 Kan. 310, 32 Pac. 1115; Horton *v.* Helmholtz, 149 Mich. 227, 112 N. W. 930; Brown *v.* Lyon, 81 Miss. 438, 33 So. 284.

4. Curry *v.* Hinman, 11 Ill. 420; Shelley *v.* Smith, 97 Iowa 259, 66 N. W. 172; Callanan *v.* Wayne County, 73 Iowa 709, 36 N. W. 654; Frank *v.* Arnold, 73 Iowa 370, 35 N. W. 453; Keokuk, etc., R. Co. *v.* Lindley, 48 Iowa 11; Chandler *v.* Keeler, 46 Iowa 596; Long *v.* Stanley, 79 Miss. 298, 30 So. 823; Edwards *v.* Lyman, 122 N. C. 741, 30 S. E. 328.

Applications.—A deed from an administrator, regular on its face, and reciting the proceedings in the probate court, is sufficient evidence of title (Glos *v.* Ault, 221 Ill. 562, 77 N. E. 939), as is also a tax deed which is valid on its face (McQuity *v.* Doudna, 101 Iowa 144, 70 N. W. 99; Adams *v.* Burdick, 68 Iowa 666, 27 N. W. 911); but not a mere certificate of purchase at a tax-sale (Johns *v.* Griffin, 76 Iowa 419, 41 N. W. 59), nor any deed which is void on its face (Baird *v.* Law, 93 Iowa 742, 61 N. W. 1086). And a merely constructive possession will not answer (Towson *v.* Denson, 74 Ark. 302, 86 S. W. 661); nor a miner's mere entry on the lands of another for the purpose of following his own vein (Lebanon Min. Co. *v.* Rogers, 8 Colo. 34, 5 Pac. 661).

5. Baird *v.* Law, 93 Iowa 742, 61 N. W. 1086; Pitts *v.* Seavey, 88 Iowa 336, 55 N. W. 480; Hintrager *v.* Kiene, 62 Iowa 205, 15 N. W. 568, 17 N. W. 910; Murphy *v.* Williams, (Tex. Civ. App. 1900) 56 S. W. 695.

6. Clark *v.* Sexton, 122 Iowa 310, 98 N. W. 127; Boggess *v.* Scott, 48 W. Va. 316, 37 S. E. 661.

7. *Illinois.*— Burton *v.* Perry, 146 Ill. 71, 34 N. E. 60; Miller *v.* Cook, 135 Ill. 190, 25 N. E. 756, 10 L. R. A. 292; McAlpine *v.* Zitzer, 119 Ill. 273, 10 N. E. 901.

Iowa.— Blumenthal *v.* Culver, 116 Iowa 326, 89 N. W. 1116; Petersborough Sav. Bank *v.* Des Moines Sav. Bank, 110 Iowa 519, 81 N. W. 786.

Kansas.— Hoffman *v.* Groll, 35 Kan. 652, 12 Pac. 34.

Louisiana.— Beltram *v.* Villeré, (1888) 4 So. 506; Villey *v.* Jarreau, 33 La. Ann. 291.

New York.— Cromwell *v.* MacLean, 123 N. Y. 474, 25 N. E. 932.

South Dakota.— Stoddard *v.* Lyon, 18 S. D. 207, 99 N. W. 1116.

Wisconsin.—Avery *v.* Judd, 21 Wis. 262.

See 45 Cent. Dig. tit. "Taxation," § 1581.

8. McManus *v.* Morgan, 38 Wash. 528, 80 Pac. 786.

thereon,[9] at the instance of a complainant having sufficient title or interest.[10] Under some statutes the grounds of such an action are limited by law to the objection that the taxes were paid before sale or that the land was not taxable.[11] But in the absence of such a restriction, if the owner can point out any illegality, fraud, omission, or irregularity, not attributable to himself, substantially affecting the validity of the proceedings, and not concluded by a judgment,[12] or condoned by a curative statute, it will be a sufficient cause of action.[13] So also the suit may be

9. Crocker *v.* Dougherty, 139 Cal. 521, 73 Pac. 429; Carroll *v.* Brown, 28 Gratt. (Va.) 791; Pulford *v.* Whicher, 76 Wis. 555, 45 N. W. 418.

Cross complaint in ejectment.—Where the holder of a tax deed brings ejectment to recover possession of the land, relying on his tax title, defendant may, by cross complaint, ask for the cancellation of the deed, and the court can order it canceled, if found invalid, although on other grounds than those alleged. Rustin *v.* Merchants', etc., Tunnel Co., 23 Colo. 351, 47 Pac. 300.

10. *Illinois.*— Glos *v.* Cass, 230 Ill. 641, 82 N. E. 827, holding that one who has executed a contract to sell lots, stating that the property "is hereby bargained and sold," and permitting the vendee to take immediate possession, may still sue to set aside a tax deed as a cloud on his title, since the legal title remains in him.

Kentucky.— Pittsburgh Nat. Bank of Commerce *v.* Licking Valley Land, etc., Co., 22 S. W. 881, 15 Ky. L. Rep. 211, not necessary that either party shall be in possession.

Louisiana.—Williams *v.* Chaplain, 112 La. 1075, 36 So. 859.

Maryland.— Textor *v.* Shipley, 77 Md. 473, 26 Atl. 1019, 28 Atl. 1060.

Mississippi.— House *v.* Gumble, 78 Miss. 259, 29 So. 71, holding that where a purchaser under a trustee's sale brings suit to cancel tax deeds on the premises, defendant cannot assert a want of interest in complainant to defeat his recovery.

Nebraska.— Chamberlain *v.* Grimes, 42 Nebr. 701, 60 N. W. 948.

Wisconsin.— Roach *v.* Sanborn Land Co., 135 Wis. 354, 115 N. W. 1102, holder of notes secured by trust deed on the property sold.

See 45 Cent. Dig. tit. "Taxation," § 1583. See also *supra*, XIV, B, 3, a, (III).

11. Burns *v.* Ford, 124 Mich. 274, 82 N. W. 885; Berkey *v.* Burchard, 119 Mich. 101, 77 N. W. 635, 79 N. W. 908; Detroit F. & M. Ins. Co. *v.* Wood, 118 Mich. 31, 76 N. W. 136; Virginia Coal Co. *v.* Thomas, 97 Va. 527, 34 S. E. 486; Gerke Brewing Co. *v.* St. Clair, 46 W. Va. 93, 33 S. E. 122.

12. Gage *v.* Busse, 102 Ill. 592; Chicago Theological Seminary *v.* Gage, 2 Fed. 398, 11 Biss. 289.

13. *Iowa.*— Gray *v.* Coan, 23 Iowa 344.

Louisiana.— Lavedan *v.* Choppin, 119 La. 1056, 44 So. 886.

Maine.— Morrill *v.* Lovett, 95 Me. 165, 49 Atl. 666, 56 L. R. A. 634.

Missouri.— Zweigart *v.* Reed, 221 Mo. 33, 119 S. W. 960, holding that if the purchaser has actual notice that tax receipts were given for taxes, and that the real owner was not a party to the judgment under which he bought, the real owner will be entitled to a judgment canceling the deed and his quit-claim to another.

Nebraska.—Ambler *v.* Patterson, 80 Nebr. 570, 114 N. W. 781 (holding that after confirmation of a sale for delinquent taxes the deed issued will not be set aside for irregularity in the levying of the tax, or because an item of a void special tax was included in the sale); Manning *v.* Oakes, 80 Nebr. 471, 114 N. W. 604 (holding that a tax deed issued to a former tenant cannot be avoided or set aside on the ground that such tenant was indebted to the fee owner for rent which accrued during the tenancy).

New York.— People *v.* Lewis, 127 N. Y. App. Div. 107, 111 N. Y. Suppl. 398 (holding that Laws (1896), c. 908, § 132, making a controller's deed subject to cancellation for "any defect in the proceedings affecting the jurisdiction upon constitutional grounds," means jurisdictional defects); Saranac Land, etc., Co. *v.* Roberts, 125 N. Y. App. Div. 333, 109 N. Y. Suppl. 547 [*affirmed* in 195 N. Y. 303, 88 N. E. 753]; Loomis *v.* Semper, 38 Misc. 567, 78 N. Y. Suppl. 74.

Washington.—Vestal *v.* Morris, 11 Wash. 451, 39 Pac. 960.

Wisconsin.— Roach *v.* Sanborn Land Co., 135 Wis. 354, 115 N. W. 1102 (holding that a tax deed which has not been of record for three years prior to the commencement of an action is open to attack); Van Ostrand *v.* Cole, 131 Wis. 446, 110 N. W. 891.

See 45 Cent. Dig. tit. "Taxation," § 1583.

Applications.—A substantial defect or irregularity in the assessment of the property may be made the basis of a suit to cancel a tax deed (Perkins *v.* Nugent, 45 Mich. 156, 7 N. W. 757; Blanchard *v.* Powers, 42 Mich. 619, 4 N. W. 542), as where the land has been listed to a wrong person and sold as his property (Yancey *v.* Hopkins, 1 Munf. (Va.) 419). But such a suit cannot be sustained on the ground of an objection to the assessment which could have been obviated by a timely application to the board of equalization. Duggan *v.* McCullough, 27 Colo. 43, 59 Pac. 743. Nor will the sale and deed be vacated merely because the property is valuable and the amount of the tax small (Nester *v.* Church, 121 Mich. 81, 79 N. W. 893); or because the taxes could have been collected out of personal property (Nester *v.* Church, *supra*); or because the amount stated as the consideration of the deed is excessive, when the excess can be reasonably accounted for (Kennedy *v.* Scott, 72 Kan. 359, 83 Pac. 971); or because the property is in the possession of a receiver as part of the assets

founded on the prior payment of the taxes or redemption of the land,[14] or on the fact that the owner was prevented from paying taxes really due by the fraud or mistake of the officers charged with their collection,[15] or on fraud and collusion in the conduct of the tax-sale.[16]

c. Suit to Remove Cloud on Title [17]— (i) *Right of Action.* A court of equity has jurisdiction of a suit, on proper grounds, to annul an invalid tax deed as constituting a cloud on the owner's title,[18] provided that such an action is authorized by statute, or, if based on principles of general equity jurisdiction, that there is

of an insolvent corporation (Whitehead *v.* Farmers' L. & T. Co., 98 Fed. 10, 39 C. C. A. 34); or because the purchase-money due on the tax-sale has not been paid (Woody *v.* Dean, 24 S. C. 499); or because the taxes were not properly paid through a mistake of the owner's agent (Moss *v.* Mayo, 23 Cal. 421; Brooks *v.* Dix, 119 Mich. 329, 78 N. W. 125); or because of an alleged misdescription in the tax deed, where the court can lawfully infer that the description in the deed conveys the identical property described in the bill (Stearns *v.* Glos, 235 Ill. 290, 85 N E. 335). And although a banking corporation is engaged in real estate speculations not authorized by its charter, the fact that it is one of the grantors in a chain of title derived from a tax-sale of real estate is insufficient to avoid the tax deed. Jones *v.* Carnes, 17 Okla. 470, 87 Pac. 652.

Gross inadequacy of price will avoid a sale for taxes when it is combined with irregularity or with circumstances indicating unfairness in the sale (Younger *v.* Meadows, 63 W. Va. 275, 59 S. E. 1087); but inadequacy of price which was caused by the acts of the complaining party himself cannot be set up by him as grounds for setting aside the sale (Walker *v.* Mills, 210 Mo. 684, 109 S. W. 44).

Constructive trust in case of fraudulent purchase at taxation sale see Teich *v.* San José Deposit Sav. Bank, 8 Cal. App. 397, 97 Pac. 167. And see Trusts.

Retroactive effect of statute making a tax deed subject to cancellation see People *v.* Lewis, 127 N. Y. App. Div. 107, 111 N. Y. Suppl. 398.

14. Koen *v.* Martin, 110 La. 242, 34 So. 429; Palmer *v.* New Orleans Bd. of Assessors, 42 La. Ann. 1122, 8 So. 487; Weho *v.* Auditor-Gen., 138 Mich. 586, 101 N. W. 809; Squire *v.* McCarthy, 77 Nebr. 431, 112 N. W. 327, 77 Nebr. 429, 109 N. W. 768; Wyatt *v.* Simpson, 8 W. Va. 394.

15. Hickman *v.* Kempner, 35 Ark. 505; Kneeland *v.* Wood, 117 Mich. 174, 75 N. W. 461; Thomas *v.* Jones, 98 Va. 323, 36 S. E. 382; Gerke Brewing Co. *v.* St. Clair, 46 W. Va. 93, 33 S. E. 122. See also *supra*, IX, A, 1, g, (II). *Compare* McGahen *v.* Carr, 6 Iowa 331, 71 Am. Dec. 421.

16. Hunt *v.* McFadgen, 20 Ark. 277; Connolly *v.* Connolly, 63 Iowa 202, 18 N. W. 868; Corbin *v.* Beebee, 36 Iowa 336; Kerwer *v.* Allen, 31 Iowa 578; Chandler *v.* Wilson, 77 Me. 76. And see *supra*, XI, I, 2.

17. **Taxes and assessments as a cloud on title** generally see Quieting Title, 32 Cyc. 1323.

Restraining issuance of tax deed see *supra*, XIII, B, 5.

18. *District of Columbia.*— Buchanan *v.* Macfarland, 31 App. Cas. 6.

Florida.— Hughey *v.* Winborne, 44 Fla. 601, 33 So. 249. See also Dees *v.* Smith, 55 Fla. 652, 46 So. 173.

Illinois.— Gilbreath *v.* Dilday, 152 Ill. 207, 38 N. E. 572; Lee *v.* Ruggles, 62 Ill. 427. *Compare* Springer *v.* Rosette, 47 Ill. 223.

Mississippi.— Scarborough *v.* Elmer, 87 Miss. 508, 40 So. 69.

New Jersey.— Woglom *v.* Kant, 71 N. J. Eq. 32, 63 Atl. 283.

New York.— Crooke *v.* Andrews, 40 N. Y. 547.

Oregon.— Moores *v.* Clackamas County, 40 Oreg. 536, 67 Pac. 662.

Pennsylvania.— Dull's Appeal, 113 Pa. St. 510, 6 Atl. 540.

South Dakota.— Clark *v.* Darlington, 7 S. D. 148, 63 N. W. 771, 58 Am. St. Rep. 835.

Virginia.— Boon *v.* Simmons, 88 Va. 259, 13 S. E. 439.

West Virginia.— Collins *v.* Reger, 62 W. Va. 195, 57 S. E. 743; Jackson *v.* Kittle, 34 W. Va. 207, 12 S. E. 484.

Wisconsin.— Dean *v.* Madison, 9 Wis. 402. See 45 Cent. Dig. tit. "Taxation," § 1584. But *compare* Porter *v.* Mitchell, 82 Ind. 214; Blackwood *v.* Van Vleet, 11 Mich. 252.

State as purchaser.—Where the state becomes the purchaser at a tax-sale, a bill to cancel the sale as a cloud on the owner's title cannot be maintained against the auditor-general unless the state consents. Burrill *v.* Auditor-Gen., 46 Mich. 256, 9 N. W. 273.

Numerous tax deeds.—Where lands were sold to several persons for non-payment of taxes, the owner may sue to cancel the numerous tax deeds in one action, as to remove a cloud from title, on the ground of avoiding a multiplicity of suits. Ulmas *v.* Iaeger, 67 Fed. 980.

Suit against tax purchaser's grantee.— Where the bill is brought against the grantee of the tax purchaser, without making the latter a party, it is erroneous to set aside the deed from him to defendant, although the tax deed itself is invalid. Smith *v* Prall, 133 Ill. 308, 24 N. E. 521.

Defendant holders of a tax deed cannot claim relief thereunder in a suit to quiet plaintiff's title, where the issuance of a deed was enjoined, and where they did not make plaintiffs parties to the proceeding in which issuance was compelled. Carney *v.* Twitchell, 22 S. D. 521, 118 N. W. 1030.

no adequate remedy at law,[19] and provided that some sufficient ground is shown for the interference of the chancery court.[20] The owner of the property is not obliged to wait for an attack on his own title to be made by the holder of the tax deed, but may anticipate any hostile action by filing a bill of this kind,[21] although of course he must show that his predicament is not due to his own fault or negligence.[22]

(II) *What Constitutes Cloud.* To constitute a cloud on title, a tax deed must have the semblance of regularity and validity and be sufficient in itself to create an apparent title in the grantee, as is the case where the illegality or defect does not appear on the face of the deed and is of such a character that it would not necessarily and indubitably appear from the evidence which the holder of the tax title would be obliged to produce in order to prove his title under the deed; but if the deed is void on its face it does not cloud the title.[23] It is to be noted, however, that if the statute makes the tax deed presumptive evidence of

19. Graham *v.* Florida Land, etc., Co., 33 Fla. 356, 14 So. 796; White *v.* Gove, 183 Mass. 333, 67 N. E. 359; Dull's Appeal, 113 Pa. St. 510, 6 Atl. 540; Weaver *v.* Arnold, 15 R. I. 53, 23 Atl. 41, adequate remedy at law.

20. *Arkansas.*— Rector *v.* Conway, 20 Ark. 79.

Connecticut.—Adams *v.* Castle, 30 Conn. 404, mere irregularities not sufficient where tax was legally laid and assessed.

Illinois.— Gage *v.* Chapman, 56 Ill. 311; Gage *v.* Billings, 56 Ill. 268; Gage *v.* Rohrbach, 56 Ill. 262, taxes paid before sale.

Iowa.— Burke *v.* Cutler, 78 Iowa 299, 43 N. W. 204, deed issued notwithstanding previous redemption.

Massachusetts.— Davis *v.* Boston, 129 Mass. 377, improper assessment to wrong person.

Missouri.— Fontaine *v.* Hudson, 93 Mo. 62, 5 S. W. 692, 3 Am. St. Rep. 515, holding that equity will not interfere where the only question is as to who held the paramount legal title.

New Jersey.— Field *v.* West Orange Tp., 37 N. J. Eq. 434, sale made after expiration of tax lien.

New York.— New York, etc., R. Co. *v.* Davenport, 65 How. Pr. 484, illegal assessment.

Texas.— Cassiano *v.* Ursuline Academy, 64 Tex. 673, land not liable to taxation.

Wisconsin.— Kimball *v.* Ballard, 19 Wis. 601, 88 Am. Dec. 705; Dean *v.* Madison, 9 Wis. 402, tax levied for illegal object.

United States.— Slater *v.* Maxwell, 6 Wall. 268, 18 L. ed. 796, fraud or unfair practises.

See 45 Cent. Dig. tit. "Taxation," § 1584.

Delay or acquiescence as not estopping owner see Compton *v.* Johnson, 240 Ill. 621, 88 N. E. 991.

21. Rogers *v.* Nichols, 186 Mass. 440, 71 N. E. 950; Dean *v.* Madison, 9 Wis. 402; Sharpleigh *v.* Surdam, 21 Fed. Cas. No. 12,711, 1 Flipp. 472. But see Busbee *v.* Lewis, 85 N. C. 332, holding that an action to remove a cloud upon title will not be entertained merely to afford protective relief, where plaintiff is under no disability to bring suit to test the question of title.

22. Winton Coal Co. *v.* Lackawanna County, 1 Lack. Leg. N. (Pa.) 105.

23. *Arkansas.*—Allen *v.* Ozark Land Co., 55 Ark. 549, 18 S. W. 1042; Crane *v.* Randolph, 30 Ark. 579.

California.—Axtell *v.* Gerlach, 67 Cal. 483, 8 Pac. 34; Williams *v.* Corcoran, 46 Cal. 553.

Florida.— Hughey *v.* Winborne, 44 Fla. 601, 33 So. 249.

Illinois.— Gage *v.* Starkweather, 103 Ill. 559, no seal.

Massachusetts.— Holt *v.* Weld, 140 Mass. 578, 5 N. E. 506, holding that a tax deed held by a purchaser who has not complied with the statutory requirements constitutes a cloud on the title.

Michigan.— Curtis *v.* East Saginaw, 35 Mich. 508; Detroit *v.* Martin, 34 Mich. 170, 22 Am. Rep. 512.

Minnesota.— Gilman *v.* Van Brunt, 29 Minn. 271, 13 N. W. 125; Scribner *v.* Allen, 12 Minn. 148.

New Hampshire.— Derry Nat. Bank *v.* Griffin, 68 N. H. 183, 34 Atl. 740; Eastman *v.* Thayer, 60 N. H. 408.

New York.—Wilcox *v.* Rochester, 129 N. Y. 247, 29 N. E. 99; Clark *v.* Davenport, 95 N. Y. 477 [*affirming* 30 Hun 161]; Wells *v.* Buffalo, 80 N. Y. 253; Fonda *v.* Sage, 48 N. Y. 173; Overing *v.* Foote, 43 N. Y. 290.

North Carolina.— Beck *v.* Meroney, 135 N. C. 532, 47 S. E. 613.

West Virginia.— Cunningham *v.* Brown, 39 W. Va. 588, 20 S. E. 615.

Wisconsin.— Hoffman *v.* Peterson, 123 Wis. 632, 102 N. W. 47; Shepardson *v.* Milwaukee County Sup'rs, 28 Wis. 593; Truesdell *v.* Rhodes, 26 Wis. 215; Dean *v.* Madison, 9 Wis. 402.

United States.—Whitman College *v.* Berryman, 156 Fed. 112 (certificate of delinquency for unpaid taxes as constituting a cloud on the title); Massie *v.* Halstead, 127 Fed. 176; Minturn *v.* Smith, 17 Fed. Cas. No. 9,647, 3 Sawy. 142.

See 45 Cent. Dig. tit. "Taxation," § 1584.

But *compare* Stokes *v.* Allen, 15 S. D. 421, 89 N. W. 1023, holding that a tax deed, although void on its face, constitutes color of title.

title or of the regularity of the prior proceedings, it will cloud the title, notwithstanding the fact that the irregularities or defects would be disclosed by scrutiny of the successive steps in the tax proceedings.[24]

(III) *Possession as Essential to Maintenance of Bill.*[25] Strictly speaking, an action to remove a cloud on title or to quiet title as against a tax title claimant cannot be maintained unless plaintiff is in possession.[26] But a different rule now prevails in many states, either because the courts make an exception to the general rule where a tax title is in question or because the statutory actions to test tax titles are not governed by the strict rules of equity.[27]

d. Payment or Tender as Condition Precedent[28] — (I). *In General.* In order to secure a tax purchaser in good faith against loss, the statutes of many states provide that any one seeking to impeach or vacate a tax title shall first tender or offer to pay an amount sufficient to cover the taxes legally chargeable on the land, with the costs of the sale, or, in some cases, the purchase-money paid, with interest, or the amount required to redeem, or that this money shall be brought into court in order to be paid over to the purchaser if his title is adjudged invalid.[29] These

24. Hibernia Sav., etc., Soc. *v.* Ordway, 38 Cal. 679; Sloan *v.* Sloan, 25 Fla. 53, 5 So. 603; Sanders *v.* Downs, 141 N. Y. 422, 36 N. E. 391; King *v.* Townshend, 141 N. Y. 358, 36 N. E. 513; Stewart *v.* Crysler, 100 N. Y. 378, 3 N. E. 471; Boyle *v.* Brooklyn, 71 N. Y. 1; Crooke *v.* Andrews, 40 N. Y. 547; Allen *v.* Buffalo, 39 N. Y. 386; Gage *v.* Kaufman, 133 U. S. 471, 10 S. Ct. 406, 33 L. ed. 725; Lyon *v.* Alley, 130 U. S. 177, 9 S. Ct. 480, 32 L. ed. 899; Huntington *v.* Central Pac. R. Co., 12 Fed. Cas. No. 6,911, 2 Sawy. 503; Tilton *v.* Oregon Cent. Military Road Co., 23 Fed. Cas. No. 14,055, 3 Sawy. 22.

25. **Necessity and sufficiency of possession to sustain action to quiet title** in general see QUIETING TITLE, 32 Cyc. 1335 *et seq.*

26. *Illinois.*— Glos *v.* Davis, 216 Ill. 532, 75 N. E. 208; Glos *v.* O'Toole, 173 Ill. 366, 50 N. E. 1063; Gould *v.* Sternburg, 105 Ill. 488; Gage *v.* Schmidt, 104 Ill. 106.

Missouri.—Apperson *v.* Allen, 42 Mo. App. 537.

Pennsylvania.— Hilborn *v.* Wilson, 17 Pa. Co. Ct. 346, holding that the remedy where plaintiff is not in possession is ejectment.

Rhode Island.—Weaver *v.* Arnold, 15 R. I. 53, 23 Atl. 41.

Tennessee.— Everhard *v.* Johnson, (Ch. App. 1898) 50 S. W. 655.

See 45 Cent. Dig. tit. "Taxation," § 1585.

27. *Iowa.*— Patton *v.* Luther, 47 Iowa 236.

Louisiana.— Citizens' Bank *v.* Marr, 111 La. 601, 35 So. 780. But a claimant out of possession cannot urge other causes for setting aside a tax title than those enumerated in the statute. Canter *v.* Williams, 107 La. 77, 31 So. 627.

Maryland.— Oppenheimer *v.* Levi, 96 Md. 296, 54 Atl. 74, 60 L. R. A. 729.

Michigan.— Day *v.* Davey, 132 Mich. 173, 93 N. W. 256.

Minnesota.— Sanborn *v.* Mueller, 38 Minn. 27, 35 N. W. 666.

Washington.— Dolan *v.* Jones, 37 Wash. 176, 79 Pac. 640.

West Virginia.— Boggess *v.* Scott, 48 W. Va. 316, 37 S. E. 661.

Wisconsin.—Pier *v.* Fond du Lac, 38 Wis. 470; Taylor *v.* Rountree, 28 Wis. 391.

See 45 Cent. Dig. tit. "Taxation," § 1585.

28. **Payment or tender as condition:** To relief in action to restrain issuance of tax deed see *supra*, XIII, B, 5, b. To right to defend against tax title see *supra*, XIV, B, 2, c.

29. See the statutes of the several states. And as to the construction and application of these statutes, particularly with reference to the amount to be tendered and the payment of the money into court, see the following cases:

Arkansas.— Cook *v.* Franklin, 73 Ark. 23, 83 S. W. 325; Trigg *v.* Ray, 64 Ark. 150, 41 S. W. 55; Anthony *v.* Manlove, 53 Ark. 423, 14 S. W. 624; Hickman *v.* Kempner, 35 Ark. 505; Spain *v.* Johnson, 31 Ark. 314.

California.— Savings, etc., Soc. *v.* Burke, 151 Cal. 616, 91 Pac. 504.

Colorado.— Whitehead *v.* Callahan, 44 Colo. 396, 99 Pac. 57, holding that 2 Mills Annot. St. § 3904, does not require a tender by plaintiff before suit brought or deposit in court to cover the amount of taxes paid by defendant.

Connecticut.— Adams *v.* Castle, 30 Conn. 404.

District of Columbia.— Knox *v.* Gaddis, 1 App. Cas. 336.

Georgia.— Picquet *v.* Augusta, 64 Ga. 254.

Idaho.—Hole *v.* Van Duzer, 11 Ida. 79, 81 Pac. 109.

Illinois.— Glos *v.* Garrett, 219 Ill. 208, 76 N. E. 373; Glos *v.* Goodrich, 175 Ill. 20, 51 N. E. 643; Glos *v.* Beckman, 168 Ill. 74, 48 N. E. 69; Smith *v.* Prail, 133 Ill. 308, 24 N. E. 521; Gage *v.* Arndt, 121 Ill. 491, 13 N. E. 138; Gage *v.* Waterman, 121 Ill. 115, 13 N. E. 543; Peacock *v.* Carnes, 110 Ill. 99; Glos *v.* Dawson, 83 Ill. App. 197; Durfee *v.* Murray, 7 Ill. App. 213. See also Maher *v.* Brown, 183 Ill. 575, 56 N. E. 181.

Indiana.— Willard *v.* Ames, 130 Ind. 351, 30 N. E. 210; Montgomery *v.* Trumbo, 126 Ind. 331, 26 N. E. 54; Rowe *v.* Peabody, 102 Ind. 198, 1 N. E. 353; Peckham *v.* Millikan, 99 Ind. 352; Lancaster *v.* Du Hadway, 97 Ind. 565; Ethel *v.* Batchelder, 90 Ind. 520.

Iowa.— Crawford *v.* Liddle, 101 Iowa 148, 70 N. W. 97; Maxwell *v.* Palmer, 73 Iowa

statutes have generally been held valid and constitutional, in so far as they relate to the setting aside of tax titles on account of mere errors and irregularities, and do not impose on the landowner conditions or restrictions beyond what the principles of equity would ordinarily require of him.[30] But they do not apply

595, 35 N. W. 659; Gardner *v.* Early, 69 Iowa 42, 28 N. W. 427; White *v.* Smith, 68 Iowa 313, 25 N. W. 115, 27 N. W. 250; Taylor *v.* Ormsby, 66 Iowa 109, 23 N. W. 288; Corbin *v.* Woodbine, 33 Iowa 297.

Kansas.— Franz *v.* Krebs, 41 Kan. 223, 21 Pac. 99; Miller *v.* Ziegler, 31 Kan. 417, 2 Pac. 601; Wilder *v.* Cockshutt, 25 Kan. 504; Cartwright *v.* McFadden, 24 Kan. 662; Coe *v.* Farwell, 24 Kan. 566; Pritchard *v.* Madren, 24 Kan. 486; Millbank *v.* Ostertag, 24 Kan. 462; Herzog *v.* Gregg, 23 Kan. 726; Knox *v.* Dunn, 22 Kan. 683; Hagaman *v.* Cloud County Com'rs, 19 Kan. 394.

Louisiana.— State *v.* Judges of Ct. of Appeals, 49 La. Ann. 303, 21 So. 516; Prescott *v.* Payne, 44 La. Ann. 650, 11 So. 140; Blanton *v.* Ludeling, 30 La. Ann. 1232. See also State *v.* Cannon, 44 La. Ann. 734, 11 So. 86.

Maine.— Belfast Sav. Bank *v.* Kennebec Land, etc., Co., 73 Me. 404; Briggs *v.* Johnson, 71 Me. 235.

Maryland.— Steuart *v.* Meyer, 54 Md. 454.

Michigan.— Greenley *v.* Hovey, 115 Mich. 504, 73 N. W. 808.

Mississippi.— Ragsdale *v.* Alabama Great Southern R. Co., 67 Miss. 106, 6 So. 630.

Missouri.— Burkham *v.* Manewal, 195 Mo. 500, 94 S. W. 520; Yeaman *v.* Lepp, 167 Mo. 61, 66 S. W. 957; Petring *v.* Current River Land, etc., Co., 111 Mo. App. 373, 85 S. W. 933.

Ohio.— Mathers *v.* Bull, 19 Ohio Cir. Ct. 657, 10 Ohio Cir. Dec. 515; Hack *v.* Heffern, 19 Ohio Cir. Ct. 233, 10 Ohio Cir. Dec. 461.

Oregon.— Brentano *v.* Brentano, 41 Oreg. 15, 67 Pac. 922.

Pennsylvania.— See Rogers *v.* Johnson, 67 Pa. St. 43.

Texas.— Eustis *v.* Henrietta, (Civ. App. 1897) 41 S. W. 720.

Virginia.—Mathews *v.* Glenn, 100 Va. 352, 41 S. E. 735.

Washington.—Nunn *v.* Stewart, 52 Wash. 513, 100 Pac. 1004; Ontario Land Co. *v.* Yordy, 44 Wash. 239, 87 Pac. 257; Young *v.* Droz, 38 Wash. 648, 80 Pac. 810; McManus *v.* Morgan, 38 Wash. 528, 80 Pac. 786; Denman *v.* Steinbach, 29 Wash. 179, 69 Pac. 751; Merritt *v.* Corey, 22 Wash. 444, 61 Pac. 171.

West Virginia.— Siers *v.* Wiseman, 58 W. Va. 340, 52 S. E. 460.

Wisconsin.—Van Ostrand *v.* Cole, 131 Wis. 446, 110 N. W. 891; Maxcy *v.* Simonson, 130 Wis. 650, 110 N. W. 803; Tucker *v.* Whittlesey, 74 Wis. 74, 41 N. W. 535, 42 N. W. 101; Wisconsin Cent. R. Co. *v.* Comstock, 71 Wis. 88, 36 N. W. 843; Kimball *v.* Ballard, 19 Wis. 601, 88 Am. Dec. 705; Wright *v.* Wing, 18 Wis. 45.

United States.— Whitehead *v.* Farmers' L. & T. Co., 98 Fed. 10, 39 C. C. A. 34; Smith *v.* Gage, 12 Fed. 32, 11 Biss. 217.

See 45 Cent. Dig. tit. "Taxation," § 1586.

In the federal courts, the payment or tender by the owner of land of the amount of taxes for which it was sold, together with the interest and penalties to which the holder of the tax certificate is entitled under the state laws, is an indispensable condition precedent to his right to maintain a bill in equity to cancel such certificate. Rice *v.* Jerome, 97 Fed. 719, 38 C. C. A. 388.

Form of action.— Such statutes apply notwithstanding the fact that the suit is in form of ejectment (Ward *v.* Huggins, 16 Wash. 530, 48 Pac. 240); but not where the proceeding is one to foreclose a mortgage (Mather *v.* Darst, 13 S. D. 75, 82 N. W. 407).

To what parties statutes apply.— Statutes such as those mentioned in the text apply to one holding a judgment lien on the land and suing to quiet title. Browning *v.* Smith, 139 Ind. 280, 37 N. E. 540; Gillett *v.* Webster, 15 Ohio 623. But not to an administrator who sues for an order to sell the lands of his decedent and to quiet title against a tax-sale (Hannah *v.* Collins, 94 Ind. 201); nor where it is the tax title claimant who takes the offensive and sues to quiet his title (Manwarring *v.* Missouri Lumber, etc., Co., 200 Mo. 718, 98 S. W. 762); nor where the holder of the tax title sues for partition, and the owner of the patent title pleads in bar a former adjudication declaring the tax title invalid (Thomsen *v.* McCormick, 136 Ill. 135, 26 N. E. 373); nor in a bill by the state to sell forfeited lands and to annul a tax deed constituting a title hostile to that of the state (State *v.* Harman, 57 W. Va. 447, 50 S. E. 828).

Sufficiency of tender.— A tender of the amount due on a tax certificate, with interest and costs, and requiring the holder to convey his title, is insufficient, since only conditions enjoined by law or arising out of a contract or trust relation between the parties can be attached to a tender. Glos *v.* Goodrich, 175 Ill. 20, 51 N. E. 643.

Where the sole requirement of the statute is a tender of all the taxes paid, the rule that one seeking the aid of equity to vacate a judgment must show that the former judgment was inequitable, and that he had a good defense, does not apply to an action to set aside a tax judgment, and a sale based thereon. Holly *v.* Munro, 55 Wash. 311, 104 Pac. 508.

30. *Alabama.*—Lassiter *v.* Lee, 68 Ala. 287 (holding that a statute requiring a deposit of double the amount of the purchase-money is unconstitutional as imposing an unreasonable condition); Whitworth *v.* Anderson, 54 Ala. 33.

Arkansas.— Coats *v.* Hill, 41 Ark. 149; Pope *v.* Macon, 23 Ark. 644; Craig *v.* Flanagin, 21 Ark. 319.

Kansas.—Belz *v.* Bird, 31 Kan. 139, 1 Pac.

in cases where the assessment or other proceedings were affected by such a want of jurisdiction or such fundamental errors as render the tax deed entirely null and void;[31] where the ground of attack is that the tax itself was illegal,[32] that the land in question was not subject to taxation,[33] or that the owner had paid the taxes before the sale;[34] where the sum to be awarded to the tax purchaser is so indefinite or uncertain that the amount to be tendered cannot be ascertained;[35] where it is charged that the tax title was obtained by fraud and collusion;[36] where a tax deed has not yet been executed, but only a certificate of purchase;[37] or where an offer to redeem has been made and refused.[38]

(II) *PAYMENT OF TAXES AS CONDITION OF RELIEF.* In some states the statutes provide that no one shall be permitted to impeach a tax title without first showing that all the taxes justly due and chargeable on the land have been paid.[39] And independently of such statutes and on general equity principles, one seeking to have a tax deed set aside as a cloud on his title must offer to repay to the purchaser the amount of all taxes and costs paid by him, which were a just and legal charge upon the land; and it is error to set aside a tax-sale for mere irregularities or defects without requiring such repayment,[40] although the rule is

246; Coonradt *v.* Myers, 31 Kan. 30, 2 Pac. 858.

Maine.—Straw *v.* Poor, 74 Me. 53; Crowell *v.* Utley, 74 Me. 49; Dunn *v.* Snell, 74 Me. 22.

Tennessee.—Glass *v.* White, 5 Sneed 475; Tharp *v.* Hart, 2 Sneed 569.

Wisconsin.— Wisconsin Cent. R. Co. *v.* Comstock, 71 Wis. 88, 36 N. W. 843; Lombard *v.* Antioch College, 60 Wis. 459, 19 N. W. 367; Smith *v.* Smith, 19 Wis. 615, 88 Am. Dec. 707.

See 45 Cent. Dig. tit. "Taxation," § 1586.

But *compare* Reed *v.* Tyler, 56 Ill. 288; Conway *v.* Cable, 37 Ill. 82, 87 Am. Dec. 240; Weller *v.* St. Paul, 5 Minn. 95.

31. *California.*— Preston *v.* Hirsch, 5 Cal. App. 485, 90 Pac. 965, where the certificate of sale was fatally defective.

Dakota.— Bode *v.* New England Inv. Co., 6 D. 499, 42 N. W. 658, 45 N. W. 197.

Kansas.— Shinkle *v.* Meek, 69 Kan. 368, 76 Pac. 837; Longworth *v.* Johnson, 66 Kan. 193, 71 Pac. 259; Coe *v.* Farwell, 24 Kan. 566; Babbitt *v.* Johnson, 15 Kan. 252.

Louisiana.— Stafford *v.* Twitchell, 33 La. Ann. 520 [*overruling* Barrow *v.* Lapene, 30 La. Ann. 310]; Guidry *v.* Broussard, 32 La. Ann. 924.

Maine.— Morrill *v.* Lovett, 95 Me. 165, 49 Atl. 666, 56 L. R. A. 634; Straw *v.* Poor, 74 Me. 53; Crowell *v.* Utley, 74 Me. 49; Dunn *v.* Snell, 74 Me. 22; Wiggin *v.* Temple, 73 Me. 380; Orono *v.* Veazie, 57 Me. 517.

Michigan.—Fowler *v.* Campbell, 100 Mich. 398, 59 N. W. 185; Hanscom *v.* Hinman, 30 Mich. 419.

North Dakota.— State Finance Co. *v.* Bowdle, 16 N. D. 193, 112 N. W. 76.

Oklahoma.— Keller *v.* Hawk, 19 Okla. 407, 91 Pac. 778; Wade *v.* Crouch, 14 Okla. 593, 78 Pac. 91.

Oregon.—Title Trust Co. *v.* Aylsworth, 40 Oreg. 20, 66 Pac. 276; Jory *v.* Palace Dry Goods Co., 30 Oreg. 196, 46 Pac. 786.

West Virginia.— Collins *v.* Sherwood, 50 W. Va. 133, 40 S. E. 603.

See 45 Cent. Dig. tit. "Taxation," § 1586.

32. Capital State Bank *v.* Lewis, 64 Miss. 727, 2 So. 243; O'Neil *v.* Tyler, 3 N. D. 47, 53 N. W. 434.

33. Gaither *v.* Lawson, 31 Ark. 279; West *v.* Cameron, 39 Kan. 736, 18 Pac. 894.

34. Kelso *v.* Robertson, 51 Ark. 397, 11 S. W. 582; Douglass *v.* Flynn, 43 Ark. 398; Lefebre *v.* Negrotto, 44 La. Ann. 792, 11 So. 91.

35. Breaux *v.* Negrotto, 43 La. Ann. 426, 9 So. 502; Weber *v.* Harris, 32 La. Ann. 1309; Miller *v.* Montagne, 32 La. Ann. 1290; Lawler *v.* Brett, 20 Fed. 219.

36. Beltram *v.* Villere, (La. 1888) 4 So. 506; Taylor *v.* Snyder, Walk. (Mich.) 490; Mendenhall *v.* Hall, 134 U. S. 559, 10 S. Ct. 616, 33 L. ed. 1012.

37. Bode *v.* New England Inv. Co., 6 D. 499, 42 N. W. 658, 45 N. W. 197.

38. Kelly *v.* Gwatkin, 108 Va. 6, 60 S. E. 749, holding that where the redemptioner has in proper time made a sufficient offer to redeem from a tax-sale, which the purchaser has rejected on grounds distinct from the non-production of the money, equity will entertain a bill to cancel the tax-deed without a formal tender of dues.

39. See the statutes of the several states. And see the following cases:

Illinois.—Laueor *v.* Weber, 177 Ill. 115, 52 N. E. 489; Curry *v.* Hinman, 11 Ill. 420.

Iowa.— Wilkin *v.* Wilkin, 91 Iowa 652, 60 N. W. 194; Maxwell *v.* Palmer, 73 Iowa 595, 35 N. W. 659. See also Knight *v.* Hawkeye Loan, etc., Co., 121 Iowa 74, 95 N. W. 273.

Michigan.— Kent *v.* Auditor-Gen., 138 Mich. 605, 101 N. W. 805. See also Morse *v.* Auditor-Gen., 143 Mich. 610, 107 N. W. 317.

Nebraska.— Thomas *v.* Farmers' L. & T. Co., 76 Nebr. 568, 107 N. W. 589.

North Dakota.— O'Neil *v.* Tyler, 3 N. D. 47, 53 N. W. 434.

Tennessee.— Tharp *v.* Hart, 2 Sneed 569.

Texas.— Henrietta *v.* Eustis, 87 Tex. 14, 26 S. W. 619; Lufkin *v.* Galveston, 73 Tex. 340, 11 S. W. 340.

See 45 Cent. Dig. tit. "Taxation," § 1586.

40. *Alabama.*— Tallassee Mfg. Co. *v.* Spigener, 49 Ala. 262.

otherwise where the objection goes to the legality of the tax or discloses a want of jurisdiction or faults rendering the proceedings entirely void.[41] If any definable portion of the tax was legal, although the balance may have been illegal, equity will not interfere unless that which is legal is first paid.[42] Where, however, it is impossible to determine what amount of the tax levied on the land was a just charge, the court will not require payment of any sum as a condition of relief.[43]

4. Limitation of Actions and Laches — a. Statutes of Limitation — (i) *In General.* In many states laws have been enacted prescribing a special short period of limitations for actions concerning the validity of tax titles,[44] as distinguished from titles founded in any other manner.[45] Provided the time allowed

Arkansas.—Hickman *v.* Kempner, 35 Ark. 505; Twombly *v.* Kimbrough, 24 Ark. 459. See also McCrary *v.* Joyner, 64 Ark. 547, 44 S. W. 79.

California.— Flannigan *v.* Towle, 8 Cal. App. 229, 96 Pac. 507.

Connecticut.— Adams *v.* Castle, 30 Conn. 404.

Georgia.— Picquet *v.* Augusta, 64 Ga. 516.

Illinois.— Gage *v.* Du Puy, 134 Ill. 132, 24 N. E. 866; Gage *v.* Caraher, 125 Ill. 447, 17 N. E. 777; Gage *v.* Nichols, 112 Ill. 269; Glos *v.* Dawson, 83 Ill. App. 197.

Indiana.— Skelton *v.* Sharp, 161 Ind. 383, 67 N. E. 535; Montgomery *v.* Trumbo, 126 Ind. 331, 26 N. E. 54; Peckham *v.* Millikan, 99 Ind. 352.

Kansas.— Black *v.* Johnson, 63 Kan. 47, 64 Pac. 988; Millbank *v.* Ostertag, 24 Kan. 462; Knox *v.* Dunn, 22 Kan. 683; Challiss *v.* Hekelnkaemper, 14 Kan. 474.

Minnesota.— Lewis *v.* Knowlton, 84 Minn. 53, 86 N. W. 875.

Nebraska.— Payne *v.* Anderson, 80 Nebr. 216, 114 N. W. 148 (holding that in an action to quiet title as against a sale for taxes under a void decree, an offer to pay such sum as the court may find due on account of any lien for taxes paid is a sufficient offer to do equity and a sufficient tender); Browne *v.* Finlay, 51 Nebr. 465, 71 N. W. 34; Dillon *v.* Merriam, 22 Nebr. 151, 34 N. W. 344; McNish *v.* Perrine, 14 Nebr. 582, 16 N. W. 837; Boeck *v.* Merriam, 10 Nebr. 199, 4 N. W. 962; Hunt *v.* Easterday, 10 Nebr. 165, 4 N. W. 952; Wood *v.* Helmer, 10 Nebr. 65, 4 N. W. 968.

North Dakota.— State Finance Co. *v.* Trimble, 16 N. D. 199, 112 N. W. 984; Powers *v.* Bottoneau First Nat. Bank, 15 N. D. 466, 109 N. W. 361; Fenton *v.* Minnesota Title Ins., etc., Co., 15 N. D. 365, 109 N. W. 363, 125 Am. St. Rep. 599.

West Virginia.—Lohr *v.* George, 65 W. Va. 241, 64 S. E. 609 (holding that equity will not set aside a tax-deed without providing for repayment of the taxes, interest, and costs paid by the purchaser, and that the bill should tender payment thereof or aver a willingness to pay the same; but that if such an offer is omitted the defect may be cured by a tender or offer before or on the entry of the decree); Toothman *v.* Courtney, 62 W. Va. 167, 58 S. E. 915.

United States.— Smith *v.* Gage, 12 Fed. 32, 11 Biss. 217.

See 45 Cent. Dig. tit. "Taxation," § 1586.

Form of decree.— It is not enough to decree that such repayment to the tax purchaser be made, but the court should make it a condition precedent to setting aside the tax deed. Gage *v.* Du Puy, 134 Ill. 132, 24 N. E. 866; Johnson *v.* Huling, 127 Ill. 14, 18 N. E. 786.

41. *Illinois.*— Eagan *v.* Connelly, 107 Ill. 458.

Iowa.— Miller *v.* Corbin, 46 Iowa 150.

Maine.— Wiggin *v.* Temple, 73 Me. 380.

North Carolina.— Warren *v.* Williford, 148 N. C. 474, 62 S. E. 697. See also Eames *v.* Armstrong, 146 N. C. 1, 59 S. E. 165, 125 Am. St. Rep. 436.

North Dakota.— State Finance Co. *v.* Trimble, 16 N. D. 199, 112 N. W. 984; State Finance Co. *v.* Beck, 15 N. D. 374, 109 N. W. 357; Eaton *v.* Bennett, 10 N. D. 346, 87 N. W. 188.

United States.— Gage *v.* Kaufman, 133 U. S. 471, 10 S. Ct. 406, 33 L. ed. 725.

See 45 Cent. Dig. tit. "Taxation," § 1586.

42. Orlando *v.* Equitable Bldg., etc., Assoc., 45 Fla. 507, 33 So. 986; Lawrence *v.* Killam, 11 Kan. 499.

43. Cahalan *v.* Van Sant, 87 Iowa 593, 54 N. W. 433; Anderson *v.* Douglas County, 98 Wis. 393, 74 N. W. 109; Hebard *v.* Ashland County, 55 Wis. 145, 12 N. W. 437.

44. See the statutes of the several states. And see the following cases:

Alabama.— Doe *v.* Moog, 150 Ala. 460, 43 So. 710.

Arkansas.— Helena *v.* Hornor, 58 Ark. 151, 23 S. W. 966.

Iowa.— Roth *v.* Munzenmaier, 118 Iowa 326, 91 N. W. 1072.

Kansas.— Long *v.* Wolf, 25 Kan. 522.

Louisiana.— Russell *v.* Lang, 50 La. Ann. 36, 23 So. 113.

Michigan.—St. Mary's Power Co. *v.* Chandler-Dunbar Water Power Co., 133 Mich. 470, 95 N. W. 554.

Minnesota.— Security Inv. Co. *v.* Buckler, 72 Minn. 251, 75 N. W. 107.

Pennsylvania.— Young *v.* Hosack, 2 Penr. & W. 162.

Washington.—Ward *v.* Huggins, 16 Wash. 530, 48 Pac. 240.

See 45 Cent. Dig. tit. "Taxation," § 1588.

What property affected.—Where the statute prescribes a period of time within which action must be brought for the recovery of "lands" held under a tax title, the term quoted includes town lots. Helena *v.* Hornor, 58 Ark. 151, 23 S. W. 966.

45. Worthen *v.* Fletcher, 64 Ark. 662, 42 S. W. 900, holding that a tax-sale is not a

is not unreasonably short, these statutes are valid and constitutional.[46] And they are to be construed as statutes of repose, as the effect of the lapse of the prescribed time is to quiet the title and settle the question of ownership.[47]

(II) *To What Proceedings Applicable.* The statutes of limitation will not be extended by implication, but will be limited to the remedies or forms of action mentioned, leaving the parties free otherwise to test their rights in other methods.[48] And if the statute enumerates the grounds of objection to the tax title which shall be barred after the lapse of the prescribed time, it does not affect proceedings based on other grounds,[49] and so as to the persons who shall be affected,[50] and the classes of property concerning which the action is to be brought.[51] Furthermore, the statutes in general relate only to direct attacks on the tax-sale, and not to suits in which the validity of the tax title may be only collaterally or incidentally involved.[52] In many states an action of ejectment against the tax purchaser is considered collateral, in this sense, so as not to be barred by the statute;[53] and if the statute only prescribes limitation for actions "for the

"judicial" sale, within a statute declaring the period within which actions must be brought against the purchaser for recovery of lands sold at judicial sale. And see Hotson *v.* Wetherby, 88 Wis. 324, 60 N. W. 423, holding that the statute in that state prescribes no limitation as to tax certificates, but is confined to tax deeds.

46. *Alabama.*— Lassiter *v.* Lee, 68 Ala. 287.

Arkansas.— Kelley *v.* McDuffy, 79 Ark. 629, 96 S. W. 358; Ross *v.* Royal, 77 Ark. 324, 91 S. W. 178.

Iowa.— Thomas *v.* Stickle, 32 Iowa 71.

Kansas.— Bowman *v.* Cockrill, 6 Kan. 311.

Michigan.— State Land Office Com'r *v.* Auditor-Gen., 131 Mich. 147, 91 N. W. 153.

Pennsylvania.— Sheik *v.* McElroy, 20 Pa. St. 25.

Wisconsin.— Smith *v.* Cleveland, 17 Wis. 556; Sprecker *v.* Wakeley, 11 Wis. 432; Falkner *v.* Dorman, 7 Wis. 388; Edgerton *v.* Bird, 6 Wis. 527, 70 Am. Dec. 473.

47. Ashley Co. *v.* Bradford, 109 La. 641, 33 So. 634; Canter *v.* Williams, 107 La. 77, 31 So. 627; Knox *v.* Cleveland, 13 Wis. 245.

48. Kipp *v.* Johnson, 31 Minn. 360, 17 N. W. 957; People *v.* Morgan, 45 N. Y. App. Div. 19, 60 N. Y. Suppl. 898 (holding that an application to the state controller to cancel an invalid tax-sale is not an "action," within the statute); Flickinger *v.* Cornwell, 22 S. D. 382, 117 N. W. 1039; Smith *v.* Sherry, 54 Wis. 114, 11 N. W. 465.

A limitation on actions for the recovery of real estate sold for taxes does not apply to an action which questions the capacity of the person claiming title under a tax deed, to acquire title to the prejudice of others (Gilman *v.* Heitman, 137 Iowa 336, 113 N. W. 932); or to an equitable suit to remove a cloud (Dees *v.* Smith, 55 Fla. 652, 46 So. 173); or to an action to cancel a tax deed (Cauley *v.* Sutton, 150 N. C. 327, 64 S. E. 3).

49. See the statutes of the several states. And see Smith *v.* Cox, 83 S. C. 1, 65 S. E. 222, holding that Civ. Code (1902), § 426, providing that an action to recover land sold for delinquent taxes must be brought within two years from the sale, applies where lands are sold either for non-payment of taxes or for alleged non-payment of taxes by the owner of the property levied on, but does not apply to a sale for non-payment of taxes levied against a vendor, where the land was assessed against the purchaser in a deed recorded in the auditor's office, who paid the taxes.

Fraud.— A statute limiting actions for the recovery of real estate sold for taxes does not apply to actions founded on the fraud of the tax purchaser. Doyle *v.* Doyle, 33 Kan. 721, 7 Pac. 615; McMahon *v.* McGraw, 26 Wis. 614.

Disqualification of purchaser.— Where the ground of objection to the tax title is the disqualification of defendant to purchase at the tax-sale, by reason of his interest in the property or his fiduciary relation to the owner, the statute of limitations does not apply. Soreson *v.* Davis, 83 Iowa 405, 49 N. W. 1004; Woodman *v.* Davis, 32 Kan. 344, 4 Pac. 262.

50. Lee *v.* Crawford, 10 N. D. 482, 88 N. W. 97; Falkner *v.* Dorman, 7 Wis. 388.

51. Mount *v.* McAulay, 47 Oreg. 444, 83 Pac. 529 (statute applying only to lands bid in by county); Simpson *v.* Meyers, 197 Pa. St. 522, 47 Atl. 868 (statute applicable only to sale of unseated lands for taxes).

52. Bowen *v.* Swander, 121 Ind. 164, 22 N. E. 725 (partition); Wallace *v.* McEchron, 176 N. Y. 424, 68 N. E. 663 (partition); Ryon *v.* Davis, 32 Tex. Civ. App. 500, 75 S. W. 59. But see Jackson, etc., R. Co. *v.* Solomon Lumber Co., 146 Mich. 204, 109 N. W. 257, holding that when the owner's right to impeach the tax-sale directly is barred, he cannot attack it in an action of replevin to recover logs cut from the land in question.

53. *Alabama.*—Jones *v.* Williams, 108 Ala. 282, 19 So. 317.

Arkansas.— Sparks *v.* Faris, 71 Ark. 117, 71 S. W. 255, 945. But *compare* Gavin *v.* Ashworth, 77 Ark. 242, 91 S. W. 303.

Minnesota.— Baker *v.* Kelley, 11 Minn. 480.

Missouri.— Grandy *v.* Casey, 93 Mo. 595, 6 S. W. 376.

recovery of land" claimed under a tax title, it does not apply to a suit in equity to remove the cloud on the owner's title,[54] or to quiet the title.[55]

(iii) *Retrospective Statutes.* It is competent for the legislature to make a statute of this kind applicable to tax-sales which have taken place before its enactment, provided a reasonable time after the passage of the act is left to the owner in which to assert his rights.[56] But the presumption is always against the intention to make a law retroactive, and such statutes will not be construed as having this effect unless plainly so intended.[57]

(iv) *Repeal or Extension of Statute.* Questions concerning the repeal or extension of a statute of limitations of this character, and its effect on pending matters or proceedings, are determined by the ordinary rules of construction;[58] with this proviso, however, that when the bar of the statute of limitations is complete in favor of the holder of a tax deed, he has an absolute title to the land, which cannot be defeated by a statute subsequently enacted removing the bar or extending the period of limitations.[59]

b. Persons Affected by Statute of Limitations — (i) *In General.* As a general rule the special statute of limitations applies only as between the person who owned the property at the time of the tax-sale and the holder of the tax deed, or those claiming under them respectively, and cannot be pleaded by or against any third person.[60] In the character of a claimant under a tax-sale, the

New Jersey.— Alden *v.* Newark, 40 N. J. L. 92.

New York.— Zink *v.* McManus, 121 N. Y. 259, 24 N. E. 467.

See 45 Cent. Dig. tit. "Taxation," § 1588.

But *compare* Burd *v.* Patterson, 32 Pa. St. 219; Dull *v.* Ahls, 14 Pa. Co. Ct. 350; Mead *v* Nelson, 52 Wis. 402, 8 N. W. 895.

54. Smith *v.* Smith, 150 Mass. 73, 22 N. E. 437; Brennan *v.* Buffalo, 13 N. Y. App. Div. 453, 43 N. Y. Suppl. 597 [*reversed* on other grounds in 162 N. Y. 491, 57 N. E. 81]; Beck *v.* Meroney, 135 N. C. 532, 47 S. E. 613. *Compare* Hill *v.* Lund, 13 Minn. 451.

55. Kraus *v.* Montgomery, 114 Ind. 103, 16 N. E. 153; Earle *v.* Simons, 94 Ind. 573; Gabe *v.* Root, 93 Ind. 256; Farrar *v.* Clark, 85 Ind 449; Mount *v.* McAulay, 47 Oreg. 444, 83 Pac. 529. See also Shawler *v.* Johnson, 52 Iowa 473, 3 N. W. 604; Burkham *v.* Manewal, 195 Mo. 500, 94 S. W. 520.

56 Barrow *v.* Wilson, 39 La. Ann. 403, 2 So 809; Halsted *v.* Silberstein, 196 N. Y. 1, 89 N. E. 443 [*reversing* 122 N. Y. App. Div. 909, 107 N. Y. Suppl. 1129]; Ward *v.* Huggins, 7 Wash. 617, 32 Pac. 740, 1015, 36 Pac. 285. *Compare* Magruder *v.* Esmay, 35 Ohio St. 221.

57. *Iowa.*—Bailey *v.* Howard, 55 Iowa 290, 7 N. W. 592.

Louisiana.— Ashley Co. *v.* Bradford, 109 La. 641, 33 So. 634.

Michigan.— Owens *v.* Auditor-Gen., 147 Mich. 683, 111 N. W. 354; St. Mary's Power Co. *v.* Chandler-Dunbar Water Power Co., 133 Mich. 470, 95 N. W. 554; Porter *v.* Van Dyke, 31 Mich. 176.

Minnesota.— O'Mulcahy *v.* Florer, 27 Minn. 449, 8 N. W. 166.

Nebraska.— Sutton *v.* Stone, 4 Nebr. 319.

Wisconsin.— Webster *v.* Schwears, 69 Wis. 89, 33 N. W. 105; Lombard *v.* Culbertsen, 59 Wis 433, 18 N. W. 399; Osborn *v.* Jaines, 17 Wis. 573.

See 45 Cent. Dig. tit. "Taxation," § 1588.

58. *Michigan.*—Perry *v.* Hepburne, 4 Mich. 165.

Minnesota.— O'Connor *v.* Finnegan, 60 Minn. 455, 62 N. W. 618.

Pennsylvania.— McCall *v.* Himebaugh, 4 Watts & S. 164; Ash *v.* Ashton, 3 Watts & S. 510.

Wisconsin.— Clarke *v.* Lincoln County, 54 Wis. 578, 12 N. W. 20; Manseau *v.* Edwards, 53 Wis. 457, 10 N. W. 534.

United States.— Kraus *v.* Congdon, 161 Fed. 18, 88 C. C. A. 182.

59. Sigman *v.* Lundy, 66 Miss. 522, 6 So. 245; Gibson *v.* Berry, 66 Miss. 515, 6 So. 325; Mead *v.* Nelson, 52 Wis. 402, 8 N. W. 895; Lindsay *v.* Fay, 28 Wis. 177. *Compare* Kipp *v.* Johnson, 31 Minn. 360, 17 N. W. 957.

Aliter where the statute had not fully run before the repeal or change of the law. Keith *v.* Keith, 26 Kan. 26.

60. *Iowa.*— Gill *v.* Candler, 114 Iowa 332, 86 N. W. 300; Baird *v.* Law, 93 Iowa 742, 61 N. W. 1086; Kruger *v.* Walker, (1894) 59 N. W. 65; Schee *v.* La Grange, 78 Iowa 101, 42 N. W. 616; Knight *v.* Campbell, 76 Iowa 730, 39 N. W. 829; Varnum *v.* Shuler, 69 Iowa 92, 28 N. W. 451; Lockridge *v.* Daggett, 54 Iowa 332, 2 N. W. 1023, 6 N. W. 543; Lockridge *v.* Daggett, 47 Iowa 679.

Louisiana.— Doyle *v.* Negrotto, 124 La. 100, 49 So. 992; Millaudon *v.* Gallagher, 104 La. 713, 29 So. 307.

Pennsylvania.— Chadwick *v.* Phelps, 45 Pa. St. 105.

Washington.— McManus *v.* Morgan, 38 Wash. 528, 80 Pac. 786.

Wisconsin.— Brunette *v.* Norber, 130 Wis. 632, 110 N. W. 785.

See 45 Cent. Dig. tit. "Taxation," § 1589.

Right of party in possession to plead statute as against a tax purchaser see Buckingham *v.* Hallett, 24 Ark. 519.

state may be bound like any private person.[61] But persons entitled to rely on the statute may be debarred from doing so on principles of estoppel or waiver,[62] or by reason of their quasi-fiduciary relation to other persons interested in the property.[63]

(II) *Persons Under Disabilities.* Unless there is an exception in the statute of limitations in favor of persons under disabilities, they are bound by its provisions the same as persons who are *sui juris*; and if there is such an exception, it is confined strictly to the terms of the statute.[64] Hence it has been held that the period of limitation cannot be extended in favor of an infant who acquires title to the property during the running of the statute, the owner at the time of the sale having been an adult,[65] nor in favor of an adult grantee of a minor owner.[66]

c. Actions by Tax Title Claimant — (I) *In General.* A statute limiting the time for actions for "the recovery of lands sold for taxes" applies to suits by the tax purchaser, and if the time so prescribed, or that limited by any statute specifically applicable to him, elapses without effective action on his part, his rights under the tax-sale are lost.[67] The starting point of the period of limitation

61. Smith *v.* New Orleans, 43 La. Ann. 726, 9 So. 773; Chamberlain *v.* Ahrens, 55 Mich. 111, 20 N. W. 814. *Compare* Morse *v.* Auditor-Gen., 143 Mich. 610, 107 N. W. 317.

62. Pitre *v.* Schleslinger, 110 La. 234, 34 So. 425; Bardon *v.* Land, etc., Imp. Co., 157 U. S. 327, 15 S. Ct. 650, 39 L. ed. 719. And see Guy *v.* District of Columbia, 25 App. Cas. (D. C.) 117.

A tax purchaser, who fails to pay the taxes due, as required by statute, cannot plead the statute of limitations as a bar to an action to subject the property to the payment of city taxes. Bowe *v.* Richmond, 109 Va. 254, 64 S. E. 51.

63. Jones *v.* Merrill, 69 Miss. 747, 11 So. 23 (holding that a tenant for life, buying at a tax-sale, cannot plead the statute against the remainder-men); Jonas *v.* Flanniken, 69 Miss. 577, 11 So. 319 (holding that a tenant in common cannot plead the statute against his cotenant); Kohle *v.* Hobson, 215 Mo. 213, 114 S. W. 952; Allen *v.* De Groodt, 98 Mo. 159, 11 S. W. 240, 14 Am. St. Rep. 626 (holding that the statute does not begin to run against remainder-men until the death of the life-tenant).

64. *Alabama.*— Jones *v.* Williams, 108 Ala. 282, 19 So. 317.

Arkansas.— Sparks *v.* Farris, 71 Ark. 117, 71 S. W. 255, 945.

Kansas.— Goodman *v.* Wilson, 54 Kan. 709, 39 Pac. 704; Cartwright *v.* Korman, 45 Kan. 515, 26 Pac. 48. See also Douglass *v.* Lowell, 55 Kan. 574, 40 Pac. 917.

Louisiana.— Roberts *v.* Zansler, 34 La. Ann. 205. *Compare* Kearns *v.* Collins, 40 La. Ann. 453, 4 So. 498, holding that the statute does not run against incapacitated persons.

Mississippi.— Metcalf *v.* Perry, 66 Miss. 68, 5 So. 232.

See 45 Cent. Dig. tit. "Taxation," § 1590.

"Other legal disabilities."— This phrase, as used in a special statute of limitations for actions concerning tax titles, does not embrace non-residence in the state, although it may include absence from the United States. Smith *v.* Bryan, 74 Ind. 515.

65. Hawley *v.* Griffin, 121 Iowa 667, 92 N. W. 113, 97 N. W. 86; Stevens *v.* Cassaday, 59 Iowa 113, 12 N. W. 803. But *compare* Gannon *v.* Moore, 83 Ark. 196, 104 S. W. 139 (holding that the statute does not run against minor children of an estate until they have the right to take possession as heirs at maturity); Jones *v.* Boykin, 70 S. C. 309, 49 S. E. 877 (holding that the limitation in the tax statutes as to bringing action to recover land sold for taxes is a statute of limitation, and is affected by the disability of infancy); Dunham *v.* Harvey, 111 Tenn. 620, 69 S. W. 772.

One holding under a tax deed, and under a deed conveying the husband's curtesy in the land, which descended to the children of the deceased owner subject to the husband's curtesy, cannot, during the lifetime of the husband, avail himself, as against the children, of a statute limiting the time for the commencement of an action for the recovery of real estate sold for taxes, since the children are not entitled to possession until the termination of the life-estate, and limitations cannot begin to run against them until the termination of the life-estate by the death of the husband. Kohle *v.* Hobson, 215 Mo. 213, 114 S. W. 952.

66. McCaughan *v.* Tatman, 53 Iowa 508, 5 N. W. 712; Gibbs *v.* Sawyer, 48 Iowa 443; Patterson *v.* Durfey, 68 Miss. 779, 9 So. 354.

67. *Iowa.*—Laverty *v.* Sexton, 41 Iowa 435.

Kansas.— Coale *v.* Campbell, 58 Kan. 480, 49 Pac. 604; Thornburgh *v.* Cole, 27 Kan. 490; Estes *v.* Stebbins, 25 Kan. 315; Bowman *v.* Cockrill, 6 Kan. 311.

Michigan.— Richardson Lumber Co. *v.* Jasspon, 145 Mich. 8, 108 N. W. 497.

Nebraska.— Alexander *v.* Pitz, 34 Nebr. 361, 51 N. W. 851; Black *v.* Leonard, 33 Nebr. 745, 51 N. W. 126; Alexander *v.* Meadville, 33 Nebr. 219, 49 N. W. 1123; Alexander *v.* Wilcox, 30 Nebr. 793, 47 N. W. 81, 9 L. R. A. 735; D'Gette *v.* Sheldon, 27 Nebr. 829, 44 N. W. 30; Osgood *v.* Westover, 2 Nebr. (Unoff.) 668, 89 N. W. 746.

Texas.— Jordan *v.* Higgins, 63 Tex. 150.

Wisconsin.— Brunette *v.* Norber, 130 Wis.

under the various statutes may be the execution and recording of the tax deed;[68] or it may be the date of the sale, which means a sale completed by the delivery of a conveyance, and hence the statute begins to run from the time the purchaser becomes entitled to a deed,[69] or when the period of redemption has expired.[70] But it has been held that a statute of this kind does not apply to an action by the tax purchaser to quiet his title;[71] although, on the other hand, it is not limited to actions against the original owner, but applies as well to a suit against one claiming under a later tax-sale.[72] Independently of statutes of this kind, great and unreasonable delay on the part of the purchaser in asserting his rights may deprive him of the ordinary remedies.[73]

(II) *Possession or Occupation of Land.* If the tax title claimant acquires and holds possession of the premises, the statute of limitations will not run against him.[74] And if the land has remained entirely vacant and unoccupied during the period limited by the statute, it is considered that the tax deed gives a constructive possession, and the same result follows.[75] But if the original owner remains in undisputed possession, or if he takes possession at any time during the period of limitations and holds it to the close thereof, the bar of the statute may then be interposed to prevent any action by the tax purchaser.[76]

632, 110 N. W. 785; Lain *v.* Shepardson, 23 Wis. 224; Falkner *v.* Dorman, 7 Wis. 388.

United States.— Barrett *v.* Holmes, 102 U. S. 651, 26 L. ed. 291.

See 45 Cent. Dig. tit. "Taxation," § 1591.

But *compare* Sullivan *v.* Collins, 20 Colo. 528, 39 Pac. 334, holding that Mills Annot. St. § 3904, so providing, does not apply to an action by a purchaser at a tax-sale, but only to an action by the prior owner whose title is sought to be divested by the tax-sale.

Relief in equity against operation of statute see Koen *v.* Martin, 110 La. 242, 34 So. 429; Union Mut. L. Ins. Co. *v.* Dice, 14 Fed. 523, 11 Biss. 373.

68. Cassady *v.* Sapp, 64 Iowa 203, 19 N. W. 909; Bowman *v.* Cockrill, 6 Kan. 311; Falkner *v.* Dorman, 7 Wis. 388.

Second deed on same sale.— Where the tax deed first issued is invalid and the purchaser procures a second and valid deed, the statute begins to run from the execution of the second deed. Adams *v.* Griffin, 66 Iowa 125, 23 N. W. 295. But one cannot have a second deed merely for the purpose of evading the statute of limitations, after the expiration of the time within which he should have sued for the land. Corbin *v.* Bronson, 28 Kan. 532.

Arrest of statute by recovery of judgment see Fulton *v.* Mathers, 75 Kan. 770, 90 Pac. 256.

69. Innes *v.* Drexel, 78 Iowa 253, 43 N. W. 201; Thode *v.* Spofford, 65 Iowa 294, 17 N. W. 561, 21 N. W. 647; Keokuk, etc., R. Co. *v.* Lindley, 48 Iowa 11; Thornton *v.* Jones, 47 Iowa 397; Hintrager *v.* Hennessy, 46 Iowa 600.

70. Smith *v.* Midland R. Co., 4 Ont. 494.

71. Francis *v.* Griffin, 72 Iowa 23, 33 N. W. 345; Wright *v.* Lacy, 52 Iowa 248, 3 N. W. 47; Lewis *v.* Soule, 52 Iowa 11, 2 N. W. 400; Walker *v.* Boh, 32 Kan. 354, 4 Pac. 272.

72. Smith *v.* Jones, 37 Kan. 292, 15 Pac. 185.

73. Slattery *v.* Heilperin, 110 La. 86, 34 So. 139. And see Hole *v.* Rittenhouse, 19 Pa. St. 305.

74. Gunnison *v.* Hoehne, 18 Wis. 268.

75. Dorweiler *v.* Callanan, 91 Iowa 299, 59 N. W. 74; Strabala *v.* Lewis, 80 Iowa 510, 45 N. W. 871; Maxwell *v.* Hunter, 65 Iowa 121, 21 N. W. 481; Goslee *v.* Tearney, 52 Iowa 455, 3 N. W. 502; Lewis *v.* Soule, 52 Iowa 11, 2 N. W. 400; Moingona Coal Co. *v.* Blair, 51 Iowa 447, 1 N. W. 768; Myers *v.* Coonradt, 28 Kan. 211; Austin *v.* Holt, 32 Wis. 478; Lawrence *v.* Kenney, 32 Wis. 281; Gunnison *v.* Hoehne, 18 Wis. 268. And see Warren *v.* Putnam, 63 Wis. 410, 24 N. W. 58. *Compare* Slattery *v.* Heilperin, 110 La. 86, 34 So. 139.

76. Griffith *v.* Carter, 64 Iowa 193, 19 N. W. 903; Monk *v.* Corbin, 58 Iowa 503, 12 N. W. 571; Barrett *v.* Love, 48 Iowa 103; Wallace *v.* Sexton, 44 Iowa 257; Peck *v.* Sexton, 41 Iowa 566; Brown *v.* Painter, 38 Iowa 456; Jones *v.* Collins, 16 Wis. 594; Parish *v.* Eager, 15 Wis. 532; Hintrager *v.* Nightingale, 36 Fed. 847.

In Kansas, where land is actually vacant and unoccupied for more than two years after the recording of the tax deed, the holder of such deed will have two years from the time when the original owner or other person took actual possession before being barred of his action to recover possession. Case *v.* Frazier, 30 Kan. 343, 2 Pac. 519.

Character of possession by owner.— The possession of land necessary to bar an action by a tax-title claimant against the occupant, by virtue of a patent, is not required to be of the adverse, hostile, and exclusive character required under the general statute of limitations. Griffith *v.* Carter, 64 Iowa 193, 19 N. W. 903. Cutting hay, by authority of the record owner, on wild prairie land sold for taxes, stacking it on the land, and plowing fire breaks around the stacks, indicate an intention to dispute the tax title, and are sufficient acts of possession by the record owner to satisfy the

d. Actions Against Tax Title Claimant — (i) *Computation of Time* — (A) *In General.* Aside from the general statute of limitations, which may be invoked by a tax title claimant as against a suit by the original owner of the land,[77] special statutes of limitation in the various states provide that such suits must be brought within a certain time after the tax-sale,[78] or after the giving of notice thereof to the owner,[79] or after the expiration of the time allowed for redemption,[80] or the time when the purchaser takes possession of the premises,[81] or the execution and recording of a tax deed issued to him.[82] But the running of these statutes may be interrupted by the commencement and pendency of an action,[83] or their time-limit may be affected by dealings between the parties or the application of the principles of equity.[84]

(B) *Issuance and Record of Deed.* According to the limitation now most generally provided by the statutes, an action must be brought against the tax title claimant within a certain length of time after the execution and delivery of a tax deed to him or after the same is recorded.[85] Even where the statute

statute of limitations. Dorweiler *v.* Callanan, 91 Iowa 299, 59 N. W. 74.

77. Boagni *v.* Pacific Imp. Co., 111 La. 1063, 36 So. 129.

78. See the statutes of the several states. And see the following cases:

Arkansas.— Radcliffe *v.* Scruggs, 46 Ark. 96; Buckingham *v.* Hallett, 24 Ark. 519; Mitchell *v.* Etter, 22 Ark. 178. But see Cairo, etc., R. Co. *v.* Parks, 32 Ark. 131. Under the present statutes in this state the limitation runs from the date of the deed executed in pursuance of the statute, and not from the date of the sale. Haggart *v.* Ranney, 73 Ark. 344, 84 S. W. 703.

Kentucky.— Packard *v.* Beaver Valley Land, etc., Co., 96 Ky. 249, 28 S. W. 779, 16 Ky. L. Rep. 451.

Louisiana.— Smith *v.* New Orleans, 43 La. Ann. 726, 9 So. 773; McDougall *v.* Monlezun, 39 La. Ann. 1005, 3 So. 273; Barrow *v.* Wilson, 39 La. Ann. 403, 2 So. 809.

Minnesota.— Bower *v.* O'Donnall, 29 Minn. 135, 12 N. W. 352; Lambert *v.* Slingerland, 25 Minn. 457.

Pennsylvania.— Johnston *v.* Jackson, 70 Pa. St. 164; Rogers *v.* Johnson, 67 Pa. St. 43; Robb *v.* Bowen, 9 Pa. St. 71.

South Dakota.— Flickinger *v.* Cornwell, 22 S. D. 382, 117 N. W. 1039, holding that the statutory limitation from the date of the sale, which shall be deemed completed when the certificate thereof has been issued by the treasurer, applies to the sale and proceedings thereto, and not to subsequent proceedings under the control of the tax purchaser.

United States.— Indiana, etc., Lumber, etc., Co. *v.* Milburn, 161 Fed. 531, 88 C. C. A. 473, holding that under Ark. Act (1881), p. 63, the statute does not begin to run until confirmation of the sale.

See 45 Cent. Dig. tit. "Taxation," § 1593.

79. Hayward *v.* O'Connor, 145 Mich. 52, 108 N. W. 366.

80. Cairo, etc., R. Co. *v.* Parks, 32 Ark. 131; Lewis *v.* Seibles, 65 Miss. 251, 3 So. 652, 7 Am. St. Rep. 649; Halsted *v.* Silberstein, 196 N. Y. 1, 89 N. E. 443 [*reversing* 122 N. Y. App. Div. 909, 107 N. Y. Suppl. 1129]; Beatty *v.* O'Harrow, 49 Tex. Civ. App. 404, 109 S. W. 414.

81. Parsons *v.* Viets, 96 Mo. 408, 9 S. W. 908; Baldwin *v.* Merriam, 16 Nebr. 199, 20 N. W. 250; Cranmer *v.* Hall, 4 Watts & S. (Pa.) 36; Waln *v.* Shearman, 8 Serg. & R. (Pa.) 357, 11 Am. Dec. 624.

82. See *infra*, XIV, B, 4, d, (I), (B).

83. Hooper *v.* Sac County Bank, 72 Iowa 280, 33 N. W. 681; Barke *v.* Early, 72 Iowa 273, 33 N. W. 677; Myers *v.* Coonradt, 28 Kan. 211; Prater *v.* Craighead, 113 La. 627, 43 So. 258; Becker *v.* Wing, 61 Wis. 252, 21 N. W. 47.

84. Jordan *v.* Brown, 56 Iowa 281, 9 N. W. 200, (1880) 6 N. W. 278 (holding that where the parties agree to convert a valid tax title into a mortgage, the statute of limitations does not run while the relation of mortgagor and mortgagee continues); Davis *v.* Chapman, 24 Fed. 674 (merger of tax title in fee).

Fraud.— If a tenant in possession fraudulently acquires a tax title to the demised premises, the statute of limitations does not begin to run against a suit by the owner until the discovery of the fraud. Duffitt *v.* Tuhan, 28 Kan. 292; McMahon *v.* McGraw, 26 Wis. 614. And recording a tax deed, which has been fraudulently obtained by a tenant of the land described therein, will not impart notice of such fraud to the owner, who is a non-resident and has no reason to suspect the existence of fraud, so as to start the running of the statute against such owner. St. Clair *v.* Craig, 77 Kan. 394, 94 Pac. 790.

85. *Alabama.*— Smith *v.* Cox, 115 Ala. 503, 22 So. 78; Bolling *v.* Smith, 79 Ala. 535; Doe *v.* Anderson, 79 Ala. 209; Lassitter *v.* Lee, 68 Ala. 287.

Colorado.— Crisman *v.* Johnson, 23 Colo. 264, 47 Pac. 296, 58 Am. St. Rep. 224.

Florida.— Spaulding *v.* Ellsworth, 39 Fla. 76, 21 So. 812.

Illinois.— Smith *v.* Prall, 133 Ill. 308, 24 N. E. 521.

Iowa.— Hunt *v.* Gray, 76 Iowa 268, 41 N. W. 14; Scroggs *v.* Garver, 69 Iowa 680, 29 N. W. 779; Peters *v.* Jones, 35 Iowa 512; Douglass *v.* Tullock, 34 Iowa 262.

Kansas.— Morris *v.* Gregory, 80 Kan. 626, 103 Pac. 137; Vogler *v.* Stark, 75 Kan. 831,

mentions the "sale" as the starting point of the statute, some of the courts understand this to mean a sale completed by the delivery of a deed,[86] or do not consider the statute as in motion until the time when the purchaser becomes entitled to a deed and could obtain one.[87]

(II) *Possession of Premises* — (A) *In General.* So long as the original owner of land which has been sold for taxes remains in undisturbed possession of it, the statute of limitations does not run against him or prevent the maintenance of a suit to set aside the tax sale or remove the cloud on his title.[88] In some

89 Pac. 653; West *v.* Cameron, 39 Kan. 736, 18 Pac. 894; Campbell *v.* Stagg, 37 Kan. 419, 15 Pac. 531; Estes *v.* Stebbins, 25 Kan. 315; Bowman *v.* Cockrill, 6 Kan. 311.

Kentucky.— Washington *v.* McCombs, 32 S. W. 398, 17 Ky. L. Rep. 740.

Michigan.— Downer *v.* Richardson, 148 Mich. 596, 112 N. W. 761.

Missouri.—Allen *v.* White, 98 Mo. 55, 10 S. W. 881; Mason *v.* Crowder, 85 Mo. 526; Skinner *v.* Williams, 85 Mo. 489.

North Carolina.— Lyman *v.* Hunter, 123 N. C. 508, 31 S. E. 827.

Oklahoma.— O'Keefe *v.* Dillenbeck, 15 Okla. 437, 83 Pac. 540.

Oregon.— Martin *v.* White, 53 Oreg. 319, 100 Pac. 290.

Pennsylvania.— Rogers *v.* Johnson, 67 Pa. St. 43; Stewart *v.* Trevor, 56 Pa. St. 374.

Wisconsin.— Strange *v.* Oconto Land Co., 136 Wis. 516, 117 N. W. 1023; Herbst *v.* Land, etc., Co., 134 Wis. 502, 115 N. W. 119; Wisconsin River Land Co. *v.* Paine Lumber Co., 130 Wis. 393, 110 N. W. 220; Whitney *v.* Marshall, 17 Wis. 174; Knox *v.* Cleveland, 13 Wis. 245; Hill *v.* Kricke, 11 Wis. 442; Sprecker *v.* Wakeley, 11 Wis. 432; Edgerton *v.* Bird, 6 Wis. 527, 70 Am. Dec. 473.

United States.— Leffingwell *v.* Warren, 2 Black 599, 17 L. ed. 261; Collier *v.* Goessling. 160 Fed. 604, 87 C. C. A. 506; Sprague *v.* Pitt, 22 Fed. Cas. No. 13,254, McCahon 212.

See 45 Cent. Dig. tit. "Taxation," § 1596.

Successive tax deeds.— The statute in Kansas gives the landowner two years in which to set aside "any and all tax deeds," where different or successive tax deeds on the same sale have been put on record by the same party, not merely two years in which to set aside the last deed recorded, but two years in which to set aside all such different or successive deeds, without regard to the length of time which the prior tax deeds, merged in the last deed, have been on record. Austin *v.* Jones, 37 Kan. 327, 15 Pac. 166.

The recording of a valid tax title is notice that the grantee therein disclaims a tenancy under a lease of the premises, and an action against him must be brought within the statutory period. Hudson *v.* Schumpert, 80 S. C. 23, 61 S. E. 104.

Commencement of action.—An action against a non-resident, who is outside of the state, to defeat a tax title, is to be deemed begun, within the meaning of the statute of limitations, where plaintiff, without causing a summons to be issued, has filed his petition and affidavit for publication and caused notice to be delivered to the only newspaper printed in the county, with directions for its insertion, provided a proper publication results; and in such case the action is commenced at the date of the first publication. Canaday *v.* Davis, 79 Kan. 816, 101 Pac. 626. And where an action to quiet title is begun against several defendants, and the holder of the tax deed is not a defendant in the action or brought into court until more than the statutory period after recording his deed, the action will be deemed to be commenced, as to him, when he was brought into court, and he can then avail himself of the statutory limitation. Gibson *v.* Freeland, 77 Kan. 450, 94 Pac. 782.

86. Jones *v.* Randle, 68 Ala. 258; Barrett *v.* Love, 48 Iowa 103; Jeffrey *v.* Brokaw, 35 Iowa 505; McCready *v.* Sexton, 29 Iowa 356, 4 Am. Rep. 214; Henderson *v.* Oliver, 28 Iowa 20; Eldridge *v.* Kuehl, 27 Iowa 160.

87. Capehart *v.* Guffey, 130 Ala. 425, 30 So. 390; Roth *v.* Munzenmaier, 118 Iowa 326, 91 N. W. 1072; Gallaher *v.* Head, 108 Iowa 588, 79 N. W. 387; Wolcott *v.* Holland, 27 Ohio Cir. Ct. 71.

88. *Arkansas.*— McCann *v.* Smith, 65 Ark. 305, 45 S. W. 1057; Woolfork *v.* Buckner, 60 Ark. 163, 29 S. W. 372; Parr *v.* Matthews, 50 Ark. 390, 8 S. W. 22.

Colorado.— Morris *v.* St. Louis Nat. Bank, 17 Colo. 231, 29 Pac. 802.

Indiana.— Kraus *v.* Montgomery, 114 Ind. 103, 16 N. E. 153.

Iowa.— Burke *v.* Cutler, 78 Iowa 299, 43 N. W. 204; Monk *v.* Corbin, 58 Iowa 503, 12 N. W. 571; Patton *v.* Luther, 47 Iowa 236. See also Griffin *v.* Turner, 75 Iowa 250, 39 N. W. 294.

Kansas.— Mitchell *v.* Lines, 36 Kan. 378, 13 Pac. 593; Haase *v.* Kelley, 8 Kan. App. 648, 56 Pac. 535.

Louisiana.— Bartley *v.* Sallier, 118 La. 93, 42 So. 657; Lisso *v.* Giddens, 117 La. 507, 41 So. 1029; Tieman *v.* Johnston, 114 La. 112, 38 So. 75; *In re* Seim, 111 La. 554, 35 So. 744; State *v.* New Orleans, 110 La. 405, 34 So. 582; Koen *v.* Martin, 110 La. 242, 34 So. 429; Carey *v.* Cagney, 109 La. 77, 33 So. 89; Hansen *v.* Mauberret, 52 La. Ann. 1565, 28 So. 167; Prescott *v.* Payne, 44 La. Ann. 650, 11 So. 140.

Missouri.— Mason *v.* Crowder, 85 Mo. 526; Spurlock *v.* Dougherty, 81 Mo. 171.

Nebraska.— Baldwin *v.* Merriam, 16 Nebr. 199, 20 N. W. 250.

New Jersey.— Brooks *v.* Union Tp., 68 N. J. L. 133, 52 Atl. 238.

Oklahoma.— Cadman *v.* Smith, 15 Okla. 633, 85 Pac. 346.

Pennsylvania.— Rogers *v.* Johnson, 67 Pa. St. 43.

states the statute begins to run in favor of the tax purchaser only from the time he takes possession.[89] But on the other hand, if the purchaser acquires the possession and continues to hold it for the full period of time limited by the statute, his title then becomes unassailable and the rights of the former owner are gone.[90]

(B) *Vacant or Unoccupied Lands.* In many states it is held that if the land remains vacant and unoccupied after the tax-sale, the tax deed, if fair on its face,

Texas.— Telfener *v.* Dillard, 70 Tex. 139, 7 S. W. 847.

Wisconsin.— Finn *v.* Wisconsin River Land Co., 72 Wis. 546, 40 N. W. 209.

United States.— Indianapolis Land Trust *v.* Hoffman, 57 Fed. 333, 6 C. C. A. 358.

See 45 Cent. Dig. tit. "Taxation," § 1596.

Length of possession.— To stop the running of the statute against the original owner of land sold for taxes it is not necessary that he shall be in actual possession during the whole period prescribed by the statute, but it is sufficient if he is in possession for any considerable length of time. Smith *v.* Sherry, 54 Wis. 114, 11 N. W. 465.

Possession by tenant.—Where the land is occupied by a person who is not shown to be in possession under the authority of the holder of the tax deed, it will be presumed, until the contrary is shown, that he occupies as tenant of the former owner and not as a mere trespasser. Lewis *v.* Disher, 32 Wis. 504.

Possession of timber lands and mining properties.—As to what acts of entry and ownership will be sufficient to constitute an actual possession by the former owner of lands occupied only for the purpose of logging or mining operations see Goslee *v.* Tearney, 52 Iowa 455, 3 N. W. 502; St. Croix Land, etc., Co. *v.* Ritchie, 78 Wis. 492, 47 N. W. 657; Finn *v.* Wisconsin River Land Co., 72 Wis. 546, 40 N. W. 209; Haseltine *v.* Mosher, 51 Wis. 443, 8 N. W. 273; Stephenson *v.* Wilson, 50 Wis. 95, 6 N. W. 240; Coleman *v.* Eldred, 44 Wis. 210; Stephenson *v.* Wilson, 37 Wis. 482; Wilson *v.* Henry, 35 Wis. 241.

89. *Alabama.*—Long *v.* Boast, 153 Ala. 428, 44 So. 955.

Arkansas.— Ross *v.* Royal, 77 Ark. 324, 91 S. W. 178.

Florida.— Dees *v.* Smith, 55 Fla. 652, 46 So. 173, holding that the statutory limitation only applies when the purchaser of land at a tax-sale goes into actual possession.

Missouri.— Parsons *v.* Viets, 96 Mo. 408, 9 S. W. 908.

Nebraska.— Baldwin *v.* Merriam, 16 Nebr. 199, 20 N. W. 250.

Pennsylvania.— Cranmer *v.* Hall, 4 Watts & S. 36; Waln *v.* Shearman, 8 Serg. & R. 357, 11 Am. Dec. 624. But see Sheik *v.* McElroy, 20 Pa. St. 25, holding that the statute begins to run in favor of the tax purchaser from the date of his tax title.

South Carolina.— Gardner *v.* Reedy, 62 S. C. 503, 40 S. E. 947.

See 45 Cent. Dig. tit. "Taxation," § 1596. And see cases cited in preceding note.

Where a tax proceeding is void and the purchaser is not in possession, the legislature cannot transfer to him the title of the owner by lapse of time alone, but there must be actual possession by the purchaser before the statute begins to run. Martin *v.* White, 53 Oreg. 319, 100 Pac. 290.

90. *Arkansas.*— Sparks *v.* Farris, 71 Ark. 117, 71 S. W. 255, 945; Woolfork *v.* Buckner, 60 Ark. 163, 29 S. W. 372; Cooper *v.* Lee, 59 Ark. 460, 27 S. W. 970.

Iowa.— Bemis *v.* Plato, 119 Iowa 127, 93 N. W. 83; Bullis *v.* Marsh, 56 Iowa 747, 2 N. W. 578, 6 N. W. 177; Moingona Coal Co. *v.* Blair, 51 Iowa 447, 1 N. W. 768.

Louisiana.— Bartley *v.* Sallier, 118 La. 93, 42 So. 657; Slattery *v.* Kellum, 114 La. 282, 38 So. 170; Ashley Co. *v.* Bradford, 109 La. 641, 33 So. 634; Scott *v.* Parry, 108 La. 11, 32 So. 188; Russell *v.* Lang, 50 La. Ann. 36, 23 So. 113; Breaux *v.* Negrotto, 43 La. Ann. 426, 9 So. 502.

Michigan.— St. Mary's Power Co. *v.* Chandler-Dunbar Water Power Co., 133 Mich. 470, 95 N. W. 554.

Mississippi.— Butts *v.* Ricks, 82 Miss. 533, 34 So. 354; Pearce *v.* Perkins, 70 Miss. 276, 12 So. 205.

Pennsylvania.— Bayard *v.* Inglis, 5 Watts & S. 465; Bradford *v.* Dornseif, 2 Penr. & W. 503; Young *v.* Hosack, 2 Penr. & W. 162.

Wisconsin.— Brunette *v.* Norber, 130 Wis. 632, 110 N. W. 785; Edgerton *v.* Bird, 6 Wis. 527, 70 Am. Dec. 473.

United States.— Pillow *v.* Roberts, 13 How. 472, 14 L. ed. 228.

See 45 Cent. Dig. tit. "Taxation," § 1596.

Extent of possession.—Actual possession by the tax purchaser of a portion of the tract, which is divided from the rest by a stream, amounts to possession of the whole tract. Butts *v.* Ricks, 82 Miss. 533, 34 So. 354.

Tax deed as basis of possession.— It is not sufficient merely that the tax purchaser shall be in possession, but his possession must be founded on his tax deed as the basis of his title; if he is in possession under another claim of title, the special statute of limitations will not run in his favor. Doe *v.* Moog, 150 Ala. 460, 43 So. 710 (possession under auditor's deed not sufficient); Quertermous *v.* Walls, 70 Ark. 326, 67 S. W. 1014; Gilman *v.* Riopelle, 18 Mich. 145. The limitation as to suits to avoid a tax-sale is not a curative statute, but the title thus acquired is in the nature of a prescriptive title, in which the deed must on its face constitute color of title under which possession is held. Martin *v.* White, 53 Oreg. 319, 100 Pac. 290.

Possession fraudulently acquired.— The statute does not run against a landowner in favor of one who, after acquiring a tax deed, fraudulently induces the owner's tenant to

will draw after it the constructive possession of the premises, so as to support the purchaser's claim under the statute of limitations.[91] But under other statutes the mere delivery or recording of the deed, without possession, is not sufficient to start the running of the statute.[92]

(III) *Sufficiency of Deed or Title.* If a tax deed is void on its face, the statute of limitations will not run in favor of the holder of it.[93] But on the

give him possession. Pulford *v.* Whicher, 75 Wis. 555, 45 N. W. 418.

91. *Colorado.*—Williams *v.* Conroy, 35 Colo. 117, 83 Pac. 959. *Compare* Morris *v.* St. Louis Nat. Bank, 17 Colo. 231, 29 Pac. 802.

Illinois.—Whitney *v.* Stevens, 77 Ill. 585.

Iowa.—Bullis *v.* Marsh, 56 Iowa 747, 2 N. W. 578, 6 N. W. 177; Zent *v.* Picken, 54 Iowa 535, 6 N. W. 750; Moingona Coal Co. *v.* Blair, 51 Iowa 447, 1 N. W. 768.

Kansas.—Stump *v.* Burnett, 67 Kan. 589, 73 Pac. 894.

Louisiana.—Crillen *v.* New Orleans Terminal Co., 117 La. 349, 41 So. 645; Slattery *v.* Kellum, 114 La. 282, 38 So. 170.

Minnesota.—See Musser-Sauntry Land, etc., Co. *v.* Tozer, 56 Minn. 443, 57 N. W. 1072.

Wisconsin.—Van Ostrand *v.* Cole, 131 Wis. 446, 110 N. W. 891; Cornell University *v.* Mead, 80 Wis. 387, 49 N. W. 815; Lewis *v.* Disher, 32 Wis. 504; Austin *v.* Holt, 32 Wis. 478; Lawrence *v.* Kenney, 32 Wis. 281; Gunnison *v.* Hoehne, 18 Wis. 268; Dean *v.* Earley, 15 Wis. 100; Hill *v.* Kricke, 11 Wis. 442; Sprecker *v.* Wakeley, 11 Wis. 432.

United States.—Bardon *v.* Land, etc., Imp. Co., 157 U. S. 327, 15 S. Ct. 650, 39 L. ed. 719. See also Indiana, etc., Lumber, etc., Co. *v.* Milburn, 161 Fed. 531, 88 C. C. A. 473.

See 45 Cent. Dig. tit. "Taxation," § 1596.

Camping on vacant land for a week, and watching it for several weeks to keep off trespassers, is not sufficient to interrupt the running of the statute in favor of the tax purchaser under constructive possession. Musser-Sauntry Land, etc., Co. *v.* Tozer, 56 Minn. 443, 57 N. W. 1072.

Under N. Y. Laws (1885), c. 448, and c. 453, § 4, limitations do not begin to run in favor of a controller's deed until after there is an advertisement by the controller, for three successive weeks, of a list of the wild, vacant, or forest lands to which the state holds title under a tax-sale or otherwise. Saranac Land, etc., Co. *v.* Roberts, 195 N. Y. 303, 88 N. E. 753 [*affirming* 125 N. Y. App. Div. 333, 109 N. Y. Suppl. 547].

92. Gates *v.* Kelsey, 57 Ark. 523, 22 S. W. 162; Childers *v.* Schantz, 120 Mo. 305, 25 S. W. 909.

93. *Arkansas.*—Peasley *v.* Equitable Securities Co., 72 Ark. 601, 84 S. W. 224.

Colorado.—Dimpfel *v.* Beam, 41 Colo. 25, 91 Pac. 1107; Crisman *v.* Johnson, 23 Colo. 264, 47 Pac. 296, 58 Am. St. Rep. 224; Gomer *v.* Chaffee, 6 Colo. 314.

Indiana.—Jackson *v.* Neal, 136 Ind. 173, 35 N. E. 1021.

Iowa.—Nichols *v.* McGlathery, 43 Iowa 189; Early *v.* Whittingham, 43 Iowa 162.

Kansas.—Gibson *v.* Kueffer, 69 Kan. 534, 77 Pac. 282; Martin *v.* Garrett, 49 Kan. 131, 30 Pac. 168; Richards *v.* Thompson, 43 Kan. 209, 23 Pac. 106; Edwards *v.* Sims, 40 Kan. 235, 19 Pac. 710; Barr *v.* Randall, 35 Kan. 126, 10 Pac. 515; Hall *v.* Dodge, 18 Kan. 277; Waterson *v.* Devoe, 18 Kan. 223; Hubbard *v.* Johnson, 9 Kan. 632; Shoat *v.* Walker, 6 Kan. 65.

Louisiana.—Surget *v.* Newman, 42 La. Ann. 777, 7 So. 731.

Michigan.—Fitschen *v.* Olson, 155 Mich. 320, 119 N. W. 3.

Minnesota.—Babcock *v.* Johnson, 108 Minn. 217, 121 N. W. 909; Burdick *v.* Bingham, 38 Minn. 482, 38 N. W. 489; Sanborn *v.* Cooper, 31 Minn. 307, 17 N. W. 856; Sheehy *v.* Hinds, 27 Minn. 259, 6 N. W. 781. See also Murphy *v.* Burke, 47 Minn. 99, 49 N. W. 387.

Mississippi.—Pearce *v.* Perkins, 70 Miss. 276, 12 So. 205; Clay *v.* Moore, 65 Miss. 81, 3 So. 142.

Missouri.—Kinney *v.* Forsythe, 96 Mo. 414, 9 S. W. 918; Duff *v.* Neilson, 90 Mo. 93, 2 S. W. 222; Callahan *v.* Davis, 90 Mo. 78, 2 S. W. 216; Pearce *v.* Tittsworth, 87 Mo. 635; Hopkins *v.* Scott, 86 Mo. 140; Mason *v.* Crowder, 85 Mo. 526; Smith *v.* H. D. Williams Cooperage Co., 100 Mo. App. 153, 73 S. W. 315.

Nebraska.—Griffey *v.* Kennard, 24 Nebr. 174, 38 N. W. 791; Bendexen *v.* Fenton, 21 Nebr. 184, 31 N. W. 685; Housel *v.* Boggs, 17 Nebr. 94, 22 N. W. 226; Towle *v.* Holt, 14 Nebr. 221, 15 N. W. 203; McGavock *v.* Pollack, 13 Nebr. 535, 14 N. W. 659.

New York.—Matter of Rourke, 63 Misc. 354, 118 N. Y. Suppl. 415, holding that where the record of a tax deed of occupied lands is an absolute nullity, statutory limitation does not apply.

North Dakota.—Beggs *v.* Paine, 15 N. D. 436, 109 N. W. 322; Eaton *v.* Bennett, 10 N. D. 346, 87 N. W. 188; Hegar *v.* De Groat, 3 N. D. 354, 56 N. W. 150.

Oklahoma.—Keller *v.* Hawk, 19 Okla. 407, 91 Pac. 778.

Oregon.—Lewis *v.* Blackburn, 42 Oreg. 114, 69 Pac. 1024.

South Dakota.—Batelle *v.* Knight, 23 S. D. 161, 120 N. W. 1102; Battelle *v.* Wolven, 22 S. D. 39, 115 N. W. 99; King *v.* Lane, 21 S. D. 101, 110 N. W. 37; Bandow *v.* Wolven, 20 S. D. 445, 107 N. W. 204; Horswill *v.* Farnham, 16 S. D. 414, 92 N. W. 1082; Salmer *v.* Lathrop, 10 S. D. 216, 72 N. W. 570.

Texas.—Harber *v.* Dyches, (1890) 14 S. W. 580; Berrendo Stock Co. *v.* Kaiser, 66 Tex. 352, 1 S. W. 257; Wofford *v.* McKinna, 23 Tex. 36, 76 Am. Dec. 53.

other hand, if the deed is fair on its face, with no patent defects, it will be sufficient to support a claim under the statute of limitations, notwithstanding the existence of irregularities or defects of which the purchaser, taking in good faith, had no notice;[94] and it is held that the deed should be liberally construed, to make its recitals correspond with the real facts of the case, if it would be valid on its face when so construed.[95]

(IV) *Defects Cured by Limitations* — (A) *In General.* After a title has been held under a tax deed for the prescribed length of time, all irregularities, informalities, and defects of form are cured, and thereafter no questions can be raised as to the validity of the tax proceedings,[96] except those which concern the

Washington.— Hurd *v.* Brisner, 3 Wash. 1, 28 Pac. 371, 28 Am. St. Rep. 17.

Wisconsin.— Cutler *v.* Hurlbut, 29 Wis. 152.

United States.— Moore *v.* Brown, 11 How. 414, 13 L. ed. 751; Coulter *v.* Stafford, 56 Fed. 564, 6 C. C. A. 18; Daniels *v.* Case, 45 Fed. 843; Slyfield *v.* Healy, 32 Fed. 2; Davis *v.* Chapman, 24 Fed. 674; Arrowsmith *v.* Burlingim, 1 Fed. Cas. No. 563, 4 McLean 489; Swope *v.* Saine, 23 Fed. Cas. No. 13,705, 1 Dill. 416.

See 45 Cent. Dig. tit. "Taxation," § 1594.

Defects which invalidate.—A tax deed is void, within the meaning of the rule stated in the text, when the description of the property varies materially from that in the assessment roll (Saddler *v.* Smith, 54 Fla. 671, 45 So. 718; Carncross *v.* Lykes, 22 Fla. 587; Bird *v.* Benlisa, 142 U. S. 664, 12 S. Ct. 323, 35 L. ed 1151); when it has not been acknowledged (Flowers *v.* Jernigan, 116 Ala. 516, 22 So. 853; Johnston *v.* Sutton, 45 Fed. 296); when the land in question was not subject to taxation (Taylor *v.* Miles, 5 Kan. 498, 7 Am. Rep. 558); when the purchaser at the tax-sale was a tenant who had agreed to pay the taxes (Carithers *v.* Weaver, 7 Kan. 110); when the deed was executed after a redemption had been effected (Burke *v.* Cutler, 78 Iowa 299, 43 N. W. 204); when the clerk was without authority to make the deed because the list filed by the county trustee did not comply with the statute (Collier *v.* Goessling, 160 Fed. 64, 87 C. C. A. 506); or when there is nothing to show the right of the holder as an assignee of the original purchaser (Smith *v.* Philips, 51 Fla. 327, 41 So. 527). But after the statute of limitations has run, it is not a ground of objection that the treasurer executed the deed to himself. Guthrie *v.* Harker, 27 Fed. 586. And the omission of the deed to recite the previous issue of an irregular deed will not prevent the running of the statute. Peck *v.* Comstock, 6 Fed. 22.

A compromise tax deed, void on its face, is not cured by the statutory limitation. Lanning *v.* Brown, 79 Kan. 103, 98 Pac. 771.

94. *Arkansas.*— Gannon *v.* Moore, 83 Ark. 196, 104 S. W. 139.

Colorado.— Wood *v.* McCombe, 37 Colo. 174, 86 Pac. 319; Williams *v.* Conroy, 35 Colo. 117, 83 Pac. 959.

Louisiana.— Holland *v.* Southern States Land, etc., Co., 124 La. 406, 50 So. 436; Harris *v.* Natlabany Lumber Co., 119 La. 978, 44 So. 806; Levy *v.* Gause, 112 La. 789, 36 So. 684; Wykoff *v.* Miller, 48 La. Ann. 475, 19 So. 478; Barrow *v.* Wilson, 38 La. Ann. 209; Giddens *v.* Mobley, 37 La. Ann. 417, in which it was said that the good faith necessary to enable a claimant under a tax title to plead prescription is simply that he shall not have acquired the property *mala fide.* A purchaser is a *bona fide* possessor where the tax deed is valid in form, having no defect apparent on its face, and the sale was made by the proper officer; and in such a case he cannot be deprived of the right to plead prescription because he might by inquiry and careful examination have discovered want of title in his vendor.

Mississippi.— Pipes *v.* Farrar, 64 Miss. 514, 1 So. 740.

South Dakota.— Northwestern Mortg. Trust Co. *v.* Levtzow, 23 S. D. 562, 122 N. W. 600; Cornelius *v.* Ferguson, 23 S. D. 187, 121 N. W. 91.

Wisconsin.— Although the tax deed may be actually void, yet it may suffice to set the statute running in favor of the holder if he has taken actual, open, and notorious possession. McMillan *v.* Wehle, 55 Wis. 685, 13 N. W. 694; Cutler *v.* Hurlbut, 29 Wis. 152; Lindsay *v.* Fay, 25 Wis. 460; Swain *v.* Comstock, 18 Wis. 463; Lain *v.* Shepardson, 18 Wis. 59; Edgerton *v.* Bird, 6 Wis. 527, 70 Am. Dec. 473.

See 45 Cent. Dig. tit. "Taxation," § 1594.

Effect of fraud as to third persons.— The statute of limitations may be invoked in behalf of a tax title purchased in good faith, although such title would be void in the hands of the grantor because of a fraudulent agreement between the latter and the owner that the sale for taxes should be made for the purpose of cutting off an existing mortgage lien. Nickum *v.* Gaston, 24 Oreg. 380, 33 Pac. 671, 35 Pac. 31.

95. Sanger *v.* Rice, 43 Kan. 580, 23 Pac. 633.

96. *Arkansas.*— Radcliffe *v.* Scruggs, 46 Ark. 96.

Florida.— Mundee *v.* Freeman, 23 Fla. 529, 3 So. 153.

Iowa.— McCash *v.* Penrod, 131 Iowa 631, 109 N. W. 180; Lawrence *v.* Hornick, 81 Iowa 193, 46 N. W. 987; Collins *v.* Valleau, 79 Iowa 626, 43 N. W. 284, 44 N. W. 904; Griffin *v.* Bruce, 73 Iowa 126, 34 N. W. 773; Jeffrey *v.* Brokaw, 35 Iowa 505; Thomas *v.* Stickle, 32 Iowa 71.

Kansas.— Thompson *v.* Colburn, 68 Kan.

power and jurisdiction of the taxing officers or go to the very groundwork of the proceedings,[97] and those which concern the fraud or misconduct of the parties.[98] If the requisite notice of the expiration of the time allowed for redemption is not given, or is given to the wrong person, or is radically insufficient, this fault will not be cured by the statute,[99] although it is otherwise as to a mere defect in the proof of service of such notice.[1]

(B) *Defects in Assessment and Sale.*[2] The statute of limitations will cure any mere irregularity or informality in the levy or assessment of the taxes,[3] but will

819, 75 Pac. 508; Goddard *v.* Storch, 57 Kan. 714, 48 Pac. 15; Jordan *v.* Kyle, 27 Kan. 190.

Louisiana.— Welsh *v.* Augusti, 52 La. Ann. 1949, 28 So. 363; Le Seigneur *v.* Bessan, 52 La. Ann. 187, 26 So. 865; Stille *v.* Schull, 41 La. Ann. 816, 6 So. 634; Kent *v.* Brown, 38 La. Ann. 802.

New York.— Meigs *v.* Roberts, 162 N. Y. 371, 56 N. E. 838, 76 Am. St. Rep. 322 [*reversing* 42 N. Y. App. Div. 290, 59 N. Y. Suppl. 215]; Cone *v.* Lauer, 131 N. Y. App. Div. 193, 115 N. Y. Suppl. 644.

Pennsylvania.— Burd *v.* Patterson, 22 Pa. St. 219; Iddings *v.* Cairns, 2 Grant 88; Bayard *v.* Inglis, 5 Watts & S. 465.

Wisconsin.— Herbst *v.* Land, etc., Co., 134 Wis. 502, 115 N. W. 119; Dupen *v.* Wetherby, 79 Wis. 203, 48 N. W. 378; Urquhart *v.* Westcott, 65 Wis. 135, 26 N. W. 552; McDonald *v.* Daniels, 58 Wis. 426, 17 N. W. 11; Sherry *v.* Gilmore, 58 Wis. 324, 17 N. W. 252; Prentice *v.* Ashland County, 56 Wis. 345, 14 N. W. 297; Dreutzer *v.* Smith, 56 Wis. 292, 14 N. W. 465; Milledge *v.* Coleman, 47 Wis. 184, 2 N. W. 77.

United States.— Guthrie *v.* Harker, 27 Fed. 586.

See 45 Cent. Dig. tit. "Taxation," § 1594.

97. *Arkansas.*— Radcliffe *v.* Scruggs, 43 Ark. 96.

Illinois.— Torrence *v.* Shedd, 156 Ill. 194, 41 N. E. 95, 42 N. E. 171.

Kansas.— Stump *v.* Burnett, 67 Kan. 589, 73 Pac. 894.

Louisiana.— George *v.* Cole, 109 La. 816, 33 So. 784; Pennington *v.* Jones, 52 La. Ann. 2025, 28 So. 352; Prescott *v.* Payne, 44 La. Ann. 650, 11 So. 140; Surget *v.* Newman, 42 La. Ann. 777, 7 So. 731.

Minnesota.—Holmes *v.* Loughren, 97 Minn. 83, 105 N. W. 558.

North Dakota.—State Finance Co. *v.* Beck, 15 N. D. 374, 109 N. W. 357.

Oregon.— Martin *v.* White, 53 Oreg. 319, 100 Pac. 290.

Wisconsin.— Chicago, etc., R. Co. *v.* Arnold, 114 Wis. 434, 90 N. W. 434; Pratt *v.* Milwaukee, 93 Wis. 658, 68 N. W. 392; Wadleigh *v.* Marathon County Bank, 58 Wis. 546, 17 N. W. 314; Smith *v.* Sherry, 54 Wis. 114, 11 N. W. 465; Knox *v.* Cleveland, 13 Wis. 245.

United States.— Martin *v.* Barbour, 140 U. S. 634, 11 S. Ct. 944, 35 L. ed. 546.

See 45 Cent. Dig. tit. "Taxation," §§ 1594, 1595.

Some of the decisions go much further than the rule stated in the text, and hold that the statutes in question, since they are to be regarded not merely as curative acts but also as statutes of limitation, will prevent an impeachment of the tax title even on the ground of fundamental and jurisdictional defects. Ross *v.* Royal, 77 Ark. 324, 91 S. W. 178; Carlisle *v.* Yoder, 69 Miss. 384, 12 So. 255; Saranac Land, etc., Co. *v.* Roberts, 177 U. S. 318, 20 S. Ct. 642, 44 L. ed. 786.

Although the recitals of a tax deed may be made conclusive as to irregularities, yet if the proceedings are void, a bar to a suit by an owner must be something more than a lapse of time, and he must be ousted from possession, or the purchaser's title quieted, to cut off his right. Martin *v.* White, 53 Oreg. 319, 100 Pac. 290.

98. Duffitt *v.* Tuhan, 28 Kan. 292; McGee *v.* Holmes, 63 Miss. 50; Fox *v.* Zimmermann, 77 Wis. 414, 46 N. W. 533; McMahon *v.* McGraw, 26 Wis. 614; Knox *v.* Cleveland, 13 Wis. 245. See also Herbst *v.* Land, etc., Co., 134 Wis. 502, 115 N. W. 119. *Compare* Stark *v.* Brown, 101 Ill. 395; Waggoner *v.* Mann, 83 Iowa 17, 48 N. W. 1065.

A fraudulent tax title will not serve as a basis for a constitutional or statutory limitation. Babin *v.* Daspit, 120 La. 755, 45 So. 597; Boon *v.* Root, 137 Wis. 451, 119 N. W. 121.

99. Chicago, etc., R. Co. *v.* Kelley, 105 Iowa 106, 74 N. W. 935; Shelley *v.* Smith, 97 Iowa 259, 66 N. W. 172; Wilson *v.* Russell, 73 Iowa 395, 35 N. W. 492; Slyfield *v.* Barnum, 71 Iowa 245, 32 N. W. 270; Slyfield *v.* Healy, 32 Fed. 2.

1. Bull *v.* Gillett, 79 Iowa 547, 44 N. W. 815; Bolin *v.* Francis, 72 Iowa 619, 34 N. W. 447; Trulock *v.* Bentley, 67 Iowa 602, 25 N. W. 824.

2. Recitals in deed as to amount of land offered and sold see *supra*, XIII, D, 2, e, note 52.

3. *Iowa.*— Lawrence *v.* Hornick, 81 Iowa 193, 46 N. W. 987; Collins *v.* Valleau, 79 Iowa 626, 43 N. W. 284, 44 N. W. 904; Griffin *v.* Bruce, 73 Iowa 126, 34 N. W. 773; Peirce *v.* Weare, 41 Iowa 378.

Kansas.—Doudna *v.* Harlan, 45 Kan. 484, 25 Pac. 883; Harris *v.* Curran, 32 Kan. 580, 4 Pac. 1044; Maxson *v.* Huston, 22 Kan. 643.

Mississippi.— Cole *v.* Coon, 70 Miss. 634, 12 So. 849; Jonas *v.* Flanniken, 69 Miss. 577, 11 So. 319; Nevin *v.* Bailey, 62 Miss. 433.

New York.— Ensign *v.* Barse, 107 N. Y. 329, 14 N. E. 400, 15 N. E. 401; People *v.* Pulver, 60 Misc. 256, 113 N. Y. Suppl. 139; People *v.* Bain, 60 Misc. 253, 113 N. Y. Suppl. 27.

South Dakota.—Cornelius *v.* Ferguson, 23

not prevent an attack on the tax title on the ground that the property was never assessed at all,[4] or that the assessment was illegal or unauthorized,[5] or was so radically defective as not to confer any jurisdiction on the officers to proceed with the sale,[6] or that the owner was never notified of the assessment [7] or of the proposed sale of his lands.[8] So also as to the sale; any irregularities in regard to the mode or form in which it was conducted will be cured by the statute; [9] but not so where no sale in fact ever took place,[10] where it was for any reason

S. D. 187, 121 N. W. 91; Stoddard *v.* Lyon, 18 S. D. 207, 99 N. W. 1116.

United States.— Guthrie *v.* Harker, 27 Fed. 586.

See 45 Cent. Dig. tit. "Taxation," § 1595.

4. Townsend *v.* Edwards, 25 Fla. 582, 6 So. 212; Cornelius *v.* Ferguson, 23 S. D. 187, 121 N. W. 91. But *compare* Hill *v.* Atterbury, 88 Mo. 114.

5. Sloan *v.* Sloan, 25 Fla. 53, 5 So. 603; Holland *v.* Southern States Land, etc., Co., 124 La. 406, 50 So. 436; Hansen *v.* Mauberret, 52 La. Ann. 1565, 28 So. 167; Beltram *v.* Villere, (La. 1888) 4 So. 506 Person *v.* O'Neil, 32 La. Ann. 228; Eastland *v.* Yazoo Delta Lumber Co., 90 Miss. 330, 43 So. 956 (made under unconstitutional law); Stewart *v.* Trevor, 56 Pa. St. 374; Stewart *v.* Shoenfelt, 13 Serg. & R. (Pa.) 360. *Compare* Oconto County *v.* Jerrard, 46 Wis. 317, 50 N. W. 591.

Assessment of exempt property see Cornelius *v.* Ferguson, 23 S. D. 187, 121 N. W. 91; Chicago, etc., R. Co. *v.* Bayfield County, 87 Wis. 188, 58 N. W. 245; Swope *v.* Purdy, 23 Fed. Cas. No. 13,704, 1 Dill. 349.

Assessment to one not the true owner see Bernstine *v.* Leeper, 118 La. 1098, 43 So. 889; Posey *v.* Ducros, 115 La. 359, 39 So. 26; Davenport *v.* Knox, 34 La. Ann. 407; Lague *v.* Boagni, 32 La. Ann. 912. But *compare* Crillen *v.* New Orleans Terminal Co., 117 La. 349, 41 So. 645; Terry *v.* Heisen, 115 La. 1070, 40 So. 461; Robinson *v.* Williams, 45 La. Ann. 485, 12 So. 499.

Assessment in name of dead man see Millaudon *v.* Gallagher, 104 La. 713, 29 So. 307; Kohlman *v.* Glaudi, 52 La. Ann. 700, 27 So. 116.

6. McKeown *v.* Collins, 38 Fla. 276, 21 So. 103; Scott *v.* Parry, 108 La. 11, 32 So. 188; Woolfolk *v.* Fonbene, 15 La. Ann. 15; Moran *v.* Thomas, 19 S. D. 469, 104 N. W. 212.

7. Nichols *v.* McGlathery, 43 Iowa 189.

8. Townsend *v.* Martin, 55 Ark. 192, 17 S. W. 875; Foreman *v.* Hinchcliffe, 106 La. 225, 30 So. 762; Johnson *v.* Martinez, 48 La. Ann. 52, 18 So. 909; Montgomery *v.* Marydale Land, etc., Co., 46 La. Ann. 403, 15 So. 63; Concordia Parish *v.* Bertron, 46 La. Ann. 356, 15 So. 60; Morrow *v.* Lander, 77 Wis. 77, 45 N. W. 956; Morris *v.* Carmichael, 68 Wis. 133, 31 N. W. 483; Ramsay *v.* Hommel, 68 Wis. 12, 31 N. W. 271; Urquhart *v.* Westcott, 65 Wis. 135, 26 N. W. 552.

But publication of advertisement of a tax-sale for less than the full period prescribed by law is an informality cured by the statute of limitations. Robinson *v.* Williams, 45 La. Ann. 485, 12 So. 499.

9. *Alabama.*— Long *v.* Boast, 153 Ala. 428, 44 So. 955.

Iowa.— Thomas *v.* Stickle, 32 Iowa 71.

Louisiana.— Simoneaux *v.* White Castle Lumber, etc., Co., 112 La. 221, 36 So. 328.

Michigan.— Spaulding *v.* O'Connor, 119 Mich. 45, 77 N. W. 323.

Pennsylvania.— Johnston *v.* Jackson, 70 Pa. St. 164.

Wisconsin.— Kennan *v.* Smith, 115 Wis. 463, 91 N. W. 986, 60 L. R. A. 585; Milledge *v.* Coleman, 47 Wis. 184, 2 N. W. 77.

United States.—Geekie *v.* Kirby Carpenter Co., 106 U. S. 379, 27 L. ed. 157; Indiana, etc., Lumber, etc., Co. *v.* Milburn, 161 Fed. 531, 88 C. C. A. 473.

See 45 Cent. Dig. tit. "Taxation," § 1595.

A "ring" sale of land for taxes is voidable only and cannot be questioned after the running of the statute of limitations. Bullis *v.* Marsh, 56 Iowa 747, 2 N. W. 578, 6 N. W. 177.

Purchase by county officer.— A purchase at a tax-sale by any of the officers concerned in the sale is illegal and is not validated by the statute of limitations. Barker *v.* Jackson, 90 Miss. 621, 44 So. 34, chancery clerk. But *compare* Lawrence *v.* Hornick, 81 Iowa 193, 46 N. W. 987.

Irregularity as to mode of offering land for sale.— A failure of the officer conducting the sale to offer the least quantity of the land that any purchaser would take for the amount of the taxes on it, before proceeding to sell the whole, is a mere irregularity which is cured by the statute of limitations. Simoneaux *v.* White Castle Lumber, etc., Co., 112 La. 221, 36 So. 328; Muller *v.* Mazerat, 109 La. 116, 33 So. 104. So also, although the tax deed shows that several tracts were illegally sold for a gross sum, the statute will bar a recovery by the original owner. Monk *v.* Corbin, 58 Iowa 503, 12 N. W. 571; Bullis *v.* Marsh, 56 Iowa 747, 2 N. W. 578, 6 N. W. 177; Douglass *v.* Tullock, 34 Iowa 262; Thomas *v.* Stickle, 32 Iowa 71; Francis *v.* Grote, 14 Mo. App. 324.

Failure of the purchaser to file a surplus bond is an irregularity which the statute cures. Rogers *v.* Johnson, 67 Pa. St. 43; Iddings *v.* Cairns, 2 Grant (Pa.) 88; Ash *v.* Ashton, 3 Watts & S. (Pa.) 510. *Aliter* where the purchaser fails to pay the amount of his bid. Donnel *v.* Bellas, 10 Pa. St. 341.

As against sales not included in the deed to defendants in an action to quiet title against tax-sales, limitations do not run against the right of plaintiff. Martin *v.* White, 53 Oreg. 319, 100 Pac. 290.

10. Early *v.* Whittingham, 43 Iowa 162; Case *v.* Albee, 28 Iowa 277.

entirely null and void,[11] or where it was held on a day not authorized by law for that purpose.[12]

(v) *Redemption or Payment of Taxes.* The statute of limitations does not protect a tax title where the taxes had been in fact paid before the sale or where the owner redeems within the time allowed by law for that purpose; and in some states this exception is incorporated in the statute, while in others it is implied from the consequent invalidity of the sale or deed.[13] In some jurisdictions also this rule is applied where the owner was ready and offered to pay his taxes but was erroneously informed that none were due.[14]

e. Laches in Attacking Tax Title.[15] Irrespective of the statute of limitations, or in cases where the statute would not apply, the owner of land sold for taxes will be denied relief against the sale where he has delayed, for a great and unreasonable length of time, to seek redress;[16] more especially where the property has meanwhile been greatly enhanced in value by the labor or expenditures of the

11. Honor *v.* Fellman, 119 La. 1061, 44 So. 887; *In re* Sheehy, 119 La. 608, 44 So. 315; Kennedy *v.* Sanders, 90 Miss. 524, 43 So. 913; Zingerling *v.* Henderson, (Miss. 1895) 18 So. 432; Harris *v.* Mason, 120 Tenn. 668, 115 S. W. 1146, 25 L. R. A. N. S. 1011; Hurd *v.* Brisner, 3 Wash. 1, 28 Pac. 371, 28 Am. St. Rep. 17.

Where a tax-sale is void, the tax deed alone can start limitations running against the owner. Martin *v.* White, 53 Oreg. 319, 100 Pac. 290.

12. Allen *v.* Ozark Land Co., 55 Ark. 549, 18 S. W. 1042; Burdick *v.* Bingham, 38 Minn. 482, 38 N. W. 489; McLemore *v.* Anderson, (Miss. 1907) 43 So. 878; Nevin *v.* Bailey, 62 Miss. 433.

13. *Alabama.*— Scott *v.* Brown, 106 Ala. 604, 17 So. 731.

Iowa.— Rath *v.* Martin, 93 Iowa 499, 61 N. W. 941; Burke *v.* Cutler, 78 Iowa 299, 43 N. W. 204; Patton *v.* Luther, 47 Iowa 236.

Kansas.— Noble *v.* Douglass, 56 Kan. 92, 42 Pac. 328; Wilson *v.* Reasoner, 37 Kan. 663, 16 Pac. 100.

Louisiana.— Holland *v.* Southern States Land, etc., Co., 124 La. 406, 50 So. 436; Little River Lumber Co. *v.* Thompson, 118 La. 284, 42 So. 938.

Mississippi.— Cochran *v.* Richberger, 70 Miss. 843, 12 So. 851; Metcalfe *v.* Perry, 66 Miss. 68, 5 So. 232.

Missouri.— Allen *v.* White, 98 Mo. 55, 10 S. W. 881.

New York.— Wallace *v.* International Paper Co., 53 N. Y. App. Div. 41, 65 N. Y. Suppl. 543.

Oregon.— Nickum *v.* Gaston, 28 Oreg. 322, 42 Pac. 130.

South Dakota.— Cornelius *v.* Ferguson, 23 S. D. 187, 121 N. W. 91.

West Virginia.— Battin *v.* Woods, 27 W. Va. 58.

Wisconsin.— Hoffman *v.* Peterson, 123 Wis. 632, 102 N. W. 47; Dunbar *v.* Lindsay, 119 Wis. 239, 96 N. W. 557; Lindsay *v.* Fay, 28 Wis. 177.

See 45 Cent. Dig. tit. "Taxation," § 1595.

But *compare* Dickinson *v.* Hardie, 79 Ark. 364, 96 S. W. 355.

14. Gould *v.* Sullivan, 84 Wis. 659, 54 N. W. 1013, 36 Am. St. Rep. 955, 20 L. R. A. 487.

15. **Presumptions arising from laches or lapse of time** see *supra*, XIII, G, 1, b.

16. *Arkansas.*— Earle Imp. Co. *v.* Chatfield, 81 Ark. 296, 99 S. W. 84; Clay *v.* Bilby, 72 Ark. 101, 78 S. W. 749.

District of Columbia.— Guy *v.* District of Columbia, 25 App. Cas. 117; Knox *v.* Gaddis, 1 App. Cas. 336.

Iowa.— Burke *v.* Cutler, 78 Iowa 299, 43 N. W. 204. See also Roth *v.* Munzenmaier, 118 Iowa 326, 91 N. W. 1072.

Louisiana.— Rovens *v.* McRobinson, 117 La. 731, 42 So. 251; Barrow *v.* Wilson, 39 La. Ann. 403, 2 So. 809.

Michigan.— Owens *v.* Auditor-Gen., 147 Mich. 683, 111 N. W. 354; Bending *v.* Auditor-Gen., 137 Mich. 500, 100 N. W. 777; Cook *v.* Hall, 123 Mich. 378, 82 N. W. 59.

Missouri.— Morrison *v.* Turnbaugh, 192 Mo. 427, 91 S. W. 152.

New Jersey.— Casselbury *v.* Piscataway Tp., 43 N. J. L. 353.

West Virginia.— Siers *v.* Wiseman, 58 W. Va. 340, 52 S. E. 460.

United States.— Steinbeck *v.* Bon Homme Min. Co., 152 Fed. 333, 81 C. C. A. 441; Florida Coast Line Canal, etc., Co. *v.* Ellsworth Trust Co., 144 Fed. 972, 75 C. C. A. 676.

See 45 Cent. Dig. tit. "Taxation," § 1597.

But *compare* Telfener *v.* Dillard, 70 Tex. 139, 7 S. W. 847 (holding that in trespass to try title against the grantees in a tax deed, unsupported by evidence that the tax laws had ever been complied with, the doctrine of stale demand has no application, since such deed does not operate to divest the owner of the legal title); Taylor *v.* Stringer, 1 Gratt. (Va.) 158.

Delay not sufficient to constitute laches see Compton *v.* Johnson, 240 Ill. 621, 88 N. E. 991; Fuller *v.* Butler, 72 Iowa 729, 32 N. W. 283; Aztec Copper Co. *v.* Auditor-Gen., 128 Mich. 615, 87 N. W. 895; Manwarring *v.* Missouri Lumber, etc., Co., 200 Mo. 718, 98 S. W. 762; Indiana, etc., Lumber, etc., Co. *v.* Milburn, 161 Fed. 531, 88 C. C. A. 473.

A mere failure to assert his title for a long period will not estop the owner from maintaining an action against one claiming

tax purchaser,[17] or where it has passed into the hands of innocent purchasers from him in good faith.[18]

5. Parties and Process — a. Parties. In an action to confirm a tax title or to foreclose a tax lien, all persons should be joined as defendants who claim a title or interest in the premises adverse to the tax title.[19] A suit to set aside a tax-sale, or to remove the cloud on title, may be brought by the real owner of the property, or, in proper cases, by one holding the title as a trustee,[20] and should be brought against the purchaser at the tax-sale or his assignee or grantee and those claiming an interest under him or jointly with him;[21] but ordinarily no other defendants are necessary,[22] the state or county not being a necessary party except where it was the purchaser at the sale,[23] and the issue at this stage being between the former owner of the premises and the holder of the tax title, the public officers who were concerned in the tax proceedings are neither necessary nor proper parties,[24]

under a void tax deed, whose possession has never ripened into title by prescription, and who is not protected by any statute of limitations. Marysville Inv. Co. *v.* Holle, 58 Kan. 773, 51 Pac. 281.

Possession not taken by tax purchaser.— Laches will not bar a landowner from assailing a tax-sale of his land where there is no actual possession under the tax title. State *v.* Sponaugle, 45 W. Va. 415, 32 S. E. 283, 43 L. R. A. 727. Thus where the holder of a tax title never entered into possession and never acquired a right of possession because of the service of a defective notice to redeem, the original owner was not guilty of laches in failing to institute a suit to cancel the tax deed as a cloud on his title until three or four years had elapsed after the issuance of a writ of assistance to the holder of the tax title. G. F. Sanborn Co. *v.* Johnson, 148 Mich. 405, 111 N. W. 1091.

17. St. Louis, etc., Lumber, etc., Co. *v.* Godwin, 85 Ark. 372, 108 S. W. 516; Steinbeck *v.* Bon Homme Min. Co., 152 Fed. 333, 81 C. C. A. 441.

18. St. Louis, etc., Lumber, etc., Co. *v.* Godwin, 85 Ark. 372, 108 S. W. 516; Hewitt *v.* Morgan, 88 Iowa 468, 55 N. W. 478; Pitts *v.* Seavey, 88 Iowa 336, 55 N. W. 480; Mathews *v.* Culbertson, 83 Iowa 434, 50 N. W. 201; Head *v.* Howcott Land Co., 119 La. 331, 44 So. 117; Arbuckle *v.* Kelley, 144 Fed. 276; Flynn *v.* Edwards, 36 Fed. 873.

19. *Arkansas.*— Scott *v.* Watkins, 22 Ark. 556.

Mississippi.— Smith *v.* Denny, 90 Miss. 434, 43 So. 479; Trager *v.* Jenkins, 75 Miss. 676, 23 So. 424; Metcalfe *v.* Perry, 66 Miss. 68, 5 So. 232.

Washington.—Bardon *v.* Hughes, 45 Wash. 627. 88 Pac. 1040.

Wisconsin.— Lybrand *v.* Haney, 31 Wis. 230.

United States.— Hintrager *v.* Nightingale, 36 Fed. 847.

See 45 Cent. Dig. tit. "Taxation," § 1598.

Life-tenant and remainder-man.— Where the purchaser at a tax-sale, suing to foreclose his lien, makes the life-tenant the only defendant, and the land is sold under the decree for the full amount of the lien, only the interest of the life-tenant passes by the sale, and the lien on the interest of the remainder-man is extinguished. Williams *v.* Hedrick, 96 Fed. 657, 37 C. C. A. 552.

An action to foreclose a tax lien against the real owner of the property is not void because he is not the person shown to be the owner by the tax record. Bardon *v.* Hughes, 45 Wash. 627, 88 Pac. 1040.

20. Glos *v.* Ambler, 218 Ill. 269, 75 N. E. 764; Barke *v.* Early, 72 Iowa 273, 33 N. W. 677; Watson *v.* Phelps, 40 Iowa 482.

21. *Arkansas.*— Twombly *v.* Kimbrough, 24 Ark. 459.

Illinois.— Jones *v.* Glos, 236 Ill. 178, 86 N. E. 282; Larson *v.* Glos, 235 Ill. 584, 85 N. E. 926 [*reversing* 138 Ill. App. 412]; Smith *v.* Prall, 133 Ill. 308, 24 N. E. 521.

Kansas.— Morris *v.* Lemmon, 6 Kan. App. 423, 49 Pac. 814.

South Carolina.— Pool *v.* Evans, 57 S. C. 78, 35 S. E. 436.

Wisconsin.— Stephenson *v.* Doolittle, 123 Wis. 36, 100 N. W. 1041.

See 45 Cent. Dig. tit. "Taxation," § 1598.

Purchaser pendente lite.— Where defendant's wife purchased certain tax deeds after the filing of a bill and the service of summons in a suit to set the same aside, she was held not a necessary party to the suit. Glos *v.* Hanford, 212 Ill. 261, 72 N. E. 439.

22. Bedgood *v.* McLain, 89 Ga. 793, 15 S. E. 670; Lufkin *v.* Galveston, 73 Tex. 340, 11 S. W. 340.

Property assessed in name of third person. — Where the tax was assessed on the land in the name of a third person, and plaintiff sues to set aside the sale on an allegation that the land belonged to him and not to such third person, and where an action to determine title is already pending between plaintiff and such third person as adverse claimants, it is not necessary to join the third person as defendant in the controversy concerning the tax-sale. Gilman *v.* Sheboygan County, 79 Wis. 26, 48 N. W. 111.

23. Moores *v.* Clackamas County, 40 Oreg. 536, 67 Pac. 662; Pool *v.* Evans, 57 S. C. 78, 35 S. E. 436. But see Lasher *v.* Tretheway, 10 Brit. Col. 438.

24. Christian *v.* Soderberg, 118 Mich. 47, 76 N. W. 126; Greenley *v.* Hovey, 115 Mich. 504, 73 N. W. 808; Harrison *v.* Owen, 3 Ohio Dec. (Reprint) 55, 2 Wkly. L. Gaz. 315; West *v.* Duncan, 42 Fed. 430. But *compare*

except as the representatives of the state or county in cases where the latter was the purchaser.[25]

b. Process. Process in cases of this kind is governed by the ordinary rules, save for exceptions growing out of the peculiar nature of the proceedings.[26]

6. Pleading — a. Pleading a Tax Title. Whenever a tax title is specially set forth in pleadings it is necessary that every fact should be averred which is requisite to show that each of the statutory provisions has been complied with;[27] and it is not enough to allege that the proceedings, or any of the proceedings, were taken "duly" or "according to the statute."[28] Furthermore it has been held that a statute declaring that tax deeds shall be *prima facie* evidence of certain facts essential to their validity does not dispense with the necessity of alleging such facts in a plea setting up a tax deed.[29] If plaintiff wishes to protect himself

Commercial Bank *v.* Sandford, 99 Fed. 154, holding that in a suit against a purchaser at a tax-sale to set aside such sale on the ground that the action of the sheriff who made it was illegal, such sheriff is a proper party defendant.

25. Sanders *v.* Saxton, 33 Misc. (N. Y.) 389, 67 N. Y. Suppl. 680.

In a suit by one entitled to a deed of the state's title to real estate, acquired by its purchasing the same at a tax-sale and to establish his interest therein, the auditor-general is a proper party, and complainant may ask that he execute a proper deed. Horton *v.* Helmholtz, 149 Mich. 227, 112 N. W. 930.

26. G. F. Sanborn Co. *v.* Johnson, 148 Mich. 405, 111 N. W. 1091 (holding that a notice of the expiration of the time for redemption of certain tax-sales reciting that, if payment was not made as required, the undersigned would institute proceedings for the possession of the land, is insufficient to confer jurisdiction upon the court, without further process, to issue a writ of assistance); Davis *v.* Cass, 72 Miss. 985, 18 So. 454 (publication of notice); Babcock *v.* Wolffarth, 35 Tex. Civ. App. 512, 80 S. W. 642 (notice to "unknown owner whose residence is unknown" is fatally defective).

27. *Arkansas.*— Blakeney *v.* Ferguson, 8 Ark. 272.

California.— Russell *v.* Mann, 22 Cal. 131.

Illinois.— Koch *v.* Hubbard, 85 Ill. 533.

Indiana.— Locke *v.* Catlett, 96 Ind. 291.

Iowa.— Stratton *v.* Drenan, 58 Iowa 571, 12 N. W. 602. See Mallory *v.* French, 44 Iowa 133.

Kentucky.— Com. *v.* Three Forks Coal Co., 95 Ky. 273, 25 S. W. 3, 15 Ky. L. Rep. 633; Durrett *v.* Stewart, 88 Ky. 665, 11 S. W. 773, 11 Ky. L. Rep. 172; Hundley *v.* Taylor, 25 S. W. 887, 15 Ky. L. Rep. 808. See also Packard *v.* Beaver Valley Land, etc., Co., 96 Ky. 249, 28 S. W. 779, 16 Ky. L. Rep. 451.

Mississippi.— Coffee *v.* Coleman, 85 Miss. 14, 37 So. 499; Brulie *v.* Cooney, (1893) 12 So. 463; Griffin *v.* Dogan, 48 Miss. 11. See also Belcher *v.* Mhoon, 47 Miss. 613.

Tennessee.— Reeves *v.* Brockman, (Ch. App. 1901) 62 S. W. 50.

Wisconsin.— Preston *v.* Thayer, 127 Wis. 123, 106 N. W. 672; Comstock *v.* Ludington, 47 Wis. 229, 2 N. W. 283. See also Hunt *v.* Miller, 101 Wis. 583, 77 N. W. 874; Manseau *v.* Edwards, 53 Wis. 457, 10 N. W. 554.

See 45 Cent. Dig. tit. "Taxation," §§ 1600, 1601.

But *compare* Blakemore *v.* Roberts, 12 N. D. 394, 96 N. W. 1029, holding that a complaint under Laws (1901), c. 5, p. 9, and based on a tax lien, need not allege that such tax lien was based on a regular assessment and levy of tax.

The year for which the tax was assessed must be averred; and moreover it is not sufficient to aver that in that year the assessor entered the levy on the assessment roll. Russell *v.* Mann, 22 Cal. 131.

Allegation as to possession.— In Louisiana it is not necessary that a tax purchaser suing to quiet title shall allege possession in himself or want of possession in defendant, but the fact of possession by defendant is a matter of defense. Slattery *v.* Kellum, 114 La. 282, 38 So. 170.

Admission of defendant's ownership.— Where, under the statute, a suit to foreclose a tax title can be brought only against the original owner, the bringing of the action is an admission that defendant was such owner, although the allegation of the fact is defective. Randall *v.* Dailey, 66 Wis. 285, 28 N. W. 352.

A complaint in an adversary suit to quiet title which alleges that plaintiff is the owner of the land which is unoccupied, claiming under a tax deed, and that defendant is asserting title thereto and paying taxes, states a cause of action to quiet title under the general equity jurisdiction of the court, irrespective of whether plaintiff is entitled to a general decree for confirmation of the tax-sale. Knauff *v.* National Cooperage Co., 87 Ark. 494, 113 S. W. 28.

28. Blakeney *v.* Ferguson, 8 Ark. 272; Carter *v.* Koezley, 9 Bosw. (N. Y.) 583, 14 Abb. Pr. 147. See also Chrisman *v.* Currie, 60 Miss. 858.

29. Gage *v.* Harbert, 145 Ill. 530, 32 N. E. 543; Smith *v.* Denny, 90 Miss. 434, 43 So. 479, holding that under such a statute a bill of complaint alleging that the land was sold and that the list of the land sold to the state at the time of the sale shows the lands in question were sold, and making the tax collector's deed an exhibit, states a perfect cause of action. But see Hibernia Sav., etc., Soc. *v.* Ordway, 38 Cal. 679, holding

against the consequences of his tax deed being held invalid, and to secure such compensation or reimbursement as the law allows in that case, he may do so by amendment to his bill or complaint, or, where he is attacked, by cross bill.[30]

b. Complaint or Answer Impeaching Tax Title. Where a pleading undertakes to impeach the validity of a tax title it is not sufficient to allege that the opposite party claims some interest in the premises under certain tax-sales or deeds but that the same are invalid;[31] but it is necessary to point out, clearly and specifically and in apt terms, the particular defect, illegality, or failure of compliance with the law which is supposed to invalidate the title and on which the pleader means to rely.[32] And in case the action is against a subsequent purchaser from the original holder of the tax title, there must be allegations to connect him with

that naming the instrument is sufficient to show an apparent validity.

30. Wartensleben *v.* Haithcock, 80 Ala. 565, 1 So. 38; Robinson *v.* Dunne, 45 Fla. 553, 33 So. 530; Preston *v.* Banks, 71 Miss. 601, 14 So. 258; Stephenson *v.* Doolittle, 123 Wis. 36, 100 N. W. 1041.

31. Smith *v.* Gilmer, 93 Ala. 224, 9 So. 588; Knudson *v.* Curley, 30 Minn. 433, 15 N. W. 873. But *compare* Gray *v.* Coan, 23 Iowa 344.

A bill to quiet title by a tax deed holder, under Mich. Comp. Laws, § 448, setting up a claim to property, must aver, where no record evidence of a cloud upon its title is asserted, that defendants have asserted title or some claim adverse to defendant's title. Triangle Land Co. *v.* Nessen, 155 Mich. 463, 119 N. W. 586; Jenks *v.* Hathaway, 48 Mich. 536, 12 N. W. 621.

32. *Alabama.*— Francis *v.* Sandlin, 150 Ala. 583, 43 So. 829.

Arkansas.— Shell *v.* Martin, 19 Ark. 139.

Colorado.— Webber *v.* Wannemaker, 39 Colo. 425, 89 Pac. 780.

Florida.—Robertson *v.* Dunne, 45 Fla. 553, 33 So. 530.

Illinois.— Glos *v.* Hayes, 214 Ill. 372, 73 N. E. 802; Glos *v.* Stern, 213 Ill. 325, 72 N. E. 1057; Glos *v.* Hanford, 212 Ill. 261, 72 N. E. 439; Langlois *v.* People, 212 Ill. 75, 72 N. E. 28; Glos *v.* Kingman, 207 Ill. 26, 69 N. E. 632; Langlois *v.* McCullom, 184 Ill. 195, 54 N. E. 955; Gage *v.* Bailey, 102 Ill. 11; Gage *v.* McLaughlin, 101 Ill. 155.

Indiana.—Ethel *v.* Batchelder, 90 Ind. 520; Sohn *v.* Wood, 75 Ind. 17; Beatty *v.* Krauskopf, 7 Ind. 565.

Iowa.— Farmers' L. & T. Co. *v.* Wall, 129 Iowa 651, 106 N. W. 160; Grove *v.* Benedict, 69 Iowa 346, 28 N. W. 631; Plympton *v.* Sapp, 55 Iowa 195, 7 N. W. 498.

Kansas.— Taylor *v.* Adams, 79 Kan. 360, 99 Pac. 597; Crebbin *v.* Wever, 71 Kan. 445, 80 Pac. 977. See also Shinkle *v.* Meek, 69 Kan. 368, 76 Pac. 837.

Kentucky.— Stites *v.* Short, 76 S. W. 518, 25 Ky. L. Rep. 918.

Louisiana.— Edwards *v.* Fairex, 47 La. Ann. 170, 16 So. 736.

Michigan.— Flint Land Co. *v.* Godkin, 136 Mich. 668, 99 N. W. 1058; Wagar *v.* Bowley, 104 Mich. 38, 62 N. W. 293; Gamble *v.* East Saginaw, 43 Mich. 367, 5 N. W. 416.

Mississippi.— Byrd *v.* McDonald, (1900) 28 So. 847; Clarke *v.* Frank, 64 Miss. 827, 3 So. 531.

Montana.— Casey *v.* Wright, 14 Mont. 315, 36 Pac. 191.

Nebraska.— Weston *v.* Meyers, 45 Nebr. 95, 63 N. W. 117; Dillon *v.* Merriam, 22 Nebr. 151, 34 N. W. 344.

North Carolina.— Beck *v.* Meroney, 135 N. C. 532, 47 S. E. 613.

Oregon.— O'Hara *v.* Parker, 27 Oreg. 156, 39 Pac. 1004.

Texas.— Gulf, etc., R. Co. *v.* Poindexter, 70 Tex. 98, 7 S. W. 316.

Virginia.— Glenn *v.* Brown, 99 Va. 322, 38 S. E. 189.

Washington.— Kahn *v.* Thorp, 43 Wash. 463, 86 Pac. 855 (holding that in an action either of ejectment or to recover property or to remove a cloud, where the property has been sold for taxes, the petition must allege that the lands were not taxable or that the taxes, penalties, interest, and costs sustained by the purchaser at the tax-sale had been fully paid or tendered and tender rejected); Rowland *v.* Eskland, 40 Wash. 253, 82 Pac. 599; McManus *v.* Morgan, 38 Wash. 528, 80 Pac. 786.

West Virginia.— Hogan *v.* Piggott, 60 W. Va. 541, 56 S. E. 189; State *v.* McEldowney, 54 W. Va. 695, 47 S. E. 650.

Wisconsin.— Mitchell Iron, etc., Co. *v.* Flambeau Land Co., 120 Wis. 545, 98 N. W. 530; Anderson *v.* Douglas County, 98 Wis. 393, 74 N. W. 109; Prentice *v.* Ashland County, 56 Wis. 345, 14 N. W. 297; Lawrence *v.* Kenney, 32 Wis. 281; Sayles *v.* Davis, 22 Wis. 225; Johnston *v.* Oshkosh, 21 Wis. 184; Wilson *v.* Jarvis, 19 Wis. 597; Jarvis *v.* McBride, 18 Wis. 316; Wakeley *v.* Nicholas, 16 Wis. 588.

United States.— Meyer *v.* Kuhn, 65 Fed. 705, 13 C. C. A. 298; De Forest *v.* Thompson, 40 Fed. 375.

See 45 Cent. Dig. tit. "Taxation," §§ 1600, 1601.

But *compare* Owen *v.* Ruthruff, 81 Minn. 397, 84 N. W. 217 (holding that it is proper pleading to specify in the complaint, in a statutory action to test tax titles, the tax certificate or deed which is assailed as invalid); Lewis *v.* Bartleson, 39 Minn. 89, 38 N. W. 707; Jones *v.* Boykin, 70 S. C. 309, 49 S. E. 877.

Alleging cloud on title.— Where the statute makes a tax deed *prima facie* evidence of title, in an action to remove a cloud created by a tax deed, an allegation in the complaint that the deed is regular on its face

the defect complained of or to affect him with notice thereof.[33] The pleading should also aver facts showing complainant's ownership or right to contest the tax title;[34] and under some statutes must also aver payment, or tender of payment of taxes, costs, etc., and a refusal thereof;[35] but it has been held that where it does not appear in a complaint in an action to quiet title that taxes are due on the land in suit, the complaint is not rendered insufficient by the fact that it contains no offer to pay taxes.[36]

c. Issues, Proof, and Variance. In actions concerning tax titles, as in other suits, the material facts pleaded must be established by evidence,[37] unless

sufficiently shows its apparent validity. Day *v.* Schnider, 28 Oreg. 457, 43 Pac. 650.

Fraud in a tax-sale may be taken advantage of by answer and cross complaint in an action by the purchaser to recover the land. Neal *v.* Wideman, 59 Ark. 5, 26 S. W. 16.

Complaint to test validity of forfeiture of lands to state for non-payment of taxes see Willard *v.* Redwood County, 22 Minn. 61.

A general allegation that the tax deed is void is sufficient in the absence of a motion to make more specific. Snell *v.* Dubuque, 88 Iowa 442, 55 N. W. 310. See also Sanders *v.* Parshall, 67 Hun (N. Y.) 105, 22 N. Y. Suppl. 20 [*affirmed* in 142 N. Y. 679, 37 N. E. 825].

Offer to redeem.— Where the bill in a suit to declare a tax deed void as a cloud on plaintiff's title alleges an offer to redeem, it is proper to allow an amended bill alleging with greater particularity the unsuccessful efforts of plaintiffs, before bringing suit, to redeem the land and the denial of their right to redeem on the hypothesis that the statutory period for payment had expired. Kelly *v.* Gwatkin, 108 Va. 6, 60 S. E. 749.

Contradictory counts.— In an action to quiet title where the first count of a replication is a general denial of defendant's answer and the second count sets up defects in defendant's alleged tax title, the counts are not contradictory. Mitchell *v.* Knott, 43 Colo. 135, 95 Pac. 335.

Admission of possession or interest.— Alleging reasons why a tax deed, under which defendant claims, conveyed no title does not admit defendant's possession or interest in the property. Mitchell *v.* Knott, 43 Colo. 135, 95 Pac. 335. So a statement in a bill to set aside a tax title that a deed was issued "whereby and by the terms of which said county treasurer granted and conveyed" property to the grantee, cannot be construed as an admission that the title passed by such deed. Kraus *v.* Congdon, 161 Fed. 18, 88 C. C. A. 182.

Amendment.— Where in an action to quiet title plaintiff claims title under tax deeds of which the first in date is void on its face, and the second covering in part the same property conflicts in its statements of fact with the first, defendant should be permitted to amend his pleadings to show the invalidity of the second deed. Webber *v.* Wannemaker, 39 Colo. 425, 89 Pac. 780.

Supplemental bill assailing tax-sale on other grounds than that set forth in the original bill as not making a new and independent case see De Forest *v.* Thompson, 40 Fed. 375. Where a mortgagee purchases mortgaged lands at a foreclosure sale pending a suit by him to set aside an invalid tax-sale, a supplemental bill setting up title under such sale and praying the same relief as the original bill is germane to the original bill. Miller *v.* Cook, 135 Ill. 190, 25 N. E. 756, 10 L. R. A. 292.

33. Walters *v.* Hermann, 99 Mo. 529, 12 S. W. 890.

34. Harrington *v.* Hayes County, 81 Nebr. 231, 115 N. W. 773, 129 Am. St. Rep. 680, holding that in an action to set aside a sheriff's tax deed an allegation that plaintiffs are the owners in fee simple of the land is a sufficient plea of ownership, when the petition is attacked by a general demurrer. *Compare* Kraus *v.* Congdon, 161 Fed. 18, 88 C. C. A. 182, holding that in a suit under Ballinger Annot. Codes & St. Wash. § 552, by one in possession of lands to set aside a tax title thereon, plaintiff is not required to plead title in himself or to prove the same even if alleged.

35. Ryno *v.* Snider, 49 Wash. 421, 95 Pac. 644 (holding that a complaint in ejectment against the grantee of a purchaser at a tax-sale which fails to allege tender to defendant fails to state a cause of action); Kahn *v.* Thorpe, 43 Wash. 463, 86 Pac. 855. But see Bullock *v.* Wallace, 46 Wash. 690, 92 Pac. 675, holding that an action of ejectment is not an action to recover property sold for taxes within Ballinger Annot. Codes & St. § 5679, requiring the complaint in such an action to set forth that the tax has been paid or tendered.

In an action to determine adverse claims arising out of tax certificates, in which the statute provides a form of complaint, the complaint need not allege payment or offer of payment for taxes justly due, but before granting any relief the court should require such payment as a condition thereof. Powers *v.* Bottineau First Nat. Bank, 15 N. D. 466, 109 N. W. 361.

36. Clark *v.* Darlington, 7 S. D. 148, 63 N. W. 771, 58 Am. St. Rep. 835.

37. Glos *v.* Miller, 213 Ill. 22, 72 N. E. 714; Smith *v.* Smith, 19 Wis. 615, 88 Am. Dec. 707.

In ejectment against a purchaser at a tax-sale, his denial of plaintiff's ownership and right of possession is sufficient to make an issue upon plaintiff's title and place upon the latter the burden of proving such title.

admitted;[38] and the evidence must be confined to the matters pleaded and be pertinent to the issues raised,[39] and a material variance between the pleadings and proofs will be fatal to the case.[40] Nor is it proper to set aside a tax deed on account of defects not alleged in the bill or complaint.[41]

7. Evidence[42] — a. In General. When it becomes necessary to prove the various steps on which a tax title rests, the best and original evidence consists of the records made by the various officers concerned in the assessment and collection of the taxes, or certified copies thereof, if the latter are admissible under the statutory rules,[43] and the courts may exercise the necessary power to procure the production of such records or copies for use in cases pending before them.[44]

b. Presumptions and Burden of Proof.[45] At common law, the burden of proof is on one who claims title under a tax deed to prove the regularity and validity of each successive step in the proceedings from the assessment to the sale,[46] except where the statute of limitations has run in his favor, in which case he may stand on his possession and need not prove the validity of his title,[47] although if he is out of possession and is suing the owners who are in possession, he is bound

Wildharber *v.* Lunkenheimer, 128 Ky. 344, 108 S. W. 327, 32 Ky. L. Rep. 1221.

38. Glos *v.* McKerlie, 212 Ill. 632, 72 N. E. 700; Crosby *v.* Bonnowsky, 29 Tex. Civ. App. 455, 69 S. W. 212.

39. *Colorado.*—Webber *v.* Wannemaker, 39 Colo. 425, 89 Pac. 780.

Florida.— Spratt *v.* Price, 18 Fla. 289.

Georgia.— Dickerson *v.* Burke, 25 Ga. 225.

Illinois.— Gage *v.* Webb, 141 Ill. 533, 31 N. E. 130.

Indiana.— Scarry *v.* Lewis, 133 Ind. 96, 30 N. E. 411; Travellers' Ins. Co. *v.* Martin, 131 Ind. 155, 30 N. E. 1071; State *v.* Casteel, 110 Ind. 174, 11 N. E. 219.

Kansas.— Curtis *v.* Schmehr, 69 Kan. 124, 76 Pac. 434; Douglass *v.* Lowell, 55 Kan. 574, 40 Pac. 917.

Louisiana.— Richard *v.* Perrodin, 116 La. 440, 40 So. 789.

Montana.— Conklin *v.* Cullen, 29 Mont. 38, 74 Pac. 72.

South Carolina.— Pool *v.* Evans, 57 S. C. 78, 35 S. E. 436.

Wisconsin.— Dunbar *v.* Lindsay, 119 Wis. 239, 96 N. W. 557; Stringham *v.* Oshkosh, 22 Wis. 326.

See 45 Cent. Dig. tit. "Taxation," § 1604.

The defense of inadequate consideration and unfairness in the sale cannot be urged where not pleaded. Walker *v.* Mills, 210 Mo. 684, 109 S. W. 44.

In ejectment against a tenant and his landlords, where the tenant denies plaintiff's ownership and right of possession, and alleges that his landlords hold under a tax deed and plead limitation, the landlords can rely upon such defenses without setting them up in their own answer, since the tenant's possession inures to their benefit. Wildharber *v.* Lunkenheimer, 128 Ky. 344, 108 S. W. 327, 32 Ky. L. Rep. 1221.

A quitclaim deed from the holder of a tax deed to persons not parties individually but under the designation "unknown owners" who have defaulted, to a suit to cancel such tax deed as a cloud, is not admissible in such suit to show title in the grantees. Brimson *v.* Arnold, 236 Ill. 495, 86 N. E. 254.

40. Seymour *v.* Deisher, 33 Colo. 349, 80 Pac. 1038; Dickerson *v.* Burke, 25 Ga. 225; Vaughan *v.* Swayzie, 56 Miss. 704.

Not fatal variance.—An averment that complainants are the owners in fee simple "as joint tenants" is supported by a deed conveying the premises to them "not as tenants in common but as joint tenants," and the omission of the words "not as tenants in common" is immaterial. Brimson *v.* Arnold, 236 Ill. 495, 86 N. E. 254.

41. Angelo *v.* Angelo, 146 Ill. 629, 35 N. E. 229.

42. Evidence of payment of tax see *supra*, IX, A, 3.

Evidence of tax title dependent on preliminary or supplementary proof see *supra*, XIII, G, 4, h.

Evidence to sustain deed or to aid construction see supra, XIII, D, 2, h, 3, d.

Tax deed as evidence see *supra*, XIII, G.

43. See *supra*, XIII, G, 1, d. See also Gibbs *v.* Southern, 116 Mo. 204, 22 S. W. 713, as to repeal of statute making certified copies evidence.

44. Carroll *v.* Perry, 5 Fed. Cas. No. 2,456, 4 McLean 25.

45. Presumptions arising from possession and lapse of time see *supra*, XIII, G, 1, b.

Presumptions as to validity of assessment see *supra*, VI, E, 11.

Presumptions as to validity of tax-sale see *supra*, X, N, 2.

46. See *supra*, XIII, G, 1, a.

In Arkansas a cause instituted to confirm a tax title, but which proceeds to a final hearing as a suit by defendant against plaintiff to cancel plaintiff's tax title, is not governed by Kirby Dig. § 7105, and defendant has the burden of proving his title, and he cannot rely on the weakness of plaintiff's title. McDaniel *v.* Berger, 89 Ark. 139, 116 S. W. 194. So a petitioner to quiet title under a deed executed from the commissioner of state lands, conveying lands forfeited for taxes and his possession and payment of taxes, has the burden to show title. Morris *v.* Breedlove, 89 Ark. 296, 116 S. W. 223.

47. Russell *v.* Lang, 50 La. Ann. 36, 23 So. 113.

to assert his title and can receive no aid from prescription.[48] But statutes making tax deeds *prima facie* or conclusive evidence of title or of the regularity of the prior proceedings have the effect of shifting the burden of proof, so that it is incumbent on the party assailing the tax title to show the particular defect which is fatal to its validity.[49] But even with the help of such a statute, various matters may come in issue which are not covered by the recitals of the deed or the provisions of the statute, and as to these the party relying on the tax title must assume the burden of proof, such as, to identify the particular land affected,[50] to show an assignment of the tax certificate to himself,[51] to show that his purchase was fair and in good faith,[52] or that there has been no redemption; [53] or, if he means to claim reimbursement on the setting aside of the tax deed, to show the precise amount to which he is entitled.[54] Similarly it is a general rule that one shall not be permitted to impeach a tax title without first showing title in himself,[55] and in some jurisdictions he is required to prove that all taxes due on the land have been paid,[56] and his continued and adverse possession of the premises, if that is essential to his attack or defense.[57]

c. Admissibility.[58] As a general rule, all the books, papers, and records relating to the taxes, made by and in the custody of the proper officers, are admis-

48. Waddill *v.* Walton, 42 La. Ann. 763, 7 So. 737.

49. See *supra*, XIII, G, 4, b. See also Husbands *v.* Polivick, 96 S. W. 825, 29 Ky. L. Rep. 890; St. Paul, etc., R. Co. *v.* Howard, 23 S. D. 34, 119 N. W. 1032, holding that a railroad company attacking a tax deed on the ground that the land was "necessarily used in the operations of its lines," so as to be subject only to a mileage tax, has the burden of showing that the land was so used.

Action before issuance of deed.—In a suit to set aside a tax-sale, commenced before a deed is issued, the burden of proof is on the purchaser to show compliance with the law, and is not changed by the fact that a deed is recorded pending the suit. Columbia Finance, etc., Co. *v.* Fierbaugh, 59 W. Va. 334, 53 S. E. 468.

Where in an action to test the validity of a tax deed plaintiff owns the fee and defendant is in possession under the tax deed, which the court holds to be good on its face, the burden is on plaintiff to show facts which make the deed ineffective. Taylor *v.* Adams, 79 Kan. 360, 99 Pac. 597.

Where in ejectment defendant exhibits a title derived from a treasurer's sale for taxes assessed on the land as unseated, regular in form and long subsequent to the acquisition of the title exhibited by plaintiffs, derived from a like sale, the burden is on plaintiffs to prove the defect alleged in defendant's title. Floyd *v.* Kulp Lumber Co., 222 Pa. St. 257, 71 Atl. 15.

Where a complaint alleges that tax deeds were issued and recorded, it will be assumed, in the absence of averment to the contrary, that such tax deeds were in the form required by law, thus entitling them to a presumption in favor of the regularity of all prior proceedings and to the protection of the statute of limitations when the lands are vacant and unoccupied. Strange *v.* Oconto Land Co., 136 Wis. 516, 117 N. W. 1023.

Tax deed set aside.—Where, on account of irregularities connected with a tax-sale, the deed is set aside, it no longer possesses any evidential force, and the party relying on the tax title must prove the regularity of the tax proceedings. O'Neil *v.* Tyler, 3 N. D. 47, 53 N. W. 434. And see Wood *v.* Bigelow, 115 Mich. 123, 73 N. W. 129.

50. Chapman *v.* Zoberlein, 152 Cal. 216, 92 Pac. 188; Smith *v.* Bodfish, 27 Me. 289; Canole *v.* Allen, 28 Pa. Super. Ct. 244; Swanson *v.* Hoyle, 32 Wash. 169, 72 Pac. 1011.

51. Smith *v.* Harrow, 1 Bibb (Ky.) 97.

52. Morton *v.* Waring, 18 B. Mon. (Ky.) 72.

53. Goodman *v.* Sanger, 85 Pa. St. 37, holding that a presumption of redemption arising from lapse of time and non-claim may be rebutted by facts. But see Nind *v.* Myers, 15 N. D. 400, 109 N. W. 335, 8 L. R. A. N. S. 157, holding that a party claiming title under a tax-sale certificate need not prove that no redemption had been made.

54. Glos *v.* Kelly, 212 Ill. 314, 72 N. E. 378; Barrow *v.* Lapene, 30 La. Ann. 310.

55. Hilton *v.* Singletary, 107 Ga. 821, 33 S. E. 715; Glos *v.* Gleason, 209 Ill. 517, 70 N. E. 1045 (holding, however, that in a suit to set aside a tax deed as a cloud on title it is not necessary for complainant to prove his own title with the same strictness as in an action of ejectment); Glos *v.* Adams, 204 Ill. 546, 68 N. E. 398; Glos *v.* Randolph, 133 Ill. 197, 24 N. E. 426, 138 Ill. 268, 27 N. E. 941; Curry *v.* Hinman, 11 Ill. 420; Roth *v.* Munzenmaier, 118 Iowa 326, 91 N. W. 1072.

56. Curry *v.* Hinman, 11 Ill. 420; Maxwell *v.* Palmer, 73 Iowa 595, 35 N. W. 659; Lufkin *v.* Galveston, 73 Tex. 340, 11 S. W. 340.

57. Glos *v.* Perkins, 188 Ill. 467, 58 N. E. 971; Glos *v.* Beckman, 183 Ill. 158, 55 N. E. 636; Jones *v.* Sadler, 75 Kan. 380, 89 Pac. 1019; Boagni *v.* Pacific Imp. Co., 111 La. 1063, 36 So. 129; Lawrence *v.* Kenney, 32 Wis. 281.

58. Evidence to impeach deed or title see *supra*, XIII, G, 5.

sible in evidence,[59] including the assessment list or roll, provided its authenticity and official character are first shown.[60] Parol evidence may be admissible to supply, sustain, or contradict the recitals in the tax deed,[61] and in other particulars the admissibility of this kind of evidence in tax cases is governed by the ordinary rules.[62]

d. Weight and Sufficiency.[63] By the aid of statutes in many of the states, the claimant under a tax title makes out a *prima facie* case by the production of his tax deed, which will be sufficient to establish his title unless overcome by affirmative evidence.[64] And on the other hand, one who seeks to have a tax-sale set aside must prove the defects relied on by clear and satisfactory evidence.[65] In regard to the various particular issues which may arise in the course of such a proceeding, the ordinary rules as to the probative force and sufficiency of evidence will apply.[66]

59. *Alabama.*— Riddle *v.* Messer, 84 Ala. 236, 4 So. 185.

Iowa.— McCready *v.* Sexton, 29 Iowa 356, 4 Am. Rep. 214.

Maine.— Greene *v.* Martin, 101 Me. 232, 63 Atl. 814.

Maryland.— Young *v.* Ward, 88 Md. 413, 41 Atl. 925.

Mississippi.— Kennedy *v.* Sanders, 90 Miss. 524, 43 So. 913.

Missouri.— Howard *v.* Heck, 88 Mo. 456.

New Hampshire.— French *v.* Spalding, 61 N. H. 395.

North Carolina.— Geer *v.* Brown, 126 N. C. 238, 35 S. E. 470.

Pennsylvania.— Fager *v.* Campbell, 5 Watts 287; Herron *v.* Murphy, 10 Pa. Cas. 280, 13 Atl. 958; Bernhard *v.* Allen, 10 Pa. Cas. 274, 14 Atl. 42.

Washington.— Jefferson County *v.* Trumbull, 34 Wash. 276, 75 Pac. 876.

See 45 Cent. Dig. tit. "Taxation," § 1607.

60. Kinney *v.* Doe, 8 Blackf. (Ind.) 350; Scott *v.* Babcock, 3 Greene (Iowa) 133; Stevens *v.* Palmer, 10 Bosw. (N. Y.) 60; Beggs *v.* Paine, 15 N. D. 436, 109 N. W. 322.

Where the description of land in the tax rolls is insufficient the rolls are not admissible in evidence to support a tax deed. Moses *v.* McFarlin, 2 Tex. Unrep. Cas. 291. And see McQueen *v.* Bush, 76 Miss. 283, 24 So. 196.

On an issue whether the land in dispute was assessed for a certain year as seated as well as unseated land, so as to be exempt from sale, the assessment lists for the pear preceding and the two years following the year in question are irrelevant. Floyd *v.* Kulp Lumber Co., 222 Pa. St. 257, 71 Atl. 13.

61. See *supra*, XIII, D, 2, h.

62. Culbertson *v.* Munson, 104 Ind. 451, 4 N. E. 57; Coxe *v.* Deringer, 78 Pa. St. 271; Chadwick *v.* Phelps, 45 Pa. St. 105; Trego *v.* Huzzard, 19 Pa. St. 441; Stephenson *v.* Doolittle, 123 Wis. 36, 100 N. W. 1041; Knox *v.* Cleveland, 13 Wis. 245.

Parol evidence to show payment of taxes see Perret *v.* Borries, 78 Miss. 934, 30 So. 59.

That a body of land described in the tax deed was patented, owned, and conveyed in three distinct tracts is inadmissible as against the grantee of a tax deed which has been recorded more than five years, and who is in possession. Carson *v.* Platt, 76 Kan. 636, 92 Pac. 705.

Where a tax deed is void on its face, a quitclaim deed by the grantee in the tax deed is not admissible in evidence in favor of one claiming under such deeds. Loring *v.* Groomer, 142 Mo. 1, 43 S. W. 647.

63. **Effect of tax deed as evidence of title** see *supra*, XIII, G.

64. Orono *v.* Veazie, 57 Me. 517; Yazoo, etc., R. Co. *v.* McLarty, 71 Miss. 755, 15 So. 928; Starr *v.* Voss, 2 Nebr. (Unoff.) 642, 89 N. W. 750; Concordia L. & T. Co. *v.* Van Camp, 2 Nebr. (Unoff.) 633, 89 N. W. 744. See also *supra*, XIII, G, 3.

65. Pickett *v.* Southern Athletic Club, 47 La. Ann. 1605, 18 So. 634. *Compare* Hall *v.* Kellogg, 16 Mich. 135, holding that where one who can show a record title to the fee and is in possession files a bill to quiet his title against a party claiming under a tax-sale, he is only required to make out a *prima facie* case if it is not met by proof sufficient to shake it.

66. For decisions concerning the weight and sufficiency of evidence to establish various points in actions involving tax titles see the following cases:

Ownership of property.— Mitchell *v.* Titus, 33 Colo. 385, 80 Pac. 1042; Brimson *v* Arnold, 236 Ill. 495, 86 N. E. 254; Glos *v.* Holmes, 228 Ill. 436, 81 N. E. 1064; Glos *v.* Greiner, 226 Ill. 546, 80 N. E. 1055; Glos *v.* Garrett, 219 Ill. 208, 76 N. E. 373; Glos *v.* Davis, 216 Ill. 532, 75 N. E. 208; Glos *v.* Boettcher, 193 Ill. 534, 61 N. E. 1017; Gage *v.* Parker, 103 Ill. 528; Hawkeye Sav., etc., Assoc. *v.* Moore, 139 Iowa 133, 117 N. W. 51; Jackson *v.* Mixon, 110 La. 581, 34 So. 695; Delaroderie *v.* Hillen, 28 La. Ann. 537; Graton *v.* Holliday-Klotz Land, etc., Co., 189 Mo. 322, 87 S. W. 37; Southern Immigration Imp., etc., Co. *v.* Rosey, 144 N. C. 370, 57 S. E. 2.

Possession of property as essential to maintenance of suit or under statute of limitations. Glos *v.* Ault, 221 Ill. 562, 77 N. E. 939; Clark *v.* Sexton, 122 Iowa 310, 98 N. W. 127; Bemis *v.* Plato, 119 Iowa 127, 93 N. W. 83; Grindo *v.* McGee, 111 Wis. 531, 87 N. W. 468.

Assessment to right or wrong person.— Culnane *v.* Dixon, 107 N. Y. App. Div. 163, 94 N. Y. Suppl. 1093.

8. Trial or Hearing. The court should determine the validity of the tax deed where that is the decisive question,[67] and proceed to dispose of the various issues and branches of the cause in their due order,[68] referring the case or particular questions therein to a master or referee where such a course is proper,[69] or making and filing findings where that accords with the general practice.[70] But questions of fact must, as in other cases, be left to the determination of the jury,[71]

Identification of lands in controversy.— Beasley *v.* Equitable Securities Co., 72 Ark. 601, 84 S. W. 224; Stough *v.* Reeves, 42 Colo. 432, 95 Pac. 958; Glos *v.* Bain, 223 Ill. 343, 79 N. E. 111; Blackman *v.* Arnold, 113 Wis. 487, 89 N. W. 513.

Payment of taxes.— McKinley-Lanning L. & T. Co. *v.* Varney, 19 Colo. App. 210, 74 Pac. 338; Glos *v.* Kelly, 212 Ill. 314, 72 N. E. 378; Roth *v.* Munzenmaier, 118 Iowa 326, 91 N. W. 1072; Rovens *v.* McRobinson, 117 La. 731, 42 So. 251.

Redemption.— Arbuckle *v.* Matthews, 73 Ark. 27, 83, S. W. 326; Young *v.* Ward, 88 Md. 413, 41 Atl. 925.

Election and qualification of tax collector.— Baker *v.* Webber, 102 Me. 414, 67 Atl. 144; Pierce *v.* Richardson, 37 N. H. 306.

Record of assessment.— Baker *v.* Webber, 102 Me. 414, 67 Atl. 144; Kennedy *v.* Sanders, 90 Miss. 524, 43 So. 913; Beggs *v.* Paine, 15 N. D. 436, 109 N. W. 322. The fact that delinquent tax lists cannot be found in the office in which they are required to be kept on searches made at least six years after the years when the lists should have been prepared is not sufficient to show that no such lists were ever prepared, so as to render tax deeds void, in the face of the statutory presumption from the deeds themselves and the presumption of the performance of all official duties. Reis *v.* Pacific Imp. Co., (Cal. App.) 94 Pac. 597; Davis *v.* Pacific Imp. Co., 7 Cal. App. 452, 94 Pac. 595.

Notice to taxpayer.— Lisso *v.* Giddens, 117 La. 507, 41 So. 1029; Tieman *v.* Johnston, 114 La. 112, 38 So. 75.

Ownership of tax certificate.— Vanderlinde *v.* Canfield, 40 Minn. 541, 42 N. W. 538; Leavitt *v.* Bartholomew, 1 Nebr. (Unoff.) 764, 93 N. W. 856.

Property not subject to taxation.— Saranac Land, etc., Co. *v.* Roberts, 125 N. Y. App. Div. 333, 109 N. Y. Suppl. 547 [*affirmed* in 195 N. Y. 303, 88 N. E. 753] (property without district); St. Paul, etc., R. Co. *v.* Howard, 23 S. D. 34, 119 N. W. 1032 (property not used for railroad purposes).

Validity of taxes.— Herrick *v.* Niesz, 18 Wash. 132, 51 Pac. 346.

Appearance in opposition to judgment.— Gage *v.* Lyons, 138 Ill. 590, 28 N. E. 832.

Fraud in sale and deed.— Darnell Min., etc., Co. *v.* Ruckles, 45 Wash. 180, 88 Pac. 101.

Disability of owner as affecting right of redemption. Hawley *v.* Griffin, 121 Iowa 667, 92 N. W. 113, 97 N. W. 86.

Disqualification of purchaser at tax-sale.— New England L. & T. Co. *v.* Browne, 177 Mo. 412, 76 S. W. 954; Day *v.* Fay, 59 W. Va. 65, 52 S. E. 1013.

67. London, etc., Mortg. Co. *v.* Gibson, 77 Minn. 394, 80 N. W. 205, 777.

68. Robert P. Lewis Co. *v.* Knowlton, 84 Minn. 53, 86 N. W. 875; Stephenson *v.* Doolittle, 123 Wis. 36, 100 N. W. 1041, holding that the question as to the reimbursement of a tax title claimant in case his deed is set aside should not be entered upon until after the preliminary question as to the validity of the tax title is determined.

69. Glos *v.* Gleason, 209 Ill. 517, 70 N. E. 1045; Bennett *v.* Darling, 15 S. D. 1, 86 N. W. 751.

70. *California.*— Haaren *v.* High, 97 Cal. 445, 32 Pac. 518.

Illinois.— Glos *v.* Hayes, 214 Ill. 372, 73 N. E. 802.

Indiana.— Mattox *v.* Stevens, 140 Ind. 282, 39 N. E. 460; Green *v.* McGrew, 35 Ind. App. 104, 72 N. E. 1049, 73 N. E. 832, 111 Am. St. Rep. 149.

Iowa.— Walker *v.* Sioux City, etc., Town Lot, etc., Co., 66 Iowa 751, 24 N. W. 563.

Kansas.— Coonradt *v.* Myers, 32 Kan. 270, 4 Pac. 359.

South Dakota.—Bandow *v.* Wolven, 20 S. D. 445, 107 N. W. 204, holding that in an action to determine the validity of a claim under a tax deed, findings that no notice of intention to take out the tax deed was served, except by publication, did not necessarily show that the notice and service were not sufficient, in the absence of an affirmative finding that the party to be notified was not a non-resident of the state.

Wisconsin.— Safford *v.* Conan, 88 Wis. 354, 60 N. W. 429; Geisinger *v.* Beyl, 80 Wis. 443, 50 N. W. 501.

See 45 Cent. Dig. tit. "Taxation," § 1609.

71. Coxe *v.* Deringer, 82 Pa. St. 236; McReynolds *v.* Longenberger, 57 Pa. St. 13 (identification of assessment book); Rupert *v.* Delp, 7 Pa. Super. Ct. 209 (to whose fault failure to pay taxes was due); Dickson *v.* Burckmyer, 67 S. C. 526, 46 S. E. 343 (whether the sheriff made an excessive levy for taxes); State *v.* Coughran, 19 S. D. 271, 103 N. W. 31 (whether notice of application for tax deed was properly served); Cooley *v.* O'Connor, 12 Wall. (U. S.) 391, 20 L. ed. 446 (whether published notice sufficiently described the land).

Identity of owner erroneously described in the land book as being a question for the jury see Yellow Poplar Lumber Co. *v.* Thompson, 108 Va. 612, 62 S. E. 358.

Identity of land claimed with that assessed and sold is a question for the jury. Miller *v.* Hale, 26 Pa. St. 432; Russel *v.* Werntz, 24 Pa. St. 337; Burns *v.* Lyon, 4 Watts (Pa.) 363.

Whether land was seated or unseated is a question for the jury. Crum *v.* Burke, 25 Pa. St. 377; Rosenburger *v.* Schull, 7 Watts (Pa.) 390.

under proper instruction of the court as to the legal effect of the evidence which has beed adduced.[72]

9. Judgment or Decree — a. In General. A judgment or decree foreclosing a tax lien or confirming the tax title or quieting title in the claimant is not open to collateral attack or impeachment,[73] but is conclusive evidence of title in the tax purchaser,[74] as against all parties and privies,[75] although it may be vacated or set aside, like other judgments, if invalid.[76] Similar consequences attach to a judgment declaring the tax title void,[77] or to a conditional judgment providing for the reimbursement of the tax purchaser on the vacation of his deed.[78]

b. Scope and Extent of Relief Granted — (i) *In General.* If the issues are found in favor of the tax title claimant, the court may in a proper case make a decree confirming or quieting his title.[79] On the other hand, if the determination is adverse to him, the judgment will vacate and set aside the tax-sale and deed,[80] not necessarily *in toto*, but to the extent of the interest of the person contesting it and showing title in himself.[81] The defeated tax purchaser may have a lien adjudged to him for the taxes which he has paid,[82] and may be required to account for rents and profits,[83] and to surrender possession; [84] but it is not proper to order him to convey or quitclaim to the record owner, unless there are special equitable grounds for it, although he may be perpetually enjoined from asserting his tax

72. Ropes *v.* Minshew, 47 Fla. 212, 36 So. 579.

73. Ingram *v.* Sherwood, 75 Ark. 176, 87 S. W. 435; McGavock *v.* Pollack, 13 Nebr. 535, 14 N. W. 659; Thomas *v.* Lawson, 21 How. (U. S.) 331, 16 L. ed. 82.

74. *Illinois.*— Glos *v.* Hanford, 212 Ill. 261, 72 N. E. 439.

Iowa.— Knudson *v.* Litchfield, 87 Iowa 111, 54 N. W. 199; Brownell *v.* Storm Lake Bank, 63 Iowa 754, 19 N. W. 788.

Mississippi.— McLemore *v.* Scales, 68 Miss. 47, 8 So. 844.

Texas.— Houssels *v.* Taylor, 24 Tex. Civ. App. 72, 58 S. W. 190.

United States.—Thomas *v.* Lawson, 21 How. 331, 16 L. ed. 82; Flannigan *v.* Chapman, etc., Land Co., 144 Fed. 371, 75 C. C. A. 310.

See 45 Cent. Dig. tit. "Taxation," § 1615.

75. Glos *v.* Ambler, 218 Ill. 269, 75 N. E. 764; Smith *v.* Williams, 44 Mich. 240, 6 N. W. 662; Olmsted County *v.* Barber, 31 Minn. 256, 17 N. W. 473, 944; Warner *v.* Trow, 36 Wis. 195.

Decree determining priority of liens.—A decree that the interest of the holder of a tax certificate is inferior to that of another claimant does not invalidate the certificate or prevent the interest under it from ripening into a perfect title by the lapse of time and failure to redeem. Mallory *v.* French, 38 Iowa 431.

76. Mason *v.* Gates, 82 Ark. 294, 102 S. W. 190 (decree confirming tax title obtained under unconstitutional act); Ingram *v.* Sherwood, 75 Ark. 176, 87 S. W. 435; Houston *v.* Walsh, 27 Tex. Civ. App. 121, 66 S. W. 106; Swanson *v.* Hoyle, 32 Wash. 169, 72 Pac. 1011; Smith *v.* Smith, 19 Wis. 615, 88 Am. Dec. 707. See also Thompson *v.* McKean, 43 Iowa 402.

Order of cancellation by public officer.—A certificate of error issued by the auditor-general, purporting to cancel a tax deed, if judicial, is the act of a limited tribunal, and will be treated as void if it shows on its face that it was based on a mistake of law. Vetterly *v.* McNeal, 129 Mich. 507, 89 N. W. 441.

77. Glos *v.* Hayes, 214 Ill. 372, 73 N. E. 802.

78. Eversole *v.* Early, 80 Iowa 601, 44 N. W. 897; Easton *v.* Cranmer, 19 S. D. 224, 102 N. W. 944; Maxcy *v.* Simonson, 130 Wis. 650, 110 N. W. 803.

79. See *supra*, XIV, B, 2.

Where it appears that the consideration was grossly inadequate a court of equity will ordinarily refuse its aid to establish a title derived from a tax-sale. Harper *v.* Sexton, 22 Iowa 442; Brien *v.* Marsh, 1 Tenn. Ch. 625.

80. Glos *v.* Cass, 230 Ill. 641, 82 N. E. 827 (holding that it was not error that the decree only set aside the tax deed and did not bar any interest that defendant had in the premises other than that derived from the tax deed); Hampton *v.* McClanahan, 143 Mo. 501, 45 S. W. 297.

81. Glos *v.* McKerlie, 212 Ill. 632, 72 N. E. 700; Glos *v.* Adams, 204 Ill. 546, 68 N. E. 398; King *v.* Lane, 21 S. D. 101, 110 N. W. 37.

82. Glos *v.* Ault, 221 Ill. 562, 77 N. E. 939; Easton *v.* Cranmer, 19 S. D. 224, 102 N. W. 944. See also *infra*, XIV, B, 9, b, (II), (A); XIV, C, 3.

83. Longworth *v.* Johnson, 66 Kan. 193, 71 Pac. 259; Cooper *v.* Falk, 109 La. 474, 33 So. 567.

Rents and profits may be offset against taxes paid by one who alleges possession under a voidable tax deed. Dimpfel *v.* Beam, 41 Colo. 25, 91 Pac. 1107.

84. Lombard *v.* Atwater, 43 Iowa 599; Wolf *v.* Brown, 142 Mo. 612, 44 S. W. 733.

The court may award a writ of possession on setting aside a tax deed, if the purchaser is in possession at the time of the decree. Lohr *v.* George, 65 W. Va. 241, 64 S. E. 609.

title,[85] and the purchaser shall not be restrained from acts of dominion over the land, since the owner will be able to invoke proper remedies for his protection, and there is no presumption that the purchaser will continue his efforts to hold the land.[86] It has been held that the court, having jurisdiction of the parties and subject-matter, may also correct defects in the assessment or other proceedings.[87]

(II) *Reimbursement of Tax Purchaser*[88]— (A) *In General.* If a tax-sale was absolutely void, because of the illegality of the taxes, the fact that they had been paid, or for other cause, no rights accrue to the purchaser, and the owner of the land cannot be required to reimburse him.[89] But in the absence of defects rendering the proceedings entirely null, the statutes of many states provide for the reimbursement of the purchaser in case his deed is vacated or set aside,[90] and where the taxes paid by the purchaser were a just charge on the property, but the sale or deed was invalid because of irregularities, it is within the power of a court of equity to make the reimbursement of the purchaser a condition upon the granting of relief to the record owner.[91] Hence it is a general rule, applicable in equity on general principles and applicable at law under the statutes, that where the owner brings suit to clear or quiet his title or to have the sale and deed set aside, relief will be granted to him only on terms of his repaying to the tax purchaser what is justly due; [92] and where the tax purchaser sues for possession

85. Reed *v.* Reber, 62 Ill. 240; Woodard *v.* Glos, 113 Ill. App. 353.

86. Lohr *v.* George, 65 W. Va. 241, 64 S. E. 609.

87. Brennan *v.* Buffalo, 162 N. Y. 491, 57 N. E. 81.

88. **Compensation for improvements** see *infra*, XIV, C, 5.

Payment or tender as affecting right to attack tax title see *supra*, XIV, B, 3, d.

Reimbursement of purchaser of invalid tax title in general see *infra*, XIV, C.

89. *Illinois.*— Glos *v.* Shedd, 218 Ill. 209, 75 N. E. 887.

Minnesota.—Burdick *v.* Bingham, 38 Minn. 482, 38 N. W. 489.

Missouri.— Burke *v.* Brown, 148 Mo. 309, 49 S. W. 1023; Rowe *v.* Current River Land, etc., Co., 99 Mo. App. 158, 73 S. W. 362.

West Virginia.— State *v.* McEldowney, 54 W. Va. 695, 47 S. E. 650.

United States.— Barnes *v.* Bee, 138 Fed. 476 [*affirmed* in 149 Fed. 727, 79 C. C. A. 433]; Paine *v.* Germantown Trust Co., 136 Fed. 527, 69 C. C. A. 303.

See 45 Cent. Dig. tit. "Taxation," § 1612.

90. See the statutes of the several states. And see Riverside Co. *v.* Townsend, 120 Ill. 9, 9 N. E. 65, holding such a statute not to be retrospective.

91. McKinney *v.* Minnehaha County, 17 S. D. 407, 97 N. W. 15; McClain *v.* Batton, 50 W. Va. 121, 40 S. E. 509.

Remedy confined to equity proceedings.— Relief to the tax purchaser, on the lines stated in the text, cannot ordinarily be granted in an action such as ejectment, but is confined to purely equitable proceedings. Riverside Co. *v.* Townsend, 120 Ill. 9, 9 N. E. 65; Weimer *v.* Porter, 42 Mich. 569, 4 N. W. 306; Ellsworth *v.* Freeman, 43 Mich. 488, 5 N. W. 675. But relief may be granted to a claimant under a tax title who intervenes in an action of partition and sets up his tax title as paramount. North *v.* Lehman, 97 Ill. App. 399. But see Thomsen *v.* McCormick, 136 Ill. 135, 26 N. E. 373, holding that the record owner should be required to reimburse the tax purchaser only when such owner is seeking affirmative relief, and hence not when, in defense to an action for partition, he pleads in bar a former judgment declaring the tax title void.

Relief dependent on holding of tax deed.— Where the tax title claimant never had a tax deed, it seems he has no right to reimbursement. Bryant *v.* Nelson-Frey Co., 94 Minn. 305, 102 N. W. 859.

Offer and refusal of reimbursement.—Where the record owner, before any suit, offers reimbursement to the tax purchaser, and the latter refuses the same and elects to stand on his tax title, he cannot claim such reimbursement in a suit in equity to vacate the tax deed as a cloud on title. Perham *v.* Haverhill Fibre Co., 64 N. H. 485, 14 Atl. 462.

92. *Arkansas.*— Gordon *v.* Church, 11 Ark. 118.

Colorado.— Charlton *v.* Kelly, 24 Colo. 273, 50 Pac. 1042; Crisman *v.* Johnson, 23 Colo. 264, 47 Pac. 296, 58 Am. St. Rep. 224.

Florida.— Hughey *v.* Winborne, 44 Fla. 601, 33 So. 249.

Illinois.— Glos *v.* Hanford, 212 Ill. 261, 72 N. E. 439; Glos *v.* Woodard, 202 Ill. 480, 67 N. E. 3; Glos *v.* Brown, 194 Ill. 307, 62 N. E. 622; Gage *v.* Du Puy, 137 Ill. 652, 24 N. E. 541, 26 N. W. 386; Miller *v.* Cook, 135 Ill. 190, 25 N. E. 756, 10 L. R. A. 292; Johnson *v.* Huling, 127 Ill. 14, 18 N. E. 786; Alexander *v.* Merrick, 121 Ill. 606, 13 N. E. 190; Smith *v.* Hutchinson, 108 Ill. 662; Phelps *v.* Harding, 87 Ill. 442. See also Wilmerton *v.* Phillips, 103 Ill. 78.

Indiana.— Green *v.* McGrew, 35 Ind. App. 104, 72 N. E. 1049, 73 N. E. 832, 111 Am. St. Rep. 149.

Iowa.— Crumb *v.* Davis, 54 Iowa 25, 6 N. W. 53.

Kansas.— Wagner *v.* Underhill, 71 Kan.

or to confirm or quiet his title, and is defeated, he is entitled to the same relief,[93] which may be given by decreeing a lien on the premises in his favor,[94] or if he is in possession, he may retain the possession until the sum found due him has been paid.[95]

(B) *Amount of Recovery.* According to the rules prevailing in some of the states, the amount to be repaid to the purchaser at a tax-sale by way of reimbursment is a sum equal to that which the owner would be obliged to pay into the public treasury if the land had not been sold, and hence it includes the taxes,

637, 81 Pac. 177; Peck *v.* Truesdell, 59 Kan. 779, 54 Pac. 1131; Davenport *v.* Sadler, 48 Kan. 311, 29 Pac. 168; McAllaster *v.* Polenqueen, 10 Kan. App. 140, 62 Pac. 440; Peck *v.* Truesdell, 7 Kan. App. 189, 51 Pac. 797.

Louisiana.— Genella *v.* Vincent, 50 La. Ann. 956, 24 So. 690.

Michigan.— Aztec Copper Co. *v.* Auditor-Gen., 128 Mich. 615, 87 N. W. 895.

Mississippi.— Ragsdale *v.* Alabama Great Southern R. Co., 67 Miss. 106, 6 So. 630.

Missouri.— Bingham *v.* Birmingham, 103 Mo. 345, 15 S. W. 533. See also Smith *v.* Laumier, 84 Mo 672.

Montana.—Foster *v.* Bender, 28 Mont. 526, 73 Pac. 121.

Nebraska.— Wygant *v.* Dahl, 26 Nebr. 562, 42 N. W. 735; Dillon *v.* Merriam, 22 Nebr. 151, 34 N. W. 344.

New Jersey.— Brooks *v.* Union Tp., 68 N. J. L. 133, 52 Atl. 238.

North Dakota.— Powers *v.* Bottineau First Nat Bank, 15 N. D. 466, 109 N. W. 361; State Finance Co *v.* Beck, 15 N. D. 374, 109 N. W. 357.

South Dakota.— Thompson *v.* Roberts, 16 S. D. 403, 92 N. W. 1079; Clark *v.* Darlington, 11 S. D. 418, 78 N. W. 997.

Texas.— Lamberida *v.* Barnum, (Civ. App. 1905) 90 S. W. 698. See also Cooper *v.* Conerty, 83 Tex. 133, 18 S. W. 334.

West Virginia.— Mosser *v.* Moore, 56 W. Va. 478, 49 S. E. 537; Winning *v.* Eakin, 44 W. Va. 19, 28 S. E. 757.

Wisconsin.— Doolittle *v.* J. L. Gates Land Co., 131 Wis. 24, 110 N. W. 890; Pinkerton *v.* J. L. Gates Land Co., 118 Wis. 514, 95 N. W. 1089; Wisconsin Cent. R. Co. *v.* Comstock, 71 Wis. 88, 36 N. W. 843.

United States.— Smith *v.* Gage, 12 Fed. 32, 11 Biss. 217.

See 45 Cent. Dig. tit. "Taxation," § 1612.

Terms of decree.— The tax purchaser is not entitled to a personal judgment against the owner for the amount to which he is found to be entitled (Polenqueen *v.* McAllaster, 64 Kan. 263, 67 Pac. 826; Barker *v.* Mecartney, 10 Kan. App. 130, 62 Pac. 439), nor is the payment or tender of the taxes a prerequisite to the purchaser's liability for rents and profits (Heffern *v.* Hack, 65 Ohio St. 164, 61 N. E. 703); but the decree will make the relief awarded to the owner of the property conditional upon his paying to the tax purchaser the amount due to the latter within a reasonable time, which is generally fixed in the decree (Glos *v.* Brown, 194 Ill. 307, 62 N. E. 622; Larson *v.* Peppard, 38 Mont. 128, 94 Pac. 136, 129 Am. St. Rep. 630; Pettit *v.* Black, 8 Nebr. 52), and in default of such payment his bill will be dismissed (Glos *v.* Cratty, 196 Ill. 193, 63 N. E. 690; Farwell *v.* Harding, 96 Ill. 32). But the decree need not provide for the distribution of the amount deposited with the clerk of the court (Brimson *v.* Arnold, 236 Ill. 495, 86 N. E. 254), and a provision in the decree for a deposit to be paid to defendants as their respective rights may thereafter be determined is proper (Glos *v.* Cass, 230 Ill. 641, 82 N. E. 827).

Reimbursement of purchaser's grantee.— A quitclaim deed by a tax purchaser operates as an assignment of an interest in the taxes found due, and tax titles so quitclaimed should not be set aside without requiring the repayment to the grantee of his proportion of the taxes, interest, and costs. Glos *v.* Mulcahy, 210 Ill. 639, 71 N. E. 629.

Where the tax title is not pleaded or relied on, defendant is not entitled to a decree for any money. Gage *v.* Du Puy, 134 Ill. 132, 24 N. E. 866.

93. *Alabama.*— Brummell *v.* Crook, 119 Ala. 670, 24 So. 452.

Indiana.— Richcreek *v.* Russell, 34 Ind. App. 217, 72 N. E. 617.

Kansas.— Standard Inv. Co. *v.* Freeman, 64 Kan. 885, 67 Pac. 859; Geer *v.* Thrasher, 37 Kan. 657, 16 Pac. 94; Belz *v.* Bird, 31 Kan. 139, 1 Pac. 246.

Missouri.— Gregg *v.* Jesberg, 113 Mo. 34, 20 S. W. 652. See also Bender *v.* Dugan, 99 Mo. 126, 12 S. W. 795.

Wisconsin.— Blackman *v.* Arnold, 113 Wis. 487, 89 N. W. 513; Call *v.* Chase, 21 Wis. 511.

United States.— Parks *v.* Watson, 20 Fed. 764.

See 45 Cent. Dig. tit. "Taxation," § 1612.

94. Haney *v.* Cole, 28 Ark. 299; Ward *v.* Montgomery, 57 Ind. 276; Auld *v.* McAllaster, 43 Kan. 162, 23 Pac. 165; Canine *v.* Finnup, 5 Kan. App. 798, 48 Pac. 992; Powell *v.* Finn, 5 Kan. App. 495, 47 Pac. 573; Larson *v.* Peppard, 38 Mont. 128, 99 Pac. 136. See also *infra*, XIV, C, 3. *Compare* Equitable Inv. Trust Co. *v.* Essex, 74 Kan. 240, 86 Pac. 467, holding that in an action by the holder of a tax deed against the original owner to quiet title, if he fails to establish his title he cannot have the taxes paid decreed to be a lien upon the lands.

95. Rose *v.* Newman, 47 Kan. 18, 27 Pac. 181; Smith *v.* H. D. Williams Cooperage Co., 100 Mo. App. 153, 72 S. W. 315.

But under a statute providing that no purchaser under any tax-sale shall enter into possession of land so purchased until six months after notice to the party in interest,

interest, penalty, and costs charged on the land at the time of sale;[96] or which would have been necessary to effect a redemption;[97] or the amount of the purchase-money or the price actually paid by the purchaser at the sale.[98] In either case, however, the purchaser is also held entitled to be reimbursed for any taxes on the premises which have been paid by him after the sale,[99] and he may usually

a purchaser who takes possession of the premises without giving such notice cannot recover the purchase-price or the amount of taxes subsequently paid in a proceeding to vacate the decree under which he bought. Corrigan *v.* Davis, 125 Mich. 125, 83 N. W. 1020.

96. *Arkansas.*— Hare *v.* Carnall, 39 Ark. 196; Cole *v.* Moore, 34 Ark. 582.

Colorado.—Buchanan *v.* Griswold, 37 Colo. 18, 86 Pac. 1041.

Iowa.— Buckley *v.* Early, 72 Iowa 289, 33 N. W. 769; Springer *v.* Bartle, 46 Iowa 688; Miller *v.* Corbin, 46 Iowa 150.

Kansas.— Geer *v.* Thrasher, 37 Kan. 657, 16 Pac. 94; Richards *v.* Cole, 31 Kan. 205, 1 Pac. 647; Belz *v.* Bird, 31 Kan. 139, 1 Pac. 246; Coonradt *v.* Myers, 31 Kan. 30, 2 Pac. 858; Russell *v.* Hudson, 28 Kan. 99; Coe *v.* Farwell, 24 Kan. 566; Barker *v.* Mecartney, 10 Kan. App. 130, 62 Pac. 439; Booge *v.* Ritchie, 2 Kan. App. 714, 43 Pac. 1144.

Nebraska.— Medland *v.* Linton, 60 Nebr. 249, 82 N. W. 866.

North Dakota.— Bode *v.* New England Inv. Co., 1 N. D. 121, 45 N. W. 197; Farrington *v.* New England Inv. Co., 1 N. D. 102, 45 N. W. 191.

Tennessee.—Paul *v.* Hill, 3 Tenn. Ch. 443.

Texas.— Murphy *v.* Williams, (Civ. App. 1900) 56 S. W. 695.

Wisconsin.— Pierce *v.* Schutt, 20 Wis. 423.

United States.—Lamb *v.* Farrell, 21 Fed. 5.

See 45 Cent. Dig. tit. "Taxation," § 1612.

Revaluation of land not proper.— It is not proper for the court to inquire into the correctness of the assessed valuation of the land, for the purpose of showing the amount of taxes justly chargeable thereon, and to reduce the amount of taxes recoverable by the holder of the invalid tax deed. Booge *v.* Ritchie, 2 Kan. App. 714, 43 Pac. 1144.

Costs made subsequent to sale are not generally chargeable to the owner, such as the cost of procuring a deed. Covell *v.* Young, 11 Nebr. 510, 9 N. W. 694. And see Russell *v.* Hudson, 28 Kan. 99.

Allowance of attorney's fee see Wygant *v.* Dahl, 26 Nebr. 562, 42 N. W. 735.

97. Snell *v.* Dubuque, etc., R. Co., 88 Iowa 442, 55 N. W. 310; Allen *v.* Buckley, 94 Mo. 158, 7 S. W. 10. And see Clapp *v.* Pinegrove Tp., 138 Pa. St. 35, 20 Atl. 836, 12 L. R. A. 618.

98. *Arkansas.*—Anderson *v.* Williams, 59 Ark. 144, 26 S. W. 818.

Colorado.— Buchanan *v.* Griswold, 37 Colo. 18, 86 Pac. 1041; Pueblo Realty Co. *v.* Tate, 32 Colo. 67, 75 Pac. 402.

Illinois.— Langlois *v.* Stewart, 156 Ill. 609, 41 N. E. 177; Cotes *v.* Rohrbeck, 139 Ill. 532, 28 N. E. 1110; Gage *v.* Du Puy, 137 Ill. 652, 24 N. E. 541, 26 N. E. 386; Ames *v.* Sankey, 128 Ill. 523, 21 N. E. 579; Gage *v.* Pirtle, 124 Ill. 502, 17 N. E. 34; Barnett *v.* Cline, 60 Ill. 205; Woodard *v.* Glos, 113 Ill. App. 353.

Iowa.— Stinson *v.* Richardson, 48 Iowa 541.

Kansas.— Hoffman *v.* Groll, 35 Kan. 652, 12 Pac. 34.

Michigan.— Jenkinson *v.* Auditor-Gen., 104 Mich. 34, 62 N. W. 163.

Mississippi.— Martin *v.* Swofford, 59 Miss. 328.

South Dakota.— Easton *v.* Cranmer, 19 S. D. 224, 102 N. W. 944.

Tennessee.— Bloomstein *v.* Brien, 3 Tenn. Ch. 55.

Texas.— Moore *v.* Rogers, 100 Tex. 361, 99 S. W. 1023; Rogers *v.* Moore, (Civ. App. 1906) 94 S. W. 114.

West Virginia.— McClain *v.* Batton, 50 W. Va. 121, 40 S. E. 509.

Wisconsin.— Washburn Land Co. *v.* Swanby, 131 Wis. 1, 110 N. W. 806; Chippewa River Land Co. *v.* J. L. Gates Land Co., 118 Wis. 345, 94 N. W. 57, 95 N. W. 954.

See 45 Cent. Dig. tit. "Taxation," § 1612.

99. *Colorado.*— Charlton *v.* Kelly, 24 Colo. 273, 50 Pac. 1042.

Illinois.— Gage *v.* Du Puy, 137 Ill. 652, 24 N. E. 541, 26 N. E. 386; Miller *v.* Cook, 135 Ill. 190, 25 N. E. 756, 10 L. R. A. 292; Smith *v.* Prall, 133 Ill. 308, 24 N. E. 521; Ames *v.* Sankey, 128 Ill. 523, 21 N. E. 579; Gage *v.* Caraher, 125 Ill. 447, 17 N. E. 777; Gage *v.* Pirtle, 124 Ill. 502, 17 N. E. 34; Barnett *v.* Cline, 60 Ill. 205; Reed *v.* Tyler, 56 Ill. 288; Glos *v.* Collins, 110 Ill. App. 121.

Iowa.— Harrison *v.* Sauerwein, 70 Iowa 291, 30 N. W. 571; Harber *v.* Sexton, 66 Iowa 211, 23 N. W. 635.

Kansas.— Ritchie *v.* Mulvane, 39 Kan. 241, 17 Pac. 830.

Louisiana.— *In re* Lindner, 113 La. 772, 37 So. 720; Walsh *v.* Harang, 48 La. Ann. 984, 20 So. 202.

Michigan.— Sinclair *v.* Learned, 51 Mich. 335, 16 N. W. 672.

Missouri.— Pitkin *v.* Shacklett, 106 Mo. 571, 17 S. W. 651; Pitkin *v.* Reibel, 104 Mo. 505, 16 S. W. 244.

North Dakota.— O'Neil *v.* Tyler, 3 N. D. 47, 53 N. W. 434.

Tennessee.— Hamilton *v.* Brownsville Gaslight Co., 115 Tenn. 150, 90 S. W. 159.

Wisconsin.— Morrow *v.* Lander, 77 Wis. 77, 45 N. W. 956.

United States.— Indiana, etc., Lumber, etc., Co. *v.* Milburn, 161 Fed. 531, 88 C. C. A. 473.

See 45 Cent. Dig. tit. "Taxation," § 1612.

recover interest on one or all of these items, in some states at an extraordinary rate, but in others only at the legal rate.[1]

10. Appeal and Review. The ordinary rules as to the right of appeal and the giving of a bond or other condition apply in tax cases.[2] The reviewing court will ordinarily not consider objections to the regularity or validity of the tax proceedings or other exceptions not presented and urged below,[3] or those which are not alleged with sufficient distinctness and supported by the evidence brought up.[4] Reasonable presumptions will be indulged in favor of the correctness of the actions of the trial court,[5] and its decision will not be reversed for harmless error,[6] or for errors not affecting the substantial rights of the party appealing.[7] But in proper cases the judgment or decree may be reversed and remanded for further proceedings.[8]

11. Costs. In a suit by the owner to set aside a tax-sale of his property, or to quiet his title or remove the cloud from it, the costs will be assessed against the tax purchaser if a sufficient tender has been made to him of the amount due to him;[9] but in the absence of such a tender, defendant cannot be charged with the

1. *Arkansas.*—Anderson *v.* Williams, 59 Ark. 144, 26 S. W. 818; Boehm *v.* Porter, 54 Ark. 665, 17 S. W. 1; Cole *v.* Moore, 34 Ark. 582.

Colorado.— Pueblo Realty Trust Co. *v.* Tate, 32 Colo. 67, 75 Pac. 402; Mitchell *v.* Arkell, 3 Colo. App. 253, 32 Pac. 720.

Illinois.— Glos *v.* Gerrity, 190 Ill. 545, 60 N. E. 833; Glos *v.* Gould, 182 Ill. 512, 55 N. E. 369; Gage *v.* Du Puy, 137 Ill. 652, 24 N. E. 541, 26 N. E. 386; Gage *v.* Nichols, 135 Ill. 128, 25 N. E. 672; Ames *v.* Sankey, 128 Ill. 523, 21 N. E. 579; Gage *v.* Pirtle, 124 Ill. 502, 17 N. E. 34; Barnett *v.* Cline, 60 Ill. 205.

Kansas.— Peck *v.* Truesdell, 59 Kan. 779, 54 Pac. 1131; Hentig *v.* Redden, 45 Kan. 20, 25 Pac. 219; Wilson *v.* Reasoner, 37 Kan. 663, 16 Pac. 100; Hoffman *v.* Groll, 35 Kan. 652, 12 Pac. 34; Coonradt *v.* Myers, 31 Kan. 30, 2 Pac. 858; Corbin *v.* Young, 24 Kan. 198; Hentig *v.* Thomas, 7 Kan. App. 115, 53 Pac. 80.

Minnesota.— Taylor *v.* Slingerland, 39 Minn. 470, 40 N. W. 575.

Montana.— Larson *v.* Peppard, 38 Mont. 128, 99 Pac. 136, holding that where in a suit to quiet title against void tax deeds the taxes are declared to be a lien, it is erroneous for the court to allow interest to defendant on the amount of the taxes paid by him at a rate higher than the legal rate of interest.

Nebraska.— Merrill *v.* Ijams, 58 Nebr. 706, 79 N. W. 734; Grant *v.* Bartholomew, 57 Nebr. 673, 78 N. W. 314.

North Dakota.— State Finance Co. *v.* Beck, 15 N. D. 374, 109 N. W. 357.

West Virginia.— McClain *v.* Batton, 50 W. Va. 121, 40 S. E. 509.

See 45 Cent. Dig. tit. "Taxation," § 1612.

2. See Woodard *v.* Glos, 113 Ill. App. 353; Belcher *v.* Wilkerson, 54 Miss. 677. And see, generally, Appeal and Error, 2 Cyc. 474.

Right to appeal on behalf of state see Smith *v.* New Orleans, 43 La. Ann. 726, 9 So. 773.

Bond on appeal see Smith *v.* New Orleans, 43 La. Ann. 726, 9 So. 773; Meagher *v.* Hand, 28 Wash. 332, 68 Pac. 892.

On appeal in a suit by a tax-sale purchaser to quiet title and to enforce a lien for taxes, parties not shown to be owners of the lands cannot ask a reversal of a judgment decreeing a foreclosure of the tax lien. Holbrook *v.* Kunz, 41 Ind. App. 260, 83 N. E. 730.

3. *Arkansas.*— Gerstle *v.* Vandergriff, 72 Ark. 261, 79 S. W. 776.

Illinois.— Glos *v.* Hayes, 214 Ill. 372, 73 N. E. 802.

Michigan.— Platz *v.* Englehardt, 138 Mich. 485, 101 N. W. 849; Aztec Copper Co. *v.* Auditor-Gen., 128 Mich. 615, 87 N. W. 895; Hall *v.* Mann, 118 Mich. 201, 76 N. W. 314; Sands *v.* Davis, 40 Mich. 14.

Missouri.— Blodgett *v.* Schaffer, 94 Mo. 652, 7 S. W. 436.

Vermont.— Wilmot *v.* Lathrop, 67 Vt. 671, 32 Atl. 861.

See 45 Cent. Dig. tit. "Taxation," § 1617.

4. Jones *v.* Foley, 121 Ind. 180, 22 N. E. 987; Wing *v.* Hall, 47 Vt. 182.

5. St. Louis, etc., R. Co. *v.* Alexander, 49 Ark. 190, 4 S. W. 752; Swanson *v.* Hoyle, 32 Wash. 169, 72 Pac. 1011; Parish *v.* Eager, 15 Wis. 532.

6. Scarry *v.* Lewis, 133 Ind. 96, 30 N. E. 411; Langohr *v.* Smith, 81 Ind. 495; Gooch *v.* Benge, 90 Ky. 393, 14 S. W. 375, 12 Ky. L. Rep. 368; Dikeman *v.* Parrish, 6 Pa. St. 210, 47 Am. Dec. 455.

7. Gage *v.* Mayer, 117 Ill. 632, 7 N. E. 97; Grindo *v.* McGee, 111 Wis. 531, 87 N. W. 468.

8. Green *v.* McGrew, 35 Ind. App. 104, 72 N. E. 1049, 73 N. E. 832, 111 Am. St. Rep. 149; Day *v.* Davey, 132 Mich. 173, 93 N. W. 256; Finney *v.* Ford, 22 Wis. 173.

9. *Illinois.*— Glos *v.* Garrett, 219 Ill. 208, 76 N. E. 373; Glos *v.* Ambler, 218 Ill. 269, 75 N. E. 764; Glos *v.* Dyche, 214 Ill. 417, 73 N. E. 757; Glos *v.* Stern, 213 Ill. 325, 72 N. E. 1057; Glos *v.* Gleason, 209 Ill. 517, 70 N. E. 1045; Glos *v.* Gould, 182 Ill. 512, 55 N. E. 369; Gage *v.* Arndt, 121 Ill. 491, 13 N. E. 138.

costs, but may, on the other hand, be entitled to his own costs,[10] as he will be also when he is successful in an action to confirm or quiet his title or to foreclose the interest of the former owner.[11]

C. Reimbursement of Purchaser of Invalid Title — 1. Right to Relief in General — a. Application of Rule of Caveat Emptor. At common law the purchaser at a tax-sale assumes the risks of his purchase. The proceedings are of record, and he is chargeable with notice of any defect or irregularity which the records disclose. Moreover the power of the officer to sell is a naked power, statutory, and not coupled with an interest, and the purchaser is bound to inquire whether it is rightly exercised. Therefore, in the absence of special legislation to the contrary, he comes within the rule of *caveat emptor*, and if his title proves worthless, he cannot recover his money from the officer or the municipality,[12] although on equitable principles, and if he is free from fraud or bad faith,[13] it is

Iowa.— Springer *v.* Bartle, 46 Iowa 688.

Kansas.— Shinkle *v.* Meek, 69 Kan. 368, 76 Pac. 837.

Ohio.— Mathers *v.* Bull, 9 Ohio S. & C. Pl. Dec. 408, 6 Ohio N. P. 45.

Texas.— Rogers *v.* Moore, (Civ. App. 1906) 94 S. W. 114.

Washington.— Wheeler Co. *v.* Pates, 43 Wash. 247, 86 Pac. 625.

In Michigan where a bill to remove a cloud on title to land and to redeem from a tax-sale for delinquent drain taxes is in effect a suit to set aside the drain taxes, within the meaning of the statute which precludes costs against either party in an action to set aside any sale for delinquent taxes, the auditor-general, although a necessary party under General Tax Law, § 144 (Pub. Acts (1899), p. 140), is not entitled to costs on the dismissal of the bill. Haney *v.* Miller, 154 Mich. 337, 117 N. W. 71, 745.

10. Bauer *v.* Gloss, 236 Ill. 450, 86 N. E. 116; Glos *v.* Garrett, 219 Ill. 208, 76 N. E. 373; South Chicago Brewing Co. *v.* Taylor, 205 Ill. 132, 68 N. E. 732; Glos *v.* Adams, 204 Ill. 546, 68 N. E. 398. But *compare* Van Ostrand *v.* Cole, 131 Wis. 446, 110 N. W. 891; Stephenson *v.* Doolittle, 123 Wis. 36, 100 N. W. 1041.

Equitable grounds for awarding costs.—A decree for costs against one holding a tax certificate or a tax deed cannot be entered until after, by a valid tender, he has been placed in the position of refusing to do equity. Stearns *v.* Glos, 235 Ill. 290, 85 N. E. 335; Glos *v.* Collins, 110 Ill. App. 121. But a tender to a tax purchaser of the amount paid for a tax certificate, together with costs and interest, coupled with a condition that a quitclaim deed of the property should be given by him, is not a sufficient tender. Stearns *v.* Glos, *supra*.

Where deed absolutely void.— Where it is determined, in a suit to set aside a tax deed, that the deed is absolutely void on the ground that the property was not subject to the assessment in question, costs should not be allowed to either party. Barnes *v.* Bee, 138 Fed. 476.

11. Collins *v.* Bryan, 124 N. C. 738, 32 S. E. 975; State *v.* Hatch, 36 Wash. 164, 78 Pac. 796; Loomis *v.* Rice, 37 Wis. 262. See also Jarvis *v.* Mohr, 18 Wis. 188.

12. *Colorado.*— Mitchell *v.* Minnequa Town Co., 41 Colo. 367, 92 Pac. 678.

Illinois.— Miller *v.* Cook, 135 Ill. 190, 25 N. E. 756, 10 L. R. A. 292.

Indiana.— Worley *v.* Cicero, 110 Ind. 208, 11 N. E. 227; State *v.* Casteel, 110 Ind. 174, 11 N. E. 219; McWhinney *v.* Indianapolis, 98 Ind. 182; Indianapolis *v.* Langsdale, 29 Ind. 486.

Kansas.— Sullivan *v.* Davis, 29 Kan. 28.

Louisiana.— Lindner *v.* New Orleans, 116 La. 372, 40 So. 736.

Maryland.— Hamilton *v.* Valiant, 30 Md. 139; Polk *v.* Rose, 25 Md. 153, 89 Am. Dec. 773.

Michigan.— People *v.* Auditor-Gen., 30 Mich. 12.

Montana.— Larson *v.* Peppard, 38 Mont. 128, 99 Pac. 136, 129 Am. St. Rep. 630.

Nebraska.— Martin *v.* Kearney County, 62 Nebr. 538, 87 N. W. 351; McCague *v.* Omaha, 58 Nebr. 37, 78 N. W. 463; Norris *v.* Burt County, 56 Nebr. 295, 76 N. W. 551; Adams *v.* Osgood, 42 Nebr. 450, 60 N. W. 869; Pennock *v.* Douglas County, 39 Nebr. 293, 58 N. W. 117, 42 Am. St. Rep. 579, 27 L. R. A. 121.

North Dakota.— Tyler *v.* Cass County, 1 N. D. 369, 48 N. W. 232.

South Carolina.— Cooke *v.* Pennington, 15 S. C. 185.

South Dakota.—American Inv. Co. *v.* Beadle County, 5 S. D. 410, 59 N. W. 212.

Tennessee.— Ross *v.* Mabry, 1 Lea 226.

Virginia.— Hoge *v.* Currin, 3 Gratt. 201.

United States.— Stead *v.* Course, 4 Cranch 403, 2 L. ed. 660; Martin *v.* Barbour, 34 Fed. 701 [*affirmed* in 140 U. S. 634, 11 S. Ct. 944, 35 L. ed. 546].

See 45 Cent. Dig. tit. "Taxation," § 1619. See also *infra*, XIV, C, 2, a.

In Pennsylvania, under an act of 1856, the rule of *caveat emptor* did not apply to tax-sales in case of double assessment, or where the taxes had been paid, or where the lands did not lie within the county; and in such cases the money was to be refunded to the purchaser. Bredin *v.* Cranberry Tp. Road Com'rs, 87 Pa. St. 441; Siggins *v.* Forest County, 2 Chest. Co. Rep. 421.

13. West *v.* Negrotto, 52 La. Ann. 381, 27 So. 75.

right that he should be subrogated to the rights of the municipality in any tax he has paid in making his purchase or in its protection.[14]

b. Covenants and Liabilities of Officers. A public officer may be liable in damages to a tax purchaser for neglect or inaction which prevents such purchaser from securing his rights under a valid sale;[15] but he is not liable in damages for a failure of title, unless due to fraud or wilful neglect on his own part.[16] Even where a covenant of warranty is inserted in a tax deed, as required by the statute, it is regarded as an official and not a personal covenant, and the officer is not to be held personally liable for its breach.[17]

2. Recovery From State or Municipality — a. Right of Action at Common Law. Unless aided by express statutory authority, the purchaser at a tax-sale whose title proves to be invalid is not entitled to recover back his money in an action against the state, or its officers, or the city or county for whose taxes the land was sold.[18] Neither is it competent for the officers of a county to make a special contract with tax purchasers, agreeing to refund the money if the title fails, for unless such a contract is authorized by statute it will not be binding on the county, or give the purchaser a right of action.[19]

b. Statutes Giving Right of Action — (i) *In General.* In many states the statutes now provide that the purchase-money paid at a tax-sale shall be refunded to the purchaser if the title conveyed proves to be invalid, with a right of action against the municipality if the refund is refused.[20] Such laws, however, are

14. Leavitt *v.* Bartholomew, 1 Nebr. (Unoff.) 756, 764, 93 N. W. 856.

15. Holden *v.* Eaton, 7 Pick. (Mass.) 15, holding that a tax collector was liable for a failure to make a proper return of the tax-sale, in consequence of which the purchaser could not procure a deed.

16. Harris *v.* Willard, Smith (N. H.) 63.

17. Stephenson *v.* Weeks, 22 N. H. 257; Wilson *v.* Cochran, 14 N. H. 397; Gibson *v.* Mussey, 11 Vt. 212. And see *supra*, XIII, D, 1, d. *Compare* Stubbs *v.* Page, 2 Me. 378.

18. *Arkansas.*— Nevada County *v.* Dickey, 68 Ark. 160, 56 S. W. 779.

California.— Loomis *v.* Los Angeles County, 59 Cal. 456.

Colorado.— Larimer County *v.* National State Bank, 11 Colo. 564, 19 Pac. 537.

Indiana.— Worley *v.* Cicero, 110 Ind. 208, 11 N. E. 227; State *v.* Casteel, 110 Ind. 174, 11 N. E. 219; Hilgenberg *v.* Marion County, 107 Ind. 494, 8 N. E. 294; McWhinney *v.* Indianapolis, 98 Ind. 182; Logansport *v.* Humphrey, 84 Ind. 467; Indianapolis *v.* Langsdale, 29 Ind. 486.

Iowa.— Lindsey *v.* Boone County, 92 Iowa 86, 60 N. W. 173.

Kansas.— Lyon County *v.* Goddard, 22 Kan. 389.

Louisiana.— Lindner *v.* New Orleans, 116 La. 372, 40 So. 736.

Maine.— Packard *v.* New Limerick, 34 Me. 266; Treat *v.* Orono, 26 Me. 217.

Massachusetts.— Lynde *v.* Melrose, 10 Allen 49.

Michigan.— People *v.* Auditor-Gen., 30 Mich. 12.

Nebraska.— Martin *v.* Kearney County, 62 Nebr. 538, 87 N. W. 351; Norris *v.* Burt County, 56 Nebr. 295, 76 N. W. 551.

New York.— Coffin *v.* Brooklyn, 116 N. Y. 159, 22 N. E. 227; Brevoort *v.* Brooklyn, 89 N. Y. 128.

North Dakota.— Tyler *v.* Cass County, 1 N. D. 369, 48 N. W. 232; Budge *v.* Grand Forks, 1 N. D. 309, 47 N. W. 390, 10 L. R. A. 165.

Oregon.— Dowell *v.* Portland, 13 Oreg. 248, 10 Pac. 308.

Pennsylvania.— Lackey *v.* Mercer County, 9 Pa. St. 318.

South Dakota.— Minnesota Loan, etc., Co. *v.* Beadle County, 18 S. D. 431, 101 N. W. 29; American Inv. Co. *v.* Beadle County, 5 S. D. 410, 59 N. W. 212.

Wisconsin.— See Jackson *v.* Jacksonport, 56 Wis. 310, 14 N. W. 296, holding that where a town, under the statutes, cannot legally purchase and hold tax certificates and therefore cannot sell them, a town making such a sale may be sued for the return of the money paid by the purchaser for the certificate.

Canada.—Austin *v.* Simcoe County Corp., 22 U. C. Q. B. 73.

See 45 Cent. Dig. tit. "Taxation," § 1621. See also *supra*, XIV, C, 1, a.

19. Hyde *v.* Kenosha County Sup'rs, 43 Wis. 129.

20. See the statutes of the several states. And see the following cases:

California.— Hayes *v.* Los Angeles County, 99 Cal. 74, 33 Pac. 766.

Illinois.— Joliet Stove Works *v.* Kiep, 230 Ill. 550, 82 N. E. 875 [*affirming* 132 Ill. App. 457], holding that the Revenue Act (Hurd Rev. St. (1905) c. 120), §§ 213, 214, modified the rule of *caveat emptor* applicable to tax-sales, in so far that when the sale is void for any of the specified defects the purchaser or his assignee is entitled to recover the money paid from the county.

Massachusetts.— Spring *v.* Cambridge, 199 Mass. 1, 85 N. E. 160.

Nebraska.— McCann *v.* Otoe County, 9 Nebr. 324, 2 N. W. 707.

construed with some strictness and confined to the specific cases mentioned.[21] They are not unconstitutional if they give a right of action against a county for a claim which it is morally or legally bound to recognize, but it is otherwise where the only basis for the action is attributable to the purchaser's own fault or neglect.[22] Such a statute, in force at the time of the sale, forms a part of the contract, and the rights vesting in the purchaser under it cannot be impaired or taken away by the repeal of the act.[23]

(II) *Retroactive Statutes.* A statute of this character may constitutionally be made to apply to tax-sales occurring before its enactment;[24] but such a law will not be construed as being retroactive unless the intention of the legislature to give it such an operation is clearly apparent.[25]

New York.— Wheeler *v.* State, 190 N. Y. 406, 83 N. E. 54, 132 Am. St. Rep. 555 [*affirming* 118 N. Y. App. Div. 913, 103 N. Y. Suppl. 1150].

South Dakota.— King *v.* Lane, 21 S. D. 101, 110 N. W. 37.

See 45 Cent. Dig. tit. "Taxation," § 1622.

Demand and refusal of refund.— Where a statute provides that any taxes erroneously or illegally collected may be refunded by the county treasurer by order of the board of supervisors, the word "may" means "shall," and the board have no discretion to allow or refuse a claim for refund, and if they refuse to allow it, an action then lies against the county. Hayes *v.* Los Angeles County, 99 Cal. 74, 33 Pac. 766.

Effect of refunding.— The state does not lose its lien on the property for the taxes refunded. Auditor-Gen. *v.* Patterson, 122 Mich. 39, 80 N. W. 884; Olmsted County *v.* Barber, 31 Minn. 256, 17 N. W. 473, 944.

Refunding by mistake and subsequent restoration of money.— Where a purchaser of land at a tax-sale, through a mistake of fact, applies to the county to refund the amount paid, which is done, but afterward, on discovering the mistake, he returns the money, this will not estop him to perfect and rely on the tax title, at least where the former owner was in no way misled or influenced thereby; nor will this operate as a cancellation of the tax purchaser's deed, which was in fact valid, the county board having no power to refund money received on a valid sale. Edwards *v.* Upham, 93 Wis. 455, 67 N. W. 728.

21. People *v.* Auditor-Gen., 30 Mich. 12; Roberts *v.* Fargo First Nat. Bank, 8 N. D. 504, 79 N. W. 1049.

Judgment annulling tax-sale.— Where the law provides for a refund of the purchase-money in case the tax title has been "annulled pursuant to law," this means that it must have been annulled by a judgment acting directly on the title in a proceeding analogous to a suit to quiet title, and does not apply where the tax title was merely introduced in evidence in an action of ejectment and there held defective. People *v.* Auditor-Gen., 30 Mich. 12. But *compare* Fleming *v.* Roverud, 30 Minn. 273, 15 N. W. 119.

Purchase from state.— The statute in Mississippi providing for refunding to the purchaser if the taxes were not due applies to the state's vendee as well as to the purchaser at a tax collector's sale. Wilkinson County *v.* Fitts, 63 Miss. 600.

Failure to recover possession.— Where the statute authorizes a refund in case the purchaser "shall be unable to recover possession" by reason of the invalidity of the tax-sale, he must show not only that the tax-sale was invalid but also that he has made some effort to recover possession of the land. Reid *v.* Albany County, 128 N. Y. 364, 28 N. E. 367.

Deed invalid but not sale.— Where the tax-sale and all proceedings preliminary thereto were regular and valid, the fact of an irregularity or error in the certificate or deed does not impair the sale, and therefore does not give the purchaser a right to recover his money. Clarke *v.* New York, 111 N. Y. 21, 19 N. E. 436. And see Ball *v.* Barnes, 123 Ind. 394, 24 N. E. 142, holding that where the sale is sufficient to pass the tax lien, although ineffectual to convey title, on account of a defective description, the purchaser must rely on his lien and cannot recover his money back from the county.

22. State *v.* Bruce, 50 Minn. 491, 52 N. W. 970.

23. St. Louis, etc., R. Co. *v.* Alexander, 49 Ark. 190, 4 S. W. 753; Morgan *v.* Miami County, 27 Kan. 89; Harding *v.* Auditor-Gen., 136 Mich. 358, 99 N. W. 275; Tillotson *v.* Saginaw Cir. Judge, 97 Mich. 585, 56 N. W. 945; Comstock *v.* Devlin, 99 Minn. 68, 108 N. W. 888.

In Minnesota Gen. Laws (1905), c. 271, relating to notice of the expiration of the time of redemption of any tax certificate, does not deprive the holder of such certificate of the right to refundment secured to him under the prior law on judicial determination of the invalidity of the certificate. State *v.* Krahmer, 105 Minn. 422, 117 N. W. 780, 21 L. R. A. N. S. 157.

24. Millikan *v.* Lafayette, 118 Ind. 323, 20 N. E. 847; School Dist. No. 15 *v.* Allen County, 22 Kan. 568; Schoonover *v.* Galarnault, 45 Minn. 174, 47 N. W. 654; Easton *v.* Hayes, 35 Minn. 418, 29 N. W. 59; Coles *v.* Washington County, 35 Minn. 124, 27 N. W. 497; State *v.* Cronkhite, 28 Minn. 197, 9 N. W. 681; Pier *v.* Oneida County, 102 Wis. 338, 78 N. W. 410. *Compare* State *v.* Bruce, 50 Minn. 491, 52 N. W. 970.

25. Shaw *v.* Morley, 89 Mich. 313, 50 N. W. 993; Norris *v.* Burt County, 56 Nebr. 295, 76

c. Grounds and Extent of Relief. The statutes in question generally give a right of action to the tax purchaser where the title fails on account of a "mistake or wrongful act of the treasurer or other officer," [26] or where it is annulled in a judicial proceeding,[27] or proves fatally defective for other reasons.[28] Under such statutes it is ground for claiming a refund that the land in question was exempt or was not subject to taxation,[29] that no taxes were due upon it at the time,[30] that the taxes had previously been paid,[31] that the collector failed to demand and exhaust personalty before selling the land,[32] or that there was such a fundamental vice or defect in the assessment or subsequent proceedings as is totally to invalidate the sale.[33] The measure of the purchaser's recovery is the amount

N. W. 551; Tyler *v.* Cass County, 1 N. D. 369, 48 N. W. 232; American Inv. Co. *v.* Thayer, 7 S. D. 72, 63 N. W. 233; American Inv. Co. *v.* Beadle County, 5 S. D. 410, 59 N. W. 212.

Error occurring before passage of act with sale after.— Even where the law is prospective in its terms, the county is bound to indemnify one who purchases at a tax-sale occurring after the act takes effect, although the error of the assessor which invalidates the title was made before the passage of the act, and consequently the county cannot recover from the assessor. Hurd *v.* Hamill, 10 Colo. 174, 14 Pac. 126.

26. See Lonsdale *v.* Carroll County, 105 Iowa 452, 75 N. W. 332; Martin *v.* Kearney County, 62 Nebr. 538, 87 N. W. 351; Norris *v.* Burt County, 56 Nebr. 295, 76 N. W. 551.

Railroad grant lands.— Where the law imperatively requires the treasurer to sell all lands on the delinquent list, under the warrant of the county commissioners, it is held that, in making sales, he acts in a purely ministerial capacity, and has no discretion as to any lands shown by the warrant to be liable for delinquent taxes; and hence when he sells railroad grant lands contained therein, and regularly listed to private persons, but which are in fact not yet liable to taxation, such sale is not "by mistake or wrongful act of the treasurer," within the meaning of these statutes. Stutsman County *v.* Wallace, 142 U. S. 293, 12 S. Ct. 227, 35 L. ed. 1018. And see Tyler *v.* Cass County, 1 N. D. 369, 48 N. W. 232.

27. Wolverine Land Co. *v.* Auditor-Gen., 133 Mich. 666, 95 N. W. 715; People *v.* Auditor-Gen., 30 Mich. 12; Fleming *v.* Roverud, 30 Minn. 273, 15 N. W. 119; Paine *v.* Dickey County, 8 N. D. 582, 80 N. W. 770; Van Nest *v.* Sargent County, 7 N. D. 139, 73 N. W. 1083.

28. See the statutes of the several states.

Necessity for ouster.— Under Mass. Rev. Laws, c. 13, § 44, it is not necessary to enable a purchaser, who has no claim to the property by reason of some irregularity in the tax-sale, to surrender his title and recover from the city the amount paid, that he be ousted or his possession disturbed by the holder of a paramount title. Spring *v.* Cambridge, 199 Mass. 1, 85 N. E. 160.

29. *Illinois.*— Champaign County *v.* Reed, 106 Ill. 389.

Indiana.— McWhinney *v.* Logansport, 132 Ind. 9, 31 N. E. 449; State *v.* Casteel, 110 Ind. 174, 11 N. E. 219; Hilgenberg *v.* Marion County, 107 Ind. 494, 8 N. E. 294; Reid *v.* State, 74 Ind. 252.

Kansas.— Menger *v.* Douglas County, 48 Kan. 553, 29 Pac. 588; School Dist. No. 15 *v.* Allen County, 22 Kan. 568.

Nebraska.— Fuller *v.* Colfax County, 33 Nebr. 716, 50 N. W. 1044; Wilson *v.* Butler County, 26 Nebr. 676, 42 N. W. 891, 4 L. R. A. 589; Roberts *v.* Adams County, 18 Nebr. 471, 25 N. W. 726, 20 Nebr. 409, 30 N. W. 405.

New York.— People *v.* Campbell, 35 N. Y. App. Div. 103, 54 N. Y. Suppl. 725.

See 45 Cent. Dig. tit. "Taxation," § 1623.

But *compare* Brooks *v.* Tulare County, 117 Cal. 465, 49 Pac. 469, holding that Pol. Code, § 3804, providing that taxes "erroneously or illegally collected, may, by the order of the board of supervisors, be refunded by the county treasurer," does not authorize a recovery by a purchaser at a tax-sale who paid the tax, although the land was the property of the United States and not subject to taxation.

30. Rio Grande County *v.* Whelen, 28 Colo. 435, 65 Pac. 38; Larimer County *v.* National State Bank, 11 Colo. 564, 19 Pac. 537.

31. State *v.* Casteel, 110 Ind. 174, 11 N. E. 219; Corbin *v.* Davenport, 9 Iowa 239. See also Otoe County *v.* Gray, 10 Nebr. 565, 7 N. W. 325.

32. McWhinney *v.* Brinker, 64 Ind. 360.

33. *Colorado.*— Elder *v.* Chaffee County, 33 Colo. 475, 81 Pac. 244.

Indiana.— McWhinney *v.* Indianapolis, 101 Ind. 150.

New York.— Brevoort *v.* Brooklyn, 89 N. Y. 128; Matter of Chadwick, 59 N. Y. App. Div. 334, 69 N. Y. Suppl. 853.

North Dakota.— State Finance Co. *v.* Beck, 15 N. D. 374, 109 N. W. 357.

Washington.— Gove *v.* Tacoma, 26 Wash. 474, 67 Pac. 261.

See 45 Cent. Dig. tit. "Taxation," § 1623.

But *compare* the following cases, as to defects or irregularities held not such as to invalidate the sale and give the purchaser a right of action: Elder *v.* Chaffee County, 33 Colo. 475, 81 Pac. 244; Ball *v.* Barnes, 123 Ind. 394, 24 N. E. 142; Hanson *v.* Haverhill, 60 N. H. 218; Tooker *v.* Roe, 44 N. J. L. 591; Coffin *v.* Brooklyn, 116 N. Y. 159, 22 N. E. 227; Iowa, etc., Land Co. *v.* Barnes County, 6 N. D. 601, 72 N. W. 1019; Minnesota Loan, etc., Co. *v.* Beadle County, 18 S. D. 431, 101 N. W. 29.

paid by him for the tax title, with the statutory interest thereon,[34] and it may also include subsequent taxes paid by him.[35] But this statutory remedy is not available to a purchaser who is chargeable with fraud, bad faith, or great negligence.[36]

d. Persons Entitled to Reimbursement. The right of reimbursement given by the statutes under consideration inures to the heirs and devisees of the purchaser at a tax-sale,[37] to one to whom the tax purchaser has conveyed the land by deed,[38] and to the assignee of the tax certificate,[39] including one who takes such an assignment from the county or municipality,[40] although under some statutes the word "sale" is held to refer only to the original tax-sale of the land and not to a subsequent assignment of the tax-sale certificate.[41] But these statutes were not made for the benefit of the original owner of the land, who acquires a tax certificate by way of redemption rather than of purchase,[42] nor do they give a right of action to any one who becomes the purchaser at the tax-sale under an arrangement with the owner and for the latter's benefit or by the use of his money.[43]

e. Actions to Enforce Claims — (i) *In General.* The count for money had and received is a proper form of declaration in an action against a county to recover the sum paid for an invalid tax title.[44] The complaint or petition for such a refunding must allege distinctly the particular matters which caused the

34. *Iowa.*— Coulter *v.* Mahaska County, 17 Iowa 92.

Massachusetts.— Forster *v.* Forster, 129 Mass. 559.

Nebraska.— McCann *v.* Otoe County, 9 Nebr. 324, 2 N. W. 707.

New Mexico.— Stewart *v.* Bernalillo County, 11 N. M. 517, 70 Pac. 574.

New York.— Wheeler *v.* State, 190 N. Y. 406, 83 N. E. 54, 123 Am. St. Rep. 555, holding that the purchaser's reimbursement was limited to the purchase-money and interest and could not include the increase in value of the land at the time of his eviction.

Vermont.— Saulters *v.* Victory, 35 Vt. 351, not the intrinsic value of the land.

Wisconsin.— Barden *v.* Columbia County, 33 Wis. 445, 14 Am. Rep. 762.

See 45 Cent. Dig. tit. "Taxation," § 1623.

35. Auditor-Gen. *v.* Patterson, 122 Mich. 39, 80 N. W. 884; Comstock *v.* Devlin, 99 Minn. 68, 108 N. W. 888; Wilson *v.* Butler County, 26 Nebr. 676, 42 N. W. 891, 4 L. R. A. 589. *Compare* Lindsey *v.* Boone County, 92 Iowa 86, 60 N. W. 173; Scott *v.* Chickasaw County, 53 Iowa 47, 3 N. W. 820.

36. Emerson *v.* Washington County, 9 Me. 88; Easton *v.* Scofield, 66 Minn. 425, 69 N. W. 326; Merriam *v.* Otoe County, 15 Nebr. 408, 19 N. W. 479.

37. Schoonover *v.* Galarnault, 45 Minn. 174, 47 N. W. 654.

38. Easton *v.* Hayes, 35 Minn. 418, 29 N. W. 59; People *v.* Chapin, 109 N. Y. 177, 16 N. E. 331; People *v.* Chapin, 104 N. Y. 96, 10 N. E. 141 [*reversing* 40 Hun 386]. But see Treat *v.* Orono, 26 Me. 217, holding that where a vendee of the tax purchaser, under a quitclaim deed, has been benefited by his purchase by receiving rents, and has been able to obtain a title at a less price by reason of his apparent title, he is not entitled to recover back the purchase-money.

A tax purchaser who has granted the lands to another cannot afterward assign to a third person the right to receive the refunded purchase-money. People *v.* Chapin, 46 Hun (N. Y.) 383 [*affirmed* in 109 N. Y. 177, 16 N. E. 331].

39. Bidwell *v.* Tacoma, 26 Wash. 518, 67 Pac. 259; Superior First Nat. Bank *v.* Douglas County, 124 Wis. 15, 102 N. W. 315.

Effect of assignment of tax certificate as collateral security see Bidwell *v.* Tacoma, 26 Wash. 518, 67 Pac. 259.

40. People *v.* Nassau County, 104 N. Y. App. Div. 176, 93 N. Y. Suppl. 344. See also Scanlan *v.* Campbell, 22 Tex. Civ. App. 505, 55 S. W. 501. But *compare* Matter of Olmstead, 11 Misc. (N. Y.) 700, 32 N. Y. Suppl. 1124.

41. Sapp *v.* Brown County, 20 Kan. 243. See also Matter of Olmstead, 11 Misc. (N. Y.) 700, 32 N. Y. Suppl. 1124.

42. Morris *v.* Sioux County, 42 Iowa 416; Jones *v.* Miami County, 30 Kan. 278, 1 Pac. 76; Finegan *v.* New York, 4 N. Y. App. Div. 15, 38 N. Y. Suppl. 358; Curtis *v.* Brown County, 22 Wis. 167; Whiton *v.* Rock County, 16 Wis. 44.

But on the other hand, a statute providing for the refunding of taxes wrongfully assessed applies only in favor of the owner of the property and not of a purchaser at a tax-sale. Hilgenberg *v.* Marion County, 107 Ind. 494, 8 N. E. 294.

43. Sheldon *v.* South School Dist., 24 Conn. 88; Dickinson County *v.* National Land Co., 23 Kan. 196; Lamborn *v.* Dickinson County, 97 U. S. 181, 24 L. ed 926.

A mortgagee of land, whether in possession before foreclosure or out of possession, who purchases the land at a tax-sale, is entitled to have the purchase-money repaid to him in case the sale is invalid; but not so a mortgagee who, after the assessment of the tax, became the absolute owner of the premises by purchasing at a sale under a power in his mortgage. Home Sav. Bank *v.* Boston, 131 Mass. 277.

44. Hays *v.* Hogan, 5 Cal. 241.

tax-sale and deed to be ineffectual,[45] and plaintiff must sustain the burden of proof of these facts and of such as are necessary to bring his case within the provisions of the statute,[46] including compliance with any conditions precedent,[47] such as demand and refusal of repayment if the act makes that the proper course to be pursued before suit,[48] and the fact and causes of the failure of his title.[49] So if the statute makes it a condition precedent to such suit that the tax title shall have been adjudged void, a judicial decision to that effect must be pleaded and proved;[50] and where the statute authorizes reimbursement of the purchaser in case he shall be "unable to recover possession," it is essential to show at least a demand for possession and some effort to recover it.[51]

(II) *Limitations and Laches.* The purchaser's right of reimbursement from the municipality will be barred, if not claimed within the time prescribed by statutes of limitation, which vary in the different states.[52] According to local law and decisions, the statute may begin to run from the date of the sale or of the deed,[53] from the time when the tax title is declared void by the decision of a competent court,[54] from the discovery of the defect or irregularity which invalidates it,[55] or from the time when the purchaser, acting with reasonable promptness,

45. *Colorado.*—Clear Creek County *v.* Yingling, 14 Colo. App. 449, 60 Pac. 582.

Indiana.— Hilgenberg *v.* Marion County, 107 Ind. 494, 8 N. E. 294.

Kansas.— Topeka Commercial Security Co. *v.* Harper County, 63 Kan. 351, 65 Pac. 660.

Massachusetts.— Lynde *v.* Malden, 166 Mass. 244, 44 N. E. 227.

Nebraska.— Kaeiser *v.* Nuckolls County, 14 Nebr. 277, 15 N. W. 363; Otoe County *v.* Gray, 10 Nebr. 565, 7 N. W. 325.

New Mexico.— Stewart *v.* Bernalillo County, 12 N. M. 79, 75 Pac. 43.

Texas.— Conklin *v.* El Paso, (Civ. App. 1897) 44 S. W. 879.

See 45 Cent. Dig. tit. "Taxation," § 1628.

46. State *v.* Casteel, 110 Ind. 174, 11 N. E. 219; Treat *v.* Orono, 26 Me. 217; People *v.* Woodruff, 57 N. Y. App. Div. 342, 68 N. Y. Suppl. 100.

Admissibility of evidence see Joliett Stove Works *v.* Kiep, 230 Ill. 550, 82 N. E. 875 [*affirming* 132 Ill. App. 457] (holding that the entry required to be made by the county clerk on the sale and redemption record that the land was erroneously sold is not the only evidence of such fact that may be received by a court in an action to recover the price and subsequent tax paid under a void sale); Spring *v.* Cambridge, 199 Mass. 1, 85 N. E. 160.

47. Ball *v.* Auditor-Gen., 133 Mich. 521, 95 N. W. 589; Flint *v.* Republic County, 27 Fed. 850, showing return of tax certificate, or offer to return it, before suit.

48. Stocks *v.* Sheboygan, 42 Wis. 315. See also Boynton *v.* Faulk County, 7 S. D. 423, 64 N. W. 518; Norton *v.* Rock County, 13 Wis. 611.

49. Bates *v.* York County, 15 Nebr. 284, 18 N. W. 81 (where purchaser had never applied for a deed nor sought to enforce the tax lien against the land); Kruger *v.* Wood County, 44 Wis. 605 (purchaser not shown ever to have been disturbed in his possession of the land).

50. Flint *v.* Jackson County, 43 Kan. 656, 23 Pac. 1048; Harding *v.* Auditor-Gen., 136 Mich. 358, 99 N. W. 275; Corbin *v.* Morrow, 46 Minn. 522, 49 N. W. 201; German-American Bank *v.* White, 38 Minn. 471, 38 N. W. 361; Easton *v.* Hayes, 38 Minn. 463, 38 N. W. 364; Coles *v.* Washington County, 35 Minn. 124, 27 N. W. 497; Van Nest *v.* Sargent County, 7 N. D. 139, 73 N. W. 1083.

51. Reid *v.* Albany County, 128 N. Y. 364, 28 N. E. 367 [*reversing* 60 Hun 215, 14 N. Y. Suppl. 594].

52. See the statutes of the several states. And see the following cases:

Kansas.— Jarvis-Conklin Mortg. Trust Co. *v.* Gray County, 7 Kan. App. 712, 52 Pac. 107.

Michigan.— Harding *v.* Auditor-Gen., 136 Mich. 358, 99 N. W. 275.

Minnesota.— State *v.* Murphy, 81 Minn. 254, 83 N. W. 991; State *v.* Norton, 59 Minn. 424, 61 N. W. 458; State *v.* Olson, 68 Minn. 1, 59 N. W. 634.

Nebraska.— McCague *v.* Douglas County, 65 Nebr. 329, 91 N. W. 412; Fuller *v.* Colfax County, 33 Nebr. 716, 50 N. W. 1044.

New York.— Reid *v.* Albany County, 128 N. Y. 364, 28 N. E. 367 [*reversing* 60 Hun 215, 14 N. Y. Suppl. 594]; White *v.* Brooklyn, 122 N. Y. 53, 25 N. E. 243; People *v.* Morgan, 45 N. Y. App. Div. 19, 60 N. Y. Suppl. 898.

Wisconsin.— Smith *v.* Janesville, 52 Wis. 680, 9 N. W. 789; Eaton *v.* Manitowoc County, 40 Wis. 668; Baker *v.* Columbia County, 39 Wis. 444; Tarbox *v.* Adams County, 34 Wis. 558; State *v.* Sheboygan County, 29 Wis. 79.

See 45 Cent. Dig. tit. "Taxation," § 1627.

53. Harding *v.* Auditor-Gen., 136 Mich. 358, 99 N. W. 275; White *v.* Brooklyn, 5 N. Y. St. 868; Clapp *v.* Pinegrove Tp., 138 Pa. St. 35, 20 Atl. 836, 12 L. R. A. 618.

54. State *v.* Kipp, 70 Minn. 286, 73 N. W. 164; Easton *v.* Sorenson, 53 Minn. 309, 55 N. W. 128; Merriam *v.* Otoe County, 15 Nebr. 408, 19 N. W. 479.

55. Hayes *v.* Los Angeles County, 99 Cal. 74, 33 Pac. 766; Storm Lake Bank *v.* Buena

fails in his effort to recover possession of the land;[56] and if no clause of the statute applies explicitly to such a claim for reimbursement, it will be governed by a provision limiting the right of action "on a liability created by statute other than a penalty or forfeiture."[57] In this connection the statute of limitations should not be construed retrospectively.[58] Aside from the statute the purchaser's claim may be rejected on the ground of laches.[59]

f. Authority and Duty of Public Officers to Refund. In some states the laws provide for the reimbursement of the purchaser of an invalid tax title by authorizing the county treasurer or other proper officer to refund the money without suit,[60] on the surrender of the tax certificate or deed for cancellation,[61] and the presentation of proper proof of the applicant's right to a return of his money.[62] The decision of the officer on the question of refunding is so far judicial in its nature as to be immune against collateral impeachment;[63] but in a case where his duty is plain he may be required by mandamus to perform it,[64] or if he is restrained by the order of the county commissioners, forbidding him to pay over the money, the purchaser may then bring suit against the county.[65]

3. Purchaser's Lien — a. Right to Lien in General. A mere purchase of land at a tax-sale gives no lien enforceable in equity for the reimbursement of the money paid;[66] but where the tax title proves defective, the statutes of many states now create a lien in favor of the purchaser for the amount of the price paid, or to the extent of the taxes paid, either generally or in special cases.[67] There is, however,

Vista County, 66 Iowa 128, 23 N. W. 297; White *v.* Brooklyn, 122 N. Y. 53, 25 N. E. 243. But *compare* Clapp *v.* Pinegrove Tp., 138 Pa. St. 35, 20 Atl. 836, 12 L. R. A. 618.

Until the grantee has clear and positive knowledge that the sale is invalid, the statute of limitations does not commence to run against his claim to have the purchase-money refunded by reason of the invalidity of the tax-sale. Hutchinson *v.* Sheboygan County, 26 Wis. 402.

56. Reid *v.* Albany County, 128 N. Y. 364, 28 N. E. 367.

57. Rork *v.* Douglas County, 46 Kan. 175, 26 Pac. 391.

58. Reid *v.* Albany County, 128 N. Y. 364, 28 N. E. 367.

59. Jefferson County *v.* Johnson, 23 Kan. 717; Harding *v.* Auditor-Gen., 136 Mich. 358, 99 N. W. 275.

60. See the statutes of the several states. And see the following cases:

Louisiana.— State *v.* Cannon, 44 La. Ann. 734, 11 So. 86.

Michigan.— Harding *v.* Auditor-Gen., 136 Mich. 358, 99 N. W. 275; O'Connor *v.* Auditor-Gen., 127 Mich. 553, 86 N. W. 1023; Auditor-Gen. *v.* Bay County, 106 Mich. 662, 64 N. W. 570.

New Mexico.— Stewart *v.* Bernalillo County, 11 N. M. 517, 70 Pac. 574.

New York.— People *v.* Campbell, 35 N. Y. App. Div. 103, 54 N. Y. Suppl. 725.

Wisconsin.— Pier *v.* Oneida County, 102 Wis. 338, 78 N. W. 410, 93 Wis. 463, 67 N. W. 702; State *v.* Sheboygan County, 29 Wis. 79.

Availability of funds for reimbursement of tax purchaser see Brown *v.* Pontchartrain Land Co., 49 La. Ann. 1779, 23 So. 292.

61. Warner *v.* Outagamie County, 19 Wis. 611.

62. Corbin *v.* Morrow, 46 Minn. 522, 49 N. W. 201. And see State *v.* Dunn, 88 Minn. 444, 93 N. W. 306, as to determination by the state auditor that a tax certificate is or is not invalid within the purport of previous decisions of the supreme court.

63. People *v.* Chapin, 104 N. Y. 96, 10 N. E. 141; People *v.* Land Office Com'rs, 90 Hun (N. Y.) 525, 36 N. Y. Suppl. 29. *Compare* State *v.* Dressel, 38 Minn. 90, 35 N. W. 580.

64. Curd *v.* Auditor-Gen., 122 Mich. 151, 80 N. W. 1005. See also Harding *v.* Auditor-Gen., 136 Mich. 358, 99 N. W. 275.

Action to compel issuance of warrant.—An action may be brought against a county auditor, by a person entitled to require him to issue his warrant upon the county treasurer for money paid on a tax-sale subsequently adjudged void, to compel him to issue it. Corbin *v.* Morrow, 46 Minn. 522, 49 N. W. 201.

65. Lincoln County *v.* Faulkner, 27 Kan. 164; Saline County *v.* Geis, 22 Kan. 381.

66. *California.*— Greenwood *v.* Adams, 80 Cal. 74, 21 Pac. 1134.

Iowa.— Smith *v.* Blackiston, 82 Iowa 240, 47 N. W. 1075.

Michigan.— Croskery *v.* Busch, 116 Mich. 288, 74 N. W. 464.

Missouri.— Burkham *v.* Manewal, 195 Mo. 500, 94 S. W. 520.

New Mexico.— Blackwell *v.* Albuquerque First Nat. Bank, 10 N. M. 555, 63 Pac. 43.

Tennessee.— Ross *v.* Mabry, 1 Lea 226.

But *compare* Pettit *v.* Black, 8 Nebr. 52; Kaighn *v.* Burgin, 56 N. J. L. 852, 42 Atl. 1117.

Equitable lien on interest of cotenants for taxes advanced see Niday *v.* Cochran, 42 Tex. Civ. App. 292, 93 S. W. 1027.

67. *Arkansas.*— Files *v.* Jackson, 84 Ark. 587, 106 S. W. 950; Hunt *v.* Curry, 37 Ark. 100.

California.— Harper *v.* Rowe, 53 Cal. 233.

a limit to the power of the legislature to provide for liens of this character; it is only in cases where the tax was justly chargeable upon the owner of the land, and where the title fails only through some irregularity or omission, that its payment can be enforced in this indirect manner; and if the tax was illegal or the land exempt, or the sale otherwise a violation of the rights of the owners, there can be no lien in favor of the purchaser.[68] But a mistaken or incomplete descrip-

Indiana.— Wagner *v.* Stewart, 143 Ind. 78, 42 N. E. 469; Ristine *v.* Johnson, 143 Ind. 44, 41 N. E. 538, 42 N. E. 310; Gable *v.* Seiber, 137 Ind. 155, 36 N. E. 844; Scarry *v.* Lewis, 133 Ind. 96, 30 N. E. 411; Logansport *v.* Case, 124 Ind. 254, 24 N. E. 88; Morrison *v.* Jacoby, 114 Ind. 84, 14 N. E. 546, 15 N. E. 806; State *v.* Casteel, 110 Ind. 174, 11 N. E. 219; Millikan *v.* Ham, 104 Ind. 498, 4 N. E. 60; Scott *v.* Millikan, 104 Ind. 75, 3 N. E. 647; Peckham *v.* Millikan, 99 Ind. 352; Locke *v.* Catlett, 96 Ind. 291; Crecilius *v.* Mann, 84 Ind. 147; Parker *v.* Goddard, 81 Ind. 294; Sloan *v.* Sewell, 81 Ind. 180; Burkham *v.* Kunz, 41 Ind. App. 655, 84 N. E. 766; Holbrook *v.* King, 41 Ind. App. 260, 83 N. E. 730.

Iowa.— Cahalan *v.* Van Sant, 87 Iowa 593, 54 N. W. 433; Thode *v.* Spofford, 65 Iowa 194, 17 N. W. 561, 21 N. W. 647.

Kansas.— Lewis Academy *v.* Wilkinson, 79 Kan. 557, 100 Pac. 510; Pierce *v.* Adams, 77 Kan. 46, 93 Pac. 594; Jackson *v.* Challiss, 41 Kan. 247, 21 Pac. 87; Stetson *v.* Freeman, 36 Kan. 608, 14 Pac. 256.

Kentucky.— James *v.* Blanton, 134 Ky. 803, 121 S. W. 951, 123 S. W. 328; Hamilton *v.* Steele, (1909) 117 S. W. 378; Jones *v.* Louville, 97 S. W. 390, 30 Ky. L. Rep. 108.

Michigan.—Tillotson *v.* Saginaw Cir. Judge, 97 Mich. 585, 56 N. W. 945.

Minnesota.— Jenks *v.* Henningsen, 102 Minn. 352, 113 N. W. 903.

Mississippi.— McLaran *v.* Moore, 60 Miss. 376; Cogburn *v.* Hunt, 57 Miss. 681; Ingersoll *v.* Jeffords, 55 Miss. 37.

Missouri.— Smith *v.* Laumier, 84 Mo. 672; White *v.* Shell, 84 Mo. 569.

Nebraska.— Green *v.* Hellman, 61 Nebr. 875, 86 N. W. 912; Carman *v.* Harris, 61 Nebr. 635, 85 N. W. 848; John *v.* Connell, 61 Nebr. 267, 85 N. W. 82; Adams *v.* Osgood, 60 Nebr. 779, 84 N. W. 257; Merrill *v.* Ijams, 58 Nebr. 706, 79 N. W. 734; Sanford *v.* Moore, 58 Nebr. 654, 79 N. W. 548; Grant *v.* Bartholomew, 57 Nebr. 673, 78 N. W. 314; Johnson *v.* Finley, 54 Nebr. 733, 74 N. W. 1080; Frank *v.* Scoville, 48 Nebr. 169, 66 N. W. 1113; Weston *v.* Myers, 45 Nebr. 95, 63 N. W. 117.

North Carolina.— Beck *v.* Meroney, 135 N. C. 532, 47 S. E. 613.

Texas.— Patton *v.* Minor, (Civ. App.) 117 S. W. 920; Scanlan *v.* Campbell, 22 Tex. Civ. App. 505, 55 S. W. 501.

Washington.— Wheeler Co. *v.* Pates, 43 Wash. 247, 86 Pac. 625.

United States.— Lamb *v.* Farrell, 21 Fed. 5; Parks *v.* Watson, 20 Fed. 764. And see Davis *v.* Chapman, 24 Fed. 674.

Canada.— Jones *v.* Cowden, 34 U. C. Q. B. 345.

See 45 Cent. Dig. tit. "Taxation," §§ 1478, 1630.

Retroactive statutes.— While it is competent for the legislature to create and vest in the tax purchaser such a lien as mentioned in the text, it cannot be done by retroactive legislation. Jenks *v.* Henningsen, 102 Minn. 352, 113 N. W. 903; Blackwell *v.* Albuquerque First Nat. Bank, 10 N. M. 555, 63 Pac. 43.

Sale of personal property.— The statutes under consideration apply only to the sale of land for taxes, not to an invalid tax-sale of personal property. Boutwell *v.* Parker, 124 Ala. 341, 27 So. 309.

Merger of lien in fee see Davis *v.* Chapman, 24 Fed. 674.

Extent of property affected.— A strip of land only a fraction of an inch wide, sold to a purchaser at a tax-sale in consideration of his paying the taxes on certain lots, is too small to enforce his lien against the same on the failure of his title. Phelps *v.* Brumback, 107 Mo. App. 16, 80 S. W. 678.

Lien created only by purchase at tax-sale. — Where one claims the benefit of this statutory lien, he must show that the land was sold for taxes and was purchased by him at the sale; a mere voluntary payment is not enough to entitle him to the lien. Sohn *v.* Wood, 75 Ind. 17.

Lands bid in for state.— Ky. St. (1909) § 4036 (Russell St. § 5928), providing that, where a sale of land for taxes is set aside, the purchaser shall have a lien for the taxes and costs paid by him for which the property is liable, with legal interest from the time of payment, which may be recovered by the owner, is applicable to sales of land bid in for the state, as well as sales to individuals. James *v.* Blanton, 134 Ky. 803, 121 S. W. 951, 123 S. W. 328.

68. *Arkansas.*— Gaither *v.* Lawson, 31 Ark. 279.

California.— Harper *v.* Rowe, 53 Cal. 233.

Indiana.— Scarry *v.* Lewis, 133 Ind. 96, 30 N. E. 411; Morrison *v.* Jacoby, 114 Ind. 84, 14 N. E. 546, 15 N. E. 806; Dixon *v.* Eikenberry, (App.) 65 N. E. 938.

Iowa.— Smith *v.* Blackiston, 82 Iowa 240, 47 N. W. 1075; Roberts *v.* Deeds, 57 Iowa 320, 10 N. W. 740; Sully *v.* Poorbaugh, 45 Iowa 453; Nichols *v.* McGlathery, 43 Iowa 189; Early *v.* Whittingham, 43 Iowa 162.

Kansas.— Jeffries *v.* Clark, 23 Kan. 448. Where the holder of a tax deed brings ejectment and is defeated, he is entitled to a lien for the amount of the taxes paid, although his deed is based on an assessment made on each of three contiguous lots when it should have been made on the entire tract as a single description; they being owned by one person, devoted to a common use, and

tion of the land will not defeat the lien, if it is capable of identification.[69] Where the lien exists, it will descend to the heirs or devisees of the tax purchaser,[70] and pass to his grantee or assignee;[71] and conversely one who buys from the original owner takes subject to the lien.[72]

b. Extent of Lien — (I) *In General.* The purchaser's lien will secure the repayment to him of the taxes which were a valid charge on the land at the time of the sale, or so much thereof as he has paid in making his purchase, with interest thereon,[73] at a rate which is fixed by statute and varies in the different states.[74] Damages for waste or permanent injury to the property committed by the purchaser while in possession may be set off against his recovery.[75]

(II) *Lien For Subsequent Taxes Paid.* The lien of the purchaser of an invalid tax title will also cover taxes subsequently assessed on the land and paid by him, or previous taxes which he pays after the sale, with interest.[76] But

occupied by improvements incapable of division along lot lines. Lewis Academy *v.* Wilkinson, 79 Kan. 557, 100 Pac. 510. Although a tax deed, executed on the last day of the three-year period of redemption, is void on its face as a conveyance, it vests in the grantee the lien for taxes. Pierce *v.* Adams, 77 Kan. 46, 93 Pac. 594.

Minnesota.— Barber *v.* Evans, 27 Minn. 92, 6 N. W. 445.

Mississippi.— Kaiser *v.* Harris, 63 Miss. 590.

Nebraska.—Alexander *v.* Hunter, 29 Nebr. 259, 45 N. W. 461.

See 45 Cent. Dig. tit. "Taxation," § 1630 *et seq.*

69. Travelers' Ins. Co. *v.* Martin, 131 Ind. 155, 30 N. E. 1071; State *v.* Casteel, 110 Ind. 174, 11 N. E. 219; Scott *v.* Millikan, 104 Ind. 75, 3 N. E. 647; Peckham *v.* Millikan, 99 Ind. 352; Parker *v.* Goddard, 81 Ind. 294; Sloan *v.* Sewell, 81 Ind. 180; Douglas *v.* Byers, 69 Kan. 59, 76 Pac. 432; Krutz *v.* Chandler, 32 Kan. 659, 5 Pac. 170. *Compare* Scarry *v.* Lewis, 133 Ind. 96, 30 N. E. 411.

70. Stephenson *v.* Martin, 84 Ind. 160.

71. Otis *v.* Carpenter, 10 Kan. App. 147, 62 Pac. 535; Alexander *v.* Goodwin, 20 Nebr. 216, 29 N. W. 468; Patton *v.* Minor, (Civ. App.) 117 S. W. 920.

72. Comstock *v.* Devlin, 99 Minn. 68, 108 N. W. 888. *Compare* Brown *v.* Poole, 85 Iowa 412, 52 N. W. 349.

73. Stalcup *v.* Dixon, 136 Ind. 9, 35 N. E. 987; Bothwell *v.* Millikan, 104 Ind. 162, 2 N. E. 959, 3 N. E. 816; Polenqueen *v.* McAllaster, 64 Kan. 263, 67 Pac. 826; Auld *v.* McAllaster, 43 Kan. 162, 23 Pac. 165; Fish *v.* Genett, 56 S. W. 813, 22 Ky. L. Rep. 177; Carman *v.* Harris, 61 Nebr. 635, 85 N. W. 848. See 45 Cent. Dig. tit. "Taxation," § 1632.

Where tax judgment and sale void, no interest allowed see Jenks *v.* Henningsen, 102 Minn. 352, 113 N. W. 903.

Taxes partly invalid.—Where the record shows an attempted tax-sale and that the purchaser paid in good faith taxes, some of which were a valid charge upon the land, he is entitled to foreclose his lien for so much of the tax and interest as was actually due. Medland *v.* Schleuter, 1 Nebr. (Unoff.) 134, 95 N. W. 342.

Taxes assessed on several tracts.— One purchasing several tracts of land at a void tax-sale cannot have a lien on one of them without showing what part of the taxes was chargeable against it. Faris *v.* Simpson, 50 Tex. Civ. App. 103, 69 S. W. 1029.

Restraining impairment of security.— The lien of the holder of a certificate of purchase at tax-sale will support an action to restrain the removal of buildings from the land; but the lien is waived as to buildings where, after their removal, the tax purchaser obtains a judgment for their value against those who removed them, which is declared a lien on the buildings. Phillips *v.* Myers, 55 Iowa 265, 7 N. W. 580.

74. See the statutes of the different states. And see McKeen *v.* Haskell, 108 Ind. 97, 8 N. E. 901; Medland *v.* Linton, 60 Nebr. 249, 82 N. W. 866; Alling *v.* Nelson, 55 Nebr. 161, 75 N. W. 581; Osgood *v.* Grant, 44 Nebr. 350, 62 N. W. 894; Adams *v.* Osgood, 42 Nebr. 450, 60 N. W. 869; Stegeman *v.* Faulkner, 42 Nebr. 53, 60 N. W. 319; Merriam *v.* Rauen, 23 Nebr. 217, 36 N. W. 489; Dillon *v.* Merriam, 22 Nebr. 151, 34 N. W. 344; Reed *v.* Merriam, 15 Nebr. 323, 18 N. W. 137.

75. Uhl *v.* Small, 54 Kan. 651, 39 Pac. 178. But see Hoffmire *v.* Rice, 22 Kan. 749, holding that rents accruing while the holder of the tax deed was in possession cannot be set off.

76. *Alabama.*— Sheffield City Co. *v.* Tradesmen's Nat. Bank, 131 Ala. 185, 32 So. 598. But see Tradesmen's Nat. Bank *v.* Sheffield City Co., 137 Ala. 547, 34 So. 625.

Arkansas.— Files *v.* Jackson, 84 Ark. 587, 106 S. W. 950.

Colorado.— Paine *v.* Palmborg, 20 Colo. App. 432, 79 Pac. 330.

Iowa.— Elliott *v.* Parker, 72 Iowa 746, 32 N. W. 494.

Kentucky.— Hamilton *v.* Steele, 117 S. W. 378.

Minnesota.— Robert P. Lewis Co. *v.* Knowlton, 84 Minn. 53, 86 N. W. 875; Pfefferle *v.* Wieland, 60 Minn. 328, 62 N. W. 396.

Mississippi.— O'Flinn *v.* McInnis, 80 Miss. 125, 31 So. 584; Capital State Bank *v.* Lewis, 64 Miss. 727, 2 So. 243.

Nebraska.— Toy *v.* McHugh, 62 Nebr. 820, 87 N. W. 1059; John *v.* Connell, 61 Nebr. 267, 85 N. W. 82; Medland *v.* Connell, 57

some of the decisions deny his right to be reimbursed for subsequent taxes where the taxes for which the sale was made were illegal or absolutely void, on the theory that, such taxes being no lien on the land, the sale passed no interest or lien to the purchaser which would entitle him to pay subsequent taxes, and consequently such payment would be voluntary and irrecoverable.[77] And this rule has also been applied where the tax purchaser voluntarily had the land assessed to himself and paid the subsequent taxes on such assessment.[78] To enforce a lien for subsequent taxes paid, there must first be a judgment declaring the invalidity of the tax title.[79]

c. Priorities. The purchaser's lien, like that of the state for the taxes, may be made paramount to all others; [80] and will at all events take precedence of a mortgage made after the tax-sale.[81] But where the land is sold a second time, for subsequently accruing taxes, it is the second purchaser, and not the first, who has the prior lien.[82]

d. Enforcement and Foreclosure — (i) *In General.* Generally the purchaser's lien may be enforced in an action or suit similar to a proceeding for the foreclosure of a mortgage,[83] brought in a court of competent jurisdiction.[84] In some states it is held that such a suit does not lie until after the rendition of a judgment declaring the invalidity of the tax title; [85] but in others it is not neces-

Nebr. 10, 77 N. W. 437; Alexander *v.* Thacker, 43 Nebr. 494, 61 N. W. 738; Roads *v.* Estabrook, 35 Nebr. 297, 53 N. W. 64; Merriam *v.* Hemple, 17 Nebr. 345, 22 N. W. 775.

Tennessee.— Strother *v.* Reilly, 105 Tenn. 48, 58 S. W. 332.

See 45 Cent. Dig. tit. "Taxation," § 1632.

Rate of interest see Culbertson *v.* Munson, 104 Ind. 451, 4 N. E. 57.

77. Barke *v.* Early, 72 Iowa 273, 33 N. W. 677; Roberts *v.* Deeds, 57 Iowa 320, 10 N. W. 740; Pfefferle *v.* Wieland, 55 Minn. 202, 56 N. W. 824; Broxson *v.* McDougal, 70 Tex. 64, 7 S. W. 591. See Peterson *v.* Kittredge, 65 Miss. 33, 3 So. 65, 5 So. 824, where a portion of the tax for which the sale was made was legal, and the purchaser was held entitled to a lien for subsequent taxes paid.

78. Tradesmen's Nat. Bank *v.* Sheffield City Co., 137 Ala. 547, 34 So. 625.

79. Weimer *v.* Porter, 42 Mich. 569, 4 N. W. 306. And see Bender *v.* Dugan, 99 Mo. 126, 12 S. W. 795.

A decree settling the title to land in the original holder as against a tax purchaser does not bar an action by the latter to recover taxes thereon paid by him in good faith after the sale. Stewart *v.* Corbin, 38 Iowa 571.

Limitation of actions.—An action by the tax purchaser for the recovery of taxes paid by him upon the land, the title to which has been quieted in the patent owner, will be barred by the statute of limitations in the prescribed period after the taxes became delinquent. Sexton *v.* Peck, 48 Iowa 250.

80. Brown *v.* Reeves, 31 Ind. App. 517, 68 N. E. 604.

Priority over lien of person redeeming for contribution.— Under Burns Annot. St. Ind. (1908) § 10,379, providing that a tax deed vests in the grantee an absolute fee-simple estate subject to claims of the state for taxes, liens, or encumbrances, the title of a purchaser of land at a tax-sale would be superior to the lien of a part-owner of land who had redeemed it from sale for a ditch assessment for contribution on the land for the shares of the other owners, that lien not being a claim or lien of the state; and if the tax-sale is invalid, the purchaser is still entitled to have his tax lien for the amount ascertained and declared superior to the lien for contribution of the person redeeming from such assessment sale. Ellison *v.* Branstrattor, (Ind. App. 1909) 88 N. E. 963. The fact that the purchaser at the tax-sale afterward received conveyances of the land from persons holding legal title to it at the time of the tax-sale does not extinguish his lien superior to the other's lien for contribution, but equity will keep it alive to protect his rights. Ellison *v.* Branstrattor, *supra.*

81. Ludlow *v.* Ludlow, 109 Ind. 199, 9 N. E. 769.

82. Robbins *v.* Barron, 34 Mich. 517.

83. *Michigan.*— Tillotson *v.* Saginaw Cir. Judge, 97 Mich. 585, 56 N. W. 945.

Minnesota.— Comstock *v.* Devlin, 99 Minn. 68, 108 N. W. 888.

Mississippi.— Moores *v.* Flurry, 87 Miss. 707, 40 So. 226.

Nebraska.—Adams *v.* Osgood, 60 Nebr. 779, 84 N. W. 257.

North Carolina.— Wilcox *v.* Leach, 123 N. C. 74, 31 S. E. 374.

See 45 Cent. Dig. tit. "Taxation," § 1635 *et seq.*

84. Abbott *v.* Union Mut. L. Ins. Co., 127 Ind. 70, 26 N. E. 153, holding that the remedy given by statute in Indiana to holders of invalid tax titles, by suit to have the amount due for taxes on the property ascertained and the lien therefor on the land foreclosed, may, on removal of such a suit to the circuit court of the United States, be enforced in that court by a proceeding in chancery.

85. Tillotson *v.* Saginaw Cir. Judge, 97 Mich. 585, 56 N. W. 945; Nester *v.* Busch, 64 Mich. 657, 31 N. W. 572; Weimer *v.*

sary for the purchaser to bring an action to test the validity of the title; he may proceed directly for the foreclosure of his lien,[86] and he may even assert his lien and secure its enforcement in any proceeding in which the tax title is directly in issue, whether it be ejectment or a bill to quiet or confirm title or to set aside the deed,[87] or even a mortgage foreclosure proceeding in which he is made a defendant.[88] To proceed for the enforcement of this lien it is necessary that the purchaser shall have taken out his deed,[89] but not that he shall give notice to the owner of the land.[90] The proper defendant is the person entitled to the equity of redemption, and others may be joined having interests to be affected by the lien.[91] The claimant is required to allege and prove the facts essential to his

Porter, 42 Mich. 569, 4 N. W. 306; Webb *v.* Bidwell, 15 Minn. 479.

In Alabama the lien conferred by statute upon the purchaser at an ineffectual tax-sale for the amounts paid thereon and for subsequent taxes paid does not arise except at the end, and as the result, of a judgment in ejectment for the land so sold, and where the lien is not so established, it cannot be enforced by defendant in a suit to quiet title to the land or by a bill in equity to enforce the same. Geo. E. Wood Lumber Co. *v.* Williams, 157 Ala. 73, 47 So. 202; Tradesmen's Nat. Bank *v.* Sheffield City Co., 137 Ala. 547, 34 So. 625; Sheffield City Co. *v.* Tradesmen's Nat. Bank, 131 Ala. 185, 32 So. 598.

Former judgment no bar.—A judgment declaring the invalidity of the tax title, even if not a condition precedent to the institution of a suit to foreclose the lien, as held by the cases cited above, is clearly no bar to such a suit. Harding *v.* Greene, 59 Kan. 202, 52 Pac. 436; Merriam *v.* Dovey, 25 Nebr. 618, 41 N. W. 550.

86. McClure *v.* Warner, 16 Nebr. 447, 20 N. W. 387; Bryant *v.* Estabrook, 16 Nebr. 217, 20 N. W. 245; Shelley *v.* Towle, 16 Nebr. 194, 20 N. W. 251; Miller *v.* Hurford, 11 Nebr. 377, 9 N. W. 477.

87. *Arkansas.*— Haney *v.* Cole, 28 Ark. 299.

Indiana.— Jones *v.* Foley, 121 Ind. 180, 22 N. E. 987; Millikan *v.* Ham, 104 Ind. 498, 4 N. E. 60; Reed *v.* Earhart, 88 Ind. 159; Jenkins *v.* Rice, 84 Ind. 342.

Iowa.— Buck *v.* Holt, 74 Iowa 294, 37 N. W. 377; Harper *v.* Sexton, 22 Iowa 442.

Kansas.— Lewis Academy *v.* Wilkinson, 79 Kan. 557, 100 Pac. 510; Rose *v.* Newman, 47 Kan. 18, 27 Pac. 181; Krutz *v.* Chandler, 32 Kan. 659, 5 Pac. 170; Russell *v.* Hudson, 28 Kan. 99; Arn *v.* Hoppin, 25 Kan. 707; Fairbanks *v.* Williams, 24 Kan. 16. *Compare* Corbin *v.* Young, 24 Kan. 198.

Kentucky.— Wheeler *v.* Bramel, 8 S. W. 199, 10 Ky. L. Rep. 301.

Nebraska.— Pettit *v.* Black, 8 Nebr. 52.

United States.— Hintrager *v.* Nightingale, 36 Fed. 847.

Canada.— *In re* Cameron, 14 Grant Ch. (U. C.) 612.

Contra.— Bidwell *v.* Webb, 10 Minn. 59, 88 Am. Dec. 56.

Provision in decree setting aside tax-sale or title for purchaser's lien for reimbursement see *supra*, XIV, B, 9, b, (II), (A).

Waiver by failure to assert lien.— Defendant, in an action to quiet title against a void tax-sale, need not be given judgment for the amount tendered as a condition precedent to setting aside the sale; but while the court will allow a person, who has paid taxes on land of another in the belief that title is in him, a lien on the land for the amount so paid, when he comes into court and asserts his lien, he may waive the right, and does waive it by failure to assert it. Cordiner *v.* Finch Inv. Co., 54 Wash. 574, 103 Pac. 829.

Action by assignee of tax purchaser.— Where one buys land from a purchaser thereof at tax-sale and sues to recover it from a third person in possession, if he fails to recover he is not entitled to a lien for the amount which he paid to the original holder of the tax title, although the tax execution may have been a lien on the land. Maddox *v.* Arthur, 122 Ga. 671, 50 S. E. 668.

88. Columbia Bank *v.* Jones, (N. J.) 17 Atl. 808. And see Dixon *v.* Eikenberry, (Ind. App. 1903) 65 N. E. 938.

89. Sharpe *v.* Dillman, 77 Ind. 280. But see Parker *v.* Matheson, 21 Nebr. 546, 32 N. W. 598, holding that an action to foreclose the tax lien may be maintained on the certificate of sale, when it is alleged in the petition that a deed would be invalid if issued.

Expiration of time for redemption.— The right of action in the tax purchaser to foreclose his lien does not accrue until after the expiration of the time allowed by law for the owner to redeem from the tax-sale. Peet *v.* O'Brien, 5 Nebr. 360.

90. Carman *v.* Harris, 61 Nebr. 635, 85 N. W. 848; Merrill *v.* Ijams, 58 Nebr. 706, 79 N. W. 734; McClure *v.* Lavender, 21 Nebr. 181, 31 N. W. 672; Helphrey *v.* Redick, 21 Nebr. 80, 31 N. W. 256; Lammers *v.* Comstock, 20 Nebr. 341, 30 N. W. 251; Bryant *v.* Estabrook, 16 Nebr. 217, 20 N. W. 245; Merrill *v.* Riverview Inv. Co., 1 Nebr. (Unoff.) 260, 95 N. W. 333.

91. Jenkins *v.* Rice, 84 Ind. 342; Carman *v.* Harris, 61 Nebr. 635, 85 N. W. 848; Alexander *v.* Thacker, 30 Nebr. 614, 46 N. W. 825; Moss. *v.* Rockport, (Tex. Civ. App. 1899) 51 S. W. 652.

The wife is not a necessary party to a suit to foreclose a tax lien against her husband's homestead. San Antonio *v.* Berry, 92 Tex. 319, 48 S. W. 496; Collins *v.* Ferguson, 22 Tex. Civ. App. 552, 56 S. W. 225.

Disability of owner.— The right of action

lien, such as the assessment and amount of the taxes, the sale and his purchase thereat, and the failure of the tax title,[92] and his complaint and evidence must identify and locate the particular land taxed and sold and on which the lien is claimed, if there is any ambiguity or insufficiency of description.[93] On the other hand, the party resisting the enforcement of the lien must sustain the burden of pleading and proving facts which would defeat it, such as the illegality of the tax, the exempt character of the land, the previous payment of the tax, and the like,[94] and defenses will not be regarded which go only to the manner of levying or assessing the taxes or advertising or conducting the sale or the qualification of officers concerned with it.[95] The judgment or decree will be against the owner of the property, for the proper amount, and will direct the foreclosure of the lien in the ordinary manner.[96] The matter of costs and attorney's fees in such actions is regulated by the local statutes.[97]

(II) *Limitations and Laches.* The right of the purchaser at an invalid tax-sale to enforce his lien against the land is barred by statutes of limitation at

in the tax purchaser to foreclose his lien is not affected by the fact that the owner of the land is an infant or an insane person. Leavitt *v.* Bell, 55 Nebr. 57, 75 N. W. 524.

Life-tenant and remainder-man. — Where only the owner of the life-estate is made defendant in such an action, and the land is sold under a decree of foreclosure of the tax lien, the purchaser acquires only the life-estate, and the lien upon the interest of the remainder-man is discharged. Williams *v.* Hedrick, 101 Fed. 876, 42 C. C. A. 75.

Apportionment between tenants in common. — In order that tenants in common may obtain an apportionment of liability for taxes, they must show their interests affirmatively in a suit to foreclose his lien by a purchaser at a tax-sale of the property. Jenkins *v.* Rice, 84 Ind. 342.

One corporation controlling another. — A railroad company owning a majority of the stock and bonds of another company, and whose agents compose a majority of the latter company's directors, is a proper and necessary party in a suit to foreclose a tax lien on the property of the latter company. Yazoo, etc., R. Co. *v.* Adams, 77 Miss. 764, 25 So. 355.

92. Bowen *v.* Striker, 87 Ind. 317; Sohn *v.* Wood, 75 Ind. 17; Douglass *v.* Byers, 69 Kan. 59, 76 Pac. 432; Brown *v.* Corbin, 40 Minn. 508, 42 N. W. 481; Webb *v.* Bidwell, 15 Minn. 479; Darr *v.* Berquist, 63 Nebr. 713, 89 N. W. 256; Carman *v.* Harris, 61 Nebr. 635, 85 N. W. 848; Adams *v.* Osgood, 60 Nebr. 779, 84 N. W. 257; Miller *v.* Hurford, 13 Nebr. 13, 12 N. W. 832.

Tax liens for several years. — If it is sought to enforce liens for several years' taxes on the same land in one action, the complaint should set forth particularly the nature and amount of the tax of each year. If it merely gives the aggregate amount, it is not sufficiently definite. Webb *v.* Bidwell, 15 Minn. 479.

Uniting several tracts of land. — In an action to foreclose a tax lien, plaintiff may join as many tracts of land belonging to the same defendant, on which he holds tax liens, as he may see fit; but he should number and state the tax on each tract separately as a distinct cause of action. McNish *v.* Perrine, 14 Nebr. 582, 16 N. W. 837.

93. Grigsby *v.* Akin, 128 Ind. 591, 28 N. E. 180; Forl *v.* Kolb, 84 Ind. 198; Parker *v.* Goddard, 81 Ind. 294; Sloan *v.* Sewell, 81 Ind. 180; Sharpe *v.* Dillman, 77 Ind. 280; Cooper *v.* Jackson, 71 Ind. 244; Douglass *v.* Byers, 69 Kan. 59, 76 Pac. 432; Cogburn *v.* Hunt, 56 Miss. 718; Yandell *v.* Pugh, 53 Miss. 295.

94. Cole *v.* Gray, 139 Ind. 396, 38 N. E. 856; Scott *v.* Millikan, 104 Ind. 75, 3 N. E. 647; Medland *v.* Connell, 57 Nebr. 10, 77 N. W. 437; Adams *v.* Osgood, 42 Nebr. 450, 60 N. W. 869; Merrill *v.* Wright, 41 Nebr. 351, 59 N. W. 787; McClure *v.* Warner, 16 Nebr. 447, 20 N. W. 387; Miller *v.* Hurford, 13 Nebr. 13, 12 N. W. 832.

95. Dovey *v.* McCullough, 60 Nebr. 376, 83 N. W. 171; Roads *v.* Estabrook, 35 Nebr. 297, 53 N. W. 64; Merriam *v.* Dovey, 25 Nebr. 618, 41 N. W. 550; Otoe County *v.* Mathews, 18 Nebr. 466, 25 N. W. 618; Otoe County *v.* Brown, 16 Nebr. 394, 398, 20 N. W. 274, 641; Miller *v.* Hurford, 13 Nebr. 13, 12 N. W. 832.

96. *Arkansas.*— Hunt *v.* Curry, 37 Ark. 100, personal decree against owner.

Kansas.— Park *v.* Hetherington, 9 Kan. App. 309, 61 Pac. 328, there is no authority for a strict foreclosure of a tax lien.

Nebraska.—O'Donohue *v.* Hendrix, 17 Nebr. 287, 22 N. W. 548.

Ohio.— Sibley *v.* Challen, 8 Ohio Dec. (Reprint) 209, 6 Cinc. L. Bul. 288.

South Dakota.— Clark *v.* Darlington, 11 S. D. 418, 78 N. W. 997.

See 45 Cent. Dig. tit. "Taxation," § 1640.

97. See the statutes of the different states. And see the following cases: Osgood *v.* Grant, 44 Nebr. 350, 62 N. W. 894; Alexander *v.* Thacker, 43 Nebr. 494, 61 N. W. 738; Adams *v.* Osgood, 42 Nebr. 450, 60 N. W. 869; Merrill *v.* Jones, 39 Nebr. 763, 58 N. W. 449; Lammers *v.* Comstock, 20 Nebr. 341, 30 N. W. 251; Otoe County *v.* Brown, 16 Nebr. 394, 398, 20 N. W. 274, 641; San Antonio *v.* Berry, 92 Tex. 319, 48 S. W. 496.

periods varying in the different states.[98] In some the statute begins to run from the end of the period allowed for redemption,[99] and particularly where the tax purchaser, satisfied of the inutility of an endeavor to recover the property, does not take out a deed.[1] In others it begins to run from the time when he becomes entitled to a deed, rather than from the date of the deed itself;[2] in others, from the failure of title on which the action is based, which occurs, according to some authorities, upon the issuance of a deed which is in fact void,[3] or according to others, upon a judicial declaration of the invalidity of the title.[4] When the statute has run it not merely bars an action but also extinguishes the lien.[5]

4. Reimbursement by Owner — a. Right of Reimbursement in General. At common law the purchaser of land at a void tax-sale cannot recover from the owner, even to the extent to which his purchase operated as payment of a tax legally chargeable on the land, as such payment is regarded as voluntary and not made at the request of the owner.[6] But some of the authorities authorize such a recovery when the tax title is set aside for causes not going to the validity of the tax or of the proceedings for its collection,[7] or where the only ground of invalidity is an error in the assessment.[8] And in some states the laws now provide for the reimbursement of the purchaser by the owner, to an amount equal to the sum which would have been necessary to discharge the land from the taxes if they

98. See the statutes of the different states. And see Bowen *v.* Striker, 87 Ind. 317; Brown *v.* Fodder, 81 Ind. 491; Park *v.* Hetherington, (1901) 64 Pac. 1115 [*affirming* 9 Kan. App. 309, 61 Pac. 328]; Douglass *v.* Boyle, 42 Kan. 392, 22 Pac. 316; Geer *v.* Thrasher, 37 Kan. 657, 16 Pac. 94; Mitchell *v.* Lines, 36 Kan. 378, 13 Pac. 593; Corbin *v.* Bronson, 28 Kan. 532 (when the time has expired within which the holder of a tax deed might have brought suit for the recovery of the land, his claim for a lien is barred); Hathaway *v.* Nelson, 52 Nebr. 109, 71 N. W. 981; Alexander *v.* Thacker, 43 Nebr. 494, 61 N. W. 738; Black *v.* Leonard, 33 Nebr. 745, 51 N. W. 126; Fuller *v.* Colfax County, 33 Nebr. 716, 50 N. W. 1044; Warren *v.* Demary, 33 Nebr. 327, 50 N. W. 15; Alexander *v.* Wilcox, 30 Nebr. 793, 47 N. W. 81, 9 L. R. A. 735; Plant *v.* Murphy, 5 Ohio Dec. (Reprint) 544, 6 Am. L. Rec. 479.

99. Williams *v.* Hedrick, 101 Fed. 876, 42 C. C. A. 75.

1. D'Gette *v.* Sheldon, 27 Nebr. 829, 44 N. W. 30; Shepherd *v.* Burr, 27 Nebr. 432, 43 N. W. 256; Parker *v.* Matheson, 21 Nebr 546, 32 N. W. 598; Helphrey *v.* Redick, 21 Nebr. 80, 31 N. W. 256.

2. Montgomery *v.* Aydelotte, 95 Ind. 144; La Rue *v.* King, 74 Iowa 288, 37 N. W. 374. But see Schoenheit *v.* Nelson, 16 Nebr. 235, 20 N. W. 205, holding that if the law in force at the time does not require the tax purchaser to take out his deed within a limited time, his right to enforce the tax lien will not be prejudiced by delay in procuring a deed.

3. Carson *v.* Broady, 56 Nebr. 648, 77 N. W. 80, 71 Am. St. Rep. 691; McClure *v.* Lavender, 21 Nebr. 181, 31 N. W. 672; McClure *v.* Warner, 16 Nebr. 447, 20 N. W. 387; Otoe County *v.* Brown, 16 Nebr. 394, 20 N. W. 274; Holmes *v.* Andrews, 16 Nebr. 296, 20 N. W. 347; Schoenheit *v.* Nelson, 16 Nebr. 235, 20 N. W. 205; Bryant *v.* Estabrook, 16 Nebr. 217, 20 N. W. 245; Peet *v.* O'Brien, 5 Nebr. 360.

4. St. Louis, etc., R. Co. *v.* Alexander, 49 Ark. 190, 4 S. W. 753; Tillotson *v.* Saginaw Cir. Judge, 97 Mich. 585, 56 N. W. 945; Comstock *v.* Devlin, 99 Minn. 68, 108 N. W. 888.

5. Brown *v.* Fodder, 81 Ind. 491; Carson *v.* Broady, 56 Nebr. 648, 77 N. W. 80, 71 Am. St. Rep. 691; Foree *v.* Stubbs, 41 Nebr. 271, 59 N. W. 798; Alexander *v.* Shaffer, 38 Nebr. 812, 57 N. W. 541. But *compare* Columbia Bank *v.* Jones, (N. J. 1889) 17 Atl. 808. And see Richards *v.* Tarr, 42 Kan. 547, 22 Pac. 557.

6. *Arkansas.*— St. Louis, etc., R. Co. *v.* Alexander, 49 Ark. 190, 4 S. W. 753.

California.— Harper *v.* Rowe, 53 Cal. 233.

Colorado.—Mitchell *v.* Minnequa Town Co., 41 Colo. 367, 92 Pac. 678.

Illinois.—Wilmerton *v.* Phillips, 103 Ill. 78.

Indiana.— Stevens *v.* Williams, 70 Ind. 536.

Iowa.— Roberts *v.* Deeds, 57 Iowa 320, 10 N. W. 740; Forey *v.* Bigelow, 56 Iowa 381, 9 N. W. 313; Thompson *v.* Savage, 47 Iowa 522.

Nebraska.— Carman *v.* Harris, 61 Nebr. 635, 85 N. W. 848.

New Hampshire. — Perham *v.* Haverhill Fibre Co., 64 N. H. 485, 14 Atl. 462.

New York.— Finegan *v.* New York, 4 N. Y. App. Div. 15, 38 N. Y. Suppl. 358.

Ohio.—Waltz *v.* Hirtz, 11 Ohio Dec. (Reprint) 14, 24 Cinc. L. Bul. 110.

Texas.— McCormick *v.* Edwards, 69 Tex. 106, 6 S. W. 32; Schaffer *v.* Davidson, 44 Tex. Civ. App. 100, 97 S. W. 858; Mumme *v.* McCloskey, 28 Tex. Civ. App. 83, 66 S. W. 853.

See 45 Cent. Dig. tit. "Taxation," § 1643.

7. Wright *v.* Graham, 42 Ark. 140; Stewart *v.* Corbin, 38 Iowa 571; Hunt *v.* Rowland, 28 Iowa 349.

8. Thompson *v.* Fasnacht, 37 La. Ann. 918; Hickman *v.* Dawson, 35 La. Ann. 1086; Guidry *v.* Broussard, 32 La. Ann. 924.

had not been paid by the purchaser, or for reimbursement for subsequent taxes paid.[9] Such a statute should be liberally construed with a view to promote its objects,[10] and may be given a retroactive operation if that is plainly the intention of the legislature; [11] and a statute of this kind, in force at the time of the sale, vests in the purchaser a valuable right which cannot be divested by the subsequent repeal or modification of the statute.[12]

b. Amount Claimable by Purchaser. In these circumstances the tax purchaser is entitled to claim the amount which the owner himself would have been obliged to pay, at the time of the sale, in order to satisfy the taxes chargeable on the land and free it from the lien thereof,[13] together with interest on such amount, at the legal rate in some states, and in others at a special or extraordinary rate,[14]

9. *Arkansas.*—Wright *v.* Graham, 42 Ark. 140; Hare *v.* Carnall, 39 Ark. 196; Hunt *v.* Curry, 37 Ark. 100.

Illinois.— Joliet Stove Works *v.* Kiep, 230 Ill. 550, 82 N. E. 875 [*affirming* 132 Ill. App. 457], subsequent taxes paid.

Iowa.— Guise *v.* Early, 72 Iowa 283, 33 N. W. 683; Besore *v.* Dosh, 43 Iowa 211; Everett *v.* Beebe, 37 Iowa 452; Claussen *v.* Rayburn, 14 Iowa 136.

Kansas.— Coe *v.* Farwell, 24 Kan. 566; Ritchie *v.* Will, 9 Kan. App. 367, 58 Pac. 118.

Michigan.— People *v.* Auditor-Gen., 30 Mich. 12.

Minnesota.— Barber *v.* Evans, 27 Minn. 92, 6 N. W. 445.

Mississippi.— Martin *v.* Swofford, 59 Miss. 328; Cogburn *v.* Hunt, 56 Miss. 718.

Missouri.— Pitkin *v.* Shacklett, 106 Mo. 571, 17 S. W. 641; Pitkin *v.* Reibel, 104 Mo. 505, 16 S. W. 244; Bingham *v.* Birmingham, 103 Mo. 345, 15 S. W. 533; Phelps *v.* Brumback, 107 Mo. App. 16, 80 S. W. 678.

See 45 Cent. Dig. tit. "Taxation," § 1643.

Necessity of taking out deed.— It is not always necessary that the tax purchaser should take out a tax deed to entitle himself to this statutory right of reimbursement; he may sue when he has been perpetually enjoined from procuring a deed. Logansport *v.* Case, 124 Ind. 254, 24 N. E. 88.

Transfer or inheritance of right.— Where the statute gives such a right of reimbursement to the purchaser and to "persons holding his right," his heirs and devisees come within the meaning of the clause. Schoonover *v.* Galarnault, 45 Minn. 174, 47 N. W. 654. And where a deed made to the assignee of the tax purchaser recites the fact of the assignment, it is sufficient evidence of the assignment to enable the grantee to recover taxes paid. Pitkin *v.* Reibel, 104 Mo. 505, 16 S. W. 244. Recovery by assignee of tax purchaser of subsequent taxes paid see Joliet Stove Works *v.* Kiep, 230 Ill. 550, 82 N. E. 875 [*affirmed* in 132 Ill. App. 457]. A conveyance of a part of land claimed by the grantor under a void tax deed operates as an assignment of the grantor's rights and interest to the extent of the interest conveyed, and his grantee is entitled to receive his proportionate share of the amount refunded by the owner upon the cancellation of the tax deeds, if his interest appears from the evidence or allegations. Warden *v.* Glos, 236 Ill. 511, 86 N. E. 116.

Tax deed for infinitesimal part of tract.— Where taxes paid are on the whole tract under a void deed to a one vigintillionth part only, it is a voluntary payment and is not recoverable at law. Petty *v.* Beers, 127 Ill. App. 593 [*affirmed* in 224 Ill. 129, 79 N. E. 704].

Reimbursement of purchaser provided for in judgment or decree vacating tax-sale or adjudging tax title invalid see *supra*, XIV, B, 9, b, (II).

10. Douglass *v.* Byers, 69 Kan. 59, 76 Pac. 432.

11. Flinn *v.* Parsons, 60 Ind. 573; Shaw *v.* Morley, 89 Mich. 313, 50 N. W. 993; Schoonover *v.* Galarnault, 45 Minn. 174, 47 N. W. 654; State *v.* Cronkhite, 28 Minn. 197, 9 N. W. 681.

12. State *v.* Foley, 30 Minn. 350, 15 N. W. 375; Fleming *v.* Roverud, 30 Minn. 273, 15 N. W. 119; Capital State Bank *v.* Lewis, 64 Miss. 727, 2 So. 243; Corbin *v.* Washington County, 3 Fed. 356, 1 McCrary 521.

13. *Colorado.*— Clark *v.* Knox, 32 Colo. 342, 76 Pac. 372.

Iowa.— Hunter *v.* Early, 75 Iowa 769, 37 N. W. 776; Barke *v.* Early, 72 Iowa 273, 33 N. W. 677; Springer *v.* Bartle, 46 Iowa 688; Miller *v.* Corbin, 46 Iowa 150; Sexton *v.* Henderson, 45 Iowa 160; Besore *v.* Dosh, 43 Iowa 211; Light *v.* West, 42 Iowa 138; Everett *v.* Beebe, 37 Iowa 452.

Louisiana.—Williams *v.* Chaplain, 112 La. 1075, 36 So. 859; Fishel *v.* Mercier, 37 La. Ann. 356.

Minnesota.— Ryan *v.* Ruff, 90 Minn. 169, 95 N. W. 1114.

Mississippi.— Thomas *v.* Romano, 82 Miss. 256, 33 So. 969.

See 45 Cent. Dig. tit. "Taxation," § 1645.

14. *Arkansas.*— Boehm *v.* Porter, 54 Ark. 665, 17 S. W. 1.

Illinois.— Gage *v.* Nichols, 135 Ill. 128, 25 N. E. 672.

Indiana.— Helms *v.* Wagner, 102 Ind. 385, 1 N. E. 730; Hosbrook *v.* Schooley, 74 Ind. 51; Duke *r.* Brown, 65 Ind. 25.

Nebraska.— Baldwin *v.* Merriam, 16 Nebr. 199, 20 N. W. 250; Shelley *v.* Towle, 16 Nebr. 194, 20 N. W. 251; Sullivan *v.* Merriam, 16 Nebr. 157, 20 N. W. 118.

Ohio.— Younglove *v.* Hackman, 43 Ohio St. 69, 1 N. E. 230.

South Dakota.— Cornelius *r.* Ferguson, 16 S. D. 113, 91 N. W. 460.

See 45 Cent. Dig. tit. "Taxation," § 1645.

and also, in some jurisdictions, although not in all, any penalties prescribed for delinquency in the payment of taxes or granted by the statute to the purchaser.[15] The aggregate thus made up is not necessarily the price paid by the purchaser at the sale, nor will it ordinarily include the costs of the sale.[16] But there should be added the amount of subsequent taxes paid by the purchaser in the character of a claimant in good faith, and to the extent to which such payment has relieved the land from a legal charge,[17] except in cases where the tax-sale was absolutely void, as for want of jurisdiction or other such cause; for in this event the payment of subsequent taxes by the purchaser is voluntary and irrevocable.[18]

c. Action or Proceeding to Enforce Claim. The ultimate holder of the tax title [19] may maintain an action against the original owner of the land within the period limited by statute for that purpose,[20] in which, on pleading and proving the facts essential to establish his claim for reimbursement,[21] he may have a personal judgment for the amount found due; [22] or, where the statute so directs, provision for his reimbursement may be made in a judgment or decree setting aside the tax-sale or quieting the title in the original owner.[23]

15. Barke *v.* Early, 72 Iowa 273, 33 N. W. 677; Foreman *v.* Hinchcliffe, 106 La. 225, 30 So. 762. *Compare* Michigan Mut. L. Ins. Co. *v.* Kroh, 102 Ind. 515, 2 N. E. 733; Johnson *v.* Stewart, 29 Ohio St. 498.

16. Hopkins *v.* Daunoy, 33 La. Ann. 1423; Stafford *v.* Twitchell, 33 La. Ann. 520; Jacques *v.* Kopman, 6 La. Ann. 542; Carter *v.* Phillips, 49 Mo. App. 319. *Compare* Gage *v.* Consumers' Electric Light Co., 194 Ill. 30, 64 N. E. 653; Collins *v.* Reger, 62 W. Va. 195, 57 S. E. 743.

17. *Arkansas.* — Gregory *v.* Bartlett, 55 Ark. 30, 17 S. W. 344.

Illinois. — Joliet Stove Works *v.* Kiep, 230 Ill. 550, 82 N. E. 875 [*affirming* 132 Ill. App. 457], recovery of subsequent taxes authorized by statute.

Indiana. — Millikan *v.* Ham, 104 Ind. 498, 4 N. E. 60; Crecelius *v.* Mann, 84 Ind. 147.

Iowa. — Barke *v.* Early, 72 Iowa 273, 33 N. W. 677; Forey *v.* Bigelow, 56 Iowa 381, 9 N. W. 313; Thompson *v.* Savage, 47 Iowa 522; Sexton *v.* Henderson, 45 Iowa 160; Early *v.* Whittingham, 43 Iowa 162; Fenton *v.* Way, 40 Iowa 196; Curl *v.* Watson, 25 Iowa 35, 95 Am. Dec. 763; Harper *v.* Sexton, 22 Iowa 442; Orr *v.* Travacier, 21 Iowa 68.

Kansas. — Jackson *v.* Challiss, 41 Kan. 247, 21 Pac. 87; Belz *v.* Bird, 31 Kan. 139, 1 Pac. 246; Coonradt *v.* Myers, 31 Kan. 30, 2 Pac. 858; Arn. *v.* Hoppin, 25 Kan. 707.

Louisiana. — Guidry *v.* Broussard, 32 La. Ann. 924.

Nebraska. — Merriam *v.* Hemple, 17 Nebr. 345, 22 N. W. 775.

Ohio. — Younglove *v.* Hackman, 43 Ohio St. 69, 1 N. E. 230; Chapman *v.* Sollars, 38 Ohio St. 378.

Washington. — Wheeler Co. *v.* Pates, 43 Wash. 247, 86 Pac. 625.

Wisconsin. — Morrow *v.* Lander, 77 Wis. 77, 45 N. W. 956.

See 45 Cent. Dig. tit. "Taxation," § 1645.

Compare Broxson *v.* McDougal, 70 Tex. 64, 7 S. W. 591.

Apportionment according to value of land and of improvements. — Under Kan. Gen. St. (1901) § 7681, providing that the successful claimant in ejectment shall not be let into possession until the defeated tax title holder has been paid the full amount he has expended for taxes on the land, with interest, costs, and charges, and section 5088, providing that a defeated tax title holder shall not be evicted until he is paid the value of all lasting and valuable improvements he has placed on the land, and section 5091, allowing the successful claimant to elect to take the value of the land, apart from the value added by the improvements, and leave the tax title holder in possession. A tax deed holder in possession who is defeated in ejectment and who claims the benefit of the statute should be reimbursed for that portion only of the taxes paid, levied upon the assessed valuation of the land apart from the improvements, and not for the full amount of the taxes. Hills *v.* Allison, 79 Kan. 617, 100 Pac. 651.

Payment after redemption. — A purchaser of land at a tax-sale cannot demand from the original owner repayment of taxes paid after redemption. Byington *v.* Wood, 12 Iowa 479; Byington *v.* Allen, 11 Iowa 3.

Taxes paid subsequent to commencement of suit not recoverable see Roach *v.* Sanborn Land Co., 140 Wis. 435, 122 N. W. 1020.

18. Barke *v.* Early, 72 Iowa 273, 33 N. W. 677; Roberts *v.* Deeds, 57 Iowa 320, 10 N. W. 740; Croskery *v.* Busch, 116 Mich. 288, 74 N. W. 464; McHenry *v.* Brett, 9 N. D. 68, 81 N. W. 65; Phelps *v.* Tacoma, 15 Wash. 367, 46 Pac. 400.

19. Morton *v.* Shortridge, 38 Ind. 492.

20. Barke *v.* Early, 72 Iowa 273, 33 N. W. 677; Sexton *v.* Peck, 48 Iowa 250; Steel *v.* Pogue, 15 Ohio Cir. Ct. 149, 8 Ohio Cir. Ct. 255.

21. Hershey *v.* Thompson, 50 Ark. 484, 8 S. W. 689; Reid *v.* Yazoo, etc., R. Co., 74 Miss. 769, 21 So. 745; Chapman *v.* Sollars, 38 Ohio St. 378.

22. St. Louis, etc., R. Co. *v.* Alexander, 49 Ark. 190, 4 S. W. 753 (there may be a "personal judgment," although defendant is a railroad company); Phelps *v.* Brumback, 107 Mo. App. 16, 80 S. W. 678.

23. See *supra*, XIV, B, 9, b, (II). And see Heffern *v.* Hack, 65 Ohio St. 164, 61 N. E. 703.

5. Compensation For Improvements — a. Right to Compensation. Where a purchaser at tax-sale has in good faith put valuable improvements upon the land during his occupancy of it, it is commonly provided that he shall be recompensed by the owner for the value of such improvements, when the sale is afterward set aside for irregularities or the purchaser dispossessed by law.[24] But to be entitled to such compensation, the purchaser must have made the improvements after the tax title accrued,[25] in reliance upon that title alone,[26] and before he was notified of the owner's intention to reclaim the land, either by a tender of the amount already due or the institution of a suit.[27] Aside from the statutes dealing exclusively with tax titles, it is also generally held that a similar claim to compensation for improvements may be made under the ordinary "occupying claimants" acts, by a tax purchaser as well as by another.[28]

b. Good Faith and Color of Title. To be entitled to claim reimbursement for improvements, the tax purchaser must have held under color of title and his good faith in the matter must be beyond doubt; and if a fatal infirmity is discoverable on the face of the proceedings, or if the purchaser knows facts which render the tax-sale absolutely void, he cannot recover for betterments.[29] So far as the tax deed is concerned, it is sufficient to justify the purchaser if fair and regular on its face; if obviously invalid, it may still constitute color of title, but may then afford ground to impugn the holder's good faith.[30] But aside from the

24. *Arkansas.*— McCann *v.* Smith, 65 Ark. 305, 45 S. W. 1057; Hershey *v.* Thompson, 50 Ark. 484, 8 S. W. 689.

Colorado.— Knowles *v.* Martin, 20 Colo. 393, 38 Pac. 467.

Kansas.— Hills *v.* Allison, 79 Kan. 617, 100 Pac. 651; Gibson *v.* Fields, 79 Kan. 38, 98 Pac. 1112, 131 Am. St. Rep. 278, 20 L. R. A. N. S. 378; Ross *v.* Kilson, (1908) 98 Pac. 772, holder of tax-sale certificate.

Kentucky.— Hamilton *v.* Steele, (1909) 117 S. W 378.

Louisiana.— Page *v.* Kidd, 121 La. 1, 46 So. 35; Bartley *v.* Sallier, 118 La. 93, 42 So. 657; Hickman *v.* Dawson, 35 La. Ann. 1086; Davenport *v.* Knox, 34 La. Ann. 407; Gernon *v.* Handlin, 19 La. Ann. 25.

Minnesota.— Goodrich *v.* Florer, 27 Minn. 97, 6 N. W. 452.

Mississippi.— Edwards *v.* Butler, 94 Miss. 678, 47 So. 801.

Nebraska.— Page *v.* Davis, 26 Nebr. 670, 42 N. W. 875.

Pennsylvania.— Lynch *v.* Brudie, 63 Pa. St. 206; Steele *v.* Spruance, 22 Pa. St. 256; Lambertson *v.* Hogan, 2 Pa. St. 22; Coney *v.* Owen, 6 Watts 435; Gilmore *v.* Thompson, 3 Watts 106; Creigh *v.* Wilson, 1 Serg. & R. 38.

Wisconsin.—Zwietusch *v.* Watkins, 61 Wis. 615, 21 N. W. 821; Oberich *v.* Gilman, 31 Wis. 495.

Canada.— Haisley *v.* Somers, 13 Ont. 600; Churcher *v.* Bates, 42 U. C. Q. B. 466. See Edinburgh L. Assur. Co. *v.* Ferguson, 32 U. C. Q. B. 253.

See 45 Cent. Dig. tit. "Taxation," §§ 1614, 1648.

The dispossession of a claimant under a void tax deed need not be by suit, in order to entitle him to claim compensation for improvements under the Michigan statute. Croskery *v.* Busch, 116 Mich. 288, 74 N. W. 464.

25. Jacks *v.* Dyer, 31 Ark. 334; Wheeler *v.* Merriman, 30 Minn. 372, 15 N. W. 665; Uhl *v.* Grissom, 12 Okla. 322, 72 Pac. 372.

26. Sands *v.* Davis, 40 Mich. 14; King *v.* Harrington, 18 Mich. 213.

27. Seger *v.* Spurlock, 59 Ark. 147, 26 S. W. 819; Hilgenberg *v.* Rhodes, 111 Ind. 167, 12 N. E. 149; People *v.* Campbell, 35 N. Y. App. Div. 103, 54 N. Y. Suppl. 725.

28. Fitch *v.* Douglass, 76 Kan. 60, 90 Pac. 769, 12 L. R. A. N. S. 172; Stebbins *v.* Guthrie, 4 Kan. 353; Jewell *v.* Truhn, 38 Minn. 433, 38 N. W. 106; Neiswanger *v.* Gwynne, 13 Ohio 74; Zwietusch *v.* Watkins, 61 Wis. 615, 21 N. W. 821. *Contra*, Robson *v.* Osborn, 13 Tex. 298 [*disapproved* in Dorn *v.* Dunham, 24 Tex. 366].

The Occupying Claimants Act does not apply in the case of land bought by the state at a tax-sale and sold by it to a third person, since the statute does not affect the sovereign. Martin *v.* Roesch, 57 Ark. 474, 21 S. W. 881.

29. *Indiana.*— Hilgenberg .. Rhodes, 111 Ind. 167, 12 N. E. 149.

Louisiana.— Payne *v.* Anderson, 35 La. Ann. 977.

Minnesota.— Jewell *v.* Truhn, 38 Minn. 433, 38 N. W. 106; Everett *v.* Boyington, 29 Minn. 264, 13 N. W. 45.

Pennsylvania.— Orr *v.* Cunningham, 4 Watts & S. 294.

Texas.— House *v.* Stone, 64 Tex. 677; Hatchett *v.* Conner, 30 Tex. 104; Robson *v.* Osborn, 13 Tex. 298.

Vermont.—Whitney *v.* Richardson, 31 Vt. 300.

See 45 Cent. Dig. tit. "Taxation," §§ 1648, 1649.

30. *Arizona.*— Silver Queen Min. Co. *v.* Crocker, 8 Ariz. 397, 76 Pac. 479.

Kansas.— Stebbins *v.* Guthrie, 4 Kan. 353.

Minnesota.— Pfefferle *v.* Wieland, 55 Minn. 202, 56 N. W. 824; O'Mulcahy *v.* Florer, 27

deed, various circumstances of fraud, trespass, or irregular action may suffice to show that the claimant is not an occupant in good faith.[31]

c. Amount Claimable For Improvements. At common law, the party in possession of land, failing to make good his title, could not be allowed for improvements anything more than the value of the rents and profits.[32] But the special statutes applicable to these cases allow a recovery of the full cash value of the improvements, or at least the amount by which they are shown to have increased the market value of the land,[33] and in some states without deduction of the rents and profits,[34] but also without interest.[35]

Minn. 449, 8 N. W. 166; Madland *v.* Benland, 24 Minn. 372.

Pennsylvania.— Liggett *v.* Long, 19 Pa. St. 499.

South Dakota.— Parker *v.* Vinson, 11 S. D. 381, 77 N. W. 1023, void tax deed as color of title.

See 45 Cent. Dig. tit. "Taxation." § 1649.

31. See the cases cited *infra*, this note.

Facts evidencing bad faith.—Where the officer who is charged with making sales of land for taxes becomes the purchaser at such a sale, he is not a claimant in good faith so as to be entitled to compensation for improvements. Clute *v.* Barrow, 2 Mich. 192. So where a son purchases at tax-sale a homestead set off to his mother (Allen *v.* Russell, 59 Ohio St. 137, 52 N. E. 121); and where the tax title claimant enters as a mere trespasser (Mumme *v.* McCloskey, 28 Tex. Civ. App. 83, 66 S. W. 853), or before the expiration of the time allowed for redemption (McLellan *v.* Omodt, 37 Minn. 157, 33 N. W. 326), or without giving the statutory notice to the former owner (Cook Land, etc., Co. *v.* McDonald, 155 Mich. 175, 118 N. W. 959; Corrigan *v.* Davis, 125 Mich. 125, 83 N. W. 1020). But on the other hand, it is said that, although the assessment and other proceedings may be marred by irregularities which would be apparent to the eye of a lawyer, it does not necessarily follow that the tax purchaser may not have had an honest belief in the validity of his title. House *v.* Stone, 64 Tex. 677. And where the validity or invalidity of the tax-sale must be determined upon the interpretation of a statute of very doubtful import, the holder will not be deprived of his right to reimbursement for improvements. Wederstrandt *v.* Freyham, 34 La. Ann. 705. And so the *bona fides* of a tax purchaser is not affected by the constructive notice afforded by a recorded deed of trust on the property. Boatmen's Sav. Bank *v.* Grewe, 101 Mo. 625, 14 S. W. 708; Whitney *v.* Richardson, 31 Vt. 300.

Invalid sale of seated land as unseated.— One who purchases land which is sold for taxes in the character of unseated land, and improves it, but knowing that the land was actually seated at the time the tax was assessed and payable, is not entitled to compensation for his improvements. Lynch *v.* Brudie, 63 Pa. St. 206; Lambertson *v.* Hogan, 2 Pa. St. 22; Cranmer *v.* Hall, 4 Watts & S. (Pa.) 36; Hockenbury *v.* Snyder, 2 Watts & S. (Pa.) 240; McKee *v.* Lamberton, 2 Watts & S. (Pa.) 107; Miller *v.* Keene, 5 Watts (Pa.) 348.

32. Marlow *v.* Adams, 24 Ark. 109; Dothage *v.* Stuart, 35 Mo. 251.

33. Bender *v.* Bean, 52 Ark. 132, 12 S. W. 180, 241; Jones *v.* Griffin, 74 S. W. 713, 25 Ky. L. Rep. 117; Dothage *v.* Stuart, 35 Mo. 251; Pacquette *v.* Pickness, 19 Wis. 219. When a tax-sale is held invalid, the purchaser is entitled to a lien, not only for the amount paid on the purchase and for all taxes thereafter paid in good faith, with proper interest thereon, but also for improvements on and expenditures in caring for the property, and for money expended in having land surveyed to protect the timber against trespass. Hamilton *v.* Steele, 117 S. W. 378.

Clearing, fencing, and cultivation.— Clearing and fencing agricultural land, and rendering it cultivable, is an improvement of it within the meaning of these statutes, and the tax title claimant may recover the amount so expended. Croskery *v.* Busch, 116 Mich. 288, 74 N. W. 464; Towle *v.* Holt, 14 Nebr. 221, 15 N. W. 203. Although plowing and cultivation of land theretofore under cultivation does not constitute a permanent improvement for which a person in possession under a tax deed defeated in ejectment is entitled to compensation, the breaking and reducing of wild land to cultivation does. Gibson *v.* Fields, 79 Kan. 38, 98 Pac. 1112, 131 Am. St. Rep. 278, 20 L. R. A. N. S. 378.

Where the improvements are also beneficial to adjoining lands owned by the tax title claimant, he is only entitled to such a part of the cost as is proportioned to the land in controversy. Gilbreath *v.* Dilday, 152 Ill. 207, 38 N. E. 572.

The right to compensation is not affected by the fact that the improvements were made in supposed compliance with a municipal regulation which was void. Flanagan *v.* Mathisen, 78 Nebr. 412, 110 N. W. 1012.

34. Bender *v.* Bean, 52 Ark. 132, 12 S. W. 180, 241; Murphy *v.* Williams, (Tex. Civ. App. 1900) 56 S. W. 695. In Kansas, where a person in possession under a tax deed defeated in ejectment claims compensation for permanent improvements and taxes paid, reasonable rent without the improvements must be set off, but not rent as increased by the improvements. Gibson *v.* Fields, 79 Kan. 38, 98 Pac. 1112, 131 Am. St. Rep. 278, 20 L. R. A. N. S. 378. The rent to be offset against a claim for improvements and taxes is to be determined from the cash price paid for like premises during the same time and in the same locality. Gibson *v.* Fields, *supra*.

35. Steele *v.* Spruance, 22 Pa. St. 256.

d. Enforcement of Claim. There are various methods in which the tax title claimant may enforce his right to reimbursement for improvements. He may be adjudged to have a lien on the premises for the amount.[36] When judgment in ejectment or any similar action goes against him, it may be so framed that he cannot be evicted until compensated for his improvements.[37] He may set off such a claim on an accounting for rents and profits,[38] or he may interpose and enforce this claim in an equitable action for redemption.[39] But he cannot have a general money judgment and general execution against the owner of the premises.[40]

XV. PENALTIES AND FORFEITURES.[41]

A. Penalties [42] — **1. Power to Impose.** The power to levy and assess taxes includes the power to adopt such measures as will make their collection prompt and effective,[43] always having a regard to the requirement of due process of law,[44] and this includes the authority to impose penalties for delay or refusal to pay taxes justly due and for concealing taxable property or otherwise seeking to obstruct or defeat the operation of the revenue laws,[45] the amount of such penalties being in the discretion of the legislature, within reasonable limitations.[46]

2. Statutory Provisions. A penal statute of this character will be construed strictly,[47] and not extended by implication to any taxes not clearly within its terms,[48] nor will it be given a retroactive operation unless the intention of the

36. Mercer *v.* Justice, 63 Kan. 225, 65 Pac. 219.

37. Mercer *v.* Justice, 63 Kan. 225, 65 Pac. 219. See Lee *v.* Livingston, 143 Mich. 203, 106 N. W. 713; Sanborn *v.* Mueller, 38 Minn. 27, 35 N. W. 666.

38. Gilbreath *v.* Dilday, 152 Ill. 207, 38 N. E. 572; Strother *v.* Reilly, 105 Tenn. 48, 58 S. W. 332.

39. Collins *v.* Storm, 75 Iowa 36, 39 N. W. 161.

40. Childs *v.* Shower, 18 Iowa 261.

41. **For non-payment of municipal tax** see Municipal Corporations, 28 Cyc. 1728.

42. **Penalty** generally see Penalties, 30 Cyc. 1331.

43. Slack *v.* Ray, 26 La. Ann. 674.

44. **Due process of law** generally see Constitutional Law, 8 Cyc. 1080 *et seq.*

45. *Arkansas.*— Scott *v.* Watkins, 22 Ark. 556.

Indiana.—Western Union Tel. Co. *v.* State, 146 Ind. 54, 44 N. E. 793 [*affirmed* in 165 U. S. 304, 17 S. Ct. 345, 41 L. ed. 725]; Boyer *v.* Jones, 14 Ind. 354.

Kentucky.— Belknap *v.* Com., 120 Ky. 59, 85 S. W. 693, 27 Ky. L. Rep. 473; Bishop *v.* Gregory, 85 S. W. 1197, 27 Ky. L. Rep. 478.

Louisiana.—Victoria Lumber Co. *v.* Rives, 115 La. 996, 40 So. 382; Slack *v.* Ray, 26 La. Ann. 674.

Michigan.— Drennan *v.* Herzog, 56 Mich. 467, 23 N. W. 170.

New Jersey.— Dixon *v.* Jersey City, 37 N. J. L. 39.

See 45 Cent. Dig. tit. "Taxation," § 1650. See also *infra*, XV, A, 3, b, c.

Penalty as damages for breach of contract. — In Morrison *v.* Larkin, 26 La. Ann. 699, the right to impose penalties for the non-payment of taxes is put on the somewhat fanciful ground that there is an implied contract on the part of the individual to pay his share of the public burdens, and if he fails to meet this obligation he should pay damages for its breach.

Double punishment for same offense.—A statute imposing a penalty for refusal to give a list of all taxable property does not, on account of there being another statute imposing a penalty for furnishing a false or fraudulent list, violate a bill of rights provision that no person shall be twice punished for the same offense, as the two wrongs are not identical. Burgh *v.* State, 108 Ind. 132, 9 N. E. 75.

46. Chicago, etc., R. Co. *v.* People, 217 Ill. 164, 75 N. E. 368; Burgh *v.* State, 108 Ind. 132, 9 N. E. 75; Western Union Tel. Co. *v.* Indiana, 165 U. S. 304, 17 S. Ct. 345, 41 L. ed. 725 [*affirming* 146 Ind. 54, 44 N. E. 793].

Excessive penalties.— Under the usual constitutional provision that "excessive fines shall not be imposed," it is held that a penalty prescribed by statute for failure to pay taxes is to be considered a "fine," and the statute may be invalid on this ground if the penalties imposed are excessive or liable to become so by accumulation. State *v.* Galveston, etc., R. Co., 100 Tex. 153, 97 S. W. 71 [*reversing* (Civ. App. 1906) 93 S. W. 464, and *reversed* on other grounds in 210 U. S. 217, 28 S. Ct. 638, 52 L. ed. 1031].

47. Gachet *v.* McCall, 50 Ala. 307; Marion County *v.* Kruidenier, 72 Iowa 92, 33 N. W. 378; Albany Mut. Bldg. Assoc. *v.* Laramie, 10 Wyo. 54, 65 Pac. 1011.

Interest as penalty.—A statute providing for the collection of interest on unpaid taxes at the rate of one per cent a month creates a penalty. People *v.* Peacock, 98 Ill. 172. And see Evansville, etc., R. Co. *v.* West, 139 Ind. 254, 37 N. E. 1009.

48. Chicago, etc., R. Co. *v.* People, 217 Ill. 164, 75 N. E. 368; Illinois Cent. R. Co. *v.* Com., 98 S. W. 1008, 30 Ky. L. Rep. 190; Vicksburg, etc., R. Co. *v.* Traylor, 104 La. 284, 29 So. 141.

legislature in that behalf is very manifest.[49] That body may at any time repeal a statute imposing such penalties and remit the penalties;[50] but the repeal of a statute under which penalties for the non-payment of taxes have already accrued will not affect the liability of the owner for the amount of such penalties.[51]

3. Grounds For Imposition of Penalties — a. In General. Penalties may be and are imposed for any conduct on the part of the taxpayer which prevents or obstructs the just application of the revenue laws to his taxable property, as where he neglects or refuses to list his property for assessment or makes a false return,[52] or where he wilfully neglects or refuses to pay the taxes assessed against him;[53] so also where he fraudulently conceals his property from the assessors or misrepresents it,[54] or where, for the fraudulent purpose of escaping taxation, he transfers it to another person or temporarily converts it into non-taxable securities.[55]

b. Failure to List or Report Property or Making False List. Where the law prescribes a penalty for the neglect or refusal to file a list or inventory of property for taxation, the simple failure to do so, without a valid excuse, is ordinarily sufficient ground for the imposition of the penalty,[56] provided a proper demand for such list or return has first been made if that is also a requirement of the statute;[57] and so also of the refusal to verify a list or return.[58] But where the ground for the penalty is the making of a false list or return, it must be made false intentionally or through culpable negligence, not as the consequence of an honest doubt or mistake,[59] and, in accordance with the rule of strict construction

49. People *v.* Peacock, 98 Ill. 172; People *v.* Thatcher, 95 Ill. 109; Bartruff *v.* Remey, 15 Iowa 257; Louisville, etc., R. Co. *v.* Com., 30 S. W. 624, 17 Ky. L. Rep. 136; Redwood County *v.* Winona, etc., Land Co., 40 Minn. 512, 41 N. W. 465; Brown County *v.* Winona, etc., Land Co., 39 Minn. 380, 40 N. W. 166.

50. Tobin *v.* Hartshorn, 69 Iowa 648, 29 N. W. 764; Territory *v.* Perea, 10 N. M. 362, 62 Pac. 1094; Wyckoff *v.* King County, 18 Wash. 256, 51 Pac. 379.

51. Scott *v.* Watkins, 22 Ark. 556; Hartford *v.* Champion, 58 Conn. 268, 20 Atl. 471; State *v.* Halter, 149 Ind. 292, 47 N. E. 665, 49 N. E. 7; Abbott *v.* Edgerton, 53 Ind. 196; Tobin *v.* Hartshorn, 69 Iowa 648, 29 N. W. 764; Cedar Rapids, etc., R. Co. *v.* Carroll County, 41 Iowa 153. *Contra*, Dixon *v.* Jersey City, 37 N. J. L. 39; Belvidere *v.* Warren R. Co., 34 N. J. L. 193; Com. *v.* Penn Mut. L. Ins. Co., 1 Dauph. Co. Rep. (Pa.) 233.

52. See *infra*, XV, A, 3, b.

53. See *infra*, XV, A, 3, c.

54. Clunie *v.* Siebe, 112 Cal. 593, 44 Pac. 1064; Willard *v.* Wetherbee, 4 N. H. 118. And see Savannah, etc., R. Co. *v.* Morton, 71 Ga. 24.

55. Darrow *v.* Langdon, 20 Conn. 288; Durbin *v.* People, 54 Ill. App. 101; La Plante *v.* State, 152 Ind. 80, 52 N. E. 452; Durham *v.* State, 6 Ind. App. 23, 32 N. E. 104. And see *supra*, III, A, 1, e.

56. *Kentucky.*— Louisville, etc., Ferry Co. *v.* Com., 104 Ky. 726, 47 S. W. 877, 20 Ky. L. Rep. 927; Johnson *v.* Com., 7 Dana 338.

New Hampshire.— *In re* Perry, 16 N. H. 44; Walker *v.* Cochran, 8 N. H. 166; Tucker *v.* Aiken, 7 N. H. 113.

Pennsylvania.— Com. *v.* Wyoming Valley Canal Co., 50 Pa. St. 410; Drexel *v.* Com., 46 Pa. St. 31; Harper *v.* Farmers', etc., Bank, 7 Watts & S. 204.

Vermont.— Bartlett *v.* Wilson, 60 Vt. 644, 15 Atl. 317; Newman *v.* Wait, 46 Vt. 689.

Virginia.—Washington *v.* Com., 2 Va. Cas. 258.

See 45 Cent. Dig. tit. "Taxation," § 1655.

Penal action to impose fine for failure to list property for taxation or for making false list see *supra* VI, C, 3, c.

Filing personally with clerk of court.— Although under Ky. Gen. St. art. 1, c. 92, § 11, a non-resident owning lands within a certain county, who went in person to the assessor and listed the lands owned by him in that county within the proper time, was thereby exempted from the penalty for failure to file a descriptive list thereof with the clerk of the county court in the time required by law (Com. *v.* Ellis, 9 S. W. 221, 10 Ky. L. Rep. 341); such a listing with the assessor was not sufficient under Ky. St. 4039, before its amendment in 1900 (Com. *v.* Lauth, 56 S. W. 519, 22 Ky. L. Rep. 4), especially when the listing was done by a non-resident corporation through a local agent of limited authority, instead of through one of its officers (Com. *v.* Farmers', etc., Leaf Tobacco Warehouse Co., 107 Ky. 1, 52 S. W. 799, 21 Ky. L. Rep. 573).

57. Lee *v.* Com., 6 Dana (Ky.) 311; Nelson *v.* Pierce, 6 N. H. 194; Willard *v.* Wetherbee, 4 N. H. 118.

58. Washington County *v.* Miller, 14 Iowa 584; Lee *v.* Com., 6 Dana (Ky.) 311; Perley *v.* Parker, 20 N. H. 263.

59. Leper *v.* Pulsifer, 37 Ill. 110; Ratterman *v.* Ingalls, 48 Ohio St. 468, 28 N. E. 168 [*affirming* 11 Ohio Dec. (Reprint) 99, 24 Cinc. L. Bul. 433]; Hamilton County Ins. Co. *v.* Cappellar, 38 Ohio St. 560; Phipps *v.* Ratterman, 10 Ohio Cir. Ct. 205, 6 Ohio Cir.

applicable to statutes of this character,[60] it is held that a statute providing a penalty for refusal to furnish a "statement" does not authorize a penalty for a false statement,[61] or for refusal to furnish lists, reports, or schedules required by other statutes.[62]

c. Failure to Pay Taxes.[63] In many states the law authorizes the imposition of a penalty for the neglect or failure to pay taxes when due.[64] But no additional charge by way of penalty can be made unless expressly authorized by statute,[65] or until the taxpayer has been accorded the full time allowed by law in which to make a voluntary payment,[66] or unless his neglect or omission was intentional or inexcusable.[67]

4. Excuses and Defenses. The courts will not enforce a penalty against the taxpayer where he makes a good defense against its imposition or shows a legally sufficient excuse for the delinquency charged.[68] It is held a sufficient ground for refusing to enforce the penalty that the officers did not give the taxpayer the notice or demand to which he was entitled;[69] that the tax was illegal or illegally levied;[70] that he tendered or offered to pay so much of the tax as was legal, resisting payment only of an illegal excess;[71] that he made an honest mistake as to the amount, extent, or value of his taxable property;[72] that he entertained a

Dec. 488; Ratterman *v.* Phipps, 11 Ohio Dec. (Reprint) 473, 27 Cinc. L. Bul. 118; Ohio Farmers' Ins. Co. *v.* Hard, 10 Ohio S. & C. Pl. Dec. 469, 8 Ohio N. P. 36; Ratterman *v.* Phipps, 4 Ohio S. & C. Pl. Dec. 453, 3 Ohio N. P. 69.

A wilful undervaluation of property returned for taxation is itself a "false return" within the meaning of Ohio Rev. St. § 2781, authorizing the imposition of a penalty for a false return of taxable property. Ohio Farmers' Ins. Co. *v.* Hard, 59 Ohio St. 248, 52 N. E. 635.

The fraudulent omission of an item of property is within the condemnation of a statute directed against the giving of a false or fraudulent schedule or statement. Durnham *v.* State, 117 Ind. 477, 19 N. E. 327.

60. See *supra*, XV, A, 2.

61. Stein *v.* Local Bd. of Review, 135 Iowa 539, 113 N. W. 339.

62. Chicago, etc., R. Co. *v.* People, 217 Ill. 164, 75 N. E. 368.

63. **Effect of tender** see *supra*, IX, A, 1, f.

Liability for interest generally see *supra*, IX, A, 2, e.

64. See the statutes of the several states. And see State *v.* Sage, 75 Minn. 448, 78 N. W. 14; Lehigh Coal, etc., Co. *v.* Gormley, 21 Pa. Co. Ct. 636; State *v.* Rutland R. Co., 81 Vt. 508, 71 Atl. 197; Lynch *v.* Canada North-West Land Co., 19 Can. Sup. Ct. 204.

65. State *v.* Graham, 2 Hill (S. C.) 457; Central Trust Co. *v.* Condon, 67 Fed. 84, 14 C. C. A. 314.

66. Victoria Lumber Co. *v.* Rives, 115 La. 996, 40 So. 382; State *v.* Edgar, 26 La. Ann. 726; Nichols *v.* Roberts, 12 N. D. 193, 96 N. W. 298; Hacke *v.* Pittsburgh, 24 Pittsb. Leg. J. N. S. (Pa.) 16.

67. Columbus *v.* Columbus Bank, (Ky. 1909) 122 S. W. 835; Com. *v.* Philadelphia, etc., Coal, etc., Co., 145 Pa. St. 283, 23 Atl. 809; State *v.* Chicago, etc., R. Co., 128 Wis. 449, 108 N. W. 594; Ketchum *v.* Pacific R. Co., 14 Fed. Cas. No. 7,738, 4 Dill. 41.

Sufficiency of personal property.—A delinquent taxpayer is not released from the penalty for delinquency by the fact that he has personal property out of which the collector might have made the taxes but failed to do so. Foresman *v.* Chase, 68 Ind. 500; Roseberry *v.* Huff, 27 Ind. 12.

68. *In re* Perry, 16 N. H. 44; Topliff *v.* Shields, 1 Ohio S. & C. Pl. Dec. 551, 32 Cinc. L. Bul. 74; Com. *v.* Philadelphia, etc., Coal, etc., Co., 145 Pa. St. 283, 23 Atl. 809; State *v.* Chicago, etc., R. Co., 128 Wis. 449, 108 N. W. 594.

69. Gachet *v.* McCall, 50 Ala. 307; Whittelsey *v.* Clinton, 14 Conn. 72; Marion County *v.* Galvin, 73 Iowa 18, 34 N. W. 617; Hunter *v.* Borck, 51 Ohio St. 320, 37 N. E. 714.

70. Com. *v.* Louisville, etc., R. Co., 89 Ky. 134, 9 S. W. 805; State *v.* St. Louis, etc., R. Co., 71 Mo. 88.

71. Redwood County *v.* Winona, etc., Land Co., 40 Minn. 512, 41 N. W. 465; State *v.* Alta Silver Min. Co., 24 Nev. 230, 51 Pac. 982; Wheeling, etc., R. Co. *v.* Stewart, 13 Ohio Cir. Ct. 359, 7 Ohio Cir. Dec. 193; Lampasas First Nat. Bank *v.* Lampasas, 33 Tex. Civ. App. 530, 78 S. W. 42. *Compare* State *v.* Virginia, etc., R. Co., 24 Nev. 53, 49 Pac. 945, 50 Pac. 607.

72. Taylor *v.* Com., 15 Mon. (Ky.) 11; Stewart *v.* Duerr, 20 Ohio Cir. Ct. 505, 11 Ohio Cir. Dec. 310. See Ratterman *v.* Ingalls, 48 Ohio St. 468, 28 N. E. 168, holding that, although a person is not liable to the penalty if he makes an untrue return through mistake, yet he becomes liable if, on learning of the mistake, he fails to correct it.

Additions by assessor of after-discovered property see Rowell *v.* Horton, 58 Vt. 1, 3 Atl. 906; Howes *v.* Bassett, 56 Vt. 141.

Disclosure forced by court.—The penalty provided by statutes in case of delinquent taxes cannot be enforced on a disclosure compelled by the court, as this would be requiring the taxpayer to give evidence against himself. Johnson *v.* Com., 7 Dana (Ky.) 338.

sincere and reasonable belief that the particular property was exempt or was not taxable,[73] particularly where such belief was founded on the advice of counsel,[74] or was the subject of judicial consideration, or such as fairly to warrant a resort to the courts.[75] In some cases also impossibility of performance has been accepted as a sufficient excuse.[76] But an erroneous or excessive assessment is not a good excuse for non-payment of the proper amount,[77] nor any informalities in the qualification or bond of the assessor.[78] Neither can the taxpayer relieve himself by a belated payment of the taxes after the penalty has accrued or suit has been brought to enforce it.[79]

5. Persons Liable For Penalties. The liability for such penalty will survive and may be enforced against the personal representatives of a deceased taxpayer.[80] It may also be imposed on non-residents having taxable property within the state,[81] and is applicable in the case of corporations, even foreign corporations, as well as individuals.[82] But the president of a corporation is not personally liable for a penalty incurred by it.[83]

6. Remission or Relief From Penalty and Waiver. Local boards or officers may remit penalties if so authorized by law,[84] and a court, when the matter is properly before it, may remit, reduce, or refuse to enforce a penalty unlawfully or inequitably imposed,[85] if the person complaining shows that he has done all that the law requires of him and is equitably entitled to such relief.[86] Waiver of a

73. Phipps *v.* Ratterman, 10 Ohio Cir. Ct. 205, 6 Ohio Cir. Dec. 488; Ratterman *v.* Phipps, 11 Ohio Dec. (Reprint) 473, 27 Cinc. L. Bul. 118; *In re* Miller, 182 Pa. St. 157, 37 Atl. 1000; Albany Mut. Bldg. Assoc. *v.* Laramie, 10 Wyo. 54, 65 Pac. 1011; U. S. Trust Co. *v.* New Mexico, 183 U. S. 535, 22 S. Ct. 172, 46 L. ed. 315. *Compare* Mackay *v.* San Francisco, 113 Cal. 392, 45 Pac. 696.

74. Adams *v.* Shields, 17 Ohio Cir. Ct. 129, 9 Ohio Cir. Dec. 558.

75. Louisville, etc., R. Co. *v.* Com., 94 S. W. 655, 29 Ky. L. Rep. 666; State *v.* Chicago, etc., R. Co., 128 Wis. 449, 108 N. W. 594; Ketchum *v.* Pacific R. Co., 14 Fed. Cas. No. 7, 738, 4 Dill. 41 note.

76. Com. *v.* Philadelphia, etc., Coal, etc., Co., 145 Pa. St. 283, 23 Atl. 809 (where the delinquent corporation was in the hands of a receiver and had no money); State *v.* Galveston, etc., R. Co., 100 Tex. 153, 97 S. W. 71 (where a railroad could not pay the tax actually due, and a tender thereof to the state treasurer would be useless as he could not accept it, the state claiming a larger tax).

77. State *v.* Virginia, etc., R. Co., 24 Nev. 53, 49 Pac. 945, 50 Pac. 607; Matter of Smallwood, 35 Misc. (N. Y.) 167, 70 N. Y. Suppl. 720 [*affirmed* in 63 N. Y. App. Div. 329, 71 N. Y. Suppl. 490]. See Texarkana Water Co. *v.* State, 62 Ark. 188, 35 S. W. 788, where the tax-sale was void for want of a sufficient description of the land in the assessment.

78. Washington County *v.* Miller, 14 Iowa 584.

79. Western Union Tel. Co. *v.* State, 147 Ind. 274, 45 N. E. 473; Bracey *v.* Ray, 26 La. Ann. 710.

80. Davis *v.* State, 119 Ind. 555, 32 N. E. 9; Genin *v.* Belmont County Auditor, 18 Ohio St. 534. *Contra*, State *v.* Atchison, 173 Mo. 164, 72 S. W. 1075.

A remainder-man is not liable, under the Tennessee statutes, for penalties for non-payment of taxes assessed to the life-tenant. Hadley *v.* Hadley, 114 Tenn. 156, 87 S. W. 250.

81. Com. *v.* Lauth, 56 S. W. 519, 22 Ky. L. Rep. 4; Coleman *v.* Shattuck, 62 N. Y. 348. *Contra*, Shaw *v.* Hartford, 56 Conn. 351, 15 Atl. 742.

82. Com. *v.* Farmers', etc., Leaf Tobacco Warehouse Co., 107 Ky. 1, 52 S. W. 799, 21 Ky. L. Rep. 573; People *v.* Horn Silver Min. Co., 105 N. Y. 76, 11 N. E. 155; Ohio Farmers' Ins. Co. *v.* Hard, 59 Ohio St. 248, 52 N. E. 635. But see Jones *v.* Bridgeport, 36 Conn. 283.

Decision as to liability of corporation.— Where the auditor-general has decided that a corporation is not liable to certain taxes, a penalty imposed for neglect to make certain necessary returns is not incurred, although the corporation is in fact liable for such taxes. Delaware Div. Canal Co. *v.* Com., 50 Pa. St. 399.

83. Judson *v.* State, Minor (Ala.) 150.

84. Beecher *v.* Webster County, 50 Iowa 538; Oxford Bank *v.* Oxford, 70 Miss. 504, 12 So. 203; Pickering *v.* Ball, 19 Wash. 185, 52 Pac. 1022.

The Illinois statutes are construed to mean that while the board of review, in passing upon an assessment, has no power to remit the fifty per cent penalty added to the "fair cash value," for failure to file a schedule as required by law, it may increase or decrease the amount of such penalty by changing the amount found by the assessors to be the "fair cash value." People *v.* Meacham, 241 Ill. 415, 89 N. E. 691.

85. *In re* Perry, 16 N. H. 44; Matter of De Graff, 24 Misc. (N. Y.) 147, 53 N. Y. Suppl. 591; Ohio Farmers Ins. Co. *v.* Hard, 10 Ohio S. & C. Pl. Dec. 469, 8 Ohio N. P. 36; Washington *v.* Com., 2 Va. Cas. 258.

86. Mackay *v.* San Francisco, 113 Cal. 392, 45 Pac. 696; Leper *v.* Pulsifer, 37 Ill. 110.

penalty may not be implied from a failure seasonably to demand it,[87] but may from receipt of the tax without the penalty after suit brought.[88]

7. Actions and Proceedings to Recover Penalties[89] — a. In General. A proceeding to recover such a penalty is not a criminal prosecution to be commenced by indictment, but a penal action,[90] which is to be brought on the relation of the proper public officer,[91] within the time limited by law for such proceedings,[92] and must be supported by a complaint setting out sufficiently all the essentials of a cause of action for the recovery of the penalty,[93] to which defendant must plead according to the form of the action and the nature of his defense,[94] and in which the ordinary rules of evidence and procedure are applicable.[95] Sometimes, however, such a penalty may be recovered in a suit brought to recover the taxes proper,[96] or to have omitted property assessed.[97]

b. Amount of Penalty and Interest. The imposition of such penalties will be strictly and carefully limited to the exact amounts and the precise contingencies laid down in the law; anything beyond this is null and void.[98] But penal-

See Cedar Rapids, etc., R. Co. *v.* Carroll County, 41 Iowa 153, holding that the fact that penalties have largely accumulated while litigation has been pending respecting the validity of a tax will not justify a court of equity in remitting or diminishing them.

87. Ferguson *v.* Pittsburgh, 159 Pa. St. 435, 28 Atl. 118.

88. Boswell *v.* Washington, 3 Fed. Cas. No. 1,684, 2 Cranch C. C. 18.

89. **Right to trial by jury** see Juries, 24 Cyc. 136, 137, 108.

90. Durham *v.* State, 116 Ind. 514, 19 N. E. 329; Belknap *v.* Com., 120 Ky. 59, 85 S. W. 693, 27 Ky. L. Rep. 473; Louisville City R. Co. *v.* Louisville, 4 Bush (Ky.) 478. And see Evans *v.* Com., 13 Bush (Ky.) 269, holding that the action is so far penal as to permit of the taking of an appeal under the provisions of the criminal code.

91. La Plante *v.* State, 152 Ind. 80, 52 N. E. 452; State *v.* Lauer, 116 Ind. 162, 18 N. E. 527; Warner *v.* State, 3 Ind. App. 60, 29 N. E. 173. See also Durbin *v.* People, 54 Ill. App. 101.

District attorney's fees.— In Nevada the district attorney is entitled to a fee of five per cent of the penalty. State *v.* California Min. Co., 13 Nev. 289.

92. Louisville, etc., R. Co. *v.* Com., 85 Ky. 198, 3 S. W. 139, 8 Ky. L. Rep. 840.

93. Judson *v.* State, Minor (Ala.) 150; People *v.* Strauss, 97 Ill. App. 47; Davis *v.* State, 119 Ind. 555, 22 N. E. 9; State *v.* Lauer, 116 Ind. 162, 18 N. E. 527; Burgh *v.* State, 108 Ind. 132, 9 N. E. 75; Gilliland *v.* State, 13 Ind. App. 651, 42 N. E. 238; Brand *v.* State, 3 Ind. App. 469, 28 N. E. 1030; Swift *v.* State, 3 Ind. App. 285, 29 N. E. 488; Warner *v.* State, 3 Ind. App. 60, 29 N. E. 173; U. S. Trust Co. *v.* New Mexico, 183 U. S. 535, 22 S. Ct. 172, 46 L. ed. 315.

Value and description of property.— In actions to recover penalties, under the Indiana statutes, for failure to list property for taxation, or for making a false or fraudulent list, the complaint need not allege the value of the property (La Plante *v.* State, 152 Ind. 80, 52 N. E. 452), or that it is of any value (Swift *v.* State, 3 Ind. App. 285, 29 N. E. 488), nor need there be filed, with the complaint, copies of the false lists (State *v.* Halter, 149 Ind. 292, 47 N. E. 665, 49 N. E. 7), or the list actually made in case the action is for omission (La Plante *v.* State, *supra*). In Kentucky a general description of the property is sufficient, at least in the absence of a motion to make more specific. Belknap *v.* Com., 120 Ky. 59, 85 S. W. 693, 27 Ky. L. Rep. 473; Bishop *v.* Gregory, 85 S. W. 1197, 27 Ky. L. Rep. 478.

The cause of action for each year should be stated in a separate paragraph. La Plante *v.* State, 152 Ind. 80, 52 N. E. 452; State *v.* Halter, 149 Ind. 292, 47 N. E. 665, 49 N. E. 7.

Summons.— Under the Kentucky statutes providing for the making up of issues of fact upon a summons issued by the clerk, it is a condition precedent to the issuance of the summons that the taxpayer be returned a delinquent (Evans *v.* Com., 13 Bush (Ky.) 269), and it is essential to the sufficiency of the summons that it state the nature and elements of the violation of law which forms the basis of the suit (Evans *v.* Com., *supra*; McCall *v.* Justices Clark County Ct., 1 Bibb (Ky.) 516).

94. Newman *v.* Wait, 46 Vt. 689.

A plea of not guilty is insufficient, as the proceeding is not a criminal prosecution. Belknap *v.* Com., 120 Ky. 59, 85 S. W. 693, 27 Ky. L. Rep. 473; Bishop *v.* Gregory, 85 S. W. 1197, 27 Ky. L. Rep. 478.

95. Washington County *v.* Miller, 14 Iowa 584 (proving qualification of assessor); State *v.* Wolfrum, 88 Wis. 481, 60 N. W. 799 (form of verdict).

96. People *v.* Todd, 23 Cal. 181. See U. S. Trust Co. *v.* Territory, 10 N. M. 416, 62 Pac. 987. *Contra*, Hartman *v.* Hunter, 8 Ohio Cir. Ct. 623, 4 Ohio Cir. Dec. 200.

97. Com. *v.* Citizens' Nat. Bank, 117 Ky. 946, 80 S. W. 158, 25 Ky. L. Rep. 2100; Commonwealth Bank *v.* Com., 107 S. W. 812, 32 Ky. L. Rep. 1087.

98. *Arizona.*— Atlantic, etc., R. Co. *v.* Yavapai County, (1889) 21 Pac. 768.

Arkansas.—Pack *v.* Crawford, 29 Ark. 489.

Indiana.— Evansville, etc., R. Co. *v.* West, 139 Ind. 254, 37 N. E. 1009.

Kentucky.— Henderson Bridge Co. *v.* Com.,

ties may be cumulative if the statute so directs; that is, a pecuniary penalty may be cumulative to one of a different nature,[99] and if the taxes on the same property for several years in succession remain unpaid, it may be proper to assess a penalty for each year the default continues,[1] although it is not generally considered permissible to assess annually the same penalty on the same tax; that is, each separate annual tax may bear a separate penalty, but continued delinquency as to the tax of a given year does not authorize the annual repetition of the penalty on that tax.[2] Neither should the penalties be compounded.[3] Interest on the amount of an accrued penalty is recoverable if the statute expressly authorizes it,[4] but not otherwise.[5]

B. Forfeiture of Property Delinquent[6] — **1. Constitutionality of Statutes.** Notwithstanding some decisions to the contrary,[7] it is now generally held that statutes authorizing the forfeiture to the state of lands on which the taxes have remained delinquent for a certain length of time are not unconstitutional if they also give the taxpayer notice and an opportunity to be heard and provide for some form of judicial inquiry and adjudication.[8]

120 Ky. 690, 87 S. W. 1088, 27 Ky. L. Rep. 1104, 1177; Johnson *v.* Com., 7 Dana 338; Owensboro Waterworks Co. *v.* Owensboro, 74 S. W. 685, 24 Ky. L. Rep. 2530.

Louisiana.—State *v.* De Monasterio, 26 La. Ann. 734.

Nevada.— State *v.* California Min. Co., 13 Nev. 203.

New York.— People *v.* Pitman, 9 N. Y. St. 469.

See 45 Cent. Dig. tit. "Taxation," § 1661.

Where the penalty added is within the statutory limitation, an objection that it is excessive is without force. Lacey *v.* Davis, 4 Mich. 140, 66 Am. Dec. 524.

Penalty assessed held not excessive see La Plante *v.* State, 152 Ind. 80, 52 N. E. 452.

99. State *v.* Washoe County, 5 Nev. 317.

1. Cedar Rapids, etc., R. Co. *v.* Carroll County, 41 Iowa 153; People *v.* Wemple, 61 Hun (N. Y.) 53, 15 N. Y. Suppl. 711 [*reversed* on other grounds in 129 N. Y. 664, 29 N. E. 812].

2. People *v.* Wemple, 61 Hun (N. Y.) 53, 15 N. Y. Suppl. 711 [*reversed* on other grounds in 129 N. Y. 664, 29 N. E. 812]; White *v.* Woodward, 44 Ohio St. 347, 7 N. E. 446. But see Chambers *v.* People, 113 Ill. 509.

3. Evansville, etc., R. Co. *v.* West, 139 Ind. 254, 37 N. E. 1009; Roseberry *v.* Huff, 27 Ind. 12; Newport *v.* South Covington, etc., St. R. Co., 89 Ky. 29, 11 S. W. 954, 11 Ky. L. Rep. 319; Hunter *v.* Borck, 51 Ohio St. 320, 37 N. E. 714. *Contra*, Gillespie *v.* Hamilton, 12 U. C. C. P. 426.

4. Kansas Pac. R. Co. *v.* Amrine, 10 Kan. 318; Litchfield *v.* Brooklyn, 13 Misc. (N. Y.) 693, 34 N. Y. Suppl. 1090; Nichols *v.* Roberts, 12 N. D. 193, 96 N. W. 298; Com. *v.* Standard Oil Co., 101 Pa. St. 119.

5. People *v.* North Pacific Coast R. Co., 68 Cal. 551, 10 Pac. 45; Challiss *v.* Baker, 12 Kan. 253; Commonwealth Bank *v.* Com., 107 S. W. 812, 32 Ky. L. Rep. 1087; Licking Valley Bldg. Assoc. No. 3 *v.* Com., 89 S. W. 682, 28 Ky. L. Rep. 543; Cumberland, etc., R. Co. *v.* State, 92 Md. 668, 48 Atl. 503, 56 L. R. A. 764.

6. **Forfeiture** generally see Forfeitures, 19 Cyc. 1355.

7. Robinson *v.* Huff, 3 Litt. (Ky.) 37; Barbour *v.* Nelson, 1 Litt. (Ky.) 59; Hill *v.* Lund, 13 Minn. 451; Baker *v.* Kelley, 11 Minn. 480; St. Anthony Falls Water Power Co. *v.* Greely, 11 Minn. 321; Griffin *v.* Mixon, 38 Miss. 424; Kinney *v.* Beverley, 2 Hen. & M. (Va.) 318.

8. *Kentucky.*— Kentucky Union Co. *v.* Com., 128 Ky. 610, 108 S. W. 931, 110 S. W. 398, 33 Ky. L. Rep. 9, 49, 587 [*following* Eastern Kentucky Coal Lands Corp. *v.* Com., 127 Ky. 667, 106 S. W. 260, 32 Ky. L. Rep. 129, 108 S. W. 1138, 33 Ky. L. Rep. 49].

Louisiana.— Martinez *v.* State Tax Collector, 42 La. Ann. 677, 7 So. 706; Morrison *v.* Larkin, 26 La. Ann. 699.

Maine.— Adams *v.* Larrabee, 46 Me. 516; Hodgdon *v.* Wight, 36 Me. 326.

Ohio.— McMillan *v.* Robbins, 5 Ohio 28; State *v.* Lewis, 25 Ohio Cir. Ct. 703.

Virginia.— Usher *v.* Pride, 15 Gratt. 190; Flanagan *v.* Grimmet, 10 Gratt. 421; Hale *v.* Branscum, 10 Gratt. 418; Wild *v.* Serpell, 10 Gratt. 405. But see Martin *v.* Snowden, 18 Gratt. 100.

West Virginia.— Holly River Coal Co. *v.* Howell, 36 W. Va. 489, 15 S. E. 214; Waggoner *v.* Wolf, 28 W. Va. 820, 1 S. E. 25.

United States.— Braxton *v.* Rich, 47 Fed. 178.

See 45 Cent. Dig. tit. "Taxation," § 1662.

Provisions for redemption by or on behalf of the owner of the whole, or such part of the land as he may desire to redeem, or for a sale thereof and the return of the proceeds to the owner after deduction of all taxes and proper charges therefrom, must be incorporated in a statute relating to forfeiture for taxes in order to afford the due process of law guaranteed by the constitution of the United States. King *v.* Hatfield, 130 Fed. 564.

Municipal corporations have no power to confiscate and sell property of citizens for failure to pay taxes on the same. Halloway *v.* Livingston Police Jury, 16 La. Ann. 203.

2. Construction of Statutes. An intention to work an absolute and irredeemable forfeiture of delinquent lands will not be inferred if the statute is susceptible of any milder construction; [9] and a statute of forfeiture is to be construed strictly in regard to the due observance of all the steps necessary to effect a divestiture of the title; [10] while, on the other hand, statutes giving relief from forfeitures are to be construed liberally in favor of the taxpayer.[11] In other particulars the ordinary rules of interpretation apply.[12]

3. Causes of Forfeiture. If the statute so directs, a forfeiture may be incurred by the failure of the owner to list or report his land for taxation or have it entered on the proper books for that purpose.[13] But the most usual cause of forfeiture is the failure to pay the taxes charged against the land.[14] To make a forfeiture on his ground valid, however, it is essential that the property should have been duly and legally assessed and under a description by which it can be identified,[15] and there can be no forfeiture if the taxes were actually paid,[16] even though by one other than the true owner,[17] nor unless there has been a strict compliance with the statutory provisions as to reporting, returning, or recording the land as delinquent, advertising it, and other such preliminary steps.[18]

9. *Florida.*— Dickerson *v.* Acosta, 15 Fla. 614.

Indiana.— Mount *v.* State, 6 Blackf. 25.

Kentucky.— Lockhard *v.* Com., 133 Ky. 369, 118 S. W. 331; Nesbitt *v.* Liggitt, 10 Bush 137.

Ohio.— Thevenin *v.* Slocum, 16 Ohio 519.

Virginia.— Hale *v.* Marshall, 14 Gratt. 489.

West Virginia.— See State *v.* Swann, 46 W. Va. 128, 33 S. E. 89.

United States.—Bennett *v.* Hunter, 9 Wall 326, 19 L. ed. 672; Fairfax *v.* Hunter, 7 Cranch 603, 3 L. ed. 453; Schenck *v.* Peay, 21 Fed. Cas. No. 12,451, 1 Dill. 267.

See 45 Cent. Dig. tit. "Taxation," § 1663.

10. *In re* Baton Rouge Oil Works, 34 La. Ann. 255; Millett *v.* Mullen, 95 Me. 400, 49 Atl. 871; Tolman *v.* Hobbs, 68 Me. 316; Magruder *v.* Esmay, 35 Ohio St. 221; Mathers *v.* Bull, 9 Ohio S. & C. Pl. Dec. 408, 6 Ohio N. P. 45; Bond *v.* Pettit, 89 Va. 474, 16 S. E. 666.

11. Miller *v.* Merrick, 21 Ark. 427; Millett *v.* Mullen, 95 Me. 400, 49 Atl. 871.

12. Moore *v.* McNutt, 41 W. Va. 695, 24 S. E. 682; Forqueran *v.* Donnally, 7 W. Va. 114; Harvey *v.* Tyler, 2 Wall. (U. S.) 328, 17 L. ed. 871.

The fact that part of the statute is inoperative will not be held to affect the validity of the remainder. Kentucky Union Co. *v.* Com., 128 Ky. 610, 108 S. W. 931, 110 S. W. 398, 33 Ky. L. Rep. 49, 587.

Washington statute not retroactive.— Barker *v.* Muehler, 55 Wash. 411, 104 Pac. 637.

13. Hale *v.* Marshall, 14 Gratt. (Va.) 489; Stockton *v.* Craig, 56 W. Va. 464, 49 S. E. 386; McDougal *v.* Musgrave, 46 W. Va. 509, 33 S. E. 281; State *v.* Cheney, 45 W. Va. 478, 31 S. E. 920; Yokum *v.* Fickey, 37 W. Va. 762, 17 S. E. 318; Fay *v.* Crozer, 156 Fed. 486; Lasher *v.* McCreery, 66 Fed. 834; Van Gunden *v.* Virginia Coal, etc., Co., 52 Fed. 838, 3 C. C. A. 294.

Kentucky statute construed.— It being notoriously true that there was a large number of outstanding patents in the hands of non-residents, some of whom were unknown, and who had persistently for a long period of years failed or refused to return their lands for taxation, the object of the Kentucky statute relating to forfeiture was to compel these owners to list their lands for taxation, or to give up their claim to the land covered by their patents. It was never the intention of the legislature, where an owner in good faith had each year after he received his patent listed what he believed was all the land he could legally claim under it, that, if it developed that there was more than was returned, the remainder might be forfeited to the state. Lockhard *v.* Com., 133 Ky. 369, 118 S. W. 331.

Listing and payment of taxes in the name of one in privity of title with the person in possession and holding the real title is sufficient (Kelley *v.* Dearman, 65 W. Va. 49, 63 S. W. 693; Blake *v.* O'Neal, 63 W. Va. 483, 61 S. E. 410, 16 L. R. A. N. S. 1147); and in this connection it is held that forfeiture of title to minerals in land for non-entry on the land books cannot be predicated on mere severance in title of the minerals from the surface and lapse of time, since presumptively the land was taxed as a whole when the severance occurred and has since been carried on the land book in the same manner and the taxes paid (Sult *v.* A. Hochstetter Oil Co., 63 W. Va. 317, 61 S. E. 307).

14. Harvey *v.* Tyler, 2 Wall. (U. S.) 328, 17 L. ed. 871.

15. Lonergan *v.* Baber, 59 Ark. 15, 26 S. W. 13; Wilbert *v.* Michel, 42 La. Ann. 853, 8 So. 607; *In re* Baton Rouge Oil Works, 34 La. Ann. 255; Kinney *v.* Beverley, 2 Hen. & M. (Va.) 318; Webb *v.* Ritter, 60 W. Va. 193, 54 S. E. 484; State *v.* Low, 46 W. Va. 451, 33 S. E. 271; State *v.* Sponaugle, 45 W. Va. 415, 32 S. E. 283, 43 L. R. A. 727.

16. Kelly *v.* Salinger, 53 Ark. 114, 13 S. W. 596; Wyman *v.* Smith, 45 Me. 522; Webb *v.* Ritter, 60 W. Va. 193, 54 S. E. 484; Smith *v.* Tharp, 17 W. Va. 221.

17. Miller *v.* Ahrens, 163 Fed. 870.

18. *Maine.*— Hill *v.* Mason, 38 Me. 461; Flint *v.* Sawyer, 30 Me. 226.

4. Persons Against Whom Forfeiture May Be Enforced. A forfeiture of land for non-payment of taxes can be enforced only against the proper owner at the time being;[19] if the proceedings are in the name of a former owner, who has sold and conveyed the property to another, no title passes.[20]

5. Proceedings For Enforcement. The proceedings to enforce such a forfeiture vary in the different states, but in nearly all it is agreed that the mere failure to pay the taxes does not effect a forfeiture, but there must be some form of judicial inquiry or proceeding,[21] of which the owner shall have notice and in which he shall be accorded an opportunity to be heard,[22] and resulting in a judgment,[23] which can be authorized only by showing full compliance with the statutory directions as to preliminary proceedings,[24] and which should correctly describe and identify the land in question,[25] but which, having the character of an adjudication *in rem*, is binding and conclusive on all persons in interest.[26]

6. Operation and Effect.[27] According to the theory prevailing in different states, a forfeiture of land for delinquent taxes may vest an absolute and irredeemable title in the state,[28] or an equitable title subject to a right of redemption

Mississippi.— Hopkins *v.* Sandidge, 31 Miss. 668.

Ohio.— Woodward *v.* Sloan, 27 Ohio St. 592.

Virginia.— Delaney *v.* Goddin, 12 Gratt. 266.

West Virginia.— Smith *v.* Tharp, 17 W. Va. 221.

United States.— Miner *v.* McLean, 17 Fed. Cas. No. 9,630, 4 McLean 138.

See 45 Cent. Dig. tit. "Taxation," § 1665.

19. See cases cited *infra*, note 20.

20. Eastern Land, etc., Co. *v.* State Bd. of Education, 101 N. C. 35, 7 S. E. 573; Lohrs *v.* Miller, 12 Gratt. (Va.) 452; Cook *v.* Lasher, 73 Fed. 701, 19 C. C. A. 654; Lasher *v.* McCreery, 66 Fed. 834.

21. Marshall *v.* McDaniel, 12 Bush (Ky.) 378; Harlan *v.* Seaton, 18 B. Mon. (Ky.) 312; Eastern Land, etc., Co. *v.* State Bd. of Education, 101 N. C. 35, 7 S. E. 573. *Contra*, Levasser *v.* Washburn, 11 Gratt. (Va.) 572; Staats *v.* Board, 10 Gratt. (Va.) 400; State *v.* Swann, 46 W. Va. 128, 33 S. E. 89.

Matters triable.— In an equitable suit to sell land as forfeited to the state for non-entry on the tax books, the right of claimants adverse to the state may be tried, as well as the liability of the land to sale as forfeited. State *v.* Harman, 57 W. Va. 447, 50 S. E. 828.

22. Dentler *v.* State, 4 Blackf. (Ind.) 258; Phelps *v.* Chesson, 34 N. C. 194; Cook *v.* Lasher, 73 Fed. 701, 19 C. C. A. 654. But *compare* McClure *v.* Mauperture, 29 W. Va. 633, 2 S. E. 761; McClure *v.* Maitland, 24 W. Va. 561; De Forest *v.* Thompson, 40 Fed. 375.

Collector as party.—After the delinquent list has been returned, the authority of the tax collector ceases, and he cannot thereafter be made a party, nor is he competent to represent the state, in a suit by vendor against purchaser, to compel a settlement of taxes due on the lands. Hall *v.* Hall, 23 La. Ann. 135. And see Garner *v.* Anderson, 27 La. Ann. 338; Morrison *v.* Larkin, 26 La. Ann. 699.

23. Elmwood Cemetery Co. *v.* People, 204 Ill. 468, 68 N. E. 500; Biggins *v.* People, 106 Ill. 270; Smith *v.* People, 3 Ill. App. 380; Smith *v.* State, 5 Blackf. (Ind.) 65. *Contra*, Wild *v.* Serpell, 10 Gratt. (Va.) 405.

24. Williams *v.* State, 6 Blackf. (Ind.) 36; Finney *v.* Gulf States Land, etc., Co., 112 La. 949, 36 So. 814; George *v.* Cole, 109 La. 816, 33 So. 784; Le Seigneur *v.* Bessan, 52 La. Ann. 187, 26 So. 865.

Statute of limitations does not run against the proceeding. Lewis *v.* Yates, 62 W. Va. 575, 59 S. E. 1073 [*distinguishing* State *v. Harman*, 57 W. Va. 447, 50 S. E. 828; Foley *v.* Doddridge County Ct., 54 W. Va. 16, 46 S. E. 246].

Negativing statutory exceptions.— In proceedings to forfeit land under the Kentucky statute, it is not necessary that the petition allege what part, if any, of the land proceeded against is held by the occupants under a statutory provision that title to land forfeited and not purchased back by the owner is vested in any person having adverse possession for five years, since the purchaser from the commonwealth, and not the occupant, will be required to show that the land purchased by him was not in the excluded class. Kentucky Union Co. *v.* Com., 128 Ky. 610, 108 S. W. 931, 110 S. W. 398, 33 Ky. L. Rep. 9, 49, 587.

25. Smith *v.* State, 5 Blackf. (Ind.) 65; And see Randolph *v.* Adams, 2 W. Va. 519.

26. Elmwood Cemetery Co. *v.* People, 204 Ill. 468, 68 N. E. 500; Holly River Coal Co. *v.* Howell, 36 W. Va. 489, 15 S. E. 214.

27. Adverse possession how affected by forfeiture see Adverse Possession, 1 Cyc. 1018.

28. Usher *v.* Pride, 15 Gratt. (Va.) 190.

An entire forfeiture of the *corpus* of the land was contemplated by Va. Acts (1838), p. 21, c. 8, § 17, as it never was the policy of the legislature to forfeit or dispose of undivided or particular estates in land. State *v.* King, 64 W. Va. 546, 63 S. E. 468.

Ejectment by former owner.— In Ohio the forfeiture of land to the state for taxes does not divest the owner of title so as to prevent him from maintaining ejectment against one in possession not claiming title under the state. Thevenin *v.* Slocum, 16

by the former owner,[29] or a mere lien for the taxes, which may be satisfied by their subsequent payment.[30] In some states provision has been made by law for vesting title to forfeited lands in those persons, other than the delinquent or his heirs, who may show title derived from a grant from the state with actual possession and payment of subsequent taxes.[31]

7. Redemption. The statutes generally allow a redemption of lands forfeited for non-payment of taxes,[32] such redemption to be effected by the former owner of the property,[33] or his heirs,[34] or vendee,[35] or by any person having a legal or equitable title to the premises,[36] either within a limited time, after which the forfeiture will become absolute,[37] or before the state has sold or otherwise disposed of the lands.[38] The amount to be paid on redemption ordinarily includes all

Ohio 519. But in Virginia the heirs of a patentee of land, forfeited for non-payment of taxes and never redeemed, have no title on which they can maintain ejectment against any person whatsoever. Usher *v.* Pride, 15 Gratt. (Va.) 190. An action of ejectment cannot be maintained by the original owner after the lapse of two years, under the New York statutes, even though the notice of redemption was faulty. Meigs *v.* Roberts, 162 N. Y. 371, 56 N. E. 838, 76 Am. St. Rep. 322 [*reversing* 42 N. Y. App. Div. 290, 59 N. Y. Suppl. 215].

29. Usher *v.* Pride, 15 Gratt. (Va.) 190, grant of right of redemption by subsequent statute.

30. Millett *v.* Mullen, 95 Me. 400, 49 Atl. 871; State *v.* Heman, 70 Mo. 441; Thevenin *v.* Slocum, 16 Ohio 519; French *v.* McConnell, 4 Ohio Dec. (Reprint) 551, 2 Clev. L. Rep. 369; Dixon *v.* Hockady, 36 S. C. 60, 15 S. E. 342.

Removal of lien by invalid forfeiture.— Where a forfeiture of land for non-payment of taxes is invalid, a deed to such land, given by the state, conveys no title, but only removes the state's lien for taxes. Henry *v.* Knod, 74 Ark. 390, 85 S. W. 1130.

31. See the statutes of Virginia and West Virginia. And see Levasser *v.* Washburn, 11 Gratt. (Va.) 572; Hale *v.* Branscum, 10 Gratt. (Va.) 418; Wild *v.* Serpell, 10 Gratt. (Va.) 405; Webb *v.* Ritter, 60 W. Va. 193, 54 S. E. 484; Mills *v.* Henry Oil Co., 57 W. Va. 255, 50 S. E. 157; State *v.* Jackson, 56 W. Va. 558, 49 S. E. 465; Bowman *v.* Dewing, 50 W. Va. 445, 40 S. E. 576; Collins *v.* Sherwood, 50 W. Va. 133, 40 S. E. 603; Kenna *v.* Quarrier, 3 W. Va. 210; Braxton *v.* Rich, 47 Fed. 178 [*affirmed* in 158 U. S. 375, 15 S. Ct. 1006, 39 L. ed. 1022].

32. See the statutes of the several states. And see Smith *v.* Tharp, 17 W. Va. 221, 41 Am. Rep. 688; Miller *v.* Ahrens, 163 Fed. 870; Read *v.* Dingess, 60 Fed. 21, 8 C. C. A. 389.

Privilege only.— Redemption of lands, title to which has become vested in the state, is not a vested right, but is a mere privilege extended by the state, which it may withdraw, or which it may deny before redemption by grant to another than the former owner. State *v.* King, 64 W. Va. 610, 63 S. E. 495.

33. Keith *v.* Freeman, 43 Ark. 296 (infant owners); Bishop *v.* Lovan, 4 B. Mon. (Ky.) 116 (duty of officers to make search for former owner or heirs and offer the privilege of redemption).

Priority between former owners.— The owner of a valid title originating by reason of a first sale of lands by the state, as forfeited to or vested in the state, has, in regard to a subsequent forfeiture or vesting, a right of redemption superior to that of the former owner. State *v.* King, 64 W. Va. 546, 610, 63 S. E. 468, 495.

34. Reynolds *v.* Lieper, 7 Ohio 17; Rich *v.* Braxton, 158 U. S. 375, 15 S. Ct. 1006, 39 L. ed. 1022.

35. People's Bank *v.* Ballowe, 34 La. Ann. 565; Waggoner *v.* Wolf, 28 W. Va. 820, 1 S. E. 25, redemption by former owner inuring to benefit of his grantee.

36. Dixon *v.* Hockady, 36 S. C. 60, 15 S. E. 342; Halstead *v.* Buster, 140 U. S. 273, 11 S. Ct. 782, 35 L. ed. 484.

Necessity of good and valid title.— One seeking redemption must prove that, at the time his land became vested in the state, he held a good and valid title, legal or equitable, superior to that of any other claimant, irrespective of whether that claimant was the state or an individual. State *v.* Garnett, 66 W. Va. 106, 66 S. E. 98; State *v.* Jackson, 56 W. Va. 558, 49 S. E. 465.

The owner of an undivided interest in land forfeited may fully redeem the land, only where it is open to redemption by any other or all the owners under the same title, since redemption must always be of full fee-simple title of so much of the land as is redeemed, and not of mere interests or estates therein. State *v.* King, 64 W. Va. 546, 610, 63 S. E. 468, 495.

37. Hale *v.* Branscum, 10 Gratt (Va.) 418; Wild *v.* Serpell, 10 Gratt. (Va.) 405; Staats *v.* Board, 10 Gratt. (Va.) 400.

In Washington, the two-year period for redemption commences to run from the date of sale, and not from the forfeiture, and the date of sale is construed to mean the day on which the certificate of the county treasurer issues to the purchaser. State *v.* Maple, 16 Wash. 430, 47 Pac. 966.

38. Ebaugh *v.* Mullinax, 40 S. C. 244, 18 S. E. 802; State *v.* King, 64 W. Va. 546, 610, 63 S. E. 468, 495; State *v.* Jackson, 56 W. Va. 558, 49 S. E. 465; Loudon *v.* Spellman, 80 Fed. 592, 26 C. C. A. 13.

taxes due and in arrear, together with interest, penalties, and costs.[39] Although a redemption of this kind is generally to be effected as a matter of office business, it is sometimes provided that the owner shall proceed by petition in equity and obtain a decree;[40] and, where the redemption proceedings are regular and complete, the person redeeming is invested with the paper title to the land.[41]

8. Setting Aside, Release, or Waiver. It is competent for the legislature to release or remit a forfeiture already incurred,[42] or it may be canceled or set aside for good cause shown in a judicial proceeding brought for that purpose.[43] If the theory is that the forfeiture vests a final and complete title in the state, subject to no further equities in the original owner, it would be inconsistent for the state to continue to assess taxes on the lands in the former owner's name after the forfeiture, and such an act would be a waiver of the forfeiture.[44] But if, after the forfeiture, a time is still given to the owner in which to redeem, the assessment and collection of state taxes for several successive years after the forfeiture is no waiver.[45]

9. Sale or Other Disposition of Forfeited Lands.[46] After forfeiture has become complete, the state, in disposing of the lands forfeited, acts as an owner and proprietor, rather than a creditor,[47] and, as it cannot sell that which it does not own,[48] it cannot sell the same land twice, unless, after the first sale, the lands have again become forfeited in the hands of the new owner.[49] To make a valid

39. Neff *v.* Smyth, 111 Ill. 100; Stamposki *v.* Stanley, 109 Ill. 210; Belleville Nail Co. *v.* People, 98 Ill. 399; People *v.* Smith, 94 Ill. 226; People *v.* Gale, 93 Ill. 127; State *v.* King, 47 W. Va. 437, 35 S. E. 30; Tebbetts *v.* Charleston, 33 W. Va. 705, 11 S. E. 23.

A tender of the amount of the taxes and the value of the improvements is impracticable and unnecessary, under the Arkansas statute, when redemption is sought by one claiming an undivided share of the land, and the rights of the parties must be determined upon equitable principles. Loudon *v.* Spellman, 80 Fed. 592, 26 C. C. A. 13.

Payment in behalf of party redeeming.— Payment of taxes in redemption will be presumed, in the absence of anything to the contrary, to have been made by or for someone entitled to redeem. Harman *v.* Stearns, 95 Va. 58, 27 S. E. 601.

40. Mills *v.* Henry Oil Co., 57 W. Va. 255, 50 S. E. 157; Yokum *v.* Fickey, 37 W. Va. 762, 17 S. E. 318; Simmons Creek Coal Co. *v.* Doran, 142 U. S. 417, 12 S. Ct. 239, 35 L. ed. 1063, effect of proceedings where true owner was not made a party or notified.

A decree allowing redemption is prima facie evidence of redemption as to third persons, and cannot be collaterally attacked for error in that the sum paid to redeem was less than the amount actually due (State *v.* Jackson, 56 W. Va. 558, 49 S. E. 465), or that the land was not within the jurisdiction of the court (Cecil *v.* Clark, 44 W. Va. 659, 30 S. E. 216).

41. Mitchell *v.* Bond, 84 Miss. 72, 36 So. 148; State *v.* Jackson, 56 W. Va. 558, 49 S. E. 465, holding that, under a decree declaring the owner redeeming should occupy the position of a purchaser, the owner took, not only the title redeemed, but any other title in the state at the time of the redemption.

42. Fagg *v.* Martin, 53 Ark. 449, 14 S. W. 647; Lewis *v.* Yates, 62 W. Va. 575, 59 S. E. 1073; Van Gunden *v.* Virginia Coal, etc., Co., 52 Fed. 838, 3 C. C. A. 294.

But a county board has no power to set aside a forfeiture of land to the state for the non-payment of taxes. Madison County *v.* Smith, 95 Ill. 328.

43. Madison County *v.* Smith, 95 Ill. 328; Surget *v.* Newman, 43 La. Ann. 873, 9 So. 561; Willard *v.* Redwood County, 22 Minn. 61; Hall *v.* Swann, 39 W. Va. 353, 19 S. E. 509.

44. Clarke *v.* Strickland, 5 Fed. Cas. No. 2,864, 2 Curt. 439, holding also that a subsequent act of the legislature giving further time for the payment of the taxes would likewise be a waiver of the forfeiture.

The mere retention, on the tax books, of the description of the lands, without charging any taxes against it or collecting any from the owner, does not affect a forfeiture incurred during a previous year. Hill *v.* Denton, 74 Ark. 463, 86 S. W. 402.

45. Hodgdon *v.* Wight, 36 Me. 326; Crane *v.* Reeder, 25 Mich. 303; State *v.* Sponaugle, 45 W. Va. 27, 32 S. E. 283, 43 L. R. A. 101.

46. Form, contents, and effect of tax deeds see *supra*, XIII. D.

47. Leathem, etc., Lumber Co. *v.* Nalty, 109 La. 325, 33 So. 354.

48. George *v.* Cole, 109 La. 816, 33 So. 784; State *v.* Garnett, 66 W. Va. 106, 66 S. E. 98; State *v.* Harman, 57 W. Va. 447, 50 S. E. 828.

49. State *v.* Garnett, 66 W. Va. 106, 66 S. E. 98; State *v.* King, 64 W. Va. 610, 63 S. E. 495; State *v.* Jackson, 56 W. Va. 558, 49 S. E. 465, holding, however, that where a senior title is forfeited and transferred to the holder of a junior title, and the junior title subsequently becomes forfeited, a sale by the state will pass both titles to the purchaser.

sale of lands forfeited to the state for non-payment of taxes it is necessary that the list of such lands should be properly authenticated by the proper officer,[50] and that such notice or published advertisement of the intended sale should be given as the statute directs,[51] containing a sufficient description of the property to be sold,[52] and that the sale should be conducted by a duly qualified officer,[53] and should take place only after the expiration of the time, if any, allowed for redemption.[54] In respect to the manner and conduct of the sale and the rights and duties of purchasers, the rules governing ordinary tax-sales will generally be found to apply.[55] Provision is made for the execution of a deed to the purchaser;[56] but the validity of his title will of course depend on the validity of the forfeiture on which the sale was based, which may be established or controverted by competent

50. Muskegon Lumber Co. *v.* Brown, 66 Ark. 539, 51 S. W. 1056; Woodward *v.* Sloan, 27 Ohio St. 592; Hannel *v.* Smith, 15 Ohio 134; Owens *v.* Owens, 25 S. C. 155; Raymond *v.* Longworth, 20 Fed. Cas. No. 11,595, 4 McLean 481 [*affirmed* in 14 How. (U. S.) 76, 14 L. ed. 333].

51. Bell *v.* Taylor, 37 La. Ann. 56; McQuade *v.* Jaffray, 47 Minn. 326, 50 N. W. 233; Coffin *v.* Estes, 32 Minn. 367, 20 N. W. 357; Kipp *v.* Dawson, 31 Minn. 373, 17 N. W. 961, 18 N. W. 96.

52. Bell *v.* Taylor, 37 La. Ann. 56; Hannel *v.* Smith, 15 Ohio 134; Bowman *v.* Dewing, 50 W. Va. 445, 40 S. E. 576.

53. Garner *v.* Anderson, 27 La. Ann. 338; Hoge *v.* Currin, 3 Gratt. (Va.) 201; Wilson *v.* Doe, 7 Leigh (Va.) 22; Chapman *v.* Bennett, 2 Leigh (Va.) 329; Clarke *v.* Strickland, 5 Fed. Cas. No. 2,864, 2 Curt. 439.

54. Kentucky Union Co. *v.* Com., 128 Ky. 610, 108 S. W. 931, 33 Ky. L. Rep. 9, 49, 110 S. W. 398, 33 Ky. L. Rep. 587; Morrill *v.* Scott, 61 Fed. 769. And see Hodgdon *v.* Burleigh, 4 Fed. 111.

55. See, generally, cases cited *infra*, this note.

How much and what land sold see Texarkana Water Co. *v.* State, 62 Ark. 188, 35 S. W. 788; Campbell *v.* Heard, 8 Mo. 519.

Estate or interest sold.—A conveyance of "all the right, title, and interest of the state" in certain lands, by virtue of a forfeiture for the non-payment of taxes, is not authorized by a statute directing a sale and conveyance of such lands. Hodgdon *v.* Burleigh, 4 Fed. 111.

Who may purchase see McFarlane *v.* Grober, 70 Ark. 371, 69 S. W. 56, 91 Am. St. Rep. 84; Whitehead *v.* Curry, 67 Miss. 637, 7 So. 497; Atkins *v.* Lewis, 14 Gratt. (Va.) 30.

For what taxes and charges land is forfeited and sold see Joyner *v.* Harrison, 56 Ark. 276, 19 S. W. 920; State *v.* Labranche, 34 La. Ann. 538; Hoyt *v.* Chapin, 85 Minn. 524, 89 N. W. 850; Louisville, etc., R. Co. *v.* Buford, 73 Miss. 494, 19 So. 584; Winder *v.* Sterling, 7 Ohio 190.

Effect of private sale see Bender *v.* Dugan, 99 Mo. 126, 12 S. W. 795.

Necessity of showing offer to individual bidders before forfeiture to state see Magruder *v.* Esmay, 35 Ohio St. 221.

Payment of bid in state bonds see State *v.* Houston, 38 La. Ann. 533.

Disposition of surplus see Wiant *v.* Hays, 38 W. Va. 681, 18 S. E. 807, 23 L. R. A. 82.

Where less than the whole is to be sold, the judgment ordering the sale should specify what parts are to be sold; a judgment authorizing a commissioner to sell the tract as a whole or in parcels to suit the purchaser is erroneous. Kentucky Union Co. *v.* Com., 128 Ky. 610, 108 S. W. 931, 33 Ky. L. Rep. 9, 49, 110 S. W. 398, 33 Ky. L. Rep. 587.

56. Walton *v.* Hale, 9 Gratt. (Va.) 194; Forqueran *v.* Donnelly, 7 W. Va. 114. The commissioners of forfeited lands may each convey alone the lands which he has declared forfeited, and all need not join in the conveyance; but where one commissioner has sold and received the price, his successor cannot make the conveyance without an order of court. Miller *v.* Williams, 15 Gratt. (Va.) 213.

A duplicate deed may be issued to the purchaser, in case of loss of the original. Thornton *v.* Smith, 88 Ark. 543, 115 S. W. 677.

Time for obtaining deed.—Under the Washington statute a sale certificate is absolutely void after a year has elapsed without a deed obtained and recorded. Barker *v.* Muehler, 55 Wash. 411, 104 Pac. 637.

Record evidence of identity of land.—The Virginia and West Virginia statutes providing for the purchaser having the land bought surveyed and the court, in case it finds the plat, certificate, or report of the surveyor correct, ordering the same recorded, are designed solely to furnish record evidence of the land sold and do not contemplate that the court, in the summary proceeding authorized, shall adjudicate all the questions arising upon delinquent land sales. Nowlin *v.* Burwell, 28 Gratt. (Va.) 883. Such a survey and report is, however, a condition precedent to the giving of a deed, unless the court decides that no survey is necessary, on account of there already being a sufficient description of the land in the records. Glenn *v.* Christian, 96 Va. 679, 33 S. E. 1015; Glenn *v.* Cutshaw, 96 Va. 677, 33 S. E. 1015; Old Dominion Bldg., etc., Assoc. *v.* Sohn, 54 W. Va. 101, 46 S. E. 222; Barton *v.* Gilchrist, 19 W. Va. 223; Forqueran *v.* Donnally, 7 W. Va. 114 [*followed* in State *v.* Harman, 57 W. Va. 447, 50 S. E. 828].

Transfer by operation of statute without deed see Wild *v.* Serpell, 10 Gratt. (Va.) 405.

evidence in an action directly affecting it,[57] or in proceedings by the purchaser to obtain a confirmation of his title, if that is provided for by law.[58]

XVI. LEGACY AND INHERITANCE TAXES.[59]

A. Nature and Power to Impose — 1. NATURE OF SUCCESSION TAXES. An inheritance or legacy tax is not a tax on the property affected, real or personal, but on the privilege of succeeding to the inheritance or of becoming a beneficiary under the will, the privilege of acquiring property by will or by succession being a right created and regulated by the state.[60] Hence the right and power of the

57. *Arkansas.*— Henry *v.* Knod, 74 Ark. 390, 85 S. W. 1130.

Mississippi.— Mitchell *v.* Bond, 84 Miss. 72, 36 So. 148.

Virginia.— Hitchcox *v.* Rawson, 14 Gratt. 526; Smith *v.* Chapman, 10 Gratt. 445.

West Virginia.—Webb *v.* Ritter, 60 W. Va. 193, 54 S. E. 484; Bowman *v.* Dewing, 37 W. Va. 117, 16 S. E. 440; Strader *v.* Goff, 6 W. Va. 257; Twiggs *v.* Chevallie, 4 W. Va. 463.

United States.— Lasher *v.* McCreery, 66 Fed. 834.

See 45 Cent. Dig. tit. "Taxation," § 1672.

Where the title given by the state has failed, there can be no recovery from the county of the portion of the purchase-price which it received, in the absence of express statute for such refunding. Nevada County *v.* Dickey, 68 Ark. 160, 56 S. W. 779.

Valid sale bars dower rights.— Tullis *v.* Pierano, 9 Ohio Cir. Ct. 647, 9 Ohio Cir. Dec. 103.

58. Martin *v.* Hawkins, 62 Ark. 421, 35 S. W. 1104.

59. **Descent and distribution** see DESCENT AND DISTRIBUTION, 14 Cyc. 1.

Internal revenue tax see INTERNAL REVENUE, 22 Cyc. 1592, 1616.

Legacies and devises generally see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1; WILLS.

60. *Colorado.*— *In re* Macky, 46 Colo. 79, 102 Pac. 1075, 23 L. R. A. N. S. 1207.

Connecticut.— Hopkin's Appeal, 77 Conn. 644, 60 Atl. 657.

Iowa.— Lacy *v.* State Treasurer, (1909) 121 N. W. 179; *In re* Stone, 132 Iowa 136, 109 N. W. 455.

Kentucky.— Allen *v.* McElroy, 130 Ky. 111, 113 S. W. 66; Booth *v.* Com., 130 Ky. 88, 113 S. W. 61; Barrett *v.* Continental Realty Co., (1908) 113 S. W. 66, 130 Ky. 109, 114 S. W. 750.

Louisiana.—Kohn's Succession, 115 La. 71, 38 So. 898.

Maryland.— Tyson *v.* State, 28 Md. 577.

Massachusetts.— Minot *v.* Winthrop, 162 Mass. 113, 38 N. E. 512, 26 L. R. A. 259.

Michigan.— *In re* Fox, 154 Mich. 5, 117 N. W. 558.

Montana.— *In re* Touhy, 35 Mont. 431, 90 Pac. 170.

New Jersey.—Nelson *v.* Russell, 76 N. J. L. 27, 69 Atl. 476.

New York.— *In re* Keeney, 194 N. Y. 281, 87 N. E. 428; *In re* Davis, 149 N. Y. 539, 44 N. E. 185; *In re* Swift, 137 N. Y. 77, 32 N. E. 1096, 18 L. R. A. 709; *In re* Cooley, 113 N. Y. App. Div. 388, 98 N. Y. Suppl. 1006 [*reversed* on other grounds in 186 N. Y. 220, 78 N. E. 939]; Matter of Pell, 60 N. Y. App. Div. 286, 70 N. Y. Suppl. 196 [*reversed* on other grounds in 171 N. Y. 48, 63 N. E. 789, 89 Am. St. Rep. 791, 57 L. R. A. 545]; Matter of Wolfe, 15 N. Y. Suppl. 539, 2 Connoly Surr. 600; Matter of Swift, 16 N. Y. Suppl. 193, 2 Connoly Surr. 644.

Ohio.— State *v.* Ferris, 53 Ohio St. 314, 41 N. E. 579, 30 L. R. A. 218.

Utah.— See Dixon *v.* Ricketts, 26 Utah 215, 72 Pac. 947.

Virginia.— Eyre *v.* Jacob, 14 Gratt. 422, 73 Am. Dec. 367.

Wisconsin.— Beals *v.* State, 139 Wis. 544, 121 N. W. 347; Nunnemacher *v.* State, 129 Wis. 190, 108 N. W. 627, holding, however, that the taxation of inheritances is justifiable, not on the ground that the right to inherit is a creation of the law which can be given or withheld on such terms as the legislature may see fit to impose, but under the power reasonably to regulate and tax transfers of property. See also Black *v.* State, 113 Wis. 205, 89 N. W. 522, 90 Am. St. Rep. 853.

United States.— Plummer *v.* Coler, 178 U. S. 115, 20 S. Ct. 829, 44 L. ed. 998 [*affirming* 30 Misc. 19, 62 N. Y. Suppl. 1024]; U. S. *v.* Perkins, 163 U. S. 625, 16 S. Ct. 1073, 41 L. ed. 287; Scholey *v.* Rew, 23 Wall. 331, 23 L. ed. 99.

See 45 Cent. Dig. tit. "Taxation," § 1673.

A "death duty" is an exaction by the state, to be collected from the property left by a deceased person while in its custody, prescribed upon the occasion of his death, and the consequent devolution of his property, by force of its laws. The particular name given the duty in any statute — as probate, legacy, succession, transfer, or estate tax or duty — depends for its meaning upon the terms of that statute. A tax may be laid upon property immediately after it has devolved upon any person by will or inheritance, so as to be not easily distinguishable from a form of taxation sometimes called a "legacy tax." Hopkins' Appeal, 77 Conn. 644, 60 Atl. 657, 659.

The collateral inheritance tax is a specific tax and not *ad valorem*, notwithstanding it is based on the value of the property inherited. Union Trust Co. *v.* Wayne Prob. Judge, 125 Mich. 487, 84 N. W. 1101.

"Probate duty" see 32 Cyc. 404.

"A 'succession tax' as the words indicate and the history of such taxes clearly establishes, is an excise or duty upon the

legislature to impose burdens in the form of taxes on this privilege is not restricted by the constitutional provisions relating to the taxation of property as such.[61] And for the same reason the tax may be imposed on the transfer, by bequest or under the intestate laws, of securities which are not within the taxing power of the state, considered as property in themselves, such as United States bonds.[62]

2. Constitutionality of Statutes[63] — a. In General. The constitutional validity of legacy and inheritance taxes has generally been sustained both in principle and in detail.[64] The power to tax is incident to the legislative power, so

right of a person or corporation to receive property by devise or inheritance from another under the regulation of the State. Whenever properly laid, this is its distinguishing feature in contradistinction from a property tax." The mere calling of such a tax a "succession tax" does not make it different from an ordinary tax upon property, when the effect and operation are identical with an ordinary property tax. State *v.* Switzler, 143 Mo. 287, 328, 45 S. W. 245, 65 Am. St. Rep. 653, 40 L. R. A. 280. "The succession tax provided for, as defined by the terms of the Act in force when the testatrix died, is a death duty prescribed in view of the death of a domiciled resident of this State whose land within this State and whose personal property, wherever situate, is governed as to its disposition, distribution and succession, by the laws of this State, and of the death of a non-resident owning land within this State which is governed as to its distribution and succession by the same law; prescribed in respect to the beneficial interest which thus by force of our laws devolves upon all beneficiaries of the decedent; and fixed as to amount by a percentage upon the value of the whole interest thus devolving on the decedent's beneficial successors, based upon a valuation previously made of all the decedent's property inventoried by the administrator." Hopkins' Appeal, 77 Conn. 644, 649, 60 Atl. 657.

"The transfer tax . . . must be regarded as a tax, not upon the money which is the subject of the legacy, but upon the passing of that money under the will in possession or enjoyment." Matter of Wolfe, 89 N. Y. App. Div. 349, 350, 85 N. Y. Suppl. 949 [*affirmed* in 179 N. Y. 599, 72 N. E. 1152].

Such taxes are very ancient in origin, and have been long in use, especially in European states. The states of the Union have been singularly slow in adopting such laws, but the number of states to adopt and enforce them is increasing year by year. Black *v.* State, 113 Wis. 205, 210, 89 N. W. 522, 90 Am. St. Rep. 853.

61. *Kentucky.*— Allen *v.* McElroy, 130 Ky. 111, 113 S. W. 66; Booth *v.* Com., 130 Ky. 88, 113 S. W. 61; Barrett *v.* Continental Realty Co., (1908) 113 S. W. 66, 130 Ky. 109, 114 S. W. 750.

Michigan.— *In re* Fox, 154 Mich. 5, 117 N. W. 558.

Montana.— *In re* Touhy, 35 Mont. 431, 90 Pac. 170.

New Hampshire.— Thompson *v.* Kidder, 74 N. H. 89, 65 Atl. 392.

North Carolina.— *In re* Morris, 138 N. C. 259, 50 S. E. 682; Pullen *v.* Wake County, 66 N. C. 361.

Ohio.— State *v.* Guilbert, 70 Ohio St. 229, 71 N. E. 636.

In Missouri it is held that an excise upon the right to receive property by devise or inheritance is a "tax" within the meaning of the constitutional provision that taxes may be levied and collected for public purposes only. State *v.* Switzler, 143 Mo. 287, 45 S. W. 245, 65 Am. St. Rep. 653, 40 L. R. A. 280.

62. Levy's Succession, 115 La. 377, 39 So. 37, 8 L. R. A. N. S. 1180; Kohn's Succession, 115 La. 71, 38 So. 898 (state and municipal bonds); *In re* Sherman, 153 N. Y. 1, 46 N. E. 1032; Matter of Whiting, 2 N. Y. App. Div. 590, 38 N. Y. Suppl. 131 [*modified* in 150 N. Y. 27, 44 N. E. 715, 55 Am. St. Rep. 640, 34 L. R. A. 232]; Matter of Carver, 4 Misc. (N. Y.) 592, 25 N. Y. Suppl. 991 [*affirmed* in 28 N. Y. Suppl. 1126]; Matter of Tuigg, 15 N. Y. Suppl. 548, 2 Connoly Surr. 633; Matter of Howard, 5 Dem. Surr. (N. Y.) 483; Strode *v.* Com., 52 Pa. St. 181; Plummer *v.* Coler, 178 U. S. 115, 20 S. Ct. 829, 44 L. ed. 998 [*affirming* 30 Misc. (N. Y.) 19, 62 N. Y. Suppl. 1024] (holding that the impairment of the borrowing power of the government as the remote effect of a state statute imposing a tax upon the transfer of a decedent's property, when the statute is applied to property consisting of United States bonds, is not sufficient to render the statute unconstitutional); Wallace *v.* Myers, 38 Fed. 184, 4 L. R. A. 171. See also Matter of Schermerhorn, 50 Misc. (N. Y.) 233, 100 N. Y. Suppl. 480. But *compare* Matter of Coogan, 27 Misc. (N. Y.) 563, 59 N. Y. Suppl. 111.

63. Constitutional law generally see Constitutional Law, 8 Cyc. 695 *et seq.*

64. *Connecticut.*— Nettleton's Appeal, 76 Conn. 235, 56 Atl. 565.

Illinois.— Walker *v.* People, 192 Ill. 106, 61 N. E. 489.

Louisiana.— Stauffer's Succession, 119 La. 66, 43 So. 928.

Minnesota.— State *v.* Vance, 97 Minn. 532, 106 N. W. 98; State *v.* Bazille, 97 Minn. 11, 106 N. W. 93, 6 L. R. A. N. S. 732.

New York.— *In re* Delano, 176 N. Y. 486, 68 N. E. 871, 64 L. R. A. 279; Matter of Kimberly, 27 N. Y. App. Div. 470, 50 N. Y. Suppl. 586.

Pennsylvania.— Lacey's Estate, 19 Pa. Co. Ct. 431. *Compare In re* Cope, 29 Pittsb. Leg. J. N. S. 379 [*affirmed* in 191 Pa. St. 1, 43 Atl. 79, 71 Am. St. Rep. 749, 45 L. R. A. 316].

that to justify the imposition of an inheritance tax by the legislature it is sufficient that the constitution does not prohibit it, and it is not essential that it shall be expressly authorized by the constitution.[65] Any provisions of the state constitution specifically applicable to this class of taxes must of course be obeyed;[66] but the restrictions on the power of the legislature with respect to the taxation of property generally have little or no application to succession taxes.[67] A tax of this kind has been held not to be within the constitutional provision that every law which imposes a tax shall distinctly state the tax and the object to which it is to be applied.[68] Statutory provisions for the enforcement of such a tax, through the agency of the probate courts, have generally been sustained.[69]

b. Rule of Equality and Uniformity. A statute imposing taxes on inheritances, legacies, and successions is not within the constitutional rule of equality and uniformity, because it lays the tax not on property, but on the privilege of succeeding to the ownership of real or personal estate by will or descent.[70] For this

Virginia.— Eyre *v.* Jacob, 14 Gratt. 422, 73 Am. Dec. 367.

Wisconsin.— State *v.* Pabst, 139 Wis. 561, 121 N. W. 351; Beals *v.* State, 139 Wis. 544, 121 N. W. 347; Nunnemacher *v.* State, 129 Wis. 190, 108 N. W. 627.

See 45 Cent. Dig. tit. "Taxation," § 1674. And see CONSTITUTIONAL LAW, 8 Cyc. 1072.

A man's property is subject to taxation while in the custody of the law after his death in a similar manner as before, which may create a lien upon the property in whosesoever hands it may come. Hopkins' Appeal, 77 Conn. 644, 60 Atl. 657, 659.

Inheritance tax as tax on "civil suits" within constitution of Wisconsin see State *v.* Mann, 76 Wis. 469, 45 N. W. 526, 46 N. W. 51.

Inheritance as a commodity.— Within the meaning of the constitution of Massachusetts, authorizing the imposition of excise taxes on "commodities," the privilege of transmitting and receiving property, on the death of the owner, by will or descent, is a commodity. Minot *v.* Winthrop, 162 Mass. 113, 38 N. E. 512, 26 L. R. A. 259.

65. Allen *v.* McElroy, 130 Ky. 111, 113 S. W. 66; Booth *v.* Com., 130 Ky. 88, 113 S. W. 61; Barrett *v.* Continental Realty Co., (Ky. 1908), 113 S. W. 66, 130 Ky. 109, 114 S. W. 750.

The enumeration of subjects of taxation in the constitution is not exclusive, and the legislature may provide for the taxation of inheritances. State *v.* Vinsonhaler, 74 Nebr. 675, 105 N. W. 472.

66. Union Trust Co. *v.* Wayne Prob. Judge, 125 Mich. 487, 84 N. W. 1101 (application of taxes collected); State *v.* Harvey, 90 Minn. 180, 95 N. W. 764 (limitation on rate of taxation).

67. See *supra*, XVI, A, 1.

68. Union Trust Co. *v.* Wayne Prob. Judge, 125 Mich. 487, 84 N. W. 1101; *In re* McPherson, 104 N. Y. 306, 10 N. E. 685, 58 Am. Rep. 502. But *compare* Chambe *v.* Durfee, 100 Mich. 112, 58 N. W. 661.

69. Union Trust Co. *v.* Wayne Prob. Judge, 125 Mich. 487, 84 N. W. 1101; *In re* McPherson, 104 N. Y. 306, 10 N. E. 685, 58 Am. Rep. 502. See also Morgan *v.* Warner, 45 N. Y. App. Div. 424, 60 N. Y. Suppl. 963 [*affirmed* in 162 N. Y. 612, 57 N. E. 1118].

70. *California.*— *In re* Campbell, 143 Cal. 623, 77 Pac. 674.

Colorado.— *In re* Magnes, 32 Colo. 527, 77 Pac. 853; *In re* House Bill No. 122, 23 Colo. 492, 48 Pac. 535.

Illinois.—*In re* Speed, 216 Ill. 23, 74 N. E. 809, 108 Am. St. Rep. 189.

Maine.— State *v.* Hamlin, 86 Me. 495, 30 Atl. 76, 41 Am. St. Rep. 569, 25 L. R. A. 632.

Maryland.— Tyson *v.* State, 28 Md. 577.

Michigan.— Union Trust Co. *v.* Wayne Prob. Judge, 125 Mich. 487, 84 N. W. 1101; Chambe *v.* Wayne County Prob. Judge, 100 Mich. 112, 58 N. W. 661.

Missouri.— State *v.* Henderson, 160 Mo. 190, 60 S. W. 1093. But see State *v.* Switzler, 143 Mo. 287, 45 S. W. 245, 65 Am. St. Rep. 653, 40 L. R. A. 280.

Montana.—Gelsthorpe *v.* Furnell, 20 Mont. 299, 51 Pac. 267, 39 L. R. A. 170.

Nebraska.— State *v.* Vinsonhaler, 74 Nebr. 675, 105 N. W. 472.

New Hampshire.— Thompson *v.* Kidder, 74 N. H. 89, 65 Atl. 392. *Compare* Curry *v.* Spencer, 61 N. H. 624, 60 Am. Rep. 337.

New York.— *In re* Keeney, 194 N. Y. 281, 87 N. E. 428; *In re* Brez, 172 N. Y. 609, 64 N. E. 958.

North Carolina.— *In re* Morris, 138 N. C. 259, 50 S. E. 682.

Ohio.— Hagerty *v.* State, 55 Ohio St. 613, 45 N. E. 1046; State *v.* Ferris, 53 Ohio St. 314, 41 N. E. 579, 30 L. R. A. 218; Dyer *v.* Hagerty, 12 Ohio Cir. Ct. 606, 5 Ohio Cir. Dec. 701.

Pennsylvania.— Com. *v.* Randall, 225 Pa. St. 197, 73 Atl. 1109.

Utah.— Dixon *v.* Ricketts, 26 Utah 215, 72 Pac. 947.

Virginia.— Schoolfield *v.* Lynchburg, 78 Va. 366; Eyre *v.* Jacob, 14 Gratt. 422, 73 Am. Dec. 367.

Wisconsin.— State *v.* Pabst, 139 Wis. 561, 121 N. W. 351; Beals *v.* State, 139 Wis. 544, 121 N. W. 347; Nunnemacher *v.* State, 129 Wis. 190, 108 N. W. 627.

In Minnesota Const. art. 9, § 1, provides that "all taxes to be raised in this state shall be as nearly equal as may be . . . provided . . . that there may be by law levied

reason such a statute is not unconstitutional because it exempts from its operation estates or inheritances below a certain minimum value,[71] provided the exemption is not so excessive as to be entirely unreasonable,[72] or because it discriminates between direct and collateral heirs, by exempting the former altogether or by imposing a higher tax upon the latter than upon the former,[73] for it is said that, even if the rule of uniformity applies, the distinction between kindred in the direct line and collateral heirs is a natural and reasonable one and there is no inequality between members of the same class.[74]

3. Construction and Operation of Statutes[75] — a. In General. An inheritance tax law should be construed strictly against the government and in favor of the taxpayer, and a doubt as to the taxability of a particular fund should be resolved in favor of the citizen.[76] Yet the construction must not be so narrow or technical as to defeat the purpose of the legislature, but such as to effectuate its proper and legitimate objects.[77] And to this end invalid clauses or limitations should be stricken out, leaving the remainder of the statute in force, if that can be done.[78] The various provisions of the act should be so interpreted as to make

and collected a tax upon all inheritances, devises, bequests, legacies and gifts of every kind and description above a fixed and specified sum, of any and all natural persons and corporations. Such tax above such exempted sum may be uniform, or it may be graded or progressive, but shall not exceed a maximum tax of five per cent." Under this constitutional provision it was held that Laws (1897), c. 293, which attempts to lay an inheritance tax, is unconstitutional for the reasons: (a) It excludes from its operation real property, and lays the tax upon inheritances of personal property alone; (b) it exempts from its operation persons and corporations whose property is exempt by law from taxation; (c) it allows a larger exemption to lineal heirs than to collaterals, and does not lay the tax on the excess of the value of the property received above a uniform exempted sum. Drew *v.* Tifft, 79 Minn. 175, 81 N. W. 839, 47 L. R. A. 525. The statute was held, however, not to be unconstitutional because it taxed collateral heirs and distributees at a higher rate than lineals, for the constitution expressly authorized the graduation of the tax. Drew *v.* Tifft, 79 Minn. 175, 81 N. W. 839, 47 L. R. A. 525. See also State *v.* Vance, 97 Minn. 532, 106 N. W. 98; State *v.* Bazille, 97 Minn. 11, 106 N. W. 93, 6 L. R. A. N. S. 732; State *v.* Gorman, 40 Minn. 232, 41 N. W. 948, 2 L. R. A. 701.

71. *California.*— *In re* Wilmerding, 117 Cal. 281, 49 Pac. 181.

Montana.—Gelsthorpe *v.* Furnell, 20 Mont. 299, 51 Pac. 267, 39 L. R. A. 170.

Ohio.— State *v.* Guilbert, 70 Ohio St. 229, 71 N. E. 636. But *compare* State *v.* Ferris, 9 Ohio Cir. Ct. 298, 6 Ohio Cir. Dec. 158.

Pennsylvania.— Mixter's Estate, 10 Pa. Co. Ct. 409. But *compare In re* Cope, 191 Pa. St. 1, 43 Atl. 79, 71 Am. St. Rep. 749, 45 L. R. A. 316; Blight's Estate, 6 Pa. Dist. 459; Portuondo's Estate, 20 Pa. Co. Ct. 209.

Tennessee.— State *v.* Alston, 94 Tenn. 674, 30 S. W. 750, 28 L. R. A. 178.

Vermont.— *In re* Hickok, 78 Vt. 259, 62 Atl. 724.

72. Minot *v.* Winthrop, 162 Mass. 113, 38 N. E. 512, 26 L. R. A. 259, holding that an excise tax on inheritances is not so clearly unreasonable, by reason of exempting estates under $10,000, as to render it unconstitutional. But *compare* State *v.* Ferris, 9 Ohio Cir. Ct. 298, 6 Ohio Cir. Dec. 158, holding void an inheritance tax law which exempted property to the amount of twenty thousand dollars.

73. *California.*— *In re* Campbell, 143 Cal. 623, 77 Pac. 674; *In re* Wilmerding, 117 Cal 281, 49 Pac. 181.

Illinois.— Kochersperger *v.* Drake, 167 Ill. 122, 47 N. E. 321, 41 L. R. A. 446.

Massachusetts.— Minot *v.* Winthrop, 162 Mass. 113, 38 N. E. 512, 26 L. R. A. 259.

Missouri.— State *v.* Henderson, 160 Mo. 190, 60 S. W. 1093.

Tennessee.— State *v.* Alston, 94 Tenn. 674, 30 S. W. 750, 28 L. R. A. 178.

Washington.— State *v.* Clark, 30 Wash. 439, 71 Pac. 20.

Wisconsin.— Beals *v.* State, 139 Wis. 544, 121 N. W. 347.

Contra.— State *v.* Bazille, 87 Minn. 500, 92 N. W. 415, 94 Am. St. Rep. 718.

74. *In re* Campbell, 143 Cal. 623, 77 Pac. 674; State *v.* Clark, 30 Wash. 439, 71 Pac. 20.

75. **Statutory construction** generally see Statutes, 36 Cyc. 1102.

76. People *v.* Koenig, 37 Colo. 283, 85 Pac. 1129; *In re* Harbeck, 161 N. Y. 211, 55 N. E. 850; Matter of Kimberly, 27 N. Y. App. Div. 470, 50 N. Y. Suppl. 586. *Compare* State *v.* Vance, 97 Minn. 532, 106 N. W. 98; State *v.* Bazille, 97 Minn. 11, 106 N. W. 93, 6 L. R. A. N. S. 732.

77. *Louisiana.*— D'Auqin's Succession, 9 La. Ann. 400.

Missouri.— State *v.* Switzler, 143 Mo. 287, 45 S. W. 245, 65 Am. St. Rep. 653, 40 L. R. A. 280.

New York.— People *v.* Mensching, 187 N. Y. 8, 79 N. E. 884.

Pennsylvania.— Cooper *v.* Com., 5 Pa. Co. Ct. 271.

Utah.— Dixon *v.* Ricketts, 26 Utah 215, 72 Pac. 947.

78. *In re* Stanford, 126 Cal. 112, 54 Pac. 259, 58 Pac. 462, 45 L. R. A. 788.

it a harmonious whole,[79] and so as to make it reasonable and free from unjust discrimination.[80]

b. Retroactive Operation. Generally a right of inheritance, or of taking an estate, interest, legacy, or devise becomes fixed at the death of the testator or intestate, and is not taxable under a law enacted after that event.[81] In the case of an estate in remainder or reversion which vests at the time of the testator's death, although the possession is postponed, the transfer or succession, which is the subject of the tax, rather than the estate itself, is referred to the death of the testator, and if not taxable under any law then existing, cannot be taxed under a statute enacted thereafter, although before the vesting of the estate in possession.[82] So even though a will confers a power of appointment, subsequent legislation cannot authorize a tax upon the transfer of property effected solely by means of the will, with no aid from the power of appointment.[83] But it is competent for the legislature to provide for the taxing of interests when they shall come into possession or enjoyment, by the exercise of a power of appointment, although

79. State *v.* Vance, 97 Minn. 532, 106 N. W. 98; State *v.* Bazille, 97 Minn. 11, 106 N. W. 93, 6 L. R. A. N. S. 732.

80. Beals *v.* State, 139 Wis. 544, 121 N. W. 347.

81. *Illinois.*— *In re* Benton, 234 Ill. 366, 84 N. E. 1026, 18 L. R. A. 458; Connell *v.* Crosby, 210 Ill. 380, 71 N. E. 350; Provident Hospital, etc., Assoc. *v.* People, 198 Ill. 495, 64 N. E. 1031.

Iowa.— Gilbertson *v.* Ballard, 125 Iowa 420, 101 N. W. 108; Herriott *v.* Potter, 115 Iowa 648, 89 N. W. 91.

Kentucky.— Winn *v.* Schenck, 110 S. W. 827, 33 Ky. L. Rep. 615. See also Com. *v.* Stoll, 132 Ky. 234, 114 S. W. 279, (1909) 116 S. W. 687.

Louisiana.— Westfeld's Succession, 122 La. 836, 48 So. 281; Deyraud's Succession, 9 Rob. 357; Oyon's Succession, 6 Rob. 504, 41 Am. Dec. 274.

Maine.— *In re* Collateral Inheritance Tax, 88 Me. 587, 34 Atl. 530.

Massachusetts.— Howe *v.* Howe, 179 Mass. 546, 61 N. E. 225, 55 L. R. A. 626.

Michigan.— Miller *v.* McLaughlin, 141 Mich. 425, 104 N. W. 777.

Minnesota.— State *v.* Washington County Prob. Ct., 102 Minn. 268, 113 N. W. 888.

Missouri.— State *v.* Switzler, 143 Mo. 287, 45 S. W. 245, 65 Am. St. Rep. 653, 40 L. R. A. 280.

New Hampshire.— Carter *v.* Whitcomb, 74 N. H. 482, 69 Atl. 779, 17 L. R. A. N. S. 733.

New York.—*In re* Haggerty, 194 N. Y. 550, 87 N. E. 1120; *In re* Ripley, 192 N. Y. 536, 574, 84 N. E. 1120 [*affirming* 122 N. Y. App. Div. 419, 106 N. Y. Suppl. 844]; *In re* Kidd, 188 N. Y. 274, 80 N. E. 924; *In re* Backhouse, 185 N. Y. 544, 77 N. E. 1181 [*affirming* 110 N. Y. App. Div. 737, 96 N. Y. Suppl. 466]; *In re* Lansing, 182 N. Y. 238, 74 N. E. 882; *In re* Pettit, 171 N. Y. 654, 63 N. E. 1121 [*affirming* 68 N. Y. App. Div. 67, 74 N. Y. Suppl. 450]; *In re* Sloane, 154 N. Y. 109, 47 N. E. 978; Matter of Chapman, 133 N. Y. App. Div. 337, 117 N. Y. Suppl. 679; Matter of Vanderbilt, 68 N. Y. App. Div. 27, 74 N. Y. Suppl. 450 [*modified* in 172 N. Y. 69, 64 N. E. 782]; Matter of Brooks, 6 Dem. Surr. 165, 20 N. Y. St. 149.

Ohio.— Eury *v.* State, 72 Ohio St. 448, 74 N. E. 650.

Pennsylvania.— Henise's Estate, 12 York Leg. Rec. 164.

Tennessee.— Zickler *v.* Union Bank, etc., Co., 104 Tenn. 277, 57 S. W. 341.

See 45 Cent. Dig. tit. "Taxation," § 1676.

As to property transmitted by a contract, testamentary in character, Iowa Code, § 1467, imposing a collateral inheritance tax is effective where the transferrer of the property died after the enactment of the statute, although the contract was made prior to such enactment. Lacy *v.* State Treasurer, (Iowa 1909) 121 N. W. 179.

82. *In re* Craig, 181 N. Y. 551, 74 N. E. 1116 [*affirming* 97 N. Y. App. Div. 289, 89 N. Y. Suppl. 971]; *In re* Pell, 171 N. Y. 48, 63 N. E. 789, 89 Am. St. Rep. 791, 57 L. R. A. 540; Matter of Hitchins, 101 N. Y. App. Div. 612, 92 N. Y. Suppl. 1128 [*affirmed* in 181 N. Y. 553, 74 N. E. 1118]; Matter of Langdon, 11 N. Y. App. Div. 220, 43 N. Y. Suppl. 419 [*affirmed* in 153 N. Y. 6, 46 N. E. 1034]; Matter of Travis, 19 Misc. (N. Y.) 393, 44 N. Y. Suppl. 349. *Compare* Ring *v.* Jarman, L. R. 14 Eq. 357, 41 L. J. Ch. 535, 26 L. T. Rep. N. S. 690, 20 Wkly. Rep. 744; *In re* Lovelace, 4 De G. & J. 340, 5 Jur. N. S. 694, 28 L. J. Ch. 489, 7 Wkly. Rep. 575, 61 Eng. Ch. 267, 45 Eng. Reprint 131; Wilcox *v.* Smith, 4 Drew. 40, 3 Jur. N. S. 604, 26 L. J. Ch. 596, 5 Wkly. Rep. 667, 62 Eng. Reprint 16; Atty.-Gen. *v.* Gardner, 1 H. & C. 639, 9 Jur. N. S. 281, 32 L. J. Exch. 84, 7 L. T. Rep. N. S. 682, 11 Wkly. Rep. 378; Atty.-Gen. *v.* Middleton, 3 H. & N. 125; Atty.-Gen. *v.* Fitzjohn, 2 H. & N. 465, 27 L. J. Exch. 79, 5 Wkly. Rep. 876.

83. *In re* Haggerty, 194 N. Y. 550, 87 N. E. 1120 [*affirming* 128 N. Y. App. Div. 479, 112 N. Y. Suppl. 1017]; *In re* Ripley, 192 N. Y. 536, 84 N. E. 574, 1120 [*affirming* 122 N. Y. App. Div. 419, 106 N. Y. Suppl. 844]; *In re* Backhouse, 185 N. Y. 544, 77 N. E. 1181 [*affirming* 110 N. Y. App. Div. 737, 96 N. Y. Suppl. 466]; *In re* Lansing, 182 N. Y. 238, 74 N. E. 882; *In re* Pell, 171 N. Y. 48, 63 N. E. 789, 89 Am. St. Rep. 791, 57 L. R. A. 540. See also *In re* Kidd, 188 N. Y. 274, 80 N. E. 924.

they were not taxable at the death of the donor of the power.[84] Succession statutes have also sometimes been made to apply to the property of persons dying before their enactment, in so far as the same might remain undistributed or in the hands of executors or under the control of the probate court at the time of the enactment of the statute; and their validity has generally been sustained.[85]

4. Amendment and Repeal of Statutes. Legacy or inheritance taxes accrued and due under an existing statute are not remitted or released by its subsequent repeal.[86] As the statutes imposing taxes of this kind have been so often revised, amended, repealed, and reënacted in the different states, it seems important to remark that a law of this character is to be regarded as repealed by a later enactment which purports to be a revision of the entire subject and to provide a new and complete system;[87] but not so where the later statute merely contains new provisions, not necessarily inconsistent with those already existing but capable of being read into the existing statute as amendments to it.[88]

5. Effect of Treaty Provisions. Since a treaty between the United States and a foreign government is the "supreme law of the land," it may operate as a limitation upon the power of a state to impose inheritance taxes.[89] Treaties,

84. *In re* Delano, 176 N. Y. 486, 68 N. E. 871, 64 L. R. A. 279; Matter of Hosack, 39 Misc. (N. Y.) 130, 78 N. Y. Suppl. 983. See also *In re* Kidd, 188 N. Y. 274, 80 N. E. 924.

In New York prior to the enactment of subd. 6 of § 22, of the New York Tax Law (Laws (1909), c. 62, § 220) bequests in the exercise of a power by will, executed after the enactment of the Transfer Tax Act but created by a will which took effect before the enactment of any taxable transfer law were not subject to the transfer tax, since the source of the title was the will creating the power, into which the names of the appointees must be read, and their right of succession vested, not at the time of the execution of the power but at the time the will creating it went into effect. *In re* Harbeck, 161 N. Y. 211, 55 N. E. 850 [*reversing* 43 N. Y. App. Div. 188, 59 N. Y. Suppl. 362]. But it has been held that under subd. 6 of § 220 of the New York Tax Law (Laws (1909), c. 62, § 220) a transfer tax is imposed upon the exercise, by a last will and testament, of a power of appointment derived from a deed or will executed and taking effect before the passage of any tax transfer statute and the statutory provision as thus construed has been held not to be violative of any constitutional provision, state or federal. *In re* Delano, 176 N. Y. 486, 68 N. E. 871, 64 L. R. A. 279 [*affirmed* in 205 U. S. 466, 27 S. Ct. 550, 51 L. ed. 882]; *In re* Dows, 167 N. Y. 227, 60 N. E. 439, 88 Am. St. Rep. 508, 52 L. R. A. 433 [*affirmed* in 183 U. S. 278, 22 S. Ct. 213, 46 L. ed. 196]; Matter of Vanderbilt, 50 N. Y. App. Div. 246, 63 N. Y. Suppl. 1079 [*affirmed* in 163 N. Y. 597, 57 N. E. 1127].

85. *Iowa.*— Montgomery *v.* Gilbertson, 134 Iowa 291, 111 N. W. 964, 10 L. R. A. N. S. 986; Ferry *v.* Campbell, 110 Iowa 290, 81 N. W. 604, 50 L. R. A. 92.

Louisiana.— Stauffer's Succession, 119 La. 66, 43 So. 928.

Ohio.— Hostetter *v.* State, 26 Ohio Cir. Ct. 702.

Pennsylvania.— *In re* Short, 16 Pa. St. 63. *Contra*, Portuondo's Estate, 20 Pa. Co. Ct. 209.

United States.—Carpenter *v.* Pennsylvania, 17 How. 456, 15 L. ed. 127.

86. *California.*— *In re* Bowen, (1908) 94 Pac. 1055; Trippet *v.* State, 149 Cal. 521, 86 Pac. 1084, 8 L. R. A. N. S. 1210; *In re* Lander, 6 Cal. App. 744, 93 Pac. 202.

Louisiana.— Pritchard's Succession, 118 La. 883, 43 So. 537; Arnaud *v.* His Executor, 3 La. 336.

New Jersey.— Hoyt *v.* Hancock, 65 N. J. Eq. 688, 55 Atl. 1004.

New York.— *In re* Prime, 136 N. Y. 347, 32 N. E. 1091, 8 L. R. A. 713; *In re* Moore, 90 Hun 162, 35 N. Y. Suppl. 782; Matter of Arnett, 49 Hun 599, 2 N. Y. Suppl. 428.

Ohio.— Friend *v.* Levy, 76 Ohio St. 26, 80 N. E. 1036.

Virginia.— Eyre *v.* Jacob, 14 Gratt. 422, 73 Am. Dec. 367.

United States.— Tilghman *v.* Eidman, 131 Fed. 651 [*affirmed* in 136 Fed. 141, 69 C. C. A. 139 (*affirmed* in 203 U. S. 580, 27 S. Ct. 779, 51 L. ed. 326)].

See 45 Cent. Dig. tit. "Taxation," § 1677.

87. San Diego County *v.* Schwartz, 145 Cal. 49, 78 Pac. 231; Matter of Sondheim, 32 Misc. (N. Y.) 296, 66 N. Y. Suppl. 726 [*affirmed* in 69 N. Y. App. Div. 5, 74 N. Y. Suppl. 510]; Zickler *v.* Union Bank, etc., Co., 104 Tenn. 277, 57 S. W. 341; Fox *v.* Com., 16 Gratt. (Va.) 1. But see Matter of Jones, 54 Misc. (N. Y.) 202, 105 N. Y. Suppl. 932.

88. *In re* Howe, 176 N. Y. 570, 68 N. E. 1118; Miller *v.* Tracy, 93 N. Y. App. Div. 27, 86 N. Y. Suppl. 1024.

89. U. S. Const. art. 6; Sala's Succession, 50 La. Ann. 1009, 24 So. 674; Dufour's Succession, 10 La. Ann. 391.

For example if a treaty provides that the subjects of a given foreign power shall not be required to pay any other taxes than those imposed on citizens of the United States in like cases, its effect is to suspend the operation of a state statute imposing succession taxes on foreign heirs or legatees exclusively or at a higher rate than in the

however, are not generally retrospective, and such a provision does not apply in the case of a succession vested by the death of the testator before the signing of the treaty.[90]

B. Property and Transfers Liable to Tax — 1. In General. The property subject to an inheritance tax is not necessarily the same as that assessable for purposes of general taxation;[91] but it must of course be property subject to the jurisdiction of the taxing state,[92] and such as belonged to the decedent and was available to him at the time of his death,[93] and not in the nature of a gratuity or death benefit payable only to his heirs or next of kin.[94] Again, unless the statute otherwise directs, the tax is imposed on, or measured by, the value of the estate as it stood at the time of the death, and not including income or increase in value thereafter obtained or accruing.[95]

2. Nature of Property. There is no reason why real estate passing by devise or inheritance should not be subject to the tax, and usually the state statutes so provide.[96] If, however, the circumstances are such that the transfer regarded as a transfer of real estate falls within some exemption of the statute no tax can be imposed,[97] unless, at least, the property is to be treated as personal estate on the theory of equitable conversion.[98] A fund bequeathed to executors or trustees

case of its own citizens. Sala's Succession, 50 La. Ann. 1009, 24 So. 674; Rixner's Succession, 48 La. Ann. 552, 19 So. 597, 32 L. R. A. 177; Crusius' Succession, 19 La. Ann. 369; Amat's Succession, 18 La. Ann. 403; Frederickson *v.* Louisiana, 23 How. (U. S.) 445, 16 L. ed. 577. *Compare* Matter of Strobel, 5 N. Y. App. Div. 621, 39 N. Y. Suppl. 169.

90. Schaffer's Succession, 13 La. Ann. 113; Prevost's Succession, 12 La. Ann. 577 [*affirmed* in 19 How. (U. S.) 1, 15 L. ed. 572].

91. *In re* Stanton, 142 Mich. 491, 105 N. W. 1122; *In re* Knoedler's Estate, 140 N. Y. 377, 35 N. E. 601. See also Cooper *v.* Com., 5 Pa. Co. Ct. 271.

Property otherwise taxed.— In Louisiana the inheritance tax is not enforced against property which has previously borne its just proportion of taxes. Succession of Stauffer, 119 La. 66, 43 So. 928 (interest in partnership); Abadie's Succession, 118 La. 708, 43 So. 306 (inheritance consisting in part of property already taxed).

Exempt property.— In Becker's Succession, 118 La. 1056, 43 So. 701, it was held that an inheritance tax is due on a legacy not paid from the proceeds of exempt property, but not due on a legacy necessarily paid from the proceeds of exempt property.

United States bonds and other non-taxable securities see *supra*, XVI, A, 1.

92. *In re* Sherman, 153 N. Y. 1, 46 N. E. 1032; *In re* Joyslin, 76 Vt. 88, 56 Atl. 281.

93. Matter of Parson, 51 Misc. (N. Y.) 370, 101 N. Y. Suppl. 430 [*affirmed* in 117 N. Y. App. Div. 321, 102 N. Y. Suppl. 168]; *In re* Hultz, 32 Pittsb. Leg. J. N. S. (Pa.) 418.

Stock held as collateral.— Stock purchased by a broker for a customer and held as security for the payment of the purchase-price by the latter is not taxable on the latter's death, since the broker is the owner of it subject only to the customer's rights as pledgor. Matter of Havemeyer, 32 Misc. (N. Y.) 416, 66 N. Y. Suppl. 722. But if the executor pays the loan and redeems the stock, it is then taxable. Matter of Hurcomb, 36 Misc. (N. Y.) 755, 74 N. Y. Suppl. 475.

Estoppel of heir to dispute ancestor's ownership of property see Matter of Edwards, 85 Hun (N. Y.) 436, 32 N. Y. Suppl. 901 [*affirmed* in 146 N. Y. 380, 41 N. E. 89].

94. Matter of Fay, 25 Misc. (N. Y.) 468, 55 N. Y. Suppl. 749; Vogel's Estate, 1 Pa. Co. Ct. 352.

95. Hooper *v.* Bradford, 178 Mass. 95, 59 N. E. 678; *In re* Vassar, 127 N. Y. 1, 27 N. E. 394; *In re* Williamson, 153 Pa. St. 508, 26 Atl. 246; Miller's Estate, 5 Pa. Co. Ct. 522; Henise's Estate, 12 York Leg. Rec. (Pa.) 164. But *compare In re* Touhy, 35 Mont. 431, 90 Pac. 170; Clarke's Estate, 28 Pa. Co. Ct. 270; Williamson's Estate, 11 Pa. Co. Ct. 235.

96. Callahan *v.* Woodbridge, 171 Mass. 595, 51 N. E. 176; Hinds *v.* Wilcox, 22 Mont. 4, 55 Pac. 355; Matter of Hallock, 42 Misc. (N. Y.) 473, 87 N. Y. Suppl. 255 (decided under amendment of 1903 to section 221 of the Transfer Tax Act); *In re* Lea, 194 Pa. St. 524, 45 Atl. 337 (bequest to collateral legatee payable by devisee of land out of future rents). See also Matter of Wheeler, 115 N. Y. App. Div. 616, 100 N. Y. Suppl. 1044.

97. Matter of Sutton, 3 N. Y. App. Div. 208, 38 N. Y. Suppl. 277 [*affirming* 15 Misc. 659, 38 N. Y. Suppl. 102 (*affirmed* in 149 N. Y. 618, 44 N. E. 1128)].

98. *In re* Dalrymple, 215 Pa. St. 367, 64 Atl. 554; *In re* Vanuxem, 212 Pa. St. 315, 61 Atl. 876, 1 L. R. A. N. S. 400; Binn's Estate, 25 Pa. Co. Ct. 337; Henise's Estate, 12 York Leg. Rec. (Pa.) 164; *In re* Gunn, 9 P. D. 242, 49 J. P. 72, 53 L. J. P. D. & Adm. 107, 33 Wkly. Rep. 169; Atty.-Gen. *v.* Lomas, L. R. 9 Exch. 29, 43 L. J. Exch. 32, 29 L. T. Rep. N. S. 749, 22 Wkly. Rep. 188; Williamson *v.* Advocate-Gen., 10 Cl. & F. 1, 8 Eng. Reprint 641; Hobson *v.* Neale, 8 Exch. 368, 22 L. J. Exch. 175; Atty.-Gen.

with a direction that it be laid out in land,[99] the interest of a decedent as a partner or shareholder in the real estate owned by the firm or corporation,[1] and a leasehold interest is personal property for the purposes of succession taxation.[2] Generally the tax attaches upon every kind and item of personal estate, not specially exempt, coming to the hands of the executor or administrator,[3] including securities and obligations and evidences of debt,[4] and choses in action reduced to possession or recovered by him by proceedings at law or in equity,[5] and the proceeds of life insurance policies payable to the insured or his estate.[6]

3. Property of Non-Residents or Aliens — a. In General. According to the general construction and effect of the statutes imposing succession taxes, the

v. Simcox, 1 Exch. 749, 18 L. J. Exch. 61; Harding *v.* Harding, 2 Giffard 597, 7 Jur. N. S. 906, 66 Eng. Reprint 250; Advocate-Gen. *v.* Ramsay, 4 L. J. Exch. 211; Advocate-Gen. *v.* Smith, 1 Macq. 760. See also Matter of Mills, 86 N. Y. App. Div. 555, 67 N. Y. Suppl. 956, 84 N. Y. Suppl. 1135 [*affirmed* in 177 N. Y. 562, 69 N. E. 1127]; Matter of Wheeler, 1 Misc. (N. Y.) 450, 22 N. Y. Suppl. 1075. *Compare* Matter of Swift, 137 N. Y. 77, 32 N. E. 1096, 18 L. R. A. 709; Matter of Cobb, 14 Misc. (N. Y.) 409, 36 N. Y. Suppl. 448.

An infant's share of the proceeds of a partition sale of land is taxable as personal property. Matter of Stiger, 7 Misc. (N. Y.) 268, 28 N. Y. Suppl. 163.

99. Kenlis *v.* Hodgson, [1895] 2 Ch. 458, 64 L. J. Ch. 585, 72 L. T. Rep. N. S. 866, 13 Reports 603; *Re* De Lancey, L. R. 5 Exch. 102, 39 L. J. Exch. 76, 22 L. T. Rep. N. S. 239, 18 Wkly. Rep. 468.

1. *In re* Jones, 172 N. Y. 575, 65 N. E. 570, 60 L. R. A. 476; Atty.-Gen. *v.* Hubbuck, 13 Q. B. D. 275, 53 L. J. Q. B. 146, 50 L. T. Rep. N. S. 374.

2. *In re* Althause, 168 N. Y. 670, 61 N. E. 1127 [*affirming* 63 N. Y. App. Div. 252, 71 N. Y. Suppl. 445].

Leases of land in Japan from the Japanese government at a fixed rent so long as the rent should be paid are not assets of decedent's estate, and his interest as a tenant thereunder is not taxable under the law relating to taxable transfers. *In re* Vivanti, 63 Misc. (N. Y.) 618, 118 N. Y. Suppl. 680.

3. *In re* Edson, 159 N. Y. 568, 54 N. E. 1092. But *compare* Williams *v.* Mosher, 6 Gill (Md.) 454 (taxation of executors' commissions); Matter of Page, 39 Misc. (N. Y.) 220, 79 N. Y. Suppl. 382 (articles set apart as widow's exemptions).

A seat in the New York stock exchange is property subject to the inheritance transfer tax on the death of the owner. *In re* Hellman, 174 N. Y. 254, 66 N. E. 809, 95 Am. St. Rep. 582 [*reversing* 77 N. Y. App. Div. 355, 79 N. Y. Suppl. 201]; Matter of Curtis, 31 Misc. (N. Y.) 83, 64 N. Y. Suppl. 574.

The good-will of a business is taxable property on the death of the owner. Matter of Vivanti, 63 Misc. (N. Y.) 618, 118 N. Y. Suppl. 680; Matter of Keahon, 60 Misc. (N. Y.) 508, 113 N. Y. Suppl. 926; Matter of Dun, 40 Misc. (N. Y.) 509, 82 N. Y. Suppl. 802. So of the good-will of a newspaper owned by a joint stock association. Matter of Jones, 69 N. Y. App. Div. 237, 74 N. Y. Suppl. 702 [*reversed* on other grounds in 172 N. Y. 575, 65 N. E. 570, 60 L. R. A. 476].

Money loaned by a partner to his firm is taxable assets of his estate. Matter of Probst, 40 Misc. (N. Y.) 421, 82 N. Y. Suppl. 396.

A bequest to a corporation of its bonds passes property to the legatee and the bonds may be assessed at their market value. *In re* Rothchild, 72 N. J. L. 425, 65 Atl. 1118.

A bequest of freedom to a slave was a legacy within the meaning of the inheritance tax law. Spencer *v.* Negro Dennis, 8 Gill (Md.) 314; State *v.* Dorsey, 6 Gill (Md.) 388.

4. Kohn's Succession, 115 La. 71, 38 So. 898; Hennell *v.* Strong, 25 L. J. Ch. 407, holding that shares in a banking company purchased by executors with the assets of their testator in the name of a party who is entitled to the dividends for life are subject to probate duty.

Exempt securities.— Power of state to impose legacy or succession duties where property consists of United States bonds or other non-taxable securities see *supra*, XVI, A, 1.

5. Atty.-Gen. *v.* Brunning, 8 H. L. Cas. 243, 6 Jur. N. S. 1083, 30 L. J. Exch. 379, 8 Wkly. Rep. 362, 11 Eng. Reprint 421.

A claim which is in genuine litigation is not to be considered in determining the amount of the transfer tax against the estate owning it. Matter of Skinner, 106 N. Y. App. Div. 217, 94 N. Y. Suppl. 144.

Decedent's distributive share of estate administered in another state.— Money representing the decedent's distributive share in an estate situate and administered in another state, which is remitted direct from such other state to the executors under the will of the deceased for distribution is not taxable as property within the state. Matter of Thomas, 3 Misc. (N. Y.) 388, 24 N. Y. Suppl. 713.

A claim of an insurance agent for commissions on renewal policies is taxable, although taxes had been regularly paid on the premiums by the insurance company and the computation of the commissions was made only after the deduction of the taxes thus paid. Fell's Succession, 119 La. 1037, 44 So. 879, 15 L. R. A. N. S. 267.

6. *In re* Knoedler, 140 N. Y. 377, 35 N. E. 601.

transfer of any property which is situated within the state and subject to its jurisdiction is subject to the payment of the tax, although the decedent was a resident of another state or an alien.[7] So where the property is within the state of which the decedent was a citizen, its transfer is taxable there, although the heir or legatee may be a non-resident or an alien.[8] But where both the domicile of the decedent and the *situs* of the property are in a foreign state or country, no tax is payable, although the succession devolves upon a resident citizen.[9] The laws of the different states vary as to the character of the property, belonging to a non-resident, which may be considered as within the state for the purposes of such a tax. The general rule has been laid down that it is only real estate and personal property of a tangible nature and capable of having a *situs* of its own

7. *Maryland.*— State *v.* Dalrymple, 70 Md. 294, 17 Atl. 82, 3 L. R. A. 372.

Massachusetts.— Callahan *v.* Woodbridge, 171 Mass. 595, 51 N. E. 176.

New York.— *In re* Lord, 186 N. Y. 549, 79 N. E. 1110 [*affirming* 111 N. Y. App. Div. 152, 97 N. Y. Suppl. 553]; *In re* Houdayer, 150 N. Y. 37, 44 N. E. 718, 55 Am. St. Rep. 642, 34 L. R. A. 235; *In re* Romaine's Estate, 127 N. Y. 80, 27 N. E. 759, 12 L. R. A. 401 [*affirming* 58 Hun 109, 11 N. Y. Suppl. 313]; Matter of Chabot, 44 N. Y. App. Div. 340, 60 N. Y. Suppl. 927; Matter of Fitch, 39 N. Y. App. Div. 609, 57 N. Y. Suppl. 786 [*affirmed* in 160 N. Y. 87, 54 N. E. 701]; Matter of Embury, 19 N. Y. App. Div. 214, 45 N. Y. Suppl. 881 [*affirmed* in 154 N. Y. 746, 49 N. E. 1096]; *In re* Vinot's Estate, 7 N. Y. Suppl. 517. But *compare In re* Enston's Will, 113 N. Y. 174, 21 N. E. 87 [*reversing* 46 Hun 506, 19 Abb. N. Cas. 227, 5 Dem. Surr. 93]; Matter of Tulane, 51 Hun 213, 4 N. Y. Suppl. 36, holding that property deposited for safe-keeping in the state of New York, by its owner, a resident of another state, who dies intestate, passes by the intestate law of the latter state and is not liable to the inheritance tax.

North Carolina.— Alvany *v.* Powell, 55 N. C. 51.

Ohio.— *In re* Speers, 6 Ohio S. & C. Pl. Dec. 398, 4 Ohio N. P. 238.

Pennsylvania.— Com. *v.* Smith, 5 Pa. St. 142; Weaver's Estate, 4 Pa. Dist. 260; Alexander's Estate, 4 Pa. L. J. 448, 3 Pa. L. J. Rep. 87; Com. *v.* Kuhn, 18 Phila. 403, 2 Pa. Co. Ct. 248.

England.— Chatfield *v.* Berchtoldt, L. R. 7 Ch. 192, 41 L. J. Ch. 255, 26 L. T. Rep. N. S. 267, 20 Wkly. Rep. 401; Atty.-Gen. *v.* Campbell, L. R. 5 H. L. 524, 41 L. J. Ch. 611; *In re* Cigala, 7 Ch. D. 351, 47 L. J. Ch. 166, 38 L. T. Rep. N. S. 439, 26 Wkly. Rep. 257; *In re* Badart, L. R. 10 Eq. 288, 39 L. J. Ch. 645, 24 L. T. Rep. N. S. 13, 18 Wkly. Rep. 885; *In re* Lovelace, 4 De G. & J. 340, 28 L. J. Ch. 489, 7 Wkly. Rep. 575, 61 Eng. Ch. 267, 45 Eng. Reprint 131; *In re* Wallop, 1 De G. J. & S. 656, 10 Jur. N. S. 328, 33 L. J. Ch. 351, 10 L. T. Rep. N. S. 174, 3 New Rep. 678, 12 Wkly. Rep. 587, 66 Eng. Ch. 510, 46 Eng. Reprint 259; *In re* Smith, 10 L. T. Rep. N. S. 598, 12 Wkly. Rep. 933.

See 45 Cent. Dig. tit. "Taxation," § 1681.

Payment of tax in several jurisdictions.— It is no objection to the collection of the tax on the transfer of property within the state, belonging to a non-resident decedent, that the same was inventoried at the place of his residence as belonging to his estate and was there assessed and taxed, and that it also paid a tax to the federal government under its laws. *In re* Daly, 182 N. Y. 524, 74 N. E. 1116.

Exemption from taxation as affected by order of distribution at domicile of decedent. — Under Tenn. Acts (1893), p. 347, c. 174, § 1, providing that all estates, real, personal and mixed, situated in this state, whether the person dying seized thereof be domiciled within or without the state, passing from any person who may die seized or possessed of such estates to any person other than to or for the use of the father, mother, husband, wife, children, and lineal descendants born in lawful wedlock of the person dying seized and possessed thereof, shall be subject to a tax, it has been held that where, under the laws of decedent's domicile, the property passed to decedent's mother, it could not be taxed in Tennessee, although under its law the property would have passed to a brother. Fidelity, etc., Co. *v.* Crenshaw, 120 Tenn. 606, 110 S. W. 1017.

8. State *v.* Poydras, 9 La. Ann. 165; Com. *v.* Brenner, 2 Leg. Gaz. (Pa.) 413; Atty.-Gen. *v.* Campbell, L. R. 5 H. L. 524, 41 L. J. Ch. 611. *Compare* Matter of Chabot, 44 N. Y. App. Div. 340, 60 N. Y. Suppl. 927.

9. State *v.* Brim, 57 N. C. 300; *In re* Hood, 21 Pa. St. 106; Jackson *v.* Forbes, 2 Cromp. & J. 382, 1 L. J. Exch. 159, 2 Tyrw. 355; Arnold *v.* Arnold, 1 Jur. 255, 6 L. J. Ch. 218, 2 Myl. & C. 256, 14 Eng. Ch. 256, 40 Eng. Reprint 638; Logan *v.* Fairlie, 1 Myl. & C. 59, 13 Eng. Ch. 59, 40 Eng. Reprint 298; Logan *v.* Fairlie, 3 L. J. Ch. O. S. —, 2 Sim. & St. 284, 25 Rev. Rep. 208, 1 Eng. Ch. 284, 57 Eng. Reprint 355; Hay *v.* Fairlie, 1 Russ. 117, 46 Eng. Ch. 102, 38 Eng. Reprint 46.

Effect of temporary change of domicile see People *v.* Moir, 207 Ill. 180, 69 N. E. 905, 99 Am. St. Rep. 205.

Reference to ascertain testator's residence. — Under N. Y. Code Civ. Proc. § 2546, the surrogate has authority to appoint a referee to take evidence on a question of fact as to the residence of a testator at the time of his death, to determine the liability of his estate for taxation. Matter of Bishop, 111 N. Y. App. Div. 545, 97 N. Y. Suppl. 1098.

which may be so treated,[10] not including choses in action.[11] On the other hand it is held to be within the power of the state to create a *situs* within its own borders for intangible personal property represented there by securities or investments.[12] So it has been held that a tax may be imposed on debts due to a foreign decedent from resident citizens,[13] money on deposit in a local bank to the credit of a non-resident decedent,[14] and upon his mortgages on real property within the state.[15] But a policy of insurance issued by a domestic corporation on the life of a resident of another state is not, upon the death of the insured, taxable at the domicile of the insurance company where the policy was kept in the state of the domicile of the insured and the company had designated a person in that state upon whom process might be served, since in such case it is not necessary for the person claiming under the policy to invoke the courts of the state in which the insurance company was incorporated to aid in the enforcement of the policy.[16] On the same principle a policy of insurance issued by a foreign corporation on the life of a non-resident is not taxable in the state where the policy is located.[17]

b. Corporate Stocks and Bonds. Shares of stock in a domestic corporation are subject to the tax at the domicile of the corporation on their transfer by will or under the intestate laws, although the decedent was a non-resident,[18] and this

10. Orcutt's Appeal, 97 Pa. St. 179.

11. *In re* Coleman, 159 Pa. St. 231, 28 Atl. 137; Del Busto's Estate, 6 Pa. Co. Ct. 289.

12. *In re* Clinch, 180 N. Y. 300, 73 N. E. 35 [*affirming* 99 N. Y. App. Div. 298, 90 N. Y. Suppl. 923 (*affirming* 44 Misc. 190, 89 N. Y. Suppl. 802)]; *In re* Lewis, 203 Pa. St. 211, 52 Atl. 205. And see *supra*, V, A, 2.

Taxation of bond at place where situated see Matter of Gibbs, 60 Misc. (N. Y.) 645, 113 N. Y. Suppl. 939; Blackstone *v.* Miller, 188 U. S. 189, 23 S. Ct. 277, 47 L. ed. 439; Matter of Preston, 75 N. Y. App. Div. 250, 78 N. Y. Suppl. 91.

13. Blackstone *v.* Miller, 188 U. S. 189, 23 S. Ct. 277, 47 L. ed. 439; Matter of Gibbs, 60 Misc. (N. Y.) 645, 113 N. Y. Suppl. 939. *Compare* Gilbertson *v.* Oliver, 129 Iowa 568, 105 N. W. 1002, 4 L. R. A. N. S. 953; Matter of Phipps, 77 Hun (N. Y.) 325, 28 N. Y. Suppl. 330 [*affirmed* in 143 N. Y. 641, 37 N. E. 823]; Matter of King, 30 Misc. (N. Y.) 575, 63 N. Y. Suppl. 1100 [*affirmed* in 56 N. Y. App. Div. 617, 67 N. Y. Suppl. 766]; Kintzing *v.* Hutchinson, 14 Fed. Cas. No. 7,834, 7 Wkly. Notes Cas. (Pa.) 226.

14. *In re* Daly, 182 N. Y. 524, 74 N. E. 1116; *In re* Blackstone, 171 N. Y. 682, 64 N. E. 1118 [*affirmed* in 188 U. S. 189, 23 S. Ct. 277, 47 L. ed. 439]; *In re* Romaine, 127 N. Y. 80, 27 N. E. 759, 12 L. R. A. 401; Matter of Daly, 100 N. Y. App. Div. 373, 91 N. Y. Suppl. 858 [*affirmed* in 182 N. Y. 524, 74 N. E. 1116]; Matter of Burr, 16 Misc. (N. Y.) 89, 38 N. Y. Suppl. 811; Matter of Clark, 9 N. Y. Suppl. 444, 2 Connoly Surr. 183; Matter of Houdayer, 150 N. Y. 27, 44 N. E. 718, 55 Am. St. Rep. 642, 34 L. R. A. 235 [*reversing* 3 N. Y. App. Div. 474, 38 N. Y. Suppl. 323]. *Contra*, Matter of Leopold, 35 Misc. (N. Y.) 369, 71 N. Y. Suppl. 1032; Matter of Bentley, 31 Misc. (N. Y.) 650, 66 N. Y. Suppl. 95; Allen *v.* Philadelphia Sav. Fund Soc., 1 Fed. Cas. No. 234, 14 Phila. (Pa.) 408, 7 Wkly. Notes Cas. (Pa.) 231.

15. *In re* Rogers, 149 Mich. 305, 112 N. W. 931, 11 L. R. A. N. S. 1134; *In re* Merriam, 147 Mich. 630, 111 N. W. 196, 9 L. R. A. N. S. 1104; Matter of Clark, 9 N. Y. Suppl. 444, 2 Connoly Surr. 183; Miller's Estate, 31 Pittsb. Leg. J. N. S. (Pa.) 355. *Contra*, *In re* Davison, 34 Pittsb. Leg. N. S. (Pa.) 402.

16. *In re* Gordon, 186 N. Y. 471, 79 N. E. 722 [*affirming* 114 N. Y. App. Div. 202, 99 N. Y. Suppl. 630]; Matter of Horn, 39 Misc. (N. Y.) 133, 78 N. Y. Suppl. 979; Matter of Abbett, 29 Misc. (N. Y.) 567, 61 N. Y. Suppl. 1067. *Contra*, Lyall *v.* Lyall, L. R. 15 Eq. 1, 42 L. J. Ch. 195, 27 L. T. Rep. N. S. 530, 21 Wkly. Rep. 34.

17. Matter of Gibbs, 60 Misc. (N. Y.) 645, 113 N. Y. Suppl. 939.

18. *Massachusetts.*— Kingsbury *v.* Chapin, 196 Mass. 533, 82 N. E. 700; Moody *v.* Shaw, 173 Mass. 375, 53 N. E. 891; Greves *v.* Shaw, 173 Mass. 205, 53 N. E. 372.

New Hampshire.— Gardiner *v.* Carter, 74 N. H. 507, 69 Ark. 939.

New Jersey.—Dixon *v.* Russell, 78 N. J. L. 296, 73 Atl. 51. But see Astor *v.* State, 72 Atl. 78; Neilson *v.* Russell, 76 N. J. L. 655, 71 Atl. 286 [*reversing* 76 N. J. L. 27, 69 Atl. 476].

New York.— *In re* Palmer, 183 N. Y. 238, 76 N. E. 16; *In re* Bushnell, 172 N. Y. 649, 65 N. E. 1115; *In re* Newcomb, 172 N. Y. 608, 64 N. E. 1123; Matter of Bushnell, 73 N. Y. App. Div. 325, 77 N. Y. Suppl. 4 [*affirmed* in 172 N. Y. 649, 65 N. E. 1115]; Matter of Newcomb, 71 N. Y. App. Div. 606, 76 N. Y. Suppl. 222 [*affirmed* in 172 N. Y. 608, 64 N. E. 1123]; Matter of Burden, 47 Misc. 329, 95 N. Y. Suppl. 972; Matter of Cushing, 40 Misc. 505, 82 N. Y. Suppl. 795; *In re* Leavitt, 4 N. Y. Suppl. 179.

Pennsylvania.— See Small's Estate, 151 Pa. St. 1, 25 Atl. 23. But see Del Busto's Estate, 6 Pa. Co. Ct. 289; Kintzing *v.* Hutchinson, 14 Fed. Cas. No. 7,834, 7 Wkly. Notes Cas. (Pa.) 226, decided under Pennsylvania statute.

A resident decedent's stock in a domestic

without regard to the place where the certificate may be kept.[19] But a different rule applies to bonds of a corporation. The bonds of a domestic corporation are not taxable at the domicile of the corporation if kept at the domicile of a non-resident owner,[20] but are subject to the tax if physically present in the state, although belonging to a non-resident decedent.[21] Stocks and bonds of a foreign corporation are taxable on the death of their owner if he was a resident of the taxing state,[22] but not where both the domicile of the owner and the home of the corporation were without the state.[23]

c. Appropriation of Assets of Non-Resident to Payment of Debts or Exempt Distributive Shares. The personal representative of a non-resident decedent by election to appropriate the assets within the state to the payment of debts, to the exemption of property within the state of the decedent's domicile,[24] or to the payment of distributive shares which are exempt from the tax instead of to the payment of taxable distributive shares,[25] cannot relieve the property from

corporation, although held by a foreign trustee, is taxable at the place of domicile of the corporation. Douglas County *v.* Kountze, 84 Nebr. 506, 121 N. W. 593.

Stock of corporation incorporated in several states.— Corporate stock belonging to a non-resident is taxable under the inheritance laws of the state of the domicile of the corporation, although the corporation may be also incorporated and doing business and may own property in other states. Kingsbury *v.* Chapin, 196 Mass. 533, 82 N. E. 700. But in a proceeding for the assessment of a transfer tax on shares of a railroad company incorporated under the laws of several states in which it operates its lines, only such proportionate part of the market value of the corporation's stock consisting of a single issue should be taxed in New Hampshire as the value of the franchises and property of the corporation situated there is of the total value of its franchises and properly, wherever situated. Gardiner *v.* Carter, 74 N. H. 507, 69 Atl. 939.

19. *In re* Bronson, 150 N. Y. 1, 44 N. E. 707, 55 Am. St. Rep. 632, 34 L. R. A. 238.

20. *In re* Bronson, 150 N. Y. 1, 44 N. E. 707, 55 Am. St. Rep. 632, 34 L. R. A. 238.

21. *In re* Clinch, 180 N. Y. 300, 73 N. E. 35 [*affirming* 99 N. Y. App. Div. 298, 90 N. Y. Suppl. 923]; *In re* Whiting, 150 N. Y. 27, 44 N. E. 715, 55 Am. St. Rep. 640, 34 L. R. A. 232 [*modifying* 2 N. Y. App. Div. 590, 38 N. Y. Suppl. 131].

Bonds pledged as collateral.— Bonds and stocks of a domestic corporation belonging to a non-resident decedent, held in pledge as collateral by creditors in New York, being taxable property in that state, are not taxable under the transfer tax law before the debts are paid. Matter of Pullman, 46 N. Y. App. Div. 574, 62 N. Y. Suppl. 395.

22. Frothingham *v.* Shaw, 175 Mass. 59, 55 N. E. 623, 78 Am. St. Rep. 475; *In re* Merriam, 141 N. Y. 479, 36 N. E. 505; Lines' Estate, 155 Pa. St. 378, 26 Atl. 728; *In re* Short. 16 Pa. St. 63; Stern *v.* Reg., [1896] 1 Q. B. 211, 65 L. J. Q. B. 240, 73 L. T. Rep. N. S. 752, 44 Wkly. Rep. 302; *In re* Ewin, 1 Cromp. & J. 151, 9 L. J. Exch. O. S. 37, 1 Tyrw. 92; Atty.-Gen. *v.* Bouwens, 1 H. & H. 319, 7 L. J. Exch. 297, 4 M. & W. 171. *Compare* Matter of Thomas, 3 Misc. (N. Y.) 388, 24 N. Y. Suppl. 713; Atty.-Gen. *v.* Hope, 8 Bligh N. S. 44, 5 Eng. Reprint 863, 2 Cl. & F. 84, 6 Eng. Reprint 1087, 1 C. M. & R. 530, 4 Tyrw. 878.

23. *In re* Gibbes, 176 N. Y. 565, 68 N. E. 1117; *In re* Whiting, 150 N. Y. 27, 44 N. E. 715, 55 Am. St. Rep. 640, 34 L. R. A. 232; *In re* James, 144 N. Y. 6, 38 N. E. 961; Matter of Hillman, 116 N. Y. App. Div. 186, 101 N. Y. Suppl. 640; Matter of Gibbes, 84 N. Y. App. Div. 510, 83 N. Y. Suppl. 53 [*affirmed* in 176 N. Y. 565, 68 N. E. 1117]; Matter of Bishop, 82 N. Y. App. Div. 112, 81 N. Y. Suppl. 474.

Necessity for consent of New York controller to transfer.— Laws (1896), p. 872, c. 908, § 228, as amended by Laws (1902), p. 351, c. 101, require the consent of the controller to the transfer of stock held by a non-resident decedent, unless sufficient funds are retained to pay taxes on account of the transfer. It was held, under this statute, that, stock in a foreign corporation owned by a non-resident being non-taxable, a transfer in New York of such stock held by a non-resident decedent did not require such consent. Dunham *v.* City Trust Co., 193 N. Y. 642, 86 N. E. 1123 [*affirming* 115 N. Y. App. Div. 584, 101 N. Y. Suppl. 87].

24. Kingsbury *v.* Chapin, 196 Mass. 533, 82 N. E. 700, holding that only a proportional part of the property in the state may be used in paying debts, the balance being subject to the tax.

25. Tilford *v.* Dickinson, (N. J. Sup. 1910) 75 Atl. 574; *In re* Ramsdill, 190 N. Y. 492, 83 N. E. 584, 18 L. R. A. N. S. 946 [*reversing* 119 N. Y. App. Div. 890, 105 N. Y. Suppl. 1139, and *distinguishing In re* James, 144 N. Y. 6, 38 N. E. 961], holding that an administrator of a non-resident intestate, leaving him surviving a brother and nieces and nephews, cannot by election to appropriate all the assets situate within the state to the payment of the distributive share of intestate's brother, avoid payment of the inheritance tax, on the distributive share of the nieces and nephews, since under the laws of intestacy a distributee takes an undivided interest in the whole estate. *Compare* Matter of Embury, 19 N. Y. App. Div. 214, 45

liability to the state inheritance tax attaching to the property upon the death of the decedent. On the other hand, no tax is payable on the property of a non-resident situated within the state where it appears that his indebtedness to resident creditors is in excess of the value of the property within the state;[26] and the fact that the ancillary executor has brought money from out of the state for the payment of the debts, so that assets within the state could be transmitted to be administered at the domicile of the decedent, will not alter the rule.[27]

4. Situs of Property. Where the decedent was a citizen of the state seeking to impose the inheritance tax, the liability of his estate thereto will sometimes depend on the *situs* of particular property. Land is taxable only where it lies, and if it is in another state, no succession tax can be imposed, although the deceased owner was domiciled in the taxing state;[28] but an exception must be made where the will absolutely directs the sale of the lands, as in this case there is an equitable conversion of it into personalty.[29] The same rule prevails as to tangible personal property, capable of having a *situs* of its own; it is not subject to the tax when located in a foreign state,[30] unless, at least, it is brought on to the home state for distribution, and therefore passes by virtue of the laws of the latter state.[31] As to intangible personal property and choses in action, the general rule is that *mobilia sequuntur personam*, and they are taxable at the place of the owner's domicile.[32] But this rule is considerably modified in some states by the disposition to create a special *situs*, for purposes of taxation, for certain

N. Y. Suppl. 881 [*affirmed* in 154 N. Y. 746, 49 N. E. 1096]; Matter of McEwan, 51 Misc. (N. Y.) 455, 101 N. Y. Suppl. 733; Memphis Trust Co. *v.* Speed, 114 Tenn. 677, 88 S. W. 321; *In re* Clark, 37 Wash. 671, 80 Pac. 267.

26. Matter of Grosvenor, 124 N. Y. App. Div. 331, 108 N. Y. Suppl. 926.

27. Matter of Grosvenor, 124 N. Y. App. Div. 331, 108 N. Y. Suppl. 926. To a similar effect see McCurdy *v.* McCurdy, 197 Mass. 248, 83 N. E. 881, 16 L. R. A. N. S. 329, holding that ancillary executors cannot be compelled, for the purpose of increasing the amount subject to the tax, within the jurisdiction, to bring the proceeds of personal estate from the place of domiciliary administration to pay debts of resident creditors secured by a mortgage on land within the state, so that the land may be freed from encumbrance.

28. Connell *v.* Crosby, 210 Ill. 380, 71 N. E. 350; Westfeldt's Succession, 122 La. 836, 48 So. 281; *In re* Swift, 137 N. Y. 77, 32 N. E. 1096, 18 L. R. A. 709; Lorillard *v.* People, 6 Dem. Surr. (N. Y.) 268; *In re* Handley, 181 Pa. St. 339, 37 Atl. 587; Hale's Estate, 161 Pa. St. 181, 28 Atl. 1071; Com. *v.* Lackawanna Iron, etc., Co., 129 Pa. St. 346, 18 Atl. 133; Drayton's Appeal, 61 Pa. St. 172.

29. *In re* Shoenberger, 221 Pa. St. 112, 70 Atl. 579, 128 Am. St. Rep. 737, 19 L. R. A. N. S. 290; *In re* Dalrymple, 215 Pa. St. 367, 64 Atl. 554; Williamson's Estate, 153 Pa. St. 508, 26 Atl. 246; Miller *v.* Com., 111 Pa. St. 321, 2 Atl. 492.

30. Weaver *v.* State, 110 Iowa 328, 81 N. W. 603; *In re* Lord, 186 N. Y. 549, 79 N. E. 1110; State *v.* Brevard, 62 N. C. 141; Stamps Com'r *v.* Hope, [1891] A. C. 476; Atty.-Gen. *v.* Dimond, 1 Cromp. & J. 356, 9 L. J. Exch. O. S. 90, 1 Tyrw. 243. But see Matter of Dingman, 66 N. Y. App. Div. 228, 72 N. Y. Suppl. 694; *In re* Milliken, 206 Pa. St. 149, 55 Atl. 853.

Property in hands of foreign trustee.— Under the transfer tax law imposing a tax on a transfer of property intended to take effect, in possession or enjoyment, at or after the death of the grantor or donor, etc., that personal property transferred in this state by a resident thereof in trust was in another state at the time of the grantor's death with the legal title in the trustee did not affect the liability of the transfer to taxation. *In re* Keeney, 194 N. Y. 281, 87 N. E. 428.

31. *In re* Swift, 137 N. Y. 77, 32 N. E. 1096, 18 L. R. A. 709. See also McCurdy *v.* McCurdy, 197 Mass. 248, 83 N. E. 881, 16 L. R. A. N. S. 329.

32. *Connecticut.*— Hopkins' Appeal, 77 Conn. 644, 60 Atl. 657; Gallup's Appeal, 76 Conn. 617, 57 Atl. 699.

New Hampshire.—Mann *v.* Carter, 74 N. H. 345, 68 Atl. 130, 15 L. R. A. N. S. 150, holding deposits in foreign savings banks taxable, although subject to similar tax in the foreign state.

New Jersey.— *In re* Hartman, 70 N. J. Eq. 664, 62 Atl. 560.

New York.— *In re* Clinch, 180 N. Y. 300, 73 N. E. 35; Matter of Horn, 39 Misc. 133, 78 N. Y. Suppl. 979; Matter of Corning, 3 Misc. 160, 23 N. Y. Suppl. 285.

Pennsylvania.— Lines' Estate, 155 Pa. St. 378, 26 Atl. 728; *In re* Short, 16 Pa. St. 63; Stanton's Estate, 3 Pa. Dist. 371. See also *In re* Lewis, 203 Pa. St. 211, 52 Atl. 205.

Vermont.— *In re* Howard, 80 Vt. 489, 68 Atl. 513 [*distinguishing In re* Joyslin, 76 Vt. 88, 56 Atl. 281].

England.— Stamps Com'r *v.* Hope, [1891] A. C. 476; Forbes *v.* Steven, L. R. 10 Eq. 178, 39 L. J. Ch. 485, 22 L. T. Rep. N. S. 703, 18 Wkly. Rep. 686; Lawson *v.* Inland Revenue Com'rs, [1896] 2 Ir. 418; Thomson *v.* Advocate-Gen., 12 Cl. & F. 1, 9 Jur. 217, 8 Eng. Reprint 1294.

classes of personalty, as stated in the preceding sections,[33] and the application of one rule in the state of the decedent's domicile and another in the state where the property is found frequently results in its taxation by both states.[34] It has been intimated, moreover, that if property of a decedent in a foreign country consisting of debts *bona notabilia* is fully administered in the jurisdiction where the debtor resides and is distributed to the beneficiaries in accordance with the court's order there, no succession tax can be imposed with respect to the same property in another state where the decedent was domiciled.[35]

5. Transfers Subject to Tax — a. In General. A taxable transfer may be created by an instrument other than a will,[36] as where one conveys his property to trustees, reserving a life-interest or income to himself, and ordering the distribution of the property after his death according to directions contained in the deed or in his will.[37] But the instrument must be testamentary in character or bestow an estate to be enjoyed after the grantor's decease, and the transfer is not taxable if the deed or assignment was by way of sale or irrevocable gift *inter vivos*.[38] Further, the transfer, in order to be taxable, must be one created by the will or by the succession *ab intestato*, as the case may be, as distinguished from the vesting of an estate or interest, concurrent with the death of the decedent, but created previously by the agreement of the parties or by the act of the law independently of the question of inheritance or succession.[39] For this reason, a husband's right of curtesy [40] or a widow's right of dower [41] is not a taxable inheritance unless expressly made so, although if the widow elects to take a legacy under the will in lieu of dower it is taxable.[42] Again, the estate or interest to be taxed must pass directly from the decedent to the beneficiary,[43] or at most through the intervention of a trustee charged with a positive duty in regard to it and not with a mere discretion.[44] The tax is not chargeable on a sum paid by the heir or

33. See *supra*, XVI, B, 3, a, b.

34. Hopkins' Appeal, 77 Conn. 644, 60 Atl. 657; Mann *v.* Carter, 74 N. H. 345, 68 Atl. 130, 15 L. R. A. N. S. 150.

35. *In re* Howard, 80 Vt. 489, 68 Atl. 513. See also Matter of Cummings, 63 Misc. (N. Y.) 621, 118 N. Y. Suppl. 684; Tilt *v.* Kelsey, 207 U. S. 43, 28 S. Ct. 1, 52 L. ed. 95.

36. See cases cited *infra*, note 37 *et seq.*

37. Seibert's Appeal, 110 Pa. St. 329, 1 Atl. 346; Reish *v.* Com., 106 Pa. St. 521; *In re* Maris, 14 Pa. Co. Ct. 171; De Rechberg *v.* Beeton, 38 Ch. D. 192, 57 L. J. Ch. 1090, 59 L. T. Rep. N. S. 56, 36 Wkly. Rep. 682; Atty.-Gen. *v.* Henniker, 7 Exch. 331, 21 L. J. Exch. 293 [*affirmed* in 8 Exch. 257, 16 Jur. 1143, 22 L. J. Exch. 41]; *In re* Palmer, 3 H. & N. 26; Atty.-Gen. *v.* Jones, 3 Price 368. See also Douglas County *v.* Kountze, 84 Nebr. 506, 121 N. W. 593. And see *infra*, XVI, B, 5, c.

38. Matter of Baker, 38 Misc. (N. Y.) 151, 77 N. Y. Suppl. 170 (antenuptial agreement); Fryer *v.* Morland, 3 Ch. D. 675, 45 L. J. Ch. 817, 35 L. T. Rep. N. S. 458, 25 Wkly. Rep. 21, Jeffries *v.* Alexander, 8 H. L. Cas. 594, 11 Eng. Reprint 562; Advocate-Gen. *v.* Ramsay, 4 L. J. Exch. 211; Brown *v.* Advocate-Gen., 1 Macq. 79; Tompson *v.* Browne, 3 Myl. & K. 32, 5 L. J. Ch. 64, 10 Eng. Ch. 32, 40 Eng. Reprint 13.

39. *In re* Kidd, 188 N. Y. 274, 80 N. E. 924; Matter of Stebbins, 52 Misc. (N. Y.) 438, 103 N. Y. Suppl. 563; Matter of Demers, 41 Misc. (N. Y.) 470, 84 N. Y. Suppl. 1109 (judgment ordering specific performance of a contract made by decedent in his lifetime to leave his property to his natural child); Blair *v.* Herold, 150 Fed. 199 [*affirmed* in 158 Fed. 804] (partnership agreement providing for acquisition by one partner of the other's interest in the firm on the latter's death).

A joint deposit in a savings bank in the name of a decedent and his wife, made up of sums previously given by decedent to his wife, is not taxable under the transfer tax law. *In re* Rosenberg, 114 N. Y. Suppl. 726.

The surviving wife's share of community property is subject to the tax, since the wife takes as heir and not as survivor. *In re* Moffitt, 153 Cal. 359, 95 Pac. 653, 1025.

40. Matter of Starbuck, 63 Misc. (N. Y.) 156, 116 N. Y. Suppl. 1030.

41. Marsal's Succession, 118 La. 212, 42 So. 778; Commonwealth's Appeal, 34 Pa. St. 204; Small's Estate, 11 Pa. Co. Ct. 1. *Compare* Billings *v.* People, 189 Ill. 472, 59 N. E. 798, 59 L. R. A. 807.

42. Matter of Riemann, 42 Misc. (N. Y.) 648, 87 N. Y. Suppl. 731; Matter of De Graff, 24 Misc. (N. Y.) 147, 53 N. Y. Suppl. 591.

43. Hooper *v.* Shaw, 176 Mass. 190, 57 N. E. 361.

44. Matter of Langdon, 11 N. Y. App. Div. 220, 43 N. Y. Suppl. 419 [*affirmed* in 153 N. Y. 6, 46 N. E. 1034]; *In re* Hoyt, 37 Misc. (N. Y.) 720, 76 N. Y. Suppl. 504; Matter of Lynn, 34 Misc. (N. Y.) 681, 70 N. Y. Suppl. 730; Lauman's Appeal, 131 Pa. St. 346, 18 Atl. 900 (holding that where a will gives testator's estate to his widow on condition that she pay specified legacies to certain collateral relatives, such legacies

executor to a claimant in compromise of litigation.[45] And it must be a gift, and not the payment of a debt or an advancement or compensation for services to be rendered.[46] Also it must be a donation capable of vesting, and if it is impossible that it should become effective, as by reason of the non-existence of the beneficiary, it is not taxable;[47] but it is no objection to the imposition of the tax that the beneficiary is not immediately ascertainable and that the ultimate vesting of the interest is contingent,[48] or, it has been held, that the designated beneficiary assigns his share for a nominal consideration to one whose right of succession is exempt from the tax.[49]

b. Execution of Power of Appointment. In the absence of statute to the contrary [50] the general rule is that where property is left by will to a trustee with power to appoint the legatee, or to one for life with power of appointment, and the power is exercised, the appointee takes under the will of the donor of the power, not by inheritance from the donee, and the taxability of the transfer is to be determined accordingly.[51] But under the ordinary rules the tax is not to be

are subject to the collateral inheritance tax, as directly bestowed by the will); *In re* James, 2 Del. Co. (Pa.) 164; *In re* Martineau, 48 J. P. 295 (holding that a devise to executors in full confidence, but without imposing any trust or obligation that they will apply a sum of money in a particular manner, does not create a trust on which legacy duty is payable).

45. *In re* Wells, 142 Iowa 255, 120 N. W. 713; Matter of Weed, 10 Misc. (N. Y.) 628, 32 N. Y. Suppl. 777; *In re* Kerr, 159 Pa. St. 512, 28 Atl. 354; *In re* Pepper, 159 Pa. St. 508, 28 Atl. 353; English *v.* Crenshaw, 120 Tenn. 531, 110 S. W. 210, 127 Am. St. Rep. 1025, 17 L. R. A. N. S. 753. See also People *v.* Rice, 40 Colo. 508, 91 Pac. 33 (payment of additional sum to a legatee disputing the will); *In re* Pepper Compromise Fund, 4 Pa. Dist. 101.

46. Matter of Bartlett, 4 Misc. (N. Y.) 380, 25 N. Y. Suppl. 990. See also *In re* Thorley, [1891] 2 Ch. 613, 60 L. J. Ch. 537, 64 L. T. Rep. N. S. 515, 39 Wkly. Rep. 565, provision for annual compensation for carrying on testator's business.

Legacies in payment of debts see *infra*, XVI, B, 5, d.

47. Matter of Chesebrough, 34 Misc. (N. Y.) 365, 69 N. Y. Suppl. 848. And see *In re* Rohan-Chabot, 167 N. Y. 280, 60 N. E. 598.

48. Howe *v.* Howe, 179 Mass. 546, 61 N. E. 225, 55 L. R. A. 626; Matter of Edson, 38 N. Y. App. Div. 19, 56 N. Y. Suppl. 409 [*affirmed* in 159 N. Y. 568, 54 N. E. 1092]; Matter of Le Brun, 39 Misc. (N. Y.) 516, 80 N. Y. Suppl. 486.

49. Frank's Estate, 9 Pa. Co. Ct. 662.

50. **By statute in New York** (Laws (1897), c. 284, p. 150, Consol. Laws, c. 60, § 220, subd. 6), it is provided in effect that whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made before the passage of the statute or afterward, such appointment shall be deemed a transfer taxable in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will. *In re* Ripley, 192 N. Y. 536, 84 N. E. 574, 1120 [*affirming* 122 N. Y. App. Div. 419, 106 N. Y. Suppl. 844]; Matter of Buckingham, 106 N. Y. App. Div. 13, 94 N. Y. Suppl. 130; Matter of Rogers, 71 N. Y. App. Div. 461, 75 N. Y. Suppl. 835 [*affirmed* in 172 N. Y. 617, 64 N. E. 1125]; Matter of Potter, 51 N. Y. App. Div. 212, 64 N. Y. Suppl. 1013; Matter of Warren, 62 Misc. (N. Y.) 444, 116 N. Y. Suppl. 1034. Under this statute it is held that a transfer under a power of appointment by trustees under the will is taxable where they have converted the property into personalty under a power of sale in the will, although at the death of the testator it was real estate not subject to any such tax. *In re* Dows, 167 N. Y. 227, 60 N. E. 439, 88 Am. St. Rep. 508, 52 L. R. A. 433. Trust funds as to which a power of appointment is exercised are under this statute liable to taxation, although invested in corporations the capital of which is taxable, or in bonds exempt from taxation. *In re* Dows, 167 N. Y. 227, 60 N. E. 439, 88 Am. St. Rep. 508, 52 L. R. A. 433.

Taxability of property without the state subject to power of appointment see *In re* Hull, 186 N. Y. 586, 79 N. E. 1107 [*affirming* 111 N. Y. App. Div. 322, 97 N. Y. Suppl. 701]. *Compare* Matter of Thomas, 39 Misc. (N. Y.) 136, 78 N. Y. Suppl. 981.

51. *In re* Cooksey, 182 N. Y. 92, 74 N. E. 880; *In re* Mather, 179 N. Y. 526, 71 N. E. 1134 [*affirming* 90 N. Y. App. Div. 382, 85 N. Y. Suppl. 657]; *In re* Rohan-Chabot, 167 N. Y. 280, 60 N. E. 598; *In re* Harbeck, 161 N. Y. 211, 55 N. E. 850; *In re* Stewart, 131 N. Y. 274, 30 N. E. 184, 14 L. R. A. 836; Matter of Spencer, 119 N. Y. App. Div. 883, 107 N. Y. Suppl. 543; Matter of Howe, 86 N. Y. App. Div. 286, 83 N. Y. Suppl. 825 [*affirmed* in 176 N. Y. 570, 68 N. E. 1118]; Com. *v.* Williams, 13 Pa. St. 29; Com. *v.* Duffield, 12 Pa. St. 277; Lisle's Estate, 22 Pa. Super. Ct. 262; Com. *v.* Sharpless, 2 Chest. Co. Rep. (Pa.) 246; Drake *v.* Atty.-Gen., 10 Cl. & F. 257, 8 Eng. Reprint 739; *In re* Cholmondeley, 1 Cromp. & M. 149, 2 L. J. Exch. 65, 3 Tyrw. 10; Sweeting *v.* Sweeting, 1 Drew. 331, 17 Jur. 123, 22 L. J. Ch. 441, 1 Wkly. Rep. 122, 61 Eng. Reprint 478; Platt *v.* Routh, 10 L. J. Exch. 105, 6

imposed until the power of appointment is exercised.[52] Under statute it has been held that if the donee of the power fails to make any appointment, or appoints in favor of the same persons who were to succeed in default of an appointment, they are to be regarded as taking under the donee or appointor.[53]

c. Ante-Mortem Deeds and Gifts. In some states the laws impose a tax on all transfers of property by deed made or intended to take effect in possession or enjoyment after the death of the grantor, or, as it is sometimes expressed, on gifts or transfers made in contemplation of death.[54] These provisions are intended to prevent evasions of the inheritance tax by distributions of property among the members of a family or others just before the death of the owner.[55] Whether or not a transfer was made "in contemplation of death" is a question of fact, in the determination of which the donor's age, his physical condition at the time, and the length of time he actually survives should be taken into account.[56] Under these provisions the tax of course attaches to a gift *causa mortis*.[57] The provisions, however, do not apply to a purchase and sale of property,[58] although a part of the consideration may be the support and maintenance of the grantor during his life.[59] And generally a gift, assignment, or transfer to a man's wife or children or to

M. & W. 756; Vandiest *v.* Fynmore, 6 Sim. 570, 9 Eng. Ch. 570, 58 Eng. Reprint 707; Nail *v.* Punter, 5 Sim. 555, 9 Eng. Ch. 555, 58 Eng. Reprint 447; Palmer *v.* Whitmore, 5 Sim. 178, 9 Eng. Ch. 178, 58 Eng. Reprint 304.

52. *In re* Howe, 176 N. Y. 570, 68 N. E. 1118 [*affirming* 86 N. Y. App. Div. 286, 83 N. Y. Suppl. 825]. *Compare* Howe *v.* Howe, 179 Mass. 546, 61 N. E. 225, 55 L. R. A. 626; Matter of Le Brun, 39 Misc. (N. Y.) 516, 80 N. Y. Suppl. 486.

Remainders created in a trust fund by the exercise of a power of appointment by the beneficiary under the will creating the trust are subject to taxation at the time of the transfer where they are absolute and not subject to be divested or to fail in any contingency whatever, and their present value is determinable by the aid of the table of annuities. *In re* Dows, 167 N. Y. 227, 60 N. E. 439, 88 Am. St. Rep. 508, 52 L. R. A. 433.

53. *In re* Cooksey, 182 N. Y. 92, 74 N. E. 880; *In re* Langdon, 153 N. Y. 6, 46 N. E. 1034; Matter of Lewis, 60 Misc. (N. Y.) 643, 113 N. Y. Suppl. 1112 [*reversed* in 129 N. Y. App. Div. 905, 113 N. Y. Suppl. 1136]; Matter of Bartow, 30 Misc. (N. Y.) 27, 62 N. Y. Suppl. 1000. See also Matter of Lowndes, 60 Misc. (N. Y.) 506, 113 N. Y. Suppl. 1114; Atty.-Gen. *v.* Brackenbury, 1 H. & C. 782, 9 Jur. N. S. 257, 32 L. J. Exch. 108, 8 L. T. Rep. N. S. 822, 11 Wkly. Rep. 380. But *compare* *In re* Lansing, 182 N. Y. 238, 74 N. E. 882.

54. Emmons *v.* Shaw, 171 Mass. 410, 50 N. E. 1033; Matter of Miller, 77 N. Y. App. Div. 473, 78 N. Y. Suppl. 930; Matter of Cruger, 54 N. Y. App. Div. 405, 66 N. Y. Suppl. 636 [*affirmed* in 166 N. Y. 602, 59 N. E. 1121]; Matter of Hendricks, 3 N. Y. Suppl. 281, 1 Connoly Surr. 301; State *v.* Pabst, 139 Wis. 561, 121 N. W. 351.

55. Matter of Palmer, 117 N. Y. App. Div. 360, 102 N. Y. Suppl. 236; Matter of Birdsall, 22 Misc. (N. Y.) 180, 49 N. Y. Suppl. 450 [*affirmed* in 43 N. Y. App. Div. 624, 60 N. Y. Suppl. 1133].

56. Merrifield *v.* People, 212 Ill. 400, 72 N. E. 446; Rosenthal *v.* People, 211 Ill. 306, 71 N. E. 1121; Matter of Palmer, 117 N. Y. App. Div. 360, 102 N. Y. Suppl. 236; Matter of Bullard, 76 N. Y. App. Div. 207, 78 N. Y. Suppl. 491; Matter of Mahlstedt, 67 N. Y. App. Div. 176, 73 N. Y. Suppl. 818; *In re* Spaulding, 49 N. Y. App. Div. 541, 63 N. Y. Suppl. 694 [*affirmed* in 163 N. Y. 607, 57 N. E. 1124]; Matter of Birdsall, 22 Misc. (N. Y.) 180, 49 N. Y. Suppl. 450; State *v.* Pabst, 139 Wis. 561, 121 N. W. 351.

57. Matter of Cornell, 66 N. Y. App. Div. 162, 73 N. Y. Suppl. 32 [*modified* in 170 N. Y. 423, 63 N. E. 445]; Matter of Edgerton, 35 N. Y. App. Div. 125, 54 N. Y. Suppl. 700 [*affirmed* in 158 N. Y. 671, 52 N. E. 1124]; Matter of Edwards, 85 Hun (N. Y.) 436, 32 N. Y. Suppl. 901 [*affirmed* in 146 N. Y. 380, 41 N. E. 89].

Gifts in contemplation of death not confined to gifts causa mortis.— Gifts in contemplation of the death of the donor within the contemplation of the inheritance tax laws are not limited to gifts *causa mortis* but include gift *inter vivos*, made in view of such death. *In re* Benton, 234 Ill. 366, 84 N. E. 1026, 18 L. R. A. N. S. 458; Matter of Price, 62 Misc. (N. Y.) 149, 116 N. Y. Suppl. 283; Matter of Birdsall, 22 Misc. (N. Y.) 180, 49 N. Y. Suppl. 450; State *v.* Pabst, 139 Wis. 561, 121 N. W. 351. The object of the inheritance tax law, however, is not to prevent a parent from giving the whole or any portion of his property to his children during his lifetime, if he so desires, but only to subject such property to a tax if the gift is made in contemplation of the death of the donor. People *v.* Kelley, 218 Ill. 509, 75 N. E. 1038. And see Matter of Baker, 83 N. Y. App. Div. 530, 82 N. Y. Suppl. 390 [*affirmed* in 178 N. Y. 575, 70 N. E. 1094].

58. Matter of Hess, 110 N. Y. App. Div. 476, 96 N. Y. Suppl. 990 [*affirmed* in 187 N. Y. 554, 80 N. E. 1111]; Matter of Thorne, 44 N. Y. App. Div. 8, 60 N. Y. Suppl. 419; Hagerty *v.* State, 55 Ohio St. 613, 45 N. E. 1046; Garman's Estate, 3 Pa. Co. Ct. 550.

59. Matter of Hess, 110 N. Y. App. Div.

others, made absolutely and irrevocably at a time when the donor is not in contemplation of death, is not taxable;[60] but if the donor reserves an annuity or life income out of the property, or retains the control, management, and benefit of it, the beneficial interest or enjoyment of it is regarded as not vesting until his death, and it is therefore taxable.[61]

d. Gift or Legacy in Discharge of Debt. In some jurisdictions a bequest or an *ante-mortem* gift to a creditor of the testator in discharge of his claim is not subject to the tax,[62] provided the bequest represents a true and valid debt, recognized by both parties as such, and is not a mere pretense used to avoid payment of the legacy tax.[63] In other jurisdictions, however, a different rule prevails.[64] Where the decedent is the creditor, the remission or forgiveness of the debt by will is a legacy and taxable as such.[65]

6. Estates or Interests Created by Transfer — a. In General. Any valuable interest or estate, immediate or future, created by a will and referable to the death of the testator, is a taxable transfer within the meaning of the statutes,

476, 96 N. Y. Suppl. 990 [*affirmed* in 187 N. Y. 554, 80 N. E. 1111].

60. Matter of Pierce, 132 N. Y. App. Div. 465, 116 N. Y. Suppl. 816; Matter of Parsons, 117 N. Y. App. Div. 321, 102 N. Y. Suppl. 168; Matter of Baker, 83 N. Y. App. Div. 530, 82 N. Y. Suppl. 390 [*affirmed* in 178 N. Y. 575, 70 N. E. 1094]; Matter of Cornell, 66 N. Y. App. Div. 162, 73 N. Y. Suppl. 32 [*modified* in 170 N. Y. 423, 63 N. E. 445]; Matter of Edgerton, 35 N. Y. App. Div. 125, 54 N. Y. Suppl. 700 [*affirmed* in 158 N. Y. 671, 52 N. E. 1124]; Matter of Masury, 28 N. Y. App. Div. 580, 51 N. Y. Suppl. 331 [*affirmed* in 159 N. Y. 532, 53 N. E. 1127]; Matter of Graves Estate, 52 Misc. (N. Y.) 433, 103 N. Y. Suppl. 571; *In re* Bullard, 37 Misc. (N. Y.) 663, 76 N. Y. Suppl. 309 [*affirmed* in 76 N. Y. App. Div. 207, 78 N. Y. Suppl. 491]; Matter of Spaulding, 22 Misc. (N. Y.) 420, 50 N. Y. Suppl. 398 [*affirmed* in 49 N. Y. App. Div. 541, 63 N. Y. Suppl. 694]; Huey's Estate, 24 Pittsb. Leg. J. N. S. (Pa.) 470.

61. People *v.* Kelley, 218 Ill. 509, 75 N. E. 1038; People *v.* Moir, 207 Ill. 180, 69 N. E. 905, 99 Am. St. Rep. 205; Lacy *v.* State Treasurer, (Iowa 1909) 121 N. W. 179; Lamb *v.* Morrow, 140 Iowa 89, 117 N. W. 1118, 18 L. R. A. N. S. 226; Crocker *v.* Shaw, 174 Mass. 266, 54 N. E. 549; *In re* Brandreth, 169 N. Y. 437, 62 N. E. 563, 58 L. R. A. 148; *In re* Bostwick, 160 N. Y. 489, 55 N. E. 208; *In re* Green, 153 N. Y. 223, 47 N. E. 292; Matter of Palmer, 117 N. Y. App. Div. 360, 102 N. Y. Suppl. 236; Matter of Masury, 28 N. Y. App. Div. 580, 51 N. Y. Suppl. 331 [*affirmed* in 159 N. Y. 532, 53 N. E. 1127]; Matter of Ogsbury, 7 N. Y. App. Div. 71, 39 N. Y. Suppl. 978; Matter of Pierce, 60 Misc. (N. Y.) 25, 112 N. Y. Suppl. 594; Matter of Skinner, 45 Misc. (N. Y.) 559, 92 N. Y. Suppl. 972; Matter of Sharer, 36 Misc. (N. Y.) 502, 73 N. Y. Suppl. 1057; *In re* Barbey, 114 N. Y. Suppl. 725; Wright's Appeal, 38 Pa. St. 507; Davenport's Appeal, 10 Pa. Cas. 603, 14 Atl. 346; Singer *v.* Guarantee Trust, etc., Co., 24 Pa. Super. Ct. 270; McCormick's Estate, 15 Pa. Co. Ct. 621; Conwell's Estate, 5 Pa. Co. Ct. 368. But *compare* Balch *v.* Shaw, 174 Mass. 144, 54 N. E. 490; State *v.* Washington County Prob. Ct., 102 Minn. 268, 113 N. W. 888.

62. *In re* Hooper, 6 Ohio S. & C. Pl. Dec. 560, 4 Ohio N. P. 186 (holding that where a pecuniary bequest is made to an executor in lieu of his commissions, only the excess of such legacy above the reasonable value of his services is taxable); *In re* Hawley, 214 Pa. St. 525, 63 Atl. 1021; Quin's Estate, 13 Phila. (Pa.) 340.

63. Tyson's Appeal, 10 Pa. St. 220; Leicht's Estate, 11 Pa. Dist. 313 (holding that the sole legatee of an estate cannot avoid payment of the collateral inheritance tax on the ground that testator, before the execution of the will, confessed judgment to him for an amount largely in excess of the value of the estate, where the judgment was given without consideration and on the tacit understanding that no use was to be made of it during testator's lifetime); Rubincam's Estate, 14 Phila. (Pa.) 306.

64. *In re* Gould, 156 N. Y. 423, 51 N. E. 287; Matter of Rogers, 71 N. Y. App. Div. 461, 75 N. Y. Suppl. 835 [*affirmed* in 172 N. Y. 617, 64 N. E. 1125]; Matter of Wood, 40 Misc. (N. Y.) 155, 81 N. Y. Suppl. 511; Matter of Doty, 7 Misc. (N. Y.) 193, 27 N. Y. Suppl. 653 (a legacy to a physician "in view and in consideration of his unremitting care and attention to me during my years of sickness, without asking any reward for services rendered"); Turner *v.* Martin, 7 De G. M. & G. 429, 3 Jur. N. S. 397, 26 L. J. Ch. 216, 5 Wkly. Rep. 277, 56 Eng. Ch. 332, 44 Eng. Reprint 168; Atty.-Gen. *v.* Hollingworth, 2 H. & N. 416, 27 L. J. Exch. 102, 5 Wkly. Rep. 684. *Compare* Matter of Huber, 86 N. Y. App. Div. 458, 83 N. Y. Suppl. 769; Matter of Daniell, 40 Misc. (N. Y.) 329, 81 N. Y. Suppl. 1033; Matter of Underhill, 20 N. Y. Suppl. 134, 2 Connoly Surr. 262; *In re* Hulse, 15 N. Y. Suppl. 770; Matter of Tuigg, 15 N. Y. Suppl. 548, 2 Connoly Surr. 633; Matter of Rogers, 10 N. Y. Suppl. 22, 2 Connoly Surr. 198.

65. Atty.-Gen. *v.* Holbrook, 12 Price 407, 3 Y. & J. 114; Morris *v.* Livie, 11 L. J. Ch. 172, 1 Y. & Coll. 380, 20 Eng. Ch. 380, 62 Eng. Reprint 934. See also Leavell *v.* Arnold, 131 Ky. 426, 115 S. W. 232.

including estates for life or for years,[66] annuities or life incomes charged upon property,[67] and pecuniary legacies, although the payment of them may be postponed to a future time.[68]

b. Estates in Remainder. A vested estate in remainder created by a will is a taxable transfer of property,[69] and the fact that the prior estate is exempt from the inheritance tax will not relieve the remainder-man from the payment of such tax.[70] So also a contingent remainder absolute is taxable,[71] although it may not be immediately subject to the tax on account of the uncertainty of the person to whom it may eventually descend or because he is not yet *in esse*,[72] or because the life-tenant is given full control of the *corpus* of the property, with a right to use so much thereof as he may desire or as may be necessary, and the ultimate value of the remainder therefore cannot be determined.[73]

C. Exemptions — 1. Amount or Value of Estate. In Louisiana, property on which taxes have already been paid is exempt from the inheritance tax.[74] In other states no succession tax is imposed unless the estate exceeds a certain value; and this exemption is held valid if not unreasonable in amount.[75] In some jurisdictions the rule is that the "estate passing by will," which is exempt if below a certain sum, refers to the portion passing to the legatee or heir, and not to the whole estate of the decedent, so that a legacy or distributive share below that value is not taxable, although the estate to be distributed may in the aggregate exceed the statutory limit.[76] But in other states the rule is that an estate to be

66. Billings *v.* People, 189 Ill. 472, 59 N. E. 798; Ayers *v.* Chicago Title, etc., Co., 187 Ill. 42, 58 N. E. 318; Dow *v.* Abbott, 197 Mass. 283, 84 N. E. 96; *In re* Plum, 37 Misc. (N. Y.) 466, 75 N. Y. Suppl. 940; Matter of Eldridge, 29 Misc. (N. Y.) 734, 62 N. Y. Suppl. 1026.

67. People *v.* McCormick, 208 Ill. 437, 70 N. E. 350, 64 L. R. A. 775; *In re* De Hoghton, [1896] 1 Ch. 855, 65 L. J. Ch. 528, 74 L. T. Rep. N. S. 297, 44 Wkly. Rep. 550; Stow *v.* Davenport, 5 B. & Ad. 359, 2 N. & M. 805, 27 E. C. L. 156, 110 Eng. Reprint 823; Bryan *v.* Mansion, 3 Jur. N. S. 473, 26 L. J. Ch. 510, 5 Wkly. Rep. 483. See also Green *v.* Croft, 2 H. Bl. 30.

68. Matter of Cogswell, 4 Dem. Surr. (N. Y.) 248.

69. *In re* Rohan-Chabot, 167 N. Y. 280, 60 N. E. 598; *In re* Seaman, 147 N. Y. 69, 41 N. E. 401; Matter of Bushnell, 73 N. Y. App. Div. 325, 77 N. Y. Suppl. 4 [*affirmed* in 172 N. Y. 649, 65 N. E. 1115]; Knight *v.* Stevens, 66 N. Y. App. Div. 267, 72 N. Y. Suppl. 815 [*reversed* on other grounds in 171 N. Y. 40, 63 N. E. 787]; Matter of Cruger, 54 N. Y. App. Div. 405, 66 N. Y. Suppl. 636 [*affirmed* in 166 N. Y. 602, 59 N. E. 1121]; *In re* Hoyt, 37 Misc. (N. Y.) 720, 76 N. Y. Suppl. 504; Matter of Runcie, 36 Misc. (N. Y.) 607, 73 N. Y. Suppl. 1120; Matter of Sherman, 30 Misc. (N. Y.) 547, 63 N. Y. Suppl. 957; Matter of Bogert, 25 Misc. (N. Y.) 466, 55 N. Y. Suppl. 751; *In re* Lange, 55 N. Y. Suppl. 750; *In re* Vinot, 7 N. Y. Suppl. 517; Harrison *v.* Johnston, 109 Tenn. 245, 70 S. W. 414; Bailey *v.* Drane, 96 Tenn. 16, 33 S. W. 573.

70. Bailey *v.* Drane, 96 Tenn. 16, 33 S. W. 573.

71. Ayers *v.* Chicago Title, etc., Co., 187 Ill. 42, 58 N. E. 318; *In re* Dows, 167 N. Y. 227, 60 N. E. 439, 88 Am. St. Rep. 508, 52 L. R. A. 433; Matter of Hitchins, 43 Misc. (N. Y.) 485, 89 N. Y. Suppl. 472 [*affirmed* in 101 N. Y. App. Div. 612, 92 N. Y. Suppl. 1128 (*affirmed* in 181 N. Y. 553, 74 N. E. 1118)]; Matter of Forsyth, 10 Misc. (N. Y.) 477, 32 N. Y. Suppl. 175; Willing's Estate, 11 Phila. (Pa.) 119; Bailey *v.* Drane, 96 Tenn. 16, 33 S. W. 573.

72. See *infra*, XVI, D, 1, b.

73. See *infra*, XVI, D, 1, b.

74. Pritchard's Succession, 118 La. 883, 43 So. 537, holding that the constitutional provision exempting from the inheritance tax property which has borne its just proportion of taxes is restricted to the particular property inherited, and if taxes thereon have not been paid by the former owner, it is immaterial that he paid all the taxes assessed on other property which he sold, investing the proceeds in the property inherited, for the exemption is neither personal nor transmissible.

75. State *v.* Vance, 97 Minn. 532, 106 N. W. 98; State *v.* Bazille, 97 Minn. 11, 106 N. W. 93, 6 L. R. A. N. S. 732; Blight's Estate, 6 Pa. Dist. 459; Black *v.* State, 113 Wis. 205, 89 N. W. 522, 90 Am. St. Rep. 853.

76. People *v.* Koenig, 37 Colo. 283, 85 Pac. 1129; Booth *v.* Com., 130 Ky. 88, 113 S. W. 61; State *v.* Hamlin, 86 Me. 495, 30 Atl. 76, 41 Am. St. Rep. 569, 25 L. R. A. 632; State *v.* Hennepin County Probate Ct., 101 Minn. 485, 112 N. W. 878.

In New York the rule of the text obtains at present under statute. Laws (1910), c. 706. A different rule was declared by prior statutes. *In re* Costello, 189 N. Y. 288, 82 N. E. 139; *In re* Corbett, 171 N. Y. 516, 64 N. E. 209; *In re* Hoffman, 143 N. Y. 327, 38 N. E. 311; Matter of Fisher, 96 N. Y. App. Div. 133, 89 N. Y. Suppl. 102; Matter of McMurray, 96 N. Y. App. Div. 128, 89 N. Y. Suppl. 71; Matter of Garland, 88 N. Y. App. Div. 380, 84 N. Y. Suppl. 630; Matter

distributed, if it amounts in the aggregate to more than the limited sum, is taxable, although the separate legacies or portions may be individually below the limit.[77] Generally the value of the estate is to be taken as at the date of the testator's death,[78] and both real and personal property must be added together in determining it.[79] If the value of a pecuniary legacy is to be determined, it must be estimated at its face value.[80]

2. Funeral and Cemetery Expenses. The statutes usually exempt from taxation funds set apart for the funeral expenses of the testator, and this may include a reasonable provision for the care and maintenance of the decedent's cemetery lot and the graves of himself and his family and the erection of suitable monuments,[81] and perhaps also for the saying of masses for the repose of testator's soul.[82] But in some of the cases a distinction has been made between sums spent for these purposes in the discretion of the executor and definite bequests, the income from which is to be used for the same purposes, it being held that in the latter case the bequests are taxable.[83]

3. Relationship of Parties — a. In General. In most states the inheritance tax is imposed only on collateral heirs, exempting lineal heirs or exempting certain classes of relations by name.[84] But an exemption of this kind is construed with some strictness and is limited to the very persons intended by the statute to be relieved from the payment of the tax;[85] and the exemption of a certain class

of Bliss, 6 N. Y. App. Div. 192, 39 N. Y. Suppl. 875; Matter of Rosenthal, 40 Misc. 542, 82 N. Y. Suppl. 992; Matter of Conklin, 39 Misc. 771, 80 N. Y. Suppl. 1124; Matter of Curtis, 31 Misc. 83, 64 N. Y. Suppl. 574; Matter of De Graff, 24 Misc. 147, 53 N. Y. Suppl. 591; Matter of Birdsall, 22 Misc. 180, 49 N. Y. Suppl. 450; Matter of Taylor, 6 Misc. 277, 27 N. Y. Suppl. 232. *Compare In re* Swift, 137 N. Y. 77, 32 N. E. 1096, 18 L. R. A. 709; *In re* Sherwell, 125 N. Y. 376, 26 N. E. 464; *In re* Howe, 112 N. Y. 100, 19 N. E. 513, 28 L. R. A. 825; McVean *v.* Sheldon, 48 Hun 163; Matter of Mock, 49 Misc. 283, 99 N. Y. Suppl. 236; Matter of Sterling, 9 Misc. 224, 30 N. Y. Suppl. 385; Matter of Underhill, 20 N. Y. Suppl. 134, 2 Connoly Surr. 262; Matter of Peck, 9 N. Y. Suppl. 465, 2 Connoly Surr. 201; Matter of Hopkins, 6 Dem. Surr. 1; Matter of Smith, 5 Dem. Surr. 90.

77. *Iowa.*— Gilbertson *v.* McAuley, 117 Iowa 522, 91 N. W. 788; Herriott *v.* Bacon, 110 Iowa 342, 81 N. W. 701; *In re* McGhee, 105 Iowa 9, 74 N. W. 695.

Michigan.— Stellwagen *v.* Wayne Prob. Judge, 130 Mich. 166, 89 N. W. 728.

Ohio.— *In re* Inheritance Tax, 5 Ohio S. & C. Pl. Dec. 555, 7 Ohio N. P. 547.

Pennsylvania.— Howell's Estate, 147 Pa. St. 164, 23 Atl. 403 [*affirming* 10 Pa. Co. Ct. 232]; Com. *v.* Boyle, 2 Del. Co. 335.

Utah.— Dixon *v.* Rickett, 26 Utah, 215, 72 Pac. 947.

Wisconsin.— Black *v.* State, 113 Wis. 205, 89 N. W. 522, 90 Am. St. Rep. 853.

78. Hooper *v.* Bradford, 178 Mass. 95, 59 N. E. 678.

79. Matter of Collins, 104 N. Y. App. Div. 184, 93 N. Y. Suppl. 342; Matter of Hallock, 42 Misc. (N. Y.) 473, 87 N. Y. Suppl. 255. See also Matter of Jones, 69 N. Y. App. Div. 237, 74 N. Y. Suppl. 702 [*reversed* on other grounds in 172 N. Y. 575, 65 N. E. 570, 60 L. R. A. 476].

80. Matter of Bird, 11 N. Y. Suppl. 895, 2 Connoly Surr. 376.

81. Morrow *v.* Durant, 140 Iowa 437, 118 N. W. 781, 23 L. R. A. N. S. 474 (sum set aside by decedent to erect tomb); Matter of Edgerton, 35 N. Y. App. Div. 125, 54 N. Y. Suppl. 700 [*affirmed* in 158 N. Y. 671, 52 N. E. 1124] (sum spent by executor in erection of monument); Matter of Liss, 39 Misc. (N. Y.) 123, 78 N. Y. Suppl. 969 (reasonable sum spent by executor for burial lot); *In re* Vinot, 7 N. Y. Suppl. 517 (bequest of income of fund for care of burial lot); Middleton's Estate, 13 Pa. Dist. 811; Hurst *v.* Cookman, 1 Lanc. L. Rev. (Pa.) 60; *In re* Fleck, 35 Pittsb. Leg. J. (Pa.) 67 (reasonable provision for care of cemetery lot). *Compare* Walter's Estate, 3 Pa. Co. Ct. 447.

82. Matter of Didion, 54 Misc. (N. Y.) 201, 105 N. Y. Suppl. 924. But *compare* Matter of McAvoy, 112 N. Y. App. Div. 377, 98 N. Y. Suppl. 437; Matter of Black, 5 N. Y. Suppl. 452, 1 Connoly Surr. 477.

Provision for saying masses as a "charitable" or "religious" use see *In re* Schouler, 134 Mass. 426; Matter of Eppig, 63 Misc. (N. Y.) 613, 118 N. Y. Suppl. 683; Rhymer's Appeal, 93 Pa. St. 142, 39 Am. Rep. 736; Estate of Power, 35 Leg. Int. (Pa.) 68.

83. Matter of Fay, 62 Misc. (N. Y.) 154, 116 N. Y. Suppl. 423; Long's Estate, 22 Pa. Super. Ct. 370. But see Matter of Liss, 39 Misc. (N. Y.) 123, 78 N. Y. Suppl. 969.

84. See the statutes of the several states. And see *In re* Campbell, 143 Cal. 623, 77 Pac. 674; Sala's Succession, 50 La. Ann. 1009, 24 So. 674; Matter of Smith, 5 Dem. Surr. (N. Y.) 90; Com. *v.* Henderson, 172 Pa. St. 135, 33 Atl. 368.

85. See the cases cited *infra*, this note.

"Lineal descendants."— This term includes only the direct descendants of the deceased, and not the children of his brothers and sisters. *In re* Miller, 45 Hun (N. Y.) 244, 5 Dem. Surr. 132; Matter of Miller, 10 N. Y.

of relations by specific designation, as "brothers," "nephews," or the like, will not exempt their descendants.[86] But where the legacy or devise passes over the original legatee and vests in a third person, in consequence of the pre-decease of the original legatee, the exercise of a power of appointment, or the vesting of a remainder after a life-estate, it is regarded as passing directly from the testator to the final taker, and its taxability must be determined by the relationship of that taker to the testator, not by his relationship to the original legatee.[87] A legacy intended for the use and benefit of an exempt relative is not taxable because it is left to a third person in trust for him.[88] In addition to the usual exemptions of this kind, the laws of some states include legacies to the wife or widow of a son or the husband of a daughter.[89]

b. Adopted and Putative Children. Where an exemption is made in favor of the children or lineal descendants of the testator, it does not include adopted children,[90] unless specially so provided by statute, as is now the case in several states;[91] nor does it include illegitimate children unless legitimated by the subsequent marriage of their parents.[92] In New York an exemption is made where the testator and legatee have for a certain number of years "stood in the mutually acknowledged relation of parent and child."[93] The mutual acknowledgment here

St. 341. Nor does it include a grandmother. McDowell *v.* Addams, 45 Pa. St. 430.

Half brothers.— In Ohio, it has been held that bequests to half brothers are exempt from the payment of the collateral inheritance tax. Ormsby's Estate, 5 Ohio S. & C. Pl. Dec. 553, 7 Ohio N. P. 542.

Nephews and nieces.— The exemption of bequests to a decedent's nephews and nieces extends only to children of the decedent's brothers and sisters, and does not include nephews or nieces of a decedent's husband or wife. Bates' Estate, 5 Ohio S. & C. Pl. Dec. 547, 7 Ohio N. P. 625.

Widow of decedent.— Provision is usually made for special exemption in favor of the widow of a decedent. See the statutes of the several states. And see Connell *v.* Crosby, 210 Ill. 380, 71 N. E. 350; Memphis Trust Co. *v.* Speed, 114 Tenn. 677, 88 S. W. 321.

86. Matter of Moore, 90 Hun (N. Y.) 162, 35 N. Y. Suppl. 782; Matter of Bird, 11 N. Y. Suppl. 895, 2 Connoly Surr. 376; Simon's Estate, 5 Ohio S. & C. Pl. Dec. 548, 7 Ohio N. P. 667; Bates' Estate, 5 Ohio S. & C. Pl. Dec. 547, 7 Ohio N. P. 625.

87. *In re* Hulett, 121 Iowa 423, 96 N. W. 952; Dow *v.* Abbott, 197 Mass. 283, 84 N. E. 96; Parke's Estate, 3 Pa. Dist. 196; Com. *v.* Sharpless, 2 Chest. Co. (Pa.) 246; Com. *v.* Schumacher, 9 Lanc. Bar (Pa.) 195, 199. *Compare* Matter of Rogers, 71 N. Y. App. Div. 461, 75 N. Y. Suppl. 835 [*affirmed* in 172 N. Y. 617, 64 N. E. 1125]; Matter of Walworth, 66 N. Y. App. Div. 171, 72 N. Y. Suppl. 984; Matter of Seaver, 63 N. Y. App. Div. 283, 71 N. Y. Suppl. 544.

88. Matter of Murphy, 4 Misc. (N. Y.) 230, 25 N. Y. Suppl. 107; Matter of Farley, 15 N. Y. St. 727; Morris's Estate, 1 Pa. Dist. 818.

89. See the statutes of the several states. **In New York** a legacy to the husband of the testator's daughter is exempt from taxation, although the daughter died before the testator (Matter of Woolsey, 19 Abb. N. Cas. 232; Matter of McGarvey, 6 Dem. Surr. 145), and even though the husband of the deceased daughter has remarried (Matter of Ray, 13 Misc. 480, 35 N. Y. Suppl. 481).

In Pennsylvania a legacy to a daughter-in-law who remarries is held to be taxable. Com. *v.* Powell, 51 Pa. St. 438.

90. Miller's Estate, 110 N. Y. 216, 18 N. E. 139; Com. *v.* Ferguson, 137 Pa. St. 595, 20 Atl. 870, 10 L. R. A. 240; Tharp *v.* Com., 58 Pa. St. 500; Com. *v.* Nancrede, 32 Pa. St. 389; Galbraith *v.* Com., 14 Pa. St. 258; Province's Estate, 4 Pa. Dist. 591; Wayne's Estate, 2 Pa. Co. Ct. 93.

91. See the statutes of the several states. And see *In re* Winchester, 140 Cal. 468, 74 Pac. 10; Frigala's Succession, 123 La. 71, 48 So. 652; Miller's Estate, 110 N. Y. 216, 18 N. E. 139; Matter of Duryea, 128 N. Y. App. Div. 205, 112 N. Y. Suppl. 611; Matter of Butler, 58 Hun (N. Y.) 400, 12 N. Y. Suppl. 201 [*affirmed* in 136 N. Y. 649, 32 N. E. 1016]; *In re* Cayuga County Surrogate, 46 Hun (N. Y.) 657 [*affirmed* in 111 N. Y. 343, 18 N. E. 866]; Matter of Thompson, 14 N. Y. St. 487; Warrimer *v.* People, 6 Dem. Surr. (N. Y.) 211.

Issue of adopted children.— These share the benefit of the exemption given to their ancestor, in inheriting from the adopting parent. *In re* Winchester, 140 Cal. 468, 74 Pac. 10; *In re* Cook, 187 N. Y. 253, 79 N. E. 991 [*modifying* 114 N. Y. App. Div. 718, 99 N. Y. Suppl. 1049, and *reversing* 50 Misc. 487, 100 N. Y. Suppl. 628]. See also Matter of Fisch, 34 Misc. (N. Y.) 146, 69 N. Y. Suppl. 493.

92. Com. *v.* Ferguson, 137 Pa. St. 595, 20 Atl. 870; Galbraith *v.* Com., 14 Pa. St. 258; Com. *v.* Gilkeson, 18 Pa. Super. Ct. 516, 9 Pa. Dist. 679, 24 Pa. Co. Ct. 289. *Compare* Com. *v.* Mackey, 222 Pa. St. 613, 72 Atl. 250, holding that an illegitimate child inheriting money from its mother is under no liability to pay a collateral inheritance tax thereon.

93. N. Y. Laws (1887), c. 713, § 25; Laws (1892), c. 399, § 2; Laws (1905), p. 829,

intended is not necessarily a formal act of adoption or any formal declaration of the parties as to their real or intended relationship;[94] but it may be established by pertinent facts, such as the care and maintenance of the legatee by the testator, that the latter supported and educated the former, that the legatee lived in the testator's home and as a member of his family, their mutually affectionate relations, and their style of address to each other.[95] On the other hand a presumption arising from circumstances of this kind may be rebutted by proof that the relationship of the parties was other than that of parent and child, as, for example, that of uncle and niece, and that they always addressed each other in terms appropriate to their actual relation.[96]

4. Character of Donee — a. In General. As the inheritance tax is not laid on the property but on the privilege of transferring it,[97] the state may lawfully tax a legacy given to the United States, and such a legacy is taxable if not specifically exempt by statute.[98] Nor is a bequest to a city or other public corporation exempt unless made so by law,[99] or unless the purpose of the gift brings it within the exemption of bequests for charitable and educational uses.[1] A statute imposing a tax on property of a decedent "which passes to any person" other than certain specified relatives, includes property devised to a private corporation.[2]

b. Charitable, Educational, and Religious Institutions. A legacy to a charitable, educational, or religious institution is not exempt from taxation merely because the property of the institution is exempt from general taxes.[3] But it is

c. 368, § 221. And see Matter of Harder, 124 N. Y. App. Div. 77, 108 N. Y. Suppl. 154, Matter of Wheeler, 115 N. Y. App. Div. 616, 100 N. Y. Suppl. 1044; Matter of Thomas, 3 Misc. (N. Y.) 388, 24 N. Y. Suppl. 713; *In re* Ryan, 3 N. Y. Suppl. 136.

Application of statute.— It was at first thought that the statute in question applied only to the illegitimate children of the testator. Matter of Beach, 19 N. Y. App. Div. 630, 46 N. Y. Suppl. 354 [*reversed* in 154 N. Y. 242, 48 N. E. 516]; Matter of Hunt, 86 Hun (N. Y.) 232, 33 N. Y. Suppl. 256. But the application of the statute has been very much broadened by construction. See Matter of Nichols, 91 Hun (N. Y.) 134, 36 N. Y. Suppl. 538, and cases cited *infra*, notes 94, 95.

94. Matter of Butler, 58 Hun (N. Y.) 400, 12 N. Y. Suppl. 201 [*affirmed* in 136 N. Y. 649, 32 N. E. 1016]; *In re* Stilwell, 34 N. Y. Suppl. 1123.

95. *In re* Beach, 154 N. Y. 242, 48 N. E. 516; Matter of Nichols, 91 Hun (N. Y.) 134, 36 N. Y. Suppl. 538; Matter of Birdsall, 22 Misc. (N. Y.) 180, 49 N. Y. Suppl. 450; Matter of Moulton, 11 Misc. (N. Y.) 694, 33 N. Y. Suppl. 578; Matter of Wheeler, 1 Misc. (N. Y.) 450, 22 N. Y. Suppl. 1075; Matter of Sweetland, 20 N. Y. Suppl. 310, 1 Pow. Surr. 200; *In re* Capron, 10 N. Y. Suppl. 23.

96. Matter of Deutsch, 107 N. Y. App. Div. 192, 95 N. Y. Suppl. 65. But see *In re* Davis, 184 N. Y. 299, 77 N. E. 259 [*reversing* 98 N. Y. App. Div. 546, 90 N. Y. Suppl. 244]; Matter of Spencer, 4 N. Y. Suppl. 395, 1 Connoly Surr. 208.

97. See *supra*, XVI, A, 1.

98. Matter of Cullom, 5 Misc. (N. Y.) 173, 25 N. Y. Suppl. 699 [*affirmed* in 76 Hun 610]; U. S. *v.* Perkins, 163 U. S. 625, 16 S. Ct. 1073, 41 L. ed. 287 [*affirming* 141 N. Y. 479, 36 N. E. 505]. See also Carter *v.* Whitcomb, 74 N. H. 482, 69 Atl. 779, 17 L. R. A. N. S. 733.

99. *In re* Hamilton, 148 N. Y. 310, 42 N. E. 717. But *compare In re* Macky, 46 Colo. 79, 102 Pac. 1075, 23 L. R. A. N. S. 1207.

1. *In re* Graves, 242 Ill. 23, 89 N. E. 672 (bequest to city to erect drinking fountain for horses); Essex *v.* Brooks, 164 Mass. 79, 41 N. E. 119 (bequest to establish public library); *In re* Thrall, 157 N. Y. 46, 51 N. E. 411 (bequest to city to establish and maintain public library).

2. Miller *v.* Com., 27 Gratt. (Va.) 110.

3. *Kentucky.*— Leavell *v.* Arnold, 131 Ky. 426, 115 S. W. 232.

New York.— Sherrill *v.* Christ Church, 121 N. Y. 701, 25 N. E. 50; Presbyterian Church Bd. of Foreign Missions, 58 Hun 116, 11 N. Y. Suppl. 310; *In re* Kavanagh, 6 N. Y. Suppl. 669; *In re* Keith, 5 N. Y. Suppl. 201, 1 Connoly Surr. 370.

North Carolina.— Barringer *v.* Cowan, 55 N. C. 436.

Ohio.— Simon's Estate, 5 Ohio S. & C. Pl. Dec. 548, 7 Ohio N. P. 667; Bates' Estate, 5 Ohio S. & C. Pl. Dec. 547, 7 Ohio N. P. 625.

Pennsylvania.— *In re* Finnen, 196 Pa. St. 72, 46 Atl. 269; Com. *v.* Gilpin, 3 Pa. Dist. 711; Gilpin's Estate, 14 Pa. Co. Ct. 122.

Virginia.— Miller *v.* Com., 27 Gratt. 110.

England.— Harris *v.* Howe, 29 Beav. 261, 7 Jur. N. S. 383, 30 L. J. Ch. 612, 9 Wkly. Rep. 404, 54 Eng. Reprint 627; *In re* Parker, 4 H. & N. 666, 5 Jur. N. S. 1058, 29 L. J. Exch. 66, 7 Wkly. Rep. 600; Atty.-Gen. *v.* Fitzgerald, 7 Jur. 569, 13 Sim. 83, 36 Eng. Ch. 83, 60 Eng. Reprint 33.

See 45 Cent. Dig. tit. "Taxation," § 1693.

Exemption of charitable, educational, and

within the constitutional power of the legislature to exempt bequests so given,[4] and this is sometimes done by a provision relieving from taxation legacies to corporations now exempt by law from taxation.[5] To avail itself of this immunity the institution must be able to show that its property in general is released from taxation either by its charter or by general law,[6] that the exemption applies to all its property and embraces all classes and kinds of taxes,[7] and that its objects and activities are charitable, educational, or religious, within the meaning of the law.[8] Where the legacy is given to trustees for the purpose of founding and endowing a charitable institution, it may be considered as if in the possession of a corporation already formed under the will for that purpose; [9] but the exemption does not extend to a legacy which is absolute on the face of the will, although bound by a secret trust for charitable purposes.[10]

c. Foreign Corporations. A bequest to a foreign corporation is not exempt from payment of the legacy tax, although such corporation, by reason of its character as a charitable, religious, or educational institution, is exempt from taxation in the state of its domicile, or although domestic corporations of the same class are exempt; [11] and it is immaterial that such corporation has been empowered

religious institutions from general taxation see *supra*, IV, E.

Taxation of bequest to public school not against public policy see Leavell *v.* Arnold, 131 Ky. 426, 115 S. W. 232.

4. State *v.* Henderson, 160 Mo. 190, 60 S. W. 1093; Thompson *v.* Kidder, 74 N. H. 89, 65 Atl. 392. *Contra, In re* Stanford, 126 Cal. 112, 54 Pac. 259, 58 Pac. 462, 45 L. R. A. 788.

5. See the statutes of the several states.

6. First Universalist Soc. *v.* Bradford, 185 Mass. 310, 70 N. E. 204; Hooper *v.* Shaw, 176 Mass. 190, 57 N. E. 361; *In re* Vassar, 127 N. Y. 1, 27 N. E. 394; Matter of Huntington, 62 N. Y. App. Div. 96, 70 N. Y. Suppl. 853 [*modified* in 168 N. Y. 399, 61 N. E. 643]; Matter of Howell, 34 Misc. (N. Y.) 40, 69 N. Y. Suppl. 505; *In re* Neale, 10 N. Y. Suppl. 713; *In re* Kavanagh, 6 N. Y. Suppl. 669; *In re* Hunter, 11 N. Y. St. 704, 22 Abb. N. Cas. 24, 6 Dem. Surr. 154; Matter of Miller, 5 Dem. Surr. (N. Y.) 132.

Retroactive effect of statutes see Sherrill *v.* Christ Church, 121 N. Y. 701, 25 N. E. 50; Church of Transfiguration *v.* Niles, 86 Hun (N. Y.) 221, 33 N. Y. Suppl. 243; Matter of Wolfe, 15 N. Y. Suppl. 539, 2 Connoly Surr. 600.

Amendment and repeal of various statutes in New York see *In re* Huntington, 168 N. Y. 399, 61 N. E. 643; Matter of Crouse, 34 Misc. (N. Y.) 670, 70 N. Y. Suppl. 731; Matter of Howell, 34 Misc. (N. Y.) 40, 69 N. Y. Suppl. 505.

7. Minot *v.* Winthrop, 162 Mass. 113, 38 N. E. 512, 26 L. R. A. 259; Matter of Vassar, 58 Hun (N. Y.) 378, 12 N. Y. Suppl. 203; Catlin *v.* Trinity College, 49 Hun (N. Y.) 278, 1 N. Y. Suppl. 808 [*affirmed* in 113 N. Y. 133, 20 N. E. 864, 3 L. R. A. 206]; *In re* Forrester, 12 N. Y. Suppl. 774; Matter of Vanderbilt, 10 N. Y. Suppl. 239, 2 Connoly Surr. 319.

8. *In re* Vineland Historical, etc., Soc., 66 N. J. Eq. 291, 56 Atl. 1039; Matter of White, 118 N. Y. App. Div. 869, 103 N. Y. Suppl. 688, holding that the status of the corporation, as concerns the question of exemption, must be determined by the statutory law and the certificate of incorporation, irrespective of what the corporation has assumed to do.

Corporations held to be charitable or educational within the meaning of the exemption clauses of the inheritance tax laws see *In re* Graves, 242 Ill. 23, 89 N. E. 672, 24 L. R. A. N. S. 283; Carter *v.* Whitcomb, 74 N. H. 482, 69 Atl. 779, 17 L. R. A. N. S. 733; *In re* Mergentime, (N. Y. 1909) 88 N. E. 1125 [*affirming* 129 N. Y. App. Div. 367, 113 N. Y. Suppl. 948]; Matter of Moses, 60 Misc. (N. Y.) 637, 113 N. Y. Suppl. 930; Matter of Higgins, 55 Misc. (N. Y.) 175, 106 N. Y. Suppl. 465.

Money bequest to library corporation.— Under New York Tax Laws (Laws (1896), p. 869, c. 908, as amended by Laws (1905), p. 829, c. 368), § 221, a money bequest to a library association is taxable, although it constitutes a part of a university and is educational in its nature. *In re* Francis, 189 N. Y. 554, 82 N. E. 1126.

Bequest to bishop under New York statute see Matter of Palmer, 33 N. Y. App. Div. 307, 53 N. Y. Suppl. 847 [*affirmed* in 158 N. Y. 669, 52 N. E. 1125]; Matter of Kelly, 29 Misc. (N. Y.) 169, 60 N. Y. Suppl. 1005.

9. *In re* Graves, 171 N. Y. 40, 63 N. E. 787.

10. Cullen *v.* Atty.-Gen., L. R. 1 H. L. 190, 12 Jur. N. S. 531, 14 L. T. Rep. N. S. 644, 14 Wkly. Rep. 869.

11. *Illinois.*— *In re* Speed, 216 Ill. 23, 74 N. E. 809, 108 Am. St. Rep. 189.

Massachusetts.— Rice *v.* Bradford, 180 Mass. 545, 63 N. E. 7.

New York.— *In re* Prime, 136 N. Y. 347, 32 N. E. 1091, 18 L. R. A. 713; Catlin *v.* Trinity College, 113 N. Y. 133, 20 N. E. 864, 3 L. R. A. 206; Matter of Taylor, 80 Hun 589, 30 N. Y. Suppl. 582; Matter of Balleis, 78 Hun 275, 29 N. Y. Suppl. 261 [*affirmed* in 144 N. Y. 132, 38 N. E. 1007]; Matter of Smith, 77 Hun 134, 28 N. Y. Suppl. 476; Matter of Fayerweather, 30 N. Y. Suppl.

by law to take and hold property in the taxing state,[12] or that the fund provided in the bequest is to be used within the taxing state.[13]

D. Time of Accrual, Amount, and Incidence of Tax — 1. Time of Accrual — a. In General. The inheritance tax accrues and becomes fixed as of the date of the death of the testator or intestate,[14] although, according to local practice, its payment may be postponed until the executor settles with the legatee or devisee,[15] or until the termination of litigation which may affect the taxable value of the estate.[16]

b. Postponed, Contingent, or Expectant Estates. An ordinary vested remainder not subject to any condition or contingency is, in the absence of express statutory provision to the contrary, taxable immediately upon the death of the decedent.[17] But in the absence of statutory provisions to the contrary, a succession tax cannot be assessed or demanded as of the date of the testator's death, where the actual value of the postponed estate cannot be ascertained, on account of a power given to the holder of the intermediate estate to spend the principal or a part thereof or for any similar reason;[18] nor where the person who will ultimately become entitled to the postponed estate cannot be known or identified until the termination of the intermediate estate,[19] as where the devolution of a remainder

273, 31 Abb. N. Cas. 287; Matter of Tuigg, 15 N. Y. Suppl. 548, 2 Connoly Surr. 633; McCoskey's Estate, 1 N. Y. Suppl. 782, 22 Abb. N. Cas. 20, 6 Dem. Surr. 438. But *compare* Matter of James, 144 N. Y. 6, 38 N. E. 961 [*affirming* 77 Hun 211, 28 N. Y. Suppl. 351 (*reversing* 6 Misc. 206, 27 N. Y. Suppl. 288)].

Ohio.— Humphreys *v.* State, 70 Ohio St. 67, 70 N. E. 957, 101 Am. St. Rep. 888, 65 L. R. A. 776.

Vermont.— *In re* Hickok, 78 Vt. 259, 62 Atl. 724.

See 45 Cent. Dig. tit. "Taxation," § 1699.

Public policy no ground of exemption.— In the absence of a statute exempting foreign charitable corporations from the collateral inheritance tax, the courts cannot declare them exempt therefrom on the ground that gifts for the promotion of charity, education, and religion should be encouraged and should not be diminished by the exactions of the state. *In re* Prime, 136 N. Y. 347, 32 N. E. 1091, 18 L. R. A. 713.

In New Jersey the rule of the text was at one time announced. Alfred Univ. *v.* Hancock, 69 N. J. Eq. 470, 46 Atl. 178. But under Pamphl. Laws (1898), p. 106, it has been held that foreign religious or charitable institutions not confined in their operations to local or state purposes, but for the general good of the people interested therein are exempt from payment of the collateral inheritance tax. *In re* Jones, 73 N. J. Eq. 353, 67 Atl. 1035 [*affirmed* in 74 N. J. Eq. 447, 70 Atl. 1101]; *In re* Rothchild, 72 N. J. Eq. 425, 65 Atl. 1118.

12. Matter of Wolfe, 23 Misc. (N. Y.) 439, 52 N. Y. Suppl. 415.

13. Humphreys *v.* State, 24 Ohio Cir. Ct. 238.

14. *California.*— *In re* Stanford, 126 Cal. 112, 54 Pac. 259, 58 Pac. 462, 45 L. R. A. 788.

Louisiana.— Becker's Succession, 118 La. 1056, 43 So. 701.

Massachusetts.—McCurdy *v.* McCurdy, 197 Mass. 248, 83 N. E. 881, 16 L. R. A. N. S. 329.

New Jersey.— *In re* Hartman, 70 N. J. Eq. 664, 62 Atl. 560.

New York.— Matter of Harbeck, 161 N. Y. 211, 55 N. E. 850 [*reversing* on other grounds 43 N. Y. App. Div. 188, 59 N. Y. Suppl. 362]; Matter of Green, 153 N. Y. 223, 47 N. E. 292 [*reversing* on other grounds 7 N. Y. App. Div. 339, 40 N. Y. Suppl. 1019], conveyance of personal property in the nature of a testamentary disposition.

United States.— Prevost *v.* Greneaux, 19 How. 1, 15 L. ed. 572.

England.—Bell *v.* Master in Equity, 2 App. Cas. 560, 36 L. T. Rep. N. S. 936.

See 45 Cent. Dig. tit. "Taxation," § 1709.

15. *In re* Clinch, 180 N. Y. 300, 73 N. E. 35 [*affirming* 99 N. Y. App. Div. 298, 90 N. Y. Suppl. 923]; Atty.-Gen. *v.* Allen, 59 N. C. 144; Coombe *v.* Trist, 1 Myl. & C. 69, 13 Eng. Ch. 69, 40 Eng. Reprint 302; Atty.-Gen. *v.* Manners, 1 Price 411; Atty.-Gen. *v.* Wood, 2 Y. & J. 290.

16. Matter of Newcomb, 35 Misc. (N. Y.) 589, 72 N. Y. Suppl. 58 [*affirmed* in 71 N. Y. App. Div. 606, 76 N. Y. Suppl. 222 (*affirmed* in 172 N. Y. 608, 64 N. E. 1123)].

17. *In re* Kingman, 220 Ill. 563, 77 N. E. 135; Ayers *v.* Chicago Title, etc., Co., 187 Ill. 42, 58 N. E. 318.

18. *In re* Roosevelt, 143 N. Y. 120, 38 N. E. 281, 25 L. R. A. 695; *In re* Cager, 111 N. Y. 343, 18 N. E. 866; Matter of Babcock, 81 N. Y. App. Div. 645, 81 N. Y. Suppl. 1117; *In re* Cayuga County Surrogate, 46 Hun (N. Y.) 657; Matter of Millward, 6 Misc. (N. Y.) 425, 27 N. Y. Suppl. 286; Matter of Hopkins, 6 Dem. Surr. (N. Y.) 1; Lanman's Appeal, 131 Pa. St. 346, 18 Atl. 900; Leche's Estate, 1 Lanc. L. Rev. (Pa.) 65. See also Com. *v.* Gaulbert, 134 Ky. 157, 119 S. W. 779; Simon's Estate, 5 Ohio S. & C. Pl. Dec. 548, 7 Ohio N. P. 667.

19. *In re* Davis, 149 N. Y. 539, 44 N. E. 185; Matter of Clarke, 39 Misc. (N. Y.) 73, 78 N. Y. Suppl. 869; *In re* Plum, 37 Misc.

or other expectant estate depends on a question of survivorship;[20] and generally a contingent remainder is not taxable until it vests in possession, or until the defeating contingency has been rendered forever impossible of occurrence.[21] Moreover, the laws of some states have provided generally that the tax shall not be imposed on future or expectant estates until the beneficiaries shall come into the possession and enjoyment thereof;[22] whereas in New York the statute is so framed as to require the immediate appraisal of the postponed estate and the payment forthwith of the tax on it out of the property transferred.[23] In the case of an annuity, it is sometimes held that the tax should be assessed on the annual payments as they successively accrue;[24] but in other jurisdictions it has been held that the whole present value of the annuity is to be appraised and the tax on the whole paid at once out of the principal set aside for the creation of the annuity.[25]

2. Rate or Amount of Tax. The rate of the inheritance tax varies in the different states, and is wholly a matter of statutory regulation.[26] It is a common provision to grade it according to the nearness or remoteness of the relationship between the decedent and the heir or legatee.[27] If payment of the tax is deferred, or is not made within a limited time, it is also usual to provide that it shall bear interest.[28]

3. Persons Liable For Tax — a. In General. Although payment of the

(N. Y.) 466, 75 N. Y. Suppl. 940; Matter of Howell, 34 Misc. (N. Y.) 432, 69 N. Y. Suppl. 1016; Swann's Estate, 12 Pa. Co. Ct. 135.

20. People *v.* McCormick, 208 Ill. 437, 70 N. E. 350, 64 L. R. A. 775; State *v.* Hennepin County Prob. Ct., 100 Minn. 192, 110 N. W. 865; *In re* Hoffman, 143 N. Y. 327, 38 N. E. 311; *In re* Curtis, 142 N. Y. 219, 36 N. E. 887; *In re* Plum, 37 Misc. (N. Y.) 466, 75 N. Y. Suppl. 940; Matter of Westcott, 11 Misc. (N. Y.) 589, 33 N. Y. Suppl. 426; *In re* Wallace, 4 N. Y. Suppl. 465.

21. *In re* Stewart, 131 N. Y. 274, 30 N. E. 184, 14 L. R. A. 836; Matter of Wheeler, 1 Misc. (N. Y.) 450, 22 N. Y. Suppl. 1075; Matter of Clark, 5 N. Y. Suppl. 199, 1 Connoly Surr. 431; Matter of Lefever, 5 Dem. Surr. (N. Y.) 184; State *v.* Pabst, 139 Wis. 561, 121 N. W. 351.

22. Dow *v.* Abbott, 197 Mass. 283, 84 N. E. 96; Stevens *v.* Bradford, 185 Mass. 439, 70 N. E. 425; *In re* Coxe, 193 Pa. St. 100, 44 Atl. 256; Mellon's Appeal, 114 Pa. St. 564, 8 Atl. 183; Christian's Estate, 2 Pa. Co. Ct. 91; Wharton's Estate, 14 Phila. (Pa.) 279; Harrison *v.* Johnston, 109 Tenn. 245, 70 S. W. 414. *Compare In re* Dalrymple, 215 Pa. St. 367, 64 Atl. 554; *In re* Bennett, 35 Pittsb. Leg. J. (Pa.) 73.

23. *In re* Vanderbilt, 172 N. Y. 69, 64 N. E. 782 [*modifying* 68 N. Y. App. Div. 27, 74 N. Y. Suppl. 450]; Matter of Huber, 86 N. Y. App. Div. 458, 83 N. Y. Suppl. 769; Matter of Post, 85 N. Y. App. Div. 611, 82 N. Y. Suppl. 1079.

24. State *v.* Hennepin County Prob. Ct., 100 Minn. 192, 110 N. W. 865; Crompton's Estate, 10 Pa. Co. Ct. 443, 20 Phila. 169.

25. Minot *v.* Winthrop, 162 Mass. 113, 38 N. E. 512, 26 L. R. A. 259; *In re* Tracy, 179 N. Y. 501, 72 N. E. 519.

26. See the statutes of the several states. And see *In re* Bull, 153 Cal. 715, 96 Pac. 366; Matter of Lind, 132 N. Y. App. Div. 321, 117 N. Y. Suppl. 49; State *v.* Pabst, 139 Wis. 561, 121 N. W. 351.

Effect of constitutional limitations as to rate of taxation.—Since the inheritance tax is not a tax on property but on a privilege, it is not subject to a constitutional provision limiting the rate of taxation on property for state purposes. *In re* Magnes, 32 Colo. 527, 77 Pac. 853.

What law governs.— The rate of the inheritance tax is the rate in force at the date of the testator's death. *In re* Woodward, 153 Cal. 39, 94 Pac. 242; Parke's Estate, 13 Pa. Dist. 196, 30 Pa. Co. Ct. 191.

Reduction of amount of tax by paying tax to another state see *In re* Meadon, 81 Vt. 490, 70 Atl. 1064.

27. *In re* Cook, 187 N. Y. 253, 79 N. E. 991 (holding that the succession tax is measured by the legal relation which the legatee bears to the testator, and is not affected by the relation which an assignee of the legatee bears to the testator); *In re* Rogers, 172 N. Y. 617, 64 N. E. 1125; Matter of Linkletter, 134 N. Y. App. Div. 309, 118 N. Y. Suppl. 878; Matter of Eaton, 55 Misc. (N. Y.) 472, 106 N. Y. Suppl. 682; Matter of Stebbins, 52 Misc. (N. Y.) 438, 103 N. Y. Suppl. 563; Matter of Lane, 39 Misc. (N. Y.) 522, 80 N. Y. Suppl. 381.

28. *Colorado.*— People *v.* Rice, 40 Colo. 508, 91 Pac. 33.

Massachusetts.— Bradford *v.* Storey, 189 Mass. 104, 75 N. E. 256.

New York.— *In re* Fayerweather, 143 N. Y. 114, 38 N. E. 278; Matter of Milne, 76 Hun 328, 27 N. Y. Suppl. 727.

Pennsylvania.— Lines' Estate, 155 Pa. St. 378, 26 Atl. 728; Cooper *v.* Com., 5 Pa. Co. Ct. 271.

Tennessee.— Shelton *v.* Campbell, 109 Tenn. 690, 72 S. W. 112.

See 45 Cent. Dig. tit. "Taxation," § 1724.

inheritance tax is primarily to be made by the executor or administrator,[29] it is not chargeable upon the general funds of the estate, unless so ordered by the will;[30] but each legatee, devisee, or distributee is liable for the tax on his own share,[31] although not to an extent greater than the amount which actually comes into his hands,[32] and not at all in case he renounces or disclaims his legacy.[33] As between a tenant for life and a remainder-man, each estate should bear its proper proportion of the tax unless otherwise directed by the statute.[34]

b. Executors, Administrators, and Trustees. Although the tax on a legacy or devise is the debt of the beneficiary,[35] it is primarily the duty of the executor or administrator to pay it, and if he pays the legacies or distributes the estate without paying the inheritance taxes, he becomes personally liable for them,[36] as also where he exhausts the personalty in paying debts without providing for the tax.[37] He cannot maintain an action against the legatee or distributee, whom he has paid in full, to recover back the amount of the tax which he should first have deducted.[38] So if he erroneously pays taxes on legacies which really were exempt and not taxable, the loss is his own.[39] In some states the statutes make the executor personally liable for the tax in the first instance, and he is not freed from this liability until he produces a proper official receipt for the amount of

29. See *infra*, XVI, F, 1.

Devise of realty.— The collateral inheritance tax on a transfer of realty is payable not by the executor but by the devisee, and a citation to compel payment should be directed to the latter. Lisle's Estate, 10 Pa. Dist. 713.

Funds on deposit in bank.— The state cannot sustain a claim for the collateral inheritance tax against a bank in which funds of the testator are deposited, but must look to the estate in the hands of the legal representatives after they have reduced it to possession. Allen *v.* Philadelphia Sav. Fund Soc., 1 Fed. Cas. No. 234, 7 Reporter 775, 14 Phila. (Pa.) 408, 7 Wkly. Notes Cas. (Pa.) 231.

30. See *infra*, XVI, D, 3, b.

31. *Louisiana.*— Pargoud's Succession, 13 La. Ann. 367.

Nebraska.— State *v.* Vinsonhaler, 74 Nebr. 675, 105 N. W. 472.

New Hampshire.— Kingsbury *v.* Bazeley, 75 N. H. 13, 70 Atl. 916.

North Carolina.— State *v.* Brevard, 62 N. C. 141; Hunter *v.* Husted, 45 N. C. 141.

Pennsylvania.— Miller's Estate, 20 Lanc. L. Rev. 42; Diffenbaugh *v.* Rockey, 19 Lanc. L. Rev. 69.

Rhode Island.— Goddard *v.* Goddard, 9 R. I. 293.

England.— Londesborough *v.* Somerville, 19 Beav. 295, 23 L. J. Ch. 646, 52 Eng. Reprint 363.

Assignment of legacy.— Where a legatee assigns one half of his legacy, the assignee should pay half of the tax, although the assignment was made by a deed which represented the legacy as being "unencumbered." Bliss *v.* Putnam, 7 Beav. 40, 29 Eng. Ch. 40, 49 Eng Reprint 977.

32. *In re* Bushnell, 172 N. Y. 649, 65 N. E. 1115 [*affirming* 73 N. Y. App. Div. 325, 77 N. Y. Suppl. 4].

33. Morrow *v.* Durant, 140 Iowa 437, 118 N. W. 781, 23 L. R. A. N. S. 474; *In re* Wolfe, 179 N. Y. 599, 72 N. E. 1152 [*affirming* 89 N. Y. App. Div. 349, 85 N. Y. Suppl. 949]; Atty.-Gen. *v.* Munby, 3 H. & N. 826.

34. Matter of McMahon, 28 Misc. (N. Y.) 697, 60 N. Y. Suppl. 64. See also Harrison *v.* Johnston, 109 Tenn. 245, 70 S. W. 414.

Under the New York statute, the transfer taxes imposed on trust estates and on estates for life and in remainder created by will are to be paid from the principal of such trusts and life-estates. *In re* Tracy, 179 N. Y. 501, 72 N. E. 519 [*reversing* 87 N. Y. App. Div. 215, 83 N. Y. Suppl. 1049]; Matter of Bass, 57 Misc. (N. Y.) 531, 109 N. Y. Suppl. 1084. But the rule is otherwise if the will directs the tax to be paid from the income. Matter of Bass, *supra*.

35. See *supra*, XVI, D, 3, a.

Liability of trustees.— Where a residue is bequeathed to trustees in trust for various persons in succession, the trustees originally appointed as well as any new trustees are liable to pay the legacy tax. *In re* Jones, 21 L. J. Ch. 566.

36. Matter of Hacket, 14 Misc. (N. Y.) 282, 35 N. Y. Suppl. 1051; Wright's Appeal, 38 Pa. St. 507; *In re* Wilkinson, 1 C. M. & R. 142, 4 Tyrw. 513; Wright *v.* Barnewall, 13 Jur. 1041, 19 L. J. Ch. 38; *In re* Sammon, 3 M. & W. 381. See also Dow *v.* Abbott, 197 Mass. 283, 84 N. E. 96.

37. Greville *v.* Greville, 27 Beav. 596, 54 Eng. Reprint 236; *In re* Taylor, 8 Exch. 384, 22 L. J. Exch. 211.

38. Foster *v.* Ley, 2 Bing. N. Cas. 269, 1 Hodges 326, 5 L. J. C. P. 17, 2 Scott 438, 29 E. C. L. 532; Farwell *v.* Seale, 3 De G. & Sm. 359, 13 Jur. 483, 18 L. J. Ch. 189, 64 Eng. Reprint 515; Horn *v.* Coleman, 2 Jur. N. S. 1127, 26 L. J. Ch. 213, 5 Wkly. Rep. 32; Bowra *v.* Rhodes, 8 Jur. N. S. 1050, 10 Wkly. Rep. 747. But see Bate *v.* Payne, 13 Q. B. 900, 13 Jur. 609, 18 L. J. Q. B. 273, 66 E. C. L. 900; Hales *v.* Freeman, 1 B. & B. 391, 4 Moore C. P. 21, 21 Rev. Rep. 663, 5 E. C. L. 701.

39. Shaw *v.* Turbett, 14 Ir. Ch. 476.

the tax,[40] or unless he can justify himself by a judicial decision that the particular bequest is exempt.[41]

c. Provisions of Will. If a testator in his will directs that the amount of a legacy shall be paid to the legatee without deduction of the inheritance tax, or free and clear of such tax, the tax will be paid out of the residuary estate and not charged to the particular legacy.[42] Whether or not the legatee is to take his legacy in this way depends upon the intention of the testator as manifested on the face of the will, and no special formula of words is necessary to free the legacy from the tax, provided the intention is clear.[43]

E. Assessment — 1. Jurisdiction. According to the usual statutory provisions, the probate court having charge of a decedent's estate by the probate of the will or the grant of letters of administration [44] is given jurisdiction to determine all questions relative to the imposition of the inheritance tax, including the question whether a particular legacy or devise is subject to the tax or exempt from it and as to the incidence of the tax; [45] and this will include jurisdiction to construe

40. *In re* Bushnell, 172 N. Y. 649, 65 N. E. 1115; Matter of Vanderbilt, 10 N. Y. Suppl. 239, 2 Connoly Surr. 319.

41. Matter of Vanderbilt, 10 N. Y. Suppl. 239, 2 Connoly Surr. 319.

Effect of judicial decision by court having no jurisdiction of the question involved see Matter of Wolfe, 66 Hun (N. Y.) 389, 29 Abb. N. Cas. 340, 21 N. Y. Suppl. 515, 522 [*reversed* in 137 N. Y. 205, 33 N. E. 156].

42. Isham *v.* New York Assoc. for Improving Condition of Poor, 177 N. Y. 218, 69 N. E. 367; Jackson *v.* Tailer, 96 N. Y. App. Div. 625, 88 N. Y. Suppl. 1104 [*affirmed* in 184 N. Y. 603, 77 N. E. 1189]; *In re* De Borbon, 211 Pa. St. 623, 61 Atl. 244; *In re* Lea, 194 Pa. St. 524, 45 Atl. 337; Brown's Estate, 12 Pa. Dist. 123; Cumming's Estate, 12 Pa. Co. Ct. 45; Hurst *v.* Cookman, 1 Lanc. L. Rev. (Pa.) 60.

43. Kingsbury *v.* Bazeley, 75 N. H. 13, 70 Atl. 916; Holbrook's Estate, 3 Pa. Co. Ct. 265; Horter's Estate, 1 Leg. Gaz. (Pa.) 90; Gude *v.* Mumford, 1 Jur. 577, 2 Y. & C. Exch. 448.

Applications of text.— In various English cases the following expressions, used in wills, have been held to evince an intention that the legacy duty should be paid out of the residuary estate, and not by the legatee or in diminution of the legacy.

"*Free of legacy duty.*"— Early *v.* Benbow, 2 Coll. 354, 10 Jur. 280, 33 Eng. Ch. 354, 63 Eng. Reprint 767; Byne *v.* Currey, 2 Cromp. & M. 603, 3 L. J. Exch. 177, 4 Tyrw. 479; Ansley *v.* Cotton, 16 L. J. Ch. 55; Courtoy *v.* Vincent, Turn. & R. 433, 24 Rev. Rep. 94, 12 Eng. Ch. 433, 37 Eng. Reprint 1167.

"*Free from all expense.*"— Gosden *v.* Dotterell 2 L. J. Ch. 15, 1 Myl. & K. 56, 7 Eng. Ch. 56, 39 Eng. Reprint 602.

"*Free from all taxes.*"— Burrows *v.* Cottrell, 3 Sim. 375, 30 Rev. Rep. 171, 6 Eng. Ch. 375, 57 Eng. Reprint 1038. But a gift of six months' "full salary" is not a gift free from legacy duty. *In re* Marcus, 56 L. J. Ch. 830.

"*Free from any charge or liability.*"— Warbrick *v.* Varley, 30 Beav. 241, 54 Eng. Reprint 881.

"*Clear of all taxes and deductions.*"— Stow *v.* Davenport, 5 B. & Ad. 359, 2 N. & M. 805, 27 E. C. L. 156, 110 Eng. Reprint 823.

"*Clear yearly sum.*"— *In re* Coles, L. R. 8 Eq. 271, 22 L. T. Rep. N. S. 221; Pridie *v.* Field, 19 Beav. 497, 52 Eng. Reprint 443; Baily *v.* Boult, 14 Beav. 595, 15 Jur. 1049, 21 L. J. Ch. 277, 51 Eng. Reprint 413; Harper *v.* Morley, 2 Jur. 653; Gude *v.* Mumford, 1 Jur. 577, 2 Y. & C. Exch. 448; Wilks *v.* Groom, 2 Jur. N. S. 798, 4 Wkly. Rep. 697; Marris *v.* Burton, 9 L. J. Ch. 373, 11 Sim. 161, 34 Eng. Ch. 161, 59 Eng. Reprint 836; Louch *v.* Peters, 3 L. J. Ch. 167, 1 Myl. & K. 489, 7 Eng. Ch. 489, 39 Eng. Reprint 766; *Re* Robins, 58 L. T. Rep. N. S. 382; Sanders *v.* Kiddell, 7 Sim. 536, 5 L. J. Ch. 29, 8 Eng. Ch. 536, 58 Eng. Reprint 943. See Banks *v.* Braithwaite, 32 L. J. Ch. 35, 7 L. T. Rep. N. S. 149, 10 Wkly. Rep. 612.

"*To be paid clear.*"— Ford *v.* Ruxton, 1 Coll. 403, 28 Eng. Ch. 403, 63 Eng. Reprint 474.

"*Without any deduction.*"— Ferguson *v.* Ogilby, 12 Ir. Ch. 411; Smith *v.* Anderson, 4 Russ. 352, 6 L. J. Ch. O. S. 105, 28 Rev. Rep. 122, 4 Eng. Ch. 352, 38 Eng. Reprint 838; Dawkins *v.* Tatham, 2 Sim. 492, 2 Eng. Ch. 492, 57 Eng. Reprint 872; Barksdale *v.* Gilliat, 1 Swanst. 562, 18 Rev. Rep. 139, 36 Eng. Reprint 506.

44. Hopkins' Appeal, 77 Conn. 644, 60 Atl. 657 (holding that, although the statute contains no express direction as to who shall compute the tax, or the manner of computation, the duty devolves by necessary implication on the probate court); Dixon *v.* Russell, 78 N. J. L. 296, 73 Atl. 51; *In re* Fitch, 160 N. Y. 87, 54 N. E. 701 (ancillary administration on estate of non-resident); Matter of Hathaway, 27 Misc. (N. Y.) 474, 59 N. Y. Suppl. 166 (holding that where real or personal property of a decedent is situated in two counties, the filing of a petition for letters of administration in one county excludes the jurisdiction of the other).

45. *In re* Kidd, 188 N. Y. 274, 80 N. E. 924; *In re* Westurn, 152 N. Y. 93, 46 N. E. 315; Grace Church's Appeal, 137 N. Y. 205, 33 N. E. 156; *In re* Wolfe, 137 N. Y. 205, 33 N. E. 156; Matter of Seaver, 63 N. Y.

the will or determine the validity of particular clauses of it, when the decision may affect the amount of taxable property.[46] But the grant of such jurisdiction by statute does not take away the right of a legatee to sue for his legacy at common law and have the question of its liability to the tax determined in such action.[47]

2. Appraisement — a. In General. So far as concerns the procedure for the assessment and collection of the inheritance tax, the law to be followed is that in force when proceedings are instituted.[48] Under some systems the first step is a report or return to be made to the court by the persons liable to pay the tax;[49] under others it is the duty of the executor to apply for an appraisement of the estate for the purpose of the tax.[50] But, generally speaking, authority is given to the surrogate or judge of probate to appoint an appraiser, either on the motion of a party in interest or on his own motion,[51] selecting a suitable person for that purpose if there is no official appraiser.[52] In case these steps are not taken, the state may intervene by its proper officer and institute proceedings to have an appraisement made.[53] It is the function and duty of the appraiser to find and report all the property of the estate which is liable to the payment of the tax;[54] and when questions arise as to the liability of particular property or its exemption, or as to the deduction of particular debts in determining the taxable value of the residuary estate, it is his duty to examine witnesses, if necessary, and report the facts and his findings thereon to the court.[55]

b. Notice and Hearing. Notice of the time and place of an appraisement must be given to all parties interested in the estate or whose interests may be affected by the imposition of the tax, including on the one hand the legatees, heirs at law, etc.,[56] and on the other hand the proper representatives of the state,

App. Div. 283, 71 N. Y. Suppl. 544; Matter of Jones, 54 Misc. (N. Y.) 202, 105 N. Y. Suppl. 932.

On whose motion proceedings taken.— See *In re* Kidd, 188 N. Y. 274, 80 N. E. 924; Matter of Farley, 15 N. Y. St. 727.

46. *In re* Ullmann, 137 N. Y. 403, 33 N. E. 480; Matter of Peters, 69 N. Y. App. Div. 465, 74 N. Y. Suppl. 1028. See also *In re* Edson, 159 N. Y. 568, 54 N. E. 1092.

47. Essex *v.* Brooks, 164 Mass. 79, 41 N. E. 119.

48. *In re* Davis, 149 N. Y. 539, 44 N. E. 185.

49. Com. *v.* Gaulbert, 134 Ky. 157, 119 S. W. 779; Harrison *v.* Johnston, 109 Tenn. 245, 70 S. W. 414.

50. Frazer *v.* People, 3 N. Y. Suppl. 134, 6 Dem. Surr. 174. And see *In re* Morris, 138 N. C. 259, 50 S. E. 682.

51. Matter of O'Donohue, 44 N. Y. App. Div. 186, 60 N. Y. Suppl. 690; Matter of Lansing, 31 Misc. (N. Y.) 148, 64 N. Y. Suppl. 1125; Matter of Jones, 5 Dem. Surr. (N. Y.) 30. See also Duell *v.* Glynn, 191 N. Y. 357, 84 N. E. 282; Matter of Crerar, 56 N. Y. App. Div. 479, 67 N. Y. Suppl. 795; Burkhardt's Estate, 25 Pa. Super. Ct. 514.

Venue of proceedings.— In New York, where the property of a decedent is situated in more than one county, the surrogate of either county may take jurisdiction, and the one first acquiring jurisdiction may have the whole estate appraised for taxation. Matter of Keenan, 5 N. Y. Suppl. 200, 1 Connoly Surr. 226. In Pennsylvania the appraiser must be appointed by the register of wills in the county in which the decedent had his residence at the time of his death, or the county in which is the principal part of his estate. *In re* Dalrymple, 215 Pa. St. 367, 64 Atl. 554.

52. Kelsey *v.* Church, 112 N. Y. App. Div. 408, 98 N. Y. Suppl. 535 (when county treasurer should be directed to make the appraisement); Matter of King, 56 N. Y. App. Div. 617, 67 N. Y. Suppl. 766; *In re* Johnston, 11 York Leg. Rec. (Pa.) 4 (holding that deputy register of wills is not a competent person to act as appraiser).

53. Kelsey *v.* Church, 112 N. Y. App. Div. 408, 98 N. Y. Suppl. 535; Matter of Crerar, 56 N. Y. App. Div. 479, 67 N. Y. Suppl. 795; Matter of Schmidt, 39 Misc. (N. Y.) 77, 78 N. Y. Suppl. 879; Astor's Estate, 20 Abb. N. Cas. (N. Y.) 405.

54. Matter of Astor, 2 N. Y. Suppl. 630, 6 Dem. Surr. 413.

When appraisement unnecessary.—Where legacies subject to the inheritance tax are in cash, no appraiser is necessary. Astor's Estate, 14 N. Y. St. 478, 6 Dem. Surr. 402.

55. Matter of Bishop, 82 N. Y. App. Div. 112, 81 N. Y. Suppl. 474; Matter of Wormser, 36 Misc. (N. Y.) 434, 72 N. Y. Suppl. 748; Matter of Bolton, 35 Misc. (N. Y.) 688, 72 N. Y. Suppl. 430; Matter of Fisch, 34 Misc. (N. Y.) 146, 69 N. Y. Suppl. 493; Matter of O'Donoghue, 28 Misc. (N. Y.) 607, 59 N. Y. Suppl. 1087 [*affirmed* in 44 N. Y. App. Div. 180, 60 N. Y. Suppl. 180, 60 N. Y. Suppl. 772 (*affirmed* in 162 N. Y. 660, 57 N. E. 1110]; Matter of Astor, 2 N. Y. Suppl. 630, 6 Dem. Surr. 413. But see Matter of Wolfe, 66 Hun (N. Y.) 389, 21 N. Y. Suppl. 515, 522 [*reversed* in 137 N. Y. 205, 33 N. E. 156].

56. *In re* Backhouse, 185 N. Y. 544, 77 N. E. 1181 [*affirming* 110 N. Y. App. Div. 737, 96 N. Y. Suppl. 466]; Matter of Wood,

such as the state controller or treasurer;[57] and a hearing should be held in pursuance of such notice.[58] At such hearing the burden of proof is on one who claims to be exempt from the tax or claims a lower rate of taxation on account of his relationship to the decedent.[59]

c. Valuation of Estate or Interest — (i) *In General.* According to one rule the valuation is to be placed in the first instance upon the entire taxable estate of the decedent;[60] and according to another rule, upon each separate legacy, devise, or transfer individually.[61] In either case the valuation is to be fixed as of the date of the death of the testator,[62] and the property is to be appraised at its fair market value.[63] What is the fair market value is a question of fact which

40 Misc. (N. Y.) 155, 81 N. Y. Suppl. 511; Matter of Winters, 21 Misc. (N. Y.) 552, 48 N. Y. Suppl. 1097; Matter of Vanderbilt, 10 N. Y. Suppl. 239, 2 Connoly Surr. 319; Matter of Astor, 2 N. Y. Suppl. 630, 6 Dem. Surr. 413; Astor's Estate, 14 N. Y. St. 478, 6 Dem. Surr. 402; Belcher's Estate, 12 Pa. Dist. 774, 11 Kulp 107.

57. *In re* McGhee, 105 Iowa 9, 74 N. W. 695; Matter of Collins, 104 N. Y. App. Div. 184, 93 N. Y. Suppl. 342; Matter of Bolton, 35 Misc. (N. Y.) 688, 72 N. Y. Suppl. 430; Matter of Fulton, 30 Misc. (N. Y.) 70, 62 N. Y. Suppl. 995; Matter of Wolfe, 15 N. Y. Suppl. 539, 2 Connoly Surr. 600. See also *In re* Kidd, 188 N. Y. 274, 80 N. E. 924.

58. Belcher's Estate, 12 Pa. Dist. 774, 11 Kulp 107, stating the proper procedure in Pennsylvania as follows: To make an appraisement binding reasonable notice should be given to all the parties subject to the tax, fixing a time and place of hearing, when and where evidence may be heard; a hearing should be held in pursuance of such notice; notice should be given of the time of filing the appraisement, on or before the date of filing but not later; and the report of the appraiser should show that the notice was given, stating how given and to whom and when, and if not given to all the parties the reasons for not doing so should be stated.

59. Murphy *v.* People, 213 Ill. 154, 72 N. E. 779; Matter of Davis, 98 N. Y. App. Div. 546, 90 N. Y. Suppl. 244 [*reversed* on other grounds in 184 N. Y. 299, 77 N. E. 259].

60. Hopkins' Appeal, 77 Conn. 644, 60 Atl. 657, holding that the probate court, in computing the tax, is required to make a valuation of the whole interest that would, except for the tax, pass to all the decedent's beneficial successors, by deducting from the total amount of the valuation of all property left by the decedent, as it appears in the inventory and appraisal returned by the administrator and accepted by the court, or by a new appraisal that may be ordered at the instance of the state treasurer or any party interested, the amount of debts paid and expenses of administration, with other amounts required by the statute; then a sum equal to one half of one per cent on such proportion of the beneficial interest thus valued as would pass to husband or wife, parents, or lineal descendants, and three per cent on such proportion as would pass to any others, fixes the amount of death duty or succession tax payable to the state on occasion of that succession.

61. Matter of Hutchinson, 105 N. Y. App. Div. 487, 94 N. Y. Suppl. 354; Matter of King, 30 Misc. (N. Y.) 575, 63 N. Y. Suppl. 1100 [*affirmed* in 56 N. Y. App. Div. 617, 67 N. Y. Suppl. 766]. See also *In re* Masury, 159 N. Y. 532, 53 N. E. 1127.

Interest on legacy.— In England, it has been held that where a legacy is not paid at the time appointed by the testator, legacy duty is payable, not merely on the capital sum bequeathed, but on the aggregate amount of capital and interest ultimately received by the legatee. Thomas *v.* Montgomery, 3 Russ. 502, 3 Eng. Ch. 502, 38 Eng. Reprint 664. But see Atty.-Gen. *v.* Holbrook, 12 Price 407, 3 Y. & J. 114, holding that where a specific sum is bequeathed, or a specific debt forgiven, which is known and ascertained at the time of the testator's death, legacy duty is not payable upon the interest accruing in respect of such debt or sum of money between the time of such death and the period when the executors close their accounts.

62. Hooper *v.* Bradford, 178 Mass. 95, 59 N. E. 678; *In re* Davis, 149 N. Y. 539, 44 N. E. 185; Matter of Earle, 74 N. Y. App. Div. 458, 77 N. Y. Suppl. 503; Morgan *v.* Cowie, 49 N. Y. App. Div. 612, 63 N. Y. Suppl. 608; Matter of Offerman, 25 N. Y. App. Div. 94, 48 N. Y. Suppl. 993; Matter of Rice, 29 Misc. 404, 61 N. Y. Suppl. 911; *In re* Leavitt, 4 N. Y. Suppl. 179; *In re* Lines, 155 Pa. St. 378, 26 Atl. 728; Com. *v.* Smith, 20 Pa. St. 100; Atty.-Gen. *v.* Sefton, 11 H. L. Cas. 257, 12 L. T. Rep. N. S. 242, 5 New Rep. 436, 11 Eng. Reprint 1331; Atty.-Gen. *v.* Partington, 1 H. & C. 457, 10 Jur. N. S. 617 [*affirmed* in 3 H. & C. 193, 10 Jur. N. S. 825, 33 L. J. Exch. 281, 10 L. T. Rep. N. S. 751, 13 Wkly. Rep. 54]. See Atty.-Gen. *v.* Cavendish, Wightw. 82, 12 Rev. Rep. 716. *Contra*, Ayers *v.* Chicago Title, etc., Co., 187 Ill. 42, 58 N. E. 318.

Time of valuation of estate in remainder or estate created by exercise of power of appointment see Fisher *v.* State, 106 Md. 104, 66 Atl. 661; Matter of Walworth, 66 N. Y. App. Div. 171, 72 N. Y. Suppl. 984.

63. *In re* McGehee, 105 Iowa 9, 74 N. W. 695 (not necessarily the value of the property as assessed for purposes of general taxation); Matter of Astor, 2 N. Y. Suppl. 630, 6 Dem. Surr. 413.

Price on subsequent sale of property.— In

must be determined upon all available evidence, and the force and weight of such evidence is to be tested by the ordinary rules.[64]

(II) *Annuities, Life-Estates, and Remainders.* The value of an annuity or life-estate is to be ascertained by calculating its probable duration according to the standard tables of mortality in use by actuaries, life insurance companies, and others; [65] and if the estate in remainder is to be appraised at the same time, its value is determined by deducting from the entire estate transferred the value of the life-estate as thus calculated.[66] But it is held that if the appraisement and taxation of an expectant or contingent estate are deferred until the beneficiary comes into the actual enjoyment of it, it should then be appraised at its present actual value, and without diminution on account of any valuation theretofore made of the particular estate.[67]

(III) *Corporate Stocks and Bonds.* In the case of stocks and bonds listed on the stock exchange, they should be appraised at their market value at the date of the decedent's death, by ascertaining the range of the market and the average of prices as thus found running back a reasonable period of time; [68] and although the decedent's holdings of particular stocks may have been so large that they could not be thrown upon the market at once without materially depressing the price, it is not proper to appraise them at less than the current market

an English case, where an executor placed a certain value on pictures and other personal property not reduced to money, and the commissioners accepted legacy duty on that value, but afterward the executor sold the property for a sum greatly in excess of the value so placed on it, and accounted to the residuary legatee for the proceeds, it was held that the crown was entitled to duty on the amount paid to the legatee. Atty.-Gen. *v.* Dardier, 11 Q. B. D. 16, 47 J. P. 484, 52 L. J. Q. B. 329, 48 L. T. Rep. N. S. 582, 31 Wkly. Rep. 499.

64. Morgan *v.* Warner, 162 N. Y. 612, 57 N. E. 1118; *In re* Westurn, 152 N. Y. 93, 46 N. E. 315; Matter of Arnold, 114 N. Y. App. Div. 244, 99 N. Y. Suppl. 740; Matter of Kennedy, 113 N. Y. App. Div. 4, 99 N. Y. Suppl. 72; Matter of Thorne, 27 Misc. (N. Y.) 624, 59 N. Y. Suppl. 700 [*reversed* on other grounds in 44 N. Y. App. Div. 8, 60 N. Y. Suppl. 419]. See also Matter of Vivanti, 63 Misc. (N. Y.) 618, 118 N. Y. Suppl. 680.

In determining the value of the good-will of a business for the purpose of a transfer tax, the net earnings of a single year should be multiplied by a certain number of years; the number depending on the nature of the business. Matter of Keahon, 60 Misc. (N. Y.) 508, 113 N. Y. Suppl. 926.

65. *Massachusetts.*— Howe *v.* Howe, 179 Mass. 546, 61 N. E. 225, 55 L. R. A. 626.

New Jersey.— *In re* Rothchild, 72 N. J. L. 425, 65 Atl. 1118.

New York.— *In re* Tracy, 179 N. Y. 501, 72 N. E. 519; Matter of Jones, 28 Misc. 356, 59 N. Y. Suppl. 983; Matter of Robertson, 5 Dem. Surr. 92.

Ohio.— See Chisholm *v.* Shields, 67 Ohio St. 374, 66 N. E. 93.

Pennsylvania.— Von Storch's Estate, 7 Pa. Dist. 204.

England.— *In re* Cornwallis, 11 Exch. 580, 25 L. J. Exch. 149, 4 Wkly. Rep. 711.

See 45 Cent. Dig. tit. "Taxation," § 1714.

Estimating probable income of life-estate. — In determining the value of a life-estate in real and personal property, it is the duty of the appraiser to take into consideration testimony offered as to the probable net income of the estate, and it is not proper to appraise it on the theory that the annual income will be six per cent. Kass' Estate, 5 Pa. Co. Ct. 583.

66. People *v.* Nelms, 241 Ill. 571, 89 N. E. 683; *In re* Kingmans, 220 Ill. 563, 77 N. E. 135; Ayers *v.* Chicago Title, etc., Co., 187 Ill. 42, 58 N. E. 318; Howe *v.* Howe, 179 Mass. 546, 61 N. E. 225, 55 L. R. A. 626; *In re* Sloane, 154 N. Y. 109, 54 N. E. 978 [*affirming* 19 N. Y. App. Div. 411, 46 N. Y. Suppl. 264]; Matter of Maresi, 74 N. Y. App. Div. 76, 77 N. Y. Suppl. 76; Matter of Hall, 36 Misc. (N. Y.) 618, 73 N. Y. Suppl. 1124; *In re* Coxe, 9 Kulp (Pa.) 393; State *v.* Pabst, 139 Wis. 561, 121 N. W. 351.

67. Matter of Mason, 120 N. Y. App. Div. 738, 105 N. Y. Suppl. 667 [*affirmed* in 189 N. Y. 556, 82 N. E. 1129]; Matter of Connoly, 38 Misc. (N. Y.) 533, 77 N. Y. Suppl. 1113; *In re* Goelet, 78 N. Y. Suppl. 47. And see *In re* Vanderbilt, 172 N. Y. 69, 64 N. E. 782. *Compare* Matter of Meyer, 83 N. Y. App. Div. 381, 82 N. Y. Suppl. 329, holding that where the testator bequeaths the income of a fund to his brother for life, with authority to the executors to use the principal if necessary for the brother's support, and with remainder to the brother's children, the transfer tax thereon, although it cannot be computed until the death of the life-tenant and the interest of the remainder-men becomes apparent, must then be levied on what the sum coming to the remainder-men would have been worth at the testator's death in view of its deferred payment.

68. Walker *v.* People, 192 Ill. 106, 61 N. E. 489; *In re* Curtice, 185 N. Y. 543, 77 N. E. 1184; Matter of Proctor, 41 Misc. (N. Y.) 79, 83 N. Y. Suppl. 643.

price for this reason.[69] In the case of unlisted securities, their value is to be determined on the best available data, including prices established by actual sales, unofficial quotations or offers, earning capacity of the corporation as shown by current dividends, and the value of the real estate, plant, or other property in which its capital is invested.[70] In assessing the tax on the stock of a railroad corporation incorporated under the laws of various states, the tax should be assessed on such percentage of the value of the stock as the amount of property of the railroad within the state bears to the total property in the several states of the railroad's incorporation.[71]

d. Deductions — (i) *In General.* In determining the taxable value of an entire estate or of a residuary estate, all valid and genuine debts due from the decedent should first be deducted,[72] mortgage debts, however, being deducted only from the real estate on which they rest, and not from personal estate.[73] There should also be deducted the proper costs and expenses of administering and settling the estate,[74] including the cost of litigation to sustain the will as against

69. Walker *v.* People, 192 Ill. 106, 61 N. E. 489; Matter of Gould, 19 N. Y. App. Div. 352, 46 N. Y. Suppl. 506 [*modified* on other grounds in 156 N. Y. 423, 51 N. E. 287]; Matter of Cook, 50 Misc. (N. Y.) 487, 100 N. Y. Suppl. 628 [*reversed* in 114 N. Y. App. Div. 718, 99 N. Y. Suppl. 1049 (*modified* in 187 N. Y. 253, 79 N. E. 991)].

70. *In re* Cooley, 186 N. Y. 220, 78 N. E. 939; *In re* Curtice, 185 N. Y. 543, 77 N. E. 1184; *In re* Palmer, 183 N. Y. 238, 76 N. E. 16; *In re* Jones, 172 N. Y. 575, 65 N. E. 570, 60 L. R. A. 476; Matter of Smith, 71 N. Y. App. Div. 602, 76 N. Y. Suppl. 185; Matter of Proctor, 41 Misc. (N. Y.) 79, 83 N. Y. Suppl. 643; Matter of Brandreth, 28 Misc. (N. Y.) 468, 59 N. Y. Suppl. 1092 [*reversed* in 58 N. Y. App. Div. 575, 69 N. Y. Suppl. 142 (*reversed* in 169 N. Y. 437, 62 N. E. 563, 58 L. R. A. 148)].

Compelling production of evidence.— In fixing the value of corporate stock belonging to a decedent's estate, the court has no power to compel the corporation to produce and exhibit its books and papers. State *v.* Carpenter, 129 Wis. 180, 108 N. W. 641, 8 L. R. A. N. S. 78.

71. Kingsbury *v.* Chapin, 196 Mass. 533, 82 N. E. 700; Gardiner *v.* Carter, 74 N. H. 507, 69 Atl. 939; *In re* Cooley, 186 N. Y. 220, 78 N. E. 939; Matter of Thayer, 58 Misc. (N. Y.) 117, 110 N. Y. Suppl. 751.

72. *Illinois.*— Connell *v.* Crosby, 210 Ill. 380, 71 N. E. 350.

Louisiana.— May's Succession, 120 La. 692, 45 So. 551; Levy's Succession, 115 La. 377, 39 So. 37, 8 L. R. A. N. S. 1180.

New York.— Matter of King, 71 N. Y. App. Div. 581, 76 N. Y. Suppl. 220 [*affirmed* in 172 N. Y. 616, 64 N. E. 1122]; Matter of Campbell, 50 Misc. 485, 100 N. Y. Suppl. 637; Matter of Burden, 47 Misc. 329, 95 N. Y. Suppl. 972; Matter of Morgan, 36 Misc. 753, 74 N. Y. Suppl. 478. See also Matter of Wormser, 28 Misc. 608, 59 N. Y. Suppl. 1088. *Compare* Matter of Westurn, 152 N. Y. 93, 46 N. E. 315 [*reversing* 8 N. Y. App. Div. 59, 40 N. Y. Suppl. 567]; Matter of Havemeyer, 32 Misc. 416, 66 N. Y. Suppl. 722; Matter of Millward, 6 Misc. 425, 27 N. Y. Suppl. 286.

Pennsylvania.— Commonwealth's Appeal, 127 Pa. St. 435, 17 Atl. 1094.

Tennessee.— Memphis Trust Co. *v.* Speed, 114 Tenn. 677, 88 S. W. 321; Shelton *v.* Campbell, 109 Tenn. 690, 72 S. W. 112.

Canada.— Receiver-Gen. *v.* Hayward, 35 N. Brunsw. 453.

See 45 Cent. Dig. tit. "Taxation," § 1719.

Debts barred by limitation.—Debts justly due by the decedent, but which are barred by the statute of limitations, are to be deducted from the gross assets of the estate, where neither legatees nor creditors desire to interpose the plea of the statute. McKee's Estate, 10 Pa. Dist. 538, 25 Pa. Co. Ct. 589.

Debts not yet proved.— The surrogate is not bound to wait until all debts are proved before proceeding to assess the tax, but has power to reserve an amount from the appraisal adequate to meet the probable debts, especially where the statute provides for the refunding of a proportionate part of the tax in case debts are allowed after its payment. *In re* Westurn, 152 N. Y. 93, 46 N. E. 315.

73. McCurdy *v.* McCurdy, 197 Mass. 248, 83 N. E. 881, 16 L. R. A. N. S. 329; *In re* Fox, 154 Mich. 5, 117 N. W. 558; Matter of Maresi, 74 N. Y. App. Div. 76, 77 N. Y. Suppl. 76; Matter of Offerman, 25 N. Y. App. Div. 94, 48 N. Y. Suppl. 993; Matter of Sutton, 3 N. Y. App. Div. 208, 38 N. Y. Suppl. 277 [*affirmed* in 149 N. Y. 618, 44 N. E. 1128]; Matter of Livingston, 1 N. Y. App. Div. 568, 37 N. Y. Suppl. 463; Matter of De Graaf, 24 Misc. (N. Y.) 147, 53 N. Y. Suppl. 591; Matter of Berry, 23 Misc. (N. Y.) 230, 51 N. Y. Suppl. 1132; Matter of Kene, 8 Misc. (N. Y.) 102, 29 N. Y. Suppl. 1078.

74. Hopkins' Appeal, 77 Conn. 644, 10 Atl. 657; *In re* Gihon, 169 N. Y. 443, 62 N. E. 561; Matter of Dimon, 82 N. Y. App. Div. 107, 81 N. Y. Suppl. 428; Matter of Gould, 19 N. Y. App. Div. 352, 46 N. Y. Suppl. 506 [*modified* in 156 N. Y. 423, 51 N. E. 287]; Matter of Rothschild, 63 Misc. (N. Y.) 615, 118 N. Y. Suppl. 654; Matter of Purdy, 24 Misc. (N. Y.) 301, 53 N. Y. Suppl. 735. See also Matter of Ludlow, 4 Misc. (N. Y.) 594, 25 N. Y. Suppl. 989; *In re* Miller, 182 Pa. St. 157, 37 Atl. 1000; Cullen's Estate, 8 Pa. Co. Ct. 234; Shelton *v.* Camp-

a contest, or to construe it where necessary,[75] the legal costs of enforcing and collecting claims due to the estate,[76] and the statutory commissions of the personal representatives.[77] Desperate debts or worthless claims on the part of the estate should also be excluded.[78]

(II) *Federal and Other Taxes.* General state or municipal taxes assessed and due before the death of the decedent are to be deducted,[79] but not so a sum which will be payable as an inheritance tax in a foreign jurisdiction.[80] In determining the taxable value of the estate, the rule in Massachusetts is that the amount of a legacy tax paid or payable to the United States under the War Revenue Act of 1898 should be deducted,[81] but in New York this is not allowed.[82]

3. Conclusiveness and Effect of Assessment. The report of an appraiser may be accepted or rejected by the court or sent back for further proceedings, as the case may require.[83] But when adopted or confirmed by the court it becomes an adjudication, which is final and conclusive if not appealed from, as to the taxable value of the property,[84] although not necessarily as to its taxability or exemption.[85]

4. Review, Modification, and Reappraisement. The power of a probate court or surrogate's court to open, vacate, or modify its adjudications on the appraisal of a decedent's estate is generally limited to those cases in which a court of general jurisdiction would have a similar authority over its own judgments.[86] But in

bell, 109 Tenn. 690, 72 S. W. 112. *Contra*, Callahan *v.* Woodbridge, 171 Mass. 595, 51 N. E. 176. See also Lines' Estate, 155 Pa. St. 378, 26 Atl. 728, fees of counsel.

Legacy tax as part of expenses of administration see Matter of Swift, 16 N. Y. Suppl. 193, 2 Connoly Surr. 644 [*affirmed* in 19 N. Y. Suppl. 292, but *modified* in 137 N. Y. 77, 32 N. E. 1096, 18 L. R. A. 709].

75. Connell *v.* Crosby, 210 Ill. 380, 71 N. E. 350; Matter of Maresi, 74 N. Y. App. Div. 76, 77 N. Y. Suppl. 76; Shelton *v.* Campbell, 109 Tenn. 690, 72 S. W. 112.

But the heirs of a decedent are not entitled to have the expense of litigation to set aside a will deducted from the appraisal of the estate to fix their taxable interest therein. *In re* Westurn, 152 N. Y. 93, 46 N. E. 315.

Payments in compromise of litigation see *In re* Wells, 142 Iowa 255, 120 N. W. 713; Matter of Wormser, 51 N. Y. App. Div. 441, 64 N. Y. Suppl. 897; Matter of Marks, 40 Misc. (N. Y.) 507, 82 N. Y. Suppl. 803; Small's Appeal, 151 Pa. St. 1, 25 Atl. 23.

76. Matter of Thomas, 39 Misc. (N. Y.) 223, 79 N. Y. Suppl. 571.

77. *In re* Gihon, 169 N. Y. 443, 62 N. E. 561; Matter of Vanderbilt, 68 N. Y. App. Div. 27, 74 N. Y. Suppl. 450 [*modified* in 172 N. Y. 69, 64 N. E. 782]; Matter of Gould, 19 N. Y. App. Div. 352, 46 N. Y. Suppl. 506 [*modified* in 156 N. Y. 423, 51 N. E. 287]; Matter of Van Pelt, 63 Misc. 616, 118 N. Y. Suppl. 655; Matter of Kennedy, 20 Misc. (N. Y.) 531, 46 N. Y. Suppl. 906. But see State *v.* Hennepin County Prob. Ct., 101 Minn. 485, 112 N. W. 878.

78. *In re* Manning, 169 N. Y. 449, 62 N. E. 565; *In re* Rosenberg, 114 N. Y. Suppl. 726.

79. Matter of Brundage, 31 N. Y. App. Div. 348, 52 N. Y. Suppl. 362; Matter of Hoffman, 42 Misc. (N. Y.) 90, 85 N. Y. Suppl. 1082; Matter of Liss, 39 Misc. (N. Y.) 123, 78 N. Y. Suppl. 969. See also Matter of Maresi, 74 N. Y. App. Div. 76, 77 N. Y. Suppl. 76.

80. Matter of Kennedy, 20 Misc. (N. Y.) 531, 46 N. Y. Suppl. 906; *In re* Brown, 208 Pa. St. 161, 57 Atl. 360.

81. Hooper *v.* Bradford, 178 Mass. 95, 59 N. E. 678; Hooper *v.* Shaw, 176 Mass. 190, 57 N. E. 361.

82. *In re* Gihon, 169 N. Y. 443, 62 N. E. 561; Matter of Vanderbilt, 71 N. Y. App. Div. 611, 75 N. Y. Suppl. 969 [*modified* on other grounds in 172 N. Y. 69, 64 N. E. 782]; Matter of Curtis, 31 Misc. (N. Y.) 83, 64 N. Y. Suppl. 574; Matter of Irish, 28 Misc. (N. Y.) 647, 60 N. Y. Suppl. 30; Matter of Becker, 26 Misc. (N. Y.) 633, 57 N. Y. Suppl. 940.

83. Matter of Lawrence, 96 N. Y. App. Div. 29, 88 N. Y. Suppl. 1028; Matter of Earle, 74 N. Y. App. Div. 458, 77 N. Y. Suppl. 503; Matter of Davis, 91 Hun (N. Y.) 53, 36 N. Y. Suppl. 822 [*affirmed* in 149 N. Y. 539, 44 N. E. 185]; Matter of Kelly, 29 Misc. (N. Y.) 169, 60 N. Y. Suppl. 1005. See also Becker *v.* Nye, 8 Cal. App. 129, 96 Pac. 333.

84. *In re* Kidd, 188 N. Y. 274, 80 N. E. 924; Miller's Estate, 110 N. Y. 216, 18 N. E. 139; Matter of Rice, 29 Misc. (N. Y.) 404, 61 N. Y. Suppl. 911; Matter of Hacket, 14 Misc. (N. Y.) 282, 35 N. Y. Suppl. 1051; Com. *v.* Freedley, 21 Pa. St. 33. See also *In re* Naylor, 189 N. Y. 556, 82 N. E. 1129 [*affirming* 120 N. Y. App. Div. 738, 105 N. Y. Suppl. 667].

85. *In re* Vineland Historical, etc., Soc., 66 N. J. Eq. 291, 56 Atl. 1039; Weston *v.* Goodrich, 86 Hun (N. Y.) 194, 33 N. Y. Suppl. 382 (holding that the power of the surrogate to determine in the first instance whether a fund is subject to the transfer tax is exclusive and cannot be exercised by the supreme court as incidental to its jurisdiction to construe a will); Matter of Irwin, 36 Misc. (N. Y.) 277, 73 N. Y. Suppl. 415; Stinger *v.* Com., 26 Pa. St. 422.

86. See Matter of Crerar, 56 N. Y. App. Div. 479, 67 N. Y. Suppl. 795.

Illustrations.— The following are instances

cases where this authority cannot be invoked, a right of appeal is generally granted,[87] which is available either to the executor or beneficiary whose interests are affected, on the one hand, or, on the other hand, to the state acting through its proper officers.[88] The appeal must be taken on such notice and within such time as may be limited by the statute;[89] and the reviewing court will not generally try the case *de novo*, but will restrict its inquiries to the specific questions and objections brought before it.[90] Provision is also made by law in some states

of vacating or modifying appraisals for the causes mentioned:

Order made without jurisdiction.— Matter of Silliman, 175 N. Y. 513, 67 N. E. 1090 [*affirming* 79 N. Y. App. Div. 98, 80 N. Y. Suppl. 336].

Inadvertent confirmation of fatally defective appraiser's report. Matter of Earle, 74 N. Y. App. Div. 458, 77 N. Y. Suppl. 503.

Tax imposed under statute afterward declared unconstitutional.— *In re* Scrimgeour, 175 N. Y. 507, 67 N. E. 1089 [*affirming* 80 N. Y. App. Div. 388, 80 N. Y. Suppl. 636].

Fraud or newly discovered evidence.— Morgan *v.* Cowie, 49 N. Y. App. Div. 612, 63 N. Y. Suppl. 608. But the concealment of facts by an administrator is no ground for setting aside the appraisement, as the law does not require him to give voluntary aid to the appraiser or make any disclosure as to the estate. Matter of Smith, 14 Misc. (N. Y.) 169, 35 N. Y. Suppl. 701.

Mistake.— *In re* Earle, 71 N. Y. Suppl. 1038.

Error of fact or clerical error in imposition of tax.— Matter of Backhouse, 185 N. Y. 544, 77 N. E. 1181 [*affirming* 110 N. Y. App. Div. 737, 96 N. Y. Suppl. 466]; Matter of Willets, 119 N. Y. App. Div. 119, 104 N. Y. Suppl. 1150 [*affirming* 51 Misc. 176, 100 N. Y. Suppl. 850, and *affirmed* in 190 N. Y. 527, 83 N. E. 1134]; Matter of Wallace, 28 Misc. (N. Y.) 603, 59 N. Y. Suppl. 1084.

Property omitted from appraisement.— *In re* Silliman, 175 N. Y. 513, 67 N. E. 1090; Matter of Crerar, 56 N. Y. App. Div. 479, 67 N. Y. Suppl. 795; Matter of Connelly, 38 Misc. (N. Y.) 466, 77 N. Y. Suppl. 1032; Matter of Smith, 14 Misc. (N. Y.) 169, 35 N. Y. Suppl. 701; *In re* Moneypenny, 181 Pa. St. 309, 37 Atl. 589.

Erroneous inclusion of exempt property.— Matter of Cameron, 97 N. Y. App. Div. 436, 89 N. Y. Suppl. 977 [*affirmed* in 181 N. Y. 560, 74 N. E. 1115]; Matter of Schermerhorn, 38 N. Y. App. Div. 350, 57 N. Y. Suppl. 26; Matter of Von Post, 35 Misc. (N. Y.) 367, 71 N. Y. Suppl. 1039; Matter of Daly, 34 Misc. (N. Y.) 148, 69 N. Y. Suppl. 494.

Taxation at lower rate than provided by law.— Matter of Eaton, 55 Misc. (N. Y.) 472, 106 N. Y. Suppl. 682.

Error as to valuation.—A surrogate has authority to open a decree of appraisement of a decedent's estate, for the purpose of showing an excessive valuation of the assets. Matter of Fulton, 30 Misc. (N. Y.) 70, 62 N. Y. Suppl. 995. But not on the ground merely that a subsequet sale of the property showed that the appraisement was too high, or that it was too low. Matter of Lowry, 89 N. Y. App. Div. 226, 85 N. Y. Suppl. 924; *In re* Bruce, 59 N. Y. Suppl. 1083.

Erroneous holding that transfer took place.— Matter of Warren, 62 Misc. (N. Y.) 444, 116 N. Y. Suppl. 1034.

Ordering refund.—A decree of the surrogate setting aside his prior order fixing a transfer tax need not direct the state controller to refund, as the latter officer is commanded by statute to refund in such cases. Matter of Cameron, 97 N. Y. App. Div. 436, 89 N. Y. Suppl. 977 [*affirmed* in 181 N. Y. 560, 74 N. E. 1115].

87. See the statutes of the several states. And see Howe *v.* Howe, 179 Mass. 546, 61 N. E. 225, 55 L. R. A. 626; Morgan *v.* Warner, 45 N. Y. App. Div. 424, 60 N. Y. Suppl. 963 [*affirmed* in 162 N. Y. 612, 57 N. E. 1118].

Appeal from decision of surrogate acting as assessor improper.— In the case of *In re* Costello, 189 N. Y. 288, 82 N. E. 139 [*modifying* order in 117 N. Y. App. Div. 807, 103 N. Y. Suppl. 6], it was held that on the decision of a surrogate acting as an assessor under the Transfer Tax Act, Laws (1896), c. 908, §§ 231, 232, an appeal does not lie; the proper practice being to apply to the surrogate to review his decision and appeal from the determination thereof.

Decision on appeal as res adjudicata see *In re* Cook, 194 N. Y. 400, 87 N. E. 786 [*affirming* 125 N. Y. App. Div. 114, 109 N. Y. Suppl. 417].

88. Becker *v.* Nye, 8 Cal. App. 129, 96 Pac. 333; Matter of Hull, 109 N. Y. App. Div. 248, 95 N. Y. Suppl. 819 (right of state controller to appeal); Matter of Cornell, 66 N. Y. App. Div. 162, 73 N. Y. Suppl. 32 (an executor as such is entitled to appeal); Humphreys *v.* State, 70 Ohio St. 67, 70 N. E. 957, 101 Am. St. Rep. 888, 65 L. R. A. 776; Commonwealth's Appeal, 128 Pa. St. 603, 18 Atl. 386 (holding that the voluntary payment by an executor of the amount fixed as the collateral inheritance tax due from his testator's estate does not prevent the state from appealing from the decree). *Compare* Com. *v.* Coleman, 52 Pa. St. 468, holding that an administrator cannot appeal from the appraisement of real estate.

89. Matter of Stone, 56 Misc. (N. Y.) 247, 107 N. Y. Suppl. 385; Matter of Connelly, 38 Misc. (N. Y.) 466, 77 N. Y. Suppl. 1032; *In re* Belcher, 211 Pa. St. 615, 61 Atl. 252.

90. People *v.* Sholem, 238 Ill. 203, 87 N. E. 390; *In re* Keeney, 194 N. Y. 281, 87 N. E. 428; *In re* Westurn, 152 N. Y. 93, 46 N. E. 315; Miller *v.* Tracy, 93 N. Y. App. Div. 27, 86 N. Y. Suppl. 1024; Matter of Brundage, 31 N. Y. App. Div. 348, 52 N. Y. Suppl. 362;

for ordering a reappraisement, chiefly in cases where property has been omitted by mistake,[91] although in some cases also where the state complains of an undervaluation.[92]

F. Payment and Collection — 1. Payment. It is the duty of the executor or administrator in the first instance to pay the inheritance tax out of funds in his hands available for that purpose, looking for reimbursement to those upon whom it is ultimately chargeable.[93] The tax on a legacy is payable from the legacy, unless the testator directs otherwise;[94] and if the tax on an estate in remainder is to be made forthwith, it must come out of the principal of the fund.[95]

2. Refunding and Recovery of Tax Paid. Where an inheritance tax has been assessed and paid erroneously or on exempt successions or under an invalid statute, the laws generally provide for a method by which it may be reclaimed and refunded by the proper officers,[96] the claimant being also entitled to interest.[97] The time

In re Johnson, 37 Misc. (N. Y.) 542, 75 N. Y. Suppl. 1046; Matter of Havemeyer, 32 Misc. (N. Y.) 416, 66 N. Y. Suppl. 722; Matter of Crary, 31 Misc. (N. Y.) 72, 64 N. Y. Suppl. 566.

The purpose of an appeal to the surrogate from his order confirming an appraiser's report is not simply to review his former determination, but to ascertain the true value of the estate. Matter of Thompson, 57 N. Y. App. Div. 317, 68 N. Y. Suppl. 18.

On an appeal from an order appointing an appraiser the supreme court will go no further than to ascertain whether the succession to any property is subject to such appraisement. Douglas County *v.* Kountze, 84 Nebr. 506, 121 N. W. 593.

91. Matter of Crerar, 56 N. Y. App. Div. 479, 67 N. Y. Suppl. 795; Morgan *v.* Cowie, 49 N. Y. App. Div. 612, 63 N. Y. Suppl. 608; Matter of Niven, 29 Misc. (N. Y.) 550, 61 N. Y. Suppl. 956. *Compare In re* Moneypenny, 181 Pa. St. 309, 37 Atl. 589.

92. Morgan *v.* Warner, 45 N. Y. App. Div. 424, 60 N. Y. Suppl. 963 [*affirmed* in 162 N. Y. 612, 57 N. E. 1118]. See also Matter of Kelly, 29 Misc. (N. Y.) 169, 60 N. Y. Suppl. 1005.

Reference to ascertain question of fact.— Where an appraiser reported to the surrogate the property of a testator in New York which was subject to taxation, and counsel for the controller moved that the matter be sent back to the appraiser, to ascertain and report the property not in the state, but which would be subject to taxation if the testator was a resident of the state, a question of fact was presented to the surrogate for decision as to the place of testator's residence at the time of his death, which question the surrogate had power to refer. Matter of Bishop, 111 N. Y. App. Div. 545, 97 N. Y. Suppl. 1098.

93. Bridgeport Trust Co.'s Appeal, 77 Conn. 657, 60 Atl. 662; Hopkins' Appeal, 77 Conn. 644, 60 Atl. 657; George's Succession, 4 La. Ann. 223; Hughes *v.* Golden, 44 Misc. (N. Y.) 128, 89 N. Y. Suppl. 765; Greeves' Estate, 8 Pa. Dist. 287. And see *supra*, XVI, D, 3, b.

Payment of tax in another state.— Jurisdiction to enforce the collateral inheritance tax of the state is not affected by voluntary payment by the executor of the inheritance tax of another state. *In re* Lewis, 203 Pa. St. 211, 52 Atl. 205.

Compromise of tax claim by executor see *In re* Kidd, 188 N. Y. 274, 80 N. E. 924 [*reversing* 115 N. Y. App. Div. 205, 100 N. Y. Suppl. 917].

Proof of payment see Howe *v.* Lichfield, L. R. 1 Eq. 641, 35 Beav. 370, 14 Wkly. Rep. 468, 55 Eng. Reprint 939 [*affirmed* in L. R. 2 Ch. 155, 36 L. J. Ch. 313, 16 L. T. Rep. N. S. 436, 15 Wkly. Rep. 323]; Harrison *v.* Borwell, 10 Sim. 380, 16 Eng. Ch. 380, 59 Eng. Reprint 662.

Presumption of payment from lapse of time see Stewart's Estate, 147 Pa. St. 383, 23 Atl. 599.

94. Bispham's Estate, 6 Pa. Co. Ct. 459; Thomson's Estate, 12 Phila. (Pa.) 36. And see *supra*, XVI, D, 3, c.

95. Minot *v.* Winthrop, 162 Mass. 113, 38 N. E. 512, 26 L. R. A. 259; Matter of Johnson, 20 N. Y. St. 134, 6 Dem. Surr. 146.

96. Matter of Skinner, 106 N. Y. App. Div. 217, 94 N. Y. Suppl. 144; Matter of Howard, 54 Hun (N. Y.) 305, 7 N. Y. Suppl. 594; Matter of Hall, 4 Silv. Sup. (N. Y.) 413, 7 N. Y. Suppl. 595; Matter of Scrimgeour, 39 Misc. (N. Y.) 128, 78 N. Y. Suppl. 971; Matter of Sherar, 25 Misc. (N. Y.) 138, 54 N. Y. Suppl. 930; Beals *v.* State, 139 Wis. 544, 121 N. W. 347; Reg. *v.* Stamps, etc., Com'rs, 13 Jur. 624, 18 L. J. Q. B. 201; Hicks *v.* Keat, 3 Beav. 141, 43 Eng. Ch. 141, 49 Eng. Reprint 55.

What law governs.— The procedure by a devisee for recovering back from the state a payment of a void transfer tax is governed by the statute in force when the proceeding is commenced, rather than the law in force when the testator died. Matter of Coogan, 27 Misc. (N. Y.) 563, 59 N. Y. Suppl. 111.

Mandamus to compel repayment see Reg. *v.* Inland Revenue Com'rs, 12 Q. B. D. 461, 48 J. P. 452, 53 L. J. Q. B. 229, 51 L. T. Rep. N. S. 46, 32 Wkly. Rep. 543.

Voluntary payment through error of law.— The surrogate will not give relief to one who has voluntarily paid a transfer tax under a mistake of law, which was not discovered until after the court of appeals had rendered a decision declaring the property not subject to such tax. Matter of Von Post, 35 Misc. (N. Y.) 367, 71 N. Y. Suppl. 1039.

97. *In re* O'Berry, 179 N. Y. 285, 72 N. E. 109 [*affirming* 91 N. Y. App. Div. 3, 86 N. Y. Suppl. 269].

within which proceedings for this purpose may be taken is commonly limited by law.[98] In New York it is also provided that a person receiving a legacy and paying a tax therefor, who shall thereafter be compelled to refund a part of the legacy to pay debts proved against the estate after the payment of the legacy, shall be entitled to repayment of an equitable portion of the tax, by the executor if the tax has not yet been paid, or by the proper state or county officers if it has.[99]

3. Collection and Enforcement — a. In General. The collection of the inheritance tax is ordinarily made in and as a part of the proceedings for the administration of the estate, the executor or administrator being ordered to retain the amount of the tax from the funds in his hands, and being required, by rule if necessary, to pay it over to the proper officer.[1] The officers of the probate court are responsible for it if paid into that court.[2] But this does not exclude the maintenance of a suit by or on behalf of the state for the recovery of the tax where resort to such action becomes necessary;[3] and the state is not estopped from bringing such a suit for the unpaid tax on certain legacies by the fact that it has accepted payment of the tax on other legacies passing under the same will.[4]

b. Lien and Priority. In some states the inheritance tax rests as a lien upon the lands of the decedent,[5] but it is generally limited in time as against pur-

98. *In re* Hoople, 179 N. Y. 308, 72 N. E. 229; Matter of Mather, 90 N. Y. App. Div. 382, 85 N. Y. Suppl. 657 [*affirmed* in 179 N. Y. 526, 71 N. E. 1134]; Matter of Willets, 51 Misc. (N. Y.) 176, 100 N. Y. Suppl. 850 [*affirmed* in 119 N. Y. App. Div. 119, 104 N. Y. Suppl. 1150 (*affirmed* in 190 N. Y. 527, 83 N. E. 1134)]; Matter of Sherar, 25 Misc. (N. Y.) 138, 54 N. Y. Suppl. 930.

99. Matter of Park, 8 Misc. (N. Y.) 550, 29 N. Y. Suppl. 1081. See also Matter of Hamilton, 41 Misc. (N. Y.) 268, 84 N. Y. Suppl. 44; *In re* Taylor, 8 Exch. 384, 22 L. J. Exch. 211.

1. *In re* Mahoney, 133 Cal. 180, 65 Pac. 389, 85 Am. St. Rep. 155; *In re* Vivian, 1 Cromp. & J. 409, 1 Tyrw. 379; *In re* Pigott, 1 Cromp. & M. 827, 2 L. J. Exch. 298, 3 Tyrw. 859; *In re* Robinson, 5 Dowl. P. C. 609, 6 L. J. Exch. 158, M. & H. 71, 2 M. & W. 407; *In re* Evans, 3 H. & C. 562, 11 Jur. N. S. 182, 34 L. J. Exch. 87, 11 L. T. Rep. N. S. 717, 13 Wkly. Rep. 350.

Contempt proceedings to enforce order for payment of tax see *In re* Prout, 3 N. Y. Suppl. 831.

2. Com. *v.* Toms, 45 Pa. St. 408, liability of sureties on bond of register of wills for collateral inheritance taxes collected by him but not paid over.

3. *Illinois.*— Connell *v.* Crosby, 210 Ill. 380, 71 N. E. 350.

Kentucky.— Com. *v.* Gaulbert, 134 Ky. 157, 119 S. W. 779.

Louisiana.— Pargoud's Succession, 13 La. Ann. 367.

New York.— Matter of Blackstone, 69 N. Y. App. Div. 127, 74 N. Y. Suppl. 508 [*affirmed* in 171 N. Y. 682, 64 N. E. 1118 (*affirmed* in 188 U. S. 189, 23 S. Ct. 277, 47 L. ed. 439)]; Kissam *v.* People, 3 N. Y. Suppl. 135, 6 Dem. Surr. 171.

Tennessee.— Harrison *v.* Johnston, 109 Tenn. 245, 70 S. W. 414.

What law governs.— A proceeding to enforce a collateral inheritance tax is governed by the law in force at the time of decedent's death. Matter of Sterling, 9 Misc. (N. Y.) 224, 30 N. Y. Suppl. 385.

Parties.— It is unnecessary to appoint a special guardian to represent an infant heir, where the latter's interest is only in remainder and not presently taxable. Matter of Post, 5 N. Y. App. Div. 113, 38 N. Y. Suppl. 977.

Nature and form of remedy.— If the administrator pays over money to a distributee or legatee without deducting the inheritance tax, it becomes, to the extent of the tax, money had and received by him for the use of the state, and an action of assumpsit may be maintained against him therefor. Montague *v.* State, 54 Md. 481. See also Fidelity, etc., Co. *v.* Crenshaw, 120 Tenn. 606, 110 S. W. 1017. But see Atty.-Gen. *v.* Pierce, 59 N. C. 240, holding that the proper mode of suing for the inheritance tax is by a bill in equity in the nature of an information, in the name of the attorney-general.

Burden of proof.— The state has the burden of proving that property is subject to the inheritance tax. Matter of Miller, 77 N. Y. App. Div. 473, 78 N. Y. Suppl. 930. But where the government has made out a *prima facie* case for duty at a particular rate, if events have happened by which the duty would be less, the burden of proving such facts is on defendant. Solicitor-Gen. *v.* Law Reversionary Interest Soc., L. R. 8 Exch. 233, 42 L. J. Exch. 146, 28 L. T. Rep. N. S. 769, 21 Wkly. Rep. 854.

4. Matter of Smith, 23 N. Y. Suppl. 762, Pow. Surr. 150; Matter of Wolfe, 15 N. Y. Suppl. 539, 2 Connoly Surr. 600.

5. Kitching *v.* Shear, 26 Misc. (N. Y.) 436, 57 N. Y. Suppl. 464 (holding that the lien is not paramount to that of an existing mortgage); *In re* Wilcox, 118 N. Y. Suppl. 254.

Discharge of lien by judicial sale.—In Pennsylvania the lien of the state for a collateral inheritance tax will be deemed constructively discharged if, upon a judicial sale of the land, although for other purposes, which realizes more than enough to pay such lien, the

chasers.[6] If the testator directs the sale of his real estate, the lien of the tax is transferred to the fund produced by the conversion.[7]

c. Limitations.[8] The inheritance tax is not a debt, nor is it a statutory penalty or forfeiture, and therefore it is not within the statutes limiting actions on claims of either of those classes.[9] Special statutes of limitation, relating to the collection of this tax, have now been enacted in the various states where such a tax is imposed.[10]

d. Costs and Fees. The costs and expenses of a proceeding to collect the inheritance tax may be charged against the estate, if there was default in its payment,[11] or against the heirs or distributees whose neglect or refusal made the proceedings necessary,[12] but not against the state except under the conditions prescribed by the statute.[13] These costs may include a fee for the attorney employed to collect the tax if the law so provides,[14] and in some states probate officers are authorized to retain commissions on the taxes collected and paid over by them.[15]

G. Penalties — 1. In General. In some states penalties for the non-payment of the inheritance tax are imposed in the form of heavy interest, beginning from the time when normally the estate should be settled and the tax paid.[16] If the delay in the payment of the tax is due to the fault of the executor or administrator, he may be personally liable for the penalty.[17]

2. Grounds For Penalty and Excuses For Delay. The ground for imposing the penalty is that the tax was not paid within the time limited by law for that purpose.[18] But it is generally made a sufficient excuse for delay that the estate could not be settled within the time limited by reason of claims made against it, necessary litigation, or other unavoidable causes of delay.[19] Aside from a statutory provision of this character, an executor is not in fault if he withholds payment

state fails to claim its privilege, although the state officers were unaware of the existence of the lien and had not appraised the estate or assessed the tax; and the fact that the judicial sale was of but a portion of the land liable for the tax will not prevent the discharge of the lien, since the tax is not apportionable, but rests on the entire tract. Mellon's Appeal, 114 Pa. St. 564, 8 Atl. 183.

6. *In re* James, 2 Del. Co. (Pa.) 164, holding that the lien is limited to twenty years in favor of purchasers, but is perpetual against the heirs and devisees.

7. Brown *v.* Lawrence Park Realty Co., 133 N. Y. App. Div. 753, 118 N. Y. Suppl. 132; Brown's Estate, 5 Pa. Dist. 286.

8. Limitations of actions generally see Limitations of Actions, 25 Cyc. 963.

9. Bradford *v.* Storey, 189 Mass. 104, 75 N. E. 256; Matter of Vanderbilt, 10 N. Y. Suppl. 239, 2 Connoly Surr. 319.

10. See the statutes of the several states. And see Howe *v.* Howe, 179 Mass. 546, 61 N. E. 225, 55 L. R. A. 626; Matter of Strang, 117 N. Y. App. Div. 796, 102 N. Y. Suppl. 1062; Matter of Moench, 39 Misc. (N. Y.) 480, 80 N. Y. Suppl. 222; Cullen's Estate, 142 Pa. St. 18, 21 Atl. 781 [*affirming* 8 Pa. Co. Ct. 234]; Mellon's Appeal, 114 Pa. St. 564, 8 Atl. 183; *In re* James, 2 Del. Co. (Pa.) 164; Miller *v.* Wolfe, 115 Tenn. 234, 89 S. W. 398.

11. Frazer *v.* People, 3 N. Y. Suppl. 134, 6 Dem. Surr. 174; Lyall *v.* Paton, 25 L. J. Ch. 746.

12. Burkhart's Estate, 25 Pa. Super. Ct. 514; Cowley *v.* Wellesley, L. R. 1 Eq. 656, 35 Beav. 634, 14 L. T. Rep. N. S. 425, 14 Wkly. Rep. 528, 55 Eng. Reprint 1043.

13. Matter of McCarthy, 5 Misc. (N. Y.) 276, 25 N. Y. Suppl. 987.

14. Shelton *v.* Campbell, 109 Tenn. 690, 72 S. W. 112; Harrison *v.* Johnston, 109 Tenn. 245, 70 S. W. 414. But *compare* Levy's Succession, 115 La. 377, 39 So. 37, 8 L. R. A. N. S. 1180; Kohn's Succession, 115 La. 71, 38 So. 898.

15. Allegheny County *v.* Stengel, 213 Pa. St. 493, 63 Atl. 58. *Compare* Banks *v.* State, 60 Md. 305.

16. See the statutes of the several states. And see People *v.* Prout, 53 Hun (N. Y.) 541, 3 Silv. Sup. 170, 6 N. Y. Suppl. 457 [*affirmed* in 117 N. Y. 650, 22 N. E. 1132]; Commonwealth's Appeal, 128 Pa. St. 603, 18 Atl. 386; Banks' Estate, 5 Pa. Co. Ct. 614.

17. Allen's Estate, 9 Pa. Co. Ct. 328; Palmer's Estate, 2 Del. Co. (Pa.) 180.

18. Com. *v.* Smith, 20 Pa. St. 100; Com. *v.* Bausman, 10 Lanc. Bar (Pa.) 189.

19. *In re* Stewart, 131 N. Y. 274, 30 N. E. 184, 14 L. R. A. 836; Matter of Wormser, 51 N. Y. App. Div. 441, 64 N. Y. Suppl. 897; Matter of Moore, 90 Hun (N. Y.) 162, 35 N. Y. Suppl. 782 (litigation to determine the proper distributive shares of several legatees is an "unavoidable cause of delay"); People *v.* Prout, 53 Hun (N. Y.) 541, 3 Silv. Sup. 170, 6 N. Y. Suppl. 457 [*affirmed* in 117 N. Y. 650, 22 N. E. 1132]; Matter of Bolton, 35 Misc. (N. Y.) 688, 72 N. Y. Suppl. 430; Commonwealth's Appeal, 128 Pa. St. 603, 18 Atl. 386; Miller *v.* Com., 111 Pa. St. 321, 2 Atl. 492; Banks' Estate, 5 Pa. Co. Ct. 614 (uncer-

of the tax while litigation to test the constitutionality of the law imposing it is in progress.[20] But relief from the penalty should not be granted to an executor where his only excuse is that he was ignorant of the law.[21]

XVII. TAX ON TRANSFERS OF CORPORATE STOCK.

The tax of two cents a share imposed on transfers of stock,[22] made within that state, by the New York Tax Law of 1905,[23] does not violate the fourteenth amendment of the national constitution as making an arbitrary discrimination in favor of sales of other kinds of personal property,[24] or because it adopts the face value, instead of the market value, of the shares, as the basis of the tax;[25] neither is it objectionable as a tax on property outside the jurisdiction of the state,[26] nor as

tainty as to identity of trustee named in the will); State *v.* Pabst, 139 Wis. 561, 121 N. W. 351.

Burden of proof.— One claiming exemption from the penalty on the ground of litigation or unavoidable delay must show affirmatively that the litigation was necessary and the delay unavoidable. People *v.* Prout, 53 Hun (N. Y.) 541, 5 Silv. Sup. 170, 6 N. Y. Suppl. 457 [*affirmed* in 117 N. Y. 650, 22 N. E. 1132].

Where estate can be partially settled.— It is the duty of executors, where a part of the estate cannot be settled up within the year, to estimate the amount thus suspended, and pay the collateral inheritance tax on the balance. Commonwealth's Appeal, 34 Pa. St. 204.

20. Bates' Estate, 5 Ohio S. & C. Pl. Dec. 545, 7 Ohio N. P. 625. And see Sprankle *v.* Com., 2 Walk. (Pa.) 420.

21. Matter of Platt, 8 Misc. (N. Y.) 144, 29 N. Y. Suppl. 396.

22. **The original issuance of stock is not a transfer** within the meaning of N. Y. Laws (1905), p. 474, c. 241. People *v.* Duffy-McInnerney Co., 122 N. Y. App. Div. 336, 106 N. Y. Suppl. 878 [*affirmed* in 193 N. Y. 636, 86 N. E. 1129].

23. N. Y. Laws (1905), pp. 474, 477, c. 241, §§ 315, 324. This act imposes a tax "on all sales, or agreements to sell, or memoranda of sales or deliveries or transfers of shares or certificates of stock in any domestic or foreign association, company or corporation, made after the first day of June, 1905," of two cents "on each hundred dollars of face value or fraction thereof." Payment of the tax must be denoted by an adhesive stamp or stamps affixed in the manner adapted to the circumstances of the sale. A violation of the act by a transfer without payment of the tax is made a misdemeanor and may be punished by fine, or imprisonment, or both, and the offender is also subject to "a civil penalty of five hundred dollars for each violation," to be recovered by the state controller in any court of competent jurisdiction. The statute further provides that no transfer of stock without payment of the tax "shall be made the basis of any action or legal proceedings, nor shall proof thereof be offered or received in evidence in any court in this state." The taxes thus imposed "and the revenues thereof shall be paid by the state controller into the state treasury and be applicable to the general fund, and to the payment of all claims and demands which are a lawful charge thereon." See People *v.* Reardon, 184 N. Y. 431, 77 N. E. 970, 112 Am. St. Rep. 628, 8 L. R. A. N. S. 314 [*affirmed* in 204 U. S. 152, 27 S. Ct. 188, 57 L. ed. 415].

A similar provision was contained in War Revenue Act, June 13, 1898, and was upheld in Thomas *v.* U. S., 192 U. S. 363, 24 S. Ct. 305, 48 L. ed. 481. See INTERNAL REVENUE, 22 Cyc. 1624 text and note 70.

24. New York *v.* Reardon, 204 U. S. 152, 27 S. Ct. 188, 51 L. ed. 415 [*affirming* 184 N. Y. 431, 77 N. E. 970, 112 Am. St. Rep. 628, 8 L. R. A. N. S. 314].

The act imposes a tax, not upon property, but upon its transfer, and being uniform in its operation upon all transfers of the class named and upon all persons making such transfers within the state, is not obnoxious to the state or federal constitution as being so arbitrary, discriminating, and unreasonable in taxing the transfer of one class of property only, as to deprive certain persons of their property without due process of law, and denying to them the equal protection of the laws. People *v.* Reardon, 184 N. Y. 431, 77 N. E. 970, 112 Am. St. Rep. 628, 8 L. R. A. N. S. 314 [*affirmed* in 204 U. S. 152, 27 S. Ct. 188, 51 L. ed. 415].

25. New York *v.* Reardon, 204 U. S. 152, 27 S. Ct. 188, 51 L. ed. 415 [*affirming* 184 N. Y. 431, 77 N. E. 970, 112 Am. St. Rep. 628, 8 L. R. A. N. S. 314].

Transfer tax not dependent on principle of valuation.— The tax imposed by the act being an excise tax imposed upon the transfer of a particular class of property does not depend upon any principle of valuation or any notice to the taxpayer. It is not a direct tax governed by the rule of appraisement but an indirect tax governed by the rule of uniformity; where there is no sale there is no tax; when there is a sale, the tax follows, which the legislature had the right to apportion in its discretion. It is valid, therefore, although not based upon the value of the certificates sold or of the sum for which they are sold. People *v.* Reardon, 184 N. Y. 431, 77 N. E. 970, 112 Am. St. Rep. 628, 8 L. R. A. N. S. 314 [*affirmed* in 204 U. S. 152, 27 S. Ct. 188, 51 L. ed. 415].

26. New York *v.* Reardon, 204 U. S. 152, 27 S. Ct. 188, 51 L. ed. 415 [*affirming* 184 N. Y.

an interference with interstate commerce.[27] But so much of the act as attempts to authorize a compulsory examination of all the private books and papers of a person having made, or suspected of having made, transfers of stock, for the purpose of securing evidence of violations of the act, is unconstitutional, as compelling a person in a criminal case to be a witness against himself.[28] And an amendment to the act of 1905,[29] imposing the same tax upon the transfer of each share of corporate stock, regardless of the face or actual value thereof, is invalid, as an arbitrary discrimination in favor of one and against another of the same class.[30]

XVIII. DISPOSITION OF TAXES COLLECTED.[31]

A. Power to Regulate and Direct. Taxes which are set apart by the constitution of the state for particular uses cannot be diverted by the legislature to any other purpose.[32] But subject to this limitation it is in the general power

431, 77 N. E. 970, 112 Am. St. Rep. 628, 8 L. R. A. N. S. 314].

Not tax on property outside jurisdiction of state.— The fact that transfers made within the state by non-residents of certificates issued by foreign corporations and owned by such non-residents are subject to the tax does not constitute it a tax upon property without the jurisdiction of the state. Regarded as a tax not upon property but upon the privilege of its transfer, the state has the right to tax all business done and all contracts made within its territory, although relating to property situated elsewhere, provided they are not protected as federal agencies, whether the business is done or the contracts are made by residents or non-residents. Assuming, however, that the tax is in effect a tax upon property, the certificates may, for the purposes of taxation, be treated as property, and when found here are within the jurisdiction of the state and subject to the tax, so that whether regarded as a tax on the transfer of or upon the certificates themselves, it affects neither persons nor property without the jurisdiction of the state. People *v.* Reardon, 184 N. Y. 431, 77 N. E. 970, 112 Am. St. Rep. 628, 8 L. R. A. N. S. 314 [*affirmed* in 204 U. S. 152, 27 S. Ct. 188, 51 L. ed. 415].

27. New York *v.* Reardon, 204 U. S. 153, 27 S. Ct. 188, 51 L. ed. 415 [*affirming* 184 N. Y. 431, 77 N. E. 970, 112 Am. St. Rep. 628, 8 L. R. A. N. S. 314].

The act does not violate the commerce clause of the federal constitution because it taxes transfers of certificates of stock in foreign corporations made by non-residents in New York. The tax is uniform, is upon the privilege of transferring within the state of New York certificates of stock in all corporations, domestic or foreign, whether the transfers are made by citizens or non-residents; the fact that the certificates represent property situated in another jurisdiction is immaterial, and this would be true if it were a property tax. Assuming, however, that it is an indirect restraint thereon, in that it tends to prevent freedom of commercial intercourse, if there is no discrimination against persons or property from other states, that does not constitute such a substantial interference with interstate commerce as to amount to a state regulation thereof. People *v.* Reardon, 184 N. Y. 431, 77 N. E. 970, 112 Am. St. Rep. 628, 8 L. R. A. N. S. 314 [*affirmed* in 204 U. S. 152, 27 S. Ct. 188, 51 L. ed. 415].

28. People *v.* Reardon, 197 N. Y. 236, 90 N. E. 829, 134 Am. St. Rep. 871, 27 L. R. A. N. S. 141 [*affirming* 124 N. Y. App. Div. 818, 109 N. Y. Suppl. 504].

29. N. Y. Laws (1906), p. 1008, c. 414.

30. People *v.* Mensching, 187 N. Y. 8, 79 N. E. 884, 10 L. R. A. N. S. 625.

While the legislature has wide latitude in classification, its power in that regard is not without limitation, for the classification must have some basis, reasonable or unreasonable, other than mere accident, whim, or caprice. Under this statute the owners of corporate stocks do not stand on an equal footing. They do not receive the equal protection thereof, for some have to pay more than others in the same situation. Thus, if A sells one hundred shares of the face value of ten dollars each for one thousand dollars, he is taxed two dollars; while B, who sells ten shares of the face value of one hundred dollars each for one thousand dollars, is taxed twenty cents, the thing sold in each case being worth the same amount. This is not classification but arbitrary or accidental selection. People *v.* Mensching, 187 N. Y. 8, 79 N. E. 884, 10 L. R. A. N. S. 625.

31. **Accounting and payment over by collector** see *supra*, X, A, 5.

Collector's liability for uncollected taxes see *supra*, X, A, 7.

Discrimination in disposition of taxes see *supra*, II, B, 1, i.

Disposition of: County taxes see COUNTIES, 11 Cyc. 582. Highway taxes see STREETS AND HIGHWAYS, *ante*, p. 325. License-fees see LICENSES, 25 Cyc. 631. Liquor license-fees see INTOXICATING LIQUORS, 23 Cyc. 151. Local assessments and special highway taxes see STREETS AND HIGHWAYS, *ante*, p. 330. Municipal taxes see MUNICIPAL CORPORATIONS, 28 Cyc. 1729. School taxes see SCHOOLS AND SCHOOL-DISTRICTS, 35 Cyc. 1045. Town taxes see TOWNS.

Mandamus to compel particular disposition of taxes see MANDAMUS, 26 Cyc. 334 text and notes 94–97.

32. *Illinois.*— People *v.* Lippincott, 65 Ill. 548; People *v.* Miner, 46 Ill. 384. *Compare* Sleight *v.* People, 74 Ill. 47.

of the legislature, not only by appropriation bills but also by directions incorporated in the revenue laws, to regulate the disposition which shall be made of the taxes collected both by the state agencies and by the local authorities.[33]

B. Distribution of Taxes as Between State and Municipalities [34] — **1. Taxes Collected by State.** Where the taxation of particular kinds of property, such as corporate franchises,[35] is withdrawn from the local authorities which otherwise would have jurisdiction, and committed to the state authorities under a general system, the state holds the taxes so collected as a trustee for the various municipalities affected,[36] and the apportionment to them of their distributive shares will be made in accordance with the provisions of the statute regulating the subject and according to the method of administration therein prescribed.[37]

2. General Taxes Collected by Municipalities — a. Rights of State in General. There is nothing in the nature or the ordinary purposes and functions of a county to impose upon it the duty of collecting taxes for the state;[38] but such a duty may be laid upon counties or other municipalities by statute,[39] and in that case the county acts as the agent of the state in the collection of so much of the general taxes as belongs to the state.[40] It is also competent to give the state a preference and

Kansas.— Lawrence Nat. Bank *v.* Barber, 24 Kan. 534.

Michigan.— Chambe *v.* Durfee, 100 Mich. 112, 58 N. W. 661.

North Carolina.— Macon County Bd. of Education *v.* Macon County, 137 N. C. 310, 49 S. E. 353.

South Carolina.— State *v.* Smith, 8 S. C. 127; State *v.* Cobb, 8 S. C. 123.

Tennessee.— Nashville *v.* Towns, 5 Sneed 186.

See 45 Cent. Dig. tit. "Taxation," § 1738.

Application to bonded debt see *infra*, XVIII, D.

33. *Indiana.*— Florer *v.* State, 133 Ind. 453, 32 N. E. 829.

Kentucky.—Auditor *v.* Frankfort Common School, 81 Ky. 680.

Missouri.— State *v.* Ferguson, 62 Mo. 77; State *v.* Thompson, 41 Mo. 25.

Nebraska.— State *v.* Cobb, 44 Nebr. 434, 62 N. W. 867.

North Carolina.— Brown *v.* Hertford County, 100 N. C. 92, 5 S. E. 178.

Oregon.— Yamhill County *v.* Foster, 53 Oreg. 124, 99 Pac. 286.

See 45 Cent. Dig. tit. "Taxation," § 1738. See also Counties, 11 Cyc. 582 text and notes 39–47; Municipal Corporations, 28 Cyc. 1729 text and note 73.

Compare State *v.* Smith, 8 S. C. 127; State *v.* Cobb, 8 S. C. 123.

Application to bonded debt see *infra*, XVIII, D.

Money collected as taxes by a county is public property, and within constitutional limits is subject to legislative control. Yamhill County *v.* Foster, 53 Oreg. 124, 99 Pac. 286.

Apportionment between city and county.— The legislature has authority to prescribe the division and apportionment of money raised by county taxes between the county and a city within its limits. Logan County *v.* Lincoln, 81 Ill. 156; Sangamon County *v.* Springfield, 63 Ill. 66; Hannibal *v.* Marion County, 69 Mo. 571; State *v.* St. Louis County Ct., 34 Mo. 546. It is otherwise, however, where constitutional limitations have been infringed. Sleight *v.* People, 74 Ill. 47; Nashville *v.* Towns, 5 Sneed (Tenn.) 186.

However, the state has no such control over the funds of a county that it may divert the money received from the citizens of one county by taxation for the benefit of citizens of another. Yamhill County *v.* Foster, 53 Oreg. 124, 99 Pac. 286.

34. **Liability for uncollected taxes** see *infra*, XVIII, F.

35. Worcester *v.* Board of Appeal, 184 Mass. 460, 69 N. E. 330.

36. Worcester *v.* Board of Appeal, 184 Mass. 460, 69 N. E. 330.

37. Strong *v.* Wright, 1 Conn. 459; Worcester *v.* Board of Appeal, 184 Mass. 460, 69 N. E. 330; Alcona County *v.* Auditor-Gen., 136 Mich. 130, 98 N. W. 975.

38. Com. *v.* Griffith, 1 Lanc. L. Rev. (Pa.) 201.

39. People *v.* Ontario County, 188 N. Y. 1, 80 N. E. 381 [*reversing* on other grounds 114 N. Y. App. Div. 915, 100 N. Y. Suppl. 1136]; Ulster County *v.* State, 79 N. Y. App. Div. 277, 80 N. Y. Suppl. 128 [*affirmed* in 177 N. Y. 189, 69 N. E. 370]; Yamhill County *v.* Foster, 53 Oreg. 124, 99 Pac. 286; State *v.* Stong, (Tenn. Ch. App. 1897) 47 S. W. 1103.

40. Washington County *v.* Clapp, 83 Minn. 512, 86 N. E. 775; Ulster County *v.* State, 79 N. Y. App. Div. 277, 80 N. Y. Suppl. 128 [*affirmed* in 177 N. Y. 189, 69 N. E. 370]; Chicago, etc., R. Co. *v.* State, 128 Wis. 553, 108 N. W. 557. *Compare* Yamhill County *v.* Foster, 53 Oreg. 124, 99 Pac. 286, where it is held that, although the general scheme of taxation creates the relation of debtor and creditor between the county and the state for the amount of state revenue apportioned to the county, to the extent of the county's liability therefor, for which an action may be maintained and for which the county may be charged, whether it collects the tax or not, the debt so created is not a contract obligation, but is a liability

direct that its proportion of the taxes shall be paid out of the first money collected.[41] But in no case can the state demand or receive from a county more than the latter's legal quota of the state taxes,[42] and if the whole sum has been paid over, without deductions which should have been first made, the county may reclaim the excess.[43] The local officers charged with the duty of paying over the state taxes cannot refuse or withhold payment on account of alleged irregularities in the assessment or collection of the taxes or constitutional objections to the statute under which they were levied,[44] as the right to raise such objections belongs only to the taxpayers.[45]

b. Interest.[46] Where a county fails to pay to the state taxes due to the latter, it is liable for interest at the legal rate from the time when the taxes became due and payable to the state,[47] except in cases where it was impossible for the

imposed by the state on one of its governmental agencies, the payment of which contemplates and requires the exercise of the taxing power which is governed by constitutional provisions. *Contra*, Com. *v.* Philadelphia County, 7 Pa. Cas. 282, 10 Atl. 772, holding that the relation between the state and the county, in the matter of the collection of state taxes, is that of debtor and creditor, and not principal and agent.

Incurring expenses for collection.— The county, as the agent and representative of the state, for the purpose of collecting delinquent personal property taxes, has the implied power to incur necessary expenses, including attorney's fees, in connection therewith. Washington County *v.* Clapp, 83 Minn. 512, 86 N. W. 775.

A county treasurer may act as agent of the state without being subject to the control of the county authorities. Aplin *v.* Van Tassel, 73 Mich. 28, 40 N. W. 847.

41. Trewin *v.* Shurtz, 74 N. J. L. 200, 65 Atl. 984; Shields *v.* Paterson, 55 N. J. L. 495, 27 Atl. 803; Dugan *v.* Jersey City, 50 N. J. L. 359, 12 Atl. 774. *Compare* Pillsbury *v.* Humphrey, 26 Mich. 245.

Holding county funds as security for payment over of state taxes.— Under a statute providing that one third of the net amount of tax that is collected and paid into the state treasury by a county shall be returned to the county for its own use, where the state, before the full amount of a county's tax has been paid, returns to the county part of its third, the state is not entitled to have the amount so returned repaid to it, there being no question of the ability or willingness of the county to pay the balance of the tax as soon as the amount is finally determined. Com. *v.* Philadelphia County, 157 Pa. St. 531, 27 Atl. 546.

42. Com. *v.* Philadelphia County, 7 Pa. Cas. 282, 10 Atl. 772.

Division of county and organization of new county.— Where a portion of a county was detached and organized into a separate county, and the state assessed taxes on the county as originally constituted, which were collected, the old county cannot refuse to pay over the amount collected in excess of its share, but must resort to the new county for reimbursement. Auditor-Gen. *v.* Bay County, 106 Mich. 662, 64 N. W. 570.

Charging county with loss sustained on re-

sale of lands sold for delinquent state taxes and bid in by the state see Auditor-Gen. *v.* Saginaw County, 62 Mich. 579, 29 N. W. 492; People *v.* Monroe County, 36 Mich. 70. *Compare* Auditor-Gen. *v.* Ottawa County, 76 Mich. 295, 42 N. W. 1101, holding that the loss upon state tax lands sold under the law of 1869 was not a proper charge against a county, but that where such item had been paid by the county to the state, the county could not use it as a set-off against a lawful claim in favor of the state.

43. Ulster County *v.* State, 79 N. Y. App. Div. 277, 80 N. Y. Suppl. 128 [*affirmed* in 177 N. Y. 189, 69 N. E. 370].

Money had and received is a proper form of action. Ulster County *v.* State, 79 N. Y. App. Div. 277, 80 N. Y. Suppl. 128 [*affirmed* in 177 N. Y. 189, 69 N. E. 370].

Parties.— Where the county collectors improperly pay to the state money which should have been paid to a town, the county and not the town is the proper party to sue the state for the money illegally diverted. Ulster County *v.* State, 177 N. Y. 189, 69 N. E. 370 [*affirming* 79 N. Y. App. Div. 277, 80 N. Y. Suppl. 128].

The creation of a deficiency in the state's revenue fund, by the refunding of taxes illegally diverted from their proper channel, is not a defense to an action against the state by the county for such taxes. Ulster County *v.* State, 177 N. Y. 189, 69 N. E. 370 *affirming* 79 N. Y. App. Div. 277, 80 N. Y. Suppl. 128].

44. People *v.* Williams, 3 Thomps. & C. (N. Y.) 338; People *v.* Myers, 13 N. Y. Suppl. 182.

45. People *v.* Williams, 3 Thomps. & C. (N. Y.) 338.

46. **Interest collected** see *infra*, XVIII, E.

47. Auditor-Gen. *v.* Bay County, 106 Mich. 662, 64 N. W. 570; Auditor-Gen. *v.* Saginaw County, 62 Mich. 579, 29 N. W. 492; People *v.* Fitch, 148 N. Y. 71, 42 N. E. 520; People *v.* Myers, 138 N. Y. 590, 34 N. E. 372 [*affirming* 66 Hun 167, 21 N. Y. Suppl. 79]; People *v.* New York County, 5 Cow. (N. Y.) 331; Com. *v.* Philadelphia, 157 Pa. St. 550, 27 Atl. 551. *Contra*, State *v.* Multnomah County, 13 Oreg. 287, 10 Pac. 635. And see Louisville *v.* Com., 9 Dana (Ky.) 70, construing particular Kentucky statute. But *compare* State *v.* Marion County, 36 Oreg. 371, 57 Pac. 814, where interest was **ex-**

county to collect the state taxes before the time fixed by law for paying them over.[48]

c. Default of Municipal Officers. A city or county treasurer whose duty it is to receive and pay over state taxes collected by the municipality is nevertheless not the agent of the state in respect to that duty, but is the agent of his municipality;[49] and hence if the money due to the state is lost through his embezzlement or other fault, the loss must fall upon the municipality and not the state.[50] But the city or county may obtain reimbursement by a suit on the defaulting officer's bond, although that bond runs to the state.[51] If the negligence, mistake, or fault of state officers has contributed to cause the loss, the state should bear its proportional share, and the municipality should not be charged with penalties in the shape of increased interest or attorney's fees.[52]

d. Actions to Recover Taxes Collected. The state may maintain an action against a county or city for state taxes due from the municipality[53] as soon as the latter has made the collection and is in default for not paying over the money.[54] But the position of the municipal corporation is not that of a collector or receiver of public moneys in such sense that judgment can be taken against it in a summary proceeding.[55]

C. Distribution and Apportionment of Taxes Between Different Municipalities[56] **— 1. In General.** Where general taxes are collected by a larger municipal division of the state, such as a county, their apportionment and distribution among the different municipalities interested, such as cities, towns, villages, boroughs, and school-districts, will be made according to the principles and rules prescribed by the statutes and in the manner there directed.[57] Gener-

pressly authorized under the provision of the statute.

48. State *v.* Marion County, 36 Oreg. 371, 59 Pac. 814.

49. People *v.* St. Clair County, 30 Mich. 388; Com. *v.* Philadelphia County, 157 Pa. St. 558, 27 Atl. 553. But *compare* State *v.* Leavenworth County, 2 Kan. 61.

50. Auditor-Gen. *v.* Ottawa County, 76 Mich. 295, 42 N. W. 1101; People *v.* St. Clair County, 30 Mich. 388; Com. *v.* Hershey, 200 Pa. St. 306, 49 Atl. 882; Com. *v.* Philadelphia, 157 Pa. St. 558, 27 Atl. 553; Com. *v.* Philadelphia County, 157 Pa. St. 531, 27 Atl. 546. *Contra,* State *v.* Leavenworth County, 2 Kan. 61; Lancaster County *v.* State, 74 Nebr. 211, 104 N. W. 187, 107 N. W. 388, 104 N. W. 187, where the county officer was considered the agent of the state.

51. Com. *v.* Hershey, 200 Pa. St. 306, 49 Atl. 882.

52. Auditor-Gen. *v.* Bay County, 106 Mich. 662, 64 N. W. 570; Com. *v.* Philadelphia, 157 Pa. St. 558, 27 Atl. 553; Com. *v.* Philadelphia County, 157 Pa. St. 531, 27 Atl. 546.

53. State *v.* Baker County, 24 Oreg. 141, 33 Pac. 530; Com. *v.* Philadelphia County, 157 Pa. St. 531, 27 Atl. 546; Com. *v.* McKean County, 9 Pa. Dist. 395, 24 Pa. Co. Ct. 33.

Estoppel to set up laches against a state may result from a settled determination, under advice of counsel, that the tax should not be levied or collected. State *v.* Columbia, (Tenn. Ch. App. 1899) 52 S. W. 511, relating to the "state litigation tax."

Statute of limitations concerning actions to enforce payment of taxes against taxpayers does not apply to suits to recover state taxes already collected and in the hands of the municipal officers. State *v.* Columbia, (Tenn. Ch. App. 1899) 52 S. W. 511.

54. State *v.* Ada County, 7 Ida. 261, 62 Pac. 457.

55. Louisville *v.* Com., 4 Metc. (Ky.) 63.

56. Liability for uncollected taxes see *infra,* XVIII, F.

57. See the statutes of the several states. And see the following cases:

Illinois.— Baird *v.* People, 83 Ill. 387; Chicago *v.* Cook County, 136 Ill. App. 120.

Indiana.— Truelove *v.* Washington, 169 Ind. 291, 82 N. E. 530.

Maryland.— Frederick County *v.* Frederick, 88 Md. 654, 42 Atl. 218.

New Hampshire.— Pittsfield *v.* Exeter, 69 N. H. 336, 41 Atl. 82.

New Jersey.— Trewin *v.* Shurts, 74 N. J. L. 200, 65 Atl. 984; Sheridan *v.* Van Winkle, 43 N. J. L. 579.

New York.— People *v.* Harris, 16 How. Pr. 256.

South Dakota.— Liberty Tp. *v.* Hutchinson County, 7 S. D. 530, 64 N. W. 1117.

Wisconsin.— Spooner *v.* Washburn County, 124 Wis. 24, 102 N. W. 325; State *v.* Hunter, 119 Wis. 450, 96 N. W. 921; Sheboygan County *v.* Sheboygan, 54 Wis. 415, 11 N. W. 598; Marinette *v.* Oconto County, 47 Wis. 216, 2 N. W. 314.

See 45 Cent. Dig. tit. "Taxation," § 1746.

Compare State *v.* Mudgett, 21 Wash. 99, 57 Pac. 351, construing Wash. Laws (1893), p. 167.

N. J. Pamphl. Laws (1903), p. 420, § 41, makes it the duty of a borough collector of taxes, on or before the twenty-second day of

ally speaking, the collecting district is not the agent of the other municipalities, but their debtor,[58] and if the taxes are lost through the fault or fraud of its officers it is responsible for them.[59] A municipal corporation entitled to a share of the taxes may be estopped to claim such portion,[60] and should in any case be charged with a proper part of taxes delinquent and uncollected and of the expense of colection.[61] But the invalidity of the statute authorizing the tax is no defense to an action by a city to recover its share of the tax.[62]

2. Interest.[63] A city is entitled not only to the taxes collected for it by a county, but also to any penalties and interest accruing on those taxes by reason of their delinquency, if actually collected by the county.[64] But the county is not liable for interest on each collection made for the city, from the date of such collection, but is liable only when the city demands payment of any sums due to it which have actually been collected and not paid over by the county.[65]

3. Actions For Recovery of Taxes Collected. A city or other municipality may maintain an action at law against a county which has collected taxes for it and failed to pay them over,[66] as soon as the liability of the county becomes fixed

December in each year, out of the first money collected, to pay to the county collector the state and county taxes required to be assessed in his taxing district. Trewin *v.* Shurts, 74 N. J. L. 200, 65 Atl. 984.

Meaning of "tax district" under New York statutes see People *v.* Columbia County, 182 N. Y. 556, 75 N. E. 1133 [*affirming* 105 N. Y. App. Div. 319, 93 N. Y. Suppl. 1093]; Utica *v.* Oneida County, 109 N. Y. App. Div. 189, 95 N. Y. Suppl. 839; People *v.* Schoharie County, 39 Misc. 162, 79 N. Y. Suppl. 145.

Apportionment of taxes on division of county or creation of new county see Morgan County *v.* Hendricks County, 32 Ind. 234; Midland Tp. *v.* Roscommon Tp., 39 Mich. 424; Reeves County *v.* Pecos County, 69 Tex. 177, 7 S. W. 54.

Tax for public library.— Where a city is authorized by statute to establish and maintain a public library and to levy taxes for that purpose, and the city levies a tax and certifies the levy to the county clerk, the city is the authority to which the taxes levied are payable by the collector, and not the library board. Chicago *v.* Cook County, 136 Ill. App. 120.

58 Ascot Tp. *v.* Compton County, 29 Can. Sup. Ct. 228. And see Kelley *v.* Gage County, 67 Nebr. 6, 93 N. W. 194, 99 N. W. 524. But see Washington County *v.* Clapp, 83 Minn. 512, 86 N. W. 775, holding that the county is the representative and agent of the school-districts and other municipal subdivisions, for the purpose of collecting delinquent taxes on personal property.

A county is not a trustee for the city for which it collects taxes. Chicago *v.* Cook County, 136 Ill App. 120.

59. Cumming Tp. *v.* Ogemaw County, 100 Mich. 567, 59 N. W. 240; Potter County *v.* Oswayo Tp., 47 Pa. St. 162. See also Oceana County *v.* Hart Tp., 48 Mich. 319, 12 N. W. 190; Westboro *v.* Taylor County, 90 Wis. 355, 63 N. W. 287.

A county treasurer may be sued by a town for taxes which he has collected for it but has refused to pay over to it. White Sulphur Springs *v.* Pierce, 21 Mont. 130, 52 Pac. 103.

The tax collector, and not the township trustees, should be sued for tax money wrongfully paid over to the town trustees instead of to directors of a school-district. School Directors *v.* School Trustees, 61 Ill. App. 89.

60. Sanford *v.* Orange County, 54 Fla. 577, 45 So. 479; Cumming Tp. *v.* Ogemaw County, 100 Mich. 567, 59 N. W. 240.

No estoppel.— The fact that a county has already expended the money retained by it from taxes collected for one of its cities, with the latter's consent, does not estop the city to claim it. Iowa City *v.* Johnson County, (Iowa 1895) 61 N. W. 995. Nor will a city be estopped to claim its share of the taxes collected by the failure of its officers to perform the duties assigned to them jointly with county officers, in regard to the apportionment of the taxes between the city and county. Logan County *v.* Lincoln, 81 Ill. 156.

61. Spooner *v.* Washburn County, 124 Wis. 24, 102 N. W. 325; State *v.* Bell, 111 Wis. 601, 87 N. W. 478. See Mineral School Dist. No. 10 *v.* Pennington County, 19 S. D. 602, 104 N. W. 270, as to charging school-district with part of expenses incurred in defending injunction proceedings against collection of tax.

62. Liberty Tp. *v.* Hutchinson County, 7 S. D. 530, 64 N. W. 1117.

63. **Interest collected** see *infra*, XVIII, E.

64. Sedgwick County *v.* Wichita, 62 Kan. 704, 64 Pac. 621; Fergus Falls *v.* Otter Tail County, 88 Minn. 346, 93 N. W. 126.

65. Spooner *v.* Washburn County, 124 Wis 24, 102 N. W. 325. And see Clark *v.* Sheldon, 134 N. Y. 333, 32 N. E. 23, 19 L. R. A. 138 [*reversing* 10 N. Y. Suppl. 357].

66. *Georgia.*— Morgan County *v.* Walton County, 120 Ga. 1028, 48 S. E. 409.

Illinois.— Sangamon County *v.* Springfield, 63 Ill. 66.

Iowa.— Iowa City *v.* Johnson County, (1895) 61 N. W. 995.

Montana.— See White Sulphur Springs *v.* Pierce, 21 Mont. 130, 53 Pac. 103.

New York.—Vinton *v.* Cattaraugus County, 89 Hun 582, 35 N. Y. Suppl. 285; Wood *v.* Monroe County, 50 Hun 1, 2 N. Y. Suppl. 369,

and absolute,[67] and upon a presentation of its claims in appropriate form,[68] and within the time limited by law for such proceedings.[69] It is no defense to such an action that the money collected as taxes was paid under protest.[70]

D. Rights of Bond and Other Creditors. Where a tax is levied for the distinct purpose of paying interest on the public debt, and the constitution provides that money raised by taxation shall be applied to the object stated in the statute imposing the tax, this is a sufficient appropriation of it to that purpose.[71] Where the law provides that money raised by the taxation of particular property in a municipality shall be held by the county treasurer as a sinking fund for the redemption of bonds issued by that municipality in aid of a railroad, the money so raised is appropriated to the specific purpose mentioned and cannot be diverted to any other, and the obligation resting on the treasurer may be enforced by the municipality by appropriate action;[72] and such obligation resting upon the

See also Kilbourne *v.* Sullivan County, 137 N. Y. 170, 33 N. E. 159.

Oregon.— Eugene *v.* Lane County, 50 Oreg. 468, 93 Pac. 255.

Wisconsin.— Newbold *v.* Douglas, 123 Wis. 28, 100 N. W. 1040. *Compare* Milwaukee *v.* Whitefish Bay, 106 Wis. 25, 81 N. W. 989.

See 45 Cent. Dig. tit. "Taxation," § 1750.

Compare Atlantic County *v.* Weymouth Tp., 68 N. J. L. 652, 54 Atl. 458.

Extent of rule.— Where, under a city charter, taxes on property within the city, for road purposes within the city, should have been levied by the city, but the same were levied by the county, and the county collected them, as required by Ballinger & C. Comp. St. § 3094, and the taxes were voluntarily paid, the city was entitled to recover them from the county. Eugene *v.* Lane County, 50 Oreg. 468, 93 Pac. 255.

Form of remedy.— The fact that the county collector may be liable on his bond will not prevent the town from maintaining an action against the county for taxes collected for the town. Bridges *v.* Sullivan County, 27 Hun (N. Y.) 175 [*affirmed* in 92 N. Y. 570]. But *compare* Hart Tp. *v.* Oceana County, 44 Mich. 417, 6 N. W. 863. As to when a state officer acts judicially in apportioning taxes, so that his decision cannot be reviewed collaterally, but only by certiorari see Pittsfield *v.* Exeter, 69 N. H. 336, 41 Atl. 82. Common counts in assumpsit is the proper form of remedy. Sangamon County *v.* Springfield, 63 Ill. 66; Chicago *v.* Cook County, 136 Ill. App. 120. See also Kilbourne *v.* Sullivan County, 137 N. Y. 170, 33 N. E. 159.

Equity has no jurisdiction to determine a question as to what amount collected in taxes, if any, a county has illegally withheld from a city. Chicago *v.* Cook County, 136 Ill. App. 120.

Insufficiency of complaint see Iron River *v.* Bayfield County, 106 Wis. 587, 82 N. W. 559.

67. Millsaps *v.* Monroe, 37 La. Ann. 641.

68. Mountainhome *v.* Elmore County, 9 Ida. 410, 75 Pac. 65; Spooner *v.* Washburn County, 124 Wis. 24, 102 N. W. 325.

69. Mountainhome *v.* Elmore County, 9 Ida. 410, 75 Pac. 65.

Laches.— Where a county has collected taxes for road purposes, and a city claims under its charter the right to receive and disburse for street purposes a portion thereof, the claim will not be enforced in equity where the city has for several years neglected to demand its proportion of the tax until the same has been disbursed by the county under statutory authority. Sanford *v.* Orange County, 54 Fla. 577, 45 So. 479.

70. Ratterman *v.* State, 44 Ohio St. 641, 10 N. E. 678.

71. Morton *v.* Comptroller-Gen., 4 S. C. 430.

72. Woods *v.* Madison County, 136 N. Y. 403, 32 N. E. 1011; Spaulding *v.* Arnold, 125 N. Y. 194, 26 N. E. 295; Strough *v.* Jefferson County, 119 N. Y. 212, 23 N. E. 552; Clark *v.* Sheldon, 106 N. Y. 104, 12 N. E. 341; Bridges *v.* Sullivan County, 92 N. Y. 570; People *v.* Brown, 55 N. Y. 180; Ackerson *v.* Niagara County, 72 Hun (N. Y.) 616, 25 N. Y. Suppl. 196; People *v.* Cayuga County, 63 Hun (N. Y.) 636, 18 N. Y. Suppl. 808; Walsh *v.* Richards, 22 Misc. (N. Y.) 610, 50 N. Y. Suppl. 1114. See also Ulster County *v.* State, 79 N. Y. App. Div. 277, 80 N. Y. Suppl. 128 [*affirmed* in 177 N. Y. 189, 69 N. E. 370].

Applications of rule.— The fact that the predecessors of the present county treasurer failed to make the appropriation of the railroad taxes required by law, and paid them over to their successors in office, will not excuse the present treasurer from making the appropriation. Spaulding *v.* Arnold, 125 N. Y. 194, 26 N. E. 295. And it is the duty of the treasurer to set aside and invest the money in question, as the law directs, although by doing so a deficiency is left in other funds and he will not have money enough to pay the obligations of the county to the state. Clark *v.* Sheldon, 106 N. Y. 104, 12 N. E. 341. If the money is diverted by the county treasurer, by the payment of state taxes and ordinary county expenses, it may be recovered by the town from the county. Crowinshield *v.* Cayuga County, 124 N. Y. 583, 27 N. E. 242. And it is no defense for the county to allege that the taxes were not all paid into the county treasury, but part was used by the town collector to pay town expenses. Ackerson *v.* Niagara County, 72 Hun (N. Y.) 616, 25 N. Y. Suppl. 196. But *compare* as to the last point Peirson *v.* Wayne County, 87 Hun (N. Y.) 605, 34 N. Y. Suppl. 568 [*affirmed*

treasurer may, it seems, be enforced even by a holder of the municipal aid bonds.[73]

E. Interest[74] and Penalties Collected. Unless otherwise directed,[75] interest, penalties, and costs collected on delinquent taxes follow the tax, and go to the state, county, or city, according as the one or the other is entitled to the tax itself;[76] and in cases where two or more of these are interested in the tax, such interest and penalties should be apportioned among them in the ratio of their respective shares of the tax.[77] But the legislature may change this rule and dispose otherwise of interest or penalties.[78]

F. Liability of Municipalities For Uncollected Taxes. As a general rule a municipality, such as a county, which is charged with the duty of collecting taxes for the state or for other municipal corporations within its limits, is held responsible for the entire amount of the tax levied and assessed,[79] not deduct-

in 155 N. Y. 105, 49 N. E. 766]. A town is not entitled to have such appropriation made after the bonds which it issued have matured and been paid off. People *v.* Cayuga County, 136 N. Y. 281, 32 N. E. 854. But where new bonds have been issued for the purpose of paying the original bonds and coupons, the town is entitled to the same application of taxes in respect to the new issue. Barnum *v.* Sullivan County, 137 N. Y. 179, 33 N. E. 162. And the town is entitled to the benefit of this statute, although its issue of bonds has been adjudged invalid, where some of the bonds have been sold and have been held valid in the hands of the purchasers by the United States supreme court. Strough *v.* Jefferson County, 50 Hun (N. Y.) 55, 3 N. Y. Suppl. 110 [*affirmed* in 119 N. Y. 212, 23 N. E. 552].

73. Moore *v.* Bath County Ct., 7 Bush (Ky.) 177.

74. Interest for failure to make settlement see *supra*, XVIII, B, 2, b; XVIII, C, 2.

75. See cases cited *infra* note 34.

76. *California.*— Honeycutt *v.* Colgan, 3 Cal. App. 348, 85 Pac. 165.

Colorado.— Arapahoe County *v.* Denver, 30 Colo. 13, 69 Pac. 586; Prowers County *v.* People, 17 Colo. App. 519, 69 Pac. 73.

Indiana.— Hancock County *v.* State, 119 Ind. 473, 22 N. E. 10. *Compare* State *v.* Halter, 149 Ind. 292, 49 N. E. 7, 47 N. E. 665.

Michigan.—Auditor-Gen. *v.* Bay County, 106 Mich. 662, 64 N. W. 570.

Minnesota.— Crookston *v.* Polk County, 79 Minn. 283, 82 N. W. 586, 79 Am. St. Rep. 453.

Nevada.— State *v.* Huffaker, 11 Nev. 300.

North Dakota.— See Fargo *v.* Ross, 11 N. D. 369, 92 N. W. 449.

Washington.— State *v.* Mish, 13 Wash. 302, 43 Pac. 40; Tacoma School Dist. No. 10 *v.* Hedges, 13 Wash. 69, 42 Pac. 522.

Wisconsin.—Milwaukee County *v.* Hackett, 21 Wis. 613. See also Oneida County *v.* Keppler, 125 Wis. 18, 102 N. W. 1135; Oneida County *v.* Tibbits, 125 Wis. 9, 102 N. W. 897.

See 45 Cent. Dig. tit. "Taxation," § 1751.

77. Hancock County *v.* State, 119 Ind. 473, 22 N. E. 10; State *v.* Huffaker, 11 Nev. 300; Fargo *v.* Ross, 11 N. D. 369, 92 N. W. 449. *Compare* Alcona County Sup'rs *v.* Auditor-Gen., 136 Mich. 130, 98 N. W. 975.

78. People *v.* Reis, 76 Cal. 269, 18 Pac. 309; Sedgwick County *v.* Wichita, 62 Kan. 704, 64 Pac. 621; New Whatcom *v.* Roeder, 22 Wash. 570, 61 Pac. 767. See also Fargo *v.* Ross, 11 N. D. 369, 92 N. W. 449; Spooner *v.* Washburn County, 124 Wis. 24, 102 N. W. 325.

Interest collected retained by sheriff under an agreement to that effect see Hubert *v.* New Orleans, 116 La. 507, 40 So. 853.

79. *Kansas.*— Harper County *v.* Cole, 62 Kan. 121, 61 Pac. 403. *Compare* Guittard Tp. *v.* Marshall County Com'rs, 4 Kan. 388; State *v.* Leavenworth County, 2 Kan. 61.

Kentucky.— See Bracken County Ct. *v.* Robertson County Ct., 6 Bush 69.

Michigan.—Muskegon *v.* Muskegon County, 123 Mich. 272, 82 N. W. 131; Oceana County *v.* Hart Tp., 48 Mich. 319, 12 N. W. 190; People *v.* Monroe County Sup'rs, 36 Mich. 70. See also Muskegon *v.* Soderberg, 111 Mich. 559, 69 N. W. 1116; Auditor-Gen. *v.* Bay County, 106 Mich. 662, 64 N. W. 570. But *compare* Auditor-Gen. *v.* Midland County, 84 Mich. 121, 47 N. W. 579.

New York.— New York *v.* Davenport, 92 N. Y. 604; Jefferson County *v.* Watertown, 98 N. Y. App. Div. 494, 90 N. Y. Suppl. 790.

Oregon.— State *v.* Multnomah County, 13 Oreg. 287, 10 Pac. 635.

Pennsylvania.— Com. *v.* McKean County, 200 Pa. St. 383, 49 Atl. 982; Com. *v.* Griffith, 1 Lanc. L. Rev. 201, by express statutory provision.

Tennessee.—.See State *v.* Columbia, (Ch. App. 1899) 52 S. W. 511, "state litigation tax."

Wisconsin.— Oneida County *v.* Keppler, 125 Wis. 18, 102 N. W. 1135; Oneida County *v.* Tibbits, 125 Wis. 9, 102 N. W. 897. *Compare* Crandon *v.* Forest County, 91 Wis. 239, 64 N. W. 847; Winchester *v.* Tozer, 24 Wis. 312. And see Spooner *v.* Washburn County, 124 Wis. 24, 102 N. W. 325; State *v.* Bell, 111 Wis. 601, 87 N. W. 478.

Wyoming.— State *v.* Laramie County, 8 Wyo. 104, 55 Pac. 451.

See 45 Cent. Dig. tit. "Taxation," § 1752.

All losses sustained by default of the treasurer are, by the Mich. Comp. Laws, § 1105, chargeable as liabilities. Oceana

ing delinquencies, and not merely for so much of the tax as has actually been collected.[80]

G. Proceedings For Apportionment, Accounting, and Settlement.[81] The duty of settling accounts and apportioning money raised by taxation, between the state and county, or between different municipalities, is ordinarily committed to a public officer or board,[82] whose decision, if not appealed from or brought up for review,[83] is final and conclusive.[84] But the duty to be performed by such officer or board is ministerial,[85] and if such officer or board neglect to perform such duty, the amount due to one of the parties in interest may be ascertained in any other manner that will satisfactorily establish it,[86] and hence by an action at

County *v.* Hart Tp., 48 Mich. 319, 12 N. W. 190.

Illegal obligations incurred in a previous year by the municipal authorities, requiring the imposition of an additional amount to taxes for the current year, is no defense to a mandamus to compel the payment of state and county taxes. Shields *v.* Grear, 55 N. J. L. 503, 27 Atl. 807; Shields *v.* Paterson, 55 N. J. L. 495, 27 Atl. 803.

The state may make a county or other taxing district responsible as principal debtor for its entire quota of state taxes assessed within it. State *v.* Laramie County, 8 Wyo. 104, 55 Pac. 451.

Interest deducted under an agreement to that effect see Hubert *v.* New Orleans, 116 La. 507, 40 So. 853.

Parties.— The treasurer or the agent appointed by the county court, and not the judge of the county court, is the proper party to institute the proceedings to compel the enforcement of a tax required by law to be collected by one county for another. Bracken County Ct. *v.* Robertson County Ct., 6 Bush (Ky.) 69.

80. Harper County *v.* Cole, 62 Kan. 121, 61 Pac. 403; Muskegon *v.* Muskegon County, 123 Mich. 272, 82 N. W. 131; Oceana County *v.* Hart Tp., 48 Mich. 319, 12 N. W. 190. But *compare* Guittard Tp. *v.* Marshall County Com'rs, 4 Kan. 388, holding that, although a county may collect taxes for the townships in it, it is not liable for their quota until the taxes have been paid into the county treasury.

Pending injunction proceedings will not authorize deductions of taxes as delinquent for that reason. People *v.* Monroe County Sup'rs, 36 Mich. 70.

Lands bid in at tax-sale.—A county is not delinquent in failing to levy a tax as to lands which have been bid off by the county treasurer for delinquent taxes and have not yet been redeemed. State *v.* Ada County, 7 Ida. 261, 62 Pac. 457; State *v.* Atchison County, 1 Kan. 479. See also State *v.* Brewer, 64 Ala. 287.

Charging back to county uncollected taxes rejected or held to be invalid see Auditor-Gen. *v.* Bolt, 124 Mich. 185, 82 N. W. 845; Auditor-Gen. *v.* Gurney, 109 Mich. 472, 67 N. W. 525, 1113; Auditor-Gen. *v.* Bay County, 106 Mich. 662, 54 N. W. 570; Mason *v.* Hazelton Tp., 82 Mich. 440, 46 N. W. 784; People *v.* Monroe County, 36 Mich. 70.

81. Actions to recover taxes collected see *supra*, XVIII, B, 2, d; XVIII, C, 3.

82. See the statutes of the several states. And see Bush *v.* Hunterdon County Collector, 36 N. J. L. 363; People *v.* Columbia County, 182 N. Y. 556, 75 N. E. 1133 [*affirming* 105 N. Y. App. Div. 319, 93 N. Y. Suppl. 1093]; Lackawanna County *v.* Com., 156 Pa. St. 477, 26 Atl. 1119; Elizabeth City County *v.* Newport News, 106 Va. 764, 56 S. E. 801; Spooner *v.* Washburn County, 124 Wis. 24, 102 N. W. 325. *Compare* Morgan County *v.* Walton County, 120 Ga. 1028, 48 S. E. 409 (construing Laws (1003), p. 16); Mountainhome *v.* Elmore County, 9 Ida. 410, 75 Pac. 65 (construing Rev. St. (1887) § 1773).

83. Elizabeth City County *v.* Newport News, 106 Va. 764, 56 S. E. 801.

Appeal.— Where a street railway company did not contest a determination of the state corporation commission apportioning certain of its personal property for taxation between a city and a county, Code (1904), §§ 573*a*, 3454, prohibiting an appeal from the judgment of the state corporation commission ascertaining the value of any property of a railroad for the purpose of taxation and assessing taxes thereon, did not preclude the county from maintaining a writ of error against the city to review such apportionment. Elizabeth City County *v.* Newport News, 106 Va. 764, 56 S. E. 801.

Petition for reconsideration.— Where the state corporation commission apportioned certain personal property of a railroad company for taxation between the city and the county, the latter was entitled to institute an original proceeding before the commission to have such apportionment reconsidered and corrected. Elizabeth City County *v.* Newport News, 106 Va. 764, 56 S. E. 801.

84. Lackawanna County *v.* Com., 156 Pa. St. 477, 26 Atl. 1119; Bloomsburg School Directors' Appeal, 121 Pa. St. 293, 15 Atl. 548; Com. *v.* Philadelphia County, 7 Pa. Cas. 282, 10 Atl. 772; Com. *v.* Philadelphia County, 3 Pa. Co. Ct. 97. See also Com. *v.* Luzerne County, (Pa. 1888) 15 Atl. 540.

Interference by unauthorized board see Com. *v.* Luzerne County, (Pa. 1888) 15 Atl. 540.

Impeachment for mistake or fraud see Auditor-Gen. *v.* Bay County, 106 Mich. 662, 64 N. W. 570; Auditor-Gen. *v.* Saginaw County, 62 Mich. 579, 29 N. W. 492; State *v.* Laramie County, 4 Wyo. 313, 33 Pac. 992, 35 Pac. 929.

85. Logan County *v.* Lincoln, 81 Ill. 156.

86. Logan County *v.* Lincoln, 81 Ill. 156.

law [87] in the nature of a suit for accounting,[88] to which the statute of limitations will not apply,[89] and in which, as the suit is equitable in its nature, such relief may be granted as the facts at the close of the litigation will warrant.[90]

H. Payment and Application Thereof.[91] Receivers of public taxes are required to keep the money safely until the proper time for its distribution,[92] and then to pay it over to the several treasurers or other officers entitled,[93] which duty may be enforced by mandamus.[94] In some jurisdictions state and county taxes are given a preference and are required to be paid over out of the first moneys received.[95]

Mandamus as not the proper remedy see Ontonagon County *v.* Gogebic, 74 Mich. 721, 42 N. W. 170.

87. Cumming Tp. *v.* Ogemaw County, 93 Mich. 314, 53 N. W. 361; Ontonagon County *v.* Gogebic, 74 Mich. 721, 42 N. W. 170; Ulster County *v.* State, 177 N. Y. 189, 69 N. E. 370 [*affirming* 79 N. Y. App. Div. 277, 80 N. Y. Suppl. 128]; Kilbourne *v.* Sullivan County, 62 Hun (N. Y.) 210, 16 N. Y. Suppl. 507 [*affirmed* in 137 N. Y. 170, 33 N. E. 159].

88. Logan County *v.* Lincoln, 81 Ill. 156; Cumming Tp. *v.* Ogemaw County, 93 Mich. 314, 53 N. W. 361; Ontonagon County *v.* Gogebic County, 74 Mich. 721, 42 N. W. 170; Ulster County *v.* State, 177 N. Y. 189, 69 N. E. 370; Kilbourne *v.* Sullivan County, 62 Hun (N. Y.) 210, 16 N. Y. Suppl. 507 [*affirmed* in 137 N. Y. 170, 33 N. E. 159]; Elizabeth City County *v.* Newport News, 106 Va. 764, 56 S. E. 801.

89. Spaulding *v.* Arnold, 125 N. Y. 194, 26 N. E. 295 [*affirming* 53 Hun 631, 6 N. Y. Suppl. 336]. But see People *v.* Miller, 85 N. Y. App. Div. 145, 83 N. Y. Suppl. 559 [*affirmed* in 181 N. Y. 439, 74 N. E. 477], where relator's claim was held to be barred by lapse of time. *Compare* State *v.* Columbia, (Tenn. Ch. App. 1899) 52 S. W. 511, relating to "state litigation tax."

90. Kilbourne *v.* Sullivan County, 62 Hun (N. Y.) 210, 16 N. Y. Suppl. 507 [*affirmed* in 137 N. Y. 170, 33 N. E. 159].

91. Application of payments generally see PAYMENT, 30 Cyc. 1227.

92. Meyer *v.* Widber, 126 Cal. 252, 58 Pac. 532. In this case it appeared that a statute required the tax collector to settle with the county auditor each month for moneys collected, and to turn the same over to the county treasurer, and another statute required the auditor to settle the accounts of all persons indebted to the county and certify the amount to the treasurer; and it was held that where the collector deposited with the treasurer certain sacks containing money received on taxes generally, the treasurer was not required to segregate the amount to be credited to a certain fund, or pay it out to those entitled to the fund, until the collector had settled with the auditor and the latter had certified the amount to the treasurer.

Time of payment.— Payment to the school board of taxes for school purposes is not to be postponed until all the taxes of a particular year are collected, but they should be turned over from time to time as received. Iberia Parish School Directors *v.* Police Jury, 123 La. 416, 49 So. 5.

93. People *v.* Raymond, 188 Ill. 454, 59 N. E. 7; Atlantic County *v.* Weymouth Tp., 68 N. J. L. 652, 54 Atl. 458.

Delinquent personal property taxes.— The sum realized by the county as a result of legal proceedings, less the amount of expenses and fees for collecting, belongs, in the proportion prescribed by law, to the state, county, school-districts, and other governmental subdivisions. Washington County *v.* Clapp, 83 Minn. 512, 86 N. W. 775.

Manner of payment is sometimes regulated by statute. State *v.* Welbes, 11 S. D. 86, 75 N. W. 820.

In a proceeding to compel a county treasurer to make the application of taxes in the manner prescribed by law, it is no objection to the relief sought that the books in his office did not show the particular item to which the tax was to be applied, or that a town had not turned over its proportion of taxes for the particular purpose, or that claim had not been made upon the treasurer to have the taxes properly applied, or that the identical funds collected for the particular purpose were not then in the hands of the treasurer. Walsh *v.* Richards, 22 Misc. (N. Y.) 610, 50 N. Y. Suppl. 1114.

Payments diverted from their proper channel and paid by mistake to the state (Ulster County *v.* State, 177 N. Y. 189, 59 N. E. 370 [*affirming* 79 N. Y. App. Div. 277, 80 N. Y. Suppl. 128]), or to the wrong county (Humboldt County *v.* Lander County, 24 Nev. 461, 56 Pac. 228; Kilbourne *v.* Sullivan County, 137 N. Y. 170, 33 N. E. 159 [*affirming* 62 Hun 210, 16 N. Y. Suppl. 507]), may be recovered back. *Compare* Auditor-Gen. *v.* Ottawa County, 76 Mich. 295, 42 N. W. 1101.

Restraining payment.— Where state taxes illegally apportioned against a county have been paid into the county treasury, the county cannot restrain the treasurer from paying the amount thereof to the state. Yamhill County *v.* Foster, 53 Oreg. 124, 99 Pac. 286.

94. People *v.* Raymond, 188 Ill. 454, 59 N. E. 7. And see Buffalo *v.* Neal, 86 Hun (N. Y.) 76, 33 N. Y. Suppl. 346. But *compare* Sheridan *v.* Van Winkle, 46 N. J. L. 117, holding that, where a city treasurer had for several years been permitted by the county collector to pay over part of the state and county tax to the board of education and received credit therefor in his settlement with the collector, mandamus would not lie to compel repayment to the collector of moneys already paid to the board.

95. Sheridan *v.* Rahway, 44 N. J. L.

TAXATION OF COSTS. In practice, the process of ascertaining and charging up the amount of costs in an action to which a party is legally entitled, or which are legally chargeable. In English practice, the process of examining the items in an attorney's bill of costs and making the proper deductions, if any.[1] (Taxation of Costs: In General, see Costs, 11 Cyc. 154. As Subject of Mandamus, see Mandamus, 26 Cyc. 217. In Admiralty, see Admiralty, 1 Cyc. 910. In Garnishment Proceedings, see Garnishment, 20 Cyc. 1125. In Proceedings — Before Arbitrators, see Arbitration and Award, 3 Cyc. 724; To Establish Highway, see Streets and Highways, *ante*, p. 150. On Accounting and Settlement by Executor, see Executors and Administrators, 18 Cyc. 1218.)

TAX BILL. See Taxation, *ante*, p. 1204.

TAX BOOK. See Taxation, *ante*, p. 1046 *et seq.*

TAX CERTIFICATE. See Taxation, *ante*, pp. 1169, 1370 *et seq.*

TAX COLLECTOR. See Taxation, *ante*, p. 1190 *et seq.*

TAX DEED. See Taxation, *ante*, p. 1422.

TAXED CART. A designation given by statute [2] to a particular kind of carriage described in the Act, namely, to a carriage with less than four wheels, constructed wholly of wood and iron, without any covering other than a tilted covering, and without any lining or springs, and with a fixed seat, without slings or braces, and without any ornament whatever other than paint of a dark colour for the preservation of the wood or iron only, and which should have the words "A taxed cart," and the christian and surname and address of the owner painted in letters of a given length and of a given colour upon the back panel, and which should not be of more than a given value.[3]

TAXICAB. A cab drawn or propelled by motor power, electricity, or other artificial means.[4]

TAXIMETER. Designation of the fare indicator and time and distance register which is affixed to a motor cab or horse-drawn vehicle for the purpose of automatically determining the charge for which the passenger becomes liable.[5]

TAXING-MASTER. At common law, an officer of the court by whom the costs in an action were taxed.[6]

TAX LEGISLATION. The making of laws that are to furnish the measure of every man's duty in support of the public burdens, and the means of enforcing it.[7]

TAX LIEN. See Taxation, *ante*, p. 1138 *et seq.*

TAX LIST. See Taxation, *ante*, p. 964 *et seq.*

TAXPAYER. A person owning property in the state subject to taxation, and on which he regularly pays taxes.[8] (Taxpayer: Qualification of as — Grand

587; Rahway Water Com'rs *v.* Brewster, 42 N. J. L. 125; Bayonne *v.* Kingsland, 41 N. J. L. 368.

State and county taxes are distinguished from other taxes in their object, destination, and amount. Pillsbury *v.* Humphrey, 26 Mich. 245.

Money or cash for this purpose has been held to include warrants but not bonds taken and received by a city treasurer in payment of taxes. Sheridan *v.* Rahway, 44 N. J. L. 587.

Taking part of a borough as a public park and thereby exempting it from taxation, after the fixing of the quota of state and county taxes to be levied and collected within the borough, does not excuse a borough collector from paying out of the first moneys collected the full quota of state and county taxes. Coe *v.* Englewood Cliffs, 68 N. J. L. 559, 53 Atl. 562.

1. Black L. Dict.

2. St. 43 Geo. III, c. 161 (2).

3. Williams *v.* Lear, L. R. 7 Q. B. 285, 287, 41 L. J. M. C. 76, 25 L. T. Rep. N. S. 906.

4. Lynch *v.* Robert P. Murphy Hotel Co., 112 N. Y. Suppl. 915, 917.

5. Lynch *v.* Robert P. Murphy Hotel Co., 112 N. Y. Suppl. 915, 917.

6. Hersey *v.* Hutchins, 71 N. H. 458, 459, 52 Atl. 862.

7. Philadelphia Assoc. *v.* Wood, 39 Pa. St. 73, 82.

Imposing on agents of foreign insurance companies the duty of paying two per cent on premiums received by them to an association for the relief of disabled firemen is not, either in form or substance, tax legislation, but is a mere requisition that one class of men shall pay their money to another class, and is not legislation at all. Philadelphia Assoc. *v.* Wood, 39 Pa. St. 73, 82.

8. State *v.* Fasse, (Mo. App. 1903) 71 S. W. 745.

Statutory definition see Strang *v.* Cook, 47 Hun (N. Y.) 46, 48. See also Mentz *v.* Cook,

Juror, see GRAND JURIES, 20 Cyc. 1297; Juror, see JURIES, 24 Cyc. 202; Petitioner For Levy of School Tax, see SCHOOLS AND SCHOOL-DISTRICTS, 35 Cyc. 1012; Voter at School-District Meeting, see SCHOOLS AND SCHOOL-DISTRICTS, 35 Cyc. 875; Voter in General, see ELECTIONS, 15 Cyc. 296.)

TAX RECEIPT. See TAXATION, *ante*, p. 1169.

TAX ROLL. See TAXATION, *ante*, p. 1046 *et seq.*

TAX-SALE. See TAXATION, *ante*, p. 1280 *et seq.*

TAX TITLE. See TAXATION, *ante*, p. 1468.

TEA. The leaves of a shrub or small tree of a *genus Thea* or *Cammelia.*[9]

TEACHER. See SCHOOLS AND SCHOOL-DISTRICTS, 35 Cyc. 817, 1064.

TEACHER OF RELIGION. A term said to be synonymous with "minister."[10]

TEACHERS' INSTITUTE. See SCHOOLS AND SCHOOL-DISTRICTS, 35 Cyc. 1065.

TEAM. As a noun, two or more horses, oxen or other beasts, harnessed together to the same vehicle for drawing;[11] one horse or two horses with their harness and the vehicle to which they are customarily attached for use;[12] two or more horses, oxen, or other beasts harnessed together to the same vehicle for drawing, as to a coach, carriage, wagon, cart, sled, sleigh, or the like;[13] any number passing in a line; a long line, etc.[14] As a verb, to join together in a team.[15] (Team: In General, see LIVERY-STABLE KEEPERS, 25 Cyc. 1504. As Defect or Obstruction in Street, see MUNICIPAL CORPORATIONS, 28 Cyc. 1369 note 88. As Supplies Giving Right to Agricultural Lien, see AGRICULTURE, 2 Cyc. 57 note 7. Exemption of, see EXEMPTIONS, 18 Cyc. 1412. License-Tax on Vehicle, see LICENSES, 25 Cyc. 616. Parol Evidence as to Meaning of Term, see EVIDENCE, 17 Cyc. 684. Regulation of Vehicles Under Police Power, see MUNICIPAL COR-

108 N. Y. 504, 509, 15 N. E. 541; Rich *v.* Mentz, 18 Fed. 52, 53, 21 Blatchf. 492.

Includes only those who have paid taxes and not those liable to taxation but who have not been taxed. Thompson *v.* Newtown, 21 N. H. 595, 599.

9. Webster Dict. [*quoted* in Briffitt *v.* State, 58 Wis. 39, 43, 16 N. W. 39, 46 Am. Rep. 621], adding: "The shrub is a native of China and Japan"].

10. Pfeiffer *v.* Detroit Bd. of Education, 118 Mich. 560, 565, 77 N. W. 250, 42 L. R. A. 536.

11. Inman *v.* Chicago, etc., R. Co., 60 Iowa 459, 462, 15 N. W. 286; Imperial Dict. [*quoted* in Middleton *v.* Flanagan, 25 Ont. 417, 422]; Webster Dict. [*quoted* in Hutchinson *v.* Chamberlin, 11 N. Y. Leg. Obs. 248, 250].

12. Brown *v.* Davis, 9 Hun (N. Y.) 43, 44.

13. Webster Dict. [*quoted* in Harthouse *v.* Rikers, 1 Duer (N. Y.) 606, 11 N. Y. Leg. Obs. 223; Marlborough *v.* Osborn, 5 B. & S. 67, 72, 33 L. J. Q. B. 148, 10 L. T. Rep. N. S. 28, 12 Wkly. Rep. 418, 117 E. C. L. 67].

Has been said to be a word of indefinite and equivocal meaning when interpretation is attempted without the aid of surrounding circumstances, and may mean horses, mules, oxen, and two, four, six, or even more of either kind of beasts. Ganson *v.* Madigan, 15 Wis. 144, 153, 82 Am. Dec. 659.

May properly be used to designate either a vehicle for the carriage of goods or one for the carriage of persons. Rowell *v.* Crothers, 75 Conn. 124, 126, 52 Atl. 818.

Construed as meaning conveyance for property as distinguished from conveyance for persons, as used in a statute providing for the mode of passing when any wagon, carriage, etc., should meet or overtake a team on the highway. Hotchkiss *v.* Hoy, 41 Conn. 568, 577.

The driver or person in charge is not a part of the "team and carriage." Dexter *v.* Canton Toll-Bridge Co., 79 Me. 563, 567, 12 Atl. 547.

Live stock may not embrace the idea of a "team" but it cannot be denied that "team" embraces the idea of "live stock," hence under a statute making a railroad liable for injuries to live stock resulting from a failure to fence its tracks, an allegation of injury to plaintiff's team is sufficient. Inman *v.* Chicago, etc., R. Co., 60 Iowa 459, 462, 15 N. W. 286.

"Team" or "carriage," in a statute making a town liable for damages happening to any person, his team or carriage, traveling upon a highway, or bridge thereon, by reason of any obstruction, defect, insufficiency or want of repair, which renders it unsuitable for travel thereon, include whatever animal or animals, drew or carried the load, and their harness, also the load itself (Woodman *v.* Nottingham, 49 N. H. 387, 393, 6 Am. Rep. 526; Conway *v.* Jefferson, 46 N. H. 521, 526), and "team" as used in this statute was held to include animals driven on the highway as well as those attached to a vehicle (Elliott *v.* Libson, 57 N. H. 27, 30).

Under exemption laws see EXEMPTIONS, 18 Cyc. 1412.

14. Webster Dict. [*quoted* in Marlborough *v.* Osborn, 5 B. & S. 67, 72, 33 L. J. Q. B. 148, 10 L. T. Rep. N. S. 28, 12 Wkly. Rep. 418, 117 E. C. L. 67, where it is said: "This is the primary sense, but is rarely used"].

15. Johnson Dict. [*quoted* in Marlborough *v.* Osborn, 5 B. & S. 67, 72, 33 L. J. Q. B. 148, 10 L. T. Rep. N. S. 28, 12 Wkly. Rep. 418, 117 E. C. L. 67].

PORATIONS, 28 Cyc. 731. Use of Highway and Law of the Road, see MUNICIPAL CORPORATIONS, 28 Cyc. 910; STREETS AND HIGHWAYS, *ante*, p. 266.)

TEAMSTER. In common speech, one who drives a team.[16] As used in exemption statutes, one who is engaged, with his own team or teams, in the business of teaming — that is to say, in the business of hauling freight for other parties for a consideration by which he habitually supports himself and family, if he has one.[17] (Teamster: As Laborer Entitled to Mechanic's Lien, see MECHANICS' LIENS, 27 Cyc. 82. Right to Exemption, see EXEMPTIONS, 18 Cyc. 1409.)

TEAM-WORK. Work done by a team as a substantial part of a man's business;[18] work done by a team, as distinguished from personal labor.[19]

TEAZER. A machine used for cleaning cotton.[20]

TECHNICAL. Belonging or peculiar to an art or profession.[21] (Technical: Error, see APPEAL AND ERROR, 3 Cyc. 386; CRIMINAL LAW, 12 Cyc. 910; JUSTICES OF THE PEACE, 24 Cyc. 761; TRIAL. Estoppel, see ESTOPPEL, 16 Cyc. 682. Language — Failure to Use Affecting Affidavit of Attachment, see ATTACHMENT, 4 Cyc. 494 note 2; Parol Evidence to Explain, see EVIDENCE, 17 Cyc. 685. Omission, Audita Querela to Set Aside Judgment and Execution Because of, see AUDITA QUERELA, 4 Cyc. 1060 note 15. Words, Construction of in — Contract, see CONTRACTS, 9 Cyc. 583; Deed, see DEEDS, 13 Cyc. 606; Will, see WILLS.)

TECHNICAL ERRORS. A term said to include merely abstract and practically harmless errors.[22] (See APPEAL AND ERROR, 3 Cyc. 386; CRIMINAL LAW, 12 Cyc. 910; JUSTICES OF THE PEACE, 24 Cyc. 761; TRIAL.)

TECHNICAL ESTOPPEL. See ESTOPPEL, 16 Cyc. 682.

TECHNICAL IMPORT. A phrase which when used in connection with words denotes that which is suggested by their use in reference to a science or profession — that which particular use has affixed to them.[23]

16. Brusie *v.* Griffith, 34 Cal. 302, 306, 91 Am. Dec. 695 (where it is said: "But in the sense of the statute every one who drives a team is not necessarily a teamster, nor is he necessarily not a teamster unless he drives a team continually. In the sense of the statute, one is a teamster who is engaged, with his own team or teams, in the business of teaming"); Edgecomb *v.* His Creditors, 19 Nev. 149, 153, 7 Pac. 533; Elder *v.* Williams, 16 Nev. 416, 420.

17. Brusie *v.* Griffith, 34 Cal. 302, 306, 91 Am. Dec. 695; Edgecomb *v.* His Creditors, 19 Nev. 149, 153, 7 Pac. 533; Elder *v.* Williams, 16 Nev. 416, 420.

A clerk in a store at a stated salary who purchased a team to furnish employment to his seventeen-year-old son and by whom the team was habitually used in hauling freight for other parties is not a teamster within the meaning of the statute. Brusie *v.* Griffith, 34 Cal. 302, 306, 91 Am. Dec. 695.

A livery-stable keeper is not a teamster simply because he drives his own team in carrying people around town. Edgecomb *v.* His Creditors, 19 Nev. 149, 153, 7 Pac. 533.

18. Tishomingo Sav. Inst. *v.* Young, 87 Miss. 473, 481, 40 So. 9, 112 Am. St. Rep. 454, 3 L. R. A. N. S. 693; Hickok *v.* Thayer, 49 Vt. 372, 375, where it is said: "As in farming, staging, express carrying, drawing of freight, peddling, the transportation of material used or dealt in as a business. This is clearly distinguishable from what is circumstantial to one's business, as a matter of convenience in getting to and from it, or as a means of going from place to place to solicit patronage, or to settle or make collections, or to see persons for business purposes."

A horse kept and used as a racer and not otherwise used except on a few occasions is not within the statute exempting two horses of a bankrupt kept and used for "team work." *In re* Libby, 103 Fed. 776, 777.

19. Webster Dict. [*quoted* in Harthouse *v.* Rikers, 1 Duer (N. Y.) 606, 11 N. Y. Leg. Obs. 223; Marlborough *v.* Osborn, 5 B. & S. 67, 72, 33 L. J. Q. B. 148, 10 L. T. Rep. N. S. 28, 12 Wkly. Rep. 418, 117 E. C. L. 67].

In an agreement that the tenant shall perform for the landlord in each year "one day's team-work with two horses and one proper person," the term means that the tenant shall send his horses and his man to the spot indicated, and there do what work they are put to. Marlborough *v.* Osborn, 5 B. & S. 67, 74, 33 L. J. Q. B. 148, 10 L. T. Rep. N. S. 28, 12 Wkly. Rep. 418, 117 E. C. L. 67.

20. Whitney *v.* Carter, 29 Fed. Cas. No. 17,583.

21. Black L. Dict.

22. Epps *v.* State, 102 Ind. 539, 557, 1 N. E. 491.

23. People *v.* Hallett, 1 Colo. 352, 359 (where it is distinguished from "natural" import which is said to be that which their utterance promptly and uniformly suggests to the mind, that which common use has affixed to them, and it is further said that when the natural and technical import unite upon a word both their rules combine to control its construction, and, indeed, it is difficult to understand how any other signifi-

TECHNICALLY PURE. Pure in the ordinary acceptation of the terms of the art.[24]

TELEGRAM. See TELEGRAPHS AND TELEPHONES, *post*, p. 1607.

cation, than that which they suggest, can be affixed to it, unless upon the most positive declaration that a different meaning was designed); People *v.* May, 3 Mich. 598, 605.

24. Matheson *v.* Campbell, 69 Fed. 597, 608, where such was held to be the meaning of the term as used in reference to substances employed in chemical process.

TELEGRAPHS AND TELEPHONES

By Francis Raymond Stark

Sometime Fellow in International Law at Columbia University, and sometime Professor of Law at Fordham University

I. General Considerations, 1606
- A. *Definition and Nature,* 1606
  - 1. *Telegraph,* 1606
  - 2. *Telegraphy,* 1607
  - 3. *Telegram,* 1607
  - 4. *Telegraph Station,* 1607
  - 5. *Telephone,* 1607
  - 6. *Telephone Exchange,* 1608
  - 7. *Line,* 1608
- B. *Telegraph and Telephone Distinguished,* 1608
  - 1. *In General,* 1608
  - 2. *Telegraph as Including Telephone,* 1609
- C. *Nature and Status of Companies,* 1610
  - 1. *In General,* 1611
  - 2. *As Common Carriers,* 1611
- D. *Formation, Franchises, and Powers,* 1613
  - 1. *Formation or Incorporation,* 1613
  - 2. *Franchises and Privileges,* 1613
    - a. *In General,* 1613
    - b. *Right to Alienate Franchise or Property,* 1616
    - c. *Rights in and Use of Streets, Highways, or Private Property,* 1617
  - 3. *Powers,* 1618
    - a. *In General,* 1618
    - b. *Right to Make Rules and Regulations,* 1619
  - 4. *Leases, Contracts, and Combinations,* 1620
    - a. *In General,* 1620
    - b. *Contracts With Railroad Companies,* 1622

II. Construction, Maintenance, and Regulation, 1622
- A. *Authority For Construction and Maintenance,* 1622
  - 1. *Federal Government,* 1622
    - a. *Post Roads,* 1622
    - b. *Navigable Waters,* 1625
  - 2. *State,* 1626
  - 3. *Municipality,* 1627
  - 4. *Property-Owners,* 1629
- B. *Regulation and Control,* 1629
  - 1. *In General,* 1629
  - 2. *Rates and Charges,* 1630
  - 3. *License-Fees, Taxes, and Rentals,* 1632
  - 4. *Place and Mode of Construction and Maintenance,* 1633
    - a. *In General,* 1633
    - b. *Removal or Change of Location,* 1635
    - c. *Underground Conduits,* 1635
    - d. *Character of Equipment,* 1638
- C. *Mode of Construction and Maintenance,* 1638
- D. *Injuries From Construction or Maintenance,* 1639
  - 1. *Liability For Injuries,* 1639

a. *Personal Injuries,* 1639
b. *Injuries to Property,* 1642
(I) *In General,* 1642
(II) *Injury to Trees,* 1642
2. *Actions For Injuries,* 1644
a. *Pleading,* 1644
b. *Evidence,* 1644
(I) *Presumptions and Burden of Proof,* 1644
(II) *Admissibility,* 1645
(III) *Weight and Sufficiency,* 1645
c. *Trial,* 1646
(I) *Instructions,* 1646
(II) *Questions For Court or Jury,* 1647
d. *Damages,* 1647
E. *Liability For Injury To or Interference With Lines,* 1649

III. DUTY AS TO FURNISHING SERVICES AND FACILITIES, 1650

A. *In General,* 1650
B. *Nature and Forms of Discrimination,* 1652
1. *In General,* 1652
2. *Refusal to Serve,* 1654
3. *Rates and Charges,* 1654
4. *Character or Quality of Services and Facilities,* 1655
5. *Services and Facilities to Other Companies,* 1656
6. *Remedies,* 1658

IV. DUTIES AND LIABILITIES IN REGARD TO MESSAGES, 1659

A. *Duty to Accept,* 1659
1. *In General,* 1659
2. *Messages Which May Not Be Genuine,* 1660
3. *Obscene Messages,* 1661
4. *Libelous Messages,* 1661
5. *Messages For Illegal or Immoral Purposes,* 1661
6. *Sunday Messages,* 1663
7. *Oral Messages,* 1663
8. *Messages Not on Regular Blanks,* 1664
9. *Messages For Points Not on Company's Lines,* 1664
10. *Collect and Deadhead Messages,* 1664
11. *Unstamped Messages,* 1665
B. *Duty to Transmit,* 1665
1. *In General,* 1665
2. *To Transmit Promptly,* 1666
a. *In General,* 1666
b. *Excuses For Delay,* 1667
(I) *In General,* 1667
(II) *Wire Trouble,* 1667
(III) *Office Hours,* 1668
c. *Order of Transmission,* 1669
3. *To Transmit Correctly,* 1670
C. *Duty to Deliver,* 1671
1. *In General,* 1671
2. *Insufficient or Erroneous Name or Address,* 1673
3. *Time For and Delay In Delivery,* 1675
a. *In General,* 1675
b. *Office Hours,* 1677
4. *Place or Distance For Delivery,* 1678
a. *In General,* 1678
b. *Free Delivery Limits,* 1678

5. *To Whom Delivery May or Should Be Made,* 1680
a. *In General,* 1680
b. *Person in Whose Care Message Is Addressed,* 1681
6. *Mode of Delivery,* 1683
D. *Duty to Forward,* 1684
E. *Duty Not to Disclose,* 1684

V. MODIFICATION OF LIABILITY BY CONTRACT, 1684
A. *What Contracts or Stipulations Are Valid,* 1684
1. *Limiting Liability For Unrepeated Messages,* 1684
a. *In General,* 1684
b. *Gross Negligence or Wilful Misconduct,* 1686
c. *Defaults Which Repetition Would Not Have Prevented,* 1687
2. *That Message Shall Not Be Delivered During Night,* 1688
3. *Limiting Liability For Errors in Cipher or Obscure Messages,* 1688
4. *That Written Claim Shall Be Presented Within Specified Time,* 1688
a. *In General,* 1688
b. *Requisites of Claim,* 1690
c. *Condition Precedent or Subsequent,* 1691
d. *Waiver,* 1691
5. *That Company's Messenger in Bringing Message to Office Shall Be Agent of Sender,* 1692
6. *Stipulation Against Liability For Defaults of Connecting Lines,* 1692
B. *How Such Contracts Made,* 1693
1. *Proof of Sender's Assent,* 1693
a. *Message Written on Usual Blank,* 1693
(I) *By Sender,* 1693
(II) *By Operator,* 1694
b. *Message on Other Company's Blank,* 1694
c. *Message on Plain Paper,* 1694
d. *Message Accepted Over Telephone,* 1695
2. *Whether Addressee Bound,* 1695
3. *Third Party,* 1696

VI. DUTIES AND LIABILITIES IN PARTICULAR CASES, 1696
A. *Libelous Messages,* 1696
B. *Forged, Fraudulent, or Unauthorized Messages,* 1696
C. *Ticker or Market Quotation Service,* 1697
D. *District Telegraph or Messenger Business,* 1699
E. *Connecting Lines,* 1700
F. *Telephone Companies,* 1701

VII. STATUTORY PENALTIES, 1702
A. *In General,* 1702
B. *Construction and Application of Statutes,* 1703
1. *In General,* 1703
2. *Statutes Relating to Discrimination,* 1705
3. *No Extraterritorial Effect,* 1705
C. *Who May Recover,* 1706
D. *Defenses,* 1707
E. *Actions to Recover Penalties,* 1707
1. *Parties,* 1707
2. *Pleading,* 1708
3. *Evidence,* 1709
4. *Judgment,* 1709

VIII. ACTIONS AGAINST TELEGRAPH OR TELEPHONE COMPANIES, 1709
A. *Right of Action and Defenses,* 1709
1. *In General,* 1709

2. *Conditions Precedent,* 1710
3. *Limitation of Actions,* 1711
4. *What Law Governs,* 1711
a. *In General,* 1711
b. *Right to Recover For Mental Anguish,* 1712
c. *Stipulations Limiting Liability,* 1714
5. *Defenses,* 1715
B. *Persons Entitled to Sue,* 1715
1. *In General,* 1715
2. *Addressee,* 1717
3. *Undisclosed Principal,* 1720
a. *Of Sender,* 1720
b. *Of Addressee,* 1722
4. *Agent,* 1722
C. *Pleading,* 1722
1. *Complaint,* 1722
a. *In General,* 1722
b. *Allegations as to Damages,* 1724
(I) *In General,* 1724
(II) *Exemplary Damages,* 1725
c. *In Mental Anguish Cases,* 1726
2. *Answer,* 1727
D. *Issues, Proof, and Variance,* 1727
E. *Evidence,* 1728
1. *Presumptions and Burden of Proof,* 1728
a. *In General,* 1728
b. *In Mental Anguish Cases,* 1731
2. *Admissibility,* 1733
a. *In General,* 1733
b. *Declarations and Admissions,* 1734
c. *Evidence as to Negligence,* 1735
d. *Evidence as to Notice,* 1736
e. *Evidence as to Damages,* 1737
f. *In Mental Anguish Cases,* 1738
3. *Weight and Sufficiency,* 1740
F. *Questions For Court or Jury,* 1742
1. *In General,* 1742
2. *Particular Issues,* 1743
a. *In General,* 1743
b. *Stipulations or Regulations Affecting Liability,* 1744
c. *In Mental Anguish Cases,* 1745
G. *Instructions,* 1746
H. *Appeal and Error,* 1748

IX. DAMAGES, 1749
A. *Nominal Damages or Cost of Transmission,* 1749
B. *Compensatory Damages,* 1750
1. *In General,* 1750
a. *Must Be Contemplated,* 1750
(I) *In General,* 1750
(II) *Cipher Messages,* 1752
(III) *Obscure Messages,* 1752
(IV) *Messages Relating to Business Transactions,* 1753
b. *Must Be Proximate,* 1754
(I) *In General,* 1754
(II) *Remote, Speculative, or Contingent Damages,* 1755
(III) *Intervening Efficient Causes,* 1757
(IV) *Losses Which Plaintiff Might Have Prevented,* 1757

(v) *Losses Which Might Have Occurred at All Events*, 1758
c. *Must Not Grow Out of Illegal Transaction*, 1759
(i) *In General*, 1759
(ii) *Sunday Messages*, 1759
d. *Measure of Damages*, 1759
e. *Contributory Negligence*, 1760
2. *In Particular Classes of Cases*, 1760
a. *Message a Mere Step in Negotiations*, 1760
b. *Message a Definite Offer*, 1761
c. *Message an Acceptance of an Offer*, 1762
d. *Loss of a Mere Chance*, 1763
e. *Loss of a Sale*, 1763
f. *Loss of a Purchase*, 1765
g. *Loss of an Exchange*, 1765
h. *Loss of a Contract of Employment*, 1766
i. *Loss of a Debt*, 1767
j. *Loss of Commissions*, 1767
k. *Expenses of a Trip*, 1767
l. *Losses Due to Errors in Transmission*, 1769
m. *Deterioration in Value of Property*, 1772
n. *Shipment Induced by Negligence of Company*, 1772
o. *Message Summoning a Physician*, 1773
p. *Message Summoning a Veterinary*, 1774
q. *Message Requesting Addressee to Meet Sender*, 1774
r. *Money Transfer Messages*, 1775
3. *Mental Anguish*, 1775
a. *In General*, 1775
b. *Minority Rule*, 1776
c. *Incidental to Other Injury*, 1778
d. *Applications and Limitations of Rule*, 1778
(i) *In General*, 1778
(ii) *Under Statutory Provisions*, 1780
(iii) *Must Be Contemplated*, 1781
(iv) *Must Be Proximate Result*, 1782
(v) *Must Be Plaintiff's Own*, 1784
(vi) *Relationship Between Parties*, 1784
(vii) *Prolongation of Existing Mental Anguish*, 1786
(viii) *Unwarranted Apprehension or Mistake of Facts*, 1787
(ix) *Failure to Meet Plaintiff*, 1788
(x) *Message Relating to Sickness or Death*, 1788
(a) *In General*, 1788
(b) *Deprivation of Aid and Consolation*, 1789
(c) *Arrival of Body and Preparations For Burial*, 1790
(d) *Message Summoning Physician*, 1791
(xi) *Contributory Negligence*, 1791
C. *Exemplary Damages*, 1792
D. *Excessive or Inadequate Damages*, 1793

CROSS-REFERENCES

For Matters Relating to:

Abatement of Action For Mental Suffering For Failure to Deliver Telegram by Death of Plaintiff, see ABATEMENT AND REVIVAL, 1 Cyc. 62.

Admissions of Accused Persons by Telephone, see CRIMINAL LAW, 12 Cyc. 423.

Appropriation of Property For Telegraph or Telephone Lines, see EMINENT DOMAIN, 15 Cyc. 592, 625, 627, 628.

Contracts in Furtherance of Gambling, see GAMING, 20 Cyc. 934.

For Matters Relating to — (*continued*)

Corporations in General, see CORPORATIONS, 10 Cyc. 1.

Criminal Liability in Regard to Gaming, see GAMING, 20 Cyc. 894 note 29, 897 text and note 49.

Foreign Corporations Owning Telegraph or Telephone Lines, see FOREIGN CORPORATIONS, 19 Cyc. 1264.

Injunctions By or Against Telegraph or Telephone Company, see INJUNCTIONS, 22 Cyc. 765 note 29, 823 note 95, 848 note 41, 937 note 42.

Judicial Notice of Facts Relating to Telegraph Lines see EVIDENCE, 16 Cyc. 869.

Mandamus to Compel Performance of Public Duties, see MANDAMUS, 26 Cyc. 375.

Notice by Telegraph or Telephone, see NOTICE, 29 Cyc. 1118 text and notes 34, 35.

Offer and Acceptance by Telegraph, see CONTRACTS, 9 Cyc. 293.

Power of Municipality to Grant Use of Streets, see MUNICIPAL CORPORATIONS, 28 Cyc. 868.

Regulations of Commerce, see COMMERCE, 7 Cyc. 450, 482.

Right of Railroad Company to Transfer Franchise to Operate Telegraph Lines, see CORPORATIONS, 10 Cyc. 1092.

Taxation of Telegraph and Telephone Companies, see COMMERCE, 7 Cyc. 482; TAXATION, *ante*, p. 853.

Taxing Disbursements For Telegrams as Costs see COSTS, 11 Cyc. 130.

Telegram as Memorandum Within the Statute of Frauds, see FRAUDS, STATUTE OF, 20 Cyc. 254.

Telegraph Operator as Fellow Servant of Employees on Trains, see MASTER AND SERVANT, 26 Cyc. 1341.

I. GENERAL CONSIDERATIONS.

A. Definition and Nature — 1. TELEGRAPH. A telegraph, from two Greek words, meaning to write afar off or at a distance,[1] has been defined as an apparatus or adjustment of instruments for transmitting messages or other communications by means of electric currents and signals.[2] The term "telegraph" is sufficiently broad and comprehensive to include any apparatus for transmitting messages by means of electric currents and signals,[3] or by means of a wire, whether the communication is made by electricity or not,[4] and in the construction of statutory

1. Com. *v.* Pennsylvania Tel. Co., 18 Phila. (Pa.) 588, 591; O'Reilly *v.* Morse, 15 How. (U. S.) 62, 134, 14 L. ed. 601.

2. Chesapeake, etc., Tel. Co. *v.* Baltimore, etc., Tel. Co., 66 Md. 399, 410, 7 Atl. 809, 59 Am. Rep. 167.

Other definitions are: "An instrument or apparatus for communicating words or language to a distance by the use of electricity." Webster Dict. [*quoted* in Com. *v.* Pennsylvania Tel. Co., 18 Phila. (Pa.) 588, 592; Atty.-Gen. *v.* Edison Tel. Co., 6 Q. B. D. 244, 254, 50 L. J. Q. B. 145, 43 L. T. Rep. N. S. 697, 29 Wkly. Rep. 428].

"An apparatus, or a process for communicating rapidly between distant points, especially by means of preconcerted visible signals representing words or ideas, or by means of words and signs transmitted by electro-magnetism." Bouvier L. Dict.

The English Telegraph Act of 1863 defines a telegraph as "a wire or wires used for the purpose of telegraphic communication, with any casing, coating, tube or pipe enclosing the same, and any apparatus connected therewith for the purpose of telegraphic communication." Atty.-Gen. *v.* Edison Tel. Co., 6 Q. B. D. 244, 248, 50 L. J. Q. B. 145, 43 L. T. Rep. N. S. 697, 29 Wkly. Rep. 428.

3. *California.*— Davis *v.* Pacific Tel., etc., Co., 127 Cal. 312, 315, 59 Pac. 698.

Maryland.— Chesapeake, etc., Tel. Co. *v.* Baltimore, etc., Tel. Co., 66 Md. 399, 410, 7 Atl. 809, 59 Am. Rep. 167.

Oregon.— McLeod *v.* Pacific Tel. Co., 52 Oreg. 22, 28, 94 Pac. 568, 95 Pac. 1009, 15 L. R. A. N. S. 810, 18 L. R. A. N. S. 954.

Pennsylvania.— Com. *v.* Pennsylvania Tel. Co., 18 Phila. 588, 591.

England.— Atty.-Gen. *v.* Edison Tel. Co., 6 Q. B. D. 244, 248, 50 L. J. Q. B. 145, 43 L. T. Rep. N. S. 697, 29 Wkly. Rep. 428.

4. Atty.-Gen. *v.* Edison Tel. Co., 6 Q. B. D. 244, 249, 50 L. J. Q. B. 145, 43 L. T. Rep. N. S. 697, 29 Wkly. Rep. 428.

provisions has repeatedly been held to include the telephone.[5] Even before the invention of the modern electro-magnetic telegraph the term was applied to various contrivances or devices to communicate intelligence by means of signals or semaphores, which appeal to the eye,[6] but the term as now generally used applies distinctively to the electro-magnetic telegraph,[7] which was first perfected and put into practical operation by Morse,[8] although the term applies whether a wire is used or not,[9] and a telegraph line is such whether furnished with the Morse instruments or the typewriting instruments or other devices which have been invented to accomplish the same purpose.[10] The telegraph in common parlance is generally understood as referring to the entire system of appliances used in the transmission of telegraphic messages by electricity.[11]

2. Telegraphy. Telegraphy has been defined as the transaction of business over or through wires.[12]

3. Telegram. A telegram is any message or other communication transmitted or intended for transmission by telegraph.[13] A communication by telephone has also been held to be a telegram within the application of a statute.[14]

4. Telegraph Station. Telegraph stations are the ordinary offices for the business of telegraphy along the line of telegraph.[15]

5. Telephone. A telephone has been defined as an instrument for transmitting spoken words.[16] In a general sense the name "telephone" applies to any instrument or apparatus which transmits sound beyond the limits of ordinary audibility;[17] but since the recent discoveries in telephony the name is technically

5. See *infra*, I, B, 2.

6. Com. *v.* Pennsylvania Tel. Co., 18 Phila. (Pa.) 588, 591; O'Reilly *v.* Morse, 15 How. (U. S.) 62, 134, 14 L. ed. 601; Atty.-Gen *v.* Edison Tel. Co., 6 Q. B. D. 244, 248, 50 L. J. Q. B. 145, 43 L. T. Rep. N. S. 697, 29 Wkly. Rep 428.

7. Bouvier L. Dict. See also Hockett *v.* State, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep 201; O'Reilly *v.* Morse, 15 How. (U. S.) 62, 14 L. ed. 601.

8. O'Reilly *v.* Morse, 15 How. (U. S.) 62, 134, 14 L. ed. 601.

9. Atty.-Gen. *v.* Edison Tel. Co., 6 Q. B. D. 244, 249, 50 L. J. Q. B. 145, 43 L. T. Rep. N. S. 697, 29 Wkly. Rep. 428, where the court said: "The result of the definition seems to be that any apparatus for transmitting messages by electric signals is a telegraph, whether a wire is used or not."

Wireless telegraphy.— For a description of the different systems of wireless telegraphy and the patent rights covered thereby see National Electric Signaling Co. *v.* DeForest Wireless Tel. Co., 140 Fed. 449; Marconi Wireless Tel. Co. *v.* DeForest Wireless Tel. Co., 138 Fed. 657.

10. Com. *v.* Pennsylvania Tel. Co., 18 Phila. (Pa.) 588, 591; Atty.-Gen. *v.* Edison Tel. Co., 6 Q. B. D. 244, 249, 50 L. J. Q. B. 145, 43 L. T. Rep. N. S. 697, 29 Wkly. Rep. 428.

A ticker and the wires and electrical apparatus for the operation thereof is within the meaning of the word "telegraph." Chicago, etc., Tel. Co. *v.* Type Tel. Co., 137 Ill. App. 131, 137.

11. Hockett *v.* State, 105 Ind. 250, 262, 5 N. E. 178, 55 Am. Rep. 201.

The system of appliances includes: (1) A battery or other source of electric power; (2) a line-wire or conductor for conveying the electric current from one station to another; (3) the apparatus for transmitting, interrupting, and if necessary reversing the electric current at pleasure; and (4) the indicator or signalizing instrument. Hockett *v.* State, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201.

12. York Tel. Co. *v.* Keesey, 5 Pa. Dist. 366, 369.

13. Anderson L. Dict.

Another definition is: "A telegraphic dispatch; a message sent by telegraph." Black L. Dict.

14. Atty.-Gen. *v.* Edison Tel. Co., 6 Q. B. D. 244, 254, 50 L. J. Q. B. 145, 43 L. T. Rep. N. S. 697, 29 Wkly. Rep. 428, construing the English Telegraph Act of 1869, 32 & 33 Vict. c. 73.

15. Marietta, etc., R. Co. *v.* Western Union Tel. Co., 38 Ohio St. 24, 30, construing the words "telegraph stations" as used in a contract between a railroad company and a telegraph company.

16. Bouvier L. Dict.

Other definitions are: "An instrument by which two persons may talk directly to each other." Gilpin *v.* Savage, 60 Misc. (N. Y.) 605, 609, 112 N. Y. Suppl. 802.

"An instrument for conveying sound to a great distance." Webster Dict. [*quoted* in Central Union Tel. Co. *v.* State, 118 Ind. 194, 206, 19 N. E. 604, 10 Am. St. Rep. 114].

17. Hockett *v.* State, 105 Ind. 250, 261, 5 N. E. 178, 55 Am. Rep. 201, where the court said: "In a general sense, the name 'telephone' applies to any instrument or apparatus which transmits sound beyond the limits of ordinary audibility. The speaking tube used in conveying the sound of the

and primarily restricted to an instrument or device which transmits sound by means of electricity and wires similar to telegraphic wires.[18] The exact meaning of the word "telephone" may vary according to the sense in which it is used,[19] and so may refer generally to the art of telephony as an institution,[20] or more particularly to the apparatus used in the transmission and reception of telephonic messages,[21] and in the latter case may refer either to a particular instrument,[22] or to the entire system of appliances used in the transmission of telephonic messages.[23]

6. Telephone Exchange. A telephone exchange is an arrangement for putting up and maintaining wires, poles, and switch-boards within a given area, with a central office, and the necessary operators to enable the individual hirers of telephones within that area to converse with each other.[24]

7. Line. The term "line" has been defined as a wire connecting one telegraphic station with another, or the whole system of telegraph wires under one management and name.[25] The term "line" as applied to telegraph and telephone lines has, however, both a popular and a technical meaning, and in a statute will be construed according to what appears to have been the intention of the legislature.[26]

B Telegraph and Telephone Distinguished — 1. In General. Strictly speaking the telegraph and telephone are different and clearly distinguishable.[27] They have certain points of resemblance,[28] such as the use of poles and wires and the employment of an electric current,[29] and the common object of transmitting intelligence to a distance;[30] but they also have certain well-defined differences,[31] particularly in regard to the character of the terminal instruments,[32] and the mode of transmitting messages,[33] the telegraph conveying messages by means of sounds, representing words, letters, or figures,[34] requiring skilled operators to transmit, receive, and translate the same;[35] while the telephone conveys and

voice from one room to another in large buildings, or a stretched cord or wire attached to vibrating membranes or discs, by which the voice is carried to a distant point, is, strictly speaking, a telephone."

18. Hockett *v.* State, 105 Ind. 250, 261, 5 N. E. 178, 55 Am. Rep. 201.

19. Charles Simons Sons Co. *v.* Maryland Tel., etc., Co., 99 Md. 141, 170, 57 Atl. 193, 63 L. R. A. 727, construing the term "telephone" as used in an ordinance.

20. Hockett *v.* State, 105 Ind. 250, 261, 5 N. E. 178, 55 Am. Rep. 201.

21. Hockett *v.* State, 105 Ind. 250, 261, 5 N. E. 178, 55 Am. Rep. 201.

22. See Hockett *v.* State, 105 Ind. 250, 261, 5 N. E. 178, 55 Am. Rep. 201.

23 Central Union Tel. Co. *v.* Bradbury, 106 Ind. 1, 9, 5 N. E. 721; Hockett *v.* State, 105 Ind. 250, 261, 5 N. E. 178, 55 Am Rep. 201.

24. Western Union Tel. Co. *v.* American Bell Tel Co., 105 Fed. 684, 696.

25. Webster Intern. Dict. [*quoted in* Southern Bell Tel., etc., Co. *v.* D'Alemberte, 39 Fla 25, 37, 21 So. 570].

Another definition is: "A telegraph wire between stations, forming with them the circuit." Century Dict. [*quoted* in Southern Bell Tel., etc., Co *v.* D'Alemberte, 39 Fla. 25, 37, 21 So. 570].

26 Southern Bell Tel., etc., Co. *v.* D'Alemberte, 39 Fla. 25, 37, 21 So. 570, holding that in determining the length of a telephone "line" for the purpose of ascertaining the amount of a license-tax, the "line" should be construed as made up of the different wires leading to the instruments of the different individual subscribers, and not in the sense of a line of poles and the wires suspended thereon, without regard to the number of such wires.

27. Central Union Tel. Co. *v.* State, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114.

28. Northwestern Tel. Exch. Co. *v.* Chicago, etc., R. Co., 76 Minn. 334, 79 N. W. 315; Wisconsin Tel. Co. *v.* Oshkosh, 62 Wis. 32, 21 N. W. 828.

29. Northwestern Tel. Exch. Co. *v.* Chicago, etc., R. Co., 76 Minn. 334, 79 N. W. 315; State *v.* Central New Jersey Tel. Co., 53 N. J. L. 341, 21 Atl. 460, 11 L. R. A. 664; Wisconsin Tel. Co. *v.* Oshkosh, 62 Wis. 32, 21 N. W. 828.

30. Com. *v.* Pennsylvania Tel. Co., 18 Phila. (Pa.) 588.

31. Central Union Tel. Co. *v.* State, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114; Home Tel. Co. *v.* Nashville, 118 Tenn. 1, 101 S. W. 770.

32. Northwestern Tel. Exch. Co. *v.* Chicago, etc., R. Co., 76 Minn. 334, 79 N. W. 315.

33. Central Union Tel. Co. *v.* State, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114; Northwestern Tel. Exch. Co. *v.* Chicago, etc., R. Co., 76 Minn. 334, 79 N. W. 315.

34. Northwestern Tel. Exch. Co. *v.* Chicago, etc., R. Co., 76 Minn. 334, 79 N. W. 315.

35. Central Union Tel. Co. *v.* State, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114; Northwestern Tel. Exch. Co. *v.* Chicago, etc., R. Co., 76 Minn. 334, 79 N. W. 315.

reproduces the sound of the voice,[36] and with proper connections and facilities can be used by any person and requires no skill or experience to operate it.[37] This distinction leads to important differences in regard to the manner in which such companies transact business with their patrons and the facilities which they are required to furnish.[38] It is a marked and universal peculiarity in the telephone business as conducted in the United States that the instruments are always rented and never sold.[39]

2. Telegraph as Including Telephone. The term "telegraph" is sufficiently broad and comprehensive to include the telephone,[40] and since the latter is comparatively so recent an invention as not to be mentioned in many statutes relating to telegraph companies,[41] it has been held that in applying the principles of the common law or in construing statutes the telephone is to be considered a telegraph unless there are express statutory provisions governing the case.[42] The telephone has accordingly been held to be included under the term "telegraph" in the application of constitutional or statutory provisions relating to the incorporation,[43] or taxation of such companies,[44] the exercise of the right of eminent domain,[45] and various other provisions relating to telegraph companies.[46] In

36. Northwestern Tel. Exch. Co. *v.* Chicago, etc., R. Co., 76 Minn. 334, 79 N. W. 315; Atty.-Gen. *v.* Edison Tel. Co., 6 Q. B. D. 244, 50 L. J. Q. B. 145, 43 L. T. Rep. N. S. 697, 29 Wkly. Rep. 428.

37. Central Union Tel. Co. *v.* State, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114.

38. Central Union Tel. Co. *v.* State, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114; State *v.* Nebraska Tel. Co., 17 Nebr. 126, 22 N. W. 237, 52 Am. Rep. 404.

39. See Western Union Tel. Co. *v.* American Bell Tel. Co., 105 Fed. 684.

40. Davis *v.* Pacific Tel., etc., Co., 127 Cal. 312, 57 Pac. 764, 59 Pac. 698; Cincinnati Inclined Plane R. Co. *v.* City, etc., Tel. Assoc., 48 Ohio St. 390, 27 N. E. 890, 29 Am. St. Rep. 559, 12 L. R. A. 534; San Antonio, etc., R. Co. *v.* Southwestern Tel., etc., Co., 93 Tex. 313, 55 S. W. 117, 77 Am. St. Rep. 884, 49 L. R. A. 459; Texarkana *v.* Southwestern Tel., etc., Co., 48 Tex. Civ. App. 16, 106 S. W. 915; Atty.-Gen. *v.* Edison Tel. Co., 6 Q. B. D. 244, 50 L. J. Q. B. 145, 43 L. T. Rep. N. S. 697, 29 Wkly. Rep. 428.

Telephone an improved telegraph.— It has been said that "in these days there ought to be no one to question the statement that a telephone is simply an improved telegraph. The former was originally called the speaking telegraph." Northwestern Tel. Exch. Co. *v.* Chicago, etc., R. Co., 76 Minn. 334, 344, 79 N. W. 315.

41. Wisconsin Tel. Co. *v.* Oshkosh, 62 Wis. 32, 35, 21 N. W. 828, where the court said: "The telephone is a new invention; so recent, that even our statutes, as revised in 1878, fail to mention it."

42. Northwestern Tel. Exch. Co. *v.* Chicago, etc., R. Co., 76 Minn. 334, 79 N. W. 315.

43. *Maryland.*— Chesapeake, etc., Tel. Co. *v.* Baltimore, etc., Tel. Co., 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167.

New Jersey.—State *v.* Central New Jersey Tel. Co., 53 N. J. L. 341, 21 Atl. 460, 11 L. R. A. 664.

New York.— Hudson River Tel. Co. *v.* Watervliet Turnpike, etc., Co., 135 N. Y. 393, 32 N. E. 148, 31 Am. St. Rep. 838, 17 L. R. A. 674, 4 Am. Elec. Cas. 275.

Pennsylvania.— York Tel. Co. *v.* Keesey, 5 Pa. Dist. 366; Central Pennsylvania Tel., etc., Co. *v.* Wilkesbarre, etc., R. Co., 11 Pa. Co. Ct. 417.

Wisconsin.— Wisconsin Tel. Co. *v.* Oshkosh, 62 Wis. 32, 21 N. W. 828.

United States.— Cumberland Tel., etc., Co. *v.* United Electric R. Co., 42 Fed. 273, 12 L. R. A. 544.

44. Iowa Union Tel. Co. *v.* Oskaloosa, 67 Iowa 250, 25 N. W. 155; Com. *v.* Pennsylvania Tel. Co., 18 Phila. (Pa.) 588.

45. Northwestern Tel. Exch. Co. *v.* Chicago, etc., R. Co., 76 Minn. 334, 79 N. W. 315; State *v.* Central New Jersey Tel. Co., 53 N. J. L. 341, 21 Atl. 460, 11 L. R. A. 664; Pennsylvania Tel. Co. *v.* Hoover, 11 Pa. Dist. 708; San Antonio, etc., R. Co. *v.* Southwestern Tel., etc., Co., 93 Tex. 313, 55 S. W. 117, 77 Am. St. Rep. 884, 49 L. R. A. 459; Southwestern Tel., etc., Co. *v.* Gulf, etc., R. Co., (Tex. Civ. App. 1899) 52 S. W. 106.

In Mississippi telegraph and telephone companies are recognized by statute as separate and distinct, and a telephone company cannot exercise the right of eminent domain under the statute relating to telegraph companies. Alabama, etc., R. Co. *v.* Cumberland Tel., etc., Co., 88 Miss. 438, 41 So. 258.

46. *California.*— Davis *v.* Pacific Tel., etc., Co., 127 Cal. 312, 57 Pac. 764, 59 Pac. 698, penal statute in regard to removing, obstructing, or severing telegraph wires.

Iowa.— Franklin *v.* Northwestern Tel. Co., 69 Iowa 97, 28 N. W. 461, venue of actions against telegraph companies.

Maryland.— Chesapeake, etc., Tel. Co. *v.* Baltimore, etc., Tel. Co., 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167, statute requiring one telegraph company to receive despatches from and for other telegraph lines or companies.

Missouri.— St. Louis *v.* Bell Tel. Co., 96 Mo. 623, 10 S. W. 197, 9 Am. St. Rep. 370, 2 L. R. A. 278, 2 Am. Elec. Cas. 44, power to fix rates.

some cases statutes originally relating in terms only to telegraph companies have by express enactment been made applicable to telephone companies also.[47] The term "telegraph" as used in statutes does not, however, always or necessarily include the telephone,[48] particularly where there is separate legislation relating specifically to telephones.[49]

C. Nature and Status of Companies — 1. In General. Telegraph and telephone companies are quasi-public corporations,[50] or servants,[51] engaged in a quasi-public business,[52] in many respects similar to that of common carriers,[53] and their instruments and apparatus are therefore devoted to a public use.[54] Such companies receive from the public various valuable rights and franchises,[55] such as the right of eminent domain,[56] and are subject to certain well-defined duties and obligations to the public,[57] such as to serve the public gener-

Ohio.— Cincinnati Inclined Plane R. Co. *v.* City, etc., Tel. Assoc., 48 Ohio St. 390, 27 N. E. 890, 29 Am. St. Rep. 559, 12 L. R. A. 534, statute authorizing construction along public roads.

Pennsylvania.— People's Tel., etc., Co. *v.* Berks, etc., Turnpike Road, 199 Pa. St. 411, 49 Atl. 284 (authority to construct along public roads, streets, or highways); Bell Tel. Co. *v.* Com., 17 Wkly. Notes Cas. 505, 2 Am. Elec. Cas. 407 (forbidding discrimination).

Texas.— Texarkana *v.* Southwestern Tel., etc., Co., 48 Tex. Civ. App. 16, 106 S. W. 915, right to occupy public roads and streets.

Wisconsin.— Roberts *v.* Wisconsin Tel. Co., 77 Wis. 589, 46 N. W. 800, 20 Am. St. Rep. 143, authority to construct and maintain line along public highways.

England.— Atty.-Gen. *v.* Edison Tel. Co., 6 Q. B. D. 244, 50 L. J. Q. B. 145, 43 L. T. Rep. N. S. 697, 29 Wkly. Rep. 428 (English statute of 1863 relating to exclusive privilege of postmaster-general as to transmission of telegrams); National Tel. Co. *v.* Baker, [1893] 2 Ch. 186, 57 J. P. 373, 62 L. J. Ch. 699, 68 L. T. Rep. N. S. 283, 3 Reports 318, 4 Am. Elec. Cas. 320.

47. State *v.* Central New Jersey Tel. Co., 53 N. J. L. 341, 21 Atl. 460, 11 L. R. A. 664; Cincinnati Inclined Plane R. Co. *v.* City, etc., Tel. Assoc., 48 Ohio St. 390, 27 N. E. 890, 29 Am. St. Rep. 559, 12 L. R. A. 534; Wichita *v.* Old Colony Trust Co., 132 Fed. 641, 66 C. C. A. 19 [*affirming* 123 Fed. 762].

48. Home Tel. Co. *v.* Nashville, 118 Tenn. 1, 101 S. W. 770; Richmond *v.* Southern Bell Tel., etc., Co., 174 U. S. 761, 19 S. Ct. 778, 43 L. ed. 1162 [*reversing* in part 85 Fed. 19, 28 C. C. A. 659] (holding that the acts of congress of July 24, 1866 (U. S. Rev. St. (1878) §§ 5263–5268 [U. S. Comp. St. (1901) p. 3579–3581]), authorizing telegraph companies to construct and maintain lines over and along any military or post roads of the United States, and over, under, or across navigable streams or waters of the United States does not apply to telephone companies); Sunset Tel., etc., Co. *v.* Pomona, 164 Fed. 561 [*affirmed* in 172 Fed. 829] (holding that a California statute authorizing telegraph companies to construct their lines along public roads or highways did not include telephone companies).

49. Alabama, etc., R. Co. *v.* Cumberland Tel., etc., Co., 88 Miss. 438, 41 So. 258 (holding that in Mississippi telegraph and telephone companies are recognized by statute as being separate and distinct, and that the statutory provisions in regard to the exercise of the right of eminent domain by telegraph companies do not apply to telephone companies); Home Tel. Co. *v.* Nashville, 118 Tenn. 1, 101 S. W. 770.

50. York Tel. Co. *v.* Keesey, 5 Pa. Dist. 366; Jones *v.* Western Union Tel. Co., 101 Tenn. 442, 47 S. W. 699; Marr *v.* Western Union Tel. Co., 85 Tenn. 529, 3 S. W. 496; Cumberland Tel., etc., Co. *v.* Evansville, 127 Fed. 187 [*affirmed* in 143 Fed. 238, 74 C. C. A. 368].

51. Ayer *v.* Western Union Tel. Co., 79 Me. 493, 10 Atl. 495, 1 Am. St. Rep. 353; State *v.* Nebraska Tel. Co., 17 Nebr. 126, 22 N. W. 237, 52 Am. St. Rep. 404; Telegraph Co. *v.* Frith, 105 Tenn. 167, 58 S. W. 118.

Public service corporation.—A telegraph company is a public service corporation. Dunn *v.* Western Union Tel. Co., 2 Ga. App. 845, 59 S. E. 189.

52. Central Union Tel. Co. *v.* Bradbury, 106 Ind. 1, 5 N. E. 721; Ayer *v.* Western Union Tel. Co., 79 Me. 493, 10 Atl. 495, 1 Am. St. Rep. 353; State *v.* Kinloch Tel. Co., 93 Mo. App. 349, 67 S. W. 684; Cumberland Tel., etc., Co. *v.* Evansville, 127 Fed. 187 [*affirmed* in 143 Fed. 238, 74 C. C. A. 368].

Private business.— Telephone companies sometimes install what may be termed a local telephone plant by which persons in different rooms of a large building can communicate with each other, which system does not connect with the general telephone exchange or permit of conversation with the outside public, but is only for the use of persons in the building. Such telephones, although installed by a public telephone company, are not a part of its public business, as for the purpose of rate regulation. Chesapeake, etc., Tel. Co. *v.* Manning, 186 U. S. 238, 22 S. Ct. 881, 46 L. ed. 1144.

53. See *infra*, I, C, 2.

54. Hockett *v.* State, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201.

55. Ayer *v.* Western Union Tel. Co., 79 Me. 493, 10 Atl. 495, 1 Am. St. Rep. 353.

56. See Eminent Domain, 15 Cyc. 592.

57. Hockett *v.* State, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201; Ayer *v.* Western

ally,[58] and without discrimination,[59] and to conduct their business in a manner conducive to the public benefit.[60] Owing to their quasi-public character such companies are subject to legislative regulation and control.[61] While the franchise for conducting such a business may be exercised by an individual as well as by a corporation,[62] the fact that it is so exercised does not affect the public character of the business,[63] or the obligation owing to the public,[64] or its liability to legislative regulation and control.[65]

2. As Common Carriers. Telegraph and telephone companies have frequently been termed "common carriers," [66] or common carriers of news or information,[67] and in some jurisdictions have been declared to be common carriers by constitutional or statutory provisions; [68] but while they are in the nature of common carriers in regard to their quasi-public character,[69] and their duty to serve the public generally and without discrimination,[70] and in being subject to legislative

Union Tel. Co., 79 Me. 493, 10 Atl. 495, 1 Am. St. Rep. 353; State *v.* Nebraska Tel. Co., 17 Nebr. 126, 22 N. W. 237, 52 Am. Rep. 404.

58. Central Union Tel. Co. *v.* Bradbury, 106 Ind. 1, 5 N. E. 721; State *v.* Kinloch Tel. Co., 93 Mo. App. 349, 67 S. W. 684. See also *infra*, III.

59. Central Union Tel. Co. *v.* State, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114; Central Union Tel. Co. *v.* Bradbury, 106 Ind. 1, 5 N. E. 721; State *v.* Kinloch Tel. Co., 93 Mo. App. 349, 67 S. W. 684; State *v.* Nebraska Tel. Co., 17 Nebr. 126, 22 N. W. 237, 52 Am. Rep. 404; State *v.* Delaware, etc., Tel. Co., 47 Fed. 633 [*affirmed* in 50 Fed. 677, 2 C. C. A. 1]. See also *infra*, III.

60. Central Union Tel. Co. *v.* State, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114.

61. Central Union Tel. Co. *v.* Bradbury, 106 Ind. 1, 5 N. E. 721; Hockett *v.* State, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201; State *v.* Kinloch Tel. Co., 93 Mo. App. 349, 67 S. W. 684.

Regulation and control see *infra*, II, B.

62. See *infra*, I, D, 2, a.

63. State *v.* Cadwallader, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319; Lowther *v.* Bridgeman, 57 W. Va. 306, 50 S. E. 410.

64. State *v.* Cadwallader, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319.

65. Lowther *v.* Bridgeman, 57 W. Va. 306, 50 S. E. 410.

66. *California.*— Parks *v.* Alta California Tel. Co., 13 Cal. 422, 73 Am. Dec. 589.

Indiana.— Central Union Tel. Co. *v.* State, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114, 2 Am. Elec. Cas. 27; Western Union Tel. Co. *v.* Meek, 49 Ind. 53, 1 Am. Elec. Cas. 139.

Iowa.— Manville *v.* Western Union Tel. Co., 37 Iowa 214, 18 Am. Rep. 8, 1 Am. Elec. Cas. 94.

Kentucky.—Western Union Tel. Co. *v.* Eubanks, 100 Ky. 591, 38 S. W. 1068, 18 Ky. L. Rep. 995, 66 Am. St. Rep. 361, 36 L. R. A. 711, 6 Am. Elec. Cas. 770.

Maine.— True *v.* International Tel. Co., 60 Me. 9, 11 Am. Rep. 156, Allen Tel. Cas. 530.

Nebraska.— Western Union Tel. Co. *v.* Call Pub. Co., 44 Nebr. 326, 62 N. W. 506, 48 Am. St. Rep. 729, 27 L. R. A. 622, 5 Am. Elec. Cas. 673; Pacific Tel. Co. *v.* Underwood, 37 Nebr. 315, 55 N. W. 1057, 40 Am. St. Rep. 490; Kemp *v.* Western Union Tel. Co., 28 Nebr. 661, 44 N. W. 1064, 26 Am. St. Rep. 363.

Ohio.— Daily *v.* State, 51 Ohio St. 348, 37 N. E. 710, 46 Am. St. Rep. 578, 24 L. R. A. 724.

United States.— Muskogee Nat. Tel. Co. *v.* Hall, 118 Fed. 382, 55 C. C. A. 208, 8 Am. Elec. Cas. 64; State *v.* Delaware, etc., Tel. Co., 47 Fed. 633 [*affirmed* in 50 Fed. 677, 2 C. C. A. 1]; State *v.* Bell Tel. Co., 23 Fed. 539.

England.— MacAndrew *v.* Electric Tel. Co., 17 C. B. 3, 1 Jur. N. S. 1073, 25 L. J. C. P. 26, 4 Wkly. Rep. 7, 84 E. C. L. 3, 3 Allen Tel. Cas. 38.

Canada.— Bell Tel. Co. *v.* Montreal St. R. Co., 10 Quebec Super. Ct. 162.

67. State *v.* Cadwallader, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319; Central Union Tel. Co. *v.* State, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114; Central Union Tel. Co. *v.* Bradbury, 106 Ind. 1, 5 N. E. 721; Hockett *v.* State, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201; State *v.* Nebraska Tel. Co., 17 Nebr. 126, 22 N. W. 237, 52 Am. Rep. 404; Muskogee Nat. Tel. Co. *v.* Hall, 118 Fed. 382, 55 C. C. A. 208. See also cases cited *supra*, note 66.

68. Western Union Tel. Co. *v.* Eubanks, 100 Ky. 591, 38 S. W. 1068, 18 Ky. L. Rep. 995, 66 Am. St. Rep. 361, 36 L. R. A. 711; Alabama, etc., R. Co. *v.* Cumberland Tel., etc., Co., 88 Miss. 438, 41 So. 258; Postal Tel., etc., Co. *v.* Wells, 82 Miss. 733, 35 So. 190; Blackwell Milling, etc., Co. *v.* Western Union Tel. Co., 17 Okla. 376, 89 Pac. 235.

69. Hockett *v.* State, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201; Central Union Tel. Co. *v.* Swoveland, 14 Ind. App. 341, 42 N. E. 1035; True *v.* International Tel. Co., 60 Me. 9, 11 Am. Rep. 156; State *v.* Nebraska Tel. Co., 17 Nebr. 126, 22 N. W. 237, 52 Am. Rep. 404.

70. Central Union Tel. Co. *v.* State, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114; Central Union Tel. Co. *v.* Bradbury, 106 Ind. 1, 5 N. E. 721; State *v.* Kinloch Tel. Co., 93 Mo. App. 349, 67 S. W. 684; State *v.* Nebraska Tel. Co., 17 Nebr. 126, 22 N. W. 237, 52 Am. Rep. 404; State *v.* Delaware, etc., Tel.

regulation and control,[71] they are not strictly speaking common carriers,[72] and their obligations and liabilities are not to be measured by the same rules as are

Co., 47 Fed. 633 [*affirmed* in 50 Fed. 677, 2 C. C. A. 1].

Duty as to furnishing services and facilities see *infra*, III.

71. Central Union Tel. Co. *v.* Bradbury, 106 Ind. 1, 5 N. E. 721; Hockett *v.* State, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201; State *v.* Kinloch Tel. Co., 93 Mo. App. 349, 67 S. W. 684.

72. *Arkansas.*—Western Union Tel. Co. *v.* Short, 53 Ark. 434, 14 S. W. 649, 9 L. R. A. 744.

California.— Coit *v.* Western Union Tel. Co., 130 Cal. 657, 63 Pac. 83, 80 Am. St. Rep. 153, 53 L. R. A. 678; Hart *v.* Western Union Tel. Co., 66 Cal. 579, 6 Pac. 637, 56 Am. Rep. 119, 1 Am. Elec. Cas. 734.

Georgia.— Stamey *v.* Western Union Tel. Co., 92 Ga. 613, 18 S. E. 1008, 44 Am. St. Rep. 95; Western Union Tel. Co. *v.* Fontaine, 58 Ga. 433, 1 Am. Elec. Cas. 229.

Illinois.— Western Union Tel. Co. *v.* Tyler, 74 Ill. 168, 24 Am. Rep. 279, 1 Am. Elec. Cas. 115.

Indiana.— Western Union Tel. Co. *v.* Meredith, 95 Ind. 93, 1 Am. Elec. Cas. 643; Central Union Tel. Co. *v.* Swoveland, 14 Ind. App. 341, 42 N. E. 1035.

Iowa.— Sweatland *v.* Illinois, etc., Tel. Co., 27 Iowa 433, 1 Am. Rep. 285.

Kentucky.— Smith *v.* Western Union Tel. Co., 83 Ky. 104, 4 Am. St. Rep. 126, 1 Am. Elec. Cas. 743; Camp *v.* Western Union Tel. Co., 1 Metc. 164, 71 Am. Dec. 461, Allen Tel. Cas. 85.

Maine.— Fowler *v.* Western Union Tel. Co., 80 Me. 381, 15 Atl. 29, 6 Am. St. Rep. 211, 2 Am. Elec. Cas. 607; Bartlett *v.* Western Union Tel. Co., 62 Me. 209, 16 Am. Rep. 437, 1 Am. Elec. Cas. 45.

Maryland.— Birney *v.* New York, etc., Tel. Co., 18 Md. 341, 81 Am. Dec. 607; Allen Tel. Cas. 195.

Massachusetts.—Grinnell *v.* Western Union Tel. Co., 113 Mass. 299, 18 Am. Rep. 485, 1 Am. Elec. Cas. 70; Ellis *v.* American Tel. Co., 13 Allen 226, Allen Tel. Cas. 306.

Michigan.— Jacob *v.* Western Union Tel. Co., 135 Mich. 600, 98 N. W. 402; Birkett *v.* Western Union Tel. Co., 103 Mich. 361, 61 N. W. 645, 50 Am. St. Rep. 374, 33 L. R. A. 404, 5 Am. Elec. Cas. 727; Western Union Tel. Co. *v.* Carew, 15 Mich. 525.

Missouri.— State *v.* St. Louis, 145 Mo. 551, 46 S. W. 981, 42 L. R. A. 113; Reed *v.* Western Union Tel. Co., 56 Mo. App. 168.

Nebraska.— Becker *v.* Western Union Tel. Co., 11 Nebr. 87, 7 N. W. 868, 38 Am. Rep. 356.

New York.— Kiley *v.* Western Union Tel. Co., 109 N. Y. 231, 16 N. E. 75; Elwood *v.* Western Union Tel. Co., 45 N. Y. 549, 6 Am. Rep. 140, Allen Tel. Cas. 594; Leonard *v.* New York, etc., Tel. Co., 41 N. Y. 544, 1 Am. St. Rep. 446, Allen Tel. Cas. 500; Hirsch *v.* American Dist. Tel. Co., 112 N. Y. App. Div. 265, 98 N. Y. Suppl. 371 [*reversing* 48 Misc. 370, 95 N. Y. Suppl. 562]; Wolfskehl *v.* Western Union Tel. Co., 46 Hun 542, 2 Am. Elec. Cas. 647; Schwartz *v.* Atlantic, etc., Tel. Co., 18 Hun 157, 1 Am. Elec. Cas. 284; Breese *v.* U. S. Telegraph Co., 45 Barb. 274, 31 How. Pr. 86 [*affirmed* in 48 N. Y. 132, 8 Am. Rep. 526]; MacPherson *v.* Western Union Tel. Co., 52 N. Y. Super. Ct. 232, 1 Am. Elec. Cas. 755; De Rutte *v.* New York, etc., Electro Magnetic Tel. Co., 1 Daly 547, 30 How. Pr. 403.

North Carolina.— Lassiter *v.* Western Union Tel. Co., 89 N. C. 334.

Ohio.— Western Union Tel. Co. *v.* Griswold, 37 Ohio St. 301, 41 Am. Rep. 500, 1 Am. Elec. Cas. 329.

Pennsylvania.—Passmore *v.* Western Union Tel. Co., 78 Pa. St. 238, 1 Am. Elec. Cas. 168; New York, etc., Tel. Co. *v.* Dryburg, 35 Pa. St. 298, 78 Am. Dec. 338, Allen Tel. Cas. 157.

South Carolina.— Pinckney *v.* Western Union Tel. Co., 19 S. C. 71, 45 Am. Rep. 765, 1 Am. Elec. Cas. 516; Aiken *v.* Western Union Tel. Co., 5 S. C. 358, 1 Am. Elec. Cas. 121.

Tennessee.— Western Union Tel. Co. *v.* Mellon, 96 Tenn. 66, 33 S. W. 725; Western Union Tel. Co. *v.* Munford, 87 Tenn. 190, 10 S. W. 318, 10 Am. St. Rep. 630, 2 L. R. A. 601; Marr *v.* Western Union Tel. Co., 85 Tenn. 529, 3 S. W. 496.

Texas.— Western Union Tel. Co. *v.* Hearne, 77 Tex. 83, 13 S. W. 970; Western Union Tel. Co. *v.* Neill, 57 Tex. 283, 44 Am. Rep. 589, 1 Am. Elec. Cas. 355.

Utah.— Wertz *v.* Western Union Tel. Co., 7 Utah 446, 27 Pac. 172, 13 L. R. A. 510.

Vermont.— Gillis *v.* Western Union Tel. Co., 61 Vt. 461, 17 Atl. 736, 15 Am. St. Rep. 917, 4 L. R. A. 611.

Virginia.— Western Union Tel. Co. *v.* Reynolds, 77 Va. 173, 46 Am. Rep. 715, 1 Am. Elec. Cas. 487.

Wisconsin.— Thompson *v.* Western Union Tel. Co., 64 Wis. 531, 25 N. W. 789, 54 Am. Rep. 644; Hibbard *v.* Western Union Tel. Co., 33 Wis. 558, 14 Am. Rep. 775, 1 Am. Elec. Cas. 62.

United States.— Primose *v.* Western Union Tel. Co., 154 U. S. 1, 14 S. Ct. 1098, 38 L. ed. 883, 5 Am. Elec. Cas. 809; Western Union Tel. Co. *v.* Coggin, 68 Fed. 137, 15 C. C. A. 231; Western Union Tel. Co. *v.* Cook, 61 Fed. 624, 9 C. C. A. 680, 5 Am. Elec. Cas. 799; Abraham *v.* Western Union Tel. Co., 23 Fed. 315, 1 Am. Elec. Cas. 728.

England.— Playford *v.* United Kingdom Electric Tel. Co., L. R. 4 Q. B. 706, 10 B. & S. 759, 38 L. J. Q. B. 249, 21 L. T. Rep. N. S. 21, 17 Wkly. Rep. 968, Allen Tel. Cas. 437; Dickson *v.* Reuter's Tel. Co., 3 C. P. D. 1, 47 L. J. C. P. 1, 37 L. T. Rep. N. S. 370, 26 Wkly. Rep. 23 [*affirming* 2 C. P. D. 62, 46 L. J. C. P. 197, 35 L. T. Rep. N. S. 842, 25 Wkly. Rep. 272].

applicable to common carriers of goods.[73] So while they are liable for negligence in the performance of their public duties they are not liable as insurers.[74]

D. Formation, Franchises, and Powers — 1. Formation or Incorporation. Except in so far as regulated by special constitutional or statutory provisions the formation and incorporation of telegraph and telephone companies is governed by the principles relating to corporations generally;[75] but telephone companies, in the absence of express provision, may be incorporated under statutory provisions relating to telegraph companies.[76]

2. Franchises and Privileges — a. In General.[77] The right to carry on a public telegraph or telephone business with the rights and privileges usually incident thereto is ordinarily termed a franchise,[78] which is exercised by and

Canada.— Baxter *v.* Dominion Tel. Co., 37 U. C. Q. B. 470.

Telegraph companies have been called common carriers of messages or intelligence, and while there is sufficient analogy between them to make the term appropriate as a designation of the public character of such companies and of their business, they are not, strictly speaking, common carriers or within the law applicable to carriers of goods. Marr *v.* Western Union Tel. Co., 85 Tenn. 529, 3 S. W. 496.

An ordinance declaring a telegraph company to be a common carrier does not make it so. State *v.* St. Louis, 145 Mo. 551, 46 S. W. 981, 42 L. R. A. 113.

In California the statute defining common carriers expressly excepts telegraph companies. Hart *v.* Western Union Tel. Co., 66 Cal. 579, 6 Pac. 637, 56 Am. St. Rep. 119.

District telegraph company.—A telegraph company which maintains a staff of messenger boys which it furnishes to its patrons is not a common carrier as to the services rendered by such messengers in the delivery of packages. Hirsch *v.* American Dist. Tel. Co., 112 N. Y. App. Div. 265, 98 N. Y. Suppl. 371 [*reversing* 48 Misc. 370, 95 N. Y. Suppl. 562].

73. Stamey *v.* Western Union Tel. Co., 92 Ga. 613, 18 S. E. 1008, 44 Am. St. Rep. 95; Western Union Tel. Co. *v.* Fontaine, 58 Ga. 433; Western Union Tel. Co. *v.* Carew, 15 Mich. 525; Pinckney *v.* Western Union Tel. Co., 19 S. C. 71, 45 Am. Rep. 765; Marr *v.* Western Union Tel. Co., 85 Tenn. 529, 3 S. W. 496. See also cases cited *infra*, note 74.

Distinction between telegraph companies and common carriers and reasons for different rules of liability see Ellis *v.* American Tel. Co., 13 Allen (Mass.) 226.

A constitutional provision that telegraph companies shall be common carriers does not affect the rule that they are not liable in the same manner and to the same extent as common carriers of goods. Poteet *v.* Western Union Tel. Co., 74 S. C. 491, 55 S. E. 113.

74. *Arkansas.*—Western Union Tel. Co. *v.* Short, 53 Ark. 434, 14 S. W. 649, 9 L. R. A. 744; Little Rock, etc., Tel. Co. *v.* Davis, 41 Ark. 79.

Georgia.— Western Union Tel. Co. *v.* Fontaine, 58 Ga. 433.

Illinois.— Tyler *v.* Western Union Tel. Co., 60 Ill. 421, 14 Am. Rep. 48.

Maine.— Fowler *v.* Western Union Tel. Co., 80 Me. 381, 15 Atl. 29, 6 Am. St. Rep. 211.

Maryland.— Birney *v.* New York, etc., Tel. Co., 18 Md. 341, 81 Am. Dec. 607.

Michigan.— Western Union Tel. Co. *v.* Carew, 15 Mich. 525.

New York.— Breese *v.* U. S. Telegraph Co., 48 N. Y. 132, 8 Am. Rep. 526; De Rutte *v.* New York, etc., Electro Magnetic Tel. Co., 1 Daly 547, 30 How. Pr. 403.

South Carolina.— Pinckney *v.* Western Union Tel. Co., 19 S. C. 71, 45 Am. Rep. 765.

Tennessee.— Western Union Tel. Co. *v.* Munford, 87 Tenn. 190, 10 S. W. 318, 10 Am. St. Rep. 630, 2 L. R. A. 601; Marr *v.* Western Union Tel. Co., 85 Tenn. 529, 3 S. W. 496.

Texas.— Western Union Tel. Co. *v.* Edsall, 63 Tex. 668; Western Union Tel. Co. *v.* Neill, 57 Tex. 283, 44 Am. Rep. 589.

Vermont.— Gillis *v.* Western Union Tel. Co., 61 Vt. 461, 17 Atl. 736, 15 Am. St. Rep. 917, 4 L. R. A. 611.

United States.—Primrose *v.* Western Union Tel. Co., 154 U. S. 1, 14 S. Ct. 1098, 38 L. ed. 883; Western Union Tel. Co. *v.* Schriver, 141 Fed. 538, 72 C. C. A. 596, 4 L. R. A. N. S. 678; Abraham *v.* Western Union Tel. Co., 23 Fed. 315; White *v.* Western Union Tel. Co., 14 Fed. 710, 5 McCrary 103.

Company not an insurer.— Of transmission. See *infra*, IV, B, 1. Of prompt transmission. See *infra*, IV, B, 2, a. Of accuracy in transmission. See *infra*, IV, B. 3. Of delivery. See *infra*, IV, C, 1. Of prompt delivery. See *infra*, IV, C, 3, a.

75. See Corporations, 10 Cyc. 201, 219.

The Georgia constitution confers upon the legislature the exclusive power to charter telegraph companies, and a charter granted by a superior court is therefore null and void. Doboy, etc., Tel. Co. *v.* De Magathias, 25 Fed. 697.

76. See *supra*, I, B, 2.

77. See, generally, Franchises, 19 Cyc. 1451.

78. California State Tel. Co. *v.* Alta Tel. Co., 22 Cal. 398 [*overruled* on other grounds in San Francisco *v.* Spring Valley Water Works, 48 Cal. 493]; Western Union Tel. Co. *v.* Omaha, 73 Nebr. 527, 103 N. W. 84; Lowther *v.* Bridgeman, 57 W. Va. 306, 50 S. E. 410; Western Union Tel. Co. *v.* Norman, 77 Fed. 13.

Constitutional requirements as to the mode

pursuant to legislative authority,[79] the right to exercise which may be inquired into by quo warranto,[80] and which may be forfeited in case it was illegally or improperly granted or for non-user or misuser.[81] The franchise consisting of the rights and privileges incident to such a business is, however, distinct from the franchise to exist as a corporation,[82] and need not necessarily be granted to a corporation, but may be granted to an individual,[83] and this notwithstanding the statute under which the grant is made refers in terms to "companies."[84] It has also been held that an individual may own and conduct a telephone system without legislative authority unless there is some legislative restriction upon such right,[85] although legislative authority is undoubtedly necessary for the exercise of the right of eminent domain,[86] and the right to occupy public streets or highways must be derived either directly or indirectly from legislative authority.[87] The grant of a franchise to erect, maintain, and operate a telephone system authorizes the purchase of one which is already in existence;[88] but such purchase having been made the function of the grant is fulfilled and the grantee cannot thereafter erect and operate another system.[89] In some cases it has been held that the rights and privileges granted to telegraph or telephone companies by a municipality are not franchises, but merely licenses,[90] notwithstanding by a constitu-

of acquiring a franchise to establish and operate a telephone system in a town or city must be complied with or the company will be a trespasser and without standing in court. Rural Home Tel. Co. *v.* Kentucky, etc., Tel. Co., 128 Ky 209, 107 S. W. 787, 32 Ky. L. Rep. 1068.

79. Lowther *v.* Bridgeman, 57 W. Va. 306, 50 S. E. 410.

80. People *v.* Chicago Tel. Co., 220 Ill. 238, 77 N. E. 245; Clark *v.* Interstate Independent Tel. Co., 72 Nebr. 883, 101 N. W. 977. See also, generally, QUO WARRANTO, 32 Cyc. 1412

Quo warranto and not injunction.—If a franchise has been illegally or improperly granted to a telephone company, the remedy is by quo warranto at the suit of the state and not by a suit for injunction brought by a taxpayer to restrain the exercise of the franchise. Clark *v.* Interstate Independent Tel Co., 72 Nebr. 883, 101 N. W. 977.

81. People *v.* Chicago Tel. Co., 220 Ill. 238, 77 N. E. 245; State *v.* Cumberland Tel., etc., Co., 114 Tenn. 194, 86 S. W. 390. See also, generally, CORPORATIONS, 10 Cyc. 1087, 1279 *et seq.*

A municipality cannot adjudge that a franchise granted to a telephone and telegraph company by the legislature has been lost by non-user where no such authority is vested in the municipality by its charter. Matter of Seaboard Tel., etc., Co., 68 N. Y. App. Div. 283, 74 N. Y. Suppl. 15.

It is not ground for forfeiture of a telephone company's franchise that it made an unauthorized lease of its plant where long prior to the institution of such proceedings it had avoided the lease as *ultra vires* and no public interest would be subserved by such forfeiture. State *v.* Cumberland Tel., etc., Co., 114 Tenn. 194, 86 S. W. 390.

82. Western Union Tel. Co. *v.* Omaha, 73 Nebr. 527, 103 N. W. 84.

83. Lowther *v.* Bridgeman, 57 W. Va. 306, 50 S. E 410. See also State *v.* Cadwallader, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319.

84. Lowther *v.* Bridgeman, 57 W. Va. 306, 50 S. E. 410.

85. Magee *v.* Overshiner, 150 Ind. 127, 49 N. E. 951, 65 Am. St. Rep. 358, 40 L. R. A. 370. See also Bishop *v.* Riddle, (Tex. Civ. App. 1908) 113 S. W. 151.

Private connecting line.—Where a telephone company has acquired from a city and county a franchise to operate its system, agreeing to furnish any person for whom it might not construct a line telephone service over a line constructed by such person, parties constructing for their private use, and not for operation in competition with the company's system, a connecting line are not required to obtain a franchise therefor. Cumberland Tel., etc., Co. *v.* Cartwright Creek Tel. Co., 128 Ky. 395, 108 S. W. 875, 32 Ky. L. Rep. 1357.

86. See EMINENT DOMAIN, 15 Cyc. 567.

87. People *v.* Chicago Tel. Co., 220 Ill. 238, 77 N. E. 245. See also *infra*, I, D, 2, c.

88. Eby *v.* Lathrop, 128 Mo. App. 315, 107 S. W. 410.

89. Eby *v.* Lathrop, 128 Mo. App. 315, 107 S. W. 410.

90. Chicago *v.* Chicago Tel. Co., 230 Ill. 157, 82 N. E. 607, 13 L. R. A. N. S. 1084; People *v.* Chicago Tel. Co., 220 Ill. 238, 77 N. E. 245; People *v.* Central Union Tel. Co., 192 Ill. 307, 61 N. E. 428; Dakota Cent. Tel. Co. *v.* Huron, 165 Fed. 226. See also CORPORATIONS, 10 Cyc. 1085; FRANCHISES, 19 Cyc. 1460.

Exclusiveness of grant.—A grant to a telephone company of the right to construct and maintain a telephone system is a mere license and not exclusive, and the municipality may subsequently grant to another company a like privilege. Rock Island *v.* Central Union Tel. Co., 132 Ill. App. 248.

A municipality cannot grant a franchise to a telegraph or telephone company unless the power to do so has been delegated to it. State *v.* Milwaukee Independent Tel. Co., 133 Wis. 588, 114 N. W. 108, 315.

tional or statutory provision such municipal consent is necessary;[91] but this doctrine has been questioned,[92] and the term "franchise" is frequently used in this connection;[93] and it has been held even where the right to occupy public streets is termed a license and not a franchise, that such right, since it can only be granted pursuant to legislative authority, may be inquired into by information in the nature of quo warranto.[94] The fact that the incorporation of a telephone company is incomplete at the time a privilege is granted to it by a municipality does not affect its right thereto;[95] nor can a municipality which has granted rights and privileges to a telephone company organized under the laws of the state question the validity of the company's incorporation in a suit to restrain the municipality from interfering with the exercise of the rights which it has granted.[96] A grant by a municipality of rights, franchises, or privileges to a telegraph or telephone company and their acceptance by such company constitute a contract,[97] which is binding upon the municipality so that it cannot be revoked or rescinded without cause,[98] or the rights granted be nullified or materially impaired,[99] or made subject to new and burdensome conditions not justifiable under the municipality's police powers;[1] and it is also binding upon the company as to the conditions imposed,[2] and estops the company to repudiate any of the provisions of such

91. Dakota Cent. Tel. Co. *v.* Huron, 165 Fed. 226.

Where municipal consent not necessary.— If a telegraph or telephone company is authorized by statute to occupy public streets and the consent of the municipality is not necessary, the franchise is derived from the legislature, although the municipality may have the right to regulate and control the manner in which it is exercised. Barhite *v.* Home Tel. Co., 50 N. Y. App. Div. 25, 63 N. Y. Suppl. 659.

92. See CORPORATIONS, 10 Cyc. 1086.

93. See Mt. Pleasant Tel. Co. *v.* Ohio, etc., Tel. Co., 140 Ill. App. 27; Cumberland Tel., etc., Co. *v.* Cartwright Creek Tel. Co., 128 Ky. 395, 108 S. W. 875, 32 Ky. L. Rep. 1357; Old Colony Trust Co. *v.* Wichita, 123 Fed. 762 [*affirmed* in 132 Fed. 641, 66 C. C. A. 19].

94. People *v.* Chicago Tel. Co., 220 Ill. 238, 77 N. E. 245.

Although a municipality cannot grant a franchise, if the telegraph or telephone company accepts the ordinance and exercises the franchise attempted to be conferred, quo warranto is a proper proceeding to oust it from exercising the same. State *v.* Milwaukee Independent Tel. Co., 133 Wis. 588, 114 N. W. 108, 315.

95. State *v.* Citizens' Tel. Co., 9 N. J. L. J. 210.

96. Old Colony Trust Co. *v.* Wichita, 123 Fed. 762 [*affirmed* in 132 Fed. 641, 66 C. C. A. 19].

97. *Illinois.*— Chicago *v.* Chicago Tel. Co., 230 Ill. 157, 82 N. E. 607, 13 L. R. A. N. S. 1084; London Mills *v.* White, 208 Ill. 289, 70 N. E. 313; People *v.* Central Union Tel. Co., 192 Ill 307, 61 N. E. 428, 85 Am. St. Rep. 338; Rock Island *v.* Central Union Tel. Co., 132 Ill. App. 248.

Kentucky.— Cumberland Tel., etc., Co. *v.* Cartwright Creek Tel. Co., 128 Ky. 395, 108 S. W. 875, 32 Ky. L. Rep. 1357.

Maryland.— Chesapeake, etc., Tel. Co. *v.* Baltimore, 90 Md. 638, 45 Atl. 446; Chesapeake, etc., Tel. Co. *v.* Baltimore, 89 Md. 689, 43 Atl. 784, 44 Atl. 1033.

New York.— Western Union Tel. Co. *v.* Syracuse, 24 Misc. 338, 53 N. Y. Suppl. 690 [*modified* in 35 N. Y. App. Div. 631, 55 N. Y. Suppl. 1151].

North Dakota.— Northwestern Tel. Exch. Co. *v.* Anderson, 12 N. D. 585, 98 N. W. 706, 102 Am. St. Rep. 580, 65 L. R. A. 771.

United States.— Southern Bell Tel., etc., Co. *v.* Mobile, 162 Fed. 523; Cumberland Tel., etc., Co. *v.* Evansville, 143 Fed. 238, 74 C. C. A. 368 [*affirming* 127 Fed. 187]; Morristown *v.* East Tennessee Tel. Co., 115 Fed. 304, 53 C. C. A. 132.

98. London Mills *v.* White, 208 Ill. 289, 70 N. E. 313; People *v.* Central Union Tel. Co., 192 Ill. 307, 61 N. E. 428, 85 Am. St. Rep. 338; Rock Island *v.* Central Union Tel. Co., 132 Ill. App. 248; Hudson Tel. Co. *v.* Jersey City, 49 N. J. L. 303, 8 Atl. 123, 60 Am. Rep. 619; Morristown *v.* East Tennessee Tel. Co., 115 Fed. 304, 53 C. C. A. 132.

99. Chesapeake, etc., Tel. Co. *v.* Baltimore, 89 Md. 689, 43 Atl. 784, 44 Atl. 1033; Western Union Tel. Co. *v.* Syracuse, 24 Misc. (N. Y.) 338, 53 N. Y. Suppl. 690 [*modified* in 35 N. Y. App. Div. 631, 55 N. Y. Suppl. 1151]; Northwestern Tel. Exch. Co. *v.* Anderson, 12 N. D. 585, 98 N. W. 706, 102 Am. St. Rep. 580, 65 L. R. A. 771; Southern Bell Tel., etc., Co. *v.* Mobile, 162 Fed. 523.

A municipality will be enjoined from illegally interfering with or destroying the property of a telephone company which is conducting a telephone system pursuant to an ordinance which it has accepted and acted upon. Rock Island *v.* Central Union Tel. Co., 132 Ill. App. 248; Southern Bell Tel., etc., Co. *v.* Mobile, 162 Fed. 523.

1. Chesapeake, etc., Tel. Co. *v.* Baltimore, 89 Md. 689, 43 Atl. 784, 44 Atl. 1033.

2. Jamestown *v.* Home Tel. Co., 125 N. Y. App. Div. 1, 109 N. Y. Suppl. 297; Cumberland Tel., etc., Co. *v.* Evansville, 143 Fed. 238, 74 C. C. A. 368 [*affirming* 127 Fed. 187].

contract;[3] but where pursuant to statute the designation of streets or manner of constructing the line is made by a court, the court cannot insert requirements not authorized by the statute, although assented to by the company.[4] An ordinance granting rights to a telegraph or telephone company will be strictly construed against the grantee,[5] and one company under a grant of the right to use streets cannot under its franchise confer a similar right upon a separate and distinct company without the consent of the municipality;[6] but the limitations or conditions imposed must be construed as coterminous with the franchise which the municipality was authorized to grant.[7] A right or franchise granted by a municipality to a telephone company for a certain period cannot be arbitrarily terminated by the municipality prior to the expiration of such period unless the right to do so is expressly reserved,[8] and if reserved the municipality must in enforcing such right proceed in accordance with the provisions of the ordinance reserving it,[9] although the grant may be revoked for an abuse of the powers granted or failure to comply with the conditions imposed,[10] and will terminate at the expiration of the time limited.[11] Where a municipality by ordinance has granted certain rights and privileges to a telegraph or telephone company, a subsequent ordinance granting other or additional rights to such company does not necessarily repeal the former ordinance;[12] but under some circumstances an acceptance by the company of the second ordinance may estop it to claim any further rights under the original ordinance.[13]

b. Right to Alienate Franchise or Property. The general rule that corporations having public duties to perform cannot without legislative authority disable themselves from discharging such duties[14] applies to telegraph and telephone

Rates.— A municipality may legally annex to the grant of a telephone franchise a condition limiting the rates to be charged to its citizens. Moberly *v.* Richmond Tel. Co., 126 Ky. 369, 103 S. W. 714, 31 Ky. L. Rep. 783.

Mandamus will not lie to enforce the contract between a municipality and a telephone company growing out of an ordinance authorizing the company to occupy its streets and imposing conditions accepted by the company, although mandamus would lie to compel the performance of a duty owing to the public growing out of such ordinance and acceptance as distinguished from a duty owing merely to the municipality. Chicago *v.* Chicago Tel. Co., 230 Ill. 157, 82 N. E. 607, 13 L. R. A. N. S. 1084.

3. Cumberland Tel., etc., Co. *v.* Cartwright Creek Tel. Co., 128 Ky. 395, 108 S. W. 875, 32 Ky. L. Rep. 1357.

Reasonableness of terms.— Where a telegraph company accepts an ordinance granting it the right to maintain poles and wires in city streets in consideration of an annual payment of a certain sum, it cannot thereafter contest the reasonableness of such charge. Postal Tel. Cable Co. *v.* Newport, 76 S. W. 159, 25 Ky. L. Rep. 635.

4. State *v.* Lord, 61 N. J. L. 136, 38 Atl. 752.

5. State *v.* Thief River Falls, 102 Minn. 425, 113 N. W. 1057, holding that an ordinance granting to a long distance telephone company authority to construct its line within and through a city will be construed as referring to the company's long distance system only and will not authorize the establishment of a local telephone exchange.

6. Western Union Tel. Co. *v.* Toledo, 103 Fed. 746.

7. Moberly *v.* Richmond Tel. Co., 126 Ky. 369, 103 S. W. 714, 31 Ky. L. Rep. 783, holding that as a city can only grant a telephone franchise operative within the city, a condition of the grant limiting the rates to be charged does not apply to the county service of such company outside of the city.

8. Old Colony Trust Co. *v.* Wichita, 123 Fed. 762 [*affirmed* in 132 Fed. 641, 66 C. C. A. 19].

9. Wichita *v.* Old Colony Trust Co., 132 Fed. 641, 66 C. C. A. 19 [*affirming* 123 Fed. 762].

Who may raise question.— Whether a telephone company has strictly observed all the conditions of a franchise ordinance is a question which can only be raised by the municipality granting the same. Mt. Pleasant Tel. Co. *v.* Ohio, etc., Tel. Co., 140 Ill. App. 27.

10. Western Union Tel. Co. *v.* Toledo, 103 Fed. 746.

11. Mutual Union Tel. Co. *v.* Chicago, 16 Fed. 309, 11 Biss. 539, holding, however, that, although the ordinance provides that the rights and privileges granted shall terminate upon a particular date, the municipal authorities have no right, without notice to the company, to cut down and remove the wires after the expiration of such time.

12. Wichita *v.* Old Colony Trust Co., 132 Fed. 641, 66 C. C. A. 19 [*affirming* 123 Fed. 762].

13. Cumberland Tel., etc., Co. *v.* Evansville, 143 Fed. 238, 74 C. C. A. 368 [*affirming* 127 Fed. 187].

14. See CORPORATIONS, 10 Cyc. 1090.

companies.[15] It has accordingly been held that a telegraph or telephone company cannot, without legislative authority, alienate its franchises,[16] or property necessary for the exercise of such franchises,[17] and that a railroad company having also a franchise to maintain and operate a line of telegraph cannot alienate the latter franchise.[18] A sale of such franchises and property may, however, be made if authorized by statute,[19] and the statutes and general policy of some jurisdictions are very liberal in regard to such transfers in the case of telegraph and telephone companies;[20] although an authority to lease does not include authority to sell,[21] nor does authority to hold and convey such real and personal property as may be proper for the construction and maintenance of its lines authorize such a company to sell its franchise or property necessary for the exercise thereof.[22] If, however, authority to sell is conferred by statute, a sale made pursuant thereto is not illegal because it is the result of a ruinous rate war and for the purpose of ending further competition,[23] and where the sale is authorized by statute it may be made without municipal consent.[24]

c. Rights in and Use of Streets, Highways, or Private Property.[25] A telegraph or telephone company cannot take or injure private property against the owner's consent without making due compensation,[26] nor can such a company occupy or use public streets or highways without legislative authority granted either directly or indirectly,[27] but the state may authorize such use of streets and highways,[28] and while this power is vested primarily in the legislature,[29] it may be delegated to a municipality.[30] Such right when duly granted vests in the company an

15. Cumberland Tel., etc., Co. *v.* Evansville, 127 Fed. 187 [*affirmed* in 143 Fed. 238, 74 C. C. A. 368]; Atlantic, etc., Tel. Co. *v.* Union Pac. R. Co., 1 Fed. 745, 1 McCrary 188, 541.

16. Philadelphia *v.* Western Union Tel. Co., 11 Phila. (Pa.) 327, 2 Wkly. Notes Cas. 455; Cumberland Tel., etc., Co. *v.* Evansville, 127 Fed. 187 [*affirmed* in 143 Fed. 238, 74 C. C. A. 368].

17. Cumberland Tel., etc., Co. *v.* Evansville, 127 Fed. 187 [*affirmed* in 143 Fed. 238, 74 C. C. A. 368].

18. U. S. *v.* Union Pac. R. Co., 160 U. S. 1, 16 S. Ct. 190, 40 L. ed. 319 [*reversing* 59 Fed. 813, 8 C. C. A. 282, and *affirming* 50 Fed. 28]; Central Branch Union Pac. R. *v.* Western Union Tel. Co., 3 Fed. 417, 1 McCrary 551; Western Union Tel. Co. *v.* Union Pac. R. Co., 3 Fed. 1, 1 McCrary 418; Atlantic, etc., Tel. Co. *v.* Union Pac. R. Co., 1 Fed. 745, 1 McCrary 541.

19. Michigan Tel. Co. *v.* St. Joseph, 121 Mich. 502, 80 S. W. 383, 80 Am. St. Rep. 520, 47 L. R. A. 87; Williams *v.* Western Union Tel. Co., 93 N. Y. 162; Hatch *v.* American Union Tel. Co., 9 Abb. N. Cas. (N. Y.) 223; State *v.* Cumberland Tel., etc., Co., 114 Tenn. 194, 86 S. W. 390; Badger Tel. Co. *v.* Wolf River Tel. Co., 120 Wis. 169, 97 N. W. 907.

Conditions of public policy cannot avail in the courts against express legislative authority constitutionally granted. Hatch *v.* American Union Tel. Co., 9 Abb. N. Cas. (N. Y.) 223.

A transfer of all the property of a telephone company carries the franchise to operate the system, although the franchise is not expressly mentioned in the deed. Wichita *v.* Old Colony Trust Co., 132 Fed. 641, 66 C. C. A. 19 [*affirming* 123 Fed. 762].

20. See Michigan Tel. Co. *v.* St. Joseph, 121 Mich. 502, 80 N. W. 383, 80 Am. St. Rep. 520, 47 L. R. A. 87; Hatch *v.* American Union Tel. Co., 9 Abb. N. Cas. (N. Y.) 223.

21. Cumberland Tel., etc., Co. *v.* Evansville, 127 Fed. 187 [*affirmed* in 143 Fed. 238, 74 C. C. A. 368].

22. Cumberland Tel., etc., Co. *v.* Evansville, 127 Fed. 187 [*affirmed* in 143 Fed. 238, 74 C. C. A. 368].

23. State *v.* Cumberland Tel., etc., Co., 114 Tenn. 194, 86 S. W. 390.

24. Michigan Tel. Co. *v.* St. Joseph, 121 Mich. 502, 80 N. W. 383, 80 Am. St. Rep. 520, 47 L. R. A. 87.

25. Effect of Post Roads Act of 1866 see *infra*, II, A, 1.

26. See *infra*, II, A, 4; EMINENT DOMAIN, 15 Cyc. 639.

27. People *v.* Chicago Tel. Co., 220 Ill. 238, 77 N. E. 245; Southern Bell Tel., etc., Co. *v.* Mobile, 162 Fed. 523; Morristown *v.* East Tennessee Tel. Co., 115 Fed. 304, 53 C. C. A. 132.

28. See EMINENT DOMAIN, 15 Cyc. 627; MUNICIPAL CORPORATIONS, 28 Cyc. 866, 869 text and note 60.

Legislative authority see *infra*, II, A, 2.

29. Domestic Tel. Co. *v.* Newark, 49 N. J. L. 344, 8 Atl. 128; Morristown *v.* East Tennessee Tel. Co., 115 Fed. 304, 53 C. C. A. 132. See also MUNICIPAL CORPORATIONS, 28 Cyc. 866.

30. Southern Bell Tel., etc., Co. *v.* Mobile, 162 Fed. 523; Morristown *v.* East Tennessee Tel. Co., 115 Fed. 304, 53 C. C. A. 132. See also EMINENT DOMAIN, 15 Cyc. 627; MUNICIPAL CORPORATIONS, 28 Cyc. 866, 869 text and note 60.

Municipal consent see *infra*, II, A, 3.

easement which is a property right and entitled to all the constitutional protection afforded to other property and contracts;[31] but the right must be exercised in such manner as not unnecessarily to obstruct or injure the street or highway,[32] and subject to all proper legislative or municipal regulations.[33] The right to construct a telegraph or telephone line in a street or highway includes the right to place therein necessary and proper appliances for such purpose;[34] but does not authorize any invasion of adjoining private property for the purpose of constructing the line or stringing wires across such property.[35] An unauthorized entry upon private property for the purpose of constructing a telegraph or telephone line is a trespass,[36] and a mere license to attach wires to a building is revokable at the owner's pleasure.[37] The consent of a landowner to the construction of a telegraph or telephone line across one part of his land does not authorize its subsequent removal to another part of his land without his consent;[38] nor does the grant of a right to construct a telegraph or telephone line over private property, as incidental to and to facilitate some other business, authorize the construction of such a line for ordinary commercial purposes.[39]

3. Powers — a. In General. As in the case of corporations generally,[40] telegraph and telephone companies can exercise only such powers as are expressly or impliedly conferred upon them.[41] Since, however, the term "telegraph" ordinarily includes the telephone,[42] it has been held that a company incorporated as a telegraph company may carry on a telephone business,[43] and that telephone companies may exercise many of the rights and privileges conferred in terms upon telegraph companies.[44] A company incorporated as a telegraph company may also engage in a ticker business, since it is substantially of the same character,[45] and if a telegraph or telephone company is authorized by statute to transact any business in which electricity over or through wires may be applied to any useful purpose, such company may conduct an electric lighting business.[46]

31. Southern Bell Tel., etc., Co. *v.* Mobile, 162 Fed. 523. See also Morristown *v.* East Tennessee Tel. Co., 115 Fed. 304, 53 C. C. A. 132.

Acceptance of municipal grant as a binding contract see *supra*, I, D, 2, a.

Injury to or interference with lines or property see *infra*, II, E.

32. See *infra*, II, C.

33. See *infra*, II, B.

34. Simonds *v.* Maine Tel., etc., Co., 104 Me. 440, 72 Atl. 175.

35. Majenica Tel. Co. *v.* Rogers, 43 Ind. App 306, 87 N. E. 165.

36. Northeastern Tel., etc., Co. *v.* Hepburn, 73 N. J. Eq. 657, 69 Atl. 249 [*reversing* 72 N. J. Eq. 7, 65 Atl. 747]; Bunke *v.* New York Tel. Co., 110 N. Y. App. Div. 241, 97 N. Y. Suppl. 66 [*affirmed* in 188 N. Y. 600, 81 N. E. 1161].

37. Bunke *v.* New York Tel. Co., 110 N. Y. App. Div. 241, 97 N. Y. Suppl. 66 [*affirmed* in 188 N. Y. 600, 81 N. E. 1161], holding further that a conveyance of the premises is such a revocation, of which the licensee is bound to take notice.

38. Russelville Home Tel. Co. *v.* Com., 109 S. W. 340, 33 Ky. L. Rep. 132.

39. Northeastern Tel., etc., Co. *v.* Hepburn, 73 N. J. Eq. 657, 69 Atl. 249 [*reversing* 72 N. J. Eq. 7, 65 Atl. 747], holding that a deed to a water company having no right in its corporate capacity to operate a telegraph or telephone line except as incidental to its business as a water company, which grants a right of way for the laying of water pipes "with the right to set up, operate and maintain a telegraph or telephone line or lines thereon," should be construed as imposing upon the land in question only the burden resulting from such lines as might be reasonably adequate for the purpose of constructing and maintaining the pipe lines authorized by the grant, and hence is not broad enough to confer on a telephone company holding under an assignment from the water company the right to use such right of way for the maintenance of a commercial telephone line.

40. See Corporations, 10 Cyc. 1096.

41. Cumberland Tel., etc., Co. *v.* Evansville, 127 Fed. 187 [*affirmed* in 143 Fed. 238, 74 C. C. A. 368]; Atlantic, etc., Tel. Co. *v.* Union Pac. R. Co., 1 Fed. 745, 1 McCrary 541.

42. See *supra*, I, B, 2.

43. Chesapeake, etc., Tel. Co. *v.* Baltimore, etc., Tel. Co., 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167; State *v.* Central New Jersey Tel. Co., 53 N. J. L. 341, 21 Atl. 460, 11 L. R. A. 664; Cumberland Tel., etc., Co. *v.* United Electric R. Co., 42 Fed. 273, 12 L. R. A. 544. But see Home Tel. Co. *v.* Nashville, 118 Tenn. 1, 101 S. W. 770.

44. See *supra*, I, B, 2.

45. Midland Tel. Co. *v.* National Tel. News Co., 236 Ill. 476, 86 N. E. 107 [*affirming* 137 Ill. App. 131].

46. Brown *v.* Maryland Tel., etc., Co., 101 Md. 574, 61 Atl. 338.

b. Right to Make Rules and Regulations.[47] Telegraph and telephone companies have a right to make reasonable rules and regulations in regard to the conduct of their business,[48] which persons desiring to avail themselves of the services and facilities furnished by such companies must comply with,[49] such as rules and regulations in regard to their office hours,[50] requiring telegraphic messages to be presented in writing,[51] and at one of the company's transmitting offices,[52] and requiring transient persons sending telegrams requiring answers to make a deposit to pay for the expected answer;[53] and they may also establish reasonable free delivery limits.[54] Telephone companies may also make reasonable regulations,[55] such as requiring rentals to be paid in advance or by a certain date and providing for a discontinuance of the service in case of non-payment,[56] or prohibiting the use of profane or indecent language and making such use a ground for discontinuing the service.[57] It is well settled, however, that any rule

47. Limitation of liability see *infra*, V.

48. *Georgia.*— Stamey *v.* Western Union Tel. Co., 92 Ga. 613, 18 S. E. 1008, 44 Am. St. Rep. 95.

Indiana.— Western Union Tel. Co. *v.* McGuire, 104 Ind. 130, 2 N. E. 201, 54 Am. Rep. 296; Western Union Tel. Co. *v.* Harding, 103 Ind. 505, 3 N. E. 172.

Kentucky.— McDaniel *v.* Faubush Tel. Co., 106 S. W. 825, 32 Ky. L. Rep. 572; Roche *v.* Western Union Tel. Co., 70 S. W. 39, 24 Ky. L. Rep. 845.

Maryland.— Birney *v.* New York, etc., Tel. Co., 18 Md. 341, 81 Am. Dec. 607.

Ohio.— Pugh *v.* City, etc., Tel. Assoc., 8 Ohio Dec. (Reprint) 644, 9 Cinc. L. Bul. 104 [*affirmed* in 13 Cinc. L. Bul. 190].

Texas.— Western Union Tel. Co. *v.* Neel, 86 Tex. 368, 25 S. W. 15, 40 Am. St. Rep. 847; Western Union Tel. Co. *v.* McMillan, (Civ. App. 1895) 30 S. W. 298.

West Virginia.— Davis *v.* Western Union Tel. Co., 46 W. Va. 48, 32 S. E. 1026.

United States.— Howlett *v.* Western Union Tel. Co., 28 Fed. 181.

Knowledge of rule or regulation.— Reasonable rules and regulations made by a telegraph company for the management of its business are binding upon its patrons, whether they have knowledge of the existence of such rules or not. Western Union Tel. Co. *v.* Neel, 86 Tex. 368, 25 S. W. 15, 40 Am. St. Rep. 847; Western Union Tel. Co. *v.* McMillan, (Tex. Civ. App. 1895) 30 S. W. 298. But see State *v.* Kinloch Tel. Co., 93 Mo. App. 349, 67 S. W. 684.

49. Pugh *v.* City, etc., Tel. Assoc., 8 Ohio Dec. (Reprint) 644, 9 Cinc. L. Bul. 104 [*affirmed* in 13 Cinc. L. Bul. 190]; Gardner *v.* Providence Tel. Co., 23 R. I. 262, 49 Atl. 1004.

50. *Indiana.*— Western Union Tel. Co. *v.* Harding, 103 Ind. 505, 3 N. E. 172.

Kentucky.— Western Union Tel. Co. *v.* Van Cleave, 107 Ky. 464, 54 S. W. 827, 22 Ky. L. Rep. 53, 92 Am. St. Rep. 366; Roche *v.* Western Union Tel. Co., 70 S. W. 39, 24 Ky. L. Rep. 845.

North Carolina.— Suttle *v.* Western Union Tel. Co., 148 N. C. 480, 62 S. E. 593, 128 Am. St. Rep. 631.

Rhode Island.— Sweet *v.* Postal Tel., etc., Co., 22 R. I. 344, 47 Atl. 881, 53 L. R. A. 732.

Texas.— Western Union Tel. Co. *v.* Neel, 86 Tex. 368, 25 S. W. 15, 40 Am. St. Rep. 847; Western Union Tel. Co. *v.* Wingate, 6 Tex. Civ. App. 394, 32 So. 439.

West Virginia.— Davis *v.* Western Union Tel. Co., 46 W. Va. 48, 32 So. 1026.

The reasonableness depends upon the location and size of the place and amount and character of business transacted there. Western Union Tel. Co. *v.* Van Cleave, 107 Ky. 464, 54 S. W. 827, 22 Ky. L. Rep. 53, 92 Am. St. Rep. 366; Davis *v.* Western Union Tel. Co., 46 W. Va. 48, 32 So. 1026.

Different hours at different places.— A telegraph company need not observe the same office hours at all places where it maintains offices but may regulate the same according to the necessities of its business at the different points. Western Union Tel. Co. *v.* Harding, 103 Ind. 505, 3 N. E. 172.

51. People *v.* Western Union Tel. Co., 166 Ill. 15, 46 N. E. 731, 36 L. R. A. 637. See also Western Union Tel. Co. *v.* Wilson, 93 Ala. 32, 9 So. 414, 30 Am. St. Rep. 23.

52. Stamey *v.* Western Union Tel. Co., 92 Ga. 613, 18 S. E. 1008, 44 Am. St. Rep. 95.

53. Western Union Tel. Co. *v.* McGuire, 104 Ind. 130, 2 N. E. 201, 54 Am. Rep. 296; Hewlett *v.* Western Union Tel. Co., 28 Fed. 181.

54. Roche *v.* Western Union Tel. Co., 70 S. W. 39, 24 Ky. L. Rep. 845; Western Union Tel. Co. *v.* Ayers, 41 Tex. Civ. App. 627, 93 S. W. 199. See also *infra*, IV, C, 4, b.

55. McDaniel *v.* Faubush Tel. Co., 106 S. W. 825, 32 Ky. L. Rep. 572; People *v.* Hudson River Tel. Co., 19 Abb. N. Cas. (N. Y.) 466; Pugh *v.* City, etc., Tel. Assoc., 8 Ohio Dec. (Reprint) 644, 9 Cinc. L. Bul. 104 [*affirmed* in 13 Cinc. L. Bul. 190].

Rates and charges.— A telephone company may, in the absence of statute, prescribe the rates which it will charge for its services or facilities, and individual subscribers cannot complain if such rates are reasonable and uniform. McDaniel *v.* Faubush Tel. Co., 106 S. W. 825, 32 Ky. L. Rep. 572.

56. Irvin *v.* Rushville Co-operative Tel. Co., 161 Ind. 524, 69 N. E. 258; Malochee *v.* Great Southern Tel., etc., Co., 49 La. Ann. 1090, 22 So. 922.

57. Pugh *v.* City, etc., Tel. Assoc., 8 Ohio Dec. (Reprint) 644, 9 Cinc. L. Bul. 104 [*affirmed* in 13 Cinc. L. Bul. 190].

or regulation of a telegraph or telephone company to be valid and binding must be reasonable,[58] and not contrary to public policy,[59] or in conflict with any duty or liability imposed by law,[60] whether its purpose is to facilitate business or to limit liability;[61] and such rules and regulations, although reasonable in themselves, must also be reasonably applied with reference to the circumstances of particular cases.[62] A telegraph or telephone company may also waive the benefit of a rule or regulation,[63] and thus become liable for a failure properly to perform the duties so undertaken.[64]

4. Leases, Contracts, and Combinations — a. In General. The same principles which prevent a telegraph or telephone company from selling its franchises and property without legislative authority[65] have been held to prevent a lease of the same,[66] or to prevent a railroad company having such a franchise from leasing the same to a telegraph company.[67] Such a lease may, however, be made if authorized by statute,[68] provided the requirements of the statute are complied

58. Bartlett *v.* Western Union Tel. Co., 62 Me. 209, 16 Am. Rep. 437; True *v.* International Tel. Co., 60 Me. 9, 11 Am. Rep. 156; Atlantic, etc., Tel. Co. *v.* Western Union Tel. Co., 4 Daly (N. Y.) 527; Gillis *v.* Western Union Tel. Co., 61 Vt. 461, 17 Atl. 736, 15 Am. St. Rep. 917, 4 L. R. A. 611; Western Union Tel. Co. *v.* Reynolds, 77 Va. 173, 46 Am. Rep. 715.

The test of reasonableness is not whether some other rule or regulation would answer the purpose of the company as well or better, but whether the one in question is fairly and generally beneficial to the company and to all its customers. Hewlett *v.* Western Union Tel. Co., 28 Fed. 181.

While there is some disagreement as to the reasonableness of particular rules and regulations, there is none as to the fact that a rule or regulation which is unreasonable is invalid and has no binding force. Bartlett *v.* Western Union Tel. Co., 62 Me. 209, 16 Am. Rep. 437.

Regulation unreasonable.— Where a telephone company also does a general messenger business, a rule which prohibits a subscriber from using the telephone for calling messengers except from its own office is unreasonable and void. People *v.* Hudson River Tel. Co., 19 Abb. N. Cas. (N. Y.) 466.

59. Western Union Tel. Co. *v.* Blanchard, 68 Ga. 299, 45 Am. Rep. 480; Gillis *v.* Western Union Tel. Co., 61 Vt. 461, 17 Atl. 736, 15 Am. St. Rep. 917, 4 L. R. A. 611.

60. Atlantic, etc., Tel. Co. *v.* Western Union Tel. Co., 4 Daly (N. Y.) 527; Western Union Tel. Co. *v.* Reynolds, 77 Va. 173, 46 Am. Rep. 715.

61. Bartlett *v.* Western Union Tel. Co., 62 Me. 209, 16 Am. Rep. 437.

62. Hewlett *v.* Western Union Tel. Co., 28 Fed. 181, holding that while a rule requiring a transient person sending telegrams requiring an answer to make a deposit to cover the cost of an answer of ten words is not unreasonable, it may be unreasonable to enforce it under the circumstances of a particular case.

63. Suttle *v.* Western Union Tel. Co., 148 N. C. 480, 62 S. E. 593, 128 Am. St. Rep. 631 (waiver as to office hours); Western Union Tel. Co. *v.* Stevenson, 128 Pa. St. 442, 18 Atl. 441, 15 Am. St. Rep. 687, 5 L. R. A. 515.

Regulation not waived.— The fact that a telegraph company receives verbal messages transmitted over one telephone line does not constitute a waiver of its right to refuse to receive verbal messages over the line of another telephone company. People *v.* Western Union Tel. Co., 166 Ill. 15, 46 N. E. 731, 36 L. R. A. 637.

64. Western Union Tel. Co. *v.* Cunningham, 99 Ala. 314, 14 So. 579 (waiver as to prepayment); McPeek *v.* Western Union Tel. Co., 107 Iowa 356, 78 N. W. 63, 70 Am. St. Rep. 205, 43 L. R. A. 214 (waiver as to office hours); Suttle *v.* Western Union Tel. Co., 148 N. C. 480, 62 S. E. 593, 128 Am. St. Rep. 631 (waiver as to office hours).

65. See *supra*, I, D, 2, b.

66. Philadelphia *v.* Western Union Tel. Co., 11 Phila. (Pa.) 327, 2 Wkly. Notes Cas. 455; Atlantic, etc., Tel. Co. *v.* Union Pac. R. Co., 1 Fed. 745, 1 McCrary 541. See also State *v.* Cumberland Tel., etc., Co., 114 Tenn. 194, 86 S. W. 390, where a lease was made but subsequently avoided. But see Midland Tel. Co. *v.* National Tel. News Co., 236 Ill. 476, 86 N. E. 107 [*affirming* 137 Ill. App. 131], holding that an ordinary telegraph company may lease the property and business of a telegraphic ticker company.

67. U. S. *v.* Union Pac. R. Co., 160 U. S. 1, 16 S. Ct. 190, 40 L. ed. 319 [*reversing* 59 Fed. 813, 8 C. C. A. 282, and *affirming* 50 Fed. 28]; Atlantic, etc., Tel. Co. *v.* Union Pac. R. Co., 1 Fed. 745, 1 McCrary 541.

68. Reiff *v.* Western Union Tel. Co., 49 N. Y. Super. Ct. 441 (holding further that where a telegraph company is authorized by statute to lease its lines and property, such lease cannot be enjoined on the ground that it tends to create a monopoly or is contrary to public policy); Bradford City *v.* Pennsylvania, etc., Tel., etc., Co., 26 Pa. Co. Ct. 321 (lease authorized except in case of parallel or competing lines).

Pole license.— Under a municipal grant to a telephone company "or its assignees" of the right to maintain poles with an unlimited number of wires thereon, such company may grant to an individual a "pole license" for stringing on its poles wires to be used for

with;[69] but a provision in the charter of a telegraph company authorizing it to lease its lines, fixtures, and apparatus does not authorize a lease of its franchise,[70] or authorize its lessee to build new lines on new routes.[71] The validity of contracts and combinations between different telegraph or telephone companies depends upon the provisions of the statutes or, in the absence of a statute, upon questions of public policy;[72] but in so far as expressly authorized by statute the question of public policy cannot control.[73] Such contracts and combinations, if not *ultra vires*,[74] and which tend to promote the public welfare and convenience, are valid;[75] and such contracts, although they may incidentally involve a partial restraint in competition, are not contrary to public policy if the main object of the agreement is lawful and beneficial to the public, and such restraint is only an incident and fairly necessary for the accomplishment of the main object of the agreement.[76] So an arrangement between two such companies to prevent a competition which would be ruinous to each is not contrary to public policy;[77] and it has also been held that an agreement between two companies to divide their receipts and expenses in certain proportions is not invalid.[78] A contract between two telephone companies which provides for a physical connection between the two systems and stipulates that it may be terminated by either party on notice is not contrary to public policy, and the patrons of each are bound to know that such connection is liable to be discontinued;[79] but where the contract for such a connection is silent as to its continuance or discontinuance, it fixes a status affected by a public interest which cannot be voluntarily terminated by either or both of the parties,[80] but only by a retirement of one of the parties from the business.[81] A contract between two telegraph or telephone companies if valid may be specifically enforced,[82] although specific performance may be denied where there is another adequate remedy.[83] Such a contract if severable may be valid and enforceable as to some of its provisions, although invalid as to others.[84] The construction of contracts between such companies is governed by the rules relating to the construction of contracts generally.[85]

telegraphic or telephonic messages in a salvage and notification business. Newman *v.* Avondale, 1 Ohio S. & C. Pl. Dec. 356, 31 Cinc. L. Bul. 123.

69. Reiff *v.* Western Union Tel. Co., 49 N. Y. Super. Ct. 441, holding that under the New York statute of 1870, requiring the consent in writing of three fifths of the stockholders, such consent must be given at a general meeting called for this purpose.

70. Philadelphia *v.* Western Union Tel. Co., 11 Phila. (Pa.) 327, 2 Wkly. Notes Cas. 455.

71. Philadelphia *v.* Western Union Tel. Co., 11 Phila. (Pa.) 327, 2 Wkly. Notes Cas. 455.

72. Benedict *v.* Western Union Tel. Co., 9 Abb. N. Cas. (N. Y.) 214. See also Wayne-Monroe Tel. Co. *v.* Ontario Tel. Co., 60 Misc. (N. Y.) 435, 112 N. Y. Suppl. 424.

The Donnelly Anti-Trust Act of 1899 providing for the prevention of monopolies in the manufacture, production, and sale of commodities does not apply to telegraph companies. Matter of Jackson, 57 Misc. (N. Y.) 1, 107 N. Y. Suppl. 799.

73. Benedict *v.* Western Union Tel. Co., 9 Abb. N. Cas. (N. Y.) 214.

74. See Midland Tel. Co. *v.* National Tel. News Co., 236 Ill. 476, 86 N. E. 107; Benedict *v.* Western Union Tel. Co., 9 Abb. N. Cas. (N. Y.) 214.

75. Wayne-Monroe Tel. Co. *v.* Ontario Tel. Co., 60 Misc. (N. Y.) 435, 112 N. Y. Suppl. 424.

76. Wayne-Monroe Tel. Co. *v.* Ontario Tel. Co., 60 Misc. (N. Y.) 435, 112 N. Y. Suppl. 424.

77. Benedict *v.* Western Union Tel. Co., 9 Abb. N. Cas. (N. Y.) 214.

78. Benedict *v.* Western Union Tel. Co., 9 Abb. N. Cas. (N. Y.) 214.

79. State *v.* Cadwallader, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319.

80. State *v.* Cadwallader, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319; Campbellsville Tel. Co. *v.* Lebanon, etc., Tel. Co., 118 Ky. 277, 80 S. W. 1114, 26 Ky. L. Rep. 127, 84 S. W. 518, 27 Ky. L. Rep. 90.

81. State *v.* Cadwallader, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319.

82. Wayne-Monroe Tel. Co. *v.* Ontario Tel. Co., 60 Misc. (N. Y.) 435, 112 N. Y. Suppl. 424.

83. State *v.* Cadwallader, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319.

84. Bland *v.* Cumberland Tel., etc., Co., 109 S. W. 1180, 33 Ky. L. Rep. 399.

85. See CONTRACTS, 9 Cyc. 577.

Construction of contract by which the Western Union Telegraph Company conveyed to the American Bell Telephone Company its business and patent rights in regard to telephones in consideration of a certain percentage of the rentals or royalties received by the latter company see Western Union Tel. Co. *v.* American Bell Tel. Co., 125 Fed. 342, 60 C. C. A. 220.

b. Contracts With Railroad Companies.[86] It has been held in a number of cases that a railroad company cannot legally grant to one telegraph company the exclusive right to occupy and use its right of way for telegraphic purposes,[87] it being held that such contracts are not only contrary to public policy,[88] but also in contravention of the federal statute of 1866 authorizing telegraph companies to maintain and operate lines of telegraph along the post roads of the United States,[89] which by statute include all railroads.[90] In other cases, however, it has been held that a railroad company may grant an exclusive right to the use of its right of way to one telegraph company,[91] and that such contracts are not contrary to public policy.[92] It seems to be uniformly held, however, that a railroad company cannot legally contract with a telegraph company occupying its right of way not to furnish equal transportation facilities to rival telegraph companies.[93]

II. CONSTRUCTION, MAINTENANCE, AND REGULATION.

A. Authority For Construction and Maintenance — 1. FEDERAL GOVERNMENT — a. Post Roads. The federal statute of 1866, sometimes known as the Post Roads Act, authorizes all telegraph companies accepting its provisions to construct, maintain, and operate lines of telegraph over any portion of the public domain and over and along any of the military or post roads of the United States, provided they are so constructed as not to interfere with ordinary travel

86. See also CONTRACTS, 9 Cyc. 534 note 2; RAILROADS, 33 Cyc. 191 text and note 34.

87. Western Union Tel. Co. *v.* American Union Tel. Co., 65 Ga. 160, 38 Am. Rep. 781; Union Trust Co. *v.* Atchison, etc., R. Co., 8 N. M. 327, 43 Pac. 701; U. S. *v.* Union Pac. R. Co., 160 U. S. 1, 16 S. Ct. 190, 40 L. ed. 319 [*reversing* 59 Fed. 813, 8 C. C. A. 282, and *affirming* 50 Fed. 28]; Georgia R., etc., Co. *v.* Atlantic Postal Tel. Cable Co., 152 Fed. 991; Mercantile Trust Co. *v.* Atlantic etc., R. Co., 63 Fed. 910; Pacific Postal Tel. Cable Co. *v.* Western Union Tel. Co., 50 Fed. 493; Baltimore, etc., Tel. Co. *v.* Western Union Tel. Co., 24 Fed. 319; Western Union Tel. Co. *v.* Baltimore, etc., Tel. Co., 23 Fed. 12; Western Union Tel. Co. *v.* Baltimore, etc., Tel. Co., 19 Fed. 660; Western Union Tel. Co. *v.* Burlington, etc., R. Co., 11 Fed. 1, 3 McCrary 130; Western Union Tel. Co. *v.* Kansas Pac. R. Co., 4 Fed. 284; Western Union Tel. Co. *v.* St. Joseph, etc., R. Co., 3 Fed. 430, 1 McCrary 565. See also Cumberland Tel., etc., Co. *v.* Morgan's Louisiana, etc., R. Co., 51 La. Ann. 29, 24 So. 803, 72 Am. St. Rep. 442, where the contract also contained other objectionable stipulations.

In Texas such exclusive contracts with telegraph companies are prohibited by statute. Western Union Tel. Co. *v.* Baltimore, etc., Tel. Co., 22 Fed. 133.

88. Western Union Tel. Co. *v.* American Union Tel. Co., 65 Ga. 160, 38 Am. Rep. 781; Union Trust Co. *v.* Atchison, etc., R. Co., 8 N. M. 327, 43 Pac. 701; Baltimore, etc., Tel. Co. *v.* Western Union Tel. Co., 24 Fed. 319; Western Union Tel. Co. *v.* Burlington, etc., R. Co., 11 Fed. 1, 3 McCrary 130.

Such contracts are contrary to public policy because they are in restraint of trade and tend to create monopolies. Western Union Tel. Co. *v.* American Union Tel. Co., 65 Ga. 160, 38 Am. Rep. 781.

89. Union Trust Co. *v.* Atchison, etc., R. Co., 8 N. M. 327, 43 Pac. 701; U. S. *v.* Union Pac. R. Co., 160 U. S. 1, 16 S. Ct. 190, 40 L. ed. 319 [*reversing* 59 Fed. 813, 8 C. C. A. 282, and *affirming* 50 Fed. 28]; Western Union Tel. Co, *v.* Baltimore, etc., Tel. Co., 19 Fed. 660; Western Union Tel. Co. *v.* Burlington, etc., R. Co., 11 Fed. 1, 3 McCrary 130.

90. Western Union Tel. Co. *v.* Baltimore, etc., Tel. Co., 19 Fed. 660; Western Union Tel. Co. *v.* Burlington, etc., R. Co., 11 Fed. 1, 3 McCrary 130. See also *infra*, II, A, 1, a.

91. Western Union Tel. Co. *v.* Chicago, etc., R. Co., 86 Ill. 246, 29 Am. Rep. 28; Western Union Tel. Co. *v.* Atlantic, etc., Tel. Co., 7 Ohio Dec. (Reprint) 163, 1 Cinc. L. Bul. 201; Western Union Tel. Co. *v.* Atlantic, etc., Tel. Co., 5 Ohio Dec. (Reprint) 407, 5 Am. L. Rec. 429; Western Union Tel. Co. *v.* Atlantic, etc., Tel. Co., 29 Fed. Cas. No. 17,445, 7 Biss. 367; Canadian Pac. R. Co. *v.* Western Union Tel. Co., 17 Can. Sup. Ct. 151.

92. Western Union Tel. Co. *v.* Chicago, etc., R. Co., 86 Ill. 246, 29 Am. Rep. 28; Canadian Pac. R. Co. *v.* Western Union Tel. Co., 17 Can. Sup. Ct. 151. And see cases cited *supra*, note 91.

Such a contract is not contrary to public policy since it does not prevent the construction of competing lines of telegraph which may, notwithstanding such contract, be constructed along the lines of other railroads or along the railroad right of way but outside of its boundaries, or even upon the same right of way by condemnation proceedings. Western Union Tel. Co. *v.* Atlantic, etc., Tel. Co., 29 Fed. Cas. No. 17,445, 7 Biss. 367.

93. Cumberland Tel., etc., Co. *v.* Morgan's Louisiana, etc., R. Co., 51 La. Ann 29, 24 So. 803, 72 Am. St. Rep. 442; Western Union

on such roads,[94] and by later statutes the term "post roads" is made to embrace all railroads,[95] and all public roads and highways while kept up and maintained as such,[96] including the streets of a town or city.[97] The act does not, however, apply to telephone companies,[98] or to district telegraph companies,[99] or to telegraph companies not organized under the laws of a state but under the laws of a foreign country,[1] or to domestic telegraph companies which have not accepted the provisions of the act.[2] As to telegraph companies which have accepted the provisions of the act it confers the right to construct lines of telegraph over and along the places named and insures such companies against exclusion by or any unreasonable interference on the part of any state or political subdivision thereof,[3] although it does not confer the absolute right to construct and maintain such lines free from legislative or municipal regulation and control.[4] The act is merely

Tel. Co. *v.* Atlantic, etc., Tel. Co., 7 Ohio Dec. (Reprint) 163, 1 Cinc. L. Bul. 201; Mercantile Trust Co. *v.* Atlantic, etc., R. Co., 63 Fed. 910.

94. Western Union Tel. Co. *v.* Visalia, 149 Cal. 744, 87 Pac. 1023; Western Union Tel. Co. *v.* Pennsylvania R. Co., 195 U. S. 540; 25 S. Ct. 133, 49 L. ed. 312; Richmond *v.* Southern Bell, Tel., etc., Co., 174 U. S. 761, 19 S. Ct. 778, 43 L. ed. 1162.

95. Richmond *v.* Southern Bell Tel., etc., Co., 174 U. S. 761, 19 S. Ct. 778, 43 L. ed. 1162; Western Union Tel. Co. *v.* Baltimore, etc., Tel. Co., 19 Fed. 660; Western Union Tel. Co. *v.* Burlington, etc., R. Co., 11 Fed. 1, 3 McCrary 130.

96. Western Union Tel. Co. *v.* Visalia, 149 Cal. 744, 87 Pac. 1023; Richmond *v.* Southern Bell Tel., etc., Co., 174 U. S. 761, 19 S. Ct. 778, 43 L. ed. 1162.

97. Western Union Tel. Co. *v.* Visalia, 149 Cal. 744, 87 Pac. 1023; St. Louis *v.* Western Union Tel. Co., 148 U. S. 92, 13 S. Ct. 485, 37 L. ed. 380.

98. Richmond *v.* Southern Bell Tel., etc., Co., 174 U. S. 761, 19 S. Ct. 778, 43 L. ed. 1162; Sunset Tel., etc., Co. *v.* Pomona, 164 Fed. 561 [*affirmed* in 172 Fed. 829]; Cumberland Tel., etc., Co. *v.* Evansville, 127 Fed. 187 [*affirmed* in 143 Fed. 238, 74 C. C. A. 368].

A company doing both a telegraph and a telephone business is not entitled to the benefit of the act of 1866, as to lines used in the telephone business. Sunset Tel., etc., Co. *v.* Pomona, 164 Fed. 561 [*affirmed* in 172 Fed. 829].

99. Toledo *v.* Western Union Tel. Co., 107 Fed. 10, 46 C. C. A. 111, 52 L. R. A. 730.

District telegraph business see *infra*, VI, D.

1. De Castro *v.* Compagnie Francaise, 85 Hun (N. Y.) 231, 32 N. Y. Suppl. 960 [*affirmed* in 155 N. Y. 688, 50 N. E. 1116].

2. Chicago, etc., Bridge Co. *v.* Pacific Mut. Tel. Co., 36 Kan. 113, 12 Pac. 535.

3. *Alabama.*— Moore *v.* Eufaula, 97 Ala. 670, 11 So. 921.

California.— Western Union Tel. Co. *v.* Visalia, 149 Cal. 744, 87 Pac. 1023.

District of Columbia.— Hewett *v.* Western Union Tel. Co., 4 Mackey 424.

Louisiana.— Postal Tel. Cable Co. *v.* Morgan's Louisiana, etc., R. Co., 49 La. Ann. 58, 21 So. 183, 6 Am. Elec. Cas. 183.

Massachusetts.— Pierce *v.* Drew, 136 Mass. 75, 49 Am. Rep. 7, 1 Am. Elec. Cas. 571.

Mississippi.—Hodges *v.* Western Union Tel. Co., 72 Miss. 910, 18 So. 84, 29 L. R. A. 770.

Nebraska.—Western Union Tel. Co. *v.* Fremont, 39 Nebr. 692, 58 N. W. 415, 26 L. R. A. 698, 4 Am. Elec. Cas. 626.

Nevada.— Western Union Tel. Co. *v.* Atlantic, etc., States Tel. Co., 5 Nev. 102, Allen Tel. Cas. 428.

New Jersey.— Matter of Pennsylvania Tel. Co., 48 N. J. Eq. 91, 20 Atl. 846, 27 Am. St. Rep. 462, 3 Am. Elec. Cas. 9.

Ohio.— Daily *v.* State, 51 Ohio St. 348, 37 N. E. 710, 46 Am. St. Rep. 578, 24 L. R. A. 724.

South Carolina.— Charleston *v.* Postal, 3 Am. Elec. Cas. 56, 62.

United States.— Postal Tel. Cable Co. *v.* Adams, 155 U. S. 688, 15 S. Ct. 268, 360, 39 L. ed. 311; Postal Tel. Cable Co. *v.* Charleston, 153 U. S. 692, 14 S. Ct. 1094, 38 L. ed. 871, 5 Am. Elec. Cas. 663; Leloup *v.* Mobile, 127 U. S. 640, 8 S. Ct. 1380, 32 L. ed. 311, 2 Am. Elec. Cas. 79; Ratterman *v.* Western Union Tel. Co., 127 U. S. 411, 8 S. Ct. 1127, 32 L. ed. 229; Western Union Tel. Co. *v.* Massachusetts, 125 U. S. 530, 8 S. Ct. 961, 31 L. ed. 790, 2 Am. Elec. Cas. 57; Western Union Tel. Co. *v.* Texas, 105 U. S. 460, 26 L. ed. 1067; Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. 1, 24 L. ed. 708, 1 Am. Elec. Cas. 250; Southern Bell Tel., etc., Co. *v.* Richmond, 78 Fed. 858, 6 Am. Elec. Cas. 1; St. Louis *v.* Western Union Tel. Co., 63 Fed. 68; Western Union Tel. Co. *v.* New York, 38 Fed. 552, 3 L. R. A. 449, 2 Am. Elec. Cas. 195; Western Union Tel. Co. *v.* American Union Tel. Co., 29 Fed. Cas. No. 17,444, 9 Biss. 72, 1 Am. Elec. Cas. 288.

A state cannot grant an exclusive franchise to one telegraph company which will prevent other telegraph companies which have accepted the provisions of the act of 1866 from constructing telegraph lines along the places specified in such act. Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. 1, 24 L. ed. 708.

4. American Tel., etc., Co. *v.* Harborcreek Tp., 23 Pa. Super. Ct. 437; Western Union Tel. Co. *v.* Massachusetts, 125 U. S. 530, 8 S. Ct. 961, 31 L. ed. 790; Ganz *v.* Ohio Postal

permissive,[5] and the franchise or privilege granted must, like any other franchise, be exercised in subordination to both public and private rights.[6] The act does not authorize the taking without compensation of state or municipal property,[7] which includes public streets and highways,[8] or of private property,[9] which includes railroad rights of way,[10] or even authorize the taking of such property in the absence of condemnation proceedings without the owner's consent, although compensation therefor is tendered.[11] The statute does not confer the right of eminent domain,[12] or authorize any compulsory proceedings for the taking of property without the owner's consent,[13] so that if the company is not entitled under the state statutes to exercise the right of eminent domain, it cannot take private property without the owner's consent, although willing to make just compensation therefor.[14] It does not deprive the state of the right to tax the property of the telegraph company, including its franchise, as far as the same has a *situs* within the state,[15] nor of the right to exact rental for the use of state

Tel. Cable Co., 140 Fed. 692, 72 C. C. A. 186; Toledo *v.* Western Union Tel. Co., 107 Fed. 10, 46 C. C. A. 111, 52 L. R. A. 730; Michigan Tel. Co. *v.* Charlotte, 93 Fed. 11.

Regulation and control see *infra*, II, B.

Foreign corporations.— A telegraph company is not relieved from compliance with a statute requiring foreign corporations to comply with certain conditions for the privilege of exercising their franchises within a state because of its acceptance of the act of 1866. State *v.* Western Union Tel. Co., 75 Kan. 609, 90 Pac. 299.

5. Western Union Tel. Co. *v.* Massachusetts, 125 U. S. 530, 8 S. Ct. 961, 31 L. ed. 790; Toledo *v.* Western Union Tel. Co., 107 Fed. 10, 46 C. C. A. 111, 52 L. R. A. 730.

6. Western Union Tel. Co. *v.* Pennsylvania R. Co., 195 U. S. 540, 25 S. Ct. 133, 49 L. ed. 312; St. Louis *v.* Western Union Tel. Co., 148 U. S. 92, 13 S. Ct. 485, 37 L. ed. 380.

7. Postal Tel. Cable Co. *v.* Newport, 76 S. W. 159, 25 Ky. L. Rep. 635, 8 Am. Elec. Cas. 25, 76; American Tel., etc., Co. *v.* Harborcreek, 23 Pa. Super. Ct. 437; Postal Tel. Cable Co. *v.* Baltimore, 156 U. S. 210, 15 S. Ct. 356, 39 L. ed. 399; St. Louis *v.* Western Union Tel. Co., 148 U. S. 92, 13 S. Ct. 485, 37 L. ed. 380; Cumberland Tel. etc., Co. *v.* Evansville, 127 Fed. 187 [*affirmed* in 143 Fed. 238, 74 C. C. A. 368].

8. St. Louis *v.* Western Union Tel. Co., 148 U. S. 92, 13 S. Ct. 485, 37 L. ed. 380; Sunset Tel., etc., Co. *v.* Pomona, 164 Fed. 561 [*affirmed* in 172 Fed. 829].

9. Western Union Tel. Co. *v.* Pennsylvania R. Co., 195 U. S. 540, 594, 25 S. Ct. 133, 150, 49 L. ed. 312, 332; Western Union Tel. Co. *v.* Ann Arbor R. Co., 178 U. S. 239, 20 S. Ct. 867, 44 L. ed. 1052; Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. 1, 24 L. ed. 708; Sunset Tel., etc., Co. *v.* Pomona, 164 Fed. 561 [*affirmed* in 172 Fed. 829]. See also *infra*, II, A, 4.

10. Western Union Tel. Co. *v.* Pennsylvania R. Co., 195 U. S. 540, 25 S. Ct. 133, 49 L. ed. 312; Western Union Tel. Co. *v.* Ann Arbor R. Co., 178 U. S. 239, 20 S. Ct. 867, 44 L. ed. 1052; Postal Tel. Cable Co. *v.* Southern R. Co., 89 Fed. 190.

11. Western Union Tel. Co. *v.* Pennsylvania R. Co., 195 U. S. 540, 25 S. Ct. 133, 49 L. ed. 312; Western Union Tel. Co. *v.* Ann Arbor R. Co., 178 U. S. 239, 20 S. Ct. 867, 44 L. ed. 1052.

12. Western Union Tel. Co. *v.* Pennsylvania R. Co., 195 U. S. 540, 25 S. Ct. 133, 49 L. ed. 312; Western Union Tel. Co. *v.* Pennsylvania R. Co., 195 U. S. 594, 25 S. Ct. 150, 49 L. ed. 332; Sunset Tel., etc., Co. *v.* Pomona, 164 Fed. 561 [*affirmed* in 172 Fed. 829].

13. Western Union Tel. Co. *v.* Pennsylvania R. Co., 195 U. S. 540, 25 S. Ct. 133, 49 L. ed. 312; Western Union Tel. Co. *v.* Ann Arbor R. Co., 178 U. S. 239, 20 S. Ct. 867, 44 L. ed. 1052; Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. 1, 24 L. ed. 708; Western Union Tel. Co. *v.* Polhemus, 167 Fed. 231.

Effect of statute.—The statute does not authorize the taking of private property without the owner's consent, but provides that if such consent is obtained no state legislation shall prevent the occupation of the places named in the act for telegraphic purposes by companies accepting the provisions of the act. Western Union Tel. Co. *v.* Pennsylvania R. Co., 195 U. S. 540, 25 S. Ct. 133, 49 L. ed. 312; Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. 1, 24 L. ed. 708.

14. Western Union Tel. Co. *v.* Pennsylvania R. Co., 195 U. S. 540, 25 S. Ct. 133, 49 L. ed. 312. See also Western Union Tel. Co. *v.* Polhemus, 167 Fed. 231.

Right of lessee.— The right of eminent domain cannot be delegated, and the lessee of a telegraph line cannot exercise the right of eminent domain conferred by statute upon its lessor. Western Union Tel. Co. *v.* Pennsylvania R. Co., 195 U. S. 594, 25 S. Ct. 150, 49 L. ed. 332.

15. Western Union Tel. Co. *v.* Missouri, 190 U. S. 412, 23 S. Ct. 730, 47 L. ed. 1116; Atlantic, etc., Tel. Co. *v.* Philadelphia, 190 U. S. 160, 23 S. Ct. 817, 47 L. ed. 995; Western Union Tel. Co. *v.* Taggart, 163 U. S. 1, 16 S. Ct. 1054, 41 L. ed. 49; Postal Tel. Cable Co. *v.* Adams, 155 U. S. 688, 15 S. Ct. 268, 360, 39 L. ed. 311; Massachusetts *v.* Western Union Tel. Co., 141 U. S. 40, 11 S. Ct. 889, 35 L. ed. 628; Leloup *v.* Mobile, 127 U. S. 640, 8 S. Ct. 1380, 32 L. ed. 311; Western Union Tel. Co. *v.* Massachusetts, 125

property or to permit a municipality to exact such rental for the use of its streets where the municipality owns the streets;[16] nor of the right to impose or permit a municipality to impose a license-tax, as a revenue measure, provided such tax is based exclusively on domestic messages not pertaining to the business of the government of the United States;[17] nor of the right under the police power to exact or permit the exaction by a municipality of a license-fee, not as a revenue measure, but designed to cover and commensurate with the cost of police supervision.[18] But while the state retains the rights referred to, it may not, in enforcing them, make use of any means which impedes, embarrasses, or obstructs the continuance of the interstate, foreign, or governmental business of a company which has accepted the provisions of the act of 1866.[19]

b. Navigable Waters. The act of 1866 also authorizes the construction and maintenance of telegraph lines over, under, or across the navigable streams or waters of the United States,[20] provided they are so constructed and maintained as not to obstruct navigation;[21] but the statute does not apply to companies which have not accepted its provisions,[22] or to a company not organized "under the laws of any state," but of a foreign country for transoceanic communication.[23] Any unnecessary interference with the free movement of vessels is an obstruction

U. S. 530, 8 S. Ct. 961, 31 L. ed. 790; Western Union Tel. Co. *v.* Texas, 105 U. S. 460, 26 L. ed. 1067.

But the state cannot enjoin a telegraph company which has accepted the provisions of the act of 1866 and constructed its line along post roads from continuing to carry on its business in that state as a means of enforcing the payment of taxes, and a statute providing for such a remedy is invalid. Western Union Tel. Co. *v.* Massachusetts, 125 U. S. 530, 8 S. Ct. 961, 31 L. ed. 790.

Federal franchises not taxable.— The franchise granted by the act of 1866 is not subject to state taxation either directly or indirectly, and where a telegraph company under the authority of the act of 1866 and the statutes of the state has constructed its line along the streets of a city, an ordinance merely prescribing the location of poles and mode of exercising the right does not grant to the company any new franchise which the municipality may legally tax. Western Union Tel. Co. *v.* Visalia, 149 Cal. 744, 87 Pac. 1023.

16. St. Louis *v.* Western Union Tel. Co., 148 U. S. 92, 13 S. Ct. 485, 37 L. ed. 380. See also Richmond *v.* Southern Bell Tel., etc., Co., 174 U. S. 761, 19 S. Ct. 778, 43 L. ed. 1162; Postal Tel. Cable Co. *v.* Baltimore, 156 U. S. 210, 15 S. Ct. 356, 39 L. ed. 399.

17. Western Union Tel. Co. *v.* Fremont, 39 Nebr. 692, 58 N. W. 415, 26 L. R. A. 698; Postal Tel. Cable Co. *v.* Norfolk, 101 Va. 125, 43 S. E. 207; Postal Tel. Cable Co. *v.* Charleston, 153 U. S. 692, 14 S. Ct. 1094, 38 L. ed. 871.

18. Norwood Borough *v.* Western Union Tel. Co., 25 Pa. Super. Ct. 406; Atlantic, etc., Tel. Co. *v.* Philadelphia, 190 U. S. 160, 23 S. Ct. 817, 47 L. ed. 995; Western Union Tel Co. *v.* New Hope, 187 U. S. 419, 23 S. Ct. 204, 47 L. ed. 240.

19. Matter of Pennsylvania Tel. Co., 48 N. J. Eq. 91, 20 Atl. 846, 27 Am. St. Rep. 462, 3 Am. Elec. Cas. 9; Western Union Tel. Co. *v.* Massachusetts, 125 U. S. 530, 8 S. Ct. 961, 31 L. ed. 790, holding that the state cannot enjoin such a company from continuing to carry on its business in the state as a means of enforcing the payment of unpaid taxes.

Even purely domestic business within the state cannot be entirely prohibited by the state. Western Union Tel. Co. *v.* Andrews, 216 U. S. 165, 30 S. Ct. 286, 54 L. ed. — [*reversing* 154 Fed. 95]; Ludwig *v.* Western Union Tel. Co., 216 U. S. 146, 30 S. Ct. 280, 54 L. ed. — [*affirming* 156 Fed. 152, and *disapproving* Western Union Tel. Co. *v.* State, 82 Ark. 302, 309, 101 S. W. 745, 748]; Western Union Tel. Co. *v.* Kansas, 216 U. S. 1, 30 S. Ct. 190, 54 L. ed. — [*reversing* 75 Kan. 609, 90 Pac. 299]. See, however, 23 Harvard L. Rev. 549–551.

20. Western Union Tel. Co. *v.* Inman, etc., Steamship Co., 59 Fed. 365, 8 C. C. A. 152 [*affirming* 43 Fed. 85]. See also Western Union Tel. Co. *v.* Pennsylvania R. Co., 195 U. S. 540, 25 S. Ct. 133, 49 L. ed. 312; Richmond *v.* Southern Bell Tel., etc., Co., 174 U. S. 761, 19 S. Ct. 778, 43 L. ed. 1162.

21. Western Union Tel. Co. *v.* Inman, etc., Steamship Co., 59 Fed. 365, 8 C. C. A. 152 [*affirming* 43 Fed. 85].

Construction on bridge.— A telegraph company cannot construct a line of telegraph along a public bridge over a navigable river in such manner as will interfere with the opening of the draw-span of the bridge and thus obstruct navigation. Pacific Mut. Tel. Co. *v.* Chicago, etc., Bridge Co., 36 Kan. 118, 12 Pac. 560.

Burden of proof.— In case a vessel while navigating comes in contact with and is injured by a cable, the burden of proof is upon the company owning the cable to show that it was not so maintained as to obstruct navination. Western Union Tel. Co. *v.* Inman, etc., Steamship Co., 59 Fed. 355, 8 C. C. A. 152 [*affirming* 43 Fed. 85].

22. Chicago, etc., Bridge Co. *v.* Pacific Mut. Tel. Co., 36 Kan. 113, 12 Pac. 535.

23. De Castro *v.* Compagnie Francaise du Tel. de Paris, 85 Hun (N. Y.) 231, 32 N. Y.

within the meaning of the act,[24] and a vessel is navigating if proceeding under her own power, although plowing through soft mud.[25] The manner in which a cable must be laid so as not to obstruct navigation depends upon the nature of the locality and the character and extent of the navigation;[26] and the statute does not confer any absolute right to lay a cable upon the surface of even a solid bottom if it is necessary in order to prevent obstruction that it should be sunk below the surface.[27]

2. STATE. Since under the act of 1866 the state cannot exclude, its consent is of course unnecessary for the construction of telegraph lines along post roads by companies accepting the provisions of that act.[28] There are, however, in many jurisdictions statutes authorizing the construction of telegraph or telephone lines upon or along the public roads, streets, or highways of the state,[29] subject in some cases to the consent of the municipal authorities;[30] and such statutes, although referring in terms only to telegraph companies, apply to telephone companies also,[31] so that they confer rights and privileges upon companies not entitled to the benefit of the act of 1866.[32] In some cases the statutes also authorize the construction of such lines along and upon railroad rights of way,[33] subject of course

Suppl. 960 [*affirmed* in 155 N. Y. 688, 50 N. E. 1116].

24. The City of Richmond, 43 Fed. 85 [*affirmed* in 59 Fed. 365, 8 C. C. A. 152].

25. Western Union Tel. Co. *v.* Inman, etc., Steamship Co., 59 Fed. 365, 8 C. C. A. 152 [*affirming* 43 Fed. 85].

26. Western Union Tel. Co. *v.* Inman, etc., Steamship Co., 59 Fed. 365, 8 C. C. A. 152 [*affirming* 43 Fed. 85].

27. The City of Richmond, 43 Fed. 85 [*affirmed* in 59 Fed. 365, 8 C. C. A. 152].

28. See *supra*, II, A, 1, a.

29. See the statutes of the several states; and the following cases:

New Jersey.— State *v.* Central New Jersey Tel. Co., 53 N. J. L. 341, 21 Atl. 460, 11 L. R. A. 664, 3 Am. Elec. Cas. 546.

New York.— Barhite *v.* Home Tel. Co., 50 N. Y. App. Div. 25, 63 N. Y. Suppl. 659.

Ohio.— Cincinnati Inclined Plane R. Co. *v.* City, etc., Tel. Assoc., 48 Ohio St. 390, 27 N. E. 890, 29 Am. St. Rep. 559, 12 L. R. A. 534; State *v.* Bell Tel. Co., 36 Ohio St. 296, 38 Am. Rep. 583, 1 Am. Electric Cas. 299.

Pennsylvania.— People's Tel., etc., Co. *v.* Berks, etc., Turnpike Road, 199 Pa. St. 411, 49 Atl. 284.

Texas.— Texarkana *v.* Southwestern Tel., etc., Co., 48 Tex. Civ. App. 16, 106 S. W. 915.

Wisconsin.—Roberts *v.* Wisconsin Tel. Co., 77 Wis. 589, 46 N. W. 800, 20 Am. St. Rep. 143.

United States.— Postal Tel. Cable Co. *v.* Southern R. Co., 89 Fed. 190.

The term "highway" in such a statute includes a street. Sunset Tel., etc., Co. *v.* Pomona, 164 Fed. 561 [*affirmed* in 172 Fed. 829]; Southern Bell Tel., etc., Co. *v.* Mobile, 162 Fed. 523.

A bridge is a part of the public highway and where a telegraph company obtained from a bridge company the right to run its wires across the bridge for an annual rental and thereafter the bridge was acquired by the county in which it was situated it was held that the county could not compel by a suit in equity the telegraph company to remove its wires, it having an adequate remedy at law in an action to recover damages for the use while no compensation was paid. Beaver County *v.* Central Dist., etc., Tel. Co., 219 Pa. St. 340, 68 Atl. 846.

30. See *infra*, II, A, 3.

31. Cincinnati Inclined Plane R. Co. *v.* City, etc., Tel. Assoc., 48 Ohio St. 390, 27 N. E. 890, 29 Am. St. Rep. 559, 12 L. R. A. 534; People's Tel., etc., Co. *v.* Berks, etc., Turnpike Road, 199 Pa. St. 411, 49 Atl. 284; Texarkana *v.* Southwestern Tel., etc., Co., 48 Tex. Civ. App. 16, 106 S. W. 915; Roberts *v.* Wisconsin Tel. Co., 77 Wis. 589, 46 N. W. 800, 20 Am. St. Rep. 143. See also, generally, *supra*, I, B, 2. *Contra*, Home Tel. Co. *v.* Nashville, 118 Tenn. 1, 101 S. W. 770 (holding that the Tennessee statutes giving a telegraph company the right to construct a telegraph line along any public highway or street does not authorize a telegraph company to erect a telephone line); Sunset Tel., etc., Co. *v.* Pomona, 164 Fed. 561 [*affirmed* in 172 Fed. 829] (construing a California statute).

32. See Richmond *v.* Southern Bell Tel., etc., Co., 174 U. S. 761, 19 S. Ct. 778, 43 L. ed. 1162.

33. *Illinois.*— St. Louis, etc., R. Co. *v.* Postal Tel., Co., 173 Ill. 508, 51 N. E. 382, holding that the words "along and upon any railroad" mean lengthwise along and upon the right of way and not merely across it.

Louisiana.— Southwestern Tel. Co. *v.* Kansas City, etc., R. Co., 109 La. 892, 33 So. 910, holding that the words, "along and parallel to any of the railroads in the state," authorize the construction of a telephone line upon the railroad right of way, although not upon the road-bed.

South Carolina.— South Carolina, etc., R. Co. *v.* American Tel., etc., Co., 65 S. C. 459, 43 S. E. 970.

Tennessee.— Railroad Co. *v.* Postal Tel. Cable Co., 101 Tenn. 62, 46 S. W. 571, 41 L. R. A. 403.

Texas.— Ft. Worth, etc., R. Co. *v.* Southwestern Tel., etc., Co., 96 Tex. 160, 71 S. W. 270.

to the making of just compensation either by agreement or pursuant to condemnation proceedings;[34] but railroad rights of way are not within the application of such statutes which refer merely to public highways.[35]

3. Municipality.[36] A municipality cannot of course exclude from the use of its streets a telegraph company which has accepted the provisions of the act of 1866.[37] So also, where the state has authorized the construction of telegraph and telephone lines on all the public highways of the state, a municipality cannot exclude such corporations from its streets,[38] unless, as is sometimes the case, the statutory permission is conditional on the obtaining of the consent of the local authorities,[39]

Virginia.— Postal Tel. Cable Co. *v.* Farmville, etc., R. Co., 96 Va. 661, 32 S. E. 468 [*disapproving* Postal Tel. Cable Co. *v.* Norfolk, etc., R. Co., 88 Va. 920, 14 S. E. 803], holding that the words "along and parallel to" authorize the construction of a telegraph line along and upon the right of way.

United States.— Postal Tel. Cable Co. *v.* Southern R. Co., 89 Fed. 190.

See also, generally, Eminent Domain, 15 Cyc. 625.

34. Postal Tel. Cable Co. *v.* Southern R. Co., 89 Fed. 190. See also, generally, Eminent Domain, 15 Cyc. 670.

35. New York City, etc., R. Co. *v.* Central Union Tel. Co., 21 Hun (N. Y.) 261; Western Union Tel. Co. *v.* Pennsylvania R. Co., 123 Fed. 33, 59 C. C. A. 113 [*affirmed* in 195 U. S. 540, 25 S. Ct. 133, 49 L. ed. 312].

The words "public roads streets and highways" do not include a railroad right of way. New York City, etc., R. Co. *v.* Central Union Tel. Co., 21 Hun (N. Y.) 261.

36. **Power of municipality** to grant use of streets see, generally, Municipal Corporations, 28 Cyc. 866.

37. See *supra*, II, A, 1, a.

But a telephone company, not being within the application of the act of 1866, cannot by filing an acceptance thereof acquire any right to use the streets of a city for its lines without the consent of the local authorities. Cumberland Tel., etc., Co. *v.* Evansville, 127 Fed. 187 [*affirmed* in 143 Fed. 238, 74 C. C. A. 368].

38. *Iowa.*— Chamberlain *v.* Iowa Tel. Co., 119 Iowa 619, 93 N. W. 596.

Louisiana.— New Orleans *v.* Great Southern Tel., etc., Co., 40 La. Ann. 41, 3 So. 533, 8 Am. St. Rep. 502.

Michigan.— Michigan Tel. Co. *v.* Benton Harbor, 121 Mich. 512, 80 N. W. 386, 47 L. R. A. 104.

Mississippi.— Hodges *v.* Western Union Tel. Co., 72 Miss. 910, 18 So. 84, 29 L. R. A. 770.

Montana.— State *v.* Red Lodge, 30 Mont. 338, 76 Pac. 758.

New Jersey.— Summit Tp. *v.* New York, etc., Tel. Co., 57 N. J. Eq. 123, 41 Atl. 146; American Union Tel. Co. *v.* Harrison, 31 N. J. Eq. 627.

New York.— Carthage *v.* Central New York Tel., etc., Co., 185 N. Y. 448, 78 N. E. 165 [*reversing* 110 N. Y. App. Div. 625, 96 N. Y. Suppl. 919, and *affirming* 48 Misc. 423, 96 N. Y. Suppl. 917]; Barhite *v.* Home Tel. Co., 50 N. Y. App. Div. 25, 63 N. Y. Suppl. 659, 7 Am. Elec. Cas. 75.

Texas.— Texarkana *v.* Southwestern Tel., etc., Co., 48 Tex. Civ. App. 16, 106 S. W. 915.

Wisconsin.— Wisconsin Tel. Co. *v.* Milwaukee, 126 Wis. 1, 104 N. W. 1009, 110 Am. St. Rep. 886, 12 L. R. A. N. S. 581; Wisconsin Tel. Co. *v.* Oshkosh, 62 Wis. 32, 21 N. W. 828.

United States.— Wichita *v.* Old Colony Trust Co., 132 Fed. 641, 66 C. C. A. 19.

Canada.— Toronto *v.* Bell Tel. Co., 6 Ont. L. Rep. 335, 2 Ont. Wkly. Rep. 750 [*reversing* 3 Ont. L. Rep. 465, 1 Ont. Wkly. Rep. 192].

Municipal consent is not necessary unless required by constitutional or statutory provision. Barhite *v.* Home Tel. Co., 50 N. Y. App. Div. 25, 31, 63 N. Y. Suppl. 659, where the court said: "In every instance, so far as I have been able to discover, where the consent of a municipal body has been held to be a necessary preliminary to the occupation of its streets by a corporation, that consent has been based upon the delegation of power by the Legislature."

The right to regulate and control the erection, construction, laying, stringing, and maintaining of poles, wires, and cables in the streets of a city does not make the consent of the municipality essential to the right to occupy its streets, the right of regulation being subordinate to the legislative franchise. Barhite *v.* Home Tel. Co., 50 N. Y. App. Div. 25, 63 N. Y. Suppl. 659.

39. See the statutes of the several states. And see Rough River Tel. Co. *v.* Cumberland Tel., etc., Co., 119 Ky. 470, 84 S. W. 517, 27 Ky. L. Rep. 32; East Tennessee Tel. Co. *v.* Anderson County Tel. Co., 115 Ky. 488, 74 S. W. 218, 24 Ky. L. Rep. 2358; Postal Tel. Cable Co. *v.* Newport, 76 S. W. 159, 25 Ky. L. Rep. 635; Missouri River Tel. Co. *v.* Mitchell, 22 S. D. 191, 116 N. W. 67; Dakota Cent. Tel. Co. *v.* Huron, 165 Fed. 226; North Western Tel. Exch. Co. *v.* St. Charles, 154 Fed. 386.

Nature of right.—Where the constitution provides that a telegraph or telephone company shall not occupy the streets of a city without municipal consent, and that such consent shall only be granted by a sale to the highest bidder, the right or franchise so granted by the municipality is not the right to carry on such a business in the city, which is a right that a municipality could not deny, but is merely the right to occupy some part of the public streets. Bland *v.* Cumberland Tel., etc., Co., 109 S. W. 1180, 33 Ky. L. Rep. 399.

in which case it must be obtained,[40] and in the manner provided by the constitutional or statutory provision requiring it,[41] although if no particular mode of manifesting such consent is prescribed it may be either express or implied.[42] So also, although municipal consent was necessary and not obtained, the municipality, by permitting a telegraph or telephone company without objection to construct its line and expend large sums of money in so doing, may be precluded by its acquiescence and laches from objecting to the occupancy of its streets by such company.[43] Where municipal consent is necessary it may ordinarily be granted subject to any reasonable and proper conditions;[44] but the municipality cannot legally impose any conditions other than those permitted by the legislature,[45] unless they can be sustained under its general police powers in regard to the control and regulation of its streets,[46] although a telegraph or telephone company, by accepting the rights granted, may be bound by a condition annexed thereto which the municipality was not authorized to impose.[47] Municipal consent when once given and acted upon cannot be arbitrarily revoked,[48] or made subject to new conditions not justifiable under its police powers,[49] and a municipality may also be estopped by its conduct from denying the validity of an ordinance or resolution granting such consent.[50] A municipality, although its consent is not necessary in order to confer a right to use its streets, may regulate and control the manner in which such right shall be exercised;[51] but this right of

Consent as to maintenance.— A constitutional provision requiring municipal consent for the construction of a telegraph or telephone line does not require such consent for its subsequent maintenance and operation, but is intended for the purpose of enabling municipalities to impose proper conditions within the limits of the police power before the company can place its poles and wires in the streets. Dakota Cent. Tel. Co. *v.* Huron, 165 Fed. 226. But if the statute requires municipal consent to "maintain and operate," such consent is necessary for the maintenance as well as for the construction. Southern Bell Tel., etc., Co. *v.* Richmond, 103 Fed. 31, 44 C. C. A. 147.

40. Rough River Tel. Co. *v.* Cumberland Tel., etc., Co., 119 Ky. 470, 84 S. W. 517, 27 Ky. L. Rep. 32; East Tennessee Tel. Co. *v.* Russellville, 106 Ky. 667, 51 S. W. 308, 21 Ky. L. Rep. 305; Bland *v.* Cumberland Tel., etc., Co., 109 S. W. 1180, 33 Ky. L. Rep. 399. See also cases cited *supra*, note 39.

Effect of failure to obtain.— Where municipal consent is necessary, a telegraph or telephone company which occupies the streets of a city without obtaining such consent is a trespassser and the presence of the poles and wires upon the streets is a public nuisance. East Tenn. Tel. Co. *v.* Russellville, 106 Ky. 667, 51 S. W. 308, 21 Ky. L. Rep. 305; Bland *v.* Cumberland Tel., etc., Co., 109 S. W. 1180, 33 Ky. L. Rep. 399.

41. Rural Home Tel. Co. *v.* Kentucky, etc., Tel. Co., 128 Ky. 209, 107 S. W. 787, 22 Ky. L. Rep. 1068; Merchants' Police, etc., Tel. Co. *v.* Citizens' Tel. Co., 123 Ky. 90, 93 S. W. 642, 29 Ky. L. Rep. 512; Bland *v.* Cumberland Tel., etc., Co., 109 S. W. 1180, 33 Ky. L. Rep. 399.

Under the Kentucky constitution municipal consent is necessary and can be granted only by advertisement and public sale to the highest bidder. Merchants' Police, etc., Tel. Co. *v.* Citizens' Tel. Co., 123 Ky. 90, 93 S. W. 642, 29 Ky. L. Rep. 512; Bland *v.* Cumberland Tel., etc., Co., 109 S. W. 1180, 33 Ky. L. Rep. 399.

42. Missouri River Tel. Co. *v.* Mitchell, 22 S. D. 191, 116 N. W. 67; Dakota Cent. Tel. Co. *v.* Huron, 165 Fed. 226.

Express municipal assent to the occupation of a city street by a telephone company can only be shown by formal municipal action, and not by mere general declarations of witnesses that such assent was given. Pelham *v.* Pelham Tel. Co., 131 Ga. 325, 62 S. E. 186.

43. Bradford *v.* New York, etc., Tel., etc., Co., 206 Pa. St. 582, 56 Atl. 41.

44. Southern Bell Tel., etc., Co. *v.* Richmond, 103 Fed. 31, 44 C. C. A. 147, particularly where municipal consent is necessary not only for construction but also for maintenance. See also, generally, MUNICIPAL CORPORATIONS, 28 Cyc. 876.

45. Missouri River Tel. Co. *v.* Mitchell, 22 S. D. 191, 116 N. W. 67. See also State *v.* Flad, 23 Mo. App. 185.

46. See State *v.* Milwaukee Independent Tel. Co., 133 Wis. 588, 114 N. W. 108, 315.

47. Southern Bell Tel., etc., Co. *v.* Richmond, 103 Fed. 31, 44 C. C. A. 147.

48. London Mills *v.* White, 208 Ill. 289, 70 N. E. 313; Hudson Tel. Co. *v.* Jersey City, 49 N. J. L. 303, 8 Atl. 123, 60 Am. Rep. 619; Missouri River Tel. Co. *v.* Mitchell, 22 S. D. 191, 116 N. W. 67. See also *supra*, I, D, 2, a.

49. Chesapeake, etc., Tel. Co. *v.* Baltimore, 89 Md. 689, 43 Atl. 784, 44 Atl. 1033; Southern Bell Tel., etc., Co. *v.* Mobile, 162 Fed. 523.

50. London Mills *v.* White, 208 Ill. 289, 70 N. E. 313; Missouri River Tel. Co. *v.* Mitchell, 22 S. D. 191, 116 N. W. 67.

51. See *infra*, II, B, 4, a.

regulation is entirely distinct from the original granting of the privilege, and is subordinate to the franchise granted directly by the legislature.[52]

4. Property-Owners. A telegraph or telephone business is a public use authorizing the taking, under the power of eminent domain, of private property,[53] or property already devoted to a public use, such as a street or a railroad right of way;[54] but such property cannot constitutionally be taken against the owner's consent without compensation,[55] although already devoted to a public use.[56] So, if a telegraph or telephone line is constructed on a railroad right of way, compensation must be made to the railroad company,[57] and also to the abutting landowner;[58] and in some jurisdictions the abutting landowner is entitled to compensation where such construction is upon a public street or highway.[59]

B. Regulation and Control — 1. In General. Owing to the quasi-public character of telegraph and telephone companies and the business conducted by them,[60] they are subject to legislative regulation and control,[61] and the same rule applies whether the business is carried on by a corporation or by an individual.[62] The state may also delegate its power of regulation and control to a board or body, such as a railroad commission,[63] or to a municipal corporation;[64] but legislative functions such as the right to designate the location of poles or mode of construction in a municipality cannot be delegated to a court.[65] Telegraph and telephone companies are subject to all regulations falling properly within the police power of the state,[66] or the police powers vested in a municipal

52. Barhite *v.* Home Tel. Co., 50 N. Y. App. Div. 25, 32, 63 N. Y. Suppl. 659, where the court said: "When a corporation of this kind is to avail itself of the legislative grant, the manner of its exercise, the location of its poles, the stringing of its wires, etc., are within the control and regulation of the local legislative body. That is one of the police functions committed to the municipality. This right of regulation is, however, entirely distinct from the original granting of the privilege. It is subordinate to that right."

53. See Eminent Domain, 15 Cyc. 592.

Right of telephone companies to condemn land under statutes relating to telegraph companies see *supra*, I, B, 2; and Eminent Domain, 15 Cyc. 592 note 12.

54. See Eminent Domain, 15 Cyc. 625, 627.

55. See Eminent Domain, 15 Cyc. 639.

The Post Roads Act of 1866 does not affect this rule. See *supra*, II, A, 1, a.

56. See Eminent Domain, 15 Cyc. 668 *et seq.*

57. See Eminent Domain, 15 Cyc. 670.

58. See Eminent Domain, 15 Cyc. 684.

59. See also Eminent Domain, 15 Cyc. 681.

60. See *supra*, I, C, 1.

61. Central Union Tel. Co. *v.* Bradbury, 106 Ind. 1, 5 N. E. 721; Hockett *v.* State, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201; State *v.* Kinloch Tel. Co., 93 Mo. App. 349, 67 S. W. 684; Lowther *v.* Bridgeman, 57 W. Va. 306, 50 S. E. 410.

Effect of patents.— The fact that telegraph or telephone instruments or appliances are patented under the constitution and laws of the United States, while vesting in the patentee the exclusive right for a limited time to make, vend, and use the same, does not deprive the state of its right to regulate and control such use. Hockett *v.* State, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201.

The strictly private business of a public telephone company not constituting any part of its business with the general public is not subject to legislative regulation. Chesapeake, etc., Tel. Co. *v.* Manning, 186 U. S. 238, 22 S. Ct. 881, 46 L. ed. 1144.

62. Lowther *v.* Bridgeman, 57 W. Va. 306, 50 S. E. 410.

63. Western Union Tel. Co. *v.* Myatt, 98 Fed. 335.

Powers of railroad commissioners.— The North Carolina statute authorizing the railroad commissioners to regulate rates to be charged by telegraph companies does not authorize the commissioners to prescribe any other rules and regulations than those directed in section 26 of such act. Railroad Com'rs *v.* Western Union Tel. Co., 113 N. C. 213, 18 S. E. 389, 22 L. R. A. 570; Mayo *v.* Western Union Tel. Co., 112 N. C. 343, 16 S. E. 1006. La. Const. art. 284, grants to the railroad commission the power to make regulations to govern the tariffs and service of carriers of passengers and freight, and to make regulations to govern the charges and rates of telephone and telegraph lines, but the power is nowhere conferred on the commission to regulate or make orders with regard to telegraph service. Western Union Tel. Co. *v.* State R. Commission, 120 La. 758, 45 So. 598.

64. Home Tel., etc., Co. *v.* Los Angeles, 211 U. S. 265, 29 S. Ct. 50, 53 L. ed. 176 [*affirming* 155 Fed. 554].

65. New York, etc., Tel. Co. *v.* Bound Brook, 66 N. J. L. 168, 48 Atl. 1022; Zanesville *v.* Zanesville Tel., etc., Co., 63 Ohio St. 442, 59 N. E. 109.

66. State *v.* Western Union Tel. Co., 172 Ind. 20, 87 N. E. 641; Hockett *v.* State, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201;

corporation,[67] and a state or municipality cannot by contract with such companies surrender this power and deprive itself of the right to make proper police regulations.[68] The power of municipal corporations to regulate and control telegraph and telephone companies is derived from the legislature,[69] and limited accordingly; [70] but municipalities are usually vested with broad and extensive powers in regard to regulations affecting the occupancy and use of their streets.[71] The power of regulation is not affected by the Post Roads Act of 1866,[72] nor do the exclusive powers of congress in regard to interstate commerce prevent the making of proper local regulations; [73] but the power of regulation, whether exercised directly or indirectly, is not absolute, but subject to certain constitutional limitations,[74] and municipal regulations to be valid must be reasonable.[75]

2. Rates and Charges. It is competent for the legislature to regulate the rates and charges of telegraph and telephone companies, and to fix a maximum rate for the transmission of telegrams or telephone messages or for telephone service if the rate so fixed is not unreasonable.[76] The right to make such regulations may also be delegated by the state to a board or commission,[77] or to a munic-

State *v.* Western Union Tel. Co., 75 Kan. 609, 90 Pac. 299; Michigan Tel. Co. *v.* Charlotte, 93 Fed. 11.

Police power generally see Constitutional Law, 8 Cyc. 863.

67. Wichita *v.* Missouri, etc., Tel. Co., 70 Kan. 441, 78 Pac. 886; Philadelphia *v.* Western Union Tel. Co., 11 Phila. (Pa.) 327, 2 Wkly. Notes Cas. 455; Marshfield *v.* Wisconsin Tel. Co., 102 Wis. 604, 78 N. W. 735, 44 L. R. A. 565; Michigan Tel. Co. *v.* Charlotte, 93 Fed. 11.

Police powers of municipal corporations generally see Municipal Corporations, 28 Cyc. 692 *et seq.*

68. Michigan Tel. Co. *v.* Charlotte, 93 Fed. 11.

69. St. Louis *v.* Bell Tel. Co., 96 Mo. 623, 10 S. W. 197, 9 Am. St. Rep. 370, 2 L. R. A. 278; Texarkana *v.* Southwestern Tel., etc., Co., 48 Tex. Civ. App. 16, 106 S. W. 915; State *v.* Sheboygan, 111 Wis. 23, 86 N. W. 657.

70. St. Louis *v.* Bell Tel. Co., 96 Mo. 623, 10 S. W. 197, 9 Am. St. Rep. 370, 2 L. R. A. 278; State *v.* Red Lodge, 30 Mont. 338, 76 Pac. 758; Texarkana *v.* Southwestern Tel., etc., Co., 48 Tex. Civ. App. 16, 106 S. W. 915; State *v.* Sheboygan, 111 Wis. 23, 86 N. W. 657.

71. See *infra*, II, B, 4, a.

72. See *supra*, II, A, 1, a.

73. Michigan Tel. Co. *v.* Charlotte, 93 Fed. 11.

74. Swayze *v.* Monroe, 116 La. 643, 40 So. 926; Western Union Tel. Co. *v.* Myatt, 98 Fed. 335.

75. Hannibal *v.* Missouri, etc., Tel. Co., 31 Mo. App. 23; Wisconsin Tel. Co. *v.* Oshkosh, 62 Wis. 32, 21 N. W. 828.

76. Central Union Tel. Co. *v.* State, 123 Ind. 113, 24 N. E. 215; Central Union Tel. Co. *v.* State, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114; Central Union Tel. Co. *v.* Bradbury, 106 Ind. 1, 5 N. E. 721; Hockett *v.* State, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201; St. Louis *v.* Bell Tel. Co., 96 Mo. 623, 10 S. W. 197, 9 Am. St. Rep. 370, 2 L. R. A. 278; Nebraska Tel. Co. *v.* State, 55 Nebr. 627, 76 N. W. 171, 45 L. R. A. 113; Home Tel., etc., Co. *v.* Los Angeles, 211 U. S. 265, 29 S. Ct. 50, 53 L. ed. 176 [*affirming* 155 Fed. 554]; Chesapeake, etc., Tel. Co. *v.* Manning, 186 U. S. 238, 22 S. Ct. 881, 46 L. ed. 1144; Missouri *v.* Bell Tel. Co., 23 Fed. 539.

Constitutionality of regulations of rates and charges of quasi-public corporations generally see Constitutional Law, 8 Cyc. 969, 1066, 1117.

Private business.— A local telephone plant installed in a building so that parties in different rooms can communicate with each other, but having no connection with the general telephone exchange or means of communicating with the general public, and intended solely as a local convenience for the occupants of the building is not, although installed by a public telephone company, a part of its public business, and the rates to be charged for such services are not subject to legislative regulation. Chesapeake, etc., Tel. Co. *v.* Manning, 186 U. S. 238, 22 S. Ct. 881, 46 L. ed. 1144.

Partnership rate.— Physicians using connecting offices and conducting a copartnership as to "minor surgery," although having a private individual practice in other lines, are copartners within the schedule of rates authorizing a telephone company to charge copartnerships for the use of one telephone three dollars and fifty cents per month. Manning *v.* Interstate Tel., etc., Co., 147 N. C. 298, 60 S. E. 1134.

Telephone rates limited by statute see Central Union Tel. Co. *v.* State, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114.

77. Western Union Tel. Co. *v.* Myatt, 98 Fed. 335. See also Western Union Tel. Co. *v.* State R. Commission, 120 La. 758, 45 So. 598 (railroad commission); Nebraska Tel. Co. *v.* Cornell, 59 Nebr. 737, 82 N. W. 1 (board of transportation); Railroad Com'rs *v.* Western Union Tel. Co., 113 N. C. 213, 18 S. E. 389, 22 L. R. A. 570 (railroad commissioners); Pioneer Tel., etc., Co. *v.* Westenhaver, (Okla. 1909) 99 Pac. 1019 (corporation commission).

ipal corporation.[78] This, however, is a power of the state, and not usually or ordinarily a power of a municipal government, nor will it be recognized as existing in any municipal government unless very clearly delegated.[79] Such delegation is not to be implied from general language granting to municipalities the right of regulating and controlling the exercise of public franchises in their streets,[80] even if the setting of poles and stringing of wires be expressly mentioned in the city's charter as one of the subjects which the city shall have power to regulate;[81] and still less will the power to fix rates be implied from the ordinary general grant to cities of power to pass ordinances for the peace, good government, health, and welfare of the city.[82] A municipality may, however, in granting rights and privileges to such a company, annex thereto a condition as to the rates to be charged,[83] and although the municipality may not have power to impose such

Telephone rentals.— A power vested in a board of transportation to regulate charges on "messages sent by telegraph and telephone" includes the power to regulate rentals charged for the installation of telephone instruments. Nebraska Tel. Co. *v.* Cornell, 59 Nebr. 737, 82 N. W. 1.

Powers of railroad commissioners.— The North Carolina statute authorizing the railroad commissioners to regulate the rates charged by telegraph companies does not authorize the commissioners to require the opening of offices for commercial business. Railroad Com'rs *v.* Western Union Tel. Co., 113 N. C. 213, 18 S. E. 389, 22 L. R. A. 570.

Under the Oklahoma constitution it is the duty of the state corporation commission on hearing a petition for an order to reduce telephone rates to make a finding of the facts on which the order is based, and on appeal to the supreme court to certify the facts found by it to such court; and in case of a failure to do so the supreme court may remand the case to the commission with directions to find the facts and certify the same. Pioneer Tel., etc., Co. *v.* Westenhaver, (Okla. 1909) 99 Pac. 1019.

78. State *v.* Missouri, etc., Tel. Co., 189 Mo. 83, 88 S. W. 41; St. Louis *v.* Bell Tel. Co., 96 Mo. 623, 10 S. W. 197, 9 Am. St. Rep. 370, 2 L. R. A. 278; Home Tel., etc., Co. *v.* Los Angeles, 211 U. S. 265, 29 S. Ct. 50, 53 L. ed. 176 [*affirming* 155 Fed. 554]. See also MUNICIPAL CORPORATIONS, 28 Cyc. 724.

Rate not subject to change.— The legislature might authorize a municipality to fix by agreement a rate which could not subsequently be altered, but authority to make such an agreement which would suspend the power of regulation must be clearly and unmistakably conferred, and will not be implied merely from a delegation of power to fix and determine such rates. Home Tel., etc., Co. *v.* Los Angeles, 211 U. S. 265, 29 S. Ct. 50, 53 L. ed. 176 [*affirming* 155 Fed. 554].

79. State *v.* Missouri, etc., Tel. Co., 189 Mo. 83, 88 S. W. 41; St. Louis *v.* Bell Tel. Co., 96 Mo. 623, 10 S. W. 197, 9 Am. St. Rep. 370, 2 L. R. A. 278; Wright *v.* Glen Tel. Co., 112 N. Y. App. Div. 745, 99 N. Y. Suppl. 85; Farmers *v.* Columbiana County Tel. Co., 72 Ohio St. 526, 74 N. E. 1078; State *v.* Toledo Home Tel. Co., 72 Ohio St. 60, 74 N. E. 162; Macklin *v.* Home Tel. Co., 24 Ohio Cir. Ct. 446; State *v.* Central Union Tel. Co., 14 Ohio Cir. Ct. 273, 7 Ohio Cir. Dec. 536; State *v.* Sheboygan, 111 Wis. 23, 86 N. W. 657.

80. State *v.* Missouri, etc., Tel. Co., 189 Mo. 83, 88 S. W. 41. *Compare* Moberly *v.* Richmond Tel. Co., 126 Ky. 369, 103 S. W. 714, 31 Ky. L. Rep. 783.

81. Wright *v.* Glen Tel. Co., 112 N. Y. App. Div. 745, 99 N. Y. Suppl. 85. See also St. Louis *v.* Bell Tel. Co., 96 Mo. 623, 10 S. W. 197, 9 Am. St. Rep. 370, 2 L. R. A. 278; State *v.* Sheboygan, 111 Wis. 23, 86 N. W. 657. But see Charles Simons Sons Co. *v.* Maryland Tel., etc., Co., 99 Md. 141, 57 Atl. 193, 63 L. R. A. 727.

82. St. Louis *v.* Bell Tel. Co., 96 Mo. 623, 10 S. W. 197, 9 Am. St. Rep. 370, 2 L. R. A. 278; State *v.* Sheboygan, 111 Wis. 23, 86 N. W. 657.

83. Moberly *v.* Richmond Tel. Co., 126 Ky. 369, 103 S. W. 714, 31 Ky. L. Rep. 783; Charles Simons Sons Co. *v.* Maryland Tel., etc., Co., 99 Md. 141, 57 Atl. 193, 63 L. R. A. 727.

Although there is a general statute prescribing a maximum rate, a municipality may by contract with a telephone company secure a lower rate. Charles Simons Sons Co. *v.* Maryland Tel., etc., Co., 99 Md. 141, 57 Atl. 193, 63 L. R. A. 727.

A telephone company will be enjoined from charging rates in excess of those prescribed by the ordinance granting its franchise to do business within the municipality. Cumberland Tel., etc., Co. *v.* Hickman, 129 Ky. 220, 111 S. W. 311, 33 Ky. L. Rep. 730.

Construction of ordinance.—Where an ordinance granting a telephone company a franchise to operate within a city prescribed that the company should not charge tolls in excess of a schedule contained in the ordinance, such schedule was limited to service within the city, and did not preclude the corporation from charging an extra rate for connections outside the city limits. Moberly *v.* Richmond Tel. Co., 126 Ky. 369, 103 S. W. 714, 31 Ky. L. Rep. 783. A city telephone franchise providing that the grantee should connect the central exchange, and thereby each subscriber's instrument with other specified towns and cities, and specifying monthly rates of one dollar and fifty cents and two

a condition upon the company against its consent,[84] yet if the company voluntarily accepts the rights granted with the condition annexed, it cannot afterward contest the reasonableness of such rate,[85] or refuse to furnish services and facilities at the rate stipulated,[86] or deny the authority of the municipality to make such agreement.[87] Rates established under the power of regulation, whether by the state or by a municipality or other body to which such power has been delegated, must not, however, be unreasonable or confiscatory;[88] but it will be presumed that the rate established is reasonable and valid, and the burden is upon the telegraph or telephone company to show the contrary.[89]

3. License-Fees, Taxes, and Rentals.[90] The telegraph or telephone business is one which is properly subject to a license-tax,[91] subject to the limitation that a state or municipality cannot by such means impose a tax upon or interfere

dollars and fifty cents for residence and business telephones, respectively, does not entitle subscribers to service to such other towns and cities without additional charge, but merely gives them the privilege of using long-distance connections from their telephones. Cumberland Tel., etc., Co. *v.* Hickman, 129 Ky. 220, 111 S. W. 311, 33 Ky. L. Rep. 730.

84. See Rochester Tel. Co. *v.* Ross, 125 N. Y. App. Div. 76, 109 N. Y. Suppl. 381 [*affirmed* in 195 N. Y. 429, 88 N. E. 793]; State *v.* Central Union Tel. Co., 14 Ohio Cir. Ct. 273, 7 Ohio Cir. Dec. 536.

85. Charles Simons Sons Co. *v.* Maryland Tel., etc., Co., 99 Md. 141, 57 Atl. 193, 63 L. R. A. 727.

86. Charles Simons Sons Co. *v.* Maryland Tel., etc., Co., 99 Md. 141, 57 Atl. 193, 63 L. R. A. 727.

Rights of citizens.— A citizen of a city is entitled to insist on the enforcement of a contract between the city and a telephone company limiting the rate to be charged subscribers for service. Rochester Tel. Co. *v.* Ross, 125 N. Y. App. Div. 76, 109 N. Y. Suppl. 381 [*affirmed* in 195 N. Y. 429, 88 N. E. 793]. But where a private citizen, for whose benefit a contract is made between a city and a telephone company fixing maximum rates for telephone service, voluntarily and with knowledge of the facts contracts with the company for service at a different rate than that prescribed by the municipal franchise, he cannot repudiate his contract and demand a different service at a different rate by virtue of the franchise, on the ground that the company is bound by its franchise to render the service demanded. Buffalo Merchants' Delivery Co. *v.* Frontier Tel. Co., 112 N. Y. Suppl. 862.

87. Rochester Tel. Co. *v.* Ross, 125 N. Y. App. Div. 76, 109 N. Y. Suppl. 381 [*affirmed* in 195 N. Y. 429, 88 N. E. 793]; Buffalo Merchants' Delivery Co. *v.* Frontier Tel. Co., 112 N. Y. Suppl. 862.

88. Western Union Tel. Co. *v.* Myatt, 98 Fed. 335. See also Chesapeake, etc., Tel. Co. *v.* Manning, 186 U. S. 238, 22 S. Ct. 881, 46 L. ed. 1144.

Specific performance of ordinance.— Where a rate, reasonable in the beginning, has, because of changed conditions, become unreasonable and confiscatory it will not be specifically enforced even though it was originally accepted by the company as a matter of contract, in exchange for its franchise or other privileges. Maryland Tel., etc., Co. *v.* Charles Simons Sons Co., 103 Md. 136, 63 Atl. 314, 115 Am. St. Rep. 346.

Different rates for different companies.— The fact that a municipal corporation authorized by statute to regulate telephone rates prescribes different rates for different companies doing business within its limits does not necessarily constitute an illegal discrimination or denial of the equal protection of the laws, since a just ground for such classification may exist by reason of the differences in the territory occupied, facilities furnished, and services rendered by the different companies. Home Tel., etc., Co. *v.* Los Angeles, 211 U. S. 265, 29 S. Ct. 50, 53 L. ed. 176 [*affirming* 155 Fed. 554].

Power of courts.— The power of fixing rates and charges is a legislative function which cannot be performed by the courts (Nebraska Tel. Co. *v.* State, 55 Nebr. 627, 76 N. W. 171, 45 L. R. A. 113); but after the rates to be charged have been fixed, the determination as to whether they are unreasonable or confiscatory is a judicial function (Western Union Tel. Co. *v.* Myatt, 98 Fed. 335).

In determining the unreasonableness of telephone rates it must be taken into consideration that a decrease in rates does not, as in the case of railroads and some other businesses, increase the volume of business without a corresponding increase in the expense of conducting it. State R. Commission *v.* Cumberland Tel., etc., Co., 212 U. S. 414, 29 S. Ct. 357, 53 L. ed. 577.

89. State Railroad Commission *v.* Cumberland Tel., etc., Co., 212 U. S. 414, 29 S. Ct. 357, 53 L. ed. 577 [*reversing* 156 Fed. 823], holding further that the presumption in favor of the correctness of telephone rates established by a state commission obtains, although the data upon which the commission acted may have been insufficient, so long as the rates adopted were not based entirely upon arbitrary conjecture.

90. Effect of Post Roads Act of 1866 see *supra*, II, A, 1, a.

Taxes generally see Taxation, *ante*, p. 853.

91. See Licenses, 25 Cyc. 620 text and note 1; Municipal Corporations, 28 Cyc. 726 text and notes 29, 30.

with the carrying on of interstate commerce.[92] It may, however, as a police measure impose a license fee or tax to cover the cost of police regulation and supervision, provided the amount of the fee or tax is reasonably commensurate with such cost.[93] Under the rights of ownership and control with regard to their streets vested in certain municipalities by their charters or by statute, it has been held that they might exact from telegraph or telephone companies a charge in the nature of a rental for the occupancy and use of the streets;[94] but under other charter and statutory provisions this right has been denied.[95] A municipality having power to demand compensation for the privilege of maintaining a telephone system may fix the charge by means of competitive bidding,[96] and award the franchise or privilege to the bidder offering the largest percentage of its gross receipts.[97]

4. Place and Mode of Construction and Maintenance — a. In General. While a municipality cannot exclude from its streets a telegraph or telephone company having authority from the legislature to occupy and use the same,[98] it may make reasonable and proper regulations as to the manner in which such right shall be exercised.[99] The general powers possessed by municipal corporations with regard to the control and regulation of their streets extend as a rule to the deter-

92. See Commerce, 7 Cyc. 450, 482.

93. Philadelphia *v.* Postal Tel. Cable Co., 67 Hun (N. Y.) 21, 21 N. Y. Suppl. 556; Allentown *v.* Western Union Tel. Co., 148 Pa. St. 117, 23 Atl. 1070, 33 Am. St. Rep. 820; Schellsburg *v.* Western Union Tel. Co., 26 Pa. Super. Ct. 343; Kittanning Borough *v.* Western Union Tel. Co., 26 Pa. Super. Ct. 346; Atlantic, etc., Tel. Co. *v.* Philadelphia, 190 U. S. 160, 23 S. Ct. 817, 47 L. ed. 995; Western Union Tel. Co. *v.* New Hope, 187 U. S. 419, 23 S. Ct. 204, 47 L. ed. 240. See also Commerce, 7 Cyc. 450, 482; Municipal Corporations, 28 Cyc. 720, 722, 726, 749.

Where police supervision is necessary a municipality is not bound to furnish it for nothing, although the company is engaged in interstate commerce, but may require the company to pay a reasonable license-fee to cover the cost of such supervision. Atlantic, etc., Tel. Co. *v.* Philadelphia, 190 U. S. 160, 23 S. Ct. 817, 47 L. ed. 995.

The use of streets for a telephone business is a proper and legal use, but the exercise of the right to such use is subject to municipal regulation, and the power to regulate carries with it the power to impose a money charge as a condition to the enjoyment of the right. Lancaster *v.* Briggs, 118 Mo. App. 570, 96 S. W. 314.

If the fee is unreasonable in amount the ordinance imposing it is invalid. Collingdale Borough *v.* Keystone State Tel., etc., Co., 33 Pa. Super. Ct. 351; Postal Tel. Cable Co. *v.* New Hope, 192 U. S. 55, 24 S. Ct. 204, 48 L. ed. 338; Postal Tel. Cable Co. *v.* Taylor, 192 U. S. 64, 24 S. Ct. 208, 48 L. ed. 342. See also as to reasonableness of fee Licenses, 25 Cyc. 611; Municipal Corporations, 28 Cyc. 749.

94. Postal Tel. Cable Co. *v.* Baltimore, 79 Md. 502, 29 Atl. 819, 24 L. R. A. 161 [*affirmed* in 156 U. S. 210, 15 S. Ct. 356, 39 L. ed. 399]; Nebraska Tel. Co. *v.* Lincoln, 82 Nebr. 59, 117 N. W. 284; St. Louis *v.* Western Union Tel. Co., 149 U. S. 465, 13 S. Ct. 990, 37 L. ed. 810; St. Louis *v.* Western Union Tel. Co., 148 U. S. 92, 13 S. Ct. 485, 37 L. ed. 380; Memphis *v.* Postal Tel. Cable Co., 145 Fed. 602, 76 C. C. A. 292 [*reversing* 139 Fed. 707].

Such charge is not a tax but is in the nature of a rental. St. Louis *v.* Western Union Tel. Co., 148 U. S. 92, 13 S. Ct. 485, 37 L. ed. 380; Memphis *v.* Postal Tel. Cable Co., 145 Fed. 602, 76 C. C. A. 292.

The federal statute of 1866 does not affect the right of a municipality to exact such a rental. St. Louis *v.* Western Union Tel. Co., 148 U. S. 92, 13 S. Ct. 485, 37 L. ed. 380. And see *supra*, II, A, 1, a.

Reasonableness of charge.— A charge by a city of three dollars per pole as rental for the occupancy and use of its streets by a telegraph company is reasonable. Memphis *v.* Postal Tel., etc., Co., 164 Fed. 600, 91 C. C. A. 135.

95. Hodges *v.* Western Union Tel. Co., 72 Miss. 910, 18 So. 84, 29 L. R. A. 770.

96. California *v.* Bunceton Tel. Co., 112 Mo. App. 722, 87 S. W. 604; Plattsburg *v.* Peoples' Tel. Co., 88 Mo. App. 306.

Under the Kentucky constitution providing that a city may sell telephone franchises at public sale to the highest bidder for a term not exceeding twenty years, a city has no power to grant such a franchise without offering the same at public sale. Moberly *v.* Richmond Tel. Co., 126 Ky. 369, 103 S. W. 714, 31 Ky. L. Rep. 783.

97. Plattsburg *v.* People's Tel. Co., 88 Mo. App. 306.

Payment cannot be avoided by a telephone company which has obtained its right by offering a certain percentage of its gross receipts at a competitive bidding on the ground that others have been granted a like privilege without charge. California *v.* Bunceton Tel. Co., 112 Mo. App. 722, 87 S. W. 604.

98. See *supra*, II, A, 3.

99. Barhite *v.* Home Tel. Co., 50 N. Y. App. Div. 25, 63 N. Y. Suppl. 659; Philadelphia *v.* Western Union Tel. Co., 11 Phila. (Pa.) 327, 2 Wkly. Notes Cas. 455; State

mination of the particular spots in which poles and other fixtures shall be erected and the manner in which wires shall be strung,[1] and this power of regulation extends to the prescribing of the particular streets upon which such poles and wires may be placed.[2] The municipality cannot, however, under the guise of regulation, practically exclude such a company,[3] as by demanding a compliance with unauthorized and improper conditions,[4] or by failing or refusing to designate the location of poles or to make other necessary regulations,[5] or to grant a permit for the making of necessary repairs upon lines already constructed.[6] The company cannot in such cases take matters into its own hands and proceed with the work of construction,[7] but it may by mandamus or other proper legal proceedings compel the municipal authorities to act,[8] although where such action involves

v. Milwaukee, 132 Wis. 615, 113 N. W. 40; Marshfield *v.* Wisconsin Tel. Co., 102 Wis. 604, 78 N. W. 735, 44 L. R. A. 565.

1. *Michigan.*— Michigan Tel. Co. *v.* Benton Harbor, 121 Mich. 512, 80 N. W. 386, 47 L. R. A. 104; Michigan Tel. Co. *v.* St. Joseph, 121 Mich. 502, 80 N. W. 383, 80 Am. St. Rep. 520, 47 L. R. A. 87.

Minnesota.— St. Paul *v.* Freedy, 86 Minn. 350, 90 N. W. 781.

Montana.— State *v.* Red Lodge, 30 Mont. 338, 76 Pac. 758, 33 Mont. 345, 83 Pac. 642.

New Jersey.— New York, etc., Tel. Co. *v.* Bound Brook, 66 N. J. L. 168, 48 Atl. 1022; Marshall *v.* Bayonne, 59 N. J. L. 101, 34 Atl. 1080; New York, etc., Tel. Co. *v.* East Orange, 42 N. J. Eq. 490, 8 Atl. 289.

New York.— Carthage *v.* Central New York Tel., etc., Co., 185 N. Y. 448, 78 N. E. 165 [*reversing* 110 N. Y. App. Div. 625, 96 N. Y. Suppl. 919, and *affirming* 48 Misc. 423, 96 N. Y. Suppl. 917]; Utica *v.* Utica Tel. Co., 24 N. Y. App. Div. 361, 48 N. Y. Suppl. 916.

Ohio.— Zanesville *v.* Zanesville Tel., etc., Co., 63 Ohio St. 442, 59 N. E. 109; Auerbach *v.* Cuyahoga Tel. Co., 9 Ohio S. & C. Pl. Dec. 389, 7 Ohio N. P. 633.

Pennsylvania.— New Castle *v.* Central Dist., etc., Tel. Co., 207 Pa. St. 371, 56 Atl. 931; Central Pennsylvania Tel., etc., Co. *v.* Wilkes-Barre, etc., R. Co., 11 Pa. Co. Ct. 417; Philadelphia *v.* Western Union Tel. Co., 11 Phila. 327, 2 Wkly. Notes Cas. 455.

Wisconsin.— State *v.* Sheboygan, 111 Wis. 23, 86 N. W. 657.

The city may require the company to submit a map showing the proposed location of each pole, etc. Auerbach *v.* Cuyahoga Tel. Co., 9 Ohio S. & C. Pl. Dec. 389, 7 Ohio N. P. 633.

While the city has the right to designate the exact location for each pole, it is not necessarily under an obligation to do so. Marshall *v.* Bayonne, 59 N. J. L. 101, 34 Atl. 1080.

Height of wires crossing streets.— A municipality may regulate the height of wires where they cross the streets, but if no regulation has been made and the wires are hung at a sufficient height so as not to interfere with travel, and the poles are not constructed in the streets but upon private property, the municipality has no right to destroy them. American Union Tel. Co. *v.* Harrison, 31 N. J. Eq. 627.

2. Wichita *v.* Missouri, etc., Tel. Co., 70 Kan. 441, 78 Pac. 886; Jonesville *v.* Southern Michigan Tel. Co., 155 Mich. 86, 118 N. W. 736, 130 Am. St. Rep. 562; Marshfield *v.* Wisconsin Tel. Co., 102 Wis. 604, 78 N. W. 735, 44 L. R. A. 565.

A municipality may entirely prohibit the erection of telephone poles on a particular block of a particular street where good reason for such regulation exists, unless the company will thereby be cut off from communication with persons whom it desires to reach and whom by law it is obliged to serve. Jonesville *v.* Southern Michigan Tel. Co., 155 Mich. 86, 118 N. W. 736, 130 Am. St. Rep. 562.

3. Summit Tp. *v.* New York, etc., Tel. Co., 57 N. J. Eq. 123, 41 Atl. 146; State *v.* Milwaukee, 132 Wis. 615, 113 N. W. 40; State *v.* Sheboygan, 111 Wis. 23, 86 N. W. 657.

4. Michigan Tel. Co. *v.* Benton Harbor, 121 Mich. 512, 80 N. W. 386, 47 L. R. A. 104; Summit Tp. *v.* New York, etc., Tel. Co., 57 N. J. Eq. 123, 41 Atl. 146; State *v.* Central Union Tel. Co., 14 Ohio Cir. Ct. 273, 7 Ohio Cir. Dec. 536; State *v.* Sheboygan, 111 Wis. 23, 86 N. W. 657.

5. Michigan Tel. Co. *v.* St. Joseph, 121 Mich. 502, 80 N. W. 383, 80 Am. St. Rep. 520, 47 L. R. A. 87; State *v.* Red Lodge, 30 Mont. 338, 76 Pac. 758; State *v.* Sheboygan, 111 Wis. 23, 86 N. W. 657.

6. Matter of Seaboard Tel., etc., Co., 68 N. Y. App. Div. 283, 74 N. Y .Suppl. 15, holding that while a municipality may under its police powers regulate the time and method under which repairs shall be made, it cannot absolutely deny the right to make such repairs and thus in effect condemn the company's property and confiscate its franchise, and that a municipality may be compelled by mandamus to grant a permit.

7. St. Paul *v.* Freedy, 86 Minn. 350, 90 N. W. 781; Marshfield *v.* Wisconsin Tel. Co., 102 Wis. 604, 78 N. W. 735, 44 L. R. A. 565.

8. *Michigan.*— Michigan Tel. Co. *v.* St. Joseph, 121 Mich. 502, 80 N. W. 383, 80 Am. St. Rep. 520, 47 L. R. A. 87.

Minnesota.— St. Paul *v.* Freedy, 86 Minn. 350, 90 N. W. 781.

Montana.— State *v.* Red Lodge, 30 Mont. 338, 76 Pac. 758.

New Jersey.— New York, etc., Tel. Co. *v.* Bound Brook, 66 N. J. L. 168, 48 Atl. 1022.

New York.— Matter of Seaboard Tel., etc.,

the exercise of a discretion on the part of the municipal authorities, the courts will not prescribe in advance the particular action to be taken,[9] their authority being limited to compelling action and passing upon the validity of such action when taken.[10]

b. Removal or Change of Location.[11] Since a municipality cannot prevent the use of its streets by a telegraph or telephone company having legislative authority to use the same,[12] or, where its consent is necessary, arbitrarily revoke the same after it has been given and acted upon,[13] it cannot require the entire removal from its streets of a telegraph or telephone line which has been constructed pursuant to such legislative authority,[14] or municipal consent,[15] or prevent the company from making proper extensions of its line;[16] nor can a municipality arbitrarily require such a company after it has constructed its line to change the location thereof.[17] A municipality cannot, however, by its consent or agreement, surrender the right to make under its police powers such subsequent regulations as the public safety and welfare may require;[18] and where by reason of changed conditions a telegraph or telephone line has become an obstruction to traffic or a menace to the public safety, or there are other reasons connected with the public welfare or safety making a change of location necessary, such change may be required by the municipality,[19] even though it involves a removal of the line from one street to another.[20] But the municipality cannot require the company to incur such expenses unless some reasonable necessity for the change exists,[21] and it cannot act arbitrarily or unreasonably either in regard to making the change or the method prescribed for effecting it.[22]

c. Underground Conduits. As the maintenance of poles and overhead wires has in many places become a great source of danger and inconvenience to the public,[23] statutes have been enacted in some jurisdictions either authorizing or requiring the placing of telegraph and telephone wires in underground con-

Co. *v.* Kearney, 68 N. Y. App. Div. 283, 74 N. Y. Suppl. 15.

Pennsylvania.— Com. *v.* Warwick, 185 Pa. St. 623, 40 Atl. 93.

Wisconsin.— State *v.* Sheboygan, 111 Wis. 23, 86 N. W. 657.

But a proper request or application for action on the part of the municipal authorities must be made and a reasonable time allowed for them to act thereon before the courts will compel them to do so (Marshfield *v.* Wisconsin Tel. Co., 102 Wis. 604, 78 N. W. 735, 44 L. R. A. 565); and the request or application must be a proper one for action which it is the duty of the municipal authorities to take (State *v.* Red Lodge, 33 Mont. 345, 83 Pac. 642; State *v.* Milwaukee, 132 Wis. 615, 113 N. W. 40).

9. State *v.* Milwaukee, 132 Wis. 615, 113 N. W. 40.

The effect of mandamus proceedings is merely to compel action and not to interfere with the discretionary powers of the municipality as to any particular lawful and reasonable regulations. State *v.* Red Lodge, 30 Mont. 338, 76 Pac. 758.

10. Michigan Tel. Co. *v.* St. Joseph, 121 Mich. 502, 80 N. W. 383, 80 Am. St. Rep. 520, 47 L. R. A. 87.

A delegation of authority by the legislature to a court to designate the route or mode of constructing a telegraph or telephone line in a municipality is improper and void. New York, etc., Tel. Co. *v.* Bound Brook, 66 N. J. L. 168, 48 Atl. 1022; Zanesville *v.* Zanesville Tel., etc., Co., 63 Ohio St. 442, 59 N. E. 109.

11. **Removal into underground conduits** see *infra*, II, B, 4, c.

12. See *supra*, II, A, 3.

13. See *supra*, I, D, 2, a; II, A, 3.

14. Duluth *v.* Duluth Tel. Co., 84 Minn. 486, 87 N. W. 1127; Wichita *v.* Old Colony Trust Co., 132 Fed. 641, 66 C. C. A. 19; Abbott *v.* Duluth, 104 Fed. 833 [*affirmed* in 117 Fed. 137, 55 C. C. A. 153].

15. London Mills *v.* White, 208 Ill. 289, 70 N. E. 313; Southern Bell Tel., etc., Co. *v.* Mobile, 162 Fed. 523.

16. Duluth *v.* Duluth Tel. Co., 84 Minn. 486, 87 N. W. 1127.

17. Hannibal *v.* Missouri, etc., Tel. Co., 31 Mo. App. 23; Southern Bell Tel., etc., Co. *v.* Mobile, 162 Fed. 523.

18. Michigan Tel. Co. *v.* Charlotte, 93 Fed. 11.

19. American Tel., etc., Co. *v.* Millcreek Tp., 195 Pa. St. 643, 46 Atl. 140; American Tel., etc., Co. *v.* Harborcreek Tp., 23 Pa. Super. Ct. 437; Ganz *v.* Ohio Postal Tel. Cable Co., 140 Fed. 692, 72 C. C. A. 186; Michigan Tel. Co. *v.* Charlotte, 93 Fed. 11.

20. Michigan Tel. Co. *v.* Charlotte, 93 Fed. 11.

21. Northwestern Tel. Exch. Co. *v.* Minneapolis, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69, 53 L. R. A. 175; Hannibal *v.* Missouri, etc., Tel. Co., 31 Mo. App. 23.

22. Hannibal *v.* Missouri, etc., Tel. Co., 31 Mo. App. 23.

23. See People *v.* Squire, 107 N. Y. 593, 14 N. E. 820, 1 Am. St. Rep. 893 [*affirmed* in 145 U. S. 175, 12 S. Ct. 880, 36 L. ed. 666].

duits.[24] The state, or a municipality pursuant to legislative authority, may authorize the construction of such underground conduits,[25] and such authority constitutes a valuable right,[26] which when granted by the legislature cannot be denied by a municipality,[27] and which when granted by a municipality and accepted by the company cannot subsequently be arbitrarily revoked,[28] or materially impaired or subjected to new and burdensome conditions,[29] although the municipality may regulate the mode of construction.[30] The legislature may also, under its police powers, expressly require that telegraph or telephone wires shall be placed in underground conduits,[31] and that companies that have already constructed their lines upon the overhead system shall remove them to underground conduits,[32]

24. See the statutes of the several states. And see Chesapeake, etc., Tel. Co. *v.* Baltimore, 89 Md. 689, 43 Atl. 784, 44 Atl. 1033 (statute permissive); State *v.* St. Louis, 145 Mo. 551, 46 S. W. 981, 42 L. R. A. 113 (statute permissive, subject to municipal consent); American Rapid Tel. Co. *v.* Hess, 125 N. Y. 641, 26 N. E. 919, 21 Am. St. Rep. 764, 13 L. R. A. 454 (statute mandatory in cities having a population of five hundred thousand or over); Bell Tel. Co. *v.* Owen Sound, 8 Ont. L. Rep. 74, 4 Ont. Wkly. Rep. 69 (statute permissive and subject to municipal supervision as to mode of construction).

25. State *v.* St. Louis, 145 Mo. 551, 46 S. W. 981, 42 L. R. A. 113.

The legislature may ratify an authority previously granted by a municipality to construct underground conduits. Chesapeake, etc., Tel. Co. *v.* Baltimore, 89 Md. 689, 43 Atl. 784, 44 Atl. 1033.

The probate court cannot grant to a telephone company the right to place its wires in underground conduits without the consent of the municipal authorities. Queen City Tel. Co. *v.* Cincinnati, 73 Ohio St. 64, 76 N. E. 392.

26. Chesapeake, etc., Tel. Co. *v.* Baltimore, 89 Md. 689, 43 Atl. 784, 44 Atl. 1033; State *v.* St. Louis, 145 Mo. 551, 46 S. W. 981, 42 L. R. A. 113.

27. Bell Tel. Co. *v.* Owen Sound, 8 Ont. L. Rep. 74, 4 Ont. Wkly. Rep. 69, holding that where a telegraph or telephone company is authorized by statute to place its wires underground, subject only to municipal supervision as to the mode of doing the work, the municipality cannot under this power arbitrarily refuse to permit the company to do so.

28. Chesapeake, etc., Tel. Co. *v.* Baltimore, 90 Md. 638, 45 Atl. 446; Chesapeake, etc., Tel. Co. *v.* Baltimore, 89 Md. 689, 43 Atl. 784, 44 Atl. 1033; State *v.* St. Louis, 145 Mo. 551, 46 S. W. 981, 42 L. R. A. 113.

A municipality will be enjoined from preventing the construction of an underground conduit for which it has given its consent, provided it is constructed in a proper manner under the regulation and control of the municipality as to the mode of construction. Chesapeake, etc., Tel. Co. *v.* Baltimore, 90 Md. 638, 45 Atl. 446.

29. Chesapeake, etc., Tel. Co. *v.* Baltimore, 89 Md. 689, 43 Atl. 784, 44 Atl. 1033; State *v.* St. Louis, 145 Mo. 551, 46 S. W. 981, 42 L. R. A. 113 (holding that where an underground conduit for telegraph and telephone wires has been constructed pursuant to municipal authority, the municipality will be compelled by mandamus to permit connections to be made between the conduit and adjoining buildings, provided they do not materially impair the use of the highway); Western Union Tel. Co. *v.* Syracuse, 24 Misc. (N. Y.) 338, 53 N. Y. Suppl. 690 (holding that where an underground conduit has been constructed pursuant to municipal consent, a municipality cannot authorize a different company to construct another conduit immediately over it so as to interfere with and prevent access thereto).

A grant of a right to adopt an underground system necessarily authorizes the construction of conduits, terminal poles, or any such appliances as are or may be reasonably necessary to make the system effective, but if the municipality has retained the right to regulate the manner of occupation this also includes the power to compel from time to time the adoption of any reasonable and generally accepted improvements which tend to decrease the obstruction of the streets or increase the safety and convenience of the public in their use. Com. *v.* Warwick, 185 Pa. St. 623, 40 Atl. 93.

30. See Chesapeake, etc., Tel. Co. *v.* Baltimore, 90 Md. 638, 45 Atl. 446; State *v.* St. Louis, 145 Mo. 551, 46 S. W. 981, 42 L. R. A. 113.

31. American Rapid Tel. Co. *v.* Hess, 125 N. Y. 641, 26 N. E. 919, 21 Am. St. Rep. 764, 13 L. R. A. 454.

32. American Rapid Tel. Co. *v.* Hess, 125 N. Y. 641, 26 N. E. 919, 21 Am. St. Rep. 764, 13 L. R. A. 454; People *v.* Squire, 107 N. Y. 593, 14 N. E. 820, 1 Am. St. Rep. 893 [*affirmed* in 145 U. S. 175, 12 S. Ct. 880, 36 L. ed. 666]; Geneva *v.* Geneva Tel. Co., 30 Misc. (N. Y.) 236, 62 N. Y. Suppl. 172; Western Union Tel. Co. *v.* New York, 38 Fed. 552, 3 L. R. A. 449.

If the company refuses after due notice to remove its wires into an underground conduit, the municipal authorities may cut down and remove such poles and wires, and will not be enjoined from so doing. American Rapid Tel. Co. *v.* Hess, 125 N. Y. 641, 26 N. E. 919, 21 Am. St. Rep. 764, 13 L. R. A. 454.

The Post Roads Act of 1866 does not affect the power of the state to require telegraph or telephone wires to be placed in under-

and pay the expense incident to such change,[33] and the legislature may delegate to a municipal corporation the power to make such requirements,[34] and of regulating the manner in which the work of excavation and construction shall be done.[35] So also the legislature, or municipality pursuant to legislative authority, may authorize the construction by independent companies of subways or conduits to be used by telegraph, telephone, and other companies using electrical conductors,[36] and may require telegraph or telephone companies to remove their wires into such conduits,[37] and pay a reasonable rental therefor,[38] or to remove them into conduits constructed by the municipality,[39] and may refuse such companies permission to construct their own conduits,[40] provided the other conduits already constructed or provided are adequate and suitable.[41] The legislature may also require that companies constructing underground conduits shall submit to the local authorities for approval plans and specifications of the system proposed, and that the work of excavation and construction shall be done under the supervision and control of such authorities.[42] Where a telegraph or telephone company has legislative authority to construct its lines upon city streets, without the consent of the municipality, and subject only to its regulation and control, the municipality cannot require that in constructing such line it shall place its wires in underground conduits;[43] and it has also been held that in such case the municipality cannot without express legislative authority subsequently require overhead wires to be removed into underground conduits;[44] but on the contrary it has been held that a municipality has this power,[45] although it cannot exercise it arbitrarily where no reasonable necessity for such change exists.[46] The duty of making such removal may, however, be imposed upon the company by agree-

ground conduits (American Rapid Tel. Co. *v.* Hess, 125 N. Y. 641, 26 N. E. 919, 21 Am. St. Rep. 764, 13 L. R. A. 454. See also *supra*, II, A, 1, a); although in one case the court, in sustaining the right to require the removal of wires from poles into underground conduits, held that the right to require such removal from the structure of an elevated railroad, where at the time the wires did not cause any public inconvenience, was so doubtful that it should be submitted to the court of last resort and the doubt temporarily be resolved in favor of the telegraph company (Western Union Tel. Co. *v.* New York, 38 Fed. 552, 3 L. R. A. 449).

33. American Rapid Tel. Co. *v.* Hess, 125 N. Y. 641, 26 N. E. 919, 21 Am. St. Rep. 764, 13 L. R. A. 454; People *v.* Squire, 107 N. Y. 593, 14 N. E. 820, 1 Am. St. Rep. 893 [*affirmed* in 145 U. S. 175, 12 S. Ct. 880, 36 L. ed. 666]; Western Union Tel. Co. *v.* New York, 38 Fed. 552, 3 L. R. A. 449.

34. People *v.* Squire, 107 N. Y. 593, 14 N. E. 820, 1 Am. St. Rep. 893 [*affirmed* in 145 U. S. 175, 12 S. Ct. 880, 36 L. ed. 666]; Geneva *v.* Geneva Tel. Co., 30 Misc. (N. Y.) 236, 62 N. Y. Suppl. 172.

35. People *v.* Squire, 107 N. Y. 593, 14 N. E. 820, 1 Am. St. Rep. 893 [*affirmed* in 145 U. S. 175, 12 S. Ct. 880, 36 L. ed. 666].

36. State *v.* St. Louis, 145 Mo. 551, 46 S. W. 981, 42 L. R. A. 113; American Rapid Tel. Co. *v.* Hess, 125 N. Y. 641, 26 N. E. 919, 21 Am. St. Rep. 764, 13 L. R. A. 454; Western Union Tel. Co. *v.* New York, 38 Fed. 552, 3 L. R. A. 449.

Public use.— A subway for telegraph and telephone wires is for a public use and may properly be permitted to be constructed under the streets of a city. State *v.* St. Louis, 145 Mo. 551, 46 S. W. 981, 42 L. R. A. 113 [*overruling* State *v.* Murphy, 134 Mo. 548, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132, 56 Am. St. Rep. 515, 34 L. R. A. 369].

37. American Rapid Tel. Co. *v.* Hess, 125 N. Y. 641, 26 N. E. 919, 21 Am. St. Rep. 764, 13 L. R. A. 454; Western Union Tel. Co. *v.* New York, 38 Fed. 552, 3 L. R. A. 449.

38. See Western Union Tel. Co. *v.* New York, 38 Fed. 552, 3 L. R. A. 449.

39. Geneva *v.* Geneva Tel. Co., 30 Misc. (N. Y.) 236, 62 N. Y. Suppl. 172.

40. Geneva *v.* Geneva Tel. Co., 30 Misc. (N. Y.) 236, 62 N. Y. Suppl. 172.

41. Rochester *v.* Bell Tel. Co., 52 N. Y. App. Div. 6, 64 N. Y. Suppl. 804; Geneva *v.* Geneva Tel. Co., 30 Misc. (N. Y.) 236, 62 N. Y. Suppl. 172.

42. People *v.* Squire, 107 N. Y. 593, 14 N. E. 820, 1 Am. St. Rep. 893 [*affirmed* in 145 U. S. 175, 12 S. Ct. 880, 36 L. ed. 666].

43. State *v.* Red Lodge, 30 Mont. 338, 76 Pac. 758.

44. Carthage *v.* Central New York Tel., etc., Co., 185 N. Y. 448, 78 N. E. 165, 113 Am. St. Rep. 932 [*reversing* 110 N. Y. App. Div. 625, 96 N. Y. Suppl. 919 (*reversing* 48 Misc. 423, 96 N. Y. Suppl. 917)].

45. Northwestern Tel. Exch. Co. *v.* Minneapolis, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69, 53 L. R. A. 175.

46. Northwestern Tel. Exch. Co. *v.* Minneapolis, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69, 53 L. R. A. 175. See also Hudson River Tel. Co. *v.* Johnstown, 37 Misc. (N. Y.) 41, 74 N. Y. Suppl. 767.

ment with a municipality made in consideration of rights and privileges granted by the latter.[47]

d. Character of Equipment. Under its general powers with reference to the control and regulation of its streets a municipality may prescribe not only the precise location of telegraph and telephone poles, posts, piers, and abutments,[48] but also, within reasonable limits, the character, form, size, and color of such fixtures.[49] Thus it may require that decayed poles be removed or replaced with sound ones,[50] or that broken or crooked and unsightly poles be replaced with others that are neat and shapely;[51] it may refuse to permit the use of poles of improper and unusual size;[52] and it seems that it may even require the painting of all poles and prescribe what color they shall be painted.[53]

C. Mode of Construction and Maintenance. In so far as the mode of construction is prescribed by statute, the company must conform thereto;[54] but independently of statutory or municipal regulations as to the mode of construction and maintenance,[55] a telegraph or telephone company in constructing its line must exercise due care to avoid any unnecessary or improper obstruction of streets or highways,[56] or other negligent or improper mode of construction which would injure or endanger life or property,[57] and must also exercise such care

47. Baltimore *v.* Chesapeake, etc., Tel. Co., 92 Md. 692, 48 Atl. 465.

48. See *supra*, II, B, 4, a.

49. State *v.* Flad, 23 Mo. App. 185; Forsythe *v.* Baltimore, etc., Tel. Co., 12 Mo. App. 494; Philadelphia *v.* Western Union Tel. Co., 11 Phila. (Pa.) 327, 2 Wkly. Notes Cas. 455; Hardwick *v.* Vermont Tel., etc., Co., 70 Vt. 180, 40 Atl. 169; Michigan Tel. Co. *v.* Charlotte, 93 Fed. 11.

50. Michigan Tel. Co. *v.* Charlotte, 93 Fed. 11.

51. Forsythe *v.* Baltimore, etc., Tel. Co., 12 Mo. App. 494; Hardwick *v.* Vermont Tel. Co., 70 Vt. 180, 40 Atl. 169.

52. See Philadelphia *v.* Western Union Tel. Co., 11 Phila. (Pa.) 327, 2 Wkly. Notes Cas. 455.

53. See Hardwick *v.* Vermont Tel., etc., Co., 70 Vt. 180, 40 Atl. 169.

54. Weaver *v.* Dawson County Mut. Tel. Co., 82 Nebr. 696, 118 N. W. 650, 22 L. R. A. N. S. 1189 (statutory provision as to height of wires at road crossing); Little *v.* Central Dist., etc., Tel. Co., 213 Pa. St. 229, 62 Atl. 848 (statutory provision in regard to construction so as not to obstruct use of highway); Chant *v.* Clinton Tel. Co., 130 Wis. 533, 110 N. W. 423 (statutory provision as to height of wires above ground at crossing).

The words "all road crossings," as used in Cobbey St. (1907) § 11963, providing that telephone wires shall be placed at the height of not less than twenty feet above all road crossings, refers to private as well as public roads. Weaver *v.* Dawson County Mut. Telephone Co., 82 Nebr. 696, 118 N. W. 650, 22 L. R. A. N. S. 1189.

55. See *supra*, II, B, 4.

56. *Alabama.*— Postal Tel. Cable Co. *v.* Jones, 133 Ala. 217, 32 So. 500.

Kentucky.— Bevis *v.* Vanceburg Tel. Co., 121 Ky. 177, 89 S. W. 126, 28 Ky. L. Rep. 142.

Maine.— Dickey *v.* Maine Tel. Co., 46 Me. 483.

Pennsylvania.—Little *v.* Central Dist., etc., Tel. Co., 213 Pa. St. 229, 62 Atl. 848.

Utah.— Davidson *v.* Utah Independent Tel. Co., 34 Utah 249, 97 Pac. 124.

Designation by highway commissioners.— A telephone company which places its poles along a highway at places designated by the highway commissioners is not liable to a statutory penalty for obstructing the highway, but if the commissioners refuse to make such designation, although requested to do so, the company acts at its peril in placing its poles, and if they interfere with the use of the highway the company may be proceeded against for obstructing the same without being first notified by the commissioners to move the poles. Inter-State Independent Tel., etc., Co. *v.* Towando, 221 Ill. 299, 77 N. E. 456 [*affirming* 123 Ill. App. 55].

57. *Kentucky.*— Bevis *v.* Vanceburg Tel. Co., 121 Ky. 177, 89 S. W. 126, 28 Ky. L. Rep. 142.

Louisiana.— Simmons *v.* Shreveport Gas, etc., Co., 116 La. 1033, 41 So. 248.

Missouri.— Politowitz *v.* Citizens' Tel. Co., 123 Mo. App. 77, 99 S. W. 756.

New Hampshire.— Ela *v.* Postal Tel. Cable Co., 71 N. H. 1, 51 Atl. 281.

New York.— Ensign *v.* Central New York Tel., etc., Co., 79 N. Y. App. Div. 244, 79 N. Y. Suppl. 799 [*affirmed* in 179 N. Y. 539, 71 N. E. 1130].

North Carolina.— Harton *v.* Forest City Tel. Co., 146 N. C. 429, 59 S. E. 1022, 14 L. R. A. N. S. 956.

Utah.— Davidson *v.* Utah Independent Tel. Co., 34 Utah 249, 97 Pac. 124.

See also *infra*, II, D, 1.

In laying a cable under navigable waters it must be so laid and maintained as not to interfere with navigation. Blanchard *v.* Western Union Tel. Co., 60 N. Y. 510; Stephens, etc., Transp. Co. *v.* Western Union Tel. Co., 22 Fed. Cas. No. 13,371, 8 Ben. 502.

Degree of care.— A telegraph or telephone company using a public street for the erection and maintenance of its poles and wires

in making any necessary repairs and maintaining its line in a safe and proper condition;[58] and for failure to do so it will be liable for injuries to persons or property caused by such negligent or improper construction or maintenance.[59]

D. Injuries From Construction or Maintenance — 1. Liability For Injuries — a. Personal Injuries. A telegraph or telephone company will be liable for injuries to persons caused by the negligent or improper manner of constructing its lines,[60] as in the case of injuries caused by wires being strung too low,[61] or improperly located,[62] poles placed in the traveled part of a street or highway,[63] lack of proper safeguards against lighting,[64] failure to provide proper

must exercise care to prevent injury to travelers on the street, and the care must be proportionate to the danger that may be reasonably apprehended from the location and nature of the appliances used. The greater the danger, the greater must be the care. Davidson *v.* Utah Independent Tel. Co., 34 Utah 249, 97 Pac. 124.

58. *Alabama.*— Postal Tel. Cable Co. *v.* Jones, 133 Ala. 217, 32 So. 500.

Iowa.— Crawford *v.* Standard Tel. Co., 139 Iowa 331, 115 N. W. 878.

Kentucky.— West Kentucky Tel. Co. *v.* Pharis, 78 S. W. 917, 25 Ky. L. Rep. 1838.

New York.— Walther *v.* American Dist. Tel. Co., 11 Misc. 71, 32 N. Y. Suppl. 751.

North Carolina.— Harton *v.* Forest City Tel. Co., 146 N. C. 429, 59 S. E. 1022, 14 L. R. A. N. S. 956.

The duty of inspection in regard to its frequency cannot be definitely stated, as it depends upon the condition of the weather, season of the year, character of the soil, and other conditions. Harton *v.* Forest City Tel. Co., 146 N. C. 429, 59 S. E. 1022, 14 L. R. A. N. S. 956. It cannot be said, however, that so long as a telegraph or telephone wire will carry messages there is no duty to inspect it to ascertain if it is hanging loose or otherwise in a dangerous condition. Crawford *v.* Standard Tel. Co., 139 Iowa 331, 115 N. W. 878.

A telephone company must exercise ordinary care to maintain its line in good working order but is not liable for interruptions in the service not preventable by ordinary care. Eastern Kentucky Tel., etc., Co. *v.* Hardwick, 106 S. W. 307, 32 Ky. L. Rep. 582.

59. See *infra*, II, D, 1.

60. *Alabama.*— Postal Tel. Cable Co. *v.* Jones, 133 Ala. 217, 32 So. 500.

Kentucky.— Bevis *v.* Vanceburg Tel. Co., 121 Ky. 177, 89 S. W. 126, 28 Ky. L. Rep. 142.

Missouri.— Politowitz *v.* Citizens' Tel. Co., 123 Mo. App. 77, 99 S. W. 756.

New Hampshire.— Ela *v.* Postal Tel. Cable Co., 71 N. H. 1, 51 Atl. 281, failure to provide proper guards and brackets on curve.

New York.— Ensign *v.* Central New York Tel., etc., Co., 79 N. Y. App. Div. 244, 79 N. Y. Suppl. 799 [*affirmed* in 179 N. Y. 539, 71 N. E. 1130].

Pennsylvania.— Little *v.* Central Dist., etc., Tel. Co. 213 Pa. St. 229, 62 Atl. 848.

Utah.— Davidson *v.* Utah Independent Tel. Co., 34 Utah 249, 97 Pac. 124.

61. *Alabama.*— Postal Tel. Cable Co. *v.* Jones, 133 Ala. 217, 32 So. 500, wire sagging because attached to rotten cross arm.

Colorado.— Western Union Tel. Co. *v.* Eyser, 2 Colo. 141 [*reversed* on other grounds in 91 U. S. 495, 23 L. ed. 377].

Maine.— Dickey *v.* Maine Tel. Co., 46 Me. 483.

Massachusetts.— Thomas *v.* Western Union Tel. Co., 100 Mass. 156.

Michigan.— Hovey *v.* Michigan Tel. Co., 124 Mich. 607, 83 N. W. 600.

Nebraska.— Weaver *v.* Dawson County Mut. Tel. Co., 82 Nebr. 696, 118 N. W. 650, 22 L. R. A. N. S. 1189.

Pennsylvania.— Pennsylvania Tel. Co. *v.* Varnau, (1888) 15 Atl. 624.

Texas.— Commercial Tel. Co. *v.* Davis, 43 Tex. Civ. App. 547, 96 S. W. 939; Adams *v.* Weakley, 35 Tex. Civ. App. 371, 80 S. W. 411.

West Virginia.— Hannum *v.* Hill, 52 W. Va. 166, 43 S. E. 223.

Wisconsin.— Chant *v.* Clinton Tel. Co., 130 Wis. 533, 110 N. W. 423.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 9.

62. Ensign *v.* Central New York Tel., etc., Co., 79 N. Y. App. Div. 244, 79 N. Y. Suppl. 799 [*affirmed* in 179 N. Y. 539, 71 N. E. 1130], wire strung so near decayed tree as to be broken down by a falling limb.

63. *Illinois.*— Illinois Terminal R. Co. *v.* Thompson, 210 Ill. 226, 71 N. E. 328, brakeman on car colliding with pole located too near track.

Kentucky.— Bevis *v.* Vanceburg Tel. Co., 121 Ky. 177, 89 S. W. 126, 28 Ky. L. Rep. 142.

Massachusetts.— Riley *v.* New England Tel., etc., Co., 184 Mass. 150, 68 N. E. 17, irrespective of negligence under Massachusetts statute.

Nebraska.— Nebraska Tel. Co. *v.* Jones, 60 Nebr. 396, 83 N. W. 197, stump of pole in middle of road.

Pennsylvania.— Little *v.* Central Dist. etc., Tel. Co., 213 Pa. St. 229, 62 Atl. 848.

Texas.— Alice, etc., Tel. Co. *v.* Billingsley, 33 Tex. Civ. App. 452, 77 S. W. 255.

Virginia.— Watts *v.* Southern Bell Tel., etc., Co., 100 Va. 45, 40 S. E. 107.

United States.— Moore *v.* East Tennessee Tel. Co., 142 Fed. 965, 74 C. C. A. 227.

Canada.— Wells *v.* Western Union Tel. Co., 40 Nova Scotia 81 (brace against pole); Bonn *v.* Bell Tel. Co., 30 Ont. 696.

64. *Alabama.*— Southern Bell Tel., etc., Co.

guards or insulation to prevent contact with other wires,[65] improper location or anchoring of guy-wires,[66] or unguarded excavations, manholes, or trenches; [67] or to the negligent or improper manner of maintaining the line,[68] or failure to repair defects or other dangerous conditions due to storms or other causes,[69] as in the case of injuries caused by sagging wires,[70] falling poles,[71] charged wires in a street,[72] or wires allowed to remain down for an unreasonable length of time.[73] A telegraph

v. McTyer, 137 Ala. 601, 34 So. 1020, 97 Am. St. Rep. 62, abandoned telephone wires.

Georgia.— Southern Bell Tel., etc., Co. *v.* Parker, 119 Ga. 721, 47 S. E. 194, shock at the telephone.

Kentucky.— Brucker *v.* Gainesboro Tel. Co., 125 Ky. 92, 100 S. W. 240, 30 Ky. L. Rep. 1162; Evans *v.* Eastern Kentucky Tel., etc., Co., 124 Ky. 620, 99 S. W. 936, 30 Ky. L. Rep. 833.

Maine.—Wells *v.* Northeastern Tel. Co., 101 Me. 371, 64 Atl. 648.

Minnesota.— Bardon *v.* Northwestern Tel. Exch. Co., 93 Minn. 421, 101 N. W. 1132.

Pennsylvania.— Delahunt *v.* United Tel., etc., Co., 215 Pa. St. 241, 64 Atl. 515, 114 Am. St. Rep. 958.

Texas.— Southern Tel., etc., Co. *v.* Evans, (Civ. App. 1909) 116 S. W. 418.

Virginia.— See Richmond, etc., R. Co. *v.* Rubin, 102 Va. 809, 47 S. E. 834.

Wisconsin.— Owen *v.* Portage Tel. Co., 126 Wis. 412, 105 N. W. 924. See also Jackson *v.* Wisconsin Tel. Co., 88 Wis. 243, 60 N. W. 430, 26 L. R. A. 101.

65. Heidt *v.* Southern Tel., etc., Co., 122 Ga. 474, 50 S. E. 361; Simmons *v.* Shreveport Gas, etc., Co., 116 La. 1033, 41 So. 248; Politowitz *v.* Citizens' Tel. Co., 123 Mo. App. 77, 99 S. W. 756; Guinn *v.* Delaware, etc., Tel. Co., 72 N. J. L. 276, 62 Atl. 412, 111 Am. St. Rep. 668, 3 L. R. A. N. S. 988; New York, etc., Tel. Co. *v.* Bennett, 62 N. J. L. 742, 42 Atl. 759.

66. *Kentucky.*— Louisville Home Tel. Co. *v.* Gasper, 123 Ky. 128, 93 S. W. 1057, 9 L. R. A. N. S. 548, 29 Ky. L. Rep. 578.

Louisiana.—Wilson *v.* Great Southern Tel., etc., Co., 41 La. Ann. 1041, 6 So. 781.

Michigan.— Friesenhan *v.* Michigan Tel. Co., 134 Mich. 292, 96 N. W. 501.

New York.—Sheldon *v.* Western Union Tel. Co., 51 Hun 591, 4 N. Y. Suppl. 526 [*affirmed* in 121 N. Y. 697, 24 N. E. 1099].

Texas.— South Texas Tel. Co. *v.* Tabb, (Civ. App. 1908) 114 S. W. 448.

Utah.—Davidson *v.* Utah Independent Tel. Co., 34 Utah 249, 97 Pac. 124.

67. Kent *v.* Southern Bell Tel., etc., Co., 120 Ga. 980, 48 S. E. 399; Merritt *v.* Kinloch Tel. Co., 215 Mo. 299, 115 S. W. 19 (hole not properly filled up after moving pole); Van Vechten *v.* New York, etc., Tel., etc., Co., 71 N. J. L. 45, 58 Atl. 1096 (manhole); White *v.* Keystone Tel. Co., 211 Pa. St. 455, 60 Atl. 998.

68. *Alabama.*— Postal Tel. Cable Co. *v.* Jones, 133 Ala. 217, 32 So. 500.

Iowa.—Crawford *v.* Standard Tel. Co., 139 Iowa 331, 115 S. W. 878.

Kentucky.—West Kentucky Tel. Co. *v.* Pharis, 78 S. W. 917, 25 Ky. L. Rep. 1838.

New York.—Walther *v.* American Dist. Tel. Co., 11 Misc. 71, 32 N. Y. Suppl. 751.

North Carolina.— Harton *v.* Forest City Tel. Co., 146 N. C. 429, 59 S. E. 1022, 14 L. R. A. N. S. 956.

Wisconsin.— Chant *v.* Clinton Tel. Co., 130 Wis. 533, 110 N. W. 423.

69. West Kentucky Tel. Co. *v.* Pharis, 78 S. W. 917, 25 Ky. L. Rep. 1838; Simmons *v.* Shreveport Gas, etc., Co., 116 La. 1033, 41 So. 248; Harton *v.* Forest City Tel. Co., 146 N. C. 429, 59 S. E. 1022, 14 L. R. A. N. S. 956. See also cases cited *infra*, notes 70–73.

70. *Arkansas.*— Jacks *v.* Reeves, 78 Ark. 426, 95 S. W. 781.

Georgia.— Southern Bell Tel., etc., Co. *v.* Howell, 124 Ga. 1050, 53 S. E. 577.

Iowa.— Crawford *v.* Standard Tel. Co., 139 Iowa 331, 115 N. W. 878.

Nebraska.—Weaver *v.* Dawson County Mut. Tel. Co., 82 Nebr. 696, 118 N. W. 650, 22 L. R. A. N. S. 1189.

Wisconsin.—Chant *v.* Clinton Tel. Co., 130 Wis. 533, 110 N. W. 423.

71. Burton *v.* Cumberland Tel., etc., Co., (Ky. 1909) 118 S. W. 287; Cumberland Tel., etc., Co. *v.* Warner, 79 S. W. 199, 25 Ky. L. Rep. 1843; Kyes *v.* Valley Tel. Co., 132 Mich. 281, 93 N. W. 623; Johnson *v.* Northwestern Tel. Exch. Co., 54 Minn. 37, 55 N. W. 829; Harton *v.* Forest City Tel. Co., 146 N. C. 429, 59 S. E. 1022, 14 L. R. A. N. S. 956.

72. *Georgia.*— Southern Bell Tel., etc., Co. *v.* Howell, 124 Ga. 1050, 53 S. E. 577; Western Union Tel. Co. *v.* Griffith, 111 Ga. 551, 36 S. E. 859, in hotel court-yard.

Louisiana.— Simmons *v.* Shreveport Gas, etc., Co., 116 La. 1033, 41 So. 248.

Missouri.— Politowitz *v.* Citizens' Tel. Co., 123 Mo. App. 77, 99 S. W. 756.

New Jersey.— New York, etc., Tel. Co. *v.* Bennett, 62 N. J. L. 742, 42 Atl. 759.

New York.— Fox *v.* Manchester, 183 N. Y. 141, 75 N. E. 1116, 2 L. R. A. N. S. 474.

Ohio.—Burton Tel. Co. *v.* Gordon, 25 Ohio Cir. Ct. 641.

Oregon.— Carroll *v.* Grande Ronde Electric Co., 47 Oreg. 424, 84 Pac. 389, 6 L. R. A. N. S. 290; Ahern *v.* Oregon Tel., etc., Co., 24 Oreg. 276, 33 Pac. 403, 35 Pac. 549, 22 L. R. A. 635.

Texas.— Citizens' Tel. Co. *v.* Thomas, 45 Tex. Civ. App. 20, 99 S. W. 879.

United States.—Henning *v.* Western Union Tel. Co., 41 Fed. 864.

73. *Alabama.*— Home Tel. Co. *v.* Fields, 150 Ala. 306, 43 So. 711 (abandoned line); Postal Tel. Cable Co. *v.* Jones, 133 Ala. 217, 32 So. 500 (two days).

or telephone company is not, however, an insurer against injury, but is only required to exercise reasonable care according to the danger of injury,[74] and will not be liable for injuries where it was not negligence either in the construction or maintenance of its line,[75] or where its negligence was not the proximate cause of the injury complained of,[76] or the injured party was guilty of contributory negligence,[77] or was a person to whom the company owed no duty in regard to the matter complained of.[78] Where defects or dangerous conditions have arisen from storms or other causes other than the acts of the company, the company is entitled to a

Arkansas.— Jacks *v.* Reeves, 78 Ark. 426, 95 S. W. 781, two days.

Indiana.— Central Union Tel. Co. *v.* Sokola, 34 Ind. App. 429, 73 N. E. 143, five months.

Kentucky.— West Kentucky Tel. Co. *v.* Pharis, 78 S. W. 917, 25 Ky. L. Rep. 1838, fourteen days.

Michigan.— Friesenhan *v.* Michigan Tel. Co., 134 Mich. 292, 96 N. W. 501, four days.

Texas.— Texas, etc., Tel. Co. *v.* Prince, 36 Tex. Civ. App. 462, 82 S. W. 327; Adams *v.* Weakley, 35 Tex. Civ. App. 371, 80 S. W. 411.

Virginia.— Lynchburg Tel. Co. *v.* Booker, 103 Va. 594, 50 S. E. 148, three days.

74. Heidt *v.* Southern Tel., etc., Co., 122 Ga. 474, 50 S. E. 361; Ward *v.* Atlantic, etc., Tel. Co., 71 N. Y. 81, 27 Am. Rep. 10.

75 Heidt *v.* Southern Tel., etc., Co., 122 Ga. 474, 50 S. E. 361; Cumberland Tel., etc., Co. *v.* Coats, 100 Ill. App. 519; Chalmers *v.* Paterson, etc., Tel. Co., 66 N. J. L. 41, 48 Atl. 993; Quill *v.* Empire State Tel., etc., Co., 159 N. Y. 1, 53 N. E. 679; Ward *v.* Atlantic, etc., Tel. Co., 71 N. Y. 81, 27 Am. Rep. 10; Fitch *v.* Central New York Tel., etc., Co., 42 N. Y. App. Div. 321, 59 N. Y. Suppl. 140; Allen *v.* Atlantic, etc., Tel. Co., 21 Hun (N. Y.) 22; Brinckhard *v.* Western Union Tel. Co., 12 N. Y. Suppl. 534.

Under the Massachusetts statutes telegraph and telephone companies are liable for injuries caused by their poles, wires, or other apparatus irrespective of the question of negligence (Riley *v.* New England Tel., etc., Co., 184 Mass. 150, 68 N. E. 17); although the statute does not preclude the right of such a company to interpose the defense of contributory negligence on the part of the person injured (Riley *v.* New England Tel., etc., Co., *supra*).

Use of streets.— A telephone company having a right to construct its line in a street has also the right to use thereon at needful places suitable appliances for this purpose, and is not liable for injuries caused by a horse taking fright at a reel with lead pipe coiled thereon which the company had placed next to the sidewalk for the purpose of stringing the pipe on poles. Simonds *v.* Maine Tel., etc., Co., 104 Me. 440, 72 Atl. 175.

Ownership or control of wire.—In an action for an injury due to plaintiff's tripping over a wire lying concealed in the grass, he cannot recover in the absence of proof that defendant company owned or was in control of the wire at the time of the injury. Lee *v.* Maryland Tel., etc., Co., 97 Md. 692, 55 Atl. 680.

Wires of another company.— Where a telegraph company permits a messenger service company to string wires on its poles, and the two companies occupy toward each other only the relation of licensor and licensee, the telegraph company is not liable for the negligence of the messenger service company in permitting its wire to fall to the pavement and remain there to the injury of a passer-by. Holmes *v.* Union Tel., etc., Co., 16 N. Y. Suppl. 563.

76. Burton *v.* Cumberland Tel., etc., Co., (Ky. 1909) 118 S. W. 287; Leeds *v.* New York Tel. Co., 178 N. Y. 118, 70 N. E. 219 [*reversing* 79 N. Y. App. Div. 121, 80 N. Y. Suppl. 114 (*reversing* 64 N. Y. App. Div. 484, 72 N. Y. Suppl. 250)]; Allen *v.* Atlantic, etc., Tel. Co., 21 Hun (N. Y.) 22; Harton *v.* Forest City Tel. Co., 146 N. C. 429, 59 S. E. 1022, 14 L. R. A. N. S. 956.

77. Bergin *v.* Southern New England Tel. Co., 70 Conn. 54, 38 Atl. 888, 39 L. R. A. 192; Citizens' Tel. Co. *v.* Westcott, 124 Ky. 684, 99 S. W. 1153, 30 Ky. L. Rep. 922; Randall *v.* North Western Tel. Co., 54 Wis. 140, 11 N. W. 419, 41 Am. St. Rep. 17; Henning *v.* Western Union Tel. Co., 41 Fed. 864.

Not contributory negligence.— A person traveling along a road crossed by a telephone line is not bound to anticipate danger and to look to see if there is danger before passing under the wire. Weaver *v.* Dawson County Mut. Tel. Co., 82 Nebr. 696, 118 N. W. 650, 22 L. R. A. N. S. 1189.

78. Morris *v.* Rounsaville, 132 Ga. 462, 64 S. E. 473 (holding that where a telephone company permits a person for his own convenience to climb one of its poles to remove a wire, in order to facilitate the moving of a house across the highway, the company is not liable for an injury sustained by such person while so doing either on the ground that the pole was constructed without authority or on the ground that it was in a rotten condition, since the company is under no duty to keep its poles in a safe condition for persons to climb for such purpose); Cumberland Tel., etc., Co. *v.* Martin, 116 Ky. 554, 76 S. W. 394, 77 S. W. 718, 25 Ky. L. Rep. 787, 105 Am. St. Rep. 229, 63 L. R. A. 469 (holding that a telephone company is not liable for an injury to a person who takes refuge during a storm in a building to which one of its wires is attached and is injured by lightning which strikes one of its poles and is conducted over a wire negligently maintained over the metal roof of the building,

reasonable time to discover and remedy them,[79] and it will not be liable for resulting injuries where the defect or condition has not existed for a sufficient length of time to charge the company with negligence.[80]

b. Injuries to Property — (i) *In General.* A telegraph or telephone company is liable, not only for personal injuries,[81] but also for injuries to property caused by the negligent or improper manner of constructing or maintaining its line.[82] It must appear, however, that the company was negligent,[83] and that such negligence was the proximate cause of the injury.[84]

(ii) *Injury to Trees.* A telegraph or telephone company has no right to go upon private property and cut or trim trees without the owner's consent,[85] although such cutting or trimming is merely of branches which overhang a street or highway,[86] and if it does so it will be liable in trespass.[87] It seems also to be

plaintiff being at most a bare licensee to whom defendant owed no duty in this regard).

79. Heidt *v.* Southern Tel., etc., Co., 122 Ga. 474, 50 S. E. 361; Cumberland Tel., etc., Co. *v.* Pierson, 170 Ind. 543, 84 N. E. 1088; Harton *v.* Forest City Tel. Co., 146 N. C. 429, 59 S. E. 1022, 14 L. R. A. N. S. 956.

80. Heidt *v.* Southern Tel., etc., Co., 122 Ga. 474, 50 S. E. 361; Cumberland Tel., etc., Co. *v.* Pierson, 170 Ind. 543, 84 N. E. 1088; Ward *v.* Atlantic, etc., Tel. Co., 71 N. Y. 81, 27 Am. Rep. 10; Fitch *v.* Central New York Tel., etc., Co., 42 N. Y. App. Div. 321, 59 N. Y. Suppl. 140; Harton *v.* Forest City Tel. Co., 146 N. C. 429, 59 S. E. 1022, 14 L. R. A. N. S. 956.

81. See *supra*, II, D, 1, a.

82. *Alabama.*— McKay *v.* Southern Bell Tel., etc., Co., 111 Ala. 337, 19 So. 695, 56 Am. St. Rep. 59, 31 L. R. A. 589, injury to horse by a fallen wire charged by contact with trolley wire.

Indiana.— Merchants' Mut. Tel. Co. *v.* Hirschman, 43 Ind. App. 283, 87 N. E. 238, obstructing access to property by improper location of telephone pole.

Michigan.— Hovey *v.* Michigan Tel. Co., 124 Mich. 607, 83 N. W. 600, injury to horse by wire suspended across highway.

New York.— Blanchard *v.* Western Union Tel. Co., 60 N. Y. 510, injury to vessel by improperly constructed cable.

Virginia.— Richmond, etc., R. Co. *v.* Rubin, 102 Va. 809, 47 S. E. 834, burning of plaintiff's store as result of electricity from defendant's high tension wire communicated through broken telephone wires.

Wisconsin.— Jackson *v.* Wisconsin Tel. Co., 88 Wis. 243, 60 N. W. 430, 26 L. R. A. 101, destruction of plaintiff's barn by fire, caused by lightning conducted over defendant's wire.

United States.— Stephens, etc., Transp. Co. *v.* Western Union Tel. Co., 22 Fed. Cas. No. 13,371, 8 Ben. 502, injury to vessel by cable improperly maintained.

83. South Western Tel., etc., Co. *v.* Morris, (Tex. Civ. App. 1907) 106 S. W. 426; South Western Tel., etc., Co. *v.* Ingrando, 27 Tex. Civ. App. 400, 65 S. W. 1085, holding that the company will not be liable for an injury to a building by a falling pole, where it is shown that the pole was blown down against the building by a storm of unprecedented violence and that the pole was sufficient under ordinary conditions for the purpose for which it was used.

84. South Western Tel., etc., Co. *v.* Morris, (Tex. Civ. App. 1907) 106 S. W. 426, where it was held that there was no evidence that defendant's wire was the cause of lightning striking a horse.

85. *Illinois.*— Western Union Tel. Co. *v.* Satterfield, 34 Ill. App. 386, 2 Am. Electric Cas. 296.

Louisiana.— Tissot *v.* Great Southern Tel., etc., Co., 39 La. Ann. 996, 3 So. 261, 4 Am. St. Rep. 248.

Mississippi.— Clay *v.* Postal Tel. Cable Co., 70 Miss. 406, 11 So. 658.

New York.— Van Siclen *v.* Jamaica Electric Light Co., 45 N. Y. App. Div. 1, 61 N. Y. Suppl. 210 [*affirmed* in 168 N. Y. 650, 61 N. E. 1135].

Tennessee.— Cumberland Tel., etc., Co. *v.* Shaw, 102 Tenn. 313, 52 S. W. 163; Cumberland Tel., etc., Co. *v.* Poston, 94 Tenn. 696, 30 S. W. 1040; Memphis Bell Tel. Co. *v.* Hunt, 16 Lea 456, 1 S. W. 159, 57 Am. Rep. 237.

Texas.— Southwestern Tel., etc., Co. *v.* Branham, (Civ. App. 1903) 74 S. W. 949.

Canada.— Gilchrist *v.* Dominion Tel. Co., 19 N. Brunsw. 553; Roy *v.* Great Northwestern Tel. Co., 2 Quebec Super. Ct. 135.

86. Tissot *v.* Great Southern Tel., etc., Co., 39 La. Ann. 996, 3 So. 261, 41 Am. St. Rep. 248; Memphis Bell Tel. Co. *v.* Hunt, 16 Lea (Tenn.) 456, 1 S. W. 159, 57 Am. Rep. 237; Southwestern Tel., etc., Co. *v.* Branham, (Tex. Civ. App. 1903) 74 S. W. 949; Roy *v.* Great Northwestern Tel. Co., 2 Quebec Super. Ct. 135.

Regardless of the respective rights of telegraph and telephone companies and abutting landowners as to the use of sidewalks along a street, such a company has no right to go upon the land of an abutting owner for the purpose of cutting off overhanging branches without his consent. Southwestern Tel., etc., Co. *v.* Branham, (Tex. Civ. App. 1903) 74 S. W. 949; Roy *v.* Great Northwestern Tel. Co., 2 Que' c Super. Ct. 135.

87. Western Union Tel. Co. *v.* Satterfield, 34 Ill. App. 386; Clay *v.* Postal Tel.-Cable Co., 70 Miss. 406, 11 So. 658; Memphis Bell Tel. Co. *v.* Hunt, 16 Lea (Tenn.) 456, 1 S. W. 159, 57 Am. Rep. 237; Roy *v.* Great Northwestern Tel. Co., 2 Quebec Super. Ct. 135.

uniformly held that a telegraph or telephone company will be liable in damages to an abutting landowner for any unnecessary or wanton injury to trees which overhang or are growing upon a sidewalk, street, or highway in front of his premises;[88] but as to its liability where there is no more cutting or trimming than is reasonably necessary for the proper construction or maintenance of its line, the authorities are directly conflicting,[89] it being held in some cases that the abutting owner is entitled to damages,[90] and in others that he is not;[91] the question, according to some of the cases, being in the absence of statute dependent upon whether the use of the street by the telegraph or telephone company is to be considered as a proper and ordinary use or as an additional servitude,[92] as to which there is a direct conflict of authority in different jurisdictions.[93] The fact that an abutting owner is entitled to damages does not, however, necessarily entitle him to an injunction.[94] Telegraph and telephone companies are also within the applica-

88. *Alabama.*— See Southern Bell Tel. Co. *v.* Francis, 109 Ala. 224, 19 So. 1, 55 Am. St. Rep. 930, 131 L. R. A. 193.

Louisiana.— Tissot *v.* Great Southern Tel., etc., Co., 39 La. Ann. 996, 3 So. 261, 4 Am. St. Rep. 248.

Michigan.— See Wyant *v.* Central Tel. Co., 123 Mich. 51, 81 N. W. 928, 81 Am. St .Rep. 155, 47 L. R. A. 497.

Nebraska.— Bronson *v.* Albion Tel. Co., 67 Nebr. 111, 93 N. W. 201, 60 L. R. A. 426.

New York.— Van Siclen *v.* Jamaica Electric Light Co., 45 N. Y. App. Div. 1, 61 N. Y. Suppl. 210 [*affirmed* in 168 N. Y. 650, 61 N. E. 1135.

Tennessee.— Memphis Bell Tel. Co. *v.* Hunt, 16 Lea 456, 1 S. W. 159, 57 Am. Rep. 237.

Canada.— Gilchrist *v.* Dominion Tel. Co., 19 N. Brunsw. 553.

Even if he is not the owner, if he has planted the trees in front of his premises with the acquiescence of the city he may recover for their wrongful or wilful cutting. Osborne *v.* Auburn Tel. Co., 111 N. Y. App. Div. 702, 97 N. Y. Suppl. 874.

89. See Bronson *v.* Albion Tel. Co., 67 Nebr. 111, 93 N. W. 201, 60 L. R. A. 426, and cases cited *infra*, notes 90–92.

90. *Connecticut.*— Bradley *v.* Southern New England Tel. Co., 66 Conn. 559, 34 Atl. 499, 32 L. R. A. 280, under statutory provision.

Illinois.— Board of Trade Tel. Co. *v.* Barnett, 107 Ill. 507, 47 Am. Rep. 453.

Mississippi.— Cumberland Tel., etc., Co. *v.* Cassedy, 78 Miss. 666, 29 So. 762.

Missouri.— Cartwright *v.* Liberty Tel. Co., 205 Mo. 126, 103 S. W. 982, 12 L. R. A. N. S. 1125; State *v.* Graeme, 130 Mo. App. 138, 108 S. W. 1131; McAntire *v.* Joplin Tel. Co., 75 Mo. App. 535.

Nebraska.— Bronson *v.* Albion Tel. Co., 67 Nebr. 111, 93 N. W. 201, 60 L. R. A. 426.

New York.— Osborne *v.* Auburn Tel. Co., 111 N. Y. App. Div. 702, 97 N. Y. Suppl. 874.

Ohio.— See Daily *v.* State, 51 Ohio St. 348, 37 N. E. 710, 46 Am. St. Rep. 578, 24 L. R. A. 724, injury to ornamental trees in highway under Ohio statutes.

Pennsylvania.— Marshall *v.* American Tel., etc., Co., 16 Pa. Super. Ct. 615, under statutory provision.

Canada.— See O'Connor *v.* Nova Scotia Tel. Co., 22 Can. Sup. Ct. 276; Gilchrist *v.* Dominion Tel. Co., 19 N. Brunsw. 553; Hodgins *v.* Toronto, 19 Ont. App. 537. *Compare* O'Connor *v.* Nova Scotia Tel. Co., 23 Nova Scotia 509.

In Canada a telegraph company if authorized by statute may, without liability to an abutting owner, cut off overhanging branches which interfere with the working of its line, provided it does not go upon his land and thus commit a trespass in so doing. Roy *v.* Great Northwestern Tel. Co., 2 Quebec Super. Ct. 135.

91. Southern Bell Tel. Co. *v.* Francis, 109 Ala. 224, 19 So. 1, 55 Am. St. Rep. 930, 31 L. R. A. 193; Wyant *v.* Central Tel. Co., 123 Mich. 51, 81 N. W. 928, 81 Am. St. Rep. 155, 47 L. R. A. 497; Southern Bell Tel., etc., Co. *v.* Constantine, 61 Fed. 61, 9 C. C. A. 359, 4 Am. Elec. Cas. 219. See also Western Union Tel. Co. *v.* Rich, 19 Kan. 517, 27 Am. Rep. 159, 1 Am. Elec. 271.

If a telephone company is required by ordinance to move its poles and wires from a street to the adjoining sidewalk, and in so doing it is necessary to trim trees, the company is not liable in trespass therefor to an abutting owner. Southern Bell Tel. Co. *v.* Francis, 109 Ala. 224, 19 So. 1, 55 Am. St. Rep. 930, 31 L. R. A. 193; Southern Bell Tel., etc., Co. *v.* Constantine, 61 Fed. 61, 9 C. C. A. 359.

The company need not give the owner an opportunity to cut or trim the trees himself unless required to do so by statute. Wyant *v.* Central Tel. Co., 123 Mich. 51, 81 N. W. 928, 81 Am. St. Rep. 155, 47 L. R. A. 497.

92. Wyant *v.* Central Tel. Co., 123 Mich. 51, 81 N. W. 928, 81 Am. St. Rep. 155, 47 L. R. A. 497; Bronson *v.* Albion Tel. Co., 67 Nebr. 111, 93 N. W. 201, 60 L. R. A. 426. But see Southern Bell Tel. Co. *v.* Francis, 109 Ala. 224, 19 So. 1, 55 Am. St. Rep. 930, 31 L. R. A. 193; McAntire *v.* Joplin Tel. Co., 75 Mo. App. 535, holding that an abutting owner is entitled to damages for injuries to trees growing inside of the curb line of the street, although the company is proceeding pursuant to lawful authority, and conceding that such use of the street is not an additional servitude.

93. See EMINENT DOMAIN, 15 Cyc. 681, 682.

94. Bronson *v.* Albion Tel. Co., 67 Nebr.

tion of a statute making it an indictable offense for any person to cut down or destroy the fruit or shade trees of another.[95]

2. Actions For Injuries — a. Pleading. As in other civil actions,[96] the complaint must state facts sufficient to constitute a cause of action,[97] and the answer must be responsive to the complaint or bill.[98] A complaint based upon a breach on the part of defendant of the terms of a town ordinance imposing upon defendant the duty of maintaining its wires so as not to interfere with public travel must show the ordinance and its breach,[99] and where negligence is the gist of the action it must be properly alleged,[1] as must be also freedom from contributory negligence where it is inferable from other allegations in plaintiff's complaint that he was guilty of contributory negligence;[2] but defendant's negligence may be averred in general terms,[3] as may be also defendant's duty to keep its wires out of the way of travelers along public roads.[4]

b. Evidence — (i) *Presumptions and Burden of Proof.* In an action against a telegraph or telephone company for injuries resulting from construction or maintenance, the burden is on plaintiff to prove that the injury was caused by the fault or negligence of defendant.[5] Upon the question as to whether the burden is upon plaintiff to prove freedom from contributory negligence, the same difference of opinion is noted that arises in negligence cases generally;[6] and accordingly it has been held on the one hand that the burden is on plaintiff to prove that there was no contributory fault or negligence on his part,[7] and on the other that while the burden of proof is upon plaintiff to prove that the negligence of defendant caused the injury, plaintiff is not bound to prove affirmatively, as part of his case, that there was no contributory negligence.[8] Where a telephone company is sued for damages caused by the falling of a wire, the falling of the wire must be explained by evidence showing that it was unavoidable, and the burden

111, 93 N. W. 201, 60 L. R. A. 426, holding that unless special circumstances authorizing such relief are shown an injunction will not be granted but the abutting owner will be left to his remedy at law.

95. Russellville Home Tel. Co. *v.* Com., 109 S. W. 340, 33 Ky. L. Rep. 132, holding that oak and hickory trees growing along the border of a public highway upon the land of an abutting owner are shade trees within the application of the statute.

96. See Pleading, 31 Cyc. 100.

97. Roberts *v.* Wisconsin Tel. Co., 77 Wis. 589, 46 N. W. 820, 20 Am. St. Rep. 143.

Averment held insufficient to charge defendant telephone company with notice of defective condition of wire over a street, and to show the lapse of a reasonable time in which to make proper repairs, in the absence of any facts tending to cause the company to apprehend that its wires might need repairs, or that it had an opportunity to learn of the defect, and in the absence of a general charge of negligence see Cumberland Tel., etc., Co. *v.* Pierson, 170 Ind. 543, 84 N. E. 1088.

98. American Tel., etc., Co. *v.* Morgan County Tel. Co., 138 Ala. 597, 36 So. 178, 100 Am. St. Rep. 53, suit by one company against another to enjoin the latter from erecting poles on the same side of the street, where an answer tending to show that complainant's purpose was to maintain a monopoly was held not responsive.

99. Cumberland Tel., etc., Co. *v.* Pierson, 170 Ind. 543, 84 N. E. 1088.

1. Leeds *v.* New York Tel. Co., 32 Misc. (N. Y.) 671, 66 N. Y. Suppl. 457, allegation of negligence in attaching wire to brick chimney held insufficient.

2. Moore *v.* East Tennessee Tel. Co., 142 Fed. 965, 74 C. C. A. 227.

3. Postal Tel. Cable Co. *v.* Jones, 133 Ala. 217, 32 So. 500, complaint held to state the negligence relied on with sufficient particularity. See also Cumberland Tel., etc., Co. *v.* Hunt, 108 Tenn. 697, 69 S. W. 729.

4. Postal Tel. Cable Co. *v.* Jones, 133 Ala. 217, 32 So. 500, holding also that the court takes cognizance of the duty even without averment.

5. Dickey *v.* Maine Tel. Co., 43 Me. 492 (injury by contact with telegraph wire across highway); Pennsylvania Tel. Co. *v.* Varnau, (Pa. 1888) 15 Atl. 624 (death caused by sagging telephone wire across highway).

6. See Negligence, 29 Cyc. 601.

7. Dickey *v.* Maine Tel. Co., 43 Me. 492, injury by contact with telegraph wire across highway.

Facts held not to raise presumption of contributory negligence see Pennsylvania Tel. Co. *v.* Varnau, (Pa. 1888) 15 Atl. 624.

8. Pennsylvania Tel. Co. *v.* Varnau, (Pa. 1888) 15 Atl. 624, holding that plaintiff's testimony must not show that there was contributory negligence, but that if it does not, and such negligence is alleged by defendant, it is a part of the defense and the burden of proof is upon defendant.

Facts held not to show plaintiff guilty of contributory negligence as a matter of law see Chant *v.* Clinton Tel. Co., 130 Wis. 533, 110 N. W. 423.

of proving that fact is on defendant,[9] and proof of a defect in a telephone line and injury therefrom to plaintiff raises a presumption of negligence on the part of defendant.[10]

(II) *ADMISSIBILITY.* The rule applicable in civil actions generally, that evidence to be admissible must be relevant,[11] applies to actions against telegraph or telephone companies for injuries from construction or maintenance.[12] In an action for damages for injury caused by a sagging telephone wire stretched across the road, evidence is admissible to show that defendant, shortly after the accident, made its line very much higher at the point where the accident took place by putting in larger poles and stretching the wire,[13] as is also evidence that a servant of defendant received orders to change the pole and wire,[14] and evidence is also admissible as to the height of the wire a few days before the accident;[15] and in an action for injuries from defendant's negligence in permitting a telephone wire to be down and lying across a highway at a certain spot, proof that defendant's poles and wire were down at other places within a few miles of the place of the injury and at other times within a few months before the time of the injury was held to be properly admitted to show negligence;[16] but where a question is raised as to the soundness of poles which fell and suspended wires across the highway, evidence is not admissible as to the condition of other poles a considerable distance away without evidence to show that they were of the same kind, put up at the same time and equally exposed;[17] and, similarly, in an action for personal injuries from a low hanging wire on a highway, evidence is inadmissible as to the condition of the wire some months subsequent to the time of the injury.[18]

(III) *WEIGHT AND SUFFICIENCY.* The rules governing the weight and sufficiency of evidence in civil actions generally,[19] and in so far as they are pertinent the rules relating to the weight and sufficiency of evidence in actions for negligence,[20] are applicable to actions against telegraph or telephone companies for injuries resulting from maintenance or construction.[21] The fact that a tele-

9. Arkansas Tel. Co. *v.* Ratteree, 57 Ark. 429, 21 S. W. 1059.

10. Jacks *v.* Reeves, 78 Ark. 426, 95 S. W. 781.

11. See EVIDENCE, 16 Cyc. 1110 *et seq.*

12. Western Union Tel. Co. *v.* Levi, 47 Ind. 552; Southwestern Tel., etc., Co. *v.* Whiteman, 36 Tex. Civ. App. 163, 81 S. W. 76.

Evidence held admissible see Brunke *v.* Missouri, etc., Tel. Co., 115 Mo. App. 36, 90 S. W. 753 (an action for injury to a pedestrian by a tool thrown from one lineman to another, in which evidence was admitted to show that it was customary to pass tools by means of a line); Leeds *v.* New York Tel. Co., 79 N. Y. App. Div. 121, 80 N. Y. Suppl. 114 [*reversed* on other grounds in 178 N. Y. 118, 70 N. E. 219] (holding that, in an action for injuries sustained through defendant's alleged negligence in maintaining a wire attached to a defective chimney, evidence of the defective nature of the mortar in the chimney occasioned by lapse of time and action of the elements, and of the appearance of the brick and mortar when the chimney fell to the street, was competent to show the actual existing conditions).

13. Pennsylvania Tel. Co. *v.* Varnau, (Pa. 1888) 15 Atl. 624.

14. Pennsylvania Tel. Co. *v.* Varnau, (Pa. 1888) 15 Atl. 624.

15. Pennsylvania Tel. Co. *v.* Varnau, (Pa. 1888) 15 Atl. 624.

16. Randall *v.* Northwestern Tel. Co., 54 Wis. 140, 11 N. W. 419, 41 Am. Rep. 17.

17. Western Union Tel. Co. *v.* Levi, 47 Ind. 552.

18. Hannum *v.* Hill, 52 W. Va. 166, 43 S. E. 223.

19. See EVIDENCE, 17 Cyc. 753.

20. See NEGLIGENCE, 29 Cyc. 753.

21. See the cases cited *infra*, this note; and notes 22, 23.

Evidence held insufficient: To rebut inference of negligence on defendant's part arising from proof of a defect in the line and injury to travelers. Jack *v.* Reeves, 78 Ark. 426, 95 S. W. 781. To show in an injunction suit by one telephone company against another that the manner of construction of defendant's system on the same side of the street, with the wires above complainant's, was an unnecessary or unreasonable interference with complainant's right. Chicago Tel. Co. *v.* Northwestern Tel. Co., 199 Ill. 324, 65 N. E. 329. To show in an action to enjoin defendants from obstructing telephone cross arms and appliances and cutting down telephone poles on ground alleged to be a part of a public street of a town, that the land was a street, or that the town trustees had granted plaintiff the right to erect poles thereon, or that defendant had cut or otherwise damaged any poles erected in the street. Heck *v.* Greenwood Tel. Co., 35 Ind. App. 244, 73 N. E. 960. To justify a finding that defendants owned or were in control of a telephone wire at the time of an injury caused by tripping over it. Lee *v.* Maryland Tel., etc., Co., 97 Md. 692, 55 Atl. 680. To require a finding

graph line crossing a highway is allowed to swing down so low as to obstruct ordinary travel is evidence of some negligence on the part of the telegraph company, and in the absence of anything to explain it will warrant a verdict against it for damages for injuries sustained by one who, using due care, was thrown from his vehicle by means of the wire,[22] and proof of a defect in the line and consequent injury to a traveler is sufficient to raise an inference of negligence on the part of a telephone company.[23]

c. Trial — (i) *Instructions.* The parties are upon request entitled to full instructions correctly stating the law applicable to the case as made by the pleadings.[24] The instructions must conform to the issues and evidence,[25] and must not be misleading,[26] but one clear and full submission of an issue is all that is required.[27] An exception to an instruction cannot be sustained where that given was at least as favorable as that asked,[28] and it is not error to refuse to give a requested instruction the substance of which has already been given in other instructions.[29] Where the complaint charges a malicious and wilful trespass, and the answer denies merely the words of aggravation, plaintiff is entitled to a peremptory instruction for the actual damage done his property.[30]

that the falling of a telephone pole was caused by the manner in which the guy wires were removed. Johnson *v.* Northwestern Tel. Exch., 54 Minn. 37, 55 N. W. 829. To connect defendant with an injury to plaintiff by an explosion in a street near defendant's manhole. Brinckhard *v.* Western Union Tel. Co., 12 N. Y. Suppl. 534. To show negligence on the part of defendant in not discovering a fallen wire and remedying the defect before the accident. Fitch *v.* Central New York Tel., etc., Co., 42 N. Y. App. Div. 321, 59 N. Y. Suppl. 140. To prove in an action against a telegraph company for trespass on plaintiff's land that defendant obtained a permit so to do, fraudulently, or that it had injuriously exercised the right in a negligent manner. Mason *v.* Postal Tel. Cable Co., 71 S. C. 153, 50 S. E. 782.

Evidence held sufficient: To warrant a finding that the use of a rotten cross arm was negligence proximately causing plaintiff's injuries. Postal Tel. Cable Co. *v.* Jones, 133 Ala. 217, 32 So. 500. To justify a verdict for plaintiff in an action by the owner of a building against a telephone company for destruction of a building by fire caused by electricity conducted to the structure by a guy wire. Wells *v.* Northeastern Tel. Co., 101 Me. 371, 64 Atl. 648. To justify a finding that defendant was negligent in having a guy wire along a fence so nearly the color of the fence as to render the wire practically indiscernible. Louisville Home Tel. Co. *v.* Gasper, 123 Ky. 128, 93 S. W. 1057, 29 Ky. L. Rep. 578, 9 L. R. A. N. S. 548. To justify a finding that defendant was negligent in sinking a stone to which was attached an anchor wire, so close to the highway that, being not easily seen, it injured a traveler. Walther *v.* American Dist. Tel. Co., 11 Misc. (N. Y.) 71, 32 N. Y. Suppl. 751. To justify a recovery in an action against a telephone company for injury to the wife of a patron by lightning entering the house through the failure of the company to provide a proper lightning arrester. Southern Tel., etc., Co. *v.* Evans, (Tex. Civ. App. 1909) 116 S. W. 418. To authorize a finding of actionable negligence in an action against a telephone company for injuries to a traveler on a highway caused by his horse coming in contact with a broken wire in the highway. Bishop *v.* Rocky Mountain Bell Tel. Co., 33 Utah 464, 94 Pac. 976. To prove that plaintiff's building was set on fire by a stroke of lightning conducted to the building by defendant's telephone wire. Jackson *v.* Wisconsin Tel. Co., 88 Wis. 243, 60 N. W. 430, 26 L. R. A. 101.

22. Thomas *v.* Western Union Tel. Co., 100 Mass. 156.

23. Jacks *v.* Reeves, 78 Ark. 426, 95 S. W. 781.

24. Adams *v.* Weakley, 35 Tex. Civ. App. 371, 80 S. W. 411.

25. Miles *v.* Postal Tel. Cable Co., 55 S. C. 403, 33 S. E. 493.

26. Jacks *v.* Reeves, 78 Ark. 426, 95 S. W. 781, holding that an instruction, in an action for injuries received by a traveler on a highway coming in contact with a telephone wire dragging over the highway, due to a broken pole, that plaintiff, in order to recover, must prove that the accident occurred through the negligence of the owner of the telephone line was misleading, because not qualified by a charge that the evidence of the accident and injury flowing therefrom, when the occurrence was not out of the usual course, was *prima facie* evidence of negligence, and shifted the burden to defendant to prove that the injury was not caused by any want of care on his part.

Instruction held to properly present the issue of negligence charged in the petition see Merritt *v.* Kinloch Tel. Co., 215 Mo. 299, 115 S. W. 19.

27. Adams *v.* Weakley, 35 Tex. Civ. App. 371, 80 S. W. 411, where the court was held to have erred in repeatedly submitting to the jury the issue of contributory negligence.

28. Burnett *v.* Postal Tel. Cable Co., 71 S. C. 146, 50 S. E. 780.

29. Miles *v.* Postal Tel. Cable Co., 55 S. C. 403, 33 S. E. 493.

30. Johns *v.* Cumberland Tel., etc., Co., 80 S. W. 165, 25 Ky. L. Rep. 2074.

(II) *Questions For Court or Jury.* As in other civil actions,[31] if the evidence is conflicting or such that different conclusions might reasonably be drawn therefrom, the issue presented thereby is for the jury;[32] but where the facts are admitted or shown without conflict, and the conclusion is clear and certain, the question is for the court;[33] nor will issues be submitted to the jury where the evidence is such that a finding thereon would not be sustained,[34] or where no evidence is introduced from which the jury could determine the pecuniary loss suffered by plaintiff in consequence of the injury complained of;[35] but if the evidence is such that a finding in favor of either party would be sustained, a nonsuit will not be granted.[36] So it is ordinarily a question for the jury whether the telegraph or telephone company was negligent,[37] and if so whether such negligence was the proximate cause of the injury complained of,[38] and also whether the person injured was guilty of contributory negligence.[39]

d. Damages. Exemplary damages cannot be awarded where an act of the

31. See Negligence, 29 Cyc. 627 *et seq.*; Trial.

32. Bevis *v.* Vanceburg Tel. Co., 121 Ky. 177, 89 S. W. 126, 28 Ky. L. Rep. 142 (question whether pole was a nuisance and unauthorized by statute); Harton *v.* Forest City Tel. Co., 146 N. C. 429, 59 S. E. 1022, 14 L. R. A. N. S. 956; Burnett *v.* Postal Tel. Cable Co., 71 S. C. 146, 50 S. E. 780 (an action of trespass against a telegraph company, for entry on plaintiff's land, in which it was held to be a question for the jury whether money which had passed between the parties was payment for the permit to enter upon the land).

33. Citizens' Tel. Co. *v.* Westcott, 124 Ky. 684, 99 S. W. 1153, 30 Ky. L. Rep. 922; Harton *v.* Forest City Tel. Co., 146 N. C. 429, 59 S. E. 1022, 14 L. R. A. N. S. 956.

34. Shinzel *v.* Philadelphia Bell Tel. Co., 31 Pa. Super. Ct. 221.

35. Shinzel *v.* Philadelphia Bell Tel. Co., 31 Pa. Super. Ct. 221. See also Barber *v.* Hudson River Tel. Co., 105 N. Y. App. Div. 154, 93 N. Y. Suppl. 993.

36. Burnett *v.* Postal Tel. Cable Co., 71 S. C. 146, 50 S. E. 780, holding that in an action against a telegraph company for trespass on plaintiff's land it was proper to refuse a nonsuit where the evidence of plaintiff was that the permit under which defendant claimed to have entered was fraudulently obtained.

37. *Alabama.*— Postal Tel. Cable Co. *v.* Jones, 133 Ala. 217, 32 So. 500.

Iowa.— Crawford *v.* Standard Tel. Co., 139 Iowa 331, 115 N. W. 878, holding that in an action against a telephone company maintaining its wires along the public highway for injuries sustained by a traveler coming in contact with a fallen wire, the question of the negligence of the company was for the jury, although there was evidence of an inspection two weeks before the accident and the wires were in fit condition for sending messages until the accident.

Michigan.— Friesenhan *v.* Michigan Tel. Co., 134 Mich. 292, 96 N. W. 501, sagging wire across road.

Minnesota.— Flack *v.* Western Union Tel. Co., 106 Minn. 337, 118 N. W. 1022.

New Jersey.— Campbell *v.* Delaware, etc., Tel., etc., Co., 70 N. J. L. 195, 56 Atl. 303 (question of negligence of servants of telephone company in handling a reel of wire); New York, etc., Tel. Co. *v.* Bennett, 62 N. J. L. 742, 42 Atl. 759 (where in an action against a telephone company for personal injuries to one who picked up a fallen wire, the question whether the linemen of the telephone company had been reasonably diligent in discovering the fallen wire, and in preventing probable injury, the evidence being conflicting, was held to be for the jury).

New York.— Ensign *v.* Central New York Tel., etc., Co., 79 N. Y. App. Div. 244, 79 N. Y. Suppl. 799 [*affirmed* in 179 N. Y. 539, 71 N. E. 1130], running wire under decayed tree so as to be broken down by falling limb.

Pennsylvania.— Varnau *v.* Pennsylvania Tel. Co., 5 Lanc. L. Rev. 97 [*affirmed* in (1888) 15 Atl. 624], sagging telephone wire over highway, which caused death of driver.

Texas.— South Texas Tel. Co. *v.* Tabb, (Civ. App. 1908) 114 S. W. 448.

Utah.— See Davidson *v.* Utah Independent Tel. Co., 34 Utah 249, 97 Pac. 124.

Wisconsin.— Randall *v.* Northwestern Tel. Co., 54 Wis. 140, 11 N. W. 419, 41 Am. Rep. 17.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 13.

38. Ela *v.* Postal Tel. Cable Co., 71 N. H. 1, 51 Atl. 281; Leeds *v.* New York Tel. Co., 64 N. Y. App. Div. 484, 72 N. Y. Suppl. 250 [*reversing* 32 Misc. 671, 66 N. Y. Suppl. 457]; Harton *v.* Forest City Tel. Co., 141 N. C. 455, 54 S. E. 299.

Question for court see Harton *v.* Forest City Tel. Co., 146 N. C. 429, 59 S. E. 1022, 14 L. R. A. N. S. 956.

39. *Massachusetts.*— Thomas *v.* Western Union Tel. Co., 100 Mass. 156, attempting to drive over a wire which was swinging across a highway near to the ground.

Michigan.— Friesenhan *v.* Michigan Tel. Co., 134 Mich. 292, 96 N. W. 501 (injury by driving in the daytime against telephone wire which sagged to within a few feet of the ground); Kyes *v.* Valley Tel. Co., 132 Mich. 281, 93 N. W. 623.

Nebraska.— Nebraska Tel. Co. *v.* Jones, 60 Nebr. 396, 83 N. W. 197, driving against the

telegraph or telephone company was merely negligent and not wilful or intentional,[40] particularly where the company's acts were with the consent of the city, and it does not appear that the company's employees intended to act in other than a lawful manner;[41] and only nominal damages will be allowed where a trespass was committed by the company in ignorance of the fact that it was on plaintiff's property and where it has repaired the injury complained of after the bringing of the action.[42] But where the company commits a trespass in a high-handed, malicious, and oppressive manner, punitive damages are recoverable,[43] as where a telephone company negligently and wantonly destroys ornamental trees without permission of the owner,[44] particularly if the owner has previously refused his permission and the work is constructed in his absence,[45] and over the protest of his wife,[46] and the company is not protected under such circumstances by authorization of a city official;[47] but in an action against a telegraph company by the owner of property for the wrongful cutting of shade trees growing along a highway which passes through it, an oral license from a tenant not authorized to give it, if acted on in good faith, and the instructions of the company to its servants with respect to the manner of trimming trees along its line, if given in good faith, are competent to defeat or mitigate the recovery of exemplary damages, although not competent to prevent the recovery of full compensation.[48] The measure of damages for the unnecessary cutting of trees so as to substantially injure them by a telephone or telegraph company, under a grant of the right to construct its line over and along premises and trim the trees thereon, has been held to be the difference between the value of the premises before and after the trees were cut and mutilated;[49] but, on the other hand, it has been held that the measure of damages for unreasonable cutting of trees in constructing a telephone line is the difference between the value of the land as it would have been if the cutting had been reasonable and what it was after the cutting, and not the difference between the value before and after the cutting.[50] In an action for damages for trespass in cutting a strip of woodland and erecting a telephone line, plaintiff's

stump of a telephone pole which plaintiff knew was in the roadway.

New Jersey.— Campbell *v.* Delaware, etc., Tel., etc., Co., 70 N. J. L. 195, 56 Atl. 303; New York, etc., Tel. Co. *v.* Bennett, 62 N. J. L. 742, 42 Atl. 759, picking up charged wire in street.

Pennsylvania.— Little *v.* Central Dist., etc., Tel. Co., 213 Pa. St. 229, 62 Atl. 848, riding in a wagon with feet extending beyond the side.

Texas.— Alice, etc., Tel. Co. *v.* Billingsley, 33 Tex. Civ. App. 452, 77 S. W. 255, attempting to drive between telegraph pole and two posts at the angle formed by the intersection of two streets.

Wisconsin.— Randall *v.* Northwestern Tel. Co., 54 Wis. 140, 11 N. W. 419, 41 Am. Rep. 17.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 13.

Contributory negligence as a matter of law see Citizens' Tel. Co. *v.* Westcott, 124 Ky. 684, 99 S. W. 1153, 30 Ky. L. Rep. 922.

40. Southwestern Tel., etc., Co. *v.* Whiteman, 36 Tex. Civ. App. 163, 81 S. W. 76 (trespass for placing pole in corner of unoccupied lot in ignorance of the fact that it was private property); Western Union Tel. Co. *v.* Eyser, 91 U. S. 495, 23 L. ed. 377 [*reversing* 2 Colo. 141] (low wire over street).

41. Erie Tel., etc., Co. *v.* Kennedy, 80 Tex. 71, 15 S. W. 704, action against a telephone company for tearing up plaintiff's sidewalk and cutting a hole in his awning for the purpose of setting a telephone pole.

42. Southwestern Tel., etc., Co. *v.* Whiteman, 36 Tex. Civ. App. 163, 81 S. W. 76, where under these circumstances the damages awarded were held excessive.

43. Johns *v.* Cumberland Tel., etc., Co., 80 S. W. 165, 25 Ky. L. Rep. 2074.

44. Cumberland Tel., etc., Co. *v.* Poston, 94 Tenn. 696, 30 S. W. 1040.

45. Cumberland Tel., etc., Co. *v.* Cassedy, 78 Miss. 666, 29 So. 762.

46. Cumberland Tel., etc., Co. *v.* Shaw, 102 Tenn. 313, 62 S. W. 163.

47. Cumberland Tel., etc., Co. *v.* Cassedy, 78 Miss. 666, 29 So. 762.

48. Western Union Tel. Co. *v.* Smith, 64 Ohio St. 106, 59 N. E. 890.

49. Nichols *v.* New York, etc., Tel., etc., Co., 126 N. Y. App. Div. 184, 110 N. Y. Suppl. 325.

The measure of damages for cutting a handsome shade tree in front of plaintiff's premises is not the value of the tree for timber or firewood, but the amount which its presence added to the value of the lot for any purpose in connection with which an ornamental shade tree is desirable. Hoyt *v.* Southern New England Tel. Co., 60 Conn. 385, 22 Atl. 957.

50. Meyer *v.* Standard Tel. Co., 122 Iowa 514, 98 N. W. 300.

measure of damages is properly based upon the cutting of the timber, the making of a roadway, and the maintenance of the line, to the commencement of the action;[51] but since actions for future trespasses may be maintained it is improper to allow damages for the entire value of the land taken and all damages that might accrue, upon the assumption that defendant's trespass would be permanent.[52]

E. Liability For Injury To or Interference With Lines. Where a telegraph or telephone line is lawfully maintained, damages for any tortious injury thereto, whether wilful and wanton or merely negligent, or for a technical trespass which may not involve even negligence, may be recovered in a civil action against the tort-feasor. The ordinary principles of the law of torts apply to such actions.[53] A telegraph or telephone company is also entitled to injunctive relief against an unauthorized interference with or injury to its poles, wires, or property either on the part of an individual,[54] or a municipal corporation,[55] or another telegraph or telephone company.[56] In a proper case a telegraph or telephone company may have relief by injunction against injury to its lines by induction or conduction from the lines of a high tension company not having a prior or otherwise superior right in the streets;[57] but if the latter company cannot

51. Morison *v.* American Tel., etc., Co., 115 N. Y. App. Div. 744, 101 N. Y. Suppl. 140.

52. Morison *v.* American Tel., etc., Co., 115 N. Y. App. Div. 744, 101 N. Y. Suppl. 140.

53. *Illinois.*— Dickson *v.* Kewanee Electric Light, etc., Co., 53 Ill. App. 379.

Indiana.— Williams *v.* Citizens' R. Co., 130 Ind. 71, 29 N. E. 408, 30 Am. St. Rep. 201, 15 L. R. A. 64.

Maryland.— Townsend *v.* Epstein, 93 Md. 537, 49 Atl. 629, 86 Am. St. Rep. 441, 52 L. R. A. 409.

Massachusetts.— Day *v.* Green, 4 Cush. 433.

New Hampshire.— Graves *v.* Shattuck, 35 N. H. 257, 69 Am. Dec. 536.

New Jersey.— New York, etc., Tel. Co. *v.* Dexheimer, 14 N. J. L. J. 295; Millville Traction Co. *v.* Goodwin, 53 N. J. Eq. 448, 32 Atl. 263.

North Dakota.— Northwestern Tel. Exch. Co. *v.* Anderson, 12 N. D. 585, 98 N. W. 706, 102 Am. St. Rep. 580, 65 L. R. A. 771.

Pennsylvania.— Pennsylvania Tel. Co. *v.* Varnau, (1888) 15 Atl. 624.

See also, generally, TORTS; TRESPASS.

House moving.— The question has sometimes arisen in the case of injury or interruption of the line in consequence of the operations of a house mover, and it has been held that the moving of a house along the streets of a city even pursuant to statute, and under a license from the city, is not the exercise of an ordinary street use, but an extraordinary use of the street for an unusual purpose, and as between the house mover and the telegraph or telephone company the former is liable for the damage resulting from the interruption. Northwestern Tel. Exch. Co. *v.* Anderson, 12 N. D. 585, 98 N. W. 706, 102 Am. St. Rep. 580, 65 L. R. A. 771. But see Telegraph Co. *v.* Wilt, 1 Phila. (Pa.) 270.

54. Kibbie Tel. Co. *v.* Landphére, 151 Mich. 309, 115 N. W. 244, 16 L. R. A. N. S. 689, holding that the use of streets for moving a building is an unusual and extraordinary use and is not such "other public use" as is contemplated by a statute requiring telegraph and telephone companies to so construct their lines in streets and highways as not injuriously to interfere with "other public uses" of such places, and that a telephone company may enjoin a threatened injury to its lines by the moving of a building.

55. Rock Island *v.* Central Union Tel. Co., 132 Ill. App. 248; Missouri River Tel. Co. *v.* Mitchell, 22 S. D. 191, 116 N. W. 67; Southern Bell Tel., etc., Co. *v.* Mobile, 162 Fed. 523; Morristown *v.* East Tennessee Tel. Co., 115 Fed. 304, 53 C. C. A. 132.

56. Northwestern Tel. Exch. Co. *v.* Twin City Tel. Co., 89 Minn. 495, 95 N. W. 460.

57. *Missouri.*— Western Union Tel. Co. *v.* Guernsey, etc., Electric Light Co., 46 Mo. App. 120.

Nebraska.— Nebraska Tel. Co. *v.* York Gas, etc., Light Co., 27 Nebr. 284, 43 N. W. 126.

Ohio.— Western Union Tel. Co. *v.* Champion Electric Light Co., 9 Ohio Dec. (Reprint) 540, 14 Cinc. L. Bul. 327.

Pennsylvania.— Central Pennsylvania Tel., etc., Co. *v.* Wilkesbarre, etc., R. Co., 11 Pa. Co. Ct. 417.

Vermont.— Rutland Electric Light Co. *v.* Marble City Electric Light Co., 65 Vt. 377, 26 Atl. 635, 36 Am. St. Rep. 868, 20 L. R. A. 821.

United States.— Cumberland Tel., etc., Co. *v.* United Electric R. Co., 42 Fed. 273, 12 L. R. A. 544. See also Western Union Tel. Co. *v.* Los Angeles Electric Co., 76 Fed. 178.

Canada.— Bell Tel. Co. *v.* Belleville Electric Light Co., 12 Ont. 571.

See also, generally, ELECTRICITY, 15 Cyc. 469.

An electric light company will not be enjoined from placing its wires within three or four feet of the wires of a telegraph company, if the weight of evidence is against any sensible diminution of current by induction, and it appears that the linemen will not be in danger if careful except when doing certain work, when the current of the light company must on notice be stopped. Western Union

guard against the interference except at great expense, and the telegraph or telephone company can do so by the adoption of a safe and comparatively inexpensive device, an injunction will not be granted,[58] although the telegraph or telephone company may recover the cost of procuring and installing such device.[59] A wilful and deliberate interference with or injury to the poles, wires, or other equipment of a telegraph or telephone company has been held to be indictable as malicious mischief under the common law;[60] but there are in many jurisdictions special statutes expressly defining and providing a punishment for the offense of malicious injury to telegraph or telephone lines;[61] and in many instances these statutes provide also that it shall be a criminal offense maliciously to interfere with or obstruct the transmission of messages, even without physical injury to the line.[62]

III. DUTY AS TO FURNISHING SERVICES AND FACILITIES.

A. In General. Since telegraph and telephone companies are engaged in a quasi-public business in many respects similar to that of common carriers,[63] it is their duty to serve the public generally, impartially, and without discrimination, extending to every member thereof equal facilities under equal conditions.[64]

Tel. Co. *v.* Champion Electric Light Co., 9 Ohio Dec. (Reprint) 540, 14 Cinc. L. Bul. 327.

58. Hudson River Tel. Co. *v.* Watervliet Turnpike, etc., Co., 135 N. Y. 393, 32 N. E. 148, 31 Am. St. Rep. 838, 17 L. R. A. 674; Cumberland Tel., etc., Co. *v.* United Electric R. Co., 42 Fed. 273, 12 L. R. A. 544. See also Central Pennsylvania Tel., etc., Co. *v.* Wilkesbarre, etc., R. Co., 11 Pa. Co. Ct. 417. But see Western Union Tel. Co. *v.* Guernsey, etc., Electric Light Co., 46 Mo. App. 120.

59. Cumberland Tel., etc., Co. *v.* United Electric R. Co., 93 Tenn. 492, 29 S. W. 104, 27 L. R. A. 236. See also Central Pennsylvania Tel., etc., Co. *v.* Wilkesbarre, etc., R. Co., 11 Pa. Co. Ct. 417.

60. State *v.* Watts, 48 Ark. 56, 2 S. W. 342, 3 Am. St. Rep. 216. See also, generally, MALICIOUS MISCHIEF, 25 Cyc. 1671.

61. See the statutes of the several states; and the following cases:

Arkansas.— St. Louis, etc., R. Co. *v.* Batesville, etc., Tel. Co., 80 Ark. 499, 97 S. W. 660, holding that the words "wilfully" and "intentionally" as used in the statute imply an evil intent without justifiable excuse.

California.— Davis *v.* Pacific Tel., etc., Co., 127 Cal. 312, 57 Pac. 764, 59 Pac. 698, holding that the word "telegraph" in such a statute includes "telephone."

Missouri.— State *v.* McKee, 126 Mo. App. 524, 104 S. W. 486, felony.

Pennsylvania.— Telegraph Co. *v.* Wilt, 1 Phila. 270, 10 Pa. L. J. 375, statutory penalty of one hundred dollars.

Texas.— South Western Tel., etc., Co. *v.* Priest, 31 Tex. Civ. App. 345, 72 S. W. 241, criminal offense.

Vermont.— Western Union Tel. Co. *v.* Bullard, 65 Vt. 634, 27 Atl. 322, statutory penalty.

House moving.— A person who, while lawfully moving a house along a public street, injures a telegraph wire which is in the way, is not liable for the statutory penalty of one hundred dollars for wilfully and knowingly breaking a telegraph wire. Telegraph Co. *v.* Wilt, 1 Phila. (Pa.) 270.

62. See the statutes of the several states.

To tap a telegraph wire is not alone a crime under the laws of Ohio, a strict construction of the statute requiring not only that the wire should be unlawfully tapped by an unauthorized person but also that a communication or message should be taken therefrom in an unauthorized manner. Martin *v.* Sheriff, 5 Ohio S. & C. Pl. Dec. 100, 32 Cinc. L. Bul. 113.

63. See *supra*, I, C.

64. *Alabama.*— Western Union Tel. Co. *v.* Henderson, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148.

Illinois.— Inter Ocean Pub. Co. *v.* Associated Press, 184 Ill. 438, 56 N. E. 822, 75 Am. St. Rep. 184, 48 L. R. A. 568.

Indiana.— Central Union Tel. Co. *v.* Fehring, 146 Ind. 189, 45 N. E. 64; Central Union Tel. Co. *v.* Falley, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114; Central Union Tel. Co. *v.* Bradbury, 106 Ind. 1, 5 N. E. 721.

Kentucky.— Western Union Tel. Co. *v.* Van Cleave, 107 Ky. 464, 54 S. W. 827, 92 Am. St. Rep. 366.

Maryland.— Chesapeake, etc., Tel. Co. *v.* Baltimore, etc., Tel. Co., 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167.

Missouri.— Reed *v.* Western Union Tel. Co., 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492; State *v.* Kinloch Tel. Co., 93 Mo. App. 349, 67 S. W. 684.

Nebraska.— Western Union Tel. Co. *v.* Call Pub. Co., 44 Nebr. 326, 62 N. W. 506, 48 Am. St. Rep. 729, 27 L. R. A. 622, 58 Nebr. 192, 78 N. W. 519; State *v.* Nebraska Tel. Co., 17 Nebr. 126, 22 N. W. 237, 52 Am. Rep. 404.

New Jersey.— Trenton, etc., Turnpike Co. *v.* American, etc., News Co., 43 N. J. L. 381.

New York.— Friedman *v.* Gold, etc., Tel. Co., 32 Hun 4; U. S. Tel. Co. *v.* Western Union Tel. Co., 56 Barb. 46; Atlantic, etc., Tel. Co. *v.* Western Union Tel. Co., 4 Daly 527. See also People *v.* Hudson River Tel. Co., 19 Abb. N. Cas. 466.

North Carolina.—Leavell *v.* Western Union

In some jurisdictions there are statutory provisions to this effect,[65] but such duty exists independently of statute by reason of the character of such companies and their business.[66] The fact that the telegraph or telephone instrument or device is patented and used by or under a lease or license from the patentee or owner of the patent right does not affect the application of the general rule or statutory provisions in regard to discrimination,[67] for while the patent is property and the owner may determine to what use he will put it,[68] and might lease or license it to an individual for his private use so that the latter alone could use it,[69] yet if the lease or license is for a public use, it is necessarily subject to the general rules requiring such use to be for the benefit of the entire public and without discrimination,[70] and any restrictions in the lease or license requiring discrimina-

Tel. Co., 116 N. C. 211, 21 S. E. 391, 47 Am. St. Rep. 798, 27 L. R. A. 843.

Ohio.— State *v.* Bell Tel. Co., 36 Ohio St. 296, 38 Am. Rep. 583.

Pennsylvania.— Bell Tel. Co. *v.* Com., 2 Pa. Cas. 299, 3 Atl. 825.

South Carolina.— Gwynn *v.* Citizens' Tel. Co., 69 S. C. 434, 48 S. E. 460, 104 Am. St. Rep. 819, 67 L. R. A. 111; State *v.* Citizens' Tel. Co., 61 S. C. 83, 39 S. E. 257, 85 Am. St. Rep. 870, 55 L. R. A. 139.

South Dakota.— Kirby *v.* Western Union Tel. Co., 4 S. D. 105, 55 N. W. 759, 46 Am. St. Rep. 765, 30 L. R. A. 612, 621, 624.

Vermont.— Commercial Union Tel. Co. *v.* New England Tel., etc., Co., 61 Vt. 241, 17 Atl. 1071, 15 Am. St. Rep. 893, 5 L. R. A. 161.

United States.— Western Union Tel. Co. *v.* Call Pub. Co., 181 U. S. 92, 21 S. Ct. 561, 45 L. ed. 765; Cumberland Tel., etc., Co. *v.* Kelly, 160 Fed. 316, 87 C. C. A. 268; Delaware, etc., Tel., etc., Co. *v.* Delaware, 50 Fed. 677, 2 C. C. A. 1 [*affirming* 47 Fed. 633]; Missouri *v.* Bell Tel. Co., 23 Fed. 539.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," §§ 16, 21.

Particular forms of discrimination see *infra*, III. B.

65. See the statutes of the several states; and the following cases:

Indiana.— Central Union Tel. Co. *v.* State, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114.

Maryland.— Chesapeake, etc., Tel. Co. *v.* Baltimore, etc., Tel. Co., 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167.

Nebraska.— Western Union Tel. Co. *v.* Call Pub. Co., 44 Nebr. 326, 62 N. W. 506, 48 Am. St. Rep. 729, 27 L. R. A. 622.

Ohio.— State *v.* Bell Tel. Co., 36 Ohio St. 296, 38 Am. Rep. 583.

Pennsylvania.— Bell Tel. Co. *v.* Com., 2 Pa. Cas. 299, 3 Atl. 825.

South Carolina.— State *v.* Citizens' Tel. Co., 61 S. C. 83, 39 S. E. 257, 85 Am. St. Rep. 870, 55 L. R. A. 139.

United States.— Cumberland Tel., etc., Co. *v.* Kelly, 160 Fed. 316, 87 C. C. A. 268.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," §§ 15, 16.

Company doing interstate business only.— A statute requiring all telegraph companies doing business in the state to accept and transmit all messages tendered to them does not require a telegraph company having the right to do only interstate business to accept an intrastate message and so in effect require a foreign telegraph company as a condition to doing interstate business to do the things required by statute as the condition to doing intrastate business in the state. Western Union Tel. Co. *v.* State, 82 Ark. 309, 101 S. W. 748.

66. Central Union Tel. Co. *v.* Bradbury, 106 Ind. 1, 5 N. E. 721; State *v.* Kinloch Tel. Co., 93 Mo. App. 349, 67 S. W. 684; State *v.* Nebraska Tel. Co., 17 Nebr. 126, 22 N. W. 237, 52 Am. Rep. 404. See also *supra*, I, C.

Statutory provisions against discrimination are merely declaratory of the common law and should be construed according to the principles of the common law in determining what constitutes an unjust discrimination. Cumberland Tel., etc., Co. *v.* Kelly, 160 Fed. 316, 87 C. C. A. 268.

67. Chesapeake, etc., Tel. Co. *v.* Baltimore, etc., Tel. Co., 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167; Commercial Union Tel. Co. *v.* New England Tel., etc., Co., 61 Vt. 241, 17 Atl. 1071, 15 Am. St. Rep. 893, 5 L. R. A. 161; Delaware, etc., Tel. Co. *v.* Delaware, 50 Fed. 677, 2 C. C. A. 1 [*affirming* 47 Fed. 633]; Missouri *v.* Bell Tel. Co., 23 Fed. 539. But see American Rapid Tel. Co. *v.* Connecticut Tel. Co., 49 Conn. 352, 44 Am. Rep. 237.

68. See Delaware, etc., Tel. Co. *v.* Delaware, 50 Fed. 677, 2 C. C. A. 1 [*affirming* 47 Fed. 633]; Missouri *v.* Bell Tel. Co., 23 Fed. 639.

69. See Commercial Union Tel. Co. *v.* New England Tel., etc., Co., 61 Vt. 241, 17 Atl. 1071, 15 Am. St. Rep. 893, 5 L. R. A. 161.

70. *Maryland.*— Chesapeake, etc., Tel. Co. *v.* Baltimore, etc., Tel. Co., 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167.

New York.— People *v.* Hudson River Tel. Co., 19 Abb. N. Cas. 466.

Pennsylvania.— Philadelphia Bell Tel. Co. *v.* Com., 2 Pa. Cas. 299, 3 Atl. 825.

Vermont.— Commercial Union Tel. Co. *v.* New England Tel., etc., Co., 61 Vt. 241, 17 Atl. 1071, 15 Am. St. Rep. 893, 5 L. R. A. 161.

United States.— Delaware, etc., Tel. Co. *v.* Delaware, 50 Fed. 677, 2 C. C. A. 1 [*affirming* 47 Fed. 633]; Missouri *v.* Bell Tel. Co., 23 Fed. 539.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 16.

But see American Rapid Tel. Co. *v.* Con-

tions on the part of the lessee or licensee are contrary to public policy and void.[71] It is the duty of a telegraph or telephone company to furnish safe access to the places where business with them is to be transacted,[72] and to see that such persons while there are accorded proper and respectful treatment.[73] It is not the duty of a telephone company to transmit messages where by its rules and course of business it does not undertake to transmit messages but only to bring to its line persons for whom calls are made.[74]

B. Nature and Forms of Discrimination — 1. In General. Discrimination on the part of a telegraph or telephone company may consist in an absolute refusal to serve or furnish facilities,[75] or in regard to rates and charges,[76] or in regard to the character and quality of the services or facilities furnished.[77] Such companies are not, however, absolutely bound to serve or furnish facilities to every applicant therefor,[78] and may properly refuse to furnish the same in furtherance of a purpose or business which is obviously illegal or a public nuisance;[79] nor where services are rendered or facilities furnished is it every discrimination which is illegal, but only such discriminations as are unjust,[80] or in other words discriminations in regard to substantially similar services or facilities rendered or furnished under substantially similar conditions,[81] to applicants or patrons of the same class or similarly situated.[82] Such companies may make reasonable rules and regulations for the conduct of their business,[83] and may refuse to render services or

necticut Tel. Co., 49 Conn. 352, 44 Am. Rep. 237.

Application of rule to discriminations by a telephone company between different telegraph companies see *infra*, III, B, 5.

71. State *v.* Bell Tel. Co., 36 Ohio St. 296, 38 Am. Rep. 583; Philadelphia Bell Tel. Co. *v.* Com., 2 Pa. Cas. 299, 3 Atl. 825; Commercial Union Tel. Co. *v.* New England Tel., etc., Co., 61 Vt. 241, 17 Atl. 1071, 15 Am. St. Rep. 893, 5 L. R. A. 161; Delaware, etc., Tel. Co. *v.* Delaware, 50 Fed. 677, 2 C. C. A. 1 [*affirming* 47 Fed. 633]. But see American Rapid Tel. Co. *v.* Connecticut Tel. Co., 49 Conn. 352, 44 Am. Rep. 237.

72. Jeffries *v.* Western Union Tel. Co., 2 Ga. App. 853, 59 S. E. 192; Dunn *v.* Western Union Tel. Co., 2 Ga. App. 845, 59 S. E. 189.

73. Jeffries *v.* Western Union Tel. Co., 2 Ga. App. 853, 59 S. E. 192; Dunn *v.* Western Union Tel. Co., 2 Ga. App. 845, 59 S. E. 189.

If a telegraph agent insults and humiliates without provocation a person who has entered one of the company's offices for the purpose of sending a message, the company will be liable therefor. Dunn *v.* Western Union Tel. Co., 2 Ga. App. 845, 59 S. E. 189.

74. Southwestern Tel., etc., Co. *v.* Gotcher, 93 Tex. 114, 53 S. W. 686; Southwestern Tel., etc., Co. *v.* Flood, (Tex. Civ. App. 1908) 111 S. W. 1064.

75. See *infra*, III, B, 2.

76. See *infra*, III, B, 3.

77. See *infra*, III, B, 4.

78. Crouch *v.* Arnett, 71 Kan. 49, 79 Pac. 1086; Cumberland Tel., etc., Co. *v.* Kelly, 160 Fed. 316, 87 C. C. A. 268.

A statutory provision requiring telephone companies to "supply all applicants" should be reasonably construed and applied in such manner as not to lead to injustice or oppression. Cumberland Tel., etc., Co. *v.* Kelly, 160 Fed. 316, 87 C. C. A. 268.

79. Godwin *v.* Carolina Tel., etc., Co., 136 N. C. 258, 48 S. E. 636, 103 Am. St. Rep. 941, 67 L. R. A. 251. See also Western Union Tel. Co. *v.* State, 165 Ind. 492, 76 N. E. 100, 3 L. R. A. N. S. 153; Louisville *v.* Wehmhoff, 116 Ky. 812, 76 S. W. 876, 79 S. W. 201, 25 Ky. L. Rep. 995, 1924; Smith *v.* Western Union Tel. Co., 84 Ky. 664, 2 S. W. 483, 8 Ky. L. Rep. 672; Bryant *v.* Western Union Tel. Co., 17 Fed. 825.

80. Western Union Tel. Co. *v.* Call Pub. Co., 44 Nebr. 326, 62 N. W. 506, 48 Am. St. Rep. 729, 27 L. R. A. 622; Western Union Tel. Co. *v.* Call Pub. Co., 181 U. S. 92, 21 S. Ct. 561, 45 L. ed. 765 [*affirming* 58 Nebr. 192, 78 N. W. 519].

81. Western Union Tel. Co. *v.* Call Pub. Co., 44 Nebr. 326, 62 N. W. 506, 48 Am. St. Rep. 729, 27 L. R. A. 622; Cumberland Tel., etc., Co. *v.* Kelly, 160 Fed. 316, 87 C. C. A. 268.

82. Ivanhoe Furnace Co. *v.* Virginia, etc., Tel. Co., 109 Va. 130, 63 S. E. 426 (holding that an ordinary individual subscriber to a telephone is not of the same class as another telephone company); Cumberland Tel., etc., Co. *v.* Kelly, 160 Fed. 316, 87 C. C. A. 268 (holding that an applicant for telephone facilities on a party wire is of a different class from an applicant for a direct connection, and that it is not an illegal discrimination for a party line applicant to be served ahead of a prior applicant for direct services).

Dividing territory into districts. — If a telephone company in good faith and in accordance with the usual methods of well-managed companies divides its territory into different districts to be served by wires carried in cables to a point of convenient distribution, there is no discrimination if the applicants of the same district are served in the same manner. Cumberland Tel., etc., Co. *v.* Kelly, 160 Fed. 316, 87 C. C. A. 268.

83. See *supra*, I, D, 3, b.

furnish facilities to persons who refuse to comply with such rules,[84] or may discontinue facilities furnished in case of a substantial violation thereof.[85] In such cases the rule or regulation must be reasonable;[86] but if reasonable the fact that it has not been enforced in particular cases does not necessarily make its enforcement in other cases an unjust discrimination.[87] Such companies may also require payment for their services or facilities in advance,[88] or require rentals to be paid on a certain day of the month,[89] and the fact that credit has been extended to one person does not require that it should be extended to others,[90] nor does the fact that such a company is indebted to a subscriber prevent it from enforcing against him its proper rules as to payment.[91] Such companies may in good faith determine for themselves the limits within which they will carry on their business,[92] and the character of such business.[93] So a telephone company doing business

84. *Indiana.*— Western Union Tel. Co. *v.* McGuire, 104 Ind. 130, 2 N. E. 201, 54 Am. Rep. 296.

Ohio.— Pugh *v.* City, etc., Tel. Assoc., 8 Ohio Dec. (Reprint) 644, 9 Cinc. L. Bul. 104 [*affirmed* in 13 Cinc. L. Bul. 190].

Rhode Island.— Gardner *v.* Providence Tel. Co., 23 R. I. 262, 49 Atl. 1004.

South Dakota.— Kirby *v.* Western Union Tel. Co., 7 S. D. 623, 65 N. W. 37, 46 Am. St. Rep. 765, 30 L. R. A. 612, 621, 624.

United States.—Hewlett *v.* Western Union Tel. Co., 28 Fed. 181.

85. Irvin *v.* Rushville Co-operative Tel. Co., 161 Ind. 524, 69 N. E. 258 (failure to pay telephone rentals by a certain day of the month); Pugh *v.* City, etc., Tel. Assoc., 8 Ohio Dec. (Reprint) 644, 9 Cinc. L. Bul. 104 [*affirmed* in 13 Cinc. L. Bul. 190] (use of profane or indecent language over telephone); Gardner *v.* Providence Tel. Co., 23 R. I. 262, 49 Atl. 1004 (regulation forbidding the use by telephone subscribers in connection with the telephone company's wires of extension instruments not furnished by such company).

86. See *supra*, I, D, 3, b.

87. People *v.* Western Union Tel. Co., 166 Ill. 15, 46 N. E. 731, 36 L. R. A. 637 (regulation requiring telegraph messages to be in writing); Irvin *v.* Rushville Co-operative Tel. Co., 161 Ind. 524, 69 N. E. 258 (rule requiring telephone rentals to be paid by a certain day of the month on pain of having the service discontinued). But see Plummer *v.* Hattelsted, (Iowa 1908) 117 N. W. 680 (holding that a patron of a telephone company may be unjustly discriminated against in the use of the telephone exchange by the mere enforcement against him of a just and proper rule, it being ignored in favor of others in like situation); Atlantic, etc., Tel. Co. *v.* Western Union Tel. Co., 4 Daly (N. Y.) 527 (holding that a telegraph company cannot enforce a regulation against another telegraph company alone, the effect of which is to place the latter company at a disadvantage and defeat the object of a statute requiring one telegraph company to transmit messages for other telegraph companies impartially and in good faith for the usual rates charged to individuals).

88. Yancey *v.* Batesville Tel. Co., 81 Ark. 486, 99 S. W. 679; Western Union Tel. Co. *v.* McGuire, 104 Ind. 130, 2 N. E. 201, 54 Am. Rep. 296; Rushville Co-operative Tel. Co. *v.* Irvin, 27 Ind. App. 62, 59 N. E. 327; Buffalo County Tel. Co. *v.* Turner, 82 Nebr. 841, 118 N. W. 1064, 130 Am. St. Rep. 699, 19 L. R. A. N. S. 693; Nebraska Tel. Co. *v.* State, 55 Nebr. 627, 76 N. W. 171, 45 L. R. A. 113. See also Ashley *v.* Rocky Mountain Bell Tel. Co., 25 Mont. 286, 64 Pac. 765.

Reasonableness of rule.— A rule of a rural telephone company that telephone rentals must be paid six months in advance is reasonable; and a subscriber, refusing to comply therewith, is not entitled to service. Buffalo County Tel. Co. *v.* Turner, 82 Nebr. 841, 118 N. W. 1064, 130 Am. St. Rep. 699, 19 L. R. A. N. S. 693.

89. Irvin *v.* Rushville Co-operative Tel. Co., 161 Ind. 524, 69 N. E. 258, holding that where a telephone company has made a rule requiring telephone rentals to be paid by a certain day of the month on pain of discontinuance of the service, and such rule is known to a subscriber, the company may in case of non-payment discontinue the service without informing the subscriber at the exact time of such discontinuance as to the reasons therefor.

90. Irvin *v.* Rushville Co-operative Tel. Co., 161 Ind. 524, 69 N. E. 258.

91. Irvin *v.* Rushville Co-operative Tel. Co., 161 Ind. 524, 69 N. E. 258, holding that, where a telephone company has made a rule unknown to its subscribers requiring rentals to be paid by a certain day of the month, it may discontinue the service for non-payment although it is indebted to the subscriber.

A counter-claim by a rural telephone subscriber against the company for faulty services or for insignificant acts performed for its benefit, a large part of which is exorbitant and illegal, does not justify him in demanding that he be given a service without a prepayment of such rent as other subscribers pay. Buffalo County Tel. Co. *v.* Turner, 82 Nebr. 841, 118 N. W. 1064, 130 Am. St. Rep. 699, 19 L. R. A. N. S. 693.

92. Cumberland Tel., etc., Co. *v.* Kelly, 169 Fed. 316, 87 C. C. A. 268; Delaware, etc., Tel., etc., Co. *v.* Delaware, 50 Fed. 677, 2 C. C. A. 1 [*affirming* 47 Fed. 633].

93. Delaware, etc., Tel., etc., Co. *v.* Delaware, 50 Fed. 677, 2 C. C. A. 1 [*affirming* 47 Fed. 633].

within a municipality is not obliged to extend its facilities to persons living outside of the corporate limits; [94] and even where it has so extended its facilities to certain persons it is not obliged to extend them to another person who is not similarly situated.[95] So also a telegraph company doing only an interstate business cannot be required to receive and transmit intrastate messages.[96]

2. Refusal to Serve. A telegraph or telephone company cannot arbitrarily refuse to furnish service to a particular customer, if the service demanded be of a character which it holds itself out as prepared to furnish to the public generally, or to the public of the applicant's class.[97] It cannot require an applicant for service to contract not to make use of the facilities offered by a rival company,[98] or not to use a telephone to call messengers from another office,[99] or refuse such services on the ground that the applicant had broken a previous agreement to this effect.[1] It cannot refuse service to a person offering to pay therefor, or require as a condition of furnishing service that such person pay an old debt or settle a disputed claim growing out of a previous transaction, even though of the same kind.[2] Nor may service be refused because of a mere suspicion that the applicant therefor desires it for an illegal or immoral purpose,[3] and still less because of the general character of the applicant or the fact that the applicant is engaged in an illegal or immoral business at another place and with which the service requested can have no connection.[4]

3. Rates and Charges. Even in the absence of any statutory regulation on the subject,[5] a telegraph or telephone company must not charge one of its customers

94. Crouch *v.* Arnett, 71 Kan. 49, 79 Pac. 1086.

95. Crouch *v.* Arnett, 71 Kan. 49, 79 Pac. 1086, holding that a telephone company doing business within the corporate limits of a city is not obliged to furnish its facilities to a person living outside of such limits, although it has done so for other persons, where such other persons are not similarly situated and pay for their own poles and wires.

96. Western Union Tel. Co. *v.* State, 82 Ark. 309, 101 S. W. 748, holding further that a state statute requiring telegraph companies to accept and transmit all messages tendered to them does not affect the application of the rule but applies only to messages of the class handled by the company.

97. *Kansas.*— Crouch *v.* Arnett, 71 Kan. 49, 79 Pac. 1086.

Nebraska.— State *v.* Nebraska Tel. Co., 17 Nebr. 126, 22 N. W. 237, 52 Am. Rep. 404.

New York.— People *v.* Hudson River Tel. Co., 19 Abb. N. Cas. 466.

Ohio.— State *v.* Bell Tel. Co., 36 Ohio St. 296, 38 Am. Rep. 583.

South Carolina.— State *v.* Citizens' Tel. Co., 61 S. C. 83, 39 S. E. 257, 85 Am. St. Rep. 870, 55 L. R. A. 139.

United States.— Delaware, etc., Tel., etc., Co. *v.* Delaware, 50 Fed. 677, 2 C. C. A. 1 [*affirming* 47 Fed. 633].

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 16.

98. Gwynn *v.* Citizens' Tel. Co., 69 S. C. 434, 48 S. E. 460, 104 Am. St. Rep. 819, 67 L. R. A. 111; State *v.* Citizens' Tel. Co., 61 S. C. 83, 39 S. E. 257, 85 Am. St. Rep. 870, 55 L. R. A. 139.

A telephone company cannot remove an instrument from the office of a subscriber engaged in a general messenger business who is not in default as to his rentals because he uses the instrument to notify persons who are wanted at a rival telephone exchange. Owensboro-Harrison Tel. Co. *v.* Wisdom, 62 S. W. 529, 23 Ky. L. Rep. 97.

99. People *v.* Hudson River Tel. Co., 19 Abb. N. Cas. (N. Y.) 466.

1. State *v.* Citizens' Tel. Co., 61 S. C. 83, 39 S. E. 257, 85 Am. St. Rep. 870, 55 L. R. A. 139.

2. Cumberland Tel., etc., Co. *v.* Hobart, 89 Miss. 252, 42 So. 349 (holding that while a telephone company may remove a telephone after due notice for non-payment of rentals, if the subscriber subsequently tenders the amount due to the company it cannot require as a condition of reinstating the service that the applicant shall pay an amount due on another instrument installed in a different building under a different contract); State *v.* Kinloch Tel. Co., 93 Mo. App. 349, 67 S. W. 684 (holding that where a telephone has been removed the company cannot refuse to reinstate it upon tender of the usual advance payment on the ground that it has a disputed claim against the subscriber for past rentals if such subscriber is solvent); State *v.* Nebraska Tel. Co., 17 Nebr. 126, 22 N. W. 237, 52 Am. Rep. 404 (holding that a telephone company cannot refuse to install a telephone for a person financially responsible and who tenders the amount required from other subscribers for putting in a telephone on the ground that it has a disputed claim against the applicant for previous rentals). *Compare* Irvin *v.* Rushville Co-operative Tel. Co., 161 Ind. 524, 69 N. E. 258.

3. See Western Union Tel. Co. *v.* Ferguson, 57 Ind. 495.

4. Godwin *v.* Carolina Tel., etc., Co., 136 N. C. 258, 48 S. E. 636, 103 Am. St. Rep. 941, 67 L. R. A. 251.

5. Western Union Tel. Co. *v.* Call Pub. Co.,

more than it charges others for the performance of a similar service under similar conditions; [6] and in the application of this rule it is not material that the higher rate charged to one customer is not in itself unreasonable, since the rates charged must not only be reasonable in themselves but relatively reasonable.[7] It is not, however, every discrimination which is illegal but only such a discrimination as is under the circumstances unreasonable and unjust; [8] and in some cases different rates may be charged to different customers where there are substantial differences in the character of the services rendered or facilities furnished or a difference in conditions affecting the inconvenience and expense thereof to the company.[9] Even in such cases, however, the difference in rates must be reasonably proportionate to the difference in the conditions justifying a discrimination; [10] and the difference in conditions must not be due to the wrongful or improper conduct of the company, as by sending messages of one customer by a direct route and those of another by a longer and more expensive route,[11] although if a difference in conditions is shown justifying a discrimination, the burden is upon the party complaining to show the injustice of the amount thereof.[12] A discrimination in rates is not justified merely because one customer transacts a larger amount of business with the company than another.[13]

4. Character or Quality of Services and Facilities. A telegraph or telephone company cannot discriminate between different patrons in regard to the character and quality of the services or facilities furnished.[14] Such companies doing business within a certain place or territory must provide themselves with sufficient operatives and equipment reasonably to supply the public demand,[15] and there-

181 U. S. 92, 21 S. Ct. 561, 45 L. ed. 765 [*affirming* 58 Nebr. 192, 78 N. W. 519].

Statutory regulation of rates see *supra*, II, B, 2.

6. Western Union Tel. Co. *v.* Call Pub. Co., 44 Nebr. 326, 62 N. W. 506, 48 Am. St. Rep. 729, 27 L. R. A. 622; Leavell *v.* Western Union Tel. Co., 116 N. C. 211, 21 S. E. 391, 47 Am. St. Rep. 798, 27 L. R. A. 843; Western Union Tel. Co. *v.* Call Pub. Co., 181 U. S. 92, 21 S. Ct. 561, 45 L. ed. 765 [*affirming* 58 Nebr. 192, 78 N. W. 519].

7. Western Union Tel. Co. *v.* Call Pub. Co., 44 Nebr. 326, 62 N. W. 506, 48 Am. St. Rep. 729, 27 L. R. A. 622.

8. Western Union Tel. Co. *v.* Call Pub. Co., 44 Nebr. 326, 62 N. W. 506, 48 Am. St. Rep. 729, 27 L. R. A. 622; Western Union Tel. Co. *v.* Call Pub. Co., 181 U. S. 92, 21 S. Ct. 561, 45 L. ed. 765 [*affirming* 58 Nebr. 192, 78 N. W. 519.

Statutory provisions prohibiting discriminations do not prohibit the charging of different rates for services rendered under materially different conditions. Western Union Tel. Co. *v.* Call Pub. Co., 44 Nebr. 326, 62 N. W. 506, 48 Am. St. Rep. 729, 27 L. R. A. 622.

9. Western Union Tel. Co. *v.* Call Pub. Co., 44 Nebr. 326, 62 N. W. 506, 48 Am. St. Rep. 729, 27 L. R. A. 622.

Application of rule.— A telegraph company may discriminate in rates for news despatches between different newspapers in the same place where one is a morning paper receiving its news at night, when the amount of ordinary commercial business is small, and the other an afternoon paper receiving its news during the day, when the amount of ordinary commercial business is large. Western Union Tel. Co. *v.* Call Pub. Co., 44 Nebr. 326, 62 N. W. 506, 48 Am. St. Rep. 729, 27 L. R. A. 622. A telegraph company may establish reasonable limits within which it will make free deliveries of telegrams, and it is not a discrimination to exact from persons living outside of such limits extra compensation approximately commensurate with the distance traveled and the expense incurred in making such delivery. State *v.* Western Union Tel. Co., 172 Ind. 20, 87 N. E. 641.

10. Western Union Tel. Co. *v.* Call Pub. Co., 181 U. S. 92, 21 S. Ct. 561, 45 L. ed. 765 [*affirming* 58 Nebr. 192, 78 N. W. 519].

11. Leavell *v.* Western Union Tel. Co., 116 N. C. 211, 21 S. E. 391, 47 Am. St. Rep. 798, 27 L. R. A. 843.

12. Western Union Tel. Co. *v.* Call Pub. Co., 44 Nebr. 326, 62 N. W. 506, 48 Am. St. Rep. 729, 27 L. R. A. 622.

13. Western Union Tel. Co. *v.* Call Pub. Co., 44 Nebr. 326, 62 N. W. 506, 48 Am. St. Rep. 729, 27 L. R. A. 622.

14. *Indiana.*— State *v.* Cadwallader, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319; Central Union Tel. Co. *v.* State, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114.

Iowa.— Plummer *v.* Hattelsted, (1908) 117 N. W. 680.

Missouri.— State *v.* Kinlock Tel. Co., 93 Mo. App. 349, 67 S. W. 684.

Nebraska.— State *v.* Nebraska Tel. Co., 17 Nebr. 126, 22 N. W. 237, 52 Am. Rep. 404.

North Carolina.— Leavell *v.* Western Union Tel. Co., 116 N. C. 211, 21 S. E. 391, 47 Am. St. Rep. 798, 27 L. R. A. 843.

15. Leavell *v.* Western Union Tel. Co., 116 N. C. 211, 21 S. E. 391, 47 Am. St. Rep. 798, 27 L. R. A. 843; Gwynn *v.* Citizens' Tel. Co.,

after increase the same in accordance with the demands of business,[16] and they cannot justify a failure or refusal to furnish proper services or facilities on the ground of the inadequacy of their equipment,[17] although this rule must be applied reasonably according to the circumstances of particular cases.[18] A telephone company cannot discriminate either in regard to its public station system or its so-called private system of instruments;[19] and the fact that it provides public stations for the use of all who will pay toll is no justification for refusing to install an instrument in an office, residence, or place of business.[20] A telephone company must furnish to one who demands it and offers to pay the maximum price authorized by statute to be charged therefor, as modern and thoroughly equipped a telephone apparatus, with all the appurtenances thereof, as is furnished to any other of its customers;[21] and if some subscribers are furnished with a directory or telephone book containing their names and telephone numbers, it must be furnished to all, and must contain the names and telephone numbers of all who require their names and numbers inserted;[22] but one subscriber cannot demand more than is furnished to other subscribers paying the same rate,[23] and of the same class.[24]

5. Services and Facilities to Other Companies. In the absence of statute it seems that a telegraph or telephone company might limit its business to the transmission of messages or furnishing of facilities for the personal business of individuals to the exclusion of other telegraph or telephone companies;[25] but if such

69 S. C. 434, 48 S. E. 460, 104 Am. St. Rep. 819, 67 L. R. A. 111; Cumberland Tel., etc., Co. *v.* Kelly, 160 Fed. 316, 87 C. C. A. 268.

16. Leavell *v.* Western Union Tel. Co., 116 N. C. 211, 222, 21 S. E. 391, 47 Am. St. Rep. 798, 27 L. R. A. 843, where the court said: "The small cost of an additional wire, which it is common knowledge does not exceed ten dollars per mile, furnishes no ground to exempt the defendant from furnishing the additional facility to do the business for all."

17. Leavell *v.* Western Union Tel. Co., 116 N. C. 211, 21 S. E. 391, 47 Am. St. Rep. 798, 27 L. R. A. 843 (holding that a telegraph company cannot send the messages of one person over a long and expensive route on the ground that it has but one direct wire between the places in question which is fully occupied with the business of another customer); Gwynn *v.* Citizens' Tel. So., 69 S. C. 434, 48 S. E. 460, 104 Am. St. Rep. 819, 67 L. R. A. 111 (holding that a telephone company cannot justify its refusal to install a telephone on the ground that its switchboard is already full).

18. Cumberland Tel., etc., Co. *v.* Kelly, 160 Fed. 316, 87 C. C. A. 268, holding that while it is the duty of a telephone company to provide reasonably adequate facilities, it should not be subjected to a severe statutory penalty for a delay in furnishing facilities to an applicant, occasioned by the fact that the cable leading to the applicant's district was full, where the company was conducting its business in the usual and approved manner.

19. State *v.* Kinloch Tel. Co., 93 Mo. App. 349, 67 S. W. 684.

20. Central Union Tel. Co. *v.* State, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114; State *v.* Kinloch Tel. Co., 93 Mo. App. 349, 67 S. W. 684; State *v.* Nebraska Tel. Co., 17 Nebr. 126, 22 N. W. 237, 52 Am. Rep. 404.

A telephone company cannot discontinue its private rental system on the ground that the rates permitted by the statute are not remunerative, and furnish services only by means of public stations, and such a company will be compelled by mandamus to install private telephones with the necessary connections and facilities at the statutory rate. Central Union Tel. Co. *v.* State, 123 Ind. 113, 24 N. E. 215.

21. Central Union Tel. Co. *v.* Falley, 118 Ind. 598, 20 N. E. 145; Central Union Tel. Co. *v.* State, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114, 2 Am. Elec. Cas. 27; Johnson *v.* State, 113 Ind. 143, 15 N. E. 215, 2 Am. Elec. Cas. 22; Central Union Tel. Co. *v.* Bradbury, 106 Ind. 1, 5 N. E. 721, 2 Am. Elec. Cas. 14; Hockett *v.* State, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201, 2 Am. Elec. Cas. 1; Gardner *v.* Providence Tel. Co., 23 R. I. 262, 49 Atl. 1004, 7 Am. Elec. Cas. 867, 23 R. I. 312, 50 Atl. 1014; Commercial Union Tel. Co. *v.* New England Tel., etc., Co., 61 Vt. 241, 17 Atl. 1071, 15 Am. St. Rep. 893, 5 L. R. A. 161, 2 Am. Elec. Cas. 426.

22. State *v.* Sunset Tel., etc., Co., 30 Wash. 676, 71 Pac. 198. See also State *v.* Nebraska Tel. Co., 17 Nebr. 126, 22 N. W. 237, 52 Am. Rep. 404.

23. Red Line Mut. Tel. Co. *v.* Pharris, 82 Nebr. 371, 117 N. W. 995, holding that one subscriber cannot demand a switchboard and two wires connecting different lines of the telephone company where other subscribers are furnished a single wire and connections between the different lines are made through the general central office.

24. Ivanhoe Furnace Co. *v.* Virginia, etc., Tel. Co., 109 Va. 130, 63 S. E. 426.

25. See Delaware, etc., Tel., etc., Co. *v.* Delaware, 50 Fed. 677, 2 C. C. A. 1 [*affirming* 47 Fed. 633].

services and facilities are extended to one company the general rule applies that they cannot discriminate against others of the same class.[26] So if a telephone company extends its facilities to one telegraph company it cannot withhold them from others,[27] even though the telephone company be a mere lessee under an agreement with its lessor not to serve the particular telegraph company applying for service,[28] and such lessor is the patentee or owner of the patent rights of the instruments used.[29] There are in some jurisdictions constitutional or statutory provisions expressly requiring that one telegraph or telephone company shall receive and transmit messages for other telegraph or telephone companies,[30] and while in some cases the statutes make an exception in the case of companies owning parallel or competing lines,[31] the fact that two companies have lines that are parallel or competing between certain points does not bring them within the application of the exception as to a line or portion thereof of one company between points where the other company has no parallel or competing line.[32] The general rule that one common carrier cannot demand the use of a rival's property for carrying on its own business applies to telegraph and telephone companies;[33] and neither at common law nor under the statutes requiring such a company to receive and transmit messages for other companies can a telephone company be required to instal an instrument in the office of another telegraph or

26. State *v.* Cadwallader, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319; Delaware, etc., Tel., etc., Co. *v.* Delaware, 50 Fed. 677, 2 C. C. A. 1 [*affirming* 47 Fed. 633]. See also cases cited *infra*, notes 27, 28.

27. *Maryland.*— Chesapeake, etc., Tel. Co. *v.* Baltimore, etc., Tel. Co., 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167.

New York.— People *v.* Hudson River Tel. Co., 19 Abb. N. Cas. 466, 2 Am. Elec. Cas. 394.

Ohio.— State *v.* Bell Tel. Co., 36 Ohio St. 296, 38 Am. Rep. 583.

Pennsylvania.— Philadelphia Bell Tel. Co. *v.* Com., 2 Pa. Cas. 299, 3 Atl. 825.

Vermont.— Commercial Union Tel. Co. *v.* New England Tel., etc., Co., 61 Vt. 241, 17 Atl. 1071, 15 Am. St. Rep. 893, 5 L. R. A. 161.

United States.— Delaware, etc., Tel., etc., Co. *v.* Delaware, 50 Fed. 677, 2 C. C. A. 1 [*affirming* 47 Fed. 633, 3 Am. Elec. Cas. 633]; Missouri *v.* Bell Tel. Co., 23 Fed. 539, 2 Am. Elec. Cas. 404.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 16.

28. *Maryland.*— Chesapeake, etc., Tel. Co. *v.* Baltimore, etc., Tel. Co., 66 Md. 399, 7 Atl. 809, 59 Am. St. Rep. 167.

New York.— People *v.* Hudson River Tel. Co., 19 Abb. N. Cas. 466.

Ohio.— State *v.* Bell Tel. Co., 36 Ohio St. 296, 38 Am. Rep. 583.

Pennsylvania.—Bell Tel. Co. *v.* Com., 2 Pa. Cas. 299, 3 Atl. 825.

Vermont.— Commercial Union Tel. Co. *v.* New England Tel., etc., Co., 61 Vt. 241, 17 Atl. 1071, 15 Am. St. Rep. 893, 5 L. R. A. 161.

United States.— Delaware, etc., Tel., etc., Co. *v.* Delaware, 50 Fed. 677, 2 C. C. A. 1 [*affirming* 47 Fed. 633]; Missouri *v.* Bell Tel. Co., 23 Fed. 539.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 16.

Contra.— American Rapid Tel. Co. *v.* Connecticut Tel. Co., 49 Conn. 352, 44 Am. Rep. 237.

The lessor itself could not lawfully engage in the public calling of a telephone company and discriminate between one telegraph company and another, and what the lessor itself could not do cannot be placed within the power of its lessee by any restrictions in the lease. Delaware, etc., Tel., etc., Co. *v.* Delaware, 50 Fed. 677, 2 C. C. A. 1 [*affirming* 47 Fed. 633].

29. See cases cited *supra*, note 28; and, generally, *supra*, III, A.

30. See the statutes of the several states. And see Rural Home Tel. Co. *v.* Kentucky, etc., Tel. Co., 128 Ky. 209, 107 S. W. 787, 32 Ky. L. Rep. 1068 (constitutional provision); Campbellsville Tel. Co. *v.* Lebanon, etc., Tel. Co., 118 Ky. 277, 80 S. W. 1114, 26 Ky. L. Rep. 127, 84 S. W. 518, 27 Ky. L. Rep. 90; U. S. Telegraph Co. *v.* Western Union Tel. Co., 56 Barb. (N. Y.) 46 (statutory provision).

Failure to obtain franchise.— Under Const. § 199, providing that telephone companies operating exchanges in different towns and cities shall receive and transmit each other's messages, etc., a telephone company operating a telephone system with an exchange in a city without having obtained a franchise therefor in the manner prescribed by sections 163 and 164 cannot compel another company operating a system with an exchange elsewhere to receive and transmit messages. Rural Home Tel. Co. *v.* Kentucky, etc., Tel. Co., 128 Ky. 209, 107 S. W. 787, 32 Ky. L. Rep. 1068.

31. See U. S. Telegraph Co. *v.* Western Union Tel. Co., 56 Barb. (N. Y.) 46.

32. U. S. Telegraph Co. *v.* Western Union Tel. Co., 56 Barb. (N. Y.) 46; Atlantic, etc., Tel. Co. *v.* Western Union Tel. Co., 4 Daly (N. Y.) 527.

33. People *v.* Hudson River Tel. Co., 19

telephone company to be used by the patrons of or for delivering the telegraphic messages of the other company,[34] and while a telephone company may be required to install an instrument in the office of a telegraph company for its ordinary private business, it is a proper regulation to require that it shall not be used for the delivery of messages in carrying on the public business of the latter company.[35] There is also a marked difference between furnishing initial independent service for another company and secondary service by means of a direct connection of two or more plants or systems;[36] and in the absence of statute a telephone company cannot be required to make a physical connection of its system with that of another company so as to give the latter the physical use of its lines,[37] although a telephone company may be required to make such connection under constitutional and statutory provisions expressly so requiring and providing that compensation shall be made under the statutory provisions relating to eminent domain.[38] It has also been held that where such connection has been made voluntarily by agreement between two telephone companies and without any stipulation as to the time of its continuance, it cannot be discontinued by either or both companies;[39] and that if a telephone company makes a physical connection with another exchange it cannot refuse to make such connection with other exchanges similarly situated.[40]

6. Remedies. For the refusal of a telegraph or telephone company, without legal justification, to furnish or to continue its service in a given case, the usual and appropriate remedy is mandamus,[41] or in some cases by injunction.[42] The

Abb. N. Cas. (N. Y.) 466; People *v.* Central New York Tel., etc., Co., 47 N. Y. App. Div. 17, 58 N. Y. Suppl. 221.

34. People *v.* Hudson River Tel. Co., 19 Abb. N. Cas. (N. Y.) 466 (where it was held not the duty of a telephone company to allow a telegraph company doing a rival business to use its instrument at the ordinary subscriber's rates for delivering telegrams); People *v.* Central New York Tel., etc., Co., 47 N. Y. App. Div. 17, 58 N. Y. Suppl. 221 (telephone company not obliged to instal an instrument in the office of another company for the use of that company's patrons).

35. People *v.* Hudson River Tel. Co., 19 Abb. N. Cas. (N. Y.) 466.

36. State *v.* Cadwallader, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319.

37. State *v.* Cadwallader, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319. See also Ivanhoe Furnace Co. *v.* Virginia, etc., Tel. Co., 109 Va. 130, 63 S. E. 426.

38. Billings Mut. Tel. Co. *v.* Rocky Mountain Bell Tel. Co., 155 Fed. 207, holding that under such provisions one company is entitled not only to a physical connection with the lines of other companies but also to such use thereof as is reasonably practicable.

39. See *supra*, I, D, 4, a.

40. State *v.* Cadwallader, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319.

41. *Indiana.*— Central Union Tel. Co. *v.* State, 123 Ind. 113, 24 N. E. 215; Central Union Tel. Co. *v.* State, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114.

Kansas.— Crouch *v.* Arnett, 71 Kan. 49, 79 Pac. 1086.

Maryland.— Chesapeake, etc., Tel. Co. *v.* Baltimore, etc., Tel. Co., 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167.

Michigan.— Mahan *v.* Michigan Tel. Co., 132 Mich. 242, 93 N. W. 629.

Missouri.— State *v.* Kinloch Tel. Co., 93 Mo. App. 349, 67 S. W. 684.

Nebraska.— State *v.* Nebraska Tel. Co., 17 Nebr. 126, 22 N. W. 237, 52 Am. Rep. 404.

New York.— People *v.* Central New York Tel., etc., Co., 41 N. Y. App. Div. 17, 58 N. Y. Suppl. 221; People *v.* Hudson River Tel. Co., 19 Abb. N. Cas. 466.

Pennsylvania.— Bell Tel. Co. *v.* Com., 2 Pa. Cas. 299, 3 Atl. 825.

South Carolina.— State *v.* Citizens' Tel. Co., 61 S. C. 83, 39 S. E. 257, 85 Am. St. Rep. 870, 55 L. R. A. 139.

Vermont.— Commercial Union Tel. Co. *v.* New England Tel., etc., Co., 61 Vt. 241, 17 Atl. 1071, 15 Am. St. Rep. 893, 5 L. R. A. 161.

Washington.— State *v.* Sunset Tel., etc., Co., 30 Wash. 676, 71 Pac. 198.

United States.— Missouri *v.* Bell Tel. Co., 23 Fed. 539.

See also, generally, Mandamus, 26 Cyc. 375.

The fact that a penalty is provided by statute does not affect the remedy by mandamus, the former remedy being merely cumulative. Central Union Tel. Co. *v.* State, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114.

42. Williams *v.* Maysville Tel. Co., 119 Ky. 33, 82 S. W. 995, 26 Ky. L. Rep. 945 (mandatory injunction); Anderson *v.* Mt. Sterling Tel. Co., 86 S. W. 1119, 27 Ky. L. Rep. 868 (contract for service in consideration of grant of right of way will be specifically enforced); Wright *v.* Glen Tel. Co., 112 N. Y. App. Div. 745, 99 N. Y. Suppl. 85 (mandatory injunction); Sterne *v.* Metropolitan Tel., etc., Co., 33 N. Y. App. Div. 169, 53 N. Y. Suppl. 467; Central Dist., etc., Tel. Co. *v.* Com., 114 Pa. St. 592, 7 Atl. 926; Keith *v.* National Tel. Co., [1894] 2 Ch. 147, 58 J. P. 573, 63 L. J. Ch. 373, 70 L. T. Rep. N. S. 276, 8 Reports 776, 42 Wkly. Rep. 380.

company is also liable in an action at law for damages;[43] and, in some jurisdictions, where the refusal to furnish service has amounted to a wilful and conscious invasion of plaintiff's rights, for punitive damages,[44] although there can be no recovery of punitive damages for mere negligence or honest mistake without any conscious invasion of plaintiff's rights,[45] or where the failure to furnish facilities demanded was due merely to the inadequacy of the company's equipment.[46] In some jurisdictions such companies are also liable for statutory penalties.[47]

IV. Duties and Liabilities in Regard to Messages.

A. Duty to Accept — 1. In General. Generally speaking telegraph companies are bound to accept and contract to transmit, at a reasonable rate,[48] all messages offered to them by any member of the public, on compliance with their reasonable conditions.[49] A telegraph company may, however, make and insist

43. *Georgia.*— Southern Bell Tel., etc., Co. *v.* Earle, 118 Ga. 506, 45 S. E. 319; Atlanta Standard Tel. Co. *v.* Porter, 117 Ga. 124, 43 S. E. 441, bad service pleaded in action for rentals.

Kentucky.— Cumberland Tel., etc., Co. *v.* Hendon, 114 Ky. 501, 71 S. W. 435, 24 Ky. L. Rep. 1271, 102 Am. St. Rep. 290, 60 L. R. A. 849 (where no proof of pecuniary loss, measure of damages is amount paid for service during time instrument was disconnected, calculated at contract rate); Owensboro-Harrison Tel. Co. *v.* Wisdom, 62 S. W. 529, 23 Ky. L. Rep. 97 (substantial damages sustained, where removal of telephone practically destroyed one branch of plaintiff's business, and jury allowed to consider profits which would have been made).

Louisiana.— Barton *v.* Cumberland Tel., etc., Co., 116 La. 125, 40 So. 590.

Mississippi.— Cumberland Tel., etc., Co. *v.* Hobart, 89 Miss. 252, 42 So. 349; Cumberland Tel., etc., Co. *v.* Baker, 85 Miss. 486, 37 So. 1012.

Montana.— Ashley *v.* Rocky Mountain Bell Tel. Co., 25 Mont. 286, 64 Pac. 765, offer to restore telephone on payment of certain sum provable in mitigation, since plaintiff must use efforts to reduce his loss.

South Carolina.— Gwynn *v.* Citizens' Tel. Co., 69 S. C. 434, 48 S. E. 460, holding that the fact that defendant's switchboard was full may be shown in mitigation of damages, but that such fact will not preclude a recovery.

Damages for annoyance and inconvenience as well as actual loss sustained may be allowed in cases of wrongful removal or refusal to install a telephone. Cumberland Tel., etc., Co. *v.* Hobart, 89 Miss. 252, 42 So. 349.

A physician cannot, in an action for cutting off his telephone service, recover for loss of practice proved only by his own testimony that certain persons told him that they had tried to reach him by telephone to secure his services. Cumberland Tel., etc., Co. *v.* Hicks, 89 Miss. 270, 42 So. 285.

Liability of purchasing company.— Where a telephone company makes a contract to furnish perpetual service to a subscriber and thereafter sells its system to another company without any provision as to the carrying out of such contract, there is no privity of contract between the subscriber and the purchasing company and he cannot maintain an action against such company for damages for removing the telephone. Southern Bell Tel., etc., Co. *v.* Jacoway, 131 Ga. 483, 62 S. E. 640.

44. See Southern Bell Tel., etc., Co. *v.* Earle, 118 Ga. 506, 45 S. E. 319 (verdict for one thousand dollars sustained, telephone having been wantonly removed from premises of grocer, whereby he was humiliated on account of impression conveyed to customers that he was without capital sufficient for his business); Barton *v.* Cumberland Tel., etc., Co., 116 La. 125, 40 So. 590.

45. Cumberland Tel., etc., Co. *v.* Hendon, 114 Ky. 501, 71 S. W. 435, 24 Ky. L. Rep. 1271, 102 Am. St. Rep. 290, 60 L. R. A. 849; Cumberland Tel., etc., Co. *v.* Baker, 85 Miss. 486, 37 So. 1012; Gwynn *v.* Citizens' Tel. Co., 69 S. C. 434, 48 S. E. 460, 104 Am. St. Rep. 819, 67 L. R. A. 111.

46. Gwynn *v.* Citizens' Tel. Co., 69 S. C. 434, 48 S. E. 460, 104 Am. St. Rep. 819, 67 L. R. A. 111.

47. See *infra*, VII.

48. Western Union Tel. Co. *v.* Call Pub. Co., 44 Nebr. 326, 62 N. W. 506, 48 Am. St. Rep. 729, 27 L. R. A. 622.

Regulation of rates see *supra*, II, B, 2.

49. *Georgia.*— Gray *v.* Western Union Tel. Co., 87 Ga. 350, 13 S. E. 562, 27 Am. St. Rep. 259, 14 L. R. A. 95; Jeffries *v.* Western Union Tel. Co., 2 Ga. App. 853, 59 S. E. 192; Dunn *v.* Western Union Tel. Co., 2 Ga. App. 845, 59 S. E. 189.

Illinois.— Tyler *v.* Western Union Tel. Co., 60 Ill. 421, 14 Am. Rep. 38.

Indiana.— Western Union Tel. Co. *v.* Ferguson, 57 Ind. 495; Central Union Tel. Co. *v.* Swoveland, 14 Ind. App. 341, 42 N. E. 1035.

Kentucky.— Com. *v.* Western Union Tel. Co., 112 Ky. 355, 67 S. W. 59, 23 Ky. L. Rep. 1633, 99 Am. St. Rep. 299, 57 L. R. A. 614.

Maine.— Fowler *v.* Western Union Tel. Co., 80 Me. 381, 15 Atl. 29, 6 Am. St. Rep. 211.

Michigan.— Western Union Tel. Co. *v.* Carew, 15 Mich. 525.

Nebraska.— Nebraska Tel. Co. *v.* State, 55 Nebr. 627, 76 N. W. 171, 45 L. R. A. 113; Western Union Tel. Co. *v.* Call Pub. Co., 44

upon a compliance with reasonable rules and regulations,[50] and is not required to receive messages the transmission of which would subject the company to a penalty,[51] or to a civil [52] or criminal liability,[53] and it may refuse messages not couched in decent language, although it would not incur a liability by transmitting them;[54] but generally speaking, if a message offered for transmission is couched in decent language, and the company might legally transmit the same without incurring any liability therefor it is its duty to do so.[55] The fact that a message is not signed is not sufficient ground for refusing to accept and transmit the same unless its contents indicate some unlawful purpose or are calculated to arouse a well-grounded suspicion that there is some improper reason for withholding the signature.[56] So also where a message is offered which by reason of the ignorance of the sender is not in proper form, it would seem to be the duty of the operator to aid or advise him in regard to putting it into proper form.[57]

2. MESSAGES WHICH MAY NOT BE GENUINE.[58] In the absence of facts or circumstances calculated to arouse suspicion in the mind of a person of ordinary prudence and intelligence, a telegraph company is not required to investigate or ascertain the identity or authority of a person who tenders a message for transmission,[59] whether the message is in writing, or spoken directly to the operator, or

Nebr. 326, 62 N. W. 506, 48 Am. St. Rep. 729, 27 L. R. A. 622.

New York.— Breese *v.* U. S. Tel. Co., 48 N. Y. 132, 8 Am. Rep. 526; De Rutte *v.* New York, etc., Electric Magnetic Tel. Co., 1 Daly 547. See also U. S. Telegraph Co. *v.* Western Union Tel. Co., 56 Barb. 46; Atlantic, etc., Tel. Co. *v.* Western Union Tel. Co., 4 Daly 527.

North Carolina.— Cordell *v.* Western Union Tel. Co., 149 N. C. 402, 63 S. E. 71, 22 L. R. A. N. S. 540.

Tennessee.— Cumberland Tel. Co. *v.* Brown, 104 Tenn. 56, 55 S. W. 155, 78 Am. St. Rep. 906, 50 L. R. A. 277; Marr *v.* Western Union Tel. Co., 85 Tenn. 529, 3 S. W. 496.

Texas.— Western Union Tel. Co. *v.* Neill, 57 Tex. 283, 44 Am. Rep. 589; Western Union Tel. Co. *v.* Downs, 25 Tex. Civ. App. 597, 62 S. W. 1078.

Vermont.— Gillis *v.* Western Union Tel. Co., 61 Vt. 461, 17 Atl. 736, 15 Am. St. Rep. 917, 4 L. R. A. 611; Commercial Union Tel. Co. *v.* New England Tel., etc., Co., 61 Vt. 241, 17 Atl. 1071, 15 Am. St. Rep. 893, 5 L. R. A. 161.

United States.—Primrose *v.* Western Union Tel. Co., 154 U. S. 1, 14 S. Ct. 1098, 38 L. ed. 883; Nye *v.* Western Union Tel. Co., 104 Fed. 628.

Nature of liability.—A telegraph company's refusal without legal excuse to accept and transmit a message tendered to it is an actionable tort. Cordell *v.* Western Union Tel. Co., 149 N. C. 402, 63 S. E. 71, 22 L. R. A. N. S. 540.

50. Kirby *v.* Western Union Tel. Co., 7 S. D. 623, 65 N. W. 37, 46 Am. St. Rep. 765, 30 L. R. A. 612, 621, 624, 4 S. D. 105, 55 N. W. 759, 46 Am. St. Rep. 765, 30 L. R. A. 612, 621, 624.

Right to make rules and regulations see *supra*, I, D, 3, b.

51. Western Union Tel. Co. *v.* Young, 138 Ala. 240, 36 So. 374, message without revenue stamp.

52. Peterson *v.* Western Union Tel. Co., 65 Minn. 18, 67 N. W. 646, 33 L. R. A. 302. See also Gray *v.* Western Union Tel. Co., 87 Ga. 350, 13 S. E. 562, 27 Am. St. Rep. 259, 14 L. R. A. 95.

Libelous messages see *infra*, IV, A, 4.

53. Gray *v.* Western Union Tel. Co., 87 Ga. 350, 13 S. E. 562, 27 Am. St. Rep. 259, 14 L. R. A. 95; Louisville *v.* Wehmhoff, 116 Ky. 812, 76 S. W. 876, 79 S. W. 201, 25 Ky. L. Rep. 995, 1924.

Message for illegal or immoral purpose see *infra*, IV, A, 5.

54. See *infra*, IV, A, 3.

55. Gray *v.* Western Union Tel. Co., 87 Ga. 350, 13 S. E. 562, 27 Am. St. Rep. 259, 14 L. R. A. 95; Western Union Tel. Co. *v.* Ferguson, 57 Ind. 495; Com. *v.* Western Union Tel. Co., 112 Ky. 355, 67 S. W. 59, 23 Ky. L. Rep. 1633, 99 Am. St. Rep. 299, 57 L. R. A. 614; Nye *v.* Western Union Tel. Co., 104 Fed. 628.

Message not improper.— A message delivered to a telegraph company for transmission and delivery to the superintendent of a railroad, which states, "No fire in depot. Is it agent's or passenger's place to make one? Wire answer," and signed by sender, is a proper message, and a refusal to send it cannot be justified, although a telegraph operator may refuse to send a message that is obscene, slanderous, blasphemous, profane, indecent, or the like. Western Union Tel. Co. *v.* Lillard, 86 Ark. 208, 110 S. W. 1035, 17 L. R. A. N. S. 836.

56. Cordell *v.* Western Union Tel. Co., 149 N. C. 402, 63 S. E. 71, 22 L. R. A. N. S. 540.

57. See Cordell *v.* Western Union Tel. Co., 149 N. C. 402, 63 S. E. 71, 22 L. R. A. N. S. 540.

58. **Liability of company in regard to forged or unauthorized messages** see *infra*, VI, B.

59. Western Union Tel. Co. *v.* Meyer, 61 Ala. 158, 32 Am. Rep. 1, 1 Am. Elec. Cas. 282; Havelock Bank *v.* Western Union Tel. Co., 141 Fed. 522, 72 C. C. A. 580. See also

communicated to him over a telephone; [60] but it is the duty of such a company to exercise reasonable care to transmit only genuine and authorized messages and to avoid being made an instrument of fraud or deception; [61] and if there are facts and circumstances reasonably calculated to arouse suspicion the company should not receive and transmit the message without investigating and ascertaining the identity or authority of the sender,[62] or should at least communicate such circumstances, inquiry, or suspicions to the addressee at or before the time of delivering the message.[63]

3. Obscene Messages. A telegraph company need not accept a message unless it is couched in decent language,[64] although if such a message is accepted and transmitted, there would seem to be no liability at common law on the part of the company for transmitting it, unless it is libelous.[65]

4. Libelous Messages.[66] A telegraph company need not and should not accept a message which is obviously libelous; [67] but if the message is reasonably capable of an innocent construction, or might reasonably be supposed to be a privileged communication, the telegraph company cannot refuse it on the ground that it may possibly be libelous.[68]

5. Messages For Illegal or Immoral Purposes. A telegraph company is not permitted to act as a censor of public or private morals,[69] or a judge of the good or

Western Union Tel. Co. *v.* Totten, 141 Fed. 533, 72 C. C. A. 591.

The presumption is that a message presented for transmission is genuine and authorized, and an operator has the right to rely and act upon such presumption in the absence of suspicious facts or circumstances. Havelock Bank *v.* Western Union Tel. Co., 141 Fed. 522, 72 C. C. A. 580.

Transmission of money by telegraph.— Where a person presents for transmission a telegram wherein another is requested to transmit money by telegraph to the sender, the telegraph company, in the absence of anything calculated to excite suspicion, is not required before sending the message or delivering to the sender the money received in reply to require the sender to identify himself as being the person whose name is signed to the telegram. Western Union Tel. Co. *v.* Meyer, 61 Ala. 158, 32 Am. Rep. 1.

60. Havelock Bank *v.* Western Union Tel. Co., 141 Fed. 522, 72 C. C. A. 580. See also Western Union Tel. Co. *v.* Totten, 141 Fed. 533, 72 C. C. A. 591.

61. Elwood *v.* Western Union Tel. Co., 45 N. Y. 549, 6 Am. Rep. 140; Western Union Tel. Co. *v.* Totten, 141 Fed. 533, 72 C. C. A. 591.

62. Elwood *v.* Western Union Tel. Co., 45 N. Y. 549, 6 Am. Rep. 140; Western Union Tel. Co. *v.* Totten, 141 Fed. 533, 72 C. C. A. 591. See also Havelock Bank *v.* Western Union Tel. Co., 141 Fed. 522, 72 C. C. A. 580.

The character of the message itself may be such that it should arouse suspicion and require investigation. Western Union Tel. Co. *v.* Totten, 141 Fed. 533, 72 C. C. A. 591.

63. Western Union Tel. Co. *v.* Totten, 141 Fed. 533, 72 C. C. A. 591.

64. See Western Union Tel. Co. *v.* Lillard, 86 Ark. 208, 110 S. W. 1035, 17 L. R. A. N. S. 836; Gray *v.* Western Union Tel. Co., 87 Ga. 350, 13 S. E. 562, 27 Am. St. Rep. 259, 14 L. R. A. 95; Western Union Tel. Co. *v.* Ferguson, 57 Ind. 495, 1 Am. Elec. Cas. 266; Nye *v.* Western Union Tel. Co., 104 Fed. 628.

65. Stockman *v.* Western Union Tel. Co., (Kan. App. 1900) 63 Pac. 658.

Libelous messages see *infra*, IV, A, 4; VI, A.

66. **Liability of company** for transmission of libelous messages see *infra*, VI, A.

67. *Kansas.*— See Stockman *v.* Western Union Tel. Co., (App. 1900) 63 Pac. 658.

Minnesota.— Peterson *v.* Western Union Tel. Co., 65 Minn. 18, 67 N. W. 646, 33 L. R. A. 302, "Slippery Sam, your name is pants. [Signed] Many Republicans."

Wisconsin.— Monson *v.* Lathrop, 96 Wis. 386, 71 N. W. 596, 65 Am. St. Rep. 54, "The citizens of Wisconsin demonstrated you are an unscrupulous liar. A Marshfield Democrat."

United States.— Western Union Tel. Co. *v.* Cashman, 149 Fed. 367, 81 C. C. A. 5, 9 L. R. A. N. S. 140 ("Your article in issue of Thursday is a dirty lie as you know. Who is responsible? You nasty dog. Answer."); Nye *v.* Western Union Tel. Co., 104 Fed. 628.

Canada.— Dominion Tel. Co. *v.* Silver, 10 Can. Sup. Ct. 238 ("John Silver & Company . . . have failed, liabilities heavy." But this was a news despatch sent under a special contract, and one therefore which the telegraph company might have refused); Archambault *v.* Great Northwestern Tel. Co., 14 Quebec 8.

68. Stockman *v.* Western Union Tel. Co., (Kan. App. 1900) 63 Pac. 658; Nye *v.* Western Union Tel. Co., 104 Fed. 628, "Judge Vanderburgh . . . stated distinctly in my presence that Charlie Pillsbury bought you up in 1896, otherwise you would have been for Bryan." See also Peterson *v.* Western Union Tel. Co., 65 Minn. 18, 67 N. W. 646, 33 L. R. A. 302.

69. Western Union Tel. Co. *v.* Ferguson, 57 Ind. 495; Com. *v.* Western Union Tel. Co.,

bad faith of persons desiring to send messages over its lines; [70] and consequently is not justified in refusing a message couched in decent language and not libelous because its purpose or effect may be to accomplish or aid in the accomplishment of an illegal or immoral act,[71] provided the company would not itself incur a civil or criminal liability by transmitting the same.[72] Thus a message cannot ordinarily be refused because it relates to gambling in futures,[73] or contains reports of horse-races which the addressee may illegally use, when received, in conducting a pool room,[74] or is intended to procure the attendance of women of bad character for immoral purposes, provided the illegal or immoral purpose does not appear on the face of the message.[75] A telegraph company, however, is under no obligation to aid in or abet the commission of a crime, or to render itself liable to indictment, and if the sending of the message would itself be an illegal act or in direct furtherance of such an act, and the illegality appears from the face of the message or is otherwise positively known to the telegraph company, the message should not be transmitted; [76] but in such cases if the language of the message is ambiguous the doubt should be resolved in favor of the sender.[77] Such extraordinary remedies as mandamus and injunction will not be invoked against a telegraph or telephone company to compel service in favor of the proprietor of an admitted bawdy-house or similar place of ill repute; [78] nor, it seems, in favor of a bucket shop [79] or pool room.[80]

112 Ky. 355, 67 S. W. 59, 23 Ky. L. Rep. 1633, 99 Am. St. Rep. 299, 57 L. R. A. 614.

70. Western Union Tel. Co. *v.* Ferguson, 57 Ind. 495.

71. Gray *v.* Western Union Tel. Co., 87 Ga. 350, 13 S. E. 562, 27 Am. St. Rep. 259, 14 L. R. A. 95; Western Union Tel. Co. *v.* Ferguson, 57 Ind. 495, 1 Am. Elec. Cas. 266; Com. *v.* Western Union Tel. Co., 112 Ky. 355, 67 S. W. 59, 23 Ky. L. Rep. 1633, 99 Am. St. Rep. 299, 57 L. R. A. 614.

Analogy to railroad companies.— A telegraph company has no more right to refuse to transmit a message couched in decent language and for which the usual charges have been paid, on the ground that the information may be used for an illegal or immoral purpose, than a railroad company would have to refuse to carry a passenger who was not disorderly and who had paid his fare because it believed that his purpose in going to a certain place was to commit an illegal or immoral act. Com. *v.* Western Union Tel. Co., 112 Ky. 355, 67 S. W. 59, 23 Ky. L. Rep. 1633, 99 Am. St. Rep. 299, 57 L. R. A. 614.

72. Gray *v.* Western Union Tel. Co., 87 Ga. 350, 13 S. E. 562, 27 Am. St. Rep. 259, 14 L. R. A. 95; Com. *v.* Western Union Tel. Co., 112 Ky. 355, 67 S. W. 59, 23 Ky. L. Rep. 1633, 99 Am. St. Rep. 299, 57 L. R. A. 614.

73. Gray *v.* Western Union Tel. Co., 87 Ga. 350, 13 S. E. 562, 27 Am. St. Rep. 259, 14 L. R. A. 95, dealings in futures not being illegal.

74. Com. *v.* Western Union Tel. Co., 112 Ky. 355, 67 S. W. 59, 23 Ky. L. Rep. 1633, 99 Am. St. Rep. 299, 57 L. R. A. 614. But see Louisville *v.* Wehmhoff, 116 Ky. 812, 76 S. W. 876, 79 S. W. 201, 25 Ky. L. Rep. 995, 1924.

In the absence of statute or ordinance the transmission and delivery of reports of horse-races and other sporting events is a legitimate business and cannot be rendered illegitimate by the fact that the recipient of such reports without further connivance of the telegraph or telephone company puts them to an illegal use. People *v.* Breen, 44 Misc. (N. Y.) 375, 89 N. Y. Suppl. 998.

75. Western Union Tel. Co. *v.* Ferguson, 57 Ind. 495, 1 Am. Electric Cas. 266.

76. Gray *v.* Western Union Tel. Co., 87 Ga. 350, 13 S. E. 562, 27 Am. St. Rep. 259, 14 L. R. A. 95; Louisville *v.* Wehmhoff, 116 Ky. 812, 76 S. W. 876, 79 S. W. 201, 25 Ky. L. Rep. 995, 1924.

A telegraph company may be prohibited by statute or ordinance from transmitting information or money in furtherance of gambling transactions. State *v.* Harbourne, 70 Conn. 484, 40 Atl. 179, 66 Am. St. Rep. 126, 40 L. R. A. 607; Louisville *v.* Wehmhoff, 116 Ky. 812, 76 S. W. 876, 79 S. W. 201, 25 Ky. L. Rep. 995, 1924; Reg. *v.* Osborne, 27 Ont. 185.

77. Gray *v.* Western Union Tel. Co., 87 Ga. 350, 354, 13 S. E. 562, 27 Am. St. Rep. 259, 14 L. R. A. 95, where the court said: "When a dispatch is ambiguous, the law would give the benefit of the ambiguity to the company in dealing with it either civilly or criminally for transmitting the dispatch, and hence, it would be the duty of the company, in deciding whether to transmit or not, to give the benefit of the doubt to the sender."

78. Godwin *v.* Carolina Tel., etc., Co., 136 N. C. 258, 48 S. E. 636, 103 Am. St. Rep. 941, 67 L. R. A. 251.

79. Bryant *v.* Western Union Tel. Co., 17 Fed. 825. See also Western Union Tel. Co. *v.* State, 165 Ind. 492, 76 N. E. 100, 3 L. R. A. N. S. 153; Smith *v.* Western Union Tel. Co., 84 Ky. 664, 2 S. W. 483, 8 Ky. L. Rep. 672.

80. Cullen *v.* New York Tel. Co., 106 N. Y. App. Div. 250, 94 N. Y. Suppl. 290.

6. Sunday Messages. Under the laws relating to the observance of Sunday,[81] a telegraph company may keep its office open on Sunday;[82] but it is not obliged to receive for transmission messages not relating to matters of charity or necessity.[83] If, however, a message is presented for transmission which relates to a matter of charity or necessity it is the duty of the company to receive and transmit the same,[84] notwithstanding the person presenting it might have done so on the day previous.[85]

7. Oral Messages. A telegraph company may properly require that, before a message is accepted for transmission, it shall be reduced to writing, and may refuse to accept a message not in writing,[86] although one of its operators may at the sender's request act for him in writing the message.[87] The company may also waive the requirement that messages shall be tendered in writing, and may accept and contract to transmit a verbal message, or a message offered over a telephone,[88] in which case it will be liable for failure properly to transmit and deliver the same,[89] provided it is established that the message did in fact reach the telegraph company,[90] and what its language, as it reached the company, was.[91]

81. See Sunday, *ante*, p. 556.

82. Western Union Tel. Co. *v.* Yopst, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224, holding that a telegraph office may be kept open on Sunday, since messages relating to matters of charity or necessity are apt to be presented for transmission or received.

But the telegraph business generally is not a work of necessity. Rogers *v.* Western Union Tel. Co., 78 Ind. 169, 41 Am. Rep. 558.

83. Willingham *v.* Western Union Tel. Co., 91 Ga. 449, 18 S. E. 298; Western Union Tel. Co. *v.* Yopst, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224; Thompson *v.* Western Union Tel. Co., 32 Mo. App. 191.

84. Western Union Tel. Co. *v.* Wilson, 93 Ala. 32, 9 So. 414, 30 Am. St. Rep. 23; Burnett *v.* Western Union Tel. Co., 39 Mo. App. 599; Galveston, etc., R. Co. *v.* Levy, 59 Tex. 542, 46 Am. Rep. 269.

Necessity.— It is not practicable to give any exact definition of the word "necessity" as used in this connection, each case depending upon its particular facts and circumstances. Western Union Tel. Co. *v.* Yopst, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224.

85. Burnett *v.* Western Union Tel. Co., 39 Mo. App. 599.

86. People *v.* Western Union Tel. Co., 166 Ill. 15, 46 N. E. 731, 36 L. R. A. 637; Western Union Tel. Co. *v.* Liddell, 68 Miss. 1, 8 So. 510; Western Union Tel. Co. *v.* Dozier, 67 Miss. 288, 7 So. 325; Kirby *v.* Western Union Tel. Co., 7 S. D. 623, 65 N. W. 37, 46 Am. St. Rep. 765, 30 L. R. A. 612, 621, 624, 4 S. D. 105, 55 N. W. 759, 46 Am. St. Rep. 765, 30 L. R. A. 612, 621, 624; Rich *v.* Western Union Tel. Co., (Tex. Civ. App. 1907) 110 S. W. 93.

87. Western Union Tel. Co. *v.* Prevatt, 149 Ala. 617, 43 So. 106; Mims *v.* Western Union Tel. Co., 82 S. C. 247, 64 S. E. 236; Western Union Tel. Co. *v.* Foster, 64 Tex. 220, 53 Am. Rep. 754, 1 Am. Elec. Cas. 740; Western Union Tel. Co. *v.* Edsall, 63 Tex. 668, 1 Am. Elec. Cas. 715; Gulf, etc., R. Co. *v.* Geer, 5 Tex. Civ. App. 349, 24 S. W. 86. See also Carroll *v.* Southern Express Co., 37 S. C. 452, 16 S. E. 128.

Effect upon company's liability see *infra*, V, B, 1, a, (II).

88. *Alabama.*— Western Union Tel. Co. *v.* Wilson, 93 Ala. 32, 9 So. 414, 30 Am. St. Rep. 23.

Illinois.— People *v.* Western Union Tel. Co., 166 Ill. 15, 46 N. E. 731, 36 L. R. A. 637.

Indiana.—Western Union Tel. Co. *v.* Todd, (App. 1899) 53 N. E. 194.

Kentucky.— Western Union Tel. Co. *v.* Gault, 90 S. W. 610, 28 Ky. L. Rep. 881.

Michigan.—Carland *v.* Western Union Tel. Co., 118 Mich. 369, 76 N. W. 762, 74 Am. St. Rep. 394, 43 L. R. A. 280.

South Carolina.— Bowie *v.* Western Union Tel. Co., 78 S. C. 424, 59 S. E. 65.

89. Western Union Tel. Co. *v.* Wilson, 93 Ala. 32, 9 So. 414, 30 Am. St. Rep. 23; Western Union Tel. Co. *v.* Todd, (Ind. App. 1899) 53 N. E. 194; Carland *v.* Western Union Tel. Co., 118 Mich. 369, 76 N. W. 762, 74 N. W. 394, 43 L. R. A. 280; Bowie *v.* Western Union Tel. Co., 78 S. C. 424, 59 S. E. 65.

Effect upon company's liability where message is given orally or by telephone see *infra*, V, B, 1, d.

90. Planters' Cotton Oil Co. *v.* Western Union Tel. Co., 126 Ga. 621, 55 S. E. 495, 6 L. R. A. N. S. 1180, holding that if the telegraph company denies having accepted the message, plaintiff does not make a case unless he knew the person who answered the telephone or recognized the voice, and can connect such person with the telegraph company as its agent to accept messages, it not being sufficient to testify that he asked for a telephone connection with the telegraph office, and that thereafter some unknown person answered and stated that he was the telegraph operator and agreed to take the message.

91. Western Union Tel. Co. *v.* Gault, 90 S. W. 610, 28 Ky. L. Rep. 881, holding that where an error occurs in telephoning the

8. Messages Not on Regular Blanks. The company may reasonably require, not only that the message shall be reduced to writing, but that it shall, when presented for acceptance, be written on one of the usual blank forms containing the printed conditions on which only the company holds itself out to the public as prepared to accept messages, and it may refuse a message not so written;[92] but the company may waive the requirement and accept messages not so written, in which case it will be liable for a failure properly to transmit and deliver the same.[93]

9. Messages For Points Not on Company's Lines. No obligation rests on a telegraph company to accept messages for points at which it has no office and no facilities for delivery, and for which it does not hold itself out to the public generally as prepared to handle messages;[94] but it is the duty of its agents to know the places at which the company has offices,[95] and of the company to furnish its agents with all necessary information in this regard.[96] So if an agent of a telegraph company through negligence or the lack of such information accepts for transmission a message for a point at which the company has no office, the company will nevertheless be liable for a failure to transmit and deliver the same;[97] and if an agent refuses to accept a message under the erroneous belief that the company has no office at the place to which it is addressed, the company will be liable in damages for such refusal,[98] although such a mistake, and the consequent refusal of a message, is not ground for the recovery of a statutory penalty in a state where the penalty is aimed only at wilful refusal or intentional discrimination.[99]

10. Collect and Deadhead Messages. A telegraph company may require, before accepting and contracting to transmit a message, that its reasonable charges for the service demanded shall be prepaid;[1] but the right to require such pre-

message to the telegraph office and the operator testifies that he received it as he wrote it down, and the sender's agent, who telephoned it, does not remember anything about the transaction, there is no evidence of negligence.

92. Western Union Tel. Co. *v.* Liddell, 68 Miss. 1, 8 So. 510; Western Union Tel. Co. *v.* Dozier, 67 Miss. 288, 7 So. 325; Kirby *v.* Western Union Tel. Co., 7 S. D. 623, 65 N. W. 37, 46 Am. St. Rep. 765, 30 L. R. A. 612, 621, 624, 4 S. D. 105, 55 N. W. 759, 46 Am. St. Rep. 765, 30 L. R. A. 612, 621, 624.

If a person insists upon erasing from the printed conditions of a telegraph blank a reasonable and valid stipulation contained therein, the company may refuse to receive the message. Kirby *v.* Western Union Tel. Co., 7 S. D. 623, 65 N. W. 37, 46 Am. St. Rep. 765, 30 L. R. A. 612, 621, 624, 4 S. D. 105, 55 N. W. 759, 46 Am. St. Rep. 765, 30 L. R. A. 612, 621, 624.

93. Western Union Tel. Co. *v.* Jones, 69 Miss. 658, 13 So. 471, 30 Am. St. Rep. 579.

Effect upon company's liability see *infra*, V, B, 1, c.

94. Western Union Tel. Co. *v.* Hargrove, 14 Tex. Civ. App. 79, 36 S. W. 1077.

Connecting lines see *infra*, VI, E.

95. Western Union Tel. Co. *v.* Jones, 69 Miss. 658, 13 So. 471, 30 Am. St. Rep. 579.

96. Western Union Tel. Co. *v.* Downs, 25 Tex. Civ. App. 597, 62 S. W. 1078.

97. Western Union Tel. Co. *v.* Jones, 69 Miss. 658, 13 So. 471, 30 Am. St. Rep. 579; Western Union Tel. Co. *v.* Hargrove, 14 Tex. Civ. App. 79, 36 S. W. 1077.

98. Western Union Tel. Co. *v.* Downs, 25 Tex. Civ. App. 597, 62 S. W. 1078, where an operator refused to accept a message addressed to "New Waverly" on the ground that the company had no office at such place when the company did have an office there but it was erroneously listed in its books as "Waverly." See also State *v.* Western Union Tel. Co., 76 Ark. 124, 88 S. W. 834, where an operator refused to accept a message on the ground that the company had no office at the place to which the message was addressed, due to his negligence in examining an old and obsolete list of offices, it being held, however, that such negligence did not render the company liable for a statutory penalty.

99. State *v.* Western Union Tel. Co., 76 Ark. 124, 88 S. W. 834.

Statutory penalties see *infra*, VII.

1. *Alabama.*— Western Union Tel. Co. *v.* Cunningham, 99 Ala. 314, 14 So. 579.

Illinois.— Western Union Tel. Co. *v.* Dubois, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109.

Indiana.— Western Union Tel. Co. *v.* Henley, 157 Ind. 90, 60 N. E. 682; Western Union Tel. Co. *v.* Yopst, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224.

Mississippi.— Western Union Tel. Co. *v.* Liddell, 68 Miss. 1, 8 So. 510.

New York.— Macpherson *v.* Western Union Tel. Co., 52 N. Y. Super. Ct. 232, 1 Am. Elec. Cas. 755.

North Carolina.—Cogdell *v.* Western Union Tel. Co., 135 N. C. 431, 47 S. E. 490.

Texas.— Western Union Tel. Co. *v.* Snodgrass, 94 Tex. 284, 60 S. W. 308.

Deposit from transients.—On the same prin-

payment is a privilege which the company may waive,[2] and if it undertakes to render a dead-head[3] or collect[4] service, or to extend credit therefor, charging the tolls for the same at the regular tariff rates to the account of the sender,[5] or agreeing to accept payment at a later date,[6] it is held in the absence of contract to the same degree of care and diligence as though the charges had been fully prepaid.[7]

11. Unstamped Messages. Where a statute or act of congress provides for a stamp tax on telegraph messages the duty of affixing such stamp and paying such tax is on the person sending the message, and the telegraph company is not bound to accept for transmission a message which is not properly stamped.[8]

B. Duty to Transmit — 1. In General. Where a telegraph company has duly received a message for transmission, it is its duty to transmit the same, and it will be liable for a failure to do so,[9] notwithstanding it is a message which the company might have refused to accept,[10] unless it is also one which it would be unlawful for the company to transmit.[11] It is no justification for failure to transmit a message that it was written in cipher,[12] or that the operator mistakenly thought that the addressee was not at the place stated in the address.[13] A telegraph company by receiving a message for transmission does not, however, abso-

ciple it has been held that a regulation requiring a deposit from transient persons sending telegrams which require answers is reasonable. Western Union Tel. Co. *v.* McGuire, 104 Ind. 130, 2 N. E. 201, 54 Am. Rep. 296, 1 Am. Elec. Cas. 77; Hewlett *v.* Western Union Tel. Co., 28 Fed. 181, 2 Am. Elec. Cas. 851.

Telephone rentals see *supra*, III, B, 1.

2. Western Union Tel. Co. *v.* Cunningham, 99 Ala. 314, 14 So. 579; Western Union Tel. Co. *v.* Henley, 157 Ind. 90, 60 N. E. 682.

3. Western Union Tel. Co. *v.* Snodgrass, 94 Tex. 284, 60 S. W. 308, 86 Am. St. Rep. 851.

4. Western Union Tel. Co. *v.* Cunningham, 99 Ala. 314, 14 So. 579; Western Union Tel. Co. *v.* Yopst, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224; Cogdell *v.* Western Union Tel. Co., 135 N. C. 431, 47 S. E. 490.

5. Western Union Tel. Co. *v.* Henley, 157 Ind. 90, 60 N. E. 682.

6. Western Union Tel. Co. *v.* Cunningham, 99 Ala. 314, 14 So. 579.

7. Western Union Tel. Co. *v.* Henley, 157 Ind. 90, 60 N. E. 682. See also cases cited *supra*, notes 2–6.

8. Western Union Tel. Co. *v.* Waters, 139 Ala. 652, 36 So. 773; Western Union Tel. Co. *v.* Young, 138 Ala. 240, 36 So. 374 (subsequent repeal of the act does not make the company liable where no stamp was originally affixed); Kirk *v.* Western Union Tel. Co., 90 Fed. 809.

9. *Georgia.*— Baldwin *v.* Western Union Tel. Co., 93 Ga. 692, 21 S. E. 212, 44 Am. St. Rep. 194.

Maryland.— Birney *v.* New York, etc., Printing Tel. Co., 18 Md. 341, 81 Am. Dec. 607.

Mississippi.— Western Union Tel. Co. *v.* Jones, 69 Miss. 658, 13 So. 471, 30 Am. St. Rep. 579.

Missouri.— Burnett *v.* Western Union Tel. Co., 39 Mo. App. 599.

North Carolina.—Hocutt *v.* Western Union Tel. Co., 147 N. C. 186, 60 S. E. 980.

Pennsylvania.— U. S. Tel. Co. *v.* Wenger, 55 Pa. St. 262, 93 Am. Dec. 751.

Virginia.— Western Union Tel. Co. *v.* Reynolds, 77 Va. 173, 46 Am. Rep. 715.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 31.

If a telegraph company makes no effort to transmit a message which it has received, as where the operator forgets and entirely neglects to transmit the same, it will be liable for all damages resulting from such neglect regardless of any rule or regulation limiting its liability in the case of unrepeated messages. Birney *v.* New York, etc., Printing Tel., Co., 18 Md. 341, 81 Am. Dec. 607.

Message stopped at intermediate point.— If a message is received at one point to be transmitted to another point on the company's line and is transmitted from the first point but never goes beyond an intermediate point on the line, and no reason is shown for the failure to transmit it to its destination, the company will be liable for the damages sustained. U. S. Telegraph Co. *v.* Wenger, 55 Pa. St. 262, 93 Am. Dec. 751.

10. Western Union Tel. Co. *v.* Cunningham, 99 Ala. 314, 14 So. 579 (charges not prepaid); Western Union Tel. Co. *v.* Jones, 69 Miss. 658, 13 So. 471, 30 Am. St. Rep. 579 (message not on regular blank); Western Union Tel. Co. *v.* Reynolds, 77 Va. 173, 46 Am. Rep. 715.

11. Western Union Tel. Co. *v.* Young, 138 Ala. 240, 36 So. 374; Kirk *v.* Western Union Tel. Co., 90 Fed. 809, under statute making telegraph company liable for a penalty for transmitting unstamped messages.

12. Western Union Tel. Co. *v.* Reynolds, 77 Va. 173, 46 Am. Rep. 715, holding that the fact that a message is in cipher so that its meaning is not intelligible to the company is no justification for a failure to transmit it, where it is expressed in a series of letters which could readily be transmitted.

13. Hocutt *v.* Western Union Tel. Co., 147 N. C. 186, 60 S. E. 980.

lutely insure that it will be transmitted,[14] and circumstances over which it has no control may arise which will excuse a failure to do so;[15] but if the failure to transmit is due to the negligence of the company, it will be liable for all damages directly resulting from such failure,[16] and in some jurisdictions for a statutory penalty;[17] and if without negligence on the part of the company circumstances arise making it impossible to transmit the message, it may be the duty of the company to notify the sender of the message of such fact.[18]

2. To Transmit Promptly — a. In General. The merit of telegraphic communication lies in its speed, and it is for this reason that it is resorted to instead of using the more certain and less expensive method of communicating by mail.[19] It is therefore the duty of telegraph companies, which hold themselves out to the world as prepared to furnish this rapid means of communication, to transmit messages promptly, and in the absence of any legal excuse they will be liable for a failure to do so.[20] Such companies, however, do not insure the prompt transmission of a message, but are liable only for failure to exercise ordinary care; that is, for failure to transmit as promptly as is reasonably practicable under all the circumstances.[21] They must, however, exercise reasonable care and diligence to secure a prompt transmission of messages,[22] and in determining whether they have done so all the facts and circumstances of the particular case should be considered,[23] including the urgency or importance of the message in question.[24] A telegraph company cannot justify a delay in transmission on the ground that one of its rules or regulations was not complied with where it has waived the same by accepting and agreeing to transmit the message.[25] In regard to Sunday

14. See Birney *v.* New York, etc., Printing Tel. Co., 18 Md. 341, 81 Am. Dec. 607.

15. See Western Union Tel. Co. *v.* Reynolds, 77 Va. 173, 46 Am. Rep. 715.

16. Birney *v.* New York, etc., Printing Tel. Co., 18 Md. 341, 81 Am. Dec. 607 (where the operator forgot about the message and made no effort to transmit it); U. S. Telegraph Co. *v.* Wenger, 55 Pa. St. 262, 93 Am. Dec. 751; Western Union Tel. Co. *v.* Reynolds, 77 Va. 173, 46 Am. Rep. 715. See also cases cited *supra*, note 9.

17. Burnett *v.* Western Union Tel. Co., 39 Mo. App. 599.

Penalties see *infra*, VII.

18. Buchanan *v.* Western Union Tel. Co., (Tex. Civ. App. 1907) 100 S. W. 974.

Notice of circumstance causing delay see *infra*, IV, B, 2, b, (I), (II).

19. Daughtery *v.* American Union Tel. Co., 75 Ala. 168, 51 Am. Rep. 435; Dorgan *v.* Western Union Tel. Co., 7 Fed. Cas. No. 4,004.

20. *Alabama.*— Western Union Tel. Co. *v.* Cunningham, 99 Ala. 314, 14 So. 579; Daughtery *v.* American Union Tel. Co., 75 Ala. 168, 51 Am. Rep. 435.

Florida.— Western Union Tel. Co. *v.* Hyer, 22 Fla. 637, 1 So. 129, 1 Am. St. Rep. 222, 2 Am. Elec. Cas. 484.

Kentucky.— Cumberland Tel., etc., Co. *v.* Quigley, 129 Ky. 788, 112 S. W. 897, 19 L. R. A. N. S. 575.

Nevada.— Mackay *v.* Western Union Tel. Co., 16 Nev. 222.

New York.—Pearsall *v.* Western Union Tel. Co., 124 N. Y. 256, 26 N. E. 534, 21 Am. St. Rep. 662; Leonard *v.* New York, etc., Electro Magnetic Tel. Co., 41 N. Y. 544, 1 Am. Rep. 446.

Texas.— Western Union Tel. Co. *v.* True, 101 Tex. 236, 106 S. W. 315 [*reversing* on other grounds (Civ. App. 1907) 103 S. W. 1180]; Mitchell *v.* Western Union Tel. Co., 12 Tex. Civ. App. 262, 33 S. W. 1016.

United States.— Beasley *v.* Western Union Tel. Co., 39 Fed. 181; Behm *v.* Western Union Tel. Co., 3 Fed. Cas. No. 1,234, 8 Biss. 131, 7 Reporter 710; Dorgan *v.* Western Union Tel. Co., 7 Fed. Cas. No. 4,004.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 33.

21. Western Union Tel. Co. *v.* McDonald, 42 Tex. Civ. App. 229, 95 S. W. 691; Western Union Tel. Co. *v.* Hays, (Tex. Civ. App. 1901) 63 S. W. 171.

Excuse for delay see *infra*, IV, B, 2, b.

22. Western Union Tel. Co. *v.* McDonald, 42 Tex. Civ. App. 229, 95 S. W. 691; Beasley *v.* Western Union Tel. Co., 39 Fed. 181; Behm *v.* Western Union Tel. Co., 3 Fed. Cas. No. 1,234, 8 Biss. 131, 7 Reporter 710.

23. Beasley *v.* Western Union Tel. Co., 39 Fed. 181; Behm *v.* Western Union Tel. Co., 3 Fed. Cas. No. 1,234, 8 Biss. 131, 7 Reporter 710; Stevenson *v.* Montreal Tel. Co., 16 U. C. Q. B. 530.

It is a question for the jury whether under the circumstances of the particular case a telegraph company was chargeable with negligence, that is, with unreasonable delay. Stevenson *v.* Montreal Tel. Co., 16 U. C. Q. B. 530.

24. Cumberland Tel., etc., Co. *v.* Quigley, 129 Ky. 788, 112 S. W. 897, 19 L. R. A. N. S. 575; Beasley *v.* Western Union Tel. Co., 39 Fed. 181.

25. Western Union Tel. Co. *v.* Cunningham, 99 Ala. 314, 14 So. 579, waiver of regulation requiring prepayment of charges by agree-

messages it has been held that, although the company receives a message on Sunday, it is not liable for failure to transmit it on the same day if it does not relate to a matter of charity or necessity;[26] but if the message is of such character the company will be liable for failure to transmit the same.[27]

b. Excuses For Delay — (i) *In General.* In addition to the general rule requiring that ordinarily messages are to be transmitted in the order in which they are received,[28] various circumstances or conditions may exist which will justify or excuse a delay in transmission,[29] or justify a refusal to accept a message for transmission unless it is taken subject to delay.[30] If, however, the message is accepted for transmission and circumstances arise making a prompt transmission impossible, the sender of the message should be notified.[31]

(ii) *Wire Trouble.* Inasmuch as a telegraph company is liable only for negligence and does not insure prompt transmission,[32] it follows that it is not responsible for delays due to unavoidable interruptions in the working of its lines, such as those due to storms or atmospheric disturbances or other causes over which it has no control and against which, in the exercise of ordinary prudence and foresight, it was not reasonably practicable to guard.[33] Wire trouble, however, is no legal excuse where its existence and extent were known to the company's operator when the message was accepted, and the facts not communicated by him to the sender;[34] nor is it an excuse when the trouble arises because of the

ment to transmit the message and receive payment on the following day.

26. Willingham *v.* Western Union Tel. Co., 91 Ga. 449, 18 S. E. 298; Western Union Tel. Co. *v.* Yopst, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224 (not liable for statutory penalty); Rogers *v.* Western Union Tel. Co., 78 Ind. 169, 41 Am. Rep. 558 (not liable for statutory penalty). See also *supra*, IV, A, 6.

27. Burnett *v.* Western Union Tel. Co., 39 Mo. App. 599.

28. See *infra*, IV, B, 2, c.

29. See Glover *v.* Western Union Tel. Co., 78 S. C. 502, 59 S. E. 526; Behm *v.* Western Union Tel. Co., 3 Fed. Cas. No. 1,234, 8 Biss. 131, 7 Reporter 710; Dorgan *v.* Western Union Tel. Co., 7 Fed. Cas. No. 4,004; Stevenson *v.* Montreal Tel. Co., 16 U. C. Q. B. 530.

30. Petze *v.* Western Union Tel. Co., 128 N. Y. App. Div. 192, 112 N. Y. Suppl. 516, holding that where a message is presented to a telegraph company for transmission during a strike of its operators, the company is not liable for a statutory penalty because it refuses to receive the message except subject to delay.

31. Swan *v.* Western Union Tel. Co., 129 Fed. 318, 63 C. C. A. 550, 67 L. R. A. 153. See also Buchanan *v.* Western Union Tel. Co., (Tex. Civ. App. 1907) 100 S. W. 974. But see Stevenson *v.* Montreal Tel. Co., 16 U. C. Q. B. 530.

In case of wire trouble see *infra*, IV, B, 2, b, (II).

32. See *supra*, IV, B, 2, a.

33. *Georgia.*— Western Union Tel. Co. *v.* Davis, 95 Ga. 522, 22 S. E. 642.

Indiana.— Bierhaus *v.* Western Union Tel. Co., 8 Ind. App. 246, 34 N. E. 581.

Michigan.— Jacob *v.* Western Union Tel. Co., 135 Mich. 600, 98 N. W. 402.

Missouri.— Taylor *v.* Western Union Tel. Co., 107 Mo. App. 105, 80 S. W. 697; Smith *v.* Western Union Tel. Co., 57 Mo. App. 259.

New York.— Leonard *v.* New York, etc., Electro Magnetic Tel. Co., 41 N. Y. 544, 1 Am. Rep. 446.

South Carolina.— Glover *v.* Western Union Tel. Co., 78 S. C. 502, 59 S. E. 526.

South Dakota.— Kirby *v.* Western Union Tel. Co., 4 S. D. 105, 55 N. W. 759, 46 Am. St. Rep. 765, 30 L. R. A. 612, 621, 624.

Texas.— Western Union Tel. Co. *v.* McGown, 42 Tex. Civ. App. 565, 93 S. W. 710; Faubion *v.* Western Union Tel. Co., 36 Tex. Civ. App. 98, 81 S. W. 56; Western Union Tel. Co. *v.* Birge-Forbes Co., 29 Tex. Civ. App. 526, 69 S. W. 181; Western Union Tel. Co. *v.* Stiles, (Civ. App. 1896) 35 S. W. 76.

United States.— Beasley *v.* Western Union Tel. Co., 39 Fed. 181; Behm *v.* Western Union Tel. Co., 3 Fed. Cas. No. 1,234, 8 Biss. 131, 7 Reporter 710; Dorgan *v.* Western Union Tel. Co., 7 Fed. Cas. No. 4,004.

Canada.— Stevenson *v.* Montreal Tel. Co., 16 U. C. Q. B. 530.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 33.

34. Bierhaus *v.* Western Union Tel. Co., 8 Ind. App. 246, 34 N. E. 581, 12 Ind. App. 17, 39 N. E. 881; Western Union Tel. Co. *v.* Birge-Forbes Co., 29 Tex. Civ. App. 526, 69 S. W. 181; Swan *v.* Western Union Tel. Co., 129 Fed. 318, 63 C. C. A. 550, 67 L. R. A. 153; Fleischner *v.* Pacific Postal Tel. Co., 55 Fed. 738 [*affirmed* on this point in 66 Fed. 899, 14 C. C. A. 166]. But see Stevenson *v.* Montreal Tel. Co., 16 U. C. Q. B. 530.

Time or place of delay.— It is the duty of a telegraph company to notify the sender of a message of its inability promptly to transmit the same, whether the cause of the delay exists at the time the message is received or arises subsequently before the message is transmitted. Swan *v.* Western Union Tel. Co., 129 Fed. 318, 63 C. C. A. 550, 67 L. R. A. 153.

company's own negligence, and was of a character which could have been prevented, or obviated earlier, by the exercise of ordinary care,[35] or where the message might have been transmitted by using a different wire, ordinarily but not at the particular time devoted to a different class of business.[36] So where a delay in transmission is shown, if the company relies upon wire trouble as a defense, it must go further and show that it was not due to the fault of the company.[37]

(III) *OFFICE HOURS.* It is well settled that a telegraph company may make reasonable rules and regulations in regard to its office hours,[38] and is not required to keep its offices open for every hour of the day and night, or for the same number of hours on every day of the week or year, as in the case of Sundays and holidays,[39] or for the same hours at different places.[40] It is also held that it is not the duty of a telegraph company to keep its operators at every point informed as to its office hours at other places where it maintains offices,[41] or of its operators to know such office hours,[42] or to ascertain upon accepting a message, and inform the sender, whether the office hours at the point of destination are such that the message may be promptly transmitted.[43] So the mere acceptance of a message for transmission does not import any agreement or undertaking that it shall be immediately or promptly transmitted, regardless of such office hours;[44] but on the contrary it is implied, in the absence of express agreement, that it shall be transmitted subject thereto,[45] and the company will not be liable for such delay as is due to the reasonable office hours observed at the point of destination or relay points through which the message must pass.[46] In order, however, that

But where the message is delayed at a relay point on account of wire trouble caused by severe storms, and this fact is not known to the operator at the original point of transmission, the company will not be liable for failure to notify the sender of the message of the delay, in the absence of anything to charge it with knowledge of the urgent character of the message. Jacob *v.* Western Union Tel. Co., 135 Mich. 600, 98 N. W. 402.

35. Western Union Tel. Co. *v.* Sircle, 103 Ind. 227, 2 N. E. 604; Tinsley *v.* Western Union Tel. Co., 72 S. C. 350, 51 S. E. 913; Western Union Tel. Co. *v.* McGown, 42 Tex. Civ. App. 565, 93 S. W. 710; Western Union Tel. Co. *v.* Merrill, (Tex. Civ. App. 1893) 22 S. W. 826.

36. Buchanan *v.* Western Union Tel. Co., (Tex. Civ. App. 1907) 100 S. W. 974, holding that where a telegraph company has three wires between given points, two of which are used for railroad business and the other for commercial business, it cannot excuse a delay in transmitting a death message because the commercial wire is crossed with another wire and has to be put out of business, in the absence of proof of an emergency for the exclusive use of the railroad wires for railroad dispatches, when the message was presented for transmission.

37. Western Union Tel. Co. *v.* Boots, 10 Tex. Civ. App. 540, 31 S. W. 825.

38. See *supra*, I, D, 3, b.

39. Western Union Tel. Co. *v.* Ford, 77 Ark 531, 92 S. W. 528 (shorter hours on holidays); Western Union Tel. Co. *v.* Van Cleave, 107 Ky. 464, 54 S. W. 827, 22 Ky. L. Rep. 53, 92 Am. St. Rep. 366 (no delivery service during night); Ayres *v.* Western Union Tel. Co., 65 N. Y. App. Div. 149, 72 N. Y. Suppl. 634 (shorter hours on Sundays); Western Union Tel. Co. *v.* McConnico, 27 Tex. Civ. App. 610, 66 S. W. 592 (shorter hours on Sundays).

40. Western Union Tel. Co. *v.* Harding, 103 Ind. 505, 3 N. E. 172; Sweet *v.* Postal Tel., etc., Co., 22 R. I. 344, 47 Atl. 881, 53 L. R. A. 732.

41. Western Union Tel. Co. *v.* Harding, 103 Ind. 505, 3 N. E. 172; Western Union Tel. Co. *v.* Neel, 86 Tex. 368, 25 S. W. 15, 40 Am. St. Rep. 847; Western Union Tel. Co. *v.* May, 8 Tex. Civ. App. 176, 27 S. W. 760; Given *v.* Western Union Tel. Co., 24 Fed. 119. But see Western Union Tel. Co. *v.* Hill, 163 Ala. 18, 50 So. 248; Western Union Tel. Co. *v.* Harris, (Ark. 1909) 121 S. W. 1051; Bierhaus *v.* Western Union Tel. Co., 8 Ind. App. 246, 34 N. E. 581.

42. Sweet *v.* Postal Tel., etc., Co., 22 R. I. 344, 47 Atl. 881, 53 L. R. A. 732; Western Union Tel. Co. *v.* McConnico, 27 Tex. Civ. App. 610, 66 S. W. 592; Given *v.* Western Union Tel. Co., 24 Fed. 119.

43. Western Union Tel. Co. *v.* Neel, 86 Tex. 368, 25 S. W. 15, 40 Am. St. Rep. 847. But see Bierhaus *v.* Western Union Tel. Co., 8 Ind. App. 246, 34 N. E. 581.

It is not negligence on the part of an operator to receive a message for transmission, not knowing whether the office to which it is addressed is open so as to permit of prompt transmission. Sweet *v.* Postal Tel., etc., Co., 22 R. I. 344, 47 Atl. 881, 53 L. R. A. 732.

44. Western Union Tel. Co. *v.* McConnico, 27 Tex. Civ. App. 610, 66 S. W. 592.

45. Western Union Tel. Co. *v.* Neel, 86 Tex. 368, 25 S. W. 15, 40 Am. St. Rep. 847; Western Union Tel. Co. *v.* McConnico, 27 Tex. Civ. App. 610, 66 S. W. 592.

46. *Alabama.*— Western Union Tel. Co. *v.* Crumpton, 138 Ala. 632, 36 So. 517.

the telegraph company may avail itself of the defense of office hours, as an excuse for delay, the established office hours must be reasonable.[47] The company may also waive its regulations as to office hours;[48] and if it expressly agrees that the message shall be transmitted promptly or within a certain time, it will be liable for a failure to do so regardless of its office hours,[49] it being within the implied authority of its transmitting agent to make such agreement.[50] It is not sufficient, however, to constitute such express agreement, that the sender of the message stated to the operator that he wished it to be at its destination by a certain time,[51] or that the operator stated that he thought he could get it through, and would send it immediately.[52]

c. Order of Transmission. In the absence of statute it is ordinarily the duty of a telegraph company to transmit messages in the order in which they are received by it,[53] from which it follows that the company will be liable for damages due to

Arkansas.— Western Union Tel. Co. *v.* Ford, 77 Ark. 531, 92 S. W. 528; Western Union Tel. Co. *v.* Love Banks Co., 73 Ark. 205, 83 S. W. 949.

Georgia.— Western Union Tel. Co. *v.* Georgia Cotton Co., 94 Ga. 444, 21 S. E. 835.

Indiana.— Western Union Tel. Co. *v.* Harding, 103 Ind. 505, 3 N. E. 172, penalty suit.

Kentucky.— Western Union Tel. Co. *v.* Crider, 107 Ky. 600, 54 S. W. 963, 21 Ky. L. Rep. 1336; Western Union Tel. Co. *v.* Steenbergen, 107 Ky. 469, 54 S. W. 829, 21 Ky. L. Rep. 1289; Western Union Tel. Co. *v.* Van Cleave, 107 Ky. 464, 54 S. W. 827, 22 Ky. L. Rep. 53, 92 Am. St. Rep. 366; Davis *v.* Western Union Tel. Co., 66 S. W. 17, 23 Ky. L. Rep. 1758.

Michigan.— Jacob *v.* Western Union Tel. Co., 135 Mich. 600, 98 N. W. 402.

New York.— Ayres *v.* Western Union Tel. Co., 65 N. Y. App. Div. 149, 72 N. Y. Suppl. 634.

Rhode Island.— Sweet *v.* Postal Tel., etc., Co., 22 R. I. 344, 47 Atl. 881, 53 L. R. A. 732.

South Carolina.— Roberts *v.* Western Union Tel. Co., 73 S. C. 520, 53 S. E. 985, 114 Am. St. Rep. 100; Harrison *v.* Western Union Tel. Co., 71 S. C. 386, 51 S. E. 119; Bonner *v.* Western Union Tel. Co., 71 S. C. 303, 51 S. E. 117. See also Smith *v.* Western Union Tel. Co., 77 S. C. 378, 58 S. E. 6; Smith *v.* Western Union Tel. Co., 72 S. C. 116, 51 S. E. 537.

Tennessee.— McCaul *v.* Western Union Tel. Co., 114 Tenn. 661, 88 S. W. 325.

Texas.— Western Union Tel. Co. *v.* Neel, 86 Tex. 368, 25 S. W. 15, 40 Am. St. Rep. 847, (Civ. App. 1894) 25 S. W. 661; Western Union Tel. Co. *v.* Byrd, 34 Tex. Civ. App. 594, 79 S. W. 40; Western Union Tel. Co. *v.* Christensen, (Civ. App. 1904) 78 S. W. 744; Western Union Tel. Co. *v.* McConnico, 27 Tex. Civ. App. 610, 66 S. W. 592; Western Union Tel. Co. *v.* Rawls, (Civ. App. 1901) 62 S. W. 136; Western Union Tel. Co. *v.* Gibson, (Civ. App. 1899) 53 S. W. 712; Robinson *v.* Western Union Tel. Co., (Civ. App. 1898) 43 S. W. 1053; Western Union Tel. Co. *v.* McMillan, (Civ. App. 1895) 30 S. W. 298; Western Union Tel. Co. *v.* May, 8 Tex. Civ. App. 176, 27 S. W. 760; Western Union Tel. Co. *v.* Murray, (Civ. App. 1894) 26 S. W. 996; Western Union Tel. Co. *v.* Wingate, 6 Tex. Civ. App. 394, 25 S. W. 439; Western Union Tel. Co. *v.* Merrill, (Civ. App. 1893) 22 S. W. 826.

Utah.— Brown *v.* Western Union Tel. Co., 6 Utah 219, 21 Pac. 988.

West Virginia.— Davis *v.* Western Union Tel. Co., 46 W. Va. 48, 32 S. E. 1026.

United States.— Given *v.* Western Union Tel. Co., 24 Fed. 119; Behm *v.* Western Union Tel. Co., 3 Fed. Cas. No. 1,234, 8 Biss. 131, 7 Reporter 710.

47. Western Union Tel. Co. *v.* Ford, 77 Ark. 531, 92 S. W. 528; Western Union Tel. Co. *v.* Crider, 107 Ky. 600, 54 S. W. 963, 21 Ky. L. Rep. 1336; Western Union Tel. Co. *v.* Gibson, (Tex. Civ. App. 1899) 53 S. W. 712; Brown *v.* Western Union Tel. Co., 6 Utah 219, 21 Pac. 988.

48. Suttle *v.* Western Union Tel. Co., 148 N. C. 480, 62 S. E. 593, 128 Am. St. Rep. 631. See *infra*, p. 77 text and notes 35–41.

Right to waive regulations generally see *supra*, I, D, 3, b.

49. Western Union Tel. Co. *v.* Crumpton, 138 Ala. 632, 36 So. 517; McPeek *v.* Western Union Tel. Co., 107 Iowa 356, 78 N. W. 63, 70 Am. St. Rep. 205, 43 L. R. A. 214; Suttle *v.* Western Union Tel. Co., 148 N. C. 480, 62 S. E. 593, 128 Am. St. Rep. 631; Western Union Tel. Co. *v.* Cavin, 30 Tex. Civ. App. 152, 70 S. W. 229.

50. Western Union Tel. Co. *v.* Crumpton, 138 Ala. 632, 36 So. 517; McPeek *v.* Western Union Tel. Co., 107 Iowa 356, 78 N. W. 63, 70 Am. St. Rep. 205, 43 L. R. A. 214.

51. Jacob *v.* Western Union Tel. Co., 135 Mich. 600, 98 N. W. 402.

52. Western Union Tel. Co. *v.* Gibson, (Tex. Civ. App. 1899) 53 S. W. 712.

53. *Alabama.*— Daughtery *v.* American Union Tel. Co., 75 Ala. 168, 51 Am. Rep. 435, 18 Cent. L. J. 428.

Nevada.— Mackay *v.* Western Union Tel. Co., 16 Nev. 222.

Ohio.— Davis *v.* Western Union Tel. Co., 1 Cinc. Super. Ct. 100, Allen Tel. Cas. 563.

Texas.— See Western Union Tel. Co. *v.* Neill, 57 Tex. 283, 288, 44 Am. Rep. 589.

Virginia.— See Western Union Tel. Co. *v.* Reynolds, 77 Va. 173, 195, 46 Am. Rep. 715.

a delay caused by a violation of this rule,[54] and will not be liable for such a delay as is merely incident to an adherence thereto.[55] There are, however, in some jurisdictions statutes according a preference in the order of transmission to certain classes of messages;[56] and under the federal statute of 1866, known as the Post Roads Act, telegraph companies which have accepted the provisions of such act are required to give preference to government messages.[57]

3. To Transmit Correctly.[58] It is the duty of a telegraph company to transmit messages correctly, and it will be liable for a negligent failure to do so,[59] although, as in the case of its duty to transmit promptly,[60] the company does not, in the absence of express agreement, absolutely insure against errors in transmission but is liable only for negligence.[61] So the company will not be

United States.— Dorgan *v.* Western Union Tel. Co., 7 Fed. Cas. No. 4,004.

England.— Reuter *v.* Electric Tel. Co., 6 E. & B. 341, 2 Jur. N. S. 1245, 26 L. J. Q. B. 46, 4 Wkly. Rep. 564, 88 E. C. L. 341.

Statement of rule.—With a few exceptions based on public exigency, telegraphic communication is governed by the law of the mill. Messages must be sent in the order in which they are received, without favor or partiality, without delay, and without reference to the value of the interests to be affected. Daughtery *v.* American Union Tel. Co., 75 Ala. 168, 51 Am. Rep. 435, 18 Cent. L. J. 428.

54. Mackay *v.* Western Union Tel. Co., 16 Nev. 222; Davis *v.* Western Union Tel. Co., 1 Cinc. Super. Ct. (Ohio) 100.

55. Dorgan *v.* Western Union Tel. Co., 7 Fed. Cas. No. 4,004.

56. See the statutes of the several states.

57. See Western Union Tel. Co. *v.* Pennsylvania R. Co., 195 U. S. 540, 558, 25 S. Ct. 133, 49 L. ed. 312, where the provision of the statute is quoted.

58. **Limitation of liability** see *infra*, V.

59. *Florida.*—Western Union Tel. Co. *v.* Merritt, 55 Fla. 462, 46 So. 1024, 127 Am. St. Rep. 169.

Georgia.— Stewart *v.* Postal Tel.-Cable Co., 131 Ga. 31, 61 S. E. 1045, 127 Am. St. Rep. 205, 18 L. R. A. N. S. 692; Western Union Tel. Co. *v.* Cohen, 73 Ga. 522; Western Union Tel. Co. *v.* Blanchard, 68 Ga. 299, 45 Am. Rep. 480. See also Western Union Tel. Co. *v.* Rountree, 92 Ga. 611, 18 S. E. 979, 44 Am. St. Rep. 93.

Illinois.— Western Union Tel. Co. *v.* Tyler, 74 Ill. 168, 24 Am. Rep. 279; Tyler *v.* Western Union Tel. Co., 60 Ill. 421, 14 Am. Rep. 38; Western Union Tel. Co. *v.* Hart, 62 Ill. App. 120.

Indiana.— Western Union Tel. Co. *v.* Meek, 49 Ind. 53.

Iowa.— Turner *v.* Hawkeye Tel. Co., 41 Iowa 458, 20 Am. Rep. 605.

Maine.— Bartlett *v.* Western Union Tel. Co., 62 Me. 209, 16 Am. Rep. 437.

Massachusetts.— May *v.* Western Union Tel. Co., 112 Mass. 90.

Mississippi.— Western Union Tel. Co. *v.* Lyon, 93 Miss. 590, 47 So. 344.

Missouri.— Reed *v.* Western Union Tel. Co., 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492.

Nebraska.— Western Union Tel. Co. *v.* Kemp, 44 Nebr. 194, 62 N. W. 451, 48 Am. St. Rep. 723.

New York.— Pearsall *v.* Western Union Tel. Co., 124 N. Y. 256, 26 N. E. 534, 21 Am. St. Rep. 662; Rittenhouse *v.* Independent Tel. Line, 44 N. Y. 263, 4 Am. Rep. 673 [*affirming* 1 Daly 474]; Leonard *v.* New York, etc., Electro Magnetic Tel. Co., 41 N. Y. 544, 1 Am. Rep. 446; Wolfskehl *v.* Western Union Tel. Co., 46 Hun 542; De Rutte *v.* New York, etc., Electro Magnetic Tel. Co., 1 Daly 547.

Ohio.— Western Union Tel. Co. *v.* Griswold, 37 Ohio St. 301, 41 Am. Rep. 500.

Texas.—Womack *v.* Western Union Tel. Co., 58 Tex. 176, 44 Am. Rep. 614; Western Union Tel. Co. *v.* Ragland, (Civ. App. 1901) 61 S. W. 421; Western Union Tel. Co. *v.* Tobin, (Civ. App. 1900) 56 S. W. 540; Western Union Tel. Co. *v.* Hines, 22 Tex. Civ. App. 315, 54 S. W. 627.

Virginia.—Washington, etc., Tel. Co. *v.* Hobson, 15 Gratt. 122.

Canada.— Lane *v.* Montreal Tel. Co., 7 U. C. C. P. 23.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 34.

Liability for penalty.— Under the Georgia statute imposing a penalty for failure to transmit messages "with impartiality and good faith and with due diligence," a telegraph company is not liable for such penalty for an error in transmission notwithstanding the error is a material one. Western Union Tel. Co. *v.* Rountree, 92 Ga. 611, 18 S. E. 979, 44 Am. St. Rep. 93. See also Wolf *v.* Western Union Tel. Co., 94 Ga. 434, 19 S. E. 717.

60. See *supra*, IV, B, 2, a.

61. *Arkansas.*—Western Union Tel. Co. *v.* Short, 53 Ark. 434, 14 S. W. 649, 9 L. R. A. 744.

Michigan.— Western Union Tel. Co. *v.* Carew, 15 Mich. 525.

New York.— Breese *v.* U. S. Telegraph Co., 48 N. Y. 132, 8 Am. Rep. 526; De Rutte *v.* New York, etc., Electro Magnetic Tel. Co., 1 Daly 547. See also Pearsall *v.* Western Union Tel. Co., 124 N. Y. 256, 26 N. E. 534, 21 Am. St. Rep. 662; Leonard *v.* New York, etc., Electro Magnetic Tel. Co., 41 N. Y. 544, 1 Am. Rep. 446.

South Carolina.— Pinckney *v.* Western Union Tel. Co., 19 S. C. 71, 45 Am. Rep. 765.

Texas.— Western Union Tel. Co. *v.* Edsall, 63 Tex. 668; Western Union Tel. Co. *v.* Neill, 57 Tex. 283, 44 Am. Rep. 589; Western Union

liable if the error was due to climatic or atmospheric influences or other causes temporarily affecting the insulation of its wires or the working of its instruments,[62] nor will the company be liable, in the absence of negligence, that is, if it exercised due care,[63] although the error was not due to uncontrollable causes.[64] So also the rule requiring correct transmission does not require that the message shall be transmitted *verbatim et literatim et punctuatim*, and if it is substantially correct the company will not be liable for an immaterial error,[65] or where the addressee was not misled or any damage or injury caused.[66] It is the duty of a telegraph company, however, to exercise reasonable care and diligence to secure an accurate transmission of messages and it will be liable for a failure to do so.[67]

C. Duty to Deliver — 1. In General. It is the duty of a telegraph company to deliver to the addressee or person authorized to receive the same every message accepted and transmitted by it,[68] even though it be one which the company might have refused to receive and transmit;[69] and in case of a wrongful or negligent failure to do so it will be liable for damages caused by such failure.[70] The company does not absolutely insure the delivery of messages,[71] but is only required to exercise ordinary care and diligence,[72] and will not be liable where in the exercise of such care it is unable to find the addressee or deliver the mes-

Tel. Co. *v.* Brown, (Civ. App. 1903) 75 S. W. 359.

United States.— Primrose *v.* Western Union Tel. Co., 154 U. S. 1, 14 S. Ct. 1098, 38 L. ed. 883; Abraham *v.* Western Union Tel. Co., 23 Fed. 315; White *v.* Western Union Tel. Co., 14 Fed. 710, 5 McCrary 103.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 34.

62. White *v.* Western Union Tel. Co., 14 Fed. 710, 5 McCrary 103.

63. Pinckney *v.* Western Union Tel. Co., 19 S. C. 71, 45 Am. Rep. 765; Western Union Tel. Co. *v.* Neill, 57 Tex. 283, 44 Am. Rep. 589; Western Union Tel. Co. *v.* Brown, (Tex. Civ. App. 1903) 75 S. W. 359.

64. Pinckney *v.* Western Union Tel. Co., 19 S. C. 71, 45 Am. Rep. 765.

65. Western Union Tel. Co. *v.* Clarke, 71 Miss. 157, 14 So. 452, even under a statute imposing a penalty for failure to "transmit correctly."

66. Western Union Tel. Co. *v.* Clarke, 71 Miss. 157, 14 So. 452; Newsome *v.* Western Union Tel. Co., 144 N. C. 178, 56 S. E. 863.

67. Pearsall *v.* Western Union Tel. Co., 124 N. Y. 256, 26 N. E. 534, 21 Am. St. Rep. 662; Leonard *v.* New York, etc., Electro Magnetic Tel. Co., 41 N. Y. 544, 1 Am. Rep. 446. And see cases cited *supra*, note 59.

68. State *v.* Western Union Tel. Co., 172 Ind. 20, 87 N. E. 641; Western Union Tel. Co. *v.* Johnsey, (Tex. Civ. App. 1908) 109 S. W. 251.

Message in foreign language.—Where a telegram in a foreign language is accepted for delivery in a country using that language, the telegraph company contracts that it has agents who can intelligently receive and deliver the same, and it is not a defense for failing to deliver such a message that the company's agent at the point of destination did not understand the language. Western Union Tel. Co. *v.* Olivarri, (Tex. Civ. App. 1908) 110 S. W. 930.

69. Western Union Tel. Co. *v.* Wilson, 93 Ala. 32, 9 So. 414, 30 Am. St. Rep. 23 (message not presented in writing but accepted and transmitted); Western Union Tel. Co. *v.* Snodgrass, 94 Tex. 284, 60 S. W. 308, 86 Am. St. Rep. 851 (message transmitted gratuitously).

70. *Alabama.*—Western Union Tel. Co. *v.* Krichbaum, 145 Ala. 409, 41 So. 16.

Arkansas.— Arkansas, etc., R. Co. *v.* Stroude, 82 Ark. 117, 100 S. W. 760.

Iowa.— Hendershot *v.* Western Union Tel. Co., 106 Iowa 529, 76 N. W. 828, 68 Am. St. Rep. 313.

Kentucky.— Postal Tel. Cable Co. *v.* Pratt, 85 S. W. 225, 27 Ky. L. Rep. 430.

New York.— Milliken *v.* Western Union Tel. Co., 110 N. Y. 403, 18 N. E. 251, 1 L. R. A. 281.

North Carolina.— Edwards *v.* Western Union Tel. Co., 147 N. C. 126, 60 S. E. 900; Lyne *v.* Western Union Tel. Co., 123 N. C. 129, 31 S. E. 350.

Texas.— Western Union Tel. Co. *v.* Cooper, 71 Tex. 507, 9 S. W. 589, 10 Am. St. Rep. 772, 1 L. R. A. 728; Western Union Tel. Co. *v.* Johnsey, (Civ. App. 1908) 109 S. W. 251; Western Union Tel. Co. *v.* O'Fiel, 47 Tex. Civ. App. 40, 104 S. W. 406; Western Union Tel. Co. *v.* Craige, 44 Tex. Civ. App. 214, 90 S. W. 681; Western Union Tel. Co. *v.* Cain, (Civ. App. 1897) 40 S. W. 624; Western Union Tel. Co. *v.* Birchfield, 15 Tex. Civ. App. 426, 39 S. W. 1002.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 32.

71. Little Rock, etc., Tel. Co. *v.* Davis, 41 Ark. 79; Western Union Tel. Co. *v.* Fontaine, 58 Ga. 433; Western Union Tel. Co. *v.* Elliott, 131 Ky. 340, 115 S. W. 228, 22 L. R. A. N. S. 761; Fowler *v.* Western Union Tel. Co., 80 Me. 381, 15 Atl. 29, 6 Am. St. Rep. 211.

72. *Kentucky.*—Western Union Tel. Co. *v.* Elliott, 131 Ky. 340, 115 S. W. 228, 22 L. R. A. N. S. 761.

Maine.— Fowler *v.* Western Union Tel. Co., 80 Me. 381, 15 Atl. 29, 6 Am. St. Rep. 211.

North Carolina.— Hinson *v.* Postal Tel. Cable Co., 132 N. C. 460, 43 S. E. 945.

sage,[73] or such delivery is prevented by circumstances over which the company has no control and for which it is not responsible;[74] but it must exercise ordinary care and diligence to find the addressee and deliver the message.[75] Whether the company has been negligent or has exercised proper care and diligence to deliver a message depends upon the circumstances of the particular case,[76] including any defect or insufficiency in the address,[77] and is ordinarily a question of fact for the jury.[78] It is not sufficient for the company, without making reasonable efforts to find the addressee elsewhere, merely to inquire at his residence or place of business,[79] or at the place of local address given,[80] or to inquire at his office without also inquiring at his residence;[81] and if the addressee or his whereabouts is unknown the company should consult the city directory[82] and perhaps make inquiry at the post-office;[83] but it is not required to make a house to house search for

Texas.— Western Union Tel. Co. *v.* Cox, (Civ. App. 1903) 74 S. W. 922; Hargrave *v.* Western Union Tel. Co., (Civ. App. 1901) 60 S. W. 687; Western Union Tel. Co. *v.* Burgess, (Civ. App. 1897) 43 S. W. 1033.

United States.— Ross *v.* Western Union Tel. Co., 81 Fed. 676, 26 C. C. A. 564.

Various terms have been employed in designating the degree of care required, but they are merely varied forms of expressing the requirement of what is known in law as ordinary care as applied to an employment of this nature. Fowler *v.* Western Union Tel. Co., 80 Me. 381, 15 Atl. 29, 6 Am. St. Rep. 211.

A telegraph company is not required to establish detective agencies to run down strangers to whom messages have been directed, but is only required to exercise reasonable diligence to find them according to the circumstances of the particular case. Western Union Tel. Co. *v.* Cox, (Tex. Civ. App. 1903) 74 S. W. 922.

73. Western Union Tel. Co. *v.* Elliott, 131 Ky. 340, 115 S. W. 228, 22 L. R. A. N. S. 761; Western Union Tel. Co. *v.* Cross, 116 Ky. 5, 74 S. W. 1098, 76 S. W. 162, 25 Ky. L. Rep. 268; Hinson *v.* Postal Tel. Cable Co., 132 N. C. 460, 43 S. E. 945; Western Union Tel. Co. *v.* Cox, (Tex. Civ. App. 1903) 74 S. W. 922 (inquiry at all hotels, one boarding-house, a picture store and office of another telegraph company held sufficient, where addressee was a "traveling picture man"); Hargrave *v.* Western Union Tel. Co., (Tex. Civ. App. 1901) 60 S. W. 687; Western Union Tel. Co. *v.* Burgess, (Tex. Civ. App. 1897) 43 S. W. 1033.

74. Fowler *v.* Western Union Tel. Co., 80 Me. 381, 15 Atl. 29, 6 Am. St. Rep. 211, message destroyed by burning of telegraph office.

75. Western Union Tel. Co. *v.* Krichbaum, 145 Ala. 409, 41 So. 16; Hendershot *v.* Western Union Tel. Co., 106 Iowa 529, 76 N. W. 828, 68 Am. St. Rep. 313; Lyne *v.* Western Union Tel. Co., 123 N. C. 129, 31 S. E. 350; Western Union Tel. Co. *v.* Cooper, 71 Tex. 507, 9 S. W. 598; Western Union Tel. Co. *v.* O'Fiel, 47 Tex. Civ. App. 40, 104 S. W. 406; Western Union Tel. Co. *v.* Waller, 37 Tex. Civ. App. 515, 84 S. W. 695; Western Union Tel. Co. *v.* James, 31 Tex. Civ. App. 503, 73 S. W. 79.

76. Hurlburt *v.* Western Union Tel. Co., 123 Iowa 295, 98 N. W. 794; Western Union Tel. Co. *v.* Cooper, 71 Tex. 507, 9 S. W. 598; Western Union Tel. Co. *v.* Cox, (Tex. Civ. App. 1903) 74 S. W. 922; Western Union Tel. Co. *v.* James, 31 Tex. Civ. App. 503, 73 S. W. 79; Western Union Tel. Co. *v.* De Jarles, 8 Tex. Civ. App. 109, 27 S. W. 792.

77. Western Union Tel. Co. *v.* Ford, 77 Ark. 531, 92 S. W. 528; Western Union Tel. Co. *v.* Patrick, 92 Ga. 607, 18 S. E. 980, 44 Am. St. Rep. 90; Hurlburt *v.* Western Union Tel. Co., 123 Iowa 295, 98 N. W. 794.

Insufficient or erroneous name or address see *infra*, V, C, 2.

78. See *infra*, VIII, F, 2, a.

79. Postal Tel. Cable Co. *v.* Pratt, 85 S. W. 225, 27 Ky. L. Rep. 430; Western Union Tel. Co. *v.* Cooper, 71 Tex. 507, 9 S. W. 598.

80. Klopf *v.* Western Union Tel. Co., 100 Tex. 540, 101 S. W. 1072, 123 Am. St. Rep. 831, 10 L. R. A. N. S. 498 [*reversing* (Civ. App. 1906) 97 S. W. 829]; Western Union Tel. Co. *v.* Waller, 37 Tex. Civ. App. 515, 84 S. W. 695; Western Union Tel. Co. *v.* De Jarles, 8 Tex. Civ. App. 109, 27 S. W. 792.

The local address given is merely an aid in finding the addressee and does not necessarily define the extent of the duty of the company, which should make reasonable efforts to find the addressee elsewhere, but such address does materially affect the question whether the diligence employed was sufficient. Klopf *v.* Western Union Tel. Co., 100 Tex. 540, 101 S. W. 1072, 123 Am. St. Rep. 831, 10 L. R. A. N. S. 498 [*reversing* (Civ. App. 1906) 97 S. W. 829].

Address "care some hotel."—Although the telegram is addressed "care some hotel" the company does not as a matter of law discharge its full duty by inquiring at the various hotels in the place but should make reasonable efforts to find the addressee elsewhere. Western Union Tel. Co. *v.* Waller, 37 Tex. Civ. App. 515, 84 S. W. 695.

81. Hendershot *v.* Western Union Tel. Co., 106 Iowa 529, 76 N. W. 828, 68 Am. St. Rep. 313.

82. Woods *v.* Western Union Tel. Co., 148 N. C. 1, 61 S. E. 653, 128 Am. St. Rep. 581; Martin *v.* Western Union Tel. Co., 81 S. C. 432, 62 S. E. 833; Klopf *v.* Western Union Tel. Co., 100 Tex. 540, 101 S. W. 1072, 123 Am. St. Rep. 831, 10 L. R. A. N. S. 498 [*reversing* (Civ. App. 1906) 97 S. W. 829].

83. Woods *v.* Western Union Tel. Co., 148 N. C. 1, 61 S. E. 653, 128 Am. St. Rep. 581;

him,[84] or to send a messenger into every store, saloon, or other public place to inquire for him.[85] If the company is unable to find the addressee or deliver the message, it should, if practicable to do so, and, if its own regulations so require, notify the sender of such fact,[86] and request a better address; [87] and while a failure to send such a message when required may not be negligence *per se*,[88] it is evidence of negligence on the part of the company.[89] So also, although the company is not negligent in failing to deliver, it may be liable for negligently informing the sender of the message that it has been delivered.[90] The fact that a message which the company undertook to transmit was not delivered is *prima facie* evidence of negligence; [91] but such presumption may be rebutted by evidence showing that the company exercised due care,[92] or was prevented from making delivery by causes over which it had no control.[93]

2. Insufficient or Erroneous Name or Address. A recovery for a negligent failure to deliver a telegram is not necessarily precluded by the fact that the message was sent without any local address,[94] or that the local address was indefinite,[95] or erroneous,[96] or there was an error in spelling the name of the place to

Lyne *v.* Western Union Tel. Co., 123 N. C. 129, 31 S. E. 350, failure to inquire at post-office such evidence of negligence as should go to the jury.

84. Western Union Tel. Co. *v.* Cox, (Tex. Civ. App. 1903) 74 S. W. 922.

85. Western Union Tel. Co. *v.* Cox, (Tex. Civ. App. 1903) 74 S. W. 922.

86. Cogdell *v.* Western Union Tel. Co., 135 N. C. 431, 47 S. E. 490; Hendricks *v.* Western Union Tel. Co., 126 N. C. 304, 35 S. E. 543, 78 Am. St. Rep. 658.

The reason of the rule is to enable the sender to remedy any defect or insufficiency in the address or to communicate with mutual friends or resort to other means of communicating with the addressee and thus lessen or avoid the damages which would result from an unreported non-delivery of the telegram. Hendricks *v.* Western Union Tel. Co., 126 N. C. 304, 35 S. E. 543, 78 Am. St. Rep. 658.

Misleading message.—Where a service message announcing non-delivery stated, "Party said to be out of city," and the addressee was a railroad engineer who was absent on his daily run, and this fact was known to the sender of the message, it was held that the sender could not claim that by the wording of the message he was misled and prevented from sending another message giving a more specific address. Western Union Tel. Co. *v.* Garrett, 46 Tex. Civ. App. 430, 102 S. W. 456.

Agreement to notify sender.—Where a telegraph operator agrees to notify the sender of the message in case it is not delivered within a certain time, it is negligence for him to fail to do so. Johnson *v.* Western Union Tel. Co., 75 S. C. 54, 54 S. E. 826, holding, however, that in an action by the addressee the company will not be liable if such failure to notify the sender in no way caused or contributed to the injury complained of.

87. Woods *v.* Western Union Tel. Co., 148 N. C. 1, 61 S. E. 653, 128 Am. St. Rep. 581. See also Hinson *v.* Postal Tel. Cable Co., 132 N. C. 460, 43 S. E. 945.

88. Hendricks *v.* Western Union Tel. Co., 126 N. C. 304, 35 S. E. 543, 78 Am. St. Rep. 658.

It is a question for the jury whether it was negligence for a telegraph company to fail to notify the sender of a message of its inability to deliver the same, and it is error to instruct the jury to find for plaintiff in case the company failed to do so. Western Union Tel. Co. *v.* Davis, (Tex. Civ. App. 1899) 51 S. W. 258.

89. Cogdell *v.* Western Union Tel. Co., 135 N. C. 431, 47 S. E. 490; Hendricks *v.* Western Union Tel. Co., 126 N. C. 304, 35 S. E. 543, 78 Am. St. Rep. 658.

90. Laudie *v.* Western Union Tel. Co., 126 N. C. 431, 35 S. E. 810, 78 Am. St. Rep. 668.

91. Fowler *v.* Western Union Tel. Co., 80 Me. 381, 15 Atl. 29, 6 Am. St. Rep. 211; Woods *v.* Western Union Tel. Co., 148 N. C. 1, 61 S. E. 653, 128 Am. St. Rep. 581; Cogdell *v.* Western Union Tel. Co., 135 N. C. 431, 47 S. E. 490; Hendricks *v.* Western Union Tel. Co., 126 N. C. 304, 35 S. E. 543, 78 Am. St. Rep. 658. See also *infra*, VIII, E, 1, a.

92. Western Union Tel. Co. *v.* Elliott, 131 Ky. 340, 115 S. W. 228, 22 L. R. A. N. S. 761.

93. Fowler *v.* Western Union Tel. Co., 80 Me. 381, 15 Atl. 29, 6 Am. St. Rep. 211, where the message was destroyed by the burning of the telegraph office.

94. Western Union Tel. Co. *v.* Lewis, 89 Ark. 375, 116 S. W. 894; Western Union Tel. Co. *v.* Ford, 77 Ark. 531, 92 S. W. 528; Western Union Tel. Co. *v.* McKibben, 114 Ind. 511, 14 N. E. 894; Western Union Tel. Co. *v.* Bowen, (Tex. Civ. App. 1903) 76 S. W. 613 [*reversed* on other grounds in 97 Tex. 621, 81 S. W. 27].

95. Western Union Tel. Co. *v.* Birchfield, 15 Tex. Civ. App. 426, 39 S. W. 1002, address "care some hotel."

96. Hise *v.* Western Union Tel. Co., 137 Iowa 329, 113 N. W. 819; Woods *v.* Western Union Tel. Co., 148 N. C. 1, 61 S. E. 653, 128 Am. St. Rep. 581 (addressed "38 Depot Street" instead of "83 Depot Street"); Western Union Tel. Co. *v.* Cain, (Tex. Civ. App. 1897) 40 S. W. 624 (addressed "Union Street" instead of "Union Alley").

which the message was addressed,[97] or in the name or initials of the addressee.[98] In such case it is still the duty of the telegraph company to exercise reasonable efforts to ascertain the identity and whereabouts of the addressee and deliver the message, and it will be liable if by the exercise of such care it could have done so;[99] but while such defects do not entirely excuse a failure to deliver, they do have an important bearing upon the question as to whether the company exercised due care and diligence to make delivery.[1] In an action by the sender of a message an insufficiency or error in the name or address of the addressee may preclude a recovery on the ground of contributory negligence,[2] and the defense of such contributory negligence on the part of the sender has also been sustained in cases where the action was brought by the addressee,[3] although the application of the doctrine in actions brought by the addressee and based upon the negligence of the company has been questioned.[4] Negligence of the sender is no defense if it did not cause or contribute to the failure to deliver;[5] and conversely, it is not

97. Western Union Tel. Co. *v.* Hankins, (Tex. Civ. App. 1908) 110 S. W. 539 (addressed to "Holenville" instead of "Holdenville," there being no place of the former name in the state); Beasley *v.* Western Union Tel. Co., 39 Fed. 181 (addressed to "Wallace" instead of "Wallis," there being no place of the former name in the state).

98. Arkansas, etc., R. Co. *v.* Stroude, 82 Ark. 117, 100 S. W. 760 (initials written "A. G." instead of "A. J."); Hurlburt *v.* Western Union Tel. Co., 123 Iowa 295, 98 N. W. 794 (name spelled "Hulburt" instead of "Hurlburt"); Cogdell *v.* Western Union Tel. Co., 135 N. C. 431, 47 S. E. 490 (name spelled "Codgell" instead of "Cogdell"); Western Union Tel. Co. *v.* Gamble, (Tex. Civ. App. 1907) 101 S. W. 1166 (name spelled "Gamble" instead of "Gambill").

99. Western Union Tel. Co. *v.* Ford, 77 Ark. 531, 92 S. W. 528; Hurlburt *v.* Western Union Tel. Co., 123 Iowa 295, 98 N. W. 794; Woods *v.* Western Union Tel. Co., 148 N. C. 1, 61 S. E. 653, 128 Am. St. Rep. 581; Cogdell *v.* Western Union Tel. Co., 135 N. C. 431, 47 S. E. 490; Western Union Tel. Co. *v.* Bowen, (Tex. Civ. App. 1903) 76 S. W. 613 [*reversed* on other grounds in 97 Tex. 621, 81 S. W. 27]; Western Union Tel. Co. *v.* Cain, (Tex. Civ. App. 1897) 40 S. W. 624.

1. Western Union Tel. Co. *v.* Ford, 77 Ark. 531, 92 S. W. 528; Western Union Tel. Co. *v.* Patrick, 92 Ga. 607, 18 S. E. 980, 44 Am. St. Rep. 90.

Error in name of addressee.—A telegraph company is not liable for failure to deliver to Richard Cason a message addressed to Richard Corson, where it had no reason to believe that it was intended for Cason. Cason *v.* Western Union Tel. Co., 77 S. C. 157, 57 S. E. 722.

2. Western Union Tel. Co. *v.* Patrick, 92 Ga. 607, 18 S. E. 980, 44 Am. St. Rep. 90 (where the message was addressed to "Col. O. M. Bergstrom, 47 S. Pryor St.," and the addressee was not a colonel or known by that title and did not reside at the local address given); Western Union Tel. Co. *v.* McDaniel, 103 Ind. 294, 2 N. E. 709 (where the message did not state the christian name or local street address of the addressee, and although the sender's attention was called to the defect he declined to remedy the same, stating that it was not necessary). See also Deslottes *v.* Baltimore, etc., Tel. Co., 40 La. Ann. 183, 3 So. 566; Western Union Tel. Co. *v.* Wofford, 32 Tex. Civ. App. 427, 72 S. W. 620, 74 S. W. 943.

3. Western Union Tel. Co. *v.* Rawls, (Tex. Civ. App. 1901) 62 S. W. 136 (failure to prefix "Mrs." to name "L. W. Rawls"); Hargrave *v.* Western Union Tel. Co., (Tex. Civ. App. 1901) 60 S. W. 687 (where sender gave a misleading address as "near" a certain mill, when in fact the addressee lived a mile from the mill, and although after sending the message the sender obtained a better address he did not communicate the fact to the telegraph company).

4. Cogdell *v.* Western Union Tel. Co., 135 N. C. 431, 47 S. E. 490, where in an action by the addressee in which the company charged contributory negligence in misspelling the name of the addressee, the court said that the defense was not available, since if the error in spelling was so great as to render it practically impossible for the company to identify the addressee, there would be no negligence on its part and no occasion for setting up the defense of contributory negligence, while if the defect was not such as to prevent the company by the exercise of ordinary diligence from identifying the addressee and delivering the message, the company could not set up the antecedent negligence of the sender in bar of recovery.

Sender not agent of addressee.—The failure of the sender of a message to give a local address, although notified of the non-delivery of the message, is not contributory negligence which will preclude a recovery by the addressee, where the sender did not act as the agent of the addressee for and by his procurement in sending the original message. Western Union Tel. Co. *v.* McKibben, 114 Ind. 511, 14 N. E. 894.

5. Western Union Tel. Co. *v.* Lewis, 89 Ark. 375, 116 S. W. 894 (no definite local address); Arkansas, etc., R. Co. *v.* Stroude, 82 Ark. 117, 100 S. W. 760 (mistake in initials of addressee); Hise *v.* Western Union Tel. Co., 137 Iowa 329, 113 N. W. 819 (wrong local address given but failure to deliver due to negligence of the company

necessary that such negligence should be the sole direct and proximate cause of such failure, it being sufficient if concurring and combining with that of defendant it proximately contributes to such failure.[6] It is not necessarily contributory negligence to send a message without a definite local address,[7] particularly where the sender gives the best address that he knows or can with reasonable diligence ascertain.[8] The company will be liable if the error to which the failure to deliver is due was caused by the negligence of its agents in transmitting the message,[9] or in intentionally altering it;[10] and even where the message is written by the agent at the request of the sender, the company may be liable for an error of such agent in spelling the name of the place to which the message is addressed.[11]

3. Time For and Delay In Delivery — a. In General. It is the duty of a telegraph company to deliver messages with reasonable promptness,[12] and to provide proper and sufficient messengers or facilities for so doing,[13] and in case of a wrongful or negligent failure to do so it will be liable for damages resulting from the delay.[14] In determining the question whether delivery, in a particular case, has

in changing the name of the addressee in transmission).

6. Western Union Tel. Co. *v.* Rawls, (Tex. Civ. App. 1901) 62 S. W. 136.

7. Western Union Tel. Co. *v.* Lewis, 89 Ark. 375, 116 S. W. 894, holding that it is not error to refuse to instruct that sending a telegram to a person living in a family of a different name and in a city of six thousand population without a street number or in care of some person or place is such negligence as to preclude a recovery for failure to deliver.

8. Western Union Tel. Co. *v.* Bowen, (Tex. Civ. App. 1903) 76 S. W. 613 [*reversed* on other grounds in 97 Tex. 621, 81 S. W. 27].

9. Hise *v.* Western Union Tel. Co., 137 Iowa 329, 113 N. W. 819 (name negligently changed in transmission from "Hise" to "Sire"); Postal Tel. Cable Co. *v.* Sunset Constr. Co., 102 Tex. 148, 114 S. W. 98 [*reversing* (Civ. App. 1908) 109 S. W. 265] (initials changed in transmission).

10. Elsey *v.* Postal Tel. Co., 15 Daly (N. Y.) 58, 3 N. Y. Suppl. 117, holding that where a telegraph operator received a message addressed to "H. Elsey" and not finding such name in the directory changed the "H" to "J" and delivered the message to John Elsey, the company was liable, although the operator acted in good faith.

11. Western Union Tel. Co. *v.* Hankins, (Tex. Civ. App. 1908) 110 S. W. 539, holding that while a telegraph operator in writing a message for the sender acts as the latter's agent in writing the body of the message, it is his duty to know the correct mode of spelling the names of the company's offices, and his mistake in such spelling resulting in a failure to deliver the message is the company's mistake, where it appears that the sender sought specific information concerning the name which the company's rule required the operator to furnish.

12. *Indiana.*— Reese *v.* Western Union Tel. Co., 123 Ind. 294, 24 N. E. 163, 7 L. R. A. 583, 3 Am. Elec. Cas. 640; Julian *v.* Western Union Tel. Co., 98 Ind. 327; Western Union Tel. Co. *v.* Moore, 12 Ind. App. 136, 39 N. E. 874, 54 Am. St. Rep. 515.

Iowa.— Harkness *v.* Western Union Tel. Co., 73 Iowa 190, 34 N. W. 811, 5 Am. St. Rep. 672.

Kentucky.— Western Union Tel. Co. *v.* Parsons, 72 S. W. 800, 24 Ky. L. Rep. 2008.

Missouri.— Bliss *v.* Baltimore, etc., Tel. Co., 30 Mo. App. 103.

North Carolina.— Cogdell *v.* Western Union Tel. Co., 135 N. C. 431, 47 S. E. 490; Hendricks *v.* Western Union Tel. Co., 126 N. C. 304, 35 S. E. 543, 78 Am. St. Rep. 658; Cannon *v.* Western Union Tel. Co., 100 N. C. 300, 6 S. E. 731, 6 Am. St. Rep. 590.

Oklahoma.— Blackwell Milling, etc., Co. *v.* Western Union Tel. Co., 17 Okla. 376, 89 Pac. 235.

Tennessee.— Cumberland Tel. Co. *v.* Brown, 104 Tenn. 56, 55 S. W. 155, 78 Am. St. Rep. 906, 50 L. R. A. 277.

Texas.— Western Union Tel. Co. *v.* Neel, 86 Tex. 368, 25 S. W. 15, 40 Am. St. Rep. 847; Western Union Tel. Co. *v.* Adams, 75 Tex. 531, 12 S. W. 857, 16 Am. St. Rep. 920, 6 L. R. A. 844; Western Union Tel. Co. *v.* Moran, (Civ. App. 1908) 113 S. W. 625.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 33.

13. Western Union Tel. Co. *v.* Henderson, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148; Western Union Tel. Co. *v.* Parsons, 72 S. W. 800, 24 Ky. L. Rep. 2008.

Mode of delivery.—Where the expense of delivering a message in the country was guaranteed, it was error to instruct the jury in an action for delay in delivery that "it was not due diligence to entrust a guaranteed message to a stranger to carry on foot a distance of two and one-half miles." The company having no messengers at that station to deliver messages in the country, it was only required to select a trusty person for such purpose, and whether the person selected was suitable and whether he could have delivered the message sooner by waiting to find or hire a horse than by starting at once on foot were questions for the jury. Western Union Tel. Co. *v.* Daniels, 15 Ky. L. Rep. 813.

14. *Arkansas.*—Western Union Tel. Co. *v.* Hanley, 85 Ark. 263, 107 S. W. 1168.

been made with reasonable promptness, regard must be had to all the circumstances,[15] including the company's established office hours,[16] its regulations requiring that messages, before being sent out for delivery, shall be copied, enveloped, and addressed,[17] the distance from the telegraph office to the addressee's residence or place of business,[18] and also, as sometimes said, the character and importance of the message itself,[19] so that the question is ordinarily one of fact for the jury.[20] A telegraph company does not absolutely insure a prompt delivery of messages regardless of circumstances,[21] and will not be liable where it satisfactorily appears that it was not negligent in regard to the delay complained of,[22] unless it has expressly agreed that the message shall be delivered promptly or within or before a certain time, in which case it will be liable for a failure to do so.[23] It is no justification for a negligent delay in delivering a message actually transmitted that it was one which the company might have refused to accept and transmit,[24] or that it was transmitted gratuitously,[25] or was transmitted on Sunday, provided it relates to a matter of charity or necessity.[26]

Indiana.— Reese *v.* Western Union Tel. Co., 123 Ind. 294, 24 N. E. 163, 7 L. R. A. 583.

Iowa.— Hendershot *v.* Western Union Tel. Co., 106 Iowa 529, 76 N. W. 828, 68 Am. St. Rep. 313.

Kentucky.— Western Union Tel. Co. *v.* Parsons, 72 S. W. 800, 24 Ky. L. Rep. 2008.

Maryland.— Western Union Tel. Co. *v.* Lehman, 106 Md. 318, 67 Atl. 241.

New York.— Bryant *v.* American Tel. Co., 1 Daly 575.

North Carolina.— Suttle *v.* Western Union Tel. Co., 148 N. C. 480, 62 S. E. 593, 128 Am. St. Rep. 631.

Oklahoma.— Blackwell Milling, etc., Co. *v.* Western Union Tel. Co., 17 Okla. 376, 89 Pac. 235.

South Carolina.— Kirby *v.* Western Union Tel. Co., 77 S. C. 404, 58 S. E. 10, 122 Am. St. Rep. 580; Smith *v.* Western Union Tel. Co., 77 S. C. 378, 58 S. E. 6.

Texas.— Western Union Tel. Co. *v.* Kibble, (Civ. App. 1909) 115 S. W. 643; Western Union Tel. Co. *v.* Moran, (Civ. App. 1908) 113 S. W. 625; Western Union Tel. Co. *v.* Johnsey, (Civ. App. 1908) 109 S. W. 251; Western Union Tel. Co. *v.* Ayres, 47 Tex. Civ. App. 557, 105 S. W. 1165; Western Union Tel. Co. *v.* Craige, 44 Tex. Civ. App. 214, 90 S. W. 681; Western Union Tel. Co. *v.* Roberts, 34 Tex. Civ. App. 76, 78 S. W. 522.

Delivery to unauthorized person.—If a telegraph company delivers a message to a person not authorized to receive it, it will be liable for damages due to any delay on the part of such person in delivering the message to the addressee. Mott *v.* Western Union Tel. Co., 142 N. C. 532, 55 S. E. 363; Glover *v.* Western Union Tel. Co., 78 S. C. 502, 59 S. E. 526; Western Union Tel. Co. *v.* Belew, 32 Tex. Civ. App. 338, 74 S. W. 799. See also *infra*, IV, C, 5.

15. Ayres *v.* Western Union Tel. Co., 65 N. Y. App. Div. 149, 72 N. Y. Suppl. 634; Western Union Tel. Co. *v.* McConnico, 27 Tex. Civ. App. 610, 66 S. W. 592; Western Union Tel. Co. *v.* De Jarles, 8 Tex. Civ. App. 109, 27 S. W. 792.

16. See *infra*, IV, C, 3, b.

17. Davis *v.* Western Union Tel. Co., 66 S. W. 17, 23 Ky. L. Rep. 1758; Western Union Tel. Co. *v.* McConnico, 27 Tex. Civ. App. 610, 66 S. W. 592.

18. Ayres *v.* Western Union Tel. Co., 65 N. Y. App. Div. 149, 72 N. Y. Suppl. 634; Altman *v.* Western Union Tel. Co., 84 N. Y. Suppl. 54.

19. Reese *v.* Western Union Tel. Co., 123 Ind. 294, 24 N. E. 163, 7 L. R. A. 583; Bryant *v.* American Tel. Co., 1 Daly (N. Y.) 575; Suttle *v.* Western Union Tel. Co., 148 N. C. 480, 62 S. E. 593, 128 Am. St. Rep. 631; Brown *v.* Western Union Tel. Co., 6 Utah 219, 21 Pac. 988.

20. Western Union Tel. Co. *v.* De Jarles, 8 Tex. Civ. App. 109, 27 S. W. 792. See also *infra*, VIII, F, 2, a.

21. Ayres *v.* Western Union Tel. Co., 65 N. Y. App. Div. 149, 72 N. Y. Suppl. 634; Western Union Tel. Co. *v.* Munford, 87 Tenn. 190, 10 S. W. 318, 10 Am. St. Rep. 630, 2 L. R. A. 601; Western Union Tel. Co. *v.* Hays, (Tex. Civ. App. 1901) 63 S. W. 171.

"Immediate" delivery is not required and it is error so to instruct the jury. Western Union Tel. Co. *v.* De Jarles, 8 Tex. Civ. App. 109, 27 S. W. 792.

22. Western Union Tel. Co. *v.* Patrick, 92 Ga. 607, 18 S. E. 980, 44 Am. St. Rep. 90; Ayres *v.* Western Union Tel. Co., 65 N. Y. App. Div. 149, 72 N. Y. Suppl. 634; Western Union Tel. Co. *v.* McConnico, 27 Tex. Civ. App. 610, 66 S. W. 592; Western Union Tel. Co. *v.* Hays, (Tex. Civ. App. 1901) 63 S. W. 171.

Where a severe storm delays the delivery of a message, this is a cause over which the company has no control, and it will not be liable for the delay. Western Union Tel. Co. *v.* Hays, (Tex. Civ. App. 1901) 63 S. W. 171.

23. Suttle *v.* Western Union Tel. Co., 148 N. C. 480, 62 S. E. 593, 128 Am. St. Rep. 631.

Effect of agreement as to office hours see *infra*, IV, C, 3, b.

24. Western Union Tel. Co. *v.* Wilson, 93 Ala. 32, 9 So. 414, 30 Am. St. Rep. 23, message not presented in writing.

25. Western Union Tel. Co. *v.* Snodgrass, 94 Tex. 284, 60 S. W. 308, 86 Am. St. Rep. 851.

26. Gulf, etc., R. Co. *v.* Levy, 59 Tex. 542, 46 Am. Rep. 269.

b. Office Hours.[27] The rules previously stated in regard to delays in transmission due to office hours also apply to delays in delivery of messages actually transmitted.[28] So, although a message is transmitted, if it is received at the point of destination after the regular office hours at that point, the company will not ordinarily be liable for a failure to deliver the same after such office hours,[29] provided it is delivered with reasonable promptness during the next ensuing office hours.[30] This rule is particularly applicable where the person receiving the message at the point of destination is not the agent of the telegraph company;[31] and it has also been frequently applied in cases where the telegraph operator is also the agent of a railroad company and the office is kept open for the receipt and transmission of despatches but closed after the messenger goes off duty in the evening for the purpose of delivery of ordinary messages.[32] It has been held, however, in one case that if a message shows upon its face that it is urgent and is received by the agent at the point of destination after office hours and he cannot deliver it, it is his duty to inform the transmitting agent of such fact, so that notice may be given to the sender of the message.[33] As in other cases to enable the company to justify a delay in delivery on the ground of its office hours, such hours must be reasonable.[34] It is competent for the company to waive the benefit of its office hours;[35] and if it expressly agrees that the message shall be delivered

27. Stipulation that night message shall not be delivered until next day see *infra*, V, A, 2.

28. Western Union Tel. Co. *v.* Harding, 103 Ind. 505, 3 N. E. 172.

Delay in transmission due to office hours see *supra*, IV, B, 2, b, (III).

29. *Indiana.*—Western Union Tel. Co. *v.* Harding, 103 Ind. 505, 3 N. E. 172.

Kentucky.—Western Union Tel. Co. *v.* Van Cleave, 107 Ky. 464, 54 S. W. 827, 22 Ky. L. Rep. 53, 92 Am. St. Rep. 366; Davis *v.* Western Union Tel. Co., 66 S. W. 17, 23 Ky. L. Rep. 1758.

Rhode Island.— Sweet *v.* Postal Tel., etc., Co., 22 R. I. 344, 47 Atl. 881, 53 L. R. A. 732.

South Carolina.— Smith *v.* Western Union Tel. Co., 77 S. C. 378, 58 S. E. 6; Bonner *v.* Western Union Tel. Co., 71 S. C. 303, 51 S. E. 117.

Texas.— Western Union Tel. Co. *v.* Neel, 86 Tex. 368, 25 S. W. 15, 40 Am. St. Rep. 847; Starkey *v.* Western Union Tel. Co., (Civ. App. 1909) 115 S. W. 853; Western Union Tel. Co. *v.* Rawls, (Civ. App. 1901) 62 S. W. 136; Western Union Tel. Co. *v.* May, 8 Tex. Civ. App. 176, 27 S. W. 760; Western Union Tel. Co. *v.* Wingate, 6 Tex. Civ. App. 394, 25 S. W. 439.

West Virginia.— Davis *v.* Western Union Tel. Co., 46 W. Va. 48, 32 S. E. 1026.

But see Dowdy *v.* Western Union Tel. Co., 124 N. C. 522, 32 S. E. 802; Brown *v.* Western Union Tel. Co., 6 Utah 219, 21 Pac. 988, where it is said that a message may show upon its face such urgent necessity for immediate delivery as to make it the duty of the company to deliver it, although received at the point of destination after the regular office hours at such place.

30. See Harrison *v.* Western Union Tel. Co., 71 S. C. 386, 51 S. E. 119; Bonner *v.* Western Union Tel. Co., 71 S. C. 303, 51 S. E. 117; Macaul *v.* Western Union Tel. Co., 114 Tenn. 661, 88 S. W. 325; Western Union Tel. Co. *v.* Neel, 86 Tex. 368, 25 S. W. 15, 40 Am. St. Rep. 847; Western Union Tel. Co. *v.* De Jarles, 8 Tex. Civ. App. 109, 27 S. W. 792.

31. Sweet *v.* Postal Tel., etc., Co., 22 R. I. 344, 47 Atl. 881, 53 L. R. A. 732 (where the person receiving the message was not the agent of the telegraph company but was using its office to receive and transmit press despatches, and took the message leaving it on file for the regular operator who delivered it on the following day); Harrison *v.* Western Union Tel. Co., 71 S. C. 386, 51 S. E. 119 (where the person receiving the message was not the agent of the telegraph company but merely happened to be in its office and as he understood telegraphy took the message, leaving it on the desk of the operator who delivered it promptly on the following day); Western Union Tel. Co. *v.* Rawls, (Tex. Civ. App. 1901) 62 S. W. 136 (railroad operator on night duty in telegraph office and not an agent of telegraph company).

32. Western Union Tel. Co. *v.* Crider, 107 Ky. 600, 54 S. W. 963, 21 Ky. L. Rep. 1336; Davis *v.* Western Union Tel. Co., 66 S. W. 17, 23 Ky. L. Rep. 1758; Sweet *v.* Postal Tel., etc., Co., 22 R. I. 344, 47 Atl. 881, 53 L. R. A. 732; Roberts *v.* Western Union Tel. Co., 73 S. C. 520, 53 S. E. 985, 114 Am. St. Rep. 100; Harrison *v.* Western Union Tel. Co., 71 S. C. 386, 51 S. E. 119; Bonner *v.* Western Union Tel. Co., 71 S. C. 303, 51 S. E. 117; Western Union Tel. Co. *v.* McConnico, 27 Tex. Civ. App. 610, 66 S. W. 592. But see Dowdy *v.* Western Union Tel. Co., 124 N. C. 522, 32 S. E. 802.

33. Carter *v.* Western Union Tel. Co., 141 N. C. 374, 54 S. E. 274 [*distinguished* in Cates *v.* Western Union Tel. Co., 151 N. C. 497, 66 S. E. 592].

34. Western Union Tel. Co. *v.* Ford, 77 Ark. 531, 92 S. W. 528; Western Union Tel. Co. *v.* Crider, 107 Ky. 600, 54 S. W. 963, 21 Ky. L. Rep. 1336; Brown *v.* Western Union Tel. Co., 6 Utah 219, 21 Pac. 988. See also *supra*, IV, B, 2, b, (III).

35. Suttle *v.* Western Union Tel. Co., 148

by a certain time it will be liable for a failure to do so, regardless of its office hours;[36] it being within the implied authority of its transmitting agent to make such agreement.[37] So also, notwithstanding reasonable office hours have been established, the company may waive or be precluded from relying thereon as a defense for failing to deliver a message by disregarding such office hours at the point of destination,[38] provided the company or its agent at such places has done so ordinarily and habitually;[39] but it is not sufficient to establish an abrogation by the company of its regular office hours to show that on some occasions its agent has kept his office open after such hours,[40] or has, as a matter of accommodation, delivered certain messages outside of such office hours.[41]

4. Place or Distance For Delivery — a. In General. Ordinarily a telegraph company is not liable for failure to deliver a message addressed to a person at a particular incorporated place if the addressee does not reside or cannot by reasonable diligence be found within the limits of such place.[42] The fact, however, that the addressee may reside outside the corporate limits is no excuse for failure to deliver to him, if as a matter of fact he was within the limits and could by ordinary effort have been found there;[43] or if, although living beyond the limits of the town, his name appears in the directory thereof, and his residence is within the district in which messages are customarily delivered from the telegraph office in the town, and not within the corporate limits of any other town having a telegraph office;[44] or if the company has notice, at the time the message is delivered to it for transmission, of the distance at which the addressee lives, and nevertheless contracts specially with the sender to deliver the message.[45] Where a telegraph company agrees with the sender of a message to deliver the answer at a particular local address, it will be liable for a failure to do so, although the answer is directed to a different local address.[46]

b. Free Delivery Limits. Without regard to corporate limits, a telegraph company may properly establish reasonable free-delivery limits, and refuse to deliver messages at an indefinite distance in the country, or at any point beyond

N. C. 480, 62 S. E. 593, 128 Am. St. Rep. 631.

36. McPeek *v.* Western Union Tel. Co., 107 Iowa 356, 78 N. W. 63, 70 Am. St. Rep. 205, 43 L. R. A. 214; Suttle *v.* Western Union Tel. Co., 148 N. C. 480, 62 S. E. 593, 128 Am. St. Rep. 631; Bright *v.* Western Union Tel. Co., 132 N. C. 317, 43 S. E. 841; Western Union Tel. Co. *v.* Perry, 30 Tex. Civ. App. 243, 70 S. W. 439; Western Union Tel. Co. *v.* Cavin, 30 Tex. Civ. App. 152, 70 S. W. 229. See also *supra*, IV, B, 2, b, (III).

37. McPeek *v.* Western Union Tel. Co., 107 Iowa 356, 78 N. W. 63, 70 Am. St. Rep. 205, 43 L. R. A. 214; Western Union Tel. Co. *v.* Cavin, 30 Tex. Civ. App. 152, 70 S. W. 229.

38. Bright *v.* Western Union Tel. Co., 132 N. C. 317, 43 S. E. 841; Western Union Tel. Co. *v.* Johnsey, (Tex. Civ. App. 1908) 109 S. W. 251.

39. Western Union Tel. Co. *v.* Georgia Cotton Co., 94 Ga. 444, 21 S. E. 835; Smith *v.* Western Union Tel. Co., 77 S. C. 378, 58 S. E. 6; Bonner *v.* Western Union Tel. Co., 71 S. C. 303, 51 S. E. 117.

It is a question for the jury whether the company's violation of its established office hours has been so habitual as to amount to a waiver thereof. Smith *v.* Western Union Tel. Co., 77 S. C. 378, 58 S. E. 6.

40. Western Union Tel. Co. *v.* Georgia Cotton Co., 94 Ga. 444, 21 S. E. 835.

41. Bonner *v.* Western Union Tel. Co., 71 S. C. 303, 51 S. E. 117; Western Union Tel. Co. *v.* McConnico, 27 Tex. Civ. App. 610, 66 S. W. 592. See also Western Union Tel. Co. *v.* Crider, 107 Ky. 600, 54 S. W. 963, 21 Ky. L. Rep. 1336.

42. Western Union Tel. Co. *v.* Harvey, 67 Kan. 729, 74 Pac. 250; Western Union Tel. Co. *v.* Matthews, 113 Ky. 188, 67 S. W. 849, 24 Ky. L. Rep. 3; Western Union Tel. Co. *v.* Scott, 87 S. W. 289, 27 Ky. L. Rep. 975; Western Union Tel. Co. *v.* McCaul, 115 Tenn. 99, 90 S. W. 856; McCaul *v.* Western Union Tel. Co., 114 Tenn. 661, 88 S. W. 325; Western Union Tel. Co. *v.* Swearingen, 95 Tex. 420, 67 S. W. 767 [*reversing* (Civ. App. 1901) 65 S. W. 1080]; Western Union Tel. Co. *v.* Byrd, 34 Tex. Civ. App. 594, 79 S. W. 40; Western Union Tel. Co. *v.* Christensen, (Tex. Civ. App. 1904) 78 S. W. 744.

43. Arkansas, etc., R. Co. *v.* Stroude, 82 Ark. 117, 100 S. W. 760; Rosser *v.* Western Union Tel. Co., 130 N. C. 251, 41 S. E. 378; Western Union Tel. Co. *v.* Davis, 30 Tex. Civ. App. 590, 71 S. W. 313.

44. Klopf *v.* Western Union Tel. Co., 100 Tex. 540, 101 S. W. 1072, 123 Am. St. Rep. 831, 10 L. R. A. N. S. 498 [*reversing* (Civ. App. 1906) 97 S. W. 829].

45. Western Union Tel. Co. *v.* Matthews, 113 Ky. 188, 67 S. W. 849, 24 Ky. L. Rep. 3.

46. Harper *v.* Western Union Tel. Co., 92 Mo. App 304. See also Milliken *v.* Western Union Tel. Co., 110 N. Y. 403.

such free-delivery limits, unless an additional charge covering the cost of such service is prepaid or satisfactorily guaranteed.[47] Free-delivery limits, however, are no defense where such limits exist merely on paper, without being observed in practice;[48] where the addressee, although he resides without the limits, could by reasonable diligence have been found within;[49] where with full notice as to the distance at which the addressee resided the company has made a special contract with the sender to deliver at all events;[50] or where the message has never been transmitted to the point of destination, or where its delay in reaching that point, and not the delay in delivery thereafter, is the subject of complaint.[51] It is *prima facie* the duty of the sender to ascertain where the addressee resides and to provide for the delivery of the message by paying or guaranteeing the charges for special delivery, if such charges are required;[52] and it has been held that handing in a message for transmission without explanation imposes no duty upon the transmitting operator other than to forward it accurately and promptly, or upon the terminal operator other than to copy it accurately and deliver it with reasonable promptness if the addressee resides within the free-delivery limits,[53]

47. *Alabama.*—Western Union Tel. Co. *v.* Whitson, 145 Ala. 426, 41 So. 405; Western Union Tel. Co. *v.* Henderson, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148.

Arkansas.— Arkansas, etc., R. Co. *v.* Stroude, 82 Ark. 117, 100 S. W. 760.

Georgia.— Western Union Tel. Co. *v.* Smith, 93 Ga. 635, 21 S. E. 166.

Illinois.— Western Union Tel. Co. *v.* Trotter, 55 Ill. App. 659.

Kansas.— Western Union Tel. Co. *v.* Harvey, 67 Kan. 729, 74 Pac. 250.

Kentucky.— Cumberland Tel., etc., Co. *v.* Atherton, 122 Ky. 154, 91 S. W. 257, 28 Ky. L. Rep. 1100; Western Union Tel. Co. *v.* Cross, 116 Ky. 5, 74 S. W. 1098, 76 S. W. 162, 25 Ky. L. Rep. 268, 646; Western Union Tel. Co. *v.* Matthews, 113 Ky. 188, 67 S. W. 849, 24 Ky. L. Rep. 3; Western Union Tel. Co. *v.* Mathews, 107 Ky. 663, 55 S. W. 427, 21 Ky. L. Rep. 1405; Western Union Tel. Co. *v.* Scott, 87 S. W. 289, 27 Ky. L. Rep. 975; Roche *v.* Western Union Tel. Co., 70 S. W. 39, 24 Ky. L. Rep. 845.

Missouri.— Reynolds *v.* Western Union Tel. Co., 81 Mo. App. 223.

Tennessee.— Western Union Tel. Co. *v.* McCaul, 115 Tenn. 99, 90 S. W. 856; McCaul *v.* Western Union Tel. Co., 114 Tenn. 661, 88 S. W. 325.

Texas.— Western Union Tel. Co. *v.* Jennings, 98 Tex. 465, 84 S. W. 1056; Western Union Tel. Co. *v.* Swearingen, 95 Tex. 420, 67 S. W. 767 [*reversing* (Civ. App. 1901) 65 S. W. 1080]; Anderson *v.* Western Union Tel. Co., 84 Tex. 17, 19 S. W. 285; Western Union Tel. Co. *v.* Ayers, 41 Tex. Civ. App. 627, 93 S. W. 199; Western Union Tel. Co. *v.* Bryant, 35 Tex. Civ. App. 442, 80 S. W. 406; Western Union Tel. Co. *v.* Byrd, 34 Tex. Civ. App. 594, 79 S. W. 40; Western Union Tel. Co. *v.* Christensen, (Civ. App. 1904) 78 S. W. 744; Hargrave *v.* Western Union Tel. Co., (Civ. App. 1901) 60 S. W. 687; Western Union Tel. Co. *v.* Redinger, 22 Tex. Civ. App. 362, 54 S. W. 417; Western Union Tel. Co. *v.* Teague, 8 Tex. Civ. App. 444, 27 S. W. 958; Western Union Tel. Co. *v.* Taylor, 3 Tex. Civ. App. 310, 22 S. W. 532.

United States.— Whittemore *v.* Western Union Tel. Co., 71 Fed. 651; Given *v.* Western Union Tel. Co., 24 Fed. 119.

The free delivery limits must be reasonable in order to protect the company for failing to deliver. Western Union Tel. Co. *v.* Ayers, 41 Tex. Civ. App. 627, 93 S. W. 199.

Determination of free delivery limits.— Where the free delivery limits of a telegraph office extend to a radius of half a mile, if the addressee's residence is within that radius he is entitled to free delivery, although the usual route in going from the office to his residence is more than half a mile. Western Union Tel. Co. *v.* Benson, 159 Ala. 254, 48 So. 712.

48. Western Union Tel. Co. *v.* Robinson, 97 Tenn. 638, 37 S. W. 545, 34 L. R. A. 431; Western Union Tel. Co. *v.* Davis, 24 Tex. Civ. App. 427, 59 S. W. 46; Western Union Tel. Co. *v.* Cain, (Tex. Civ. App. 1897) 40 S. W. 624.

49. Western Union Tel. Co. *v.* Benson, 159 Ala. 254, 48 So. 712; Arkansas, etc., R. Co. *v.* Stroude, 82 Ark. 117, 100 S. W. 760; Rosser *v.* Western Union Tel. Co., 130 N. C. 251, 41 S. E. 378; Western Union Tel. Co. *v.* Davis, 30 Tex. Civ. App. 590, 71 S. W. 313.

50. Western Union Tel. Co. *v.* Matthews, 113 Ky. 188, 67 S. W. 849, 24 Ky. L. Rep. 3; Western Union Tel. Co. *v.* Robinson, 97 Tenn. 638, 37 S. W. 545, 34 L. R. A. 431; Western Union Tel. Co. *v.* Carter, 24 Tex. Civ. App. 80, 58 S. W. 198. See also Western Union Tel. Co. *v.* McIlvoy, 107 Ky. 633, 55 S. W. 428, 21 Ky. L. Rep. 1393; Gainey *v.* Western Union Tel. Co., 136 N. C. 261, 48 S. E. 653.

51. Western Union Tel. Co. *v.* Merrill, 144 Ala. 618, 39 So. 121, 113 Am. St. Rep. 66; Western Union Tel. Co. *v.* Scott, 87 S. W. 289, 27 Ky. L. Rep. 975; Western Union Tel. Co. *v.* Lyles, (Tex. Civ. App. 1897) 42 S. W. 636.

52. Western Union Tel. Co. *v.* Henderson, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148.

53. Western Union Tel. Co. *v.* Henderson, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148.

particularly where the sender knew of the existence of a rule in regard to free-delivery limits.[54] In some cases, however, it has been held, and particularly where the sender did not know of any rule in regard to free-delivery limits,[55] that if it develops that the addressee lives beyond such limits it is the duty of the company to communicate this fact to the sender and demand delivery charges or notify him that delivery will not be made unless such charges are paid or guaranteed;[56] and this has been held to be the proper construction and effect of a stipulation providing that messages will be delivered free within the company's established free-delivery limits, but that for delivery at a greater distance a special charge will be made.[57] This rule does not affect the right of the company to establish free-delivery limits and to exact reasonable compensation for delivery beyond such limits,[58] nor does a statute expressly requiring delivery within certain limits require a free delivery to the extent of such limits.[59] Where a service message demanding special delivery charges is sent the company will not be liable for failure to deliver the message if the sender refuses to pay or guarantee the extra charge;[60] and if such payment or guaranty is made it does not become effective so as to require a delivery until the answering message advising the terminal operator of this fact is received;[61] but the company will be liable for a negligent delay in sending the service message,[62] or in failing to make delivery after the answering message is received.[63] So also if delivery charges are guaranteed by the sender at the time the message is presented for transmission, it has been held to be negligence for the company not to wire this fact with the message.[64]

5. To Whom Delivery May or Should Be Made — a. In General. The duty of a telegraph company to the addressee of a telegram is personal,[65] and is not fulfilled until it has exercised reasonable care and diligence to place the message in his hands,[66] so that ordinarily the delivery of a message to any person other than

But see Western Union Tel. Co. *v.* Davis, 24 Tex. Civ. App. 427, 59 S. W. 46.

54. Western Union Tel. Co. *v.* Henderson, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148.

55. See Bright *v.* Western Union Tel. Co., 132 N. C. 317, 43 S. E. 841.

56. Hood *v.* Western Union Tel. Co., 135 N. C. 622, 47 S. E. 607; Bryan *v.* Western Union Tel. Co., 133 N. C. 603, 45 S. E. 938; Bright *v.* Western Union Tel. Co., 132 N. C. 317, 43 S. E. 841; Lyles *v.* Western Union Tel. Co., 77 S. C. 174, 57 S. E. 725, 12 L. R. A. N. S. 534; Campbell *v.* Western Union Tel. Co., 74 S. C. 300, 54 S. E. 571; Western Union Tel. Co. *v.* Kuykendall, (Tex. Civ. App. 1905) 86 S. W. 61 [*reversed* on other grounds in 99 Tex. 323, 89 S. W. 965]. See also Gainey *v.* Western Union Tel. Co., 136 N. C. 261, 48 S. E. 653.

Where it is the custom of a telegraph company where special delivery charges are necessary for the receiving office to notify the sending office and for that office to notify the sender, such custom has the force of a rule and constitutes a part of the contract of transmission. Evans *v.* Western Union Tel. Co., (Tex. Civ. App. 1900) 56 S. W. 609. See also Hood *v.* Western Union Tel. Co., 135 N. C. 622, 47 S. E. 607.

57. Bryan *v.* Western Union Tel. Co., 133 N. C. 603, 45 S. E. 938; Martin *v.* Western Union Tel. Co., 81 S. C. 432, 62 S. E. 833; Campbell *v.* Western Union Tel. Co., 74 S. C. 300, 54 S. E. 571.

58. Campbell *v.* Western Union Tel. Co., 74 S. C. 300, 54 S. E. 571.

59. State *v.* Western Union Tel. Co., 172 Ind. 20, 87 N. E. 641, holding that a statute requiring telegraph companies to deliver messages within a distance of one mile, "on payment of any charges due for the same," does not require free delivery within such limits, but permits the company to establish reasonable free delivery limits and exact compensation for delivery beyond such limits.

60. See Gainey *v.* Western Union Tel. Co., 136 N. C. 261, 48 S. E. 653.

61. Hargrave *v.* Western Union Tel. Co., (Tex. Civ. App. 1901) 60 S. W. 687. See also Western Union Tel. Co. *v.* Mathews, 107 Ky. 663, 55 S. W. 427, 21 Ky. L. Rep. 1405.

62. Western Union Tel. Co. *v.* Ayres, 47 Tex. Civ. App. 557, 105 S. W. 1165.

63. Western Union Tel. Co. *v.* Mathews, 107 Ky. 663, 55 S. W. 427, 21 Ky. L. Rep. 1405; Western Union Tel. Co. *v.* Ayres, 47 Tex. Civ. App. 557, 105 S. W. 1165.

64. Edwards *v.* Western Union Tel. Co., 147 N. C. 126, 60 S. E. 900. But see Hargrave *v.* Western Union Tel. Co., (Tex. Civ. App. 1901) 60 S. W. 687.

65. Pope *v.* Western Union Tel. Co., 9 Ill. App. 283; Western Union Tel. Co. *v.* Newhouse, 6 Ind. App. 422, 33 N. E. 800; Glover *v.* Western Union Tel. Co., 78 S. C. 502, 59 S. E. 526; Western Union Tel. Co. *v.* Mitchell, 91 Tex. 454, 44 S. W. 274, 66 Am. St. Rep. 906, 40 L. R. A. 209; Western Union Tel. Co. *v.* Houghton, 82 Tex. 561, 17 S. W. 86, 27 Am. St. Rep. 918, 15 L. R. A. 129.

66. Glover *v.* Western Union Tel. Co., 78 S. C. 502, 59 S. E. 526.

the addressee is improper unless such person is authorized by the addressee to receive the same.[67] If, however, the addressee is absent the telegraph company may deliver the message to any other person who is expressly [68] or impliedly authorized to receive the same,[69] and it is its duty to do so, so that the message may be forwarded or the addressee notified by such person.[70] So it has been held that in the absence of the addressee a message may be delivered to his wife,[71] or to the clerk at his hotel.[72] It is not, however, the duty of a telegraph company, although the addressee is absent, to deliver the message to a person not authorized to receive the same ;[73-74] and it has been held that there is no such implied authority growing out of the relation between the parties as makes it the duty of a telegraph company, in the absence of the addressee, to deliver a message to his wife,[75] unless the message relates to a family matter in which the wife is directly interested.[76]

b. Person in Whose Care Message Is Addressed. Where a message is addressed to one person in care of another, it may be delivered either to the addressee or to

67. Glover *v.* Western Union Tel. Co., 78 S. C. 502, 59 S. E. 526; Western Union Tel. Co. *v.* Cobb, 95 Tex. 333, 67 S. W. 87, 93 Am. St. Rep. 862.

Instances of improper delivery.—A hotel clerk has no authority as a matter of law to receive telegrams for guests, and in the absence of any showing of a custom to this effect the delivery of a telegram to the clerk of the hotel where the addressee resides, without any attempt to find the addressee, is not sufficient. Western Union Tel. Co. *v.* Cobb, 95 Tex. 333, 67 S. W. 87, 93 Am. St. Rep. 862. The delivery of a telegram to the addressee's minor son while passing the telegraph office is improper and makes such person the agent of the company so as to render it liable for any delay in delivering the telegram to the addressee. Mott *v.* Western Union Tel. Co., 142 N. C. 532, 55 S. E. 363. Where a telegram is addressed to a certain person at the freight yards of a railroad company, the telegraph company is not justified in leaving it with a yard master at such place who does not know the addressee, without any further effort to find the addressee. Western Union Tel. Co. *v.* Newhouse, 6 Ind. App. 422, 33 N. E. 800. If a telegraph company delivers a telegram to a neighbor of the addressee, it will be liable for damages caused by a delay on the part of such person in delivering it to the addressee. Western Union Tel. Co. *v.* Belew, 32 Tex. Civ. App. 338, 74 S. W. 799. The delivery of a telegram to the captain of a steamboat on which the addressee is a passenger is not sufficient. Davies *v.* Eastern Steamboat Co., 94 Me. 379, 47 Atl. 896, 53 L. R. A. 239. A business partner has no authority, as such, to receive his copartner's private or social telegrams. Glover *v.* Western Union Tel. Co., 78 S. C. 502, 59 S. E. 526.

Agreement to deliver to third person.—If the addressee, anticipating the receipt of a telegram, directs the agent of the telegraph company to deliver the same to a third person living near the telegraph office, by whom it is to be taken to the addressee, and the agent agrees to do so, the telegraph company will be liable for a failure to do so, such agreement being within the scope of the agent's authority. Western Union Tel. Co. *v.* Evans, 5 Tex. Civ. App. 55, 23 S. W. 998.

68. Western Union Tel. Co. *v.* Barefoot, 97 Tex. 159, 76 S. W. 914, 64 L. R. A. 491, holding that where a person directs a hotel clerk to forward telegrams for him, he thereby expressly constitutes such person his agent to receive telegrams, so that a delivery by the company to such agent is a sufficient delivery to the addressee.

69. Western Union Tel. Co. *v.* Trissal, 98 Ind. 566, holding that the authority of one person to receive telegrams for another need not be express but may be implied.

70. Western Union Tel. Co. *v.* Woods, 56 Kan. 737, 44 Pac. 989; Western Union Tel. Co. *v.* Clark, 14 Tex. Civ. App. 563, 38 S. W. 225. See *infra*, note 76, and *infra*, note 75.

71. Given *v.* Western Union Tel. Co., 24 Fed. 119.

72. Western Union Tel. Co. *v.* Trissal, 98 Ind. 566; Western Union Tel. Co. *v.* Barefoot, 97 Tex. 159, 76 S. W. 914, 64 L. R. A. 491. See *supra*, note **67.**

73-74. Western Union Tel. Co. *v.* Mitchell, 91 Tex. 454, 44 S. W. 274, 66 Am. St. Rep. 906, 40 L. R. A. 209; Western Union Tel. Co. *v.* Moseley, 28 Tex. Civ. App. 562, 67 S. W. 1059; Western Union Tel. Co. *v.* Redinger, (Tex. Civ. App. 1901) 63 S. W. 156.

75. Western Union Tel. Co. *v.* Mitchell, 91 Tex. 454, 44 S. W. 274, 66 Am. St. Rep. 906, 40 L. R. A. 209 (no duty to deliver business telegrams to addressee's wife); Western Union Tel. Co. *v.* Moseley, 28 Tex. Civ. App. 562, 67 S. W. 1059 (no duty to deliver to wife a message relating to death of husband's brother). *Compare* Western Union Tel. Co. *v.* Woods, 56 Kan. 737, 44 Pac. 989.

Applying this rule to a delivery to the clerk of a hotel see Western Union Tel. Co. *v.* Redinger, (Tex. Civ. App. 1901) 63 S. W. 156. *Compare* Western Union Tel. Co. *v.* Trissal, 98 Ind. 566.

76. Western Union Tel. Co. *v.* Hendricks, 29 Tex. Civ. App. 413, 68 S. W. 720, holding that while it is not the duty of a telegraph company, in the absence of the addressee, to deliver business telegrams to his wife, she

the person in whose care it is addressed;[77] and if the latter can be found and delivery can be made to him it is not necessary to attempt to find and deliver the message to the addressee.[78] If, however, the person in whose care the message is addressed cannot be found the company must make all reasonable efforts to find and deliver the message to the addressee;[79] and it has also been held that if the person in whose care the message addressed is found, but refuses to receive the message, it is then the duty of the telegraph company to use all reasonable efforts to find and deliver it to the addressee.[80] A message addressed to one person in care of another, if not delivered to the addressee, should be delivered personally to the one in whose care it is addressed,[81] and it is not proper to deliver a telegram so addressed to a business associate of such person,[82] to his wife,[83] to an agent designated by him to receive messages addressed to him personally,[84] or even to notify such person himself by telephone,[85] although it may be delivered

is impliedly authorized to receive a telegram relating to the illness of their child, and that the company will be liable for failure to deliver such a telegram to her.

77. *Alabama.*— Western Union Tel. Co. *v.* Rowell, 153 Ala. 295, 45 So. 73.

Indiana.— Western Union Tel. Co. *v.* Newhouse, 6 Ind. App. 422, 33 N. E. 800.

Michigan.— Sweet *v.* Western Union Tel. Co., 139 Mich. 322, 102 N. W. 850.

North Carolina.— Hinson *v.* Postal Tel. Cable Co., 132 N. C. 460, 43 S. E. 945; Lefler *v.* Western Union Tel. Co., 131 N. C. 355, 42 S. E. 819.

Tennessee.— Western Union Tel. Co. *v.* McCaul, 115 Tenn. 99, 90 S. W. 856.

Texas.— Western Union Tel. Co. *v.* Mitchell, 91 Tex. 454, 44 S. W. 274, 66 Am. St. Rep. 906, 40 L. R. A. 209; Western Union Tel. Co. *v.* Young, 77 Tex. 245, 13 S. W. 985, 19 Am. St. Rep. 751; Western Union Tel. Co. *v.* Shaw, 40 Tex. Civ. App. 277, 90 S. W. 58; Western Union Tel. Co. *v.* Terrell, 10 Tex. Civ. App. 60, 30 S. W. 70; Western Union Tel. Co. *v.* Elliott, 7 Tex. Civ. App. 482, 27 S. W. 219.

Where a message is addressed in care of a corporation it is sufficient if it is delivered to the corporation (Lefler *v.* Western Union Tel. Co., 131 N. C. 355, 42 S. E. 819; Western Union Tel. Co. *v.* Shaw, 40 Tex. Civ. App. 277, 90 S. W. 58); and if such corporation is a railroad company it is sufficient to deliver the message to its ticket agent at the place to which the message is addressed (Lefler *v.* Western Union Tel. Co., *supra*); and it is no excuse for failing to deliver a telegram to a corporation in whose care it is addressed that no particular officer of the corporation is named to whom it may be delivered or that the addressee is not connected with such corporation (Western Union Tel. Co. *v.* Shaw, *supra*).

78. Lefler *v.* Western Union Tel. Co., 131 N. C. 355, 42 S. E. 819. See also cases cited *supra*, note 77.

79. Western Union Tel. Co. *v.* Houghton, 82 Tex. 561, 17 S. W. 846, 27 Am. St. Rep. 918, 15 L. R. A. 129. See also Western Union Tel. Co. *v.* Jackson, 19 Tex. Civ. App. 273, 46 S. W. 279.

"Care some hotel."—Although a message is addressed "Care some hotel," the company does not discharge its whole duty by inquiring at the various hotels in the place, if by ordinary care the addressee could be found elsewhere. Western Union Tel. Co. *v.* Waller, 37 Tex. Civ. App. 515, 84 S. W. 695.

80. Hinson *v.* Postal Tel. Cable Co., 132 N. C. 460, 43 S. E. 945. *Contra*, Western Union Tel. Co. *v.* Young, 77 Tex. 245, 13 S. W. 985, 19 Am. St. Rep. 751, holding that a message addressed to A, "care of" B, has the same meaning and legal effect as if addressed to B, "for" A, and that as the contract of the company is merely to deliver the message to B for A, if B refuses to receive it its liability is at an end and it is under no duty to attempt to find and deliver the message to A.

81. Western Union Tel. Co. *v.* McCaul, 115 Tenn. 99, 90 S. W. 856; Western Union Tel. Co. *v.* Hendricks, 29 Tex. Civ. App. 413, 68 S. W. 720; Thompson *v.* Western Union Tel. Co., 10 Tex. Civ. App. 120, 30 S. W. 250.

The reason of this rule is that the person in whose care the message is addressed is the only person authorized to receive it for the addressee (Western Union Tel. Co. *v.* McCaul, 115 Tenn. 99, 90 S. W. 856); and he has no right to waive the duty of making such personal delivery (Thompson *v.* Western Union Tel. Co., 10 Tex. Civ. App. 120, 30 S. W. 250).

If both parties are absent so that the message cannot be delivered either to the addressee or to the person in whose care it is addressed, it should be delivered at the residence of the addressee and not to a business associate of the person in whose care it is addressed. Western Union Tel. Co. *v.* Hendricks, 26 Tex. Civ. App. 366, 63 S. W. 341.

82. Western Union Tel. Co. *v.* Hendricks, 29 Tex. Civ. App. 413, 68 S. W. 720; Western Union Tel. Co. *v.* Hendricks, 26 Tex. Civ. App. 366, 63 S. W. 341.

83. Western Union Tel. Co. *v.* McCaul, 115 Tenn. 99, 90 S. W. 856.

84. Thompson *v.* Western Union Tel. Co., 10 Tex. Civ. App. 120, 30 S. W. 250.

85. Western Union Tel. Co. *v.* Pearce, 95 Tex. 578, 68 S. W. 771 [*reversing* (Civ. App. 1902) 67 S. W. 920].

Mode of delivery generally see *infra*, IV, C, 6.

to some other person who has been expressly authorized by the addressee to receive the same.[86]

6. Mode of Delivery. It is ordinarily the duty of a telegraph company to make delivery of a message by writing out a copy thereof and actually delivering such copy to the addressee or person authorized to receive the same,[87] and in the absence of agreement to the contrary a different mode of delivery, as by telephone, is insufficient.[88] The addressee may, however, agree to accept delivery by telephone,[89] in which case it has been held that if an error is made in telephoning the message the company will not be liable either to the addressee or to the sender of the message.[90] Where a telegram is received for a person living beyond the free-delivery limits of the company,[91] and no arrangement has been made for extra charges for delivery, it has been held sufficient for the company to mail the message to the addressee;[92] and under some circumstances this may be sufficient even where it is held that ordinarily the company should in such cases wire back for the payment or guarantee of delivery charges.[93] It is not the duty of the telegraph company under its ordinary contract to telephone a telegraphic message, particularly as it would impair the confidential relations assumed;[94] but it is competent for it to agree to deliver a message in this manner.[95] It is also within the apparent scope of an agent's authority to agree on accepting a message that it shall be transmitted by wire to a point where the company has an office and thence by mail to a different point and specially delivered to the addressee from the latter point.[96]

86. Western Union Tel. Co. *v.* Barefoot, 97 Tex. 159, 76 S. W. 914, 64 L. R. A. 491, holding that a telegram addressed to A in care of B may in the absence of A be delivered to C, if C has been expressly authorized by A to receive the same, and that in such case the company will not be liable for making such delivery instead of delivering the message to B.

87. Brashears *v.* Western Union Tel. Co., 45 Mo. App. 433; Western Union Tel. Co. *v.* Pearce, 95 Tex. 578, 68 S. W. 771; Barnes *v.* Western Union Tel. Co., 120 Fed. 550. *Compare* Norman *v.* Western Union Tel. Co., 31 Wash. 577, 72 Pac. 474.

88. Brashears *v.* Western Union Tel. Co., 45 Mo. App. 433 (holding that where a message is delivered to the addressee by telephone, and the operator makes a mistake in telephoning the message, the company will be liable to the sender of the message for a statutory penalty); Barnes *v.* Western Union Tel. Co., 120 Fed. 550.

A person in whose care a message is addressed cannot by receiving the same over a telephone waive the duty owing by the company to the addressee of the message to make an actual delivery thereof. Western Union Tel. Co. *v.* Pearce, 95 Tex. 578, 68 S. W. 771 [*reversing* (Civ. App. 1902) 67 S. W. 920].

89. Norman *v.* Western Union Tel. Co., 31 Wash. 577, 72 Pac. 474.

90. Norman *v.* Western Union Tel. Co., 31 Wash. 577, 72 Pac. 474, holding that where the addressee directs a messenger of a telegraph company to telephone a message, the messenger in so doing acts as the agent of the addressee, and that if an error is made in telephoning the message, it is in effect an error of the addressee, so that while he may be liable to the sender of the message the telegraph company will not. But see Brashears *v.* Western Union Tel. Co., 45 Mo. App. 433, holding that while an addressee may waive his own rights by accepting a message by telephone, he cannot, by so doing, waive the rights of the sender, and that if an error is made in telephoning the message to the addressee the company will be liable therefor to the sender.

91. Rules as to free delivery limits generally see *supra*, IV, C, 4, b.

92. King *v.* Western Union Tel. Co., 89 Ark. 402, 117 S. W. 521, where the message was for a person living six or eight miles in the country and nothing had been said by the sender of the message in regard to the payment or guarantee of delivery charges.

93. Gainey *v.* Western Union Tel. Co., 136 N. C. 261, 48 S. E. 653, holding that ordinarily where a message is received for a person beyond the free delivery limits, the company should wire back for a payment or guarantee of delivery charges, but where the message was addressed "Mr. Noel Gainey, (P. O. Idaho), Fayetteville, N. C.," and did not show any necessity for immediate delivery, the company was justified in assuming from the character of the address and other circumstances that the parties contemplated a delivery by mail.

94. Hellams *v.* Western Union Tel. Co., 70 S. C. 83, 49 S. E. 12. See also Lyles *v.* Western Union Tel. Co., 77 S. C. 174, 57 S. E. 725, 12 L. R. A. N. S. 534.

95. Lyles *v.* Western Union Tel. Co., 77 S. C. 174, 57 S. E. 725, 12 L. R. A. N. S. 534, holding that where such agreement is made the company will be liable for failing to comply therewith.

96. Western Union Tel. Co. *v.* Carter, 24 Tex. Civ. App. 80, 58 S. W. 198, holding that under such agreement the company will be liable, although the message is duly trans-

D. Duty to Forward. Where neither the addressee nor any agent of his authorized to receive messages is to be found at the point of destination, the company is under no obligation to forward the message to the place where the addressee happens to be, even though it is informed of his whereabouts.[97] Such further obligation can ordinarily arise only out of a new and independent contract, requiring a new consideration,[98] although it may be the duty of a telegraph company to forward a message where the sender has paid or guaranteed extra compensation to insure prompt delivery under such circumstances that an undertaking to forward should the addressee be absent may be implied.[99] There is no obligation to forward merely because the addressee has given instructions that his messages be forwarded, in the absence of any payment or agreement to pay the charges therefor,[1] and even a valid agreement to forward is, in the absence of express stipulation, binding only for a reasonable length of time.[2]

E. Duty Not to Disclose. It is a part of the undertaking of the telegraph company, with respect to the transmission and subsequent handling of a message, that the contents of the message shall not be disclosed to any person whomsoever without the consent, express or implied, of either the sender or of the addressee; and for a violation of this duty, wilful or negligent, the company will be liable.[3] By statute in many states the wilful violation of this duty of secrecy is made a criminal offense punishable by fine or imprisonment, or both.[4] No liability, however, is incurred where the contents of the telegram are divulged in response to a proper subpœna.[5]

V. MODIFICATION OF LIABILITY BY CONTRACT.

A. What Contracts or Stipulations Are Valid — 1. Limiting Liability For Unrepeated Messages — a. In General. Telegraph companies usually contract with the sender of a message that, if it is desired that the message shall be repeated, that is, telegraphed back to the originating office for comparison, an additional charge shall be made for such extra service, and that the company shall not be liable for mistakes or delays in the transmission or delivery or for non-delivery of any unrepeated message beyond the amount received for sending the same. As to the validity of this stipulation the authorities are divided, some holding that it is reasonable, and that, when assented to by the sender, it relieves the company from liability beyond the amount stipulated, except in cases of wilful misconduct or gross negligence;[6] while others, and an undoubted numerical

mitted by wire and then by mail to the point from which it was to be delivered if the company makes no provision for a special delivery to the addressee from the latter point.

97. Thorp *v.* Western Union Tel. Co., 84 Iowa 190, 50 N. W. 675; Abbott *v.* Western Union Tel. Co., 86 Minn. 44, 90 N. W. 1. See also Western Union Tel. Co. *v.* Redinger, (Tex. Civ. App. 1901) 63 S. W. 156.

98. Abbott *v.* Western Union Tel. Co., 86 Minn. 44, 90 N. W. 1.

99. Western Union Tel. Co. *v.* Hendricks, 26 Tex. Civ. App. 366, 63 S. W. 341, where the addressee was known to the company to be at another place where the company had an office.

1. Abbott *v.* Western Union Tel. Co., 86 Minn. 44, 90 N. W. 1.

2. Thorp *v.* Western Union Tel. Co., 84 Iowa 190, 50 N. W. 675, holding that it was a question for the jury whether twenty-six days was a reasonable time to which an agreement to forward would extend.

3. Cocke *v.* Western Union Tel. Co., 84 Miss. 380, 36 So. 392. See also Matter of Renville, 46 N. Y. App. Div. 37, 61 N. Y. Suppl. 549; Hellams *v.* Western Union Tel. Co., 70 S. C. 83, 49 S. E. 12.

Delivery to wrong person.— The telegraph company will be liable for delivering a telegram to a person other than the addressee and not authorized to receive the same and by whom its contents are divulged. Barnes *v.* Western Union Tel. Co., 120 Fed. 550.

Exemplary damages are not recoverable merely for divulging the contents of a telegram where the act was not done wilfully, maliciously, or with any wrongful intent. Cocke *v.* Western Union Tel. Co., 84 Miss. 380, 36 So. 392.

4. See the statutes of the several states. And see Arkansas, etc., R. Co. *v.* Stroude, 82 Ark. 117, 100 S. W. 760; Matter of Renville, 46 N. Y. App. Div. 37, 61 N. Y. Suppl. 549.

5. Woods *v.* Miller, 55 Iowa 168, 7 N. W. 484, 39 Am. Rep. 170.

Compelling production of telegrams as evidence see WITNESSES.

6. *California.*— Coit *v.* Western Union Tel. Co., 130 Cal. 657, 63 Pac. 83, 80 Am. St. Rep.

majority, are to the effect that, as applied to a case in which the telegraph company through its servants has been guilty of even ordinary negligence, the stipulation is contrary to public policy and void,[7] particularly where such companies are

153, 53 L. R. A. 678; Hart *v.* Western Union Tel. Co., 66 Cal. 579, 6 Pac. 637, 56 Am. Rep. 119.

Maryland.— U. S. Telegraph Co. *v.* Gildersleeve, 29 Md. 232, 96 Am. Dec. 519.

Massachusetts.— Wheelock *v.* Postal Tel. Cable Co., 197 Mass. 119, 83 N. E. 313; Clement *v.* Western Union Tel. Co., 137 Mass. 463; Grinnell *v.* Western Union Tel. Co., 113 Mass. 299, 18 Am. Rep. 485; Redpath *v.* Western Union Tel. Co., 112 Mass. 71, 17 Am. Rep. 69; Ellis *v.* American Tel. Co., 13 Allen 226.

Michigan.— Jacob *v.* Western Union Tel. Co., 135 Mich. 600, 98 N. W. 402; Birkett *v.* Western Union Tel. Co., 103 Mich. 361, 61 N. W. 645, 50 Am. St. Rep. 374, 33 L. R. A. 404; Western Union Tel. Co. *v.* Carew, 15 Mich. 525.

New York.— Halsted *v.* Postal Tel. Cable Co., 193 N. Y. 293, 85 N. E. 1078, 127 Am. St. Rep. 952, 19 L. R. A. N. S. 1021 [*affirming* 120 N. Y. App. Div. 433, 104 N. Y. Suppl. 1016]; Kiley *v.* Western Union Tel. Co., 109 N. Y. 231, 16 N. E. 75; Breese *v.* U. S. Telegraph Co., 48 N. Y. 132, 8 Am. Rep. 526; Ayres *v.* Western Union Tel. Co., 65 N. Y. App. Div. 149, 72 N. Y. Suppl. 634; Riley *v.* Western Union Tel. Co., 8 Misc. 217, 28 N. Y. Suppl. 581; Altman *v.* Western Union Tel. Co., 84 N. Y. Suppl. 54.

Pennsylvania.— Passmore *v.* Western Union Tel. Co., 78 Pa. St. 238; Harris *v.* Western Union Tel. Co., 9 Phila. 88.

United States.— Primrose *v.* Western Union Tel. Co., 154 U. S. 1, 14 S. Ct. 1098, 38 L. ed. 883; Box *v.* Postal Tel.-Cable Co., 165 Fed. 138, 91 C. C. A. 172; Western Union Tel. Co. *v.* Coggin, 68 Fed. 137, 15 C. C. A. 231. *Compare* White *v.* Western Union Tel. Co., 14 Fed. 710, 5 McCrary 103.

England.— MacAndrew *v.* Electric Tel. Co., 17 C. B. 3, 1 Jur. N. S. 1073, 25 L. J. C. P. 26, 4 Wkly. Rep. 7, 84 E. C. L. 3.

Canada.— Baxter *v.* Dominion Tel. Co., 37 U. C. Q. B. 470.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," §§ 43, 44.

In West Virginia the court, although expressing the opinion that the weight of authority was in support of the validity of the stipulation, refused definitely to decide this question, holding that the stipulation if valid applied only to errors which could be prevented by a repetition of the message and that it did not cover a total failure to transmit or deliver. Beatty Lumber Co. *v.* Western Union Tel. Co., 52 W. Va. 410, 44 S. E. 309.

7. *Alabama.*—American Union Tel. Co. *v.* Daughtery, 89 Ala. 191, 7 So. 660.

Arizona.— Stiles *v.* Western Union Tel. Co., 2 Ariz. 308, 15 Pac. 712.

Arkansas.— Western Union Tel. Co. *v.* Short, 53 Ark. 434, 14 S. W. 649, 9 L. R. A. 744

Colorado.— Western Union Tel. Co. *v.* Graham, 1 Colo. 230, 9 Am. Rep. 136.

Florida.— Western Union Tel. Co. *v.* Milton, 53 Fla. 484, 43 So. 495, 125 Am. St. Rep. 1077, 11 L. R. A. N. S. 560.

Georgia.— Western Union Tel. Co. *v.* Blanchard, 68 Ga. 299, 45 Am. Rep. 480. *Compare* Western Union Tel. Co. *v.* Fontaine, 58 Ga. 433.

Illinois.—Western Union Tel. Co. *v.* Tyler, 74 Ill. 168, 24 Am. Rep. 279; Tyler *v.* Western Union Tel. Co., 60 Ill. 421, 14 Am. Rep. 38.

Indiana.—Western Union Tel. Co. *v.* Meredith, 95 Ind. 93; Western Union Tel. Co. *v.* Adams, 87 Ind. 598, 44 Am. Rep. 776; Western Union Tel. Co. *v.* Fenton, 52 Ind. 1; Western Union Tel. Co. *v.* Meek, 49 Ind. 53; Central Union Tel. Co. *v.* Swoveland, 14 Ind. App. 341, 42 N. E. 1035.

Iowa.— Harkness *v.* Western Union Tel. Co., 73 Iowa 190, 34 N. W. 811, 5 Am. St. Rep. 672; Manville *v.* Western Union Tel. Co., 37 Iowa 214, 18 Am. Rep. 8; Sweatland *v.* Illinois, etc., Tel. Co., 27 Iowa 433, 1 Am. Rep. 285.

Kansas.— Western Union Tel. Co. *v.* Crall, 38 Kan. 679, 17 Pac. 309, 5 Am. St. Rep. 795.

Kentucky.— Western Union Tel. Co. *v.* Eubanks, 100 Ky. 591, 38 S. W. 1068, 18 Ky. L. Rep. 995, 66 Am. St. Rep. 361, 36 L. R. A. 711; Smith *v.* Western Union Tel. Co., 83 Ky. 104, 4 Am. St. Rep. 126. *Compare* Camp *v.* Western Union Tel. Co., 1 Metc. 164, 71 Am. Dec. 461.

Louisiana.— La Grange *v.* Southwestern Tel. Co., 25 La. Ann. 383.

Maine.— Ayer *v.* Western Union Tel. Co., 79 Me. 493, 10 Atl. 495, 1 Am. St. Rep. 353; Bartlett *v.* Western Union Tel. Co., 62 Me. 209, 16 Am. Rep. 437.

Mississippi.—Postal Tel., etc., Co. *v.* Wells, 82 Miss. 733, 35 So. 190; Western Union Tel. Co. *v.* Goodbar, (1890) 7 So. 214.

Missouri.—Reed *v.* Western Union Tel. Co., 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492 [*overruling* Wann *v.* Western Union Tel. Co., 37 Mo. 472, 90 Am. Dec. 395].

Nebraska.— Kemp *v.* Western Union Tel. Co., 28 Nebr. 661, 44 N. W. 1064, 26 Am. St. Rep. 363. *Compare* Becker *v.* Western Union Tel. Co., 11 Nebr. 87, 7 N. W. 868, 38 Am. Rep. 356.

New Mexico.— Western Union Tel. Co. *v.* Longwill, 5 N. M. 308, 21 Pac. 339.

North Carolina.— Williamson *v.* Postal Tel. Cable Co., 151 N. C. 223, 65 S. E. 974; Sherrill *v.* Western Union Tel. Co., 116 N. C. 655, 21 S. E. 429; Brown *v.* Postal Tel. Co., 111 N. C. 187, 16 S. E. 179, 32 Am. St. Rep. 793, 17 L. R. A. 648.

Ohio.— Western Union Tel. Co. *v.* Griswold, 37 Ohio St. 301, 41 Am. Rep. 500.

Oklahoma.— Blackwell Milling, etc., Co. *v.* Western Union Tel. Co., 17 Okla. 376, 89 Pac. 235.

declared by constitution or statute to be common carriers.[8] Even where such a stipulation has been held valid except as against gross negligence or wilful misconduct, it will be strictly construed,[9] and where it specifically mentions only certain grounds of liability, it will not be extended so as to include others not within the terms of the stipulation.[10] For the same reason that a telegraph company cannot, in most jurisdictions, limit its liability for negligence to the amount received for sending the message, it is also held that as against negligence it cannot limit its liability to a definite sum in excess of this amount, such as ten times the amount or any other multiple thereof.[11]

b. Gross Negligence or Wilful Misconduct. In those jurisdictions where the stipulation is regarded as valid it does not relieve the company from liability for wilful misconduct or for gross negligence;[12] but in such cases the burden is

Tennessee.— Pepper *v.* Western Union Tel. Co., 87 Tenn. 554, 11 S. W. 783, 10 Am. St. Rep. 699, 4 L. R. A. 660; Marr *v.* Western Union Tel. Co., 85 Tenn. 529, 3 S. W. 496.

Texas.— Postal Tel.-Cable Co. *v.* Sunset Constr. Co., 102 Tex. 148, 114 S. W. 98 [*reversing* on other grounds (Civ. App. 1908) 109 S. W. 265]; Western Union Tel. Co. *v.* Broesche, 72 Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 843; Gulf, etc., R. Co. *v.* Wilson, 69 Tex. 739, 7 S. W. 653; Womack *v.* Western Union Tel. Co., 58 Tex. 176, 44 Am. Rep. 614; Western Union Tel. Co. *v.* Neill, 57 Tex. 283, 44 Am. Rep. 589; Western Union Tel. Co. *v.* Norris, 25 Tex. Civ. App. 43, 60 S. W. 982; Western Union Tel. Co. *v.* Tobin, (Civ. App. 1900) 56 S. W. 540; Western Union Tel. Co. *v.* Hines, 22 Tex. Civ. App. 315, 54 S. W. 627; Western Union Tel. Co. *v.* Odom, 21 Tex. Civ. App. 537, 52 S. W. 632; Mitchell *v.* Western Union Tel. Co., 12 Tex. Civ. App. 262, 33 S. W. 1016; Western Union Tel. Co. *v.* Nagle, 11 Tex. Civ. App. 539, 32 S. W. 707.

Utah.— Wertz *v.* Western Union Tel. Co., 7 Utah 446, 27 Pac. 172, 13 L. R. A. 510.

Vermont.— Gillis *v.* Western Union Tel. Co., 61 Vt. 461, 17 Atl. 736, 15 Am. St. Rep. 917, 4 L. R. A. 611.

Wisconsin.— Fox *v.* Postal Tel. Cable Co., 138 Wis. 648, 120 N. W. 399; Thompson *v.* Western Union Tel. Co., 64 Wis. 531, 25 N. W. 789, 54 Am. Rep. 644; Candee *v.* Western Union Tel. Co., 34 Wis. 471, 17 Am. Rep. 452; Hibbard *v.* Western Union Tel. Co., 33 Wis. 558, 14 Am. Rep. 775.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," §§ 39, 43, 44.

Contract made in another state.—Although the contract of transmission is made in a state where a stipulation limiting the liability of the company for negligence in regard to unrepeated messages is recognized as valid, such stipulation will not be enforced in another state where it is held to be contrary to public policy. Williamson *v.* Postal Tel. Co. (N. C. 1909) 65 N. E. 974; Fox *v.* Postal Tel. Cable Co., 138 Wis. 648, 120 N. W. 399. But see Heath *v.* Postal Tel.-Cable Co., (S. C. 1910) 69 S. E. 282, holding that the law of the place of the contract governs.

8. Western Union Tel. Co. *v.* Eubanks, 100 Ky. 591, 38 S. W. 1068, 18 Ky. L. Rep. 995, 66 Am. St. Rep. 361, 36 L. R. A. 711; Postal Tel., etc., Co. *v.* Wells, 82 Miss. 733, 35 So. 190; Blackwell Milling, etc., Co. *v.* Western Union Tel. Co., 17 Okla. 376, 89 Pac. 235.

9. Fleischner *v.* Pacific Postal Tel. Cable Co., 55 Fed. 738.

10. Baldwin *v.* U. S. Telegraph Co., 54 Barb. (N. Y.) 505, 6 Abb. Pr. N. S. 405 [*reversed* on other grounds in 45 N. Y. 744, 6 Am. Rep. 165] (holding that a total failure to transmit and deliver is not within a stipulation against "delays, errors and remissness"); Sprague *v.* Western Union Tel. Co., 6 Daly (N. Y.) 200 [*affirmed* in 67 N. Y. 590] (holding that a total failure to transmit is not within a stipulation against "mistake or delay in the transmission or delivery, or a non-delivery"); Bryant *v.* American Tel. Co., 1 Daly (N. Y.) 575 (holding that a delay in delivery is not within a stipulation against mistakes or delays in the "transmission" of messages); Beatty Lumber Co. *v.* Western Union Tel. Co., 52 W. Va. 410, 44 S. E. 309 (holding that a total failure to transmit is not within the application of a stipulation against "mistakes or delays in the transmission or delivery, or for non-delivery").

11. *Iowa.*— Harkness *v.* Western Union Tel. Co., 73 Iowa 190, 34 N. W. 811, 5 Am. St. Rep. 672.

Kentucky.— Western Union Tel. Co. *v.* Eubanks, 100 Ky. 591, 38 S. W. 1068, 18 Ky. L. Rep. 995, 66 Am. St. Rep. 361, 36 L. R. A. 711.

Maine.— Fowler *v.* Western Union Tel. Co., 80 Me. 381, 15 Atl. 29, 6 Am. St. Rep. 211.

Texas.— Western Union Tel. Co. *v.* Neill, 57 Tex. 283, 44 Am. Rep. 589.

Wisconsin.— Fox *v.* Postal Tel. Cable Co., 138 Wis. 648, 120 N. W. 399.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," §§ 43, 44.

Errors or delays not due to negligence.— It would seem on principle that the parties might agree upon a sum certain in the nature of liquidated damages for an error or delay not due to misconduct, fraud, or want of due care, but that if the error or delay was due to such causes the same reasons which prohibit an exemption from liability would also prohibit a limitation upon the true amount of damages. Western Union Tel. Co. *v.* Neill, 57 Tex. 283, 44 Am. Rep. 589.

12. U. S. Telegraph Co. *v.* Gildersleeve, 29

upon plaintiff in order to recover more than nominal damages or the price paid for transmission to show negligence of this character.[13]

c. Defaults Which Repetition Would Not Have Prevented. In some cases it has been held in those jurisdictions where the stipulation is regarded as valid that it makes no difference whether the particular breach of duty which is the foundation of the action is one which would have been prevented by repetition or not.[14] In other cases, however, it has been held that the stipulation is merely to secure accuracy in transmission,[15] and that it does not operate to relieve the company from a liability which a repetition of the message would not have tended to prevent,[16] as in the case of a total failure to transmit [17] or deliver the message,[18] or a negligent delay in transmission [19] or delivery.[20] While it is to be observed that some of these decisions are from jurisdictions in which the validity of the

Md. 232, 96 Am. Dec. 519; Mowry *v.* Western Union Tel. Co., 51 Hun (N. Y.) 126, 4 N. Y. Suppl. 666; Postal Tel. Cable Co. *v.* Nichols, 159 Fed. 643, 89 C. C. A. 585, 16 L. R. A. N. S. 870; Fleischner *v.* Pacific Postal Tel. Cable Co., 55 Fed. 738; White *v.* Western Union Tel. Co., 14 Fed. 710, 5 McCrary 103. See also Halsted *v.* Postal Tel. Cable Co., 193 N. Y. 293, 85 N. E. 1078, 127 Am. St. Rep. 952, 19 L. R. A. N. S. 1021; and *supra*, V, A, 1, a.

13. Kiley *v.* Western Union Tel. Co., 109 N. Y. 231, 16 N. E. 75 (unexplained failure to transmit to destination); Ayres *v.* Western Union Tel. Co., 65 N. Y. App. Div. 149, 72 N. Y. Suppl. 634 (unexplained delay of five hours). See also Monsees *v.* Western Union Tel. Co., 127 N. Y. App. Div. 289, 111 N. Y. Suppl. 53 (unexplained delay of two days, and error); and *infra*, VIII, E, 1, a.

14. Clement *v.* Western Union Tel. Co., 137 Mass. 463 (delay in delivery); Jacob *v.* Western Union Tel. Co., 135 Mich 600, 98 N. W. 402 (delay in transmission); Birkett *v.* Western Union Tel. Co., 103 Mich. 361, 61 N. W. 645, 50 Am. St. Rep. 374, 33 L. R. A. 404 (delay in delivery); Monsees *v.* Western Union Tel. Co., 127 N. Y. App. Div. 289, 111 N. Y. Suppl. 53 (delay in delivery); Ayres *v.* Western Union Tel. Co., 65 N. Y. App. Div. 149, 72 N. Y. Suppl. 634 (delay in delivery).

15. Western Union Tel. Co. *v.* Graham, 1 Colo. 230, 9 Am. Rep. 136; Western Union Tel. Co. *v.* Fenton, 52 Ind. 1; Barnes *v.* Western Union Tel. Co., 24 Nev. 125, 50 Pac. 438, 77 Am. St. Rep. 791; Box *v.* Postal Tel.-Cable Co., 165 Fed. 138, 91 C. C. A. 172; Purdom Naval Stores Co. *v.* Western Union Tel. Co., 153 Fed. 327.

16. *Alabama.*—Western Union Tel. Co. *v.* Henderson, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148.

Colorado.— Western Union Tel. Co. *v.* Graham, 1 Colo. 230, 9 Am. Rep. 136.

Illinois.— North Packing, etc., Co. *v.* Western Union Tel. Co., 70 Ill. App. 275.

Indiana.— Western Union Tel. Co. *v.* Fenton, 52 Ind. 1.

Nevada.— Barnes *v.* Western Union Tel. Co., 24 Nev. 125, 50 Pac. 438, 77 Am. St. Rep. 791.

West Virginic.— Beatty Lumber Co. *v.* Western Union Tel. Co., 52 W. Va. 410, 44 S. E. 309.

United States.— Box *v.* Postal Tel.-Cable Co., 165 Fed. 138, 91 C. C. A. 172; Fleischner *v.* Pacific Postal Tel. Cable Co., 55 Fed. 738.

17. Western Union Tel. Co. *v.* Way, 83 Ala. 542, 4 So. 844; Birney *v.* New York, etc., Tel. Co., 18 Md. 341, 81 Am. Dec. 607; Beatty Lumber Co. *v.* Western Union Tel. Co., 52 W. Va. 410, 44 S. E. 309. See also Mowry *v.* Western Union Tel. Co., 51 Hun (N. Y.) 126, 4 N. Y. Suppl. 666, where a total failure to transmit was held to be gross negligence and not within the stipulation.

A distinction has also been made between a total failure to transmit and deliver and a mere negligent delay in so doing, in a case where it is expressly held that the stipulation is not confined to errors which a repetition would tend to prevent. Birkett *v.* Western Union Tel. Co., 103 Mich. 361, 61 N. W. 645, 50 Am. St. Rep. 374, 33 L. R. A. 404.

18. *Kentucky.*— Smith *v.* Western Union Tel. Co., 83 Ky. 104, 4 Am. St. Rep. 126.

Texas.—Western Union Tel. Co. *v.* Broesche, 72 Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 843; Gulf, etc., R. Co. *v.* Wilson, 69 Tex. 739, 7 S. W. 653; Western Union Tel. Co. *v.* Nagle, 11 Tex. Civ. App. 539, 32 S. W. 707; Western Union Tel. Co. *v.* Burrow, 10 Tex. Civ. App. 122, 30 S. W. 378.

West Virginia.— Beatty Lumber Co. *v.* Western Union Tel. Co., 52 W. Va. 410, 44 S. E. 309.

United States.— Purdom Naval Stores Co. *v.* Western Union Tel. Co., 153 Fed. 327.

Canada.— Bell *v.* Dominion Tel. Co., 25 L. C. Jur. 248, 3 Montreal Leg. N. 406.

19. Thompson *v.* Western Union Tel. Co., 107 N. C. 449, 12 S. E. 427; Box *v.* Postal Tel.-Cable Co., 165 Fed. 138, 91 C. C. A. 172; Fleischner *v.* Pacific Postal Tel. Cable Co., 55 Fed. 738.

20. *Alabama.*—Western Union Tel. Co. *v.* Henderson, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148.

Colorado.— Western Union Tel. Co. *v.* Graham, 1 Colo. 230, 9 Am. Rep. 136.

Illinois.— North Packing, etc., Co. *v.* Western Union Tel. Co., 70 Ill. App. 275.

Indiana.— Western Union Tel. Co. *v.* Fenton, 52 Ind. 1.

Nevada.— Barnes *v.* Western Union Tel. Co., 24 Nev. 125, 50 Pac. 438, 77 Am. St. Rep. 791.

stipulation has been entirely denied,[21] others so limit its application while expressly conceding its validity as to errors which a repetition of the message would tend to prevent.[22]

2. That Message Shall Not Be Delivered During Night. It is reasonable for a telegraph company to stipulate that in consideration of a reduced rate a message shall be sent during the night, and delivered not earlier than the morning of the next ensuing business day; and in such a case if the message is delivered with reasonable promptness on the morning of the next business day there can be no liability for the delay over night, to which the sender assented.[23]

3. Limiting Liability For Errors in Cipher or Obscure Messages. It has been held that there is nothing unreasonable or contrary to public policy in a stipulation limiting the liability of a telegraph company for errors in the transmission of cipher or obscure messages,[24] but there are also decisions to the contrary.[25]

4. That Written Claim Shall Be Presented Within Specified Time — a. In General. While there are some decisions to the contrary,[26] it is ordinarily held that a stipulation that the telegraph company shall not be liable unless a claim is presented in writing within a specified time, usually sixty days, is, in the absence of statute, valid and binding,[27] whether the action is to recover damages or a

21. See cases cited *supra*, notes 15–20; and, generally, *supra*, V, A, 1, a.

22. Birney *v.* New York, etc., Tel. Co., 18 Md. 341, 81 Am. Dec. 607 (total failure to transmit); Box *v.* Postal Tel.-Cable Co., 165 Fed. 138, 91 C. C. A. 172 (delay in transmission); Purdom Naval Stores Co. *v.* Western Union Tel. Co., 153 Fed. 327 (total failure to deliver).

23. Western Union Tel. Co. *v.* Van Cleave, 107 Ky. 464, 54 S. W. 827, 22 Ky. L. Rep. 53, 92 Am. St. Rep. 366; Fowler *v.* Western Union Tel. Co., 80 Me. 381, 15 Atl. 29, 6 Am. St. Rep. 211; Western Union Tel. Co. *v.* McCoy, (Tex. Civ. App. 1895) 31 S. W. 210.

24. Primrose *v.* Western Union Tel. Co., 154 U. S. 1, 28, 14 S. Ct. 1098, 38 L. ed. 883, where the court said: "It is difficult to see anything unreasonable, or against public policy, in a stipulation that if the handwriting of a message, delivered to the company for transmission, is obscure, so as to be read with difficulty, or is in cipher, so that the reader has not the usual assistance of the context in ascertaining particular words, the company will not be responsible for its miscarriage, and that none of its agents shall, by attempting to transmit such a message, make the company responsible." See also Western Union Tel. Co. *v.* Coggin, 68 Fed. 137, 15 C. C. A. 231.

The stipulation does not apply where there is an entire failure to transmit the message and no effort whatever is made to do so. Western Union Tel. Co. *v.* Way, 83 Ala. 542, 4 So. 844.

25. Western Union Tel. Co. *v.* Eubanks, 100 Ky. 591, 38 S. W. 1068, 18 Ky. L. Rep. 995, 66 Am. St. Rep. 361, 36 L. R. A. 711; Postal Tel., etc., Co. *v.* Wells, 82 Miss. 733, 35 So. 190.

26. Davis *v.* Western Union Tel. Co., 107 Ky. 527, 54 S. W. 849, 21 Ky. L. Rep. 1251, 92 Am. St. Rep. 371; Western Union Tel. Co. *v.* Eubanks, 100 Ky. 591, 38 S. W. 1068, 18 Ky. L. Rep. 995, 66 Am. St. Rep. 361, 36 L. R. A. 711; Western Union Tel. Co. *v.* Kemp, 44 Nebr. 194, 62 N. W. 451, 48 Am. St. Rep. 723; Pacific Tel. Co. *v.* Underwood, 37 Nebr. 315, 55 N. W. 1057, 40 Am. St. Rep. 490; Western Union Tel. Co. *v.* Longwill, 5 N. M. 308, 21 Pac. 339; Johnston *v.* Western Union Tel. Co., 33 Fed. 362.

27. *Alabama.*—Western Union Tel. Co. *v.* Heathcoat, 149 Ala. 623, 43 So. 117; Harris *v.* Western Union Tel. Co., 121 Ala. 519, 25 So. 910, 77 Am. St. Rep. 70; Western Union Tel. Co. *v.* Way, 83 Ala. 542, 4 So. 844.

Arkansas.— Western Union Tel. Co. *v.* Moxley, 80 Ark. 435, 98 S. W. 112; Western Union Tel. Co. *v.* Dougherty, 54 Ark. 221, 15 S. W. 468, 26 Am. St. Rep. 33, 11 L. R. A. 102.

Colorado.— Western Union Tel. Co. *v.* Dunfield, 11 Colo. 335, 18 Pac. 34.

Georgia.— Western Union Tel. Co. *v.* Waxelbaum, 113 Ga. 1017, 39 S. E. 443, 56 L. R. A. 7411; Stamey *v.* Western Union Tel. Co., 92 Ga. 613, 18 S. E. 1008, 44 Am. St. Rep. 95; Western Union Tel. Co. *v.* James, 90 Ga. 254, 16 S. E. 83; Hill *v.* Western Union Tel. Co., 85 Ga. 425, 11 S. E. 874, 21 Am. St. Rep. 166; Postal Tel.-Cable Co. *v.* Moss, 5 Ga. App. 503, 63 S. E. 590.

Illinois.— Webbe *v.* Western Union Tel. Co., 64 Ill. App. 331; Western Union Tel. Co. *v.* Beck, 58 Ill. App. 564; Western Union Tel. Co. *v.* Fairbanks, 15 Ill. App. 600.

Indiana.— Western Union Tel. Co. *v.* Yopst, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224; Western Union Tel. Co. *v.* Jones, 95 Ind. 228, 48 Am. Rep. 713; Western Union Tel. Co. *v.* Meredith, 95 Ind. 93; Western Union Tel. Co. *v.* Trumbull, 1 Ind. App. 121, 27 N. E. 313.

Iowa.— Free *v.* Western Union Tel. Co., 135 Iowa 69, 110 N. W. 143; Heald *v.* Western Union Tel. Co., 129 Iowa 326, 105 N. W. 588; Albers *v.* Western Union Tel. Co., 98 Iowa 51, 66 N. W. 1040.

Kansas.— Russell *v.* Western Union Tel. Co., 57 Kan. 230, 45 Pac. 598.

Maryland.— Western Union Tel. Co. *v.* Lehman, 106 Md. 318, 67 Atl. 241.

statutory penalty.[28] Such a stipulation is not in the nature of a statute of limitations,[29] nor is it a limitation of liability for negligence, but is a recognition of such liability coupled with a reasonable requirement that the company shall have an opportunity to investigate the facts while its records are still in existence and the facts fresh in the memory of its witnesses.[30] Equally valid, under ordinary circumstances, is a stipulation that claims shall be presented within any other particular period of time, provided such period is reasonable,[31] as within

Massachusetts.— Wheelock *v.* Postal Tel.-Cable Co., 197 Mass. 119, 83 N. E. 313.

Minnesota.— Cole *v.* Western Union Tel. Co., 33 Minn. 227, 22 N. W. 385.

Mississippi.— Hartzog *v.* Western Union Tel. Co., 84 Miss. 448, 36 So. 539, 105 Am. St. Rep. 459; Clement *v.* Western Union Tel. Co., 77 Miss. 747, 27 So. 603.

Missouri.— Thorp *v.* Western Union Tel. Co., 118 Mo. App. 398, 94 S. W. 554; Kendall *v.* Western Union Tel. Co., 56 Mo. App. 192; Montgomery *v.* Western Union Tel. Co., 50 Mo. App. 591; Smith-Frazier Boot, etc., Co. *v.* Western Union Tel. Co., 49 Mo. App. 99; Massengale *v.* Western Union Tel. Co., 17 Mo. App. 257.

New York.— Young *v.* Western Union Tel. Co., 65 N. Y. 163.

North Carolina.— Sykes *v.* Western Union Tel. Co., 150 N. C. 431, 64 S. E. 177; Bryan *v.* Western Union Tel. Co., 133 N. C. 603, 45 S. E. 938; Lewis *v.* Western Union Tel. Co., 117 N. C. 436, 23 S. E. 319; Sherrill *v.* Western Union Tel. Co., 109 N. C. 527, 14 S. E. 94.

Pennsylvania.— Wolf *v.* Western Union Tel. Co., 62 Pa. St. 83, 1 Am. Rep. 387.

South Carolina.— Smith *v.* Western Union Tel. Co., 77 S. C. 378, 58 S. E. 6; Eaker *v.* Western Union Tel. Co., 75 S. C. 97, 55 S. E. 129; Broom *v.* Western Union Tel. Co., 71 S. C. 506, 51 S. E. 259; Hays *v.* Western Union Tel. Co., 70 S. C. 16, 48 S. E. 608, 106 Am. St. Rep. 731, 67 L. R. A. 481; Young *v.* Western Union Tel. Co., 65 S. C. 93, 43 S. E. 448; Aiken *v.* Western Union Tel. Co., 5 S. C. 358.

South Dakota.— Kirby *v.* Western Union Tel. Co., 7 S. D. 623, 4 S. D. 105, 55 N. W. 759, 65 N. W. 37, 46 Am. St. Rep. 765, 30 L. R. A. 612, 621, 624.

Tennessee.— Western Union Tel. Co. *v.* Greer, 115 Tenn. 368, 89 S. W. 327, 1 L. R. A. N. S. 525; Western Union Tel. Co. *v.* Courtney, 113 Tenn. 482, 82 S. W. 484; Manier *v.* Western Union Tel. Co., 94 Tenn. 442, 29 S. W. 732.

Texas.— Phillips *v.* Western Union Tel. Co., 95 Tex. 638, 69 S. W. 63; Lester *v.* Western Union Tel. Co., 84 Tex. 313, 19 S. W. 256; Western Union Tel. Co. *v.* Brown, 84 Tex. 54, 19 S. W. 336; Western Union Tel. Co. *v.* Culberson, 79 Tex. 65, 15 S. W. 219; Western Union Tel. Co. *v.* Rains, 63 Tex. 27; Western Union Tel. Co. *v.* Murray, 29 Tex. Civ. App. 207, 68 S. W. 549; Western Union Tel. Co. *v.* Hays, (Civ. App. 1901) 63 S. W. 171; Western Union Tel. Co. *v.* Vanway, (Civ. App. 1899) 54 S. W. 414; Western Union Tel. Co. *v.* May, 8 Tex. Civ. App. 176, 27 S. W. 760; Western Union Tel. Co. *v.* Jobe, 6 Tex. Civ. App. 403, 25 S. W. 168, 1036; Western Union Tel. Co. *v.* Pells, 2 Tex. App. Civ. Cas. § 41.

Utah.— Brooks *v.* Western Union Tel. Co., 26 Utah 147, 72 Pac. 499.

Wisconsin.— Heimann *v.* Western Union Tel. Co., 57 Wis. 562, 16 N. W. 32.

United States.— Primrose *v.* Western Union Tel. Co., 154 U. S. 1, 14 S. Ct. 1098, 38 L. ed. 883; Southern Express Co. *v.* Caldwell, 21 Wall. 264, 22 L. ed. 556; Whitehill *v.* Western Union Tel. Co., 136 Fed. 499; Western Union Tel. Co. *v.* Coggin, 68 Fed. 137, 15 C. C. A. 231; Findlay *v.* Western Union Tel. Co., 64 Fed. 459; Beasley *v.* Western Union Tel. Co., 39 Fed. 181.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 42.

28. Western Union Tel. Co. *v.* Yopst, (Ind. 1887) 11 N. E. 16; Western Union Tel. Co. *v.* Trumbull, 1 Ind. App. 121, 27 N. E. 313; Western Union Tel. Co. *v.* Greer, 115 Tenn. 368, 89 S. W. 327, 1 L. R. A. N. S. 525. See also cases cited *infra*, p. 1707, note 20.

29. Western Union Tel. Co. *v.* Trumbull, 1 Ind. App. 121, 27 N. E. 313; Sykes *v.* Western Union Tel. Co., 150 N. C. 431, 64 S. E. 177; Western Union Tel. Co. *v.* Mellon, 96 Tenn. 66, 33 S. W. 725. But see Western Union Tel. Co. *v.* Longwill, 5 N. M. 308, 319, 21 Pac. 339, where a stipulation of this character was referred to as being "a species of private statute of limitation, or nonclaim."

The statutory time within which an action for damages may be instituted against the company is in no manner shortened by requiring a mere claim therefor to be presented within a reasonable time. The action may be brought at any time within the statutory limitation. Kirby *v.* Western Union Tel. Co., 7 S. D. 623, 65 N. W. 37, 46 Am. St. Rep. 765, 30 L. R. A. 612, 621, 624.

30. Western Union Tel. Co. *v.* Dougherty, 54 Ark. 221, 15 S. W. 468, 26 Am. St. Rep. 33, 11 L. R. A. 102; Western Union Tel. Co. *v.* Trumbull, 1 Ind. App. 121, 27 N. E. 313; Sykes *v.* Western Union Tel. Co., 150 N. C. 431, 64 S. E. 177; Sherrill *v.* Western Union Tel. Co., 109 N. C. 527, 14 S. E. 94; Southern Express Co. *v.* Caldwell, 21 Wall. (U. S.) 264, 22 L. ed. 556. But see Pacific Tel. Co. *v.* Underwood, 37 Nebr. 315, 55 N. W. 1057, 40 Am. St. Rep. 490.

31. Heimann *v.* Western Union Tel. Co., 57 Wis. 562, 16 N. W. 32.

In Texas it is provided by statute that such stipulations shall not be valid unless reasonable, and that a stipulation requiring notice within a period of less than ninety days shall be void. Western Union Tel. Co. *v.* Lovely, (Civ. App. 1899) 52 S. W. 563.

[V, A, 4, a]

thirty,[32] or even twenty, days.[33] But conceding the validity of the stipulation under ordinary circumstances, it has been held not binding where it would operate unreasonably under the circumstances of a particular case,[34] as where plaintiff had no knowledge of the company's negligence or default until after the stipulated period for presenting claims had expired;[35] and in a few of such cases that it is sufficient if the claim is presented within the stipulated number of days after such knowledge is acquired,[36] and the same rule has been applied in some cases where such knowledge was acquired some time after the sending of the message but before the entire expiration of the period stipulated,[37] although it would seem that the better rule should be to the contrary.[37a] Where the stipulation requires the claim to be presented within a certain time after the "sending" of the message, the period does not begin to run until the message is actually started,[38] and if there is a total failure to transmit, no presentation of claim is necessary;[39] but if the message is actually transmitted a delay in delivery will not extend the time for presenting claim if after the discovery of the company's negligence a reasonable time for presenting the claim still remains before the expiration of the period stipulated.[40]

b. Requisites of Claim. The claim must identify the message, state the negligence complained of, and the nature and extent of the damages sustained.[41] It is not sufficient merely to give notice of the negligence complained of,[42] to make complaint thereof and demand an explanation,[43] or to give notice that a claim for damages will be made,[44] although the process or complaint in an action against the company, if sufficient in form, may serve as a written presentation of claim.[45] There can be no recovery by one person on a claim presented by another,[46] nor

32. *Alabama.*—Western Union Tel. Co. *v.* Prevatt, 149 Ala. 617, 43 So. 106.

Colorado.—Western Union Tel. Co. *v.* Dunfield, 11 Colo. 335, 18 Pac. 34.

Iowa.—Herron *v.* Western Union Tel. Co., 90 Iowa 129, 57 N. W. 696.

Maryland.—Western Union Tel. Co. *v.* Lehman, 106 Md. 318, 67 Atl. 241.

Minnesota.—Cole *v.* Western Union Tel. Co., 33 Minn. 227, 22 N. W. 385.

Missouri.—Massengale *v.* Western Union Tel. Co., 17 Mo. App. 257.

Texas.—Western Union Tel. Co. *v.* Culberson, 79 Tex. 65, 15 S. W. 219.

Washington.—Martin *v.* Sunset Tel., etc., Co., 18 Wash. 260, 51 Pac. 376.

United States.—Beasley *v.* Western Union Tel. Co., 39 Fed. 181.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 42.

33. Aiken *v.* Western Union Tel. Co., 5 S. C. 358; Heimann *v.* Western Union Tel. Co., 57 Wis. 562, 16 N. W. 32.

34. Sherrill *v.* Western Union Tel. Co., 109 N. C. 527, 14 S. E. 94; Conrad *v.* Western Union Tel. Co., 162 Pa. St. 204, 29 Atl. 888, cable message from Philadelphia to Shanghai, where defendant's neglect was not and could not have been discovered in the ordinary course of business within sixty days.

35. Sherrill *v.* Western Union Tel. Co., 109 N. C. 527, 14 S. E. 94; Conrad *v.* Western Union Tel. Co., 162 Pa. St. 204, 29 Atl. 888.

36. Sherrill *v.* Western Union Tel. Co., 109 N. C. 527, 14 S. E. 94.

37. Postal Tel. Cable Co. *v.* Nichols, 159 Fed. 643, 89 C. C. A. 585, 16 L. R. A. N. S. 870, holding that where a telegram was filed for transmission on June 12, but the sender had no knowledge, prior to July 11, of the company's failure to deliver the same, and notice of claim was filed on August 17, the claim was in time under a stipulation requiring claims to be presented within sixty days after the message was filed for transmission.

37a. Stone *v.* Postal-Tel. Co., (R. I. 1900) 76 Atl. 762; Heimann *v.* Western Union Tel. Co., 57 Wis. 562, 16 N. W. 32.

38. Western Union Tel. Co. *v.* Way, 83 Ala. 542, 4 So. 844.

39. Western Union Tel. Co. *v.* Way, 83 Ala. 542, 4 So. 844; Western Union Tel. Co. *v.* Yopst, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224.

40. Stone *v.* Postal Tel. Co., (R. I. 1910) 76 Atl. 762; Heimann *v.* Western Union Tel. Co., 57 Wis. 562, 16 N. W. 32.

41. Western Union Tel. Co. *v.* Moxley, 80 Ark. 554, 98 S. W. 112; Postal Tel.-Cable Co. *v.* Moss, 5 Ga. App. 503, 63 S. E. 590; Toale *v.* Western Union Tel. Co., 76 S. C. 248, 57 S. E. 117; Western Union Tel. Co. *v.* Courtney, 113 Tenn. 482, 82 S. W. 484. *Compare* Western Union Tel. Co. *v.* Brown, 84 Tex. 54, 19 S. W. 336.

42. Western Union Tel. Co. *v.* Moxley, 80 Ark. 554, 98 S. W. 112; Manier *v.* Western Union Tel. Co., 94 Tenn. 442, 29 S. W. 732.

43. Toale *v.* Western Union Tel. Co., 76 S. C. 248, 57 S. E. 117.

44. Postal Tel.-Cable Co. *v.* Moss, 5 Ga. App. 503, 63 S. E. 590.

45. Postal Tel.-Cable Co. *v.* Moss, 5 Ga. App. 503, 63 S. E. 590; Western Union Tel. Co. *v.* Courtney, 113 Tenn. 482, 82 S. W. 484.

Sufficiency of suit generally see *infra*, V, A, 4, c.

46. Western Union Tel. Co. *v.* Swearengen, (Ark. 1910) 126 S. W. 1071; Webbe *v.* Western Union Tel. Co., 64 Ill. App. 331; Western

can there be a recovery for subjects of damage not included in the claim presented,[47] although it is not necessary that the claim should accurately state the amount of the loss,[48] and plaintiff will not be limited in his recovery to the amount of damages stated in his claim.[49]

c. Condition Precedent or Subsequent. In some cases it has been held that the stipulation requiring claims to be presented within a certain time is a condition precedent to a right of action,[50] and that if such claim is not presented an action cannot be maintained, although the action is brought within the time stipulated for presenting claims.[51] In other cases, however, it is held that the condition is not a condition precedent, but a condition subsequent,[52] merely operating, in cases where no claim is presented within the time limited, to defeat a cause of action which has already accrued,[53] and that it is sufficient, although no other claim is presented, if suit is instituted within the time limited.[54] These decisions seem to be based upon the ground that the suit is equivalent to a written presentation of claim, and therefore a sufficient compliance with the stipulation,[55] it being stated that while it is sufficient if the process or complaint sufficiently informs defendant of the different facts which a written claim should set out,[56] a mere summons to answer is not sufficient.[57]

d. Waiver. Like any other contractual stipulation, the requirement in the contract of transmission that a written claim for damages shall be presented within a specified time may be waived by the party for whose benefit it was inserted in the contract — that is, the telegraph company;[58-59] and it is held that

Union Tel. Co. *v.* Beck, 58 Ill. App. 564; Brockelsby *v.* Western Union Tel. Co., (Iowa 1910) 126 N. W. 1105; Younker *v.* Western Union Tel. Co., (Iowa 1910) 125 N. W. 577; Swain *v.* Western Union Tel. Co., 12 Tex. Civ. App. 385, 34 S. W. 783; Western Union Tel Co. *v.* Kinsley, 8 Tex. Civ. App. 527, 28 S. W. 831.

47. Western Union Tel. Co. *v.* Nelson, 86 Ark. 336, 111 S. W. 274; Western Union Tel. Co. *v.* Moxley, 80 Ark. 554, 98 S. W. 112; Western Union Tel. Co. *v.* Murray, 29 Tex. Civ. App. 207, 68 S. W. 549.

There can be no recovery for mental anguish where plaintiff in his claim expressly limited the same to compensation for loss "sustained in actual money." Western Union Tel. Co. *v.* Nelson, 86 Ark. 336, 111 S. W. 274.

48. Western Union Tel. Co. *v.* Lehman, 106 Md. 318, 67 Atl. 241.

49. Western Union Tel. Co. *v.* Murray, 29 Tex. Civ. App. 207, 68 S. W. 549.

50. Western Union Tel. Co. *v.* Yopst, (Ind. 1887) 11 N. E. 16; Western Union Tel Co. *v.* McKinney, 2 Tex. App. Civ. Cas. § 644.

51. Western Union Tel. Co. *v.* Yopst, (Ind. 1887) 11 N. E. 16; Western Union Tel. Co. *v.* Hays, (Tex. Civ. App. 1901) 63 S. W. 171; Western Union Tel. Co. *v.* Ferguson, (Tex. Civ. App. 1894) 27 S. W. 1048; Western Union Tel. Co. *v.* McKinney, 2 Tex. App. Civ. Cas. § 644.

52. Western Union Tel. Co. *v.* Way, 83 Ala. 542, 4 So. 844; Western Union Tel. Co. *v.* Piner, 9 Tex. Civ. App. 152, 29 S. W. 66.

53. Western Union Tel. Co. *v.* Trumbull, 1 Ind. App. 121, 27 N. E. 313; Phillips *v.* Western Union Tel. Co., 95 Tex. 638, 69 S. W. 63; Western Union Tel. Co. *v.* Piner, 9 Tex. Civ. App. 152, 29 S. W. 66.

54. *Alabama.*—Western Union Tel. Co. *v.* Henderson, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148.

Indiana.—Western Union Tel. Co. *v.* Trumbull, 1 Ind. App. 121, 27 N. E. 313.

North Carolina.—Bryan *v.* Western Union Tel. Co., 133 N. C. 603, 45 S. E. 938; Sherrill *v.* Western Union Tel. Co., 109 N. C. 527, 14 S. E. 94.

South Carolina.— Smith *v.* Western Union Tel. Co., 77 S. C. 378, 58 S. E. 6.

Tennessee.— Western Union Tel. Co. *v.* Mellon, 96 Tenn. 66, 33 S. W. 725.

Texas.— Phillips *v.* Western Union Tel. Co., 95 Tex. 638, 69 S. W. 63; Western Union Tel. Co. *v.* Crawford, (Civ. App. 1903) 75 S. W. 843; Phillips *v.* Western Union Tel. Co., (Civ. App. 1902) 69 S. W. 997; Western Union Tel. Co. *v.* Piner, 9 Tex. Civ. App. 152, 29 S. W. 66.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 42.

55. See Smith *v.* Western Union Tel. Co., 77 S. C. 378, 58 S. E. 6; Western Union Tel. Co. *v.* Mellon, 96 Tenn. 66, 33 S. W. 725; Phillips *v.* Western Union Tel. Co., (Tex. Civ. App. 1902) 69 S. W. 997.

56. Postal Tel.-Cable Co. *v.* Moss, 5 Ga. App. 503, 63 S. E. 590; Western Union Tel. Co. *v.* Greer, 115 Tenn. 368, 89 S. W. 327, 1 L. R. A. N. S. 525; Western Union Tel. Co. *v.* Courtney, 113 Tenn. 482, 82 S. W. 484; Phillips *v.* Western Union Tel. Co., 95 Tex. 638, 69 S. W. 63.

Requisites of claim see *supra*, V, A, 4, b.

57. Western Union Tel. Co. *v.* Courtney, 113 Tenn. 482, 82 S. W. 484. But see Bryan *v.* Western Union Tel. Co., 133 N. C. 603, 45 S. E. 938, holding that the service of a summons puts defendant upon inquiry and is therefore sufficient.

58-59. *Alabama.*—Western Union Tel. Co. *v.* Heathcoat, 149 Ala. 623, 43 So. 117.

such waiver may rest in parol,[60] but that the evidence of waiver must be unequivocal, direct, and positive.[61] A mere promise to look into the matter, in response to an oral complaint, is not a waiver,[62] nor is waiver shown by mere verbal statements to and interviews with the company's operators,[63] or by correspondence commencing with a letter from plaintiff to the company merely asking an explanation and demanding an apology.[64] An ordinary telegraph operator, as such, has no authority to waive the benefit of the stipulation,[65] and still less has a messenger,[66] although the manager of an office, on whom the claim might properly have been served, has, ostensibly at least, such authority.[67]

5. That Company's Messenger in Bringing Message to Office Shall Be Agent of Sender. A provision to the effect that no responsibility regarding messages shall attach to the company until the same are presented and accepted at one of its transmitting offices, and that if a message is sent to the office by one of the company's messengers he shall act for that purpose as the agent of the sender, is reasonable and valid.[68]

6. Stipulation Against Liability For Defaults of Connecting Lines.[69] A stipulation that the telegraph company shall be the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination is reasonable and valid, and protects the initial company against liability for negligence on the part of any other company to which

Georgia.— Hill *v.* Western Union Tel. Co., 85 Ga. 425, 11 S. E. 874, 21 Am. St. Rep. 166.

Indiana.—Western Union Tel. Co. *v.* Yopst, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224; Western Union Tel. Co. *v.* Stratemeier, 6 Ind. App. 125, 32 N. E. 871.

Massachusetts.— Wheelock *v.* Postal Tel. Cable Co., 197 Mass. 119, 83 N. E. 313.

South Carolina.— Hays *v.* Western Union Tel. Co., 70 S. C. 16, 48 S. E. 608, 106 Am. St. Rep. 731, 67 L. R. A. 481.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 47.

The time limit for presentation may be waived by an acceptance and retention of the claim without objection, and a subsequent request for further information in regard to the merits of the claim. Hays *v.* Western Union Tel. Co., 70 S. C. 16, 40 S. E. 608, 106 Am. St. Rep. 731, 67 L. R. A. 481.

The requirement that the claim shall be in writing may be waived by accepting without objection and investigating and acting upon a claim presented orally. Hill *v.* Western Union Tel. Co., 85 Ga. 425, 11 S. E. 874, 21 Am. St. Rep. 166; Western Union Tel. Co. *v.* Stratemeier, 6 Ind. App. 125, 32 N. E. 871.

It is ordinarily a question for the jury whether the company by its conduct has waived its right to rely upon the stipulation requiring a written presentation of claims within a certain time. Wheelock *v.* Postal Tel. Cable Co., 197 Mass. 119, 83 N. E. 313.

60. Western Union Tel. Co. *v.* Heathcoat, 149 Ala. 623, 43 So. 117.

61. Western Union Tel. Co. *v.* Goslin, 3 Tex. App. Civ. Cas. § 220.

62. Massengale *v.* Western Union Tel. Co., 17 Mo. App. 257.

63. Albers *v.* Western Union Tel. Co., 98 Iowa 51, 66 N. W. 1040.

64. Toale *v.* Western Union Tel. Co., 76 S. C. 248, 57 S. E. 117.

65. Young *v.* Western Union Tel. Co., 65 N. Y. 163; Hays *v.* Western Union Tel. Co., 70 S. C. 16, 48 S. E. 608, 106 Am. St. Rep. 731, 67 L. R. A. 481; Western Union Tel. Co. *v.* Rains, 63 Tex. 27.

66. Western Union Tel. Co. *v.* Terrell, 10 Tex. Civ. App. 60, 30 S. W. 70. See also Given *v.* Western Union Tel. Co., 24 Fed. 119.

67. Western Union Tel. Co. *v.* Heathcoat, 149 Ala. 623, 43 So. 117; Hill *v.* Western Union Tel. Co., 85 Ga. 425, 11 S. E. 874, 21 Am. St. Rep. 166; Western Union Tel. Co. *v.* Yopst, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224.

68. Stamey *v.* Western Union Tel. Co., 92 Ga. 613, 18 S. E. 1008, 44 Am. St. Rep. 95; Ayres *v.* Western Union Tel. Co., 65 N. Y. App. Div. 149, 72 N. Y. Suppl. 634. But see Will *v.* Postal Tel. Cable Co., 3 N. Y. App. Div. 22, 37 N. Y. Suppl. 933.

Waiver of regulation.—Whether such regulation be valid or not it is waived where the company directs its messenger to receive and bring the message to its office. Will *v.* Postal Tel. Cable Co., 3 N. Y. App. Div. 22, 37 N. Y. Suppl. 933.

It seems that, even without such a provision, a telegraph company is not responsible for a message given to a messenger outside the office unless and until the messenger files it in the office in the regular manner (Stamey *v.* Western Union Tel. Co., 92 Ga. 613, 18 S. E. 1008, 44 Am. St. Rep. 95); although it would doubtless be otherwise in the absence of contract if the messenger were sent for the express purpose of receiving the message, or if the message were an answer for which he had been instructed to ask (Will *v.* Postal Tel. Cable Co., 3 N. Y. App. Div. 22, 37 N. Y. Suppl. 933).

69. Liability in absence of stipulation see *infra*, VI, E.

Right of common carriers generally to limit liability to their own lines see CARRIERS, 6 Cyc. 480.

the message is necessarily transferred; [70] but such a stipulation does not protect the original transmitting company against its own negligence prior to the transfer of the message to the connecting company,[71] or affect the liability of the latter company for its own negligence after the message has been transferred to it.[72] Such a stipulation does not authorize the transfer of a message to a telephone company if there is a connecting telegraph company; [73] nor does it require a telegraph company, where the addressee of a message lives at a distance from its office, to deliver the message by telephone.[74]

B. How Such Contracts Made — 1. Proof of Sender's Assent — a. Message Written on Usual Blank — (i) *By Sender.* A person who writes a telegram on one of the blank forms in common use by telegraph companies, and delivers it, so written, to the company for transmission, is bound by the stipulations printed on the form, to the extent that the same are reasonable and valid; [75] and in such cases, in the absence of fraud, he must be held to have assented to the contract signed, whether as a matter of fact he read or knew of the stipulations contained therein or not.[76] It is also immaterial in the application of the

70. *Indiana.*— Western Union Tel. Co. *v.* Stratemeier, 6 Ind. App. 125, 32 N. E. 871.

Louisiana.— La Grange *v.* Southwestern Tel. Co., 25 La. Ann. 383.

Michigan.— Western Union Tel. Co. *v.* Carew, 15 Mich. 525.

Nebraska.— Pacific Tel. Co. *v.* Underwood, 37 Nebr. 315, 55 N. W. 1057, 40 Am. St. Rep. 490.

New York.— Baldwin *v.* U. S. Tel. Co., 45 N. Y. 744, 6 Am. Rep. 165 [*reversing* 54 Barb. 505, 6 Abb. Pr. N. S. 405]; De Rutte *v.* New York, etc., Electric Magnetic Tel. Co., 1 Daly 547, 30 How. Pr. 403.

Ohio.— Western Union Tel. Co. *v.* Griswold, 37 Ohio St. 301, 41 Am. Rep. 500.

South Carolina.— Hellams *v.* Western Union Tel. Co., 70 S. C. 83, 49 S. E. 12.

Tennessee.— Western Union Tel. Co. *v.* Mumford, 87 Tenn. 190, 10 S. W. 318, 10 Am. St. Rep. 630, 2 L. R. A. 601; Marr *v.* Western Union Tel. Co., 85 Tenn. 529, 3 S. W. 496.

Texas.— Smith *v.* Western Union Tel. Co., 84 Tex. 359, 19 S. W. 441, 31 Am. St. Rep. 59; Western Union Tel. Co. *v.* Jones, 81 Tex. 271, 16 S. W. 1006; Western Union Tel. Co. *v.* McDonald, 42 Tex. Civ. App. 229, 95 S. W. 691; Western Union Tel. Co. *v.* Sorsby, 29 Tex. Civ. App. 345, 69 S. W. 122 (but initial company must notify sender if terminal line down); Gulf, etc., R. Co. *v.* Geer, 5 Tex. Civ. App. 349, 24 S. W. 86; Western Union Tel. Co. *v.* McLeod, (Civ. App. 1893) 22 S. W. 988; Western Union Tel. Co. *v.* Taylor, 3 Tex. Civ. App. 310, 22 S. W. 532.

Canada.—See Baxter *v.* Dominion Tel. Co., 37 U. C. Q. B. 470; Stevenson *v.* Montreal Tel. Co., 16 U. C. Q. B. 530.

71. Western Union Tel. Co. *v.* Seals, (Tex. Civ. App. 1898) 45 S. W. 964; Weatherford, etc., R. Co. *v.* Seals, (Tex. Civ. App. 1897) 41 S. W. 841.

72. Squire *v.* Western Union Tel. Co., 98 Mass. 232, 93 Am. Dec. 157; Smith *v.* Western Union Tel. Co., 84 Tex. 359, 19 S. W. 441, 31 Am. St. Rep. 59.

73. Western Union Tel. Co. *v.* McLeod, (Tex. Civ. App. 1894) 24 S. W. 815.

74. Hellams *v.* Western Union Tel. Co., 70 S. C. 83, 49 S. E. 12.

75. *Alabama.*—Western Union Tel. Co. *v.* Prevatt, 149 Ala. 106, 43 So. 106.

Georgia.— Hill *v.* Western Union Tel. Co., 85 Ga. 425, 11 S. E. 874, 21 Am. St. Rep. 166.

Massachusetts.—Grinnell *v.* Western Union Tel. Co., 113 Mass. 299, 18 Am. Rep. 485; Redpath *v.* Western Union Tel. Co., 112 Mass. 71, 17 Am. Rep. 69.

Michigan.— Jacob *v.* Western Union Tel. Co., 135 Mich. 600, 98 N. W. 402; Western Union Tel. Co. *v.* Carew, 15 Mich. 525.

Minnesota.— Cole *v.* Western Union Tel. Co., 33 Minn. 227, 22 N. W. 385.

New York.— Kiley *v.* Western Union Tel. Co., 109 N. Y. 231, 16 N. E. 75; Young *v.* Western Union Tel. Co., 65 N. Y. 163; Breese *v.* U. S. Telegraph Co., 48 N. Y. 132, 8 Am. Rep. 526.

Pennsylvania.— Wolf *v.* Western Union Tel. Co., 62 Pa. St. 83, 1 Am. Rep. 387.

Tennessee.— Western Union Tel. Co. *v.* Courtney, 113 Tenn. 482, 82 S. W. 484.

Texas.— Womack *v.* Western Union Tel. Co., 58 Tex. 176, 44 Am. Rep. 614.

United States.— Primrose *v.* Western Union Tel. Co., 154 U. S. 1, 14 S. Ct. 1098, 38 L. ed. 883; Postal Tel. Cable Co. *v.* Nichols, 159 Fed. 643, 89 C. C. A. 585, 16 L. R. A. N. S. 870; Beasley *v.* Western Union Tel. Co., 39 Fed. 181.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 45.

Although the blank was torn and mutilated if there was sufficient to show that it contained certain agreements the sender must be held to be bound by the stipulations contained in a perfect blank. Kiley *v.* Western Union Tel. Co., 109 N. Y. 231, 16 N. E. 75.

76. *Alabama.*—Western Union Tel. Co. *v.* Prevatt, 149 Ala. 617, 43 So. 106.

Massachusetts.— Grinnell *v.* Western Union Tel. Co., 113 Mass. 299, 18 Am. Rep. 485.

Minnesota.— Cole *v.* Western Union Tel. Co., 33 Minn. 227, 22 N. W. 385.

New York.— Kiley *v.* Western Union Tel. Co., 109 N. Y. 231, 16 N. E. 75; Breese *v.*

rule that the sender of the message may have been an infant, the stipulation if valid being as binding upon infants as adults.[77]

(II) *By Operator.* Where the message is written on the blank by one of the company's messengers or operators at the dictation and request of the sender, the messenger or operator is, for this purpose, the sender's agent, and the latter is bound by the stipulations as though he had written the message himself;[78] and in such cases it is not material, in the absence of fraud or misrepresentation, that the sender did not read such stipulations,[79] or even that he was unable to read or write,[80] or did not know of the existence of such stipulations.[81]

b. Message on Other Company's Blank. Where a message as delivered to and accepted by a telegraph company for transmission is written not on a form issued by that company, but on a form issued by another company containing certain stipulations, such stipulations are a part of the contract and the sender is bound thereby to the same extent that he would have been bound had he delivered the message to the company whose name appeared on the blank;[82] although it seems that if the transmitting operator, without the knowledge of the sender, rewrites the message upon a blank of his own company, the sender will not be bound by stipulations upon that blank which he never saw, signed, or agreed to.[83]

c. Message on Plain Paper. Where a message as delivered to the telegraph company is written on paper containing no contract stipulations, the sender is not ordinarily bound by the stipulations printed on the usual blank,[84] and this rule is not affected by the fact that the operator may, without the sender's knowledge or consent, subsequently attach it to or copy it upon one of such blanks.[85]

U. S. Telegraph Co., 48 N. Y. 132, 8 Am. Rep. 526.

Texas.— Western Union Tel. Co. *v.* Edsall, 63 Tex. 668.

United States.— Postal Tel. Cable Co. *v.* Nichols, 159 Fed. 643, 89 C. C. A. 585, 16 L. R. A. N. S. 870; Beasley *v.* Western Union Tel. Co., 39 Fed. 181.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 45.

But see Tyler *v.* Western Union Tel. Co., 60 Ill. 421, 14 Am. Rep. 38; Western Union Tel. Co. *v.* Fairbanks, 15 Ill. App. 600.

In Illinois it is held that the condition must have been known or assented to and that while slight evidence of assent may suffice yet there must be something more than the mere fact that the condition was to be found in the printed matter appearing upon the blank used (Western Union Tel. Co. *v.* Lycan, 60 Ill. App. 124); and that in an action by the addressee of a message the condition is not binding unless assented to by him notwithstanding he had knowledge of the condition (Webbe *v.* Western Union Tel. Co., 169 Ill. 610, 48 N. E. 670, 6 Am. St. Rep. 207 [*reversing* 64 Ill. App. 331]).

77. Western Union Tel. Co. *v.* Greer, 115 Tenn. 368, 89 S. W. 327, 1 L. R. A. N. S. 525.

78. Western Union Tel. Co. *v.* Benson, 159 Ala. 254, 48 So. 712; Western Union Tel. Co. *v.* Prevatt, 149 Ala. 617, 43 So. 106; Western Union Tel. Co. *v.* Foster, 64 Tex. 220, 53 Am. Rep. 754; Western Union Tel. Co. *v.* Edsall, 63 Tex. 668; Gulf, etc., R. Co. *v.* Geer, 5 Tex. Civ. App. 349, 24 S. W. 86. See also Western Union Tel. Co. *v.* Simms, 30 Tex. Civ. App. 32, 69 S. W. 464.

79. Western Union Tel. Co. *v.* Edsall, 63 Tex. 668.

80. Western Union Tel. Co. *v.* Prevatt, 149 Ala. 617, 43 So. 106.

81. Western Union Tel. Co. *v.* Prevatt, 149 Ala. 617, 43 So. 106. But see Mims *v.* Western Union Tel. Co., 82 S. C. 247, 64 S. E. 236.

82. *Georgia.*—Western Union Tel. Co. *v.* Waxelbaum, 113 Ga. 1017, 39 S. E. 443, 56 L. R. A. 741.

Maryland.— U. S. Telegraph Co. *v.* Gildersleve, 29 Md. 232, 96 Am. Dec. 519.

Massachusetts.— Clement *v.* Western Union Tel. Co., 137 Mass. 463.

Michigan.— Jacob *v.* Western Union Tel. Co., 135 Mich. 600, 98 N. W. 402.

South Carolina.— Young *v.* Western Union Tel. Co., 65 S. C. 93, 43 S. E. 448.

It is not material what company's name appears upon the blank since the intention of the sender is to contract with the company to which the message is delivered for transmission, and the stipulations on the blank used constitute the contract, and being assented to are binding upon the sender. Western Union Tel. Co. *v.* Waxelbaum, 113 Ga. 1017, 39 S. E. 443, 56 L. R. A. 741; Young *v.* Western Union Tel. Co., 65 S. C. 93, 43 S. E. 448.

83. See Western Union Tel. Co. *v.* Uvalde Nat. Bank, (Tex. Civ. App. 1903) 72 S. W. 232.

84. Harris *v.* Western Union Tel. Co., 121 Ala. 519, 25 So. 910, 77 Am. St. Rep. 70; Pearsall *v.* Western Union Tel. Co., 124 N. Y. 256, 26 N. E. 534, 21 Am. St. Rep. 662; Anderson *v.* Western Union Tel. Co., 84 Tex. 17, 19 S. W. 285; Western Union Tel. Co. *v.* Pruett, (Tex. Civ. App. 1896) 35 S. W. 78. See also Western Union Tel. Co. *v.* McMillan, (Tex. Civ. App. 1894) 25 S. W. 821.

85. Harris *v.* Western Union Tel. Co., 121

The rule has also been held to apply even where the sender knew of the stipulations on the company's ordinary blanks,[86] but in other cases it has been held that if he knew of such stipulations he will be bound thereby.[87]

d. Message Accepted Over Telephone. If a telegraph company accepts for transmission a message offered to it over a telephone, and the operator without the knowledge or direction of the sender writes the message upon one of the company's blanks, the sender will not ordinarily be bound by the stipulations contained thereon,[88] particularly where he did not know of such stipulations or intend or expect the message to be written upon such blank.[89]

2. Whether Addressee Bound. In an action against a telegraph company brought by the addressee of a message,[90] it is ordinarily held that he is bound by the stipulations in the contract between the company and the sender of the message to the same extent as the sender.[91] In some cases, however, it has been held that the addressee is not bound by such stipulations unless he assented thereto, although he may have had knowledge thereof,[92] and also that where the addressee sues not in contract but in tort he is not bound by such stipulations,[93]

Ala. 519, 25 So. 910, 77 Am. St. Rep. 70; Anderson *v.* Western Union Tel. Co., 84 Tex. 17, 19 S. W. 285; Western Union Tel. Co. *v.* Pruett, (Tex. Civ. App. 1896) 35 S. W. 78; Western Union Tel. Co. *v.* Arwine, 3 Tex. Civ. App. 156, 22 S. W. 105; Beasley *v.* Western Union Tel. Co., 39 Fed. 181.

86. Pearsall *v.* Western Union Tel. Co., 124 N. Y. 256, 26 N. E. 534, 21 Am. St. Rep. 662.

87. Western Union Tel. Co. *v.* Buchanan, 35 Ind. 429, 9 Am. Rep. 744; Clement *v.* Western Union Tel. Co., 137 Mass. 463.

88. Carland *v.* Western Union Tel. Co., 118 Mich. 369, 76 N. W. 762, 74 Am. St. Rep. 394, 43 L. R. A. 280; Bowie *v.* Western Union Tel. Co., 78 S. C. 424, 59 S. E. 65; Western Union Tel. Co. *v.* Powell, 94 Va. 268, 26 S. E. 828.

89. Bowie *v.* Western Union Tel. Co., 78 S. E. 424, 59 S. E. 65.

90. Right of addressee to sue see *infra*, VIII, B, 2.

91. *California.*— Coit *v.* Western Union Tel. Co., 130 Cal. 657, 63 Pac. 83, 80 Am. St. Rep. 153, 53 L. R. A. 678.

Georgia.— Western Union Tel. Co. *v.* Waxelbaum, 113 Ga. 1017, 39 S. E. 443, 56 L. R. A. 741; Stamey *v.* Western Union Tel. Co., 92 Ga. 613, 18 S. E. 1008, 44 Am. St. Rep. 95; Hill *v.* Western Union Tel. Co., 85 Ga. 425, 11 S. E. 874, 21 Am. St. Rep. 166.

Kansas.— Russell *v.* Western Union Tel. Co., 57 Kan. 230, 45 Pac. 598.

Kentucky.— Western Union Tel. Co. *v.* Van Cleave, 107 Ky. 464, 54 S. W. 827, 22 Ky. L. Rep. 53, 92 Am. St. Rep. 366.

Massachusetts.— Ellis *v.* American Tel. Co., 13 Allen 226.

Mississippi.— Clement *v.* Western Union Tel. Co., 77 Miss. 747, 27 So. 603.

New York.— Halsted *v.* Postal Tel. Cable Co., 193 N. Y. 293, 85 N. E. 1078, 127 Am. St. Rep. 952, 19 L. R. A. N. S. 1021 [*affirming* 120 N. Y. App. Div. 433, 104 N. Y. Suppl. 1016].

North Carolina.— Lewis *v.* Western Union Tel. Co., 117 N. C. 436, 23 S. E. 319; Sherrill *v.* Western Union Tel. Co., 109 N. C. 527, 14 S. E. 94.

Oregon.— Frazier *v.* Western Union Tel. Co., 45 Oreg. 414, 78 Pac. 330, 67 L. R. A. 319.

South Carolina.— Broom *v.* Western Union Tel. Co., 71 S. C. 506, 51 S. E. 259; Aiken *v.* Western Union Tel. Co., 5 S. C. 358.

Tennessee.— Manier *v.* Western Union Tel. Co., 94 Tenn. 442, 29 S. W. 732.

Texas.— Lester *v.* Western Union Tel. Co., 84 Tex. 313, 19 S. W. 256; Western Union Tel. Co. *v.* Culberson, 79 Tex. 65, 15 S. W. 219; Western Union Tel. Co. *v.* Hays, (Civ. App. 1901) 63 S. W. 171; Baldwin *v.* Western Union Tel. Co., (Civ. App. 1896) 33 S. W. 890; Western Union Tel. Co. *v.* Terrell, 10 Tex. Civ. App. 60, 30 S. W. 70; Western Union Tel. Co. *v.* Sanders, (Civ. App. 1894) 26 S. W. 734; Western Union Tel. Co. *v.* Phillips, 2 Tex. Civ. App. 608, 21 S. W. 638.

United States.— Whitehill *v.* Western Union Tel. Co., 136 Fed. 499; Findlay *v.* Western Union Tel. Co., 64 Fed. 459; Beasley *v.* Western Union Tel. Co., 39 Fed. 181.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 45.

A distinction has been suggested between actions based upon a wrongful act independent of any duty assumed under the contract and actions based upon the negligent performance of a duty assumed by the contract, it being held, however, that in cases of the latter character, as in case of a negligent delay in delivery, the stipulations of the contract are binding upon the addressee. Russell *v.* Western Union Tel. Co., 57 Kan. 230, 45 Pac. 598.

92. Webbe *v.* Western Union Tel. Co., 169 Ill. 610, 48 N. E. 670, 61 Am. St. Rep. 207 [*reversing* 64 Ill. App. 331]. See also La Grange *v.* Southwestern Tel. Co., 25 La. Ann. 383, 1 Am. Electric Cas. 59.

93. Webbe *v.* Western Union Tel. Co., 169 Ill. 610, 48 N. E. 670, 61 Am. St. Rep. 207 [*reversing* 64 Ill. App. 331]; Western Union Tel. Co. *v.* Dubois, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109; Western Union Tel. Co. *v.* McKibben, 114 Ind. 511, 14 N. E. 894; Western Union Tel. Co. *v.* Fenton, 52 Ind. 1; Western Union Tel. Co. *v.* Todd, (Ind. App. 1899) 53 N. E. 194; Tobin *v.* Western Union

although in other cases it has been held that the addressee is bound whether the action is in contract or in tort.[94]

3. Third Party. Where a third party, neither the sender nor the addressee, is allowed to maintain an action on the contract for the transmission of the message on the theory that such contract was made for his benefit, he is of course bound by the conditions.[95]

VI. Duties and Liabilities in Particular Cases.

A. Libelous Messages.[96] Since a telegraph company is not obliged to receive for transmission a message which is obviously libelous,[97] and the transmission of such a message through its sending and receiving operators is a technical publication by the company,[98] a telegraph company may be held liable for the transmission of a libelous message;[99] but since the company cannot arbitrarily refuse to receive messages for transmission, and the nature of its business requires prompt action, if the message under the circumstances is reasonably susceptible of a construction which would make it either not libelous or privileged, it is the duty of the company to transmit the same and it will not be liable for so doing.[1]

B. Forged, Fraudulent, or Unauthorized Messages. It is the duty of a telegraph company to exercise reasonable care and diligence to prevent being made a means of perpetrating a fraudulent or wrongful act,[2] and for failure to

Tel. Co., 146 Pa. St. 375, 23 Atl. 324, 28 Am. St. Rep. 802; New York, etc., Printing Tel. Co. *v.* Dryburg, 35 Pa. St. 298, 78 Am. Dec. 338; Harris *v.* Western Union Tel. Co., 9 Phila. (Pa.) 88. See also Western Union Tel. Co. *v.* Longwill, 5 N. M. 308, 21 Pac. 339.

The Indiana decisions above cited rest, at least in part, on a statute of that state by which telegraph companies are made liable for special damages occasioned by their negligence. See Western Union Tel. Co. *v.* Todd, (App. 1899) 53 N. E. 194; and cases cited *supra*, this note.

94. Western Union Tel. Co. *v.* Van Cleave, 107 Ky. 464, 54 S. W. 827, 22 Ky. L. Rep. 53, 92 Am. St. Rep. 366; Broom *v.* Western Union Tel. Co., 71 S. C. 506, 51 S. E. 259. See also Halsted *v.* Postal Tel. Cable Co., 120 N. Y. App. Div. 433, 104 N. Y. Suppl. 1016 [*affirmed* in 193 N. Y. 293, 85 N. E. 1078, 127 Am. St. Rep. 952, 19 L. R. A. N. S. 1021].

In other cases where it was held generally that the addressee was bound by the stipulations of the contract, it will also be observed that the action was in tort. See cases cited *supra*, note 91.

95. Sherrill *v.* Western Union Tel. Co., 109 N. C. 527, 14 S. E. 94; Whitehill *v.* Western Union Tel. Co., 136 Fed. 499.

96. See, generally, Libel and Slander, 25 Cyc. 225.

97. See *supra*, IV, A, 4.

98. See Libel and Slander, 25 Cyc. 369.

But there is no publication by the company where the person transmitting the message is not an agent of the company, and the message is merely received by an agent of the company at the point of destination and delivered in an envelope to the addressee. Western Union Tel. Co. *v.* Cashman, 149 Fed. 367, 81 C. C. A. 5, 9 L. R. A. N. S. 140.

99. *Minnesota.*—Peterson *v.* Western Union Tel. Co., 75 Minn. 368, 77 N. W. 985, 74 Am. St. Rep. 502, 43 L. R. A. 581; Peterson *v.* Western Union Tel. Co., 72 Minn. 41, 74 N. W. 1022, 71 Am. St. Rep. 461, 40 L. R. A. 661; Peterson *v.* Western Union Tel. Co., 65 Minn. 18, 67 N. W. 646, 33 L. R. A. 302.

Wisconsin.— Monson *v.* Lathrop, 96 Wis. 386, 71 N. W. 596, 65 Am. St. Rep. 54.

United States.— See Nye *v.* Western Union Tel. Co., 104 Fed. 628.

England.—Whitfield *v.* Southeastern R. Co., E. B. & E. 115, 4 Jur. N. S. 688, 27 L. J. Q. B. 229, 6 Wkly. Rep. 545, 96 E. C. L. 115.

Canada.— Dominion Tel. Co. *v.* Silver, 10 Can. Sup. Ct. 238.

Damages.— Exemplary damages may be recovered if the publication was malicious (Peterson *v.* Western Union Tel. Co., 75 Minn. 368, 77 N. W. 985, 74 Am. St. Rep. 502, 43 L. R. A. 581; Peterson *v.* Western Union Tel. Co., 65 Minn. 18, 67 N. W. 646, 33 L. R. A. 302. See also Libel and Slander, 25 Cyc. 536); but in the absence of malice or gross negligence only compensatory damages can be recovered (Peterson *v.* Western Union Tel. Co., 72 Minn. 41, 74 N. W. 1022, 71 Am. St. Rep. 461, 40 L. R. A. 661; Western Union Tel. Co. *v.* Cashman, 132 Fed. 805, 65 C. C. A. 607); and in assessing damages where the only publication is the transmission from one operator to another, the presumption of secrecy arising from a criminal liability for divulging the contents of a telegram should be taken into consideration (Peterson *v.* Western Union Tel. Co., 75 Minn. 368, 77 N. W. 985, 74 Am. St. Rep. 502, 43 L. R. A. 581; Peterson *v.* Western Union Tel. Co., 65 Minn. 18, 67 N. W. 646, 33 L. R. A. 302).

1. Nye *v.* Western Union Tel. Co., 104 Fed. 628. See also Stockman *v.* Western Union Tel. Co., (Kan. App. 1900) 63 Pac. 658.

Duty to accept where message is **not obviously** libelous see *supra*, IV, A, 4.

2. Elwood *v.* Western Union Tel. Co., 45

do so it will be liable for damages resulting from the delivery of a forged, fraudulent, or unauthorized message;[3] but as the company is not absolutely bound to ascertain that messages offered for transmission are not of this character, it will not, in the absence of any facts or circumstances reasonably calculated to arouse suspicion, be liable merely because a message is not genuine.[4] The company may, however, be liable whether the message was one accepted from an impostor in the ordinary course of business, but under such peculiar circumstances that the company is chargeable with negligence either in accepting it or in failing to communicate the suspicious facts to the addressee,[5] or a forged message placed on the wires by a wire tapper, if such tapping of the line is contributed to by some affirmative negligence on the part of the company, or by lack of reasonable care to safeguard its lines against such interference;[6] or a message forged by one of the company's own operators, acting within the scope of his employment.[7] In such cases the company has been held liable in tort to the person whose name was forged as the apparent sender of the message,[8] or to the addressee to whom the message was delivered,[9] although not to an undisclosed principal of the addressee[10] or a mere stranger,[11] for the damages actually sustained,[12] as a proximate consequence of its wrongful act,[13] and without contributory negligence on the part of plaintiff.[14]

C. Ticker or Market Quotation Service. Telegraph companies are in some cases organized for or engage in the business of furnishing stock or market quotations or other information, usually by means of instruments known as

N. Y. 549, 6 Am. Rep. 140, Allen Tel. Cas. 594; Western Union Tel. Co. *v.* Uvalde Nat. Bank, (Tex. Civ. App. 1903) 72 S. W. 232 [*affirmed* in 97 Tex. 219, 77 S. W. 603, 65 L. R. A. 805]; Pacific Postal Tel. Cable Co. *v.* Palo Alto Bank, 109 Fed. 369, 48 C. C. A. 413, 54 L. R. A. 711.

Duty as to acceptance, where message may not be genuine see *supra*, IV, A, 2.

3. *California.*— State Bank *v.* Western Union Tel. Co., 52 Cal. 280.

Minnesota.— McCord *v.* Western Union Tel. Co., 39 Minn. 181, 39 N. W. 315, 12 Am. St. Rep. 636, 1 L. R. A. 143, 2 Am. Elec. Cas. 629.

Mississippi.— Magouirk *v.* Western Union Tel. Co., 79 Miss. 632, 31 So. 206, 89 Am. St. Rep. 663.

New York.— Elwood *v.* Western Union Tel. Co., 45 N. Y. 549, 6 Am. Rep. 140, Allen Tel. Cas. 594.

Texas.— Western Union Tel. Co. *v.* Uvalde Nat. Bank, (Civ. App. 1903) 72 S. W. 232 [*affirmed* in 97 Tex. 219, 77 S. W. 603, 65 L. R. A. 805].

United States.— Western Union Tel. Co. *v.* Schriver, 141 Fed. 538, 72 C. C. A. 596, 4 L. R. A. N. S. 678; Pacific Postal Tel. Cable Co. *v.* Palo Alto Bank, 109 Fed. 369, 48 C. C. A. 413, 54 L. R. A. 711; Strause *v.* Western Union Tel. Co., 23 Fed. Cas. No. 13,531, 8 Biss. 104.

4. Western Union Tel. Co. *v.* Meyer, 61 Ala. 158, 32 Am. St. Rep. 1, 1 Am. Elec. Cas. 282; Havelock Bank *v.* Western Union Tel. Co., 141 Fed. 522, 72 C. C. A. 580.

5. Elwood *v.* Western Union Tel. Co., 45 N. Y. 549, 6 Am. Rep. 140, Allen Tel. Cas. 594; Western Union Tel. Co. *v.* Schriver, 141 Fed. 538, 72 C. C. A. 596, 4 L. R. A. N. S. 678.

6. Western Union Tel. Co. *v.* Uvalde Nat. Bank, (Tex. Civ. App. 1903) 72 S. W. 232 [*affirmed* in 97 Tex. 219, 77 S. W. 603, 65 L. R. A. 805].

7. California Bank *v.* Western Union Tel. Co., 52 Cal. 280; McCord *v.* Western Union Tel. Co., 39 Minn. 181, 39 N. W. 315, 12 Am. St. Rep. 636, 1 L. R. A. 143, 2 Am. Electric Cas. 629; Magouirk *v.* Western Union Tel. Co., 79 Miss. 632, 31 So. 206, 89 Am. St. Rep. 663; Pacific Postal Tel. Cable Co. *v.* Palo Alto, 109 Fed. 369, 48 C. C. A. 413, 54 L. R. A. 711.

8. Magouirk *v.* Western Union Tel. Co., 79 Miss. 632, 31 So. 206, 89 Am. St. Rep. 663.

9. California Bank *v.* Western Union Tel. Co., 52 Cal. 280; McCord *v.* Western Union Tel. Co., 39 Minn. 181, 39 N. W. 315, 12 Am. St. Rep. 636, 1 L. R. A. 143; Elwood *v.* Western Union Tel. Co., 45 N. Y. 549, 6 Am. Rep. 140.

10. Western Union Tel. Co. *v.* Schriver, 141 Fed. 538, 72 C. C. A. 596, 4 L. R. A. N. S. 678.

11. McCormick *v.* Western Union Tel. Co., 79 Fed. 449, 25 C. C. A. 35, 38 L. R. A. 684, not liable to a stranger who had merely seen the telegram and acted thereon to his injury.

12. McCord *v.* Western Union Tel. Co., 39 Minn. 181, 39 N. W. 315, 12 Am. St. Rep. 636, 1 L. R. A. 143; Strause *v.* Western Union Tel. Co., 23 Fed. Cas. No. 13,531, 8 Biss. 104.

13. McCord *v.* Western Union Tel. Co., 39 Minn. 181, 39 N. W. 315, 12 Am. St. Rep. 636, 1 L. R. A. 143, 2 Am. Elec. Cas. 629; Western Union Tel. Co. *v.* Uvalde Nat. Bank, (Tex. Civ. App. 1903) 72 S. W. 232 [*affirmed* in 97 Tex. 219, 77 S. W. 603, 65 L. R. A. 805].

14. See California Bank *v.* Western Union Tel. Co., 52 Cal. 280; Western Union Tel. Co. *v.* Uvalde Nat. Bank, (Tex. Civ. App.

tickers,[15] and while ordinary telegraph companies not regularly engaged in such a business will not be required to do so for the benefit of a particular applicant,[16] yet where they do engage in such a business they are subject to the general rule previously stated,[17] that they must without partiality or discrimination furnish such service to all members of the public desiring the same, upon payment of their usual charges and compliance with their ordinary and reasonable regulations,[18] and under such circumstances they may be compelled by mandamus to furnish such service,[19] or enjoined from discontinuing the same or removing their instruments from a subscriber's office or place of business.[20] Such companies may, however, make reasonable rules and regulations for the conduct of their business,[21] such as that subscribers shall not communicate the information received to other persons,[22] and they will not be required to furnish or continue to furnish their service to persons who refuse to comply with or who violate such regulations,[23] nor are such companies required to furnish or continue to furnish such service for the use of a bucket shop or gambling house.[24] A distinction has also been made between cases where the telegraph company itself collects or purchases and distributes such information, and cases where it merely transmits reports or quotations which are the property of and furnished by a stock exchange or board of trade, under an agreement to furnish such information only to subscribers designated or approved by the board or exchange,[25] it being held that in the latter case the company cannot be required to furnish or continue to furnish such information to persons other than those designated or approved by

1903) 72 S. W. 232 [*affirmed* in 97 Tex. 219, 77 S. W. 603, 65 L. R. A. 805].

15. See Western Union Tel. Co. *v.* State, 165 Ind. 492, 76 N. E. 100, 3 L. R. A. N. S. 153; Friedman *v.* Gold, etc., Tel. Co., 32 Hun (N. Y.) 4, 1 Am. Elec. Cas. 621; Davis *v.* Electric Reporting Co., 19 Wkly. Notes Cas. (Pa.) 567, 2 Am. Elec. Cas. 375.

The information gathered and transmitted in such a business is property of the telegraph company and entitled to protection as such. Illinois Commission Co. *v.* Cleveland Tel. Co., 119 Fed. 301, 56 C. C. A. 205; National Tel. News Co. *v.* Western Union Tel. Co., 119 Fed. 294, 56 C. C. A. 198, 60 L. R. A. 805.

16. See Smith *v.* Gold, etc., Tel. Co., 42 Hun (N. Y.) 454, 2 Am. Electric Cas. 373; Bradley *v.* Western Union Tel. Co., 8 Ohio Dec. (Reprint) 707, 9 Cinc. L. Bul. 223; Sterrett *v.* Philadelphia Local Tel. Co., 18 Wkly. Notes Cas. (Pa.) 77; Metropolitan Grain, etc., Co. *v.* Chicago Bd. of Trade, 15 Fed. 847, 11 Biss. 531.

17. See *supra*, III, A.

18. Western Union Tel. Co. *v.* State, 165 Ind. 492, 76 N. E. 100, 3 L. R. A. N. S. 153; Smith *v.* Gold, etc., Tel. Co., 42 Hun (N. Y.) 454; Friedman *v.* Gold, etc., Tel. Co., 32 Hun (N. Y.) 4, 1 Am. Elec. Cas. 621; Davis *v.* Electric Reporting Co., 19 Wkly. Notes Cas. (Pa.) 567, 2 Am. Elec. Cas. 375. See also Metropolitan Grain, etc., Co. *v.* Chicago Bd. of Trade, 15 Fed. 847, 11 Biss. 531.

News service.— The rule as stated in the text applies to the furnishing of news service such as that furnished by the Associated Press. Inter-Ocean Pub. Co. *v.* Associated Press, 184 Ill. 438, 56 N. E. 822, 71 Am. St. Rep. 184, 48 L. R. A. 568.

19. Davis *v.* Electric Reporting Co., 19 Wkly. Notes Cas. (Pa.) 567, 2 Am. Elec. Cas. 375.

20. Smith *v.* Gold, etc., Tel. Co., 42 Hun (N. Y.) 454, 2 Am. Elec. Cas. 373; Friedman *v.* Gold, etc., Tel. Co., 32 Hun (N. Y.) 4.

21. Western Union Tel. Co. *v.* State, 165 Ind. 492, 76 N. E. 100, 3 L. R. A. N. S. 153.

It is a reasonable regulation that a person furnished with the special service in question shall not communicate the information to non-subscribers. Shepard *v.* Gold, etc., Tel Co., 38 Hun (N. Y.) 338, 1 Am. Elec. Cas. 584.

But it is not a reasonable regulation that the company shall be authorized to remove its instrument whenever, in its judgment, there has been any violation of the conditions of the contract by the subscriber. Smith *v.* Gold, etc., Tel. Co., 42 Hun (N. Y.) 454, 2 Am. Elec. Cas. 373.

22. Shepard *v.* Gold, etc., Tel. Co., 38 Hun (N. Y.) 338, 1 Am. Elec. Cas. 854.

23. Shepard *v.* Gold, etc., Tel. Co., 38 Hun (N. Y.) 338, 1 Am. Elec. Cas. 854.

24. Western Union Tel. Co. *v.* State, 165 Ind. 492, 76 N. E. 100, 3 L. R. A. N. S. 153; Smith *v.* Western Union Tel. Co., 84 Ky. 664, 2 S. W. 483, 8 Ky. L. Rep. 672, 2 Am. Elec. Cas. 289; Bradley *v.* Western Union Tel. Co., 8 Ohio Dec. (Reprint) 707, 9 Cinc. L. Bul. 223; Bryant *v.* Western Union Tel. Co., 17 Fed. 825. But see Sterrett *v.* Philadelphia Local Tel. Co., 18 Wkly. Notes Cas. (Pa.) 77.

25. Matter of Renville, 46 N. Y. App. Div. 37, 61 N. Y. Suppl. 549; Cain *v.* Western Union Tel. Co., 10 Ohio Dec. (Reprint) 72, 18 Cinc. L. Bul. 267. See also Davis *v.* Electric Reporting Co., 19 Wkly. Notes Cas. (Pa.) 567.

the board or exchange.[26] Where a telegraph company undertakes to furnish market reports, its obligation is to procure and furnish correct reports, and it will be liable for losses occasioned by errors or mistakes therein.[27]

D. District Telegraph or Messenger Business. A district telegraph business ordinarily consists in the furnishing of messenger boys to deliver messages, carry packages, run errands, and perform other miscellaneous services,[28] although it may also include night watchman signals, fire and burglar alarms, and police calls.[29] As the business is ordinarily conducted, messengers are summoned by means of an electric call, and are sent out without any knowledge on the part of the company as to the particular services for which thay are wanted,[30] and the charges are based upon the time for which the messengers are employed, without reference to the character of the services rendered.[31] As to the status and consequent liability of such companies there is a conflict of authority.[32] In some earlier cases it was held that they are common carriers and liable as such,[33] except, in the absence of notice or special agreement, in regard to the transmission of money.[34] But by the weight of recent authority, while such companies resemble common carriers in their public character and duty to serve all,[35] they are not, strictly speaking, common carriers or liable as insurers as in case of carriers of goods.[36] So it has been held that while in case of a special agreement to perform a particular

26. Matter of Renville, 46 N. Y. App. Div. 37, 61 N. Y. Suppl. 549; Cain *v.* Western Union Tel. Co., 10 Ohio Dec. (Reprint) 72, 18 Cinc. L. Bul. 267. But see New York, etc., Grain, etc., Exch. *v.* Chicago Bd. of Trade, 127 Ill. 153, 19 N. E. 855, 11 Am. St. Rep. 107, 2 L. R. A. 411.

Right of exchanges in regard to their market quotations see EXCHANGES, 17 Cyc. 869–871.

27. Turner *v.* Hawkeye Tel. Co., 41 Iowa 458, 20 Am. Rep. 605; New Orleans Bank *v.* Western Union Tel. Co., 27 La. Ann. 49.

Contract to furnish correct reports.— If a telegraph company contracts to furnish correct market reports, its failure to do so is a breach of its contract, irrespective of whether it exercised ordinary care in furnishing the reports or not. Western Union Tel. Co. *v.* Bradford, (Tex. Civ. App. 1908) 114 S. W. 686.

28. Toledo *v.* Western Union Tel. Co., 107 Fed. 10, 14, 46 C. C. A. 111, 52 L. R. A. 730, where the court said: "A district telegraph business, as disclosed by this record, consists in securing the attendance of messenger boys to carry telegraph messages, run miscellaneous errands, carry packages, distribute posters, invoices, invitations, etc." See also American Dist. Tel. Co. *v.* Walker, 72 Md. 454, 20 Atl. 1, 20 Am. St. Rep. 479; Haskell *v.* Boston Dist. Messenger Co., 190 Mass. 189, 76 N. E. 215, 112 Am. St. Rep. 324, 2 L. R. A. N. S. 1091.

29. Toledo *v.* Western Union Tel. Co., 107 Fed. 10, 46 C. C. A. 111, 52 L. R. A. 730.

30. Haskell *v.* Boston Dist. Messenger Co., 190 Mass. 189, 76 N. E. 215, 112 Am. St. Rep. 324, 2 L. R. A. N. S. 1091.

31. Haskell *v.* Boston Dist. Messenger Co., 190 Mass. 189, 76 N. E. 215, 112 Am. St. Rep. 324, 2 L. R. A. N. S. 1091; Hirsch *v.* American Dist. Tel. Co., 112 N. Y. App. Div. 265, 98 N. Y. Suppl. 371 [*reversing* 48 Misc. 370, 95 N. Y. Suppl. 562]; Feiber *v.* Manhattan Dist. Tel. Co., 15 Daly (N. Y.) 62, 3 N. Y. Suppl. 116, 4 N. Y. Suppl. 555, 22 Abb. N. Cas. 121 [*affirming* 21 Abb. N. Cas. 11].

32. See White *v.* Postal Tel., etc., Co., 25 App. Cas. (D. C.) 364; and cases cited *infra*, notes 33–38.

Post-Roads Act.— District telegraph companies are not within the application of the federal statute of 1866, known as the Post-Roads Act. Toledo *v.* Western Union Tel. Co., 107 Fed. 10, 46 C. C. A. 111, 52 L. R. A. 730. See also *supra*, II, A, 1, a.

33. Sanford *v.* American Dist. Tel. Co., 13 Misc. (N. Y.) 88, 34 N. Y. Suppl. 144 [*reversing* on other grounds 6 Misc. 534, 27 N. Y. Suppl. 142].

34. White *v.* Postal Tel., etc., Co., 25 App. Cas. (D. C.) 364; Gilman *v.* Postal Tel. Co., 48 Misc. (N. Y.) 372, 95 N. Y. Suppl. 564. But see Sanford *v.* American Dist. Tel. Co., 13 Misc. (N. Y.) 88, 34 N. Y. Suppl. 144.

35. White *v.* Postal Tel., etc., Co., 25 App. Cas. (D. C.) 364.

36. American Dist. Tel. Co. *v.* Walker, 72 Md. 454, 20 Atl. 1, 20 Am. St. Rep. 479; Haskell *v.* Boston Dist. Messenger Co., 190 Mass. 189, 76 N. E. 215, 112 Am. St. Rep. 324, 2 L. R. A. N. S. 1091; Hirsch *v.* American Dist. Tel. Co., 112 N. Y. App. Div. 265, 98 N. Y. Suppl. 371 [*reversing* 48 Misc. 370, 95 N. Y. Suppl. 562]. See also Feiber *v.* Manhattan Dist. Tel. Co., 15 Daly (N. Y.) 62, 3 N. Y. Suppl. 116, 4 N. Y. Suppl. 555, 22 Abb. N. Cas. 121 [*affirming* 21 Abb. N. Cas. 11].

Violation of instructions.— In one early case it was held that regardless of whether a district telegraph company is a common carrier or not, if a package is given to one of its messengers, with instructions not to deliver it except upon certain conditions, the company will be liable if it is delivered in violation of such instructions. Feiber *v.* Manhattan Dist. Tel. Co., 15 Daly (N. Y.) 62, 3 N. Y. Suppl. 116, 4 N. Y. Suppl. 555, 22 Abb. N. Cas. 121.

service the company will be liable for a failure to perform it,[37] yet where a messenger is merely summoned in the ordinary manner, the company will not be liable for his acts unless it was negligent in the selection of the messenger.[38]

E. Connecting Lines. As previously shown, a telegraph company may by express stipulation limit its liability to its own line;[39] but in the absence of such stipulation it has been held that, although telegraph companies are not common carriers or liable as such, where a message is to be transmitted over different connecting lines the respective liabilities of the different companies must be governed by the rules relating to connecting carriers,[40] as to which there is a direct conflict of authority between the so-called English and American rules.[41] So in some cases it has been held that while each company is liable for its own acts, neither is liable for the negligence or defaults of the other company;[42] and in others that, where one telegraph company receives for transmission a message for a point beyond its own line, and collects the entire charges therefor, it will be liable for the negligence or defaults of a connecting company over whose line the message must pass in reaching its destination.[43] But under either rule,[44] and irrespective of the liability of the original transmitting company,[45] the connecting company to which the message is transferred for further transmission will be liable for its own negligence or defaults,[46] although it will not be chargeable with knowledge of facts or circumstances from which special damages would

37. See Hirsch *v.* American Dist. Tel. Co., 112 N. Y. App. Div. 265, 98 N. Y. Suppl. 371 [*reversing* 48 Misc. 370, 95 N. Y. Suppl. 562], holding, however, that the evidence did not justify a finding that such a contract was made.

Procuring messenger for particular service. — Where a person applies at the office of a district telegraph company for a boy competent to drive a team of horses to a certain place, and a boy is furnished for this purpose, the company will be liable if, through his negligence or incompetency, the team is permitted to run away and is injured. American Dist. Tel. Co. *v.* Walker, 72 Md. 454, 20 Atl. 1, 20 Am. St. Rep. 479.

38. Haskell *v.* Boston Dist. Messenger Co., 190 Mass. 189, 76 N. E. 215, 112 Am. St. Rep. 324, 2 L. R. A. N. S. 1091, holding, in a case where a messenger was sent out to collect money and failed to return it, that in such case the messenger while in the general service of the company was for the time being the servant of the person employing him, and that in the absence of any negligence on the part of the company in selecting a suitable and proper person for the performance of the ordinary duties of a messenger it was not liable for his acts. See also Hirsch *v.* American Dist. Tel. Co., 112 N. Y. App. Div. 265, 98 N. Y. Suppl. 371 [*reversing* 48 Misc. 370, 95 N. Y. Suppl. 562].

39. See *supra*, V, A, 6.

40. Leonard *v.* New York, etc., Electro Magnetic Tel. Co., 41 N. Y. 544, 1 Am. Rep. 446; De Rutte *v.* New York, etc., Electric Magnetic Tel. Co., 1 Daly (N. Y.) 547, 30 How. Pr. 403; Smith *v.* Western Union Tel. Co., 84 Tex. 359, 19 S. W. 441, 31 Am. St. Rep. 59; Stevenson *v.* Montreal Tel. Co., 16 U. C. Q. B. 530.

41. See CARRIERS, 6 Cyc. 479, 480.

42. Baldwin *v.* U. S. Tel. Co., 45 N. Y. 744, 6 Am. Rep. 165 [*reversing* 54 Barb. 505, 6 Abb. Pr. N. S. 405]; Leonard *v.* New York, etc., Electro Magnetic Tel. Co., 41 N. Y. 544, 1 Am. Rep. 446; Western Union Tel. Co. *v.* Munford, 87 Tenn. 190, 10 S. W. 318, 10 Am. St. Rep. 630, 2 L. R. A. 601; Stevenson *v.* Montreal Tel. Co., 16 U. C. Q. B. 530. See also Western Union Tel. Co. *v.* Stratemeier, 6 Ind. App. 125, 32 N. E. 871.

43. De Rutte *v.* New York, etc., Electric Magnetic Tel. Co., 1 Daly (N. Y.) 547, 30 How. Pr. 403; Western Union Tel. Co. *v.* Shumate, 2 Tex. Civ. App. 429, 21 S. W. 109.

44. See Smith *v.* Western Union Tel. Co., 84 Tex. 359, 19 S. W. 441, 31 Am. St. Rep. 59.

45. Smith *v.* Western Union Tel. Co., 84 Tex. 359, 19 S. W. 441, 31 Am. St. Rep. 59, holding that the connecting company is liable for its own negligence, notwithstanding a stipulation in the original contract of transmission relieving the transmitting company from liability for defaults of connecting lines.

46. Squire *v.* Western Union Tel. Co., 98 Mass. 232, 93 Am. Dec. 157; Baldwin *v.* U. S. Telegraph Co., 45 N. Y. 744, 6 Am. Rep. 165 [*reversing* 54 Barb. 505, 6 Abb. Pr. N. S. 405]; Leonard *v.* New York, etc., Electro Magnetic Tel. Co., 41 N. Y. 544, 1 Am. Rep. 446; Smith *v.* Western Union Tel. Co., 84 Tex. 359, 19 S. W. 441, 31 Am. St. Rep. 59; Western Union Tel. Co. *v.* Lyman, 3 Tex. Civ. App. 460, 22 S. W. 656; Western Union Tel. Co. *v.* Taylor, 3 Tex. Civ. App. 310, 22 S. W. 532.

Liability to addressee.—A connecting telegraph company is liable to the addressee for its own negligence, although the original contract of transmission was between the transmitting company and the sender of the message. Western Union Tel. Co. *v.* Lyman, 3 Tex. Civ. App. 460, 22 S. W. 656.

accrue, which were not communicated to it by the first company or apparent from the message itself.[47] If the original transmitting company expressly undertakes to send a message to its destination, it will be liable for a failure to do so, although such failure was due to the default of a connecting line,[48] and one company may also be liable for the acts of another on the ground that in the particular case there was an agency or partnership relation;[49] but the existence of such a relation cannot be inferred merely from the fact that the two companies have a common terminus and are in the habit of receiving messages from each other,[50] even if it further appears that, for convenience, an arrangement exists between them whereby the initial company collects from the sender in each case the tolls for both lines, accounting afterward to the connecting company for the latter's proportion.[51] If there is more than one connecting line to which it is possible to transfer the message the sender may determine which one shall be selected, and the initial company will be liable if it transfers to the other and the other is negligent;[52] but it will be relieved from liability if it transfers to the one selected by the sender, whether the latter company is negligent or not.[53] In case there is negligence or default on both the line of the initial and the line of the connecting company, and each default contributes to the ultimate damage, both companies are liable.[54]

F. Telephone Companies.[55] Ordinarily it is not the duty of a telephone company, although conducting a long distance business, to transmit messages, but merely to furnish a means of communication and to find and notify persons for whom calls are made,[56] in which case it will not be liable for refusing to transmit a message;[57] but it will be liable for a negligent failure or delay in regard to notifying persons for whom calls are made,[58] or negligently bringing in response to such a call a different person from the one for whom the call is made.[59] If,

47. Baldwin *v.* U. S. Telegraph Co., 45 N. Y. 744, 6 Am. Rep. 165 [*reversing* 54 Barb. 505, 6 Abb. Pr. N. S. 405]. See also Sabine Valley Tel. Co. *v.* Oliver, 46 Tex. Civ. App. 428, 102 S. W. 925, applying the same rule to calls in the case of connecting long distance telephones.

48. Western Union Tel. Co. *v.* Stratemeier, 6 Ind. App. 125, 32 N. E. 871. See also Western Union Tel. Co. *v.* Carter, 24 Tex. Civ. App. 80, 58 S. W. 198.

Estoppel.—Where the sender of a message inquires if the company has an office at the place of destination and is informed that it has, and thereupon delivers the message and pays for its transmission to such point, the company is estopped in an action for non-delivery to assert that it had no office at such place and that the non-delivery was due to the negligence of a connecting line. Western Union Tel. Co. *v.* Stratemeier, 6 Ind. App. 125, 32 N. E. 871.

49. Western Union Tel. Co. *v.* Craven, (Tex. Civ. App. 1906) 95 S. W. 633. See also Sabine Val. Tel. Co. *v.* Oliver, 46 Tex. Civ. App. 428, 102 S. W. 925, telephone companies.

50. Baldwin *v.* U. S. Telegraph Co., 45 N. Y. 744, 6 Am. Rep. 165 [*reversing* 54 Barb. 505, 6 Abb. Pr. N. S. 405]; Western Union Tel. Co. *v.* Lovely, (Tex. Civ. App. 1899) 52 S. W. 563.

51. Western Union Tel. Co. *v.* Lovely, (Tex. Civ. App. 1899) 52 S. W. 563.

52. Western Union Tel. Co. *v.* Turner, 94 Tex. 304, 60 S. W. 432.

53. Western Union Tel. Co. *v.* Simms, 30 Tex. Civ. App. 32, 69 S. W. 464.

54. Weatherford, etc., R. Co. *v.* Seals, (Tex. Civ. App. 1897) 41 S. W. 841.

55. Duty to furnish services and facilities see *supra*, III.

56. Southwestern Tel., etc., Co. *v.* Gotcher, 93 Tex. 114, 53 S. W. 686; Southwestern Tel., etc., Co. *v.* Flood, (Tex. Civ. App. 1908) 111 S. W. 1064.

57. Southwestern Tel., etc., Co. *v.* Gotcher, 93 Tex. 114, 53 S. W. 686.

58. McLeod *v.* Pacific Tel. Co., 52 Oreg. 22, 94 Pac. 568, 95 Pac. 1009, 15 L. R. A. N. S. 810, 18 L. R. A. N. S. 954; Southwestern Tel., etc., Co. *v.* Owens, (Tex. Civ. App. 1909) 116 S W. 89; Southwestern Tel., etc., Co. *v.* McCoy, (Tex. Civ. App. 1908) 114 S. W. 387; Southwestern Tel., etc., Co. *v.* Flood, (Tex. Civ. App. 1908) 111 S. W. 1064; Southwestern Tel., etc., Co. *v.* Taylor, 26 Tex. Civ. App. 79, 63 S. W. 1076.

It is a question for the jury whether a telephone company has exercised due care and diligence to find and notify the person for whom a call is made. Southwestern Tel., etc., Co. *v.* McCoy, (Tex. Civ. App. 1908) 114 S. W. 387.

59. McLeod *v.* Pacific Tel. Co., 52 Oreg. 22, 94 Pac. 568, 95 Pac. 1009, 15 L. R. A. N. S. 810, 18 L. R. A. N. S. 954, holding that where a telephone company negligently summons the wrong person in response to a long distance call it will be liable for any resulting damages to the person for whom the call was in fact made.

however, a telephone company undertakes to transmit and deliver messages, its duties and liabilities in this regard are similar to those of telegraph companies.[60] Where a request is made for a particular number or telephone, the company discharges its duty by making the proper connection, and is not responsible for the identity of the person answering,[61] although it might be liable for negligently giving a wrong connection.[62]

VII. STATUTORY PENALTIES.

A. In General. In a number of jurisdictions there are statutes imposing penalties upon telegraph companies for violations of their public duties,[63] which statutes in some cases expressly include telephone companies also,[64] and such statutes are not unconstitutional,[65] except in so far as they attempt to regulate or interfere with interstate commerce.[66] The statutes vary both as to their terms and their objects, some being designed merely to prevent partiality or discrimination,[67] or applying only to wilful or intentional acts,[68] and others including

60. See Cumberland Tel., etc., Co. *v.* Atherton, 122 Ky. 154, 91 S. W. 257, 28 Ky. L. Rep. 1100.

61. See McLeod *v.* Pacific Tel. Co., 52 Oreg. 22, 94 Pac. 568, 95 Pac. 1009, 15 L. R. A. N. S. 810, 18 L. R. A. N. S. 954.

62. See McLeod *v.* Pacific Tel. Co., 52 Oreg. 22, 94 Pac. 568, 95 Pac. 1009, 15 L. R. A. N. S. 810, 18 L. R. A. N. S. 954.

63. *Arkansas.*— State *v.* Western Union Tel. Co., 76 Ark. 124, 88 S. W. 834.

California.— Thurn *v.* Alta Tel. Co., 15 Cal. 472.

Georgia.— Western Union Tel. Co. *v.* Rountree, 92 Ga. 611, 18 S. E. 979, 44 Am. St. Rep. 93.

Indiana.— Western Union Tel. Co. *v.* Braxton, 165 Ind. 165, 74 N. E. 985; Western Union Tel. Co. *v.* Ferguson, 157 Ind. 37, 60 N. E. 679.

Michigan.— Weaver *v.* Grand Rapids, etc., R. Co., 107 Mich. 300, 65 N. W. 225.

Missouri.— Connell *v.* Western Union Tel. Co., 108 Mo. 459, 18 S. W. 883; Pollard *v.* Missouri, etc., Tel. Co., 114 Mo. App. 533, 90 S. W. 121.

New York.— Gifford *v.* Glenn Tel. Co., 54 Misc. 468, 106 N. Y. Suppl. 53; Hearn *v.* Western Union Tel. Co., 36 Misc. 557, 73 N. Y. Suppl. 1077.

North Carolina.— Mayo *v.* Western Union Tel. Co., 112 N. C. 343, 16 S. E. 1006.

Virginia.— Western Union Tel. Co. *v.* Hughes, 104 Va. 240, 51 S. E. 225; Western Union Tel. Co. *v.* Powell, 94 Va. 268, 26 S. E. 828.

United States.— Stafford *v.* Western Union Tel. Co., 73 Fed. 273, California statute.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," §§ 79, 80.

In Mississippi the statute imposing a penalty for delay in the delivery of messages was omitted from the enrolled bill of the code of 1906 and was therefore repealed by section 13 thereof, which expressly repeals all laws of a general nature not brought forward and embodied in such code. Postal Tel. Cable Co. *v.* Shannon, 91 Miss. 476, 44 So. 809. See also Western Union Tel. Co. *v.* Morgan, 92 Miss. 108, 45 So. 427.

64. *Arkansas.*— Phillips *v.* Southwestern Tel., etc., Co., 72 Ark. 478, 81 S. W. 605.

Indiana.— Central Union Tel. Co. *v.* Fehring, 146 Ind. 189, 45 N. E. 64.

Mississippi.— Cumberland Tel., etc., Co. *v.* Sanders, 83 Miss. 357, 35 So. 653.

Missouri.— Pollard *v.* Missouri, etc., Tel. Co., 114 Mo. App. 533, 90 S. W. 121.

United States.— Cumberland Tel., etc., Co. *v.* Kelly, 160 Fed. 316, 87 C. C. A. 268, Tennessee statute.

The Indiana statute, in its application to telephones, applies not only to the furnishing of instruments and their connection with the exchange, but also to subsequent connections and facilities for the use of such instruments for conversing with particular persons. Central Union Tel. Co. *v.* Fehring, 146 Ind. 189, 45 N. E. 64.

65. Western Union Tel. Co. *v.* Ferguson, 157 Ind. 37, 60 N. E. 679; Central Union Tel. Co. *v.* Fehring, 146 Ind. 189, 45 N. E. 64; Marshall *v.* Western Union Tel. Co., 79 Miss. 154, 27 So. 614, 89 Am. St. Rep. 585; Western Union Tel. Co. *v.* Hughes, 104 Va. 240, 51 S. E. 225; Western Union Tel. Co. *v.* Powell, 94 Va. 268, 26 S. E. 828.

66. Western Union Tel. Co. *v.* Pendleton, 122 U. S. 347, 7 S. Ct. 1126, 30 L. ed. 1187 [*reversing* 95 Ind. 12, 48 Am. Rep. 692]. See also COMMERCE, 7 Cyc. 450–452.

67. State *v.* Western Union Tel. Co., 76 Ark. 124, 88 S. W. 834; Weaver *v.* Grand Rapids, etc., R. Co., 107 Mich. 300, 65 N. W. 225; Hearn *v.* Western Union Tel. Co., 36 Misc. (N. Y.) 557, 73 N. Y. Suppl. 1077; Wichelman *v.* Western Union Tel. Co., 30 Misc. (N. Y.) 450, 62 N. Y. Suppl. 491. See also *infra*, VII, B, 2.

68. State *v.* Western Union Tel. Co., 76 Ark. 124, 88 S. W. 834; Frauenthal *v.* Western Union Tel. Co., 50 Ark. 78, 6 S. W. 236.

In Arkansas the act of 1885, repealing a former statute applying in terms to every "neglect or refusal" to transmit or receive messages, omits the word "neglect," and it is held that the latter statute applies only to wilful or intentional acts, and not to such as are merely negligent. State *v.* Western Union Tel. Co., 76 Ark. 124, 88 S. W. 834.

within their application negligent acts or omissions.[69] It is ordinarily held that the remedy provided by such statutes is merely cumulative,[70] and that the penalty is not in the nature of liquidated damages,[71] but rather in the nature of a punishment for breach of a public duty,[72] and that a recovery of the penalty is not a bar to an action for damages.[73] It is not necessary, in order to recover the penalty, that plaintiff should have sustained any actual damages,[74] nor is his object in sending the message material, provided the message was of a character proper for transmission.[75]

B. Construction and Application of Statutes — 1. In General. As in the case of other penal statutes,[76] statutes imposing penalties upon telegraph or telephone companies must be strictly construed,[77] not only as to the liability imposed, but also as to the companies or persons liable,[78] and the person or persons entitled to enforce such liability,[79] particularly since the rights of any injured party, in cases not within the provisions of the statute, are fully guarded by the right to sue for damages; [80] but this rule does not prevent a reasonable construction of the statute as a whole,[81] so as to give effect to the evident intention of the legislature.[82] Under the rule of strict construction it has been held that statutes requiring transmission or delivery "within a reasonable time," [83] or with "due diligence," [84] are intended merely to secure promptness and do not apply to errors in transmission; and that a statute requiring the company to transmit correctly and deliver promptly imposes no penalty for delay in transmission,[85] or even for

69. Western Union Tel. Co. *v.* Braxton, 165 Ind. 165, 74 N. E. 985; Western Union Tel. Co. *v.* Ferguson, 157 Ind. 37, 60 N. E. 679; Burnett *v.* Western Union Tel. Co., 39 Mo. App. 599.

70. Western Union Tel. Co. *v.* Ferguson, 157 Ind. 37, 60 N. E. 679.

71. Western Union Tel. Co. *v.* Pendleton, 95 Ind. 12, 48 Am. Rep. 692 [*reversed* on other grounds in 122 U. S. 347, 7 S. Ct. 1126, 30 L. ed. 1187].

72. Western Union Tel. Co. *v.* Axtell, 69 Ind. 199. See also Carnahan *v.* Western Union Tel. Co., 89 Ind. 526, 46 Am. Rep. 175.

73. Wilkins *v.* Western Union Tel. Co., 68 Miss. 6, 8 So. 678.

Under the Georgia statute the penalty and damages may be recovered in the same action. See Western Union Tel. Co. *v.* Lindley, 89 Ga. 484, 15 S. E. 636.

74. Little Rock, etc., Tel. Co. *v.* Davis, 41 Ark. 79; Western Union Tel. Co. *v.* Axtell, 69 Ind. 199; Western Union Tel. Co. *v.* Buchanan, 35 Ind. 429, 9 Am. Rep. 744; Western Union Tel. Co. *v.* Allen, 66 Miss. 549, 6 So. 461.

75. Western Union Tel. Co. *v.* Lillard, 86 Ark. 208, 110 S. W. 1035, 17 L. R. A. N. S. 836.

76. See Statutes, 36 Cyc. 1183.

77. *Arkansas.*— State *v.* Western Union Tel. Co., 76 Ark. 124, 88 S. W. 834; Brooks *v.* Western Union Tel. Co., 56 Ark. 224, 19 S. W. 572; Frauenthal *v.* Western Union Tel. Co., 50 Ark. 78, 6 S. W. 236.

Georgia.— Western Union Tel. Co. *v.* Rountree, 92 Ga. 611, 18 S. E. 979, 44 Am. St. Rep. 93.

Indiana.— Western Union Tel. Co. *v.* Mossler, 95 Ind. 29; Western Union Tel. Co. *v.* Axtell, 69 Ind. 199.

Michigan.— Weaver *v.* Grand Rapids, etc., R. Co., 107 Mich. 300, 65 N. W. 225.

Mississippi.— Cumberland Tel., etc., Co. *v.* Sanders, 83 Miss. 357, 35 So. 653; Marshall *v.* Western Union Tel. Co., 79 Miss. 154, 21 So. 614, 89 Am. St. Rep. 585.

Missouri.— Connell *v.* Western Union Tel. Co., 108 Mo. 459, 18 S. W. 883; Dudley *v.* Western Union Tel. Co., 54 Mo. App. 391.

New York.— Hearn *v.* Western Union Tel. Co., 36 Misc. 557, 73 N. Y. Suppl. 1077; Wichelman *v.* Western Union Tel. Co., 30 Misc. 450, 62 N. Y. Suppl. 491.

Oklahoma.— Butner *v.* Western Union Tel. Co., 2 Okla. 234, 37 Pac. 1087.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," §§ 79, 80.

78. Western Union Tel. Co. *v.* Axtell, 69 Ind. 199.

But the term "company" will not be restricted to corporations, but will be held to include an individual or partnership which is conducting a telegraph business. Western Union Tel. Co. *v.* Ferguson, 157 Ind. 37, 60 N. E. 679.

79. Thurn *v.* Alta Tel. Co., 15 Cal. 472; Hadley *v.* Western Union Tel. Co., 115 Ind. 191, 15 N. E. 845; Thompson *v.* Western Union Tel. Co., 40 Misc. (N. Y.) 443, 82 N. Y. Suppl. 675.

80. Western Union Tel. Co. *v.* Rountree, 92 Ga. 611, 18 S. E. 979, 44 Am. St. Rep. 93.

81. Western Union Tel. Co. *v.* Braxton, 165 Ind. 165, 74 N. E. 985; Western Union Tel. Co. *v.* Ferguson, 157 Ind. 37, 60 N. E. 679; U. S. Telegraph Co. *v.* Western Union Tel. Co., 56 Barb. (N. Y.) 46.

82. Parker *v.* Western Union Tel. Co., 87 Mo. App. 553.

83. Wilkins *v.* Western Union Tel. Co., 68 Miss. 6, 8 So. 678.

84. Western Union Tel. Co. *v.* Rountree, 92 Ga. 611, 18 S. E. 979, 44 Am. St. Rep. 93. See also Wolf *v.* Western Union Tel. Co., 94 Ga. 434, 19 S. E. 717.

85. Western Union Tel. Co. *v.* Pearce, 82 Miss. 487, 34 So. 152; Western Union Tel.

an entire failure to transmit,[86] but only for incorrect transmission or delay in delivery after the transmission is complete.[87] In some cases it has been held that statutes relating in terms only to the transmission of messages do not apply to defaults in regard to their delivery;[88] but, on the contrary, it has been held that the term "transmit" necessarily includes delivery,[89] and that therefore such statutes apply to negligence or defaults in regard to delivery.[90] A statute imposing a penalty for failure to transmit upon payment or tender of the usual charges does not apply unless such charges have been prepaid or tendered,[91] and a statute requiring prompt delivery "upon the arrival" of a message at the point of destination does not apply where the message never arrived at such point,[92] nor does a provision requiring prompt delivery "where the regulations of the company require" such delivery apply where the message is addressed to a place beyond the company's delivery limits.[93] A statute requiring delivery of all messages, provided the addressees "reside" within a certain distance or within certain limits, does not apply to a failure to deliver a message to a non-resident temporarily within such limits,[94] although he has given to the company an address within such limits at which he can be found;[95] but such a proviso in regard to delivery does not protect the company for a breach of duty in regard to the transmission of the message, although the addressee may not live within such limits.[96] A statute, although expressly including telephone companies, which requires the receipt and transmission of "messages" or "despatches," relates only to such as are in writing, and does not apply to a refusal to permit a person to communicate directly with another by telephone,[97] or to a failure to transmit by telephone a message tendered orally.[98] A statute directing that messages shall be transmitted

Co. *v.* Pallotta, 81 Miss. 216, 32 So. 310; Western Union Tel. Co. *v.* Hall, 79 Miss. 623, 31 So. 202; Marshall *v.* Western Union Tel. Co., 79 Miss. 154, 27 So. 614, 89 Am. St. Rep. 585.

86. Hilley *v.* Western Union Tel. Co., 85 Miss. 67, 37 So. 556.

87. Hilley *v.* Western Union Tel. Co., 85 Miss. 67, 37 So. 556; Western Union Tel. Co. *v.* Pearce, 82 Miss. 487, 34 So. 152; Western Union Tel. Co. *v.* Pallotta, 81 Miss. 216, 32 So. 310; Western Union Tel. Co. *v.* Hall, 79 Miss. 623, 31 So. 202; Marshall *v.* Western Union Tel. Co., 79 Miss. 154, 27 So. 614, 89 Am. St. Rep. 585.

88. Brooks *v.* Western Union Tel. Co., 56 Ark. 224, 19 S. W. 572; Connell *v.* Western Union Tel. Co., 108 Mo. 459, 18 S. W. 883; Rixke *v.* Western Union Tel. Co., 96 Mo. App. 406, 70 S. W. 265; Dudley *v.* Western Union Tel. Co., 54 Mo. App. 391 [*disapproving* Brashears *v.* Western Union Tel. Co., 45 Mo. App. 433]; Butner *v.* Western Union Tel. Co., 2 Okla. 234, 37 Pac. 1087. See also Hearn *v.* Western Union Tel. Co., 36 Misc. (N. Y.) 557, 73 N. Y. Suppl. 1077.

In Arkansas the wording of the statute is not merely "transmit," but "transmit over its wires." Brooks *v.* Western Union Tel. Co., 56 Ark. 224, 19 S. W. 572.

In Virginia the distinction is carefully drawn by the statute itself, which provides a penalty for failure to transmit, and, in a separate section, a penalty for failure to deliver. See Western Union Tel. Co. *v.* Powell, 94 Va. 268, 26 S. E. 828.

89. Western Union Tel. Co. *v.* Braxtan, 165 Ind. 165, 74 N. E. 985.

90. Western Union Tel. Co. *v.* Braxtan, 165 Ind. 165, 74 N. E. 985; Western Union Tel. Co. *v.* Ferguson, 157 Ind. 37, 60 N. E. 679; Western Union Tel. Co. *v.* Gougar, 84 Ind. 176; Parker *v.* Western Union Tel. Co., 87 Mo. App. 553 [*overruled* in effect in Connell *v.* Western Union Tel. Co., 108 Mo. 459, 18 S. W. 883].

91. Western Union Tel. Co. *v.* Ryals, 94 Ga. 336, 21 S. E. 573; Langley *v.* Western Union Tel. Co., 88 Ga. 777, 15 S. E. 291 (message sent collect); Western Union Tel. Co. *v.* Mossler, 95 Ind. 29.

Waiver.—A telegraph company, by sending a message collect, does not waive the right to rely upon this provision of the statute in an action to recover a penalty. Langley *v.* Western Union Tel. Co., 88 Ga. 777, 15 S. E. 291.

92. Western Union Tel. Co. *v.* Powell, 94 Va. 268, 26 S. E. 828.

93. Western Union Tel. Co. *v.* Powell, 94 Va. 268, 26 S. E. 828.

94. Western Union Tel. Co. *v.* Murphey, 96 Ga. 768, 22 S. E. 297; Western Union Tel. Co. *v.* Timmons, 93 Ga. 345, 20 S. E. 649. See also Western Union Tel. Co. *v.* Mansfield, 93 Ga. 349, 20 S. E. 650, holding, however, that in case the addressee calls at the office and the message is not delivered to him he may recover a penalty under a different section of the statute.

95. Western Union Tel. Co. *v.* Timmons, 93 Ga. 345, 20 S. E. 649.

96. Horn *v.* Western Union Tel. Co., 88 Ga. 538, 15 S. E. 16.

97. Pollard *v.* Missouri, etc., Tel. Co., 114 Mo. App. 533, 90 S. W. 121.

98. Cumberland Tel., etc., Co. *v.* Sanders, 83 Miss. 357, 35 So. 653.

"correctly" does not require absolute literal accuracy, but only that they shall be substantially correct.[99]

2. Statutes Relating to Discrimination. Penal statutes merely directing in substance that telegraph companies shall receive and transmit messages without discrimination, and with impartiality and in good faith, and in the order received, without any express requirement that the transmission shall be correct or prompt, are ordinarily construed as intended merely to prevent partiality and discrimination between different patrons,[1] and as applying only to intentional or wilful acts,[2] not including merely negligent acts or omissions,[3] such as a negligent failure to transmit,[4] delay in transmission or delivery,[5] error in transmission,[6] or even a positive refusal to accept a message for transmission, due merely to negligence on the part of the operator in ascertaining whether the company has an office at the point of destination;[7] but in some cases it has been held that if the act or omission complained of is within the terms of the statute, it is not material whether it was intentional or merely negligent.[8]

3. No Extraterritorial Effect. Statutes imposing penalties upon telegraph companies have no extraterritorial effect,[9] and so there can be no recovery in one

99. Western Union Tel. Co. *v.* Clarke, 71 Miss. 157, 14 So. 452.

1. State *v.* Western Union Tel. Co., 76 Ark. 124, 88 S. W. 834; Weaver *v.* Grand Rapids, etc., R. Co., 107 Mich. 300, 65 N. W. 225; Petze *v.* Western Union Tel. Co., 128 N. Y. App. Div. 192, 112 N. Y. Suppl. 516; Gifford *v.* Glen Tel. Co., 54 Misc. (N. Y.) 468, 106 N. Y. Suppl. 53; Hearn *v.* Western Union Tel. Co., 36 Misc. (N. Y.) 557, 73 N. Y. Suppl. 1077; Wichelman *v.* Western Union Tel. Co., 30 Misc. (N. Y.) 450, 62 N. Y. Suppl. 491.

Use of slot telephone at pay station.— Under the New York statute which is designed to prevent partiality and discrimination, if a person, contrary to the printed instructions, deposits his money in the slot while the receiver is hung up, so that the operator cannot hear the coins register, the company is not liable for the penalty in case the operator refuses to make the connection unless another deposit is made with the receiver down. Gifford *v.* Glen Tel. Co., 54 Misc. (N. Y.) 468, 106 N. Y. Suppl. 53.

Where the company's operators are on a strike, a refusal to accept a message for transmission except subject to delay is not an act of partiality, bad faith, or discrimination, and does not subject the company to the statutory penalty. Petze *v.* Western Union Tel. Co., 128 N. Y. App. Div. 192, 112 N. Y. Suppl. 516.

2. State *v.* Western Union Tel. Co., 76 Ark. 124, 88 S. W. 834; Weaver *v.* Grand Rapids, etc., R. Co., 107 Mich. 300, 65 N. W. 225; Wichelman *v.* Western Union Tel. Co., 30 Misc. (N. Y.) 450, 62 N. Y. Suppl. 491.

3. State *v.* Western Union Tel. Co., 76 Ark. 124, 88 S. W. 834; Frauenthal *v.* Western Union Tel. Co., 50 Ark. 78, 6 S. W. 236; Weaver *v.* Grand Rapids, etc., R. Co., 107 Mich. 300, 65 N. W. 225; Hearn *v.* Western Union Tel. Co., 36 Misc. (N. Y.) 557, 73 N. Y. Suppl. 1077.

In Indiana the same construction was formerly placed upon a similar statute (Western Union Tel. Co. *v.* Jones, 116 Ind. 361, 18 N. E. 529; Hadley *v.* Western Union Tel. Co., 115 Ind. 191, 15 N. E. 845; Western Union Tel. Co. *v.* Swain, 109 Ind. 405, 9 N. E. 927; Western Union Tel. Co. *v.* Steele, 108 Ind. 163, 9 N. E. 78); but later cases construe it as applying to mere negligence if within the terms of the statute (Western Union Tel. Co. *v.* Braxton, 165 Ind. 165, 74 N. E. 985; Western Union Tel. Co, *v.* Ferguson, 157 Ind. 37, 60 N. E. 679).

4. Frauenthal *v.* Western Union Tel. Co., 50 Ark. 78, 6 S. W. 236.

5. Hearn *v.* Western Union Tel. Co., 36 Misc. (N. Y.) 557, 73 N. Y. Suppl. 1077.

6. Wichelman *v.* Western Union Tel. Co., 30 Misc. (N. Y.) 450, 62 N. Y. Suppl. 491.

7. State *v.* Western Union Tel. Co., 76 Ark. 124, 88 S. W. 834.

8. Western Union Tel. Co. *v.* Braxtan, 165 Ind. 165, 74 N. E. 985; Western Union Tel. Co. *v.* Ferguson, 157 Ind. 37, 60 N. E. 679 [*disapproving* Western Union Tel. Co. *v.* Jones, 116 Ind. 361, 18 N. E. 529; Western Union Tel. Co. *v.* Swain, 109 Ind. 405, 9 N. E. 927; Western Union Tel. Co. *v.* Steele, 108 Ind. 163, 9 N. E. 78]; Wood *v.* Western Union Tel. Co., 59 Mo. App. 236; Burnett *v.* Western Union Tel. Co., 39 Mo. App. 599.

Under the Indiana statute it is held that telegraph companies are required, under penalty, to receive and transmit messages: (1) With impartiality and in good faith; (2) in the order of time in which they are received; and (3) without discrimination in rates or conditions of service; and that even conceding that the first and third requirements can be violated only by intentional acts, the second may be by negligence as well as by design. Western Union Tel. Co. *v.* Ferguson, 157 Ind. 37, 60 N. E. 679.

9. Western Union Tel. Co. *v.* Carter, 156 Ind. 531, 60 N. E. 305; Western Union Tel. Co. *v.* Reed, 96 Ind. 195; Carnahan *v.* Western Union Tel. Co., 89 Ind. 526, 46 Am. Rep. 175; Taylor *v.* Western Union Tel. Co., 95 Iowa 740, 64 N. W. 660; Connell *v.* Western Union Tel. Co., 108 Mo. 459, 18 S. W. 883.

state of a penalty incurred under the laws of another state,[10] or for an act or omission occurring beyond the borders of the state where the action is brought and by the laws of which the penalty is provided.[11]

C. Who May Recover. The question as to what person or persons may sue to recover a statutory penalty depends upon the terms of the statute.[12] Under some of the statutes imposing penalties upon telegraph companies, the right to recover is limited to the sender of the message and does not include the addressee,[13] and some statutes have been so construed, although applying in terms to "any party aggrieved;"[14] but under other statutes the action may

10. Taylor *v.* Western Union Tel. Co., 95 Iowa 740, 64 N. W. 660, South Dakota penalty not recoverable in Iowa.

11. *Indiana.*—Western Union Tel. Co. *v.* Carter, 156 Ind. 531, 60 N. E. 305; Rogers *v.* Western Union Tel. Co., 122 Ind. 395, 24 N. E. 157, 17 Am. St. Rep. 373; Western Union Tel. Co. *v.* Reed, 96 Ind. 195; Carnahan *v.* Western Union Tel. Co., 89 Ind. 526, 47 Am. Rep. 175. But see Western Union Tel. Co. *v.* Hamilton, 50 Ind. 181.

Mississippi.— See Alexander *v.* Western Union Tel. Co., 66 Miss. 161, 5 So. 397, 14 Am. St. Rep. 556, 3 L. R. A. 71.

Missouri.— Connell *v.* Western Union Tel. Co., 108 Mo. 459, 18 S. W. 883; Rixke *v.* Western Union Tel. Co., 96 Mo. App. 406, 70 S. W. 265.

New York.— Hearn *v.* Western Union Tel. Co., 36 Misc. 557, 73 N. Y. Suppl. 1077.

Oklahoma.— Butner *v.* Western Union Tel. Co., 2 Okla. 234, 37 Pac. 1087.

United States.— Western Union Tel. Co. *v.* James, 162 U. S. 650, 16 S. Ct. 934, 40 L. ed. 1105; Western Union Tel. Co. *v.* Pendleton, 122 U. S. 347, 7 S. Ct. 1126, 30 L. ed. 1187 [*reversing* 95 Ind. 12, 48 Am. Rep. 692].

See 45 Cent. Dig. tit. "Telegraphs and Telephones," §§ 79, 80.

Application of rule.—A telegraph company is not subject to a penalty provided by the laws of one state for failing to transmit a message to that state from a point in another state (Western Union Tel. Co. *v.* Reed, 96 Ind. 195); or for failing to deliver in another state a message transmitted from a point in the state imposing the penalty (Western Union Tel. Co. *v.* Carter, 156 Ind. 531, 60 N. E. 305; Connell *v.* Western Union Tel. Co., 108 Mo. 459, 18 S. W. 883).

Interference with interstate commerce.— As the telegraph is an instrument of commerce (see COMMERCE, 7 Cyc. 450), any attempt on the part of one state to penalize a telegraph company in regard to the conduct of its business in another state, as by attempting to regulate the delivery of messages in another state, would be in conflict with the commerce clause of the federal constitution (Western Union Tel. Co. *v.* Pendleton, 122 U. S. 347, 7 S. Ct. 1126, 30 L. ed. 1187 [*reversing* 95 Ind. 12, 48 Am. Rep. 692]); but such a statute is not invalid, even in regard to interstate messages, in so far as it applies only to defaults occurring within the state imposing the penalty, provided it imposes no new burden or duty (Western Union Tel. Co. *v.* James, 162 U. S. 650, 16 S. Ct. 934, 40 L. ed. 1105. See also COMMERCE, 7 Cyc. 452 text and note 6).

12. Thompson *v.* Western Union Tel. Co., 40 Misc. (N. Y.) 443, 82 N. Y. Suppl. 675.

Statutes strictly construed see *supra*, VII, B, 1.

13. Thurn *v.* Alta Tel. Co., 15 Cal. 472 (statute reading, "the person or persons sending or desiring to send" messages); Western Union Tel. Co. *v.* Brown, 108 Ind. 538, 8 N. E. 171 (statute reading, "the person whose dispatch is neglected or postponed"); Western Union Tel. Co. *v.* Kinney, 106 Ind. 468, 7 N. E. 191; Western Union Tel. Co. *v.* Reed, 96 Ind. 195; Thompson *v.* Western Union Tel. Co., 40 Misc. (N. Y.) 443, 82 N. Y. Suppl. 675 (statute reading, "the person or persons sending or desiring to send").

One who directs a message to be forwarded to him at another address does not thereby make himself the sender of the message forwarded. Western Union Tel. Co. *v.* Kinney, 106 Ind. 468, 7 N. E. 191.

Message transferred to other line.— Under a statute imposing a penalty for the benefit of "the person or persons sending or desiring to send" messages, it has been held that where a message is filed for transmission with the A company for a point not on its line, and is transferred by it to the B company, and the B company is guilty of a breach of duty, the proper plaintiff in an action against the B company is not the original sender of the message, but the A company. Thurn *v.* Alta Tel. Co., 15 Cal. 472.

Another telegraph company which desires to forward a message to a point beyond the terminus of its own line, over the line of another company, is the party desiring to send the message and may sue the connecting company for a failure or refusal to transmit the same. The words "person or persons," as used in the statute, include corporations. U. S. Telegraph Co. *v.* Western Union Tel. Co., 56 Barb. (N. Y.) 46.

14. Western Union Tel. Co. *v.* Ferguson, 157 Ind. 37, 60 N. E. 679; Hadley *v.* Western Union Tel. Co., 115 Ind. 191, 15 N. E. 845.

The reason for this construction of the Indiana statute is that it is designed merely to prevent partiality and discrimination between different patrons of the company, and that only those giving or offering business to the company can rightly be called its patrons. Hadley *v.* Western Union Tel. Co., 115 Ind. 191, 15 N. E. 845.

be brought to recover the penalty by either the sender of the message or the addressee.[15]

D. Defenses. Ordinarily it seems that the same defenses are available in actions to recover penalties as in actions for damages.[16] In such actions it has been held that the company may interpose the defense of office hours to excuse a delay in transmission or delivery,[17] or contributory negligence on the part of plaintiff in failing to give a correct or definite address,[18] and the defense that the addressee resided without the established free delivery limits.[19] It is also ordinarily held that a failure to comply with a stipulation requiring the presentation of claims within a certain time is available as a defense in an action for a penalty, as well as in actions to recover damages,[20] although in some cases a stipulation requiring the presentation of claims for "damages," and not specifically referring to penalties, has been construed as not applying in actions to recover penalties.[21] It is no bar to an action for a penalty that the company has refunded the amount received by it for the service undertaken,[22] or has paid the expenses incurred by plaintiff by reason of its negligence or default,[23] unless it was agreed that such payment was made and accepted in full settlement of all claims against the company.[24]

E. Actions To Recover Penalties — 1. Parties. The question as to what person or persons are entitled to sue to recover the penalty depends upon the provisions of the statute;[25] but such persons may sue in their own names and need not bring the action in the name of the state;[26] and where the message was sent by two persons who are jointly interested in the cause of action stated they may join as co-plaintiffs in the same suit.[27] A company receiving a despatch for transmission and a connecting company by which it should have been delivered cannot be joined as defendants in an action for a penalty, where the action is

The fact that a different name was signed to the telegram will not prevent a recovery, if it is shown that the message was in fact written and sent by plaintiff and that he was the contracting and real party in interest. Western Union Tel. Co. *v.* Troth, 43 Ind. App. 7, 84 N. E. 727.

15. See Western Union Tel. Co. *v.* Tyler, 90 Va. 297, 18 S. E. 280, 44 Am. St. Rep. 910.

16. See Western Union Tel. Co. *v.* Yopst, (Ind. 1887) 11 N. E. 16; Western Union Tel. Co. *v.* Jones, 95 Ind. 228, 48 Am. Rep. 713; Western Union Tel. Co. *v.* Greer, 115 Tenn. 368, 89 S. W. 327, 1 L. R. A. N. S. 525; and cases cited *infra*, notes 17–20. But see Mathis *v.* Western Union Union Tel. Co., 94 Gas. 338, 21 S. E. 564, 1039, 47 Am. St. Rep. 167.

17. Western Union Tel. Co. *v.* Harding, 103 Ind. 505, 3 N. E. 172.

18. Western Union Tel. Co. *v.* Patrick, 92 Ga. 607, 18 S. E. 980, 44 Am. St. Rep. 90.

19. See Western Union Tel. Co. *v.* Lindley, 62 Ind. 371.

20. *Indiana.*—Western Union Tel. Co. *v.* Yopst, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224; Western Union Tel. Co. *v.* Jones, 95 Ind. 228, 48 Am. Rep. 713; Western Union Tel. Co. *v.* Meredith, 95 Ind. 93.

Mississippi.— Clement *v.* Western Union Tel. Co., 77 Miss. 747, 27 So. 603.

Missouri.— Kendall *v.* Western Union Tel. Co., 56 Mo. App. 192; Montgomery *v.* Western Union Tel. Co., 50 Mo. App. 591; Barrett *v.* Western Union Tel. Co., 42 Mo. App. 542.

South Dakota.— Kirby *v.* Western Union Tel. Co., 7 S. D. 623, 65 N. W. 37, 46 Am. St. Rep. 765, 30 L. R. A. 612, 621, 624.

Tennessee.— Western Union Tel. Co. *v.* Greer, 115 Tenn. 368, 89 S. W. 327, 1 L. R. A. N. S. 525.

Virginia.— Western Union Tel. Co. *v.* Powell, 94 Va. 268, 26 S. E. 828.

Contra.— Mathis *v.* Western Union Tel. Co., 94 Ga. 338, 21 S. E. 564, 1039, 47 Am. St. Rep. 167, although the stipulation expressly included penalties as well as damages.

21. Western Union Tel. Co. *v.* Cobb, 47 Ark. 344, 1 S. W. 558, 58 Am. Rep. 756; Western Union Tel. Co. *v.* James, 90 Ga. 254, 16 S. E. 83; Western Union Tel. Co. *v.* Cooledge, 86 Ga. 104, 12 S. E. 264. But see Western Union Tel. Co. *v.* Jones, 95 Ind. 228, 48 Am. Rep. 713.

22. Western Union Tel. Co. *v.* Brightwell, 94 Ga. 434, 21 S. E. 518; Western Union Tel. Co. *v.* Moss, 93 Ga. 494, 21 S. E. 63; Western Union Tel. Co. *v.* Buchanan, 35 Ind. 429, 9 Am. Rep. 744.

23. Western Union Tel. Co. *v.* Taylor, 84 Ga. 408, 11 S. E. 396, 8 L. R. A. 189.

24. See Western Union Tel. Co. *v.* Taylor, 84 Ga. 408, 11 S. E. 396, 8 L. R. A. 189; Western Union Tel. Co. *v.* Buchanan, 35 Ind. 429, 9 Am. Rep. 744.

25. See *supra*, VII, C.

26. Western Union Tel. Co. *v.* Tyler, 90 Va. 297, 18 S. E. 280, 44 Am. St. Rep. 910.

27. Western Union Tel. Co. *v.* Huff, 102 Ind. 535, 26 N. E. 85.

for an alleged default of each separately, and no joint default or joint conduct of business is alleged.[28]

2. Pleading. The complaint in an action to recover a penalty must allege all facts necessary to bring the case clearly within the application of the statute,[29] and must allege facts and not merely conclusions of law.[30] It is not necessary, however, for the complaint to follow the exact language of the statute,[31] to refer expressly to the statute,[32] to set out a copy of the telegram in question,[33] or to allege that any actual damages were sustained.[34] It is not necessary for the complaint to negative matters of affirmative defense,[35] but on the contrary such

28. Chandler' *v.* Western Union Tel. Co., 94 Ga. 422, 21 S. E. 832.

29. *Georgia.*— Greenberg *v.* Western Union Tel. Co., 89 Ga. 754, 15 S. E. 651.

Indiana.—Reese *v.* Western Union Tel. Co., 123 Ind. 294, 24 N. E. 163, 7 L. R. A. 583 (holding that the complaint must allege that the addressee lived within the statutory delivery limits); Western Union Tel. Co. *v.* Kinney, 106 Ind. 468, 7 N. E. 191; Western Union Tel. Co. *v.* Mossler, 95 Ind. 29 (holding that where the statute imposes certain duties upon the company, "on payment or tender of the usual charge," the complaint must allege that such charges were paid or tendered); Western Union Tel. Co. *v.* Axtell, 69 Ind. 199 (holding that the complaint must allege that defendant was "engaged in telegraphing for the public").

Missouri.— Pollard *v.* Missouri, etc., Tel. Co., 114 Mo. App. 533, 90 S. W. 121; Rixke *v.* Western Union Tel. Co., 96 Mo. App. 406, 70 S. W. 265 (holding that the complaint must allege that the negligence or default complained of occurred within the state, and also that where the penalty is for a failure to "transmit" a complaint alleging a failure to "transmit and deliver" is bad); Wood *v.* Western Union Tel. Co., 59 Mo. App. 236 (holding that where the statute requires telegraph companies to transmit messages "on payment or tender of their usual charges," it is not sufficient to allege that a certain sum was paid, without any allegation that such sum was the usual charge).

North Carolina.— Mayo *v.* Western Union Tel. Co., 112 N. C. 343, 16 S. E. 1006, holding that a complaint is defective which does not allege that the acts complained of were in violation of any rule or regulation prescribed by the railroad commissioners.

Virginia.— Western Union Tel. Co. *v.* Powell, 94 Va. 268, 26 S. E. 828, holding that under a statute requiring delivery "upon the arrival" of the message at the point of destination the complaint must allege that the message arrived at such point.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 81.

In an action before a justice of the peace, a complaint will be held sufficient if it informs defendant of the nature of plaintiff's cause of action, and is so explicit that a judgment thereon may be used as a bar to another suit for the same cause of action. Western Union Tel. Co. *v.* Huff, 102 Ind. 535, 26 N. E. 85.

Telegraphing for the public.— Under the Indiana statute, which applies in terms to companies "engaged in telegraphing for the public," it must be alleged that defendant company was so engaged, and it is not sufficient to allege that defendant was "engaged in the business of transmitting telegraphic messages for hire" (Western Union Tel. Co. *v.* Axtell, 69 Ind. 199); but if the complaint alleges that defendant was engaged in telegraphing for the public, it is not necessary to also allege that it was so engaged for hire (Western Union Tel. Co. *v.* Scircle, 103 Ind. 227, 2 N. E. 604).

Complaint held sufficient.— See Smith *v.* Western Union Tel. Co., 94 Ga. 441, 19 S. E. 979; Western Union Tel. Co. *v.* Adams, 87 Ind. 598, 44 Am. Rep. 776; Western Union Tel. Co. *v.* Roberts, 87 Ind. 377; Western Union Tel. Co. *v.* Griffin, 1 Ind. App. 46, 27 N. E. 113; Stafford *v.* Western Union Tel. Co., 73 Fed. 273.

The complaint may be amended by adding a necessary allegation, such as the place of residence of the addressee (Durant *v.* Western Union Tel. Co., 94 Ga. 442, 20 S. E. 1); or by changing the allegation in the complaint as to the place at which the message was delivered to defendant for transmission (Conyers *v.* Postal Tel. Cable Co., 92 Ga. 619, 19 S. E. 253, 44 Am. St. Rep. 100); or by striking out certain allegations, or by adding new allegations, provided they are consistent with the other allegations and merely amplify the same without setting up a new cause of action (Chandler *v.* Western Union Tel. Co., *supra*).

30. Phillips *v.* Southwestern Tel., etc., Co., 72 Ark. 478, 81 S. W. 605.

31. Western Union Tel. Co. *v.* Walker, 102 Ind. 599, 2 N. E. 137, holding that it is sufficient if words of equivalent meaning are used.

32. Western Union Tel. Co. *v.* Griffin, 1 Ind. App. 46, 27 N. E. 113, holding that if the complaint alleges facts bringing the case clearly within the application of the statute it is sufficient, although the statute is not expressly referred to.

33. Western Union Tel. Co. *v.* Meredith, 95 Ind. 93.

34. Little Rock, etc., Tel. Co. *v.* Davis, 41 Ark. 79; Western Union Tel. Co. *v.* Ferguson, 157 Ind. 37, 60 N. E. 679; Stafford *v.* Western Union Tel. Co., 73 Fed. 273.

35. Western Union Tel. Co. *v.* Buskirk, 107 Ind. 549, 8 N. E. 557; Western Union Tel. Co. *v.* Gougar, 84 Ind. 176; Western Union Tel. Co. *v.* Lindley, 62 Ind. 371.

matters in order to be available as a defense must be specially pleaded by defendant.[36]

3. Evidence. In an action to recover a penalty, the burden is upon plaintiff to establish his case by proof of all facts necessary to bring the case within the application of the statute,[37] and to show that he is a person entitled to recover the penalty,[38] and that the negligence or default complained of occurred within the state.[39] It has been held, however, that if plaintiff proves that there was an unreasonable delay, the burden is then upon defendant to explain the delay,[40] and that, although the statute applies only to intentional and not to negligent acts, if a breach of duty is shown the burden is upon defendant to show that it was not intentional.[41] The burden is of course upon defendant to establish any matters of affirmative defense.[42] If the message is fully identified, it is not error to admit evidence of its transmission at a date different from that alleged in the complaint.[43] The evidence must be sufficient to support all the material allegations essential to a recovery under the statute,[44] but no proof of any actual damage is necessary.[45]

4. Judgment. Where the statute provides that a certain proportion of the penalty shall go to plaintiff, and the remainder to the county school fund, the judgment should expressly provide for such division and disposition of the amount recovered.[46]

VIII. Actions Against Telegraph or Telephone Companies.[47]

A. Right of Action and Defenses — 1. In General. For a wrongful refusal to receive a message for transmission an action of tort will lie;[48] and where a message has been accepted for transmission a failure promptly and accurately to transmit and deliver the same is not only a breach of contract but a breach

Residence of addressee.— Under the Indiana statute requiring delivery where the addressee lives within one mile of the telegraph station or within the city or town where such station is located, it has been held that it need not be alleged in the complaint that the addressee lived within such limits, it being a matter of defense to be set up by defendant in case he did not live within such limits (Western Union Tel. Co. *v.* Buskirk, 107 Ind. 549, 8 N. E. 557; Western Union Tel. Co. *v.* Lindley, 62 Ind. 371); but in a later case it has been held, without any reference to the earlier cases, that the fact that the addressee lived within such limits must be alleged in the complaint (Reese *v.* Western Union Tel. Co., 123 Ind. 294, 24 N. E. 163, 7 L. R. A. 583).

36. Western Union Tel. Co. *v.* Scircle, 103 Ind. 227, 2 N. E. 604 (non-compliance with stipulation requiring claims to be presented within a certain time); Western Union Tel. Co. *v.* Troth, 43 Ind. App. 7, 84 N. E. 727.

37. Hearn *v.* Western Union Tel. Co., 36 Misc. (N. Y.) 557, 73 N. Y. Suppl. 1077, holding **that in an action** against a telegraph company for a penalty for failure to deliver a message, the defense that plaintiff had made no written demand within sixty days is an affirmative one, which must be pleaded by defendant on whom the burden of proving that issue rests.

38. Western Union Tel. Co. *v.* Brown, 108 Ind. 538, 8 N. E. 171.

39. Hearn *v.* Western Union Tel. Co., 36 Misc. (N. Y.) 557, 73 N. Y. Suppl. 1077. But see Western Union Tel. Co. *v.* Howell, 95 Ga. 194, 22 S. E. 286, 51 Am. St. Rep. 68, 30 L. R. A. 158.

40. Western Union Tel. Co. *v.* Scircle, 103 Ind. 227, 2 N. E. 604.

41. Little Rock, etc., Tel. Co. *v.* Davis, 41 Ark. 79, holding that when it is proved that the agent of a telegraph company received a message and failed to deliver it, and there is no proof to account for or excuse the negligence, it may be assumed to have been intentional on the part of the agent, or a gross disregard of duty.

42. Western Union Tel. Co. *v.* Troth, 43 Ind. App. 7, 84 N. E. 727 (failure to present claim within the time stipulated in the contract); Kendall *v.* Western Union Tel. Co., 56 Mo. App. 192 (failure to present claim within time stipulated in the contract).

43. Western Union Tel. Co. *v.* Kilpatrick, 97 Ind. 42.

44. Western Union Tel. Co. *v.* Trissal, 98 Ind. 566.

Evidence held sufficient to sustain verdict for penalty see Western Union Tel. Co. *v.* Lindley, 89 Ga. 484, 15 S. E. 636.

45. Little Rock, etc., Tel. Co. *v.* Davis, 41 Ark. 79; Western Union Tel. Co. *v.* Buchanan, 35 Ind. 429, 9 Am. Rep. 744.

46. Smith *v.* Western Union Tel. Co., 57 Mo. App. 259; Kendall *v.* Western Union Tel. Co., 56 Mo. App. 192.

47. **Actions for injuries from construction or maintenance** see *supra*, II, D, 2.

Actions for statutory penalties see *supra*, VII, E.

48. Cordell *v.* Western Union Tel. Co., 149 N. C. 402, 63 S. E. 71, 22 L. R. A. N. S. 540.

of a public duty,[49] constituting an actionable tort,[50] so that ordinarily the action for a breach of such duty may be brought either in contract or in tort.[51] In some cases and in some respects it is immaterial in which form the action is brought;[52] but in others the form of action is material,[53] as in regard to the right to recover exemplary damages,[54] or in determining what law governs,[55] or as affecting the jurisdiction of a justice of the peace.[56] It has also been held that as there is no contractual relation between the telegraph company and the addressee of a message, the latter's right of action is necessarily in tort,[57] unless the sender of the message acted as his agent.[58] While any breach of the contract of transmission or public duty undertaken will give rise to a right of action for at least nominal damages,[59] no cause of action arises except in favor of one to whom the company owed a duty in regard to the act or omission complained of.[60]

2. Conditions Precedent. Plaintiff in order to maintain his action must comply with any necessary conditions precedent,[61] such as a statutory requirement that claims for damages shall be presented within a certain time,[62] or a stipulation to this effect in the contract of transmission where such a stipulation is regarded as a condition precedent;[63] but a party who has been damaged by a delay in transmitting a message directing the levy of an attachment is not bound before bringing his action against the telegraph company to test by suit the validity

49. Gray *v.* Western Union Tel. Co., 87 Ga. 350, 13 S. E. 562, 27 Am. St. Rep. 259, 14 L. R. A. 95; Reese *v.* Western Union Tel. Co., 123 Ind. 294, 24 N. E. 163, 7 L. R. A. 583; Cordell *v.* Western Union Tel. Co., 149 N. C. 402, 63 S. E. 71, 22 L. R. A. N. S. 540; Woods *v.* Western Union Tel. Co., 148 N. C. 1, 61 S. E. 653, 128 Am. St. Rep. 581; Green *v.* Western Union Tel. Co., 136 N. C. 489, 49 S. E. 165, 103 Am. St. Rep. 955, 67 L. R. A. 985; Cogdell *v.* Western Union Tel. Co., 135 N. C. 431, 47 S. E. 490.

50. Cordell *v.* Western Union Tel. Co., 149 N. C. 402, 63 S. E. 71, 22 L. R. A. N. S. 540.

51. See Western Union Tel. Co. *v.* Hill, (Ala. 1909) 50 So. 248.

The sender of a message may sue either in contract or in tort but ordinarily the addressee's right of action is in tort. Shingleur *v.* Western Union Tel. Co., 72 Miss. 1030, 18 So. 425, 48 Am. St. Rep. 604, 30 L. R. A. 444.

52. Western Union Tel. Co. *v.* Woodard, 84 Ark. 323, 105 S. W. 579; Western Union Tel. Co. *v.* Hogue, 79 Ark. 33, 94 S. W. 924 (immaterial as affecting application of rule that only such damages can be recovered as may be said to have been within the contemplation of the parties); Champion Chemical Works *v.* Postal Tel.-Cable Co., 123 Ill. App. 20 (immaterial as affecting application of rule that only such damages can be recovered as are the proximate result of the negligence or default complained of).

53. Western Union Tel. Co. *v.* Rowell, 153 Ala. 295, 45 So. 73; Western Union Tel. Co. *v.* Dubois, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109.

An action for the breach of a statutory duty in regard to the transmission or delivery of a message is in effect an action for negligence. Western Union Tel. Co. *v.* Potts, 120 Tenn. 37, 113 S. W. 789, 127 Am. St. Rep. 991, 19 L. R. A. N. S. 479.

54. Western Union Tel. Co. *v.* Rowell, 153 Ala. 295, 45 So. 73.

Exemplary damages see *infra*, IX, C.

55. Western Union Tel. Co. *v.* Hill, (Ala. 1909) 50 So. 248; Balderston *v.* Western Union Tel. Co., 79 S. C. 160, 60 S. E. 435.

What law governs see *infra*, VIII, A, 4.

56. Western Union Tel. Co. *v.* Dubois, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109.

57. Western Union Tel. Co. *v.* Adams, 154 Ala. 657, 46 So. 228; Western Union Tel. Co. *v.* Cooper, 2 Ga. App. 376, 58 S. E. 517; Western Union Tel. Co. *v.* Dubois, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109. See also *infra*, VIII, B, 2.

58. See Western Union Tel. Co. *v.* Adams, 154 Ala. 657, 46 So. 228, holding that in an action for delay in delivery where the sender of the message sent it for his own benefit and not as the agent of the addressee, the latter cannot maintain an action on the contract but must sue in tort.

59. See *infra*, IX, A.

60. Western Union Tel. Co. *v.* Weniski, 84 Ark. 457, 106 S. W. 486; Poteet *v.* Western Union Tel. Co., 74 S. C. 491, 55 S. E. 113; Western Union Tel. Co. *v.* Schriver, 141 Fed. 538, 72 C. C. A. 596, 4 L. R. A. N. S. 678; McCormick *v.* Western Union Tel. Co., 79 Fed. 449, 25 C. C. A. 35, 38 L. R. A. 684.

A telegraph company owes a duty in the transmission and delivery of messages only to persons of whose beneficial interest in the message the company receives information from the face of the message itself or from other sources. Western Union Tel. Co. *v.* Weniski, 84 Ark. 457, 106 S. W. 486.

Persons entitled to sue see *infra*, VIII, B.

61. Heald *v.* Western Union Tel. Co., 129 Iowa 326, 105 N. W. 588.

62. Heald *v.* Western Union Tel. Co., 129 Iowa 326, 105 N. W. 588.

63. Albers *v.* Western Union Tel. Co., 98 Iowa 51, 66 N. W. 1040.

Stipulations in contract of transmission requiring claims to be presented within a certain time are ordinarily, although not uniformly, regarded as being conditions subse-

of the prior attachments obtained by other creditors,[64] nor where by reason of an error in transmission a contract has been entered into through an agent upon terms different from those intended by plaintiff is he required to bring an action against the other party to rescind the contract.[65]

3. Limitation of Actions.[66] Actions against telegraph companies for breaches of duty in regard to the transmission and delivery of messages are regarded as arising *ex contractu* and are governed by the statutes of limitation applicable to actions upon contracts.[67]

4. What Law Governs — a. In General. In actions against telegraph companies based upon negligence or defaults in regard to messages filed in one state to be transmitted to and delivered at a point in another state, it frequently becomes important to determine what law governs,[68] as in regard to the application of statutes imposing penalties,[69] or increasing the common-law liabilities of such companies,[70] or in regard to the validity and application of stipulations in the contract of transmission limiting the liability of the company,[71] or in regard to the right of plaintiff to recover damages for mental anguish.[72] In the case of statutory penalties it seems to be well settled that such statutes have no extra-territorial effect and that a penalty incurred under the laws of one state will not be enforced by the courts of another.[73] In regard to the other cases mentioned there is a direct conflict of authority,[74] some of the cases applying the law of the state where the contract of transmission was entered into,[75] and others the law of the state where the contract was to be performed,[76] while others make a further distinction according to whether the action is based upon the contract or is in

quent and not conditions precedent. See *supra*, V, A, 4, c.

64. Pacific Postal Tel. Cable Co. *v.* Fleischner, 66 Fed. 899, 14 C. C. A. 166.

65. Hasbrouck *v.* Western Union Tel. Co., 107 Iowa 160, 77 N. W. 1034, 70 Am. St. Rep. 181; Reed *v.* Western Union Tel. Co., 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492.

66. See, generally, Limitations of Actions, 25 Cyc. 963.

67. Western Union Tel. Co. *v.* Witt, 110 S. W. 889, 33 Ky. L. Rep. 685 (holding that an action for delay in delivering a telegram is an action upon contract to which the Kentucky statute, providing a limitation of five years, applies, and that, although damages for mental anguish are claimed, the action is not one "for an injury to the person" which must be commenced within one year); La Grange *v.* Southwestern Tel. Co., 25 La. Ann. 383 (holding that, in an action for damages due to an error made in the transmission of a telegram to plaintiff, the cause of action arises *ex contractu*, and the limitation of one year does not apply).

68. Western Union Tel. Co. *v.* Hill, (Ala. 1909) 50 So. 248; Shaw *v.* Postal Tel., etc., Co., 79 Miss. 670, 31 So. 222, 89 Am. St. Rep. 666, 56 L. R. A. 486; Gray *v.* Western Union Tel. Co., 108 Tenn. 39, 64 S. W. 1063, 91 Am. St. Rep. 706, 56 L. R. A. 301.

69. See *supra*, VII.

70. Reed *v.* Western Union Tel. Co., 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492, statutory liability "for all damages resulting" from a failure to perform any of the duties required by law.

71. Shaw *v.* Postal Tel., etc., Co., 79 Miss. 670, 31 So. 222, 89 Am. St. Rep. 666, 56 L. R. A. 486. See also *infra*, VIII, A, 4, c.

72. Western Union Tel. Co. *v.* Hill, (Ala. 1909) 50 So. 248; Johnson *v.* Western Union Tel. Co., 144 N. C. 410, 57 S. E. 122, 10 L. R. A. N. S. 256; Gray *v.* Western Union Tel. Co., 108 Tenn. 39, 64 S. W. 1063, 91 Am. St. Rep. 706, 56 L. R. A. 301; Western Union Tel. Co. *v.* Sloss, 45 Tex. Civ. App. 153, 100 S. W. 354 [*disapproving* Western Union Tel. Co. *v.* Blake, 29 Tex. Civ. App. 224, 68 S. W. 526]. See also *infra*, VIII, A, 4, b.

73. See *supra*, VII, B, 3.

74. Western Union Tel. Co. *v.* Hill, (Ala. 1909) 50 So. 248; Johnson *v.* Western Union Tel. Co., 144 N. C. 410, 57 S. E. 122, 10 L. R. A. N. S. 256. See also cases cited *infra*, notes 75–79; and, generally, *infra*, VIII, A, 4, b, c.

75. *Mississippi.*— Shaw *v.* Postal Tel., etc., Co., 79 Miss. 670, 31 So. 222, 89 Am. St. Rep. 666, 56 L. R. A. 486.

Missouri.— Reed *v.* Western Union Tel. Co., 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492.

North Carolina.— Johnson *v.* Western Union Tel. Co., 144 N. C. 410, 57 S. E. 122, 10 L. R. A. N. S. 256; Hall *v.* Western Union Tel. Co., 139 N. C. 369, 52 S. E. 50.

Oklahoma.— Western Union Tel. Co. *v.* Pratt, 18 Okla. 274, 89 Pac. 237.

Texas.— Western Union Tel. Co. *v.* Waller, 96 Tex. 589, 74 S. W. 751, 97 Am. St. Rep. 936 [*reversing* (Civ. App. 1903) 72 S. W. 264]; Ligon *v.* Western Union Tel. Co., 46 Tex. Civ. App. 408, 102 S. W. 429.

76. Western Union Tel. Co. *v.* Hill, (Ala. 1909) 50 So. 248; North Packing, etc., Co. *v.* Western Union Tel. Co., 70 Ill. App. 275; Western Union Tel. Co. *v.* Lacer, 122 Ky. 839, 93 S. W. 34, 29 Ky. L. Rep. 379, 121 Am. St. Rep. 502, 5 L. R. A. N. S. 751;

tort for the breach of a public duty,[77] or to enforce a liability other than a penalty imposed by statute,[78] holding that in such cases the law of the state where the particular breach of duty occurred controls.[79] It will be presumed, however, in the absence of evidence to the contrary, whether the action is in contract or in tort, that the law of the state where the contract was made or to be performed or the breach of duty occurred is the same as that of the state where the action is brought.[80]

b. Right to Recover For Mental Anguish. As affecting the right of plaintiff to recover damages for mental anguish it is held in some cases that the law of the state where the contract of transmission was entered into governs,[81] regardless of where the breach of duty occurred,[82] or where the action is brought.[83] Under this rule damages for mental anguish may be recovered if allowable in the jurisdiction where the contract was made, although the message was addressed to a point in another state where such damages are not recoverable,[84] and the breach consists in a negligent failure or delay in delivering the message in the latter state;[85] and conversely such damages cannot be recovered if not allowable where the contract was made, although the message was addressed to a point in a state where such damages are recoverable,[86] and the breach occurred in the latter

Howard *v.* Western Union Tel. Co., 119 Ky. 625, 84 S. W. 764, 86 S. W. 982, 27 Ky. L. Rep. 244, 858.

77. Western Union Tel. Co. *v.* Hill, (Ala. 1909) 50 So. 248; Balderston *v.* Western Union Tel. Co., 79 S. C. 160, 60 S. E. 435.

78. Western Union Tel. Co. *v.* Ford, 77 Ark. 531, 92 S. W. 528 (statutory liability for mental anguish); Gray *v.* Western Union Tel. Co., 108 Tenn. 39, 64 S. W. 1063, 91 Am. St. Rep. 706, 56 L. R. A. 301.

79. Western Union Tel. Co. *v.* Hill, (Ala. 1909) 50 So. 248; Balderston *v.* Western Union Tel. Co., 79 S. C. 160, 60 S. E. 435; Gray *v.* Western Union Tel. Co., 108 Tenn. 39, 64 S. W. 1063, 91 Am. St. Rep. 706, 56 L. R. A. 301. See also *infra*, VIII, A, 4, b.

80. Burgess *v.* Western Union Tel. Co., 92 Tex. 125, 46 S. W. 794, 71 Am. St. Rep. 833 [*reversing* (Civ. App. 1897) 43 S. W. 1033]; Western Union Tel. Co. *v.* Parsley, (Tex. Civ. App. 1909) 121 S. W. 226; Western Union Tel. Co. *v.* McNairy, 34 Tex. Civ. App. 389, 78 S. W. 969.

81. Western Union Tel. Co. *v.* Woodard, 84 Ark. 323, 105 S. W. 579; Johnson *v.* Western Union Tel. Co., 144 N. C. 410, 57 S. E. 122, 10 L. R. A. N. S. 256; Hall *v.* Western Union Tel. Co., 139 N. C. 369, 52 S. E. 50; Bryan *v.* Western Union Tel. Co., 133 N. C. 603, 45 S. E. 938; Western Union Tel. Co. *v.* Waller, 96 Tex. 589, 74 S. W. 751, 97 Am. St. Rep. 936 [*reversing* (Civ. App. 1903) 72 S. W. 2064]; Western Union Tel. Co. *v.* Parsley, (Tex. Civ. App. 1909) 121 S. W. 226; Ligon *v.* Western Union Tel. Co., 46 Tex. Civ. App. 408, 102 S. W. 429; Western Union Tel. Co. *v.* Sloss, 45 Tex. Civ. App. 153, 100 S. W. 354 [*disapproving* Western Union Tel. Co. *v.* Blake, 29 Tex. Civ. App. 224, 68 S. W. 526]; Western Union Tel. Co. *v.* Cooper, 29 Tex. Civ. App. 591, 69 S. W. 427.

82. Johnson *v.* Western Union Tel. Co., 144 N. C. 410, 57 S. E. 122, 10 L. R. A. N. S. 256; Western Union Tel. Co. *v.* Cooper, 29 Tex. Civ. App. 591, 69 S. W. 427, holding that where the message was sent from a point in Texas, there might be a recovery for mental anguish as authorized by the law of that state, although the negligence complained of occurred at a relay station in Indian Territory where such damages were not recoverable.

83. Johnson *v.* Western Union Tel. Co., 144 N. C. 410, 57 S. E. 122, 10 L. R. A. N. S. 256.

Jurisdiction of the parties in a state where damages for mental anguish are recoverable does not warrant a recovery of such damages in that state where the contract of transmission was made and to be performed in states where such damages are not recoverable. Thomas *v.* Western Union Tel. Co., 25 Tex. Civ. App. 398, 61 S. W. 501.

84. Western Union Tel. Co. *v.* Woodard, 84 Ark. 323, 105 S. W. 579; Bryan *v.* Western Union Tel. Co., 133 N. C. 603, 45 S. E. 938; Western Union Tel. Co. *v.* Waller, 96 Tex. 589, 74 S. W. 751, 97 Am. St. Rep. 936 [*reversing* (Civ. App. 1903) 72 S. W. 264]; Western Union Tel. Co. *v.* Parsley, (Tex. Civ. App. 1909) 121 S. W. 226; Western Union Tel. Co. *v.* Anderson, 34 Tex. Civ. App. 14, 78 S. W. 34.

85. Bryan *v.* Western Union Tel. Co., 133 N. C. 603, 45 S. E. 938; Western Union Tel. Co. *v.* Parsley, (Tex. Civ. App. 1909) 121 S. W. 226; Western Union Tel. Co. *v.* Anderson, 34 Tex. Civ. App. 14, 78 S. W. 34.

86. Johnson *v.* Western Union Tel. Co., 144 N. C. 410, 57 S. E. 122, 10 L. R. A. N. S. 256; Hancock *v.* Western Union Tel. Co., 137 N. C. 497, 49 S. E. 952, 107 Am. St. Rep. 474, 69 L. R. A. 403, 142 N. C. 163, 55 S. E. 82; Western Union Tel. Co. *v.* Garrett, 46 Tex. Civ. App. 430, 102 S. W. 456; Ligon *v.* Western Union Tel. Co., 46 Tex. Civ. App. 408, 102 S. W. 429; Western Union Tel. Co. *v.* Sloss, 45 Tex. Civ. App. 153, 100 S. W. 354 [*disapproving* Western Union Tel. Co. *v.* Blake, 29 Tex. Civ. App. 224, 68 S. W. 526]; Western Union Tel. Co. *v.* Buchanan, 35 Tex. Civ. App. 437, 80 S. W. 561; Western Union

state.[87] It will be presumed, however, in the absence of evidence to the contrary, that the law of the state where the contract was made is the same as that where the action is brought.[88] In other cases it is held that the law of the state where the contract is to be performed governs,[89] some of the cases seeming to regard the performance as being entirely in the state where the message is to be delivered,[90] and others recognizing a part performance in each state and making the right of recovery dependent upon the jurisdiction in which the breach complained of occurred.[91] If damages for mental anguish are recoverable both where the contract was made and where it was to be performed, it is of course immaterial as to which law should be considered as governing,[92] and in such cases damages for mental anguish may be recovered,[93] although the action is brought in a third jurisdiction where the mental anguish doctrine is not recognized at common law but has been introduced by statute.[94] In a third class of cases a distinction is recognized between cases where the action is based upon the contract and cases where it is in tort for a breach of public duty or to enforce a liability imposed by statute,[95] it being held that in such cases the law of the place where the particular breach of duty was committed governs;[96] and while in some of the cases the form of action is not expressly referred to,[97] it has been frequently held that if damages for mental anguish are recoverable where the breach of duty occurs, such a recovery may be had, although the message is sent from or addressed to a point in a state where such damages are not recoverable;[98] and in the case

Tel. Co. *v.* Christensen, (Tex. Civ. App. 1904) 78 S. W. 744.

87. Johnson *v.* Western Union Tel. Co., 144 N. C. 410, 57 S. E. 122, 10 L. R. A. N. S. 256; Western Union Tel. Co. *v.* Buchanan, 35 Tex. Civ. App. 437, 80 S. W. 561; Western Union Tel. Co. *v.* Christensen, (Tex. Civ. App. 1904) 78 S. W. 744.

88. Woods *v.* Western Union Tel. Co., 148 N. C. 1, 61 S. E. 653, 128 Am. St. Rep. 581; Western Union Tel. Co. *v.* Parsley, (Tex. Civ. App. 1909) 121 S. W. 226; Western Union Tel. Co. *v.* McNairy, 34 Tex. Civ. App. 389, 78 S. W. 969.

89. Western Union Tel. Co. *v.* Hill, (Ala. 1909) 50 So. 248; Western Union Tel. Co. *v.* Lacer, 122 Ky. 839, 93 S. W. 34, 29 Ky. L. Rep. 379, 121 Am. St. Rep. 502, 5 L. R. A. N. S. 751; Howard *v.* Western Union Tel. Co., 119 Ky. 625, 84 S. W. 764, 86 S. W. 982, 27 Ky. L. Rep. 244. 858.

90. Western Union Tel. Co. *v.* Lacer, 122 Ky. 839, 93 S. W. 34, 29 Ky. L. Rep. 379, 121 Am. St. Rep. 502, 5 L. R. A. N. S. 751, holding that in the case of a message sent from Indiana to a point in Kentucky, the contract was to be performed in Kentucky, and that in case of non-delivery there might be a recovery of damages for mental anguish as allowable in that state, although the non-delivery was due to an error in transmission by which the name of the addressee was changed and this error occurred in Indiana, where the mental anguish doctrine is not recognized.

91. Western Union Tel. Co. *v.* Hill, (Ala. 1909) 50 So. 248 (holding that where a message is sent from Georgia to Alabama, and the breach of contract is a failure to deliver the message to the addressee in Alabama, there may be a recovery of damages for mental anguish as allowable in that state, although such damages are not recoverable in Georgia); Howard *v.* Western Union Tel. Co., 119 Ky. 625, 84 S. W. 764, 86 S. W. 982, 27 Ky. L. Rep. 244, 858 (holding that where a message is sent from West Virginia to Kentucky, the contract is to be partly performed in each state, and that if the breach of contract consists in a failure to deliver the message in Kentucky there may be a recovery for mental anguish, although the doctrine is not recognized in West Virginia).

92. Western Union Tel. Co. *v.* Woodard, 84 Ark. 323, 105 S. W. 579.

93. Western Union Tel. Co. *v.* Hanley, 85 Ark. 263, 107 S. W. 1168; Western Union Tel. Co. *v.* Woodard, 84 Ark. 323, 105 S. W. 579.

94. Western Union Tel. Co. *v.* Hanley, 85 Ark. 263, 107 S. W. 1168.

95. Western Union Tel. Co. *v.* Hill, (Ala. 1909) 50 So. 248 (tort); Western Union Tel. Co. *v.* Ford, 77 Ark. 531, 92 S. W. 528 (statutory liability for mental anguish); Balderston *v.* Western Union Tel. Co., 79 S. C. 160, 60 S. E. 435 (tort); Gray *v.* Western Union Tel. Co., 108 Tenn. 39, 64 S. W. 1063, 91 Am. St. Rep. 706, 56 L. R. A. 301 (statutory liability).

96. Western Union Tel. Co. *v.* Ford, 77 Ark. 531, 92 S. W. 528; Balderston *v.* Western Union Tel. Co., 79 S. C. 160, 60 S. E. 435; Gray *v.* Western Union Tel. Co., 108 Tenn. 39, 64 S. W. 1063, 91 Am. St. Rep. 706, 56 L. R. A. 301.

97. See the cases cited *infra*, note 98.

98. Gentle *v.* Western Union Tel. Co., 82 Ark. 96, 100 S. W. 742 (holding that the addressee may recover damages for mental anguish for a negligent failure to deliver a message to him in Arkansas, although it was sent from Missouri where such damages are not recoverable); Arkansas, etc., R. Co. *v.* Lee, 79 Ark 448, 96 S. W. 148 (holding

of the non-delivery of a message it has been held that the breach of duty occurs where the message should have been delivered, although the non-delivery was due to negligence at a relay station in a different state.[99] If the breach of contract and the breach of duty both occur in the same state it is of course immaterial whether the action is in contract or in tort;[1] and in the absence of evidence to the contrary, it will be presumed, where the action is in tort, that the law of the state where the breach of duty occurred, is the same as that where the action is brought.[2]

c. Stipulations Limiting Liability. The validity of stipulations in the contract of transmission limiting the liability of the company has been held in some cases to be governed by the law of the state where the contract of transmission was entered into;[3] and in others by the law of the state where the contract was to

that damages for mental anguish as allowed by the law of Arkansas may be recovered where the message was sent from Arkansas to a point in Louisiana, where the breach of duty consisted in a negligent delay in transmitting the message from the office in Arkansas); Western Union Tel. Co. *v.* Ford, 77 Ark. 531, 92 S. W. 528 (holding that the statutory liability for mental anguish in Arkansas may be enforced where the message was sent from Missouri but the breach of duty consisted in a negligent failure to deliver it in Arkansas); Fail *v.* Western Union Tel. Co., 80 S. C. 207, 60 S. E. 697, 61 S. E. 258 (holding that there may be a recovery for mental anguish as authorized in South Carolina, where the message was filed for transmission in South Carolina addressed to a point in Georgia and the negligence consisted in the delay in transmitting the message from the South Carolina office, although such damages are not recoverable under the law of Georgia); Balderston *v.* Western Union Tel. Co., 79 S. C. 160, 60 S. E. 435 (holding that the addressee may recover in tort for mental anguish as authorized by the law of South Carolina for the non-delivery of a message sent to him from Pennsylvania, where such damages are not recoverable); Walker *v.* Western Union Tel. Co., 75 S. C. 512, 56 S. E. 38 (holding that where a message filed in South Carolina to be delivered in Louisiana is negligently altered in transmission, and the error is made at the South Carolina office, the tort is committed in that state and damages for mental anguish may be recovered regardless of the right to recover such damages in Louisiana); Hughes *v.* Western Union Tel. Co., 72 S. C. 516, 52 S. E. 107 (holding that where a message is sent from Florida to South Carolina, and the breach of duty is a delay in delivering it to the addressee in South Carolina, he may recover for mental anguish, although such damages are not recoverable in Florida); Harrison *v.* Western Union Tel. Co., 71 S. C. 386, 51 S. E. 119 (holding that there may be a recovery for mental anguish in South Carolina for the non-delivery of a telegram sent from Virginia); Gray *v.* Western Union Tel. Co., 108 Tenn. 39, 64 S. W. 1063, 91 Am. St. Rep. 706, 56 L. R. A. 301 (holding that under the statutory liability in Tennessee there may be a recovery for mental anguish for failure to deliver a message in Tennessee, although it was sent from Mississippi where such damages are not recoverable).

99. Balderston *v.* Western Union Tel. Co., 79 S. C. 160, 60 S. E. 435, holding that there may be a recovery for mental anguish as authorized by the law of South Carolina for the non-delivery of a message in that state, although the message was sent from Pennsylvania and the negligence causing the non-delivery was at a relay office in Georgia.

1. Western Union Tel. Co. *v.* Woodard, 84 Ark. 323, 105 S. W. 579 (holding that there may be a recovery for mental anguish where the making of the contract and the breach of duty both occurred in Tennessee, although the message was addressed to a point in another state and the action was brought in the latter state); Thomas *v.* Western Union Tel. Co., 25 Tex. Civ. App. 398, 61 S. W. 501 (holding that where the message was sent from a point in Arkansas to another point in the same state where damages for mental anguish were not recoverable, plaintiff could not either in contract or tort, by getting jurisdiction of the person of defendant in the state of Texas, recover damages for mental anguish as allowable by the law of that state). See also Fail *v.* Western Union Tel. Co., 80 S. C. 207, 60 S. E. 697, 61 S. E. 258.

2. Western Union Tel. Co. *v.* Parsley, (Tex. Civ. App. 1909) 121 S. W. 226.

3. Shaw *v.* Postal Tel., etc., Co., 79 Miss. 670, 31 So. 222, 89 Am. St. Rep. 666, 56 L. R. A. 486, holding that the validity of a stipulation limiting the liability of the company for errors in the transmission of cipher or obscure messages is governed by the law of the state where the contract was made, regardless of the form in which the action is brought or the place where the breach of duty occurred, and that if the stipulation is valid where the contract was made, it will be upheld, although it would not be considered as valid if the contract had been made in the state where the action was brought. See also Western Union Tel. Co. *v.* Eubanks, 100 Ky. 591, 605, 38 S. W. 1068, 18 Ky. L. Rep. 995, 66 Am. St. Rep. 361, 36 L. R. A. 711, where in a case involving the validity of stipulations limiting the liability of the company the court said: "The general rule is that the law of the place where the contract is to be performed governs, subject, of course, to the rule that a contract which is void by the law of the

be performed, this being held to be the place where the message was to be delivered;[4] but such stipulations, although valid according to a law of the place of the contract, will not be upheld if contrary to the public policy of the state where the action is brought.[5]

5. Defenses.[6] Defendant may in so far as applicable to the form of action and circumstances of the particular case rely upon such defenses as are applicable generally in actions for breach of contract and for negligence,[7] such as a failure of plaintiff to comply with a condition precedent to his right of action,[8] or contributory negligence on the part of plaintiff.[9] The company may also rely upon a valid stipulation in the contract of transmission limiting its liability,[10] or a valid regulation in regard to the conduct of its business as in regard to its office hours,[11] or free delivery limits.[12] It is of course a good defense for defendant to show affirmatively that it exercised due care and was not guilty of negligence.[13]

B. Persons Entitled to Sue — 1. In General. In case of negligence or default in regard to the transmission or delivery of a message, an action may of

place where made is void everywhere." But see Postal Tel., etc., Co. *v.* Wells, 82 Miss. 733, 35 So. 190 [*distinguishing* Shaw *v.* Postal Tel., etc., Co., *supra*].

It will be presumed in the absence of evidence to the contrary, that the law of the state where the contract was made is the same in regard to the validity of such stipulations as the law of the state where the action was brought. Burgess *v.* Western Union Tel. Co., 92 Tex. 125, 46 S. W. 794, 71 Am. St. Rep. 833 [*reversing* (Civ. App. 1897) 43 S. W. 1033].

4. North Packing, etc., Co. *v.* Western Union Tel. Co., 70 Ill. App. 275.

5. Williamson *v.* Postal Tel.-Cable Co., 151 N. C. 223, 65 S. E. 974 (holding that a stipulation limiting the liability of the company in the case of an unrepeated message is contrary to the public policy of North Carolina, and will not be upheld, although valid in New York, where the contract of transmission was entered into); Fox *v.* Postal Tel. Cable Co., 138 Wis. 648, 120 N. W. 399 (holding that a stipulation limiting the liability of a telegraph company in the case of unrepeated messages is contrary to the public policy of Wisconsin, both as judicially declared and by written law as well, and that such a stipulation will not be upheld, although the message was sent from New York where the stipulation is regarded as valid and the breach of duty consisted in a delay in delivering the message to the addressee in Illinois).

6. **Excuse for delay in transmission** see *supra*, IV, B, 2, b.

7. See Contracts, 9 Cyc. 693; Negligence, 29 Cyc. 564.

Defenses in actions for penalties see *supra*, VII, D.

Matters not available as defense.— Where defendant received and transmitted a message it is no defense for a negligent delay in delivering it that the message was not presented in writing and need not have been accepted for transmission in the first instance. Western Union Tel. Co. *v.* Wilson, 93 Ala. 32, 9 So. 414, 30 Am. St. Rep. 23. Where a message is addressed to A in care of B, the fact that A is absent from the city to which the message is addressed is no defense for failing to deliver it to B. Western Union Tel. Co. *v.* Rowell, 153 Ala. 295, 45 So. 73. Where defendant's agent accepted a message for transmission and received the charges therefor and informed the sender that the message had been transmitted, without stating that it was subject to delay on account of a strike or mentioning any limitation of the company's liability, the fact that some of its employees were on strike is not available as a defense for failing to deliver the message. Western Union Tel. Co. *v.* McMorris, 158 Ala. 563, 48 So. 349, 132 Am. St. Rep. 46. Where the sender of a message inquires of the transmitting agent if the company has an office at the place of destination and is informed that it has, and he delivers and pays for the transmission of the message in reliance upon such information, the company is estopped in an action for failing to deliver the message to assert that it did not have an office at such place. Western Union Tel. Co. *v.* Stratemeier, 6 Ind. App. 125, 32 N. E. 871.

8. Heald *v.* Western Union Tel. Co., 129 Iowa 326, 105 N. W. 588.

Conditions precedent see *supra*, VIII, A, 2.

9. Western Union Tel. Co. *v.* Gulledge, 84 Ark. 501, 106 S. W. 957; Western Union Tel. Co. *v.* Wright, 18 Ill. App. 337.

Contributory negligence see *infra*, IX, B, 1, e; IX, B, 3, d, (xi).

10. Kiley *v.* Western Union Tel. Co., 109 N. Y. 231, 16 N. E. 75; Manier *v.* Western Union Tel. Co., 94 Tenn. 442, 29 S. W. 732; Lester *v.* Western Union Tel. Co., 84 Tex. 313, 19 S. W. 256.

Stipulations limiting liability see *supra*, V.

11. Western Union Tel. Co. *v.* Neel, 86 Tex. 368, 25 S. W. 15.

Office hours as affecting liability for delay in delivery see *supra*, IV, C, 3 b.

12. Western Union Tel. Co. *v.* Henderson, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148; Western Union Tel. Co. *v.* Trotter, 55 Ill. App. 659.

Free delivery limits see *supra*, IV, C, 4, b.

13. Western Union Tel. Co. *v.* Elliott, 131 Ky. 340, 115 S. W. 228, 22 L. R. A. N. S. 761; Pinckney *v.* Western Union Tel. Co., 19 S. C. 71, 45 Am. Rep. 765.

course be maintained by the sender of the message with whom the contract of transmission was made,[14] although he may not be entitled to more than nominal damages;[15] but the right to maintain such an action is not restricted to the sender of the message.[16] A third person who is neither the sender nor the addressee may sue where the message shows or the company is otherwise informed of his beneficial interest therein;[17] but such a third person cannot sue where defendant had no notice either from the message or otherwise of his beneficial interest.[18] So in mental anguish cases it has been repeatedly held that a person other than the sender or the addressee, who is not mentioned in the message and whose interest therein is not disclosed, cannot recover for mental anguish;[19] and in no case can a person recover who is an entire stranger both to the message and to the company, and to whom the company owes no duty whatever.[20]

14. See McCormick *v.* Western Union Tel. Co., 79 Fed. 449, 25 C. C. A. 35, 38 L. R. A. 684.

Who is sender.— A person at whose instance, for whose benefit, and in whose name a message is sent and who pays for its transmission is the sender and entitled to sue, although the message was not prepared or delivered or paid for by him in person. Gulf, etc., Tel. Co. *v.* Richardson, 79 Tex. 649, 15 S. W. 689.

15. See *infra*, IX, A.

16. Western Union Tel. Co. *v.* Woodard, 84 Ark. 323, 105 S. W. 579; Fererro *v.* Western Union Tel. Co., 9 App. Cas. (D. C.) 455, 35 L. R. A. 548; Young *v.* Western Union Tel. Co., 107 N. C. 370, 11 S. E. 1044, 22 Am. St. Rep. 883, 9 L. R. A. 669. See also cases cited *infra*, note 17; and, generally, *infra*, VIII, B, 2, 3, 4.

Persons who may be entitled to sue and circumstances authorizing an action by persons other than the sender see Western Union Tel. Co. *v.* Schriver, 141 Fed. 538, 22 C. C. A. 596, 4 L. R. A. N. S. 678.

17. Sherrill *v.* Western Union Tel. Co., 109 N. C. 527, 14 S. E. 94; Western Union Tel. Co. *v.* Mellon, 96 Tenn. 66, 33 S. W. 725; Western Union Tel. Co. *v.* Morrison, (Tex. Civ. App. 1896) 33 S. W. 1025; Martin *v.* Western Union Tel. Co., 1 Tex. Civ. App. 143, 20 S. W. 860.

Application of rule.— Where a message sent from A to B, reading, "Morrison will be home in a few days; thinks he can trade," was not delivered to B and the trade was defeated, it was held that as Morrison was named in the message and his interest suggested he might maintain an action for damages. Western Union Tel. Co. *v.* Morrison, (Tex. Civ. App. 1896) 33 S. W. 1025. Where a message sent from A. to B, reading, "Tell Henry to come home. Lou is bad sick," was not delivered, it was held that the person named as Henry might sue for damages for mental anguish, since the message showed upon its face that it was sent for his benefit and that he would be the person injured by its non-delivery. Sherrill *v.* Western Union Tel. Co., 109 N. C. 527, 14 S. E. 94. Where a message sent from A to B, reading, "Tell John Mellon Maxie is very sick. Come if possible," was not delivered to B, it was held that Mellon, being the beneficiary of the message as disclosed upon its face, might sue for damages for mental anguish, particularly in view of a statute giving a right of action to "the party aggrieved." Western Union Tel. Co. *v.* Mellon, 96 Tenn. 66, 33 S. W. 725.

18. Western Union Tel. Co. *v.* Weniski, 84 Ark. 457, 106 S. W. 486; Holler *v.* Western Union Tel. Co., 149 N. C. 336, 63 S. E. 92, 19 L. R. A. N. S. 475; Elliott *v.* Western Union Tel. Co., 75 Tex. 18, 12 S. W. 954, 16 Am. St. Rep. 872; Western Union Tel. Co. *v.* Schriver, 141 Fed. 538, 72 C. C. A. 596, 4 L. R. A. N. S. 678; Western Union Tel. Co. *v.* Schriver, 129 Fed. 344, 64 C. C. A. 96.

The message itself need not show plaintiff's interest therein, but if it does not this fact must in some way be brought to the attention of defendant. Cranford *v.* Western Union Tel. Co., 138 N. C. 162, 50 S. E. 585.

19. *Arkansas.*— Western Union Tel. Co. *v.* Weniski, 84 Ark. 457, 106 S. W. 486.

Kentucky.— Morrow *v.* Western Union Tel. Co., 107 Ky. 517, 54 S. W. 853, 21 Ky. L. Rep. 1263; Davidson *v.* Western Union Tel. Co., 54 S. W. 830, 21 Ky. L. Rep. 1292.

North Carolina.— Holler *v.* Western Union Tel. Co., 149 N. C. 336, 63 S. E. 92, 19 L. R. A. N. S. 475; Helms *v.* Western Union Tel. Co., 143 N. C. 386, 55 S. E. 831, 8 L. R. A. N. S. 249 [*disapproving* Cashion *v.* Western Union Tel. Co., 124 N. C. 459, 32 S. E. 746, 45 L. R. A. 160]; Cranford *v.* Western Union Tel. Co., 138 N. C. 162, 50 S. E. 585. But see Laudie *v.* Western Union Tel. Co., 124 N. C. 528, 32 S. E. 886.

South Carolina.— Poteet *v.* Western Union Tel. Co., 74 S. C. 491, 55 S. E. 113; Rogers *v.* Western Union Tel. Co., 72 S. C. 290, 51 S. E. 773.

Texas.— Southwestern Tel., etc., Co. *v.* Gotcher, 93 Tex. 114, 53 S. W. 686; Western Union Tel. Co. *v.* Carter, 85 Tex. 580, 22 S. W. 961, 34 Am. St. Rep. 826 [*reversing* on this point (Civ. App. 1892) 20 S. W. 834]; Western Union Tel. Co. *v.* Kirkpatrick, 76 Tex. 217, 13 S. W. 70, 18 Am. St. Rep. 37; Western Union Tel. Co. *v.* Fore, (Civ. App. 1894) 26 S. W. 783.

Undisclosed principal in mental anguish cases see *infra*, VIII, B, 3, a.

20. McCormick *v.* Western Union Tel. Co., 79 Fed. 449, 25 C. C. A. 35, 38 L. R. A. 684, holding that no action can be maintained by a person who has merely seen and acted to his injury upon a message which had been

2. Addressee. In England it has been held that the addressee cannot maintain an action against a telegraph company for negligence or default in regard to the transmission or delivery of a message,[21] unless he is a party to the contract of transmission or the sender acted as his agent.[22] In the United States and Canada, however, the general rule is that the addressee may maintain such an action,[23]

incorrectly transmitted where he is an entire stranger both to the message and to the company, since to such a person the company owes no duty whatever.

21. Playford *v.* United Kingdom Electric Tel. Co., L. R. 4 Q. B. 706, 10 B. & S. 756, 38 L. J. Q. B. 249, 21 L. T. Rep. N. S. 21, 17 Wkly. Rep. 968, Allen Tel. Cas. 437; Dickson *v.* Reuter's Tel. Co., 3 C. P. D. 1, 47 L. J. C. P. 1, 26 Wkly. Rep. 23 [*affirming* 2 C. P. D. 62, 46 L. J. C. P. 197, 35 L. T. Rep. N. S. 197, 25 Wkly. Rep. 272]. See also Feaver *v.* Montreal Tel. Co., 23 U. C. C. P. 150.

22. See Playford *v.* United Kingdom Electric Tel. Co, 10 B. & S. 756, 38 L. J. Q. B. 249, 21 L. T. Rep. N. S. 21, 17 Wkly. Rep. 968.

23. *Alabama.*— Western Union Tel. Co. *v.* Manker, 145 Ala. 418, 41 So. 850; Western Union Tel. Co. *v.* Krichbaum, 132 Ala. 535, 31 So. 607.

Arkansas.— Western Union Tel. Co. *v.* Woodard, 84 Ark. 323, 105 S. W. 579; Western Union Tel. Co. *v.* Short, 53 Ark. 434, 14 S. W. 649, 9 L. R. A. 744.

California.— Germain Fruit Co. *v.* Western Union Tel. Co., 137 Cal. 598, 70 Pac. 658; Coit *v.* Western Union Tel. Co., 130 Cal. 657, 63 Pac. 83, 80 Am. St. Rep. 153, 53 L. R. A. 678; California Bank *v.* Western Union Tel. Co., 52 Cal. 280.

Colorado.— Western Union Tel. Co. *v.* Cornwell, 2 Colo. App. 491, 31 Pac. 393, 4 Am. Elec. Cas. 664.

District of Columbia.— Fererro *v.* Western Union Tel. Co., 9 App. Cas. 455, 35 L. R. A. 548.

Florida.— International Ocean Tel. Co. *v.* Saunders, 32 Fla. 434, 14 So. 148, 21 L. R. A. 810, 4 Am. Electric Cas. 674; Western Union Tel. Co. *v.* Hyer, 22 Fla. 637, 1 So. 129, 1 Am. St. Rep. 222, 2 Am. Elec. Cas. 484.

Georgia.— Stamey *v.* Western Union Tel. Co., 92 Ga. 613, 18 S. E. 1008, 44 Am. St. Rep. 95; Western Union Tel. Co. *v.* Blanchard, 68 Ga. 299, 45 Am. Rep. 480. See also Western Union Tel. Co. *v.* Waxelbaum, 113 Ga. 1017, 39 S. E. 443, 56 L. R. A. 741. But see Brooke *v.* Western Union Tel. Co., 119 Ga. 694, 46 S. E. 826.

Illinois.— Webbe *v.* Western Union Tel. Co., 169 Ill. 610, 48 N. E. 670, 61 Am. St. Rep. 207; Western Union Tel. Co. *v.* Dubois, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109; Western Union Tel. Co. *v.* Tyler, 74 Ill. 166, 24 Am. Rep. 279, 1 Am. Elec. Cas. 115; Western Union Tel. Co. *v.* Hope, 11 Ill. App. 289, 1 Am. Elec. Cas. 435.

Indiana.— Western Union Tel. Co. *v.* McKibben, 114 Ind. 511, 14 N. E. 894; Western Union Tel. Co. *v.* Fenton, 52 Ind. 1, 1 Am. Elec. Cas. 198; Western Union Tel. Co. *v.* Moore, 12 Ind. App. 136, 39 N. E. 874, 54 Am. St. Rep. 515.

Iowa.— McPeek *v.* Western Union Tel. Co., 107 Iowa 356, 78 N. W. 63, 70 Am. St. Rep. 205, 43 L. R. A. 214; Mentzer *v.* Western Union Tel. Co., 93 Iowa 752, 62 N. W. 1, 57 Am. St. Rep. 294, 28 L. R. A. 72; Herron *v.* Western Union Tel. Co., 90 Iowa 129, 57 N. W. 696; Turner *v.* Hawkeye Tel. Co., 41 Iowa 458, 20 Am. Rep. 605.

Kansas.— Western Union Tel. Co. *v.* Lawson, 66 Kan. 660, 72 Pac. 283; Russell *v.* Western Union Tel. Co., 57 Kan. 230, 45 Pac. 598; West *v.* Western Union Tel. Co., 39 Kan. 93, 17 Pac. 807, 7 Am. St. Rep. 530; Western Union Tel. Co. *v.* Howell, 38 Kan. 685, 17 Pac. 313.

Kentucky.— Chapman *v.* Western Union Tel. Co., 90 Ky. 265, 13 S. W. 880, 12 Ky. L. Rep. 265; Western Union Tel. Co. *v.* Jump, 8 Ky. L. Rep. 531.

Louisiana.—Graham *v.* Western Union Tel. Co., 109 La. 1069, 34 So. 91; New Orleans Bank *v.* Western Union Tel. Co., 27 La. Ann. 49, 1 Am. Elec. Cas. 147; La Grange *v.* Southwestern Tel. Co., 25 La. Ann. 383, 1 Am. Elec. Cas. 59.

Massachusetts.— Ellis *v.* American Tel. Co., 13 Allen 226.

Minnesota.— McCord *v.* Western Union Tel. Co., 39 Minn. 181, 39 N. W. 315, 12 Am. St. Rep. 636, 1 L. R. A. 143, 2 Am. Elec. Cas. 629.

Mississippi.— Magourik *v.* Western Union Tel. Co., 79 Miss. 632, 31 So. 206, 89 Am. St. Rep. 663; Clement *v.* Western Union Tel. Co., 77 Miss. 747, 27 So. 603; Shingleur *v.* Western Union Tel. Co., 72 Miss. 1030, 18 So. 425, 48 Am. St. Rep. 604, 30 L. R. A. 444, 6 Am. Elec. Cas. 783; Western Union Tel. Co. *v.* Allen, 66 Miss. 549, 6 So. 461, 3 Am. Elec. Cas. 625.

Missouri.— Harper *v.* Western Union Tel. Co., 92 Mo. App. 304; Lee *v.* Western Union Tel. Co., 51 Mo. App. 375.

Nebraska.— Western Union Tel. Co. *v.* Kemp, 44 Nebr. 194, 62 N. W. 451, 48 Am. St. Rep. 723, 28 Nebr. 661, 44 N. W. 1064, 26 Am. St. Rep. 363, 5 Am. Elec. Cas. 751.

New Mexico.— Western Union Tel. Co. *v.* Longwill, 5 N. M. 308, 21 Pac. 339.

New York.— Milliken *v.* Western Union Tel. Co., 110 N. Y. 403, 18 N. E. 251, 1 L. R. A. 281; Leonard *v.* New York, etc., Electro Magnetic Tel. Co., 41 N. Y. 544, 1 Am. Rep. 446, Allen Tel. Cas. 500; Wolfskehl *v.* Western Union Tel. Co., 46 Hun 542, 2 Am. Elec. Cas. 647; De Rutte *v.* New York, etc., Electro Magnetic Tel. Co., 1 Daly 547, 30 How. Pr. 403; Rose *v.* U. S. Telegraph Co., 3 Abb. Pr. N. S. 408, Allen Tel. Cas. 500.

North Carolina.— Efird *v.* Western Union

although the theory upon which he is entitled to sue has been variously stated in different jurisdictions and also varies according to the nature of the particular case.[24] The addressee may in some cases be entitled to sue by virtue of an actual contractual relation existing between him and the telegraph company,[25] as in cases where the sender in the transmission of the message acted as his agent,[26]

Tel. Co., 132 N. C. 267, 43 S. E. 825; Lewis *v.* Western Union Tel. Co., 117 N. C. 436, 23 S. E. 319; Sherrill *v.* Western Union Tel. Co., 109 N. C. 527, 14 S. E. 94; Young *v.* Western Union Tel. Co., 107 N. C. 370, 11 S. E. 1044, 22 Am. St. Rep. 883, 9 L. R. A. 669; Pegram *v.* Western Union Tel. Co., 100 N. C. 28, 6 S. E. 770, 6 Am. St. Rep. 557.

Oklahoma.— See Butner *v.* Western Union Tel. Co., 2 Okla. 234, 37 Pac. 1087.

Oregon.— McLeod *v.* Pacific Tel. Co., 52 Oreg. 22, 94 Pac. 568, 95 Pac. 1009, 15 L. R. A. N. S. 810, 18 L. R. A. N. S. 954.

Pennsylvania.— Tobin *v.* Western Union Tel. Co., 146 Pa. St. 375, 23 Atl. 324, 28 Am. St. Rep. 802; New York, etc., Printing Tel. Co. *v.* Dryburg, 35 Pa. St. 298, 78 Am. Dec. 338, Allen Tel. Cas. 157; Wolf Co. *v.* Western Union Tel. Co., 24 Pa. Super. Ct. 129; Harris *v.* Western Union Tel. Co., 9 Phila. 88, 1 Am. Elec. Cas. 37.

South Carolina.— Broom *v.* Western Union Tel. Co., 71 S. C. 509, 51 S. E. 259; Aiken *v.* Western Union Tel. Co., 5 S. C. 358, 1 Am. Elec. Cas. 121.

Tennessee.— Western Union Tel. Co. *v.* Mellon, 96 Tenn. 66, 33 S. W. 725; Manier *v.* Western Union Tel. Co., 94 Tenn. 442, 29 S. W. 732; Wadsworth *v.* Western Union Tel. Co., 86 Tenn. 695, 8 S. W. 574, 6 Am. St. Rep. 864.

Texas.— Western Union Tel. Co. *v.* Uvalde Nat. Bank, 97 Tex. 219, 77 S. W. 603, 65 L. R. A. 805 [*affirming* (Civ. App. 1903) 72 S. W. 232]; Western Union Tel. Co. *v.* Beringer, 84 Tex. 38, 19 S. W. 336; Western Union Tel. Co. *v.* Adams, 75 Tex. 531, 12 S. W. 857, 16 Am. St. Rep. 920, 6 L. R. A. 844; Western Union Tel. Co. *v.* Broesche, 72 Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 843; Western Union Tel. Co. *v.* Neill, 57 Tex. 283, 44 Am. Rep. 589; Western Union Tel. Co. *v.* Lyman, 3 Tex. Civ. App. 460, 22 S. W. 656.

Virginia.— Connelly *v.* Western Union Tel. Co., 100 Va. 51, 40 S. E. 618, 93 Am. St. Rep. 919, 56 L. R. A. 663; Western Union Tel. Co. *v.* Reynolds, 77 Va. 173, 46 Am. Rep. 715, 1 Am. Elec. Cas. 487.

Wisconsin.— Fisher *v.* Western Union Tel. Co., 119 Wis. 146, 96 S. W. 545.

United States.— Whitehall *v.* Western Union Tel. Co., 136 Fed. 499; Swan *v.* Western Union Tel. Co., 129 Fed. 318, 63 C. C. A. 550, 67 L. R. A. 153; Pacific Postal Tel. Cable Co. *v.* Palo Alto Bank, 109 Fed. 369, 48 C. C. A. 413, 54 L. R. A. 711; Findlay *v.* Western Union Tel. Co., 64 Fed. 459; Beasley *v.* Western Union Tel. Co., 39 Fed. 181; Abraham *v.* Western Union Tel. Co., 23 Fed. 315, 1 Am. Elec. Cas. 728; White *v.* Western Union Tel. Co., 14 Fed. 710, 5 McCrary 103. *Compare* Western Union Tel. Co. *v.* Wood, 57 Fed. 471, 6 C. C. A. 432, 21 L. R. A. 706.

Canada.— Bell *v.* Dominion Tel. Co., 25 L. C. Jur. 248, 3 Montreal Leg. N. 406; Watson *v.* Montreal Tel. Co., 5 Montreal Leg. N. 87. *Contra*, Feaver *v.* Montreal Tel. Co., 23 U. C. C. P. 150.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 37.

24. *Alabama.*— Postal Tel. Cable Co. *v.* Ford, 117 Ala. 672, 23 So. 684.

Arkansas.— Western Union Tel. Co. *v.* Woodard, 84 Ark. 323, 105 S. W. 579.

District of Columbia.— Fererro *v.* Western Union Tel. Co., 9 App. Cas. 455, 35 L. R. A. 548.

Mississippi.— Shingleur *v.* Western Union Tel. Co., 72 Miss. 1030, 18 So. 425, 48 Am. St. Rep. 604, 30 L. R. A. 444, 6 Am. Elec. Cas. 783.

North Carolina.— Young *v.* Western Union Tel. Co., 107 N. C. 370, 11 S. E. 1044, 22 Am. St. Rep. 883, 9 L. R. A. 669.

Oregon.— McLeod *v.* Pacific Tel. Co., 52 Oreg. 22, 94 Pac. 568, 95 Pac. 1009, 15 L. R. A. N. S. 18, 18 L. R. A. N. S. 954.

25. *Alabama.*— Western Union Tel. Co. *v.* Rowell, 153 Ala. 295, 45 So. 73; Western Union Tel. Co. *v.* Manker, 145 Ala. 418, 41 So. 850.

California.— Coit *v.* Western Union Tel. Co., 130 Cal. 657, 63 Pac. 83, 80 Am. St. Rep. 153, 53 L. R. A. 678.

Colorado.— Western Union Tel. Co. *v.* Cornwell, 2 Colo. App. 491, 31 Pac. 393, 4 Am. Elec. Cas. 664.

Georgia.— Stamey *v.* Western Union Tel. Co., 92 Ga. 613, 18 S. E. 1008, 44 Am. St. Rep. 95.

New York.— Milliken *v.* Western Union Tel. Co., 110 N. Y. 403, 18 N. E. 251, 1 L. R. A. 281; De Rutte *v.* New York, etc., Electro Magnetic Tel. Co., 1 Daly 547, 30 How. Pr. 403.

26. Western Union Tel. Co. *v.* Cunningham, 99 Ala. 314, 14 So. 579; Milliken *v.* Western Union Tel. Co., 110 N. Y. 403, 18 N. E. 251, 1 L. R. A. 281; De Rutte *v.* New York, etc., Electro Magnetic Tel. Co., 1 Daly (N. Y.) 547, 30 How. Pr. 403.

The contract is not necessarily with the sender of the message, but on the contrary if the sender in transmitting the message acts as the agent and at the request and for the benefit of the addressee, the contract is made with the latter through his agent. De Rutte *v.* New York, etc., Electro Magnetic Tel. Co., 1 Daly (N. Y.) 547, 30 How. Pr. 403.

Reply message.— A message sent by A to B, making an inquiry and requesting an answer, constitutes B the agent of A to procure and communicate the information requested, so that in case of negligence in the transmis-

although the agency was not disclosed,[27] or where he himself has made a special contract in regard to the delivery of the message;[28] or he may be entitled to sue by reason of a statutory provision imposing certain liabilities upon telegraph companies.[29] The addressee's right of action has also been sustained upon the ground that, although not a party to the contract, it was made for his benefit;[30] but while this rule is undoubtedly true if the message shows or the company is otherwise informed that it is for his benefit,[31] it has been held that he cannot recover where this fact does not appear from the message or the

sion or delivery of the reply message sent by B to A there is a sufficient contractual relation between A and the telegraph company to enable A to maintain an action for breach of the contract. Western Union Tel. Co. *v.* Cunningham, 99 Ala. 314, 14 So. 579.

Where plaintiff arranges with a third person to send him a message in a certain event, and the latter does so, informing defendant's agent of the arrangement, the necessary contractual relation exists between plaintiff and defendant. Western Union Tel. Co. *v.* Rowell, 153 Ala. 295, 45 So. 73.

But there can be no ratification so as to entitle the addressee to maintain an action for a breach of the contract where the sender of the message did not act as his agent. Heathcoat *v.* Western Union Tel. Co., 156 Ala. 339, 47 So. 139.

27. Western Union Tel. Co. *v.* Manker, 145 Ala. 418, 41 So. 850; Manker *v.* Western Union Tel. Co., 137 Ala. 292, 34 So. 839 [*overruling* Western Union Tel. Co. *v.* Allgood, 125 Ala. 712, 27 So. 1024, and *disapproving* on this point Western Union Tel. Co. *v.* Wilson, 93 Ala. 32, 9 So. 414, 30 Am. St. Rep. 23; Kennon *v.* Western Union Tel. Co., 92 Ala. 399, 9 So. 200].

Right of undisclosed principal to sue generally see *infra*, VIII, B, 3.

28. Milliken *v.* Western Union Tel. Co., 110 N. Y. 403, 18 N. E. 251, 1 L. R. A. 281, where the addressee in anticipation of the receipt of a message made a special agreement in regard to its delivery to him.

29. Western Union Tel. Co. *v.* McKibben, 114 Ind. 511, 14 N. E. 894 (statutory liability for "special damages occasioned"); Western Union Tel. Co. *v.* Fenton, 52 Ind. 1 (statutory liability for "special damages occasioned"); Herron *v.* Western Union Tel. Co., 90 Iowa 129, 57 N. W. 696 (statutory liability for "all damages resulting"); Markel *v.* Western Union Tel. Co., 19 Mo. App. 80 (statutory liability for "special damages occasioned"); Wadsworth *v.* Western Union Tel. Co., 86 Tenn. 695, 8 S. W. 574, 6 Am. St. Rep. 864 ("liable in damages to the party aggrieved").

30. *Arkansas.*— Western Union Tel. Co. *v.* Woodard, 84 Ark. 323, 105 S. W. 579.

Illinois.— Western Union Tel. Co. *v.* Hope, 11 Ill. App. 289, 1 Am. Elec. Cas. 435.

Kansas.— West *v.* Western Union Tel. Co., 39 Kan. 93, 17 Pac. 807, 7 Am. St. Rep. 530.

Kentucky.— Chapman *v.* Western Union Tel. Co., 90 Ky. 265, 13 S. W. 880, 12 Ky. L. Rep. 265; Western Union Tel. Co. *v.* Jump, 8 Ky. L. Rep. 531.

Louisiana.— La Grange *v.* Southwestern Tel. Co., 25 La. Ann. 383, 1 Am. Elec. Cas. 59.

Oregon.— McLeod *v.* Pacific Tel. Co., 52 Oreg. 22, 94 Pac. 568, 95 Pac. 1009, 15 L. R. A. N. S. 810, 18 L. R. A. N. S. 954.

South Carolina.— Aiken *v.* Western Union Tel. Co., 5 S. C. 358, 1 Am. Elec. Cas. 121.

Texas.— Western Union Tel. Co. *v.* Coffin, 88 Tex. 94, 30 S. W. 896; Western Union Tel. Co. *v.* Beringer, 84 Tex. 38, 19 S. W. 336; Western Union Tel. Co. *v.* Adams, 75 Tex. 531, 12 S. W. 857, 16 Am. St. Rep. 920, 6 L. R. A. 844; So Relle *v.* Western Union Tel. Co., 55 Tex. 308, 40 Am. Rep. 805, 1 Am. Elec. Cas. 348; Western Union Tel. Co. *v.* Cook, 45 Tex. Civ. App. 87, 99 S. W. 1131; Western Union Tel. Co. *v.* Randles, (Civ. App. 1896) 34 S. W. 447.

Virginia.— Connelly *v.* Western Union Tel. Co., 100 Va. 51, 40 S. E. 618, 93 Am. St. Rep. 919, 56 L. R. A. 663.

United States.—Whitehill *v.* Western Union Tel. Co., 136 Fed. 499; Western Union Tel. Co. *v.* Wood, 57 Fed. 471, 6 C. C. A. 432, 21 L. R. A. 706.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 37.

This rule applies in mental anguish cases where the message is sent for the purpose of notifying the addressee of the illness or death of a relative. Western Union Tel. Co. *v.* Coffin, 88 Tex. 94, 30 S. W. 896; Western Union Tel. Co. *v.* Adams, 75 Tex. 531, 12 S. W. 857, 16 Am. St. Rep. 920, 6 L. R. A. 844.

It is not material who paid for the transmission of the message if it was sent for the benefit of the addressee. Western Union Tel. Co. *v.* Beringer, 84 Tex. 38, 19 S. W. 336.

Nature of benefit to addressee.—It has been held that the message need not be for the sole and exclusive benefit of the addressee, but that it is sufficient if the company knows or is chargeable with knowledge of the fact that it will be of substantial benefit to him (McLeod *v.* Pacific Tel. Co., 52 Oreg. 22, 94 Pac. 568, 95 Pac. 1009, 15 L. R. A. N. S. 810, 18 L. R. A. N. S. 954); although it has been held that the contract must have been made for the benefit of the addressee and that it is not sufficient merely that he would be incidentally benefited by the carrying out of the contract (Postal Tel. Cable Co. *v.* Ford, 117 Ala. 672, 23 So. 684; Markel *v.* Western Union Tel. Co., 19 Mo. App. 80).

31. International Ocean Tel. Co. *v.* Saunders, 32 Fla. 434, 14 So. 148, 21 L. R. A. 810; McLeod *v.* Pacific Tel. Co., 52 Oreg. 22, 94 Pac. 568, 95 Pac. 1009, 15 L. R. A. N. S.

company is not otherwise informed thereof.[32] Cases may arise, however, where the addressee is neither party nor privy to the contract of transmission nor within the application of the rule allowing a right of action to the person beneficially interested,[33] as where the sender did not act as the agent or for the benefit of the addressee,[34] and in such cases it is clear that he cannot sue upon the contract of transmission;[35] and the circumstances may also be such that the cause of action is necessarily in tort.[36] But the fact that the addressee may not be entitled to sue on the contract does not ordinarily affect the right of action but merely the form of remedy,[37] for as previously shown a breach of duty in regard to the transmission or delivery of a message is not only a breach of the contract but also a breach of a public duty,[38] and the addressee may maintain his action for the damages sustained by reason of the breach of such duty;[39] but in such cases where there is no contractual relation between the company and the addressee the latter must sue in tort and not in contract.[40]

3. Undisclosed Principal — a. Of Sender. The general rule that an undisclosed principal may sue on a contract made by his agent[41] has frequently been applied so as to authorize an action against a telegraph company by the undisclosed principal of the sender of the message,[42] subject of course to any defenses

810, 18 L. R. A. N. S. 954. See also cases cited *supra*, note 30.

32. Frazier *v.* Western Union Tel. Co., 45 Oreg. 414, 78 Pac. 330, 67 L. R. A. 319; Western Union Tel. Co. *v.* Wood, 57 Fed. 471, 6 C. C. A. 432, 21 L. R. A. 706.

Recovery by partnership.— It is not essential to recovery by a partnership against a telegraph company for its negligent failure to properly transmit a telegram addressed to one of the partners, that the company was informed that the message was intended for the firm's benefit. Postal Tel. Co. *v.* Levy, (Tex. Civ. App. 1907) 102 S. W. 134.

33. Western Union Tel. Co. *v.* Adams, 154 Ala. 657, 46 So. 228; Postal Tel. Cable Co. *v.* Ford, 117 Ala. 672, 23 So. 684; Western Union Tel. Co. *v.* Dubois, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109.

34. See Western Union Tel. Co. *v.* Heathcoat, 149 Ala. 623, 43 So. 117; Western Union Tel. Co. *v.* Dubois, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109.

35. Heathcoat *v.* Western Union Tel. Co., 156 Ala. 339, 47 So. 139; Western Union Tel. Co. *v.* Adams, 154 Ala. 657, 46 So. 228; Western Union Tel. Co. *v.* Heathcoat, 149 Ala. 623, 43 So. 117; Postal Tel. Cable Co. *v.* Ford, 117 Ala. 672, 23 So. 684; Western Union Tel. Co. *v.* Dubois, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109.

36. See Western Union Tel. Co. *v.* Uvalde Nat. Bank, 97 Tex. 219, 77 S. W. 603, 65 L. R. A. 805 [*affirming* (Civ. App. 1903) 72 S. W. 232], where the action was for negligence in delivering to plaintiff a fraudulent message placed upon defendant's wires by a wire-tapper.

37. Western Union Tel. Co. *v.* Dubois, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109. See also Western Union Tel. Co. *v.* Adams, 154 Ala. 657, 46 So. 228; Postal Tel. Cable Co. *v.* Ford, 117 Ala. 672, 23 So. 684.

38. See *supra*, VIII, A, 1.

39. *Alabama.*— Western Union Tel. Co. *v.* Krichbaum, 132 Ala. 535, 31 So. 607.

District of Columbia.— Fererro *v.* Western Union Tel. Co., 9 App. Cas. 455, 35 L. R. A. 548.

Illinois.— Webbe *v.* Western Union Tel. Co., 169 Ill. 610, 48 N. E. 670, 61 Am. St. Rep. 207; Western Union Tel. Co. *v.* Dubois, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109.

New Mexico.— Western Union Tel. Co. *v.* Longwill, 5 N. M. 308, 21 Pac. 339.

New York.— Wolfskehl *v.* Western Union Tel. Co., 46 Hun 542, 2 Am. Elec. Cas. 647; De Rutte *v.* New York, etc., Electric Magnetic Tel. Co., 1 Daly 547, 30 How. Pr. 403.

North Carolina.— Young *v.* Western Union Tel. Co., 107 N. C. 370, 11 S. E. 1044, 22 Am. St. Rep. 883, 9 L. R. A. 669.

Pennsylvania.— New York, etc., Printing Tel. Co. *v.* Dryburg, 35 Pa. St. 298, 78 Am. Dec. 338.

South Carolina.— Aiken *v.* Western Union Tel. Co., 5 S. C. 358, 1 Am. Elec. Cas. 121.

Texas.— Western Union Tel. Co. *v.* Uvalde Nat. Bank, 97 Tex. 219, 77 S. W. 603, 65 L. R. A. 805 [*affirming* (Civ. App. 1903) 72 S. W. 232].

United States.— Pacific Postal Tel. Cable Co. *v.* Palo Alto Bank, 109 Fed. 369, 48 C. C. A. 413, 54 L. R. A. 711.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 37.

40. Western Union Tel. Co. *v.* Adams, 154 Ala. 657, 46 So. 228; Western Union Tel. Co. *v.* Cooper, 2 Ga. App. 376, 58 S. E. 517; Webbe *v.* Western Union Tel. Co., 169 Ill. 610, 48 N. E. 670, 61 Am. St. Rep. 207; Western Union Tel. Co. *v.* Dubois, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109.

41. See Parties, 30 Cyc. 52 *et seq.*; Principal and Agent, 31 Cyc. 1598 *et seq.*

42. *Alabama.*— Western Union Tel. Co. *v.* Manker, 145 Ala. 418, 41 So. 850; Manker *v.* Western Union Tel. Co., 137 Ala. 292, 34 So. 839 [*overruling* Western Union Tel. Co. *v.* Allgood, 125 Ala. 712, 27 So. 1024, and *disapproving* on this point Western Union Tel. Co. *v.* Wilson, 93 Ala. 32, 9 So. 414, 30

which would be available in case the action was brought by the agent,[43] and the addressee may be entitled to sue as an undisclosed principal of the sender.[44] In the application of the rule a distinction has, however, been made between cases relating to business messages and cases where damages are claimed for mental anguish,[45] it being held that there can be no recovery of damages for mental anguish by the undisclosed principal;[46] but this rule is said not to involve any denial of the general right of an undisclosed principal to sue but merely a question of the character of damages recoverable,[47] it being held that the principal can recover only what the agent if suing in his own name might recover,[48] and that damages for mental anguish to a person whose existence and whose interest in the message was not disclosed cannot be said to have been within the contemplation of the parties;[49] but that, although he cannot recover for mental anguish, he may recover nominal damages or the price paid for the transmission of the message.[50] It has, however, been held that the addressee may recover for mental anguish where he sues on the contract as the principal of the sender, although the agency was not disclosed.[51]

Am. St. Rep. 23; Kennon *v.* Western Union Tel. Co., 92 Ala. 399, 9 So. 200].

Georgia.— Propeller Tow-Boat Co. *v.* Western Union Tel. Co., 124 Ga. 478, 52 S. E. 766; Dodd Grocery Co. *v.* Postal Tel. Cable Co., 112 Ga. 685, 37 S. E. 981.

Iowa.— Harkness *v.* Western Union Tel. Co., 73 Iowa 190, 34 N. W. 811, 5 Am. St. Rep. 672.

New York.— Milliken *v.* Western Union Tel. Co., 110 N. Y. 403, 18 N. E. 251, 1 L. R. A. 281; Leonard *v.* New York, etc., Electro Magnetic Tel. Co., 41 N. Y. 544, 1 Am. Rep. 446.

Tennessee.— See Western Union Tel. Co. *v.* Potts, 120 Tenn. 37, 113 S. W. 789, 127 Am. St. Rep. 991, 19 L. R. A. N. S. 479.

Texas.—Western Union Tel. Co. *v.* Broesche, 72 Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 843; Gulf Coast, etc., R. Co. *v.* Todd, (App. 1892) 19 S. W. 761.

United States.— Purdom Naval Stores Co. *v.* Western Union Tel. Co., 153 Fed. 327. See also Western Union Tel. Co. *v.* Schriver, 141 Fed. 538, 72 C. C. A. 596, 4 L. R. A. N. S. 678.

If the agent was not authorized to send the message which was sent, as where he was instructed to send a certain message prepared by plaintiff but instead of so doing wrote out and sent a different message, and plaintiff's interest therein was not disclosed to defendant, plaintiff cannot recover for negligence in regard to its transmission or delivery. Elliott *v.* Western Union Tel. Co., 75 Tex. 18, 12 S. W. 954, 16 Am. St. Rep. 872.

Sender not acting as agent.— Where a merchant at the request of a customer telegraphs for certain goods desired by the latter, but in sending the message does not act as agent of the customer, but is merely seeking to supply himself with the goods in order subsequently to sell the same to the customer at a profit, there is no privity between the telegraph company and the customer which will authorize an action by the latter for negligence in regard to the delivery of the message. Deslottes *v.* Baltimore, etc., Tel. Co., 40 La. Ann. 183, 3 So. 566.

43. See Harkness *v.* Western Union Tel. Co., 73 Iowa 190, 34 N. W. 811, 5 Am. St. Rep. 672; Western Union Tel. Co. *v.* Kerr, 4 Tex. Civ. App. 280, 23 S. W. 564.

44. Western Union Tel. Co. *v.* Manker, 145 Ala. 418, 41 So. 850; Manker *v.* Western Union Tel. Co., 137 Ala. 292, 34 So. 839 [*overruling* Western Union Tel. Co. *v.* Allgood, 125 Ala. 712, 27 So. 1024, and *disapproving* on this point Western Union Tel. Co. *v.* Wilson, 93 Ala. 32, 9 So. 414, 30 Am. St. Rep. 23; Kennon *v.* Western Union Tel. Co., 92 Ala. 399, 9 So. 200].

Right of addressee to sue generally see *supra*, VIII, B, 2.

45. Western Union Tel. Co. *v.* Potts, 120 Tenn. 37, 113 S. W. 789, 127 Am. St. Rep. 991, 19 L. R. A. N. S. 479.

46. Helms *v.* Western Union Tel. Co., 143 N. C. 386, 55 S. E. 831, 8 L. R. A. N. S. 249 [*disapproving* Cashion *v.* Western Union Tel. Co., 124 N. C. 459, 32 S. E. 746, 45 L. R. A. 160]; Western Union Tel. Co. *v.* Potts, 120 Tenn. 37, 113 S. W. 789, 127 Am. St. Rep. 991, 19 L. R. A. N. S. 479; Western Union Tel. Co. *v.* Fore, (Tex. Civ. App. 1894) 26 S. W. 783; Western Union Tel. Co. *v.* Kerr, 4 Tex. Civ. App. 280, 23 S. W. 564. See also *supra*, VIII, B, 1. *Compare* Western Union Tel. Co. *v.* Broesche, 72 Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 843, where, however, it seems that defendant was informed of the agency of the sender.

47. Western Union Tel. Co. *v.* Potts, 120 Tenn. 37, 113 S. W. 789, 127 Am. St. Rep. 991, 19 L. R. A. N. S. 479; Western Union Tel. Co. *v.* Kerr, 4 Tex. Civ. App. 280, 23 S. W. 564.

48. Western Union Tel. Co. *v.* Kerr, 4 Tex. Civ. App. 280, 23 S. W. 564.

49. Western Union Tel. Co. *v.* Potts, 120 Tenn. 37, 113 S. W. 789, 127 Am. St. Rep. 991, 19 L. R. A. N. S. 479; Western Union Tel. Co. *v.* Kerr, 4 Tex. Civ. App. 280, 23 S. W. 564.

50. Western Union Tel. Co. *v.* Potts, 120 Tenn. 37, 113 S. W. 789, 127 Am. St. Rep. 991, 19 L. R. A. N. S. 479. See also Helms *v.* Western Union Tel. Co., 143 N. C. 386, 55 S. E. 831, 8 L. R. A. N. S. 249.

51. Western Union Tel. Co. *v.* Manker, 145

b. Of Addressee. Since the undisclosed principal of the sender may sue;[52] a person may of course sue where he is the undisclosed principal of both the sender and the addressee,[53] but it has been held that the action cannot be maintained by one who is the undisclosed principal of the addressee alone.[54]

4. Agent. An agent who sends a message in his own name on behalf of an undisclosed principal may sue in his own name for a breach of the contract of transmission,[55] and may recover the entire damages, but as trustee for his principal.[56] So also where a message is addressed to an agent personally and the interest of his principal is not disclosed, the agent may sue;[57] but the agent cannot sue for damages due to an error in transmitting to him a message from his principal where the agency is disclosed and the agent acts under the message in the name of and for his principal.[58]

C. Pleading — 1. Complaint — a. In General.[59] As in other civil actions the complaint must allege every fact essential to plaintiff's cause of action,[60] and must therefore show the existence of a duty owing by defendant to plaintiff and a breach of that duty,[61] it being insufficient to allege a non-performance of certain acts without showing any duty or obligation on the part of defendant to perform the same.[62] The complaint must also set out distinctly the circum-

Ala. 418, 41 So. 850; Manker *v.* Western Union Tel. Co., 137 Ala. 292, 34 So. 839 [*disapproving* on this point Western Union Tel. Co. *v.* Wilson, 93 Ala. 32, 9 So. 414, 30 Am. St. Rep. 23].

52. See *supra*, VIII, B, 3, a.

53. Harkness *v.* Western Union Tel. Co., 73 Iowa 190, 34 N. W. 811, 5 Am. St. Rep. 672 (where a message was sent by one attorney to another, both of whom were agents of plaintiff); Western Union Tel. Co. *v.* Potts, 120 Tenn. 37, 113 S. W. 789, 127 Am. St. Rep. 991, 19 L. R. A. N. S. 479.

54. Western Union Tel. Co. *v.* Schriver, 141 Fed. 538, 72 C. C. A. 596, 4 L. R. A. N. S. 678. See also Lee *v.* Western Union Tel. Co., 51 Mo. App. 375, where in an action of tort brought by an agent to whom the message was addressed, and where there was nothing to indicate the interest of his principal, the court in sustaining the right of the agent to sue said that the action could not have been maintained by his principal. *Compare* Western Union Tel. Co. *v.* Potts, 120 Tenn. 37, 45, 113 S. W. 789, 127 Am. St. Rep. 991, 19 L. R. A. N. S. 479, where the court said: "It would seem to follow, from the principles above stated, that the undisclosed principal of the sendee might also bring the action; but the contrary has been held in two cases."

55. U. S. Telegraph Co. *v.* Gildersleve, 29 Md. 232, 96 Am. Dec. 519. See also, generally, Parties, 30 Cyc. 52; Principal and Agent, 31 Cyc. 1564.

56. U. S. Telegraph Co. *v.* Gildersleve, 29 Md. 232, 96 Am. Dec. 519.

57. Lee *v.* Western Union Tel. Co., 51 Mo. App. 375, where the action was in tort.

58. Rose *v.* U. S. Telegraph Co., 34 How. Pr. (N. Y.) 308.

59. In actions for injuries from construction see *supra*, II, D, 2, a.

In actions for penalties see *supra*, VII, E, 2.

60. South Florida Tel. Co. *v.* Maloney, 34 Fla. 338, 16 So. 280; Gist *v.* Western Union Tel. Co., 45 S. C. 344, 23 S. E. 143, 55 Am. St. Rep. 763.

61. *Florida.*— South Florida Tel. Co. *v.* Maloney, 34 Fla. 338, 16 So. 280.

Georgia.— Greenberg *v.* Western Union Tel. Co., 89 Ga. 754, 15 S. E. 651.

Massachusetts.— May *v.* Western Union Tel. Co., 112 Mass. 90.

Minnesota.— Abbott *v.* Western Union Tel. Co., 86 Minn. 44, 90 N. W. 1.

Texas.— Lewis *v.* Southwestern Tel., etc., Co., (Civ. App. 1900) 59 S. W. 303.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 54.

That a contract of transmission was made need not be alleged in express terms if the complaint alleges facts sufficient to show such contract. Western Union Tel. Co. *v.* Rowe, 44 Tex. Civ. App. 84, 98 S. W. 228. See also Western Union Tel. Co. *v.* Wilson, 93 Ala. 32, 9 So. 414, 30 Am. St. Rep. 23 (where the allegations were held sufficient to show a contract of transmission entered into between plaintiff, by his agent, and defendant); Milliken *v.* Western Union Tel. Co., 110 N. Y. 403, 18 N. E. 251, 1 L. R. A. 281 [*reversing* 53 N. Y. Super. Ct. 111] (where the complaint was held sufficient to show a special contract based upon a sufficient consideration to deliver to plaintiff at a certain place an expected message as soon as it arrived).

Allegations sufficient to show negligence on the part of defendant see Western Union Tel. Co. *v.* Jump, 8 Ky. L. Rep. 531.

Forwarding.— It is not sufficient to allege that defendant failed to forward a message from the original point of destination to the point where defendant was informed that the addressee in fact was, without some allegation of payment or offer to pay the cost of forwarding. Abbott *v.* Western Union Tel. Co., 86 Minn. 44, 90 N. W. 1.

62. South Florida Tel. Co. *v.* Maloney, 34 Fla. 338, 16 So. 280; Lewis *v.* Southwestern Tel., etc., Co., (Tex. Civ. App. 1900) 59 S. W. 303.

Failure to give telephone connection.—Thus

stances which create the liability of defendant,[63] and must allege facts and not legal conclusions,[64] and the facts relied on must be alleged positively and distinctly and not stated by way of argument or inference;[65] but it is not necessary to state the evidence of such facts,[66] or to anticipate and negative matters of defense,[67] or to negative the existence of contributory negligence on the part of plaintiff.[68] The complaint must, however, allege or show a compliance on the part of plaintiff with any conditions precedent,[69] such as a compliance with a statutory requirement that claims for damages shall be presented within a certain time,[70] or compliance with a stipulation in the contract of transmission to this effect where such a stipulation is regarded as a condition precedent;[71] but it is ordinarily held that such stipulations are not conditions precedent but are conditions subsequent,[72] and that a compliance therewith need not be alleged in the complaint.[73] If the message in question was a Sunday message the complaint must allege or show that it related to a matter of charity or necessity,[74] and if it related to a transaction in futures which might or might not be illegal the complaint must show that it related to a legal transaction.[75] In cases where defendant accepted the message in question for transmission the complaint need not allege that the charges were paid or guaranteed,[76] or that the message was presented in

an allegation that defendant, a telephone company, failed to notify plaintiffs that a certain party wished to talk with them is insufficient, without some allegation that defendant undertook or agreed to serve plaintiffs or that plaintiffs paid or were ready and willing to pay defendant for its services. Lewis *v.* Southwestern Tel., etc., Co., (Tex. Civ. App. 1900) 59 S. W. 303.

63. South Florida Tel. Co. *v.* Maloney, 34 Fla. 338, 342, 16 So. 280, where the court said: "The statement must set out distinctly the circumstances which create the liability of defendant. This statement may be concise and brief, but must be specific and definite."

In an action before a justice of the peace the statement will be held to be good if it identifies the message and the act of negligence of defendant sufficiently to bar another action for the same cause. Lee *v.* Western Union Tel. Co., 51 Mo. App. 375.

64. South Florida Tel. Co. *v.* Maloney, 34 Fla. 338, 16 So. 280.

65. Graddy *v.* Western Union Tel. Co., 43 S. W. 468, 19 Ky. L. Rep. 1455.

66. Howard *v.* Western Union Tel. Co., 76 S. W. 387, 25 Ky. L. Rep. 828; Western Union Tel. Co. *v.* Rowe, 44 Tex. Civ. App. 84, 98 S. W. 228; Mitchell *v.* Western Union Tel. Co., 5 Tex. Civ. App. 527, 24 S. W. 550.

A motion to make the complaint more definite and certain should be denied where the complaint states the essential facts and a compliance with the motion would merely require a statement of the evidence. Western Union Tel. Co. *v.* Wilhelm, 48 Nebr. 910, 67 N. W. 870.

67. Western Union Tel. Co. *v.* Henley, 157 Ind. 90, 60 N. E. 682; Western Union Tel. Co. *v.* Cook, 45 Tex. Civ. App. 87, 99 S. W. 1131.

Revenue stamp.— It has been held that it need not be alleged in an action for failure to deliver a message that the message had a revenue stamp affixed as required by statute, as this is a matter of defense which need not be anticipated. Western Union Tel. Co. *v.* Henley, 157 Ind. 90, 60 N. E. 682. But see Kirk *v.* Western Union Tel. Co., 90 Fed. 809, holding that such an allegation is necessary where the action is for refusal to transmit the message.

Delivery limits.— The complaint in an action for failure to deliver a message need not allege that the addressee lived or was to be found within defendant's free delivery limits, since if defendant has established such limits and the addressee does not live within the same this is a matter of defense. Western Union Tel. Co. *v.* Whitson, 145 Ala. 426, 41 So. 405.

68. Mitchell *v.* Western Union Tel. Co., 5 Tex. Civ. App. 527, 24 S. W. 550.

There is a conflict of authority in different jurisdictions upon the general question of the necessity of negativing contributory negligence. See NEGLIGENCE, 29 Cyc. 575.

69. Heald *v.* Western Union Tel. Co., 129 Iowa 326, 105 N. W. 588.

70. Heald *v.* Western Union Tel. Co., 129 Iowa 326, 105 N. W. 588.

71. Albers *v.* Western Union Tel. Co., 98 Iowa 51, 66 N. W. 1040; Western Union Tel. Co. *v.* Hays, (Tex. Civ. App. 1901) 63 S. W. 171.

72. See *supra*, V, A, 4, c.

73. Western Union Tel. Co. *v.* Trumbull, 1 Ind. App. 121, 27 N. E. 313; Sherrill *v.* Western Union Tel. Co., 109 N. C. 527, 14 S. E. 94; Western Union Tel. Co. *v.* Piner, 9 Tex. Civ. App. 152, 29 S. W. 66.

As a matter of special defense to be specially pleaded by defendant see *infra*, VIII, C, 2.

74. Western Union Tel. Co. *v.* Henley, 23 Ind. App. 14, 54 N. E. 775. See also Western Union Tel. Co. *v.* Eskridge, 7 Ind. App. 208, 33 N. E. 238, holding, however, that an objection to a complaint on this ground cannot be taken by demurrer but only by answer.

75. Gist *v.* Western Union Tel. Co., 45 S. C. 344, 23 S. E. 143, 55 Am. St. Rep. 763.

76. Western Union Tel. Co. *v.* Henley, 157

writing,[77] or during the company's regular office hours; [78] but if the action is for a refusal to receive and transmit the message, the complaint must show some duty or obligation on the part of defendant to do so.[79] It is not necessary for the complaint to set out or state the language of the message in question,[80] but if the message was in cipher the complaint should show the translation or meaning thereof.[81] The complaint may be amended provided the amendment does not set up a new cause of action.[82]

b. Allegations as to Damages — (i) *In General.* A complaint alleging a valid contract of transmission between plaintiff and defendant and a breach thereof by the latter, although it does not show any substantial damages resulting from the breach, will warrant a recovery of nominal damages; [83] but in order to recover substantial compensatory damages the complaint must show that such damages were sustained.[84] General damages, such as naturally result from the act complained of or which the law implies therefrom, need not be specially pleaded but may be recovered under a general averment of damages,[85] and the price paid for transmission if alleged to have been paid is not special damage but may be recovered, it has been held, under a general allegation of damages; [86] but in order to recover what are known as special damages such damages must be specially pleaded,[87] and the allegations of the complaint must be sufficient properly

Ind. 90, 60 N. E. 682; Western Union Tel. Co. *v.* Meek, 49 Ind. 53; Western Union Tel. Co. *v.* Snodgrass, 94 Tex. 284, 60 S. W. 308, 86 Am. St. Rep. 851.

77. Western Union Tel. Co. *v.* Wilson, 93 Ala. 32, 9 So. 414, 30 Am. St. Rep. 23.

78. Western Union Tel. Co. *v.* Pells, 2 Tex. App. Civ. Cas. § 41.

79. Southern Florida Tel. Co. *v.* Maloney, 34 Fla. 338, 16 So. 280 (holding that a complaint for failure to receive a message for transmission is fatally defective where it merely alleges that defendant is a corporation and that it refused to receive the message, without alleging that defendant owned or operated a telegraph line or had any facilities for transmitting messages or was engaged in such business or had an office at the place to which the message was addressed or even that its refusal to receive the message was wilful or wrongful); Kirk *v.* Western Union Tel. Co., 90 Fed. 809 (holding that in an action for failure to transmit a message the complaint must allege that a revenue stamp was affixed thereto, where such a stamp was required by statute and it was the duty of the sender to affix the same and defendant was subject to a penalty for transmitting unstamped messages).

80. Lee *v.* Western Union Tel. Co., 51 Mo. App. 375; Butler *v.* Western Union Tel. Co., 62 S. C. 222, 40 S. E. 162, 89 Am. St. Rep. 893.

81. Bashinsky *v.* Western Union Tel. Co., 1 Ga. App. 761, 58 S. E. 91, holding that where it is alleged that damages have resulted from the failure promptly to deliver a cipher message which embodies a contract the fulfilment of which it is claimed would have been profitable to plaintiff and the loss whereof has damaged him, plaintiff must translate such cipher message in the complaint.

82. Western Union Tel. Co. *v.* Way, 83 Ala. 542, 4 So. 844; Western Union Tel. Co. *v.* Corso, 121 Ky. 322, 89 S. W. 212, 28 Ky. L. Rep. 290; Western Union Tel. Co. *v.* Norris, 25 Tex. Civ. App. 43, 60 S. W. 982; Western Union Tel. Co. *v.* Pelzer, (Tex. Civ. App. 1896) 35 S. W. 836.

83. Stafford *v.* Western Union Tel. Co., 73 Fed. 273.

84. Bashinsky *v.* Western Union Tel. Co., 1 Ga. App. 761, 58 S. E. 91.

Allegations held sufficient.— In an action for failure promptly to deliver a message a complaint alleging that by reason of such failure plaintiff's debtor in the meanwhile converted his property into money and fled from the state to parts unknown, whereby plaintiff was prevented from collecting and lost a debt, sufficiently shows that plaintiff sustained a substantial injury. Bierhaus *v.* Western Union Tel. Co., 8 Ind. App. 246, 34 N. E. 581.

If the complaint shows that plaintiff could have avoided by the exercise of ordinary care the damages resulting from defendant's negligence, he cannot recover more than nominal damages. Trigg *v.* Western Union Tel. Co., 4 Ga. App. 416, 61 S. E. 855.

85. So Relle *v.* Western Union Tel. Co., 55 Tex. 308, 40 Am. Rep. 805. See also, generally, DAMAGES, 13 Cyc. 175.

86. Western Union Tel. Co. *v.* McMorris, 158 Ala. 563, 48 So. 349, 132 Am. St. Rep. 46. See also Stafford *v.* Western Union Tel. Co., 73 Fed. 273.

87. *California.*— Pacific Pine Lumber Co. *v.* Western Union Tel. Co., 123 Cal. 428, 56 Pac. 103.

Georgia.— Bass *v.* Postal Tel. Co., 127 Ga. 423, 56 S. E. 465, 12 L. R. A. N. S. 489.

Kentucky.— Graddy *v.* Western Union Tel. Co., 43 S. W. 468, 19 Ky. L. Rep. 1455.

Missouri.— Barrett *v.* Western Union Tel. Co., 42 Mo. App. 542.

South Carolina.— Capers *v.* Western Union Tel. Co., 71 S. C. 29, 50 S. E. 537 (fact that addressee would have complied with request); Simmons *v.* Western Union Tel. Co., 63 S. C. 425, 41 S. E. 521, 57 L. R. A. 607

to apprise defendant of the nature and amount of the damages claimed;[88] but, although the special damages claimed are defectively pleaded or are too remote or otherwise not recoverable, the complaint is not subject to general demurrer if it would warrant a recovery of general or of nominal damages.[89] If plaintiff seeks to increase his measure of damages by proof that at the time the message was accepted by the company the latter had notice from some source other than the language of the message itself of its importance and of the consequences which would result from a failure duly to deliver it,[90] he must allege such special notice;[91] but it is not necessary to allege such notice where the complaint sets out the message and the language of the message is sufficient to charge the company with notice of its urgency and importance.[92]

(II) *EXEMPLARY DAMAGES.*[93] While it has been held that the complaint should state whether the damages claimed therein are actual or exemplary,[94]

(physical suffering, and expenses for medicine and nursing, in mental anguish case); Mood *v.* Western Union Tel. Co., 40 S. C. 524, 19 S. E. 67 (loss of contract of employment).

Texas.— Western Union Tel. Co. *v.* Turner, (Civ. App. 1904) 78 S. W. 362; Western Union Tel. Co. *v.* Partlow, 30 Tex. Civ. App. 599, 71 S. W. 584 (action for loss of employment; expense of securing another position not provable unless alleged); Western Union Tel. Co. *v.* Bell, 24 Tex. Civ. App. 572, 59 S. W. 918.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 55; and, generally, DAMAGES, 13 Cyc. 176.

In an action before a justice of the peace the rule that special damages must be specially pleaded does not apply. Lee *v.* Western Union Tel. Co., 51 Mo. App. 375.

88. Bashinsky *v.* Western Union Tel. Co., 1 Ga. App. 761, 58 S. E. 91; Ferguson *v.* Anglo-American Tel. Co., 151 Pa. St. 211, 25 Atl. 40; Purdom Naval Stores Co. *v.* Western Union Tel. Co., 153 Fed. 327.

Loss of commissions.—Where the complaint is based upon the non-delivery of a message relating to a contract, on which if consummated plaintiff would have earned commissions, the complaint must show the nature and terms of the contract and the amount of the commissions contracted for or what would have accrued to plaintiff upon the completion of the contract. Bashinsky *v.* Western Union Tel. Co., 1 Ga. App. 761, 58 S. E. 91.

Message accepting offer.— Where a telegraph company failed to deliver a message accepting an offer for the sale of the addressee's business, possession to be delivered on completion of the addressee's business year, a complaint for damages, failing to definitely allege the time when possession and delivery were to be accomplished, was defective. Purdom Naval Stores Co. *v.* Western Union Tel. Co., 153 Fed. 327.

Allegations held sufficient.— In an action for a loss on a shipment of cattle to a certain market due to the non-delivery of a message to plaintiff notifying him not to make the shipment, a complaint alleging the market value of the cattle at the time and place of shipment, the cost of shipment and the amount realized on a sale at the place of destination, is sufficient to show plaintiff's damages. Western Union Tel. Co. *v.* Linney, (Tex. Civ. App. 1894) 28 S. W. 234. Allegations held sufficient as to damages due to a loss of profits on an exchange of property which was prevented by the non-delivery of a message see Western Union Tel. Co. *v.* Wilhelm, 48 Nebr. 910, 67 N. W. 870.

89. *Alabama.*— Western Union Tel. Co. *v.* McMorris, 158 Ala. 563, 48 So. 349, 132 Am. St. Rep. 46.

Florida.— Western Union Tel. Co. *v.* Merritt, 55 Fla. 462, 46 So. 1024, 127 Am. St. Rep. 169.

Georgia.—Trigg *v.* Western Union Tel. Co., 4 Ga. App. 416, 61 S. E. 855.

Indiana.— Western Union Tel. Co. *v.* Hopkins, 49 Ind. 223.

Kentucky.— Taliferro *v.* Western Union Tel. Co., 54 S. W. 825, 21 Ky. L. Rep. 1290.

Mississippi.— Alexander *v.* Western Union Tel. Co., 66 Miss. 161, 5 So. 397, 14 Am. St. Rep. 556, 3 L. R. A. 71.

North Carolina.— Hall *v.* Western Union Tel. Co., 139 N. C. 369, 52 S. E. 50.

United States.— Stafford *v.* Western Union Tel. Co., 73 Fed. 273.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 55; and, generally, DAMAGES, 13 Cyc. 174, 178.

90. See *infra*, IX, B, 1, a, (I).

91. Taylor *v.* Western Union Tel. Co., 101 S. W. 969, 31 Ky. L. Rep. 240; Graddy *v.* Western Union Tel. Co., 43 S. W. 468, 19 Ky. L. Rep. 1455; Fass *v.* Western Union Tel. Co., 82 S. C. 461, 64 S. E. 235; Western Union Tel. Co. *v.* Steele, (Tex. Civ. App. 1908) 110 S. W. 546; Western Union Tel. Co. *v.* Turner, (Tex. Civ. App. 1904) 78 S. W. 362.

Cipher message.— In order to recover damages for negligence in the transmission of a cipher message the complaint must allege that defendant when it received the message was notified of its value and importance. Harrison *v.* Western Union Tel. Co., 3 Tex. App. Civ. Cas. § 43.

92. Western Union Tel. Co. *v.* Eskridge, 7 Ind. App. 208, 33 N. E. 238.

93. Right to recover exemplary damages see *infra*, IX, C.

94. McAllen *v.* Western Union Tel. Co., 70 Tex. 243, 7 S. W. 715.

the rule in most jurisdictions seems to be that exemplary damages need not be claimed *eo nomine* but may be recovered under a claim for damages generally.[95] The complaint must, however, allege facts sufficient to warrant a recovery of such damages.[96]

c. In Mental Anguish Cases. In mental anguish cases, except in so far as affected by the necessity of particular allegations, the general rules previously stated apply.[97] Damages for mental anguish due to negligence in the transmission or delivery of a message announcing the illness or death of a near relative, whereby plaintiff is prevented from seeing the relative before death or from being present at the funeral, are the natural result of such negligence and are therefore general damages which may be recovered under a general allegation of damages;[98] but, where the relationship between the parties is remote, damages for mental anguish are special and must be specially pleaded.[99] So also if plaintiff relies on any special circumstances as elements of such damages, he must allege them,[1] such as having to leave the corpse of a relative on a depot platform because he was not met at a railroad station,[2] or the missing of a funeral as well as a burial, as alleged in the complaint;[3] but allegations of this character if made should not be stricken out if they are relevant to the cause of action stated.[4] Since in order to recover for mental anguish due to plaintiff being prevented from being present at the death-bed or funeral of a relative, it must be affirmatively shown that but for defendant's negligence he not only could but would have gone,[5] it has been held that this must be alleged in the complaint,[6] although it is not necessary to set forth the evidence of such fact.[7] If the message was not of such a character as to apprise defendant that mental anguish would be likely to result from negligence in regard to its transmission or delivery, it must be alleged that defendant

95. See DAMAGES, 13 Cyc. 177.

Under the South Carolina statute in actions *ex delicto* for actual and for punitive damages, plaintiff is not required to make separate allegations setting up such damages. Machen *v.* Western Union Tel. Co., 63 S. C. 363, 41 S. E. 448; Butler *v.* Western Union Tel. Co., 62 S. C. 222, 40 S. E. 162.

96. Daniel *v.* Western Union Tel. Co., 61 Tex. 452, 48 Am. Rep. 305; Western Union Tel. Co. *v.* Godsey, (Tex. App. 1890) 16 S. W. 789.

Sufficiency of allegations.— A complaint is not sufficient to warrant a recovery of exemplary damages where it merely contains vague and indefinite allegations of negligence (Daniel *v.* Western Union Tel. Co., 61 Tex. 452, 48 Am. Rep. 305), or even of gross negligence unaccompanied by any allegations of facts which would warrant a recovery of such damages (Western Union Tel. Co. *v.* Godsey, (Tex. App. 1890) 16 S. W. 789); but it is sufficient where it alleges "wilful negligence" (Hartzog *v.* Western Union Tel. Co., (Miss. 1902) 34 So. 361), or alleges a "wanton, wilful and grossly negligent" failure to deliver a message (Butler *v.* Western Union Tel. Co., 62 S. C. 222, 40 S. E. 162), or that such failure was due to "gross negligence, carelessness, wantonness and reckless mismanagement" (Machen *v.* Western Union Tel. Co., 63 S. C. 363, 41 S. E. 448), provided it states with sufficient definiteness the acts so characterized (see Machen *v.* Western Union Tel. Co., *supra*).

97. See *supra*, VIII, C, 1, a, b.

98. So Relle *v.* Western Union Tel. Co., 55 Tex. 308, 40 Am. Rep. 805. See also Havener *v.* Western Union Tel. Co., 117 N. C. 540, 23 S. E. 457.

99. Amos *v.* Western Union Tel. Co., 79 S. C. 259, 60 S. E. 660, 128 Am. St. Rep. 845.

1. Western Union Tel. Co. *v.* Turner, (Tex. Civ. App. 1904) 78 S. W. 362.

2. Western Union Tel. Co. *v.* Turner, (Tex. Civ. App. 1904) 78 S. W. 362.

3. Graddy *v.* Western Union Tel. Co., 43 S. W. 468, 19 Ky. L. Rep. 1455.

4. Simmons *v.* Western Union Tel. Co., 63 S. C. 425, 41 S. E. 521, 57 L. R. A. 607.

5. See *infra*, IX, B, 3, d, (IV).

6. Western Union Tel. Co. *v.* Bell, 42 Tex. Civ. App. 462, 92 S. W. 1036. See also Western Union Tel. Co. *v.* Rowe, 44 Tex. Civ. App. 84, 98 S. W. 228. *Contra*, Harrison *v.* Western Union Tel. Co., 71 S. C. 386, 51 S. E. 119.

Sufficiency of allegations.— While it is not necessary that plaintiff should allege in express terms that he could and would have gone, there must be such allegations of fact as necessarily include this statement, and it is not sufficient to allege that by reason of defendant's negligence plaintiff was unable to leave until too late to be present at the funeral or that he could have been present if the message had been delivered within a reasonable time. Western Union Tel. Co. *v.* Bell, 42 Tex. Civ. App. 462, 92 S. W. 1036. But see Western Union Tel. Co. *v.* Eskridge 7 Ind. App. 208, 33 N. E. 238, holding that it is sufficient where the complaint alleges that by reason of defendant's negligence plaintiff was "prevented" from going.

7. Howard *v.* Western Union Tel. Co., 76

had notice of the special circumstances giving rise to such damages,[8] and if the relationship between the parties was not sufficiently close to give rise to a presumption of mental anguish, it must be alleged that there were special relations of intimacy or affection,[9] and that defendant had notice of such special relations.[10]

2. ANSWER. A general denial puts in issue not only the negligence or other breach of duty relied on, but also the happening of any damage as a proximate result thereof.[11] Special matters of affirmative defense must, however, be specially pleaded.[12]

D. Issues, Proof, and Variance. Only such evidence is admissible as is justified by the pleadings,[13] and if plaintiff alleges a particular contract and a breach thereof, evidence of a different contract is inadmissible.[14] Special damages cannot be proved unless pleaded,[15] and such damages must be proved as alleged.[16] So evidence is not admissible to show special damages other than those pleaded,[17] or of a particular element of such damages which is not alleged in the complaint;[18] nor is evidence of extrinsic notice of facts which would give rise to special damages admissible unless pleaded.[19] So in a mental anguish case where the family relationship between the parties is too remote to give rise to a presumption of mental anguish, evidence of any special relations of intimacy or affection is not

S. W. 387, 25 Ky. L. Rep. 828; Western Union Tel. Co. *v.* Rowe, 44 Tex. Civ. App. 84, 98 S. W. 228.

8. Fass *v.* Western Union Tel. Co., 82 S. C. 461, 64 S. E. 235; Western Union Tel. Co. *v.* Steele, (Tex. Civ. App. 1908) 110 S. W. 546.

Sufficiency of allegations.— In an action against a telegraph company for delay in delivering a telegram, an allegation that "notwithstanding the defendant had every reason to know the message was important" is sufficient to apprise defendant of plaintiff's intention to prove notice of reasons why the message was important. Dempsey *v.* Western Union Tel. Co., 77 S. C. 399, 58 S. E. 9.

9. Amos *v.* Western Union Tel. Co., 79 S. C. 259, 60 S. E. 660, 128 Am. St. Rep. 845; McDowell *v.* Western Union Tel. Co., 79 S. C. 257, 60 S. E. 662; Little *v.* Western Union Tel. Co., 79 S. C. 255, 60 S. E. 663.

10. Amos *v.* Western Union Tel. Co., 79 S. C. 259, 60 S. E. 660, 128 Am. St. Rep. 845.

11. Mitchiner *v.* Western Union Tel. Co., 70 S. C. 522, 50 S. E. 190, holding that in an action for a negligent delay in delivering a message where defendant pleads a general denial he may show that the injury was due to the negligence of plaintiff and that this is not an affirmative defense which must be established by a preponderance of evidence.

12. *Alabama.*— Western Union Tel. Co. *v.* Whitson, 145 Ala. 426, 41 So. 405 (free delivery limit stipulation); Collins *v.* Western Union Tel. Co., 145 Ala. 412, 41 So. 160; Harris *v.* Western Union Tel. Co., 121 Ala. 519, 25 So. 910, 77 Am. St. Rep. 70 (sixty-day limitation for presenting claims); Western Union Tel. Co. *v.* Henderson, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148 (free delivery limit stipulation).

Indiana.—Western Union Tel. Co. *v.* Trumbull, 1 Ind. App. 121, 27 N. E. 313, stipulations requiring claims to be presented within sixty days.

Missouri.— Kendall *v.* Western Union Tel. Co., 56 Mo. App. 192, limitation for presenting claims.

Pennsylvania.— Conrad *v.* Western Union Tel. Co., 162 Pa. St. 204, 29 Atl. 888, connecting line defense.

Texas.— Western Union Tel. Co. *v.* Linney, (Civ. App. 1894) 28 S. W. 234 (limitation for presenting claims); Western Union Tel. Co. *v.* Smith, (Civ. App. 1894) 26 S. W. 216 (special contract).

Washington.— Martin *v.* Sunset Tel., etc., Co., 18 Wash. 260, 51 Pac. 376, limitation for presenting claims.

13. Barrett *v.* Western Union Tel. Co., 42 Mo. App. 542; Western Union Tel. Co. *v.* Byrd, 34 Tex. Civ. App. 594, 79 S. W. 40.

It is not error to admit evidence which tends to support allegations contained in the complaint where no motion was made to strike out such allegations. Martin *v.* Western Union Tel. Co., 81 S. C. 432, 62 S. E. 833.

14. Western Union Tel. Co. *v.* Byrd, 34 Tex. Civ. App. 594, 79 S. W. 40, holding that where the complaint alleges a contract to transmit and deliver a message to the addressee at a particular town, evidence of a contract to deliver the message at the home of the addressee over two miles from such town is not admissible.

15. Amos *v.* Western Union Tel. Co., 79 S. C. 259, 60 S. E. 660, 128 Am. St. Rep. 845. See also *supra*, VIII, C, 1, b, (I).

16. Barrett *v.* Western Union Tel. Co., 42 Mo. App. 542.

17. Barrett *v.* Western Union Tel. Co., 42 Mo. App. 542, holding that where plaintiff alleges as damages for failure to transmit a telegram a loss on cattle shipped and sold in a certain market, evidence is not admissible of a loss on cattle shipped and sold elsewhere.

18. Western Union Tel. Co. *v.* Turner, (Tex. Civ. App. 1904) 78 S. W. 362.

19. Fass *v.* Western Union Tel. Co., 82 S. C. 461, 64 S. E. 235.

admissible unless alleged.[20] The allegations and the proof must correspond, and any material variance is fatal to a recovery;[21] but a variance which is not material will be disregarded.[22]

E. Evidence — 1. Presumptions and Burden of Proof — a. In General. As in other civil actions the burden is upon plaintiff to establish his case,[23] and to show the existence of a contract of transmission or duty owing to him by defendant and a breach thereof or negligence on the part of defendant,[24] and that such negligence or default was the proximate cause of the injury complained of.[25] So in an action for non-delivery it has been held that the burden is upon plaintiff to show that the addressee lived within the company's free delivery limits,[26] and that at the time he was at the place to which the message was addressed, so that it could have been delivered.[27] It is ordinarily held, however, that unless there

20. Amos *v.* Western Union Tel. Co., 79 S. C. 259, 60 S. E. 660, 128 Am. St. Rep. 845; McDowell *v.* Western Union Tel. Co., 79 S. C. 257, 60 S. E. 662; Little *v.* Western Union Tel. Co., 79 S. C. 255, 60 S. E. 663.

21. Western Union Tel. Co. *v.* Smith, 88 Tex. 9, 28 S. W. 931, 30 S. W. 549 [*reversing* (Civ. App. 1895) 30 S. W. 957] (holding that there is a material variance between an allegation that defendant undertook to transmit a message between certain points and deliver it to plaintiff and proof that the contract was made with another company from which defendant received the message at an intermediate point to undertake to forward it); Western Union Tel. Co. *v.* Byrd, 34 Tex. Civ. App. 594, 79 S. W. 40 (holding that there is a material variance between an allegation that defendant contracted to transmit and deliver the message to the addressee at a particular town and proof of a contract to deliver it at the addressee's home over two miles from such town).

22. Pope *v.* Western Union Tel. Co., 9 Ill. App. 283; Western Union Tel. Co. *v.* Roberts, 34 Tex. Civ. App. 76, 78 S. W. 522 (allegation that dying mother was "at" H, and proof that she was in fact two miles from H, in the country: held not fatal); Western Union Tel. Co. *v.* Pelzer, (Tex. Civ. App. 1896) 35 S. W. 836 (petition alleging message sent for doctor for two children, and proof showing message in fact mentioned only one: held not fatal); Western Union Tel. Co. *v.* Linney, (Tex. Civ. App. 1894) 28 S. W. 234 (holding that a variance of one day between the allegation and proof as to the time when the message should have been delivered is not material where the date of the message was correctly given); Western Union Tel. Co. *v.* Hinkle, 3 Tex. Civ. App. 518, 22 S. W. 1004.

23. U. S. Tel. Co. *v.* Gildersleve, 29 Md. 232, 96 Am. Dec. 519; Hauser *v.* Western Union Tel. Co., 150 N. C. 557, 64 S. E. 503; Western Union Tel. Co. *v.* Barnes, 95 Tenn. 271, 32 S. W. 207; White *v.* Western Union Tel. Co., 14 Fed. 710, 5 McCrary 103.

24. *Maryland.*— U. S. Tel. Co. *v.* Gildersleve, 29 Md. 232, 96 Am. Dec. 519.

New York.— Ayres *v.* Western Union Tel. Co., 65 N. Y. App. Div. 149, 72 N. Y. Suppl. 634; Altman *v.* Western Union Tel. Co., 84 N. Y. Suppl. 54.

Tennessee.— Western Union Tel. Co. *v.* Barnes, 95 Tenn. 271, 32 S. W. 207.

Texas.— Western Union Tel. Co. *v.* Smith, 88 Tex. 9, 28 S. W. 931, 30 S. W. 549; Hargrave *v.* Western Union Tel. Co., (Civ. App. 1901) 60 S. W. 687; Western Union Tel. Co. *v.* Bennett, 1 Tex. Civ. App. 558, 21 S. W. 699; Western Union Tel. Co. *v.* Bertram, 1 Tex. App. Civ. Cas. § 1152.

United States.— White *v.* Western Union Tel. Co., 14 Fed. 710, 5 McCrary 103.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 61.

The burden is upon plaintiff to show that defendant undertook to transmit and deliver the message, that it failed to do so as agreed, and that plaintiff sustained damage by reason of such failure. Western Union Tel. Co. *v.* Bertram, 1 Tex. App. Civ. Cas. § 1152.

Where the action is for special damages the burden is upon plaintiff to show a breach of the contract or negligence on the part of defendant causing such damages. Western Union Tel. Co. *v.* Bennett, 1 Tex. Civ. App. 558, 21 S. W. 699.

Where a message is addressed to two persons jointly the burden is upon plaintiff in order to show an actionable breach of duty to establish that it was not delivered to either of them. Western Union Tel. Co. *v.* Barnes, 95 Tenn. 271, 32 S. W. 207.

25. Hauser *v.* Western Union Tel. Co., 150 N. C. 557, 64 S. E. 503; Wampum First Nat. Bank *v.* Western Union Tel. Co., 34 Pa. Super. Ct. 488.

Message summoning physician.— In an action for failure to deliver a message summoning a physician the burden is upon plaintiff to show that if the message had been delivered the physician would have come. Slaughter *v.* Western Union Tel. Co., (Tex. Civ. App. 1908) 112 S. W. 688.

26. Western Union Tel. Co. *v.* Benson, 159 Ala. 254, 48 So. 712; Western Union Tel. Co. *v.* Whitson, 145 Ala. 426, 41 So. 405; Western Union Tel. Co. *v.* Henderson, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148.

27. Western Union Tel. Co. *v.* McMorris, 158 Ala. 563, 48 So. 349, 132 Am. St. Rep. 46; Western Union Tel. Co. *v.* Bennett, 1 Tex. Civ. App. 558, 21 S. W. 699. See also Western Union Tel. Co. *v.* Crowley, 158 Ala. 583, 48 So. 381, where, however, it was held that the facts shown were sufficient to war-

is some valid stipulation in the contract of transmission limiting the liability of the company,[28] proof by plaintiff of any material error made in the transmission of a message,[29] or of an unusual or unreasonable delay,[30] or of its non-deliv-

rant an inference that the message could have been delivered. But see Pope *v.* Western Union Tel. Co., 9 Ill. App. 283.

Plaintiff need not show that the addressee was at his office, however, and ready to receive the message, and an instruction to the contrary is erroneous as assuming that the only place for delivery is at the office of the addressee and ignoring the duty of defendant to exercise due diligence to find the addressee and deliver the message. Pope *v.* Western Union Tel. Co., 9 Ill. App. 283.

28. See Kiley *v.* Western Union Tel Co., 109 N. Y. 231, 16 N. E. 75; Ayres *v.* Western Union Tel. Co., 65 N. Y. App. Div. 149, 72 N. Y. Suppl. 634.

What stipulations are valid see *supra*, V, A.

29. *Arkansas.*— Western Union Tel. Co. *v.* Short, 53 Ark. 434, 14 S. W. 649, 9 L. R. A. 744.

Georgia.—Western Union Tel. Co. *v.* Cohen, 73 Ga. 522.

Illinois.— Western Union Tel. Co. *v.* Tyler, 74 Ill. 168, 24 Am. Rep. 279; Western Union Tel. Co. *v.* Hart, 62 Ill. App. 120.

Indiana.— Western Union Tel. Co. *v.* Meek, 49 Ind. 53.

Iowa.— Hise *v.* Western Union Tel. Co., 137 Iowa 329, 113 N. W. 819; Turner *v.* Hawkeye Tel. Co., 41 Iowa 458, 20 Am. Rep. 605.

Kansas.— Western Union Tel. Co. *v.* Howell, 38 Kan. 685, 17 Pac. 313; Western Union Tel. Co. *v.* Crall, 38 Kan. 679, 17 Pac. 309, 5 Am. St. Rep. 795.

Maine.— Ayer *v.* Western Union Tel. Co., 79 Me. 493, 10 Atl. 495, 1 Am. St. Rep. 353; Bartlett *v.* Western Union Tel. Co., 62 Me. 209, 16 Am. Rep. 437.

Mississippi.— Western Union Tel. Co. *v.* Goodbar, (1890) 7 So. 214.

Missouri.— Reed *v.* Western Union Tel. Co., 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492. But see E. P. Cowen Lumber Co. *v.* Western Union Tel. Co., 58 Mo. App. 257.

Nebraska.— Western Union Tel. Co. *v.* Kemp, 44 Nebr. 194, 62 N. W. 451, 48 Am. St. Rep. 723.

New York.— Pearsall *v.* Western Union Tel. Co., 124 N. Y. 256, 26 N. E. 534, 21 Am. St. Rep. 662; Baldwin *v.* U. S. Telegraph Co., 45 N. Y. 744, 6 Am. Rep. 165; Rittenhouse *v.* Independent Line of Tel., 44 N. Y. 263, 4 Am. Rep. 673 [*affirming* 1 Daly 474]; Wolfskehl *v.* Western Union Tel. Co., 46 Hun 542.

North Carolina.—Pegram *v.* Western Union Tel. Co., 97 N. C. 57, 2 S. E. 256.

Ohio.—Western Union Tel. Co. *v.* Griswold, 37 Ohio St. 301, 41 Am. Rep. 500; Bowen *v.* Lake Erie Tel. Co., 1 Ohio Dec. (Reprint) 574, 10 West. L. J. 415.

Texas.— Western Union Tel. Co. *v.* Hamilton, 36 Tex. Civ. App. 300, 81 S. W. 1052 (change of the letter "h" to "k"); Western Union Tel. Co. *v.* Brown, (Civ. App. 1903) 75 S. W. 359; Western Union Tel. Co. *v.* Ragland, (Civ. App. 1901) 61 S. W. 421; Western Union Tel. Co. *v.* Norris, 25 Tex. Civ. App. 43, 60 S. W. 982; Western Union Tel. Co. *v.* Tobin, (Civ. App. 1900) 56 S. W. 540; Western Union Tel. Co. *v.* Hines, 22 Tex. Civ. App. 315, 54 S. W. 627; Western Union Tel. Co. *v.* Harper, 15 Tex. Civ. App. 37, 39 S. W. 599.

Utah.— Wertz *v.* Western Union Tel. Co., 7 Utah 446, 27 Pac. 172, 13 L. R. A. 510.

United States.— Western Union Tel. Co. *v.* Cook, 61 Fed. 624, 9 C. C. A. 680.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 61.

Proof of the delivery of a forged message, of its forged character, and of damage resulting from its delivery, is a *prima facie* case in an action of tort for the wrongful delivery of such a message. Western Union Tel. Co. *v.* Uvalde Nat. Bank, 97 Tex. 219, 77 S. W. 603, 65 L. R. A. 805.

30. *Georgia.*— Western Union Tel. Co. *v.* Fatman, 73 Ga. 285, 54 Am. Rep. 877.

Indiana.— Western Union Tel. Co. *v.* Scircle, 103 Ind. 227, 2 N. E. 604.

Iowa.— Potter *v.* Western Union Tel. Co., 138 Iowa 406, 116 N. W. 130; Harkness *v.* Western Union Tel. Co., 73 Iowa 190, 34 N. W. 811, 5 Am. St. Rep. 672.

Kentucky.— Western Union Tel. Co *v.* Fisher, 107 Ky. 513, 54 S. W. 830, 21 Ky. L. Rep. 1293; Western Union Tel. Co. *v.* Parsons, 72 S. W. 800, 24 Ky. L. Rep. 2008.

Missouri.— Kendall *v.* Western Union Tel. Co., 56 Mo. App. 192, holding that where the usual time for the transmission and delivery of a message between certain points is from fifteen to forty-five minutes, a delay of twelve hours raises a presumption of negligence.

North Carolina.— Shepard *v.* Western Union Tel. Co., 143 N. C. 244, 55 S. E. 704; Carter *v.* Western Union Tel. Co., 141 N. C. 374, 54 S. E. 274; Alexander *v.* Western Union Tel. Co., 141 N. C. 75, 53 S. E. 657; Green *v.* Western Union Tel. Co., 136 N. C. 489, 49 S. E. 165, 103 Am. St. Rep. 955, 67 L. R. A. 985; Harrison *v.* Western Union Tel. Co., 136 N. C. 381, 48 S. E. 772; Cogdell *v.* Western Union Tel. Co., 135 N. C. 431, 47 S. E. 490.

South Carolina.— Kirby *v.* Western Union Tel. Co., 77 S. C. 404, 58 S. E. 10, 122 Am. St. Rep. 580; Eaker *v.* Western Union Tel. Co., 75 S. C. 97, 55 S. E. 129; Arial *v.* Western Union Tel. Co., 70 S. C. 418, 50 S. E. 6; Hellams *v.* Western Union Tel. Co., 70 S. C. 83, 49 S. E. 12; Poulnot *v.* Western Union Tel. Co., 69 S. C. 545, 48 S. E. 622; Young *v.* Western Union Tel. Co., 65 S. C. 93, 43 S. E. 448.

Texas.— Western Union Tel. Co. *v.* Smith, 88 Tex. 9, 28 S. W. 931, 30 S. W. 549; Western Union Tel. Co. *v.* Bouchell, 28 Tex. Civ.

ery,[31] makes a *prima facie* case of negligence placing the burden of proof upon defendant to show the contrary.[32] This rule is not affected by any stipulation in the contract of transmission limiting the liability of the company, where the stipulation is invalid;[33] but in a few cases it has been held that a stipulation limiting liability, although invalid as against negligence on the part of defendant, is valid with regard to errors due to unavoidable causes, such as atmospheric interference,[34] and that where the contract contains such a stipulation the burden is upon plaintiff to show negligence,[35] and also that where, as in some jurisdictions, the stipulation

App. 23, 67 S. W. 159; Western Union Tel. Co. *v.* Boots, 10 Tex. Civ. App. 540, 31 S. W. 825; Western Union Tel. Co. *v.* Carter, (Civ. App. 1892) 20 S. W. 834.

United States.— Dorgan *v.* Western Union Tel. Co., 7 Fed. Cas. No. 4,004.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 61.

31. *Alabama.*— Western Union Tel. Co. *v.* Merrill, 144 Ala. 618, 39 So. 121, 113 Am. St. Rep. 66.

Arkansas.— Little Rock, etc., Tel. Co. *v.* Davis, 41 Ark. 79.

Illinois.— Pope *v.* Western Union Tel. Co., 9 Ill. App. 283.

Missouri.— Barrett *v.* Western Union Tel. Co., 42 Mo. App. 542.

North Carolina.— Woods *v.* Western Union Tel. Co., 148 N. C. 1, 61 S. E. 653, 128 Am. St. Rep. 581; Hunter *v.* Western Union Tel. Co., 130 N. C. 602, 41 S. E. 796; Rosser *v.* Western Union Tel. Co., 130 N. C. 251, 41 S. E. 378; Sherrill *v.* Western Union Tel. Co., 116 N. C. 655, 21 S. E. 429.

Texas.— Western Union Tel. Co. *v.* Bertram, 1 Tex. App. Civ. Cas. § 1152.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 61.

32. *Arkansas.*— Western Union Tel. Co. *v.* Short, 53 Ark. 434, 14 S. W. 649, 9 L. R. A. 744, error in transmission.

Illinois.— Western Union Tel. Co. *v.* Tyler, 74 Ill. 168, 24 Am. Rep. 279, error in transmission.

Indiana.—Western Union Tel. Co. *v.* Scircle, 103 Ind. 227, 2 N. E. 604, unreasonable delay.

Iowa.— Harkness *v.* Western Union Tel. Co., 73 Iowa 190, 34 N. W. 811, 5 Am. St. Rep. 672, delay of three days in delivery.

Kansas.— Western Union Tel. Co. *v.* Crall, 38 Kan. 679, 17 Pac. 309, 5 Am. St. Rep. 795, error in transmission.

Maine.— Bartlett *v.* Western Union Tel. Co., 62 Me. 209, 16 Am. Rep. 437, error in transmission.

North Carolina.— Cogdell *v.* Western Union Tel. Co., 135 N. C. 431, 47 S. E. 490 (delay in delivery); Sherrill *v.* Western Union Tel. Co., 116 N. C. 655, 21 S. E. 429 (failure to deliver).

Ohio.— Western Union Tel. Co. *v.* Griswold, 37 Ohio St. 301, 41 Am. Rep. 500, error in transmission.

Texas.— Western Union Tel. Co. *v.* Smith, 88 Tex. 9, 28 S. W. 931, 30 S. W. 549 (delay in delivery); Western Union Tel. Co. *v.* Bertram, 1 Tex. App. Civ. Cas. § 1152 (failure to deliver).

United States.— Western Union Tel. Co. *v.* Cook, 61 Fed. 624, 9 C. C. A. 680, error in transmission.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 61; and cases cited *supra*, notes 29–31.

Where a message is transmitted over connecting lines and an error occurs in its transmission, if defendant seeks to avoid liability on the ground that the error was made by the other company it must show this fact. La Grange *v.* Southwestern Tel. Co., 25 La. Ann. 383.

In Iowa it is provided by statute that negligence will be presumed upon proof of an unreasonable delay, and that in such case the burden is upon defendant to show that the delay was not due to negligence on its part. Potter *v.* Western Union Tel. Co., 138 Iowa 406, 116 N. W. 130, holding that in determining what is an unreasonable delay the character and importance of the message must be considered.

33. *Illinois.*— Western Union Tel. Co. *v.* Tyler, 74 Ill. 168, 24 Am. Rep. 279.

Kansas.— Western Union Tel. Co. *v.* Crall, 38 Kan. 679, 17 Pac. 309, 5 Am. St. Rep. 795.

Maine.— Ayer *v.* Western Union Tel. Co., 79 Me. 493, 10 Atl. 495, 1 Am. St. Rep. 353; Bartlett *v.* Western Union Tel. Co., 62 Me. 209, 16 Am. Rep. 437.

Missouri.—Reed *v.* Western Union Tel. Co., 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492.

North Carolina.— Sherrill *v.* Western Union Tel. Co., 116 N. C. 655, 21 S. E. 429.

Ohio.— Western Union Tel. Co. *v.* Griswold, 37 Ohio St. 301, 41 Am. Rep. 500.

United States.— Western Union Tel. Co. *v.* Cook, 61 Fed. 624, 9 C. C. A. 680.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 61; and cases cited *supra*, notes 29–32.

What stipulations are invalid see *supra*, V, A.

34. Sweatland *v.* Illinois, etc., Tel. Co., 27 Iowa 433, 1 Am. Rep. 285.

35. Aiken *v.* Western Union Tel. Co., 69 Iowa 31, 28 N. W. 419, 58 Am. Rep. 210; Sweatland *v.* Illinois, etc., Tel. Co., 27 Iowa 433, 1 Am. Rep. 285, each holding that where the contract contains a stipulation against liability in case of unrepeated messages, it is not sufficient for plaintiff to show an error in transmission, but that the burden is upon plaintiff to show that such error was due to negligence on the part of defendant and not to some uncontrollable cause such as atmospheric disturbances. See also Postal Tel. Cable Co. *v.* Sunset Constr. Co., 102 Tex. 148, 114 S. W. 98 [*reversing* on other grounds

is valid even as against negligence, unless the negligence is wilful or gross,[36] the burden in such case is upon plaintiff to show negligence of this character,[37] and that it is not even *prima facie* proof of gross negligence that a simple error occurred in transmission,[38] or that there was an unusual delay,[39] or even that the message after being duly started on its course by the operator at the point of origin was unaccountably lost and never reached its destination,[40] although it seems that it would be *prima facie* gross negligence if the message had never been started from the office of origin at all.[41] Where a presumption of negligence arises it is of course competent for defendant to rebut the presumption by showing the exercise of due care or that the error or default complained of was due to causes for which it was not responsible,[42] the sufficiency of its evidence for such purpose being ordinarily a question for the jury.[43] The burden is upon defendant to establish any matters of affirmative defense relied on,[44] and, in any jurisdiction where such burden is ordinarily that of defendant, to show contributory negligence on the part of plaintiff.[45]

b. In Mental Anguish Cases. In mental anguish as in other cases the burden is upon plaintiff to establish a cause of action,[46] and to show that his mental anguish was the proximate result of the negligence or default complained of.[47] In the case of messages requesting that a person be met at a station or that preparations be made for a burial it cannot be presumed that had the message been duly delivered the request would have been complied with,[48] or in the case of a

(Civ. App. 1908) 109 S. W. 265]. But see Western Union Tel. Co. *v.* Tyler, 74 Ill. 168, 24 Am. Rep. 279; Bartlett *v.* Western Union Tel. Co., 62 Me. 209, 16 Am. Rep. 437; and cases cited *supra*, note 33.

36. See *supra*, V, A, 1, a, b.

37. Wheelock *v.* Postal Tel. Cable Co., 197 Mass. 119, 83 N. E. 313; Halstead *v.* Postal Tel. Cable Co., 193 N. Y. 293, 85 N. E. 1078, 127 Am. St. Rep. 952, 19 L. R. A. N. S. 1021 [*affirming* 120 N. Y. App. Div. 433, 104 N. Y. Suppl. 1016]; Kiley *v.* Western Union Tel. Co., 109 N. Y. 231, 16 N. E. 75; Ayres *v.* Western Union Tel. Co., 65 N. Y. App. Div. 149, 72 N. Y. Suppl. 634.

38. Halsted *v.* Postal Tel. Cable Co., 193 N. Y. 293, 85 N. E. 1078, 127 Am. St. Rep. 952, 19 L. R. A. N. S. 1021 [*affirming* 120 N. Y. App. Div. 433, 104 N. Y. Suppl. 1016]; Breese *v.* U. S. Telegraph Co., 48 N. Y. 132, 8 Am. Rep. 526; Altman *v.* Western Union Tel. Co., 84 N. Y. Suppl. 54; Primrose *v.* Western Union Tel. Co., 154 U. S. 1, 14 S. Ct. 1098, 38 L. ed. 883; Jones *v.* Western Union Tel. Co., 18 Fed. 717. *Compare* Redington *v.* Pacific Postal Tel. Co., 107 Cal. 317, 40 Pac. 432, 48 Am. St. Rep. 132; Postal Tel. Cable Co. *v.* Robertson, 36 Misc. (N. Y.) 785, 74 N. Y. Suppl. 876.

39. Jacob *v.* Western Union Tel. Co., 135 Mich. 600, 98 N. W. 402; Birkett *v.* Western Union Tel. Co., 103 Mich. 361, 61 N. W. 645, 50 Am. St. Rep. 374, 33 L. R. A. 404; Ayers *v.* Western Union Tel. Co., 65 N. Y. App. Div. 149, 72 N. Y. Suppl. 634; Riley *v.* Western Union Tel. Co., 8 Misc. (N. Y.) 217, 28 N. Y. Suppl. 581.

40. Kiley *v.* Western Union Tel. Co., 109 N. Y. 231, 16 N. E. 75. See also Clement *v.* Western Union Tel. Co., 137 Mass. 463; Western Union Tel. Co. *v.* Coggin, 68 Fed. 137, 15 C. C. A. 231.

41. Kiley *v.* Western Union Tel. Co., 109 N. Y. 231, 16 N. E. 75. See also Mowry *v.* Western Union Tel. Co., 51 Hun (N. Y.) 126, 4 N. Y. Suppl. 666; Bryant *v.* American Tel. Co., 1 Daly (N. Y.) 575.

42. Western Union Tel. Co. *v.* Elliott, 131 Ky. 340, 115 S. W. 228, 22 L. R. A. N. S. 761; Pinckney *v.* Western Union Tel. Co., 19 S. C. 71, 45 Am. Rep. 765; Western Union Tel. Co. *v.* Brown, (Tex. Civ. App. 1903) 75 S. W. 359; White *v.* Western Union Tel. Co., 14 Fed. 710, 5 McCrary 103.

43. Western Union Tel. Co. *v.* Brown, (Tex. Civ. App. 1903) 75 S. W. 359; White *v.* Western Union Tel. Co., 14 Fed. 710, 5 McCrary 103. See also *infra*, VIII, F, 2, a.

44. Kendall *v.* Western Union Tel. Co., 56 Mo. App. 192 (failure to present claim within time stipulated in contract of transmission); Western Union Tel. Co. *v.* Olivarri, (Tex. Civ. App. 1908) 110 S. W. 930.

Condition of blank.— Where the message blank containing stipulations limiting defendant's liability and relied on as a defense is in a mutilated condition when produced at the time of the trial, there is no presumption that it was in such condition when filed for transmission, but on the contrary it will be presumed that it was then a perfect blank. Kiley *v.* Western Union Tel. Co., 109 N. Y. 231, 16 N. E. 75. See NEGLIGENCE, 29 Cyc. 597.

45. Dehougne *v.* Western Union Tel. Co., (Tex. Civ. App. 1905) 84 S. W. 1066.

46. Western Union Tel. Co. *v.* Long, 90 Ark. 203, 118 S. W. 405; Hauser *v.* Western Union Tel. Co., 150 N. C. 557, 64 S. E. 503; Western Union Tel. Co. *v.* Smith, 88 Tex. 9, 28 S. W. 931, 30 S. W. 549. See also Heathcoat *v.* Western Union Tel. Co., 156 Ala. 339, 47 So. 139.

47. Hauser *v.* Western Union Tel. Co., 150 N. C. 557, 64 S. E. 503.

48. Western Union Tel. Co. *v.* McMorris,

message announcing the death or illness of a relative that the addressee would have gone;[49] and in such cases the burden is upon plaintiff to show that but for defendant's negligence such person could and would have been met,[50] or the funeral arrangements made,[51] or that the addressee could and would have gone,[52] and have arrived in time.[53] Where, however, by reason of the negligence of defendant plaintiff was prevented from being present at the last illness or burial of a near relative, mental anguish will be presumed from the relationship between the parties,[54] and need not be affirmatively proved,[55] either to show the existence of such suffering,[56] or to aid the jury in the estimation of damages,[57] although in order to give rise to such presumption there must be proof of the existence of a sufficiently close relationship;[58] and where the family relationship is merely by marriage or a remote blood relationship, mental anguish will not be presumed, but must be affirmatively shown;[59] and even where mental anguish is presumed from the relationship between the parties, if plaintiff seeks to recover damages on other grounds, as for physical suffering, such other damages must be affirmatively shown.[60]

158 Ala. 563, 48 So. 349, 132 Am. St. Rep. 46; Hancock *v.* Western Union Tel. Co., 137 N. C. 497, 49 S. E. 952, 69 L. R. A. 403.

49. Western Union Tel. Co. *v.* Adams, (Tex. Civ. App. 1904) 80 S. W. 93.

50. Western Union Tel. Co. *v.* McMorris, 158 Ala. 563, 48 So. 349, 132 Am. St. Rep. 46; Hancock *v.* Western Union Tel. Co., 137 N. C. 497, 49 S. E. 952, 69 L. R. A. 403. See also *infra*, IX, B, 3, d, (x), (c).

51. Western Union Tel. Co. *v.* McMorris, 158 Ala. 563, 48 So. 349, 132 Am. St. Rep. 46; Hancock *v.* Western Union Tel. Co., 137 N. C. 497, 49 S. E. 952, 69 L. R. A. 403. See also *infra*, IX, B, 3, d, (x), (c).

52. Cumberland Tel. Co. *v.* Brown, 104 Tenn. 56, 55 S. W. 155, 78 Am. St. Rep. 906, 50 L. R. A. 277; Western Union Tel. Co. *v.* Adams, (Tex. Civ. App. 1904) 80 S. W. 93. See also *infra*, IX, B, 3, d, (iv).

53. Howard *v.* Western Union Tel. Co., 119 Ky. 625, 84 S. W. 764, 86 S. W. 982, 27 Ky. L. Rep. 244, 858; Cumberland Tel. Co. *v.* Brown, 104 Tenn. 56, 55 S. W. 155, 78 Am. St. Rep. 906, 50 L. R. A. 277; Western Union Tel. Co. *v.* Smith, 88 Tex. 9, 28 S. W. 931, 30 S. W. 549. See also *infra*, IX, B, 3, d, (iv).

Prima facie case.— In an action for mental anguish caused by delay of a telegram, whereby plaintiff was prevented from attending her mother's funeral, evidence that according to train schedules plaintiff could have reached the place of the funeral in time, if the telegram had been promptly delivered, made out a *prima facie* case that she could have arrived in time, and plaintiff was not bound to negative the contingencies of wrecks, washouts, or other accidents which might have delayed her arrival. Western Union Tel. Co. *v.* Shofner, 87 Ark. 303, 112 S. W. 751.

54. Western Union Tel. Co. *v.* Blair, (Tex. Civ. App. 1908) 113 S. W. 164; Western Union Tel. Co. *v.* Thompson, 18 Tex. Civ. App. 609, 45 S. W. 429.

Relationship between parties see *infra*, IX, B, 3, d, (vi).

The presumption may be rebutted by testimony, but the mere fact that plaintiff did not attend the funeral, if explained by him as being due to his sudden illness, is not conclusive that he did not suffer mental anguish, but raises at most a question for the jury. Western Union Tel. Co. *v.* Blair, (Tex. Civ. App. 1908) 113 S. W. 164.

55. Western Union Tel. Co. *v.* Blair, (Tex. Civ. App. 1908) 113 S. W. 164; Western Union Tel. Co. *v.* Thompson, 18 Tex. Civ. App. 609, 45 S. W. 429; Western Union Tel. Co. *v.* Randles, (Tex. Civ. App. 1896) 34 S. W. 447; Western Union Tel. Co. *v.* McLeod, (Tex. Civ. App. 1893) 22 S. W. 988.

56. Western Union Tel. Co. *v.* Randles, (Tex. Civ. App. 1896) 34 S. W. 447. And see cases cited *supra*, note 55.

57. Western Union Tel. Co. *v.* Benson, 159 Ala. 254, 48 So. 712; Western Union Tel. Co. *v.* Adams, 75 Tex. 531, 12 S. W. 857, 16 Am. St. Rep. 920, 6 L. R. A. 844; Western Union Tel. Co. *v.* McLeod, (Tex. Civ. App. 1893) 22 S. W. 988.

58. Harrison *v.* Western Union Tel. Co., 136 N. C. 381, 48 S. E. 772.

59. Foreman *v.* Western Union Tel. Co., 141 Iowa 32, 116 N. W. 724, 19 L. R. A. N. S. 374; Alexander *v.* Western Union Tel. Co., 141 N. C. 75, 53 S. E. 657; Cashion *v.* Western Union Tel. Co., 123 N. C. 267, 31 S. E. 493; Johnson *v.* Western Union Tel. Co., 81 S. C. 235, 62 S. E. 244, 128 Am. St. Rep. 905, 17 L. R. A. N. S. 1002; Western Union Tel. Co. *v.* Coffin, 88 Tex. 94, 30 S. W. 896.

Relationship between parties see *infra*, IX, B, 3, d, (vi).

In the case of a remote family relationship it must affirmatively appear from the evidence that special relations of tenderness and affection existed between the parties and that the telegraph company had notice of such relations. Johnson *v.* Western Union Tel. Co., 81 S. C. 235, 62 S. E. 244, 128 Am. St. Rep. 905, 17 L. R. A. N. S. 1002; Western Union Tel. Co. *v.* Coffin, 88 Tex. 94, 30 S. W. 896.

60. Western Union Tel. Co. *v.* Thompson, 18 Tex. Civ. App. 609, 45 S. W. 429.

2. Admissibility — a. In General. As in other civil actions any evidence if justified by the pleadings,[61] and otherwise competent, is admissible if it is relevant to any of the material matters in issue;[62] but evidence which is immaterial or irrelevant is not admissible.[63] The message itself wherever relevant is admissible in evidence,[64] and in an action for delay in delivery the message delivered to the addressee is admissible,[65] it being unnecessary to produce the original message filed for transmission by the sender;[66] and in an action for delay in delivery the delivery sheet is also admissible after proof of the genuineness of the signature.[67] The general rules as to best and secondary evidence[68] apply in regard to the admission of copies of messages or of records relating thereto,[69] secondary evidence of the contents of a message being admissible if the original is shown to have been lost or destroyed.[70] While it has been held that the general rule applies[71] that parol evidence is not admissible to contradict or vary the written contract of transmission,[72] evidence is not inadmissible on this ground that defendant's transmitting agent was informed by the sender as to the character and importance of the message or the whereabouts of the addressee;[73] and it has also been held that parol evidence is admissible of an understanding between the sender and defendant's transmitting agent as to the words "care of" in the address,[74] or of the purpose of writing the word "day" across the stipulations

61. See *supra*, VIII, D.

62. Whitten *v.* Western Union Tel. Co., 141 N. C. 361, 54 S. E. 289; Western Union Tel. Co. *v.* James, 31 Tex. Civ. App. 503, 73 S. W. 79; Western Union Tel. Co. *v.* Karr, 5 Tex. Civ. App. 60, 24 S. W. 302.

Message requesting addressee to meet sender.— In an action for non-delivery of a message requesting the addressee to meet plaintiff at a railroad station, plaintiff may show that he was not met (Western Union Tel. Co. *v.* Westmoreland, 150 Ala. 654, 43 So. 790); and also that he had an agreement with the addressee that the latter should meet him when notified (Western Union Tel. Co. *v.* Westmoreland, *supra*); and the addressee may testify that if the message had been delivered he would have met plaintiff (Western Union Tel. Co. *v.* Karr, 5 Tex. Civ. App. 60, 24 S. W. 302).

63. Western Union Tel. Co. *v.* Way, 83 Ala. 542, 4 So. 844; Grinnell *v.* Western Union Tel. Co., 113 Mass. 299, 18 Am. Rep. 485; Western Union Tel. Co. *v.* Mellon, 96 Tenn. 66, 33 S. W. 725; Western Union Tel. Co. *v.* Waller, 96 Tex. 589, 74 S. W. 751, 97 Am. St. Rep. 936 [*reversing* (Civ. App. 1903) 72 S. W. 264]; Western Union Tel. Co. *v.* Stiles, 89 Tex. 312, 34 S. W. 438; Western Union Tel. Co. *v.* Jackson, 35 Tex. Civ. App. 419, 80 S. W. 649; Western Union Tel. Co. *v.* McMillan, (Tex. Civ. App. 1894) 25 S. W. 821.

Evidence held inadmissible.— Where the contract of transmission contains valid stipulations limiting the liability of the company and the message was written by plaintiff on such a blank, testimony that he did not read such stipulations is inadmissible. Grinnell *v.* Western Union Tel. Co., 113 Mass. 299, 18 Am. Rep. 485.

64. Western Union Tel. Co. *v.* Northcutt, 158 Ala. 539, 48 So. 553, 132 Am. St. Rep. 38; Western Union Tel. Co. *v.* Bennett, 1 Tex. Civ. App. 558, 21 S. W. 699.

65. Western Union Tel. Co. *v.* Northcutt, 158 Ala. 539, 48 So. 553, 132 Am. St. Rep. 38; Western Union Tel. Co. *v.* Westmoreland, 150 Ala. 654, 43 So. 790; Western Union Tel. Co. *v.* Bates, 93 Ga. 352, 20 S. E. 639; Western Union Tel. Co. *v.* Bennett, 1 Tex. Civ. App. 558, 21 S. W. 699.

66. Western Union Tel. Co. *v.* Bates, 93 Ga. 352, 20 S. E. 639; Western Union Tel. Co. *v.* Bennett, 1 Tex. Civ. App. 558, 21 S. W. 699.

67. Western Union Tel. Co. *v.* Northcutt, 158 Ala. 539, 48 So. 553, 132 Am. St. Rep. 38.

68. See Evidence, 17 Cyc. 512, 515 text and note 54.

69. Cason *v.* Western Union Tel. Co., 77 S. C. 157, 57 S. E. 722 (copy of message not admissible in the absence of evidence that it is an authorized copy); Southwestern Tel., etc., Co. *v.* Owens, (Tex. Civ. App. 1909) 116 S. W. 89 (copy of long distance telephone company's ticket record not admissible where the absence of the original is not sufficiently accounted for); Buchanan *v.* Western Union Tel. Co., (Tex. Civ. App. 1907) 100 S. W. 974 (copy of message not admissible where original is not properly accounted for).

70. Western Union Tel. Co. *v.* Williford, (Tex. Civ. App. 1894) 27 S. W. 700.

71. See Evidence, 17 Cyc. 567.

72. Grinnell *v.* Western Union Tel. Co., 113 Mass. 299, 18 Am. Rep. 485.

73. Western Union Tel. Co. *v.* O'Fiel, 47 Tex. Civ. App. 40, 104 S. W. 406.

Evidence of information as to whereabouts of addressee see *infra*, VIII, E, 2, c.

Evidence of notice as to importance of message see *infra*, VIII, E, 2, d.

74. Western Union Tel. Co. *v.* Bryant, 35 Tex. Civ. App. 442, 80 S. W. 406, holding that parol evidence of an understanding between the sender and defendant's agent that the words "care of" in a message addressed to B care of K were intended merely as a matter of reference to enable defendant's agent at the place of destination to ascertain

of a blank used for night messages.[75] So also where the message itself contains abbreviated expressions or technical or trade terms parol evidence is admissible to translate and explain its meaning.[76] One of defendant's regular blanks containing stipulations limiting its liability is not admissible where it is not shown that the message in question was written on one of such blanks.[77]

b. Declarations and Admissions. The general rules as to the admissibility of such evidence in other civil actions [78] apply in determining whether declarations and admissions of defendant's agents are [79] or are not [80] admissible against defendant.

where B resided, is admissible to show that defendant did not agree and was not bound to deliver the message to K.

75. Western Union Tel. Co. *v.* Piner, 9 Tex. Civ. App. 152, 29 S. W. 66, holding that parol evidence is admissible to show that the word "day" written across the printed stipulations on a blank used for night messages was intended to cancel such stipulations in so far as applicable to night messages.

76. Western Union Tel. Co. *v.* Merritt, 55 Fla. 462, 46 So. 1024, 127 Am. St. Rep. 169. Evidence is admissible to show that a message reading "Buy three May" meant three thousand bushels of wheat for May delivery. Carland *v.* Western Union Tel. Co., 118 Mich. 369, 76 N. W. 762, 74 Am. St. Rep. 394, 43 L. R. A. 280.

77. Western Union Tel. Co. *v.* McMillan, (Tex. Civ. App. 1894) 25 S. W. 821.

78. See EVIDENCE, 16 Cyc. 1003 *et seq.*

79. *Alabama.*— Western Union Tel. Co. *v.* Rowell, 153 Ala. 295, 45 So. 73, holding that evidence is admissible of a telephone conversation between plaintiff, the addressee, and defendant's agent tending to show that due diligence was not exercised in delivering the message.

Iowa.— Evans *v.* Western Union Tel. Co., 102 Iowa 219, 71 N. W. 219, statement made to sender of message on calling for an answer that the message had not been sent, admissible as a part of the same transaction.

Michigan.— Carland *v.* Western Union Tel. Co., 118 Mich. 369, 76 N. W. 762, 74 Am. St. Rep. 394, 43 L. R. A. 280, statement of transmitting operator made two days after the message should have been sent that it had never been received at the office of destination, admissible to show non-delivery.

South Carolina.— Fail *v.* Western Union Tel. Co., 80 S. C. 207, 60 S. E. 697, 61 S. E. 258 (declaration by defendant's agent that he had sent the message in question); Glover *v.* Western Union Tel. Co., 78 S. C. 502, 59 S. E. 526 (evidence of declarations of defendant's messenger when delivering a message to a person other than the addressee, admissible as part of the *res gestæ* as tending to show whether the delivery to such person was negligent or in wilful disregard of duty).

Texas.— Western Union Tel. Co. *v.* Simmons, (Civ. App. 1906) 93 S. W. 686 (statement made by operator on refusing to accept the message for transmission, admissible as evidence of the motive actuating him); Western Union Tel. Co. *v.* Cooper, 29 Tex. Civ. App. 591, 69 S. W. 427 (statement of agent on delivering message that he had received it the day before); Western Union Tel. Co. *v.* Davis, 24 Tex. Civ. App. 427, 59 S. W. 46 (evidence that defendant's agent when consulted as to the advisability of sending a second message said that it was an important death message and would be delivered, admissible to show defendant's knowledge of the nature and importance of the message); Western Union Tel. Co. *v.* Reeves, 8 Tex. Civ. App. 37, 27 S. W. 318 (evidence that plaintiff after sending a message and receiving no reply suggested that it be repeated and was informed by defendant's agent that it had gone through all right); Western Union Tel. Co. *v.* Bennett, 1 Tex. Civ. App. 558, 21 S. W. 699 (evidence of declarations of defendant's messenger as to his inability to find plaintiff, admissible against defendant in action for delay in delivery).

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 62.

To explain conduct of plaintiff.— Evidence of a declaration by defendant's transmitting agent made to the sender after the transmission of the message that it had been delivered is admissible to explain the subsequent conduct of plaintiff. Western Union Tel. Co. *v.* Lydon, 82 Tex. 364, 18 S. W. 701.

80. *Alabama.*— Western Union Tel. Co. *v.* Henderson, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148 (holding that a declaration by defendant's operator at the terminal office made to plaintiff the day after the message was received as to his reason for not delivering the message as soon as received is not admissible against defendant); Western Union Tel. Co. *v.* Way, 83 Ala. 542, 4 So. 844 (statements of defendant's agent not made in the performance of any duty relating to the transmission of the message, not admissible against defendant).

Iowa.— Sweatland *v.* Illinois, etc., Tel. Co., 27 Iowa 433, 1 Am. Rep. 285, declarations of defendant's agent several days after the message had been delivered inadmissible as being narrative of a past occurrence and not a part of the *res gestæ*.

Kentucky.— Graddy *v.* Western Union Tel. Co., 43 S. W. 468, 19 Ky. L. Rep. 1455.

Massachusetts.—Grinnell *v.* Western Union Tel. Co., 113 Mass. 299, 18 Am. Rep. 485, subsequent declarations of defendant's agent not connected with the transmission of the message.

South Carolina.— Aiken *v.* Western Union Tel. Co., 5 S. C. 358, admission by receiving

c. Evidence as to Negligence.[81] Subject to the general rules above stated,[82] any evidence is admissible which tends to establish the negligence relied on,[83] such as evidence that defendant's agent or messenger was informed where the addressee could be found,[84] or was directed to a person who could give such information,[85] and that the information if requested would have been given,[86] that

operator of an error in transcribing a message, the admission being made several days subsequently, not a part of the *res gestæ*.

Texas.— Southwestern Tel., etc., Co. *v.* Gotcher, 93 Tex. 114, 53 S. W. 686 (statement made by agent several days after the transaction in question); Western Union Tel. Co. *v.* Wofford, (Civ. App. 1897) 42 S. W. 119 (statement made by agent several days subsequently as to why message was not delivered).

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 62.

Rule stated.— The declarations or admissions of an agent of a telegraph company are not admissible against the company unless made within the scope of the agent's authority and while in the performance of his duty or so near in point of time to the main fact as to form a part of the *res gestæ*. Western Union Tel. Co. *v.* Way, 83 Ala. 542, 4 So. 844.

81. See, generally, NEGLIGENCE, 29 Cyc. 606.

82. See *supra*, VIII, E, 2, a, b.

83. Woods *v.* Western Union Tel. Co., 148 N. C. 1, 61 S. E. 653, 128 Am. St. Rep. 581; Western Union Tel. Co. *v.* Cooper, 71 Tex. 507, 9 S. W. 598, 10 Am. St. Rep. 772, 1 L. R. A. 728; Western Union Tel. Co. *v.* James, 31 Tex. Civ. App. 503, 73 S. W. 79; Western Union Tel. Co. *v.* Drake, 14 Tex. Civ. App. 601, 38 S. W. 632; Western Union Tel. Co. *v.* Hearne, 7 Tex. Civ. App. 67, 26 S. W. 478.

Evidence held admissible.— In an action for non-delivery a city directory giving the addressee's name and address is admissible as evidence to show negligence. Woods *v.* Western Union Tel. Co., 148 N. C. 1, 61 S. E. 653, 128 Am. St. Rep. 581. Where defendant seeks to excuse non-delivery on the ground that plaintiff was an obscure person and little known evidence is admissible of the business plaintiff was engaged in and the means employed to advertise the same, and he may introduce printed cards, letter-heads, and envelopes used by him in such business. Gulf, etc., R. Co. *v.* Wilson, 69 Tex. 739, 7 S. W. 653. Where the message is addressed to a third party and requests him to notify plaintiff, proof of the whereabouts of plaintiff is relevant. Western Union Tel. Co. *v.* Crawford, (Tex. Civ. App. 1903) 75 S. W. 843. Where defendant received and agreed to transmit a message, knowing that its wires were down and not informing the sender of the fact, plaintiff may show that previously and under similar circumstances defendant had caused messages to be sent over the wires of another company, which it did not attempt to do in this case. Pacific Postal Tel. Cable Co. *v.* Fleischner, 66 Fed. 899, 14 C. C. A. 166. In case of an error in transmitting a word in the message, where it appears that there was some difficulty in the reading of the message as written by plaintiff, plaintiff may testify what word was intended where it was so read by him to the transmitting agent. Western Union Tel. Co. *v.* Hearne, 7 Tex. Civ. App. 67, 26 S. W. 478. In an action for non-delivery of a telegram to plaintiff, the court properly permitted the sender of the telegram to testify that, if it had been reported to him that the message could not be delivered to plaintiff, because the initials in the address were not the same as plaintiff's, he would have had the initials changed. Arkansas, etc., R. Co. *v.* Stroude, 82 Ark. 117, 100 S. W. 760. Evidence is also admissible of the habits and reputation of defendant's agent to whom the message was delivered for transmission (Western Union Tel. Co. *v.* Hearne, *supra*. But see NEGLIGENCE, 29 Cyc. 610); of the time which it would take to deliver the message to the addressee at the place where he was at work (Western Union Tel. Co. *v.* Drake, 14 Tex. Civ. App. 601, 38 S. W. 632); of precautionary measures taken by plaintiff, the addressee, to secure a prompt delivery of the expected message (Western Union Tel. Co. *v.* Drake, *supra*); that plaintiff's employees were authorized to and did receive messages addressed to him (Western Union Tel. Co. *v.* Moran, (Tex. Civ. App. 1908) 113 S. W. 625); that defendant's agent was informed that a message was expected and requested to deliver it at once (Bailey *v.* Western Union Tel. Co., 150 N. C. 316, 63 S. E. 1044); that a second message was sent to defendant's operator requesting that the first message be promptly delivered (Western Union Tel. Co. *v.* Frith, 105 Tenn. 167, 58 S. W. 118); that plaintiff after waiting for two days for an answer to his message sent another message to a different person at the same place and received a reply in less than twenty-four hours (Western Union Tel. Co. *v.* Lydon, 82 Tex. 364, 18 S. W. 701); and that plaintiff gave instructions as to where he could be found if a telegram came for him to a man whom he saw using the telegraph instrument, although he did not know his name or that he was defendant's agent (Bolton *v.* Western Union Tel. Co., 76 S. C. 529, 57 S. E. 543).

84. Western Union Tel. Co. *v.* Benson, 159 Ala. 254, 48 So. 712; Western Union Tel. Co. *v.* Cooper, 71 Tex. 507, 9 S. W. 598, 10 Am. St. Rep. 772, 1 L. R. A. 728; Western Union Tel. Co. *v.* O'Fiel, 47 Tex. Civ. App. 40, 104 S. W. 406.

85. Western Union Tel. Co. *v.* Bell, 48 Tex. Civ. App. 359, 107 S. W. 570; Western Union Tel. Co. *v.* Waller, 37 Tex. Civ. App. 515, 84 S. W. 695.

86. Western Union Tel. Co. *v.* Waller, (Tex. Civ. App. 1903) 72 S. W. 264.

the addressee was generally well known in the community[87] or was known to particular witnesses,[88] and that no inquiry was made of such witnesses in regard to him,[89] that he lived near defendant's office,[90] that he had received other telegrams which had been delivered at the same place where he then resided,[91] that others searching for him at the same time found him without difficulty,[92] and that if inquiry had been made at the place where he worked information as to his whereabouts would have been given;[93] but evidence of acts of negligence on the part of defendant other than those relied on is irrelevant and inadmissible.[94] On the other hand any evidence is admissible on behalf of defendant which tends to show the exercise of due care or the absence of negligence on its part;[95] but in an action for non-delivery the testimony of witnesses living in the same place as the addressee that they did not know him is not competent,[96] nor is evidence admissible of matters which would furnish no justification or excuse for the negligence or default complained of.[97] Where one of the defenses is or may be contributory negligence plaintiff may prove any facts which tend to explain his conduct and excuse or relieve him from the imputation of negligence.[98]

d. Evidence as to Notice. Since the question of damages is materially affected by defendant's knowledge or lack of knowledge of special circumstances from which special damages might arise,[99] evidence is ordinarily admissible under proper allegations to show that at the time the message was filed for transmission

87. Western Union Tel. Co. *v.* James, 31 Tex. Civ. App. 503, 73 S. W. 79; Western Union Tel. Co. *v.* Drake, 14 Tex. Civ. App. 601, 38 S. W. 632. See also Gulf, etc., R. Co. *v.* Wilson, 69 Tex. 739, 7 S. W. 653.

88. Western Union Tel. Co. *v.* James, 31 Tex. Civ. App. 503, 73 S. W. 79.

Evidence of a mail carrier that he knew where the addressee lived is admissible to show that if greater diligence had been used in making inquiry for the addressee he could have been discovered. Martin *v.* Western Union Tel. Co., 81 S. C. 432, 62 S. E 833.

89. Arkansas, etc., R. Co. *v.* Stroude, 82 Ark. 117, 100 S. W. 760; Western Union Tel. Co. *v.* James, 31 Tex. Civ. App. 503, 73 S. W. 79.

90. Western Union Tel. Co. *v.* Woods, 56 Kan. 737, 44 Pac. 989; Western Union Tel. Co. *v.* James, 31 Tex. Civ. App. 503, 73 S. W. 79.

91. Western Union Tel. Co. *v.* Manker, 145 Ala. 418, 41 So. 850.

92. Western Union Tel. Co. *v.* Davis, 24 Tex. Civ. App. 427, 59 S. W. 46.

93. Western Union Tel. Co. *v.* Drake, 14 Tex. Civ. App. 601, 38 S. W. 632.

But if plaintiff was not within the delivery limits so that defendant was under no duty to deliver the message at the place where he was, evidence that if defendant had informed plaintiff's foreman the latter would have informed defendant of plaintiff's whereabouts is inadmissible. Western Union Tel. Co. *v.* Redinger, 22 Tex. Civ. App. 362, 54 S. W. 417.

94. Sabine Valley Tel. Co. *v.* Oliver, 46 Tex. Civ. App. 428, 102 S. W. 925.

95. Thorpe *v.* Western Union Tel. Co., 84 Iowa 190, 50 N. W. 675, evidence as to the efforts made by defendant's employees to deliver the message.

On the issue of wilfulness in delay in delivering a telegram, it may be shown that the office was a small one, and to make it self-sustaining it was necessary to unite the duties of telegraph, railroad, and express agent. Doster *v.* Western Union Tel. Co., 77 S. C. 56, 57 S. E. 671.

96. Western Union Tel. Co. *v.* Craige, (Tex. Civ. App. 1905) 90 S. W. 681; Western Union Tel. Co. *v.* James, 31 Tex. Civ. App. 503, 73 S. W. 79.

97. Western Union Tel. Co. *v.* Henderson, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148.

Evidence held inadmissible.— Evidence of defendant's office hours at the place to which the message was sent is inadmissible where there was an express agreement that the message should be delivered on the night when it was sent. Western Union Tel. Co. *v.* Hill, (Tex. Civ. App. 1894) 26 S. W. 252. In an action for delay in delivering a message evidence is not admissible that the business of the office to which the message was addressed was insufficient to justify the employment of a messenger to deliver messages. Western Union Tel. Co. *v.* Henderson, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148. In an action for delay in delivering a message evidence that in making a copy of the original telegram it was so blurred that in addressing the envelope in which it was to be delivered to the addressee his name was by mistake written "Jackson" instead of "Johnson" and that this was the cause of the delay is inadmissible since it shows no reasonable excuse for defendant's negligence. Western Union Tel. Co. *v.* Johnson, 9 Tex. Civ. App. 48, 28 S. W. 124.

98. Aiken *v.* Western Union Tel. Co., 69 Iowa 31, 28 N. W. 419, 58 Am. Rep. 210; Western Union Tel. Co. *v.* Lydon, 82 Tex. 364, 18 S. W. 701; Erie Tel., etc., Co. *v.* Grimes, 82 Tex. 89, 17 S. W. 831.

99. See *infra*, IX, B, 1, a, (I).

defendant's agent was informed as to the importance or urgency of the message,[1] or that the company was otherwise informed or chargeable with such notice.[2]

e. Evidence as to Damages. Provided it relates to the particular damages claimed in the complaint,[3] any evidence otherwise competent is admissible which tends to show the nature or amount of the damages sustained by plaintiff by reason of the negligence or default complained of;[4] and in order to show the existence or proximate character of such damages the testimony of the other party to the message or of some third person as to what he would have done in case the message had been duly transmitted and delivered has in some cases been held admissible,[5] it being often the only means of showing such facts;[6]

1. Pope *v.* Western Union Tel. Co., 14 Ill. App. 531. See also Ward *v.* Western Union Tel. Co., (Tex. Civ. App. 1899) 51 S. W. 259.

What was said by the parties at the time the message was presented for transmission is a part of the *res gestæ* and is admissible for that reason if for no other. Pope *v.* Western Union Tel. Co., 14 Ill. App. 531.

Separate transaction inadmissible see Wiggs *v.* Southwestern Tel., etc., Co., (Tex. Civ. App. 1908) 110 S. W. 179.

2. Western Union Tel. Co. *v.* Merritt, 55 Fla. 462, 46 So. 1024, 127 Am. St. Rep. 169; Smith *v.* Western Union Tel. Co., 80 Nebr. 395, 114 N. W. 288.

In determining whether a telegraph company had information of the importance of a message or the necessity for its prompt and correct transmission, surrounding circumstances may be considered. Western Union Tel. Co. *v.* Merritt, 55 Fla. 462, 46 So. 1024, 127 Am. St. Rep. 169.

3. See Barrett *v.* Western Union Tel. Co., 42 Mo. App. 542; and, generally, *supra*, VIII, D.

4. Pacific Postal Tel. Cable Co. *v.* Fleischner, 66 Fed. 899, 14 C. C. A. 166. See also Aiken *v.* Western Union Tel. Co., 69 Iowa 31, 28 N. W. 419, 58 Am. Rep. 210; Western Union Tel. Co. *v.* Williford, (Tex. Civ. App. 1894) 27 S. W. 700.

5. Carter *v.* Western Union Tel. Co., 141 N. C. 374, 54 S. E. 274 (holding that in an action by the sender of a message summoning a physician the latter may testify that if the message had been delivered to him he would have gone at once); Doster *v.* Western Union Tel. Co., 77 S. C. 56, 57 S. E. 671; Wallingford *v.* Western Union Tel. Co., 60 S. C. 201, 38 S. E. 443, 629 (holding that in an action by the sender of a message relating to a business transaction the addressee may testify as to what his answer would have been); Texas, etc., Tel. Co. *v.* MacKenzie, 36 Tex. Civ. App. 178, 81 S. W. 581; Western Union Tel. Co. *v.* Karr, 5 Tex. Civ. App. 60, 24 S. W. 302 (holding that in an action by the sender of a message requesting the addressee to meet him at a railroad station, the addressee may testify that had the message been delivered he would have done so). But see *infra*, IX, B, 2, b.

However, except in mental anguish cases (see *infra*, VIII, E, 2, f), this does not seem to be the general rule (Western Union Tel. Co. *v.* Watson, 94 Ga. 202, 21 S. E. 457, 47 Am. St. Rep. 151; Western Union Tel. Co. *v.* Ferguson, 157 Ind. 64, 60 N. E. 674, 1080, 54 L. R. A. 846), because such testimony is, at most, but the mere opinion of the witness and relates to damages which are too remote, speculative, and contingent to be recoverable (Hall *v.* Western Union Tel. Co., 59 Fla. 275, 51 So. 819, 27 L. R. A. N. S. 639; Bass *v.* Postal Tel.-Cable Co., 127 Ga. 423, 56 S. E. 465, 12 L. R. A. N. S. 489; Wilson *v.* Western Union Tel. Co., 124 Ga. 131, 52 S. E. 153; Western Union Tel. Co. *v.* Adams Mach. Co., 92 Miss. 849, 47 So. 412 [*followed* in Western Union Tel. Co. *v.* Webb, (Miss. 1909) 48 So. 408]). And *compare* Richmond Hosiery Mills *v.* Western Union Tel. Co., 123 Ga. 216, 51 S. E. 290 [*quoting* Beatty Lumber Co. *v.* Western Union Tel. Co., 52 W. Va. 410, 44 S. E. 309 (*citing* McColl *v.* Western Union Tel. Co., 44 N. Y. Super. Ct. 487, 7 Abb. N. Cas. 151)]. In the Ferguson case, *supra*, the court said: "The plaintiff says he would have gone. But would he? The jury found so as a fact wholly from the plaintiff's present opinion on a past condition of things that never existed but is now summoned before the mind by conjecture. Thus the 'mental anguish' doctrine not only departs from principle in regard to measuring compensatory damages, but also warps the rules of evidence which forbid a witness to testify what he would or would not have done in a stated contingency. Weed *v.* Martin, 89 Ala. 587, 8 So. 132: Would you have put the credit on the note if the money had not been paid? Smith *v.* Western Union Tel. Co., 83 Ky. 104, 4 Am. St. Rep. 126; (Special interrogatory to the jury.) If the message had been received by plaintiff would he have ordered his stock to be sold? Allen *v.* Stout, 51 N. Y. 668: If you had been permitted to sell those arms, in what condition would it have placed you? Kansas, etc., Short Line R. Co. *v.* Scott, 1 Tex. Civ. App. 1, 20 S. W. 725: How many trips would you probably have made per year had the railroad not revoked your pass? Commercial Bank *v.* Firemen's Ins. Co., 87 Wis. 297, 58 N. W. 391: Would you have settled the loss if you had known that the books of the insured were altered? On the answers to the questions put to the appellee in this case, how could perjury be predicated?"

Messages containing offers see *infra*, IX, B, 2, b.

6. Doster *v.* Western Union Tel. Co., 77 S. C. 56, 59, 57 S. E. 671, where the court

but evidence is not admissible on the issue of damages, either on behalf of plaintiff or defendant, which is not relevant to such issue.[7]

f. In Mental Anguish Cases. Although mental anguish is presumed where plaintiff, in consequence of the telegraph company's negligence, is unable to attend the death-bed or the funeral of a near relative,[8] the direct testimony of plaintiff, in addition, that he suffered such anguish is competent,[9] and conduct and expressions of plaintiff indicating his grief, to the extent that it resulted from the negligence of the company, may also be shown.[10] On the other hand defendant may show any facts indicating that plaintiff could not have suffered mental anguish, or that he suffered little;[11] and any testimony is relevant which will assist the jury in distinguishing between the grief which plaintiff has suffered because of the death of the relative and that which he has suffered in consequence of the negligence of the telegraph company.[12] Evidence that plaintiff, in a mental anguish case, entertained a great affection for deceased is relevant, as bearing on the extent of the anguish suffered,[13] particularly in rebuttal of evidence introduced by defendant tending to show the absence of such affection and consequent suffering as would ordinarily be presumed from the relationship between the parties;[14] but the fact that deceased entertained a great affection for plaintiff would seem to be irrelevant, as it is not the mental anguish of deceased which is in question.[15] So also it has been held that evidence is not admissible of statements made by deceased prior to his death expressing a desire to see plaintiff

said: "Testimony of this kind . . . is admissible from necessity."

7. Western Union Tel. Co. *v.* Henderson, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148; Western Union Tel. Co. *v.* Way, 83 Ala. 542, 4 So. 844; Hollis *v.* Western Union Tel. Co., 91 Ga. 801, 18 S. E. 287; Western Union Tel. Co. *v.* Williford, (Tex. Civ. App. 1894) 27 S. W. 700.

8. See *supra*, VIII, E, 1, b.

9. Mentzer *v.* Western Union Tel. Co., 93 Iowa 752, 62 N. W. 1, 57 Am. St. Rep. 294, 28 L. R. A. 72; Bailey *v.* Western Union Tel. Co., 150 N. C. 316, 63 S. E. 1044; Shepard *v.* Western Union Tel. Co., 143 N. C. 244, 55 S. E. 704; Roberts *v.* Western Union Tel. Co., 73 S. C. 520, 53 S. E. 985, 114 Am. St. Rep. 100; Western Union Tel. Co. *v.* Lydon, 82 Tex 364, 18 S. W. 701; Buchanan *v.* Western Union Tel. Co., (Tex. Civ. App. 1907) 100 S. W. 974. But see Western Union Tel. Co. *v.* Northcutt, 158 Ala. 539, 48 So. 553, 132 Am. St. Rep. 38.

Limitation of rule.—The rule has been stated that in mental anguish cases plaintiff may testify to the effect that he did suffer mental anguish after the circumstances from which such suffering might arise have been brought out, but that he cannot testify as to his peculiar apprehensions, fears, and conclusions since they might be due to individual temperament. Roberts *v.* Western Union Tel. Co., 73 S. C. 520, 55 S. E. 985, 114 Am. St. Rep. 100.

Where the family relationship is remote so that mental anguish is not presumed it must be proved and evidence of the existence of such suffering is of course admissible. Alexander *v.* Western Union Tel. Co., 141 N. C. 75, 53 S. E. 657.

10. Western Union Tel. Co. *v.* Henderson, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148; Western Union Tel. Co. *v.* Adams, 75 Tex. 531, 12 S. W. 857, 16 Am. St. Rep. 920, 6 L. R. A. 844; Western Union Tel. Co. *v.* Campbell, 41 Tex. Civ. App. 204, 91 S. W. 312; Western Union Tel. Co. *v.* Davis, 24 Tex. Civ. App. 427, 59 S. W. 46; Western Union Tel. Co. *v.* Carter, (Tex. Civ. App. 1892) 20 S. W. 834.

Testimony that witness saw plaintiff crying is admissible as tending to show mental anguish. Western Union Tel. Co. *v.* Manker, 145 Ala. 418, 41 So. 850.

11. Western Union Tel. Co. *v.* Terrell, 10 Tex. Civ. App. 60, 30 S. W. 70, holding that in an action for mental anguish due to a delay in delivering a message announcing the illness of plaintiff's daughter, defendant may show that plaintiff had abandoned his family and was at the time living apart from them.

12. Western Union Tel. Co. *v.* Crocker, 135 Ala. 492, 33 So. 45, 59 L. R. A. 398; Hancock *v.* Western Union Tel. Co., 137 N. C. 497, 49 S. E. 952, 69 L. R. A. 403; Western Union Tel. Co. *v.* Simmons, 32 Tex. Civ. App. 578, 75 S. W. 822.

13. Doster *v.* Western Union Tel. Co., 77 S. C. 56, 57 S. E. 671; Buchanan *v.* Western Union Tel. Co., (Tex. Civ. App. 1907) 100 S. W. 974; Western Union Tel. Co. *v.* Campbell, 41 Tex. Civ. App. 204, 91 S. W. 312.

14. Buchanan *v.* Western Union Tel. Co., (Tex. Civ. App. 1907) 100 S. W. 974.

15. See Western Union Tel. Co. *v.* Mellon, 96 Tenn. 66, 33 S. W. 725; Western Union Tel. Co. *v.* Stiles, 89 Tex. 312, 34 S. W. 438; Western Union Tel. Co. *v.* Jackson, 35 Tex. Civ. App. 419, 80 S. W. 649. But see Western Union Tel. Co. *v.* Lydon, 82 Tex. 364, 18 S. W. 701, holding that, in a case where plaintiff was prevented from seeing his mother before her death, it was not error to admit testimony that he was his mother's favorite child, since, although such testimony related to the feelings of the mother, it might properly be considered by the jury in connec-

or disappointment at his absence,[16] even where such statements were communicated to plaintiff upon his arrival;[17] but in a few cases evidence of such statements made by deceased and communicated to plaintiff has been held to be admissible.[18] In an action by the sender of a message the addressee may testify as to what he would have done in case the message had been duly delivered;[19] and in an action by the addressee he may testify as to what he himself would have done,[20] and may show by the testimony of the sender of the original message what the latter would have done in response to plaintiff's action.[21] Where it is alleged that the non-delivery or delay of a message prevented plaintiff from being present at the death-bed or burial of a relative, plaintiff may be asked what was the cause of his failure to be present,[22] and evidence is admissible which tends to explain any

tion with other circumstances in determining the feelings of plaintiff toward his parent.

16. Western Union Tel. Co. *v.* Mellon, 96 Tenn. 66, 33 S. W. 725; Western Union Tel. Co. *v.* Waller, 96 Tex. 589, 74 S. W. 751, 97 Am. St. Rep. 936 [*reversing* (Civ. App. 1903) 72 S. W. 264]; Western Union Tel. Co. *v.* Stiles, 89 Tex. 312, 34 S. W. 438; Western Union Tel. Co. *v.* Jackson, 35 Tex. Civ. App. 419, 80 S. W. 649.

Reasons for rule.— Evidence of such statements made by deceased is inadmissible because it is irrelevant to the true inquiry which is the effect produced upon plaintiff himself by the negligence of defendant, and also because it is calculated unduly to excite the sympathy of the jury. Western Union Tel. Co. *v.* Waller, 96 Tex. 589, 74 S. W. 751, 97 Am. St. Rep. 936 [*reversing* (Civ. App. 1903) 72 S. W. 264].

17. Western Union Tel. Co. *v.* Mellon, 96 Tenn. 66, 33 S. W. 725 (declaration of deceased that he believed he was being neglected by plaintiff); Western Union Tel. Co. *v.* Stiles, 89 Tex. 312, 34 S. W. 438 (fact that deceased repeatedly called for plaintiff). See also cases cited *supra*, note 16.

18. Potter *v.* Western Union Tel. Co., 138 Iowa 406, 116 N. W. 130 (holding that evidence that deceased before her death had called for plaintiff, her son, and wondered why he did not come, and that this fact was communicated to him upon his arrival, is admissible as bearing upon the amount of damages to be awarded); Whitten *v.* Western Union Tel. Co., 141 N. C. 361, 54 S. E. 289 (holding that while it is not competent for plaintiff himself to testify that he was told that deceased before his death expressed a desire to see him, as this would be hearsay, the testimony of the person giving such information to plaintiff is competent upon the question of damages, since the knowledge of such facts would naturally increase plaintiff's mental suffering).

19. Western Union Tel. Co. *v.* Benson, 159 Ala. 254, 48 So. 712 (holding that in an action for mental anguish due to plaintiff's being deprived of the presence and consolation of the addressee, the latter may testify that if the message had been promptly delivered he would have gone and could have arrived in time); Carter *v.* Western Union Tel. Co., 141 N. C. 374, 54 S. E. 274 (holding that in an action for mental anguish due to the non-delivery of a message summoning a physician, the physician may testify that if the message had been delivered he would have gone at once); Bright *v.* Western Union Tel. Co., 132 N. C. 317, 43 S. E. 841 (holding that in an action for mental anguish due to plaintiff's being deprived of the aid and consolation of the addressee, the latter may testify that if the message had been delivered he would have gone to plaintiff); Western Union Tel. Co. *v.* Karr, 5 Tex. Civ. App. 60, 24 S. W. 302 (holding that in an action based upon a failure of the addressee to meet plaintiff at a station as requested, the addressee may testify that if the message had been delivered to him he would have met plaintiff). See also Hancock *v.* Western Union Tel. Co., 137 N. C. 497, 49 S. E. 952, 69 L. R. A. 403.

Where the message directs the addressee to notify a third person of the death of a member of the latter's family, in an action by the latter for delay in delivering the message to the addressee, the addressee may testify that if the message had been promptly delivered he would at once have notified plaintiff as directed. Doster *v.* Western Union Tel. Co., 77 S. C. 56, 57 S. E. 671.

20. Western Union Tel. Co. *v.* Norris, 25 Tex. Civ. App. 43, 60 S. W. 982, holding that in an action by the addressee for the non-delivery of a death message he may testify that if the message had been delivered he would have wired requesting a postponement of the burial and then taken a train so as to be present.

How message understood.— In an action for non-delivery to plaintiff of a message announcing the death of his mother and stating: "If you can reach here by two o'clock, come," it is not error to allow plaintiff to testify that he would have understood the message to mean two o'clock of the following day. Western Union Tel. Co. *v.* Cooper, 29 Tex. Civ. App. 591, 69 S. W. 427.

21. Western Union Tel. Co. *v.* Norris, 25 Tex. Civ. App. 43, 60 S. W. 982, holding that in an action by the addressee of a death message where he has testified that if the message had been delivered to him he would have wired back to the sender of the original message requesting postponement of the burial, the latter may testify that if he had received such a request he would have postponed the burial until plaintiff arrived.

22. Arkansas, etc., R. Co. *v.* Stroude, (Ark. 1907) 100 S. W. 760.

failure or delay on his part in going in response to such a message.[23] Where defendant sets up as a defense that plaintiff was not financially able to go, plaintiff may show in rebuttal that his employer was indebted to him.[24]

3. Weight and Sufficiency. As in other civil actions,[25] plaintiff must establish by a preponderance of evidence the material facts in issue essential to his cause of action,[26] such as the breach of contract or negligence on the part of defendant,[27] that such negligence or default was the proximate cause of the injury complained of,[28] the damages sustained by reason thereof,[29] and where exemplary damages

23. Western Union Tel. Co. *v.* Lydon, 82 Tex. 364, 18 S. W. 701 (holding that where plaintiff had received a message announcing the illness of his mother and had wired back stating that if she was no better he would come to her, evidence is admissible that he inquired of defendant's agent and was told that his message had been delivered which, as he received no reply, induced him to believe that his mother's condition was not serious); Western Union Tel. Co. *v.* Johnsey, (Tex. Civ. App. 1908) 109 S. W. 251 (holding that where, after receiving a message announcing the death of plaintiff's mother, he failed to take the first train it was proper to permit him to state that he telephoned for a cab in which to go to the train and was informed that the cab had gone to the train and that he did not have time to make the train).

24. Western Union Tel. Co. *v.* Waller, (Tex. Civ. App. 1898) 47 S. W. 396.

25. See Evidence, 17 Cyc. 754.

26. Newsome *v.* Western Union Tel. Co., 144 N. C. 178, 56 S. E. 863; Slaughter *v.* Western Union Tel. Co., (Tex. Civ. App. 1908) 112 S. W. 688.

Evidence held sufficient: To support a verdict for plaintiff. Thorp *v.* Western Union Tel. Co., 84 Iowa 190, 50 N. W. 675; Western Union Tel. Co. *v.* Pells, 2 Tex. App. Civ. Cas. § 41. To show a contract of transmission. Harrison *v.* Western Union Tel. Co., 71 S. C. 386, 51 S. E. 119. To show that the message was delivered by the sender to an agent of defendant. Western Union Tel. Co. *v.* Russell, (Tex. Civ. App. 1895) 31 S. W. 698. To show that defendant had an office at the place to which the message was addressed. Thompson *v.* Western Union Tel. Co., 107 N. C. 449, 12 S. E. 427. To warrant a finding that the reception of a written message for transmission by the agent of a telephone company was within the scope of the agent's apparent authority. Southwestern Tel., etc., Co. *v.* Dale, (Tex. Civ. App. 1894) 27 S. W. 1059.

27. Aiken *v.* Western Union Tel. Co., 69 Iowa 31, 28 N. W. 419, 58 Am. Rep. 210; Sweatland *v.* Illinois, etc., Tel. Co., 27 Iowa 433, 1 Am. Rep. 285; Ayres *v.* Western Union Tel. Co., 65 N. Y. App. Div. 149, 72 N. Y. Suppl. 634; Western Union Tel. Co. *v.* Barnes, 95 Tenn. 271, 32 S. W. 207.

Evidence held sufficient: To show a negligent delay in the transmission of a message. Fail *v.* Western Union Tel. Co., 80 S. C. 207, 60 S. E. 697, 61 S. E. 258. To show a negligent delay in delivering a message. Western Union Tel. Co. *v.* Smith, 15 Ky. L. Rep. 334. To show an unreasonable delay in delivery. Western Union Tel. Co. *v.* Fatman, 73 Ga. 285, 54 Am. Rep. 877. To show gross negligence on the part of defendant. Redington *v.* Pacific Postal Tel. Cable Co., 107 Cal. 317, 40 Pac. 432, 48 Am. St. Rep. 132; Western Union Tel. Co. *v.* Howell, 38 Kan. 685, 17 Pac. 313; Western Union Tel. Co. *v.* Goodbar, (Miss. 1890) 7 So. 214; Pegram *v.* Western Union Tel. Co., 97 N. C. 57, 2 S. E. 256. To show that an error in spelling the name of the place to which the message was addressed was that of defendant's transmitting agent. Western Union Tel. Co. *v.* Hankins, (Tex. Civ. App. 1908) 110 S. W. 539. To sustain a verdict for plaintiff on the ground of negligence on the part of defendant, a telephone company, in failing to notify plaintiff of a long distance call. Southwestern Tel., etc., Co. *v.* McCoy, (Tex. Civ. App. 1908) 114 S. W. 387.

Evidence held insufficient: To show gross negligence essential to render a stipulation limiting the liability of the company inapplicable. Jones *v.* Western Union Tel. Co., 18 Fed. 717. Where a message is addressed to two persons jointly the evidence is not sufficient where it merely shows that the message was not delivered to one of them. Western Union Tel. Co. *v.* Barnes, 95 Tenn. 271, 32 S. W. 207.

28. Hauser *v.* Western Union Tel. Co., 150 N. C. 557, 64 S. E. 503; Newsome *v.* Western Union Tel. Co., 144 N. C. 178, 56 S. E. 863; Slaughter *v.* Western Union Tel. Co., (Tex. Civ. App. 1908) 112 S. W. 688.

Evidence held insufficient: To show that the delay of a telegram was the proximate cause of plaintiff's loss. Manier *v.* Western Union Tel. Co., 94 Tenn. 442, 29 S. W. 732. To show that defendant's transmission and delivery of a forged message was the proximate cause of plaintiff's cashing a forged draft. Wampum First Nat. Bank *v.* Western Union Tel. Co., 34 Pa. Super. Ct. 488. To show that an error by which the name of the sender of a message ordering goods was altered in transmission deceived the addressee or was the proximate cause of his failure to fill the order. Newsome *v.* Western Union Tel. Co., 144 N. C. 178, 56 S. E. 863. To show that if a message summoning a physician had been delivered the physician would have come. Slaughter *v.* Western Union Tel. Co., (Tex. Civ. App. 1908) 112 S. W. 688.

29. Western Union Tel. Co. *v.* Waxelbaum, 113 Ga. 1017, 39 S. E. 443, 56 L. R. A. 741; Western Union Tel. Co. *v.* Morrison, (Tex. Civ. App. 1896) 33 S. W. 1025; Western Union Tel. Co. *v.* Bertram, 1 Tex. App. Civ. Cas. § 1152; Western Union Tel. Co. *v.* Williams, 163 Fed. 513, 90 C. C. A. 143.

are claimed such facts and circumstances as are essential to authorize a recovery of such damages.[30] So in mental anguish cases plaintiff must establish by a preponderance of evidence the facts essential to authorize a recovery of such damages.[31] Defendant on the other hand must establish by a preponderance of evidence matters of affirmative defense relied on,[32] or where there is a presumption of negligence,[33] the existence of facts and circumstances sufficient to rebut the presumption.[34]

Evidence held sufficient to show the loss sustained by reason of a delay in the transmission and delivery of a message directing the purchase of stocks see Western Union Tel. Co. *v.* Littlejohn, 72 Miss. 1025, 18 So. 418.

Evidence held insufficient: To show any pecuniary loss to plaintiff from a failure of defendant promptly to transmit the message. Western Union Tel. Co. *v.* Williams, 163 Fed. 513, 90 C. C. A. 143. To show that plaintiff sustained any loss by reason of defendant's delay in delivering a message. Manier *v.* Western Union Tel. Co., 94 Tenn. 442, 29 S. W. 732.

30. Johnson *v.* Western Union Tel. Co., 82 S. C. 87, 63 S. E. 1.

Evidence held insufficient to authorize a recovery of exemplary damages see Oxner *v.* Western Union Tel. Co., 82 S. C. 510, 63 S. E. 545; Johnson *v.* Western Union Tel. Co., 82 S. C. 87, 63 S. E. 1.

31. Western Union Tel. Co. *v.* Long, 90 Ark. 203, 118 S. W. 405; Hauser *v.* Western Union Tel. Co., 150 N. C. 557, 64 S. E. 503.

Evidence held sufficient: To sustain a verdict for plaintiff. Western Union Tel. Co. *v.* Rhine, 90 Ark. 57, 117 S. W. 1069; Arkansas, etc., R. Co. *v.* Stroude, 82 Ark. 117, 100 S. W. 760; Western Union Tel. Co. *v.* Burrow, 10 Tex. Civ. App. 122, 30 S. W. 378. To show a negligent delay in delivering a message announcing the illness of a member of plaintiff's family. Western Union Tel. Co. *v.* Boots, 10 Tex. Civ. App. 540, 31 S. W. 825. To show that plaintiff suffered mental anguish. Mentzer *v.* Western Union Tel. Co., 93 Iowa 752, 62 N. W. 1, 57 Am. St. Rep. 294, 28 L. R. A. 72; Western Union Tel. Co. *v.* Porter, (Tex. Civ. App. 1894) 26 S. W. 866. To show that if a message announcing a serious illness, death, or burial had been duly delivered plaintiff would have gone. Western Union Tel. Co. *v.* Shofner, 87 Ark. 303, 112 S. W. 751; Western Union Tel. Co. *v.* Sloss, 45 Tex. Civ. App. 153, 100 S. W. 354; Western Union Tel. Co. *v.* Smith, (Tex. Civ. App. 1894) 30 S. W. 937. To show that if the message had been promptly delivered plaintiff could have arrived before the death or burial occurred. Western Union Tel. Co. *v.* Shofner, 87 Ark. 303, 112 S. W. 751; Western Union Tel. Co. *v.* Sloss, 45 Tex. Civ. App. 153, 100 S. W. 354; Western Union Tel. Co. *v.* Smith, (Tex. Civ. App. 1895) 33 S. W. 742; Western Union Tel. Co. *v.* Smith, (Tex. Civ. App. 1894) 30 S. W. 937. To show that if the message had been promptly delivered plaintiff would have taken an earlier train which would have arrived in time. Sutton *v.* Western Union Tel. Co., 129 Ky. 166, 110 S. W. 874, 33 Ky. L. Rep. 577. To show that if a death message had been promptly delivered plaintiff would have telegraphed the sender to postpone the funeral. Western Union Tel. Co. *v.* Moran, (Tex. Civ. App. 1908) 113 S. W. 625. To justify a finding that if a message announcing the death of plaintiff's son and requesting directions as to the disposition of his remains had been promptly delivered to plaintiff so that the answer directing shipment to plaintiff's home would have reached the sender before the burial the sender of the original message would have shipped the remains as directed. Western Union Tel. Co. *v.* Arant, 88 Ark. 499, 115 S. W. 136. To show that the negligence of defendant occurred in the state where the message was filed for transmission so as to authorize a recovery for mental anguish as allowable by the law of that state. Fail *v.* Western Union Tel. Co., 80 S. C. 207, 60 S. E. 697, 61 S. E. 258.

Evidence held insufficient to show that defendant's negligence was the proximate cause of plaintiff's not attending the funeral of a relative see Hauser *v.* Western Union Tel. Co., 150 N. C. 557, 64 S. E. 503.

32. Kendall *v.* Western Union Tel. Co., 56 Mo. App. 192; Western Union Tel. Co. *v.* Olivarri, (Tex. Civ. App. 1908) 110 S. W. 930; Western Union Tel. Co. *v.* Smith, (Tex. Civ. App. 1895) 33 S. W. 742.

Evidence held sufficient: To show that the clerk who wrote the message acted as the agent of the sender so as to bind him to a stipulation requiring claims to be presented within a certain time. Western Union Tel. Co. *v.* Prevatt, 149 Ala. 617, 43 So. 106. To show contributory negligence on the part of plaintiff. Wampum First Nat. Bank *v.* Western Union Tel. Co., 34 Pa. Super. Ct. 488.

Evidence held insufficient to show contributory negligence on the part of plaintiff see Western Union Tel. Co. *v.* Smith, (Tex. Civ. App. 1895) 33 S. W. 742.

33. See *supra*, VIII, E, 1, a.

34. Carter *v.* Western Union Tel. Co., 141 N. C. 374, 54 S. E. 274; Western Union Tel. Co. *v.* Cook, 61 Fed. 624, 9 C. C. A. 680.

Evidence held sufficient to rebut the presumption of negligence see Western Union Tel. Co. *v.* Eliot, 131 Ky. 340, 115 S. W. 228, 22 L. R. A. N. S. 761; Smith *v.* Western Union Tel. Co., 57 Mo. App. 259; Pickney *v.* Western Union Tel. Co., 19 S. C. 71, 45 Am. Rep. 765; Western Union Tel. Co. *v.* Brown, (Tex. Civ. App. 1903) 75 S. W. 359.

Evidence held insufficient to rebut the presumption of negligence see Carter *v.* Western Union Tel. Co., 141 N. C. 374, 54 S. E. 274; Western Union Tel. Co. *v.* Cook, 61 Fed. 624, 9 C. C. A. 680.

F. Questions For Court or Jury — 1. In General. As in other civil actions,[35] questions of law,[36] including the construction of the contract of transmission,[37] or of other writings involved in the case,[38] are for the court, and questions of fact are for the jury.[39] The case should be submitted to the jury if there is any evidence legally sufficient to sustain a verdict for the cause of action alleged,[40] or to sustain the defense relied on,[41] and the evidence is conflicting or such that different conclusions might reasonably be drawn therefrom;[42] but if there is no evidence in support of an essential matter in issue, or the evidence is clear and without conflict, the court may grant a nonsuit or direct a verdict,[43] and ought

35. See Trial.

36. Heimann *v.* Western Union Tel. Co., 57 Wis. 562, 16 N. W. 32.

The measure of damages is a question of law for the court whether the action is in contract or in tort. Western Union Tel. Co. *v.* Lehman, 105 Md. 442, 66 Atl. 266.

37. Thompson *v.* Western Union Tel. Co., 10 Tex. Civ. App. 120, 30 S. W. 250.

38. Western Union Tel. Co. *v.* Way, 83 Ala. 542, 4 So. 844, holding that in an action for damages due to a failure to transmit a message relating to a contract between the sender and the addressee, the construction of such contract as embodied in letters and telegrams sent from one to the other is for the court.

39. Western Union Tel. Co. *v.* Merrill, 144 Ala. 618, 39 So. 121, 113 Am. St. Rep. 66; Western Union Tel. Co. *v.* Gillis, 89 Ark. 483, 117 S. W. 749, 131 Am. St. Rep. 115; Garrett *v.* Western Union Tel. Co., 83 Iowa 257, 49 N. W. 88; Taylor *v.* Western Union Tel. Co., 101 S. W. 969, 31 Ky. L. Rep. 240.

Particular issues see *infra*, VIII, F, 2.

40. *Iowa.*— Potter *v.* Western Union Tel. Co., 138 Iowa 406, 116 N. W. 130, evidence sufficient to justify submission to jury on question of defendant's negligence.

Mississippi.— Sultan *v.* Western Union Tel. Co., 92 Miss. 785, 46 So. 827, error under the evidence to direct a verdict for defendant.

Missouri.— Reynolds *v.* Western Union Tel. Co., 81 Mo. App. 223, holding that where the abbreviation "Gtd." was indorsed on a telegram by the sender and he testifies that it was understood to mean that all charges necessary for delivery were guaranteed, the evidence is sufficient to warrant a submission of this question to the jury in an action for failure to deliver the message at a point beyond defendant's free delivery limits.

North Carolina.— Willis *v.* Western Union Tel. Co., 150 N. C. 318, 64 S. E. 11, sufficient evidence of negligence to authorize submission to jury, and motion for nonsuit properly denied.

South Carolina.— Mims *v.* Western Union Tel. Co., 82 S. C. 247, 64 S. E. 236 (evidence sufficient to justify submission of issue as to exemplary damages); Balderston *v.* Western Union Tel. Co., 79 S. C. 160, 60 S. E. 435 (evidence sufficient to justify submission of issue as to exemplary damages).

Texas.— Klopf *v.* Western Union Tel. Co., 100 Tex. 540, 101 S. W. 1072, 123 Am. St. Rep. 831, 10 L. R. A. N. S. 498 (evidence sufficient to require submission to jury on question of negligent delay in delivery, and error to direct verdict for defendant); Western Union Tel. Co. *v.* Hankins, (Civ. App. 1908) 110 S. W. 539 (evidence sufficient to justify submission to jury on question of negligent failure to deliver, and refusal to direct a verdict for defendant not error); Barefoot *v.* Western Union Tel. Co., 28 Tex. Civ. App. 457, 67 S. W. 912 (evidence sufficient to require submission to jury and error to direct verdict for defendant); Western Union Tel. Co. *v.* Merrill, (Civ. App. 1893) 22 S. W. 826 (sufficient evidence of negligence to justify the court in refusing to direct a verdict for defendant).

United States.— Box *v.* Postal Tel.-Cable Co., 165 Fed. 138, 91 C. C. A. 172, sufficient evidence of negligence to require submission to jury, and error to direct verdict for defendant.

Rule stated.—If there is sufficient evidence, if believed by the jury, to sustain a verdict in favor of plaintiff, the case should be submitted to the jury, and it is error to direct a verdict for defendant. Box *v.* Postal Tel.-Cable Co., 165 Fed. 138, 91 C. C. A. 172.

41. Garrett *v.* Western Union Tel. Co., 83 Iowa 257, 49 N. W. 88.

42. Western Union Tel. Co. *v.* Rowell, 153 Ala. 295, 45 So. 73; Western Union Tel. Co. *v.* Bowman, 141 Ala. 175, 37 So. 493; Western Union Tel. Co. *v.* Gillis, 89 Ark. 483, 117 S. W. 749, 131 Am. St. Rep. 115; Hunter *v.* Western Union Tel. Co., 130 N. C. 602, 41 S. E. 796; Roberts *v.* Western Union Tel. Co., 76 S. C. 275, 56 S. E. 960.

43. Brumfield *v.* Western Union Tel. Co., 97 Iowa 693, 66 N. W. 898 (holding that in an action for delay in delivering a message where there was no evidence as to when the message was received by defendant for transmission or as to when it reached the office at the place of destination, there was an entire absence of evidence from which the jury could find negligence in regard to its delivery and that the court properly directed a verdict for defendant); Hartstein *v.* Western Union Tel. Co., 89 Wis. 531, 62 N. W. 412 (holding that where there was no evidence to show that defendant's negligence was the cause of the injury complained of, a nonsuit was properly granted).

Separate cause of action.—Where the complaint states two causes of action, one for exemplary damages for a wilful wrong and the other for compensatory damages for negligence, and there is no evidence of wilfulness, the court may grant a nonsuit as to this

if requested, to dispose of the case in this manner without submitting such issues to the jury.[44]

2. Particular Issues — a. In General. In accordance with the general rules above stated,[45] it is ordinarily a question of fact for the jury whether the person receiving the message for transmission was an agent of defendant,[46] whether defendant was negligent,[47] as in regard to the transmission[48] or delivery of a message,[49]

cause of action leaving the cause of action for negligence to be submitted to the jury (Roberts *v.* Western Union Tel. Co., 73 S. C. 520, 53 S. E. 985, 114 Am. St. Rep. 100); but in such cases if there is any evidence of negligence defendant is not entitled to a nonsuit on the whole case (Poulnot *v.* Western Union Tel. Co., 69 S. C. 545, 48 S. E. 622; Young *v.* Western Union Tel. Co., 65 S. C. 93, 43 S. E. 448).

44. Western Union Tel. Co. *v.* Elliott, 131 Ky. 340, 115 S. W. 228, 22 L. R. A. N. S. 761, holding that, although negligence is presumed from a failure to deliver a message, yet where defendant shows that it used all reasonable diligence to make delivery the presumption of negligence is overcome, and if plaintiff introduces no evidence tending to show negligence the court should direct a verdict in favor of defendant.

It is error to submit an issue where there is no conflict in the evidence relating thereto and the evidence is conclusive on such issue (Western Union Tel. Co. *v.* Housewright, 5 Tex. Civ. App. 1, 23 S. W. 824), or to submit to the jury a ground of liability in support of which no evidence has been introduced (Cutts *v.* Western Union Tel. Co., 71 Wis. 46, 36 N. W. 627).

45. See *supra*, VIII, F, 1.

46. Western Union Tel. Co. *v.* Craven, (Tex. Civ. App. 1906) 95 S. W. 633; Western Union Tel. Co. *v.* McLeod, (Tex. Civ. App. 1893) 22 S. W. 988.

47. Potter *v.* Western Union Tel. Co., 138 Iowa 406, 116 N. W. 130; Western Union Tel. Co. *v.* Edsall, 63 Tex. 668; Western Union Tel. Co. *v.* Elliott, 7 Tex. Civ. App. 482, 27 S. W. 219; Barnes *v.* Western Union Tel. Co., 120 Fed. 550; Beasley *v.* Western Union Tel. Co., 39 Fed. 181.

48. Western Union Tel. Co. *v.* McGown, 42 Tex. Civ. App. 565, 93 S. W. 710; Box *v.* Postal Tel.-Cable Co., 165 Fed. 138, 91 C. C. A. 172; Beasley *v.* Western Union Tel. Co., 39 Fed. 181.

Whether a failure of the company to notify the sender of the message of its inability to transmit the same was negligence is a question for the jury. Faubion *v.* Western Union Tel. Co., 36 Tex. Civ. App. 98, 81 S. W. 56.

49. *Arkansas.*—Arkansas, etc., R. Co. *v.* Stroude, 82 Ark. 117, 100 S. W. 760.

Georgia.— Western Union Tel. Co. *v.* Timmons, 93 Ga. 345, 20 S. E. 649.

Iowa.— Potter *v.* Western Union Tel. Co., 138 Iowa 406, 116 N. W. 130; Hurlburt *v.* Western Union Tel. Co., 123 Iowa 295, 98 N. W. 794.

Kentucky.— Thomas *v.* Western Union Tel. Co., 120 Ky. 194, 85 S. W. 760, 27 Ky. L. Rep. 569; Postal Tel. Cable Co. *v.* Pratt, 85 S. W. 225, 27 Ky. L. Rep. 430; Western Union Tel. Co. *v.* Daniels, 15 Ky. L. Rep. 813.

North Carolina.— Kernodle *v.* Western Union Tel. Co., 141 N. C. 436, 54 S. E. 423; Lyne *v.* Western Union Tel. Co., 123 N. C. 129, 31 S. E. 350.

South Carolina.— Glover *v.* Western Union Tel. Co., 78 S. C. 502, 59 S. E. 526; Poulnot *v.* Western Union Tel. Co., 69 S. C. 545, 48 S. E. 622.

Texas.— Klopf *v.* Western Union Tel. Co., 100 Tex. 540, 101 S. W. 1072, 123 Am. St. Rep. 831, 10 L. R. A. N. S. 498; Western Union Tel. Co. *v.* Cooper, 71 Tex. 507, 9 S. W. 598, 10 Am. St. Rep. 772, 1 L. R. A. 728; Evans *v.* Western Union Tel. Co., (Civ. App. 1900) 56 S. W. 609; Thompson *v.* Western Union Tel. Co., 10 Tex. Civ. App. 120, 30 S. W. 250; Western Union Tel. Co. *v.* De Jarles, 8 Tex. Civ. App. 109, 27 S. W. 792.

Utah.— Brown *v.* Western Union Tel. Co., 6 Utah 219, 21 Pac. 988.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 76.

Whether defendant had an office at the place to which the message was addressed, or whether it was necessary to deliver the message to a connecting line in order to reach its destination, is a question for the jury where the evidence is conflicting. Western Union Tel. Co. *v.* Jones, 81 Tex. 271, 16 S. W. 1006.

Time shown by delivery sheet.— If, in an action for delay in delivering a telegram, there was evidence contradicting the genuineness of the signature to the delivery sheet which was put in evidence, it was a jury question whether the telegram was received at the time therein specified. Western Union Tel. Co. *v.* Northcutt, 158 Ala. 539, 48 So. 553, 132 Am. St. Rep. 38.

How message was addressed.— In an action against a telegraph company to recover damages for negligent delay in the delivery of a telegram sent to plaintiffs, a copy of which as delivered was addressed to plaintiffs' residence, the questions whether a paper shown a witness and alleged to be the original message, purporting to be addressed to plaintiffs' business address, was the original message, and how the same was addressed, were for the jury. Western Union Tel. Co. *v.* Lehman, 105 Md. 442, 66 Atl. 266.

The authority of a person other than the addressee to receive a message addressed to the latter is a question for the jury. Glover *v.* Western Union Tel. Co., 78 S. C. 502, 59 S. E. 526.

Notice of long distance telephone call.— In an action against a telephone company for

or an error in its transmission,[50] and whether such negligence was the proximate cause of the injury complained of.[51] Where exemplary damages are claimed it is a question for the jury whether defendant's conduct was of the gross, wanton, or wilful character essential to a recovery of such damages,[52] and where the circumstances are such as to raise a presumption of negligence placing the burden of proof upon defendant,[53] it is a question for the jury whether defendant has shown facts sufficient to rebut the presumption.[54] It is also a question for the jury whether defendant had notice of the nature and importance of the message so as to justify a recovery of special damages,[55] or whether the message itself was sufficient to charge the company with such notice,[56] unless its character and importance clearly appear upon the face of the message;[57] and also whether plaintiff was guilty of contributory negligence,[58] or after the discovery of defendant's negligence might by the exercise of reasonable care and diligence have avoided or lessened the resulting damages.[59]

b. Stipulations or Regulations Affecting Liability. The reasonableness of stipulations in the contract of transmission limiting the liability of the company or of regulations affecting the conduct of its business, as in regard to its office hours, has ordinarily been held to be a question for the court,[60] although it has

failing to secure an answer to a call over a long distance line, it is a question for the jury whether defendant exercised due diligence by merely telephoning to the place where the person called was working and making no other effort to find him on receiving an answer from such place to the effect that he was not there. Southwestern Tel., etc., Co. *v.* McCoy, (Tex. Civ. App. 1908) 114 S. W. 387.

Whether a failure to notify the sender of a message of the company's inability to find the addressee and deliver the message is negligence is a question for the jury. Western Union Tel. Co. *v.* Davis, (Tex. Civ. App. 1899) 51 S. W. 258.

50. Hart *v.* Western Union Tel. Co., (Cal. 1884) 4 Pac. 657; Western Union Tel. Co. *v.* Edsall, 63 Tex. 668.

51. Garrett *v.* Western Union Tel. Co., 83 Iowa 257, 49 N. W. 88; Dempsey *v.* Western Union Tel. Co., 77 S. C. 399, 58 S. E. 9; Toale *v.* Western Union Tel. Co., 76 S. C. 248, 57 S. E. 117; Marsh *v.* Western Union Tel. Co., 65 S. C. 430, 43 S. E. 953; Beasley *v.* Western Union Tel. Co., 39 Fed. 181.

52. Western Union Tel. Co. *v.* Cunningham, 99 Ala. 314, 14 So. 579; Mims *v.* Western Union Tel. Co., 82 S. C. 247, 64 S. E. 236; Glover *v.* Western Union Tel. Co., 78 S. C. 502, 59 S. E. 526; Marsh *v.* Western Union Tel. Co., 65 S. C. 430, 43 S. E. 953.

Right to recover exemplary damages see *infra*, IX, C.

53. See *supra*, VIII, E, 1, a.

54. Hart *v.* Western Union Tel. Co., (Cal. 1884) 4 Pac. 657; Hunter *v.* Western Union Tel. Co., 130 N. C. 602, 41 S. E. 796; Western Union Tel. Co. *v.* Edsall, 63 Tex. 668; Western Union Tel. Co. *v.* Brown, (Tex. Civ. App. 1903) 75 S. W. 359; White *v.* Western Union Tel. Co., 14 Fed. 710, 5 McCrary 103.

Directing verdict.— If there is more than a scintilla of evidence tending to show that defendant exercised due care and diligence in regard to the delivery of a message, the court should not direct a verdict for plaintiff (Hunter *v.* Western Union Tel. Co., 130 N. C. 602, 41 S. E. 796); but on the other hand if defendant introduces evidence showing that it exercised due care and diligence to deliver the message, the presumption of negligence is overcome, and if plaintiff introduces no evidence tending to show negligence the court should if requested direct a verdict for defendant (Western Union Tel. Co. *v.* Elliott, 131 Ky. 340, 115 S. W. 228, 22 L. R. A. N. S. 761).

55. Western Union Tel. Co. *v.* Merritt, 55 Fla. 462, 46 So. 1024, 127 Am. St. Rep. 169.

56. Wallingford *v.* Western Union Tel. Co., 60 S. C. 201, 38 S. E. 443, 629; Wolff *v.* Western Union Tel. Co., 42 Tex. Civ. App. 30, 94 S. W. 1062.

57. Western Union Tel. Co. *v.* May, 8 Tex. Civ. App. 176, 27 S. W. 760.

58. Manly Mfg. Co. *v.* Western Union Tel. Co., 105 Ga. 235, 31 S. E. 156; Hise *v.* Western Union Tel. Co., 137 Iowa 329, 113 N. W. 819; Garrett *v.* Western Union Tel. Co., 83 Iowa 257, 49 N. W. 88; Western Union Tel. Co. *v.* Taylor, 112 S. W. 844, 33 Ky. L. Rep. 1062, 19 L. R. A. N. S. 409; Western Union Tel. Co. *v.* Powell, (Tex. Civ. App. 1909) 118 S. W. 226.

59. Hocutt *v.* Western Union Tel. Co., 147 N. C. 186, 60 S. E. 980; Cloy *v.* Western Union Tel. Co., 78 S. C. 109, 58 S. E. 972; Dempsey *v.* Western Union Tel. Co., 77 S. C. 399, 58 S. E. 9.

60. Western Union Tel. Co. *v.* Ford, 77 Ark. 531, 92 S. W. 528 (reasonableness of regulation as to office hours a question for the court); Western Union Tel. Co. *v.* Love Banks Co., 73 Ark. 205, 83 S. W. 949 (reasonableness of regulation as to office hours a question for the court); Western Union Tel. Co. *v.* Crider, 107 Ky. 600, 54 S. W. 963, 21 Ky. L. Rep. 1336 (reasonableness of regulation as to closing office at night for purpose of delivery in small places a question for the court); Western Union Tel. Co. *v.* Scott, 87 S. W. 289, 27 Ky. L. Rep. 975 (reasonableness of regulation as to free delivery

been held that whether a stipulation ordinarily valid would be unreasonable in its application to the facts and circumstances of a particular case is a question for the jury.[61] It is also a question for the jury where the evidence is conflicting whether particular regulations were ever established,[62] and what such regulations in fact were;[63] whether plaintiff had knowledge of a stipulation in the contract of transmission,[64] or assented thereto;[65] whether he did in fact present his claim within the time stipulated;[66] whether defendant by its conduct waived a stipulation limiting its liability;[67] whether where the word "day" was written across the stipulations of a night blank the message should with regard to such stipulations be considered as a night or as a day message;[68] and where the evidence tends to show a special agreement as to the time of delivery, whether defendant's ordinary regulations as to office hours should apply.[69]

c. In Mental Anguish Cases. In mental anguish as in other cases if the evidence is sufficient to warrant its submission to the jury,[70] and it is conflicting or different conclusions might reasonably be drawn therefrom,[71] it is a question for the jury whether plaintiff suffered mental anguish,[72] and whether such suffering

limits a question for the court); Western Union Tel. Co. *v.* Phillips, 2 Tex. Civ. App. 608, 21 S. W. 638, (Civ. App. 1893) 30 S. W. 494 (reasonableness of stipulation requiring claims to be presented within sixty days ordinarily a question for the court); Heinmann *v.* Western Union Tel. Co., 57 Wis. 562, 16 S. W. 32 (reasonableness of a stipulation requiring claims to be presented within twenty days a question for the court). *Contra*, Brown *v.* Western Union Tel. Co., 6 Utah 219, 21 Pac. 988, reasonableness of regulation as to office hours a question for the jury.

61. Western Union Tel. Co. *v.* Phillips, 2 Tex. Civ. App. 608, 21 S. W. 638, (Civ. App. 1893) 30 S. W. 494, holding that while a stipulation requiring claims to be presented within sixty days is ordinarily valid as a matter of law, if a part of this time has expired before defendant's negligence or default is discovered by plaintiff, it is a question for the jury whether the time still remaining before the expiration of the sixty days is reasonably sufficient for the presentation of such claim.

62. Western Union Tel. Co. *v.* Love Banks Co., 73 Ark. 205, 83 S. W. 949, regulation as to office hours.

63. Western Union Tel. Co. *v.* Love Banks Co., 73 Ark. 205, 83 S. W. 949, regulation as to office hours.

64. Webbe *v.* Western Union Tel. Co., 169 Ill. 610, 48 N. E. 670, 61 Am. St. Rep. 207, stipulation limiting the time for presenting claims, where action is in tort by the addressee.

65. Webbe *v.* Western Union Tel. Co., 169 Ill. 610, 48 N. E. 670, 61 Am. St. Rep. 207 (stipulation requiring claims to be presented within sixty days); Western Union Tel. Co. *v.* De Golyer, 27 Ill. App. 489 (stipulation requiring claims to be presented within sixty days).

66. Western Union Tel. Co. *v.* De Golyer, 27 Ill. App. 489.

67. Western Union Tel. Co. *v.* Hines, 96 Ga. 688, 23 S. E. 845, 51 Am. St. Rep. 159 (stipulation requiring claims to be presented withing sixty days); Wheelock *v.* Postal Tel. Cable Co., 197 Mass. 119, 83 N. E. 313 (stipulation requiring claims to be presented within sixty days); Western Union Tel. Co. *v.* Stevenson, 128 Pa. St. 442, 18 Atl. 441, 15 Am. St. Rep. 687, 5 L. R. A. 515 (whether defendant by accepting messages orally and not requiring the use of its regular blanks intended to relieve its patrons from the stipulations on such blanks).

68. Western Union Tel. Co. *v.* Piner, 9 Tex. Civ. App. 152, 29 S. W. 66, where the stipulations of the regular night blank required claims to be presented within thirty days and the regular day blank allowed sixty days.

69. Western Union Tel. Co. *v.* Shaw, 33 Tex. Civ. App. 395, 77 S. W. 433.

70. Western Union Tel. Co. *v.* Hanley, 85 Ark. 263, 107 S. W. 1168 (evidence sufficient to warrant submission to the jury on the question of mental anguish); Western Union Tel. Co. *v.* Caldwell, 126 Ky. 42, 102 S. W. 840, 31 Ky. L. Rep. 497, 12 L. R. A. N. S. 748 (evidence sufficient to warrant its submission to the jury on the issue of whether defendant's negligence was the proximate cause of plaintiff's failure to attend a funeral); Gerock *v.* Western Union Tel. Co., 142 N. C. 22, 54 S. E. 782 (evidence sufficient to require submission to jury, and error to dismiss action on demurrer to the evidence); Western Union Tel. Co. *v.* Gulick, 48 Tex. Civ. App. 78, 106 S. W. 698 (evidence sufficient to justify a refusal to direct a verdict for defendant).

71. Western Union Tel. Co. *v.* Merrill, 144 Ala. 618, 39 So. 121, 113 Am. St. Rep. 66; Wiggs *v.* Southwestern Tel., etc., Co., (Tex. Civ. App. 1908) 110 S. W. 179.

Message summoning a physician.— In an action for mental anguish due to delay in delivering a message summoning a physician, where the evidence would justify the jury in finding that the physician could not have arrived in time even had the message been promptly delivered, it is proper to refuse to direct the verdict for plaintiff. Western Union Tel. Co. *v.* Haley, 143 Ala. 586, 39 So. 386.

72. Western Union Tel. Co. *v.* Benson, 159

was the proximate result of defendant's negligence.[73] So in the case of messages announcing the serious illness, death, or burial of a relative, it is ordinarily a question for the jury whether, had the message been duly transmitted and delivered, plaintiff could and would have gone,[74] and whether he could and would have arrived in time,[75] or in the case of a message summoning a physician whether the physician could have arrived in time.[76] It is also a question for the jury whether plaintiff was guilty of contributory negligence,[77] or failed to exercise reasonable care to avoid the consequences of defendant's negligence and to minimize the resulting mental suffering.[78]

G. Instructions. As in other civil actions,[79] the instructions of the court should state fully, clearly, and correctly the law of the case,[80] and must conform to the issues made by the pleadings and to the evidence,[81] and must not be

Ala. 254, 48 So. 712; Western Union Tel. Co. *v.* Merrill, 144 Ala. 618, 39 So. 121, 113 Am. St. Rep. 66; Western Union Tel. Co. *v.* Blair, (Tex. Civ. App. 1908) 113 S. W. 164.

73. Western Union Tel. Co. *v.* Merrill, 144 Ala. 618, 39 So. 121, 113 Am. St. Rep. 66; Western Union Tel. Co. *v.* Caldwell, 126 Ky. 42, 102 S. W. 840, 31 Ky. L. Rep. 497, 12 L. R. A. N. S. 748; Willis *v.* Western Union Tel. Co., 69 S. C. 531, 48 S. E. 538, 104 Am. St. Rep. 828; Wiggs *v.* Southwestern Tel., etc., Co., (Tex. Civ. App. 1908) 110 S. W. 179; Beasley *v.* Western Union Tel. Co., 39 Fed. 181.

74. Roberts *v.* Western Union Tel. Co., 76 S. C. 275, 56 S. E. 960; Western Union Tel. Co. *v.* Ridenour, 35 Tex. Civ. App. 574, 80 S. W. 1030; Western Union Tel. Co. *v.* May, 8 Tex. Civ. App. 176, 27 S. W. 760.

75. Western Union Tel. Co. *v.* Merrill, 144 Ala. 618, 39 So. 121, 113 Am. St. Rep. 66; Wiggs *v.* Southwestern Tel. Co., (Tex. Civ. App. 1908) 110 S. W. 179; Beasley *v.* Western Union Tel. Co., 39 Fed. 181.

But if the evidence is without conflict and shows conclusively that plaintiff could not have arrived in time it is error to submit this issue to the jury. Western Union Tel. Co. *v.* Housewright, 5 Tex. Civ. App. 1, 23 S. W. 824.

76. Western Union Tel. Co. *v.* Haley, 143 Ala. 586, 39 So. 386.

77. Western Union Tel. Co. *v.* Adair, 115 Ala. 441, 22 So. 73; Western Union Tel. Co. *v.* Taylor, (Ky. 1908) 112 S. W. 844; Doster *v.* Western Union Tel. Co., 77 S. C. 56, 57 S. E. 671 (whether plaintiff's delay in starting to the funeral was under the circumstances unreasonable); Western Union Tel. Co. *v.* Johnsey, (Tex. Civ. App. 1908) 109 S. W. 251; Western Union Tel. Co. *v.* Hardison, (Tex. Civ. App. 1907) 101 S. W. 541 (failure to send message requesting postponement of funeral); Western Union Tel. Co. *v.* Salter, (Tex. Civ. App. 1906) 95 S. W. 549 (failure to take earlier train).

The sufficiency of plaintiff's excuse for failing to take the first train after receipt of the message is ordinarily a question for the jury. Western Union Tel. Co. *v.* Bryson, 25 Tex. Civ. App. 74, 61 S. W. 548.

78. Dempsey *v.* Western Union Tel. Co., 77 S. C. 399, 58 S. E. 9; Willis *v.* Western Union Tel. Co., 73 S. C. 379, 53 S. E. 639; Western Union Tel. Co. *v.* Johnsey, (Tex. Civ. App. 1908) 109 S. W. 251.

79. See TRIAL.

80. *Alabama.*—Western Union Tel. Co. *v.* Benson, 159 Ala. 254, 48 So. 712 (erroneous as authorizing a recovery of exemplary damages in an action *ex contractu*); Western Union Tel. Co. *v.* Northcutt, 158 Ala. 539, 48 So. 553, 132 Am. St. Rep. 38.

Kentucky.— Western Union Tel. Co. *v.* Scott, 87 S. W. 289, 27 Ky. L. Rep. 975 (erroneous as to measure of damages); Western Union Tel. Co. *v.* Herning, 71 S. W. 642, 24 Ky. L. Rep. 1433 (erroneous as to measure of damages).

Maryland.— Western Union Tel. Co. *v.* Lehman, 105 Md. 442, 66 Atl. 266, instruction defective in not informing the jury as to how the damages should be assessed.

North Carolina.— Hinson *v.* Postal Tel. Cable Co., 132 N. C. 460, 43 S. E. 945 (instruction defective as to the measure of diligence required of defendant in regard to the delivery of messages); Thompson *v.* Western Union Tel. Co., 106 N. C. 549, 11 S. E. 269.

Texas.— Western Union Tel. Co. *v.* Stubbs, 43 Tex. Civ. App. 132, 94 S. W. 1083 (instruction defective as to measure of damages); Western Union Tel. Co. *v.* McDonald, 42 Tex. Civ. App. 229, 95 S. W. 691 (instructions inaccurate in defining the duty of the company); Western Union Tel. Co. *v.* Rawls, (Civ. App. 1901) 62 S. W. 136; Mitchell *v.* Western Union Tel. Co., 12 Tex. Civ. App. 262, 33 S. W. 1016.

Burden of proof.—An instruction is erroneous which places the burden of proof upon the wrong party. Dehougne *v.* Western Union Tel. Co., (Tex. Civ. App. 1905) 84 S. W. 1066; Western Union Tel. Co. *v.* Smith, (Tex. Civ. App. 1894) 26 S. W. 216; Western Union Tel. Co. *v.* Bennett, 1 Tex. Civ. App. 558, 21 S. W. 699.

But although the charge is very general if it is correct it will be held sufficient in the absence of any request for more specific instructions. Willis *v.* Western Union Tel. Co., 150 N. C. 318, 64 S. E. 11; Western Union Tel. Co. *v.* Kauffman, (Tex. Civ. App. 1908) 107 S. W. 630.

Instructions held sufficient upon the issue of contributory negligence see Western Union Tel. Co. *v.* Powell, (Tex. Civ. App. 1909) 118 S. W. 226.

81. *Alabama.*—Western Union Tel. Co. *v.*

argumentative,[82] or ambiguous, contradictory, confusing, or misleading,[83] or invade the province of the jury.[84] Requested instructions which state the law

Benson, 159 Ala. 254, 48 So. 712 (properly refused as relating to matters not in issue); Western Union Tel. Co. *v.* Northcutt, 158 Ala. 539, 48 So. 553, 132 Am. St. Rep. 38 (properly refused as inapplicable to evidence); Western Union Tel. Co. *v.* Manker, 145 Ala. 418, 41 So. 850 (properly refused as ignoring material matters which there was evidence tending to establish); Western Union Tel. Co. *v.* McNair, 120 Ala. 99, 23 So. 801 (erroneous as ignoring the defense of contributory negligence which was properly pleaded and supported by evidence).

Arkansas.— Arkansas, etc., R. Co. *v.* Stroude, 82 Ark. 117, 100 S. W. 760, properly refused as inapplicable to evidence.

Kentucky.— Western Union Tel. Co. *v.* Daniels, 15 Ky. L. Rep. 813, erroneous as not conforming to issues and evidence.

Mississippi.— Western Union Tel. Co. *v.* Morgan, 92 Miss. 108, 45 So. 427, erroneous as inapplicable to issues.

South Carolina.— Bolton *v.* Western Union Tel. Co., 76 S. C. 529, 57 S. E. 543, instruction as to contributory negligence properly refused where such defense was not pleaded.

Texas.— Western Union Tel. Co. *v.* Bowen, 97 Tex. 621, 81 S. W. 27 [*reversing* (Civ. App. 1903) 76 S. W. 613] (erroneous as inapplicable to issues); Landry *v.* Western Union Tel. Co., (Civ. App. 1908) 113 S. W. 10, (Civ. App. 1908) 108 S. W. 461 (erroneous as including as an element of damages a matter which the undisputed evidence showed was not due to defendant's negligence); Western Union Tel. Co. *v.* Wisdom, 85 Tex. 261, 20 S. W. 56, 34 Am. St. Rep. 805 (instruction on contributory negligence properly refused where such negligence was not pleaded); Western Union Tel. Co. *v.* Johnsey, (Civ. App. 1908) 109 S. W. 251 (properly refused as relating to a matter not in issue); Western Union Tel. Co. *v.* Gulick, (Civ. App. 1907) 106 S. W. 698 (properly refused as inapplicable to issues and evidence); Western Union Tel. Co. *v.* Ayres, (Civ. App. 1906) 93 S. W. 199 (erroneous as inapplicable to evidence); Western Union Tel. Co. *v.* Adams, 139 Tex. Civ. App. 517, 87 S. W. 1060 (properly refused as inapplicable to issues); Western Union Tel. Co. *v.* Newnum, (Civ. App. 1904) 78 S. W. 700 (error to submit an issue which is not supported by evidence); Seffel *v.* Western Union Tel. Co., (Civ. App. 1901) 65 S. W. 897 (erroneous as inapplicable to issues); Western Union Tel. Co. *v.* Norton, (Civ. App. 1901) 62 S. W. 1081 (erroneous as inapplicable to issues and evidence); Western Union Tel. Co. *v.* Redinger, 22 Tex. Civ. App. 362, 54 S. W. 417 (erroneous as inapplicable to evidence); Western Union Tel. Co. *v.* Waller, (Civ. App. 1898) 47 S. W. 396 (instruction as to exemplary damages properly refused where there was no such issue in the case or any claim for such damages); Western Union Tel. Co. *v.* Thompson, 18 Tex. Civ. App. 609, 45 S. W. 429 (erroneous as unsupported by evidence); Western Union Tel. Co. *v.* Lyles, (Civ. App. 1897) 42 S. W. 636 (properly refused as inapplicable to evidence); Western Union Tel. Co. *v.* Drake, (Civ. App. 1895) 29 S. W. 919 (erroneous as submitting a ground of recovery which no evidence had been introduced to sustain); Western Union Tel. Co. *v.* Housewright, 5 Tex. Civ. App. 1, 23 S. W. 824 (error to submit an issue unsupported by evidence); Western Union Tel. Co. *v.* Cocke, (Civ. App. 1893) 22 S. W. 1005 (erroneous as submitting a question not in issue).

Virginia.— Washington, etc., Tel. Co. *v.* Hobson, 15 Gratt. 122, properly refused as not relating to a matter in issue.

Wisconsin.— Cutts *v.* Western Union Tel. Co., 71 Wis. 46, 36 N. W. 627, erroneous as submitting a ground of liability unsupported by any evidence.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 77.

82. Western Union Tel. Co. *v.* Benson, 159 Ala. 254, 48 So. 712 (properly refused); Western Union Tel. Co. *v.* Northcutt, 158 Ala. 539, 48 So. 553, 132 Am. St. Rep. 38 (properly refused); Postal Tel. Cable Co. *v.* Lathrop, 131 Ill. 575, 23 N. E. 583, 19 Am. St. Rep. 55, 7 L. R. A. 474 (erroneous as argumentative).

83. *Alabama.*—Western Union Tel. Co. *v.* Benson, 159 Ala. 254, 48 So. 712 (properly refused as confusing and misleading); Western Union Tel. Co. *v.* Northcutt, 158 Ala. 539, 48 So. 553 (properly refused as misleading); Western Union Tel. Co. *v.* Rowell, 153 Ala. 295, 45 So. 73 (properly refused as misleading).

Arkansas.—Arkansas, etc., R. Co. *v.* Stroude, (1907) 100 S. W. 760 (properly refused as confusing and misleading); Western Union Tel. Co. *v.* Ford, 77 Ark. 531, 92 S. W. 528 (properly refused as misleading).

Illinois.— Western Union Tel. Co. *v.* Hope, 11 Ill. App. 289, erroneous as ambiguous and misleading.

Kansas.— Western Union Tel. Co. *v.* Harvey, 67 Kan. 729, 74 Pac. 250, erroneous as misleading.

Maryland.— Western Union Tel. Co. *v.* Lehman, 105 Md. 442, 66 Atl. 266, properly refused as misleading.

North Carolina.— Thompson *v.* Western Union Tel. Co., 106 N. C. 549, 11 S. E. 269, erroneous as conflicting and confusing.

Texas.— Western Union Tel. Co. *v.* McNairy, 34 Tex. Civ. App. 389, 78 S. W. 969 (erroneous as misleading); Western Union Tel. Co. *v.* Drake, 14 Tex. Civ. App. 601, 38 S. W. 632 (properly refused as misleading); Mitchell *v.* Western Union Tel. Co., 12 Tex. Civ. App. 262, 33 S. W. 1016 (erroneous as misleading).

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 77.

84. Western Union Tel. Co. *v.* Benson, 159 Ala. 254, 48 So. 712 (properly refused);

correctly and are applicable to the issues and evidence should ordinarily be given,[85] but may and should be refused if objectionable upon any of the grounds above stated,[86] and may properly be refused if they are substantially covered by the general charge or other requested instructions as given.[87]

H. Appeal and Error.[88] As in other civil actions, the judgment will not be reversed for an error which was not prejudicial to the party seeking to take advantage of it,[89] such as a harmless error in regard to the admission or exclusion of evidence,[90] or in the giving or refusing of instructions.[91] The general rule also

Western Union Tel. Co. *v.* Northcutt, 158 Ala. 539, 48 So. 553, 132 Am. St. Rep. 38 (properly refused); Western Union Tel. Co. *v.* Hope, 11 Ill. App. 289 (erroneous as assuming the existence of a fact in issue which was one of the material questions for the jury); Kernodle *v.* Western Union Tel. Co., 141 N. C. 436, 54 S. E. 423; Sherrill *v.* Western Union Tel. Co., 116 N. C. 655, 21 S. E. 429 (erroneous as invading the province of the jury by expressing an opinion upon the weight of evidence); Western Union Tel. Co *v.* Lydon, 82 Tex. 364, 18 S. W. 701 (properly refused); Western Union Tel. Co. *v.* Cooper, 71 Tex. 507, 9 S. W. 598, 10 Am. St. Rep. 772, 1 L. R. A. 728; Reed *v.* Western Union Tel. Co., 31 Tex. Civ. App. 116, 71 S. W. 389 (erroneous as being upon the weight of evidence); Western Union Tel. Co. *v.* Johnson, 16 Tex. Civ. App. 546, 41 S. W. 367 (properly refused as being upon the weight of evidence); Mitchell *v.* Western Union Tel. Co., 12 Tex. Civ. App. 262, 33 S. W. 1016 (erroneous as being upon the weight of evidence in regard to contributory negligence); Western Union Tel. Co. *v.* Karr, 5 Tex. Civ. App. 60, 24 S. W. 302 (properly refused as being upon the weight of evidence); Western Union Tel. Co. *v.* Cocke, (Tex. Civ. App. 1893) 22 S. W. 1005 (erroneous as informing the jury that certain facts enumerated made out a case of negligence); Western Union Tel. Co. *v.* Berdine, 2 Tex. Civ. App. 517, 21 S. W. 982 (properly refused as being upon the weight of evidence).

Instructions held not objectionable as being upon the weight of evidence see Western Union Tel. Co. *v.* Sweetman, 19 Tex. Civ. App. 435, 47 S. W. 676; Houston, etc., R. Co. *v.* Granberry, 16 Tex. Civ. App. 391, 40 S. W. 1062; Southwestern Tel., etc., Co. *v.* Dale, (Tex. Civ. App. 1894) 27 S. W. 1059.

85. Western Union Tel. Co. *v.* Weniski, 84 Ark. 457, 106 S. W. 486; Sherrill *v.* Western Union Tel. Co., 116 N. C. 655, 21 S. E. 429; Thompson *v.* Western Union Tel. Co., 106 N. C. 549, 11 S. E. 269; Southwestern Tel., etc., Co. *v.* Gotcher, 93 Tex. 114, 53 S. W. 686; Western Union Tel. Co. *v.* Cooper, 71 Tex. 507, 9 S. W. 598, 10 Am. St. Rep. 772, 1 L. R. A. 728; Western Union Tel. Co. *v.* T. H. Thompson Milling Co., 41 Tex. Civ. App. 223, 91 S. W. 307; Western Union Tel. Co. *v.* Stacy, (Tex. Civ. App. 1897) 41 S. W. 100.

86. Western Union Tel. Co. *v.* Benson, 159 Ala. 254, 48 So. 712 (requested instructions properly refused as being argumentative, confusing, and relating to matters not in issue and invading the province of the jury); Western Union Tel. Co. *v.* Northcutt, 158 Ala. 539, 48 So. 553, 132 Am. St. Rep. 38 (requested instructions properly refused as being argumentative, misleading, and invading the province of the jury); Arkansas, etc., R. Co. *v.* Stroude, (Ark. 1907) 100 S. W. 760 (requested instructions properly refused as being confusing, misleading, and inapplicable to any facts in evidence). See also cases cited *supra*, notes 80–84.

87. Arkansas, etc., R. Co. *v.* Stroude, (Ark. 1907) 100 S. W. 760; Erie Tel., etc., Co. *v.* Grimes, 82 Tex. 89, 17 S. W. 831; Western Union Tel. Co. *v.* Johnsey, (Tex. Civ. App. 1908) 109 S. W. 251; Western Union Tel. Co. *v.* Adams, 39 Tex. Civ. App. 517, 87 S. W. 1060; Western Union Tel. Co. *v.* Odom, 21 Tex. Civ. App. 537, 52 S. W. 632; Western Union Tel. Co. *v.* Jeanes, (Tex. Civ. App. 1895) 29 S. W. 1130.

88. See APPEAL AND ERROR, 2 Cyc. 474.

89. Hasbrouck *v.* Western Union Tel. Co., 107 Iowa 160, 77 N. W. 1034, 70 Am. St. Rep. 181; Cumberland Tel., etc., Co. *v.* Quigley, 129 Ky. 788, 112 S. W. 897, 19 L. R. A. N. S. 575 (improper remarks of counsel); Roberts *v.* Western Union Tel. Co., 76 S. C. 275, 56 S. E. 960; Gulf, etc., R. Co. *v.* Miller, 69 Tex. 739, 7 S. W. 653; Western Union Tel. Co. *v.* Bell, 48 Tex. Civ. App. 359, 107 S. W. 570 (refusal to sustain an exception to certain allegations in the complaint); Western Union Tel. Co. *v.* Hamilton, 36 Tex. Civ. App. 300, 81 S. W. 1052; Western Union Tel. Co. *v.* Edmonson, (Tex. Civ. App. 1897) 40 S. W. 622; Western Union Tel. Co. *v.* Jobe, 6 Tex. Civ. App. 403, 25 S. W. 168, 1036 (improper remarks of counsel); Western Union Tel. Co. *v.* Stephens, 2 Tex. Civ. App. 129, 21 S. W. 148. See also, generally, APPEAL AND ERROR, 3 Cyc. 383 *et seq.*

90. Western Union Tel. Co. *v.* Littlejohn, 72 Miss. 1025, 18 So. 418; Roberts *v.* Western Union Tel. Co., 76 S. C. 275, 56 S. E. 960; Slaughter *v.* Western Union Tel. Co., (Tex. Civ. App. 1908) 112 S. W. 688; Western Union Tel. Co. *v.* Hamilton, 36 Tex. Civ. App. 300, 81 S. W. 1052.

91. *Illinois.*— Postal Tel. Cable Co. *v.* Lathrop, 131 Ill. 575, 23 N. E. 583, 19 Am. St. Rep. 55, 7 L. R. A. 474.

Iowa.— Hasbrouck *v.* Western Union Tel. Co., 107 Iowa 160, 77 N. W. 1034, 70 Am. St. Rep. 181.

Maryland.— Western Union Tel. Co. *v.* Lehman, 105 Md. 442, 66 Atl. 266.

North Carolina.— Sherrill *v.* Western Union Tel. Co., 117 N. C. 352, 23 S. E. 277.

applies that ordinarily questions not raised in the trial court will not be considered on appeal,[92] and that a verdict based upon conflicting evidence will not ordinarily be disturbed on appeal,[93] if there is any evidence legally sufficient to sustain it; [94] but only where it is unsupported by evidence or is clearly and manifestly contrary to the great weight of evidence.[95] So also a judgment will not be reversed *in toto* where the only error is in the amount of damages which can be corrected by computation.[96]

IX. DAMAGES.

A. Nominal Damages or Cost of Transmission. Where an actionable breach of duty in regard to the transmission or delivery of a message is shown, plaintiff is entitled to recover at least nominal damages, although no actual damages are shown; [97] but if no actual recoverable damages are shown, plaintiff can recover only nominal damages.[98] Plaintiff has generally been allowed, however, to recover as actual damages [99] the amount paid for the transmission of the message,[1] provided he has actually paid the same;[2] but if no other actual

Texas.— Southwestern Tel., etc., Co. *v.* Owens, (Civ. App. 1909) 116 S. W. 89; Western Union Tel. Co. *v.* Edmonson, (Civ. App. 1897) 40 S. W. 622; Western Union Tel. Co. *v.* Stephens, 2 Tex. Civ. App. 129, 21 S. W. 148.

92. Western Union Tel. Co. *v.* De Golyer, 27 Ill. App. 489; Western Union Tel. Co. *v.* Hopkins, 49 Ind. 223. See also, generally, APPEAL AND ERROR, 2 Cyc. 660 *et seq.*

Whether the damages are excessive will not be considered on appeal where the question was not raised by a motion for a new trial in the court below. Western Union Tel. Co. *v.* Hopkins, 49 Ind. 223.

93. Western Union Tel. Co. *v.* Jones, 81 Tex. 271, 16 S. W. 1006. See also, generally, APPEAL AND ERROR, 3 Cyc. 348.

94. Harper *v.* Western Union Tel. Co., 92 Mo. App. 304; Western Union Tel. Co. *v.* Jones, 81 Tex. 271, 16 S. W. 1006; Gulf, etc., R. Co. *v.* Miller, 69 Tex. 739, 7 S. W. 653. See also, generally, APPEAL AND ERROR, 3 Cyc. 348.

95. Gulf, etc., R. Co. *v.* Miller, 69 Tex. 739, 7 S. W. 653. See also, generally, APPEAL AND ERROR, 3 Cyc. 351, 352.

Excessive damages see *infra*, IX, D.

96. Pacific Postal Tel. Cable Co. *v.* Fleischner, 66 Fed. 899, 14 C. C. A. 166.

97. *Alabama.*—Western Union Tel. Co. *v.* Westmoreland, 150 Ala. 654, 43 So. 790; Western Union Tel. Co. *v.* Haley, 143 Ala. 586, 39 So. 386.

Georgia.— Richmond Hosiery Mills *v.* Western Union Tel. Co., 123 Ga. 216, 51 S. E. 290; Glenn *v.* Western Union Tel. Co., 1 Ga. App. 821, 58 S. E. 83.

Indiana.— Western Union Tel. Co. *v.* Bryant, 17 Ind. App. 70, 46 N. E. 358.

Kentucky.—Denham *v.* Western Union Tel. Co., 87 S. W. 788, 27 Ky. L. Rep. 999.

Missouri.— Reynolds *v.* Western Union Tel. Co., 81 Mo. App. 223.

North Carolina.—Gerock *v.* Western Union Tel. Co., 147 N. C. 1, 60 S. E. 637; Hall *v.* Western Union Tel. Co., 139 N. C. 369, 52 S. E. 50.

Texas.— Western Union Tel. Co. *v.* Hendricks, 26 Tex. Civ. App. 366, 63 S. W. 341.

Wisconsin.— Hibbard *v.* Western Union Tel. Co., 33 Wis. 558, 14 Am. Rep. 775.

98. *Kentucky.*— Smith *v.* Western Union Tel. Co., 83 Ky. 104, 4 Am. St. Rep. 126.

Maine.— Merrill *v.* Western Union Tel. Co., 78 Me. 97, 2 Atl. 847.

North Carolina.— Cherokee Tanning Extract Co. *v.* Western Union Tel. Co., 143 N. C. 376, 55 S. E. 777; Walser *v.* Western Union Tel. Co., 114 N. C. 440, 19 S. E. 366.

West Virginia.— Beatty Lumber Co. *v.* Western Union Tel. Co., 52 W. Va. 410, 44 S. E. 309.

United States.— Western Union Tel. Co. *v.* Williams, 163 Fed. 513, 90 C. C. A. 143.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 66.

99. Western Union Tel. Co. *v.* Lawson, 66 Kan. 660, 72 Pac. 283, holding that the charges of transmission constitute actual and not nominal damages.

1. *Alabama.*—Western Union Tel. Co. *v.* Crumpton, 138 Ala. 632, 36 So. 517.

Kansas.— Western Union Tel. Co. *v.* Lawson, 66 Kan. 660, 72 Pac. 283.

Kentucky.— Taliferro *v.* Western Union Tel. Co., 54 S. W. 825, 21 Ky. L. Rep. 1290, nominal damages, including the price of the telegram.

Minnesota.— Beaupré *v.* Pacific, etc., Tel. Co., 21 Minn. 155.

Missouri.— Abeles *v.* Western Union Tel. Co., 37 Mo. App. 554.

North Carolina.— Kennon *v.* Western Union Tel. Co., 126 N. C. 232, 35 S. E. 468.

Texas.— Western Union Tel. Co. *v.* Adams, 75 Tex. 531, 12 S. W. 857, 16 Am. St. Rep. 920, 6 L. R. A. 844.

See 45 Cent. Dig. tit. "Telegraphs and Telephones." § 73.

Whether the action is in contract or in tort if the company has negligently failed to deliver a message the sender is entitled to recover as actual damage the amount paid for its transmission. Western Union Tel. Co. *v.* Westmoreland, 150 Ala. 654, 43 So. 790.

2. Bass *v.* Postal Tel.-Cable Co., 127 Ga. 423, 56 S. E. 465, holding that if no charges were actually paid, plaintiff cannot recover the same on the ground that he had assumed

damage is shown, the amount which he has paid for the transmission of the message will be the limit of his recovery.[3]

B. Compensatory Damages — 1. In General — a. Must be Contemplated — (i) *In General.* In actions for damages due to negligence or defaults in regard to the transmission or delivery of messages the general rule applies [4] that plaintiff can recover only such damages as may reasonably be supposed to have been within the contemplation of the parties at the time the contract was entered into;[5] and while plaintiff may recover such general damages as are the direct and natural result of the breach itself,[6] which generally include the price paid for the transmission of the message,[7] the company will not be liable for special or consequential damages, although the proximate result of its negligence or default, unless it had notice from the terms of the message or otherwise of the facts and circumstances from which such damages would be likely to result,[8] although such notice may

such payment and become liable therefor, and might at some future day be called upon to pay the same.

3. *Iowa.*— Pennington *v.* Western Union Tel. Co., 67 Iowa 631, 24 N. W. 45, 25 N. W. 838, 56 Am. Rep. 367.

Minnesota.— Beaupré *v.* Pacific, etc., Tel. Co., 21 Minn. 155.

Missouri.— Levy *v.* Western Union Tel. Co., 35 Mo. App. 170.

North Carolina.— Hughes *v.* Western Union Tel. Co., 114 N. C. 70, 19 S. E. 100, 41 Am. St. Rep. 782.

Texas.— Western Union Tel. Co. *v.* Parks, (Civ. App. 1894) 25 S. W. 813.

Wisconsin.— Cutts *v.* Western Union Tel. Co., 71 Wis. 46, 36 N. W. 627.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 73.

4. See Damages, 13 Cyc. 32.

5. *Arkansas.*—Western Union Tel. Co. *v.* Hogue, 79 Ark. 33, 94 S. W. 924; Western Union Tel. Co. *v.* Short, 53 Ark. 434, 14 S. W. 649, 9 L. R. A. 744.

Colorado.— Postal Tel. Cable Co. *v.* Barwise, 11 Colo. App. 328, 53 Pac. 252.

Florida.— Hildreth *v.* Western Union Tel. Co., 56 Fla. 387, 47 So. 820.

Kentucky.— Smith *v.* Western Union Tel. Co., 83 Ky. 104, 4 Am. St. Rep. 126, 1 Am. Electric Cas. 743.

Minnesota.— Beaupré *v.* Pacific, etc., Tel. Co., 21 Minn. 155.

Missouri.— Hughes *v.* Western Union Tel. Co., 79 Mo. App. 133.

New York.— McColl *v.* Western Union Tel. Co., 44 N. Y. Super. Ct. 487, 7 Abb. N. Cas. 151, 1 Am. Elec. Cas. 280.

North Carolina.— Williams *v.* Western Union Tel. Co., 136 N. C. 82, 48 S. E. 559; Kennon *v.* Western Union Tel. Co., 126 N. C. 232, 35 S. E. 468.

Oklahoma.— Western Union Tel. Co. *v.* Pratt, 18 Okla. 274, 89 Pac. 237.

South Carolina.— Kirby *v.* Western Union Tel. Co., 77 S. C. 404, 58 S. E. 10, 122 Am. St. Rep. 580; Key *v.* Western Union Tel. Co., 76 S. C. 301, 56 S. E. 962.

Texas.— Postal Tel.-Cable Co. *v.* Sunset Constr. Co., 102 Tex. 148, 114 S. W. 98 [*reversing* (Civ. App. 1908) 109 S. W. 265]; Western Union Tel. Co. *v.* Twaddell, 47 Tex. Civ. App. 51, 103 S. W. 1120.

United States.— McBride *v.* Sunset Tel. Co., 96 Fed. 81.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 64 *et seq.*

Explanation of rule.— The rule does not require that the parties must have contemplated such damages but it does require that the damages must be such as the parties may fairly be supposed to have contemplated or at least would have contemplated as flowing from the breach of duty if they had been informed of all the facts. Smith *v.* Western Union Tel. Co., 83 Ky. 104, 4 Am. St. Rep. 126.

Effect of statutory provisions.—It has been held that a statute making telegraph companies liable for "all damages occasioned" by their negligence or defaults does away with the requirement of the general rule that the damages must have been within the contemplation of the parties or that the company must have had notice of the special circumstances from which special damages would be likely to result (Barker *v.* Western Union Tel. Co., 134 Wis. 147, 114 N. W. 439; Fisher *v.* Western Union Tel. Co., 119 Wis. 146, 96 N. W. 545), it being sufficient that the damages are the natural and proximate result of the negligence or default complained of (Barker *v.* Western Union Tel. Co., *supra*); but on the contrary it has been held that the general rule is not affected by statutory provisions making such companies "liable for special damages" occasioned by their negligence (Hughes *v.* Western Union Tel. Co., 79 Mo. App. 133), or liable for the damages "actually caused" by their negligence (Wheelock *v.* Postal Tel. Cable Co., 197 Mass. 119, 83 N. E. 313).

6. Western Union Tel. Co. *v.* Short, 53 Ark. 434, 14 S. W. 649, 9 L. R. A. 744; Beaupré *v.* Pacific, etc., Tel. Co., 21 Minn. 155.

7. Western Union Tel. Co. *v.* Crumpton, 138 Ala. 632, 36 So. 517; Beaupré *v.* Pacific, etc., Tel. Co., 21 Minn. 155. See also *supra*, IX, A.

8. *Arkansas.*—Western Union Tel. Co. *v.* Hogue, 79 Ark. 33, 94 S. W. 924; Western Union Tel. Co. *v.* Short, 53 Ark. 434, 14 S. W. 649, 9 L. R. A. 744.

Colorado.— Postal Tel. Cable Co. *v.* Barwise, 11 Colo. App. 328, 53 Pac. 252.

be extrinsic as well as from the terms of the message.[9] In some cases it has been held that since the contract of transmission is the basis of the company's duty,[10] the general rule that the damages must have been within the contemplation of the parties applies whether the action technically sounds in contract or in tort,[11] although other cases where the action was in tort have followed the general rule [12] that in such actions plaintiff may recover such damages as are the direct and proximate result of the negligence complained of, whether within the contemplation of the parties or not,[13] particularly where the action is necessarily in tort,

Florida.— Hildreth *v.* Western Union Tel. Co., 56 Fla. 387, 47 So. 820.

Kentucky.— Smith *v.* Western Union Tel. Co., 83 Ky. 104, 4 Am. St. Rep. 126. See also Taylor *v.* Western Union Tel. Co., 101 S. W. 969, 31 Ky. L. Rep. 240.

Minnesota.— Beaupré *v.* Pacific, etc., Tel. Co., 21 Minn. 155.

New York.— McColl *v.* Western Union Tel. Co., 44 N. Y. Super. Ct. 487, 7 Abb. N. Cas. 151.

South Carolina.— Clio Gin Co. *v.* Western Union Tel. Co., 82 S. C. 405, 64 S. E. 426; Cason *v.* Western Union Tel. Co., 77 S. C. 157, 57 S. E. 722.

Texas.— Western Union Tel. Co. *v.* Coffin, 88 Tex. 94, 30 S. W. 896; Lewin-Cole Commission Co. *v.* Western Union Tel. Co., (Civ. App. 1908) 115 S. W. 313; Western Union Tel. Co. *v.* Twaddell, 47 Tex. Civ. App. 51, 103 S. W. 1120.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 65.

Telephone companies.—A telephone company is not liable for consequential damages caused by its negligent failure to notify one for whom a call is placed that another desires to talk to him, unless it knows in some way the nature, purpose, and subject-matter of the proposed conversation, so that the damages likely to result from such failure may be said to have been within the parties' contemplation. Southwestern Tel., etc., Co. *v.* Flood, (Tex. Civ. App. 1908) 111 S. W. 1064.

Notice insufficient.—A message, "Your mother is dead; come to-night," would not lead the telegraph company to infer that delay in delivery would cause the addressee to miss a comfortable conveyance sent for her. Kirby *v.* Western Union Tel. Co., 77 S. C. 404, 58 S. E. 10, 122 Am. St. Rep. 580.

9. *Florida.*—Western Union Tel. Co. *v.* Merritt, 55 Fla. 462, 46 So. 1024, 127 Am. St. Rep. 169.

Indiana.— Western Union Tel. Co. *v.* Henley, 23 Ind. App. 14, 54 N. E. 775.

Iowa.— McPeek *v.* Western Union Tel. Co., 107 Iowa 356, 78 N. W. 63, 70 Am. St. Rep. 205, 43 L. R. A. 214; Herron *v.* Western Union Tel. Co., 90 Iowa 129, 57 N. W. 696, 4 Am. Electric Cas. 731.

Kentucky.—Thomas *v.* Western Union Tel. Co., 120 Ky. 194, 85 S. W. 760, 27 Ky. L. Rep. 569.

Nebraska.— Smith *v.* Western Union Tel. Co., 80 Nebr. 395, 114 N. W. 288.

Nevada.— Mackay *v.* Western Union Tel. Co., 16 Nev. 222.

New York.— Rittenhouse *v.* Independent Tel. Line, 44 N. Y. 263, 4 Am. Rep. 673; Sprague *v.* Western Union Tel. Co., 6 Daly 200 [*affirmed* in 67 N. Y. 590].

North Carolina.—Dayvis *v.* Western Union Tel. Co., 139 N. C. 79, 51 S. E. 898.

South Carolina.— Jones *v.* Western Union Tel. Co., 70 S. C. 539, 50 S. E. 198, 75 S. C. 208, 55 S. E. 318.

Texas.— Erie Tel., etc., Co. *v.* Grimes, 82 Tex. 89, 17 S. W. 831; Western Union Tel Co. *v.* Hidalgo, (Civ. App. 1906) 99 S. W. 426; Western Union Tel. Co. *v.* Bell, (Civ. App. 1905) 90 S. W. 714; Western Union Tel. Co. *v.* Giffin, 27 Tex. Civ. App. 306, 65 S. W. 661; Western Union Tel. Co. *v.* Vanway, (Civ. App. 1899) 54 S. W. 414; Ward *v.* Western Union Tel. Co., (Civ. App. 1899) 51 S. W. 259; Western Union Tel. Co. *v.* Nagle, 11 Tex. Civ. App. 539, 32 S. W. 707; Western Union Tel. Co. *v.* Jobe, 6 Tex. Civ. App. 403, 25 S. W. 168, 1036; Western Union Tel. Co. *v.* Williford, 2 Tex. Civ. App. 574, 22 S. W. 244; Harrison *v.* Western Union Tel. Co., 3 Tex. App. Civ. Cas. § 43.

United States.— Postal Tel. Cable Co. *v.* Nichols, 159 Fed. 643, 89 C. C. A. 585, 16 L. R. A. N. S. 870.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 65.

Agent receiving notice.— It has been held that notice to the agent at the initial point affects the company only so far as his acts are concerned, and does not operate to increase the company's liability for the acts of the agent at the other end of the line. Pope *v.* Western Union Tel. Co., 14 Ill. App. 531. If the operator with whom the message is filed has no notice, the company is not chargeable with notice previously received by other operators in the same office. See Western Union Tel. Co. *v.* Weniski, 84 Ark. 457, 106 S. W. 486.

10. Western Union Tel. Co. *v.* Hogue, 79 Ark. 33, 94 S. W. 924.

11. Western Union Tel. Co. *v.* Hogue, 79 Ark. 33, 94 S. W. 924; Kennon *v.* Western Union Tel. Co., 126 N. C. 232, 35 S. E. 468; Poteet *v.* Western Union Tel. Co., 74 S. C. 491, 55 S. E. 113. See also cases cited *supra*, notes 5, 8.

12. See DAMAGES, 13 Cyc. 28.

13. McPeek *v.* Western Union Tel. Co., 107 Iowa 356, 78 N. W. 63, 70 Am. St. Rep. 205, 43 L. R. A. 214; Cordell *v.* Western Union Tel. Co., 149 N. C. 402, 63 S. E. 71, 22 L. R. A. N. S. 540. See also Mentzer *v.* Western Union Tel. Co., 93 Iowa 752, 62 N. W. 1, 57 Am. St. Rep. 294, 28 L. R. A. 72, under a statute making the company liable for special damages.

as where the breach of duty is a wrongful refusal to receive the message for transmission so that no contract is entered into.[14]

(II) *CIPHER MESSAGES.* As a result of the general rule above stated,[15] it is ordinarily held that where a message is written in cipher which is not understood by the agent who receives it for transmission, and its meaning is not made known to him, the company will not be liable for negligence in its transmission or delivery beyond nominal damages or the price paid for transmission.[16] In some jurisdictions, however, a more stringent rule has been adopted and a recovery of compensatory damages allowed;[17] and even in jurisdictions where the general rule obtains the company may have notice of facts which will render it liable for special damages, although the message was in cipher.[18]

(III) *OBSCURE MESSAGES.* It is also ordinarily held, following the same general rule,[19] that although the message is not in cipher, still if it is so obscure or unintelligible that it conveys no notice to the company of the nature of the loss which is likely to result from a failure to make due delivery, or that any loss is likely to result at all, recovery must be limited to nominal damages, even though there be an actual loss in fact.[20] In the application of this rule, however, a dis-

14. Cordell *v.* Western Union Tel. Co., 149 N. C. 402, 63 S. E. 71, 22 L. R. A. N. S. 540.

15. See *supra*, IX, B, 1, a, (I).

16. *California.*— Hart *v.* Western Union Tel. Co., 66 Cal. 579, 6 Pac. 637, 56 Am. Rep. 119.

Florida.— Western Union Tel. Co. *v.* Merrit, 55 Fla. 462, 46 So. 1024, 127 Am. St. Rep. 169; Western Union Tel. Co. *v.* Wilson, 32 Fla. 527, 14 So. 1, 37 Am. St. Rep. 125, 22 L. R. A. 434 [*overruling* Western Union Tel. Co. *v.* Hyer, 22 Fla. 637, 1 So. 129, 1 Am. St. Rep. 222].

Illinois.— Western Union Tel. Co. *v.* Martin, 9 Ill. App. 587.

Massachusetts.— Wheelock *v.* Postal Tel. Cable Co., 197 Mass. 119, 83 N. E. 313.

Minnesota.— Beaupré *v.* Pacific, etc., Tel. Co., 21 Minn. 155, 1 Am. Elec. Cas. 141.

Missouri.— Hughes *v.* Western Union Tel. Co., 79 Mo. App. 133; Abeles *v.* Western Union Tel. Co., 37 Mo. App. 554.

Nevada.— Mackay *v.* Western Union Tel. Co., 16 Nev. 222, 1 Am. Elec. Cas. 362.

North Carolina.— Hughes *v.* Western Union Tel. Co., 114 N. C. 70, 19 S. E. 100, 41 Am. St. Rep. 782; Cannon *v.* Western Union Tel. Co., 100 N. C. 300, 6 S. E. 731, 6 Am. St. Rep. 590.

Pennsylvania.—Fergusson *v.* Anglo-American Tel. Co., 178 Pa. St. 377, 35 Atl. 979, 56 Am. St. Rep. 770, 35 L. R. A. 554 [*distinguishing* Western Union Tel. Co. *v.* Landis, 21 Wkly. Notes Cas. 38].

South Carolina.— Hill *v.* Western Union Tel. Co., 42 S. C. 367, 20 S. E. 135, 46 Am. St. Rep. 734.

Texas.— Daniel *v.* Western Union Tel. Co., 61 Tex. 452, 48 Am. Rep. 305, 1 Am. Elec. Cas. 650; Western Union Tel. Co. *v.* Mellor, 33 Tex. Civ. App. 264, 76 S. W. 449; Houston, etc., R. Tel. Co. *v.* Davidson, 15 Tex. Civ. App. 334, 39 S. W. 605; Harrison *v.* Western Union Tel. Co., 3 Tex. App. Civ. Cas. § 43.

Wisconsin.— Candee *v.* Western Union Tel. Co., 34 Wis. 471, 17 Am. Rep. 452, 1 Am. Elec. Cas. 99.

United States.— Primrose *v.* Western Union Tel. Co., 154 U. S. 1, 14 S. Ct. 1098, 38 L. ed. 883.

England.— Sanders *v.* Stuart, 1 C. P. D. 326, 45 L. J. C. P. 682, 35 L. T. Rep. N. S. 370, 24 Wkly. Rep. 949.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 66.

17. Western Union Tel. Co. *v.* Way, 83 Ala. 542, 4 So. 844; Daughtery *v.* American Union Tel. Co., 75 Ala. 168, 51 Am. Rep. 435; Dodd Grocery Co. *v.* Postal Tel. Cable Co., 112 Ga. 685, 37 S. E. 981; Western Union Tel. Co. *v.* Fatman, 73 Ga. 285, 54 Am. Rep. 877; Western Union Tel. Co. *v.* Reynolds, 77 Va. 173, 46 Am. Rep. 715. *Compare* Bashinsky *v.* Western Union Tel. Co., 1 Ga. App. 761, 58 S. E. 91.

18. Western Union Tel. Co. *v.* Nagle, 11 Tex. Civ. App. 539, 32 S. W. 707, holding that where the message was marked "rush" and the agent was informed that it was very important, and also knew the business in which plaintiff was engaged, and there were three words in the message not in cipher indicating that it was a business message, such facts took the case out of the general rule in regard to cipher messages. But see Houston, etc., R. Tel. Co. *v.* Davidson, 15 Tex. Civ. App. 334, 39 S. W. 605, holding that it is not sufficient that the company is informed that the message is important and is requested to rush it where it has no information as to the matter to which the message relates.

19. See *supra*, IX, B, 1, a, (I).

20. *Colorado.*—Western Union Tel. Co. *v.* Cornwell, 2 Colo. App. 491, 31 Pac. 393, "S. gone to Howard. Gave man gold watch by mistake. Left no word with me. Store closed. Answer."

Maryland.— U. S. Telegraph Co. *v.* Gildersleve, 29 Md. 232, 96 Am. Dec. 519, "Sell fifty gold."

Mississippi.— Jacobs *v.* Postal Tel. Cable Co., 76 Miss. 278, 24 So. 535 ("Wait; I mail letter this day with particulars"); Western Union Tel. Co. *v.* Clifton, 68 Miss. 307, 8

tinction should be made between messages which are wholly unintelligible and those which disclose their importance and general character or purpose,[21] particularly where they show that they relate to a business transaction,[22] it being held that notice of the main purpose is sufficient to charge the company with notice of attendant details.[23]

(iv) *Messages Relating to Business Transactions.* It has frequently been held that if a message shows that it relates to a business transaction it is not necessary, in order to render the company liable for more than nominal damages, that the company should be advised of the details of the transaction to which the message relates,[24] it being sufficient if it discloses its general character and purpose,[25] and the fact that trade terms and abbreviations are used does not make it a cipher message.[26] So it has been held that the actual loss as far as it is the proximate result of the company's negligence is recoverable if the message contains sufficient, when read in the light of well-known usage in commercial correspondence, to apprise the telegraph company that it is an order to buy or to sell or to close a pending trade or option, or an offer of a definite contract, or the acceptance of such an offer.[27] It will be observed, however, that a

So. 746 ("Send Eckford on first train this evening. Am here. Answer"). See also Western Union Tel. Co. *v.* Pearce, 82 Miss. 487, 34 So. 152.

Missouri.— Melson *v.* Western Union Tel. Co., 72 Mo. App. 111, "If possible come to Shelbina in the morning."

New York.— Baldwin *v.* U. S. Telegraph Co., 45 N. Y. 744, 6 Am. Rep. 165 ("Telegraph me at Rochester what that well is doing"); Landsberger *v.* Magnetic Tel. Co., 32 Barb. 530 ("Get ten thousand dollars of the Mail Company"); McColl *v.* Western Union Tel. Co., 44 N. Y. Super. Ct. 487, 7 Abb. N. Cas. 151, 1 Am. Elec. Cas. 280 ("Can close Valkyria and Othere twenty-two, twenty net Montreal. Ans. immediately").

Oklahoma.— Western Union Tel. Co. *v.* Pratt, 18 Okla. 274, 89 Pac. 237, "High water, expense heavy, send ten dollars; funds low."

Texas.— Western Union Tel. Co. *v.* True, 101 Tex. 236, 106 S. W. 315 [*reversing* (Civ. App. 1907) 103 S. W. 1180] ("Parties failed arrange deal. If you want cattle come here"); Elliott *v.* Western Union Tel. Co., 75 Tex. 18, 12 S. W. 954, 16 Am. St. Rep. 872 (message directing immediate shipment of saw; plaintiff's mill idle); Western Union Tel. Co. *v.* Twaddell, 47 Tex. Civ. App. 51, 103 S. W. 1120.

United States.— Primrose *v.* Western Union Tel. Co., 154 U. S. 1, 14 S. Ct. 1098, 38 L. ed. 883 ("Despot am exceedingly busy bay all kinds quo perhaps bracken half of it mince moment promptly of purchase"); Western Union Tel. Co. *v.* Coggin, 68 Fed. 137, 15 C. C. A. 231 ("Be on hand evening of third. I got early"); Behm *v.* Western Union Tel. Co., 3 Fed. Cas. No. 1,234, 8 Biss. 131, 7 Reporter 710 ("Take separate deed to Marks for White Fountaine, Tippecanoe and Iowa, 4, and meet me at office at 9 to-night").

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 65.

21. Postal Tel.-Cable Co. *v.* Lathrop, 33 Ill. App. 400 [*affirmed* in 131 Ill. 575, 23 N. E. 583, 19 Am. St. Rep. 55, 7 L. R. A. 474]; Western Union Tel. Co. *v.* Nagle, 11 Tex. Civ. App. 539, 32 S. W. 707.

22. See *infra*, IX, B, 1, a, (iv).

23. Western Union Tel. Co. *v.* Edsall, 74 Tex. 329, 12 S. W. 41, 15 Am. St. Rep. 835; Western Union Tel. Co. *v.* Nagle, 11 Tex. Civ. App. 539, 32 S. W. 707.

24. Western Union Tel. Co. *v.* Merritt, 55 Fla. 462, 46 So. 1024, 127 Am. St. Rep. 169; Postal Tel.-Cable Co. *v.* Lathrop, 33 Ill. App. 400 [*affirmed* in 131 Ill. 575, 23 N. E. 583, 19 Am. St. Rep. 55, 7 L. R. A. 474]; Texas, etc., Tel., etc., Co. *v.* Mackenzie, 36 Tex. Civ. App. 178, 81 S. W. 581; Western Union Tel. Co. *v.* Nagle, 11 Tex. Civ. App. 539, 32 S. W. 707.

It is sufficient under some of the authorities if there is enough on the face of the message to show that it is a commercial message of value. Western Union Tel. Co. *v.* Blanchard, 68 Ga. 299, 45 Am. Rep. 480.

25. Postal Tel.-Cable Co. *v.* Lathrop, 33 Ill. App. 400 [*affirmed* in 131 Ill. 575, 23 N. E. 583, 19 Am. St. Rep. 55, 7 L. R. A. 474]; Pepper *v.* Western Union Tel. Co., 87 Tenn. 554, 11 S. W. 783, 10 Am. St. Rep. 699, 4 L. R. A. 660; Western Union Tel. Co. *v.* Edsall, 74 Tex. 429, 12 S. W. 41, 15 Am. St. Rep. 835; Texas, etc., Tel., etc., Co. *v.* Mackenzie, 36 Tex. Civ. App. 178, 81 S. W. 581; Western Union Tel. Co. *v.* Nagle, 11 Tex. Civ. App. 539, 32 S. W. 707.

26. Pepper *v.* Western Union Tel. Co., 87 Tenn. 554, 11 S. W. 783, 10 Am. St. Rep. 699, 4 L. R. A. 660.

27. *District of Columbia.*— Fererro *v.* Western Union Tel. Co., 9 App. Cas. 455, "Fifty-five cents, usual terms, quick acceptance."

Florida.— Western Union Tel. Co. *v.* Merritt, 55 Fla. 462, 46 So. 1024, 127 Am. St. Rep. 169.

Georgia.— Western Union Tel. Co. *v.* Blanchard, 68 Ga. 299, 45 Am. Rep. 480, "Cover two hundred September and one hundred August."

recovery of special damages has frequently been denied in cases where the message was of such a character as to disclose that it related to a business transaction,[28] since other reasons, such as the remote, uncertain, or speculative character of the damages claimed may still preclude a recovery of anything more than nominal damages.[29]

b. Must Be Proximate — (i) *IN GENERAL.* In accordance with the general rule of damages,[30] plaintiff can recover only such damages as are the proximate result of the negligence or default complained of.[31] So there can be no recovery for damages not due to the company's negligence but to some other independent

Illinois.— Postal Tel.-Cable Co. *v.* Lathrop, 33 Ill. App. 400 [*affirmed* in 31 Ill. 575, 23 N. E. 583, 19 Am. St. Rep. 55, 7 L. R. A. 474].

Iowa.— Herron *v.* Western Union Tel. Co., 90 Iowa 129, 57 N. W. 696; Garrett *v.* Western Union Tel. Co., 83 Iowa 257, 49 N. W. 88.

Maryland.— Western Union Tel. Co. *v.* Lehman, 105 Md. 442, 66 Atl. 266, "Shipped cattle today."

Massachusetts.— Squire *v.* Western Union Tel. Co., 98 Mass. 232, 93 Am. Dec. 157, "Will take your hogs at your offer."

Nebraska.— Smith *v.* Western Union Tel. Co., 80 Nebr. 395, 114 N. W. 288.

New York.— Rittenhouse *v.* Independent Tel. Line, 44 N. Y. 263, 4 Am. Rep. 673 ("If we have any Old Southern on hand sell same before board. Buy five Hudson at board"); Mowry *v.* Western Union Tel. Co., 51 Hun 126, 4 N. Y. Suppl. 666 ("Will take two cars sixteens"). See also Leonard *v.* New York, etc., Electro Magnetic Tel. Co., 41 N. Y. 544, 1 Am. Rep. 446.

Tennessee.— Pepper *v.* Western Union Tel. Co., 87 Tenn. 554, 11 S. W. 783, 10 Am. St. Rep. 699, 4 L. R. A. 660, "Car cribs six sixty caf., prompt;" it appearing that "cribs" meant in the meat trade "clear ribs," and "caf." meant cost and freight.

Texas.— Western Union Tel. Co. *v.* Bowen, 84 Tex. 476, 19 S. W. 554 ("Will ship machinery at once"); Postal Tel. Co. *v.* Levy, (Civ. App. 1907) 102 S. W. 134 ("Counter proposition not unfavorable. Imperative you come one. Answer"); Western Union Tel. Co. *v.* Birge-Forbes Co., 29 Tex. Civ. App. 526, 69 S. W. 181 ("All right. Sell bluffing each described amply"); Western Union Tel. Co. *v.* Carver, 15 Tex. Civ. App. 547, 39 S. W. 1021; Western Union Tel. Co. *v.* Nagle, 11 Tex. Civ. App. 539, 32 S. W. 707 ("Kammerer renews orders" with remainder of message in cipher).

Utah.— Brooks *v.* Western Union Tel. Co., 26 Utah 147, 72 Pac. 499.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 65.

A previous message between the same parties may be sufficient in connection with the message in question to charge the company with notice of the nature and importance of the latter message, although the latter message alone would not be sufficient. Western Union Tel. Co. *v.* Merritt, 55 Fla. 462, 46 So. 1024, 127 Am. St. Rep. 169.

28. See the following cases:

Kentucky.— Smith *v.* Western Union Tel. Co., 83 Ky. 104, 4 Am. St. Rep. 126.

Maryland.— U. S. Telegraph Co. *v.* Gildersleve, 29 Md. 232, 96 Am. Dec. 519, "Sell fifty (50) gold."

Minnesota.— Beaupré *v.* Pacific, etc., Tel. Co., 21 Minn. 155, "Will take two hundred extra mess, price named."

New York.— McColl *v.* Western Union Tel. Co., 44 N. Y. Super. Ct. 487, 7 Abb. N. Cas. 151, 1 Am. Elec. Cas. 280, "Can close Valkyria and Othere twenty-two, twenty net Montreal. Ans. immediately."

Ohio.— Hord *v.* Western Union Tel. Co., 3 Cinc. L. Bul. 147, 5 Ohio Dec. (Reprint) 555, 6 Am. L. Rec. 529, "Sold 100,000 clear rib, buyer March — Seven — can sell more."

United States.— Cain *v.* Western Union Tel. Co., 48 Fed. 810, 1 C. C. A. 107, "Sell 200 Tennessee Coal and Iron."

See 45 Cent. Dig. tit. "Telegraphs and Telephones," §§ 64, 65; and also *supra*, IX, B, 1, a, (III).

29. See Smith *v.* Western Union Tel. Co., 83 Ky. 104, 4 Am. St. Rep. 126; Beaupré *v.* Pacific, etc., Tel. Co., 21 Minn. 155; and cases cited *supra*, note 28.

Remote, speculative, and contingent damages see *infra*, IX, B, 1, b, (II).

30. See DAMAGES, 13 Cyc. 25.

31. *Colorado.*— Postal Tel. Cable Co. *v.* Barwise, 11 Colo. App. 328, 53 Pac. 252; Western Union Tel. Co. *v.* Cornwall, 2 Colo. App. 491, 31 Pac. 393.

Florida.— Hildreth *v.* Western Union Tel Co., 56 Fla. 387, 47 So. 820.

Georgia.— Wilson *v.* Western Union Tel. Co., 124 Ga. 131, 52 S. E. 153.

Illinois.— Champion Chemical Works *v.* Postal Tel.-Cable Co., 123 Ill. App. 20.

Iowa.— Bennett *v.* Western Union Tel. Co., 129 Iowa 607, 106 N. W. 13.

Kentucky.— Smith *v.* Western Union Tel. Co., 83 Ky. 104, 4 Am. St. Rep. 126.

Minnesota.— Beaupré *v.* Pacific, etc., Tel. Co., 21 Minn. 155.

Mississippi.— Yazoo, etc., R. Co. *v.* Foster, (1898) 23 So. 581.

New York.— Lowery *v.* Western Union Tel. Co., 60 N. Y. 198, 19 Am. Rep. 154, 1 Am. Elec. Cas. 163.

North Carolina.— Walser *v.* Western Union Tel. Co., 114 N. C. 440, 19 S. E. 366.

Wisconsin.— Fisher *v.* Western Union Tel. Co., 119 Wis. 146, 96 N. W. 545; Cutts *v.* Western Union Tel. Co., 71 Wis. 46, 36 N. W. 627.

United States.— Western Union Tel. Co. *v.*

or intervening cause,[32] or for damages which, although traceable to the negligence of the company, are too remote to be considered as the natural and proximate result thereof.[33] In the absence, however, of any valid limitation of liability,[34] the company will be liable for all damages which are the natural and proximate result of its negligence or default and may reasonably be said to have been within the contemplation of the parties.[35]

(II) *REMOTE, SPECULATIVE, OR CONTINGENT DAMAGES.* Plaintiff's damages must also be certain both in their nature and the cause from which they

Hall, 124 U. S. 444, 8 S. Ct. 577, 31 L. ed. 479.

The line between proximate and remote damages is exceedingly shadowy and often difficult of application to particular cases, but while the damages need not always be the immediate result, they must be the actual and proximate result of the negligence or default complained of. Smith *v.* Western Union Tel. Co., 83 Ky. 104, 4 Am. Rep. 126.

Physical suffering due merely to mental anxiety and suffering, although the latter is due to the negligence of defendant, is not the proximate result of such negligence. Kagy *v.* Western Union Tel. Co., 37 Ind. App. 73, 76 N. E. 792, 117 Am. St. Rep. 278; Western Union Tel. Co. *v.* Thompson, 18 Tex. Civ. App. 609, 45 S. W. 429.

Effect of statutory provisions.— The rule that the damages must be the proximate result of the negligence or default complained of is not affected by statutory provisions making telegraph companies liable for "all damages occasioned" (Fisher *v.* Western Union Tel. Co., 119 Wis. 146, 96 N. W. 545; Cutts *v.* Western Union Tel. Co., 71 Wis. 46, 36 N. W. 627); or "liable for special damages" (Hughes *v.* Western Union Tel. Co., 79 Mo. App. 133); or for the damages "actually caused" by their negligence (Wheelock *v.* Postal Tel. Cable Co., 197 Mass. 119, 83 N. E. 313).

32. Western Union Tel. Co. *v.* Cornwell, 2 Colo. App. 491, 31 Pac. 393; Lowery *v.* Western Union Tel. Co., 60 N. Y. 198, 19 Am. Rep. 154; Ross *v.* Western Union Tel. Co., 81 Fed. 676, 26 C. C. A. 564; Bodkin *v.* Western Union Tel. Co., 31 Fed. 134.

Intervening efficient cause see *infra*, IX, B, 1, b, (III).

33. Bennett *v.* Western Union Tel. Co., 129 Iowa 607, 106 N. W. 13; Walser *v.* Western Union Tel. Co., 114 N. C. 440, 19 S. E. 366. See also *infra*, IX, B, 1, b, (II).

34. See *supra*, V.

35. *Florida.*— Hildreth *v.* Western Union Tel. Co., 56 Fla. 387, 47 So. 820; Western Union Tel. Co. *v.* Merritt, 55 Fla. 462, 46 So. 1024, 127 Am. St. Rep. 169; Western Union Tel. Co. *v.* Milton, 53 Fla. 484, 43 So. 495, 125 Am. St. Rep. 1077, 11 L. R. A. N. S. 560.

Georgia.— Western Union Tel. Co. *v.* Blanchard, 68 Ga. 299, 45 Am. Rep. 480.

Illinois.— Postal Tel.-Cable Co. *v.* Lathrop, 33 Ill. App. 400 [*affirmed* in 131 Ill. 575, 23 N. E. 583, 19 Am. St. Rep. 55, 7 L. R. A. 474].

Missouri.— Reed *v.* Western Union Tel. Co., 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492.

South Carolina.— Hays *v.* Western Union Tel. Co., 70 S. C. 16, 48 S. E. 608, 106 Am. St. Rep. 731, 67 L. R. A. 481.

Texas.— Western Union Tel. Co. *v.* Edsall, 74 Tex. 329, 12 S. W. 41, 15 Am. St. Rep. 835; Western Union Tel. Co. *v.* Austlet, (Civ. App. 1909) 115 S. W. 624; Texas, etc., Tel., etc., Co. *v.* Mackenzie, 36 Tex. Civ. App. 178, 81 S. W. 581; Western Union Tel. Co. *v.* Wofford, 32 Tex. Civ. App. 427, 72 S. W. 620, 74 S. W. 943; Western Union Tel. Co. *v.* Hines, 22 Tex. Civ. App. 315, 54 S. W. 627.

Utah.— Brooks *v.* Western Union Tel. Co., 26 Utah 147, 72 Pac. 499.

Damages for annoyance.—Where plaintiff was compelled to get up at midnight and search for a doctor for his sick wife, because a telephone company negligently failed to answer his call, the loss of time, the extra effort, etc., caused by defendant's negligence, constituted annoyance, for which actual damages could be recovered. Cumberland Tel., etc., Co. *v.* Jackson, (Miss. 1909) 48 So. 614.

Applications of rule.— Thus the telegraph company has been held liable for the amount withdrawn from a branch bank in consequence of the delay of a message from the banker's assignee notifying the branch of the fact of the assignment (Stiles *v.* Western Union Tel. Co., 2 Ariz. 308, 15 Pac. 712); for the advance in freight, where a shipment of goods was delayed because of negligence in the transmission of the message ordering them (Western Union Tel. Co. *v.* Graham, 1 Colo. 230, 9 Am. Rep. 136); for the loss caused by the negligent delay of an order until after the delivery of a later message intended to revoke it (Hocker *v.* Western Union Tel. Co., 45 Fla. 363, 34 So. 901); for demurrage due under a charter-party, where the vessel was delayed in loading because of delay in delivery of a message to the captain directing him to proceed to a certain port (Savannah Propeller Tow-boat Co. *v.* Western Union Tel. Co., 124 Ga. 478, 52 S. E. 766); for loss on a contract awarded to plaintiff, who submitted the lowest bid, his bid being based on a message from a manufacturer quoting a price which the telegraph company had negligently lowered in transmission (Wolf Co. *v.* Western Union Tel. Co., 24 Pa. Super. Ct. 129); for damage resulting from a forced sale of plaintiff's property (Western Union Tel. Co. *v.* Wofford, (Tex. Civ. App. 1900) 58 S. W. 627); or continued detention of plaintiff's person (Western Union

proceed,[36] and must be capable of computation with reasonable certainty.[37] There can be no recovery of damages where plaintiff has not sustained any actual loss, but merely incurred a liability which may or may not be enforced against him,[38] and there can be no recovery of damages which are too remote, uncertain, speculative, or contingent.[39] This rule applies to uncertain, speculative, or contingent profits which plaintiff might or might not have made;[40] but it is only profits of this character which are necessarily excluded,[41] plaintiff being entitled to recover all his damages, including gains prevented as well as losses actually sustained, provided they are certain and such as might naturally be expected to result from the breach of duty complained of.[42] The rule does, however, exclude profits which plaintiff might or might not have made in speculative transactions in stocks, grain, or cotton which are not carried out so as to determine the loss, but are contingent upon the manner in which plaintiff would have exercised his judgment as to reselling or covering a short sale,[43] as where a message directing

Tel. Co. *v.* Gossett, 15 Tex. Civ. App. 52, 38 S. W. 536); and in other particular classes of cases hereinafter referred to (see *infra*, IX, B, 2).

36. Postal Tel. Cable Co. *v.* Barwise, 11 Colo. App. 328, 53 Pac. 252; Beaupré *v.* Pacific, etc., Tel. Co., 21 Minn. 155; Kiley *v.* Western Union Tel. Co., 39 Hun (N. Y.) 158 [*affirmed* in 109 N. Y. 231, 16 N. E. 75]. See also Smith *v.* Western Union Tel. Co., 83 Ky. 104, 4 Am. St. Rep. 126.

37. Walser *v.* Western Union Tel. Co., 114 N. C. 440, 19 S. E. 366.

38. Pacific Pine Lumber Co. *v.* Western Union Tel. Co., 123 Cal. 428, 56 Pac. 103; Bass *v.* Postal Tel.-Cable Co., 127 Ga. 423, 56 S. E. 465. See also Western Union Tel. Co. *v.* Watson, 82 Miss. 101, 33 So. 76, where it was held that plaintiff could not recover the expense of exhuming and reburying a body buried in the wrong place because of the telegraph company's negligence, there being no evidence that he had in fact incurred the expenses.

39. *Arkansas.*— James *v.* Western Union Tel. Co., 86 Ark. 339, 111 S. W. 276.

California.— Kenyon *v.* Western Union Tel. Co., 100 Cal. 454, 35 Pac. 75.

Colorado.— Postal Tel. Co. *v.* Barwise, 11 Colo. App. 328, 53 Pac. 252; Western Union Tel. Co. *v.* Cornwell, 2 Colo. App. 491, 31 Pac. 393.

Georgia.— Western Union Tel. Co. *v.* Watson, 94 Ga. 202, 21 S. E. 457, 47 Am. St. Rep. 151.

Iowa.— Bennett *v.* Western Union Tel. Co., 129 Iowa 607, 106 N. W. 13.

Kansas.— Western Union Tel. Co. *v.* Crall, 39 Kan. 580, 18 Pac. 719.

Kentucky.— Chapman *v.* Western Union Tel. Co., 90 Ky. 265, 13 S. W. 880, 12 Ky. L. Rep. 265; Smith *v.* Western Union Tel. Co., 83 Ky. 104, 4 Am. St. Rep. 126.

Minnesota.— Beaupré *v.* Pacific, etc., Tel. Co., 21 Minn. 155.

New York.— Kiley *v.* Western Union Tel. Co., 39 Hun 158 [*affirmed* in 109 N. Y. 231, 16 N. E. 75].

North Carolina.— Walser *v.* Western Union Tel. Co., 114 N. C. 440, 19 S. E. 366.

Texas.— Western Union Tel. Co. *v.* Connelly, 2 Tex. App. Civ. Cas. § 113.

United States.— Western Union Tel. Co. *v.* Hall, 124 U. S. 444, 8 S. Ct. 577, 31 L. ed. 479; Alexander *v.* Western Union Tel. Co., 126 Fed. 445.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 67.

Damages for the loss of a building by fire where plaintiff after discovering the fire attempted to get a telephone connection with the fire department and through the negligence of the telephone company was delayed in doing so, are too uncertain, speculative, and remote in their nature to authorize a recovery therefor against the telephone company. Lebanon, etc., Tel. Co. *v.* Lanham Lumber Co., 131 Ky. 718, 115 S. W. 824, 21 L. R. A. N. S. 115.

40. *Colorado.*—Western Union Tel. Co. *v.* Graham, 1 Colo. 230, 9 Am. Rep. 136.

Iowa.— Bennett *v.* Western Union Tel. Co., 129 Iowa 607, 106 N. W. 13.

Kansas.— Western Union Tel. Co. *v.* Crall, 39 Kan. 580, 18 Pac. 719.

Maryland.— Western Union Tel. Co. *v.* Lehman, 106 Md. 318, 67 Atl. 241.

Minnesota.— Beaupré *v.* Pacific, etc., Tel. Co., 21 Minn. 155.

Mississippi.— Johnson *v.* Western Union Tel. Co., 79 Miss. 58, 29 So. 787, 89 Am. St. Rep. 584.

South Carolina.— Bird *v.* Western Union Tel. Co., 76 S. C. 345, 56 S. E. 973.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 67.

41. Manville *v.* Western Union Tel. Co., 37 Iowa 214, 18 Am. Rep. 8, 1 Am. Elec. Cas. 92.

42. Manville *v.* Western Union Tel. Co., 37 Iowa 214, 18 Am. Rep. 8; Western Union Tel. Co. *v.* Wilhelm, 48 Nebr. 910, 67 S. W. 870; Hays *v.* Western Union Tel. Co., 70 S. C. 16, 48 S. E. 608, 106 Am. St. Rep. 731, 67 L. R. A. 481. See also Western Union Tel. Co. *v.* Eubanks, 100 Ky. 591, 38 S. W. 1068, 18 Ky. L. Rep. 995, 66 Am. St. Rep. 361, 36 L. R. A. 711; Western Union Tel. Co. *v.* Austlet, (Tex. Civ. App. 1909) 115 S. W. 624.

43. Western Union Tel. Co. *v.* Fellner, 58 Ark. 29, 22 S. W. 917, 41 Am. St. Rep. 81; Hibbard *v.* Western Union Tel. Co., 33 Wis. 558, 14 Am. Rep. 775.

plaintiff's broker to buy or to sell short is delayed and the transaction directed is never entered into;[44] but where there is an actual purchase at a higher price than plaintiff would have had to pay if the message had been promptly delivered, there is an actual loss for which a recovery may be had.[45]

(III) *Intervening Efficient Causes.* If, notwithstanding the negligence of the telegraph company, the loss would not have occurred had it not been for the subsequent operation of a new intervening efficient cause for which the telegraph company is not responsible and over which it has no control,[46] such as a storm or flood,[47] or the felonious,[48] fraudulent,[49] or negligent [50] act of another party, the telegraph company's breach of duty is not the proximate cause of the loss.[51]

(IV) *Losses Which Plaintiff Might Have Prevented.* It is the duty of plaintiff on learning of the negligence of the telegraph company to make reasonable efforts to render the resulting damage as light as possible,[52] and he cannot recover damages which by such care and diligence he could have avoided.[53]

Where a message notifying plaintiff of a purchase of stocks for him by his brokers is not delivered and the market subsequently declines beyond the amount of his margin and he is closed out, he cannot recover actual damages on the theory that if he had been notified of the purchase he would have sold earlier or put up more margin. Smith *v.* Western Union Tel. Co., 83 Ky. 104, 4 Am. St. Rep. 126.

44. Western Union Tel. Co. *v.* Fellner, 58 Ark. 29, 22 S. W. 917, 41 Am. St. Rep. 81; Hibbard *v.* Western Union Tel. Co., 33 Wis. 558, 14 Am. Rep. 775; Western Union Tel. Co. *v.* Hall, 124 U. S. 444, 8 S. Ct. 577, 31 L. ed. 479; Cahn *v.* Western Union Tel. Co., 48 Fed. 810, 1 C. C. A. 107.

Although there is an advance in the market price so that plaintiff if the purchase had been made might have resold at a profit, there is no presumption that he would have done so. Western Union Tel. Co. *v.* Fellner, 58 Ark. 29, 22 S. W. 917, 41 Am. St. Rep. 81.

45. Pearsall *v.* Western Union Tel. Co., 124 N. Y. 256, 26 N. E. 534, 21 Am. St. Rep. 662; U. S. Telegraph Co. *v.* Wenger, 55 Pa. St. 262, 93 Am. Dec. 751; Swan *v.* Western Union Tel. Co., 129 Fed. 318, 63 C. C. A. 550, 67 L. R. A. 153.

46. Lowery *v.* Western Union Tel. Co., 60 N. Y. 198, 19 Am. Rep. 154; Ross *v.* Western Union Tel. Co., 81 Fed. 676, 26 C. C. A. 564; Bodkin *v.* Western Union Tel. Co., 31 Fed. 134.

47. Bodkin *v.* Western Union Tel. Co., 31 Fed. 134.

48. Lowery *v.* Western Union Tel. Co., 60 N. Y. 198, 19 Am. Rep. 154; Ross *v.* Western Union Tel. Co., 81 Fed. 676, 26 C. C. A. 564.

49. Strahorn-Hutton-Evans Commission Co. *v.* Western Union Tel. Co, 101 Mo. App. 500, 74 S. W. 876; Lowery *v.* Western Union Tel. Co., 60 N. Y. 198, 19 Am. Rep. 154.

50. Western Union Tel. Co. *v.* Briscoe, 18 Ind. App. 22, 47 N. E. 473; Higdon *v.* Western Union Tel. Co., 132 N. C. 726, 44 S. E. 558.

51. Ross *v.* Western Union Tel. Co., 81 Fed. 676, 26 C. C. A. 564; Bodkin *v.* Western Union Tel. Co., 31 Fed. 134. And see cases cited *supra*, notes 46–50.

52 Western Union Tel. Co. *v.* Reid, 83 Ga. 401, 10 S. E. 919; Postal Tel. Cable Co. *v.* Schaefer, 110 Ky. 907, 62 S. W. 1119, 23 Ky. L. Rep. 344; Jones *v.* Western Union Tel. Co., 75 S. C. 208, 55 S. E. 318; Western Union Tel. Co. *v.* Jeanes, 88 Tex. 230, 31 S. W. 186. See also, generally, Damages, 13 Cyc. 71.

53. *Alabama.*—Western Union Tel. Co. *v.* Way, 83 Ala. 542, 4 So. 844; Daughtery *v.* American Union Tel. Co., 75 Ala. 168, 51 Am. Rep. 435.

Arkansas.— Brewster *v.* Western Union Tel. Co., 65 Ark. 537, 47 S. W. 560.

California.— Germain Fruit Co. *v.* Western Union Tel. Co., 137 Cal. 598, 70 Pac. 658, 59 L. R. A. 575.

District of Columbia.— Fererro *v.* Western Union Tel. Co., 9 App. Cas. 455, 35 L. R. A. 548.

Georgia.— Western Union Tel. Co. *v.* Reid, 83 Ga. 401, 10 S. E. 919. See also Haber, etc., Hat Co. *v.* Southern Bell Tel., etc., Co., 118 Ga. 874, 45 S. E. 696; Western Union Tel. Co. *v.* Bailey, 115 Ga. 725, 42 S. E. 89, 61 L. R. A. 933.

Illinois.— Western Union Tel. Co. *v.* North Packing, etc., Co., 188 Ill. 366, 58 N. E. 958, 52 L. R. A. 274; Western Union Tel. Co. *v.* Hart, 62 Ill. App. 120.

Indiana.— Western Union Tel. Co. *v.* Briscoe, 18 Ind. App. 22, 47 N. E. 473.

Iowa.— Hasbrouck *v.* Western Union Tel. Co., 107 Iowa 160, 77 N. W. 1034, 70 Am. St. Rep. 181.

Kentucky.— Western Union Tel. Co. *v.* Matthews, 113 Ky. 188, 67 S. W. 849, 24 Ky. L. Rep. 3; Postal Tel. Cable Co. *v.* Schaefer, 110 Ky. 907, 62 S. W. 1119, 23 Ky. L. Rep. 344.

Mississippi.— Shingleur *v.* Western Union Tel. Co., 72 Miss. 1030, 18 So. 425, 48 Am. St. Rep. 604, 30 L. R. A. 444.

Missouri.— Reynolds *v.* Western Union Tel. Co., 81 Mo. App. 223.

New York.— Rittenhouse *v.* Independent Tel. Line, 44 N. Y. 263, 4 Am. Rep. 673; Leonard *v.* New York, etc., Electro Magnetic Tel. Co., 41 N. Y. 544, 1 Am. Rep. 446.

Plaintiff is, however, required only to incur a reasonable amount of trouble and expense according to the circumstances of the particular case,[54] and it is not incumbent upon him to enter into litigation to rescind a contract which had already been entered into before the company's negligence was discovered.[55]

(v) *Losses Which Might Have Occurred at All Events.* The loss is not, in the eye of the law, the proximate consequence of the telegraph company's negligence in a case where, even if the company had performed its duty, there can be no legal certainty that the loss would not still have occurred or the object of the message have been defeated.[56] Thus if the happening or preventing of the loss, even though the telegraph company had performed its duty, would still have been dependent on a speculative or contingent future event,[57] or on the voluntary action or inaction of the other party to the message,[58] or of plaintiff himself,[59] or of a third party,[60] where there was no obligation on the part of such party to act or not to act, it cannot be said with legal certainty that the loss was the result of the telegraph company's negligence.[61]

North Carolina.— Hocutt *v.* Western Union Tel. Co., 147 N. C. 186, 60 S. E. 980; Cranford *v.* Western Union Tel. Co., 138 N. C. 162, 50 S. C. 585.

Ohio.— Postal Tel. Cable Co. *v.* Akron Cereal Co., 23 Ohio Cir. Ct. 516.

South Carolina.— Cason *v.* Western Union Tel. Co., 77 S. C. 157, 57 S. E. 722; Key *v.* Western Union Tel. Co., 76 S. C. 301, 56 S. E. 962; Jones *v.* Western Union Tel. Co., 75 S. C. 208, 55 S. E. 318; Mitchiner *v.* Western Union Tel. Co., 75 S. C. 182, 55 S. E. 222; Willis *v.* Western Union Tel. Co., 69 S. C. 531, 48 S. E. 538, 104 Am. St. Rep. 828.

Tennessee.— Marr *v.* Western Union Tel. Co., 85 Tenn. 529, 3 S. W. 496.

Texas.— Western Union Tel. Co. *v.* Jeanes, 88 Tex. 230, 31 S. W. 186; Womack *v.* Western Union Tel. Co., 58 Tex. 176, 44 Am. Rep. 614; Mitchell *v.* Western Union Tel. Co., 23 Tex. Civ. App. 445, 56 S. W. 439; Western Union Tel. Co. *v.* Hearne, 7 Tex. Civ. App. 67, 26 S. W. 478. See also Western Union Tel. Co. *v.* Salter, (Civ. App. 1906) 95 S. W. 549.

Virginia.— Washington, etc., Tel. Co. *v.* Hobson, 15 Gratt. 122.

United States.— Western Union Tel. Co. *v.* Baker, 140 Fed. 315, 72 C. C. A. 87.

Allowance for expenses.— It being the duty of the addressee of a telegram to minimize the damages resulting from a telegraph company's negligent delay in delivery, he may recover for his expense in lessening such damage. Postal Tel. Co. *v.* Levy, (Tex. Civ. App. 1907) 102 S. W. 134.

54. Western Union Tel. Co. *v.* Witt, 110 S. W. 889, 33 Ky. L. Rep. 685.

55. Hasbrouck *v.* Western Union Tel. Co., 107 Iowa 160, 77 N. W. 1034, 70 Am. St. Rep. 181; Reed *v.* Western Union Tel. Co., 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492.

56. Bashinsky *v.* Western Union Tel. Co., 1 Ga. App. 761, 58 S. E. 91; Cherokee Tanning Extract Co. *v.* Western Union Tel. Co., 143 N. C. 376, 55 S. E. 777; Clio Gin Co. *v.* Western Union Tel. Co., 82 S. C. 405, 64 S. E. 426; Bird *v.* Western Union Tel. Co., 76 S. C. 345, 56 S. E. 973; Beatty Lumber Co. *v.* Western Union Tel. Co., 52 W. Va. 410, 44 S. E. 309.

57. Western Union Tel. Co. *v.* Crall, 39 Kan. 580, 18 Pac. 719 (whether P's horse would have won a trotting race); Chapman *v.* Western Union Tel. Co., 90 Ky. 265, 13 S. W. 880, 12 Ky. L. Rep. 265 (whether P's father would have given him a note); Rich Grain Distilling Co. *v.* Western Union Tel. Co., 13 Ky. L. Rep. 256 (what profits, if any, would have been made by the operation of a plant); Barnesville First Nat. Bank *v.* Western Union Tel. Co., 30 Ohio St. 555, 27 Am. Rep. 475 (whether personal property parted with under mistake could have been recovered); Martin *v.* Sunset Tel., etc., Co., 18 Wash. 260, 51 Pac. 376 (whether P would have succeeded in a lawsuit).

58. *Kentucky.*—Taliferro *v.* Western Union Tel. Co., 54 S. W. 825, 21 Ky. L. Rep. 1290.

New York.— Kiley *v.* Western Union Tel. Co., 39 Hun 158 [*affirmed* in 109 N. Y. 231, 16 N. E. 75].

North Carolina.— Newsome *v.* Western Union Tel. Co., 137 N. C. 513, 50 S. E. 279.

South Carolina.—Capers *v.* Western Union Tel. Co., 71 S. C. 29, 50 S. E. 537.

United States.— Western Union Tel. Co. *v.* Hall, 124 U. S. 444, 8 S. Ct. 577, 31 L. ed. 479.

59. *Alabama.*— Frazer *v.* Western Union Tel. Co., 84 Ala. 487, 4 So. 831.

Georgia.—Haber, etc., Hat Co. *v.* Southern Bell Tel., etc., Co., 118 Ga. 874, 45 S. E. 696.

Kentucky.— Smith *v.* Western Union Tel. Co., 83 Ky. 104, 4 Am. St. Rep. 126.

New York.— Baldwin *v.* U. S. Telegraph Co., 45 N. Y. 744, 6 Am. Rep. 165; McColl *v.* Western Union Tel. Co., 44 N. Y. Super. Ct. 487, 7 Abb. N. Cas. 151, 1 Am. Elec. Cas. 280.

United States.— Alexander *v.* Western Union Tel. Co., 126 Fed. 445.

Message an offer see *infra*, IX, B, 2, b.

60. Kenyon *v.* Western Union Tel. Co., 100 Cal. 454, 35 Pac. 75; Postal Tel. Cable Co. *v.* Barwise, 11 Colo. App. 328, 53 Pac. 252; Walser *v.* Western Union Tel. Co., 114 N. C. 440, 19 S. E. 366.

61. Walser *v.* Western Union Tel. Co., 114 N. C. 440, 19 S. E. 366; Western Union Tel. Co. *v.* Connelly, 2 Tex. App. Civ. Cas. § 113.

c. Must Not Grow Out of Illegal Transaction — (I) *In General.* Where the transaction in connection with which plaintiff claims that the negligence of the telegraph company has caused him to suffer a loss is in itself an illegal transaction, and the message was sent in furtherance thereof, there can be no recovery.[62] It will be presumed, however, that the parties contemplated a legal rather than an illegal transaction, and the burden is upon defendant to show the contrary.[63]

(II) *Sunday Messages.* In jurisdictions where contracts made on Sunday are unenforceable unless relating to works of necessity or charity a telegraph company is not liable either for damages or statutory penalties for failure to perform a contract made on Sunday to deliver a message,[64] unless it falls within one of the prescribed exceptions.[65]

d. Measure of Damages. As in other civil actions,[66] unless the circumstances warrant a recovery of exemplary damages,[67] the measure of damages in actions against telegraph companies for negligence or defaults in regard to the transmission or delivery of messages is the loss actually sustained by plaintiff,[68] in so far as it is the proximate result of the negligence or default complained of and reasonably within the contemplation of the parties,[69] or in other words, just

62. *Georgia.*— Cothran *v.* Western Union Tel. Co., 83 Ga. 25, 9 S. E. 836 [*disapproving* Western Union Tel. Co. *v.* Blanchard, 68 Ga. 299, 45 Am. Rep. 480]; Augusta Nat. Bank *v.* Cunningham, 75 Ga. 366.

Kentucky.— Smith *v.* Western Union Tel. Co., 84 Ky. 664, 2 S. W. 483, 8 Ky. L. Rep. 672.

Maine.—Morris *v.* Western Union Tel. Co., 94 Me. 423, 47 Atl. 926.

Michigan.— Carland *v.* Western Union Tel. Co., 118 Mich. 369, 76 N. W. 762, 74 Am. St. Rep. 394, 43 L. R. A. 280.

Mississippi.— Western Union Tel. Co. *v.* Littlejohn, 72 Miss. 1025, 18 So. 418.

South Carolina.— Gist *v.* Western Union Tel. Co., 45 S. C. 344, 23 S. E. 143, 55 Am. St. Rep. 763.

Texas.—Western Union Tel. Co. *v.* Harper, 15 Tex. Civ. App. 37, 39 S. W. 599.

United States.— Melchert *v.* American Union Tel. Co., 11 Fed. 193, 3 McCrary 521.

63. Western Union Tel. Co. *v.* Chamblee, 122 Ala. 428, 25 So. 232, 82 Am. St. Rep. 89 (holding that a message directing a purchase of cotton for future delivery will be presumed to relate to an actual purchase and not a mere settlement of differences according to market values); Hocker *v.* Western Union Tel. Co., 45 Fla. 363, 34 So. 901 (transaction in futures not necessarily illegal because on margin); Western Union Tel. Co *v.* Hill, (Tex. Civ. App. 1902) 65 S. W. 1123 (defendant must show cotton sold for future delivery could not and would not have been delivered).

64. Western Union Tel. Co. *v.* Way, 83 Ala. 542, 4 So. 844, 2 Am. Elec. Cas. 455; Willingham *v.* Western Union Tel. Co., 91 Ga. 449, 18 S. E. 298; Western Union Tel. Co. *v.* Yopst, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224; Rogers *v.* Western Union Tel. Co., 78 Ind. 169, 41 Am. Rep. 558; Western Union Tel. Co. *v.* Henley, 23 Ind. App. 14, 54 N. E. 775; Thompson *v.* Western Union Tel. Co., 32 Mo. App. 191, 2 Am. Elec. Cas. 634.

In Missouri under the statutes as amended in 1889, if a telegraph company voluntarily engages in business on Sunday as on other days, it will be liable for negligence or defaults in regard to the transmission or delivery of messages so received, regardless of whether they relate to matters of charity and necessity. Bassett *v.* Western Union Tel. Co., 48 Mo. App. 566 [*distinguishing* Thompson *v.* Western Union Tel. Co., 32 Mo. App. 191, decided prior to the amendment of the statute].

65. *Alabama.*—Western Union Tel. Co. *v.* Wilson, 93 Ala. 32, 9 So. 414, 30 Am. St. Rep. 23.

Arkansas.— Arkansas, etc., R. Co. *v.* Lee, 79 Ark. 448, 96 S. W. 148.

Indiana.— Western Union Tel. Co. *v.* Eskridge, 7 Ind. App. 208, 33 N. E. 238; Western Union Tel. Co. *v.* Griffin, 1 Ind. App. 46, 27 N. E. 113.

Iowa.— See Taylor *v.* Western Union Tel. Co., 95 Iowa 740, 64 N. W. 660.

Mississippi.— Western Union Tel. Co. *v.* McLaurin, 70 Miss. 26, 13 So. 36, message to attorney to appear in court following morning.

Missouri.— Burnett *v.* Western Union Tel. Co., 39 Mo. App. 599.

Texas.— Gulf, etc., R. Co. *v.* Levy, 59 Tex. 542, 46 Am. Rep. 269; Jones *v.* Roach, 21 Tex. Civ. App. 301, 51 S. W. 549.

Utah.— Brown *v.* Western Union Tel. Co., 6 Utah 219, 21 Pac. 988.

Messages relating to sickness and death are universally regarded as exceptions, being works both of necessity and charity. Western Union Tel. Co. *v.* Wilson, 93 Ala. 32, 9 So. 414, 30 Am. St. Rep. 23.

66. See Damages, 13 Cyc. 136.

67. See *infra*, IX, C.

68. Western Union Tel. Co. *v.* Milton, 53 Fla. 484, 43 So. 495, 125 Am. St. Rep. 1077, 11 L. R. A. N. S. 560; Western Union Tel. Co. *v.* Dubois, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109; Western Union Tel. Co. *v.* Spivey, 98 Tex. 308, 83 S. W. 364.

69. Western Union Tel. Co. *v.* Milton, 53 Fla. 484, 43 So. 495, 125 Am. St. Rep. 1077, 11 L. R. A. N. S. 560; Western Union Tel.

compensation for the injury sustained,[70] without regard to the degree of defendant's negligence; [71] but it is not possible to lay down any exact formula by which such damages can in all cases be measured.[72]

e. Contributory Negligence.[73] As in other civil actions,[74] plaintiff may be precluded from recovering damages by reason of his own contributory negligence,[75] as where in the case of a message incorrectly transmitted plaintiff assumes to interpret and act upon it, although as delivered to him it is unintelligible,[76] where he acts upon such a message without attempting to verify its correctness, although having reasonable cause to suspect that it has been incorrectly transmitted,[77] or where after discovering that the message has been incorrectly transmitted he makes no effort to correct the mistake, although having sufficient time to do so before any damage would result.[78] It is ordinarily, however, a question of fact for the jury whether plaintiff was, under the circumstances of the particular case, guilty of such negligence.[79]

2. In Particular Classes of Cases — a. Message a Mere Step in Negotiations. Where the message relates to a proposed contract between plaintiff and another person, but is neither an acceptance of a previous offer nor itself a definite offer, but only an invitation to submit an offer or to meet or correspond with the sender for the purpose of further negotiation, the failure duly to deliver the message is not, as a matter of law, the proximate cause of the failure of the negotiations to result in a binding contract,[80] and damages for the loss of a contract which

Co. *v.* Dubois, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109; Western Union Tel. Co. *v.* Spivey, 98 Tex. 308, 83 S. W. 364.

Must be contemplated see *supra*, IX, B, 1, a.

Must be proximate result see *supra*, IX, B, 1, b.

70. Western Union Tel. Co. *v.* Dubois, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109; Turner *v.* Hawkeye Tel. Co., 41 Iowa 458, 20 Am. Rep. 605; Bowie *v.* Western Union Tel. Co., 78 S. C. 424, 59 S. E. 65.

The primary end to be kept in view is compensation to the party injured for the difference in his position from what it would have been if the company had properly performed its duty. Bowie *v.* Western Union Tel. Co., 78 S. C. 424, 59 S. E. 65.

71. Western Union Tel. Co. *v.* Williams, 163 Fed. 513, 516, 90 C. C. A. 143, where the court said: "The injured party is entitled to recover, not according to the degree of negligence of the company, but compensation for the injury he has actually received, and this rule applies except in cases where punitive damages may be allowed."

72. Bowie *v.* Western Union Tel. Co., 78 S. C. 424, 59 S. E. 65.

The measure of damages for wrongful delay in delivering a message, whether suit be on the contract or in tort, is, first, at least nominal damages: second, such damages as may be fairly considered as arising naturally, or having been within contemplation of the parties when the contract was made; and, third, in a proper case, punitive damages. Western Union Tel. Co. *v.* Potts, 120 Tenn. 37, 113 S. W. 789, 127 Am. St. Rep. 991, 19 L. R. A. N. S. 479.

Measure of damages in particular classes of cases see *infra*, IX, B, 2.

73. In mental anguish cases see *infra*, IX, B, 3, d, (XI).

74. See Negligence, 29 Cyc. 505.

75. *Arkansas.*—Western Union Tel. Co. *v.* Gulledge, 84 Ark. 501, 106 S. W. 957.

Georgia.— Manly Mfg. Co. *v.* Western Union Tel. Co., 105 Ga. 235, 31 S. E. 156.

Illinois.— Western Union Tel. Co. *v.* Wright, 18 Ill. App. 337.

Iowa.— Bowyer *v.* Western Union Tel. Co., 130 Iowa 324, 106 N. W. 748, 5 L. R. A. N. S. 984.

New York.— Hart *v.* Direct U. S. Cable Co., 86 N. Y. 633.

North Carolina.— Hocutt *v.* Western Union Tel. Co., 147 N. C. 186, 60 S. E. 980.

Pennsylvania.— Nusbaum *v.* Western Union Tel. Co., 17 Phila. 340.

Texas.—Western Union Tel. Co. *v.* Harper, 15 Tex. Civ. App. 37, 39 S. W. 599.

Not contributory negligence.—Where the addressee of a telegram sent from Staten Island but reading as if sent from South Carolina, after going to the telegraph office to inquire and finding it closed was misled into making a fruitless trip to South Carolina, it cannot be said as a matter of law that he was guilty of contributory negligence. Tobin *v.* Western Union Tel. Co., 146 Pa. St. 375, 23 Atl. 324, 28 Am. St. Rep. 802.

76. Manly Mfg. Co. *v.* Western Union Tel. Co., 105 Ga. 235, 31 S. E. 156; Hart *v.* Direct U. S. Cable Co., 86 N. Y. 633; Nusbaum *v.* Western Union Tel. Co., 17 Phila. (Pa.) 340.

77. Western Union Tel. Co. *v.* Wright, 18 Ill. App. 337.

78. Western Union Tel. Co. *v.* Harper, 15 Tex. Civ. App. 37, 39 S. W. 599.

79. Manly Mfg. Co. *v.* Western Union Tel. Co., 105 Ga. 235, 31 S. E. 156; Western Union Tel. Co. *v.* Powell, (Tex. Civ. App. 1909) 118 S. W. 226.

80. *Alabama.*—Western Union Tel. Co. *v.* Bowman, 141 Ala. 175, 37 So. 493.

might or might not have resulted from further negotiations being too remote and uncertain,[81] only nominal damages can be recovered.[82] This rule applies to messages not containing a definite offer but merely inquiring whether the addressee will accept a certain price,[83] or will accept a certain position,[84] or desires a position or employment,[85] or requesting a quotation of prices,[86] and particularly to a message which is in effect a discontinuance of pending negotiations.[87]

b. Message a Definite Offer. There is a clear distinction between messages containing a mere offer and those containing an acceptance of an offer;[88] and in some cases it has been held that compensatory damages cannot be recovered for failure to transmit or deliver a message containing a mere offer, as they are contingent upon its acceptance,[89] or at least that they cannot be recovered in the absence of satisfactory proof that the offer would have been accepted,[90] no actual damages being sustained unless the completion of a binding contract was prevented.[91] It has been held, however, that if it satisfactorily appears

California.—Kenyon *v.* Western Union Tel. Co., 100 Cal. 454, 35 Pac. 75.

Colorado.— Postal Tel. Cable Co. *v.* Barwise, 11 Colo. App. 328, 53 Pac. 252.

Georgia.— Bass *v.* Postal Tel.-Cable Co., 127 Ga. 423, 56 S. E. 465; Wilson *v.* Western Union Tel. Co., 124 Ga. 131, 52 S. E. 153; Mondon *v.* Western Union Tel. Co., 96 Ga. 499, 23 S. E. 853; Baldwin *v.* Western Union Tel. Co., 93 Ga. 692, 21 S. E. 212, 44 Am. St. Rep. 194; Clay *v.* Western Union Tel. Co., 81 Ga. 285, 6 S. E. 813, 12 Am. St. Rep. 316.

Iowa.— Bennett *v.* Western Union Tel. Co., 129 Iowa 607, 106 N. W. 13.

Maine.—Merrill *v.* Western Union Tel. Co., 78 Me. 97, 2 Atl. 847.

Mississippi.— Western Union Tel. Co. *v.* Webb, (1909) 48 So. 408; Western Union Tel. Co. *v.* Adams Mach. Co., 92 Miss. 849, 47 So. 412; Western Union Tel. Co. *v.* Pallotta, 81 Miss. 216, 32 So. 310; Johnson *v.* Western Union Tel. Co., 79 Miss. 58, 29 So. 787, 89 Am. St. Rep. 584; Western Union Tel. Co. *v.* Clifton, 68 Miss. 307, 8 So. 746.

North Carolina.— Cherokee Tanning Extract Co. *v.* Western Union Tel. Co., 143 N. C. 376, 55 S. E. 777; Walser *v.* Western Union Tel. Co., 114 N. C. 440, 19 S. E. 366;

South Carolina.— Bird *v.* Western Union Tel. Co., 76 S. C. 345, 56 S. E. 973; Harmon *v.* Western Union Tel. Co., 65 S. C. 490, 43 S. E. 959; Mood *v.* Western Union Tel. Co., 40 S. C. 524, 19 S. E. 67.

Texas.— Western Union Tel. Co. *v.* Connelly, 2 Tex. App. Civ. Cas. § 113. See also Western Union Tel. Co. *v.* Twaddell, 47 Tex. Civ. App. 51, 103 S. W. 1120.

81. Bennett *v.* Western Union Tel. Co., 129 Iowa 607, 106 N. W. 13; Johnson *v.* Western Union Tel. Co., 79 Miss. 58, 29 So. 787, 89 Am. St. Rep. 584; Walser *v.* Western Union Tel. Co., 114 N. C. 440, 19 S. E. 366; Western Union Tel. Co. *v.* Connelly, 2 Tex. Abb. Civ. Cas. § 113. See also cases cited *supra*, note 80; and, generally, *supra*, IX, B, 1, b, (II).

82. Cherokee Tanning Extract Co. *v.* Western Union Tel. Co., 143 N. C. 376, 55 S. E. 777; Walser *v.* Western Union Tel. Co., 114 N. C. 440, 19 S. E. 366. See also cases cited *supra*, notes 80, 81; and, generally, *supra*, IX, A.

83. Bennett *v.* Western Union Tel. Co., 129 Iowa 607, 106 N. W. 13.

84. Walser *v.* Western Union Tel. Co., 114 N. C. 440, 19 S. E. 366.

85. Johnson *v.* Western Union Tel. Co., 79 Miss. 58, 29 So. 787, 89 Am. St. Rep. 584; Western Union Tel. Co. *v.* Connelly, 2 Tex. App. Civ. Cas. § 113.

Loss of contract of employment see *infra*, IX, B, 2, h.

86. Postal Tel. Co. *v.* Barwise, 11 Colo. App. 328, 53 Pac. 252.

87. Fisher *v.* Western Union Tel. Co., 119 Wis. 146, 96 N. W. 545, holding that where an offer had been made by letter and a counter offer by telegram, the non-delivery of another telegram simply declining the counter offer was not the proximate cause of the loss of a contract which might or might not have resulted from subsequent negotiations.

88. Richmond Hosiery Mills *v.* Western Union Tel. Co., 123 Ga. 216, 51 S. E. 290; Beaupré *v.* Pacific, etc., Tel. Co., 21 Minn. 155.

The distinction grows out of the fact that the acceptance is the last despatch necessary to complete the bargain and is not subject to any contingency, while a mere offer is subject to the contingency that it might not be accepted. Beatty Lumber Co. *v.* Western Union Tel. Co., 52 W. Va. 410, 44 S. E. 309.

89. *Georgia.*— Richmond Hosiery Mills *v.* Western Union Tel. Co., 123 Ga. 216, 51 S. E. 290. See also Bashinsky *v.* Western Union Tel. Co., 1 Ga. App. 761, 58 S. E. 91.

New York.— Kiley *v.* Western Union Tel. Co., 39 Hun 158 [*affirmed* in 109 N. Y. 231, 16 N. E. 75].

North Carolina.— Cherokee Tanning Extract Co. *v.* Western Union Tel. Co., 143 N. C. 376, 55 S. E. 777.

West Virginia.— Beatty Lumber Co. *v.* Western Union Tel. Co., 52 W. Va. 410, 44 S. E. 309.

Canada.— Kinghorne *v.* Montreal Tel. Co., 18 U. C. Q. B. 60.

90. Bass *v.* Postal Tel.-Cable Co., 127 Ga. 423, 56 S. E. 465; Beaupré *v.* Pacific, etc., Tel. Co., 21 Minn. 155.

91. Beatty Lumber Co. *v.* Western Union Tel. Co., 52 W. Va. 410, 44 S. E. 309.

that the offer would have been accepted, plaintiff may recover for the loss of the sale, purchase, or other contract which would have resulted,[92] provided the company is chargeable with notice of the nature and purposes of the message,[93] such loss being the proximate result of the company's negligence;[94] and cases may arise where actual damages may be shown to have resulted from the non-delivery or delay of a message containing an offer independently of whether the offer would have been accepted.[95] The fact that the offer would have been accepted, it has been held, may be sufficiently shown by allegations of the complaint admitted by demurrer,[96] or by testimony of the parties in connection with evidence of circumstances tending to show that a reasonably prudent person would have accepted the offer.[97] In some cases it has been held that where the action is by the addressee it cannot be established by his own testimony that he would have accepted the offer;[98] but a distinction has been made in this regard in other cases according to whether the action is brought by the sender or by the addressee,[99] it having been held that where the action is by the sender the fact that the offer would have been accepted may be shown by the testimony of the addressee.[1] In accordance with the rules just stated there can be no recovery of damages for the non-delivery of a message containing a mere order for goods in the absence of proof that the order would have been filled,[2] unless such order is in effect an acceptance of an offer previously made by the addressee.[3]

c. Message an Acceptance of an Offer. Where the message is an unconditional acceptance of a definite offer, and the failure duly to deliver the message prevents the completion of a binding contract, the loss of the contract is of course the

92. *Arkansas.*— Hoyt *v.* Western Union Tel. Co., 85 Ark. 473, 108 S. W. 1056; Western Union Tel. Co. *v.* Love Banks Co., 73 Ark. 205, 83 S. W. 949.

Iowa.— Herron *v.* Western Union Tel. Co., 90 Iowa 129, 57 N. W. 696.

South Carolina.— Wallingford *v.* Western Union Tel. Co., 53 S. C. 410, 31 S. E. 275. See also Wallingford *v.* Western Union Tel. Co., 60 S. C. 201, 38 S. E. 443, 629.

Texas.— Texas, etc., Tel. Co. *v.* Mackenzie, 36 Tex. Civ. App. 178, 81 S. W 581; Western Union Tel. Co. *v.* Nagle, 11 Tex. Civ. App. 539, 32 S. W. 707. See also Western Union Tel. Co. *v.* Thompson Milling Co., 41 Tex. Civ. App. 223, 91 S. W. 307.

Wisconsin.— Barker *v.* Western Union Tel. Co., 134 Wis. 147, 114 N. W. 439, 126 Am. St. Rep. 1017, 14 L. R. A. N. S. 533.

93. McColl *v.* Western Union Tel. Co., 44 N. Y. Super Ct. 487, 7 Abb. N. Cas. 151 (holding that a message sent by a ship broker to the owner of a vessel, "Can close Valkyria and Othere twenty-two, twenty net Montreal. Ans. immediately," does not sufficiently disclose the purpose of the message as to make plaintiff's loss of commissions due to charters of the vessels not being concluded within the contemplation of the parties, although it appears that if the message had been delivered the offer would have been accepted); Western Union Tel. Co. *v.* True, 101 Tex. 236, 106 S. W. 315 [*reversing* (Civ. App. 1907) 103 S. W. 1180] (holding that a message reading, "Parties failed arrange deal. If you want cattle come here," is not sufficient to charge the company with notice that the deal not arranged was a prior option and that the object of the message was to extend to the addressee the privilege of exercising an option to buy the cattle upon terms already agreed upon).

94. Wallingford *v.* Western Union Tel. Co., 53 S. C. 410, 31 S. E. 275.

95. Lathan *v.* Western Union Tel. Co., 75 S. C. 129, 55 S. E. 134.

96. Wallingford *v.* Western Union Tel. Co., 53 S. C. 410, 31 S. E. 275. See also Barker *v.* Western Union Tel. Co., 134 Wis. 147, 114 N. W. 439, 126 Am. St. Rep. 1017, 14 L. R. A. N. S. 533.

97. Lathan *v.* Western Union Tel. Co., 75 S. C. 129, 55 S. E. 134.

98. Richmond Hosiery Mills *v.* Western Union Tel. Co., 123 Ga. 216, 51 S. E. 290; Beatty Lumber Co. *v.* Western Union Tel. Co., 52 W. Va. 410, 44 S. E. 309.

99. See Richmond Hosiery Mills *v.* Western Union Tel. Co., 123 Ga. 216, 51 S. E. 290; Elam *v.* Western Union Tel. Co., 113 Mo. App. 538, 88 S. W. 115; Texas, etc., Tel., etc., Co. *v.* Mackenzie, 36 Tex. Civ. App. 178, 81 S. W. 581.

1. Texas, etc., Tel., etc., Co. *v.* MacKenzie, 36 Tex. Civ. App. 178, 81 S. W. 581, holding that the fact that plaintiff's bid for a building contract would have been accepted may be shown by testimony of the addressee. But see Kinghorne *v.* Montreal Tel. Co., 18 U. C. Q. B. 60; and cases cited *supra*, note 89.

Admissibility of such testimony generally see *supra*, p. 1737 text and note 5.

2. Beaupré *v.* Pacific, etc., Tel. Co., 21 Minn. 155; Meggett *v.* Western Union Tel. Co., 69 Miss. 198, 13 So. 815; Newsome *v.* Western Union Tel. Co., 137 N. C. 513, 50 S. E. 279, 144 N. C. 178, 56 S. E. 863, 69 S. E. 10.

3. Elam *v.* Western Union Tel. Co., 113 Mo. App. 538, 88 S. W. 115.

proximate result of the failure duly to deliver the message.[4] Since, however, where a contract is made by an exchange of telegrams, the contract is ordinarily regarded as complete and binding on both parties from the instant the message of acceptance is delivered to the company for transmission,[5] it would seem that in the ordinary case of offer and acceptance by telegram the offeree, whose message of acceptance is delayed, has suffered no loss, since, notwithstanding the delay, the offerer is liable to him and must, on demand, perform the contract.[6] If the message of acceptance is not in all respects an unconditional acceptance it is, at best, no more than a counter offer, and is to be treated according to the principles which apply in the case of an original offer.[7]

d. Loss of a Mere Chance.[8] Plaintiff cannot recover on the theory that, if it had not been for the telegraph company's negligence, he might, and probably would, have reaped a benefit, when such benefit is in the nature of things speculative and contingent, and where it is impossible to show with legal certainty that plaintiff would have received the benefit had the message been duly delivered,[9] or in other words where he has lost only the mere chance or possibility of making something.[10] Thus it has been held that plaintiff cannot ask the jury to speculate as to whether, had it not been for the telegraph company's negligence, his horse would have won a prize purse at a trotting race;[11] whether his father, had he reached him before death, would have given him a note;[12] whether, had he received a message from his failing debtor inviting him to come, the debtor would voluntarily have given him security;[13] or whether, had he received the information contained in the message at the time it should have been received, he would have been able to recover money previously paid out,[14] or property delivered.[15]

e. Loss of a Sale. Where within the principles previously discussed the neg-

4. *Alabama.*—Western Union Tel. Co. *v.* Way, 83 Ala. 542, 4 So. 844, 2 Am. Elec. Cas. 467.

Arkansas.— Western Union Tel. Co. *v.* Hoyt, 89 Ark. 118, 115 S. W. 941.

Georgia.— Dodd Grocery Co. *v.* Postal Tel. Co., 112 Ga. 685, 37 S. E. 981.

Illinois.—Western Union Tel. Co. *v.* Kemp, 55 Ill. App. 583.

Iowa.— Lucas *v.* Western Union Tel. Co., 131 Iowa 669, 109 N. W. 191, 6 L. R. A. N. S. 1016.

Maine.— True *v.* International Tel. Co., 60 Me. 9, 11 Am. Rep. 156.

Massachusetts.— Squire *v.* Western Union Tel. Co., 98 Mass. 232, 93 Am. Dec. 157.

Missouri.— Elam *v.* Western Union Tel. Co., 113 Mo. App. 538, 88 S. W. 115.

Texas.— Western Union Tel. Co. *v.* Turner, 94 Tex. 304, 60 S. W. 452; Western Union Tel. Co. *v.* Bowen, 84 Tex. 476, 19 S. W. 554. See also Western Union Tel. Co. *v.* T. H. Thompson Milling Co., 41 Tex. Civ. App. 223, 91 S. W. 307.

United States.— Purdom Naval Stores Co. *v.* Western Union Tel. Co., 153 Fed. 327.

An order for goods made pursuant to an offer previously made by the addressee to sell the same constitutes an acceptance of the offer. Elam *v.* Western Union Tel. Co., 113 Mo. App. 538, 88 S. W. 115.

5. See CONTRACTS, 9 Cyc. 295.

6. Western Union Tel. Co. *v.* Davis, (Tex. Civ. App. 1902) 70 S. W. 784. See also Western Union Tel. Co. *v.* Turner, 94 Tex. 304, 60 S. W. 432, holding, however, that the telegraph company has no right to suppose that the filing of the message of acceptance will close the trade so that no damage will result from a failure to deliver it, and if by the terms of the contract a delivery of the message of acceptance is necessary to complete the same the company will be liable in case of a non-delivery.

Where an offer made by letter is accepted by telegram, neither party is bound until the telegram is delivered, and the delay of the telegram therefore may be the proximate cause of the failure of the contract. Lucas *v.* Western Union Tel. Co., 131 Iowa 669, 109 N. W. 191, 6 L. R. A. N. S. 1016.

7. Cherokee Tanning Extract Co. *v.* Western Union Tel. Co., 143 N. C. 376, 55 S. E. 777; Western Union Tel. Co. *v.* Burns, (Tex. Civ. App. 1902) 70 S. W. 784. See also Fisher *v.* Western Union Tel. Co., 119 Wis. 146, 96 N. W. 545; Kinghorne *v.* Montreal Tel. Co., 18 U. C. Q. B. 60.

Message a definite offer see *supra*, IX, B, 2, b.

8. See also *supra*, IX, B, 1, b.

9. Western Union Tel. Co. *v.* Crall, 39 Kan. 580, 18 Pac. 719; Chapman *v.* Western Union Tel. Co., 90 Ky. 265, 13 S. W. 880, 12 Ky. L. Rep. 265.

10. Clay *v.* Western Union Tel. Co., 81 Ga. 285, 6 S. E. 813, 12 Am. St. Rep. 316.

11. Western Union Tel. Co. *v.* Crall, 39 Kan. 580, 18 Pac. 719.

12. Chapman *v.* Western Union Tel. Co., 90 Ky. 265, 13 S. W. 880, 12 Ky. L. Rep. 265.

13. Hartstein *v.* Western Union Tel. Co., 89 Wis. 531, 62 N. W. 412.

14. Barnesville First Nat. Bank *v.* Western Union Tel. Co., 30 Ohio St. 555, 27 Am. Rep. 485, 1 Am. Elec. Cas. 221.

15. Western Union Tel. Co. *v.* Cornwell, 2 Colo. App. 491, 31 Pac. 393.

ligence of the telegraph company is to be regarded as the proximate cause of the loss of a sale, the question arises as to the proper measure of damages for that loss. If the subject-matter of sale has a definitely ascertainable market value, such as grain,[16] cotton,[17] lumber,[18] or wool,[19] the measure of damages for the loss of the sale is the difference between the contract price and the market value of the subject-matter of the sale at the place where it was when the vendor learned or should with ordinary diligence have learned of the failure of the trade.[20] Where by the terms of the contract of sale the delivery is to be made at another time and place, the measure of damages is the difference between the contract price and the market value of the property at the time and place of delivery.[21] If there is no market for the subject-matter of the sale at the place where it is stored the measure of damages is the difference between the contract price and the value of the property at the nearest market, together with the expense of transporting it there.[22] Where the subject-matter of sale is of such a character that it has no market value or that its market value cannot be readily ascertained, the measure of damages is the contract price less the best price which the vendor could afterward obtain for it by the exercise of reasonable diligence, together

16. Smith *v.* Western Union Tel. Co., 80 Nebr. 395, 114 N. W. 288; Western Union Tel. Co. *v.* Nye, etc., Co., 70 Nebr. 251, 97 N. W. 305.

17. Western Union Tel. Co. *v.* Love Banks Co., 73 Ark. 205, 83 S. W. 949; Western Union Tel. Co. *v.* Milton, 53 Fla. 484, 43 So. 495, 11 L. R. A. N. S. 560; Houston, etc., R. Tel. Co. *v.* Davidson, 15 Tex. Civ. App. 334, 39 S. W. 605.

18. Beatty Lumber Co. *v.* Western Union Tel. Co., 52 W. Va. 410, 44 S. E. 309.

19. Western Union Tel. Co. *v.* Haman, 2 Tex. Civ. App. 100, 20 S. W. 1133.

20. *Arkansas.*— Western Union Tel. Co. *v.* Love Banks Co., 73 Ark. 205, 83 S. W. 949.

Florida.— Western Union Tel. Co. *v.* Milton, 53 Fla. 484, 43 So. 495, 11 L. R. A. N. S. 560.

Georgia.—Western Union Tel. Co. *v.* James, 90 Ga. 254, 16 S. E. 83; Western Union Tel. Co. *v.* Reid, 83 Ga. 401, 10 S. E. 919.

Iowa.— Herron *v.* Western Union Tel. Co., 90 Iowa 129, 57 N. W. 696.

Kentucky.— Blackburn *v.* Kentucky Cent. R. Co., 15 Ky. L. Rep. 303.

Missouri.— Thorp *v.* Western Union Tel. Co., 118 Mo. App. 398, 94 S. W. 554.

Nebraska.— Smith *v.* Western Union Tel. Co., 80 Nebr. 395, 114 N. W. 288; Western Union Tel. Co. *v.* Nye, etc., Co., 70 Nebr. 251, 97 N. W. 305.

South Carolina.— Wallingford *v.* Western Union Tel. Co., 53 S. C. 410, 31 S. E. 275.

Texas.— Houston, etc., R. Co. *v.* Davidson, 15 Tex. Civ. App. 334, 39 S. W. 605; Western Union Tel. Co. *v.* Haman, 2 Tex. Civ. App. 100, 20 S. W. 1133.

West Virginia.— Beatty Lumber Co. *v.* Western Union Tel. Co., 52 W. Va. 410, 44 S. E. 309.

Wisconsin.— Thompson *v.* Western Union Tel. Co., 64 Wis. 531, 25 N. W. 789, 54 Am. Rep. 644, 1 Am. Elec. Cas. 772.

United States.— Western Union Tel. Co. *v.* Hall, 124 U. S. 444, 8 S. Ct. 577, 31 L. ed. 479.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 72.

Shipments delayed.— In case of a delay in delivering to plaintiff a message directing him to ship his hogs to Chicago at once, it was held that the measure of his damages was the difference between the market value of the hogs on the day he was enabled to place them on the market after receiving the message and what the market value would have been on the day he could have gotten them to market if there had been no delay in delivering the message. Manville *v.* Western Union Tel. Co., 37 Iowa 214, 18 Am. Rep. 8. See also Western Union Tel. Co. *v.* Eubanks, 100 Ky. 591, 38 S. W. 1068, 18 Ky. L. Rep. 995, 66 Am. St. Rep. 361, 36 L. R. A. 711.

Delay in reselling.— Where a sale of grain or cotton is defeated by the non-delivery or delay of a telegram, plaintiff's measure of damages is the difference between the contract price and the market price at the time the message should have been delivered, and if he continues to hold beyond this time he takes the risk of any fluctuations in the market and his damages are not increased in case the market declines and he afterward sells at a greater loss. Western Union Tel. Co. *v.* Love Banks Co., 73 Ark. 205, 83 S. W. 949. The same principle which relieves defendant from increased liability in case of delay in selling and a decline of the market also precludes it from deriving any advantage from a rise in the market during such delay, notwithstanding plaintiff actually sells at the higher price. Western Union Tel. Co. *v.* Nye, etc., Co., 70 Nebr. 251, 97 N. W. 305.

21. See Beatty Lumber Co. *v.* Western Union Tel. Co., 52 W. Va. 410, 44 S. E. 309. In Evans *v.* Western Union Tel. Co., 102 Iowa 219, 71 N. W. 219, the measure of damages was held to be the difference between the contract price and the value of the goods at the point of shipment, less cost of transportation to place of delivery.

22. Western Union Tel. Co. *v.* James, 90 Ga. 254, 16 S. E. 83.

with the expense, if any, of keeping it in the meanwhile;[23] but where plaintiff resells to a different purchaser and seeks to recover the difference between the amount so received and the original contract price, it must appear that he resold for the best price obtainable under the circumstances.[24]

f. Loss of a Purchase. If by reason of the negligence of a telegraph company in regard to the transmission or delivery of a message a purchase is defeated resulting in a loss to plaintiff, the company will be liable.[25] The general rule is that the measure of damages is the difference between the contract price and the market value of the goods at the time and place of delivery;[26] and where as the result of the telegraph company's negligence the purchase is not lost but delayed, there may as a general rule be a recovery for the rise in market value of the subject-matter of the sale during the delay.[27] Where the message is from plaintiff to his agent, instructing him to purchase, and there is a negligent delay in transmission, plaintiff is entitled to recover the difference between the market price at the time when the message should have been delivered and the price at which the order was in fact executed;[28] and where such a message to an agent is never delivered at all, the measure of damages is the difference between the price mentioned in the message, at which the purchase could have been made had the message been promptly delivered, and the market price at the time plaintiff learned of the non-delivery;[29] but where the message is not a positive direction to the agent to purchase, but leaves the matter to his discretion, or where in fact the agent does not purchase when the message is actually received, and no transaction takes place, there can ordinarily be no recovery beyond nominal damages or the amount paid for transmitting the message.[30]

g. Loss of an Exchange. Where, instead of a sale or a purchase, the telegraph company's negligence causes plaintiff to lose a contract for the exchange of property, the measure of damages is the difference between the value of the property

23. *Arkansas.*— Hoyt *v.* Western Union Tel. Co., 85 Ark. 473, 108 S. W. 1056.

Georgia.—Western Union Tel. Co. *v.* James, 90 Ga. 254, 16 S. E. 83.

Iowa.— Herron *v.* Western Union Tel. Co., 90 Iowa 129, 57 N. W. 696.

Kentucky.— Blackburn *v.* Kentucky Cent. R. Co., 15 Ky. L. Rep. 303.

South Carolina.— Wallingford *v.* Western Union Tel. Co., 53 S. C. 410, 31 S. E. 275.

Utah.— Brooks *v.* Western Union Tel. Co., 26 Utah 147, 72 Pac. 499.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 72.

24. Brooks *v.* Western Union Tel. Co., 26 Utah 147, 72 Pac. 499.

25. Alexander *v.* Western Union Tel. Co., 67 Miss. 386, 7 So. 280. See also cases cited *infra*, notes 26–29.

26. True *v.* International Tel. Co., 60 Me. 9, 11 Am. Rep. 156; Squire *v.* Western Union Tel. Co., 98 Mass. 232, 93 Am. Dec. 157; Alexander *v.* Western Union Tel. Co., 66 Miss. 161, 5 So. 397, 14 Am. St. Rep. 556, 3 L. R. A. 71; Western Union Tel. Co. *v.* Hall, 124 U. S. 444, 8 S. Ct. 577, 31 L. ed. 479; Purdom Naval Stores Co. *v.* Western Union Tel. Co., 153 Fed. 327. See also Western Union Tel. Co. *v.* Pells, 2 Tex. App. Civ. Cas. § 41. In Western Union Tel. Co. *v.* Hirsch, (Tex. Civ. App. 1904) 84 S. W. 394, a message offered plaintiffs an option on one hundred bales of cotton. Not receiving the message they bought the cotton in question, fifty bales at a higher price and the other fifty bales on the following day at a price still higher. Recovery was allowed only for the difference between the contract price and the market price at the time plaintiffs bought the first fifty bales, it being held that the subsequent fluctuations of the market could neither increase nor diminish the liability of defendant.

27. Gulf, etc., R. Co. *v.* Loonie, 82 Tex. 323, 18 S. W. 221, 27 Am. St. Rep. 891; Swan *v.* Western Union Tel. Co., 129 Fed. 318, 63 C. C. A. 550, 67 L. R. A. 153.

28. Dodd Grocery Co. *v.* Postal Tel.-Cable Co., 112 Ga. 685, 37 S. E. 981; Western Union Tel. Co. *v.* North Packing, etc., Co., 89 Ill. App. 301 [*affirmed* in 188 Ill. 366, 58 N. E. 958, 52 L. R. A. 274]; Pearsall *v.* Western Union Tel. Co., 124 N. Y. 256, 26 N. E. 534, 21 Am. St. Rep. 662]; Rittenhouse *v.* Independent Tel. Line, 44 N. Y. 263, 4 Am. Rep. 673; U. S. Telegraph Co. *v.* Wenger, 55 Pa. St. 262, 93 Am. Dec. 751.

29. Western Union Tel. Co. *v.* Carver, 15 Tex. Civ. App. 547, 39 S. W. 1021.

30. Western Union Tel. Co. *v.* Fellner, 58 Ark. 29, 22 S. W. 917, 41 Am. St. Rep. 81; Hibbard *v.* Western Union Tel. Co., 33 Wis. 558, 14 Am. Rep. 775; Western Union Tel. Co. *v.* Hall, 124 U. S. 444, 8 S. Ct. 577, 31 L. ed. 479. See also Brewster *v.* Western Union Tel. Co., 65 Ark. 537, 47 S. W. 560.

The damages are too remote, speculative, and contingent in such cases to authorize a recovery of more than nominal damages.

which, under the contract, plaintiff would have obligated himself to surrender, and the value of the property which he would have received in return.[31]

h. Loss of a Contract of Employment. Where the message is of such a character that its delivery would have resulted in a binding contract of employment, and in consequence of the negligence of the telegraph company no contract is made, plaintiff may recover his actual loss,[32] namely, the amount which the other party would have been legally obliged to pay him under the contract, less what he actually made or could in the exercise of reasonable diligence have made in similar employment during the corresponding time.[33] If, however, the message is not a definite offer or acceptance, but a mere inquiry as to whether the addressee desires or will accept a position or employment, a non-delivery or delay cannot be said to be the natural and proximate cause of a failure to obtain such employment;[34] and the same rule applies where plaintiff was already employed under a contract which would have prevented his acceptance of the employment offered.[35] So also plaintiff can recover only for the contract which he actually lost, and not for subsequent renewals of that contract which, had the parties been mutually satisfied, might or might not have been made.[36] So in the case of an employment from day to day, only nominal damages, or at most one day's salary, can be recovered,[37] while in the case of an employment from month to month the limit of plaintiff's recovery is one month's salary.[38] In the case of an appointment to an office which plaintiff would have held not for any definite length of time but solely at the will of the party appointing him, only nominal damages can be recovered.[39]

Western Union Tel. Co. *v.* Fellner, 58 Ark. 29, 22 S. W. 917, 41 Am. St. Rep. 81.

31. Western Union Tel. Co. *v.* Wilhelm, 48 Nebr. 910, 67 N. W. 870. See also Lucas *v.* Western Union Tel. Co., 131 Iowa 669, 109 N. W. 191, 6 L. R. A. N. S. 1016.

32. *Georgia.*— Mondon *v.* Western Union Tel. Co., 96 Ga. 499, 23 S. E. 853; Baldwin *v.* Western Union Tel. Co., 93 Ga. 692, 21 S. E. 212, 44 Am. St. Rep. 194.

Illinois.—Western Union Tel. Co. *v.* Valentine, 18 Ill. App. 57.

Indiana.— Western Union Tel. Co. *v.* McKibben, 114 Ind. 511, 14 N. E. 894; Western Union Tel. Co. *v.* Fenton, 52 Ind. 1.

Maine.— Merrill *v.* Western Union Tel. Co., 78 Me. 97, 2 Atl. 847.

Missouri.— McGregor *v.* Western Union Tel. Co., 85 Mo. App. 308.

New Mexico.— Western Union Tel. Co. *v.* Longwill, 5 N. M. 308, 21 Pac. 339.

Texas.— Western Union Tel. Co. *v.* Partlow, 30 Tex. Civ. App. 599, 71 S. W. 584.

Wisconsin.— Barker *v.* Western Union Tel. Co., 134 Wis. 147, 114 N. W. 439, 126 Am. St. Rep. 1017, 14 L. R. A. N. S. 533.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 72.

Where a building contract is lost by the non-delivery of a message containing plaintiff's bid for the work, the measure of damages is the difference between the amount of the bid and what it would have cost plaintiff to erect the building according to the plans and specifications upon which the bid was based. Texas, etc., Tel., etc., Co. *v.* Mackenzie, 36 Tex. Civ. App. 178, 81 S. W. 581.

33. Western Union Tel. Co. *v.* Valentine, 18 Ill. App. 57; McGregor *v.* Western Union Tel. Co., 85 Mo. App. 308; Western Union Tel. Co. *v.* Partlow, 30 Tex. Civ. App. 599, 71 S. W. 584.

Where a message summoning a physician to perform a surgical operation at a place requiring a journey of several days is not delivered, the measure of his damages is the difference between what he would have made if he had gone and what he made at home during the time he would have been absent. Western Union Tel. Co. *v.* Longwill, 5 N. M. 308, 21 Pac. 339.

34. Wilson *v.* Western Union Tel. Co., 124 Ga. 131, 52 S. E. 153; Johnson *v.* Western Union Tel. Co., 79 Miss. 58, 29 So. 787, 58 Am. St. Rep. 584; Walser *v.* Western Union Tel. Co., 114 N. C. 440, 19 S. E. 366; Western Union Tel. Co. *v.* Connelly, 2 Tex. App. Civ. Cas. § 113.

35. Freeman *v.* Western Union Tel. Co., 93 Ga. 230, 18 S. E. 647.

36. Mondon *v.* Western Union Tel. Co., 96 Ga. 499, 23 S. E. 853.

37. Mondon *v.* Western Union Tel. Co., 96 Ga. 499, 23 S. E. 853; Merrill *v.* Western Union Tel. Co., 78 Me. 97, 2 Atl. 847, holding that if the contract is only for a certain amount per day for no stipulated period and is defeasible at the will of either party only nominal damages can be recovered. But see Western Union Tel. Co. *v.* McKibben, 114 Ind. 511, 14 N. E. 894.

38. Mondon *v.* Western Union Tel. Co., 96 Ga. 499, 23 S. E. 853; Baldwin *v.* Western Union Tel. Co., 93 Ga. 692, 21 S. E. 212, 44 Am. St. Rep. 194.

39. Kenyon *v.* Western Union Tel. Co., 100 Cal. 454, 35 Pac. 75, where the office was of such a character that plaintiff might have been discharged either with or without cause on the same day that he was appointed, and it was held that damages for

i. Loss of a Debt. Where as the direct result of a telegraph company's negligence plaintiff loses in whole or in part a debt which otherwise would have been collected, he may recover the amount so lost,[40] as in cases where a message directing the levy of an attachment is delayed or not delivered, so that other creditors are enabled to obtain prior attachments which exhaust the assets of the debtor,[41] or where in a message directing the levy of an attachment the amount of the claim is changed by an error in transmission so that the attachment is levied for too small an amount and the balance of the debt is lost.[42]

j. Loss of Commissions. Where the direct and proximate result of the telegraph company's negligence is to defeat a sale or purchase which the message would have effected and on which plaintiff as agent or broker would have earned a commission he may recover the amount of the commission so lost;[43] but the circumstances must be such that the loss of commission is the natural and proximate result of such negligence,[44] and can be said to have been fairly within the contemplation of the parties.[45]

k. Expenses of a Trip. Where as the direct result of the negligence of the telegraph company plaintiff, or someone for whose traveling expenses he is responsible, makes a trip which, had it not been for the company's breach of duty, it

any salary which he might have earned were too speculative and uncertain.

40. Western Union Tel. Co. *v.* Beals, 56 Nebr. 415, 76 N. W. 903, 71 Am. St. Rep. 682; Bryant *v.* American Tel. Co., 1 Daly (N. Y.) 575; Fleischner *v.* Pacific Postal Tel. Cable Co., 55 Fed. 738.

Where plaintiff was instructed to draw on a bank for the amount of a debt and the message was not delivered, and subsequently the funds of the debtor were paid out on other claims, it was held that plaintiff might recover for the loss of the debt. Baird *v.* Western Union Tel. Co., 79 S. C. 310, 60 S. E. 695.

The measure of damages for the loss of a debt is the amount of the debt together with the cost of the message and interest to the date of trial. Western Union Tel. Co. *v.* Sheffield, 71 Tex. 570, 10 S. W. 752, 10 Am. St. Rep. 790.

Notice to company.—A message to plaintiff from his agent reading, "You had better come and attend to your claim at once," is sufficient to charge the company with notice of its purpose and the necessity of prompt delivery so as to make damages due to the loss of the debt by reason of other creditors obtaining prior attachments reasonably within the contemplation of the parties. Western Union Tel. Co. *v.* Sheffield, 71 Tex. 570, 10 S. W. 752, 10 Am. St. Rep. 790.

Evidence held insufficient to show that plaintiff's debt would have been secured if the message had been promptly delivered see Hartstein *v.* Western Union Tel. Co., 89 Wis. 531, 62 N. W. 412.

41. Parks *v.* Alta California Tel. Co., 13 Cal. 422, 73 Am. Dec. 589; Fleischner *v.* Pacific Postal Tel. Cable Co., 55 Fed. 738.

If the debt is not entirely lost plaintiff is entitled to recover the amount of the debt less what he actually received. Bryant *v.* American Tel. Co., 1 Daly (N. Y.) 575.

42. Western Union Tel. Co. *v.* Beals, 56 Nebr. 415, 76 N. W. 903, 71 Am. St. Rep. 682.

43. Western Union Tel. Co. *v.* Fatman, 73 Ga. 285, 54 Am. Rep. 877, 1 Am. Elec. Cas. 666 (message to ship-broker which would have completed binding contract for charter of vessel); Hise *v.* Western Union Tel. Co., 137 Iowa 329, 113 N. W. 819; Harper *v.* Western Union Tel. Co., 92 Mo. App. 304, 111 Mo. App. 269, 86 S. W. 904; Western Union Tel. Co. *v.* Cook, 54 Nebr. 109, 74 N. W. 395.

Effect of subsequent sale.—If the loss of commissions is the proximate result they may be recovered, although at the time of the trial it appears that plaintiff subsequently negotiated a sale of the same property to another party and earned a larger commission. Hise *v.* Western Union Tel. Co., 137 Iowa 329, 113 N. W. 819.

44. Postal Tel. Cable Co. *v.* Barwise, 11 Colo. App. 328, 53 Pac. 252, holding that the loss of commissions is not the natural and proximate result of the non-delivery of a message from a broker to a manufacturer merely requesting a quotation of prices, coupled with a statement of those quoted by a rival concern and a suggestion that he could sell if the addressee could give better prices and fill an order for a certain amount, no specific order having been given to plaintiff and any prices quoted to him being subject to the approval of his principal.

45. Postal Tel. Cable Co. *v.* Barwise, 11 Colo. App. 328, 53 Pac. 252 (holding that a message from a broker to a manufacturer merely asking a quotation of his best prices and stating those quoted by a rival concern does not convey such notice of its purpose to the company as to make the loss of commissions within the contemplation of the parties); Western Union Tel. Co. *v.* Twaddell, 47 Tex. Civ. App. 51, 103 S. W. 1120 (holding that a message reading, "You can make big money next month — come at once," does not advise the company that a failure to deliver it to the addressee will result in a loss of commissions to the sender on a purchase of real estate).

would not have been necessary to make, the telegraph company is liable for the necessary and reasonable expenses of the trip,[46] and if the company's negligence causes plaintiff to make two trips when otherwise he would have made but one, he can recover for the unnecessary trip.[47] The negligence of the company must, however, have been the proximate cause of plaintiff's making the trip,[48] and if the trip is one which he would have made in any event, he cannot recover the expenses thereof,[49] notwithstanding the trip but for the negligence of the company would have been deferred until a later date,[50] although he may be entitled to recover damages of a different character.[51] A recovery has also been denied on the ground that the trip was made unnecessarily and could have been avoided by sending another telegram;[52] but if there was no reason for plaintiff to believe

46. *Arkansas.*—Western Union Tel. Co. *v.* Short, 53 Ark. 434, 14 S. W. 649, 9 L. R. A. 744, message announcing that a case had been set for trial on August 17, and date changed to August 7.

Indiana.— Western Union Tel. Co. *v.* Henley, 157 Ind. 90, 60 N. E. 682, where a trip from Bloomington, Ind., to South Bend, Ind., was held the proximate result of a failure to transmit a message reading, "Is stonework on building finished? Wire answer to-day."

Iowa.— Salinger *v.* Western Union Tel. Co., (1907) 111 N. W. 820.

Mississippi.— Duncan *v.* Western Union Tel. Co., 93 Miss. 500, 47 So. 552 (message to plaintiff reading, "Son very well," changed by error in transmission to "Son very ill," whereupon plaintiff went to his son); Western Union Tel. Co. *v.* McCormick, (1900) 27 So. 606 (message to plaintiff's servant, instructing him not to come).

Missouri.— Lee *v.* Western Union Tel. Co., 51 Mo. App. 375.

New York.— Sprague *v.* Western Union Tel. Co., 6 Daly 200 [*affirmed* in 67 N. Y. 590], "Hold my case till Tuesday or Thursday. Please reply." Message never sent, and plaintiff and his counsel went to place of trial, found case adjourned, and had to go again.

North Carolina.— Hall *v.* Western Union Tel. Co., 139 N. C. 369, 52 S. E. 50, trip from Newport News, Va., to Fayetteville, N. C., held proximate result of non-delivery of message reading, "How is mother today? Let me know at once and I will come at once."

Pennsylvania.— Tobin *v.* Western Union Tel. Co., 146 Pa. St. 375, 23 Atl. 324, 28 Am. St. Rep. 802.

Texas.— Western Union Tel. Co. *v.* Murray, 29 Tex. Civ. App. 207, 68 S. W. 549 (message to plaintiff's wife from her mother advising her not to come as her brother had died of contagious disease); Western Union Tel. Co. *v.* Shumate, 2 Tex. Civ. App. 429, 21 S. W. 109.

Canada.— Lane *v.* Montreal Tel. Co., 7 U. C. C. P. 23.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 64 *et seq.*

47. Western Union Tel. Co. *v.* Short, 53 Ark. 434, 14 S. W. 649, 9 L. R. A. 744; Western Union Tel. Co. *v.* Bates, 93 Ga. 352, 20 S. E. 639; Sprague *v.* Western Union Tel. Co., 6 Daly (N. Y.) 200 [*affirmed* in 67 N. Y. 590].

48. Western Union Tel. Co. *v.* Cain, 14 Ind. App. 115, 42 N. E. 655; Western Union Tel. Co. *v.* Mullins, 44 Nebr. 732, 62 N. W. 880 (holding that plaintiff's trip to Seattle could not be regarded as the proximate result of delivering to her, by mistake, a message dated Aspen, Colo., stating that her husband was there, and that the sender would meet her at Glenwood Springs); Hunter *v.* Western Union Tel. Co., 135 N. C. 458, 47 S. E. 745.

49. Western Union Tel. Co. *v.* Bates, 93 Ga. 352, 20 S. E. 639; Hunter *v.* Western Union Tel. Co., 135 N. C. 458, 47 S. E. 745; Western Union Tel. Co. *v.* Patton, (Tex. Civ. App. 1900) 55 S. W. 973; Western Union Tel. Co. *v.* Williams, 163 Fed. 513, 90 C. C. A. 143; Alexander *v.* Western Union Tel. Co., 126 Fed. 445.

Thus, if plaintiff is away from home and, in consequence of the company's negligence, comes home and stays there, he cannot recover his expenses, even though, had it not been for the negligence, he would have remained away longer. Western Union Tel. Co. *v.* Patton, (Tex. Civ. App. 1900) 55 S. W. 973.

The fact that plaintiff arrived too late to be present at the funeral of a relative does not entitle him to recover the expenses of the trip. Hunter *v.* Western Union Tel. Co., 135 N. C. 458, 47 S. E. 745; Alexander *v.* Western Union Tel. Co., 126 Fed. 445.

50. Western Union Tel. Co. *v.* Bates, 93 Ga. 352, 20 S. E. 639, holding that if for any reason it cost plaintiff more to make the trip at the time it was made than it would at the time to which it would have been deferred, he might recover this increased cost, but that this would be the limit of his recovery in regard to the expenses of the trip.

51. Hunter *v.* Western Union Tel. Co., 135 N. C. 458, 47 S. E. 745, holding that where by reason of the non-delivery of a death message plaintiff did not arrive in time for the funeral he could not recover his traveling expenses, because it appeared that he would have made the trip anyway, but that he could recover for mental anguish caused by being too late for the funeral.

52. Hilley *v.* Western Union Tel. Co., 85 Miss. 67, 32 So. 556, where plaintiff, a traveling man, having wired home inquiring as to the condition of his sick child, left for

that the necessity of the trip could be avoided in this manner he may recover.[53] In any event, however, plaintiff can recover as the expenses of a trip only the necessary expenses which he has actually incurred.[54]

l. Losses Due to Errors in Transmission. It frequently happens that losses for which the telegraph company will be liable are sustained by reason of errors in the transmission of a message, as in regard to the terms, conditions, or other details stated in a message relating to a business transaction, whereby one of the parties is caused to act to his prejudice upon the faith of the message as altered.[55] If the error is discovered in time the party who would be injured should ordinarily, unless he is bound to carry out the transaction, refuse to do so,[56] and in any case should make reasonable efforts to render the damages as light as

another point on his route leaving instructions to forward any answer to the latter place, and failing to receive any forwarded message made a trip from such place to his home instead of sending another message.

53. Duncan *v.* Western Union Tel. Co., 93 Miss. 500, 47 So. 552 [*distinguishing* Hilley *v.* Western Union Tel. Co., 85 Miss. 67, 37 So. 556], holding that where plaintiff sent a message inquiring as to the condition of his son and the reply message reading, "Son very well," was negligently changed in transmission to "Son very ill," it was not natural for plaintiff to suppose that another telegram would relieve him of the necessity of the trip but rather that he should go to his son at once.

54. Salinger *v.* Western Union Tel. Co., (Iowa 1907) 111 N. W. 820, holding that plaintiff's compensatory damages must be limited to actual disbursements, and that he cannot recover for the ordinary cost of sleeping-car fare and meals unless these expenses were actually incurred, or for railroad transportation if he rode on a pass.

55. *Alabama.*—Western Union Tel. Co. *v.* Chamblee, 122 Ala. 428, 25 So. 232, 82 Am. St. Rep. 89, purchase by plaintiff's agent prevented by an instruction to purchase at "twenty-five" being changed to "twenty" at which price the purchase could not be made.

Florida.— Western Union Tel. Co. *v.* Milton, 53 Fla. 484, 43 So. 495, 125 Am. St. Rep. 1077, 11 L. R. A. N. S. 560, sale of part of goods defeated by error in stating the amount which plaintiff had.

Illinois.— Tyler *v.* Western Union Tel. Co., 60 Ill. 421, 14 Am. Rep. 38, message directing agent to sell a certain quantity changed so as to instruct him to sell a greater quantity.

Iowa.— Hasbrouck *v.* Western Union Tel. Co., 107 Iowa 160, 77 N. W. 1034, 70 Am. St. Rep. 181, plaintiff induced to authorize agent to settle claim by error in message stating the amount of a mortgage on certain property.

Kentucky.— Fisher *v.* Western Union Tel. Co., 119 Ky. 885, 84 S. W. 1179, 27 Ky. L. Rep. 340, amount of plaintiff's selling price changed in transmission and accepted and goods delivered before mistake discovered.

Missouri.—Reed *v.* Western Union Tel. Co., 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492, message from plaintiff's agent as to price offered changed so that plaintiff was induced to authorize his agent to sell for an amount less than that intended.

New York.— Elsey *v.* Postal Tel. Co., 15 Daly 58, 3 N. Y. Suppl. 117, name of addressee in message ordering goods changed and message delivered to a different person who filled the order and the sender refused to accept the goods.

South Carolina.— Hays *v.* Western Union Tel. Co., 70 S. C. 16, 48 S. E. 608, 106 Am. St. Rep. 731, 67 L. R. A. 481, message quoting price to plaintiff changed inducing him to purchase at a price higher than that actually quoted.

Virginia.— Washington, etc., Tel. Co. *v.* Hobson, 15 Gratt. 122, message directing plaintiff's agent to purchase a certain number of bales of cotton changed so as to direct a larger amount.

56. See Postal Tel. Cable Co. *v.* Schaefer, 110 Ky. 907, 62 S. W. 1119, 23 Ky. L. Rep. 344; Shingleur *v.* Western Union Tel. Co., 72 Miss. 1030, 18 So. 425, 48 Am. St. Rep. 604, 30 L. R. A. 444; Joynes *v.* Postal Tel. Cable Co., 37 Pa. Super. Ct. 63.

Sender or addressee.—Where either the sender or the addressee of a message which has been changed in transmission must suffer loss, it has been held that as between them the party who selects the telegraph as a means of communication must bear the loss caused by such negligence, and that he has his remedy over against the telegraph company (Ayer *v.* Western Union Tel. Co., 79 Me. 493, 10 Atl. 495, 1 Am. St. Rep. 353. See also CONTRACTS, 9 Cyc. 294); and that accordingly if a message is sent by A offering goods at a certain price to B, and the message as delivered to B quotes a lesser price and the offer is accepted, A, although the error is discovered before the goods are delivered to B, may deliver them at the lesser price which B intended to accept and recover the resulting loss from the telegraph company (Western Union Tel. Co. *v.* Shotter, 71 Ga. 760; Ayer *v.* Western Union Tel. Co., *supra*. But see Shingleur *v.* Western Union Tel. Co., 72 Miss. 1030, 18 So. 425, 48 Am. St. Rep. 604, 30 L. R. A. 444); but if B, who is not bound to accept the goods and whose acceptance of A's offer was based upon the lesser price in the message as delivered

possible;[57] but it frequently happens, particularly where the transaction is carried on through an agent, that the transaction is completed before the error is discovered,[58] or the circumstances are such that at the time the error is discovered the transaction must be completed in order to avoid a greater loss.[59] In such cases, subject to the general rules above stated,[60] there may be a recovery of the loss actually sustained as the proximate result of the company's negligence,[61] the proper measure of damages necessarily depending upon the nature of the transaction and the circumstances of the particular case,[62] and no actual damages

to him, does after knowledge of the error accept the goods and pay the higher price, he cannot recover from the telegraph company (Joynes *v.* Postal Tel. Cable Co., 37 Pa. Super. Ct. 63).

57. Western Union Tel. Co. *v.* Truitt, 5 Ga. App. 809, 63 S. E. 934 (holding that where goods are shipped by plaintiff but not delivered to the buyer before the error in stating the price is discovered, he should not resell at a loss at the point of destination if by reshipping to another point he could secure a price which after paying transportation charges would involve a smaller loss); Postal Tel. Cable Co. *v.* Schaefer, 110 Ky. 907, 62 S. W. 1119, 23 Ky. L. Rep. 344 (holding that where goods were shipped by plaintiff and it was not discovered that his selling price had been changed until the purchaser received the draft accompanying the bill of lading, which he refused to pay, it was the duty to plaintiff to take prompt steps to dispose of the goods, which in this case were perishable, to the best advantage, and that he could not recover damages which might thus have been prevented).

But where plaintiff orders his agent to sell cotton on the faith of a telegram quoting the price for which the agent could sell it, which was negligently changed in transmission, plaintiff is under no duty to recoup damages so sustained by buying other cotton and holding it for an advance in price. Western Union Tel. Co. *v.* Crawford, 110 Ala. 460, 20 So. 111.

58. See Hasbrouck *v.* Western Union Tel. Co., 107 Iowa 160, 77 N. W. 1034, 70 Am. St. Rep. 181; Fisher *v.* Western Union Tel. Co., 119 Ky. 885, 84 S. W. 1179, 27 Ky. L. Rep. 340; Reed *v.* Western Union, 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492, holding that where plaintiff has been caused to make a sale through an agent at a price less than that intended and the sale has been completed before the error is discovered, it is not the duty of plaintiff to sue to rescind the contract.

59. Western Union Tel. Co. *v.* Dubois, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109, where before plaintiff discovered the error in the price quoted to him he had paid two hundred dollars in advance, and the goods, which were of a perishable nature, had arrived and plaintiff was compelled to pay the balance in order to secure the bill of lading which was with draft attached.

60. See *supra*, IX, B, 1.

61. *Florida.*—Western Union Tel. Co. *v.* Milton, 53 Fla. 484, 43 So. 495, 125 Am. St. Rep. 1077, 11 L. R. A. N. S. 560.

Illinois.— Western Union Tel. Co. *v.* Dubois, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109.

Kentucky.— Postal Tel. Cable Co. *v.* Shaefer, 110 Ky. 907, 62 S. W. 1119, 23 Ky. L. Rep. 344.

Missouri.— Reed *v.* Western Union Tel. Co., 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492.

New York.— Rittenhouse *v.* Ins. Line, 44 N. Y. 263, 4 Am. Rep. 673 [*affirming* 1 Daly 474].

South Carolina.— Bowie *v.* Western Union Tel. Co., 78 S. C. 424, 59 S. E. 65; Hays *v.* Western Union Tel. Co., 70 S. C. 16, 48 S. E. 608, 106 Am. St. Rep. 731, 67 L. R. A. 481.

Texas.— Western Union Tel. Co. *v.* Spivey, 98 Tex. 308, 83 S. W. 364.

Company as agent of sender.— In some cases it has been held that in the transmission of a message the telegraph company acts as the agent of the sender who is bound by the terms of the message as transmitted, and to whom, and not to the company, the addressee must look for damages arising out of an error in transmission. Brooke *v.* Western Union Tel. Co., 119 Ga. 694, 46 S. E. 826; Western Union Tel. Co. *v.* Shotter, 71 Ga. 760; Western Union Tel. Co. *v.* Cooper, 2 Ga. App. 376, 58 S. E. 517. See also Ayer *v.* Western Union Tel. Co., 79 Me. 493, 10 Atl. 495, 1 Am. St. Rep. 353; Joynes *v.* Postal Tel. Cable Co., 37 Pa. Super. Ct. 63; and, generally, CONTRACTS, 9 Cyc. 294. But see Shingleur *v.* Western Union Tel. Co., 72 Miss.. 1030, 18 So. 425, 48 Am. St. Rep. 604, 30 L. R. A. 444; Pepper *v.* Western Union Tel. Co., 87 Tenn. 554, 11 S. W. 783, 10 Am. St. Rep. 699, 4 L. R. A. 660.

62. Bowie *v.* Western Union Tel. Co., 78 S. C. 424, 59 S. E. 65. See also Western Union Tel. Co. *v.* Milton, 53 Fla. 484, 43 So. 495, 125 Am. St. Rep. 1077, 11 L. R. A. N. S. 560.

Measure of damages.—Where the addressee was to take at a certain price all the cotton plaintiff could buy, provided plaintiff reported by wire the amount bought each day, and in a message reporting the purchase of one hundred and seventy-five bales the amount was changed to one hundred and twenty-five bales, and the addressee refused to take the other fifty bales, plaintiff's measure of damages is the amount lost on the fifty bales, measured by the difference between what the addressee was to pay and the amount plaintiff received for them at the best market price obtainable. Western Union Tel. Co. *v.* Milton, 53 Fla. 484, 43 So. 495, 125 Am. St. Rep. 1077, 11 L. R. A. N. S. 560.

being recoverable unless an actual loss was sustained.[63] Where in a message quoting a price to plaintiff the price is changed to a larger amount, which is paid by plaintiff, it has been held that the measure of damages is the difference between the price as stated in the original message and the higher price paid by plaintiff;[64] but on the contrary it has been held that while plaintiff cannot recover more than this difference, he is not necessarily entitled to recover this amount,[65] his actual loss being the difference between the price paid and the market value of the property purchased.[66] Plaintiff is also entitled to recover the loss actually sus-

Where defendant agreed to furnish plaintiff correct market reports and furnished incorrect reports upon the faith of which he directed the purchase of grain to fill a contract for future delivery, the measure of damages has been held to be the difference between the price actually paid and the price as represented in the report. Turner *v.* Hawkeye Tel. Co., 41 Iowa 458, 20 Am. Rep. 605. But see Western Union Tel. Co. *v.* Bradford, (Tex. Civ. App. 1908) 114 S. W. 686, holding that the measure of damages in such a case is the difference between the incorrect price quoted and the correct market price on the day when the price was furnished. Where plaintiff, who was engaged in buying cattle for the Chicago market, had an arrangement with the dealers there through whom he sold, to furnish him market prices on request unless there was no change in prices since their last report, in which case no answer to his inquiry was to be sent, and on a failure to receive a reply to a request for prices he bought on the basis of the prices last quoted, it was held that the measure of damages was the difference between the Chicago market prices last quoted and the market price on the day of such purchase. Garrett *v.* Western Union Tel. Co., 92 Iowa 449, 58 N. W. 1064, 60 N. W. 644. Where by reason of an error in a message from plaintiff to his agent directing the purchase of a certain amount of cotton, the agent purchases a larger amount, the measure of damages is the amount lost on resale of the excess at the market price including the commissions of the agent who purchased it. Washington, etc., Tel. Co. *v.* Hobson, 15 Gratt. (Va.) 122. Where in a message ordering goods the telegraph company changed the name of the addressee and delivered the message to plaintiff, who filled the order, whereupon the sender of the message refused to accept the goods, which being perishable were entirely lost, the measure of plaintiff's damages is the value of the goods and the amount paid for transportation. Elsey *v.* Postal Tel. Co., 15 Daly (N. Y.) 58, 3 N. Y. Suppl. 117.

63. Mickelwait *v.* Western Union Tel. Co., 113 Iowa 177, 84 N. W. 1038.

No damages.—Where a message addressed to plaintiff offering twenty and one-half cents for grain was changed in transmission to twenty-one and one-half cents, and after the order was filled the sender refused to pay over twenty and one-half cents, and it was delivered to him at that price, it was held that plaintiff was not damaged if he procured the grain and filled the order at less than twenty and one-half unless the work of procuring it was worth more than this margin of profit. Mickelwait *v.* Western Union Tel. Co., 113 Iowa 177, 84 N. W. 1038. Where an incorrect transmission of a message induced plaintiff to sell shares of stock but he received the full market value therefor, it was held that he could not recover more than the cost of the message, the market value of stock, nothing else appearing, being the actual value thereof. Hughes *v.* Western Union Tel. Co., 114 N. C. 70, 19 S. E. 100, 41 Am. St. Rep. 782. Where a message directing plaintiff's broker to purchase a certain number of bales of July cotton was changed so as to direct a purchase of January cotton, which was made, and plaintiff elected to stand upon the contract as made and afterward closed out at a profit, it was held that he could not recover any damages, having made an actual profit, and any additional profits that might have been made on July cotton being too remote, speculative, and contingent to authorize a recovery. James *v.* Western Union Tel. Co., 86 Ark. 339, 111 S. W. 276.

64. Western Union Tel. Co. *v.* Dubois, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109; Bowie *v.* Western Union Tel. Co., 78 S. C. 424, 59 S. E. 65 (where a message quoting flour to plaintiff at four dollars and thirty cents per barrel was changed to four dollars and sixty cents, which plaintiff paid, and he was allowed to recover on the basis of the difference between these prices, although he had resold the flour at four dollars and forty cents); Hays *v.* Western Union Tel. Co., 70 S. C. 16, 48 S. E. 608, 106 Am. St. Rep. 731, 67 L. R. A. 481. See also Western Union Tel. Co. *v.* McCants, (Miss. 1908) 46 So. 535, where a message directing plaintiff's agent to purchase at a certain price was changed so as to authorize a purchase at a higher price, no recovery, however, being allowed on any excess of quantity purchased by the agent over that authorized.

65. Western Union Tel. Co. *v.* Spivey, 98 Tex. 308, 83 S. W. 364, holding that the difference between the price quoted in the original message and the higher price paid is the proper measure of damages only where it happens that the price so paid is the exact value of the goods bought. See also Western Union Tel. Co. *v.* Bell, 24 Tex. Civ. App. 572, 59 S. W. 918, holding that a complaint which does not allege that plaintiff has resold the goods or that they are not worth as much as he paid for them does not show that plaintiff has sustained any loss.

66. Western Union Tel. Co. *v.* Spivey, 98 Tex. 308, 83 S. W. 364. See also Western

tained where by reason of an error in transmission he is caused to sell property for a price less than that offered or intended,[67] or is caused to sell a different quantity from that intended,[68] or where, by an error in transmission, the name of the addressee is changed resulting in the message not being delivered,[69] or in its being delivered to the wrong person.[70]

m. Deterioration in Value of Property. Where personal property deteriorates in value as the direct and proximate result of the telegraph company's negligence, the amount of the deterioration constitutes the measure of damages.[71] Such a situation may present itself in cases where, as the result of the delay of a message, a shipment of perishable property is delayed;[72] or where, as the result of the telegraph company's negligent failure to communicate important information to the owner of the property, the latter fails to take proper precautions to avert a threatened danger.[73]

n. Shipment Induced by Negligence of Company. Where in consequence of a telegraph company's negligence goods are shipped and sold on a particular market, which, if the company had performed its obligation, would have been shipped and sold on another and better market, a recovery has been allowed for the difference between the markets, plus or minus, as the case may be, the difference in expense of transportation and handling.[74] Where the negligence of the tele-

Union Tel. Co. *v.* Bell, 24 Tex. Civ. App. 572, 59 S. W. 918.

67. Western Union Tel. Co. *v.* Crawford, 110 Ala. 460, 20 So. 111; Fisher *v.* Western Union Tel. Co., 119 Ky. 885, 84 S. W. 1179, 27 Ky. L. Rep. 340 (where plaintiff's offer of thirty-five dollars was changed to twenty-five dollars and accepted, and the goods delivered before the mistake was discovered); Reed *v.* Western Union Tel. Co., 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492; Western Union Tel. Co. *v.* Landis, 9 Pa. Cas. 357, 12 Atl. 467.

Measure of damages.—Where plaintiff's selling offer on potatoes was changed from one dollar and seventy cents to one dollar and seven cents per barrel and accepted, and the goods were shipped and the mistake not discovered until the buyer refused to take them and pay the draft accompanying the bill of lading, the measure of damages is the difference between the amount which the potatoes would have brought at one dollar and seventy cents and the amount which plaintiff by ordinary care and diligence could have sold them for at the place to which they were shipped, not exceeding, however, sixty-three cents on the barrel. Postal Tel. Cable Co. *v.* Schaefer, 110 Ky. 907, 62 S. W. 1119, 23 Ky. L. Rep. 344. Where a message to plaintiff from his agent stating the amount of an offer for plaintiff's land is changed so as to make the offer appear larger, and plaintiff instructs his agent to sell, which the agent does at the lesser price stated in the original message, plaintiff's measure of damages is the difference between the price actually received and the market value of the property. Reed *v.* Western Union Tel. Co., 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492. Where in a message from plaintiff's agent notifying plaintiff of the purchase of sheep at five dollars and sixty cents per hundred, the word "sixty" was changed to "six," and plaintiff, relying on the message, resold at six dollars per hundred, it was held that the measure of damages was the difference between the amount for which plaintiff sold the sheep and their actual value, although they were sold for more than they cost plaintiff. Western Union Tel. Co. *v.* Landis, 9 Pa. Cas. 357, 12 Atl. 467.

68. Tyler *v.* Western Union Tel. Co., 60 Ill. 421, 14 Am. Rep. 38, holding that where plaintiff, who was carrying one hundred shares of a certain stock, had instructed his broker by telegraph to sell one hundred shares and the message as delivered directed the sale of one thousand shares, and the broker sold this amount and plaintiff was compelled to buy nine hundred shares to replace the extra amount sold, and before such purchase could be made the price of the stock had advanced, the measure of damages was the amount of such advance on nine hundred shares.

69. Postal Tel.-Cable Co. *v.* Sunset Constr. Co., 102 Tex. 148, 114 S. W. 98 [*reversing* (Civ. App. 1908) 109 S. W. 265].

70. Elsey *v.* Postal Tel. Co., 15 Daly (N. Y.) 58, 3 N. Y. Suppl. 117.

71. Mitchell *v.* Western Union Tel. Co., 12 Tex. Civ. App. 262, 33 S. W. 1016, holding that the measure of damages for the shrinkage of cattle on a ranch from lack of water caused by a failure to deliver a telegram is their deterioration in market value and not the cost of restoring them to their former condition.

72. Western Union Tel. Co. *v.* Simpson, 10 Kan. App. 473, 62 Pac. 901 (cattle); Western Union Tel. Co. *v.* Cors, 121 Ky. 322, 89 S. W. 212, 28 Ky. L. Rep. 290 (lemons).

73. Mitchell *v.* Western Union Tel. Co., 12 Tex. Civ. App. 262, 33 S. W. 1016, message to owner of cattle informing him that water-supply is low, and requesting him to come out.

74. Western Union Tel. Co. *v.* Collins, 45 Kan. 88, 25 Pac. 187, 10 L. R. A. 515, message to plaintiff, announcing state of market

graph company results in goods being shipped and sold on a certain market, when, but for such negligence, they would not have been shipped at all, the measure of damages is the difference between the price realized by the sale and the value of the goods at the place of shipment, plus the cost of handling and freight.[75]

o. Message Summoning a Physician.[76] Where a message is sent by or on behalf of a sick person summoning a physician, and in consequence of the delay or non-delivery of the message the arrival of the physician is delayed, a recovery is generally allowed for any increased physical suffering, and the increased mental suffering incident thereto.[77] The company must, however, have had some notice that such suffering would be likely to result from a non-delivery or delay of the message,[78] and it has been held that the mere fact that the message is addressed to or requests the presence of a physician is not sufficient,[79] although it has been held sufficient where the message directs the addressee to come at once,[80] or shows that the patient is suffering from a physical injury.[81] Such damages must, however, have been the proximate result of the company's negligence, and there can be no recovery where it appears that even had the message been duly delivered the physician could not have gone or arrived in time.[82] The question does not seem to have been raised whether a recovery would be precluded under the doctrine relating to a mere offer by reason of the uncertainty as to whether the physician would have been willing to respond to the call,[83] it being apparently conceded or affirmatively shown in all of the cases that he would or was at least under some obligation to do so.[84]

at X, not delivered, and plaintiff ships his stock to Y. See also Western Union Tel. Co. *v.* Reid, 83 Ga. 401, 10 S. E. 919, holding that where goods are shipped to the wrong point in consequence of an error in a message, the shipper cannot recover the value of the goods at the proper place without deducting their value at the place to which they were actually sent.

75. Western Union Tel. Co. *v.* Woods, 56 Kan. 737, 44 Pac. 989 (message announcing market bad, cattle shipped and sold on demoralized market); Leonard *v.* New York, etc., Electro Magnetic Tel. Co., 41 N. Y. 544, 1 Am. Rep. 446 (overshipment of salt in consequence of error in message); Western Union Tel. Co. *v.* Stevens, (Tex. 1891) 16 S. W. 1095; Western Union Tel. Co. *v.* Linney, (Tex. Civ. App. 1894) 28 S. W. 234.

76. Mental anguish of sender of message due to witnessing the suffering of a member of his family see *infra*, IX, B, 3, d, (x), (D).

77. *Kansas.*— Western Union Tel. Co. *v.* McCall, 9 Kan. App. 886, 58 Pac. 797, hernia.

Nebraska.— Western Union Tel. Co. *v.* Church, 3 Nebr. (Unoff.) 22, 90 N. W. 878, 57 L. R. A. 905, confinement case.

North Carolina.— Carter *v.* Western Union Tel. Co., 141 N. C. 374, 54 S. E. 274.

Texas.— Western Union Tel. Co. *v.* Cooper, 71 Tex. 507, 9 S. W. 598, 10 Am. St. Rep. 772, 1 L. R. A. 728 (confinement case); Western Union Tel. Co. *v.* Lavender, (Civ. App. 1897) 40 S. W. 1035 (confinement case).

Utah.— Brown *v.* Western Union Tel. Co., 6 Utah 219, 21 Pac. 988, amputation of finger made necessary by delay.

United States.— Western Union Tel. Co. *v.* Morris, 83 Fed. 992, 28 C. C. A. 56, where surgical operation would not have been necessary had physician arrived earlier.

Contra.— Seifert *v.* Western Union Tel. Co., 129 Ga. 181, 186, 58 S. E. 699, 121 Am. St. Rep. 210, 11 L. R. A. N. S. 1149, where, although it appeared that the message showed and that the company's agent was informed that plaintiff was ill and suffering intensely, and that the company was grossly negligent in delaying the delivery of the message, and the physician after his arrival could and did relieve the suffering, it was held that there could be no recovery for the physical pain suffered during the period of delay. The court said: "Neither was the physical suffering the natural and proximate result of the defendant's negligence. It had its origin and continuance, not in the defendant's conduct, but in the malady with which she was afflicted. In the origin and continuance of it the defendant's conduct was not, in any sense, the preponderating cause."

78. Williams *v.* Western Union Tel. Co., 136 N. C. 82, 48 S. E. 559.

79. Williams *v.* Western Union Tel. Co., 136 N. C. 82, 48 S. E. 559, holding that a message merely reading, "Have Dr. Register meet me at Weldon Friday," is not even sufficient to show that the physician is wanted in a professional capacity.

80. Western Union Tel. Co. *v.* Church, 3 Nebr. (Unoff.) 22, 90 N. W. 878, 57 L. R. A. 905; Western Union Tel. Co. *v.* Lavender, (Tex. Civ. App. 1897) 40 S. W. 1035.

81. Brown *v.* Western Union Tel. Co., 6 Utah 219, 21 Pac. 988, broken finger.

82. Western Union Tel. Co. *v.* Haley, 143 Ala. 586, 39 So. 386; Slaughter *v.* Western Union Tel. Co., (Tex. Civ. App. 1908) 112 S. W. 688.

83. See the cases cited *supra*, note 77.

Message containing offer see *supra*, IX, B, 2, b.

84. See Western Union Tel. Co. *v.* McCall, 9 Kan. App. 886, 58 Pac. 797 (where it ap-

p. Message Summoning a Veterinary. In case of the non-delivery or delay of a message summoning a veterinary, plaintiff may recover for the loss of his animal, provided it was the proximate result of the company's negligence or default,[85] but not otherwise; [86] and while the fact that such loss was the proximate result need not be proved with absolutely certainty,[87] it must be fairly established by competent evidence and not left to mere conjecture or speculation.[88]

q. Message Requesting Addressee to Meet Sender. Where a message is sent for the sole purpose of requesting the addressee to meet the sender at a railroad depot, with or without a conveyance, while the delay or non-delivery of the message may and usually does result in some disappointment and inconvenience, there is as a rule no actionable damage, except possibly the cost of obtaining a public conveyance.[89] Disappointment and inconvenience of this character are not generally regarded as "anguish" sufficient to justify a recovery of substantial damages even in a mental anguish state; [90] nor is it ordinarily regarded as within the contemplation of the parties that the sender, if not met, will as the direct result of this circumstance become sick or contract a cold,[91] or nervous prostration,[92] or otherwise be subjected to physical suffering; [93] although the company may from the terms of the message or otherwise be chargeable with notice of facts which will render it liable for special damages of this character.[94]

peared that he was at home, had no professional engagements, was ready to meet the call had it been presented, and did start the following morning on receipt of the message); Western Union Tel. Co. *v.* Church, 3 Nebr. (Unoff.) 22, 90 N. W. 878, 57 L. R. A. 905 (where the physician had agreed to go on receipt of the telegram, and was therefore under a legal duty); Carter *v.* Western Union Tel. Co., 141 N. C. 374, 54 S. E. 274 (where plaintiff in expectation of the need of a physician's services had engaged the addressee who had promised to come whenever notified and subsequently testified that he would have done so); Brown *v.* Western Union Tel. Co., 6 Utah 219, 233, 21 Pac. 988 (where the court said: "The testimony sufficiently shows that if the dispatch had been delivered to Brown at Ogden, that he would have procured a physician to go to Promontory, who would have left on the 11:30 train, and arrived at Promontory at 2 o'clock").

85. Hendershot *v.* Western Union Tel. Co., 106 Iowa 529, 76 N. W. 828, 68 Am. St. Rep. 313, horse. See also Central Union Tel. Co. *v.* Swoveland, 14 Ind. App. 341, 42 N. E. 1035.

86. Central Union Tel. Co. *v.* Swoveland, 14 Ind. App. 341, 42 N. E. 1035, horse.

87. Hendershot *v.* Western Union Tel. Co., 106 Iowa 529, 534, 76 N. W. 828, 68 Am. St. Rep. 313, where the court said: "In the nature of things, reasonable probability as to the cause of the death of the horse is the most that can be proven in a case like this. . . . Absolute certainty is not required to entitle a party to recover, but only a preponderance of the evidence."

88. Central Union Tel. Co. *v.* Swoveland, 14 Ind. App. 341, 42 N. E. 1035 (holding that it is not sufficient where the only evidence that the animal could have been saved is the testimony of a veterinary surgeon, based on a hypothetical question, that "the chances are she could have been saved"). Duncan *v.* Western Union Tel. Co., 87 Wis. 173, 58 N. W. 75.

89. *Alabama.*—Western Union Tel. Co. *v.* Westmoreland, 151 Ala. 319, 44 So. 382.

Arkansas.— Western Union Tel. Co. *v.* Hogue, 79 Ark. 33, 94 S. W. 924.

Indiana.— Western Union Tel. Co. *v.* Henley, 23 Ind. App. 14, 54 N. E. 775; Western Union Tel. Co. *v.* Bryant, 17 Ind. App. 70, 46 S. E. 358.

Mississippi.— Yazoo, etc., R. Co. *v.* Foster, (1898) 23 So. 581.

North Carolina.— Williams *v.* Western Union Tel. Co., 136 N. C. 82, 48 S. E. 559.

South Carolina.— Todd *v.* Western Union Tel. Co., 77 S. C. 522, 58 S. E. 433; Kirby *v.* Western Union Tel. Co., 77 S. C. 404, 58 S. E. 10, 122 Am. St. Rep. 580; Jones *v.* Western Union Tel. Co., 75 S. C. 208, 55 S. E. 318.

Texas.— Western Union Tel. Co. *v.* Smith, 76 Tex. 253, 13 S. W. 169; Western Union Tel. Co. *v.* Campbell, 36 Tex. Civ. App. 276, 81 S. W. 580; Western Union Tel. Co. *v.* Ragland, (Civ. App. 1901) 61 S. W. 421.

United States.— Stafford *v.* Western Union Tel. Co., 73 Fed. 273.

90. See *infra*, IX, B, 3, d, (IX).

91. Western Union Tel. Co. *v.* Smith, 76 Tex. 253, 13 S. W. 169; Western Union Tel. Co. *v.* Campbell, 36 Tex. Civ. App. 276, 81 S. W. 580; Western Union Tel. Co. *v.* Ragland, (Tex. Civ. App. 1901) 61 S. W. 421. But see Dempsey *v.* Western Union Tel. Co., 77 S. C. 399, 58 S. E. 9.

92. Western Union Tel. Co. *v.* Henley, 23 Ind. App. 14, 54 N. E. 775.

93. Western Union Tel. Co. *v.* Bryant, 17 Ind. App. 70, 46 N. E. 358; Kirby *v.* Western Union Tel. Co., 77 S. C. 404, 58 S. E. 10, 122 Am. St. Rep. 580. But see Western Union Tel. Co. *v.* Karr, 5 Tex. Civ. App. 60, 24 S. W. 302.

94. Dempsey *v.* Western Union Tel. Co., 77 S. C. 399, 58 S. E. 9; Western Union Tel.

r. Money Transfer Messages. Where the telegraph company undertakes, for a consideration, to pay a sum of money to a person at a distant point, and fails to perform its contract, the measure of damages ordinarily is interest on the money from the time of default until tender.[95] There can be no recovery for mental distress, even in a mental anguish state;[96] nor can there be a recovery of special damages based on the fact that as a result of the failure to receive the money in due time plaintiff was evicted from home,[97] or was injured in reputation,[98] or lost credit,[99] such special damages as a rule being deemed too remote, and not within the contemplation of the parties at the time the contract for the transfer of the money was made;[1] but the company may have notice of facts and circumstances such as to render it liable for special damages.[2]

3. Mental Anguish — a. In General. At common law there can as a rule be no recovery of compensatory damages for mental suffering unaccompanied by physical injury,[3] unless resulting from the wilful or malicious wrong of defendant,[4] and in opposition to a doctrine now recognized in some jurisdictions,[5] it has been vigorously maintained that there is no sufficient reason or justification for making an exception to the common-law rule in the case of actions against telegraph companies.[6] It is accordingly held in most jurisdictions that in such cases there can be no recovery for mental anguish, although by reason of the company's negligence or default in regard to the transmission or delivery of a message plaintiff is prevented from seeing a near relative before death or from being present at the funeral.[7] Even in these jurisdictions, however, there may be a recovery for

Co. *v.* Powell, (Tex. Civ. App. 1909) 118 S. W. 226.

95. Robinson *v.* Western Union Tel. Co., 68 S. W. 656, 24 Ky. L. Rep. 452, 57 L. R. A. 611; Smith *v.* Western Union Tel. Co., 150 Pa. St. 561, 24 Atl. 1049; De Voegler *v.* Western Union Tel. Co., 10 Tex. Civ. App. 229, 30 S. W. 1107; Ricketts *v.* Western Union Tel. Co., 10 Tex. Civ. App. 226, 30 S. W. 1105; Stansell *v.* Western Union Tel. Co., 107 Fed. 668. See also Gooch *v.* Western Union Tel. Co., 90 S. W. 587, 28 Ky. L. Rep. 828; Cason *v.* Western Union Tel. Co., 77 S. C. 157, 57 S. E. 722.

96. See *infra*, IX, B, 3, d, (I).

97. Stansell *v.* Western Union Tel. Co., 107 Fed. 668.

98. Capers *v.* Western Union Tel. Co., 71 S. C. 29, 50 S. E. 537; Stansell *v.* Western Union Tel. Co., 107 Fed. 668.

99. Smith *v.* Western Union Tel. Co., 150 Pa. St. 561, 24 Atl. 1049.

1. Stansell *v.* Western Union Tel. Co., 107 Fed. 668. See also cases cited *supra*, notes 97–99.

2. Western Union Tel. Co. *v.* Wells, 50 Fla. 474, 39 So. 838, 111 Am. St. Rep. 129, 2 L. R. A. N. S. 1072.

3. Francis *v.* Western Union Tel. Co., 58 Minn. 252, 59 N. W. 1078, 49 Am. St. Rep. 507, 25 L. R. A. 406; Western Union Tel. Co. *v.* Rogers, 68 Miss. 748, 9 So. 823, 24 Am. St. Rep. 300, 13 L. R. A. 859; Connelly *v.* Western Union Tel. Co., 100 Va. 51, 40 S. E. 618, 93 Am. St. Rep. 919, 56 L. R. A. 663; Western Union Tel. Co. *v.* Sklar, 126 Fed. 295, 61 C. C. A. 281. See also Damages, 13 Cyc. 39–46.

4. See Western Union Tel. Co. *v.* Rogers, 68 Miss. 748, 9 So. 823, 24 Am. St. Rep. 300, 13 L. R. A. 859; and, generally, Damages, 13 Cyc. 44.

5. See *infra*, IX, B, 3, b.

6. *Georgia.*— Chapman *v.* Western Union Tel. Co., 88 Ga. 763, 15 S. E. 901, 30 Am. St. Rep. 183, 17 L. R. A. 430.

Indiana.— Western Union Tel. Co. *v.* Ferguson, 157 Ind. 64, 60 N. E. 674, 1080, 54 L. R. A. 846.

Minnesota.— Francis *v.* Western Union Tel. Co., 58 Minn. 252, 59 N. W. 1078, 49 Am. St. Rep. 507, 25 L. R. A. 406.

Mississippi.— Western Union Tel. Co. *v.* Rogers, 68 Miss. 748, 9 So. 823, 24 Am. St. Rep. 300, 13 L. R. A. 859.

Virginia.— Connelly *v.* Western Union Tel. Co., 100 Va. 51, 40 S. E. 618, 93 Am. St. Rep. 919, 56 L. R. A. 663.

United States.— Western Union Tel. Co. *v.* Sklar, 126 Fed. 295, 61 C. C. A. 281.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," §§ 69, 70.

7. *Arkansas.*— Peay *v.* Western Union Tel. Co., 64 Ark. 538, 43 S. W. 965, 39 L. R. A. 463. Rule changed by statute see *infra*, IX, B, 3, b.

Dakota.— Russell *v.* Western Union Tel. Co., 3 Dak. 315, 19 N. W. 408.

Florida.— International Ocean Tel. Co. *v.* Saunders, 32 Fla. 434, 14 So. 148, 21 L. R. A. 810.

Georgia.— Seifert *v.* Western Union Tel. Co., 129 Ga. 181, 58 S. E. 699, 121 Am. St. Rep. 210, 11 L. R. A. N. S. 1149; Chapman *v.* Western Union Tel. Co., 88 Ga. 763, 15 S. E. 901, 30 Am. St. Rep. 183, 17 L. R. A. 430; Glenn *v.* Western Union Tel. Co., 1 Ga. App. 821, 58 S. E. 83.

Illinois.— Western Union Tel. Co. *v.* Haltom, 71 Ill. App. 63.

Indiana.— Western Union Tel. Co. *v.* Ferguson, 157 Ind. 64, 60 N. E. 674, 1080, 54 L. R. A. 846 [*overruling* Reese *v.* Western Union Tel. Co., 123 Ind. 294, 24 N. E. 163,

mental anguish due to wilful and intentional acts of an insulting or humiliating character,[8] or for mental anguish incidental to an actual physical injury.[9]

b. Minority Rule. The doctrine that, in the case of messages relating to sickness or death, if the negligence of the telegraph company prevents plaintiff from being present at the bedside of a near relative before death, or from attending the funeral, the telegraph company is liable in compensatory damages for the mental suffering so caused, was first promulgated by the supreme court of Texas in 1881,[10] there being no authority for it, prior to that time, except a tentative suggestion advanced by a text-writer to the effect that in the writer's opinion it should be the law.[11] In spite of some subsequent judicial vacillation,[12] the doctrine has now become

7 L. R. A. 583]; Western Union Tel. Co. *v.* Adams, 28 Ind. App. 420, 63 N. E. 125.

Kansas.— West *v.* Western Union Tel. Co., 39 Kan. 93, 17 Pac. 807, 7 Am. St. Rep. 530.

Minnesota.—Francis *v.* Western Union Tel. Co., 58 Minn. 252, 59 N. W. 1078, 49 Am. St. Rep. 507, 25 L. R. A. 406.

Mississippi.— Duncan *v.* Western Union Tel. Co., 93 Miss. 500, 47 So. 552; Western Union Tel. Co. *v.* Watson, 82 Miss. 101, 33 So. 76; Western Union Tel. Co. *v.* Rogers, 68 Miss. 748, 9 So. 823, 24 Am. St. Rep. 300, 13 L. R. A. 859.

Missouri.— Connell *v.* Western Union Tel. Co., 116 Mo. 34, 22 S. W. 345, 38 Am. St. Rep. 575, 20 L. R. A. 172; Newman *v.* Western Union Tel. Co., 54 Mo. App. 434; Burnett *v.* Western Union Tel. Co., 39 Mo. App. 599.

New York.— Curtin *v.* Western Union Tel. Co., 13 N. Y. App. Div. 253, 42 N. Y. Suppl. 1109, 3 N. Y. Annot. Cas. 286.

Ohio.— Morton *v.* Western Union Tel. Co., 53 Ohio St. 431, 41 N. E. 689, 53 Am. St. Rep. 648, 32 L. R. A. 735; Kester *v.* Western Union Tel. Co., 8 Ohio Cir. Ct. 236, 4 Ohio Cir. Dec. 410; Kline *v.* Western Union Tel. Co., 4 Ohio S. & C. Pl. Dec. 224, 3 Ohio N. P. 143.

Oklahoma.— Butner *v.* Western Union Tel. Co., 2 Okla. 234, 37 Pac. 1087.

Pennsylvania.— Huston *v.* Freemansburg Borough, 212 Pa. St. 548, 61 Atl. 1022, 3 L. R. A. N. S. 49; Kightlinger *v.* Western Union Tel. Co., 20 Pa. Co. Ct. 630.

South Carolina.— Lewis *v.* Western Union Tel. Co., 57 S. C. 325, 35 S. E. 556. Rule changed by statute see *infra*, IX, B, 3, b.

Virginia.— Connelly *v.* Western Union Tel. Co., 100 Va. 51, 40 S. E. 618, 93 Am. St. Rep. 919, 56 L. R. A. 663.

West Virginia.— Davis *v.* Western Union Tel. Co., 46 W. Va. 48, 32 S. E. 1026.

Wisconsin.—Summerfield *v.* Western Union Tel. Co., 87 Wis. 1, 57 N. W. 973, 41 Am. St. Rep. 17. Rule changed by statute see *infra*, IX, B, 3, b.

United States.— Rowan *v.* Western Union Tel. Co., 149 Fed. 550; Alexander *v.* Western Union Tel. Co., 126 Fed. 445; Western Union Tel. Co. *v.* Sklar, 126 Fed. 295, 61 C. C. A. 281; Stansell *v.* Western Union Tel. Co., 107 Fed. 668; McBride *v.* Sunset Tel. Co., 96 Fed. 81; Gahan *v.* Western Union Tel. Co., 59 Fed. 433; Western Union Tel. Co. *v.* Wood, 57 Fed. 471, 6 C. C. A. 432, 21 L. R. A. 706; Tyler *v.* Western Union Tel. Co., 54 Fed. 634; Crawson *v.* Western Union Tel. Co., 47 Fed. 544; Chase *v.* Western Union Tel. Co., 44 Fed. 554, 10 L. R. A. 464.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," §§ 69, 70.

Statutory provisions.— The common-law rule is not changed so as to authorize a recovery for mental anguish by statutory provisions making telegraph companies liable for "all actual damages sustained" (Francis *v.* Western Union Tel. Co., 58 Minn. 252, 59 N. W. 1078, 49 Am. St. Rep. 507, 25 L. R. A. 406); or liable for "special damages" (Connelly *v.* Western Union Tel. Co., 100 Va. 51, 40 S. E. 618, 93 Am. St. Rep. 919, 56 L. R. A. 663); although there are statutes expressly authorizing a recovery for mental anguish (see *infra*, IX. B, 3, b).

In Georgia the court of appeals has recently expressed its disapproval of the rule established by the earlier decisions of the supreme court denying a right of recovery for mental anguish and followed those decisions only because obliged to do so (Enloe *v.* Western Union Tel. Co., 5 Ga. App. 502, 63 S. E. 590; Glenn *v.* Western Union Tel. Co., 1 Ga. App. 821, 58 S. E. 833), respectfully suggesting that the rule be changed by statute (Glenn *v.* Western Union Tel. Co., *supra*).

8. Dunn *v.* Western Union Tel. Co., 2 Ga. App. 845, 59 S. E. 189, where plaintiff entered defendant's office to deliver a message for transmission, and without provocation the agent ordered him out and insulted and humiliated him by profane and abusive language. See also Jeffries *v.* Western Union Tel. Co., 2 Ga. App. 853, 59 S. E. 192.

9. Western Union Tel. Co. *v.* Wells, 50 Fla. 474, 39 So. 838, 111 Am. St. Rep. 129, 2 L. R. A. N. S. 1072. See also *infra*, IX, B, 3, c.

10. So Relle *v.* Western Union Tel. Co., 55 Tex. 308, 40 Am. Rep. 805. See also Chapman *v.* Western Union Tel. Co., 88 Ga. 763, 15 S. E. 901, 30 Am. St. Rep. 183, 17 L. R. A. 430; Western Union Tel. Co. *v.* Ferguson, 157 Ind. 64, 60 N. E. 674, 1080, 54 L. R. A. 846; Connelly *v.* Western Union Tel. Co., 100 Va. 51, 40 S. E. 618, 98 Am. St. Rep. 919, 56 L. R. A. 663.

11. Shearman & R. Negl. (4th ed.) § 756. See also Chapman *v.* Western Union Tel. Co., 88 Ga. 763, 15 S. E. 901, 30 Am. St. Rep. 183, 17 L. R. A. 430; Western Union Tel. Co. *v.* Ferguson, 157 Ind. 64, 60 N. E. 674, 1080, 54 L. R. A. 846.

12. See Gulf, etc., R. Co. *v.* Levy, 59 Tex.

firmly established in the state of its origin,[13] and has been adopted and followed by the courts of several other states,[14] and in a few jurisdictions has been expressly recognized by statute.[15] Such a right of recovery is also recognized under the

563, 46 Am. Rep. 278 [*overruling* So Relle *v.* Western Union Tel. Co., 55 Tex. 308, 40 Am. Rep. 805, and in effect *overruled* in Stuart *v.* Western Union Tel. Co., 66 Tex. 580, 18 S. W. 351, 59 Am. Rep. 623].

13. Western Union Tel. Co. *v.* Linn, 87 Tex. 7, 26 S. W. 490, 47 Am. St. Rep. 58; Western Union Tel. Co. *v.* Erwin, (Tex. 1892) 19 S. W. 1002; Western Union Tel. Co. *v.* Beringer, 84 Tex. 38, 19 S. W. 336; Western Union Tel. Co. *v.* Nations, 82 Tex. 539, 18 S. W. 709, 27 Am. St. Rep. 914; Western Union Tel. Co. *v.* Rosentreter, 80 Tex. 406, 16 S. W. 25; Western Union Tel. Co. *v.* Simpson, 73 Tex. 422, 11 S. W. 385; Western Union Tel. Co. *v.* Broesche, 72 Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 843; Western Union Tel. Co. *v.* Brown, 71 Tex. 723, 10 S. W. 323, 2 L. R. A. 766; Western Union Tel. Co. *v.* Cooper, 71 Tex. 507, 9 S. W. 598, 10 Am. St. Rep. 772, 1 L. R. A. 728; Loper *v.* Western Union Tel. Co., 70 Tex. 689, 8 S. W. 600; Stuart *v.* Western Union Tel. Co., 66 Tex. 580, 18 S. W. 351, 59 Am. Rep. 623; Western Union Tel. Co. *v.* Seffel, 31 Tex. Civ. App. 134, 71 S. W. 616; Roach *v.* Jones, 18 Tex. Civ. App. 231, 44 S. W. 677; Western Union Tel. Co. *v.* Warren, (Tex. Civ. App. 1896) 36 S. W. 314; Western Union Tel. Co. *v.* Smith, (Tex. Civ. App. 1895) 33 S. W. 742; Western Union Tel. Co. *v.* O'Keefe, (Tex. Civ. App. 1895) 29 S. W. 1137; Western Union Tel. Co. *v.* Kinsley, 8 Tex. Civ. App. 527, 28 S. W. 831; Western Union Tel. Co. *v.* May, 8 Tex. Civ. App. 176, 27 S. W. 760; Western Union Tel. Co. *v.* Neel, (Tex. Civ. App. 1894) 25 S. W. 661; Western Union Tel. Co. *v.* Jobe, 6 Tex. Civ. App. 403, 25 S. W. 168, 1036; Western Union Tel. Co. *v.* Carter, 2 Tex. Civ. App. 624, 21 S. W. 688.

14. *Alabama.*—Western Union Tel. Co. *v.* Crumpton, 138 Ala. 632, 36 So. 517; Western Union Tel. Co. *v.* Crocker, 135 Ala. 492, 33 So. 45, 59 L. R. A. 398; Western Union Tel. Co. *v.* McNair, 120 Ala. 99, 23 So. 801; Western Union Tel. Co. *v.* Adair, 115 Ala. 441, 22 So. 73; Western Union Tel. Co. *v.* Cunningham, 99 Ala. 314, 14 So. 579; Western Union Tel. Co. *v.* Wilson, 93 Ala. 32, 9 So. 414, 30 Am. St. Rep. 23; Western Union Tel. Co. *v.* Henderson, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148.

Iowa.—Hurlburt *v.* Western Union Tel. Co., 123 Iowa 295, 98 N. W. 794; Cowan *v.* Western Union Tel. Co., 122 Iowa 379, 98 N. W. 281, 101 Am. St. Rep. 268, 64 L. R. A. 545; Mentzer *v.* Western Union Tel. Co., 93 Iowa 752, 62 N. W. 1, 57 Am. St. Rep. 294, 28 L. R. A. 72.

Kentucky.—Western Union Tel. Co. *v.* Mathews, 107 Ky. 663, 55 S. W. 427, 21 Ky. L. Rep. 1405; Western Union Tel. Co. *v.* McIlvoy, 107 Ky. 633, 55 S. W. 428, 21 Ky. L. Rep. 1393; Western Union Tel. Co. *v.* Johnson, 107 Ky. 631, 55 S. W. 427, 21 Ky. L. Rep. 1391; Western Union Tel. Co. *v.* Crider, 107 Ky. 600, 54 S. W. 963, 21 Ky. L. Rep. 1336; Western Union Tel. Co. *v.* Fisher, 107 Ky. 513, 54 S. W. 830, 21 Ky. L. Rep. 1293; Western Union Tel. Co. *v.* Steenbergen, 107 Ky. 469, 54 S. W. 829, 21 Ky. L. Rep. 1289; Western Union Tel. Co. *v.* Van Cleave, 107 Ky. 464, 54 S. W. 827, 22 Ky. L. Rep. 53, 92 Am. St. Rep. 366; Chapman *v.* Western Union Tel. Co., 90 Ky. 265, 13 S. W. 880, 12 Ky. L. Rep. 265; Taliferro *v.* Western Union Tel. Co., 54 S. W. 825, 21 Ky. L. Rep. 1290.

Nevada.—See Barnes *v.* Western Union Tel. Co., 27 Nev. 438, 76 Pac. 931, 103 Am. St. Rep. 776, 65 L. R. A. 666.

North Carolina.—Green *v.* Western Union Tel. Co., 136 N. C. 489, 49 S. E. 165, 103 Am. St. Rep. 955, 67 L. R. A. 985; Bryan *v.* Western Union Tel. Co., 133 N. C. 603, 45 S. E. 938; Meadows *v.* Western Union Tel. Co., 132 N. C. 40, 43 S. E. 512; Darlington *v.* Western Union Tel. Co., 127 N. C. 448, 37 S. E. 479; Kennon *v.* Western Union Tel. Co., 126 N. C. 232, 35 S. E. 468; Laudie *v.* Western Union Tel. Co., 124 N. C. 528, 32 S. E. 886; Dowdy *v.* Western Union Tel. Co., 124 N. C. 522, 32 S. E. 802; Cashion *v.* Western Union Tel. Co., 123 N. C. 267, 31 S. E. 493, 124 N. C. 459, 32 S. E. 746, 45 L. R. A. 160; Lyne *v.* Western Union Tel. Co., 123 N. C. 129, 31 S. E. 350; Havener *v.* Western Union Tel. Co., 117 N. C. 540, 23 S. E. 457; Sherrill *v.* Western Union Tel. Co., 116 N. C. 655, 21 S. E. 429, 117 N. C. 352, 23 S. E. 277; Young *v.* Western Union Tel. Co., 107 N. C. 370, 11 S. E. 1044, 22 Am. St. Rep. 883, 9 L. R. A. 669.

Tennessee.—Gray *v.* Western Union Tel. Co., 108 Tenn. 39, 64 S. W. 1063, 91 Am. St. Rep. 706, 56 L. R. A. 301; Western Union Tel. Co. *v.* Frith, 105 Tenn. 167, 58 S. W. 118; Western Union Tel. Co. *v.* Robinson, 97 Tenn. 638, 37 S. W. 545, 34 L. R. A. 431; Western Union Tel. Co. *v.* Mellon, 96 Tenn. 66, 33 S. W. 725; Wadsworth *v.* Western Union Tel. Co., 86 Tenn. 695, 8 S. W. 574, 6 Am. St. Rep. 864.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," §§ 69, 70.

The federal courts sitting in these jurisdictions have refused to follow the decisions of the state courts on this question. Western Union Tel. Co. *v.* Sklar, 126 Fed. 295, 61 C. C. A. 281. See also *supra*, IX, B, 3, a.

Form of action.—In Alabama it has been held that if the action is not for breach of contract but is in tort, and there is no proof of damage for physical injury or injury in estate, there can be no recovery of damages for mental anguish. Blount *v.* Western Union Tel. Co., 126 Ala. 105, 27 So. 779. See also Western Union Tel. Co. *v.* Rowell, 153 Ala. 295, 45 So. 73.

15. Western Union Tel. Co. *v.* Shenep, 83 Ark. 476, 104 S. W. 154, 12 L. R. A. N. S.

civil law in Louisiana.[16] On the other hand, in at least one jurisdiction, where the mental anguish doctrine was formerly recognized,[17] it has been expressly repudiated by the courts.[18]

c. Incidental to Other Injury. Mental anguish may be considered as an element of damages in connection with damages due to some other injury sustained by plaintiff,[19] and as incidental to an actual physical injury may be recovered for even in jurisdictions where the general mental anguish doctrine is not recognized;[20] but in such jurisdictions where there can be no recovery for mental anguish alone, it is held that there can be no recovery for physical suffering resulting from such mental suffering.[21]

d. Applications and Limitations of Rule — (i) *In General.* Even in jurisdictions where the mental anguish doctrine is recognized the courts have, in order, as said, to prevent intolerable litigation,[22] adopted various rules and limitations

886; Western Union Tel. Co. *v.* Hollingsworth, 83 Ark. 39, 102 S. W. 681, 11 L. R. A. N. S. 497; Simmons *v.* Western Union Tel. Co., 63 S. C. 425, 41 S. E. 521, 57 L. R. A. 607; Wis. Laws (1907), c. 165, § 1778.

No recovery against agent.— Fail *v.* Western Union Tel. Co., 80 S. C. 207, 60 S. E. 697, 61 S. E. 258.

Constitutionality of statutes.— It has been held that a state statute expressly providing that all telegraph companies doing business within the state "shall be liable in damages for mental anguish or suffering even in the absence of bodily injury for negligence in receiving, transmitting or delivering messages" is not in violation of either the state or federal constitution. Simmons *v.* Western Union Tel. Co., 63 S. C. 425, 41 S. E. 521, 57 L. R. A. 607. But see *dictum* in Western Union Tel. Co. *v.* Ferguson, 157 Ind. 64, 60 N. E. 674, 1080, 54 L. R. A. 846 [*quoted* in Connelly *v.* Western Union Tel. Co., 100 Va. 51, 67, 40 S. E. 618, 93 Am. St. Rep. 919, 56 L. R. A. 663]. It seems, however, that such a statute would be unconstitutional if it extended the doctrine so as to allow a recovery for mental anguish for mere business disappointments, as in such cases there would be no sufficient ground for making a distinction between telegraph companies and common carriers or other agencies for the transmission of money or goods. See Capers *v.* Western Union Tel. Co., 71 S. C. 29, 50 S. E. 537.

In Virginia there is a statute providing that telegraph companies shall be liable for "special damages," and that "grief and mental anguish occasioned to the plaintiff by the aforesaid negligent failures may be considered by the jury in the determination of the *quantum* of damages," but it is expressly held that the statute does not permit a recovery for mental anguish as an independent cause of action or affect the common-law rule in this regard. Connelly *v.* Western Union Tel. Co., 100 Va. 51, 40 S. E. 618, 93 Am. St. Rep. 919, 56 L. R. A. 663.

16. Graham *v.* Western Union Tel. Co., 109 La. 1069, 34 So. 91.

17. Reese *v.* Western Union Tel. Co., 123 Ind. 294, 24 N. E. 163, 7 L. R. A. 583; Western Union Tel. Co. *v.* Bryant, 17 Ind. App. 70, 46 N. E. 358; Western Union Tel. Co. *v.* Cain, 14 Ind. App. 115, 42 N. E. 655; Western Union Tel. Co. *v.* Cline, 8 Ind. App. 364, 35 N. E. 564; Western Union Tel. Co. *v.* Newhouse, 6 Ind. App. 422, 33 N. E. 800; Western Union Tel. Co. *v.* Stratemeier, 6 Ind. App. 125, 32 N. E. 871.

18. Western Union Tel. Co. *v.* Ferguson, 157 Ind. 64, 60 N. E. 674, 1080, 54 L. R. A. 846 [*overruling* Reese *v.* Western Union Tel. Co., 123 Ind. 294, 24 N. E. 163, 7 L. R. A. 583].

19. Western Union Tel. Co. *v.* Hanley, 85 Ark. 263, 107 So. 1168 (where plaintiff, who was not met at a railroad station, suffered from cold and exposure and resulting sickness as well as mental anguish); Barnes *v.* Western Union Tel. Co., 27 Nev. 438, 76 Pac. 931, 103 Am. St. Rep. 776, 65 L. R. A. 666 (where by the delay of a message asking for a railroad ticket, plaintiff was obliged to reach home partly by walking and partly by stealing rides on freight trains, and suffered from cold and hunger as well as from mental anguish); Western Union Tel. Co. *v.* Burgess, (Tex. Civ. App. 1900) 56 S. W. 237 (where, by reason of the negligent delay of a message requesting money to be sent to plaintiff by telegraph, plaintiff, a woman, was left alone in a strange city without money and suffered both physically and mentally); Western Union Tel. Co. *v.* Procter, 6 Tex. Civ. App. 300, 25 S. W. 811 (holding that where a delivery of the message would have prevented the marriage of plaintiff's minor daughter, he may recover for the loss of her services and for mental anguish caused by her marriage).

20. Western Union Tel. Co. *v.* Wells, 50 Fla. 474, 39 So. 838, 111 Am. St. Rep. 129, 2 L. R. A. N. S. 1072, where by reason of defendant's wrongful refusal to pay over money transmitted by telegraph, plaintiff was compelled to travel for over thirty-six hours without food or funds, and suffered from bodily pain and sickness as well as mental anguish. See also Barnes *v.* Western Union Tel. Co., 27 Nev. 438, 76 Pac. 931, 103 Am. St. Rep. 776, 65 L. R. A. 666; and, generally, DAMAGES, 13 Cyc. 39.

21. Kagy *v.* Western Union Tel. Co., 37 Ind. App. 73, 76 N. E. 792, 117 Am. St. Rep. 278; Curtin *v.* Western Union Tel. Co., 13 N. Y. App. Div. 253, 42 N. Y. Suppl. 1109.

22. Rowell *v.* Western Union Tel. Co., 75 Tex. 26, 12 S. W. 534.

in regard to its application,[23] which in recent cases they have expressed a disinclination to extend beyond the limitations established by the earlier decisions.[24] Some of these rules and limitations grow out of the general principles previously stated,[25] requiring that the damages recoverable must be the proximate result of the negligence or default complained of,[26] and reasonably within the contemplation of the parties,[27] while others are of a more or less arbitrary character.[28] The cases are not entirely uniform in the different states, or even in the same state, as to the proper applications and limitation of the doctrine,[29] and applications or limitations recognized in some states have been expressly disapproved in others.[30] So in some cases it has been said that the doctrine should be limited to cases where the message related to a matter of sickness or death,[31] and, even in cases of this character, to cases where there was a close family relationship between the parties,[32] and where plaintiff was prevented from being present at the last illness or funeral of his relative.[33] In other cases it is held that the doctrine is not limited to messages relating to sickness or death,[34] but should be restricted

23. *Alabama.*—Western Union Tel. Co. *v.* Ayers, 131 Ala. 391, 31 So. 78, 90 Am. St. Rep. 92.
Arkansas.— Western Union Tel. Co. *v.* Shenep, 83 Ark. 476, 104 S. W. 154, 12 L. R. A. N. S. 886.
Indiana.— Western Union Tel. Co. *v.* Stratemeier, 6 Ind. App. 125, 32 N. E. 871.
Kentucky.— Lee *v.* Western Union Tel. Co., 130 Ky. 202, 113 S. W. 55; Robinson *v.* Western Union Tel. Co., 68 S. W. 656, 24 Ky. L. Rep. 452.
South Carolina.— Capers *v.* Western Union Tel. Co., 71 S. C. 29, 50 S. E. 537.
Tennessee.— Western Union Tel. Co. *v.* McCaul, 115 Tenn. 99, 90 S. W. 856.
Texas.— Western Union Tel. Co. *v.* Arnold, 96 Tex. 493, 73 S. W. 1043; Western Union Tel. Co. *v.* Edmondson, 91 Tex. 206, 42 S. W. 549; Rowell *v.* Western Union Tel. Co., 75 Tex. 26, 12 S. W. 534; Western Union Tel. Co. *v.* Reed, 37 Tex. Civ. App. 445, 84 S. W. 296.

24. Western Union Tel. Co. *v.* Ayers, 131 Ala. 391, 31 So. 78, 90 Am. St. Rep. 92; Western Union Tel. Co. *v.* Stratemeier, 6 Ind. App. 125, 32 N. E. 871; Western Union Tel. Co. *v.* McCaul, 115 Tenn. 99, 90 S. W. 856; Western Union Tel. Co. *v.* Edmondson, 91 Tex. 206, 42 S. W. 549; Western Union Tel. Co. *v.* Reed, 37 Tex. Civ. App. 445, 84 S. W. 296.

25. See *supra*, IX, B, 1.

26. See *infra*, IX, B, 3, d, (IV).

27. See *infra*, IX, B, 3, d, (III).

28. Western Union Tel. Co. *v.* Ayers, 131 Ala. 391, 31 So. 78, 90 Am. St. Rep. 92; Lee *v.* Western Union Tel. Co., 130 Ky. 202, 113 S. W. 55; Robinson *v.* Western Union Tel. Co., 68 S. W. 656, 24 Ky. L. Rep. 452; Western Union Tel. Co. *v.* McCaul, 115 Tenn. 99, 90 S. W. 856.

In Tennessee the rule has been stated, in a recent case, that mental anguish may be recovered for being deprived of the privilege of attending the bedside of a near relative during his last hours, or of superintending the preparations for his interment or of being present at the burial, but in no other cases. Western Union Tel. Co. *v.* McCaul, 115 Tenn. 99, 90 S. W. 856.

29. See Western Union Tel. Co. *v.* Henderson, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148; Western Union Tel. Co. *v.* Hollingsworth, (Ark. 1907) 102 S. W. 681, 11 L. R. A. N. S. 497; Western Union Tel. Co. *v.* Reid, 120 Ky. 231, 85 S. W. 1171, 27 Ky. L. Rep. 659, 70 L. R. A. 289.

30. Western Union Tel. Co. *v.* Ayers, 131 Ala. 391, 31 So. 78, 90 Am. St. Rep. 92; Western Union Tel. Co. *v.* Hollingsworth, (Ark. 1907) 102 S. W. 681, 11 L. R. A. N. S. 497; Western Union Tel. Co. *v.* Moxley, 80 Ark. 554, 98 S. W. 112; Western Union Tel. Co. *v.* Arnold, 96 Tex. 493, 73 S. W. 1043.

31. Western Union Tel. Co. *v.* Sledge, 153 Ala. 291, 45 So. 59; Western Union Tel. Co. *v.* Westmoreland, 151 Ala. 319, 44 So. 382; Western Union Tel. Co. *v.* McCaul, 115 Tenn. 99, 90 S. W. 856.

32. Western Union Tel. Co. *v.* Ayers, 131 Ala. 391, 31 So. 78, 90 Am. St. Rep. 92; Lee *v.* Western Union Tel. Co., 130 Ky. 202, 113 S. W. 55.

Relationship between parties see *infra*, IX, B, 3, d, (VI).

33. Western Union Tel. Co. *v.* McCaul, 115 Tenn. 99, 90 S. W. 856.

If plaintiff was not prevented from being present at the funeral, he cannot recover for mental anguish suffered from the uncertainty as to whether the funeral would be postponed in order to permit him to be present. Western Union Tel. Co. *v.* Reed, 37 Tex. Civ. App. 445, 84 S. W. 296.

34. Western Union Tel. Co. *v.* Hanley, 85 Ark. 263, 107 S. W. 1168; Thurman *v.* Western Union Tel. Co., 127 Ky. 137, 105 S. W. 155, 32 Ky. L. Rep. 26, 14 L. R. A. N. S. 499; Postal Tel. Cable Co. *v.* Terrell, 124 Ky. 822, 100 S. W. 292, 14 L. R. A. N. S. 927; Dayvis *v.* Western Union Tel. Co., 139 N. C. 79, 51 S. E. 898; Green *v.* Western Union Tel. Co., 136 N. C. 489, 49 S. E. 165, 103 Am. St. Rep. 955, 67 L. R. A. 985; Western Union Tel. Co. *v.* Burgess, (Tex. Civ. App. 1900) 56 S. W. 237.

Recovery allowed.—Where plaintiff was expecting the arrival of his wife and children on a certain train, it was held that he might recover for mental anguish due to the nondelivery of a telegram from his wife notify-

to matters of a personal and social nature, as distinguished from business matters;[35] while in others it has been broadly stated that the doctrine extends to all cases where mental suffering may reasonably be anticipated.[36] It is well settled, however, that damages cannot be recovered on this ground for every mental disturbance or injury to the feelings,[37] and that to constitute mental anguish there must be something more than mere worry, vexation, or disappointment,[38] or anger and resentment,[39] and it must be based upon grounds reasonably calculated to produce mental suffering.[40] There can be no recovery for mental anguish in regard to the non-delivery or delay of a mere business message,[41] or money transfer message,[42] or message asking for money,[43] nor for worry over the loss of a position.[44]

(II) *UNDER STATUTORY PROVISIONS.* In those jurisdictions where the mental anguish doctrine has been expressly recognized by statute, it is held that the statutes do not give any new meaning or application thereto, but merely adopt the same as previously recognized and applied by the courts,[45] although

ing him that they had gotten left at an intermediate point, whereby he was left in ignorance of their whereabouts and condition. Dayvis *v.* Western Union Tel. Co., 139 N. C. 79, 51 S. E. 898. Where plaintiff sent a message requesting the addressee to meet his minor daughter who was to arrive in a strange city at midnight, and was informed, after it was too late to make other arrangements, that the message had not been delivered, it was held that he might recover for mental anguish due to his apprehension as to what had befallen her. Green *v.* Western Union Tel. Co., 136 N. C. 506, 49 S. E. 171.

35. Western Union Tel. Co. *v.* Shenep, 83 Ark. 476, 104 S. W. 154, 12 L. R. A. N. S. 886; Robinson *v.* Western Union Tel. Co., 68 S. W. 656, 25 Ky. L. Rep. 452; Todd *v.* Western Union Tel. Co., 77 S. C. 522, 58 S. E. 433; Capers *v.* Western Union Tel. Co., 71 S. C. 29, 50 S. E. 537.

36. Thurman *v.* Western Union Tel. Co., 127 Ky. 137, 105 S. W. 155, 32 Ky. L. Rep. 26, 14 L. R. A. N. S. 499; Postal Tel. Cable Co. *v.* Terrell, 124 Ky. 822, 100 S. W. 292, 30 Ky. L. Rep. 1023, 14 L. R. A. N. S. 927.

37. Hancock *v.* Western Union Tel. Co., 137 N. C. 497, 49 S. E. 952, 69 L. R. A. 403; Rowell *v.* Western Union Tel. Co., 75 Tex. 26, 12 S. W. 534; Western Union Tel. Co. *v.* Bell, (Tex. Civ. App. 1901) 61 S. W. 942.

38. Western Union Tel. Co. *v.* Shenep, 83 Ark. 476, 104 S. W. 154, 12 L. R. A. N. S. 886; Hancock *v.* Western Union Tel. Co., 137 N. C. 497, 49 S. E. 952, 69 L. R. A. 403; Capers *v.* Western Union Tel. Co., 71 S. C. 29, 50 S. E. 537.

The term "anguish" means intense pain of body or mind, and is derived from *anguis*, a snake, referring to the writhing or twisting of the animal body. Hancock *v.* Western Union Tel. Co., 137 N. C. 497, 49 S. E. 952, 69 L. R. A. 403.

"Regret" indicates no higher degree of mental suffering than disappointment, and does not constitute mental anguish. Hancock *v.* Western Union Tel. Co., 137 N. C. 497, 49 S. E. 952, 69 L. R. A. 403.

39. Western Union Tel. Co. *v.* Bell, (Tex. Civ. App. 1901) 61 S. W. 942.

40. Western Union Tel. Co. *v.* Shenep, 83 Ark. 476, 104 S. W. 154, 12 L. R. A. N. S. 886; McAllen *v.* Western Union Tel. Co., 70 Tex. 243, 7 S. W. 715; Morrison *v.* Western Union Tel. Co., 24 Tex. Civ. App. 347, 59 S. W. 1127.

Unwarranted apprehension see *infra*, IX, B, 3, d, (VIII).

41. Western Union Tel. Co. *v.* Shenep, 83 Ark. 476, 104 S. W. 154, 12 L. R. A. N. S. 886; Gooch *v.* Western Union Tel. Co., 90 S. W. 587, 28 Ky. L. Rep. 828; Robinson *v.* Western Union Tel. Co., 68 S. W. 656, 24 Ky. L. Rep. 452, 57 L. R. A. 611; Todd *v.* Western Union Tel. Co., 77 S. C. 522, 58 S. E. 433; Cason *v.* Western Union Tel. Co., 77 S. C. 157, 57 S. E. 722; Capers *v.* Western Union Tel. Co., 71 S. C. 29, 50 S. E. 537; De Voegler *v.* Western Union Tel. Co., 10 Tex. Civ. App. 229, 30 S. W. 1107; Ricketts *v.* Western Union Tel. Co., 10 Tex. Civ. App. 226, 30 S. W. 1105; Western Union Tel. Co. *v.* Gidcumb, (Tex. Civ. App. 1894) 28 S. W. 699.

42. Robinson *v.* Western Union Tel. Co., 68 S. W. 656, 24 Ky. L. Rep. 452, 57 L. R. A. 611; De Voegler *v.* Western Union Tel. Co., 10 Tex. Civ. App. 229, 30 S. W. 1107; Ricketts *v.* Western Union Tel. Co., 10 Tex. Civ. App. 226, 30 S. W. 1105. But see Cumberland Tel., etc., Co. *v.* Quigley, 129 Ky. 788, 112 S. W. 897, 19 L. R. A. N. S. 575, where to the knowledge of the telegraph company the transmission of the money was for the purpose of preparing the remains of the sender's deceased daughter for transportation and burial.

43. Gooch *v.* Western Union Tel. Co., 90 S. W. 587, 28 Ky. L. Rep. 828.

44. Western Union Tel. Co. *v.* Shenep, 83 Ark. 476, 104 S. W. 154, 12 L. R. A. N. S. 886; Western Union Tel. Co. *v.* Partlow, 30 Tex. Civ. App. 599, 71 S. W. 584.

45. Western Union Tel. Co. *v.* Shenep, 83 Ark. 476, 104 S. W. 154, 12 L. R. A. N. S. 886; Western Union Tel. Co. *v.* Hogue, 79 Ark. 33, 94 S. W. 924; Western Union Tel. Co. *v.* Raines, 78 Ark. 545, 94 S. W. 700; Capers *v.* Western Union Tel. Co., 71 S. C. 29, 50 S. E. 537; Arial *v.* Western Union Tel. Co., 70 S. C. 418, 50 S. E. 6.

it was not the intention of such statutes to adopt the particular applications of the doctrine prevailing in the state of its origin, or any other particular state.[46]

(III) *MUST BE CONTEMPLATED.* The rule that plaintiff can recover only such special damages as may be said to have been within the contemplation of the parties applies to damages for mental anguish as well as for actual pecuniary loss,[47] so that there can be no recovery on this ground unless the telegraph company had notice from the language of the message or otherwise that by reason of its negligence or default such damages would be likely to result;[48] and this rule applies

46 Western Union Tel. Co. *v.* Hollingsworth, 83 Ark. 39, 102 S. W. 681, 11 L. R. A. N. S. 497, holding that where the decisions are conflicting in other jurisdictions as to a particular application of the doctrine, the court will give such application to the statute as it may deem reasonable and proper.

47. Western Union Tel. Co. *v.* Hogue, 79 Ark. 33, 94 S. W. 924; Western Union Tel. Co. *v.* Henry, 87 Tex. 165, 27 S. W. 63. And see cases cited *infra*, note 48.

48. *Alabama.*—Western Union Tel. Co. *v.* Westmoreland, 151 Ala. 319, 44 So. 382.

Arkansas.— Western Union Tel. Co. *v.* Weniski, 84 Ark. 457, 106 S. W. 486; Western Union Tel. Co. *v.* Shenep, 83 Ark. 476, 104 S. W. 154, 12 L. R. A. N. S. 886; Western Union Tel. Co. *v.* Blackmer, 82 Ark. 526, 102 S. W. 366; Western Union Tel. Co. *v.* Hogue, 79 Ark. 33, 94 S. W. 924; Western Union Tel. Co. *v.* Raines, 78 Ark. 545, 94 S. W. 700.

Indiana.— Western Union Tel. Co. *v.* Henley, 23 Ind. App. 14, 54 N. E. 775; Western Union Tel. Co. *v.* Bryant, 17 Ind. App. 70, 46 N. E. 358.

Kentucky.— Thurman *v.* Western Union Tel. Co., 127 Ky. 137, 105 S. W. 155, 32 Ky. L. Rep. 26, 14 L. R. A. N. S. 499; Postal Tel. Cable Co. *v.* Terrell, 124 Ky. 822, 100 S. W. 292, 30 Ky. L. Rep. 1023, 14 L. R. A. N. S. 927.

North Carolina.— Williams *v.* Western Union Tel. Co., 136 N. C. 82, 48 S. E. 559; Bowers *v.* Western Union Tel. Co., 135 N. C. 504, 47 S. E. 597; Sparkman *v.* Western Union Tel. Co., 130 N. C. 447, 41 S. E. 881; Darlington *v.* Western Union Tel. Co., 127 N. C. 448, 37 S. E. 479; Kennon *v.* Western Union Tel. Co., 126 N. C. 232, 35 S. E. 468.

South Carolina.— Cloy *v.* Western Union Tel Co., 78 S. C. 109, 58 S. E. 972; Todd *v.* Western Union Tel. Co., 77 S. C. 522, 58 S. E. 433; Cason *v.* Western Union Tel. Co., 77 S. C. 157, 57 S. E. 722; Key *v.* Western Union Tel. Co., 76 S. C. 301, 56 S. E. 962; Mitchiner *v.* Western Union Tel. Co., 75 S. C. 182, 55 S. E. 222; Capers *v.* Western Union Tel. Co., 71 S. C. 29, 50 S. E. 537; Jones *v.* Western Union Tel. Co., 70 S. C. 539, 50 S. E. 198; Mitchiner *v.* Western Union Tel. Co., 70 S. C. 522, 50 S. E. 190; Arial *v.* Western Union Tel. Co., 70 S. C. 418, 50 S. E. 6. But see Dempsey *v.* Western Union Tel. Co., 77 S. C. 399, 58 S. E. 9; Toale *v.* Western Union Tel. Co., 76 S. C. 248, 57 S. E. 117.

Texas.—Western Union Tel. Co. *v.* Kuykendall, 99 Tex. 323, 89 S. W. 965; Western Union Tel. Co. *v.* Wilson, 97 Tex. 22, 75 S. W. 482; Western Union Tel. Co. *v.* Arnold, 96 Tex. 493, 73 S. W. 1043; Western Union Tel. Co. *v.* Edmondson, 91 Tex. 206, 42 S. W. 549; Western Union Tel. Co. *v.* Luck, 91 Tex. 178, 41 S. W. 469, 66 Am. St. Rep. 869; Western Union Tel. Co. *v.* Carter, 85 Tex. 580, 22 S. W. 961, 34 Am. St. Rep. 826; McAllen *v.* Western Union Tel. Co., 70 Tex. 243, 7 S. W. 715; Western Union Tel. Co. *v.* Kibble, (Civ. App. 1909) 115 S. W. 643; Western Union Tel. Co. *v.* Bell, (Civ. App. 1905) 90 S. W. 714 (message from plaintiff "Your mother is dying. Come at once" held to give no notice of plaintiff's interest); Western Union Tel. Co. *v.* McFadden, 32 Tex. Civ. App. 582, 75 S. W. 352; De Voegler *v.* Western Union Tel. Co., 10 Tex. Civ. App. 229, 30 S. W. 1107; Ricketts *v.* Western Union Tel. Co., 10 Tex. Civ. App. 226, 30 S. W. 1105; Western Union Tel. Co. *v.* Gidcumb, (Civ. App. 1894) 28 S. W. 699; Western Union Tel. Co. *v.* Smith, (Civ. App. 1894) 26 S. W. 216; Ikard *v.* Western Union Tel. Co., (Civ. App. 1893) 22 S. W. 534.

Illustrations of rule.— In the absence of some extrinsic notice as to the purpose or importance of the message, there can be no recovery for mental anguish in regard to a message merely reading, "Come at once" (Bowers *v.* Western Union Tel. Co., 135 N. C. 504, 47 S. E. 597; Western Union Tel. Co. *v.* Kibble, (Tex. Civ. App. 1909) 115 S. W. 643); or "Have Dr. Register meet me at Weldon Friday" (Williams *v.* Western Union Tel. Co., 136 N. C. 82, 48 S. E. 559); or "Meet me at Union this P. M." (Jones *v.* Western Union Tel. Co., 70 S. C. 539, 50 S. E. 198).

The statutory provisions expressly adopting the mental anguish doctrine do not affect the application of this rule. Western Union Tel. Co. *v.* Hogue, 79 Ark. 33, 94 S. W. 924.

It is not essential, however, that the company should have detailed information as to every specific matter which may cause mental anguish. Lyles *v.* Western Union Tel. Co., 77 S. C. 174, 57 S. E. 725.

If the action is founded not on contract but on pure tort, as where defendant wrongfully refuses to receive the message, so that no contract was ever entered into, the rule as stated in the text does not apply and defendant is liable if mental anguish was the natural and proximate result of such refusal, whether within the contemplation of the parties or not. Cordell *v.* Western Union Tel. Co., 149 N. C. 402, 63 S. E. 71, 22 L. R. A. I. N. S. 540.

not only to the existence of any mental anguish, but also to the particular elements or grounds for such suffering in the particular case,[49] and not only to the general character of the message, but also to plaintiff's connection therewith or interest in the subject-matter.[50] If, however, the company has notice, either from the language of the message or otherwise, of facts from which the resulting mental anguish might reasonably have been anticipated, it will be liable therefor;[51] and ordinarily the fact that the message shows that it relates to a matter of sickness or death is sufficient to charge the company with notice that someone is likely to suffer mental anguish from its non-delivery or delay,[52] although it may not be sufficient to charge the company with notice that mental anguish will result to the particular person appearing as plaintiff.[53]

(IV) *MUST BE PROXIMATE RESULT.* The general rule applies in mental anguish cases that such suffering must have been the proximate result of the negligence or default complained of;[54] and as the telegraph company is not liable

49. Smith *v.* Western Union Tel. Co., 72 S. C. 116, 51 S. E. 537; Western Union Tel. Co. *v.* Wilson, 97 Tex. 22, 75 S. W. 482; Western Union Tel. Co. *v.* Burch, 36 Tex. Civ. App. 237, 81 S. W. 552; Western Union Tel. Co. *v.* Murray, 29 Tex. Civ. App. 207, 68 S. W. 549; Weatherford, etc., R. Co. *v.* Seals, (Tex. Civ. App. 1897) 41 S. W. 841; Western Union Tel. Co. *v.* Birchfield, 14 Tex. Civ. App. 664, 38 S. W. 635.

50. Western Union Tel. Co. *v.* Northcutt, 158 Ala. 539, 48 So. 553, 132 Am. St. Rep. 38; Holler *v.* Western Union Tel. Co., 149 N. C. 336, 63 S. E. 92, 19 L. R. A. N. S. 475; Western Union Tel. Co. *v.* Potts, 120 Tenn. 37, 113 S. W. 789, 127 Am. St. Rep. 991, 19 L. R. A. N. S. 479; Southwestern Tel., etc., Co. *v.* Gotcher, 93 Tex. 114, 53 S. W. 686; Western Union Tel. Co. *v.* Luck, 91 Tex. 178, 41 S. W. 469, 66 Am. St. Rep. 869.

51. *Alabama.*— Postal Tel. Cable Co. *v.* Beal, 159 Ala. 249, 48 So. 676; Western Union Tel. Co. *v.* Rowell, 153 Ala. 295, 45 So. 73.

Arkansas.— Western Union Tel. Co. *v.* Moxley, 80 Ark. 554, 98 S. W. 112.

Kentucky.— Postal Tel. Cable Co. *v.* Pratt, 85 S. W. 225, 27 Ky. L. Rep. 430.

North Carolina.—Dayvis *v.* Western Union Tel. Co., 139 N. C. 79, 51 S. E. 898.

South Carolina.— Fass *v.* Western Union Tel. Co., 82 S. C. 461, 64 S. E. 235; Lyles *v.* Western Union Tel. Co., 77 S. C. 174, 57 S. E. 725.

Texas.— Western Union Tel. Co. *v.* Olivarri, (Civ. App. 1908) 110 S. W. 930; Western Union Tel. Co. *v.* Bell, (Civ. App. 1905) 90 S. W. 714.

52. *Arkansas.*—Western Union Tel. Co. *v.* Moxley, 80 Ark. 554, 98 S. W. 112.

Iowa.— Foreman *v.* Western Union Tel. Co., 141 Iowa 32, 116 N. W. 724, 19 L. R. A. N. S. 374.

North Carolina.— Meadows *v.* Western Union Tel. Co., 132 N. C. 40, 43 S. E. 512; Lyne *v.* Western Union Tel. Co., 123 N. C. 129, 31 S. E. 350.

South Carolina.— Lyles *v.* Western Union Tel. Co., 77 S. C. 174, 57 S. E. 725.

Texas.— Potts *v.* Western Union Tel. Co., 82 Tex. 545, 18 S. W. 604.

53. Western Union Tel. Co. *v.* Potts, 120 Tenn. 37, 113 S. W. 789, 127 Am. St. Rep. 991, 19 L. R. A. N. S. 479; Western Union Tel. Co. *v.* Luck, 91 Tex. 178, 41 S. W. 469, 66 Am. St. Rep. 869 [*overruling* Western Union Tel. Co. *v.* Nations, 82 Tex. 539, 18 S. W. 709, 27 Am. St. Rep. 914].

Relationship of parties see *infra*, IX, B, 3, d, (VI).

54. *Alabama.*—Western Union Tel. Co. *v.* Leland, 156 Ala. 334, 47 So. 62.

Indiana.— Western Union Tel. Co. *v.* Briscoe, 18 Ind. App. 22, 47 N. E. 473.

Kentucky.— Thurman *v.* Western Union Tel. Co., 127 Ky. 137, 105 S. W. 157, 32 Ky. L. Rep. 31, 14 L. R. A. N. S. 499.

North Carolina.—Higdon *v.* Western Union Tel. Co., 132 N. C. 726, 44 S. E. 558.

South Carolina.— Smith *v.* Western Union Tel. Co., 72 S. C. 116, 51 S. E. 537; Arial *v.* Western Union Tel. Co., 70 S. C. 418, 50 S. E. 6.

Texas.— Landry *v.* Western Union Tel. Co., 102 Tex. 67, 113 S. W. 10 [*reversing* (Civ. App. 1908) 108 S. W. 461]; Western Union Tel. Co. *v.* Linn, 87 Tex. 7, 26 S. W. 490, 47 Am. St. Rep. 58; Western Union Tel. Co. *v.* Taylor, (Civ. App. 1904) 81 S. W. 69.

The period of time for which mental anguish can be recovered is also restricted to that which is the proximate result of the company's negligence. Mitchiner *v.* Western Union Tel. Co., 75 S. C. 182, 55 S. E. 222, holding that where, through a failure to deliver a telegram to plaintiff's wife, she went to a town where there was smallpox, plaintiff could recover for mental anguish only for such time as would be reasonably necessary to remove her from the danger, and not for any subsequent length of time during which he voluntarily permitted her to remain.

Where plaintiff's telegram merely inquires as to the condition of his sister, a failure to deliver it is not the proximate cause of mental anguish due to his being absent from her funeral, since there is no certainty that any answer to the message would have been sent, or if sent that it would have reached plaintiff. Taliferro *v.* Western Union Tel. Co., 54 S. W. 825, 21 Ky. L. Rep. 1290.

for the mental anguish resulting to plaintiff from the illness or death of a relative, care should always be taken to distinguish between such mental anguish and that which is really attributable to the company's negligence.[55] So also there can be no recovery for not being present at a death-bed or funeral, unless, had the message been duly delivered, plaintiff not only could but would have gone,[56] and arrived in time,[57] which must be affirmatively shown;[58] or where his failure to do so was due to his being erroneously informed that a train which he might have taken had already gone,[59] or to the fact that the train which he did take and which should have arrived in time was late,[60] or to the fact that he stopped off at an intermediate point.[61] In some cases it has been held that if plaintiff could not have arrived by the time at which the funeral actually occurred, he cannot recover on the ground that if the telegram had been duly delivered he would have wired for and procured a postponement;[62] but in other cases it has been held that there may be a recovery on this ground,[63] provided it appears not only that he would

The company's negligence need not be the sole cause, however, in order to be the proximate cause. Western Union Tel. Co. *v.* Gulick, (Tex. Civ. App. 1907) 106 S. W. 698.

55. Western Union Tel. Co. *v.* Benson, 159 Ala. 254, 48 So. 712; Hancock *v.* Western Union Tel. Co., 137 N. C. 497, 49 S. E. 952, 69 L. R. A. 403; Hunter *v.* Western Union Tel. Co., 135 N. C. 458, 47 S. E. 745; So Relle *v.* Western Union Tel. Co., 55 Tex. 308, 40 Am. Rep. 805; Western Union Tel. Co. *v.* Steele, (Tex. Civ. App. 1908) 110 S. W. 546; Western Union Tel. Co. *v.* Bowles, (Tex. Civ. App. 1903) 76 S. W. 456; Western Union Tel. Co. *v.* Smith, (Tex. Civ. App. 1894) 30 S. W. 937 [*reversed* on other grounds in 88 Tex. 9, 30 S. W. 549]; Western Union Tel. Co. *v.* Wingate, 6 Tex. Civ. App. 394, 25 S. W. 439.

56. Cumberland Tel. Co. *v.* Brown, 104 Tenn. 56, 55 S. W. 155, 78 Am. St. Rep. 906, 50 L. R. A. 277; Western Union Tel. Co. *v.* Adams, (Tex. Civ. App. 1904) 80 S. W. 93; Western Union Tel. Co. *v.* Newnum, (Tex. Civ. App. 1904) 78 S. W. 700; Western Union Tel. Co. *v.* Johnson, 16 Tex. Civ. App. 546, 41 S. W. 367. *Compare* Harrison *v.* Western Union Tel. Co., 71 S. C. 386, 51 S. E. 119, holding that it is not necessary for the complaint to allege that if the message had been promptly delivered plaintiff would have gone.

57. Howard *v.* Western Union Tel. Co., 84 S. W. 764, 27 Ky. L. Rep. 244; Smith *v.* Western Union Tel. Co., 72 S. C. 116, 51 S. E. 537; Cumberland Tel. Co. *v.* Brown, 104 Tenn. 56, 55 S. W. 155, 78 Am. St. Rep. 906, 50 L. R. A. 277; Western Union Tel. Co. *v.* Motley, 87 Tex. 38, 27 S. W. 52; Western Union Tel. Co. *v.* Linn, 87 Tex. 7, 26 S. W. 490; Sabine Valley Tel. Co. *v.* Oliver, 46 Tex. Civ. App. 428, 102 S. W. 925; Western Union Tel. Co. *v.* Ford, 40 Tex. Civ. App. 474, 90 S. W. 677; Western Union Tel. Co. *v.* Hendricks, 26 Tex. Civ. App. 366, 63 S. W. 341; Western Union Tel. Co. *v.* Stone, (Tex. Civ. App. 1894) 27 S. W. 144. But see Hughes *v.* Western Union Tel. Co., 72 S. C. 516, 52 S. E. 107, holding that if it appears from the telegram that there was a probability that plaintiff could have arrived in time if the message had been promptly delivered, he may recover, although as a matter of fact unknown to plaintiff the funeral was fixed for a time at which he could not have arrived.

58. Howard *v.* Western Union Tel. Co., 119 Ky. 625, 84 S. W. 764, 86 S. W. 982, 27 Ky. L. Rep. 244, 858; Cumberland Tel. Co. *v.* Brown, 104 Tenn. 56, 55 S. W. 155, 78 Am. St. Rep. 906, 50 L. R. A. 277; Western Union Tel. Co. *v.* Bell, 42 Tex. Civ. App. 462, 92 S. W. 1036; Western Union Tel. Co. *v.* Adams, (Tex. Civ. App. 1904) 80 S. W. 93. But see Sutton *v.* Western Union Tel. Co., 129 Ky. 166, 110 S. W. 874, 33 Ky. L. Rep. 577.

It cannot be presumed from the relationship between the parties, even in the case of parent and child, that plaintiff would have gone, since regardless of his inclinations circumstances might have prevented his doing so. Western Union Tel. Co. *v.* Adams, (Tex. Civ. App. 1904) 80 S. W. 93.

Evidence held sufficient to show that plaintiff would have gone to the funeral see Western Union Tel. Co. *v.* Ridenour, 35 Tex. Civ. App. 574, 80 S. W. 1030.

59. Higdon *v.* Western Union Tel. Co., 132 N. C. 726, 44 S. E. 558.

60. Western Union Tel. Co. *v.* Briscoe, 18 Ind. App. 22, 47 N. E. 473. But see Sutton *v.* Western Union Tel. Co., 110 S. W. 874, 33 Ky. L. Rep. 577, holding that if the negligent delay in delivering a message informing the addressee of his mother's death causes him to miss two trains by which he might have arrived in time for the funeral, such negligence is the proximate cause of his failure to arrive in time therefor, although after the telegram was finally delivered he did get a train which ordinarily would have brought him in time for the funeral, but which was delayed in its progress so that he was unable to get there.

61. Western Union Tel. Co. *v.* Birchfield, 14 Tex. Civ. App. 664, 38 S. W. 635.

62. Western Union Tel. Co. *v.* Motley, 87 Tex. 38, 27 S. W. 52; Western Union Tel. Co. *v.* Linn, 87 Tex. 7, 26 S. W. 490, 47 Am. St. Rep. 58; Western Union Tel. Co. *v.* Stone, (Tex. Civ. App. 1894) 27 S. W. 144.

63. Western Union Tel. Co. *v.* Caldwell,

have requested a postponement, but also that the request would have been granted.[64] The fact that such a message was sent, and that those in charge of the burial did not postpone it, will not, however, necessarily preclude a recovery.[65] Where a message announces a catastrophe and at the same time announces the safety of those near to plaintiff, the delay of the message is the cause of no actionable mental anguish to plaintiff unless he knew of the catastrophe from some other source;[66] but if he did know of it from some other source, he may recover for the mental anguish sustained owing to the non-delivery of the message.[67]

(v) *MUST BE PLAINTIFF'S OWN.* The mental anguish for which a recovery may be had must be that of plaintiff himself,[68] and he cannot recover for the mental suffering of his wife or other members of his family;[69] or, it has been held, for mental suffering of his own which is merely reflex or sympathetic suffering due to witnessing the suffering of other members of his family;[70] but the mere fact that others are also caused to suffer does not affect the right of plaintiff to recover for his own mental anguish.[71]

(vi) *RELATIONSHIP BETWEEN PARTIES.* Another limitation in the application of the mental anguish doctrine is based upon the relationship between the parties,[72] as between plaintiff and the person whose death or illness is announced,[73] or between plaintiff and the addressee whose aid and consolation is desired,[74] or between plaintiff and deceased, where the message relates to the arrival of the

126 Ky. 42, 102 S. W. 840, 31 Ky. L. Rep. 497, 12 L. R. A. N. S. 748; Western Union Tel. Co. *v.* Swearingin, 97 Tex. 293, 78 S. W. 491, 104 Am. St. Rep. 876; Western Union Tel. Co. *v.* Simmons, (Tex. Civ. App. 1906) 93 S. W. 686; Western Union Tel. Co. *v.* Chambers, 34 Tex. Civ. App. 17, 77 S. W. 273; Western Union Tel. Co. *v.* Norris, 25 Tex. Civ. App. 43, 60 S. W. 982; Western Union Tel. Co. *v.* Vanway, (Tex. Civ. App. 1899) 54 S. W. 414.

Where plaintiff wires that he is coming, in answer to a telegram announcing the death of his wife and requesting an answer if he is not coming, he may recover for mental anguish where the telegraph company fails to deliver his answering message, and the funeral which otherwise would have been postponed is held before his arrival. Roach *v.* Jones, 18 Tex. Civ. App. 231, 44 S. W. 677.

64. Western Union Tel. Co. *v.* Caldwell, 126 Ky. 42, 102 S. W. 840, 31 Ky. L. Rep. 497, 12 L. R. A. N. S. 748, holding that if the evidence is uncontradicted that plaintiff would have requested a postponement and that the request would have been granted, there may be a recovery notwithstanding intervening steps must have been taken and independent causes set in motion.

65. Western Union Tel. Co. *v.* Cain, (Tex. Civ. App. 1897) 40 S. W. 624, where it appeared that the burial could not have been delayed until the time of plaintiff's arrival without embalming the body. See also Western Union Tel. Co. *v.* Johnsey, (Tex. Civ. App. 1908) 109 S. W. 251.

66. Gaddis *v.* Western Union Tel. Co., 33 Tex. Civ. App. 391, 77 S. W. 37, "Storm over; all safe. Mamie hurt, but not dangerous."

67. Suttle *v.* Western Union Tel. Co., 148 N. C. 480, 62 S. E. 593, 128 Am. St. Rep. 631, holding that there may be a recovery in such a case, although the statement made by the sender of the message that he was not injured was untrue, the company being fully informed that the purpose of the message was to prevent any mental suffering on the part of his wife to whom the message was sent.

68. Western Union Tel. Co. *v.* Stratemeier, 6 Ind. App. 125, 32 N. E. 871; Gulf, etc., Tel. Co. *v.* Richardson, 79 Tex. 649, 15 S. W. 689.

69. Western Union Tel. Co. *v.* Stratemeier, 6 Ind. App. 125, 32 N. E. 871; Sabine Valley Tel. Co. *v.* Oliver, 46 Tex. Civ. App. 428, 102 S. W. 925; Western Union Tel. Co. *v.* Lovett, 24 Tex. Civ. App. 84, 58 S. W. 204; Western Union Tel. Co. *v.* Procter, 6 Tex. Civ. App. 300, 25 S. W. 811.

70. Western Union Tel. Co. *v.* Stratemeier, 6 Ind. App. 125, 32 N. E. 871.

Message summoning physician see *infra*, IX, B, 3, d, (x), (d).

71. Gulf, etc., Tel. Co. *v.* Richardson, 79 Tex. 649, 15 S. W. 689.

72. Western Union Tel. Co. *v.* McMorris, 158 Ala. 563, 48 So. 349, 132 Am. St. Rep. 46; Western Union Tel. Co. *v.* Ayers, 131 Ala. 391, 31 So. 78, 90 Am. St. Rep. 92; Lee *v.* Western Union Tel. Co., 130 Ky. 202, 113 S. W. 55; Western Union Tel. Co. *v.* Steenbergen, 107 Ky. 469, 54 S. W. 829, 21 Ky. L. Rep. 1289; Butler *v.* Western Union Tel. Co., 77 S. C. 148, 57 S. E. 757; Western Union Tel. Co. *v.* Coffin, 88 Tex. 94, 30 S. W. 896.

73. Denham *v.* Western Union Tel. Co., 87 S. W. 788, 27 Ky. L. Rep. 999; Davidson *v.* Western Union Tel. Co., 54 S. W. 830, 21 Ky. L. Rep. 1292; Western Union Tel. Co. *v.* Wilson, 97 Tex. 22, 75 S. W. 482; Western Union Tel. Co. *v.* Porterfield, (Tex. Civ. App. 1904) 84 S. W. 850.

74. Western Union Tel. Co. *v.* Ayers, 131 Ala. 391, 31 So. 78, 90 Am. St. Rep. 92; Western Union Tel. Co. *v.* Steenbergen, 107 Ky. 469, 54 S. W. 829, 21 Ky. L. Rep. 1289.

body or funeral preparations.[75] In such cases it has been held that there may be a recovery if the relationship between the parties is close, such as that of husband and wife, parent and child, or brother and sister,[76] or even that of grandparent and grandchild;[77] but that there can be no recovery where the relationship is merely by marriage or a remote blood relationship,[78] or the parties are merely engaged to be married;[79] and while in some cases the rule is stated that there can be no recovery in cases of a remote family relationship unless the company had notice of some special relations between the parties from which mental anguish would be likely to result,[80] in others the rule seems to be applied arbitrarily,[81] regardless of any special relations of intimacy or affection.[82] In other cases, however, it is held that the right of recovery does not depend upon the technical relationship or legal status of the parties, but upon the actual relations and state of feeling between them,[83] and that while there is no presumption of mental anguish in the case of a remote family relationship,[84] yet if such suffering does in fact result it may be shown and damages recovered therefor.[85] As to whether the company must have notice of the relationship there is some conflict of authority,[86] it being held in some cases that if the message shows that it is urgent, as where

75. Western Union Tel. Co. *v.* McMorris, 158 Ala. 563, 48 So. 349, 132 Am. St. Rep. 46. See also *infra*, IX, B, 3, d, (x), (c).

76. Western Union Tel. Co. *v.* Benson, 159 Ala. 254, 48 So. 712; Western Union Tel. Co. *v.* McMorris, 158 Ala. 563, 48 So. 349, 132 Am. St. Rep. 46; Western Union Tel. Co. *v.* Heathcoat, 149 Ala. 623, 43 So. 117; Western Union Tel. Co. *v.* De Andrea, 45 Tex. Civ. App. 395, 100 S. W. 977.

If the deceased is plaintiff's child, even though an infant, a recovery is allowed. Western Union Tel. Co. *v.* De Andrea, 45 Tex. Civ. App. 395, 100 S. W. 977.

77. Western Union Tel. Co. *v.* Prevatt, 149 Ala. 617, 43 So. 106; Doster *v.* Western Union Tel. Co., 77 S. C. 56, 57 S. E. 671; Western Union Tel. Co. *v.* Porterfield, (Tex. Civ. App. 1904) 84 S. W. 850.

78. Western Union Tel. Co. *v.* Ayers, 131 Ala. 391, 31 So. 78, 90 Am. St. Rep. 92 (brother-in-law); Lee *v.* Western Union Tel. Co., 130 Ky. 202, 113 S. W. 55 (plaintiff nephew of deceased); Western Union Tel. Co. *v.* Steenbergen, 107 Ky. 469, 54 S. W. 829, 21 Ky. L. Rep. 1289 (plaintiff father-in-law of addressee); Denham *v.* Western Union Tel. Co., 87 S. W. 788, 27 Ky. L. Rep. 999 (plaintiff aunt of deceased); Davidson *v.* Western Union Tel. Co., 54 S. W. 830, 21 Ky. L. Rep. 1292 (plaintiff son-in-law of deceased); Western Union Tel. Co. *v.* Wilson, 97 Tex. 22, 75 S. W. 482 (plaintiff uncle of deceased).

79. Randall *v.* Western Union Tel. Co., 107 S. W. 235, 32 Ky. L. Rep. 859, 15 L. R. A. N. S. 277, holding that an action will not lie by the addressee of a telegram, to recover damages for mental anguish due to a negligent failure of defendant to deliver a telegram, announcing the death of his fiancée, in time to enable him to attend her funeral.

80. Butler *v.* Western Union Tel. Co., 77 S. C. 148, 57 S. E. 757 (plaintiff brother-in-law of addressee); Western Union Tel. Co. *v.* Coffin, 88 Tex. 94, 30 S. W. 896 (plaintiff brother-in-law of deceased); Rich *v.* Western Union Tel. Co., (Tex. Civ. App. 1908) 110 S. W. 93; Western Union Tel. Co. *v.* Gibson, (Tex. Civ. App. 1896) 39 S. W. 198 (plaintiff father-in-law of deceased); Western Union Tel. Co. *v.* Garrett, (Tex. Civ. App. 1896) 34 S. W. 649 (plaintiff stepson of deceased); Western Union Tel. Co. *v.* McMillan, (Tex. Civ. App. 1895) 30 S. W. 298 (sister-in-law).

81. Western Union Tel. Co. *v.* Ayers, 131 Ala. 391, 31 So. 78, 90 Am. St. Rep. 92; Lee *v.* Western Union Tel. Co., 130 Ky. 202, 113 S. W. 55; Western Union Tel. Co. *v.* Steenbergen, 107 Ky. 469, 54 S. W. 829, 21 Ky. L. Rep. 1289; Randall *v.* Western Union Tel. Co., 107 S. W. 235, 32 Ky. L. Rep. 859, 15 L. R. A. N. S. 277.

In Kentucky the right of recovery is said to be arbitrarily limited to cases where the relationship between the parties is that of parent and child, husband and wife, sister and brother, or grandparent and grandchild. Lee *v.* Western Union Tel. Co., 130 Ky. 202, 113 S. W. 55.

82. Randall *v.* Western Union Tel. Co., 107 S. W. 235, 32 Ky. L. Rep. 859, 15 L. R. A. N. S. 277.

83. Hunter *v.* Western Union Tel. Co., 135 N. C. 458, 47 S. E. 745; Bright *v.* Western Union Tel. Co., 132 N. C. 317, 43 S. E. 841.

84. Foreman *v.* Western Union Tel. Co., 141 Iowa 32, 116 N. W. 724, 19 L. R. A. N. S. 374; Harrison *v.* Western Union Tel. Co., 136 N. C. 381, 48 S. E. 772; Cashion *v.* Western Union Tel. Co., 123 N. C. 267, 31 S. E. 493.

85. Western Union Tel. Co. *v.* Moxley, 80 Ark. 554, 98 S. W. 112 (plaintiff son-in-law of person who was sick); Foreman *v.* Western Union Tel. Co., 141 Iowa 32, 116 S. W. 724, 19 L. R. A. N. S. 374 (plaintiff son-in-law of addressee); Hunter *v.* Western Union Tel. Co., 135 N. C. 458, 47 S. E. 745 (second cousin); Bright *v.* Western Union Tel. Co., 132 N. C. 317, 43 S. E. 841 (husband's uncle); Bennett *v.* Western Union Tel. Co., 128 N. C. 103, 38 S. E. 294 (father-in-law).

86. See Western Union Tel. Co. *v.* Moxley, 80 Ark. 554, 98 S. W. 112; and cases cited *infra*, notes 87–90.

it relates to sickness or death, it is not necessary that it should show, or the company be otherwise informed of, the relationship between the parties;[87] and while in some of these cases it appears that the relationship between the parties was close,[88] it has been expressly held that the same rule applies, although the family relationship is remote, and the right of recovery is based upon the special relations of intimacy or affection;[89] but in other cases it is held that if the family relationship is remote there can be no recovery unless defendant had notice of such special relations.[90]

(VII) *PROLONGATION OF EXISTING MENTAL ANGUISH.* In some cases it has been held that there can be no recovery for mental anguish where the negligence or default of the telegraph company merely causes a prolongation of mental anguish already existing, but which a delivery of the message would have relieved,[91]

87. *Alabama.*— Postal Tel., etc., Co. *v.* Beal, 159 Ala. 249, 48 So. 676.

Arkansas.— Western Union Tel. Co. *v.* Moxley, 80 Ark. 554, 98 S. W. 112. *Compare* Western Union Tel. Co. *v.* Blackmer, 82 Ark. 526, 102 S. W. 366, where, however, the language of the message was held to be sufficient to put the company on notice as to the relationship.

Iowa.— Foreman *v.* Western Union Tel. Co., 141 Iowa 32, 116 N. W. 724, 19 L. R. A. N. S. 374.

Kentucky.— Davis *v.* Western Union Tel. Co., 107 Ky. 527, 54 S. W. 849, 21 Ky. L. Rep. 1251, 92 Am. St. Rep. 371; Postal Tel. Cable Co. *v.* Pratt, 85 S. W. 225, 27 Ky. L. Rep. 430.

North Carolina.— Hunter *v.* Western Union Tel. Co., 135 N. C. 458, 47 S. E. 745; Bright *v.* Western Union Tel. Co., 132 N. C. 317, 43 S. E. 841; Meadows *v.* Western Union Tel. Co., 132 N. C. 40, 43 S. E. 512; Bennett *v.* Western Union Tel. Co., 128 N. C. 103, 38 S. E. 294; Lyne *v.* Western Union Tel. Co., 123 N. C. 129, 31 S. E. 350.

South Carolina.— Lyles *v.* Western Union Tel. Co., 77 S. C. 174, 57 S. E. 725.

Texas.— Potts *v.* Western Union Tel. Co., 82 Tex. 545, 18 S. W. 604; Western Union Tel. Co. *v.* Rosentreter, 80 Tex. 406, 16 S. W. 25.

A distinction has been made according to whether the action is brought by the sender or by the addressee, it being held that while in case of a message relating to sickness or death the telegraph company is chargeable with notice of the relationship, if any, between the addressee and the person whose death or illness is announced, it is not chargeable with notice of the relationship between the sender and the addressee, so as to sustain an action by the sender for mental anguish due to being deprived of the aid and consolation of the addressee. Western Union Tel. Co. *v.* Luck, 91 Tex. 178, 41 S. W. 469, 66 Am. St. Rep. 869 [*overruling* Western Union Tel. Co. *v.* Nations, 82 Tex. 539, 18 S. W. 709, 27 Am. St. Rep. 914]. But see Potts *v.* Western Union Tel. Co., 82 Tex. 545, 18 S. W. 604. *Contra*, Bright *v.* Western Union Tel. Co., 132 N. C. 317, 43 S. E. 841.

88. See Postal Tel. Cable Co. *v.* Pratt, 85 S. W. 225, 27 Ky. L. Rep. 430 (brothers); Meadows *v.* Western Union Tel. Co., 132 N. C. 40, 43 S. E. 512 (brother and sister); Lyne *v.* Western Union Tel. Co., 123 N. C. 129, 31 S. E. 350 (husband and wife); Lyles *v.* Western Union Tel. Co., 77 S. C. 174, 57 S. E. 725 (husband and wife); Potts *v.* Western Union Tel. Co., 82 Tex. 545, 18 S. W. 604 (brother and sister); and cases cited *supra*, note 87.

89. Western Union Tel. Co. *v.* Moxley, 80 Ark. 554, 98 S. W. 112 (plaintiff son-in-law of person who was sick); Foreman *v.* Western Union Tel. Co., 141 Iowa 32, 116 N. W. 724, 19 L. R. A. N. S. 374; Hunter *v.* Western Union Tel. Co., 135 N. C. 458, 47 S. E. 745 (plaintiff second cousin of deceased); Bright *v.* Western Union Tel. Co., 132 N. C. 317, 43 S. E. 841; Bennett *v.* Western Union Tel. Co., 128 N. C. 103, 38 S. E. 294.

90. Amos *v.* Western Union Tel. Co., 79 S. C. 259, 60 S. E. 660, 128 Am. St. Rep. 845 (plaintiff father-in-law of person whose illness was announced); Butler *v.* Western Union Tel. Co., 77 S. C. 148, 57 S. E. 757 (plaintiff brother-in-law of addressee); Western Union Tel. Co. *v.* Wilson, 97 Tex. 22, 75 S. W. 482 (plaintiff uncle of deceased); Western Union Tel. Co. *v.* Coffin, 88 Tex. 94, 30 S. W. 896 (plaintiff brother-in-law of deceased); Western Union Tel. Co. *v.* Gibson, (Tex. Civ. App. 1896) 39 S. W. 198 (plaintiff father-in-law of deceased); Western Union Tel. Co. *v.* Garrett, (Tex. Civ. App. 1896) 34 S. W. 649 (stepson); Western Union Tel. Co. *v.* McMillan, (Tex. Civ. App. 1895) 30 S. W. 298 (plaintiff sister-in-law of deceased).

The reason for this rule has been stated to be that since there is no presumption of mental anguish where the relationship is remote, if such mental suffering does in fact result the damage is special and the company is not liable for such special damage unless it has notice of the circumstances giving rise thereto. Amos *v.* Western Union Tel. Co., 79 S. C. 259, 60 S. E. 660, 128 Am. St. Rep. 845.

91. Western Union Tel. Co. *v.* Leland, 156 Ala. 334, 47 So. 62; Sparkman *v.* Western Union Tel. Co., 130 N. C. 447, 41 S. E. 881; Giffin *v.* Western Union Tel. Co., 93 Tex. 530, 56 S. W. 744; Western Union Tel. Co. *v.* Edmonson, 91 Tex. 206, 42 S. W. 549; Rowell *v.* Western Union Tel. Co., 75 Tex. 26, 12

as in the case of a failure to deliver a message announcing the fact that a relative known to have been seriously sick is better,[92] or delay in regard to a message sent by plaintiff inquiring as to the condition of a sick relative,[93] or a message sent to plaintiff in reply to a message making such inquiry; [94] but in other cases the distinction between mental anguish directly caused and that merely prolonged has been expressly disapproved,[95] and a recovery has frequently been allowed in cases of the latter character,[96] while in one case where the distinction was recognized, a recovery was allowed on the ground that the preëxisting mental suffering was increased.[97]

(VIII) *UNWARRANTED APPREHENSION OR MISTAKE OF FACTS.* It has been frequently held that there can be no recovery for mental anguish growing out of an unwarranted apprehension on the part of plaintiff; [98] but the mere fact that such suffering grows out of a belief in circumstances which do not actually exist will not preclude recovery,[99] both the reasonableness and the extent of plaintiff's mental suffering being questions for the jury;[1] and if through the negligence or default of the company plaintiff is reasonably caused to believe erroneously in the existence of a state of facts which, if true, would justify mental anguish, he may recover therefor.[2]

S. W. 534; Kopperl *v.* Western Union Tel. Co., (Tex. Civ. App. 1905) 85 S. W. 1018; Western Union Tel. Co. *v.* Bass, 28 Tex. Civ. App. 418, 67 S. W. 515; Morrison *v.* Western Union Tel. Co., 24 Tex. Civ. App. 347, 59 S. W. 1127; Akard *v.* Western Union Tel. Co., (Tex. Civ. App. 1897) 44 S. W. 538; Johnson *v.* Western Union Tel. Co., 14 Tex. Civ. App. 536, 38 S. W. 64.

Illustration of rule.—Where a person was suffering mental anxiety because of the knowledge that her relatives were on a train bound for a fever-stricken city, and a failure of a telegraph company to send a message to them on the train warning them of their danger merely prolonged the preëxisting anxiety, she could not recover for failure to send the message on the ground of her mental anguish. Rich *v.* Western Union Tel. Co., (Tex. Civ. App. 1907) 110 S. W. 93.

92. Rowell *v.* Western Union Tel. Co., 75 Tex. 26, 12 S. W. 534; McCarthy *v.* Western Union Tel. Co., (Tex. Civ. App. 1900) 56 S. W. 568.

93. Western Union Tel. Co. *v.* O'Callaghan, 32 Tex. Civ. App. 336, 74 S. W. 798; Western Union Tel. Co. *v.* Bass, 28 Tex. Civ. App. 418, 67 S. W. 515; Akard *v.* Western Union Tel. Co., (Tex. Civ. App. 1897) 44 S. W. 538.

94. Kopperl *v.* Western Union Tel. Co., (Tex. Civ. App. 1905) 85 S. W. 1018.

95. Western Union Tel. Co. *v.* Hollingsworth, 83 Ark. 39, 102 S. W. 681, 11 L. R. A. N. S. 497; Dayvis *v.* Western Union Tel. Co., 139 N. C. 79, 51 S. E. 898 [*disapproving* on this point Sparkman *v.* Western Union Tel. Co., 130 N. C. 447, 41 S. E. 881].

96. Western Union Tel. Co. *v.* Hollingsworth, 83 Ark. 39, 102 S. W. 681, 11 L. R. A. N. S. 497 (failure to deliver message announcing the improved condition of plaintiff's brother); Fass *v.* Western Union Tel. Co., 82 S. C. 461, 64 S. E. 235 (failure to deliver message to wife in reply to message inquiring as to condition of husband); Willis *v.* Western Union Tel. Co., 69 S. C. 531, 48 S. E. 538, 104 Am. St. Rep. 828 (failure to transmit message inquiring as to condition of plaintiff's mother).

97. Western Union Tel. Co. *v.* Cavin, 30 Tex. Civ. App. 152, 70 S. W. 229.

98. McAllen *v.* Western Union Tel. Co., 70 Tex. 243, 7 S. W. 715 (holding that there can be no recovery for mental anguish growing out of plaintiff's unwarranted apprehension that a failure to meet him at a station as requested was due to the death or serious illness of his father); Hart *v.* Western Union Tel. Co., (Tex. Civ. App. 1909) 115 S. W. 638 (holding that, in case of a delay in transmitting a telegram to have the body of plaintiff's wife sent to him, he cannot recover for mental anguish due to his mistaken belief that by reason of the delay the remains never could be shipped but would have to be buried where deceased died); Morrison *v.* Western Union Tel. Co., 24 Tex. Civ. App. 347, 59 S. W. 1127 (holding that a wife cannot recover for mental anguish caused by the non-delivery of a telegram from her husband who had promised to telegraph her, but who was not exposed to any danger, so that there was no reasonable ground for her suffering mental anguish on not hearing from him); Ricketts *v.* Western Union Tel. Co., 10 Tex. Civ. App. 226, 30 S. W. 1105 (holding that a mother cannot recover for mental anguish due to the non-delivery of money sent by telegraph to her son, where the son was in no danger and there was no reasonable cause for such mental suffering).

If plaintiff's sorrows are imaginary and not the result of any real or adequate cause, there can be no recovery for mental anguish. McAllen *v.* Western Union Tel. Co., 70 Tex. 243, 7 S. W. 715.

99. Western Union Tel. Co. *v.* Hines, 22 Tex. Civ. App. 315, 54 S. W. 627. And see cases cited *infra*, note 2.

1. Green *v.* Western Union Tel. Co., 136 N. C. 506, 49 S. E. 171.

2. Taylor *v.* Western Union Tel. Co., 101 S. W. 969, 31 Ky. L. Rep. 240 (where plaintiff was led to believe that both parents were

(IX) *Failure to Meet Plaintiff.* Under ordinary circumstances there can be no recovery on the ground of mental anguish because plaintiff was not met at a railroad station.[3] The rule is otherwise, however, in cases where plaintiff to the knowledge of the company is accompanied by the body of a deceased relative,[4] and in some cases a recovery has been allowed even where no question of sickness or death was involved,[5] the company being chargeable with notice from the terms of the message or otherwise that mental anguish would be likely to result.[6]

(X) *Message Relating to Sickness or Death* — (A) *In General.* It is well settled in jurisdictions where the mental anguish doctrine is recognized that plaintiff may recover for mental anguish due to being prevented from being present at the death-bed or funeral of a near relative;[7] but even in such cases it

dead instead of only one); Green *v.* Western Union Tel. Co., 136 N. C. 506, 49 S. E. 171 (holding that a father who had sent a message requesting the addressee to meet his minor daughter who was to arrive in a strange city at midnight, and who was later informed that the message had not been delivered, may recover for mental anguish due to his apprehension as to what might have happened to her, although it subsequently appeared that she was not exposed to any actual insult or injury); Rich *v.* Western Union Tel. Co., (Tex. Civ. App. 1907) 110 S. W. 93 (holding that where a message warning plaintiff not to come to a certain city on account of the presence of yellow fever was not delivered, he might recover for mental anguish suffered because of his exposure to the danger of contracting the disease, although subsequent events showed that he was in no danger of contracting it); Western Union Tel. Co. *v.* Patton, (Tex. Civ. App. 1900) 55 S. W. 973 (wife "much better" changed to "no better"); Western Union Tel. Co. *v.* Hines, 22 Tex. Civ. App. 315, 54 S. W. 627 ("mother started" changed to "mother died"); Western Union Tel. Co. *v.* Odom, 21 Tex. Civ. App. 537, 52 S. W. 632 (message stating sister "better" changed to sister "dead").

3. *Alabama.*—Western Union Tel. Co. *v.* Howle, 156 Ala. 331, 47 So. 341; Western Union Tel. Co. *v.* Sledge, 153 Ala. 291, 45 So. 59; Western Union Tel. Co. *v.* Westmoreland, 151 Ala. 319, 44 So. 382.

Arkansas.— Western Union Tel. Co. *v.* Hogue, 79 Ark. 33, 94 S. W. 924.

Indiana.—Western Union Tel. Co. *v.* Henley, 23 Ind. App. 14, 54 N. E. 775.

North Carolina.— Williams *v.* Western Union Tel. Co., 136 N. C. 82, 48 S. E. 559.

South Carolina.— Todd *v.* Western Union Tel. Co., 77 S. C. 522, 58 S. E. 433.

Texas.— McAllen *v.* Western Union Tel. Co., 70 Tex. 243, 7 S. W. 715.

4. See *infra*, IX, B, 3, d, (x), (c).

5. *Arkansas.*—Western Union Tel. Co. *v.* Hanley, 85 Ark. 263, 107 S. W. 1168, where plaintiff, a woman, was compelled to suffer a delay at midnight and in freezing weather in a deserted railroad station.

Kentucky.— Postal Tel. Cable Co. *v.* Terrell, 124 Ky. 822, 100 S. W. 292, 30 Ky. L. Rep. 1023, 14 L. R. A. N. S. 927, where plaintiff was a woman arriving at midnight at a station which was three miles from the home of her father, and she was compelled to wait in the station until morning.

North Carolina.— Green *v.* Western Union Tel. Co., 136 N. C. 489, 49 S. E. 165, 103 Am. St. Rep. 955, 67 L. R. A. 985, plaintiff, a young girl arriving alone on a midnight train in a town where she was a stranger.

South Carolina.— Toale *v.* Western Union Tel. Co., 76 S. C. 248, 57 S. E. 117, where plaintiff to the knowledge of the company was anxious to be with his family, was obliged to seek for a vehicle at night, and was delayed for an hour in reaching his home.

Texas.— Western Union Tel. Co. *v.* Siddall, (Civ. App. 1905) 86 S. W. 343 (where plaintiff was a delicate woman accompanied by a small child and arriving at a late hour in stormy weather); Western Union Tel. Co. *v.* Norton, (Civ. App. 1901) 62 S. W. 1081 (where plaintiff was a woman arriving at night at a small flag station where there was no hotel or livery stable).

6. See Postal Tel. Cable Co. *v.* Terrell, 124 Ky. 822, 100 S. W. 292, 30 Ky. L. Rep. 1023, 14 L. R. A. N. S. 927; Western Union Tel. Co. *v.* Siddall, (Tex. Civ. App. 1905) 86 S. W. 343; and cases cited *supra*, note 5.

7. *Alabama.*—Western Union Tel. Co. *v.* Benson, 159 Ala. 254, 48 So. 712; Western Union Tel. Co. *v.* Crumpton, 138 Ala. 632, 36 So. 517.

Arkansas.— Western Union Tel. Co. *v.* Arant, 88 Ark. 499, 115 S. W. 136; Arkansas, etc., R. Co. *v.* Stroude, 82 Ark. 117, 100 S. W. 760.

Kentucky.—Postal Tel. Cable Co. *v.* Pratt, 85 S. W. 225, 27 Ky. L. Rep. 430.

North Carolina.—Bailey *v.* Western Union Tel. Co., 150 N. C. 316, 63 S. E. 1044; Lyne *v.* Western Union Tel. Co., 123 N. C. 129, 31 S. E. 350.

South Carolina.— Hughes *v.* Western Union Tel. Co., 72 S. C. 516, 52 S. E. 107.

Texas.— Western Union Tel. Co. *v.* Beringer, 84 Tex. 38, 19 S. W. 336; Western Union Tel. Co. *v.* O'Fiel, 47 Tex. Civ. App. 40, 104 S. W. 406; Buchanan *v.* Western Union Tel. Co., (Tex. Civ. App. 1907) 100 S. W. 974; Roach *v.* Jones, 18 Tex. Civ. App. 231, 44 S. W. 677.

See 45 Cent. Dig. tit. "Telegraphs and Telephones," §§ 69, 70; and, generally, *supra*, IX, B, 3, b.

Relationship between parties see *supra*, IX, B, 3, d, (VI).

Insane relative.—A recovery may also be

is not every matter incidental thereto which may be considered as an element of such damages;[8] and it has been held not to be an element of such damages that plaintiff was prevented from being present with the other members of his family;[9] or was prevented from offering them his consolation and assistance;[10] or that deceased was buried at an unsatisfactory place,[11] in unsuitable clothes,[12] or at the expense of strangers;[13] or that a particular clergyman did not conduct the funeral;[14] or that plaintiff was deprived of the companionship of another member of his family while on the way to the bedside of a dying relative,[15] or was compelled frequently to leave the bedside of his relative to meet incoming trains;[16] and it has also been held that if plaintiff is not actually prevented from being present at the funeral he cannot recover for mental anguish due to uncertainty as to whether the funeral would be postponed in order to allow him to be present.[17] If, however, a case of sickness or death is involved, there is some authority that there may be a right of recovery for mental distress, although plaintiff was not actually prevented from attending at the bedside before death, or from attending the funeral.[18] Thus recoveries have been allowed in cases where, as the direct and proximate consequences of the telegraph company's breach of duty, plaintiff failed to arrive while his relative was still conscious, even though he arrived before death,[19] or failed to arrive in time to see the body before decomposition set in, even though he arrived in time for the funeral.[20]

(B) *Deprivation of Aid and Consolation.* In many cases it has been held that in the case of messages relating to sickness or death the sender of the message may recover for mental anguish due to his being deprived of the aid, companionship, and consolation of the addressee;[21] although it has been held that a message

had for mental anguish due to a delay in reaching a relative who has become insane and confined in a hospital. Western Union Tel. Co. *v.* McIlvoy, 107 Ky. 633, 55 S. W. 428, 21 Ky. L. Rep. 1393.

8. Arkansas, etc., R. Co. *v.* Stroude, 82 Ark. 117, 100 S. W. 760; Western Union Tel. Co. *v.* McCaul, 115 Tenn. 99, 90 S. W. 856; Buchanan *v.* Western Union Tel. Co., (Tex. Civ. App. 1907) 100 S. W. 974; Western Union Tel. Co. *v.* Birchfield, 14 Tex. Civ. App. 664, 38 S. W. 635.

9. Buchanan *v.* Western Union Tel. Co., (Tex. Civ. App. 1907) 100 S. W. 974; Western Union Tel. Co. *v.* Butler, 45 Tex. Civ. App. 28, 99 S. W. 704. *Compare* Machen *v.* Western Union Tel. Co., 72 S. C. 256, 51 S. E. 697.

10. Arkansas, etc., R. Co. *v.* Stroude, 82 Ark. 117, 100 S. W. 760; Western Union Tel. Co. *v.* Wilson, 97 Tex. 22, 75 S. W. 482; Western Union Tel. Co. *v.* Butler, 45 Tex. Civ. App. 28, 99 S. W. 704.

11. Western Union Tel. Co. *v.* McCaul, 115 Tenn. 99, 90 S. W. 856; Western Union Tel. Co. *v.* Carter, 85 Tex. 580, 22 S. W. 961, 34 Am. St. Rep. 826; Western Union Tel. Co. *v.* McNairy, 34 Tex. Civ. App. 389, 78 S. W. 969. *Compare* Western Union Tel. Co. *v.* Arant, 88 Ark. 499, 115 S. W. 136.

12. Western Union Tel. Co. *v.* Carter, 85 Tex. 580, 22 S. W. 961, 34 Am. St. Rep. 826.

13. Western Union Tel. Co. *v.* McNairy, 34 Tex. Civ. App. 389, 78 S. W. 969.

14. Western Union Tel. Co. *v.* Arnold, 96 Tex. 493, 73 S. W. 1043. *Compare* Western Union Tel. Co. *v.* Robinson, 97 Tenn. 638, 37 S. W. 545, 34 L. R. A. 431.

15. Western Union Tel. Co. *v.* Birchfield, 14 Tex. Civ. App. 664, 38 S. W. 635.

16. Arial *v.* Western Union Tel. Co., 70 S. C. 418, 50 S. E. 6.

17. Western Union Tel. Co. *v.* Reed, 37 Tex. Civ. App. 445, 84 S. W. 296.

18. Hamrick *v.* Western Union Tel. Co., 140 N. C. 151, 52 S. E. 232, holding that where the delivery of a telegram, announcing the serious illness of plaintiff's wife, was delayed for twenty-eight hours, and plaintiff knew of the delay, he might recover for mental anguish suffered after the receipt of the telegram, due to the fear that his wife had died during these twenty-eight hours, although she was not dead and subsequently recovered.

19. Meadows *v.* Western Union Tel. Co., 132 N. C. 40, 43 S. E. 512; Western Union Tel. Co. *v.* De Andrea, 45 Tex. Civ. App. 395, 100 S. W. 977; Western Union Tel. Co. *v.* Adams, (Tex. Civ. App. 1904) 80 S. W. 93; Western Union Tel. Co. *v.* Stacy, (Tex. Civ. App. 1897) 41 S. W. 100; Western Union Tel. Co. *v.* Piner, 9 Tex. Civ. App. 152, 29 S. W. 66.

20. Western Union Tel. Co. *v.* Hamilton, 36 Tex. Civ. App. 300, 81 S. W. 1052; Western Union Tel. Co. *v.* De Jarles, 8 Tex. Civ. App. 109, 27 S. W. 792. See also Woods *v.* Western Union Tel. Co., 148 N. C. 1, 61 S. E. 653, 128 Am. St. Rep. 581, holding that it is no defense to the action that plaintiff saw his brother's body before burial, but that it is not an element of damages that he saw his brother's body after decomposition had advanced so far that the features could hardly be recognized.

21. *Alabama.*—Western Union Tel. Co. *v.*

announcing illness or death is ostensibly sent in the interest of the addressee, and to enable him to be present,[22] and that there can be no recovery by the sender for mental anguish sustained by him by reason of the absence of the addressee, unless the company had notice of the purpose of the message, or circumstances from which such mental anguish would be supposed to result.[23] A recovery has also been denied in such cases on the ground of the remoteness of the relationship between plaintiff and the addressee.[24] Such mental anguish must also be the proximate result of the company's negligence or default,[25] and there can be no recovery except for the mental anguish suffered between the time when, if the message had been promptly delivered, the addressee would have arrived and the time when he actually did arrive.[26]

(c) *Arrival of Body and Preparations For Burial.* While ordinarily the sender of a message cannot recover for mental anguish because he was not met at a railroad station,[27] there may be a recovery on this ground where plaintiff is traveling with a corpse, and as a result of the telegraph company's negligence there is no one to meet him on his arrival, and no preparations have been made for the burial,[28] provided the relationship between plaintiff and deceased is such as to

Benson, 159 Ala. 254, 48 So. 712; Postal Tel., etc., Co. *v.* Beal, 159 Ala. 249, 48 So. 676; Western Union Tel. Co. *v.* Crocker, 135 Ala. 492, 33 So. 45, 59 L. R. A. 398.

Indiana.— Western Union Tel. Co. *v.* Stratemeier, 6 Ind. App. 125, 32 N. E. 871.

Iowa.— Foreman *v.* Western Union Tel. Co., 141 Iowa 32, 116 N. W. 724, 19 L. R. A. N. S. 374.

Kentucky.— Thurman *v.* Western Union Tel. Co., 127 Ky. 137, 105 S. W. 155, 32 Ky. L. Rep. 26, 14 L. R. A. N. S. 499.

North Carolina.—Cordell *v.* Western Union Tel. Co., 149 N. C. 402, 63 S. E. 71, 22 L. R. A. N. S. 540; Bright *v.* Western Union Tel. Co., 132 N. C. 317, 43 S. E. 841.

South Carolina.—Bolton *v.* Western Union Tel. Co., 76 S. C. 529, 57 S. E. 543.

Texas.— Potts *v.* Western Union Tel. Co., 82 Tex. 545, 18 S. W. 604; Western Union Tel. Co. *v.* Olivarri, (Civ. App. 1908) 110 S. W. 930; Western Union Tel. Co. *v.* Steele, (Civ. App. 1908) 110 S. W. 546; Western Union Tel. Co. *v.* Hankins, (Civ. App. 1908) 110 S. W. 543 (where the company had notice of the purpose of the message); Western Union Tel. Co. *v.* Bell, (Civ. App. 1905) 90 S. W. 714 (where the company had information charging it with notice of the purpose of the message).

See 45 Cent. Dig. tit. "Telegraphs and Telephones," §§ 69, 70.

22. Western Union Tel. Co. *v.* Luck, 91 Tex. 178, 41 S. W. 469, 66 Am. St. Rep. 869 [*overruling* Western Union Tel. Co. *v.* Nations, 82 Tex. 539, 18 S. W. 709, 27 Am. St. Rep. 914].

23. Western Union Tel. Co. *v.* Luck, 91 Tex. 178, 41 S. W. 469, 66 Am. St. Rep. 869 [*overruling* Western Union Tel. Co. *v.* Nations, 82 Tex. 539, 18 S. W. 709, 27 Am. St. Rep. 914], holding that the rule applies, although the addressee was plaintiff's daughter, where the message did not disclose the relationship. See also Weatherford, etc., R. Co. *v.* Seals, (Tex. Civ. App. 1897) 41 S. W. 841. *Contra*, Foreman *v.* Western Union Tel. Co., 141 Iowa 32, 116 N. W. 724, 19 L. R. A. N. S. 374; Bright *v.* Western Union Tel. Co., 132 N. C. 317, 43 S. E. 841, holding that if the message shows that it relates to a matter of sickness or death, and is therefore urgent, it is not necessary that it should show either its purpose or the relationship between plaintiff and the addressee.

24. Western Union Tel. Co. *v.* Ayers, 131 Ala. 391, 31 So. 78, 90 Am. St. Rep. 92 (plaintiff brother-in-law of addressee); Western Union Tel. Co. *v.* Steenbergen, 107 Ky. 469, 54 S. W. 829, 21 Ky. L. Rep. 1289 (plaintiff father-in-law of addressee); Butler *v.* Western Union Tel. Co., 77 S. C. 148, 57 S. E. 757 (plaintiff brother-in-law of addressee, and defendant not chargeable with notice of any special relations or affection between them). But see Western Union Tel. Co. *v.* Crocker, 135 Ala. 492, 33 So. 45, 58 L. R. A. 398 (recovery allowed by father of deceased child for absence of its grandmother); Bright *v.* Western Union Tel. Co., 132 N. C. 317, 43 S. E. 841 (addressee uncle of plaintiff's husband).

25. Landry *v.* Western Union Tel. Co., (Tex. 1908) 113 S. W. 10 [*reversing* (Civ. App. 1908) 108 S. W. 461], holding that if the addressee could not have arrived any sooner than he did arrive, even if the message had been promptly delivered, there can be no recovery for mental anguish on account of such delay.

26. Western Union Tel. Co. *v.* Northcutt, 158 Ala. 539, 48 So. 553, 132 Am. St. Rep. 38.

27. See *supra*, IX, B, 3, d, (IX).

28. Western Union Tel. Co. *v.* Crowley, 158 Ala. 583, 48 So. 381; Western Union Tel. Co. *v.* McMorris, 158 Ala. 563, 48 So. 349, 132 Am. St. Rep. 46; Western Union Tel. Co. *v.* Long, 148 Ala. 202, 41 So. 965; Lyles *v.* Western Union Tel. Co., 77 S. C. 174, 57 S. E. 725; Western Union Tel. Co. *v.* Turner, (Tex. Civ. App. 1904) 78 S. W. 362 (funeral postponed one day, and corpse carried in express wagon); Western Union Tel. Co. *v.* Giffin, 27 Tex. Civ. App. 306, 65 S. W. 661, (1900) 57 S. W. 327 (grave not dug and

warrant a recovery on this ground.[29] In order to authorize a recovery in such cases, however, the message must show, or the company be otherwise informed, that the sender is accompanied by a corpse,[30] and it must be affirmatively shown that the message could have been delivered to the addressee,[31] and that had it been duly delivered the sender could and would have been met, or the burial arrangements made.[32]

(D) *Message Summoning Physician.* As to whether in case of non-delivery or delay in regard to a message summoning a physician to attend a member of the sender's family he may recover for his mental anguish due to the absence of the physician and to witnessing the suffering of his sick relative, the authorities are conflicting even in the same jurisdiction,[33] a right of recovery under such circumstances being expressly denied in some cases,[34] and recognized in others,[35] provided the negligence or default complained of was the proximate cause of such suffering.[36]

(XI) *CONTRIBUTORY NEGLIGENCE.* As in other cases plaintiff may be precluded from recovering damages for mental anguish, by reason of his own contributory negligence,[37] which negligence may consist in his failure to send a message requesting the postponement of a funeral,[38] or in failing to take an earlier

body left in freight warehouse). But see Western Union Tel. Co. *v.* Burch, 36 Tex. Civ. App. 237, 81 S. W. 552, holding that there can be no recovery for mental anguish growing out of particular circumstances connected with the failure to meet plaintiff which could not reasonably have been within the contemplation of the parties.

29. Western Union Tel. Co. *v.* McMorris, 158 Ala. 563, 48 So. 349, 132 Am. St. Rep. 46, holding that the relationship of brothers is sufficient.

Relationship between parties see *supra*, IX, B, 3, d, (VI).

30. Western Union Tel. Co. *v.* Kuykendall, 99 Tex. 323, 89 S. W. 965.

31. Western Union Tel. Co. *v.* McMorris, 158 Ala. 563, 48 So. 349, 132 Am. St. Rep. 46, where there was no evidence that the addressee was at his home or place of business on the day in question, or that the message could have been delivered by the telegraph company.

32. Western Union Tel. Co. *v.* McMorris, 158 Ala. 563, 48 So. 349, 132 Am. St. Rep. 46; Hancock *v.* Western Union Tel. Co., 137 N. C. 497, 49 S. E. 952, 69 L. R. A. 403. *Compare* Western Union Tel. Co. *v.* Crowley, 158 Ala. 583, 48 So. 381.

It cannot be presumed that plaintiff would have been met or the funeral preparations made, however willing the addressee may have been to comply with such a request, since too many contingencies might have prevented his doing so. Hancock *v.* Western Union Tel. Co., 137 N. C. 497, 49 S. E. 952, 69 L. R. A. 403.

33. See Western Union Tel. Co. *v.* Henderson, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148; Western Union Tel. Co. *v.* Reid, 120 Ky. 231, 85 S. W. 1171, 27 Ky. L. Rep. 659, 70 L. R. A. 289; Western Union Tel. Co. *v.* Kendzora, (Tex. Civ. App. 1894) 26 S. W. 245; and cases cited *infra*, notes 34–36.

34. Western Union Tel. Co. *v.* Reid, 120 Ky. 231, 85 S. W. 1171, 27 Ky. L. Rep. 659, 70 L. R. A. 289; Western Union Tel. Co. *v.* Cooper, 71 Tex. 507, 9 S. W. 598, 10 Am. St. Rep. 772, 1 L. R. A. 728.

The grounds upon which a recovery has been denied are that the mental suffering of plaintiff in such cases is merely reflex or sympathetic, too remote, and not within the contemplation of the parties. Western Union Tel. Co. *v.* Reid, 120 Ky. 231, 85 S. W. 1171, 27 Ky. L. Rep. 659, 70 L. R. A. 289.

35. Western Union Tel. Co. *v.* Haley, 143 Ala. 586, 39 So. 386; Western Union Tel. Co. *v.* Henderson, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148; Gulf, etc., Tel. Co. *v.* Richardson, 79 Tex. 649, 15 S. W. 689; Western Union Tel. Co. *v.* Cavin, 30 Tex. Civ. App. 152, 70 S. W. 229; Western Union Tel. Co. *v.* Kendzora, (Tex. Civ. App. 1894) 26 S. W. 245; Western Union Tel. Co. *v.* Stephens, 2 Tex. Civ. App. 129, 21 S. W. 148.

The right of recovery is, however, limited to the mental anguish due to the absence of the physician, and does not include that caused by the death of the member of plaintiff's family. Western Union Tel. Co. *v.* Stephens, 2 Tex. Civ. App. 129, 21 S. W. 148.

36. Western Union Tel. Co. *v.* Haley, 143 Ala. 586, 39 So. 386, holding that there can be no recovery where the physician could not have arrived in time, even if the message had been promptly delivered. See also Slaughter *v.* Western Union Tel. Co., (Tex. Civ. App. 1908) 112 S. W. 688.

37. Western Union Tel. Co. *v.* Gulledge, 84 Ark. 501, 106 S. W. 957; Hocutt *v.* Western Union Tel. Co., 147 N. C. 186, 60 S. E. 980; Edwards *v.* Western Union Tel. Co., 147 N. C. 126, 60 S. E. 900; Western Union Tel. Co. *v.* Jeanes, 88 Tex. 230, 31 S. W. 186.

38. Western Union Tel. Co. *v.* Jeanes, 88 Tex. 230, 31 S. W. 186, holding that such failure is contributory negligence if a reasonably prudent person would have sent such a message, the question being for the jury. But see Western Union Tel. Co. *v.* Witt, 110 S. W. 889, 33 Ky. L. Rep 685 (holding that

train which he might have taken,[39] or by involuntarily stopping off at an intermediate point.[40]

C. Exemplary Damages.[41] In those jurisdictions where a corporation may be held liable for exemplary damages for wilful torts committed by its servants, without a showing that the corporation previously authorized or subsequently ratified the torts,[42] a telegraph or telephone company may, in a proper case, be compelled to respond in exemplary damages.[43] Such damages, however, are not recoverable where the action is brought in contract.[44] Exemplary damages are

if it was too late when plaintiff received the message for him to have secured a postponement, a failure to send a message requesting a postponement is not contributory negligence); Postal Tel. Cable Co. *v.* Pratt, 85 S. W. 225, 27 Ky. L. Rep. 430 (holding that it is not incumbent upon plaintiff as a matter of law to request a postponement of the funeral); Western Union Tel. Co. *v.* Crawford, (Tex. Civ. App. 1903) 75 S. W. 843 (holding that plaintiff is not necessarily precluded from recovering on the ground of contributory negligence, where there is evidence which would justify the jury in finding that if the message had been sent the funeral would not have been postponed); Western Union Tel. Co. *v.* Anderson, (Tex. Civ. App. 1896) 37 S. W. 619 (holding that plaintiff was not guilty of contributory negligence in not wiring to have the funeral postponed, where he expected to arrive in time and would have done so but for the lateness of the train).

39. Western Union Tel. Co. *v.* Johnsey, (Tex. Civ. App. 1908) 109 S. W. 251. See also Western Union Tel. Co. *v.* Porterfield, (Tex. Civ. App. 1904) 84 S. W. 850, holding, however, that it was not necessarily contributory negligence to fail to take an earlier train, where plaintiff was old and feeble and the earlier train went by an indirect route unfamiliar to him and requiring a change of cars at an intermediate point.

40. Western Union Tel. Co. *v.* Birchfield, 14 Tex. Civ. App. 664, 38 S. W. 635.

41. See, generally, DAMAGES, 13 Cyc. 105–121.

42. See DAMAGES, 13 Cyc. 117.

Authorization or ratification.—In some cases it is held that a telegraph company is not liable for exemplary damages for the acts of its agents unless it authorized or directed or subsequently ratified such acts (Western Union Tel. Co. *v.* Brown, 58 Tex. 170, 44 Am. Rep. 610; Western Union Tel. Co. *v.* Landry, (Tex. Civ. App. 1908) 108 S. W. 461 [*reversed* on other grounds in 102 Tex. 67, 113 S W. 10]. But see Gulf, etc., R. Co. *v.* Levy, 59 Tex. 542, 46 Am. Rep. 269); or unless the company was negligent in the selection of its servants (see Western Union Tel. Co. *v.* Brown, *supra*), and where it is alleged that defendant was negligent in the employment of incompetent servants, a verdict for exemplary damages cannot be sustained where the evidence does not show any knowledge on the part of defendant of such incompetence or that its servants were negligent before or after the act complained of (Western Union Tel. Co. *v.* Karr, 5 Tex. Civ. App. 60, 24 S. W. 302).

43. *Alabama.*—Western Union Tel. Co. *v.* Crowley, 158 Ala. 583, 48 So. 381 (message held for twenty-four hours without any effort to transmit it until called for by the operator at the other end of the line); Western Union Tel. Co. *v.* Seed, 115 Ala. 670, 22 So. 474.

Kansas.— Western Union Tel. Co. *v.* Gilstrap, 77 Kan. 191, 94 Pac. 122; Western Union Tel. Co. *v.* Lawson, 66 Kan. 660, 72 Pac. 283; West *v.* Western Union Tel. Co., 39 Kan. 93, 17 Pac. 807, 7 Am. St. Rep. 530.

Mississippi.— Western Union Tel. Co. *v.* Hiller, 93 Miss. 658, 47 So. 377; Western Union Tel. Co. *v.* Watson, 82 Miss. 101, 33 So. 76. *Compare* Hartzog *v.* Western Union Tel. Co., (1903) 34 So. 361.

South Carolina.—Glover *v.* Western Union Tel. Co., 78 S. C. 502, 59 S. E. 526; Bowen *v.* Western Union Tel. Co., 77 S. C. 122, 57 S E. 674; Doster *v.* Western Union Tel. Co., 77 S. C. 56, 57 S. E. 671; Toale *v.* Western Union Tel. Co., 76 S. C. 248, 57 S. E. 117; Machen *v.* Western Union Tel. Co., 72 S. C. 256, 51 S. E. 697; Poulnot *v.* Western Union Tel. Co., 69 S. C. 545, 48 S. E. 622 (intentional failure to deliver); Butler *v.* Western Union Tel. Co, 65 S. C. 510, 44 S. E. 91 (messenger intentionally failing to deliver); March *v.* Western Union Tel. Co., 65 S. C. 430, 43 S. E. 953; Young *v.* Western Union Tel. Co., 65 S. C. 93, 43 S. E. 448 (fourteen hours without any attempt to deliver).

Tennessee.— Western Union Tel. Co. *v.* Frith, 105 Tenn. 167, 58 S. W. 118, operator forgot message for four days.

See 45 Cent. Dig. tit. "Telegraph and Telephones," § 71.

Conduct of operator.—Where a telegraph operator, when asked about the non-delivery of a message, laughs at the inquiry and gives offensive answers, it will support punitive damages. Toale *v.* Western Union Tel. Co., 76 S. C. 248, 57 S. E. 117.

Long unexplained delay in the delivery of a telegram is sufficient to go to the jury on the question of punitive damages in the absence of undisputed evidence of some effort to deliver it. Glover *v.* Western Union Tel. Co., 78 S. C. 502, 59 S. E. 526; Bolton *v.* Western Union Tel. Co., 76 S. C. 529, 57 S. E. 543.

Unless some actual damage is sustained it has been held that there can be no recovery for exemplary damages. Gulf, etc., R. Co. *v.* Levy, 59 Tex. 563, 46 Am. Rep. 278. See also DAMAGES, 13 Cyc. 109.

44. Western Union Tel. Co. *v.* Benson, 159

also confined in the jurisdictions where they are allowed to cases of wantonness, wilfulness, recklessness, or malice;[45] and while such damages may be recovered in cases of negligence so gross as to amount to wantonness or wilfulness,[46] they cannot be recovered where the company's breach of duty is the result of a mere mistake,[47] or thoughtlessness,[48] or of simple as distinguished from gross negligence,[49] or where there has been some honest effort to perform its duty.[50]

D. Excessive or Inadequate Damages.[51] In mental anguish cases and other cases where the damages are unliquidated the court will not ordinarily interfere with the discretion of the jury in fixing the amount necessary to compensate plaintiff for the injury caused by the breach of duty complained of.[52]

Ala. 254, 48 So. 712; Western Union Tel. Co. *v.* Rowell, 153 Ala. 295, 45 So. 73; Western Union Tel. Co. *v.* Way, 83 Ala. 542, 4 So. 844; Haber, etc., Hat Co. *v.* Southern Bell Tel., etc., Co., 118 Ga. 874, 45 S. E. 696; Cumberland Tel., etc., Co. *v.* Cartwright Creek Tel. Co., 128 Ky. 395, 108 S. W. 875, 32 Ky. L. Rep. 1357; Davis *v.* Western Union Tel. Co., 46 W. Va. 48, 32 S. E. 1026. See also, generally, DAMAGES, 13 Cyc. 113.

45. Western Union Tel. Co. *v.* Westmoreland, 151 Ala. 319, 44 So. 382 (where the court said that such damages "are never allowed, except in cases in which the act is done with a bad motive, termed 'malice,' in the defendant," although "malice may be established as an inference from the circumstances of gross negligence"); Cumberland Tel., etc., Co. *v.* Paine, (Miss. 1909) 48 So. 229 (not recoverable where there is no "element of willful, malicious, fraudulent, or oppressive wrongdoing"); Western Union Tel. Co. *v.* Spratley, 84 Miss. 86, 36 So. 188; McAllen *v.* Western Union Tel. Co., 70 Tex. 243, 7 S. W. 715 (no "gross negligence, willful wrong or oppression shown"); Kopperl *v.* Western Union Tel. Co., (Tex. Civ. App. 1905) 85 S. W. 1018 (where the court said: "The case must contain some element of fraud, malice, or oppression"). See also DAMAGES, 13 Cyc. 105 *et seq.*

46. Western Union Tel. Co. *v.* Crowley, 158 Ala. 583, 48 So. 381 (where defendant was "so grossly negligent as to evince an utter disregard of the feelings and rights of plaintiff"); Western Union Tel. Co. *v.* Seed, 115 Ala. 670, 22 So. 474 (negligence held to be so gross as to be "the equivalent of wilful wrong"); Western Union Tel. Co. *v.* Gilstrap, 77 Kan. 191, 94 Pac. 122 (negligence so gross as to show a "wanton and reckless disregard of the rights of plaintiff"); Western Union Tel. Co. *v.* Lawson, 66 Kan. 660, 72 Pac. 283 (negligence "so gross as to amount to wantonness"); Western Union Tel. Co. *v.* Frith, 105 Tenn. 167, 58 S. W. 118 (case said to be one of "the grossest negligence"); Gulf, etc., R. Co. *v.* Levy, 59 Tex. 542, 46 Am. Rep. 269 (exemplary damages recoverable if negligence is "wilful or gross" which is a question to be determined by the jury).

47. Cumberland Tel., etc., Co. *v.* Hendon, 114 Ky. 501, 71 S. W. 435, 24 Ky. L. Rep. 1271, 102 Am. St. Rep. 290, 60 L. R. A. 849 (physician's telephone disconnected by mistake); Cumberland Tel., etc., Co. *v.* Paine, (Miss. 1909) 48 So. 229 (where the manager of a telephone exchange, without knowing that the franchise of the company required it to extend free county service to its patrons, made a charge for such service); Gwynn *v.* Citizens' Tel. Co., 69 S. C. 434, 48 S. E. 460, 104 Am. St. Rep. 819, 67 L. R. A. 111.

48. Cocke *v.* Western Union Tel. Co., 84 Miss. 380, 36 So. 392, thoughtless disclosure by operator of contents of message.

49. Western Union Tel. Co. *v.* Westmoreland, 151 Ala. 319, 44 So. 382. See also DAMAGES, 13 Cyc. 110.

50. Western Union Tel. Co. *v.* Cross, 116 Ky. 5, 74 S. W. 1098, 25 Ky. L. Rep. 268, 76 S. W. 162, 25 Ky. L. Rep. 646; Western Union Tel. Co. *v.* Spratley, 84 Miss. 86, 36 So. 188; Cloy *v.* Western Union Tel. Co., 78 S. C. 109, 58 S. E. 972; Butler *v.* Western Union Tel. Co., 77 S. C. 148, 57 S. E. 757; Key *v.* Western Union Tel. Co., 76 S. C. 301, 56 S. E. 962; Lewis *v.* Western Union Tel. Co., 57 S. C. 325, 35 S. E. 556.

Where the evidence is uncontradicted of an attempt to deliver a telegram, punitive damages for wilfulness for not delivering it cannot be recovered. Todd *v.* Western Union Tel. Co., 77 S. C. 522, 58 S. E. 433; Foster *v.* Western Union Tel. Co., 77 S. C. 155, 57 S. E. 760; Butler *v.* Western Union Tel. Co., 77 S. C. 148, 57 S. E. 757.

Conflicting duties.— The fact that a delay was due to the operator acting also as agent for the railroad company and express company and obliged from time to time to perform duties for those companies which temporarily interfered with his duties as agent of the telegraph company is to be considered on the question of punitive damages. Key *v.* Western Union Tel. Co., 76 S. C. 301, 56 S. E. 962.

51. See, generally, DAMAGES, 13 Cyc. 121.

52. *Alabama.*—Western Union Tel. Co. *v.* Crocker, 135 Ala. 492, 33 So. 45, 59 L. R. A. 398 (two hundred and twenty-five dollars for failure to deliver message summoning plaintiff's mother-in-law to bedside of plaintiff's child); Western Union Tel. Co. *v.* Cunningham, 99 Ala. 314, 14 So. 579 (five hundred dollars where plaintiff was prevented from being present at the death-bed of his mother).

Arkansas.— Western Union Tel. Co. *v.* Hanley, 85 Ark. 263, 107 S. W. 1168 (two hundred dollars for physical suffering, sickness, and mental anguish owing to plaintiff not being met at station and being compelled to remain on a cold night in a deserted railroad

Where, however, the amount of damages awarded by the jury is clearly or grossly

station); Western Union Tel. Co. *v.* Blackmer, 82 Ark. 526, 102 S. W. 366 (one thousand dollars for failure of plaintiff to reach his mother until after her death); Arkansas, etc., R. Co. *v.* Stroude, 82 Ark. 117, 100 S. W. 760 (five hundred dollars where plaintiff was prevented from being with his wife in her last hours and from attending her funeral).

Indiana.— Western Union Tel. Co. *v.* Stratemeir, 11 Ind. App. 601, 39 N. E. 527 (five hundred dollars where plaintiff was deprived of the aid and consolation of her daughter at the time of the death of plaintiff's son); Western Union Tel. Co. *v.* Newhouse, 6 Ind. App. 422, 33 N. E. 800 (four hundred dollars for non-delivery of telegram summoning plaintiff to the bedside of his dying mother).

Iowa.— Potter *v.* Western Union Tel. Co., 138 Iowa 406, 116 N. W. 130, one thousand dollars where plaintiff was prevented from reaching his mother's bedside until after her death.

Kansas.— Western Union Tel. Co. *v.* Gilstrap, 77 Kan. 191, 94 Pac. 122, seven hundred and fifty dollars, including exemplary damages, for failure of plaintiff to reach his father before his death.

Kentucky.— Cumberland Tel., etc., Co. *v.* Quigley, 129 Ky. 788, 112 S. W. 897, 19 L. R. A. N. S. 575 (two hundred dollars for negligently delaying the transmission of money sent to the company's knowledge for use in preparing plaintiff's daughter's remains for transportation); Western Union Tel. Co. *v.* Caldwell, 126 Ky. 42, 102 S. W. 840, 31 Ky. L. Rep. 497, 12 L. R. A. N. S. 748 (one thousand dollars for missing brother's funeral); Western Union Tel. Co. *v.* McIlvoy, 107 Ky. 633, 55 S. W. 428, 21 Ky. L. Rep. 1393 (one thousand dollars for delay in reaching plaintiff's insane brother); Western Union Tel. Co. *v.* Fisher, 107 Ky. 513, 54 S. W. 830, 21 Ky. L. Rep. 1293 (three hundred dollars for failure of plaintiff to reach his child before its death).

Nebraska.— Western Union Tel. Co. *v.* Church, 3 Nebr. (Unoff.) 22, 90 N. W. 878, 57 L. R. A. 905, nine hundred and fifty dollars for delay of message summoning physician in confinement case.

Nevada.— Barnes *v.* Western Union Tel. Co., 27 Nev. 438, 76 Pac. 931, 103 Am. St. Rep. 776, 65 L. R. A. 666, four hundred dollars where plaintiff was left without funds in a strange city four hundred miles from home and suffered from cold and hunger.

South Carolina.— Doster *v.* Western Union Tel. Co., 77 S. C. 56, 57 S. E. 671, two hundred and fifty dollars where plaintiff was unable to attend the funeral of his grandchild and there was evidence sufficient to require the question of punitive damages to be submitted to the jury.

Tennessee.— Western Union Tel. Co. *v.* Frith, 105 Tenn. 167, 58 S. W. 118, one thousand dollars, including punitive damages, where plaintiff was prevented from being present at the funeral of his child.

Texas.— Western Union Tel. Co. *v.* Cooper, (1892) 20 S. W. 47 (six hundred dollars for failure to deliver message summoning physician to attend plaintiff's wife in her confinement); Erie Tel., etc., Co. *v.* Grimes, 82 Tex. 89, 17 S. W. 831 (six hundred and sixty-seven dollars and fifty-six cents, where plaintiff was prevented from seeing his mother before her death); Western Union Tel. Co. *v.* Rosentreter, 80 Tex. 406, 16 S. W. 25 (one thousand dollars for delay in transmitting message to plaintiff announcing the death of his sister); Western Union Tel. Co. *v.* Broesche, 72 Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 843 (one thousand one hundred and sixty-eight dollars, where wife's corpse was not met); Western Union Tel. Co. *v.* Bell, 48 Tex. Civ. App. 151, 106 S. W. 1147 (four hundred dollars and twenty-five cents for failure to deliver message from plaintiff to her brother announcing the death of their mother, whereby plaintiff was left alone in her distress and compelled to allow her mother to be buried by the public authorities in a pauper's grave); Western Union Tel. Co. *v.* Hardison, (Civ. App. 1907) 101 S. W. 541 (two thousand dollars for missing mother's funeral); Western Union Tel. Co. *v.* Sloss, 45 Tex. Civ. App. 153, 100 S. W. 354 (one thousand nine hundred and ninety-five dollars for failure of plaintiff to arrive before son's death); Western Union Tel. Co. *v.* Shaw, 40 Tex. Civ. App. 277, 90 S. W. 58 (one thousand one hundred dollars for being prevented from attending funeral of son); Western Union Tel. Co. *v.* Porterfield, (Civ. App. 1904) 84 S. W. 850 (five hundred dollars where grandmother was prevented from seeing the remains of her deceased grandchild); Western Union Tel. Co. *v.* Hamilton, 36 Tex. Civ. App. 390, 81 S. W. 1052 (one thousand three hundred and sixteen dollars where decomposition of wife's body was so far advanced before plaintiff arrived that he could not view the remains); Western Union Tel. Co. *v.* James, 31 Tex. Civ. App. 503, 73 S. W. 79 (one thousand nine hundred and ninety-five dollars and twenty-five cents for not being present during last illness and at funeral of son); Western Union Tel. Co. *v.* Patton, (Civ. App. 1900) 55 S. W. 973 (one thousand dollars for error in transmitting message in regard to plaintiff's wife where the words "much better" were changed to "no better"); Western Union Tel. Co. *v.* Trice, (Civ. App. 1898) 48 S. W. 770 (one thousand dollars where plaintiff was prevented from seeing her brother before his death); Western Union Tel. Co. *v.* Russell, 12 Tex. Civ. App. 82, 33 S. W. 708 (one thousand five hundred dollars and twenty-five cents for failure to deliver telegram summoning physician to attend plaintiff's child which died); Western Union Tel. Co. *v.* Guest, (Civ. App. 1895) 33 S. W. 281 (four hundred and fifty dollars for non-delivery of message announcing death of plaintiff's child); Western Union Tel. Co. *v.* Piner, 9 Tex. Civ. App. 152, 29 S. W. 66 (two thousand one hundred and fifty

excessive,[53] or it appears that the verdict must have been the result of passion or prejudice,[54] or sympathy for plaintiff,[55] or due to disregarding the instructions of the court,[56] or the consideration of matters not properly attributable to defendant's negligence or which plaintiff might have avoided,[57] or to the erroneous

dollars for failure to reach bedside of father before he became unconscious); Western Union Tel. Co. *v.* O'Keefe, (Civ. App. 1895) 29 S. W. 1137 (one thousand dollars where plaintiff was prevented from seeing his daughter before her death); Western Union Tel. Co. *v.* Kinsley, 8 Tex. Civ. App. 527, 28 S. W. 831 (seven hundred and fifty dollars where plaintiff was prevented from being present at the funeral of her son); Western Union Tel. Co. *v.* Porter, (Civ. App. 1894) 26 S. W. 866 (one thousand dollars for not seeing half sister before her death); Western Union Tel. Co. *v.* Houghton, (Civ. App. 1894) 26 S. W. 448 (two thousand dollars where father was prevented from being present at the last illness of his son); Western Union Tel. Co. *v.* Hill, (Civ. App. 1894) 26 S. W. 252 (five hundred dollars for being prevented from attending brother's funeral); Western Union Tel. Co. *v.* Zane, 6 Tex. Civ. App. 585, 25 S. W. 722 (one thousand nine hundred and fifty dollars for failure to arrive before brother's death); Western Union Tel. Co. *v.* Karr, 5 Tex. Civ. App. 60, 24 S. W. 302 (one hundred dollars where plaintiff, a woman, traveling with a small child, was not met at a station and was compelled to go on foot at night to a friend's house, and was exposed to severely cold weather); Western Union Tel. Co. *v.* Evans, 5 Tex. Civ. App. 55, 23 S. W. 998 (two thousand five hundred dollars for failure of mother to reach the bedside of her son before his death).

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 74.

53. *Alabama.*—Western Union Tel. Co. *v.* Collins, 156 Ala. 333, 47 So. 61, three hundred and forty-five dollars for the inconvenience and annoyance of having to ride in a hack for a distance of twenty miles.

Arkansas.— Western Union Tel. Co. *v.* Rhine, 90 Ark. 57, 117 S. W. 1069 (seven hundred and fifty dollars for missing son's funeral where the remains were in such condition that plaintiff could not have seen them); Western Union Tel. Co. *v.* Weniski, 84 Ark. 457, 106 S. W. 486 (one thousand three hundred and fifty-four dollars for being prevented from attending brother's funeral held grossly excessive).

Mississippi.— Western Union Tel. Co. *v.* Hiller, 93 Miss. 658, 47 So. 377, holding that, although punitive damages are recoverable, a verdict for one thousand dollars for negligently delaying the delivery of a telegram requesting information as to the condition of plaintiff's mother is excessive by five hundred dollars.

Nevada.— Barnes *v.* Western Union Tel. Co., 24 Nev. 125, 50 Pac. 438, 77 Am. St. Rep. 791, one thousand two hundred and fifty dollars for being left almost penniless four hundred miles from home.

South Carolina.— Cloy *v.* Western Union Tel. Co., 78 S. C. 109, 58 S. E. 972, eight hundred and fifty dollars for failure to deliver a telegram announcing that plaintiff's husband who was expected on a certain train had gotten left at an intermediate station.

Texas.— Western Union Tel. Co. *v.* Houghton, 82 Tex. 561, 17 S. W. 846, 27 Am. St. Rep. 913, 15 L. R. A. 129 (four thousand five hundred dollars and twenty-five cents for failure of plaintiff to reach home before death of son); Western Union Tel. Co. *v.* Berdine, 2 Tex. Civ. App. 517, 21 S. W. 982 (one thousand nine hundred and ninety-nine dollars and ninety-nine cents, twelve hours' delay in arrival of doctor); Western Union Tel. Co. *v.* Piner, 1 Tex. Civ. App. 301, 21 S. W. 315 (four thousand seven hundred and fifty dollars, where plaintiff failed to reach his father's bedside before the latter became unconscious, but was with him for several days before he died); Western Union Tel. Co. *v.* Evans, 1 Tex. Civ. App. 297, 21 S. W. 266 (five thousand dollars for failure of plaintiff to reach the bedside of her son before his death).

See 45 Cent. Dig. tit. "Telegraphs and Telephones," § 74.

54. Western Union Tel. Co. *v.* Frith, 105 Tenn. 167, 58 S. W. 118; Western Union Tel. Co. *v.* Houghton, 82 Tex. 561, 17 S. W. 846, 27 Am. St. Rep. 918, 15 L. R. A. 129; Western Union Tel. Co. *v.* Evans, 1 Tex. Civ. App. 297, 21 S. W. 266.

55. Western Union Tel. Co. *v.* Berdine, 2 Tex. Civ. App. 517, 21 S. W. 982.

56. Barnes *v.* Western Union Tel. Co., 24 Nev. 125, 50 Pac. 438, 77 Am. St. Rep. 791.

57. Western Union Tel. Co. *v.* Melion, 96 Tenn. 66, 33 S. W. 725 (five hundred dollars held excessive where, although a message notifying plaintiff of his son's sickness was not delivered, plaintiff learned the fact from other sources in time to have reached his son before the latter's death but delayed starting for two days); Newport News, etc., R. Co. *v.* Griffin, 92 Tenn. 694, 22 S. W. 737 (nine hundred dollars held excessive where, although a message notifying plaintiff of his father's illness was not delivered, he went to see his father anyway two days later and was with him for thirty-six hours before his death); Western Union Tel. Co. *v.* Bowles, (Tex. Civ. App. 1903) 76 S. W. 456 (where had plaintiff started promptly he could have been at the funeral, although the telegraph company's negligence caused him to miss the death; one thousand dollars reduced to five hundred dollars); Western Union Tel. Co. *v.* Berdine, 2 Tex. Civ. App. 517, 21 S. W. 982 (one thousand nine hundred and ninety-nine dollars and ninety-nine cents for twelve hours' delay in the arrival of a doctor, where plaintiff might have procured another doctor).

inclusion of punitive damages,[58] the court will grant a new trial,[59] unless plaintiff will consent to file a remittitur of the amount to which the court deems the verdict to be excessive.[60] The damages may also be so obviously inadequate that a new trial should be granted.[61]

TELEGRAPHY. See TELEGRAPHS AND TELEPHONES, *ante*, p. 1607.

TELEPHONE. See TELEGRAPHS AND TELEPHONES, *ante*, p. 1607.

TELEPHONE EXCHANGE. See TELEGRAPHS AND TELEPHONES, *ante*, p. 1608.

TELLER. An officer of a bank who receives and pays money on checks.[1] (See BANKS AND BANKING, 5 Cyc. 476.)

TELLTALE. A contrivance to warn brakemen of the proximity of a bridge;[2] ropes suspended from a wire across the track to give warning of a low bridge.[3] (Telltale: Duty of Railroad Company to Maintain, see MASTER AND SERVANT, 26 Cyc. 1133.)

TEMERE CREDERE EST NERVUS SAPIENTÆ AMITTERE. A maxim meaning "To believe rashly is to lack the nerve of wisdom."[4]

TEMPER. Disposition of mind; as inclination to give way to anger, resentment or the like.[5]

TEMPERANCE. Habitual moderation in regard to the indulgence of the natural appetites and passions; restrained or moderate indulgence; moderation.[6] (Temperance: Gift For Promotion of as Charitable Purpose, see CHARITIES, 6 Cyc. 924.)

TEMPERANCE SALOON. A common designation for places where non-intoxicating drinks and other refreshments are kept for sale.[7]

TEMPERATE. Moderate; not excessive;[8] showing moderation; not lavish or inordinate.[9] (Temperate: Habits of Insured, Statements as to in Application For Insurance, see LIFE INSURANCE, 25 Cyc. 808.)

TEMPERATE DAMAGES. Such damages as would be a reasonable compensation for the injury.[10] (See, generally, DAMAGES, 13 Cyc. 1.)

58. Cloy *v.* Western Union Tel. Co., 78 S. C. 109, 58 S. E. 972.

59. Western Union Tel. Co. *v.* Weniski, 84 Ark. 457, 106 S. W. 486; Western Union Tel. Co. *v.* Berdine, 2 Tex. Civ. App. 517, 21 S. W. 982. See also cases cited *supra*, notes 53–58; and, generally, DAMAGES, 13 Cyc. 124; NEW TRIAL, 29 Cyc. 839.

60. Western Union Tel. Co. *v.* Rhine, 90 Ark. 57, 117 S. W. 1069; Western Union Tel. Co. *v.* Hiller, 93 Miss. 658, 47 So. 377; Western Union Tel. Co. *v.* Frith, 105 Tenn. 167, 58 S. W. 118; Western Union Tel. Co. *v.* Bowles, (Tex. Civ. App. 1903) 76 S. W. 456. See also, generally, APPEAL AND ERROR, 3 Cyc. 430; DAMAGES, 13 Cyc. 134.

61. Prewitt *v.* Southwestern Tel., etc., Co., 46 Tex. Civ. App. 123, 101 S. W. 812.

1. Webster Dict. [*quoted* in Union Dime Sav. Inst. *v.* Neppert, 3 N. Y. Suppl. 797, 800, 25 Abb. N. Cas. 357].

2. Wallace *v.* Central Vermont R. Co., 18 N. Y. Suppl. 280, 281.

It is constructed of an upright upon each side of the road, a pole running across the road upon the uprights, and from such pole a number of strands of wire are suspended. Wallace *v.* Central Vermont R. Co., 18 N. Y. Suppl. 280, 281.

3. West *v.* Chicago, etc., R. Co., 179 Fed. 801, 802.

4. Morgan Leg. Max. [*citing* Wade's Case, 5 Coke 114*a*, 114*b*, 77 Eng. Reprint 232.

5. Gardner *v.* State, 40 Tex. Cr. 19, 22, 48 S. W. 170.

"Courage" distinguished see Gardner *v.* State, 40 Tex. Cr. 19, 22, 48 S. W. 170.

6. Webster Dict. [*quoted* in People *v.* Dashaway Assoc., 84 Cal. 114, 123, 24 Pac. 277, 12 L. R. A. 117], adding: "As temperance in eating and drinking; 'temperance' in the indulgence of joy or mirth."

The term has no fixed legal meaning as contradistinguished from its usual import. People *v.* Dashaway Assoc., 84 Cal. 114, 123, 24 Pac. 277, 12 L. R. A. 117.

7. Clinton *v.* Grusendorf, 80 Iowa 117, 120. 45 N. W. 470.

8. Century Dict. [*quoted* in Hilton *v.* Jesup Banking Co., 128 Ga. 30, 32, 57 S. E. 78, 11 L. R. A. N. S. 224]; Webster Dict. [*quoted* in Wolf *v.* Mutual Ben. L. Ins. Co., 30 Fed. Cas. No. 17,925*a*]. See also Chambers *v.* Northwestern Mut. L. Ins. Co., 64 Minn. 495, 499, 67 N. W. 367, 58 Am. St. Rep. 549.

9. Century Dict. [*quoted* in Hilton *v.* Jesup Banking Co., 128 Ga. 30, 32, 57 S. E. 78, 11 L. R. A. N. S. 224].

Does not imply total abstinence but suggests moderation. Supreme Lodge K. P. *v.* Foster, 26 Ind. App. 333, 59 N. E. 877, 881; Meacham *v.* State Mut. Ben. Assoc., 120 N. Y. 237, 241, 34 N. E. 283; Wolf *v.* Mutual Ben. L. Ins. Co., 30 Fed. Cas. No. 17,925*a*. But if a man use spirituous liquors to such an extent as to produce frequent intoxication he is not sober and temperate. Brockway *v.* Mutual Ben. L. Ins. Co., 9 Fed. 249, 253.

10. Hilton *v.* Jesup Banking Co., 128 Ga. 30, 32, 57 S. E. 78, 11 L. R. A. N. S. 224,

TEMPERATURE. Condition with respect to heat or cold, especially as indicated by the sensation produced, or by the thermometer or pyrometer; degree of heat or cold.[11] (Temperature: Opinion Evidence as to, see EVIDENCE, 17 Cyc. 107. Right of Municipality to Wait For Change of to Remove Ice or Snow, see MUNICIPAL CORPORATIONS, 28 Cyc. 1378.)

TEMPEST. A violent wind, storm, tumult, commotion;[12] an extensive current of wind, rushing with great velocity and violence; a storm of extreme violence.[13] (Tempest: Cause of Loss Under Marine Insurance Policy, see MARINE INSURANCE, 26 Cyc. 652. Liability For Injury Caused by, see NEGLIGENCE, 29 Cyc. 441. Liability For Loss or Destruction of Goods in Hands of Common Carrier by, see CARRIERS, 6 Cyc. 379; SHIPPING, 36 Cyc. 238. Liability of City For Injury From Falling Wall Caused by, see MUNICIPAL CORPORATIONS, 28 Cyc. 1380.)

TEMPESTUOUS. Stormy; boisterous;[14] very stormy, turbulent, rough with wind, blowing with violence.[15]

TEMPLATE. A piece of sheet iron, the contour of which corresponds to the opening between the rolls.[16]

TEMPORA IN CERTA OMNES ACTIONES IN MUNDO LIMITATIONEM HABENT. A maxim meaning "All worldly actions are limited within certain periods."[17]

TEMPORAL. A synonym of "worldly."[18]

TEMPORALITIES. In the Catholic Church the revenues of the church derived from pew rents, Sunday and other collections, graveyard charges, school fees, and donations.[19]

TEMPORARILY. A word of which the expressions "for the time" and "for the time being" are the equivalents.[20]

TEMPORARY. Existing or continuing for a limited time;[21] lasting for a time

where it is said: "They are more than nominal damages."

11. Webster Int. Dict.

12. Johnson Dict.; Walker Dict. [both *quoted* in Stover *v.* Insurance Co., 3 Phila. (Pa.) 38, 40].

13. Webster Dict. [*quoted* in Stover *v.* Insurance Co., 3 Phila. (Pa.) 38, 40]; Imperial Dict. [*quoted* in Thistle *v.* Union Forwarding, etc., Co., 29 U. C. C. P. 76, 84], where it is said: "We usually apply the word to a steady wind of long continuance; but we say also of a tornado, it blew a tempest. The currents of wind are named, according to their respective degrees of force or rapidity, a 'breeze,' a 'gale,' a 'storm,' a 'tempest;' but 'gale' is also used as synonymous with 'storm,' and storm with 'tempest.'"

A synonym of "storm" see Stover *v.* Insurance Co., 3 Phila. (Pa.) 38, 39.

14. Johnson Dict.; Walker Dict. [both *quoted* in Stover *v.* Insurance Co., 3 Phila. (Pa.) 38, 40].

15. Webster Dict. [*quoted* in Stover *v.* Insurance Co., 3 Phila. (Pa.) 38, 40].

16. Johnson Steel Street-Rail Co. *v.* North Branch Steel Co., 48 Fed. 191, 193.

17. Morgan Leg. Max. [*citing* Bracton 52].

18. Webster New Int. Dict.

"Temporal estate" see Goodrich *v.* Harding, 3 Rand. (Va.) 280, 283, 285; Watson *v.* Powell, 3 Call (Va.) 306; Tanner *v.* Wise, 3 P. Wms. 295, 297, 24 Eng. Reprint 1072 [*cited* in Beall *v.* Holmes, 6 Harr. & J. (Md.) 205, 211; Kennon *v.* McRoberts, 1 Wash. (Va.) 96, 106, 1 Am. Dec. 428].

19. Barabasz *v.* Kabat, 86 Md. 23, 30, 37 Atl. 720.

"Hiring a sexton to perform the duties incident to such an office, has nothing to do with the management of 'the temporalities' of the church." St. Patrick's Roman Catholic Church *v.* Alest, 76 Ill. 252, 253.

20. State *v.* Cunningham, 75 Vt. 332, 334, 55 Atl. 654, where it is said each expression constitutes a good definition of "temporarily."

In an act entitled "An act to remove the seat of government temporarily to Wheeling" the term is used in its most familiar signification and import, or natural and ordinary meaning, and in contradistinction to permanent, and not in a technical sense. It therefore means an indefinite time not to be permanent, but to be determined by some future contingency or event. Slack *v.* Jacob, 8 W. Va. 612, 649. See also Knox *v.* Beirne, 4 Ark. 460, 464, where the term is used in contradistinction to "constant" or "permanent."

Construed as short and definite interval or portion of time in a statute authorizing the police commissioners of a city, whenever in their judgment the public peace and tranquillity might require it, to order the closing "temporarily" of all bar-rooms, etc. State *v.* Strauss, 49 Md. 288, 299.

"Temporarily domiciled" see Rex *v.* Townsend, 5 Can. Cr. Cas. 143, 145.

21. Moore *v.* Smead, 89 Wis. 558, 567, 62 N. W. 426; Webster Dict. [*quoted* in Slack *v.* Jacob, 8 W. Va. 612, 650], giving, as illustrations of the meaning of the term: "The patient has obtained temporary relief — there is a temporary cessation of hostilities — there is a temporary supply of provisions. In times of great danger Rome appointed a temporary dictator."

only;[22] lasting for a limited time; only for a limited time; transitory;[23] not of long duration;[24] not permanent; transitory; continuing but a short time;[25] that which is to last for a limited time; the opposite of perpetual.[26] (Temporary: Absence as Constituting Vacancy or Non-Occupancy, see FIRE INSURANCE, 19 Cyc. 730 note 74. Administrators, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 108. Alien Enemy Distinguished From Permanent Alien Enemy, see ALIENS, 2 Cyc. 84 note 7. Alimony, see DIVORCE, 14 Cyc. 748. Chairman of County Board, see COUNTIES, 11 Cyc. 388 note 43. Court or Commission, see COURTS, 11 Cyc. 712. Injunction, see TEMPORARY INJUNCTION, *post*, this page. Insanity, see CRIMINAL LAW, 12 Cyc. 175. Insurance, see FIRE INSURANCE, 19 Cyc. 674 note 14. Position, Power of City Council to Provide, see MUNICIPAL CORPORATIONS, 28 Cyc. 589. Quarters For Holding Court, see COURTS, 11 Cyc. 738. Receiver, see RECEIVERS, 34 Cyc. 16 note 3. Removal — As Constituting Vacancy or Non-Occupancy, see FIRE INSURANCE, 19 Cyc. 730 note 74; Of Barriers Around Excavation Affecting Liability of City For Injury, see MUNICIPAL CORPORATIONS, 28 Cyc. 1407. Statute, see TEMPORARY STATUTE, *post*, p. 1799.)

TEMPORARY ADMINISTRATOR. See EXECUTORS AND ADMINISTRATORS, 18 Cyc. 108.

TEMPORARY ALIMONY. See DIVORCE, 14 Cyc. 743.

TEMPORARY DAMAGES. Damages for which recovery may be had from time to time as damages accrued.[27]

TEMPORARY INJUNCTION. An order operative usually until the final hearing of the case in which it is issued.[28] (Temporary Injunction: In General, see INJUNCTIONS, 22 Cyc. 740. In Aid of Creditor's Bill, see CREDITORS' SUITS, 12 Cyc. 48. Restraining — Acts of Defendant in Ejectment, see EJECTMENT, 15 Cyc. 90; Condemnation Proceedings, see EMINENT DOMAIN, 15 Cyc. 987; Disposition of Mortgaged Property Pending Foreclosure, see MORTGAGES, 27 Cyc. 1621; Disposition of Partnership Property Pending Accounting Between Partners, see PARTNERSHIP, 30 Cyc. 725; Diversion of Subterranean or Percolating Waters, see WATERS; Diversion of Waters From Stream, see WATERS; Foreclosure of Chattel Mortgage, see CHATTEL MORTGAGES, 7 Cyc. 120; Foreclosure of Mortgage, see

22. Moore *v.* Smead, 89 Wis. 558, 567, 62 N. W. 426; Webster Dict. [*quoted* in Slack *v.* Jacob, 8 W. Va. 612, 650].

23. Worcester Dict. [*quoted* in Slack *v.* Jacob, 8 W. Va. 612, 650].

24. Moore *v.* Smead, 89 Wis. 558, 567, 62 N. W. 426; Worcester Dict. [*quoted* in Slack *v.* Jacob, 8 W. Va. 650].

25. Moore *v.* Smead, 89 Wis. 558, 567, 62 N. W. 426.

26. Bouvier L. Dict. [*quoted* in People *v.* Wright, 70 Ill. 388, 399].

In reference to an obstruction in a street which may be maintained for the construction of a public improvement, the term is the opposite of "permanent" and means a period of time commensurate with the reasonable prosecution of the work which is being carried on. Lefkovitz *v.* Chicago, 238 Ill. 23, 29, 87 N. E. 58.

"Temporary abandonment" used in reference to public lands see Jones *v.* Wright, (Tex. Civ. App. 1906) 92 S. W. 1010, 1013.

"Temporary impairment of the power to earn money" see Cincinnati, etc., R. Co. *v.* Silvers, (Ky. 1910) 126 S. W. 120, 123.

"Temporary loan," as used in General Municipal Law of New York, seems to be one which is to be paid with and by the taxes of a current fiscal year. People *v.* Carpenter, 31 N. Y. App. Div. 603, 608, 52 N. Y. Suppl. 781. A loan is not temporary which is made for eleven months and then paid to answer a temporary purpose of the creditor, and as soon as that purpose is effected is renewed or made again for the same period. Una *v.* Dodd, 39 N. J. Eq. 173, 187.

"Temporary privileges" see Bates *v.* Holbrook, 67 N. Y. App. Div. 25, 35, 73 N. Y. Suppl. 417.

"Temporary purpose" is not confined to a purpose that happens to last in fact for a few years only, but includes a purpose which is temporary in the sense that it may within the reasonable contemplation of the parties come to an end. The term is thus construed in considering the question of the creation of an easement. Burrows *v.* Lang, (1901) 2 Ch. 502, 508, 70 L. J. Ch. 607, 84 L. T. Rep. N. S. 623, 17 T. L. R. 514, 49 Wkly. Rep. 564.

"Temporary removal" as applied to leaving homestead means a removal for a fixed and temporary purpose, or for a temporary reason. Blackburn *v.* Lake Shore Traffic Co., 90 Wis. 362, 366, 63 N. W. 289; Moore *v.* Smead, 89 Wis. 558, 567, 62 N. W. 426.

27. McHenry *v.* Parkersburg, 66 W. Va. 533, 535, 66 S. E. 750.

28. State *v.* Johnston, 78 Kan. 615, 617, 97 Pac. 790, where it is said that while the term is sometimes used synonymously with "restraining order" the better usage makes a distinction. See also State *v.* Baker, 62 Nebr. 840, 849, 88 N. W. 124, where "restraining order" is distinguished.

MORTGAGES, 27 Cyc. 1538; Infringement of Copyright, see COPYRIGHT, 9 Cyc. 954; Infringement of Patents, see PATENTS, 30 Cyc. 1006; Infringement of Trade-Mark or Trade-Name, see TRADE-MARKS AND TRADE-NAMES; Maintenance of Nuisance, see NUISANCES, 29 Cyc. 1219; Pollution of Stream, see WATERS; Sale of Property For Unpaid Taxes, see TAXATION, *ante*, p. 1273; Unfair Competition in Trade, see TRADE-MARKS AND TRADE-NAMES; Violation of Liquor law, see INTOXICATING LIQUORS, 23 Cyc. 302.)

TEMPORARY INSANITY. See CRIMINAL LAW, 12 Cyc. 175.

TEMPORARY RECEIVER. See RECEIVERS, 34 Cyc. 16 note 3.

TEMPORARY STATUTE. A statute limited in its duration.[29]

TEMPTATION. That which tempts to evil; an evil enticement or allurement.[30]

TEMPUS ENIM MODUS TOLLENDI OBLIGATIONES ET ACTIONES, QUIA TEMPUS CURRIT CONTRA DESIDES ET SUI JURIS CONTEMPTORES. A maxim meaning "For time is a means of destroying obligations and actions, because time runs against the slothful and contemners of their own rights." [31]

TEMPUS EST QUANDO NIHIL; TEMPUS EST QUANDO ALIQUID; NULLUM TAMEN EST TEMPUS IN QUO DICENDA SUNT OMNIA. A maxim meaning "There is a time when to say nothing; a time to say something; but no time to say every thing." [32]

TEMPUS EX SUAPTE NATURA VIM NULLUM EFFECTICEM HABET. A maxim meaning "Time in its own nature has no effectual force." [33]

TEMPUS SPECTATUR IN RE STIPULATIONIBUS QUO CONTRAHIMUS. A maxim meaning "In construing agreements reference is to be had to the time at which they were entered into." [34]

TENANCY. That relation which exists where one has let real estate to another, to hold of him as landlord.[35] (Tenancy: At Sufferance, see LANDLORD AND TENANT, 24 Cyc. 1041. At Will — In General, see LANDLORD AND TENANT, 24 Cyc. 1036; Creation by Parol, see FRAUDS, STATUTE OF, 20 Cyc. 214; Right of Possession of Property Under Mortgage From, see MORTGAGES, 27 Cyc. 1234 note 46. By Curtesy, see CURTESY, 12 Cyc. 1013. By Entirety, see HUSBAND AND WIFE, 21 Cyc. 1195. For Life, see ESTATES, 16 Cyc. 614. For Years, see LANDLORD AND TENANT, 24 Cyc. 958. From Month to Month, see LANDLORD AND TENANT, 24 Cyc. 1034. From Year to Year — In General, see LANDLORD AND TENANT, 24 Cyc. 1027; Creation by Parol, see FRAUDS, STATUTE OF, 20 Cyc. 214. In Common, see TENANCY IN COMMON. In Coparcenary, see TENANCY IN COMMON. In Dower, see DOWER, 14 Cyc. 1013. In Tail, see ESTATES, 16 Cyc. 608. Joint, see JOINT TENANCY, 23 Cyc. 482.)

29. People *v.* Wright, 70 Ill. 388, 399, where such statute is distinguished from a "local" or "special" statute, the latter being limited in the objects to which it applies.

30. Hall *v.* State, 134 Ala. 90, 119, 32 So. 750 (where it is said of the term as used with reference to seduction: "Temptation can be by conduct or act — by suggestions of confidence and secrecy if they are believed by the unmarried woman and she is induced thereby to surrender her chastity, this would be seduction"); Suther *v.* State, 118 Ala. 88, 93, 24 So. 43.

"Is not always invitation. As the common law is understood by the most competent authorities, it does not excuse a trespass because there is a temptation to commit it, or hold property-owners bound to contemplate the infraction of property rights because the temptation to untrained minds to infringe them might have been foreseen." Wilmot *v.* McPadden, 79 Conn. 367, 376, 65 Atl. 157, 19 L. R. A. N. S. 1101; Holbrook *v.* Aldrich, 168 Mass. 15, 16, 46 N. E. 115, 60 Am. St. Rep. 364, 36 L. R. A. 493; Delaware, etc., R. Co. *v.* Reich, 61 N. J. L. 635, 643, 40 Atl. 682, 68 Am. St. Rep. 727, 41 L. R. A. 831; Paolino *v.* McKendall, 24 R. I. 432, 443, 53 Atl. 268, 60 L. R. A. 133, 96 Am. St. Rep. 736.

31. Bouvier L. Dict. [*citing* Fleta 1, 4, c. 5, § 12].

32. Morgan Leg. Max. [*citing* Riley Leg. Max.].

33. Morgan Leg. Max. [*citing* Trayner Leg. Max.].

34. Morgan Leg. Max. [*citing* Dig. 50, 17, 144, 1].

35. Morrill *v.* Mackman, 24 Mich. 279, 284, 9 Am. Rep. 124.

Landlord necessary to constitute tenancy see Bates *v.* State, 45 Tex. Cr. 420, 422, 76 S. W. 462.

No particular form of words is necessary to create a tenancy. Any words that show an indication of the lessor to divest himself of the possession and confer it on another, subject to his own title, is sufficient. Lightbody *v.* Truelsen, 39 Minn. 310, 313, 40 N. W. 67.

"Tenancy of the present occupants" see Place *v.* St. Paul Title Ins., etc., Co., 67 Minn. 126, 129, 69 N. W. 706, 64 Am. St. Rep. 404.